UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE

PAYMENT CARD INTERCHANGE FEE AND MERCHANT-DISCOUNT ANTITRUST LITIGATION

MASTER FILE NO. 1:05-md-1720-JG-JO

This Document Relates To: All Class Actions

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SECOND SUPPLEMENTAL CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

I.

PREAMBLE

1. Class Plaintiffs' allegations in this Supplemental Complaint are brought under the antitrust laws to challenge the conduct of Visa and its Member Banks in the events leading up to and culminating with its Initial Public Offering (IPO) on March 18, 2008.

2. From its inception in the 1960s until today, Visa has facilitated the transfer of funds from Merchants to Issuing Banks. In the early 2000s, Visa realized what courts and regulatory bodies had understood for some time -- that Visa's practice of requiring the payment of Interchange Fees and establishing the level of those fees posed substantial harms to

competition when those rules and the level of those fees were determined by the competing Member Banks that until recently made up all or nearly all of the Boards of Directors of Visa U.S.A., Visa International, and other regional Visa entities.

3. Visa management evaluated several changes to its business practices that would have eliminated the mandate that Interchange Fees pursuant to Visa's default schedule of fees be charged on every Visa transaction. These changes would have removed some of the anticompetitive restraints on Merchants and therefore may have significantly reduced or eliminated the antitrust risk that Visa and its Member Banks faced. (Partridge Exh. 32808 at VI_IC_00171718.)

4. But instead of changing its rules or its practices to conform to the antitrust laws of the United States and foreign jurisdictions, Old Visa sought to transform itself into a "single entity," which it hoped would not be subject to the proscriptions of Section 1 of the Sherman Act and similar laws in foreign jurisdictions when it continued to enforce its rules requiring the payment of an Interchange Fee and continued to establish the level of those fees. To effectuate these goals, various regional Visa entities merged into Visa, Inc., which was originally owned by Old Visa's regional entities and Member Banks, after which Visa, Inc. redeemed the bank-held shares, and in return provided the banks with two new classes of shares and most of the proceeds from Visa, Inc.'s IPO.

5. Ultimately the Member Banks retained the ability to protect what they believed to be their important interests, including ensuring that New Visa would continue in its role of mandating the redistribution of funds from Merchants to Issuing Banks through the Interchange Fee or some other means while preventing the takeover of New Visa by a less bank-friendly entity. These changes took effect with the IPO.

6. To the extent New Visa is now considered to be a single entity, rather than an association of its Member Banks, it serves the role of a third party that has been appointed by the Issuers to set uniform schedules of default Interchange Fees for them. New Visa continues to enforce its rule that requires the Interchange Fee to be deducted from the amount that is paid to the Merchant, which then becomes revenue for the Issuing Banks, not for Visa. New Visa also continues to enforce the Anti-Steering Restraints and Miscellaneous Exclusionary Restraints as set forth in the Second Consolidated Amended Class Action Complaint. And, as a result of ownership and governance interests, and other interests, maintained by the banks after the IPO, New Visa cannot cease imposing Interchange Fees or drastically reduce those fees without gaining the assent of the banks. New Visa's continuing practice of requiring the payment of an Interchange Fee and establishing default levels of those fees at supracompetitive levels is challenged in Part Five of the Second Consolidated Amended Class Action Complaint.

7. Moreover, because of the market power that New Visa and its Member Banks possess, the New Visa has been able to impose Interchange Fee increases on Merchants since the Restructuring began. And according to arguments previously crafted by Visa's paid "experts" in the Payment Card industry, New Visa will be able to continue increasing Interchange Fees.

8. As is more fully described below in Part VII.G., the Visa restructuring has harmed, or threatens to harm, competition in the Relevant Markets. Prior to the Restructuring, the Member Banks that owned and controlled Visa understood and acknowledged that by adopting the anticompetitive rules and restraints challenged in Class Plaintiffs' Second Amended Class Action Complaint they and Visa were a "structural conspiracy" that was violating Section 1 of the Sherman Act every day that they continued to do business in that form while enforcing the challenged rules and restraints. They implemented the Restructuring, however,

only after having set Visa on a business strategy that was designed to serve the interests of the Member Banks, in a market constructed by the Member Banks, through their common ownership and control of both MasterCard and Visa, which constrained the competitive choices of the New Visa. Those choices were further constrained by the Ownership and Control Restrictions, by which the Member Banks kept effective control over New Visa. The result is that New Visa, while nominally an "independent" entity, is a firm with substantial market power that has continued, at the insistence of the Member Banks to enforce unchanged all of the rules and restraints of Old Visa, and has continued to raise Interchange Fees charged to Merchants. Because prevention of the creation (by merger or acquisition of stock or assets) of a single firm with substantial market power to harm competition is the central policy goal of Section 7 of the Clayton Act, Class Plaintiffs challenge the Restructuring by this Amended Supplemental Complaint.

9. Plaintiffs Photos Etc. Corporation; Traditions, Ltd.; Capital Audio Electronics, Inc.; CHS Inc.; Coborn's Incorporated; Crystal Rock LLC; D'Agostino Supermarkets; Discount Optics, Inc.; Jetro Holdings, Inc. and Jetro Cash & Carry Enterprises, LLC; Leon's Transmission Service, Inc.; Parkway Corp.; and Payless ShoeSource, Inc. (collectively the "Merchant Plaintiffs"), Affiliated Foods Midwest Cooperative, Inc.; National Association of Convenience Stores; NATSO, Inc.; National Community Pharmacists Association; National Cooperative Grocers Association; National Grocers Association; and National Restaurant Association (collectively the "Trade-Association Plaintiffs") on behalf of themselves and two classes of Merchants, by their undersigned attorneys herein, allege for their Complaint against Visa, Inc., and the other Defendants named in this Complaint ("Bank Defendants") (collectively referred to as "Defendants") as follows:

II.

INTRODUCTION

10. Class Plaintiffs hereby incorporate each and every factual allegation and definition of the Second Consolidated Amended Class Action Complaint as if fully set forth herein.

11. The Merchant Plaintiffs operate commercial businesses throughout the United States that have accepted Visa and MasterCard Credit Cards, Offline Debit Cards, and Interlink PIN-Debit Cards as forms of payment along with cash, checks, travelers checks, and other plastic Credit, Debit, and Charge Cards.

12. The Trade-Association Plaintiffs are each comprised of members that operate commercial establishments in the United States which accept Visa and MasterCard Credit Cards, Offline Debit Cards, and Interlink PIN-Debit Cards as forms of payment along with cash, checks, travelers checks, and other plastic Credit, Debit, and Charge Cards.

13. Together, the Merchant Plaintiffs and the Trade-Association Plaintiffs (hereinafter "Plaintiffs") represent two classes of millions of Merchants that accept Visa and MasterCard Credit and Offline Debit Cards and Interlink PIN-Debit Cards as forms of payment and challenge the collusive and anticompetitive practices of the Defendants under the antitrust laws of the United States.

14. The Restructuring alleged herein is illegal under Section 7 of the Clayton Act, 15 U.S.C. § 18.

15. The contracts, combinations, and conspiracies in restraint of trade alleged herein, are illegal under Section 1 of the Sherman Act, 15 U.S.C. § 1.

III.

JURISDICTION AND VENUE

16. This Complaint is filed under Section 16 of the Clayton Act, 15 U.S.C. § 26, to prevent and restrain violations of Section 1 of the Sherman Act, 15 U.S.C. §1 and Section 7 of the Clayton Act, 15 U.S.C. § 18, and for damages under § 4 of the Clayton Act, 15 U.S.C. § 15. This Court has jurisdiction over Plaintiffs' federal antitrust claims under 28 U.S.C. §§ 1331, 1337, 2201, and 2202.

17. Venue in the Eastern District of New York is proper under 28 U.S.C. §§ 1391, 1407 and 15 U.S.C. §§ 15, 22, and 26. Several of the Merchant Plaintiffs operate retail outlets in the District. The Trade-Association Plaintiffs' members include Merchants that transact business in this District. Defendants transact business and are found in the Eastern District of New York. Thousands of Merchants located in the Eastern District of New York accept MasterCard Credit Cards and Debit Cards issued by one or more Defendants and, thus, are Class Members. Hundreds of Member Banks of Visa, including many of the banks named as Defendants, issue Visa Credit Cards and Debit Cards and/or acquire retail Merchant transactions for Visa in the Eastern District of New York. A substantial part of the interstate trade and commerce involved and affected by the alleged violations of the antitrust laws was and is carried on in part within the Eastern District of New York. The acts complained of have had, and will have, substantial anticompetitive effects in the Eastern District of New York.

IV.

DEFINITIONS

18. As used in this Complaint, the following terms are defined as:

a. "Agreements" means the contracts, agreements, and mutual understandings by, between and among Old Visa, the members of its Board of Directors, and its Member Banks, relating in any way to the

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proposed Initial Public Offering described in the Forms S-1, prospectus, and other filings made by Visa with the United States Securities and Exchanges Commission.

b. "New Visa" means the corporate entity emerged when the IPO was fully consummated, and the Restructuring was complete on March 18, 2008. Allegations relating to the entities that emerged after the March 18, 2008 IPO generally refer to "New Visa."

c. "Ownership and Control Restrictions" means those portions of the Agreements, and such other contracts, agreements, and mutual understandings by, between, and among Old Visa, the members of its Board of Directors, and its Member Banks, which limit the percentage of shares in New Visa that any one shareholder or group of shareholders may own or control, and the limitations upon the free exercise of the business judgment of the Board of Directors of New Visa, including limitations imposed by the supermajority voting requirements and the right of bank-controlled Class B and C shares to vote on actions to approve mergers, acquisitions, or decisions to exit the "core payments business."

d. "Old Visa" means Visa U.S.A., Visa International, and other regional Visa entities that until the Restructuring was complete, were owned and governed completely or nearly completely by their Member Banks. Allegations relating to the entities that existed before March 18, 2008 generally refer to "Old Visa."

e. "Relevant Markets" include markets no broader than the markets for General Purpose Cards, General Purpose Card Network Services, Offline-Debit Cards, Offline-Debit Card Network Services, PIN-Debit Network Services, Visa General Purpose Card Network Services, and Visa Offline-Debit Card Network Services and Interlink PIN-Debit Card Network Services.

f. "Restructuring" means the series of agreements and transactions by which Old Visa's Boards of Directors and management sought to transform Old Visa from a "structural conspiracy" to a "single entity," whose Interchange-Fee-setting activity is outside the reach of Section 1 of the Sherman Act. The agreements and transactions that are part of the Restructuring are the delegation of Interchange-fee-setting authority from Old Visa's Board of Directors to "independent" directors, the consideration of alternative business models for Old Visa, the managers of Visa U.S.A., Visa International, and Visa Canada into Visa, Inc., the Visa IPO that was consummated on March 18, 2008, and the "Ownership and Control Restructures" defined herein.

g. Allegations referring to "Visa" generally refer to business practices that began before the Restructuring and continued beyond that date.

V.

THE PARTIES

19. Defendants Bank of America, N.A., BA Merchant Services LLC (f/k/a Defendant National Processing, Inc.), Bank of America Corporation, MBNA America Bank, N.A. (collectively "Bank of America"), Chase Bank USA, N.A., Chase Manhattan Bank USA, N.A., Chase Paymentech Solutions, LLC, JPMorgan Chase Bank, N.A., JPMorgan Chase & Co., Bank One Corporation, Bank One Delaware (collectively "Chase"), National City Corporation, National City Bank of Kentucky (collectively "National City"), Texas Independent Bancshares, Inc. ("Texas Independent Bancshares"), and Wells Fargo & Company ("Wells Fargo"), (collectively "Bank Defendants"), are Member Banks of the Visa and MasterCard networks. The Bank Defendants are actual or potential competitors for the issuance of Payment Cards and acquisition of Merchants. All of the Bank Defendants belong to both Networks and have conspired with each other and with the Visa and MasterCard Associations to require the payment of an Interchange Fee on every Visa transaction and to fix the level of Interchange Fees that they charge to Merchants. Each of the Bank Defendants are represented on the Visa, Inc. Board of Directors or were represented on the Boards of Directors of Visa U.S.A., Inc. or Visa International when those Boards took the actions described in the Second Consolidated Amended Class Action Complaint, and entered into the IPO and other related Agreements described in this Second Supplemental Complaint. Each of the Bank Defendants had actual knowledge of, participated in, and consciously committed itself to the acquisitions, combinations, and conspiracies alleged herein.

VI.

CO-CONSPIRATORS

20. In addition to the parties named as Defendants, the co-conspirators in the anticompetitive conduct alleged herein include the following: (i) J.P. Morgan Securities, Inc., Goldman Sachs & Co., Banc of America Securities LLC, and Citigroup Global Markets Inc., Visa's chief underwriters for the IPO; McKinsey & Co. ("McKinsey") a consulting firm that advised Old Visa on business issues relating to the Restructuring; William Sheedy, the former head of Visa U.S.A.'s Interchange Strategy Group, and current President of the U.S. Region for Visa, Inc., who was intimately involved with the Restructuring; Christopher Rodrigues, President and CEO of Visa International while the Restructuring was ongoing; John Philip Coughlan, President and CEO of Visa U.S.A., Inc while the Restructuring was ongoing, Joseph Saunders, current CEO of Visa, Inc., and members of the Visa International and Visa U.S.A., Inc. Boards of Directors from 2004 through the IPO on March 18, 2008. The members of the Visa U.S.A., Inc. Board of Directors include the following: William Campbell (J.P. Morgan Chase); Richard Davis (U.S. Bancorp); Philip DeFee; Charles Doyle (Texas First Bank); Benjamin Jenkins (Wachovia Corp.); Linda Baker Keene; Bruce Lauritzen (First National Bank of Omaha); Peter Raskind (National City Corp.); Charles Scharf (J.P. Morgan Chase); John Stumpf (Wells Fargo & Co.); John Swainson; James Wells (SunTrust Banks, Inc.); Tim Arnoult (Bank of America Corp.); William Boardman (Bank One Corp.); James Gorman; Carl Pascerella; Patrick Philips (Bank of America Corp.); Jay Searles (Bank of America Corp.). The Members of the Visa International Board of Directors not previously named include the following: Peter Ayliffe (Lloyds TSB Bank); Vivian Bartlett (First Rand Bank); Alberta Cefis (The Bank of Nova Scotia); Edison Costa (Banco ABN AMRO Real); Johannes Evers (Bankgesellshaft Berlin); Peter Hawkins (Banco Popular de Puerto Rico); Gary Hoffman (UK

Banking and Barclaycard); Michiyoshi Kuriyama; Antonio Lee Go (Equitable PCI Banking); Giles Leflambe (Servies Bancaires); Jan Liden (ForningsSparbanken); Walt Macnee; Eduardo Merigo; Gerard Nebouy (Groupement Carte Bkeue); Segismundo Schulin-Zeuthen (Banco de Chile); Hans Van Der Velde; David Chafey (Banco Popular de Puerto Rico); Mike Fairey (Lloyds TSB Bank); K.V. Kamath (ICICI Bank); Sandro Molinari (CartaSi); Yang Berbahagia Tan Sri Mohamed Basir Bin Ahmed (Malysian Banking Berhad); Gianni Testoni (Deutsche Bank); Mark Tonnesen (RBC); and Malcolm Williamson.

VII.

TRADE AND INTERSTATE COMMERCE

21. The trade and interstate commerce relevant to this action is General Purpose Card Network Services, Offline Debit Card Network Services, PIN-Debit Card Network Services, Visa General Purpose Card Network Services, Visa Offline Debit Card Network Services, and Interlink PIN-Debit Card Network Services.

22. During all or part of the Class Period, each of the Defendants, directly or through their affiliates or subsidiaries, participated in the markets for General Purpose Card Network Services, Offline Debit Card Network Services, PIN-Debit Card Network Services, Visa General Purpose Card Network Services, Visa Offline Debit Card Network Services, and Interlink PIN-Debit Card Network Services.

23. The activities of Defendants and their co-conspirators, as described herein, were within the flow of and had a substantial effect on interstate commerce.

VIII.

FACTUAL ALLEGATIONS

A. Visa Evolves from a Regional Banking Association into an Association of over 20,000 Banks with Market Power in the Relevant Markets

24. Visa operates an international Payment-Card Network whose members include banks, regional-banking associations, and other financial institutions. The Visa Network was established by its members to develop, promote, and operate a national Credit Card network.

25. Visa's predecessor, Bank Americard, was the local Credit Card program of Bank of America, based in California. In 1970, the program was introduced throughout the United States under the name National Bank Americard, Inc. ("NBI"). In 1977, NBI changed its name to Visa.

26. From the early days of Old Visa and its predecessor entities, it was a member-owned and member-governed association of banks that issued Visa-branded Payment Cards and acquired Visa-branded transactions for Merchants.

27. As its Payment-Card Network was being established, Old Visa's predecessor entities had to incent consumers and Merchants, respectively, to carry and accept Visa-brand Payment Cards. To overcome this "chicken-and-egg" problem, the predecessors of Visa claimed that it was necessary to devise an "Interchange Fee" that the Issuing Bank would deduct from the amount that the Merchant received for a given transaction.

28. From the time of Bank Americard's founding into the 1980s, the operation of a Payment-Card network was relatively more costly than it is today because transactions were conducted and records kept on paper forms called "drafts."

29. Thus, another of the early justifications of Interchange Fees was that the fees were necessary to "balance" the costs in the system between Issuing and Acquiring Banks. For this

reason, Interchange Fees in the early days of the Visa Network were purportedly based on the Member Banks' costs of issuing Payment Cards and "acquiring" Merchants for the Network. The level of Interchange Fees was purportedly supported by analyses conducted by Visa's consultant, Arthur Andersen, which Visa claimed to be "independent."

30. In addition, Visa and its Member Banks could have argued that their collective setting of a default schedule of uniform Interchange Fees did not impose significant harms on competition in approximately the first 20 years of the network's existence because Old Visa arguably did not yet have market power, and its transactions constituted a relatively small share of all payments.

