UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE:	:	MASTER FILE NO. CV-96-5238
	:	
VISA CHECK/MASTERMONEY ANTITRUST LITIGATION	:	(Gleeson, J.) (Orenstein, M. J.)
This Document Relates To	:	
	:	
ALL ACTIONS	:	

LEAD COUNSEL'S RESPONSE TO WELLS FARGO'S MOTION FOR AN ORDER TO SHOW CAUSE

Respectfully submitted,

CONSTANTINE CANNON LLP
Jeffrey I. Shinder (JS-5719)
Jason J. Enzler (JE-2475)
450 Lexington Avenue, 17th Floor
New York, NY 10017
Telephone: (212) 350-2700
Facsimile: (212) 350-2701

Lead Counsel for the Plaintiff Class

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Constantine Cannon LLP, Lead Counsel for the Plaintiff Class, respectfully submits this response to Wells Fargo Retail Finance II, LLC's ("Wells Fargo") motion to permit its filing of untimely claims.

This case has involved seven years of active litigation, two years of settlement approval, and a roughly three-year window for filing claims. During that time, millions of notices were sent to the class regarding settlement and millions more were sent notifying the class of claims filing deadlines. Notices of both were posted in various media, which likely reached hundreds of millions. After several extensions to the deadline for filing claims, the Court ordered a final cutoff of September 15, 2008 – three years after initial claim forms were mailed to the class.

On April 15, 2009, seven months after the final cutoff for claims, Wells Fargo (a large Visa debit issuer that profited from the restraints that were at issue in this case) approached Lead Counsel and requested that it be permitted (I) to file untimely claims, and (II) for merchants in whose shoes it purports to stand, to access those merchants' claims information and to participate in the residual distribution.[1] Lead Counsel opposes Wells Fargo's untimely request to open up the claims period for these five claims seven months after the final cutoff because Wells Fargo had notice of the settlement and the claims process years before the deadline for filing claims expired, but did nothing to pursue these purported claims.

"There is no question that in the distribution of a large class action settlement fund, 'a cutoff date is essential and at some point the matter must be terminated.'"[2] The claims period

[1] As outlined in its Memorandum of Law in support of its motion, Wells Fargo made this request regarding the following seven merchants: (1) Golf America Stores, Inc.; (2) HGG Acquisition Corp., a/k/a McCrory Corp.; (3) Aslanyan & Kocoglu, Inc., d/b/a/ Leathermode; (4) Wickes Furniture Company, Inc.; (5) Gantos, Inc.; (6) The Music Network, Inc.; and (7) SLJ Retail, LLC. Two of these seven merchants filed claims and have received payments. The five other merchants have not filed claims. Declaration of Perry Carbone Regarding The Wells Fargo Order To Show Cause at ¶ 11 ("Carbone Decl.").

[2] *In re Gypsum Antitrust Cases*, 565 F.2d 1123, 1127 (9th Cir. 1977) (quoting *Reports of the Conference forDistrict Court Judges*, 63 F.R.D. 231, 262 (1973)).

was open for three years in this matter. Wells Fargo fails to meet its burden for showing cause to allow late claims. It does not even offer explanation, much less explanation rising to the level of excusable neglect, about its neglect to file any claims between 2005 – 2008, despite the fact that it clearly knew about the litigation, the settlement, and the claims process.

As for Wells Fargo's request to access information regarding claims already filed by two class members, Lead Counsel takes no position in assessing Wells Fargo's right to such information, and more importantly, its purported right to receive these merchants' residual payments. This request raises issues of bankruptcy law, which, as Lead Counsel has explained to Wells Fargo, are best addresses to the Court.

I. STATEMENT OF FACTS

The Plaintiff Class in this case are the millions of merchants that accepted Visa and MasterCard credit cards, and that under the merchants Honor All Cards rules ("HAC" rules), also were required to accept Visa's and MasterCard's debit cards. As the Second Circuit acknowledged, during the relevant time period, Visa and MasterCard were essentially cartels of their member banks as their rules and practices were the product of decisions made by banks that competed as issuers and acquirers. *See, e.g., United States v. Visa U.S.A. Inc.*, 344 F.3d 229, 242 (2d Cir. 2003) ("These 20,000 banks set the policies of Visa U.S.A. and MasterCard."). Notably, Wells Fargo was a leading member of Visa and MasterCard and an issuer of debit cards that profited from the supra-competitive interchange enabled by the HAC rules.[3] In 2003, the class reached settlement agreements with Visa and MasterCard that required, among other things, the defendants' payment of $3.05 billion to class members over a ten-year period in exchange for the

[3] *See* Wells Fargo's Rule 7.1 Corporate Disclosure Statement, dated October 20, 2009 (Dkt. No. 1534) (disclosing that Wells Fargo's parent is Wells Fargo and Company).

release of claims for damages from overcharges on signature debit, credit card, and PIN debit transactions.

