UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION This Document Relates To: ALL ACTIONS	Case No. 1:05-md-1720-JG-JO

DEFENDANTS' SUR-REPLY MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

REDACTED/PUBLIC VERSION

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In their reply brief in support of class certification, plaintiffs have invented entirely new arguments and theories, and modified other arguments, in an effort to get a class certified. These new analyses are just as defective as their initial ones, however, and fall far short of meeting their burden under *Miles v. Merrill Lynch & Co.*, 471 F.3d 24 (2d Cir. 2006) (also referred to as *In re Initial Public Offering Securities Litig.*).[1] Plaintiffs' motion rests on invalid expert models artificially constructed to avoid real world evidence and the predominately individualized determinations necessary to determine fact of injury, causation and damages in this case.[2]

First, with respect to the *intra-network damages claims*, plaintiffs' assertions of the availability of common proof as to key elements of those claims – including proof of injury-in-fact (a necessary element of liability[3]) – rely entirely on "but for" scenarios hypothesized by their expert, Dr. Gustavo Bamberger. As set forth in Defendants' Motion to Exclude Opinions of Dr. Bamberger, those "but for" scenarios are *legally* improper, and therefore cannot provide a basis for class certification. Wholly apart from that fundamental legal defect, however, plaintiffs' and Dr. Bamberger's replies have not met their burden of *factually* demonstrating that their "but for" scenarios would have been *likely* outcomes (or even plausible ones). Yet in the absence of such a showing, there is no adequate reason to believe that these core issues can be proved through common evidence, as required to satisfy predominance and manageability.

Importantly, Dr. Bamberger and plaintiffs have shifted ground from their initial approach on this issue of likely "but-for" outcomes: Previously Dr. Bamberger testified that for purposes

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[1] Plaintiffs have not moved for class certification with respect to their PIN debit claims, despite their earlier promise to do so. *See* Plaintiffs' Memorandum of Law in Support of Motion for Class Certification ("Plffs. Br.") at 5 n.6. Nor have they otherwise attempted to demonstrate why such claims may be certified.

[2] This sur-reply brief responds to the new arguments plaintiffs and Dr. Bamberger have raised, and also addresses the new evidence related to those claims. Accordingly, it does not address all of the arguments in their replies. By not responding to an argument, defendants of course do not concede it.

[3] *Cordes & Co. Financial Services, Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 106 (2d Cir. 2007).

of his "overcharge" analysis he believed that he must *assume* that *only* interchange rules would change in his but-for worlds – with no consideration of other changes potentially made by the Visa and MasterCard networks in competitive response, even if such other changes would have widely variable impacts on merchants. *See* page 8, *infra*. In their reply papers, however, plaintiffs and Dr. Bamberger have now largely abandoned that "assumption."

Instead, plaintiffs and Dr. Bamberger now assert in their replies that they considered the possibility of other changes all along[4] – *but see* page 8, *infra* – and portray their dispute with defendants' expert, Dr. Edward Snyder, as *factual*. They contend that it is most likely that the networks would have made no changes whatsoever if interchange were eliminated or substantially reduced, and would instead have been content to foist tens of billions of dollars in new costs every year on their issuers and cardholders. Yet in making this claim, Dr. Bamberger has conducted no meaningful analysis regarding whether this outcome would be feasible as a *competitive* matter in the U.S.; instead, he purports to rely once again on inapplicable foreign "benchmarks."

However, with respect to his "benchmarks" for plaintiffs' primary, "zero interchange" but-for world, Dr. Bamberger acknowledged in his recent deposition that *no four-party credit card system anywhere in the world operates with zero interchange fees. See* pages 12-13, *infra*. Accordingly, he does not even have a single comparable "benchmark" for the U.S. credit card system he hypothesizes. That is hardly surprising, given that merchants obtain significant benefits from credit card systems that they could not expect to receive elsewhere for free – including, for example, the guaranteed payment merchants receive in many instances when

[4] Bamberger Reply Decl. ¶¶ 4, 17-19, 163; Plaintiffs' Reply Memorandum of Law In Support of Motion for Class Certification ("Plffs. Reply") at 42 & n.93.

cardholders default on their payment obligation, which is funded at substantial cost by issuers.[5] And even as a comparison to the U.S. *debit* system, the assertions Dr. Bamberger makes in reply regarding his foreign "benchmarks" are demonstrably incorrect. In reality, the largely undisputed facts related to those systems provide further empirical support for what Dr. Snyder suggests would have happened in Dr. Bamberger's "zero interchange" world: In some of them alternative fees arrangements or bilateral interchange have in fact developed, and in others issuers are not profitable, or the network is being phased out of existence after regulation of interchange.

