

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

-----X
IN RE : **MASTER FILE NO.**
 : **CV-06-5238**
 : **(Gleeson, K.) (Mann, M.J.)**
VISA CHECK/MASTERMONEY ANTITRUST :
LITIGATION :
-----X
This Document Relates to: :
All Actions :
 :
-----X

**MEMORANDUM OF LAW IN FURTHER
OPPOSITION TO LEAD COUNSEL'S MOTION
REGARDING SPECTRUM SETTLEMENT RECOVERY LLC**

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

ARGUMENT 3

 I. AS IN ALLAPATTAH, THIS COURT LACKS SUBJECT MATTER JURISDICTION
 TO ENJOIN A NON-PARTY 3

 II. SPECTRUM CORRECTLY PREDICTED THAT THE CLAIMS PROCESS WOULD
 BE COMPLICATED 5

CONCLUSION 8

PRELIMINARY STATEMENT

Lead Counsel's moving papers claim that Spectrum's marketing materials are misleading, and that Spectrum has confused and harmed the merchant class. Spectrum's response details the sources for its challenged statements, which include statements made by Lead Counsel, publicly-filed documents describing the settlement process, and Spectrum's experience in the claims processing business. With the claims process now underway, it is quickly becoming apparent that Spectrum's concerns about the process are well-founded and shared by many class members. Lead Counsel has recently indicated as much in requesting an extension of the deadline for submitting challenges. *See* Declaration of Wendy H. Schwartz, dated Oct. 7, 2005 ("Second Schwartz Decl."), Exh. A.¹

Only one of Spectrum's fact-based statements was not correct, and in that instance Spectrum explained the error, and that it has been corrected. In reply, Lead Counsel seizes upon this one error to wildly accuse Spectrum of "admit[ting] that it has misrepresented the Plan of Allocation . . . to frighten class members," Reply Mem. at 1,² and that it "intentionally misled"

¹ Following on Lead Counsel's request, Spectrum agreed that the challenge deadline should be extended, and also asked the Court to synchronize the deadlines for filing challenges and accepting estimates. Second Schwartz Decl., Exh. B. Instead of advising the Court of its view on this suggested additional extension, Lead Counsel objected to Spectrum making such a request, contending that only Lead Counsel should have access to the Court. *Id.*, Exh. C. But interested parties can always petition the Court, which is the ultimate arbiter of all issues under the Settlements. *See, e.g.*, Second Schwartz Decl., Exh. D (granting request by individual class member for class notice regarding claims process in Spanish).

² "Reply Mem." references the Reply Memorandum Of Law In Support Of Lead Counsel's Motion To Enjoin Spectrum Settlement Recovery, dated Oct. 3, 2005. The Memorandum Of Law In Support Of Lead Counsel's Application For An Order To Show Cause, dated Sept. 9, 2005 is referenced as "Initial Mem." and the Memorandum Of Law In Opposition To Lead Counsel's Motion Regarding Spectrum Settlement Recovery LLC, dated Sept. 26, 2005 is referenced as "Spectrum Response Mem."

Class Members." *Id.* But Spectrum has admitted no such thing, as made plain by Lead Counsel's failure to cite any evidence whatsoever in support of these accusations.³

Spectrum has likewise not stated that the claims process is being run by Visa or MasterCard. *See* Reply Mem. at 16. Indeed, in its complaints about Spectrum's supposed slights impugning the Claims Administrator, Reply Mem. at 17, Lead Counsel acknowledges Spectrum's statements that the Claims Administrator -- not Visa or MasterCard -- is calculating the estimates. It is evident, when read in context, that Spectrum's statements regarding the "Visa/MasterCard estimate" are merely shorthand for estimates based on the database obtained from Visa (previously planned to also include data from MasterCard). *See, e.g.*, Declaration of Lloyd Constantine, dated Sept. 9, 2005, Exh. C at 25 (referencing "Visa/MasterCard estimate" on same page as "the Claims Administrator's calculations"); 35 (referencing "'offer' generated by MasterCard and Visa" on same page as "'offer' provided to you by the Settlement Administrator who is dependent upon the MasterCard and Visa databases").

