EXHIBIT 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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

Supplemental Declaration of K. Craig Wildfang in Further Support of Approval of Final Settlement

ROBINS, KAPLAN, MILLER & CIRESI, L.L.P.
K. Craig Wildfang
Thomas J. Undlin
Ryan W. Marth

2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402
Tel: 612--349--8500
Fax: 612--339--4181

Co-Lead Counsel for Class Plaintiffs

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I. Introduction and Overview

1. I, K. Craig Wildfang, am a partner in the law firm of Robins, Kaplan, Miller & Ciresi, L.L.P. and am one of the Co-Lead Counsel in this matter. I make this Supplemental Declaration in support of final approval of the Settlement Agreement in the above-captioned matter.

2. Class Counsel's extensive efforts in this long-running and complex case were described in detail in my initial Declaration. I described the challenges presented by the case, the dynamics of the payment-card industry, developments both before and after we commenced this case, and the achievements that we accomplished on behalf of merchants both during the case and through the proposed settlement. The purpose of this Declaration is to respond more specifically to certain objections that have been raised regarding our representation of the Class – primarily objections raised by former class representatives, the Objecting Plaintiffs. I also respond to certain of the other objections to the terms of the settlement.

II. Response to Objections to Settlement

A. The process by which the Settlement was reached was appropriate, and served the interest of the Classes.

1. The Class Representatives

3. The class representatives named in the initial complaint filed in what became MDL 1720 in June 2005, were Traditions Ltd., Photos Etc. Corporation, and CHS Inc. Traditions and Photos Etc. These merchants are owned by entrepreneurs who

educated themselves about the issues related to payment card issues because they saw the day-to-day impact of the Visa and MasterCard bank joint ventures on their businesses. CHS, Inc. is a Fortune 100 company, owned by hundreds of local farmer-owned cooperatives in the upper Midwest. None of these class representatives are ideologues. They are merchants that sought practical, reasoned solutions to the payment card problems they faced in 2004, even after the *In re VisaCheck* settlement.

4. The class representatives in the many follow-on cases which eventually became part of MDL 1720 included Payless Shoes, a large nationwide retailer, and other relatively small merchants with every day, real-world interactions with Visa and MasterCard. Together, these class representatives were the core of the case and more than adequate representatives of the classes of merchants they sought to represent.

5. The trade associations that are now Objecting Plaintiffs were later added as class representatives in complaints filed in late 2005 and early 2006. They were clients of my then partner David Balto, who had joined my firm's Washington, D.C. office in July, 2004.

6. Before we filed the first action in June 2005, David and I met with many large merchants, and several trade associations, including current objector National Retail Federation "NRF." In each meeting we presented our legal theories and strategy for attacking the banks' joint ventures, Visa and MasterCard, via a class action suing Visa and MasterCard and the banks. Most of these large merchants and trade associations were unwilling to be a class representative in such an action. The reasons were generally that they feared retaliation by suing the banks, and, in the case of the

trade associations, were unwilling to expose their members to the cost of responding to discovery.

7. Many of the Objecting Plaintiffs who oppose the Settlement have now submitted declarations claiming that, in their (after the fact) judgment, Class Counsel did not represent their best interests in negotiating the Settlement. One such declarant stated: "[I]t is clear to me that the lawyers who negotiated the settlement did not adequately represent the interest of the NGA [National Grocers' Association]." Decl. of Thomas F. Wenning, ¶28, Dkt. No. 2475. Many others made nearly identical statements concerning their company or association. *See* Decl. of Lisa Mullings (NATSO), ¶26, Dkt. No. 2461; Decl. of Chris Coborn (Coborn's), ¶26, Dkt. No.¶2447; Decl. of Nicholas D'Agostino (D'Agostino's), ¶21, Dkt. No. 2449; Decl. of Richard Kirschner(Jetro), ¶17, Dkt. No.2459; Decl. of B. Douglas Hoey (NCPA), ¶32, Dkt. No. 2619; Decl. of Robynn Shrader (NCGA), ¶25, Dkt. No. 2546; Decl. of Duane Severson (Affiliated Foods), ¶25, Dkt. No. 2563. These statements by Objecting Plaintiffs are simply unfounded and incorrect as I explain below. Underlying these assertions, in my view and based on my experience in this case, is a fundamental misconception on many of their parts of their role as class representatives against which Class Counsel constantly had to combat. Many failed to understand that Class Counsel's ultimate duty (and indeed the duty of the class representatives) were to pursue the best interests of the *whole* merchant class, and not solely the particularized concerns of a single merchant or the political agendas of a given trade association. Their agenda, whatever that may be, is hidden under a panoply of objections that distort the intended operation of the Settlement, offer no

cogent explanation of a superior and attainable outcome in the litigation, and display no recognition of the risks of litigation if this case were to continue.

8. In order to meet the assertion that Class Counsel either failed to adequately communicate or consult with the class representatives or in any other way fulfill their obligations to the Class, I discuss below the mediation process leading to the settlement, including the opportunities for the class representatives (including Objecting Plaintiffs) to participate in that process. In this context, I describe the evolution of debit-card rate regulations that impacted our settlement objectives and other developments that underscore the utility and wisdom of the Settlement before the Court.

2. The Mediation Process

9. The Objecting Plaintiffs' principal complaint about the mediation process leading to the Settlement is their assertion that Class Counsel failed adequately to communicate with them and that their concerns about the mediators' proposals forming the framework for the settlement were "not only not welcomed by Class Counsel, but also ignored." *See* Decl. of Lisa Mullings (NATSO), ¶6, Dkt. No. 2461.[1] While the attorney-client privilege and mediation privilege constrain what may be publicly disclosed about the mediation process, Objecting Plaintiffs have raised these issues and, therefore, it is appropriate for me to respond.[2]

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[1] This phrase is repeated verbatim in the declarations of Objecting Plaintiffs NGA (¶7), NACS (¶11), NCPA (¶13), Coborn's (¶7), D'Agostino's (¶8), leading to the inference that the phrase is the work product of the lawyers now representing them, and not their own words.

[2] The Objecting Plaintiffs, by describing communication with their counsel for purposes of attacking Class Counsel's ethics and integrity, have waived the attorney-client privilege, at least with respect to the proportionate

10. Some context about how the mediation process evolved is relevant. The mediation began in the spring of 2008 before the Honorable Edward Infante (Ret.), who the parties selected as the initial and primary mediator for the case. Judge Infante is a very experienced and highly regarded mediator. Later, in July of 2009, Professor Eric Green, another very experienced and highly regarded mediator, joined the effort, having been initially selected by the parties as a second mediator in the event they desired the involvement of two mediators. The mediation during 2008 consisted primarily of *ex parte* educational meetings with Judge Infante about the substance of the case and relative merits from each side's perspective. Class Counsel also made a presentation to Defendants' counsel and business representatives on the merits of Plaintiffs' claims. The mediation activity was sporadic but continuous, as the parties were heavily occupied with the deposition phase of discovery that involved hundreds of depositions of necessary witnesses. Throughout that year, as was my custom since the inception of the case, my co-counsel and I held periodic meetings with the class representatives, either as a group or individually, usually on the East Coast where many of the class representatives were located. In addition, we had regular group telephone conferences, and I had dozens of group and individual telephone calls and email communications with the class representatives. While I believe the detail furnished in this Declaration will be more than adequate, if the Court determines that more detail with respect to the regularity and quality of Class Counsel's

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and restrained response that I provide in this Declaration. *See* Restatement (Third) of the Law Governing Lawyers, Sec. 64, Comment e (referencing a "proportionate and restrained" public response).

communications with the class representatives is an important issue, I can provide the Court with a more exhaustive enumeration of all of the telephone calls and meetings with the class representatives.

11. In 2009 the mediation activity increased somewhat with additional meetings and telephone conversations between Class Counsel and the mediators. In addition, Class Counsel had numerous meetings and telephone calls with all of the class representatives to keep them apprised of litigation developments in the case and to discuss strategy for litigation, mediation and, notably, developments on Capitol Hill regarding efforts to promote legislation aimed at lowering interchange rates on both credit- and debit- cards. My records reflect that, in addition to dozens of telephone and email communications, my co-counsel and I held in-person meetings with some or all of the class representatives, on at least eight occasions during 2009. This included six meetings in Washington D.C., a meeting at the National Grocers' Annual Convention (NGA board meeting) in Las Vegas, and a mediation session attended by several of the class representatives in New York City on December 10 and 11, 2009. At the December mediation sessions, Class Counsel and class representatives had extensive discussions about our settlement position and we exchanged with Defendants, through the mediators, comprehensive settlement proposals.[3] The gulf between the parties' positions remained wide.

[3] In the case of the Class Plaintiffs' proposals, they were always made in the form of a set of terms which Class Counsel were prepared to recommend to the Class. *See* discussion *infra*.