Plaintiffs and Dr. Bamberger have also criticized Dr. Snyder's analysis of alternative network responses, such as adopting a system of alternative fees or bilateral interchange arrangements, as "speculative."[6] But plaintiffs' own recently-filed supplemental complaints allege that when the networks were *in fact* faced with legal challenges to interchange fees in the real world, they considered some of the very same changes that Dr. Snyder suggests they would. And, far from sitting idly by when centrally-set default interchange was challenged in the U.S., as plaintiffs assume for class certification purposes, the networks actually undertook significant changes to their structures – *i.e.*, the initial public offerings ("IPOs") – in an attempt to preserve interchange, according to plaintiffs' own allegations.[7] These allegations directly contradict plaintiffs' assertion now, on class certification, that instead of making any changes, Visa and MasterCard would simply have done nothing if interchange were eliminated or drastically reduced. And, of course, it is plaintiffs themselves who bear the burden of proof, and who have

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[5] *See* Sur-Reply Declaration of Edward Snyder ("Snyder Sur-Reply Decl."), which is being filed concurrently with this brief, at 9 n. 24.

[6] *E.g.*, Plffs. Reply at 43.

[7] *E.g.*, First Amended Supplemental Class Action Complaint ¶¶ 105, 115, 147, 155, 159, 273c; Second Supplemental Class Action Complaint ¶ 238c. Similarly, plaintiffs themselves allege that MasterCard has undertaken changes to its system in Europe, including imposing new fees on the acquirer-side, in response to regulation there. *Id.* ¶ 5.

failed to provide any valid empirical support or competitive analysis suggesting why Visa and MasterCard would, in a "zero interchange" world, allow tens of billions of dollars every year in new costs to be foisted on their issuers and cardholders, putting their networks at a significant competitive disadvantage vis-à-vis their competitors, including American Express ("Amex") and Discover.

Dr. Bamberger's reduced interchange but-for world fares no better. To begin with, this but-for world, where interchange is assumed to be fixed at a lower level, is the most obvious example of impermissible price regulation. *See* Defendants' Motion to Exclude Opinions of Dr. Bamberger, pp. 9-10. In any event, plaintiffs' contention, advanced for the first time in reply, that the Australia experience somehow demonstrates that Visa and MasterCard would not undertake network-level changes *in the U.S.* in response to significant reductions in interchange here, constitutes false logic based on inaccurate premises. Dr. Bamberger's assertions, for example, ignore the fact that the networks faced constraints on potential alterations to their systems due to the regulatory environment in Australia.[8] [REDACTED] As discussed below, this fact undercuts a key assumption of Dr. Bamberger's Reply, and indicates that Australia is not a reliable or appropriate benchmark for evaluating what would happen *competitively* in the U.S. but-for world, [REDACTED]. At the end of the day, the allegations in plaintiffs' new complaints regarding changes Visa and MasterCard actually considered in the U.S. – changes that plaintiffs do not dispute would impact merchants variably – provide a far more realistic

[8] The declarations of Robert Selander, CEO of MasterCard, and Tolan Steele of Visa, submitted concurrently herewith, confirm that the regulatory environment in Australia played a central role in the two networks' decision-making there.

picture than the differently-situated Australian "benchmark," especially given that each of Visa and MasterCard ultimately *did* change their respective systems here through their respective IPOs. In short, plaintiffs have not satisfied their burden of demonstrating by a preponderance of the evidence that either of their artificial but-for worlds would likely have existed here without accompanying network-level changes of varying impact, and therefore have not met their burden of demonstrating by a preponderance of the evidence that common issues predominate.