Lead Counsel's inflammatory characterizations of Spectrum's statements and motives are entirely of Lead Counsel's own creation, and show a palpable anger at Spectrum that begs the question -- what exactly is Lead Counsel seeking to protect? Lead Counsel makes no evidentiary showing that class members need protection, as it provides no actual complaints from merchants that have signed on with Spectrum.⁴ At bottom, Lead Counsel is attempting to shut down perceived negative comments by Spectrum questioning how well the claims process will work. *See, e.g.*, Reply Mem. at 2-4; Initial Mem. at 9-10. But a court cannot enjoin speech simply

³ This is what Spectrum said: "[t]o its knowledge, Spectrum made only one statement regarding database flaws that it subsequently determined to be incorrect," Spectrum Response Mem. 20, and "Spectrum no longer questions whether debit and credit are separately accounted for." *Id.* at 21.

⁴ Lead Counsel's claim that it is "besieged" by class members confused by Spectrum's supposedly misleading statements appears only in its brief (*see* Reply Mem. at 9), with no citation to any evidence.

because it expresses an opinion that a party does not like. In the absence of some attempt to usurp the Court's authority -- which is not demonstrated here -- there is simply no basis to issue the extraordinary relief requested.

ARGUMENT

I. AS IN ALLAPATTAH, THIS COURT LACKS SUBJECT MATTER JURISDICTION TO ENJOIN A NON-PARTY

Lead Counsel cannot meaningfully distinguish this motion from *Allapattah Servs., Inc. v. Exxon Corp.*, Case No. 91-0986-CIV-GOLD, 2004 U.S. Dist. LEXIS 27979 (S.D. Fla. Dec 14, 2004), *aff'g* 2004 U.S. Dist. LEXIS 27978 (S.D. Fla. Sept 28, 2004), which makes clear that neither Fed. R. Civ. P. 23 nor the All Writs Act provide subject matter jurisdiction to enjoin a non-party in the circumstances presented. *Id.* at *16.⁵ Lead Counsel's claim that *Allapattah* is somehow off-point because the issue ultimately may have been moot, Reply Mem. at 7, makes little sense: the Magistrate Judge found there was no jurisdiction *before* the claims process was complete, *see* 2004 U.S. Dist. LEXIS 27978, *18, and the District Judge expressly affirmed that ruling irrespective of the claimed mootness: "[a]lthough Plaintiff's counsel conceded that their request for entry of injunctions is now moot, I agree with Magistrate Simonton's conclusion that I do not have subject matter jurisdiction to enter the injunctions requested by Plaintiffs in any event." 2004 U.S. Dist. LEXIS 27979, *10.

Unable to distinguish *Allapattah*, and apparently unwilling to rely only on the inapposite cases cited in its moving papers, Lead Counsel now invokes another irrelevant case, *In re*

⁵ Spectrum does not contend the Court lacks subject matter jurisdiction over this case as a whole. The issue is whether the Court may enjoin a non-party that does not threaten the jurisdiction the Court already has. Lead Counsel recognized in its moving papers that enjoining a non-party requires a separate jurisdictional basis. *See* Initial Mem. at 10-11. Lead Counsel's argument that the Court can assert jurisdiction notwithstanding individual arbitration clauses in Spectrum's contracts, *see* Reply Mem. at 10-11, likewise misses the point -- the prong of Lead Counsel's motion that seeks to avoid individual contracts on behalf of individual merchants (who are not themselves complaining) requires individualized showings that each affected merchant was fraudulently induced. *See* Spectrum Response Mem. at 17. These claims must be handled in accordance with the contract terms.

Domestic Air Transportation Litigation, No. 1:90-CV-2485-MHS, 1992 WL 357433 (N.D. Ga. 1992). See Reply Mem. at 5-6. But just as with Lead Counsel's other cases, *Domestic Air* has no relation to the facts presented here.⁶

