UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION	**Case No. 05-MD-01720 (JG) (JO)**
This Document Applies to: All Actions.	**ORAL ARGUMENT REQUESTED**

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF FINAL APPROVAL OF DEFINITIVE CLASS SETTLEMENT AGREEMENT

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PRELIMINARY STATEMENT

Defendants submit this reply memorandum in further support of final approval of the Definitive Class Settlement Agreement and to respond to certain objections raised in opposition to final approval.

The settlement has been subject to an unprecedented — and in many respects misleading — lobbying effort designed to foster opposition. That orchestrated effort has generated a large number of objections and opt out requests, many lodged by members of the plaintiff trade associations who, after having fully participated in the negotiation of the settlement, decided to object to it. But the objectors represent only about 0.1% of the approximately eight million merchants who received notice of the settlement, and whether that percentage is viewed as "high" or "low" is not the issue. The number of objections does not inform the Court about the fairness of the settlement. *See, e.g.*, *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 23 (2d Cir. 1987) ("it is well established that a settlement can be fair notwithstanding a large number of objectors"); *TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456, 462 (2d Cir. 1982) (approving settlement despite objections of approximately 56% of the class); *see also Hayes v. Harmony Gold Mining Co. Ltd.*, 509 Fed. App'x 21, 23 (2d Cir. 2013) (objection by named class representative does not prevent approval of the settlement). What matters is substance. When assessed on a substantive level, the objections of the trade association plaintiffs and the other objectors should be rejected, for four reasons in particular.

First, the objectors ignore the serious weaknesses in class plaintiffs' claims. The evidence shows that the challenged Visa and MasterCard network rules were pro-competitive, that there was no conspiracy among banks and Visa or MasterCard to impose those rules, and that there were legal bars to plaintiffs' claims. When measured against the tremendous risks that plaintiffs faced in trying to prove their claims, and the unlikelihood that plaintiffs could or would

obtain greater relief than the settlement provides, the settlement — which provides the largest antitrust settlement payment in history and permits merchants to impose surcharges on Visa and MasterCard credit card purchases — is fair, reasonable, and adequate.

Second, the objectors' arguments against certification of the Rule 23(b)(2) Settlement Class have no merit. That Class does not seek damages; it seeks only injunctive relief. That Class also is sufficiently cohesive because the Visa and MasterCard network rules modifications provided in the settlement equally apply to each member of the Class. For that reason, there is no basis for permitting opt outs from that Class or excluding from that Class future Class members, to whom the rules modifications also equally will apply. Indeed, doing so would render the settlement illusory and effectively allow unceasing, renewed attacks on the very system-wide issues which the settlement is designed to put to rest.

Third, contrary to the objectors' assertions, the releases provided by the Rule 23(b)(2) and 23(b)(3) Settlement Classes are proper and reasonable, especially given the breadth of plaintiffs' claims. As is customary and would be anticipated, the releases extend to all claims that were or could have been alleged, which is consistent with the "identical factual predicate" doctrine. The releases properly include a release of all liability — for both injunctive relief and damages — based on defendants' continued adherence in the future to those Visa and MasterCard network rules that were or could have been alleged and that remain in substantially similar form as they existed at the time of preliminary approval of the settlement (including the rules modifications required by the settlement). Contrary to the objectors' claims, the releases do not extend to "new" future conduct; going forward, the releases apply only to the continued adherence to existing or substantially similar rules. Nor do the releases extend to possible claims of payment network competitors as competitors, to claims of ATM owners as ATM owners, or to claims of state attorneys general asserted to vindicate a sovereign or quasi-sovereign interest.

Finally, there is no legal or factual basis for Discover's objection that the settlement's modification of the Visa and MasterCard "no surcharge" rules violates Section 1 of the Sherman Act. The "level playing field" provisions to which Discover objects are "most favored nations" provisions of the sort that courts have upheld, and Discover's complaints about those provisions derive from problems with its own rules and pricing, and not anything in the settlement.

ARGUMENT

I. THE OBJECTORS IMPROPERLY IGNORE THE WEAKNESSES IN CLASS PLAINTIFFS' CASE, WHICH MAKE THE RELIEF PROVIDED IN THE SETTLEMENT FAIR, REASONABLE, AND ADEQUATE

Settlements by their nature are a compromise among the parties, in return for which each party achieves some of what it desires, but fails to achieve what it otherwise might attain through successful litigation. Accordingly, "[c]ourts judge the fairness of a proposed compromise by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement." *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981) (citation omitted); *see also, e.g.*, *Blessing v. Sirius XM Radio Inc.*, 507 Fed. App'x 1, 3-4 (2d Cir. 2012) (affirming class settlement as fair in light of the fact that "were the case to go to trial, plaintiffs' likelihood of success was slim"). When assessed under this well-settled standard, the settlement here is fair, reasonable, and adequate.

Some of the objectors assert that the money to be paid to members of the Rule 23(b)(3) Settlement Class — the largest antitrust settlement in history — is inadequate. The objectors also assert that the Visa and MasterCard rules modifications provided to members of the Rule 23(b)(2) Settlement Class do not alter default interchange rules, and are otherwise insufficient and of little value. Those complaints fail to account for the weaknesses in class plaintiffs' case

that make the settlement a fair compromise. Accordingly, they provide no basis to deny final approval of the class settlement.

As demonstrated below, the evidence presented an exceedingly strong case that default interchange rules are necessary for the Visa and MasterCard payment card networks to operate at all, which is why such rules have been held to be pro-competitive. Rules like the network "no surcharge" and "honor all cards" rules — which ensure an easy, costless, and universally accepted credit card experience for consumers — similarly have been held to be pro-competitive. Moreover, plaintiffs would have been unable to establish that any of those rules was the result of an antitrust conspiracy among banks with Visa or MasterCard, or is not subject to other legal bars to recovery, such as the *Illinois Brick* doctrine and the release of claims in prior merchant litigation against Visa and MasterCard. Thus, there is a significant risk — and defendants submit a strong likelihood — that plaintiffs would not have prevailed on their antitrust challenge to any of those rules, or, even if plaintiffs had prevailed, that they would have obtained lesser damages or rules modifications than the settlement provides. Given those risks, the consideration provided in the settlement is more than fair, reasonable, and adequate.

A. Plaintiffs Are Not Entitled to Modification of the Visa and MasterCard Network Default Interchange Rules

Various objectors complain that the settlement provides no future, direct relief with respect to the Visa and MasterCard network default interchange rules. *See, e.g.*, Objecting Pls.' Mem. [Docket #2670] at 47-48; NRF Objections [Docket #2538] at 11-13. But the objectors ignore the fact that plaintiffs are not entitled to *any* relief with respect to those rules. That is true not only because default interchange rules have never been unreasonable restraints of trade, as discussed below; it is especially so given that Visa and MasterCard each have undergone IPOs

and in choosing to utilize default interchange rules are indisputably independent actors not controlled by banks. *See* Section I.C below.

As defendants established in their opening memorandum, the evidence shows that the default interchange rules do not unreasonably restrain trade, as courts already have held. *See* Defs.' Mem. [Docket #2110] at 5-8. In *National Bancard Corp. (NaBanco) v. Visa U.S.A., Inc.*, 596 F. Supp. 1231 (S.D. Fla. 1984), *aff'd*, 779 F.2d 592 (11th Cir. 1986), *cert. denied*, 479 U.S. 923 (1986), the district court recognized that, in a four-party network like Visa, some before-the-fact rules must be established concerning the financial rights and obligations of issuing banks and acquiring banks with respect to the transaction data and funds that they must interchange. *See* 596 F. Supp. at 1254. Without pre-defined default interchange rules, bank issuers and acquirers would potentially have to negotiate thousands of bilateral agreements; otherwise, a cardholder could not be assured of universal acceptance by merchants everywhere, and a merchant could not be assured of access to each cardholder. *See id.* at 1259-60. The court thus concluded that Visa's establishment of default interchange rules was "the most, if not the only, realistic alternative." *Id*. at 1261. Pre-determined network default interchange rules were "of vital import to the day-to-day functioning of the system," because they eliminate "the costly uncertainty and prohibitive time and expense of 'price negotiations at the time of the exchange' between thousands of [network] members," and "guarantee[ ] the universal acceptability that is at the heart of the competitive success of the product." *Id.* at 1259-60.

The Eleventh Circuit affirmed the district court's decision. It held that "[f]or a payment system like VISA to function, rules must govern the interchange of the cardholder's receivable," and the default interchange rule "represents one such rule establishing a 'necessary' term, without which the system would not function." 779 F.2d at 602. The Eleventh Circuit explained that "universality of acceptance — the key element to a national payment system — could not be

guaranteed absent prearranged interchange rules." *Id.*; *see also In re ATM Fee Antitrust Litig.*, 554 F. Supp. 2d 1003, 1016 (N.D. Cal. 2008) (concluding that "[a]s in *NaBANCO*, there are too many potential entities involved in the transaction that all efficiencies would be lost if the cardholder's bank and the ATM owner were required to engage in bilateral negotiations every time a cardholder attempted to get money from a foreign ATM").

The objecting plaintiffs assert that despite the *NaBanco* decisions, default interchange rules are no longer necessary because Visa and MasterCard no longer need default interchange to encourage issuing banks to issue payment cards. *See* Objecting Pls.' Mem. [Docket #2670] at 55-56. But that ignores the underlying rationale of the *NaBanco* decisions and the operating requirements of a four-party payment card network like Visa or MasterCard. Default interchange rules remain just as vital today because of the impracticalities of relying exclusively on bilateral arrangements among thousands of participating banks.

