UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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

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PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR AN ORDER PRELIMINARILY APPROVING VISA SETTLEMENT

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TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

PROCEDURAL HISTORY OF THE ACTION 2
- A. Filing Of The Action 2
- B. Class Certification Proceedings 3
- C. Discovery 4
- D. Summary Judgment 5
- E. The Settlement 6

TERMS OF THE SETTLEMENT 6

ARGUMENT 8

- I. THE STANDARD FOR PRELIMINARY APPROVAL OF A CLASS SETTLEMENT AGREEMENT 8

- II. THE VISA SETTLEMENT SHOULD RECEIVE PRELIMINARY APPROVAL 9

  - A. The Terms Of The Visa Settlement Are Fair 10
    1. Comparison Of The Proposed Settlement With the Likely Result Of Litigation 10
    2. Complexity, Expense, and Likely Duration Of The Litigation . . 11
    3. Experience Of Class Counsel 12
    4. The Scope Of Discovery Preceding The Settlement 13
    5. The Ability Of Visa To Satisfy A Greater Judgment 14

  - B. The Settlement Is The Product Of Arm's Length Negotiation 14

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir.1974) 10

In re BankAmerica Corp. Securities Litig., 210 F.R.D. 694, 701 (E.D.Mo. 2002) 12

In re Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 292 (2d. Cir. 1992) 10

In re General Motors Corporation Pick-Up Truck Fuel Tank Products Liability Litigation, 55 F.3d 768, 784 (3d. Cir. 1995) 9

In re NASDAQ Market-Makers Antitrust Litigation, 187 F.R.D. 465, 473 (S.D.N.Y. 1998) . . . 14

In re NASDAQ Market-Makers Antitrust Litig., 176 F.R.D. 99, 102 (S.D.N.Y. 1997) 8

In re Panasonic Consumer Elecs. Prods. Antitrust Litig., No. 89 CIV-0368 (SWK), 1989 WL 63240, at *2 (S.D.N.Y. June 5, 1989) 8

In re Prudential Securities, Inc., Ltd. Partnership, 163 F.R.D. 200, 209 (S.D.N.Y. 1995) 8

In re Visa Check/MasterMoney Antitrust Litigation, 280 F.3d 124, 138 (2d. Cir. 2001), *cert. denied,* 536 U.S. 917 (2002) 4, 5

In re Visa Check/MasterMoney Antitrust Litigation, 192 F.R.D. 68, 88 (E.D.N.Y. 2000) 3

Maley v. Del Global Technologies Corp., 186 F.Supp.2d 358, 36 (S.D.N.Y. 2002) 11

Protective Committee for Independent Stockholders of TMT Trailer Fee, Inc. v. Andersen, 390 U.S. 414, 424 (1968) 10

Slomovics v. All for a Dollar, Inc., 906 F. Supp. 146, 149 (E.D.N.Y.1995) 11

State of New York et al. v. Nintendo of America, Inc., 775 F. Supp. 676, 681 (S.D.N.Y. 1991) 12

Weinberger v. Kendrick, 698 F.2d 61, 73 (2d. Cir. 1982) 9, 10, 14

Statutes

Fed. R. Civ. P. 23 . . . . *passim*

Other Authorities

2 Herbert Newberg & Alba Conte, *Newberg on Class Actions*
§§11.25 and 11.26 (4th ed. 1992) 9

Manual for Complex Litigation - Third §30.41 (1995) 8, 9

This memorandum of law is respectfully submitted by the plaintiff class in support of the motion for an Order preliminarily approving the settlement reached between the plaintiff class and defendant Visa U.S.A., Inc. ("Visa"), pursuant to Fed. R. Civ. P. 23(e).[1]

PRELIMINARY STATEMENT

This complex antitrust action, settled between the plaintiff class and defendant Visa after mediated settlement discussions and the impanelment of a jury, should be granted preliminary approval.

The settlement should be approved because of the substantial relief it provides to the millions of merchants in the class. Merchants will -- for the first time -- be free to accept or not accept Visa debit card products while continuing to accept Visa credit card products. Plaintiffs assert that this process will result in more competitively priced debit products, resulting in relief to class members of tens of billions of dollars over the next decade. Further, the over $3 billion fund created by the settlements (including the $1.025 billion that defendant MasterCard International, Inc. ("MasterCard") will pay in settlement) is a significant amount from which to address class member claims for compensatory relief. In exchange for providing this relief, Visa will be released from all claims arising out of or relating to this litigation and the case against Visa will be dismissed with prejudice.

The settlement should also be approved because without such approval this case is certain to result in a lengthy trial, significant post-trial motion practice and appeals. If, during continued litigation, merchant class members were still required to accept Visa debit products at the rates

[1] Defendant Visa does not oppose this motion.

currently charged, in plaintiffs' view, extensive additional damage to the class would occur. The settlement thus assures that this alleged continued damage to the class will cease.

The Court has extraordinary knowledge concerning the factual, economic and legal theories behind the parties' cases. Unlike "settlement class actions," this settlement was reached after six-and-a-half years of litigation -- after the Court's Class Certification Order was affirmed by the Second Circuit and the Supreme Court's denial of certiorari. Unlike most class action settlements, this settlement was reached after cross-motions for summary judgment -- containing over 1,500 exhibits -- were decided by the Court. Accordingly, the Court is in an excellent position to judge how the relief achieved by the settlement compares to relief which the class might have achieved by prevailing at trial and sustaining that result after a lengthy appellate process. This is especially true with respect to the injunctive portion of the settlement where the Court would have acted as the trier of fact.

In sum, this settlement is fair, adequate and reasonable. In order to avoid any further delay of relief, the Court should preliminarily approve the settlement.

