UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION	:	MDL No. 1720(JG)(JO) Civil No. 05-5075(JG)(JO)
This Document Relates To: ALL ACTIONS.	:	MEMORANDUM IN SUPPORT OF CLASS PLAINTIFFS' MOTION FOR FINAL APPROVAL OF SETTLEMENT

Judge: The Honorable John Gleeson
Date: September 12, 2013
Time: 10:00 a.m.
Courtroom: 6C

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I. Introduction

Class Counsel, on behalf of Class Plaintiffs, respectfully request that this Court finally approve a proposed class action settlement that:

- Creates two cash funds, with a combined estimated value of $7.25 billion;
- Gives class members the right to surcharge credit transactions, which could result in savings estimated to be more than $26 billion over the next decade;
- Gives merchants the ability to join together in "buying groups" to negotiate with Visa and MasterCard for better rates;
- Permits merchants to utilize different acceptance strategies at different outlets; and
- Locks in minimum price, discounting, and cost-information reforms.

With the largest-ever cash relief in an antitrust class action settlement plus unprecedented rules changes that will enable merchants to recover their costs of credit card acceptance, encourage customers to use less-costly payment methods and brands, increase transparency at the point of sale, and make the payment card market more competitive, the proposed settlement is far more than "fair, adequate, and reasonable." The agreement was negotiated at arm's length by highly experienced antitrust counsel, with the assistance of two nationally-recognized mediators and the Court, and reached only after the completion of all fact and expert discovery and following the briefing and argument of numerous dispositive motions and a motion for class certification. Because this settlement easily satisfies the standard for assessing whether a settlement is fair, adequate, and reasonable, Class Counsel respectfully urge that final approval is warranted.

In support of their motion, Class Counsel also submit the declarations of the Honorable Edward A. Infante (Ret.), Professor Eric D. Green, the Honorable Charles B. Renfrew (Ret.), Dr.

Alan S. Frankel, Nicole F.J. Hamann of Epiq Systems, Cameron R. Azari of Hilsoft Communications, Class Counsel K. Craig Wildfang, and each of the Class Plaintiffs.[1]

II. Procedural History

The extensive procedural history of this eight-year-long litigation is summarized in Class Plaintiffs' Memorandum in Support of Preliminary Approval and detailed in the Class Counsel Declaration and will not be repeated here. The following is a brief summary of the litigation, events that occurred during the litigation that affected the payment card market, the mediation and settlement conferences that resulted in the settlement agreement, and the approval process to date.

Beginning in June of 2005, merchants filed more than 40 class action complaints against Visa, MasterCard, and the largest issuing and acquiring banks. Class Plaintiffs alleged that the Defendants conspired to fix the price of interchange fees in violation of §1 of the Sherman Act. They also challenged network rules that insulated those fees from competitive pressures by prohibiting merchants from steering customers to less-expensive payment methods and brands. The

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[1] *See* attached hereto as Ex. 1, Declaration of the Honorable Edward A. Infante (Ret.) in Support of Class Plaintiffs' Motion for Final Approval of Settlement ("Infante Decl."), Ex. 2, Declaration of Eric D. Green ("Green Decl."), Ex. 3, Declaration of Charles B. Renfrew as to the Risks of Litigation ("Renfrew Decl."), Ex. 4, Declaration of Alan S. Frankel, Ph.D. Relating to the Proposed Class Settlement ("Frankel Decl."), Ex. 5, Declaration of Nicole F.J. Hamann on Class Administrator's Implementation of Settlement Notice Plan ("Hamann Decl."), Ex. 6, Declaration of Cameron R. Azari, Esq. on Implementation and Adequacy of Settlement Notice Program ("Azari Decl."), Ex. 5 to the Memorandum in Support of Class Plaintiffs' Joint Motion for Award of Attorneys' Fees, Expenses and Class Plaintiffs' Awards (Declaration of K. Craig Wildfang, Esq. in Support of Class Plaintiffs' Motion for Final Approval of Settlement and Class Plaintiffs' Joint Motion for Award of Attorneys' Fees, Expenses and Class Plaintiffs' Awards ("Class Counsel Decl.")), and attached as Exhibits 6-15 (Declarations of Class Plaintiffs Photos Etc. Corporation, Traditions, Ltd., CHS Inc., Parkway Corp., Discount Optics, Inc., Crystal Rock LLC, Leon's Transmission Service, Inc., Payless ShoeSource, Inc., and Capital Audio Electronics, Inc. ("Class Plaintiffs")) to the Memorandum in Support of Class Plaintiffs' Joint Motion for Award of Attorneys' Fees, Expenses and Class Plaintiffs' Awards, filed concurrently.

class actions were consolidated in 2005, together with 19 individual actions, and the Court appointed Class Counsel as co-lead counsel on February 24, 2006.[2] Class Plaintiffs filed a consolidated amended complaint on April 24, 2006.[3]

Discovery began in 2006 and continued for several years. Ultimately, Class Plaintiffs' attorneys deposed more than 370 witnesses and reviewed more than 60 million pages of documents. Class Counsel Decl., ¶¶ 60, 145 (Ex. 2 thereto) . The parties exchanged 17 expert reports and took 32 days of expert deposition testimony. *Id*., ¶¶142-147.

After the first class action was filed, MasterCard – and then Visa – underwent major corporate restructurings that reduced bank influence and minimized antitrust challenges. After having existed as a joint venture of competing banks for more than 40 years, MasterCard conducted an IPO in 2006, and became a public company owned by public shareholders. Visa, a joint venture of competing banks since 1970, followed suit in 2008. In addition to amending their original consolidated complaint, Class Plaintiffs filed two supplemental complaints challenging MasterCard's and Visa's IPOs as unlawful acquisitions under §7 of the Clayton Act and unlawful combinations under §1 of the Sherman Act.[4]

At the time of settlement, several significant and dispositive motions were pending. Class Plaintiffs' motion to certify two classes had been briefed and argued. The parties had also briefed

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[2] Dkt. No. 279.

[3] Dkt. No. 317.

[4] Dkt. Nos. 1152, 1154.

and argued Defendants' motions to dismiss Class Plaintiffs' supplemental complaints challenging the IPOs, and cross motions for: (i) summary judgment; and (ii) to disqualify key expert witnesses.[5]

The parties began mediation in 2008. The mediation was initially conducted under the auspices of the Honorable Edward A. Infante (Ret.), formerly Chief Magistrate Judge for the Northern District of California, and currently a mediator at JAMS. Professor Eric D. Green of Resolutions, LLC joined the mediation in mid-2009. Between April of 2008 and December of 2011, the parties participated in numerous mediation sessions, presided over by Judge Infante, Professor Green, or both, including dozens of in-person meetings and numerous telephonic sessions. Infante Decl., ¶¶2-9; Green Decl., ¶¶8-31. Judge Gleeson and Magistrate Judge Orenstein also participated in some of the mediation sessions, with all parties' consent. Infante Decl., ¶¶7-8; Green Decl., ¶¶22, 23, 28, 31. At several sessions before the mediators and at others with the Court present, the proposed class representatives were invited to attend, did attend and were heard by the mediators and the Court. Infante Decl., ¶7; Green Decl, ¶¶22-28. In December 2011, shortly after oral argument on the parties' cross-motions for summary judgment and to exclude expert witness testimony, the Court conducted a two-day settlement conference with all parties and the mediators. The parties then resumed discussions with the mediators and, on December 22, 2011, following numerous additional in-person, telephonic, and written mediation communications, the mediators made a "mediators' proposal." By February 21, 2012, all of the Defendants and all of the proposed class representatives, including several plaintiffs that are now objecting to the settlement, had agreed to negotiate toward a

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[5] Dkt. Nos. 1491, 1492, 1494, 1495, 1496, 1497, 1499, 1503, 1505, 1506, 1508, 1533-1534, 1537, 1538, 1539, 1542, 1543, 1545, 1547, 1548, 1550, 1553, 1554, 1555.

final settlement agreement through the process laid out by the mediators and the Court. Infante Decl., ¶8; Green Decl., ¶29.

Between February 21, 2012 and June 21, 2012, the parties engaged in extensive negotiations to turn the agreed-to terms of the mediators' proposal into a settlement agreement. During this period the parties met in person dozens of times and participated in numerous telephonic negotiation sessions. Infante Decl., ¶9; Green Decl., ¶¶30-31. Mediators Infante and Green participated in several of these meetings and discussions. *Id.* At the conclusion of a two-day settlement conference held in late June, 2012 in which the mediators, the Court, and all parties participated, the parties completed their negotiations on the settlement agreement's terms and announced to the Court that they had reached a final agreement on all issues to settle the litigation. *Id.* For the next three weeks the parties negotiated the language of the Settlement Agreement. On July 13, 2012, the parties filed a Memorandum of Understanding attaching the Class Settlement Agreement.[6] The parties then spent the next three months working together to develop the attachments (including the escrow agreements, the preliminary and final approval orders, and the Plan of Administration and Distribution). Green Decl., ¶32. Between October 15 and October 19, 2012, the parties executed the Definitive Class Settlement Agreement,[7] and on October 19, 2012, Class Counsel moved for preliminary approval of the settlement.[8]

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[6] Dkt. No. 1588.

[7] The Definitive Class Settlement Agreement (hereinafter, "Settlement Agreement" or "SA") includes Appendices A-J and corrects minor typographical errors in the Agreement, filed on July 13, 2012. Dkt. Nos. 1588, 1656-1.

[8] Dkt. No. 1656.

Thereafter, several of the named Class Plaintiffs that had participated in the mediation and settlement negotiations, as well as absent class members represented largely by the same counsel, objected to preliminary approval.[9] After considering the objectors' written materials and hearing argument, the Court granted Class Plaintiffs' motion for preliminary approval, provisionally certified classes under Rules 23(b)(2) and (b)(3), appointed Photos Etc. Corporation, Traditions, Ltd., CHS Inc., Parkway Corp., Discount Optics, Inc., Crystal Rock LLC, Leon's Transmission Service, Inc., Payless ShoeSource, Inc., and Capital Audio Electronics, Inc. to serve as Class Plaintiffs, approved the content of class Notice Plan, approved the Plan of Administration and Distribution, and appointed the law firms of Robins, Kaplan, Miller & Ciresi L.L.P., Berger & Montague, P.C., and Robbins Geller Rudman & Dowd LLP to serve as Class Counsel.[10]

The Class Administrator notified class members of the proposed settlement through an extensive mailed notice and publication campaign that included more than 20 million mailings and publication in more than 400 publications. The Notice Plan was carried out between January 29, 2013 and February 22, 2013. Hamann Decl., ¶¶18-19, 29-31; Azari Decl., ¶¶16-24; *see generally* Azari Decl., ¶¶16-61. Class members have until May 28, 2013 to opt out of the damages class,

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[9] Constantine Cannon LLP represents named Plaintiffs Coborn's Incorporated, D'Agostino Supermakets, Inc., Jetro Holdings, Inc. and Jetro Cash & Carry Enterprises, LLC; Affiliated Foods Midwest Cooperative, Inc.; NACS; NATSO; NCPA; NCGA; NGA; and NRA. Dkt. No. 1681 at 1 n.1, Objectors' Opp to Prelim App. In addition, Constantine Cannon lawyers submitted the declarations of members of NACS, NCPA, NCGA and NGA and other absent class members in support of opposition to preliminary approval. Dkt. No. 1681-1, ¶¶3, 5, Shinder Declaration. Objections were also submitted by members of NCPA, The Home Depot, 17 Retailers & Merchants, Target and several other retailers and associations. Dkt. Nos. 1635, 1653, 1670, 1676, 1681-3 – 1681-13, 1708, 1709, 1710, 1711, 1728. Several non-merchant entities also submitted objections. Dkt. Nos. 1680, 1683, 1693, 1702, 1717, 1722.

[10] Dkt. No. 1745.

object to the proposed settlement, or both. If the Court grants final approval of the settlement, the Plan of Administration and Distribution as approved by the Court will be implemented. SA, Appendix I at I-8 (Plan of Administration and Distribution).

