UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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| IN RE PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION<br><br>This document refers to: All Actions | MDL No. 1720<br>Case No. 1:05-md-1720-MKB-JO |

**DECLARATION OF K. CRAIG WILDFANG, ESQ. IN SUPPORT OF RULE 23(b)(3) CLASS PLAINTIFFS' MOTION FOR FINAL APPROVAL OF SETTLEMENT AND IN SUPPORT OF MOTION FOR AWARD OF ATTORNEYS' FEES, EXPENSES AND CLASS PLAINTIFFS' SERVICE AWARDS**

## I. Introduction and Overview.

1. I, K. Craig Wildfang, am a partner in Robins Kaplan LLP, one of three Co-Lead Counsel firms appointed for the Rule 23(b)(3) damages Class ("Class Plaintiffs") in the above-captioned litigation. I submit this declaration in support of the Class Plaintiffs' Motion for Final Approval of the Superseding and Amended Definitive Class Settlement Agreement of the Rule 23(b)(3) Class Plaintiffs and the Defendants dated September 13, 2018 (the "2018 Settlement"), and in support of the Class Plaintiffs' motion for an award of attorneys' fees, expenses and Class Representative service awards.

2. My prior declarations described in detail the conduct of this litigation by Co-Lead Counsel over the last fourteen years.

3. To avoid repeating what I have already said in prior declarations, I hereby incorporate by reference those prior declarations in support of this settlement and the now-vacated 2012 settlement in this matter: Decl. of K. Wildfang, ECF No. 7257-3 (Sept. 18, 2018) ("Wildfang 2018 Decl."); 2d Supp. Decl. of K. Wildfang in Sup. Cl. Pls.' Mot. Cl. Rep. Service Awards, ECF No. 6366-2 (Jan. 12, 2015) ("Wildfang 2015 Decl."); Decl. of K. Wildfang, ECF No. 2113-6 (April 11, 2013) ("Wildfang 2013 Decl."). For the Court's convenience those declarations are attached as Exhibits 1, 2 and 3. For the Court's further convenience, I attach as Exhibit 4 a true and correct copy of J. Davis & R. Kohles, 2018 Antitrust Annual Report: Class Action Filings in Federal Court (May 2019), which is cited in Rule 23(b)(3) Class Plaintiffs' Memorandum of Law in Support of Final Approval of Class-Action Settlement.

4. This declaration summarizes the factual and procedural developments in the litigation, and the activities of Co-Lead Counsel, since the filing of the Motion for Preliminary

Approval on September 18, 2018. These prior declarations demonstrate that: (a) Class Plaintiffs and Co-Lead Counsel throughout have been fully engaged in this litigation and the related legislative and administrative proceedings; (b) Class Plaintiffs and Co-Lead Counsel have a full understanding and appreciation of all the risks to the Class peculiar to this litigation; (c) the settlement negotiations were at arms' length and involved only the interests of the Rule 23(b)(3) Class; and (d) under all the circumstances, this settlement is well within the range of reasonableness to warrant final approval of the proposed settlement by this Court.

5. A settlement, much less a settlement of this magnitude, was never a foregone conclusion when the first complaint was filed in 2005. There were no guilty pleas. There was no government investigation in this country until the Department of Justice sought Co-Lead Counsel's assistance in 2009. A large portion of the academic scholarship on the economics of payment-card networks was financed by the payment-card networks and the banks that, until recently, owned and governed them. And the one prior U.S. appellate-court decision that addressed the practices this litigation challenged, *Nat'l Bancard Corp. v. Visa U.S.A., Inc.*, 779 F.2d. 592, 605 (11th Cir. 1987), actually ruled in favor of the Defendants.

6. This settlement was the product of unending focus, dedication, and creativity by Co-Lead Counsel, Supporting Counsel, the Class Representatives, and the Class's experts.

7. I discussed the risks of continued litigation in my 2013 and 2018 declarations. *See* Wildfang 2018 Decl. ¶¶ 229-30; Wildfang 2013 Decl. ¶¶ 204-05. Judge Sarokin has submitted a declaration in connection with this settlement that assesses the risks facing the Class, as the late Judge Renfrew had done in connection with the 2012 settlement. *See* ECF No. 2111-2 (Apr. 11, 2013). Additionally, the Court-appointed expert, Dr. Alan O. Sykes, outlined the risks facing the

Class in connection with his assessment of the prior settlement.[1] This declaration complements those assessments by adding Co-Lead Counsel's perspective.

8. In support of our motion for final approval of the settlement, Co-Lead Counsel submit the Expert Report of Michael A. Williams, Ph.D. ("Williams Report"). We asked Dr. Williams to determine whether the amount of money paid to the Class Plaintiffs under the Settlement – currently $6.3 billion, subject to possible reduction if the opt-outs represent more than 15% of the total transaction volume[2] - is reasonable from an economic perspective. To answer this question, Williams reviewed and summarized the substantial economic literature on antitrust settlements, and then developed and applied econometric analysis to the amount of the settlement.

9. These analyses led to Williams's opinion that the amount of the Class's Settlement "in this case are similar to, but higher than, the settlement amounts predicted by [his] regression model …". Williams therefore concluded that "from an economic perspective, considering the amounts of damages claimed in this case and the risks involved, the amounts of monetary compensation in the settlement proposed for approval in this case are economically reasonable when examined in comparison to the damages estimated by the plaintiffs' and defendants' experts." Williams Report ¶¶ 37-38.

10. Co-Lead Counsel worked with Williams to gather the information that he used in his regression analysis. Williams's principal data source on prior antitrust settlements was compiled by two other economists in a study on "international cartel cases." Williams Report ¶ 18, citing

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[1] Mem. Alan O. Sykes to Hon. John Gleeson, D.E. 5695 (Aug. 28, 2013).

[2] Superseding & Definitive Cl. Sett. Ag. of the R. 23(b)(3) Cl. Pls. & Defs. ¶ 22, ECF No. 7257-2 (Sep. 18, 2018).

Connor, J. and Lande, R., *Not Treble Damages: Cartel Recoveries Are Mostly Less Than Single Damages*, 100 Iowa L. Rev. 1997-2023 (2015) ("Connor & Lande"). These data consisted of 71 settled, private antitrust damages actions, including class and non-class cases, and cases that did and did not follow criminal convictions. *Id*.[3] To reach his opinions, Williams compared the value of the proposed settlement and the damages estimate offered by Class Plaintiffs' expert to the settlement values and damages estimates in the data on the 71 cases.

11. Williams's analysis is reasonable, and supports a determination that his settlement is fair, reasonable and adequate because the value of the settlement here is even higher than Williams's regression predicted.

12. Co-Lead Counsel examined the data that Professor Connor provided from a legal perspective. We noted that the vast majority of the 71 cases appeared to be *riskier* for defendants, and *less risky* for plaintiffs.

13. There are reasons why it appears that the vast majority of the 71 cases were riskier for defendants, and less risky for plaintiffs. First, most of the "international cartel" cases were classic cartels of horizontal competitors fixing prices and/or restricting output. Such conspiracies are *per se* unlawful under Section 1 of the Sherman Act, 15 U.S.C. § 1. The Supreme Court has held that price-fixing agreements are unlawful *per se* and "no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221-22 (1990).

14. Vertical agreements, on the other hand, have generally been analyzed under the much more demanding Rule of Reason standard. *E.g. United States v. Am. Express Co.*, 838 F.3d 179,

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[3] Williams was able to access the data underlying the Connor and Lande data. Williams Report ¶ 21 n. 22.

194 (2d Cir. 2016); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 907 (2007). The Defendants in this case have consistently taken the position that the network rules that Class Plaintiffs challenged were vertical in nature, *i.e.,* they were adopted by Visa and Mastercard acting as single entities and enforced on the issuing and acquiring banks. Admittedly, this was a less persuasive argument while Visa and Mastercard were owned and run by the member banks. But once Mastercard and Visa had completed their IPOs (in 2006 and 2008, respectively) Defendants' arguments became stronger, *i.e.*, it made the case riskier for Class Plaintiffs. While we argued that the Defendants' conduct could be viewed as illegal *per se* or under a "quick look" rule of reason, there was a not-insubstantial risk that we would have to prove our claims under a full-blown Rule of Reason analysis.

15. A second, and related, reason the sample of 71 cases were riskier for defendants and less risky for plaintiffs, is Section 5 of the Clayton Act, 15 U.S.C. § 16. That statute provides that:

> A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the affect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties hereto …

16. Connor and Lande report that, of the 71 private actions challenging cartel activity 42 followed successful government prosecutions. Connor & Lande at 2010. That means that in 60% of the 71 private actions, the plaintiffs likely had the advantage of having liability established, so the case would be principally about proving the amount of damages. In this case, Class Plaintiffs had no such advantage, making this case *less risky* for the Defendants and *riskier* for Class Plaintiffs. The third reason why Connor and Lande's sample of cases underestimates risk in this

case is the prospect of proving liability and damages in a two-sided market, which I discuss in Paragraph 32 below.

17. Another issue that impacts the risk assessment is the number of legal and factual developments that occurred since this case was filed in 2005. I have over three decades of experience in litigating complex antitrust cases. Other Co-Lead Counsel have as many or more years of experience. In my career, I cannot recall a case that involved as many changes to the legal and factual landscape during its pendency as this one.

18. For example, the Supreme Court decided at least five cases that touched on the legal and factual issues of this case—two of which resulted in decisions for plaintiffs[4] while defendants prevailed in three.[5] Had this litigation not settled, the Court's recent decision in *Apple v. Pepper*, 138 S.Ct. 2647 (2019), may have required us to adapt our strategy in response to the Defendants' anticipated *Illinois Brick* arguments.

19. Legislation, most notably the Durbin Amendment to the Dodd-Frank Wall Street Reform and Consumer Protection Act enacted in 2010, also altered the basis for the Class's claims by imposing caps on debit-card interchange fees and opening up new steering options for merchants.

20. Litigation settlements, first with the Department of Justice, and later in the 2012 settlement in this litigation, further loosened the Defendants' restrictions on point-of-sale steering. While the caps on debit-card interchange fees and the improved steering options were

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[4] *Expressions Hair Design Co. v. Schneiderman*, 137 S. Ct. 1144 (2017); *Am. Needle, Inc. v. NFL*, 560 U.S. 183 (2010).

[5] *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2287 (2018); *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013); *Texaco Inc. v. Dagher*, 547 U.S. 1, 8 (2006).

undoubtedly positive developments for merchants, they challenged Co-Lead Counsel and Class experts to explain how the Defendants' rules were, on balance, still anticompetitive even after these developments.

21. By offering new ways for consumers to pay for goods and services, technology also complicated the factual landscape of this case, relative to 2005, when nearly all consumer payments were made with cash, checks, or magnetic-stripe payment cards.

22. The developments over the past fourteen years show that had this case proceeded to trial in two or three years rather than settle, the factual landscape for this case would have likely become even more complicated. Without settlement, the Class also faced a risk that future decisions in other cases could severely undercut, or even eliminate the Class's ability to seek redress for the injuries caused by the Defendants' conduct.

23. I will not repeat what Judges Sarokin and Renfrew and Dr. Sykes have said. However, from the perspective of someone who has litigated complex antitrust cases for thirty-years, I would like to provide additional perspective related to the "battle of the experts" that would have awaited the Class, absent settlement.

24. While no two antitrust cases are identical, most private damages cases involve horizontal collusion with a definite start and end time. Often the "end time" occurs because one of the defendants seeks leniency and reports the cartel to authorities or the government begins investigating the defendants on its own initiative. In those cases, the plaintiffs present expert testimony to compare prices or output during the "cartel period" to the period before the cartel activity began or after it ceased. In other cases where the anticompetitive activity is limited to a particular geographic region, the experts can compare prices and output in the "cartel region"

with prices and output in other, "competitive" regions. In those cases, experts can use fairly standard multivariable regression analysis to prove liability and damages.

25. The expert analysis in this case was significantly more complex. Because the U.S. credit-card system had never existed without all of the conduct alleged to be anticompetitive, including the setting of interchange fees, the Class's experts could not rely on the same economic tools that they might use in a "typical" antitrust case. The Class's primary economic expert during the litigation, was Dr. Alan Frankel, one of the world's leading expert on the economics of payment card networks.[6] Frankel addressed this problem by pointing to the U.S. checking system, early U.S. debit-card networks, and foreign debit-card networks, each of which operated without interchange fees, to support his primary thesis that interchange fees are not necessary to the efficient functioning of a four-party payment network. He therefore concluded that no interchange fees were necessary for Visa and Mastercard to function efficiently, such that the entire interchange fee was a competitive overcharge. Exp. Rep. of Dr. Alan S. Frankel ¶¶ 342-46, Decl. of Ryan W. Marth Ex. SUFEX240, ECF No. 1507 (Jul. 11, 2011) ("Frankel Rep.").[7]

26. Dr. Frankel argued, in the alternative, that regulated levels of interchange fees in Australia, the United Kingdom, or the European Union could serve as a benchmark for what level of interchange fees might exist in a competitive market to estimate damages. Frankel Rep. ¶¶ 312-21. In addition, these regulated interchange fees rebutted Defendants' argument, made in the regulatory proceeding in Australia and elsewhere, that any reduction in the levels of

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[6] *See* Dennis Carlton & Alan Frankel, *The Antitrust Economics of Credit Card Networks*, 63 Antitrust L.J. 643 (1995) (setting out challenge to interchange fees and anti-steering restraints from an industrial economics perspective).

[7] For the Court's convenience, I have attached a true and correct copy of the portions of Dr. Frankel's report cited in this declaration as Exhibit 5.

interchange fees would lead to a "death spiral" of declining issuance of credit cards, which would lead to declining levels of merchant acceptance of credit cards by merchants. Class Plaintiffs argued that there was no evidence of such declines in countries where lower interchange fees had been mandated by regulatory or judicial proceedings.

27. During Phase One, the Defendants moved to exclude Dr. Frankel's opinions, arguing that he failed to point to a competitive "but-for" world for what level of interchange fees would exist in the absence of the challenged conduct. Defs' Mem. Sup. Mot. Exclude Frankel at 1-5, ECF No. 1499-1 (Jul. 7, 2011). Had the parties not reached this settlement, the Defendants would have renewed their arguments that Class Plaintiffs' expert testimony was inadmissible under *Daubert* and certainly would have challenged it at trial.

28. The Defendants also argued in dispositive and *Daubert* motions during Phase One that no interchange fees for credit-card acceptance meant that merchants would get the service for "free." It was certainly possible that a jury could accept this argument despite our opposition.

29. In over thirty years of practicing complex antitrust law, I have encountered many able and accomplished defense counsel. I can safely say that Defendants' counsel in this case were among the best I have encountered in my career. Thus, I have no doubt that, had we proceeded to trial and/or appeal, the Defendants' story would have been told as well as it could possibly have been told.

30. There is also a risk that the jury could agree with the Defendants that the damage period should be much shorter than the period from January 1, 2004 until trial, fifteen-and-a-half years and counting. Defendants proffer several arguments to support a jury finding a shorter damage period. Each of these arguments pose risks to the Class's damages claims. A further substantial risk to the Class is Defendants' argument that the dates of Mastercard's and Visa's

respective IPOs should terminate the Defendants' liability. The Defendants argue that the IPOs converted the Mastercard and Visa joint ventures into single entities, like Discover and American Express, and thus ended any "horizontal" setting of interchange fees and merchant rules. If the Court or the jury were to accept this argument, the damages period for Mastercard would be January 2004-May 2006, only two years and five months, not fifteen-and-a-half years. And the damages period for Visa would be January 1, 2004-March 17, 2008, four years and about three months, not fifteen-and-a-half years.

31. If the jury found that the IPOs terminated the Defendants' liability, even if the Class's experts' opinions were credited by the jury, and rejected the contrary opinions of the Defendants' experts, the Class's damage recovery would be only about 15% of the Class's experts' damages attributable to Mastercard transactions, and only about 27% of the damages attributable to Visa transactions.

32. Similarly, if the Court or a jury found that *Ohio v. American Express*'s two-sided market holding applied to this case, proving liability would be more difficult for the Class. In addition, damages could be further reduced to account for the value of payment-card rewards and other benefits that cardholders receive, which the Defendants might argue are attributable to their rules. The economic analysis needed to prove liability or damages would be much more complex in a "two-sided" relevant than in a similar market that included only the merchant "side." Indeed, such an economic analysis has, to my knowledge, never been tested in the context of litigation. And the few attempts by academics to do so on a theoretical basis have proven inconclusive.

33. In addition to preparing the papers in support of the current motions, Co-Lead Counsel have been very active since the time of my September 2018 declaration. As detailed in the declarations of Nicole Hamann and Cameron Azari, the claims administrator, Epiq, at our

direction undertook significant efforts to process and interpret data from Visa, Mastercard, and many acquiring banks to complete mailed notice to more than 16 million merchants, while also engaging in an extensive print-media and electronic-media publicity campaign.

34. Epiq worked under the guidance of Co-Lead Counsel, who provided input and direction during three face-to-face meetings and dozens of conference calls since my last declaration. Among other things, Co-Lead Counsel advised Epiq regarding the notice requirements imposed by Rule 23 and the Due Process Clause, in order to help it meet the law's requirements for notice while preserving Class resources to the greatest extent possible. Co-Lead Counsel also provided direction to Epiq regarding the script for telephone agents who answer merchant calls about the settlement and the training of those agents, and the content and placement of notice in the paid media. Co-Lead Counsel contributed their knowledge of class-action procedures and the payment-card industry to convert over 200 million rows of payment-card transaction data into a useable database of 16 million merchants (based on the number of unique TINs).

35. In the spring of 2013, Co-Lead Counsel learned that certain third-party claims filers were making misleading, and at times threatening, statements in an attempt to convince merchants to sign over a portion of their claims in the previous settlement. After alerting the Court to this issue, Co-Lead Counsel aggressively protected the interests of absent Class members by sending cease-and-desist letters, moving for injunctions against certain third parties, and monitoring other parties' compliance with Court orders intended to protect the Class from misleading communications. Co-Lead Counsel's prior activities are described in Paragraphs 177-85 of my 2018 declaration.

36. Co-Lead Counsel's activities with respect to third parties have continued in the months since we moved for preliminary approval. Co-Lead Counsel has continued to monitor and address various matters regarding third-party claims-filing entities. Several Class members have contacted Co-Lead Counsel in the months following the September filing to alert us to potential issues regarding misleading statements made by these entities. On several occasions, Co-Lead Counsel contacted companies that were providing Class members with incorrect information and, without needing Court intervention, had the companies remove the problematic materials.

37. On a weekly basis, Co-Lead Counsel receives communications from various third-party claims-filing companies seeking information about the settlement and seeking guidance to ensure that various solicitations are not misleading. Additionally, Co-Lead Counsel monitors, on a regular basis, both already known third-party-firm web sites and research new entrants in the market. We expect that our involvement with third-party filers will continue as the settlement process moves forward.

38. While approval of the 2012 settlement was pending, Co-Lead Counsel learned that several state legislatures were considering banning merchant surcharging in their states. At that time, ten other states already had laws that potentially restricted merchant surcharging. We were concerned that, if enough of these states passed anti-surcharge legislation, one of the key industry reforms that Co-Lead counsel had obtained in the 2012 settlement could have been severely undermined. To combat this potential negative development, Co-Lead Counsel coordinated with Lockridge Grindal Nauen P.L.L.P., a Supporting Counsel in MDL 1720 with its own government relations department, to hire state lobbyists and coordinate a unified lobbying strategy at state legislatures. As we had done in connection with the Durbin Amendment, Co-

Lead Counsel enlisted the assistance of the Class Representatives and merchants in the various states to tell the merchants' story of why surcharging bans were harmful to consumers. After Co-Lead Counsel's efforts, only one state, Utah, passed legislation that restricted surcharging. As detailed in my 2018 declaration and in the Memorandum of Law in Support of Final Approval, this and other bans were declared unconstitutional in *Expressions Hair Design v. Schneiderman*, 137 S.Ct. 1144 (2017).

June 7, 2019
Minneapolis, Minnesota

K. Craig Wildfang

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# EXHIBIT 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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| IN RE PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION<br><br>This document refers to: All Actions | MDL No. 1720<br>Case No. 1:05-md-1720-JG-JO |

**DECLARATION OF K. CRAIG WILDFANG, ESQ. IN SUPPORT OF RULE 23(b)(3) CLASS PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT**

## I. Introduction and Overview.

1. I, K. Craig Wildfang, am a partner in Robins Kaplan LLP, one of three Co-Lead Counsel appointed for the Rule 23(b)(3) damages class in the above-captioned litigation. I submit this declaration in support of the Class Plaintiffs' Motion for Preliminary Approval of the Superseding and Amended Definitive Class Settlement Agreement of the Rule 23(b)(3) Class Plaintiffs and the Defendants dated September 13, 2018 (the "2018 Settlement").

2. This declaration summarizes the factual and procedural history of this litigation and the events leading up to this settlement. It also demonstrates that: (a) Class Plaintiffs and Class Counsel throughout have been fully engaged in this litigation and the related legislative and administrative procedures; (b) Class Plaintiffs and Class Counsel have a full understanding and appreciation of all the risks to the Class peculiar to this litigation; (c) Class Plaintiffs' and Class Counsel's prior pursuit of injunctive relief contributed to their thorough understanding of how Defendants' conduct caused injury to the class; (d) the settlement negotiations were at arms' length and involved only the interests of the Rule 23(b)(3) class; and (e) under all the circumstances, this settlement is well within the range of reasonableness to warrant notice being disseminated to the Class and ultimately final approval of the proposed settlement.

3. As explained more fully below, under the leadership of the three Co-Lead Counsel[1] appointed by the Court - Robins Kaplan LLP, Berger Montague PC, and Robbins Geller Rudman & Dowd LLP - Class Counsel have achieved a monetary settlement for the Class of approximately $6.25 billion (before reduction for opt-outs), which we believe is the largest ever cash settlement in an antitrust class action.

4. This settlement was achieved only after vigorous and determined opposition in litigation with the Defendants, which comprise many of the most powerful financial institutions in the world and are represented by some of the most formidable law firms in America. Only persistent and effective efforts by Class Counsel over the last thirteen years made this settlement possible – a result that provides significant cash recoveries to card-accepting merchants operating during the class period. '

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[1] While the Superseding and Amended Definitive Class Settlement Agreement defines the three lead firms as "Rule 23(b)(3) Class Counsel,"for readability and to avoid possible confusion, I refer to the three lead counsel firms appointed by this Court in the Order dated November 30, 2016 as "Co-Lead Counsel." ""The collective of all class firms who participated in this action will be referred to as "Class Counsel", unless otherwise explained in the text.

5. Before the filing of this case in 2005, Visa and Mastercard, the dominant payment-card networks, were owned and controlled by a cartel of member banks that successfully avoided or defeated most of the prior challenges to their collusive structure, which had been maintained for over 30 years.

6. The risks posed to Visa and Mastercard and their controlling banks by MDL 1720 and its challenge to the collective setting on interchange fees, stimulated the banks to more seriously consider what previously had been unthinkable, i.e. divesting their ownership and control of Visa and Mastercard. Three months after the filing of the first action in June 2005, Defendants set in motion their strategy to limit their litigation exposure by restructuring both Mastercard and Visa into publicly owned companies – a restructuring completed via an IPO by Mastercard in 2006, followed by Visa in 2008. Thus, one of the principal remedies initially sought by the Class Plaintiffs – bank divestiture of their ownership and control of Visa and Mastercard - was accomplished within three years of the commencement of the litigation, and ten years before this settlement.

7. As described in more detail below, the relief obtained by the Department of Justice in its 2010 consent judgment with Visa and Mastercard, which eliminated many of the networks' anti-steering rules, complements the monetary relief obtained in this settlement, and was based substantially on the record and work product compiled by Class Counsel in MDL 1720.

8. Moreover, our lobbying consultants in Washington, D.C. observed that the existence of this litigation, led by counsel who were willing to engage with Congress, and provide important strategic insights to merchants, were important factors that helped to convince Congress to enact legislation – the Durbin Amendment - capping interchange fees on debit-card transactions as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.

9. Now, in addition to the structural reforms accomplished via the Mastercard and Visa restructurings, the reform of the networks' anti-steering and other merchant-restraint rules accomplished by the DOJ consent decree and the 2012 Settlement, Class Plaintiffs have negotiated what we believe to be the largest ever cash settlement of an antitrust class action of $6.26 billion.[2] We respectfully submit that the relief we have obtained and the record we present to the Court will amply support preliminary and then final approval to the settlement, and the award of attorneys' fees and costs sought by Class Counsel.

## II. Pre-filing Investigation by Robins Kaplan LLP.

### A. Expertise in payment-card markets.

10. The genesis of what became MDL 1720 began in 2003. I had become generally familiar with the economics and antitrust issues related to the payment-card industry during my service as Special Counsel to the Assistant Attorney General for Antitrust with the Department of Justice Antitrust Division in the mid-1990s. I added to my knowledge of the industry when I represented two large merchants, Best Buy Stores, Inc. and Darden Restaurants (Olive Garden, Red Lobster, Capital Grille) who had opted out of the class in the In re Visa Check/MasterMoney Antitrust Litigation.

11. While representing Best Buy and Darden, I came into contact with several large merchants and merchant trade associations. I learned that merchants were dissatisfied with the continued domination of the payment-card industry by the country's largest banks. Although the Department of Justice had succeeded in its case challenging Visa's and Mastercard's exclusivity rules in 2002, see United States v. Visa

[2] This is the amount of the settlement as of September 7, 2018. However, approximation is necessary because the potential future opt-out reduction is unknown and the settlement funds, which have continued to be held in escrow accounts since the prior settlement, continue to earn interest and pay related taxes.

U.S.A., Inc., 344 F.3d 229 (2d Cir. 2003), and although the class in In re Visa Check/MasterMoney Antitrust Litigation had obtained relief in the form of eliminating the tying agreement between credit- and debit-card acceptance for merchants, merchants believed that the competitive problems in the payment-card industry had not been substantially alleviated.

12. Because the banks owned and controlled the networks, they were able to enforce a set of rules that inhibited the entry of new competitors by disabling merchants from conveying transparent price signals as to the costs of payment choices to their customers at the point-of-sale. Thus, unlike competitive markets where new entrants can succeed and build sales volume by offering products at a lower price, in the payment-card market that method of entry was impossible.

13. Not only had the banks successfully enforced these rules, but they also were able routinely to increase the interchange rates paid by merchants on both credit-card and debit-card transactions. They did this not only by raising the pre-existing rates on standard "traditional" credit cards, but also by issuing new "premium" cards which carried much higher interchange rates allegedly to support the cost of providing rewards to cardholders and encouraging banks to migrate their customers from lower-interchange cards to "premium" cards. Finally, as consumer preferences shifted away from paying with cash and checks and towards credit and debit cards, the proportion of retail sales volume paid for with credit or debit cards, versus checks or cash, increased dramatically. By 2005, the total costs of acceptance for merchants had increased dramatically. Payment cards accounted for 38% of retail sales volume[3] and interchange-fee revenue paid by merchants to Visa and Mastercard card-issuing banks had risen to over $30 billion per year.

[3] Nilson Report No. 896 at 1, 7-9 (Dec. 2006).

14. It became clear to me that the long-term solution for merchants was to wrest control of Visa and Mastercard from the banks that then owned and governed them, and to reform the rules such that transparent price signals could be provided at the point-of-sale so that the usual competitive market mechanisms would work to make the merchants' costs of acceptance more reflective of actual competitive conditions.

15. I concluded that a new antitrust class action was the only option that offered any realistic chance of achieving a more competitive market for payment-card services in the foreseeable future. I also concluded that any such new action would have to be a broad-based attack on the structure of the industry and, in particular, must include an attack on the ownership and control of Visa and Mastercard by the nation's largest banks.

16. During 2004 and 2005 my law firm and I conducted our pre-filing investigation. One of the conclusions we had reached was that in order to obtain the type of thorough relief that we thought necessary, the action would have to include as defendants banks that controlled Visa and Mastercard, as well as the networks themselves. It became apparent to us that some large merchants were unwilling to be the first to file a complaint that named the banks as defendants. Because many of these merchants had important banking relationships with many of the would-be defendants, they expressed that the business risk of retaliation outweighed whatever benefit they may obtain by being the lead plaintiff in a broad-based class-action lawsuit.[4] However, we found that this same fear of the banks did not necessarily extend to smaller merchants, who tended to have banking relationships with smaller banks who were not likely to be defendants.

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[4] Because of a wave of mergers and acquisitions, in the banking industry in the decade from 1995 to 2005, 89% of MasterCard issuing volume was consolidated in the hands of five issuing banks. Five banks accounted for 75% of Visa issuing volume.

17. In the spring of 2005 I was contacted by two small merchants who, after some discussion, decided that they were ready, willing, and able to become representative plaintiffs in the new class action. These two small merchants, who were prepared to undertake this litigation when it appeared that perhaps no other merchant would, were Photos Etc. Corp. and Traditions Ltd. Once these two merchants stepped forward, other merchants became more willing to lend their names to the cause, as well.

**B. Meetings and information gathering with merchants.**

18. I have represented plaintiffs and defendants in both class and non-class antitrust litigation since 1981. While we had confidence in the merits of the case we were planning to file, we understood that it represented a great risk to the law firm and its partners who would be risking millions of dollars to take on the largest members of the U.S. banking industry.

19. Between November 2004 and June 2005, my Robins Kaplan colleagues and I continued to perform legal research and factual investigation as we drafted our first complaint. We met with a number of large and small merchants and several merchant trade associations, both to gather information from them regarding their experiences in the payment-card industry, and also to assess whether they were interested in being a part of this effort. We interviewed and engaged an economic-consulting firm, Lexecon, to advise us on the many complicated economic issues that we would face. And we engaged Professor Herbert Hovenkamp, the leading academic in the field of antitrust law, and the author of the most cited and most respected antitrust treatise.

20. By June 2005 we had our complaint fully drafted, and had been retained by five merchants: Photos Etc. Corporation; CHS Inc.; Traditions Ltd.; A Dash of Salt, L.L.C.; and KSARRA, L.L.C. to file the case on their behalf. These merchants were willing to take on not only Visa and Mastercard, but also the banks that owned and

controlled both networks. On June 25, 2005 we filed the first complaint in the District of Connecticut, where two of the Class Plaintiffs did business.

## III. History of this Litigation – PHASE I[5].

### A. The first cases filed by Robins Kaplan LLP.

21. Our initial complaint asserted claims under Sections 1 and 2 of the Sherman Act, and state law analogs, challenging the Defendants' collective setting of interchange fees and their imposition of rules that restricted merchant steering. The initial complaint named as Defendants Visa, Mastercard and the following banks: Bank of America Corporation; Bank of America, N.A.; National Processing, Inc.; Bank One Corporation; Bank One, Delaware, N.A.; Chase Manhattan Bank USA, N.A.; JPMorgan Chase & Co.; First Century Bank, N.A.,; First Century Bankshares, Inc.; Fleet Bank (RI), N.A.; Fleet National Bank; Capital One Bank; Capital One F.S.B.; Capital One Financial Corporation; Citicorp; Citigroup, Inc.; Citibank, N.A.; First National Bank of Nebraska; First National Bank of Omaha; HSBC Finance Corporation; HSBC Holdings, PLC; HSBC North America Holdings, Inc.; MBNA America Bank, N.A.; National City Corporation; National City Bank of Kentucky; Providian Financial Corporation; Providian National Bank; RBC Centura Banks, Inc.; RBC Royal Bank of Canada; People's Bank; RBS National Bank of Bridgeport; Royal Bank of Scotland Group, PLC; Suntrust Banks, Inc.; Texas Independent Bancshares, Inc.; USAA Federal Savings Bank; Wachovia Corporation; Wachovia Bank, N.A.; and Westpac Banking Corporation.

22. That initial action sought damages and injunctive relief to make the market more competitive. Although we thought that obtaining the divestiture of the banks'

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[5] "Phase I" refers to the history of these cases consolidated as MDL 1720 from the initiation of the pre-filing investigation in 2004 until the reversal of this Court's approval of the 2012 Settlement by the Second Circuit on June 30, 2016.

ownership interests in Visa and Mastercard would be difficult—because very few private antitrust actions in the history of the antitrust laws have ever succeeded in obtaining such structural relief—we were determined to make that effort. We believed that, because our goal was to get the banks out of their position as owners and controllers of Visa and Mastercard, a settlement was unlikely and a trial would be necessary.

23. Within six days of the filing of our complaint, similar cases began to be filed in various district courts around the country. Most of these cases, like ours, were brought as class actions. A complete list of these actions is attached as Appendix A to the Superseding and Amended Definitive Class Settlement Agreement. Also among these cases were a number of non-class, individual actions brought on behalf of various large merchants. Ultimately, in the first phase of the litigation over 38 class actions, and seven individual actions on behalf of 19 large merchants, were filed in several different federal courts. The multiple filings led to proceedings before the Judicial Panel on Multidistrict Litigation. The JPML held a hearing on September 29, 2005 and, on October 19, 2005, ordered that all of these similar cases be consolidated and coordinated in the Eastern District of New York, before Judge Gleeson.

## B. Class Counsel organization, early status conferences, early discovery and the Court's case management role.

24. By December 2005 a significant majority of counsel in the various cases that had been filed agreed upon an organizational and leadership structure to recommend to the Court. After reaching this agreement, we filed a motion with the Court recommending the entry of an order designating three firms as Interim Co-Lead

Counsel, Robins Kaplan LLP[6], Berger Montague PC,[7] and Robbins Geller Rudman & Dowd LLP.[8] By Order dated February 24, 2006 the Court appointed as Interim Co-Lead Counsel for the Class the three firms referred to above. [Dkt. No. 279]. Based upon their experience in managing large, multi-defendant antitrust class actions, Co-Lead Counsel knew that the success of their management of these consolidated actions required the Court to actively supervise and manage these actions. We requested that Magistrate Judge Orenstein require the parties to file a joint status report every other month, followed by regularly scheduled status conferences. [Dkt. No. 125, at 12]. We also knew that it was crucial to the efficient conduct of this case that the efforts of all of the law firms that had filed cases consolidated as MDL 1720 be carefully coordinated and directed so that there would be as little duplication of effort as possible. To that end, Co-Lead Counsel designated two other highly experienced law firms to serve as Co-Chairs of the Class Plaintiffs' Steering Committee: Freedman Boyd Hollander Goldberg Urias & Ward P.A., and Hulett Harper Stewart LLP. The talented lawyers at these two firms assisted the Co-Lead Counsel in managing the efforts of Class Counsel, and in developing the strategy that proved successful.

25. Magistrate Judge Orenstein agreed to our suggestion and throughout the pretrial period, regularly scheduled status conferences were held. Class Plaintiffs pushed for an early start for discovery. As a result, at the status conference held on May 17, 2006, Magistrate Judge Orenstein ordered that the Defendants immediately produce the documents from prior cases, including documents produced in In re Visa

[6] When the Court issued its Order appointing Co-Lead Counsel this firm was named Robins, Kaplan, Miller & Ciresi L.L.P.
[7] When the Court issued its Order appointing Co-Lead Counsel this firm was named Berger & Montague, P.C.
[8] When the Court issued its Order appointing Co-Lead Counsel this firm was named Coughlin, Stoia, Geller, Rudman & Robbins L.L.P.

Check/MasterMoney Antitrust Litigation and United States v. Visa U.S.A. and Mastercard International Co. (hereinafter the "legacy productions").

26. At the Court's direction the legacy productions were made by Defendants on a rolling basis over the next several months. This enabled Class Plaintiffs to begin preparing the background information for the more current discovery to come.

### C. The First Consolidated Amended Complaint (April 2006) and motions to dismiss.

27. Pursuant to the Scheduling Order of March 23, 2006 [Dkt. No. 303], Class Plaintiffs filed the First Consolidated Amended Class Action Complaint ("FCACAC") on April 24, 2006. The complaint contained 16 claims for relief under federal and state antitrust laws.

28. The FCACAC sought relief on behalf of two classes—a monetary-relief class under Rule 23(b)(3) and an injunctive-relief class under Rule 23(b)(2). The complaint was set forth in three parts: the first setting out the factual background for all claims; the second alleging facts specific to claims relating to the fixing of credit-card interchange fees; and the third alleging facts specific to the fixing of signature-debit-card interchange fees.

29. The chart below summarizes the various claims for relief in the FCACAC.

| Claim # | Class | Defendants | Cause of Action |
|---|---|---|---|
| 1 | I | Visa & Bank Defendants | Sherman Act § 1—Visa Intranetwork Conspiracy (Credit) |
| 2 | I | Mastercard & Bank Defendants | Sherman Act § 1—MC Intranetwork Conspiracy (Credit) |
| 3 | I | Visa, Mastercard & Bank Defendants | Sherman Act §1— Visa & MC Internetwork Conspiracy (Credit) |
| 4 | I | Visa & Bank Defendants | Sherman Act §1—Visa Anti-Steering Restraints. |
| 5 | I | Mastercard & Bank Defendants | Sherman Act §1—MC Anti-Steering Restraints |
| 6 | I | Visa & Bank Defendants | Sherman Act §2—Monopolization Through Anti-Steering Restraints. |
| 7 | I | Visa & Bank Defendants | Sherman Act §1—Tying/bundling of Various Services Within Network Services |
| 8 | I | Mastercard & Bank Defendants | Sherman Act §1— Tying/bundling of Various Services Within Network Services |
| 9 | I | Visa & Bank Defendants | Sherman Act §1—Exclusive dealing for Fraud Protection and Transaction Processing |
| 10 | I | Mastercard & Bank Defendants | Sherman Act §1—Exclusive dealing for Fraud Protection and Transaction Processing |
| 11 | I | Visa & Bank Defendants | Cal. Cartwright Act—Intranetwork Conspiracy (Credit) |
| 12 | II | All Defendants | Clayton Act §16—Declaratory and Injunctive Relief Relating to Conduct Alleged in Claims 1-10. |
| 13 | I | Visa & Bank Defendants | Sherman Act §1—Intranetwork Conspiracy (Debit) |
| 14 | I | Mastercard & Bank Defendants | Intranetwork Conspiracy (Debit) |
| 15 | I | Visa & Bank Defendants | Cartwright Act—Intranetwork Conspiracy (Debit) |
| 16 | II | All Defendants | Clayton Act §16—Declaratory and Injunctive Relief Relating to Conduct Alleged in Claims 13-15 |

30. The complaint was the result of a comprehensive effort by Class Counsel, including several hundreds of hours of attorney time to marshal the facts in the public record.

### D. The networks' restructurings and Class Plaintiffs' decision to challenge them.

31. Less than three months after we filed the first actions challenging the banks' use of Visa and Mastercard as price-fixing vehicles, Mastercard publicly announced that it was considering restructuring itself by having its bank owners divest their ownership interests in Mastercard and sell a majority their stock to the public via an initial public offering (IPO). Within weeks of Mastercard's announcement, Visa announced that it was considering a similar restructuring. We now know from the discovery taken with respect to the Mastercard and Visa restructurings that one of the primary motivations for the banks to give up their ownership and control of the two networks was the recognition of potentially ruinous damage exposure from the actions then being consolidated under MDL 1720. We also know from discovery that the banks desired alternatives that would permit them to remain effectively in control of the two networks, while minimizing their antitrust liability. The banks feared that, without ownership and control of Visa and Mastercard, the networks would abandon their "bank-centric" business model. Ultimately, the banks were advised by their counsel that no alternative short of complete divestiture of their ownership interests in both Mastercard and Visa would provide them the opportunity to limit their antitrust damage exposure that they sought, and accepted the risk that, freed of bank control, Visa and Mastercard would pursue their own economic interests, and not the banks.

32. I believed that the restructuring could be challenged as antitrust violations themselves, under either Section 1 of the Sherman Act or Section 7 of the Clayton Act. Robins Kaplan researched the law on these issues and consulted with our antitrust

expert Professor Herbert Hovenkamp. Based on our research and analysis, we concluded that if we could prove that the transactions by which the restructurings were accomplished unreasonably restrained competition (Section 1 of the Sherman Act) and/or threatened to reduce competition in a relevant market (Section 7 of the Clayton Act), the claims might be viable. We recognized, however, that our ability to prevail on such claims would depend upon the facts obtained in discovery and proven at trial.

33. On May 22, 2006, we informed the Court, Mastercard, and its banks that the Class intended to commence a new action challenging the Mastercard restructuring under Section 1 of the Sherman Act and Section 7 of the Clayton Act. While this claim had substantial risks for the Class Plaintiffs, it also created risks for Defendants by keeping the prospect of ruinous damage exposure on the bank Defendants.

34. Class Counsel could not find another instance in which a court applied the antitrust laws to the reorganization of a joint venture into a publicly traded company. The precedent-setting nature of this issue was confirmed in the Defendants' briefing on the issue, in which they also did not point to a single instance in which this issue was addressed by a court or antitrust-enforcement agency.

35. The First Supplemental Class Action Complaint ("FSCAC") alleged that the Mastercard restructuring was an attempt by the banks that then controlled Mastercard to continue their anticompetitive conduct, shielded from the proscriptions of Section 1 of the Sherman Act. It further alleged that, because the entity arising out of the IPO had been adjudicated by the Second Circuit in United States v. Visa, et al. to have market power, the IPO necessarily created a single entity with market power, which we challenged under Section 7 of the Clayton Act and Section 1 of the Sherman Act.

36. Like the main consolidated amended complaint, the FSCAC was the result of hundreds of hours of attorney time. Class attorneys and advisors mined Mastercard's SEC filings to fill in factual allegations regarding the mechanics of and the stated

justifications for the Mastercard IPO. Class Counsel also consulted leading antitrust scholars who provided their input into the supplemental complaint.

37. On May 25, 2006—a little more than a month after the FCACAC was filed—Mastercard completed and consummated its restructuring. Class Counsel later confirmed through discovery that a major motivation of the IPO was to escape or mitigate Defendants' damage liability in MDL 1720.

38. The Mastercard restructuring posed significant risks for Class Plaintiffs. If Mastercard's planning was successful in establishing that its restructuring converted it from a "consortium of competitors," as found by the Second Circuit, into a "single entity," it would be increasingly difficult to show that it violated Section 1 of the Sherman Act when it established interchange fees and other rules. That would greatly limit Defendants' damages exposure and, more importantly, would greatly imperil Class Plaintiffs' prospects for injunctive relief.

39. As discussed below, Class Counsel also challenged the Visa restructuring that was consummated on March 18, 2008 when we filed the Second Supplemental Class Action Complaint in January of 2009.

## E. Defendants' motions to dismiss the FCACAC and supplemental complaint.

40. On June 9, 2006, the Defendants moved to dismiss the pre-2004 damages claims in the FCACAC or, in the alternative, to strike allegations relating to pre-2004 damages. Defendants argued that the release in Visa Check precluded all such damage claims.

41. On July 21, 2006, we filed our opposition to Defendants' motion. Defendants filed their reply brief on August 18, 2006.

42. Oral arguments on Defendants' motion to dismiss were conducted on November 21, 2006.

43. On September 15, 2006, Defendants moved to dismiss the FSCAC in its entirety. We filed our response on October 30 and Defendants filed their reply on November 29, 2006.

44. Class Plaintiffs' brief in opposition to Defendants' motions to dismiss was the product of hundreds of hours of attorney time, and was drafted in consultation with Class Plaintiffs' expert economists and leading antitrust scholars, including Professor Hovenkamp. The Court held oral argument on Defendants' motion to dismiss the FSCAC on February 2, 2007.

45. On July 7, 2007, Magistrate Judge Orenstein issued a report and recommendation that the Defendants' motion to dismiss pre-2004 damages be granted. Class Plaintiffs appealed to Judge Gleeson and filed written objections to the report and recommendation on November 13, 2007. Judge Gleeson adopted the report and recommendation on January 8, 2008.

46. On February 12, 2008, Judge Orenstein issued a report and recommendation that partially dismissed the FSCAC with leave to re-plead. Even though Judge Orenstein recommended partial dismissal, his report and recommendation accepted Class Plaintiffs' premise that the Mastercard restructuring could harm competition and thus could violate Section 7 of the Clayton Act. In an issue that was largely one of first impression, Judge Orenstein concluded that Section 7 of the Clayton Act applied both to Mastercard and the banks, as both had acquired "assets of another." He also concluded that the FSCAC alleged a substantial likelihood of harm to competition, as required by Section 7 of the Clayton Act. Judge Orenstein partially dismissed the antitrust claims of the FSCAC as to the banks, however, because Class Plaintiffs technically failed to allege that the banks acquired "assets of another." The Defendants filed objections to the

Report and Recommendation, arguing that the complaint should have been dismissed in its entirely for failure to state a claim.

47. On November 25, 2008, Judge Gleeson upheld Defendants' objection and dismissed the FSCAC with leave to re-plead. On January 29, 2009, Class Plaintiffs filed the First Amended Supplemental Class Action Complaint.

## F. Class Counsel building the record.

### 1. Organizing the discovery effort.

48. Building the record was a mammoth undertaking. The Class had sued 19 banks, including many of the world's largest banks, as well as Visa and Mastercard, the two largest payment-card networks in the world. These Defendants had enormous resources and were represented by many of the largest and most prestigious law firms in the world.

49. In addition, we knew that the Defendants would retain experienced and well-regarded experts to help tell the Defendants' version of the story. The Defendants, and most particularly Visa, for years had funded "academic research" by prestigious economists all over the world, building Visa's argument that in "two-sided markets," standard economics and the antitrust rules do not apply.

50. In discovery, many Defendants' documents, even routine correspondence, were withheld on the basis of privilege by reason of the document being copied to legal counsel. The result was that the privilege logs of each Defendant contained tens of thousands of entries. Visa's privilege log contained over 100,000 entries.

51. Faced with such daunting obstacles, Co-Lead Counsel organized discovery efforts to efficiently obtain, review, analyze and summarize the evidence necessary to prove our case. This was accomplished by Co-Lead Counsel assigning tasks to Class

firms according to their capabilities and resources and established policies and practices to assure "quality control." So, for example, no firm (or lawyer) was assigned any work on the case until the firm/lawyer had attended a training session in order to gain a more complete understanding of the case. We also established procedures by which important evidence discovered by one firm was shared with other firms, so that the knowledge base was continually expanding.

52. To organize pleadings and correspondence, Robins Kaplan established a case "Extranet," to which each of the Executive Committee firms had access. The Extranet contained, among other things, all correspondence, discovery requests, substantive pleadings from MDL 1720 and related cases, court orders, legal research, factual analysis, and news articles.

2. Early stages of discovery.

53. The discovery record in MDL 1720 became one of the largest ever in any private civil antitrust case. Including documents produced in other litigation between 2006 and 2011, the Defendants produced almost four million documents, totaling over 56 million pages. Class Plaintiffs produced nearly 200,000 documents, ultimately totaling over 2 million pages. Individual Plaintiffs' production added over 8.4 million pages to this count. In addition, third parties subpoenaed by Plaintiffs or Defendants produced nearly 300,000 documents totaling over four million pages. The Phase I record also included 370 depositions taken in MDL 1720 and over 570 taken in other matters. Exhibit 1 sets forth the number and pages of documents produced by each party to MDL 1720.

54. Before discovery formally began on May 1, 2006, Class Counsel met with each of the Class Plaintiffs to discuss which individuals and categories of documents were

likely to have information responsive to Defendants' discovery requests and to organize each client's mandated, initial disclosures.

55. Anticipating that reviewing and analyzing the documents produced in discovery would be an enormous undertaking, in February 2006, Class Counsel sent out requests for proposal ("RFPs") to leading e-discovery vendors seeking estimates for processing the production and making it accessible to Class Counsel via a web portal. We selected Encore Legal Solutions.

56. As noted above, the first documents Class Plaintiffs requested were documents previously produced in earlier litigations. Obtaining these already-amassed documents required extensive negotiation and was accomplished only after Judge Orenstein ordered these "legacy productions" in early 2006.

57. After culling the documents using search terms, we assigned dozens of Class Counsel who collectively spent thousands of hours reviewing, analyzing, and coding these documents.

58. Also before the May 1, 2006 start of formal discovery, we worked in conjunction with Individual Plaintiffs' counsel to draft the initial sets of interrogatories and document requests to be served on Defendants. On May 1, Class and Individual Plaintiffs together served 417 document requests and 370 interrogatories. On May 3, 2006, Defendants collectively served 69 interrogatories and 122 document requests on Class Plaintiffs. Each of these figures includes subparts.

59. The "meet and confer" sessions were lengthy and complicated. Altogether, there were dozens of meetings and telephone calls held to try to reach agreement on discovery disputes in order to avoid, to the extent possible, unnecessary burden on the Court.

3. Depositions and document discovery of Defendants during Phase I.

60. By the initial discovery cutoff in 2009, Class and Individual Plaintiffs collectively had served 718 document requests and 631 interrogatories, and five requests for admission.

61. In addition to physical and electronic documents, the parties turned over massive amounts of data in discovery. Visa, for example produced thirteen years' worth of its transaction-level databases to Class Plaintiffs.

62. A small team of Class Counsel was also tasked with gathering large quantities of data from each of the bank Defendants to support Class Plaintiffs' motion for class certification. Members from several Class Counsel firms were tasked with ensuring that that data needed by Class Plaintiffs' experts were produced. During a several-month period in 2008 and 2009—while the parties were in the throes of deposition discovery—Class Counsel held multiple meet-and-confer sessions with Defendants' counsel to secure this data.

63. Class Counsel engaged in substantial motion practice and raised numerous issues I the regularly scheduled status conferences before Judge Orenstein relating to discovery issues. The scheduling of regular status conferences was an enormous help in resolving disputes, as many issues were resolved by the parties before, at, or immediately following status conferences, before those issues required formal motion practice.

64. Class Counsel began receiving document productions from Defendants on a rolling basis in the fall of 2006. Defendants substantially completed their initial document productions in the spring of 2007.

65. To assist in the review of documents, understanding the Defendants' businesses and the preparation for depositions, Class and Individual Plaintiffs' Counsel

conducted Rule 30(b)(6) depositions of each of the Defendants on issues related to their corporate structures and the identity of their employees with knowledge of the relevant facts in this litigation. These depositions occurred in the summer and fall of 2006.

66. Like the legacy productions, the Defendants' main productions in MDL 1720 had to be reviewed and coded before Class Counsel could begin any substantive depositions. Each bank Defendant was assigned one or more Co-Lead Counsel or Executive Committee firms, which would take a leading role in reviewing their documents and deposing those Defendants' employees.

67. Class Counsel who were charged with reviewing a particular custodian's documents were required to write a document-review memorandum that summarized that custodian's role in the Defendant's business, and identified salient documents in his or her files. Class Counsel reviewed the files of 880 custodians, and wrote custodial review memoranda for many of these.

68. Class Counsel began taking depositions of Defendants' employees in the summer of 2007 and continued through the end of fact depositions in early 2009. Partners at Co-Lead Counsel and the co-chairs of the Executive Committee, supported by associates where appropriate, deposed the top-level executives at the Network and Bank Defendants. For all depositions, junior lawyers were responsible for identifying from among the hundreds-to-thousands of documents that were tagged as relevant for the deponent, those documents most likely to be helpful as deposition exhibits. Senior associates at Class Counsel firms deposed some of the lower-to-mid level employees of Defendants. For each deposition, paralegals worked with the associate taking or supporting the deposition to arrange for the copying and shipment of documents to the deposition location.

69. A deposition-scheduling committee, made up of representatives from Class Counsel, Individual Plaintiffs, and Defendants met on a regular basis to propose

depositions, arrange schedules, and ensure the multi-tracked depositions were properly staffed with court reporters and videographers. Procedures were in place to limit the number of depositions in a given month by party and the members of the committee held calls sometimes weekly to organize the schedules.

70. Exhibit 2 summarizes the Defendant depositions that were taken in Phase I.

4. Discovery of Class Plaintiffs.

71. While some attorneys at Class Counsel firms were reviewing Defendants' documents and taking depositions, other firms responded to Defendants' discovery requests and defended Class Plaintiff depositions. Defendants aggressively pursued discovery of all Class Plaintiffs.

72. Over the course of the case, Defendants propounded 135 document requests and 295 interrogatories (including subparts) on Class Plaintiffs.

73. Defendants were also aggressive in seeking depositions of Class Plaintiffs' employees. For example, Defendants demanded three full days of deposition testimony from Class Plaintiff Traditions Ltd.—a small furniture retailer with two outlets in Minneapolis-St. Paul and one in Naples, Florida.

74. Generally, attorneys at the Co-Lead Counsel firms who were primarily responsible for the Class Plaintiffs' discovery responses took the lead in preparing for those Class Plaintiffs' depositions. Each deposition required at least several hours of document review plus a full day of preparation with the witness, in addition to defending the deposition. Most of these depositions required travel to the location of the deposition. Exhibit 3 summarizes the depositions that Class Counsel defended in Phase I.

75. Defendants took numerous depositions of Individual Plaintiffs' employees as well. Even when Class Counsel did not directly participate in these depositions, Class Counsel monitored the depositions for their effect on the record.

5. Discovery of third parties.

76. Class Counsel, working together with Individual Plaintiffs' Counsel, also pursued extensive discovery of third parties. Some of these third parties included consulting firms that had performed work for the Defendants, rival payment-card networks, and member banks of Visa and Mastercard that were not named Defendants in this lawsuit.

77. Disputes arose with these third parties over the discovery directed at them. Class Counsel therefore engaged in motion practice and extensive meet-and-confer sessions with the third parties' counsel.

78. In addition to seeking and obtaining document discovery from third parties, Class Counsel took many depositions of third-party witnesses. Class Counsel also questioned witnesses in third-party depositions noticed by Defendants or Individual Plaintiffs. See Exhibit 4 which lists the third-party depositions in Phase I.

