UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION	:	MDL Docket No. 1720
	:	MASTER FILE NO. 1:05-md-1720-JG-JO
This Document Relates To:	:	
ALL CLASS ACTIONS	:	

MEMORANDUM OF LAW IN SUPPORT OF CLASS PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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I. INTRODUCTION

Plaintiffs' claims are ideally suited for class certification. Defendants have engaged in a uniform course of anticompetitive conduct, causing like harms to all members of the merchant class. Proof of that conduct and those harms will be the same for all class members. This Court certified a similar class in *In re VisaCheck/Master Money Antitrust Litig.*, 192 F.R.D. 68 (E.D.N.Y. 2000) ("*VisaCheck/Master Money I*"), *aff'd*, 280 F.3d 124 (2d Cir. 2001) ("*VisaCheck/Master Money II*"). While this is the only litigation pending in the United States that addresses Defendants' anticompetitive conduct,[1] multiple forums outside the United States have addressed that conduct and made findings that are substantially consistent with Plaintiffs' allegations, after considering legal and factual issues that related to virtually all merchants who deal with Visa and/or MasterCard within the geographic areas affected by those proceedings.[2]

Defendants Visa, MasterCard and their member banks have engaged in anticompetitive practices, including collusion, that artificially inflated the interchange fee that all merchants paid (and continue to pay) to accept Visa- and MasterCard-branded credit and debit cards.[3]

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[1] Other plaintiffs have raised similar claims in other courts, all of which were dismissed for reasons other than the merits. *See Reyn's Pasta Bella, LLC v. Visa U.S.A., Inc.*, 442 F.3d 741 (9th Cir. 2006) (claims barred by releases in *VisaCheck/Master Money*); *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042 (9th Cir. 2008) ("*Kendall*") (claims dismissed for inadequate pleading).

[2] *See, e.g.*, Ex. 1 to the Declaration of Michael J. Kane in Support of Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Class Certification, Declaration of Gustavo Bamberger, Ph.D. ("Bamberger Decl. "; all other exhibits appended to the Kane Declaration will be referred to as "Ex. __") ¶¶ 14-15; Ex. 2, Commission Decision (E.C.) COMP/34.579 of 19 DecemberDec. 2007 ("*E.C. Decision*"); Ex. 3, Office of Fair Trading, Decision No. CA 98/05/05 – Investigation of the Multilateral Interchange Fees Provided for in the UK Domestic Rules of MasterCard UK Members Forum Limited (formerly known as MasterCard/Europay UK Limited), Case No. CP/0090/00/S (Sept. 6, 2005); Ex. 4, Reserve Bank of Australia, *Reform of Credit Card Schemes in Australia IV* (August 2002).

[3] Defendant Visa USA, Inc. was, during the relevant time prior to its recent initial public offering, a group-member of Visa International Service Association. Visa International licensed

Interchange fees, which are neither cost-based nor negotiated between merchants and the banks with whom they deal directly ("acquiring banks"), raise merchant discount fees (*i.e.*, fees merchants effectively pay, which include interchange fees) to supracompetitive levels and have generated enormous profits for the Bank Defendants. Defendants have colluded, and continue to collude, with respect to interchange fees in violation of Section 1 of the Sherman Act, pursuant to three separate (but interrelated) conspiracies, those being between and among:

a. The Visa network and its member banks;

b. The MasterCard network and its member banks; and

c. The Visa network, the MasterCard network, and their respective member banks.

The purposes of each conspiracy are the same: (a) to perpetuate the imposition of interchange fees, which are not necessary to the efficient operation of Visa's and MasterCard's networks; and (b) to repeatedly increase interchange fees to ever higher artificial levels, even as information technology costs associated with processing credit and debit cards continue their long term decline.

Each conspiracy has been, and continues to be, successful for a number of reasons. Those reasons include, *inter alia*: (a) each network and its member banks, and both networks together, have at all times maintained the market power necessary to profitably raise prices above competitive levels; (b) the operating rules of each network, which are incorporated into the contracts between acquiring banks and their merchant customers, as required by the networks, contain "anti-steering restraints" that Defendants enforce to maintain and enhance the networks' market power, by preventing merchants from applying even minimal competitive

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the Visa name and symbol to its group-members, including Visa USA. Defendants Visa USA and Visa International are collectively referred to herein as "Visa."

pressure on Defendants with respect to interchange fees; and (c) the interchange fee system is structured by the networks and member banks in such a way that there is virtually no transparency to consumers, and thus there is no competitive pressure from consumers to reduce or eliminate interchange fees. In short, *no* participant adversely affected by interchange fees (*i.e.*, consumers or merchants) is able to impose competitive pressure on Defendants with respect to interchange fees.[4]

Defendants' collusive imposition and enforcement of the anti-steering restraints facilitates the conspiracies, and has enabled Visa to obtain and maintain monopoly power in the relevant market, in violation of section 2 of the Sherman Act. These anti-steering restraints generally prevent merchants from influencing a customer's choice of payment method at the point of sale. The foremost example is the "no surcharge" rule, which prevents merchants from surcharging credit card transactions to recoup the costs associated with credit card usage (the largest of which by far is the interchange fee), and thus acts to perpetuate Defendants' market power.

In an to attempt to avoid liability for their continuing anticompetitive conduct, MasterCard and the banks that owned it converted their joint venture into a single MasterCard entity through an initial public offering ("IPO"), in May 2006.[5] Plaintiffs have challenged MasterCard's IPO under Section 1 of the Sherman Act and Section 7 of the Clayton Act. MasterCard and its member banks entered agreements and took actions leading to the IPO which violated Section 1 of the Sherman Act by consolidating the member banks' market power in the

[4] Merchants pay the interchange fee and it inflates prices to consumers to the extent that merchants are able to adjust their prices, although competition often thwarts efforts to pass on interchange fees. *See* Ex. 5, Class Pls.' Answers to Agreed Upon First Set of Interrogs. Propounded to Each Class Representative by All Defs., at 9.

[5] *See, e.g.*, Ex. 6, Murphy Dep. Tr. 507:3-509:4.

new MasterCard, allowing the member banks to retain significant control over the new MasterCard, all while perpetuating the member banks' business strategy of setting interchange fees at supracompetitive levels. The consummation of the IPO violated Section 7 of the Clayton Act by threatening substantially to lessen competition in the relevant market. The IPO confers upon the new MasterCard market power in a relevant market, which when unilaterally exercised harms competition.

Absent Defendants' anticompetitive conduct, the payment card industry would be very different. There would be no interchange fee and no anti-steering restraints, or alternatively, interchange fees would be set in the least restrictive manner possible, resulting in substantially lower fees. Thus, virtually all merchants are adversely impacted by the above-referenced conspiracies and are damaged in a way that can be established through common proof. Likewise, Defendants' conduct applies generally to the class, and the injunctive relief Plaintiffs request is uniformly applicable to and beneficial to the merchant class.

Plaintiffs seek certification of two classes: (1) an Injunctive Relief Class and (2) a Damages Class. The Injunctive Relief Class seeks injunctive relief pursuant to Plaintiffs' claims under the Sherman Act, 15 U.S.C. §§ 1 & 2, and the California Cartwright Act, CAL. BUS. & PROF. CODE § 16700 *et seq.*, for the threatened damage to Plaintiffs and the members of the class by reason of Defendants' anticompetitive conduct. The Injunctive Relief Class is defined as:

> All persons, businesses, and other entities that currently accept Visa and/or MasterCard Credit and/or Debit Cards in the United States. This Class does not include the named Defendants, their directors, officers, or members of their families, or their co-conspirators, or the United States Government.

Plaintiffs move for certification of an Injunctive Relief Class for the following claims:

- Against all Defendants seeking to enjoin Defendants' anticompetitive conduct with respect to credit cards as set forth in Claims 1-6 and 11 of the First Consolidated Amended Class Action Complaint ("FCACAC");

- Against all Defendants seeking to enjoin Defendants' anticompetitive conduct with respect to off-line debit cards as set forth in Claims 13-15 of the FCACAC;[6] and

- Against MasterCard and the banks named as Defendants in the First Supplemental Complaint, seeking to enjoin the illegal conduct alleged in that Complaint.[7]

The Damages Class seeks damages arising from Plaintiffs' claims under the Sherman Act, 15 U.S.C. § 1 and section 16700, *et seq.*, of the Cartwright Act, to recover for the injury to Plaintiffs' and class members' business or property attributable to the amount of the overcharges they have paid. The Damages Class is defined as:

> All persons, businesses, and other entities that have accepted Visa and/or MasterCard Credit and/or Debit Cards in the United States at any time from and after January 1, 2004. This Class does not include the named Defendants, their directors, officers, or members of their families, or their co-conspirators, or the United States Government.

Plaintiffs move for certification of a Damages Class for the following claims:[8]

- Conspiracy between Visa and its member banks to fix the price of interchange fees for credit cards in violation of section 1 of the Sherman Act (Claim 11 of the FCACAC);

- Conspiracy between MasterCard and its member banks to fix the price of interchange fees for credit cards in violation of section 1 of the Sherman Act (Claim 2 of the FCACAC);

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[6] Class Plaintiffs will move for certification of a similar class with regard to Visa's PIN debit cards after filing the next amended complaint.

[7] Plaintiffs will move for the certification of a similar class with regard to Visa's IPO after filing the Second Supplemental Complaint.

[8] In the forthcoming amended complaint, Plaintiffs will seek only injunctive relief, not damages, as to claims 4-6 of the FCACAC. In addition, Plaintiffs will eliminate claims 7-10 of the FCACAC as independent stand alone claims seeking damages and injunctive relief, but will continue to allege that Defendants' tying and bundling and exclusive dealing practices have facilitated Defendants' anticompetitive conduct. Thus, as to claims 7-10, Plaintiffs are not moving for class certification.

- Conspiracy between Visa, MasterCard and their member banks to fix the price of interchange fees for credit cards in violation of section 1 of the Sherman Act (Claim 33 of the FCACAC);

- Conspiracy between Visa and its members banks to fix the price of interchange fees for credit cards in violation of section 16700, *et seq.*,*seq.*, of the Cartwright Act (Claim 11 of the FCACAC);

- Conspiracy between Visa and its member banks to fix the price of interchange fees for off-line debit cards in violation of section 1 of the Sherman Act (Claim 13 of the FCACAC);[9]

- Conspiracy between MasterCard and its member banks to fix the price of interchange fees for off-line debit cards in violation of section 1 of the Sherman Act (Claim 14 of the FCACAC);

- Conspiracy between Visa and its members banks to fix the price of interchange fees for off-line debit cards in violation of section 16700, *et seq.*, of the Cartwright Act (Claim 15 of the FCACAC);

- Challenging MasterCard's IPO as a violation of Section 7 of the Clayton Act (Claim 17 of First Supplemental Class Action Complaint); and

- Challenging MasterCard's IPO as a violation of Section 1 of the Sherman Act as an unreasonable restraint of trade and unlawful combination (Claims 1818 and 1919 of the First Supplemental Class Action Complaint).[10]

Class certification is particularly justified in this case because Plaintiffs' claims and the merchant class members' claims arise from the same course of conduct, and every Plaintiff and member of the classes will rely upon the same common proof to establish their claims.

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[9] As to Visa debit cards, Plaintiffs have already alleged that Visa and its member banks have conspired to fix interchange fees for off-line (signature) debit transactions. In an amended complaint, which Plaintiffs will file soon, Plaintiffs will allege the same with respect to Visa on-line (PIN) debit transactions. That claim will be established on a class-wide basis for the same reasons as the other price-fixing claims. Plaintiffs will move for certification of a similar class with regard to Visa PIN debit cards after filing the next amended complaint.

[10] Plaintiffs will soon file a Second Supplemental Complaint which alleges a similar claim with regard to Visa's recent IPO. That claim also presents common questions and can be proven on a class-wide basis.

II. BACKGROUND[11]

A. Class Plaintiffs

There are nineteen Plaintiff class representatives, fourteen of whom are merchants. *See* FCACAC ¶¶ 9-50. These Plaintiffs represent a diverse cross-section of merchants operating throughout the United States.

The fourteen merchant Plaintiffs include large national companies that generate billions of dollars in sales, regional companies that operate in multiple locations, single-location companies, and "mom-and-pop" merchants. They include "brick and mortar" operations and internet merchants. These merchants seek both damages for Defendants' anticompetitive conduct and injunctive relief to enjoin the imposition of the collusively fixed and maintained interchange fees, to enjoin the various rules and restrictions Defendants use to facilitate their collusive conduct, and to enjoin MasterCard's IPO.

There are also five Plaintiff trade associations who represent the interests of their respective constituencies, including convenience stores, pharmacies, grocers, and restaurants. They seek damages on their own behalf, and injunctive relief on behalf of their merchant members and the class.

The class consists of millions of merchants.[12] All of the merchants seeking damages have been injured by paying supracompetitive interchange fees.[13] Interchange fees represent a

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[11] The following is based primarily on the record to date, as discovery is ongoing. It is necessarily reflective of only a portion of that record. In virtually every instance in which Plaintiffs cite documents or testimony, it is representative of additional documents and testimony to similar effect.

Discovery yet to be compiled will include, *inter alia*, transactional data from the bank defendants and perhaps third parties, deposition testimony from all parties and perhaps non-parties, the production of documents previously designated as privileged, and supplemental interrogatory answers and document productions.

set cost that have a substantial impact on the class merchants' bottom line. The president of plaintiff National Association of Convenience Stores, for example, has said that interchange fees constitute the third highest operating cost for his business and the industry, behind only payroll and rent.[14] Despite the high fees, merchants have no practical choice other than to accept Visa- and MasterCard-branded credit and debit cards and would be crippled if they did not do so.[15]

B. Visa and MasterCard Networks and Payment Card Transactions[16]

The Visa and MasterCard networks are member organizations whose primary purpose is to facilitate credit and debit card transactions.[17] They do so by setting standards for the exchange of transaction data and funds among merchants, acquiring banks and card issuing banks. The

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[12] *See* Ex. 7, Sheedy AmEx. Dep. Tr. 40:6-42:9 (Sheedy deposition transcript from the *American Express v. Visa USA* litigation produced in this action) (millions of merchants accept Visa cards); Ex. 8, at MCI_MDL02_10607843 (same for MasterCard).

[13] *See, e.g.*, Ex. 9, Schumann Dep. Tr. 17:10-18:3; Ex. 10, D'Agostino Dep. Tr. 108:17-109:9, 110:19-112:10.

[14] Ex. 11, NACS Online, *NACS, Other Associations File Antitrust Case Against Visa, MasterCard and Major U.S. Banks* (Sep. 26, 2005), at 2.

[15] Ex. 10, D'Agostino Dep. Tr. 111:7-112:10. Even Visa's consultant, former FTC Chair Timothy Muris, concedes: "Most merchants . . . cannot accept just one major card because they are likely to lose profitable incremental sales if they do not take the major payment cards. Because most consumers do not carry all of the major payment cards, refusing to accept a major card may cost the merchant substantial sales." Timothy J. Muris, *Payment Card Regulation and the (Mis)application of the Economics of Two-Sided Markets*, 2005 COLUM. BUS. L. REV. 515, 522 (2005). Also, in *United States v. Visa, U.S.A., Inc.*, 163 F. Supp. 2d 322, 340 (S.D.N.Y. 2001) ("*U.S. v. Visa, U.S.A.*"), the court found that not even one merchant dropped Visa or MasterCard card acceptance due to increases in interchange fees.

[16] Unless otherwise noted, the following reflects Defendants' conduct both before and after the networks' respective IPOs.

[17] *See* Ex. 12, BOFAIC00953976, 3980, 4028; Ex. 13, Raymond Dep. Tr. 77:19-78:13; Ex. 14, MasterCard, Inc. Form 10-K for the period ending Dec. 31, 2007, at 3, 9-10 ("MasterCard 2007 10-K"); Ex. 15, Visa, Inc. Form 10-K for the period ending Sept. 30, 2007, at 4 ("Visa 2007 10-K").

networks also provide authorization, clearance and settlement services for all Visa- and MasterCard-branded payment card transactions.[18]

Members of Visa and MasterCard are financial institutions who issue cards to cardholders and/or contract with merchants to accept payment card transactions. The Bank Defendants are members of both Visa and MasterCard, and during the class period all of them were issuing banks, and some were both issuing and acquiring banks. All of the Bank Defendants have at some point during the relevant period been represented on the Visa and/or MasterCard Boards of Directors, which collectively imposed and set the levels of interchange fees, and/or on influential Visa or MasterCard committees.[19]

When a cardholder presents a Visa- or MasterCard-branded payment card to make a purchase, the merchant contacts its acquiring bank (usually instantly and electronically) to request authorization for the purchase.[20] That request, including the transaction amount and identity of the cardholder, is then sent to either Visa or MasterCard, which, in turn, relays or

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[18] *See* Ex. 14, MasterCard 2007 10-K, at pp. 8-9; Ex. 13, Raymond Dep. Tr. 79:11-18; Ex. 15, Visa 2007 10-K, at p. 4; Ex. 12, at BOFAIC00953976, 3980, 4028.

[19] *See, e.g.*, Ex. 16, Visa USA's Answer to Interrogatory No. 1 of All Plaintiffs' Consolidated First Set of Omnibus Discovery Requests to Network Defendants; Ex. 17, MasterCard's May 15, 2007 Supplemental Answer to Interrogatory No. 1 of All Plaintiffs' Consolidated First Set of Omnibus Discovery Requests to Network Defendants.

[20] The transaction information may also be sent to a third-party processor rather than directly to the acquiring bank. Third-party processors are entities that provide payment card processing services to issuing banks, acquiring banks and merchants. *See* Ex. 18, at BOFAIC 01368593. They provide the software and systems necessary for the clearing and settlement of payment card transactions where the acquiring or issuing banks do not have internal systems necessary to perform those functions. Third-party processors therefore transmit data from the merchant to the acquiring bank and then to the network. *Id.* They may also transmit data between the issuing bank and the network. Third-party processors include First Data Resources and Total Systems Services, Inc. *See* Ex. 19, Mattea Dep. Tr. 17:19-18:10; Ex. 20, at CHASE001324734. While the fees charged by third-party processors may be included in merchant discount fees, third-party processors have no influence with regard to interchange fees paid by merchants. Third-party processors also do not pay interchange fees.