III. The Settlement Terms

The Settlement Agreement creates two cash funds totaling up to an estimated $7.25 billion. The first is a cash fund of $6.05 billion that will compensate class members for past damages. SA, ¶¶9-10. In accordance with the settlement, the Defendants deposited the entire $6.05 billion into an interest-bearing escrow account as of December 12, 2012. Class Counsel Decl., ¶214; SA, ¶10. This fund is subject to a reduction for opt-outs, capped at 25% of the fund. SA, ¶¶17-20. The second cash fund starts accruing by July 29, 2013, and has an estimated value of $1.2 billion. This fund represents the cash value of an eight-month, ten-basis-point reduction in interchange fees paid between July 29, 2013 and March 29, 2014 by class members that do not opt out. Even if the settlement is ultimately not approved, funds accruing in the second cash fund prior to the agreement's termination will not revert to Defendants. SA, ¶¶11-13.

In addition to providing the largest-ever cash payment in an antitrust class action settlement, the Settlement Agreement requires Visa and MasterCard to revise their merchant acceptance rules in ways that will reduce merchants' costs, enable merchants to steer customers to less-costly payment methods and brands, and make the United States payment card market more transparent and competitive. Those rules changes went into effect on January 27, 2013, and are summarized as follows:

First, Visa and MasterCard have modified their rules to permit merchants to impose a surcharge on Visa- or MasterCard-branded credit card transactions at either the brand or product level. SA, ¶¶42, 55. Merchants can surcharge up to the full amount of the costs of acceptance if

they surcharge by brand, subject to a disclosure obligation and a "level-playing-field" provision relating to competing credit card brands that are equally or more expensive and that have more-stringent limitations on surcharging. *Id.*

In addition, Visa and MasterCard are obligated to negotiate in good faith with merchant buying groups that satisfy certain criteria under antitrust guidelines and whose proposals provide reasonable commercial benefits to the parties. SA, ¶¶43, 56. Visa and MasterCard are also required to permit a merchant that operates multiple businesses under different "trade names" or "banners" to accept Visa and/or MasterCard at fewer than all of its businesses, without penalty under any volume-based incentive program that is generally available to United States merchants. SA, ¶¶41, 54. This will enable merchants with multiple businesses and pricing strategies to experiment with acceptance practices. Finally, the Settlement Agreement locks in minimum-price, cost-information, and discounting rules changes required by the Durbin Amendment to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 15 U.S.C. §1693o-2(b)(3)(A)(i), and by the final judgment as to MasterCard and Visa in *United States v. American Express Co. et al.*, No. 10-CV-04496-NGG-RER (E.D.N.Y.) ("*U.S. v. AmEx*") ("DOJ Consent Judgment"). SA, ¶¶40, 44, 53, 57, Appendix J. Even if the Durbin Amendment is repealed, or the DOJ Consent Judgment is terminated, Visa and MasterCard must maintain the rules modifications until July 20, 2021. *Id.*

In exchange for significant monetary and going-forward relief, the Settlement releases Defendants from all claims that "are alleged or could have been alleged" in the litigation. SA, ¶¶33, 68. Rule 23(b)(3) class members can opt out of that settlement class; Rule 23(b)(2) class members cannot. SA, ¶¶2(a)-2(b).

IV. The Standards for Assessing Whether a Class Action Settlement is Fair, Reasonable, and Adequate

While the decision to grant or deny approval of a settlement lies within the broad discretion of the trial court, there is a general policy favoring settlement. *Bano v. Union Carbide Corp.*, 273 F.3d 120, 129-30 (2d Cir. 2001). Moreover, "[c]lass action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation. There is a strong public interest in quieting any litigation; this is 'particularly true in class actions.'" *In re Luxottica Grp. S.p.A. Sec. Litig.*, 233 F.R.D. 306, 310 (E.D.N.Y. 2006) (citing *In re Prudential Sec. Inc. P'ships Litig.*, 163 F.R.D. 200, 209 (S.D.N.Y. 1995)); *see also Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982) (settlement of complex class action litigations is clearly favored by the courts as "[t]here are weighty justifications, such as the reduction of litigation and related expenses, for the general policy favoring the settlement of litigation").

A court may approve a class settlement if it is "fair, adequate, and reasonable, and not a product of collusion." Fed. R. Civ. P. 23(e)(2); *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775 (JG) (VVP), 2012 WL 3138596, at *4 (E.D.N.Y. Aug. 2, 2012) (citing *Joel A. v. Giuliani*, 218 F.3d 132, 138 (2d Cir. 2000)); *McReynolds v. Richards-Cantave*, 588 F.3d 790, 803 (2d Cir. 2009). This evaluation requires the court to consider "both the settlement's terms and the negotiating process leading to settlement." *Wal-Mart Stores, Inc. v. VISA U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) ("*Wal-Mart*"). "So long as the integrity of the arm's length negotiation process is preserved . . . a strong initial presumption of fairness attaches to the proposed settlement." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y), *aff'd*, 117 F.3d 721 (2d Cir. 1997); *see also McReynolds*, 588 F.3d at 803 (same); *Wal-Mart*, 396 F.3d at 116 (same).

Recognizing that a settlement represents an exercise of judgment by the negotiating parties, the Second Circuit has cautioned that while a court should not give "rubber stamp approval" to a proposed settlement, it must "stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case." *Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974). In assessing a settlement, then, the court should neither substitute its judgment for that of the parties who negotiated the settlement, nor conduct a mini-trial on the action's merits. *Weinberger*, 698 F.2d at 74; *see also In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 455 (S.D.N.Y. 2004) (court should not substitute its "business judgment for that of counsel, absent evidence of fraud or overreaching").[11]

The factors to be considered by a court in making a Rule 23(e) fairness determination are:

> (1) the complexity, expense and likely duration of the litigation . . . ; (2) the reaction of the class to the settlement . . . ; (3) the stage of the proceedings and the amount of discovery completed . . . ; (4) the risks of establishing liability . . . ; (5) the risks of establishing damages . . . ; (6) the risks of maintaining the class action through the trial . . . ; (7) the ability of the defendant to withstand a greater judgment . . . ; (8) the range of reasonableness of the settlement fund in light of the best possible recovery . . . ; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation . . . .

Grinnell, 495 F.2d at 463; *see also In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 122-23 (S.D.N.Y. 2009). In applying these factors, "not every factor must weigh in favor of the settlement, but rather the court should consider the totality of these factors in light of the particular circumstances." *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 575 (S.D.N.Y. 2008) (internal quotation marks omitted); *see also Int'l Union of Elec., Elect., Salaried Mach. & Furniture Workers*

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[11] Unless otherwise noted, citations are omitted and emphasis is added.

v. Unisys Corp., 858 F. Supp. 1243, 1265 (E.D.N.Y. 1994) (the court need not apply any "single, inflexible test").

The settlement satisfies these criteria. In light of the risks facing Class Plaintiffs, this Settlement represents an excellent resolution for the classes. In the unanimous judgment of Class Counsel, there is serious doubt a more-favorable result could be obtained if this case were litigated through class certification, summary judgment, trial, and the inevitable post-trial motions and appeals. And even if some more favorable result were theoretically possible, it is a certainty that such a result would come only after many more years of litigation. The proposed settlement is fair, reasonable, and adequate, and warrants this Court's final approval.

V. The Settlement Is Entitled to A Presumption of Fairness Because It Was Negotiated at Arm's Length by Experienced Counsel with the Assistance of Two Nationally-Recognized Mediators and the Court

The Settlement Agreement is entitled to an initial presumption of fairness and adequacy because it was reached by experienced, fully-informed counsel after extensive arm's-length negotiations, with the assistance of nationally-recognized mediators Judge Infante and Professor Green, as well as the Court. *See* Infante Decl., ¶12; Green Decl., ¶33; Renfrew Decl., ¶¶13-18 (after review of proceedings, concluding that there was no evidence of collusion). *See Telik*, 576 F. Supp. 2d at 576 (the use of an experienced mediator "in the settlement negotiations strongly supports a finding that they were conducted at arm's length and without collusion"); *see also Air Cargo*, 2012 WL 3138596, at *4 (Judge Infante's involvement in the settlement supported final approval).

As the declarations of Judge Infante, Professor Green, Judge Renfrew, and Class Counsel demonstrate, the settlement negotiations were protracted, adversarial, and often contentious. On more than one occasion, the discussions were close to collapsing. Infante Decl., ¶12; Green Decl.,

¶33. The lawyers for the parties spent many days in face-to-face negotiations, in addition to frequent telephonic and written negotiation communications among the parties. They exchanged dozens of drafts and negotiated literally every paragraph in the Settlement Agreement. Far from being the product of collusion, the Settlement Agreement represents a considered compromise by vigorous advocates. Renfrew Decl., ¶¶13-15, 18. Judge Infante described the settlement negotiations as "fair, adversarial, and always conducted at arms-length." Infante Decl., ¶12. And as Professor Green stated, "the outcome of these mediated negotiations is the result of a fair, thorough, and full-informed arm's-length process between highly capable, experienced, informed, and motivated [p]arties and counsel." Green Decl., ¶33.

VI. Evaluation of the *Grinnell* Factors Confirms that the Settlement More than Satisfies the Fair, Reasonable and Adequate Standard

Evaluation of this settlement under the *Grinnell* factors supports final approval. Any litigated resolution of this case is years away, and the already-staggering costs – in terms of out-of-pocket expenses, attorney time, and burden upon the Court – are, and would be, enormous.[12] Having completed more than six years of fact and expert discovery, with motions to dismiss, motions for class certification, summary judgment, and to exclude expert testimony fully briefed and fully argued, Class Counsel were in an excellent position to weigh the risks of proceeding to trial against the benefits of settling now. Class Plaintiffs faced a substantial risk that if they went to trial the jury would not find for the plaintiffs on liability, would not award damages, or would reduce the damages

[12] As detailed in Memorandum in Support of Class Plaintiffs' Joint Motion for Award of Attorneys' Fees, Expenses and Class Plaintiffs' Awards, the lawyers and other professionals for the classes have devoted approximately 500,000 hours to this litigation. Out-of-pocket expenses exceed $27 million.

award.[13] Renfrew Decl., ¶¶21-22, 34. These risks would have continued through the inevitable and lengthy appeals. And lurking everywhere in this enormously complicated case is the risk that an appellate court might find some reversible error in the Court's rulings on motions or conduct of the trial, or that the jury might misunderstand or misapply their instructions on the law.

In light of the risks, the result here – a sea change in the competitive landscape and the largest-ever antitrust class action settlement – is nothing short of outstanding.

A. Litigation Through Trial and Appeals Would be Costly and Delay Any Resolution by Several Years

At the time the parties reached an agreement to settle the case, there were more than a dozen motions pending before the Court, including motions to dismiss, summary judgment motions, *Daubert* motions, and a class certification motion. The record for these motions is voluminous, with thousands of pages of briefing and boxes and boxes of exhibits. The transcript of oral arguments, which occupied several full days, is hundreds of pages long. Even assuming the Court were able to render decisions on these many motions quickly, the losing party on the class certification motion was sure to seek review by the Second Circuit under Fed. R. Civ. P. 23(f). Even if the Court's decision on class certification were affirmed, the appeal of that order would likely delay the trial by at least a year. Moreover, given the high stakes in this case, and the Supreme Court's recent interest in class-certification issues, a petition for certiorari by the losing party in the Court of Appeals would

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[13] One *Grinnell* factor – the ability of defendants to withstand a greater judgment – will not be discussed in detail in this Memorandum. While potentially a relevant factor in certain cases, the fact that the defendants would be able to pay a very substantial judgment collectively does not militate against approval of an otherwise fair and reasonable settlement. *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 478 (S.D.N.Y. 1998); *see also PaineWebber*, 171 F.R.D. at 129.

be likely. The trial itself would have taken several months. And given the stakes of the litigation, the losing party would undoubtedly appeal, likely delaying any resolution by years.

With the rules changes in effect since January, class members are already able to take advantage of the proposed settlement, and will likely receive monetary compensation before 2015. Immediate injunctive relief, plus the assurance of monetary relief years before it could be obtained through a litigated outcome, weighs heavily in favor of the settlement. *In re Visa Check/MasterMoney Antitrust Litig.*, 297 F. Supp. 2d 503, 510 (E.D.N.Y. 2003) ("*Visa Check*") (prospect of long trial and appeals "weigh[ed] heavily in favor of approving the Settlements"), *aff'd sub nom.*, *Wal-Mart*, 396 F.3d 96; *Currency Conversion*, 263 F.R.D. at 124 (that "action would have continued for years with motions for summary judgment, interlocutory appeals, a possible trial, and the inevitable post-trial motions and further appeals" favors settlement's approval).