Furthermore, the Visa and MasterCard network default interchange rules do not restrain trade — an essential element of a Sherman Act Section 1 claim — because they allow bilateral negotiations between bank acquirers and issuers to establish non-default interchange rates. *See* Defs.' Stmt. Of Material Facts [Docket #1555] ¶¶ 58-63. The default interchange rules on their face thus do not prohibit any independent competitive behavior. The Second Circuit has made clear, as a matter of law, that an alleged agreement that does not prohibit its parties from engaging in uninhibited competitive behavior regarding the subject of the agreement is not an agreement in restraint of trade within the meaning of Section 1. *See* Defs.' Mem. in Support of Mot. For Summ. J. [Docket #1495-1] at 30-39 (discussing *Buffalo Broad. Co. v. ASCAP*, 744 F.2d 917 (2d Cir. 1984), *Columbia Broad. Sys. v. ASCAP*, 620 F.2d 930 (2d Cir. 1980), and *Paycom Billing Servs., Inc. v. MasterCard Int'l, Inc.*, 467 F.3d 283 (2d Cir. 2006)).

In *Paycom*, for example, the Second Circuit concluded that an agreement among bank members of MasterCard to a default chargeback rule that permitted, but did not require, issuers to issue chargebacks and acquiring banks to pass those chargebacks on to merchants, does not constitute an agreement in restraint of trade. *See* 467 F.3d at 292-93. The Second Circuit reasoned that nothing in the "MasterCard rules or an agreement among acquiring banks have prevented [the merchant] from negotiating with acquiring banks to create an individualized solution to [the merchant's] costs of fraud." *Id.* at 292; *see also NaBanco*, 779 F.2d at 600 & n.13 (Visa-established interchange fees did not violate the Sherman Act when individual acquirers and issuers were free to bypass Visa's rules and negotiate their own fees).

Accordingly, plaintiffs' antitrust challenge to the Visa and MasterCard default interchange rules lacks merit as a matter of law. The objectors' complaints about those rules simply reflect a desire for the competitively set default interchange rates to be lower. Like the plaintiff in *NaBanco*, the objectors seemingly want a court order establishing an artificial ceiling on, or fixing, the level of interchange rates. But court-imposed rate regulation would be inconsistent with the antitrust laws. *See* Defs.' Mem. in Opp'n to Summ J. [Docket #1494-2] at 27-28, 44-45. As one court found, a claim that network interchange fees should be "abolished" is "the same thing as 'set at zero,'" and is "not an antitrust argument at all, for it amounts to a dispute over prices and competition law is not concerned with the setting of a proper price." *Brennan v. Concord EFS, Inc.*, 369 F. Supp. 2d 1127, 1131-32 (N.D. Cal. 2005). In short, regulation of default interchange rates is not relief that plaintiffs could obtain in this case.[1]

[1] *See, e.g., United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927) (the lawfulness of a price setting agreement must be judged "in the light of its effect on competition," not by judicial assessments of the reasonableness of price levels); *Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1340 (7th Cir. 1986) (courts should not become "little versions of the Office of Price Administration"); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 294 (2d Cir. 1979) ("judicial oversight of pricing policies would place the courts in a role akin to that of a public regulatory commission" and courts

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B. Plaintiffs Are Not Entitled to Further Modifications of the Visa and MasterCard Network Card Acceptance Rules

Various objectors also assert that the settlement's modification of Visa and MasterCard network card acceptance rules, including modifications of the "no surcharge" and other rules, is inadequate. *See, e.g.*, Objecting Pls.' Mem. [Docket #2670] at 48-54; NRF Objections [Docket #2538] at 15-25; RILA Objection [Docket #2469] at 3-5. Visa and MasterCard agreed to modify their "no surcharge" and other rules to settle this case, even though defendants continue to believe that plaintiffs were unlikely to be able to prove that those rules were anticompetitive in violation of the antitrust laws. Similarly, defendants remain of the view that plaintiffs would not have succeeded in their challenge to the Visa and MasterCard network "honor all cards" rules. The objectors make no showing to the contrary.

The evidence shows that the "no surcharge" rules protected the integrity of each network's brand, prevented merchant free-riding, and benefitted consumers. *See* Defs.' Mem. [Docket #2110] at 8-9. Moreover, courts have rejected antitrust challenges to bans on surcharging as a matter of law. For example, in *Kartell v. Blue Shield of Massachusetts, Inc.*, 749 F.2d 922 (1st Cir. 1984), the First Circuit rejected an antitrust challenge to agreements that Blue Shield negotiated to make payments directly to doctors for medical services provided to insured consumers, in which Blue Shield banned participating doctors from surcharging those consumers. *Id.* at 923-26. The First Circuit concluded that such surcharging bans "do not . . . show an unreasonable restraint of trade." *Id.* at 924; *see also, e.g., Tennessean Truckstop, Inc. v.*

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"would be wise to decline that function unless Congress clearly bestows it"); *Yankees Entm't & Sports Network, LLC v. Cablevision Sys. Corp.*, 224 F. Supp. 2d 657, 674-75 (S.D.N.Y. 2002) (asking a court to determine if a price is "reasonable" amounts to "nothing less than price regulation of the kind undertaken by regulatory agencies — something for which both the federal courts and the antitrust litigation process are extremely ill-suited and which is, in any event, inconsistent with antitrust's fundamental 'market' orientation") (quoting IIIB P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 771b, at 172 (3d ed. 2008)).

NTS, Inc., 875 F.2d 86, 90 (6th Cir. 1989) (affirming dismissal of challenge to defendant's ban on truckstops' charging its credit cardholders more than 105% of the prices paid by cash customers because the "surcharge cap is obviously a proconsumer device"); *SouthTrust Corp. v. Plus Sys., Inc.*, 913 F. Supp. 1517, 1522 (N.D. Ala. 1995) (granting summary judgment for ATM network that banned member banks from surcharging ATM transactions of consumers who did not use the bank's ATM card, because the "no surcharge" rule "enhances consumer welfare by limiting prices consumers will pay").

The objectors do not dispute those facts or case law, and they have presented no contrary authority. In fact, the objectors recognize that the Visa and MasterCard "no surcharge" rules were favored by consumers. As objectors acknowledge, merchants fear that surcharging "will antagonize their customers" and "risk customer backlash and the attendant lost sales." Objecting Pls.' Mem. [Docket #2670] at 49; NRF Objections [Docket #2538] at 16. Moreover, while the objectors focus on the reputational risk they would face by surcharging, the brand image of Visa and MasterCard (and the issuers of those card brands) also would be damaged by surcharging. And surcharging would increase the average time that a customer spends at the checkout counter, while the customer and the sales clerk determine which of the customer's credit cards is subject to surcharging. *See, e.g.*, Wal-Mart Objection [Docket #2644] at ¶¶ 30-31. Indeed, objectors acknowledge that at least eleven states have made the legislative judgment that surcharging harms consumers, and therefore have statutorily prohibited merchants from imposing a surcharge on credit card transactions. *See, e.g.*, Objecting Pls.' Mem. [Docket #2670] at 48-49; NRF Objections [Docket #2538] at 16-17. Those legislative actions, like the judicial decisions upholding "no surcharge" bans, make it unlikely that plaintiffs could prevail on their claims that the Visa and MasterCard "no surcharge" rules were anticompetitive and harmful to consumers.

Nor is it likely that plaintiffs could prevail on their claims concerning the Visa and MasterCard network "honor all cards" rules. The objectors do not dispute the evidence that shows those rules are necessary to create a competing card product that the thousands of card-issuing banks could not offer individually, and benefit consumers by assuring them that the network's cards will be accepted by a merchant, regardless of which bank issued the card or what features the card offers. *See* Defs.' Mem. [Docket #2110] at 10-11.

Moreover, the objectors would find it exceedingly difficult to establish that the "honor all cards" rules prevent them from refusing to accept Visa or MasterCard cards that may carry higher fees. Objectors say that merchants "need" to accept American Express cards, which generally carry higher fees to merchants than Visa or MasterCard cards. NRF Objections [Docket #2538] at 19. Thus, merchants logically also would "need" to accept Visa and MasterCard rewards credit cards — the credit cards that may carry higher merchant discount fees — or face the displeasure of customers who would threaten to shop elsewhere. And any merchant that would not add a small surcharge to a rewards payment card due to possible adverse customer reaction is not likely to want to decline to accept that card altogether.

In the end, the objectors appreciate that their customers want an easy, costless, and universally accepted credit card experience at the point of sale that does not discriminate against them for their payment card preference. Given the serious weaknesses in plaintiffs' antitrust challenge to the Visa and MasterCard payment card acceptance rules, the rules modifications to which Visa and MasterCard have committed in the settlement are fair, reasonable, and adequate.

C. Plaintiffs Could Not Show That Visa and MasterCard Network Rules Were or Are Imposed by an Antitrust Conspiracy with Banks

The objectors also point to no evidence that could establish a conspiracy among banks and Visa, or banks and MasterCard, to impose any Visa or MasterCard network rules in violation

of Sherman Act Section 1. Visa and MasterCard never were, and are not now, "structural" conspiracies with banks. *See* Defs. Mem. [Docket #2110] at 11-14. That is underscored by the banks' divestiture of their voting interests in MasterCard as part of its IPO in 2006, and in Visa as part of its IPO in 2008. Since the IPOs, each network has been a public company with an independent board of directors responsible to public shareholders. *See id.* at 12-13. As this Court held when it dismissed plaintiffs' supplemental complaint challenging the MasterCard IPO, "plaintiffs' allegations, and the reasonable inferences they create, actually demonstrate that [following MasterCard's IPO] the Banks do not retain sufficient control to allow them, for example, to continue to impose supracompetitive interchange fees." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-md-1720, 2008 WL 5082872, at *10 (E.D.N.Y. Nov. 25, 2008). Thus, plaintiffs could not "plausibly allege that MasterCard will continue to impose supracompetitive interchange fees following its IPO, because its board would not be controlled by the Banks. Rather, a majority of the board would consist of independent directors who would theoretically oppose any efforts to enrich the Banks at MasterCard's expense." *Id*.

