UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

IN RE PAYMENT CARD INTERCHANGE FEE and MERCHANT-DISCOUNT ANTI-TRUST LITIGATION	MASTER FILE NO. 1:05-md-1720-JG-JO ORAL ARGUMENT REQUESTED
This Document Relates to All Class Actions	

REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS SECOND CONSOLIDATED AMENDED CLASS ACTION COMPLAINT

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Defendants respectfully submit this reply memorandum of law in support of their motion, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the Second Consolidated Amended Class Action Complaint (the "Complaint" or "Compl.") in its entirety.

ARGUMENT

I. THE *VISA CHECK* RELEASE BARS PLAINTIFFS FROM CHALLENGING DEFENDANTS' CONTINUED ADHERENCE TO DEFAULT INTERCHANGE AND ANTI-STEERING RULES THAT HAVE EXISTED FOR MORE THAN FORTY YEARS

Plaintiffs continue to ignore the very language of the release in *In re Visa Check/ MasterMoney Antitrust Litig.*, 297 F. Supp. 2d 503 (E.D.N.Y. 2003), *aff'd sub nom. Wal-Mart Stores, Inc. v. Visa U.S.A.*, 396 F.3d 96 (2d Cir. 2005) ("*Visa Check*"). That language does not release defendants merely from claims or damages accruing before January 1, 2004, but from any liability "*relating in any way* to *any conduct* prior to January 1, 2004." *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, No. 05-MD-1720 (JG)(JO), 2008 WL 115104, at *3 (E.D.N.Y. Jan. 8, 2008) (emphasis added). This Court has already held that plaintiffs' claims fall within the scope of the release and that the release bars plaintiffs in this case from recovering damages incurred prior to January 1, 2004. *Id.* at *10-16. By the same reasoning, the release also bars plaintiffs from asserting defendants' liability after January 1, 2004, for (i) conduct (including network rules) that occurred or was in place before January 1, 2004, and (ii) continued enforcement of, or adherence to, such conduct after January 1, 2004.[1]

[1] Although plaintiffs argue that a release cannot bar them from pursuing future *damages*, there can be no dispute that, as a matter of law, a release can release future damages arising from pre-release conduct. *See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 342-43 (1971) (1957 release "extended not only to past but also to all future damages arising out of pre-1957 conspiratorial acts").

As a matter of law, a releasing party may not later challenge the released party's continued adherence to pre-release conduct that was the subject of the release. *Madison Square Garden, L.P. v. NHL*, No. 07-CV-8455 (LAP), 2008 WL 4547518, at *8 (S.D.N.Y. Oct. 10, 2008) ("*NHL*"). Like the challenge to "continued adherence to a pre-release restraint" in *NHL*, plaintiffs' challenge to defendants' continued adherence to the same pre-release method of establishing default interchange rates and the same anti-steering rules that pre-dated the *Visa Check* settlement is barred by the *Visa Check* release.[2]

Cases applying a related legal doctrine – *res judicata* – are instructive on the question of the extent to which the resolution of one lawsuit bars a subsequent challenge to a defendant's continued adherence to a rule or practice that was at issue, and survived, the prior lawsuit. A prior judgment will preclude a subsequent lawsuit where "the same transaction or connected series of transactions is at issue," including continued adherence to a rule or practice at issue in the first lawsuit. *Monahan v. New York City Dep't of Corrections*, 214 F.3d 275, 289 (2d Cir. 2000). In *Monahan*, the plaintiffs challenged as unconstitutional the defendants' continued adherence to a sick leave policy that had been the subject of an earlier lawsuit. The earlier lawsuit had ended in a settlement and dismissal, pursuant to which the defendants had agreed to certain changes in the policy, but had essentially left the policy in force. In *Monahan*, the plaintiffs argued that their constitutional challenge to the policy, as amended by the earlier settlement, was not barred by *res judicata* because that version of the policy and the enforcement of that pol-