31. Since the early 1980s, however, technological advancements have greatly reduced the costs and time that are required to conduct a Payment-Card transaction. Technologies are continually being developed that drive down the cost of processing a Payment-Card transaction relative to processing costs in the early days of the network.

32. Since the time that Interchange Fees were devised, Old Visa and its Member Banks acquired market power in the Relevant Markets described herein. Visa's market power has been confirmed by this Court, the United States District Court for the Southern District of New York, the United States Court of Appeals for the Second Circuit, and courts and regulatory bodies in several foreign jurisdictions.

33. Since 1970, the number of Visa Member Banks has increased from approximately 1400 to 14,000 in the United States and over 22,000 worldwide. U.S. consumers now carry more than 512 million Visa-branded Credit, Debit, commercial, and prepaid cards.

34. Moreover, Old Visa long since abandoned any claim that its Interchange Fees are cost-based. Rather, Visa now establishes numerous categories of Interchange Fees that

correspond with the elasticity of demand (i.e., those Merchants' ability to refuse to accept Visa-branded Payment Cards) of various categories of Merchants. And the cost studies that were purportedly used to "balance costs" in the past are now used merely to gauge demand.

35. Thus none of the early rationalizations for collectively-set, uniform schedules of default Interchange Fees (incenting issuance and acquiring, balancing costs, and competition with other forms of payment) are still valid, if they ever were. Accordingly, Interchange Fees are no longer necessary (if they ever were necessary) to the efficient functioning of a Payment-Card Network.

36. Visa's Rule 30(b)(6) designee on Interchange methodology, William Sheedy, testified that Visa does not consider any theoretical justification for Interchange Fees when it introduces new rates. Rather, Visa seeks only to satisfy its "business objectives." (Sheedy, Jun. 17-18, 2008, Dep. Tr. 152:3 – 153:4)

B. Despite the Lack of Any Justification for Their Continued Existence, Collectively-Set Uniform Schedules of Default Interchange Fees Remain a Part of the Visa Payment System and Continue to Escalate.

37. From the beginnings of the Bank Americard association until the Restructuring events described herein, Old Visa and its predecessor entities were membership associations that were owned and governed completely by their competing Member Banks.

38. The Member Banks were holders of shares in Old Visa, which entitled them to certain rights within the Visa association. Importantly for purposes of this Supplemental Complaint, Old Visa's Member Banks elected a Board of Directors, composed exclusively or almost exclusively of competing Member Banks. That Board of Directors in turn established rules that required the payment of an Interchange Fee on every Visa transaction and established uniform schedules of default Interchange Fees for those transactions.

39. Before Visa's IPO, Section 5.01(a) of the Bylaws of Visa U.S.A. (May 15, 2004) limited seats on its Board of Directors to (i) "officers of [Visa U.S.A.]," (ii) "officers of Charter Members [with some exceptions]...having at least the equivalent rank of Chief Executive Officer or Chief Administrative Officer, or [for larger Member Banks] a person who in the performance of his regular duties reports to such an officer." Individuals who "previously held the title of Chairman, Vice Chairman, or Chief Executive Officer of a Charter Member were allowed to hold the post of "Second Special Director At Large" or "Third Special Director At Large for Technology," provided that the latter was "well qualified in systems and technology issues of importance to [Visa U.S.A.'s] Payment Services." Even after the IPO, representatives of Member Banks maintain substantial representation on the Board of Directors of New Visa.

40. Viewed in combination with the market power of Old Visa and its Member Banks, the Anti-Steering Restraints described herein and in the Second Consolidated Amended Class Action Complaint, Old Visa and its Member Banks' requirement of the payment of an Interchange Fee and their agreement upon a uniform schedule of default Interchange Fees created a market in which the only way that the Networks could compete with each other was through consistently increasing the level of Interchange Fees that they promised to Issuers. As fully described below, this anticompetitive market structure, born of collusion among the Networks and the Member Banks, led to antitrust challenges before courts and regulatory authorities across the Globe. Visa refers to this anticompetitive structure as a "perception issue." (*See* Partridge Dep. 70:5-20.)

41. Even after the early "justifications" for Interchange Fees were abandoned or discredited, Old Visa's Member Banks, acting through the Board of Directors, continued to establish uniform schedules of default Interchange Fees, which Old Visa's rules required to be

applied to all Visa transactions. Moreover, since the mid-1990s, Visa's "effective Interchange Rate" – the weighted average Interchange Fees paid on all Visa transactions – has been consistently increasing.

42. While Visa's uniform schedules of default Interchange Fees have remained in existence and even increased, Payment-Card networks in other countries were established, grew, and prospered without default Interchange Fees or with dramatically lower Interchange Fees. This further demonstrates that uniform schedules of default Interchange Fees are not necessary to the efficient functioning of a Payment-Card network. Examples of networks that function without Interchange Fees include the following: the Interac Debit-Card network in Canada, the EFTPOS debit-card network in Australia, the Bank Axept Payment-Card network in Norway, the Dankort Debit-Card network in Denmark, the Pankkikortti Debit-Card network in Finland, and the Interpay Debit-Card network in the Netherlands. In addition, domestic Credit-Card transactions in Sweden and Iceland are processed without any default Interchange Fees. In addition to the networks named above that have no Interchange Fee, virtually every other Payment-Card network in the world has lower Interchange Fees than those of Visa and MasterCard in the United States. Even among Visa and MasterCard-branded transactions, the Interchange Fees in the United States are among the highest (if not the highest) in the world.

43. Old Visa's collectively-set, uniform schedules of default Interchange Fees persisted because Interchange Fees became a large source of profits for the banks that issued Visa-branded Payment Cards. As Old Visa acquired and enhanced its market power, it and its Member Banks were able to establish supracompetitive levels of default Interchange Fees for Visa transactions. Old Visa's Issuing Banks profited from their and Visa's collective conduct by sharing in the supracompetitive Interchange Fees, which could not have existed without the

anticompetitive actions described in this Second Supplemental Complaint and the Second Consolidated Amended Class Action Complaint.

44. Prior to the Restructuring, Old Visa's Member Banks acting through the Board of Directors, collectively adopted and enforced rules that require the payment of an Interchange Fee, set at Visa's uniform levels, for all Visa-branded transactions. Even after the Restructuring, the Bank Defendants agree to abide by these rules.

45. Old Visa's Operating Regulation 5.2.B.3.a requires Merchants that accept Visa-branded Payment Cards to accept all Visa cards within the "categories of acceptance" that it accepts, regardless of the identity of the Issuing Bank or the level of Interchange Fee that is attributable to a particular Payment Card. New Visa has maintained this Rule after the Restructuring.

46. Old Visa Operating Regulation 9.5 requires that Visa's default Interchange Fee applies to every Visa transaction in which the Issuing and Acquiring Banks have not executed a bilateral Interchange Fee agreement. New Visa has maintained this Rule after the Restructuring.

47. By enacting and enforcing the "Honor All Cards" and Interchange Fee payment rules noted above, the Defendants have created a situation in which the payment of an Interchange Fee is required on all transactions, regardless of the Issuing Bank. Visa and MasterCard have both recognized that the Honor All Cards Rule has the effect of making each Issuing Bank a monopolist with respect to Merchants that accept cards issued by it and can get paid only by that Issuing Bank. Because of this problem – a problem entirely of Defendants' own creation – Defendants now claim that uniform schedules of default Interchange Fees actually benefit Merchants by setting a "fall back" rate that prevents an Issuing Bank from "holding up" the Merchant by demanding an Interchange Fee that is as high as the Issuer would

like, knowing that the Honor All Cards rule prevents the Merchant from refusing that transaction. Defendants refer to this phenomenon as the "holdup problem."

48. But for the rules described in this section, Merchants would have the option to reject a specific type of Visa Payment Card for a given transaction if the benefit the Merchant receives from accepting the card or allowing the transaction is not commensurate with the associated Merchant fee.

49. Before the corporate-restructuring transactions described herein, Old Visa and the Bank Defendants further insulated their anticompetitive practices from competitive pressures by adopting and enforcing the No-Surcharge Rule and other Anti-Steering Restraints, which prevent Merchants from incenting consumers to use less-expensive payment methods. *See* Visa Op. Reg 5.2F. Because it is the consumer who selects which card to use in making a purchase, the No-Surcharge Rule and other Anti-Steering Restraints guarantee that the consumer will make this selection without regard to the cost to the Merchant of accepting the card; the consumer cannot know how expensive his or her chosen card is to the Merchant, because the Anti-Steering Restraints ensure that the costs of the transaction will be borne only indirectly by him or her, and without his or her knowledge.

50. The No-Surcharge Rule is reflected in the rules and Merchant agreements of Old Visa and its Member Banks, respectively. Old Visa's Operating Regulation 4.2 mandates that Merchant agreements require Merchants to abide by their respective operating regulations, which include the Anti-Steering restraints. New Visa has maintained the No Surcharge-Rule, the Anti-Steering Restraints and the Miscellaneous Exclusionary Restraints after the Restructuring.

51. Under the Bank Defendants' standard-form Merchant agreements, Merchants "shall not impose any surcharge or fee for accepting a [Visa-branded or MasterCard-branded]

Card." The Card Acceptance and Chargeback Management Guide for Visa Merchants, revised in October 2007, provides that "you may not impose any surcharge on a Visa transaction."

52. Accordingly, a Credit or Debit Card Network that charges lower Merchant-Discount Fees Defendants will not be able to make inroads on the monopoly position of Visa. While potential new market entrants and competitors such as Discover stand ready, willing, and able to compete with the Defendants by offering lower fees charged to Merchants, the Defendants' rules prevent and restrain any such competition by ensuring that increased efficiency and lower prices will not lead to increased market share for competitors in the Relevant Markets.

53. In fact, MasterCard admitted, in a submission to the Reserve Bank of Australia, that surcharging can place downward pressure on Merchant fees because "[Networks] set interchange fees to avoid widespread surcharging and other forms of card usage discouragement behavior." Payment System Regulation, Response by MasterCard Worldwide to the Issues for the 2007/08 Review. Visa has made similar statements to the Competition Directorate of the European Commission.

54. The other Anti-Steering Restraints also serve to protect the Defendants' elevated Interchange Fees. In the face of Merchant prompting — and particularly faced with the prospect of incurring surcharges — consumers would migrate towards less-expensive payment products, causing Defendants to drop their Interchange Fees in order to maintain market share. In the absence of the Anti-Steering Restraints, therefore, Defendants' Interchange Fees, would be lower.

55. Finally, there is no procompetitive justification for the Anti-Steering Restraints. These rules are naked restraints on trade, are not ancillary to the legitimate and competitive purposes of the Defendants, and have profound anticompetitive effects.

56. Old Visa's and its Member Banks' traditional practice of collectively adopting rules requiring the payment of Interchange Fees on every transaction, the setting of uniform schedules of default Interchange Fees and their adoption and enforcement of the Anti-Steering Restraints created a situation in which Old Visa's Issuing Banks used their collective market power to extract supracompetitive Interchange Fees from Merchants, while Merchants were powerless to use normal market responses such as price to combat Visa's and the banks' practices.

C. Visa and Bank Defendants' Ability to Impose Supra-Competitive Interchange Fees Unchecked is Threatened by Courts and Regulatory Bodies Concluding That They are a "Structural Conspiracy."

57. Old Visa and its Member Banks abused their collaborative structure in the past.

58. In 1998, the Antitrust Division of the Department of Justice sued Visa and MasterCard alleging that the joint governance of the two Networks and certain rules that prevented banks from issuing cards on competitive networks (the "exclusionary rules") violated Section 1 of the Sherman Act. After a 34-day trial the court found the exclusionary rules, including Visa's Rule 2.10(e), violated the antitrust laws and that decision was affirmed by the United States Court of Appeals for the Second Circuit. *United States v. Visa USA, et al.*, 163 F.Supp.2d 322 (S.D.N.Y. 2001), *aff'd*, 344 F.3d 229 (2d Cir. 2003). The court found that the Visa and MasterCard Networks, together with their Member Banks, implemented and enforced illegal exclusionary agreements requiring any U.S. bank that issued Visa or MasterCard General Purpose Cards to refuse to issue American Express and Discover cards. 163 F. Supp. 2d at 405-06.

59. The court concluded that the "exclusionary rules undeniably reduce output and harm consumer welfare," that Visa and MasterCard had "offered no persuasive procompetitive justification for them," that "the Member Banks agreed not to compete by means of offering American Express and Discover branded cards," that "[s]uch an agreement constitutes an unreasonable horizontal restraint [that] cannot be permitted," and that "these rules constitute agreements that unreasonably restrain interstate commerce in violation of Section 1 of the Sherman Act." *Id*. at 405-06.

60. In affirming the court's "comprehensive and careful opinion," 344 F.3d at 234, the United States Court of Appeals for the Second Circuit underscored the crucial role played by the Member Banks in agreeing to, and abiding by, the Visa and MasterCard versions of the exclusionary rules: "Visa U.S.A. and MasterCard, however, are not single entities; they are consortiums of competitors. They are owned and effectively operated by some 20,000 banks, which compete with one another in the issuance of Payment Cards and the acquiring of Merchants' transactions. These 20,000 banks set the policies of Visa U.S.A. and MasterCard. These competitors have agreed to abide by a restrictive exclusivity provision to the effect that in order to share the benefits of their association by having the right to issue Visa or MasterCard cards, they must agree not to compete by issuing cards of American Express or Discover. *The restrictive provision is a horizontal restraint adopted by 20,000 competitors*." *Id.* at 242. (emphasis added.) Thus, "the restraint imposed by the consortium members [the Member Banks] is on themselves. Each has agreed not to compete with the others in a manner which the consortium considers harmful to its combined interests." *Id.*

61. MasterCard and Visa argued on appeal that the antitrust rules applicable to single entities should apply to the action to exclude banks that sought to issue rival cards. The court of appeals rejected that argument. 344 F.3d at 242.

62. That same year, this Court issued a summary-judgment opinion in a class action brought by Merchants against Visa and MasterCard, challenging the Networks' "Honor-All-Cards" Rules that required all Merchants that accepted Visa and MasterCard-branded Credit Cards to also accept the Networks' Offline-Debit Cards. In that decision, the Court concluded that Visa possessed market power in the Credit-Card and Debit-Card markets as a matter of law. And while the Court would not make the same conclusion as a matter of law with respect to MasterCard, it did note the existence of evidence that would support a finding of market power for MasterCard, such as its high market shares in the credit-card and debit-card markets, evidence of collusion between it and Visa, and the fact that Merchants had not switched to other forms of payment even in the face of frequent and significant increases in Interchange Fees. *In re Visa Check and MasterMoney Antitrust Litigation*, No. 96-cv-5238, 2003 WL 1712568 *3-*4 (E.D.N.Y. Apr. 1, 2003). On the eve of trial in *Visa Check*, Visa and MasterCard settled with the Merchant class, agreeing to abolish the challenged portion of the "Honor-All-Cards" Rule, to reduce Interchange Fees for Offline-Debit Cards and to pay the Merchant class approximately $3 billion over ten years.

63. In March 2004, shortly after the settlement of the *Visa Check* class action, the Merchants that had opted out of *Visa Check*, including Best Buy Co. Inc. and Darden Restaurants, Inc. (parent of Olive Garden, Red Lobster and other restaurant chains), represented by Robins, Kaplan, Miller & Ciresi L.L.P., amended their complaints against Visa and MasterCard to include claims of price fixing of Interchange Fees.

64. Beyond the domestic threats to Visa's anticompetitive collaboration with its Member Banks, competition and regulatory authorities in several jurisdictions around the globe have concluded that Visa and MasterCard's collectively-fixed uniform schedule of Interchange Fees and other restraints are anticompetitive and illegal.

65. In 2000, for example, the European Commission issued a formal statement of objections against the collective setting of uniform levels of default Interchange Fees for European cross-border transactions by Visa Member Banks. Visa settled with the commission in 2002. Under this settlement, Visa received an exemption from E.C. competition-law prohibitions on agreements among competitors, in exchange for agreeing to base its cross-border Interchange Fees on cost-based metrics and to cap its interchange rate for those transactions at 0.7%. Visa's exemption expired on December 31, 2007.

66. In 2003, the Commission opened an investigation of MasterCard's Interchange-Fee-setting practices. Unlike Visa, however, MasterCard chose to fight the commission and on December 19, 2007, receiving a ruling that its cross-border Interchange Fee violates Article 81(1) of the E.C. Treaty, the E.C. counterpart to Section 1 of the Sherman Act.

67. In its 241-page decision, the E.C. rejected each of the arguments that Defendants have attempted to make in this litigation, including that the Networks' IPOs absolved them of continuing Section 1 liability, that the relevant market is broader than Payment Cards, and that rules requiring the payment of Interchange Fees on every transaction and collectively-fixed, uniform schedules of Interchange Fees are necessary to the functioning of a four-sided Payment Card Network. The Commission also found that the fact that MasterCard executed a similar Restructuring plan to Visa's did not alter its conclusion that uniform interchange fess among MasterCard's Member Banks were anticompetitive.

68. After MasterCard was found to have violated E.C. law by setting and imposing uniform schedules of default Interchange Fees for cross-border transactions in Europe, the European Commission ordered it to abolish its cross-border, default Interchange Fees. MasterCard responded by imposing acceptance fees on European Merchants for cross border transactions and using the proceeds to pay European Issuers.

69. Under the E.C.'s decision, MasterCard was ordered to cease and desist from its anticompetitive conduct, including its enforcement of its rule requiring the payment of Interchange Fees on all cross-border European transactions. Had Visa not chosen to settle with the Commission, it likely would have received a similar, adverse decision.

70. Upon the expiration of Visa's exemption, the Commission made it clear that it expected Visa to comply with the substance of its decision in the MasterCard matter and to eliminate its rule that requires the payment of an Interchange Fee on all cross-border Visa transactions. Then, on March 25, 2008 the E.C. formally announced that it was launching an antitrust investigation into the setting of Visa's cross-border Interchange Fees, which Visa announced that it intended to settle with the E.C.