Objectors argue that before the IPOs, the Second Circuit found Visa and MasterCard to be "'consortiums of competitors . . . owned and effectively operated by some 20,000 banks,'" which the objectors say "supports condemning interchange as horizontal price-fixing." Objecting Pls.' Mem. [Docket #2670] at 56 (quoting *United States v. Visa U.S.A. Inc.*, 344 F.3d 229, 242 (2d Cir. 2003), *aff'g*, 163 F. Supp. 2d 322 (S.D.N.Y. 2001)). But the Second Circuit based that statement on its observation that Visa and MasterCard were "owned and effectively operated by . . . banks, which compete with one another in the issuance of payment cards." 344 F.3d at 242. Because the Visa and MasterCard IPOs thereafter eliminated that bank ownership

structure, no post-IPO agreement among the banks could be inferred from the Second Circuit's "consortium of competitors" language.

Nor does that language establish a pre-IPO conspiracy among banks and Visa or MasterCard regarding interchange. The Second Circuit made the "consortium of competitors" statement only in connection with former card-issuer exclusivity rules of Visa and MasterCard, which prevented banks that issued Visa or MasterCard payment cards from also "issuing cards of Amex or Discover." 344 F.3d at 242. Significantly, the Department of Justice in that case also had challenged different Visa and MasterCard network "governance duality" rules, but the district court rejected the claim that "dual governance is the result of separate conspiracies between each association and its members" — a decision that the Department of Justice did not appeal. *United States*, 163 F. Supp. 2d at 347; *see* 344 F.3d at 234 & n.1.

Objectors also argue that even after their respective IPOs, Visa and MasterCard "continue to serve as the vehicles for price coordination among competitors and, as such, remain subject to Section 1 of the Sherman Act under *American Needle, Inc. v. National Football League*, 130 S. Ct. 2201 (2010)." Objecting Pls.' Mem. [Docket #2670] at 57. In *American Needle*, the Supreme Court held that an agreement by NFL teams to license their independently owned team trademarks through the NFL on common and exclusive terms could fall within Sherman Act Section 1 because the teams' agreement "depriv[es] the marketplace of independent centers of decisionmaking, and therefore of actual or potential competition." 130 S. Ct. at 2213 (internal quotation omitted). But whereas in *American Needle* each NFL team independently owned the licensing right to its own team logo that it ceded to the NFL — an unincorporated association of teams — plaintiffs here do not and cannot claim that each bank ever had the independent authority to establish Visa or MasterCard network interchange or other rules, which the bank could have ceded to Visa or MasterCard. Thus, plaintiffs could not prove a conspiracy to

restrain trade under *American Needle*. *See Nat'l ATM Council, Inc. v. Visa Inc.*, No. 1:11-cv-01803, 2013 WL 525463, at *19-20 (D.D.C. Feb. 13, 2013) (finding "*American Needle* is inapposite" with respect to Visa and MasterCard ATM network rules).

In short, plaintiffs could not prove that the Visa and MasterCard network rules, including the default interchange rules and the "no surcharge," "honor all cards," and other card acceptance rules, are the product of a conspiracy to restrain trade. For this reason, plaintiffs were unlikely to recover any damages or injunctive relief with respect to those rules, which shows that the terms of the settlement are fair, reasonable, and adequate.

D. Plaintiffs Faced Significant Additional Bars to Obtaining Relief

The weaknesses in plaintiffs' claims also arise from the significant risk that plaintiffs could not overcome additional and independent bars to their claims. In the context of that risk, the terms of the settlement are underscored as being fair, reasonable, and adequate.

1. Plaintiffs Were Unlikely to Obtain Any Damages Due to the *Illinois Brick* Doctrine

Defendants demonstrated in their summary judgment papers that *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), bars plaintiffs from recovering *any* of the damages they seek based on interchange fees, because merchants do not pay interchange fees, but instead pay merchant discount fees to bank acquirers. *See* Defs' Stmt. of Material Facts [Docket #1555] ¶¶ 37-57; Defs.' Mem. in Support of Mot. for Summ. J. [Docket #1495-1] at 15-30. Each of the hundreds of bank acquirers is free to set its merchant discount fees to its merchant customers on the basis of its own profit goals and cost demands, and merchant discount fees accordingly are negotiated between each merchant and its acquirer. *See* Defs' Stmt. of Material Facts [Docket #1555] ¶ 43. No Visa or MasterCard rule requires bank acquirers to "pass on" interchange fees to merchants. *See id.* ¶ 47. Indeed, while agreements between merchants and bank acquirers often permit

acquirers to increase the merchant discount fee in response to an increase in interchange fees, the evidence establishes that acquirers do not uniformly do so. *See id.* ¶¶ 47-57.

Despite their conclusory arguments to the contrary (*see* Objecting Pls.' Mem. [Docket #2670] at 60), the objectors cannot dispute that merchants do not contract directly with bank issuers or with Visa or MasterCard to accept payment cards; merchants contract with bank acquirers.[2] As these same merchants alleged in the *In re Visa Check* case, merchants pay merchant discount fees to their bank acquirers, and the *acquirers* pay interchange fees to card-issuing banks. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d at 102 (defining the "interchange fee" as a "fee the acquiring institution must pay to the card-issuing institution"); *In re Visa Check/Master Money Antitrust Litig.*, 192 F.R.D. 68, 72 (E.D.N.Y. 2000) (the "interchange fee" is "the fee that the acquiring institution pays the card-issuing institution every time it processes a payment by one of the card-issuing institution's cardholders at one of the acquiring institution's retailers"), *aff'd*, 280 F.3d 124 (2d Cir. 2001), *cert. denied*, 536 U.S. 917 (2002).

Because merchants do not pay interchange directly, *Illinois Brick* bars merchants from making any claim based on alleged interchange rate overcharges. That Supreme Court decision prohibits antitrust damages claims by indirect payers of an alleged overcharge, even where the plaintiff claims that the overcharge was passed on to it in the form of higher intermediate prices. *See Illinois Brick*, 431 U.S. at 728. And courts specifically have enforced *Illinois Brick* to bar antitrust damages claims in the payment card and ATM businesses. For example, in *Paycom*, the

[2] The objecting plaintiffs' proffered expert recognizes this. *See* 05/04/2009 Brief of Evidence of J. Hausman, in the High Court of New Zealand, Auckland Registry, CIV-2006-485-2636 and CIV-2006-485-2693, ¶ 7.7 (surcharging would "lower merchant costs since merchant acquirers compete to keep their [discount rates to merchants] low . . . and this business strategy would in turn place competitive pressure on issuers to keep any interchange fees low [to merchant acquirers]").

Second Circuit concluded that *Illinois Brick* barred the merchant plaintiff from pursuing its damages claim because Paycom "alleges that the chargebacks and chargeback fines and penalties are imposed by issuing banks and MasterCard on acquiring banks," and "Paycom is, therefore, in a position analogous to the indirect purchasers in *Illinois Brick*." *Paycom*, 467 F.3d at 291-92; *see also In re ATM Fee Antitrust Litig.*, 686 F.3d 741, 750 (9th Cir. 2012) (affirming dismissal of ATM cardholders' antitrust claims under *Illinois Brick* because "they do not directly pay the fixed interchange fee"); *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1050 (9th Cir. 2008) (affirming dismissal of merchants' damages claims for price-fixing of interchange fees as barred by *Illinois Brick* because the merchants did not allege that defendants had fixed the "merchant discount fee the acquiring bank chooses to charge, or not to charge, the merchant").

1. Plaintiffs Were Unlikely to Obtain Any Relief Due to the Prior Release of Their Claims

In addition, this Court already has held that claims in this case fall within the scope of the class settlement and releases in the *In re Visa Check/MasterMoney Antitrust Litigation*, 297 F. Supp. 2d 503 (E.D.N.Y. 2003), *aff'd sub nom. Wal-Mart Stores v. Visa U.S.A., Inc.*, 396 F.3d 96 (2d Cir. 2005), *cert. denied*, 544 U.S. 1044 (2005). The Court explained that the plaintiffs here:

> seek damages for harms they allegedly suffered due to concerted activity among the defendants that violated federal antitrust law. They complain about the agreements into which the defendants entered, the exclusionary rules they implemented, and the supracompetitive interchange fees they charged. The factual allegations on which those complaints are predicated plainly relate to the factual predicate of the [*In re 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.

In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., No. 05-md-1720, 2008 WL 115104, at *11 (E.D.N.Y. Jan. 8, 2008) (citations omitted). For that reason, this Court held that plaintiffs here were barred from pursuing "all claims arising out of conduct occurring before

January 1, 2004 [the operative date of the *In re Visa Check* releases] related to the claims at issue in the [*In re Visa Check*] litigation." *Id.*

Significantly, all of plaintiffs' claims in this case, with the exception of their challenge to the networks' IPOs, arise out of defendants' continued adherence to rules that (a) existed before January 1, 2004, (b) relate to the claims at issue in the *In re Visa Check* litigation, and (c) were or could have been challenged in that litigation. *See* Defs.' Stmt. of Material Facts [Docket #1555] at ¶¶ 15-36; Defs.' Mem. in Support of Mot. for Summ. J. [Docket #1495-1] at 10-15. As plaintiffs themselves allege, "[f]or more than 40 years America's largest banks have fixed the fees imposed on Merchants for transactions processed over the Visa and MasterCard Networks and have collectively imposed restrictions on Merchants that prevent them from protecting themselves against those fees." Second Cons. Am. Class Action Compl. [Docket #1153] ¶ 1.