B. Given the Advanced Stage of the Proceedings, the Parties were Well-Positioned to Evaluate the Settlement Against the Risks of Further Litigation

The advanced stage of the case also weighs heavily in favor of approval of the Settlement. Fact discovery was complete, the parties had exchanged expert reports and deposed the experts, and all dispositive motions had been briefed and argued. Class Counsel were thus in a superior position to evaluate the benefits of the proposed Settlement against the risks of proceeding through resolution of the pending motions, trial, and appeals. Infante Decl., ¶13; Green Decl., ¶¶19, 33. *See Wal-Mart*, 396 F.3d at 118 (where several years of discovery, summary judgment and mediation occurred prior to settlement, plaintiffs had "a thorough understanding of their case").

C. Class Plaintiffs Faced Substantial Risks

The risks faced by Class Plaintiffs were substantial. This is an enormously complex antitrust action, with novel claims and challenges to conduct that had never before been found illegal by any United States court or jury. Infante Decl., ¶11; Renfrew Decl., ¶¶25-31. Antitrust cases are inherently risky. *See, e.g.*, *Wal-Mart*, 396 F.3d at 122 ("antitrust cases, by their nature, are highly complex"); *Weseley v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 719 (E.D.N.Y. 1989) (antitrust class actions are "notoriously complex, protracted, and bitterly fought"). Here, Class Plaintiffs' antitrust claims were even more risky than usual, because there was neither any dispositive precedent on which to rely nor any parallel or prior government proceeding regarding the class' core claims. *See, e.g.*, *NASDAQ*, 187 F.R.D. at 474-75 (where there was no prior governmental criminal investigation nor guilty pleas, the risk of not establishing liability was heightened); *Currency Conversion*, 263 F.R.D. at 123 (same). *Cf. Wal-Mart*, 396 F.3d at 118-19 (recognizing, as this Court did, that liability "'was no sure thing' for the plaintiffs" even though the United States' successful prosecution of the Membership Rules case "improved plaintiffs' likelihood of success").

The risks faced by Class Plaintiffs in proving liability and damages, and on certifying the class and maintaining the class through trial and subsequent appeal, weigh heavily in favor of final approval of the settlement.

1. Class Plaintiffs Faced Substantial Risks in Proving Liability

As this Court knows from the extensive briefing and argument on the pending dispositive motions, Defendants vigorously challenged all of Class Plaintiffs' claims. If any one of Defendants' motions to dismiss or for summary judgment had succeeded, Class Plaintiffs could have lost the case entirely, lost the ability to pursue any going-forward relief, or significantly reduced their damages. Infante Decl., ¶11; Renfrew Decl., ¶¶19-22. Even if Class Plaintiffs prevailed on each of the

pending motions and through a Rule 23(f) petition, they faced the substantial risk of losing at trial or on appeal.

a. Defendants Argue that Default Interchange Rules Do Not Unreasonably Restrain Trade

To prevail on a claim based on the default interchange rules, Class Plaintiffs bore the burden of proving that the rules constituted an unreasonable restraint of trade under the rule of reason. *See, e.g., Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979) (the *per se* rule is only appropriate after courts have had considerable experience with the type of restraint at issue); *Nat'l Bancard Corp. (NaBanco) v. Visa U.S.A., Inc.*, 596 F. Supp. 1231, 1252 (S.D. Fla. 1984), *aff'd*, 779 F.2d 592 (11th Cir. 1986) (finding that Sherman Act challenges to interchange fees are to be adjudged under the rule of reason). Defendants argue that the networks' default interchange rules do not unreasonably restrain trade, but are instead ***pro-competitive***. The default interchange rule, according to Defendants, ***solved*** a competitive problem that arose out of the absence of a uniform fee requirement.[14] While Class Counsel were prepared to contest Defendants' conclusions, they recognize that there is a significant risk that the Court, a jury, or the Court of Appeals might see it differently. Many observers agree that some rules governing the interchange of transaction information and funds between issuing and acquiring banks are essential to a nationwide credit

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[14] Before 1971, acquiring banks in the BankAmericard system were free to set different merchant discount fees, but had to remit the entirety of the fee to the issuing bank. As a result, acquiring banks tried to evade the requirement that they submit the entirety of the merchant discount fee to issuers, causing issuing banks to retaliate by refusing to accept transactions and delaying payment on sales drafts. These issues, according to defendants, "threatened to undo the competitive benefits" that would otherwise accrue from a nationwide credit system in which different banks serve as issuers and acquirers. Dkt. No. 1548 at 10, Ds' Opp to Class Ps' MSJ.

system in which different banks provide issuing and acquiring functions.[15] The risk that the Court, or a jury, or an appellate court might find that the default interchange rule is vital to the operation of the networks, or at a minimum sufficiently pro-competitive under the rule of reason analysis, is highlighted by the Antitrust Division's decision not to challenge default interchange in its 2010-2011 case.[16]

This risk is further demonstrated by Visa's wins in the district court and Eleventh Circuit in *NaBanco*. In *NaBanco*, a processing agent asserted that Visa's establishment of interchange rates violated §1 of the Sherman Act. Following a bench trial, the district court rejected NaBanco's antitrust challenge, holding that the interchange rules were actually ***procompetitive***. 596 F. Supp at 1254 ("Prohibiting [network-established interchange rates] would thus undermine 'interbrand' competition, 'which is the primary concern of the antitrust law.'") (quoting *Continental T.V. v. GTE Sylvania*, 433 U.S. 36, 52 n.19 (1977)). In its affirming decision, the Eleventh Circuit agreed that interchange was vital to the Visa system's operation. Without a rule setting in advance the amount of interchange to be paid on each transaction, there could be no guarantee of "universality of acceptance – the key element to a national payment system" and therefore "the system would not function." *Nat'l Bancard Corp. (NaBanco) v. VISA U.S.A., Inc.*, 779 F.2d 592, 602 (11th Cir. 1986); *see* Renfrew Decl., ¶¶23-27.

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[15] *See, e.g.*, Dkt. No. 1548 at 9, Ds' Opp to Class Ps' MSJ (without "'a workable interchange system . . . nationwide bank credit cards simply cannot exist'") (quoting Joe Nocera, *A Piece of the Action: How the Middle Class Joined the Money Class* 67 (1994)).

[16] *See* the complaint filed by the United States in *United States v. MasterCard, Visa, and American Express,* Dkt. No. 1 (*available at* http://www.justice.gov/atr/cases/f262800/262864.htm).

b. Defendants Argue that Merchants Released Most of Their Claims in *In re Visa Check*

Defendants also argue that most of Class Plaintiffs' claims were released by the class action settlement and release in *Visa Check*, 297 F. Supp. 2d 503. As Defendants argue and this Court has found, the same factual predicate underlies Class Plaintiffs' claims in this case and the plaintiffs' claims in the *Visa Check* action. *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-MD-1720 (JG) (JO), 2008 WL 115104, at *11 (E.D.N.Y. Jan. 8, 2008) ("The factual allegations on which those complaints are predicated plainly relate to the factual predicate of the *Visa Check* litigation, which included the nature and extent of defendants' collaboration, the effect of any such collaboration on competition and interchange fees, and the resulting harm to merchants in the plaintiff class.").[17]

The expansive release in *Visa Check* released Visa, MasterCard, and their member banks from all antitrust claims that any plaintiff or class member "'ever had, now has, or hereafter can, shall or may have, ***relating in any way to any conduct prior to January 1, 2004*** concerning any claims alleged in the Complaint or any of the complaints consolidated therein, including, without limitation, ***claims which have been asserted or could have been asserted in this litigation***.'" 297 F. Supp. 2d at 512 (some emphasis in original). Thus, the principal question to be decided by the Court (if it were to rule on Defendants' motion to dismiss or motion for summary judgment) is whether, as Defendants contend, the conduct challenged in the currently operative complaints constitutes "relat[es]in any way" to "conduct prior to January 1, 2004." *Id.*

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[17] At the time of the settlement, the Court had ruled that the claims prior to January 1, 2004, were released and had not ruled on post-January 1, 2004 claims. Dkt. No. 740, Report and Recommendations; Dkt. No. 874, Report and Recommendations adopted by Judge Gleeson.

Defendants argue that ***all*** of the rules and conduct challenged by Class Plaintiffs relates to "conduct prior to January 1, 2004" – and is thus released – because the default interchange rules, the no-surcharge rules, the modified honor-all-cards rules, and the other anti-steering restraints challenged in this case "have remained materially unchanged since the *Visa Check* settlement and releases."[18] *See Madison Square Garden, L.P. v. Nat'l Hockey League*, No. 07 CV 8455(LAP), 2008 WL 4547518, at *6 (S.D.N.Y. Oct. 10, 2008) (rejecting plaintiff's antitrust challenge to NHL rules based on prior release "[b]ecause this very antitrust 'claim' 'exist[ed]' at the time of the release and because the only allegations in the Complaint demonstrate that the League ***continued*** its enforcement of pre-existing policies"). (Emphasis in original.) The fact that Class Counsel believe there are persuasive arguments that the release in *Visa Check* did not release the Classes' claims in this case does not eliminate the risk of losing all of their claims to this one issue.

c. Defendants Argue that Class Plaintiffs' Damages Claims are Barred by *Illinois Brick*

Defendants posit a basic challenge to the standing of the Rule 23(b)(3) class members, arguing that the *Illinois Brick* doctrine bars all damages claims because Class Plaintiffs do not directly pay interchange fees. Instead, according to Defendants, Class Plaintiffs and class members pay the merchant discount fee, which ***includes*** interchange fees, to their acquirers; acquirers – not merchants – pay interchange fees directly to issuers.[19]

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[18] Dkt. No. 1495-1 at 12, Ds' MSJ re SCACAC; Dkt. No. 1555, ¶¶23-36, Ds' SMF.

[19] Dkt. No. 1495-1 at 16-18, Ds' MSJ re SCACAC (citing *In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. 68, 72 (E.D.N.Y. 2000), *aff'd*, 280 F.3d 124 (2d Cir. 2001)); *Wal-Mart*, 396 F.3d at 102; *see Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977)) (with limited exceptions, a plaintiff may not recover damages under federal antitrust law unless it directly paid the anticompetitive overcharge).

Class Plaintiffs dispute Defendants' factual characterization of the payment of interchange fees, and also argue that the co-conspirator and other exceptions render *Illinois Brick* inapplicable, or at a minimum applicable to less than all of the 23(b)(3) class.[20] However, Defendants have submitted significant evidence in support of their argument, and have the benefit of three recent Court of Appeals decisions that have rejected interchange fee challenges on *Illinois Brick* grounds.[21] *See Paycom Billing Servs. v. MasterCard Int'l, Inc.*, 467 F.3d 283 (2d Cir. 2006) (merchant's antitrust damages claim challenging MasterCard's chargeback policy was barred by *Illinois Brick*); *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042 (9th Cir. 2008) (affirming on *Illinois Brick* grounds dismissal of merchants' antitrust damages claim where merchants alleged that networks and issuing banks conspired to fix interchange fees in violation of §1); *In re ATM Fee Antitrust Litig.*, 686 F.3d 741 (9th Cir. 2012) (affirming summary judgment on *Illinois Brick* grounds where bank customers challenged interchange fees paid by card-issuing bank to foreign ATM owners).

Class Plaintiffs thus faced a significant risk that all of their federal antitrust damages claims could be barred under *Illinois Brick*, or that those class members that did not contract directly with a bank defendant would be barred from recovering their damages.

d. Defendants Argue that Class Plaintiffs' Challenges to the MasterCard and Visa IPOs and Post-IPO Conduct Should be Dismissed Because the Banks Relinquished Control over the Networks

During the pendency of this litigation, both MasterCard and Visa conducted IPOs that transformed them from bank-owned joint ventures into public companies. The discovery record is

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[20] Dkt. No. 1533 at 22-42, Class Ps' Opp to Ds' MSJ.

[21] Dkt. No. 1555, ¶¶39-57, Ds' SMF.

clear that the networks intended these transactions to alter the joint venture structure on which Class Plaintiffs based their §1 claims challenging the collective fixing of interchange fees and other conduct. *See, e.g.*, Class Counsel Decl., ¶6. If Defendants' IPO plans were successful, the IPOs would cap Class Plaintiffs' damages claims and severely curtail their ability to obtain meaningful injunctive relief because the challenged conduct would no longer be "concerted" conduct subject to §1 of the Sherman Act.

