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9 SUPERIOR COURT FOR THE STATE OF CALIFORNIA
10 CITY AND COUNTY OF SAN FRANCISCO
11 UNLIMITED JURISDICTION

12 COORDINATION PROCEEDING)
SPECIAL TITLE [RULE 1550(b)])

J.C.C.P. No.: 4335

13 **CREDIT/DEBIT CARD TYING CASES**)

CLASS ACTION

14 This Document Relates to:)

15 All Actions)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

16 Date: September 28, 2009

17 Time: 10:30 a.m.

18 Dept.: 304

19 Judge: Hon. Richard Kramer

20 Trial Date: None set

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1 **I. INTRODUCTION**

2 Plaintiffs submit this Memorandum in support of their motion for preliminary approval of
3 the proposed Settlement Agreement between Plaintiffs and Defendants Visa U.S.A. Inc. and Visa
4 International Service Association (collectively “Visa”), and MasterCard International Incorporated
5 (“MasterCard”) (collectively “Defendants”).

6 The combined \$31,000,000 all cash settlement was achieved through lengthy and arms-
7 length negotiations, after nine years of litigation, as Plaintiffs were preparing to file their motion for
8 class certification. It came after this Court’s rulings on several dispositive motions and the
9 completion of substantial discovery. The settlement compensates California consumers who
10 purchased retail products or services from businesses that accepted and/or issued Visa- or
11 MasterCard-branded credit and debit cards. Plaintiffs alleged, among other things, that Defendants’
12 “honor all cards” rules were illegal tying arrangements that required businesses to pay artificially
13 inflated transaction fees, and constituted an unfair business practice.

14 Visa will pay \$25,000,000 and MasterCard will pay \$6,000,000 for a fund (the “Settlement
15 Fund”). There are tens of millions of potential class members—everyone in California who made
16 retail purchases from businesses subjected to Defendants’ rules and fees during the settlement class
17 period, which runs from 1980 through final approval. Considering the length of this period and
18 California’s population, there are more class members than dollars potentially available for
19 distribution, and it would not be practical to distribute cash directly to so many class members.
20 Therefore, Plaintiffs propose to distribute the net settlement proceeds, after payment of attorneys’
21 fees and costs, service fee awards, and notice costs, in the form of cy pres benefits to class
22 members and the citizens of California.

23 If the Court awards the requested fees and costs of 30 percent of the Settlement Fund, the
24 net proceeds available for cy pres distribution are expected to be approximately \$21 million.¹
25 Consistent with the subject matter of this lawsuit, Plaintiffs propose that fifty percent of the
26 available amount be used to develop and distribute a comprehensive financial literacy toolkit, to be
27

28 ¹ As discussed below, this number may be reduced should the Court award fees to counsel in a related case.

1 made available to members of the settlement class and all Californians. Plaintiffs propose that
2 thirty percent be distributed to eight non-profit organizations which specialize in providing
3 financial literacy services in California, and the remaining twenty percent to law schools, legal aid
4 providers, and other non-profit organizations in California to use for initiatives to benefit settlement
5 class members. No amount of the settlement funds will revert to Visa or MasterCard, thereby
6 guaranteeing full recovery to the class.

7 By this motion, Plaintiffs request that the Court: (1) grant preliminary approval of the
8 Settlement Agreement; (2) certify, for settlement purposes only, the settlement class specified
9 therein; (3) approve the proposed forms and plan of notice; (4) establish a schedule for the
10 dissemination of notice to class members as well as deadlines for class members to object to or
11 opt-out of the settlement; and (5) schedule a hearing on final approval.

12 **II. LITIGATION HISTORY**

13 **A. Overview of Allegations and Claims.**

14 This action involves state antitrust and unfair competition claims on behalf of a class of
15 persons in California who purchased retail products or services from businesses that accepted
16 and/or issued Visa- or MasterCard-branded credit and debit cards. Plaintiffs allege that Defendants
17 violated the Cartwright Act, Cal. Bus. & Prof. Code § 16700 et seq., and the Unfair Competition
18 Law, Cal. Bus. & Prof. Code § 17200 et seq., by among other things imposing “honor all cards”
19 rules, which were *per se* unlawful tying arrangements that required businesses to pay artificially
20 inflated transaction fees for sales involving Defendants’ “off-line” debit cards, and resulted in
21 higher prices on retail products and services as the businesses passed on their increased costs to
22 consumers. Declaration of Craig C. Corbitt ¶ 2.