A. Notice Of The Settlement And Claims

On June 13, 2003, the Court preliminarily approved the settlement agreements. Pursuant to the orders giving preliminary approval, Garden City Group ("Claims Administrator") mailed more than 8.1 million notices of the settlement agreements to U.S. merchants on or before July 3, 2003. And notices were posted in media estimated to reach more than 150 million targets between June 20 and August 4, 2003. Carbone Decl. at ¶ 3. On August 18, 2003, Lead Counsel submitted a Plan of Allocation to the Court detailing how claims would be processed and paid. [4] After a fairness hearing, held on September 25, 2003, the Court approved the settlement agreements and the Plan of Allocation on December 19, 2003, which became final on June 1, 2005 after all appeals were exhausted and the time to seek further review expired.

Numerous notices of the settlement agreements and impending claims process were distributed as press releases and posted on the case and trade websites prior to the mailing of claim forms in 2005. And at least five notices were issued during the summer of 2005 alerting class members of the upcoming distribution of claim forms. Carbone Decl. at ¶ 3.

As required by the Plan of Allocation, the Claims Administrator mailed more than eight million claim packets to merchants by September 29, 2005. Class members were required to review the forms and file their claims or provide data supporting their claims by November 28, 2005. This deadline for filing claims was extended three times, first to December 28, 2005, second to October 29, 2006 (in cases where claim forms were requested before July 31, 2006), and a third time to September 15, 2008. Carbone Decl. at ¶ 4.

[4] The Plan of Allocation was amended on August 16, 2005.

Multiple notices were provided to class members regarding these deadlines. For example, on October 12, November 14, and December 23, 2005, Lead Counsel issued press releases advising class members of the December 28, 2005 deadline for filing claims.[5] Carbone Decl. at ¶ 6. Likewise, Lead Counsel issued a press release on August 4, 2008 regarding the September 15, 2008 deadline. And Lead Counsel authorized a massive outreach program during July and August 2008 to publicize the impending deadline in a campaign designed to reach over 37 million subscribers along with approximately 80 million readers. Carbone Decl. at ¶ 7.

As a result of these extensive outreach efforts, hundreds of thousands of class members have filed timely claims. The Claims Administrator has paid approximately 677,000 claims involving signature debit and credit overcharges for a total value of $1.38 billion and approximately 120,000 claims involving PIN debit overcharges for a total value of $257 million. Carbone Decl. at ¶ 8. Only 10 late claims have been received by the Claims Administrator. Carbone Decl. at ¶ 5.

B. Wells Fargo's Notice

On April 15, 2009, seven months after the final claims deadline, David Weitman, counsel for Wells Fargo, contacted Lead Counsel to discuss, for the first time, its purported rights to claims involving merchants that had filed for bankruptcy.[6] Declaration of Jason J. Enzler at ¶ 4 ("Enzler Decl."). But this was not the first time that Wells Fargo had contacted Lead Counsel to inquire about the settlement administration, claims, or payments. Wells Fargo has made multiple inquiries to the offices of Lead Counsel and the Claims Administrator since at least as early as

[5] *See* "Merchant Advisory on Extension of Time to 90 Days to Submit Claim Forms or Challenge Estimated Cash Payments for the Distribution of the Visa Check/MasterMoney Antitrust Litigation Settlement Fund," Oct. 12, 2005; "Merchant Advisory on Consolidation Detail Now Available on the Website for the Distribution of the Visa Check/MasterMoney Antitrust Litigation Settlement Fund," Nov. 14, 2005; "Merchant Advisory on Pending Consolidation Requests," Dec. 23, 2005, at www.inrevisacheckmastermoneyantitrustlitigation.com/press.php3 (the case website).

[6] *See supra* note 1 for a list of the seven merchants.

2006. Enzler Decl. at ¶¶ 2-3. Moreover, as early as December 2005, Mr. Weitman was directly receiving information regarding the settlements and the claims process. Carbone Decl. at ¶ 10.

Wells Fargo urged that it be permitted to file late claims and that it be allowed to access confidential claims information. Based on confidentiality orders previously issued by this Court, however, it is the Claims Administrator's policy not to provide confidential class member data to any party other than the class member itself, or its legal counsel, without proper documentation evidencing that the class member has authorized such action. Similarly, it is the Claims Administrator's policy not to transfer the ownership of a claim without the express written consent of the class member itself, or its legal counsel, without the aforementioned authorization. Carbone Decl. at ¶ 12.