While Class Plaintiffs propounded two theories of post-IPO §1 liability – that the IPOs were illegal under the antitrust laws governing mergers and that Defendants entered into "hub-and-spoke" conspiracies after the IPOs – both were vigorously contested by the Defendants and both risked being rejected at the Rule 12 or Rule 56 stage. Class Plaintiffs' IPO challenges were ***literally unprecedented***. Neither Class Plaintiffs, nor Visa, or MasterCard could point to a single case in which a court addressed a joint venture's IPO under the antitrust laws governing mergers. In weighing the prospects of their challenge to the IPOs, Class Counsel needed to consider the fact that this Court had already dismissed the First Supplemental Class Action Complaint challenging the MasterCard IPO, holding it failed to state a claim on which relief could be granted. And even though Class Plaintiffs were granted leave to and did augment their claim with references to the discovery record, Class Plaintiffs must take seriously Defendants' challenge that they lacked adequate factual support for the proposition that the banks controlled the post-IPO networks.[22]

The post-IPO "hub-and-spoke-conspiracy" theory of liability posed similar risks for Class Plaintiffs. Legally, Class Plaintiffs' claim depends on a ruling that liability can be based solely on

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[22] Dkt. No. 1553 at 7-11, Ds' MSJ Mem re IPO.

communications between the networks (the "hubs") and the banks (the "spokes").[23] While Class Plaintiffs pointed the Court to authority to support §1 liability even for so-called "rimless" conspiracies, the law on this point is far from settled.[24] And although the *American Needle* decision strengthens Class Plaintiffs' legal hand, some courts have concluded that the decision did not expand the reach of §1 of the Sherman Act. *See, e.g.*, *Nat'l ATM Council, Inc. v. Visa Inc.*, No. 1:11-CV-7803 (AJB), __ F. Supp. 2d __ , 2013 WL 525463 (D.D.C. Feb. 13, 2013) (*American Needle, Inc. v. NFL*, __ U.S.__, 130 S. Ct. 2201 (2010) did not help the plaintiffs establish a post-IPO conspiracy among Visa-issuing banks without allegations that the banks controlled post-IPO Visa). Even the DOJ Consent Judgment implicitly acknowledges the difficultly of characterizing intra-network agreements as "horizontal" after the IPOs, because it challenges only the vertical aspect of the networks' anti-steering restraints.

e. Defendants Argue that the Testimony of Class Plaintiffs' Economic Expert is Inadmissible

Defendants' motion to exclude the testimony of Class Plaintiff's economic expert was pending at the time the parties agreed to settle the case. Plaintiffs intended to rely on Dr. Frankel's testimony at trial to support their claims that the Defendants' establishment of default interchange and anti-steering rules caused them injury and damages, and that those rules adversely affected

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[23] *See* Dkt. No. 1553 at 17-18, Ds' MSJ Mem re IPO.

[24] Dkt. No. 1548 at 55-56, Ds' Opp to Class Ps' MSJ. *See, e.g.*, *Wellnx Life Sci's., Inc. v. Iovate Health Scis. Research, Inc.*, 516 F. Supp. 2d 270, 291 (S.D.N.Y. 2007) ("The fact that each [competitor] knew that its horizontal competitors were going to be presented with the same offer . . . or that others had already [agreed], or 'believe[ed]' that the other competitors would fall in line, does not suffice to 'raise[] a suggestion of a preceding agreement . . . .'") (citing *Bell Atl. v. Twombly*, 550 U.S. 544, 557 (2007)).

competition in relevant markets. Thus, a ruling favorable to Defendants would have devastated Class Plaintiffs' case.

2. Class Plaintiffs Faced Substantial Risks on Proving Damages

Plaintiffs also faced substantial risks that they would not succeed in proving damages, or that they would not obtain all the damages they sought. In addition to seeking to exclude all of Dr. Frankel's testimony, Defendants challenged Dr. Frankel's damages methodologies and calculations. Their principal damages expert, Robert H. Topel, opined that "there is no economic theory supporting the Class Plaintiffs' approach to damages," and that Dr. Frankel's proposed methodologies and calculations were "speculative, flawed and unreliable."[25] They argued "an upper bound on total damages for Class Merchants is $661 million."[26]

Thus, Class Plaintiffs faced a significant risk that even if they prevailed on all of their liability claims, the jury would award only a fraction of claimed damages. *See, e.g.*, *Wal-Mart*, 396 F.3d at 118 ("'Indeed, the history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible damages, at trial, or on appeal.'") (quoting *NASDAQ*, 187 F.R.D. at 475-76); *Visa Check*, 297 F. Supp. 2d at 511 (proving damages to a jury is complex and difficult).

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25 Expert Report of Robert H. Topel, December 14, 2009 ("Topel Report") at 62, 67, attached as SUFEX304 to Marth Declaration in Support of Dkt. No. 1538, Class Ps' MSJ.

26 Topel Report at 63.

Further, if the Court or a jury were to reject Class Plaintiffs' post-IPO claims, the damages period would shrink to less than two-and-one-half years for MasterCard transactions, and less than four-and-one-half years for Visa transactions.[27]

3. Class Plaintiffs Faced Risks in Certifying and Then Maintaining the Class

At the time of settlement, Class Plaintiffs' motion to certify Rule 23(b)(2) and (b)(3) classes was pending. Defendants vigorously opposed that motion.

While Class Plaintiffs believed that they had a strong case for certification, there was some risk that the Court would decline to certify the classes, or would exclude from the (b)(3) class any merchant that did not have a direct contractual relationship with a defendant acquiring bank, on *Illinois Brick* grounds. In addition, there existed a risk that the Court of Appeals would reverse a certification order, particularly in light of recent decisions increasing plaintiffs' burden at class certification. *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, __ U.S. __, 131 S. Ct. 2541 (2011) ("*Dukes*") (Rule 23 does not set forth a mere pleading standard but instead requires proponent to prove that requirements met.); *Comcast Corp. v. Behrend*, No. 11-864 __ U.S. __, 2013 WL 1222646 (March 27, 2013) (holding that antitrust class was improperly certified where damages model inconsistent with case's liability theory).

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[27] In 2004 and 2006, MasterCard and Visa made certain structural changes even before the IPOs that arguably could have terminated antitrust liability. *See* Dkt. No. 1152, FASCAC, ¶107 (MasterCard board formally delegated authority to management to set the interchange fees for the U.S. region in July 2004); Dkt. No. 1154, SSCAC, ¶96 (Visa's Board of Directors appointed four independent directors to set default interchange fees in the U.S. in April 2006).

D. The Settlement is More than Fair, Reasonable, and Adequate in Light of the Risks Faced by Class Plaintiffs

In light of the enormous risks faced by Class Plaintiffs, the proposed Settlement is more than fair, reasonable, and adequate. The $6.05 billion cash fund, plus the estimated $1.2 billion interchange reduction fund, represents the largest-ever cash settlement in an antitrust class action and the third-largest class action settlement in history.[28] The already-implemented rules reforms – which are expected to save merchants an estimated tens of billions of dollars over the next decade – will help make the payment card market more competitive and transparent, enable merchants to recover their costs of credit card acceptance and steer customers to less costly payment methods and brands, and ultimately drive down merchants' costs and consumers' prices.

1. The Cash Funds Are Well Within A Range Reasonableness

Given the risks, the cash portion of the settlement is far more than reasonable: it is "staggering." *Wal-Mart*, 396 F.3d at 119 (describing $3 billion settlement); *see also Grinnell Corp.*, 495 F.2d at 455 n.2 ("there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery").

The $7.25 billion in cash relief compares favorably to other antitrust class action settlements, particularly in light of the lack of a prior governmental investigation and the vast disparity in the parties' damages calculations. *Cf. Visa Check*, 297 F. Supp. 2d 503 (approving $3 billion settlement where plaintiffs' pre-trebling damages estimates, including injunctive relief, were between $37 and

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[28] This cash portion of the Settlement Agreement is only marginally smaller than the two larger class action settlements. *See In re Enron Corp. Sec.*, 586 F. Supp. 2d 732 n.2 (S.D Tex. 2008) ($7.227 billion recovery before interest); *In re Oil Spill by the Oil Rig Deepwater Horizon in Gulf of Mexico*, MDL No. 2179, __ F. Supp. 2d __ , 2012 U.S. Dist. LEXIS 181511, (E.D. La. Dec. 21, 2012); *see also* http://www.bp.com/claims (last visited April 8, 2013) ($8.7 billion recovery).

$102 billion); *Currency Conversion*, 263 F.R.D. at 123 (noting that a settlement of $336 million and injunctive relief "represent a extraordinarily significant recovery" in light of the fact that "Plaintiffs did not have the benefit of a Government investigation"); *In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 142 F.R.D. 588, 597 (S.D.N.Y. 1992) ("[T]his is not a case where plaintiffs' counsel can be cast as jackals to the government's lion, arriving on the scene after some enforcement or administrative agency has made the kill. They did all the work on their own."); *NASDAQ*, 187 F.R.D. at 478 (approving an antitrust settlement of $1.027 billion where plaintiffs' and defendants' damages estimates were vastly disparate).

2. The Rules Reforms Provide Valuable Relief to Class Members

a. Surcharging is a Valuable Right

As a result of the settlement, for the first time ever, merchants can now impose a surcharge on Visa and MasterCard credit card transactions, whether by brand or by product, in order to recover their costs of acceptance and steer customers to less costly payment methods. SA, ¶¶42, 55. This new right allows merchants to recover the full amount of the costs they incur in accepting Visa- and MasterCard-branded credit transactions. It also enables merchants to send clear price signals to consumers, steering them to less-costly payment methods and payment brands. As evidence from other jurisdictions demonstrates, surcharging or the threat of surcharging will permit merchants to recover their costs of acceptance and, over time, will cause the networks to reduce interchange and other network fees, resulting in lower costs for merchants and lower prices for consumers. Class Plaintiffs' expert estimates that the ability to surcharge could save merchants between $26.4 and $62.8 billion over the next decade. Frankel Decl., ¶¶67-73.

As Class Plaintiffs' expert explains, modification of Visa's and MasterCard's no-surcharge rules benefits merchants and their customers in three ways:

> First, by surcharging credit card payments, the merchant recovers all, or a significant portion, of the costs associated with accepting credit card transactions. At the same time, the merchant's posted shelf price will tend to decrease. This will help surcharging merchants to increase sales to cash, check and debit card customers (who benefit from the lower prices as they no longer subsidize the additional costs of serving credit customers). Second by surcharging, merchants will steer a significant number of their customers to use alternative, lower cost and non-surcharged payment methods or brands. This will reduce the merchant's overall average cost (and the average prices paid by consumers), which, all else equal, can be expected to increase . . . total merchant sales. Third, because the Networks will lose more transactions if they maintain high interchange fees with surcharging than without surcharging, they will have an economic incentive to set lower interchange fees and (and network fees) when merchants have the ability to surcharge. This will tend to benefit all merchants, whether or not they surcharge.

Frankel Decl., ¶32. Dr. Frankel's conclusions are supported by evidence from Australia, where no-surcharge rules were eliminated in 2003. Several years after it ordered the card networks to eliminate their no-surcharge rules, the Reserve Bank of Australia ("RBA") undertook an extensive study of the effect of its reforms. The RBA concluded that elimination of no-surcharge rules has provided significant competitive benefits: As expected, surcharging "'improve[d] price signals to cardholders'" about the relative costs of different payment methods, provided a "'negotiating tool for merchants who might use the threat of surcharging to negotiate lower fees,'" and ended the subsidization of credit card users by cash, check, and debit users. Frankel Decl., ¶35 (quoting Reserve Bank of Australia, *A Variation to the Surcharging Standards: A Consultation Document*, at 2 (December 2011)). As Dr. Frankel points out, elimination of no-surcharge rules in Australia has "played an important role" in the reduction of merchant fees in that country. Frankel Decl., ¶46.