In *Domestic Air*, a third party unaffiliated with the court or class counsel had set up two "900" numbers, which it invited class members to call to obtain information and claim forms. 1992 WL 357433, *1. People who called the number were automatically charged \$1.99 per minute for a four minute informational call, and \$9.95 for requesting a claim form. *Id.* Thus, just as in *Synthroid*, 197 F.R.D. 607 (N.D. Ill. 2000) (the case on which Lead Counsel relies in its moving papers), a third party was effectively posing as an adjunct of the court: "[t]he Court finds that the actions of [the third party] improperly create the impression that [the third party] is acting as a Court-authorized clearinghouse for the claims procedure." 1992 WL 357433, *1. The situation in *Domestic Air* was described as particularly concerning because the third party was charging class members upon their initial contact -- dialing the "900" number -- before the class member had determined whether it had any need for the third party's service, *id.*, and the information being provided under the false imprimatur of the Court did "not accurately provide the information approved by the Court for the claims procedure." *Id.* Significantly, the third party in *Domestic Air* failed to appear or respond to class counsel's motion, so there was no challenge to the facts presented by class counsel, nor to the legal basis for the relief granted in that case. *Id.* The third party's failure to appear or respond effectively renders the decision in *Domestic Air* a default judgment, making it of limited utility even if it were on-point, which it is not.

⁶ Lead Counsel also relies in its reply on *Erhardt v. Prudential Group, Inc.*, 629 F.2d 843 (2d Cir. 1980). Reply Mem. at 6. In that case, a principal of the defendant sent unapproved notices to class members encouraging them to opt-out. 629 F.2d at 844-46. Even though the notices included information that class counsel disputed, and which the lower court had declined to include in the official notice, the Second Circuit reversed the lower court's finding of contempt, finding the mailing not plainly prohibited by the court's prior orders. *Id.* at 846-47.

Unlike the third party in *Domestic Air*, Spectrum has never purported to act as a representative or agent of the Court, and has never appropriated or interfered with the Court's jurisdiction or the rights of any member of the class. Spectrum has simply marketed its services, to the benefit of its individual merchant customers, and -- to the extent participation is increased and the process as a whole is made more transparent -- to the benefit of the class as a whole.⁷ In these circumstances, the Court has no power, and no need, to enjoin Spectrum.

II. SPECTRUM CORRECTLY PREDICTED THAT THE CLAIMS PROCESS WOULD BE COMPLICATED

Lead Counsel's reply continues to insist that Spectrum's services lack any value. Reply Mem. at 2-3. But with the claims process now underway, various difficulties, with which many merchants need help, are becoming obvious. In just the last week, Spectrum has encountered numerous issues, including the following:

- Many merchants have more than one location and/or more than one line of business. Declaration of Mac Irvin, dated Oct. 7, 2005 ("Irvin Decl.") ¶ 2. For each account with Visa, a merchant obtains a card acceptor ID number (a "Merchant ID"). *Id.* ¶ 3. A merchant may have a different Merchant ID for each location it operates, or it may have one Merchant ID for many locations. *Id.* ¶ 4. A merchant may also have more than one Merchant ID for one location if it operates different lines of business there. For example, a hotel may have one ID for its restaurant, one for its gift shop and one for its booking and reservations. *Id.* ¶ 5. Each Merchant ID should correlate to a specific transaction volume, and a merchant should thus receive a separate estimate of claim (on a "VM-1" form) for each Merchant ID. *Id.* ¶ 7. Many merchants are receiving multiple estimates, but they are not correlated with Merchant ID numbers, making it difficult for the merchant to determine what portion of its business the estimate covers. *Id.* ¶ 9(a). This difficulty is compounded by the fact that merchants are not receiving the same number of estimates as the number of their known Merchant IDs. *Id.* ¶ 9(b).

⁷ Lead Counsel's assertion that "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," Reply Mem. at 10 n.7, is meaningless. The issue is not whether merchants have received notice or claim forms, but rather, what will they do with those forms. Lead Counsel does not dispute the general understanding that settlement funds tend to draw low participation rates, *see* Spectrum Response Mem. at 14-15 n.6; indeed, Lead Counsel itself predicts only 50% participation. *Id.* In filing claims for hundreds of merchants and alerting thousands more through solicitations and postings on its website, Spectrum increases the numbers of merchants who may actually return their claim forms, and thus obtain the compensation that the Common Fund was established to provide.