12. During 2010, there was less mediation activity in the early part of the year, but mediation sessions among counsel were held in early September in New York and in early November in Washington D.C., albeit with little or no substantive progress made. Despite this decrease in actual mediation activity in 2010, Class Counsel kept appropriate contact with the class representatives regarding developments. My co-counsel and I had meetings with class representatives in January, May, July, and September. In addition, I had dozens of telephone and email communications, both individually and via group communication.

13. Even though there was little or no substantive progress in mediation, significant activity occurred throughout 2010 that established a very important element which influenced the subsequent mediators' proposals and the ultimate Settlement Agreement – the passage of the so-called "Durbin Amendment." 15 U.S.C. §1693o-2, as enacted by Section 1075 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). The Durbin Amendment had the effect ultimately of: (1) lowering the interchange rates that large banks (80% of transaction volume for merchants) could charge for debit-card transactions; (2) creating alternative network routing for debit-cards; and (3) imposing a permissible minimum transaction amount limit on credit-card transactions of $10.00.

14. The Durbin Amendment was the product, at least in part, of a strategy initiated, endorsed and promoted by Class Counsel, of focusing our attack in Congress on debit-card interchange fees. The logic was that such regulation would be easier to accomplish because a debit-card transaction is essentially an "electronic check."

Therefore, as compared to check transactions that redeemed at "par" value, *i.e.* without an interchange fee, the networks' and banks' defense of their interchange regime was more difficult for debit-cards. Moreover, debit-card transaction volume was growing much more quickly than credit card volume. In part, through our efforts, and the efforts from many of the class representatives (including by some of the trade associations that are now Objecting Plaintiffs), the Durbin Amendment passed in June of 2010 and was successfully incorporated into the Dodd-Frank Wall Street Reform Consumer Protection Act of 2010. With its passage and implementation over the ensuing 12-month period, most merchants now had a practical, very low-cost electronic payment alternative to which to steer their cardholding customers.

15. The Durbin Amendment delegated to the Federal Reserve Board the duty to study the debit-card payment market and to enact regulations to set standards for determining whether an interchange fee charged by debit-card issuing banks "'are reasonable and proportional to the cost incurred by the issuer with respect to the transaction." 15 U.S.C. §1693-2(a)(2). During the period in which the Federal Reserve studied the subject of their rules on debit, I met with Louise Roseman of the Federal Reserve in September of 2010 to advocate for the lowest possible rate based on debit-card transaction costs, and I submitted materials to the Federal Reserve in support of that effort and follow-up communications. I worked closely with Class Representative NACS and its legislative counsel in this effort because we all knew that achieving meaningful action on reducing debit interchange rates, a function more appropriate for legislative and regulatory action, and not practical through litigation or judicial

decision, would solve one piece of the puzzle and open the door for meaningful relief on anti-steering rules then in place for credit cards.

16. On December 16, 2010, the Federal Reserve issued its interim determination on debit-card interchange rates that provided two alternative approaches. In very simple terms, the first alternative allowed issuing banks to recover up to a safe harbor of seven cents ($.07) per transaction and up to a cap of twelve cents ($.12) with a sufficient showing of additional acceptance costs. Either level represented a significant decrease from existing debit-card rates, which averaged approximately 44 cents ($.44) per transaction at the time. [4]

17. The passage of the Durbin Amendment and the interim ruling by the Federal Reserve implementing it had a significant impact on the thinking of Class Counsel, and many of the class representatives, in terms of a strategy for pursuing a mediated settlement in this case. At a January 5, 2011, meeting with class representatives in Washington, D.C., we discussed the beneficial impact of low-cost debit cards as a steering target for merchants. One trade association representative in attendance stated to me in substance that "With the Durbin debit rates, if we can get the ability to surcharge to steer customers to debit, along with a substantial cash payment, we can now settle this case." This statement was representative of the sentiment among

[4] We continued to assist our clients and push for the most favorable debit-card regulations by submitting, on February 22, 2011, comments on behalf of the merchant Class in MDL-1720 to press the Federal Reserve to choose the most favorable alternatives possible. The Federal Reserve, in its Final Rule issued in July 2011, imposed an interchange fee limit on debit-card transactions of 21 cents plus 5 basis points per transaction. That limit was higher than either of the staff recommended alternatives, but still a significant savings to merchants. That final cap was successfully challenged by a group of merchant trade associations in *NACS v. Bd. of Governors of the Fed. Reserve Sys.*, Civ. No. 11-2075, 2013 U.S. Dist. LEXIS 107581 (D.D.C. July 31, 2013). The even lower debit-card fee limit that will result from this determination will make steering to debit-cards an even more attractive to merchants and place competitive pressures on the credit-card interchange fees of Visa and MasterCard in the future.

many in the Class leadership group in the aftermath of the passage of the Durbin Amendment, and had a significant effect on ongoing settlement strategy in light of the myriad of facts and legal issues involved in the case and settlement discussions around them. Among these was the growing awareness that Defendants would never agree to a significant reduction in credit-card interchange fees because of the strength of the defenses they had available to them in the litigation (including the evolving standards for class certification), and the recognition by all of the parties that a significant amount of time would pass before the banks would face tangible exposure to those claims. I also had been telling the class representatives for some time that, even if we were to prevail on our liability claims, a federal court was unlikely to mandate new lower rates, as rate-setting was beyond the power of a federal court. At most, a court could strike the default interchange rule, assuming the Court found insufficient offsetting pro-competitive reasons for the rule – a result that would be seriously challenged by defendants given the functionality of a four-party open network, the need to avoid any hold-up problem and adverse precedent.

18. Also informing our developing settlement strategy was the fact that the Antitrust Division of the Department of Justice had entered a consent judgment with Visa and MasterCard in October of 2010. The DOJ based its investigation exclusively on the discovery record developed in MDL 1720. While that consent judgment provided merchants with a strengthened ability to steer customers to low-cost payment alternatives through discounts and through other financial incentives, the DOJ in its case declined to challenge, and achieved no agreement modifying, the "no-surcharge"

rules, Honor-All-Cards rules, or default interchange rules maintained by Visa and MasterCard. The Settlement obtained here offers significant additional relief beyond what the DOJ achieved.

19. The mediation effort continued throughout 2011 while the parties were briefing and then arguing their respective summary judgment and *Daubert* motions. I am aware that many of the former class representatives and now Objecting Plaintiffs have claimed in declarations that they were not sufficiently apprised of mediation efforts during this period of time. While I regret that these former clients express that they wanted yet more communication, I do not believe that these claims are accurate. During 2011, I personally met with class representatives on January 5, March 18, April 28, May 26, November 10, and December 1-3. Most of these meetings were held in Washington, D.C. in order to minimize the burden of travel for clients based there. Other Class Counsel and I had dozens of individual and group telephone conversations with our class representatives that year, and many email communications, to discuss litigation strategy, ongoing issues relating to the Durbin Amendment implementation, constitutional challenges to the Durbin Amendment brought by TCF Financial (in which Class Counsel aided the DOJ in successfully defending against the challenge), and meetings with the DOJ to encourage stronger credit-card enforcement efforts in attacking the networks' "no-surcharge" rules beyond the discounting relief the DOJ achieved in the consent judgment of 2010. During these communications we also regularly discussed ongoing mediation efforts and settlement strategy in this case.

20. By the spring of 2011, the mediators were pushing each side in an effort to close the large gap that always had persisted between them. Indeed, this gap was never "closed;" but it was "bridged" late in the year with the presentation and ultimate acceptance of the mediators' proposals in late 2011 and early 2012. In the spring of 2011 and again in the fall of 2011, Class Counsel exchanged with the Defendants (through the mediators) outlines of the broad contours of a possible settlement. As noted earlier, Class Counsel always made clear to the mediators, the Defendants, and the class representatives that "outlines" of a possible settlement were only what Class Counsel were prepared to recommend, and were not "offers" to settle. These outlines of terms included terms relating to interchange rate reductions, changes to merchant anti-steering rules at the point of sale, network by-pass freedoms, minimum/maximum transaction caps on required acceptance of credit-card transactions, money damage demands and the like. As one might expect, the outlines of terms included more aggressive positions on settlement for the Class than ultimately were agreed to in the final settlement, including provisions that Objecting Plaintiffs now say are missing in the final settlement, causing it to be deficient in their view. And it may be true that certain of the class representatives would have preferred even more aggressive terms. It is important to note, however, the outlines of terms shared by Class Counsel were always expressly communicated as only broad terms that Class Counsel, in their duty to the Class, would be prepared to recommend as the framework for a potential settlement. The Class Counsel outlines of terms included terms that would never have been accepted by Defendants. Even more significantly, these outlines were a "last ditch"

effort to probe whether a settlement on reasonable terms could be achieved because it was perceived that the parties were on the brink of rulings on motions to dismiss, summary judgment motions and on our motion for class certification. Finally, and most significantly, Class Counsel understood that the mediators were very likely to deploy the strategy of issuing mediators' proposals in the second half of the year. This, in my judgment, required Class Counsel to make the best effort on behalf of the Class to advocate for perhaps less than desired, but realistic, relief so that the mediators, if they choose to prepare mediators' proposals, would craft a "bridge" (that could be accepted or declined) with terms as favorable to the Class as possible.

