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United States Court of Appeals
for the
Second Circuit

IN RE PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION

On Appeal from the United States District Court for the Eastern District of New York (Gleeson, J.)

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CORPORATE DISCLOSURE STATEMENT

Consistent with this Court's Order of May 27, 2014, *see* ECF Docket Entry 935 in No. 12-4671(L), the parties to this brief complied with Rule 26.1 of the Federal Rules of Appellate Procedure by submitting a Compendium of Corporate Disclosure Statements on June 16, 2014, *see* Docket Entry 988.

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COUNTERSTATEMENT OF THE ISSUES

Did the District Court abuse its discretion in certifying separate settlement classes under Rules 23(b)(2) and 23(b)(3) of the Federal Rules of Civil Procedure and approving as fair, adequate, and reasonable the settlement entered into by those classes?

STATEMENT OF THE CASE

Nine years ago, various merchants brought federal antitrust claims against Visa, MasterCard and various member banks (collectively, Defendants) challenging as anti-competitive the core structures undergirding the Visa and MasterCard networks. Those networks permit widespread issuance and acceptance of bank-issued payment cards, which enhances consumer purchasing power and increases overall demand for merchant goods and services, while practically eliminating the risk of non-payment for the millions of merchants who accept Visa and/or MasterCard.

Facing dispositive motions presenting substantial defenses to their claims, and facing additional uncertainty regarding their ability to obtain the remedies they sought even if they prevailed on liability, the Class Plaintiffs settled with Defendants. The settlement resulted from four years of negotiations, in which Judge Gleeson, Magistrate Judge Orenstein, and two distinguished mediators played significant hands-on roles.

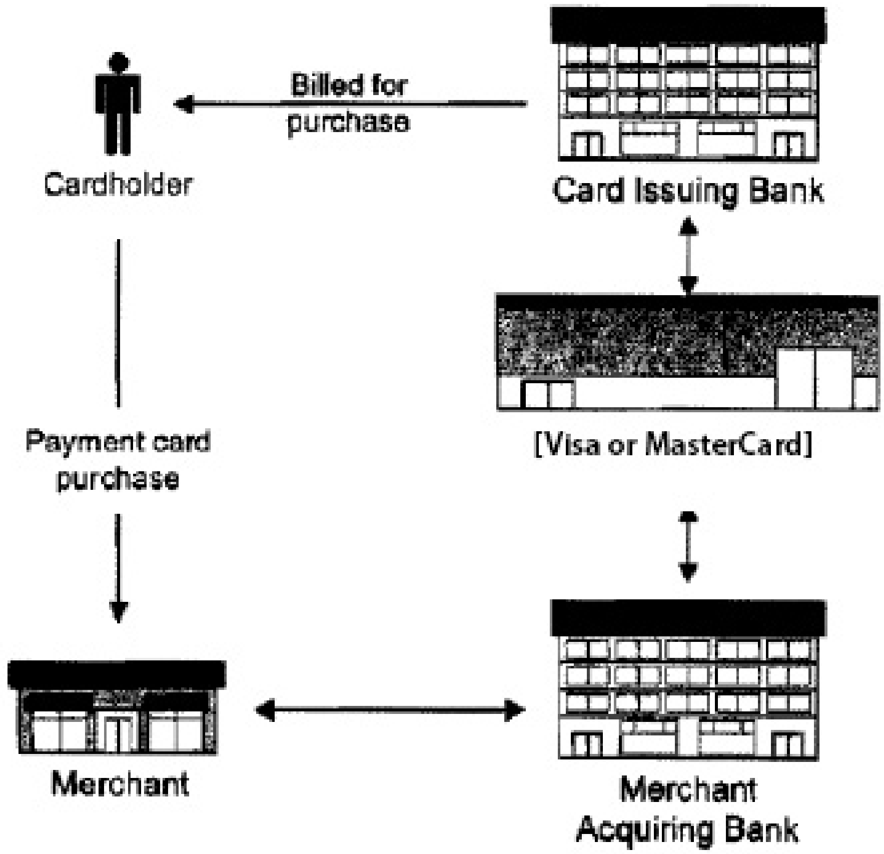
The court-approved settlement provides substantial monetary relief—up to an estimated $7.25 billion (subject to reduction for opt-outs)—to a Rule 23(b)(3) class that had sought damages for alleged antitrust violations, and going-forward relief to a Rule 23(b)(2) class. Only the going-forward relief is challenged here. That relief makes a number of changes to the rules governing the Visa and MasterCard networks that were sought by plaintiffs. Having agreed to make and retain these changes to the networks, Defendants asked for, and the Class Plaintiffs agreed to, "releases cover[ing] claims that are or could have been alleged in this case," SPA44, releases that protect Defendants against endless litigation about the lawfulness of the networks' rules to which plaintiffs had agreed. The court explained that "[i]n exchange for a new, going-forward rules structure, the defendants are entitled to bargain for and receive releases of claims that are or could have been alleged based on the identical factual predicate of the claims in this case," and stated "[t]hat is all these releases accomplish." SPA45–SPA46.

Given the strength of Defendants' legal and evidentiary hand, the possibility that the court would uphold the lawfulness of the networks as they existed at the time of the settlement was far more than theoretical—a point underscored by the court-appointed expert. After balancing the substantial monetary and injunctive relief provided in the settlement against plaintiffs' likelihood of success in the litigation, the District Court properly concluded that the settlement was just, fair, and reasonable, and approved it. The result of that ruling is peace from further challenges to the existing rules of the Visa and MasterCard networks, which were the subject of the litigation, as modified pursuant to settlement. As explained below, Objectors show no error in the District Court's approval of the settlement, much less an abuse of discretion. The judgment should be affirmed.

A. Factual Background

Consumers take for granted that a merchant in the Visa and MasterCard networks will accept all versions of those cards as payment for the merchant's goods or services. It does not matter which bank issues the consumer's Visa- or MasterCard-branded card, and it does not matter which particular card issued by that bank (*e.g.*, cards earning miles, or cards offered to individuals just starting to build their credit history) the consumer uses. This is so because the Visa and MasterCard networks have been structured to ensure widespread acceptance, which benefits consumers and merchants.

Visa's and MasterCard's networks are built to complete a complex multi-party transaction with no friction. As illustrated below, a typical transaction on the Visa or MasterCard network involves five participants: cardholder, merchant, card issuer (usually a bank), acquirer (which, again, is usually a bank, and which contracts with the merchant and pays it promptly following a transaction), and the payment card network itself. *See* SPA7



McCormack Rep. ¶ 17, fig.4 (lodged with D.E. 2088).

When a consumer swipes a card or enters card information for online purchases, the merchant collects the payment-card information and sends the details of the transaction to the merchant's bank (the "acquiring bank"), which then forwards that information to the appropriate network. SPA7. The network, in turn, relays the transaction data to the bank that issued the customer's card (the "issuing bank"), which confirms, among other things, that the customer has sufficient credit (or sufficient funds in the debit card context) to cover the purchase. *Id.* If all is in order, the issuing bank so advises the acquiring bank, which transmits that confirmation to the merchant and the sale of the merchant's goods or services is completed. *Id.* The entire approval process takes a few seconds.

That instantaneity has made the card system enormously successful with consumers and merchants alike. Consumers benefit from quick payment times and the ease of making purchases freed from the limitations of available cash-on-hand. *See, e.g.*, K. Murphy Rep. ¶¶ 254, 113 (lodged with D.E.2088). Merchants benefit from a consuming public with ready access to funds, promoting larger purchasing volume—volume which might shrink if customers had to endure a substantial wait for transactions to clear. *See, e.g.*, *id.* ¶¶ 80–86, 113 & n.126, 255, 273–293; D.E.1550 ¶¶ 186–187. The card system also enables on-line purchases, where use of cash or checks is not possible. K. Murphy Rep. ¶ 254.

Merchants not only reap enhanced sales volume through the payment card networks, they also receive payment without having to wait for cardholders to pay their bills to banks, and without incurring risk of payment default if cardholders fail to do so. That is because after each consumer transaction, the merchant's acquiring bank promptly pays the merchant, pursuant to an agreement between the merchant and the acquiring bank.[1] Typically, the acquirer deducts a fee, known as the "merchant discount fee," from the face amount of the transactions as payment for its services and expenses. SPA7–SPA8.

[1] The acquiring market is highly competitive and contractual agreements between merchants and acquirers vary widely.

In connection with the acquiring bank's payment to the merchant, the acquiring bank also receives a payment from the issuing bank (via the Visa or MasterCard network) with respect to the transaction. SPA7; D.E.1478-4 ¶ 11. That leaves the issuing bank with the right to demand payment from the consumer. T. Murphy Decl. ¶ 11 (lodged with D.E.2088). That right comes with a delay in receiving any payment and a risk of default by the consumer. D.E.1550 ¶ 168. Generally, the issuing bank cannot return to the acquiring bank and demand compensation if the cardholder fails to pay, nor may the acquiring bank turn to the merchant. Indeed, the issuing bank must pledge to pay for charges incurred on its cards as a condition of joining the Visa or MasterCard network. D.E.1478-4 ¶ 12.

Just as the acquiring bank deducts a fee from its payment to the merchant, each issuing bank deducts a fee from its payment to the acquiring bank (*i.e.*, the issuer pays the acquiring bank less than the full price the merchant charged the consumer). That fee is known as the interchange fee, SPA7, and addresses, among other things, the cost of services an issuer performs and risks it assumes. *See* D.E.1478-4 ¶ 12; D.E.1550 ¶ 157. Any particular acquiring bank and particular issuing bank are free to reach separately negotiated agreements governing compensation, whether generally or with respect to a particular merchant client of the acquiring bank. *See* SPA7–SPA10; SPA16; D.E.1550 ¶¶ 181–187. To promote efficiency, however, each network sets a schedule establishing the "default" interchange fees that will govern transactions processed over the network in the absence of a separately negotiated agreement between the acquiring and issuing banks. SPA7–SPA10; SPA16; D.E.1550 ¶¶ 181–187.

Default interchange rules enable the networks to operate seamlessly by eliminating the need for each of thousands of issuers and acquirers to negotiate appropriate interchange fees for every possible combination of merchant, transaction value, and specific card product (*e.g.*, Chase Freedom, Chase Sapphire Preferred, Chase Slate, and so on). D.E.1550 ¶ 181; SPA29–SPA30. Such individualized negotiations would entail substantial transaction costs and would likely inhibit merchants' ability to accept all versions of the Visa- and MasterCard-branded cards. Moreover, by providing a default interchange fee, a network prevents the possibility of negotiation impasse or "hold-up"—*e.g.*, a particular issuer that declines to accept transactions forwarded by an acquiring bank from a particular merchant absent receipt of a much higher fee.

Other network rules also ensure the widespread acceptance of cards. For example, the "Honor-all-Cards" rule "require[s] merchants to accept all the network's credit cards . . . when proffered for payment, regardless of which bank issued the card." SPA19. This rule ensures that the Visa network, for instance, functions as a *Visa* network. Customers can purchase secure in the knowledge that *their* particular Visa card will be accepted wherever *any* Visa card is welcome.

SPA31–SPA32. The rule also assures issuers that all cards carrying a particular network's mark will be accepted on an equal basis. Honor-all-Cards thus parallels the rule *requiring* issuing banks to accept payment obligations passed to them from merchants through the acquiring bank. Just as an issuing bank must honor all payment obligations for cardholder purchases made over a network, so, too, must a merchant honor all network-branded cards presented to it. D.E.1478-4 ¶ 12; *see* D.E.5965 at 14–15 (report of court-appointed expert Dr. Sykes). As the District Court found, the Honor-all-Cards and default interchange rules are "closely interrelated," "lay at the heart of Visa's and MasterCard's efforts to build the successful networks they now have," and "undeniably have significant procompetitive effects." SPA16; SPA31.

Finally, as yet another means of assuring uniform acceptance and a reliable customer experience, Visa and MasterCard each have maintained a "no-surcharge" rule. *See* SPA9; SPA18; D.E.1478-4 ¶¶ 26–27, 30–31. Absent restrictions on surcharging, for example, an "Honor-all-Cards" rule could be undermined, as a given merchant could impose an exorbitant surcharge on a given card, rather than refusing it outright. K. Murphy Rep. ¶ 134; *see id.* ¶¶ 130–134.

