20-339(L)

20-304(CON), 20-340(CON), 20-341(CON),
20-342(CON), 20-343(CON), 20-344(CON)

In The United States Court of Appeals For the Second Circuit

IN RE: PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK
Case No. 1:05-cv-01720-MKB-JO

FINAL ANSWERING BRIEF (FINAL APPROVAL ORDER)
OF APPELLEES RULE 23(b)(3) CLASS PLAINTIFFS

ROBINS KAPLAN LLP
K. Craig Wildfang
Thomas J. Undlin
Eric J. Magnuson
Ryan W. Marth
Eric P. Barstad
800 LaSalle Avenue, Suite 2800
Minneapolis, MN 55402–2015
T: 612–349–8500
KCWildfang@RobinsKaplan.com
EMagnuson@RobinsKaplan.com
RMarth@RobinsKaplan.com
EBarstad@RobinsKaplan.com

ROBBINS GELLER RUDMAN & DOWD LLP
Patrick J. Coughlin
Joseph D. Daley
Alexandra S. Bernay
Carmen A. Medici
655 West Broadway, Suite 1900
San Diego, CA 92101
T: 619-231-1058
patc@rgrdlaw.com
jdaley@rgrdlaw.com
xanb@rgrdlaw.com
cmedici@rgrdlaw.com

BERGER MONTAGUE PC
H. Laddie Montague, Jr.
Merrill G. Davidoff
Michael J. Kane
1818 Market Street, 36th Floor
Philadelphia, PA 19103
T: 215-875-3000
hlmontague@bm.net
mdavidoff@bm.net
mkane@bm.net

FREEDMAN BOYD HOLLANDER
GOLDBERG URIAS & WARD, P.A.
Joseph Goldberg
P.O. Box 25326
20 First Plaza, Suite 700
Albuquerque, NM 87102
T: 505-842-9960
jg@fbdlaw.com

Attorneys for Appellees Rule 23(b)(3) Class Plaintiff-Appellees

Corporate Disclosure Statement

Appellees Rule 23(b)(3) Class Plaintiffs submit this Corporate Disclosure Statement under Federal Rule of Appellate Procedure 26.1(a): Photos Etc. Corporation DBA ScanMyPhotos.Com; Traditions, Ltd.; Capital Audio Electronics, Inc.; CHS Inc.; Discount Optics, Inc.; Leon's Transmission Service, Inc.; Parkway Corporation; and Payless Inc., do not have parent corporations or any publicly held corporation that owns more than 10% of any of their shares.

Table of Contents

Table of Authorities

Page(s)

Cases

Statutes

Rules

Other Authorities

Statement of Issues

1. **Can an "intra-class conflict" exist within a Rule 23(b)(3) settlement class between two groups of entities, only one of which is in the class?**

2. **Have the Appellants made a clear showing that the district court abused its discretion when it found that a settlement class definition that included all merchants that "accepted" Visa or Mastercard payment cards during a specific time period and in a specific geographic area was "objectively defined?"**

3. **Have the Appellants made a clear showing that the district court abused its discretion when it concluded that providing first-class mail notice to millions of potential members of a proposed settlement class, an additional "notice of exclusion" to merchants that may have been excluded from the class, and a third supplemental notice informing merchants that they may submit claims, even if another entity purported to release the merchant's claims, constituted the best notice practicable under the circumstances?**

4. **Have the Appellants made a clear showing that the district court abused its discretion when it approved a multi-billion dollar settlement of an antitrust class action in exchange for a release that extinguishes future-accruing claims based upon the identical factual predicate of the litigation, but only up to a future date-certain that is uniform for all class members?**

5. **May objectors invalidate a settlement benefitting millions of merchants because the district court indicated that it will appoint a special master to determine issues of claims allocation and resolve disputes among potential claimants, subject to review in the district court?**

Introduction

District courts have broad discretion to supervise class actions, including settlements, and accordingly a district court's certification of a settlement class and approval of a settlement will be affirmed, unless the district court abuses its broad discretion.

The district court's approval of the settlement in this case—the largest class-action antitrust settlement ever—is a prototypical example of a district court's proper exercise of its discretion. The court presided over this case through contentious discovery battles, comprehensive motion practice, and intense mediation. After this Court reversed an earlier settlement, the district court oversaw another two years of adversarial litigation and mediation before the parties arrived at the settlement agreement currently before this Court. In its final-approval order, the district court confirmed that this settlement corrected the problems that this Court identified with the prior settlement and also concluded that providing the Defendants with a release of future-accruing claims within the "identical factual predicate" of the litigation, but only up to a date

certain, was a reasonable bargain for the Class Plaintiffs to strike. The district court found that the risks of continuing litigation that the class faced further supported its conclusion that the settlement was reasonable. The district court was in the best position to evaluate the current settlement and protect the interests of absent class members and its decision should be affirmed.

Objections to the settlement by a small number of petroleum merchants do not present the kind of "intra-class conflict" that could justify overturning an otherwise reasonable settlement. As the parties made clear before the district court, only one entity is entitled to a recovery in the settlement for any given transaction, and so only that entity is a class member based on the transaction. Simply put, without a conflict between two entities—*both of which are in the class*—there can be no "intra-class conflict." Such a conflict is absent from this case and, therefore, there is no need to create subclasses or appoint substitute counsel.

After fourteen years of arduous litigation, Class Plaintiff-Appellees respectfully request that this Court affirm the district

court and allow America's merchants to receive the compensation that they have been awaiting for years.

Statement of the Case

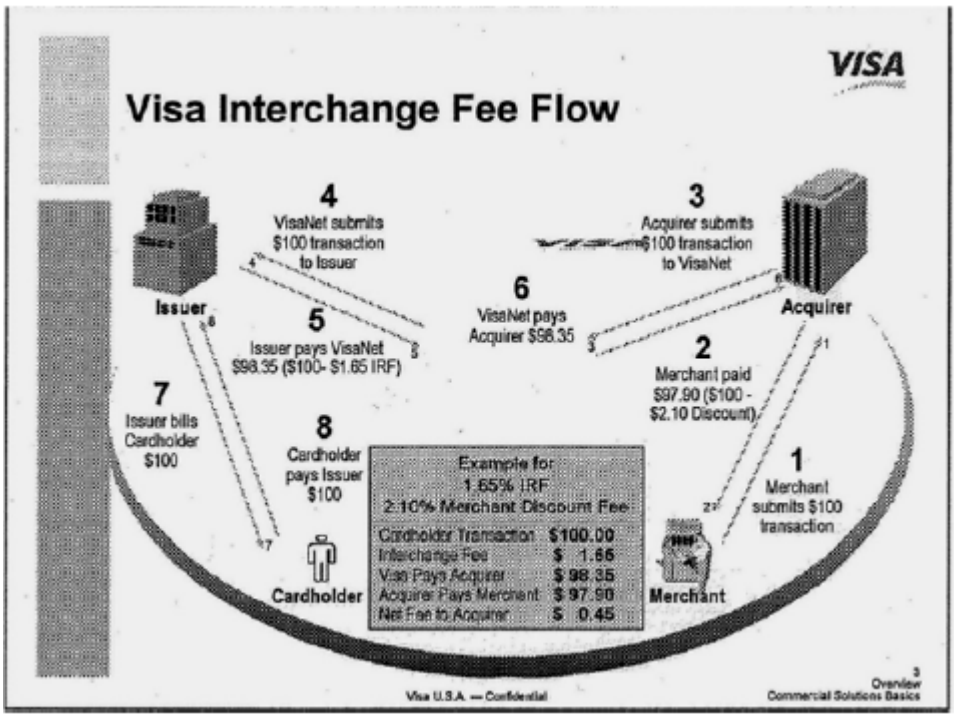
A. The challenged conduct in the context of a payment-card transaction.

A Visa or Mastercard payment-card transaction involves five parties: (1) the cardholder; (2) the merchant; (3) the "acquiring bank"; (4) the "issuing bank"; and (5) the network itself – *i.e.*, Visa or Mastercard. The acquiring bank is the link between the network and the merchant that accepts the card for payment. *See generally In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207, 214 (E.D.N.Y. 2013) ("*Payment Card I*"). The issuing bank is the bank that issued the payment card to the customer. When the cardholder presents a card for payment the various parties relay data among themselves to ensure that the transaction is consistent with the cardholder's account status and credit limit. *Id.*

The issuing bank then transmits to the acquiring bank the amount of the purchase price minus the "interchange fee." The acquiring bank withholds additional fees before the remaining transaction proceeds are forwarded to the merchant with whom it contracted. The total costs the merchant bears to accept the

transaction is called the "merchant discount fee," the largest portion of which is the interchange fee. *Id*.

Following is a graphical depiction of this typical transaction:



ECF6923 ¶98.

In this case, a class of plaintiffs certified for settlement purposes under Fed. R. Civ. P. 23(b)(3) ("Class Plaintiffs") alleged that Visa and Mastercard violated Sections 1 and 2 of the Sherman Act by setting uniform schedules of default interchange fees and imposing several "anti-steering restraints" that prevented merchants from lowering their card-acceptance costs by encouraging consumers to

pay with lower-cost payment cards or other payment forms. ECF6923.

B. *In re Payment Card*, Phase One Litigation.

1. 2004 to 2012: The case is aggressively litigated on behalf of two nationwide classes of merchants under Rules 23(b)(2) and 23(b)(3).

The litigation that culminated in the settlement now on appeal has been an epic undertaking with few historical precedents. When Co-Lead Counsel began their pre-suit investigation in 2004, Visa and Mastercard were owned and governed by the nation's major card-issuing banks. *See Payment Card I*, 986 F. Supp. 2d at 215-16. The banks set interchange fees for each network (at supracompetitive levels according to the Class Plaintiffs), and imposed rules forbidding merchants from placing "surcharges" on Visa or Mastercard transactions or engaging in certain other behaviors to incentivize consumers to use other forms of payment. *Id*. at 214-15. This created a situation in which, according to the Class Plaintiffs' first amended complaint, the networks' fees consistently increased in tandem, insulated from any realistic

competitive challenge. Following eight years of litigation and mediation,[1] the parties reached a settlement Memorandum of Understanding, which they filed with the court on July 13, 2012. *Id.* at 216-17.