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[2] Plaintiffs' citations to *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96 (2d Cir. 2005), and *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741 (9th Cir. 2006), are misplaced because the question presented here was not raised and therefore not remotely addressed in either of those cases. The snippets on which plaintiffs rely – e.g., the release "precludes actions for conduct occurring" before 2004 (Opp. at 4) – simply beg the question whether continued adherence to conduct before 2004 has been released.

icy occurred after the first settlement. The Second Circuit rejected that argument, holding that such a "semantic cartwheel would virtually eliminate the doctrine of *res judicata* for a significant subset of those claims resolved by settlement agreement. Parties would have no incentive to modify a controversial policy if the amended version was subject to renewed attack. The efficiencies created by a mutually agreeable settlement would be lost." *Id.* The court held that, to the extent the subsequent challenges are to enforcement of "aspects of the policy which survive the earlier litigation, then the claim itself was subsumed by the earlier litigation." *Id.* at 290. *See also Waldman v. Village of Kiryas Joel*, 207 F.3d 105, 112-13 (2d Cir. 2000) (applying *res judicata* and rejecting argument that second lawsuit was based only on post-settlement facts where those facts were part of the same series of transactions underlying the earlier settled lawsuit).

Plaintiffs here complain that, since January 1, 2004, defendants have continued to adhere to the same default interchange and anti-steering rules that existed before the *Visa Check* release. (Opp. at 6.)[3] But, although plaintiffs contend that continued adherence to rules that survived the *Visa Check* release constitutes "new anticompetitive conduct" because it allegedly occurred after January 1, 2004, their Complaint clearly alleges that the conduct they challenge – continued adherence to default interchange and certain anti-steering rules – has been ongoing "[f]or more than 40 years." (Compl. Preamble ¶ 1.) Indeed, there can be no serious question that the rules at issue in this case are the very same rules that were at issue in *Visa Check*. The merchant class in *Visa Check* alleged that Visa and MasterCard and their respective member banks "collectively fix the Visa . . . [and] MasterCard interchange fees" (*Visa Check* class complaint ¶

[3] To be sure, the recent network initial public offerings ("IPOs") were not part of the *Visa Check* litigation. But plaintiffs do not challenge the IPOs themselves in the Complaint addressed on this motion; instead they challenge defendants' continued adherence to the same default interchange and anti-steering rules after the IPOs as existed before the IPOs.

45 (May 26, 1999) (1999 WL 34848247) ("*Visa Check* Compl."), just as the merchant plaintiffs here allege that those same parties engaged in "the collective fixing of uniform . . . Interchange Fees" and that "the collectively-set Interchange Fee" was established at "supra-competitive levels." (Compl. ¶¶ 3, 298, 305, 319-20, 377, 384, 391-92.) The *Visa Check* class likewise alleged that under Visa and MasterCard rules, "retailers are even prohibited from asking a consumer whether she would not mind using a different payment system," including "far less costly forms of payment" (*Visa Check* Compl. ¶¶ 74, 87), just as the plaintiffs here allege that Visa and MasterCard rules imposed "Anti-Steering Restraints to prevent Merchants from incenting customers to use less-expensive payment methods." (Compl. ¶ 190.)[4] And in consideration for "the largest settlement ever approved by a federal court," *id.* at 511, the *Visa Check* plaintiffs agreed to release the networks and their member banks from any claims arising out of, among other things, the default interchange rules and the existing anti-steering rules applied to credit cards. Defendants cannot be asked to pay twice for conduct covered by the *Visa Check* release.

Plaintiffs' argument that the mere change in default interchange rates constitutes "new anticompetitive conduct" (Opp. at 6-7) is specious. Plaintiffs challenge the rules pursuant to which the networks establish default interchange rates, and those rules, which have existed for more than forty years, survived the *Visa Check* settlement and are part of the same series of transactions that were at issue in *Visa Check*. It is defendants' adherence to those rules that forms the core of plaintiffs' Section 1 theories. And it is equally specious for plaintiffs to argue

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[4] In their summary judgment motion, the *Visa Check* class claimed that "Visa and MC rules specifically prohibited merchants from engaging in any attempts to discourage the holder of any Visa or MC payment card from using that card – through verbal or other means, or through discounting or surcharging" and that "Visa and MC's rules explicitly prohibit merchants from surcharging Visa/MC transactions." (*Visa Check*, Mem. in Supp. of Pls.' Mot. For Sum. J. at 8, 66 (June 7, 2000).)

that there is "new anticompetitive conduct" every time a network republishes its rules (Opp. at 7-8), particularly when plaintiffs fail to identify any revision in the rules that takes them outside the circumstances existent at the time of the *Visa Check* settlement. Simply republishing and adhering to the same rules in a different format does not relieve plaintiffs of their contractual obligation to honor the release to which they agreed in *Visa Check*.