Courts repeatedly have concluded that such pre-release conduct continuing post-release is released. As one court concluded: "Because this very antitrust 'claim' 'exist[ed]' at the time of the release, and because the only allegations in the Complaint demonstrate that the [defendant] *continued* its enforcement of pre-existing policies, the Court has little trouble concluding that the Release evidences that the 'parties had in mind a general settlement of all accounts up to that time.'" *Madison Square Garden, L.P. v. Nat'l Hockey League*, No. 07-cv-8455, 2008 WL 4547518, at *6 (S.D.N.Y. Oct. 10, 2008) (emphasis in original) (citing *Willsea v. Theis*, No. 98-cv-6774, 1999 WL 595629, at *12 (S.D.N.Y. Aug. 6, 1999) (characterizing as "nonsense" the argument that a release did not bar a subsequent challenge by the releasing party to post-release continuation of the released conduct)); *see also, e.g., VKK Corp. v. Nat'l Football League*, 244 F.3d 114, 126 (2d Cir. 2001) ("[i]t is not uncommon, we assume, for a release to prevent the releasor from bringing suit against the releasee for engaging in a conspiracy that is later alleged

to have continued after the release's execution"); Defs.' Mem. in Support of Mot. for Summ. J. [Docket #1495-1] at 13-14 (discussing additional cases).[3]

Accordingly, plaintiffs faced a significant risk that the releases from the *In re Visa Check* settlements would bar their antitrust challenges to the Visa and MasterCard network default interchange and payment card acceptance rules. To permit plaintiffs to pursue their claims here would improperly allow them to retain the benefits of their prior settlements yet seek in subsequent litigation what they were unable to obtain at the negotiating table. *See, e.g.*, *Crivera v. City of N.Y.*, No. 03-cv-447, 2004 WL 339650, at *4 (E.D.N.Y. Feb. 23, 2004) (Gleeson, J.) ("[o]nce an individual executes a valid settlement agreement, he cannot subsequently seek both the benefit of the agreement and the opportunity to pursue the claim he agreed to settle") (citation and internal quotation omitted).

II. THE OBJECTORS FAIL TO SHOW THAT THE RULE 23(b)(2) SETTLEMENT CLASS IS IMPROPER

The objectors claim that the Rule 23(b)(2) Settlement Class is improper and should not be certified, for four principal reasons. They argue that: (a) the Class seeks damages; (b) the Class is not sufficiently cohesive; (c) no opt outs are permitted from the Class; and (d) "future" members should be excluded from the Class. None of those objections has any merit.

A. The Rule 23(b)(2) Settlement Class Does Not Seek Damages

The Target objectors assert that the Rule 23(b)(2) Settlement Class improperly seeks damages that are individualized and that may be sought only by a Rule 23(b)(3) class. *See* Target Mem. [Docket #2495-1] at 9-16. In fact, the Rule 23(b)(2) Settlement Class seeks no

[3] The Second Circuit's decision in *Remington Rand Corp. v. Amsterdam-Rotterdam Bank, N.V.*, 68 F.3d 1478 (2d Cir. 1995), which preceded *Madison Square Garden* and *VKK* by several years, is not to the contrary, as the objecting plaintiffs suggest. *See* Objecting Pls.' Mem. [Docket #2670] at 59-60. There, the Second Circuit did not reject application of a release to prior conduct continuing post-release, but remanded for the district court to determine "whether, after their release, the Banks committed any wrongful acts upon which liability could be based." 68 F.3d at 1485.

damages or other monetary relief. The settlement agreement explicitly provides that "[m]embers of the Rule 23(b)(2) Settlement Class shall receive no monetary payments but shall receive" only the specified Visa and MasterCard network rules modifications. Definitive Class Settlement Agreement [Docket #1656-1] ¶ 39; *see also id.* ¶¶ 40-65 (rules modifications).

The Target objectors nonetheless argue that the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), "instructs" that when a class action as a whole "seeks monetary relief that is other than 'incidental' to injunctive relief, it should be certified only pursuant to Rule 23(b)(3)." Target Mem. [Docket #2495-1] at 10. But *Dukes* "instructs" no such thing. *Dukes* addressed certification of a class *exclusively* under Rule 23(b)(2). *Dukes* did not address certification where, as in this case, a Rule 23(b)(3) class is *separately* certified to address claims for past damages. *See Dukes*, 131 S. Ct. at 2557. As defendants' opening memorandum demonstrated, both before and after *Dukes*, courts in the Second Circuit have certified a Rule 23(b)(2) class for prospective injunctive relief claims while separately certifying a Rule 23(b)(3) class for past damages claims. *See* Defs.' Mem. [Docket #2110] at 18-19 (discussing cases).[4]

The Target objectors also argue that the Visa and MasterCard network rules modifications give monetary relief to the Rule 23(b)(2) Settlement Class. Those objectors assert that the Class members who can now surcharge under the settlement "will be paid *more money* from customers," may receive "'Independent Consideration' . . . to refrain from surcharging," and may receive the benefit of "reduce[d] . . . interchange rates for all retailers." *See* Target Mem. [Docket #2495-1] at 12-13. That argument is frivolous. In virtually every antitrust case in

[4] Nor is the Second Circuit's decision in *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 147 (2d Cir. 2001), *aff'g*, 192 F.R.D. 68 (E.D.N.Y. 2000), to the contrary, as the Target objectors suggest. There, the Second Circuit determined that it "need not consider whether the district court erred by certifying the class under Rule 23(b)(2) in addition to Rule 23(b)(3)." *Id.*

which a Rule 23(b)(2) class is certified, the awarded injunctive relief benefits the members of the class and that benefit has monetary value. But the fact that injunctive relief may have monetary value to the recipient does not change the nature of the relief. It is still injunctive relief. Courts routinely certify such classes under Rule 23(b)(2) because they do not require litigation of individualized damages claims, and fulfill the fundamental requirement of Rule 23(b)(2) that the defendants act "on grounds that apply generally to the class, so that final injunctive relief" as to the defendants' future conduct "is appropriate." *See, e.g.*, *In re Visa Check*, 192 F.R.D. at 89 (certifying Rule 23(b)(2) class where "the requested injunction would save the putative class $63 billion over the next decade"); *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 116 (S.D.N.Y. 2009) (certifying Rule 23(b)(2) settlement class to enjoin defendants from conspiring to impose allegedly inflated "foreign transaction fees" on class members); *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 516 (S.D.N.Y. 1996) (certifying Rule 23(b)(2) class to enjoin defendants from "continu[ing] to inflate [bid and ask stock price] spreads for the benefit of Defendants to the detriment of the Class").

B. The Rule 23(b)(2) Settlement Class Is Cohesive

Various objectors also assert that the Rule 23(b)(2) Settlement Class is not sufficiently "cohesive." They argue that Class members have divergent interests and that the Visa and MasterCard "no surcharge" rules modifications provided in the settlement are of no interest or benefit to Class members that do not want to surcharge, are located in states with statutes that prohibit surcharging, or accept American Express cards for payment. *See*, *e.g.*, Objecting Pls.' Mem. [Docket #2670] at 24-27; Target Mem. [Docket #2495-1] at 7-9; Retailers' and Merchants' Objection [Docket #2281] at 24-27; Home Depot Mem. [Docket #2591] at 19-27. But class plaintiffs maintain that the threat of surcharging, over time, will lead Visa and MasterCard to reduce their respective default interchange rates and other network fees, resulting

in lower merchant discount fees to all Class members, even those that cannot surcharge or do not want to surcharge. *See*, *e.g.*, Class Pls.' Mem. [Docket #2111-1] at 26-29. If class plaintiffs are correct, even non-surcharging merchants would have an interest in the settlement's "no surcharge" rules modifications.

More fundamentally, the objectors misperceive the concept of "cohesiveness." Certification of a settlement class under Rule 23(b)(2) does not require that each class member be equally interested in, or equally benefit from, the injunctive relief sought. Rule 23(b)(2) provides for certification where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive or declaratory relief is appropriate respecting the class as a whole." All class members "need not be aggrieved by or desire to challenge a defendant's conduct in order for some of them to seek relief under Rule 23(b)(2)," since "[w]hat is necessary is that the challenged conduct . . . be premised on a ground that is applicable to the entire class." 7 C. Wright & A. Miller, *Federal Practice and Procedure* § 1775 (3d. ed. 2013) (footnote omitted).

For example, in the prior merchant litigation against Visa and MasterCard, this Court certified a class under Rule 23(b)(2) of "all persons and business entities who have accepted Visa and/or MasterCard credit cards and have therefore been required to accept VisaCheck and/or MasterMoney debit cards" due to the Visa and MasterCard "honor all cards" rules. *In re Visa Check*, 192 F.R.D. at 90. The Court found certification proper because those rules applied generally to each class member, even though "some named plaintiffs . . . testified that they would have continued to accept off-line debit cards at current prices even absent the tie," and thus had no interest in the injunctive relief sought. *Id.* at 82; *see also*, *e.g.*, *In re NASDAQ*, 169 F.R.D. at 516 (certifying Rule 23(b)(2) class of overcharged securities investors even though "Plaintiffs have not alleged that all of the members . . . intend to trade in Class Securities in the future").

The objectors point to language in *Dukes* that states: "Rule 23(b)(2) applies only when a single injunction . . . would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a different injunction . . . ." *Dukes*, 113 S. Ct. at 2557. But here, the Visa and MasterCard network rules modifications will provide relief to each member of the Rule 23(b)(2) Settlement Class, because they equally will apply to each member of the Class. And each Class member could not be entitled to a different injunction regarding the Visa and MasterCard rules, because they are *network* rules that equally apply to all Class members.

C. The Rule 23(b)(2) Settlement Class Is Properly a Non-Opt Out Class

Various objectors further assert that opt out rights should be afforded to members of the Rule 23(b)(2) Settlement Class, and First Data has moved to exclude itself from that Class, on two grounds. Neither ground has any merit, and First Data's motion should be denied. A Rule 23(b)(2) class is a "mandatory" class for which Rule 23 "provides no opportunity for . . . class members to opt out." *Dukes*, 131 S. Ct. at 2558; *see also* Fed. R. Civ. P. 23(c)(2) & 2003 advisory committee note ("[t]here is no right to request exclusion from a . . (b)(2) class"); Defs.' Mem. [Docket #2110] at 19-22.