Second, with respect to their *inter-network claims*, as defendants pointed out in their previous submission, plaintiffs and their expert Dr. Gustavo Bamberger did not provide any meaningful methodology for proving fact-of-injury and damages on a classwide basis in their initial submission, as required to satisfy the predominance requirement. In reply, Dr. Bamberger makes no serious attempt to defend his original submission, and instead submits an entirely new methodology. In particular, he and plaintiffs suggest that they will compare the "gap" at each merchant between Visa and MasterCard interchange rates before and after the conspiracy allegedly began to try to prove fact-of-injury and damages. But Dr. Bamberger's proposed methodology would, as he admits, need to be conducted separately for each of the millions of putative class members, which alone defeats the predominance requirement for this claim. And, significantly, Dr. Bamberger's analysis fails to take into account numerous non-conspiratorial factors requiring individual inquiry that obviously affected interchange rates – including factors he identified in his original report – which must also be analyzed on a merchant-by-merchant basis for purposes of establishing causation and fact-of-injury, as Dr. Snyder describes.[9] Instead of addressing these individual, non-conspiratorial causes, Dr. Bamberger testified that he just "assumed" that they could be ignored if plaintiffs prevail on their claims, which is obviously

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[9] *See* Snyder Sur-Reply Decl. ¶¶ 7-10.

wrong.[10] Plaintiffs, therefore, have not met their burden of showing that common evidence of fact of injury, causation and damages will exist with respect to this claim either.

Third, with respect to the *Illinois Brick* indirect purchaser doctrine, plaintiffs rely primarily on a new argument, which appeared nowhere in the *Illinois Brick* section of their initial brief. They now suggest that card processors are not true intermediaries between plaintiffs and defendants because they are mere "delivery agents" who purchase nothing themselves.[11] Even if this were a valid exception to *Illinois Brick*, proof of this claim would require a fact-intensive inquiry for each merchant – as the authority plaintiffs themselves rely on demonstrates – once again causing individual issues to predominate.

Fourth, with respect to *conflicts*, Dr. Bamberger has now admitted in his most recent deposition that it is in fact "likely" that payments to co-brand merchants would at least be reduced if plaintiffs are granted the relief they seek.[12] Indeed, the new evidence he relies on regarding co-brands in Australia confirms this fact. *See* pages 26 – 27, *infra*. Although plaintiffs attempt to hide the significance of this by claiming that the decline in co-brand payments is not relevant to an "overcharge" analysis for purposes of *damages*, it is clearly relevant to the question of whether the *injunctive* relief they seek will harm putative class members. The conflicts are therefore indisputable.

ARGUMENT

Despite plaintiffs' protestations, there is no serious dispute that *Miles* (or "*IPO*") imposes a more stringent class certification standard than had been applied at the time of *In re Visa Check*. *Miles* requires the Court to "resolve[] factual disputes relevant to each Rule 23

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[10] Ex. A to *Declaration of Benjamin Nagin* ("Nagin Decl.," filed concurrently herewith), Bamberger Reply Dep. 46:13-50:19, 63:11-64:14.

[11] Plffs. Reply at 77.

[12] Ex. A to Nagin Decl., Bamberger Reply Dep. 341:18-342:2.

requirement," and not simply to accept the testimony of plaintiffs' expert in an effort to avoid a battle of the experts. *Miles*, 471 F.3d at 36, 40-42. Moreover, since defendants submitted their original memorandum opposing class certification, the Second Circuit has further clarified applicable class certification standards, holding that a *preponderance of the evidence* standard applies in determining whether plaintiffs have met their burden. *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 202 (2d Cir. 2008). Thus, plaintiffs' assertion that this Court must "resolve doubts" regarding class certification in their "favor"[13] is wrong as a matter of law.

I. Plaintiffs Have Not Met Their Burden of Demonstrating That Common Evidence Will Predominate With Respect to Their *Intra*-network Conspiracy Claims.

As set forth in Defendants' Motion to Exclude Opinions of Dr. Bamberger, Plaintiffs' assertion that a class can be certified with respect to their intra-network conspiracy claims rests entirely on a theory and testimony from Dr. Bamberger that is contrary to law and inadmissible.[14] Their motion should be denied on that basis alone. Even if plaintiffs' and Dr. Bamberger's legally-flawed theory were admissible, however, it remains insufficient to meet their burden under *Miles*.