Plaintiffs' assertion that the release violates public policy (Opp. at 9-11) is also without merit. The preclusive effect of a release does not violate public policy simply because it involves the important concerns underlying constitutional rights or the antitrust laws. *See*, *e.g.*, *Monahan*, 214 F.3d at 290 (plaintiffs cannot escape consequences of *res judicata* "by invoking legal terms of art with constitutional mystique"); *Richard's Lumber & Supply Co. v. U.S. Gypsum Co.*, 545 F.2d 18, 20 (7th Cir. 1976) (per curiam) ("A general release . . . is not ordinarily contrary to public policy simply because it involves antitrust claims."). This is particularly so where, as here, the challenged conduct is not unlawful *per se*, but, as the conduct of a legitimate joint venture, is subject to the rule of reason. *See*, *e.g.*, *NHL*, at *7 ("the venture's undisputed legitimacy diminishes the public policy concerns compared to those in the case of a Section 1 conspiracy whose very existence is unlawful, as in the case of a monopoly or price-fixing conspiracy"). Moreover, requiring plaintiffs to honor their contractual commitment to release defendants from any liability for the conduct they now challenge does not immunize defendants' conduct from the antitrust laws "in perpetuity." (Opp. at 3, 10.) Merchants and other market participants who did not contractually agree to release the networks and their member banks for the establishment of default interchange rates and the enforcement of pre-release anti-steering rules may challenge that conduct now. But, as a matter of contract law, those merchants who accepted the benefits of the *Visa Check* settlement and contractually bound themselves to the re-

lease cannot now challenge the network default interchange and anti-steering rules that survived the *Visa Check* litigation.[5]

Indeed, it is plaintiffs' pursuit of their claims in the face of the *Visa Check* release that violates the public policy favoring settlement. *See, e.g., Bano v. Union Carbide Corp.*, 273 F.3d 120, 129-30 (2d Cir. 2001) ("it is axiomatic that the law encourages settlement of disputes"). Particularly where, as here, the challenged conduct is potentially pro-competitive behavior subject to the rule of reason and antitrust liability is far from certain, plaintiffs' proposed result would render settlement nearly impossible, for no defendant could meaningfully settle such an antitrust case without either agreeing to abandon the challenged behavior or remaining subject to repeated lawsuits for the same practice. Under plaintiffs' theory, the parties could settle this case today, plaintiffs could execute a release, and, unless the networks abandoned the practice of establishing network default interchange rates, plaintiffs could file a new lawsuit challenging the same default interchange rules next week. *Monahan*, 214 F.3d at 289. Because plaintiffs do not allege that there has been any material change in any of the rules at issue since January 1, 2004, their claims are barred by the *Visa Check* release as a matter of law. *NHL*, at *8.[6]

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[5] Plaintiffs' reliance on cases like *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), and *In re American Express Merchant Litig.*, 554 F.3d 300 (2d Cir. 2009), involving the effect of arbitration clauses on antitrust claims, is misplaced. The arbitration clauses at issue in those cases had the potential to operate as a waiver of any and all antitrust claims arising in the future regardless of whether the conduct giving rise to the claim could have been contemplated by the parties at the time they entered into the arbitration clause. By contrast, a settlement and release is limited to the conduct existing at the time of the release, and only precludes the releasing party from suing the released party for continued adherence to that released conduct.