PROCEDURAL HISTORY OF THE ACTION

A. Filing Of The Action

The instant litigation (the "Action") was filed on October 25, 1996 by The Limited, Inc. and Wal-Mart Stores, Inc. In the Action, the plaintiffs allege that Visa and MasterCard had violated Section 1 of the Sherman Action by requiring merchants that accepted their credit cards to also accept their debit cards. The plaintiffs also allege that Visa, individually, and jointly with MasterCard attempted to monopolize the market for debit card services to merchants in violation of Sherman Act Section 2. Finally, plaintiffs allege that Visa and MasterCard conspired to

monopolize the market for debit card services to merchants in violation of Sherman Act Section 2. The plaintiffs sought compensatory damages and injunctive relief.

Following the filing of the initial Complaint, numerous virtually identical lawsuits were filed by additional merchants. The Action, along with these other lawsuits, were thereafter consolidated into a putative class action proceeding before this Court on December 27, 1996. The operative Complaint in the Action -- the Second Amended Consolidated Class Action Complaint and Jury Demand -- was filed on May 26, 1999, after leave to file the Amended Complaint was granted. That Complaint seeks compensatory damages and injunctive relief on behalf of the class.

B. <u>Class Certification Proceedings</u>

The Court granted plaintiffs' motion for class certification under Fed. R. Civ. P. 23 (b) (2) and 23 (b) (3) in a Memorandum and Order dated February 22, 2000 (the "Class Certification Order"). The Court certified a class consisting of:

> All persons and business entities who have accepted Visa and/or MasterCard credit cards and therefore have been required to accept Visa Check and/or MasterMoney debit cards under the challenged tying arrangements during the fullest period permitted by the applicable statutes of limitation.

The Court held that class action status was appropriate because "[w]ithout class certification, there are likely to be numerous motions to intervene, and millions of small merchants will lose any practical means of obtaining damages for defendants' allegedly illegal conduct." *In re Visa Check/MasterMoney Antitrust Litigation*, 192 F.R.D. 68, 88 (E.D.N.Y. 2000). Indeed, the Court held -- in an exhaustive 45 page analysis -- that plaintiffs could prove the substantive elements of their Section 1 and Section 2 claims on a class wide basis and that

plaintiffs' theory of "injury in fact" caused by defendants' allegedly illegal practices is "susceptible to common proof." *Id.* at 84, 87-88.

Defendants thereafter sought leave from the Second Circuit Court of Appeals to appeal the Class Certification Order pursuant to Fed. R. Civ. P. 23(f). That application was granted by the Second Circuit on June 6, 2000.

In a decision dated October 17, 2001, the Second Circuit affirmed the Class Certification Order, holding that the district court did not abuse its discretion in "finding that the existence of injury and causation can be established by class-wide proof." *In re Visa Check/MasterMoney Antitrust Litigation*, 280 F.3d 124, 138 (2d. Cir. 2001), *cert. denied*, 536 U.S. 917 (2002). The Second Circuit noted the uniformity in interest among the class members in holding that "[a]ll class members . . . wish to prove that the debit card fees would be significantly lower without the tie. Every member also has an interest in establishing the hypothetical 'untied' price as low as possible in order to maximize recovery of damages." *Id.* at 144. Further, the Second Circuit held that the class was properly certified under Rule 23(b)(3) because common issues predominated over individual ones -- including issues concerning the amount of damages incurred by individual members of the class. *Id.* at 138-140.

Defendants' Supreme Court petition for a writ of certiorari was denied on June 10, 2002.

C. <u>Discovery</u>

The parties engaged in a discovery process that lasted for more than five years. That process consisted of the review of over five million documents and approximately 400 depositions of party and non-party representatives. Fact discovery substantially concluded on March 15, 2000. Expert discovery did not conclude until October 31, 2002.

Preliminary expert reports were filed on October 15, 1999. "Final" expert reports were filed on April 4, 2000 with rebuttal reports submitted on April 25, 2000. Supplemental expert reports were submitted on September 23, 2002. Plaintiffs submitted reports from five experts in total, including the reports of their liability and damages expert, Dr. Franklin M. Fisher. Defendants submitted reports from fourteen expert witnesses.

D. Summary Judgment

The parties cross-moved for summary judgment during the summer of 2000. Summary judgment briefing was supplemented by the parties on December 13, 2002, as required by the Court. Plaintiffs' summary judgment supplementation referenced 1,366 exhibits.

In an April 1, 2003 Memorandum and Order (the "Summary Judgment Decision"), the Court denied all of defendants' motions for summary judgment in their entirety. *In re Visa Check/MasterMoney Antitrust Litigation*, 2003 WL 1712568 (E.D.N.Y. April 1, 2003). The Court granted plaintiffs' motions for summary judgment in part and denied them in part. Plaintiffs' motions were granted on the following issues: (1) that debit cards and credit cards are distinct products, (2) that credit and charge card services to merchants constitutes a relevant antitrust market, (3) that Visa had market power in the market for credit and charge card services to merchants, (4) that defendants tied their credit card services to their debit card services (5) that defendants' tying arrangements affected a not insubstantial amount of commerce, and (6) that debit card services to merchants constitutes a relevant antitrust market. The Court also held that (1) plaintiffs' allegations of predatory or anticompetitive conduct, alleged as part of their Section 2 claims, were "factually supported," (2) plaintiffs made a "threshold showing" that there was a dangerous probability that defendant Visa, individually, would achieve monopoly power in the debit card services market, (3) plaintiffs presented direct and circumstantial evidence of a

conspiracy, and (4) plaintiffs "have presented a sufficiently compelling (and factually-supported) theory of damages." *Id.* at *6-8.

E. The Settlement

The Action was scheduled for trial commencing on April 28, 2003 and concluding by August 1, 2003. After an exhaustive mediation, the case against Visa settled on April 30, 2003, after the completion of jury selection.[2] A Memorandum of Understanding, executed by lead counsel for plaintiffs and defendant Visa, which outlined the parameters of the Visa settlement, was executed on April 30, 2003. Ex. A.

TERMS OF THE SETTLEMENT

The Visa Settlement, a copy of which is submitted herewith, specifies the following relief for the members of the certified class (as defined in the Class Certification Order and set forth above).