First, objectors argue that opt out rights should be afforded as a matter of due process because the Rule 23(b)(2) Settlement Class would release future damages claims. *See, e.g.*, Target Mem. [Docket #2495-1] at 16-17; First Data Objections [Docket #2427] at 9-14; First Data Mot. to Opt Out [Docket #2429-2] at 10-15. The cases on which the objectors rely, however, provided opt out rights because the Rule 23(b)(2) class sought not only prospective

injunctive relief but also *past damages*.[5] In contrast, the Rule 23(b)(2) Settlement Class here seeks only injunctive relief; damages are sought by a separate Rule 23(b)(3) Settlement Class for which opt out rights were provided. Moreover, the Rule 23(b)(2) Settlement Class here may properly release all liability — including claims for future damages — based on defendants' continued adherence in the future to conduct existing at the time of the settlement. *See* Section III.C below.

Second, First Data and American Express argue that they individually should be permitted to opt out from the Rule 23(b)(2) Settlement Class, because they are competitors of Visa and MasterCard that accept Visa and MasterCard cards only incidentally in their business operations, and because the release should not cover their claims as competitors. *See* First Data Mot. to Opt Out [Docket #2429-2] at 15-22; American Express Objection [Docket #2648] at 16-25. But neither First Data nor American Express claims to have suffered any unique harm in *accepting* Visa or MasterCard cards that could warrant allowing them to opt out. *See id.* The Visa and MasterCard network rules modifications "apply generally" to First Data and American Express just as they apply to all other Class members. Fed. R. Civ. P. 23(b)(2). And the releases do not extend to claims that First Data or American Express may possess based on injuries as competitors of Visa or MasterCard. *See* Section III.D below.

[5] *See, e.g., McReynolds v. Richards-Cantave*, 588 F.3d 790, 800 (2d Cir. 2009) (quoting *Eubanks v. Billington*, 110 F.3d 87, 94-95 (D.C. Cir. 1997) (court has discretion " to grant opt out rights in . . . (b)(2) class actions . . . where both injunctive and monetary relief are sought")); *Weinberger v. Kendrick*, 698 F.2d 61, 68 (2d Cir. 1982) (providing opt out rights to settlement class of investors who were to receive "some $2.84 million" under the settlement); *Jefferson v. Ingersoll Int'l, Inc.*, 195 F.3d 894, 898 (7th Cir. 1999) ("when monetary relief is incidental to the equitable remedy" a class may be certified exclusively under Rule 23(b)(2) "giving notice and an opportunity to opt out"); *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1152 (11th Cir. 1983) (extending opt out rights to (b)(2) class members "[b]ecause many monetary claims in this case are unique to individual class members").

D. The Rule 23(b)(2) Settlement Class Properly Includes Future Class Members

Finally, some objectors assert that merchants who come into existence after July 2021 should not be included in the Rule 23(b)(2) Settlement Class. Those objectors argue that the interests of such "future" merchant Class members conflict with those of current Class members, because future merchants that come "into existence after July 2021, when Visa's and MasterCard's obligations under the settlement will have expired[,] will be subject to the release of future claims, without having received any benefits under the settlement." Home Depot Objections [Docket #2591] at 21; *see also id.* at 3-4, 22-23; Objecting Pls.' Mem. [Docket #2670] at 38-39.

Under the settlement, however, Rule 23(b)(2) Settlement Class members that come into existence after July 2021 — just like current Class members — will *not* be subject to the release without receiving the benefit of the settlement's rules modifications. If Visa and MasterCard choose to maintain the settlement's rules modifications after July 2021, Class members who begin to accept Visa or MasterCard payment cards after that date — just like current Class members — will receive the continued benefit of the settlement's rules modifications, and will be subject to the release. If instead, Visa or MasterCard adopts new rules after July 2021 that are not substantially similar to the modified rules, or reverts to old rules modified by the settlement, future Class members — just like current Class members — would not receive any further benefit from the settlement's rules modifications. But in that case, those future Class members — just like current Class members — also will not have released claims based on the newly adopted rules. The release includes claims based on the *continuation* of rules substantially similar to those that were or could have been alleged as of the time of the settlement's preliminary approval (and as modified in the settlement); the release does not cover substantially

different rules adopted in the future. *See* Definitive Class Settlement Agreement [Docket #1656-1] ¶ 68(g)-(h).

Moreover, because the settlement rules modifications and release apply in exactly the same way to both current members of the Rule 23(b)(2) Settlement Class and members that come into existence after July 2021, their interests do not conflict. That makes this case unlike the cases on which the objectors rely, in which courts found a Rule 23(b)(1) or (b)(3) class of current and future *claimants* had conflicting interests in *monetary awards* from a fixed settlement fund. *See, e.g.*, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 855-56 (1999) (finding Rule 23(b)(1) class certification deficient as to "the fairness of the distribution of the fund" where class was "divided between holders of present and future claims"); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 (1997) (rejecting Rule 23(b)(3) class in which the goal of "the currently injured . . . is generous immediate payment" whereas "the interests of exposure-only plaintiffs [is] in ensuring an ample, inflation-protected fund for the future").

III. THE OBJECTORS FAIL TO SHOW THAT THE RELEASES PROVIDED BY THE RULE 23(b)(2) OR 23(b)(3) SETTLEMENT CLASSES ARE IMPROPER

The objectors claim that the releases provided by the Rule 23(b)(2) and 23(b)(3) Settlement Classes are overbroad, for four principal reasons. They argue that one or both of those releases improperly: (a) extend beyond the claims at issue in this case; (b) extend to the continuation of Visa and MasterCard network rules in the future; (c) extend to future damages claims based on those continuing rules; and (d) preclude claims that Class members may possess

as payment network competitors and ATM operators, and as State sovereigns. None of those objections has any merit.[6]

A. The Releases Properly Extend to All Claims That Were or Could Have Been Alleged

Defendants' opening memorandum established that the releases provided by the Rule 23(b)(2) and 23(b)(3) Settlement Classes are a standard form of class release of all claims that were or could have been alleged, and are consistent with the "identical factual predicate" doctrine. *See* Defs.' Mem. [Docket #2110] at 26-27. The releases extend to claims "that are alleged or which could have been alleged from the beginning of time to the date of the Court's entry of the Class Settlement Preliminary Approval Order . . . ," including certain specified claims that the parties understood and "expressly agreed . . . are claims that were or could have been alleged in this Action." Definitive Class Settlement Agreement [Docket #1656-1] ¶¶ 33, 68. The objectors do not seriously dispute that such a form of class release is proper.

Various objectors nonetheless assert that the releases are overbroad. They argue that the specified claims that are released include claims based on Visa and MasterCard network rules and fees that could not have been challenged in this case and that were not part of the factual predicate of this case. *See, e.g.*, Objecting Pls.' Mem. [Docket #2670] at 32-36; Target Mem. [Docket #2495-1] at 24; NRF Objection [Docket #2538] at 14-15; Retailers' and Merchants' Objection [Docket #2281] at 20-22. However, those objectors ignore the breadth of plaintiffs' claims concerning Visa and MasterCard network rules and fees.

[6] Other objections to the releases likewise lack merit and are addressed in the Class Plaintiffs' Reply Memorandum of Law in Further Support of Settlement Final Approval. And the objections that the class notice was inadequate are likewise without merit, particularly as they relate to the releases, since the class notice quoted the releases in their entirety. *See* Definitive Class Settlement Agreement [Docket #1656-1] Ex. F2-20 to F2-29; *In re Visa Check*, 297 F. Supp. 2d at 516 (finding "notice of the scope of the releases was adequate" when the class notice "recited the releases, word for word").

The complaint alleges that the defendant banks "owned and effectively operated" Visa and MasterCard, such that they were "structural conspiracies and walking conspiracies" with respect to all their network rules. Second Cons. Am. Class Action Compl. [Docket #1153] ¶ 101; *see also id.* ¶¶ 54-94. Plaintiffs allege that even after the Visa IPO, "New Visa . . . has continued, at the insistence of the Member Banks[,] to enforce unchanged *all* of the rules and restraints of Old Visa." Second Supp. Class Action Compl. [Docket #1154] ¶ 8 (emphasis added); *see also, e.g.*, First Am. Supp. Class Action Compl. [Docket #1542] ¶ 10 (making same allegations as to MasterCard and its member banks).

Plaintiffs further allege that the asserted "structural conspiracies" regarding the Visa and MasterCard network rules "fixed the fees imposed on Merchants for transactions processed over the Visa and MasterCard Networks." Second Cons. Am. Class Action Compl. [Docket #1153] ¶ 1. Those fees allegedly included not only the respective default interchange fees established by Visa and MasterCard, but also merchant discount fees, which allegedly included Visa and MasterCard network fees and assessments charged to acquirers, as well as fees that acquirers or processors charged to merchants. *See, e.g.*, *id.* ¶¶ 8(a)(e)(n)(r), 149, 157.

In these circumstances, broad releases of claims relating to Visa and MasterCard network rules are appropriate. And broad releases of claims relating to interchange fees, Visa and MasterCard network fees, and other fees allegedly included in merchant discount fees, or other fees allegedly imposed on merchants, are likewise proper.

B. The Releases Properly Extend to the Continuation of Visa and MasterCard Network Rules in the Future

Various objectors also assert that the releases provided by the Rule 23(b)(2) and 23(b)(3) Settlement Classes are void as against public policy because they would immunize or waive future antitrust liability. *See, e.g.*, Objecting Pls.' Mem. [Docket #2670] at 28-32; Target Mem.

[Docket #2495-1] at 23; Retailers' and Merchants' Objection [Docket #2281] at 11-17; Home Depot Objections [Docket #2591] at 33-37. But the objectors misperceive the releases' scope.