Australia's success has led, in turn, to the elimination of no-surcharge rules in other jurisdictions, including New Zealand. As the New Zealand Commissioner of Commerce said when he announced that MasterCard had agreed to settle a lawsuit by eliminating its no-surcharge rules, "'[t]he settlement can be expected to reduce overall costs for consumers of payment systems by

driving down interchange fees and facilitating merchant steering towards lower cost payment methods. It will also ensure that costs of credit card use fall to a greater extent on the card users themselves, who can make informed choices about payment methods, and less on other consumers.'" Frankel Decl., ¶47 (quoting Press Release, Commerce Commission New Zealand, Commerce Commission and MasterCard Agree to Settle Credit Card Interchange Fee Proceedings (Aug. 24, 2009) (*available at* http://www.comcom.govt.nz/media-releases/detail/2009/commercecommissionandmastercardagr)) (last visited April 10, 2013).

While American merchants had gained the right to offer discounts to steer customers to less-costly payment methods and less-costly credit card brands as a result of the Durbin Amendment and the DOJ Consent Judgment, discounts are less effective in influencing payment choices than surcharging. That is because consumers are more sensitive to a loss than a gain: discounts and surcharges "are not ***economically*** equivalent [because] consumers react differently to higher versus lower posted prices, and they react differently to perceived penalties (such as a surcharge) than they do to perceived rewards of equal magnitude." Frankel Decl., ¶48 (emphasis in original). *See also* Fumiko Hayashi, *Discounts and Surcharges: Implications for Consumer Payment Choice*, Federal Reserve Bank of Kansas City, at 2 (June 2012)[29] ("consumers would react more strongly to surcharges than to discounts"); Scott Schuh *et al.*, *Explaining Adoption and Use of Payment*

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[29] *Available at* http://www.kansascityfed.org/publicat/PSR/Briefings/psr-briefingjune2012.pdf (last visited April 9, 2013).

Instruments by U.S. Consumers at 33-34; Figure 5 (Mar. 6, 2013)[30] (more consumers would choose debit cards rather than credit cards in the case of surcharge).

Even the objectors recognize the value of permitting surcharging: As one NACS witness testified:

> Cash discounts and surcharges may be an effective way for some merchants to let their customers know the costs that are associated with card acceptance. If that works for some businesses, then they ought to be able to do it. The Visa/MasterCard rules restricting this kind of pricing information from being part of the consideration for purchasers is wrong and is part of the reason why this is a broken market. These restrictions should not exist.

See Credit Card Interchange Fees: Antitrust Concerns? Hearing Before the Sen. Comm. on the Judiciary, S. Hrg. 109-583, 41 (2006) (response from Bill Douglass, CEO of Douglass Distributing Co.). Similarly, the Merchant Payment Coalition, through W. Stephen Cannon of Constantine Cannon, stated:

> The MPC believes that the card associations "'no surcharge'" rule is a part of their anticompetitive scheme to fix interchange fees. This compelled lack of transparency reinforces the card associations' price fixing efforts. Specifically, the card associations ensure that consumers (*i.e.*, card holders) deciding which form of payment to use remain ignorant of the supra-competitive costs of using their Visa or MasterCard card by preventing merchants from imposing a surcharge on card purchases that reflect the interchange fees charged to the merchant.

See Credit Card Interchange Fees: Antitrust Concerns?: Hearing Before the Sen. Comm. on the Judiciary, S. Hrg. 109-583, 28 (2006).[31]

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[30] *Available at* https://bepp.wharton.upenn.edu/bepp/assets/File/AE-S13-Rysman.pdf (last visited April 9, 2013).

[31] *See also* Dkt. No. 1635 at 1, Florida Retail Federations' Objection (ability to surcharge is a "negotiating point" that can help keep fees low).

b. The Buying Group Provision Gives Merchants Additional Opportunities and Leverage

The "buying group" provision in the settlement gives smaller merchants the opportunity to form buying groups and use their collective bargaining power to attempt to negotiate better rates from Visa and MasterCard. If a group of merchants that complies with certain antitrust guidelines makes a proposal to Visa or MasterCard, the network now has the affirmative duty to "exercise its discretion and business judgment in good faith" in determining whether the proposal provides commercially reasonable benefits. If it concludes that the proposal does provide commercially reasonable benefits, then the network is further obligated to exercise "good faith" in its negotiations regarding such proposals, and in deciding whether to accept or reject the proposal. SA, ¶¶43, 56.

As Dr. Frankel explains, this provision helps "facilitate the ability of smaller merchants to obtain the scale economies, organizational efficiencies and negotiating ability of large merchants." Frankel Decl., ¶56. By allowing smaller merchants to aggregate their sales in a group that bargains with the Networks for lower interchange rates, this provision will, like the surcharging provision, impose competitive constraints on interchange fees. *Id.*, ¶57.

c. The Discounting, Cost Information, and Minimum Purchase Provisions are Essential to Lock in DOJ Consent Judgment and Durbin Reforms

The Settlement Agreement also contractually locks in the minimum price and discounting rules changes required by the Durbin Amendment and by the DOJ Consent Judgment, and requires Visa and MasterCard to provide credit card cost information to merchants at no charge. SA, ¶¶40, 44, 53, 57. The Durbin Amendment required Visa and MasterCard to modify their rules prohibiting merchants from setting a minimum amount for credit card transactions and prohibiting discounting. Merchants are now permitted to set a minimum purchase amount – up to $10.00 – for credit card

transactions. 15 U.S.C. §1693o-2(b)(3)(A)(i); SA, ¶¶44, 57. As a result of the combined effect of the Durbin Amendment and the DOJ Consent Judgment, merchants are also now permitted to steer customers to lower-cost payment methods and lower-cost payment card brands by offering discounts, rebates, free products or services, rewards program points, or other benefits, and to use signage and other methods to encourage customers to use particular payment methods.[32] In addition, Visa and MasterCard committed, in support of the United States's motion to enter the Consent Judgment, to provide services that would enable merchants to determine the costs of accepting particular Visa and MasterCard credit cards.[33]

Under the proposed Settlement Agreement in this case, even if the Durbin Amendment is repealed or the Consent Judgment is modified, Visa and MasterCard must maintain all of these rules modifications until July 20, 2021. SA, ¶¶40, 44, 53, 57. In addition, Visa and MasterCard must provide the cost information services described in the Tomchek and Reed Declarations to merchants at no cost until July 20, 2021. SA, ¶¶40, 53.[34]

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[32] DOJ Consent Judgment at 9-11; *U.S. v. AmEx* Dkt. No. 5 at 10-11 (Competitive Impact Statement) (*available at* http://www.justice.gov/atr/cases/f262800/262873.htm) (last visited April 10, 2013).

[33] *U.S. v. AmEx* Dkt. No. 119-16, ¶¶7-14 (Declaration of Brad Tomchek (MasterCard)) (*available at* http://www.justice.gov/atr/cases/f269300/269312.htm) (last visited April 10, 2013) (describing MasterCard's Product Validation service); *U.S. v. AmEx* Dkt. No. 119-14, ¶¶4-9 (Declaration of Judson Reed (Visa)) (*available at* http://www.justice.gov/atr/cases/f269200/269252.pdf and http://www.justice.gov/atr/cases/f269300/269312.htm (last visited April 10, 2013) (describing Visa's Product Eligibility Inquiry Service).

[34] *Cf. U.S. v. AmEx* Dkt. No. 119-16, ¶8, Declaration of Brad Tomchek (MasterCard) (while initially providing the service without cost, "MasterCard reserve[d] the right to adjust the fee based on demand and other factors"); *U.S. v. AmEx* Dkt. No. 119-14, ¶9, Declaration of Judson Reed (Visa) (same).

By providing merchants with additional steering tools, the minimum price and discounting rules benefit merchants and enhance competition in the market. Frankel Decl., ¶¶20-21. In addition, the credit card cost information available through MasterCard's Product Validation service and Visa's Product Eligibility Inquiry Service gives merchants information they need in order to steer effectively, especially if they choose to surcharge Visa and MasterCard credit card transactions at the product level.

d. All-Outlets Rule Provides Valuable Flexibility to Merchants

The settlement also requires Visa and MasterCard to permit a merchant that operates multiple businesses under different "trade names" or "banners" to accept Visa and/or MasterCard at fewer than all of its businesses, without penalty, under any volume-based incentive program that is generally available to merchants in the United States. SA, ¶¶41, 54. This will enable merchants with multiple businesses and multiple pricing strategies to experiment with acceptance practices, thereby enhancing competitive constraints. *See* Frankel Decl., ¶54.

In sum, the monetary compensation and the unprecedented market reforms obtained and secured by this settlement constitute an outstanding resolution of this litigation for the class and certainly one that meets the fair, reasonable, and adequate standard.

VII. Reaction of the Class

The reaction of class members to the proposed settlement is another important factor in determining whether to grant final approval. *Visa Check*, 297 F. Supp. 2d at 510. Although the deadline for opting out and objecting is not until May 28, 2013, responses to date suggest that the majority of class members support the Settlement.

As of April 1, 2013, 215 class members had objected to final approval of the settlement. Of these, roughly 90% appear to be form objections downloaded from the websites of the objecting trade association plaintiffs. Even though the trade association plaintiffs and their lawyers have launched an extensive campaign opposing the settlement,[35] the resulting objections represent only a miniscule percentage – less than 3/100ths of one percent – of the class.[36] *Cf. Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 24 (2d Cir. 1987) (approving class settlement where 45 of the 126 class members, or approximately 36%, expressed opposition to the settlement). Assuming that all of the named plaintiffs and absent class members that objected to preliminary approval also object to final approval, the percentage of objecting class members would still be less than 2/10ths of one percent.[37]

The positive response to the settlement, in contrast, has been significant. Even though the claim form is not yet available, 43,260 class members have availed themselves of the option to "pre-register" their claims, and an additional 28,269 have created preregistration accounts. Hamann Decl., ¶37. In addition, the Class Administrator's call center has received more than 93,000 calls about the settlement. Hamann Decl., ¶26. In roughly 48.17% of those inquiries, the class member has asked for a claim form. Hamann Decl., ¶¶27-28.

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[35] *See* Dkt. No. 1963, Class Plaintiffs' March 29, 2013 Letter (detailing websites such as http://merchantsobject.com sponsored by large trade associations).

[36] Although the exact number of class members is not known, a total of 20,844,892 long-form notices were mailed. Hamann Decl., ¶¶18-19. Many of these are duplicate mailings. *Id.* However, it is reasonable to assume that the number of class members exceeds 12 million.

[37] *See* Dkt. No. 1681-1, Shinder Declaration, Exs. 10-335 (attaching objections of 325 members of plaintiffs NACS, NCPA, NCGA and NGA) and Dkt. No. 1681-3, Ex. 5, Declaration of Douglas Hoey (attaching objections of 850 members of plaintiffs NCPA); Dkt. Nos. 1635, 1653, 1670, 1676, 1680, 1681-3 – 1681-13, 1683, 1693, 1702, 1708, 1709, 1710, 1711, 1717, 1722, 1728.

Just as important is the fact that Class Counsel, including those who previously represented objector plaintiffs, support the settlement, as do the other lawyers representing the classes. Class Counsel Decl., ¶ 185. These are the lawyers who litigated this case and who are in a superior position to evaluate the risks and benefits. Infante Decl., ¶13; Green Decl., ¶33. The opinion of Class Counsel weighs heavily in favor of final approval.