21. I had repeatedly told all of the class representatives that the goal of Class Counsel was to try to get the Defendants to make an offer to the Class that was as close as possible to what we believed was the Defendants' "bottom line," so that the Class could have the choice of whether or not to settle the case. I also repeatedly told the class representatives that Class Counsel would not make settlement offers to the Defendants, but rather would give Defendants only an indication of what Class Counsel would agree to recommend to the Class as a fair, reasonable and adequate settlement. Due to the wide disparity of views among the many class representatives regarding what they would consider as an adequate settlement, and the fact that those views changed over time, Class Counsel recognized that it would likely be impossible to get all, or perhaps even a majority, of the class representatives to agree to making a specific offer to the Defendants that was realistic.

22. In the late fall of 2011, the parties accepted the invitation of the mediators to hold a settlement conference with the involvement of the Court on December 2-3, 2011. This settlement conference was held pursuant to a stipulation entered by the parties over a year earlier, in May 2010, agreeing to allow the Court to participate in settlement discussions hosted by the mediators if the parties desired. All of the representative plaintiffs including those who are now objecting to this settlement agreed to this process.

23. On November 2, 2011 the parties argued their respective summary judgment and *Daubert* motions before the Court. This enabled the Court, the mediators, counsel, and the parties to have an informed view of the strengths and weaknesses of all parties' positions in the litigation. Prior to the December 2011 settlement conference, I met in Washington, D.C. on November 10 with many of the class representatives, including Objecting Plaintiffs, and had telephone conversations with others. I reported on the arguments referenced above and advised class representatives again as to the status of the mediation effort and the pendency of and preparation for the court-supervised settlement conference in which they would be involved. I discussed with them the comparative negotiating positions of the parties and reviewed the difficult choices with which the plaintiffs had to contend in order to provide maximum influence on mediators proposals that we believed would be issued after the early December settlement conference. I also shared with them the term sheets that had been exchanged and the settlement proposal statements that Class Counsel was submitting pursuant to the settlement conference. Some class representatives were concerned about

the positions taken, advocating for a stronger stance, others understood that the mediators proposals were, in all likelihood, certain to be issued and that the Class position had to be realistic, principled and positioned to maximize the chance of those mediators' proposals being more (rather than less) favorable to the Class based on the parties respective settlement stances to that point. On October 7, 2011, the Defendants sent a "draft" proposed settlement agreement to Class Counsel – a step that departed from what I understood the mediation process would be leading up to the settlement conference. This draft was an unacceptable recitation of Defendants' longstanding position on settlement, with nothing newly offered. We viewed it as solely a bargaining ploy by Defendants designed to influence the mediation process for tactical purposes. Since we knew that the class representatives were adamantly opposed to any settlement similar to the terms proposed, we did not immediately set up a meeting with the class representatives. Since we knew we would soon be meeting with the class representatives and be making contact with the Defendants at the settlement conference set for December 2 and 3, 2013, we thought it best for the Class to treat the Defendants' "offer" for what it was, "nothing new." We did not immediately provide this to the class representatives for that reason. In addition, Class Counsel was focused on how we could best position ourselves before the court and the mediators for the upcoming settlement conference and impending mediators' proposals.

24. On November 29, 2011, I sent a comprehensive memo to the class representatives describing where the parties stood in terms of settlement, the types of relief Class Counsel was advocating for both in terms of submissions to the Court and

to the mediators. On December 1, Class Counsel and the class representatives held a dinner meeting where we discussed settlement at length. On December 2-3, all of the parties, counsel, the class representatives, and business people from the Defendants participated in the settlement conference. Each constituency had an opportunity to speak with the mediators and the Court about their views about the case and any potential settlement. A second settlement conference was held on December 17, 2011, primarily focused, to my understanding, on disparate positions between some of the Defendants on their settlement positions. In the three weeks following the early December settlement conference, I had at least three (3) teleconferences with groups of class representatives (December 7, 14 and 19), primarily the trade associations, and we exchanged numerous documents setting forth position pieces for final submission to the mediators. Objecting Plaintiffs NACS, NRA and NGA were particularly involved, along with NACS's outside counsel, Doug Kantor, in providing language and suggestions relating to surcharging relief, the loosening of the all-outlets requirement and buying group language, among other desired terms to urge on the mediators.

25. On December 22, 2011, the mediators issued their mediation proposals – one relating to a settlement between the Class and the Visa Defendants and one relating to the MasterCard Defendants, both of which contained similar terms. The terms included specific language on relief from the "no-surcharge" rules (including a level playing field), other specific rule relief, a specific amount of monetary relief, and explicitly providing for a release on the broadest permissible terms. Each side had until January 13, 2012, to advise the mediators whether they "accepted" the proposals as the

basis for negotiating a final settlement agreement. The responses were to be conveyed confidentially to the mediators, who would only reveal the outcome if both sides agreed to go forward. The mediators' proposals were circulated to all of the class representatives immediately, followed by a meeting between Class Counsel and the class representatives to discuss the proposals on January4 and 5, 2012.

26. We did not achieve unanimity among the class representatives in early January, but a majority of them were in favor of accepting the mediators' proposals and going forward. The three Co-Lead Counsel law firms, and the two law firms who had served as Chairs of the Class' Steering Committee, all of whom were closely involved in all phases of the litigation and mediation, and who collectively and individually have decades of experience in antitrust class litigation and in the payment card industry, recommended acceptance of the mediators' proposals. Each firm's representatives carefully explained to the class representatives the reasons they had reached the judgment.

27. In addition to the January 4 and 5 meeting, Class Counsel prepared a detailed recommendation memo that was provided to the class representatives on January 9 and then conducted follow-up calls on January 12 and January 13. On January 10, the trade association class representatives (NACS, NATSO, NCPA, NGA and NRA) provided a responsive letter to Class Counsel that described the deficiencies in the mediators' proposals from their perspective. Their complaints were not so much about the rules reforms provided, such as the right to surcharge (which they acknowledged had value if even as a potential threat), but rather argued that the reforms did not go far

enough or had too many restrictive elements. After this vigorous exchange of ideas, and based on the sentiments shared, and the belief of Class Counsel and a majority of the class representatives that it was in the best interests of the Class to "accept" the proposals and to proceed with negotiations, Class Counsel accepted on behalf of the Class the mediators' proposals on January 13.[5] Defendants, likewise, agreed to accept the mediators' proposals and go forward with negotiations in an effort to reach a final settlement.

28. Because the Class Plaintiffs' initial acceptance of the mediators' proposals as a basis for negotiating a final agreement was not unanimous, the Defendants raised the question of who should properly participate in the negotiations. The same issue was raised with the mediators and, ultimately, the Court. The Defendants did not want dissenting class representatives to participate, yet the dissenters wished to continue to participate. The threshold question of who would be involved in negotiating a definitive agreement based on the accepted mediator proposals needed to be resolved before the parties undertook any detailed negotiations. Class Counsel had numerous phone calls with the potential dissenting representatives during January, and had an in-person meeting with some of these representatives and Professor Green in Washington D.C. on February 6, in an effort to resolve this issue. Ultimately, there was another settlement conference before the Court on February 10 to help further resolve the issue and provide clarity going forward. Unfortunately, I was unable to attend the

[5] Class Counsel accepted the mediators' proposals, despite some dissension among class representatives, under the authority of Pretrial Order No. 5 [Dkt. No. 279] and in recognition of their primary fiduciary responsibilities to the Class as a whole.

February 10, 2011 conference with the Court because I had recently undergone my third major back surgery since August 2009 and was unable to travel. However, my colleagues provided me with a full report on the conference.