The releases do not release liability for claims based on "new" conduct in the future. Instead, they release liability for claims based on the continuation of conduct that was or could have been alleged in this case — including the Visa and MasterCard rules that were or could have been alleged as of the time of the settlement's preliminary approval (and as modified in the settlement), and the continued adherence to those rules or substantially similar rules. The cases on which the objectors rely are inapposite because they reject the release of *new* conduct by the defendant *after* the settlement, not the release of *existing* conduct by the defendant that *continues* after the settlement and which the settlement deliberately leaves intact. For example, in *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 328 (1955), the Supreme Court rejected a release of conduct "all subsequent to the . . . judgment" and "which did not even then exist and which could not possibly have been sued upon in the previous case." Other cases on which objectors rely are to the same effect.[7]

[7] *See, e.g.*, *In re Am. Express Fin. Advisors Sec. Litig.*, 672 F.3d 113, 135-39 (2d Cir. 2011) (defendants' allegedly new unsuitable investments "involve[d] conduct occurring after the Class Period" and so "cannot be Released Claims"); *In re Am. Express Merchants' Litig.*, 634 F.3d 187, 197 (2d Cir. 2011) (finding unenforceable arbitration clause that would effectively waive antitrust liability for all future conduct), *adhered to on rehearing*, 667 F.3d 204 (2d Cir. 2012), *rev'd*, 133 S. Ct. 594 (2012); *Three Rivers Motors Co. v. Ford Motor Co.*, 522 F.2d 885, 894-96 & n.27 (3d Cir. 1975) (release barred antitrust claim based on conduct existing at time of settlement, and so did not offend public policy by "seek[ing] to waive damages from future violations of the antitrust laws"); *Redel's Inc. v. Gen. Elec. Co.*, 498 F.2d 95, 99 (5th Cir. 1974) (enforcing release "that the parties did not intend . . . to apply prospectively" to "antitrust actions arising from subsequent violations"); *Fox Midwest Theatres v. Means*, 221 F.2d 173, 176, 180 (8th Cir. 1955) (release could not bar defendants' later conduct that allegedly "breached . . . the settlement as made"); *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666, 676-79 (S.D.N.Y. 2011) (rejecting class settlement because "it would release Google (and others) from liability for certain *future* acts" based on new "forward-looking business arrangements"); *Minn. Mining & Mfg. Co. v. Graham-Field, Inc.*, No. 96-cv-3839, 1997 WL 166497, at *2-3 (S.D.N.Y. Apr. 9, 1997) (release could not bar antitrust claim based on new conduct that "likely . . . took place after" the settlement).

Here, the releases are not contrary to public policy because they do not extend to future claims based on new Visa or MasterCard network rules adopted in the future. Instead, the releases extend to claims arising from the "future effect in the United States of the continued imposition of or adherence to" Visa and MasterCard network rules that are the same as, or substantially similar to, rules in effect when the Court entered the Class Settlement Preliminary Approval Order or rules modified by the settlement. Definitive Class Settlement Agreement [Docket #1656-1] ¶¶ 33(g), 68(g); *see also id.* ¶¶ 33(h), 68(h).

That release is fully supported by the case law. *See* Defs.' Memo. [Docket #2110] at 28-32 (discussing cases). Objectors try to distinguish one case that defendants cite, *Madison Square Garden*, on the ground that its release "barred only claims for subsequent conduct that was based on policies which existed at the time of the release," and was "focused on conduct that occurred primarily in the past." Objecting Pls.' Mem. [Docket #2670] at 31; Home Depot Objections [Docket #2591] at 37. But that argument proves defendants' point. Madison Square Garden alleged that the National Hockey League had continued to enforce, or had reaffirmed, rules and policies that were in existence when, years earlier, Madison Square Garden had executed the release in question. The court held, in language equally applicable here, that "[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, . . . the Court has little trouble concluding that the Release evidences that the 'parties had in mind a general settlement of all accounts up to that time.'" *Madison Square Garden*, 2008 WL 4547518, at *5.

Objectors also hypothesize that even if the current Visa and MasterCard network rules as modified in the settlement are lawful today, at some point in the future those rules might develop some potential anticompetitive effect, based on currently unforeseeable changes in market

conditions, such as in developing payments technologies. *See, e.g.*, Objecting Pls.' Mem. [Docket #2670] at 30-31; Home Depot Objections [Docket #2591] at 27-33. But such risks are entirely speculative and part of the bargain inherent in any antitrust settlement that requires modification of defendants' rules going forward, but deliberately permits, as part of the settlement, other conduct to continue. Plaintiffs cannot agree to a settlement regarding the scope of permissible conduct, including insisting that Visa and MasterCard modify their network rules to implement an agreed new systemic structure, while at the same time reserving the right to challenge again in future litigation the very structure and set of rules to which plaintiffs agreed. That anomalous position would effectively render any settlement of a Rule 23(b)(2) class claim illusory, and of little or no value to defendants.[8]

C. The Rule 23(b)(2) Settlement Class Release Properly Extends to Damages Claims Based on the Continuation of Network Rules in the Future

In a related objection, various objectors assert that the release provided by the Rule 23(b)(2) Settlement Class is improper because it releases future damages claims based on the continuation of the Visa and MasterCard network rules as modified by the settlement. *See, e.g.*, Objecting Pls.' Mem. [Docket #2670] at 21-24; Home Depot Objections [Docket #2591] at 15-19; Retailers' and Merchants' Objection [Docket #2281] at 8-11. But despite their rhetoric, the objectors identify no case law that supports their assertion.

[8] Defendants note that Visa and MasterCard network rules governing payment card acceptance — including their respective "honor all cards" rules — have for years encompassed a wide variety of card, mobile phone, other contactless, and other payment and access devices and technologies. Any suggestion to the contrary is contradicted by the plain language and traditional application of those rules. *See, e.g.*, *Visa Int'l Operating Regulations* at 395, 1181, 1209 (Apr. 15, 2013) http://usa.visa.com/download/merchants/visa-international-operating-regulations-main.pdf; *MasterCard Rules* at 1, 2, 7, 15-33 (June 14, 2013) http://www.mastercard.com/us/merchant/pdf/BM-Entire_Manual_public.pdf. Determination of whether the application of the network rules to payment technologies developed in the future would be removed from the scope of the releases is premature, as it is hypothetical and speculative, and would depend on the character of the rules as applied to the nature of such new technologies, and should properly be addressed only when and if an actual issue arises.

The principal cases on which the objectors rely address when a class may properly be *certified*, not what claims a certified class may properly *release*. For example, in *Dukes*, the Supreme Court did not address the proper scope of a Rule 23 class release, as the objectors suggest, but rather made clear that "[w]e consider whether the certification of the plaintiff class was consistent with Federal Rule of Civil Procedure 23(a) and (b)(2)." *Dukes*, 131 S. Ct. at 2547. Other cases on which the objectors rely likewise did not address the proper scope of a class release. *See, e.g.*, *Ortiz*, 527 U.S. at 821 ("[t]his case turns on the conditions for certifying a mandatory class on a limited fund theory under Federal Rule of Civil Procedure 23(b)(1)(B)"); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 823 (1985) ("[w]e therefore affirm the judgment of the Supreme Court of Kansas insofar as it upheld the jurisdiction of Kansas courts over the plaintiff class members in this case . . .").

Several of the objectors' cases address releases by classes certified *only* under Rule 23(b)(1) or (b)(2), and whether *res judicata* should bar class members' subsequent claims for *past* damages. *See Brown v. Ticor Title Inc. Co.*, 982 F.2d 386, 392 (9th Cir. 1992) (though Brown was member of a non-opt out Rule 23(b)(1) or (b)(2) class, "*res judicata* will not bar Brown's claims for monetary damages"); *In re Vitamin C Antitrust Litig.*, 279 F.R.D. 90, 114-15 (E.D.N.Y. 2012) (Cogan, J.) (where Rule 23(b)(2) class "seeks injunctive relief on behalf of indirect purchasers but fails to pursue damages," principles of *res judicata* should not bar "the indirect purchasers' damages claims . . . in subsequent suits"). But those cases have no bearing here, since the settlement in this case provides for a separate Rule 23(b)(3) Settlement Class to seek past damages. Moreover, the release expressly provides that members of the Rule 23(b)(2) Settlement Class that opt out of the Rule 23(b)(3) Settlement Class "shall not be deemed to have released any claims for damages based on any Rules or other conduct . . . prior to the date of the

Court's entry of the Class Settlement Preliminary Approval Order." Definitive Class Settlement Agreement [Docket #1656-1] ¶ 68.

The objecting plaintiffs also mischaracterize the decision in *Clarke v. Advanced Private Networks, Inc.*, 173 F.R.D. 521 (D. Nev. 1997). Objecting plaintiffs note that there, the court rejected a settlement that provided only for "structural relief and a (b)(1) class under which 'no class member could opt out,' . . . because '[t]he fact that the parties have negotiated an agreement whereby plaintiffs release their damages claims in exchange for defendants' concessions regarding [structural relief] does not transform the original damages claims into injunctive relief.'" Objecting Pls.' Mem. [Docket #2670] at 22 (quoting *Clarke*, 173 F.R.D. at 522). But objecting plaintiffs fail to disclose that the court emphasized that it "may very well have certified two classes: a 23(b)(3) class for the damages claims (with opt out rights provided) and a no opt-out class for the claims for injunctive relief." *Clarke*, 173 F.R.D. at 522. That is precisely what the parties have agreed to in their settlement in this case, to ensure that class members may seek past damages through a Rule 23(b)(3) Settlement Class for which opt out rights were provided. *See also Molski v. Gleich*, 318 F.3d 937, 950-951 & n.16 (9th Cir. 2003) (due process concern of "certification of a mandatory class that includes treble damages" claims "could have been addressed" if court had "bifurcate[d] the claims and certified the class under Rule 23(b)(2) and (b)(3)").