1. The creation of a settlement fund from which class member claims for damages can be addressed. Visa will pay $2.025 billion over a ten year period to the Settlement Fund. Settlement Agreement ¶ 3(a).[3]

2. The unbundling of Visa debit card services to merchants from Visa credit card services to merchants effective on January 1, 2004. Settlement Agreement ¶ 4. Because of this unbundling, merchants will have the right to decide whether or not to accept Visa debit products regardless of whether they accept Visa branded credit and other payment card products.

[2] The settlement between Visa and plaintiffs will be referred to as the "Visa Settlement."

[3] Class members who exercised their opt-out rights under Rule 23 (b) (3) are barred from making a claim against this fund.

Indeed, plaintiffs assert that, because of these new prerogatives, the prices paid by merchants for accepting all point-of-sale debit products are likely to decline. In this regard, Dr. Fisher has estimated that the class members may save as much as $100 billion over the next decade. Ex. B, Fisher Rebuttal Report at ¶¶ 108-27.

3. The creation of uniform and conspicuous visual designations on Visa debit cards. In this way, merchants will better be able to visually identify Visa debit cards at the point of sale. Settlement Agreement ¶ 5. Visa is also required to design its debit cards so merchants can identify them with electronic equipment. Settlement Agreement ¶ 7.

4. The establishment of unique interim debit interchange rates by August 1, 2003 in order to compensate merchants for continued bundled acceptance of debit products prior to the unbundling on January 1, 2004. Settlement Agreement ¶ 8. These rates will be significantly lower (at least 48 basis points for non-supermarkets and $.14 for supermarkets) than the Visa rates at which Visa debit transactions currently interchange.

5. The barring of Visa for two years from entering into exclusive arrangements with financial institutions for debit issuance. Settlement Agreement ¶ 10.

6. The Court's continuing jurisdiction to ensure compliance of the Settlement. Settlement Agreement ¶ 40.

ARGUMENT

I. THE STANDARD FOR PRELIMINARY APPROVAL OF A CLASS SETTLEMENT AGREEMENT

When considering a proposed class action settlement, courts routinely apply a two-step approach. In the first step - often called "preliminary approval" - the court reviews the proposed settlement for obvious deficiencies, schedules a fairness hearing, preliminarily approves a Settlement and the substance of a Notice Program, and directs that the class be provided with notice of the proposed settlement and the hearing. In the second step, the court considers final approval of the proposed settlement at a formal fairness hearing where arguments and evidence may be presented in support of, and in opposition to, the settlement. The issue presently before this Court is whether the settlements are entitled to preliminary approval.

To grant preliminary approval, the Court is required to determine whether the settlements are sufficiently within the range of what might be approved as fair, reasonable and adequate to justify providing mail and publication notice of the settlements to Class Members and to schedule a final approval hearing. *See In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997) ("NASDAQ"); *In re Prudential Securities, Inc., Ltd. Partnership*, 163 F.R.D. 200, 209 (S.D.N.Y. 1995). At this point, the Court is not required to make a final determination that the settlements are fair and reasonable. *See In re Panasonic Consumer Elecs. Prods. Antitrust Litig.*, No. 89 CIV-0368 (SWK), 1989 WL 63240, at *2 (S.D.N.Y. June 5, 1989) ("at the preliminary approval stage, the court should not make any final determination as to the fairness or adequacy of the proposed settlement, but instead should merely determine whether there is 'probable cause' on these issues..."). This two-step process is the method recommended by recognized class action authorities. *See Manual for Complex*

Litigation - Third §30.41 (1995); 2 Herbert Newberg & Alba Conte, *Newberg on Class Actions* §§11.25 and 11.26 (4th ed. 1992).

II. THE VISA SETTLEMENT SHOULD RECEIVE PRELIMINARY APPROVAL

The Visa Settlement should be preliminarily approved by the Court because, at this stage, it is obviously fair, adequate and reasonable. *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d. Cir. 1982). *Newberg on Class Actions* at §11:41.[4]

Although the Court has discretion as to whether to accept the proposed settlement, "[t]here is usually an initial presumption of fairness when a proposed class settlement, which was negotiated at arm's length by counsel for the class, is presented for Court approval." *Newberg on Class Actions* §11.41 (4th ed. 2002); *see also Manual for Complex Litigation - Third* §30.42 at 240 (1995) (same).

Indeed, "[t]he law favors settlement, particularly in class action and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." *In re General Motors Corporation Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 784 (3d. Cir. 1995). *See Weinberger*, 698 F2d. at 73 ("[t]here are weighty justifications, such as the reduction of litigation and related expenses, for a general policy favoring the settlement of litigation")

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[4] Fed. R. Civ. P. 23(e) states that "A class action shall not be dismissed or compromised without the approval of the Court . . . ."

A. The Terms Of The Visa Settlement Are Fair

In determining whether a settlement should be granted preliminary Court approval under Rule 23(e), the Court should consider several factors, including the following:

- comparison of the proposed settlement with the likely result of litigation;
- the complexity, expense and likely duration of the litigation;
- experience of class counsel;
- scope of discovery preceding settlement; and
- the ability of the defendant to satisfy a greater judgment.

See e.g., In re Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 292 (2d. Cir. 1992); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir.1974).

1. Comparison Of The Proposed Settlement With The Likely Result Of Litigation

In order to compare the proposed settlement with the likely result of litigation, the Court must "apprise [itself] of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated." *Weinberger*, 698 F.2d at 73-74 (quoting *Protective Committee for Independent Stockholders of TMT Trailer Fee, Inc. v. Andersen*, 390 U.S. 414, 424 (1968)). The Court, in this matter, exhaustively acquainted itself with the facts and legal theories underlying the parties' cases, especially when one considers the class certification and exhibit intensive summary judgment motions decided by the Court.

The settlement compares favorably with what the plaintiffs likely would have achieved at trial, albeit much more speedily since a lengthy appellate process has been avoided. First, the significant injunctive relief -- the untying of debit card service from credit card services, the

lowering of Visa's interchange rate for debit transactions, and causing Visa to more clearly identify its debit product for merchants -- is precisely the relief sought by plaintiffs.