A. Plaintiffs' Analysis With Respect to the Intra-network Claim Has Changed; They Now Largely Fail to Dispute That There Is No Legal Impediment to Consideration of the Structural Changes Analyzed By Dr. Snyder.

Plaintiffs' and Dr. Bamberger's reply papers mark a fundamental shift from their original position. Previously, Dr. Bamberger had assumed that for purposes of his overcharge analysis *all else must remain equal*, other than the elimination or reduction of centrally-set default

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[13] Plffs. Br. at 27.

[14] In particular, as detailed in Defendants' motion to strike the testimony of Dr. Bamberger, Dr. Bamberger's analysis fails to remove the allegedly "collective" aspect of interchange, and instead simply substitutes for current price levels the level the named plaintiffs would prefer, which is not permissible under well-established antitrust doctrine.

interchange fees, and that any other changes the networks may have made in his but-for worlds, and the differential impacts they might have in merchants, were simply not relevant. He testified, for example:

> There are a variety of rules that could be different in some but-for world, but the analysis I'm doing is of the challenge[d] conduct. I believe the appropriate comparison is between an actual world as it is and a but-for world where *everything is the same* except the challenge[d] conduct.[15]

Now, in contrast, plaintiffs and Dr. Bamberger claim that they have considered all along whether the networks would have made rule changes in their but-for worlds, and found that such changes are less *likely* than the alternative – *i.e.*, they believe that the networks would simply do nothing, and make no network-level changes. Thus, for example, plaintiffs state that "Dr. Bamberger considered and analyzed plausible industry changes in his proposed but-for world . . . ."[16]

This claim is disingenuous, and contrary to Dr. Bamberger's prior testimony.[17] The true significance of this attempted recasting is that plaintiffs in reply now tacitly concede that if the

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[15] Ex. 1 to Novoselsky Decl., Bamberger Dep. at 94:13-21 (emphasis added). Dr. Bamberger also testified:

> Q. For purposes of the but-for worlds you are using for your damages analyses in paragraph 109 and 110, are you assuming or opining that all network rules would remain exactly as they were with the exception of rules establishing default interchange rates and what you refer to as the anti-steering rules?
>
> A. I'm describing, in paragraphs 109 and 110, methodologies for calculating but-for world damages. What I describe is a comparison of the actual world to the but-for world and in my analysis, the but-for world only differs from the actual world in terms of the challenge[d] conduct, which is the requirement to pay interchange and the anti-steering restraints. *So other rules, I'm assuming, would be the same in the actual and the but-for world.*"

Id. at 532:6-33:4 (emphasis added); *see also id.* at 542-44.

[16] Plffs. Reply at 42 & n.93; *see also* Bamberger Reply Decl. ¶¶ 4, 17-19, 163.

[17] While Dr. Bamberger did previously note certain changes – higher cardholder fees, reduced cardholder rewards, and lower issuer profits – he thought would occur in his "but for" worlds, those changes played no role at all in his "overcharge" analysis, where all else was assumed to be equal, as he admits. Ex. A to Nagin Decl., Bamberger Reply Dep. 299-301. And, Dr. Bamberger was quite explicit that for purposes of his "overcharge" analysis he was simply *assuming* that all network rules other than those challenged remained intact. *See* n.15, *supra*.

network-level changes Dr. Snyder suggests would have happened – *e.g.*, alternative fee arrangements or bilateral interchange fees – then they should be considered for purposes of the fact-of-injury analysis. Indeed, plaintiffs have not made any effort to refute defendants' showing that where, as here, contractual terms like the rules and responsibilities of system participants defined by Visa and MasterCard are interdependent, experts and courts may not simply ignore the effect that a change in one term – such as elimination of default interchange – would have upon other terms in a but-for world in analyzing fact of injury. *See* Df. Mem. at 57-58. Moreover, as defendants previously demonstrated, the law is clear that if competitive responses by the networks to elimination or reduction of interchange fees would have led to alternative fees, bilateral interchange or the other changes Dr. Snyder suggests, they *must* be taken into account in any overcharge analysis, because they would affect the *amount the merchant actually would have paid*. *See* Df. Mem. at 58-60. Plaintiffs have responded to none of this, nor to any of the legal authority cited by defendants.[18]

With their shift in position, plaintiffs and Dr. Bamberger now assert that their dispute with Dr. Snyder is *factual*, and relates to whether the changes Dr. Snyder proposes would in fact have happened.[19] But plaintiffs simply have not carried their burden of proof on this factual question.