23 Defendants established rules that required merchants accepting their credit cards to also
24 accept their off-line debit cards. In 1996, a class of merchants filed a lawsuit in federal court,
25 alleging that these rules were a *per se* illegal tying arrangement under the Sherman Act. *See In re*
26 *Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. 68, 71 (E.D.N.Y. 2000), *aff’d* 280 F.3d 124
27 (2d Cir. 2001). The merchants claimed that, but for the tying arrangement, interchange fees for off-
28 line debit transactions would have been lower, and therefore each merchant suffered damages as a

1 result of the tie, in the amount of the overcharge paid. *Id.* at 74. The merchants also claimed that
2 Defendants' "exclusionary" rules and alleged price-fixing of fees contributed to the overcharges.
3 The litigation settled on the eve of trial in 2003. See *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396
4 F.3d 96, 102-103 (2d Cir. 2005). Corbitt Decl. ¶ 3.

5 Plaintiffs allege among other things that the same conduct of Visa and MasterCard that was
6 at issue in the federal litigation caused harm to California consumers. Merchants overcharged by
7 Defendants passed on the higher costs they were forced to incur in the form of higher prices on
8 their retail goods and services. Plaintiffs also allege various other anticompetitive practices by Visa
9 and MasterCard that harmed consumers, including "exclusionary" rules that eliminated competition
10 from competing credit cards such as American Express and Discover, and common control of Visa
11 and MasterCard by the member banks that formerly operated them. Some of these practices were
12 at issue in litigation brought by the Government against Visa and MasterCard. See *United States v.*
13 *Visa USA Inc.*, 344 F.3d 229, 234 (2d Cir. 2003). Corbitt Decl. ¶ 4.

14 **B. Procedural Background, Motion Practice, Discovery, and Settlement.**

15 The first complaint in this action was filed on January 26, 2000 (the "*Johns*" complaint).
16 Defendants answered. The parties initially agreed to a stay pending the outcome of the federal
17 merchant case, which plaintiffs viewed as advantageous in order to minimize expense and to
18 potentially obtain the benefit of favorable rulings from the federal court. The parties ultimately
19 stipulated to an order staying the proceedings and tolling the five year trial commencement rule,
20 which was entered on March 21, 2003. Corbitt Decl. ¶ 5.

21 Following the settlement of the federal merchant case in 2003, approximately twelve
22 additional indirect purchaser cases were filed in California state court, making the same general
23 allegations as the initial *Johns* complaint. Following a petition for coordination, Judge Richard A.
24 Kramer was assigned as the Coordination Trial Judge on January 16, 2004. On July 8, 2004, the
25 Court entered Pretrial Order No. 1, designating the undersigned and Zelle Hofmann to serve as
26 plaintiffs' lead counsel ("Class Counsel"). Corbitt Decl. ¶ 6.

27 On July 12, 2004, Plaintiffs filed the currently operative Consolidated Amended Complaint,
28 attached as Exh. A to the Corbitt Decl. Defendants filed a demurrer and, on October 14, 2004, the

1 Court entered an order sustaining Defendants' demurrer to Plaintiffs' Cartwright Act claims but
2 overruling their demurrer to the Unfair Competition Law causes of action. Following the passage
3 of Proposition 64 and the Supreme Court's rulings concerning the scope and retroactivity of that
4 initiative, the parties agreed to another stipulated stay and tolling order while Defendants filed a
5 motion for judgment on the pleadings against Plaintiffs' remaining claim under the UCL. The
6 Court denied that motion in an order filed on May 3, 2007, and discovery commenced. Plaintiffs
7 engaged in substantial fact discovery, and worked extensively with experts to opine on liability,
8 impact and restitution issues. Plaintiffs propounded substantial written discovery on Defendants,
9 resulting in the production and review of hundreds of thousands of documents relating to liability,
10 as well as transactional sales and fee data relating to Plaintiffs' restitution claim. Corbitt Decl. ¶ 7.

11 Plaintiffs moved to apply collateral estoppel to certain findings made by the federal district
12 court in granting motions for summary judgment brought by the plaintiffs in the federal merchant
13 case. The Court issued an order on December 6, 2007, holding that Plaintiffs failed to meet their
14 burden to establish collateral estoppel. Plaintiffs continued to review discovery and prepare for
15 class certification and trial. Corbitt Decl. ¶ 8.

16 At a status conference on August 11, 2008, Defendants indicated that they were preparing to
17 file a second motion for judgment on the pleadings, while Plaintiffs stated that they were preparing
18 to file their motion for class certification. The Court set an October 10, 2008 deadline for both sides
19 to file their respective motions. Corbitt Decl. ¶ 9.

