

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

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IN RE :
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VISA CHECK/MASTERMONEY ANTITRUST :
LITIGATION :
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This Document Relates To: :
All Actions :
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**MASTER FILE NO.
CV-96-5238
(Gleeson, J.) (Mann, M.J.)**

**REPLY MEMORANDUM OF LAW IN SUPPORT OF
LEAD COUNSEL'S MOTION TO ENJOIN
SPECTRUM SETTLEMENT RECOVERY**

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PRELIMINARY STATEMENT

Spectrum's opposition ("Opp. Mem.") admits that it has misrepresented the Plan of Allocation (the "Plan") to frighten Class Members into believing that they will receive less than their fair share of the Settlement Fund if they do not retain Spectrum. Spectrum intentionally misled Class Members by telling them that the Plan's principal source of Class Member purchase volumes – the Visa Transactional Database – does not distinguish between debit and credit card transactions. Spectrum now concedes that these solicitations, which likely were made to thousands of merchants, were "incorrect." (Opp. Mem. at 20-21.) Yet this "mistake" cannot be dismissed as harmless error. Spectrum's misrepresentation attacked the very integrity of the Plan and the District Court's decision approving it.

Spectrum cannot credibly claim to have only recently discovered this "mistake." In approving the Plan, the District Court specifically recognized that the Plan is "fair and reasonable" because it determines Class Members' proportionate shares of off-line debit and credit damages by utilizing the Visa Transactional Database – the one industry source that accurately separates off-line debit and credit purchase volumes for virtually the entire Class for most of the damages period. In fact, the District Court found that "Visa's database includes Visa debit and credit transaction counts and dollar volumes broken out by month for each Class Member that accepted Visa transactions at any time between October 1, 1996 and July 31, 2003." *In re Visa Check/MasterMoney Antitrust Litig.*, 297 F. Supp. 2d 503, 519 (E.D.N.Y. 2003), *aff'd sub nom. Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96 (2d Cir. 2005), *cert. denied sub nom. Leonardo's Pizza by the Slice, Inc. v. Wal-Mart Stores, Inc.*, 125 S. Ct. 2277 (May 16, 2005). Moreover, this finding was consistent with the plain wording of the Plan and the Fisher Allocation Declaration.

Spectrum also cannot credibly claim that its misrepresentation of the Visa Transactional Database does not call into question the integrity of the Plan. Consistent with plaintiffs' theory of the case, the Fisher Allocation Methodology provides Class Members greater allocations per dollar volume of debit transactions than credit transactions. If the Visa Transactional Database mischaracterizes debit transactions as credit transactions – as Spectrum falsely claimed – the process would necessarily shortchange Class Members. Even though Spectrum had to know its claims were false, Spectrum nonetheless repeated them to confuse and scare Class Members into retaining its services.

Aside from admitting this misrepresentation, Spectrum's opposition skirts the numerous other ways its solicitations intentionally misrepresent the Plan. Spectrum, for example, does not even attempt to explain its mischaracterization of Class Members' estimated recoveries as "the Visa/MasterCard estimate" or offers "generated by MasterCard and Visa." A cursory review of the Plan shows that Class Members' recoveries are to be calculated by the Claims Administrator under Lead Counsel and, ultimately, the District Court's supervision. Even though Spectrum obviously knows that Visa and MasterCard have nothing to do with "generating" these "offers," Spectrum is nonetheless telling Class Members that their former adversaries are making the calculations. Once again, Spectrum apparently wants the Class to question the integrity of the process in order to convince Class Members that Spectrum's services are somehow necessary to protect their interests.

Spectrum also does not bother to explain or defend its false statements impugning the integrity of the Claims Administrator, the Garden City Group. Spectrum's opposition says nothing about its claim that the Claims Administrator will become "adversarial" once the claim forms are mailed. Nor does Spectrum address its claim that the Claims Administrator will be

“paid to defend the Visa/MasterCard estimate.” Such falsehoods cannot be whitewashed as mere “opinion.” On the contrary, if Spectrum is truly “one of the nation’s largest claim filing and fund recovery services,” it must know that an experienced claims administrator such as Garden City could not oversee a large, court-supervised distribution such as this one if it were “paid” to defend estimates generated by the defendants.