In contrast to the cases on which the objectors rely, ample authority supports a Rule 23(b)(2) class's release of claims not only for injunctive relief, but also for damages, based on defendants' continued adherence in the future to conduct at the time of the settlement. As defendants demonstrated in their opening memorandum, the Second Circuit has concluded that a Rule 23(b)(2) class may release all claims based on the identical factual predicate as the action, and such claims include damages claims based on defendants' continued adherence in the future

to conduct at the time of settlement. *See* Defs.' Memo. [Docket #2110] at 33 (discussing *TBK Partners*, 675 F.2d at 459-60, and *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 247-48 (2d Cir. 2011)). Thus, courts have concluded that a Rule 23(b)(2) class release may preclude a plaintiff "from seeking monetary damages for injuries incurred after . . . the date on which the settlement agreement was approved." *Scarver v. Litscher*, 371 F. Supp. 2d 986, 997 (W.D. Wis. 2005); *see* Defs.' Memo. [Docket #2110] at 33-34.

Moreover, that result makes sense. No defendant would settle a claim for injunctive relief and leave itself open to damages claims based on the agreed-to modification of its conduct. The Rule 23(b)(2) Settlement Class thus properly releases claims for *all* liability, including damages as well as injunctive relief, that are based on the negotiated continuation of the released Visa and MasterCard network rules as modified.

D. The Releases Do Not Extend to Claims That Certain Objectors Say Should Be Preserved

Finally, certain objectors contend that the releases provided by the Rule 23(b)(2) and 23(b)(3) Settlement Classes improperly bar specific claims that they individually possess as payment network competitors or ATM operators, or as State sovereigns. Those objections lack merit because the releases do not extend to such claims and, in any event, defendants are willing to propose that the Court clarify that point in the Class Settlement Order and Final Judgment.

1. The Releases Do Not Bar Claims Based on Injuries as Payment Network Competitors or ATM Operators

A few objectors that operate payment card networks, and claim to accept Visa and MasterCard cards only incidentally in their businesses, assert that the releases might improperly bar claims that they could possess based on injuries as payment card network competitors of Visa and MasterCard. *See* American Express Objection [Docket #2648] at 16-22; Discover Objections [Docket #2659] at 5-8; First Data Objections [Docket #2427] at 17-20. Similarly,

certain objectors complain that the releases could improperly bar claims they might possess based on injuries as ATM operators. *See* ATMIA Amicus Brief [Docket #1955] at 8-9; Cardtronic Objection [Docket #2428] at 7.

Those objectors do not and cannot dispute, however, that the releases extend only to claims "that are alleged or which could have been alleged" in this action, which was brought on behalf of merchants that accept Visa and MasterCard, not networks that compete with them or ATM operators. Definitive Class Settlement Agreement [Docket #1656-1] ¶¶ 33, 68. Nor can those objectors dispute that the class notice made clear that "[i]n general, the settlement will resolve and release all claims made by persons, businesses, and other entities that *arise from or relate to their capacity as merchants that accept Visa-Branded Cards and/or MasterCard-Branded Cards* in the United States . . . ." Pls.' Letter to Court [Docket #1740] and revised class notice [Docket 1740-2] at page F2-12 (emphasis added). Accordingly, there is no merit to objectors' contentions that the releases would have the effect of barring their claims based on injuries as payment network competitors or as ATM operators.

In any event, to accommodate these objections, defendants are willing to propose that the Court add the following provision to a Class Settlement Order and Final Judgment:

> The Definitive Class Settlement Agreement and this Class Settlement Order and Final Judgment do not bar an action by a payment network to the extent that it asserts an injury as a payment network competitor of the Visa Defendants or MasterCard Defendants, and do not bar an action by an ATM operator to the extent that it asserts an injury as the operator of an ATM.

That provision would clarify the intended scope of the releases, and should adequately address the concerns of the objectors that are payment network competitors or ATM operators.

2. The Release Does Not Bar Claims by States Acting in Their Sovereign Capacity

The state attorneys general objectors contend that because state governmental entities may accept Visa or MasterCard cards for payment, the releases might bar States from pursuing "claims that are uniquely and exclusively claims belonging to the States as sovereigns," specifically "state law enforcement or *parens patriae* claims," including *parens patriae* claims for fines, civil, or other penalties. State Objections [Docket #2623] at 2. The state attorneys general note that the releases extend to all claims, whether individual, class, representative, "'*parens patriae*,'" or otherwise in nature. *Id.* at 5-6 (quoting Definitive Class Settlement Agreement [Docket #1656-1] ¶¶ 33, 68).

But the state attorneys general — like the network competitors addressed above — do not and cannot dispute that the releases extend only to claims "that are alleged or which could have been alleged" in this action. Definitive Class Settlement Agreement [Docket #1656-1] ¶¶ 33, 68. Thus, as stated in the class notice, "[i]n general, the settlement will resolve and release all claims made by persons, businesses, and other entities that *arise from or relate to their capacity as merchants that accept Visa-Branded Cards and/or MasterCard-Branded Cards* in the United States . . . ." Pls.' Letter to Court [Docket #1740] and revised class notice [Docket 1740-2] at page F2-12 (emphasis added). Accordingly, there is no merit to the contention of the state attorneys general that the releases bar claims brought by States to vindicate interests in their sovereign capacity, which the state attorneys general assert the private class plaintiffs lack standing to settle or release. *See* State Objections [Docket #2623] at 7-12, 16-17.

At the same time, the releases would properly bar claims for injuries to States in their proprietary or commercial capacities, in which States or state governmental entities accept Visa or MasterCard cards for payment. In that respect, as members of the Rule 23(b)(3) Settlement

Class, the States would receive monetary compensation under the settlement unless they chose to opt out of that Class. And as members of the Rule 23(b)(2) Settlement Class, the States would receive the Visa and MasterCard rules modifications provided in the settlement, which would "apply generally" to them in accepting Visa and MasterCard cards as well as to the other Class members. Fed. R. Civ. P. 23(b)(2).

In addition, while the releases do not extend to *parens patriae* claims that States assert in their sovereign capacity, the releases would bar claims, regardless of whether denominated as *parens patriae* claims, that States may assert in a representative capacity on behalf of state residents that are members of the Rule 23(b)(3) Settlement Class or the Rules 23(b)(2) Settlement Class. The distinction between these two types of claims is based on the distinction between the common law *parens patriae* doctrine and federal and certain state statutes that authorize States to bring representative claims in a *parens patriae* capacity.

Under the common law *parens patriae* doctrine, "a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer of the personal claims of its citizens." *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976). A State's quasi-sovereign interests are "a judicial construct" that "stand apart from . . . sovereign interests, proprietary interests, or private interests pursued by a state as a nominal party," and "consist of a set of interests that a state has in the well-being of its populace." *Alfred L. Snapp & Son, Inc. v. Barez*, 458 U.S. 592, 601-02 (1982). Thus, under the common law *parens patriae* doctrine, a State may bring a *parens patriae* action on behalf of the State only to recover for injuries to the *State's interest* in the health and well-being of its citizens, and *not* for injuries to interests of state residents. *See Alfred L. Snapp*, 458 U.S. at 607 ("the State must articulate an interest apart from the interests of particular private parties"); *Pennsylvania*, 426

U.S. at 665-66 (Pennsylvania could not bring *parens patriae* action for "nothing more than a collectivity of private suits against New Jersey for taxes withheld from private parties").

In contrast to this common law *parens patriae* doctrine, States may assert *parens patriae* claims in a representative capacity for injuries to the interests of state residents when specifically authorized by a federal or state statute. *See, e.g.*, 15 U.S.C. § 15c; Cal. Bus. & Prof. Code § 16760; 740 Ill. Comp. Stat. 10/7. But in such a statutory *parens patriae* action, the State's claim is derivative of the state resident's claim, and may be barred where the resident's claim is barred. *See, e.g.*, *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 218-19 (1990) (States could not bring statutory *parens patriae* claim for injuries to state residents because their claims were barred by the *Illinois Brick* doctrine); *In re Baldwin-United Corp.*, 770 F.2d 328, 336 (2d Cir. 1985) (plaintiffs' class settlement release "barred the states from bringing state law claims derivative of the plaintiffs' rights"). Here, class plaintiffs have standing to release the claims of the members of the Rule 23(b)(2) and (b)(3) Settlement Classes, which cannot then form the basis for a State *parens patriae* action in a representative capacity on behalf of those Class members.

Thus, the settlement releases in this case properly bar a State *parens patriae* or other action that is derivative of the released claims of the members of the Rule 23(b)(2) or 23(b)(3) Settlement Classes. Indeed, if the releases did not bar those claims, defendants could be faced with duplicative lawsuits filed by States seeking to recover money or other relief for Class members who already have settled their claims in return for the substantial monetary compensation and Visa and MasterCard network rules modifications provided in the settlement. Recognizing the potential for such an unacceptable result, in *In re Baldwin-United Corp*, the Second Circuit affirmed the district court's order enjoining States from "'commencing any action or proceeding of any kind against any defendant . . . on behalf of or derivative of the rights of

any plaintiff or purported class member . . . .'" 770 F.2d at 334. The Second Circuit concluded that otherwise "the finality of virtually any class action involving pendent state claims could be defeated by subsequent suits brought by the states asserting rights derivative of those released by the class members." *Id.* at 336; *see also, e.g.*, *Pennsylvania v. BASF Corp.*, No. 3127, 2001 WL 1807788, at *6-8 (Pa. Com. Pl. Mar. 15, 2001) (Pennsylvania lacked standing to "assert *parens patriae* claims on behalf of Pennsylvania residents who released Defendants for the same conduct alleged in this action").

