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

1:05-cv-03800	1:05-cv-05081
1:05-cv-03924	1:05-cv-05082
1:05-cv-04194	1:05-cv-05083
1:05-cv-04520	1:05-cv-05153
1:05-cv-04521	1:05-cv-05207
1:05-cv-04728	1:05-cv-05319
1:05-cv-04974	1:05-cv-05866
1:05-cv-04974	1:05-cv-05868
1:05-cv-05069	1:05-cv-05869
1:05-cv-05070	1:05-cv-05870
1:05-cv-05071	1:05-cv-05871
1:05-cv-05072	1:05-cv-05878
1:05-cv-05073	1:05-cv-05879
1:05-cv-05074	1:05-cv-05880
1:05-cv-05075	1:05-cv-05881
1:05-cv-05076	1:05-cv-05882
1:05-cv-05077	1:05-cv-05883
1:05-cv-05080	1:05-cv-05885

FIRST AMENDED SUPPLEMENTAL CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

I.

PREAMBLE

1. Plaintiffs' allegations in this First Amended Supplemental Class Action Complaint ("Amended Supplemental Complaint") are directed at the conduct of MasterCard and its Member Banks in events leading up to and culminating in its Initial Public Offering ("IPO") on May 25, 2006. Plaintiffs bring claims under the antitrust laws and for fraudulent conveyance.

2. The MasterCard Member Banks that controlled MasterCard (hereinafter "Member Banks") transformed MasterCard from a privately held stock company—owned and governed

completely by the Member Banks ("Old MasterCard")—to a publicly held corporation ("New MasterCard"). Contemporaneous documents generated by MasterCard, the Member Banks, their consultants, and their co-conspirators attest that this restructuring was an attempt to avoid the application of the U.S. antitrust laws to the anticompetitive Interchange Fee setting conduct of MasterCard and its Member Banks, which they knew and were advised by their lawyers was unlawful. (*See, e.g.*, Selander Exhs. 28424, 28426; Heuer Exh. 21863; Murphy Exhs. 21864, 21866, 21867, 21897.) Despite the attempts by MasterCard and its Member Banks to change their appearance, their intention was always to continue establishing and collecting Interchange Fees on behalf of the Issuing Banks in exactly the same fashion as they had done before the IPO. (Selander Exhs. 28404, 28424; Murphy Exhs. 21880, 21882; Heuer Dep. at 39:22-41:11.)

3. Before MasterCard's IPO, and continuing today, MasterCard transferred money in the form of Interchange Fees from Merchants to Issuing Banks. MasterCard itself describes interchange as "wealth redistribution" from Merchants to the Issuing Banks. (Selander Exh. 28410.) MasterCard's largest Issuing Bank, Citigroup, views interchange as "the fuel of the system." (Massingale Exh. 26272.) That view has persisted after the IPO. On December 18, 2006, MasterCard executive Deborah Doyle likened interchange to a drug for the Issuing Banks: "It's kind of like opium to a drugee: this interchange gets dicer [sic] and dicer [sic] the higher it gets," and "Interchange is a little scary with our degree of dependence on it. And we haven't even cleared house yet from the last set of lawsuits." (Garabedian Exh. 34033A.)

4. From MasterCard's inception until its IPO, representatives of the Member Banks—the financial institutions that owned MasterCard and governed it by electing and serving on its Board of Directors—determined uniform schedules of default Interchange Fees for MasterCard transactions. Ownership of MasterCard by horizontal competitors, and vesting those

competitors with the authority to set rules and prices for the enterprise, led the U.S. Department of Justice and even MasterCard's counsel to describe it as a "walking" or "structural" conspiracy. (Murphy Dep. 72:11-74:19; Selander Exh. 28409; Heuer Exh. 27068.) With respect to interchange, this arrangement exposed MasterCard and its Member Banks to Section 1 claims for price fixing, since competitors were literally meeting (at Board meetings) and deciding how much money they should receive from Merchants.

5. MasterCard management and the Board initiated an attempt at damage control in late 2003 and early 2004 during what it termed a "strategic review," in which MasterCard management and the Board candidly admitted that MasterCard was a "business model and structure under global assault" and in its then current form was "untenable" for MasterCard as a franchise. (Selander Exh. 28424.) During this time period, MasterCard's own consultants put the loss of interchange revenue at over $100 billion and MasterCard's potential damages from litigation at $200 billion. (Selander Exhs. 28418, 28419.) MasterCard believed that antitrust claims posed a serious threat to its survival as well as a significant and material threat to its Member Banks. (Heuer Exh. 27058.) In an attempt to save MasterCard from what one Director called a litigation "tsunami," MasterCard considered a new business model ("NBM" or New Business Model") [redacted]. (Murphy Exh. 21866; Heuer Exh. 27071.) Under the NBM, [redacted]. (Heuer Exh. 27071.) Ultimately, the MasterCard Board voted against implementing the NBM. (Selander Exh. 28426.) Recently, however, MasterCard introduced a [redacted] new acquirer fee in an attempt to evade the European Commission's ruling that its cross-border Interchange Fees violated E.C. law. (Heuer Exh.

27073; Merchants Group Says MasterCard is Dodging European Ruling, *Cardline*, 10/2/08; *see also* European Commission, Commission Decision Relating to a Proceeding Under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, MasterCard Europe S.p.r.l. (COMP/34.579) (hereinafter "E.C. Decision").)

6. During the 2004 strategy review, MasterCard also considered adopting a true bilateral system wherein MasterCard did not require the application of its default schedule of Interchange Fees, but rejected that business model in part because bilateral agreements could lead to the disintermediation of MasterCard from the four-party system. (Friedman Exhs. 24378, 24379, 24380.)

7. MasterCard attempted to transform itself from a "structural conspiracy" that violated U.S. antitrust laws to a public company with a majority of the equity in the hands of non-bank shareholders and a majority of independent directors. MasterCard's management and Board, acting on behalf of the Member Banks, engaged in a series of sales and acquisitions of assets, equity shares, and voting rights, which are described at length below. Ultimately the Member Banks retained the ability to protect what they believed to be their important interests, including ensuring that New MasterCard would continue in its role of mandating the "wealth distribution" of funds from Merchants to Issuing Banks through the Interchange Fee or some other means, while preventing the takeover of New MasterCard by a less bank-friendly entity. (Murphy Exh. 21910.) These changes took effect with the IPO. (Murphy Exhs. 21912, 21913, 21914.)

8. To the extent MasterCard is now considered to be a single entity, rather than an association of its Member Banks, it serves in the role of a third party who has been appointed by the Issuing Banks to set uniform schedules of default Interchange Fees for them. New

MasterCard 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 MasterCard. New MasterCard 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 MasterCard cannot cease imposing Interchange Fees without gaining the assent of the banks. New MasterCard's continuing practice of requiring the payment of an Interchange Fee and establishing default levels of those fees is challenged in Part Five of the Second Consolidated Amended Class Action Complaint.

9. Moreover, MasterCard management and its Member Banks, in the process of going public, attempted to shift liability for antitrust damages resulting from their past conduct, which MasterCard estimated at $15 billion annually (net present value of $150 billion), to the shareholders of New MasterCard. (Selander Exhs. 28413, 28417, 28418, 28419.) As part of the Restructuring, Old MasterCard and its Board of Directors accomplished this by giving up the right to assess the Member Banks in the event of an extraordinary legal event. (Murphy Exhs. 21882, 21883). The agreement between MasterCard and its Member Banks to give up the special assessment right was not supported by adequate consideration and was a fraudulent conveyance under New York law.

10. As is more fully described below in Part VIII.F., the MasterCard restructuring has harmed, or threatens to harm, competition in the Relevant Markets. Prior to the Restructuring, the Member Banks, which owned and controlled MasterCard, understood and acknowledged that by adopting the anticompetitive rules and restraints challenged in Class Plaintiffs' Second Amended Class Action Complaint, they and MasterCard were a "structural conspiracy" that was

violating Section 1 of the Sherman Act every day they continued to do business in that form while enforcing the challenged rules and restraints. After considering whether they should modify their conduct to conform to Section 1 of the Sherman Act, however, the Member Banks and MasterCard decided instead to adopt the Restructuring in an attempt to evade the proscriptions of the U.S. antitrust laws. They did so by implementing the Restructuring, but only after having set MasterCard on a business strategy 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 MasterCard. Those choices were further constrained by the Ownership and Control Restrictions, by which the Member Banks kept effective control over New MasterCard. The result is that New MasterCard, while nominally an "independent" entity, is a firm with substantial market power that has continued, at the instance of the Member Banks, to enforce unchanged all of the rules and restraints of Old MasterCard, and has continued to raise Interchange Fees charged to Merchants. Since 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.

11. 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 MasterCard International Incorporated ("MasterCard"), and the other Defendants named in this Complaint ("Bank Defendants") (collectively referred to as "Defendants") as follows:

II.

INTRODUCTION

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

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

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

15. Together, the Merchant Plaintiffs and the Trade-Association Plaintiffs (hereinafter "Plaintiffs") represent two classes of millions of Merchants that accept MasterCard and Visa Credit, Offline Debit Cards, and 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.

16. The acquisitions and agreements alleged herein are illegal under Section 7 of the Clayton Act, 15 U.S.C. § 18.

17. 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.

18. The agreement between Old MasterCard, the Bank Defendants, and MasterCard's other Member Banks whereby New MasterCard released its right of special assessment of its Member Banks was made with intent to defraud creditors of New MasterCard, including Plaintiffs and members of the Classes, and without adequate consideration. Accordingly, the release is unlawful as a fraudulent conveyance under N.Y. Debt. & Cred. Law §§ 275, 276 (2008).

III.

JURISDICTION AND VENUE

19. This Amended Supplemental 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.

20. This Court has original jurisdiction over Plaintiffs' state-law claims under 28 U.S.C. § 1332. The aggregate amount in controversy for this class action exceeds $5,000,000 and less than one-third of all class members reside in New York. This Court has supplemental jurisdiction over the state-law claims pursuant to 28 U.S.C. § 1367.

21. 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 MasterCard, including many of the banks named as Defendants, issue MasterCard Credit Cards and Debit Cards and/or acquire retail Merchant transactions for MasterCard 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

22. As used in this Amended Supplemental Complaint, the following terms are defined as:

a. "Agreements" means the contracts, agreements, and mutual understandings by, between and among MasterCard, the members of its Board of Directors, and its Member Banks, relating in any way to the proposed Initial Public Offering described in the Forms S-1, prospectus, and other filings made by MasterCard with the United States Securities and Exchange Commission.

b. Allegations referring simply to "MasterCard" generally refer to business practices that began before the Restructuring and have continued beyond that date.

c. "New MasterCard" means the corporate entity that emerged when the Restructuring was completed after May 25, 2006. Allegations relating to this entity generally refer to it as "New MasterCard."

d. "Old MasterCard" means the entities known as MasterCard Incorporated and MasterCard International Incorporated as they existed prior to MasterCard's May 25, 2006 IPO. Allegations relating to this entity generally refer to it as "Old MasterCard."

e. "Ownership and Control Restrictions" means those portions of the Agreements disclosed in the Forms S-1 and other filings made by MasterCard with the United States Securities and Exchange Commission, and such other contracts, agreements, and mutual understandings by, between, and among MasterCard, the members of its Board of Directors, and its Member Banks, which purport to limit the percentage of shares in the New MasterCard that any shareholder may own or control, and the limitations upon the free exercise of the business judgment of the Board of Directors of the New MasterCard, including the limitations imposed by the grant of certain veto powers to the holders of the Class M shares in the New MasterCard and the ongoing business relationships between New MasterCard and its Member Banks.

f. "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, MasterCard General Purpose Card Network Services, and MasterCard Offline-Debit Card Network Services.

g. "Restructuring" means the series of agreements and transactions entered into by Old MasterCard and its Member Banks, the goal of which was to transform MasterCard from a "structural conspiracy" to a "single entity," whose Interchange-Fee-setting activity Defendants hoped would be outside the reach of Section 1 of the Sherman Act. The agreements and transactions that are part of the Restructuring are the purported delegation of Interchange-Fee-setting authority from MasterCard's Board of Directors to management, the consideration of alternative business models for MasterCard, the MasterCard IPO that began on May 25, 2006, and the "Ownership and Control Restrictions" defined herein.

V.

THE PARTIES

23. 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"); Capital One Bank, (USA), N.A.,; Capital One F.S.B., Capital One Financial Corporation (collectively "Capital One"), 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"); Citibank (South Dakota), N.A.; Citibank N.A.; Citigroup, Inc.; Citicorp (collectively "Citigroup"); HSBC Finance Corporation; HSBC Bank USA, N.A.; HSBC North American Holdings, Inc.; HSBC Holdings, plc; and HSBC Bank, plc (collectively "HSBC"), are Member

Banks of the MasterCard Network. The Bank Defendants are actual or potential competitors for the issuance of Payment Cards and acquisition of Merchant transactions. All of the Bank Defendants belong to the MasterCard Networks and have conspired with each other and with MasterCard to establish uniform schedules of default Interchange Fees that are imposed on Merchants. Many of the Bank Defendants are, or were during the relevant period, represented on the MasterCard Board of Directors at the times when the Board took the actions described in the Second Consolidated Amended Class Action Complaint, and entered into the IPO and other related agreements described in this Amended 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.

24. The Bank Defendants are therefore directly responsible for the Restructuring and the Agreements of MasterCard that are described herein as well as the fraudulent conveyance of MasterCard's right to assess its members for losses such as those flowing from this lawsuit. Collectively, the Bank Defendants, through their operation of MasterCard, adopted and approved the above-mentioned Agreements and have significantly benefited from them.

VI.

CO-CONSPIRATORS

25. In addition to the parties named as Defendants, the co-conspirators in the anticompetitive and fraudulent conduct alleged herein include the following: (i) Goldman Sachs, MasterCard's advisor and chief underwriter for the IPO (Murphy Exh. 21919); (ii) Houlihan Lokey Howard & Zukin ("Houlihan Lokey"), an investment banking firm that provided MasterCard with a capital adequacy opinion in connection with the IPO (*Id.*); (iii) Boston Consulting Group, Inc. ("BCG"), MasterCard's consultant for its 2004 strategy review (Selander

Exh. 28422); (iv) senior MasterCard executives from November 18, 2004 through the completion of the IPO: Chief Executive Officer Robert W. Selander, General Counsel Noah J. Hanft, Chief Financial Officer Chris McWilton, and Chief Risk Officer Christopher D. Thom; and (v) Members of MasterCard International Inc.'s Board of Directors from November 18, 2004 through the consummation of the IPO, including the banks they represented on the Board. The members of the Board (and the name of their affiliated bank or financial institution) include: Baldomero Falcones Jaquotot (Banco Santander Central Hispano), Donald L. Boudreau (formerly of Chase), Norman C. McLuskie (Royal Bank of Scotland Group), "Dato" Tan Teong Hean (Southern Bank Berhad), Michael T. Pratt (Westpac Banking Corporation), Robert B. Willumstad (formerly of Citigroup), William F. Aldinger (formerly of HSBC), Silvio Barzi (Unicredito Italiano), Richard D. Fairbank (Capital One), Iwao Iijima (Orient Corporation), Augusto M. Escalante (Banco Nacional de Mexico, S.A.), Robert W. Pearce (Bank of Montreal), Jac Verhaegen (formerly of Rabobank), Lance L. Weaver (MBNA), Michel Lucas (Banque Federative du Credit Mutuel), Siddharth N. Mehta (HSBC), and Bernd M. Fieseler (Deutscher Sparkassen- und Giroverband).