Finally, Spectrum fails to explain its recent press release that falsely warns that a large majority of Class Members are at risk of missing their opportunity to claim a share of the Settlement Fund. Spectrum’s opposition acknowledges that the Plan utilizes data from virtually every acquirer in the United States to identify the Class Members that are entitled to a claim form. (Opp. Mem. at 5 n.2.) Given that, Spectrum cannot credibly claim any basis for its assertion that millions of Class Members will not even get an “opportunity” to participate in this process.

In short, Spectrum’s opposition confirms that it has deliberately and repeatedly misrepresented the integrity of the Plan, the Claims Administrator – and ultimately the District Court’s decisions approving this process – for the purpose of creating a demand for its services. These misrepresentations threaten to compromise the distribution process, emmesh the District Court in needless litigation brought by confused Class Members, and ultimately tax the common fund and the recoveries of the Class Members that have been duped by Spectrum. The District Court plainly has jurisdiction under the Settlement Agreements (the “Settlement”) to protect the administration of justice by enjoining this conduct.

This conclusion is reinforced by the various baseless legal arguments Spectrum makes against this motion. First, subject matter jurisdiction exists for the simple reason that the District Court has retained jurisdiction over the Settlement and the Plan. Second, injunctive relief is

appropriate because Spectrum's falsehoods plainly threaten the administration of the Settlement. Thus, they are not protected commercial speech under the First Amendment.

For the foregoing reasons, and for the reasons set forth in Lead Counsel's Memorandum of Law in Support of Lead Counsel's Application for an Order to Show Cause filed on September 9, 2005, Lead Counsel respectfully requests this Court to void Spectrum Settlement Recovery's contracts with Class Members or in the alternative to require Spectrum Settlement Recovery to provide notice to the Class, at its own expense, correcting its misrepresentations and misleading statements. Spectrum Settlement Recovery should also be enjoined from soliciting Class Members with these or similar misrepresentations.

ARGUMENT

I. THIS COURT HAS SUBJECT MATTER JURISDICTION OVER THIS MOTION.

Spectrum's argument that neither Fed. R. Civ. P. 23 nor the All Writs Act provides subject matter jurisdiction misses the point. This Court has retained continuing and exclusive subject matter jurisdiction over the administration of the Settlement and the Plan, "including the administration and consummation of the Settlement and *in order to determine issues relating to any distribution to Class Members.*" Order and Final Judgment ¶ 16, *In re Visa Check/MasterMoney Antitrust Litig.*, Civ. A. No. 96-5238 (JG) (JM) (E.D.N.Y. dated Jan. 23, 2004) (attached hereto as Exhibit 1) ("Order and Final Judgment") (emphasis added).¹ This Court initially obtained subject matter jurisdiction over this litigation pursuant to § 4 of the Clayton Act, 15 U.S.C. § 15, and retained that jurisdiction in the Settlement in order to oversee

¹ The attached Order and Final Judgment resolved the claims against Visa U.S.A., Inc. Paragraph 16 of the attached order is substantively identical to ¶ 15 of the Order and Final Judgment that resolved the claims against MasterCard.

the Settlement and the Plan's proper and efficient administration. The Court continues to exercise that jurisdiction to this day.²

Contrary to Spectrum's assertion, Lead Counsel has not invoked the Federal Rules of Civil Procedure or the All Writs Act to create subject matter jurisdiction, which already exists. Rather, Lead Counsel invokes these provisions to prevent interference with the Court's existing jurisdiction.³ Moreover, Spectrum's argument that the Article III case or controversy requirements for constitutional standing are not met is similarly unavailing because this litigation is an existing case or controversy for Article III purposes.

A. This Court Has Authority Under Fed. R. Civ. P. 23 and the All Writs Act to Enjoin Spectrum.

1. The Court's Authority Under Fed. R. Civ. P. 23

District courts have exercised their jurisdiction over complex class action settlements to enjoin non-parties that threaten to undermine the administration of the settlement through misleading and false solicitations. In fact, in a case similar to this one, the court held, "The injunctive relief requested by plaintiffs is within the subject matter jurisdiction of this Court in its role under Rule 23 of the Federal Rule of Civil Procedure." *In re Domestic Air Transportation Antitrust Litig.*, 1992 WL 357433, 24 Fed. R. Serv. 3d 515, 1992-2 Trade Cas. (CCH) ¶ 70,039 (N.D. Ga. 1992). *Domestic Air Transportation* involved a non-party, ATS, which operated "900" telephone numbers that provided potential class members with information about the proposed settlement and a faxed copy of the claim form for specified fees. 1992 WL 357433, at *1. The court found that "the information provided by ATS in its informational response is

² Spectrum's assertion that there is no statutory basis for subject matter jurisdiction (Opp. Mem. at 1, 9-10) is thus incorrect. Section 4 of the Clayton Act provided the basis for subject matter jurisdiction over this litigation, which this Court has not relinquished.