6. Supplementation of the discovery record.

79. Many major developments occurred in the payment-card industry between the time the initial discovery requests were served and the briefing on the dispositive motions in 2011. To name just a few, Mastercard and Visa completed their restructurings, each network was investigated by antitrust-enforcement agencies in the United States and abroad, and new payment technologies were being developed and implemented in the marketplace.

80. These developments required multiple rounds of discovery supplementation from the Defendants. Each of these rounds was resisted by the Defendants, requiring

additional meet-and-confer sessions, additional correspondence between the parties, and, in some cases, further motion practice.

7. CaseMap cataloging of facts.

81. As fact discovery for Phase I was nearing a close, we prepared a master outline and a master evidentiary narrative that provided a roadmap for organizing the evidence that Class Counsel had obtained in discovery and would ultimately need for trial. This formed the starting point for building our CaseMap database. CaseMap is a tool that allows users to upload facts and exhibits into an organized structure of legal and factual issues. This effort was a necessary step in the preparation to try the case. The master case outline was supplemented with input from my colleagues, and the outline was then condensed into a format appropriate for CaseMap.

82. Once the outline was created, junior attorneys at the Co-Lead firms reviewed each deposition summary, transcript, and exhibit. These attorneys marked where each piece of evidence should be placed in the outline and ensured that the information was inputted into the appropriate module in the CaseMap system.

83. As we progressed into summary-judgment motion drafting, the CaseMap database was one of our primary sources of information. It would have also been the basis for our trial plan if the case would have proceeded to trial.

## G. Class certification motion.

84. Class certification was another major undertaking. It was only after much research during Phase I that we decided to pursue certification of both a Rule 23(b)(3) class for damages and a Rule 23(b)(2) class for equitable relief.[9] We sought discovery to support each class.

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[9] For the reasons discussed below, in Phase II we sought certification of only a (b)(3) class.

85. Class Plaintiffs retained Dr. Gustavo Bamberger of Lexecon as the expert economist supporting class certification. Co-Lead Counsel and the co-chairs of the steering committee worked with Dr. Bamberger to be sure he had all the information he needed to form his opinions for his expert report. This required marshaling materials from discovery (both documents and deposition testimony). These same attorneys worked with Dr. Bamberger in the preparation of his deposition and defended his two-day deposition by Defendants.

86. Defendants retained Dr. Edward A. Snyder, as their expert opposing class certification. Co-Lead Counsel's preparation required an extensive review of his prior writings and opinions, as well as the discovery record upon which he relied. Co-Lead Counsel deposed Dr. Snyder for two days.

87. Co-Lead Counsel and the co-chairs of the steering committee worked with Dr. Bamberger to prepare a rebuttal report, which was submitted along with Class Plaintiffs' Reply Memorandum in Support of Class Certification. Defendants then deposed Professor Bamberger again for one more day.

88. The Court devoted a full day to class certification argument. That occurred on November 19, 2009 and was argued by Merrill G. Davidoff of Berger Montague PC, supported by other lawyers from the Co-Lead Counsel firms.

## H. Class Counsel's efforts to reform the payment-card industry.

89. Simultaneously with aggressively litigating their claims in court, Class Counsel were seeking to reform the payment-card industry outside of the courtroom, in particular before Congress and the Department of Justice. These efforts led to tangible benefits for the merchant class.

90. In 2009, I was asked by several of my merchant clients in MDL 1720 to work with merchant groups to push a more effective, legislative strategy. Because Co-Lead

Counsel viewed developments in Washington, D.C., both in Congress and at the Department of Justice, as important adjuncts to the litigation, beginning in 2009 and continuing to the present I have been significantly involved in the development of strategic options for merchants with respect to legislative and regulatory remedies.

91. After a series of meetings and other discussions with merchants and their trade associations, the merchants agreed in the spring of 2010 to adopt a unified strategy (for the first time) focused on drafting legislation, and urging its passage, which would impose a cap on interchange fees charged to merchants on debit-card transactions and direct the Federal Reserve Board to adopt regulations enforcing those limitations. Thus, in the spring of 2010, I became involved in the drafting and strategizing legislative proposals that ultimately came to be called the Durbin Amendment, after its author Sen. Dick Durbin of Illinois. The Durbin Amendment also contained other important relief, such as requiring issuing banks to enable debit cards to be processed over at least two competing networks, allowing merchants to provide discounts to consumers for payment by cash, check, or debit card, in lieu of credit cards, and allowing merchants to place a minimum purchase amount of up to $10.00 on credit-card transactions.

92. I traveled to Washington, D.C. eight times in the first half of 2010 to meet with merchants and their counsel, and occasionally with senators and their staff, to assist with the efforts to convince the Senate to adopt the Durbin Amendment as an amendment to the bill that ultimately became known as the Dodd Frank Act. I also participated in dozens of conference calls to discuss these efforts, as well. On May 12, 2010, during the debate on the Dodd Frank Act on the floor of the Senate, Sen. Durbin offered his amendment, which passed with a bipartisan total of 64 votes.

93. The Durbin Amendment to the Dodd-Frank Act and the ensuing Federal Reserve Board ("FRB") regulations limited interchange fees on debit-card transactions

to a maximum of about $0.24. This was highly significant to the MDL 1720 litigation because it gave merchants, for the first time, a substantially lower-priced form of payment other than cash to which they now could try to steer their customers. Debit-card transaction volume already was growing at a faster rate than credit-card transaction volume, and the Durbin Amendment seemed certain to accelerate that growth.

94. After the enactment of the Durbin Amendment, permitting merchants to steer their customers to low-priced debit cards would be a valuable tool. Merchants in other countries had successfully employed steering strategies when they were permitted to surcharge, or threaten to surcharge.

95. To assist the merchants after the enactment of Dodd-Frank in the summer of 2010, we prepared materials for submission to the FRB. To do so, we brought a motion before the Court to lift some of the restrictions on the Protective Order so that we could provide litigation materials to the FRB that we believed would assist it in carrying out its responsibilities under the Durbin Amendment, and personally met with and corresponded with the staff at the Federal Reserve Board that were responsible for the development of the rules. Our goal was to provide pertinent information about the economics of payment cards generally, and debit cards in particular.

96. We also assisted the FRB in opposing a constitutional challenge to the Durbin Amendment. In October 2010, a large Minnesota-based bank, TCF National Bank, brought suit in the United States District Court for the District of South Dakota against the Board of Governors of the Federal Reserve Bank, charged with ratemaking for interchange fees on debit-card transactions under the Durbin Amendment. One feature of the Durbin Amendment was that the FRB rules would not apply to banks that had assets of less than $10 billion. TCF had assets above that level and claimed that the Durbin Amendment, and any FRB rules to be adopted pursuant to the new law, would

violate the Equal Protection Clause and amount to an unconstitutional confiscatory taking under the Due Process Clause. Thus, merchants came to me and asked me to provide assistance to the lawyers for the FRB in formulating their response to the TCF lawsuit. We did so. We prepared a long memorandum providing information to the FRB lawyers on the history of payment cards in United States, and describing many of the legal and economic issues that were relevant to TCF's claims. We also prepared and submitted an amicus brief, along with a declaration from our expert Dr. Alan Frankel, in opposition to TCF's motion for preliminary injunction to stop the FRB from conducting its ratemaking. Ultimately, the District Court in South Dakota denied TCF's preliminary injunction motion in April 2011. The Eighth Circuit Court of Appeals affirmed the denial in June 2011. Co-Lead Counsel submitted an amicus brief in support of the FRB on appeal as well.

## I. Department of Justice investigation.

97. I had discussions with the Department of Justice regarding the competitive problems in the payment-card markets since my representation of Best Buy and Darden Restaurants in the In re Visa Check litigation. After the commencement of MDL 1720, I continued those discussions with the goal of motivating the Department of Justice to open an investigation and to begin enforcement proceedings against Visa, Mastercard and the banks.

98. In October 2008, the Department of Justice opened an investigation into the rules and conduct of Visa and Mastercard. This investigation led to a consent decree that provided another important benefit to merchants by reforming to Visa and MasterCard's point-of-sale rules. This relief is summarized in Judge Gleeson's opinion finally approving the 2012 settlement of this case. In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig., 986 F. Supp. 2d 207, 265 (E.D.N.Y. 2013). By the spring of 2009, attorneys at the Department of Justice and at several state attorneys general's

offices began requesting information from Class Plaintiffs. Our ability to provide information to them was significantly constrained by the Protective Order the parties had negotiated and the Court had entered in MDL 1720. The Department of Justice eventually concluded that the most efficient way for them to gather information was to serve a Civil Investigative Demand ("CID") on the Class Plaintiffs in MDL 1720, which it did on April 21, 2009.

99. Thus began a sixteen-month period of support by private plaintiffs of a Department of Justice antitrust investigation. Over that period, Class Counsel provided to the Department of Justice access to the document and deposition databases which Class Counsel had created, at great expense. The document database ultimately consisted of over 60 million pages of documents, which was completely searchable by custodian, key-word, or by any one of dozens of electronic "tags" that Class document reviewers had placed on documents to indicate their relevance to particular issues. The deposition database contained the transcripts and exhibits of over 400 depositions taken, or defended, by Class or Individual Plaintiffs' Counsel. We also provided to 15 state-attorney-general staff attorneys access to the same database. Class Counsel also shared their analyses of this record with the Department of Justice. Class Counsel's cooperation with the Department of Justice, including several in-person meetings and multiple telephone calls, consisted both of junior attorneys directing DOJ lawyers to salient portions of the record and senior attorneys having meetings and telephone calls with senior DOJ lawyers.

100. We also made our expert, Dr. Frankel, available to the DOJ and the states. Dr. Frankel attended two of our meetings with DOJ officials in Washington, D.C. and participated in conference calls with state AG attorneys, at which he gave detailed presentations on the economic analysis of the record and discussed the issues surrounding the case.

101. Our involvement with the DOJ and state attorney-general investigations culminated with a meeting with Assistant Attorney General Christine Varney and her senior staff at which we urged the Department of Justice to conclude its investigation by commencing an action against Visa and Mastercard challenging the Networks' anti-steering rules (ASRs). Shortly after that meeting the Department announced that it was going to file suit against Visa and Mastercard, and that both networks had agreed to eliminate many of the ASRs.

## J. Amended complaints and new motions to dismiss.

102. Class Counsel filed new amended and supplemental complaints in early 2009. By then, the fact-discovery record was nearly complete. Drafting amended complaints therefore became a fact-intensive exercise akin to summary-judgment briefing in a typical antitrust case.

103. In December 2008 and January 2009, teams of Class attorneys worked on drafting the amended complaints and pulling evidence from the discovery record to support the amended claims. Like the original consolidated and supplemental complaints, Class Counsel invested hundreds of hours of attorney time on the Second Consolidated Amended Class Action Complaint, the First Amended Supplemental Class Action Complaint, and the Second Supplemental Class Action complaint.

104. This significant time investment into the complaints—especially the supplemental complaints—was required in order to review and incorporate the discovery record in the tens of millions of pages in order to find the most persuasive documents and deposition excerpts to support the claims that Judge Gleeson had concluded were insufficient in their pre-discovery forms. We also supplemented the SCACAC with salient facts from the record, both to support our theory of post-IPO liability and to conform our allegations to the discovery record.

105. In addition to adding factual detail to the allegations in the FCACAC, the SCACAC added new claims and revised previously asserted claims, primarily to address the now-accomplished Mastercard and Visa restructurings. It added claims that both Visa and Mastercard's default interchange fees constituted unreasonable restraints on trade, even after the IPOs. It also added claims that challenged the setting of default interchange fees on Visa's Interlink PIN-debit cards both before and after the restructurings.

106. On March 31, 2009, Defendants moved to dismiss each of the amended complaints. The Defendants argued, as they had done with respect to the FSCAC, that the amended complaints challenging the restructurings failed to allege a substantial likelihood of harm to competition and—in the case of Mastercard—failed to allege a fraudulent conveyance.

107. Unlike the original motion to dismiss the pre-2004 damages claims in the FCACAC, the Defendants raised a broad-based challenge to the SCACAC that sought to completely dismiss Class Plaintiffs' case. They moved to dismiss on the following bases: (i) that the release in the In re Visa Check case released all of Class Plaintiffs' damages and injunctive-relief claims; (ii) that the complaint failed to allege a "restraint on trade" sufficiently to state a claim under § 1 of the Sherman Act; (iii) that the complaint failed to allege a "plausible" inter-network conspiracy under Bell Atlantic v. Twombly, 550 U.S. 544 (2007); (iv) that Twombly barred the complaint's allegations of post-IPO conspiracies within Visa and Mastercard; and (v) that Class Plaintiffs' claims were barred by the doctrine of Illinois Brick.

108. In addition to the motions filed on behalf of all Defendants, Chase moved to strike its acquiring entity, Chase Paymentech, as a Defendant, arguing that Class Plaintiffs improperly added it as a Defendant without obtaining leave of court.

109. Class Counsel again devoted substantial efforts to opposing Defendants' motions, which threatened to derail the entire case. The three Co-Lead firms divided the briefing up among themselves. Each firm assigned multiple attorneys to drafting opposition briefs. After nine weeks of briefing, Class Plaintiffs filed three separate opposition briefs: 42 pages in response to the motion to dismiss the SCACAC; 46 pages in response to the motions to dismiss the IPO complaints; and 9 pages in opposition to the motion to strike Chase Paymentech.

110. Oral arguments on the motions to dismiss the amended complaints and on the class-certification motion were set for August 18 and 20, 2009 in front of Judge Orenstein.

111. We prepared exhaustively for the oral arguments on the motions to dismiss and for Class certification. On August 12-13, 2009, Class Counsel held mock arguments on the motions to dismiss and the class-certification motion at Robins Kaplan's offices in Minneapolis. We retained the services of retired Minnesota Supreme Court Justice James H. Gilbert to preside over the mock arguments.

112. Due to the sudden and unexpected unavailability of one of the Defendants' primary counsel, the Court rescheduled oral arguments from August to November 18-19, 2009.

113. Because two-and-a-half months had passed since the originally scheduled arguments, Co-Lead Counsel had to duplicate many of our original preparation efforts before the November arguments.

## K. Merits experts reports and depositions.

114. The selection of experts was crucial to the successful prosecution of the Class Plaintiffs' claims. Even before the first case was filed, Co-Lead Counsel conducted an exhaustive review of the economic literature related to payment-card networks and

interviewed several economists who had expertise in this field. In our review of the literature, we did not limit ourselves only to those articles which viewed the economics favorably from the merchants' point-of-view, but also tried to understand the economics from the point-of-view of the banks and networks.[10]

115. The initial merits expert reports of both the Class Plaintiffs and the Individual Plaintiffs were filed on July 2, 2009. Class Plaintiffs filed a total of five initial expert reports, totaling over 377 pages of text. Individual Plaintiffs filed a total of four initial expert reports, totaling over 214 pages of text. The Class Plaintiffs' expert reports were founded upon the massive factual base assembled by Class Counsel, including the document database and the deposition database consisting of nearly 900 current and legacy depositions, with over 10,880 deposition exhibits. A list of all Plaintiffs' experts are set forth in Exhibit 5.

116. The Class Plaintiffs' expert reports were also the product of the efforts of Co-Lead Counsel, and the co-chairs of the steering committee, to provide to the various experts information they requested from the factual record we had assembled, and to organize the efforts of the experts to address the various issues in the case that were within their respective areas of expertise. The lawyers who had been assigned to work with the various experts met frequently, and talked by telephone even more frequently over the many months during which the preparation of the expert reports took place, in order to keep the effort efficient and well organized, and to assure that all of the necessary issues were covered by at least one of our experts.

117. Under the agreed-upon schedule, the Defendants served their initial expert reports on December 14, 2009. The Defendants served a total of 12 separate expert

[10] The expert issues related to class certification are discussed *Supra*. at III.I.

reports, totaling over 800 pages of text. As demonstrated in Exhibit 6, Defendants' experts included several economists with excellent reputations in their fields.

118. Upon receiving these Defendants' expert reports, Co-Lead Counsel reviewed and analyzed each, and then organized the preparation of appropriate responses by Class Plaintiffs' experts. As with the initial expert reports, Co-Lead Counsel made assignments to various of the senior lawyers in the firms mentioned above to work with the experts in first understanding the reports we had received from the Defendants, doing the necessary analysis of the opinions reflected in those reports and the factual support (or lack thereof) for those opinions, then doing our own further analysis to determine whether any of the Class experts needed to expose errors in the analysis and/or factual support reflected in the Defendants' expert reports.

119. Part of the exercise of responding to Defendants' expert reports included preparing for and taking depositions of Defendants' experts. Each of Defendants' 12 experts were deposed, for a total of 15 days of testimony. Senior Class lawyers took the lead on these depositions and were supported by more junior attorneys who scrutinized the experts' prior reports and publications and the documents that they relied upon. Class Counsel were also in frequent contact with Class experts and their support staff to help them analyze the economic arguments made by Defendants' experts.

120. Under the agreed-upon schedule, the Class Plaintiffs' rebuttal expert reports were due on July 28, 2010. Class Counsel and our experts worked diligently to perform the necessary analysis of the opinions reflected in the Defendants' many expert report, understand the factual support (if any) for those opinions, identify facts that might contradict opinions proffered by any of the Defendants' experts, and then to do our own further analysis of the economics and the facts to determine what our experts would say in rebuttal.

121. Defendants deposed Class and Individual Plaintiffs' experts in the late summer and early fall of 2010. In total, Defendants deposed Plaintiffs' experts for a total of 15 days of testimony. This included the three-day deposition of Dr. Frankel, Class Plaintiffs' principal economic expert. Defending depositions also required extensive preparation by Class Counsel, who reviewed prior publications and testimony of each expert and spent days preparing them for questioning.

122. Almost immediately after the service of our rebuttal expert reports in July 2010, and knowing that the deadline for the filing of dispositive and Daubert motions was fast approaching, we began the preparation of drafts of motions to exclude the testimony of certain Defendants' experts.

## L. Summary judgment and Daubert motions.

123. On February 11, 2011, Class Plaintiffs, Individual Plaintiffs, and Defendants served motions for summary judgment. The parties also served several Daubert motions on the same day.

124. Class Plaintiffs moved for summary judgment on liability on Claims 1, 2, 5, 10, 11, 13, 14, 17, 18, and 20 in the SCACAC. Generally speaking, these were the claims relating to the intra-network fixing of interchange fees before and after the networks' restructurings. Individual Plaintiffs moved for summary judgment with respect to their claims that the Defendants' anti-steering restraints constituted per se violations of the antitrust laws.

125. The Defendants moved for summary judgment on the entirety of Class Plaintiffs' and Individual Plaintiffs' cases. They argued that summary judgment against Class Plaintiffs was appropriate on the following bases: that the Visa Check release barred Class Plaintiffs' claims; that the Illinois Brick doctrine precluded our claims; that the setting of interchange fees was not a "restraint on trade" within the meaning of

Section 1 of the Sherman Act; that Defendants' conduct did not reduce output; that no material issue of fact existed on our inter-network conspiracy claims; that Defendants were entitled to summary judgment on our claims challenging the networks' restructurings and our post-IPO Section 1 claims; and that Plaintiffs had not raised a material issue of fact with respect to the claims based on the anti-steering restraints.

126. The Defendants moved to exclude each of the Plaintiffs' primary experts under Daubert. These include Alan Frankel, Kevin Henry, and Victor Fleischer for the Class Plaintiffs and Christopher Vellturo, Joseph Stiglitz, and Daniel Ariely for the Individual Plaintiffs. The Class and Individual Plaintiffs filed a joint motion to exclude the testimony of the Defendants' primary economic expert, Kevin Murphy, and accounting expert, J.T. Atkins.

127. Moving for and opposing summary judgment with hundreds of depositions and tens of millions of pages in the record required nearly a year's worth of effort by the Co-Lead Counsel and other firms. Associate and partner-level attorneys at Co-Lead Counsel firms provided significant contributions, including drafting important sections of the memoranda of law and the Rule 56.1 fact statements. Attorneys at Executive Committee firms were also involved in this effort as necessary.

128. Co-Lead Counsel began the process of drafting our affirmative summary-judgment briefs and Local Rule 56.1 Statements of Undisputed Facts (SUF) in the summer of 2010.

129. Those who worked on this project reviewed the record for documents or deposition testimony that supported the various points in the SUF. They reviewed—among other sources—the CaseMap database in its entirety, the class-certification record in its entirety, the deposition summaries of all witnesses, as well as all documents tagged as "hot" or relevant to particular issues, all documents cited in class and merits expert reports, the United States v. Visa trial record and the Visa Check

summary-judgment record in their entirety, the expert reports in their entirety, the entire deposition transcripts of all important witnesses, the European Commission's decision ruling that Mastercard's interchange fees violated EU competition law, and other materials from foreign regulatory and judicial bodies that were available publicly or obtained in discovery.

130. Two lead paralegals at Robins Kaplan cataloged all documents that were referenced as exhibits and cross-referenced them in the brief and statement of undisputed facts. This was a demanding and labor-intensive task as each of the 589 documents that were served as exhibits to our summary-judgment motion had to be cross-referenced to the brief and SUF in the appropriate places.

131. Class Plaintiffs served a memorandum of law in opposition to Defendants' motion for summary judgment, along with a Rule 56.1 Counterstatement of Fact (CSF) on May 6, 2011. Summary-judgment briefing was completed on June 30, 2011, upon the service of Class Plaintiffs' reply brief and Rule 56.1 Reply Statement of Facts (RSF). That same day, summary-judgment and Daubert motion papers were filed with the Court under seal. The opposition papers to Defendants' motion and the reply papers in further support of Class Plaintiffs' motion demanded the same level of intensity and teamwork among Co-Lead Counsel.

132. Briefing on Daubert motions followed the same schedule as the motions for summary judgment. It also required teamwork among lawyers at each of the Co-Lead firms and Individual Plaintiffs' counsel. We argued that Professor Murphy should be disqualified for two primary reasons: (i) his use of data from a study by Daniel Garcia-Swartz was plainly erroneous because he failed to take account for revisions to the data used in that study; and (ii) his analysis relating to the effect of credit availability on prices is plainly unreliable and therefore inadmissible.

133. Executive Committee chair, Joseph Goldberg, along with attorneys from Berger Montague, and I were primarily responsible for drafting Class Plaintiffs' response to Defendants' motion to disqualify Alan Frankel. The response to Defendants' motion to disqualify Kevin Henry was primarily drafted by attorneys from Robbins Gellar Rudman & Dowd. These attorneys also provided invaluable assistance to our motion to disqualify Professor Murphy.

134. After the sealed dispositive motions and Daubert motions were on file, the parties exchanged proposed public versions of the pleadings and supporting exhibits. Class Plaintiffs recommended no redactions. Some Defendants, on the other hand, proposed substantial redactions. After approximately two weeks of line-for-line, intense negotiations, the parties were able to reach agreement on a mutually acceptable set of redactions for the written pleadings.

135. To assist the Court's review of the summary-judgment memoranda and supporting exhibits, we created "hyperlinked" versions of the non-public and public versions of the summary-judgment and Daubert motions. These are electronic copies of the pleadings that allow the user to see the documents supporting various propositions by clicking a mouse on electronic links within the documents. This task fell largely upon paralegals and litigation-and-case support staff at Co-Lead firms.

136. Oral arguments on the summary-judgment and Daubert motions were set for November 3, 2011. Once again, we divided up responsibilities for arguing the motions. I argued the motion to disqualify Professor Murphy, as well as the portions of the summary-judgment motions relating to the networks' IPOs, Defendants' liability under Section 1, and their market power. My Co-Counsel, Bonny Sweeney of Robbins Gellar, took the defense of the Defendants' Illinois Brick and output arguments and also planned to argue the portion relating to the Defendants' argument that the Class Plaintiffs could not demonstrate a restraint on trade. Joseph Goldberg argued the

defense of the Defendants' motion to disqualify Alan Frankel. All of those assigned to argue portions of these motions received invaluable assistance from lawyers and staff at the Co-lead Counsel firms and at Mr. Goldberg's and Mr. Stewart's firms.

137. Oral argument also involved an intensive preparation process. For example, I personally conducted three practice arguments with my colleagues. We conducted another mock argument in front of Justice Gilbert.

138. The arguments took place as scheduled on November 3 and 4, 2011. The Court kindly complimented all counsel on the quality of the briefs and argument.

## M. Communications with class representatives.

139. Co-Lead Counsel has regularly communicated with all of the class representatives. Co-Lead Counsel met on dozens of occasions with groups of the class representatives, and met individually with them on many more occasions. In addition to the in-person meetings, we had frequent conference calls in which all class representatives were invited to participate. In addition to the meetings and phone calls, we maintained regular written communications with them as well. Subject to the limitations of the Protective Order, we provided to class representatives much detailed information about the evidence we were accumulating, and the progress of the litigation generally, as we could. In particular, I tried to communicate with class representatives before and after each formal mediation session.

## N. Trial preparation.

140. While most of the activities of Class Counsel to this point could be fairly characterized as preparing for trial, we began explicit trial planning in early 2011. At that time, Co-Lead Counsel and the co-chairs of the steering committee interviewed a handful of prominent trial-and-graphics consultants who might assist us in presenting our case to a jury. A firm was selected in early 2011.

141. At approximately the same time, Class Counsel, Individual Plaintiffs' Counsel, and Defendants each established small groups of lawyers who were tasked with meeting and conferring on issues relating to trial preparation, such as motion schedules and procedures, time limits, and designation of witness testimony.

142. Co-Lead Counsel and the co-chairs of the steering committee met with the trial consultants in May 2011 to discuss case themes and presentation strategies for trying the case to a jury. Based on this session, break-out groups prepared materials for a focus-group session in Brooklyn in the fall of 2011. The results of the focus-group session informed Class Counsel's future trial-planning activities.

143. In preparing the case for trial, Class Counsel also drafted comprehensive jury instructions and verdict forms which were to form the backbone of Class Plaintiffs' trial plan. The jury instructions were based on an analysis and assessment of jury instructions from more than 50 other antitrust cases, with significant work being done to account for the unique issues in this litigation. The verdict forms were designed to guide the jury through the complex and thorny issues raised in the case. Additionally, work began on various expected motions in limine and Class Counsel began the time-consuming process of culling the massive record down to trial exhibits, with consideration given to issues related to admissibility and other evidentiary concerns.

## IV. Mediation and the 2012 Settlement.

144. Settlements between the Defendants and the Individual and Class Plaintiffs were reached in 2012, as the result of a prolonged and difficult mediation process spanning over five years. Ultimately, the parties agreed on using two of the most distinguished and most experienced mediators, at-the-time-retired Magistrate Judge Edward Infante and Professor Eric Green.

145. By the time the settlement was reached and a Memorandum of Understanding was filed on July 13, 2012, counsel for the parties, either jointly or separately, had met with one or both of the mediators approximately 45 times. There were many hundreds of telephone calls and e-mails with the mediators. My co-counsel and I maintained regular communications with the Class Plaintiffs advising them of the status of the settlement discussions and mediation sessions.

146. The first mediation session with Judge Infante occurred on April 14-15, 2008. Co-Lead Counsel prepared and submitted to Judge Infante a mediation statement, which described the factual and legal basis for the class's claims, and attached relevant materials that would assist the Judge in getting up to speed on the case. The first mediation session made it clear that the parties were far apart in their positions with respect to settlement, and that it was going to take a lot of time and effort to get the Defendants to the point where they would be willing to settle on terms that Class Counsel would be prepared to recommend to the class.

147. Another mediation session took place on June 10, 2008 with both outside and inside counsel for Defendants present. During the litigation Co-Lead Counsel and co-chairs of the Executive Committee participated in hundreds of conference calls and dozens of in-person meetings with some or all of the class representatives. In addition, we frequently prepared memoranda to the class representatives summarizing the status of the litigation, including the status of settlement discussions.

148. Between April of 2008 and December of 2011, the counsel for Class Plaintiffs and the Defendants, sometimes together with the Individual Plaintiffs, had dozens of face-to-face meetings, and hundreds of telephone calls, e-mails and other written communications trying to determine whether the parties could make progress toward a settlement.

149. After the argument on the summary-judgment motions before Judge Gleeson on November 2, 2011, the Court had expressed interest in assisting the parties and the mediators in trying to resolve the litigation. To that end, on November 2, 2011 Judge Gleeson issued an order setting a two-day settlement conference with the Court, the mediators, counsel and all parties in the action. That settlement conference was scheduled for December 2-3, 2011. In the days leading up to that settlement conference, Co-Lead Counsel had several telephone conference calls and in-person discussions with many of the class representatives in preparation for them to attend the settlement conference. At the conference Judges Gleeson and Orenstein, as well as the mediators Judge Infante and Professor Green, all encouraged the parties to make every possible effort to try to reach agreement.

150. After the two-day settlement conference, there was another flurry of communications between and among the mediators and the parties, and between and among Class Counsel and the class representatives.

151. As is common in complex mediations, the mediators employed a mediators' proposal—which they presented to the parties on December 22, 2011, who in turn had to accept or reject the proposal in its entirety. Ultimately Class Counsel and the class representatives and Defendants accepted the mediators' proposal.

152. Between February and June, 2012 Class Counsel and Defendants continued to negotiate over the many details of the settlement agreement. On June 20–22, 2012 the parties participated in another settlement conference with Judges Orenstein and Gleeson, and mediator Eric Green. After two days of great effort to reach agreement on language details the parties informed the court on the evening of June 22, 2012 that an agreement on all of the primary terms of a settlement had been reached. The parties agreed to finalize the Settlement Agreement and file a memorandum of understanding attaching the agreement with the Court by July 13, 2012.

## V. The 2012 Settlement.

153. The parties' negotiations resulted in a settlement that created two funds totaling over $5 billion (after accounting for opt outs) to compensate merchants for the overcharges they incurred as a result of the defendants' practices. The settlement also contained injunctive relief, primarily aimed at reforming the defendants' point-of-sale rules challenged in this litigation.

154. This Court granted final approval on December 13, 2013. See In re Payment Card Interchange Fee Antitrust Litig., 986 F. Supp. 2d 207 (E.D.N.Y. 2013).

155. Shortly thereafter, this Court issued a 17-page decision approving a $544.8 million attorneys' fee—9.56% of the damages fund, after opt-out reductions—as "a reasonable overall fee" in light of the "unique … size, duration, complexity, and … relief" of this case. In re Payment Card Interchange Fee & Merchant Disc. Antitrust Litig., 991 F. Supp. 2d 437, 439, 448 (E.D.N.Y. 2014). Applying the multi-factor standard of Goldberger v. Integrated Resources, 209 F.3d 43, 47-48 (2d Cir. 2000), Judge Gleason found the 2012 Settlement confirmed the court's judgment that class counsel "litigated the case with skill and tenacity" and that the settlement "would not exist" but for counsel's assumption of risk and extraordinary efforts. Id. at 441-42.[11]

156. This Court's final approval of the 2012 settlement was appealed to the Second Circuit. After a protracted briefing schedule and oral argument on September 28, 2015, the Second Circuit reversed and vacated the final approval order finding there was a conflict arising from the same counsel representing both the Rule 23(b)(3) damages class and the Rule 23(b)(2) injunctive relief class.

[11] To calculate the fee, the court used a sliding scale that awarded counsel diminishing percentages of the settlement fund as the fund increased. In re Payment Card Interchange Fee & Merchant Disc. Antitrust Litig., 991 F. Supp. 2d 437, 445 (E.D.N.Y. January 10, 2014). It further confirmed that the lodestar multiplier was "comparable to multipliers in other large, complex cases." Id. at 448.

## VI. Post-2012-Settlement Activities through June 30, 2016.

### A. Notice and administration of the 2012 Settlement.

#### 1. Co-Lead Counsel selected the class administrator following a lengthy process.

157. After reaching an agreement in principal for what became the 2012 Settlement, Co-Lead Counsel sought proposals from and interviewed a number of the top claims administration companies in the United States. It was apparent to counsel that effective notice and administration of a class settlement of this magnitude would require the services of a firm with an extensive data management expertise and resources.

158. After a review and assessment of the proposals, Co-Lead Counsel recommended Epiq Class Action & Claims Solutions, Inc. ("Epiq") as the notice and claims administrator for the class.

159. Hilsoft Notifications, a business unit of Epiq, served as the firm responsible for designing, developing, analyzing and implementing the notice plan. Hilsoft's services were included as part of Epiq's bid to serve as Class Administrator. Hilsoft has experience in more than 200 cases and notice plans developed by the company have been recognized and approved by courts throughout the United States.

160. On November 27, 2012 the Court approved appointment of Epiq as the Class Administrator.

#### 2. Co-Lead Counsel selected escrow and custodial banks to manage the class settlement cash and Interchange escrow account.

161. Following the July 13, 2012 settlement announcement, Co-Lead Counsel was aware of their fiduciary duties to the class to consider and select escrow and custodial banks to manage Settlement Cash and Interchange Escrow Accounts. Co-Lead counsel

sought proposals from reliable and healthy banks that had experience in managing qualified settlement funds, particularly of the size and potential complexity presented by this settlement. After reviewing proposals, conducting interviews, and obtaining favorable fee quotes, Co-Lead counsel selected Huntington Bank as the primary escrow bank and US Bank as a secondary custodial bank. Currently each bank holds and manages approximately one-half of the Settlement Cash Escrow of $5.3 billion, originally funded by Defendants after preliminary approval of the 2012 Settlement, and following a reduction of the approximately $1.5 billion due to opt-outs per the terms of the agreement. Huntington Bank has been working with Co-Lead Counsel in connection with the escrowed funding to manage the accounts and disburse administrative expenses for class notice and administration with approval by the Court. Defendants, as per the 2012 Settlement Agreement, have participated in the process by approving Co-Lead Counsel's selection of the banks and in approving requested escrow functions.

3. Notice to the Class.

162. On October 19, 2012, the Notice Plan prepared by Hilsoft was submitted to the Court as Appendix E of the Definitive Class Settlement Agreement. [Dkt. No. 1656-1]. During the two months prior to the submission of the Settlement Agreement, Hilsoft, Co-Lead Counsel and Defendants worked together to draft the proposed notices. Senior attorneys from the Co-Lead Counsel firms worked extensively with Epiq and Defendants to craft a notice that would exceed the due process requirements under the Constitution and Federal Rule of Civil Procedure 23.

163. Once the language of the notices was agreed upon, additional work regarding everything from type size to margins was considered and evaluated by senior lawyers from the Co-Lead Counsel firms. Proofs of the notices were approved by all parties on October 19, 2012 and revised on November 26, 2012. Following the agreement regarding

the content of the notices, further decisions regarding set up for mailing, paper thickness and other details were made by the attorneys and Epiq.

164. Co-Lead Counsel also worked with Hilsoft on the paid media effort which included 475 separate print publication units with a combined circulation of over 80 million and 770 million adult internet banner impressions.

4. Co-Lead Counsel took significant steps to obtain class member contact information to ensure the class received sufficient notice of the settlement.

165. In July 2012, pursuant to Paragraph 81(d) of the Definitive Class Settlement Agreement, Co-Lead Counsel sent either a document request or subpoena to 25 entities. A document request and protective order was sent to following six settling Defendants: Bank of America Merchant Services, Chase Paymentech Solutions, Citi Merchant Services, SunTrust Merchant Services, Vantiv (f/k/a Fifth Third Bancorp), and Wells Fargo Merchant Services. Subpoenas were sent to the following 19 acquirers: BB&T Corporation, The Bancorp Bank, Elavon, Inc., EVO Merchant Services, LLC, Fidelity National Information Services, Inc., First Data Resources, Inc. ("First Data"), Global Payments Direct, Inc., Heartland Payment Systems, Inc., Intuit, Inc., iPayment, Inc., Merchant E-Solutions, Mercury Payment Systems, LLC, Merrick Bank Corporation, Moneris Solutions, Inc., PNC Financial Services Group, Inc., Santander Holdings USA, Inc., TransFirst, LLC, TSYS Merchant Solutions, LLC, and Worldpay US, Inc.

166. Each document request and subpoena requested name, address and related information for each merchant for whom the entity had acquired or processed Visa or Mastercard transactions at any time between January 1, 2004 and August 1, 2012.

167. Following the return date, several of the entities objected to the subpoenas via written objections. Several of the entities refused to produce the requested data without additional protective orders or agreements regarding confidentiality. Co-Lead Counsel

firms held numerous meet and confer negotiations with the subpoenaed entities. Dozens of telephone conferences and email negotiations with the various entities were conducted by Co-Lead Counsel attorneys.

168. Special agreements regarding the confidentiality of produced data were created for several entities, including: First Data Heartland Payment Systems, Inc.; Global Payments Direct, Inc.; TransFirst LLC; and Wells Fargo Merchant Services, LLC. Getting to agreement on these confidentiality provisions entailed significant back and forth between the parties and included executives at Epiq (the entity that was to receive the data) as well as counsel for Visa and MasterCard.

169. Co-Lead Counsel had difficulty getting any data from some of the subpoenaed parties and as to a few of the entities, motions to compel were threatened before the requested data was turned over. As to First Data, a letter motion to compel was filed after the parties reached impasse regarding the subpoena. That motion was filed on December 7, 2012. [Dkt. No. 1757]. It was later taken off calendar following First Data's agreement to produce requested data.

170. Co-Lead Counsel also obtained data from Visa and Mastercard for use in the notice process. Visa provided extracts from two databases containing information about merchants who accepted Visa during the class period: the Visa Merchant Profile Database ("VMPD") and the Common Merchant Systems ("CMS") database. MasterCard provided two Aggregate Merchants List files that were imported on November 1, 2012 and December 21, 2012.

171. Through this process, Co-Lead Counsel was able to provide Epiq with 115,045,756 rows of data containing merchant name, address and related information from the subpoenaed entities.

172. Co-Lead Counsel worked with Epiq on all aspects of the development of the notice database, including de-duplication of records that shared key characteristics and the identification of excluded entities under the class definition. Once the notice database was finalized, Co-Lead Counsel worked with Epiq to monitor the mailing of the approximately 20 million notices. The initial notice mailing began January 29, 2013 and ended on February 22, 2013. Issues related to re-mailing of notices, undeliverable mail and other technical issues are monitored by lawyers at Co-Lead Counsel firms on a daily basis.

5. Class member support via the toll-free number, dedicated website and through Co-Lead Counsel.

173. Co-Lead Counsel worked with Epiq to develop a script for an automated Interactive Voice Response ("IVR") telephone system. By calling this number, potential class members can listen to the answer to frequently asked questions as well as request the Long-Form Notice and Settlement Agreement. Co-Lead Counsel also worked with Epiq to develop a script for live operators to respond to frequently asked questions. By January 28, 2013, the toll-free number was fully operational. Lawyers from Co-Lead Counsel assisted with in-person training of the live operators. As of March 31, 2013, the IVR system had received 93,478 calls, representing 426,157 minutes of use. Among these calls, 50,218 have been transferred to operators totaling 323,676 minutes of time. Through the end of the original claims period, May of 2013, and in the intervening years to present, the IVR system has handle many more inquiries.

174. Attorneys from the Co-Lead Counsel firms regularly responded to class members who have called into the toll-free line, but requested more detailed information. Epiq provided Co-Lead Counsel with a list of Class Members who have either requested to speak to Class Counsel, or who had questions that required an answer from a lawyer. Co-Lead Counsel also have responded to hundreds of class

member calls made directly to Co-Lead Counsel. Responding to class member communications is a continuing process, with calls, emails and letters being received on a daily basis.

175. Epiq and Co-Lead Counsel worked together to develop the content of the Settlement Website which became available on December 7, 2012. Attorneys from the Co-Lead Counsel firms worked on every aspect of the website, ensuring the content was neutral and informative.

176. The settlement website allowed class members to preregister and provide information to help the Class Administrator in the preparation of the class member's Claim Form. Co-Lead Counsel worked with Epiq in the development and testing of the preregistration module, ensuring ease of use for class members.

### 6. Class Counsel's efforts to combat misleading statements directed at the class by certain trade association and third-party filers.

177. Numerous class members contacted the class administrator to express concern about various third party claims filers seeking to sign up class members for claims-filing services in exchange for up to 35% of the class members' expected recovery.

178. In response to these concerns, Class Counsel engaged in extensive investigative, monitoring and litigation activities to ensure class members received only accurate information from third parties.

179. In March 2013, Class Counsel became aware of a website launched by certain opponents of the 2012 Settlement, entitled www.merchantsobject.com. This website provided numerous links and information that purported to allow and encourage merchants to object, opt out, or otherwise voice opposition to the settlement.

180. On March 29, 2013, Class Counsel wrote the Court seeking entry of an Order requiring modifications to the website and asking to receive advance notice of any planned future communications to class members. [Dkt. 1963]. The Court granted Class Counsel's motion on April 11, 2013, and, after the parties failed to reach agreement on a procedure to govern future communications to class members, the Court issued a new order that required corrective banners to be placed on the www.merchantsobject.com website.

181. By the summer of 2013, Class Counsel learned that certain third-party claims filers had begun making misleading statements to class members, implying, or stating explicitly, that those class members could not recover under the settlement without enlisting the third party's assistance. Some communications implored class members to "act now" or contained similar language that implied that the class member receiving the notice was facing a deadline for recovery. Most of these third-party claims filers planned to take substantial portions of a merchant's recover in exchange for the "service" of filing their claims.

182. One third party in particular, Managed Care Advisory Group, Inc. ("MCAG"), entered into contracts with various merchant processors which in turn told their merchant customers that unless they "opt[ed] out" MCAG would file a claim on their behalf, for which MCAG would retain a 25% share of the merchant's claim.

183. After Class Counsel was unable to persuade MCAG to alter its practices, Class Counsel alerted the Court to MCAG's activities. [Dkt. 5964.] The Court in turn ordered MCAG and the processors with which it contracted to appear at a show cause hearing on September 12, 2013. [Dkt. 5975.] At this hearing, the Court ordered MCAG and the processors to stop their conduct immediately and negotiate with Class Counsel on proposed relief. Class Counsel and MCAG agreed on relief that, among other things, required MCAG to end its automatic claims-filing scheme and to inform merchants it

had contact that, should a settlement be finally approved, claims-filing assistance would be available to class members at no cost.

184. In the summer and early fall of 2013, Class Counsel began noticing other third-party filers that were making misleading statements. When Class Counsel brought this to the Court's attention, the Court ordered Class Counsel to confer with "claims filing companies that Class Counsel alleges have knowingly made materially false or misleading solicitations to class members…to agree with them on dates for evidentiary hearings regarding any such statements." [Dkt. 6193 at 2.] Following the Court's order, Class Counsel directed discovery at several third parties regarding their activities, conducted six evidentiary hearings regarding misleading statements by those parties, and regularly updated the Court on third parties' conduct and Class Counsel's efforts to police it and protect class members.

185. On October 3, 2014, the Court issued an omnibus order regarding third-party claims filers, which permanently enjoined one party, Premier, from activities relating to the settlement. The Court further concluded that various third-party filers' "statements deceived merchants in multiple ways." [Dkt. 6349 at 59.] The Court's order noted that "Class Counsel have been vigilant in policing the conduct of [third-party filers], contacting them directly when their statements are misleading and even working out corrective communications directly with them." The Court "commend[ed] Class Counsel for those actions, and for the professionalism and thoroughness that has characterized their conduct of the five evidentiary hearings on the subject." [Id. at 60.]

## VII. Appellate Practice in Connection with the 2012 Settlement.

186. Even though we believed that the 2012 settlement significantly benefitted the merchant class and was far superior to continued litigation, we knew the Court's final approval would be appealed. We therefore we retained Paul B. Clement, then with

Bancroft PLLC, as our appellate counsel. In addition to getting experienced appellate advocacy, another reason for retaining separate appellate counsel was to get a fresh look at issues that we had been living with for years. Mr. Clement was and is a highly experienced appellate lawyer. Between 2000 and 2008 Mr. Clement served for three year as Deputy Solicitor General in the U.S. Department of Justice followed by one year as Acting Solicitor General and three years as Solicitor General.

187. After we selected Mr. Clement to lead our opposition to the appeals, we began the effort to get him up to speed on the relevant factual and legal issues.

188. The briefing on the appeals to the Second Circuit was a group effort, led by the Bancroft team. Before we received the Appellants' briefs we researched the issues that were raised by the Appellants in the district court, and prepared memoranda summarizing that research. Then, after we received the Appellants' brief, we used those memoranda as the building blocks of our Brief of Appellees.

189. The appellate work also included assisting Mr. Clement and his staff in preparing for the oral argument, set for the Fall of 2015. This preparation included both in-person and telephonic meetings and two mock arguments, including one before my partner, Eric Magnuson, a former Chief Justice of the Minnesota Supreme Court.

190. On September 28, 2015, the United States Court of Appeals for the Second Circuit heard oral argument on the appeal.

191. After the Second Circuit panel issued its opinion reversing the District Court's final approval order, Co-Lead Counsel and our appellate team considered our remaining options, and decided to file petitions for en banc review and for certiorari.

192. On March 27, 2017, the Supreme Court denied our petition.

## VIII. Litigation challenging state "no surcharge" statutes.

193. One feature of the legal landscape that emerged as directly relevant to our efforts was the existence of state laws in ten states—including California, Florida, New York, and Texas—governing credit-card surcharges. Enacted in the 1980s at the behest of the credit-card lobby, these laws made it illegal for merchants to "impose a surcharge on a cardholder who elects to use a credit card in lieu of payment by cash," while permitting them to offer discounts for cash. We knew early on that these laws could block hard-won relief. Even if Visa and Mastercard lifted their parallel contractual rules, the laws could still prevent merchants from surcharging. And given the integrated nature of the retail economy, they were likely to have national reach.

194. To address this problem, we began coordinating in March 2013 with Deepak Gupta, a constitutional and appellate litigator at Gupta Wessler PLLC. With our support, and in collaboration with class counsel, Mr. Gupta devised and executed a nationwide strategy for challenging these statutes under the First Amendment. In June 2013, just after Visa and MasterCard lifted their no-surcharge rules, Mr. Gupta and this team initiated a series of constitutional challenges on behalf of small merchants that ultimately went to the U.S. Supreme Court and back. In the first case, Judge Jed Rakoff of the United States District Court for the Southern District of New York held that New York's surcharge law "plainly regulates speech" because it "draws the line between prohibited 'surcharges' and permissible 'discounts' based on words and labels, rather than economic realities" and fails First Amendment scrutiny because it "actually perpetuates consumer confusion," "by preventing sellers from using the most effective means at their disposal to educate consumers about the true costs of credit-card usage." Expressions Hair Design v. Schneiderman, 975 F. Supp. 2d 430, 444, 446 (S.D.N.Y. 2013).

195. Following that initial victory, and with our continued support, Mr. Gupta and his team filed a second wave of First Amendment challenges in Florida, Texas, and

California in March 2014. After five years of litigation at all levels of the judiciary, those three challenges all proved successful, yielding decisions invalidating the Florida, Texas, and California laws and permanently enjoining those states' attorneys general from enforcing them against merchants who seek to impose fully disclosed credit-card surcharges. See Rowell v. Paxton, No. 14-190-LY (W.D. Tex. Aug. 16, 2018); Italian Colors Restaurant v. Becerra, 878 F.3d 1165 (9th Cir. 2018), Dana's R.R. Supply v. Bondi, 14-cv-134-RH (N.D. Fla. May 2, 2017); Dana's R.R. Supply v. Attorney General, 807 F.3d 1235 (11th Cir. 2015). The New York case, meanwhile, made its way up to the U.S. Supreme Court, which unanimously agreed with the merchants that these laws restrict speech rather than conduct and remanded for application of First Amendment scrutiny. Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144 (2017). On remand, the Second Circuit certified the case to New York Court of Appeals to interpret the statute. The certified question was argued on Wednesday, September 12, 2018.

## IX. Phase II Litigation.

196. With the reversal of the 2012 Settlement approval, and upon remand to this Court, Class Counsel suggested to the Court that the best way to proceed, consistent with the Court of Appeals' opinion, would be for the Court to appoint separate counsel for any proposed Rule 23(b)(2) class for injunctive relief and for any proposed Rule 23(b)(3) class seeking damages only.

197. Consistent with our recommendation, the Court invited applications by counsel, or groups of counsel, for appointment as Rule 23(b)(2) and Rule 23(b)(3) counsel. On November 30, 2016, after considering the applications of various counsel, the Court appointed Robins Kaplan, Berger Montague and Robbins Gellar Rudman & Dowd—the same counsel who had served as Phase I Class Counsel—as Rule 23(b)(3) damages counsel. The Court appointed The Nussbaum Law Group, P.C., Hilliard &

Shadowen LLP, Freed Kanner London & Millen LLC, and Grant & Eisenhofer P.A. to be interim co-lead counsel for a proposed class of plaintiffs seeking class certification pursuant to Federal Rule of Civil Procedure 23(b)(2). Those latter counsel prepared and served a new complaint, and have been separately participating in the coordinated discovery on behalf of the (b)(2) class in a case entitled Barry's Cut Rate Stores, Inc., et al. v. Visa, Inc., et al.

### A. Drafting and motion practice relating to the Third Consolidated Amended Class Action Complaint.

198. As soon as we were appointed as interim Co-Lead Counsel for the Rule 23(b)(3) Class, we began updating our operative class complaint to address legal and factual developments and to address the Second Circuit's criticism of the 2012 Settlement and the previous structure of the classes and counsel.

199. Because the operative class complaints were updated last in early 2009, the process of bringing the complaint current was a significant undertaking, which, as noted below, was occurring simultaneously with the renewed document and deposition discovery of the Defendants. Class Counsel accordingly consolidated what had been three standalone complaints (one consolidated complaint and one complaint challenging each of the Visa and MasterCard IPOs) into one operative complaint. We updated our factual allegations to conform to this new structure and to bring them in line with market and legal developments over the past decade. The updates included alleging alternative "two-sided" relevant markets that included both merchants and cardholders, in order to address the argument that, in light of the Second Circuit's United States v. Am. Express decision, the market included both "sides" of the Visa and Mastercard platforms, and supporting those markets with concrete factual allegations.

200. Defendants did not consent to Class Plaintiffs alleging alternative "two-sided" relevant markets and argued that, even if amendment were permitted, the

amendments would not "relate back" to the beginning of the damages period in 2004. Class Plaintiffs accordingly engaged in motion practice to seek leave to amend and in support of the proposition that their amendments related back. [Dkt. 6880] Judge Orenstein held argument on these motions on April 20, 2017 and granted leave to amend on September 27, 2017, but concluded that Class Plaintiffs' amendments relating to an alternative "two-sided" relevant market did not relate back. [Dkt. 7076]. Class counsel worked with counsel for the other plaintiff groups to formulate objections to Judge Orenstein's Report and Recommendation. On August 30, 2018, Judge Brodie ruled that plaintiffs' amendments related back to their prior complaints. [Dkt. 7244.]

## B. Phase II discovery.

201. After the Second Circuit remanded the case to a renewed litigation footing, Class Counsel faced the prospect of additional discovery to prepare the case for trial. The factual record amassed in Phase I, discussed above, ended 6 years earlier, in 2010. The expert work, likewise, required updating in light of new case law, primarily the Second Circuit's decision in United States v. Am. Express Co., 838 F.3d 179 (2d Cir. 2016), which held that, at least in the context of Amex's "three-party" network, the relevant market included both merchants and cardholders.

### 1. Organizing the discovery effort for Phase II.

202. The Rule 23 (b)(3) Class Counsel approached the organization of discovery efforts in Phase II of the litigation in generally the same way that we approached discovery during Phase I, including coordinating with the counsel for the Direct Action Plaintiffs and Rule 23(b)(2) Class Plaintiffs, so that discovery would be conducted efficiently and expeditiously.

203. During the pendency of the appeal, and in the period after the decision of the Second Circuit and until the resolution of the issues of who would be appointed as class

counsel for the injunctive relief and damages classes were resolved, the Defendants and Direct Action Plaintiffs had negotiated various agreements and schedules that were to govern the next phase of discovery in their continuing litigation.

204. In that period, the Defendants and Direct Action Plaintiffs had produced over one hundred million pages of documents (not including "native" files) and were preparing to begin deposition discovery.

205. Indeed, deposition discovery in Phase II of the litigation began the day after the Court's order of November 30, 2016 appointing us as Class Counsel for the Rule 23(b)(3) Class.

206. The combination of these developments—the progression of the Direct Actions, the reappointment of Class Counsel, and the immediate commencement of deposition discovery—challenged Class Counsel to analyze millions of pages of documents created after the conclusion of document discovery in Phase I while simultaneously preparing for dozens of depositions per month.

207. While Class Counsel could take advantage of advancements in document-review and artificial-intelligence technology and their knowledge from Phase I of the case, this challenge necessarily had to be met by employing the human power of dozens of attorneys to review and summarize documents. Many of the reviewing attorneys were veterans of the Phase I review. These review attorneys reviewed over 5 million pages of documents (not including "native" files, which by Phase II of the litigation, constituted a significantly larger proportion of the total) produced by Defendants and third parties.

208. Before reviewing documents, reviewers—including those with Phase I experience—were trained in-person or via webinar on the document-review software, the history of the case, and the points that needed to be addressed in Phase II. The Co-

Lead firms regularly held "check-in" meetings with document-review attorneys (which generally occurred weekly) to control the quality of the document-review work and direct reviewers' efforts going forward.

209. Each Co-Lead firm and Executive-Committee-Co-Chair firms was again responsible for the participating in the depositions of one or more defendants. Senior associates and partners from these firms took the majority of depositions, with the assistance of more junior attorneys and paralegals to parse through the document record and organize lines of questioning.

2. Fact discovery taken of the Defendants and third parties.

210. Class Counsel took or participated in nearly 150 depositions over the next 18 months. As with the depositions taken during Phase I of the litigation, we had an organized effort to prepare summaries of the depositions contemporaneously and to circulate them to all of the Rule 23(b)(3) Class Counsel.