VII.

TRADE AND INTERSTATE COMMERCE

26. The trade and interstate commerce relevant to this action is General Purpose Card Network Services and Offline Debit Card Network Services.

27. 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 and Offline Debit Card Network Services in a continuous and uninterrupted flow of interstate commerce.

28. 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. MasterCard Evolves From A Regional Banking Association Into An Association Of Over 20,000 Banks With Market Power In The Relevant Markets.

29. MasterCard operates an international payment card network whose members include banks, regional-banking associations, and other financial institutions. The MasterCard Network was established by its members to develop, promote, and operate a national Credit Card network in the United States.

30. MasterCard is the successor to Master Charge, which was created in 1967 when the Interbank Card Association ("ICA") of New York banks merged with the Western States Bankcard Association.

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

32. As its Payment-Card Network was being established, MasterCard's predecessor entities had to incent consumers and Merchants, respectively, to carry and accept MasterCard-branded Payment Cards. To overcome this "chicken-and-egg" problem, the predecessors of MasterCard 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.

33. Over the years, MasterCard and its Member Banks have attempted to justify this transfer payment—the Interchange Fee—in various ways.

34. One of the early rationalizations for Interchange Fees was that the fees were necessary to "balance" the costs in the system between Issuing and Acquiring Banks. Although the Interchange Fee revenue is not allocated by Issuing Banks to any specific costs, Interchange Fees in the early days of the MasterCard Network were said to be based on costs of Member Banks that issued Payment-Cards, and MasterCard retained a consultant, Edgar, Dunn & Co., to perform cost studies that were designed to rationalize the Interchange Fee.

35. In addition, MasterCard and its Member Banks could have argued that their collective setting of a default schedule of uniform Interchange Fees did not impose significant harm on competition in the early years of the network's existence because MasterCard did not yet have market power and MasterCard transactions constituted a relatively small share of all payments.

36. 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.

37. Since the time that Interchange Fees were devised, MasterCard and its Member Banks have also acquired market power in the Relevant Markets described herein. MasterCard'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 many foreign jurisdictions.

38. Since its early days, MasterCard has experienced substantial growth, now with over 23,000 Member Banks worldwide. During 2006, there were more than 360 million MasterCard-branded Payment Cards in circulation in the United States.

39. MasterCard has long since abandoned any claim that its Interchange Fees are cost based. Rather, MasterCard now establishes numerous categories of Interchange Fees that correspond to its estimates of the elasticity of demand (*i.e.*, those Merchants' ability to refuse to accept MasterCard-branded Payment Cards) of various categories of Merchants. As Carl Munson, Associate General Counsel of MasterCard, admitted in 2007 in testimony before the European Commission, MasterCard's cost studies attempt to answer the following question: "How high could interchange fees go before we would start having serious 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.

40. 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 not necessary to the efficient functioning of the MasterCard Payment Card Network.

41. Old MasterCard acknowledged in internal documents that Interchange Fees are no longer necessary. An April 7, 2004 MasterCard presentation regarding the proposed MasterCard "New Business Model," discussed at length below, admits that a "[j]ustification of interchange model is no longer needed," and that "it is being eroded in any event." (McWilton Exh. 24616.)

42. Despite the lack of any justification for their continued existence, collectively-set uniform schedules of default Interchange Fees remain a part of the MasterCard payment system, and those Fees continue to escalate.

43. Even after the early "justifications" for Interchange Fees were abandoned or discredited, Old MasterCard's Member Banks, acting through MasterCard's Board of Directors until July 2004, and then through delegating power to management, continued to establish

uniform schedules of default Interchange Fees, which MasterCard's rules required to be applied to all MasterCard transactions in the absence of bilateral agreements. Even after the Restructuring, New MasterCard and the Bank Defendants agree to abide by and enforce these rules. Moreover, since the mid-1990s, MasterCard's "effective interchange rate"—the weighted average Interchange Fees paid on all MasterCard transactions—has consistently increased.

44. While MasterCard's uniform schedules of default Interchange Fees have remained in existence and even increased, Payment-Card networks in other highly developed countries were established, succeeded, and grew 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 such networks 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. Furthermore, 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.

45. MasterCard's collectively-set, uniform schedules of default Interchange Fees persist because Interchange Fees became a large source of revenues for the banks that issued MasterCard-branded Payment Cards and encouraged and subsidized risky lending practices and inefficient marketing programs. As MasterCard acquired and enhanced its market power, it and

its Member Banks were able to establish supracompetitive levels of default Interchange Fees for MasterCard transactions. MasterCard's Issuing Banks profited from their and MasterCard's collective conduct by sharing in the supracompetitive Interchange Fees, which could not have existed without the anticompetitive actions described in this Amended Supplemental Complaint and the Second Consolidated Amended Class Action Complaint.

46. Most Member Banks, including all of the Issuing Banks, were also shareholders in Old MasterCard, with certain rights. These rights included the right to receive dividends and to vote for a Board of Directors that then set uniform schedules of default Interchange Fees for all MasterCard-branded transactions. In July 2004, the Member Bank-controlled Board of Directors of Old MasterCard delegated the authority to set Interchange Fees to management. MasterCard Chief Operating Officer Alan Heuer exercised this authority in the United States until his retirement in January 2009, when MasterCard executive Walt Macnee assumed those duties. (Heuer Dep. 19:18-20:11.)

47. Prior to the Restructuring, the Bank Defendants and the other Old MasterCard Member Banks, acting through the Old MasterCard Board of Directors, collectively adopted, abided by, and enforced rules that require the payment of an Interchange Fee, set at MasterCard's uniform levels, for all transactions conducted with MasterCard-branded Payment Cards. Even after the Restructuring, the Bank Defendants continue to abide by these rules, some of which are set forth below.

48. Prior to the Restructuring, Article IV-1 of Old MasterCard's Bylaws required that each Director "be an officer of a member institution of MasterCard International Incorporated or an individual otherwise uniquely qualified to provide guidance as to the Corporation's affairs."

49. Even after the Restructuring, MasterCard International Inc., New MasterCard's principal operating subsidiary, remains a membership organization. (Murphy Dep. 588:6-590:5.)

50. Rule 9.1 of Old MasterCard's Bylaws and Rules required Merchants that accept MasterCard-branded Payment Cards to "honor all valid MasterCard cards without discrimination when properly presented for payment." New MasterCard and its Member Banks continue to enforce this rule.

51. Rule 10.4 of Old MasterCard's Bylaws and Rules required the payment of MasterCard's uniform schedule of default Interchange Fees on all MasterCard transactions. New MasterCard and its Member Banks continue to enforce this rule.

52. MasterCard saw so little change in its process that Rule 10.5, which stated that "[t]he interchange fee applied to intracountry transactions is called an intracountry interchange fee and shall be the fee agreed to by members doing business within the country," was still published on the MasterCard website in May 2008, long after the Restructuring was accomplished. This Rule was removed only after Plaintiffs pointed out the Rule's continued publication. Moreover, as of October 2008, New MasterCard's Rule 9.5 states that if New MasterCard does not establish default Interchange Fees for a particular country, default intracountry Interchange Fees in that country would be established "by agreement of Member [Banks] in the country as set forth in Rule 9.5.1" or through "application of intraregional interchange and service fees to Intracountry Transactions and intracountry cash disbursements as set forth in Rule 9.5.2."

53. By enacting and enforcing the "Honor All Cards" and Interchange Fee payment rules noted above, Defendants have created a situation in which the payment of an Interchange Fee is required on all transactions, regardless of the Issuing Bank. Moreover, every Issuing Bank

is guaranteed to receive Interchange Fees according to New MasterCard's uniform schedule of default fees, and every Issuing Bank knows that other Issuing Banks are guaranteed Interchange Fees based on the same schedule. MasterCard and Visa 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 Payment Cards issued by it and can get paid for these transactions only by the 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 Issuing Bank would like, knowing that the Honor All Cards rule prevents the Merchant from refusing that transaction. Defendants refer to this phenomenon as the "hold up problem."

54. But for the rules described in this section, Merchants would have the option to reject a given MasterCard 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-Discount Fee.

55. Before the Restructuring, MasterCard 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* MasterCard Op. R. 9.12.) 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.

56. The No-Surcharge Rule is reflected in the rules and Merchant agreements of MasterCard and its Member Banks. Old MasterCard's Bylaw 9.8 and Operating Rule 9.1.2 mandate that Merchant agreements require Merchants to abide by their respective operating regulations, which include the Anti-Steering restraints. New MasterCard has maintained the No-Surcharge Rule, the Anti-Steering Restraints, and the Miscellaneous Exclusionary Restraints even after the restructuring.

57. 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 MasterCard Member Service Provider Rules Manual, published April 2005, likewise admonishes Merchants that they "must not directly or indirectly require any MasterCard cardholder to pay a surcharge" (§ 9.12.2).

58. Accordingly, a Credit or Debit Card Network that imposes lower Merchant-Discount Fees than the Defendants will not be able to make inroads on the monopoly position of MasterCard. 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.

59. In fact, MasterCard admitted in a submission to the Reserve Bank of Australia that surcharging can reduce or restrain the level of 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. (Aug. 31, 2007.)

60. 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. Therefore, in the absence of the Anti-Steering Restraints, Defendants' Interchange Fees would be lower.

61. Finally, there is simply 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 Defendant Networks, and have profound anticompetitive effects.

62. Old MasterCard's and its Member Banks' practice of collectively adopting rules that require 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 MasterCard'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 MasterCard's and the banks' practices. New MasterCard has continued these practices essentially unchanged.

B. MasterCard and Bank Defendants' Ability to Impose Supracompetitive Interchange Fees is Threatened by Courts and Regulatory Bodies Concluding That They are a "Structural Conspiracy."

63. Old MasterCard and its Member Banks abused their collaborative structure in the past.

64. In 1998, the Antitrust Division of the U.S. 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 violated the antitrust laws, and that decision was affirmed by 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), cert. denied, 125 S.Ct. 45 (2004). 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.

65. 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.

66. 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*. (emphasis added).

67. On appeal, MasterCard and Visa claimed 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.

68. That same year, this Court granted partial summary-judgment 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 did 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. Unbeknownst to the Merchants, however, Visa and MasterCard, and their Member Banks, conspired to increase Interchange Fees on credit card transactions at the same time.

69. In March 2004, the opt-out plaintiffs in the *Visa Check* action amended their complaints against Visa and MasterCard to include claims relating to the price fixing of Interchange Fees.

70. Beyond the domestic threats to MasterCard's anticompetitive collaboration with its Member Banks, competition and regulatory authorities in many 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.

71. For example, the European Commission ("E.C.") ruled on December 19, 2007 that MasterCard's cross-border Interchange Fee violates Article 81(1) of the E.C. Treaty, its counterpart to Section 1 of the Sherman Act.

72. In its 241-page decision, the E.C. rejected each of the arguments that Defendants have attempted to make in this litigation, including that MasterCard's restructuring absolved them of continuing Section 1 liability (E.C. Decision at 102-106), that the relevant product market is broader than Payment Cards (E.C. Decision at 77-90), 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-party Payment Card Network (E.C. Decision at 203-204).

73. In its decision, the E.C. ordered MasterCard 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. MasterCard complied with the E.C Order and since June 21, 2008 has not collected Interchange Fees on cross-border transactions in the E.C. *See* European Commission, Commission Memo of June 12, 2008: Commission notes

MasterCard's decision to temporarily repeal its cross-border Multilateral Interchange Fees within the EEA (MEMO/08/397).

74. 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. *See* Decision of the Office of Fair Trading of September 5, 2008: Investigation of the multilateral interchange fees provided for in the UK domestic rules of MasterCard UK Members Forum Limited (formerly known as MasterCard/Europay UK Limited) (No. CA98/05/05) ("U.K. OFT Decision").

75. Recently, however, MasterCard introduced a new acquirer fee in an attempt to evade the European Commission's ruling that its cross-border Interchange Fees violated E.C. law. (Heuer Exh. 27073; Merchants Group Says MasterCard is Dodging European Ruling, *Cardline*, 10/2/08.

76. In addition to finding that MasterCard had market power in the relevant markets for Payment-Card issuance, acquiring and a "wholesale" market (U.K. OFT Decision at 50-52), 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 (U.K. OFT Decision at 209-211). Two of the costs found by the OFT to be "extraneous," the cost of "rewards" and the cost of the interest-free "float" period, are often used by Defendants as examples of costs that justify the imposition of uniform schedules of Interchange Fees on Merchants. (U.K. OFT Decision at 209-211).

77. The Reserve Bank of Australia ("RBA") has also extensively investigated its domestic Payment Card industry. In August 2002, as a result of that investigation, the RBA

ordered Visa and MasterCard to reduce the weighted average of domestic Interchange Fees by 40 percent, from an average of 95 basis points (.95%) before the reforms to approximately 55-60 basis points. Reserve Bank of Australia, Reform of Credit Card Schemes in Australia IV, Final Reforms and Regulation Impact Statement (August 2002). In 2006, the RBA further reduced the weighted average of Interchange Fees to 50 basis points.

C. MasterCard Concedes That it is a Structural Conspiracy and Explores Options to Continue While Avoiding Antitrust Liability.

78. After the *Visa Check* settlement and the Second Circuit decision affirming the judgment in *United States v. Visa*, MasterCard executives and its legal department realized that MasterCard had been adjudicated a "structural conspiracy." (Murphy Dep. 72:4-8.)

79. On July 13, 2003, approximately one month after the *Visa Check* settlement, MasterCard formed a task force to review its governance and business practices in order to, in the words of Christopher Thom, formerly its Chief Risk Officer, "mitigate existing and potential legal and regulatory risks and manage reputational concerns." (Hanft Exh. 28200.)

80. In a September 12, 2003 "Business Update" to Standard & Poor's, CEO Robert Selander reviewed the legal and regulatory challenges directed at MasterCard and concluded that "they represent a threat to the business model." (Selander Exh. 28407.)