³ Spectrum unsurprisingly offers no citation or support for its claim that Lead Counsel has asserted jurisdiction under Fed. R. Civ. P. 23 and the All Writs Act. (Opp. Mem. at 10, 11.)

misleading and confusing in that it does not accurately provide the information approved by the Court for the claims procedure.” *Id.* The court further held that “ATS has ignored the role of the Court, plaintiffs’ counsel and class representatives, thus posing a real danger of misrepresentation and confusion to potential class members.” *Id.*

The court therefore enjoined ATS from further use and advertisement of the “900” numbers and from “acting or appearing to act as authorized representatives of potential class members in connection with the settlement of this litigation.” *Id.* at *2. The court further required ATS to “refund all fees” generated by the “900” numbers and to “publish written corrective notices to the public and provide written corrective notices directly to anyone who responded to ATS.” *Id.*

In so holding, the court specifically addressed whether Rule 23 gave it the authority to issue such injunctive relief, and held that “Rule 23 gives to the certifying court specific authority to devise and issue appropriate orders necessary for the protection of class members.” *Id.* at *1; *see also Erhardt v. Prudential Group, Inc.*, 629 F.2d 843, 846 (2d Cir. 1980) (“Unapproved notices to class members which are factually or legally incomplete, lack objectivity or neutrality, or contain untruths will surely result in confusion and adversely affect the administration of justice.”). “The certifying court, therefore, has inherent jurisdiction to supervise any person or entity seeking to act on behalf of the prospective members of the class.” *Domestic Air Transportation*, 1992 WL 357433, at *1.

Here, as in *Domestic Air Transportation*, Spectrum seeks to act on behalf of Class Members, as their agent. (Constantine Decl. Ex. D (“Spectrum serves as an agent for its clients”); Opp. Mem. at 16 (characterizing Spectrum’s contracts as “agency agreements”); Constantine Decl. Ex. E (Spectrum’s contract entitled “Revocable Letter of Agency”).)

Moreover, going well beyond the enjoined activity in *Domestic Air Transportation*, Spectrum has bombarded the Class with materials that can charitably be characterized as inaccurate, misleading, and confusing to the Class. (Lead Counsel Mem. at 6-9.) The litany of Spectrum's false statements impugning the Plan and its administration include, among other things, that: (i) the Plan's principal source of Class Member purchase volumes, the Visa Transactional Database, does not accurately distinguish between debit and credit transactions; (ii) the estimated recoveries provided Class Members are offers "generated by MasterCard and Visa"; (iii) the Claims Administrator will become adversarial because it is "paid to defend the Visa/MasterCard estimate"; and (iv) millions of Class Members are at risk of losing their "opportunity" to participate in the Settlement. These falsehoods "ignore[] the role of the Court" as the ultimate guardian of the Class, not to mention the Court's finding that the Visa Transactional Database will result in fair and reasonable calculations of Class Members' estimated cash recoveries. *See Domestic Air Transportation*, 1992 WL 357433, at *1.

Allapattah Servs., Inc. v. Exxon Corp., Case No. 91-0986-CIV-GOLD, 2004 U.S. Dist. LEXIS 27979 (S.D. Fla. Dec. 14, 2004), the case on which Spectrum principally relies, is not on-point. There, the plaintiffs "acknowledged that there is no longer any need for the Court to enter any injunctions because the deadline for class members to file claims has passed," and thus "their request for entry of injunctions is now moot." In other words, there was nothing to protect class members from in *Allapattah*. *Id.* at *10. *Allapattah* cannot be compared to this case, where Spectrum is using misleading and confusing solicitations regarding the claims process just as it is getting underway.⁴ Absent injunctive relief, Spectrum's misrepresentations threaten the

⁴ On September 29, 2005, the Claims Administrator completed the mailing of approximately 8,000,000 claim forms to Class Members. The deadline for submitting these forms is November 28, 2005. Class Members can challenge their estimated cash recoveries by submitting a written challenge by October 29, 2005. By letter dated September 29, 2005, Lead Counsel petitioned the Court to extend the deadline for submitting challenges to December 28, 2005.

administration of justice by potentially enmeshing this Court in needless litigation brought by misinformed Class Members that have been persuaded by Spectrum's misrepresentations to mistrust the Visa Transactional Database and/or the credibility of the Claims Administrator.