71. Similarly, in 2005 the antitrust-enforcement body in the United Kingdom, the Office of Fair Trading ("OFT"), concluded after a four-year investigation, that MasterCard's domestic Interchange Fees violated the U.K. equivalent to Section 1 of the Sherman Act.

72. In addition to finding that MasterCard had market power in the relevant markets for Payment-Card issuance, acquiring and a "wholesale" market, the OFT also found that the Interchange Fee was used to extract extraneous costs – i.e., those not necessary to the functioning of a Payment Card network. Two of the "extraneous costs" found by the OFT, the cost of "rewards" and the cost of the interest-free "float" period, are often held up by Defendants as

examples of costs that justify the imposition of uniform schedules of Interchange Fees on Merchants.

73. The Reserve Bank of Australia ("RBA") has also extensively investigated its domestic Payment Card industry. In 2002, as a result of that investigation, the RBA ordered Visa and MasterCard to reduce domestic Interchange Fees by nearly half, from an average of 95 basis points (.95%) before the reforms to approximately 50 basis points today.

D. Visa Concedes That it is a Structural Conspiracy and Explores Options to Continue Securing Interchange Fees for the Banks Without the Threat of Antitrust Liability.

74. Even before Old Visa agreed to pay approximately $2 billion to settle the *Visa Check* class action in 2003, its management realized that the business model that it, Old MasterCard, and their dual Member Banks had created was leading Old Visa down a path toward ruinous antitrust liability.

75. Visa U.S.A. was the primary driver behind the global restructuring. Visa, Inc's current CEO, Joseph Saunders, admitted that Visa U.S.A.'s motivation resulted from the fact that it felt the open-association model was "untenable for the future." (Saunders Dep. Tr. 156:19-158:2.)

76. On September 4, 2002, Visa executive Bill Sheedy sent an email to his colleague, Bob Pifke warning that "[Visa] tend[s] to underestimate the risks and challenges associated with the status quo path, where [MasterCard] has the same exact acceptance functionality and therefore defaults to competing with [Visa] on [Interchange Fees]." Mr. Sheedy – the head of Visa's Interchange Strategy group for at least the last decade and current President of its U.S. Region – understood that, when both Networks have market power and create a system in which consumers are indifferent to the costs of various payment systems, the only way to compete is by

incenting banks to issue Visa-branded Payment Cards through consistent escalation of Interchange Fees.

77. Mr. Sheedy also understood — and continued in his email — that the current system "is fraught with risk (i.e., continued [interchange] escalation)." From Mr. Sheedy's perspective, "[t]he fact that all of the banks, and their two general purpose acceptance brands, are taking on this risk together should be of no consolation." (Sheedy Exh. 34812.) A March 2003 presentation authored by Mr. Sheedy also warned that "[c]ommoditized product utility requires risky [interchange] competition." (Sheedy Exh. 34812.)

78. Soon after Mr. Sheedy's comments, the prospect of substantial antitrust liability for Old Visa and its Member Banks arising from their collaborative structure became more immediate. In June 2003, Visa had reached an agreement on principle to settle the *Visa Check* class action for $2 billion plus injunctive relief. In addition, when the court of appeals affirmed the district court's decision in *United States v. Visa*, Old Visa understood that it would be facing follow-on suits by American Express and Discover and that those suits would also impose multibillion dollar liabilities. Finally, as some of the opt-out Plaintiffs in *Visa Check* had amended their complaints in March of 2004 to assert claims relating to Interchange-Fee price fixing, Old Visa was on notice that *this lawsuit* was imminent.

79. Two years later, in December 2005, after Old Visa had begun to give serious consideration to restructuring, it noted that its damages resulting from U.S. class-action lawsuits that challenge Interchange-Fee setting could be [redacted] by 2006. (Partridge Exh. 32815.) This [redacted] is noteworthy because it represents only two years of damages, as Visa had assumed that the release in the *Visa Check* action would insulate it from monetary damages for the period before January 1, 2004. (Steele Exh. 31451.)

80. By this time, Visa International and the other Visa regions realized the gravity of the potential liability that was facing the Networks in the United States as a result of its anticompetitive conduct. Reflecting this realization, Christopher Rodrigues, the President and CEO of Visa International, wrote to Bill Campbell in January 2005, stating in part: "[C]ontext after the [Visa International] Board meeting . . . the Regions now understand that:- Old Visa's days are numbered. No one can stay as they are. . ." (Partridge Exh. 32804 at VI_IC_02710990.)

81. Class Plaintiffs announced their intention to challenge the similar MasterCard restructuring shortly before the May 25, 2006 consummation of that transaction. Thus, Old Visa understood well before it developed its final Restructuring plan that the fact that it restructured itself to avoid liability could itself be a violation of the antitrust laws governing mergers. (*See* Partridge Exh. 62:17-62:25.) It is therefore highly probable that the Old Visa employees and directors who were involved in restructuring were more careful than their MasterCard counterparts to avoid stating that the Restructuring was an attempt to preserve an anticompetitive structure while avoiding antitrust liability.

E. To Correct What They Publicly Stated Was a "Perception Issue," Visa U.S.A.'s Management and Its Bank-Controlled Board of Directors Decide to Delegate the Setting of Default Interchange Fees to "Independent Directors."

82. As a recognition of the liability that faced it and its Member Banks for their enforcement of rules that require the payment of an Interchange Fee, as well as the collective setting of those fees, Visa U.S.A.'s management – led by General Counsel Josh Floum – embarked upon Project Colorado in 2004 to examine structural and operations changes that might mitigate its and the Member Banks' prospective antitrust risk.

83. Possibly because Project Colorado was a management-driven initiative as opposed to one that was controlled by the Member Banks, it yielded only the "interim solution" of adding four "independent" directors rather than a final restructuring plan for Visa U.S.A.

84. By early 2006, Visa U.S.A. management had considered alternative ownership and governance forms, which were never given serious consideration by the Visa U.S.A. Board.

85. For example, management considered [redacted] which it viewed as a solution to Visa's antitrust risk. (Partridge Dep. 81:9-14, 82:1-3, 82:4-7.) Even though Visa U.S.A. management viewed [redacted] as a solution to its antitrust risk, that option would eliminate or greatly reduce the control that Visa's Member Banks could exert over Visa and therefore was never seriously considered by the Visa U.S.A. Board.

86. At the same time as Project Colorado was ongoing within Visa U.S.A., other Visa regions were considering their own alternatives for restructuring to avoid antitrust liability. For this reason, Visa International, led by its President and CEO, Christopher Rodrigues, initiated a project called "Project George" in February 2005, which was intended to coordinate the restructuring efforts of the various regions. Despite the attempt by Visa International to foster cooperation among the various Visa regions, however, there was still uncertainty by early 2006 as to whether Visa International could facilitate a global restructuring solution.

87. Visa's Rule 30(b)(6) designee on Restructuring topics, John Partridge, agreed that the "possibility that Visa U.S.A. would become controlled by some person or entity other than banks" as a result of its examination of alternative structures as part of Project Colorado was one of the primary reasons behind Visa International trying to facilitate a global solution.

88. Visa International was also considering alternative business models for Visa. By April of 2005, Christopher Rodrigues and another Visa International employee, Matthew Piasecki, were assigned the task of assembling an "Analysis of Business Model Options for Visa," in connection with Projects George and Heights. The primary reason listed for this

analysis of business models was to "Minimize Legal/Regulatory Risk." Specifically, a presentation prepared in connection with this analysis stated that the goal of re-examining Visa's business model was to "establish a commercially viable pricing system (that produces the right price, set competitively, in a transparent way)." (Partridge Exh. 32808 at VI_IC_00171718.)

89. At least six different alternative business models were examined as part of this analysis: [redacted]. (*Id.* at VI_IC_00171719, 723.)

90. Even though the alternative business models that Messrs. Rodrigues and Piasecki prepared carried at least some promise of mitigating Visa's antitrust risk, they never received serious consideration by the Visa International Board or any regional board because they threatened the Visa Member Banks' control over the Interchange Fee revenue stream. Visa's 30(b)(6) designee testified that "the dynamics within this project were horrible and it failed miserably" because "the Visa International management was perceived as being not sufficiently

in tune with the Member Banks of the various regions in terms of the business strategy." (Partridge Dep. Tr. 122:20-125:5.)

91. In contrast to the alternative business models analyzed by Messrs. Rodrigues and Piasecki, which were attempted to identify the "right price, set competitively, in a transparent way" and which never received serious Board (i.e., bank) consideration, Visa U.S.A. examined its own alternative models, which would have re-invented interchange as another form of transfer payment from Merchants to Issuers.

92. Robert Towne, who at the time was Senior Vice President of "acceptance economics" within Visa's Interchange Strategy Group, testified that, from 2004 to at least December 2007, a Visa task force examined ways evaluate a new structure for interchange. For this project, Visa worked with First Annapolis, a consulting firm, and Arnold & Porter, outside counsel. At the instruction of counsel, Mr. Towne refused to testify any further. Towne, Sept. 2-5, 2008, Dep. Tr. 205:02-212:14.

93. More specifically, [redacted] (VUSAMDL1-07905305, at VUSAMDL1-07905311) (emphasis in original).

94. As described in Section F below, Visa and its Member Banks ultimately decided to restructure Visa's corporate form while maintaining its existing business model.

95. Despite the inability of Visa's Project Colorado team to arrive at a restructuring solution, it nonetheless understood the immediacy of the antitrust threat that was facing Visa and therefore proposed and received Board approval for an "interim solution," which was intended solely to reduce the antitrust pressure on Visa and its Member Banks for their practice of implementing rules that required the payment of an Interchange Fee on all transactions and collectively agreeing to the level of default Interchange Fees.

96. Under this interim solution proposed by Mr. Floum and the Project Colorado team, Visa U.S.A.'s Board of Directors appointed four "independent" directors – directors who were not employed by Old Visa Member Banks – to the Board and delegated to the "independent" directors the sole authority to establish uniform schedules of default Interchange Fees. The "independent" directors were appointed in April 2006 and Interchange-Fee-setting authority was officially delegated to them by May 2006. Visa's internal announcement of its intention to add independent directors states that this change "will strengthen Visa's position with regard to legal issues concerning the impartiality and autonomy of directors." (Floum Exh. 28901 at VUSA_MDL2_00037468.)

97. Mr. Partridge stated in his 30(b)(6) deposition on Restructuring topics that one of the reasons for the appointment of "independent" directors was that it "addressed a perception issue in terms of the setting of pricing and interchange by moving that to independent directors not affiliated with banks. (Partridge Dep. 70:17-20.) The "perception issue" that Mr. Partridge mentions was a common way for Visa to refer to the structural conspiracy that courts and regulatory bodies in the United States and abroad had adjudicated it to be.

98. Old Visa's delegation of Interchange-Fee-setting authority to "independent" directors altered only the appearance of collusion rather than the substance or legality of

requiring the payment of an Interchange Fee, based upon a uniform schedule of default fees, on all Visa transactions. This is demonstrated by the fact that, even after MasterCard's restructuring, the European Commission, concluded that the setting of Interchange Fees by New MasterCard Board of Directors did not alter the anticompetitive effect of MasterCard's uniform schedule of default Interchange Fees or the illegality of those fees under E.C. law. ("E.C. Decision" European Commission, Commission Decision of December 19, 2007 Relating to a Proceeding Under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/34.579; COMP 36.518; COMP 58.580) at 102-113.)

99. There is no factual or legal distinction between the delegation decisions that Visa and MasterCard made.

100. In April of 2006, Visa former CEO, John Philip Coghlan, asked Tolan Steele to draft a hypothetical speech to Citibank's head of cards in response to the following query:

> "You know, I'm very concerned about your strategy on interchange. You're at parity with MCI in most areas, but I think I see you slipping behind in a few key areas. I also think that MCI's strategy after they go public will be to increase interchange to attrack [sic] big issuers like me. I'm concerned that with [Independent Directors] and the Merchant-friendly public pronouncements you've been making, that you won't be competitive. How can you assuage my concerns?"

(Morrissey Exh. 30533 at VUSA_MDL1_09023986.)

101. In cooperation with the Interchange Strategy team, Mr. Steele then drafted a response stating in part, "[a]nd though the Directors to whom we bring interchange decisions may have changed, the process that we go through to develop and deploy interchange enhancements will remain largely the same." (*Id.*) Messrs. Steele and Morrissey agreed that in such a discussion with Citibank, Visa would need to discuss its "guts, as in our courage and willingness to drive rates one direction or another." (*Id.* at VUSA_MDL1_09023984.)

102. Visa, Inc.'s current CEO, Joseph Saunders admitted that Visa's Interchange-Fee-setting process and methodology did not change as a result of the delegation to the "independent" directors. Visa's Interchange Strategy Group performed the same functions before and after the delegation; the only difference was that a different group of directors – all of whom were elected by Visa Member Banks – approved the result. (*See* Saunders Dep. 147:13-148:18.)

F. Visa Management and Its Bank Directors Devise a Structure that Preserves the Banks' Revenues and Control While Supposedly Absolving Them of Future Liability for the Setting of Interchange Fees.

1. The Restructuring Process Demonstrates Visa's Desire to Preserve the Anticompetitive Market Structure that it had Helped Create, While Removing its Interchange-Fee-Setting Practices from Scrutiny Under Section 1 of the Sherman Act.

103. In January 2006, Visa launched a "MasterCard IPO Intelligence Initiative" to gauge its Member Banks' reactions to MasterCard's planned restructuring. Visa found that the banks perceived MasterCard's IPO as an effort to "mitigate future litigation" and that the banks' "[b]ig question is when will Visa do the same thing?" (VUSAMDL1-07873861.) One of the primary concerns expressed by Old Visa's dual-issuer Member Banks regarding MasterCard's IPO was that MasterCard might be obligated meet the needs of its shareholders rather than those of its Member Banks.(*Id*). The banks were also worried that they would "lose control" over MasterCard. (*Id*.)

104. Documents produced in the litigation by Defendant Chase – which occupied two seats on Old Visa's Board at the time of Restructuring – confirm the intention of Old Visa's Member Banks to give up just enough control to create the appearance of a "single entity," while guaranteeing that the New Visa continues to pursue its bank-focused strategy.

105. For example, when Old Visa and its Member Banks were considering appointing "independent" directors to set Interchange Fees, Vincent D'Agostino, the head of Chase's

payment strategy group detailed a conversation that he had with Visa, wherein Visa informed him that the reason that certain options were preferred by Visa was "because it will take a full vote of the membership (12-14M banks) to change anything about how Visa operates – so Visa believes it will always remain bank/issuer centric." Mr. D'Agostino further noted that "Visa believes that they will be sued in Oct[ober 2005] – so this will look like it is a reaction to that." (Webb Exh. 27628.)

106. In another email, Susan Webb, then an Executive Vice President for Strategy and Corporate Development for Defendant Chase's retail banking and payment strategies, relayed her conversation with Bill Campbell, then a Chase representative on the Visa U.S.A. Board, about "how [Chase can] really retain control over structure and governance [and in today's call I thought it became, much more clear, the bank directors don't, the members do – entirely different] versus the legal benefits – and how much those benefits are really enhanced by [a] majority [of "independent directors" setting Interchange Fees." (Webb Exh. 27632) (second brackets in original).

107. Ms. Webb admitted that when she wrote this email, she was "thinking about the extent to which [Chase] could retain control over [structure and governance of Visa]. And specifically it was how do we — or can we prevent Visa from becoming a competitor of ours." (Webb Dep. 210:2-6.)

108. In February 2006, a project known as "Project Heights" was initiated by Old Visa's regional entities to perform the same function as the previous "Project George" – namely devise a global Restructuring solution to the antitrust risk that Visa and its Member Banks faced. Unlike Project George, which was management driven, Project Heights was director driven (i.e., bank driven), which as Visa's 30(b)(6) designee on Restructuring topics admitted, was "probably

one of the reasons why [Project George] didn't make much progress." (Partridge Dep. 40:23-41:5.)

109. As part of Project Heights, Old Visa considered several restructuring options that provided varying degrees of autonomy for the various regional Visa entities.

110. These options were described as: 1) a Global Float; 2) a Global Float with Regionality; 3) a Bilateral Global Solution; and 4) a Global Association. (Partridge Exh. 32836 at VI-IC-02792046.) Under the first option, the Global Float, the New Visa would be a single worldwide majority publicly-owned publicly traded company. Under the second model (a variation of which became the final New Visa structure) a New Visa public company would maintain a regional structure with regional subsidiaries which could be bank-owned. The third option conceived of a bilateral solution very similar to the second option where regions can choose whether to retain the association structure or join a new for-profit public company. The fourth option of a global association essentially maintained Visa's former membership association structure with "improvements in key areas such as… antitrust exposure" stemming from regional incorporation and independent directors. (*Id*. at VI-IC-02792050-76.)

111. In evaluating the different structural options, Project Heights used evaluation criteria to "support effective decision-making by the Visa International board." (*Id*. at VI-IC-02792077.) The Project Heights document describing the four structural options is heavily redacted such that a portion of the "Evaluation Criteria" section is missing. Upon review of the April 18, 2006 Visa International Asia Pacific Board Minutes it can be seen that the missing section of Evaluation Criteria is titled "Risk Mitigation and Liability. (Partridge Dep. Exhibit 32846 at VI-IC-02792377.) Moreover, Visa testified that the options were evaluated with regard

to how potential litigation and regulation would affect each structural option. (Partridge Dep. 337:12-22.)

112. Project Heights provided its Final Report and Recommendations to the Visa International Board on May 8, 2006. (Partridge Exh. 32849 at VI-IC-02755900.) After considering two specific implementations of Option 2 (the Global Float with Regionality discussed above), Heights settled upon and recommended what it referred to as Option 2A whereby "Visa Europe would be a Licensee Region, owned 5 percent by the Global Company [Visa Inc.] and 95 percent by local financial institutions." (*Id*. at VI-IC-02755901.)