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[18] Plaintiffs' reply contains a single sentence asserting that Dr. Snyder's analysis of the "overall financial effect of lower interchange rates" on merchants involves a "lost profits analysis," rather than an "overcharge" analysis. (Plffs. Reply at 48). The paragraph of Dr. Snyder's report referred to by plaintiffs, however (Plffs. Reply, p. 48, n. 113), is a paragraph concerned with potential issuer changes to co-brand arrangements, not with potential network-level changes to the network's interdependent system of obligations and rules. As noted above, plaintiffs have made no attempt to distinguish the authority relied on by defendants with regard to such network-level matters. Moreover, plaintiffs in any event provide no analysis and cite to no authority in support of their assertions. Plaintiffs have also failed to even attempt to make a showing that the changes suggested by Dr. Snyder would themselves have somehow been unlawful.

[19] Bamberger Reply Decl. ¶¶ 20-27.

B. Contrary to Plaintiffs' Reply, the Empirical Evidence Demonstrates That Plaintiffs Have Not Met Their Burden, And Visa and MasterCard Likely Would Have Undertaken the Structural Changes Proposed by Dr. Snyder, Causing Individual Issues to Predominate.

As outlined in Defendants' and Dr. Snyder's initial submission, it is highly unlikely that Visa and MasterCard would have been content to sit idly by and make no changes if interchange were eliminated or substantially reduced, as plaintiffs suggest. Rather, it is far more likely that, as a competitive response, they each would have made systemic changes that would have affected different merchants differently.[20] The reason is clear: If they did not, their cardholders and issuers would have substantial reason to abandon usage and/or shift to alternatives, including Amex and Discover, to avoid the tens of billions of dollars in new costs plaintiffs and Dr. Bamberger suggest they would be required to pay in their but-for worlds.[21]

In response, Plaintiffs and Dr. Bamberger now contend that it is more likely that the networks would have made no changes at all and would simply have forced issuers and cardholders to absorb such costs. To support their implausible but-for scenario – which they bear the burden of proving is more likely than not at the class certification stage – plaintiffs and Dr. Bamberger ignore the competitive reality, and instead rely on an erroneous analysis of alleged "benchmarks." This factual dispute is critical because if the networks would have made changes to their systems in response to the elimination of interchange, there would be differential impacts on merchants – which plaintiffs do not dispute. Accordingly, common evidence on critical issues of liability (causation and injury-in-fact) and damages would not exist, thereby rendering class certification inappropriate. *See* page 21, *infra*; Df. Mem. at 40.

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[20] *See, e.g.*, Selander Decl.

[21] October 6, 2008 Snyder Decl. ¶ 82.

1. Plaintiffs' New Criteria for an "Appropriate" Benchmark" Are Contrary to Law and Do Not Address the Relevant Factual Question.

As an initial matter, plaintiffs and Dr. Bamberger do not even use their "benchmarks" to address the relevant question – *i.e.*, whether, if interchange were eliminated or substantially reduced, *competitive* pressures would likely have caused each network to have made changes to its system in ways that would impact different merchants differently. Instead, Dr. Bamberger frames the question using a wholly erroneous "viability" standard.[22] In his recent reply, the "viability" standard remains, albeit semantically obscured at times as "successful operation."[23] He then claims that the key question is whether the networks would have "operated successfully" in his but-for worlds, *i.e.*, maintained some minimal level of "viability" after the elimination or substantial reduction in interchange.[24] In fact, Dr. Bamberger's reply declaration proposes a new three-part test for purposes of determining an "appropriate" benchmark," and expressly admits that its purpose is merely to determine whether defendants could "operate successfully," not to provide a means of identifying competitively comparable circumstances.[25] But plaintiffs nowhere dispute the authority and analysis in defendants' opening brief that this "viability" standard is contrary to antitrust law. Df. Mem. at 54-55.