2. The 2012 Settlement provides for damages and injunctive relief on behalf of the merchant classes.

The 2012 Settlement included damages payments to a Rule 23(b)(3) class and injunctive relief for a Rule 23(b)(2) class. A-2575/ECF2113-6 ¶¶153-54. After accounting for takedowns due to class-member opt outs, the cash portion of the settlement totaled approximately $5.3 billion.A-2575/ECF2113-6 ¶153. The Rule 23(b)(2) class portion of the prior settlement further reformed certain Visa and Mastercard rules, such as rules prohibiting

[1] The history of "Phase One" of this litigation, and the efforts of Co-Lead Counsel are more thoroughly described in the Declaration of K. Craig Wildfang submitted in support of Class Plaintiffs' motions for final approval and for attorney fees, in connection with the 2012 Settlement (Apr. 11, 2013), A-2519/ECF2113-6, and in the district court's orders granting final approval, *Payment Card I*, 986 F. Supp. 2d at 224, and attorney fees, 991 F. Supp. 2d 437, 439-48 (E.D.N.Y. 2014) ("*Payment Card II*").

merchant surcharges. A-2430/ECF1656-2 at 2-3; A-2575/ECF2113-6 ¶153.

The district court granted final approval to the 2012 Settlement, over objections focused on the Rule 23(b)(2) injunctive-relief settlement. *Payment Card I*, 986 F. Supp. 2d at 230-37, *rev'd and vacated*, 827 F.3d 223 (2d Cir. 2016) ("*Payment Card III*").

3. This Court reverses and vacates the 2012 Settlement.

Numerous objectors appealed final approval of the 2012 Settlement to this Court. This Court reversed and vacated the final-approval order, finding that, under the unique circumstances of the 2012 Settlement, a conflict arose from the same counsel negotiating the settlement on behalf of both the Rule 23(b)(3) damages class and the Rule 23(b)(2) injunctive-relief class. *Payment Card III*, 827 F.3d 233, 236 (2d Cir. 2016). The Court held that at least some of the Rule 23(b)(2) class was not adequately represented under Rule 23(a)(4) because, potentially, greater relief could have been afforded to the Rule 23(b)(3) opt-out damages-only class at the expense of the separate Rule 23(b)(2) non-opt-out, injunctive-relief class. *Id*. In a

concurring opinion, Judge Leval expressed concerns about the Rule 23(b)(2) settlement release, including its applicability to merchants that had not yet come into existence, particularly in light of the lack of an end date on the release. *Id*. at 240-41 (Leval, J., concurring). Notably, this Court did not criticize the settlement amount secured for members of the damages class nor did it question the Co-Lead Counsel's commitment to the case. *Id*. at 234.

C. *In re Payment Card,* Phase Two Litigation.

1. 2016: The case is aggressively litigated on behalf of a Rule 23(b)(3) class only.

On November 30, 2016, after remand from this Court, the district court appointed the same three firms as interim Co-Lead Counsel for a proposed damages-only class seeking certification under Rule 23(b)(3). A-2992/ECF6754 at 1. The district court found that Co-Lead Counsel were "eminently qualified" and had demonstrated that they were "in the best position to continue to represent the interests of the Damages Class" through their cooperative work "with the court and with the other non-lead

counsel." A-2992/ECF6754. The district court appointed separate counsel to represent a proposed injunctive-relief class seeking certification under Rule 23(b)(2). *Id*. That action remains pending.

Co-Lead Counsel immediately resumed intensive litigation activities. Indeed, a new round of depositions began the day after the district court's November 30, 2016 order. These new litigation efforts included reviewing and analyzing more than 5 million additional pages of documents from among the Defendants' productions, producing more than 500,000 pages of additional documents from the Class Plaintiffs' own files, participating in 147 depositions of defense witnesses and 32 depositions of third-party witnesses, and defending Class Plaintiff depositions. A-2594/ECF2113-6 ¶¶207, 210-223. Co-Lead Counsel also worked closely with economic experts who were preparing class and merits expert reports. *See In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, 330 F.R.D. 11, 34 (E.D.N.Y. 2019) ("*Payment Card IV*").

2. 2018: Co-Lead Counsel secures another historic settlement on behalf of the Rule 23(b)(3) Class Plaintiffs.

In February 2017, Co-Lead Counsel began settlement negotiations with the Defendants, with assistance from Judge Edward Infante (Ret.) and Professor Eric Green. Over the next eighteen months, Co-Lead Counsel conducted numerous mediation sessions with the Defendants and the mediators, while continuing to litigate. *See* A-3693/ECF7257-5 ¶¶12-27; A-4130/ECF7257-4 ¶9; A-4097/ECF7257-3 ¶235. These mediation sessions culminated in an agreement in principle to settle the Rule 23(b)(3) damages class action, which the parties reduced to a written settlement agreement on September 17, 2018. A-3655/ECF7257-3 ¶239; A-3694/ECF7257-5 ¶¶26-27; A-4131/ECF7257-4 ¶11.

The Superseding and Amended Definitive Class Settlement Agreement (the "Settlement Agreement" or "2018 Settlement"), defined the following class:

> [a]ll persons, businesses, and other entities that have accepted any Visa-Branded Cards and/or Mastercard-Branded Cards in the United States at any time from January 1, 2004 to the Settlement Preliminary Approval Date, except that the Rule

> 23(b)(3) Settlement Class shall not include (a) the Dismissed Plaintiffs…[or three other categories of merchants not relevant to this appeal]."

Payment Card IV, 330 F.R.D. at 24.

The "Dismissed Plaintiffs" were specifically identified merchants that were members of the 2012 settlement class, but which opted out of that class to individually pursue their claims against the Defendants, settled those claims, and dismissed them. The definition of "Dismissed Plaintiffs" also included "any additional persons, businesses, or other entities included in an exclusion request that those plaintiffs previously submitted to the Class Administrator in connection with the [2012 Settlement]." A-3316/ECF7257-2 ¶3(t), A-3316/ECF7257-2 at 9.

The Settlement Agreement also addressed the issues that led this Court to reject the previous Rule 23(b)(2) injunctive-relief class settlement. The 2018 Settlement is not contingent on the resolution of the Rule 23(b)(2) class action, or any other action, and expressly does not release a class member's continued participation, as a named representative or non-representative class member, in the

Rule 23(b)(2) class action. A-3341/ECF7257-2 ¶34(a); Class members also have full opt-out rights to pursue individual litigation, whether for damages or injunctive relief. *See* A-3320/ECF7257-2 ¶3(mm) (defining settlement class as merchants that do not opt out); A-3333/ECF7257-2 ¶29 (limiting scope of release to members of the settlement class); *see also Payment Card IV*, 330 F.R.D. at 30 (finding that "the bifurcation of the (b)(2) and (b)(3) classes and their Class Counsel sufficiently addresses the Second Circuit's concern"); *In re: Payment Card Interchange Fee & Merchant Discount Antitrust Litig., No. 05-MD-1720*, 2019 WL 6875472, at *24 (E.D.N.Y. Dec. 16, 2019) ("*Payment Card V*") (distinguishing 2018 Settlement release from 2012 Settlement release).

The 2018 Settlement release is also narrower than the 2012 release in important respects. First, it carves out class-action injunctive-relief claims that are currently being pursued by Rule 23(b)(2) Class Counsel. A-3337/ECF7257-2 ¶31(a). Second, it applies only to merchants that accepted Visa or Mastercard-payment cards during the class period, and therefore does not affect the rights of

so-called "future merchants" that come into existence after the class period. *See* A-3324/ECF7257-2 ¶4; c*f. Payment Card III*, 827 F.3d at 241 (Leval, J. concurring). Third, as the court-approved class notice explicitly states, the release "is intended to be consistent with and no broader than federal law on the identical factual predicate doctrine." *See* A-4500/ECF7354-2 at G1-3 to G1-4. Finally, the release is limited in duration, terminating and permitting merchants to again challenge the conduct released in this case with claims that start accruing five years after the "Settlement Final Date" – *i.e.*, the date when all appeals are resolved in favor of the settlement. A-3321/ECF7257-2 at ¶3(ss).

3. The district court preliminarily approves the 2018 Settlement, directs notice to potential class members and directs notice to the Dismissed Plaintiffs.

Co-Lead Counsel filed a preliminary-approval motion on September 19, 2018.

On October 30, 2018, a group of independent retailers of fuel sold under major oil-company brands, such as Exxon and Valero, calling themselves the "Branded Operators," objected to preliminary

approval. A-4143/ECF7280 at 1. They stated that they were class members because they "accepted" Visa and Mastercard, and objected on three grounds: (i) that the settlement contained an "intra-class conflict" between the Branded Operators and their suppliers, *id*. at 2-3; (ii) that the Dismissed Plaintiffs were wrongly excluded from the settlement without their knowledge or consent, *id*.; and (iii) that the Settlement failed to inform the Dismissed Plaintiffs whether they were excluded "from recovery based on *all* sales at *all* locations" regardless of whether those sales were processed by Valero. *Id*. at 3.

Assuming the truth of the Branded Operators' assertion that they "accepted" payment cards,[2] the Class Plaintiffs responded that it "appear[ed]" that the Branded Operators were class members, "unless by contract they transferred [their] claims to oil companies." A-4149/ECF7294 at 3. The Class Plaintiffs noted that the Branded Operators' complaint did not amount to an intra-class conflict,

[2] Class Plaintiffs did not, as the Branded Operators assert in their brief, "confirm[] that [the] Branded Operators were class members." Fikes Br. (ECF 155) at 19.

however, because disputes over the ownership of particular claims did not "pit[] two distinct sets of class members with distinct claims against each other," and could be resolved at the claims-administration phase. A-4148/ECF7294 at 2.