29. As a result of the February 10 court conference, however, the Court instructed Class Counsel to advise the Court, by February 21, who among the class representatives would agree to proceed with negotiations based on the terms of the mediators' proposals and who, if any, declined to go forward. My co-counsel and I had continuing communications on this issue during this eleven-day period, including a call with the dissenting trade associations on February 14. On February 21, Class Counsel advised the Court that all 19 of the class representatives had "agreed" to the mediators' proposals and to proceed with negotiations based on them. Seven of the initially dissenting representatives (NACS, NATSO, NGA, D'Agostino's, Jetro, Coborn's, and Affiliated Foods) conveyed their acceptance via a letter to the Court, which stated in pertinent part: "After significant consideration, the undersigned class representatives have asked Class Counsel to continue to represent us and to negotiate toward a final settlement with the Defendants through the process laid out by the mediators and the Court in this matter. We are committed to participating in that negotiation process in our role as class representatives in good faith in the hopes that it will result in a final settlement that is in the best interests of the class as a whole."[6] These same class representatives, who are now Objecting Plaintiffs, now either outright claim in their

[6] That "process" it should be noted entailed negotiating a definitive settlement agreement based on the terms expressed in the mediators' proposals.

declarations that they never accepted the mediators' proposals or equivocate on the issue. Henry Ogden Armour (NACS) Stmt., ¶11, Dkt. No. 2561; Nicholas D'Agostino (D'Agostino's) Decl., ¶8, Dkt. No. 2449; Thomas Wenning (NGA) Decl., ¶¶7,10--11, Dkt. No. 2475; Lisa Mullings (NATSO) Decl., ¶6, Dkt. No. 2461; Duane Severson (Affiliated Foods) Decl., ¶7, Dkt. No. 2563; Richard Kirschner (Jetro) Decl., ¶6, Dkt. No. 2459; Chris Coborn (Coborn's) Decl. ¶¶10--11, Dkt. No. 2447.[7] They are either mincing words now, or they were then. The clear import of the temporary impasse in February 2012 was each representative had to decide whether it accepted going forward with negotiations based on the mediators' proposals or not. I believe that their communication to Class Counsel, the mediators and the Court make it clear that they elected to go forward within the framework of those terms, contrary to their present positions.

30. Once the "acceptance" issue was resolved, the parties proceeded in the lengthy process of negotiating the detailed terms of a settlement document in an effort to reach final agreement. This process spanned from late February 2012 until July 13, 2012, when the parties filed with the Court a Class Settlement Agreement (absent appendices) and Memorandum of Understanding, memorializing that an agreement had been reached subject to completion of appendices to form an integrated and definitive settlement agreement.

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[7] In the case of the National Restaurant Association, it conveyed to Class Counsel its unequivocal acceptance of the Mediators' Proposal by executing an explicit statement to that effect.

31. Further, evidencing the clear understanding that the "negotiation process laid out by the mediators and the Court" referred to the negotiation of a Definitive Settlement Agreement based on the terms of the mediators' proposals were the events which transpired subsequent to that communication. During the approximately 20 week period from late February to July 13, 2012, Class Counsel held several drafting sessions with Defendants and exchanged with them (and shared with all class representatives) numerous iterations of a draft settlement document. Class Counsel regularly shared our negotiation strategy and progress with the class representatives. For example, as early as February 23, 2012, I sent to class representatives for comment a draft settlement agreement that had been prepared by Class Counsel. We followed that up with a group teleconference with class representatives on February 27 and then held a mark-up session in the Washington D.C. offices of NACS's outside counsel, Doug Kantor, on February 29. As a part of this process, Mr. Kantor provided suggested language for the Class's draft agreement that was incorporated and exchanged with Defendants when the parties made a mutual exchange of drafts on March 2. When Class Counsel received Defendants' competing version of a draft settlement agreement, we provided it to the class representatives for comment and, in fact, received redline comments from several class representatives, including those who are now Objecting Plaintiffs. One such topic that Objecting Plaintiffs participated in negotiating and providing draft language for (typically through email communications) during March of 2012 was the "level playing field" provisions of the surcharging relief. Subsequently, Class Counsel relayed to the class representatives additional settlement drafts

throughout April, and provided them with memoranda updating the status of the negotiations on April 12 and April 30.

32. Aside from the many individual calls and emails, where Class Counsel and class representatives exchanged possible negotiating terms and ideas, my records show that we held conference calls with all of the class representatives who wished to participate to discuss the status of negotiations on February 23, April 4, April 13, April 17, May 4, May 18, June 5, June 6 and June 8. We also conducted in-person meetings to which all class representatives were invited (many attended in person, some attended by phone) on February 29, May 18, May 21 and June 19.

33. On June 20-21, all of the parties, including counsel and their representatives, participated in a two-day settlement conference with the mediators and the Court to attempt to hammer out the final and most difficult language issues remaining. Each of the class representatives, including those now objecting, had an opportunity to discuss issues with the Defendants, the mediators, and the Court. At the conclusion of that session, the parties jointly advised the Court that all of the major terms of the settlement had been agreed to, and much, but not all, of the minor verbiage was complete and expected to have a final settlement agreement and MOU to file by July 13. The Court issued a sealed Order on June 25 reflecting the fact that an agreement in principal had been achieved. This Order was unsealed on August 2, 2012. [Dkt. No. 1583.]

34. Significantly, most, if not all of the Objecting Plaintiffs were in attendance for all or part of the June 20-–21 settlement conference. The only class representative to show any significant level of consternation with the agreement on major terms was

NACS. None of the NACS representatives, Mr. Armour, Mr. Beckwith, or its outside counsel, Mr. Kantor, who were in attendance and participated in the negotiations, raised any objection to the Court at that time. However, before the parties filed the final Class Settlement Agreement and MOU with the Court on July 13, 2012, NACS wrote to Class Counsel on July 10 advising that it objected to the settlement and asked that its name be removed from any settlement documentation. NACS also advised us that it had hired Jeffrey Shinder and the law firm of Constantine Cannon to represent NACS in this matter.

35. With the benefit of hindsight, including NACS' public refutation of the agreement shortly before the agreement became public and NACS' concerted, well-timed and coordinated campaign to malign the agreement from the moment it was filed through the fairness period ending in May 2013, one could reasonably infer that NACS never intended to agree to any settlement on terms set forth in the mediators' proposals or to participate in the negotiation process with good faith adherence to the principals stated in those proposals. Several times, and particular after the session on June 20-21, other class representatives conveyed appreciation for Class Counsel's efforts and satisfaction with the terms, only to later object after being subjected to political pressures from fellow trade associations. For example, shortly before we concluded the June 21 session and acknowledged to the Court that an agreement in principle had been reached, Peter Larkin, the President of NGA, told me, "Good job! We're behind you all the way!" On Friday morning, July 27, 2012, Peter Larkin called me and said the NGA had now decided to oppose the settlement. He was apologetic, but said that he and his

members had received a lot of pressure from "Hank [Armour] and others." I told Mr. Larkin that this was a serious step, but that if NGA was determined to oppose the Settlement, he would need to obtain other counsel. He replied that he would check again with his Board about their decision and get back to me. Mr. Larkin called me later that day and told me that NGA was definitely going to oppose the Settlement. Later that day, NGA announced publicly that it opposed the settlement and also that it had retained the Constantine Cannon firm to represent it. Other Washington-based merchant trade groups, including class representatives NATSO, NCPA, and NRA, soon followed and came out in opposition to the settlement in a movement that seemed to be focused not so much on the merits of the settlement as on Washington political pressure and the perceived need to maintain an unyielding lobbying position against the networks on Capitol Hill. I have been told by several knowledgeable people that the trade associations' decisions to now oppose the settlement were driven by their government relations/lobbying staff, and not by their lawyers.

36. The point of my statements, here, is not that approval of the settlement of a class action is subject to some kind of vote – for surely Class Counsel has a duty to pursue the best interests of the Class as whole. Nor am I suggesting that a party was not entitled to change its mind -- for principled reasons -- before the final Definitive Settlement Agreement was executed and presented to the Court for approval. This recounting does, however, reflect on some of the Objecting Plaintiffs' current claims that their concerns were ignored, that they were excluded from the process and they were not adequately advised. And it explains the depth of their knowledge of ongoing

events during the process of reaching the primary terms of the agreement, to which they now so vehemently object.

37. Other examples abound. For example, many of the Objecting Plaintiffs now say that they never received a copy of the final Class Settlement Agreement and MOU before it was publicly filed. Wenning Decl., ¶12; Armor Stmt., ¶17; Hoey Decl., ¶18, Mullings Decl. ¶11; D'Agostino Decl., ¶11; and Coborn Decl., ¶12.This claim is not accurate. Class Counsel provided a near to final draft on July 11 and provided the final Class Settlement Agreement and MOU (when all final verbiage was resolved) at mid-day on July 13, 2012, before it was filed. *See* Wildfang E-mail communication of July11, 2012 and Wildfang E-mail communication of July13, 2012, attached as Exhibits 1 and 2.