[6] Plaintiffs' assertion that defendants have waived this argument (Opp. at 11) is wrong. Plaintiffs having filed a second amended complaint, defendants are entitled to move against that complaint on any grounds applicable to that complaint. *G.K. Las Vegas Ltd. P'ship v. Simon Prop. Group, Inc.*, 460 F. Supp. 2d 1222, 1243 n.11 (D. Nev. 2006) ("Plaintiff's contention that Defendants waived their right to challenge the claim of conversion by not bringing it in *(cont'd)*

II. THE UNIMPAIRED FREEDOM OF MEMBER BANKS TO DO ANYTHING THEY COULD HAVE DONE HAD THEY NOT JOINED THE NETWORKS ESTABLISHES THAT THE NETWORK DEFAULT INTERCHANGE RULES DO NOT CONSTITUTE "RESTRAINTS" UNDER SECTION 1

Plaintiffs' opposition papers concede that "the joint ventures in this case (Visa and MasterCard) created an entirely new product" (Opp. at 19 n.18), ignore the fact that each bank defendants' arrangement with Visa and MasterCard is non-exclusive, and demonstrate plaintiffs' fundamental misunderstanding of what constitutes a restraint by a joint venture under Section 1. As a matter of law, where, as here, a non-exclusive joint venture does not impair its members' freedom to continue to compete in every way in which those members could have competed had they not joined the venture, and instead, simply adopts and enforces rules for the creation and sale of the joint venture's new product, those rules do not constitute restraints of trade cognizable under Section 1. Only where a joint venture restricts its members' ability to compete in ways in which those members could have competed if they had not joined the venture are such restrictions deemed restraints of trade, their reasonableness scrutinized under Section 1.

Plaintiffs here do not allege that Visa or MasterCard restricts the banks from engaging in any conduct in which they could have engaged absent the networks. Each network's establishment of default interchange rates does not in any way inhibit the member banks' free-

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the first motion to dismiss is without merit. Plaintiff filed the [Second Amended Complaint] and Defendants are well within their rights to assert defenses to the claims contained in the SAC even if they chose not to do so in the [First Amended Complaint]."); *Pucci v. Litwin*, 828 F. Supp. 1285, 1287 n.2 (N.D. Ill. 1993) ("defendants have not waived any arguments on this motion to dismiss by failing to raise them in their previous motion to dismiss. This is a new complaint and a new ball game."); *Day v. Moscow*, 769 F. Supp. 472, 476-77 (S.D.N.Y. 1991) (rejecting plaintiff's assertion that defendant's failure to raise an argument in its motion to dismiss the original complaint constituted a waiver of the right to raise the argument in its motion to dismiss the amended complaint; "it is incongruous to deny [defendant] the chance to raise a viable defense when [plaintiff] is afforded the opportunity to amend his complaint, thus getting a second bite at the apple"), *aff'd*, 955 F.2d 807 (2d Cir. 1992).

dom – as either issuers or acquirers – to continue to compete in every way in which they could have competed if they had not joined Visa or MasterCard or if the networks did not exist. Plaintiffs do not dispute that the member banks are free, for example, to issue payment cards as members of other networks. Nor do plaintiffs dispute that member banks are free to issue private label, or "proprietary," cards to individual merchants for use only at the particular merchant's outlets. In the same vein, plaintiffs cannot dispute that member banks are free to acquire merchants as members of other networks and to process transactions on private label cards as acquirers.[7] Because plaintiffs make no allegation that the banks are restricted from engaging in any conduct in which they could have engaged in the absence of the networks, the network establishment of default interchange rates for the competitive payment card products the networks have created does not constitute a restraint of trade subject to the scrutiny of Section 1.

This is the teaching of *Buffalo Broadcasting Co. v. ASCAP*, 744 F.2d 917 (2d Cir. 1984), where the non-exclusive blanket license did not impair the individual ASCAP members' freedom to negotiate individual licenses for their compositions just as they could have done before joining ASCAP. Just as the networks here (Opp. Br. at 19 n.18), the blanket license created by ASCAP was a new product, *see Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 22-23 (1979), the non-exclusive nature of which did not "restrain willing buyers and sellers from negotiating for the licensing of performing rights to individual compositions." *Buffalo Broadcasting*, 744 F.2d at 932. Because individual composers could continue to compete in every way in which they could have competed if they had not joined ASCAP or if ASCAP had not been created, the agreements among competing composers to create ASCAP and to market the non-exclusive