Second, while the $3.05 billion settlement fund (including the portion defendant MasterCard will pay in settlement) is less than the amount of damages that plaintiffs sought, it is clearly significant compensatory relief. This is especially true when one considers that the plaintiff class will get the benefit of this award now rather than after years of likely appellate litigation.

Indeed, monetary compensation above the $2.025 billion level might have threatened the economic viability of Visa, which class members rely upon for vital credit card services. *See infra* part B.5.

2. Complexity, Expense, and Likely Duration Of The Litigation

This antitrust suit is certainly an extraordinarily complex case. It is based on sophisticated antitrust/economic analysis which drew upon a massive discovery record. Further, its outcome will affect thousands of financial institutions, millions of merchants and hundreds of millions of consumers.

In addition, a full trial of this case followed by appeals would likely last a number of additional years, increasing expenses and additional claimed damages exponentially along the way. It is therefore beneficial for the class to settle now for a lower, but still substantial monetary figure in order to achieve the equally important injunctive relief portion of the settlement. *See Slomovics v. All for a Dollar, Inc.*, 906 F. Supp. 146, 149 (E.D.N.Y.1995) (Gleeson, J.) ("The potential for [] litigation to result in great expense and to continue for a long time suggest[s] that settlement is in the best interests of the Class."); *Maley v. Del Global Technologies Corp.*, 186 F.Supp.2d 358, 361 (S.D.N.Y. 2002) (McMahon, J.) (settlement

approved where settlement results in a substantial and tangible present recovery, without the attendant risk and delay of trial); *see also In re BankAmerica Corp. Securities Litig.*, 210 F.R.D. 694, 701 (E.D.Mo. 2002) ("[W]hen considering settlement agreements [courts] should consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation") (Internal quotations and citations omitted); *State of New York et al. v. Nintendo of America, Inc.*, 775 F. Supp. 676, 681 (S.D.N.Y. 1991) (Sweet, J.) (in an antitrust action, settlement agreement approved where court held: "If this litigation proceeds to trial, it no doubt will be complex, protracted and costly. Even if [plaintiff] ultimately prevails, it could be years before consumers receive any meaningful restitution.")

3. Experience Of Class Counsel

Lead counsel, Constantine & Partners, PC ("C&P"), has been involved with a number of class actions and is one of the foremost authorities on antitrust and electronic payment systems matters in the country. *See* www.cpny.com. Lloyd Constantine, lead counsel in this action and managing partner of C&P, served as Chief of the Antitrust Bureau for the Attorney General of New York and, in that position, prosecuted numerous *parens patriae* actions on behalf of the natural person citizens of New York state. In the late 1980s and early 1990s, Mr. Constantine represented fourteen states in an antitrust action that resulted in the abandonment of the Visa/MasterCard debit card joint venture known as "Entree" and the entry of a consent decree that partially governed Visa and MasterCard practices until the mid-1990s.

Robert L. Begleiter, another partner at C&P, has vast experience in civil litigation. He is the former Chief of the Civil Division of the United States Attorney's Office for the Eastern District of New York.

Co-lead counsel, Hagens Berman, is one of the leaders of the class action bar and has tried and settled numerous class actions on behalf of plaintiff classes. *See* www.Hagens-Berman.com. George Sampson, Hagens Berman's primary attorney on this case, was, like Mr. Constantine, Chief of New York State's Antitrust Bureau. He has represented numerous *parens patriae* group and classes in complex antitrust cases.

4. The Scope Of Discovery Preceding The Settlement

There have been few, if any, cases that have resulted in a discovery record of the magnitude developed in this Action. Millions of documents have been exchanged and roughly four hundred depositions were taken.

Further, defendants retained fourteen expert witnesses who filed numerous reports, all of whom were deposed.[5] Plaintiffs retained five expert witnesses. Indeed, plaintiffs' liability and damages expert, Dr. Fisher, was deposed for more than five full days in connection with the four reports that he submitted-- reports that attached 538 exhibits and referenced thousands of additional documents.

The massive discovery record is further borne out by the witness lists submitted by the parties in connection with the Joint Pretrial Order. Those lists identify approximately 229 witnesses that the parties expected to call at trial and further identified approximately 740 total witnesses that might be called at trial. Also, over 12,000 exhibits were listed on the Joint Pretrial Order, encompassing over 200,000 pages of documentation.

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[5] Most of these experts were deposed for two full business days.

In light of all of this, the Court scheduled a trial that would have lasted more than three months under a rigorous schedule.[6]

5. The Ability Of Visa To Satisfy A Greater Judgment

Obviously, a $2.025 billion monetary payment is significant relief. Under the terms of the settlement, Visa will be required to pay into a settlement fund $225 million this year and $200 million each year for the next nine years. Under this arrangement, Visa will likely remain economically viable.

B. The Settlement Is The Product Of Arm's Length Negotiation

In determining whether a class action settlement is fair, adequate and reasonable, the Court must evaluate the "negotiating process by which the settlement was reached." *In re NASDAQ Market-Makers Antitrust Litigation,* 187 F.R.D. 465, 473 (S.D.N.Y. 1998) (quoting *Weinberger* at 73).

> So long as the integrity of the arm's length negotiation process is preserved . . . a strong presumption of fairness attaches to the proposed settlement . . .and "great weight" is accorded to the recommendations of counsel who are most closely acquainted with the facts of the underlying litigation.

Id. at 474.

In this matter, the Visa Settlement was reached after the Court had certified the class and the Class Certification Order was the subject of appellate review. Further, the parties did not reach settlement until six-and-a-half years into the litigation, after a massive amount of discovery was completed and the Court ruled on the parties' respective summary judgment motions. Indeed, settlement was reached at the beginning of trial after months of mediation between the parties and with significant participation by the Court itself (with the permission of the parties.)

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[6] Without this rigorous schedule, the matter would have likely taken four months to try.

The settlement should therefore be preliminarily approved by the Court.