Defendants have sought to address the concerns of the state attorneys general about this legitimate aspect of the release in the course of discussions over the last several months. To resolve the concerns raised by the state attorneys general in a way consistent with the distinction between a state acting in its sovereign or quasi-sovereign capacity and a state acting in its representative capacity, defendants have proposed to the state attorneys general, and propose to the Court, that the following provision be added to a Class Settlement Order and Final Judgment:

> The Definitive Class Settlement Agreement and this Class Settlement Order and Final Judgment do not bar an investigation or action, whether denominated as *parens patriae*, law enforcement, or regulatory, by a state or local governmental entity to vindicate sovereign or quasi-sovereign interests. The Definitive Class Settlement Agreement and this Class Settlement Order and Final Judgment bar a claim brought by a state or local governmental entity to the extent that such a claim is based on a state or local governmental entity's proprietary interests (a) as a member of the Rule 23(b)(2) Settlement Class, or (b) as a member of the Rule 23(b)(3) Settlement Class that has received or is entitled to receive a financial recovery in this action. The Definitive Class Settlement Agreement and this Class Settlement Order and Final Judgment also bar a claim brought by a state or local governmental entity to the extent that such a claim is brought on behalf of, or is based upon the interests of or injuries sustained by, natural persons, businesses, or other non-state or non-local governmental entities or private parties who themselves (i) are members of the Rule 23(b)(2) Settlement Class or (ii) are members of the Rule 23(b)(3) Settlement Class.

That provision would clarify the intended scope of the releases, and should adequately address the concerns of the state attorneys general.[9]

IV. DISCOVER FAILS TO SHOW THAT THE SETTLEMENT'S "NO SURCHARGE" RULE MODIFICATIONS VIOLATE ANTITRUST LAW

Discover objects to the "level playing field" provisions in the settlement's modifications to the Visa and MasterCard "no surcharge" rules. Those provisions state:

> If a merchant's ability to surcharge any Competitive Credit Card Brand that the merchant accepts in a channel of commerce (either face-to-face or not face-to-face) is limited in any manner by that Competitive Credit Card Brand, other than by prohibiting a surcharge greater than the Competitive Credit Card Brand's Cost of Acceptance, then the merchant may surcharge Visa [or MasterCard] Credit Card Transactions . . . only on either the same conditions on which the merchant would be allowed to surcharge transactions of that Competitive Credit Card Brand in the same channel of commerce, or on the terms on which the merchant actually does surcharge transactions of that Competitive Credit Card Brand in the same channel of commerce . . . .

Definitive Class Settlement Agreement [Docket #1656-1] ¶¶ 42(a)(iv), 55(a)(iv). However, the provisions do not apply to the extent that "the Competitive Credit Card Cost of Acceptance to the merchant is less than the Visa [or MasterCard] Credit Card Cost of Acceptance to the merchant and the Competitive Credit Card Brand does not prohibit or effectively prohibit surcharging Credit Cards . . . ." *Id.* ¶¶ 42(a)(v)(A), 55(a)(v)(A).

As a "Competitive Card Brand," Discover contends that the "level playing field" provisions are anticompetitive and harm Discover by imposing costs and burdens on merchants that may cause merchants to stop accepting Discover cards, rather than determining whether the

[9] Although some state attorneys general have contended that such a clarification must be effected through an amendment to the settlement (*see* State Objections [Docket #2623] at 19), the final approval order and judgment is an appropriate means for the Court to effect a clarification of the settlement agreement. *See, e.g., County of Suffolk v. Stone & Webster Eng'g Corp.*, 106 F.3d 1112, 1117 (2d Cir. 1997) (district court properly granted final approval of class settlement agreement subject to its interpretation — set forth in the final judgment and order — of certain provisions of the agreement).

Discover network rules would permit them to surcharge Visa or MasterCard. *See* Discover Mem. at 2-3, 7.[10] Discover's objection has no merit and should be rejected.

It is well settled that when a class settlement agreement is claimed to restrain trade, a court may finally approve the settlement unless "the alleged illegality of the settlement agreement is . . . a legal certainty." *Robertson v. Nat'l Basketball Ass'n*, 556 F.2d 682, 686 (2d Cir. 1977) (internal quotation omitted); *see also, e.g., Armstrong v. Bd. of School Dirs. of the City of Milwaukee*, 616 F.2d 305, 319-20 (7th Cir. 1980) (same). Such legal certainty is not present where "the challenged practices have not been held to be illegal per se in a previously decided case." *Robertson*, 556 F.2d at 686; *see also, e.g., White v. Nat'l Football League*, 822 F. Supp. 1389, 1425-26 (D. Minn. 1993) (approving settlement despite objections that some provisions violated antitrust law because the provisions were not *per se* illegal).

Discover fails to meet this burden. Discover identifies no case in which these types of "level playing field" provisions were adjudicated to be a *per se* violation of the antitrust laws. *See* Discover Mem. at 5-15. To remedy that failure, Discover attempts to characterize the provisions as a *per se* illegal group boycott. *See* Selendy Decl. Ex. B ¶¶ 45-50 (complaint in intervention). But "[i]n the Second Circuit, when the anticompetitive effects on the relevant market are not obvious or 'clearly apparent,' courts have denied group boycotts or concerted denials *per se* treatment." *Bennett v. Cardinal Health Marmac Distribs., Inc.*, No. 02-cv-3095, 2003 WL 21738604, at *4 (E.D.N.Y July 14, 2003) (Gleeson, J.) (citation omitted). Here, no anticompetitive effect is clearly apparent because the "level playing field" provisions respond to class plaintiffs' objectives of *promoting* competition among payment forms by allowing

[10] Discover's application to file its memorandum and complaint in intervention under seal in part is pending before the Court. The citations to those materials in the text are to the portions that Discover proposes to file publicly.

merchants to surcharge through the *elimination* of the prior Visa and MasterCard *prohibitions* on surcharging.

The "level playing field" provisions are, in essence, "most favored nations" provisions designed to ensure that Visa and MasterCard card payments are not surcharged and "priced" higher to consumers than they would be under the network rules of a higher-cost Competitive Card Brand. Such "most favored nations" provisions are not clearly anticompetitive or unlawful *per se*; to the contrary, many courts have found such provisions to be *lawful* because they ensure that consumer-buyers do not pay higher prices than those charged for competing services. *See, e.g.*, *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995) ("[m]ost favored nations clauses are standard devices by which buyers try to bargain for low prices, by getting the seller to agree to treat them as favorably as any of their other customers . . . and that is the sort of conduct that the antitrust laws seek to encourage"); *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of R.I.*, 883 F.2d 1101, 1102, 1110 (1st Cir. 1989) (such conduct is "legitimate competitive activity of a sort that is favored — not prohibited — by the antitrust laws" because "a policy of insisting on a supplier's lowest price . . . tends to further competition on the merits").

Nor does Discover offer any evidence that it will suffer legally cognizable harm from the "level playing field" provisions. Discover states that it "historically has been the low price network," and "is in the process of clarifying and amending its rules to make plain that surcharging of both credit and debit is allowed." Discover Mem. at 3, 8. To that extent, the "level playing field" provisions might not even apply to Discover. *See* Definitive Class Settlement Agreement [Docket #1656-1] ¶¶ 42(a)(iv)-(v)(A), 55(a)(iv)-(v)(A). Moreover, the settlement contains provisions that preserve Discover's ability to contract with merchants to waive their ability to surcharge Discover cards. *See id.* ¶¶ 42(a)(iv)-(v)(C), 55(a)(iv)-(v)(C).

Although Discover objects that those provisions are "not practical" and "incomprehensible" in certain respects (Discover Mem. at 12-13), they simply require that the merchant's acceptance of Discover cards not be conditioned its waiving surcharging, and that the waiver contract specify a price at which the merchant alternatively may accept and surcharge Discover cards transactions. *See* Definitive Class Settlement Agreement [Docket #1656-1] ¶¶ 42(a)(iv)-(v)(C), 55(a)(iv)-(v)(C).

Discover also complains that the "level playing field" provisions "require merchants that want to surcharge Visa and/or MasterCard to perform an analysis of the [Discover] network's rules and operating regulations to determine whether and on what terms surcharging is permissible," and that "[m]any of Discover's largest merchants have indicated that they are unable to accurately compare Discover's pricing with that offered by Visa and MasterCard." Discover Mem. at 7, 10. But remarkably, Discover is unable to state exactly what its "Equal Treatment Rule" says or provides with respect to surcharging. *See id.* at 8. Merchants' inability to understand *Discover's* rule — which Discover cannot even explain — cannot make the Visa and MasterCard "level playing field" rules that are explained in the settlement unlawful.

Moreover, to the extent that merchants have any difficulty comparing Discover's pricing to Visa's or MasterCard's pricing, that is attributable entirely to *Discover's* pricing. The settlement provides that "[i]f a merchant cannot determine its" Visa or MasterCard Credit Card or Credit Card Product Cost of Acceptance, "then the Merchant may use the . . . Cost of Acceptance for the merchant's merchant category as published no less than two times each year on [the Visa or MasterCard] website." Definitive Class Settlement Agreement [Docket #1656-1] ¶¶ 42(a)-(b) and 55(a)-(b) (at pages 44, 47, 57, and 60-61). Thus, the Visa and MasterCard costs

of acceptance are posted on their websites and readily available to any merchant that cannot itself determine those costs.[11]

Because Discover itself is the source of the asserted problems with the "level playing field" provisions about which it complains, those provisions are not subject to an antitrust challenge. *See, e.g.*, *U.S. Airways Grp. v. British Airways, PLC*, 989 F. Supp. 482, 489 (S.D.N.Y. 1997) (a self-inflicted injury does not provide antitrust standing).

CONCLUSION

For the foregoing reasons, the Court should approve the Definitive Class Settlement Agreement and enter the parties' Class Settlement Order and Final Judgment.

Dated: August 16, 2013.

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[11] *See Merchant Category Definitions and Visa's Credit Card Cost of Acceptance to Acquirers*, Visa, http://usa.visa.com/download/merchants/merchant-category-definitions-credit-card-cost-to-acquirers.pdf (last visited Aug. 15, 2013); *MasterCard Cost of Acceptance – Brand Level*, MasterCard, http://www.mastercard.us/merchants/_assets/docs/MACostofAcceptance.Brand.Level.pdf (last visited Aug. 15, 2013); *MasterCard Cost of Acceptance – Product Level*, MasterCard, http://www.mastercard.us/merchants/_assets/docs/MACostofAcceptance.Product.Level.pdf (last visited Aug. 15, 2013).

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