211. Class Plaintiffs participated in another 32 depositions of third-party witnesses. These depositions involved similar levels of preparation to those of the Defendants, including review of the third parties' document productions, coordination with Direct Action Plaintiff counsel and Rule 23(b)(2) Class Counsel on allocation of time and topics to cover, and summary of the salient points from each deposition. Exhibit 7 to this declaration reflects a summary of the third-party and defendant depositions taken in Phase II.

212. Document discovery also continued at an active pace after Class Counsel's appointment. Class Counsel, along with Direct Action Plaintiffs' counsel and counsel for the Rule 23(b)(2) Class, issued supplemental document requests to the network and bank defendants. Each of these requests was negotiated in extensive—and often contentious—sessions with the Defendants. Class Counsel, generally at the junior

partner level, actively participated in the drafting and negotiation over these requests with their peers among counsel for the Defendants and the other plaintiff groups.

213. As in Phase I of the litigation, Defendants produced privilege logs that contained millions of entries. Class Counsel prioritized the review of Defendants' privilege logs, especially in connection with upcoming depositions. Accordingly, Class Counsel, in conjunction with counsel for the other plaintiff groups, sent dozens of letters challenging privilege designations, participated in meet-and-confer conversations with defense counsel regarding those documents.

214. Working together with counsel for the other plaintiff groups, Class Counsel also engaged in motion practice relating to matters such as the scope of the Defendants' supplementation of prior discovery responses [Dkt. 6987], the allotted time and scope of defendant depositions [Dkt. 7048, 7060, 7070, 7083, 7170] and motions to de-designate certain Defendant documents as privileged [Dkt. 7049].

3. Defendants' fact discovery of Class Plaintiffs.

215. On September 11, 2017, Defendants served their Second Set of Requests for Production and Inspection of Documents to Each of the Putative Rule 23(b)(3) Class Plaintiffs. This set included 110 individual requests, each of which sought information going back to at least 2006, while a significant portion of the requests sought information extending back to 2000. Responding to these requests was made more challenging by the fact that a majority of the requests were lifted verbatim from the Defendants' requests to the Direct Action Plaintiffs, which generally were large, sophisticated entities with significantly more expansive operations.

216. Class Counsel embarked upon a long and arduous meet-and-confer process over the document requests that spanned into 2018 and culminated in Defendants' motion to compel custodial searches in response to all of the requests and for certain

requests to extend back to 2000. [Dkt. 7139.] This was argued on January 23, 2018 [Dkt. 7142].

217. The process of gathering documents responsive to Defendants' requests was labor intensive, Class Counsel was required to search for documents dating back nearly two decades. As would be expected in such a search, many of the custodians with knowledge of these documents had either moved jobs, retired, or in some cases passed away.

218. Class Counsel generally employed associate-level attorneys to liaise with Class Plaintiffs to identify custodians and locations for responsive documents. Paralegals and litigation-support personnel collaborated to gather and process the data that was produced pursuant to the Defendants' requests. Teams of document-review attorneys reviewed the collected documents for responsiveness, privilege, and flagged particularly relevant documents. As with the review of the Defendants' documents, attorneys from the Co-Lead firms were in regular contact with the attorneys who reviewed Class Plaintiff documents to control quality and ensure consistency. Before documents were produced, paralegals and litigation-support staff inspected production for errors and technical deficiencies.

219. These efforts resulted in Class Plaintiffs producing approximately half-a-million additional documents, and reviewing millions more.

220. Defendants served their Second Set of Interrogatories to Each of the Putative (b)(3) Class Plaintiffs—totaling 59 interrogatories and subparts—on October 20, 2017. Class Counsel objected to and responded to these interrogatories on behalf of their clients on December 4, 2017. Class Counsel then began another lengthy and arduous meet-and-confer process relating to the interrogatories, simultaneously with negotiating the scope of their response to the document requests.

221. Defendants served Class Plaintiffs with Rule 30(b)(6) deposition notices on January 25, 2018. Class Counsel thereafter negotiated the scope of the notices with defense counsel.

222. Although the Defendants' deposition notices were not served until relatively late in the Phase II discovery period, Class Counsel anticipated that their clients would face additional depositions and therefore began preparing for deposition discovery of the Class Plaintiffs immediately after being appointed as (b)(3) counsel. Initially, this consisted of attending depositions of select Direct Action Plaintiff witnesses, in order to better understand the deposition strategies of defense counsel. As depositions approached, we worked with Class Plaintiffs to select designees, selected documents that were likely to be used as exhibits and outlining potential questions, and prepared the deponents in person for their depositions. After depositions were completed, Class Counsel summarized the depositions for the benefit of the other lawyers in the group.

223. Class Counsel defended four Class Representative depositions in Phase II, most of which lasted nearly the entire seven hours allowed by the Federal Rules of Civil Procedure. By the time they reached agreement in principle on the terms of the 2018 settlement, Class Counsel had also begun preparing the defend depositions of the other Class Plaintiffs.

4. Renewed expert discovery in Phase II of the litigation.

224. Class Counsel also worked extensively to update the expert-discovery record to account for the passage of time since the 2010—when the last Phase I expert reports were served—as well as to address substantive developments during that time period, such as the Durbin Amendment, the loosening of the Defendants' steering rules, Defendants' new strategies to maintain high interchange rates, and the market reactions to those developments. Important developments had also occurred abroad, which could

affect the legal analysis of Class Plaintiffs' claims, and therefore needed to be addressed through expert testimony. Changes in the substantive law regarding class certification would also necessitate updated expert analysis from expert economists.

225. Soon after the Second Circuit reversed the 2012 Settlement, Class Plaintiffs began working with Dr. Frankel and his firm, Coherent Economics, to update the expert work that had been done in Phase I. Class Counsel worked together with Dr. Frankel and other economists and staff at Coherent to agree upon expert tasks for Phase II, devise outlines for expert reports, and strategize as to areas of discovery to seek from the Defendants. Because of their familiarity with the antitrust and economic underpinnings of this case, the senior-most attorneys among the Co-Lead Counsel and the Co-Chairs of the Executive Committee firms had the most extensive substantive contacts with Dr. Frankel and Coherent.

226. In addition to Coherent, Class Counsel engaged another nationally recognized consulting firm to assist in the expert analysis of the case and potentially submit an expert report. The same group of lawyers worked with this new firm and helped coordinate its work with that of Coherent.

227. The experts retained by Class Counsel necessarily required updated data from the defendants in order to conduct their analyses. A subset of Co-Lead counsel therefore worked with counsel for the other plaintiff groups to receive updated data discovery from the Defendants. This included correspondence and meet-and-confer conversations spanning over a year with counsel for the networks, and inputs from economic consultants and to secure the data that our experts required.

228. In an attempt to secure additional documents and data to be used in merits and class expert reports, Class Counsel served requests for production of documents on the bank defendants in 2017. In the following months, Class Counsel had several in-

person and telephonic meet-and-confer sessions with counsel for the bank defendants to resolve objections and secure responsive data.

## X. Mediation and the 2018 Settlement.

229. All antitrust litigation is risky, and big complex antitrust cases such as this one are exceptionally risky. There are two kinds of risks that should factor into the calculus of any contemplated settlement. The first is the risk of delay. Because of its difficulty and size, and the circuitous path of appeal following the 2012 Settlement, this case has now been pending over thirteen years. Further delay after litigation and a trial verdict, or even settlement, prolongs the period that merchants could possibly recover monetary compensation for past harm.

230. The second risk is the ever-present prospect of losing in litigation, combined with the risk of the applicable law changing adversely to the interests of the class over time. As to risk of loss, nothing could more powerfully demonstrate this risk than the fact that one resolution to the case – the 2012 Settlement – was lost on appeal. A trial verdict and judgment would also be subject to the risk of reversal at the Second Circuit. Risks also exist for class certification. More recently adopted procedural hurdles also raise the stakes. For example, within a few weeks of the 2012 Settlement, the Supreme Court decided Comcast Corp. v. Behrend, 569 U.S. 27 (2013), which further elevated the hurdles one must overcome to successfully prosecute class actions. With these risks in mind, Co-Lead Counsel thought it most prudent to attempt to achieve a new settlement through renewed mediation while continuing to prepare for trial.

231. Our mediation team had significant experience. Each of the three individuals who served on a day-to-day basis as Co-Lead Counsel as well as the chairs of the Executive Committee has tried to verdict antitrust cases with damages approaching or over a hundred million dollars. Other partners in the three Co-Lead Counsel firms have

tried to verdict many cases of a similar magnitude. Moreover, these firms have litigated massive cases in many industries involving antitrust, securities, and/or environmental claims, including in the payment industry, over the last three decades with exemplary results for their clients. In addition, almost all of the other Rule 23(b)(3) Class Counsel firms bring substantial trial, class-action, and antitrust expertise to their roles in the case. All Class Counsel and other counsel for the Rule 23(b)(3) Class Plaintiffs support this settlement as fair, reasonable, and adequate and certainly meeting the standard for preliminary approval

232. After the Second Circuit's June 30, 2016 opinion, it was necessary that the class quickly make contact with the Defendants to discuss next steps. In part this was due to the fact that the 2012 Settlement had a termination provision that required a party who was entitled to terminate the agreement, such as after a reversal of the settlement approval on appeal, to give the required notice within 20 days. This would precipitate an unwinding of the agreement and all of the infrastructure that the parties had implemented for a settled resolution, such as the escrow agreements and accounts, claims administration and the like. This was of concern to both sides because if they wished to continue mediation, it was important to maintain the work completed in the event that any new settlement was achieved in a relatively short period of time. To that end, the parties agreed to a series of extensions as they resumed litigation and explored a resumption of new settlement negotiations concerning a single Rule 23(b)(3) class.

233. The Defendants were willing to avoid outright termination of the 2012 Settlement through a series of extensions. This indicated to us there was hope for renewing settlement discussions for a new agreement on behalf of the Rule 23(b)(3) Class. Despite this indication, of course, we had no choice but to persist in the ongoing discovery between the DAPs and Defendants. This was particularly true since the discovery we conducted during the first phase of the litigation ended in 2010 – six years

earlier – and there had been many new developments in the payment card industry during the interim.

234. Following several months devoted to our appointment as Co-Lead Counsel for the damages class, and reengagement in the pending litigation discovery, the parties resumed discussions about making a new effort to try to resolve the claims of the damages class. In addition to their own experiences and expertise, we again received the valuable assistance of two of the most experienced and respected mediators in the country, Professor Eric Green and Judge Edward Infante. At all times we insisted that our negotiations on behalf of the Rule 23(b)(3) Class be completely independent from the Rule 23(b)(2) injunctive relief class and that a settlement, if any, must not be contingent on a Rule 23(b)(2) class settlement or any other settlement.

235. The parties approached Professor Green and Judge Infante in February of 2017. From then through the agreement in principle that the parties reached on June 7, 2018, Class Counsel engaged in twelve in-person mediation sessions, involving counsel for all, or nearly all, parties to the 23(b)(3) class case, and had countless telephone calls with counsel for defendants, the mediators, or both. Many of the mediation sessions were preceded by the exchange of draft settlement terms or proposed settlement language by one or both sides.

236. Of course, the intensive mediation activities and the exchange of terms and language necessitated even more discussions and coordination among Co-Lead Counsel and the Co-Chairs of the Executive Committee regarding strategy for these mediation sessions.

237. Class Counsel also made sure that the injunctive relief claims of the Rule 23(b)(2) Class Plaintiffs in Barry's Cut Rate Stores, Inc., et. al. v. Visa, Inc., et al., MDL No. 1720, Docket No. 05-md-01720-MKB-JO ("Barry's") are explicitly excluded from, and unaffected by, the release and remain to be resolved in the Barry's case, that the

Settlement Class members retain their rights as prospective class members in Barry's, that the release of claims is of limited duration, and that only those claims arising out of or relating to conduct or acts that were alleged or raised or that could have been alleged or raised relating to the subject matter of the litigation are released.

238. Despite the parties' diligent efforts to reach agreement on material terms, the mediators realized that the parties had reached impasse on certain key issues by late May of 2018, and received the parties' consent to resolve that impasse by issuing a mediators' proposal, which like the 2012 proposal, would have to be accepted or rejected in its totality.

239. All parties accepted the mediators' proposal on June 5, 2018 and finalized their agreement on the principal terms of a settlement during an in-person meeting in New York two days later.

240. The settlement greatly benefits the merchant class. The cash amount of the settlement– approximately $6.26 billion, before reduction for opt-outs, if any – is the largest antitrust class-action settlement in the history of U.S. courts. In addition, Class Counsel note that, even without an agreement to do so, the remaining anti-steering rules previously enforced by Visa and MasterCard that were eliminated or modified by the 2012 Settlement Agreement have not been re-instated. Class Counsel were and are unanimously in favor of settling the case on the terms embodied in the 2018 Settlement.

241. Class Counsel were fully informed of the significant litigation risks based on an extensive factual record, expert opinions and insights, and the previously briefed and argued class, dispositive, and Daubert motions. Absent settlement, all of these motions would have had to be briefed and argued again to address the additional discovery and issues arising since then. Through this settlement, the Rule 23(b)(3) Settlement Class gets the certainty of a substantial monetary recovery instead of enduring the risk of delay, and the possibility of no recovery at all if their claims were

litigated through summary judgment, trial and post-trial proceedings. Thus, in our collective judgment, this resolution easily exceeds the applicable legal standard of being fair, adequate and reasonable to the Rule 23(b)(3) Damages Class.

## XI. Conclusion.

242. The preceding paragraphs in this declaration have described in some measure the great effort, dedication and expense that has been required to bring this complex and lengthy case to a successful conclusion. When we started this case, Visa and Mastercard were consortia of competing banks whose primary goal in their dual ownership of the payment-card networks was to drive card issuance and use through the promise of higher interchange rates, paid to the banks, and protected by anti-steering rules. This struggle has spanned over thirteen years to date. Class Counsel built a record based on millions of pages of documents testimony from hundreds of witnesses, critically analyzed that evidence, and and prepared for trial,. And the Class Plaintiffs have responded in kind to the reciprocal discovery demands of Defendants. The parties engaged in long, arduous, and often-stalled settlement negotiations that began before the Great Recession that eliminated some of the Bank Defendants originally named.

243. But today, because of the efforts of Class Counsel, and their merchant clients, we have a much improved payment-card world. The banks have divested their ownership of the networks, Congress has provided through the Durbin Amendment a low-cost debit-card alternative to which merchants can migrate, and the Justice Department has imbedded the right of merchants to encourage lower-cost payment forms through discounts or other incentives. This proposed settlement complements these reforms by providing an unprecedented sum of monetary relief for past damages. Certainly, this settlement is preferable to continuing contentious litigation against Visa,

Mastercard, and the banks for years to come, with no guarantee of a more favorable outcome.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: September 17, 2018
Minneapolis, Minnesota.

K. Craig Wildfang

89273767.6

# EXHIBIT 1

EXHIBIT 1 to the Declaration of K. Craig Wildfang, Esq.

DOCUMENT PRODUCTIONS - PHASE I

| DEFENDANT | DOCUMENTS | PAGES |
|---|---|---|
| MasterCard | 692,331 | 12,700,836 |
| Visa | 855,064 | 11,376,679 |
| Bank of America | 110,267 | 6,448,787 |
| Banks Citi | 129,790 | 2,595,857 |
| Banks FNBO | 124,792 | 1,184,764 |
| Banks SunTrust | 53,164 | 845,324 |
| Barclays | 22,994 | 877,604 |
| Capital One | 35,074 | 972,988 |
| Chase | 238,252 | 3,708,686 |
| Fifth Third | 217,059 | 2,549,733 |
| HSBC | 55,833 | 708,610 |
| MasterCard/DOJ | 89,525 | 496,758 |
| National City | 12,037 | 259,926 |
| Texas Independent | 7,220 | 51,300 |
| Visa/CID | 164,574 | 1,069,618 |
| Wachovia | 29,476 | 291,363 |
| Washington Mutual | 41,517 | 1,116,489 |
| Wells Fargo | 44,416 | 738,034 |
| Non MDL Deposition transcripts and exhibits | 15,169 | 330,065 |
| Legacy productions | 1,035,482 | 7,709,856 |
| TOTAL | 3,974,036 | 56,033,277 |
| CLASS PLAINTIFF | DOCUMENTS | PAGES |
| Affiliated Foods Midwest Cooperative | 6,820 | 36,453 |
| Capital Audio Electronics, Inc. | | 5,406 |
| CHS, Inc. | 98,385 | 497,085 |
| Coborn's Incorporated | 10,625 | 82,716 |
| Crystal Rock LLC | | 7,356 |
| D'Agostino Supermarkets | 15,556 | 220,929 |
| Discount Optics Inc | | 1,626 |
| Jetro Holdings, Inc. | 7,588 | 151,449 |
| Leon's Transmission Services, Inc. | | 27, 871 |
| National Association of Convenience Stores | 25,474 | 263,744 |
| National Community Pharmacists Association | 1,313 | 30,765 |
| National Cooperative Grocers Association | 2,543 | 7,473 |
| National Grocers Association | 10,116 | 183,657 |
| National Restaurant Association | 892 | 17,416 |
| NATSO | 14,521 | 99,808 |
| Parkway Corp. | | 20,886 |
| Payless ShoeSource Inc. | | 476,759 |
| Photos Etc. Corporation | 2,031 | 17,945 |
| Traditions Ltd. | 1,440 | 6,157 |
| TOTAL | 197,304 | 2,127,630 |
| INDIVIDUAL PLAINTIFF | DOCUMENTS | PAGES |
| Ahold USA, Inc. | 95,683 | 903,969 |
| Albertson's Inc. | 53,615 | 1,833,260 |

EXHIBIT 1 to the Declaration of K. Craig Wildfang, Esq.

DOCUMENT PRODUCTIONS - PHASE I

| | | |
|---|---|---|
| Bi-Lo LLC | | 684,227 |
| Delhaize America, Inc. | | 958,900 |
| Hy-Vee, Inc. | 16,442 | 134,054 |
| Kroger Co. | 151,385 | 930,963 |
| Maxi Drug | | |
| Meijer, Inc. | | |
| Pathmark Stores, Inc. | 13,622 | 263,710 |
| Publix Supermarkets, Inc. | | |
| QVC, Inc. | | |
| Raley's | | |
| Rite Aid Corporation (includes Brooks, Eckerd) | | 2,208,752 |
| Safeway | 16,782 | 170,179 |
| Supervalue Inc. | | |
| Walgreen Co. | 48,293 | 355,025 |
| TOTAL | 395,822 | 8,443,039 |

| | | |
|---|---|---|
| ALL PARTY TOTAL | 4,567,162 | 66,603,946 |

# EXHIBIT 2

EXHIBIT 2 to the Declaration of K. Craig Wildfang, Esq.

DEPOSITIONS OF DEFENDANTS - PHASE I

| Deponent | Date | Company | Location |
|---|---|---|---|
| Coscia, Albert 30(b)(6) on Organizational | 6/15/2006 | Visa USA | San Francisco, CA |
| Thoma, Joy 30(b)(6) on Organizational | 6/29/2006 | MasterCard | New York, NY |
| Hudson, Michael Sean 30(b)(6) on Organizational | 7/11/2006 | SunTrust | Atlanta, GA |
| McDonnell, Kristen 30(b)(6) on Organizational | 7/12/2006 | Washington Mutual | San Francisco, CA |
| Baxter, Nicholas 30(b)(6) on Organizational | 7/14/2006 | First National Bank of Omaha | Omaha, NE |
| Tabaczynski, Jeanine 30(b)(6) on Organizational | 7/18/2006 | Wachovia | Atlanta, GA |
| Madairy, David 30(b)(6) on Organizational | 7/19/2006 | Bank of America NA | New York, NY |
| Estabrook, Bard 30(b)(6) on Organizational | 7/20/2006 | Chase (Debit, issuing) | Columbus, OH |
| Wright, Michael 30(b)(6) on Organizational | 7/20/2006 | Bank of America NA | New York, NY |
| Counsellor, Melissa 30(b)(6) on Organizational | 7/21/2006 | Barclays | New York, NY |
| Potter, Catherine Owens 30(b)(6) on Organizational | 7/24/2006 | Texas Independent Bancshares | Galveston, TX |
| Goeden, David 30(b)(6) on Organizational | 7/25/2006 | HSBC | New York, NY |
| Rhein, Kevin 30(b)(6) on Organizational | 7/25/2006 | Wells Fargo | Minneapolis, MN |
| Likerman, Karyn 30(b)(6) on Organizational | 7/26/2006 | Citicorp Credit Services | New York, NY |
| Smith, Kathryn Jo 30(b)(6) on Organizational | 7/26/2006 | Chase Bank USA | Dallas, TX |
| Howe, Gaylon 30(b)(6) on Organizational | 7/27/2006 | Visa International | San Francisco, CA |
| Bostwick, William 30(b)(6) on Organizational | 7/28/2006 | National City | Kalamazoo, MI |
| Brashears, Kerry 30(b)(6) on Organizational | 7/31/2006 | SunTrust | Atlanta, GA |
| Banaugh, Michelle 30(b)(6) on Organizational | 8/4/2006 | Wells Fargo | San Francisco, CA |
| Pyke, Jacqueline 30(b)(6) on Organizational | 8/11/2006 | Capital One | Falls Church, VA |
| Dinehart, Shelley 30(b)(6) on Organizational | 10/17/2006 | Chase | Wilmington, DE |
| Bell, Chris 30(b)(6) on Organizational | 11/1/2006 | Fifth Third | Cincinnati, OH |

EXHIBIT 2 to the Declaration of K. Craig Wildfang, Esq.

DEPOSITIONS OF DEFENDANTS - PHASE I

| Deponent | Date | Company | Location |
|---|---|---|---|
| Doyle, Charles 30(b)(6) on Visa BOD | 11/29/2006 | Texas Independent Bancshares | Texas City, TX |
| Hsu, Peter 30(b)(6) on June 2003 interchange rate change | 6/14/2007 | Visa USA | San Francisco, CA |
| Haarma, Hannu | 8/2/2007 | Visa USA | San Francisco, CA |
| Towne, Robert 30(b)(6) on June 2003 interchange rate change | 8/30/2007 | Visa USA | Washington, DC |
| Lauritzen, Bruce | 9/14/2007 | First National Bank of Omaha | Omaha, NE |
| Jonas, Steven 30(b)(6) on June 2003 interchange rate change | 9/18/2007 | MasterCard | New York, NY |
| Kapteina, Elizabeth | 10/11/2007 | MasterCard International | New York, NY |
| Hawkins, Jay | 11/15/2007 | Visa USA | San Francisco, CA |
| Miller, Stephanie | 11/28/2007 | Chase | Columbus, OH |
| Batchelder, Elizabeth | 11/30/2007 | Bank of America NA | Charlotte, NC |
| Cullinane, Cathy | 12/4/2007 | Visa USA | San Francisco, CA |
| Williams, Elizabeth | 12/4/2007 | Visa USA | San Francisco, CA |
| Gelb, Valerie | 12/6/2007 | MasterCard International | New York, NY |
| Leoni, Giovanni | 12/14/2007 | Visa USA | San Francisco, CA |
| Bhamani, Riaz | 12/17/2007 | Bank of America NA | Charlotte, NC |
| Middleton, Dan | 12/20/2007 | Wells Fargo | San Francisco, CA |
| Quinlan, Greg | 12/20/2007 | Citigroup | Chicago, IL |
| Gore, Fred | 1/8/2008 | MasterCard International | Boston, MA |
| Kelleher, John | 1/8/2008 | Visa International (former), Washington Mutual (present) | San Francisco, CA |
| Fam, Hany | 1/9/2008 | MasterCard International | New York, NY |
| Marshak, Robert | 1/9/2008 | Visa USA | San Francisco, CA |
| Offenberg, Alex | 1/9/2008 | Visa USA | San Francisco, CA |
| Beck, Gary | 1/11/2008 | Visa USA | Denver, CO |
| Demanett, David | 1/11/2008 | Wells Fargo | Minneapolis, MN |
| Rossi, Debra | 1/15/2008 | Wells Fargo | San Francisco, CA |
| Morais, Diane | 1/16/2008 | Bank of America NA | Charlotte, NC |
| Eulie, Steven | 1/17/2008 | First National Bank of Omaha | Omaha, NE |
| Madairy, David | 1/17/2008 | Bank of America NA | Charlotte, NC |
| Moss, Kevin | 1/17/2008 | Wells Fargo | San Francisco, CA |
| Gauer, Matt | 1/18/2008 | First National Bank of Omaha | Omaha, NE |
| Thom, Christopher | 1/18/2008 | MasterCard International | New York, NY |
| Cramer, David | 1/22/2008 | Visa USA (former) | Cincinnati, OH |
| D'Agostino, Vincent | 1/24/2008 | Chase | New York, NY |
| Aafedt, John | 1/29/2008 | Visa USA | San Francisco, CA |
| Hunt, Donna | 1/30/2008 | Visa International | San Francisco, CA |
| Morrissey, Richard | 1/30-31/2008 | Visa USA | San Francisco, CA |
| Robinson, Chris | 1/30/2008 | Citicorp Credit Services | New York, NY |
| Fisher, Katherine | 1/31/2008 | Bank of America NA | Charlotte, NC |
| Leoni, Giovanni | 1/31/2008 | Visa USA | San Francisco, CA |

EXHIBIT 2 to the Declaration of K. Craig Wildfang, Esq.

DEPOSITIONS OF DEFENDANTS - PHASE I

| Deponent | Date | Company | Location |
|---|---|---|---|
| DeVinney, Ericka | 2/5/2008 | Barclays | New York, NY |
| Best, Wayne | 2/6/2008 | Visa USA | San Francisco, CA |
| Forsey, Gareth | 2/8/2008 | MasterCard | New York, NY |
| Zuercher, Peter | 2/8/2008 | Visa USA | San Francisco, CA |
| Duffy, Michael | 2/11/2008 | Chase (Paymentech) | Dallas, TX |
| Lamba, Lakhbir | 2/19/2008 | National City | Cleveland, OH |
| Campbell, Radie Dickey | 2/20/2008 | Texas Independent Bancshares | Texas City, TX |
| DePhillipis, Ed | 2/20/2008 | MasterCard International | New York, NY |
| Huber, Marsha | 2/20/2008 | Chase (Chase debit) | Columbus, OH |
| Hughes, Kevin | 2/20/2008 | Citibank | New York, NY |
| Daly, Michael | 2/22/2008 | Bank of America NA | Wilmington, DE |
| Reid, Margaret | 2/22/2008 | Visa International | San Francisco, CA |
| Campbell, William | 2/26/2008 | Chase | New York, NY |
| Miller, Larry | 2/26/2008 | MasterCard International | New York, NY |
| Swales, Roger | 2/27/2008 | Visa International | San Francisco, CA |
| Kaiser, Caryn | 2/28/2008 | Chase (JP Morgan Corp) | Wilmington, DE |
| Landheer, Jamie | 2/28/2008 | Fifth Third | Cincinnati, OH |
| Murphy, Timothy 30(b)(6) on IPO | 2/28-29/2008 | MasterCard International | New York, NY |
| Robinson, Benjamin | 3/3/2008 | Bank of America NA | Charlotte, NC |
| Garofalo, Edward | 3/5/2008 | Citibank | New York, NY |
| Drury, Larry | 3/7/2008 | Visa International | San Francisco, CA |
| Pukas, Julie | 3/7/2008 | Citigroup | New York, NY |
| Abrams, Steve | 3/13/2008 | MasterCard | New York, NY |
| Lee, Bill | 3/13/2008 | Visa International | San Francisco, CA |
| Ehrlich, Susan | 3/14/2008 | Washington Mutual | Chicago, IL |
| Mattea, Karen | 3/18/2008 | Citigroup | Chicago, IL |
| Sommer, Kenneth | 3/20/2008 | Visa International | San Francisco, CA |
| Cullen, Lorinda | 3/25/2008 | Chase | New York, NY |
| Lampasona, Peter | 3/25/2008 | MasterCard | New York, NY |
| Pyke, Mark | 3/25/2008 | Bank of America NA | New York, NY |
| Rossi, Debra | 3/25/2008 | Wells Fargo | San Francisco, CA |
| Vaglio, Steven | 3/28/2008 | Bank of America NA | Charlotte, NC |
| Gustafson, Pete | 4/1/2008 | Visa USA (former) | San Francisco, CA |
| Fox, Eric | 4/2/2008 | Capital One | Richmond, VA |
| Steele, Tolan | 4/2-3/2008 | Visa USA | San Francisco, CA |
| Kresge, David | 4/3/2008 | Bank of America NA | Tampa, FL |
| League, Steven | 4/4/2008 | Bank of America NA | Wilmington, DE |
| Perry, Linda | 4/8/2008 | Visa USA | San Francisco, CA |
| Raymond, Douglas | 4/8/2008 | Mastercard | New York, NY |
| Buse, Elizabeth individual and 30(b)(6) on Premium Cards | 4/10-11/2008 | Visa USA | San Francisco, CA |
| Fischer, Raymond | 4/10/2008 | Chase | Wilmington, DE |

EXHIBIT 2 to the Declaration of K. Craig Wildfang, Esq.

DEPOSITIONS OF DEFENDANTS - PHASE I

| Deponent | Date | Company | Location |
|---|---|---|---|
| Doyle, Deborah individual and 30(b)(6) on Merchant Rules | 4/21-22/2008 | MasterCard | New York, NY |
| Jonas, Steven 30(b)(6) on Interchange Methodology | 4/23-24/2008 | MasterCard | New York, NY |
| Gallo, Paul | 4/24/2008 | Visa USA | Chicago, IL |
| Goldman, Ira | 4/24-25/2008 | Chase | New York, NY |
| Sabiston, Diana | 4/24/2008 | Citigroup | Jacksonville, FL |
| Morrison, Douglas | 4/30/2008 | Citigroup | Chicago, IL |
| Siraj, Mohamed | 4/30/2008 | SunTrust | Atlanta, GA |
| Baum, Elaine | 5/1/2008 | Visa USA | San Francisco, CA |
| Healy, Tim | 5/7/2008 | Wells Fargo | San Francisco, CA |
| Clay, Charmaine | 5/8/2008 | Wells Fargo | San Francisco, CA |
| Lehman, Luba | 5/8/2008 | Visa USA | San Francisco, CA |
| Banaugh, Michelle | 5/9/2008 | Wells Fargo | San Francisco, CA |
| Johnson, William | 5/14/2008 | Citicorp Credit Services | Atlanta, GA |
| Portelli, Jeffery | 5/14/2008 | MasterCard | New York, NY |
| Rethorn, Mike | 5/15/2008 | Mastercard | New York, NY |
| Knitzer, Peter | 5/21/2008 | Citicorp Credit Services | New York, NY |
| Sachs, Jeff | 5/21/2008 | Visa USA | San Francisco, CA |
| Christian, Frank Phillip | 5/22/2008 | Chase | Wilmington, DE |
| Baxter, Nicholas | 5/29/2008 | First National Bank of Omaha | Omaha, NE |
| Lyons, Richard | 5/29/2008 | Mastercard | New York, NY |
| Kadletz, Edward Michael | 5/30/2008 | Wells Fargo | Minneapolis, MN |
| Poorman Tschantz, Martha | 6/11/2008 | Bank of America NA | Wilmington, DE |
| Yankovich, Margaret | 6/13/2008 | HSBC | New York, NY |
| Sheedy, William 30(b)(6) on Interchange Methodology | 6/17-18/2008 | Visa USA | New York, NY |
| Birnbaum, Robert | 6/18/2008 | Chase | Wilmington, DE |
| Martinez, Adrian | 6/23/2008 | HSBC | New York, NY |
| James, Michael | 6/25/2008 | Wells Fargo | San Francisco, CA |
| Srednicki, Richard | 6/25/2008 | Chase | Wilmington, DE |
| Grathwohl, Sue | 6/26/2008 | Fifth Third | Cincinnati, OH |
| Poturalski, Joseph | 6/26/2008 | Visa USA | Denver, CO |
| Barth, Eric | 6/27/2008 | Bank of America NA | Louisville, KY |
| Beidler, Melissa | 6/27/2008 | Visa USA | San Francisco, CA |
| Mangan, Kara | 6/27/2008 | Fifth Third | Cincinnati, OH |
| Bruesewitz, Jean | 7/2/2008 | Visa USA | San Francisco, CA |
| Charron, Dan | 7/2/2008 | Chase | Dallas, TX |
| Friedman, Theodore | 7/2/2008 | MasterCard | New York, NY |
| Attinger, Tim | 7/8/2008 | Visa USA | San Francisco, CA |
| Jorgensen, Chris | 7/9/2008 | Visa USA | San Francisco, CA |
| Munto, Tim | 7/15/2008 | Bank of America NA | Louisville, KY |
| Stewart, James | 7/16/2008 | Barclays | Wilmington, DE |
| McWilton, Chris | 7/17/2008 | MasterCard | New York, NY |

EXHIBIT 2 to the Declaration of K. Craig Wildfang, Esq.

DEPOSITIONS OF DEFENDANTS - PHASE I

| Deponent | Date | Company | Location |
|---|---|---|---|
| Donnelly, Kathleen | 7/22/2008 | Citigroup | Hagerstown, MD |
| Peppas, Jamie | 7/23/2008 | HSBC | New York, NY |
| Schultz, Kevin | 7/24/2008 | Visa USA | Milwaukee, WI |
| Olebe, Edward 30(b)(6) on Premium Cards | 7/25/2008 | MasterCard | New York, NY |
| Vague, Richard | 7/25/2008 | Barclays | Philadelphia, PA |
| Malone, Wayne | 7/28/2008 | Citigroup | New York, NY |
| Groch, Jon | 7/29/2008 | Fifth Third | Cincinnati, OH |
| McElhinney, Bruce | 7/29/2008 | Visa USA | San Francisco, CA |
| Hambry, Doug | 7/30/2008 | Visa USA | San Francisco, CA |
| Marshall, Ruth Ann | 7/30/2008 | MasterCard | Santa Fe, NM |
| Fellman, Herbert | 7/31/2008 | Bank of America NA | Charlotte, NC |
| Ruwe, Steve | 8/5/2008 | Visa USA (former) | Chicago, IL |
| Kranzley, Art | 8/6/2008 | MasterCard | New York, NY |
| Murdock, Wendy | 8/7/2008 | MasterCard | New York, NY |
| Kilga, Ken | 8/8/2008 | HSBC | New York, NY |
| DiSimone, Harry | 8/14/2008 | Chase | New York, NY |
| Phillips, G. Patrick | 8/14/2008 | Bank of America NA | Charlotte, NC |
| Van Ryn, Carolyn | 8/14/2008 | MasterCard | New York, NY |
| Gardner, John | 8/15/2008 | Visa USA | Denver, CO |
| Hackett, Gail | 8/15/2008 | MasterCard | New York, NY |
| Pinkerd, Stacey individual and 30(b)(6) on Convergence Strategy | 8/19-20/2008 | Visa USA | San Francisco, CA |
| Taglione, Richard | 8/20/2008 | Chase | Wilmington, DE |
| Halle, Bruce | 8/27/2008 | Citigroup | New York, NY |
| Baker, David | 9/4/2008 | Fifth Third | Cincinnati, OH |
| Partridge, John 30(b)(6) on Reorganization | 9/4-5/2008 | Visa USA | San Francisco, CA |
| Towne, Robert | 9/4-5/2008 | Visa USA | Washington, DC |
| Peirez, Joshua | 9/5/2008 | MasterCard | New York, NY |
| Lorberg, Dana | 9/10/2008 | MasterCard | New York, NY |
| Weichert, Margaret | 9/10/2008 | Bank of America NA | Charlotte, NC |
| DiSimone, Harry | 9/11/2008 | Chase | New York, NY |
| Knupp, Billy | 9/11/2008 | Visa USA | San Francisco, CA |
| Massingale, Faith | 9/16/2008 | Citi (former) | New York, NY |
| Munson, Carl | 9/17/2008 | MasterCard | New York, NY |
| Nadeau, Robert 30(b)(6) on Merchant Rules | 9/17/2008 | Chase | Dallas, TX |
| Weaver, Lance | 9/17/2008 | Bank of America NA | Wilmington, DE |
| Hammonds, Bruce | 9/22/2008 | Bank of America NA | Wilmington, DE |
| Mehta, Siddharth | 10/1/2008 | HSBC (former) | Chicago, IL |
| Wechsler, Robert | 10/1/2008 | Chase | Dallas, TX |
| Flood, Gary | 10/2/2008 | MasterCard | New York, NY |

EXHIBIT 2 to the Declaration of K. Craig Wildfang, Esq.

DEPOSITIONS OF DEFENDANTS - PHASE I

| Deponent | Date | Company | Location |
|---|---|---|---|
| Rhein, Kevin | 10/2/2008 | Wells Fargo | Minneapolis, MN |
| Saunders, Joseph | 10/2/2008 | Visa USA | San Francisco, CA |
| Hinderaker, James | 10/7/2008 | Bank of America NA | Charlotte, NC |
| Moran, Patrick | 10/7/2008 | Fifth Third | Cincinnati, OH |
| Naffah, Albert 30(b)(6) on Australia Related Topics | 10/7/2008 | MasterCard | New York, NY |
| Steel, Tim | 10/8/2008 | Visa Europe | London, England |
| Boeding, Donald | 10/9/2008 | Fifth Third | Cincinnati, OH |
| Stumpf, John | 10/9/2008 | Wells Fargo | San Francisco, CA |
| Davila, Kelly Ann 30(b)(6) on Merchant Rules | 10/15/2008 | Bank of America NA | Charlotte, NC |
| Heuer, Alan | 10/16/2008 | MasterCard | New York, NY |
| Macnee, Walter | 10/17/2008 | MasterCard | New York, NY |
| Humphrey, Thomas 30(b)(6) on Merchant Rules | 10/21/2008 | Fifth Third | Cincinnati, OH |
| Rajamannar, M.V. | 10/21/2008 | Citigroup | New York, NY |
| Reilly, Patricia | 10/21/2008 | Chase | New York, NY |
| Dahir, Victor | 10/22/2008 | Visa USA | San Francisco, CA |
| Goosse, Etienne 30(b)(6) on Europe and UK | 10/21-22/2008 | MasterCard | New York, NY |
| Rogers, Dan | 10/24/2008 | Wells Fargo (former), Presently at Fifth Third Bank | San Francisco, CA |
| Webb, Susan | 10/27/2008 | Chase | New York, NY |
| Wright, Michael | 10/29/2008 | Bank of America NA | Wilmington, DE |
| Holman, Jerrilyn | 10/30/2008 | SunTrust | Atlanta, GA |
| Bergman, Ginger | 11/4/2008 | Visa USA | San Francisco, CA |
| Kranzley, Art 30(b)(6) on Technology Issues | 11/4/2008 | MasterCard | New York, NY |
| Lorberg, Dana 30(b)(6) on Technology Issues | 11/4/2008 | MasterCard | New York, NY |
| McGee, Liam | 11/5/2008 | Bank of America NA | Charlotte, NC |
| Scharf, Charles | 11/5/2008 | Chase | New York, NY |
| Steele, Tolan 30(b)(6) on European/UK Topics and Australia | 11/5-6/2008 | Visa USA | San Francisco, CA |
| Atal, Vikram | 11/6/2008 | CitiGroup | New York, NY |
| Hanft, Noah | 11/7/2008 | MasterCard | New York, NY |
| Jenkins, Ben | 11/7/2008 | Wachovia | Charlotte, NC |
| Dimon, Jamie | 11/13/2008 | Chase | New York, NY |
| Boehm, Steve | 11/17/2008 | Wachovia | Charlotte, NC |
| Selander, Robert | 11/17/2008 | MasterCard | Purchase, NY |
| Alexander, Lou Anne | 11/19/2008 | Wachovia | Charlotte, NC |
| Freiberg, Steve | 11/20/2008 | CitiGroup | New York, NY |
| Sheedy, William | 11/20-21/2008 | Visa USA | Washington, DC |

EXHIBIT 2 to the Declaration of K. Craig Wildfang, Esq.

DEPOSITIONS OF DEFENDANTS - PHASE I

| Deponent | Date | Company | Location |
|---|---|---|---|
| Stein, Alejandro | 11/21/2008 | Chase | New York, NY |
| Floum, Joshua | 12/2/2008 | Visa USA | San Francisco, CA |
| Flanagan, Veronica 30(b)(6) on Merchant Rules | 12/4/2008 | Wells Fargo | New York, NY |
| Grathwohl, Sue | 12/8/2008 | Fifth Third | Cincinnati, OH |
| Mangan, Kara | 12/8/2008 | Fifth Third | Cincinnati, OH |
| Gracia, Anthony 30(b)(6) on Merchant Relations | 12/9/2008 | MasterCard | New York, NY |
| Sharkey, Thomas 30(b)(6) on Merchant Relations | 12/9/2008 | MasterCard | New York, NY |
| Doyle, Charles | 12/12/2008 | Texas Independent Bancshares | Texas City, TX |
| Portelli, Jeffery 30(b)(6) on Premium Cards | 12/12/2008 | MasterCard | New York, NY |
| Allen, Paul | 12/16/2008 | Visa USA | San Francisco, CA |
| Coghlan, John | 12/16/2008 | Visa USA | San Francisco, CA |
| Attinger, Tim 30(b)(6) on Technology | 12/17/2008 | Visa USA | San Francisco, CA |
| Gonella, Michael 30(b)(6) on Technology | 12/17/2008 | Visa USA | San Francisco, CA |
| Gregory, Robert individual and 30(b)(6) on Card Business | 12/17-18/2008 | Capital One | Richmond, VA |
| Pascarella, Carl | 12/17-18/2008 | Visa USA | San Francisco, CA |
| Somerville, Una 30(b)(6) on Merchant Rules | 12/19/2008 | Visa USA | San Francisco, CA |
| Walker, Richard 30(b)(6) on Card Business | 12/19/2008 | Capital One | Richmond, VA |
| Selander, Robert | 1/26/2009 | MasterCard | Purchase, NY |
| Fulton, Henry | 2/12/2009 | Bank of America NA | Charlotte, NC |
| Fairbank, Richard | 4/7/2009 | Capital One | McLean, VA |
| Somerville, Una 30(b)(6) on Merchant Rules | 4/7/2009 | Visa USA | San Francisco, CA |

# EXHIBIT 3

EXHIBIT 3 to the Declaration of K. Craig Wildfang, Esq.

DEPOSITIONS OF CLASS PLAINTIFFS - PHASE I

| Deponent | Date | Company | Location |
|---|---|---|---|
| Feeney, James 30(b)(6) on Organizational Structure | 8/10/2006 | Payless | Topeka, KS |
| Schumann, Michael | 11/15/2007 | Traditions | Minneapolis, MN |
| Schermerhorn, David | 12/4/2007 | NCGA | Minneapolis, MN |
| Agan, Colleen | 1/8/2008 | NCPA | Washington, DC |
| Ivancikova, Daniela | 1/8/2008 | Parkway (former) | Bala Cynwyd, PA |
| D'Agostino, Nicholas | 1/10/2008 | D'Agostino | New York, NY |
| Archer, Vincent | 1/17/2008 | Leon's | Los Angeles, CA |
| Emmert, Brian | 1/17/2008 | Jetro | New York, NY |
| Buckley, Neil | 1/18/2008 | D'Agostino | New York, NY |
| Schumacher, Jerome | 1/24/2008 | Coborns | Minneapolis, MN |
| Smith, Gary (Chuck) | 1/24/2008 | NCPA | Washington, DC |
| Vasco, Nunzi | 1/31/2008 | Capital Audio | New York, NY |
| Menard, Steve | 2/5/2008 | CHS | Minneapolis, MN |
| McPadden, Denise | 2/8/2008 | D'Agostino | New York, NY |
| Thueringer, Robert | 2/12/2008 | Coborns | Minneapolis, MN |
| Hall, Terry | 2/20/2008 | NCPA | Washington, DC |
| Gule, Roberta Avoletta | 2/21/2008 | Crystal Rock | Waterbury, CT |
| Smith, Kelly | 2/25/2008 | NCGA | Iowa City, IA |
| Hardman, John | 2/26/2008 | CHS | Minneapolis, MN |
| Schumann, Suzanne | 2/26/2008 | Traditions | Naples, FL |
| Shrader, Robynn | 2/26/2008 | NCGA | Iowa City, IA |
| Opper, Norman | 2/27/2008 | Discount Optics | Boca Raton, FL |
| Wolfe, Stephen | 2/28/2008 | NCGA | Madison, WI |
| Platkin, Susan | 3/13/2008 | Capital Audio | New York, NY |
| Ierubino, Paul | 3/20/2008 | Parkway | Bala Cynwyd, PA |
| Fiereck, Linda | 3/27/2008 | Coborns | Minneapolis, MN |
| Jurasek, David | 3/27/2008 | Crystal Rock | Waterbury, CT |
| Hayes, Pamela | 4/4/2008 | NATSO | Alexandria, VA |
| Berman, Carl | 4/10/2008 | Photos, Inc. | Los Angeles, CA |
| Severson, Duane | 4/10/2008 | Affiliated Foods | Omaha, NE |
| Beckwith, Lyle | 4/15/2008 | NACS | Washington, DC |
| Zlotnikoff, Stuart | 4/16/2008 | NGA | Washington, DC |
| Doughty, Peggy | 4/24/2008 | CHS (former) | Minneapolis, MN |
| Engelhaupt, David | 4/24/2008 | Affiliated Foods | Omaha, NE |
| Zuritzky, Robert | 4/30/2008 | Parkway | Bala Cynwyd, PA |
| Tucker, David | 5/2/2008 | NACS (Former) | Washington, DC |
| Hamilton, Kathy | 5/6/2008 | CHS | Minneapolis, MN |
| Wenning, Thomas | 5/23/2008 | NGA | Washington, DC |
| Lieberman, Erik | 6/4/2008 | NGA | Washington, DC |
| Sprague, Kristie | 6/10/2008 | CHS | Minneapolis, MN |
| Ching, Vic | 6/17/2008 | Affiliated Foods | Minneapolis, MN |
| DiPasquale, Frank | 6/18/2008 | NGA | Washington, DC |

EXHIBIT 3 to the Declaration of K. Craig Wildfang, Esq.

DEPOSITIONS OF CLASS PLAINTIFFS - PHASE I

| Deponent | Date | Company | Location |
|---|---|---|---|
| Taylor, Gray | 6/26/2008 | NACS | Addison, TX |
| Ihry, Reed | 7/1/2008 | CHS | Minneapolis, MN |
| Lindberg, Michael | 7/2/2008 | CHS | Minneapolis, MN |
| Diehl, Carmen | 7/8/2008 | Affiliated Foods | Rapid City, SD |
| Shuman, Robert | 7/8/2008 | NATSO | Alexandria, VA |
| Kirschner, Richard | 7/17/2008 | Jetro | New York, NY |
| Zentner, Arlen | 7/23-24/2008 | Payless | Topeka, KS |
| Richman, Teri | 7/29/2008 | NACS | Washington, DC |
| Cooke, Brent | 7/31/2008 | Payless | Topeka, KS |
| Goldstone, Mitch | 8/6/2008 | Photos, Inc. | Los Angeles, CA |
| Riehle, Hudson | 8/6/2008 | NRA | Washington, DC |
| Leibman, Mark 30(b)(6) on Organizational structure, services, payment systems, studies & investigations | 8/7/2008 | NRA | Washington, DC |
| Mullings, Lisa | 8/13/2008 | NATSO | Alexandria, VA |
| Olson, Donald | 8/14/2008 | CHS | Minneapolis, MN |
| Chung, Anderson | 8/15/2008 | D'Agostino | New York, NY |
| Miller, James | 8/22/2008 | Affiliated Foods | Omaha, NE |
| Opper, Deborah | 8/27/2008 | Discount Optics | Boca Raton, FL |
| Culver, Paul individual and 30(b)(6) on Marketer/Merchant Agreements Rule | 8/28-29/2008 | CHS | Minneapolis, MN |
| Coborn, Chris | 9/4/2008 | Coborns | Minneapolis, MN |
| Munkittrick, Ron | 9/9/2008 | D'Agostino | New York, NY |
| Zaucha, Thomas | 9/19/2008 | NGA | Washington, DC |
| D'Agostino, Nicholas | 9/25/2008 | D'Agostino | New York, NY |
| Sinclair, Scott 30(b)(6) on Country Operations | 10/10/2008 | CHS | Minneapolis, MN |
| Cummings, Richard | 10/15/2008 | CHS | Minneapolis, MN |
| Armour, Henry | 10/22/2008 | NACS | Washington, DC |
| Culver, Paul 30(b)(6) on Proprietary Cards | 10/29/2008 | CHS | Minneapolis, MN |
| Harari, Abraham | 10/30/2008 | Capital Audio | New York, NY |
| Pearson, Harold | 10/30/2008 | Payless | Topeka, KS |
| D'Agostino, Nicholas 30(b)(6) on Payment Practices and Recordkeeping | 11/5/2008 | D'Agostino | New York, NY |
| Bendle, Bradley (Woody) | 11/14/2008 | Payless | Topeka, KS |
| Schumann, Michael 30(b)(6) on Cost of Payment Systems | 12/4/2008 | Traditions | Naples, FL |

# EXHIBIT 4

EXHIBIT 4 to the Declaration of K. Craig Wildfang, Esq.

DEPOSITIONS OF THIRD PARTIES - PHASE I

| Deponent | Date | Company | Location |
|---|---|---|---|
| Dunn, Peter | 4/17-18/2008 | Edgar, Dunn & Co. | New York, NY |
| Campbell, Christopher | 10/17/2008 | Westpac | New York, NY |
| Garabedian, John | 11/6/2008 | Boston Consulting | Chicago, IL |
| Aviles, James | 11/11/2008 | Merchant e-Solutions | San Francisco, CA |
| Honor, Cathy | 12/4/2008 | Royal Bank of Canada | Toronto, ON |
| Pomerleau, Ricky | 12/9/2008 | Wright Express | Portland, ME |
| Randazza, Joseph | 1/7/2009 | National Payment Card LLC | Boca Raton, FL |
| Sourges, James | 1/13/2009 | MODASolutions | New York, NY |
| Grossman, Michael | 1/15/2009 | Tempo Payments | San Francisco, CA |
| Rathgaber, Steven | 2/17/2009 | NYCE Payments Network, LLC | New York, NY |
| Polikoff, Ira | 3/19/2009 | American Express | New York, NY |
| McCurdy, Stephen | 3/24/2009 | American Express | New York, NY |
| Smits, Suzanne | 4/14-15/2009 | DFS Services LLC (Discover) | Chicago, IL |
| Hatcher, Jennifer | 4/17/2009 | Food Marketing Institute | Washington, DC |
| McNeal, Glenda | 4/22/2009 | American Express | New York, NY |

# EXHIBIT 5

EXHIBIT 5 to the Declaration of K. Craig Wildfang, Esq.

PLAINTIFFS' EXPERTS - PHASE I

| Class Expert | Subject Matter | Company | Title | Education |
|---|---|---|---|---|
| Bamberger, Gustavo | Class certification | | Economist at Compass Lexecon | Ph.D., University of Chicago, 1987, Graduate School of Business; M.B.A., University of Chicago, 1984, Graduate School of Business; B.A., Southwestern at Memphis, 1981 |
| Fleischer, Victor | Motivations for networks' IPOs | University of Colorado | Assoc. Prof. of Law, University Colorado | J.D., Columbia University, 1996 |
| Frankel, Alan | Economic analysis of Class Plaintiffs' claims | Coherent Economics, LLC/Compass Lexecon/Antitrust Law Journal | Director of Coherent Economics, LLC; Senior Advisor to Compass Lexecon | Ph.D., Economics, University Chicago, 1986 |
| Henry, Kevin | Class Plaintiffs' fraudulent-conveyance claim | Freeman & Mills, Inc. | V.P., Freeman & Mills, Inc. | B.S. Business and Administrative Studies – Finance, Lewis & Clark College |
| Macey, Jonathan | Mastercard corporate governance | Yale Law School | Sam Harris Professor of Corporate Law, Finance, and Securities Regulation, Yale | J.D., Yale |
| McCormack, Michael | Industry background / *Illinois Brick* | Palma Advisors, LLC | President, Palma Advisors, LLC | B.A., Political Science, Cal. Poly., 1988 |
| McFarlane, Bruce | Defendants' accounting for interchange fees / *Illinois Brick* | LitNomics | Managing Director / CEO, LitiNomics | B.A., Bus. Admin., University Washington, 1984 |
| Wolter, Kirk* | Critique of Mr. Houston's survey of Australian merchants. | National Opinion Research Center/University of Chicago, Dept. of Statistics | E.V.P., National Opinion Research Center; University of Chicago, Dept. of Statistics | Ph.D., Statistics, Iowa State, 1974 |
| **Individual Plaintiffs' Expert** | **Subject Matter** | **Company** | **Title** | **Education** |
| Ariely, Dan | Behavioral economic analysis of anti-steering restraints | Duke University | James B. Duke Professor of Behavioral Economics at the Fuqua School of Business, The Center for Cognitive Neuroscience, and the Economics Department at Duke University | Ph.D Cognitive Psychology, University of N.C. 1996; Ph.D. Business Administration, Duke University 1998 |
| Porter, Katherine | Effect of Defendants' business practices on consumer lending. | University of Iowa College of Law/ Robert Braucher Visiting Professor Harvard Law School | Prof. of Law, University Iowa | J.D., Harvard, 2001 |
| Stiglitz, Joseph | Economic analysis of ASR-claims | Columbia Business School/Sebago Associates, Inc. | Prof., Columbia, Recipient of 2001 Nobel Prize in Economics. | Ph.D., Economics, M.I.T., 1967 |
| Vellturo, Christopher | Economic analysis of Individual Plaintiffs' claims | QES | Pres., Quantitative Economic Solutions, LLC | Ph.D., Economics, M.I.T., 1989 |
| Warren, Elizabeth | Economic analysis of ASR-claims | | U.S. Senator, former Leo Gottlieb Professor of Law, Harvard | J.D., Rutgers, 1976 |

*Kirk Wolter was an expert for the Individual Plaintiffs as well

# EXHIBIT 6

EXHIBIT 6 to the Declaration of K. Craig Wildfang, Esq.