CONCLUSION

For the foregoing reasons, the motion for preliminary approval of the Visa Settlement should be granted.

Dated: New York, New York
June5, 2003

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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IN RE

VISA CHECK/MASTERMONEY
ANTITRUST LITIGATION

MASTER FILE NO. CV-96-5238
(Gleeson, J.) (Mann, M.J.)

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MEMORANDUM OF UNDERSTANDING

The parties to this memorandum (the "Parties"), by and through their undersigned attorneys ("Plaintiffs' Co-Lead Counsel" on behalf of plaintiffs, and "Defendant's Counsel" on behalf of defendant Visa USA Inc. ("Visa") (collectively, "the Parties"), have reached an agreement in principle for the settlement (the "Settlement") of this litigation (the "Action") as against Visa (without settling any claims as against MasterCard International Incorporated ("MasterCard")) on the terms set forth below and subject to Court approval. This Memorandum contains principal terms of the proposed Settlement and is intended to be a binding agreement. The Parties will draft a formal agreement ("Settlement Agreement") and accompanying papers that shall embody the terms set forth herein and such other and consistent terms as are agreed upon by counsel for the Parties.

1. The Class, as heretofore certified by the Court on February 22, 2000, is as follows:

> All persons and business entities who have accepted Visa and/or MasterCard credit cards and therefore have been required to accept Visa Check and/or MasterMoney debit cards under the challenged tying arrangements during the fullest period permitted by the applicable statutes of limitations.

2. Visa shall cause to be paid to the Class, in settlement of the claims against it or otherwise, ten (10) equal annual installments of two hundred million dollars ($200,000,000), to be deposited into a joint interest-bearing account at such financial institution as the Parties may agree (the "Settlement Fund Account"), with ten million dollars ($10,000,000) of the first installment to be deposited within thirty (30) days after the execution of the Settlement Agreement, and the remainder of the first installment to be deposited no later than December 22, 2003. Thereafter, each annual installment shall be deposited into the Settlement Fund account on or before December 22 of each calendar year. The Settlement Fund Account shall require a signature from a partner of each of Plaintiffs' Co-Lead Counsel -- Constantine & Partners, P.C. ("Constantine"), and Hagens Berman ("Hagens") -- and a signature from a partner of Heller Ehrman White & McAuliffe, LLP ("HE") to release deposited funds, and any such requests for release of deposited funds shall be accompanied by appropriate documentation supporting the expenditures. Plaintiffs' Co-Lead Counsel and HE agree to hold the

funds in the Settlement Fund Account in escrow for the purposes set forth herein. Upon the Effective Date of the Settlement (as defined in Paragraph 3 below), HE will resign as a co-signatory on the Settlement Fund Account, and thereafter Plaintiffs' Co-Lead Counsel shall be the signatories on the Settlement Fund Account. The parties hereto agree that the Settlement Fund Account is intended to be a Qualified Settlement Fund within the meaning of Treasury Regulation § 1.468B-1 and all taxes with respect to the earnings on the deposited funds shall be the responsibility of the Settlement Fund Account. Plaintiffs' Co-Lead Counsel shall administer the Settlement Fund Account. All reasonable costs and expenses of class notice and administration of the Settlement shall be paid from the Settlement Fund Account when incurred. The Parties shall cooperate in effecting notice to the Class that satisfies the requirements of Federal Rule Civil Procedure 23. The Settlement Fund Account funds, including any accrued interest, less only the costs incurred up to $6 million in connection with notice and administration, plus any taxes incurred and paid on any interest, shall revert to Visa if the Settlement does not become effective.

3. Definitions

(a) The term "Visa POS Debit Device" shall consist of any Visa consumer offering, issued within the United States, that when presented for payment in the United States, directly accesses demand deposit or asset accounts.

For purposes of this Memorandum, Visa POS Debit Device shall also include stored value cards, electronic benefits transfer ("EBT") cards, prepaid cards and payroll cards. Notwithstanding the foregoing, the term "Visa POS Debit Device" shall not include deferred Debit Device where the debit to the account occurs at least two weeks after the date of the transaction.

(b) The term "Other Visa Product" shall consist of any other Visa program that does not fall within subsection (a) of this paragraph.

(c) The term "Effective Date" shall be the date by which all of the following have occurred (1) the Settlement has been approved by the Court as required by Rule 23(e) of the Federal Rules of Civil Procedure; (2) an Order and Final Judgment reflecting the terms of this Memorandum and the Settlement Agreement has been entered by the Court and not vacated or modified in any way affecting any party's rights or obligations hereunder, upon appeal or otherwise; and (3) either (i) the time to appeal or otherwise seek review of the Order and Final Judgment has expired without any appeal having been taken or review sought, or (ii) if an appeal is taken or review sought, approval of the Settlement, the Settlement Agreement, and the Order and Final Judgment have been affirmed in their entirety by the Court of last resort to which such appeal has been taken and such affirmance has become no longer subject to further appeal or review.

4. Parties also agree that:

(a) As of the earlier of 45 days after the Effective Date or January 1, 2004, Visa agrees to implement rule(s) that will unbundle, and agrees not to bundle in the future, the merchant acceptance of Visa POS Debit Devices from other Visa programs by including a proviso in its rules that: (i) merchants who currently accept Visa POS Debit Devices may elect not to accept Visa POS Debit Devices, and the Parties will negotiate on whether notice is required and if so on what basis; and (ii) merchants who begin to accept Visa POS Debit Devices, as of the earlier of 45 days after the Effective Date or January 1, 2004, must elect to accept or not accept Visa POS Debit Devices. Further, with respect to merchants who currently accept Visa POS Debit Devices and whose merchant agreements come up for renewal, the Parties agree to negotiate in good faith to determine an appropriate election procedure. Nothing herein shall prevent Visa from adopting and enforcing an Honor All Cards rule that (i) requires merchants who choose to accept any Visa POS Debit Device to accept all Visa POS Debit Devices, and (ii) requires merchants who choose to accept any Other Visa Product to accept all Other Visa Products.