2. The final Restructuring plan.

113. After the final Restructuring plan was agreed upon, various Visa entities entered into a series of mergers that resulted in one entity known as Visa, Inc. and another separately-incorporated entity known as Visa Europe. Under these mergers, Visa U.S.A., Visa Canada, and Innovant, LLC became subsidiaries of Visa, Inc. Visa, Inc. then issued common stock to the financial-institution members of Visa U.S.A., the financial-institution members of Visa Canada, the financial-institution members of three unincorporated geographic regions of Visa International, Visa U.S.A., Visa Europe, and Visa Europe's subsidiary, VESI. The transactions that produced Visa, Inc. and Visa Europe were completed by October 3, 2007.

114. After the merger phase of the Restructuring was completed, Visa, Inc. conducted an Initial Public Offering of 406,000,000 shares of Class A common stock in Visa, Inc. on March 18, 2008. By redeeming those shares and reclassifying them as publicly-held class A shares, the IPO had the effect of Visa, Inc. purchasing the Member Banks' shares in it. In exchange for redeeming the formerly-bank-held shares, Visa provided the banks with a large part of the proceeds of the IPO as well as Class B shares and C shares in Visa, Inc.

115. The types of shares that the banks could own post-Restructuring were limited by geographic region. Class B shares could be held only by members of the former Visa U.S.A. Former members of Visa Canada, AP (Asia Pacific), LAC (Latin America/Caribbean), and CEMEA (Central Europe/Middle East/Africa) acquired Class C (series I) common stock. Member Banks in Visa Europe acquired Class C (series II, III, and IV) common stock. A portion of these Class B and C shares were subject to a mandatory redemption following the IPO and a redemption of Class C (series II and III) stock occurred in October 2008.

116. Similar to MasterCard's Restructuring, the Visa Restructuring placed several limitations on New Visa that were intended to preserve the anticompetitive market structure that Visa and its Member Banks has created. For example, New Visa's Board of Directors must provide advance approval before any person may own more than 15 % of the aggregate shares of Class A common stock. In addition, the holders of Class B and C shares (Visa's Member Banks) will be able to elect 6 of 17 directors over the three years following the IPO.

117. The Member Banks that hold Class B or C stock are entitled to voting rights governing certain extraordinary transactions that relate to the consolidation or merger of New Visa, or its exit from the core payments business. In addition, approving a merger, consolidation, or exit of the core business requires an 80% approval of voting shares. This supermajority provision, in combination with the Member Banks' right to vote on these types of occurrences gives the banks veto powers that allow them to prevent the sale of Visa or prevent a change in the core business of Visa, just as the Member Banks of MasterCard retained certain veto rights through their Class M shares in the MasterCard Restructuring. In addition, the holders of Visa, Inc. Class B and C stock must approve any changes to New Visa's certificate of Incorporation that would take away this veto right.

118. Class B stock – the stock that is held by the U.S. Member Banks – is non-transferable (with limited exceptions) until three years after the close of the IPO and the final resolution of this and other litigation. Class C stock is non-transferable until three years after the closing of the IPO.

119. Another aspect of the Restructuring involved a collective agreement among Old Visa and the U.S. Member Banks regarding this litigation.

120. As part of the Restructuring, Visa U.S.A. and its Member Banks in the United States entered into a series of agreements known as the Retrospective Responsibility Plan. This Plan included a judgment-sharing agreement whereby the signatory banks agree to fix their respective liabilities for any monetary-damage judgment against them or New Visa in this and other actions. The purpose of this agreement is to attempt to fix, at a lower level than competition would otherwise generate, the level of rebates that are provided to Class Members for the Interchange-Fee overcharges that they sustained as a result of the conduct that Plaintiffs are challenging in this litigation.

121. Also as part of the Retrospective Responsibility Plan, the Visa Member Banks in the United States appointed a Litigation Committee composed of representatives of those Member Banks. The Litigation Committee is charged, among other things, with making recommendations with regard to the settling these actions. This constitutes concerted action by Visa and its U.S. Member Banks with respect to the level of rebates of overcharges that Defendants might agree on, and provides these Member Banks another mechanism by which they can control New Visa.

3. The Ownership and Control Restrictions and the Retrospective Responsibility Plan were intended to protect the stream of supracompetitive fees to banks while insulating those banks from competition.

122. When asked whether Visa's Member Banks were concerned about losing control of the New Visa through restructuring, Visa's 30(b)(6) witness on Restructuring topics, John Partridge, testified that issuers voted to approve the restructuring only when they were convinced that their card issuing businesses would continue to be successful. (Partridge Dep. Tr. 183:7-187:7.) Furthermore, contemporaneous documents generated by Visa U.S.A. and Visa International clearly demonstrate that the banks held grave concerns about losing control and that these concerns drove Visa's restructuring process and the Member Banks' final approval of the restructuring plans.

123. For example, when Visa's Restructuring options were presented to Visa International's Board of Directors, bank-control issues were discussed as part of the discussion on the Global Float option, which was similar to the final Restructuring. This discussion noted that New Visa would:

> "be a profit-seeking entity, with a need to maximize shareholder value while serving its chosen customers better than its competition. This means that it will behave differently from today's association. Over time, it can be expected to restructure and reorganize to reduce costs, change its mix of businesses and ensure commercial pricing for all customers. In the long term, we would expect the company to take these actions, although *clearly its interests will not be served by alienating its customers*."
>
> * * *
>
> In addition, constraints may be imposed on the actions of the new company to give comfort to members. For example, for a transitional period, the company might not be permitted to:
>
> - Allow itself to be taken over
> - Sell its major assets
> - Merge with another company

- Exit its core payments business
- Remove the upper limit on ownership by a single entity

> These constraints may "sunset" after a period of time or if bank ownership falls below a specified percentage."

(Partridge Exh. 32846 at VI-IC-02792351 - 352.) (emphasis added)

124. This presentation also noted that some Member Banks may have concern with a "Global Float" or a "Global Float with Regionality" because they may lose "ownership and control over the future direction of the organization." (*Id*. at VI-IC-02792353, VI-IC-02792358.)

125. Again, while Mr. Partridge denied that Visa explicitly took actions to address the Member Banks' concern, he did state that, post-Restructuring, if New Visa did not address the needs of its customers (i.e., banks), it could not protect its value. (Partridge Dep. 335:1-17.) He also testified that post-restructuring, New Visa's Member Banks "understood that, as a customer, you have certain control over any company that you do business with." Partridge Dep. Tr. 185:5-7.

126. Thus, Mr. Partridge, as Visa's 30(b)(6) witness, admitted that Visa's Issuing Member Banks that controlled the Restructuring, considered various restructuring options, and approved the final Restructuring plan with the goal in mind of protecting their business interests as Visa Issuers (Partridge Dep. 186:18-187:7), rather than maximizing the value of Visa as an independent business. The primary way in which large Issuing Banks could protect their Issuing businesses is to guarantee the continued flow of funds from Merchants to Issuers in the post-Restructuring world.

127. The Ownership and Control restrictions on New Visa that were put in place have the effect of addressing the Member Banks' stated concerns of losing control of Visa through its transformation into a purported "single entity."

128. The Restructuring limits the equity interest that any one shareholder can attain in the New Visa to 15 % of equity, save for a Member Bank that may have acquired a greater stake through the Restructuring itself. This limitation would prevent a single investor or group of investors from gaining a controlling stake in New Visa. By preventing an outside entity – be it a Merchant, a group of Merchants, or another large buyer – from acquiring Visa and adopting a more Merchant-friendly business model, this ownership limitation serves to protect the bank-focused business model that Visa and its Member Banks constructed. It also protects the interests of Visa's Member Banks, which are virtually all members of MasterCard, by helping to ensure that competition for Merchants' business does not break out between the two networks.

129. Possibly because Class Plaintiffs challenged a similar ownership restriction in the MasterCard Restructuring, Visa attempted to distinguish its limitation from MasterCard's by allowing the limitation to be overridden by a vote of its Board of Directors. This is not a persuasive distinction, however, because while the Member Banks surrendered a majority of their equity and governing stake in New Visa, they retain substantial representation on the Board of Directors of New Visa and would continue to have a large influence over any vote to approve an exception to the ownership limitation.

130. Currently representatives of Visa Member Banks fill 6 of 17 seats on the Board of Visa, Inc. and the CEO, Joseph Saunders, is a former top-level executive at Visa Member Bank, Washington Mutual. Furthermore, the Restructuring guarantees that the Member Banks will maintain this representation for the later of (a) three years from the IPO, or (b) the conclusion of this litigation.

131. Many of the Old Visa senior executives who, at the direction of the bank-controlled Board of Old Visa, devised the anticompetitive practices described in the Second

Consolidated Amended Class Action Complaint and this Second Supplemental Complaint, remain in place in the New Visa.

132. Similarly, the veto right in the hands of the Member Banks, combined with the guarantee that the Member Banks will maintain that right for the duration of this litigation, perpetuates the situation in which New Visa cannot take any business actions that are contrary to the Member Banks' interests of receiving transfers of funds from Merchants on all Visa-branded Payment Card transactions – be it through Interchange Fees or another mechanism. Moreover, it also handicaps New Visa in this litigation by guaranteeing that any settlement that it attempts to enter into with Plaintiffs, including any settlement on a lower level of Interchange Fees, meets the approval of the Member Banks.

133. On information and belief, the vetoing rights on attempts by new Visa to exit the core payments business that was retained by the Member Banks of New Visa would allow the Member Banks to block an attempt by New Visa to eliminate Interchange Fees.

134. [redacted].

G. <u>The Restructuring Harms Competition in the Relevant Markets.</u>

135. As detailed in the preceding paragraphs, Old Visa and its Member Banks realized that the business structure that they had collusively established — a structure that mandated the

transfer of funds from Merchants to Issuers — was anticompetitive and illegal under the antitrust laws of the United States and many foreign jurisdictions. But instead of changing their conduct to conform to the law, Old Visa and its Member Banks elected to restructure themselves into a New Visa that they hoped would allow them to continue their anticompetitive conduct while eliminating their antitrust risk, and placed restrictions on New Visa in an attempt to guarantee that New Visa would continue to facilitate the transfer of funds from Merchants to Issuers despite its nominally "independent" form.

136. The Restructuring has created a New Visa with market power in the Relevant Markets described in Section IX below. The prevention of the acquisition or maintenance of market power by merger or acquisition is the central goal of Section 7 of the Clayton Act.

137. That New Visa remains under the effective control of its Member Banks is shown by the following:

a. Due to the long-standing control of Visa and MasterCard by the largest banks in the United States, the Relevant Markets have been structured by the banks through the adoption and enforcement of the Honor All Cards Rules, the Anti-Steering Restraints, the Miscellaneous Exclusionary Restraints and the rules requiring the deduction of Interchange Fees by Issuers on every transaction. As a result the only form of competition is competition by the Networks for the issuance of their Payment Cards by banks (rather than *e.g.* competing for Merchant acceptance), and the principal mode of competition is through ever-increasing Interchange Fees imposed on Merchants and paid to banks as an inducement to issue Visa or MasterCard Payment Cards. Because both Visa and MasterCard have substantial market power in the Relevant Markets, Merchants have no practical ability to decline to accept Visa and MasterCard Payment cards.

b. The six largest Issuing Banks in the United States now account for almost 90% of the issuance of Credit Cards. Neither Visa nor MasterCard can pursue any business strategy that that does not involve ever-higher Interchange Fees being imposed on Merchants.

c. Because the largest Member Banks have representatives on the Boards of Directors of New Visa and New MasterCard, and neither Merchants nor cardholders have such representation, those Member Banks continue to exercise undue influence on and effective control of the day-to-day business of Visa.

d. Even though New Visa could, in theory, collect Interchange Fees from Merchants and keep that substantial revenue, and discovery thus far indicates that Visa has in fact considered that, it has not done so. Rather, the Board of Directors of New Visa has continued to use Interchange Fees to re-distribute wealth from Merchants to Issuers.

e. The current New Visa Board of Directors undoubtedly understands that it lacks the resources to fund a significant adverse litigation judgment or settlement, such as this litigation, without the consent of the Member Banks. Post-IPO, the largest Member Banks have retained sufficient power and control over Visa to prevent it from settling this Action on terms that involve lowering Interchange Fees. Thus, even if Visa is highly motivated to resolve the pending litigation, it cannot do so without the authority and consent of its largest Member Banks.

f. New Visa, MasterCard and the Defendant Banks have entered into the Joint Defense Agreement in MDL 1720 described above.

138. The Restructuring adopted by Visa is akin to the members of a cartel who, having been caught fixing prices in violation of the Sherman Act, have instead spun off their competing businesses to a new "single entity", with the explicit understanding that the new "single entity" would continue to fix prices at the supra-competitive levels previously set by the members of the cartel. However, Section 7 of the Clayton and Section 1 of the Sherman Act makes this evasive conduct unlawful, as well, as it creates an entity with substantial market power.

139. Because the "single entity" New Visa has market power in the Relevant Markets, it can unilaterally impose uniform schedules of default Interchange Fees on Merchants. New Visa's market power also allows it to raise those Interchange Fees to supra-competitive levels. On information and belief, Visa has increased its level of "effective" Interchange Fees since its IPO, and continues to enforce its restrictive rules without losing significant Merchant acceptance.

140. But for the illegal horizontal agreements challenged in the Second Consolidated Amended Class Action Complaint or the Restructuring described herein, Visa and its Member

Banks could not impose uniform levels of default Interchange Fees on Merchants, and they certainly could not increase those fees to the exorbitant levels that exist today.

141. Visa contends that by reconstituting its Board of Directors to include a majority of directors "independent" of the Member Banks, and changing the ownership and governance rights of the Member Banks, New Visa is a single entity whose post-IPO setting of Interchange Fees is outside of the scope of Section 1 of the Sherman Act. Because it is the Restructuring, agreed to by the Member Banks, that reconstituted Visa's Board nominally "independent" of the Member Banks, it is the Restructuring that allows Visa's Board to continue to direct management to establish uniform schedules of default Interchange Fees and establish those fees at supra-competitive levels.

142. As Visa acknowledged before its Restructuring, Interchange Fees were doomed to disappear or drastically decrease. (Partridge Exh. 32804 at VI_IC_02710990.) The Restructuring harmed competition by allowing Visa to perpetuate the anticompetitive Interchange Fee levels described in paragraph 47 above.

143. The Restructuring has the effect of a merger to monopoly in the alternative Relevant Markets for Visa General Purpose Card Network Services, Visa Offline Debit Card Network Services, and Interlink PIN-Debit Card Network Services (collectively referred to as "Visa Card Acceptance Services")

144. In a competitive market, the fees that were imposed on Merchants in the Visa Card Acceptance Services Markets would be completely subject to the forces of competition, as Acquirers competed for Merchants' business by offering the lowest fees and best services to Merchants.

145. In competitive markets for Visa Card Acceptance Services, the only situation in which an Issuer could impose an Interchange Fee on a Merchant would be one in which the Issuer could offer something of value to that Merchant. In a competitive market, Issuers' value proposition to Merchants would also be subject to the forces of competition.

146. The Restructuring gives the New Visa Board of Directors the power – acting as a monopolist – to unilaterally determine the amount of fees to be imposed on Merchants by Issuers in the alternative market for Visa Card Acceptance Services and to unilaterally determine what (if any) services are offered in exchange for those fees. Previously, such fees could be imposed only through the collusive action of Old Visa Member Banks, electing and acting through the Board of Old Visa.

147. Visa and MasterCard have essentially admitted that their new structures lessen competition. Economists retained by Visa and MasterCard for many years have argued the joint-venture structure of Old Visa and Old MasterCard promoted competition, and that, if Visa and MasterCard had been structured as "single entities" like American Express, that would have lead to less competition. Thus, for example, professors David Evans and Richard Schmalensee wrote:

> If Visa and MasterCard had organized themselves as proprietary systems (e.g., with Member Banks having equity shares) in which members did not compete with each other, there would have been far less competition in the payment card industry than there is today.

Evans & Schmalensee, Paying With Plastic 288 (1st ed., 1999).

148. The same authors wrote in 1993:

> The number of entities that can profitably operate systems is naturally limited. The industry probably could not sustain a large number of payment card systems because of economies of scale. Nevertheless, the relatively high level of concentration at the system level is ameliorated by the fact that Visa and MasterCard operate as joint ventures rather than single firms. The two largest payment card systems, Visa and MasterCard, have adopted an organizational structure that maximizes competition at the issuer level. Visa and MasterCard control only those aspects of the system that require central coordination—

> establishing rules, operating the interchange system, setting the interchange fee in their respective systems, conducting research and development that benefits all members, and maintaining and promoting the system trademark. Member card issuers are then left to compete among themselves by choosing their own prices, features and marketing strategies.
>
> *There would be far less competition in this industry if Visa and MasterCard had chosen to operate as single companies*, integrated vertically and horizontally, as did American Express and Discover. In that case there would only be four major payment card issuers, instead of several thousand making independent decisions on payment card prices and features. Despite the existence of only four major payment card systems, the payment card business remains one of the country's more competitive industries.

David S. Evans & Richard L. Schmalensee, The Economics of the Payment Card Industry 103 (1993) (emphasis added.)

149. In a similar vein, in 2000, MasterCard's General Counsel Noah Hanft testified to the United States Senate Banking Committee:

> "In contrast to American Express and Discover, which are proprietary and fully-integrated systems, *MasterCard is an open association of competing financial institutions which, by its structure, benefits both its members and consumers*."
>
> * * *
>
> "MasterCard is an "open association" that is made up of tens of thousands of member institutions around the world that issue cards and sign Merchants to accept MasterCard. As an open system, all qualified member financial institutions can gain membership in our association, where there is intense competition among members for every aspect of individual cardholder and Merchant accounts, but cooperation in the advancement of the brand and development of the infrastructure. Without interference from MasterCard, each member determines the fees it will charge, the interest rates for its cards, value-added features, and a range of other competitive services."

