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

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PRELIMINARY STATEMENT

Defendants submit this memorandum in support of final approval of the Definitive Class Settlement Agreement. Class plaintiffs' motion papers show that the Court should finally approve the settlement as fair, reasonable, and adequate. Defendants provide this memorandum to emphasize three points.

First, the fairness of the settlement is supported by the serious risks that class plaintiffs (and any opt outs) would face in attempting to prove their claims. Given those risks, the settlement more than adequately addresses class plaintiffs' claims.

Second, despite the objections made to date to the Rule 23(b)(2) Settlement Class, that Class is entirely proper. It fulfills the requirements of Rule 23(b)(2) and is supported by well-established precedent.

Third, objections made to the release provided by the Rule 23(b)(2) Settlement Class — and the similar release provided by the Rule 23(b)(3) Settlement Class — lack merit. Both releases follow a standard form that courts routinely have approved and enforced in class actions.

ARGUMENT

I. THE SETTLEMENT APPROPRIATELY ADDRESSES CLASS PLAINTIFFS' CLAIMS

Class plaintiffs claim that Visa and MasterCard have each unreasonably restrained trade through network rules and practices adopted through "structural conspiracies" with banks. But compelling evidence shows that those rules and practices do not unreasonably restrain trade, and that Visa and MasterCard were not "structural" conspiracies and certainly are not now. Because of this compelling evidence, class plaintiffs confronted serious — and likely insurmountable — risks in attempting to prove their claims and were unlikely to prevail. Nevertheless, in order to put all disputes between merchants and defendants behind them, defendants agreed to settle this

case to resolve those claims fully and finally, and in a manner that appropriately addresses class plaintiffs' claims given the risks of litigation.

A. Class Plaintiffs Claim That Visa and MasterCard Each Adopted Unlawful Network Rules Through "Structural" Conspiracies with Banks

Class plaintiffs claim that Visa and MasterCard each adopted and enforced a wide range of network rules and practices relating to payment cards, which in their combined effects unreasonably restrained trade and injured merchants. Those rules include, but are not limited to:

- Rules regarding the setting of default interchange rates, which class plaintiffs allege are fees that they paid indirectly to their acquiring banks as part of their merchant discount fees for Visa or MasterCard card payments. *See* Second Cons. Am. Class Action Compl. [Docket #1153] ¶¶ 8(n), 149-151, 155, 239, 242, 246, 292-325, 371-397, 409-428, 443-468.

- A number of so-called "anti-steering" rules — including "no surcharge" rules, "no discounting" or "non-discrimination" rules, and "no minimum purchase" rules — that allegedly restricted class plaintiffs in steering customers to use brands and forms of payment other than Visa or MasterCard payment cards. *See id.* ¶¶ 8(d), 8(v), 8(y), 190-192, 326-357.

- A number of so-called "exclusionary" rules — including "all outlets" rules, "no bypass" rules, and "no multi-issuer" rules — that allegedly restricted merchants in accepting and processing payments made with Visa and MasterCard cards. *See id.* ¶¶ 8(c), 8(s), 8(w), 8(x), 234, 288, 370.

- "Honor all cards" rules, which required merchants to accept all the network's credit cards or all the network's debit cards when proffered for payment, regardless of which bank issued the card. *See id.* ¶¶ 8(m), 240-241, 244-246.

The so-called "anti-steering" and "exclusionary" rules — particularly "no surcharge" rules — in conjunction with the default interchange, "honor all cards," and other network rules, purportedly insulated the Visa and MasterCard networks from competition with other brands and forms of payment. That allegedly allowed Visa and MasterCard to set inflated default interchange rates for payments made with its credit and debit cards. *See id.* ¶¶ 190, 193-198, 308(h).

Class plaintiffs allege that all of these network rules were adopted pursuant to unlawful agreements among banks and Visa, and among banks and MasterCard. Class plaintiffs allege that the defendant banks were members of Visa or MasterCard, and were represented on the boards of Visa or MasterCard that determined the network's rules and practices. *See id.* ¶¶ 54-97. Class plaintiffs allege that the banks thus owned and effectively operated Visa and MasterCard, such that Visa and MasterCard were unlawful "'structural conspiracies' and 'walking conspiracies'" with respect to their network rules and practices. *See id.* ¶ 101.

Class plaintiffs further allege that unlawful agreements among banks and Visa, and among banks and MasterCard, continued even after the Visa and MasterCard initial public offerings (IPOs). Specifically, class plaintiffs allege that even after MasterCard's IPO in 2006, "New MasterCard . . . has continued, at the insistence of the Member Banks, to enforce unchanged all of the rules and restraints of Old MasterCard, and has continued to raise Interchange Fees charged to Merchants." First Am. Supp. Class Action Compl. [Docket #1152] ¶ 10. Similarly, class plaintiffs allege that even after Visa's IPO in 2008, "New Visa . . . has continued, at the insistence of the Member Banks[,] to enforce unchanged all of the rules and restraints of Old Visa, and has continued to raise Interchange Fees charged to Merchants." Second Supp. Class Action Compl. [Docket #1154] ¶ 8. Class plaintiffs assert that "[e]ven after the Networks' restructuring attempts and IPOs, each Member Bank that participates in the Visa or MasterCard network agrees to abide by the respective Network's bylaws and rules." Second Cons. Am. Class Action Compl. [Docket #1153] ¶ 433; *see generally id.* ¶¶ 430-442.

Based on those allegations, class plaintiffs seek both retrospective and prospective relief. Class plaintiffs seek damages to compensate merchants for allegedly inflated default interchange rates in the past. *See id.* ¶¶ 298, 305, 312, 320, 377, 384, 392, 415, 423, 449, 456, and Prayer for Relief ¶ D. Class plaintiffs seek injunctive relief to restructure Visa's and MasterCard's network

rules and practices in the future. *See id.* ¶¶ 325, 333, 341, 349, 357, 397, 428, 468, and Prayer for Relief ¶¶ B-C.

B. Compelling Evidence Shows That the Visa and MasterCard Network Rules Relating to Payment Cards Do Not Unreasonably Restrain Trade

The evidence obtained in discovery did not support class plaintiffs' claims. Among other things, that evidence established that class plaintiffs' claims are barred by the class settlement releases in the *In re Visa Check/MasterMoney Antitrust Litigation*, No. 96-CV-5238 (E.D.N.Y.) (JG) (JO). Moreover, because class plaintiffs paid any default interchange fees only indirectly, their damage claims based on those fees are barred by the decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) — a point underscored by the Ninth Circuit's recent decision in *In re ATM Fee Antitrust Litigation*, 686 F.3d 741, 749-50 (9th Cir. 2012), which rejected the same arguments (with respect to ATM fees) that class plaintiffs made in this case. And because the Visa and MasterCard IPOs — through which the networks became publicly owned and operated — eliminated any basis to assert "structural" conspiracies with banks, class plaintiffs lacked any basis for obtaining prospective injunctive relief regarding each network's rules or practices. Accordingly, defendants moved for summary judgment on those and other grounds. *See generally* Defs.' Stmt. of Material Facts [Docket #1555]; Defs.' Reply to Class & Indiv. Pls.' Counter-Stmt. [Docket #1547]; Defs' Memos. in Support of Mot. for Summ. J. [Docket #1495-1 & #1495-2].

This case settled while defendants' motion for summary judgment was pending. But even if class plaintiffs had survived summary judgment in whole or in part, compelling evidence would have shown at trial that the Visa and MasterCard network rules and practices did not and do not unreasonably restrain trade. Some of that evidence is described below and in the Rule

56.1 statements that defendants filed publicly in support of, and in opposition to, the motions for summary judgment.[1]

1. Compelling Evidence Shows That the Network Default Interchange Rules Do Not Unreasonably Restrain Trade

Visa and MasterCard network rules regarding default interchange rates paid by merchant-acquiring banks to card-issuing banks do not restrain trade, much less unreasonably restrain trade. The evidence shows that these interrelated rules created a new competitive product — card-based payment systems — which fostered competition rather than restraining it. *See* Defs.' Counter-Stmt. in Opp'n to Class Pls.' Stmt. [Docket #1550] ¶¶ 181-187; K. Murphy Rep. ¶ 65-75 [Docket #2088]. Such "before the fact" rules concerning the rights and obligations of acquiring and issuing banks, and the transaction data and funds that they must interchange, are necessary for the efficient operation of Visa and MasterCard. *See* Sheedy Decl. ¶¶ 25-26 & T. Murphy Decl. ¶¶ 26-27 [Docket #2088].