20 As the filing date approached, settlement discussions between Plaintiffs' counsel and Visa's
21 counsel intensified. The motion filing deadline was continued at the parties' request. After
22 extensive arms-length negotiations, Plaintiffs reached settlement terms with Visa. On October 21,
23 2008, the Court entered an order staying all proceedings against Visa in light of the settlement.
24 Corbitt Decl. ¶ 10. Plaintiffs then prepared to proceed with class certification against MasterCard.
25 Negotiations with MasterCard substantially progressed in the subsequent months, facilitated by
26 scheduling continuances from the Court. As the result of arms-length negotiations, Plaintiffs
27 reached settlement terms with MasterCard and, on February 18, 2009, the Court stayed all
28 proceedings against MasterCard. Corbitt Decl. ¶ 11. In the following months the parties negotiated

1 the terms of a single agreement, and then executed the Settlement Agreement, which is attached as
2 Exh. B to the Corbitt Decl.

3 **III. SUMMARY OF THE SETTLEMENT TERMS**

4 Plaintiffs have negotiated a cash settlement in the combined amount of \$31,000,000 with
5 Defendants. Visa will pay \$25,000,000, and MasterCard will pay \$6,000,000.² The Settlement
6 Agreement resolves all claims of Plaintiffs and the class against all Defendants. Class Counsel shall
7 distribute approximately \$21 million of the Settlement Fund by making payments of Cy Pres awards
8 for the benefit of the members of the settlement class. These payments are summarized in the
9 Settlement Agreement, ¶ 8(a), and further described in the Cy Pres Distribution Plan attached as
10 Appendix H thereto. (Corbitt Decl., Exh. B):

- 11 • Fifty percent of the amounts to be distributed as Cy Pres awards will be used for the
12 development and distribution of a comprehensive financial literacy toolkit that will provide
13 financial education materials on topics applicable to all life stages and a wide variety of
14 demographic groups, and which will be advertised and made available to members of the
15 Settlement Class and other California residents through a website, toll-free telephone
16 number, and other means. The budget, content, and distribution plan for the toolkit will be
17 developed by Class Counsel, with the participation of Visa and MasterCard, with input from
18 an Advisory Board that will consist of one or more representatives from each of the
19 following non-profit organizations: the American Association of Retired Persons, the
20 California Council on Economic Education, the California Jump\$tart Coalition, Consumer
21 Action, the National Foundation for Credit Counseling, and the University of California
22 Cooperative Extension. The Advisory Board will operate under the direction of Class
23 Counsel and representatives of Visa and MasterCard may also participate in the activities of
24 the Advisory Board. Class Counsel is authorized to retain Seven Design or such other
25 organizations on which the Parties may agree to assist in the development, production, and
26

27 ² Within 15 days after preliminary approval, Visa shall pay \$450,000 and MasterCard shall pay \$120,000. Class
28 Counsel may use those funds to pay the notice administrator for its notice plan activities. A second installment of
\$24,550,000 from Visa and \$5,880,000 from MasterCard is due within 10 business days after the Court enters final
judgment and an order granting final approval. See Corbitt Decl. Exh. B ¶ 5.

1 distribution of the toolkit, including making the toolkit available in multiple formats (e.g.,
2 on a website, DVDs, podcasts, and in hard copies) and in multiple languages (including
3 English, Spanish, Mandarin, and Korean), and by advertising the availability of the toolkit.
4 The Advisory Board, under the direction of Class Counsel with participation by Visa and
5 MasterCard, will be responsible, among other things, for providing input on the existing
6 resources on financial literacy, the work that is necessary to develop the financial literacy
7 toolkit contemplated above and along the general lines of the proposal in Appendix H to the
8 Settlement Agreement, the financial education materials generated for the financial literacy
9 toolkit, and how the toolkit should be distributed and made available to members of the
10 Settlement Class and each of the Advisory Board organization's respective members and
11 constituencies. The detailed budget, proposed and final content, and distribution plan for
12 the toolkit that Class Counsel develops, after consultation with and with the agreement of
13 Visa and MasterCard, must be approved by the Court. (Settlement Agreement, ¶ 8(a)(i))