A. Objectors' Assertion that the Rule 23(b)(2) Release Improperly Releases Interchange Price-Fixing Claims Ignores Changes that Have Occurred Since Case Was Filed and Ignores Injunctive Relief

The objectors argue that the (b)(2) class is improper, and the release is overbroad, because it precludes claims that Defendants fix the price of interchange fees.[38] This objection utterly ignores the fact that Visa and MasterCard underwent major corporate restructurings to eliminate bank influence over the setting of interchange. Positing, as the objectors do, that the settlement allows "the anticompetitive system to remain in place" simply assumes away perhaps the most hotly contested issue in the case, *i.e.*, that the setting of a default interchange fee by the now single-entity networks constitutes an unreasonable restraint of trade. No reasonable lawyer evaluating the merits of the settle/litigate decision can simply assume they will win a legitimately and highly contested central legal and factual issue. This objection also fails to recognize that the anti-steering restraints

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[38] The main objection is that Visa and MasterCard still have the ability to set default interchange fees even after the settlement. *See, e.g.*, Dkt. No. 1703 at 6-7, Opp to Prelim App of Def Class Action Settl Agr ("The anti-competitive system will stay in place" and "[t]he Settlement Agreement does not change the market as is"); *see also* the form objections at *e.g.*, Dkt. Nos. 1925-1927, 1930, 1931, 1933, 1934, 1935-1941, 1943, 1944-1952, ¶1 of Statement of Objections ("The proposed settlement does not address Visa's and MasterCard's price-fixing of interchange rates . . . .").

that facilitated high interchange rates have almost entirely disappeared as a result of this settlement, the DOJ Consent Judgment, and the Durbin Amendment.[39]

A recent development underscores how the IPOs have altered the payment-card marketplace for the better. Earlier this year Visa amended its rules to allow inter-issuer steering – *i.e.*, permitting merchants to discount one issuer's Visa cards. Kevin Wack & Maria Aspan, *Visa Ends Ban on Retailer Discounts for Specific Cards*, American Banker (Feb. 22, 2013).[40] Within days, Chase took advantage of this new opportunity, announcing that it was partnering with Visa to build direct connections to merchants. Daniel Wolfe & Maria Aspan, *JPMorgan Chase, Visa to Launch Merchant Services Partnership*, PaymentsSource (Feb. 26, 2013).[41] This rule change will lead to lower card-acceptance costs because merchants can now solicit offers from issuers to favor their cards. This material change is made possible by Visa's new corporate structure, in which an independent Visa's primary obligation is to enhance Visa's profitability for its shareholders, rather than for the banks that once controlled it.[42]

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[39] Objectors also refuse to recognize the role that this litigation and the work product generated in this litigation played in those events. *See* Class Counsel's Decl., ¶¶ 207-209.

[40] *Available at* http://www.americanbanker.com/issues/178_37/visa-ends-ban-on-retailer-discounts-for-specific-cards-1056996-1.html (last visited April 9, 2013).

[41] *Available at* http://www.paymentssource.com/news/jpmorgan-chase-visa-to-launch-merchant-services-parternship-3013346-1.html (last visited April 9, 2013).

[42] *See, e.g.*, Dkt. No. 1543, ¶74, Class Ps' SUF (Visa executives expressed concern about bilateral agreements between banks and merchants because competition among issuers would lead to lower interchange for all issuers).

B. Objectors' Complaints About the Rules Relief are Meritless

Objectors' complaints that the rules relief is inadequate are similarly meritless. The near-unanimous consensus among economists is that these reforms will lead to a more-competitive marketplace, lower credit card acceptance costs for merchants, and lower prices for consumers.

1. Objectors Misconstrue Surcharging Provisions and Ignore Facts

The objectors complain that the surcharging provisions in the Settlement Agreement are flawed because many merchants will not want to surcharge, or will be prevented from surcharging by state laws or because they accept American Express. These objections misconstrue the language of the Settlement Agreement, however, and ignore the impact that even a modest number of surcharging merchants can have on the market.

Several objectors contend that national or multi-state merchants will not be able to surcharge in ***any*** state if they have even one store located in a state that prohibits surcharging.[43] However, as the notice makes clear (and as was expressly stated by Class Counsel at the preliminary approval hearing)[44], nothing in the Settlement Agreement prohibits multi-state merchants from surcharging in those states where permitted, even if the merchant is prohibited by law from surcharging in other states.[45]

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[43] *See, e.g.*, Dkt. 1676 at 24, The Home Depot Objection.

[44] Dkt. No. 1732 at 14, Hrg Tr. of November 9, 2012.

[45] *See* Dkt. No. 1740-2 at F2-10 ("Nothing in the settlement affects a merchant's obligations to comply with all applicable state or federal laws, including state laws regarding surcharging of credit or debit card transactions and federal and state laws regarding deceptive or misleading disclosures. However, the fact that a merchant's ability to surcharge may be restricted under the laws of one or more states is not intended to limit that merchant's ability under the settlement to surcharge Visa or MasterCard credit cards where permitted by state law.").

Objectors also argue that the surcharging relief is worthless for merchants that do business only in a state prohibiting surcharging.[46] This objection ignores the manner in which Visa and MasterCard set interchange rates: on a nationwide basis, not state-by-state. Thus if, as expected, surcharging by merchants in those states where surcharging is permitted causes interchange rates to decline, that decline will be enjoyed by merchants in ***all*** states.[47] As Dr. Frankel states, "[w]ith common interchange fees throughout the United States, the constraining effect of surcharging and potential surcharging in states where it is possible to surcharge protects even merchants located in states that prohibit surcharging." Frankel Decl., ¶59. Merchants that choose not to surcharge will likewise benefit from the competitive pressure exerted by merchants that do surcharge, or that threaten to surcharge. *Id.*, ¶60.

Objectors also complain that the "level-playing-field" provision makes it impossible for merchants to surcharge, because most merchants that accept Visa and MasterCard also accept American Express. While American Express's limitations on surcharging may currently present some impediment to universally surcharging Visa and MasterCard, that impediment is not as great as objectors claim. A significant number of merchants that accept Visa and MasterCard do not accept American Express, and so are literally unconstrained by American Express' rules. *The Nilson Report*, Issue No. 1011, at 10 (Feb. 2013) (of the roughly 9 million merchant acceptance locations

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[46] Dkt. No. 1925, *see* form objection; Dkt. No. 1681 at 7-8, Obj Opp to Prelim App.

[47] If Visa or MasterCard were to modify their interchange-setting policies in response to surcharging in some states, that conduct would not be protected by the release from future suit. SA, ¶68(g)-(h) (claims challenging these new practices would not be claims "alleged or which could have been alleged" in the litigation, and would not be "substantially similar" conduct or rules). Such conduct might also stimulate retraction of the no-surcharge legislation, or indeed, constitute a violation of the Settlement Agreement.

currently in the United States that accept Visa and MasterCard, only 6.2 million also accept American Express).[48] Thus, there are almost 3 million merchants for whom the level-playing-field provision does not apply, and who can currently surcharge Visa and MasterCard transactions due to this Settlement. In addition, merchants that want to surcharge Visa and MasterCard may choose to ignore American Express's anticompetitive rules (which are currently being challenged by the Justice Department), and surcharge all three brands, or may choose to discontinue accepting American Express. As Dr. Frankel explains, "even modest responses to the threat of surcharging or modest amounts of surcharging will result in substantial savings and recoupment of costs by merchants." Frankel Decl., ¶66. *See also id.*, ¶63 ("although American Express' policy, while it persists, reduces the ability of merchants to use surcharge strategies to lower their costs, it does not eliminate it").[49]

Some objectors complain that the Settlement does not go far enough in its reform of Visa and MasterCard no-surcharge rules, because merchants cannot surcharge debit transactions.[50] However, since the Federal Reserve Bank capped most debit interchange fees at 21 cents plus 0.05% of the transaction following enactment of the Durbin Amendment, the average debit interchange paid per transaction for Visa and MasterCard debit has decreased drastically, from 43 cents to 24 cents. *See* Federal Reserve Board: Average Debit Card Interchange Fee by Payment Card Network (*available at* http://www.federalreserve.gov/paymentsystems/regii-average-interchange-fee.htm) (last visited

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48 Frankel Decl. at n.80.

49 This litigation, even if tried to verdict, cannot address state legislation or American Express's rules.

50 Dkt. No. 1681 at 2; 6-7, Obj Opp to Prelim App.

April 10, 2013). Thus, as the objectors concede, most merchants will want to steer credit card users to debit, not away from debit.[51] The fact that merchants now have a low-cost, payment-card alternative to credit greatly enhances the economic value to merchants of the elimination of the anti-steering rules. If the Durbin Amendment cap is lifted, under the Settlement Agreement merchants will be permitted to surcharge Visa and MasterCard debit transactions. SA, ¶¶42(g), 55(g).

2. The Group Buying and All-Outlets Provisions Provide Real Benefits to Class Members

While some objectors are dismissive of the group buying and all-outlets provisions because they will not take advantage of them, that is no basis for upholding those objections. *Lagarde v. Support.com, Inc.*, No. C12-0609 JSC, 2013 U.S. Dist. LEXIS 42725, at *15-*16 (N.D. Cal. Mar. 25, 2013) (while "it is unknown as to how many class members will actually take advantage" of the relief, "the Court concludes that these deficiencies do not weigh against a finding of fairness and adequacy"). Others complain that this relief is illusory, because Visa and MasterCard rules did not previously prohibit merchants from engaging in joint negotiations or employing different acceptance practices at different trade names.[52] There is, however, no history of negotiations between Visa and buying groups or MasterCard and buying groups. Class Counsel Decl., ¶¶193. Now there is an affirmative obligation on the part of the networks to negotiate in "good faith," which makes buying groups a realistic option. SA, ¶¶43, 56. Similarly, while Visa and MasterCard rules did not explicitly prohibit merchants from using different acceptance practices at outlets operating under different "banners" or "trade names," the practical effect of the networks' volume-based interchange

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[51] *See id.*

[52] Dkt. No. 1681 at 8-9, Objectors Opp to Prelim App.

fee incentive programs was to preclude such differential practices. *See* SA, ¶¶41, 54 (merchants can engage in different acceptance practices "without penalty under any volume-based incentive program that is generally available to merchants in the United States").

3. Other Rules Provisions Provide Benefits to Class Members

Objectors argue that the discounting, cost information, and minimum-purchase provisions in the Settlement Agreement "confe[r] no benefit on class members," because this relief was provided by the Durbin Amendment and DOJ Consent Judgment.[53] However, these objections ignore the potential political fragility of, and repeated attempts to repeal, the Durbin Amendment in its entirety, as well as numerous instances in which consent decrees in other antitrust cases have been modified or terminated.[54] They also ignore Defendants' commitment to provide credit card cost information to merchants at no charge, which was not a requirement of the DOJ Consent Judgment.

C. Objectors' Due Process Arguments Lack Merit

The objectors' due process arguments are completely without merit, because a separate Rule 23(b)(2) Settlement Class is appropriate here. This is not a case where Class Plaintiffs are attempting to cram a monetary damages settlement into a single mandatory Rule 23(b)(2) injunctive

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[53] *See, e.g.*, Dkt. No. 1676 at 20-21, The Home Depot Objection; Dkt. No. 1681 at 9, Obj Opp to Prelim App.

[54] *See, e.g.*, H.R. 46-113th Congress: To repeal the Dodd-Frank Wall Street Reform and Consumer Protection Act (2013); S. 20 (113th): Financial Takeover Repeal Act of 2013; S. 746 (112th): Dodd-Frank Repeal Act of 2011; *United States v. Microsoft Corp.*, 231 F. Supp. 2d 144 (D.D.C. 2002) (Microsoft consent decree modified subsequent to final judgment); *In re Nine W. Grp.*, No. C-3937, 2000 F.T.C. LEXIS 48 (F.T.C. Apr. 11, 2000) (modifying final order that restricted Nine West's use of resale price maintenance agreements).

class. Rather, Class Plaintiffs have always sought certification of a Rule 23(b)(2) class for injunctive relief separate and distinct from a Rule 23(b)(3) class for damages.[55]

Where, as here, Class Plaintiffs seek both damages and to redress group-wide injury through broad class-wide injunctive relief, courts do not hesitate to certify a Rule 23(b)(3) damages class and a separate 23(b)(2) injunctive relief-only class. *See, e.g.*, *In re Vitamin C Antitrust Litig.*, 279 F.R.D. 90 (E.D.N.Y. 2012) (certifying a damages class under Rule 23(b)(3) and an injunctive relief class under Rule 23(b)(2) in price-fixing case); *Easterling v. State Dep't. of Corr.*, 278 F.R.D. 41 (D. Conn. 2011) (in a civil rights case, certifying separate 23(b)(2) (injunctive relief) and (b)(3) (damages) classes); *Jermyn v. Best Buy Stores, L.P.*, 276 F.R.D. 167 (S.D.N.Y. 2011) (in a deceptive practices case, where plaintiffs sought damages for past conduct and an injunction to stop further statutory violations, the court certified separate Rule 23(b)(2) and (b)(3) classes).