38. Some Objecting plaintiffs claim they were unaware of the specific terms of the settlement and, in particular, the release language before it was publicly filed. As I have described above, this is not true. In addition, weeks earlier Class Counsel had been advising the class representatives about the progress of negotiations on all major aspects of a settlement. On May 30, 2012, my co-counsel Bonny Sweeney sent to all of the class representatives a draft of the settlement agreement that melded the parties' competing drafts that had been exchanged up to that point. That draft included the release language that contains many of the elements that Objecting Plaintiffs complain about now. NACS's outside counsel, Mr. Kantor, provided comments to the draft on May 31, before it was shared with Defendants. In addition, on June 8, 2012, Class Counsel provided all class representatives a memorandum summarizing an attorney-only mediation session held in San Francisco on June 1. On June 25, I circulated to all of

the class representatives a memorandum describing in detail the major issues that were resolved at the court sponsored settlement conference four days earlier. After additional drafting sessions among counsel, I circulated another memo to the class representatives on July 3 summarizing the current settlement drafts and describing in significant detail the elements of the surcharge relief (including brand and product level surcharging), the fact that store-by-store surcharge testing would be permissible, the language on buying group relief, the contours of the release language and "open issues" yet to be resolved. Then, after further negotiations, I sent to the class representatives the near-to-final redline draft of the settlement agreement on July 11, referenced above.

39. Some of the Objecting Plaintiffs now imply that those class representatives who did not abandon the process, and went forward and accepted and signed the Settlement Agreement, did so only on a promise by Class Counsel that they would receive rich incentive awards. They imply that coercion occurred because Class Counsel told the Objecting Plaintiffs that they would not seek any incentive awards for them in the motion for preliminary approval and plan of allocation. This claim is false. At no time did I or, to my knowledge, did any other Class Counsel attempt to entice a Class Representative's assent to the Settlement with the promise of an incentive award or the threat of opposing such an award. When Objecting Plaintiffs asked me if they would receive an incentive award as a Class Representative, I did advise them that if they were not proponents of the settlement who offered it for approval to the Court, and in fact were adverse to its approval, that Class Counsel did not believe it would be proper for Class Counsel to seek incentive awards on their behalf in the event that the settlement

was approved and such awards were granted by the Court. Moreover, the Objecting Plaintiffs, once they made their decision to reject the Settlement, had already hired Constantine Cannon to represent them and we withdrew from our representation. I was very clear with these former clients that, while I would not seek an incentive award for them, their new counsel could do so. To the best of my knowledge Objecting Plaintiff's' new counsel has not sought such an award. I continue to believe if Objecting Plaintiffs wish to seek from the Court incentive awards for their litigation efforts, they are free to do so.

B. MDL 1720 has resulted in greater reforms to the payment-card industry than did *In re VisaCheck*.

40. In my view, consideration of the relief obtained in the previously approved *In re VisaCheck* case to that obtained in the present case is relevant to the issue of approval because both cases involved the same industry and many of the same competitive issues and the same legal standard. I believe that, while the injunctive relief obtained in *In re Visa Check* (elimination of the tie between credit and debit) represented a positive reform, it is also my belief that by any objective measurement, the relief afforded merchants as a result of the MDL 1720 Settlement is, for the reasons discussed at length in our briefs, broader and promises to have an even more significant impact on the competitiveness of these markets. Against this backdrop, the vehemence and rhetoric of the opposition to this Settlement advanced by the objectors and their counsel who were proponents of the *In re Visa Check* settlement, in my view, fundamentally lacks credibility.

41. The changes to the payment card industry resulting from *In re VisaCheck* were summarized by this Court on its December 19, 2003 decision approving the settlement in that case. *In re Visa Check/Master Money Antitrust Litig.*, 297 F. Supp. 2d 503 (E.D.N.Y. 2003). That relief included the modification of the Visa and MasterCard "Honor All Cards" rules to eliminate the "tie" between the associations' debit and credit merchant acceptance services (while retaining the honor-all-cards for all credit cards); the creation of visual identifiers so that merchants could more easily distinguish between debit and credit cards; the temporary (five months) reduction of interchange fees on debit cards; other injunctive relief relating to merchant signage, etc. Other than this relief, the Visa and MasterCard payment card networks were *unchanged* as a result of the *In re VisaCheck* case. This included the continuing ownership and control of both networks by banks and no change to the no-surcharge rule.[8] In addition, Visa and MasterCard agreed to pay the merchants $3.2 billion, but spread over 10 years.

42. In contrast, the changes to the Visa and MasterCard networks brought by MDL 1720 have more fundamentally changed the payment card industry and have brought more equilibrium to the opposing forces of the networks/banks and the merchants. The biggest change was the banks' divestiture of their ownership of both Visa and MasterCard. Indeed, the discovery record developed by the Class Counsel revealed that it was the legal threat posed to the banks by MDL 1720 (generated by the fact that Class Counsel had sued the banks in addition to Visa and MasterCard) that caused the banks reluctantly to conclude that they must sell to public shareholders the

[8] Class Counsel in *VisaCheck* did not sue any of the banks.

majority of their ownership interests in both networks. See ¶¶ 33-40. Had divestiture not occurred by Defendants' own accord in an effort to avoid "ruinous liability," it would have been MDL 1720 Class Counsels' first requested element of injunctive relief if we prevailed at trial, even though it would have been difficult to achieve because divestiture is viewed as the "nuclear option" in antitrust cases.[9]

43. In addition to this important and fundamental change, Class Counsels' prosecution of MDL 1720 lead directly to the decision by the DOJ to commence an action challenging some of the same Visa and MasterCard rules that Class Counsel were challenging in MDL 1720. Based almost entirely on the record compiled by Class Counsel at their own expense, the entirety of which was provided free of charge to the DOJ, the United States convinced Visa and MasterCard to enter into a consent judgment by which both networks abandoned their rules that prevented merchants from disclosing hidden fees and using discounts to steer card holders to less expensive forms of payment. The DOJ action rectified some of the anticompetitive rules which we had challenged in MDL 1720 and is consistent, albeit less extensive, with the relief we have obtained here.

44. Then in 2010, in part due to the notoriety that MDL 1720 and the record it developed in it brought to Visa and MasterCard's rules and conduct, and in part due to strategic decisions made by merchant trade associations, at the urging and with the assistance of Class Counsel, the merchant community was able to persuade the

[9] Even in *United States v. Microsoft Corp.*, the largest civil antitrust case in the last 30 years, the Department of Justice did not obtain divestiture as part of the remedy. *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. 2001).

Congress to regulate debit interchange fees. That regulation is already saving merchants more than $6 billion per year. It also provides a lower cost payment method to which merchants can steer transactions with their newly-acquired right under the Settlement to surcharge credit-card transactions. This promises to save merchants even more in debit and credit interchange fees the coming years.[10]

45. Then in 2012, Class Counsel negotiated this Settlement, which provides even further and additional relief as summarized in Class Plaintiffs' submissions to the Court in April 2013 and now in support of final approval of this Settlement.

46. Ten years ago, at the urging of the Constantine Cannon law firm and merchant class representatives (some of whom now object to this settlement), this Court properly found that the settlement in *In re VisaCheck* met the standard for approval under Rule 23, Fed. R. Civ. P. *In re Visa Check*, 297 F. Supp. 2d at 507. This Court's decision was affirmed on appeal. *Wal-Mart Stores v. Visa U.S.A., Inc.*, 396 F.3d 96 (2d Cir.); *cert.* denied, 544 U.S. 1044 (2005). Because the MDL 1720 Settlement now before the Court plainly provides even more extensive relief than the settlement in *In re VisaCheck*, it follows that this Settlement also meets the standards for final approval under Rule 23.

47. The merits of the current proposed settlement must be weighed on their own terms. It is enlightening, however, to compare what Constantine Cannon and its

[10] See discussion *infra* at ¶¶ 73-75, regarding the recent favorable decision in the challenge to the rules adopted by the Federal Reserve Board to implement the Durbin Amendment. The Durbin rules will likely be modified to provide even greater savings to merchants.

clients[11] in *In re VisaCheck* had to say about that settlement with what they now say about this Settlement.

48. One unambiguous characterization of the *In re VisaCheck* settlement is the subtitle Lloyd Constantine chose for the book he wrote about that case "Priceless." The subtitle was: "The case that brought down the Visa/MasterCard bank cartel." Mr. Constantine's view was that the settlement in *In re VisaCheck*, *i.e.* the "untying" of debit and credit card acceptance decisions by merchants, would remedy *all* of the competitive problems in the payment card industry. He declared that no additional relief was necessary.

49. In his book Mr. Constantine described the competitive problems:

> "This was a case against Visa and MasterCard, which is a cartel of 8,000 banks. Visa and MasterCard are owned by the same banks, they're members of the same banks, and they do the same thing. And that's what this case was about.
>
> They imposed their regime of price-fixing and restraint of trade on merchants in America. They were forcing merchants in the United States to take debit card transactions at credit card prices, they were denying merchants freedom of choice, and that imposed billions of dollars in extra costs on merchants every year. All those costs were passed along to consumers in the form of higher prices."

