

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

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

I, Lloyd Constantine, hereby declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following is true and correct:

1. I am the Chairman of the law firm Constantine Cannon, which is "Lead Counsel" for the class of merchants in the above-captioned action. I submit this declaration pursuant to Local Civil Rule 6.1(d) in support of Lead Counsel's request for an Order to Show Cause. No previous application for similar relief has been made.

INTRODUCTION

2. Lead Counsel submits this application pursuant to its fiduciary obligation to the Class and invokes this Court's continuing jurisdiction over all proceedings and/or disputes arising out of or relating to the Settlement Agreements in this action (*see* Visa Settlement at ¶ 39(a); MasterCard Settlement at ¶ 41(a)).

3. It has come to Lead Counsel's attention that at least one class action settlement recovery firm, Spectrum Settlement Recovery (hereinafter "Spectrum"), is misleading Class Members to entice them to retain Spectrum to prepare and file their Claim Forms.¹ In its solicitations, Spectrum misrepresents the Plan of Allocation (the

¹ Lead Counsel is aware of other class action refund firms that have been soliciting Class Members

"Plan"),² the Visa Transactional Database which will be utilized to calculate Class Members' shares of the Settlement Fund, as well as the claims process, and falsely suggests that Spectrum has a superior "algorithm" that will "maximize" Class Members' recoveries from the Settlement Fund. Presumably relying upon these false and misleading statements, some 211 Class Members have entered into agreements that designate Spectrum as their agent for the claims process, and pursuant to those agreements, Spectrum is to receive a fee of 30% of each Class Member's settlement recovery.³ Spectrum has requested that the Claim Forms and Cash Payments for these 211 merchants that have retained it be sent directly to Spectrum.⁴

4. Spectrum's solicitations state that Class Members that decline to retain Spectrum will receive less than a full settlement recovery. Spectrum's solicitations also promise to dispute each and every Class Member's estimated settlement recovery to "maximize" its "clients'" shares of the Net Settlement Fund. Such automatic disputes would represent an abuse of the Plan's challenge mechanism. Section 7 of the Plan gives Class Members the ability to challenge their Estimated Cash Payment if they can submit documentation showing that their estimate was based on purchase volumes that differ from the volumes actually received by the Class Member. *See* Exhibit A. Spectrum, by

to assist them in the preparation of their Claim Forms. Unlike Spectrum, we have yet to see solicitations from these firms that blatantly misrepresent the claims process.

² The Amended Plan is attached hereto as Exhibit A.

³ A capture of Spectrum's advertisement on the California Lodging Industry Association website on September 7, 2005, attached hereto as Exhibit B, indicates that "Spectrum's fee is 30% of your approved claim" (<http://www.clia.org/Endorsed/spectrum.cfm>).

⁴ A representative sample of Spectrum's solicitations are attached hereto as Exhibit C. A list of the Class Members that have retained Spectrum, which includes some of the largest merchants in the country, is attached hereto as Exhibit D. A representative sample of Spectrum's agency agreements is attached hereto as Exhibit E. A press release issued by Spectrum on September 9, 2005 is attached to the Constantine Decl. as Exhibit H.

contrast, intends to file blanket disputes on the basis that it has an "algorithm" superior to the Fisher Allocation Methodology. That methodology was approved by this Court.⁵ The time for such an objection to the Plan has long since passed. In addition, such blanket and formulaic disputes will improperly tax and diminish the Common Fund and may also injure the Class Members that retained Spectrum by unduly delaying their settlement recoveries.

5. To protect Class Members and the Common Fund, we respectfully request that: (i) the Court void these fraudulently-induced contracts; or, in the alternative, (ii) declare that Lead Counsel and the Claims Administrator can mail Claim Forms and Cash Payments directly to the Class Members. We also request that (iii) the Court require Spectrum to correct its misrepresentations and give notice (at Spectrum's expense) to those Class Members with which it has entered into agency agreements; and (iv) the Court enjoin Spectrum from soliciting any Class Members with materials and/or statements that mischaracterize the Plan approved by the Court in this litigation, the Visa Transactional Database, the claims process, or Spectrum's ability to collaterally attack a Plan no longer subject to timely objection or appeal.