B. Commencement And Litigation of Plaintiffs' Claims

No American court has ever found these practices anticompetitive. SPA30. In fact, a previous challenge to interchange was tried before a federal district judge and rejected, and the Eleventh Circuit affirmed the judgment. *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). Nevertheless, merchants and affiliated trade organizations sued to challenge Visa's and MasterCard's interchange-related rules and structures. The actions relevant to this appeal were filed beginning in June 2005 and later amended after consolidation before Judge Gleeson. SPA18.[2] From the outset, plaintiffs sought to present their antitrust claims via two discrete classes: a Rule 23(b)(3) class "seek[ing] damages only," and a Rule 23(b)(2) class "seek[ing] declaratory and injunctive relief only." D.E.317 ¶ 97(a)–(b) (complaint). Both putative classes asserted that Defendants conspired to fix interchange fees. SPA6. Plaintiffs' allegations focused on the three sets of network rules discussed above: (i) default interchange, (ii) Honor-all-Cards, and (iii) no-surcharge and other alleged "anti-steering" rules. *See* SPA8–SPA9; SPA18–SPA19. The putative (b)(3) class sought damages to compensate

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[2] The Judicial Panel on Multidistrict Litigation assigned these actions to Judge Gleeson. *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, 398 F. Supp. 2d 1356, 1358 (J.P.M.L. 2005) (MDL-1720). They followed years of class and opt-out litigation before Judge Gleeson by retailers concerning the networks' "Honor-all-Cards" rules, particularly as applied to acceptance of debit cards, and default interchange rules. *See id.* (discussing Judge Gleeson's "familiar[ity] with the operation of the credit card networks"); *In re Visa/MasterCard Antitrust Litig.*, 295 F. Supp. 2d 1379, 1380–81 (J.P.M.L. 2003) (assigning MDL-1575 to Judge Gleeson who "has become thoroughly familiar with the allegations . . . as a result of his seven year involvement with the New York class action litigation").

merchants for allegedly inflated default interchange rates in the past, and the putative (b)(2) class sought injunctive relief to revise the Visa and MasterCard networks going forward.

During the pendency of these actions, there were significant changes to Visa's and MasterCard's corporate structures and businesses. *See* SPA10; SPA17–SPA19. First, MasterCard and Visa completed IPOs in 2006 and 2008, respectively, which fundamentally changed their organizational structures. At the time of the initial complaints, Visa and MasterCard were bankcard associations comprised of member banks, which plaintiffs claimed were therefore "structural conspiracies." SPA19; D.E.317 ¶¶ 131–135. Through its IPO, each network became a standalone "publicly traded compan[y] with no bank governance." SPA10. Unable to rely on their former "structural conspiracy" allegations, Plaintiffs filed amended complaints in January 2009 insisting that the networks still functioned as conspiracies among the banks and Visa or MasterCard.[3]

Second, the Durbin Amendment in the Dodd-Frank legislation, *see* 15 U.S.C. § 1693*o*-2(b)(3)(A)(i), modified the networks' "no minimum purchase" rules and discounting rules to allow merchants greater ability to steer consumers away from using credit cards. SPA10 & n.6; SPA17.

[3] *See* D.E.1170-4 ¶¶ 10, 147–162; D.E.1170-2 ¶¶ 8, 135–150; D.E.1170-3 ¶¶ 261–270, 429–442, 444.

Third, through consent decrees entered in 2011 to resolve targeted antitrust suits brought by the U.S. Department of Justice (DOJ), Visa and MasterCard agreed to modify various rules. *See* SPA 10, SPA17.[4] Visa's and MasterCard's modifications of their "no discounting" and "non-discrimination" rules broadened merchants' discretion to offer discounts and other incentives for a range of alternative types of payment, including for using other credit card brands or debit cards, and to encourage customers to use other forms of payment. *See* SPA10.

Alongside these developments, the parties vigorously litigated this case. They disputed, *inter alia*, whether the default interchange, Honor-all-Cards, and no-surcharge rules were necessary to produce the procompetitive efficiencies that each network indisputably generated. Eventually, Dr. Alan O. Sykes of the New York University School of Law—whom Judge Gleeson appointed pursuant to Federal Rule of Evidence 706 to advise the court on economic issues—concluded that "plaintiffs face a substantial probability of failure in efforts to establish that the core practices that would remain in place after the proposed settlement violate the antitrust laws." D.E.5965 at 22–23. The parties further disputed whether there was no antitrust conspiracy as a matter of law post-IPOs.

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[4] The government also brought suit against American Express. *See United States v. Am. Express Co.*, 10-cv-4496-NGG (E.D.N.Y. filed Oct. 4, 2010). Closing arguments in a bench trial were held on October 9, 2014.

The parties also engaged in wide-ranging expert discovery, and the experts sparred over what the "but-for" world would have looked like without the challenged practices, including absent any default interchange fee. As Dr. Sykes later observed: "To the best of my knowledge, no general purpose (non-debit) card network of any consequence has ever operated without significant interchange fees (or substantial merchant fees in a three-party network)." D.E.5965 at 19. Plaintiffs' experts argued that the MasterCard and Visa networks could "survive" with zero interchange and hypothesized a "but-for" world designed to produce such a result. In that imagined (and improbable) world, issuers would be *required*, by the networks' rules, to accept all merchant transactions from acquirers and *required* to pay acquirers the full amount of the merchant transaction without receiving *any* compensation from acquiring banks or their merchants, not even for the very real risk of non-payment by the consumer. But, as Professor Sykes later advised the District Court, "survival" is not an antitrust standard, and plaintiffs' experts failed to show that a "zero interchange" competitive equilibrium would ever realistically emerge, even with hypothesized changes in the networks' rules. *See id.* at 18, 21–24.

By 2011, many issues were fully briefed and awaiting rulings, including cross-motions for summary judgment, Defendants' motions challenging the admissibility of plaintiffs' experts' opinions, and Defendants' opposition to plaintiffs' motion for class certification. *See, e.g.*, SPA10. Judge Gleeson held these motions in abeyance pending the outcome of the parties' settlement discussions. SPA11 & n.9.

C. Settlement

Even as they were aggressively litigating, starting in 2008 the parties made efforts—assisted by mediators, Magistrate Judge Orenstein and Judge Gleeson—to settle their disputes. *See* SPA11–SPA12. Settlement efforts intensified in late 2011. *Id.* The parties sought a final resolution of their ongoing disputes regarding the legitimacy of the networks' respective interchange fee rules and other challenged rules. After all, Visa and MasterCard had earlier settled the class action in *In re Visa Check/MasterMoney Antitrust Litigation*, which had likewise challenged, *inter alia*, "Honor-all-Cards" and default interchange, only to find themselves embroiled in a new class action making the same claims almost immediately thereafter.[5] Defendants had no desire to continue litigating these same issues about rules that Visa and MasterCard each perceived as central to their

[5] *See, e.g.*, *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96 (2d Cir. 2005) ("*Wal-Mart II*") (class settlement); *Wal-Mart Stores v. Visa U.S.A. Inc. (In re Visa Check/Mastermoney Antitrust Litig.)*, 280 F.3d 124 (2d Cir. 2001) ("*Wal-Mart I*") (class certification), *overruled on other grounds*, *Miles v. Merrill Lynch & Co. (In re Initial Pub. Offerings Sec. Litig.)*, 471 F.3d 24 (2d Cir. 2006); *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741 (9th Cir. 2006) (effect of *Wal-Mart II* settlement and release).

operations. And plaintiffs viewed settlement as an opportunity to obtain otherwise uncertain relief and change the complexion of network rules. *See* SPA11.

Despite the difficult and contentious issues involved and the evolving litigation landscape, the parties reached a settlement in summer 2012. SPA12. Judge Gleeson granted preliminary approval in November 2012 and provisionally certified separate settlement classes for each of the two putative classes asserted by Plaintiffs: one under Rule 23(b)(2) (asserting claims for injunctive relief) and one under Rule 23(b)(3) (asserting claims for damages). After exhaustive approval-related proceedings, Judge Gleeson granted final approval to the settlement in December 2013.

1. The Settlement's Terms

In the settlement with the (b)(3) class, Defendants agreed to make monetary payments to class members valued at up to approximately $7.25 billion (before reductions for opt-outs), primarily for releasing their claims for monetary damages that had accrued up to the date of preliminary approval. SPA13. This fund represents "the largest-ever cash settlement in an antitrust class action." SPA35. The (b)(3) class permits opt-outs because it sought only damages for past conduct.

In the settlement with the (b)(2) class, Defendants agreed to a package of relief that modified the networks' respective rules prospectively from the date of preliminary approval and ensured the continuity of certain changes that occurred during this litigation. The (b)(2) class settlement makes material rules modifications sought by plaintiffs, including significant changes to the alleged "anti-steering" rules. This going-forward relief was provided in connection with a non-opt out (b)(2) class because it involves uniform, across-the-board prescriptions for each network's operation; the network rules themselves have always been and must be consistent with respect to all merchants. For that reason as well, the (b)(2) class was defined to include both existing and future merchants. SPA118 ¶ 2(b).

First, Visa and MasterCard agreed to allow merchants to surcharge on Visa- or MasterCard-branded credit card transactions at the brand level (*i.e.*, all Visa or all MasterCard transactions) and product level (*e.g.*, all "Visa Signature" transactions). SPA13. Merchants thus won the ability to pass their card acceptance costs on directly to their customers.

Second, the settlement "lock[s]-in" the Durbin Amendment's minimum-purchase and discounting provisions and those in the consent decree with the DOJ. *Id.* Defendants agreed to continue to abide by those requirements, regardless of legislative, judicial, or other developments that would otherwise dissolve them. *See id.*

Third, the settlement makes clear that merchants who operate different businesses under different "banners" or "trade names" can accept Visa- and MasterCard-branded cards at some of those businesses but not others. *Id.*

Fourth, the settlement obligates Visa and MasterCard to negotiate in good faith with groups of merchants that wish to negotiate with the networks collectively rather than one-on-one. *Id.*

The District Court concluded that the settlement

> preserves the integrity of the rules that made (and continue to make) the networks successful. At the same time, by further relaxing merchant restraints regarding pricing, it provides for transparency and competition at the point of sale. Merchants who choose to use the power the proposed rules changes give them will be able to exercise control over (and perhaps reduce) their costs from accepting Visa and MasterCard credit cards.

SPA32.

In exchange for the agreement to modify or eliminate these existing practices, the (b)(2) class agreed to permit on a going-forward basis certain other conduct that had been the subject of the claims for injunctive relief. SPA118 ¶ 2(b). Additionally, the (b)(3) and (b)(2) classes agreed to release "claims that are or could have been alleged in this case." SPA44; *see* SPA134–SPA136 ¶ 33 ((b)(3) class release); SPA169–172 ¶ 68 ((b)(2) release). As the District Court explained, "[i]n exchange for a new, going-forward rules structure," Defendants "bargain[ed] for and receive[d] releases of claims that are or could have been alleged based on the [']identical factual predicate['] of the claims in this case." SPA45–SPA46. The provisions "do not release the defendants from liability for claims based on new rules or new conduct or a reversion to the pre-settlement rules." SPA46. Similarly, while Defendants must adhere to the agreed-upon rules modifications until 2021, *see, e.g.*, SPA84 & SPA87 ¶ 13(a)–(b) & (k)–(m); SPA151 ¶ 45; SPA164 ¶ 58, if they enact rules that are not "substantially similar" to those agreed-upon provisions, the releases would not apply to those provisions, *see* SPA82 ¶ 12(c)(vii), SPA88 ¶ 16(b)(vii).[6]

2. Bases for Approval

"Only .05%" of the "approximately 12 million merchants compri[sing] the class" objected to the settlement. SPA23. As the District Court observed, 90% of the objections were submitted on boilerplate forms downloaded from websites that "disseminated false and misleading information for the precise purpose of drumming up objections and opt-outs." *Id.* A number of legitimate objectors, however, argued that the settlement was procedurally and substantively unreasonable. SPA13-SPA14; *see* SPA34–SPA47 (discussing objections).

After extensive approval-related proceedings, *see* SPA14, SPA7, Judge Gleeson issued a lengthy opinion approving the settlement. SPA1–SPA55. The court found that the settlement "secures both a significant damage award and meaningful injunctive relief for a class of merchants that would face a substantial likelihood of securing no relief at all if this case were to proceed." SPA15; *accord*

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[6] *Compare* Merchant Appellants' (hereinafter "Merchants") Br. 8 (alleging that the settlement "prevents merchants . . . from challenging anticompetitive conduct *forever*").

D.E.5965 at 3 (Sykes). The court highlighted three significant sources of risk with respect to liability and to the relief plaintiffs requested. SPA15–SPA16; SPA25–SPA32.

First, Judge Gleeson concluded that the networks' IPOs would undermine plaintiffs' ability to prove "part of the 'core conduct' [they] sought to address," namely that "'Visa and MasterCard member banks [. . .] effectively control the decisions of both Networks' by setting rules and interchange fees for the networks to serve their collective interest." SPA28 (quoting complaint) (second alteration in original). The networks' restructurings, the court explained, brought them "out from under the control of their member banks," which "strengthened the defendants' argument" that the setting of interchange fees was a unilateral network activity, not the result of some structural or "walking" conspiracy. *Id.*

Second, the court was skeptical that plaintiffs could prove the unlawfulness of the networks' rules and practices—particularly default interchange and the Honor-all-Cards rule. SPA16; SPA28–SPA32. Default interchange, Judge Gleeson concluded, "played an essential role in the construction of the networks at issue here, and those networks provide substantial benefit to both merchants and consumers." SPA30. Without default interchange, network participants would need to execute countless bilateral agreements regarding unique interchange rates, which would inflate costs and impair the now seamless system. *See* SPA29–

SPA30; D.E.1550 ¶ 181. As the District Court noted, courts, economists and practitioners have agreed that "the Honor-all-Cards rule and similar rules [are] *procompetitive* under the Rule of Reason." SPA31. Quoting the public remarks of Objectors' lead counsel below, the District Court explained that such rules represent:

> "a classic example of a restraint that was actually necessary for the functioning of the joint venture. . . . We all take it for granted, but you needed to have a rule that ensured to you, as a consumer, that when you proffer the Visa card, the merchant is going to take it. It's not going to say, 'I'll take a Chase Visa card, but I don't like Citibank, so I'm going to turn that one down.'"