50. Mr. Constantine's opinion was that *his* settlement would completely solve the competitive problems in the payment card industry. In a press conference held the day the settlement was announced, Mr. Constantine told the reporters:

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[11] The objections of the other objectors, in the main, parrot the objections raised by Constantine Cannon on behalf of Objecting Plaintiffs.

> Beginning today that is going to end almost immediately. … Beginning in 2004 – on January 1, 2004, merchants in the U.S. will have a right they never had before which is to freely accept certain Visa and MasterCard products or not, based upon their quality and based upon their price. They just never had that opportunity before. *And for the first time, they will have the opportunity to purchase the use of those services in a free and open market.*

"Priceless" at p. 210 (emphasis added).

As late as 2009, when his book was published, Mr. Constantine continued to proclaim that the *VisaCheck* settlement in 2003 was all the "reform" the payment card industry needed. In 2009, he denigrated the MDL 1720 cases as essentially unnecessary.[12]

51. This background is relevant to assess the credibility of the campaign of opposition now led by the same counsel, and their largest merchant client Wal-Mart — the lead class representative which urged approval of *In re VisaCheck*. If the *In re VisaCheck* settlement solved all of the competitive problems posed by Visa and MasterCard in 2003, and if in 2009 the MDL 1720 cases were unnecessary and only driven by greedy lawyers with uncommitted clients, how is it that by July 2012 this settlement, which achieves far greater reform, is not in the best interests of the Class? There is simply no way to reconcile the statements of the Constantine law firm regarding the *In re VisaCheck* settlement and the vehement attacks on the Settlement of MDL 1720.

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[12] *See Priceless* at p. 240, "In the wake of the Merchants' Settlement, well over a hundred new class actions were filed, driven by lawyers attempting to hit it big, as they thought we had. And while none of these cases seems to have either the legal talent, the client commitment, or the other attributes that formed the basis of our victory, the amount of money claimed in those cases, still pending against Visa and MasterCard, is in the hundreds of billions of dollars."

C. The objectors' complaints lack merit and are greatly exaggerated.

1. The settlement does not confer antitrust immunity to Defendants.

52. Many of the Objectors complain that the release is overbroad, and would release a vast variety of future conduct from challenge by merchants. They argue that the Settlement has bestowed upon Visa and MasterCard perpetual antitrust immunity. It was the intention of Class Counsel in the negotiation of the settlement agreement to release only those claims that were alleged or could have been alleged in MDL 1720 or which were based on the same set of facts as the asserted claims. For the reasons discussed in Class Plaintiffs Reply Memorandum in Support of Final Approval, this argument is not supported by the text of the releases or by the applicable case law. Moreover, even if the releases cover a particular set of conduct that occurs in the future, *e.g.* the continuation and adherence to the default interchange rule, that conduct is not immune from antitrust challenge. Each of the 50 state attorneys general, as well as every consumer in United States, has standing under Section 16 of the Clayton Act, 15 U.S.C. Section 26 (2012), to bring an action for injunctive relief against threatened harm. Thus, every natural person who is not a class member still has standing in his or her individual capacity under the antitrust laws to challenge any conduct of Visa and MasterCard and the banks regardless of the scope of the release in the settlement. Moreover, as the parties to the Settlement have made clear, the releases do not bar any antitrust claims of competitors, but only bar claims of businesses in their capacity as merchants [cite to Notice]. Thus, any competitor, or potential competitor, that has antitrust claims based upon the conduct of any of the defendants may sue *both* for

damages and injunctive relief. In addition, under the laws of 21 states indirect purchasers have standing to seek damages for antitrust violations such as those alleged in Class Plaintiffs' complaints. In addition, the DOJ Antitrust Division has shown an interest in payment-card networks going back almost 40 years, and is capable of enforcing the United States antitrust laws. Contrary to the impression that many objectors seek to leave with this Court, there is no risk that a future antitrust violation by Visa or MasterCard, even if based on the identical factual predicate of MDL 1720, will go unchallenged due to the scope of the release in this case. Class Counsel is not aware of any injunctive-relief suit directed at Visa's Fixed Acquirer Network Fee.

2. The objectors ignore the risk of going forward with litigation.

53. Several of the objectors denigrate the risk faced by the Class in pursuing this case to a trial and subsequent appeals. I discussed the risks faced by the Class in my initial declaration dated April 11, 2013, so I will only briefly further address it here. Among the many serious risks faced by the Class in this case is the threat that the litigation Class will not be certified in the District Court, or could not be maintained on appeal. Practitioners and commentators recognize that the case law for proponents of class certification has become more challenging over the last few years since this case was originally filed.[13] Indeed, even before the most recent round of adverse decisions by the United States Supreme Court, counsel for objecting plaintiffs Mr. Shinder stated

[13] *See e.g.*, "Class-Action Lawyers Face Triple Threat at Supreme Court," *Forbes*, October 1, 2012. www.forbes.com/sites/danielfisher/2012/10/01/class-action-lawyers-face-triple-threat-at-supreme-court/

publicly that he did not think that the Class in MDL 1720 could be certified.[14] In the same public statement, Mr. Shinder opined that the corporate restructurings of Visa and MasterCard, culminating in their respective IPOs, would make it more difficult for the Class in MDL 1720 to prevail.[15] Thus, the assertion that the Class faced little risk in proceeding with the litigation is simply not true.

3. Many objectors seemingly would prefer the status quo.

54. Many of the objectors appear to be of the view that the continuation of the litigation in MDL 1720 will provide them a superior opportunity to challenge any new anticompetitive conduct by Visa, MasterCard or the banks in the near future. This view is based largely on the objectors misreading and misunderstanding of the terms of the releases. The threat raised by objectors is a the hypothetical scenario in which Visa and MasterCard engage new anticompetitive conduct, for example, by extending their respective honor-all-cards rules to erect entry barriers to new technology. If MDL 1720 were ongoing and not settled, an antitrust claim based on that conduct would likely end up in this Court as part of MDL 1720. The new anticompetitive conduct would then become co-mingled with the existing claims and swallowed up by the enormous record of MDL 1720. This would likely also result in a further delay of the trial in MDL 1720, as

[14] Panel Discussion II: Consumer Issues at 13 (Fordham Univ. School of Law 2008), Marth Decl. Ex. C.

[15] Ironically, one of Objecting Plaintiffs' criticisms is that the Class should never have released through the Settlement claims arising from the Network IPOs without conducting discovery into those restructurings after they were completed. Obj. Pls.' Br. at 44. Contrary to Objecting Plaintiffs' speculation, Class Counsel took extensive discovery regarding the networks' IPOs, including three years of post-IPO document discovery of MasterCard, Rule 30(b)(6) depositions of both networks regarding the restructurings and the processes leading up to them, and supplemental discovery of the networks aimed at discovering communications between the networks and banks after the IPOs.

new discovery would have to be taken. It easily could be another five to eight years before the Class is able to obtain a final judgment.

55. On the other hand, if the claims of MDL 1720 are settled now, then the new anticompetitive extension of the honor all cards rule can be examined separately from all of the prior anticompetitive conduct, which makes it more likely that this more isolated new conduct can be shown to have anticompetitive effects.

56. Most experienced antitrust lawyers would recognize that if a principal fear is the future extension of Visa and MasterCard market power to new products or new technologies, being able to bring those claims separately, and not as part of MDL 1720, would be a superior alternative.

D. The prospective relief is very valuable to merchants and is more than sufficient to warrant final approval.

1. The ability to surcharge is very valuable to merchants.

57. The objectors' claim that the settlement surcharge relief is not valuable is supported principally by the opinion of Prof. Hausman. Prof. Hausman's opinion is decisively refuted by the Reply Declaration of Dr. Frankel. In addition, the Expert Report of Prof. Joseph Stiglitz offered by Individual Plaintiffs during the course of litigation, winner of the Nobel Prize for Economics, persuasively demonstrates that the principal competitive problem is the Visa and MasterCard payment card networks are their respective "no surcharge" rules, or what Prof. Stiglitz calls the "no price" rules. *See* Expert Report of Joseph Stiglitz dated July 2, 2009 at ¶¶ 22-24; 39-50.

58. The surcharging freedoms brought by this Settlement modifies Visa's and MasterCard's surcharge rules to allow merchants to surcharge at the network level or the card product level, subject to generous surcharge caps that will ensure that merchants can recover the full cost of acceptance. These freedoms apply to traditional plastic cards or new payment devices, which prevents the networks from evolving away from these settlement reforms. The surcharge reforms also will help to incite an acceptance battle among networks to capture merchants who may otherwise disfavor a brand or card, and isolate other networks who choose to maintain non-discrimination rules over their merchants (such as American Express), thereby putting downward pressure on interchange rates over time for all networks, as we have seen from the experience in Australia.