Without default interchange rules, thousands of issuing and acquiring banks would be required to negotiate countless separate agreements regarding the rate at which each payment card transaction is interchanged. *See* Defs.' Counter-Stmt. in Opp'n to Class Pls.' Stmt. [Docket #1550] ¶ 181; Sheedy Decl. ¶ 25 & Murphy Decl. ¶ 27 [Docket #2088]. The cost of negotiating those agreements would drive up the costs of Visa and MasterCard payment card transactions. *See* Sheedy Decl. ¶¶ 26-27 & Murphy Decl. ¶ 28 [Docket #2088].[2] Moreover, without a "default" set of default interchange rules, network participants would face "hold-up" demands —

[1] *See generally* Defs.' Stmt. of Material Facts [Docket #1555]; Defs.' Reply to Class and Indiv. Pls.' Counter-Stmt. [Docket #1547]; Defs.' Counter-Stmt. in Opp'n to Class Pls.' Stmt. [Docket #1550]; Network Defs.' Counter-Stmt. in Opp'n to Indiv. Pls.' Stmt. [Docket #1556]. Underlying evidence on which those Rule 56.1 statements are based are on disks filed at Docket #2088 and #2090.

[2] Moreover, the Visa and MasterCard default interchange rules do not prevent banks or merchants from entering into individual agreements to adjust interchange rates; the default interchange rules apply only in the absence of such "bilateral" agreements. *See* Defs.' Stmt. of Material Facts [Docket #1555] ¶¶ 58-63.

an occurrence in the early network days that was one of the factors leading to adoption of default interchange. *See* Defs.' Counter-Stmt. in Opp'n to Class Pls.' Stmt. [Docket #1550] ¶¶ 131-132. And ultimately, an alternative system of bilateral negotiations would face the possibility of no acceptable agreement being reached among participants — destroying the fundamental assurance of ubiquitous transaction acceptance vital to customers and to the network's existence. *See id.* ¶ 181; Sheedy Decl. ¶¶ 24-27 & Murphy Decl. ¶¶ 25-27 [Docket #2088].

Evidence shows that Visa and MasterCard network default interchange rules are pro-competitive for other reasons as well. Default interchange benefits consumers by enabling issuers to improve card features and rewards, and reduce card finance charges and other costs. *See* Defs.' Counter-Stmt. in Opp'n to Class Pls.' Stmt. [Docket #1550] ¶¶ 159-160; Sheedy Decl. ¶ 31 & Murphy Decl. ¶ 29 [Docket #2088]. Default interchange benefits merchants by providing consumers greater purchasing incentives and thus increasing consumer demand, which increases merchant sales, and by allowing banks that issue cards, rather than merchants, to assume the costs of fraud and non-payment. *See* Defs.' Counter-Stmt. in Opp'n to Class Pls.' Stmt. [Docket #1550] ¶¶ 186-187; Sheedy Decl. ¶¶ 31-32 & Murphy Decl. ¶¶ 30-31 [Docket #2088].

Visa and MasterCard each set default interchange rates to maximize output of its payment card transactions, by increasing consumer usage of cards and increasing card acceptance at merchants. *See* Defs.' Counter-Stmt. in Opp'n to Class Pls.' Stmt. [Docket #1550] ¶¶ 182-185; Sheedy Decl. ¶¶ 13, 18-19 & Murphy Decl. ¶¶ 16-17, 22-23 [Docket #2088]; Network Defs.' Counter-Stmt. in Opp'n to Indiv. Pls.' Stmt. [Docket #1556] ¶¶ 167-169. For example, the networks have set default interchange higher for rewards-based card programs, to encourage issuers to fund those programs and encourage consumers to carry and use rewards cards. *See* Sheedy Decl. ¶ 14 & Murphy Decl. ¶ 18 [Docket #2088]. At the same time, the networks have set default interchange rates lower to promote acceptance by merchants that

traditionally accepted only cash and check payments, and to encourage merchants to reduce fraud levels and adopt new technologies to speed payment processing. *See* Defs.' Counter-Stmt. in Opp'n to Class Pls.' Stmt. [Docket #1550] ¶¶ 182-184; Sheedy Decl. ¶¶ 16-17 & Murphy Decl. ¶¶ 19-21 [Docket #2088].

The pro-competitive nature of the Visa and MasterCard default interchange rules is confirmed by the fact that market output — as measured by the dollar sales volume of payment card transactions — has not been restricted, but has increased. *See* Defs.' Stmt. of Material Facts [Docket #1555] ¶ 78. For example, from 2004 to 2008, total credit and charge card purchase volume increased by approximately 36%. *See* Network Defs.' Counter-Stmt. in Opp'n to Indiv. Pls.' Stmt. [Docket #1556] ¶¶ 111-117.

Case precedent also supports the pro-competitiveness of default interchange rules. No American court has ever held that Visa or MasterCard default interchange rules violate antitrust laws or should be enjoined or modified. And, consistent with that, the Department of Justice has never challenged the legality of those rules. The only court to consider an antitrust challenge to default interchange rules in fact found them to be pro-competitive and lawful after a bench trial. *See Nat'l 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). There, the district court concluded that Visa's default interchange "is necessary to offer the VISA card — a pro-competitive benefit which offsets any anti-competitive effects." 596 F. Supp. at 1265. The court reasoned that default interchange "is of vital import to the day-to-day functioning of the system," eliminates the "prohibitive time and expense of price negotiations at the time of the exchange between the thousands of VISA members," and "promotes efficiency and competitiveness" by addressing the "fundamental economic interdependence between card issuing and merchant signing in the system." *Id.* at 1259-60 (internal quotation omitted). On

appeal, the Eleventh Circuit affirmed, emphasizing that default interchange is "a necessary element in the creation of efficiency creating integration," "without which the system would not function," and "is no broader than required for that purpose." 779 F.2d at 601-02 (internal quotation omitted).[3]

2. Compelling Evidence Shows That the Network "No Surcharge" and Other Rules Did Not Unreasonably Restrain Trade

Visa and MasterCard network "no surcharge" rules, which prohibited merchants from imposing surcharges on customers who pay with Visa or MasterCard payment cards, likewise did not unreasonably restrain trade. Evidence shows that the "no surcharge" rules protected the integrity of each network's brand and prevented merchant free-riding. *See* Network Defs.' Counter-Stmt. in Opp'n to Indiv. Pls.' Stmt. [Docket #1556] ¶ 162. Without those rules, merchants could present themselves publicly as accepting Visa or MasterCard cards, and receive the benefits of the network's brand image, but limit or effectively refuse acceptance through high surcharges. *See id.* ¶ 163.

The "no surcharge" rules also benefited consumers and ensured that they had a positive experience at the point of sale. *See id.* ¶ 159. The rules protected consumers from "bait and switch" tactics, in which a merchant could lure a consumer into a purchase by offering a low price in an advertisement or shelf sign, only to effectively raise that price through surcharging the consumer's Visa or MasterCard payment card at the point of sale. *See id.* ¶ 160. The "no

[3] Moreover, a class of merchants previously challenged the Visa and MasterCard network "tying" and default interchange rules in *In re Visa Check/MasterMoney Antitrust Litigation*, 297 F. Supp. 2d 503 (E.D.N.Y. 2003), *aff'd sub nom. Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96 (2d Cir. 2005), *cert. denied*, 544 U.S. 1044 (2005). Despite the merchants' claim that those default interchange rules unreasonably restrained trade, class counsel in that case — who now represent certain objecting merchants in this case — sought approval of a class settlement that required *no* modifications of the default interchange rules. *See* 297 F. Supp. 2d at 508-09, 513-14. This Court approved the settlement as fair, reasonable, and adequate, including its release of default interchange claims, a finding that the Second Circuit affirmed on appeal. *See id.* at 512-15; 396 F.3d at 100-01, 106-13.

surcharge" rules also prevented merchants from opportunistically surcharging individual consumers who lack readily available payment alternatives, such as consumers making telephone or internet purchases, or large dollar purchases. *See id.* ¶ 161.