SPA32 (quoting Panel Discussion II: Consumer Issues at 5–6 (Statement of Jeffrey Shinder) (Fordham Univ. Sch. of Law 2008) (*reproduced at* D.E.5939-3)).

Those procompetitive effects, together with "DOJ's recent decision not to challenge the default interchange rules despite the entreaties by Class Counsel that it do so . . . further sugges[t] that the plaintiffs' antitrust challenge to the rules could easily fail." SPA30.

Third, even if plaintiffs were able to establish an unlawful agreement with predominantly anticompetitive effects, the court concluded that plaintiffs faced significant risks as to the relief they sought. For instance, the District Court recognized that there was a compelling argument that *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), barred the (b)(3) class's ability to recover damages and would foreclose any future claims for monetary relief related to the interchange system. *See* SPA27–SPA28 & n.15.

Additionally, even if *Illinois Brick* did not extinguish damages entirely, the court doubted that plaintiffs could fully overcome the "problems and complexities inherent in proving damages to the jury," SPA32, particularly because—as the court-appointed expert concluded—plaintiffs lacked a model demonstrating what the payment card market would look like in the absence of the challenged rules. SPA33.

Furthermore, the court recognized that plaintiffs faced additional hurdles as to the injunctive relief they pursued. It explained that many of plaintiffs' requests—such as judicial regulation of interchange fees—were simply outside the power of the federal judiciary. SPA14; SPA17.

After weighing all of the foregoing, the District Court approved the settlement on December 13, 2013, and Objectors timely appealed.

SUMMARY OF ARGUMENT

The District Court acted well within its discretion in certifying two settlement classes, one pursuant to Rule 23(b)(2) and one pursuant to Rule 23(b)(3), and in approving the settlement. Appellants challenge the judgment on essentially two fronts. They assert that the (b)(2) class obtained relief that was inadequate in light of the purported strength of the Class's claims, and that Judge

Gleeson violated Rule 23 and absent class members' due process rights by approving both the non-opt-out (b)(2) settlement class and the release provided by that class settlement. In addition, several of the networks' competitors raise a series of narrow objections. None of these arguments has merit or demonstrates an abuse of discretion.

I. A class-action settlement must be fair, adequate, reasonable, and not the product of collusion between the parties. Here, an irreproachable settlement process yielded a settlement that was fair, adequate, and reasonable, in all respects.

Both settlement classes received substantial relief. The Rule 23(b)(3) class obtained monetary relief valued at more than $7 billion (before reductions for opt-outs), the sufficiency of which Objectors do not challenge here. The modifications to the networks' rules secured by the (b)(2) class were likewise more than adequate, especially in light of the serious litigation risks confronting plaintiffs.

Those risks were daunting. Any hope of the (b)(2) class to obtain going-forward relief was clouded by the IPOs, which eliminated the argument that the networks were structural conspiracies, left the banks with no control over the networks' policies at issue, and undercut plaintiffs' ability to demonstrate the threshold antitrust requirement of an "agreement." Moreover, as the District Court recognized, the challenged network rules have significant procompetitive features, and thus the class faced substantial obstacles in showing that they were unlawful.

Default interchange streamlines card acceptance and eliminates the need for separate, bilateral negotiations over the interchange fee schedule. Honor-all-Cards is an indispensable element of the seamless payment experience that has driven the expansion of cardholding, card usage, and merchant sales. Plaintiffs had not shown that a credit-card system could survive, much less flourish, without the challenged network rules. Yet, such a showing was essential to establishing that the challenged rules were unlawful restraints.

Plus, if plaintiffs somehow prevailed on liability, they faced an equally onerous task at the remedies phase. Because merchants do not directly pay interchange fees—acquiring banks do—plaintiffs faced the significant risk that *Illinois Brick* bars any past or future damages claims. And, if damages were not entirely precluded, plaintiffs still faced a grave risk, as the District Court and the court-appointed expert observed, that they would not recover substantial sums, because plaintiffs' damages model rested on an implausible "but-for" world. As to injunctive relief, the District Court explained that plaintiffs' demand for a wholesale reshaping of the payment card networks was more than a federal court could provide, especially given changes to the networks that occurred during the litigation. Given the many weaknesses in plaintiffs' case, the relief afforded was more than fair.

The District Court also did not abuse its discretion in certifying a mandatory, non-opt-out (b)(2) settlement class here. Contrary to Objectors' contentions, the proper focus of the certification inquiry is on the *claims presented and pursued* by the class, not on the relief ultimately obtained or the issues compromised by the class in exchange for that relief. Here, a putative (b)(2) class had been, since the filing of the first class complaint, challenging the lawfulness of core network rules. Those rules applied to the class on the whole.

As a consequence, it was entirely proper under both Rule 23 and the Due Process Clause that the (b)(2) settlement class agreed to release its ability to challenge—whether in a damages action or one for injunctive relief—the lawfulness of the post-settlement network rules. Such concessions must be within the power of a (b)(2) settlement class, otherwise defendants could not enter meaningful Rule 23(b)(2) settlements. Without such a release, whatever remedies Defendants agreed to, and whatever changes they agreed to adopt, would be subject to a new round of legal challenges by the same group of plaintiffs the moment the settlement was approved. "Settlements" would settle nothing. There is no reason to treat cases involving a non-opt-out settlement class as immune from a negotiated conclusion.

II. The releases here were proper because they simply reflect the boundaries of the "identical factual predicate" doctrine. The releases do nothing more than release the claims that were, or could have been, asserted on the factual predicate underlying this action. That is what the settlement agreement says, what counsel represented to the District Court, and the basis of the court's approval decision. Of course, as Judge Gleeson recognized, there may be cases in which it is not immediately clear whether particular claims fall within or without the scope of these releases. But future courts can examine the actual claims raised and facts alleged in such future cases to determine whether the release bars them.

III. Finally, the claims raised by competitors American Express, First Data, and Discover are unavailing. Their principal concern—that the settlement releases claims they may hold *in their capacities as competitors to Visa and MasterCard*—is belied by the text and context of the agreement. Discover also asserts that the settlement enshrines an unlawful group boycott against it as a competing network, but that novel claim cannot meet the standard for showing that a settlement violates the antitrust laws.

ARGUMENT

This Court reviews the approval of a class settlement—including the decision to certify the settlement classes—for abuse of discretion. *Wal-Mart I*, 280 F.3d at 132; *Joel A. v. Giuliani*, 218 F.3d 132, 139 (2d Cir. 2000). "The trial judge's views are accorded 'great weight . . . because he is exposed to the litigants, and their strategies, positions and proofs. . . . Simply stated, he is on the firing line and can evaluate the action accordingly.'" *Joel A.*, 218 F.3d at 139 (alterations in original) (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 454 (2d Cir. 1974)); *accord Wal-Mart II*, 396 F.3d at 117; *Cnty. of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1323 (2d Cir. 1990). Moreover, "[this] considerable deference . . . is heightened where the trial judge's experience has imparted to the judge a particularly high degree of knowledge." *Joel A.*, 218 F.3d at 139.

This case is the archetype for applying "heightened" deference. Judge Gleeson has spent 16 years on the interchange "firing line"—eight during this litigation and another eight courtesy of earlier actions between various merchant-plaintiffs and the network defendants. *See supra* at 9 n.2, 13–14 & n.5.

Regardless of the degree of deference, however, the result here would be the same. A painstaking, arms-length settlement process negotiated while the parties vigorously litigated the fundamental issues raised by plaintiffs' claims produced a deal that provides meaningful backward- and forward-looking relief for plaintiffs and is a fair compromise in all respects. Despite Objectors' mountain of briefing, they fail to raise any serious question regarding Judge Gleeson's evaluation of the propriety of the settlement classes or the procedural or substantive fairness of the settlement. The judgment should be affirmed.

I. JUDGE GLEESON PROPERLY APPROVED THE CLASS SETTLEMENT.

Before a court may approve any class settlement, it must determine (1) that the settlement is fair, adequate, reasonable, and not a product of collusion, per Rule 23(e); and (2) that the requirements of Rule 23(a) and (b) have been met. *In re Am. Int'l Grp., Inc. Sec. Litig.*, 689 F.3d 229, 239 & n.8 (2d Cir. 2012) ("*AIG*"). These requirements were satisfied here.

A. The District Court Did Not Abuse Its Discretion In Approving The Settlement.

"The central question raised by the proposed settlement of a class action is whether the compromise is fair, reasonable and adequate." *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982). That inquiry requires evaluating "both the settlement's terms and the negotiating process leading to settlement." *Wal-Mart II*, 396 F.3d at 116. "A 'presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.'" *Id.*

The settlement process here was unimpeachable. As such, the agreement is presumptively valid. But even absent that deference, the record confirms that the settlement was more than appropriate in every respect, and the judgment should therefore be affirmed.

1. The Settlement Was Procedurally Fair.

The parties were represented by a host of “experienced and able” class-action counsel, SPA21, who “litigated the case full-throttle” even during the pendency of settlement talks, SPA11. Discovery was not merely “‘meaningful,’” *Wal-Mart II*, 396 F.3d at 116, but exhaustive and completed before settlement. The parties produced tens of millions of documents and took hundreds of fact and expert depositions. Summary judgment motions were awaiting decision and all litigants were well-positioned to appreciate the strengths and weaknesses of their (and their opponents’) positions. SPA10–SPA11; SPA16. The District Court found that the parties’ talks were “fair and conducted at arm’s length” and rejected Objectors’ suggestion that there was an “indicat[ion of] collusion.” SPA21. Moreover, *four* third-party neutrals facilitated negotiations—two highly respected outside mediators (former U.S. Magistrate Judge Edward Infante and Professor Eric Green) and, in the later stages, Magistrate Judge Orenstein and Judge Gleeson. *See id.*; SPA11 & n.9; *see also D’Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (“[A] court-appointed mediator’s involvement in pre-certification settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure.”).

Because the process was fair and collusion-free, the resulting agreement is presumed to be fair, adequate, and reasonable. *Wal-Mart II*, 396 F.3d at 116. Nothing in the record or the briefing on appeal upsets that presumption.

2. The Settlement Was Substantively Fair In Light Of The Substantial Legal Defenses Plaintiffs Faced.

While Defendants agree with and therefore join the Class Plaintiffs' substantive-fairness arguments, *see* Class Br. § II, we write to underscore the reasonableness of the settlement's terms in light of the significant litigation risks the Classes would have faced if (as Objectors wish) they had spurned settlement. *See Grinnell*, 495 F.2d at 463 (requiring court to consider litigation risk, among other factors, in evaluating the fairness of a settlement); SPA20.

Everyone but Objectors recognizes that the Class Plaintiffs' position at the moment of settlement was precarious. The viability of their core challenges to default interchange and Honor-all-Cards—already highly doubtful under the Rule of Reason, even for the period that the networks remained nonpublic bankcard associations—had further weakened after the Visa and MasterCard IPOs. And even assuming, *arguendo*, some antitrust violation could be shown, the merchants had little chance of securing the relief they sought. Between *Illinois Brick*, a serious *Daubert* challenge to their principal expert on antitrust injury, the lack of a plausible vision for a functional payment-card market without the challenged rules, and difficulties in persuading a jury to award billions in damages here, plaintiffs stood little chance of securing a substantial award. Plaintiffs also were unlikely to obtain the "sweeping" injunctive relief they had demanded—including, among other things, invalidation of Honor-all-Cards and the resetting of default interchange to some indeterminate level between zero and its current levels—due to the inherent limitations on the federal courts' power to regulate the marketplace. *See* SPA14; SPA17.

Plaintiffs faced serious odds of complete failure, and counsel who actively litigate are in the best position to understand the risks. On appeal, however, Objectors ignore those risks. The lead brief—the Merchants' Brief—barely addresses litigation risk. It first mentions the case's merits on page 78, but fails to address the procompetitive effects of the challenged rules, the IPOs, or plaintiffs' risks at the remedies phase. *Compare* SPA20–SPA36. The Merchant Trade Groups pay marginally more attention to the merits, *see* Br. § II, but never reconcile their optimism about the likelihood of success with Judge Gleeson's findings or the record. *See id.* at 50 (asserting, without analysis, that the plaintiffs' "'best possible recovery'" was total elimination of Honor-all-Cards, default interchange, and the no-surcharge rules) (quoting *Grinnell*, 495 F.2d 463). To the extent Objectors are suggesting that a court reviewing a settlement should ignore the substantial weaknesses in plaintiffs' claims—that a settlement should be viewed as if plaintiffs were highly likely to prevail in full—they are wrong as a matter of law. *See Weinberger*, 698 F.2d at 73–74.

Objectors also erroneously suggest that the District Court had to fully *adjudicate* plaintiffs' claims, faulting Judge Gleeson for (among other things) not resolving whether the networks possess market power. *See, e.g.*, Merchant Trade Groups' Br. 38 (charging that the District Court "skipp[ed] the first two parts in the antitrust analysis"); *id.* at 39–41, 46. In fact, "[t]he district court [need] not determine the validity of the [plaintiffs'] claim . . . . The very purpose of a compromise is to avoid the determination of sharply contested and dubious issues . . . ." *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1086 (2d Cir. 1971) (citing *In re Prudence Co.*, 98 F.2d 559, 560 (2d Cir. 1938)); *id.* at 1085. As a consequence, it is unremarkable that the District Court devoted its risk assessment to the points discussed below and did not dwell on market power (though, it made clear that it was aware of the issue, SPA26 n.14).