Prepared Testimony of Noah Hanft, Senior Vice President & General Counsel, MasterCard International, United States Senate Banking Committee, Subcommittee on Financial Institutions, Hearing on Competition and Innovation in the Credit Card Industry at the Consumer and Network Level, May 25, 2000 (emphasis added) (*available at* http://banking.senate.gov/00_05hrg/052500/hanft.htm).

150. In a written submission to the FTC, Visa stated that its "structure precludes it or its [Member Banks] from using interchange to extract supracompetitive profits from consumers. Because Visa operates on a not for profit basis," Visa argued, "the organization itself has no incentive to use the interchange fee to extract supracompetitive profits." Paul A. Allen, Visa U.S.A., Inc., Comment on Issues Relating to Joint Venture Project at 8 (FTC July 31, 1997). Old Visa's history of frequent, significant increases in Interchange Fees without losing Merchant acceptance demonstrates that it could in fact extract supracompetitive Interchange Fees from Merchants. Nonetheless, the implication of Visa's own submission is that it could extract even higher fees from Merchants if it converted to a for-profit entity, as it sought to do through the Restructuring. *Id.*

H. The Ownership and Control Restrictions Harm Competition In The Relevant Markets

151. The Ownership and Control Restrictions prevent a single investor or group of investors from acquiring New Visa and operating it as a single entity, free from the constraints of Member Banks.

152. A Merchant or Merchant joint venture which acquired Visa would have every incentive to reduce Interchange Fees and eliminate the other anticompetitive rules and arrangements that Old Visa imposed before the Restructuring and will continue to impose.

153. Even if a non-Merchant entity acquired New Visa, it could reinvent Visa as a low Interchange Fee competitor, absent the Ownership and Control Restrictions.

154. The level of Visa Interchange Fees relative to Visa's market capitalization makes this point. Visa's current market capitalization is roughly $34 billion. Estimates of the magnitude of Interchange Fees imposed annually on Merchants by Visa Member Banks exceed $25 billion.

If Merchants collectively could acquire control of Visa with the prospect of saving more on Interchange Fees than it would cost to acquire control of Visa, Merchants might very well do so.

155. The Ownership and Control Restrictions also enable the Member Banks of Visa to protect the supra-competitive profits that they earn as MasterCard Member Banks. If those restrictions did not exist and a single firm could acquire Visa, that acquiring firm could lower Interchange Fees to attract Merchant transaction volume, thereby forcing the MasterCard Member Banks to respond by lowering their fees. This is precisely what occurred in Australia when Visa and MasterCard's Interchange Fees were substantially reduced. There, competitive forces caused American Express to reduce their Merchant fees by almost the same amount.

156. The 15-percent ownership limitation acts as a barrier to entry in the relevant market, and as such has an immediate adverse effect on competition and inflationary impact on prices.

157. The Member Banks' acquisition of Class B and C shares in New Visa also harms competition and imposes antitrust injury on Class Plaintiffs.

158. Because the banks view the setting of Interchange Fees as the central feature of Visa's value proposition to them, the Class B and C shareholders (banks) could block an attempt by the Board of New Visa to eliminate or greatly reduce Interchange Fees or reform them to be more "transparent" and "competitive[ly]" set.

159. The intended and actual effect of the Ownership and Control Restrictions, and the Restructuring *in toto* is similar placing an airplane on auto-pilot, or setting the rudder of a ship at a certain point, and then turning over control of the plane or ship to a new captain. Both cause the vessel to move in the previously fixed direction, unless the new captain has the knowledge, experience and wherewithal to change directions. As described above, the Member Banks of

Old Visa carefully designed the Relevant Markets, the business strategy of Old Visa, and the Restructuring, to assure that New Visa would be unable to change directions.

IX.

RELEVANT MARKETS

160. There exists a relevant market, the product dimension of which is no broader than General Purpose Cards. *In re Visa Check/MasterMoney Antitrust Litig.*, 2003 WL 1712568, at *3 (E.D.N.Y. Apr. 1, 2003); *United States v. Visa*, 163 F. Supp. 2d 322, 335 (S.D.N.Y. 2001). The geographic dimension of this market is the United States ("General Purpose Card Market"). *United States v. Visa*, 163 F. Supp. 2d at 339-40 (S.D.N.Y. 2001), *aff'd*, 344 F.3d at 239 (2d Cir. 2003).

161. There exists a relevant market, the product dimension of which is no broader than General Purpose Card Network Services. *In re Visa Check/MasterMoney Antitrust Litig.*, 2003 WL 1712568, at *3 (E.D.N.Y. Apr. 1, 2003); *United States v. Visa*, 163 F. Supp. 2d at 338, *aff'd*, 344 F.3d at 239. The geographic dimension of this market is the United States ("General Purpose Card Network Services Market").

162. Both Visa and MasterCard, "together with their Member Banks," jointly and separately, have market power in the market for General Purpose Cards and General Purpose Card Network Services. *United States v. Visa*, 163 F. Supp. 2d at 340, *aff'd*, 344 F.3d at 239.

163. The market shares of Visa indicate that it has market power in the General Purpose Card Network Services market. In 1999, Visa had a 47% share of the General Purpose Card transactions by dollar volume in the United States, while Visa and MasterCard had a combined market share of 73%. *United States v. Visa*, 163 F. Supp. 2d at 341. At that time, Visa and MasterCard collectively issued 85% of the General Purpose Cards in the United States. *Id.*

164. In 2007, Visa transactions accounted for 43% of U.S. General Purpose Card purchase volume, which included American Express and Discover. Visa's market share is significantly higher if Charge Cards are excluded from the market. Visa and MasterCard collectively accounted for 71% of General Purpose Card purchase volume, the same share of purchase volume that they had when Judge Jones ruled that Visa and MasterCard possessed market power six years earlier.

165. Concerted activity between Visa and MasterCard allows the Networks to collectively assert market power. *See In re Visa Check/MasterMoney Antitrust Litig.*, 2003 WL 1712568, at *3 (E.D.N.Y. Apr. 1, 2003) (noting evidence of collusion between Visa and MasterCard with respect to their Debit Card strategies).

166. Merchants do not view Offline Debit Card Network Services and PIN-Debit Card Network Services as acceptable substitutes to General Purpose Card Network Services. This is demonstrated by the fact that Merchants continue to accept Visa and MasterCard Credit Cards even though the Interchange Fees associated with Credit Card transactions is significantly higher than the fees associated with Debit Card transactions.

167. More recently, New Visa has increased Interchange Fees by large amounts without losing any Merchants as a result.

168. None of the recent increases in New Visa's Credit Card Interchange Fees have been attributable to increases in the level of costs associated with the operations of the Networks.

169. Old Visa and its Member Banks exercised their market power in the General Purpose Card Network Services market. As the court noted in the United States' action against the Networks, Old Visa raised Credit Card Interchange Fees charged to Merchants a number of times without losing Merchants. *United States v. Visa*, 163 F. Supp. 2d at 340. New Visa

continues its practice of increasing Interchange Fees, again without losing significant Merchant acceptance.

170. Old Visa and its Member Banks also demonstrated their market power by "price discriminating" in the level of Interchange Fees that were imposed on various Merchants and for various types of transactions. *United States v. Visa*, 163 F. Supp. 2d at 340. Since the United States' action, New Visa has only increased its price-discrimination practices.

171. Visa's price-discrimination among categories of Merchants is not based on cost but is based instead on its perception of the "elasticity of demand" (*i.e.*, the Merchants' willingness to pay) of the various categories of Merchants. It is Visa's practice to impose the highest fees on those Merchants that have the fewest options to discontinue acceptance as fees increase.

172. The Networks' pricing policies are reflected in the comments of MasterCard's Associate General Counsel before the European Commission in 2007. The Associate General Counsel discussed that when MasterCard performs a cost study, it attempts to answer the following question: "How high could interchange fees go before we would start having serious acceptance problems, where Merchants would say: we don't want this product anymore, or by Merchants trying to discourage the use of the card either by surcharging or discounting for cash." E.C. Decision at 56.

173. The ability of Visa to set prices to Merchants based on the Merchant's elasticity of demand is referred to by economists as setting a "reservation price." This pricing strategy is used by firms with monopoly power.

174. Old Visa also forced Premium Credit Cards upon Merchants that accept its Credit Cards. These Premium Cards carry higher Interchange Fees than non-premium cards and many

Merchants would refuse to accept them if they had the power to do so. Old Visa rules required Merchants that accepted Visa Credit Cards to also accept these "Premium Cards." The inability of Merchants to resist the imposition of higher Interchange Fee cards further demonstrated Visa's substantial market power. New Visa's continued market power is demonstrated that it has continued the practices described in this paragraph after its Restructuring.

175. There are significant barriers to entry in the General Purpose Card Network Services Market. Because of these barriers, the only successful market entrant since the 1960's has been Discover, which was introduced by Sears and benefited from its extensive network of stores, its extensive base of customers who carried Sears' store card, and its relationship with Dean Witter. New entry into the General Purpose Card Network Services Market would be extremely costly and would involve a "chicken-and-egg problem of developing a Merchant acceptance network without an initial network of cardholders who, in turn, are needed to induce Merchants to accept the system's cards in the first place." *United States v. Visa*, 163 F. Supp. 2d at 342.

176. Visa's former CEO, J.P. Coghlan, estimated that it would cost a new entrant [redacted] to establish a competitive Payment-Card Network. (Coghlan Dep. 160:17-161:23.)

177. There exists a relevant market, the product dimension of which is Offline Debit Cards. The geographic dimension of this market is the United States.

178. In the alternative, there exists a relevant market, the product dimension of which is no broader than Debit Cards. *See In re Visa Check/MasterMoney Antitrust Litig.*, 2003 WL 1712568, at *2 (E.D.N.Y. Apr. 1, 2003).

179. There exists a relevant market, the product dimension of which is Offline Debit Card Network Services. The geographic dimension of this market is the United States. The evidence may also establish that "single-brand" markets exist in the market as well.

180. In the alternative, there exists a relevant market, the product dimension of which is no broader than Debit Card Network Services. *See In re Visa Check/MasterMoney Antitrust Litig.*, 2003 WL 1712568, at *7 (E.D.N.Y. Apr. 1, 2003).

181. Offline Debit Cards and Offline Debit Card Network Services are a unique bundle of services. Consumers who use Offline Debit Cards either want to or have to make contemporaneous payment for their purchases with funds in their depository accounts. These consumers either cannot borrow money for those purchases (because they may not be deemed credit-worthy by Credit Card Issuing Banks) or choose not to.

182. From a consumer's perspective, Offline Debit Cards are not interchangeable with PIN-Debit Cards. Offline Debit Cards carry a Visa or MasterCard "Bug" and therefore are accepted by virtually all Merchants that accept Visa and MasterCard Payment Cards. On the other hand, PIN-Debit Cards are accepted at many fewer Merchant locations and therefore a consumer who prefers to pay for purchases with a PIN-Debit Card must necessarily carry an alternate form of payment as well.

183. Because Offline Debit Cards uniquely enable consumers to make certain types of purchases, the acceptance of Offline Debit Cards is also unique from a Merchant's perspective. There are therefore no other services that are reasonably substitutable for Offline Debit Card Network Services.

184. PIN-Debit transactions require a PIN pad and are not processed by a paper receipt. This means that there is a greater upfront cost to the Merchant of accepting PIN

transactions, and in some situations, the use of a PIN-Debit Card may require a change in business procedures. For example, in a restaurant, if customers did not pay at a central location, the server would have to bring a wireless PIN pad to the table. This practice is common in countries in which Zero-Interchange-Fee PIN-Debit Card Networks are well-established.

185. Visa and MasterCard have market power in the market for Offline Debit Card Network Services. In 2007, Visa's Offline Debit Card product had a 74% share of the purchase volume in the Offline Debit Card Network Services market. Visa and MasterCard collectively had a 100% share of the purchase volume in the Offline Debit Card Network Services market.

186. Visa and MasterCard's market power in the Offline Debit Card and Offline Debit Card Network Services markets is reinforced by the fact that the major Visa-Check-Issuing Banks are members of MasterCard and major MasterCard-Debit-Issuing Banks are members of Visa. This makes the Interchange Fee structures between Visa and MasterCard transparent to them and minimizes the incentives of the Networks to undercut each other's fees. *See In re Visa Check/MasterMoney Antitrust Litig.*, 2003 WL 1712568, at *3, *6 (E.D.N.Y. Apr. 1, 2003) (citing incidents of concerted activity between Visa and MasterCard).

187. Few, if any, Merchants would stop accepting Visa or MasterCard Offline Debit Cards even in the face of a substantial increase in Merchant-Discount Fees. In fact, even after the settlement in *Visa Check* allowed Merchants to refuse acceptance of Defendants' Offline Debit Cards while continuing to accept Defendants' Credit Cards, few Merchants have actually availed themselves of this opportunity.

188. There exists a relevant market the product dimension of which is PIN-Debit Cards. The geographic dimension of this market is the United States.

189. There exists a relevant market, the product dimension of which is PIN-Debit Card Network Services. The geographic dimension of this market is the United States.

190. A hypothetical monopolist could impose a small but significant and nontransitory increase in the price of PIN-Debit Card Network Services that are imposed on Merchants.

191. In fact, as part of its plan to "converge" Interchange Fees for imposed on Merchants for accepting Visa's Interlink PIN-Debit cards and its Visa Check Card Offline Debit Cards, Visa has significantly increased the Interchange Fees on PIN-Debit transactions without losing significant Merchant acceptance.

192. Visa's Interlink network has market power in the relevant market. In 2006, Interlink had a 39% market share of all PIN-Debit-transactions in the United States, as measured by transaction volume. Upon information and belief Interlink's market share of PIN-Debit transactions in 2008 is approaching 50%.

193. PIN-Debit Cards and PIN-Debit Card Network Services are a unique bundle of services. Consumers value the ease and speed of payment with PIN-Debit Cards relative to Offline Debit Cards and General Purpose Cards, the ability to receive cash back on POS transactions, and the enhanced security functions of PIN-Debit Cards. From a Merchant's perspective, the acceptance of PIN-Debit Cards is unique in that PIN-Debit Cards carry lower fraud rates, lower chargeback rates, and speedier settlement of funds in relation to Offline Debit Cards or General Purpose Cards.

194. Until Visa embarked on its policy of "convergence," described at length in Paragraphs 145-146 of the Second Consolidated Amended Class Action Complaint, PIN-Debit Card Interchange Fees were significantly lower than Offline Debit Card Interchange Fees and General Purpose Card Interchange Fees. While the gap between Offline Debit and PIN-Debit

Interchange Fees is shrinking, a gap between the two fee levels remains. Because of the gap in Interchange-Fee levels attributable to Offline Debit Cards and PIN-Debit Cards, few if any Merchants would discontinue the acceptance of PIN-Debit Cards in favor of other Payment Cards, even in the face of substantial increases in Interchange Fees.

195. The fact that Visa has been able to successfully converge PIN-Debit and Offline Debit Interchange Fees without losing significant Merchant acceptance is direct evidence of the market power of Visa's Interlink Network.

196. In recent years Visa adopted a strategy of attempting to enter into exclusive contracts with banks with respect to issuance of Visa Interlink cards. These efforts and other Visa strategies are in furtherance of Visa's long-standing efforts to marginalize or eliminate the regional PIN-Debit networks as competitive threats to Visa's dominance.

197. Barriers to entry in the PIN-Debit Card market and the PIN-Debit Card Network Services market are high. No new competitors have emerged since Visa acquired the Interlink network and began to lure banks to issue Interlink cards by increasing the Interchange Fees associated with Interlink transactions.

198. Visa's substantial (both individually and collectively with MasterCard) market power in the Relevant Markets described herein has been reinforced by their implementation and enforcement of the Anti-Steering Restraints and Miscellaneous Exclusionary Restraints, which insulate them from competition that would exist in a free market.

199. There exists an alternate relevant market, the product dimension of which is Visa General-Purpose Card Network Services. The geographic dimension of this market is the United States. This market is sometimes referred to as Visa General Purpose Card-Acceptance Services.

200. Visa General-Purpose Card Network Services is the technical infrastructure and the collection of agreements among Merchants, Issuing and Acquiring Banks, and Visa that allow Merchants to accept a Visa-branded General-Purpose Card for payment, and obtain authorization, clearing and settlement services for transactions initiated with a Visa-branded General Purpose Card. Visa General-Purpose Card Network Services enable a Merchant that has an agreement with a Visa Acquiring Bank to accept any Visa-branded General-Purpose Card that a consumer presents to the Merchant for payment for goods and services. Visa General-Purpose Card Network Services do not enable Merchants to accept MasterCard-, American Express-, or Discover-branded forms of payment, or any other form of payment. Similarly, MasterCard General-Purpose Card Network Services do not enable Merchants to accept Visa-branded General-Purpose Cards. Also, neither American Express nor Discover provide network services which enable Merchants to accept Visa-branded General-Purpose Cards presented to the Merchant by cardholders.

201. A hypothetical monopolist in the Visa General-Purpose Card Network Services market could profitably raise prices to Merchants by at least five to 10 percent (e.g. raise Interchange Fees from 2.0% to 2.1% or 2.2%).This is demonstrated by the fact that, during the pendency of this action, Visa has increased the Interchange Fees that are applied to Visa transactions by significant amounts without losing any meaningful level of Merchant acceptance.

202. Merchants do not view the acceptance of MasterCard-branded Payment Cards as an acceptable substitute for Visa General-Purpose Card Network Services.

203. Merchants do not view the acceptance of American Express-branded Payment Cards as an acceptable substitute for Visa General-Purpose Card Network Services.

204. Merchants do not view the acceptance of Discover-branded Payment Cards as an acceptable substitute for Visa General-Purpose Card Network Services.

205. Merchants do not view these other brands of payment as acceptable substitutes for Visa General-Purpose Card Network Services because they are concerned that, even if they lost only a few sales as a result of not accepting Visa General-Purpose Card Network Services, their lack of acceptance of Visa-branded General Purpose Cards would be unprofitable.