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[22] Bamberger Decl. ¶ 74 ("[s]ubstantial evidence indicates that in a but-for world without required interchange fees, it is likely that . . . the Visa and MasterCard credit and debit card systems would be economically viable . . . ."); *see also id.* at pp. 41 - 45.

[23] In his Reply declaration, Dr. Bamberger defines "operat[ing] successfully" as: "the networks would have *existed*; issuing banks would have had an economic incentive to issue Visa and MasterCard payment cards; and merchants would have had an economic incentive to accept Visa and MasterCard payment cards." Bamberger Reply Decl. ¶ 14 (emphasis added). Moreover, in his initial declaration, Dr. Bamberger used his minimal "viability" standard and the "operating successfully" standard interchangeably. Bamberger Decl. pp. 41 - 45.

[24] Bamberger Decl. pp. 41 - 45; Bamberger Reply Decl. ¶ 36 ("In this matter, I use benchmarks to assess a particular issue – namely, whether Visa and MasterCard credit and debit card systems would have operated successfully in the but-for world."); *id.* ¶¶ 37-38, 42; Ex. 1 to Novoselsky Decl., Bamberger Dep. at 235:14-236:10; Ex. A to Nagin Decl., Bamberger Reply Dep. at 281:11-282:19.

[25] Bamberger Reply Decl. ¶ 37.

Moreover, the mere fact that Visa or MasterCard may be "viable" in Dr. Bamberger's but-for worlds does not even begin to answer the critical question regarding *what would in fact have happened in light of competitive conditions* in the but-for worlds plaintiffs propose. Dr. Bamberger has not even considered what those competitive conditions would be. He simply assumes, for example, that issuers will be less profitable, but admittedly has not analyzed what level of profitability would be necessary to induce issuers to continue offering Visa and MasterCard cards.[26] Nor has he analyzed how much higher cardholder fees would have to be,[27] and the resulting impact this would have on the number of cardholders or on competition for cardholders between Visa and MasterCard, on the one hand, and Amex and Discover, on the other hand. In other words, as Dr. Snyder concludes,[28] Dr. Bamberger has substituted a legally improper and irrelevant "viability" standard for the required economic analysis. Because plaintiffs and Dr. Bamberger rely on their benchmarks for the proposition that Visa and MasterCard could be viable without interchange or with substantially reduced interchange – not for purposes of showing what a competitive outcome in their but-for world would have been – their analysis is flawed at the very outset.

2. The New Arguments in Plaintiffs' and Dr. Bamberger's Reply Related to the "Zero Interchange" But-For World Do Not Meet Their Burden.

Even apart from the irrelevant "viability" standard, plaintiffs and Dr. Bamberger's latest assertions regarding the purported "benchmarks" for their "zero interchange" but-for world do not support their analysis for still other reasons. Most importantly, Dr. Bamberger conceded in his recent deposition that *he is not aware of a single four-party credit card network anywhere in*

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[26] Ex. A to Nagin Decl., Bamberger Reply Dep. 307 - 08.
[27] Ex. A to Nagin Decl., Bamberger Reply Dep. 306 - 07.
[28] Snyder Sur-Reply Decl. ¶¶ 15, 20.

the world that operates with zero interchange fees, so he does not have a single benchmark that meets even his own criteria for an "appropriate" comparable for the U.S. credit card system:

> Q: As you sit here today, you're unaware of a single benchmark in which there exists a four-party system for credit cards in which there is no interchange?
> A: Correct.[29]

That concession is not at all surprising, because issuers provide valuable services to the acquiring/merchant side of the business, which one would not expect them to provide for free (at zero interchange) in a competitive marketplace. Dr. Bamberger's assumption, for example, that in a competitive but-for world issuers would receive *absolutely no compensation* from the acquirer/merchant side of the business for guaranteeing payment to them when cardholders default on their payment obligations makes absolutely no sense as an economic (or common sense) matter.[30]

To be sure, Dr. Bamberger suggested in his deposition that it is possible that Iceland's credit card system *might* be an example of a four-party credit card system with zero interchange fees, but confessed that he was basing his speculation merely on a reading of Dr. Snyder's declaration.[31] But, as demonstrated in Dr. Snyder's declaration, the reason that the Icelandic system had no interchange fees associated with credit card transactions in the past was that it was essentially a *closed loop/three*-party system, where the issuers owned the single acquirer and were able to earn substantial revenue from merchants in that manner instead of interchange

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[29] Ex. A to Nagin Decl., Bamberger Reply Dep. 281:3-7.