Objectors' reliance on *Dukes*, 131 S. Ct. 2541, is misplaced. In *Dukes*, the plaintiffs attempted to combine damages claims – in the form of backpay[56] – with injunctive relief claims in a ***single*** mandatory Rule 23(b)(2) class. The Supreme Court held that combining damages claims with injunctive relief claims in a Rule 23(b)(2) class was improper because damages represent a claim for

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[55] *See* Dkt. No. 1153, ¶108, SCACAC; Dkt. No. 1165 at 4-5, Ps' Class Cert Mem. In support of settlement class certification, Class Plaintiffs also rely on their initial and reply memoranda and supporting material for class certification and their motion for preliminary approval of the settlement. Dkt. Nos. 1165, 1167 and 1656-2. However, settlement classes may be easier to certify because settlement (and no trial) may eliminate manageability issues. *In re Am. Int'l Grp., Inc.*, 689 F.3d 229, 240-42 (2d Cir. 2012); *Sullivan v. DB Inves., Inc.*, 667 F.3d 273, 297 (3d Cir. 2011) (noting some concerns dissipate when considering a settlement class).

[56] In employment discrimination cases, some courts had allowed the combination of equitable monetary relief (back pay) with injunctive relief in a Rule 23(b)(2) mandatory class. *Dukes,* 131 S. Ct. at 2557.

"***individualized*** relief," which contravenes the requirements of the Rule 23(b)(2). *Dukes*, 131 S. Ct. at 2557 (emphasis in original). As the Supreme Court explained, however, a Rule 23(b)(2) class is appropriate where the challenged conduct "can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Id.* Under those circumstances, the warranted injunctive or declaratory remedy is of an indivisible nature. *Id.* Thus, where "declaratory relief is a separable and distinct type of relief that will resolve an issue common to all class members" it is appropriate to certify a Rule 23(b)(2) class separate and distinct from a Rule 23(b)(3) class. *Gooch v. Life Investors Ins. Co. of Am.*, 672 F.3d 402, 428 (6th Cir. 2012).

That standard is met here. The damages settlement and damages claims are not only part of a separate and distinct Rule 23(b)(3) Settlement Class, but the injunctive relief is separate and distinct from any damages claims.[57] Class Plaintiffs sought solely injunctive and declaratory relief for alleged antitrust violations resulting from the no-surcharge and other anti-steering restraints.[58] Class Plaintiffs challenged uniform conduct in the form of anti-steering rules that all merchants were bound to follow. The settlement provides for group-wide structural relief to address that uniform conduct in the form of modifications to Visa's and MasterCard's no-surcharge rule and other anti-steering rules. These rules modifications are focused on changing Defendants' conduct going forward. This satisfies the express requirement of Rule 23(b)(2) that defendant has "acted or refused

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[57] While there is substantial overlap between membership in the Rule 23(b)(3) Settlement Class and that of the Rule 23(b)(2) Settlement Class, those memberships are not identical. The difference lies in the time line for a merchant's existence – *e.g.*, those only in business before the Settlement Preliminary Approval Date (November 28, 2012) and those only in business after that date.

[58] Dkt. No. 1153, SCACAC, ¶¶321-357.

to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."

A separate Rule 23(b)(2) class is appropriate when "seeking institutional reform in the form of injunctive relief." *See Stinson v. City of New York*, 282 F.R.D. 360, 379 (S.D.N.Y. 2012) (*Dukes* does not prohibit certifying a Rule 23(b)(3) class for damages and a separate Rule 23(b)(2) class for injunctive relief to remedy city-wide policy). Through this settlement, Class Plaintiffs are not combining injunctive relief with damages claims based on past conduct in a single Rule 23(b)(2) Settlement Class. And members of the Rule 23(b)(3) Settlement Class remain free to opt-out of the Rule 23(b)(3) Settlement Class and pursue their damages claims even though they are still members of the mandatory Rule 23(b)(2) Settlement Class. *See Vitamin C*, 279 F.R.D. at 116 (separate Rule 23(b)(2) class appropriate where it did not extinguish the damages claim of a class member who opts out of the Rule 23(b)(3) class).

D. The Releases are Reasonable

1. The Standard Releases in the Settlement Prevent Relitigation of the Same Claims and Conduct Settled Here

Objectors' complaints about the breadth of the Rule 23(b)(2) and (b)(3) releases are similarly meritless, because both are typical class action releases. It is the consideration of the release which lies at the core of the exchange inherent in a settlement of litigation and which thus is critical in "achiev[ing] a comprehensive settlement that [will] prevent relitigation of settled questions at the core of [this] class action." *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982); *see also In re Literary Works in Elec. Databases Copyright Litig. v. Thomson Corp.*, 654 F.3d 242, 247-48 (2d Cir. 2011) ("[p]arties often reach broad settlement agreements encompassing claims not presented in the complaint in order to achieve comprehensive settlement of class actions,

particularly when a defendant's ability to limit his future liability is an important factor in his willingness to settle"). As the Court of Appeals has recognized, "[p]ractically speaking, class action settlements simply will not occur if the parties cannot set definitive limits on defendants' liability." *Wal-Mart*, 396 F.3d at 106.

2. The Releases' Express Language and the Class Definition Circumscribe the Releases' Scope

Both releases are expressly limited in scope to claims that were alleged or could have been alleged in this case:

> any and all manner of claims, demands, actions, suits, and causes of action . . . [that a member of either the Rule 23(b)(2) or b(3) classes] now has, or hereafter can, shall, or may in the future have, arising out of or relating in any way to any conduct . . . ***that are alleged or could have been alleged*** . . . .

SA, ¶¶33, 68. In *Visa Check*, this Court approved a release that contained identical limiting language. 297 F. Supp. 2d at 512 (releasing "'***claims which have been asserted or could have been asserted in this litigation***'") (emphasis in original). Affirming this Court's approval of the settlement in *Visa Check*, the Second Circuit recognized that "Plaintiffs in a class action may release claims that were or could have been pled in exchange for settlement relief." *Wal-Mart*, 396 F.3d at 106; *see also Literary Works*, 654 F.3d at 247 (same).

Claims that were or could have been alleged are related to claims arising out of the "identical factual predicate" as the settled conduct. *Wal-Mart*, 396 F.3d at 106; *see also Literary Works*, 654 F.3d at 248. Recently, the court in *Lehman Brothers* explained the identical factual predicate doctrine as follows:

> As the Second Circuit has put it, "[a]ny released claims not presented directly in [a class action] complaint . . . must be based on the identical factual predicate as that underlying the claims in the settled class action." *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 248 (2d Cir. 2011) (internal quotation marks and citation omitted); *accord TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d

> 456, 460 (2d Cir. 1982) ("[A] court may permit the release of a claim based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented and might not have been presentable in the class action."); *Wal-Mart*, 396 F.3d at 107. The underlying principle is that "[i]f a judgment after trial cannot extinguish claims not asserted in the class action complaint, a judgment approving a settlement in such an action ordinarily should not be able to do so either." *Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch.*, 660 F.2d 9, 18 (2d Cir. 1981).

In re Lehman Bros. Sec. & ERISA Litig., No. 09 MD 2017 (LAK), 2012 WL 2478483, at *6 (S.D.N.Y. June 29, 2012). "In other words, a settlement may be framed to prevent future suits 'depending on the very same set of facts,' . . . but future claims are barred only 'where there is a realistic identity of issues' between the former and future cases and 'where the relationship between the suits is at the time of the class action foreseeably obvious to notified class members.'" *In re Digital Music Antitrust Litig.*, 812 F. Supp. 2d 390, 399-400 (S.D.N.Y. 2011).

In this case, claims relating to those rules that enabled Visa and MasterCard to set and maintain their respective default interchange fees in the United States at supra-competitive levels that were actually challenged or could have been challenged in this litigation are released. Likewise, claims relating to conduct that enabled Visa and MasterCard to set and maintain their respective default interchange fees in the United States at supra-competitive levels that was actually challenged or could have been challenged in this litigation are released. Also released are all claims that Visa and MasterCard are structural conspiracies based on the mere existence of their respective rules, and all claims related to their respective IPOs. Finally, both releases are limited to claims by persons, businesses, and other entities that arise from or relate to their capacity as merchants (the only members of the settlement classes).[59] Therefore, any claim arising in any capacity other than as a

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[59] Dkt. No. 1745, ¶¶5-6, Class Settl Prelim App Order.

merchant, such as a competitor network or an ATM operator, is not released. Moreover, it is obvious that the release only bars claims of merchant class members, and does not bar claims of others who may have standing to challenge any anticompetitive conduct of the Defendants, including 300+ million consumers, 50 state attorneys general, and the Department of Justice. SA, ¶¶2, 31, 33, 66, 68.

3. Only the Future Effects of the Unmodified Rules and Conduct in Place at the Time of Preliminary Approval and All Rules Modified Pursuant to the Settlement Agreement Are Released

For clarity's sake, the releases explicitly state that certain types of claims that were alleged or could have been alleged are released. Such released claims are the future effects of the continued imposition of or adherence to the unmodified rules in place at the time of preliminary approval of the settlement and the rules modified pursuant to the settlement:

> [T]he future effect in the United States of the continued imposition of or adherence to any Rule of Any Visa Defendant or MasterCard Defendant in effect in the United States as of the date of the Court's entry of the Class Settlement Preliminary Approval Order, any Rule modified or to be modified pursuant to this Class Settlement Agreement, or any rules that is substantial similar to any Rule in effect in the United Stats as of the date of the Court's entry of the Class Settlement Preliminary approval Order or any Rule modified or to be modified pursuant of this Class Settlement Agreement.

SA, ¶¶33(g) & 68(g). This provision is unremarkable as it merely releases the status quo going forward once the releases become effective. The first clause in the provision releases the future effects of the continued imposition of or adherence to the rules of Visa and MasterCard in place as of preliminary approval and not modified pursuant to the settlement that were or could have been challenged in this litigation. This prevents re-litigation of the claims central to this litigation. The second clause in the provision releases the future effects of rules of Visa and MasterCard modified pursuant to the settlement. Together these two clauses prevent a merchant from collaterally

challenging the status quo as it was agreed to in the settlement. However, any substantive deviation from these rules by Visa or MasterCard is ***not*** released. Also not released are the effects of any new rules adopted and implemented after the Settlement's Preliminary-Approval Date, or a reversion to any old rule before it was modified or eliminated by the settlement.

A related, explicitly released claim is the claim challenging future effects of conduct related to those Visa and MasterCard rules as well as the future effects of conduct related to the setting of interchange rates:

> [T]he future effect in the United States of any conduct of any Rule 23(b)(3) Settlement Class Released Party substantially similar to the conduct of any Rule 23(b)(3) Settlement Class Released Party related to or arising out of interchange rules, interchange fees or interchange rates, any Rule of any Visa Defendant or MasterCard Defendant modified or to be modified pursuant to this Class Settlement Agreement, any other Rule of any Visa Defendant or any MasterCard Defendant in effect as of the date of the court's entry of the Class Settlement Preliminary Approval Order, or any Rule substantially similar to any of the foregoing Rules.

SA, ¶¶33(h) & 68(h). Again, this provision must be read in the context of claims that were alleged or could have been alleged in this litigation. As with subparagraphs 33(g) and 68(g) above, the purpose of this provision is to prevent re-litigation of claims that have been settled and released. Any substantive deviation from this conduct, or a new unrelated course of conduct or reversion to any old rule that was modified or eliminated by the settlement, is not released. Thus, this provision merely releases the status quo going forward once the release becomes effective.

The scope of the future effects of the rules and conduct released described in paragraphs 33(g-h) and 68(g-h) of the Settlement Agreement includes "substantially similar" rules and conduct.

That term makes clear that non-substantive, non-material changes to the released rules and conduct maintains the status quo and thus those same rules and conduct continue to be released.[60]

Accordingly, as to conduct that was alleged or could have been alleged in this litigation, the Releases apply only to class members in their capacity as merchants and release only conduct relating to Visa's and MasterCard's rules in the United States existing under the settlement, either those rules which existed and were unchanged or those rules which were modified, including the conduct's future effects.

4. The Future Effects of Ongoing Conduct Can Be Released Where the Conduct Has Never Been Found to be Illegal

Contrary to the claim of several objectors, the release does not in any way grant Defendants antitrust immunity. Rather, it simply prevents members of the settlement classes from challenging the rules and rule modifications in place by reason of the settlement. So as long as the Defendants comply with the terms of the equitable relief required by the settlement, the challenged conduct is released for damage claims going forward.