6. Spectrum's most blatant misrepresentations are discussed below.⁶

⁵ Copies of the Fisher Allocation Declaration and Supplemental Fisher Allocation Declaration are attached hereto as Exhibits F and G.

⁶ The following section sets forth only the blatant misrepresentations that Spectrum makes regarding the details of the Plan of Allocation. However, Spectrum's solicitations also include false statements regarding the various antitrust cases against Visa and MasterCard, including this case. For example, Spectrum claims that the *Visa Check/MasterMoney Antitrust Litigation* was consolidated in 2003 with *United States v. Visa U.S.A. Inc.*, 163 F. Supp. 2d 322 (S.D.N.Y. 2001), *aff'd*, 344 F.3d 229 (2d Cir. 2003), *cert denied* 125 S.Ct. 45 (2004). *See* Exhibit C. Even a cursory review of the history of these cases shows Spectrum's claims to be false. Notwithstanding their obvious ignorance of the relevant cases and the payments industry, Spectrum falsely claims to have a superior method for "maximizing" Class Members' recoveries under the Settlement.

SPECTRUM'S MISREPRESENTATIONS

7. Spectrum's solicitations indicate that it will automatically utilize the challenge mechanism to "litigate" Class Members' shares of the Settlement Fund.

- "We take the litigation-cost-risk to get all that your company is entitled to."
- "On behalf of the Class, SPECTRUM is also committed to filing *amicus curiae* briefs to extend deadlines or challenge allocation interpretations."
- "Spectrum's legal team brings the knowledge, substantive and procedural, of anti-trust and class action law to its clients. Spectrum also brings to its clients the experience of arguing briefs and motions in federal as well as state court. Spectrum has already spent close to a thousand labor hours researching the federal Visa/MasterCard anti-trust case so that you don't have to." (emphasis omitted)
- "SPECTRUM mitigates the management time required to keep your claims active by assigning a Claims Specialist who employs a series of pre-designed legal templates and more importantly deploys a dedicated attorney *licensed to practice in your state and able to specifically file for federal class action cases.*" (emphasis in original)
- "We can assist with pleadings and discovery issues, prepare claims assessments, critique the Administrator's challenges and appear as an expert witness in court."

See Exhibit C.

8. Spectrum's solicitations also indicate that Class Members will not receive the full amount of their recovery if they do not retain Spectrum to dispute their claims. Spectrum falsely claims to have a special "algebraic algorithm" to "maximize" Class Members' recoveries, and falsely asserts that the court-approved Fisher Allocation Methodology provides Class Members with a "lowest common denominator" recovery. These misstatements include the following:

- "We basically create a recovery maximized algebraic algorithm to challenge the lowest common denominator algorithm from the

Franklin Fischer [sic] formula in the Plan of Allocation."

- "Those claimants who challenge the partial 'offer' and maximize their recovery value will have a proportionately higher distribution of the remaining unclaimed pool." (emphasis omitted)
- "We have a mutually aligned interest in **maximizing** your refund, and getting the full amount." (emphasis in original)
- "Trust their 'databases' and leave a good share of your claim recovery on the table." (emphasis omitted)
- "Clearly, if you had significant debit card volume, and especially offline debit card transactions in 1992-1996, there is a high probability the Administrator's estimate will be low. The SPECTRUM solution is once again a systematic audit."

See Exhibit C.⁷

9. Spectrum's solicitations also indicate that the Claims Administrator will be acting against Class Members' interests, and will categorically reject any and all challenges that may be made by Class Members. For example, Spectrum states:

- "You will be dependent on the settlement administrator, a clerical mail notification house working on hundreds of cases at the same time. The settlement administrator is obligated to rely only on the questionable information provided by MasterCard and Visa. You will get no special treatment from them. Their interests are not aligned with yours." (emphasis omitted)
- "Please keep in mind that once the estimates are mailed, the settlement administrator goes into defense mode and becomes adversarial. They are paid to defend the Visa/MasterCard estimate."
- "The settlement administrator is not *compensated* and has no incentive to passively accept your processor's records in lieu of their reliance on the Visa and MasterCard databases. This is why there will be many dogfights. Spectrum has the specialized legal knowledge and courtroom experience to win these dogfights." (bolded emphasis)