The district court held a preliminary-approval hearing on December 6, 2018, at which it addressed the Branded Operators' objections. In response to the Branded Operators' contention that the Dismissed Plaintiffs had their claims released without their knowledge, the district court suggested that Co-Lead Counsel prepare a "Notice of Exclusion" to these merchants. Following the court's suggestion, Co-Lead Counsel drafted a notice that informed the merchant-recipients of their alleged exclusion and instructed them to contact Co-Lead Counsel if they believed the exclusion was improper or if they had other questions. A-4472/ECF7354-1 at G3-2. The notice informed merchants that, despite their presence on an exclusion list, they may nonetheless be entitled to settlement funds if, for example, they accepted payment cards in a capacity other than as a "Dismissed Plaintiff." *Id*. The notice then encouraged these

merchants to "follow the instructions on how to participate in the settlement or exclude [themselves] from the settlement." *Id*.

The district court approved the notice and granted preliminary approval on January 24, 2019. *Payment Card IV*, 330 F.R.D. at 60.

The district court also approved long-form notices that the claims administrator mailed to over 16 million merchants. *Id*. at 59-60. The notice program included a mass-media campaign, consisting of paid advertisements in print, on the internet, and on social-media platforms. *Payment Card V*, 2019 WL 6875472, at *4 (recounting notice effort). The notice advised merchants, among other things, that they could contact the claims administrator via email or a toll-free telephone number, if they "are not sure whether [they] are a part of the settlement." A-4452/ECF7257-2 at G2-7. In addition, the Plan of Administration and Distribution, available on the case website, indicated that, if it was not clear whether a merchant was the proper party to assert a claim, the administrator may request that it submit additional information to support its claim. A-3574/ECF7257-2 at I-9.

4. The 2018 Settlement is met with disapproval by a small number of objectors.

This comprehensive notice campaign elicited approximately 176 objections – an infinitesimally small percentage of the approximately twelve-million-member class.[3] *Payment Card V*, 2019 WL 6875472, at *16.

a. Branded Operator Objectors.

Approximately 140 of the objections were filed by the Branded Operators, 130 of which were identical, boilerplate objections. These Branded Operators claimed—in most cases inaccurately, A-5262/ECF7469-7 ¶¶12-20 —that they did not receive notice of the settlement. Substantively, the boilerplate objections claimed the

[3] Approximately sixteen million notices were sent to "likely" class members. A-5261/ECF7469-7 at 9-10. While the mailed notices inevitably reached some merchants that were not in the class (and the publication notice certainly reached non-class members), providing "the best notice that is practicable under the circumstances," Fed. R. Civ. P. 23(c)(2)(B), often necessitates that class counsel be overinclusive in its notice campaign. *See, e.g.*, *Macarz v. Transworld Systems, Inc.*, 201 F.R.D. 54, 61 (D. Conn. 2001) (ordering notice using data that was approximately twenty-five percent overinclusive).

major oil companies would file claims against the settlement fund for transactions at the Branded Operators' retail locations resulting in those companies receiving the funds for these transactions instead of the Branded Operators. The objections claimed that the Branded Operators, not their affiliated oil companies, were the entities that should be entitled to the settlement funds allocated to these transactions. *See, e.g.*, ECF7582.

Approximately ten Branded Operators also filed individualized objections, making similar arguments, but through counsel and supported by memoranda of law. Fikes Wholesale, Inc., Midwest Petroleum Company, and Slidell Oil Company, LLC (the "Branded Operator Appellants") sought denial of final approval. They also sought appointment of separate counsel to represent the Branded Operators asserting the class definition overbroadly included both Branded Operators and their upstream suppliers, such that both would be subject to the release while only one received compensation. According to these Branded Operators, this created an intra-class conflict between the oil companies and them. They

further contended that they were inadequately represented because the representative plaintiffs' interests were not "aligned with" those of the Branded Operators. *Payment Card V*, 2019 WL 6875472, at *9. A handful of trade associations representing the interests of fuel retailers objected on similar grounds. A-6673/ECF7561.

Similarly, Jack Rabbit, LLC and Cahaba Heights Service Center, Inc. (the "Jack Rabbit Appellants") stated that Branded Operators "are members of an unrepresented subclass, whose interests have not been adequately protected by the proposed settlement." A-6705/7574 at 2−3.

Even when the Branded Operators, the Jack Rabbit Appellants, and the merchants represented by the trade associations are considered together, they represent only a fraction of the millions of merchants that received the class notice. No other franchisee or group of franchisees objected on the same basis as the Branded Operators and Jack Rabbit. The district court also noted that, despite their objections, none of the Branded Operators or Jack Rabbit Appellants filed motions "over the issue of whether they own[ed]

the claim to a pro rata share of the settlement, or whether the major oil suppliers own[ed] the claim." *Payment Card V*, 2019 WL 6875472, at *16 n. 13.

b. Gnarlywood Objectors and McLaughlin Objectors

Gnarlywood LLC and Quincy Woodrights, LLC (the "Gnarlywood Appellants") objected that the settlement agreement was substantively unfair because it purported to release the Defendants "against their future misconduct…without corresponding consideration to members of the Rule 23(b)(3) Settlement Class." They further contended that the settlement agreement provided for "inequitable distribution" of the fund because class members that more recently began accepting payment cards would be disproportionately affected by the release of damages claims that accrue in the future.

Objector Kevan McLaughlin raised similar issues to the Gnarlywood Objectors and added an objection that the settlement release constituted a release of future claims, which McLaughlin argued violated public policy. A-6689/ECF7571 at 3.

5. The district court grants final approval over these objections.

The district court held a fairness hearing on November 7, 2019. At this hearing, the Branded Operators reiterated their argument that an intra-class conflict existed because both they and their suppliers were in the class by virtue of having "accepted" payment cards, yet only one of them would be compensated.[4]

On December 13, 2019, the district court granted final approval. *Payment Card V*, 2019 WL 6875472, at *36. The court noted the extensive record in support of approval submitted by Rule 23(b)(3) Class Plaintiffs. *Id*. at *2 (citing record submissions). Analyzing that extensive record, as well as materials and memoranda submitted in favor of and in opposition to the settlement, and applying the

[4] In their appellate briefs, the Branded Operators make much of an exchange between Co-Lead Counsel and the district court regarding which entities might be the proper claimants, as between the Branded Operators and their suppliers. As the district court noted in its final-approval memorandum, however, Co-Lead Counsel "stated unequivocally that they are agnostic…as to who owns the claim," which the court found to indicate adequacy of representation and weigh in favor of final approval. *Payment Card V*, 2019 WL 6875472, at *18-19.

Grinnell factors, the court approved the settlement, explaining its reasons in a 74-page memorandum. *See id*. at *13-14 (citing *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974)).

a. Adequacy of representation.

The district court found that class members were adequately represented, and that this factor weighed in favor of final approval. *Id*. at *19. The district court rejected the Branded Operators' central objection that their interests were inadequately represented by the Class Plaintiffs and Co-Lead Counsel because of alleged potentially conflicting interests of the Branded Operators and their fuel-supplier franchisors. *Id*. at *17. Relying on this Court's precedents that adequacy requires only that class counsel and the class representatives show that their "interests are [not] antagonistic to the interest of other members of the class," the district court concluded that the Class Plaintiffs fulfilled the adequacy requirement by representing a finite class seeking the same type of relief for the same conduct. *Id*. (citing *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 99 (2d Cir. 2007)).

The district court also found that a dispute between a Branded Operator and an oil company over *who owns a particular claim* does not give rise to an "intra-class conflict," because "[s]omebody owns the claim and somebody does not." *Id*. at *18 (quoting Co-Lead Counsel's statement at fairness hearing). As there is only one "owner" of a claim for any particular transaction (and thus only one class member as a result of that transaction), the court found that subdividing the class or appointing separate counsel was unnecessary. *Id*. Any disputes over who owned a claim could be addressed through an orderly claims-administration process. *Id*. The court reasoned that this settlement was typical of other settlements, in which a determination as to who is the proper owner of a disputed claim to the settlement funds and that it would be unacceptable to delay approval while these issues were resolved *Id*. The court observed that in the *Visa Check* case, similar claim-ownership issues had been addressed and resolved without difficulty by a court-appointed special master. *Id*. at *21.

b. Effectiveness of distributing relief to the class and method of processing class-member claims.

The district court found that, contrary to the Branded Operators' objections, the claims-processing method set forth in the Plan of Administration and Distribution was reasonable and rational and therefore favored approval. The district court found that the Plan of Administration and Distribution was devised by "experienced and competent complex class action attorneys," it prescribed a pro rata distribution, which courts frequently approve, and allowed class members to object to projected claim amounts if they believed that they were entitled to more than the administrator's estimate. *Id*. at *20 (citing *In re Credit Default Swaps Antitrust Litig*., No. 13-MD-2476, 2016 WL 2731524, at *4 (S.D.N.Y Apr. 26, 2016)).

c. The release from liability.

The district court also rejected arguments by the Gnarlywood Appellants and others that the release invalidly extinguished (for a limited time) class members' future damages claims arising from the

same conduct that had been the subject of the litigation. *Id*. at *22. The court concluded that the release fell within this Circuit's "well established" precedent that "class action releases may include claims not presented and even those which could not have been presented as long as the released conduct arises out of the 'identical factual predicate' to the settled conduct." *Id*. at *25 (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 107 (2d Cir. 2005)). The court emphasized that it granted preliminary approval only "after ensuring that the Second Circuit's prior concerns were not implicated in the new release [and] the [new] release comported with the Second Circuit's 'identical factual predicate test. . . .'" *Id.* at *23. The court also concluded that the release's limited duration and scope favored approval, concluding that "it does not appear that there is any prohibition on the release of *future* claims, as long as those claims fall within the identical factual predicate test." *Id*. at *25 (citing *Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 95 (2d Cir. 2019)).