The District Court conducted the requisite realistic assessment of the prospects of further litigation. *See* SPA14–SPA19; SPA25–SPA36. Having done so, it fully understood the obstacles facing plaintiffs, including plaintiffs' inability to: (a) prove an unlawful agreement causing anticompetitive harms, and (b) obtain the damages or injunctive relief they sought, even if they prevailed on the merits.[7] In light of those risks, the settlement was more than fair.

a. Plaintiffs Faced Substantial Hurdles In Proving A Conspiracy And Anticompetitive Restraints.

To establish a right to *any* relief—monetary or injunctive—plaintiffs would have to prove (among other things) that the networks' challenged rules (1) were agreements in restraint of trade; and (2) were *unlawful*—that is, anticompetitive—restraints. *See, e.g.*, *Bd. of Trade v. United States*, 246 U.S. 231, 238–39 (1918). As Judge Gleeson found, plaintiffs "face[d] a substantial likelihood of securing no relief at all." SPA15.

First, as to the agreement, plaintiffs initially asserted that Visa and MasterCard were "'structural conspiracies' or 'walking conspiracies'" by virtue of their organization as bankcard associations of member banks. SPA19; *see* SPA28. That contention, even if arguable when this case was filed, crumbled when the networks completed their IPOs. Post-IPO, member banks no longer retained their ownership of Visa or MasterCard, lacked voting control over the networks'

[7] These were not the only hurdles plaintiffs had to surmount. They faced strong opposition on their class-certification motion and would have confronted "practical problem[s]" in convincing a jury to award them damages. *See, e.g.*, SPA33–SPA34. And, even if plaintiffs had managed to eke out any sort of victory, an appeal to this Court, potentially followed by further proceedings in the Supreme Court or on remand to the District Court, would have increased their chances of non-recovery, not to mention prolonged the already lengthy period that they could expect to wait before obtaining any relief. *See Grinnell*, 495 F.2d at 457.

respective Boards of Directors, and had no power to adopt, maintain, or modify *any* of the networks' payment-card rules or policies. *See* D.E.1477-7 ¶¶ 181–191. As the District Court recognized, the IPOs brought the networks "out from under the control of their member banks" and thereby "strengthened the . . . argument that . . . the setting of interchange fees cannot constitute horizontal price-fixing." SPA28.

The Merchant Trade Groups argue that, post-IPOs, both Visa and MasterCard maintained default interchange (like other rules plaintiffs challenged), and that this somehow indicates a conspiracy among the Defendants to retain the pre-existing anticompetitive rules. Br. 15–16 & n.8, 47–49. But the persistence of the challenged rules simply shows that the rules are a procompetitive feature of a well-functioning system. Plaintiffs faced serious obstacles to proving that, post-IPOs, Visa and MasterCard failed to make independent decisions regarding the challenged rules.[8]

Second, the District Court's lengthy discussion of the network rules that plaintiffs challenged highlights plaintiffs' likely inability to prove an *unlawful*

[8] On July 18, 2014, Judge Gleeson denied Defendants' motions to dismiss opt-out complaints brought by certain merchants. *In re Payment Card Interchange Fee & Merchant Disc. Antitrust Litig.—Opt Out Cases*, No. 1:14-md-1720-JG (E.D.N.Y. July 18, 2014) (minute order and transcript (D.E.104 & 105). The court did so on the pleadings without passing on the underlying merits of the opt-out claims or revisiting its earlier statements in the judgment on appeal about the litigation risks to plaintiffs.

restraint of trade. SPA16; SPA28–SPA32. The District Court determined that the default interchange and Honor-all-Cards "rules undeniably have significant procompetitive effects," SPA16, and the Eleventh Circuit has held default interchange lawful, *NaBanco*, 779 F.2d at 602. Furthermore, other courts have found lawful no-surcharge rules similar to those challenged by plaintiffs.[9]

Here, the District Court observed that default interchange lay "at the core of the defendants' successful business model," SPA29, and underscored that it "played an essential role in the construction of the networks at issue here," SPA30. The Merchants Trade Groups nakedly assert that what has been true historically is not necessarily true today given the alleged "matur[ity]" of the networks. *E.g.*, Br. 38. But they ignore that the underlying rationales which courts have previously found compelling remain just as vital today. Likewise, they ignore the abundant evidence on this subject before the District Court, including expert analyses provided not only by Defendants but also by the court's independent expert. *See, e.g.*, K. Murphy Rep. ¶¶ 32–34, 98, 202, 209, 219–224; D.E.5965 at 8, 13–22.

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[9] *See, e.g.*, *Tennessean Truckstop, Inc. v. NTS, Inc.*, 875 F.2d 86 (6th Cir. 1989); *Kartell v. Blue Shield of Mass., Inc.*, 749 F.2d 922 (1st Cir. 1984) (Breyer, J.). Defendants showed that without restrictions on surcharging, merchants could attempt to nullify "Honor-all-Cards" by imposing an exorbitant surcharge on a given card, D.E.1477-7 ¶ 163, and harm consumers by offering low prices in advertisements but effectively raising the price through surcharging at the point of sale, *id.* ¶ 160, or opportunistically surcharging consumers lacking payment alternatives, *id.* ¶ 161.

Default interchange fees serve functions that have not changed with the passage of time. SPA29. Default interchange still obviates the need for thousands of issuers and acquirers to negotiate separately. *See* SPA29–SPA30. Default interchange thus eliminates a massive transaction cost on a system that has grown tremendously in the last few decades, thanks in large part to the rule's minimization of such costs. D.E.1550 ¶ 181; *see* SPA29; T. Murphy Decl. ¶¶ 24–28; Sheedy Decl. ¶¶ 24–27 (lodged with D.E.2088). Courts have highlighted this procompetitive efficiency, concluding that default interchange rules are "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 the thousands of [network] members." *NaBanco*, 596 F. Supp. at 1259–60; *see In re ATM Fee Antitrust Litig.*, 554 F. Supp. 2d 1003, 1007 (N.D. Cal. 2008).

Moreover, as the Eleventh Circuit concluded in *NaBanco*, "[f]or a payment system like VISA to function, rules must govern the interchange of the cardholder's receivable," because, "absent prearranged interchange rules," "universality of acceptance—the key element to a national payment system—could not be guaranteed." 779 F.2d at 602. Absent a system of mandatory acceptance of all network-branded cards, a customer walking into a store that purports to accept Visa would have no assurance that the Visa-branded card issued by his or her particular bank would function at that store. Acceptance would depend on whether compensation arrangements had been reached with that particular customer's issuing bank covering transactions from this particular merchant. The fundamental importance of universal acceptance—*i.e.*, that any card bearing a network brand will work at any merchant that purports to accept the brand—to network functioning and image has not changed with time. Instead, universal acceptance remains central to the Visa and MasterCard brands. *See*, *e.g.*, Elzinga Rep. at 16, 71–74 (lodged with D.E.2088); K. Murphy Rep. ¶¶ 111, 206–224; T. Murphy Decl. ¶¶ 25–27; Sheedy Decl. ¶¶ 24–28.[10]

Thus, the District Court observed that "those networks provide substantial benefit to both merchants and consumers." SPA30. The court noted that Defendants' showings about procompetitive effects were essentially undisputed, and rejected Objectors' suggestion that these beneficial "practices have become antitrust violations by virtue of industry maturation." SPA29; *see* SPA30 (similar). Instead, without making any merits determination, Judge Gleeson endorsed the court-appointed economic expert's finding that "'plaintiffs face considerable difficulty in establishing [that] default interchange . . . *cause[s] anticompetitive*

[10] The record showed many other procompetitive features, including enhancing cardholder rewards programs, which increase card use and, unsurprisingly, merchant sales, D.E.1550 ¶ 186; Sheedy Decl. ¶ 31; guaranteeing payment to acquirers and merchants, even in cases of fraud or nonpayment, D.E.1550 ¶ 187; T. Murphy Decl. ¶ 29; and funding innovations and enhancements to the networks, D.E.1550 ¶¶ 182–183; *see* Sheedy Decl. ¶ 18; SPA29.

harm that outweighs [its] pro-competitive benefits.'" SPA31 (emphasis added) (crediting Professor Sykes' view that "'plaintiffs face a substantial probability of securing little or no relief at the conclusion of trial'" (alteration omitted)); *accord* SPA15. Similarly, the court recognized that "the prospect that [the default interchange rule's] anticompetitive effects remain outweighed by its procompetitive ones is real." SPA30. These observations are consistent with *NaBanco*, decided when Visa was a bankcard association, in which the Eleventh Circuit affirmed that the interchange fee "is more procompetitive than anticompetitive." 779 F.2d at 605. Moreover, Judge Gleeson's findings demonstrate the incorrectness of the Merchant Trade Groups' assertion that the District Court failed to recognize the need to weigh procompetitive effects against any anticompetitive ones. Br. 46.

Likewise, the Merchants Trade Groups are wrong that the allegedly anticompetitive effects of default interchange were "largely undisputed." Br. 40–41. To the contrary, Defendants produced evidence that network output *increased*, which is the opposite of what one would expect from an anticompetitive system. D.E.5965 at 10–11. In any event, the Trade Groups' argument misses the point. The key question facing the District Court was whether there was a real risk that plaintiffs would fail to carry their burden of proving that any anticompetitive effects outweigh the rules' procompetitive benefits. The many and substantial procompetitive features created a serious risk that plaintiffs would fail to make that showing, and thus there was no reason for Judge Gleeson to focus on the relative difficulty of proving whether default interchange had *any* anticompetitive effects.

Finally, the District Court recognized that "[n]o American court has ever held that Visa or MasterCard's default interchange rules violate the antitrust laws." SPA30. In addition to endorsing the *NaBanco* court's findings, *id.*, Judge Gleeson recognized (*id.*) that the Ninth Circuit more recently affirmed the dismissal of claims that "Banks conspired to fix the interchange fee," holding that "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." *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008). Given the evidence here, plaintiffs faced a serious risk that the court would follow these decisions and find default interchange lawful. SPA30–SPA31.

The District Court concluded that plaintiffs' Honor-all-Cards challenge was similarly tenuous, given the reality that "assurances that a network's cards will be accepted wherever the network's logo is displayed [are] critical to customers' desire to carry such cards and to merchants' willingness to accept them." SPA31. If merchants could choose which Visa- or MasterCard-branded cards to accept, the concept of a network and a network brand would lose all meaning. The court recognized that courts, economists and practitioners have therefore found Honor-all-Cards or similar rules "to be *procompetitive*." *Id.* (emphasis in original) (analogizing Honor-all-Cards to the system upheld in *Buffalo Broadcasting Co. v. ASCAP*, 744 F.2d 917 (2d Cir. 1984)); SPA32 (reiterating that "procompetitive features" cast doubt on plaintiff's ability to succeed); Sheedy Decl. ¶¶ 33–35; T. Murphy Decl. ¶¶ 37–40. As detailed, *supra* at 19, the District Court observed that Objectors' lead counsel had described the rule as a "'classic example of a restraint that was actually necessary.'" SPA32.

In addition, as Professor Sykes noted, "a showing that default interchange and related network rules . . . are anticompetitive requires . . . a convincing description of a counterfactual world in which the purportedly anticompetitive practices of each network are eliminated, and in which the resulting market equilibrium is demonstrably superior from an economic standpoint." D.E.5965 at 19–20. Absent a plausible explanation of how a payment card market could be viably maintained in the absence of the challenged rules, plaintiffs stood little chance of proving that those rules violate the Sherman Act. SPA31 (endorsing Professor Sykes' conclusion that it would be difficult to establish that the alleged anticompetitive harm of Honor-all-Cards outweighs its procompetitive effects). Yet, as Defendants' *Daubert* filings and own expert reports showed, Objectors never presented a reliable expert or other analysis of what a realistic counterfactual world would look like. *See* D.E.5965 at 23–25 (Sykes' criticisms of plaintiffs' theory). Objectors fail to come to grips with the substantial risk faced by the Class Plaintiffs on the merits.

If that were not enough, legal developments beyond this litigation further eroded plaintiffs' claims by removing some of the practices they challenged as unlawful. *See* SPA10 & n.6; *supra* at 10–11 (discussing rules changes triggered by the Durbin Amendment and the DOJ consent decree). This increased the chances that the going-forward interchange system would not, on balance, be deemed an unlawful restraint of trade.

b. Even If Plaintiffs Could Establish Liability, It Was Doubtful That They Would Obtain Their Desired Remedies.

Plaintiffs also faced long odds as to the relief they sought. *See* SPA32–SPA33.

i. The District Court rightly recognized that *Illinois Brick* raised serious doubts that merchants could ever recover *any* damages. SPA27–SPA28 & n.15. *Illinois Brick* not only would foreclose the accrued damages that the (b)(3) class sought, but also would extinguish plaintiffs' ability to recover any future monetary damages allegedly resulting from the interchange system that remained in place following the (b)(2) settlement. Objectors' contention that surrendering future claims for damages was a substantial sacrifice is off-base, in large part because they never confront *Illinois Brick*'s potential impact on those hypothetical claims.

