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October 9, 2009

BY ECF – UNREDACTED ORIGINAL SUBMITTED TO CHAMBERS

REDACTED

The Honorable John Gleeson
United States District Court Judge
for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Visa Check/MasterMoney Antitrust Litigation (CV-96-5238)(JG)

Dear Judge Gleeson:

In accordance with Sections 10 and 12 of the Amended Plan of Allocation, Constantine Cannon LLP, Lead Counsel for the class, submits this letter to respectfully request that the Court approve a proposed distribution of **\$1,092,678,783**¹ from the settlement funds to class members who are eligible under the plan to participate in this distribution. This proposed distribution (the “Residual Distribution”) would be, for the most part, funded from the proceeds that Visa and MasterCard paid pursuant to their respective agreements to prepay their remaining obligations to the class. The Residual Distribution also will include the funds that were remaining in the settlement fund after claims for signature debit, credit and PIN debit overcharges were paid to the class in the previous distributions.

With this distribution, the bulk of the remaining funds shall be distributed pro rata to class members that received and cashed checks for their allocations from the settlement funds for signature debit, PIN debit and credit card overcharges (“Claimants”). As the distribution is to be made on a pro rata basis, several issues concerning the size of the distribution and the reserve need to be approved by the Court before Garden City Group (the “Claims Administrator”) can proceed with the calculations. We respectfully request that these issues be determined expeditiously by the Court because, as the Independent Expert explains in his report, a “12.30% bond-equivalent yield, is a reasonable assumption for the average marginal Class cost of capital.” Using that assumption, each week Claimants do not receive their Residual Distribution is equivalent to a lost opportunity cost of approximately \$2.8 million. Moreover, given the current economic climate, where merchants anticipate a weak fourth quarter and where some Claimants likely face the prospect of going out of business, any delay in making this distribution is a material issue for the class. Once the size of the distribution and reserve are determined by the

¹ Attached hereto as Exhibit A is a balance sheet Lead Counsel prepared reflecting the amount available for distribution.

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Court, the Claims Administrator will be able to execute the distribution and mail the checks in approximately four weeks.

Below we address seriatim: (i) the eligibility to participate in the Residual Distribution; (ii) the potential size of the distribution; and (iii) the size of the reserve.

A. Eligibility to Participate in Residual Distributions

Consistent with the plan, the Residual Distribution will be made pro rata to Claimants that received and cashed a check for signature debit, credit card and/or PIN debit overcharges in prior distributions. *See* Amended Plan of Allocation at ¶ 12.2. Whatever percentage the Claimant received of the settlement funds that were distributed for signature debit and credit overcharges, the Claimant will receive the same percentage of the Residual Distribution that has been allocated for those damages. A portion of the Residual Distribution has been set aside for PIN debit and each Claimant that received a check for PIN debit damages shall receive a portion of those funds based on their pro rata share of the allocation for PIN debit damages.

As the Court may recall, with the Court's approval Lead Counsel grossed-up to \$12 the payments to class members whose allocations were less than \$5 to distribute their portion of the residue in the initial distributions. As these class members have already received their residual payments, Lead Counsel recommends that they not be included in the Residual Distribution. We also recommend that the Residual Distribution exclude class members that did not cash their checks in the pre-2008 distributions. In those instances, after exhaustive efforts, including publication notice, were undertaken in vain to notify the class members at issue, the Court ordered that the funds be returned to the settlement fund. Given that history, we do not believe additional checks should be mailed to these class members.²

Based on the foregoing, Lead Counsel anticipates that 634,738 Claimants are eligible to participate in the Residual Distribution.³

² This exclusion does not apply, however, to uncashed checks from the 2008 distribution where the Claims Administrator is still receiving requests for reissuances after sending letters to class members and efforts are still ongoing to locate those merchants. Nor should this exclusion apply to uncashed checks from distributions before the September 15, 2008 deadline for cashing checks where, as of the date of this letter, Lead Counsel has received requests for reissuances of checks.

³ A complete description of the processing and handling of the payments for the Residual Distribution will be set forth in the Declaration of Neil L. Zola in Support of Residual Signature Debit and Credit Payments ("Zola Declaration"), prepared by the Court-appointed Claims Administrator, The Garden City Group, Inc. Ten days before the anticipated mailing of the checks, Lead Counsel and the Claims Administrator, consistent with past practice, shall submit to the Court a CD ROM containing a list of the Claimants eligible of Residual Distribution payments and their payment amounts along with the Zola Declaration.