"switches" it to the cardholder's issuing bank for approval. The issuing bank either approves or rejects the request based on the cardholder's available credit limit or bank account funds. That decision is then transmitted electronically through the system to the merchant. If the transaction is approved, the sale is then completed.[21] After acquiring the completed transaction from the merchant, the acquiring bank transmits it to the network (Visa or MasterCard), which computes the interchange fee and processes the transaction to the card issuing bank. The issuing bank then advances funds due to the merchant (later collected from the cardholder) to the acquiring bank (again, through the network), *less* the interchange fee.[22] The acquiring bank then takes out an additional fee[23] (for the service it provides, covering the acquiring bank's cost, plus a profit)[24] and forwards the remainder of the funds to the merchant.[25] Because it is the acquiring bank that contracts with the merchant,[26] that contract provides for a merchant discount fee which

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[21] Ex. 21, at VUSAMDL1-020603216; Ex. 14, MasterCard 2007 10-K, at p. 7.

[22] *See, e.g.*, Ex. 22, Steele Dep. Tr. 325:17-328:19; Ex. 23, Fischer Dep. Tr. 155:22-156:13; Ex. 13, Raymond Dep. Tr. 138:11-139:15; Ex. 24, at CITI INT 001062067.

[23] The acquiring bank unilaterally sets its service fee which, unlike the interchange fee, can be negotiated by merchants. In fact, the level of the service fee (or non-interchange fee component of the merchant discount) is the subject of vigorous competition between acquiring banks in their efforts to solicit merchant customers. *See, e.g.*, Ex. 25, at BOFAIC0120493; Ex. 26, Landheer Dep. Tr. 218:23-219:23; Ex. 27, Pukas Dep. Tr. 129:9-24, 130:24-131:4.

[24] *See., e.g.*, Ex. 22, Steele Dep. Tr. 164:9-14; Ex. 25, at BOFAIC01210493-0494.

[25] *See* Ex. 28, DePhilippis Dep. Tr. 192:24-195:25; Ex. 22, Steele Dep. Tr. 325:17-328:19; Ex. 21, at VUSAMDL1-02603216.

[26] In order to accept Visa- and MasterCard-branded payment cards, a merchant must enter into a contract with an acquiring bank. The contract establishes the terms and conditions for acceptance of those cards, including the payment of merchant discount fees and a requirement that the merchant adhere to the networks' operating rules. Some acquirers use independent sales organizations ("ISOs") to act as sales agents in soliciting merchant customers. However, even under those circumstances, the key terms and conditions do not vary, as the acquiring bank is a party to each merchant contract and must approve the key terms and conditions of that agreement. *See* Ex. 29, Visa USA Nov. 15, 2005 Operating Regulations ("Visa Op. Reg."), at

incorporates the interchange fee and adds the acquiring bank's service fee.[27] Those contracts generally have a provision that causes the merchant discount fee to increase in step with increases to the interchange fee.[28]

The typical transaction flow is exemplified by the following example, which hypothetically assumes a $100 purchase, 1.65 percent interchange fee and a $.35 acquiring bank fee:

- A cardholder purchases a product for $100 from a merchant;
- The merchant, through the acquiring bank, electronically transmits a request to Visa for authorization and payment of $100;
- Visa then electronically transmits the request for $100 to the issuing bank for authorization and payment to the merchant;
- The issuing bank authorizes the transaction and sends to Visa only $98.35 ($100 less the $1.65 interchange fee), as it retains the interchange fee;
- Visa sends $98.35 to the acquiring bank;
- The acquiring bank deducts its fee of $.35 and pays $98 to the merchant; *and*
- The issuing bank bills the cardholder $100.[29]

1.5.B, 1.4.F.1 and 4.2.C.1.a; Ex. 30, October 2005 MasterCard International By-Laws and Rules ("MC Rules"), at 7.3.1, 7.3.2., 7.3.4, 7.3.10, 7.3.11 and 9.1.1.1.

[27] *See, e.g.*, Ex. 31, BOFAIC00000263-0284; Ex. 32, CITINT000381256-1275; Ex. 33, WFINT0000037821-37833; Ex. 34, JET 002322-2344.

[28] *Id.*

[29] *See, e.g.*, Ex. 21, at VUSAMDL1-02603216; Ex. 14, MasterCard 2007 Form 10-K, at p. 7. At some point, pursuant to every Visa transaction, both the acquiring bank and the issuing bank pay processing fees to Visa, which are generally less than .01 percent of the amount of the transaction for each bank. It is not relevant to Plaintiffs' motion how or when that happens.

This transaction flow applies to each class member and is same for all credit and debit card transactions.

C. Defendants' Anticompetitive Conduct

Defendants' anticompetitive conduct artificially inflates the price that merchants pay to accept Visa and MasterCard credit and debit cards. That course of conduct is uniform as to all class members and all of the facts necessary to prove the representative Plaintiffs' claims are common to those necessary to prove the claims of the members of the proposed classes.

1. Defendants Collusively Fix and Impose Interchange Fees

Each of the three interrelated conspiracies to impose and fix the price of interchange fees presents a common question regarding the existence of a conspiracy. That question should be undisputed as to the intra-network conspiracies between Visa and its member banks and MasterCard and its member banks, at least from the beginning of the class period through the date of MasterCard's IPO.[30] If disputed, however, it presents a common question which will be proven through evidence common to the class. While Plaintiffs allege that the agreement that resulted in MasterCard's IPO, and the IPO itself, violates section 1 of the Sherman Act and section 7 of the Clayton Act by perpetuating Defendants' maintenance of supracompetitive interchange fees, the question of whether it does so is common to the class, and subject to proof on a class wide-basis.[31]

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[30] Even if Defendants were to admit to the commonality of that question, it would still weigh in favor of class certification. "[A] concession does not eliminate a common issue from the predominance calculus." *In re Nassau County Strip Search Cases,* 461 F.3d 219, 227 (2d Cir. 2006), *quoted in Cordes & Co. Fin. Serv., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 108 (2d Cir. 2007) ("*Cordes*").

[31] After the IPO, the agreement between MasterCard and its member banks to abide by the interchange fees fixed by MasterCard violates section 1 of the Sherman Act. *See United States v. Masonite Corp.*, 316 U.S. 265, 275-76 (1942) ("Nor can the fact that Masonite alone fixed the prices and that the other appellees never consulted with Masonite concerning them

a. Conspiracy Between Visa and its Member Banks to Fix Interchange Fees

The conspiracy between Visa and its member banks to fix interchange fees is subject to class-wide proof. Such proof will center on the agreement to fix the fees and the process for doing so – factual issues common to all class members. Central to the conspiracy question is Visa Op. Reg. 9.5 (Ex. 29), which requires each member bank to agree to charge the applicable interchange fee: "These Interchange Fee Reimbursement Fees apply in all circumstances where Members have not set their own terms for the Interchange of Visa transactions."[32] That rule also provides the mechanism for Visa and its member banks to collusively impose and fix interchange fees.

The process Defendants used to collusively impose and fix interchange fees is also subject to class-wide proof as it too involves a uniform course of conduct common to all class members. Specifically, approximately twice a year Visa personnel review and analyze the level and structure of its interchange fees. After completing their analysis, the Visa personnel make

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make the combination any less illegal. Prices are fixed when they are agreed upon. The fixing of prices by one member of a group, pursuant to express delegation, acquiescence, or understanding, is just as illegal as the fixing of prices by direct, joint action.") (citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222 (1940)); *see also Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764, n.9 (1984) (holding it would be (*per se* illegal for manufacturer of herbicides, Monsanto, to obtain an agreement from distributors to abide by fixed prices, even if the manufacturer set the amount of those prices unilaterally); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 781-83 (1975) (minimum recommended fee schedule for lawyers set by the local bar association was a "naked agreement" and a *per se* violation of the antitrust laws); *U.S.*violation); *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 606-08 (1972) (allocation of territories by supermarkets through cooperative buying association violated section 1) ("*Topco Assocs.*").

[32] In practice, the member banks do not set their own terms for the interchange fee, but instead abide by the interchange fee schedules. and agreements. Every bank necessarily knows that the others will abide by those fee schedules, as the requirement is incorporated into Visa's and MasterCard's operating rules. *See* Ex. 29, Visa Op. Reg. 9.5; Ex. 30, MC Rule 10.4. *See also* Ex. 35, at WFINT0000546471-6472; Ex. 36, Morrissey Dep. Tr. 235:11-236:10; Ex. 22, Steele Dep. Tr. 66:22-67:16.

recommendations regarding rates and categories to Visa's management, which, in turn, makes recommendations to the Board of Directors.[33] Through August 2005, seats on the Board were held almost exclusively by officers of the Bank Defendants and other large banks, and since May 2006, those officers held a majority of the seats.[34] Those same bank officers collectively approve new interchange fee rates and merchant categories.[35]

The new fee schedule is then disseminated to all member banks, including the Bank Defendants, who each agree to charge the collectively fixed interchange fees, pursuant to Visa Op. Reg. 9.5 (Ex. 29). The fixed fee schedule is applied uniformly within each merchant category by card type.

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[33] *See* Ex. 22, Steele Dep. Tr. 158:1-22; Ex. 7, Sheedy Amex Dep. Tr. 31:1-32:24, 46:19-49:10.

[34] *See* Ex. 7, Sheedy AmEx Dep. Tr. 49:19-50:13. *See also* Ex. 16.

[35] Ex. 7, Sheedy Amex Dep. Tr. 22:7-19, 49:11-18, 50:21-52:18; *see also* Ex. 37, Doyle Dep. Tr. 60:14-19.

[36] *See, e.g.*, Ex. 38, Zuercher Dep. Tr. 124:19-126:24; Ex. 39, at VUSAMDL1-07021472-1488; Ex. 40, at VUSAMDL1-07022488-2495. Merchants who are parties to co-branding and affinity agreements pay the same interchange fees as other merchants in their merchant categories who are not parties to such agreements.

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A co-branded card is a card that bears the names of both the issuing bank and a merchant on its face. In general, these types of cards provide rewards to the cardholder, which accrue based on the dollar value of the purchase. *See, e.g.*, Ex. 42, at BOFAIC00190360-0361, 0387. Citi's American Airlines card, which earns the cardholder miles for every purchase using the card, is an example of a co-branded card. An affinity card bears on its face the name of the issuing bank and that of a non-profit organization or group. Generally, a cardholder does not earn rewards when making purchases with an affinity card. Instead, the card issuing bank gives money to the organization identified on the card every time the cardholder uses the card.

b. Conspiracy Between MasterCard and its Member Banks to Fix Interchange Fees

The conspiracy between MasterCard and its member banks to collusively impose and fix the price of interchange fees is also subject to class-wide proof. Similar to the Visa conspiracy, proof of the MasterCard conspiracy will center on the common issues of an agreement to fix the interchange fees and the process for doing so. Central to the conspiracy, both before and after the IPO, is MC Rule 10.4 (Ex. 30), which requires each member to agree to charge the interchange fees set forth in the schedule: "An interchange transaction between members results in the payment of the appropriate interchange fee …, as applicable, as part of the net settlement process…. [MasterCard] periodically publishes a fee schedule."[37]

The process for collusively imposing and fixing interchange fees also involves a uniform course of conduct as to all class members. For most of the relevant period prior to MasterCard's IPO in 2006, the Bank Defendants, acting by and through the Board of Directors, fixed the amounts of MasterCard's interchange fees. Like Visa, MasterCard had a group of employees whose primary responsibility was to review and analyze the rates and structure of its interchange fees approximately twice each year. That group made recommendations regarding interchange fees to MasterCard's management, which, in turn, made recommendations to MasterCard's Board of Directors. Based on those recommendations, the Board, comprised primarily of officers of member banks, then approved and authorized the issuance of new interchange fee schedules.[38]

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[38] *See, e.g.*, Ex. 43, Abrams Dep. Tr. 194:16-198:11; Ex. 44 Jonas April 23, 2008 Dep. Tr. 8:2-11:17; Ex. 45, Kapteina Dep. Tr. 70:11-79:20, 86:6-89:17.

MasterCard notified its members of the new interchange fees through its U.S. Regional Bulletin,[39] and the members agreed to, and did, charge the fixed fee, as required by MC Rule 10.4 (Ex. 30). Those fixed interchange fees were uniformly applied to all merchants within a merchant category by card product type.[40] Moreover, according to MasterCard's Vice President of Interchange, Stephen Jonas, every merchant pays the applicable interchange fee in accordance with the published fee schedule, but a limited number of merchants receive a rebate of a portion of the interchange fee paid pursuant to agreements made with MasterCard.[41]

Since MasterCard's IPO, MasterCard and its member banks have maintained their collusion with respect to interchange fees.[42] The interchange group still reviews and analyzes interchange fee rates and structures and makes recommendations to MasterCard's senior management, who authorize the establishment of new interchange fees.[43] The Bank Defendants continue to participate in the conspiracy by agreeing to charge the interchange fees set forth in the fee schedules pursuant to MC Rule 10.4 (Ex. 30). The European Commission concluded that even after the IPO MasterCard and its member banks continued to collude with respect to interchange fees:

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[39] *See, e.g.*, Ex. 46, at MCI_MDL02_00018801-8803; Ex. 47, at MCI_MDL02_00018762-8765.

[40] Ex. 48, at MCI_MDL02_11822351. *See also* Ex. 49, at MCI_MDL02_00018785; Ex. 50, at MCI_MDL02_00018766; Ex. 51, at MCI_MDL02_00018740-8742; Ex. 52, Gore Dep. Tr. 126:20-127:15.

[41] Ex. 44, Jonas April 23, 2008 Dep. Tr. at 227:23-229:8. *See also* Ex. 43, Abrams Dep. Tr. 197:11-198:5.

[42] Ex. 6, Murphy Dep. Tr. 183:2-184:19, 223:12-224:13. *See also* Ex. 53, Jonas April 24, 2008 Dep. Tr. 143:8-145:19, 206:05-07:16.

[43] *See* Ex. 44, Jonas April 23, 2008 Dep. Tr. 8:2-11:17; Ex. 53, Jonas April 24, 2008 Dep. Tr. 143:8-145:19, 206:5-207:16; Ex. 45, Kapteina Dep. Tr. 57:22-59:22.

> The banks agreed to the IPO and the ensuing changes in the organisation's governance in order to perpetuate the [interchange fee] as part of the business model in a form which they perceived to be less exposed to antitrust scrutiny. Even after the IPO of MasterCard Incorporated interchange fees in the MasterCard organisation are not 'unilaterally imposed'. MasterCard's member banks still share a common interest as regards the [interchange fee] because it yields guaranteed revenues for their issuing business. There is thus a continuing commonality of the banks' interests in a[n interchange fee] after the IPO which is also reflected in the setting of interchange fee rates by MasterCard . . .

Ex. 2, *E.C. Decision* ¶ 3.[44] There is no evidence that any member bank has deviated from the published interchange fee schedule.[45]

c. Conspiracy Between Visa and MasterCard and Their Member Banks to Fix Interchange Fees

Like the intra-network conspiracies, the existence of a conspiracy between Visa, MasterCard, and their member banks is a question common to the class and subject to class-wide proof. Visa, MasterCard and their member banks colluded to fix interchange fees for Visa- and MasterCard-branded credit cards pursuant to a common course of conduct, which is identical for each class member. The evidence will focus on Defendants' conduct and, in particular, how the banks' common ownership and governance of Visa and MasterCard facilitated the conspiracy.[46] Duality enabled the Bank Defendants to coordinate the activities of Visa and MasterCard, including fixing and increasing in stair-step fashion Visa's and MasterCard's interchange fees.

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[44] Any differences between the European market and the United States market are irrelevant to this analysis. The European market is comprised of several highly-developed economies. All things being equal, interchange fees should in fact be higher in the European market than in the United States market, because it is comprised of numerous countries, and has a high volume of cross-border transactions.

[45] *See, e.g.*, Ex. 54, Kresge Dep. Tr. 160:9-15; Ex. 55, Beck Dep. Tr. 110:6-111:3.

[46] The common ownership and governance of Visa and MasterCard is known in the industry as "duality."

To that end, Visa and MasterCard contemporaneously increased interchange rates at numerous times before and during the class period, including April 1999, April 2003, August 2003, January through April 2004, and April 2005.[47]

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[47] April 1999: Ex. 56, at MCI_MDL02_01350321-0335 and Ex. 57, at VUSAMDL1-00430532-0536; April 2003: Ex. 58, at MCI_MDL02_05164688-4692 and Ex. 59, at VUSAMDL1-04273796; August 2003: Ex. 60, at CITI INT 000744978-4983 [MasterCard] and Ex. 61, at VUSAMDL1-01352603-2607; Jan-April 2004: (Debit): Ex. 62, at CITI INT 000580670-0674 [MasterCard] and Ex. 63, at VUSAMDL1-03238547-8552; April 2004: (Credit): Ex. 64, at CITI INT 000758134-8139 [MasterCard] and Ex. 65, at CHASE000475097-5103 [Visa]; April 2005: Ex. 66, at CITI INT 143459-3476 [MasterCard] and Ex. 67, at VUSAMDL1-00311348-1352.

Ex. 44, Jonas April 23, 2008 Dep. Tr. 163:9-166:21; Ex. 68, at MCI_MDL02_01638610.

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See, e.g., Ex. 69, at VUSAMDL1-08832689; Ex. 70, at TIB_MDL_016413; Ex. 71 at VUSAMDL1-05163893; Ex. 72, at VUSAMDL1-09023985-3986; Ex. 73, at VUSAMDL1-00279858-9860.

Ex. 44, Jonas April 23, 2008 Dep. Tr. 119:5-121:12, 146:24-147:5, 158:7-166:21, 211:8-214:11, 218:23-224:22; Ex. 53, Jonas April 24, 2008 Dep. Tr. 30:9-31:12; Ex. 74, at MCI_MDL02_11291972. Since then, the interchange fees for Visa and MasterCard have been nearly identical and increased in stair step fashion.

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2. Defendants' Conspiracy to Fix and Maintain Interchange Fees at Supracompetitive Levels Is Facilitated by the Imposition of Anti-Steering Restraints

Defendants have engaged in several practices that insulate their supracompetitive interchange fees from competition. These practices and their effects are common to the class and subject to common proof.