In *Illinois Brick*, the Supreme Court held that the Clayton Act permits only *direct* purchasers of a product to sue over alleged price-fixing. 431 U.S. at 735–37; *see id.* at 726–29. Here, merchants allege that Defendants fixed the price of interchange fees. SPA22. But the acquiring banks, not merchants, pay those fees directly to the issuers. The challenged network interchange fee rules address only the acquiring-bank-to-issuing-bank payment obligation. Merchants typically pay their acquirers a merchant discount fee, which the evidence showed is not required by anything in the network rules, not "fixed" by horizontal agreement among acquirers, and not homogeneous in practice. *See, e.g.*, D.E.1478-4 ¶¶ 43–44, 51–57; D.E.1550 ¶¶ 131, 152; *see* SPA7–SPA8. Plaintiffs contend that the discount fee simply passes on the cost of the interchange fee jot-for-jot, but the Supreme Court rejected that as a reason to depart from the direct-purchaser-only rule. *Ill. Brick*, 431 U.S. at 743–44 ("Respondents here argue . . . that pass-on theories should be permitted for middlemen that resell goods without altering them and for contractors that add a fixed percentage markup to the cost of their materials in submitting bids. . . . We reject these attempts to carve out exceptions . . . for particular types of markets." (footnote omitted)); *accord Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 216 (1990) ("ample justification exists for [the Court's] decision not to 'carve out exceptions to the [direct purchaser] rule for particular types of markets.'") (second alteration in original).

This Court and the Ninth Circuit have ruled *Illinois Brick* bars damages sought by downstream payors of payment-card fees and charges that—like interchange fees—an intermediate party pays in the first instance. *See Paycom Billing Servs., Inc. v. MasterCard Int'l, Inc.*, 467 F.3d 283, 291–92 (2d Cir. 2006); *In re ATM Fee Antitrust Litig.*, 686 F.3d 741, 744–45, 749–50 (9th Cir. 2012), *cert. denied sub nom. Brennan v. Concord, EFS, Inc.*, 134 S. Ct. 257 (2013). Indeed, as Judge Gleeson recognized, the Ninth Circuit's ruling, which addressed another system of interchange payments, rejected the same "exceptions to the *Illinois Brick* rule that plaintiffs here have relied on." SPA28 n.15 (citing *ATM Fee*, 686 F.3d at 750–58). Thus, the District Court correctly concluded, "the indirect purchaser doctrine would be a source of significant uncertainty for the plaintiffs." SPA28.

Although Objectors fail to address *Illinois Brick*'s application to plaintiffs' claims here,[11] the Merchant Trade Groups dismiss Judge Gleeson's discussion of the case, contending that the court committed a "legal error" in using *Illinois Brick* to "justif[y] the (b)(2) Settlement" because *Illinois Brick* applies only to damages, not injunctive relief. Br. 35. The argument is meritless.

To start, that is not what the District Court did. It acknowledged that *Illinois Brick* holds only "that 'indirect purchasers' may not recover antitrust *damages*,"

[11] The Merchants, American Express, Blue Cross Blue Shield, Discover, First Data, and the Retailers and Merchants Objectors do not cite it. U.S. PIRG appears to recognize the potential merit of the *Illinois Brick* argument. Br. 26 n.6.

SPA27, and repeatedly discussed the doctrine in that context, *see*, *e.g.*, *id.* ("treble-damages antitrust actions"); *id.* ("actions for antitrust damages"); SPA28 (similar). The court discussed *Illinois Brick*—like all of the litigation risks here, *see* SPA25—not as a risk to the (b)(2) class, but to plaintiffs generally. Moreover, the Merchant Trade Groups claim that "the (b)(2) settlement" "unjustifiably releases merchants' claims for *future damages*." Br. 51 (emphasis added, capitalization omitted). As discussed below, there is nothing improper in the release. But to the extent the Merchant Trade Groups are suggesting that plaintiffs gave up something of value when releasing claims for future damages, the viability and value of those claims—including the impact of *Illinois Brick*—is highly relevant.

ii. Even if *Illinois Brick* was not an absolute bar, "the history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible damages." *Wal-Mart II*, 396 F.3d at 118 (internal quotation marks omitted). Any past or future damages claim here faced that risk. Given plaintiffs' claim that the default interchange system overcharges them, it was essential for plaintiffs to construct a rigorous model for ascertaining what interchange rates would prevail in a payment card market that lacked default interchange and Honor-all-Cards.

No such model exists. Although plaintiffs suggested a number of possibilities, including an interchange fee of 0.0% and an interchange fee that was equivalent to the rate charged for debit transactions, D.E.5965 at 22 (Sykes Rep.), those scenarios are unrealistic. Judge Gleeson found that "[i]t is not likely that credit card interchange fees would . . . become zero." SPA33. As Professor Sykes explained, zero interchange is implausible because, at least "to [his] knowledge[,] no general purpose credit or charge card network of any consequence has ever evolved with zero interchange." D.E.5965 at 23–24. And debit-rate interchange was unlikely given that credit cards are more costly to issue than debit cards due to their many advantages to consumers (*e.g.*, credit itself, float, purchase protection, and reward programs). *See* SPA33; D.E.5965 at 16, 24.

iii. Finally, the Class Plaintiffs faced major obstacles as to the injunctive relief sought, most notably the inherent limits on a federal court's remedial authority and the many changes to the legal landscape since the case began.

Over the course of the litigation, there were numerous changes that effectively eliminated many of the network structures that plaintiffs had complained of: The IPOs terminated the banks' control of Visa and MasterCard; Dodd-Frank expanded merchants' discounting authority; and the settlement with DOJ enlarged the merchants' discounting power still further. Additionally, the settlement here, of course, permits surcharging on a going forward basis.[12] All of

[12] Objectors decry the surcharging relief because some states' laws prohibit surcharging, which means that some merchants will not be able to surcharge Visa and MasterCard transactions even in a post-settlement world. *See, e.g.*, Merchants'

these developments both weakened plaintiffs' claim that the going-forward system was anticompetitive, *see supra* § I.A.2.a, and narrowed the range of remedies available to the District Court (beyond that achieved in the settlement) in the event it concluded that interchange fees were in fact set at supracompetitive levels.

Put simply, by the time the District Court was evaluating the prospects of further litigation in light of the settlement, the only other injunctive remedies that remained possible concerned default interchange and Honor-all-Cards. But, as discussed in detail above, those two features of the core network rules had been repeatedly recognized by courts as, on balance, procompetitive, the record in this case confirmed the continuing importance of those rules to the universal acceptance that is central to the Visa and MasterCard brands, and both the court-appointed expert and Judge Gleeson expressed serious doubts that plaintiffs could mount a successful challenge on the merits to those rules. *Supra* § I.A.2. Any request to enjoin default interchange and Honor-all-Cards out of existence entirely would have required precisely the evidence plaintiffs had failed to bring forth: an explanation of how a supposed-restraint-free world would have produced networks without such rules at all.

Br. 15, 22–23. The Class's brief discusses the going-forward importance of the surcharging relief, Class Br. § II.A.2, and we touch on the importance the class placed on such relief throughout this litigation below, *infra* § I.A.3.

Plaintiffs might have asked the court to impose a different default interchange rate than that imposed by the networks. But judicial regulation was improbable, because courts enforcing the antitrust laws cannot set prices. *See, e.g.*, *Image Technical Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1225 (9th Cir. 1997). *But cf.* Merchants' Br. 14 (complaining that the settlement immunizes from suit "the default interchange schedules"). Any effort to urge judicial regulation also was compromised by the lack of a convincing counterfactual model showing that a payment-card system could flourish—or, for that matter, even function—with modified or judicially regulated interchange fees and card-acceptance policies. As Judge Gleeson summarized the weaknesses in plaintiffs' case for injunctive relief:

> Even if the plaintiffs spent several years pursuing this unwieldy case to a successful conclusion (despite substantial odds against such a result), *this Court would be in no position to grant the sweeping relief the objectors seek*. It cannot regulate interchange fees or enjoin nonparties or preempt state laws or reform network rules that do not violate the antitrust laws. *The Sherman Act affords relief only from certain proven anticompetitive business practices.*

SPA17 (emphases added); *see* SPA14.

In sum, plaintiffs had little hope of obtaining *any* of the relief they sought. The rules changes and billions of dollars they secured through this settlement would have been in substantial doubt if this case went forward.

3. The Settlement Was Substantively Fair In Light Of The Relief Provided To The Class.

Objectors offer no challenge to the more than $7 billion in monetary compensation made available to merchants in the (b)(3) class. Instead, Objectors complain that the changes to the network rules agreed to in the 23(b)(2) settlement supposedly provide little more than a peppercorn, in exchange for which they were forced to sacrifice valid and valuable claims. *See* Merchants' Br. 38–48; Merchant Trade Groups' Br. 31–60; SPA36–SPA37.

As discussed above, plaintiffs' claims were seriously in doubt. Moreover, Objectors are wrong in belatedly suggesting (post-settlement) that the ability to surcharge is a recently invented (and insignificant) consideration. In reality, obtaining the ability to surcharge was among the Class's primary goals from the litigation's outset. *See, e.g.*, D.E.1170-2 ¶ 49 (alleging that Defendants "insulated their anticompetitive practices from competitive pressures by adopting and enforcing the No-Surcharge Rule and other Anti-Steering Restraints"); *id.* ¶ 53.[13] As the JPML summarized in its initial transfer order assigning this MDL to Judge Gleeson, "[a]ll actions share factual questions arising out of allegations *that the*

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[13] *Accord* D.E.1170-3 ¶ 190 ("Visa and MasterCard impose the No-Surcharging Rule . . . to prevent Merchants from incenting consumers to use less-expensive payment methods."); *id.* ¶ 197 (no-surcharge rule "insulat[es] Defendants from competition and rais[es] prices for all consumers"); *id.* ¶ 330 ("The Anti-Steering Restraints (and particularly the No-Surcharge Rule) are anticompetitive vertical restraints."); *id.* ¶¶ 328–329, 336–338 (similar).

imposition of a no-surcharge rule and/or the establishment of the interchange fee causes the merchant discount fee to be set at supracompetitive levels." 398 F. Supp. 2d at 1358 (emphasis added).

The Class Plaintiffs maintained that focus at summary judgment, long before the settlement, describing surcharging as "the *most effective tool for merchants* to influence consumers' payment choices." Mem. Supp. Summ. J. (D.E.1538) at 8 (citing expert reports); *see*, *e.g.*, *id.* at 36, 54. As Judge Gleeson summarized, it was a rule change that the Class and individual plaintiffs "fought very hard to obtain." SPA36. Accordingly, Objectors' new antipathy toward that relief is suspect.

Objectors also challenge the (b)(2) settlement's value by claiming that the settlement "creates a worse result than if the Plaintiffs tried and lost the case." Merchant Trade Groups' Br. 52. This line of argument is doubly flawed. First, it is principally a challenge to the scope of the releases, yet—as discussed in depth *infra* § II—both the language and effect of the releases are standard, and "[t]he law is well-established in this Circuit and others that class action releases may include claims not presented and even those which could have not been presented." *Wal-Mart II*, 396 F.3d at 107; *accord Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 376–77 (1996). Second, Objectors rest their argument on the indefensible notion that, if a certified (b)(2) class had *lost at trial*, the exact same plaintiffs could have filed an identical suit the following day because—in Objectors' view—each card swipe made under the networks' rules would be a wholly new antitrust violation so different from those alleged in the earlier action that it would somehow evade traditional rules of preclusion. Merchant Trade Groups' Br. 52.

Objectors are off the mark. "'A final judgment on the merits of an action precludes the parties or their privies from relitigating *issues* that *were or could have been raised* in that action.'" *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1463 (2d Cir. 1996) (emphases added, alteration omitted) (quoting *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981)). *Res judicata* represents "finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Id.* (quoting *Nevada v. United States*, 463 U.S. 110, 129–30 (1983)).

In other words, if a (b)(2) litigation class had been certified and had judgment entered against it, absent class members could *not* simply have re-litigated the lawfulness of default interchange, Honor-all-Cards, no-surcharge, and the other rules at issue here. *See id.* "[U]nder elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation." *Cooper v. Fed. Reserve Bank of*

Richmond, 467 U.S. 867, 874 (1984). "A judgment in favor of the defendant extinguishes the claim, barring a subsequent action on that claim." *Id.*[14] Indeed, if preclusion were not the result, trials of Rule 23(b)(2) claims would be little more than an endless moot court for plaintiffs' counsel, who could continue to press the same claims over and over while hoping for a different result.

Thus, when plaintiffs settled, they did not put themselves in a position worse than unsuccessful litigation would have produced. Instead, in exchange for receiving going-forward settlement relief with respect to some of the rules, they agreed to foreclose continued challenges to other rules. That type of compromise is what settling parties always do, and the District Court properly found that compromise fair and reasonable given the litigation risks.