In this case, none of the ongoing released conduct has ever been found to violate the antitrust laws. In particular, Visa's and MasterCard's rules concerning, and practices for setting, interchange and related fees have never been found to be illegal by any United States court. Where, as here at the time of the settlement, no court has ever found the challenged practices to be illegal – the illegality of the conduct is not a certainty – the court may approve a settlement that releases the future effects of that ongoing conduct. *See Robertson v. NBA*, 556 F.2d 682, 687 (2d Cir. 1977); *Armstrong v. Bd. of Sch. Dirs.*, 616 F.2d 305, 321 (7th Cir. 1980) ("before a settlement may be

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[60] A change without a material difference is a "substantially similar" rule.

rejected because it initiates or authorizes a clearly illegal or unconstitutional practice, prior judicial decisions must have found that practice to be illegal or unconstitutional as a general rule" based on the state of the law at time settlement); *Handschu Servs. v. Special Servs. Div.*, 605 F. Supp. 1384, 1395 (S.D.N.Y. 1985), *aff'd*, 787 F.2d 828 (2d Cir. 1986). As the Court of Appeals recognized long ago, "a court in approving a settlement should not in effect try the case by deciding unsettled legal questions." *Robertson*, 556 F.2d at 686. Otherwise, courts would be required to rule on unsettled legal and factual questions that the parties chose not to litigate, which would be "clearly inappropriate in a case resolved by settlement" and would eviscerate the purpose of settling the case. *Armstrong*, 616 F.2d at 322; *see also Robertson*, 556 F.2d at 682; *Handschu*, 605 F. Supp. at 1395.

Accordingly, a release that "prevent[s] 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" is proper and enforceable. *VKK Corp. v. NFL*, 244 F.3d 114, 126 (2d Cir. 2001); *see also Xerox Corp. v. Media Scis., Inc.*, 609 F. Supp. 2d 319, 326 (S.D.N.Y. 2009) ("courts have enforced even general releases to bar antitrust claims predicated on ***continuing violations of pre-release*** conduct, such as 'conspiracies alleged to continue post-release'") (emphasis in original); *Managed Care Litig. v. Humana Inc.*, No. 00-MD-1334-MORENO, 2010 U.S. Dist. LEXIS 142863, at *64 (S.D. Fla. Aug. 15, 2010) ("The problem that Provider Plaintiffs have in this case is that the claims at issue being prosecuted in the UCR Litigation are based on conspiratorial conduct, practices and 'chain of events' that took place long before the execution and approval of this Settlement Agreement. . . . [P]ublic policy considerations differ when the only 'prospective' application of the release in question is the continued adherence to a pre-release restraint on trade."). *See also Literary Works*, 654 F.3d at 248 (where a complaint seeks an injunction against future uses, a settlement releasing future

infringement was proper "regardless of whether future infringements would be considered independent injuries").

Because the release does not release new anticompetitive conduct in the future, it does not violate the public policy against granting antitrust immunity through settlement. *See, e.g.*, *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 329 (1955); *Fox Midwest Theaters, Inc. v. Means*, 221 F.2d 173, 180 (8th Cir. 1955). That objectors or others would prefer different relief, or feel the relief falls short of what they desire, is irrelevant. *Handschu*, 605 F. Supp. at 1395 ("It is beside the point for objectors to posit constitutional restraints on police conduct as they would prefer them to be, and then criticize the settlement because it falls short of a state of law they devoutly desire but have not yet achieved.").

5. Claims of Future Members of the Rule 23(b)(2) Settlement Class Can Be Subject to the Release

Future merchants, including those that start accepting Visa-and MasterCard-branded cards after July 20, 2021, benefit from the rules changes provided for under the settlement. Thus, including them within the Rule 23(b)(2) settlement class is entirely appropriate. A leading treatise on class actions explains:

> No formal rules govern class definitions. Classes have been upheld as properly defined, with definitions ranging from the simple formula on behalf of others similarly situated to definitions of class members of present and future generations, be they born or yet unborn.

2 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* §6:15 (4th ed. 2002) (citing *inter alia*, *Dixon v. Bowen,* 673 F. Supp. 123 (S.D.N.Y. 1987) (future applicants for disability benefits were properly included in a class action challenging the continuing use of severity regulations in the evaluation of disability claims)). Courts have also recognized that it is appropriate to certify a class that includes future class members. *Comer v. Cisneros*, 37 F.3d 775, 796-97 (2d Cir. 1994)

(certifying Rule 23(b)(2) class of minority residents who may in the future seek benefits and assistance); *Engwiller v. Pine Plains Cent. Sch. Dist.*, 199 F.R.D. 127, 128 (S.D.N.Y. 2001) (certifying class of "all students with disabling conditions who are now parties to, or who may in the future be parties to" certain administrative proceedings); *Pettco Enters., Inc. v. White*, 162 F.R.D. 151, 159-60 (M.D. Ala. 1995) (named plaintiffs adequate to represent class only by virtue of amendment of class definition to include future class members); *Honorable v. Easy Life Real Estate Sys., Inc.*, 182 F.R.D. 553, 558-61 (N.D. Ill. 1998) (certifying class that included future purchasers of homes).

Including future members in a class is appropriate where, as here, the interests of those future class members is adequately represented by the class representatives. *Id.* at 559. "[I]n the present case plaintiffs' claim can fairly be characterized as seeking systemic injunctive relief which would benefit all class members. Thus, there are no conflicting interests which prevent certification." *Ceasar v. Pataki*, No. 98CIV.8532 (LMM), 2000 WL 1154318, at *7 (S.D.N.Y. Aug. 14, 2000). Here no conflict exists because all current and future merchants have the same interest in obtaining injunctive relief with respect to the rules and conduct of Visa and MasterCard that are alleged to be anticompetitive, and the injunctive relief obtained provides for systematic institutional reform: Visa's and MasterCard's rules apply to all merchants; the rule changes likewise apply to all merchants; the rule changes are intended to have a market-wide effect that will benefit all merchants, including future merchants. Systematic institutional reform would be undermined if future merchants could challenge the rules that are the subject of the Settlement Agreement, making it unlikely that Defendants would agree to such reforms.

6. The Rule 23(b)(2) Release Does Not Require A Termination Date

The Rule 23(b)(2) release does not require a specific termination date. That is because the scope and duration of the releases are conduct-based: Only claims that were alleged or could have been alleged are released. *See* SA, ¶¶33, 68. Accordingly, the releases do not release ***new*** anticompetitive conduct in the future, which includes, *inter alia*, reversion to the old rules which are modified or eliminated by the settlement and the future adoption and implementation of rules that did not exist as of the time of preliminary approval, unless such new rules were substantially similar to existing rules. *See, e.g.*, *Lawlor*, 349 U.S. at 329; *Literary Works*, 654 F.3d at 247-50; *Wal-Mart*, 396 F.3d at 106-07; *Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch.*, 660 F.2d 9, 18 (2d Cir. 1981); *Lehman Bros.*, 2012 WL 2478483, at *6.

The releases therefore do not need to be coterminous with July 20, 2021 – the date when Visa and MasterCard are no longer obligated to maintain the rules modified pursuant to the settlement. The old rules which have been modified by the settlement do not automatically become reinstated at that time. Visa and MasterCard may maintain the modified rules, or they may engage in new conduct that could include reverting to the old rules modified or eliminated by the settlement. But, reinstituting the old rules ***is*** new conduct, which is not released. The releases remain in effect only so long as Defendants maintain the status quo in accordance with the settlement's terms.

E. The Robust Notice Program Adequately Advised Class Members of their Rights

Due process requires that notice to the class of a class action settlement "'fairly apprise 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. The standard for

the adequacy of a settlement notice in a class action "is measured by reasonableness." *Id.* at 113 (citing *Soberal-Perez v. Heckler*, 717 F.2d 36, 43 (2d Cir. 1983); Fed. R. Civ. P. 23(e)).

Here, the robust notice program more than meets the requirements of due process, Rule 23, and notice standards articulated by the Second Circuit. The notice describes the litigation, summarizes the settlement's terms, quotes the releases verbatim, describes the request for attorneys' fees, expenses, and incentive awards for Class Plaintiffs, and explains the deadline and procedure for filing objections to the settlement as well as opting out of the cash settlement class. *See* SA, Appendix F1 & F2. Additionally, the notice prominently notifies class members how they can obtain more information from Class Counsel or the Class Administrator though a toll-free number, a website, and traditional channels including mail and telephone. These features of the notice all demonstrate due process and that the federal rules have been satisfied.[61]

To ensure the largest possible reach of the mailed notice program, Class Counsel worked extensively with the Class Administrator to identify class members. Using data from Visa, MasterCard, and the defendant banks, as well as data subpoenaed from 14 non-defendant banks and processors, a database consisting of 19,874,922 unique addresses was developed for mailing. *See* Hamann Decl., ¶¶12, 18. That mailing took place between January 29, 2013 and February 22, 2013. *Id.* After more data was received, an additional 969,970 mailings went out on March 29, 2013. Hamann Decl., ¶19.

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[61] "Notice is 'adequate if it may be understood by the average class member.'" *Wal-Mart*, 396 F.3d at 114 (quoting 4 *Newberg on Class Actions* §11.53, at 167). In order to ensure the notice could easily be understood by class members, Class Counsel consulted a plain language expert in its drafting. Azari Decl, ¶9. The notice as well as the website was also made available in six languages to ensure that non-English speaking members of the class would be fully apprised of their rights regarding the litigation. Hamann Decl., ¶31.

A massive publication notice plan was launched at the same time as the mailed notice. A short form of the notice was published in 475 separate print publication units comprising a combined circulation of 80 million and 770 million adult internet impressions. Azari Decl., ¶20; Hamann Decl., ¶¶29-31.

The successful reach of the notice can be judged in part by the reaction of the class. "Where . . . the notice of settlement prompts widespread reaction from class members, it would appear that the notice has served its due process purpose." *Handschu v. Special Servs. Div.*, 787 F.2d 828, 833 (2d Cir. 1986). From December 18, 2012 when the toll-free number was activated, through April 1, 2013, the Class Administrator has received more than 93,000 calls. Hamann Decl., ¶26. Similarly, the dedicated website, which went live on December 7, 2012 has received more than 3.743 million website pages visitors in the past two months. Hamann Decl., ¶¶29, 32. Class Counsel have also responded to hundreds of inquiries from class members. Class Counsel Decl., ¶ 229.

The notice provided to absent class members here was "the best practicable, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Hecht v. United Collection Bureau, Inc.*, 691 F.3d 218, 224 (2d Cir. 2012) (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985)).

F. The Plan of Administration and Distribution Is Fair, Reasonable, and Adequate

This Court should also approve the proposed Plan of Administration and Distribution (Appendix I to the Settlement Agreement), which is fair, reasonable, and adequate. *In re Air Cargo Shipping Services Antitrust Litig.*, No. 06-MD-1775 (JG) (WP), 2011 WL 2909162, at *5 (E.D.N.Y.

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July 15, 2011) ("'[a]s a general rule, the adequacy of an allocation plan turns on . . . whether the proposed apportionment is fair and reasonable' under the particular circumstances of the case.") (quoting *PaineWebber*, 171 F.R.D. at 133, *aff'd*, 117 F.3d 721 (2d Cir. 1997)). "An allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel." *Id.*; *Visa Check*, 297 F. Supp. 2d at 518-19 (same).

Under the proposed Plan, the Class Administrator will distribute the $6.05 billion Cash Fund to Authorized Cash Claimants, on a pro rata basis, depending on the amount of actual or estimated interchange fees they paid during the class period. Payments to Authorized Interchange Claimants from the estimated $1.2 billion Default Interchange Payments fund will be made pro rata, and will be based on one-tenth of one percent of the Claimant's Visa and MasterCard credit card sales during the eight- month period as compared to total of all claim values for that fund. The Plan is intended to simplify the claim-filing process as much as possible, and so relies, to the extent possible, on data provided by Defendants and third parties. It also provides specific mechanisms for Claimants to contest the accuracy of estimates provided by the Class Administrator. *Id.*

VIII. Conclusion

For the foregoing reasons, Class Plaintiffs, on their own behalf and on behalf of the Rule 23(b)(2) and (b)(3) and classes, request that the Court grant final approval of the Settlement and the Plan of Administration and Distribution.

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Respectfully submitted,

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