Plaintiffs will proffer evidence common to the class that Defendants have engaged in a uniform course of conduct to impose and enforce a number of rules, known as anti-steering restraints, which prevent merchants from influencing a customer's choice of payment method at the point of sale.[53] For example, MC Rule 9.12 (Ex. 30) titled "Prohibited Practices," prohibits merchants from: (i) favoring other "acceptance brand[s]" over MasterCard-branded cards ("no-discrimination"); (ii) charging consumers a surcharge for using a MasterCard-branded card ("no-

[49] Ex. 75, at MCI MDL02 11148470.

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[50] Ex. 76.

[51] Ex. 77, at VUSAMDL1-06235739.

[52] Ex. 78, at VUSAMDL1-08706459-6462; Ex. 79, Towne Dep. Tr. 157:8-22.

[53] *See* Ex. 29, Visa Op. Reg. at 4.2.C.1.c , 4.2.D; and Ex. 30, MC Rules at 9.1.2, 9.8.

surcharge"); and (iii) establishing a minimum purchase price for a MasterCard-branded card transaction ("no-minimum purchase"). Visa has imposed and enforced similar rules prohibiting these practices.[54] These rules apply to all merchants, and all merchants who accept Visa- and MasterCard-branded credit and debit cards are required to follow them.[55]

Other issues common to the class include whether the anti-steering rules effectively limit merchants' options in accepting payment cards, and prevent merchants from exerting downward pressure on interchange fees. For example, the "no-surcharge rule" prohibits all merchants from charging a customer more for using credit cards (or any particular type of credit card), which cost merchants more to accept than other types of payment.[56] Plaintiffs will proffer evidence common to the class to establish that Defendants collusively impose and enforce this rule because surcharging would discourage cardholders from using credit cards.[57] Plaintiffs will also proffer evidence common the class that, absent the no-surcharge rule, Defendants would be forced to reduce interchange fees to encourage merchants to forgo surcharging.[58]

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[54] *See* Ex. 29, Visa Op. Reg. at 5.2.F.

[55] *See* Ex. 29, Visa Op. Reg. at 4.2.C.1.c and 4.2.D; Ex. 30, MC Rule at 9.1.2 and 9.8.

[56] Ex. 80, at MCI_MDL02_08162628 REDACTED Ex. 54, Kresge Dep. Tr. 241:19-244:8; Ex. 81, at BOFAIC06481362-1363.

[57] Ex. 36, Morrissey Dep. Tr. 79:22-80:12; Ex. 82, Reserve Bank of Australia Payment System Regulation Response by MasterCard Worldwide to the Issues for the 2007/08 Review, at 18, 20 (admitting the ability of a merchant to surcharge "effectively constrains interchange fees.").

[58] Ex. 22, Steele Dep. Tr. 500:1-24; *see also* Ex. 83, at MCI_MDL02_08058057-8058 REDACTED *see also* Bamberger Decl. ¶ 102.

Another rule that limits merchants' choices, raises their costs, and prevents them from effectively limiting interchange fees is the "honor all cards" rule. That rule requires merchants who accept one of Visa's or MasterCard's credit card products to accept all such products, no matter what bank issued the card and, more importantly, no matter what the cost to the merchant.[59] Plaintiffs will proffer evidence common to the class, that many merchants would not accept all Visa- and MasterCard-branded credit cards absent that rule, and thus would be able to exert downward pressure on interchange fees. For example, Plaintiff D'Agostino Supermarkets would prefer not to accept Visa's Signature credit card because its interchange fees are substantially higher than those of other Visa cards, but has no choice but to do so, and cannot steer their customers to cards with lower interchange fees.[60]

Another rule that limits merchants' options, raises their costs and prevents them from effectively limiting interchange fees is Visa's rule that requires credit card and off-line debit transactions to be processed only through Visa's network (the "no bypass" rule).[61] Questions relating to the existence, purpose and effect of this rule are common to the class and subject to class-wide proof. Absent such a rule, merchants could elect to bypass Visa and process transactions using a third-party processor. Plaintiffs will proffer evidence common to the class

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[59] *See* Ex. 29, Visa Op. Reg. at 5.2.B; Ex. 30, MC Rule at 9.11; Ex. 84, at CITI INT 002413367 (memo to "All Merchants" that "MasterCard has announced that merchants that are not compliant [with a new regulation requiring acceptance of Diners Club cards] by December 1st may be subject to fines…. .To avoid the risk of being fined, be sure your terminal has been upgraded to accept these transactions"); Ex. 85, at WFINT0000011600, 1612 (Wells Fargo program guide for new internet merchants notes that the "honor all cards" rule (and other merchant restraints) "are requirements strictly enforced by Visa and MasterCard."); Ex. 54, Kresge Tr. 226:21-229:7; Ex. 22, Steele Tr. 546:2-15

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[60] Ex. 10, D'Agostino Dep. Tr. 38:4-24, 43:7-44:4.

[61] *See* Ex. 29, Visa Op. Reg. at 6.2.J.1.

that third-party processors, such as First Data Resources, have the proven technical capability to allow merchants to bypass the Visa network for both credit card and off-line debit transactions, but cannot do so because of the "no bypass" rule.[62]

D. Collusively Fixed and Imposed Interchange Fees Are Unnecessary to the Efficient Operation of Defendants' Networks

Another issue common to the class is whether collusively imposed and fixed interchange fees are necessary to the existence and efficient operation of a mature payment card network. Plaintiffs will proffer evidence common to all class members that they are not, including Dr. Bamberger's conclusion that interchange fees are not necessary to the efficient operation of a mature payment card network.[63] That same conclusion was reached by the European Commission in finding MasterCard's interchange fee to be illegal.[64]

Plaintiffs will also proffer evidence common to the class that the original cost-based justifications for collusively imposed and fixed interchange fees are no longer valid, if they ever

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[62] In fact, Visa filed suit against First Data seeking to prevent it from bypassing Visa's network services when processing Visa payment card transactions on behalf of certain issuing and acquiring banks. Prior to that litigation, First Data had provided network services for approximately thirty years. *See Visa U.S.A., Inc. v. First Data Corp.*, 2005 WL 3274105, at *2 (N.D. Cal. Dec. 1, 2005). *See also* Ex. 86, at MCI_MDL02_01416136 ("First Data offers complete end-to-end closed systems to more than 100 major clients"); Ex. 87, at MCI_MDL02_01514167 REDACTED Ex. 88, at BOFAIC00006478-6479.

[63] Bamberger Decl. ¶¶ 74-78, 82 and 89. REDACTED Ex. 43, Abrams Dep. Tr. 102:18-23.

[64] Ex. 2, *E.C. Decision* ¶ 4 ("An open payment card scheme such as MasterCard's can operate without [an interchange fee] as is evidenced by the existence of comparable open payment card schemes without [an interchange fee]"); ¶ 751 ("MasterCard has, however, not proven to the requisite standard that its current [interchange fees are] indeed indispensible to maximise system output and to achieve any related objective efficiencies.").

were. Such common evidence will include documents demonstrating that Defendants originally claimed that they needed to collusively set interchange fees to defray the costs and risks associated with card issuance, marketing, transferring transactional paper between issuing banks and acquirers, fraud, and floating funds to cardholders and did so purportedly with the assistance of independent auditing firms, based on costs.[65] To demonstrate that those cost-based justifications are no longer valid for the time period relevant to this action, Plaintiffs will proffer evidence identical for all class members that interchange fees bear no meaningful relationship to Defendants' costs.[66] The record to date confirms that neither MasterCard nor Visa sets interchange fees based on costs:[67]

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[65] *See* Ex. 89, at MCI_MDL02_01485818; Ex. 22, Steele Dep. Tr. 314:1-18.

[66] *See* Ex. 48, at MCI_MDL02_11822350; Ex. 90, Ehrlich Dep. Tr. at 46:25-52:5.

[67]

See Ex. 91, at VUSAMDL1-01432525, 2534

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Ex. 92, at VUSAMDL1-00289620
Ex. 93, at VUSAMDL1-00038667

[68] Ex. 45, Kapteina Dep. Tr. 312:20-313:19, 371:13-373:23.

[69] Ex. 94, at MCI_MDL02_08058713. The European Commission also found that "MasterCard's cost based benchmarks include cost items that are neither intrinsic in the payment functionality of a card nor related to services that clearly benefit the customers that bear the expenses of this [interchange fee]." Ex. 2, *E.C. Decision* ¶¶ 10, 147-150 (describing evolution of MasterCard's justification for interchange from costs to fictional "balancing" function).

[70] Ex. 95, at BOFAIC06455261.

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Any other justifications proffered by Defendants for collusively imposing and fixing interchange fees will also be issues common to the class that will be refuted using evidence common to all class members.

E. Plaintiffs and Class Members Pay the Interchange Fees Charged on Visa- and MasterCard-Branded Payment Card Transactions

Plaintiffs will proffer evidence common to the class establishing that they and all merchant class members directly pay interchange fees to issuing banks on every credit and debit card transaction. Common evidence includes the fact that issuing banks deduct the interchange fee from the amount owed to the merchant, the terms of the merchants' contracts with their acquiring banks, and the means by which acquiring banks record interchange fees in their financial records:[74]

- MasterCard describes the process as follows: "the issuer pays the acquirer an amount equal to the transaction value minus any interchange fee";[75]

[71] Ex. 22, Steele Dep. Tr. at 314:1-320:23; *see also* 323:10-324:5

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[72] Ex. 96, at VUSAMDL1-08471805.

[73] Ex. 97, at VUSAMDL1-06292021; Ex. 98, at HSBC_174663.

[74] This obligation is further buttressed by rules, restrictions and other practices imposed by Defendants to ensure that every merchant pays an interchange fee on every credit and off-line debit card transaction.

[75] Ex. 14, MasterCard 2007 10-K at 7.

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- An internal Citibank document similarly states on a $100 transaction "[Citi] pay[s] the $98. We don't pay $100 and get $2 back.";[77]

- Dr. Bamberger concludes "from an economics perspective … interchange fees are appropriately characterized as being paid by merchants to issuing banks";[78]

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[76] Ex. 23, Fischer Dep. Tr. 156:8-13.

[77] Ex. 24, CITI INT 001062067.

[78] Bamberger Decl. ¶ 23; *see also id.* ¶¶ 24-31 (expounding ¶ 23).

[79] Merchants cannot avoid the obligation to pay interchange fees by contracting with a non-member ISO rather than an acquirer. *See* Ex. 99, Duffy Dep. Tr. 90:7-11; Ex. 100, Pyke Dep. Tr. 108:20-109:9. The issue of whether merchants still pay the interchange fees when they contract with an ISO is a common question subject to class wide determination. Such common evidence will include that the operating rules imposed by Visa and MasterCard require: (1) an acquiring bank member to be a party to any contract between an ISO and a merchant; (2) the acquiring bank to set the merchant discount fee for the transactions handled by the ISO for the merchant; and 3) all merchants and ISOs to adhere to Visa's and MasterCard's operating rules. *See* Ex. 29, Visa Op. Reg. at 1.4.B.3.b, 1.4.F, 1.4.F.1, 1.5.B, 1.5.D.1, 4.2.C.1.c and 4.2.D; Ex. 30, MC Rule at 7.3.4, 7.3.10, 7.4.1, 7.4.2, 9.1.1.1., 9.1.2 and 9.8.

[80] *See* Ex. 7, Sheedy Amex Dep. Tr. at 413:24-414:3

see also Ex. 35, at WFINT0000546471-6472. REDACTED

See Ex. 101, Bhamani Dep. Tr. 151:9-152:9.

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III. ARGUMENT

A. Antitrust Cases are Well-Suited for Class Certification

The Supreme Court has recognized that the antitrust laws are "as important to the preservation of economic freedom and our free-enterprise system as the *Bill of Rights* is to the protection of our fundamental personal freedoms." *Community Communications Co. v. Boulder*, 455 U.S. 40, 57 n.19 (1982) (quoting *Topco Assocs.*, 405 U.S. at 610). It has also repeatedly stressed the importance of private litigation to the enforcement of the antitrust laws. *See, e.g.*, *Pillsbury Co. v. Conboy*, 459 U.S. 248, 262-63 (1983); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262, 266 (1972); *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 329 (1955); *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 751-52 (1947).

For this and other reasons, courts routinely certify classes in price-fixing cases.[84] In fact, "Courts have noted that class actions are a particularly appropriate mechanism for achieving

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[81] *See* Ex. 102, at CITI INT 001427164; Ex. 103, at BOFAIC00224861, 4869; Ex. 104, at NC_IF_01_0002784.

[82] *See* Ex. 105, Rossi Dep. Tr. 83:12-84:23; Ex. 103, at BOFAIC00224861, 4869; Ex. 106, at WB0132762-2763.

[83] Ex. 107, at WFINT0000719258 REDACTED

Ex. 105, Rossi Dep. Tr. 83:12-84:23; Ex. 108, Miller Dep. Tr. 138:10-19.

[private antitrust] enforcement ... and, therefore, 'courts resolve doubts in favor of certifying the class.'" *In re Carbon Black Antitrust Litig.*, 2005 WL 102966, at *9 (D. Mass. Jan. 18, 2005) ("*Carbon Black*") (citation omitted); *see also Meijer, Inc. v. Warner Chilcott Holdings Co. III, Ltd.*, 246 F.R.D. 293, 307 (D.D.C. 2007) ("*Meijer*"); *In re Tableware Antitrust Litig.*, 241 F.R.D. 644, 648 (N.D. Cal. 2007) ("*Tableware*"). As the court recognized in *Adames v. Mitsubishi Bank, Ltd.*, 133 F.R.D. 82, 88 (E.D.N.Y. 1989):

> It is often proper to view the class action liberally at the early stages of the litigation since the class can always be modified or divided as issues are later refined for trial. *Woe v. Cuomo*, 729 F.2d 96, 107 (2d Cir. 1984), *cert. denied*, 469 U.S. 936 (1984).

The Second Circuit has specifically directed district courts to apply Rule 23 liberally rather than narrowly. *Korn v. Franchard Corp.*, 456 F.2d 1206, 1208-09 (2d Cir. 1972); *Green v. Wolf Corp.*, 406 F.2d 291, 298, 301 (2d Cir. 1968). When a court is in doubt as to whether to certify a class action, the court must err in favor of allowing the class. *In re Medical X-ray Film Antitrust Litig.*, 1997 WL 33320580, at *2 (E.D.N.Y., Dec. 26, 1997). *In re Initial Public Offerings Secs. Litig.*, 471 F.3d 24 (2d Cir. 2006) ("*IPO*"), did not disturb the basic Second Circuit principle that Rule 23 is to be liberally construed. *Jeffries v. Pension Trust Fund of Pension, Hosp. and Benefit Plan of the Elec. Ind.*, 2007 WL 2454111, at *10 (S.D.N.Y. Aug. 20, 2007) ("*Jeffries*").

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[84] *See, e.g., In re Currency Conversion Fee Antitrust Litig.*, 224 F.R.D. 555 (S.D.N.Y. 2004) ("*Currency Conversion*"), *mod. on other grounds*, 361 F. Supp.2d 237 (S.D.N.Y. 2005); *In re Vitamins Antitrust Litig.*, 209 F.R.D. 251 (D.D.C. 2002) ("*Vitamins*"); *Arden Architectural Specialties, Inc. v. Washington Mills Electro Minerals Corp.*, 2002 WL 31421915 (W.D.N.Y. Sep. 17, 2002); *In re Magnetic Audiotape Antitrust Litig.*, 2001 WL 619305 (S.D.N.Y. Jun. 6, 2001) ("*Magnetic Audiotape*"); *In re Auction Houses Antitrust Litig.*, 193 F.R.D. 162 (S.D.N.Y. 2000) ("*Auction Houses*"); *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493 (S.D.N.Y. 1996) ("*NASDAQ*"); *In re Workers' Comp.*, 130 F.R.D. 99 (D. Minn. 1990).

Class certification is no less warranted in this case than in the scores of antitrust class actions that have preceded it. Indeed, this Court has previously certified a nearly identical merchant class, alleging claims (against Visa and MasterCard) for antitrust violations in *VisaCheck/Master Money I*. Neither the passage of time nor the distinctions between the classes and claims in this case and the class and claims in the *VisaCheck/Master Money I* case dictate a different result here. *See also Currency Conversion*, 224 F.R.D. 555(certifying class alleging both intra- and inter-network price-fixing claims against Visa, MasterCard and seven of their largest card-issuing members).[85]

B. The Standards for Class Certification Under Rule 23

To certify a class, the court must determine that "each of the Rule 23 requirements has been met" based on a review of sufficient evidence. *IPO*, 471 F.3d at 41; *Guzman v. VLM, Inc.*, 2008 WL 597186, at *5 (E.D.N.Y. Mar. 2, 2008) ("*Guzman*"); *Velez v. Novartis Pharm. Corp.*, 244 F.R.D. 243, 256-57 (S.D.N.Y. 2007) ("*Velez*"). In doing so, the court is required to consider all the evidence submitted and resolve any factual issues relevant to class certification, even where those issues are merits issues as well. However, the court should not resolve any merits issue unrelated to the Rule 23 requirements. *IPO*, 471 F.3d at 41; *see also Cordes*, 502 F.3d at 108;*Wagner v. Barrick Gold Corp.*, 2008 WL 465115, at *2 (S.D.N.Y., Feb. 15, 2008) ("*Wagner*"); *Dupler v. Costco Wholesale Corp.*, 2008 WL 321776, at *3 (E.D.N.Y., Jan. 31, 2008) ("*Dupler*"); *Velez*, 244 F.R.D. at 257. The court also has discretion to limit any hearing so

[85] The Second Circuit's *IPO* decision does not affect these comparisons. While the *IPO* decision requires courts to find that Rule 23 requirements have been met and to resolve any factual disputes, this Court did that in *Visa Check/MasterMoney I* when it credited plaintiffs' expert's overcharge theory and rejected defendants' expert's economic theory. Similarly, in this case, Plaintiffs' expert has shown that impact and damages can be established on a class-wide basis based on an overcharge theory. Courts have generally held that an overcharge theory eliminates individual issues. *See infra* § III.D.2.a.vi.(c).

as to avoid a mini-trial. *IPO*, 471 F.3d at 41; *see also Collins v. Olin Corp*, 248 F.R.D. 95, 100 (D. Conn. 2008) ("*Collins*") (citing *IPO*). Ultimately, the determination, "as to each requirement, is [] a mixed question of fact and law." *IPO*, 471 F.3d at 40.