Between April and September of 2009, Wells Fargo provided several documents to Lead Counsel and the Claims Administrator for each of the seven merchants it sought information about in an attempt to allay the confidentiality and claim ownership concerns. These documents included purported loan and security agreements between Wells Fargo and those merchants as well as summarized docket information, motions, and orders issued by different courts holding jurisdiction over each class member's bankruptcy proceeding. At Lead Counsel's request, the Claims Administrator reviewed these documents internally with its bankruptcy group. In each instance the Claims Administrator determined that, while Wells Fargo may have a security interest in certain assets pertaining to the merchants in question, the documents provided did not prove that Wells Fargo had the explicit authority to receive confidential claim information and forthcoming payments, absent consent from the class members themselves or by order of this Court. Carbone Decl. at ¶ 13.

II. ARGUMENT

A. Standard Of Review

"The determination whether to allow the participation of late claimants in a class action settlement is essentially an equitable decision within the discretion of the court." *In re Crazy Eddie Securities Litigation*, 906 F.Supp. 840, 843 (E.D.N.Y. 1995) (citing *Zients v. LaMorte*, 459 F.2d 628, 629-30 (2d Cir. 1972) among others). As the Settlement Funds have not been entirely distributed, the Court "retains its traditional equity powers" in supervising the administration and distribution of the Settlement Funds. *Zients*, 459 F.2d at 630. Decisions of whether to permit the filing of untimely claims should be made under the "excusable neglect" standard, especially here, where Wells Fargo essentially requests that the Court amend its July 22, 2008 order setting September 15, 2008 as the deadline for filing claims. *See Crazy Eddie Securities Litigation*, 906 F.Supp. at 844 ("Moreover, since the deadline for filing proofs of claims was first set by Judge Nickerson in his order of March 30, 1993, the instant motion is essentially a request for an enlargement of time with respect to a court ordered deadline.").

"Factors to be considered in evaluating excusable neglect include '[1] the danger of prejudice to the [non-movant], [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith.'" *Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355, 366 (2d Cir. 2003) (alterations in original) (quoting *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 395 (1993)). The Second Circuit accords the most weight to the third factor, the movant's explanation for delay and whether the movant caused the delay. *See id.* at 366, 366 n.7. And the Second Circuit has

"taken a hard line" in refusing to find excusable neglect in cases involving failure to comply with clear court orders or rules. *Id.* at 368.

B. Wells Fargo Cannot Show Excusable Neglect Regarding The Five Claims It Seeks To File Because It Had Actual Notice Of The Settlements And The Claims Process Long Before The September 15 Deadline

In deciding whether to allow the five claims Wells Fargo seeks to file late, the most important consideration is the "reason for the delay." "[T]he starting point and common denominator (indeed, the *sine qua non*) in every case employing an analysis of excusable neglect is an explanation of the reason for the delay." *Demint v. NationsBank Corp.*, 208 F.R.D. 639, 642 (M.D. Fla. 2002). Wells Fargo attempts to explain its delay by arguing that it had no notice before February 2009 of "(i) the class action settlement, (ii) the existence of the Litigation Trust, or (iii) the need to provide notice of any claims with respect to the settlement proceeds from the Litigation Trust." Mem. of Law at 1. Each of these assertions is false.

Wells Fargo had actual notice of (i) the settlements, (ii) the existence of the settlement funds, and (iii) the claims process at least as early as December 2005. A letter, dated December 28, 2005, from the trustee of a class member in bankruptcy to the Claims Administrator, discusses the process of filing a claim in this matter for that merchant. *See* Carbone Decl. at ¶ 10; Exhibit A. David Weitman, counsel for Wells Fargo, is copied on that letter. *Id.* In 2006, with the window for filing claims still open, Mr. Weitman was copied on another letter further discussing the claims process. *Id.* at ¶ 10; Exhibit B.

Moreover, Wells Fargo took an active interest in the administration of this settlement between 2005 and the September 15, 2008 deadline. At least as early as June 2006, Mr. Weitman had contacted the offices of Lead Counsel to inquire about the filing of a claim and to learn when claims would be paid. *See* Enzler Decl. at ¶ 3. Mr. Weitman provided confidential claims information for a class member to Lead Counsel at that time, including the claim and

control numbers and a copy of the filed claim. *See id.* And in March 2008, with the final cutoff for filing claims more than five months away, the Claims Administrator informed Lead Counsel that Mr. Weitman was inquiring about PIN debit payments. *See id.*

As such, Wells Fargo knew about the settlement, the settlement funds, and the claims process for almost three years before the final cutoff for filing claims. Wells Fargo, itself a sophisticated entity, was aided during this time by counsel. And it was actively engaged in learning about the settlement administration and inquiring about timing issues concerning claims and payments. Yet Wells Fargo did nothing to pursue the filing of the claims it now seeks to file. This cannot be the type of neglect courts consider "excusable."