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[14] Rule 23(e) itself, *see Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997), as well as the adequacy of representation doctrine under Rule 23(a)(4) (requiring the representatives "adequately protect the interests of the class"), provide the bulwark against unfairly binding an absent class member to a non-opt-out class judgment. *See, e.g.*, *Hansberry v. Lee*, 311 U.S. 32, 42–43 (1940); *Robinson v. Metro-N. Commuter R.R.*, 267 F.3d 147, 165 (2d Cir. 2001), *abrogated on other grounds by Hecht v. United Collection Bureau, Inc.*, 691 F.3d 218 (2d Cir. 2012); *Marcera v. Chinlund*, 595 F.2d 1231, 1240 n.13 (2d Cir.) ("[D]ue process permits binding absentees to a judgment with respect to common questions of law if they have been adequately represented in the suit."), *vacated on other grounds sub nom. Lombard v. Marcera*, 442 U.S. 915 (1979); *see also Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 59 (3d Cir. 1994) (analysis of (b)(2) class certification recognizes that absent plaintiffs will "be[] bound by such judgment in the subsequent application of principles of res judicata.'"). Defendants already have shown why Rule 23(e) is satisfied here, *supra* § I.A, and embrace the Class's discussion of why its representation was adequate (and the Class's explication of why the other Rule 23(a) factors are satisfied here). *See* Class Br. § I.

B. The District Court Did Not Abuse Its Discretion In Certifying The (b)(2) And (b)(3) Settlement Classes In This Case, Based On The Specific Facts In This Record.

A district court that is presented with a proposed class settlement must, separate and apart from the Rule 23(e) analysis, "determine whether the requirements for class certification in Rule 23(a) and (b) have been satisfied." *AIG*, 689 F.3d at 238. Judge Gleeson did so here. SPA51–SPA53 & n.20; *see also* SPA36–SPA43. As the Class Plaintiffs' brief shows, Judge Gleeson did not abuse his discretion in finding those prerequisites met in this case. Several points bear additional mention.

Objectors assert that a (b)(2) class was improperly certified for settlement because the case involved claims for money damages and injunctive relief, and the settlement extinguishes claims for money damages. *See* Merchants' Br. at 32–66. Objectors' arguments blend a certification objection with an objection to the release of speculative "damages" claims that might arise in the future, and assert that reversal is proper because they were not permitted to opt out of the (b)(2) class. *See*, *e.g.*, *id.* at 32–36, 41–46, 52, 60. Objectors are mistaken about the facts and the law.

1. The Non-Opt-Out (b)(2) Class Settlement Properly Resolved Existing Claims For Injunctive Relief, Not Those For Existing Monetary Damages.

Objectors' challenge rests on the oft-repeated premise that the (b)(2) class sought to resolve "individualized claims for money damages." Merchants' Br. 32 (capitalization omitted).[15] The premise is false. From the outset of this case, the putative (b)(2) class sought injunctive relief only. *See* D.E.317 ¶ 97(b). The (b)(2) class did not pursue any present, already-accrued claim for damages, and did not receive any monetary payments through the settlement agreement. SPA84–SPA87 ¶ 13; SPA139 ¶ 39 ("[m]embers of the Rule 23(b)(2) Settlement Class shall receive no money payments but shall receive" only the rules modifications detailed in the agreement). The (b)(2) release also does not require plaintiffs to forgo any already-accrued claim for money damages. *See* SPA90 ¶ 16.c; SPA92 ¶ 16.c.ix (releasing, *inter alia*, claims for "damages or other monetary relief relating to the period after the date of the Court's entry of the Class Settlement Preliminary Approval Order"). Any plaintiff who wishes to continue to litigate a claim for money damages brought in this case may opt out of the (b)(3) class and face the going-forward litigation risks, as various Objectors have done. The (b)(2) class

[15] *See also, e.g.*, Merchants' Br. 32 (same); *id.* at 33 ("individualized legal claims," "individualized awards of monetary damages," "individualized monetary claims"); *id.* at 33–34 ("individual monetary claims"); *id.* at 34 ("individualized monetary claims," "individualized legal claims," "individualized claim for money"); *id.* at 35 (similar). (Some of these quotations have omitted alterations or internal quotation marks for ease of reference.)

compromises the originally asserted forward-looking claims for injunctive relief, one of the most traditional remedies sought and received by (b)(2) classes, and any liability that allegedly would flow from the post-settlement network rules. *See*, *e.g.*, SPA46; SPA18; SPA139–SPA140 ¶ 40; SPA153 ¶ 53.

Objectors urge this Court to treat the non-opt out (b)(2) class as a class about damages claims because the *release* covers possible future damages claims against the going-forward network system, and therefore urge that they were entitled to opt out under Rule 23 and as a matter of due process. But the propriety of (b)(2) certification does not turn on the nature of the claims released; rather it rests on the relief demanded in the present litigation.

Objectors primarily rely on *Wal-Mart Stores, Inc. v. Dukes* in support of their theory, *see*, *e.g.*, Merchants' Br. 33–35, 38–39, but that case makes clear that the appropriate certification focus is on the *claims asserted*. *See* 131 S. Ct. 2541, 2551 (2011) ("claims must depend upon a common contention"); *id.* at 2552 ("class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action") (internal quotation marks omitted). This Court has made the point with respect to a Rule 23(b)(3) settlement class, explaining that certification is examined based "on 'questions that preexist any settlement,' and not on whether all class members have 'a common interest in a fair compromise' of their claims." *AIG*, 689 F.3d at 240 (quoting *Amchem*, 521 U.S. at 623). In the (b)(2) setting, although some courts have suggested the common bond should be stronger because of the mandatory nature of the class and possible prejudice to individual claims, *see, e.g.*, *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 142–43 (3d Cir. 1998), the basic focus remains the same: a common interest in questions that *preexist* any settlement. *See, e.g.*, *Dukes*, 131 S. Ct. at 2557.

Dukes further instructs that Rule 23(b)(2) applies "when a single injunction or declaratory judgment would provide relief to each member of the class." *Id.* This Court has similarly held that a Rule 23(b)(2) class action is a proper way for seeking systematic changes and resolving outstanding questions about the lawfulness of defendants' practices. *Robinson*, 267 F.3d at 165; *Marisol A. v. Giuliani*, 126 F.3d 372, 378 (2d Cir. 1997) (suit for injunctive relief to address "central and systemic failures" of child welfare system satisfied Rule 23(b)(2)); *contra* Merchants' Br. 34–43.

These principles apply here, where—years before the parties *commenced* settlement negotiations, D.E.317 ¶ 97(b)—the (b)(2) class challenged the networks' core rules governing all merchants, and sought injunctive relief that would displace and re-write those rules. The Class sought relief based on Defendants' "act[ions] or refus[als] 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), and that injunctive relief was sought for "an alleged group harm," *Robinson*, 267 F.3d at 165. As Appellants admit, "defendants' practices affect all class members." Merchants Br. 50. All class members participated in networks governed by the same allegedly unlawful core rules (no-surcharge, no-discounting, default interchange, Honor-all-Cards, etc.), and challenged those rules. *See* SPA52; *Marisol A.*, 126 F.3d at 378; *cf. In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 227–28 (2d Cir. 2006) (finding cohesion where a (b)(3) class sought to impose liability based on defendants' implementation of a "blanket . . . policy"). And, regardless of how this case were to end—dismissal on the merits, summary judgment, jury verdict, or settlement—*all* class members would continue to participate in a network governed by whatever network rules emerged from that judgment. In short, because plaintiffs' claims concern the legality of the *networks'* governing rules and practices, the challenged conduct may "be enjoined or declared unlawful only as to all of the class members or as to none of them." *Dukes*, 131 S. Ct. at 2557; *see, e.g.*, *Robinson*, 267 F.3d at 165; SPA52 ("the structural relief is generally applicable to the class in the manner required by Rule 23(b)(2)"); SPA46 (similar).

That is why the (b)(2) class was appropriately a mandatory, non-opt-out class. Going forward, *all* Visa- and MasterCard-accepting merchants will necessarily operate within and be bound by the same post-settlement regime, just as in the past, *all* Visa- and MasterCard-accepting merchants operated within and were bound by the pre-settlement regime. The legal challenge plaintiffs raised is not divisible as to individual merchants, and "the relief sought [would] perforce affect the entire class at once." *Dukes*, 131 S. Ct. at 2558.

Objectors urge that a non-opt-out class is improper because not all members of the class will derive the same benefit from the relief provided by the settlement. Merchants' Br. 50–52. But the law does not require all members of a (b)(2) settlement class to benefit equally from the relief obtained in the settlement. Indeed, if Objectors' view were correct, not even "the civil-rights cases at the core of Rule 23(b)(2)," Merchants' Br. 37, would warrant certification of a (b)(2) settlement class. After all, not every pupil would benefit equally from a school's desegregation of its athletics program, *see La. High Sch. Athletic Ass'n v. St. Augustine High Sch.* 396 F.2d 224 (5th Cir. 1968), nor will every employee derive the same benefit from its employer's adoption of more race- or gender-neutral advancement policies, *see Bishop v. Gainer*, 272 F.3d 1009 (7th Cir. 2001), nor every inmate from a change in prison medical treatment protocols, *Parsons v. Ryan*, 754 F.3d 657 (9th Cir. 2014). But just as those classes are proper non-opt-out classes, so too is the (b)(2) settlement class here, because the different *weight* that class members might place on various forms of relief does not alter the fact that the asserted injuries arise from a uniformly applied course of conduct, and that their injuries can be remediated via a single, unitary injunction.

In sum, either default interchange, a surcharging ban, Honor-all-Cards, or the networks' other rules are unlawful restraints of trade that generate supracompetitive interchange fees—or they are not. If they are unlawful, they impose anticompetitive restraints on *all* merchants within that network (including any future merchants who participate in the network), and those restraints can be enjoined only as to all merchants. Even as the networks allow for individualized negotiation where the parties find it advantageous, there is no way, as a matter of law, logic, or real-world commercial dealing, to offer a fully individualized payment-card system for each of the millions of merchants populating the Visa and MasterCard networks. The whole point of the networks, and an essential contributor to their success, is that network rules are established without the need for negotiation or fresh rule-making each time a new card is placed on the market or a new merchant opens its doors (or comes on-line).

2. The (b)(2) Class Was Not Improperly Certified For Settlement Because It Released Claims For Future Liability Stemming From The Post-Settlement Rules.

Although the Objectors are wrong that the (b)(2) class sought to resolve individualized monetary damages claims, the (b)(2) class settlement does release future claims for liability (whether seeking damages or injunctive relief) that purport to challenge the network rules deliberately left in place by the settlement. That, however, does not demonstrate that the certification of the (b)(2) settlement class was improper. *Contra*, *e.g.*, Merchants' Br. 38–40.[16] It simply illustrates one potential consequence of a proper (b)(2) class settlement, namely, the arrangement implemented as a result of settlement can be insulated from the parties' (and their privies') future legal challenges. *See In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 248 (2d Cir. 2011) (holding that "the Settlement's release of claims regarding future infringements is not improper" where the complaint sought "injunctive relief for future uses, and therefore contemplate[d] these alleged future injuries"). It is no more remarkable that agreements providing that assurance would preclude plaintiffs from bringing *any* species of legal challenge to the lawfulness of the post-settlement status quo, including claims for money damages. *See San Diego Police Officers' Ass'n v. San Diego City Emps' Ret. Sys.*, 568 F.3d 725, 734–36 & n.7 (9th Cir. 2009) (enforcing release in (b)(2) class settlement to hold that monetary damages claims "alleg[ing] the same injury" and "the same wrong" as in the released action were "barred by the doctrine of claim preclusion"); *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 32–34

[16] As a technical matter, Objectors' arguments are little more than challenges to release's scope. Nonetheless, because Objectors raise the release of unasserted claims for future damages under their challenge to (b)(2) certification, we discuss here briefly both why the release is lawful, and the lack of authority for Objectors' argument. For the fuller discussion of the lawful scope of the release, see § II below.

(1st Cir. 1991) (enforcing release of claims in state court Rule 23(b)(2) action to preclude damages claims by plaintiffs who fell within class definition, reasoning "[t]he two suits, notwithstanding any differences in remedies sought or theories of recovery pleaded, shared a common gravamen. In sum, the instant case bore a sufficiently close relation to the *Dana* complaint to come within the plain language of the general release formulated as part of the *Dana* settlement.").

Objectors refuse to accept that plaintiffs settling claims challenging generally applicable, uniform conduct (like the network rules here) must be able to promise not to sue the defendants for following the settlement's terms. This is nothing less than a refusal to acknowledge that litigation has consequences, and judgments have going-forward impacts. For example, in a litigated case, if a (b)(2) plaintiff class loses on the merits of an injunctive claim because a challenged practice is found to be lawful, there are consequences that go beyond the denial of the injunctive relief requested. Since any future damages claim challenging the same conduct depends on the ability to demonstrate *liability*—that is, some legal violation by the defendant—the future damages claim will be doomed because any effort to establish *liability* would be precluded by the prior judgment. *See supra* at 47–49 (discussing *res judicata*). The legal system does not tolerate, much less demand, endless litigation over the lawfulness of the same behavior. The release at issue here has a similar effect.

Were it otherwise, no (b)(2) settlement (or litigation on the merits) could ever conclusively resolve the legality of a particular network, practice, or system of rules. This Court has acknowledged that such resolutions are possible. *E.g.*, *TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982) (recognizing the essentiality of "achiev[ing] a comprehensive settlement that would prevent relitigation of settled questions at the core of a class action"); *see infra* § II (discussing lawful scope of releases).