(b) As of the earlier of 45 days after the Effective Date or January 1, 2004, Visa agrees to implement rule(s) requiring issuers in the United States to place on the face of a Visa POS Debit Device the phrase "Check Card" in clear and

conspicuous letters, or another word, phrase, term, name or mark, so long as it is used consistently and uniformly for all Visa POS Debit Devices. The rules shall require that such changes occur upon issuance of new Visa POS Debit Devices, and within the normal reissuance cycles of existing cards, provided however that Visa will cause to have 80 percent of outstanding Visa POS Debit Devices in compliance herewith within 18 months of the earlier of the Effective Date or January 1, 2004 and the remainder being compliant within 36 months of the earlier of the Effective Date or January 1, 2004. In lieu of using the phrase "Check Card" or other common identifier, Visa retains the right to adopt a new brand or program name for a Visa POS Debit Device, as defined in subsection (a) of Paragraph 3, so long as any such brand or program name complies with subsection (a) of Paragraph 4.

(c) As of the earlier of 90 days after the Effective Date or January 1, 2004, Visa agrees to deliver signage to acquirers, upon request, for merchant usage at the point of sale and at the entrance to the store, communicating the fact that a given merchant accepts Visa POS Debit Devices.

(d) As of the earlier of 45 days after the Effective Date or January 1, 2004, Visa agrees to implement rule(s) requiring that Visa POS Debit Devices be given unique electronic identities, which merchants can utilize to distinguish them from other programs. This would be done by distinct BIN ranges. Further, the

Parties in good faith will explore the efficacy of adopting a second electronic technology such as service code field, identification on magnetic stripe, and member message field identification on magnetic stripe. The rule(s) shall require that such change(s) occur upon issuance of new Visa POS Debit Devices, and within the normal reissuance cycles of existing cards, provided however that Visa will cause to have 80 percent of outstanding Visa POS Debit Devices in compliance herewith within 18 months of the earlier of the Effective Date or January 1, 2004 and the remainder being compliant within 36 months of the earlier of the Effective Date or January 1, 2004.

(e) By August 1, 2003, Visa agrees to reduce its current supermarket debit rate by no less than 14¢ and to reduce its current non-supermarket rate for all other Visa POS Debit Devices by no less than 48 basis points, with the expectation that the reductions will be substantially greater. In addition, in recognition of the interim period between the execution of this Memorandum and August 1, 2003, on the earlier of 30 days after the Effective Date or December 22, 2003, Visa shall cause to be paid to into the Settlement Fund Account an additional twenty-five Million Dollars ($25,000,000).

(f) Visa will not enact rules that prohibit merchants from encouraging or steering Visa POS Debit Device cardholders to use other forms of payment or

that prohibit merchants from providing a discount to consumers who pay by any other form of payment.

(g) For a period of two years from the date of the Settlement Agreement, Visa will not enter into a contract with a member bank that prohibits the bank from issuing an ATM and/or POS debit card of any competing ATM and/or POS network, other than MasterCard. Apart from this provision, nothing herein shall prohibit Visa from competing with any other payment card brand for the card issuing business of Visa member financial institutions.

(h) If the Settlement Agreement does not become final and no Effective Date under Paragraph 3(c) above occurs, then the foregoing provisions of subsection (a) – (g) of this Paragraph 4 will become null and void.

5. The Class Plaintiffs agree that, effective upon the date hereof, in the event that they enter into a settlement of any of the other actions currently pending in this No. 96-CV-5238(JG) proceeding with any other defendant that provides for a more favorable term or terms than the term or terms set forth herein, then Visa shall be entitled to such more favorable term or terms and this Settlement Agreement shall be amended to incorporate said more favorable term or terms.

6. In addition to the effect of any final judgment entered in accordance with the Settlement Agreement, upon the Settlement Agreement becoming final, Visa, Visa International Service Association, and their past,

present or future officers, directors, stockholders, member financial institutions, agents, employees, legal representatives, trustees, parents, associates, affiliates, subsidiaries, divisions, partners, heirs, executors, administrators, purchasers, predecessors, successors and assigns ("Released Parties") shall be released and forever discharged from all manner of claims, demands, actions, suits, causes of action against the Released Parties, whether class, individual, or otherwise in nature, damages whenever incurred, liabilities of any nature whatsoever, including costs, expenses, penalties and attorneys' fees, known or unknown, suspected or unsuspected, in law or equity, that any class plaintiff or plaintiffs or any member or members of the Class who have not timely excluded themselves from the Class Action (including any of their past, present or future officers, directors, stockholders, member financial institutions, agents, employees, legal representatives, trustees, parents, associates, affiliates, subsidiaries, divisions, partners, heirs, executors, administrators, purchasers, predecessors, successors and assigns) and whether or not they object to the settlement and whether or not they make a claim upon or participate in the Settlement Fund, whether directly, representatively, derivatively or in any other capacity, ever had, now has or hereafter can, shall or may have, relating in any way to any conduct prior to the date hereof concerning any claims alleged in the Consolidated Class Action Complaint or any of the complaints consolidated therein, including, without

limitation, claims which have been asserted or could have been asserted in this litigation which arise under or relate to any federal or state antitrust, unfair competition, unfair practices, or other law or regulation, or common law, including, without limitation the Sherman Act, 15 U.S.C. § 1 et seq. ("Released Claims"). Each member of the class hereby covenants and agrees that it shall not, hereafter, seek to establish liability against any Released Party based, in whole or in part, upon any of the Released Claims.

7. This Settlement shall not release any claims that Plaintiffs or the Class have against Non-Settling Defendant MasterCard or MasterCard members arising out of claims against MasterCard in this matter.

8. All applications to the Court with respect to any aspect of the Settlement shall be presented to and determined by United States District Judge John Gleeson (the "Court"). By the close of the following business day upon execution of this Memorandum, the Parties shall advise the Court of this agreement and shall seek a severance and stay of all pending proceedings in the Action involving Visa.