81. Similarly, in a November 2003 presentation to the Board of Directors, COO Alan Heuer reported that "[r]ecent rulings question interchange legality," as MasterCard was under "increased regulatory scrutiny occurring in several markets, with litigation pending in [the United States]." Mr. Heuer concluded that interchange was under a "serious threat in several key geographic markets," including the U.S. (Heuer Exh. 27058.)

82. MasterCard CEO Robert Selander, articulated the fundamental challenges and significant antitrust liability facing MasterCard due to its ownership and governance structure in his remarks at a MasterCard marketing meeting in December 2003:

> When I look at our organization in the current legal/regulatory environment, the analogy I use is the python that ate the pig.
>
> We're the python, by the way. And we're slowly digesting the pig—and it will have a definite impact on our business.
>
> But we ARE in control. We HAVE to be in control. In fact, I would argue that our current situation is in large part because we HAVEN'T been in control.
>
> For example, many of the ongoing legal and regulatory issues we're dealing with are legacies of things that generally were done by our customers.
>
> We were cited in the Wal-Mart litigation, even though we weren't an economic participant in the interchange.
>
> We've been cited by the Reserve Bank of Australia, even though we didn't determine or set the interchange rate. That was done by the local members.
>
> Same thing with OFT in the United Kingdom and the European commission on interchange. Again, we're cited because of our structure and who we are, not because of our having any particular economic involvement in these transactions.
>
> * * *
>
> I think we have to acknowledge that given our size and scope, the challenge is going to be with us from now on. We're talking about a fundamental repositioning of the company from a legal and regulatory standpoint—in effect, reversing the pendulum . . . so that we're initiating more, and reacting less . . . and that CAN'T be done in a single step . . . or a single year.
>
> It means more than building the walls a little higher, and boiling a little more oil, *to keep the barbarians at bay. That's, at best, a short-term solution.* Over time, we want the barbarians to go attack OTHER people's business, and leave ours alone. We want to reposition ourselves so some of the inherent things that we have aren't as interesting, or attractive, for regulators or others to come after.
>
> By this time next year, I want to be able to look back and say, the pig may still be working its way through the python . . . but at least we know we're not going to have to swallow anything else like this, because we've done the

> necessary things from a structural or ownership or governance or whatever standpoint, so that we don't carry inherent exposures.

(Selander Exh. 28409) (capitals in original; italics added). The references to "our customers" above is MasterCard parlance for its Member Banks.

83. Thus, MasterCard management recognized that interchange was threatened by legal and regulatory challenges and concluded that the "inevitable" result of these challenges was that Interchange Fees would decrease. CRO Chris Thom made comments to this effect at a December 8, 2003 meeting of MasterCard executives. (Thom Exh. 25135.)

84. MasterCard's conclusion that antitrust enforcement would "inevitably" cause Interchange Fees to drop demonstrates the downward pressure that the prospect of antitrust enforcement has on Interchange Fees.

85. At the direction of the Member Banks represented on the Old MasterCard Board of Directors, Mr. Selander and his management team undertook a top-to-bottom strategy review to react to the antitrust and regulatory threat aimed at its governance and ownership structures. In the first half of 2004, MasterCard's Executive Management Group—a collection of high-level MasterCard executives—worked with consultant BCG to develop and analyze alternative business models. MasterCard phrased its investigation of alternative business models as a quest to "protect system value," which in plain English meant to protect the ability of MasterCard and its Member Banks to transfer funds from Merchants to Issuing Banks, whether as Interchange Fees or fees under another name. The team of employees assigned to "protect system value" came up with what they described as the "New Business Model." (Selander Exh. 28410; Hanft Exh. 28201; McWilton Exh. 24616; Hanft Exh. 28204.)

86. An early New Business Model document entitled "Getting in the Game . . ." contemplated eliminating interchange and [redacted]

. In this document MasterCard described interchange as “wealth redistribution to issuers,” “always in cash and uniform in amount and timing,” and Merchants as “reluctant participants.” (Selander Exh. 28410.)

87. Under the New Business Model, fees imposed on Merchants would not necessarily decrease.

.

88. MasterCard projected that its revenue under the New Business Model would

. (Garabidien Dep. Exhs. 34022A, 34026A.)

89. An example of how the New Business Model was intended to replace the Interchange Fee under a new name appears in a document entitled “Eliminate Interchange Exploration.” [redacted]. Not surprisingly, the document states that “success” would be attained by, among other things, “[a]chieving the interchange **montra** [sic] of maximizing card issuance and Merchant acceptance,” and “[p]rotecting key issuer revenue . . . ,” while “reducing regulatory pressure.” (Garibedian Exh. 34008A) (emphasis in original).

90. In a Spring 2004 update to the Board of Directors, Mr. Selander noted that global regulatory actions and threats of further actions had significantly increased the legal and

regulatory risks to four-party systems such as MasterCard, which meant that "[w]e should expect a reduction in interchange/Merchant fees, especially from large Merchants." Mr. Selander's paper also noted that "[t]here seems to be less regulatory pressure on interchange for 3 party system competitors such as American Express, despite higher Merchant discount rates than MasterCard or Visa." (Selander Exh. 20711.) Thus, in Mr. Selander's view, MasterCard and its Member Banks could decrease the pressure on it and thereby increase Merchant fees to be collected by Member Banks if it could convert itself into a three-party system such as American Express. Director Dato Tan, who kept in close communication with Mr. Selander throughout the restructuring process, questioned whether "in reinventing [MasterCard] in the solution contemplated, is the new [MasterCard] effectively a 3-party system?" (Murphy Exh. 21895.)

91. In a June 7, 2004 update to the MasterCard Board of Directors, Mr. Selander summarized the Board's feedback concerning the strategy review, including that legal risks in the United States posed a significant threat to the overall business. (Selander Exh. 28413.) In this report, Mr. Selander summarized whether the New Business Model would enhance and maintain "system value" (*i.e.*, interchange revenue) and decrease exposure to legal and regulatory risk. (Selander Exh. 28413.) MasterCard management concluded that:

- There are significant risks to the interchange model
- These risks stem from legal and regulatory threats, which in tandem with growing Merchant power, threaten interchange
- The risks are most acute in the U.S.
- The risks do not merely threaten MasterCard, but also directly threaten individual financial institutions. In the United States, Issuing Banks face the risk of lawsuits seeking treble damages which could result in payouts that are significant in relation to their overall earnings from payment services
- Awareness of the risk is growing and was published in a Morgan Stanley research report entitled, "Attacking the Death Star." (Selander Exh. 28413.)

92. Given the threat, Mr. Selander wrote that "the case for a New Business Model was compelling." To drive home the seriousness of the situation, an appendix to the Board update warned that "the legal threat now presents significant and material risk to interchange system value." *Id*.

93. On June 8, 2004, a document created in connection with a working session of MasterCard's Executive Management Group concluded that the New Business Model "would appear to be operationally feasible." (Hanft Exh. 28224.) Similarly, a document created by BCG in November 2004 concluded that the New Business Model was "feasible, executable, and potentially mitigates (though does not eliminate) the significant system value [antitrust] risk." (Garabedian Exh. 34015A.)

94. The MasterCard Board took the information presented by MasterCard management seriously. In a June 15, 2004 email from Mr. Heuer to Mr. Selander, Mr. Heuer wrote that William Aldinger, a MasterCard Director and HSBC executive said, "the Morgan Stanley article really scared him." The Death Star article, which Mr. Selander caused to be distributed to the Board and MasterCard senior management, estimated a loss of interchange revenue in the several billions annually if rates were reduced to Australia's levels. (Selander Exh. 28414.)

95. On July 8, 2004, Mr. Selander provided two presentations to the MasterCard Board of Directors that included estimates of the threat to interchange revenue. According to MasterCard and its consultant BCG, if as a result of litigation Interchange Fees were reduced in the United States to the same degree that they were reduced in Australia, the risk to MasterCard and its Member Banks in the United States was a loss of $16 billion annually, or a net present value of approximately $100 billion. These presentations also noted that the New Business

Model could mitigate the antitrust risk that MasterCard and its Member Banks would face while preserving the revenue represented by Interchange Fees for its Member Banks. (Selander Exhs. 28415, 28417.)

96. At the July 8, 2004 Board meeting, the Board formally instructed management to examine three alternative business strategies to mitigate and/or eliminate the antitrust risk to MasterCard and its Member Banks from allowing its bank-controlled Board to establish uniform schedules of default Interchange Fees: (i) the new business model; (ii) bilateral agreements between Issuing and Acquiring Banks or Issuing Banks and Merchants; and (iii) governance and ownership changes. (Selander Exhs. 28416, 28424.)

97. In another strategy review update in September 2004, Mr. Selander wrote that the Morgan Stanley Death Star report describing the threats to interchange confirmed MasterCard's approach to considering changes to its business model to address regulatory and legal risks. He reiterated that the risks threatened not only MasterCard but also the banks. (Selander Exh. 28422.)

98. Mr. Selander, in a handwritten note to MasterCard's General Counsel, Noah Hanft, dated October 4, 2004, discussed the presentations that he, Mr. Heuer, Mr. Hanft, and CFO Christopher McWilton made to Board members. In the presentation, they acknowledge the risk to MasterCard, the replacement of interchange with the New Business Model, consideration of bilaterals, and a change in governance and ownership with an IPO. The key IPO consideration was addressing regulatory and legal concerns. Another key consideration was that the "IPO should protect broad business interests of current members." (Selander Exh. 28423.)

99. Even though management and BCG had concluded that the New Business Model was operationally feasible and even though [redacted]

, on October 25, 2004, the Nominating and Corporate Governance Committee of the MasterCard Board of Directors—composed of representatives of MasterCard Member Banks—voted to pursue governance and ownership changes instead of the New Business Model. (Murphy Exh. 21863.)

100. In the words of Mr. Heuer: "I did not make a sale" of the New Business Model to the Board of Directors. (Heuer Dep. 184:21-185:8.)

101. At the October 26, 2004, Nominating and Corporate Governance Committee meeting, Mr. Selander expressed management's view that bilateral agreements "among nearly 2,000 principal members" would not be feasible because it "would be technically challenging and would increase additional barriers to increased MasterCard participation in processing opportunities." *Id*. A bilateral-agreement solution to MasterCard's legal risk was formally rejected at a November 16, 2004 meeting of the Nominations and Corporate Governance Committee. (Murphy Exh. 21864.)

102. Mr. Selander's statement that bilaterals would be "technically challenging" is contradicted by MasterCard witnesses with far greater knowledge of MasterCard's technical capabilities. For example, T.J. Sharkey, the head of MasterCard's Global Merchant and Acquirers Group, testified that he is aware of no limit on the number of bilateral agreements that MasterCard's system can accommodate. (Skarkey Dep. at 93:2-101:5.) The real reason for MasterCard's rejection of bilaterals is that MasterCard's greatest value in the operation of the MasterCard Network is its role in facilitating the transfer of money from Merchants to Issuing Banks by way of Interchange Fee deductions on every transaction. Bilateral agreements (which would take MasterCard out of the role of transferring money from Merchants to Issuing Banks) would facilitate "disintermediation" of MasterCard's role in the payments industry and turn the

services offered by MasterCard into a commodity. (MCI_MDL02_11816533; MCI_MDL02_11832706.) In other words, MasterCard feared that, in a world of bilateral agreements, its function of guaranteeing a stream of supracompetitive revenues to Issuing Banks would vanish and its other functions could be replicated by others.

103. The Nominating and Corporate Governance Committee presented its analysis to the full Board of Directors on November 18, 2004, and the Board passed resolutions stating, "MasterCard in its current form may not be an acceptable alternative" and that a new governance and ownership structure needs to "significantly mitigate antitrust risks." (Selander Exh. 28426.)

104. The primary factor driving the decision to pursue governance and ownership changes instead of the New Business Model was the belief, based on the advice of counsel, that governance and ownership changes had a greater likelihood of shielding MasterCard and its Member Banks from antirust liability arising from the establishment of uniform schedules of default Interchange Fees. (Murphy Exh. 21863.) As reflected in the minutes of an October 26, 2004 meeting of MasterCard's Nominating and Corporate Governance Committee, MasterCard Director and Committee member, Dato Tan, expressed views that the New Business Model "presents many uncertainties, only partial protection against regulatory and legal challenges, and that a new strategy should address risk and opportunity concurrently not sequentially." *Id*. The committee members also "expressed a preference for a strategy that can rapidly reduce regulatory and legal risk and that is not itself a competitive risk to implement." *Id*. MasterCard agreed that one of the reasons for pursuing ownership and governance changes instead of the New Business Model was to "more clearly deliver against the objectives in terms of addressing those perceived . . . conflicts of interest or—or conspiracy issues . . .." (Murphy Dep. 268:10-14.)

105. After the MasterCard Board decided neither to implement the New Business Model in the United States nor to pursue bilateral agreements, the MasterCard Board and top management focused their efforts on making changes to MasterCard's governance and ownership in hopes of removing its Interchange-Fee-setting conduct from scrutiny under Section 1 of the Sherman Act, while preserving the ability of the Member Banks to continue to control the business of MasterCard and the revenue stream provided by Interchange Fees.

D. <u>MasterCard Takes Interim Steps to Evade Antitrust Liability by Board Agreement to Delegate Interchange Rate Setting Authority to Management.</u>

106. As the governance changes that MasterCard contemplated in late 2004 would take some time to implement, MasterCard felt that it had to take immediate action to fend off imminent challenges to interchange in the United States and Europe. MasterCard and its Member Banks were aware of the urgency of the situation because, as noted above, in March 2004, many of the opt-out Plaintiffs in the *Visa Check* action had amended their complaints against Visa and MasterCard to include claims for the illegal fixing of Interchange Fees. Based on these developments, Old MasterCard and its Member Banks concluded that it was only a matter of time before a new class action was brought to challenge their Interchange-Fee-setting practices.

107. In recognition of the urgent situation facing MasterCard in the United States, at its meeting on July 8, 2004, the Board formally delegated authority to management to set the Interchange Fees for the U.S. region. (Selander Exh. 28416.)

108. The delegation of Interchange-Fee-setting authority to management was a transparent and unsuccessful attempt to evade U.S. antitrust liability. MasterCard and its Member Banks did not believe that the Board had done an ineffective job of setting Interchange Fees, nor did they see any conflict of interest in having Board members set Interchange Fees.

Also, the Board did not at this time alter its authority to set Interchange Fees in other regions. (Murphy Dep. 221:25-223:11.) Moreover, even after the MasterCard Board formally delegated authority to establish U.S. Interchange Fees, the methodology that was employed to determine those fees did not change and remains the same today. *Id*. 223:22-224:13. Management also understood that if it failed to continue to set Interchange Fees at levels demanded by the Member Banks, they could be fired, and the Member Banks could increase issuance of Visa Payment Cards. In short, with respect to the setting of MasterCard Interchange Fees in the United States, the Board's "delegation" was merely cosmetic and changed nothing of substance.