As Objectors would have it—particularly by framing their arguments in terms of a purported due process right, *see* Merchants' Br. 6, 32–48; First Data Br. 9–24—any plaintiff dissatisfied with the settlement must have an opt-out right to preserve its ability to later claim that the settlement left an unlawful state of affairs in place. Such plaintiffs, even if opting out, would get to enjoy the benefits of the injunctive relief provided by the settlement even as they endlessly sue to force further changes to the system at issue or recover going-forward damages based on that system. That repeated cycle would destroy the stability on which networks (and similar entities) rely for their efficient operation, if not their survival. Objectors' position means that each class member could hold a veto over the (b)(2) settlement, which would make settlements that much harder to achieve in the first place.[17] This position is neither tenable, for the many reasons just discussed, nor supported by the cases upon which Appellants rely.

a. *Dukes* Does Not Preclude Certification Of The 23(b)(2) Settlement Class.

The Merchants' brief invokes *Dukes* in support of its release-based challenge to the certification of the (b)(2) settlement class. That effort fails.

To begin, *Dukes* is a case about certification of litigation classes, not about the scope of a release. As noted above, *supra* § I.B.1, *Dukes* strongly supports the propriety of the Rule 23(b)(2) settlement class here based on the claims asserted by plaintiffs.

Moreover, *Dukes* addressed only a single (b)(2) class that attempted to include within its scope individual monetary claims for backpay based on alleged previous discrimination. The Court said as much, concluding that "the combination of individualized and classwide relief *in a (b)(2) class*" cannot be squared with the history and structure of the rule. 131 S. Ct. at 2557–58 (emphasis

[17] Particularly where, as here, defendants have already contested these issues across multiple litigations and entered settlements that failed to bring repose, *see, e.g.*, *Wal-Mart II*, 396 F.3d at 101–03, 118 (settlement and releases concerning Honor-all-Cards), a settlement would be impractical, if not impossible to reach, because a release often is the primary benefit a defendant receives. *See Literary Works*, 654 F.3d at 247–48; *Wal-Mart II*, 396 F.3d at 106; *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 311 (3d Cir. 2011) (en banc) ("[A]chieving global peace is a valid, and valuable, incentive to class action settlements. . . . No defendants would consider settling under [a] framework [where the release covered only certain qualifying class members], for they could never be assured that they have extinguished every claim from every potential plaintiff.").

added). Therefore, the Court construed the rule to proscribe such combinations where the monetary component *of the relief sought* was more than merely "incidental" to the class's demand for injunctive or declaratory relief. *Id.* at 2557–60; *see also id.* at 2548–49 & n.2.

This case is completely different. Here, the (b)(2) class claims for injunctive relief and the (b)(3) class claims for monetary damages arising from past conduct have been separated, with different procedures adopted as to each settlement class in light of their differing natures (including with respect to opt-out rights). The (b)(2) class in *Dukes* sought to do precisely what the (b)(2) class here does not do: bind class members to the resolution of non-incidental, individualized damages claims actually asserted by the (b)(2) class.

Consequently, the quotations that Objectors lift from *Dukes* do not address releases of future claims of liability, let alone claims of liability founded on defendants' adherence to the very regime achieved through the (b)(2) settlement. *See, e.g.*, Merchants' Br. 34–35, 45.[18] Rather, those quotations speak to the compromise of already-accrued, presently available claims. *See Dukes*, 131 S. Ct. at 2557 (concluding that "claims for monetary relief may [not normally] *be certified* under that provision") (emphasis added); *id.* at 2559 (observing that

[18] In fact, the *Dukes* Court did not say a word about the relevance to (b)(2) certification of either claims for future damages or claims released in class-action settlements, let alone the relevance of a class settlement's release of claims for future damages.

plaintiffs' proposed "test . . . creates perverse incentives for class representatives to place at risk potentially valid claims for monetary relief," such as the plaintiff-employees' claims for compensatory damages in *Dukes* itself, which the class abandoned, instead pursuing only their more modest backpay claims). As the text of the (b)(2) release makes plain, no such compromise took place here. SPA169 ¶ 68.

And, far from being condemned by *Dukes*, the two-class approach has flourished in its wake. *See Gooch v. Life Investors Ins.*, 672 F.3d 402, 427–28 (6th Cir. 2012) (approving use of separate (b)(2) and (b)(3) classes in combination); *Johnson v. Meriter Health Servs. Emp. Ret. Plan*, 702 F.3d 364, 371 (7th Cir. 2012) (suggesting that "divided certification" of a (b)(2) declaratory class and a subsequent (b)(3) damages class would be consistent with *Dukes*); *Huyer v. Wells Fargo & Co.*, 295 F.R.D. 332, 344–45 (S.D. Iowa 2013); *Bristol Vill., Inc. v. La.-Pac. Corp.*, 916 F. Supp. 2d 357, 369–70 (W.D.N.Y. 2013); *Sykes v. Mel Harris & Assocs., LLC*, 285 F.R.D. 279, 293 (S.D.N.Y. 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").

The simple truth is that *Dukes* does not discuss releases, compromises of future claims, or even class settlements generally. Objectors' repeated invocation of that decision does not demonstrate that the District Court abused its discretion either in certifying the settlement classes or in approving the settlement.

b. *Shutts* Also Does Not Support The Argument That The Release Rendered The (b)(2) Class Improper.

Just as the (b)(2) settlement is proper under the Federal Rules, it does not offend due process under *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985), as the Merchants (at 32–33) erroneously contend. *Shutts* involved already-existing claims—specifically, interest allegedly owed on already-paid natural gas royalties. 472 U.S. at 800. Nothing in *Shutts*, however, suggested that a plaintiff has a due process-protected property interest in an inchoate, unaccrued future claim. *See id.* at 808. To the contrary, it is well-established that "[n]o person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit." *N.Y. Cent. R.R. v. White*, 243 U.S. 188, 198 (1917) (collecting cases).

c. This Court's Cases Also Do Not Lead To A Different Outcome.

This Court's cases cited by the Merchants (at 36–37) do not show that the releases here precluded certification of the (b)(2) settlement class.

By Objectors' own admission, this Court in *Wal-Mart I* (*a/k/a Visa Check*), 280 F.3d 124, reserved decision on (b)(2) certification in that case, analyzing the propriety of certification only under Rule 23(b)(3), *see* Merchants' Br. 36–37, and

Hecht v. United Collection Bureau, Inc., 691 F.3d 218 (2d Cir. 2012), dealt with the (here-irrelevant) issue of the adequacy of the notice of opt-out rights in a suit adjudicating a backward-looking damages claim, *see id.* at 222–23; Merchants' Br. 36.

In *Stephenson v. Dow Chemical Co.*, a group of Vietnam Veterans sued for damages based on harms that had already been inflicted on them but whose Agent Orange injuries did not manifest until after expiration of the settlement fund established in an earlier lawsuit. 273 F.3d 249, 257–58 (2d Cir. 2001), *aff'd in part by an equally divided Court and vacated in part on other grounds*, 539 U.S. 111 (2003). Those claims were classic backward-looking damages claims, rather than the claims Objectors are concerned with here—future claims challenging the legality of actions taken pursuant to a court-approved settlement.[19]

Finally, the Merchants (at 37) are mistaken in attempting to dismiss *Literary Works*, 654 F.3d 242, in which the parties' settlement released the defendants from future litigation over subsequent use of certain copyrighted works. The Merchants contend that the *Literary Works* release is distinguishable from the one here because "it permitted class members to (1) opt out of the settlement entirely or (2)

[19] *Charron v. Wiener*, 731 F.3d 241 (2d Cir. 2013), *cert. denied sub nom. Suarez v. Charron*, 134 S. Ct. 1941 (2014), is similar. Although the court noted that the settlement did not extinguish claims excluded from its scope, the claims at issue were already-accrued, backward-looking claims. *Id.* at 244, 253. It says nothing about the sort of going forward-based claims implicated here.

'opt out of the release for future use' in particular." Merchants' Br. 37 (quoting 654 F.3d at 246–47). But the cited portion of the decision comes from this Court's statement of the case, not its analysis. This Court never suggested that there was a *requirement* that the settlement permit class members to opt out of the release for future use in order for (b)(2) certification to be appropriate. Instead, consistent with Defendants' showings *supra* and *infra*, the court noted the breadth of typical settlement releases, underscoring that "'[p]laintiffs in a class action may release claims that were or could have been pled in exchange for settlement relief,'" and that "[p]arties often reach broad settlement agreements encompassing claims not presented in the complaint in order to achieve comprehensive settlement of class actions, particularly when a defendant's ability to limit his future liability is an important factor in his willingness to settle." 654 F.3d at 247–48 (quoting *Wal-Mart II*, 396 F.3d at 106).[20]

In sum, none of the authorities cited by the Objectors supports their argument that certification of the (b)(2) settlement class was improper simply because the class released claims challenging the rules that exist post-settlement.

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[20] In addition to the cases discussed above, Objectors also contend that the settlement classes certified in this case run afoul of the Supreme Court's decisions in *Amchem*, 521 U.S. 591, and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). Merchants' Br. 52–66 (cohesion); *id.* at 66–79 (adequacy). The Class Plaintiffs aptly show why those opinions have no bearing here, *see* Class Br. § I.D.2, and so we incorporate that discussion here.

II. THE SCOPE OF THE RELEASES PROVIDED BY THE 23(b)(2) CLASS IS LAWFUL.

In addition to Objectors' argument that the release here was improperly implemented through a mandatory 23(b)(2) settlement class, Objectors suggest that, in all events, the releases were unlawful because they release claims beyond those presented in this litigation. *See*, *e.g.*, Merchants' Br. 31–32, 80–90.

Objectors' view is wrong. It contravenes decades of settled precedent, erodes the courts' longstanding policy of favoring the settlement of disputes—particularly class disputes—and threatens to overwhelm defendants and courts with a never-ending stream of litigation.

Contrary to Objectors' rhetoric, "[i]t is not at all uncommon for settlements to include a global release of all claims past, present, and future, that the parties might have brought against each other." *Williams v. Gen. Elec. Capital Auto Lease, Inc.*, 159 F.3d 266, 274 (7th Cir. 1998). That is because, "[p]ractically speaking, '[c]lass action settlements simply will not occur if the parties cannot set definitive limits on defendants' liability.'" *Wal-Mart II*, 396 F.3d at 106 (second alteration in original). Absent the ability to set such limits, defendants "would . . . face nearly limitless liability from related lawsuits in jurisdictions throughout the country." *Id.*

Judge Gleeson did not abuse his discretion in approving the releases here.

A. The "Identical Factual Predicate" Doctrine Permits A Broad Release Of Claims.

The releases are unremarkable and amply supported by this Court's decisions. "The law is well established in this Circuit and others that class action releases may include claims not presented and even those which could not have been presented as long as the released conduct arises out of the 'identical factual predicate' as the settled conduct." *Wal-Mart II*, 396 F.3d at 107 (quoting *TBK Partners*, 675 F.2d at 460). Notwithstanding its name, the "identical factual predicate" doctrine permits a class to release claims "not presented in the complaint" and those involving events that have not yet occurred. *Literary Works*, 654 F.3d at 247–48; *see, e.g.*, *Wal-Mart II*, 396 F.3d at 107, 114 (claims "not presented and [that] might not have been presentable" can nonetheless be released (emphasis omitted)); *TBK*, 675 F.2d at 460–61; *Robertson v. NBA*, 622 F.2d 34, 35 (2d Cir. 1980) ("*Robertson IV*").

In *Robertson IV*, for example, this Court concluded that Wilt Chamberlain's suit against the NBA, which challenged the same rule that was the subject of a prior class action and which had been modified in a prior class settlement, was precluded by the release in that settlement. 622 F.2d at 35. The mere fact that the later action challenged the rule's application at a subsequent time was not sufficient to remove the release's binding force under the "identical factual predicate" doctrine.

And in *Wal-Mart II*, this Court found the doctrine satisfied where in the settled case (containing the release) the plaintiffs had pleaded a tying claim, alleging "that the exclusionary rules solidified Visa and MasterCard's power in the credit card market, enabling [them] to force plaintiffs to accept their debit cards." 396 F.3d at 107. The plaintiffs raising the arguably released claims, on the other hand, had brought a Section 1 claim alleging an increase in credit-card transaction costs. *Id.* Proving those disparate claims would have required proof of at least *some* different facts (relating to the identity and contours of the relevant markets, the existence and extent of damages, etc.), but the Court held that the doctrine was satisfied because both cases involved the same central rules. *See id.* at 108. Furthermore, the Court held that the doctrine permitted the release of claims against non-parties to the action. *See id.* at 108–09.

B. The Releases Here Are Tailored To The "Identical Factual Predicate" Doctrine.

Judge Gleeson properly recognized that the Releases here are lawful under the "identical factual predicate" doctrine, because "[t]hey do not release the defendants from liability for claims based on new rules or new conduct or a reversion to the pre-settlement rules. They appropriately limit future damages claims based on the pre-settlement conduct of the networks." SPA45–SPA46. As the text of the Releases makes clear, they merely compromise 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 . . . .