206. As former Federal Trade Commission Chairman (and Visa's paid consultant) Tim Muris noted, "[m]ost Merchants cannot accept just one major card because they are likely to lose profitable incremental sales if they do not take the major payment cards. Because most consumers do not carry all of the major payment cards, refusing to accept a major card may cost the Merchant substantial sales." Timothy J. Muris, Payment Card Regulation and the (Mis)application of the Economics of Two-Sided Markets, 2005 Colum. Bus. L. Rev. 515, 522 (2005).

207. There exists an alternative relevant market, the product dimension of which is Visa Offline-Debit Card Network Services. The geographic dimension of this market is the United States. This market is sometimes referred to as Visa Offline-Debit Card-Acceptance Services.

208. Visa Offline-Debit Card Network Services is the technical infrastructure and the collection of agreements among Merchants, Issuing and Acquiring Banks, and Visa that allow Merchants to accept a Visa-branded Offline-Debit Card for payment, and obtain authorization, clearing, and settlement services for transactions initiated with a Visa-branded Offline-Debit Card.

209. Visa Offline-Debit Card Network Services enable a Merchant that has an agreement with a Visa Acquiring Bank to accept any Visa-branded Offline-Debit Card that a consumer presents to the Merchant for payment for goods and services. Visa General-Purpose Card Network Services do not enable Merchants to accept MasterCard-, American Express-, or Discover-branded forms of payment, or any other form of payment. Similarly, MasterCard General-Purpose Network Services do not enable Merchants to accept Visa-branded General-Purpose Cards. Also, neither American Express nor Discover provide network services which enable Merchants to accept Visa-branded General-Purpose Cards presented to the Merchant by cardholders.

210. A hypothetical monopolist in the Visa Offline-Debit Card Network Services market could profitably raise prices to Merchants by at least five to 10 percent (e.g. raising Interchange Fees from 2.0% to 2.1% or 2.2%). This is demonstrated by the fact that, during the pendency of this action, Visa has increased the Interchange Fees that are applied to Visa transactions by significant amounts without losing any meaningful level of Merchant acceptance.

211. Merchants do not view the acceptance of MasterCard-branded Offline-Debit Cards as an acceptable substitute for Visa Offline-Debit Card Network Services.

212. Merchants do not view other brands of payment as acceptable substitutes for Visa Offline-Debit Card Network Services because they are concerned that, even if they lost only a few sales as a result of not accepting Visa Offline-Debit Card Network Services, their lack of acceptance of Visa-branded General Purpose Cards would be unprofitable.

213. Barriers to entry in the Visa Offline-Debit Card Network Services Market and Visa General Purpose Card Network Services Market are high. These barriers to entry appear primarily in the form of Visa's rules, including the No Bypass Rule, originally adopted and

enforced by Visa's Member Banks, that apply to all transactions that are conducted with Visa-branded Payment Cards. Visa rules require that all Visa-branded Payment-Card transactions be authorized, cleared, and settled through the Visa Network. Moreover, Visa rules require the payment of a Interchange Fee conforming to a uniform schedule of default Interchange Fees, for all transactions in which the Issuing Bank and Acquiring Bank have not entered into an agreement on an alternative Interchange Fee. Accordingly, these and other rules act as barriers to entry by minimizing or eliminating the practical ability or incentive for an Issuing Bank and an Acquiring Bank or Merchant to enter into a bilateral agreement that contains an alternative Interchange-Fee arrangement, or for another provider of network services to offer such services to Merchants.

214. Because of these barriers to entry, there are very few, if any, bilateral agreements between Issuers of Visa-branded Payment Cards and Merchants or Acquirers, and providers of network services such as First Data Corporation have been forced to exit the market or limit their offerings.

215. There exists an alternative relevant market, the product dimension of which is Interlink PIN-Debit Card Network Services. The geographic dimension of this market is the United States. This market is sometimes referred to as Interlink PIN-Debit Card-Acceptance Services.

216. Interlink PIN-Debit Card Network Services is the technical infrastructure and the collection of agreements among Merchants, Issuing and Acquiring Banks, Visa, and cardholders that allow Merchants to accept a Interlink-branded PIN-Debit Card for payment, and obtain authorization, clearing, and settlement services for transactions initiated with a Visa-branded PIN-Debit Card

217. Interlink PIN-Debit Card Network Services enable a Merchant that has an agreement with a Visa Acquiring Bank to accept any Interlink-branded Payment Cards that a consumer presents to the Merchant for payment for goods and services. Interlink PIN-Debit Card Network Services do not enable Merchants to accept other PIN-Debit Cards such as Maestro, NYCE, Pulse, or Star, or any form of payment.

218. A hypothetical monopolist in the Interlink PIN-Debit Card Network Services market could profitably raise prices to Merchants by at least five to 10 percent (e.g. raising Interchange Fees from 2.0% to 2.1% or 2.2%). This is demonstrated by the fact that, during the pendency of this action, Visa has increased the Interchange Fees that are applied to Interlink transactions by significant amounts without losing any meaningful level of Merchant acceptance.

219. Merchants do not view the acceptance of competing PIN-Debit Cards as an acceptable substitute for Interlink PIN-Debit Card Network Services.

220. Merchants do not view other brands of payment as acceptable substitutes for Visa PIN-Debit Card Network Services because they are concerned that, even if they lost only a few sales as a result of not accepting Visa Offline-Debit Card Network Services, their lack of acceptance of Visa-branded General Purpose Cards would be unprofitable.

221. Barriers to entry in the Visa General Purpose Card Network Services Market, the Visa Offline-Debit Card Network Services Market and the Interlink PIN-Debit Card Network Services Market are high. These barriers to entry appear primarily in the form of Visa's rules, including the No Bypass Rule, originally adopted and enforced by Visa's Member Banks, that apply to all transactions that are conducted with Visa- and Interlink-branded Payment Cards. Visa rules require that all Visa- and Interlink-branded Payment-Card transactions be authorized, cleared, and settled through the Visa Network. Moreover, Visa rules require the payment of a

Interchange Fee conforming to a uniform schedule of default Interchange Fees, for all transactions in which the Issuing Bank and Acquiring Bank have not entered into an agreement on an alternative Interchange Fee. Accordingly, these and other rules act as barriers to entry by minimizing or eliminating the practical ability or incentive for an Issuing Bank and an Acquiring Bank or Merchant to enter into a bilateral agreement that contains an alternative Interchange-Fee arrangement, or for another provider of network services to offer such services to Merchants.

222. Because of these barriers to entry, there are very few, if any, bilateral agreements between Issuers of Visa-branded Payment Cards and Merchants or Acquirers, and providers of such services such as First Data Corporation have been forced to exit the market or limit their offerings.

X.

CLASS ACTION ALLEGATIONS

223. Plaintiffs seek to represent two classes (collectively the "Class Members") under Rule 23(b)(1), (2) and (3), Fed. R. Civ. P., for violations of 15 U.S.C. §§ 1 & 18.

a. The first class, "Class I," seeks damages only for violations of 15 U.S.C. §§ 1 & 18, and is defined as:

> All persons, businesses, and other entities, that have accepted Visa and/or MasterCard Credit and/or Debit Cards in the United States at any time from and after January 1, 2004. This Class does not include the named Defendants, their directors, officers, or members of their families, or their co-conspirators or the United States Government.

b. The second class, "Class II," seeks declaratory and injunctive relief only for violations of 15 U.S.C. §§ 1 & 18, and is defined as:

> All persons, businesses and other entities that currently accept Visa and/or MasterCard Credit and/or Debit Cards in the United States or the United States Government. This Class does not include the named Defendants, their directors, officers, or members of their families, or their co-conspirators.

224. Plaintiffs Photos Etc., Traditions, Capital Audio, CHS, Coborn's, Crystal Rock, D'Agostino, Discount Optics, Jetro, Leon's Transmission, NACS, NATSO, NCPA, N.G.A., NRA, Parkway, and Payless bring this action under Federal Rules of Civil Procedure 23(a), and (b)(3), on behalf of themselves and Class I. These Plaintiffs are members of Class I, their claims are typical of the claims of the other Class I members, and Plaintiffs will fairly and adequately protect the interests of Class I. Plaintiffs are represented by counsel who are competent and experienced in the prosecution of class-action antitrust litigation. Plaintiffs' interests are coincident with, and not antagonistic to, those of the other members of Class I.

225. Plaintiffs Photos Etc., Traditions, Capital Audio, CHS, Coborn's, Crystal Rock, D'Agostino, Discount Optics, Jetro, Leon's Transmission, Parkway and Payless bring this action under F.R.C.P. 23(a) and (b)(2), on behalf of themselves and Class II. These Plaintiffs are members of Class II, their claims are typical of the claims of the other Class II members, and Plaintiffs will fairly and adequately protect the interests of Class II. Plaintiffs are represented by counsel who are competent and experienced in the prosecution of class-action antitrust litigation. Plaintiffs' interests are coincident with, and not antagonistic to, those of the other members of Class II.

226. Plaintiffs AFMW, NACS, NATSO, NCGA, NCPA, N.G.A., and NRA bring this action under F.R.C.P. 23(a) and (b)(2), on behalf of their members and Class II. These Plaintiffs' members are members of Class II, their members' claims are typical of the claims of the other Class II members, and these Plaintiffs will fairly and adequately protect the interests of Class II. Plaintiffs are represented by counsel who are competent and experienced in the prosecution of class-action antitrust litigation. Plaintiffs' members' interests are coincident with, and not antagonistic to, those of the other members of Class II.

227. The anticompetitive conduct of Defendants alleged herein has imposed, and threatens to impose, a common antitrust injury on the Class Members. The Class Members are so numerous that joinder of all members is impracticable.

228. Defendants' relationships with the Class Members and Defendants' anticompetitive conduct have been substantially uniform. Common questions of law and fact will predominate over any individual questions of law and fact.

229. Defendants have acted, continue to act, refused to act, and continue to refuse to act on grounds generally applicable to Class Members, thereby making appropriate final injunctive relief with respect to Class Members as a whole.

230. There will be no extraordinary difficulty in the management of this Class Action. Common questions of law and fact exist with respect to all Class Members and predominate over any questions solely affecting individual members. Among the questions of law and fact common to Class Members, many of which cannot be seriously disputed, are the following:

a. Reorganization issues.

i. Whether Old Visa and its Member Banks illegally constructed and executed a series of acquisitions that have a likelihood of substantially lessening competition in the Relevant Markets described above;

ii. Whether Old Visa and its Member Banks illegally combined their stock and assets as part of the Visa Restructuring in an unreasonable restraint of trade in the Relevant Markets described above;

iii. The product and geographic scope of the proper Relevant Market with which to analyze the conduct described in this Second Supplemental Complaint;

iv. Whether (a) Old Visa and its Member Banks possessed or exercised market power in the Relevant Markets alleged in this Second Supplemental Complaint, and (b) whether New Visa possesses or is able to exercise market power in the Relevant Markets alleged in this Second Supplemental Complaint;

v. Whether any procompetitive justifications that Defendants may proffer for their conduct alleged herein do exist, and if such justifications do exist, whether those justifications outweigh the harm to competition caused by that conduct;

b. Impact and damages issues.

i. Whether virtually all Class Members have been impacted or are threatened to be impacted by the harms to competition that are alleged herein; and

ii. The proper measure of damages sustained by the Class I as a result of the conduct alleged herein;

231. These and other questions of law and fact are common to Class Members and predominate over any issues affecting only individual Class Members.

232. The prosecution of separate actions by individual Class Members would create a risk of inconsistent or varying adjudications, establishing incompatible standards of conduct for Defendants.

233. This Class Action is superior to any other method for the fair and efficient adjudication of this legal dispute, as joinder of all members is not only impracticable, but impossible. The damages suffered by many Class Members are small in relation to the expense and burden of individual litigation, and therefore, it is highly impractical for such Class Members to individually attempt to redress the wrongful anticompetitive conduct alleged herein.

234. A class virtually identical to Classes alleged herein was certified, and affirmed on appeal, in *In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. 68 (E.D.N.Y. 2000), *aff'd*, 280 F.3d 124 (2d Cir. 2001).

TWENTY-SEVENTH CLAIM FOR RELIEF
CLASS I V. DEFENDANTS VISA, BANK OF AMERICA, CHASE, NATIONAL CITY, AND TEXAS INDEPENDENT BANCSHARES FOR DAMAGES UNDER SECTION 4 OF THE CLAYTON ACT, 15 U.S.C. § 15, FOR VIOLATION OF SECTION 7 OF THE CLAYTON ACT, 15 U.S.C. § 18.

235. Class Plaintiffs repeat and re-allege each and every allegation contained in the foregoing paragraphs of this Supplemental Complaint and the Second Consolidated Amended Class Action Complaint with the same force and effect as if set forth herein.

236. As part of the Restructuring, Visa acquired assets of its Member Banks including those banks' equity shares in the Old Visa, and attendant rights, such as the right to elect a Board of Directors that sets default schedules of Interchange Fees.

237. As part of the Restructuring, Defendants Bank of America, Chase, National City Corporation, National City Bank of Kentucky, and Texas Independent Bancshares, Inc., as well as Visa's other Member Banks acquired Class B and C shares in New Visa.

238. The Restructuring is designed to, and likely will, have the effect of substantially lessening competition in the Relevant Markets in violation of Section 7 of the Clayton Act in at least the following ways:

a. It has created a New Visa with sufficient market power in the Relevant Markets to set Interchange Fees at supra-competitive levels;

b. It allows New Visa to establish uniform schedules of default Interchange Fees, which would not exist in a competitive market;

c. By creating a New Visa that is akin to a "three-party system," it will allow New Visa to further increase Interchange Fees that are imposed on Merchants;

d. To the extent that it has reduced the likelihood of successful future antitrust enforcement against New Visa and its Member Banks, it has removed a significant downward pressure on Interchange Fees;

e. It has created a New Visa that is perpetuating the anticompetitive market structure that Old Visa and its Member Banks established through collusive agreements, anticompetitive restraints on Merchants, and Visa's strategy focused on its largest Issuers;

f. By leaving much of the Member Banks' influence in New Visa intact, the Restructuring establishes a new forum for collusion among Visa's Member Banks;

g. It creates barriers to entry in the Relevant Markets by preventing a Merchant or another interested buyer from purchasing New Visa and then eliminating or greatly reducing the wealth transfers that are made from Merchants to Issuers;

h. Through its grant of a de facto veto right to the Member Banks, it allows the Member Banks to block any attempt by the New Visa Board to eliminate or greatly reduce Interchange Fees.

239. The Plaintiffs, their members, and members of the Class will suffer common antitrust injury to their business or property by reason of the violation of Section 7 of the Clayton Act. This acquisition of assets by the New Visa and its Member Banks has injured and will continue to injure Plaintiffs, their members, and members of the Classes by eliminating any competition that could lead to a competitive price, and by making antitrust enforcement more difficult or impossible for plaintiffs.

240. This harm that Plaintiffs, their members, and the Class will suffer outweighs any efficiencies that Defendants may argue arises from the Restructuring.

TWENTY-EIGHTH CLAIM FOR RELIEF
CLASS II V. DEFENDANTS VISA, BANK OF AMERICA, CHASE, NATIONAL CITY, AND TEXAS INDEPENDENT BANCSHARES FOR INJUNCTIVE RELIEF UNDER SECTION 16 OF THE CLAYTON ACT, 15 U.S.C. § 26, FOR VIOLATION OF SECTION 7 OF THE CLAYTON ACT, 15 U.S.C. § 18.

241. Class Plaintiffs repeat and re-allege each and every allegation contained in the foregoing paragraphs of this Supplemental Complaint and the Second Consolidated Amended Class Action Complaint with the same force and effect as if set forth herein.

242. As part of the IPO and Agreements, Visa acquired assets of its Member Banks including those banks' equity shares in the Old Visa, and attendant rights, such as the right to elect a Board of Directors that sets default schedules of Interchange Fees.

243. As part of the IPO and related Agreements, Defendants Bank of America, Chase, National City Corporation, National City Bank of Kentucky, and Texas Independent Bancshares, Inc., as well as Visa's other Member Banks acquired Class B and C shares in New Visa.

244. The Restructuring is designed to, and likely will, have the effect of substantially lessening competition in the Relevant Markets in violation of Section 7 of the Clayton Act in at least the following ways:

a. It has created a New Visa with sufficient market power in the Relevant Markets to set Interchange Fees at supra-competitive levels;

b. It allows New Visa to establish uniform schedules of default Interchange Fees, which would not exist in a competitive market;

c. By creating a New Visa that is akin to a "three-party system," it will allow New Visa to further increase Interchange Fees that are imposed on Merchants;

d. To the extent that it has reduced the likelihood of successful future antitrust enforcement against New Visa and its Member Banks, it has removed a significant downward pressure on Interchange Fees;

e. It has created a New Visa that is perpetuating the anticompetitive market structure that Old Visa and its Member Banks established through collusive agreements, anticompetitive restraints on Merchants, and Visa's strategy focused on its largest Issuers;

f. By leaving much of the Member Banks' influence in New Visa intact, the Restructuring establishes a new forum for collusion among Visa's Member Banks;

g. It creates barriers to entry in the Relevant Markets by preventing a Merchant or another interested buyer from purchasing New Visa and then eliminating or greatly reducing the wealth transfers that are made from Merchants to Issuers;

h. Through its grant of a de facto veto right to the Member Banks, it allows the Member Banks to block any attempt by the New Visa Board to eliminate or greatly reduce Interchange Fees.

245. The Plaintiffs, their members, and members of the Class will suffer common antitrust injury to their business or property by reason of the violation of Section 7 of the Clayton Act. This acquisition of assets by the New Visa and its Member Banks has injured and will continue to injure Plaintiffs, their members, and members of the Class by eliminating any competition that could lead to a competitive price, and by making antitrust enforcement more difficult or impossible for plaintiffs.

246. This harm that Plaintiffs, their members, and the Class will suffer outweighs any efficiencies that Defendants may argue arises from the Restructuring.

247. Plaintiffs, their members, and the Class will suffer irreparable loss or damage to their business or property by reason of the violation of Section 7 of the Clayton Act.