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B. Funds That Are Potentially Available for the Residual Distribution

The size of the Residual Distribution depends upon the following: (1) the funds that are available for distribution, (2) the reserves that will be set aside for potential claims by class members against the settlement fund, and (3) the expenses, incurred and anticipated, that will have to be funded from the settlement account. We address each of these factors below.

(i) Existing Balances in the Settlement and Distribution Accounts

Under the settlement agreements, defendants Visa U.S.A. Incorporated (“Visa”) and MasterCard International Incorporated (“MasterCard”) were to make installment payments into the settlement funds totaling \$3.05 billion, starting in 2003 and continuing through 2012. MasterCard and Visa have made such installment payments for six years, amounting to \$1.85 billion. After accounting for prior distributions to Claimants, costs, fees, uncashed checks and interest, **\$150,034,743** remains in the settlement and distribution accounts.

(ii) Proceeds From Prepayments by Visa and MasterCard

Visa and MasterCard were obligated to pay an additional \$1.2 billion into the settlement funds between now and December 2012. In lieu of making those four annual installments, Visa and MasterCard have agreed to prepay their outstanding payment obligations for a total of **\$1,017,000,000**.⁴

(iii) Total Amount Available

Based on the foregoing, a total of **\$1,167,034,743** is currently available for the Residual Distribution.

1.	Remaining Balance in Existing Accounts	\$ 150,034,000
2.	<u>Visa and MasterCard Prepayments</u>	<u>\$ 1,017,000,000</u>
	Total available	\$ 1,167,034,743

C. Potential Reserve

From the funds currently held in the settlement and distribution accounts, certain reserves will be required and various outstanding expenses will need to be paid. The following details the reserve and expense issues that should be taken into account. We have endeavored to be

⁴ MasterCard made its prepayment of \$335 million into the settlement fund on September 30, 2009, and Visa made its prepayment of \$682 million into the settlement fund on October 5, 2009.

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conservative in calculating the reserve to ensure that in each instance, if a worst case scenario contingency were to occur, there would be sufficient funds available to address that scenario.

(i) Reserves for Potential Payment Obligations to Class Members (or Third-Parties)

Lead Counsel is aware of the following types of potential claims, and based on conservative calculations, recommends the following amounts to reserve against these contingencies.

- **Paragraph 12.6 Reserves** – Lead Counsel is required to maintain a **\$10 million reserve** pursuant to paragraph 12.6 of the Amended Plan of Allocation. Lead Counsel believes that this \$10 million figure should be maintained to address potential late claims, check reissuance requests, uncashed checks from the 2008 distribution and challenges, which include the following:

- ❖ **Late Claims** – This calculation concerns claims that were not filed before the Court's September 15, 2008 deadline for filing claims, where the class member, or someone purporting to stand in their shoes, is now attempting to get paid. This includes claims by Wells Fargo and _____, which both assert that due to bankruptcy-related circumstances they should be permitted to participate in the settlement, notwithstanding that they pressed these claims after the September 15, 2008 deadline. Given the unusual circumstances of these claims, Lead Counsel advised these entities to petition the Court to resolve these issues.⁵ In the event that the Court should grant their requests, the estimated claims, including both initial distributions and the residual payments that would be due to these two entities, is approximately _____

- ❖ **Check Reissue Requests** – This calculation concerns requests by class members for reissuance of checks that were not cashed before the Court's September 15, 2008 deadline to cash checks. These check reissue requests include the outstanding request by _____ to the Court to reissue a _____ check and the request by _____ to Lead Counsel to reissue a claim check of _____. In the event these requests are granted, the reissued checks will amount to approximately _____

⁵ Even though it first approached Lead Counsel in April 2009, after the deadline, Wells Fargo, purporting to represent Golf America Stores, Inc., HGG Acquisition Corp. (a/k/a McCrory Corporation), Aslanyan & Kocoglu, Inc. (d/b/a/ Leathermode), Wickes Furniture Company, Inc., Gantos, Inc., The Music Network, Inc., and SLJ Retail, LLC, filed an Order to Show Cause on October 6 to permit it to participate in the distribution.