2. The Court's Authority Under the All Writs Act

According to Spectrum, *Allapattah* is "strikingly similar" in that it shows that Spectrum is not interfering with this Court's jurisdiction over the claims administration process. (Opp. Mem. at 11.) But there was no interference with the court's jurisdiction in that case because the deadline for submission of claims forms had passed. Moreover, in *Allapattah*, the parties agreed to a procedure for submitting disputes between class members and class action recovery firms to the special master. *Id.* at **11-12. That procedure effectively guarded against any interference with the settlement by such firms. These facts obviously bear no resemblance to this case.⁵

B. The Class Has Constitutional Standing to Enjoin Spectrum.

1. The *In re Visa Check* Case or Controversy

Spectrum does not dispute the Supreme Court's holding in *United States v. New York Telephone Co.*, 434 U.S. 159, 174 (1977), that the All Writs Act may be used to enjoin non-parties who "are in a position to frustrate the implementation of a court order or the proper administration of justice" even if the non-parties have not "engaged in any wrongdoing." (Opp. Mem. at 11.) Thus, there is no requirement of a case or controversy between the non-party and the party seeking relief under the All Writs Act. (In *New York Telephone*, the enjoined party was merely the telephone provider for criminal defendants whose telephone lines the government sought to use in its investigation and prosecution.) The only case or controversy requirement is

⁵ It is not necessary for Spectrum to violate one of this Court's orders in order for it to be enjoined under the All Writs Act. The All Writs Act may be used to enjoin non-parties who "are in a position to frustrate the implementation of a court order or the proper administration of justice." *United States v. New York Telephone Co.*, 434 U.S. 159, 174 (1977) (emphasis added).

the existence of the original case or controversy that gave the court the jurisdiction sought to be protected by the All Writs Act. Spectrum does not and cannot dispute that this Court retained that jurisdiction in its Order and Final Judgment.

2. The Case or Controversy Between the Class and Spectrum

Even assuming arguendo that a case or controversy is required as between the Class and Spectrum, such a case or controversy exists because Spectrum's actions are likely to injure the Class.⁶ Spectrum's misrepresentations threaten to imminently injure the Class by invading "a legally protected interest." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The legally protected interests threatened by Spectrum include both the effective administration of the Settlement and individual Class Members' estimated recoveries from the Settlement Fund.

Spectrum has distorted the Plan to create the false impression that Class Members need Spectrum's services to protect their interests. Spectrum admits that it has been falsely telling Class Members that the Visa Transactional Database does not accurately distinguish between debit and credit transactions. Spectrum offers no explanation for its false claims that Class Members' estimated cash recoveries are generated by Visa and MasterCard, or that the Claims Administrator is being "paid to defend" those estimates. Nor can Spectrum justify its incorrect assertion that millions of Class Members are in jeopardy of missing their "opportunity" to participate in this process. The confusion created by these scare tactics threatens to wreak havoc on this massive distribution as confused Class Members besiege the Claims Administrator and overwhelm the Court with unnecessary litigation.

Spectrum argues that this injury is "by definition hypothetical because the time to submit challenges has not yet begun." (Opp. Mem. at 15.) But the fruits of Spectrum's misinformation

⁶ Spectrum does not argue that the causation and redressability elements of constitutional standing are not met.

have already materialized as confused Class Members have approached Lead Counsel and the Claims Administrator with concerns that reflect falsehoods spread by Spectrum. With Spectrum disseminating its claims through press releases posted on the Internet (Constantine Decl. Ex. H), it is easy to see how Spectrum's misinformation poses an imminent threat to the administration of this Settlement.

In addition, Spectrum's misrepresentations have induced those Class Members that have signed with Spectrum to forego up to 30% or more of their recovery. Spectrum is dismissive of this injury as irrelevant, arguing that "the only relevant issue would be whether the class as a whole is somehow being deprived of its recovery." (Opp. Mem. at 14.) This ignores the harm to hundreds of Class Members that have been duped by Spectrum into forking over potentially millions of dollars. In any event, the Class as a whole will be injured by Spectrum's actions for the reasons described above.⁷

3. The Class Need Not Show Prudential Standing

Because the Class as a whole will be injured by Spectrum's actions, it need not show prudential standing to seek relief on behalf of those Class Members that have signed with Spectrum. Spectrum argues that the Class "seeks to place itself in between Spectrum and its present and potential customers." (Opp. Mem. at 14.) To the contrary, it is *Spectrum* that has injected itself into this litigation, and that now seeks to avoid this Court's jurisdiction.