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[7] Accordingly, plaintiffs are wrong to state that defendants' argument focuses solely on the issuing market (Opp. at 16-18); defendants' *Buffalo Broadcasting* analysis encompasses the "acceptance" market as well, even assuming that such a separate market exists.

blanket license were not restraints of trade that were "even amenable to scrutiny under section 1." *Id.* at 933. Indeed, "so long as composers or producers have no horizontal agreement among themselves to refrain from source or direct licensing and there is no other artificial barrier, such as a statute, to their use, a non-exclusive blanket license *cannot* restrain competition." *Id.* at 934 (Winter, J., concurring) (emphasis added). "In those circumstances," the non-exclusive joint venture "is simply one alternative competing on the basis of price and services with others." *Id.*

By contrast, in *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984), the challenged rules provided for exclusive licensing of all member school football games and limited the NCAA members' freedom to negotiate and enter into their own television contracts. *Id.* at 92-93. As Judge Winter observed in his concurring opinion in *Buffalo Broadcasting*, "I think all would agree that, if the NCAA had offered a *non-exclusive* license to all football games between member schools and the member schools were free to negotiate television rights on their own, the action would have been dismissed on the pleadings." 744 F.2d at 934 (Winter, J., concurring) (emphasis in original). Similarly, the Indiana Federation of Dentists' rule prohibiting its members from providing x-rays to insurers, Topco's rule prohibiting members from competing with one another in the same geographic territory, and Visa's and MasterCard's former rules preventing their members from issuing American Express or Discover cards, were restraints on the joint venture members' freedom to compete in ways in which they would have been able to compete if they had not joined the joint venture. *See, e.g., FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 456-57 (1986); *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972); *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 379 (S.D.N.Y. 2001), *aff'd*, 344 F.3d 229 (2d Cir. 2003).

Plaintiffs' effort to distinguish *Buffalo Broadcasting* on the grounds that ASCAP and BMI did not create a new product with their blanket licenses or that individual composers could offer the same product outside the joint venture is wrong. Like Visa and MasterCard (Opp. at 19 n.18), ASCAP and BMI created a new product – a blanket license – that no individual composer could produce. *Broadcast Music, Inc.*, 441 U.S. at 22-23. Just as ASCAP's creation of its blanket license introduced a new competitive product into the marketplace that was greater than the sum of its parts (the individual licensed compositions), the creation of the networks introduced a new product that was greater than the sum of each member bank's individual input.

Plaintiffs' further suggestion that *Buffalo Broadcasting* can be disregarded merely because it involved the music performance rights business and that all antitrust cases are decided on the basis of their own facts (Opp. at 18-19) is desperate. Section 1 jurisprudence is not so balkanized that doctrinal antitrust principles expressed in the context of one industry cannot be applied with equal vigor in other industries. Finally, plaintiffs' effort to distinguish *Buffalo Broadcasting* on the ground that Visa and MasterCard allegedly possess market power in the market in which they compete (Opp. at 19-20) fails. Although market power may be relevant to the issue of the reasonableness of a given restraint, it is irrelevant to the issue of whether a challenged policy constitutes a restraint at all.

III. PLAINTIFFS' ALLEGED "PLUS FACTORS" DO NOT SUPPORT AN INFERENCE OF AGREEMENT BETWEEN NETWORKS UNDER *IQBAL* OR *TWOMBLY*

Plaintiffs claim that they have established the requisite "setting" for an agreement through three basic sets of allegations: network duality; the networks' public statements that they would "not be disadvantaged" vis-à-vis their issuer customers by the pricing policies of other networks; and the market structure, which plaintiffs allege is susceptible to collusion. As defen-

dants have explained (*see* Mot. at 18.), these "plus factors," individually *or* collectively, do not "exclude the possibility of independent action" and thus fail to satisfy the standards set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554 (2007), because conduct "just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market" stops short of creating the necessary inference of agreement.[8]

Plaintiffs ignore the governing pleading standard, never contending that they have pleaded facts that "tend[] to exclude the possibility of independent action." *Id.*[9] Instead, they repeat at length the specifics of the Complaint's allegations of the three "plus factors." (Opp. at 33-40.) The sum of these allegations, however, states no more than defendants had an opportunity to conspire, which as a matter of law, cannot alone support an inference of agreement. (Mot. at 20-23.)