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- ❖ **Unpaid Claims Associated with Outstanding Challenges:** – This principally relates to 51 challenges associated with the PIN debit allocation, and an outstanding challenge by _____, totaling approximately \$1.7 million. The vast majority of those challenges have been denied, none has been appealed to the Court, and, excluding the _____ challenge, the time for appealing those decisions to the Court has expired; and
- ❖ **Uncashed Checks from 2008 Distribution** – This calculation concerns \$1,018,267.86 million in uncashed checks from the 2008 distribution, where as noted above, the Claims Administrator is still receiving requests for reissuances and efforts are still ongoing to locate the class member.

The \$10 million reserve mandated by Paragraph 12.6 would cover these contingencies and possible additional late claimants.

- **Interest Payments** – This calculation concerns the outstanding request by Enterprise Rent-A-Car Company for interest payments for all Claimants dating back to December 2005, which is now pending before Court (approximately \$52.8 million).⁶

The largest potential reserve calculation is the reservation of funds to pay interest payments to Claimants should the Court grant the most comprehensive relief sought by Enterprise. While this obligation could exceed \$50 million, Lead Counsel believes it is in the best interests of Claimants to proceed with the Residual Distribution and reserve against the possibility of making interest payments given the cost to the class of delaying payment while the Enterprise request for interest is pending.

Lead Counsel has considered the fact that reserving over \$50 million for a potential award of interest to Claimants virtually guarantees an additional distribution in 2010. Lead Counsel estimates that even with a much smaller reserve, such as \$10 million, (the minimum reserve set forth in the Plan) an additional distribution is likely given the anticipated amount of uncashed checks.⁷ While it is hard to accurately assess the costs associated with additional

⁶ In its motion for interest payments, Enterprise seeks, among other things, “to modify the Amended Plan of Allocation to provide for interest payments necessary to treat all class members as though they were paid contemporaneously.” Memorandum in Support of Motion by Enterprise Rent-A-Car Company to Modify the Amended Plan of Allocation at 1 (May 19, 2009). If granted, this request could result in \$52.8 million being awarded to treat all Claimants as if they were paid in December 2005, when the first distribution was made to approximately 25,000 class members. On the other end of the pendulum, Enterprise, in the alternative, seeks interest payments only for itself, and if the motion were limited to Enterprise the amount potentially at issue would decline to _____ (using a 4.6% interest rate). See *id.* at 13 (“While this motion is filed solely on behalf of Enterprise . . .”).

⁷ Based on past experience and reports of an increasing number of retailers going out of business, we anticipate that a not insubstantial number of checks issued in the Residual Distribution ultimately will not be cashed.

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distributions without knowing the number of checks that will be mailed, our best estimate, based on advice from the Claims Administrator, is that distributing an additional \$50 million will not materially cost more than a distribution in or around \$10 million. When all of these factors are considered, Lead Counsel recommends that a **\$52.8 million** reserve be taken for the interest issue to enable the distribution to proceed as quickly as possible.

(ii) Expenses

In addition to the reserve amount proposed for potential payment obligations to Claimants, **\$6,764,960** should be set aside to address existing expenses that are known and pending. Currently, \$2,478,290 of fees and costs (through April 2009) have been recommended for payment by the Special Master and \$4,286,670 of fees and costs are pending Court approval (including 2.8 million of fees and costs owed to Citigroup and Barclays) or have been invoiced and will be submitted for approval soon. Attached as Exhibit B is a detailed list of such entities and the corresponding amounts to be reserved for each to account for fees and costs already accrued.

In addition to the amounts listed above, Lead Counsel estimates that **\$4,791,000** should be set aside for future expenses that can be estimated with accuracy at this point, including the expenses associated with the Residual Distribution and expenses already incurred but not yet submitted to the Special Master. Most of this (\$2.9 million) is to cover the Claims Administrator's costs for the Residual Distribution. Exhibit B contains a detailed list of such entities and the corresponding amounts to be reserved for potential future costs or fees.