- 14 • As part of the Cy Pres awards described in the preceding paragraph, each of the non-profit
15 organizations represented on the Advisory Board will receive payments for providing input
16 on the financial literacy toolkit and its promotion and distribution to the organization's
17 respective members and constituencies. Class Counsel shall, after consultation with and
18 with the agreement of Visa and MasterCard, make a detailed recommendation as to the
19 specific amounts to be paid to each of these non-profit organizations for each of the above
20 purposes. (Settlement Agreement, ¶ 8(a)(ii))
- 21 • Thirty percent of the amounts to be distributed as Cy Pres awards will be paid over roughly
22 three years to each non-profit organization represented on the Advisory Board, as well as to
23 the Future Business Leaders of America-Phi Beta Lambda and the California Association
24 FHA-HERO, in the approximate amounts described in Appendix H to the Settlement
25 Agreement for additional financial literacy initiatives for the benefit of members of the
26 Settlement Class and other California residents, described in their respective proposals in
27 Appendix H. Class Counsel shall, after consultation with and with the agreement of Visa
28 and MasterCard, make a detailed recommendation as to the specific budgets for amounts to

1 be paid to each of these non-profit organizations for each specific financial literacy
2 initiative. (Settlement Agreement, ¶ 8(a)(iii))

- 3 • Twenty percent of the amounts to be distributed as Cy Pres awards will be paid to California
4 law schools, legal aid providers, and other non-profit organizations, such as those listed in
5 Appendix H to the Settlement Agreement, to be used by them for purposes consistent with
6 the promotion of financial education and advice for members of the Settlement Class and
7 other California residents, or for other purposes consistent with promoting child advocacy
8 programs or legal services for the indigent. Class Counsel shall, after consultation with and
9 with the agreement of Visa and MasterCard, make a detailed recommendation as to the
10 specific budgets for amounts to be paid to each of these organizations for each project
11 consistent with the above purposes. (Settlement Agreement, ¶ 8(a)(iv))

12 In addition, Defendants have agreed, subject to this Court's approval, that up to 30 percent of the
13 total fund, or \$9.3 million, plus any accrued interest on that amount, may be paid to Class Counsel
14 for attorneys' fees and litigation costs, and that an additional service fee award of up to \$1,000 may
15 be paid to each of the named Plaintiffs for their services in representing the members of the
16 Settlement Class. Corbitt Decl. Exh. B ¶ 8(b).

17 The proposed settlement class covers all claims which were or could have been alleged, as
18 is standard. The case of *Attridge v. Visa U.S.A. Inc.*, No. CGC 04-0436920 (S.F. Super. Ct.), was
19 filed on December 8, 2004, nearly five years after *Johns* and after the dozen subsequent cases were
20 consolidated into this J.C.C.P. proceeding. However, the *Attridge* case was never folded into this
21 proceeding. A copy of the operative *Attridge* complaint is attached as Exh. C to the Corbitt Decl.
22 The allegations in *Attridge* are based upon the facts alleged in the Government case against Visa
23 and MasterCard described above, and also repeat facts alleged in the Consolidated Amended
24 Complaint in this case.³ Therefore, claims in the *Attridge* case would be released by this

25
26 ³ The plaintiff in *Attridge* alleges that Visa and MasterCard, in combination with their member banks, eliminated
27 competition from rival credit cards and otherwise restricted competition through exclusionary rules and common
28 ownership. These allegations are virtually identical to ones made in this case well before *Attridge* was filed. *See, e.g.,*
Attridge Third Amended Complaint, pp. 1-2, *Credit-Debit Card* (JCCP) Consolidated Amended Complaint, ¶¶ 21-24
(Corbitt Decl., Exhs. C, A)

1 settlement. Should *Attridge* counsel apply for fees or costs in the present case, under the Settlement
2 Agreement any amount this Court might award would reduce the cy pres funds. *See* Corbitt Decl. ¶
3 14.

4 **IV. THE SETTLEMENT SHOULD BE PRELIMINARILY APPROVED**

5 **A. The Class To Be Certified For Settlement Purposes.**

6 In accordance with the Settlement Agreement, Plaintiffs request that this Court certify the
7 following class (the “Settlement Class”) for the purposes of settlement only:

8 All purchasers in the State of California who purchased for their own
9 use and not for resale, at any time during the period from January 1,
10 1980 to and including the date of final approval of the settlement
11 agreement in this action, retail products or services from businesses
12 (including without limitation stores, offices, restaurants, gasoline
13 stations, supermarkets, and banks) that accepted and/or issued Visa- or
14 MasterCard-branded credit and/or debit cards, and were therefore
15 subject to rules, by-laws, regulations, policies, practices, fees, or
16 charges of Visa U.S.A. Inc., Visa International Service Association,
17 Visa Inc., or MasterCard International Incorporated.

18 Corbitt Decl. Exh. B ¶ 2.⁴ Defendants do not oppose certification of this class for settlement
19 purposes only. *Id.* ¶ 1.