While class plaintiffs generally bear the burden, Plaintiffs meet their burden if the judge is "persuaded" or is "satisfied," based on all the evidence and the applicable law, that the requirements of Rule 23 are met. *Id.* at 40-41. As this Court recently held, the court must "receive enough evidence, by affidavits, documents, or testimony, to be satisfied that each Rule 23 requirement has been met." *Guzman*, 2008 WL 597186, at *5 (quoting *IPO*, 471 F.3d at 41); *see also Velez*, 244 F.R.D. at 259 (*IPO* requires that evidence be "sufficiently persuasive"); *In re Initial Public Offering Sec. Litig.*, 243 F.R.D. 79, 87 (S.D.N.Y. 2007) (the court must be "persuaded to rule, based on the relevant facts and the applicable legal standard," that the Rule 23 requirements have been met) (citation omitted). In *Velez*, the court assessed expert statistical evidence as "sufficiently rooted in accepted statistical methodology" and considered it in the light of anecdotal evidence for "texture." *Velez*, 244 F.R.D. at 261, 263-64. *IPO* suggests that this standard should be applicable to expert opinions generally.

Here, Plaintiffs have submitted evidence sufficient to meet the Rule 23 requirements.

C. The Proposed Classes Satisfy the Requirements of Rule 23(a)

Rule 23(a) Federal Rule of Civil Procedure requires the proponent of a class to show that:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Id.

The proposed classes in this case meet all four of the Rule 23(a) requirements. In fact, in *VisaCheck/Master Money I*, defendants Visa and MasterCard did not dispute numerosity ((a)(1)), commonality ((a)(2)) or adequacy of counsel ((a)(4)), *see* 192 F.R.D. at 81 n.12,[86] and Plaintiffs anticipate minimal opposition as to these requirements in this case.

1. Plaintiffs' Proposed Classes Are Too Numerous for Joinder to be Practicable.

The proposed classes clearly satisfy the numerosity requirement of Rule 23(a)(1). Like the merchant class certified in *VisaCheck/Master Money*, the proposed classes are comprised of millions of merchants who accept Visa- and MasterCard-branded cards.[87] These merchants, who can be readily identified from Defendants' records, have paid and will continue to pay interchange fees, the existence of which, as well as their artificially high level, are the product of Defendants' anticompetitive conduct. Numerosity merely requires that the proposed class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1); *see also Currency Conversion*, 224 F.R.D. at 561 (citing *Robidoux v. Celani*, 987 F.2d 931, 935-36 (2d Cir. 1993) ("*Robidoux*") (class size of 40 or more members satisfies numerosity)). Thus, the numerosity requirement is met.

2. Numerous Issues of Law and Fact Exist that Are Common to the Classes

The classes also satisfy the commonality requirement of Rule 23(a)(2). This requirement is met where "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). In the Second Circuit, a single common question of law or fact will satisfy the commonality

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[86] The Court recognized that Visa's and MasterCard's "principal attack on class certification" targeted issues that are normally addressed in a Rule 23(b) analysis. *See VisaCheck/Master Money I*, 192 F.R.D. at 81-82 (stating defendants had challenged whether plaintiffs had suffered antitrust injury and that individual issues of injury would predominate).

[87] *See* note 12, *supra*.

requirement. *See, e.g.*, *Dupler*, 2008 WL 321776, at *4; *In re J.P. Morgan Chase Cash Balance Litig.*, 242 F.R.D. 265, 272 (S.D.N.Y. 2007) ("*J.P. Morgan*") (citing *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997) ("*Marisol A.*")). The presence of "slight variations in the fact patterns of individual Plaintiffs do[es] not vitiate commonality and typicality." *Currency Conversion*, 224 F.R.D. at 562; *see also In re Vivendi Universal, S.A.*, 242 F.R.D. 76, 85 (S.D.N.Y. 2007) ("*Vivendi*"). Commonality exists where, as here, there are allegations "concerning the existence, scope, and efficacy of an alleged antitrust conspiracy." *Currency Conversion*, 224 F.R.D. at 562 (citing *NASDAQ*, 169 F.R.D. at 509-12); *see also Meijer*, 246 F.R.D. at 307; *Carbon Black*, 2005 WL 102966, at *11. This is because "proof of a conspiracy for Sherman Act purposes requires a 'conscious commitment to a common scheme designed to achieve an unlawful objective.' The different actions taken to effectuate that conspiracy in no way need to be identical, they merely need to be driven by the same anti-competitive intent." *In re Sulfuric Acid Antitrust Litig.*, 2007 WL 898600, at *3 (N.D. Ill. Mar. 21, 2007) ("*Sulfuric Acid*") (internal citations omitted). In this case, conspiracy is the basis of every class member's members claims for price fixing and the collusive imposition and enforcement of the antisteering restraints.

Defendants' anticompetitive conduct raises a host of common questions of law or fact, including, *inter alia*:

1. Conspiracy issues

    a. Whether (a) Visa and its member banks, and (b) MasterCard and its member banks illegally fixed and continue to fix uniform interchange fees for credit cards that are charged to merchants in the market for network processing services for such cards, thereby causing the classes to pay supracompetitive interchange fees and merchant discount fees;

    b. Whether the merchant restraints imposed by Defendants facilitated Defendants' respective price-fixing arrangements;

c. Whether the *per se* rule or the rule of reason should be applied to analyze the price-fixing schemes of Visa, MasterCard, and their respective member banks;

2. Monopolization issues

a. Whether Visa and its members exercise market power or monopoly power that was willfully acquired and/or maintained, in various markets as alleged in the Complaint;

b. The existence and parameters of each of the relevant markets alleged in the FCACAC;[88]

3. Clayton Act § 7 issues

a. Whether MasterCard's corporate restructuring violates § 1 of the Sherman Act and/or § 7 of the Clayton Act;

4. Impact and damages issues

a. Whether virtually all class members were overcharged for Visa and MasterCard transactions by paying higher interchange fees than they would have paid absent Defendants' conspiracy;

b. Whether interchange fees would exist in today's mature market absent the above-referenced conspiracies;

c. The proper measure of damages sustained by the Damages Class as a result of the conduct described herein.

Thus, the commonality requirement is met.

3. The Class Representatives' Claims Are Typical of Those of the Class Members

Rule 23(a)(3) requires that "the claims of the class representatives be typical of those of the class, and is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Wagner*, 2008 WL 465115, at *3; *see also Marisol A.*, 126 F.3d at 376. Typicality is established where the class representatives "have the incentive to prove all the elements of the cause of

[88] These issues are not relevant to Plaintiffs' price-fixing claims if the Court should determine that the *per se* rule applies to those claims.

action which would be presented by the individual members of the class were they initiating individualized actions." *NASDAQ*, 169 F.R.D. at 51.

Where plaintiffs allege an antitrust conspiracy, courts have long recognized that "[s]ince the representative parties need prove a conspiracy, its effectuation, and damages therefrom – precisely what the absentees must prove to recover – the representative claims can hardly be considered atypical." *In re Bulk (Extruded) Graphite Prods. Antitrust Litig.*, 2006 WL 891362, at *5 (D.N.J. Apr. 4, 2006) (quoting *In re Sugar Industry Antitrust Litig.*, 73 F.R.D. 322, 336 (E.D. Pa. 1976) (citation omitted)) ("*Bulk (Extruded) Graphite Prods.*");"); *see also Meijer*, 246 F.R.D. at 301 (typicality is commonly established in antitrust cases by alleging defendants committed the same antitrust violations); *Sulfuric Acid*, 2007 WL 898600, at *4 (finding typicality requirement met because "the question of whether or not Defendants engaged in anti-competitive behavior is a universal determination of culpability requiring only a limited examination of the differences among putative class members.").

Plaintiffs' claims here are typical of the members of the classes because Plaintiffs and absent class members all share the same interest in proving that Defendants have engaged in anticompetitive conduct that violates the Sherman, Clayton and Cartwright Acts as alleged in the Complaint. *Id.* The claims arise from the same course of conduct, and every Plaintiff and class member would need to rely upon the same common proof to establish their claims. *See Vivendi*, 242 F.R.D. at 85; *Fears v. Wilhelmina Model Agency, Inc.*, 2003 WL 21659373, at *4 (S.D.N.Y. Jul. 15, 2003) ("*Fears*"). In fact, more than 50 related cases were independently filed by a variety of different types of merchants from "mom-and-pop" shops to large international corporations. Each of those complaints generally alleges that Defendants engaged in anticompetitive conduct that artificially inflates the interchange fees paid by merchants to accept

Visa- and MasterCard-branded credit and debit cards in violation of the Sherman Act, and seeks damages and injunctive relief for that conduct. Plaintiffs will prove each of their claims using evidence common to all class members, *see infra* Part III.D.2.a, and in doing so will simultaneously prove absent class members' claims as well. *See Jeffries*, 2007 WL 2454111, at *12. Thus, the typicality requirement is satisfied.

4. Both the Class Representatives and Class Counsel Will Fairly and Adequately Protect the Interests of the Classes

Rule 23(a)(4) requires that the "representative parties will fairly and adequately protect the interests of the class." Adequacy of representation requires that "there is no conflict of interest between the named plaintiffs and other members of the plaintiff class" and that "class counsel is qualified, experienced, and generally able to conduct the litigation." *Marisol A.*, 126 F.3d at 378; *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 245 F.R.D. 147, 160 (S.D.N.Y. 2007) ("*Flag Telecom*"). Both of these requirements are satisfied here.

a. Absence of Conflict

Plaintiffs have no interests in conflict with absent class members. A proposed class representative is adequate unless the representative has a fundamental conflict with absent class members that is neither speculative nor hypothetical. *VisaCheck/Master Money II*, 280 F.3d at 145. To warrant any consideration at all, the proffered conflicts must be "apparent, imminent, and on an issue at the very heart of the suit," and "must be such that plaintiff's interests are placed in significant jeopardy." *Fears*, 2003 WL 21659373, at *5 (citation omitted); *In re Polyester Staple Antitrust Litig.*, 2007 WL 2111380, at *11 (W.D.N.C. Jul. 19, 2007) ("*Polyester Staple*"). There are no such conflicts between Plaintiffs and absent class members here.

Plaintiffs' interests are aligned with those of all members of both classes. Like Plaintiffs, each class member was injured by Defendants' anticompetitive conduct and shares the same

interest in securing relief. Each class member paid more than it would have absent interchange fees or was overcharged due to collusively imposed and fixed interchange fees. All members of the Damages Class maintain a similar interest in establishing Defendants' liability and maximizing their damages; and all members of the Injunctive Relief Class maintain an interest in enjoining Defendants' anticompetitive conduct. Where, as here, Plaintiffs seek to recover overcharges for Sherman Act violations, their interests coincide with those of the class. *See VisaCheck/Master Money II*, 280 F.3d at 137; *see also Polyester Staple*, 2007 WL 2111380, at *10. Given these common interests, Defendants cannot prove that any actual, non-speculative conflict exists. *See, e.g., Carbon Black*, 2005 WL 102966 at *14.

Moreover, it is well-settled that "'factual differences in the *amount of damages*, date, size or manner of [payment], ... and other such concerns will not defeat class action certification when plaintiffs allege that the same unlawful course of conduct affected all members of the proposed class.'" *Fears*, 2003 WL 21659373, at *5 (*citing In re Sumitomo Copper Litig.*, 182 F.R.D. 85, 92 (S.D.N.Y. 1998) (citation omitted)). Plaintiffs have already demonstrated that their claims concern the "same unlawful course of conduct" by Defendants that affects all members of the classes. Thus, there are no conflicts of interest between Plaintiffs and the members of the classes.

b. Class Counsel Are Well-Qualified

Plaintiffs' counsel are well-qualified to represent the classes. Each of the three co-lead firms has extensive experience and expertise in antitrust, class action, and complex civil litigation, and the three lead firms are actively supported by dozens of firms with similar experience. These counsel have also successfully, and efficiently, prosecuted other complex litigation involving credit cards (*Visa Check/Master Money*, Master File No. 96-cv-5238, and *In*

re Currency Conversion Fee Antitrust Litig., MDL No. 1409), and are currently litigating other cases involving the payment card industry (*Ross v. American Express Co.*, Docket No. 04-cv-5723; *Ross v. Bank of America (U.S.A.), N.A.*, Docket No. 05-cv-7116; *In re ATM Interchange Fee Antitrust Litig.*, Master File No. C-04-2676-CRB). The second prong of Rule 23(a)(4) is satisfied.

Plaintiffs therefore respectfully request, pursuant to Rule 23(g), that the Court appoint the following counsel as co-lead counsel for both classes:

Robins, Kaplan, Miller & Ciresi L.L.P.
800 LaSalle Avenue, Suite 2800
Minneapolis, MN 55402

Berger & Montague, P.C.
1622 Locust Street
Philadelphia, PA 19103

Coughlin Stoia Geller Rudman & Robbins LLP
655 West Broadway, Suite 1900
San Diego, CA 92101

D. The Class Should be Certified Pursuant to Rules 23(b)(2) and 23(b)(3)

In this case, a class should be certified under Rule 23(b)(2) and also under 23(b)(3). Courts have repeatedly certified classes alleging antitrust violations under both rules. For example, in *NASDAQ*, the court held:

> Nothing in the language of Rule 23 precludes certification of both an injunctive class and a damages class in the same action. In fact, where injunctive relief and damages are both important components of the relief requested, court[s] have regularly certified an injunctive class under Rule 23(b)(2) and a damages class under Rule 23(b)(3) in the same action.

Id., 169 F.R.D. at 515-16 (citing *Davis v. Southern Bell Tel. & Tele. Co.*, 1993-2 Trade Cas. (CCH) ¶ 70,480, 71,604, 1993 WL 593999 (S.D. Fla. 1993)); *see also Velez*, 244 F.R.D. at 270-71; *Visa Check/Master Money I*, 192 F.R.D. at 88 ("the presence of a [large] damages claim will not defeat maintenance of a class action under Rule 23(b)(2) when 'the requested … injunctive

relief is a significant component of the overall relief which plaintiffs seek'") (citation omitted);[89] *Hoffman v. Honda of America Mfg., Inc.*, 191 F.R.D. 530, 536 (S.D. Ohio 1999) ("[A]n action in which both injunctive relief and money damages are sought *may* be certified as a class under Rule 23(b)(2), as long as money damages do not constitute the predominate type of relief requested").

1. The Requirements of Rule 23(b)(2) Are Met

Certification pursuant to Rule 23(b)(2) is warranted where defendants have acted on grounds generally applicable to the class, making final injunctive or declaratory relief appropriate. Fed. R. Civ. P. 23(b)(2); *Brown v. Kelly*, 244 F.R.D. 222, 228 (S.D.N.Y. 2007) ("*Brown*"). Plaintiffs seek certification of an Injunctive Relief Class for claims alleging the threatened loss arising from Defendants' anticompetitive conduct to impose, maintain and artificially inflate interchange fees, the imposition and enforcement of anti-steering restraints, Visa's willful maintenance of its market power, and the violation arising from MasterCard's IPO. Plaintiffs seek to enjoin the imposition of the collusively fixed and maintained interchange fees and to end the various rules and restrictions Defendants use to facilitate their collusive conduct.

Certification of an injunctive relief class is warranted even where plaintiffs are also seeking monetary damages if the court finds that: "(1) even in the absence of a possible monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought; and (2) the injunctive or declaratory relief sought would be both necessary and

[89] In *Visa Check/Master Money II*, the Second Circuit chose not to address whether the district court's certification of a Rule 23(b)(2) class was appropriate because it had "already concluded that the district court appropriately certified the class under Rule 23(b)(3)." *Id.*, 280 F.2d at 147. The Second Circuit also noted that neither it nor the Supreme Court had "delineated the precise circumstances under which a putative class requesting both injunctive and monetary relief can be certified under [only] Rule 23(b)(2)" *Id.* at 146-47.

appropriate were the plaintiffs to succeed on the merits." *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 20 (2d Cir. 2003) (citing *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 164 (2d Cir. 2001)); *see also Velez*, 244 F.R.D. at 270-71; *Brown*, 244 F.R.D. at 228. Both of these elements are present and common to the Injunctive Relief Class here, and significantly, no government proceedings are pending that could achieve comparable equitable relief.

Where, as in this case, declaratory or injunctive relief is an important aspect of the overall relief sought, certification is warranted under Rule 23(b)(2). See Visa Check/*Master Money I*, 192 F.R.D. at 88-89; *Brown*, 244 F.R.D. at 228. In *VisaCheck/Master Money I*, this Court certified a merchant class pursuant to Rule 23(b)(2), in addition to a separate Rule 23(b)(3) class, because the conduct at issue was "'generally applicable' to all members of the class, and the request for an injunction ending it is central to the plaintiffs' suit." *Id.* at 88. This Court found that "the highly significant injunctive relief sought [t]here is as important as the damages claimed." *Id.*; *see also NASDAQ*, 169 F.R.D. at 517 ("the requested declaratory and injunctive relief will be necessary to ensure that Nasdaq investors are not harmed in the future by Defendants' anticompetitive conduct.").

The circumstances in this case are, in this context, identical to those in *VisaCheck/Master Money*. Defendants' anticompetitive conduct is generally applicable to all Plaintiffs and class members. In fact, Dr. Bamberger concludes that Defendants' conspiracy, if proven, would have injured virtually all merchants and thus, merchant class members would generally benefit from injunctive relief prohibiting such conduct. Bamberger Decl. ¶¶ 72, 90, 93-94, 98, 103, 122. All Plaintiffs and class members would seek to enjoin that conduct, because if Defendants are permitted to maintain their scheme, future damage to the class will total tens of billions of dollars

annually.[90] If the Court enjoins Defendants' conduct, the class will be spared those damages, without in any way undermining the efficiency of the payment card networks.[91] For these reasons alone, the injunctive relief Plaintiffs seek is as important as the damages Plaintiffs seek. As the court held in *Velez*, "[i]f Plaintiffs prevail on the merits, that injunctive relief will be appropriate and reasonably necessary, because it would serve little purpose to award money damages for discrimination without addressing the institutional structure that perpetuates it." *Velez*, 244 F.R.D. at 271.