In light of the above, Wells Fargo has failed to allege facts showing that notice was not received, and it offers no other support showing that the neglect to file claims was "excusable."[7] In fact, Wells Fargo fails to even allege any facts regarding its "neglect" in failing to file claims after it was aware, at least as early as December 2005, of the settlement and claims process.[8] But that is exactly Wells Fargo's burden if it is to succeed in obtaining relief under the standard of excusable neglect. *See, e.g., In re Electrical Carbon Products Antitrust Litigation*, 622 F.Supp.2d 144, 166 (D.N.J. 2007) (excluding late claims where movant failed to provide

[7] In assessing the credibility of Wells Fargo's claim of lack of notice, it is worth noting that even on the facts alleged by Wells Fargo, at least some of the merchants in question would have received notice of their claims at the time the claim forms were mailed in September 2005 if, as Wells Fargo alleges, the merchants stopped receiving mail only after they were dismissed from bankruptcy. Mem. of Law at 15 (Wickes dismissed on May 11, 2009) and 20 (Gantos dismissed on February 12, 2009). Indeed, the record shows that these two merchants would have received notices during the publicity campaign during the summer of 2008 regarding the impending September 15, 2008 deadline. Moreover, two of the merchants filed claims for which they have been paid. Carbone Decl. at ¶ 11. This calls into serious doubt Wells Fargo's allegation that the merchants ceased accepting mail at the time their respective cases were dismissed from bankruptcy since at least one of the paid claims was filed after the merchant was dismissed from bankruptcy according to Wells Fargo.

[8] According to Wells Fargo's own motion, bankruptcy proceedings involving the merchants at issue were either dismissed or other relief had been entered before December 2005 such that Wells Fargo was able to pursue claims and stood in the shoes of at least six of the merchants. *See* Mem. of Law. at 10 (Golf America – September 9, 2004), 12 (McCrory – February 13, 2004), 13 (SLJ Retail – April 23, 2004), 16 (Leathermode – January 15, 2002), 18 (Music Network – April 4, 2004), and 20 (citing Norton Aff., ¶ 49) (Gantos – October 17, 2000).

explanation for delay in filing claims). Wells Fargo's failure to allege facts regarding neglect or to support a reasonable basis for delay in filing claims, alone, support a denial of its request, *see, e.g.*, *Demint*, 208 F.R.D. at 642, 642 n.5 (noting that the movants failed to allege circumstances surrounding the neglect, such that consideration of the other 3 equitable factors was not necessary).

While Lead Counsel's principle rational for opposing the request to file late claims is delay, it is worth noting, in assessing the equities of this application, that Wells Fargo was a leading member of Visa and MasterCard during the relevant time period. Wells Fargo issued debit cards and profited from the supra-competitive interchange associated with the HAC rules. Given Wells Fargo's failure to justify its delay, to the extent the Court perceives that Wells Fargo raises serious issues with respect to the five claims it seeks to file, Lead Counsel respectfully requests that Wells Fargo's role as an un-named co-conspirator should weigh against it. *See* Second Amended Consolidated Class Action Complaint and Jury Demand at ¶ 32, dated May 26, 1999.

C. Wells Fargo's Request To Access Claims Information And Receive Residual Distributions

Because it concerns questions of bankruptcy law, Lead Counsel takes no position on the second portion of Wells Fargo's request, that Wells Fargo be permitted access to claims information of merchants that have previously filed claims and accepted payment of those claims so Wells Fargo can now stand in their shoes for purposes of the residual distribution. As mentioned above, two of the seven merchants that Wells Fargo's motion deals with fall into this category. It is important to note, however, that the Claims Administrator reviewed the numerous documents provided by Wells Fargo purporting to give it authorization to such claims information, and after conferring with its bankruptcy group, was still unable to determine

whether the documents supported Wells Fargo's request. Carbone Decl. at ¶ 13. Moreover, to the extent equitable factors come into play with respect to these claims, Lead Counsel respectfully reiterates its concern about Wells Fargo claiming settlement amounts for merchants given its previous history as a leading member of Visa and MasterCard that issued debit cards that contributed to the class's injuries.

III. CONCLUSION

For the foregoing reasons, Lead Counsel respectfully requests that the Court reject Wells Fargo's request to permit the filing of five late claims. Lead Counsel takes no position regarding Wells Fargo's request to access claims information for two merchants that have filed and accepted payment of claims and to participate in the residual distributions to those two merchants.

Respectfully submitted,

Dated: October 30, 2009
New York, NY

By: _____

CONSTANTINE CANNON LLP
Jeffrey I. Shinder (JS-5719)
Jason J. Enzler (JE-2475)
450 Lexington Avenue, 17th Floor
New York, NY 10017
Telephone: (212) 350-2700
Facsimile: (212) 350-2701

Lead Counsel for the Plaintiff Class