SPA169-SPA170 ¶ 68 (emphasis added). Included are claims related to the lawfulness of default interchange, SPA170-SPA171 ¶ 68(a), (g), and Honor-all-Cards, *id.* ¶ 68(c), (g). *See supra* § I.A.2.a (discussing those claims and the factors making it unlikely that plaintiffs would prevail on them).[21]

What the releases do *not* affect—contrary to Objectors' dark predictions—are claims based on "new" conduct. SPA46. If someday there are harmful rules, practices, or actions that are not "substantially similar to," SPA171 ¶ 68(g), those that were or could have been challenged in this case, the releases facially would not apply. So, if—hypothetically—Visa or MasterCard were to impose an entirely

[21] The Merchants cite the Fixed Acquirer Network Fee ("FANF") as an example of a "clai[m] beyond the scope of the case" that was released by the (b)(2) settlement. Merchants' Br. 87–88. *But cf.* SPA174 ¶ 72(d) (release does not extend to FANF-based claims for injunctive relief). First, that contention is "waived" because, as here, "an argument made only in . . . footnote[s] [i]s inadequately raised for appellate review." *Norton v. Sam's Club*, 145 F.3d 114, 117–18 (2d Cir. 1998); *see* Home Depot Objection (D.E.2591) 8 n.8; Joint Objection (D.E.2670) 34 n.43. Second, in any event, the point is meritless. Objectors concede that FANF was in place prior to settlement. Merchants' Br. 17, 40–41. It thus could have been litigated here and—as such—is part of the factual predicate of this case, notwithstanding that (as Objectors note) it was not specifically cited in the complaint. *See, e.g.*, *Wal-Mart II*, 396 F.3d at 107; *TBK Partners*, 675 F.2d at 460.

new rule preventing merchants from steering customers away from paying with credit cards, or to adopt entirely new, as opposed to "substantially similar," rules governing the use of mobile technologies (as Objectors claim to fear), the lawfulness of those new rules would be fair game for a future antitrust suit.

For the same reason, the Releases do not, as the Merchants contend (Br. 80–82), effect an improper "waiver of future liability under the federal antitrust statutes." *In re Am. Express Merchants' Litig.*, 634 F.3d 187, 197 (2d Cir. 2011); *see Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 329 (1955). The Merchants assert: "In *Lawlor*, 349 U.S. at 328–29, the Supreme Court stated that 'extinguishing claims which did not even then exist *and which could not possibly have been sued upon in the previous case* . . . would in effect confer on [defendants] a partial immunity from civil liability for future violations.'" Br. 81 (alterations in original) (emphasis added). The Merchants' quotation of *Lawlor* is disingenuous. The "immunity" which *Lawlor* prevents the parties from agreeing to is immunity from antitrust liability for *new allegedly anticompetitive conduct* that could not have been the subject of the previous suit. *Lawlor*, 349 U.S. at 328 (discussing post-settlement slow deliveries and allegedly illegal tie-ins). Here, the release does not bar a future suit challenging any *new*, *post-settlement* allegedly anticompetitive conduct that could not have been the subject of this suit. The settlement here has precisely the effect that the Supreme Court gave to the settlement in *Lawlor*. The Court there held that the earlier "judgment precludes recovery on claims arising prior to its entry, [but] it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case." *Id.* at 328. That is textbook *res judicata* doctrine and says nothing about issue preclusion and does not undermine the permissible scope of the class-settlement release at issue here.

Even Objectors' skewed reading of *Lawlor*, however, does not help them given the facts here. The releases were limited to claims based on facts that "*are alleged or which could have been alleged*" here. SPA169–SPA170 ¶ 68 (emphasis added). Having acknowledged this point and the fact that the releases—much like long-arm statutes designed to be coterminous with the reach of the Due Process Clause—were drafted only to "releas[e] . . . claims that are or could have been alleged based on the identical factual predicate of the claims in this case," SPA45–SPA46, Judge Gleeson properly recognized that the precise contours of the facially valid releases is a subject for future cases. SPA47. For example, whether a particular (presently hypothetical) claim—based on changed network rules, an evolution in payment or processing technology, or other conduct—falls within this case's factual predicate is a determination to be made in *that* case, not this one. *Id.* ("'substantial similar[ity]'" of rules will be decided in future litigation); *see Reyn's*

Pasta Bella, 442 F.3d at 748–49 (barring suit based on conclusion that it was based on identical factual predicate as *Wal-Mart II*); *Robertson IV*, 622 F.2d at 35.

Finally, the release of antitrust claims in this settlement can be overturned only if Objectors could show, to "'*a legal certainty*,'" that the Releases (or some other facet of the settlement) are unlawful. *Robertson v. NBA*, 556 F.2d 682, 686 (2d Cir. 1977) ("*Robertson II*") (emphasis added); *see id.* (declaring that unless "the challenged practices have . . . been held to be illegal per se in any previously decided case," the settlement may be approved); *see also, e.g.*, *Armstrong v. Bd. of Sch. Dirs.*, 616 F.2d 305, 319–20 (7th Cir. 1980) (same), *overruled on other grounds by Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998). Here, Objectors obviously cannot make that showing, for all of the reasons discussed in Section I.A.2, *supra*.

III. THE COMPETITORS' OBJECTIONS ARE EQUALLY MERITLESS.

American Express, First Data, and Discover also appeal the settlement's approval. Their challenges fare no better than those of other Objectors, as the District Court recognized. SPA47. In addition to the Class's showings that the Class Representatives adequately represent *all* absent class members, including AmEx, First Data, and Discover in their limited capacity as merchant acceptors of

Visa and MasterCard branded cards, *see* Class Br. § I.D,[22] Defendants briefly set forth additional infirmities in AmEx, First Data, and Discover's arguments.

A. The Competitors' Claims, *As Competitors*, Are Not Released.

AmEx and First Data principally claim that the settlement improperly and unlawfully releases their claims as competitors of the network defendants. AmEx Br. 25–32; First Data Br. 9–24.[23] Those complaints are baseless. As Judge Gleeson stated, they "seek to make something of nothing," as the relevant release language does not purport to release any claims that they may possess *as competitors*. SPA47. Instead, as the District Court concluded, "it is sufficiently clear from both the text and context of the releases that these class members are releasing only claims that merchants have alleged or could have alleged in this case in their capacity as merchants." *Id.* More specifically, those releases provide that claims "that are alleged or which could have been alleged" in *this action* (which was brought by and on behalf of *merchants* that accept Visa and MasterCard), are being released. SPA134 ¶ 33; SPA169–170 ¶ 68; *see also* D.E.1740-2 at F2–12 ("In general, the settlement will resolve and release all claims made by persons,

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[22] Competitors' specific requests—AmEx primarily seeks to unwind the settlement, *see* Br. 35; Discover seeks specific modifications to exclude it from portions of the agreement, *see* Br. 6, 50; and First Data principally seeks an opt-out right, *see, e.g.*, Br. 2—do not materially change the response to their arguments.

[23] Discover advanced a similar argument below, *see* Tr. (D.E.6094) 144–45 (admitting that it "objected to the release" and that its objections "overlap substantially" with First Data and AmEx's), but shifts course here. *See infra* § III.B.

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 . . . .") (emphasis added).[24]

American Express similarly argues that its inclusion in the class demonstrates the lack the cohesion required by Rule 23, essentially for two reasons: First, its interest in competing with Visa and MasterCard requires it to oppose "discriminatory treatment imposed by merchants (including discriminatory surcharges)—a position antithetical to the claims being settled by the Rule 23(b)(2) class." AmEx Br. 17–18; *see also* First Data Br. 36–38 (similar). Second, many of the merchants (and counsel) representing the Class are adverse to American Express in a parallel antitrust suit, and the settlement here is contrary to AmEx's own litigation goals, interests, and strategies in that case. AmEx Br. 18–19.

But those arguments, which merely rehash the competitors' release-based contentions, largely miss the point. Although First Data and AmEx do not

[24] AmEx and First Data assert that the language of the settlement agreement calls into question the breadth of the releases. *See* First Data Br. 13–15, 20–23; AmEx Br. 25–26. But if there were any question about the agreement's breadth, it should not be resolved by concluding that the agreement is unambiguously broad, *contra* First Data Br. 20–22, given that neither the parties to the agreement nor the District Court have read the agreement in the manner AmEx and First Data propose. Instead, the proper course would be to resort to parol evidence of the agreement's meaning and to defer to the parties' representations below—consistent with the District Court's conclusion, SPA47—that "the releases do not bar claims based on injuries as payment network competitors." Defs.' Reply Supp. Final Approval 32 (D.E.5937) (emphasis and capitalization omitted); *accord* Pls.' Reply Supp. Final Approval 59 (D.E.5939).

primarily do business in their merchant capacities, they nonetheless accept Visa- and MasterCard-branded cards as modes of payment for services they offer. AmEx Br. viii; First Data Br. 24. That brings them within this class, and they offer no basis for concluding that the District Court erred in concluding that the class representatives and counsel adequately represented them *in that capacity*, *see Literary Works*, 654 F.3d at 249; Class Br. § I.D—much less that it abused its discretion, *Joel A.*, 218 F.3d at 139.

B. Discover's Group-Boycott Claim Lacks Merit.

Discover also attacks the settlements, claiming that the "Level Playing Field" provisions are unlawful group boycotts and impose serious administrative burdens on any merchant that wishes to accept both Discover and Visa and/or MasterCard. Discover Br. 5–6, 22–27, 39–49. The challenged provisions ensure that surcharging of Visa or MasterCard transactions will be permitted only under the conditions pursuant to which the merchant is allowed to surcharge cards from networks with more-restrictive surcharging rules. *See* SPA141 & SPA 148 ¶ 42(a)(iv), (c); SPA154–SPA155 &SPA161–SPA162 ¶ 55(a)(iv), (c). Discover's arguments lack merit, and, in all events, are insufficient to disturb Judge Gleeson's approval decision.

Arguments, as here, that a class settlement enshrines an unlawful agreement face a high bar at the settlement-approval phase, where the district court's analysis of both the pre- and post-settlement status quo is—and must be—less rigorous than it would be in the context of a full trial on the merits. *Robertson II*, 556 F.2d at 686 (upholding a settlement approval because challengers failed to demonstrate, to "'a legal certainty,'" that the settlement was unlawful); *see supra* at 30–31 (court need not fully adjudicate plaintiffs' claims). Unless "the challenged practices have . . . been held to be illegal per se in a previously decided case," there is no error in approving an otherwise-adequate settlement accord. *Robertson II*, 556 F.2d at 686 (rejecting claim that "settlement agreement cannot be approved because it perpetuates . . . 'classic group boycotts'").

Here, Discover's group-boycott claim is doomed by its failure to identify even a single case in which settlement provisos or contractual terms such as the Level Playing Field provisions have been deemed a group boycott and held unlawful *per se*.

Additionally, Discover's attack on the "Level Playing Field" provisions as unfair and unreasonably harmful to it as a third-party, *see* Discover Br. 39–42, is unavailing, because those provisions are, at bottom, nothing more than "most favored nations" clauses. Those clauses ensure merchants cannot use a surcharge to make paying with a Visa- or MasterCard-branded card more expensive for consumers than paying with a card from a higher-cost Competitive Card Brand. Far from being unlawful *per se*, courts repeatedly have upheld "most favored nations" provisions given their legitimate, *competitive* features. *See*, *e.g.*, *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995); *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of R.I.*, 883 F.2d 1101, 1102, 1110 (1st Cir. 1989).

Finally, Discover's protestations regarding the burdensome calculations required by the "Level Playing Field" provisions ring hollow in light of the fact that Discover itself maintains an "Equal Treatment Rule" that can operate to "limit surcharges against Discover *where Discover matches or beats the pricing of a rival that is not surcharged*." Discover Br. 20 (emphasis added). In other words, it appears that even Discover's own rules can necessitate an inter-network cost comparison, which illustrates the point that such comparative exercises are merely a cost of doing business in the payment card industry. They are hardly a basis for denying settlement approval, let alone for overturning an already-approved settlement on abuse-of-discretion review.

CONCLUSION

For the foregoing reasons and those set forth by the Class Plaintiffs, the judgment should be affirmed.

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[†] Skadden, Arps, Slate, Meagher & Flom LLP is counsel to the Chase Defendants-Appellees except as to Objectors-Appellants American Express Co., American Express Travel Related Services Company, Inc., American Express Publishing Corp., Serve Virtual Enterprises, Inc., ANCA 7 LLC d/b/a Vente Privee, USA, AMEX Assurance Company, Accertify, Inc., Wal-Mart, Inc., Alon USA, LP, Amazon.com, Zappos.com, Foot Locker, Inc., and J.C. Penney Corporation, Inc. and related entities.

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and this Court's October 12, 2014 order (Docket Entry 1119) granting Defendants-Appellees' motion for leave to file an oversized brief of up to 19,000 words because this brief contains 18,351 words (as determined by the Microsoft Word 2007 word-processing program used to prepare this brief), excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. of App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using the Microsoft Word 2007 word-processing program in 14-point Times New Roman font.

/s/ Carter G. Phillips

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of October 2014, I electronically filed and served the foregoing brief using the CM/ECF System.

/s/ Carter G. Phillips

Carter G. Phillips