It is for these reasons that district courts in this Circuit have recognized that injunctive relief for ongoing antitrust violations goes hand-in-hand with damages for past violations, and have repeatedly certified Rule 23(b)(2) classes in antitrust cases where plaintiffs also sought monetary damages. *See, e.g.*, *VisaCheck/Master Money I*, 192 F.R.D. at 88-89; *Currency Conversion*, 224 F.R.D. at 567; *NASDAQ*, 169 F.R.D. at 515-17.

2. The Requirements of Rule 23(b)(3) Are Met

To meet the requirements of Rule 23(b)(3) ("Damages Class"), the Court must be satisfied that: (1) common questions of law or fact predominate over individual questions; and (2) a class action is superior to other available methods of adjudication. The Damages Class meets both of these requirements.

a. Common Questions of Law and Fact Predominate as to Plaintiffs' Claims

Plaintiffs satisfy the predominance requirement for each of their claims because they "are subject to generalized proof, and thus applicable to the class as a whole," and the issues

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91 *See* Ex. 2, *E.C. Decision* ¶¶ 4, 556-57, 751.

concerning these claims "predominate over those issues that are subject only to individualized proof." *VisaCheck/Master Money II*, 280 F.3d at 136 (citation omitted); *see also Polyester Staple*, 2007 WL 2111380, at *14 (certifying class where the "majority" of the evidence plaintiffs proposed to present at trial was common to the class); *Flag Telecom*, 245 F.R.D at 171.

The purpose of the predominance inquiry is to allow the Court to determine whether the "proposed classes are sufficiently cohesive to warrant adjudication by representation." *VisaCheck/Master Money II*, 280 F.3d at 136 (citing *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 623 (1997); *see also Flag Telecom*, 245 F.R.D at 171 (same). "The predominance requirement calls only for predominance, not exclusivity, of common questions." *Id.* at 140 (citation omitted). "Courts take a common sense approach to ... Rule 23(b)(3) predominance requirements by recognizing that some factual variation among class members' specific grievances will not prevent certification of claims on behalf of a class of plaintiffs." *In re Playmobil Antitrust Litig.*, 35 F. Supp. 2d 231, 240 (E.D.N.Y. 1998) ("*Playmobil*"). This requirement is satisfied "unless it is clear that individual issues will overwhelm the common questions and render the class action valueless." *NASDAQ*, 169 F.R.D. at 517 (citations omitted); *see also Currency Conversion*, 224 F.R.D. at 564 (same); *Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives & Composites, Inc.*, 209 F.R.D. 159, 167 (C.D. Cal. 2002) (same); *Playmobil*, 35 F. Supp. 2d at 245 (same).

Courts have generally found that the predominance element is "readily met" for claims alleging a violation of Section 1 of the Sherman Act.[92] *Cordes*, 502 F.3d 91 at 108 (citation omitted) (all legal and factual issues regarding whether defendants' conduct violated the antitrust

[92] The elements of a Sherman Act Section 1 claim are: (1) a violation of the antitrust laws, (2) injury and causation (also referred to as "injury in fact" or "impact"), and (3) damages. *VisaCheck/Master Money II*, 280 F.3d at 136; *see also Cordes*, 502 F.3d at 105; *Meijer*, 246 F.R.D. at 307.

laws and "assuming a plaintiff paid supracompetitive prices, that payment was caused by defendants' antitrust violation constitutes the kind of injury with which the antitrust laws are concerned" are common issues); *see also Polyester Staple*, 2007 WL 2111380, at *14 ("the exact nature of the antitrust violation, particularly the scope of the alleged conspiracy, is the predominant common issue for trial"); *In re Alcoholic Beverages Litig.*, 95 F.R.D. 321, 326 (E.D.N.Y. 1982) ("As a general rule in antitrust price-fixing cases, questions common to the members of the class predominate over questions affecting only individual members.").[93] That is true even where the conspiracy involves a number of different product segments, each of which is priced separately. *See Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 43 F.R.D. 452, 457-58 (E.D. Pa. 1968); *see also Carbon Black*, 2005 WL 102966, at *16; *Vitamins*, 209 F.R.D. at 260.[94] Thus, the fact that each network has segmented its merchants into separate categories does not create individual issues, particularly where merchants within each category are treated uniformly.

The predominance test is also generally satisfied in cases involving monopolization claims because the common issue of monopolization has "almost invariably, been held to predominate over individual issues."[95] 6 NEWBERG ON CLASS ACTIONS § 18.25 (4th ed. 2002)

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[93] Courts have overwhelmingly found that the predominance requirement is satisfied in cases involving horizontal anticompetitive conspiracies. *See, e.g.*, *In re Pressure Sensitive Label Stock Antitrust Litig.*, 2007 WL 4150666, at *12-21 (M.D. Pa. Nov. 19, 2007) ("*Label Stock*"); *Bulk Graphite*, 2006 WL 891362, at *9-*14; *Carbon Black*, 2005 WL 102966, at *21; *Currency Conversion*, 224 F.R.D. at 566; *Auction Houses*, 193 F.R.D. at 168; *NASDAQ*, 169 F.R.D. at 518-19.

[94] *See also In re Domestic Air Transp. Antitrust Litig.*, 137 F.R.D. 677, 698-99 (N.D. Ga. 1991) ("While the members of the class purchased many tickets at different prices according to varying conditions, the nature of their claims remains the same.").

[95] "To state a claim for monopolization, a plaintiff must plausibly allege: '(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a

(citing cases); *In re Live Concert Antitrust Litig*, 247 F.R.D. 98, 147 (C.D. Cal. 2006) ("*Live Concert*"); *In re Terazosin Hydrochloride*, 220 F.R.D 672, 696 (S.D. Fla. 2004) ("*Terazosin Hydrochloride*"); *Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D. 12, 29 (D.D.C. 2001).[96]

Here, common issues clearly predominate because each of the following key elements of Plaintiffs' claims and issues in the case are common to the class and will be established through evidence common to each merchant class member: (1) Defendants' conspiracy to fix and impose interchange fees; (2) whether plaintiffs' price-fixing claims will be analyzed under the *per se* rule or the rule of reason; (3) the anticompetitive effects and procompetitive effects, if any, of Defendants' conduct; (4) the relevant market; (5) Defendants' market power; (6) common class-wide impact; (7) damages; (8) Visa's willful maintenance of monopoly power; (9) whether MasterCard's IPO threatens to reduce competition in the relevant market; (10) whether the *NaBanco* decision applies to the claims in this case; and (11) whether Plaintiffs are direct purchasers under the *Illinois Brick* doctrine. Each of these issues is discussed in detail below.

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superior product, business acumen, or historic accident.'" *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, MD 05-1720 (JG) (JO) (E.D.N.Y.), Report and Recommendation, Jan. 11, 2008 ("R & R"), at 8 (quoting *United States v. Grinnell*, 384 U.S. 563, 570-71 (1966) ("*Grinnell*")).

[96] Because the Cartwright Act is similar to the Sherman Act, and courts interpreting it routinely rely on Sherman Act case law, the predominance element is readily met for those claims as well. *Filco v. Amana Refrigeration, Inc.*, 709 F.2d 1257, 1268 (9th Cir. 1983) ("Cartwright Act claims raise basically the same issues as do Sherman Act claims. California cases illustrate that state courts follow federal decisional law in deciding claims under the Cartwright Act.") (internal citation omitted).

Similarly, the predominance element is readily met for Plaintiffs' claim under Section 7 of the Clayton Act because it raises no individual issues. Proof of that claim will focus on the relevant market, the IPO transaction involved, Defendants' motives and conduct, and potential suppression of competition in that market, and not on the conduct of any individual merchant.

i. Defendants' Conspiracies to Fix Prices are Predominant Common Issues

Proof of the existence of a conspiracy is an issue common to all Plaintiffs and class members.[97] "[T]he relevant proof of [a conspiracy] will not vary among class members and presents a common question fundamental to all class members." *NASDAQ*, 169 F.R.D. at 518; *see also Cordes*, 502 F.3d at 108 ("all factual and legal issues that must be resolved to determine whether the defendants violated Section 1 of the Sherman Act" present common issues"); *Fears*, 2003 WL 21659373, at *6-7 (where plaintiffs allege a single course of anticompetitive conduct, "the relevant proof ... will not vary among class members," the "action clearly presents a common question that is fundamental to all class members," and the predominance requirement is easily satisfied). In fact, numerous courts have held that the element of conspiracy is the predominant issue in antitrust cases.[98]

In this case, the collusion between Visa and its member banks, between MasterCard and its member banks, and the collusion between Visa and MasterCard and their member banks present issues common to the class and will be established through common evidence. For each of these three interrelated conspiracies, Defendants have engaged in a single course of conduct to fix and impose interchange fees, and to fix the level of interchange fees at artificially high levels

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[97] Defendants may contend that the MasterCard and Visa networks and their constituent members are single entities similar to the joint venture that the Supreme Court found in *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006), to be a single entity. While Plaintiffs would dispute that contention, whether the MasterCard and Visa networks are single entities is a common issue that would be proven through common evidence. For example, the issue of whether the MasterCard and Visa networks have achieved complete economic unity such that their respective members share the risk of loss as well as the opportunities to profit will focus solely on Defendants' conduct. *Dagher*, 547 U.S. at 5-7.

[98] *See, e.g.*, *Label Stock*, 2007 WL 4150666, at *12; *Bulk Graphite*, 2006 WL 891362, at *9; *Carbon Black*, 2005 WL 102966, at *15.

both prior to and after Visa's and MasterCard's respective IPOs. The following types of common evidence will be used, *inter alia*, to establish these conspiracies:

- Visa's Operating Regulations (Ex. 29), including Visa Op. Reg. 1.2.A, which requires each member to abide by all operating regulations, and Op. Reg. 9.5 which requires the payment of interchange fees;
- Member banks' contracts with Visa;[99]
- Evidence showing that the board of directors voted on and approved new interchange fee schedules;[100]
- MasterCard's Bylaws and Rules (Ex. 30) including Rule 3.1, which requires that each member abide by all rules, and Rule 10.4, which requires payment of interchange fees;
- Member banks' contracts with MasterCard;[101]
- Evidence showing that the board of directors voted on and approved new interchange fee schedules;[102]
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[99] *See, e.g.*, Ex. 109, at CITI INT 115496-5517; Ex. 110, at WF0010142-0177; Ex. 111, at CHASE000127302-7339.

[100] *See, e.g.*, Ex. 112, at VUSAMDL1-00407267-7268; Ex. 113, at VUSAMDL1-03744136 (October 2002); Ex. 114, at VUSAMDL1-05171216 (April 2003); Ex. 115, at VUSAMDL1-05194890-4896 (April 2004).

[101] *See, e.g.*, Ex. 116, at CITI INT 132570-2617; Ex. 117, at BFC 0001175-1229; Ex. 118, at WMB00001511-1541.

[102] *See, e.g.*, Ex. 119, at MCI_MDL02_00018767-8769 (April 2002); Ex. 47 (April 2002); Ex. 120, at MCI_MDL02_01351469-1474 (April 2004).

[103] REDACTED Ex. 121, at VUSAMDL-1-07085884-5885; *see also* Ex. 54, Kresge Dep. Tr. 160:9-15 , Ex. 55, Beck Dep. Tr. 51:3-57:3 . Ex. 122, at CO0003-00007167.

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- Since the contract between the acquiring bank is the only thing that binds a merchant to pay interchange fees,

[106]

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[104]

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Ex. 124, Emmert Dep. Tr. 320:12-21 ("I do not have the ability to negotiate an interchange fee. The interchange fee is what is assessed on me and I have to pay directly to the banks. It goes through Visa and MasterCard. I have no ability to come back to them and say I want to negotiate that interchange fee. It's whatever they raise the price to is what I have to pay."); Ex. 125, at PHTO 011839 (e-mail from Chase Paymentech: "You are correct that Paymentech does not have anything to do with [increased interchange fees]. Paymentech just passes Visa and MasterCard's rates along. Unfortunately, putting the burden on the merchant for card benefits is nothing new."); Ex. 126, at TRAD 005231 (e-mail from Heartland Payment Systems to Traditions: "Nobody can reduce the Interchange fee. That is set by Visa and M/C.");

[105] Ex. 54, Kresge Dep. Tr. 160:9-15 ;

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Ex. 55, Beck Dep. Tr. 51:3-57:3 ;

[106] Evidence such as these contracts is common to the class and establishes predominance. *See Polyester Staple*, 2007 WL 2111380, at *14-18 (finding predominance requirement satisfied where Plaintiffs proposed to use common evidence such as testimony of defendants' corporate representatives and documentary evidence implicating all defendants in price-fixing conspiracy). Even if Defendants dispute whether such evidence proves the existence of a price-fixing conspiracy, this dispute itself would constitute a common issue of fact, and further establish predominance. *Id.* at *14.

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- Visa's and MasterCard's interchange levels increased at, or about, the same time;[113]

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[107] *See* Ex. 128, at CITI INT 001840866.

[108] Ex. 129, at FNBO-0941355. *See also* Ex. 130, at BOFAIC00000036; Ex. 131, at WFINT0000399192.

[109] Ex. 131, at WFINT0000399191 REDACTED Ex. 132, at CHASE002988870; Ex. 130, at BOFAIC00000033; Ex. 133, at FT053263.

[110] Ex. 134, League Dep. Tr. 117:11-119:3 REDACTED ; Ex. 71, at VUSAMDL1-05163893

[111] Ex. 135, at VUSAMDL1-06317858 Ex. 53, Jonas April 24, 2008 Dep. Tr. 119:5-19, 158:3-160:19.

[112] Ex. 136, at VUSAMDL1-00108712, 8726; Ex. 137, at VUSAMDL1-00254843; Ex. 138, at VUSAMDL1-00228097; Ex. 139, at VUSAMDL1-03613527; Ex. 140, at VUSAMDL1-013548893; Ex. 141, at MCI_MDL02_00026781; Ex. 142, at MCI_MDL02_0004017; Ex. 143, at MCI_MDL02_01351897, 1903; Ex. 144, at MCI_MDL02_01492275; Ex. 145, at MCI_MDL02_06093367; Ex. 146, at MCI_MDL02_06097025, 7027,7032, and 7036; Ex. 147, at MCI_MDL02_104688770, 8775.

[113] *See supra* note 47.

- Banks simultaneously sit on Boards and committees of both Visa and MasterCard, which facilitates their passing information between the networks;[114]

- Additional deposition testimony as to all of the above, as well as to other conspiracy evidence common to all class members; and

- Expert testimony on the subject matter of Plaintiffs' expert's reports.

ii. Whether the *Per Se* Rule or Rule of Reason Should be Applied to Plaintiffs' Price-Fixing Claims is a Predominant Common Issue

Courts analyze an alleged violation of Section 1 of the Sherman Act under either a *per se* rule, the quick look doctrine, or a rule of reason. A court's decision as to which standard will apply is an issue common to all class members. *See In re Microcrystalline Cellulose Antitrust Litig.*, 218 F.R.D. 79, 86 (E.D. Pa. 2003) ("*Microcrystalline Cellulose*") (whether the court should apply the per se rule or rule of reason is a common issue) "*Microcrystalline Cellulose*"). In fact, the Court certified a nearly identical class of merchants in *VisaCheck/Master Money I*, recognizing that plaintiffs there could prove an antitrust violation using either the *per se* or rule of reason standards. 192 F.R.D. at 80-81. Thus, this issue presents a common issue and will be determined on a class-wide basis.

iii. The Existence of Anticompetitive and Procompetitive Effects of Defendants' Conduct is a Predominant Common Issue

If the Court elects to apply the rule of reason in assessing Defendants' actions, the anticompetitive and procompetitive effects, if any, of Defendants' conduct raise questions common to the class and are amenable to being determined on a class-wide basis. That is

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[114] *See supra* § II.C.1.c; *see also* Ex. 127, Leoni Dep. Tr. 231:19-232:12, 233:16-238:8, 243:1-244:13, 262:25-264:16 ;

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Ex. 148, at VUSAMDL1-00115188-5192; Ex. 149, at WFINT0000046033; Ex. 150, at MCI_MDL02_06996889, 6927.

because determining "whether defendants' [collusive conduct] produced anticompetitive effects in the relevant [] market [] focuses on defendants' conduct rather than its effect on individual [] consumers." *Microcrystalline Cellulose*, 218 F.R.D. at 86. The same is true if Defendants proffer any procompetitive effects of their conduct.

Plaintiffs will show through evidence common to all class members that the challenged agreements have (1) increased the price merchants pay for network services far above the prices that would prevail in a competitive market; (2) resulted in increased market power for Visa and MasterCard; and (3) reduced output, innovation and efficiency in the payment card market. *NCAA v. Board of Regents*, 468 U.S. 85, 113 (1984) (increased prices, reduced output, increased market power evidence substantial adverse impact on competition). While many of these propositions are best supported by expert analysis,[115] the evidentiary record is replete with examples demonstrating the harmful economic effects of Defendants' conspiracy, such as the following:

- Prices for Visa and MasterCard network services in the United States are far higher than prices for comparable services, including:
  - Payment card network services in foreign countries;[116] and
  - Interlink and other PIN debit network services in the United States, prior to 1990.[117]

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[115] *See* Bamberger Decl. ¶¶ 52-106.

[116] According to a study by Morgan Stanley, weighted average interchange rates for Visa and MasterCard in the United States were 1.75 percent, in 2005, and are forecast to reach 1.8 percent by 2010. *See* Ex. 151, at VUSAMDL1-07046841-6842, and 6845. In Europe and Canada, by contrast, several payment card networks operate without any interchange (in Finland, Luxemborg, Denmark, The Netherlands and Norway). *See* Ex. 2, *E.C. Decision* ¶¶ 555-608. And those payment card network services that do have interchange have operated profitably for years with far lower rates. MasterCard's average interchange rate in Europe, for example, is 1.2%. *Id.* ¶ 167 n.196. In Australia, the post-reform average interchange rates for Visa and MasterCard, respectively, are .50% and .50%, *see* Ex. 180, at p. 19 (even before the reforms, Australian rates were far lower than U.S. rates, with MasterCard at .95% and Visa at .95%).