In fact, not only do plaintiffs' allegations fail to point to conspiracy, but on their face, the allegations bespeak competition. This is particularly evident with respect to American Express, where the complaint alleges that competition with American Express for issuers' portfolios explains Visa's "not to be disadvantaged" policy, and then acknowledges that MasterCard's "competitive response" came thereafter. Under these circumstances, the fact that Visa's

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[8] In *Ashcroft v. Iqbal*, the Supreme Court similarly dismissed a pleading on the ground that an "obvious alternative explanation" for the events was readily available. 129 S. Ct. 1937, 1951-52 (2009) (quoting *Twombly,* 550 U.S. at 567).

[9] In this regard, plaintiffs' assertion that an agreement may be inferred from the allegations in their supplemental complaints that the networks abandoned alternative business models in favor of the *status quo* (Opp. at 37 n.33), in fact underscores the implausibility of an agreement. The allegations actually provide an independent explanation for why MasterCard did not engage in a strategy to lower or eliminate interchange. (*See* FASCAC at ¶ 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 antitrust liability.").)

and MasterCard's policies were followed by parallel price changes is insufficient to infer an agreement between the networks and their major banks because this behavior is consistent with competition. *Twombly,* 550 U.S. at 556 n.4.

In this vein, plaintiffs' contention that defendants' discussion of American Express is "disingenuous" is wholly vacuous. Judge Jones held in 2001 that rules that prevented American Express from competing for issuers' portfolios were unlawful. *See United States v. Visa*, 163 F. Supp. 2d 322 (S.D.N.Y. 2001), *aff'd*, 344 F.3d 229 (2d Cir. 2003). Less than a year later, in 2002, Visa announced its policy "'not [to] be disadvantaged' on Interchange Fees vis-à-vis MasterCard *and American Express*." (Compl. ¶¶ 227, 230 (emphasis added).) It is clear that the policy was a response to American Express's ability to offer attractive economic terms to issuers. Visa's and MasterCard's actions thus are at least as consistent with competition with American Express as with any forced, conclusory gloss plaintiffs place on the allegations.

Unable to factually identify an agreement, plaintiffs attempt to recast the case law.[10] For example, they attempt to distinguish *In re Late Fee & Over-Limit Fee Litig.*, 528 F. Supp. 2d 953 (N.D. Cal. 2007), on the purported ground that plaintiffs alleged "only parallel conduct." That is incorrect; like plaintiffs here, the plaintiffs in *In re Late Fee* failed to allege any factual basis for inferring an agreement. Plaintiffs' reliance on *In re Graphics Processing Units Antitrust Litig.*, 540 F. Supp. 2d 1085 (N.D. Cal. 2007) ("*GPU*"), is similarly misplaced. Highlighting its dismissal of the original complaint, the *GPU* court stated that since the plaintiffs

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[10] The cases on which plaintiffs rely (*see* Opp. at 33, 35, 37, 39), mostly decided years before *Twombly* or under a standard that *Twombly* expressly overruled, are inapposite. Plaintiffs' post-*Twombly* cases are equally irrelevant as they do not alter the need for a plaintiff to plead conduct that would be inconsistent with rational economic behavior. *See, e.g.*, *In re Pressure Sensitive Labelstock Antitrust Litig.*, 566 F. Supp. 2d 363 (M.D. Pa. 2008) and *In re OSB Antitrust Litig.*, No. 06-826, 2007 WL 2253419 (E.D. Pa. Aug. 3, 2007).