109. Similarly, on November 18, 2004, the Board delegated Interchange-Fee setting in the United Kingdom to management—a move which was explicitly taken "in response to regulatory challenges in the U.K." (Murphy Exh. 28426.) After this action was taken, Mr. Selander wrote a letter to the head of the United Kingdom's antitrust-enforcement body, the Office of Fair Trading, informing him of "very important developments . . . that if implemented should have an important bearing on the Office of Fair Trading's (OFT's) interchange fee investigation." The first of these "very important developments" was the delegation of Interchange-Fee-setting authority to management; the second was governance and ownership changes under the Board's consideration. (Murphy Exh. 21861.)

110. The European Commission, however, did not find that MasterCard's delegation of Interchange-Fee-setting authority was an important development from an antitrust perspective. To the contrary, it concluded that the delegation 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 at 113-114.

111. The Commission's conclusion is equally applicable in the United States. The Board's July 2004 resolution merely appointed management as a third-party agent to determine uniform schedules of default Interchange Fees, which the Member Banks would agree to abide by, just as they had done before the delegation.

112. One MasterCard Director, Jac Verhaegen, recognized that the delegation of authority to set Interchange Fees would not insulate MasterCard or its Member Banks from antitrust liability. Mr. Verhjaegen queried his fellow Directors whether the "risks on the interchange issue in the U.S. can be avoided by having MasterCard set interchange instead of banks, as legislation on abuse of dominant position would apply in that case." (Murphy Exh. 21897.) At the same meeting, Mr. Verhaegen also questioned whether an IPO would be sufficient to remove MasterCard's Interchange Fee setting practices from the scope of Section 1.

E. MasterCard Management and its Bank-Controlled Board of Directors Conclude that their Current Structure is "Untenable" and that a New Ownership and Governance Structure had to be Devised in an Attempt to Avoid Antitrust Liability arising from the Setting of Interchange Fees.

113. On November 18, 2004, the full Board of Directors "determined that the continuation of MasterCard in its current form may not be an acceptable alternative and that a change in ownership and governance may be essential." (Heuer Exh. 27070.) This resolution confirmed the Nominating and Corporate Governance Committee's conclusion of two days earlier that "the company could not maintain the status quo ownership and governance model…" due to antitrust liability. (Murphy Exh. 21864.)

The Board further resolved:

> . . . that management is authorized to work with the Nominating and Corporate Governance Committee towards the development of a new governance and ownership structure for MasterCard, taking into account the following factors, **(a) the need to significantly mitigate antitrust risks**, and (b) the importance of recognizing the diversity of MasterCard, including a consideration of the feasibility of a holding company structure, and (c) **the significance of protecting**

> **the legitimate present and future interests and concerns of MasterCard's members** to the extent that they do not adversely impact the risk profile of the enterprise; . . .

(Murphy Exh. 21865) (emphasis added).

114. By this time, MasterCard's management and its Board of Directors had developed a standard by which to judge its restructuring attempts. Under that standard, a new governance and ownership structure would be satisfactory if and only if a post-restructuring challenge to MasterCard's ownership or governance would stand a 90 percent chance of being dismissed without a trial on the merits. (*See* Murphy Dep. 258:15-20; 357:17-23.) This standard came to be known as the "90 percent standard." MasterCard hoped to meet the 90 percent standard by concocting a governance form that would be able to qualify MasterCard as a "single entity" under the antitrust laws and not a "structural conspiracy," while preserving the Member Banks' Interchange Fee revenue stream.

1. MasterCard management and its Directors agree on a structure intended to safeguard the Member Banks' revenues and control while supposedly protecting them from future liability relating to interchange fees.

115. On January 7 and January 14, 2005, MasterCard's Nominating and Corporate Governance Committee worked on a restructuring plan leading to an IPO in hopes of finding an antitrust safe haven for MasterCard and its Member Banks, while retaining enough control for the Member Banks to guarantee that New MasterCard continued to transfer money from Merchants to Issuing Banks via Interchange Fees, or other means. (Murphy Exh. 21872.)

116. On January 10, 2005, Dato Tan, writing about the recent Nominating and Corporate Governance Committee meetings, noted that one problem facing the committee was "ring-fencing" U.S. assets. "We know the current difficulties also present the company with the best chance of escaping from its past. A lot of effort has been put in to devise solutions based on

the U.S.-centric tack & this is only natural as the epicenter of the litigation is the U.S. But the point was taken that it appears odd that it seems near impossible to shield the rest of the world from that tsunami save with the single company IPO or private placement under consideration." (Murphy Exh. 21866.)

117. Writing again to Mr. Selander on January 25, 2005, Dato Tan stressed the importance of a solution to "the anti-trust and anti-competitive threats facing MCI, it is again that the proposed solution must pass the test of time. The damage would be unimaginable if, shortly after the IPO and a challenging re-birth MCI were to come under serious litigation and anti-competitive attack again." At the same time, Dato Tan warned against a solution that would enable a party or parties acting in concert to control a substantial interest in the New MasterCard. Tan clearly understood the paramount goal of the IPO was to put "in place a governance structure devised chiefly to shield the business from future litigation and anti-competitive pressures." If successful and "with Visa mired in trouble, MCI may well end up Numero Uno with even greater market power." (MCI_MDL02_10133525.)

118. The Nominating and Corporate Governance Committee met again on March 2, 2005 to discuss the IPO structure. Director and Chairman Baldo Falcones reported that the prospect of assuming antitrust risk stemming from the U.S. nettled the European Member Banks and that the European Members believed it to be necessary and appropriate to find a means to protect the corporation and its members, particularly U.S. members, from antitrust risk. In addition, CFO McWilton discussed the post-IPO elimination of special assessment rights and management's views on handling risk without assessment rights. During this time period, the Board had engaged special antitrust counsel, and each of the of the options the Board considered

was evaluated according to the 90% test—*i.e.*, whether the new structure would have a 90% chance of defeating an antitrust challenge on the merits before trial. (Murphy Exh. 21875.)

119. On May 17, 2005, MasterCard management presented various IPO options to the European Regional Board. One of the solutions called for the creation of the MasterCard Foundation, a charitable institution that would hold a sizable percentage of shares, which it could not sell for a number of years. The idea was that the Foundation would protect the interests of the Member Banks in a New MasterCard where the Member Banks held a minority stake and independent shareholders held a majority. (Murphy Exh. 21898.)

120. Dato Tan again wrote Mr. Selander on May 17, 2005, expressing that an important issue in changing governance and ownership was accommodating European demands for continued autonomy in the European region. As the Europay integration had only been completed in 2002, certain of the European members resisted a change in governance and ownership that had them ceding additional control. Dato Tan told Mr. Selander that Director Baldo's dual role presented a conflict of interest: "A further complication as alluded to earlier is that the Chairman of the Board and the Chairman of the NCG is one and the same person. Wearing two hats, conflicts of interest are apparent and unavoidable." (MCI_MDL02_1108367.)

121. On May 20, 2005, the Nominating and Corporate Governance Committee considered how MasterCard's antitrust liability would impact the IPO. Mr. Selander reported that MasterCard's contingent liability as well as the complex structure of New MasterCard, including the creation of the Foundation, would significantly impact the value of the IPO. To distribute this "reduction of value" fairly within MasterCard, Mr. Selander proposed two options: (i) a one-time U.S. member assessment collected through IPO proceeds; and (ii) a one-time member holdback for antitrust liability related to the DOJ case. He also discussed having the

U.S. banks indemnify MasterCard. Another item on the agenda was a request by a European director that the New MasterCard would not compete directly with members in Europe for issuance or acceptance. (Murphy Exh. 21900.)

122. During spring and summer of 2005, MasterCard's Nominating and Corporate Governance Committee, along with its Board of Directors and management, evaluated several proposed structures to determine which of those structures met its twin goals of (i) absolving it and its members of antitrust liability; and (ii) guaranteeing that the new entity did not act contrary to the interests of the banks.

123. On June 22, 2005, the first complaint in what would become MDL No. 1720 was filed.

124. On July 14, 2005, the MasterCard Board—composed of representatives of Member Banks—voted to approve the essential structure of the IPO and change in governance.

125. To accomplish the IPO, MasterCard redeemed the shares owned by the Member Banks and then reissued them as Class B and Class M shares in "New MasterCard." MasterCard then offered to the public a series of Class A shares that represented 41 percent of the voting control of MasterCard. The capital raised by the public offering was used to pay the Member Banks for their shares, except that $1 billion ($650 million after taxes) owed to the U.S. Member Banks was retained by MasterCard.

126. The $650 million holdback by MasterCard from the proceeds of the IPO was intended to fund, *inter alia*, judgments and settlements based on conduct that had occurred before the IPO. Although these funds were available for MasterCard to use in defending this and other litigation, the amount was not based on any assessment of the magnitude of MasterCard's litigation liability. (Murphy Dep. at 309-316.) Rather, it was a business compromise among the

MasterCard U.S. Member Banks and MasterCard Member Banks outside of the United States. *Id.* In exchange for the $650 million, MasterCard gave up its right to assess its Member Banks for judgments or settlements based on conduct before the IPO.

127. The IPO creates three classes of shares: Class A shares, Class B shares, and Class M shares. Voting rights are limited to Class A shares, although the Member Banks, through their Class M shares, have certain veto powers, and no shareholder is allowed to acquire more than 15 percent of outstanding Class A or B shares.

128. Class B shares may be transferred among Member Banks. After four years, the Class B shares may be sold to outside investors, but the Member Banks have a right of first refusal. If allowed to be sold, these shares convert to Class A shares. If this occurs, Member Banks will be able to purchase Class A shares, which would immediately convert to Class B shares, in order to maintain their level of ownership.

129. As part of the IPO, Member Banks acquired Class M shares. These shares gave the Member Banks the right to elect three board members, and to veto: (i) any sale of all, or substantially all, of the company's assets; (ii) any merger or consolidation of the company; (iii) any waiver of beneficial ownership limitations in the certificate of incorporation; and (iv) any discontinuation of the core payments business.

2. New MasterCard was created to perpetuate the economic interests of the Member Banks.

130. Although the MasterCard IPO broadened stock ownership, it imposed clear restrictions that make it impossible for the Member Banks to lose control of the business of New MasterCard. MasterCard's Member Banks have ensured that they will maintain effective collective control even now that the IPO is completed by imposing limits on stock purchases, retaining certain veto powers over major business decisions, and by impoverishing MasterCard

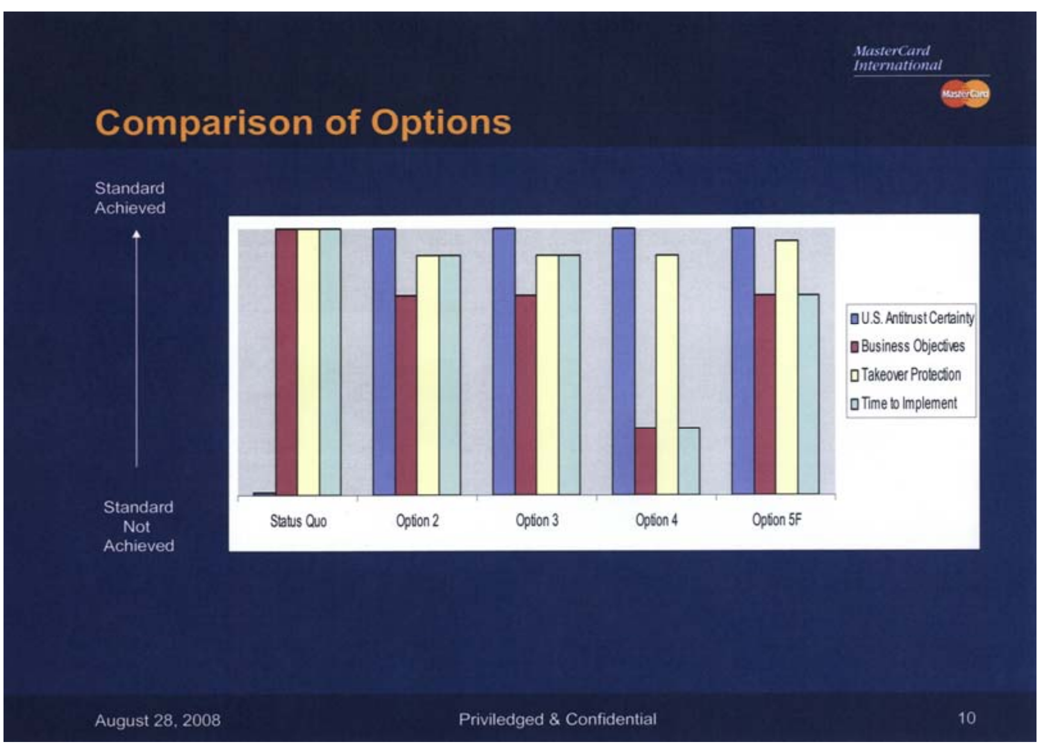
through the elimination of MasterCard's right to special assessment of Member Banks to cover its liabilities. MasterCard's potential litigation liabilities in this matter and others are far beyond the ability of MasterCard to cover from its own assets. As a result, MasterCard's largest business issue—resolving the cases that are consolidated in MDL No. 1720—cannot be addressed without the approval of the Member Banks. The New MasterCard is thus "straight jacketed" by its Member Banks. Because New MasterCard's potential liability in MDL No. 1720—even under conservative assumptions—is far greater than its assets, New MasterCard is dependent upon its Member Banks to resolve the litigation.

131. The avoidance of antitrust liability was the central motivating factor behind the IPO. This is apparent from the MasterCard documents that discuss the purposes of the IPO, which in nearly every instance list the mitigation of legal and regulatory risk first among the reasons behind the IPO. (*See, e.g.*, Heuer 27068; Selander 28424; Murphy 21863; Murphy 21864; Selander 28426; Murphy 21866; Murphy 21881; Murphy 21897.)

132. MasterCard Director Mr. Verhaegen submitted a paper to the Nominating and Corporate Governance Committee noting that "[a]ccording to MasterCard in the USA region, the setting of an interchange fee by competitors could be seen as horizontal price fixing and therefore be **per se** illegal under Section 1 of the Sherman Act." (Murphy Exh. 21897.) (emphasis in original.) Mr. Verhaegen further noted that MasterCard was "considering structural changes to reposition the company so that it is in a position to overcome antitrust litigation and/or regulatory challenges and concludes that an IPO could resolve the risk of litigations. Under the IPO construction, interchange fees are not set by competitors (banks) but by a company not (fully) owned by these competitors." *Id*.