C. The Class Is Not Bound by the Arbitration Clauses in Spectrum's Agreements.

The Class is not bound by the arbitration clauses in Spectrum's agreements because most Class Members have not signed with Spectrum. Absent circumstances not present here, non-

⁷ Spectrum's suggestion (Opp. Mem. at 14-15 n.6) that its actions benefit the Class by bringing more Class Members to the claims process is baseless. Spectrum does not point to a single instance where it brought a Class Member into the claims process that had not already been notified by the Claims Administrator.

signatories to a contract are not bound by arbitration clauses contained within that contract. *Norcal Mut. Ins. Co. v. Newton*, 100 Cal. Rptr. 2d 683, 693, 84 Cal. App. 4th 64, 76 (2000) (holding that non-signatories are not bound to arbitration clauses in the absence of a principal/agent relationship between the non-signatory and the signatory); *County of Contra Costa v. Kaiser Foundation Health Plan Inc.*, 54 Cal. Rptr. 2d 628, 631-32, 47 Cal. App. 4th 237, 242-43 (1996) (non-signatories are bound to arbitrate only if “a benefit was conferred on the nonsignatory as a result of the contract, making the nonsignatory a third party beneficiary of the arbitration agreement” or if the signatory had “implied authority” to contract for the non-signatory); *see also Specht v. Netscape Communications Corp.*, 306 F.3d 17, 39 n.20 (2d Cir. 2002) (applying California law).

Here, those Class Members that signed with Spectrum obviously had no authority to bind other Class Members. Nor do Spectrum’s agreements confer any benefit on the Class at large. Quite to the contrary, they harm the Class. “Arbitration is consensual in nature. The fundamental assumption of arbitration is that it may be invoked as an alternative to the settlement of disputes by means other than the judicial process solely because all parties have chosen to arbitrate them.” *County of Contra Costa*, 54 Cal. Rptr. 2d at 632-33, 47 Cal. App. 4th at 244-45. Not having agreed to the arbitration clauses in Spectrum’s agreements, the Class is not bound by them.

II. INJUNCTIVE RELIEF IS APPROPRIATE.

A. The First Amendment Does Not Protect Spectrum’s Misleading Statements.

Spectrum correctly states that its advertising materials constitute commercial speech. (Opp. Mem. at 17.) Unlike other forms of expression, however, commercial speech is accorded a “lesser protection.” *Central Hudson Gas & Elec. Corp. v. Public Service Comm’n of N.Y.*, 447

U.S. 557, 562-63 (1980). Because “[t]he First Amendment’s concern for commercial speech is based on the informational function of advertising . . . there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may *ban* forms of communication more likely to deceive the public than to inform it.” *Id.* at 563 (emphasis added); accord *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 367 (2002). “The First Amendment . . . does not prohibit the State from insuring that the stream of commercial information flows cleanly as well as freely.” *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771-72 (1976).

Spectrum’s statements are not protected by the First Amendment because they “do not accurately inform the public about lawful activity.” *Central Hudson*, 447 U.S. at 563. Spectrum admits that it has been falsely telling Class Members that the Visa Transactional Database does not distinguish between debit and credit transactions. And Spectrum does not even bother to explain its remarkable assertions that Class Members’ estimated recoveries are “generated” by Visa and MasterCard, that the Claims Administrator is being paid to defend Visa/MasterCard estimates, or that millions of Class Members are in jeopardy of missing their “opportunity” to participate in this distribution. The First Amendment does not protect such false and misleading commercial speech.⁸

⁸ Even if this Court finds that Spectrum’s statements are not misleading, this Court has the authority to require corrective notice notwithstanding the limited protection accorded commercial speech by the First Amendment. *Howard Guntz Profit Sharing Plan v. Superior Court*, 105 Cal. Rptr. 2d 896, 903, 88 Cal. App. 4th 572, 581 (2001). “In the context of a class action, it is the court’s authority and duty to exercise control over the class action to protect the rights of all parties, and to prevent abuses which might undermine the proper administration of justice.” *Id.* Thus, even if this Court finds that Spectrum did not deliberately mislead Class Members, the Court could still require Spectrum to clarify any ambiguities it created that might undermine the claims administration process.