"provided no baseline of *earlier* behavior by which to judge defendants' behavior during the alleged conspiracy" they "could not have shown that defendants' behavior was *unprecedented.*" *Id.* at 1092 (emphasis added). Here, the Complaint is silent on the interchange fees and structures *before* the alleged conspiracy, and thus, there is simply no baseline from which a court can infer "unprecedented behavior" or any change in behavior for that matter.[11]

In sum, plaintiffs still have not made any factual allegations that would tend to exclude the possibility of independent competitive behavior.

IV. PLAINTIFFS' POST-IPO INTRA-NETWORK CONSPIRACY CLAIMS DO NOT ADEQUATELY ALLEGE HORIZONTAL AGREEMENTS AMONG THE BANKS

Plaintiffs' opposition brief confirms that they have alleged no post-IPO conduct to support their post-IPO conspiracy claims. Plaintiffs concede that these claims are premised on allegations of "hub-and-spoke" conspiracy, and plaintiffs do not dispute that they must therefore allege a "rim" around the hub – a horizontal agreement *among the member banks* – to state a claim. (Opp. at 28.) Plaintiffs further concede that they have not alleged any facts that directly establish the existence of such a horizontal agreement. (*Id.*) Moreover, plaintiffs have not alleged that any member bank acted contrary to its independent economic self-interest by agreeing individually with the respective networks to follow the network rules, and it remains undisputed that one cannot infer a *horizontal* agreement from a series of uniform *vertical* agreements between individual banks and individual networks. Indeed, to the extent the opposition brief makes

[11] Although plaintiffs claim that they alleged an agreement between the networks to "eliminat[e] the then-existing three-to-five basis point gap between the networks' effective rates" (Opp. at 32), the Complaint does not allege the existence of any gap between the networks' effective interchange rates. The only reference to a gap between the two networks' rates is alleged as aspirational – it was "MasterCard's *goal* . . . to maintain an interchange effective rate . . . that was 3-5 basis points (.03-.05%) higher than Visa's." (Compl. ¶ 230 (emphasis added)).

any assertions regarding post-IPO conduct, plaintiffs merely repeat the conclusory allegations of a post-IPO "agreement" among the banks from the Complaint (*see, e.g.*, *id.* at 26, 28) that are inadequate under *Twombly*.

Plaintiffs' post-IPO conspiracy claims rest entirely on the proposition that a horizontal post-IPO agreement among the banks can be "*inferred*" from (i) the pre-IPO structure of Visa and MasterCard and (ii) allegations about the IPOs themselves. (*Id.* at 29.) Both arguments are mistaken. No post-IPO agreement may be inferred from the pre-IPO structure of Visa and MasterCard. Plaintiffs' assertions that Visa and MasterCard were "structural conspiracies" before their respective IPOs (*id.* at 23-24) is wholly irrelevant because the IPOs changed the fundamental structure of each network. Simply put, even if the pre-IPO structure of each network could be deemed to involve a horizontal agreement among its member banks, that pre-IPO structure would not support any inference of a *post*-IPO conspiracy among the member banks. (*See id.* at 22, 24.)[12]

Plaintiffs cannot overcome the fundamental defect in their post-IPO claims by repeating their attacks on the IPOs themselves as attempts to "create the appearance" of unilateral conduct (*id.* at 24) and arguing that the banks have "retained sufficient power and control" over the networks after the IPOs to prevent the networks from reducing interchange fees. (*Id.* at 27.) That attack, which has already been rejected once by this Court and should be rejected again for

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[12] A prior history of horizontal agreement does not support an inference of a subsequent horizontal agreement, especially where (as here) the prior history does not exclude the possibility of more recent independent action. *See Holiday Wholesale Grocery Co. v. Philip Morris, Inc.*, 231 F. Supp. 2d 1253, 1305 (N.D. Ga. 2002) (industry "history of collusion" does not "tend to exclude the possibility that Defendants were engaged in lawful conduct.") (quoting Phillip E. Areeda, Antitrust Law ¶ 1421a, at 125 (1st ed. 1986) ("Illegal behavior elsewhere in time or place does not generally allow the inference of an immediate conspiracy."), *aff'd sub nom. Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287 (11th Cir. 2003).

the reasons stated in the motions to dismiss the supplemental complaints, does not support any inference of the purported post-IPO conspiracy.[13]