Courts accordingly have held that card network "no surcharge" rules do not unreasonably restrain trade. *See* Network Defs.' Memo. in Support of Mot. for Summ. J. [Docket #1495-3] at 5-11. In *Tennessean Truckstop, Inc. v. NTS, Inc.*, 875 F.2d 86 (6th Cir. 1989), the Sixth Circuit affirmed the dismissal of a truckstop owner's claim that a payment network's ban against charging its credit cardholders more than 105% of the prices paid by cash customers violated federal antitrust law. *Id.* at 87-90. The Sixth Circuit concluded that the "surcharge cap is obviously a proconsumer device, and if it has cost [the truckstop] some profit, the 'injury' is not 'of the type the antitrust laws were intended to prevent.'" *Id.* at 90 (internal quotation omitted). In *SouthTrust Corp. v. Plus System, Inc.*, 913 F. Supp. 1517 (N.D. Ala. 1995), a court reached the same conclusion in granting summary judgment dismissing an antitrust challenge to an ATM network's ban on surcharging consumers for certain ATM transactions. *Id.* at 1520-22. The court reasoned that "[t]he no-surcharge rule . . . poses no identifiable threat of injury to competition," since "it enhances consumer welfare by limiting prices consumers will pay . . . and restricting the ability of [member banks] to opportunistically profit." *Id.* at 1522; *see also id.* at 1524-25 (analyzing "the interchange fee and the no-surcharge rule" of the ATM network and concluding that "the net effect . . . is procompetitive"); *see also Kartell v. Blue Cross of Mass., Inc.*, 749 F.2d 922, 924 (1st Cir. 1984) (surcharging ban "do[es] not . . . show an unreasonable restraint of trade").

In addition, despite class plaintiffs' allegations that numerous other Visa and MasterCard "anti-steering" and "exclusionary" rules unreasonably restrain trade by restricting merchants from steering customers to use other forms of payment, it is clear that each network's rules

permit a wide variety of methods of steering. For example, evidence shows that Visa and MasterCard network rules have allowed merchants to steer customers to use other brands and types of payment through visual and verbal means, such as by posting signs, asking customers to use another type of payment, and prompting customers to enter a PIN number on a debit transaction. *See* Network Defs.' Counter-Stmt. in Opp'n to Indiv. Pls.' Stmt. [Docket #1556] ¶ 108. Visa and MasterCard network rules also have allowed merchants to steer customers to use others brands and types of payment by offering monetary or non-monetary benefits to customers other than at the point of sale. *See id.* ¶ 109. And Visa and MasterCard network rules have permitted merchants to steer by offering customers point of sale discounts for payments with cash, checks, PIN debit, and store cards. *See id.* ¶ 110.

3. Compelling Evidence Shows That the Network "Honor All Cards" Rules Do Not Unreasonably Restrain Trade

Similarly, Visa and MasterCard network "honor all cards" rules and practices, which require merchants to accept all credit cards or all debit cards bearing the network's logo, do not unreasonably restrain trade. Evidence shows that those rules — which class plaintiffs claim facilitated the alleged anti-competitive effects of other challenged rules — are necessary for the operation of the Visa and MasterCard networks: they allow a wide variety of banks to issue cards under the Visa or MasterCard brand and thereby create a competing card product that the thousands of card-issuing banks could not offer individually. *See* Network Defs.' Counter-Stmt. in Opp'n to Indiv. Pls.' Stmt. [Docket #1556] ¶ 151. Without those "honor all cards" rules, thousands of card-issuing banks in each network would need to arrange individually for acceptance at millions of merchants. *See id.* ¶ 152. Those rules are a core feature of a national payment network. *See id.* ¶ 153; *Nat'l Bancard*, 779 F.2d at 602 ("universality of acceptance" is "the key element to a national payment system").

Evidence further shows that the "honor all cards" rules are pro-competitive. Each network's rule benefits consumers by assuring them that the network's cards will be accepted at merchants that display its logo, regardless of which bank issued the card, what type of card it is, or what features it offers. *See* Network Defs.' Counter-Stmt. in Opp'n to Indiv. Pls.' Stmt. [Docket #1556] ¶ 149. Consumers also avoid the time and effort necessary to determine whether each merchant at which the consumer shops will accept the consumer's particular Visa or MasterCard card for payment at the checkout counter. *See id.* ¶ 150. Without the "honor all cards" rules, merchants could opportunistically pick and choose which Visa or MasterCard credit or debit cards to accept. That would make those cards less valuable to consumers, reduce usage of those cards, make them less valuable to merchants, and diminish the ability of Visa and MasterCard to compete with other payment card networks and payment systems. *See id.* ¶¶ 154-156, 158.

C. Compelling Evidence Shows That Visa and MasterCard Are Not Each a "Structural" Conspiracy with Banks with Respect to Network Rules Relating to Payment Cards

Evidence also shows that even before the IPOs, Visa and MasterCard never were, and are not now, "structural" conspiracies with banks. *See* Network Defs.' Counter-Stmt. in Opp'n to Indiv. Pls.' Stmt. [Docket #1556] ¶¶ 176-180; Network Defs.' Memo. in Opp'n to the Indiv. Pls.' Mot. for Summ. J. [Docket #1488] at 23-31. Banks' memberships in the Visa or MasterCard associations and their employees' participation on the Visa or MasterCard boards are insufficient to establish an antitrust conspiracy. *See* Network Defs.' Memo. in Opp'n to the Indiv. Pls.' Mot. for Summ. J. [Docket #1488] at 25-31. In *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042 (9th Cir. 2008), the Ninth Circuit affirmed the dismissal of claims like those here that banks conspired with Visa and MasterCard regarding default interchange. The Ninth Circuit concluded that "membership in an association does not render an association's members automatically liable for

antitrust violations committed by the association," and "[e]ven participation on the association's board of directors is not enough by itself" to establish an antitrust conspiracy. *Id.* at 1048; *accord AD/SAT, A Division of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 233-34, 237 (2d Cir. 1999) ("every action by a trade association is not concerted action by the association's members"; "an antitrust plaintiff must present evidence tending to show that association members, *in their individual capacities*, consciously committed themselves to a common scheme designed to achieve an unlawful objective" (emphasis added)).

After the IPOs, and as this Court has recognized, to prove a conspiracy among banks and MasterCard (or Visa) class plaintiffs would need to show that "the Banks will retain control of post-IPO MasterCard [or Visa] in ways that may have an anticompetitive effect." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-MD-1720, 2008 WL 5082872, at *11 (E.D.N.Y. Nov. 25, 2008). Class plaintiffs cannot make that showing, because the Visa and MasterCard IPOs eliminated the bank ownership and control structures that class plaintiffs asserted were "structural" conspiracies to restrain trade. *See generally* Defs.' Stmt. of Material Facts [Docket #1555] ¶¶ 129-154; Network Defs.' Counter-Stmt. in Opp'n to Indiv. Pls.' Stmt. [Docket #1556] ¶¶ 181-194.

Specifically, evidence shows that in May 2006, MasterCard completed its IPO, through which it issued to the public voting class A stock, redeemed a portion of its member banks' shares, and reclassified their remaining shares as non-voting class B shares. *See* Network Defs.' Counter-Stmt. in Opp'n to Indiv. Pls.' Stmt. [Docket #1556] at ¶¶ 188-191. As a result, banks no longer retained their former ownership of MasterCard, any voting control over MasterCard's Board of Directors, or any ability to vote to adopt or maintain MasterCard network rules.