133. When Management and the Nominating and Corporate Governance Committee finally agreed on the final structure of New MasterCard and the IPO, Mr. Selander and Mr. Hanft made a presentation to the MasterCard Europe Board, which noted that "[c]ombined with the other governance provisions, this [structure] should be sufficient to demonstrate to a court that the structural conspiracy previously found to exist by the courts in the United States has been terminated." (Murphy Dep. at 515:19-517:13; Murphy Exh. 21898.) In other words, Mr. Selander and Mr. Hanft were opining that MasterCard's chosen path met the 90 percent test.

134. The objectives that MasterCard and its Member Banks sought to achieve with the IPO and related agreements are also unambiguously depicted in another presentation that Mr. Selander made to MasterCard's regional Boards of Directors in the summer of 2005. Option 5F—the plan that eventually became the IPO and Agreements—was intended to provide MasterCard a high degree of protection from claims under U.S. antitrust law. This presentation also demonstrates that MasterCard and its Board viewed the bank-owned-and-controlled "status quo" to be of minimal to no protection from antitrust liability. (Murphy Exh. 21904.)



80563847.1

135. But while antitrust liability was the central motivating reason for the Restructuring, MasterCard and its Member Banks also put in place Ownership and Control Restrictions intended to protect the stream of revenue provided by supracompetitive Interchange Fees.

136. MasterCard's testimony on the Restructuring makes this abundantly clear. In the course of devising a new governance structure, MasterCard's Board emphasized "the significance of protecting the legitimate present and future interests and concerns of MasterCard's owners." (Murphy Exh. 21865.) MasterCard testified:

> "That means that the Board discussed and the mandate to both the General Counsel and to the Nominating and Corporate Governance Committee was to find a governance structure that addressed the perceived antitrust issues, but **at the same time ensured that the—that the legitimate commercial interests of the then owners of the company were protected in such things as the Class M rights and what have you**, but that those interests were to be, you know, expressly, you know, evaluated in terms of how they impacted the ability of the structure to achieve its primary goal, which was the—the—the risk mitigation, you know, and to the extent of conflict, that the given so-called 90 percent test, that the former would prevail. And I think we—again, I believe we achieved that."

(Murphy Dep. 277:24-278:18.) (emphasis added.)

> Q: **So the—the goal was subject to that concern, to—to protect the business interests of the MasterCard Member Banks in pursuing the restructuring; correct?**
>
> A: **That is correct.** To give—to give recognition to and to protect the legitimate commercial interests of the banks in the restructuring as people who were—as institutions that were selling stock in an—in an enterprise that they had co-invested in as a joint venture over three decades.

(Murphy Dep. 278:25-299:13.) (emphasis added.)

137. The Ownership and Control Restrictions allow and require New MasterCard to continue to transfer money from Merchants to Issuing Banks by way of Interchange Fees or otherwise.

138. For example, the approval of Class M shareholders (*i.e.*, the Member Banks) is needed for New MasterCard to exit the "core payments business."

139. Rules requiring the payment of an Interchange Fee and the establishment and enforcement of a uniform schedule of default Interchange Fees are not necessary functions of the MasterCard network or any other Payment-Card network. However, given MasterCard's position before regulators around the globe that Interchange Fees are necessary to the functioning of a Payment Card network, the Class M shareholders (the Member Banks) view these functions as part of MasterCard's "core payment business." MasterCard's Member Banks could use their Class M rights to attempt to block any decision to eliminate or greatly reduce Interchange Fees or other transfer payments.

140. New MasterCard's own public filings demonstrate that the Class M right to prevent MasterCard from "exiting the core payments business" would prevent it from eliminating or greatly reducing Interchange Fees without a vote from the Member Banks holding Class M shares. New MasterCard states that it has a "three-tiered business model as franchisor, processor, and advisor." MasterCard, Inc., Annual Report (Form 10-K), at 9 (Feb. 21, 2008). Once a transaction has been authorized and cleared, MasterCard provides services in connection with the settlement of transactions—that is, the exchange of funds along with associated fees. *Id.* MasterCard administers the collection and remittance of interchange fees through the settlement process. *Id.*

141. The restrictions on ownership embodied in the IPO and Agreements also have the effect of protecting MasterCard and its Member Banks from takeover by an entity that might lower fees imposed on Merchants, thereby jeopardizing the banks' revenue streams from their

MasterCard-issuing operations. If Visa responded in turn, these lower fees would also threaten revenue that the banks earned from issuing Visa cards.

142. This concern is highlighted in the Member Banks' reaction to early proposals for an IPO, one of which contemplated selling a 70 percent equity stake in MasterCard to the public. Under that proposal, MasterCard could have been acquired by anyone with sufficient assets to do so. Giving up such a large stake in MasterCard concerned the banks that sat on MasterCard's Board, because a new owner of MasterCard could operate the company in a manner that was inconsistent with the banks' interest in receiving revenue through Interchange Fees or some other fee. One such Director, Dato Tan, questioned Mr. Selander in a January 24, 2005 email on whether "the desired outcome would change if a non-bank, for instance a large retailer, buys up a chunk of that stock. Or must there be written in the charters or articles of the company, stipulations to prevent aggregation of interests by any party?" (Murphy Exh. 21873.)

143. Citigroup had the same concern as Dato Tan. After returning from a MasterCard Board meeting regarding restructuring, Citigroup executive Alan Silverman summarized the meeting to a colleague and noted that "we [Citigroup] need to safeguard who owns/controls the company if not the Banks. What happens if Wal-Mart or Microsoft want to buy it?" (Massingale Exh. 26272.) Mr. Silverman also relayed his "informal discussions" with MasterCard COO Alan Heuer, in which Mr. Heuer "seemed very clear that **any new MasterCard needed to protect and even increase Interchange to keep and attract Banks**." Mr. Silverman noted that he was nonetheless "uneasy" because of the "lack of any direct link between Interchange levels and the P/L of MasterCard in the future." *Id.* (emphasis added.)

144. Similarly, in an April 6, 2005 meeting of the Nominating and Corporate Governance Committee, the Committee noted that, "[a]lthough [banks] can not govern the new

80563847.1

structure, either through voting or by economic control, a legitimate role must be found so they are supportive of the new enterprise and so MasterCard does not lose their wisdom and insight." (Murphy Exh. 21891.)

145. Some of the business forms that MasterCard's Board considered but rejected also shed light on the purpose behind adopting the Ownership and Control Restrictions. MasterCard did not pursue a sale to a private equity firm, in part, because doing so would entail greater loss of control over the future business strategy of MasterCard. In the words of MasterCard's Rule 30(b)(6) designee on this topic, one of the reasons that the bank-controlled Board rejected a private-equity sale was its feeling "that by transferring the ownership of the company to a … single party, you'd be subject to the whims of that single party" (Murphy Dep. 133:24-134:2.)

146. Additionally, the ownership restrictions served to depress the value of publicly-held shares in the MasterCard entity, thereby decreasing the market capitalization of New MasterCard and the price that the banks were able to obtain by selling their MasterCard stock. (Murphy Dep. 140:4-141:20.) Thus the ownership limitations were not imposed to further the interests of the "independent" MasterCard, but rather were imposed to protect the banks' revenue streams and insulate them from competition. Put another way, the diminution in value of the stock that the banks sold was a means of buying protection from competition. In fact, MasterCard had previously admitted that the Member Banks serving on MasterCard's Boards "do not always exercise their fiduciary responsibilities [to MasterCard] and instead use [their position on the Board] as a vehicle to gain competitive advantage [for their bank employer]." (Murphy Exh. 21858.)

F. <u>The Restructuring Harms Competition In The Relevant Markets.</u>

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

the transfer of funds from Merchants to Issuing Banks—was anticompetitive and illegal under the antitrust laws of the United States and many foreign jurisdictions. But instead of changing their conduct, Old MasterCard and its Member Banks elected to restructure themselves into a New MasterCard that they hoped would allow them to continue their anticompetitive behavior. They restructured Old MasterCard such that MasterCard would continue to facilitate the transfer of funds from Merchants to Issuing Banks.

148. The Restructuring created New MasterCard which has market power in the Relevant Markets described in Section VIII 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.

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

a. Due to the long-standing control of MasterCard and Visa 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 Rule and the Anti-Steering Restraints, the Miscellaneous Exclusionary Restraints, and the rules requiring the deduction of Interchange Fees by Issuing Banks on every transaction such that the only form of competition that can exist 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 charged to Merchants and paid to banks as an inducement to issue MasterCard or Visa Payment Cards. Because both MasterCard and Visa have substantial market power in the Relevant Markets, Merchants have no practical ability to decline to accept MasterCard and Visa Payment cards.

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

c. Because the largest Member Banks have representatives on the Board of New MasterCard, and neither Merchants nor cardholders have such

80563847.1

representation, the largest Member Banks continue to exercise undue influence and effective control in the day-to-day business of MasterCard.

d. Before the Restructuring, MasterCard recognized that Merchant class action antitrust litigation (such as MDL No. 1720) threatened "ruinous liability" of as much as $200 billion. (Garabedian Exh. 34029A, Hanft Exh. 28216.) As a result, New MasterCard's single most important business decision is how to resolve the pending Merchant antitrust class action in a way that will preserve New MasterCard's business. However, the MasterCard Member Banks caused Old MasterCard to surrender the right of New MasterCard to assess its Member Banks to cover its liabilities. This means that MasterCard's fate remains in the hands of the Member Banks who alone have the resources to resolve this litigation in a way that would preserve New MasterCard's business. Without the resources of its Member Banks, MasterCard would surely become insolvent in the event of a judgment in favor of the Class Plaintiffs in MDL 1720.

e. Even though New MasterCard could, in theory, collect Interchange Fees from Merchants and keep that substantial revenue, it has not done so. Rather, the Board of Directors of New MasterCard, has continued to use Interchange Fees to redistribute wealth from Merchants to Issuing Banks.

f. The current New MasterCard Board of Directors undoubtedly understands that it lacks the resources to fund a significant adverse litigation judgment or settlement, such as this action (MDL 1720) without the consent of the Member Banks. Post-IPO, the largest Member Banks have retained sufficient control over MasterCard to prevent it from settling this action on terms that involve lowering Interchange Fees. Thus, even if MasterCard is highly motivated to resolve the pending litigation, it cannot do so without the consent of its largest Member Banks.

g. [redacted].

150. The Restructuring adopted by MasterCard is akin to the members of a cartel who, having been caught fixing prices in violation of the Sherman Act, have 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.

151. Because the "single entity" New MasterCard has market power in the Relevant Markets, it can unilaterally impose uniform schedules of default Interchange Fees on Merchants. New MasterCard's market power also allows it to raise those Interchange Fees to supra-competitive levels. This is demonstrated by the fact that MasterCard has increased Interchange Fees several times since its IPO, and continues to enforce its restrictive rules, without losing significant Merchant acceptance.

152. Following are some of the examples of post-Restructuring Interchange-Fee increases by New MasterCard and its Member Banks: On January 17, 2007, MasterCard announced interchange rate increases effective April 13, 2007 for World Elite Consumer and Business cards and World Business cards. (Jonas Exhs. 23159, 23176.) MasterCard later increased its interchange rate on World Elite consumer credit cards. (Jonas Dep. 408:11-415:11.) With the January 17, 2007 announcement, MasterCard also increased interchange rates for enhanced consumer credit cards, effective June 15, 2007. (Jonas Exh. 23159.) In October 2007, MasterCard increased its overall effective interchange rate on commercial cards. (Jonas Dep. 460:10-462:17; 552:25-555:15.)

153. But for the illegal horizontal agreements challenged in the Second Consolidated Amended Class Action Complaint or the IPO and Agreements described herein, MasterCard 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.

154. MasterCard 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 MasterCard is a single entity whose post-IPO setting of Interchange Fees is outside the scope of Section 1 of the Sherman Act. After the IPO, the New MasterCard Board of Directors voted, as the Old MasterCard Board of Directors had voted, to delegate Interchange-Fee setting authority to MasterCard management. Because it is the Restructuring, agreed to by the Member Banks, that reconstituted MasterCard's Board nominally "independent" of the Member Banks, it is the Restructuring that allows MasterCard's Board to continue to direct management to establish uniform schedules of default Interchange Fees and to establish those fees at supra-competitive levels.

155. As MasterCard acknowledged before its IPO, Interchange Fees were doomed to disappear or drastically decrease. (Thom Exh. 25135.) The IPO harmed competition by allowing MasterCard to perpetuate the anticompetitive Interchange Fee levels described in paragraph 53.

156. The IPO has the effect of a merger to monopoly in the alternative Relevant Markets for MasterCard General Purpose Card Network Services and MasterCard Offline Debit Card Network Services (collectively "MasterCard Acceptance Services").

157. In a competitive market, the fees that Merchants would pay for MasterCard Card Acceptance Services would be completely subject to the forces of competition, as Acquirers would compete for Merchants' business by offering the lowest fees and best services to Merchants.

158. In competitive markets for MasterCard Card Acceptance Services, the only situation in which an Issuing Bank could impose an Interchange Fee on a Merchant would be one

in which the Issuing Bank 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.

159. The Restructuring gives the New MasterCard Board of Directors the power—as a monopolist would have—to unilaterally determine the amount of fees to be imposed on Merchants by Issuing Banks in the alternative market for MasterCard 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 MasterCard Member Banks, electing and acting through the Board of Old MasterCard.

160. MasterCard and Visa have essentially admitted that their new structures lessen competition. Economists retained by MasterCard and Visa for many years have argued the joint venture structure of Old MasterCard and Old Visa promoted competition, and that, if MasterCard and Visa had been structured as "single entities" like American Express, that would 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 (1st edition, 1999), p. 288.

161. 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 (NERA, 1993), p. 103 (emphasis added).

162. 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 Mr. 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 Before the Subcomm. on Financial Institutions of the Sen., Banking Comm.*, 106th Cong. (2000) (emphasis added), *available at* http://banking.senate.gov/00_05hrg/052500/hanft.htm.

G. The Ownership and Control Restrictions Harm Competition in the Relevant Markets.

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

164. As MasterCard Director Dato Tan cautioned, in the absence of such Restrictions, a single large Merchant or collection of Merchants could acquire a controlling interest of MasterCard. If Merchants could acquire control of the New MasterCard, their interests would stand in stark contrast to those of the MasterCard Member Banks.

165. A Merchant or Merchant joint venture that acquired MasterCard would have every incentive to reduce Interchange Fees and eliminate the other anticompetitive rules and requirements that Old MasterCard imposed before the IPO and which New MasterCard continues to impose.