- In addition to receiving VM-1 estimates, merchants are also receiving multiple "VM-2" forms. *Id.* ¶ 9(c). These forms are blank, and simply indicate that the merchant's address was found in a database other than the Visa Transactional Database. Declaration of Wendy H. Schwartz, dated Sept. 26, 2005 ("Schwartz Decl."), Exhs. C; M § B.1.b. It may be that these forms are intended to simply provide extra notice, and could be ignored. However, since the number of VM-1 estimates being received is not matching up with the number of known Merchant ID numbers, merchants do not know whether the VM-2 forms indicate additional lines of business or locations that require submissions of information, or whether they are duplicates that can be discarded. Irvin Decl. ¶ 10. Moreover, the number of VM-2 forms being received are substantial -- in Spectrum's current experience, they constitute approximately thirty percent of all forms being received. *Id.* ¶ 11.
- Merchants that had millions or billions of revenues over the class recovery time period are receiving estimates that are very low, including many estimates of "0." *Id.* ¶ 12. For example, one Fortune 500 merchant with hundreds of locations throughout the United States has to date received eight VM-1 forms with estimates totaling approximately \$300,000, nine VM-1 forms with estimates of less than \$5 each, 21 VM-1 forms with estimates of "0" and thirty VM-2 forms. *Id.* ¶ 13. These forms cannot be readily reconciled with the company's business locations, Merchant IDs, or its own estimated credit and debit business volume during the class period. *Id.* Another Fortune 500 merchant with approximately \$21 billion in gross revenues over the relevant period has so far received four claim forms -- three are blank, and the fourth gives an estimated recovery of \$216. *Id.* ¶ 14. Working from the official settlement website information for this estimate, the total "plastic" transaction volume for the \$21 billion in revenue is only estimated to be \$1.5 million, or a percentage of .00007. *Id.* In both of these examples -- which are representative of the experience of numerous Spectrum customers -- a significant amount of work will be required to determine the basis for the estimated numbers, what might be missing, and, if warranted, how to best submit a challenge. *Id.* ¶ 15.
- In general, it appears that substantially more data is missing from the Visa Transactional Database (or cannot/has not been correctly associated with a merchant) than was expected. Many of Spectrum's customers are receiving estimates based on extrapolated "back-up" data for Visa credit and off-line debit transactions between 1996 and 2003, instead of the actual transaction volume for that period which is supposed to be included in the Visa Transactional Database. *Id.* ¶ 16.
- To fill in the gaps where data is missing or to challenge the Claims Administrator estimates, a merchant must try to obtain its own transaction volume information directly from third-party processors. Lead Counsel has itself recently conceded that collecting relevant data is more burdensome and time consuming than expected. Second Schwartz Decl., Exh. A.

Spectrum has been engaged in conversations with the Claims Administrator and Lead Counsel trying to work through these issues and address how its customers can best understand the estimates that have been sent and determine what should and should not be challenged. Second Schwartz Decl. ¶ 6; Irvin Decl. ¶ 17. Spectrum is also spending countless hours of its own collecting information from its customers and from third-parties such as processors, so that it can understand what the customers' claims should look like, and prepare challenges if the estimates do not match these expectations. Irvin Decl. ¶ 17. We do not raise these issues here to point fingers, or (as Lead Counsel seems to believe) impugn the process; rather, we simply wish the Court to understand that, as expected, the process of allocating and distributing payments to potentially millions of merchants is necessarily complicated. Spectrum has been hired to assist its customers in working through these complications. In these circumstances, Lead Counsel's repeated insistence that Spectrum's services are unnecessary, or even affirmatively detrimental, simply make no sense.

CONCLUSION

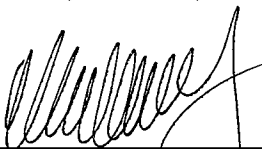
For the reasons stated above, this Court should deny all of the relief requested by Lead Counsel, and such other and further relief as the Court deems just.

Dated: New York, New York
October 7, 2005

Respectfully submitted,

BECKER, GLYNN, MELAMED & MUFFLY LLP

By:



Wendy H. Schwartz (WS 1862)
299 Park Avenue
New York, New York 10171
Tel: (212) 888-3033
Fax: (212) 888-0255

Attorneys for Spectrum Settlement Recovery, LLC