DEFENDANTS' EXPERTS - PHASE I

| Expert | Subject Matter | Company | Title | Education |
|---|---|---|---|---|
| Atkins, J.T. | Class Plaintiffs' fraudulent conveyance claim | Cypress Associates LLC | Managing Director, Cypress Assocs. LLC | J.D., Harvard, 1982 |
| Daines, Robert | Mastercard IPO | Stanford Law School | Pritzker Professor of Law and Business, Stanford | J.D., Yale |
| Elzinga, Kenneth | Economic analysis of Plaintiffs' claims | University of Virginia | Robert C. Taylor Professor of Economics, Univ. Va. | Ph.D., Michigan State University, 1967 |
| Houston, Gregory | Australian payment-card industry post RBA reforms | NERA Economic Consulting | Director, NERA Economic Consulting | B.S.c (First Class Honours), Economics, Univ. Canterbury, (NZ) 1982 |
| James, Christopher | Market definition and market power | University of Florida | William H. Dia/SunBank Eminent Scholar in Finance and Economics, University of Florida; Visiting Scholar for the San Francisco Federal Reserve Bank | Ph.D., Economics, Industrial Organization, Finance, Michigan, 1978 |
| Kahn, Barbara | Effect of anti-steering restraints on networks' brands | University of Miami School of Business Adm | Dean and Schein Family Professor of Marketing, School of Business Administration, University of Miami, Coral Gables, FL | Ph.D., Marketing, Columbia, 1984 |
| Klein, Benjamin | Economic analysis of anti-steering restraints | EA Associates/ Compass Lexecon | President, EA Associates, Inc. | PhD, Economics, Univ. Chicago, 1970 |
| Litan, Robert E. | Economic analysis of Individual Plaintiffs' claims | Brookings Institution | Senior Fellow, Economic Studies and Global Economy and Development Programs, The Brookings Institution | Ph.D., Economics, Yale, 1987; J.D., Yale, 1977. |
| Murphy, Kevin | Economic analysis of Plaintiffs' claims | University of Chicago | George J. Stigler Distinguished Service Professor of Economics, Booth School of Business & Dep't of Econ., Univ. Chicago | Ph.D., University of Chicago, 1986 |
| Snyder, Edward | Class Certification | | Dean and George Pratt Shultz Professor of Economics at the University of Chicago Graduate School of Business | B.A., Colby College, 1975 (Economics, Government); M.A., University of Chicago, 1978 (Public Policy); Ph.D., University of Chicago, 1984 (Economics) |
| Topel, Robert H. | Damages | University of Chicago | Isidore and Gladys J. Brown Professor, Booth School of Business, University of Chicago | Ph.D., Economics, UCLA, 1980 |
| Wecker, William E. | Damages | William E. Wecker Assoc. | President, William E. Wecker Associates, Inc. | Ph.D., Statistics and Management Science, Michigan, 1972 |
| Woodward, Suan E. | Profitability of credit-card lending | Sand Hill Econometrics | President, Sand Hill Econometrics | Ph.D., Financial Economics, UCLA, 1978 |

# EXHIBIT 7

EXHIBIT 7 to the Declaration of K. Craig Wildfang, Esq.

DEPOSITIONS OF DEFENDANTS AND THIRD PARTIES - PHASE II

| Defendant Deponent | Date | Company | Location |
|---|---|---|---|
| Adrienne Chambers | 12/1/2016 | MasterCard | New York, NY |
| Chris Bond | 12/7/2016 | MasterCard | New York, NY |
| Jennifer Shulz | 1/6/2017 | Visa | Los Angeles, CA |
| Elizabeth Buse | 1/10/2017 | Visa | San Francisco, CA |
| Ivan Seele | 1/11/2017 | Bank of America | Wilmington, DE |
| Paul Gallo | 1/12/2017 | Visa | Chicago, IL |
| Michael Daly | 1/18/2017 | Bank of America | Wilmington, DE |
| Jay Adelsberg | 1/18/2017 | Chase | Wilmington, DE |
| Amy Bridge | 1/24/2017 | Visa | Sacramento, CA |
| Gary Korotzer | 2/1/2017 | Wells Fargo | San Francisco, CA |
| Beverly Anderson 30(b)(6) on Credit-Issuing | 2/3/2017 | Wells Fargo | San Francisco, CA |
| Robert Ryan | 2/8/2017 | Wells Fargo | Charlotte, NC |
| Frank Mautone | 2/14/2017 | MasterCard | New York, NY |
| Carolyn Balfany | 2/17/2017 | MasterCard | New York, NY |
| Chris Lambert | 2/17/2017 | Visa | Charlotte, NC |
| Caroline Dionisio | 2/23/2017 | MasterCard | New York, NY |
| Jonathan King 30(b)(6) on Credit-Issuing | 2/24/2017 | Chase | New York, NY |
| Rosemary Stack 30(b)(6) on Credit-Issuing | 2/28/2017 | Bank of America | Wilmington, DE |
| Richard Rozbicki 30(b)(6) on Rewards | 2/28/2017 | MasterCard | New York, NY |
| Trisha Asgeirsson 30(b)(6) on Rewards | 2/28/2017 | MasterCard | New York, NY |
| Bill Dobbins | 2/28/2017 | Visa | Wilmington, DE |
| Bill Sheedy 30(b)(6) on Interchange | 2/28/2017 | Visa | Washington, D.C. |
| Bill Sheedy 30(b)(6) on Interchange | 3/1/2017 | Visa | Washington, D.C. |
| Jennifer Roberts | 3/2/2017 | Chase | Wilmington, DE |
| Linda Kirkpatrick | 3/2/2017 | MasterCard | New York, NY |
| Michael Passilla | 3/9/2017 | Chase | Atlanta, GA |
| Andrew Dittrich 30(b)(6) on Rules | 3/15/2017 | Visa | San Francisco, CA |
| Terry O'Neil 30(b)(6) on Credit-Issuing | 3/16/2017 | Citi | New York, NY |
| Andrew Dittrich 30(b)(6) on Rules | 3/16/2017 | Visa | San Francisco, CA |
| Terry O'Neil 30(b)(6) on Credit-Issuing | 3/17/2017 | Citi | New York, NY |
| Mark Nelson | 3/21/2017 | Bank of America | Charlotte, NC |
| Brian Swain 30(b)(6) on Fees and profitability | 3/23/2017 | MasterCard | New York, NY |
| Tara Maguire 30(b)(6) on Fees and profitability | 3/23/2017 | MasterCard | New York, NY |
| Elizabeth Williams | 3/24/2017 | Visa | Washington, D.C. |
| Chris Reid 30(b)(6) on Issuer differentiation/ ChaseNet | 3/28/2017 | MasterCard | New York, NY |
| Doug Hambry | 3/28/2017 | Visa | Philadelphia, PA |
| Laura Mackenzie | 3/30/2017 | MasterCard | New York, NY |
| Herb Fellman | 4/4/2017 | Bank of America | Charlotte, NC |
| Jeffrey Manchester | 4/6/2017 | MasterCard | New York, NY |
| Brian Swain 30(b)(6) on Interchange | 4/19/2017 | MasterCard | New York, NY |
| Chris Reid | 4/25/2017 | MasterCard | New York, NY |

EXHIBIT 7 to the Declaration of K. Craig Wildfang, Esq.

DEPOSITIONS OF DEFENDANTS AND THIRD PARTIES - PHASE II

| Defendant Deponent | Date | Company | Location |
|---|---|---|---|
| Mark Williams 30(b)(6) on Network Agreements | 5/9/2017 | Bank of America | Wilmington, DE |
| Douglas Bausch | 5/9/2017 | MasterCard | New York, NY |
| Elizabeth Hurvitz 30(b)(6) on ChaseNet | 5/10/2017 | Visa | New York, NY |
| Billy Knupp 30(b)(6) on Rewards | 5/11/2017 | Visa | San Francisco, CA |
| Elizabeth Hurvitz | 5/11/2017 | Visa | New York, NY |
| Jim Eitler | 5/12/2017 | Visa | San Francisco, CA |
| Brian Swain 30(b)(6) on Interchange and individual | 5/18/2017 | MasterCard | New York, NY |
| Ather Williams | 5/19/2017 | Bank of America | New York, NY |
| Elizabeth Hoople | 5/19/2017 | Wells Fargo | Walnut Creek, CA |
| Doug Raymond | 5/23/2017 | MasterCard | New York, NY |
| Jonette Sullivan 30(b)(6) on ChaseNet | 5/24/2017 | Chase | Wilmington, DE |
| Jim McCarthy | 5/24/2017 | Visa | San Francisco, CA |
| Pete Zuercher | 5/24/2017 | Visa | San Francisco, CA |
| Michael Simpson 30(b)(6) on Co-Brand/ Private Label | 5/25/2017 | Bank of America | Wilmington, DE |
| Jonette Sullivan | 5/25/2017 | Chase | Wilmington, DE |
| Pete Zuercher | 5/25/2017 | Visa | San Francisco, CA |
| Carolyn Van Ryn 30(b)(6) on Rules | 6/7/2017 | MasterCard | New York, NY |
| Carolyn Van Ryn 30(b)(6) on Rules | 6/8/2017 | MasterCard | New York, NY |
| Lillie Platko | 6/14/2017 | MasterCard | New York, NY |
| Denise Walker | 6/20/2017 | MasterCard | New York, NY |
| Tolan Steele | 6/21/2017 | Visa | San Francisco, CA |
| Stacey Pinkerd | 6/23/2017 | Visa | New York, NY |
| Billy Knupp 30(b)(6) on Profitability/ Fees | 6/27/2017 | Visa | San Francisco, CA |
| Carol Cosby | 6/28/2017 | MasterCard | New York, NY |
| Billy Knupp 30(b)(6) on Profitability/ Fees | 6/28/2017 | Visa | San Francisco, CA |
| Ralph Andretta 30(b)(6) on Credit-Issuing | 6/29/2017 | Citi | New York, NY |
| David Cramer | 6/29/2017 | Visa | Cincinnati, OH |
| Ralph Andretta | 6/30/2017 | Citi | New York, NY |
| Michael Milotich 30(b)(6) on Profitability/ Fees | 6/30/2017 | Visa | San Francisco, CA |
| Ed Kadletz 30(b)(6) on Network Issuing | 7/12/2017 | Wells Fargo | Minneapolis, MN |
| Ed Kadletz | 7/13/2017 | Wells Fargo | Minneapolis, MN |
| Max Krause | 7/20/2017 | MasterCard | New York, NY |
| Bruce McElhinney | 7/20/2017 | Visa | San Francisco, CA |
| Eileen Serra 30(b)(6) on Co-Brand / Private Label Agreements | 7/24/2017 | Chase | New York, NY |
| Eileen Serra | 7/25/2017 | Chase | New York, NY |
| Perry Beberman | 7/26/2017 | Bank of America | Wilmington, DE |
| Giovanni Leoni | 7/26/2017 | Visa | San Francisco, CA |
| David Hoyt | 7/27/2017 | Chase | Wilmington, DE |
| Joel Henckel | 8/3/2017 | MasterCard | New York, NY |

EXHIBIT 7 to the Declaration of K. Craig Wildfang, Esq.

DEPOSITIONS OF DEFENDANTS AND THIRD PARTIES - PHASE II

| Defendant Deponent | Date | Company | Location |
|---|---|---|---|
| Andrew Torre | 8/9/2017 | Visa | San Francisco, CA |
| Kevin Rhein | 8/9/2017 | Wells Fargo | Minneapolis, MN |
| Andrew Torre | 8/10/2017 | Visa | San Francisco, CA |
| Donald Boeding | 9/8/2017 | Visa | San Francisco, CA |
| Chris Como | 9/12/2017 | Visa | San Francisco, CA |
| Richard Morrissey | 9/13/2017 | Visa | San Francisco, CA |
| Phil Christian | 9/14/2017 | Chase | Wilmington, DE |
| Colin McGrath | 9/14/2017 | MasterCard | New York, NY |
| Tim Healy | 9/14/2017 | Wells Fargo | San Francisco, CA |
| Raymond Fischer | 9/18/2017 | Chase | Wilmington, DE |
| Ed Garofalo | 9/19/2017 | Citi | Wilmington, DE |
| Matthew Dill | 9/19/2017 | Visa | New York, NY |
| Sydney Ivey | 10/11/2017 | Bank of America | Charlotte, NC |
| Barry Rodrigues | 10/16/2017 | Citi | London, England |
| Kimberly Lawrence | 10/17/2017 | Visa | San Francisco, CA |
| Vincent D'Agostino | 10/19/2017 | Chase | New York, NY |
| Craig Vosburg | 10/25/2017 | MasterCard | New York, NY |
| Jonathan King 30(b)(6) on Network Agreements | 10/26/2017 | Chase | New York, NY |
| Pete Daly | 11/1/2017 | Visa | New York, NY |
| Chris McWilton | 11/2/2017 | MasterCard | New York, NY |
| Chris McWilton, B&R Supermarket matter | 11/3/2017 | MasterCard | New York, NY |
| Bob Nadeau | 11/8/2017 | Chase | Omaha, NE |
| Craig Vosburg, B&R Supermarket matter | 11/16/2017 | MasterCard | New York, NY |
| John Aafedt | 11/16/2017 | Visa | Palo Alto, CA |
| Charmaine Clay | 11/21/2017 | Wells Fargo | San Francisco, CA |
| Titi Cole | 12/1/2017 | Bank of America, | Charlotte, NC |
| Sameer Govil | 12/6/2017 | Visa | San Francisco, CA |
| Gary Flood | 12/11/2017 | MasterCard | New York, NY |
| Oliver Manahan | 12/13/2017 | MasterCard | New York, NY |
| Elizabeth Kapteina | 1/9/2018 | MasterCard | New York, NY |
| Robert Wilson | 1/19/2018 | Bank of America | Dallas, TX |
| Kevin Condon | 1/23/2018 | Bank of America | Chicago, IL |
| Paul Musser | 1/25/2018 | MasterCard | New York, NY |
| Michael Wright | 2/2/2018 | Bank of America | Wilmington, DE |
| Karen Mattea | 2/7/2018 | Citi | Chicago, IL |
| Lynn Kutruff | 2/9/2018 | Bank of America | New York, NY |
| Tim Murphy | 2/13/2018 | MasterCard | New York, NY |
| Craig Petersen | 2/16/2018 | Visa | New York, NY |
| Michael Cyr | 2/22/2018 | MasterCard | New York, NY |
| Ellen Richey, B&R Supermarket matter | 3/1/2018 | Visa | San Francisco, CA |
| Steve Jonas | 3/13/2018 | MasterCard | New York, NY |
| Ryan McInerney | 3/15/2018 | Visa | San Francisco, CA |
| Chiro Aikat | 3/20/2018 | MasterCard | New York, NY |

EXHIBIT 7 to the Declaration of K. Craig Wildfang, Esq.

DEPOSITIONS OF DEFENDANTS AND THIRD PARTIES - PHASE II

| Defendant Deponent | Date | Company | Location |
|---|---|---|---|
| Chiro Aikat, B&R Supermarket matter | 3/22/2018 | MasterCard | New York, NY |
| Oliver Jenkyn | 3/28/2018 | Visa | San Francisco, CA |
| Oliver Jenkyn | 3/29/2018 | Visa | San Francisco, CA |
| Charles Scharf | 4/4/2018 | Visa | New York, NY |
| Marsha Huber | 4/11/2018 | Chase | Columbus, OH |
| Byron Pollitt | 4/11/2018 | Visa | San Francisco, CA |
| Caryn Kaiser | 4/13/2018 | Citi | New York, NY |
| Billy Knupp | 4/17/2018 | Visa | San Francisco, CA |
| Kevin Hughes 30(b)(6) on Network Agreements | 4/18/2018 | Citi | Greenville, SC |
| Kevin Hughes | 4/19/2018 | Citi | Greenville, SC |
| Ajay Banga | 4/20/2018 | MasterCard | New York, NY |
| Beverly Anderson | 4/24/2018 | Wells Fargo | San Francisco, CA |
| Ed McLaughlin | 4/25/2018 | MasterCard | New York, NY |
| Bill Sheedy | 4/25/2018 | Visa | San Francisco, CA |
| John Stumpf | 4/25/2018 | Wells Fargo | San Francisco, CA |
| Bill Sheedy | 4/26/2018 | Visa | San Francisco, CA |
| Bill Sheedy, B&R Supermarket matter | 4/26/2018 | Visa | San Francisco, CA |
| Gordon Smith | 4/27/2018 | Chase | New York, NY |
| Todd Wade 30(b)(6) on Checkout | 5/2/2018 | Visa | San Francisco, CA |
| Debra Rossi | 5/3/2018 | Wells Fargo | San Francisco, CA |
| Kevin Church | 5/8/2018 | Bank of America | Charlotte, NC |
| Jason Gaughan | 5/15/2018 | Bank of America | Wilmington, DE |
| Thomas O'Brien 30(b)(6) on Apple Pay, Chase Pay | 6/1/2018 | Chase | Wilmington, DE |
| Judson Linville | 6/19/2018 | Citi | New York, NY |

EXHIBIT 7 to the Declaration of K. Craig Wildfang, Esq.

DEPOSITIONS OF DEFENDANTS AND THIRD PARTIES - PHASE II

| Third-Party Deponent | Date | Company | Location |
|---|---|---|---|
| Larry Earley | 12/1/2016 | nxtMOVE Corporation | Washington, D.C. |
| Larry Gorkin | 12/9/2016 | Stonebridge Consulting Cor | New York, NY |
| Steve Edgett | 4/7/2017 | Bayshore Consulting | Scottsdale, AZ |
| Peter Sidenius | 9/19/2017 | Edgar Dunn | San Francisco, CA |
| Russell Piparo | 2/26/2018 | Star Networks | Baltimore, MD |
| Thomas Layman | 2/27/2018 | Global Vision Group | San Francisco, CA |
| Russell Piparo | 2/27/2018 | Star Networks | Baltimore, MD |
| Patricia McQuade | 3/20/2018 | PNC | Pittsburgh, PA |
| Peter Dunn | 3/22/2018 | Peter T. Dunn LLC | New York, NY |
| Lee Manfred | 3/27/2018 | First Annapolis | Annapolis, MD |
| Marc Abbey | 3/27/2018 | First Annapolis | Annapolis, MD |
| Ashwin Adarkar | 4/2/2018 | Boston Consulting Group | New York, NY |
| Karen Liberto | 4/3/2018 | Global Payments | Atlanta, GA |
| Judith McGuire | 4/4/2018 | Pulse | Chicago, IL |
| Judith McGuire | 4/5/2018 | Pulse | Chicago, IL |
| Laurent Desmangles | 4/6/2018 | Boston Consulting Group | New York, NY |
| Steve Thogmartin | 4/6/2018 | Boston Consulting Group | New York, NY |
| Nathan Stephens | 4/19/2018 | Elavon | Atlanta, GA |
| Sandra Smith | 4/19/2018 | Elavon | Atlanta, GA |
| Anne Christenson | 4/13/2018 | U.S. Bank | Minneapolis, MN |
| Jason Tinurelli | 4/13/2018 | U.S. Bank | Minneapolis, MN |
| Asim Majeed | 4/13/2018 | U.S. Bank | Minneapolis, MN |
| Dekkers Davidson | 5/8/2018 | MCX | Boston, MA |
| Russell Piparo | 5/9/2018 | First Data | Baltimore, MD |
| Allen Friedman | 5/9/2018 | Ingenico | Atlanta, GA |
| Russell Piparo | 5/10/2018 | First Data | Baltimore, MD |
| Amy Parsons | 5/17/2018 | Discover | Chicago, IL |
| Kathryn Sebastian | 5/24/2018 | Navy Federal Credit Union | Washington, D.C. |
| Russell MacKaron | 5/24/2018 | USAA | San Antonio, TX |
| Vikram Parekh | 5/24/2018 | USAA | San Antonio, TX |
| Rob Orgel | 5/25/2018 | Apple, Inc. | Waltham, MA |
| Roger Hochschild | 6/15/2018 | Discover | Chicago, IL |

# EXHIBIT 2

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF NEW YORK**

| | |
|---|---|
| In Re Payment Card Interchange Fee And Merchant Discount Antitrust Litigation | Case No. 1:05-MD-1720 (MKB)(JO) |

**Second Supplemental Declaration of K. Craig Wildfang in Support of Class Plaintiffs' Motion for Class Representative Service Awards**

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*Co-Lead Counsel for Class Plaintiffs*

## I. Introduction and Overview

1. I, K. Craig Wildfang, am a partner in the law firm of Robins Kaplan LLP and am one of the Co-Lead Counsel in this matter. I submit this declaration to share my perspective as Co-Lead Counsel into the efforts by the Class Representatives in this case.

2. As the declarations submitted in connection with this motion make clear, many of the class representatives devoted hundreds of hours to discovery, mediation and settlement discussions, and the lobbying efforts associated with this case. Because many of the representatives are entrepreneurs, their commitment largely came at the expense of the businesses that they had spent their lives building. The larger Class Representatives—such as CHS and Payless—also committed an extraordinary number of hours to performing their duties as class representatives, such as participating in discovery and assisting counsel in mediation and settlement discussions. This declaration focuses on the efforts of two particular representatives, however, Michael Schumann of Traditions and Mitch Goldstone of Photos Etc. (d/b/a ScanMyPhotos.com), whose extraordinary commitment to the cause and the class they represent had a particularly important role in bringing about the result we achieved.

3. By focusing on Messrs. Schumann and Goldstone, I do not in any way intend to downplay the efforts of the other Class Representatives.

4. As detailed in Paragraphs 11-14 of my declaration dated April 11, 2013, I represented Best Buy and Darden Restaurants in opt-out litigation relating to the *In re Visa Check/MasterMoney Antitrust Litigation*. Through my involvement in that case, I became intimately familiar with the structural problems in the payment card industry, and how those problems persisted even after the settlement in *in re Visa Check*. I also learned that many large and small merchants were dissatisfied with the *Visa Check* settlement, feeling that it did not

address the structural problems that afflicted the payment-card industry, such as bank ownership of the major payment-card networks, bank control over fee-setting decisions, and the inability of merchants to show any preference for any form of payment other than Visa and MasterCard.

5. I spent late 2004 and early 2005 talking with merchants and merchant trade associations regarding Visa and MasterCard's persistent market power, the networks' control by large issuing banks, and the problems that these realities presented for merchants.

6. The merchants I met with agreed that the structure of the payment-card industry was severely tilted against merchants such that merchants could not achieve real reform of without altering that structure. Most of these merchants also agreed that the best potential solution to the long-term problem of the banks' and networks' market power was broad-based antitrust litigation directed at the structure of the dominant payment-card networks.

7. Although the merchants I spoke with agreed that litigation was the best alternative to seek relief from constantly rising card-acceptance fees, none of these merchants wanted to be the first to step forward to become a class representative in what promised to be a long and difficult litigation.

8. I often heard from merchants that, one reason they wouldn't agree to be a class representative was that they were fearful of stepping into a seven-year (or more) battle with the Defendants—as had been the case with *Visa Check*—that would subject them to extensive discovery, depositions of their top executives, and general disruption to their business. These merchants were often defendants in litigation themselves, and generally did not want to volunteer for an experience that they generally viewed as unpleasant and burdensome. In my discussions with merchants and trade associations in late 2004 and early 2005, I did not speak to a single merchant or trade association that was willing to

commit its financial resources to a class action against Visa, MasterCard, and the banks.

9. Some of the merchants that I spoke with considered acting as a class representative but would agree to do so if they were not the first or the largest merchant to step forward to sue Visa and MasterCard, much less suing the nation's largest financial institutions. These merchants indicated that they were fearful of retaliation—either in their businesses or through overly aggressive discovery tactics in litigation—by Visa, MasterCard, or the large banks that controlled them. It is a sad commentary on modern business ethics that the public perception of the big Wall Street banks is that the people running those institutions are ruthless, unscrupulous and willing to break the law if it means putting more money in their pockets. As we learned in the financial meltdown of 2008/2009, this perception is accurate. Other merchants questioned why they should step forward as a class representative if they would receive only their proportional share of a class recovery. Significantly, several of the merchants we spoke with before filing our first case eventually filed individual suits, or are objectors to the settlement.

10. As I discussed in my April 11, 2013 declaration (¶ 14), our pre-filing investigation led to the conclusion that the large issuing and acquiring banks were necessary parties to any antitrust challenge to Visa and MasterCard's market power and practices. This was another significant obstacle to convincing large merchants to sign on as representatives because—even though they were among the most vocal opponents to the interchange system—they concluded that their banking relationships would be at risk if they sued the banks. Notably, in none of the Individual Plaintiffs' complaints in this case, and only one

significant opt-out case by an objector[1] have the banks been named as defendants.

11. After months of discussions with merchants, it appeared in the spring of 2005 that the class-action challenge to Visa and MasterCard that merchants universally agreed was necessary might never get filed because no merchant was willing to step forward as a representative for the class, especially if they were the first or largest such representative.

12. This changed, however, in the span of two weeks in April 2005. During that time, I was contacted independently by Michael Schumann of Traditions, Ltd. in the Twin Cities and Mitch Goldstone of Orange County-based Photos Etc. Corp., neither of whom were previously known to me. Both Mr. Goldstone and Mr. Schumann had over the course of several months, independently conducted research to try to understand why the transaction fees they were charged by Visa and MasterCard were so high. The research of both of these merchants led them to the conclusion that the banks' control of Visa and MasterCard lay at the core of the problem of constantly escalating card-acceptance fees that was afflicting U.S. merchants.

13. Messrs. Goldstone and Schumann also researched attorneys who they felt could successfully prosecute a case against Visa, MasterCard, and the big banks. They located me by visiting my law firm's website, discovering articles that I and my colleagues had written on this topic, and finding references to me and my firm in various publications. They also were aware of my prior experience at the DOJ Antitrust Division, and of my firm's sterling reputation as being brilliant trial lawyers. In other words, they did exactly what courts should

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[1] 2d Am. Compl. *7-Eleven, Inc. et al. v. Visa Inc. et al.*, (E.D.N.Y. Apr. 28, 2014).

encourage class representatives to do; that is to search diligently for the best available class counsel.

14. After Messrs. Goldstone and Schumann contacted me, I met with both of them to discuss the potential litigation against Visa, MasterCard, and the banks. The conversations that I had with Messrs. Goldstone and Schumann were in many respects similar to the conversations I had had with larger merchants. They understood the source of the problems facing merchants and they agreed that litigation was the best alternative to achieving reform. They also had some initial trepidations about being the first to step forward in litigation against Visa and MasterCard.

15. Messrs. Schumann and Goldstone differed in one key respect from the other merchants I met with – they were aggressive entrepreneurs and thus were accustomed to taking risks.

16. However, becoming a class representative in this case was taking a risk that no merchant had ever taken, by taking on the entire U.S. banking system which, it is fair to say, has systematically robbed the U.S. economy of trillions of dollars over the last twenty years. And the reward for taking these risks, if any victory were to be achieved, would not go to them, but rather to every merchant and every consumer in the U.S. Thus, after having achieved these results on behalf of the Class it is fair that they should share, in at least a modest amount, in the benefits they have conferred on the Class.

17. Thus, although they expressed the same fears as the larger merchants—fears such as retaliation and disruption to their business—they understood that "someone had to be first" and that it was necessary for them or someone like them to take the initiative, in order for this action to get started. Within a span of a few days, both Traditions and Photos Etc. agreed to be class representatives in the first complaint.

18. After Traditions and Photos Etc. signed on as class representatives, it became easier to convince the third, fourth, and subsequent merchants to join the litigation as well. Even the large merchants that filed non-class cases waited to file their complaints until after Photos, Traditions, and CHS—the other merchant that agreed to be on the first complaint[2]—filed the first complaint in this action.

19. From the perspective of my law firm, the agreement of Traditions and Photos Etc. to step forward as plaintiffs made this case into a more compelling candidate for investing the firm's resources. By the time Traditions and Photos Etc. signed on as class representatives, my firm had already invested over a million dollars in costs and attorney time into the case. If we had not been able to secure the agreement of Traditions and Photos to act as class representatives, I do not know how long my partners would have agreed to continue funding the case.

20. Thus, the agreement of Traditions and Photos Etc. to serve as class representatives had an important "domino effect" in persuading other merchants to join the fight against Visa, MasterCard, and the banks. Moreover, I truly believe that if Traditions and Photos had not stepped forward when they did, this case may never have been brought, or may have been brought at a significantly later date, when it might not have been possible to achieve the result that we achieved.

21. The participation of the Class Representatives was also important in this case because—as a case in which industry reform was an important of the relief sought by the Class—the Representatives' input helped Class Counsel and their experts, the mediators, and the Court understand how proposed settlement provisions would play out in practice. The input of Messrs. Goldstone and

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[2] CHS was an existing client of mine, as I had represented the company in two prior antitrust actions.

Schumann was particularly important since they were both paradigmatic small merchants, which made up the vast majority of the seven-plus million merchants in the Class. And I did not need to solicit their views on the strategy and conduct of the litigation, because Messrs. Goldstone and Schumann regularly called me with information about what was happening in the small merchants' real world of payments. For example, both men would call or email me with information on Visa and MasterCard interchange fee increases, the interpretation and application of the networks' rules, and the like. This information was invaluable, particularly early in the litigation because the Visa and MasterCard merchant rules and interchange fee schedules were not disclosed to merchants or the public. This real world information enabled Class Counsel to make specific, targeted discovery requests that were far more difficult for Defendants to evade. Throughout the course of mediation, settlement conferences, and the negotiation of the final settlement agreements after the acceptance of the Mediators' Proposals, my Co-Counsel and I discussed with the Class Representatives the rules reforms that we would propose to the Defendants and those that the Defendants had proposed to the Class. I found that the input of the Class Representatives—especially those who themselves ran their own businesses—to be extremely valuable in achieving the result that we have achieved. The insight that the Class Representatives provided could not have been obtained from Class Counsel or our experts, who did not live with the Defendants' rules on a day-to-day basis. If we did not have the Class Representatives' input, Class Counsel would have been at a serious disadvantage to the Defendants' counsel who undoubtedly were in constant contact with the business people who would implement any settlement. In my experience, the role of the Class Representatives in shaping going-forward relief distinguishes this case from

virtually every other antitrust case in which I have participated, in which the Representatives only had to agree to a monetary-settlement figure.

22. I have practiced primarily antitrust law for over thirty years. While I have had a varied practice—including service in the Department of Justice—the majority of my practice has touched on class-action litigation. This includes direct participation in class cases by representing plaintiff classes, opt-out plaintiffs, and defendants, and it also includes government litigation, which spurred private class actions. Over the past thirty years, I have witnessed the full gamut of class-representative involvement in class cases. Until this case, however, I have never seen the level of engagement in a case and commitment to the class they represented as Messrs. Schumann and Goldstone displayed from the first day I met them. As their declarations detail, they were constantly in contact with me to discuss the status of the case, frequently asked about how they could assist the overall efforts of class counsel, including in litigation, lobbying, and media efforts.

23. I believe that the settlement we reached in this case was truly extraordinary and would not have been attained without the extraordinary efforts of many individuals. With this motion, Class Counsel respectfully requests that the Court recognize the extraordinary contributions of Messrs. Schumann and Goldstone and the other Class Representatives to the outstanding result that has been achieved.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: January 12, 2015

ROBINS KAPLAN LLP

K. Craig Wildfang

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# EXHIBIT 3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

| | |
|---|---|
| IN RE PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION<br><br>This document refers to: All Actions | MDL No. 1720<br>Case No. 1:05-md-1720-JG-JO |

**Declaration of K. Craig Wildfang, Esq.**
**in Support of Class Plaintiffs' Motion for Final Approval of Settlement and Class Plaintiffs' Joint Motion for Award of Attorneys' Fees, Expenses and Class Plaintiffs' Awards**

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## I. Introduction and Overview

1. I, K. Craig Wildfang, am a partner in Robins, Kaplan, Miller & Ciresi L.L.P. I submit this Declaration in support of the Class Plaintiffs' Motion for Final Approval of Settlement and Class Plaintiffs' Joint Motion for Award of Attorneys' Fees and Expenses and Class Plaintiffs' Awards.

2. This declaration summarizes the factual and procedural history of this litigation, summarizes the benefits to the classes obtained by the Settlement Agreement, describes the risks faced by the Class Plaintiffs in the litigation, and explains why the Settlement is vastly superior to any available alternative. Finally, this declaration addresses some of the objections that certain merchants have lodged against the settlement and explains why those objections are ill-founded and provide no basis for the Court to deny final approval to the settlement.

3. As explained more fully below, under the leadership of the three Co-Lead Counsel[1] appointed by the Court - Robins, Kaplan, Miller & Ciresi L.L.P., Berger & Montague P.C., and Robbins Geller Rudman & Dowd LLC - Class Counsel have achieved a settlement for the Class with injunctive relief which is a substantial further step in the reform of the payment-card markets in the United States that will provide enormous benefits to merchants over the next decade, estimated by the leading expert in the field to be worth between $26.4 and $94.3 billion in the next 10 years. *See* Declaration of Dr. Alan Frankel dated April 11, 2013. In addition, Defendants have agreed to cash payments to the Class of approximately $7.25 billion, by far the largest ever cash settlement in an antitrust class action.

4. This result was not the inevitable outcome of the filing of these actions in 2005. Rather, this result was achieved over the determined and vigorous opposition of the Defendants.

[1] While the Definitive Class Settlement Agreement defines the three lead firms as "Class Counsel", for readability and to avoid possible confusion, I refer to the three lead counsel firms as "Co-Lead Counsel" and the collective of all class firms who participated in this action as "Class Counsel", unless otherwise explained in the text.

Only persistent, prolonged and effective efforts of Class Counsel under the leadership and direction of Co-Lead Counsel over the last seven years enabled the Class to achieve this exceptional result.

5. As the Court is well aware from its management of these actions over the last seven years, everything about this case has been difficult and complex. Despite the many difficulties and complexities, and over the determined opposition of the largest financial institutions in the world, represented by many of the most renowned law firms in the world, through the efforts of Class Counsel, upon the approval of this Settlement, the prosecution of the Class's claims will have resulted in the almost complete restructuring of the payment-card industry. Before the filing of this case in 2005, the payment-card industry had been dominated by a cartel of banks which owned and controlled the only two four-party networks in the world, Visa and MasterCard. The bank cartel had successfully avoided or defeated all challenges to the bank-dominated industry structure which the banks had created and maintained for over 30 years

6. The risks posed to the banks by the broad-based challenges, such as MDL 1720, stimulated the banks to more seriously consider the unthinkable, *i.e.* divesting their ownership and control of Visa and MasterCard. In fact, we now know from discovery that within three months of the filing of the first action in June, 2005, the banks set in motion their strategy to try to limit their litigation exposure by restructuring both MasterCard and Visa into publicly-owned companies. Thus, one of the principal remedies sought by the Class Plaintiffs when the first case was filed, requiring the banks to divest themselves of their ownership and control of Visa and MasterCard, was accomplished even before the litigation was concluded by the settlement now before the Court.

7. As described in more detail below, the relief obtained by the Department of Justice in its 2010 consent judgment with Visa and MasterCard, which eliminated many of the networks'

anti-steering rules, was based almost entirely on the record and work product compiled by Class Counsel in MDL 1720.

8. Moreover, knowledgeable observers in Washington, D.C. have noted that the existence of this litigation, led by counsel who were willing to engage with Congress, and provide important strategic insights to merchants, were important factors that helped to convince Congress to enact legislation capping interchange fees on debit-card transactions as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.

9. Now, in addition to the structural reforms accomplished via the MasterCard and Visa restructurings, Class Plaintiffs have negotiated a settlement which goes beyond the legislative and Department of Justice consent judgment and which will enhance competition in card acceptance. It further reforms the industry by eliminating the Anti-Steering Rules ("ASRs") of Visa and MasterCard[2] so that, for the first time ever, merchants will be able to employ a full range of transparent price signals to their customers that will lead to increased competition among payment-card networks for the business of merchants. The ASRs prevented any downward competitive pressure on the interchange fees, whereas the competition among the networks for bank issuance creates pressure to *increase* interchange fees, as that revenue was paid to issuers. The ASRs of Visa and MasterCard had stood for over 30 years as the principal barriers to entry by new networks, because they effectively foreclosed the typical strategy of a new entrant, *i.e.* offering lower prices in return for greater sales volume. Since the ASRs prevented merchants from rewarding low prices by steering their customers to low-priced alternatives, there has been no successful new entrant into the relevant market since Discover in the mid-1980s.

10. The remainder of this Declaration will: (1) describe the genesis and history of this litigation, from the pre-filing investigation in 2004 and 2005, to the argument on summary

[2] The ASRs are described in the Report of Alan S. Frankel, Ph.D., July 2, 2009 ¶169.

judgment and *Daubert* motions in late 2011; (2) recount the lengthy and arduous mediation process which stretched over several years, and the settlement that finally resulted from that mediation in 2012; (3) explain the benefits to the Classes from the Settlement; (4) analyze the risks faced by the Class Plaintiffs in the litigation; (5) explicate why the Settlement is superior to any other alternative; and (6) summarize the time and expenses spent by Class Counsel over the last eight years to prosecute, at great risk, the Class's claims. We respectfully submit that the record we present to the Court will amply warrant the Court granting final approval to the Settlement, and the award of attorneys' fees and costs sought by Class Counsel.

## II. Pre-filing Investigation by Robins, Kaplan, Miller & Ciresi L.L.P.

### A. Expertise in Payment-Card Markets

11. The genesis of what became MDL 1720 began in 2003. I had become generally familiar with the economics and antitrust issues related to the payment-card industry during my service as Special Counsel to the Assistant Attorney General for Antitrust with the Department of Justice Antitrust Division in the mid-1990s. I added to my knowledge of the industry when I represented two large merchants, Best Buy Stores, Inc. and Darden Restaurants (Olive Garden, Red Lobster, Capital Grille) in the *In re Visa Check/MasterMoney Antitrust Litigation.*

12. While representing Best Buy and Darden, I pursued contacts with several large merchants and merchant trade associations. What I learned was that merchants were dissatisfied with the continued domination of the payment-card industry by the country's largest banks. Although the Department of Justice had succeeded in its case against Visa and MasterCard in 2002, and although the class in *In re Visa Check/MasterMoney Antitrust Litigation* had obtained relief in the form of eliminating the tying agreement between credit and debit card acceptance for merchants, merchants believed that the competitive problems in the payment-card industry had not been substantially alleviated. It was also self-evident that merchants would be reluctant to commit their own resources to another antitrust challenge to the bank cartel.

13. My experience, knowledge and investigation led me to conclude that a new antitrust class action undertaken by counsel on a contingent fee basis, and advancing the costs of the litigation out of the pockets of the lawyers, was the only option that offered any realistic chance of achieving a more competitive market for payment-card services success in the foreseeable future. I also concluded that any such new action would have to be a broad-based attack on the structure of the industry and, in particular, must include an attack on the ownership and control of Visa and MasterCard by the nation's largest banks.

14. During 2004 and 2005 I and my law firm conducted our pre-filing investigation, which included consulting with expert economists, industry experts, and antitrust academics to further inform our judgment about the antitrust claims to pursue. As we reached tentative conclusions about what allegations to make and what claims to assert, we began a new round of meetings with merchants and merchant groups to assess their interest in being representative plaintiffs in the action we contemplated. One of the conclusions we had reached, however, was that in order to obtain the type of thorough relief that we thought necessary, the action would have to include as defendants the banks that controlled Visa and MasterCard, as well as the networks themselves. It quickly became apparent to us that for many merchants, including most large merchants, any action naming the banks as defendants was seen as posing business risks of retaliation. Most large merchants had important banking relationships with many of the very would-be defendants.[3] However, we also found that this same fear of the banks did not necessarily extend to smaller merchants, who tended to have banking relationships with smaller banks who were not likely to be defendants.

15. In the spring of 2005 I was contacted by two small merchants who, after some discussion, decided that they were ready, willing and able to become representative plaintiffs in

[3] As a result of concentration, in the banking industry (in my view accomplished by lax enforcement of the antitrust laws) by 2005, 89% of MasterCard issuing volume was consolidated in the hands of five issuing banks. Five banks accounted for 75% of Visa issuing volume.

the new class action. These two small merchants, who were prepared to undertake this litigation when it appeared that perhaps no other merchant would, were Photos Etc. Corp. and Traditions Ltd. Once these two merchants stepped forward, other merchants became more willing to lend their names to the cause.

### B. Analysis of Market Conditions after *Visa Check*

16. Following the resolution of the government's case against Visa and MasterCard[4] and the settlement in *In re Visa Check*, very little had changed in the way the market was structured and the way it was likely to perform in the absence of further reforms. The bank cartel still owned and controlled both Visa and MasterCard. They used their ownership and control of those networks to enforce a set of rules which were designed to inhibit the entry of new competitors by disabling merchants from conveying transparent price signals at the point-of-sale. Thus, unlike competitive markets where new entrants can succeed and build sales volume by offering products at a lower price, in the payment-card market that method of entry was impossible. Merchants and consumers could not reward low-priced competitors to Visa and MasterCard.

17. In addition, not only had the banks successfully enforced these rules, but they also were able to increase the interchange rates paid by merchants on both credit-card and debit-card transactions. They did this not only by raising the pre-existing rates on standard "traditional" credit cards, but also by issuing new "premium" cards which carried much higher interchange rates to support the cost of providing those rewards to the cardholder. Finally, as consumers shifted their form of payment away from cash and checks and towards credit and debit cards, the proportion of retail sales volume paid for with credit or debit cards, versus checks or cash, increased dramatically. By 2005 the total costs of acceptance for merchants increased dramatically. Payment cards accounted for 38% of retail sales volume[5] and interchange-fee

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[4] *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003).
[5] Nilson Report No. 896 at 1, 7-9 (Dec. 2006).

revenue paid by merchants to Visa and MasterCard card issuing banks had risen to over $30 billion per year.

18. It became clear to me that the only long-term solution for merchants was to get the banks out of the boardrooms of Visa and MasterCard, and to reform the rules such that transparent price signals could be provided at the point-of-sale so that the usual competitive market mechanisms would work to make the merchants' costs of acceptance more reflective of actual competitive conditions.

### C. Meetings and Information Gathering with Merchants and Trade Associations

19. In November 2004 my law firm's Executive Board approved the filing of the action that we were contemplating. RKM&C had a history of representing parties in very high-stakes litigation. I have represented plaintiffs and defendants in both class and non-class antitrust litigation since 1983. While we had confidence in the merits of the case we were planning to file, we understood that it represented a great risk to the law firm and its partners who would be risking millions of dollars to take on the largest members of the U.S. banking industry. I know from speaking with my Co-Counsel during this case, that they too understood the enormity of the risk they were undertaking when they chose to pursue this case.

20. Between November 2004 and June 2005 we continued to perform legal research and factual investigation as we drafted our first complaint. We continued to meet with a number of large merchants and several merchant trade associations, both to gather information from them regarding their experiences in the payment-card market, but also to assess whether they were interested in being a part of this effort. We also interviewed and engaged an economic consulting firm, Lexecon, to advise us on the many complicated economic issues that we would face. And

we engaged Professor Herbert Hovenkamp, the leading academic in the field of antitrust law, and the author of the most cited and most respected antitrust treatise.[6]

21. By June 2005 we had our complaint fully drafted, and had been retained by five merchants Photos Etc. Corporation; CHS Inc.; Traditions LTD.; A Dash of Salt, L.L.C.; and KSARRA, L.L.C. to file the case on their behalf. These brave merchants were willing to take on not only Visa and MasterCard, but also the banks that owned and controlled both networks. Our research had led us to believe that the most favorable law on the important legal issues in our case was in the Second Circuit. Therefore, on June 25, 2005 we filed the first complaint in the District of Connecticut, where two of the Class Plaintiffs did business.[7]

## III. History of this Litigation

### A. The First Cases Filed by Robins, Kaplan, Miller & Ciresi L.L.P.

22. Consistent with our strategy, the first complaint constituted a frontal attack on the foundations of the Visa and MasterCard networks. It challenged, as horizontal price fixing, the banks' agreement on the level of interchange fees each would charge merchants for transactions by consumers using their cards. It also challenged, as horizontal agreements restraining trade under Section 1 of the Sherman Act and as unlawful monopolization under Section 2, many of the rules of Visa and MasterCard which disabled merchants from providing discounts, or employing surcharges, or to take other steps designed to make the transaction at the point-of-sale more transparent and to steer customers to a lower cost form of payment at the point-of-sale.

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[6] Philip E. Arecda. Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Applications*, (Aspen 2012).

[7] Prior to and concurrent with our investigation, long-time class action leaders Berger & Montague, P.C. and Robbins Geller Rudman & Dowd LLP were developing their expertise as to litigation involving payment cards, in particular, by pursuing a series of complex cases alleging various antitrust violations by several of the Defendants in the case. *See, e.g., Currency Conversion Fee Antitrust Litigation, MDL 1409 (S.D.N.Y.)*

23. The initial complaint named as defendants Visa, MasterCard and the following banks: Bank of America Corporation; Bank of America, N.A.; National Processing, Inc.; Bank One Corporation; Bank One, Delaware, N.A.; Chase Manhattan Bank USA, N.A.; JPMorgan Chase & Co.; First Century Bank, N.A.,; First Century Bankshares, Inc.; Fleet Bank (RI), N.A.; Fleet National Bank; Capital One Bank; Capital One F.S.B.; Capital One Financial Corporation; Citicorp; Citigroup, Inc.; Citibank, N.A.; First National Bank of Nebraska; First National Bank of Omaha; HSBC Finance Corporation; HSBC Holdings, PLC; HSBC North America Holdings, Inc.; MBNA America Bank, N.A.; National City Corporation; National City Bank of Kentucky; Providian Financial Corporation; Providian National Bank; RBC Centura Banks, Inc.; RBC Royal Bank of Canada; People's Bank; RBS National Bank of Bridgeport; Royal Bank of Scotland Group, PLC; Suntrust Banks, Inc.; Texas Independent Bancshares, Inc.; USAA Federal Savings Bank; Wachovia Corporation; Wachovia Bank, N.A.; and Westpac Banking Corporation.

24. While that initial action contained a damage claim, and we certainly expected damages to be enormous, the primary goals were to reform the market by eliminating the horizontal agreements among the banks to fix the levels of interchange fees and enforce the rules that we were challenging. Although we thought that obtaining the divestiture of the banks' ownership interests in Visa and MasterCard would be difficult, because very few private antitrust actions in the history of the antitrust laws have ever succeeded in obtaining such extensive relief, we were determined to make that effort. We believed that, because our goal was to get the banks out of their position as owners and controllers of Visa and MasterCard, a settlement was unlikely and a trial would be necessary. After all, the nation's largest banks had spent billions of dollars over 30 years to structure the payment-card industry to serve their interests, and we did not expect them to abandon those investments without a trial. Our plan was to move the case along quickly and efficiently in order to get to trial as soon as possible.

### B. Related Cases, Individual Cases, and Consolidation into One MDL Proceedings

25. Within six days of the filing of our complaint, similar cases began to be filed in various district courts around the country. Most of these cases, like ours, were brought as class actions. A complete list of these actions is attached as Exhibit 1. However, also among these cases were a number of non-class, individual actions brought on behalf of various large merchants. Ultimately over 38 class actions, and seven individual actions on behalf of 19 large merchants, were filed in several different federal courts. The filing of such a large number of similar cases led to proceedings before the Judicial Panel on Multidistrict Litigation. A hearing was held on September 29, 2005 before the JPML and on October 19, 2005 the Panel ordered that all of these similar cases be consolidated and coordinated in the Eastern District of New York, before Judge Gleeson.

### C. Early Motion Practice – Lead Counsel and Disqualification

26. Even before the JPML proceedings, I had initiated and organized discussions among counsel in the various cases that had been filed in order to determine if we could agree upon a leadership structure to recommend to the Court. Given the number of actions filed by almost 50 law firms, it was obvious that an organizational structure was imperative to the efficient prosecution of these actions. By December 2005 a significant majority of counsel in the various cases that had been filed agreed upon an organizational and leadership structure to recommend to the Court. After reaching this agreement, we filed a motion with the Court recommending the entry of an order designating three firms as Co-Lead Counsel, Robins, Kaplan, Miller & Ciresi L.L.P., Berger & Montague, P.C., and Robbins Geller Rudman & Dowd LLP.[8] This motion was opposed by a smaller group of law firms, who instead asked that the firm Milberg Weiss be

[8] When the Court issued its Order appointing Co-Lead Counsel this firm was named Coughlin, Stoia, Geller, Rudman & Robbins L.L.P.

appointed as sole lead counsel. By Order dated February 24, 2006 the Court appointed as Co-Lead Counsel for the Class the three firms referred to above. [Dkt. No. 279].

27. Before the leadership structure could be determined and put in place by the Court, another matter had to be resolved. In the fall of 2005 counsel for MasterCard had raised with me the issue of whether I should be disqualified from representing plaintiffs in the litigation due to my prior service a decade earlier in the United States Department of Justice Antitrust Division. After very serious consideration of MasterCard's position, I wrote to MasterCard's counsel declining to withdraw from the case.

28. Shortly thereafter, on December 21, 2005, MasterCard filed a motion with this Court seeking an order disqualifying me from representing plaintiffs in this matter. After a hearing on MasterCard's motion held before Magistrate Judge Orenstein on January 27, 2006, by Order dated January 27, 2006 the Court denied MasterCard's motion. Magistrate Judge Orenstein issued a written memorandum detailing the Court's reasoning in denying MasterCard's motion on August 7, 2006. MasterCard then appealed the Order of Judge Orenstein to Judge Gleeson. By Order dated September 24, 2007 Judge Gleeson rejected MasterCard's appeal.

### D. Class Counsel Organization, Early Status Conferences, Early Discovery and Court's Case Management Role

29. Based upon their vast experience in managing large, multi-defendant antitrust class actions, Co-Lead Counsel knew that it was crucial to the success of their management of these consolidated actions that we persuade the Court to actively supervise and manage these actions. Class Counsel requested Magistrate Judge Orenstein to require the parties to file a joint status report every other month, followed by regularly scheduled status conferences. [Dkt. No. 125, 1/09/06, at page 12]. We also knew that it was crucial to the efficient conduct of this case that the efforts of all of the law firms which had filed cases now consolidated as MDL 1720 be carefully coordinated and directed so that there would be as little duplication of effort as possible. To that

end, Co-Lead Counsel designated two other highly experienced law firms to serve as Co-Chairs of the Class Plaintiffs' Steering Committee, Freedman, Boyd, Hollander, Goldberg, Urias & Ward P.A., and Hulett Harper Stewart LLP. The talented lawyers at these two firms assisted the Co-Lead Counsel in managing the efforts of Class Counsel, and in developing the strategy that proved successful.

30. Magistrate Judge Orenstein agreed to our suggestion that regularly scheduled status conferences be held. As a result, throughout the pretrial period, regularly scheduled status conferences were held and Class Plaintiffs pushed for an early start for discovery. As a result, at the status conference held on May 17, 2006, Magistrate Judge Orenstein ordered that the Defendants immediately produce the documents from prior cases, including documents produced in *In re Visa Check/MasterMoney Antitrust Litigation* and *United States v. Visa U.S.A. and MasterCard International Co*. (hereinafter the "legacy productions").

31. At the Court's direction the legacy productions were made by Defendants on a rolling basis over the next several months. This enabled Class Plaintiffs to begin preparing the background information for the more current discovery to come.

### E. The First Amended Complaint (April 2006) and Motions to Dismiss

32. Pursuant to the Scheduling Order of March 23, 2006 [Dkt. No. 303], Class Plaintiffs filed the First Consolidated Amended Class Action Complaint ("FCACAC") on April 24, 2006. The complaint contained 347 paragraphs, 16 claims for relief under federal and state antitrust laws, and spanned 87 pages. Since discovery had just commenced, the allegations were all based only on facts in the public domain. Recognizing the certainty that motions to dismiss would be filed by Defendants against the new complaint, Co-Lead Counsel organized and directed an exhaustive review of materials in the public domain around the world.

33. The FCACAC alleged the existence of two classes—a monetary-relief class under Rule 23(b)(3) and an injunctive-relief class under Rule 23(b)(2). The complaint was set forth in

three parts: the first setting out the factual background for all claims; the second alleging facts specific to claims relating to the fixing of credit-card interchange fees; and the third alleging facts specific to the fixing of signature-debit-card interchange fees.