20 Section 382 of the Code of Civil Procedure authorizes class actions. The party seeking
21 certification must “establish the existence of both an ascertainable class and a well-defined
22 community of interest among the class members.” *Linder v. Thrifty Oil Co.*, 23 Cal.4th 429, 435
23 (2000). “The community of interest requirement involves three factors: ‘(1) predominant common
24 questions of law or fact; (2) class representatives with claims or defenses typical of the class; and
25 (3) class representatives who can adequately represent the class.’” *Id.* The proposed Settlement
26 Class easily satisfies all of these criteria.

27 First, the settlement class is ascertainable and sufficiently numerous. The class definition is
28 objective and merits-neutral; it consists of all end-user purchasers in California of retail products or
services from businesses that accepted and/or issued Defendants’ cards during the class period.

⁴ Excluded from the class “are defendants, any co-conspirators of defendants, defendants’ predecessors, successors, parents, subsidiaries, affiliates, officers and directors, federal and state governmental entities and agencies, cities, counties, and other municipalities, and any judge, justice or judicial officer presiding over this matter and members of their immediate family.” *Id.*

1 Thus, the potential class members can be ascertained – and can identify themselves – based upon
2 their purchases. *Hopkins v. De Beers Centenary AG*, 2005 WL 1020868, at *3 (S.F. Super. Ct.
3 Apr. 15, 2005). Further, there are millions of class members.

4 Second, common questions of law and fact predominate over individual questions. The
5 common issues include whether Defendants’ “honor all cards” and “exclusionary” rules violated
6 the UCL, whether class members suffered injury as a result of Defendants’ conduct, and whether
7 the class is entitled to restitution and, if so, in what amount. These common issues predominate. *In*
8 *re Cipro Cases I & II*, 121 Cal.App.4th 402, 411 (2004) (common questions “usually predominate
9 in cases where the defendants are alleged to have engaged in collusive, anticompetitive conduct
10 resulting in artificially high market-wide prices for a product”).

11 Third, Plaintiffs’ claims are typical of the class members’ claims, because the class
12 representatives’ claims arise from the same course of conduct that gives rise to the claims of the
13 other class members, and are based upon similar legal theories. *Hopkins*, 2005 WL 1020868 at *6.
14 Plaintiffs, like all Settlement Class members, allege that they paid inflated prices at retail as a result
15 of Defendants’ unfair “honor all cards” and “exclusionary” rules.

16 Fourth, Plaintiffs will adequately represent the Settlement Class. Plaintiffs’ counsel are
17 experienced in successfully prosecuting complex class action cases, and qualified to conduct
18 prosecution of this case. *Richmond v. Dart Indus., Inc.*, 29 Cal.3d 462, 470 (1981). Furthermore,
19 Plaintiffs’ interests are not antagonistic to those of the class. *McGhee v. Bank of America*, 60
20 Cal.App.3d 442, 450 (1976). Plaintiffs share the interest of the class in establishing liability and
21 obtaining restitution from Visa and MasterCard.

22 **B. This Settlement Is Fair and Within the Range of Possible Final Approval.**

23 California courts encourage the use of class actions in cases such as this. *Linder*, 23 Cal.4th
24 at 434; *State of California v. Levi Strauss & Co.*, 41 Cal.3d 460, 471 (1986). Further, California
25 courts favor settlement, particularly in class actions and other complex cases in which substantial
26 resources can be conserved by avoiding the time, cost and rigors of formal litigation. *Stambaugh v.*
27 *Superior Court*, 62 Cal.App.3d 231, 236 (1976); *see also Class Plaintiffs v. City of Seattle*, 955
28 F.2d 1268, 1276 (9th Cir. 1992).

1 A class action may not be settled without the approval of the court. Cal. Rules of Court,
2 Rules 3.769 and 3.770. The decision to approve or reject a proposed settlement is committed to the
3 trial court's sound discretion. *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 234-35
4 (2001). The court has broad powers to determine whether a proposed class action settlement is fair,
5 reasonable and adequate. *Mallick v. Superior Court*, 89 Cal.App.3d 434, 438 (1979). The Court's
6 approval of the proposed settlement here is obtained through a multi-step process set forth in Rule
7 3.769(c)-(g): (1) preliminary approval of the proposed settlement at a hearing; (2) dissemination of
8 notice to class members; and (3) a formal fairness hearing or final approval hearing. To grant
9 preliminary approval, this Court need find only that the Settlement Agreement falls within the
10 range of possible final approval. *Holden v. Burlington N., Inc.*, 665 F.Supp. 1398, 1402 (D. Minn.
11 1987); *In re Montgomery County Real Estate Antitrust Litig.*, 83 F.R.D. 305, 313 (D. Md. 1979).