- Prices for Visa and MasterCard network services are excessive when compared to Defendants' costs, and far higher than necessary to ensure the profitability of issuing banks.[118]

- High interchange fees have contributed to inefficiencies in the payment card industry. For example:

  - Issuing banks, motivated by high interchange fees, send out more than six billion direct mail credit card solicitations a year, with an average response rate of only 0.3%. This is a five-fold increase in solicitations since the early 1990s and a corresponding decline in response rates of 2.5%;[119]

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  - Issuers are incentivized by high interchange to issue more costly and less efficient cards;[121] and

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[117] *See* Alan S. Frankel & Allan L. Shampine, *The Economic Effects of Interchange Fees*, 73 ANTITRUST L.J. 627, 639 n.36 (2006).

[118] *See, e.g.*, Ex. 95, at BOFAIC06455261; REDACTED Ex. 152, European Commission, Interim Report I, Sector Inquiry under Article 17 Regulation 1/2003 on Retail Banking, April 12, 2006, at p.76 ("It appears that 62% of all banks surveyed would still make profits with credit card issuing even if they did not receive any interchange fee revenue at all."); Bamberger Decl. ¶¶ 85-88.

[119] Frankel, *supra*, note 117, at 627, 635 & n.26; *see also* Ex. 153, at VUSAMDL1-06740922.

[120] *See, e.g.*, Ex. 154, at CITI INT 110250.

[121] For example, before interchange rates on signature and debit cards began to converge, issuers promoted signature debit over PIN debit, even though it is a more costly transaction with greater fraud risks, because they hoped to increase the number of transactions earning a higher interchange rate. Frankel, *supra*, note 117, at 637 & n.33-34; *see also* Ex. 2, *E.C. Decision* ¶¶ 471-86.

[122] *See* Ex.155, at CITI INT 000311327; *see also* Ex. 156, Garofalo Dep. Tr. 265:25-266:18.

- Other four-party networks, including the following, operate without any interchange:
  - Debit card networks in foreign countries, including Canada, The Netherlands, Finland, Denmark and Germany;[123] and
  - Check clearing and settlement networks in the United States.[124]
- The merchant restraints have increased Visa's and MasterCard's market power:
  - The "no-surcharge" rule limits merchants' ability to steer customers to lower-cost payment options.[125]

Defendants will likely proffer several arguments to attempt to demonstrate that the collusive imposition and fixing of interchange fees is procompetitive. For example, Defendants may claim that interchange fees maximize the output of payment systems by balancing the participation of issuing and acquiring members in the network. The evidence supporting and opposing that claim will be identical for all class members. By its very nature that claim does not raise any individual issues. Moreover, based on grounds applicable to merchants in general the European Commission has found that this argument is a fiction without any empirical support. *See* Ex. 2, *E.C. Decision* ¶¶ 687-90. Other evidence common to the class that will be used to refute Defendants' claim includes Defendants' own documents regarding the purpose, setting and effect of interchange fees, including the following:

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[123] *See* Ex. 2, *E.C. Decision* ¶¶ 555-608.

[124] Frankel, *supra*, note117, at 637-39.

[125] *See, e.g.*, Ex. 2, *E.C. Decision* ¶¶ 510-21.

[126] Ex. 157, at VUSAMDL1-05576121.

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For those reasons, the effects of Defendants' anticompetitive conduct raise questions common to the class and will be proven on a class-wide basis.

iv. The Definitions of Relevant Markets are Predominant Common Issues

The definitions of the relevant markets for purposes of Plaintiffs' claims under sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act are questions common to all class members and are subject to class-wide determination. "A distinct product market comprises products that are considered by consumers to be 'reasonabl[y] interchangeab[le]' with what the defendant sells." *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 239 (2d Cir. 2003) (citation omitted);[128] *see also* Bamberger Decl. ¶¶ 34, 36, 40, 51. As Dr. Bamberger explains, "[d]ifferent products are in the same market if they are good substitutes for each other from the perspective of a seller's customers. The extent to which a particular good (or service) is a substitute for another good (or service) depends, at least, in part, on the relative prices of the two goods (or services)." Bamberger Decl. ¶ 36; *see also* ¶¶ 37-41, 50 and 51; *United States v. Grinnell Corp.*,

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[127] Ex. 97, at VUSAMDL1-06291961; *see also* Ex. 158, at VUSAMDL1-00432792; Ex. 159, at VUSAMDL1-09023985-3986.

[128] The Second Circuit has already determined that a relevant market for assessing Visa and MasterCard's anticompetitive conduct is the network services market for general purpose cards. *Visa U.S.A, Inc.*, 344 F.3d at 239. Also, while the relevant market consists of a geographic market in addition to a product market, there should not be any dispute that the geographic market in this case is national. *See PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 105 (2d Cir. 2002) (relevant market consists of a product and geographic market); *U.S. United States v. Eastman Kodak Co.*, 63 F.3d 95, 104 (2d Cir. 1995). In fact, in *United States. United States v. Visa U.S.A, Inc.*, 163 F.2d 322, 339-40 (S.D.N.Y. 2001), the court found that the same product market alleged here was national in scope. But, even if Defendants dispute the geographic market, it will be determined on a class-wide basis as it focuses on the area where the seller operates and where purchasers can seek those services. *See Eastman Kodak*, 63 F.3d at 104.

384 U.S. 563, 571 (1966). As the question of whether a particular product "is a separate market from the perspective of merchants is analyzed by considering the aggregate response to a price increase by all merchants," and not the response of an individual merchant, Dr. Bamberger concludes that the relevant market determination can be analyzed on a class-wide basis. Bamberger Decl. ¶ 51. Indeed, as the court in *Live Concert* aptly noted, the relevant market determination can clearly be made on a class-wide basis because:

> The analysis involves the same data, the same experts, the same industry analyses and the same application of the same economic tests. It would therefore be incredibly inefficient to duplicate this analysis in thousands of individual cases.... [T]he Court's focus is the process of defining the relevant market, and this process will clearly be predominated by common questions of law and fact.

Live Concert, 247 F.R.D. at 131.

In this case, the relevant market can be determined on a class-wide basis using a single methodology common to the class: the hypothetical monopolist test. Bamberger Decl. ¶¶ 37, 41, 50 and 51. That methodology analyzes whether a "hypothetical monopolist could profitably impose a significant (often assumed to equal five percent) and non-transitory increase in the price." Bamberger Decl. ¶ 37. Here, the test is whether the "hypothetical monopolist of card acceptance services for a particular payment card would be able to profitably raise its fees to merchants, by, for example, five percent." *Id.* ¶ 50. Based on his analysis to date, Dr. Bamberger concludes that substantial evidence supports Plaintiffs' market definitions: 1) General Purpose Card Network Services; 2) Off-Line Debit Card Network Services; and 3) On-Line Debit Card Network Services. *Id.* ¶¶ 32, 40-49. In particular, "merchants do not view purchasing acceptance services for different forms of payment as close substitutes" since all, or most, merchants have continued to accept credit cards even though their interchange fees are significantly higher than for off-line and on-line debit cards. *Id.* ¶¶ 43-44. In short, Dr.

Bamberger concludes, "substantial evidence indicates that a hypothetical price increase of five percent for [each General Purpose Card Network Services, Off-line Debit Card Network Services and On-Line Debit Card Network Services] would be profitable because most merchants that currently buy those services (i.e., accept that card type) would continue to do so at the higher rate." *Id.* ¶ 49.

Thus, the relevant market is an issue common to all class members, and will be determined on a class-wide basis using a well-established methodology.

v. The Existence of Defendants' Market Power is a Predominant Common Issue

The determination of whether Visa and MasterCard have market power jointly and individually for purposes of Plaintiffs' claims under sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act is a question common to all class members and can be determined on a class-wide basis. Market power is the ability to control prices or exclude competition. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 464 (1992) ("*Eastman Kodak*"); *Grinnell*, 384 U.S. at 571; *United States v. Visa U.S.A, Inc.*, 344 F.3d 229, 239 (2d Cir. 2003) ("*Visa U.S.A.*"); *VisaCheck/Master Money I*, 192 F.R.D. at 87. It may be established either directly through "evidence of specific conduct undertaken by the defendant that indicates he has the power to affect price or exclude competition" or indirectly through evidence establishing that defendant has a large share of the relevant market. *Visa U.S.A.*, 344 F.3d at 239; *see also Eastman Kodak,* 504 U.S. at 477; *Grinnell*, 384 U.S. at 571; *see also* Bamberger Decl. ¶ 54.

According to Dr. Bamberger, direct evidence of market power includes the ability to raise prices "in the absence of increases in marginal costs" and the ability to price discriminate (charging differing prices, not based on cost) to different customers. Bamberger Decl. ¶ 55.

Such evidence has also been found by courts to be sufficient to establish market power. For example, in *United States v. Visa U.S.A.*, the Second Circuit found that Visa and MasterCard each had market power because: 1) merchants could not refuse to accept Visa- or MasterCard-branded cards even when faced with significant price increases because of customers' preference to use particular cards and 2) no merchant had discontinued accepting Visa- or MasterCard-branded cards despite significant increases in interchange fees. *Id.*, 344 F.3d at 240. Similarly, in *Eastman Kodak*, the Supreme Court found direct evidence of market power where Eastman Kodak engaged in price discrimination and its contracts with customers effectively precluded customers from using the services of its competitors. 504 U.S. at 775-778; *see also Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995) ("evidence of restricted output and supracompetitive prices [] is direct proof of the injury to competition which a competitor with market power may inflict, and thus, of the actual exercise of market power").

Here, based on his review of the record to date, Dr. Bamberger concludes that there is "substantial evidence common to the proposed classes," both direct and indirect, to establish that both Visa and MasterCard have market power. Bamberger Decl. ¶ 54. According to Dr. Bamberger, direct evidence of Visa's and MasterCard's market power includes: 1) the ability of both Visa and MasterCard to repeatedly increase interchange fee levels and do so profitably; 2) Visa's effective interchange fee rate increased 22 percent between 1995 and 2004; and 3) both Visa and MasterCard "profitably price discriminate on a substantial scale" by merchant category based on differences in the elasticity of demand of the different categories of merchants, not based on cost. *Id.* ¶¶ 56, 59-60. He also finds the following indirect evidence establishing Visa's and MasterCard's market power: 1) Visa's high market shares (42.5% for credit card purchase volume in 2006; 75.8% for off-line debit transaction value; and 39.3% for on-line

debit) and MasterCard's high market shares (29.1% for credit card purchase volume in 2006 and 24.2% for off-line debit transaction value) in the relevant markets; and 2) high barriers to entry in the general payment card network services market, as evidenced by the fact that no entity has entered the credit card network services market since 1985. *Id.* ¶¶ 62-69.

Dr. Bamberger concludes that market power can be established on a class-wide basis by analyzing the types of direct and indirect evidence described above because that evidence and analysis is the same for every merchant class member, as it focuses on Visa and MasterCard, not individual merchants. *Id.* ¶ 70. This Court reached a similar conclusion in *VisaCheck/Master Money Antitrust Litig.*, stating "class-wide determination of defendants' market power is warranted" where it can be established through "objective evidence of market share and price discrimination (by category, not by individual merchant)." 192 F.R.D. at 87. In particular, the Court recognized that the market share inquiry "is readily susceptible to proof in a class action" because it "focuses on the position of the seller, not that of any individual buyers." *Id.*

Class-wide evidence of Visa's and MasterCard's market power includes:

- Visa has profitably increased interchange fees on numerous occasions;[129]
- MasterCard has profitably increased interchange fees on numerous occasions;[130]
- No, or very few, merchants have stopped accepting Visa- and/or MasterCard-branded credit and debit cards despite significant increases in both Visa's and MasterCard's interchange fees. For example, Michael Schumann, co-owner of Plaintiff Traditions testified: "I

[129] *See* R & R at 8 ("A company has monopoly power if it can sell a product or service for a supracompetitive price untroubled by market forces; in other words, if it is able to exert power to insulate its prices from competition."). *See also* Ex. 160, at VUSAMDL1-00254078; Ex. 161, at VUSAMDL1-00430541; Ex. 162, at VUSAMDL1-00430557.

[130] *See, e.g.*, Ex. 56, at MCI_MDL02_01350321; Ex. 163, at MCI_MDL02_01357515; Ex. 164, at MCI_MDL02_01518064; Ex. 58, at MCI_MDL02_05164688; Ex. 165, at MCI_MDL02_06988835, 8838-8839.

would like to not accept credit cards, but that's not a viable option for me because if I didn't accept Visa and MasterCard I would be out of business";[131]

- Visa's interchange fees vary significantly between categories of merchant, but not within each category;[132]

- MasterCard's interchange fees vary significantly between categories of merchants, but not within each category;[133]

- Each time the interchange fee is increased for a specific merchant category every merchant assigned to that category pays the increased interchange fee;[134]

- The differences in interchange fees between categories of merchants are based on the merchants' elasticity of demand, and not on costs;[135]

- Visa's and MasterCard's respective high market shares;[136]

- High barriers to entry, reflected by the fact that no entity has entered the relevant market since 1985;[137]

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[131] Ex. 9, Schumann Dep. Tr. 142:22-143:8; *see also* Ex. 10, D'Agostino Dep. Tr. 116:3-117:7; Ex. 166, Thueringer Dep. Tr. 107:8-108:2; Ex. 80, at MCI_MDL02_08162629 and 2643-2644.

[132] *See, e.g.*, Ex. 157, at VUSAMDL1- 05576131, 6139; Ex. 29, at VUSAMDL0007792-7810. A particular merchant's interchange fee is determined by the merchant category to which it is assigned and then by card type, the mechanism for transmitting the transaction, and certain other data provided with that transaction. Ex. 167, at STB_MDL_00024912.

[133] *See, e.g.*, Ex. 50, at MCI_MDL02_00018766; Ex. 51, at MCI_MDL02_00018740-8742; Ex. 168, at MCI_MDL02_00018753; Ex. 169, at MCI_MDL02_00018725-8736.

[134] *See* Ex. 45, Kapteina Dep. Tr. 321:18-322:25; Ex. 170, at BOFAIC01098067 and 8089.

[135] *See, e.g.*, Bamberger Decl. ¶¶ 55, 59; Ex. 36, Morrissey Dep. Tr. 101:1-10, 148:18-150:13; Ex. 22, Steele Dep. Tr. 314:1-320:23; Ex. 44, Stephen Jonas April 23, 2008 Dep. Tr. 62:5-65:13; Ex. 157, at VUSAMDL1-05576121; Ex. 2, *E.C. Decision* ¶¶ 172-75.

[136] Bamberger Decl. ¶ 63. *See also* Ex. 171, at FT006245; R & R, at 12 ("[W]hen direct evidence [of monopoly power] is 'unavailable or inconclusive ... monopoly power may be inferred from high market share.'") (quoting *Geneva Pharm. Tech. Corp. v. Barr Lab. Inc.*, 386 F.3d 485, 500 (2d Cir. 2004)).

[137] Bamberger Decl. ¶¶ 67-69. *See also* R & R, at 8 (monopoly power is "the power to control prices or exclude competition") (quoting *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956)).

- Visa Op. Reg. § 6.2.J.1 (Ex. 29) (the "no bypass" rule), which prevents merchants from bypassing the Visa network in processing a purchase using a Visa-branded credit or debit card;

- Visa's and MasterCard's "no surcharge" rules;[138] and

- Visa's and MasterCard's "honor all cards" rules;[139]

Thus, market power is an issue common to the class and it will be established using evidence common to the class.

vi. Antitrust Injury to Plaintiffs is a Predominant Common Issue

Plaintiffs will also prove that they and each member of the Damages Class suffered antitrust injury. Proof of antitrust injury or impact requires a showing of some injury to "business or property" due to a defendant's antitrust violations. *See Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 114 (1969); *VisaCheck/Master Money I*, 192 F.R.D. at 82; *see also Cordes*, 502 F.3d at 104-05. For class certification purposes, Plaintiffs need only prove that the fact of injury – and not the quantum of damages – can be proven through common evidence. *VisaCheck/Master Money I*, 192 F.R.D. at 82; *Magnetic Audiotape*, at *4. Plaintiffs will prove antitrust injury on a class-wide basis using evidence and economic analysis and methodologies entirely common to the class. *See* Bamberger Decl. ¶¶ 71-106.

(a) But-For World Without Interchange Fees

Here, Plaintiffs and each member of the Damages Class have suffered injury in the form of an overcharge as a result of Defendants collusively imposing and maintaining interchange

[138] Ex. 29, Visa Op. Reg. at 5.2.F; Ex. 30, MC Rule at 9.12.

[139] Ex. 29, Visa Op. Reg. at 5.2.B and Appendix A - Definitions (defining "Limited Acceptance"); Ex. 30, MC Rule at 9.11.1.

fees, and fixing interchange fees at artificially inflated levels.[140] Defendants have accomplished this, and continue to do so, in large part, by requiring all merchants to agree to contracts that impose interchange fees, and abide by rules which preclude merchants from (a) negotiating interchange fees; and (b) steering customers away from cards with high interchange fees. Dr. Bamberger concludes that the injury suffered as a result of the Defendants' collusive anticompetitive conduct is amenable to determination on a class-wide basis.[141] Bamberger Decl.

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[140] In fact, interchange fees are by far the greatest cost borne by merchants to accept debit REDACTED Ex. 172, at BOFAIC01069057-9058. *See also* Ex. 9, Schumann Dep. Tr. 63:14-23; Ex. 54, Kresge Dep. Tr. 186:17-187:14; Ex. 173 at WB0341164; Ex. 174, at BOFAIC01209659; Ex. 175, Cramer Dep. Tr. 94:24-95:2; Ex. 2, *E.C. Decision* ¶ 431.