Evidence further shows that in March 2008, Visa completed its IPO, through which it issued to the public voting class A stock, which its member banks were not permitted to hold.

See id. ¶¶ 181-185. Pursuant to the IPO, Visa required that the majority of its Board consist of directors who were not employees of banks, and Visa later amended its Board composition so that its Board now consists solely of ten directors who are not employees of banks. *See id.* ¶¶ 186-187. As a result, banks no longer retained their former ownership of Visa, any voting control over Visa's Board of Directors, or any ability to vote to adopt or maintain Visa network rules.

Moreover, each bank's adherence to Visa and MasterCard network rules since the IPOs could not establish a conspiracy *among the banks* with Visa or MasterCard to unreasonably restrain trade. The Second Circuit rejected such a theory of liability in *PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101 (2d Cir. 2002). There, the Second Circuit held that Coca-Cola's system of loyalty agreements with each of its individual distributors, which prohibited each distributor from delivering Pepsi products, could not show a "conspiracy among the [distributors] and Coca-Cola" and "was insufficient . . . to withstand summary judgment." *Id.* at 109-10; *see also, e.g., Flash Elecs., Inc. v. Universal Music & Video Distrib. Corp.*, No. 01-CV-0979, 2009 WL 7266571, at *13 (E.D.N.Y. Oct. 19, 2009) (Azrack, M.J.) ("supplier assurances of uniform enforcement of contracts among its distributors are insufficient to defeat summary judgment"), *adopted*, 2010 WL 5390176 (E.D.N.Y. Dec. 22, 2010) (Mauskopf, J.). Other courts have reached the same conclusion.[4]

[4] *See, e.g., In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 327 (3d Cir. 2010) ("one cannot plausibly infer a horizontal agreement among a broker's insurer-partners from the mere fact that each insurer entered into a similar contingent commission agreement with the broker"); *Toscano v. Prof'l Golfers' Ass'n*, 258 F.3d 978, 984 (9th Cir. 2001) (local sponsors' agreement to follow PGA rules showed "only that [they] accepted the fact that the tournaments would be operated according to the PGA's Tour rules . . . not that they agreed to use those rules to restrain trade"); *Am. Airlines v. Christensen*, 967 F.2d 410, 413-14 (10th Cir. 1992) ("[n]o evidence in the record suggests that American [Airlines] did not independently set the terms under which it would offer its travel awards, and the mere fact that its members accepted those terms does not . . . [show] concerted action").

In the *Kendall* case discussed above, the Ninth Circuit applied the same reasoning to affirm the dismissal of claims that banks conspired with Visa and MasterCard regarding default interchange. *See* 518 F.3d at 1048 ("merely charging, adopting, or following the fees set by a Consortium is insufficient as a matter of law to constitute a violation of Section 1 of the Sherman Act"). Recently, another court dismissed claims that Visa and MasterCard are "structural" conspiracies with banks with respect to Visa and MasterCard ATM network rules. *See Nat'l ATM Council, Inc. v. Visa Inc.*, No. 1:11-CV-01803, 2013 WL 525463 (D.D.C. Feb. 13, 2013). The court reasoned that neither the banks' alleged pre-IPO involvement in Visa or MasterCard nor the banks' alleged post-IPO equity interests in Visa or MasterCard could show "that banks control Visa and MasterCard today such that [they] are simply a vehicle by which the banks exercise a horizontal agreement." *Id.* at *17. No "actual or . . . tacit agreement among banks to restrain trade" could be inferred from their "individually agreeing to the Visa and MasterCard" ATM network rules. *Id.* at *18.

D. The Settlement Appropriately Addresses Class Plaintiffs' Concerns About Competition Among Payment Cards Given the Risks of Litigation

Given the compelling evidence from the discovery record, class plaintiffs were unlikely to prevail on their claims, even if they survived summary judgment. Nevertheless, after more than seven years of litigation, and with the extensive participation of two nationally recognized mediators and the Court, defendants agreed to settle this case to resolve class plaintiffs' claims fully and finally, and in a manner that appropriately addresses those claims given the inherent risks of litigation.

The settlement provides for a Rule 23(b)(3) Settlement Class to settle claims for past money damages. That Class, from which merchants may opt out, consists of "all persons, businesses, and other entities that have accepted Visa-Branded Cards and/or MasterCard-

Branded Cards in the United States at any time from January 1, 2004 to the Settlement Preliminary Approval Date . . . ." Definitive Class Settlement Agreement [Docket #1656-1] ¶ 2(a). That Class will receive payments from a Net Cash Settlement Fund into which defendants have deposited $6.05 billion, subject to certain "takedown" provisions with respect to opt outs. *See id.* ¶¶ 9-10, 17-20, 28. In addition, that Class will receive payments from an interchange settlement fund estimated to be approximately $1.2 billion, based on Visa and MasterCard withholding or adjusting a portion of interchange that otherwise would be paid to card issuers for an eight-month period. *See id.* ¶¶ 11-13, 29, Appx. F1-1. The adequacy of those sums cannot seriously be questioned, particularly given the unlikelihood that class plaintiffs could prevail on their damages claims.

The settlement also provides for a Rule 23(b)(2) Settlement Class to settle claims for injunctive relief going forward. That Class, from which opt outs are not permitted, consists of "all persons, businesses, and other entities that as of the Settlement Preliminary Approval Date or in the future accept any Visa-Branded cards and/or MasterCard-Branded Cards in the United States . . . ." *Id.* ¶ 2(b). The members of that Class will receive the benefits of modifications of the Visa and MasterCard network rules to address class plaintiffs' claims about how those rules affect merchants. *Id.* ¶¶ 39-65.

Among other things, the settlement required Visa and MasterCard each to modify its "no surcharge" rules to permit merchants to surcharge its credit card transactions at either the "brand" or the "product" level. *See id.* ¶¶ 42, 55. Surcharging now is permitted, subject only to a cap to prevent gouging of consumers, "level playing field" provisions to ensure that Visa and MasterCard are not competitively disadvantaged with respect to payment card networks that impose greater restrictions on surcharging, and merchant disclosure requirements to protect consumers from being misled. *See id.* The settlement does not require modification of the "no

surcharge" rules regarding debit card transactions, since the federal government already sets a regulated cap for default interchange rates on Visa and MasterCard debit card transactions. *See* 15 U.S.C. § 1693o-2. But the settlement provides that if the government were to cease setting that cap, Visa and MasterCard each must allow the surcharging of debit card transactions in a manner equivalent to that permitted for credit card transactions. *See* Definitive Class Settlement Agreement [Docket #1656-1] ¶¶ 42(g), 55(g).

In addition, to settle a Department of Justice investigation, Visa and MasterCard have modified their "no discounting" and "non-discrimination" rules, to allow merchants to offer point of sale discounts and other incentives for other credit card brands, and to encourage customers to use other forms of payment. *Id.* Appx. J. The settlement requires that those rules remain in effect even if they were no longer required by the settlement with the Department of Justice. *See id.* ¶¶ 40, 53. In addition, the Visa and MasterCard "no minimum purchase" rules were modified as a result of federal law that now regulates minimum dollar values for credit card transactions. *See* 15 U.S.C. § 1693o-2(b)(3)(A)(i). The settlement requires that Visa and MasterCard continue to allow merchants to impose a ten dollar minimum on credit card transactions in the event that the federal law terminates. *See* Definitive Class Settlement Agreement [Docket #1656-1] ¶¶ 44, 57.

The settlement also requires Visa and MasterCard each to modify its so-called "all outlets" rules to the extent necessary to permit merchants to decline acceptance of its credit or debit cards at all outlets operating under a particular trade name or banner. *See id.* ¶¶ 41, 54. Visa and MasterCard network rules also must allow merchants to properly organize bona fide buying groups to negotiate agreements with the network that would provide commercially reasonable benefits to the parties. *See id.* ¶¶ 43, 56.