⁷ To the extent that Spectrum intends to challenge the underlying methodology for calculating Class Members' estimated settlement shares, it is an unwarranted and untimely challenge to the Plan of Allocation which should be disregarded.

omitted) (italicized emphasis added)⁸

- "Please keep in mind that any counter 'offers' will cause the settlement administrator to shift into a defensive mode since they are paid to defend their partial 'offer'."
- "Who will challenge the settlement administrator's rejection of your own data? Most legal departments do not have a class action specialist on staff."
- "SPECTRUM'S INTERESTS BEGIN AND END 100% ALIGNED WITH YOURS" (emphasis omitted).

See Exhibit C.

10. Spectrum's claim that challenges will not be fairly adjudicated is not true. If Class Members have more accurate information regarding their transaction and purchase volumes, Section 7 of the Plan enables them to challenge their Estimated Cash Payment. *See* Exhibit A. Lead Counsel and the Claims Administrator have advised Class Members of their right to challenge their Estimated Cash Payment, and have informed Class Members that Lead Counsel and the Claims Administrator are and will be available to answer any questions that Class Members may have regarding the claims process. The Claims Administrator, The Garden City Group, Inc., has 20 years of experience administering large class action settlements and was appointed by this Court to administer the distribution of the Settlement Funds in this action. The Claims Administrator has been and will be compensated for fees and expenses incurred in its administration of the Settlement Funds, including the challenge process. Indeed, the more challenges Spectrum files on behalf of its misled clients, the higher the Claims Administrator's fee will be, and all things being equal, the lower the Class Members'

⁸ As discussed in paragraph 10, the more challenges Spectrum files on behalf of its misled clients, the higher the Claims Administrator's fee will be, and all things being equal, the lower the Class Members' settlement recoveries will be. *See also* the accompanying Affidavit of Neil L. Zola at ¶ 5.

settlement recoveries will be.⁹

11. Spectrum also mischaracterizes the method by which Class Members' settlement shares will be calculated, in accordance with the Plan approved by this Court. For example, Spectrum's solicitations state that Class Members who refuse to contract with Spectrum will be harmed in the following manner:

You may file a claim based solely on the "offer" generated by MasterCard and Visa. In this case you will receive considerably less than 100% of what is owed to you and will result in the following: a) You will not receive any funds for 1992-1996 since Visa and MasterCard databases only go back to 1996. Yet, the court approved claim period begins in 1992. b) You will not receive any funds for the "on-line" debit portion of your claim since Visa and MasterCard have admitted that they do not have this data in their databases. c) You will rely solely on the incomplete and inaccurate Visa and MasterCard "database". You will waive your court granted right to amend your claim to include transactions that were missed and mis-categorized.

See Exhibit C (emphasis omitted). Spectrum also states that:

- "All types of transactions for 1992-1996 and non-signature (PIN) debit card data for 1992-2003 do not even exist in the various databases AND there is no distinction between credit card and the much higher value signature debit card transactions either!!!" (emphasis omitted)
- "Visa and MasterCard insist that they have no access to any data or records between the years of 1992 through 1996 which could cause them to omit a very substantial part of your recovery; therefore, Spectrum has developed relationships with processors, gateways, acquiring and issuing banks, other banks, et al, in order to assist it's [sic] clients with filing a comprehensive claim...."
- "[T]he fact that the Visa and MasterCard databases are incomplete and not fully accurate is not even mentioned [in the Plan]."
- "Spectrum will distinguish credit from debit to gain the highest recovery and detect transactions that have been misreported and therefore incorrectly categorized by your processor and ultimately VMC."

⁹ See generally the Affidavit of Neil L. Zola.

- "An eleventh hour determination not to use MasterCard data to identify eligible transactions and claimants is further complicating the settlement notification process. Only the VISA data information is being used."