12 To make this fairness determination, courts must consider several relevant factors, including
13 "the strength of the plaintiffs' case, the risk, expense, complexity and likely duration of further
14 litigation, the risk of maintaining class action status through trial, the amount offered in settlement,
15 the extent of discovery completed and the stage of the proceedings, [and] the experience and views
16 of counsel . . ." *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996). "The list of factors is
17 not exclusive and the court is free to engage in a balancing and weighing of the factors depending
18 on the circumstances of each case." *Wershba*, 91 Cal.App.4th at 245. Generally, settlement
19 agreements are presumed fair when: "(1) the settlement is reached through arm's-length bargaining;
20 (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3)
21 counsel is experienced in similar litigation; and (4) the percentage of objectors is small." *Dunk*, 48
22 Cal.App.4th at 1802. The Settlement Agreement satisfies these requirements.

23 **1. The Settlement Is a Product of Arms-Length Negotiations.**

24 A factor giving rise to a presumption of fairness of a settlement is whether it is reached
25 through arms-length bargaining. *Wershba*, 91 Cal.App.4th at 245. The settlement here is the result
26 of extensive arms-length negotiations between experienced class action attorneys highly familiar
27 with the issues of this case. Corbitt Decl. ¶¶ 10-11.
28

1 **2. Sufficient Investigation and Discovery Has Occurred to Allow Counsel and the**
2 **Court to Intelligently Determine that the Settlement Is Fair.**

3 Also weighing in favor of preliminary approval here is the status of discovery and trial
4 preparation at the time the settlement was reached. *See 7-Eleven Owners for Fair Franchising v.*
5 *Southland Corp.*, 85 Cal.App.4th 1135, 1146 (2000). Plaintiffs engaged in substantial fact
6 discovery, and retained and worked extensively with experts to opine on liability, impact and
7 damages issues. Plaintiffs propounded substantial written discovery on Defendants, obtaining the
8 full discovery record from the federal merchant case as well as the trial record from the
9 Government case, and also transactional sales and fee data needed to calculate an estimated range
10 of recovery to the class. Corbitt Decl. ¶ 7. Plaintiffs' experts have provided estimates of the
11 magnitude of Plaintiffs' claims, *see Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 133
12 (2008). Corbitt Decl. ¶ 12. Moreover, at the time the settlements were reached, Plaintiffs were
13 preparing to file their class certification motion, and Defendants were preparing to file their second
14 motion for judgment on the pleadings. Corbitt Decl. ¶ 9.

15 **3. The Monetary Value Is Fair.**

16 The monetary value of a settlement is among the most important factors to consider in
17 determining whether a settlement falls within the range of possible approval. *7-Eleven*, 85
18 Cal.App.4th at 1152; *Wershba*, 91 Cal.App.4th at 244-45. This \$31,000,000 settlement is
19 unprecedented among the numerous class actions pursued throughout the U.S. in the wake of the
20 federal *Visa Check* action. In twenty-one other such matters, including cases in Arizona, Florida,
21 Iowa, Kansas, Maine, Michigan, Minnesota, Nebraska, Nevada, New York, North Carolina, North
22 Dakota, South Dakota, Tennessee, Vermont, Wisconsin, and the District of Columbia, the
23 plaintiffs' claims were dismissed, and consumers recovered *nothing*. This stark contrast
24 demonstrates the exceptional nature of the result achieved for the Settlement Class.⁵ Indeed, the
25 total value of this settlement is nearly 24 percent of one overcharge calculation generated by

26 ⁵ Defendants did settle an action brought by the State of West Virginia. However, that lawsuit presents some marked
27 differences with respect to the case at bar, including: (i) the state Attorney General sued as *parens patriae* and thus did
28 not need to get a class certified; (ii) the relevant West Virginia statutes allowed recovery of substantial civil penalties;
(iii) the court did not dismiss the state antitrust law claims, and therefore the Attorney General had a claim for treble
damages; and (iv) the plaintiff was entitled to seek damages, proof of which was less complicated than proving
restitution.

1 Plaintiffs' experts, and is a significant percentage of the range of estimates they provided. *See*
2 Corbitt Decl. ¶ 12.

3 4. The Strength of Plaintiffs' Case.