Finally, the district court rejected the Gnarlywood Appellants' objection that a class member that became a merchant for only the end of the class period would receive a smaller remuneration relative to a merchant that accepted Visa and Mastercard for the entire class period, but would be subject to the same release. The court found that such a class member would be protected by its opt-out rights and concluded that it would be administratively unfeasible to tailor a release to match the duration that a member had been in the class. *Id.* at *27.

d. Other factors

The district court addressed several other factors that were either not the subject of any objection or subject only to cursory objection. First, the court found that the infinitesimally small percentage of class members that objected to the settlement weighed in favor of approval. *Id*. at *16. The court next found that the settlement was the product of arm's-length negotiations, was justified by the costs, risks, and delay of trial and appeal, *id*. at *19-

22, and that the terms of the proposed attorneys' fees favored approval. *Id*. at *22.[5]

6. In an abundance of caution, the district court directs a supplemental notice to the Dismissed Plaintiffs.

The Branded Operators also attacked the "Notice of Exclusion" at the hearing, arguing that it did not clarify whether branded operators for Valero—a Dismissed Plaintiff—could make claims relating to non-Valero-branded transactions they may have had. Hr'g Tr. 49-50; *see also* ECF7559 at 24 n.81. The district court noted that the Notice of Exclusion did in fact alert merchants that they could make a claim or opt out if they felt that they were class members. *See* Hr'g Tr. 97-98. The Defendants added that they would not prevent any "excluded" merchant with a valid claim from being paid, even if that merchant sought compensation for the same

[5] In separate orders, the district court granted attorneys' fees and expenses to Co-Lead Counsel and service awards to the Representative Plaintiffs. A-7398/ECF7822; A-7455/ECF7823. These orders are subject to appeals that partially overlap with the appeals to final approval (20-304, 20-341, 20-342 and 20-343) and discussed at length in Class Plaintiff-Appellees' Answering Brief addressing those appeals.

transactions that the Defendants believed they had released through a prior opt-out settlement. Hr'g Tr. at 96.

To avoid any merchant confusion, however, the district court instructed that a further notice—herein a "Supplemental Notice"—be sent to the merchants that received the "Notice of Exclusion." This Supplemental Notice informed those merchants that, "depending on [their] circumstances," they "may be eligible to make a claim for settlement funds," and reiterated how to do so. A-7219/ECF7791-1 at 1-2. As these merchants had already received notice of how to file a claim or opt out, *see supra* at 17-18; A-3304/ECF7257-2; A-4472/ECF7354-1, at G3-2, the Supplemental Notice did not provide an additional opt-out opportunity. Based in part on this Supplemental Notice and assurances of Co-Lead Counsel that they represented any entity, including a Branded Operator, that demonstrated it was in the class, the district court determined that "any Branded Operator that believes it has been wrongly excluded as a result of the Valero settlement, or more broadly, any entity in a franchisee-franchisor relationship that

believes it has been wrongly excluded, may file a claim, which can be assessed for validity through a claims administration process, and will be competently represented by Co-Lead Counsel." *Payment Card V*, 2019 WL 6875472, at *33.

This appeal followed.

Summary of Argument

The Objector-Appellants make several related arguments that challenge the district court's final approval of the settlement, none of which is persuasive.

The Branded Operators' principal objections rest upon a single assertion: that the use of the word "accepted" in the class definition sweeps in both Branded Operators and their oil-company suppliers, meaning both entities are in the class (and will be bound by the release) even though only one entity can recover in the settlement. From that single, erroneous premise, the Branded Operators attempt to manufacture an "intra-class conflict" between the Branded Operators and their suppliers. But only one entity "accepted" a Visa-branded card or Mastercard-branded card on any given transaction under the class definition, and therefore ***either*** the Branded Operator ***or*** its supplier is in the class based on that transaction. An "intra-class conflict" cannot exist between two entities, only one of which is in the class. The district court correctly

rejected this argument twice. *Payment Card V*, 2019 WL 6875472, at *18-19; *Payment Card IV*, 330 F.R.D. at 32-33.

The Branded Operators' argument that notice was inadequate should also be rejected. The district court ordered an extensive notice campaign to provide class members with the best notice practicable, Fed. R. Civ. P. 23(c)(2)(B), of the settlement and provided *additional* notice to the Dismissed Plaintiffs over and above what Rule 23 requires. The district court acted within its discretion when it did not include an additional opt-out opportunity with this additional notice campaign.

The Gnarlywood and McLaughlin Appellants' arguments fare no better. It is well-settled in this Circuit that a class-action settlement can extinguish future-accruing claims that fall within the "identical factual predicate" of the litigation. And the fact that some class members have been in existence longer than others, and thus may have relatively larger claims, does not change this analysis. It is equally well-settled that a special master may make determinations

of class membership and class allocation, if and when the district court appoints one.

Standard of Review

This Court reviews the approval of a class settlement—including the decision to certify a settlement class—for abuse of discretion. *Joel A. v. Giuliani*, 218 F.3d 132, 139 (2d Cir. 2000). Under this standard, the Court examines whether the district court's application of the legal standards for approval "falls within the range of permissible decisions." *In re Petrobras Sec. Litig.*, 862 F.3d 250, 261 (2d Cir. 2017), and sets aside the district court's decision only upon a "clear showing that the district court has abused its discretion." *D'Amato v. Deutsche Bank*, 236 F. 3d 78, 85 (2d Cir. 2001) (internal citations and quotations omitted).

"The trial judge's views are accorded 'great weight . . . because [she] is exposed to the litigants, and their strategies, positions and proofs. . . . Simply stated, [she] is on the firing line and can evaluate the action accordingly.'" *Joel A.*, 218 F.3d at 139 (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 454 (2d Cir. 1974)); *accord Wal-Mart*, 396 F.3d at 117; *Cnty. of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1323 (2d Cir. 1990). Moreover, "[this] considerable

deference . . . is heightened where the trial judge's experience has imparted to the judge a particularly high degree of knowledge." *Joel A.*, 218 F.3d at 139.

Argument

I. The district court acted within its discretion when it finally approved the settlement.

The district court[6] oversaw this longstanding litigation and issued thorough analyses of the settlement at both preliminary approval and final approval, carefully applying the Rule 23(e) factors and addressing all timely and relevant objections.

A. The Representative Plaintiffs and Co-Lead Counsel adequately represented the class.

1. Non-class members may not create a "fundamental intra-class conflict."

The settlement treats all class members the same—they are subject to a unitary claims-recovery mechanism, governed by uniform *pro rata* allocation principles. *Payment Card IV*, 330 F.R.D. at 24. The district court found that settlement to be fair, reasonable,

[6] Judge Gleeson oversaw this litigation from its inception to December 2014 when the case was re-assigned to Judge Brodie. ECF6359. These judges also presided over all the opt-out cases in MDL 1720. Throughout the pendency of the litigation, nearly all of the pretrial matters were presided over by the Magistrate Judge, Hon. James Orenstein.

and adequate, in light of the risks of continued litigation. *Payment Card V*, 2019 WL 6875472, at *15.

The Branded Operators do not take issue with the deal that the Class Plaintiffs struck, but instead argue that the settlement "contains fundamental intra-class conflicts that pit subgroups of class members – virtually every franchisor and franchisee in the country[7] – against one another for recovery of the exact same settlement dollars on the exact same consumer transactions." Fikes Br. at 1. But the Branded Operators' argument hinges on one erroneous assumption: that the class definition sweeps in both Branded Operators and their oil-company suppliers on the same transactions. Fikes Br. at 29. The Branded Operators further postulate that, if they are in the class but are deemed not to be entitled to compensation, they will nonetheless be subject to the

[7] Citing a declaration from the class administrator, the Branded Operators assert that 671,161 class members were "merchants believed to be franchisees." Fikes Br. (ECF 155) at 15. But despite the broad swath of merchants that they claim this issue affects, no other group of franchisees has objected to the settlement on this basis.

class release, and will be unable to seek redress from the Defendants.

a. The Branded Operators' argument is wrong as a matter of law.

The Branded Operators' interpretation of the Settlement Agreement—that an entity determined not to be in the class would nonetheless be bound by the settlement release—is simply wrong. As to any transaction, either the Branded Operator or the supplier may be the class member that "accepted" the Visa-branded card or Mastercard-branded card transaction but both *cannot* be in the class as a result of that transaction. An entity not in the class is *not* bound by the release and accordingly maintains its potential remedies.[8] *Rothstein*, 837 F.3d at 204; *see also* Newberg on Class Actions § 13:22, at 357-58. The Defendant-Appellees agree. *See* Defendant-Appellees' Br. at 42.

[8] If a Branded Operator that is not a member of the class is an "indirect purchaser," it may seek redress against the Defendants under several state laws that allow indirect purchasers to receive antitrust damages.

The Branded Operators' tendentious interpretation of the term "accepted" is also divorced from basic antitrust-law principles, which guide the interpretation of the class definition. *See Rothstein v. Am. Int'l Grp., Inc.*, 837 F.3d 195, 205 (2d Cir. 2016) (interpreting class definition with reference to the substantive law); *see also In re Motorola Securities Litig.*, 644 F.3d 511, 517 (7th Cir. 2011) (same). In this case, the substantive law—Section 4 of the Clayton Act—is clear. Under that statute, as construed by the Supreme Court in *Illinois Brick v. Illinois*, 431 U.S. 720 (1977) and recently re-affirmed in *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019), only one entity—the "direct purchaser" from the defendant—has standing to recover damages for the defendant's antitrust violations. *Id*. Indeed, the Branded Operators acknowledge that, in the context of this case, *Illinois Brick* means that the only entity "entitled to recovery under the Sherman Act" is the "first payor of the interchange fees," A-6595/ECF7559-1 ¶9; *see also* Fikes Br. at 37. The Branded Operators' acknowledgement that only direct purchasers have standing to sue is an admission that only the merchant that is a "direct purchaser" is included in the class definition for any given transaction.

To manufacture an intra-class conflict despite the antitrust laws' clear standing limitations, the Branded Operators suggest that they and their suppliers *both* "accepted" payment cards on the same transactions, "albeit in different ways." Fikes Br. at 29. But they cite no authority for the proposition that two entities can be direct purchasers "in different ways." Nor could they cite such authority because a rule that both an upstream and downstream entity can be direct purchasers would fly in the face of the "bright-line rule" that *Illinois Brick* intended to create. *See Apple*, 139 S. Ct. at 1521.