The Visa and MasterCard network rules modifications provided in the settlement will provide merchants with additional ways to steer customers to use other brands and forms of payment, thereby addressing class plaintiffs' claim that "anti-steering" and other rules have insulated Visa and MasterCard from competition and allowed them to set default interchange rates at inflated levels. The rules modifications more than adequately address class plaintiffs' claims, especially given the unlikelihood that class plaintiffs could establish liability or a basis for injunctive relief.

The settlement does not modify the Visa and MasterCard default interchange rules or mandate a reduction in interchange rates. This is entirely appropriate, given the other consideration provided to merchants, the evidence demonstrating the pro-competitive nature of default interchange, and the networks' IPOs.

II. THE RULE 23(b)(2) SETTLEMENT CLASS IS PROPER

Objectors to the settlement to date primarily have attacked the Rule 23(b)(2) Settlement Class. As demonstrated below, those objections lack merit.

A. The Rule 23(b)(2) Settlement Class Is Proper Despite Class Plaintiffs' Damages Claims Because a Separate Rule 23(b)(3) Settlement Class Is Settling the Damages Claims

Some objectors have argued that the Rule 23(b)(2) Settlement Class is improper because class plaintiffs claim substantial money damages, which the objectors say cannot be sought by a Rule 23(b)(2) class, due to the decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). But the Rule 23(b)(2) Settlement Class is seeking only injunctive relief, which would modify the rules and practices of the Visa and MasterCard networks prospectively. That Class is not seeking damages for past conduct. Those damages claims are the subject of the relief being sought and settled by the separate Rule 23(b)(3) Settlement Class.

Courts have long held that it is proper to certify a Rule 23(b)(2) class to seek injunctive relief and a separate Rule 23(b)(3) class to seek damages. For example, in *In re NASDAQ Market-Makers Antitrust Litigation*, 169 F.R.D. 493 (S.D.N.Y. 1996), Judge Sweet certified separate Rule 23(b)(2) and (b)(3) classes. He reasoned: "Nothing in the language of Rule 23 precludes certification of both an injunctive class and a damages class in the same action. In fact, where injunctive relief and damages are both important components of the relief requested, court[s] have regularly certified an injunctive class under Rule 23(b)(2) and a damages class under Rule 23(b)(3) in the same action." *Id.* at 515 (internal quotation omitted); *see also*, *e.g.*, *Casale v. Kelly*, 257 F.R.D. 396, 408 (S.D.N.Y. 2009) (Scheindlin, J.) ("where a putative class seeks injunctive relief and significant monetary damages," one option is to "certify a Rule 23(b)(2) class for the portion of the case addressing equitable relief and a Rule 23(b)(3) class for the portion of the case addressing damages") (internal quotation omitted).

Indeed, courts have certified separate Rule 23(b)(2) and (b)(3) classes for settlement purposes in prior litigation against Visa, MasterCard, and banks. In *In re Currency Conversion Fee Antitrust Litigation*, MDL No. 1409, 2006 WL 3253037 (S.D.N.Y. Nov. 8, 2006), Judge Pauley preliminarily approved a class settlement and certified a "Settlement Damages Class, pursuant to Rule 23(a) and Rule 23(b)(3) of the Federal Rules of Civil Procedure, and a Settlement Injunctive Class, pursuant to Rule 23(a) and Rule 23(b)(2) of the Federal Rules of Civil Procedure." *Id.* at *1. He finally approved the class settlement without modifying those settlement classes. *See In re Currency Conversion*, 263 F.R.D. 110 (S.D.N.Y. 2009).

Nor did *Dukes* find it improper to certify a Rule 23(b)(2) class to seek injunctive relief and a separate Rule 23(b)(3) class to seek damages. Rather, the Supreme Court there considered only the certification of a single Rule 23(b)(2) class, and held that "claims for monetary relief . . . may not" be certified under Rule 23(b)(2), "at least where . . . the monetary relief is not

incidental to the injunctive or declaratory relief." 131 S. Ct. at 2557. The Supreme Court did not address, much less reject, certification of a Rule 23(b)(2) class to seek injunctive relief where a separate Rule 23(b)(3) class is certified to seek damages. *See id.* at 2557-61.

Accordingly, since *Dukes*, courts have continued to certify separate Rule 23(b)(2) and Rule 23(b)(3) classes. For example, in *Jermyn v. Best Buy Stores, L.P.*, 276 F.R.D. 167 (S.D.N.Y. 2011), Judge McMahon approved certification of a Rule 23(b)(2) class for injunctive relief and a Rule 23(b)(3) class for damages. She reasoned that "*Dukes* . . . was concerned with Rule 23(b)(2) classes that sought both injunctive and monetary relief. In this case, by contrast, I have certified a class both under Rule 23(b)(2) and under Rule 23(b)(3) . . . . [U]nlike *Dukes*, a (b)(2) class is not seeking monetary relief, but only an injunction against further statutory violations. It is a separately certified (b)(3) class that seeks money damages." *Id.* at 173-74. Other courts have reached the same conclusion after *Dukes*.[5]

B. No Opt Outs Are Permitted From the Rule 23(b)(2) Settlement Class, Because the Visa and MasterCard Network Rules Will Apply to All Class Members

Objectors also have argued that opt out rights should be afforded to members of the Rule 23(b)(2) Settlement Class. Those objections are based on a misunderstanding of Rule 23(b)(2) and are without merit.

[5] *See, e.g.*, *Sykes v. Mel Harris and Assocs.*, LLC, No. 09-Civ-8486, 2012 WL 3834802, at *12 (S.D.N.Y. Sept. 4, 2012) (Chin, J.) ("[t]hat plaintiffs are seeking substantial monetary damages is of no concern given the Court's certification of separate Rule 23(b)(2) and Rule 23(b)(3) classes addressing equitable relief and damages, respectively"); *Stinson v. City of N.Y.*, 282 F.R.D. 360, 381 (S.D.N.Y. 2012) (Sweet, J.) ("the *Dukes* decision does not preclude certification of a class under Rule 23(b)(2) for purposes of injunctive relief and under Rule 23(b)(3) for purposes of money damages"); *All Star Carts & Vehicles, Inc. v. BFI Canada Income Fund*, 280 F.R.D. 78, 86 (E.D.N.Y. 2012) (Wexler, J.) ("the court may certify a damages-seeking class under Rule 23(b)(3), and an injunction-seeking class under Rule 23(b)(2)," which "is precisely what the court has done").

Rule 23(b)(2) provides for a class when "the party opposing the class has acted or refused 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." Fed. R. Civ. P. 23(b)(2). Because the challenged conduct "appl[ies] generally to the class," 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"). As the Second Circuit has explained: "Where class-wide injunctive or declaratory relief is sought in a (b)(2) class action for an alleged group harm, there is a presumption of cohesion and unity between absent class members and the class representatives such that adequate representation will generally safeguard absent class members' interests and thereby satisfy the strictures of due process." *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 165 (2d Cir. 2001).

Indeed, this Court certified a Rule 23(b)(2) class of merchants without opt out rights in *In re Visa Check/MasterMoney Antitrust Litigation*, 192 F.R.D. 68 (E.D.N.Y. 2000), *aff'd*, 280 F.3d 124 (2d Cir. 2001), *cert. denied*, 536 U.S. 917 (2002). The Court certified a class under Rule 23(b)(2) on the ground that the (former) "honor all cards" rule of the Visa and MasterCard networks "is 'generally applicable' to all members of the class." 192 F.R.D. at 88. The Court then noted its inclination "to provide opt-out rights only as to the damages action" of the separately certified Rule 23(b)(3) class. *Id.* at 89. That decision was not disturbed on appeal, where the Second Circuit addressed only whether this Court properly certified a class under Rule 23(b)(3). *See* 280 F.3d at 147.

Those decisions are hardly surprising because, in general, if opt outs were permitted from a Rule 23(b)(2) class that is settling conduct going forward in the future, any such settlement could be undermined. All it would take is a single opt out to challenge the settled and agreed-

upon going-forward conduct by defendants and the entire premise of achieving a final resolution of claims in the settlement would be upset. Rather than achieving finality regarding a going-forward course of conduct, a settling defendant would effectively be left with no assurances whatever.