34. The chart below summarizes the various claims for relief in the FCACAC.

| Claim # | Class | Defendants | Cause of Action |
|---|---|---|---|
| 1 | I | Visa & Bank Defendants | Sherman Act § 1—Visa Intranetwork Conspiracy (Credit) |
| 2 | I | MasterCard & Bank Defendants | Sherman Act § 1—MC Intranetwork Conspiracy (Credit) |
| 3 | I | Visa, MasterCard & Bank Defendants | Sherman Act §1— Visa & MC Internetwork Conspiracy (Credit) |
| 4 | I | Visa & Bank Defendants | Sherman Act §1—Visa Anti-Steering Restraints. |
| 5 | I | MasterCard & Bank Defendants | Sherman Act §1—MC Anti-Steering Restraints |
| 6 | I | Visa & Bank Defendants | Sherman Act §2—Monopolization Through Anti-Steering Restraints. |
| 7 | I | Visa & Bank Defendants | Sherman Act §1—Tying/bundling of Various Services Within Network Services |
| 8 | I | MasterCard & Bank Defendants | Sherman Act §1— Tying/bundling of Various Services Within Network Services |
| 9 | I | Visa & Bank Defendants | Sherman Act §1—Exclusive dealing for Fraud Protection and Transaction Processing |
| 10 | I | MasterCard & Bank Defendants | Sherman Act §1—Exclusive dealing for Fraud Protection and Transaction Processing |
| 11 | I | Visa & Bank Defendants | Cal. Cartwright Act—Intranetwork Conspiracy (Credit) |
| 12 | II | All Defendants | Clayton Act §16—Declaratory and Injunctive Relief Relating to Conduct Alleged in Claims 1-10. |
| 13 | I | Visa & Bank Defendants | Sherman Act §1—Intranetwork Conspiracy (Debit) |
| 14 | I | MasterCard & Bank Defendants | Intranetwork Conspiracy (Debit) |
| 15 | I | Visa & Bank Defendants | Cartwright Act—Intranetwork Conspiracy (Debit) |
| 16 | II | All Defendants | Clayton Act §16—Declaratory and Injunctive Relief Relating to Conduct Alleged in Claims 13-15 |

35. Class Plaintiffs' prayer for relief requested monetary damages for the (b)(3) Class "for the fullest time period permitted by the applicable statutes of limitations and the purported settlement and release in *In re Visa Check/MasterMoney Antitrust Litigation*." By including this clause in the prayer for relief, Class Counsel sought damages from as far back in time as possible.

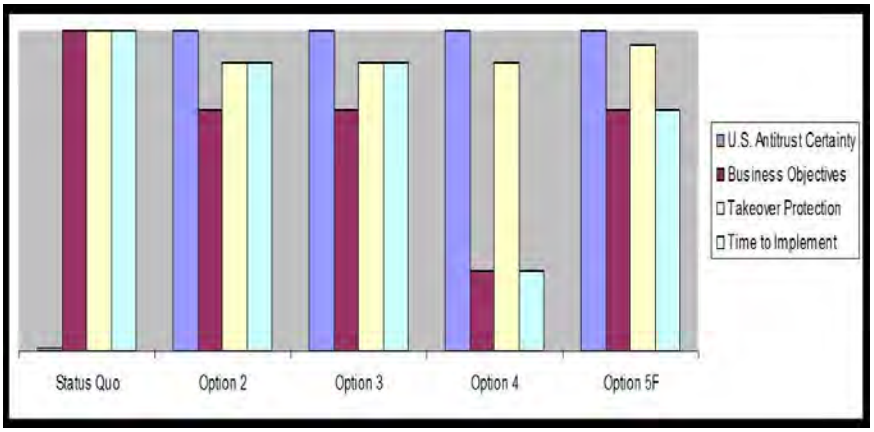
36. The complaint was the result of a comprehensive effort by Class Counsel, including several hundreds of hours of attorney time to marshal the facts in the public record. At the direction of Co-Lead Counsel, my colleague, Ryan Marth, was the primary draftsperson for the initial draft of the new complaint. However, I and attorneys at the other Co-Lead firms all provided input, comments and edits such that the final product was truly a joint effort. Industry, economic, and legal experts were also consulted with regard to the factual and legal allegations in the complaint. All Class Plaintiffs—including their in-house and outside counsel—also received drafts of the FCACAC and were asked to provide substantive input into the facts that were alleged and the theories that were pursued.

### F. The Networks' Restructurings and Class Plaintiffs' Decision to Challenge Them

37. On May 25, 2006—a little more than a month after the FCACAC was filed—MasterCard completed and consummated its restructuring. Discovery conducted by Class Counsel suggested that a major motivation of the IPO was to escape or mitigate Defendants' damage liability in MDL 1720.

38. The banks' goal was described in MasterCard's contemporaneous documents as obtaining "U.S. Antitrust Certainty" which MasterCard meant as achieving a 90% certainty that any antitrust challenge to its ownership and governance structure would be dismissed on the pleadings. (Cl. Pls' SUF ¶ 34; Tim Murphy Dep. Ex. 21904, at MCI_MDL02_10147110; T. Murphy Dep. Tr. Feb. 29, 2009 ("[Antitrust litigation across the world] was—it was a primary

reason [for the IPO], yes.")). The chart below demonstrates that, while MasterCard viewed the status quo as failing the "antitrust certainty" test, its chosen option (5F) would, in the opinion of MasterCard's specially-retained antitrust counsel, meet the 90% test:




39. The MasterCard restructuring posed significant risks for Class Plaintiffs. If MasterCard's lawyers were right and MasterCard was successful in establishing that its restructuring converted it from a "consortium of competitors," as found by the Second Circuit, into a "single entity," it would be immune from challenge under Section 1 of the Sherman Act when it establishes interchange fees and other rules. That would greatly limit Defendants' damage exposure and, more importantly, would greatly imperil Class Plaintiffs' prospects for injunctive relief. A MasterCard that was adjudicated to be a single entity could not so easily be compelled to modify the rules that Class Plaintiffs were challenging in this litigation. The MasterCard restructuring almost certainly assured an appeal from any judgment Class Plaintiffs might obtain in the District Court, thus adding both additional risk and delay to an already risky and lengthy litigation.

40. Discovery disclosed that in September 2005, less than three months after the first actions were filed challenging the banks' use of Visa and MasterCard as price-fixing vehicles, MasterCard publicly announced that it was considering restructuring itself by having its bank owners divest their ownership interests in MasterCard and sell their stock to the public via an

initial public offering (IPO). Within weeks of MasterCard's announcement, Visa also announced that it was considering a similar restructuring. We now know from the extensive discovery taken with respect to the MasterCard and Visa restructurings, including depositions of the principal architects of these transactions, that one of the primary motivations for the banks to give up their ownership and control of the two networks was the recognition of potentially ruinous damage exposure from the actions then being consolidated under MDL 1720. We also know from discovery that the banks desired alternatives that would permit them to remain in control of the two networks, while minimizing their antitrust liability. The banks feared that, without ownership and control of Visa and MasterCard, the networks would abandon their "bank-centric" business model. Ultimately, the banks were advised by their counsel that no alternative short of complete divestiture of their ownership interests in both MasterCard and Visa would provide them the opportunity to limit their antitrust damage exposure that they sought, and accepted the risk that, freed of bank control, Visa and MasterCard would pursue their own economic interests, and not the banks.

41. At the time that I first heard of MasterCard's planned restructuring, it seemed to me that the agreements by which that restructuring would be accomplished could conceivably be challenged as antitrust violations themselves, under either Section 1 of the Sherman Act or Section 7 of the Clayton Act. I asked my team at RKM&C to begin researching the law on these issues. We also consulted with our antitrust expert Professor Herbert Hovenkamp. Based on our research and analysis, we concluded that, while there was literally no precedent for such an antitrust challenge to the conversion of a joint venture into a single entity, if we could credibly allege and prove that the transactions by which the restructurings were accomplished unreasonably restrained competition (Section 1 of the Sherman Act) and/or threatened to reduce competition in a relevant market (Section 7 of the Clayton Act), we might survive motions to dismiss. We recognized, however, that our ability to prevail on such a claim would critically depend upon the facts obtained in discovery and proven at trial.

42. On May 22, 2006, only three days before MasterCard's planned IPO, we informed the Court and MasterCard and its banks that the Class intended to commence a new action challenging the MasterCard restructuring under Section 1 of the Sherman Act and Section 7 of the Clayton Act. While this claims had substantial risks for the Class Plaintiffs, it also created risks for Defendants by keeping the prospect of ruinous and ever-growing damage exposure on the bank Defendants.

43. The MasterCard restructuring posed several novel legal and factual issues. Despite hours of legal research and multiple conversations with leading antitrust scholars, Class Counsel could not find another instance in which a court applied the antitrust laws to the reorganization of a joint venture into a publicly traded company. The precedent-setting nature of this issue was confirmed in the Defendants' briefing on the issue, in which they also did not point to a single instance in which this issue was addressed by a court or antitrust-enforcement agency.

44. The claims challenging the MasterCard restructuring were set forth in the First Supplemental Class Action Complaint ("FSCAC"), which was intended to be filed pursuant to Fed. R. Civ. P. 15(d). The complaint alleged—without the benefit of any discovery at that time—that the MasterCard restructuring was an attempt by the banks that then controlled MasterCard to continue their anticompetitive conduct shielded from the proscriptions of Section 1 of the Sherman Act. We further alleged that, because the entity arising out of the IPO was adjudicated by the Second Circuit to have market power, the IPO created a single entity with market power. We challenged the creation of such an entity under Section 7 of the Clayton Act and Section 1 of the Sherman Act—the two federal antitrust statutes regulating mergers. Of course, making such allegations was far easier than proving them at trial, and even the assertion of such claims guaranteed an appeal to the Second Circuit.

45. Like the main consolidated amended complaint, the FSCAC was the result of hundreds of hours of attorney time. Class attorneys and advisors mined MasterCard's SEC

filings to fill in factual allegations regarding the mechanics of and the stated justifications for the MasterCard IPO. Leading antitrust scholars were also consulted and provided their input into the supplemental complaint.

46. As discussed below, Class Counsel also challenged the Visa restructuring that was consummated on March 18, 2008 when we filed the Second Supplemental Class Action Complaint in January of 2009.

## G. Defendants' Motions to Dismiss the FCACAC and Supplemental Complaint

47. On June 9, 2006, Defendants moved to dismiss the pre-2004 damages claims in the FCACAC or, in the alternative, to strike allegations relating to pre-2004 damages. Defendants argued that the release in *Visa Check* precluded all such damage claims.

48. On July 21, 2006, we filed our opposition to Defendants' motion. Defendants filed their reply brief on August 18, 2006.

49. Oral arguments on Defendants' motion to dismiss were conducted on November 21, 2006.

50. On September15, 2006, Defendants moved to dismiss the FSCAC in its entirety. We filed our response on October 30 and Defendants filed their reply on November 29, 2006.

51. Like the FSCAC itself, Class Plaintiffs' brief in opposition to Defendants' motion to dismiss it was the product of hundreds of hours of attorney time, and was drafted in consultation with Class Plaintiffs' expert economists and leading antitrust scholars, including Professor Hovenkamp. The Court held oral argument on Defendants' motion to dismiss the FSCAC on February 2, 2007.

52. On July 7, 2007, Magistrate Judge Orenstein issued a report and recommendation that the Defendants' motion to dismiss pre-2004 damages be granted. Class Plaintiffs appealed to

Judge Gleeson and filed written objections to the report and recommendation on November 13, 2007. Judge Gleeson adopted the report and recommendation on January 8, 2008.

53. On February 12, 2008, Judge Orenstein issued a report and recommendation that partially dismissed the FSCAC with leave to re-plead. Even though Judge Orenstein recommended partial dismissal, his report and recommendation accepted Class Plaintiffs' premise that the MasterCard restructuring could harm competition and thus could violate Section 7 of the Clayton Act. In an issue that was largely one of first impression, Judge Orenstein concluded that Section 7 of the Clayton Act applied both to MasterCard and the banks, as both had acquired "assets of another." He also concluded that the FSCAC alleged a substantial likelihood of harm to competition, as required by Section 7 of the Clayton Act. Judge Orenstein partially dismissed the antitrust claims of the FSCAC as to the banks, however, because Class Plaintiffs technically failed to allege that the banks acquired "assets of another". The Defendants filed objections to the Report and Recommendation, arguing that the complaint should have been dismissed in it's entirely for failure to state a claim.

54. On November 25, 2008, Judge Gleeson upheld Defendants' objection and dismissed the FSCAC with leave to re-plead.

## H. Class Counsel Building the Record

### 1. Organizing the Discovery Effort

55. Building a record that would be sufficient to persuade the Court and a jury of the merits of Class Plaintiffs' claims was a mammoth undertaking. The Class had sued 19 banks, including most of the world's largest banks, as well as Visa and MasterCard, the two largest payment-card networks in the world. These Defendants had virtually limitless resources and were represented by many of the largest and most prestigious law firms in the world, whose job it was *every day* for almost seven years to protect their interests.

56. In addition, we knew that the Defendants would retain experts with sterling qualifications to help the banks' and networks' version of the story. The Defendants, and most particularly Visa, had been funding "academic research" by prestigious economists all over the world, building Visa's argument that in "two-sided markets," standard economics and the antitrust rules, do not apply.

57. In discovery many Defendants' documents were withheld on the basis of privilege by reason of the document being copied to legal counsel, even on routine correspondence. The result was that the privilege logs of each Defendant contained tens of thousands of entries. Visa's privilege log contained over 100,000 entries.

58. Faced with such daunting obstacles, it was imperative that Co-Lead Counsel organize the discovery efforts to be able to efficiently obtain, review, analyze and summarize the evidence necessary to prove our case. This was accomplished by Co-Lead Counsel assigning tasks to Class firms according to their capabilities and resources. We established policies and practices to assure "quality control." So, for example, no firm (or lawyer) was assigned any work on the case until the firm/lawyer had attended a training session in order to gain a more complete understanding of the case. We also established procedures by which important evidence discovery by one firm was shared with other firms, so that the knowledge base was continually expanding.

59. To organize pleadings and correspondence, RKM&C established a case "Extranet," to which Executive Committee firms had access. The Extranet contained, among other things, all correspondence, discovery requests, substantive pleadings from MDL 1720 and related cases, court orders, legal research, factual analysis, and news articles.

### 2. Early Stages of Discovery

60. Despite the obstacles thrown up by Defendants, the discovery record in MDL 1720 became one of the largest in any private civil antitrust case. Including documents produced in

other litigation, the Defendants produced over four-and-a-half million documents, totalling over 65 million pages. Class Plaintiffs produced nearly 200,000 documents, totalling over 1.6 million pages. Individual Plaintiffs' production added over 8.6 million pages to this count. In addition, third parties subpoenaed by Plaintiffs or Defendants produced nearly 300,000 documents totalling over four million pages. The record also included 370 depositions taken in MDL 1720 and over 570 taken in other matters.

61. Discovery formally began on May 1, 2006. Even before that time, however, Class Counsel began preparing for discovery from each of the 19 Class Plaintiffs named in the SCACAC.

62. Before discovery formally began, Class Counsel met with each of the Class Plaintiffs to discuss which individuals and categories of documents were likely to have information responsive to Defendants' discovery requests and to organize each client's mandated, initial disclosures.

63. We anticipated that reviewing and analyzing the documents produced in discovery would be a complicated, difficult and labor-intensive undertaking. Thus, in February 2006, Class Counsel sent out several requests for proposal ("RFPs") to leading e-discovery vendors requesting that each provide an estimate for processing the materials produced by Defendants in discovery and making it accessible to Class Counsel via a web portal. We selected Encore Legal Solutions.

64. As noted above, the first documents Class Plaintiffs requested were documents previously produced in prior litigations. Defendants did not willingly turn over the legacy productions. Obtaining these already-amassed documents required extensive negotiation and was accomplished only after Judge Orenstein ordered these "legacy productions" produced during a status conference, in early 2006.

65. After we culled down the universe of potentially relevant documents using search terms, we assigned dozens of attorneys at Class Counsel firms to review and code those documents for relevance to several issues in the case. We held multiple training sessions at RKM&C offices in Minneapolis, as well as at B&M in Philadelphia and RGRD in San Diego. After being trained on the issues in the case, Class attorneys collectively spent thousands of hours reviewing and coding the legacy documents.

66. Also before the May 1, 2006 start of formal discovery, my colleagues and I, working in conjunction with Individual Plaintiffs' counsel, began drafting the initial sets of interrogatories and document requests to be served on Defendants. On May 1, Class and Individual Plaintiffs together served 417 document requests and 370 interrogatories. On May 3, 2006, Defendants collectively served 69 interrogatories and 122 document requests on Class Plaintiffs. Each of these figures includes subparts.

67. Because of the volume and complexity of requests and the sheer number of parties, the "meet and confer" sessions that typically occur in litigation were particularly involved. Many in-person meet-and-confer sessions were held in the first months of discovery. Typically, these involved at least one attorney from each named Defendant, and multiple attorneys from the Class Plaintiffs and the Individual Plaintiffs. In addition, several telephonic meet and confers occurred regarding the parties' initial discovery requests and subsequent rounds of requests. Altogether, there were dozens of meetings and telephone calls held to try to reach agreement on discovery disputes.

### 3. Depositions and Document Discovery of Defendants

68. By the initial discovery cutoff in 2009, Class and Individual Plaintiffs collectively had served 718 document requests and 631 interrogatories, and five requests for admissions.

69. The volume of documents produced by Defendants to Class Plaintiffs in MDL 1720 was proportional to the monumental scope of this litigation. Exhibit 2 sets forth the number and pages of documents produced by each party to MDL 1720.

70. In addition to physical and electronic documents, the parties turned over massive amounts of data in discovery. Visa, for example, produced six years' worth of its transaction-level databases to Class Plaintiffs. Producing this volume of data was extraordinary for Visa, which per corporate policy could transport the data to Class Plaintiffs only via personal delivery to Co-Lead Counsel by armed guards.

71. A small team of Class Counsel was also tasked with gathering mass quantities of data from each of the bank Defendants to support Class Plaintiffs' motion for class certification. This data discovery was conducted in addition to the document-production process. Members from several firms were tasked with ensuring that that data needed by Class Plaintiffs' experts were produced. During a several-month period in 2008 and 2009—while the parties were in the throes of deposition discovery—Class Counsel held multiple meet-and-confer sessions with Defendants' counsel to secure this data.

72. Not surprisingly, Defendants did not turn over this volume of information willingly. Class Counsel therefore engaged in significant motion practice relating to discovery issues. In addition to motion practice, Class and Individual Plaintiffs' Counsel raised numerous discovery issues in regularly scheduled status conferences before Judge Orenstein. The scheduling of regular status conferences was an enormous help in resolving disputes, as many issues were resolved by the parties before, at, or immediately following status conferences, before those issues required motion practice.

73. Prior to each status conference, the parties—including Individual Plaintiffs—worked together to craft a status conference report that laid out for the Court all pending issues. For each report, Class Counsel, Individual Plaintiffs and Defendants took turns as the primary drafter of

the report. Putting together the reports—in a manner that would assist the Court—while at the same time ensuring each side's position was clearly stated, often took many days of back and forth negotiations to finalize.

74. Class Counsel began receiving document productions from Defendants on a rolling basis in the fall of 2006. Defendants substantially completed their initial document productions in the spring of 2007.

75. To assist in the review of documents, understanding the Defendants' businesses and the preparation for depositions, Class and Individual Plaintiffs' Counsel conducted Rule 30(b)(6) depositions of each of the Defendants on issues related to their corporate structures and the identity of their employees with knowledge of the relevant facts in this litigation. These depositions occurred in the summer and fall of 2006.

76. Like the legacy productions, the Defendants' main productions in MDL 1720 had to be reviewed and coded before Class Counsel could begin any substantive depositions. Each bank Defendant was assigned one or more Co-Lead Counsel or Executive Committee firms, which would take a leading role in reviewing their documents and deposing those Defendants' employees.

| CLASS COUNSEL – DEFENDANT ASSIGNMENTS | | |
|---|---|---|
| **DEFENDANT** | **PRIMARY RESPONSIBLITY** | **CO-LEAD ASSISTANCE** |
| MASTERCARD | Robbins Geller Rudman & Dowd LLP<br>Robins, Kaplan, Miller & Ciresi L.L.P.<br>Scott+Scott LLP | |
| VISA | Robbins Geller Rudman & Dowd LLP<br>Robins, Kaplan, Miller & Ciresi L.L.P. | |
| BANK OF AMERICA | Berger & Montague, P.C. | |
| BARCLAYS | Boni & Zack LLC<br>Kohn, Swift & Graf, PC | Robins, Kaplan, Miller & Ciresi L.L.P. |
| CAPITAL ONE | Freedman, Boyd, Hollander, Goldberg, Urias & Ward P.A. | Berger & Montague, P.C. |

| | | |
|---|---|---|
| CHASE | Robins, Kaplan, Miller & Ciresi L.L.P. | |
| CITICORP | Robbins Geller Rudman & Dowd LLP | |
| FIFTH THIRD | Lockridge Grindal Nauen, PLLP | Robins, Kaplan, Miller & Ciresi L.L.P. |
| FIRST NATIONAL BANK OF OMAHA | Hulett Harper Stewart LLP | Robins, Kaplan, Miller & Ciresi L.L.P. |
| HSBC | Friedman Law Group LLP | Robbins Geller Rudman & Dowd LLP |
| NATIONAL CITY | Gustafson Gluek PLLC | Berger & Montague, P.C. |
| SUNTRUST | Pomerantz Grossman Hufford Dahlstrom & Gross LLP | Berger & Montague, P.C. |
| TEXAS INDEPENDENT BANCSHARES | Scott + Scott LLP | Robins, Kaplan, Miller & Ciresi L.L.P. |
| WACHOVIA | Labaton Sucharow LLP<br>Barrack, Rodos & Bacine | Robbins Geller Rudman & Dowd LLP |
| WASHINGTON MUTUAL | Lieff Cabraser Heimann & Bernstein LLP | Berger & Montague, P.C. |
| WELLS FARGO | Fine, Kaplan & Black, R.P.C. | Robbins Geller Rudman & Dowd LLP |

77. Reviewing the documents of the 19 Defendants was a mammoth undertaking. Class Counsel who were charged with reviewing a particular custodian's documents and writing a document-review memorandum that summarized that custodian's role in the Defendant's business, and salient documents in his or her files. Class Counsel reviewed the files of 880 custodians, and wrote custodial review memoranda for many of these.

78. The documents of top-level employees of each Defendant were reviewed by senior attorneys, most of whom were from Co-Lead Counsel firms.

79. Class Counsel began taking substantive depositions of Defendants' employees in the summer of 2007 and continued through the end of fact depositions in early 2009. Partners at Co-Lead Counsel firms deposed the top-level executives at the network and bank Defendants. At key depositions, those partners at Co-Lead Counsel firms were supported by an associate where

appropriate. For all depositions, junior lawyers were responsible for identifying from among the hundreds-to-thousands of documents that were tagged as relevant for the deponent, those documents most likely to be helpful as deposition exhibits. Senior associates at Class Counsel deposed some of the lower-to-mid level employees of Defendants. For each deposition, paralegals worked with the associate taking or supporting the deposition to arrange for the copying and shipment of documents to the deposition location.

80. A deposition-scheduling committee, made up of representatives from Class Counsel, Individual Plaintiffs, and Defendants met on a regular basis to propose depositions, arrange schedules, and ensure the multi-tracked depositions were properly staffed with court reporters and videographers. Procedures were in place to limit the number of depositions in a given month by party and the members of the committee held calls sometimes weekly to organize the schedules.

81. Co-Lead Counsel and the firms assigned to each Defendant reviewed documents and deposed Defendants' employees in a manner designed and directed by Co-Lead Counsel. Exhibit 3 summarizes the depositions that were taken.

### 4. Discovery of Class Plaintiffs

82. While some attorneys at Class Counsel firms were reviewing Defendants' documents and taking depositions, other firms responded to Defendants' discovery requests and defended Class Plaintiff depositions. Defendants aggressively pursued discovery of even the smallest Class Plaintiffs.

83. Over the course of the case, Defendants propounded 135 document requests and 295 interrogatories (including subparts) on Class Plaintiffs.

84. Defendants were also aggressive in seeking depositions of Class Plaintiffs' employees. For example, Defendants demanded three full days of deposition testimony from

Class Plaintiff Traditions Ltd.—a small furniture retailer with two outlets in Minneapolis-St. Paul and one in Naples, Florida.

85. Generally speaking attorneys at the Co-Lead Counsel firms who were primarily responsible for the Class Plaintiffs' discovery responses took the lead in preparing for those Class Plaintiffs' depositions. Oftentimes, attorneys from Berger & Montague first chaired the defense of these depositions. Each deposition required at least several hours of document review plus a full day of preparation with the witness, in addition to defending the deposition. Most of these depositions required travel to the location of the deposition. Exhibit 4 summarizes the Class Plaintiff depositions that Class Counsel defended.

86. Defendants took numerous depositions of Individual Plaintiffs' employees as well, which also are summarized in Exhibit 5. Even when Class Counsel did not directly participate in these depositions, Class Counsel monitored the depositions for their effect on the record.

### 5. Discovery of Third Parties

87. Class Counsel, working together with Individual Plaintiffs' Counsel, also pursued extensive discovery of third parties. Some of these third parties included consulting firms that had performed work for Defendants, rival payment-card networks, and member banks of Visa and MasterCard that were not named defendants in this lawsuit.

88. Disputes arose with these third parties as they had with the Defendants over the discovery directed at them. Class Counsel therefore engaged in motion practice and extensive meet-and-confer sessions with the third parties' counsel.

89. Third parties' document production is summarized at Exhibit 6.

90. In addition to seeking and obtaining document discovery from third parties, Class Counsel took many depositions of third-party witnesses. Furthermore, Class Counsel also

questioned witnesses in third-party depositions noticed by Defendants or Individual Plaintiffs. *See* Exhibit 7 which lists the third party depositions.

### 6. Supplementation of the Discovery Record

91. Many major developments occurred in the payment-card industry since the initial discovery requests were served. To name just a few, MasterCard and Visa completed their restructurings, each network was investigated by antitrust-enforcement agencies in the United States and abroad, and new payment technologies were being developed and implemented in the marketplace.

92. Because of these developments, Class Plaintiffs needed to supplement the discovery record to present an accurate picture of the marketplace and Defendants' conduct for trial. Thus, Class Plaintiffs requested multiple rounds of discovery supplementation from Defendants. Each of these rounds was vigorously resisted by Defendants, required additional meet-and-confer sessions, additional correspondence between the parties, and, in some cases, further motion practice.

### 7. CaseMap Cataloging of Facts

93. As fact discovery was nearing a close, Bonny Sweeney and I, respectively, prepared a master outline and a master evidentiary narrative which provided a roadmap for organizing the evidence that Class Counsel had obtained in discovery and would ultimately need for trial. This formed the starting point for building our CaseMap database. CaseMap is a West product that allows users to upload facts and exhibits into an organizational structure of legal and factual issues. This effort was a necessary step in the preparation to try the case. Bonny Sweeney's team then created the matrices that converted these documents into a format appropriate for CaseMap.

94. Once the outline was created, junior attorneys at the Co-Lead firms undertook the task of reviewing each deposition summary, transcript, and exhibit. These attorneys marked

where each piece of evidence should be placed in the outline and ensured that the information was inputted into the appropriate module in the CaseMap system.

95. As we progressed into summary-judgment motion drafting, the CaseMap database was one of our primary sources of information. It would have also been the basis for our trial plan if the case would have proceeded to trial.

## I. Class Certification Motion

96. The issue of class certification was another major undertaking with enormous consequences for the viability of meaningful relief. It was only after much research that it was decided to pursue certification of both a Rule 23(b)(3) class for damages and a Rule 23(b)(2) class for equitable relief. Discovery was calculated to support each class.

97. Class Plaintiffs retained Dr. Gustavo Bamberger of Lexecon as the expert economist supporting class certification. Co-Lead Counsel and the co-chairs of the steering committee worked with Dr. Bamberger to be sure he had all the information he needed to form his opinions for his expert report. This required marshaling materials from discovery (both documents and deposition testimony). These same attorneys worked with Dr. Bamberger in the preparation of his deposition and defended his two-day deposition by Defendants.

98. Defendants retained Dr. Edward A. Snyder, as their expert opposing class certification. Co-Lead Counsel's preparation required an extensive review of his prior writings and opinions, as well as the discovery record upon which he relied. Co-Lead Counsel deposed Dr. Snyder for two days.

99. Co-Lead Counsel and the co-chairs of the steering committee worked with Dr. Bamberger to prepare a rebuttal report, which was submitted along with Class Plaintiffs' Reply Memorandum in Support of Class Certification. Defendants then deposed Professor Bamberger again for one more day.

100. The Court devoted a full day to class certification argument. That occurred on November 19, 2009 and was argued by Merrill G. Davidoff of Berger & Montague.

### J. The Relevance of Foreign Proceedings

101. One of the many things that made MDL 1720 the incredibly complex and difficult case that it became was the fact that investigations and proceedings analyzing the antitrust and economic issues related to the payment-card industry were taking place in a large number of countries around the world.[9] Even prior to filing the initial class action in this case, we undertook an extensive analysis of these foreign proceedings to determine what foreign antitrust-enforcement authorities were doing with respect to many of the same conduct issues that we were planning to challenge in our case. It was very important for us to understand the claims that were being investigated or pursued by these foreign antitrust enforcement or regulatory authorities, and equally important, to understand the defenses and rationale that Visa and MasterCard were giving for their conduct in these other countries. Moreover, the relief obtained by these foreign antitrust or regulatory authorities, and the effects thereof, informed Class Counsel's view on the equitable relief to be sought in this case

102. Although it was not the first country in the world to investigate payment-card industry issues, Australia became an early leader in efforts to address some of the competition issues that were raised by the banks' ownership and control of Visa and MasterCard. In 2003, after a multi-year investigation, the Reserve Bank of Australia[10] determined that interchange fees charged to merchants in Australia were higher than they would have been if there had been true competition. Like the Federal Reserve Board in the United States, the Reserve Bank of Australia ("RBA") has authority to regulate the banking industry in Australia. Exercising its regulatory

[9] *See* Expert Report of Alan Frankel dated July 2, 2009 ¶447, for a listing of foreign proceedings since 2000.
[10] The equivalent to the United States Federal Reserve Board.

authority, in 2003 the RBA by rule imposed limits on interchange fees on credit-card transactions using Visa or MasterCard credit cards.

103. In addition to requiring the reduction in credit-card interchange fees, the RBA rules required that Visa and MasterCard no longer prohibit the use of surcharges on credit-card transactions by merchants. In filings made by both Visa and MasterCard in the RBA proceedings, both networks acknowledged that the ability of merchants to impose surcharges on credit-card transactions would lead to the reduction of interchange fees. Indeed, the evidence from Australia has now demonstrated that even the merchant discount fees charged by American Express have been reduced toward the level of Visa and MasterCard fees by the threat of surcharging by merchants.[11]

104. In addition to the proceedings in Australia, in the European Union ("EU") the Directorate General for Competition has conducted intensive investigations of both Visa and MasterCard, in addition to the payment-card industry generally. The investigation of MasterCard's cross-border interchange fees in the EU led to a decision in that proceeding which examined and rejected all of the various defenses that MasterCard has historically offered in defense of its interchange fees and anti-steering rules.

105. Because of the importance of foreign proceedings, Class Counsel closely monitored developments in other countries. Associate-level attorneys were assigned particular, relevant jurisdictions for which they reviewed public filings and discovery documents and summarized their findings in memoranda which were posted on the Extranet. The associates who drafted the initial memoranda were then responsible for tracking developments in their jurisdictions. The information gathered from this procedure became useful during deposition discovery as defendant custodians were questioned on their business practices and regulatory interventions in foreign jurisdictions.

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[11] The evidence from Australia is covered in greater detail in the accompanying Declaration of Dr. Alan Frankel.

## K. Congressional Efforts Leading to Durbin Amendment

106. In many countries merchants and merchant groups have had success in obtaining relief from the anticompetitive rules and conduct in the payment-card industry by persuading legislatures and regulators to take appropriate steps to regulate the payment-card industry. Efforts by merchants in the United States have been, with one recent exception, completely unsuccessful. It is widely believed by knowledgeable persons in Washington DC that merchants and their trade associations have been particularly ineffective in interesting state and federal regulators in taking action to address problems in the structure and conduct of the payment-card networks and their bank owners. For example, in 2009 many merchant groups unsuccessfully threw their support behind a bill in Congress that would adopt a rate-setting mechanism using a three-judge panel to set interchange rates that could be charged to merchants by Visa and MasterCard.

### 1. Assistance to Merchants in Developing a Legislative Strategy – The Passage of Dodd-Frank

107. In 2009 I was asked by several of my merchant clients in MDL 1720 to become involved in strategizing with merchant groups to try to find a more effective, and hopefully more successful, legislative strategy. Because Co-Lead Counsel viewed developments in Washington, D.C., both in Congress and at the Department of Justice, as important adjuncts to the litigation, beginning in 2009 and continuing to the present I became significantly involved in the development of strategic options for merchants with respect to legislative and regulatory remedies. My law firm retained a lobbying/consulting firm in Washington, D.C. to assist us in this task.

108. Once I became involved, it became apparent to me that some of the merchants and their trade associations were divided on what a successful strategy might be, with some merchant trade associations favoring the intrusive regulatory approach referred to above, and others in

favor of broad congressional legislation to simply capping interchange fees charged to merchants on credit-card transactions.

109. It was my view, and the view of the lobbying firm which we had retained, that the only strategy that stood any chance of success in the near-term would be one focused solely on debit cards. The story of debit cards was much easier to tell than the more complicated story with respect to credit-card interchange fees. For almost 100 years there had been no interchange fees on checks processed through the Federal Reserve System.[12] This was due to the evolution of the check-processing system in United States under competitive conditions. In urging Congress to enact limitations on debit-card interchange fees, it was relatively easy to make the argument that debit cards were just electronic checks, and that there was no reason why banks should be able to impose interchange fees on debit cards when they did not, and could not, impose interchange fees on checks.

110. After a series of meetings and other discussions with merchants and their trade associations, in the spring of 2010 the merchants agreed to adopt a unified strategy (for the first time) focused on drafting legislation, and urging its passage, which would direct the Federal Reserve Board to adopt regulations imposing limitations on interchange fees charged to merchants on debit-card transactions, and to leave credit-card interchange fees for another day. Thus, in the spring of 2010 I became intimately involved in the drafting and strategizing regarding legislative proposals that ultimately came to be called the Durbin Amendment, after its author Sen. Dick Durbin of Illinois. The principal focus of the Durbin Amendment was to authorize the Federal Reserve Board to adopt rules limiting the level of interchange fees that debit-card networks could impose on merchants. The Durbin Amendment also contained other important relief, such as requiring issuing banks to enable debit cards to be processed over at least two competing networks, allowing merchants to provide discounts to consumers for

[12] Alan S. Frankel & Allen Shampine, *The Economic Effects of Interchange Fees*, 73 Antitrust L.J. 627, 637-39 (2006).

payment by cash, check, or debit card, in lieu of credit cards, and allowing merchants to place a minimum purchase amount of up to $10.00 on credit-card transactions.

111. Ultimately, in the first six months of 2010 I traveled to Washington, D.C. eight times to meet with merchants and their counsel, and occasionally with senators and their staff, to assist with the efforts to get the Senate to adopt the Durbin Amendment as an amendment to the bill that ultimately became known as the Dodd Frank Act. I also participated in literally dozens of telephone conference calls to discuss these efforts, as well. Although proponents of the Durbin Amendment felt that momentum was building in their favor in the Senate, it was still widely believed that the Durbin Amendment would fail when it came to a floor vote in the Senate. After all, in recent years when everything in the Senate is subject to a filibuster, requiring 60 votes to pass any bill or amendment, given the enormous political power of the banks and the networks, it seemed unlikely that Sen. Durbin and the merchants could round up more than 60 votes for his amendment. Nonetheless, on May 12, 2010 during the debate on the Dodd Frank Act on the floor of the Senate, Sen. Durbin offered his amendment and, to the astonishment of almost all knowledgeable observers, it passed with a bipartisan total of 64 votes.

112. However, this was not the end of the legislative fight. There was no comparable provision in the House counterpart bill to the Senate bill, and thus the differences between the two bills were going to be resolved (if at all) in a conference committee. Although conference committees formerly were a common feature of the passage of legislation in Congress, I learned that the conference committee to put together the final version of the Dodd Frank Act was the first conference committee in several years. I spent several days monitoring the work of the conference committee. During the meetings of the conference committee, the banks and the networks were furiously trying to get enough support among the conferees to keep the Durbin Amendment out of the final legislation, ultimately the large bipartisan vote in the Senate gave the Senate conferees a persuasive argument to keep the Durbin Amendment in the final bill.

113. The enactment of the Durbin Amendment as part of Dodd-Frank, which, after the Federal Reserve Board adopted its rules limited interchange fees on debit-card transactions to a maximum of about $0.24, was highly significant to the litigation of MDL 1720. The reason for this was that it gave merchants, for the first time, a substantially lower-priced form of payment other than cash to which they now could try to steer their customers. Debit-card transaction volume already was growing at a faster rate than was credit-card transaction volume, and the Durbin Amendment seemed certain to accelerate that growth. After the enactment of the Durbin Amendment the elimination of the Visa and MasterCard anti-steering rules became an even more valuable form of relief for merchants, as they now had the opportunity, if those rules could be eliminated as part of a judgment or settlement of MDL 1720, to steer their customers to the very low-priced debit cards. We knew then that merchants in other countries had successfully employed steering strategies when they were permitted to surcharge, or threaten to surcharge. Indeed, as described in the Declaration of Dr. Alan Frankel, the experiences in other countries demonstrate that the ability to surcharge has enormous value to merchants.

114. In 2011, after the enactment of Dodd-Frank, but before the Federal Reserve Board had adopted its final debit-card rules, Visa, MasterCard and the banks mounted a determined effort to repeal the Durbin Amendment portion of Dodd-Frank. They persuaded Sen. Jon Tester, a Montana Democrat, to offer an amendment to various pieces of legislation that would be voted on the Senate floor, that would have repealed all or most of the reforms contained in the Durbin Amendment, or, alternatively, would have delayed the implementation of the Federal Reserve Board's rules. At the request of my clients I again became involved in the development of a strategy to defeat the Tester amendment. I traveled to Washington several times in the late spring and early summer of 2011 to meet with my clients and with the lobbying firm that we had retained to assist us with the goal of assisting the merchants in persuading a sufficient number of

senators to vote no on the Tester amendment. When Sen. Tester offered his amendment on the floor of the Senate on June 8, 2011 it was defeated in a close vote of 54 in favor and 44 against.[13]

115. We were also asked by our clients to assist them in connection with the development of the rules by the Federal Reserve Board that were required by the Durbin Amendment. One of the principal concerns that merchants had about the delegation of rulemaking authority to the FRB was that, since the FRB had never engaged in any type of regulation of payment cards, it lacked expertise and experience, and even basic knowledge, of the important economic issues that it would have to understand in order to properly carry out its function in developing the rules required by the Durbin Amendment.

116. To assist the merchants, after the enactment of Dodd-Frank in the summer of 2010, we prepared materials for submission to the FRB, brought a motion before the Court to lift some of the restrictions on the Protective Order so that we could provide litigation materials to the FRB that we believed would assist the FRB in caring out its responsibilities under the Durbin Amendment, and personally met with and corresponded with the staff at the Federal Reserve Board that were responsible for the development of the rules. Our goal was to try to educate them about the economics of payment cards generally, and debit cards in particular. We knew that the banks were engaged in a type of disinformation campaign with the FRB staff, and, because the FRB regulates many aspects of banks business, banks had regular communications with the FRB and had the ability to influence the rulemaking process far beyond the ability of merchants. Ultimately, the merchants' fears were proven true when the FRB adopted final rules setting the limit on debit interchange fees at a level twice as high as the FRB had indicated in its draft rules. Nonetheless, the limitation on debit interchange fees of approximately $0.24 per transaction was sufficiently low to make steering to debit desirable for merchants.

[13] Only because current Senate rules require 60 affirmative votes did the Tester amendment fail.

117. Even before the Tester challenge, in October 2010 a large Minnesota-based bank, TCF National Bank, brought suit in the United States District Court for the District of South Dakota against the Board of Governors of the Federal Reserve Bank, charged with ratemaking for interchange fees on debit-card transactions under the Durbin Amendment. One feature of the Durbin Amendment was that the FRB rules would not apply to banks that had assets of less than $10 billion. TCF had assets above that level and thus its claim against the FRB was that the Durbin Amendment, and any FRB rules to be adopted pursuant to the new law, would violate the Equal Protection Clause and amount to an unconstitutional confiscatory taking under the Due Process Clause. TCF had built its business model around the interchange fees that it earned on debit-card transactions and did not issue credit cards. Although to many lawyers the claim seemed far-fetched as a matter of law, by filing in South Dakota, where many banks have long had their payment card business headquarters due to favorable South Dakota law, merchants were very concerned that it would be a favorable forum for TCF. Merchants were also concerned that the FRB might not be motivated to put up a vigorous opposition to the lawsuit, given its generally pro-bank biases. Thus, merchants came to me and asked me to provide assistance to the lawyers for the FRB in formulating their response to the TCF lawsuit. We did so. We prepared a long memorandum educating the FRB lawyers on history of payment cards in United States, and describing many of the legal and economic issues that were relevant to TCF's claims. We also prepared and submitted an *amicus* brief, along with a declaration from our expert Dr. Alan Frankel, in opposition to TCF's motion for preliminary injunction to stop the FRB from conducting its ratemaking. Ultimately, the District Court in South Dakota denied TCF's preliminary injunction motion in April 2011. The Eighth Circuit Court of Appeals affirmed the denial in June 2011. Co-Lead Counsel submitted an *amicus* brief in support of the FRB on appeal as well.

## L. Department of Justice Investigation

118. I had had discussions with the Department of Justice regarding the competitive problems in the payment-card markets since my representation of Best Buy and Darden Restaurants in the *In re Visa Check* litigation. After the commencement of MDL 1720, I continued those discussions with the goal of motivating the Department of Justice to open an investigation and to begin enforcement proceedings against Visa, MasterCard and the banks. Beginning in early 2006, those discussions accelerated, as first the Department of Justice, and then several state attorneys general, became more interested in the claims the Class was asserting in MDL 1720.

119. In October 2008, the Department of Justice opened an investigation into the rules and conduct of Visa and MasterCard. By the spring of 2009 attorneys at the Department of Justice and at several state attorneys general's offices began requesting information from Class Plaintiffs. I explained that our ability to provide information to them was significantly constrained by the Protective Order the parties had negotiated and the Court had entered in MDL 1720. The Department of Justice eventually concluded that the most efficient way for them to gather information was to serve a Civil Investigative Demand ("CID") on the Class Plaintiffs in MDL 1720, which it did on April 21, 2009. The CID requested that the Class Plaintiffs:

> 1) Submit all products of discovery relating to the Anti-Steering Rules, including their competitive effects and justifications, produced by the entities listed in Appendix A in connection with the Merchant Discount Antitrust Litigation, including products of discovery relating to interrogatory responses, depositions, responses to requests for admissions, and documents produced.
>
> 2) Submit all pleadings, filings, motions, transcripts, rulings, and orders relating to the Anti-Steering Rules, including their competitive effects and justifications, from any proceeding or hearing as part of the Merchant Discount Antitrust Litigation.

120. Co-Lead Counsel determined that there were only two alternatives for complying with the CID. The first was to produce to the Department of Justice the entire documentary

record in the case, which by mid-2009 amounted to approximately 50 million pages of documents. Not surprisingly, the Department of Justice rejected this option, telling us that their data storage lacked the capacity to store and manage such a massive production. The second alternative was for the Class to produce to the Department of Justice only the documents and deposition testimony that were most relevant to the Class's claims but that risked waived the work product privilege as to those materials and perhaps others.

121. Since it was certainly in the Class's interests to assist the Department of Justice investigation, which offered the prospect of the government challenging the same conduct the Class was challenging, I had several discussions with the Department of Justice trying to identify a mutually acceptable solution. We finally determined that the only solution was to seek a modification of the Protective Order to permit the Class to comply with the CID by producing to the Department of Justice the Class's work product without that being considered a waiver of our work product protections. Not surprisingly, the Defendants declined to agree to such a modification, since their interests were best served by slowing down, and making more difficult and costly, the Department of Justice investigation. Therefore, on May 20, 2009 [Dkt. No. 1209] Class Plaintiffs moved the Court for an order modifying the Protective Order such that the Class could freely share our work product with the Department of Justice without the risk of a waiver. On June 18, 2009 [Dkt. No. 1235], over Defendants' opposition, the Court granted Class Plaintiffs' Motion.

122. Thus began a sixteen-month period of support by private plaintiffs of a Department of Justice antitrust investigation. Over that three-year period, Class Counsel provided to the Department of Justice unfettered access to the document and deposition databases which Class Counsel had created, at great expense. The document database ultimately consisted of over 65 million pages of documents, which was completely searchable by custodian, key word, or by any one of dozens of electronic "tags" that Class document reviewers had placed on documents to indicate their relevance to particular issues. The deposition database contained the transcripts and

exhibits of over 370 depositions taken, or defended, by Class or Individual Plaintiff's Counsel. We provided access to 15 state-attorney-general staff attorneys with access to the same database. The Class was charged $100 per month by our database management firm for each user and the Class paid a total of over $94,000 for such use, for which we were not reimbursed by the Department of Justice or the states.

123. In addition to having complete access to the entire discovery record in MDL 1720, the Department of Justice and the state attorneys general requested from Class Counsel a wide variety of our work product. This included memoranda on important legal issues, summaries of depositions, compilations of key documents, and access to our experts. For many months one of the RKM&C team attorney's principal assignments was to respond to requests from lawyers at the Department of Justice or the states. Attached to this declaration as Exhibit 8 is a summary of the information provided to the Department of Justice and the states and our responses. Typically, DOJ or state AG attorneys asked the RKM&C attorney for evidence supporting a specific proposition or propositions, to which the RKM&C attorney responded by providing portions of the discovery record, Class Counsel's work product, or publicly available documents known to Class Counsel through the prosecution of this case. In addition to the communications reflected in Exhibit 8, RKM&C attorneys were often asked informally for their analysis of particular issues or facts. RKM&C attorneys responded to at least 24 informal requests for evidence or analysis.

124. DOJ and the states also conducted telephone interviews with several merchants in the course of their investigation. Many of these merchant interviews—including Class Plaintiffs Traditions Ltd. and Photos Etc.—were arranged by Co-Lead Counsel. We also prepared these merchants for their interviews with DOJ and the states and participated in the telephonic interviews.

125. The Class's involvement was not limited to lower-level attorneys. As the investigation progressed, I had numerous telephonic and in-person meetings with DOJ and state attorney-general attorneys to discuss the high-level antitrust analysis applicable to their investigations. Especially in the late stages of the investigation, I was often joined by the senior members of the Co-Lead Counsel firms, including Bonny Sweeney, Merrill Davidoff, Laddie Montague and Gary Friedman. Many of these meetings included senior DOJ officials, including John Read, the section chief responsible for the Visa/MasterCard investigation and Carl Shapiro, the Deputy Assistant Attorney General for Economic Analysis.

126. We also expanded Dr. Frankel's engagement to include persuading DOJ and the states that the Defendants' conduct was anticompetitive from an economic perspective. Thus, Dr. Frankel attended two of our meetings with DOJ officials in Washington, D.C. and participated in conference calls with state AG attorneys, at which he gave detailed presentations on the economic analysis of the record and also discussed the issues surrounding the case telephonically with them on several occasions.

127. Our involvement with the DOJ and state attorney-general investigations culminated with a meeting with Assistant Attorney General Christine Varney and her senior staff at which we urged the Department of Justice to conclude its investigation by commencing an action against Visa and MasterCard challenging the ASRs. Shortly after that meeting the Department announced that it was going to file suit against Visa and MasterCard, and that both networks had agreed to eliminate many of the ASRs. The result of this extraordinary assistance by the Class to the Department of Justice and the states was that the government investigation was able to be completed in a much shortened period of time,[14] and at vastly less cost to the government's limited resources. To the best of my knowledge the Department of Justice and the states did not

[14] From the date of the CID to Class Plaintiffs on April 21, 2009, it took DOJ only until October 4, 2010 to complete its investigation, draft a Complaint and negotiate a consent decree with Visa and MasterCard. Bringing a case of this magnitude, in a huge industry, to successful closure in 18 months is unheard of, and could not have been accomplished so quickly, if at all, without the comprehensive assistance of Class counsel.

take *any* of their own depositions, and only issued a small number of CIDs. To my knowledge it is unheard of for a DOJ investigation to be concluded, especially so quickly, with the DOJ doing so little of their discovery and investigation. In a matter involving such an important sector of the economy, I think it is fair to infer from DOJ's conduct that both the senior decision-makers as well as the trial attorneys at DOJ had a high degree of confidence in the quality of Class Counsel's discovery efforts.

### M. Second Amended Complaints and New Motions to Dismiss

128. In the summer of 2008, Class Counsel notified Defendants of our intention to file a Second Consolidated Amended Class Action Complaint, a First Amended Supplemental Class Action Complaint challenging the MasterCard restructuring, and a Second Supplemental Class Action Complaint challenging the Visa restructuring that was consummated the previous March.

129. These three complaints were filed on January 29, 2009. Because the complaints referenced documents and deposition testimony that had been designated "highly confidential" under the protective order, the complaints were filed under seal. After the parties' counsel met and conferred extensively, Class Plaintiffs filed redacted public versions on February 20, 2009.

130. By the time the amended complaints were filed, the fact-discovery record was nearly complete. Drafting amended complaints therefore became a fact-intensive exercise akin to summary-judgment briefing in a typical antitrust case.

131. In December 2008 and January 2009, teams of Class attorneys worked on drafting the amended complaints and pulling evidence from the discovery record to support the amended claims. Like the original consolidated and supplemental complaints, Class Counsel invested hundreds of hours of attorney time on the Second Consolidated Amended Class Action Complaint, the First Amended Supplemental Class Action Complaint, and the Second Supplemental Class Action complaint.

132. This significant time investment into the complaints—especially the supplemental complaints—was required in order to review and incorporate discovery record in the tens of millions of pages in order to find the most persuasive documents and deposition excerpts to support the claims that Judge Gleeson had concluded were insufficient in their pre-discovery forms. We also supplemented the SCACAC with salient facts from the record, both to support our theory of post-IPO liability and to conform our allegations to the discovery record.

133. In addition to adding factual detail to the allegations in the FCACAC, the SCACAC added new claims and revised previously asserted claims. Primarily to address the now-accomplished MasterCard and Visa restructurings. It added claims that both Visa and MasterCard's default interchange fees constituted unreasonable restraints on trade, even after the IPOs. An injunctive-relief claim under Sherman Act Section 2 for monopolization was asserted against MasterCard in relation to its Anti-Steering Restraints. The complaint also added a damages and injunctive-relief claim against Visa and certain Bank Defendants for the fixing of default interchange fees on Visa's Interlink PIN-debit-card product. Finally, the inter-network conspiracy claim and the claims relating to the no-surcharge rule—for which plaintiffs previously sought damages and injunctive relief—were converted to claims for injunctive-relief only.

134. On March 31, 2009, Defendants moved to dismiss each of the amended complaints. As Defendants had argued with respect to the FSCAC, the Defendants argued that the amended complaints challenging the restructurings failed to allege a substantial likelihood of harm to competition and—in the case of MasterCard—failed to allege a fraudulent conveyance.

135. Unlike the original motion to dismiss the pre-2004 damages claims in the FCACAC, the Defendants raised a broad-based challenge to the SCACAC that sought to completely dismiss Class Plaintiffs' case. They moved to dismiss on the following bases: (i) that the release in the *In re Visa Check* case released *all* of Class Plaintiffs' damages and injunctive-relief claims; (ii) that

the complaint failed to allege a "restraint on trade" sufficiently to state a claim under § 1 of the Sherman Act; (iii) that the complaint failed to allege a "plausible" inter-network conspiracy under *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007); (iv) that *Twombly* barred the complaint's allegations of post-IPO conspiracies within Visa and MasterCard; and (v) that Class Plaintiffs' claims were barred by the doctrine of *Illinois Brick*.

136. In addition to the motions filed on behalf of all Defendants, Chase moved to strike its acquiring entity, Chase Paymentech, as a Defendant, arguing that Class Plaintiffs improperly added it as a Defendant without obtaining leave of court.

137. Class Counsel again devoted substantial efforts to opposing Defendants' motions, which threatened to derail our entire case. The three Co-Lead firms, in addition to Scott + Scott, (which now had attorneys formerly with Co-Lead Counsel RGRD) divided the briefing up among themselves. Each firm assigned multiple attorneys to drafting opposition briefs. After nine weeks of briefing, Class Plaintiffs filed three separate opposition briefs: 42 pages in response to the motion to dismiss the SCACAC; 46 pages in response to the motions to dismiss the IPO complaints; and 9 pages in opposition to the motion to strike Chase Paymentech.

138. Oral arguments on the motions to dismiss the amended complaints and on the class-certification motion were set for August 18 and 20, 2009 in front of Judge Orenstein. We divided the arguments on the motions to dismiss among my co-counsel, Bonny Sweeney, and me. Merrill Davidoff of Berger & Montague was set to argue the class-certification motion. Joseph Goldberg, of Freedman Boyd Hollader, was to argue the defense of Defendants' motion to disqualify Class Plaintiffs' class expert, Gustavo Bamberger.

139. My colleagues and I prepared exhaustively for the oral arguments on the motions to dismiss and Class certification, including the compilation of three-ring binders of evidence. We also selected approximately two-dozen exhibits to use at the hearing, which we prepared for use as demonstratives and also placed in three large exhibit books for the Court. On August 12-13,

2009, Class Counsel held mock arguments on the motions to dismiss and the class-certification motion at RKM&C's offices in Minneapolis. We retained the services of retired Minnesota Supreme Court Justice James H. Gilbert to preside over the mock arguments. Junior-to-mid level RKM&C associates who were not involved in the *In re Payment Card* case prepared bench memoranda for Justice Gilbert based on the parties' briefs and the relevant case law.

140. Due to the sudden and unexpected unavailability of one of the Defendants' primary counsel, the Court rescheduled oral arguments from August to November 18-19, 2009.

141. Because two-and-a-half months had passed since the originally scheduled arguments, Co-Lead Counsel had to duplicate many of our original preparation efforts before the November arguments.