Depending on the particulars of the business and legal relationships in effect between any given Branded Operator, its supplier, the acquiring bank, and Visa/Mastercard, the direct purchaser, and therefore class member, could be the Branded Operator *or* its supplier—but, as a matter of law, it can *never* be both. *See, e.g., Apple*, 139 S. Ct. at 1521 ("The bright-line rule of *Illinois Brick* . . . means that indirect purchasers who are two or more steps removed from the antitrust violator in a distribution chain may not sue. By contrast, direct purchasers—that is, those who are the

immediate buyers from the alleged antitrust violators—may sue.") (internal quotes and citations omitted). Without both supplier and operator in the class as to any given transaction, there logically can be no "intra-class conflict" between them.

b. The Branded Operators' argument that multiple entities can "accept" a particular transaction is factually incorrect.

Construing the word "accept" to include multiple entities, as the Branded Operators suggest, is inconsistent with the historical understanding and common usage of that term by market participants in the payment-card industry and is also inconsistent with the history of antitrust litigation involving Visa and Mastercard.

The Visa and Mastercard payment-card networks evolved from single bank-card networks, or regional networks of banks that issued cards or "acquired" merchant transactions. ECF6923 ¶¶73-76. As the joint ventures grew, it became necessary for these new networks to have rules that governed both the "card issuing" and the "merchant acceptance" process. On the merchant side, the

networks required merchants seeking to "accept" Visa or Mastercard payment cards to accept each network's respective rules—including their rules requiring the payment of an interchange fee—as a condition of accepting the network's cards. ECF6923 ¶9n.

By the process of agreeing to the networks' rules and paying their required fees, the merchant was said to have "accepted" payment cards. *See* ECF6923 ¶¶60, 99. This meaning of the word "accepted" in the class definition—that only one merchant below the acquiring bank in the flow of commerce "accepts" the payment-card transaction—is consistent with *Illinois Brick*, as the district court understood when it concluded that the class definition was "objectively guided by federal antitrust standards." *Payment Card V*, 2019 WL at 6875472, at *31.

The term "accepted" has a long history in litigation, as well. The *In re Visa Check* case, in which a class of merchants alleged that the networks' practices of "tying" debit-card acceptance to credit-card acceptance violated the antitrust laws, was certified on behalf

of "all persons and business entities who have *accepted* Visa and/or MasterCard credit cards. …" *In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. 68, 73, 90, *aff'd* 280 F.3d 124 (2d Cir. 2001) (Sotomayor, J.) (emphasis added). After remand, the case was settled on behalf of that class. *In re Visa Check/MasterMoney Antitrust Litig.*, 297 F. Supp. 2d 503, 514 n.12 (E.D.N.Y. 2003), *aff'd sub nom Wal-Mart Stores, Inc. v. Visa USA*, 396 F.3d. 96, 102 (2d Cir. 2005). At least one other antitrust case before this Court that addressed Visa and Mastercard's alleged market power over merchants used the term "accept" in the same fashion. *See United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 235 (2d Cir. 2003) (under the Visa and Mastercard network structures, "a particular acquiring bank acts as liaison between the network and those merchants *accepting* the network's payment cards *with whom it has contracted*.") (emphasis added).

Relying upon this Court's precedents in *Visa Check* and *Wal-Mart,* the original complaint filed in June 2005 (Case No. 305-cv-1007, ECF1 ¶55) and each of the subsequent amended complaints alleged a class of "all persons, businesses, and other entities that

have *accepted* any Visa-branded or Mastercard-branded cards in the United States …". (emphasis added) ECF317 ¶97; ECF1153 ¶108; ECF6923 ¶66. The district court certified a settlement class with that definition, *Payment Card I*, 986 F. Supp. 2d at 213 n.3, which no party challenged on the basis of the term "accepted" being ambiguous. Outside of the Branded Operators' objection in this case, the Class-Plaintiff-Appellees are not aware of any instance in prior payment-card litigation, in which the term "accept" was challenged as ambiguous. And despite the Branded Operators claiming that this issue affects "hundreds of thousands of franchisees" (Fikes Br. at 15), only approximately 140 objections were filed – all from the Branded Operators. *Payment Card V*, 2019 WL 6875472, at *8. No other franchisees challenged the class definition which was in the notice that was sent to them.

2. Without an "intra-class conflict," there can be no need to create subclasses or appoint subclass counsel.

The Branded Operators attempt to fit the square peg of their objection into the round hole of the Supreme Court's decision in

Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997)—in which two distinct groups of asbestos claimants were indisputably in the same class—and its progeny in the Supreme Court and in this Court. But without a "fundamental conflict" between two entities—*both of which are in the class*—the Branded Operators' reliance on *Amchem* and its progeny fails.

In *Amchem*, the parties structured a class-action settlement in such a way that various distinct categories of class members, some of whose injuries had not yet materialized, each would have competing claims against the same finite settlement fund. *Amchem*, 521 U.S. at 610–612. The Supreme Court held that a fatal intra-class conflict existed because each of the competing sets of differentially situated groups of class members was vying for the same finite sum of money and had divergent interests regarding the value of various settlement terms. *Id*. Under those circumstances, some "structural assurance of fair and adequate representation for the diverse groups and individuals affected" was required under Rule 23(a)(4). *Id*. at 627.

In *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), the Supreme Court rejected a proposed settlement class that was divided along two fault lines: First, as in *Amchem*, "between holders of present and future claims," *Id*. 856-57; And second, between holders of claims subject to indemnification by insurance companies and holders of claims that accrued *after* the defendant's insurance expired (with the former having "much higher" settlement value). *Id*. That conflict also fell "within the requirement of structural protection recognized in *Amchem*." *Id*.

The Branded Operators also cite this Court's decision in *In re Literary Works Elec. Database Copyright Litig.*, 654 F.3d 242, 254 (2d Cir. 2011), which applied *Amchem*. In that case, the Court vacated a class-action settlement in which class counsel represented three distinct categories of author-class members with claims against the same fund. "These categories, each of different strength . . . compete[d] with one another over the allocation of the capped Settlement fund." *Id.* at 257. Under these circumstances, this Court held the existence of a category of plaintiffs that bore the risk of

oversubscription required the structural protections of a subclass and independent counsel to ensure adequate representation. *Id*. at 254-55.

The "fundamental conflict" that characterizes each of these cases—a conflict between two groups within the same class for a greater portion of the settlement funds—is absent from this case. *Payment Card V*, 2019 WL 6875472, at *18 (finding that the dispute in question is not between class members but rather "over who has a claim to a share of the settlement fund, Branded Operators or major oil suppliers, franchisees or franchisors . . ."). In this case there is also no conflict between holders of present-injury and future–injury claims; all class members have claims based on alleged injuries in the class period, *cf. Amchem*, 521 U.S. at 610-12; *Payment Card III*, 827 F.3d at 241 (Leval, J., concurring), or between holders of claims with different settlement values. *Cf. Literary Works*, 654 F.3d at 253-54. Nor has any set of class members been singled out to bear the risk of over-subscription. *Id*. All class-member claims will be calculated pursuant to the same *pro rata* formula. *Payment Card IV*, 330 F.R.D. at

24. And because of the structural protection erected by the district court after *Payment Card III*, any incentives that might have theoretically existed for Co-Lead Counsel to trade benefits to one group for benefits to another have been eliminated. *See Payment Card IV*, 330 F.R.D. at 31 ("The structural defect of unitary representation no longer exists — the (b)(2) and (b)(3) classes now have separate interim Class Counsel, with … Rule 23(b)(3) Class Counsel . . . represent[ing] a finite class that desires and will receive the same type of relief — damages for past harm.")

In this case only one claimant may lay claim to settlement proceeds arising from any given transaction. Because all merchants—Branded Operators, oil companies, "big-box" merchants, corner stores, and all others—are treated alike and compensated by the same formula, *Amchem* is inapposite and the Branded Operators' supposed intra-class conflict does not exist. *See Amchem*, 521 U.S. at 610–12. Without a "serious intra-class conflict[]," there is no need for subclasses and no need for separate

counsel. *Amchem*, 521 U.S. at 627; *In re Literary Works*, 654 F.3d at 254-55.

B. The class is ascertainable based on objective criteria.

The district court properly concluded that the settlement class satisfies Rule 23(a)'s implied ascertainability requirement, as expounded by this Court in *Petrobras*, 862 F.3d at 264. The ascertainability standard is a "modest" and "not demanding" one. *Petrobras* 862 F.3d at 269; *Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561, 567 (S.D.N.Y. 2014). Under this standard, class membership is ascertainable if it is defined by objective criteria that make membership sufficiently definite. *Petrobras*, 862 F.3d at 266. The point of this Circuit's ascertainability test is that it should be possible for the district court to determine who is and is not in the class based on objective criteria. *Id.* at 266-67 (citing *Ebin*, 297 F.R.D. at 567, and *Charron v. Pinnacle Grp. N.Y. LLC*, 269 F.R.D. 221, 229 (S.D.N.Y. 2010)).

The class definition in this case plainly meets the "modest" standard for ascertainability. The district court found that "the term

'accepts' is objective enough by its plain English usage to satisfy the ascertainability requirement." *Payment Card V*, 2019 WL 6875472, at *31. The court also found that the settlement class is defined by reference to objective criteria, with definite temporal ("from January 1, 2004 to the Settlement Preliminary Approval Date") and geographic ("in the United States") bounds. *Payment Card V*, 2019 WL 6875472, at *31. The court also made clear that the class is defined with respect to the substantive law, which limits standing to only those that purchased "direct[ly]" from a defendant. *Payment Card V*, 2019 WL 6875472, at *31. The court therefore found that, while disputes over "who holds a claim" may arise, those disputes can ultimately be resolved based on objective information, as part of an orderly claims-administration process. *Id*.

This Court previously approved a class-action settlement with Visa and Mastercard that featured a nearly identical class definition. *Wal-Mart*, 396 F.3d at 102 (approving settlement on behalf of "all persons and business entities who have accepted Visa and/or MasterCard credit cards"); *In re Visa Check/MasterMoney Antitrust*

Litig., 280 F.3d 124, 131 (2d Cir. 2001) (approving certification of same class over defendants' objections). The class definition satisfies this Circuit's ascertainability requirement here as well.