Objectors have argued that due process requires that opt outs be allowed from a Rule 23 (b)(2) class, relying on *Dukes* and *Philips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). But in *Dukes*, the Supreme Court concluded that "(b)(2) *does not* require that class members be given . . . opt-out rights, presumably because it is thought (rightly or wrongly) that . . . depriving people of their right to sue in this manner complies with the Due Process Clause." 131 S. Ct. at 2559 (emphasis added). That conclusion is consistent with *Shutts*, in which the Supreme Court stated that the right to opt out was needed only "to bind an absent plaintiff concerning a claim for *money damages* or similar relief at law." 472 U.S. at 811 (emphasis added). The Supreme Court in *Shutts* specifically "intimate[d] no view concerning other types of class actions, such as those seeking equitable relief" under Rule 23(b)(2). *Id.* at 811 n.3.

Objectors also have argued that this Court should permit opt outs from the Rule 23(b)(2) Settlement Class based on the Second Circuit's decision in *Robinson*. But in *Robinson*, the Second Circuit suggested only that opt out rights may be allowed "for those portions of the proceedings where the presumption of class cohesion falters" because there would be a "damages phase of the proceedings" for the Rule 23(b)(2) class. 267 F.3d at 166. Here, there will be no "damages phase of the proceedings" for the Rule 23(b)(2) Settlement Class. The separate Rule 23(b)(3) Settlement Class will address the damages claims, and opt outs will be permitted from that Class.

Two objectors — American Express and First Data — have argued that they should be allowed to opt out of the Rule 23(b)(2) Settlement Class because they are payment network

competitors. But those objectors admittedly accept Visa and MasterCard cards. Thus, the Visa and MasterCard network rules "apply generally to" them and they should be included in the Rule 23(b)(2) Settlement Class. Fed. R. Civ. P. 23(b)(2).[6]

C. Future Merchants Must Be Included in the Rule 23(b)(2) Settlement Class Because the Visa and MasterCard Network Rules Also Will Apply to Them

Finally, some objectors have argued that future merchants should be excluded from the Rule 23(b)(2) Settlement Class. That exclusion would not be appropriate because the settled Visa and MasterCard network rules will "apply generally to" future as well as current merchants. Fed. R. Civ. P. 23(b)(2). A Rule 23(b)(2) class properly includes future members when, as here, "any equitable relief to which the class would be entitled would be of the sort that would affect present and future claimants in the same way." *Latino Officers Ass'n City of N.Y. v. City of N.Y.*, 209 F.R.D. 79, 90 n.87 (S.D.N.Y. 2002) (Kaplan, J.) (certifying class of "all Latino and African-American individuals who have been, are, or will be employed by the NYPD as uniformed officers . . .").

It is "not at all uncommon for a [Rule 23(b)(2)] class to include future members, who may generally avail themselves of the same relief." *Duprey v. Conn. Dep't of Motor Vehicles*, 191 F.R.D. 329, 338 (D. Conn. 2000) (certifying class including "all persons who will in the future be required to pay money for [the challenged] windshield placards"). For example, in *Comer v. Cisneros*, 37 F.3d 775 (2d Cir. 1994), the Second Circuit approved certification of

[6] Moreover, the notice provided to the class was revised to make clear that the settlement releases would not generally apply to claims made by class members in their capacities as payment network competitors of Visa or MasterCard. The revised class notice states: "In 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 against Visa, MasterCard or banks that were or could have been alleged in the lawsuit . . . ." Pls.' Letter to Court [Docket #1740] and revised class notice [Docket 1740-2] at page F2-12 (emphasis added).

three classes that included future class members, including a class of "all former, current and future residents of and applicants for housing in BMHA administered public housing projects." *Id.* at 796. In *Marisol A. v. Giuliani*, 126 F.3d 372, 375 (2d Cir. 1997), the Second Circuit similarly affirmed certification of a Rule 23(b)(2) class consisting of "[a]ll children who are or who will be in the custody of the New York City Administration for Children's Services . . . ." *Id.* at 375, *subsequent appeal*, *Joel A. v. Giuliani*, 218 F.3d 132, 136 (2d Cir. 2000) (approving settlement by that class). And in *Robidoux v. Celani*, 987 F.2d 931 (2d Cir. 1993), the Second Circuit reversed a denial of (b)(2) class certification and remanded for "certification of a class comprising at least 'all current and future Vermont applicants for assistance from the Food Stamp and ANFC programs.'" *Id.* at 939.

Those principles apply equally in antitrust actions. In *Schreiber v. NCAA*, 167 F.R.D. 169 (D. Kan. 1996), the court certified in a price-fixing action a Rule 23(b)(2) class of "all persons who are currently employed or will in the future be employed by any Division I member of the NCAA in the position of second assistant coach . . . in the sport of men's varsity baseball." *Id.* at 177-78; *see also, e.g.*, *In re Abbott Labs. Norvir Antitrust Litig.*, No. C 04-1511, 2007 WL 1689899, at *10 (N.D. Cal. June 11, 2007) (certifying in monopolization action a Rule 23(b)(2) class of persons or entities who purchased or paid for Norvir "through such time in the future as the effects of Defendant's illegal conduct, as alleged, have ceased").

Objectors have argued that in this case, the interests of the class representatives necessarily will conflict with those of future merchants. But both current and future merchants have the same interest in obtaining going-forward relief with respect to any Visa or MasterCard network rules that allegedly violate the antitrust laws, and in the network rules modifications provided in the settlement. Moreover, because the Rule 23(b)(2) Settlement Class is seeking only injunctive relief, it differs from the classes in which courts have found current and future

claimants had conflicting interests in monetary awards from a settlement fund. *See, e.g., Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 855-56 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-28 (1997); *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 260-61 (2d Cir. 2001), *aff'd and vacated in part*, 539 U.S. 111 (2003). Here, all monetary awards are to be provided to members of the Rule 23(b)(3) Settlement Class. *See* Definitive Class Settlement Agreement [Docket #1656-1] ¶¶ 28-30, 39.

Some objectors also have argued that future merchants that start accepting Visa and MasterCard after July 2021, when Visa and MasterCard are no longer obligated to maintain the rules modification provided in the settlement, will receive no benefit from the settlement but will be bound by its release. That objection misconstrues the release. If Visa and MasterCard choose to maintain the rules modifications after July 2021, merchants who begin to accept Visa or MasterCard payment cards after that date will receive the benefit of the rules modifications provided in the settlement. If Visa or MasterCard instead decides to adopt rules that are not substantially similar, or to revert to old rules modified by the settlement, future merchants, just like the current merchants in the Rule 23(b)(2) Settlement Class, will not have released claims based on those rules. *See* Definitive Class Settlement Agreement [Docket #1656-1] ¶ 68(g)-(h).

Moreover, if future merchants were to be excluded from the Rule 23(b)(2) Settlement Class, the release for which defendants negotiated with the Class would provide only illusory protection. New merchants begin accepting Visa and MasterCard payment cards every day. The Visa and MasterCard network rules and practices, as modified by the settlement, will apply to those new merchants in the future just as they will apply on an ongoing prospective basis to merchants that exist today. If new merchants were excluded from the Rule 23(b)(2) Settlement Class, the very same claims that class plaintiffs have litigated and settled here on behalf of the

Class would be open to relitigation by merchants in the future. The need for finality thus requires that future merchants be included in the Rule 23(b)(2) Settlement Class.

III. THE RELEASE PROVIDED BY THE RULE 23(b)(2) SETTLEMENT CLASS IS PROPER

As demonstrated above, class plaintiffs broadly claimed that Visa and MasterCard each adopted and enforced network rules and practices through unlawful conspiracies with banks that unreasonably restrained trade and injured merchants, in violation of antitrust laws. After more than seven years of extensive litigation, and with the involvement of two nationally recognized mediators and the Court, the parties negotiated a hard-fought settlement at arm's length. That settlement provides substantial damages for past conduct and a restructured bundle of interrelated Visa and MasterCard network rules and practices for the future. In return, the Rule 23(b)(2) Settlement Class and the Rule 23(b)(3) Settlement Class each provide a release that includes all claims that were alleged or could have been alleged by each Class in this case, in order to resolve class plaintiffs' claims fully and finally and avoid any related litigation in the future.