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

167. The pricing of the shares issued through the IPO makes this point. According to published reports, MasterCard intended to raise approximately $2.8 billion by selling shares representing over 80 percent of voting shares. MasterCard estimated the magnitude of Interchange Fees paid in 2004 by Merchants to MasterCard and Visa Member Banks to be in the range of $25 billion. (Selander Exh. 28417.) Given these numbers, if Merchants collectively could acquire control of MasterCard with the prospect of saving more on Interchange Fees than it would cost to acquire control of MasterCard, Merchants might very well do so.

168. The Ownership and Control Restrictions also enable the Member Banks of MasterCard to protect the supra-competitive profits that they earn as Visa Member Banks. If

those restrictions did not exist and a single firm could acquire MasterCard, that acquiring firm could lower Interchange Fees to attract Merchant transaction volume, thereby forcing the Visa 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 its Merchants fees by almost the same amount.

169. The 15 percent ownership limitation on the purchase of MasterCard shares 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.

170. The Member Banks' acquisition of Class M shares in MasterCard also harms competition and imposes antitrust injury on Plaintiffs.

171. Because the banks view the setting of Interchange Fees as the central feature of MasterCard's value proposition to them, the Class M shareholders (banks) could (and no doubt would) block an attempt by the Board of New MasterCard to eliminate or greatly reduce Interchange Fees.

172. The Class M shares also allow the Member Banks to prevent MasterCard from issuing Payment Cards or acquiring Merchant transactions, as doing so would constitute "entering a new line of business." This aspect of the Class M shares harms competition—and Plaintiffs—by further preventing a New MasterCard from entering the issuing or acquiring markets, even if New MasterCard's Board sensed that doing so could increase its revenues. As noted above, aside from the Class M rights, MasterCard has made clear to its Member Banks that it has no intention of competing with their issuing or acquiring businesses. (*See* Murphy Exh. 21883.)

173. The intended and actual effect of the Ownership and Control Restrictions and the Restructuring is like 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 ability to change directions. As described above, the Member Banks of Old MasterCard carefully designed the Relevant Markets, the business strategy of Old MasterCard, and the Restructuring to assure that New MasterCard would be unable to change directions.

H. <u>Seeking to Shield Themselves from Future Price-Fixing Liability for Collectively Setting Interchange Fees, the Member Banks Impede Merchants' Ability to Recover from Them and from the New MasterCard for Past Antitrust Violations.</u>

174. In addition to attempting to wash their hands of future liability for the setting of Interchange Fees, Old MasterCard's Member Banks attempted to evade their liability to Plaintiffs and other judgment creditors for their conduct before the IPO. Old MasterCard and the Member Banks attempted to accomplish this by acting through the MasterCard Board of Directors to eliminate New MasterCard's right to special assessment of its Member Banks for extraordinary legal liabilities.

175. The following chronology documents the Directors' concerns with personal liability relating to MasterCard's contingent liabilities, the redemption vote, and whether that vote coupled with the decision to bargain away the right of special assessment for $650 million left the New MasterCard unable to fund a major settlement or judgment.

176. As demonstrated below, Old MasterCard's relinquishment of this right, at the behest of its bank-controlled Board, constitutes a fraudulent conveyance under New York law.

177. MasterCard and its Member Banks have known for some time—at least as far back as their 2003 settlement in *Visa Check*—that a multibillion dollar judgment against them based upon their practice of collectively setting uniform schedules of default Interchange Fees

was likely if not imminent. Following are just some of the indications that MasterCard and its banks possessed this knowledge:

a. MasterCard and its consultant, BCG, quantified the risk that MasterCard and its banks could face as a result of litigation over Interchange Fees, estimating that banks could lose up to $150 billion (2004 net present value) in Interchange Fee revenues if a class of Merchants convinced a court or obtained a settlement that reduced Interchange Fees by 40 percent, as had happened in Australia. This figure was calculated by assuming an Australia-style reduction in Interchange Fees from an average of 1.8 percent to 1.0 percent. Additionally, MasterCard and BCG concluded that an "[a]dditional $200 [billion] litigation event risk [was] possible," as a result of Merchant lawsuits (Selander Exh. 28418.) This analysis occurred in early 2004.

b. On April 15, 2004, around the same time that BCG was performing its analysis of the liability of MasterCard and the banks, Morgan Stanley issued a research report entitled "Attacking the Death Star." This report, authored by Kenneth Posner, concluded that the "U.S. card industry appears increasingly vulnerable to antitrust litigation," which in Morgan Stanley's estimation places "some $13 billion in industry revenues at risk." Similar to MasterCard and BCG's analysis, the report derived this figure by estimating that litigation could drive Interchange Fees from an average of about 1.5 percent (in 2004) to 0.5 percent. Because MasterCard was not yet a publicly traded company, the report did not address the effect that Merchant litigation would have on MasterCard's revenues and its solvency. Nonetheless, it did confirm the analysis of MasterCard and BCG on the potential interchange revenue. The report was attached to a "Strategy Review Process" book that was distributed by MasterCard management to the Global Board of Directors. (Selander Exh. 28413.)

c. MasterCard understood that the "Attacking the Death Star" report provided support to the analysis that BCG had performed. The "Attacking the Death Star" report "confirmed" MasterCard's "approach of considering changes to our business model to address these risks." (Selander Exh. 28422.)

d. In a January 10, 2005 email to Mr. Selander, Dato Tan discussed the concept of "ring fencing" the U.S. assets of MasterCard—a term that meant segregating U.S. assets so as to protect non-U.S. Member Banks in case of an antitrust judgment—and refers to the prospect of Interchange-Fee litigation in the United States as a "tsunami." Two weeks later, Dato Tan wrote another email to Mr. Selander in which Dato Tan stated that the "damage would be unimaginable" if MasterCard would get sued over interchange after its IPO was executed. (Murphy Exh. 21866.) On June 9, 2005, Norman McLuskie, a representative of Royal Bank of Scotland on the MasterCard Global Board of Directors, wrote a letter to Mr. Selander noting that the U.S. Member Banks were proposing a $1 billion ($650 million after taxes) holdback from IPO proceeds to fund MasterCard's retrospective legal liability, and expressed concern that the holdback was not adequate. McLuskie's concern was well-informed because, as a member of the Board, he received the "Attacking the Death Star" article and the analysis of MasterCard's liability. In McLuskie's words:

> While I appreciate the desire of the US Member Banks to draw a line under their exposure, I understand the damages figures could be significantly in excess of $1 billion. If that is the case and the residual contingent liability above $1 billion passes to [MasterCard] then I would have thought that could have a major impact on the potential for a successful IPO and for the future viability of [MasterCard] itself if there were a sufficiently large claim.

e. In an analysis of restructuring options, MasterCard executive Chris Thom stated that MasterCard faced "ruinous" liability due to its antitrust violations. (Hanft Exh. 28216.)

178. The MasterCard Directors were concerned that if they voted to redeem the Member Banks' Class A shares in the Old MasterCard at the same time they were agreeing to give up the right of assessment, the new MasterCard would not be adequately capitalized and could be ruined in the event of a large litigation liability. This posed a problem for MasterCard, regarding what to disclose to the investing public, as well as the Directors of the Board, who could be personally liable if the redemption of Member Bank shares left MasterCard undercapitalized. These concerns created a powerful incentive for MasterCard to downplay, hide, and obscure the loss in system value and litigation threat it had internally estimated to be in the hundreds of billions of dollars from its underwriters (Goldman Sachs), the rating agencies (Standard & Poor's), investment bankers (Houlihan Lokey), and ultimately from the investing public. (Murphy Exh. 21911; MCI_MDL02_1170988; MCI_MDL02_11823373; Murphy Exh. 21919; MCI_MDL02_11470976; Murphy Exh. 21916.)

179. In connection with Goldman Sachs's underwriting of the IPO, MasterCard told Goldman Sachs that it did not believe that its liabilities from this lawsuit were quantifiable or probable. (Murphy Dep. 624:16-625:12.)

180. On June 7, 2005, Board Member Mike Pratt wrote to MasterCard executives Andre Sekulic and Robert Selander questioning whether the holdback for contingent liability "is actually sufficient to cover liability, and what the consequences for company and the IPO are if it is not. It is noted that there is an alternative (an indemnity by U.S. shareholders) although there are some doubts over this as well." (Murphy Exh. 21881.)

181. Echoing Mr. Pratt's concern about the holdback in relation to the size of the contingent liabilities, on June 9, 2005, Director Norman McLuskie of RBS, conveyed similar thoughts to Mr. Selander, as set forth in the preceding paragraph. (MCI_MDL02_09279543.)

182. Thereafter, the Board met on June 16, 2005 and approved a recommendation by the Nominating and Corporate Governance Committee that U.S. shareholders would fund a $1 billion pool established by a holdback of IPO proceeds ***in return for*** the elimination of future assessments. All members were relieved of "assessment exposure." (MCI_MDL02_11827826, Murphy Exh. 21883.) (emphasis added.)

183. A presentation given to the Board during the June 16, 2005 meeting stated, "The Committee recommends that U.S. shareholders fund a $1B pool in consideration of the U.S. shareholders being relieved of assess obligations. The Committee's recommendation is to likewise relieve all members of assessment exposure." (Murphy Exh. 21882.)

184. The release of assessment rights deprived MasterCard of the ability to tap into the capital of its members, a right potentially in the tens to hundreds of billions of dollars. Giving up this right as a part of the IPO caused a number of directors to express concerns about their

personal liability. As a result of the redemption of the Bank Members shares in MasterCard, the Member Banks would be taking a significant portion of the IPO proceeds, but leaving the New MasterCard and its shareholders bereft of the ability to raise sufficient capital due to giving up the special assessment right. The redemption could be seen as a fraudulent conveyance, and the Directors could be held personally liable. To placate the Directors' worries, management had counsel assure the Board that MasterCard could not quantify the contingent liability (despite the fact BCG had already done so). MasterCard also engaged Houlihan Lokey to provide it with a "capital adequacy opinion," but MasterCard specifically instructed Houlihan Lokey not to consider contingent liabilities when determining whether New MasterCard would have adequate capital after redemption of the Member Banks' shares.

185. At a December 20, 2005 meeting of the Nominating and Corporate Governance Committee, Houlihan Lokey distributed its capital adequacy opinion. Houlihan Lokey had been asked to assume the IPO and redemption of Old MasterCard Class A (Bank stock) was consummated, and opine on four tests under Delaware law: (i) the balance sheet test; (ii) the cash flow test; (iii) the reasonable capital test; and (iv) the capital surplus test. (Murphy Exh. 21916.) The balance sheet test examines whether the fair value of MasterCard's assets exceeds its liabilities. The cash flow test examines whether MasterCard "should be able to pay its debts as they become absolute and mature." The reasonable capital test examines whether the capital remaining in the company was unreasonably small for the business in which MasterCard is engaged. And the capital surplus test examined whether the present value of the company's assets exceed the sum of the company's stated liabilities and the par value of its outstanding stock. (Murphy Exh. 21917.) At the direction of MasterCard, Houlihan Lokey did not take into account the contingent liabilities associated with the antitrust litigation. Houlihan Lokey noted

that it could not recall being asked to provide a capital adequacy opinion for a company "in a position very similar to MasterCard with regard to contingent liabilities." (MCI_MDL02_11823373.)

186. On December 30, 2005, Selander wrote to the MasterCard Baldo Falcones and assured him that "Board counsel has answered every question as to how the process is designed to protect directors and we are taking every step to ensure that every aspect of the law has been addressed." Selander wrote, "our inability to quantify contingent liabilities is not a barrier to approving the necessary resolution." (MCI_MDL02_11085698.) On January 17, 2006, the full Board met and discussed the Directors' personal liability in connection with the redemption vote: "The Board discussed whether, in the event a director were to be sued based on an allegation that the director made a determination that the contemplated redemption would not impair the capital of MasterCard in a manner contrary to Delaware law. MasterCard should provisionally reimburse the Directors' expenses incurred to defend against such an allegation until such time as there is a determination whether the directors' conduct was in compliance with applicable law." (Hanft Exh. 28219.)

187. On January 27, 2006, Norman McLuskie wrote to Mr. Selander and informed him that he and other directors might abstain or be absent for the redemption vote. "Above all I want to avoid the difficulties the Directors may have around their personal liability exposure in voting for the redemption getting in the way of us making the correct commercial decision with the full unanimous support of the Board." That is, in McLuskie's view, individual Director interests were conflicting with those of MasterCard. McLuskie noted that the litigation risks, particularly in the U.S., "can be extremely significant." He asked Mr. Selander for legal advice "which specifically addresses whether having gone through that rigorous process and followed the

advice of the lawyers, is it still possible for the Directors to be held negligent if they vote to approve the redemption when they know there are contingent liabilities that cannot be quantified at that point in time." Finally, McLuskie implored Selander to consider a way to restructure the IPO without a redemption vote, a possibility also raised by Baldo Falcones. (Murphy Exh. 21920.)

188. Despite the concerns shared by McLuskie, Falcones and others, the Nominating and Corporate Governance Committee twice expressed support for the redemption vote and the full Board approved it in April 2006. Concurrently, MasterCard management put together a Director Indemnification Agreement which obligated MasterCard to indemnify and advance expenses to Directors in the event of litigation and other claims. (MCI_MDL02_110842493.)

189. MasterCard continued to maintain in its public filings and during its road show with prospective investors that the market had discounted the offering due to contingent liabilities. MasterCard conceded that the potential contingent liabilities was material to an investor decision to purchase MasterCard shares, but MasterCard refused to provide the investing public with its internal estimates of that potential liability. MasterCard's CFO, Mr. McWilton, claimed that MasterCard's liabilities were neither predictable nor estimable under Financial Accounting Standard (FAS) 5, and therefore MasterCard was under no obligation to provide the market with its estimates, including those that had been shown to the Board and ultimately led to the Board's decision to change MasterCard's governance and ownership. (McWilton Exhs. 24624; 24626.)

190. MasterCard's right of special assessment against its Member Banks was a valuable asset. Despite this fact, neither management nor the Board attempted to value the right

of assessment in terms of the contingent liabilities it was facing. (Selander Exh. 28404 at 381:9-382:4; MCI_MDL02_11085698.)

191. Even though MasterCard had never used its right of special assessment, that right provided it with a valuable guarantee of capital against future calamities, whether in the form of litigation losses, acts of God, or other events. This guarantee enabled MasterCard to obtain a higher credit rating than it otherwise would have had. (Murphy Dep. at 155-56, Exh. 21856.)

192. If, prior to the Restructuring, Old MasterCard sustained a legal judgment of even a fraction of the $200 billion that its documents had warned of, MasterCard would have been able to make a capital call from its members. Post-Restructuring, New MasterCard has no such ability. MasterCard would have to go to the capital markets to raise the money, where Mr. Selander estimates that MasterCard could raise . (Selander Exh. 28404, Selander Dep. 387:3-388:21.)