[30] Although plaintiffs suggest that merchants also bear risk from cardholder *fraud*, they nowhere deny the undisputed facts that issuers' costs from cardholder *default* are far larger, and that such issuer costs are far larger than even their revenue from interchange fees. *See* Df. Mem. at 65 n. 148 (citing September 2006 Government Accountability Office Report at p. 99 - 100, http://www.gao.gov/new.items/d06929.pdf, regarding issuers' rate of default by cardholders).

[31] Ex. A to Nagin Decl., Bamberger Reply Dep. 294-95.

fees.[32] Because Iceland was a three-party system, it does not even meet Dr. Bamberger's own test for an "appropriate" benchmark, which requires a *four*-party system. And, significantly, after the monopoly of the sole acquirer was recently eliminated, Iceland's credit card system went from being a three-party system to a four-party with interchange fees.[33] Thus, Iceland does not provide any type of "benchmark" for Dr. Bamberger's zero interchange but-for world for credit cards; it in fact directly refutes his claims.

Moreover, even as to the foreign debit "benchmarks" that purportedly involve zero interchange fees, Dr. Bamberger's analysis ignores the fact that they are *regulated* systems, and therefore do not suggest what would have happened in a *competitive* but-for world. In fact, as detailed in Dr. Snyder's country-by-country analysis, Dr. Bamberger's debit benchmarks support the outcomes Dr. Snyder has suggested. In some of them alternative fees or bilateral interchange developed – which Dr. Bamberger nowhere denies. In others issuers were unprofitable, and in at least one the network is going out of business.[34] In short, there is insufficient factual support for plaintiffs' zero interchange but-for world to sustain their burden.

3. Plaintiffs' Recently-Filed Supplemental Complaints and the Evidentiary Record Undercut Dr. Bamberger's Assumptions and Support Dr. Snyder.

Plaintiffs' own recently-filed supplemental complaints further rebut Dr. Bamberger's assumption that it is more likely that the networks would have sat idle and done nothing – content to shift tens of billions of dollars in costs to the issuing/cardholder side of the business – rather than to make any of the potential changes Dr. Snyder has noted. In those complaints, plaintiffs allege that when actually faced with a mere *threat* to interchange, each network

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[32] Snyder Sur-Reply Decl. ¶ 17; October 6, 2008 Snyder Decl. ¶ 86 & n.128, Ex. 14.

[33] Snyder Sur-Reply Decl. ¶ 17; October 6, 2008 Snyder Decl. Exhibit 14.

[34] Snyder Sur-Reply Decl. ¶ 19.

considered some of the very same structural changes that Dr. Snyder suggests they would have undertaken in plaintiffs' but-for worlds, including alternative fee structures and bilateral interchange fees, as well as the IPOs themselves. *See also* Selander Declaration, ¶¶ 3 & 6 (MasterCard considered such changes in the real world and would have done so in plaintiffs' but-for world).

In particular, with respect to MasterCard, Plaintiffs allege that – out of concern for regulatory threats and to protect interchange – it considered several options that would fundamentally alter the structure of MasterCard, including an alternative merchant fee arrangement referred to as the "New Business Model,"[35] bilateral interchange agreements (which plaintiffs make a point of alleging are feasible for the network[36]), and the IPO. According to Plaintiffs, the New Business Model would have actually *increased* fees to many merchants, *and they assert that MasterCard has in fact already adopted a version of that model in Europe in response to interchange regulation.*[37] Plaintiffs also allege that MasterCard considered moving to a bilateral system, which they assert would be practicable, despite MasterCard's concerns that it would lead to disintermediation of the network.[38] And they allege that MasterCard actually undertook a significant structural change – *i.e.*, the IPO – in an effort to preserve interchange in response to regulatory threats.[39] Similarly, with respect to Visa, Plaintiffs allege that in response to the threat of regulation of interchange, for several years Visa management considered and

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[36] First Amended Supplemental Class Action Complaint ("MasterCard Cmplt.") ¶ 102; Second Amended Consolidated Class Action Complaint ¶¶ 169-70.