Plaintiffs' reliance on the 2007 decision of the European Commission ("EC") regarding the multilateral interchange fee ("MIF") applied to cross-border transactions in the European Economic Area (*see, e.g.*, *id.* at 22) is entirely misplaced because the EC's conclusions do not support any inference of the alleged post-IPO conspiracy. The EC did not apply the fundamental principle underlying Sherman Act case law that any inference of conspiracy must be supported by conduct inconsistent with the alleged co-conspirators' independent self-interest.[14] Indeed, the EC relied on conduct that is wholly consistent with MasterCard and its member banks all acting in their own independent economic self-interests.[15]

In light of the foregoing, it is ironic that plaintiffs try to dismiss the Ninth Circuit's decision in *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042 (9th Cir. 2008), which affirmed the

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[13] To the extent plaintiffs' post-IPO conspiracy claims are premised on their challenge to the MasterCard and Visa IPOs (*see* Opp. at 25-27 & nn. 22, 24, 28, 29), if plaintiffs' challenges to the IPOs are dismissed (as they should be), plaintiffs' post-IPO conspiracy claims should be dismissed as well. For a similar reason, plaintiffs fail to distinguish *Toscano v. Professional Golfers Ass'n*, 258 F.3d 978 (9th Cir. 2001), and *American Airlines v. Christensen*, 967 F.2d 410 (10th Cir. 1992). Their argument is incorrectly premised on the assumption that the post-IPO networks are not independent actors deciding what rules to implement, but that the banks themselves establish the network rules at issue.

[14] *Compare Twombly*, 550 U.S. at 566, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986), *and Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 763-64 (1984), *with EC Decision* ¶ 390 ("According to the jurisprudence, a decision of an association of undertakings does not require that *all* members of the association agree upfront on a non-binding recommendation for that recommendation to be caught by Article 81."); ¶ 391 (EC can "leave open whether an infringement was an agreement or a concerted practice.").

[15] The EC recognized that the MIF is important to attract banks and maximize profits for the network, and its use is totally consistent with unilateral behavior. *See EC Decision* ¶ 387 (interests of MasterCard shareholders post-IPO "not opposed to" MIF because MasterCard "can expect higher revenues and thus higher profits the more banks join the scheme").

dismissal of nearly identical antitrust claims, as having "no binding effect on this Court." (Opp. at 30.) Although plaintiffs try unsuccessfully to distinguish *Kendall* as holding that "mere membership in a consortium is insufficient to allege a price-fixing conspiracy" (*id.*), that is all plaintiffs allege here. Finally, plaintiffs cannot rely on *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 215-17, 225-27 (1939) and *Toys "R" Us, Inc. v. FTC,* 221 F.3d 928, 932, 936 (7th Cir. 2000), because in both cases (as plaintiffs acknowledge, *id.* at 28-29) the conspirators took actions contrary to their independent interest with the knowledge that their competitors had been expressly asked (or agreed) to do the same. Plaintiffs mistakenly attempt to sidestep that crucial difference by arguing that such allegations are unnecessary here because other "conspiracies" were purportedly "ongoing as of the commencement of the hub-and-spoke conspiracies." (Opp. at 29.) To state an independent claim for the post-IPO conspiracies under *Twombly*, plaintiffs must allege some factual basis for those conspiracies. It is not sufficient for them to resort to allegations about pre-IPO conspiracies, or the IPOs themselves, to support their *post*-IPO claims.

Conclusion

For all of the foregoing reasons, as well as the reasons set forth in defendants' moving briefs, the Second Consolidated Amended Class Action Complaint should be dismissed.

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Respectfully submitted,

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WASHINGTON MUTUAL, INC. [16]

[16] The defendants understand that, on September 26, 2008, defendant Washington Mutual, Inc. filed a voluntary petition under Chapter 11 of Title 11 of the United States Code in the United States Bankruptcy Court for the District of Delaware and, therefore, that the automatic bankruptcy stay, 11 U.S.C. § 362, applies to plaintiffs' claims against Washington Mutual, Inc. The matter is currently pending in that court as Bankruptcy Case No. 08-12229-MFW.