Objectors have argued that the release provided by the Rule 23(b)(2) Settlement Class is improper because it covers rules and practices of the Visa and MasterCard networks that were not challenged in this action. Objectors also have asserted that the release improperly covers future claims, including future damages claims.

As demonstrated below, however, the release is appropriately limited to all claims that were or could have been alleged in this case — a form of release that courts repeatedly have approved in class settlements. Moreover, the release covers only claims based on continued rules and practices that are the same as, or substantially similar to, those currently in place or modified by the settlement, which courts have held a class may properly release.

A. The Release Is a Standard Form of Release of All Claims That Were or Could Have Been Alleged

The release at issue here covers all claims:

> arising out of or relating in any way to any conduct, acts, transactions, events, occurrences, statements, omissions, or failures to act of any Rule 23(b)(2) Settlement Class Released Party 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 in any of the Operative Class Complaints or Class Action complaints, or in any amendments to the Operative Class Complaints or Class Action complaints . . . .

Definitive Class Settlement Agreement [Docket #1656-1] ¶ 68 (emphasis added). For purposes of clarity, the parties expressly agreed that those claims include claims based on certain specified rules and practices, including but not limited to claims based on: (1) interchange rules, fees, or rates; (2) merchant discount or other fees; (3) actual or alleged "anti-steering," "exclusionary," or other rules relating to payment cards that a merchant accepts or its point-of-sale practices; (4) any agreement between or among Visa and MasterCard, or Visa or MasterCard and any bank; (5) any corporate structuring or IPO of Visa or MasterCard; (6) service of bank employees on any board or committee of Visa or MasterCard; and (7) the future effect of the continued imposition of, or adherence to, any Visa or MasterCard network rule substantially similar to a rule in effect when the Court preliminarily approved the settlement or that is modified pursuant to the settlement. *See id.* ¶ 68(a)-(i).

The release of claims that "are alleged or could have been alleged" is a standard form of release commonly approved and enforced in class action settlements. It is also fully consistent with the "identical factual predicate" doctrine recognized by the Second Circuit. For example, in *In re Visa Check*, this Court approved the release — by a class of settling merchants — of claims "'including . . . *claims which have been asserted or could have been asserted in this litigation*.'" 297 F. Supp. 2d at 512 (emphasis in original). That approval was affirmed on

appeal, where the Second Circuit held that "[p]laintiffs in a class action may release claims that were or could have been pled in exchange for settlement relief." *Wal-Mart Stores*, 396 F.3d at 106; *see also TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982) (recognizing that a class may release all claims based on the identical factual predicate of a class action).

Recently, the Second Circuit reiterated that a class settlement release may cover "'claims that were or could have been pled.'" *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 247 (2d Cir. 2011) (quoting *Wal-Mart Stores*, 396 F.3d at 106). The Second Circuit emphasized that "[p]arties often reach broad settlement agreements encompassing claims not presented in the complaint in order to achieve a 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." *In re Literary Works*, 654 F.3d at 247-48. Other circuit courts have reached the same conclusion.[7]

Here, as in those cases, the Rule 23(b)(2) Settlement Class is properly releasing only those claims that were or could have been alleged in this case, or that would be based on the identical factual predicate as this case.

[7] *See, e.g., Grimes v. Vitalink Commc'ns Corp.*, 17 F.3d 1553, 1555 n.1 (3d Cir. 1994) (enforcing class release of all claims "that are, were or could have been asserted in connection with . . . any matters, transactions or occurrences referred to in the Complaint, or any other complaint in the Consolidated Action"); *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 31 (1st Cir. 1991) (enforcing class release of all claims "that 'have been, could have been, or in the future might have been asserted . . . in connection with or that arise now or hereafter out of' any matters or transactions referred to in the complaint"); *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 221 (5th Cir. 1981) ("[t]he weight of authority establishes that . . . a court may release not only those claims alleged in the complaint and before the court, but also claims which could have been alleged by reason of or in connection with any matter or fact set forth or referred to in the complaint") (internal quotation omitted).

B. The Release Is Not Contrary to Public Policy, Because It Does Not Cover Visa or MasterCard Network Rules Adopted in the Future That Are Not Substantially Similar

Objectors also have argued that the release provided by the Rule 23(b)(2) Settlement Class is contrary to public policy because it covers future antitrust claims based on Visa or MasterCard network rules. That objection is based on a misunderstanding of the release. The release applies to claims made in the future that arise from the "future effect" of defendants' continued adherence to rules that are the same or substantially similar to rules in effect when the Court entered the Class Settlement Preliminary Approval Order, or to rules as modified by the settlement. Definitive Class Settlement Agreement [Docket #1656-1] ¶ 68(g)-(h). The release does not cover future claims based on rules adopted in the future that are not substantially similar to those Visa or MasterCard network rules. *See id.*

The release of future claims based on defendants' continued adherence to network rules and practices is entirely appropriate. Class plaintiffs' complaints sought injunctive relief with respect to a broad array of interrelated Visa and MasterCard network rules and practices relating to payment cards that merchants accept, and the relief ordered after a trial could have established those rules and practices going forward into the future just as they are established in the settlement. Given that, it is appropriate for the parties to agree to that bundle of rules and practices in the settlement — modifying some of the rules and practices and leaving others unmodified — and further agree that plaintiffs will forego any future claim against the defendants for the future effect of their continued imposition of, or adherence to, that restructured bundle of interrelated rules and practices. Regardless of whether that future effect would constitute an independent injury to a merchant in the future, the release of claims arising from that future effect is proper.

For these reasons, courts have approved releases of future claims that, as in this case, are based on defendants' current conduct that continues in the future. For example, in *In re Literary Works*, a class of freelance authors, who had contracted with publishers to publish the authors' works in print media, complained that those publishers had infringed the copyright of their works when they either published the works in electronic format or sublicensed others to do so without obtaining a new license for that purpose. *See* 654 F.3d at 245. The settlement provided for financial remuneration to members of the plaintiff class, and the release prohibited class members from barring future use of the authors' works for electronic publication. *See id.* at 246. Objectors argued that the release was improper insofar as it released future claims arising from the subsequent third-party sublicensing of the class members' works. *See id.* at 247-48. The Second Circuit rejected the objectors' argument, holding that "the consolidated complaint seeks injunctive relief for future uses," and therefore contemplated future claims. *Id.* at 248. Thus, "regardless of whether future infringements would be considered independent injuries, the [s]ettlement's release of claims regarding future infringements is not improper." *Id.* at 248 (footnote omitted); *see also id.* at 249 ("the [s]ettlement's release pertaining to future uses by publishers and their sublicensees was permissible"); *see also, e.g.*, *Smith v. Dada Entm't, LLC*, No. 11-CV-7066, 2012 WL 4711414, at *6 (S.D.N.Y. Sept. 27, 2012) (Oetken, J.) (class member could not relitigate "whether the charges that were the subject matter of the previous lawsuit [settled in 2009], even those that continued to accrue after January 7, 2010, were fraudulently billed").

Courts in other circuits likewise have concluded that a class may release future claims based on continuing conduct. For example, in *Schwarz v. Dallas Cowboys Football Club, Ltd.*, 157 F. Supp. 2d 561 (E.D. Pa. 2001) — a case that objectors here repeatedly have cited — the court rejected a class settlement release but acknowledged that "future antitrust claims that arise

out of conduct challenged by the plaintiff in the underlying litigation may be the subject of the release." *Id.* at 576. Accordingly, the court subsequently approved a revised class settlement release covering "claims arising from current or past policies, practices, contracts, conduct or provisions of the NFL Constitution and Bylaws (*a continuation of such policies, practices, contracts or provisions*) related to . . . ." *Schwartz v. Dallas Cowboys Football Club, Ltd.*, No. Civ.A. 97-5184, 2001 WL 1689714, at *1 (E.D. Pa. Nov. 21, 2001) (emphasis added); *see also*, *e.g.*, *Williams v. Gen. Elec. Capital Auto Lease*, 159 F.3d 266, 274 (7th Cir. 1998) (enforcing class release of claims that "even if . . . not ripe" were "closely enough related to the [released] disclosure claims that everything could be resolved in the settlement"); *In re Managed Care Litig.*, No. 00-MD-1334, 2010 WL 6532985, at *12 (S.D. Fla. Aug. 15, 2010) (class settlement release barred subsequent lawsuit based on continuation of pre-release conduct).