See Exhibits C and H.

12. These statements are false and misleading. The Plan principally uses the Visa Transactional Database because it is the only database which accurately distinguishes between the vast majority of Class Members' off-line debit and credit card purchase volumes over a substantial portion of the Class Period. In addition, this database covers virtually all Class Members and all Visa off-line debit and credit card transactions (with the exception of *de minimus* "on-us" transactions) for October 1, 1996 through July 31, 2003. Contrary to Spectrum's false solicitations, the Visa Transactional Database shall be used to estimate Class Members' purchase volumes for periods not covered by the database, including the 1992-1996 period, and including on-line PIN debit and MasterCard purchase volumes. See Exhibits A, F and G.

13. Spectrum's solicitations also inform Class Members that if they accepted Visa and/or MasterCard debit and credit cards during the Class Period, and they enlist Spectrum's services, they are guaranteed to collect anywhere between \$100,000 and \$6,000,000 in recovery:

Did your company accept VISA and or MasterCard ("MC") Credit and Debit Cards from October 25, 1992 to June 21, 2003? If so, your firm *is eligible to collect significant top line revenue from \$100,000 to \$6,000,000* as part of the anti-trust settlement that was filed and approved in the United States District Court in Brooklyn, New York. ... By using Spectrum Settlement Recovery, ("SSR") you can maximize your refund and minimize your time, labor and money investment in claiming these funds and with no fiduciary liability to you.

See Exhibit C (emphasis added).

14. This statement is misleading. Class Members' recoveries may or may not be within that range; yet if Class Members utilize Spectrum as their agent, they will be required to pay to Spectrum 30% of their Cash Payments, whatever their ultimate settlement recoveries. *See* Exhibit B.

15. Spectrum repeatedly states that the Claims Administrator will be making a "partial 'offer'" to Class Members. *See* Exhibit C. These statements are incorrect. The Estimated Cash Payments, which will be provided on the majority of Claim Forms, are not offers.

16. Spectrum states that "Class [M]embers have no idea when the original offer will arrive nor how much the offer will be." *See* Exhibit C. This statement is false. The Plan states that Claim Forms will be mailed to all Class Members within 120 days of Final Settlement Approval. *See* Plan at Sections 4.7 and 5.1. Merchant Advisories prepared by Lead Counsel and released on June 29, July 6, July 13, and July 20, 2005 over national newswires have also informed Class Members when Claim Forms will be mailed.

17. Spectrum states that "[s]adly, the Plan of Allocation currently only provides for 30 days to file your claim." *See* Exhibit C. This is false. Under the Plan, Class Members have 60 days to submit their Claim Forms. *See* Exhibit A at Sections 8.5 and 8.6.

18. Spectrum lists the following as "**Obstacles to Recovery for Class Members:**"

- **Gathering data:** The claim period goes back to 1992; finding applicable records will be a challenge for many merchants.
- **Claim dynamics:** Working with a claims administrator on such a large claim is complex and time consuming.

- **Incomplete claims:** The above points put the merchant at risk of not receiving its full portion of the settlement refund. Gathering data could be a challenging task for most merchants considering the lengthy settlement period. The need to find eligible data dating back to 1992 will prevent the majority of class members from filing a comprehensive claim. Finally, without proper analysis of the claims there is complete reliance on the Claims Administrator to determine eligibility and recovery amounts.

See Exhibit B. Spectrum also states that

- "The Plan of Allocation readily admits that the data assembly task is onerous ... and error-prone: *'Providing this level of transaction information is extremely difficult, if not impossible for the largest merchant in the Class, let alone for very small Class Members.'*" (emphasis in original).
- "A large majority of the businesses eligible to recover money in the \$3 billion VISA/MasterCard class action settlement will miss their opportunity for a refund."
- "Class action settlements are fraught with ambiguities and obstacles class members must navigate in order to receive their share. Slow communications, swift deadlines and filing forms written in legalese help contribute to an average of only 10 percent of claimants filing for any settlement. This is particularly important in the Visa MasterCard settlement since the law requires that the entire \$3.05 billion be distributed to claimants. To achieve this, all unclaimed portions of the settlement money will be split amongst the class members who take the time to file."
- "Considering the large settlement period, finding eligible data dating back to 1992 will prevent the majority of class members from filling their claim properly and getting the full portion of what they are entitled to."