B. Spectrum's Statements Are Misleading.

1. Spectrum's False Statements Regarding the Visa Transactional Database

Spectrum admits that it falsely told Class Members that the Visa Transactional Database offers “no distinction between credit card and the much higher value signature debit card transactions.” (Constantine Decl. Ex. C at 8; Opp. Mem. at 20-21 (conceding that the Plan of Allocation “does state that claim estimates will be calculated separately for off-line debit and off-line credit”).) Yet Spectrum contends that it only recently discovered this “mistake” and that its mistake was the result of the Plan’s ambiguous language. Neither contention is credible.

In approving the Plan, the District Court specifically recognized that the Plan will fairly determine Class Members’ proportionate shares of off-line debit and credit damages by utilizing the Visa Transactional Database – the one industry source that accurately separates off-line debit and credit purchase volumes for virtually the entire Class for most of the damages period. In fact, the District Court found that “Visa’s database includes Visa debit and credit transaction counts and dollar volumes broken out by month for each Class Member that accepted Visa transactions at any time between October 1, 1996 and July 31, 2003.” *In re Visa Check/MasterMoney Antitrust Litig.*, 297 F. Supp. 2d. 503, 519 n.20 (E.D.N.Y. 2003), *aff’d sub nom. Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96 (2d Cir. 2005), *cert. denied sub nom. Leonardo’s Pizza by the Slice, Inc. v. Wal-Mart Stores, Inc.*, 125 S. Ct. 2277 (May 16, 2005). Moreover, this finding was consistent with the plain wording of the Plan and the Fisher Allocation Declaration.⁹ (See Schwartz Decl. Ex. B at Sections 2.2, 4.8 (same); Constantine Decl. Exs. A at Section 2.3 (same), F at ¶¶ 37, 44 (same), and G at ¶¶ 7, 17 (same).)

⁹ Contrary to Spectrum’s assertion, Lead Counsel and the Claims Administrator did not make “a tacit admission that the initial database definition in the Original and the Amended Plan was confusing” by recently revising the definition of the Visa Transactional Database. (Opp. Mem. at 21.) Not one Class Member questioned that

Spectrum also cannot credibly claim that this “mistake” was merely harmless error. Consistent with plaintiffs’ theory of the case, the Fisher Allocation Methodology provides Class Members greater allocations per dollar volume of debit transactions than credit transactions. If the Visa Transactional Database mischaracterizes debit transactions as credit transactions – as Spectrum claimed – the process would necessarily shortchange Class Members. Even though it had to know its claims were false, Spectrum nonetheless repeated them to confuse and scare Class Members into retaining its services.

2. Spectrum’s Misleading Statements Regarding Allocations for Pre-October 1996 and On-Line Debit Damages

Spectrum attempts to justify its misrepresentations regarding Class Members’ potentially waiving their rights to pre-October 1996 and on-line debit damages by stating that those statements accurately portrayed the Original Plan. (Opp. Mem. at 4.) Spectrum, in addition, argues that it simply informed Class Members that under the Original Plan they had to submit additional data to claim an allocation for pre-October 1996 and on-line debit damages. (*Id.* at 6.) This is false. Spectrum misleadingly implied to merchants that they would “waive” their rights to pre-October 1996 and on-line debit damages if they did not challenge their estimated cash payment.

- “Those claimants who challenge the partial ‘offer’ and maximize their recovery value will have a proportionately higher distribution of the remaining unclaimed pool.” (emphasis omitted)
- “You may file a claim based solely on the ‘offer’ generated by MasterCard and Visa. In this case you will receive considerably less than 100% of what is owed to you and will result in the following: a) You will not receive any funds

definition until recently when it became apparent that the misinformation spread by Spectrum was confusing members of the Class. To address Spectrum’s false claims and remove any ambiguity created by Spectrum, Lead Counsel posted a document on the case website explaining that the Visa Transactional Database “includes separate Visa debit and credit transaction counts and dollar volumes.” (Schwartz Decl. at Ex. M (emphasis added).) This corrective hardly constitutes a tacit admission.

for 1992-1996 since Visa and MasterCard databases only go back to 1996. Yet, the court approved claim period begins in 1992. b) You will not receive any funds for the 'on-line' debit portion of your claim since Visa and MasterCard have admitted that they do not have this data in their databases. c) You will rely solely on the incomplete and inaccurate Visa and MasterCard 'database'. You will waive your court granted right to amend your claim to include transactions that were missed and mis-categorized." (emphasis omitted)

(Constantine Decl. Ex. C at 7, 35.) *See Georgine v. Amchem Prods., Inc.*, 160 F.R.D. 478, 491 (E.D. Pa. 1995) (finding misleading, and enjoining, statements to potential class members that they would waive their rights to future compensation by not opting-out of the class).