9. Visa shall take no position on and shall neither interfere with nor delay the efforts by Plaintiffs to pursue any claims they may have against MasterCard with respect to this Action. Visa agrees to make witnesses available under the same conditions as if it still were a party to the Action.

10. Following execution of this Memorandum, the Parties and their counsel shall use their best efforts to make final and to execute an appropriate Settlement Agreement and such other documentation as may be required or appropriate in order to obtain approval by the Court of the Settlement of this Action upon the terms set forth in this Memorandum. Within five (5) business days upon execution of the Settlement Agreement, the Parties shall apply to the Court for preliminary approval of the Settlement and for the scheduling of a hearing within fifteen (15) days for consideration of preliminary approval of the Settlement Agreement and any accompanying forms. Notice to the class shall be published and mailed within 21 days of preliminary approval of this Settlement Agreement, or as otherwise ordered by the Court. The Parties shall use their best efforts to obtain final Court approval of the Settlement. The Settlement Agreement shall provide (among other terms) that: (a) the Court shall order preliminary approval of the Settlement Agreement, Order and Final Judgment, and direct that notice of the Settlement be provided to the Class; (b) the consideration described in Paragraph 2 above shall be provided; (c) Visa has denied and continues to deny that it has engaged in any conduct or committed any act or omission giving rise to any liability and/or violation of law, and states that it is entering into the Settlement to eliminate the burden, expense and uncertainty of further litigation; (d) neither the Settlement nor any of its terms shall constitute an admission or finding of

wrongful conduct, acts or omissions; (e) upon final approval, the Court will enter a final judgment: (i) dismissing the Complaint against Visa with prejudice, and (ii) barring further actions by Class Members against Visa for any of the matters settled herein; (f) the allocation of the net Settlement Fund Account among the Class Members shall be subject to a plan of allocation to be proposed by Plaintiffs' Co-Lead counsel and approved by the Court; (g) Visa will take no position with respect to or bear any responsibility for such proposed plan of allocation or such plan as may be approved by the Court, and will agree to negotiate with plaintiffs in good faith regarding cooperating with plaintiffs by utilizing reasonable efforts to provide existing merchant specific data from Visa's databases in connection with a one-time initial notice to class members; (h) such plan of allocation is a matter separate and apart from the proposed Settlement between the Parties, and any decision by the Court concerning the plan of allocation shall not affect the validity or finality of the proposed Settlement; (i) Plaintiffs' Co-Lead Counsel immediately upon entry of an Order of the Court approving the Settlement may make an application for immediate payment of attorneys' fees and expenses, including all costs and expenses incurred by the Class representatives, upon which Visa will take no position, subject to each counsel's obligation to pay back any such amount if, or to the extent that, the award order is amended, reversed on appeal, or does not become final.

11.The Settlement Funds will be used to compensate the Class, pay for all notices and administrative costs, and pay for attorneys' fees. Visa agrees that it shall take no position on plaintiffs' counsels' requests to the Court for attorneys' fees and expenses.

12.The parties agree that there is no requirement to provide opt-out rights to class members. In the event that the Court requires the parties to provide opt-out rights, the Parties shall negotiate in good faith an appropriate "blow-up" provision as part of the Settlement.

13.Visa denies the claims in the Action.

14.Plaintiffs' Co-Lead Counsel may designate the claims administrator for the Settlement, subject to Court approval.

15.If the Settlement outlined in this Memorandum is not approved by the Court or is terminated, the Settlement shall be without prejudice, and none of its terms shall be effective or enforceable, except to the extent costs of notice and administration have been incurred or expended pursuant to Paragraph 2 above; the Parties shall revert to their litigation positions immediately prior to the execution of this Memorandum; and the fact and terms of this Settlement shall not be admissible in any hearing or trial of this Action, or any other civil action.

16.This Memorandum may be executed in counterparts, including signature transmitted by facsimile. Each counterpart when so executed shall be

deemed to be an original, and all such counterparts together shall constitute the same instrument. The undersigned signatories represent that they have authority from their clients to execute this Memorandum. The terms of this Memorandum and Settlement shall inure to and be binding upon the Parties and their successor in interest.

17.The Court shall be the sole arbiter of any dispute between the parties regarding the Memorandum of Understanding.

IT IS HEREBY AGREED by the undersigned as of April 30, 2003.

Plaintiffs

By: ______________________

By: ______________________

Visa USA

By: ______________________

CONTAINS HIGHLY CONFIDENTIAL
OUTSIDE COUNSEL EYES ONLY INFORMATION
SUBJECT TO PROTECTIVE ORDER
TO BE FILED UNDER SEAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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

REBUTTAL EXPERT REPORT
OF FRANKLIN M. FISHER

April 25, 2000

associated no-surcharge, no-discount, and anti-steering provisions, as well as the associated exclusionary conduct that I have discussed in this report and in my initial report. In addition, I assume that defendants would be required to make their off-line debit cards easily and accurately identifiable as such to both consumers and merchants.

108. I have projected expected damages to merchants for the period January 2001 through December 2010, assuming that no injunctive relief is granted, as follows:

- Damages due to supracompetitive interchange fees for off-line debit transactions:
  Before discounting: a range from $77.65 to $94.38 billion
  Discounted to December 31, 2000: a range from $40.12 to $49.06 billion
- Damages due to supracompetitive interchange fees for on-line debit transactions:
  Before discounting: a range from $4.94 to $9.01 billion
  Discounted to December 31, 2000: a range from $2.63 to $4.80 billion
- Damages due to higher interchange fees for credit card transactions:
  Before discounting: $12.74 billion
  Discounted to December 31, 2000: $7.01 billion
- Total expected damages for the period January 2001 through December 2010:
  Before discounting: a range from $95.33 to $116.13 billion
  Discounted to December 31, 2000: a range from $49.76 to $60.87 billion

In the remainder of this section I set out the methodology for these estimates.