## N. Merits Experts Reports and Depositions

142. As in any antitrust action, in this case the selection and use of experts was crucial to the successful prosecution of the Class Plaintiffs' claims. Starting even before the first case was filed, Co-Lead Counsel conducted an exhaustive review of the economic literature related to payment-card networks and interviewed several economists who had expertise in this field. In our review of the literature, we did not limit ourselves only to those articles which viewed the economics favorably from the merchant's point-of-view, but also tried to understand the economics from the point-of-view of the banks and networks. The process was laborious but necessary and contributed to our final selection of the economists that we retained as consultants and those that ended up providing testimony for the Class both at class certification and on the merits.[15]

143. Since all parties recognized the importance of the role of expert testimony in this massive antitrust case, the parties spent many long days, over many months negotiating over

[15] The expert issues related to class certification are discussed *Supra*. at III.I.

stipulations and understandings as to the timing and role of expert testimony. These discussions resulted, among other things, in a stipulation with regard to expert discovery which was filed with the Court on November 27, 2006. The purpose of the stipulation was to try to anticipate in advance, and to resolve, potential disputes before they arose. As part of the same discussions the parties agreed upon a schedule for expert discovery which called for initial reports by Plaintiffs' merits experts on February 5, 2008. Unfortunately, that deadline, like others in the case, was required to be extended due to the time necessary to complete other merits discovery. Ultimately, the initial merits expert reports of both the Class Plaintiffs and the Individual Plaintiffs were filed on July 2, 2009. Plaintiffs retained a highly-acclaimed slate of experts, experienced in providing testimony in complex, high-stakes antitrust cases. Class Plaintiffs filed a total of five initial expert reports, totalling over 377 pages of text. Individual Plaintiffs filed a total of four initial expert reports, totalling over 214 pages of text. The Class Plaintiffs' expert reports were founded upon the massive factual base assembled by Class Counsel, including the document database of over 75 million pages of documents, the deposition database consisting of nearly 900 depositions, with over 10,880 deposition exhibits. The tables below list Class and Individual Plaintiffs' experts.

| CLASS PLAINTIFFS' EXPERTS | | | | |
|---|---|---|---|---|
| **Deponent** | **Subject Matter** | **Company** | **Title** | **Education** |
| Bamberger, Gustavo | Class certification | | Economist at Compass Lexecon | Ph.D., University of Chicago, 1987, Graduate School of Business; M.B.A., University of Chicago, 1984, Graduate School of Business; B.A., Southwestern at Memphis, 1981 |
| Fleischer, Victor | Motivations for networks' IPOs | University of Colorado | Assoc. Prof. of Law, University Colorado | J.D., Columbia University, 1996 |
| Frankel, Alan | Economic analysis of Class Plaintiffs' claims | Coherent Economics, LLC/Compass Lexecon/Antitrust Law Journal | Director of Coherent Economics, LLC; Senior Advisor to Compass Lexecon | Ph.D., Economics, University Chicago, 1986 |
| Henry, Kevin | Class Plaintiffs' fraudulent-conveyance claim | Freeman & Mills, Inc. | V.P., Freeman & Mills, Inc. | B.S. Business and Administrative Studies – Finance, Lewis & Clark College |
| Macey, Jonathan | MasterCard corporate governance | Yale Law School | Sam Harris Professor of Corporate Law, Finance, and Securities Regulation, Yale | J.D., Yale |
| McCormack, Michael | Industry background / *Illinois Brick* | Palma Advisors, LLC | President, Palma Advisors, LLC | B.A., Political Science, Cal. Poly., 1988 |
| McFarlane, Bruce | Defendants' accounting for interchange fees / *Illinois Brick* | LitNomics | Managing Director / CEO, LitiNomics | B.A., Bus. Admin., University Washington, 1984 |

| CLASS PLAINTIFFS' EXPERTS | | | | |
|---|---|---|---|---|
| **Deponent** | **Subject Matter** | **Company** | **Title** | **Education** |
| Wolter, Kirk[16] | Critique of Mr. Houston's survey of Australian merchants. | National Opinion Research Center/University of Chicago, Dept. of Statistics | E.V.P., National Opinion Research Center; University of Chicago, Dept. of Statistics | Ph.D., Statistics, Iowa State, 1974 |

| INDIVIDUAL PLAINTIFFS' EXPERTS | | | | |
|---|---|---|---|---|
| **Deponent** | **Subject Matter** | **Company** | **Title** | **Education** |
| Ariely, Dan | Behavioral economic analysis of anti-steering restraints | Duke University | James B. Duke Professor of Behavioral Economics at the Fuqua School of Business, The Center for Cognitive Neuroscience, and the Economics Department at Duke University | Ph.D. Cognitive Psychology, University of N.C. 1996; Ph.D. Business Administration, Duke University 1998 |
| Porter, Katherine | Effect of Defendants' business practices on consumer lending. | University of Iowa College of Law/ Robert Braucher Visiting Professor Harvard Law School | Prof. of Law, University Iowa | J.D., Harvard, 2001 |
| Stiglitz, Joseph | Economic analysis of ASR-claims | Columbia Business School/Sebago Associates, Inc. | Prof., Columbia, Recipient of 2001 Nobel Prize in Economics. | Ph.D., Economics, M.I.T., 1967. |
| Vellturo, Christopher | Economic analysis of Individual Plaintiffs' claims | QES | Pres., Quantitative Economic Solutions, LLC | Ph.D., Economics, M.I.T., 1989 |
| Warren, Elizabeth | Economic analysis of ASR-claims | | U.S. Senator, former Leo Gottlieb Professor of Law, Harvard | J.D., Rutgers, 1976 |

[16] Kirk Wolter was an expert for the Individual Plaintiffs as well.

144. The Class Plaintiffs' expert reports were also the product of the efforts of Co-Lead Counsel, and the co-chairs of the steering committee, to provide to the various experts information they requested from the factual record we had assembled, and to organize the efforts of the experts to address the various issues in the case that were within their respective areas of expertise. The lawyers who had been assigned to work with the various experts met frequently, and talked by telephone even more frequently over the many months during which the preparation of the expert reports took place, in order to keep the effort efficient and well organized, and to assure that all of the necessary issues were covered by at least one of our experts.

145. Under the agreed-upon schedule, the Defendants served their initial expert reports on December 14, 2009. The Defendants served a total of 12 separate expert reports, totaling over 800 pages of text. Among Defendants' experts were several economists with great reputations in their fields. The table below lists Defendants' experts.

| DEFENDANTS' EXPERTS | | | | |
|---|---|---|---|---|
| **Deponent** | **Subject Matter** | **Company** | **Title** | **Education** |
| Atkins, J.T. | Class Plaintiffs' fraudulent conveyance claim | Cypress Associates LLC | Managing Director, Cypress Assocs. LLC | J.D., Harvard, 1982 |
| Daines, Robert | MasterCard IPO | Stanford Law School | Pritzker Professor of Law and Business, Stanford | J.D., Yale |
| Elzinga, Kenneth | Economic analysis of Plaintiffs' claims | University of Virginia | Robert C. Taylor Professor of Economics, Univ. Va. | Ph.D., Michigan State University, 1967 |
| Houston, Gregory | Australian payment-card industry post RBA reforms | NERA Economic Consulting | Director, NERA Economic Consulting | B.S.c (First Class Honours), Economics, Univ. Canterbury, (NZ) 1982 |

| DEFENDANTS' EXPERTS | | | | |
|---|---|---|---|---|
| **Deponent** | **Subject Matter** | **Company** | **Title** | **Education** |
| James, Christopher | Market definition and market power | University of Florida | William H. Dia/SunBank Eminent Scholar in Finance and Economics, University of Florida; Visiting Scholar for the San Francisco Federal Reserve Bank | Ph.D., Economics, Industrial Organization, Finance, Michigan, 1978 |
| Kahn, Barbara | Effect of anti-steering restraints on networks' brands | University of Miami School of Business Adm | Dean and Schein Family Professor of Marketing, School of Business Administration, University of Miami, Coral Gables, FL | Ph.D., Marketing, Columbia, 1984 |
| Klein, Benjamin | Economic analysis of anti-steering restraints | EA Associates/ Compass Lexecon | President, EA Associates, Inc. | PhD, Economics, Univ. Chicago, 1970 |
| Litan, Robert E. | Economic analysis of Individual Plaintiffs' claims | Brookings Institution | Senior Fellow, Economic Studies and Global Economy and Development Programs, The Brookings Institution | Ph.D., Economics, Yale, 1987; J.D., Yale, 1977. |
| Murphy, Kevin | Economic analysis of Plaintiffs' claims | University of Chicago | George J. Stigler Distinguished Service Professor of Economics, Booth School of Business & Dep't of Econ., Univ. Chicago | Ph.D., University of Chicago, 1986 |

| DEFENDANTS' EXPERTS | | | | |
|---|---|---|---|---|
| **Deponent** | **Subject Matter** | **Company** | **Title** | **Education** |
| Snyder, Edward | Class Certification | | Dean and George Pratt Shultz Professor of Economics at the University of Chicago Graduate School of Business | B.A., Colby College, 1975 (Economics, Government); M.A., University of Chicago, 1978 (Public Policy); Ph.D., University of Chicago, 1984 (Economics) |
| Topel, Robert H. | Damages | University of Chicago | Isidore and Gladys J. Brown Professor, Booth School of Business, University of Chicago | Ph.D., Economics, UCLA, 1980 |
| Wecker, William E. | Damages | William E. Wecker Assoc. | President, William E. Wecker Associates, Inc. | Ph.D., Statistics and Management Science, Michigan, 1972 |
| Woodward, Suan E. | Profitability of credit-card lending | Sand Hill Econometrics | President, Sand Hill Econometrics | Ph.D., Financial Economics, UCLA, 1978 |

146. Upon receiving these Defendants' expert reports, Co-Lead Counsel reviewed and analyzed each, and then organized the preparation of appropriate responses by Class Plaintiffs' experts. As with the initial expert reports, Co-Lead Counsel made assignments to various of the senior lawyers in the firms mentioned above to work with our experts in first understanding the reports we had received from the Defendants, doing the necessary analysis of the opinions reflected in those reports and the factual support (or lack thereof) for those opinions, then doing

our own further analysis to determine whether any of the Class experts needed to expose errors in the analysis and/or factual support reflected in the Defendants' expert reports.

147. Part of the exercise of responding to Defendants' expert reports included preparing for and taking depositions of Defendants' experts. Each of Defendants' 12 experts were deposed, for a total of 17 days of testimony. Senior Class lawyers took the lead on these depositions and were supported by more junior attorneys who scrutinized the experts' prior reports and publications and the documents that they relied upon. Class Counsel was also in frequent contact with Class experts and their support staff to help them analyze the economic arguments made by Defendants' experts.

148. Under the agreed-upon schedule, the Class Plaintiffs' rebuttal expert reports were due on July 28, 2010. The time between our receipt of the Defendants' initial expert reports in December 2009 and our serving of our rebuttal expert reports in July 2010 was a period of frenetic activity as we and our experts worked diligently to perform the necessary analysis of the opinions reflected in the Defendants' many expert report, understand the factual support (if any) for those opinions, identify facts that might contradict opinions proffered by any of the Defendants' experts, and then to do our own further analysis of the economics and the facts to determine what our experts would say in rebuttal.

149. Defendants deposed Class and Individual Plaintiffs' experts in the late summer and early fall of 2010. In total, Defendants deposed each of Plaintiffs' experts for a total of 15 days of testimony. This included the three-day deposition of Dr. Frankel, Class Plaintiffs' principal economic expert. Defending depositions also required extensive preparation by Class Counsel, who reviewed prior publications and testimony of each expert and spent days preparing them for questioning.

150. Therefore, in our experts' July 28, 2010 rebuttal reports our experts offered criticism of those aspects of the Defendants' expert opinions that deserved criticism, pointed out errors

where errors had been made, and generally replied to and rebutted the criticisms of our experts' initial reports. In the course of performing the analysis which underlay the opinions offered in our experts' rebuttal expert reports, they identified certain of the opinions of certain of the Defendants' experts which appeared to be so unreliable as to be worthy of a motion to exclude their testimony at trial. Thus, almost immediately after the service of our rebuttal expert reports in July 2010, and knowing that the deadline for the filing of dispositive and *Daubert* motions was fast approaching, we began the preparation of drafts of motions to exclude the testimony of certain Defendants' experts.

### O. Summary Judgment and *Daubert* Motions

151. On February 11, 2011, Class Plaintiffs, Individual Plaintiffs, and Defendants served motions for summary judgment. The parties also served several *Daubert* motions on the same day.

152. Class Plaintiffs moved for summary judgment on liability on Claims 1, 2, 5, 10, 11, 13, 14, 17, 18, and 20 in the SCACAC. Generally speaking, these were the claims relating to the intra-network fixing of interchange fees before and after the networks' restructurings. Individual Plaintiffs moved for summary judgment with respect to their claims that the Defendants' anti-steering restraints constituted *per se* violations of the antitrust laws.

153. The Defendants moved for summary judgment on the entirety of Class Plaintiffs' and Individual Plaintiffs' cases. They argued that summary judgment against Class Plaintiffs was appropriate on the following bases: that the *Visa Check* release barred Class Plaintiffs' claims; that the *Illinois Brick* doctrine precluded our claims; that the setting of interchange fees was not a "restraint on trade" within the meaning of Section 1 of the Sherman Act; that Defendants' conduct did not reduce output; that no material issue of fact existed on our inter-network conspiracy claims; that Defendants were entitled to summary judgment on our claims challenging the networks' restructurings and our post-IPO Section 1 claims; and that Plaintiffs

had not raised a material issue of fact with respect to the claims based on the anti-steering restraints.

154. The Defendants moved to exclude each of the Plaintiffs' primary experts under *Daubert*. These include Alan Frankel, Kevin Henry, and Victor Fleischer for the Class Plaintiffs and Christopher Vellturo, Joseph Stiglitz, and Daniel Ariely for the Individual Plaintiffs. The Class and Individual Plaintiffs filed a joint motion to exclude the testimony of the Defendants' primary economic expert, Kevin Murphy, and accounting expert, J.T. Atkins.

155. Moving for and opposing summary judgment with hundreds of depositions and tens of millions of pages in the record required nearly a year's worth of effort by the Co-Lead Counsel and other firms. Associate and partner-level attorneys at Co-Lead Counsel firms provided significant contributions, including drafting important sections of the memoranda of law and the Rule 56.1 fact statements. Attorneys at Executive Committee firms were also involved in this effort as necessary.

156. With the assistance of the Co-Lead firms, my team at RKM&C began the process of drafting our affirmative summary-judgment briefs and Local Rule 56.1 Statements of Undisputed Facts (SUF) in the summer of 2010.

157. Those who worked on this project reviewed the record for documents or deposition testimony that supported the various points in the SUF. They reviewed—among other sources—the CaseMap database in its entirety, the class-certification record in its entirety, the deposition summaries of all witnesses, as well as all documents tagged as "hot" or relevant to particular issues, all documents cited in class and merits expert reports, the *United States v. Visa* trial record and the *Visa Check* summary-judgment record in their entirety, the expert reports in their entirety, the entire deposition transcripts of all important witnesses, the European Commission's decision ruling that MasterCard's interchange fees violated EU competition law, and other

materials from foreign regulatory and judicial bodies that were available publicly or obtained in discovery.

158. In the final days and weeks leading up to the service of our affirmative motion for summary judgment, attorneys at Co-Lead Counsel firms worked even more intensely on the motion papers. Senior attorneys at each firm provided substantive input while senior-associate and junior-partner level attorneys edited the documents for style.

159. Two lead paralegals at RKM&C cataloged all documents that were referenced as exhibits and cross-referenced them in the brief and statement of undisputed facts. This was an extraordinarily demanding and labor-intensive task as each of the 589 documents that were served as exhibits to our summary-judgment motion had to be cross-referenced to the brief and SUF in the appropriate places.

160. Class Plaintiffs served a memorandum of law in opposition to Defendants' motion for summary judgment, along with a Rule 56.1 Counterstatement of Fact (CSF) on May 6, 2011. Summary-judgment briefing was completed on June 30, 2011, upon the service of Class Plaintiffs' reply brief and Rule 56.1 Reply Statement of Facts (RSF). That same day, summary-judgment and *Daubert* motion papers were filed with the Court under seal. The opposition papers to Defendants' motion and the reply papers in further support of Class Plaintiffs' motion demanded the same level of intensity and teamwork among Co-Lead Counsel.

161. Briefing on *Daubert* motions followed the same schedule as the motions for summary judgment. It also required teamwork among lawyers at each of the Co-Lead firms and Individual Plaintiffs' counsel. We argued that Professor Murphy should be disqualified for two primary reasons: (i) his use of data from a study by Daniel Garcia-Swartz was plainly erroneous because he failed to take account for revisions to the data used in that study; and (ii) his analysis relating to the effect of credit availability on prices is plainly unreliable and therefore inadmissible.

162. Joseph Goldberg, along with attorneys from Berger & Montague, were primarily responsible for drafting Class Plaintiffs' response to Defendants' motion to disqualify Alan Frankel. The response to Defendants' motion to disqualify Kevin Henry was primarily drafted by attorneys from Robbins Gellar Rudman & Dowd. These attorneys also provided invaluable assistance to our motion to disqualify Professor Murphy.

163. After the sealed dispositive motions and *Daubert* motions were on file, the parties exchanged proposed public versions of the pleadings and supporting exhibits. Class Plaintiffs recommended no redactions. Some Defendants, on the other hand, proposed substantial redactions. After approximately two weeks of line-for-line, intense negotiations, the parties were able to reach agreement on a mutually acceptable set of redactions for the written pleadings.

164. To assist the Court's review of the summary-judgment memoranda and supporting exhibits, we created "hyperlinked" versions of the non-public and public versions of the summary-judgment and *Daubert* motions. These are electronic copies of the pleadings that allow the user to see the documents supporting various propositions by clicking a mouse on electronic links within the documents. This task fell largely upon paralegals and litigation-and-case support staff at Co-Lead firms.

165. Oral arguments on the summary-judgment and *Daubert* motions were set for November 3, 2011. Once again, we divided up responsibilities for arguing the motions. I agreed to argue the motion to disqualify Professor Murphy, as well as the portions of the summary-judgment motions relating to the networks' IPOs, Defendants' liability under Section 1, and their market power. My Co-Counsel, Bonny Sweeney, took the defense of the Defendants' *Illinois Brick* and output arguments and also planned to argue the portion relating to the Defendants' argument that the Class Plaintiffs could not demonstrate a restraint on trade. Joseph Goldberg argued the defense of the Defendants' motion to disqualify Alan Frankel. All of those assigned to

argue portions of these motions received invaluable assistance from lawyers and staff at the Co-lead Counsel firms and at Mr. Goldberg's and Mr. Harper's firms.

166. Oral argument obviously involved an intensive preparation process. For example, I personally conducted three practice arguments with my colleagues.

167. Justice Gilbert presided over our summary-judgment mock arguments at RKM&C's offices in Minneapolis. As with the Rule 12 and class-certification motions, our Co-Lead Counsel from across the country flew to Minneapolis for the argument and practiced their portions. Also similar to the previous arguments, RKM&C associates drafted bench memoranda for Justice Gilbert, which he used in his preparation for mock arguments. Justice Gilbert provided oral feedback on the date of the argument and written feedback shortly thereafter.

168. The arguments took place as scheduled on November 3 and 4, 2011. The Court kindly complimented us on the quality of the briefs and argument.

### P. Communications with Class Plaintiffs

169. Throughout the litigation, it was the practice of Co-Lead Counsel to communicate on a regular basis with all of the class representatives. Co-Lead Counsel met on dozens of occasions with groups of the class representatives, and met individually with them on many more occasions. In addition to the in-person meetings, we had frequent conference calls in which all class representatives were invited to participate. In addition to the meetings and phone calls, we maintained regular written communications with them as well. Subject to the limitations of the Protective Order, we provided to class representatives as much detailed information about the evidence we were accumulating, and the progress of the litigation generally, as we could. In particular it was my practice to try to communicate with class representatives before and after each formal mediation session.

## Q. Coordination with the Individual Plaintiffs

170. Also throughout the litigation, Co-Lead Counsel endeavored to communicate with and coordinate the prosecution of the litigation with Counsel for the Individual Plaintiffs. This was necessary for the efficient and orderly progress of the case, and it was in the interests of both the Class Plaintiffs and the Individual Plaintiffs that we present, as nearly as possible, a united front against the Defendants, notwithstanding certain differences of view in how the claims should be asserted against the Defendants. To this end, we met regularly with counsel for the Individual Plaintiffs and, with rare exceptions, jointly served discovery and took depositions of the Defendants, and presented common positions on motions.

## R. Trial Preparation

171. While most of the activities of Class Counsel to this point could be fairly characterized as preparing for trial, we began explicit trial planning in early 2011. At that time, Co-Lead Counsel and the co-chairs of the steering committee interviewed a handful of prominent trial-and-graphics consultants who might assist us in presenting our case to a jury. A firm was selected in early 2011.

172. At approximately the same time, Class Counsel, Individual Plaintiffs' Counsel, and Defendants each established small groups of lawyers who were tasked with meeting and conferring on issues relating to trial preparation, such as motion schedules and procedures, time limits, and designation of witness testimony.

173. Co-Lead Counsel and the co-chairs of the steering committee met with the trial consultants in May 2011 to discuss case themes and presentation strategies for trying the case to a jury. Based on this session, break-out groups prepared materials for a focus-group session in Brooklyn in the fall of 2011. The results of the focus-group session informed Class Counsel's future trial-planning activities.

174. In preparing the case for trial, Class Counsel also drafted comprehensive jury instructions and verdict forms which were to form the backbone of Class Plaintiffs' trial plan. The jury instructions were based on an analysis and assessment of jury instructions from more than 50 other antitrust cases, with significant work being done to account for the unique issues in this litigation. The verdict forms were designed to guide the jury through the complex and thorny issues raised in the case. Additionally, work began on various expected motions *in limine* and Class Counsel began the time-consuming process of culling the massive record down to trial exhibits, with consideration given to issues related to admissibility and other evidentiary concerns.

## IV. Mediation and Settlement

175. The Settlement that was reached in 2012 was the result of a prolonged and difficult mediation process spanning over four years. Ultimately, the parties agreed on using two of the most distinguished and most experienced mediators, retired Magistrate Judge Edward Infante and Professor Eric Green. By the time the settlement was reached and a Memorandum of Understanding was filed on July 13, 2012, counsel for the parties, either jointly or separately, had met with one or both of the mediators approximately 45 times. There were many hundreds, perhaps even thousands, of telephone calls and e-mails with the mediators. I and my co-counsel maintained regular communications with the Class Plaintiffs advising them of the status of the settlement discussions and mediation sessions.

176. In a series of status conferences in 2007 the Court had inquired of the parties if there were any discussions being held to see if the case could be settled. At that time there were some very preliminary discussions between the Class and one of the Defendants, however in ensuing discussions, then and over the next several years, it became apparent that a settlement was going to be extraordinarily difficult to achieve given the complexity, scope and magnitude of the litigation.

177. Once the parties had reached agreement on trying to settle the case via mediation, the parties needed to agree on a mediator who could have the confidence of all of the parties. The process of selecting the mediator began with the parties agreeing to exchange lists of proposed mediators. These lists were exchanged in August and September 2007. Over the next several weeks counsel for all of the parties had a series of telephone calls and exchange of correspondence to try to identify a mediator to whom all parties could agree. The result of those discussions was that the parties agreed on retired Chief Magistrate Judge Edward Infante, with who each of the Co-Lead Counsel had prior experience in mediations. Recognizing that there was a possibility given the number of parties and, in particular, the different approaches to the litigation being taken by the Class and the Individual Plaintiffs, that there might be a need at some point in the litigation for a second mediator, the parties also agreed at that time that, if such a need arose, the parties would use Professor Eric Green, who had served as the mediator in the prior case *In re Visa Check/MasterMoney Antitrust Litigation*.

178. The first mediation session with Judge Infante was set for April 14-15, 2008. Judge Infante had asked parties to prepare and submit to him in advance of the mediation session mediation statements. After appropriate consultation with the class representatives, Co-Lead Counsel prepared and submitted to Judge Infante a mediation statement which described at length the factual and legal basis for the class's claims, and attached relevant materials that would assist the Judge in getting up to speed on the case. In that first mediation session, the parties met separately with Judge Infante to make the points already made in our mediation statement, and to respond to questions from the Judge regarding the case. There was a brief joint meeting of all the parties that was not substantive. It was reinforced in that first mediation session that the parties were miles apart in their positions with respect to settlement, and that it was going to take a lot of time and effort to get the Defendants to the point where they would be willing to settle on terms that Class Counsel would be prepared to recommend to the class.

179. Another mediation session took place on June 10, 2008 with both outside and inside counsel for Defendants present. Together with my Co-Lead Counsel I prepared a detailed set of PowerPoint slides which described the legal and factual basis for our claims, and, in particular, described the potential damage liability which the Defendants faced. The Individual Plaintiffs made a similar presentation focused on the narrower set of claims which they had brought. With respect to these formal mediation sessions, it was my general practice to try to communicate with the class representatives both before and after the session. These communications were sometimes by memorandum, and sometimes by telephone. My records show that, during the litigation I or my Co-Lead Counsel participated in hundreds of conference calls and dozens of in-person meetings with some or all of the class representatives. In addition, Co-Lead Counsel frequently prepared memoranda to the class representatives summarizing the status of the litigation, including the status of settlement discussions.

180. After the mediation session at which the plaintiffs made their presentations, the parties embarked on a long series of in person mediation sessions, telephone calls, e-mails and other written communications trying to see if the parties could make progress towards a resolution. The mediation process was made more difficult by the differing interests among the banks and network defendants.

181. Between April of 2008 and December of 2011, the Class Plaintiffs and the Defendants, sometimes together with the Individual Plaintiffs, had dozens of face-to-face meetings, and hundreds of telephone calls, e-mails and other written communications trying to determine whether the parties could make progress toward the settlement. I and my Co-Lead Counsel recognized that a settlement was in the best interests of the class, because the alternative was both risky and lengthy. As described in Section III.G. of this Declaration, the Defendants had moved to dismiss many of the Class Plaintiffs' claims, including all claims for damages after the MasterCard and Visa reorganizations, as well as motions for summary-judgment which were served by Defendants in February 2011. In addition, Class Plaintiffs had moved for class

certification in May of 2008, and the Court had this motion under advisement into 2011 when we argued the summary judgment motions. While we were confident in the legal and factual support for Class Plaintiffs' claims, we nonetheless recognized the risks to our claims of potentially adverse decisions in the District Court or in the Court of Appeals. The case law on important issues to the Class Plaintiffs, including the law relating to class certification, had evolved in a direction which emphasized the already existing risks in MDL 1720. We also recognized that the continuation of the litigation itself had adverse effects on merchants in that, damages would continue to mount without a realistic chance of collection and that some tools needed to fight rising interchange fees would continue to be absent from the marketplace. We had determined by 2011 that the mere continuation of the litigation was likely now adverse to the interests of the merchants, notwithstanding the accumulating money damages.

182. In addition, the passage of the Durbin Amendment (see Section III.K. of this Declaration) affected Class Counsel's evaluation of the value of the elimination of the Visa and MasterCard anti-steering rules. Thus, by the middle of 2011 Class Counsel had determined that a renewed push for settlement was warranted.

183. After the argument on the summary judgment motions before Judge Gleeson on November 2, 2011, the Court had expressed interest in assisting the parties and the mediators in trying to resolve the litigation. To that end, on November 2, 2011 Judge Gleeson issued an order setting a two day settlement conference with the Court, the mediators, counsel and all parties in the action. That settlement conference was scheduled for December 2-3, 2011. In the days leading up to that settlement conference, I and my Co-Counsel had several telephone conference calls and in person discussions with many of the class representatives in preparation for them to attend the settlement conference. At the conference Judges Gleeson and Orenstein, as well as the mediators Judge Infante and Professor Green, all encouraged the parties to make every possible effort to try to reach agreement. During the conference the very substantial risks that all parties were facing in this litigation now that the dispositive motions had been briefed and argued

became apparent. Of course, this was well known to counsel for the parties, as we were the ones who had conducted the litigation over the past seven years and had briefed and argued these crucial motions. However, the parties themselves, including the Class Plaintiffs, had never really had to focus on the risks they were facing as opposed to the potential gain that they might get from victory in the litigation, and some still do not want to address those risks.

184. After the two-day settlement conference was concluded, there was another flurry of communications between and among the mediators and the parties, and between and among Class Counsel and the class representatives. One of the mechanisms often used by experienced mediators to accomplish a settlement, particularly in complicated cases, is for the mediator to craft a mediator's proposal, which the adverse parties must either accept or reject in its entirety. Only if all parties agree to the proposal does any party know what any other party's answer was to the proposal. The possibility of the mediators making such a mediator's proposal had been discussed over the last several months of 2011, as the parties seemed to be making some progress in getting at least somewhat closer together. It was raised again in these discussions after the settlement conference in December. Thus, it was no surprised when the parties learned in December 2011 that the mediators intended to make a proposal. On December 22, 2011 we received the mediator's proposal.

185. The receipt by Class Counsel of the mediator's proposal immediately set off another intense flurry of discussions among Class Counsel and with the class representatives. There were several telephone conference calls, and at least one in person meeting which was held in Washington on January 5, 2012. Although there were aspects of the mediator's proposal which were not exactly as Class Counsel would have liked, when compared it to what was reasonably likely to be obtained by injunction in a trial before Judge Gleeson, and when compared to the available alternatives to settling the case on the terms proposed by the mediators, Class Counsel forged the unanimous view that accepting the mediator's proposal on behalf of the Class was far preferable to the only alternative, which was many more years of litigation while merchants

continued to be hamstrung by the no surcharge rules of Visa and MasterCard and remaining anti-steering rules. And even at the end of that additional year of litigation there was no reasonable likelihood in our view, based upon all of the facts that we knew at the time, that a significantly superior outcome could be obtained for the class in a bench trial before Judge Gleeson. Moreover, while the recovery of money damages had always been only a secondary goal of the litigation, the amount of the cash portion of the settlement – approximately $7.25 billion – was reasonable in light of the risks and equitable relief. To my knowledge it is by far the largest settlement ever in an antitrust class action in United States.

186. Unlike other litigation, in a class-action it is ultimately Class Counsel who must exercise their best judgment on behalf of the class as a whole as to whether or not to recommend to the Court that the Court approve a settlement of the Class's claims. In this case, after seven years of litigation and the substantial reform of the industry that had been accomplished in part due to the litigation and in part related to the notoriety of the issues that were contributed to by the litigation, coupled with the additional reforms contained in the settlement, and in light of all of the risks and delay, Class Counsel concluded that they could not, in good conscience, fail to accept the mediators proposal, consummate a final Settlement Agreement consistent with that proposal, and recommend that settlement to the Court.

187. At the meeting held in Washington, D.C. Class Counsel provided their unanimous recommendation to the class representatives. Most of the class representatives were supportive of the views of Class Counsel and understood that there were significant risks associated with continuing the litigation, most significantly the risk of substantial delay and a less desirable outcome.

188. In January and February, 2012 there were additional meetings, discussions and correspondence between and among Class Counsel, the class representatives, the mediators, and the Court as the parties continued their consideration of the mediator's proposal. *See* Declaration

of Eric Green at ¶¶ 26 – 29. By February 21, 2012, all of the parties, including all of the proposed class representatives in the Second Consolidated Amended Class-Action Complaint, agreed "to negotiate towards a final settlement. .... Through the process laid out by the mediators and Court in this matter."

189. Between February and June, 2012 counsel for all parties continued to negotiate over the fine details of the settlement agreement. On June 20 – 22, 2012 the parties participated in another settlement conference with judges Orenstein and Gleeson, and mediator Eric Green. After two days of great effort to reach agreement on minor language details the parties informed the court on the evening of June 22, 2012 that an agreement on all of the primary terms of a settlement had been reached, and of the parties would proceed to finalize the Settlement Agreement and file a memorandum of understanding attaching the agreement with the Court by July 13, 2012.

## V. The Settlement is an Excellent Result in Light of Risks Faced by the Class and the Settlement is far Superior to all Alternatives

190. The Settlement now pending final approval before the Court is the result obtained by Class Counsel after many years of protracted and arms' length negotiation during hard-fought litigation and in the face of substantial risks. Each of the three individuals who served on a day-to-day basis as Co-Lead Counsel has tried to verdict antitrust cases with damages approaching or over a hundred million dollars. Other partners in the three Co-Lead Counsel firms have tried to verdict many cases of a similar magnitude. Moreover, these firms have litigated massive cases in many industries involving antitrust, securities, and/or environmental claims over the last three decades with exemplary results for their clients. In addition, the almost all of the other Class Counsel firms bring substantial trial experience and antitrust expertise to their roles in the case. All Class Counsel, other counsel for the Class Plaintiffs and all counsel for the Individual (non-

class) Plaintiffs (who have litigated alongside Class Counsel in MDL 1720) support this settlement as fair, reasonable, and adequate.

191. In addition to their own experiences and expertise, Class Counsel received the valuable assistance of two of the most experienced and respected mediators in the country, Professor Eric Green and Judge Edward Infante. Finally, towards the end of the long mediation process, the parties received the assistance of the Court, and Judges Gleeson and Orenstein are two experienced trial lawyers themselves, in addition to being experienced jurists.

192. Class Counsel submit that no group of lawyers could possibly be in a better position to evaluate the merits of the settlement and to assess those merits as compared to the option of proceeding further with the litigation. Class Counsel were and are unanimously in favor of settling the case on the terms embodied in the Settlement Agreement. It represents our collective judgment that the Settlement far exceeds the applicable legal standard of being fair, adequate and reasonable to the Class.

193. The benefits to the Class of the settlement are enormous and unprecedented. The cash amount of the settlement alone – $7.25 billion – is by far the largest ever antitrust class-action settlement in the history of U.S. Courts. However, in addition, Class Counsel negotiated for the elimination of the remaining anti-steering rules previously enforced by Visa and MasterCard, and obtained a new affirmative obligation on the part of the networks, which they had historically adamantly resisted, obligating them to negotiate in good faith with merchant buying groups on terms and conditions of the merchants acceptance of Visa and MasterCard credit and debit cards.

194. The injunctive relief obtained in the Settlement Agreement is momentous. To combat high credit-card interchange fees, this settlement provides merchants the right to impose surcharges at the point-of-sale, in order to incent cardholders to use debit or other cheaper payment products. This important tool has been sought by merchants and forward-thinking

policymakers since the early 1980's, when merchant and consumer groups (including Consumer's Union) joined Senator William Proxmire in resisting the credit-card companies' bid to permanently enshrine their no-surcharge rules into federal law.

195. Winning the surcharging tool is the most consequential and empowering development yet in the long battle U.S. merchants have waged to counter the anticompetitive practices and legacies in the credit-card industry. As the Australian experience demonstrates, over the long term, as a small but meaningful number of merchants begin to employ surcharging strategies to recoup their credit-card acceptance costs, a substantial portion of U.S. transaction volume will move from costly credit-card transactions over to debit transactions, where the prices to merchants are regulated by the Federal Reserve. Meanwhile, the threat of surcharging will enable many merchants to negotiate lower credit-card rates with the networks. And in the event that the Fed ever ceases to regulate debit, the proposed settlement provides that merchants will have the right to employ the surcharge tool in the debit arena as well.

196. In the short run, we expect merchants may be understandably averse to assessing surcharges on their customers' credit-card transactions. Certainly, that was the pattern we saw in Australia: after the networks were forced to rescind their no-surcharge rules in 2003, large Australian merchants announced they had no interest in surcharging their customers. Within several years, however, almost all of those merchants had used the threat of surcharging to negotiate lower merchant fees with American Express – the one major network in Australia whose rates are not government regulated.[17] Indeed, the availability of the surcharging tool has driven American Express's rates in Australia down by 70 basis points – *more* than regulation has driven down Visa and MasterCard.

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[17] In considering evidence of the Australian experience with respect to surcharging, it is appropriate to focus on American Express, rather than Visa or MasterCard, whose regulated rates are sufficiently low to remove the incentives for most merchants to impose surcharges.

197. The surcharging tools provided to merchants under this proposed agreement, moreover, are robust. The cap on surcharges is the amount of the full discount fee incurred by the merchant – and not some subset of that fee. Merchants may surcharge brand-wide (*e.g.*, all Visa credit cards), or they may employ a more nuanced strategy and impose surcharges on one or more product groups (*e.g.*, Visa Signature cards, or MasterCard World Elite cards, which carry higher fees for many merchants). And the disclosure requirements are modest and sensible, requiring the merchants merely to advise consumers that the surcharge does not exceed the merchant's cost of acceptance, and to disclose the amount of the surcharge before it is incurred (much like an ATM surcharge) and on a receipt.

198. The proposed settlement here would allow merchants the freedom to implement the new surcharging tools right away, with one critical exception: if another network brand that the merchant accepts continues to maintain a no-surcharge rule, then the merchant may not surcharge Visa and MasterCard without also surcharging transactions on that competitor network. This exception – referred to as the "Level Playing Field" exception -- was necessary to ensure that other networks are not able to use their own anticompetitive rules to maintain inflated merchant fees, which they could then use to offer banks and consumers higher interchange fees and rewards, and to take volume away from Visa and MasterCard. In reality, this restriction boils down to a simple recognition that Visa and MasterCard will be at a competitive disadvantage vis-à-vis American Express, if they are forced to rescind their no-surcharge rules while American Express maintains what is, for all intents and purposes, a no-surcharge rule of its own.[18] Importantly, the Department of Justice took the position that the Level Playing Field restriction was reasonable and necessary, and that it would be unfair to expect Visa and MasterCard to

[18] American Express's rule is that a merchant who imposes a surcharge upon an American Express transaction must also impose an equal surcharge upon all transactions on all other payment products, *including* regulated debit. So if a merchant imposes a 3% surcharge on an Amex transaction, that merchant must also impose a 3% surcharge on a debit transaction – even though such transactions cost the merchant less than one-half of one percent. It thus operates as a no-surcharge rule.

expose themselves to merchant surcharging at establishments that do not and cannot surcharge American Express. Likewise, had there been a remedies hearing in the instant litigation following a trial on the merits, the Defendants would have sought and likely would have obtained similar measures to protect against the immediate imposition of surcharging at Amex-accepting merchants. In other words, this litigation could not eliminate this limitation.[19]

199. Meanwhile, any restrictive rules on competitor networks that would impede merchants from exploiting the opportunities afforded them under the proposed settlement here are being challenged or have already been rescinded. American Express's rules are under vigorous attack in a separate litigation spearheaded by the Department of Justice, a merchant class and many large individual merchants, including Kroger, Safeway and Walgreens. Discover voluntarily rescinded its no-surcharge rule in response to demands from counsel for the merchant class. [20]

200. The power of the surcharging tool achieved by this settlement is magnified and augmented by the other reforms this litigation has helped to obtain. *First*, the IPOs which followed shortly after the filing of this litigation fundamentally revamped the balance of power in the payments markets going forward. While the networks' provenance as associations of competitors continues to affect their market power, the future holds the promise of a dramatically leveled field of play, as the merchants use their new tools in negotiations with single-firm networks, for whom the banks are but one of numerous constituencies.[21] Indeed, these same

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[19] Likewise, nothing in this litigation could eliminate the no-surcharging statutes of certain states.

[20] After dropping its prohibition on surcharging, Discover adopted a so-called "Non-Discrimination Rule," requiring that merchants imposing a surcharge on Discover credit cards must also surcharge all other credit cards (but not debit). Clearly, such a rule in no way undercuts the ability of merchants to use surcharging to steer transactions to debit. In any event, the proposed settlement provides that merchants may surcharge Visa and MasterCard transactions without surcharging cards of this type (e.g., Discover), so long as such cards are priced meaningfully below the price to the merchant on Visa and MasterCard – a feature that is designed to promote price competition *within* credit cards.

[21] This is not to deny at all that the defendants have substantial market power as single firms, just as the DOJ and private plaintiffs intend to demonstrate with respect to American Express, which has always been a single firm.

networks, as unilateral actors, can now actually *leverage* the power of merchant surcharging to compete with other networks for transaction volume, by reducing rates or offering other inducements to merchants.

201. *Second*, relying on the work done in the instant case, DOJ was able to secure a commitment from the Defendants to allow merchants to offer discounts for the use of favored payment products, and to rescind bans on the ability of merchants to employ verbal and signage prompting in an effort to steer transactions. Going forward, merchants' ability to combine their surcharging and discounting tools may open up additional opportunities, beyond what those that are obvious today.

202. *Third*, the Durbin Amendment to Dodd-Frank ensures cheap debit acceptance services. Defendants cannot use their market power to increase debit pricing. This greatly heightens the impact of the powerful steering tools that this settlement procures for merchants: it ensures merchants have something to steer *towards*, no matter what the Defendants may do. Surcharging – including the easily implemented strategy of imposing a single surcharge amount on all credit-card transactions – is the most powerful tool available to any merchant seeking to steer consumers to use inexpensive debit.

203. The proposed settlement achieves all of the injunctive relief that could meaningfully have been achieved after a trial of this matter. Certainly, this private antitrust action could not have achieved mandated interchange rate reductions. No court would or could regulate price in that fashion. Nor is it reasonable to argue that this litigation could have stopped Visa and MasterCard from setting prices. Whatever market power those networks might possess, they are now single firms, and it is their prerogative to set a price for their services – even if they are adjudicated monopolists. No court can mandate that a single firm charge a price for its goods or

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However, with meaningful steering tools in the hands of merchants, these single-firm networks (Amex and post-IPO Visa and MasterCard) will be forced into competition in ways that bank-controlled networks could not have been.

services determined by the court. What a private antitrust lawsuit *can* achieve is the eradication of anticompetitive restraints that inflate prices. That is what this lawsuit *has* achieved, subject to final approval by the Court.

204. All antitrust litigation is risky, and big complex antitrust cases such as this one are exceptionally risky. The topic of the risk the Class faced when it finally decided to settle 2012 is covered in more detail in the Declaration of Charles B. Renfrew submitted here with. There are two kinds of risks that I think deserve mentioned in this declaration. The first is the risk of delay in this case. The case has now been pending over seven years, and if this settlement is not approved, it is certainly conceivable that it could go another seven years. And even if the additional delay is only three or four years, which sounds hopelessly optimistic at this point, the belief that is being obtained in the settlement for merchants will be postponed just that much longer. And, as is discussed in the Declaration of Dr. Alan Frankel, the sooner that merchants are able to use the new surcharge and tool, the sooner they are likely to see relief from high interchange fees.

205. The second kind of risk that deserves mention here is the risk of the law changing adversely to the interests of the class. Attached as Exhibit 9 is an article from *The Wall Street Journal* that comments on the significant changes in the law of class actions that is making class-action cases much more difficult for the plaintiffs. In fact, just within the last few weeks, the Supreme Court has decided another case that is potentially problematic for class actions, *Comcast Corp. v. Behrend*, 569 U.S.__, No. 11-864 (Mar. 27, 2013). It is indisputably true that if the class in MDL 1720 fails to get certified, that the principal leverage that merchants have over the networks to settle the case on reasonable terms will be gone. Those merchants who are objecting to the settlement do not consider these risks at all in forming their positions. Indeed, an organization of which many of them are members, the Retail Litigation Center, submitted an amicus brief in support of the defendant in the *Comcast* case. They must not understand that they

are members of a class that needs to get certified and yet they are taking positions contrary to the interests of that class in the Supreme Court.

## VI. The Objecting Class Members' Objections are Ill-Founded and the Objectors Have Failed to Present any Superior Alternatives

206. Since the parties reached agreement on the Memorandum of Understanding on July 13, 2012, this Settlement has been the subject of a vocal and well-organized objection campaign, led by former Class Plaintiff NACS. NACS and the other objectors primarily make three objections to the settlement: that the settlement fails to cap interchange fees; that the surcharging relief is "illusory" because of state statutes restricting surcharging and "level playing field" provisions; and that the release perpetually insulates Visa and MasterCard from antitrust challenge. As is fully addressed in Class Plaintiffs' Memorandum of Law in Support of Final Approval, these objections are ill-founded and do not justify overturning this historic agreement.

207. The objectors' attacks on the injunctive relief in the settlement confuse their ideal world with what can realistically be accomplished in a judgment or a settlement in an antitrust lawsuit. For example, the objectors' desire for long-term court-mandated rate relief ignores the well-established principle that a U.S. antitrust court will not mandate prices as part of injunctive relief. Similarly, the state restrictions on surcharging operate independently of the networks' no-surcharge rules, such that no outcome in this litigation—whether litigated or negotiated—could have changed them. The complaints against the "level playing field" provisions suffer a similar defect. Even without those provisions, the fact that American Express has generally higher acceptance costs than Visa and MasterCard and also restricts surcharging means that merchants that surcharge Visa or MasterCard and also accept American Express would have to consider the possibility that surcharging Visa and MasterCard would drive consumers to a more expensive payment form, *i.e.*, American Express. Thus, it is American Express's rule rather than any aspect of this settlement that creates the situation that the objectors complain about.

208. The objectors' criticisms of the release granting perpetual antitrust immunity are addressed at length in Class Plaintiffs' memorandum of law. In short, the objectors overlook the fact that the release is conduct-based. Thus, if the Defendants engaged in any new conduct or adopt any new rules that were not in existence at the time of the settlement—including re-establishing the rules that this settlement reforms—the release does not cover claims based on that conduct.

209. More fundamentally, however, the objectors fail to identify a realistic option that is preferable to this settlement. If Class Plaintiffs would have rejected the mediator's proposals and proceeded to trial, we would have risked losing significant parts of our claim at summary judgment. Most importantly, we faced a real risk that the Court would have dismissed our post-IPO and IPO claims, which would have severely restricted our ability to get *any* injunctive relief. And even if Judge Gleeson certified our class, we would risk a reversal or a de-certification order by the Second Circuit, especially in light of recent Supreme Court precedent that has been hostile to class actions. But the one thing that would have been a *certainty* if we continued to litigate the case would have been delay. Defendants could have easily delayed trial for two years with an interlocutory appeal of a class-certification order. And even if Class Plaintiffs were able to obtain a jury verdict at trial, that verdict would be subject to years of post-trial motions, appeals, and continued uncertainty.

## VII. Post Settlement Activities through January 31, 2013

### A. Selection of Claims Administrator, Escrow Banks, etc.

#### 1. Co-Lead Counsel Selected the Class Administrator Following a Lengthy Process

210. After an agreement in principal was reached in this action on June 22, 2012, Co-Lead Counsel sought preliminary requests for proposals from a number of the top claims administration companies in the United States. Following the receipt of signed non-disclosure

agreements as well as signed confidentiality agreements required by the Fourth Amended Protective Order, certain publicly-available information regarding the litigation and detailed bid forms were sent to the candidate firms. Co-Lead Counsel scrutinized these proposals and developed detailed comparison charts and memos assessing the various submissions.

211. Following the July 13, 2012 settlement announcement, Co-Lead Counsel invited several firms to present official proposals for notice and claims administration. In total, nine bids were received. After reviewing the voluminous submissions from the highly-qualified firms, a decision was made to invite five firms to in-person meetings to further discuss details related to the proposals for notice and claims administration. Those meetings took place in New York on August 8 and 9, 2012 and were attended by several of the senior members of the litigation team, with representatives from all three Co-Lead Counsel firms in attendance. Co-Lead Counsel then held several internal meetings. After a detailed review and assessment of the proposals, Co-Lead Counsel decided to recommend Epiq Class Action & Claims Solutions, Inc. ("Epiq") as the notice and claims administrator for the class.

212. Hilsoft Notifications, a business unit of Epiq, served as the firm responsible for designing, developing, analyzing and implementing the notice plan. Hilsoft's services were included as part of Epiq's bid to serve as Class Administrator. Hilsoft has experience in more than 200 cases and notice plans developed by the company have been recognized and approved by courts throughout the United States.

213. On November 27, 2012 the Court approved appointment of Epiq as the Class Administrator.

### 2. Co-Lead Counsel Selected Escrow and Custodial Banks to Manage the Class Settlement Cash and Interchange Escrow Account

214. Following the July 13, 2012 settlement announcement, Co-Lead Counsel was aware of their fiduciary duties to the class to consider and select escrow and custodial banks to manage

Settlement Cash and Interchange Escrow Accounts. Co-Lead counsel sought proposals from reliable and healthy banks that had experience in managing qualified settlement funds, particularly of the size and potential complexity presented by this Settlement. After reviewing proposals, conducting interviews, and obtaining favorable fee quotes, Co-Lead counsel selected Huntington Bank as the primary escrow bank and US Bank as a secondary custodial bank. Currently each bank holds and manages approximately one-half of the Settlement Cash Escrow of $6.05 million, which was funded by Defendants on December 12, 2012, in US treasury bills. Huntington has been working with Co-Lead Counsel since the fund was established to manage the accounts and disburse administrative expenses for class notice and administration with approval by the Court. Defendants, as per the Settlement Agreement, have participated in the process by approving Co-Lead Counsel's selection of the banks and in approving requested escrow functions.

### 3. Following the Selection of the Class Administrator, Co-Lead Counsel Worked Closely with the Administrator to Craft the Notice to the Class

215. On October 19, 2012, the Notice Plan prepared by Hilsoft was submitted to the Court as Appendix E of the Definitive Class Settlement Agreement. [Dkt. No. 1656-1]. During the two months prior to the submission of the Settlement Agreement, Hilsoft, Co-Lead Counsel and Defendants worked together to draft the proposed notices. During the drafting process, counsel was also assisted by an independent plain-language expert, Maria Mindlin. Senior attorneys from the Co-Lead Counsel firms worked extensively with Epiq and Defendants to craft a notice that would meet or exceed the due process requirements under the Constitution and Federal Rule of Civil Procedure 23. Numerous iterations of the long-form and publication notice were drafted, with input from all parties. Negotiations regarding the content and form of the notice were lengthy, spanning several weeks.

216. Once the language of the notices was agreed upon, additional work regarding everything from type size to margins was considered and evaluated by senior lawyers from the

Co-Lead Counsel firms. Proofs of the notices were approved by all parties on October 19, 2012 and revised on November 26, 2012. Following the agreement regarding the content of the notices, further decisions regarding set up for mailing, paper thickness and other details were made by the attorneys and Epiq.

217. Co-Lead Counsel also worked with Hilsoft on the paid media effort which included 475 separate print publication units with a combined circulation of over 80 million and 770 million adult internet banner impressions.

### 4. Co-Lead Counsel Took Significant Steps to Obtain Class Member Contact Information to Ensure the Class Received Sufficient Notice of the Settlement

218. Paragraph 81(d) of the Definitive Class Settlement Agreement provides that "Class Plaintiffs shall subpoena, to obtain the names and locations of any members of the Rule 23(b)(3) Settlement Class or the Rule 23(b)(2) Settlement Class, as many non-bank Defendant acquirers as would be necessary to attempt to obtain merchant name and location information attributable to more than 90% of merchant transaction volume and 90% of merchant outlets as reported in Nilson Report 990 (March 2012)."

219. Pursuant to that Paragraph, on July 2012 Co-Lead Counsel sent either a document request or subpoena to 25 entities. A document request and protective order was sent to following six settling Defendants: Bank of America Merchant Services, Chase Paymentech Solutions, Citi Merchant Services, SunTrust Merchant Services, Vantiv (f/k/a Fifth Third Bancorp), and Wells Fargo Merchant Services. Subpoenas were sent to the following 19 acquirers: BB&T Corporation, The Bancorp Bank, Elavon, Inc., EVO Merchant Services, LLC, Fidelity National Information Services, Inc., First Data Resources, Inc. ("First Data"), Global Payments Direct, Inc., Heartland Payment Systems, Inc., Intuit, Inc., iPayment, Inc., Merchant E-Solutions, Mercury Payment Systems, LLC, Merrick Bank Corporation, Moneris Solutions, Inc.,

PNC Financial Services Group, Inc., Santander Holdings USA, Inc., TransFirst, LLC, TSYS Merchant Solutions, LLC, and Worldpay US, Inc.

220. Each document request and subpoena requested name, address and related information for each merchant for whom the entity had acquired or processed Visa or MasterCard transactions at any time between January 1, 2004 through August 1, 2012.

221. Following the return date, several of the entities objected to the subpoenas via written objections. Several of the entities refused to produce the requested data without additional protective orders or agreements regarding confidentiality. Co-Lead Counsel firms held numerous meet and confer negotiations with the subpoenaed entities. Dozens of telephone conferences and email negotiations with the various entities were conducted by Co-Lead Counsel attorneys.

222. Special agreements regarding the confidentiality of produced data were created for several entities, including: First Data Heartland Payment Systems, Inc.; Global Payments Direct, Inc.; TransFirst LLC; and Wells Fargo Merchant Services, LLC. Getting to agreement on these confidentiality provisions entailed significant back and forth between the parties and included executives at Epiq (the entity that was to receive the data) as well as counsel for Visa and MasterCard.

223. Co-Lead Counsel had difficulty getting any data from some of the subpoenaed parties and as to a few of the entities, a motion to compel was threatened before the requested data was turned over. As to First Data, a letter motion to compel was filed after the parties reached impasse regarding the subpoena. That motion was filed on December 7, 2012. [Dkt. No. 1757]. It was later taken off calendar following First Data's agreement to produce requested data.

224. Co-Lead Counsel also worked with Defendants Visa and MasterCard to obtain data for use in the notice process. Visa provided extracts from two databases containing merchants who accepted Visa during the class period: the Visa Merchant Profile Database ("VMPD") and

the Common Merchant Systems ("CMS") database. MasterCard provided two Aggregate Merchants List files that were imported on November 1, 2012 and December 21, 2012.

225. In all, Co-Lead Counsel was able to provide Epiq with 115,045,756 rows of data containing merchant name, address and related information from the subpoenaed entities.

226. Co-Lead Counsel worked with Epiq on all aspects of the development of the notice database, including working with the administrator to develop an approach for the de-duplication of records that shared key characteristics. Another significant part of the development of the notice database related to the identification of excluded entities under the class definition. Named Defendants, financial institutions that have issued Visa or MasterCard Branded Cards during the class period and the United States government are excluded from the class definition. Co-Lead Counsel worked with Epiq to manually review thousands of records to determine whether the entity was properly excluded from the notice database.