Courts also have enforced non-class releases of future antitrust claims based on conduct that continues in the future, which those courts could not have done if the releases were contrary to public policy. As the Second Circuit has observed: "It is not uncommon, we assume, for a release to prevent the releasor from bringing suit against the releasee for engaging in a conspiracy that its later alleged to have continued after the release's execution." *VKK Corp. v. NFL*, 244 F.3d 114, 126 (2d Cir. 2001).

Judge Preska applied that principle in *Madison Square Garden, L.P. v. NHL*, No. 07-CV-8455, 2008 WL 4547518 (S.D.N.Y. Oct. 10, 2008). There, the plaintiff Madison Square Garden ("MSG"), the owner of the New York Rangers hockey team, claimed that certain policies of the NHL relating to merchandising and licensing, broadcasting rights, and advertising and sponsorship rules violated the federal antitrust laws. *See id.* at *1-4. MSG had previously signed a consent agreement and release which provided that, as partial consideration for the NHL's consent to MSG's purchase of the team, MSG released the NHL and its member teams from all

liability arising out of "'any act, omission, transaction, or occurrence taken or occurring at any time up to and including the date of the execution of this Consent Agreement, relating to, or arising from, any hockey operations or any NHL activity, including without limitation, the performance, presentation or exploitation of any hockey game or hockey exhibition . . . .'" *Id.* at *5.

The court rejected MSG's argument that, although the policies MSG challenged were in effect at the time of the execution of the consent agreement and release, the release did not apply to its claims because those claims were based on "'current conduct, not historical conduct.'" *Id.* at *6. According to the court, MSG had alleged only that the NHL had continued to enforce, or had acted pursuant to or reaffirmed, rules and policies that were in existence at the time of the execution of the release. *Id.* "Because 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.'" *Id.*

The court also rejected, on several grounds, MSG's argument that the release was unenforceable as against public policy because it operated as a prospective waiver of the right to sue for subsequent antitrust violations. *Id.* at *7-9. First, MSG was not challenging the existence of the NHL itself as a joint venture, but only the reasonableness of certain rules and policies of the venture that had existed at the time MSG executed the release. The "venture's undisputed legitimacy diminishes the public policy concerns compared to those in the case of a Section 1 conspiracy whose very existence is unlawful." *Id.* at *7. Second, MSG's argument was at odds with "well-settled principles favoring settlement as a matter of public policy." *Id.* at *8. The court observed that a defendant could never settle an antitrust claim predicated on a rule or

policy if the settlement's release did not bar the releasing party from thereafter asserting claims based on the defendant's continued adherence to the rule or policy. *Id.* at *8. Third, the court found that "the public policy considerations differ when the only 'prospective' application of the release in question is the continued adherence to a pre-release restraint." *Id.* at *9. Other courts have reached the same conclusion.[8]

In contrast, cases suggesting that releases of future claims violate public policy have done so because the releases — unlike the release in this case — covered future claims based on defendants' conduct in the future that is not substantially similar. For example, in *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955), the Supreme Court suggested that "a partial immunity from civil liability for future violations" would be "consistent with neither the antitrust laws nor the doctrine of res judicata." *Id.* at 329. But the Supreme Court declined to apply res judicata to bar claims based on the conduct there because — unlike the continuing conduct released in this case — it was different 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." *Id.* at 328.

Likewise, it is fully appropriate for the Rule 23(b)(2) Settlement Class release to bar future *damages* claims based on the continuing conduct covered by the release. Without such a release, a Rule 23(b)(2) settlement would be meaningless, as the defendants could be sued for

[8] *MCM Partners, Inc. v. Andrews-Bartlett & Assocs., Inc.*, 161 F.3d 443, 448 (7th Cir. 1998) (where defendants' post release refusal to deal with plaintiff was based on "continued adherence" to a pre-release agreement, the "claim is clearly based on pre-[release] conduct and, as such, is expressly barred by the [r]elease"); *Willsea v. Theis*, No. 98-civ-6773, 1999 WL 595629, at *12 (S.D.N.Y. Aug. 6, 1999) (Jones, J.) (characterizing as "nonsense" the argument that release did not bar the releasing party's subsequent challenge to post-release continuation of enforcement of a copyright that was the subject of a prior settlement and release); *Record Club of Am., Inc. v. United Artists Records, Inc.*, 611 F. Supp. 211, 217 n.8 (S.D.N.Y. 1985) (enforcing release of antitrust claim because "all of the harm allegedly flows from and is related to the terms and conditions [of the release]" and was merely the "continuing effect" of pre-release conduct).

damages based on the released conduct. In arguing against any release of future damages claims by the Rule 23(b)(2) class, even with respect to continuing conduct, objectors fail to recognize that when a Rule 23(b)(2) class seeks injunctive relief modifying defendants' *future* practices, it must be able to enter a settlement releasing all claims — for damages and otherwise — based upon those *future* practices.

The Second Circuit has concluded that a Rule 23(b)(2) settlement class may release all claims based on the factual predicate of a class action, and that includes future damages claims based on that factual predicate. In *TBK Partners*, the Second Circuit found that the release of a Rule 23(b)(2) settlement class properly barred the class members from prosecuting a separate action regarding the value of their stock. *See* 675 F.2d at 459-60. The Second Circuit found that "we see no reason why the judgment upon settlement cannot bar a claim that would have to be based on the identical factual predicate as that underlying the claims in the settled class action." *Id.* at 460 (footnote omitted). In *In re Literary Works*, the Second Circuit applied that principle to find that claims based on the identical factual predicate, which a class may release, include future damages claims based on conduct that continues in the future. *See* 654 F.3d at 247-48. Relying on *TBK Partners*, the Second Circuit held that future damages claims based on the defendants' future use of class members' works could be released. *See id.* Because "the consolidated complaint seeks injunctive relief for future uses," the future damages claims would be based on the identical factual predicate. *Id.* at 248.

Similarly, in *Scarver v. Litscher*, 371 F. Supp. 2d 986 (W.D. Wis. 2005), *aff'd on other grounds*, 434 F.3d 972 (7th Cir. 2006), the court granted summary judgment dismissing an inmate's claims for damages because he was a member of a class "certified under Fed. R. Civ. P. 23(b)(2)" that had released claims going forward that were based on the same subject matter. *Id.* at 988, 997. The court reasoned that because of the Rule 23(b)(2) class release, "plaintiff is

precluded from seeking monetary damages for injuries incurred after . . . the date on which the settlement agreement was approved." *Id.* at 997; *see also Tiggs v. Berge*, No. 01-C-171-C, 2002 WL 32342678, at *2 (W.D. Wis. Nov. 14, 2002) (member of non-opt out settlement class "cannot . . . recover money damages for conditions addressed by the agreement that occurred after the settlement agreement was approved").

Objectors' argument that *Dukes* holds otherwise misperceives the holding in *Dukes*. In *Dukes*, the Supreme Court considered only "whether the certification of the plaintiff class was consistent with Federal Rules of Civil Procedure 23(a) and 23(b)(2)." 131 S. Ct. at 2547. The Supreme Court did not address a Rule 23(b)(2) class settlement or decide what kind of release a Rule 23(b)(2) settlement class could provide, much less hold that such a class could settle claims for injunctive relief but not release all prospective claims of liability for defendants' continued adherence to that injunctive relief in the future. *See id.* at 2550-61.

CONCLUSION

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

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