See Exhibits B, C and H (emphasis omitted). However, Spectrum neglects to inform Class Members that the Plan utilizes the Visa Transactional Database to simplify the process for Class Members large and small, and ensures that they do not have to undertake the onerous burden of collecting records dating back to October 1992. See Exhibit A at Summary p. iii, and Sections 4 and 5.

19. Spectrum also states that "the Plan admits that '[d]espite extensive efforts by Lead Counsel, more than 80 major Visa/MasterCard owner/member financial institutions as well as Visa and MasterCard admit that undoubtedly there will be Class Members who have not been identified.' Those are not very reassuring words." *See* Exhibit C (emphasis omitted). This is inaccurate and misleading. Because the Plan recognizes that no database covers the entirety of this massive Class (which includes many Class Members that went out of business prior to October 1996), Section 5 of the Plan created an alternative methodology using the Visa Payment Systems Panel Study to provide such Class Members a way to submit their claims. *See* Exhibit A. Spectrum, nonetheless, has targeted solicitations to Class Members that are indeed identified in the Visa Transactional Database. This misleading tactic is clearly designed to confuse Class Members and scare them into hiring Spectrum and ceding it 30% of their cash recoveries.

20. Spectrum also states that "[y]ou and your staff will have little work to do. You will incur hardly any labor costs at all. We do all of the fact finding, compiling, collating, cross checking and analysis to craft a value maximized claim which is complete, accurate and filed on time. A Spectrum filed claim will gain the respect of the Settlement Administrator." *See* Exhibit C (emphasis omitted). This is misleading. Class Members will still have to gather the same data for Spectrum that they would on their own.

21. Based on these misrepresentations, approximately 211 Class Members have entered into fraudulently-induced contracts under which they are ceding a substantial portion of their settlement recovery to Spectrum. Pursuant to these agreements, Spectrum is promising to launch across-the-board disputes regarding Class

Members' estimated cash recoveries that will involve a direct, misguided and untimely attack on the Plan, the Visa Transactional Database, and the Fisher Allocation Methodology. As the time to challenge the Plan has long since passed, such disputes are untimely and should be dismissed. In addition, if such disputes are allowed to proceed, they will impose a tax on the common fund and will unduly delay the settlement recoveries for Class Members who have entered into agency agreements based upon Spectrum's misrepresentations.

RELIEF SOUGHT


22. Lead Counsel hereby requests an Order from this Court, declaring void all agency agreements related to this action which were entered into and executed between Spectrum and any Class Members. In the alternative, Lead Counsel requests that the Court order that the Claims Administrator, The Garden City Group, Inc., can mail Claim Forms and resultant cash payments directly to these Class Members as set forth in the Plan.

23. In addition, Lead Counsel requests that the Court require Spectrum to correct its misrepresentations and give corrective notice (at Spectrum's expense) to those Class Members with which it has entered into agency agreements. Lead Counsel further requests that the Court enjoin Spectrum from soliciting any Class Members with materials and/or statements that mischaracterize the Plan approved by the Court in this litigation, the Visa Transactional Database, the overall claims process, or Spectrum's ability to collaterally attack a Plan no longer subject to timely objection or appeal.

24. Expedited resolution of Lead Counsel's request for declaratory and injunctive relief is necessary in this action because the Claims Administrator is currently

in the process of finalizing and printing Claim Forms, which will be mailed to Class Members during the period September 15 to September 29, 2005. The Claims Administrator needs to know to whom to address the Claim Forms of those Class Members who have signed agreements with Spectrum. Because Spectrum has demanded that Claim Forms for its 211 "clients" be sent to it and not to the Class Member, this dispute must be resolved before September 29th. As a result, we respectfully request an expedited Order from the Court.

Dated: New York, New York.
September 9, 2005



Lloyd Constantine