193. MasterCard had contemplated using its right of special assessment to fund the settlement in *Visa Check* since at least 2000.

a. During a September 26, 2000 telephonic meeting of the MasterCard Global Board, a handwritten note was submitted to the Chairman of the Board, which noted that "[i]n the worst case scenario of [MasterCard] having to pay damages—which we don't wish—I understand that under the present resolution, only the members operating U.S. programs will be assessed to cover these damages (since [MasterCard] will not of course be let go bankrupt)." (MCI_MDL02_06658106.) This demonstrates not only that an assessment was a possibility as far back as 2000, but also that there was a connection between the special assessment right and MasterCard staving off bankruptcy after a large litigation loss.

b. During a June 18, 2003 meeting of the MasterCard Europe Board, European Board Member Banks noted that "during the [Europay] integration negotiations, it was the clear understanding of the Europay Board of Directors—and a precondition to entering into the "Integration Agreement" that Europe would not be directly or indirectly affected by the outcome of the [*Visa Check*] litigation." The document that memorializes this meeting also states that "a 50/50 split (50 percent to be carried by the US Region in the form of a direct assessment and 50 percent to be funded

80563847.1

by the company) would not be acceptable to the European members." Taken together, these statements indicate that MasterCard had given serious consideration to assessing the U.S. members for the *Visa Check* settlement, and had even devised a "50/50" split between a U.S. member assessment and MasterCard. (MCI_MDL02_06658107.)

c. Less than a week later, Jean-Pierre Ledru, Chairman of the Board of MasterCard Europe, wrote a letter to Mr. Selander, stating that the members of the MasterCard Europe Executive Committee viewed a 50/50 split as "not acceptable" and proposed an alternative funding method that would involve 40 percent of proceeds to be derived from an assessment of U.S. members. (MCI_MDL02_06658108.)

d. The concern of the European banks was addressed at the July 31, 2004 meeting of the Global Board of Directors, where it was resolved that, if MasterCard used its right of special assessment to fund settlements or judgments in *Visa Check*, *U.S. v. Visa*, or any related actions, that assessment would be based only on members' U.S. card-issuing activities. (MCI_MDL02_11083408.) This also acknowledged that a special assessment to protect MasterCard's solvency in the face of legal liability was a real possibility.

194. The value of MasterCard's right to assess the banks is underscored by the fact that Visa funded nearly all of its portion of the settlement in *Visa Check* with contributions from its Member Banks. *See In re: Visa Check/MasterMoney Antitrust Litig.*, 297 F. Supp. 2d 503, 514 (E.D.N.Y. 2004) ("The defendants' member banks have not only contributed to the Settlements, but virtually all of the relief comes from them.").

195. One rating agency, Standard & Poor's, understood the value of MasterCard's right of special assessment and threatened even before the IPO to downgrade MasterCard's credit rating because it had proposed to abandon the assessment right. (Murphy Dep. at 156-159.) On May 25, 2006, Standard &Poor's did in fact downgrade MasterCard's long-term counterparty and subordinated debt ratings without having an estimate of the liabilities faced by MasterCard.

196. The $650 million ($1 billion in pre-tax dollars) that MasterCard retained as part of the IPO and the reclassification of bank stock was the sole consideration for MasterCard's

release of its special assessment right. MasterCard's Nominating and Corporate Governance Committee itself acknowledged this when it "recommend[ed] that U.S. shareholders fund a $1 billion pool **in consideration of** the U.S. shareholders being relieved of assessment obligations." (Murphy Exh. 21882.) (emphasis added.) At its July 14, 2005 meeting, the Board of Directors adopted this recommendation.

197. MasterCard's and the Member Banks' understanding that the $650 million holdback was the sole consideration for MasterCard's release of its right of special assessment is also reflected in an email thread between the General Counsel of Citibank, Wendy Kleinbaum, in-house counsel Michael Schiffres and MasterCard executives Tim Murphy and Kathleen Roche. In this email and testimony discussing it and related emails, Mr. Murphy made it clear that MasterCard would not use its right of special assessment post-IPO, (Murphy Exh. 21921; Murphy Dep. 665:18-669:6.)

198. The $650 million consideration that MasterCard received for releasing its right of special assessment was grossly inadequate compared with the debilitating litigation losses that MasterCard could incur. MasterCard acknowledged that the $650 million was unrelated to any estimates of MasterCard's actual liabilities. (Murphy Dep. 308:25-310:9.)

199. The MasterCard Directors who voted in favor of redeeming the Member Banks' shares violated Del. Corp. Gen. Law § 154 because that transaction, coupled with the release of the right of special assessment, caused an impairment of the capital of MasterCard.

200. As Plaintiffs are seeking tens of billions of dollars in damages against MasterCard, they are creditors of MasterCard.

201. While the size of the assessment that Old MasterCard was allowed to make under its right of special assessment was nominally capped at twice MasterCard's annual revenues (for

a total of approximately $6 billion in 2005), Article VI-3 of MasterCard's bylaws provides an exception to this Rule for judgments in cases, like this one, that are "related" to the *U.S. v. Visa* case and the *Visa Check* case. For a case related to *U.S. v. Visa* or *Visa Check*, no limitation existed on the amount of the assessment MasterCard could impose on its Member Banks. In a motion to dismiss Class Plaintiffs' pre-2004 damages claims, MasterCard and the Bank Defendants have argued that this case is related to *Visa Check* and that the two matters have the "same factual predicate." (Defs.' Mem. Law Sup. Mot. Dismiss Pre-2004 Dam. Cls. at 17-19.) In addition, when MasterCard moved to disqualify Robins, Kaplan, Miller & Ciresi L.L.P. from proceeding as class counsel in this matter, MasterCard argued that this action (MDL No. 1720) and the *United States v. Visa* case were the "same" matter. (*See* MasterCard Rep. Mem. Law. Sup. Disq. Counsel at 5-11.)

202. MasterCard's release of its special assessment right was made with an actual intent to defraud its creditors, namely Plaintiffs, by preventing them from recovering the full value of a judgment in this action from MasterCard.

203. The General Counsel for Discover, another litigant against MasterCard, sent a letter to MasterCard's General Counsel on November 3, 2005, expressing concerns about the capital adequacy of the New MasterCard: "By eliminating MasterCard's assessment rights against its member banks for liabilities in excess of its own resources, MasterCard is eliminating the only mechanism to satisfy large damage judgments against it." (MCI_MDL02_01365955-56.)

204. MasterCard and its Member Banks have a close relationship. Until the IPO and the Agreements, the Member Banks were the sole owners of MasterCard and made up nearly 100 percent of MasterCard's Board of Directors. The bank-controlled Board set uniform schedules

of default Interchange Fees for MasterCard transactions, and approved every major business decision of MasterCard. Even after the IPO, MasterCard's Member Banks retain a significant stake in MasterCard's equity and select bank representatives to serve on MasterCard International Incorporated, MasterCard's principal operating subsidiary. MasterCard's bank-controlled, pre-IPO Board of Directors made the decision to execute the Restructuring and to release MasterCard's right of special assessment as part of those transactions.

205. This agreement to release MasterCard's valuable assessment right would not have been made by a "single entity." It is essentially an attempt by the MasterCard Member Banks to ensure that, even if their plan to remove MasterCard from Section 1 antitrust liability fails, they will face no liability for the price-fixing conduct of either the Old MasterCard or the New MasterCard. This agreement further demonstrates how the New MasterCard, far from behaving like a "single entity," has been and will continue to be, controlled by its Member Banks. Moreover, eliminating MasterCard's right of special assessment to its Member Banks to fund a judgment or settlement of the Merchant litigation gives the Member Banks, and, in particular, the largest banks which are Defendants in this Action, the effective ability to control MasterCard's business strategy.

206. The Member Banks played a central role in securing the release of the special assessment right. For example, around the time of the execution of the IPO, some of the financial institutions that served on the Board of Old MasterCard became worried that the Board of New MasterCard—supposedly free from bank control—could re-establish the right of special assessment to protect MasterCard's capital position. (Murphy Dep. 666:5-23.)

207. Out of this concern, Citigroup took an extraordinary affirmative step to guarantee that it would not be assessed for its share of a future antitrust judgment against MasterCard.

Michael Schiffres of Citigroup, along with its General Counsel, Wendy Kleinbaum, contacted Tim Murphy at MasterCard, and collaborated on the text of an email that was to be sent from Noah Hanft to Ms. Kleinbaum, assuring Citibank that "financial institution members would have significant equitable arguments were a future MasterCard board of directors to reinstate in connection with pending litigations the special assessment powers that are being removed as a part of the transition to the new ownership and governance structure described in MasterCard's proxy statement disclosure." (Murphy Exh. 21921.)

208. Exchanges such as the one described in the previous paragraph highlight both the central role that the Member Banks played in eliminating the right of special assessment and also the unusually close nature of the relationship between MasterCard and the Member Banks, even as MasterCard publicly stated that it sought to usher in a new era of "independent" ownership and governance.

209. The Board's vote to release the right of assessment was a questionable transaction that was not in the ordinary course of business and was infected by conflicts of interest. In essence, the MasterCard Directors voted to release their own banks from liability in the event that conduct they participated in or caused resulted in a legal liability for MasterCard. At the time the right of special assessment was released, MasterCard acknowledged that it was facing an imminent threat of a litigation and regulatory "tsunami." MasterCard altered its longstanding ownership and governance structure to address that threat. The release of the special assessment right shows the Member Banks' influence and control over the conduct of MasterCard, which released a valuable right without adequate consideration.

210. When the IPO and Agreements were being devised, the Board—which at the time still consisted entirely of Member Bank representatives—considered but rejected a proposal for

the Member Banks to indemnify MasterCard for its litigation liabilities. (Murphy Dep. 530:16-23.) MasterCard's Rule 30(b)(6) corporate designee on reorganization topics testified that one of the reasons that the indemnification option was rejected was that "providing open-ended indemnities was not a—something that was a, you know, so-called doable deal. In other words, you would not get shareholders both to—to cede control of the company and provide open-ended indemnities." (*Id*. 531:15-24.)

211. The power of the Class M shareholders and their elected representatives to the Board ensures that the banks still control New MasterCard. MasterCard's own bylaws prevent it from changing the manner in which it operated pre-IPO—when it was owned by its Member Banks and governed by a Board of Directors dominated by the Member Banks—without majority approval of the Class M shareholders. The pre-IPO status quo reigns subject to the whims of the Class M directors, who hold veto power over any attempt by the other Directors to cease engagement in MasterCard's core functions. Not surprisingly, the post-IPO Class M directors are executives from MasterCard's largest bank customers. For example, Norman McLuskie of Royal Bank of Scotland was an original Class M director, and Citigroup CEO Steven Freiberg is a Class M director today.

212. The approval of Class M shareholders is required before the Company could cease engaging in clearing and settlement activity, both of which are core functions of MasterCard. Interchange is a key component to the both clearing and settlement. Clearing is the exchange of financial transaction information between issuers and acquirers after a transaction has been completed. MasterCard, Inc., Annual Report (Form 10-K) at 9 (Feb. 21, 2008). Once a transaction has been authorized and cleared, MasterCard provides services in connection with the settlement of transactions—that is, the exchange of funds along with associated fees. *Id*.

MasterCard administers the collection and remittance of interchange fees through the settlement process. *Id.*

IX.

RELEVANT MARKETS

213. 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).

214. 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").

215. 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.

216. The market shares of Visa and MasterCard indicate that each has market power in the General Purpose Card Network Services Market. In 1999, Visa had a 47 percent share of the General Purpose Card transactions by dollar volume in the United States, while MasterCard's share was 26 percent. Visa and MasterCard had a combined market share of 73 percent. *United States v. Visa*, 163 F. Supp. 2d at 341. At that time, Visa and MasterCard collectively issued 85 percent of the General Purpose Cards in the United States. *Id.*

217. In 2007, MasterCard transactions accounted for 29 percent of all General Purpose Card purchase volume in the United States. This figure would be even higher if Charge Cards were excluded from the market. In 2007, Visa and MasterCard collectively accounted for 71 percent of General Purpose Card purchase volume—the same share of purchase volume that they had when Judge Jones decided that Visa and MasterCard possessed market power six years earlier.

218. 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).

219. Merchants do not view Offline Debit Card Network Services and PIN-Debit Card Network Services as acceptable substitutes to Credit 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 are significantly higher than the fees associated with Debit Card transactions.

220. More recently, MasterCard has increased Interchange Fees by large amounts without losing any Merchants as a result.

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

222. Old MasterCard and its Member Banks have exercised their market power in the General Purpose Card Network Services Market. As the court noted in the United States' action against the Networks, Visa and MasterCard 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. MasterCard continues its practice of increasing Interchange Fees, again without losing significant Merchant acceptance.

223. Old MasterCard 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, MasterCard has only increased its price-discrimination practices.

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

225. The Networks' pricing policies are reflected in the comments of MasterCard's Associate General Counsel, Carl Munson, 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 57. The ability of Visa and MasterCard to set prices to Merchants based on the Merchants' elasticity of demand is referred to by economists as setting a "reservation price". This pricing strategy is used by firms with monopoly power.

226. MasterCard has also forced Premium Credit Cards upon Merchants that accept MasterCard 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.

MasterCard rules require Merchants that accept MasterCard Credit Cards to also accept these "Premium Cards." The inability of Merchants to resist the imposition of higher Interchange Fee cards further demonstrates MasterCard's sustainable market power.

227. 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. Visa's former CEO, John Coghlan, testified that Visa estimated that it would cost a new entrant [redacted] to successfully enter the market. (Coghlan Dep. 159:22-161:23.)

228. MasterCard's substantial (individual and collective) market power in the General Purpose Card and Debit Card Network Services Markets 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. There exists a relevant market, the product dimension of which if Offline Debit Cards. The geographic dimension of this market is the United States.

229. 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). The geographic dimension of this alternative market is the United States.

230. 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.

231. 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). The geographic dimension of this alternative market is the United States.

232. 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.

233. 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.

234. 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.

235. 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.

236. Visa and MasterCard have market power in the market for Offline Debit Card Network Services. In 2007, MasterCard's Offline Debit Card product had a 26 percent share of the purchase volume in the Offline Debit Card Network Services Market. Combined, Visa and MasterCard have a 100 percent share of the purchase volume in the Offline Debit Card Network Services Market.

237. 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).

238. 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.

239. There exists an alternative relevant market, the product dimension of which is MasterCard General-Purpose Card Network Services. The geographic dimension of this market

is the United States. This market is sometimes referred to as MasterCard General Purpose Card-Acceptance Services.