248. There is no adequate remedy at law for the harm that Plaintiffs, their members, and the Class will suffer as a result of the conduct described herein.

249. Defendants' conduct described herein and the attendant harm to competition is likely to continue unless enjoined.

TWENTY-NINTH CLAIM FOR RELIEF
CLASS I V. DEFENDANTS VISA, BANK OF AMERICA, CHASE, NATIONAL CITY, AND TEXAS INDEPENDENT BANCSHARES FOR DAMAGES UNDER SECTION 4 OF THE CLAYTON ACT, 15 U.S.C. § 15, FOR VIOLATION OF SECTION 1 OF THE SHERMAN ACT, 15 U.S.C. § 1.

250. Class Plaintiffs repeat and re-allege each and every allegation contained in the foregoing paragraphs of this Supplemental Complaint and the Second Consolidated Amended Class Action Complaint with the same force and effect as if set forth herein.

251. The acquisition by Visa of the equity interest in Visa that, under Old Visa, had rested with the Member Banks constitutes a combination within the meaning of Section 1 of the Sherman Act.

252. As part of the IPO and Agreements, Defendant Visa agreed with Defendants Bank Bank of America, Chase, National City Corporation, National City Bank of Kentucky, and Texas Independent Bancshares, Inc., and Visa's other Member Banks to impose the Ownership and Control Restrictions described herein.

253. The combination that occurred through the Agreements and the IPO are designed to, and has had the effect of harming competition in the Relevant Markets in violation of Section 1 of the Sherman Act.

254. The agreements between Defendants that constitute the Ownership and Control Restrictions have the effect of harming competition in the Relevant Markets in violation of Section 1 of the Sherman Act.

255. The harms to competition that result from the contracts, combinations, conspiracies, and agreements that are part of the Restructuring include at least the following:

a. It has created a New Visa with sufficient market power in the relevant market to set Interchange Fees at supra-competitive levels;

b. It allows New Visa to establish uniform schedules of default Interchange Fees, which would not exist in a competitive market;

c. By creating a New Visa that is akin to a "three-party system," it will allow New Visa to further increase Interchange Fees that are imposed on Merchants;

d. To the extent that it has reduced the likelihood of successful future antitrust enforcement against New Visa and its Member Banks, it has removed a significant downward pressure on Interchange Fees;

e. It has created a New Visa that is perpetuating the anticompetitive market structure that Old Visa and its Member Banks established through collusive agreements, anticompetitive restraints on Merchants, and Visa's strategy focused on its largest Issuers;

f. By leaving much of the Member Banks' influence in New Visa intact, the Restructuring establishes a new forum for collusion among Visa's Member Banks;

g. It creates barriers to entry in the Relevant Markets by preventing a Merchant or another interested buyer from purchasing New Visa and then eliminating or greatly reducing the wealth transfers that are made from Merchants to Issuers;

h. Through its grant of a de facto veto right to the Member Banks, it allows the Member Banks to block any attempt by the New Visa Board to eliminate or greatly reduce Interchange Fees.

256. The Plaintiffs, their members, and members of the Class have suffered common antitrust injury to their business or property by reason of the violations of Section 1 of the Sherman Act.

257. The harm that Plaintiffs, their members, and the Class will suffer outweighs any efficiencies that Defendants may argue arises from the Restructuring.

THIRTIETH CLAIM FOR RELIEF
CLASS II V. DEFENDANTS VISA, BANK OF AMERICA, CHASE, NATIONAL CITY, AND TEXAS INDEPENDENT BANCSHARES FOR INJUNCTIVE RELIEF UNDER SECTION 16 OF THE CLAYTON ACT, 15 U.S.C. § 26, FOR VIOLATION OF SECTION 1 OF THE SHERMAN ACT, 15 U.S.C. § 1.

258. Class Plaintiffs repeat and re-allege each and every allegation contained in the foregoing paragraphs of this Supplemental Complaint and the Second Consolidated Amended Class Action Complaint with the same force and effect as if set forth herein.

259. The acquisition by Visa of the equity interest in Visa that, under Old Visa, had rested with the Member Banks constitutes a combination within the meaning of Section 1 of the Sherman Act.

260. As part of the IPO and Agreements, Defendant Visa agreed with Defendants Bank of America, Chase, National City Corporation, National City Bank of Kentucky, and Texas

Independent Bancshares, Inc., and Visa's other Member Banks to impose the Ownership and Control Restrictions described herein.

261. The combination that occurred through the Agreements and the IPO are designed to, and has had the effect of harming competition in the Relevant Markets in violation of Section 1 of the Sherman Act.

262. The agreements between Defendants that constitute the Ownership and Control Restrictions have the effect of harming competition in the Relevant Markets in violation of Section 1 of the Sherman Act.

263. The Plaintiffs, their members, and members of the Class have suffered common antitrust injury to their business or property by reason of the violations of Section 1 of the Sherman Act.

264. The harms to competition that result from the contracts, combinations, conspiracies, and agreements that are part of the Restructuring include at least the following:

a. It has created a New Visa with sufficient market power in the relevant market to set Interchange Fees at supra-competitive levels;

b. It allows New Visa to establish uniform schedules of default Interchange Fees, which would not exist in a competitive market;

c. By creating a New Visa that is akin to a "three-party system," it will allow New Visa to further increase Interchange Fees that are imposed on Merchants;

d. To the extent that it has reduced the likelihood of successful future antitrust enforcement against New Visa and its Member Banks, it has removed a significant downward pressure on Interchange Fees;

e. It has created a New Visa that is perpetuating the anticompetitive market structure that Old Visa and its Member Banks established through collusive agreements, anticompetitive restraints on Merchants, and Visa's strategy focused on its largest Issuers;

f. By leaving much of the Member Banks' influence in New Visa intact, the Restructuring establishes a new forum for collusion among Visa's Member Banks;

g. It creates barriers to entry in the Relevant Markets by preventing a Merchant or another interested buyer from purchasing New Visa and then eliminating or greatly reducing the wealth transfers that are made from Merchants to Issuers;

h. Through its grant of a de facto veto right to the Member Banks, it allows the Member Banks to block any attempt by the New Visa Board to eliminate or greatly reduce Interchange Fees.

265. The harm that Plaintiffs, their members, and the Class will suffer outweighs any efficiencies that Defendants may argue arises from the Restructuring.

266. There is no adequate remedy at law for the harm that Plaintiffs, their members, and the Class will suffer as a result of the conduct described herein.

267. Defendants' conduct described herein and the attendant harm to competition is likely to continue unless enjoined.

XI.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray for judgment with respect to their Complaint as follows:

(a) Pursuant to applicable law, award monetary damages sustained by the Representative Plaintiffs and Class Members 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*, in an amount to be proved at trial attorneys' fees, and costs of suit; and award all other and further relief as this Court may deem just and proper.

(b) Declare, adjudge, and decree that Defendants have committed the violations of the federal antitrust laws as alleged herein;

(c) Order that Defendants be enjoined from, in any manner, directly or indirectly, committing the violations of Section 1 of the Sherman Act and Section 7 of the Clayton Act in which they have been engaged;

(d) Order the reversal and unwinding of the IPO;

(e) Order that Defendants be enjoined and restrained from committing any other violations of statutes having a similar purpose or effect;

XII.

JURY DEMAND

Plaintiffs hereby demand trial by jury of all issues properly triable thereby.

Dated: Minneapolis, Minnesota
January 29, 2009

By: *S/ Craig Wildfang*
K. Craig Wildfang
Co-Lead Counsel for Plaintiffs

Robins, Kaplan, Miller & Ciresi L.L.P.
K. Craig Wildfang (kcwildfang@rkmc.com)
Thomas J. Undlin (tjundlin@rkmc.com)
Thomas B. Hatch (tbhatch@rkmc.com)
Janet C. Evans (jcevans@rkmc.com)
Stacey P. Slaughter (spslaughter@rkmc.com)
Ryan W. Marth (rwmarth@rkmc.com)
M. Tayari Garrett (mtgarrett@rkmc.com)
Ross A. Abbey (raabbey@rkmc.com)
George D. Carroll (gdcarroll@rkmc.com)
Rachel L. Osband (rlosband@rkmc.com)
Jesse M. Calm (jmcalm@rkmc.com)
Amelia N. Jadoo (anjadoo@rkmc.com)
Sarah E. Hudleston (sehudleston@rkmc.com)
2800 LaSalle Plaza
800 LaSalle Avenue South
Minneapolis, MN 55402
Tel. (612) 349-8500
Fax (612) 349-4181

Berger & Montague, P.C.
H. Laddie Montague (hlmontague@bm.net)
Bart Cohen (bcohen@bm.net)
Merrill G. Davidoff (mdavidoff@bm.net)
Michael J. Kane (mkane@bm.net)
1622 Locust Street
Philadelphia, PA 19103
Tel. (215) 875-3000
Fax (215) 875-4604

Coughlin Stoia Geller Rudman & Robbins LLP
Bonny E. Sweeney (bonnys@csgrr.com)
David Mitchell (davidm@csgrr.com)
655 West Broadway
Suite 1900
San Diego, CA 92101
Tel. (619) 231-1058
Fax (619) 231-7423

Fine Kaplan & Black
Allen Black (ablack@finekaplan.com)
Elise Singer (esinger@finekaplan.com)
1835 Market Street
28th Floor
Philadelphia, PA 19103
Tel. (215) 567-6565
Fax (215) 230-8735

Freedman, Boyd, Daniels, Hollander & Goldberg, P.A.
Joseph Goldberg (jg@fbdlaw.com)
20 First Plaza
Suite 700
Albuquerque, NM 87102
Tel. (505) 842-9960
Fax (505) 842-0761

Hulett, Harper, Stewart, LLP
Dennis J. Stewart (dennis@hulettharper.com)
550 West C Street
Suite 1600
San Diego, CA 92101
Tel. (619) 338-1133
Fax (619) 338-1139

Abraham, Fruchter & Twersky, LLP
Mitchell M. Z. Twerksy (mtwerksy@aftlaw.com)
One Penn Plaza
Suite 2805
New York, NY 10019
Tel. (212) 279-5050
Fax (212) 279-3655

Ann White Law Offices, P.C.
Ann White (awhite@awhitelaw.com)
101 Greenwood Avenue
5th Floor
Jenkintown, PA 19046
Tel. (215) 481-0274
Fax (215) 481-0271

Barrack, Rodos & Bacine
William Ban (wban@barrack.com)
Jeffrey Gittleman (jgittleman@barrack.com)
Gerald Rodos (grodos@barrack.com)
Mark Rosen (mrosen@barrack.com)
3300 Two Commerce Square
2001 Market Street
Philadelphia, PA 19103
Tel. (215) 963-0600
Fax (215) 963-0838

Beasley Firm, LLC
Slade McLaughlin (shm@beasleyfirm.com)
1125 Walnut Street
Philadelphia, PA 19107
Tel. (215) 592-1000
Fax (215) 592-8360

Bernard M. Gross, P.C.
Warren Rubin (warren@bernardmgross.com)
Suite 450
John Wanamaker Building
Juniper and Market Street
Philadelphia, PA 19107
Tel. (215) 561-3600
Fax (215) 561-3000

Boni & Zack LLP
Michael Boni (mboni@bonizack.com)
Joanne Zack (jzack@bonizack.com)
15 St. Asaphs Road
Bala Cynwyd, PA 19004
Tel. (610) 822-0201
Fax (610) 822-0206

Bonnett, Fairbourn, Friedman & Balint
Francis J. Balint, Jr. (fbalint@bffb.com)
Andrew S. Friedman (afriedman@bffb.com)
2901 North Central Avenue
Suite 1000
Phoenix, AZ 85012
Tel. (602) 274-1100
Fax (602) 274-1199

Chestnut & Cambronne, P.A.
Karl L. Cambronne (kcambronne@chestnutcambronne.com)
Jeffrey Bores (jbores@chestnutcambronne.com)
Becky Erickson (berickson@chestnutcambronne.com)
Stewart C. Loper (sloper@chestnutcambronne.com)
Brian N. Toder (btoder@chestnutcambronne.com)
3700 Mithun Tower
222 South Ninth Street
Minneapolis, MN 55402
Tel. (612) 339-7300
Fax (612) 336-2940

Chitwood, Harley Harnes LLP
Craig Harley (charley@chitwoodlaw.com)
Leslie G. Toran (ltoran@chitwoodlaw.com)
James M. Wilson (jwilson@chitwoodlaw.com)
2300 Promenade Two
1230 Peachtree Street NE
Atlanta, GA 30309
Tel. (404) 873-3900
Fax (404) 876-4476

Drubner & Hartley, LLC
Charles S. Hellman (chellman@dholaw.com)
1540 Broadway
37th Floor
New York, NY 10036
Tel. (212) 736-2121
Fax (212) 736-2122

James Hartley (jhart@dholaw.com)
500 Chase Parkway
Waterbury, CT 06708
Tel. (203) 597-6314
Fax (203) 753-6373

Edelson & Associates, LLC
Marc H. Edelson (medelson@hofedlaw.com)
45 West Court Street
Doylestown, PA 18901
Tel. (215) 230-8043
Fax (215) 230-8735

Finkelstein Thompson
Douglas G. Thompson (dgt@ftllaw.com)
Richard M. Volin (rmv@ftllaw.com)
1050 – 30th Street NW
Washington, DC 20007
Tel. (202) 337-8000
Fax (202) 337-8090

Foote, Meyers, Mielke & Flowers, LLC
Robert Foote (rmf@foote-meyers.com)
John C. Ireland (jireland@foote-meyers.com)
Dave Neuman (dneuman@foote-meyers.com)
416 S. Second Street
Geneva, IL 60134
Tel. (630) 232-6333
Fax (630) 845-8982

Friedman Law Group LLP
Gary B. Friedman (gfriedman@flgllp.com)
270 Lafayette Street
Suite 1410
New York, NY 10012
Tel. (212) 680-5150
Fax (212) 277-1151

Giskan, Solotaroff, Anderson & Stewart
Catherine Anderson (canderson@gslawny.com)
Oren Giskan (ogiskan@gslawny.com)
Jason Solotaroff (jsolotaroff@gslawny.com)
11 Broadway
Suite 2150
New York, NY 10004
Tel. (212) 847-8315
Fax (212) 473-8096

Goldman, Scarlato & Karon, P.C.
Daniel Karon (karon@gsk-law.com)
55 Public Square, Suite 1500
Cleveland, OH 44113
Tel. (216) 622-1851
Fax (216) 622-1852

Franklin, Gray & White
Mark K. Gray (mkgrayatty@aol.com)
505 West Ormsby Avenue
Louisville, KY 40203
Tel. (502) 585-2060
Fax (502) 581-1933

Gustafson Gluek PLLC
Daniel E. Gustafson (dgustafson@gustafsongluek.com)
Dan Hedlund (dhedlund@gustafsongluek.com)
Jason Kilene (jkilene@gustafsongluek.com)
650 Northstar East
608 Second Avenue South
Minneapolis, MN 55402
Tel. (612) 333-8844
Fax (612) 339-6622

Jaffe + Martin Law Office
Arthur L. Martin (amartin@lawjm.com)
Howard M. Jaffe (hjaffe@lawjm.com)
2029 Century Park East, Suite 2100
Los Angeles, CA 90067
Tel. (310) 226-7770

Kohn, Swift & Graf, P.C.
Robert J. LaRocca (rlarocca@kohnswift.com)
Joshua Snyder (jsnyder@kohnswift.com)
Kate Reznick (kreznick@kohnswift.com)
One South Broad Street
Suite 2100
Philadelphia, PA 19107
Tel. (215) 238-1700
Fax (215) 238-1968

Koskoff Koskoff & Bieder PC
Richard Bieder (rbieder@koskoff.com)
William Bloss (bbloss@koskoff.com)
Cynthia Bott (cbott@koskoff.com)
Neal A. DeYoung (ndeyoung@koskoff.com)
Lillian C. Gustilo (lgustilo@koskoff.com)
Michael Koskoff (mkoskoff@koskoff.com)
Anthony Ponvert (aponvert@koskoff.com)
Craig Smith (csmith@koskoff.com)
350 Fairfield Avenue
Bridgeport, CT 06604
Tel. (203) 336-4421
Fax (203) 368-3244

Labaton Sucharow LLP
Craig L. Briskin (cbriskin@labaton.com)
Bernard Persky (bpersky@labaton.com)
Hollis L. Salzman (hsalzman@labaton.com)
100 Park Avenue
New York, NY 10017
Tel. (212) 907-0700
Fax (212) 818-0477

Law Office of Jerald M. Stein
Jerald M. Stein (jmslaw@nyc.rr.com)
Scott Klein (sklein@mintandgold.com)
470 Park Avenue South
Floor 10 North
New York, NY 10016
Tel. (212) 481-4848
Fax (212) 481-6803

Lieff, Cabraser, Heimann & Bernstein, LLP
Joseph R. Saveri (jsaveri@lchb.com)
275 Battery Street, 30th Floor
San Francisco, CA 90411
Tel. (415) 956-1000
Fax (415) 956-1008

Hector D. Geribon (hgeribon@lchb.com)
David P. Gold (dgold@lchb.com)
780 Third Avenue, 48th Floor
New York, NY 10017
Tel. (212) 355-9500
Fax (212) 355-9592

Lockridge Grindal Nauen P.L.L.P.
W. Joseph Bruckner (wjbruckner@locklaw.com)
Richard A. Lockridge (ralockridge@locklaw.com)
Charles N. Nauen (cnnauen@locklaw.com)
100 Washington Avenue South
Suite 2200
Minneapolis, MN 55401
Tel. (612) 339-6900
Fax (612) 339-0981

Murray, Frank & Sailer LLP
Eric J. Belfi (ebelfi@murrayfrank.com)
Brian Brooks (bbrooks@murrayfrank.com)
275 Madison Avenue
8th Floor
New York, NY 10016
Tel. (212) 682-1818
Fax (212) 682-1892