4 Another factor to evaluate in determining preliminary approval is the strength of the
5 plaintiffs' case. A "proposed settlement is not to be judged against a hypothetical or speculative
6 measure of what might have been achieved had plaintiffs' prevailed at trial." *Wershba*, 91
7 Cal.App.4th at 246. Courts have routinely approved settlements that amount to a fraction of the
8 claimed damages.⁶ Further, the Court should not reach any conclusions on contested issues of law
9 or fact, because it is the uncertainty of the future outcome of litigation that leads parties to resolve
10 their disputes short of a final, litigated resolution. *7-Eleven*, 85 Cal.App.4th at 1145. Given the
11 complex nature of Plaintiffs' unfair competition claims and restitution theory, this litigation does
12 present numerous risks, including:

- 13 • Defendants' contention, upheld by this Court in sustaining Defendants' demurrer, that
14 Plaintiffs lack standing to assert claims for violations of the Cartwright Act;
- 15 • Defendants' claim that their "honor all cards" rules were lawful, justified, and the result of
16 independent business competition, and that Defendants' conduct did not increase the prices
17 that consumers paid for retail products or services, or otherwise harm consumers, but
18 instead benefited those consumers;
- 19 • Defendants' claim that Plaintiffs are not entitled to restitution under the UCL, because
20 Defendants did not receive any supra-competitive fees from their member banks for
21 accepting or issuing Visa and MasterCard credit or debit cards, and thus Defendants did not
22 obtain any portion of the alleged overcharges to class members;
- 23 • The uncertainty of certifying a class;
- 24 • The uncertainty of proving the merits of Plaintiffs' allegations;
- 25 • The difficulty of quantifying restitution or other equitable relief under the UCL; and
- 26 • Defendants' contention that their settlements with the class of merchants in the federal case
27 bars any further recovery in this case.

28 Plaintiffs' failure to prevail on any one of these issues (among others raised by Defendants) at trial
or on appeal could result in a recovery that is but a fraction of their claimed restitution or worse, no

⁶ *See, e.g., In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 325 (N.D. Ga. 1993); *Behrens v. Wometco Enters.*, 118 F.R.D. 534, 543 (S.D. Fla. 1988); *Newman v. Stein*, 464 F.2d 689 (2d Cir. 1972); *City of Detroit v. Grinnell Corp.*, 356 F.Supp. 1380, 1386 (S.D.N.Y. 1972), *aff'd in part and rev'd in part on other grounds*, 495 F.2d 448 (2d Cir. 1974); *In re Four Seasons Sec. Law Litig.*, 58 F.R.D. 19, 37 (W.D. Okla. 1972).

1 recovery for the class, as occurred in every other state law action filed by private plaintiffs. The
2 hurdles faced by Plaintiffs in this case included class certification, proof of liability, and perhaps
3 most significantly, proof of the restitution owed to the class. Class certification, which Plaintiffs
4 were preparing to brief at the time of the settlements, was by no means certain, and a denial of
5 Plaintiffs' motion would have effectively eliminated any settlement value to this case. Further, the
6 legal requirements to trace the flow of money between the Defendants and the Class and to prove
7 the amount of restitution to which the class would be entitled as the result of the alleged violations
8 were particularly daunting. A reasonable estimate provided by Plaintiffs' experts of this amount
9 was approximately \$130 million. *See* Corbitt Decl. ¶ 12. Even if Plaintiffs prevailed on all issues
10 in the trial court, that ruling, as well as the Court's decision to overrule the demurrer on the § 17200
11 claim, would surely have been appealed, with uncertain results.

12 **5. The Experience and Views of Counsel.**

13 Class Counsel and the attorneys representing the Settlement Class have decades of class
14 action experience and a long and successful record of prosecuting such matters to favorable
15 resolutions, including many cases before this Court. Their view that this settlement is fair weighs
16 in favor of preliminary approval. *7-Eleven*, 85 Cal.App.4th at 1146.

17 **V. THE PROPOSED PLAN OF DISTRIBUTION IS APPROPRIATE**

18 Plaintiffs propose a *cy pres* distribution of the net settlement funds, after reimbursement of
19 fees and costs, to various non-profit entities in or for the benefit of California. This plan of
20 distribution is fair. There are approximately 26 million adults in California. *See* the proposed
21 notice plan, submitted as Appendix C to the Settlement Agreement, at C-6. Certainly, virtually all
22 of these people have made a purchase at some point during the class period from a retail business
23 that accepts or issues Visa or MasterCard cards. That number understates the actual members of
24 the class, which includes minors and the estates of persons who made such purchases. The
25 settlement amount, while large, clearly is not enough to distribute directly to the class. It would be
26 virtually impossible to identify the tens of millions of class members, and it would be prohibitively
27 expensive to calculate and distribute the small dollar amounts that they would receive. The parties
28 have met with a number of well-known and experienced organizations which specialize in

1 providing financial expertise and education in California, and have developed with them a plan for
2 *cy pres* relief that will directly benefit all class members and is fully consistent with the subject
3 matter of this lawsuit. Additional funds will be directed to non-profit legal aid organizations and
4 law schools in California. In this economic climate, the importance of funding financial literacy
5 initiatives, as well as legal aid organizations and other charities, is self-evident. California law
6 permits *cy pres* distribution of the entire net settlement proceeds under such circumstances. *In re*
7 *Vitamin Cases*, 107 Cal.App.4th 820 (2003).