Accordingly, this situation is no different from one in which a settlement requires individuals or entities to come forth with sales records or other information to prove that they meet the objective criteria to be considered class members – a common practice in this (and every) Circuit. *See, e.g.*, *In re Auction Houses Antitrust Litig.*, 42 F. App'x 511 (2d Cir. 2002) (affirming approval of settlement which distributed funds to class members pro rata based on consignments made and sellers' commissions paid by each class member during the relevant time period); *Alaska Elec. Pension Fund v. Bank of Am., Corp.*, No. 14-cv-7126, 2020 WL 916853, at *1 (S.D.N.Y. Feb. 26, 2020) (approving distribution of settlement funds following claims administrator's determination of claimant eligibility); *In re Vitamins Antitrust Litig.*, No. MDL 1285, 2000 WL 33975411, at *1 (D.D.C. Nov. 17, 2000) (approving distribution of settlement funds following

documentation of each claimant's right to participate in settlement fund).

The Branded Operator Appellants' and Jack Rabbit Appellants' arguments to the contrary are not persuasive. Although they make cursory reference to *Petrobras*, Fikes Br. at 35-36; Jack Rabbit Br. (ECF163) at 39-40, they largely rehash the same losing ascertainability arguments advanced by the *Petrobras* appellants.[9]

In *Petrobras*, this Court affirmed the certification of classes of persons who, over a definite time-period, purchased Petrobras securities in "domestic transactions." Encouraging this Court to adopt the Third Circuit's "heightened" ascertainability test, the *Petrobras* appellants argued that the proposed class was unascertainable "because . . . the nuances of the 'domestic transaction' standard [made] determining class membership and damages . . . administratively unfeasible." *Petrobras*, 862 F.3d at 265

[9] The Branded Operators avoid explicitly using the term "ascertainable" at all and instead generally argue that *Petrobras* precludes the certification of "poorly defined" classes. *See* Fikes Br. at 35-36.

(alterations omitted). Specifically, the *Petrobras* appellants complained (similar to the Appellants in this case) that the term "domestic transaction" rendered the class unascertainable because determining who holds a claim "may require… testimonial evidence, followed by a mini-hearing on whether each unique mix of found and missing information proves that a transaction was 'domestic'—and therefore within the class definition." Reply Brief for Defendants-Appellants BB Securities Ltd., et al., *Petrobras Sec. Litig.*, 862 F.3d 250 (2d Cir. 2017) (No. 16-1914), 2016 WL 4729772, at *1, *7-8 (2d Cir. Case No. 16-1914, ECF249, Sep. 8, 2016).

Rejecting the appellants' arguments in that case, this Court held that, notwithstanding any practical challenges to determining which entity holds a claim, "the ascertainability analysis is limited to the narrower question of whether those determinations are objectively *possible*." *Petrobras*, 862 F.3d at 270. In *Petrobras*, such determinations were objectively possible because the class definition criteria – "securities purchases identified by subject matter, timing, and location" – were "clearly objective." *Id.* at 269.

The same is true in this case. Although the Appellants assert the impracticality of determining who "accepted" the transaction as between branded operators and their oil-company suppliers, *see* Jack Rabbit Br. at 58 (advocating for "administrative feasibility" requirement), such a determination is objectively possible. *Petrobras*, 862 F.3d at 268-69 (rejecting "administrative feasibility" tests as risking "encroaching on territory belonging to the predominance requirement," which this Court has rejected). If there is a dispute and fact-finding must take place to determine which entity may be entitled to settlement funds for a given transaction or set of transactions under some unique fact pattern, or if the entity that accepted the card for payment transferred its claim by contract to another entity, those issues can be addressed as a matter of claims administration or through the court's expressly retained authority to "implement, administer, consummate, and enforce" the settlement. 7832 at 13; *In re Auction Houses*, 42 F. App'x 511; *Alaska Elec. Pension Fund*, 2020 WL 916853, at *1.[10] The district court acted within in its

[10] Information upon which any dispute would be resolved could include franchise agreements, license agreements, card-

discretion in concluding that the proposed class met Rule 23(a)'s "modest" and "not demanding" ascertainability requirement.

C. The class received adequate notice.

No appellant contests the general adequacy of the notice campaign executed in this action, which included sending over sixteen million individual notices by first-class mail, placing notices in small business and financial publications with a collective circulation of approximately 40 million, and creating a case website (maintained in eight different languages) where the notice was available for download. *Payment Card V*, 2019 WL 6875472, at *4. Rather, the Branded Operators complain that Supplemental Notices to certain merchants—notices that were over and above the notice required for due process—should have included even more information and provided those merchants with additional opt-out or objection rights. Fikes Br. at 24.

---

acceptance agreements, card-processing statements, or transaction data, all objective and finite data points.

Class members are to receive "the best notice practical under the circumstances." *In re Drexel Burnham Lambert Grp.*, 995 F.2d 1138, 1144 (2d Cir. 1993). "Best notice practical" does not impose any "rigid rules" on class notice, but instead imposes a "reasonableness" standard that is met when the notice campaign, "fairly apprise[s] the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *Wal-Mart*, 396 F.3d at 114 (quoting *Weinberger v. Kendrick*, 698 F.2d 61, 70 (2d Cir. 1982)).

The notice campaign directed toward the Dismissed Plaintiffs was an effort over and above the already substantial notice efforts to (a) further apprise a small number of merchants that their claims previously may have been opted out and settled by certain plaintiffs related to those merchants; and (b) advise them of steps they could take to make a claim to settlement funds in the event they believed those plaintiffs lacked the authority to opt out or settle their claims. A-4587/ECF7354-1 at G3-2, A-7219/ECF7791-1 at 1-2.[11] The

[11] At the final-approval hearing, the Defendants acknowledged that they bear the risk of "double payment" in the event that a

supplemental notice did not render the notice campaign inadequate; it was a supererogatory component of a notice campaign that was already more than adequate.

The Branded Operators' suggestion that the recipients of the additional notices required an additional opportunity to opt out of the settlement also lacks merit. If these merchants were previously opted out of the class by a supplier such as Valero and their claims settled, they did not need an additional opt-out opportunity, as they were already excluded from the class. And even if they were still in the class, and did "accept" Visa or Mastercard during the class period, they were already apprised that opting out of the settlement was necessary to pursue individual claims against the Defendants. A-4456/7354-1, Ex. 1 at G2-11-12.

While the Branded Operators now demand a second opportunity to opt out for certain merchants, the record contains no

---

Branded Operator whose claim was purportedly (but unsuccessfully) released by its supplier files a claim that is deemed to be valid. Nov. 7, 2019 Hr'g Tr. 95:19-25. The risk to the Defendants does not affect *this* settlement's reasonableness, however.

evidence of a single merchant that desired such an opportunity (and Co-Lead Counsel are not aware of any)—either because it claimed to be misled by the Notice of Exclusion or for any other reason. The absence of objections from actual merchants to the lack of a second opt-out opportunity is telling, when compared with other merchants who, after contacting Co-Lead Counsel or the administrator, successfully petitioned the district court to amend their opt-out decision. *See* ECF7980, 7979, 7945, 7911; ECF Order May 27, 2020 (granting 7945); Order Apr. 10, 2020 (granting 7911).

II. A release of future-accruing claims within the "identical factual predicate" of this litigation was reasonable in exchange for a multi-billion dollar settlement.

Two appellant groups challenge the scope of the settlement release. Gnarlywood Br. (ECF161) at 25-28; McLaughlin Br. (ECF162) at 17-23. Specifically, they argue that that Settlement's release of future-accruing claims violates public policy and, in the case of Gnarlywood, that it disproportionately affects merchants that recently began accepting Visa or Mastercard. Gnarlywood Br. at 28-33.

A. A class-action release may extinguish claims that accrue after settlement approval.

This Court has observed that "[i]t is not uncommon…for a release to prevent the releasor from bringing suit against the releasee for engaging in a conspiracy that is later alleged to have continued after the release's execution." *VKK Corp. v. Nat'l Football League*, 244 F.3d 114, 126 (2d Cir. 2001). *Melito v. Experian Mktg Sols., Inc.*, 923 F.3d 85 (2d Cir. 2019), applied this principle. In *Melito*, a class member objected to a class-action settlement in a lawsuit that sought compensation for unsolicited text messages under the Telephone Consumer Protection Act. *Id*. at 88, 95. The objector challenged the settlement because it extinguished claims for text messages that were sent after the class period. *Id*. at 95. This Court rejected the objector's argument, however, reasoning that because text messages sent after the class period arose out of the identical factual predicate as those sent during the class period, claims based on those text messages that accrued after the class period could properly be released. *Id*. at 95-96.

Other courts have also upheld releases that extinguished claims arising after settlement based on the continuation of challenged pre-release conduct. *Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 348, 350 (6th Cir. 2009) (rejecting an objection that a release "unconscionabl[y]" extinguished future tort claims, concluding that it barred only continuing nuisance claims "arising out of conditions that existed prior to the settlement"); *see also Shane v. Humana, Inc.*, No. 00-md-1334, 2009 WL 7848518, at *4–9 (S.D. Fla. Nov. 5, 2009) (report and recommendation concluding that class-action settlement released claims that were asserted by subsequent plaintiffs, which alleged a continuation of the previously released conduct and rejecting argument that release violated public policy), *adopted sub nom In re Managed Care Litig.*, 2009 WL 7848638 (S.D. Fla. Dec. 1, 2009); *Madison Sq. Garden v. Nat'l Hockey League*, No. 07-cv-8455, 2008 WL 4547518, at *6–10 (S.D.N.Y. Oct. 10, 2008) (holding that release that extinguished hockey club's claims "which exist as of the date of execution . . . relating to, or arising from, any hockey operations or any NHL activity . . . ," released claims based on

continuing conduct that existed at the time of settlement, and that such a release did not violate public policy).

The release here extinguishes claims based on conduct or acts "that are or have been alleged or otherwise raised in the Action, or that could have been alleged or raised in the Action relating to the subject matter thereof, or arising out of or relating to a continuation or continuing effect of any such conduct." *Payment Card IV* at 44. The release clarifies, "for avoidance of doubt," that it extends "to, but only to, the fullest extent permitted by federal law." The settlement notice further clarifies that the release "is intended to be consistent with and no broader than federal law on the identical factual predicate doctrine." A-3526, A-3537/ECF7257-2 at G1-4, G2-10.