[141] Plaintiffs anticipate that Defendants will argue that antitrust injury or impact cannot be established on a class-wide basis because the Court should adopt the "net individual harms" theory of damages. Under that theory, impact is an individual question because the overcharge must be offset by any benefits to individual class members that would not exist in the "but-for" world. More specifically, Plaintiffs anticipate that Defendants will argue that funds paid to merchants pursuant to co-branding or affinity arrangements must be offset against any overcharge. For example, Defendants may argue that even though an airline, REDACTED pays a cartel overcharge when it accepts its own co-branded credit and debit cards (as do other merchants who accept co-branded cards), it also benefits when the issuing bank, , purchases miles to be redeemed by credit cardholders. However, the purchase of airline miles is irrelevant to the overcharge paid on credit cards. If a restaurant paid a cartel overcharge for steaks, it would not be offset against every meal that the conspirators purchased at the restaurant. Because these are two separate and independent transactions, the benefits of one cannot be offset against the harm of the other. *See United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 370 (1963) (anticompetitive effects of conduct in one market cannot be justified by procompetitive effects in another market). Indeed, the "net individual harms" argument is contrary to law and economic theory, because it would never allow for price-fixing damages, much less for class certification of price-fixing claims. In price-fixing cases, courts confine the impact analysis to whether the direct purchasers paid an overcharge pursuant to the transactions at issue. *See Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 494 (1968); *Illinois Brick v. Illinois*, 431 U.S. 720, 734-35 (1977).

Because off-setting benefits are legally irrelevant to an overcharge theory of antitrust injury, the "net individual harms" theory (or any similar theory) should have no bearing on this case . The court in *In re Cardizem CD Antitrust Litig.*, 200 F.R.D 297 (E.D. Mich. 2001), ("*Cardizem*"), rejected a similar argument: "Defendants'... 'off-setting benefits' argument

¶¶ 72, 94, 98 and 106. Dr. Bamberger shows that in a but-for world without the networks' rules requiring the payment of an interchange fee, merchants would not agree through bilateral negotiations to a fee and therefore, as in many other countries and other payment systems in this country, there would be no interchange payments. Bamberger Decl. ¶¶ 73-78, 82-84, 89-91.[142] Dr. Bamberger concludes that "[i]n the but-for world with no interchange payments, every merchant that paid interchange fees in the actual world … likely was injured by the collective setting of interchange fees, and merchants that currently accept such transactions or will in the future likely are or will be injured in the future."[143] *Id.* ¶ 90.

Dr. Bamberger's conclusion that there would be no interchange fees in the but-for world, and that the Visa and MasterCard credit and debit card systems would still be economically viable, is supported by the existence of payment systems without interchange fees, conclusions reached by other economists that interchange fees are not necessary and the fact that no merchant has negotiated to pay a higher interchange fee. *Id.* ¶¶ 75-78, 83, 84, 89.

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concerns the computation of damages or standing issues; not the fact of injury." *Id.* at 312. Likewise, this Court previously rejected a similar argument in the *VisaCheck/Master Money* case. In that case, Visa and MasterCard argued that antitrust injury could not be determined on a class-wide basis because there would be winners and losers in Plaintiffs' proposed "but-for" world. The Court rejected that argument out of hand, holding that "[t]his argument is immaterial when an antitrust plaintiff proceeds on an 'overcharge theory' of damages." *VisaCheck/Master Money I*, 192 F.R.D. at 85.

[142] Dr. Bamberger's conclusion that all merchants have suffered injury and that injury can be established on a class-wide basis in both the but-for world without interchange fees and the alternative but-for world with interchange fees also applies to Plaintiffs' claim challenging MasterCard's IPO under section 1 of the Sherman Act. *Id.* ¶¶ 104-06. That same analysis and conclusion will also apply to Plaintiffs' forthcoming claim challenging Visa's IPO.

[143] In addition, this same analysis would be used to determine antitrust injury on a class-wide basis arising from Plaintiffs' forthcoming claim that Visa and its member banks collusively set interchange fees for on-line debit cards. *Id.* ¶¶ 71-74, 89, 90, 106.

First, Dr. Bamberger has observed that a number of "analogous payment systems" operate successfully in several countries without any interchange fee:

- Canada (Interac Direct Payment)
- Denmark (Debit Card system)
- Finland (Debit Card system)
- Iceland (Visa and MasterCard transactions)
- Luxembourg (Debit Card system)
- Netherlands (Debit Card system); and
- New Zealand (Debit Card, including Visa).

Id. ¶ 76. In addition to those networks, at one time, in the United States "on-line debit networks generally did not require that any interchange fee be paid." *Id.* He further finds that several other well-established types of payment networks operate without interchange fees: 1) U.S check clearing system; and 2) the Automated Clearing House System. *Id.* ¶ 77.

Second, and significantly, Dr. Bamberger notes that two of Visa's expert economists in other litigation involving general purpose card network services have both concluded that payment card networks could exist without interchange fees. Specifically, Richard Schmalensee (Visa's economic expert in the *VisaCheck/Master Money* case, and other cases) has concluded that Visa could have survived with a zero interchange fee and William Baxter (Visa's economic expert in *NaBanco*) concluded that credit cards would exist without interchange fees. *Id.* ¶ 78.

Third, Dr. Bamberger concludes that merchants would not pay interchange fees absent a rule requiring them to do so because they have no economic incentive to pay interchange fees. *Id.* ¶¶ 83-84.

Dr. Bamberger's but-for world without interchange fees is also consistent with the European Commission's recent decision finding that MasterCard's rule requiring payment of "fallback" interchange fees in the European Union is anticompetitive, and ordering MasterCard to "cease and desist from determining [] a minimum price merchants must pay for accepting payment cards by way of setting [] fallback interchange fees."[144] Specifically, the European Commission found that MasterCard's mandatory "fallback" interchange fees "restricts competition between acquiring banks by inflating the base on which acquiring banks set charges to merchants and thereby sets a floor under the merchant [discount] fee," which is non-negotiable.[145] Significantly, the European Commission determined that MasterCard can operate without interchange fees and that it would result in prices being competitively set.[146] Finally, the European Commission determined that merchant discount fees would be reduced by the amount of MasterCard's interchange fees, stating "[i]n the absence of MasterCard's [interchange fees], the prices acquirers charge to merchants would not take into account the artificial cost base of the [interchange fees] and would only be set taking into account the acquirer's individual marginal cost and his mark up."[147]

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[144] *See* Ex. 2, *E.C. Decision* ¶¶ 2, 759. The European Commission also found that the fallback" interchange fees continued to be anticompetitive and illegal after MasterCard's change in governance, which was implemented via the IPO. *Id.* ¶¶ 3, 378-399, 523.

[145] *Id.* ¶¶ 2, 408, 410, 412, 413, 421, 435, 503, 664.

[146] *Id.* ¶¶ 4, 549-552, 557, 619, 628, 648, 665, 692. In particular, the European Commission found: "Banks are able to co-operate in an open payment card scheme such as MasterCard's if the scheme operates without a rule that sets a certain interchange fee rate in the absence of bilateral agreements between an issuing and acquiring bank. *As a matter of economic principle there is no reason why this should be unfeasible.*" *Id.* ¶ 549 (emphasis added).

[147] *Id.* ¶¶ 459 -60; *see also id.* ¶¶ 2, 408, 410, 499, 664.

(b) But-For World With Interchange Fees

To the extent interchange fees are found to be necessary to the existence of Visa and MasterCard, Defendants must set them in the manner least "restrictive of free competition."[148] Dr. Bamberger has therefore proposed an alternative but-for world in which the networks impose interchange fees, but set them in the least restrictive possible manner – at the level necessary to maintain the networks' economic viability. Bamberger Decl. ¶ 79. In this proposed but-for world, Dr. Bamberger concludes that antitrust injury is also amenable to being determined on a class-wide basis using an overcharge theory. *Id.* ¶ 79, 93, 94.

Specifically, Dr. Bamberger concludes that virtually every member of the Damages Class that paid interchange fees was likely injured by the collective setting of interchange fees above the competitive level. *Id.* ¶¶ 92-94. That is because each merchant still would have paid an overcharge based on the percentage by which the interchange fee rates would have been lower in the but-for world. The lower level of interchange fees in the but-for world would be established by a benchmark such as the significantly lower rate used in another country with a first world economy where credit and debit cards are widely issued to and used by consumers and accepted by merchants. *Id.* ¶¶ 80-82. That benchmark is Australia, where the Visa and MasterCard network continue to operate successfully following substantial decreases in interchange fees. *Id.* ¶ 81.

[148] *Visa U.S.A.*, 344 F.3d at 238 (under the rule of reason analysis, even where defendants establish plausible procompetitive justifications for their collusion, defendants' conduct violates section 1 of the Sherman Act if "the challenged restraint is not reasonably necessary to achieve the defendants' procompetitive justifications, or [if] those objectives may be achieved in a manner less restrictive of free competition").

In particular, both the Visa and MasterCard networks are economically viable despite interchange fees being 72 percent lower in Australia than in the United States.[149] *Id.* ¶ 80, 81 and 91. Dr. Bamberger therefore concludes that in the alternative but-for world "interchange levels for each merchant category likely would be reduced by approximately 72 percent." *Id.* ¶ 93. Accordingly, all merchants paid a cartel overcharge when they accepted Visa- and MasterCard-branded credit and debit cards for payment because, as Dr. Bamberger concludes: "[I]n the alternative but-for world with interchange rates at the minimum level required for economic viability, every merchant that paid interchange fees in the actual world likely was injured by the collective setting of interchange fees above the minimum level, and merchants that currently accept or will in the future likely are or will be injured in the future."[150] *Id.*

Dr. Bamberger has also analyzed a but-for world in which the intra-network collective setting of interchange fees and the anti-steering restraints are not challenged as violations of the Sherman Act, but Visa, MasterCard and their member banks collusively fix the price of Visa's and MasterCard's interchange fees. *Id.* ¶¶ 95-98. Dr. Bamberger concludes that Plaintiffs can establish on a class-wide basis that virtually all class merchants were injured as a result of that collusion as virtually all merchants would have paid a cartel overcharge. *Id.* ¶¶ 98, 106. Dr.

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[149] Visa and MasterCard are both economically viable in various regions around the world where their interchange fees are significantly lower than those in the United States. *Id.* ¶ 80.

[150] Dr. Bamberger has also evaluated a but-for world with interchange fees but in which "Visa and MasterCard do not impose Anti-Steering Restraints." *Id.* ¶¶ 99-103. Dr. Bamberger concludes that the anti-steering restraints prevent merchants from applying downward pressure on interchange fees because they cannot attempt to "steer consumers to different payment cards or types (e.g., by imposing a surcharge), which would tend to reduce the number of transactions made on that card." *Id.* ¶¶ 100-02. If those restraints were eliminated, Dr. Bamberger concludes that the "elasticity of demand for [merchant card acceptance services] would be expected to reduce the price of" interchange fees. *Id.* ¶ 102. He further concludes that all merchants would generally benefit from the elimination of the anti-steering restraints because they constrain how merchants set their prices." *Id.* ¶ 103.

Bamberger concludes that the effect of Defendants collusively setting prices would have been to increase the level of interchange fees across all merchant categories for credit and off-line debit cards. *Id.* ¶¶ 96-98. That is because Defendants "likely have an incentive to increase rates… to increase issuing banks' profits" and those price increases would likely have been profitable because of Defendants' market power. *Id.* ¶ 97. Thus, Dr. Bamberger concludes that virtually "all . . . members of the proposed Damages Class are injured by the alleged conspiracy, and the alleged conspiracy applies generally to members of the proposed Injunctive Relief Class." *Id.* ¶ 98.

(c) The Overcharge Theory is a Well-Accepted Methodology for Establishing Antitrust Injury

As this Court noted in *VisaCheck/Master Money I*, an overcharge theory is a well-accepted method to establish injury in fact on a class-wide basis. *VisaCheck/Master Money I*, 192 F.R.D. at 81-87; *see also Carbon Black*, 2005 WL 102966, at *16-17; *Cardizem*, 200 F.R.D. at 302. Indeed, such a theory does not require analysis of any "individualized questions." *VisaCheck/Master Money I*, 192 F.R.D. at 82-83. Similarly, in *Currency Conversion*, an overcharge theory was also sufficient to establish injury in fact on a class-wide basis. *Currency Conversion*, 224 F.R.D. at 565 (each class member was overcharged where a price fixing agreement set the floor on currency conversion fees charged when using Visa- and MasterCard-branded payment cards); *see also Cordes*, 502 F.3d at 107 (recognizing that if a "single formula can be employed to make a valid comparison between the but-for fee and the actual fee paid, then … the injury-in-fact question is common to the class").

Plaintiffs' overcharge theory is also consistent with the general rule that an illegal price fixing scheme presumptively damages all purchasers of the affected product(s). *See Polyester Staple*, 2007 WL 2111380, at *19 ("There is persuasive authority holding that 'an illegal price

fixing scheme presumptively impacts upon all purchasers of a price fixed product in a conspiratorially affected market.'") (citations omitted); *see also Auction Houses*, 193 F.R.D. at 166 ("Price fixing conspiracies ... almost invariably injure everyone who purchases the relevant goods and services."); *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 151 (3d Cir. 2002) (*citing Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 455 (3d Cir. 1977)) ("an individual plaintiff could prove fact of damage simply by proving that the free market prices would be lower than the prices paid and that he made some purchases at the higher price").[151] In *Auction Houses*, the court presumed the existence of damages in an industry dominated by two defendants, who offered highly homogeneous services – much like the one at issue in this case. Relying on the explanation of plaintiffs' expert, the court reasoned as follows:

> [T]he services provided by the two defendants appear to be virtually interchangeable from the customers' points of view. Each recognizes the other as its main competitor. Price therefore is a principal means of competition, as neither defendant could profit by a unilateral price increase because customers readily would transfer their business to the other, cheaper competitor. Hence, absent the alleged conspiracy, all or substantially all customers would have benefitted from active competition, chiefly or substantially on the basis of price.

Auction Houses, 193 F.R.D. at 167.

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[151] *See also Fears*, 2003 WL 21659373, at *6 ("the defendants allegedly conspired to fix benchmark commission rates and charge unlawful expenses, and thereby injure class members by making them pay fees and expenses that are disallowed by the federal antitrust laws."); *Microcrystalline Cellulose.*, 218 F.R.D. at 87 ("Where anticompetitive behavior artificially raises the price of a product, courts may sometimes presume that all buyers of that product suffer an antitrust injury."); *Town of New Castle v. Yonkers Contracting Co.*, 131 F.R.D. 38, 41-42 (S.D.N.Y. 1990) ("a jury may conclude that defendants' conduct caused impact or injury to each class member if it is established at trial that defendants engaged in an unlawful conspiracy which had the effect of stabilizing prices above competitive levels and that the plaintiffs were consumers of that product"); *Bogosian*, 561 F.2d at 455 (where conspiracy caused generally inflated prices it was "clear that all members of the class suffered some damage"); *Alcoholic Beverages*, 95 F.R.D. at 327.

This case is more compelling than *Auction Houses*, as the members of the merchant class necessarily must accept both Visa and MasterCard credit and debit cards. There is no element of choice involved.[152]

Antitrust injury, particularly in a price-fixing case, is an issue common to the class and clearly susceptible to common evidentiary showings. As the Second Circuit explained in *In re Master Key Antitrust Litigation,* 528 F.2d 5 (2d Cir. 1975):

> [I]f [plaintiffs] establish . . . that the defendants engaged in an unlawful national conspiracy which had the effect of stabilizing prices above competitive levels, and further establish that Plaintiffs were consumers of that product, we would think that the jury could reasonably conclude that [defendants'] conduct caused injury to each [plaintiff].

Id., 528 F.2d at 12 n.11. *See also J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 567 (1981) (jury may "infer antitrust injury"); *Carbon Black*, 2005 WL 102966, at *15 ("In fact, it has been noted that the common question of the existence of a horizontal price-fixing conspiracy has almost invariably been found to satisfy Rule 23(b)(3)").[153]

Plaintiffs anticipate that Defendants will argue that antitrust injury cannot be established on a class-wide basis because some merchants negotiate interchange fees lower than those set forth in Visa's and MasterCard's interchange fee schedules. Courts have repeatedly rejected

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[152] *See, e.g.*, Ex. 9, Schumann Dep. Tr. 142:22-143:8; Ex. 10, D'Agostino Dep. Tr. 116:3-117:7.

[153] A plaintiff is not required to show that "the fact of injury actually exists for each class member." *Cardizem*, 200 F.R.D. at 307. "Significantly, 'courts have routinely observed that the inability to show injury as to a few does not defeat class certification where the plaintiffs can show widespread injury to the class.'" *Meijer*, 246 F.R.D. at 310 (citations omitted). As the court explained in *Magnetic Audiotape*, "on a motion for class certification, the Court only evaluates whether the method by which plaintiffs propose to prove class-wide impact could prove such impact, not whether plaintiffs in fact can prove class-wide impact." *Id.*, 2001 WL 619305, at *4; *see also Cordes*, 502 F.3d at 107 (the determinative issue is whether injury in fact can be proven by common evidence); *In re Polypropylene Carpet Antitrust Litig.*, 178 F.R.D. 603, 618 (N.D. Ga. 1997).

such arguments, finding that class-wide antitrust injury arises from a conspiracy to set list prices. *See In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 656 (7th Cir. 2002) ("[a]n agreement to fix list prices is… a per se violation of the Sherman Act even if most or for that matter all transactions occur at lower prices"); *Sulfuric Acid*, 2007 WL 898600, at *7 ("The relevant question is whether any given price that was charged for sulfuric acid was higher than it would have been in the absence of the alleged conspiracy, so that Plaintiffs will succeed so long as they can prove all putative class members suffered an injury and that the injury resulted from anti-competitive harms to the market as a whole); *In re Rubber Chem. Antitrust Litig.*, 232 F.R.D. 346, 352-53 (N.D. Cal. 2005) ("class-wide impact is usually found to exist where the defendants are shown to have used collusively-set list prices for the product at issue," even where plaintiffs may have negotiated discounts from price lists); *Carbon Black*, 2005 WL 102966, at *17 (common proof of impact could be shown where prices actually paid for carbon black bore some relation to defendants' list prices); *In re Plastic Cutlery Antitrust Litig.*, 1998 WL 135703, at *7-8 (E.D. Pa., Mar. 20, 1998) (defendants' uniform price lists served as proof of class-wide impact); *In re Citric Acid Antitrust Litig.*, 1996 WL 655791, at *7 (N.D. Cal. Oct. 2, 1996) (common impact could be proven at trial where "plaintiffs planned to prove at trial that defendants set artificially high list prices for their products").