240. MasterCard General-Purpose Card Network Services is the technical infrastructure and the collection of agreements among Merchants, Issuing and Acquiring Banks, and MasterCard that allow Merchants to accept a MasterCard-branded General-Purpose Card for payment and obtain authorization, clearing, and settlement services for transactions initiated with a MasterCard-brand General Purpose Card.

241. MasterCard General-Purpose Card Network Services enable a Merchant that has an agreement with a MasterCard Acquiring Bank to accept any MasterCard-branded General-Purpose Card that a consumer presents to the Merchant for payment for goods and services. MasterCard General-Purpose Card Network Services do not enable Merchants to accept Visa-, American Express-, or Discover-branded forms of payment, or any other form of payment. Similarly, Visa General-Purpose Card Network Services do not enable Merchants to accept MasterCard-branded General-Purpose Cards. Nor do American Express or Discover provide network services that enable Merchants to accept MasterCard-branded General-Purpose Cards presented to the Merchant by Cardholder.

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

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

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

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

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

247. 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).

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

249. MasterCard Offline-Debit Card Network Services is the technical infrastructure and the collection of agreements among Merchants, Issuing and Acquiring Banks, MasterCard, and cardholders that allow Merchants to accept MasterCard-branded Offline-Debit Cards, as payment for goods and services.

250. MasterCard Offline-Debit Card Network Services enable a Merchant that has an agreement with a MasterCard Acquiring Bank to accept any MasterCard-branded Offline-Debit Card that a consumer presents to the Merchant for payment for goods and services. MasterCard General-Purpose Card Network Services do not enable Merchants to accept Visa-, American Express-, or Discover-branded forms of payment, or any other form of payment.

251. A hypothetical monopolist in the MasterCard Offline-Debit Card Network Services market could profitably raise prices to Merchants by at least five to 10 percent. This is demonstrated by the fact that, during the pendency of this action, MasterCard has increased the Interchange Fees that are applied to MasterCard transactions by significant amounts without losing any meaningful level of Merchant acceptance.

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

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

254. The example of Sam's Club is illustrative of this point. As a result of the injunctive relief contained in the settlement between Visa and MasterCard and the Merchant

class in *In re Visa Check and MasterMoney Antitrust Litigation*, Merchants were allowed to decline to accept Visa- or MasterCard-branded Offline-Debit Cards, even if they accepted Credit Cards under the same brand. In April 2004, Sam's Club, a division of Wal-Mart, the world's largest retailer, became the only large Merchant to discontinue its acceptance of an Offline-Debit card brand after the settlement, when it discontinued its acceptance of MasterCard-branded Offline-Debit Cards. Even though MasterCard has a significantly lower share of Offline-Debit Card transaction volume than Visa, Sam's Club found that its decision was unprofitable and was forced to begin accepting MasterCard-branded Offline-Debit Cards only two months after it discontinued acceptance.

255. Barriers to entry in the MasterCard Offline-Debit Card Network Services Market and MasterCard General Purpose Card Network Services Market are high. These barriers to entry appear primarily in the form of MasterCard's rules, originally adopted and enforced by MasterCard's Member Banks, that apply to all transactions that are conducted with MasterCard-branded Payment Cards.

256. MasterCard rules require Merchants that accept MasterCard Credit or Debit Cards to accept, respectively, all MasterCard-branded Credit or Debit Cards, regardless of the bank that issued those cards. The rules also require the payment of an 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. Viewed together, 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.

257. Because of these barriers to entry, there are very few, if any, bilateral agreements between Issuing Banks of MasterCard-branded Payment Cards and Merchants or Acquirers.

X.

CLASS ACTION ALLEGATIONS

258. 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 & 15, and N.Y. Debt. & Cred. Law §§ 275, 276:

a. The first class, "Class I," seeks damages only for violations of 15 U.S.C. §§ 1 & 15, N.Y. Debt. & Cred. Law §§ 275, 276 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 & 15, and N.Y. Debt. & Cred. Law §§ 275, 276 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.

259. Plaintiffs 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 competent and experienced in the prosecution of class-action antitrust litigation. Plaintiffs' interests are coincident with, and not antagonistic to, those of the other member of Class I.

260. Merchant Plaintiffs bring this action under F.R.C.P. 23(a) and (b)(2), on behalf of themselves and Class II. Merchant Plaintiffs are members of Class II, their claims are typical of the claims of the other Class II members, and they will fairly and adequately protect the interests of Class II. Merchant Plaintiffs are represented by counsel competent and experienced in the prosecution of class-action antitrust litigation. Merchant Plaintiffs' interests are coincident with, and not antagonistic to, those of the other members of Class II.

261. Trade-Association Plaintiffs bring this action under F.R.C.P. 23(a) and (b)(2), on behalf of their members and Class II. Trade Association Plaintiffs' members are members of Class II, their members' claims are typical of the claims of the other Class II members, and they will fairly and adequately protect the interests of Class II. Trade Association Plaintiffs are represented by counsel competent and experienced in the prosecution of class-action antitrust litigation. Trade Association Plaintiffs' members' interests are coincident with, and not antagonistic to, those of the other members of Class II.

262. 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.

263. 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.

264. 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.

265. 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. Restructuring issues.

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

ii. Whether MasterCard and its Member Banks illegally combined their stock and assets as part of the 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 Supplemental Complaint;

iv. Whether (a) New MasterCard and its Member Banks possess or exercise market power in the Relevant Markets alleged in this Supplemental Complaint, and (b) whether New MasterCard possesses or is able to exercise market power in the Relevant Markets alleged in this 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. Fraudulent conveyance issues.

i. Whether the release of MasterCard's right to assess its Member Banks for liabilities arising out of extraordinary events, such as settlements or judgments, was made without adequate consideration;

ii. Whether the release of MasterCard's right to special assessment of its Member Banks for liabilities arising out of extraordinary events, such as settlements or judgments, was made with the intent to defraud creditors of MasterCard, such as Plaintiffs and Members of the Classes;

iii. Whether the release of MasterCard's right to assess its Member Banks bore any of the "badges of fraud" commonly recognized by New York courts;

c. 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 members of Class I as a result of the conduct alleged herein;

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

267. 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.

268. 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.

269. A class virtually identical to Class Members alleged herein above 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-FIRST CLAIM FOR RELIEF

Class I v. Defendants MasterCard, Bank of America, Capital One, Chase, Citigroup, and HSBC 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.

270. Class Plaintiffs repeat and re-allege each and every allegation contained in the foregoing paragraphs of this Supplemental Complaint and every factual allegation and definition

contained in the Second Consolidated Amended Class Action Complaint with the same force and effect as if set forth herein.

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

272. As part of the Restructuring, Defendants Capital One, Chase, Citigroup, and HSBC, as well as MasterCard's other Member Banks acquired Class M and B shares in New MasterCard.

273. 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 as more fully described above in at least the following ways:

a. The Restructuring has created a single New MasterCard with sufficient market power in the relevant market to set Interchange Fees at supra-competitive levels;

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

c. By creating a New MasterCard that is akin to a "three-party system," it will allow New MasterCard 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 MasterCard and its Member Banks, it has removed a significant downward pressure on Interchange Fees;

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

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

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

h. Through its grant of Class M shares to MasterCard Member Banks, it allows the Member Banks to block any attempt by the New MasterCard Board to eliminate Interchange Fees.

274. 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 MasterCard 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.

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

TWENTY-SECOND CLAIM FOR RELIEF

Class II v. Defendants MasterCard, Bank of America, Capital One, Chase, Citigroup, and HSBC 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.

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

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

278. As part of the IPO and related Agreements, Defendants Capital One, Chase, Citigroup, and HSBC, as well as MasterCard's other Member Banks acquired Class M and B shares in New MasterCard.

279. 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 as more fully described above in at least the following ways:

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

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

c. By creating a New MasterCard that is akin to a "three-party system," it will allow New MasterCard 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 MasterCard and its Member Banks, it has removed a significant downward pressure on Interchange Fees;

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

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

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

h. Through its grant of Class M shares to MasterCard Member Banks, it allows the Member Banks to block any attempt by the New MasterCard Board to eliminate Interchange Fees.

280. 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 MasterCard 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.

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

282. 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.

283. 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.

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

TWENTY-THIRD CLAIM FOR RELIEF

Class I v. Defendants MasterCard, Bank of America, Capital One, Chase, Citigroup, and HSBC 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.

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

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

287. As part of the IPO and Agreements, Defendant MasterCard agreed with Defendants Bank of America, Capital One, Chase, Citigroup, HSBC, and MasterCard's other Member Banks to impose the Ownership and Control Restrictions described herein.

288. 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.

289. 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.

290. The harms to competition that result from the contracts, combinations, conspiracies, and agreements that are part of the Restructuring as more fully described above include at least the following:

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

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

c. By creating a New MasterCard that is akin to a "three-party system," it will allow New MasterCard 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 MasterCard and its Member Banks, it has removed a significant downward pressure on Interchange Fees;

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

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

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

h. Through its grant of Class M shares to MasterCard Member Banks, it allows the Member Banks to block any attempt by the New MasterCard Board to eliminate Interchange Fees.

291. 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.

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

TWENTY-FOURTH CLAIM FOR RELIEF

Class II v. Defendants MasterCard, Bank of America, Capital One, Chase, Citigroup, and HSBC 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.

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

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

295. As part of the IPO and Agreements, Defendant MasterCard agreed with Defendants Bank of America, Capital One, Chase, Citigroup, HSBC, and MasterCard's other Member Banks to impose the Ownership and Control Restrictions described herein.

296. 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.

297. 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.

298. 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.

299. The harms to competition that result from the contracts, combinations, conspiracies, and agreements that are part of the Restructuring as more fully described above include at least the following:

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

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

c. By creating a New MasterCard that is akin to a "three-party system," it will allow New MasterCard 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 MasterCard and its Member Banks, it has removed a significant downward pressure on Interchange Fees;

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

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

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

h. Through its grant of Class M shares to MasterCard Member Banks, it allows the Member Banks to block any attempt by the New MasterCard Board to eliminate Interchange Fees.

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

301. 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.

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

TWENTY-FIFTH CLAIM FOR RELIEF

Classes I and II vs. Defendants MasterCard, Bank of America, Capital One, Chase, Citigroup, and HSBC for Violation of N.Y. Debt. & Cred. Law § 275 (2008), Unlawful Fraudulent Conveyance

303. Plaintiffs repeat and re-allege each and every allegation contained in the foregoing paragraphs and every factual allegation and definition contained in the Second Consolidated Amended Class Action Complaint with the same force and effect as if fully set forth herein.

304. Class Plaintiffs are creditors of Defendants MasterCard, Bank of America, Capital One, Chase, Citigroup, and HSBC.

305. Before the IPO, Defendant MasterCard had a valuable property interest in its right to assess its Member Banks for liability expenses.

306. MasterCard released its right to assess the Member Banks.

307. MasterCard's release of its right of special assessment against the banks constitutes a conveyance to Defendants Bank of America, Capital One, Chase, Citigroup, and HSBC and its other Member Banks.

308. MasterCard released its right to assess the Member Banks in exchange for $650 million.

309. The exchange lacked good faith because, among other things, it was done with the intent to defraud plaintiffs.

310. At the time of the IPO, MasterCard and its Member Banks believed that antitrust claims challenging its setting of uniform schedules of default Interchange Fees could render it insolvent.

311. The release of the right to assess the Member Banks was a "conveyance" within the meaning of N.Y. Debt. & Cred. Law §§ 270 & 273-a (2008).

312. The Agreements released this right of special assessment without adequate consideration from the Member Banks, the potential assessees.

313. The release of the right to assess Member Banks had the effect of making MasterCard unable to satisfy the liabilities it may incur in this action (MDL 1720) and other antitrust litigation pending against it. The release was not a fair equivalent of the consideration MasterCard received. The release was therefore a fraudulent conveyance with respect to the Plaintiffs and the Class in this case.

314. The Agreements were undertaken by MasterCard and its Member Banks, including Defendants Bank of America, Capital One, Chase, HSBC, and Citigroup, with the intent to defraud potential judgment creditors, such as Plaintiffs, their members, and the Class.

The effect of these Agreements caused harm that is common to Plaintiffs, their members, and members of the Class.

TWENTY-SIXTH CLAIM FOR RELIEF

Classes I and II vs. Defendants MasterCard, Bank of America, Capital One, Chase, Citigroup, and HSBC for Violation of N.Y. Debt. & Cred. Law § 276 (2008), Unlawful Fraudulent Conveyance

315. Plaintiffs repeat and re-allege each and every allegation contained in the foregoing paragraphs and every factual allegation and definition contained in the Second Consolidated Amended Class Action Complaint with the same force and effect as if fully set forth herein.

316. Class Plaintiffs are creditors of Defendants MasterCard, Bank of America, Capital One, Chase, Citigroup, and HSBC.

317. Before the IPO, Defendant MasterCard had a valuable property interest in its right to assess its Member Banks for liability expenses.

318. MasterCard's release of its right of special assessment against the banks constitutes a "conveyance," within the meaning of N.Y. Debt. & Cred. Law §§ 270 & 273-a (2008), to Defendants Bank of America, Capital One, Chase, Citigroup, and HSBC and its other Member Banks.

319. MasterCard's release of its right of special assessment against the banks was made with actual intent to hinder and defraud Class Plaintiffs, which have potential claims of tens of millions of dollars against MasterCard.

320. Both before and after the IPO, a close relationship existed between MasterCard and its Member Banks, including Defendants Bank of America, Capital One, Citigroup, and HSBC.

321. MasterCard's release of its special assessment right was questionable and outside of the usual course of business.

322. MasterCard's release of its right of special assessment against its Member Banks was not supported by adequate consideration.

323. The release of the right to assess Member Banks had the effect of making MasterCard unable to satisfy the liabilities that it may incur in this action (MDL 1720) and other antitrust litigation pending against it. The release was therefore a fraudulent conveyance with respect to the Class Plaintiffs.

324. The Member Banks retained control of MasterCard after the IPO.

XI.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray for judgment with respect to their Amended Supplemental 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;

F. Declare, adjudge, and decree that the release of MasterCard's right to assess its Member Banks was a fraudulent conveyance in violation of N.Y. Debt. & Cred. Law §§ 275 & 276 (2008);

G. Order that Defendants be enjoined and restrained from consummating the fraudulent release of MasterCard's right to assess the Member Banks;

H. Set aside MasterCard's release of its right to assess Member Banks as fraudulent as to Plaintiffs, their members, and Class II in MDL 1720; and

I. Pursuant to applicable law, award monetary damages sustained by the Plaintiffs and the Class for the fullest time permitted by the applicable statutes of limitations in an amount to be proved at trial, attorneys' fees, and costs of suit, and award all other further relief as this Court may deem just and proper.

XII.

JURY DEMAND

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

Dated: Minneapolis, Minnesota
January 29, 2009

By: *s/ K. 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