The district court thoroughly analyzed the release and held lengthy discussions with the parties during the preliminary approval hearing to clarify its scope and the parties' intent. *Payment Card V*, 2019 WL 6875472, at *23. "[A]fter ensuring that the Second Circuit's prior concerns were not implicated in the new release [and]

the [new] release comported with the Second Circuit's 'identical factual predicate' test," the district court concluded that the release militated in favor of final approval. *Id*.

McLaughlin and Gnarlywood challenge the scope of the release, but neither contends that the release extinguishes claims outside of this litigation's identical factual predicate. Rather, they complain that the "identical factual predicate" standard itself is contrary to public policy because it permits the release of claims accruing after the Settlement Final Date. Gnarlywood Br. at 25-27; McLaughlin Br. at 17-20.

McLaughlin argues that this Circuit should abandon the "identical factual predicate" doctrine because of its "arcane origin and granular factual underpinnings." McLaughlin Br. at 20. Gnarlywood argues that the release is unlawful under a bevy of alternative supposed authorities – primarily the Rules Enabling Act, 28 U.S.C. § 2072, and non-binding portions of two irrelevant Supreme Court decisions. *See* Gnarlywood Br. 26. But Gnarlywood fails to cite a single case where a release has been struck down

under the Rules Enabling Act. And the Supreme Court cases which Gnarlywood cites – *American Exp. Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013) and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) – pertain to the judge-made exception to the Federal Arbitration Act known as the "effective vindication" exception. The "effective vindication" exception does not apply to settlement releases; it applies to arbitration clauses. *See Italian Colors Restaurant*, 570 U.S. at 235 ("The 'effective vindication' exception . . . originated as dictum in *Mitsubishi Motors*, where we expressed a willingness to invalidate, on 'public policy' grounds, *arbitration* agreements that 'operat[e] ... as a prospective waiver of a party's right to pursue statutory remedies.'"); *see also Payment Card V*, 2019 WL 6875472 at *26.

Nor do the out-of-context quotes Gnarlywood lifts from *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322 (1955) and *Info. Superhighway, Inc. v. Talk Am., Inc.*, 274 F. Supp. 2d 466 (S.D.N.Y. 2003), help its argument. In *Lawlor*, a case concerning the application of *res judicata* principles (not the approval of a settlement release), the Supreme

Court "declin[ed] to enforce an agreement which extinguished *forever* the plaintiffs' antitrust claims arising out of *uncontemplated conduct*." *US Airways, Inc. v. Sabre Holdings Corp.*, 105 F. Supp. 3d 265, 279 (S.D.N.Y. 2015), *aff'd*, 938 F.3d 43 (2d Cir. 2019) (limiting *Lawlor* to the *res judicata* context) (emphasis added). This Court has further clarified that *Lawlor* does not preclude parties from releasing "claims based on ongoing conduct … so long as the settlement agreement is clearly drafted." *Storey v. Cello Holdings, L.L.C.*, 347 F.3d 370, 387 (2d Cir. 2003); *see also US Airways*, 105 F. Supp. 3d at 279 (distinguishing *Lawlor* from a settlement that "did not release antitrust claims . . . for all conduct into eternity but for a limited period of time.").

Info. Superhighway concerned a dispute over the interpretation of an executed settlement release. The court ultimately concluded that the release was ambiguous, but noted that, under the case law, a release can "encompass[] any claims that the releasor may have been able to assert after executing the release based on conduct occurring beforehand." *Info Superhighway*, 274 F. Supp. 2d at 471.

This case undercuts Gnarlywood's argument, because it demonstrates the validity of releases that extinguish claims arising after execution of the release but which are based on pre-settlement conduct or continuations of that conduct, consistent with this Court's "identical factual predicate" precedent. The case also demonstrates that courts in this Circuit are equipped to reject *ex post* attempts by defendant-releasees to ascribe overly-broad meaning to release language.

Certain appellants attack the release provision extinguishing claims that accrue up to five years of the Settlement Final Date. Gnarlywood Br. at 25-28; McLaughlin Br. at 17-23. This objection is unfounded; indeed, this limitation greatly benefits the class. Without such a limitation, the law places no bounds on how long into the future a settlement release may act to extinguish claims, so long as those extinguished claims are confined to the "identical factual predicate" of the litigation. *See Melito*, 923 F.3d at 95-96.

By extinguishing only those claims that accrue within five years after the Settlement Final Date, the release in this case is narrower

than settlements that have been held permissible, and thus the district court acted well within its discretion in rejecting attacks on the breadth of the release. *See Robertson v. Nat'l Basketball Ass'n*, 556 F.2d 682, 686 (2d Cir. 1977) (rejecting argument that class-action settlement improperly "perpetuat[ed] for ten years two 'classic group boycotts'" because the conduct that was allowed to continue had not been ruled "clearly illegal.").

B. Prospective releases and *pro rata* allocation of funds are common features of class-action settlements that do not create intra-class conflicts.

Gnarlywood attacks the interaction between the prospective release of claims and the settlement's *pro rata* distribution. It claims the settlement treats "newer merchants" unfairly, because their pro rata shares of the settlement would entitle them to less total monetary compensation than "older merchants" that have been class members for longer periods of time, while each group[12] would

[12] Gnarlywood does not define what constitutes a "newer merchant" or an "older merchant."

give up claims accruing through five years after the Settlement Final Date. *See* Gnarlywood Br. at 28.

Gnarlywood's argument fails, however, because it amounts to a broad-sided attack on two features that are common in class-action settlements: *pro rata* distributions, and prospective releases.

Perfection is not required of a plan of allocation, so long as it has a "reasonable, rational basis," which the plan in this settlement clearly has. *See In re Visa Check*, 297 F. Supp. 2d at 519 (approving plan of allocation based on payment-card purchase volume). District courts in this Circuit routinely approve, and this Court routinely affirms, *pro rata* settlement distributions. *See, e.g., id.* (approving allocation plan where "[c]lass members will receive an award of money from the [settlement funds] directly proportional to their debit and credit purchase volume (as well as online debit transactions) during the [c]lass period" in an antitrust action); *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 327 F.R.D. 483, 496 (S.D.N.Y. 2018) (approving distribution plans where they "provide for pro rata distributions of the respective settlement funds" in an

antitrust action); *In re Credit Default Swaps Antitrust Litig.*, No. 13-md-2476, 2016 WL 2731524, at *4 (S.D.N.Y. Apr. 26, 2016) (approving, over objections, distribution plan that "calculate[es] each claimant's recovery based on its *pro rata* share of the available [s]ettlement [f]unds in relation to the recoveries to which all claimants who have submitted a valid claim are entitled"); *Shapiro v. JPMorgan Chase & Co.*, No. 11-cv-7961, 2014 WL 1224666, at *13 (S.D.N.Y. Mar. 24, 2014) (same); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 475 (S.D.N.Y. 2009) (same).

In any settlement with a *pro rata* distribution, claimants that purchased more of the defendants' products or were subject to their conduct for longer periods of time will receive greater compensation than those that were less exposed. And because class-action releases commonly extinguish claims within the "identical factual predicate" of the litigation that accrue after final approval, *see supra* at 60-62, some class members will necessarily trade identical releases of future-accruing claims for nominally unequal compensation. This is not "inequity," McLaughlin Br. at 132, but rather a concomitant

feature of any settlement that both provides for a *pro rata* distribution and releases claims within the "identical factual predicate" that accrue after final approval. *See Melito*, 923 F. 3d at 95 (upholding the release of claims based on future conduct within the identical factual predicate of the settled litigation).

Gnarlywood accuses the district court of "acknowledg[ing] the inequity of the [settlement's] distribution" yet dismissing this concern by "merely not[ing]" dissatisfied merchants' opt-out rights. *See* Gnarlywood Br. at 31-32. That is hardly a fair recitation of the record. In its preliminary and final approval opinions, the district court devoted pages to explaining why the settlement is equitable under this Circuit's law. *Payment Card V*, 2019 WL 6875472, at *15-30; *Payment Card IV*, 330 F.R.D. at 30-50. While the district court acknowledged Gnarlywood's "frustration that a class member that became a merchant for only the last several months would receive very small remuneration but have to release claims for a number of years," the district court went on to note that "it would be nearly administratively unfeasible to tailor a release to match the duration

that a member had been in the class" for large class-action settlements such as the instant one. *Payment Card V*, 2019 WL 6875472, at *27. The district court's reasoning and its reference to opt-out rights was a proper exercise of its discretion. In the words of the Supreme Court, "the Constitution does not require more to protect what must be the somewhat rare species of class member who is unwilling to execute an 'opt out' form, but whose claim is nonetheless so important that [it] cannot be presumed to consent to being a member of the class by [its] failure to do so." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 813 (1985).

Finally, Gnarlywood's citation to *Wal-Mart*, 396 F.3d at 112 for the proposition that "an expanded release requires the allocation of at least some of the settlement consideration to the holders of the claims prejudiced by the expansion," does not help its argument. *See* Gnarlywood Br. at 31 (citing *Wal-Mart*'s quoting of *In re Auction Houses Antitrust Litig.*, 2001 WL 170792 (S.D.N.Y. Feb. 22, 2001) *aff'd* 42 F. App'x. 511 (2nd Cir. 2002)). All holders of valid claims here will receive "at least some of the settlement consideration."

Moreover, *Wal-Mart* is inapposite and, if anything, is lethal to Gnarlywood. In *Wal-Mart*, this Court affirmed the district court's final approval of an antitrust class settlement and explicitly rejected the objector-appellants' argument that the release was overbroad and representation inadequate because the release extinguished claims under different legal theories than were pursued in the settled litigation. *Wal-Mart*, 396 F.3d at 105, 111-13. The Court reasoned that, because all members of the class could have pursued relief both under theories that were and were not pursued in the settled litigation, representation was adequate because all class members' interests were aligned. *Id*. at 111-13. Just as all members of the *Wal-Mart* class had claims under multiple legal theories and received the same pro rata compensation for releasing those claims, all class members in this case have claims for some period of time between 2004 and 2019 and will receive the same pro rata compensation for releasing those claims.