Pomerantz, Haudek, Block, Grossman & Gross
Jason Cowart (jscowart@pomlaw.com)
Stanley Grossman (smgrossman@pomlaw.com)
J. Douglas Richards (drichards@pomlaw.com)
Michael M. Buchman (mbuchman@pomlaw.com)
100 Park Avenue, 26th Floor
New York, NY 10017
Tel. (212) 661-1100
Fax (212) 661-8665

Reinhardt Wendorf & Blanchfield
Mark Reinhardt (mreinhardt@comcast.net)
332 Minnesota Street
E1250 First National Bank Building
St. Paul, MN 55101
Tel. (651) 287-2100
Fax (651) 287-2103

Richard L. Jasperson, P.A.
Richard L. Jasperson (jaspersonr@cs.com)
E1000 First National Bank Building
332 Minnesota Street
St. Paul, MN 55101
Tel. (651) 223-5039
Fax (651) 223-5802

Roda Nast P.C.
Dianne M. Nast (dnast@rodanast.com)
801 Estelle Drive
Lancester, PA 17601
Tel. (717) 892-3000
Fax (717) 892-1200

Scott & Scott
Edmund Searby (esearby@scott-scott.com)
PO Box 192
108 Norwich Avenue
Colchester, CT 06415
Tel. (860) 537-5537
Fax (860) 537-4432

Seeger Weiss LLP
Jonathan Shub (jshub@seegerweiss.com)
1515 Market Street
Suite 1380
Philadelphia, PA 19102
Tel. (215) 564-2300
Fax (215) 851-8029

Steyer Lowenthal Boodrookas Alvarez & Smith LLP
Allan Steyer (asteyer@steyerlaw.com)
One California Street
Third Floor
San Francisco, CA 94111
Tel. (415) 421-3400
Fax (415) 421-2234

Shepherd, Finkelman, Miller & Shah, LLP
Patrick Klingman (pklingman@sfmslaw.com)
James E. Miller (jmiller@classactioncounsel.com)
Laurie Rubinow (lrubinow@sfmslaw.com)
65 Main Street
Chester, CT 06412
Tel. (860) 526-1100
Fax (860) 526-1120

Natalie Finkelman Bennett (nfinkelman@classactioncounsel.com)
Paul Rettinger (prettinger@classactioncounsel.com)
Nathan Zipperian (nzipperian@classactioncounsel.com)
30 East State Street
Media, PA 19063
Tel. (610) 891-9880
Fax (610) 891-9883

Spector, Roseman & Kodroff
William Caldes (wcaldes@srk-law.com)
Jay S. Cohen (jcohen@srk-law.com)
Jeff Corrigan (jcorrigan@srk-law.com)
David Felderman (dfelderman@srk-law.com)
Gene Spector (espector@srk-law.com)
1818 Market Street
Suite 2500
Philadelphia, PA 19103
Tel. (215) 496-0300
Fax (215) 496-6611

Starr, Gern, Davison & Rubin, P.C.
Jonathan J. Lerner (jlerner@starrgern.com)
Nicholas Stevens (nstevens@starrgern.com)
103 Eisenhower Parkway
Roseland, NJ 07068
Tel. (973) 403-9200
Fax (973) 226-0031

Weinstein, Kitchenoff & Asher, LLC
Steven A. Asher (asher@wka-law.com)
Robert S. Kitchenoff (kitchenoff@wka-law.com)
1845 Walnut Street
Suite 1100
Philadelphia, PA 19103
Tel. (215) 545-7200
Fax (215) 545-6535

Whatley Drake & Kallas LLC
Richard Rouco (rrouco@whatleydrake.com)
Joe R. Whatley (jwhatley@whatleydrake.com)
2001 Park Place
Suite 1000
Birmingham, AL 35203
Tel. (205) 328-9576
Fax. (205) 328-9669

Wolf Popper, LLP
Marian P. Rosner (mrosner@wolfpopper.com)
Patricia I. Avery (pavery@wolfpopper.com)
845 Third Avenue
New York, NY 10022-6601
Tel. (212) 759-4600
Fax (212) 486-2093

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Case Number:	1:05-md-1720
Filer:	Payment Card Interchange Fee and Merchant Discount Antitrust Litigation
Document Number:	1154

Docket Text:
Supplemental COMPLAINT *REDACTED Second Supplemental Class Action Complaint (originally filed under seal 1.29.09 as DE 1139)*, filed by Payment Card Interchange Fee and Merchant Discount Antitrust Litigation. (Wildfang, K.)

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Adam S. Mocciolo amocciolo@pullcom.com

Alexandra S. Bernay xanb@csgrr.com, jkusy@csgrr.com

Ali Stoeppelwerth Ali.Stoeppelwerth@wilmerhale.com

Amelia N. Jadoo anjadoo@rkmc.com

Andrew Corydon Finch afinch@paulweiss.com

Andrew J. Frackman afrackman@omm.com

Andrew J. McDonald amcdonald@pullcom.com

Angus Macaulay Lawton alawton@joycelawfirm.com, sdavis@joycelawfirm.com

Ann D. White awhite@awhitelaw.com, mbucher@awhitelaw.com

Anthony D. Boccanfuso anthony_boccanfuso@aporter.com

Ashely M. Chan achan@hangley.com, als@hangley.com

Barry L. Refsin brefsin@hangley.com, hweber@hangley.com

Bart D. Cohen bcohen@bm.net

Benjamin G. Stewart bgstewart@kmklaw.com

Bernard Persky bpersky@labaton.com

Bonny E. Sweeney bsweeney@lerachlaw.com, bonnys@lerachlaw.com, e_file_sd@lerachlaw.com

Brenna L. Penrose bpenrose@kmklaw.com

Brian A. Herman bherman@morganlewis.com

Brian N. Toder btoder@chestnutcambronne.com, bbleichner@chestnutcambronne.com, dproulx@chestnutcambronne.com

Bruce Levinson b.levinson@verizon.net

Bruce Alan Birenboim bbirenboim@paulweiss.com

Carmen A. Medici cmedici@csgrr.com

Charles M. Miller cmiller@kmklaw.com, mjtrue@kmklaw.com

Charles N. Nauen cnnauen@locklaw.com, jmtreiber@locklaw.com

Charles S. Hellman chellman@dholaw.com, diane@dholaw.com

Christopher J McDonald cmcdonald@labaton.com

Christopher M. Burke cburke@scott-scott.com, efile@scott-scott.com, tturner@scott-scott.com

Christopher R. Lipsett christopher.lipsett@wilmerhale.com

Craig Gordon Harley charley@chitwoodlaw.com

Cyrus Amir-Mokri cmokri@skadden.com

D. Cameron Baker cbaker@csgrr.com

Daniel M. Bradley dbradley@rpwb.com

Daniel O. Myers dmyers@rpwb.com

Danielle M. Aguirre daguirre@paulweiss.com

David Balto david.balto@yahoo.com, bradwasser@yahoo.com

David P. Germaine dgermaine@daarvanek.com

David Sapir Lesser david.lesser@wilmerhale.com

David W. Mitchell davidm@csgrr.com, slandry@csgrr.com

Dean Martin Solomon dsolomon@flgllp.com, deanmsolomon@gmail.com

Dennis Stewart dstewart@hulettharper.com, office@hulettharper.com

Dianne M. Nast dnast@rodanast.com

Donald A. Broggi dbroggi@scott-scott.com

Donald L. Perelman dperelman@finekaplan.com, nblakeslee@finekaplan.com

Drew M. Hicks dhicks@kmklaw.com

Edward D. Hassi ehassi@omm.com

Eric Bloom ebloom@hangley.com, jhb@hangley.com, knl@hangley.com

Eric H. Grush egrush@sidley.com, bnagin@sidley.com, dgraham@sidley.com, mzatorski@sidley.com

Erica T. Grossman erica.grossman@lw.com

Erin Burns eburns@rodanast.com

Florence Amanda Crisp fcrisp@eapdlaw.com

Francis J. Balint fbalint@bffb.com, DMoy@bffb.com, RCreech@bffb.com

Gary B. Friedman gfriedman@flgllp.com

Gary R. Carney , Jr gcarney@paulweiss.com

George D Carroll gdcarroll@rkmc.com

Gregory Scott Asciolla gasciolla@labaton.com

H. Laddie Montague hlmontague@bm.net, tstires@bm.net

Hadley P Roeltgen hroeltgen@kohnswift.com

J. Douglas Richards drichards@pomlaw.com

James M. Sulentic james.sulentic@kutakrock.com, shari.mullennax@kutakrock.com

James M. Wilson , Jr jwilson@chitwoodlaw.com, ndh@classlaw.com

James P. Tallon jtallon@shearman.com

James T. Shearin jshearin@pullcom.com, plebel-lasse@pullcom.com

Jason L. Reimer jlr@hangley.com, jhb@hangley.com

Jason L. Solotaroff jsolotaroff@gslawny.com

Jason S. Cowart jasoncowart@yahoo.com, jscowart@pomlaw.com

Jason S. Kilene jkilene@gustafsongluek.com

Jay S. Cohen jcohen@srk-law.com

Jayne A. Goldstein jgoldstein@sfmslaw.com

Jeffrey D. Bores jbores@chestnutcambronne.com

Jeffrey M Norton jmn@whesq.com, tsawchuk@whesq.com

Jennifer A. Kenedy jkenedy@lordbissell.com

Jerald M. Stein jmslaw@nyc.rr.com

Jesse M. Calm jmcalm@rkmc.com, jmbutler@rkmc.com

Joanne Zack jzack@bonizack.com

Joe R. Whatley , Jr jwhatley@wdklaw.com, ecf@wdklaw.com, kgault@wdklaw.com

John M. Majoras jwclark@jonesday.com, nationalcity@jonesday.com, psimone@jonesday.com

John P. Passarelli john.passarelli@kutakrock.com, shari.mullennax@kutakrock.com

Jonathan B. Orleans jborleans@pullcom.com

Jonathan Craig Smith csmith@joycelawfirm.com

Jonathan J. Lerner jlerner@starrgern.com

Jonathan Mitchell Jacobson jjacobson@wsgr.com, cstavros@wsgr.com, krubino@wsgr.com

Joseph Goldberg rh@fbdlaw.com, jg@fbdlaw.com

Joseph M. Callow jcallow@kmklaw.com

Joseph Michael Vanek jvanek@vaneklaw.com

Joseph N. Froehlich jfroehlich@lordbissell.com

Joseph R. Saveri jsaveri@lchb.com, aacuna@lchb.com, dclevenger@lchb.com, lgrumbo@lchb.com, rtexier@lchb.com

Joshua D. Snyder jsnyder@bonizack.com

Joshua N. Holian joshua.holian@lw.com, erica.grossman@lw.com, victor.cayanan@lw.com

K. Craig Wildfang kcwildfang@rkmc.com, smlocsin@rkmc.com

Karen Hanson Riebel khriebel@locklaw.com, crbaehman@locklaw.com

Karl Cambronne kcambronne@chestnutcambronne.com

Kate Reznick kreznick@bonizack.com

Katherine A. Morgan kmorgan@csgrr.com

Keila D. Ravelo kravelo@hunton.com

Kenneth A. Gallo kgallo@paulweiss.com

Kenneth G. Walsh kwalsh@kmllp.com, cstudebaker@kmllp.com

Kenneth T. Murata kmurata@omm.com

Kimberly Keevers Palmer kkeevers@rpwb.com, smosley@rpwb.com

Kristen Anderson kanderson@scott-scott.com, efile@scott-scott.com

L. Webb Campbell , II wcampbell@sherrardroe.com

Larry Alan Coury lcoury@paulweiss.com

Leslie Hurst leslieh@lerachlaw.com

Linda P. Nussbaum lnussbaum@kaplanfox.com

Linda Wong Cenedella lwong@skadden.com

Lisl J. Dunlop ldunlop@shearman.com, alexandra.kourides@shearman.com

Lita B. Wright lbwright@samlegal.com

M. Tayari Garrett mstayari@rkmc.com

Marion Brenda Johnson marion.johnson@dbr.com

Mark Reinhardt m.reinhardt@rwblawfirm.com, k.schulte@rwblawfirm.com, mreinhardt@comcast.net

Mark E. Tully mtully@goodwinprocter.com

Mark P. Ladner mladner@mofo.com, docketny@mofo.com

Matthew Stephen Freimuth mfreimuth@hunton.com, egastelo@hunton.com

Merrill G. Davidoff mdavidoff@bm.net

Michael B. Miller mbmiller@mofo.com

Michael Edward Johnson mjohnson@alston.com

Michael J. Boni mboni@bonizack.com

Michael J. Gaertner mgaertner@lordbissell.com, jgreiner@lordbissell.com, kharris@lordbissell.com, kturner@lockelord.com, rruesch@lordbissell.com

Michael J. Kane mkane@bm.net

Michael M. Buchman mbuchman@pomlaw.com

Morissa Robin Falk mfalk@labaton.com

Naeemah Clark naeemah.clark@alston.com

Noah Shube nshube@nsfirm.com, nshube@hotmail.com

P. Russell Perdew pperdew@lordbissell.com

Patricia A. Sullivan psullivan@eapdlaw.com, kbeaton@eapdlaw.com

Patricia I. Avery pavery@wolfpopper.com

Patrick A. Klingman pklingman@sfmslaw.com

Patrick F. Fischer pfischer@kmklaw.com

Paul E. Slater pes@sperling-law.com

Paul W. Bartel , II paul.bartel@dpw.com

Perry Lange perry.lange@wilmerhale.com

Peter Clemens Herrick pherrick@omm.com

Peter Edward Greene pgreene@skadden.com

Peter S. Julian pjulian@skadden.com

Phillip F. Cramer pcramer@sherrardroe.com

Rachel J. Christiansen rjchristiansen@locklaw.com

Randall A. Hack rhack@lordbissell.com, cmaas@lordbissell.com

Richard A. Lockridge ralockridge@locklaw.com, rmemmons@locklaw.com

Richard J. Kilsheimer rkilsheimer@kaplanfox.com

Richard L. Creighton rcreighton@kmklaw.com

Richard M. Volin rmv@ftllaw.com

Richard P. Jeffries rick.jeffries@kutakrock.com, nancy.johnson@kutakrock.com

Richard P. Rouco rrouco@whatleydrake.com, ecf@whatleydrake.com

Robert C. Mason robert_mason@aporter.com, david_gersch@aporter.com, mark_merley@aporter.com, matthew_eisenstein@aporter.com

Robert D. Greenbaum rgreenba@voicenet.com

Robert Donald Carroll rcarroll@goodwinprocter.com

Robert J. LaRocca rlarocca@kohnswift.com

Robert S. Kitchenoff kitchenoff@wka-law.com

Ronald A. Bloch ronbloch@erols.com

Ross A. Abbey raabbey@rkmc.com, dmlafrance@rkmc.com

Stacey Slaughter spslaughter@rkmc.com

Steven A. Asher asher@wka-law.com

Stewart C. Loper sloper@chestnutcambronne.com

Teresa T. Bonder tbonder@alston.com

Theresa J Henson thenson@bonizack.com

Thomas B. Hatch tbhatch@rkmc.com, lcwolf@rkmc.com

Thomas J. Undlin tjundlin@rkmc.com, bsbrtek@rkmc.com

Thomas M. Campbell tcampbell@sc-llp.com, mbeaudry@kennynachwalter.com, sc-llp@sc-llp.com, sms@kennynachwalter.com, wblechman@kennynachwalter.com

Tracey L. Kitzman tkitzman@flgllp.com

Trenton B. Douthett tdouthett@kmklaw.com

Valerie C. Williams valarie.williams@alston.com

W. Joseph Bruckner wjbruckner@locklaw.com, emsipe@locklaw.com

Walter W. Noss wnoss@scott-scott.com

Wesley Railey Powell wpowell@hunton.com, ajacobs@hunton.com, ekonor@hunton.com, jstrader@hunton.com, KHunter@hunton.com, LMercado@hunton.com, mfleming@hunton.com, mfreimuth@hunton.com, shilal@hunton.com, spugatch@hunton.com

William A. Gengler wagengler@locklaw.com, jmtreiber@locklaw.com

William F. Cavanaugh wfcavanaugh@pbwt.com, mcolitigation@pbwt.com

William Harry Rooney maoedny@willkie.com

William J. Ban wban@barrack.com, sdavis@barrack.com

William Jay Blechman wblechman@kennynachwalter.com, mbeaudry@kennynachwalter.com

William V. Reiss wreiss@labaton.com, electroniccasefiling@labaton.com

Yeshimebet Abebe yabebe@chitwoodlaw.com, ndh@classlaw.com

1:05-md-1720 Notice will not be electronically mailed to:

Bank Of America, N.A.

Ada Asante Davis
Sidley Austin LLP
787 Seventh Avenue
New York, NY 10019

Andrew Howard Warren
Latham & Watkins LLP
555 Eleventh Street, Nw
Suite 1000
Washington, DC 20004

Carmen B. Copher
Lockridge Grindal Nauen P.L.L.P.
100 Washington Avenue South
Suite 2200
Minneapolis, MN 55401

Darla Jo Boggs
Lockridge Grindal Nauen P.L.L.P.
100 Washington Avenue South
Suite 2200
Minneappolis, MN 55401

Douglas Melamed
2445M Street
Washington , Dc, WA 20037

Edmund W. Searby
Scott & Scott, LLC
33 River Street
Chagrin Falls, OH 44022

Joseph W. Clark
Jones Day
51 Lousiana Avenue. N.W.
Washington, DC 20001-2113

Lee Albert
Mager & Goldstein LLP
One Liberty Place, 21st Floor
1650 Market Street
Philadelphia, PA 19103

Mark V. Jackowski
Scott Scott, LLC
33 River Street
Chagrin Falls, OH 44022

Michael Kelly
Lord Bissell & Brook LLP
111 S Wacker Dr
Chicago, IL 60606

Ryan G. Kriger
Milberg Weiss Bershad & Schulman LLP

One Pennsylvania Plaza
New York, NY 10119

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