59. Moreover, the surcharge freedoms brought by this Settlement will benefit consumers, who under the pre-settlement regime were *all* effectively surcharged because interchange fees were not transparent to them and merchants could not send the necessary price signals to customers about the cost of their payment choice. Now, if merchants deploy surcharging, or the freedoms to discount, consumers can make a payment method choice that matches an outcome they individually may prefer; *i.e.*, paying more for goods or services with a rewards card if those rewards are important to them, or paying less for those same goods and services if card perks are not attractive or useful to them.

60. The record before the Court, persuasively shows that the elimination of the Visa and MasterCard "no surcharge" rules will have significantly beneficial effects for merchants.

2. The ability for merchants to negotiate jointly is valuable to merchants.

61. Similarly, the ability of merchants to form buying groups to negotiate more advantageous terms, which is enabled by the Settlement, promises to provide substantial benefits to merchants. In other industries, buying groups have been shown to provide significantly lower prices to buyers. I understand from my interactions with clients and leaders in the merchant community that, before this settlement, it was the practice of Visa and MasterCard not to negotiate with groups of merchants. One of the principal objections of the National Retail Federation is that, historically, Visa and MasterCard refused to negotiate with groups of merchants. National Retail Federation, Obj. at 6, Dkt. No. 2538. As was pointed out in Class Plaintiffs' Memorandum in Support of Motion for Final Approval (at p. 30) the Settlement *requires* Visa and MasterCard to negotiate *in good faith* with merchant buying groups for the purpose of reaching commercially reasonable agreements. If Visa and MasterCard fail to negotiate in good faith, merchants have recourse to this Court. Def. Class Settlement Agree., ¶43, ¶56.

3. The guaranteed preservation of the relief obtained by the Department of Justice is valuable to merchants.

62. Some Objectors have argued that Class Plaintiffs overstate their case for settlement approval by taking credit for "locking in" the steering freedoms (via discounting for less expensive forms of payments) obtained by the DOJ with the Class's assistance. These same Objectors denigrate the future applicability of the release provisions because the future is "uncertain." Uncertainty, which is ever present in any decision to settle a dispute, is precisely why the settlement provision that guarantees the freedom to steer through discounting is valuable to merchants. As described in Class Plaintiffs' Reply Memorandum, political changes in Washington D.C. can bring policy and litigation-strategy shifts at the DOJ Antitrust Division. The Settlement inoculates the Class from any such departure by the government. The same protection applies equally to the Durbin Amendment reforms "locked in" by the Settlement, which would disappear if Congress were to repeal the Durbin Amendment.

4. The Settlement provision which permits separate acceptance-decisions for merchants operating under different banners or multiple outlets is valuable.

63. The Settlement allows multi-outlet merchants to experiment with strategies – such as surcharging or exclusive acceptance of a brand – before deciding whether to use them within all store locations or all banners. This is precisely the type of flexibility that will allow merchants to deploy strategies to meet competition, apply downward pressure on interchange fees and lower their cost of credit-card acceptance. Before the litigation and the resulting Settlement, merchants faced an "all-or-nothing"

proposition for credit card acceptance. The Settlement will now allow a luxury brand merchant that also owns a discount brand outlet to deploy different card-acceptance strategies. A multi-location grocer may be able to surcharge in one location but determine that it is unable to do so in another location which is also occupied by large competitors who choose not to surcharge. These are the kinds of competitive tools that will help shift the balance of power over card-acceptance pricing from the networks to the merchants over time.

E. Several objectors had prior opportunities in previous litigations against Visa and MasterCard to obtain the relief they now claim is necessary, but failed to do so.

64. As one of the Co-Lead Counsel in MDL-1720 who has battled for eight years to bring meaningful relief for merchants that will allow them to now use strong steering methods to send price signals to consumers and apply downward pressure on acceptance costs that have historically been hidden behind Visa's and MasterCard's anti-steering rules, it is frustrating to see the objections of certain large and powerful merchants who have been involved in previous litigations against these networks and have failed to secure more than a fraction of the relief secured in this Settlement – but now object vehemently that the reforms are deficient. These merchants include Wal-Mart and the National Retail Federation, who were named class representatives in *In re VisaCheck*. Neither insisted in that prior case that the settlement eliminate the honor all cards rule in its entirety or eliminate the default interchange rule. Similarly, The Home Depot voluntarily abandoned in its own litigation the reforms to the Visa and

MasterCard rules it now says are imperative. The Home Depot was an opt-out plaintiff in the *In re VisaCheck* litigation and amended its complaint in March 2004 to challenge the setting by Visa and MasterCard of credit card default interchange fees as horizontal price-fixing. In that sense, its claims were as broad as this Class' claims in MDL 1720. However in late 2004, The Home Depot settled its case against Visa and MasterCard, without obtaining any of the reforms it now says it needed.

III. Developments since the Class filed its motion for final approval provide further support for final approval of the settlement.

A. Introduction

65. When the Class filed its Memorandum in Support of Class Plaintiffs' Motion for Final Approval of Settlement, and supporting materials, on April 11, 2013, the legal and factual record supporting the final approval of the Settlement was overwhelming. Since that date developments the legal, regulatory and legislative environment provide even more support for a finding that the Settlement is "fair, reasonable and adequate."

B. Litigation challenging state statutes that limit merchant surcharging.

66. Many objectors argue that the elimination of the Visa and MasterCard no-surcharge rule required by the Settlement will provide little or no relief for merchants due to the existence in 12 states of statutes that purport to prohibit surcharging. Obj. Pl. Br. at 48-49. However, it is unclear if those statutes actually prohibit surcharging or, if they do, whether they are constitutional under the First Amendment. In June, 2013,

litigation was commenced in the United States District Court for the Southern District of New York by plaintiff merchants against the Attorney General of New York alleging that New York statute regulating merchant surcharging of credit-card transactions was, inter alia, a violation of the merchants' First Amendment Rights. Marth Decl. Ex. V. At a pretrial conference held on June 14, 2013, the Attorney General informed the court, through Assistant Attorney General, Garrett Coyle, that the New York Attorney General interprets the statute as only prohibiting *undisclosed* surcharges.[16]

67. Subsequently, the Attorney General re-affirmed this construction of the New York statute in a memorandum of law in support of his motion to dismiss the complaint. ("The State also has a strong interest in facilitating dual pricing so as not to insulate credit card companies from competition. … [U]nder the attorney general's interpretation, the statute is well-tailored to both purposes. Sellers are liable under the statute only when they fail to disclose the credit card price with equal prominence as the cash price, thus protecting credit card users from an unpleasant surprise at the point of sale. … And sellers are free to impose dual pricing schemes under the statute, regardless of the label they use to characterize it."). Marth Decl. Ex. L at 25.

68. A hearing was held on plaintiffs' motion for a preliminary injunction on Wednesday, August 14, 2013. Judge Rakoff indicated that he would decide the motion

[16] ("…the way our office interprets the statute is that it doesn't – we are going after merchants who entice consumers to commence an economic transaction by advertising one price and then, once they arrive at the register, informing them when they pull out their credit card that they are going to be subject to a surcharge above and beyond that. So long as the two prices – the credit card price and cash price – are displayed with equal prominence, our office doesn't think that violates the statute.") Marth Decl. Ex. K at 5-6.

by September. If there is a ruling by Judge Rakoff before the fairness hearing on September 12, we will provide an update for the Court.

69. Regardless of whether the plaintiffs prevail on their motion, the interpretation of the New York statute by the Attorney General is highly significant, in that it would permit merchant surcharging in New York just as merchants may surcharge in states without such statutes. And since New York's law is virtually indistinguishable from most laws in other states that purport to prohibit surcharging, there is every reason to believe attorneys general or courts in the other states with similar statutes will adopt similar limiting constructions of these statutes.

C. The failure of legislation in many states seeking to prohibit credit-card surcharges.

70. The Objecting Plaintiffs and Objectors also argue that, since the time this Settlement was preliminarily approved, legislation has been introduced in a number of state legislatures that would purport to prohibit merchant surcharging on credit cards, and that these bills further undermine the value of the relief.[17] Mr. Shinder described in detail the bills that had been introduced in the various states, but neglected to describe the fate of those bills.