Gnarlywood's invocation of *In re Auction Houses* is similarly misplaced. In *Auction Houses*, as this Court explained in *Wal-Mart*,

"marginalized groups did not receive any benefit in exchange for the releases contemplated, whereas [in *Wal-Mart*, as in this case], every claimant in [the class] benefits from the settlement." *Wal-Mart*, 396 F.3d at 112. Given this Court's precedents, there is no question that it is within a district court's "broad supervisory powers" to approve such settlements. *Credit Default Swaps*, 2016 WL 2731524, at *9; *In re Holocaust Victim Assets Litig.*, 424 F.3d 132, 146 (2d Cir. 2005).

III. Disputes regarding claim ownership are appropriate for a special master.

In its order finally approving the settlement, the district court indicated that it will appoint a special master to resolve issues regarding ownership of claims, and claims apportionment, among other things. *Payment Card V*, 2019 WL 6875472, at *21. It then requested that Co-Lead Counsel and the Defendants file a proposed order appointing a special master and proposing candidates to fill the special-master role. ECF7774. The parties did so, ECF7791 but, as of the date of this brief, the district court has yet to appoint a special master. A-1-962/ECF1792-8028.

A. Courts in this Circuit routinely appoint special masters to administer class settlements, including questions of standing and class membership.

The Branded Operators argue that appointing a special master to assist with settlement administration renders the underlying settlement "fatally flawed." To the contrary, the appointment of a special master to assist in claims administration is appropriate.[13] Courts in this Circuit routinely appoint special masters to assist with settlement administration, including deciding questions of class membership, standing, and claim approval. In *Gulino v. Board of Education of the City School District of the City of New York*, No. 96-cv-8414, 2016 WL 4129111, at *2-3 (S.D.N.Y. Aug. 3, 2016), for example, the court appointed a special master to preside over individual hearings to determine class members' damages and apportionment of settlement proceeds.

---

[13] Jack Rabbit claims that the district court "fail[ed] to even address the class definition issue in its Rule 23(B) [*sic*] analysis, and instead deferr[ed] the issue thus created for a special master to decide…". Jack Rabbit Br. at 63. This is incorrect. In both its preliminary and final approval orders the district court addressed "the class definition issue" at considerable length – including Jack Rabbit's and Branded Operators' objections related thereto. *See, e.g.*, *Payment Card V*, 2019 WL 6875472 at *30-32.

And in *In re Holocaust Victim Assets Litig.*, 302 F. Supp. 2d 89, 116–17 (E.D.N.Y. 2004), *aff'd*, 424 F.3d 132 (2d Cir. 2005), this Court affirmed the appointment of a special master, who adopted presumptions of class membership for purposes of developing a rational plan of allocation.[14]

B. The district court did not abuse its discretion by indicating that it will appoint a special master.

The Branded Operators invoke the specter of a special master presiding over "complicated and adversarial proof proceedings – with a winner and a loser," and suggest that such a specter renders the settlement "fatally flawed." Fikes Br. at 44-45. The Branded

[14] *See also, In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 119 (S.D.N.Y. 2009), *aff'd sub nom. Priceline.com, Inc. v. Silberman*, 405 F. App'x 532 (2d Cir. 2010) (special master appointed to review and amend, as appropriate, the plan for class notice and distribution of the net settlement fund); *In re Zyprexa*, 433 F. Supp. 2d 268, 273 (E.D.N.Y. 2006) (conferring special master with settlement-administration responsibilities that included review and approval of all claims, including the ability to dismiss claims, "subject to a motion to reinstate."); *In re New York City Asbestos Litigation*, 142 F.R.D. 60, 62 (E.D.N.Y. 1992)(empowering the special master's to "supervis[e] and direct[] the exchange of information necessary to effect settlement," "[resolve] disputes and questions about the factual basis for claims," and "allocat[e] settlement moneys among individual plaintiffs").

Operators try to support this contention by citing two out-of-circuit cases, neither of which is relevant. The first, *In re Aqua Dots Prod. Liab. Litig.*, 270 F.R.D. 377 (N.D. Ill. 2010), *aff'd* 654 F.3d 748, 752-53 (7th Cir. 2011), involved neither a class settlement nor a special master. It simply denied certification to a proposed litigation class because (a) the class action mechanism was not superior to an out-of-court refund program offered by the defendants and (b) insurmountable choice-of-law problems precluded certification. *Id.* Contrary to the Branded Operators' representation, the case had nothing at all to do with "complicated and adversarial proof proceedings" in the settlement administration context.

The second, *In re Katrina Canal Breaches Litig.*, 628 F.3d 185 (5th Cir. 2010), is no more helpful to the Branded Operators. The *Katrina Canal Breaches* case concerned the settlement of a *mandatory limited fund action*, for which the district court had certified a class of claimants under Rule 23(b)(1)(B). A specialized body of case law has developed concerning mandatory limited fund actions, and one essential requirement of such actions is that all claimants are

"treated equitably among themselves," since there is no opting out of a mandatory limited fund action. *Ortiz*, 527 U.S. at 839.

Applying that specialized body of law in the *Katrina Canal Breaches* case, the Fifth Circuit decertified the class and rejected the proposed settlement, since the class members in that case "suffered a wide variety of injuries, ranging from property damage to personal injury and death, and no method [was] specified for how these different claimants [would] be treated vis-á-vis each other." *Katrina Canal Breaches*, 628 F.3d at 193-94. The settlement thus failed to establish that all claimants would be "treated equitably among themselves"—one of the three "essential premises of mandatory limited fund actions" established by *Ortiz*. *Id*. at 192-94.

Needless to say, the instant case shares nothing in common with *Katrina Canal Breaches*: it is not a mandatory limited fund action; the class members involved did not "suffer[] a wide variety of injuries," and the settlement establishes a straightforward method of allocation among class members. Accordingly, *Katrina* and the law of mandatory limited fund actions have no bearing on the

settlement. However, it is notable that the *pro rata* distribution provided for in the settlement is just the type of "straightforward model[] of equitable treatment" that *does* satisfy the intra-class equity requirement of mandatory limited fund settlements under *Ortiz*. *Id*. at 193 (citing *Ortiz*, 527 U.S. at 841) ("To cleave to the traditional model of a true limited fund, the third element of intra-class equity should require that the class claims be capable of liquidation and pro rata distribution"). *See also Ortiz*, 527 U.S. at 841, (describing classic limited fund actions as 'present[ing] straightforward models of equitable treatment, with the simple equity of a pro rata distribution providing the required fairness'").

IV. Objector-Appellant Falls Auto waived its arguments by failing to object to the 2018 Settlement at the district court.

Appellant Falls Auto objected to the 2012 Settlement but did not object to the 2018 Settlement. It therefore waived any right to appeal by failing to object below. *See Ferrick v. Diable,* No. 18-1702, 2018 WL 6431410 (2d Cir. Oct. 9, 2018) (dismissing appeal of parties

who failed to timely object at the district court, relying on *Devlin v. Scardelletti*, 536 U.S. 1 (2002)).

Conclusion

For decades, merchants in the United States have incurred some of the world's highest payment-card-acceptance costs. Class Plaintiff-Appellees engaged in fourteen years of hard-fought litigation, yielding needed reforms and, through this settlement, an historic settlement fund. The attacks on that settlement are built upon misunderstandings of the functioning of the class definition and release, contradict this Court's precedents, or both. Class Plaintiff-Appellees therefore respectfully request that this Court affirm the district court's approval of the settlement, allowing U.S. merchants to receive long-awaited compensation for the Defendants' practices.

January 4, 2021 By: *K. Craig Wildfang*

ROBINS KAPLAN LLP
K. Craig Wildfang (0117043)
Thomas J. Undlin
Eric J. Magnuson
Ryan W. Marth
Eric P. Barstad
800 LaSalle Avenue, Suite 2800
Minneapolis, MN 55402–2015
T: 612–349–8500
KCWildfang@RobinsKaplan.com
EMagnuson@RobinsKaplan.com
RMarth@RobinsKaplan.com

EBarstad@RobinsKaplan.com

ROBBINS GELLER RUDMAN & DOWD LLP
Alexandra S. Bernay
Carmen A. Medici
Joseph D. Daley
Patrick J. Coughlin
655 West Broadway, Suite 1900
San Diego, CA 92101
T: 619-231-1058
xanb@rgrdlaw.com
cmedici@rgrdlaw.com
jdaley@rgrdlaw.com
patc@rgrdlaw.com

BERGER MONTAGUE PC
H. Laddie Montague, Jr.
Merrill G. Davidoff
Michael J. Kane
1818 Market Street, 36th Floor
Philadelphia, PA 19103
T: 215-875-3000
hlmontague@bm.net
mdavidoff@bm.net
mkane@bm.net

FREEDMAN BOYD HOLLANDER GOLDBERG URIAS &WARD, P.A.
Joseph Goldberg
P.O. Box 25326
20 First Plaza, Suite 700
Albuquerque, NM 87102
T: 505-842-9960
jg@fbdlaw.com

Attorneys for Appellees Rule 23(b)(3) Class Plaintiffs

Certificate of Brief Length

The undersigned counsel for Appellees Rule 23(b)(3) Class Plaintiffs, certifies that this brief complies with the requirements of Fed. R. App. P. 32(a)(7)(B) in that it is printed in 14 point, proportionately spaced typeface utilizing Microsoft Word 2016 and contains 13,194 words, including headings, footnotes, and quotations.

January 4, 2021

By: *K. Craig Wildfang*
K. Craig Wildfang (0117043)

Attorney for Appellees Rule 23(b)(3) Class Plaintiffs

Certificate of Service

The undersigned counsel for Appellees Rule 23(b)(3) Class Plaintiffs, hereby certifies that on January 4, 2021, he electronically filed the Brief Appellees Rule 23(b)(3) Class Plaintiffs with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. He certifies that all participants that service will be accomplished by the CM/ECF system to all registered counsel of record.

January 4, 2021

By: *K. Craig Wildfang*
K. Craig Wildfang (0117043)

Attorney for Appellees Rule 23(b)(3) Class Plaintiffs