227. Once the notice database was finalized, Co-Lead Counsel worked closely with Epiq to monitor the mailing of the approximately 20 million notices. The initial notice mailing began January 29, 2013 and ended on February 22, 2013. Issues related to re-mailing of notices, undeliverable mail and other technical issues are monitored by lawyers at Co-Lead Counsel firms on a daily basis.

### 5. Class Member Support via the Toll-Free Number, Dedicated Website and Through Co-Lead Counsel

228. Co-Lead Counsel worked with Epiq to develop a script for an automated Interactive Voice Response ("IVR") telephone system. By calling this number potential Class Members can listen to the answer to frequently asked questions as well as request the Long-Form Notice and Settlement Agreement. Co-Lead Counsel also worked with Epiq to develop a script for live operators to respond to frequently asked questions. By January 28, 2013, the toll-free number was fully operational. Lawyers from Co-Lead Counsel assisted in in-person training of the live

operators as the system was being rolled out. As of March 31, 2013, the IVR system has received 93,478 calls, representing 426,157 minutes of use. Among these calls, 50,218 have been transferred to operators totaling 323,676 minutes of time.

229. Attorneys from the Co-Lead Counsel firms regularly respond to class members who have called into the toll-free line, but require more detailed information. On a daily basis staff at Epiq provide Co-Lead Counsel with a list of Class Members who have either requested to speak to Class Counsel, or who have questions that require an answer from a lawyer. Co-Lead Counsel also have responded to hundreds of class member calls and emails that have come in through the Co-Lead Counsel's mail and phone systems. Responding to class member calls is a continuing process, with calls, emails and letters being received on a daily basis.

230. Epiq and Co-Lead Counsel worked extensively together to develop the content of the Settlement Website which became available on December 7, 2012. Attorneys from the Co-Lead Counsel firms worked on every aspect of the website, ensuring the content was neutral and informative.

231. The Settlement Website allows Class Members to preregister and provide information to help the Class Administrator in the preparation of the Class Member's Claim Form. Co-Lead Counsel worked with Epiq in the development and testing of the preregistration module, ensuring ease of use for class members.

### B. Motion for Preliminary Approval

232. As required by the applicable scheduling orders, on October19, 2013, Class Plaintiffs filed their motion for Preliminary Approval. This filing included the final definitive Settlement Agreement, the two-Class settlement escrow agreements, a plan for proving notice to over eight million merchants, a proposed settlement notice, and a plan of administration and distribution. Class Plaintiffs also filed a memorandum of law in support of preliminary approval.

233. There were several groups of objectors who filed oppositions to the Class Plaintiffs motion for Preliminary Approval. The Court – we believe wisely - avoided a long, confusing and unnecessarily redundant battle over preliminary approval, by sitting hearing soon after the oppositions were filed, which was held on November 9, 2012. After giving the opponents of preliminary approval fair opportunity to make their arguments, the Court concluded that the standard for granting preliminary approval was met by Class Plaintiffs and granted the motion for preliminary approval from the bench, followed by a written order issued on November 22, 2012.

### C. Activities in the Second Circuit

234. One of the oppositions to preliminary approval was submitted by The Home Depot, which indicated its intention to lodge an interlocutory appeal of preliminary approval if it was granted. On November 27, The Home Depot appealed the preliminary-approval order. That same day, the objectors represented by Constantine Cannon requested that the district court stay its preliminary-approval order. Two days later, Class Plaintiffs, Individual Plaintiffs, and Defendants each submitted a letter opposing the stay. Also on November 29, The Home Depot filed a motion with the Second Circuit to expedite briefing on the appeal, which was supported by a 22-page affidavit. In the affidavit, The Home Depot argued that this Court's injunction against collateral attacks while settlement approval was pending deprived it of its due process rights. It also argued that expedited briefing would prevent the "massive and costly notice process" from occurring in the case that the Second Circuit overturned the preliminary-approval order. Class Plaintiffs opposed The Home Depot's motion and cross-moved to defer all briefing until any appeal that may occur from final approval, arguing that the preliminary-approval order did not impose irreparable harm on The Home Depot or any other member of the class. On December 10, 2012, the Second Circuit sided with Class Plaintiffs, denying The Home Depot's motion and granting that of Class Plaintiffs.

## VIII. The Plan of Allocation is Fair

235. The plan of allocation is fair and reasonable because it uses the best available data to estimate the amounts that merchants paid in interchange fees over the Class period, and proposes to pay to each merchant who files a claim the merchant's pro-rata share of the net settlement fund. It also permits any merchant claimant to challenge the Class Administrator's estimate regarding interchange fees paid, if they believe that the data in the Class Administrator's database does not accurately reflect the amount of interchange fees they believe that they paid.

236. The plan of allocation follows from the Class Plaintiffs' theory of damages, based on the expert report of Dr. Alan Frankel, that in the "but for" world every merchant in the Class would have paid proportionately less in interchange fees than they did in the real world affected by the Defendants' anticompetitive conduct.

237. These allocation procedures are similar to those in other antitrust class actions, in that they attempt to use the best available data to estimate the magnitude of harm to each claiming class member, and then distributing the net settlement fund on a pro rata basis.

## IX. The Fee Request is Reasonable

238. Class Counsel seek an award of attorneys' fees equal to approximately 10 percent of the estimated value of the cash portion of the settlement, which will total as much as $7.25 billion. This percentage does not take into account the estimated value of the injunctive relief. The requested attorney's fee award of an estimated $725 million translates into a multiplier of 4.48 on the total lodestars of all Class Counsel based on time expended through November 30, 2012, at historical rates, and after significant review and reductions of almost $14 million in lodestar submitted by all firms, according to criteria established by Co-Lead Counsel.[22] The

[22] If RKM&C were to apply its *current* rates to its own total hours, the firm's lodestar would increase by approximately 16%. If that same percentage increase was assumed across all firms' lodestars, then the total lodestar would increase by about $25 million to just over $187 million and the total fee request would represent a 3.88 multiplier.

Declaration of Thomas J. Undlin in support of Class Plaintiffs' Motion for Award of Attorneys' Fees and Expenses and Class Plaintiffs' Awards summarizes the total lodestar for each law firm in this matter, the review criteria and resulting reductions that have been applied. Class Counsel also request reimbursement of $27,037,716.97 in out-of-pocket expenses advanced by the Class Counsel for the benefit of the classes during the litigation from inception through November 30, 2012. These case-wide expenses, also reviewed and reduced, are detailed in the Undlin Declaration and were reasonably incurred in the litigation.[23]

239. Co-Lead Counsel for the class required each Class Counsel firm to report their time and expenses on a regular basis. I periodically reviewed summaries of the reported time and expenses to assure that the time reported appeared reasonably related to tasks that had been assigned to each firm. I also periodically reviewed the summaries of reported expenses for the same purpose. In addition, Co-Lead Counsel has retained the accounting firm of CliftonLarsonAllen to audit the reported time and expenses of each Class Counsel firm to assure that the reported time is accurate, and reflects the performance of tasks which were assigned to each firm. That audit will be completed before the hearing on final approval in September.

240. In determining the lodestar fees for each Class Counsel firm Co-Lead Counsel established certain criteria and limitations on fees reported so that there would be reasonable uniformity in how time was reported and lodestar's calculated. These criteria are set forth in the Undlin Declaration.

241. The requested fee is reasonable in light of the results achieved, the work counsel performed to the benefit of the class, and the risks Plaintiffs would have faced at summary judgment, trial, and on appeal. As described above and in the accompanying briefs, the efforts of Class Counsel in this matter resulted not only in the largest ever cash recovery in an antitrust

[23] Obviously, substantially more effort and expense has been expended since November 30, 2012 and will continue to be expended.

class action, but a thorough reform of the payment-card industry itself which will pay enormous long-term benefits to the class. The cash recovery alone is more than sufficient to support the requested fee. When the other benefits to the class that were related to the litigation, *e.g.* the divestiture by the banks of their ownership interests in both Visa and MasterCard, the consent judgment obtained by the Department of Justice based entirely on the work of Class Counsel, and the enactment of the Durbin Amendment, the long-term benefits to the class are perhaps incalculable. To date, Class Counsel have received no compensation for the time expended or the expenses advanced. Between fees and expenses, and through the date of preliminary approval in late November, 2012, Class Counsel have collectively invested almost $190 million to further the interests of the class.

242. Many of my clients in this matter who became Class Plaintiffs in the amended complaints had entered into engagement agreements with my firm prior to undertaking litigation in which they agreed to support a fee request of one-third of the value of the recovery, including the economic value of the injunctive relief. The term value of the recovery was intended to reflect the likelihood that, in addition to a cash recovery it was expected that any judgment or settlement would contain injunctive relief that would have value to the class and for which counsel should be compensated.

243. It is typical in declarations of this sort in support of a fee request in an antitrust class action for there to be a representation that the requested fee is well within the range of fees awarded in other comparable antitrust class action settlements. Such a representation is difficult in this case because there are no comparable antitrust class action settlements. The cash recovery alone is almost three times the magnitude of the next largest antitrust class action settlement, which was achieved in *In re Visa Check/MasterMoney Antitrust Litigation*, adjusted for the present value of that settlement, which was paid over a period of ten years. Moreover, to the best of my knowledge there is no antitrust class action which has achieved the substantial restructuring of an entire industry.

244. What is possible to represent in this declaration is that the requested fee is certainly within a range that has been approved by courts in mega-fund cases involving settlement funds of $1 billion or more. Perhaps the most comparable settlement to the settlement now before the Court was not in an antitrust case, but rather in a securities fraud case. That case *In re Enron Corporation Securities, Derivatives & ERISA Litigation*, 586 F.Supp.2d 732 (S.D. Tex 2008), settled in 2007 for a cash component - $7,227,000,000 – comparable to the cash component in MDL 1720 estimated to be $7,250,000,000. In *Enron* Judge Harmon applied the multi-factor test used in some federal courts in determining appropriate fees in common fund cases, and awarded a fee of $688 million, which amounted to 9.52% of the settlement amount. The court noted that that was the amount agreed to by the lead plaintiff, the University of California Board of Regents, in an engagement agreement entered into prior to the litigation. In addition to the requested fee being reasonable under either the percentage of the fund approach or using the lodestar method, the court found that the fee agreement was negotiated by sophisticated clients and should be accorded some weight in determining a fair fee. As noted above, many of the Class Plaintiffs in MDL 1720 also entered into engagement agreements prior to their participation in the litigation in which they agreed to support a fee of one-third of the "Value of the Recovery" to the Class. As in *Enron*, these Class Plaintiffs are sophisticated business people, often with in-house counsel and/or other outside counsel to advise them. As also noted above, without exception the Class Plaintiffs were unwilling (or unable) to risk their own funds in support of a highly risky and costly litigation, and recognized that a substantial fee was necessary to attract sophisticated and experienced counsel to represent them and the class in this case.

245. Another instructive fee opinion was that issued by Chief Judge Hogan in *In re Vitamins Antitrust Litigation*. In that case, where the class settled for $1,050,000,000 (before reduction for opt-outs), the court awarded a fee of $123,000,000, equal to 33.7% of the common fund after reduction for opt-outs.

246. As Professor Silver emphasizes in his declaration filed herewith, and as Class Counsel argue in our petition for award of fees, many courts now believe that the best approach in awarding fees to counsel in a contingent class-action context is to determine the market rate for such legal services. In that regard it is relevant to know the fees that counsel in this case have been paid in comparable litigation on a contingent basis by clients who negotiated an arms'-length arrangement.

247. For many years my firm has had a significant contingent fee practice in complex commercial litigation. One example of a contingency agreement that is in the public domain is Exhibit 10. It is the contingent fee agreement between my law firm and the State of Minnesota whereby the state retained my firm to represent it in action asserting antitrust and fraud claims against tobacco companies. As the court will observe, the State of Minnesota agreed to pay the firm a contingent fee of 25% of the recovery.[24]

248. RKM&C has for the past two decades represented plaintiffs in patent infringement litigation on a contingent basis. These clients range from individual inventors, small companies, publicly held companies to major universities. The contingent fee agreed to in these matters ranges from 25% to 45%.

## X. Conclusion

249. The preceding paragraphs in this Declaration have described in some measure the extreme effort, dedication and expense that has been required to bring this complex and lengthy case to a successful conclusion. When we started this case, Visa and MasterCard were consortia of competing banks whose primary goal in their dual ownership of the payment card networks was to drive card issuance and use through the promise of higher interchange rates, paid to the banks, and protected by anti-steering rules. This struggle will have spanned over eight years by

[24] The recovery in that case, obtained via settlement, was approximately $6.1 billion to be paid over 25 years.

the time of the hearing on whether to finally approve this settlement. Class Counsel has obtained, reviewed and prepared for trial, evidence from millions of pages of documents and from the testimony of hundreds of witnesses. And the Class Plaintiffs have responded in kind to the reciprocal discovery demands of defendants. The parties have engaged in long, arduous and often-stalled settlement negotiations that began before the Great Recession that eliminated some of the bank defendants originally named.

250. But today, because of the efforts of Class Counsel, and their merchant clients, we are on the cusp of a much different payment card world. The banks have divested their ownership of the networks, Congress has provided through the Durbin Amendment a low cost debit card alternative to which merchants can migrate, and the Justice Department has imbedded the right of merchants to encourage lower cost payment forms through discounts or other incentives. This proposed settlement largely completes the reformation by providing merchants the ability to steer to debit cards via surcharge, make independent card acceptance decisions at different store outlets, and collectively negotiate with the networks for lower interchange rates or other benefits. The settlement also provides an almost unprecedented sum of monetary relief for past damages.

251. In the past several months, much has been said in the press by certain merchants and trade associations reacting negatively to the settlement. However, there is much more to the story than what these parties have been telling the press. This settlement, along with the other reforms that have been promoted by Class Counsel, provide merchants, for the very first time, with effective tools to fight back against high interchange fees by forcing the banks and networks to set their interchange rates in a competitive environment. And the proposed agreement brings relief to merchants in the near term. The rules changes required of the banks and networks have now gone into effect. Certain objectors have criticized the settlement because it does not do more, specifically, that the settlement does not directly eliminate the default interchange rule. They have offered no suggestion for how such a result could be accomplished short of running the table in trial and upon appeal. Such a strategy is not risk free. Even more, pursuing such a

strategy means that *any* relief from interchange rates is not only uncertain, but many years away, under the best of circumstances. And while compromise is clearly a part of any settlement, this compromise was achieved without a single material decision by the Court ruling against the class on any of the class claims for relief. This means that the settlement was negotiated against defendants from a relative position of strength in the litigation, something that may not be true in the future.

252. This settlement addresses the issues that motivated this litigation in 2005 - it eliminates the core competitive problems of the networks and banks. As a result of the settlement, Visa and MasterCard have now been forced to change their rules in ways that will permit merchants to more effectively steer customers to cheaper forms of payment. Because of these rule changes, merchants will be allowed to send price signals to customers so they can understand and make alternative payment choices that will lower merchants' and, ultimately, consumers' costs. Prior to this settlement, all consumers, even cash payers, were "surcharged" for interchange through the price of goods. With transparency and choice, consumers can avoid cross-subsidizing others who use high cost rewards cards and lower their own costs at the till if they so choose.

253. And finally, this settlement is good for America. The combined pressure of transparency and choice will discipline and eventually drive down interchange rates, that are essentially a private, and until now hidden, tax on the economy.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: Minneapolis, Minnesota.
April 11, 2013

*s/K. Craig Wildfang*
K. Craig Wildfang

83833635.1

# EXHIBIT 4

# 2018 Antitrust Annual Report

## Class Action Filings in Federal Court

Published May 2019


UNIVERSITY OF SAN FRANCISCO
School of Law

Huntington

# Foreword

We are pleased to present the inaugural Antitrust Annual Report produced in partnership with the University of San Francisco Law School and The Huntington National Bank.

It is our hope that this publication will provide a greater understanding of the outcomes of antitrust class actions. Key findings include:

- In the last 10 years, a mean number of 420 complaints are filed per year, with outlier years as low as 223 and as high as 660.
- From 2013-2018, there were Claim Defendant Wins in 43 cases as a result of Judgment on the Pleadings, Summary Judgment, or Trial.
- From 2013-2018, most antitrust class actions that reached Final Approval did so within three to five years.
- The mean settlement amount varied by year from about $25 million to $42 million, and the median amount varied by year from about $5 million to $11 million.
- The total annual settlements ranged from about $1 billion to $5 billion per year.
- The cumulative total of settlements was $19.3 billion from 2013-2018.

This report contains federal class actions from 2013-2018, summarizing complaints filed and cases with settlements reaching final approval.

We want to acknowledge several people who helped with the report including Nathaniel Ament-Stone, Noelle Feigenbaum, Lindsay Tejada, and Brent Landau. We would also like to acknowledge Lex Machina, as our primary data resource platform and for guidance from Rachel Bailey on the Lex Machina team.

We hope that you find this information interesting and helpful.

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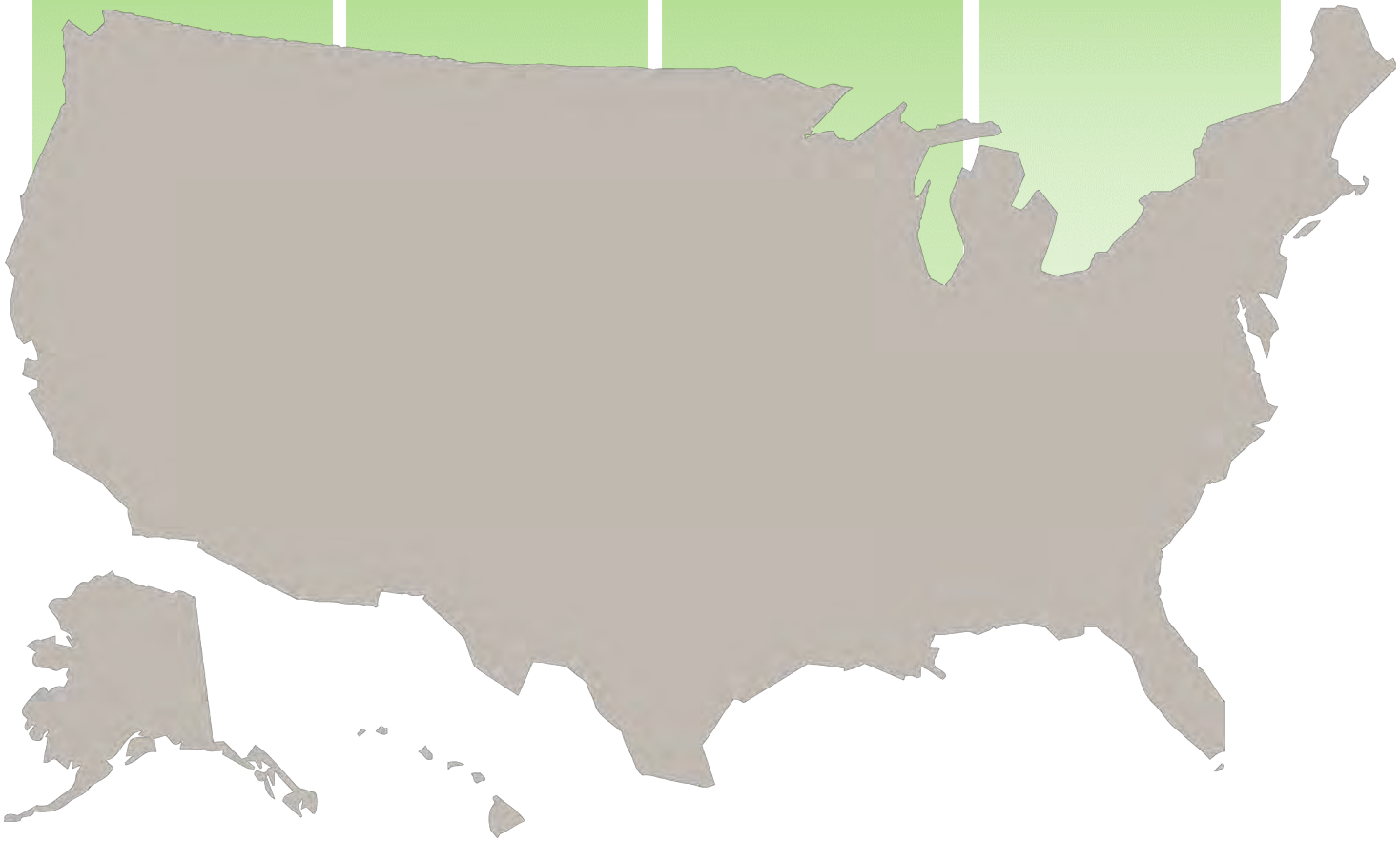
Photo Credit: Mark Thomas

# Table of Contents

# 2018 Year at a Glance

## Federal Antitrust Class Actions

| Total # Filings | # Cases with Claim Defendant Win | # Cases with Settlements Reaching Final Approval | Total $ Settlements |
|---|---|---|---|
| 318 | 12 | 22 | $5.3B |



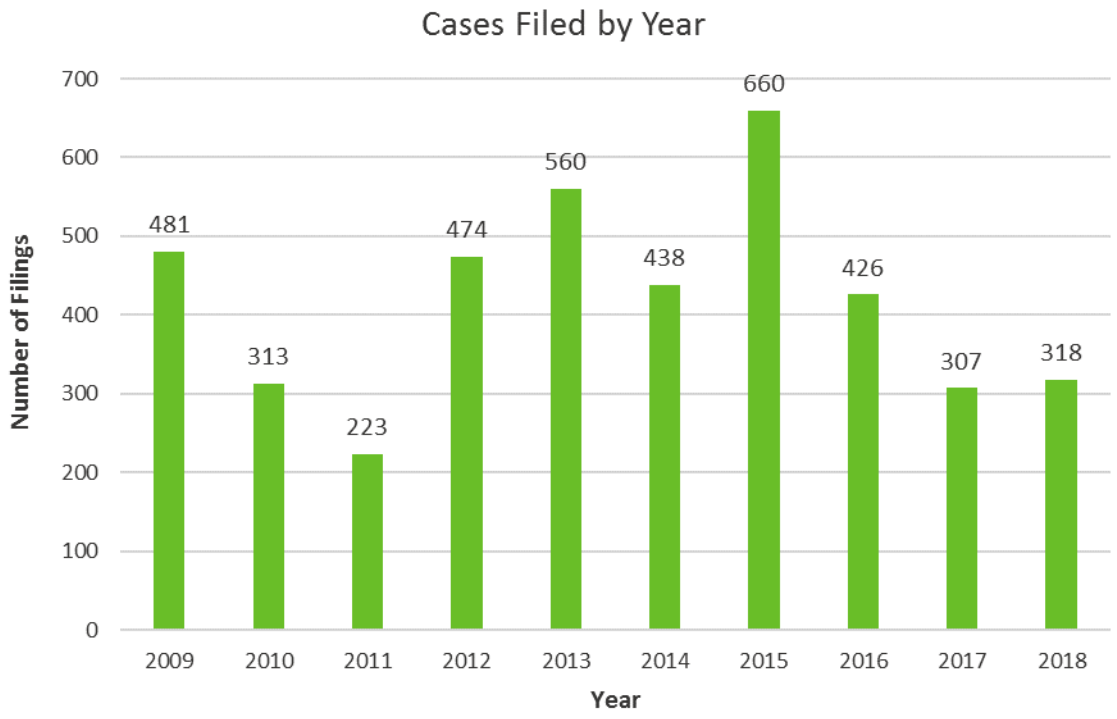
# Federal Antitrust Class Action Filings by Year

Compared to other years in the last decade, filings of antitrust class action complaints were down in 2017 and 2018 (307 and 318, respectively), and were well below the mean (420) during the last 10 years. Over the decade, two years fall outside of one standard deviation from the mean: in 2011, 233 complaints were filed, and in 2015, 660 complaints were filed.

The fact that 660 cases were filed in 2015 is interesting as it follows the premise that case filings are driven by the size of the industry and number of purchasers affected by the alleged activity. Thus, industries with large numbers of purchasers are more likely to have a higher number of filings if collusive activity is suspected—particularly under Section 1 of the Sherman Act. This is illustrated by *In re: Domestic Airline Travel Antitrust Litigation* with 111 historical related actions, and *In re: Disposable Contact Lens Antitrust Litigation* with 58 historical related actions.

- Mean Number of Filings in a year: 420 complaints
- Standard Deviation: ~126 filings

Figure 1: **Federal Antitrust Filings**
2009 - 2018

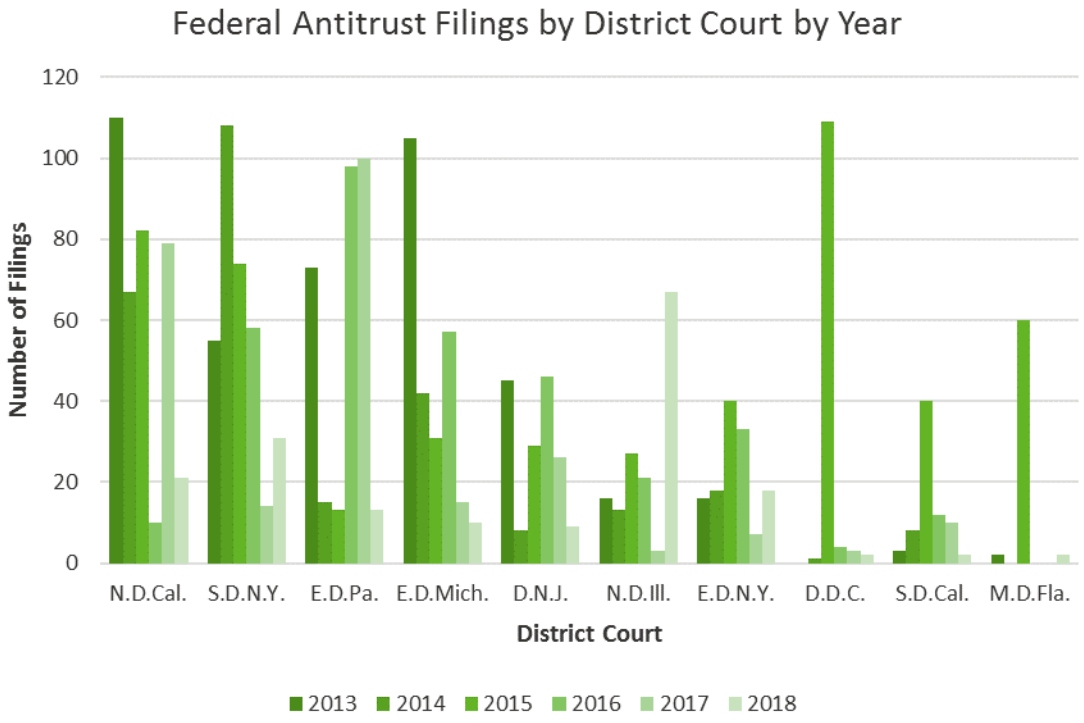


# Federal Antitrust Class Action Filings by District Court

Since 2013, over 2,500 antitrust class action complaints were filed across all districts in the United States District Court. Of these districts, Northern District of California (369), Southern District of New York (340), and Eastern District of Pennsylvania (312) have been the most frequent forums for antitrust filings. The chart below shows that there are several years where specific courts saw a notable influx of case filings. These tend to be associated with a few later-consolidated MDLs, such as:

- Northern District of California (N.D.Cal.): In 2013, 110 complaints were filed in this district. The largest action by filings for this year is *In re: Lithium Ion Batteries Antitrust Litigation,* with 85 historical related actions.
- Southern District of New York (S.D.N.Y.): High numbers of filings in this district cluster around financial instruments and the financial institutions that actively trade within these markets. A few examples:
  - *In re: Commodity Exchange Inc. Gold Futures and Options Trading Litigation* - 29 historical related actions
  - *In re: Treasury Securities Auction Antitrust Litigation* - 42 historical related actions
  - *In re: LIBOR Based Financial Instrument Antitrust Litigation* - 78 historical related actions
- District Court for the District of Columbia (D.D.C.): In 2015, D.D.C. saw a spike of filing activity, highly correlated to filings associated with *In re: Domestic Airline Travel Antitrust Litigation,* with 111 historical related actions.
- Eastern District of Pennsylvania (E.D.Pa.): High numbers of filings in this district may be attributed to antitrust actions in the pharmaceuticals industry. Specifically, there are 182 historical actions related to *In re: Generic Pharmaceuticals Pricing Antitrust Litigation* alone.

Figure 2: **Federal Antitrust Class Action Filings by District Court**
2013 - 2018



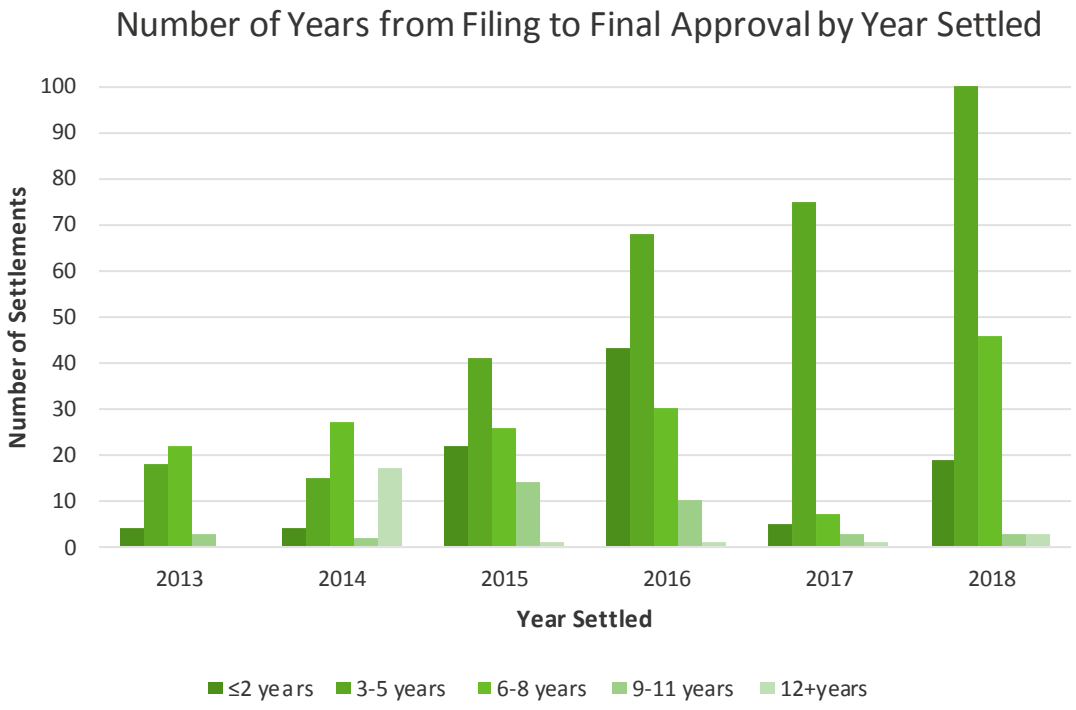
# Time from Filing to Final Approval

As shown in Figure 3, half of the settlements analyzed reached final approval within 3-5 years of the case being filed. Figure 4 illustrates a general increase in the number of cases settled per year. Of the settlements analyzed (2013-2018), the median time from the filing of the complaint to the order granting final approval of the settlement is 5 years.

Figure 3: **Percentage of Cases Settled by Number of Years from Filing to Final Approval**
2013 - 2018

| Percentage of Cases Settled by Number of Years from Filing to Final Approval | | | | | |
|---|---|---|---|---|---|
| Year | ≤2 Years | 3-5 Years | 6-8 Years | 9-11 Years | 12+ Years |
| 2013 | 8.5% | 38.3% | 46.8% | 6.4% | 0.0% |
| 2014 | 6.2% | 23.1% | 41.5% | 3.1% | 26.2% |
| 2015 | 21.2% | 39.4% | 25.0% | 13.5% | 1.0% |
| 2016 | 28.3% | 44.7% | 19.7% | 6.6% | 0.7% |
| 2017 | 5.5% | 82.4% | 7.7% | 3.3% | 1.1% |
| 2018 | 11.1% | 58.5% | 26.9% | 1.8% | 1.8% |
| All Years | 15.4% | 50.3% | 25.1% | 5.6% | 3.7% |

Figure 4: **Number of Years from Filing to Final Approval for Federal Cases**
2013 - 2018



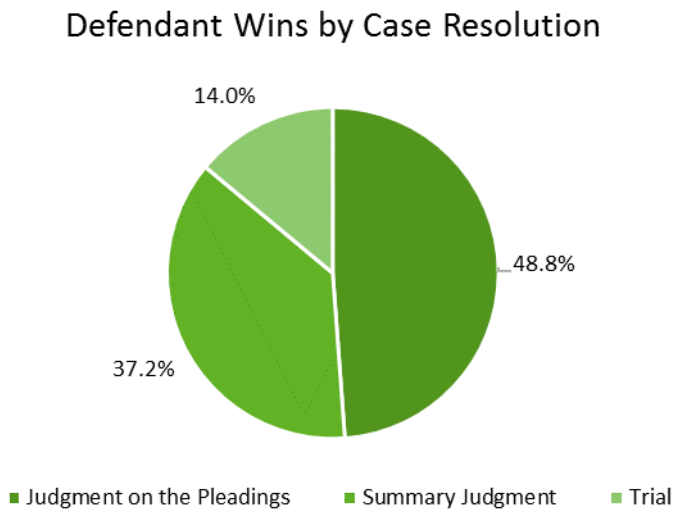
# Defendant Wins by Case Resolution

Of the 43 cases won by defendants between 2013-2018, almost half were based upon Judgment on the Pleadings. Approximately one third were won on Summary Judgment.

Figure 5: **Defendant Wins by Case Resolution**
2013 - 2018

| Defendant Wins by Case Resolution | | |
|---|---|---|
| **Case Resolution** | **# of Cases** | **% of Cases** |
| Judgment on the Pleadings | 21 | 48.8% |
| Summary Judgment | 16 | 37.2% |
| Trial | 6 | 14.0% |
| **Total** | **43** | **100%** |

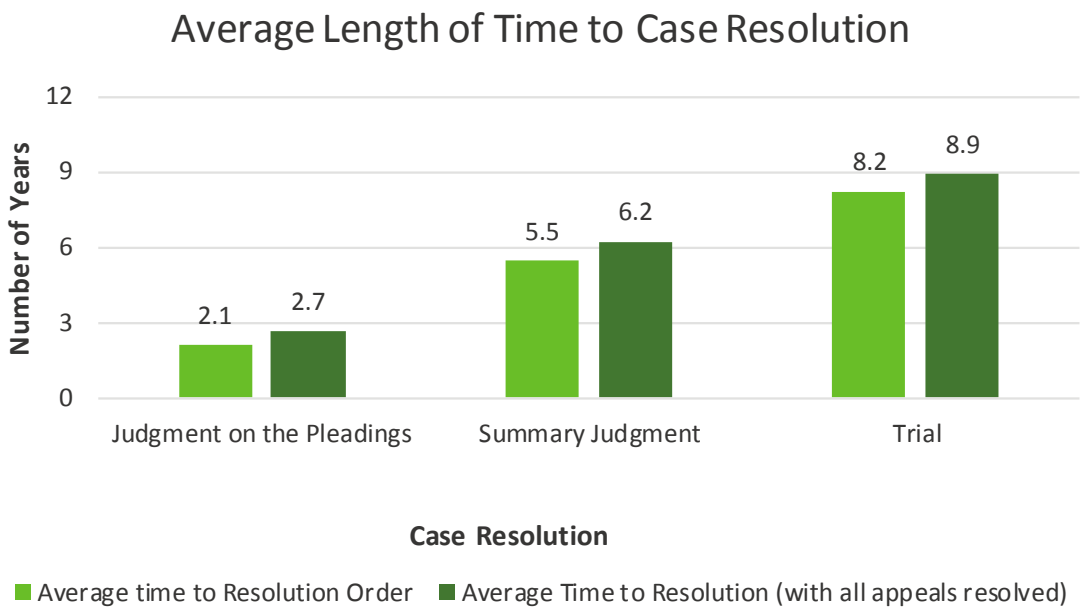
Figure 6: **Percentage of Defendant Wins by Case Resolution**
2013 - 2018



# Claim Defendant Wins by Length of Case Resolution

Comparing figures 5, 6, and 7, Judgment on the Pleadings was the quickest resolution in favor of defendants, and the most frequently awarded by the Court. Judgment on the Pleadings is ordered on average 2.1 years after filing. Summary Judgment is ordered on average 5.5 years after filing, and is also a frequent outcome when assessing defendant wins. As expected, a resolution by trial is the most time consuming, lasting on average for 8.2 years between filing and the Court's order to resolve the case.

Figure 7: **Claim Defendant Wins by Length of Case Resolution**
2013 - 2018



# Top Defense Counsel in Claim Defendant Wins

| Rank | Firm | # of Cases 2013-2018 |
|---|---|---|
| 1 | Covington & Burling LLP | 5 |
| 2 | Winston & Strawn LLP | 5 |
| 3 | Howrey LLP | 5 |
| 4 | Morgan Lewis & Bockius LLP | 4 |
| 5 | O'Melveny & Myers LLP | 4 |
| 6 | Latham & Watkins LLP | 4 |
| 7 | Baker Botts LLP | 4 |
| 8 | Mayer Brown LLP | 4 |
| 9 | Kirkland & Ellis LLP | 4 |
| 10 | Ballard Spahr LLP | 4 |
| 11 | Skadden, Arps, Slate, Meagher & Flom LLP | 3 |
| 12 | Arnold & Porter Kaye Scholer LLP | 3 |
| 13 | Morrison & Foerster LLP | 3 |
| 14 | Gibson, Dunn & Crutcher | 3 |

Note: Cases with more than one law firm as listed on complaint are attributed to each firm

# Total Settlement Amount by Year

From the data analyzed, 2016 and 2018 stand out for the Total Settlement Amount by Year. These years are notable not only for total settlement amounts, but also for the number of settlements reaching final approval in those years. In 2016, 152 settlements reached final approval, while in 2018, 171 settlements reached final approval.

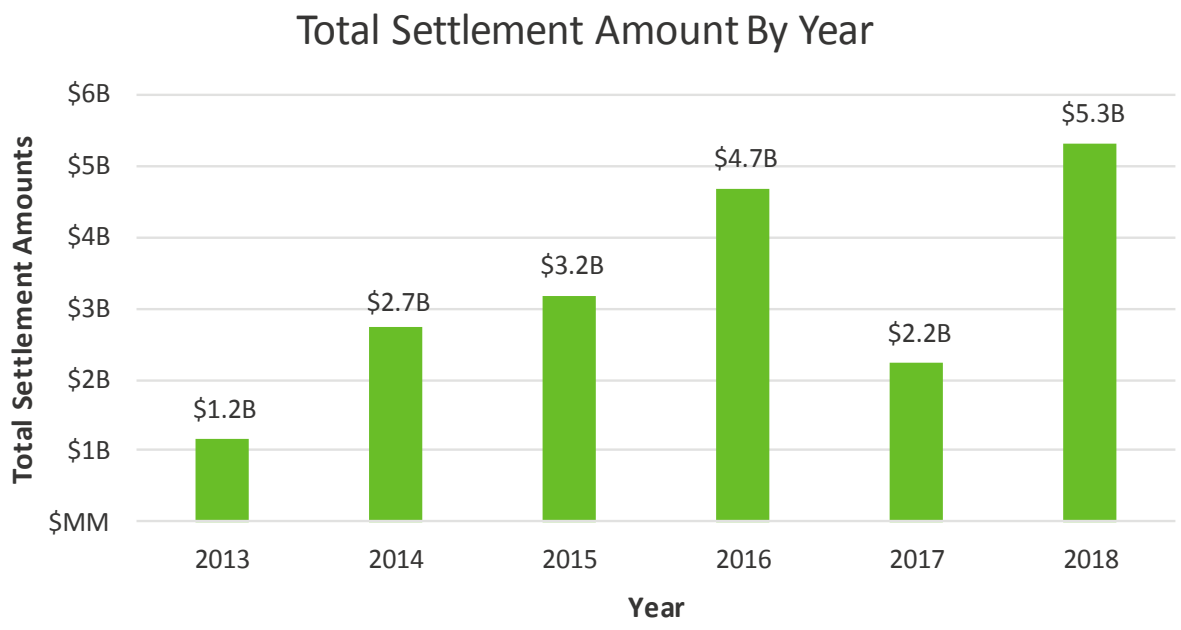
High dollar settlements in 2016 include:

- *In re: Credit Default Swaps Antitrust Litigation:* $1.8B from 14 individual settlements
- *In re: Urethane Antitrust Litigation:* $835M from 1 settlement
- *In re: Automotive Parts Antitrust Litigation:* $224M from 24 settlements for end payors class (first round of settlements)

High dollar settlements in 2018 include:

- *In re: Foreign Exchange Benchmark Rates Antitrust Litigation:* $2.3B from 15 settlements
- *In re: LIBOR Based Financial Instruments Antitrust Litigation:* $590M from 4 settlements
- *In re: ISDAfix Antitrust Litigation:* $504M from 15 settlements

Figure 8: **Total Settlement Amount by Year**
2013 - 2018



# Average Settlement Amount by Year

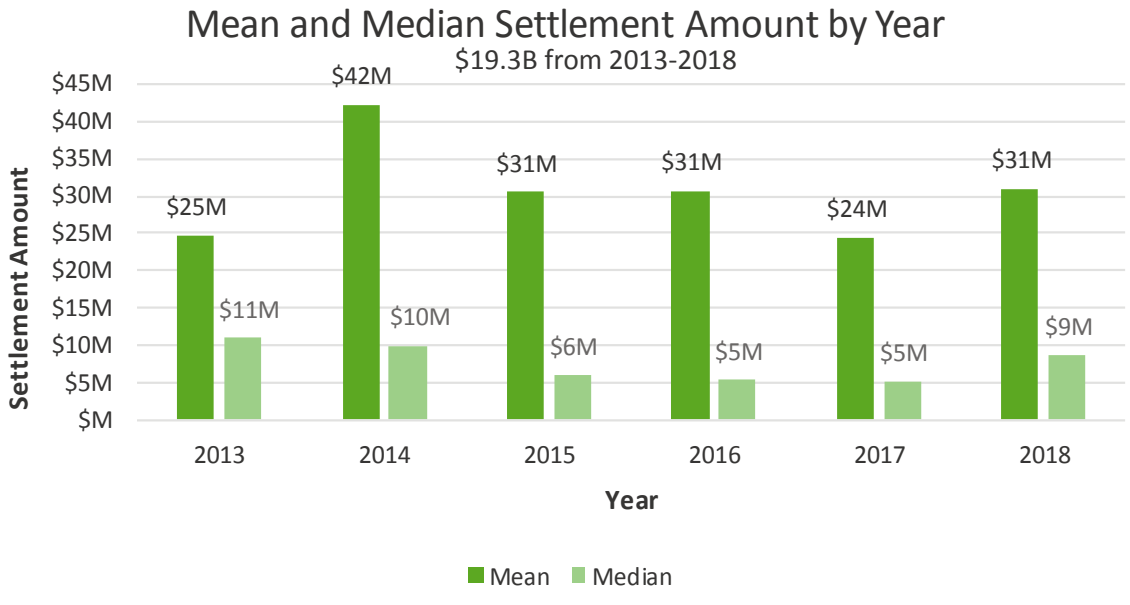
Across the six years of data analyzed, the mean settlement amount is $31M, and the median settlement amount is $7M. The median settlement amount is trending lower than the mean due to a small number of high dollar settlements that drive up the mean.

In 2018, the number of settlements (171) and the median amount ($9M) were both high. There were more large dollar settlements than in prior years, with 16 settlements surpassing $100M. Conversely, 2014 had the second lowest number of settlements reach final approval, but those that did tended to be higher than the median settlements in other years analyzed. In 2014, six settlements were for over $100M. The combination of high settlement values and a lower amount of settlements inflates the mean in 2014.

Figure 9: **Number of Settlements by Year**
2013 - 2018

| Number of Settlements by Year | |
|---|---|
| Year | # of Settlements |
| 2013 | 47 |
| 2014 | 65 |
| 2015 | 104 |
| 2016 | 152 |
| 2017 | 91 |
| 2018 | 171 |

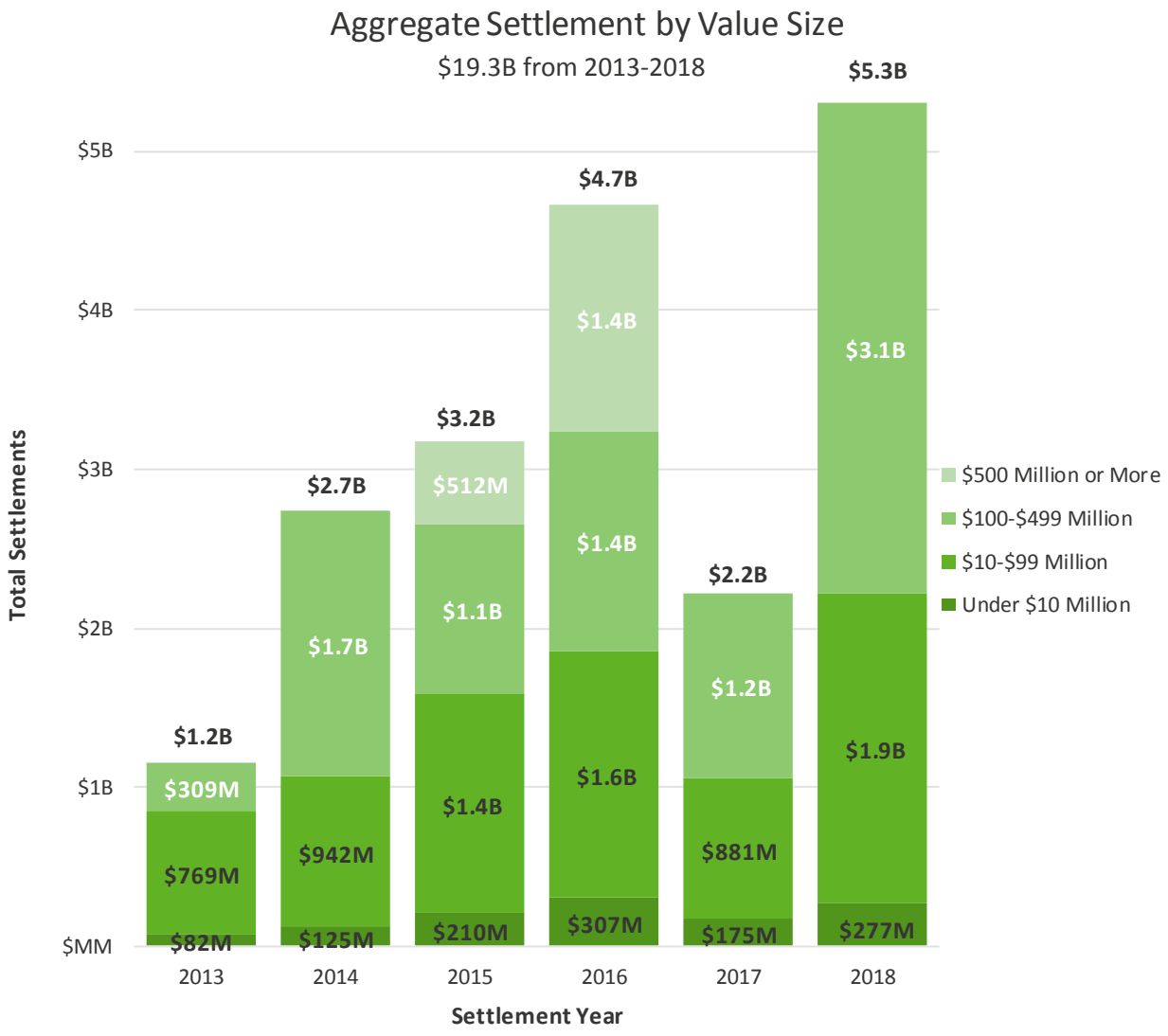
Figure 10: **Mean and Median Federal Case Settlement Amount by Year**
2013 - 2018



# Aggregate Settlement Value by Size

Since 2013, $19.3B in settlements have been reached with defendants in antitrust cases. During this timeframe, 92% of settlements were settled for amounts under $100M. Over half of the total amount came from 14 settlements, each over $100M. Specifically, 3 settlements that reached final approval were settled for amounts over $500M: *King Drug Company of Florence v. Cephalon* ($512M) in 2015, *In re: Urethane Antitrust Litigation* ($835M) in 2016, and *In re: Credit Default Swaps Litigation* ($595M) in 2016. There were 11 cases that recovered over $500M of settlement funds for the class—a listing of the largest cases can be found on page 18 of this report. The $5.3B in settlements during 2018 was the largest of the years analyzed, driven by 16 settlements for more than $100M each.