71. As described in the Declaration of H. Theodore Grindal, (Ex. 5 to Class Pltfs. Reply Brief) these proposed bills met with very little success. Of 23 states in which such proposed legislation was introduced, in only two (2) states were new laws enacted - Utah and Mississippi - and in both cases the laws were quite limited. In Utah, the

[17] Obj. Pls.' Br. at 48-49; Shinder Decl. ¶¶ 4-30.

statute purports to prohibit surcharging (using language similar to the New York statute) but it automatically *sunsets* in July 2014, less than 12 months from now. In Mississippi, the statute applies *only* to state-issued credit cards, an obviously tiny fraction of the market. Grindal Decl. at ¶¶ 4, 23, 34. In 10 of the 23 states, the legislatures had concluded their 2013 legislative sessions before the date Mr. Shinder submitted his declaration, which is a fact that he omitted to provide the Court. Since the date of Mr. Shinder's declaration, an additional six (6) state legislatures have concluded their 2013 sessions. *Id.* at ¶31. Thus, in 16 of the 23 state legislatures in which anti-surcharging legislation was introduced, the bills failed to be enacted. *Id.* at ¶30. And in the five (5) remaining states in which bills were introduced and which remain in session in 2013, only in New Jersey has there been any serious legislative progress, but it has still failed to pass.

72. The scenario painted by Mr. Shinder in his declaration, positing an avalanche of new statutes prohibiting merchant surcharging all over the country, has not come to pass. And even if a few additional states were to enact such legislation, since all are similar to the New York statute, they would suffer from the same constitutional and/or interpretation infirmities as does the New York statute.

D. The successful challenge to the FRB's rules implementing the Durbin Amendment.

73. The Durbin Amendment ("Durbin Amendment") to the Dodd-Frank Consumer Protection and Wall Street Reform Act of 2010 ("Dodd-Frank") required the Federal Reserve Board ("FRB") to adopt rules setting forth standards by which the debit

interchange fees of debit card-issuing banks could be measured against this statutory limit contained in the statute.[18] After the FRB proposed rules setting the limit at approximately 12 cents per transaction there was an outcry from the banks, whose revenue streams were reduced. In response, the FRB modified the final rule such that the limit was approximately 24 cents per transaction.[19]

74. In response to the publication of the final rule, a group of merchants sued the FRB, alleging that the FRB's rule failed to comply with the Durbin Amendment. On July 31, 2013 Judge Richard Leon of the U.S. District Court for the District of Columbia granted the merchants' motion for summary judgment and held that the FRB's debit-card rulemaking failed to comply with the statute.[20] The effect of this ruling is that the FRB will need to modify its rules to comply with the statutes, which will likely result in the new limit on debit-interchange fees being closer to the originally proposed 12 cents per transaction.

75. This recent development is important and relevant to the Court's consideration of the Settlement because the lower the debit interchange fees are, the greater the economic value to merchants of employing steering strategies like discounting and surcharging. This makes the elimination of the no-surcharge rules provided for in the Settlement even more valuable to merchants.

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[18] 15 U.S.C. §1693o-2(a)(2) (requiring that the interchange fee charged by debit-card issuing banks be "reasonable and proportional to the cost incurred by the issuer with respect to the transaction).

[19] 12 C.F.R. §235.3(b).

[20] *NACS v. Bd. of Governors of the Fed. Reserve Sys.*, Civ. No. 11-2075, 2013 U.S. Dist. LEXIS 107581 (D.D.C. July 31, 2013).

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

Dated: August 16, 2013

ROBINS, KAPLAN, MILLER & CIRESI L.L.P

K. Craig Wildfang

84114646.1

EXHIBIT 1

Ries, Ronnie J.

From:	Ries, Ronnie J. on behalf of Wildfang, K. C.
Sent:	Wednesday, July 11, 2012 1:56 PM
To:	David Balto; Edward Hall; Hartley, Jason; 'Howard Jaffe'; 'Michael Boni'; Michael M. Buchman; 'Persky, Bernard'; 'Vincent Archer'; Brian Emmert (bemmert@jetrord.com); Carl Berman (Carl@ScanMyPhotos.com); Chris Coborn (chris.coborn@cobornsinc.com); Dave Schermerhorn (daves@ncga.coop); Duane Severson (dseverson@afmidwest.com); Jennifer Mallon (Jennifer.mallon@ncpanet.org); Kirschner, Richard; Lisa Mullings (lmullings@natso.com); Malcolm McDonald (malcolm.mcdonald@chsinc.com); Martin Arter (marter@afmidwest.com); Michael Schumann (mike@traditions.com); Mitchell Goldstone (Mitchgoldstone@gmail.com); Nicholas D'Agostino III (nick3rd@dagnyc.com); Pamela Hayes (phayes@natso.com); Peter Kilgore (pkilgore@restaurant.org); plarkin@nationalgrocers.org; Robynn Shrader; Saul Winsten (swinsten@afmidwest.com); Thomas Wenning (twenning@nationalgrocers.org)
Cc:	Bonny Sweeney; Dennis Stewart (dennis@hulettharper.com); Gary Friedman (gfriedman@flgllp.com); Joseph Goldberg; Laddie Montague; Lueck, Martin R.; Marth, Ryan W.; Merrill Davidoff; Michael Kane; Patrick Coughlin (patc@rgrdlaw.com); Undlin, Thomas J.; Wildfang, K. C.; Ries, Ronnie J.
Subject:	MDL 1720 Memorandum of Understanding - HIGHLY CONFIDENTIAL / ATTORNEY-CLIENT PRIVILEGE
Attachments:	2012-07-11 settlement redline_(EAST_57654540_1).PDF; 2012-07-11 settlement clean_(EAST_57654532_1).DOCX

HIGHLY CONFIDENTIAL
SUBJECT TO ATTORNEY/CLIENT PRIVILEGE – DO NOT FORWARD

All: We just got this revised draft Settlement Agreement from the Defendants. As indicated in the note from Bob Mason, counsel for Visa, the Defendants' counsel have not yet reviewed this. Obviously, neither have Class counsel. This is the product of two days of discussions with the Defendants, but we have found in the past that there revised drafts are not always faithful to what we thought had been agreed upon in discussions. So we will need to review this carefully. we hope to send around a revised draft of the Memorandum of Understanding yet today, as well.

K. Craig Wildfang
Robins, Kaplan, Miller & Ciresi L.L.P.
800 LaSalle Avenue | 2800 LaSalle Plaza | Minneapolis, MN 55402
Direct: 612.349.8554 | Fax: 612.339.4181
kcwildfang@rkmc.com | www.rkmc.com

EXHIBIT 2

Ries, Ronnie J.

From:	Ries, Ronnie J. on behalf of Wildfang, K. C.
Sent:	Friday, July 13, 2012 12:56 PM
To:	David Balto; Edward Hall; Hartley, Jason; 'Howard Jaffe'; 'Michael Boni'; Michael M. Buchman; 'Persky, Bernard'; 'Vincent Archer'; Brian Emmert (bemmert@jetrord.com); Carl Berman (Carl@ScanMyPhotos.com); Chris Coborn (chris.coborn@cobornsinc.com); Dave Schermerhorn (daves@ncga.coop); Duane Severson (dseverson@afmidwest.com); Jennifer Mallon (Jennifer.mallon@ncpanet.org); Kirschner, Richard; Lisa Mullings (lmullings@natso.com); Malcolm McDonald (malcolm.mcdonald@chsinc.com); Martin Arter (marter@afmidwest.com); Michael Schumann (mike@traditions.com); Mitchell Goldstone (Mitchgoldstone@gmail.com); Nicholas D'Agostino III (nick3rd@dagnyc.com); Pamela Hayes (phayes@natso.com); Peter Kilgore (pkilgore@restaurant.org); plarkin@nationalgrocers.org; Robynn Shrader; Saul Winsten (swinsten@afmidwest.com); Thomas Wenning (twenning@nationalgrocers.org)
Cc:	Bonny Sweeney; Dennis Stewart (dennis@hulettharper.com); Gary Friedman (gfriedman@flgllp.com); Joseph Goldberg; Laddie Montague; Lueck, Martin R.; Marth, Ryan W.; Merrill Davidoff; Michael Kane; Patrick Coughlin (patc@rgrdlaw.com); Undlin, Thomas J.; Wildfang, K. C.
Subject:	FINAL MOU and Settlement Agreement to be filed today.
Attachments:	FINAL MOU - HIGHLY CONFIDENTIAL!!.pdf; class settlement agreement HIGHLY CONFIDENTIAL!.PDF

HIGHLY CONFIDENTIAL – DO NOT FORWARD, DISTRIBUTE OR DISSEMINATE

Attached please the Final (unsigned) MOU and Settlement Agreement which will be filed late this afternoon. THESE DOCUMENTS ARE NOT YET PUBLIC. We will notify all of you as soon as it has been filed. Until then, under no circumstances should this information be discussed outside your own organizations.

K. Craig Wildfang
Robins, Kaplan, Miller & Ciresi L.L.P.
800 LaSalle Avenue | 2800 LaSalle Plaza | Minneapolis, MN 55402
Direct: 612.349.8264 | Fax: 612.339.4181
rjries@rkmc.com | www.rkmc.com