3. Spectrum's Misleading Statements that Millions of Merchants Will Miss Their "Opportunity" to Participate

To support its false claim that millions of merchants have not been identified and thus "will miss their opportunity for a refund," Spectrum disingenuously relies upon gaps in the Visa Transactional Database. (Opp. Mem. at 19; Constantine Decl. Ex. H.) But Class Members have been principally identified by the merchant mailing lists provided by the merchant acquirers, and not by the Visa (or MasterCard) Transactional Databases. As such, pointing out whatever gaps there might be in these databases is a red herring. Spectrum's misleading exploitation of these gaps to falsely suggest that millions of merchants have not been identified is particularly disingenuous, as elsewhere in its brief it acknowledges that data from merchant acquirers has been utilized to implement the Plan. (Opp. Mem. at 5 n.2.)

4. Spectrum's False Statements Regarding the Filing Deadline

Spectrum admits that it falsely told Class Members that "[s]adly, the Plan of Allocation currently only provides for 30 days to file your claim." (*See* Constantine Decl. Ex. C at 20, 26; Opp. Mem. at 22 ("The Plan does permit 60 days to submit an unqualified acceptance of the Claims Administrator estimate.").)

5. Spectrum's False Statements Regarding the Source of Class Members' Estimated Cash Recoveries

Spectrum's solicitations falsely told Class Members' that their estimated recoveries would be an "offer" generated not by the Claims Administrator, but by *Visa and MasterCard*. (See Constantine Decl. Ex. C at 35 ("You may file a claim based solely on the 'offer' generated by MasterCard and Visa.")) Moreover, Spectrum told Class Members that once the claim forms are mailed, the Claims Administrator will become "adversarial" and will be "paid to defend the Visa/MasterCard estimate." (See Constantine Decl. Ex. C at 25 ("Please keep in mind that once the estimates are mailed, the settlement administrator goes into defense mode and becomes adversarial. *They are paid to defend the Visa/MasterCard estimate.*") (emphasis added).)

Spectrum cannot credibly defend these falsehoods by characterizing them as "opinion." *Georgine*, 160 F.R.D. at 491 n.14 (E.D. Pa. 1995) ("statements like these, by failing to label them as such, do not express opinion, rather, they give the impression of stating fact"). The Plan explicitly describes the Fisher Allocation Methodology as the method by which Class Members' estimated cash payments have been generated. And it plainly explains that the Claims Administrator, under Lead Counsel's (and ultimately the Court's) supervision, is generating Class Members' estimated recoveries by applying the Fisher formula. As a purportedly experienced class action settlement recovery firm, Spectrum presumably knows that the defendants would not be responsible for generating Class Members' estimated recoveries.¹⁰

¹⁰ Similarly, Spectrum denies that its solicitations misleadingly inform Class Members that if they accepted Visa and/or MasterCard debit and credit cards for payment during the Class Period, and they enlist Spectrum's services, they are guaranteed to collect anywhere between \$100,000 and \$6,000,000 recovery. Instead it states, "[t]hat is not what Spectrum said. Spectrum simply says claimants may be 'eligible to collect' in that range." (Opp. Mem. at 23 n.12 (emphasis added).) To the contrary, Spectrum's solicitation clearly states as follows: "Did your company accept VISA and or MasterCard ('MC') Credit and Debit Cards from October 25, 1992 to June 21, 2003? If so, your firm is eligible to collect significant top line revenue from \$100,000 to \$6,000,000" (Constantine Decl. Ex. C at 5 (emphasis added).)