Figure 11: **Aggregate Federal Settlement Value by Size**
2013 - 2018



# Cases with Settlements Reaching Final Approval in 2018

| Rank | Case Name | Co-Lead Counsel | Aggregate Settlement Amount 2018 |
|---|---|---|---|
| 1 | Foreign Exchange Benchmark Rates Antitrust Litigation | Hausfeld LLP<br>Scott+Scott Attorneys at Law LLP | $2,310,275,000 |
| 2 | Libor Based Financial Instruments Antitrust Litigation - OTC Class | Hausfeld LLP<br>Susman Godfrey LLP | $590,000,000 |
| 3 | ISDAfix Antitrust Litigation | Quinn Emanuel Urquhart & Sullivan LLP<br>Robbins Geller Rudman & Dowd LLP<br>Scott+Scott Attorneys at Law LLP | $504,500,000 |
| 4 | Automotive Parts - End Payors | Cotchett Pitre & McCarthy LLP<br>Robins Kaplan LLP<br>Susman Godfrey LLP | $432,823,040 |
| 5 | Sullivan v Barclays PLC et al (Euribor) | Lovell Stewart Halebian & Jacobson LLP<br>Lowey Dannenberg PC | $309,000,000 |
| 6 | Lidoderm Antitrust Litigation - Direct Purchasers | Faruqi & Faruqi LLP<br>Garwin Gerstein & Fisher LLP<br>Hagens Berman Sobol Shapiro LLP | $166,000,000 |
| 7 | Domestic Drywall Antitrust Litigation - Direct Purchasers | Berger Montague PC<br>Cohen Milstein Sellers & Toll PLLC<br>Spector Roseman Kodroff & Willis PC | $125,000,000 |
| 8 | Automotive Parts - Dealership Actions | Barrett Law Group PA<br>Cuneo Gilbert & LaDuca LLP<br>Larson King LLP | $115,180,800 |
| 9 | Lidoderm Antitrust Litigation - End Payors | Cohen Milstein Sellers & Toll PLLC<br>Girard Gibbs LLP<br>Heins Mills & Olson PLC | $104,750,000 |

*Cases with Settlements Reaching Final Approval in 2018 (continued)*

| Rank | Case Name | Co-Lead Counsel | Aggregate Settlement Amount |
|---|---|---|---|
| 10 | Celebrex Direct Purchaser Antitrust Litigation | Hagens Berman Sobol Shapiro LLP | $94,000,000 |
| 11 | Automotive Parts - Direct Purchasers | Freed Kanner London & Millen LLC<br>Kohn Swift & Graf PC<br>Preti Flaherty Beliveau & Pachios LLP<br>Spector Roseman Kodroff & Willis PC | $90,384,320 |
| 12 | Solodyn (Minocycline Hydrochloride) Antitrust Litigation - Direct Purchasers | Berger Montague PC<br>Hagens Berman Sobol Shapiro LLP | $72,500,000 |
| 13 | Lithium Ion Batteries Antitrust Litigation - Direct Purchasers | Berman Tabacco<br>Pearson Simon & Warshaw LLP<br>Saveri & Saveri Inc | $70,450,000 |
| 14 | Capacitors Antitrust Litigation - Direct Purchasers | Joseph Saveri Law Firm Inc | $66,900,000 |
| 15 | Transpacific Passenger Air Transportation Antitrust Litigation | Cotchett Pitre & McCarthy LLP<br>Hausfeld LLP | $50,400,000 |
| 16 | Solodyn (Minocycline Hydrochloride) Antitrust Litigation - End Payors | Hilliard & Shadowen LLP<br>Motley Rice LLC | $43,000,000 |
| 17 | Libor Based Financial Instruments Antitrust Litigation - Lender Class | Pomerantz LLP | $31,000,000 |
| 18 | Laydon v. Mizuho Bank, Ltd. et al | Lowey Dannenberg PC | $30,000,000 |
| 19 | Merced Irrigation District v Barclays Bank PLC | Cera LLP<br>Klafter Olsen & Lesser LLP | $29,000,000 |

*Cases with Settlements Reaching Final Approval in 2018 (continued)*

| Rank | Case Name | Co-Lead Counsel | Aggregate Settlement |
|---|---|---|---|
| 20 | Blood Reagents Antitrust Litigation | Spector Roseman Kodroff & Willis PC | $19,500,000 |
| 21 | Adel Tawfilis et al v Allergan Inc | The Katriel Law Firm<br>Krause Kalfayan Benink & Slavens | $13,450,000 |
| 22 | Mushroom Direct Purchaser Antitrust Litigation - Direct Purchasers | Garwin Gerstein & Fisher LLP | $11,875,000 |
| 23 | Hartig Drug Company, Inc. v Senju Pharmaceuticals Ltd | Frank LLP<br>Hausfeld LLP | $9,000,000 |
| 24 | Ductile Iron Pipe Fittings Direct Purchaser Antitrust Litigation | Cohen Milstein Sellers & Toll PLLC<br>Fox Rothschild<br>Kaplan Fox & Kilsheimer LLP<br>Lite DePalma Greenberg | $8,787,500 |
| 25 | Automotive Parts - Truck and Heavy Equipment Plaintiffs | Duane Morris LLP | $4,404,990 |
| 26 | Maplevale Farms Inc v Koch Foods Inc | Lockridge Grindal Nauen PLLP<br>Pearson Simon & Warshaw LLP | $2,250,000 |
| 27 | Ductile Iron Pipe Fittings Indirect Purchaser Antitrust Litigation | Kirby McInerney LLP<br>Kohn Swift & Graf PC<br>Weinstein Kitchenoff & Asher LLC | $1,425,000 |
| 28 | Domestic Drywall Antitrust Litigation - Indirect Purchasers | Block & Leviton LLP<br>Finkelstein Thompson LLP<br>Green & Noblin PC | $1,250,000 |

# Top 50 Cases with Settlements Reaching Final Approval 2013-2018

| Rank | Case Name | Co-Lead Counsel | Aggregate Settlement Amount |
|---|---|---|---|
| 1 | Foreign Exchange Benchmark Rates Antitrust Litigation | Hausfeld LLP<br>Scott+Scott Attorneys at Law LLP | $2,310,275,000 |
| 2 | Credit Default Swaps Antitrust Litigation | Pearson Simon & Warshaw LLP<br>Quinn Emanuel Urquhart & Sullivan LLP | $1,864,650,000 |
| 3 | TCT-LCD (Flat Panel) Antitrust Litigation—Indirect | Alioto Law Firm<br>Zelle LLP | $1,082,055,647 |
| 4 | Automotive Parts - End Payor Actions | Cotchett Pitre & McCarthy LLP<br>Robins Kaplan LLP<br>Susman Godfrey LLP | $1,036,895,658 |
| 5 | Urethane Antitrust Litigation | Cohen Milstein Sellers & Toll PLLC<br>Fine Kaplan and Black RPC | $835,000,000 |
| 6 | Air Cargo Shipping Services Antitrust Litigation | Hausfeld LLP<br>Kaplan Fox & Kilsheimer LLP<br>Levin Sedran & Berman<br>Robins Kaplan LLP | $750,342,442 |
| 7 | Klein et al v Bain Capital Partners LLC et al | Robbins Geller Rudman & Dowd LLP<br>Robins Kaplan LLP<br>Scott+Scott Attorneys at Law LLP | $590,500,000 |
| 8 | Libor Based Financial Instruments Antitrust Litigation - OTC Class | Hausfeld LLP<br>Susman Godfrey LLP | $590,000,000 |
| 9 | Electronic Books Antitrust Litigation | Cohen Milstein Sellers & Toll PLLC<br>Hagens Berman Sobol Shapiro LLP | $566,119,000 |
| 10 | King Drug Company of Florence Inc v Cephalon Inc et al (Provigil) - Direct Purchasers | Garwin Gerstein & Fisher LLP | $512,000,000 |

*Top 50 Cases with Settlements Reaching Final Approval 2013-2018 (continued)*

| Rank | Case Name | Co-Lead Counsel | Aggregate Settlement Amount |
|---|---|---|---|
| 11 | ISDAfix Antitrust Litigation | Quinn Emanuel Urquhart & Sullivan LLP<br>Robbins Geller Rudman & Dowd LLP<br>Scott+Scott Attorneys at Law LLP | $504,000,000 |
| 12 | Automotive Parts - Direct Purchaser Actions | Freed Kanner London & Millen LLC<br>Kohn Swift & Graf PC<br>Preti Flaherty Beliveau & Pachios LLP<br>Spector Roseman Kodroff & Willis PC | $422,435,320 |
| 13 | High-Tech Employee Antitrust Litigation | Berger Montague PC<br>Grant & Eisenhofer PA<br>Joseph Saveri Law Firm, Inc<br>Lieff Cabraser Heimann & Bernstein LLP | $435,000,000 |
| 14 | Kleen Products LLC et al v International Paper et al | Freed Kanner London & Milllen LLC<br>MoginRubin LLP | $376,400,000 |
| 15 | Precision Associates Inc et al v Panalpina World Transport | Cotchett Pitre & McCarthy LLP<br>Gustafson Gluek PLLC<br>Lockridge Grindal Nauen PLLP<br>Lovell Stewart Halebian Jacobson LLP | $344,315,228 |
| 16 | Sullivan v. Barclays PLC et al | Lovell Stewart Halebian Jacobson LLP<br>Lowey Dannenberg PC | $309,000,000 |
| 17 | Automotive Parts - Dealership Actions | Barrett Law Group PA<br>Cuneo Gilbert & LaDuca LLP<br>Larson King LLP | $298,859,627 |
| 18 | Polyurethane Foam Antitrust Litigation - Direct Purchasers | Boies Schiller Flexner LLP<br>Quinn Emanuel Urquhart & Sullivan LLP | $275,500,000 |
| 19 | Dynamic Random Access Memory (DRAM) Antitrust Litigation | Cooper & Kirkham PC<br>Gustafson Gluek PLLC<br>MoginRubin LLP<br>Straus & Boies LLP | $265,176,800 |
| 20 | Dial Corporation et al v News Corporation et al | Kellogg Hansen Todd Figel & Frederick PLLC<br>Susman Godfrey LLP | $244,000,000 |

*Top 50 Cases with Settlements Reaching Final Approval 2013-2018 (continued)*

| Rank | Case | Co-Lead Counsel | Aggregate Settlement |
|---|---|---|---|
| 21 | Laydon v. Mizuho Bank, Ltd. et al | Lowey Dannenberg PC | $236,000,000 |
| 22 | National Collegiate Athletic Association Athletic Grant-in-Aid Cap Antitrust Litigation | Hagens Berman Sobol Shapiro LLP<br>Pearson Simon & Warshaw LLP | $208,664,445 |
| 23 | Steel Antitrust Litigation | Fine Kaplan and Black RPC<br>Kellogg Hansen Todd Figel & Frederick PLLC | $193,899,999 |
| 24 | Domestic Drywall Antitrust Litigation - Direct Purchasers | Berger Montague PC<br>Cohen Milstein Sellers & Toll PLLC<br>Spector Roseman Kodroff & Willis PC | $192,500,000 |
| 25 | Neurontin Antitrust Litigation | Garwin Gerstein & Fisher LLP<br>Kaplan Fox & Kilsheimer LLP | $190,000,000 |
| 26 | Marchese v Cablevision Systems Corporation | Taus Cebulash & Landau LLP | $179,093,858 |
| 27 | Municipal Derivatives Antitrust Litigation | Boies Schiller Flexner LLP<br>Hausfeld LLP<br>Susman Godfrey LLP | $174,367,879 |
| 28 | Cathode Ray Tube (CRT) Antitrust Litigation - Direct Purchasers | Saveri & Saveri Inc | $169,700,000 |
| 29 | Animation Workers Antitrust Litigation | Cohen Milstein Sellers & Toll PLLC<br>Hagens Berman Sobol Shapiro LLP<br>Susman Godfrey LLP | $168,950,000 |
| 30 | Lidoderm Antitrust Litigation - Direct Purchasers | Faruqi & Faruqi LLP<br>Garwin Gerstein & Fisher LLP<br>Hagens Berman Sobol Shapiro LLP | $166,000,000 |

*Top 50 Cases with Settlements Reaching Final Approval 2013-2018 (continued)*

| Rank | Case | Co-Lead Counsel | Aggregate Settlement |
|---|---|---|---|
| 31 | Haley Paint Company et al v Kronos Worldwide Inc (Titanium Dioxide) | Cera LLP<br>Joseph Saveri Law Firm Inc<br>Lieff Cabraser Heimann & Bernstein LLP<br>Shapiro Sher Guinot & Sandler | $163,500,000 |
| 32 | Southeastern Milk Antitrust Litigation | BakerHostetler LLP<br>Brewer & Terry PC | $158,600,000 |
| 33 | Polyurethane Foam Antitrust Litigation - Indirect Purchasers | The Miller Law Firm | $151,250,000 |
| 34 | American Sales Company Inc v Smithkline Beecham Corporation | Hagens Berman Sobol Shapiro LLP<br>Kessler Topaz Meltzer & Check LLP | $150,000,000 |
| 35 | Aggrenox Antitrust Litigation | Garwin Gerstein & Fisher LLP | $146,000,000 |
| 36 | Lithium Ion Batteries Antitrust Litigation - Direct Purchasers | Berman Tabacco<br>Pearson Simon & Warshaw LLP<br>Saveri & Saveri Inc | $139,300,000 |
| 37 | Universal Delaware Inc v Ceridian Corporation | Berger Montague PC<br>Lieff Cabraser Heimann & Bernstein LLP<br>Quinn Emanuel Urquhart & Sullivan LLP | $130,000,000 |
| 38 | Processed Egg Products Antitrust Litigation | Bernstein Liebhard LLP<br>Hausfeld LLP<br>Lite DePalma Greenberg LLC<br>Susman Godfrey LLP<br>Weinstein Kitchenoff & Asher LLC | $111,425,000 |
| 39 | Lidoderm Antitrust Litigation - End Payors | Cohen Milstein Sellers & Toll PLLC<br>Girard Gibbs LLP<br>Heins Mills & Olson PLC | $104,750,000 |
| 40 | Capacitors Antitrust Litigation (No III) - Direct | Joseph Saveri Law Firm Inc | $99,500,000 |

*Top 50 Cases with Settlements Reaching Final Approval 2013-2018 (continued)*

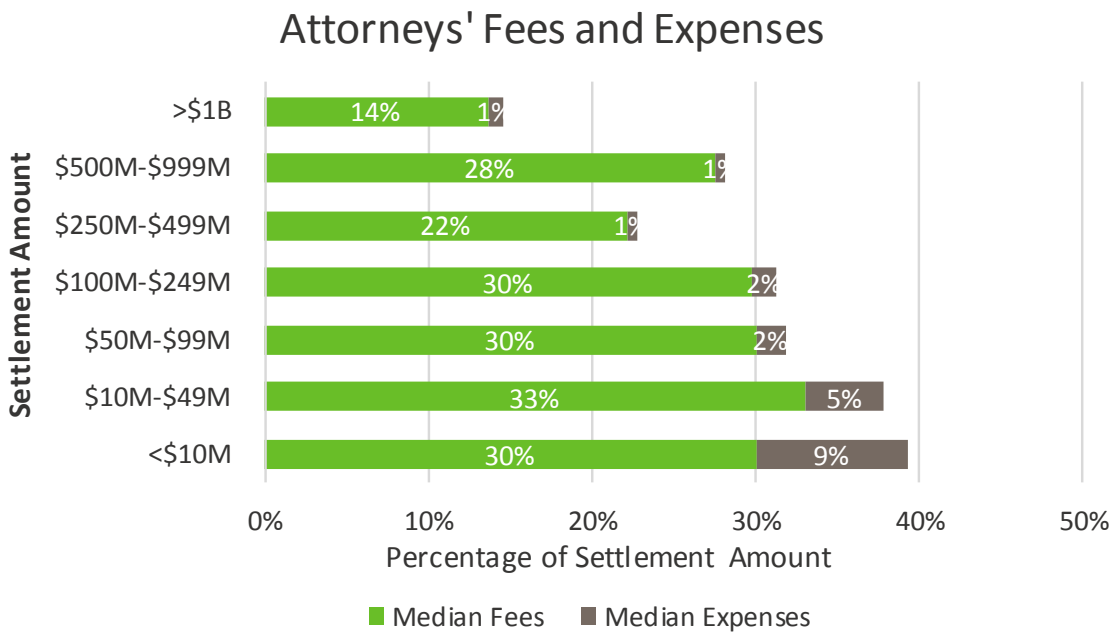
| Rank | Case | Co-Lead Counsel | Aggregate Settlement |
|---|---|---|---|
| 41 | Prograf Antitrust Litigation - Direct Purchasers | Garwin Gerstein & Fisher LLP<br>Hagens Berman Sobol Shapiro LLP | $98,000,000 |
| 42 | Celebrex Direct Purchaser Antitrust Litigation | Hagens Berman Sobol Shapiro LLP | $94,000,000 |
| 43 | Parsons v Bright House Networks LLC | Quinn Connor Weaver Davies & Rouco<br>Whatley Kallas LLP<br>Wiggins Childs Pantazis Fisher & Goldfarb | $91,164,760 |
| 44 | Potash Antitrust Litigation - Direct Purchasers | Lockridge Grindal Nauen PLLP<br>Pearson Simon & Warshaw | $90,000,000 |
| 45 | Platinum and Palladium Commodities Litigation - Plaintiffs in Futures Class | Lovell Stewart Halebian & Jacobson LLP | $88,072,500 |
| 46 | Optical Disk Drive Products Antitrust Litigation - Direct Purchasers | Saveri & Saveri Inc | $74,750,000 |
| 47 | Skelaxin (Metaxalone) Antitrust Litigation - Direct Purchasers | Hagens Berman Sobol Shapiro LLP | $73,000,000 |
| 48 | Solodyn (Minocycline Hydrochloride) Antitrust Litigation - Direct Purchasers | Berger Montague PC<br>Hagens Berman Sobol Shapiro LLP | $72,500,000 |
| 49 | Cason-Merendo et al v VHS of Michigan Inc et al | Cohen Milstein Sellers & Toll PLLC<br>James & Hoffman PC<br>Keller Rohrback LLP | $68,967,925 |
| 50 | Plasma-Derivative Protein Therapies Antitrust Litigation | Cohen Milstein Sellers & Toll PLLC<br>Williams Montgomery & John LTD | $64,000,000 |

# Plaintiffs' Lawyers' Fees and Expenses by Settlement Size

Among the analyzed antitrust settlements from 2013-2018, attorneys' fees and expenses were most often calculated as a percentage of the overall settlement fund addressed in the court order. Lodestar cross checks often accompany motions requesting attorneys' fees of a specific percent. The figure below analyzes the percentage of the total settlement fund attorneys typically earn by settlement size. Excluded from this data are settlements that are awaiting the court's order on fees and expenses, settlements that order partial attorney fee awards, and settlements with orders of attorneys' fees and expenses on appeal.

Notable within the figure is the decrease of the percentage of the fund awarded as attorneys' fees as the settlement amount surpasses $1B. There are two instances of this occurrence within the scope of the study, of which one is represented in the figure below. In the case of *In re: Credit Default Swaps Antitrust Litigation*, lead counsel and lead plaintiff negotiated the fee percentage early in the case using a sliding scale method. In the case of *In re: Foreign Exchange Benchmark,* for which the order regarding fees and expenses is currently on appeal, the court relied on fee analysis authored by Brian Fitzpatrick from Vanderbilt University Law School. The referenced study addresses "mega settlements" where the mean fee percentage for mega settlements (over $1B in size) is 13.7%. The exception to this trend applies for *TFT LCD-Flat Panel Antitrust Litigation - Indirect Purchasers*; the fee awarded for this ~$1B settlement was roughly 28.6%.

Figure 12: **Attorneys' Fees and Expenses**
2013 - 2018



# Top 25 Firms Acting as Defense Counsel

| Rank | Firm | # of Complaints 2013-2018 |
|---|---|---|
| 1 | Latham & Watkins LLP | 255 |
| 2 | Gibson, Dunn & Crutcher LLP | 223 |
| 3 | Kirkland & Ellis LLP | 205 |
| 4 | O'Melveny & Myers LLP | 191 |
| 5 | Morgan Lewis & Bockius LLP | 176 |
| 6 | Freshfields Bruckhaus Deringer LLP | 173 |
| 7 | Hogan Lovells LLP | 168 |
| 8 | Vinson & Elkins LLP | 162 |
| 9 | Skadden, Arps, Slate, Meagher & Flom LLP | 153 |
| 10 | Paul, Weiss, Rifkind, Wharton & Garrison LLP | 146 |
| 11 | Covington & Burling LLP | 127 |
| 12 | Simpson Thacher & Bartlett LLP | 124 |
| 13 | Arnold & Porter Kaye Scholer LLP | 123 |
| 14 | Winston & Strawn LLP | 111 |
| 15 | Sullivan & Cromwell LLP | 107 |
| 16 | WilmerHale LLP | 106 |
| 17 | Cleary Gottlieb Steen & Hamilton LLP | 100 |
| 18 | Allen & Overy LLP | 98 |
| 19 | Shearman & Sterling LLP | 91 |
| 20 | Boies Schiller & Flexner LLP | 89 |
| 21 | Cravath, Swaine & Moore LLP | 87 |
| 22 | Foley & Lardner LLP | 87 |
| 23 | Dechert LLP | 85 |
| 24 | White & Case LLP | 82 |
| 25 | Davis Polk & Wardwell LLP | 78 |

Note: Filings with more than one law firm as listed on complaint are attributed to each firm

# Top 25 Lead Counsel in Complaints Filed

| Rank | Firm | # of Complaints Filed 2013-2018 |
|---|---|---|
| 1 | Hausfeld LLP | 154 |
| 2 | Cuneo Gilbert & LaDuca LLP | 146 |
| 3 | Lockridge Grindal Nauen PLLP | 138 |
| 4 | Berger Montague PC | 135 |
| 5 | Cotchett Pitre & McCarthy | 130 |
| 6 | Cohen Milstein Sellers & Toll PLLC | 129 |
| 7 | Mantese Honigman Rossman & Williamson | 128 |
| 8 | Nussbaum Law Group PC | 127 |
| 9 | Susman Godfrey LLP | 119 |
| 10 | Hagens Berman Sobol Shapiro LLP | 115 |
| 11 | Barrett Law Office | 113 |
| 12 | The Miller Law Firm | 112 |
| 13 | Spector Roseman Kodroff & Willis PC | 110 |
| 14 | Gustafson Gluek PLLC | 109 |
| 15 | Robins Kaplan LLP | 96 |
| 16 | NastLaw | 90 |
| 17 | Labaton Sucharow LLP | 85 |
| 18 | Freed Kanner London & Millen LLC | 85 |
| 19 | Joseph Saveri Law Firm, Inc | 84 |
| 20 | Glancy Prongay & Murray LLP | 84 |
| 21 | Grant & Eisenhofer | 83 |
| 22 | Cera LLP | 81 |
| 23 | Heins Mills & Olson PLC | 75 |
| 24 | Scott + Scott Attorneys at Law LLP | 74 |
| 25 | Wolf Haldenstein Adler Freeman & Herz LLC | 73 |

Note: Filings with more than one law firm as listed on complaint are attributed to each firm

# Top 25 Lead Counsel in Number of Settlements

| Rank | Firm | # of Settlements 2013-2018 |
|---|---|---|
| 1 | Cotchett Pitre & McCarthy LLP | 151 |
| 2 | Susman Godfrey LLP | 145 |
| 3 | Robins Kaplan LLP | 132 |
| 4 | Cuneo Gilbert & LaDuca LLP | 99 |
| 5 | Barrett Law Group PA | 98 |
| 6 | Larson King LLP | 98 |
| 7 | Hausfeld LLP | 69 |
| 8 | Gustafson Gluek PLLC | 42 |
| 9 | Quinn Emanuel Urquhart & Sullivan LLP | 41 |
| 10 | Scott+Scott Attorneys at Law LLP | 38 |
| 11 | Lovell Stewart Halebian Jacobson LLP | 35 |
| 12 | Spector Roseman Kodroff & Willis PC | 31 |
| 13 | Cohen Milstein Sellers & Toll PLLC | 30 |
| 14 | Freed Kanner London & Millen LLC | 28 |
| 15 | Lockridge Grindal Nauen PLLP | 27 |
| 16 | Kohn Swift & Graf PC | 27 |
| 17 | Pearson Simon & Warshaw LLP | 27 |
| 18 | Saveri & Saveri | 26 |
| 19 | Hagens Berman Sobol & Shapiro LLP | 25 |
| 20 | Robbins Geller Rudman & Dowd LLP | 23 |
| 21 | Preti Flaherty Beliveau & Pachios LLP | 22 |
| 22 | Kaplan Fox & Kilsheimer LLP | 21 |
| 23 | MoginRubin LLP | 19 |
| 24 | Boies Schiller Flexner LLP | 19 |
| 25 | Berger Montague PC | 18 |

Note: Settlements with more than one law firm as lead counsel are attributed to each firm

# Top 25 Lead Counsel in Aggregate Settlement Amount

| Rank | Firm | Aggregate Settlement Amount 2013-2018 | # of Settlements 2013-2018 | Average Settlement Amount 2013-2018 |
|---|---|---|---|---|
| 1 | Hausfeld LLP | $4,214,197,321 | 69 | $61,075,323 |
| 2 | Scott + Scott Attorneys at Law LLP | $3,472,275,000 | 38 | $91,375,658 |
| 3 | Quinn Emanuel Urquhart & Sullivan LLP | $2,781,050,000 | 41 | $67,830,488 |
| 4 | Susman Godfrey LLP | $2,456,635,537 | 145 | $16,942,314 |
| 5 | Robins Kaplan LLP | $2,394,485,100 | 132 | $18,140,039 |
| 6 | Pearson Simon & Warshaw LLP | $2,324,364,445 | 27 | $86,087,572 |
| 7 | Cohen Milstein Sellers & Toll PLLC | $2,135,155,425 | 30 | $71,171,848 |
| 8 | Hagens Berman Sobol Shapiro LLP | $1,663,664,695 | 25 | $66,546,588 |
| 9 | Cotchett Pitre & McCarthy LLP | $1,486,059,886 | 151 | $9,841,456 |
| 10 | Garwin Gerstein & Fisher LLP | $1,184,075,000 | 12 | $98,672,917 |
| 11 | Robbins Geller Rudman & Dowd LLP | $1,142,500,000 | 23 | $49,673,913 |
| 12 | Alioto Law Firm | $1,082,055,647 | 10 | $108,205,565 |
| 13 | Zelle LLP | $1,082,055,647 | 10 | $108,205,565 |
| 14 | Fine Kaplan and Black RPC | $1,048,199,999 | 11 | $95,290,909 |
| 15 | Kaplan Fox & Kilsheimer LLP | $1,020,629,942 | 21 | $48,601,426 |
| 16 | Berger Montague PC | $975,046,250 | 18 | $54,169,236 |
| 17 | Lovell Stewart Halebian & Jacobson LLP | $870,887,728 | 35 | $24,882,507 |
| 18 | Freed Kanner London & Millen LLC | $829,885,320 | 28 | $29,638,761 |
| 19 | Lieff Cabraser Heimann & Bernstein LLP | $728,500,000 | 10 | $72,850,000 |
| 20 | Joseph Saveri Law Firm, Inc | $698,000,000 | 13 | $53,692,308 |
| 21 | Spector Roseman Kodroff & Willis PC | $694,185,320 | 31 | $22,393,075 |
| 22 | MoginRubin LLP | $641,576,800 | 19 | $33,767,200 |
| 23 | Gustafson Gluek PLLC | $614,392,028 | 42 | $33,767,200 |
| 24 | Boies Schiller Flexner LLP | $494,117,879 | 19 | $26,006,204 |
| 25 | Lockridge Grindal Nauen PLLP | $445,315,228 | 27 | $16,493,157 |

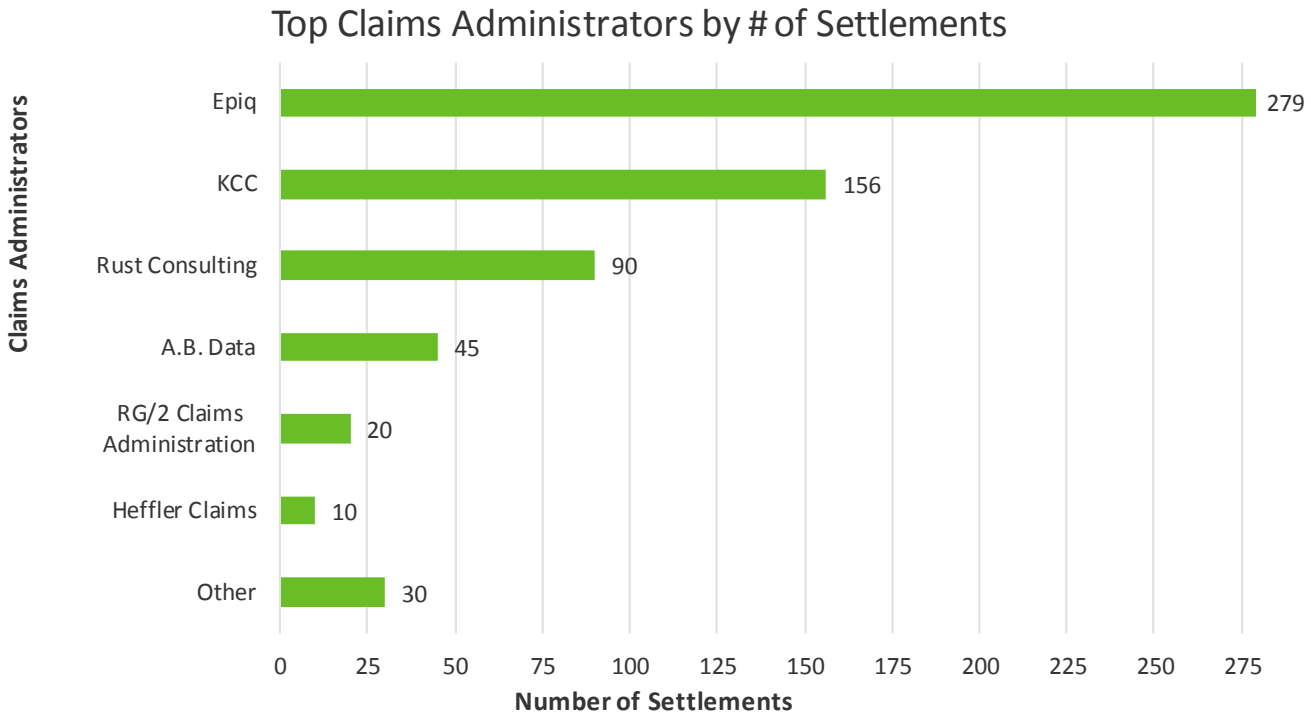
Note: Settlements with more than one law firm as lead counsel are attributed to each firm

# Top Claims Administrators

Figure 13: **Top Claims Administrators by Aggregate Settlement Amount**
2013 - 2018

| Rank | Claims Administrator | Aggregate Settlement Amount | # of Settlements | Average Settlement Amount 2013-2018 |
|---|---|---|---|---|
| 1 | Epiq | $10,093,847,005 | 279 | $36,178,005 |
| 2 | Rust Consulting | $3,804,371,372 | 90 | $42,270,793 |
| 3 | KCC | $2,415,153,032 | 156 | $15,481,750 |
| 4 | A.B. Data | $1,453,856,629 | 45 | $32,307,925 |
| 5 | RG/2 Claims Administration | $296,742,250 | 20 | $14,837,112 |
| 6 | Heffler Claims | $55,250,000 | 10 | $5,525,000 |
| | Other | $1,155,516,763 | 30 | $38,517,225 |

Figure 14: **Top Claims Administrators by Number of Settlements**
2013 - 2018




Notes:
1. Epiq includes the Garden City Group (GCG)
2. KCC includes Gilardi & Co LLC

# Methodology and Sources

Our first edition of the Antitrust Annual Report sets the stage for additional reports and analysis in the years to come. The topics selected for 2018's Antitrust Annual Report intend to provide a high-level analysis of the activity within the antitrust bar. Study topics may change or be modified for data published in future years.

**Cases Analyzed**

The cases analyzed in the preceding report represent three individual data sets: complaints filed from 2013-2018, cases won by defendants from 2013-2018, and cases with settlements reaching final approval or verdicts awarded within the time period of 2013-2018. Settlement data analyzed within the 2013-2018 period is not first evaluated by complaint filing date; which is to say, any settlement granted final approval during the six year analysis period is represented in the data, regardless of when the complaint was filed. Only settlements granted final approval within the six year analysis period are represented in the data. Regarding cases with multiple settlements, settlements reaching final approval outside of the six year time period of the study are excluded.

**Timeline**

For our debut report, we selected to highlight two specific time periods to gather our data: 2018 'Year in Review', and 2013-2017 'Five Year Lookback'. Using two time periods has allowed us to not only highlight the past year's activity within the antitrust sector, but also to compare it to historical years' data.

**Sources**

Data for this report are collected primarily through Lex Machina's Legal Analytics Platform. Lex Machina uses artificial intelligence to categorize federal court case data from PACER (Public Access to Court Electronic Records). The case data obtained from Lex Machina was verified by the supporting court docket and supplemented with additional data points also available through the Lex Machina platform. All analysis, commentary and conclusions were reviewed by each member of the authoring team.

The data gathered are not necessarily exhaustive of every settlement during the analyzed period. While this is intended to be an accurate reflection of class action matters in Federal Court, there is a possibility that cases have been excluded due to source limitations or unintentional error.

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Washington, DC 20004
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# EXHIBIT 5

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

| | | |
|---|---|---|
| IN RE PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION | : | MDL Docket No. 1720 |
| | : | MASTER FILE NO. 1:05-md-1720-JG-JO |
| This Document Relates To: | : | |
| ALL ACTIONS | : | |

**REPORT OF ALAN S. FRANKEL, Ph.D.**

**JULY 2, 2009**

more relative to previous level. Such a sequence would demonstrate directly that the corporate control transaction, by creating a single firm with market power, had anticompetitive effects. But, from an economic perspective, that is precisely what happened. If one accepts the premise that, under their new structures, MasterCard and Visa no longer are liable under the intra-network price-fixing claims, then the same post-IPO overcharges can be traced to the IPOs.

308. The second source of anticompetitive impact on merchants from the IPOs is the ability for MasterCard and Visa now to exercise their market power on their own behalf, as for-profit stock corporations, when formerly they were operated on a "not-for-profit" basis (or, at least, they were motivated primarily to maximize the profits of their owner-member banks, rather than their own profits).

309. Since the banks consolidated their ownership and control over MasterCard and Visa into the new corporate entities, MasterCard and Visa have raised network fees which are charged to merchants. For example, in March 2009 both networks announced new network fees. MasterCard imposed a 1.85 cent Network Access and Brand Usage Fee (NABU) in April and Visa imposed a 1.95 cent Acquirer Processing Fee (APF) in July. Industry experts expect merchants to bear the cost of these fees.[398]

310. The increased network fees since the IPO are incremental damages resulting from the IPOs, since, in the but-for world in which the IPOs would not have occurred, MasterCard and Visa would not have increased their fees.

311. To summarize, interchange fees paid by class members before the IPOs represent overcharges prior to the IPOs under the intra-network price-fixing claims. Interchange fees paid since the IPOs represent overcharges either under the intra-network price-fixing claims or under the IPO claims. In addition, increased network fees borne by merchants represent additional damages since the IPOs. This but-for world analysis applies to each of the relevant general purpose credit card, offline debit card, and PIN debit card network service markets.

### 9.1.5 Alternative But-For Worlds For General Purpose Card Network Services

312. As I have explained, MasterCard and Visa rules requiring the payment of interchange fees in each of the relevant markets, including their general purpose credit card network service markets, cause harm without offsetting benefits, and therefore it is appropriate to consider a but-for world in which those rules would not have existed. Useful benchmarks for these purposes may be different geographic markets, different product markets or different time periods when the anticompetitive behavior was not present or a less restrictive alternative was used, and which are sufficiently similar to the

398. See, *e.g.* "New Charges for Merchant Acquirers from Visa and MC," American Banker, March 12, 2009; Vantage Card Services: Interchange Updates; The Green Sheet, "New fees, more money for Visa, MasterCard," April 13, 2009; DigitalTransactionsNews, "Higher Fees Could be Rainmakers for the Bank Card Networks," March 17, 2009.

but-for world as to provide useful guidance, such as four party networks in the U.S. and other industrialized countries.[399]

313. The absence of interchange fees is consistent with economic theory and economic history. It is the outcome one would expect to have evolved in the competitive payment markets without restrictions or impediments on merchants' ability to steer freely among payment methods or networks.[400] It is, in fact, the outcome that resulted historically in the United States with respect to four-party check transactions, in which highly competitive markets saw the competitive elimination of interchange fees.[401] It is how PIN debit card networks initially evolved in the United States. A competitive marketplace would also have resulted in a no-interchange fee outcome with respect to general purpose cards.

314. I explore, however, an alternative but-for world, addressing defendants' argument that their conduct should be analyzed legally under a rule of reason, which as I understand, would assess whether the defendants' conduct resulted in net benefits and satisfied a "less restrictive alternative" standard. In particular, I assume for this alternative but-for world that interchange fees would have existed, but only at a less restrictive level necessary to permit the networks to operate successfully, or would have

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399. I may supplement my opinions on the benchmark levels based on information, if any, that becomes available in the future.

400. In 1995, Dennis Carlton and I first described the theoretical results that in a competitive world with no transaction costs, complete information, and merchants' unfettered ability to surcharge or discount payment methods, interchange fees would not exist because they could not be used by banks and their networks in a way that would have any significant effects other that to incur the costs of administering the interchange fee system itself. Dennis W. Carlton and Alan S. Frankel, "The Antitrust Economics of Credit Card Networks," 63 Antitrust L.J. 643 (1995). Economist Julian Wright, who has consulted for Visa, acknowledges that, "[i]n a world of perfect retail competition, the interchange fee will not be allowed to play the role of aligning joint benefits and joint costs, but nor will it be needed for this purpose." Julian Wright, "Optimal Card Payment Systems," 47 European Economic Review 587 (2003), p. 607. By perfect retail competition, Wright means that merchants can use surcharges and rebates to finely adjust their retail pricing to account for different payment costs. See also Joshua S. Gans & Stephen P. King, "The Role of Interchange Fees in Credit Card Associations: Competitive Analysis and Regulatory Issues," 29 Australian Business Law Review 94, 100 (2001) ("[S]uppose that it was possible for the customer and merchant to vary the retail price contingent on the payment mechanism used. In this situation . . . the network effect on the merchant side would virtually be eliminated. . . . [W]e show that an efficient outcome always results."). In other words, with effective competition, the claimed rationale for an interchange fee disappears.

401. See Appendix A and Frankel, "Monopoly and Competition in the Supply and Exchange of Money," 66 Antitrust Law Journal 313 (1998), attached in Exhibit 2.

been set at a competitively determined, efficient level to address a payment cost (usage externality) problem that I described in Part 6.[402]

315. I note that MasterCard and Visa have argued that interchange fees are essential to the existence of their networks.[403] But their card systems have operated successfully in many countries at much lower effective interchange fee rates than those in the United States. For example, in Australia, their systems continued to grow even after the Reserve Bank of Australia ("RBA") set the average credit card rates in that country at 0.50%.[404] The RBA has also indicated its expectation that rates should decline further to an average of 0.30%.[405] Similarly, in the United Kingdom, where the Visa consumer credit interchange fee rate dropped to 0.90%, the networks continue to operate successfully.[406]

316. The continued success and growth of MasterCard and Visa credit card usage at interchange fee rates of 0.50% in Australia and 0.90% in the U.K. indicates that interchange fees of about 2% in the United States are far above any level which might arguably be needed for the defendants to successfully operate their networks and to prevent any claimed "death spiral" collapse of MasterCard and Visa.

317. The interchange fee level resulting under the Australian reforms was based on a modification of the issuer cost-recovery methodology that both networks at one time claimed served as the basis for their interchange fee levels. Accepting a different rationale and methodology for determining the appropriate interchange fee level, the European Commission also recently accepted a rate of 0.30% on general purpose cross-border card transactions, which were the subject of the Commission's antitrust case against MasterCard.

318. According to the European Commission, it accepted a MasterCard rate of 0.30% because that rate was established based on cost studies measuring the alleged cost-saving benefits of general purpose cards. As I described in Part 6.1, such a methodology theoretically could serve as the basis for setting the interchange fee level to achieve efficiencies "to the extent that the fee is passed on to the cardholder" (and to the extent that these cost savings are real and significant marginal cost savings at the point of

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402. Because debit card networks currently exist – and thrive – without interchange fees, I do not consider alternative but-for worlds for those card network services.
403. I explain why I reject this argument in Part 9.4.1.
404. See Appendix B.
405. Reserve Bank of Australia, Reform Of Australia's Payments System: Conclusions of the 2007/08 Review (September 2008), p. 22 ("The Board will assess the degree of progress in meeting its concerns in August 2009. If at that time it judges that insufficient progress has been made, regulation of interchange fees will be retained with the benchmark for credit card interchange fees reduced to 0.3 per cent as proposed in the Preliminary Conclusions.").
406. Deposition of Tim Steel, October 8, 2008, pp. 117-19. The fee fell to around .90% in the 2005-2006 time period.

sale).[407] If interchange fees actually could be used (and were needed) to solve the merchants' payment cost problem, then I assume solely for purposes of this alternative but-for world that the defendants' interchange fees would have been set consistent with this competitive and theoretically efficient interchange fee methodology.[408]

319. In the actual world, the networks do not compete for merchant transactions or over the setting of interchange fees to attain efficiencies.[409] As I explained in Parts 3, 4 and 5, they do not use interchange fees and anti-steering rules to solve market imperfections, but instead to create and exploit market imperfections. In the primary but-for world, merchants would have solved whatever market imperfections existed using their own steering strategies, and would not have paid interchange fees, because merchants and the public at large would have been better off without any requirements for merchants to pay interchange fees than they were in the actual world. In the alternative but-for world, networks would have continued to set interchange fees but their interchange fees could withstand scrutiny under the rule of reason analysis as a less restrictive alternative.

320. Estimating damages under the alternative but-for world involves proportionate reductions of interchange fee payments to reflect the levels shown to be viable in Australia and the U.K., or the level resulting from application of the

---

407. European Commission, "Antitrust: Commissioner Kroes notes MasterCard's decision to cut cross-border Multilateral Interchange Fees (MIFs) and to repeal recent scheme fee increases – frequently asked questions," MEMO/09/143 (Brussels, 1st April 2009), p. 4. The debit card interchange fee rate was set at 0.20%. MasterCard's European cross-border interchange rates for both debit and credit were eliminated between June 12, 2008 and the April 2009 interim settlement. *Id*. at 2.

408. An interchange fee at this level conceptually could be established through competition between issuers or networks in the absence of anti-steering rules. The primary but-for world has the virtue of letting each merchant compete with other merchants over the terms of all steering strategies, while the alternative but-for world assumes that this completely decentralized competitive marketplace is somehow unattainable, and that some centrally administered interchange fee system achieved more benefits than harm. I do not believe that this alternative but-for world, in actual practice, would be likely to achieve more benefits than harm compared to the primary but-for world, which is why I deem them as the "primary" and "alternative" but-for worlds.

409. MasterCard "Update on Strategy Review," June 7, 2004, MCI MDL02 00051202-1297 at 1206 [redacted] A Morgan Stanley analyst noted in 2005 report, "Are merchants customers? While Visa's executives tried to be conciliatory, the agenda in their pack of slides started with the assertion that 'merchants paint a misleading picture.' This was a surprising statement: businesses don't commonly accuse their customers of being deceptive. The hidden message, in my view: merchants are not really customers." Ken Posner, Morgan Stanley Equity Research, The Rhetoric of Interchange: Update from Santa Fe, MCI- MDL02- 070003491-3500 at 4915.

theoretically competitive and efficient interchange fee as recently accepted for cross-border MasterCard credit card transactions in the European Union.

321. Computing aggregate damages under the alternative but-for world assumptions is straightforward. It is reasonable to assume that each merchant in these but-for worlds would have experienced a proportionate reduction in the interchange fees that they actually paid for MasterCard and Visa to attain the targeted average level. In this alternative but-for world, I assume that MasterCard and Visa would have engaged in price discrimination as they did in the actual world, but that the weighted average rate would have been at the lower levels that I identify.

### 9.1.6 Overcharges Can Be Measured Directly

322. In the actual world, MasterCard and Visa required interchange fees to be paid to their card issuing member banks on each general purpose card, offline debit card, or PIN debit card transaction. The rule is couched in terms of a requirement to pay a "default" or "fallback" interchange fee in the event that the issuer and the merchant do not have a bilateral fee agreement in place between them, but that structure (along with the anti-steering rules, including "honor all cards" rules) gives the issuing bank no economic incentive to accept less than the default interchange fee from a merchant.

323. Interchange fees are a revenue sharing device that increases the prices merchants pay by the full amount of the interchange fees.[410] No matter which acquirer a merchant approaches for defendants' card network services, the merchant will pay overcharges in an amount equal to the interchange fees that must be paid to the networks' issuing member banks. All of the factors that would influence the but-for price also influence the actual price; the only difference is the requirement to pay an interchange fee. A large, efficient merchant, for example, from which an acquirer currently earns a low acquirer margin, would also have been a large, efficient merchant in the but-for world from which its acquirer would also have earned a low margin but the merchant would not also have paid interchange fees. In other words, the amount of the acquirer margin is independent of the amount of interchange fees.

324. Because the economic evidence demonstrates that the intra-network price-fixing conduct caused an overcharge to merchants equal to the entire amount of interchange fees collected relative to the primary but-for world, data on the amount of interchange fees paid can be used directly to calculate aggregate damages since January 1, 2004.[411] Similarly, data on the amount of interchange fees paid can be used directly to determine the amount of overcharges relative to the assumptions in the alternative but-for world, since those overcharges are proportionate to the amount of interchange fees paid.

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410. See, generally, Part 5.

411. Because the defendants keep data on interchange fees paid, there are direct data available on overcharges and damages, making it unnecessary to use econometric estimation techniques to determine the overcharges indirectly (through an estimation of the but-for price).

four-party interbank payment networks can and do operate without interchange fees. They have long done so in the United States.

342. When MasterCard and Visa were created, only a few banks in the United States still imposed interchange (or "exchange") fees on checks. As I explain in Appendix A, competition led to the elimination of interchange fees in most check transactions. Only some banks with local market power (*i.e.*, located in towns with only one or two banks) continued to charge interchange fees.[417] Those fees were eventually eliminated by a combination of competition, Federal Reserve efforts and, finally, legislation. The lack of interchange fees on checks, however, did not discourage their use. Essentially all financial institutions permitted to issue checks did so, and those that did not eventually found ways to issue checks (or the practical equivalent of checks) by the 1980s.[418]

343. As technology developed, new electronic methods for sending payment data supplemented the physical transfer of paper checks and bank drafts. Billions of wire transfers and Automated Clearinghouse (ACH) transactions, including the conversion of paper checks into electronic payment messages, clear and settle between banks each year at par with no interchange fees. [419]

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Behalf of the Electronic Payments Coalition, Before The Subcommittee On Commerce, Trade, And Consumer Protection Of The Committee On Energy And Commerce, House Of Representatives, February 15, 2006, "The Law And Economics Of Credit Card Interchange Fees," p. 2 ("a fixed interchange fee is essential"); Noah Hanft, General Counsel and Corporate Secretary, MasterCard International, "Let's Get Real," in Interchange Fees in Credit and Debit Card Networks: What Role for Public Authorities?, Federal Reserve Bank of Kansas City (2005), p. 206 ("Interchange is essential to four-party systems[…]").

417. See Alan S. Frankel, "Monopoly and Competition in the Supply and Exchange of Money," 66 Antitrust Law Journal 313 (1998) and Ed Stevens, "Non-Par Banking: Competition and Monopoly in Markets for Payments Services," Federal Reserve Bank of Cleveland, Working Paper 9817 (1998).

418. Savings and loan associations, for example, began offering "negotiable orders of withdrawal" ("NOW" accounts) and other entities began offering "money market deposit accounts" ("MMDAs"), both of which were essentially interest bearing checking accounts. See Depository Institutions Deregulation and Monetary Control Act of 1980, 12 U.S.C. § 1832(a) ("NOW" Accounts), and Garn St. Germain Depository Institutions Act of 1982, formerly codified at 12 U.S.C. § 3503(c).

419. See, for example, "Retail Payment Systems," Federal Financial Institutions Examination Council, ("retailers do not pay an interchange fee for ACH transactions"). ACH recently introduced a new program called "Secure Vault Payments" which operates with an interchange fee. Secure Vault Payments is a small pilot program apparently accepted by only two online merchants (iGourmet.com and Apple Vacations). See Secure Vault Payments website.

344. An interbank credit or debit card transaction in many ways operates like an interbank check transaction.[420] The authorization, clearing and settlement operations of a credit card transaction are similar to those in a debit card or check transaction, but instead of deducting the transaction amount directly from the cardholder's account balance, the bank advances the funds on behalf of the cardholder, who is billed monthly for transactions, along with any interest charges or fees.[421]

345. Historically, some four-party credit card systems originally operated without interchange fees in the United States.[422] PIN debit networks in the United States developed primarily without interchange fees. Of the top 20 PIN debit networks in the United States around 1991, 15 had no interchange fee.[423] After Visa acquired Interlink, it imposed an interchange fee (payable to the card issuing bank) in that network , and other networks followed.[424]

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420. See, *e.g.*, David Evans and Richard Schmalensee, Paying with Plastic (1st ed. 1999), p. 79 ("Interchange required that banks clear each other's charge slips in the same way that they cleared each other's checks."); William F. Baxter, "Bank Interchange of Transactional Paper: Legal and Economic Perspectives," 26 Journal of Law and Economics 541, 541-42 (1983) ("The payment systems I discuss all involve four parties and four consensual arrangements. For example, in the checking context, the parties are the payee of the check, the bank in which the payee deposits the check for credit to his account, the bank on which the check is drawn (typically a bank with which the maker of the check has a depository arrangement), and finally, the maker of the check, usually a depositor with the drawee bank. In the context of the credit card or the debit card, four functionally analogous parties are involved, although the labels attached to them differ[…]"). Originally, banks would physically clear signed charge slips in the same manner that signed checks were cleared. Today, both can be processed electronically.

421. Dee Hock, One From Many: VISA and the Rise of Chaordic Organization (2005), p. 97 ("The fact that many card issuers allowed the customer to pay for the transactions over a period of time (in the jargon of banking, 'extended credit') was really an ancillary service and not the primary function of the card."). In some countries, the term "credit card" refers to what is otherwise known as a "deferred debit" card account, in which the charges are accumulated and automatically debited from the cardholder's current account at a later date.

422. Some early U.S. credit card networks did not have interchange fees, and before Visa acquired Interlink, most U.S. debit card networks did not have interchange fees. See Appendix A.

423. Four networks had "negative" interchange fees remitted by the issuer to the acquirer paid to the terminal owner, and in only one network were interchange fees paid to the card issuing bank. *Visa Check* Exhibit 311, at 0582087. See also Declaration of Franklin M. Fisher, in In re: *Visa Check / MasterMoney* Antitrust Litigation, December 13, 2002, Exhibit 6, listing 11 "major on-line networks" in 1992, 8 with no interchange, 2 with "issuer-paid interchange fees", and Interlink as the only network with "acquirer-paid interchange fees."

424. David Evans and Richard Schmalensee, *Paying With Plastic* (1999, 1st edition), p. 307 ("Initially, the interchange fee flowed from issuers to acquirers, but that has reversed as

346. Four-party debit card systems have also operated successfully without interchange fees in at least eight other countries (Canada, Denmark, Finland, Iceland, Luxembourg, Netherlands, New Zealand, and Norway).[425] For example, the Canadian Interac debit network operates without interchange fees,[426] yet Interac has gained widespread acceptance and Interac claims it is the most popular form of payment in the country.[427] Debit card networks likewise operate very successfully without interchange fees in New Zealand.[428] In Iceland, MasterCard and Visa general purpose card systems

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acquirers now collect fees from merchants and pass some onto issuers.").

425. See, *e.g.*, European Commission, Competition DG, Financial Services (Banking And Insurance), Interim Report I: Payment Cards, Sector Inquiry On Retail Banking, Under Article 17 Regulation 1/2003, 12 April 2006, at 26 ("[B]anks [in Finland, Luxembourg, Denmark and the Netherlands] cooperate in payment card systems without charging one another interchange fees for POS [point-of-sale] transactions"). In New Zealand, Visa debit transactions are settled without any interchange fee. EFTPOS Industry Working Group, Discussion Paper, July 2002, p. 6. For Canada, see Interac Association, "Interac – A Backgrounder," September 2008, p. 8. For Norway, see, *e.g.*, Retail Banking Research, LTD., Payment Cards Western Europe 2008, Norway, p. 39. Commission Decision of 19001/2007 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/34.579 MasterCard COMP/36.518 EuroCommerce and COMP/38.580 Commercial Cards), ¶ 556 ("[These] payment card schemes in the European Economic Area have indeed successfully been operating without a MIF for a long time period. These schemes have been established between 1979 and 1992. The number of issuing banks in these schemes ranges from 10 to 344 banks[…]"). MasterCard disputed the Commission's characterisation of these networks, but the Commission rejected MasterCard's claims in this regard. *Id*., at ¶¶ 555-608.

426. The Canadian Interac network was established with ATM services in the 1980s and subsequently introduced point of sale PIN debit card services. While an interchange fee applied to ATM services, there is none for Interac Direct Payment transactions. Interac Association, "Interac – A Backgrounder" (September 2000), p. 8 ("In the Shared Cash Dispensing service, an 'interchange' fee is paid by the Issuer to the Acquirer on each transaction. Interac Association sets a default level for this fee. At this time, there is no interchange fee in the *Interac* Direct Payment service."). Merchants are also allowed to surcharge for Interac transactions. Deposition of Cathy Honor (30(b)(6) deponent for Royal Bank of Canada), December 4, 2008, pp. 106-107 ("And my question to you is are merchants allowed to surcharge for Interac IDP transactions? A. Yes.").

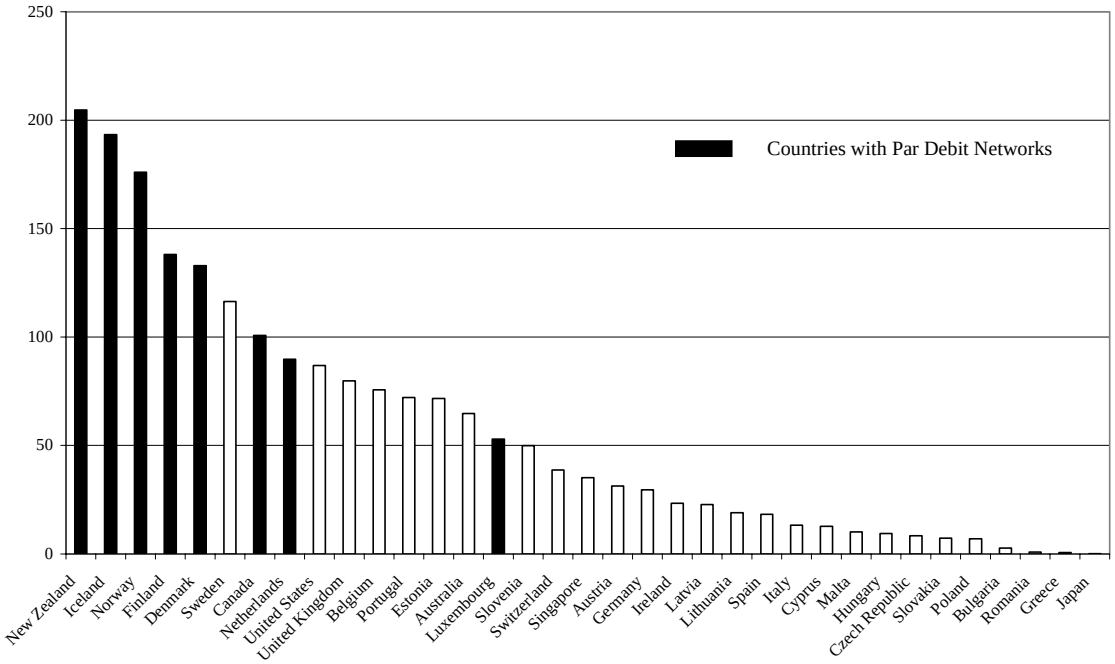
427. See Interac web site, indicating that debit is the most commonly used method of payment in Canada, and that debit card usage in Canada is among the highest in the world. See also Deposition of Cathy Honor (30(b)(6) deponent for Royal Bank of Canada), December 4, 2008, p. 64 ("Q. What do you know about the – either the number or percentage of merchants in Canada that accept Interac? A. I have general knowledge that the acceptance is very good.").

428. The Visa New Zealand web site stated "Visa Debit: Domestically at electronic Point of Sale (POS) devices when the card is physically present, a Visa Debit transaction will be processed and routed for authorization as an EFTPOS transaction, therefore no interchange rate is applicable to this type of transaction." Visa New Zealand web site, "Getting Started: Interchange". EFTPOS cards are widely accepted by New Zealand

have also operated without interchange fees, yet the networks have been very successful.[429] As Figure 9.1 shows, usage of debit card systems in these countries is among the highest in the world.

**Figure 9.1**

**2006 Debit Card Usage per Capita**




Sources: Bank of International Settlements, European Central Bank, Australian Bureau of Statistics and Reserve Bank of Australia, Statistics Iceland, Statistics New Zealand and Reserve Bank of New Zealand, Norges Bank.

347. Banks offer debit card services without interchange fees, like they offer check services, because customers demand those services, and the banks earn income on

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merchants and widely used by consumers. See Banking in New Zealand (Fourth Edition, 2006) New Zealand Banker's Association, p. 15 ("In fact, New Zealand has the highest incidence of EFTPOS terminals to head of population in the world, with one terminal for every 34 people at the end of 2005.").

429. The head of Kreditkort hf, Iceland, stated to the Chairman of MasterCard Europe, "Finally, I would like to mention that in Iceland, there are no Interchange Fees in the card schemes. Both in the MasterCard scheme and in the Visa scheme, Iceland is currently holding a world record, both regarding card penetration and card turnover per capita. The small Icelandic example is therefore worth noting." MCI MDL02 10577059-7061 at 7061 (emphasis in original). Defendants have criticized relying on evidence from other countries or drawing inferences about the need for interchange fees in credit card networks from the fact that they are not needed in debit card networks. I address these arguments in Part 9.4.7.