Based on the foregoing, Lead Counsel respectfully recommends that the Court approve a reserve totaling **\$74.4 million**, comprised of the following:

o Interest Payments	\$52,800,000
o Required Reserve	\$10,000,000
o Fees (4/09) recommended for payment by the Special Master	\$2,478,290
o Fees invoiced but not yet approved by the Special Master	\$4,286,670
o Reserve for Future Expenses	\$4,791,000
	<hr/>
	\$74,355,960

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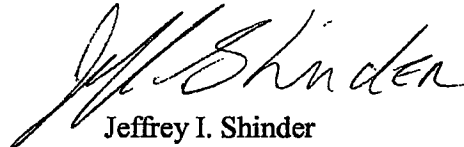
D. Summary of Requested Relief

Based on the foregoing, Lead Counsel respectfully requests that the Court approve the Residual Distribution proposal as outlined in this letter, including the following:

- the request that only class members that received and cashed checks for claims other than those grossed-up to \$12 are eligible to participate in the Residual Distribution;⁸
- the request to reserve **\$74.4 million** for costs, fees, and claims-related issues, as outlined in Section C above; and
- the request to make a Residual Distribution totaling **\$1,092,678,783**.

Should the Court approve this relief, the Residual Distribution shall be distributed to the class within four weeks of a decision by the Court. In advance of that distribution, Lead Counsel and the Claims Administrator shall submit a report under seal to the Court detailing the payments to be made to each Claimant. If the Court has any questions, we are available to discuss them at the Court's convenience.

Respectfully submitted,



Jeffrey I. Shinder

cc: Robin Wilcox, Special Master (by electronic mail)

⁸ The one exception to these eligibility requirements is outlined in footnote 1, above, regarding the inclusion of certain merchants who have not cashed their checks.

EXHIBIT A

EXHIBIT A: BALANCE SHEET

Account Balances	
Citibank account	\$138,798,812
JPMorgan account	\$2,617,077
Operating accounts	<u>\$8,618,854</u>
	\$150,034,743
Prepayments	
MasterCard payment	\$335,000,000
Visa payment	<u>\$682,000,000</u>
	\$1,017,000,000
Total Available	\$1,167,034,743
Expenses (Exhibit B)	(\$11,555,960)
Interest Payment Reserve	(\$52,800,000)
Plan of Allocation Reserve	(\$10,000,000)
Total Expenses and Reserves	(\$74,355,960)
Available for Distribution	\$1,092,678,783

EXHIBIT B

EXHIBIT B: OUTSTANDING AND FUTURE EXPENSES

(amounts rounded to nearest \$10)

Entity	Amounts Recommended by the Special Master But Not Paid	Invoices Submitted to Special Master But Not Approved and Invoices Not Yet Submitted	Reserve for Amounts Not Yet Invoiced or Work Not Yet Performed	Sum
Constantine Cannon LLP	\$457,830	\$199,930	\$556,000	\$1,213,760
Charles River Associates	\$57,530	\$8,820	\$110,000	\$176,350
Noblett & Associates LLC	\$31,080	\$0	\$0	\$31,080
Palma Advisors LLC	\$2,740	\$19,900	\$60,000	\$82,640
Cannonade Capital LLC	\$443,100	\$236,760	\$1,025,000	\$1,704,860
Apco Worldwide	\$3,660	\$4,160	\$30,000	\$37,820
Brown Rudnick LLP	\$1,005,430	\$165,880	\$0	\$1,171,310
Orrick, Herrington & Sutcliffe LLP	\$423,150	\$110,740	\$0	\$533,890
Richards, Layton & Finger PA	\$44,260	\$40,300	\$0	\$84,560
Miller Nash LLP	\$9,510	\$2,830	\$0	\$12,340
Chapman and Cutler LLP	\$0	\$103,830	\$0	\$103,830
Dorsey & Whitney LLP	\$0	\$14,970	\$0	\$14,970
Winston & Strawn LLP	\$0	\$48,040	\$0	\$48,040
Professor Bernard Black	\$0	\$44,870	\$10,000	\$54,870
Special Master Robin Wilcox	\$0	\$0	\$100,000	\$100,000
Garden City Group, Inc.	\$0	\$443,570	\$2,900,000	\$3,343,570
Barclay's Capital, Inc. and Citigroup Global Markets, Inc.	\$0	\$2,842,070	\$0	\$2,842,070
SUM	\$2,478,290	\$4,286,670	\$4,791,000	\$11,555,960