6. Spectrum's False Statements Regarding the Integrity of the Claims Administrator

Spectrum claims that its statements regarding the integrity of the Claims Administrator are merely protected opinions. Moreover, Spectrum now attempts to mischaracterize its prior misrepresentations. For example, Spectrum now claims to have said “that the Claims Administrator will be working on *hundreds of claims* at a time and has no incentive to press the interests of any one claimant with whom its interests are not aligned” and “that ‘dog-fights’ or even litigation *might be* needed to maximize recovery.” (Opp. Mem. at 9, 23-24 (emphasis added).) By substituting the word *claims* for *cases*, and stating that “dog-fights” *might be* needed instead of *will be*, Spectrum now attempts to mischaracterize the clear statements it made to Class Members in its solicitations:

- “You will be dependent on the settlement administrator, a clerical mail notification house working on hundreds of cases at the same time. The settlement administrator is obligated to rely only on the questionable information provided by MasterCard and Visa. You will get no special treatment from them. Their interests are not aligned with yours.” (emphasis omitted)
- “The settlement administrator is not compensated and has no incentive to passively accept your processor’s records in lieu of their reliance on the Visa and MasterCard databases. This is why there will be many dogfights. Spectrum has the specialized legal knowledge and courtroom experience to win these dogfights.” (emphasis omitted)
- “Who will challenge the settlement administrator’s rejection of your own data? Most legal departments do not have a class action specialist on staff.”

(Constantine Decl. Ex. C at 19, 23-24, 35, 36.) Moreover, the contention that the Claims Administrator “is obligated to rely only on the questionable information provided by Visa and MasterCard” is plainly false. Similarly false are Spectrum’s assertions that the Claims Administrator will become “adversarial” once claim forms are mailed because it is “paid to defend the Visa/MasterCard estimate.” (See Constantine Decl. Ex. C at 25.) Such falsehoods

cannot be whitewashed as mere “opinion.” To the contrary, if Spectrum is truly “one of the nation’s largest claim filing and fund recovery services,” it must know that an experienced claims administrator could not oversee a large court-supervised distribution such as this one if it blatantly acted against the interests of the Class.

C. Irreparable Harm Is Not a Requirement for an Injunction Under the All Writs Act or for Corrective Notice Under Fed. R. Civ. P. 23.

In the Second Circuit, an injunction issued pursuant to the All Writs Act need not comply with the requirements for a preliminary or permanent injunction under Fed. R. Civ. P. 65. *In re Baldwin-United Corp. (Single Premium Deferred Annuities Insurance Litig.)*, 770 F.3d 328, 338-39 (2d Cir. 1985).¹¹ “Injunctions issued under the authority of the All-Writs Act stem from very different concerns than those motivating preliminary injunctions governed by Fed. R. Civ. P. 65.” *Id.*¹² Whereas injunctions under Rule 65 “are designed to preserve the status quo between the parties,”¹³ injunctions under the All Writs Act are needed to prevent third parties from interfering with the court’s jurisdiction. *Id.* Thus, it makes no sense for Spectrum to argue that damages will adequately compensate the Class. Spectrum has falsely questioned the accuracy of the Visa Transactional Database and the credibility of the Claims Administrator overseeing the Plan. These misrepresentations pose an imminent threat to the administration of the Settlement and therefore should be enjoined.

There is also no requirement of irreparable harm for the issuance of corrective notice under Fed. R. Civ. P. 23. “The issuance of a remedial order under Fed. R. Civ. P. 23(d) does not require a finding of actual harm. A remedy is appropriate if the communications at issue create a

¹¹ None of the cases cited by Spectrum in its opposition involves an injunction issued pursuant to the All Writs Act. (See cases cited in Opp. Mem. at 24.)

¹² Although the Second Circuit in *Baldwin* spoke in terms of preliminary injunctions, the court in fact upheld a permanent injunction.

¹³ Preliminary injunctions preserve the status quo pending the court’s decision, whereas permanent injunctions preserve the status quo after the court’s decision.

‘likelihood’ of abuse, confusion, or an adverse effect on the administration of justice.” *Georgine v. Amchem Prods., Inc.*, 160 F.R.D. 478, 498 (E.D. Pa. 1995) (internal citation omitted).

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Lead Counsel’s Memorandum of Law in Support of Lead Counsel’s Application for an Order to Show Cause filed on September 9, 2005, Lead Counsel respectfully requests this Court to void Spectrum Settlement Recovery’s contracts with Class Members or in the alternative to require Spectrum Settlement Recovery to provide notice to the Class, at its own expense, correcting its misrepresentations and misleading statements. Spectrum Settlement Recovery should also be enjoined from soliciting Class Members with these or similar misrepresentations.

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