1. Value of Injunctive Relief Due to Supracompetitive Off-line POS Debit Interchange Fees

109. For this component of damages, I follow the methodology set out in my initial report in Section IX.B. To summarize, I calculate, for each of the years 2001 through 2010, the difference between the total interchange fees that merchants can be expected to pay assuming that injunctive relief *is not* granted, and the total interchange fees that merchants can be expected to pay assuming that injunctive relief *is* granted.

110. With respect to the volume of off-line transactions for the years 2001 through 2010, I rely on projections published by *The Nilson Report*. That source has recently published

projected number and dollar volume of off-line debit transactions for the years 2005 and 2010. For the intervening years, I have interpolated assuming constant growth rates in each five-year period.

111. With respect to the effective off-line interchange fee absent injunctive relief, I assume that the interchange fee schedules for Visa and MasterCard remain fixed at their respective 1999 levels. I then estimate how the effective off-line interchange fee would change based on the Nilson projections of the number and dollar volume of transactions. Exhibit FMF-24 shows my estimates of the off-line interchange fees that merchants can be expected to pay prospectively assuming no injunctive relief.

112. With respect to the off-line interchange fee assuming that injunctive relief *were* granted, as in my initial report I make three alternative assumptions. First, I assume that off-line rates would fall to a level that would be competitive with existing on-line rates. Second, I assume that off-lines rates would fall to a level competitive with on-line rates that would have prevailed had on-line rates not increased after 1993. Third, I assume that off-lines rates would fall to a level that would be competitive with on-lines transactions that clear at par.

113. I project on-line interchange rates by assuming that the interchange rate schedule for the regional on-line debit networks does not change after 1999. I then estimate how the average per transaction fee would change in each of the years 2001 through 2010 based on the Nilson projections of the number and dollar volume of on-line transactions.

114. Exhibit FMF-25 shows my estimates of the off-line interchange fees that merchants can be expected to pay prospectively assuming that injunctive relief is granted and that off-line rates would be comparable to actual on-line rates. Exhibit FMF-26 shows the value of injunctive relief under this scenario for each of the years 2001 through 2010.

115. Exhibit FMF-27 shows the estimates of the off-line interchange fees that merchants can be expected to pay prospectively assuming that injunctive relief is granted and that off-line rates would be comparable to on-line rates had they not increased after 1993. Exhibit FMF-28 shows the value of injunctive relief under this scenario for each of the years 2001 through 2010.

116. Exhibit FMF-29 shows the estimates of the off-line interchange fees that merchants can be expected to pay prospectively assuming that injunctive relief is granted and that off-line

and on-line transactions would clear at par. Exhibit FMF-30 shows the value of injunctive relief under this scenario for each of the years 2001 through 2010.

117. As discussed in my initial report, Visa and MasterCard would in the but-for world have had to lower their interchange fee to a level that would make merchants indifferent between accepting off-line POS debit transactions and accepting on-line POS debit transactions. Thus, it is appropriate to compensate merchants for any additional benefits that they receive in accepting on-line transactions that are not available by accepting off-line transactions. In my initial report, I estimate the value of one such benefit to merchants of on-line transactions—the fact that on-line transactions settle faster than off-line transactions. For purposes of valuing injunctive relief, I have extended these calculations to the period 2001 through 2010. These estimates of the additional float costs that will be incurred by merchants if no injunctive relief is granted are shown in Exhibit FMF-31.

2. Value of Injunctive Relief Due to Supracompetitive On-line Debit Interchange Fees Paid by Merchants that Accept On-line Transactions

118. For this component of damages, I follow the methodology set out in Section IX.C of my initial report. In particular, under each of the two scenarios in which level of on-line rates is assumed to be lower than they have been in the actual world, I measure the reduced interchange fees that merchants would pay for on-line debit transactions.

119. With respect to the volume of on-line transactions for the years 2001 through 2010, I rely on projections published by *The Nilson Report*. That source has recently published projected number and dollar volume of on-line POS debit transactions for the years 2005 and 2010. For the intervening years, I have interpolated assuming constant growth rates in each five-year period.

120. With respect to the level of on-line interchange fees, I use the same assumptions outlined in the previous section. Namely, under one alternative I assume that on-line interchange fees charged by the regional networks would have remained constant after 1993. Under a second alternative, I assume that on-line transactions would clear at par.

121. Exhibit FMF-32 shows my estimates of the value of injunctive relief due to supracompetitive on-line debit interchange fees for each of the years 2001 through 2010, assuming that on-line rates would not have increased after 1993.

122. Exhibit FMF-33 shows my estimates of value of injunctive relief due to supracompetitive on-line debit interchange fees for each of the years 2001 through 2010, assuming that on-line transactions would clear at par.

3. Value of Injunctive Relief Due to Higher Credit Card Interchange Fees Paid by Merchants

123. For this component of damages, I follow the methodology set out in Section IX.D of my initial report. In particular, I assume that with injunctive relief credit card interchange fees would be 10 basis points lower than without injunctive relief.

124. With respect to the volume of Visa and MasterCard credit card transactions for the years 2001 through 2010, I rely on projections published by *The Nilson Report*. That source has recently published projected number and dollar volume of Visa and MasterCard credit card transactions for the years 2005 and 2010. For the intervening years, I have interpolated assuming constant growth rates in each five-year period.

125. Exhibit FMF-34 shows my estimates of value of injunctive relief due to higher credit card interchange fees paid by merchants for each of the years 2001 though 2010 assuming that injunctive relief is not granted.

4. Alternative But-for Scenario

126. In Appendix I of my initial expert report, I considered a but-for world in which, contrary to the evidence cited in my initial report, Visa and MasterCard would have in fact price discriminated between merchants accepting on-line transactions and merchants not doing so. In that appendix, I presented alternative damage estimates under that assumption.

127. For purposes of placing a value on injunctive relief, I have also prepared calculations that make this alternative, but I believe unrealistic, assumption. These calculations result in amounts that are properly considered as a reduction in, or off-set to, the calculations of the value

of injunctive relief discussed above. Exhibits FMF-35 and FMF-36 contain these calculations for the two alternative scenarios discussed in Appendix I of my initial report.