8 VI. THE PROPOSED CLASS NOTICE IS APPROPRIATE

9 Plaintiffs request that the Court approve of the plan and forms of notice, which inform
10 Settlement Class members of the pendency of this action and the proposed settlement. This Court
11 has broad discretion in fashioning an appropriate notice program. *Cartt v. Superior Court*, 50
12 Cal.App.3d 960, 973-74 (1975). The method and content of the notice to class members should be
13 designed to fairly apprise them of “the terms of the proposed settlement and the options available to
14 them.” *Philadelphia Hous. Auth. v. Am. Radiators & Standard Sanitary Corp.*, 323 F.Supp. 364,
15 378 (E.D. Pa. 1970). An appropriate notice is one which has a “reasonable chance of reaching a
16 substantial percentage of the class members.” *Cartt*, 50 Cal.App.3d at 974.

17 Pursuant to the proposed notice plan, notice will be provided via multiple insertions of a
18 summary notice in 85 publications throughout California, and on the internet.⁷ Notice by
19 publication is appropriate here and satisfies Cal. Rule of Court 3.766(e). Further, in light of the
20 large size of the Settlement Class and the absence of records that would permit legally sufficient
21 individual notice to be given to all class members, the publication of the proposed notice is the only
22 method of notice practicable under these circumstances. *See* Rule 3.766(f). California courts have
23 routinely approved similar notice plans in consumer class actions.⁸

24 _____
25 ⁷ Further, the notice directs interested persons to a website and toll-free telephone number providing access to all
26 relevant information.

27 ⁸ *See* Corbitt Decl. Exh. D (reflecting such orders in *Smokeless Tobacco Cases I-IV*, J.C.C.P. Nos. 4250, 4258, 4259 &
28 4262 (S.F. Super. Ct. Nov. 5, 2007); *Carbon Black Cases*, J.C.C.P. No. 4323 (S.F. Super. Ct. Dec. 11, 2007);
California Indirect Purchasers MSG Antitrust Litigation, Master Case No. 304471 (S.F. Super. Ct. Mar. 4, 2004); *Flat*
Glass Cases, J.C.C.P. No. 4033 (S.F. Super. Ct. Apr. 8, 2003); *Carbon Fiber Cases I, II, and III*, J.C.C.P. Nos. 4212,
4216, 4222 (S.F. Super. Ct. Dec. 20, 2005); *Villa v. Crompton Corp.*, Case No. CGC-03-419116 (S.F. Super. Ct. Oct. 5,
2005).

1 The detailed and summary notices to be utilized are attached as Appendices D and E,
2 respectively, to the Settlement Agreement, Corbitt Decl. Exh. B. The proposed notice provides
3 information on the meaning and nature of the Settlement Class, the terms and provisions of the
4 Settlement Agreement, the relief the agreement will provide Settlement Class members, the amount
5 Class Counsel may seek for attorneys' fees and expenses, the fact that the named Plaintiffs will
6 seek service fee awards, the date, time and place of the final approval hearing, and the procedure
7 and deadlines for objecting or opting out.

8 **VII. A FINAL APPROVAL HEARING SHOULD BE SCHEDULED**

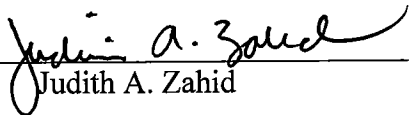
9 The final step in the settlement approval process is a final fairness hearing at which the
10 Court may hear all evidence and argument necessary to make its settlement evaluation. At that
11 hearing, the Court will further address the fairness, adequacy, and reasonableness of the Settlement
12 Agreement, the amount of attorneys' fees and expenses to be awarded to the Class Counsel, and
13 whether a final judgment should be entered resolving the action. Plaintiffs request that, should the
14 Court grant the instant motion, a date for a final approval hearing also be set.

15 **VIII. CONCLUSION**

16 Preliminary approval should be granted, the proposed notice plan should be approved, and a
17 hearing on final approval should be set as requested herein.

18
19 Dated: September 14, 2009

Respectfully submitted,

20
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