Plaintiffs also anticipate that Defendants may argue that antitrust injury cannot be established on a class-wide basis because in the but-for world some merchants will suffer injury ("losers") but others will not ("winners") and that determination can only be made on a merchant by merchant basis. Visa and MasterCard made such an argument in the *VisaCheck/Master Money* case involving a claim for unlawful tying. However, the winners and losers argument is limited to tying claims. Where two products are illegally tied together the potential for winners

and losers exist when the two products are untied because according to certain economic theory the price of the tying product will increase while the price of the tied product will decrease. Thus, determining whether a customer suffers injury in the but-for world depends upon the purchase volume of both products. *VisaCheck/Master Money I*, 192 F.R.D. at 83. In this case, Plaintiffs allege price fixing claims not a tying claim and thus, the winners and losers argument cannot apply.[154] Moreover, in *VisaCheck/Master Money I*, this Court rejected Defendants' argument because where, as here, every member of the class paid an overcharge the winners and losers argument is inapplicable. *Id.* at 82-83.

As was the case in *VisaCheck/Master Money*, common proof and standard economic analysis can establish that every member of the Damages Class was charged an artificially-inflated interchange fee when they accepted Visa- and MasterCard-branded (or co-branded) credit and debit cards for payment. *See, e.g., VisaCheck/Master Money II*, 280 F.3d at 137. Dr. Bamberger's economic analysis is based on well-accepted economic principles, as well as an extensive analysis of the record evidence and testimony produced to date.[155] Thus, his conclusions, which establish the Rule 23(b)(3) requirement, are well-founded.

vii. The Methodology for Establishing Damages is a Predominant Common Issue

Dr. Bamberger concludes that for each damages claim, he can formulaically calculate the overcharge to each member of the proposed Damages Class on a class-wide basis using well-

[154] Even assuming *arguendo* that this argument were somehow applicable as to merchants who have co-brand or affinity card arrangements with issuing banks, those merchants are readily identifiable from Defendants' records and they could be placed in a sub-class, or even excluded from the class if necessary.

[155] Plaintiffs' experts have not yet performed any econometric studies because Plaintiffs have not yet received data sufficient to enable these studies.

accepted economic methodologies.[156] Bamberger Decl. ¶¶ 107-16. He also concludes that the data necessary to calculate damages on a class-wide basis exists in Defendants' databases, particularly those of Visa and MasterCard.[157] *Id.* ¶¶ 117-20.

In the but-for world without interchange fees , each merchant's damages would be equal to the actual amount of interchange fees it paid. *Id.* ¶ 109. That is because the overcharge paid by each merchant in the Damages Class "equals the difference between the interchange fees actually paid on Visa and MasterCard credit and debit card transactions by that merchant and the amount that that merchant would have paid in the but for world." *Id.* These damages can then be calculated by subtracting the merchant's average interchange rate in the but-for world from its actual average interchange rate and multiplying that figure by the merchant's total dollar volume of Visa- and MasterCard-branded credit and off-line debit card transactions processed. Since the average interchange rate in the but-for world would have been zero damages equal the total amount of interchange fees actually paid. *Id.*

Dr. Bamberger also concludes that in the alternative but-for world in which interchange fees continue to exist but are set in the manner least restrictive for the networks to be viable the overcharge is the amount of interchange fees the merchant paid in the actual world minus the amount of interchange fees that it would have paid in the but for world. *Id.* He further concludes that damages can be calculated formulaically on a class-wide basis. *Id.* ¶ 110. First, Dr. Bamberger would determine the amount by which the average interchange fee rate would

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[156] This includes Plaintiffs' claims for damages arising out of MasterCard's IPO. Id. ¶116. He can also use the same formulaic approach for determining damages for Plaintiffs' soon to be filed damages claims challenging Visa's IPO and the conspiracy between Visa and its member banks to collectively set interchange fees for on-line debit cards.

[157] Plaintiffs may use a common formula or formulas to calculate damages. *See, e.g.*, *Live Concert*, 247 F.R.D. at 144 (certifying class where plaintiffs proposed several formulas for computing damages); *see also Fears*, 2003 WL 21659373, at *6.

have been lower in the but-for world than in the actual world (*e.g.*, 72 percent). He would then calculate damages for each merchant by subtracting the but-for world average interchange fee rate from the actual average interchange fee rate and multiplying that figure by the merchant's total dollar volume of Visa- and MasterCard-branded credit and off-line debit card transactions processed. For example, if a merchant paid an average interchange fee of 1.5 percent and the but-for average interchange fee rate would have been 72 percent lower, and the merchant processed Visa and MasterCard transactions totaling $30,000,000, the merchant's damages would be (.0150 - (.28 x .01050)) x $30,000,000 = $324,000. *Id.*

As to Plaintiffs' claim that Visa, MasterCard and their member banks collusively fixed the interchange fees for Visa and MasterCard credit and debit cards, Dr. Bamberger also concludes that the overcharge is the amount of interchange fees the merchant actually paid minus the amount of interchange fees that it would have paid in the but-for world. *Id.* ¶ 111. Damages can then be calculated on a class-wide basis using the same formula used to calculate damages in the intra-network but-for worlds. fee *Id.* ¶ 115. Dr. Bamberger concludes that he can use a benchmark to compare pre-conspiracy prices with actual prices to determine the amount of the overcharge. *Id.* ¶¶ 112-14. If pre-conspiracy prices are not an appropriate benchmark because market factors cause the difference between the benchmark price and the actual price to be understated or overstated, Dr. Bamberger concludes that he can account for those factors using widely accepted methodologies such as a multiple regression analysis. *Id.* According to Dr. Bamberger, "a multiple regression analysis can be used to 'control' for differences in non-conspiratorial explanatory variables (*e.g.*, the degree of issuing-bank concentration) between the benchmark and the actual world and so isolate the effect of a conspiracy. This type of analysis can then be used to estimate appropriate but-for world prices (*i.e.*, but-for world prices are

benchmark prices adjusted to reflect any changes in non-conspiratorial factors that affect price)." *Id.* ¶ 114. After determining the percentage by which the conspiracy increased the level of interchange fees, Dr. Bamberger can calculate damages using the same formula he can use to calculate damages in the intra-network but-for worlds. *Id.* ¶ 115.

Accordingly, common proof and economic evidence can be used to establish the overcharges that every member of the Damages Class paid when accepting Visa- and MasterCard-branded credit and debit cards. Plaintiffs' methodology for doing so is straightforward. Yet it would not matter if the damages calculation was complicated, as Plaintiffs' burden with respect to proving antitrust damages, particularly at the class stage, is a limited one. *Carbon Black*, 2005 WL 102966, at *9; *Cardizem*, 200 F.R.D. at 321. That burden is merely to show that methods are available for proving damages on a class-wide basis. Consistent with these rules, courts have held repeatedly that difficulty in the calculation of individual damages for each class member does not defeat the predominance requirement of Rule 23(b)(3). *VisaCheck/Master Money II*, 280 F.3d at 140 ("[I]f defendants' argument (that the requirement of individualized proof on the question of damages is in itself sufficient to preclude class treatment) were uncritically accepted, there would be little if any place for the class action device in the adjudication of antitrust claims.") (citations omitted); *VisaCheck/Master Money I*, 192 F.R.D. at 86 ("It is well established that individual questions with respect to damages will not defeat class certification") (citation omitted).[158] The *IPO* decision did not alter this standard.

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[158] *See also Bogosian*, 561 F.2d at 456; *Sulfuric Acid*, 2007 WL 898600, at *6 ("The extent to which any awarded damages must be adjusted to each individual is not fatal to certification, first because it has traditionally been seen as an inappropriate barrier to applying the efficiencies of Rule 23, and second because there are adequate judicial processes for addressing the problem"); *Carbon Black*, 2005 WL 102966, at *20-21; *In re Catfish Antitrust Litig.*, 826 F. Supp. 1019, 1042-43 (N.D. Miss. 1993); 6 NEWBERG ON CLASS ACTIONS §18.27

Moreover, the burden of proof for damages in an antitrust case is less than the burden of proof with regard to impact. *See Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 565-66 (1931). To deny Plaintiffs their recovery because Defendants' violation of the antitrust laws has resulted in an inability to prove damages with precision "would enable the wrongdoer to profit by his wrongdoing at the expense of his victim...The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-65 (1946); *see also In re Scrap Metal Antitrust Litig.*, 2006 WL 2850453, at *15, n. 41 (N.D. Ohio Sep. 30, 2006) (same); *In re Sumitomo Copper Litig.*, 182 F.R.D. 85, 93 n. 11 (S.D.N.Y. 1998) (same).

viii. Defendants' Willful Maintenance of Market Power is a Predominant Common Issue

Proof that Defendants willfully maintained their respective monopoly power is also a common question and will be established on a class-wide basis. Plaintiffs will submit evidence common to all class members to establish that Defendants engaged in a common course of anticompetitive conduct to maintain their monopoly power. *Live Concert*, 247 F.R.D. at 131-32.[159] Such evidence will focus on the purpose and effect of the anti-steering restraints.

("Individual damages questions do not preclude a Rule 23(b)(3) class action when the issue of liability is common to the class.").

[159] This inquiry focuses on Defendants' conduct and its effect on the relevant market. *See Tower Air, Inc. v. Federal Express Corp.*, 956 F. Supp. 270, 286 (E.D.N.Y. 1996) ("To prove a monopolist willfully acquired monopoly power, a plaintiff must prove that the alleged monopolist used or attempted to use monopoly power to foreclose competition, gain competitive advantage, or destroy competitors; this element requires proof of exclusionary or anti-competitive intent and effect."). *See also Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297 (3d Cir. 2007); *Terazosin Hydrochloride*, 220 F.R.D at 696.

ix. Whether MasterCard's IPO Threatens to Reduce Competition in the Relevant Market is a Predominant Common Issue

Proof that MasterCard's IPO threatens to reduce competition in the relevant market is also a common question and will be established on a class-wide basis. Common evidence will include the structure of the relevant market, its concentration, its history and the ease with which a competitor can enter the market. *See In re Payment Card Interchange Fee and Merchant Discount Fee Litigation*, Feb. 12, 2008 Report & Recommendation, at 10-11, 24-25 (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 321-22 (1962)). Accordingly, this claim presents common issues and will be proven with common evidence, as it focuses solely on Defendants' conduct and its effect.

x. Whether the *NaBanco* Decision Applies to Plaintiffs' Claims is a Predominant Common Issue

Plaintiffs anticipate that Defendants will argue that the collective fixing and imposition of interchange fees does not violate the Sherman Act, based on the Eleventh Circuit's 1986 decision in *National Bancard Corp. v. Visa U.S.A, Inc.*, 779 F.2d 592 (11th Cir. 1986) ("*NaBanco*"). In Plaintiffs' view, that case was incorrectly decided and is no longer applicable.[160] Regardless of whether the Court shares that view, the issue is clearly one common to all class members, and will be determined on a class-wide basis. Plaintiffs will submit common evidence to establish that the payment card industry has changed radically from the late 1970s and early 1980s until now. The payment card industry, riding a wave of technological innovation and drastic changes in buying patterns by Americans, has transformed from the nascent industry examined by the *NaBanco* court to a mature, highly concentrated industry. In reaching its decision, the *NaBanco*

[160] For example, both the Second Circuit, in *U.S. v. Visa, U.S.A.*, and the European Commission, in its recent MasterCard decision, rejected the broad market definition the *NaBanco* court adopted.

court relied upon ten market characteristics each of which have changed radically from 1982, the close of discovery in *NaBanco*, to 2004 (the beginning of the damages period in this case). Plaintiffs will submit evidence, which will be identical for all class members, to show that the payment card market has evolved as follows:

Market Characteristic	1982	2004
Consumer Penetration	16%	78%
Merchant Acceptance	Few	Universal
Credit Card Transactions	$8 billion	$1.7 trillion
Card Profits	Not abnormally high	Highest of all banking services
Transaction Processing	Paper	Electronic
Market Share of Top 10 Issuing Banks	35%	82% (increased to 93% in 2007)
Interchange Rate Justification	Cost-based	Profit-based
Mandatory Interchange	No	Yes
By-Pass System	Yes	No
Interstate Banking	No	Yes

Thus, the applicability of the *NaBanco* case to the claims here presents common issues and those issues will be addressed using evidence common to the class.

xi. Whether Plaintiffs are Direct Purchasers Under the *Illinois Brick* Doctrine is a Predominant Common Issue

Plaintiffs anticipate that Defendants will argue that Plaintiffs cannot claim damages or show antitrust injury because Plaintiffs are indirect purchasers, pursuant to *Illinois Brick v. Illinois*, 431 U.S. 720 (1977), and *Kendall*. In Plaintiffs' view, the *Illinois Brick* case and its progeny do not apply here. Indeed, it is instructive that Defendants did not move to dismiss the

FCACAC on *Illinois Brick* grounds. Putting all that aside, the applicability of the indirect purchaser rule and its well-established exceptions present common issues, and those issues will be determined on a class-wide basis. For example, Plaintiffs will submit the following types of evidence, common to all class members, to establish that merchants, not acquiring banks, are direct purchasers because they pay interchange fees to issuing banks:

- the interchange fee is deducted by the issuing bank prior to advancing the funds owed to the merchant:[161]
  - MasterCard describes the process as follows: "the issuer pays the acquirer an amount equal to the transaction value minus any interchange fee";[162]
  - REDACTED
  - An internal Citibank document similarly states that on a $100 transaction "[Citi] pay[s] the $98. We don't pay $100 and get $2 back.";[164]
  - Tolan Steele, Vice President for Interchange at Visa, testified that the amount of the credit card purchase goes from the issuer back to the acquirer "minus the interchange that the issuer retained" in the transaction.[165]
  - Dr. Bamberger concludes that "from an economics perspective," interchange fees are paid by merchants to card-issuing banks.[166]

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[161] *See, e.g.*, Ex. 28, DePhilippis Dep. Tr. 192:24-195:25; Ex. 176, Best Dep. Tr. 81:9-83:13; Ex. 177, at MCI_MDL02_06991683; Ex. 14, MasterCard 2007 10-K, at p. 7; Ex. 15, Visa 2007 10-K, at pp. 13-14; Ex. 21 at VUSAMDL1-020603216.

[162] Ex. 14, MasterCard 2007 10-K, at p. 7.

[163] Ex. 23, Fischer Dep. Tr. 155:22-156:13.

[164] Ex. 24, at CITI INT 001062067.

[165] Ex. 22, Steele Dep. Tr. 328:4-328:19.

[166] Bamberger Decl. ¶ 23; *see also* ¶¶ 24-31 (describing the economic evidence in more detail).

- acquiring banks never pay interchange fees, REDACTED [167]

- REDACTED

Likewise, the well-established exceptions to the indirect purchaser rule, such as the co-conspirator exception, the ownership-or-control exception, or the exception where there is no realistic possibility that the direct purchaser will sue over antitrust violations, each raise issues common to the class and will be established using evidence common to the class. That is because those exceptions focus exclusively on Defendants' course of conduct which is identical as to all merchant class members.

Thus, the indirect purchaser rule raises issues common to the class and is subject to determination on a class-wide basis.

b. A Class Action Is the Superior Mechanism for Managing the Litigation

The size of the Damages Class — which is comprised of millions of merchants — not only makes class treatment the most convenient means of adjudicating this case, but also makes class treatment the only efficient means of adjudicating this case. Other courts have repeatedly acknowledged that class action litigation is a superior method of efficiently and justly resolving cases such as this one. As the court aptly stated in *NASDAQ*:

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[167] Ex. 27, Pukas Dep. Tr. at 157:2-158:2; Ex. 178, at CITI INT 001522272; Ex. 102, at CITI INT 001427164; Ex. 103, at BOFAIC00224861, 4869; Ex. 18, at BOFAIC 01368580; Ex. 179, at BOFAIC01012303.

[168] Ex. 176, Best Dep. Tr. 74:7-75:3.

[169] Ex. 102, at CITI INT 001427164.

> Given the number of class members injured by Defendants' conspiracy, a class action is not only the most efficient and convenient method to resolve the controversy, it is the only 'fair' and 'efficient' means to adjudicate the controversy. Multiple lawsuits would be costly and inefficient, and the exclusion of class members who cannot afford separate representation would be neither 'fair' nor an 'adjudication' of their claims. .... In addition, class certification here would partially equalize the bargaining power between plaintiffs as a group and Defendants as a group, and thus improve the chances of an equitable settlement.

Id., 169 F.R.D. at 527-28.[170]

In *VisaCheck/Master Money I*, the Court found that certifying a class nearly identical to this one was superior to other methods of adjudication because, "[w]ithout class certification, there are likely to be numerous motions to intervene, and millions of small merchants will lose any practical means of obtaining damages for defendants' allegedly illegal conduct." *Id.*, 192 F. Supp. 2d at 88.[171] In affirming, the Second Circuit further held that the merchant class action was manageable, and warned that the "failure to certify an action under Rule 23(b)(3) on the sole ground that it would be unmanageable is disfavored and 'should be the exception rather than the rule.'" *VisaCheck/Master Money II*, 280 F.3d at 140-41.

In light of the size of the Damages Class, the allegations and proof involved, the impracticability of joinder, the extraordinary problems that would be created by the individual litigation of all of the class members' claims, and the other above-referenced policy considerations, a class action is the only fair and efficient means of adjudicating this case.

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[170] *See also Green v. Wolf Corp.*, 406 F.2d 291, 296 (2d Cir. 1968); *Flag Telecom*, 245 F.R.D at 172 ("a class action will save an enormous amount in litigation costs for all parties and allow them to more efficiently prosecute their claims and defenses"); *Jeffries*, 2007 WL 2454111, at *16; *Currency Conversion*, 224 F.R.D. at 566.

[171] See *also Dupler*, 2008 WL 321776, at *15.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court certify two classes: the "Damages Class," for all merchants who have accepted Visa and/or MasterCard credit and/or debit cards in the United States at any time from and after January 1, 2004; and the "Injunctive Relief Class," for all merchants who currently accept Visa and/or MasterCard credit and/or debit cards in the United States.

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Respectfully submitted,

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