[37] MasterCard Cmplt. ¶¶ 5, 75, 87, 89, 93, 96.

[38] MasterCard Cmplt. ¶¶ 6, 102, Second Amended Consolidated Class Action Complaint ¶¶ 169-70.

[39] MasterCard Cmplt. ¶¶ 105, 115, 147, 155, 159, 273c; Second Amended Consolidated Class Action Complaint ¶¶ 262, 268.

studied structural changes, including bilateral interchange, and eventually undertook its IPO to preserve interchange and reduce antitrust risk.[40]

Thus, plaintiffs' own allegations suggest that the networks would have taken steps to adopt changes if interchange were impermissible or substantially lower, because that is allegedly what they did in the real world when interchange was *merely threatened*, according to plaintiffs. And that is, in fact, what plaintiffs allege MasterCard and Visa actually did in their IPOs: They were willing to significantly alter their ownership structures in response to the challenges to interchange, according to plaintiffs. Therefore, the empirical evidence alleged by plaintiffs, and the evidentiary record, demonstrate that it is far more likely that the networks would have adopted changes of the sort outlined by Dr Snyder, impacting merchants differentially, rather than simply sitting still while their issuers and cardholders were stripped of incentives and left with enormous additional costs.[41]

4. The New Arguments in Plaintiffs' and Dr. Bamberger's Reply Related to the Reduced Interchange ("28%") But-For World Do Not Meet Their Burden.

With respect to their *reduced* interchange world, plaintiffs and Dr. Bamberger also claim for the first time in reply that Visa and MasterCard would not have made network-level changes because they did not do so in Australia. But the regulatory experience in Australia is not a factually appropriate benchmark for gauging what unregulated, competitive conditions would have produced in the United States. *First*, the interchange reduction in Australia was *several times* smaller than what plaintiffs propose here, even for their reduced interchange but-for

[40] Second Supplemental Class Action Complaint (related to Visa IPO) ¶¶ 82–94, 108-10, 112, 146, 238c.

[41] With respect to the IPOs, it is notable that Dr. Bamberger assumes a but-for world in which all parties know when the but-for world begins that setting interchange in a member-owned association structure would have been impermissible. Ex. A to Nagin Decl., Bamberger Reply Dep. 168-69, 186-88. The declaration of MasterCard's CEO provides factual support for the logical conclusion that MasterCard would have done an IPO in such a but-for world even earlier than it did in the real world and before damages period in this case began in January 2004.

world.[42] This is significant because in the U.S. issuers use these higher interchange revenues to compete with other methods of payment by funding rewards and reduced fees for cardholders (which defendants noted in their opening brief[43] and plaintiffs have not disputed). Dr. Bamberger's substantially larger proposed reduction in interchange fees in the U.S. would therefore put defendants at a far greater competitive disadvantage vis-à-vis Amex, Discover and other payment systems than was the case in Australia, where the loss of revenue was far smaller.

Second, plaintiffs' and Dr. Bamberger's analysis is based on an invalid assumption regarding Australia: [redacted][44] This is directly contrary to the key assumption Dr. Bamberger makes in reply for purposes of his new analysis.[45] And it is significant, because, as noted above, competition with [redacted] Amex (among others) in Dr. Bamberger's but-for world in the U.S. would likely force Visa and MasterCard to make significant changes to remain competitive. Invoking "Australia," as plaintiffs repeatedly do, simply is no substitute for proper factual investigation of what the but-for world would have been in the U.S. and is not sufficient to carry plaintiffs' burden on this motion.[46]

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[42] Snyder Sur-Reply Decl. ¶ 20.

[43] Df. Mem. at 16-17.

[44] Ex. B to Nagin Decl., McCurdy Dep. 45-46, 370-71, 399-401.

[45] Bamberger Reply Decl. ¶ 33 ([redacted]).

[46] Plaintiffs and Dr. Bamberger's assertions that various representatives of Visa and MasterCard have made comparisons to Australia do not support their arguments. None of them analyze the competitive responses by Visa and MasterCard outlined by Dr. Snyder.

Third, Dr. Bamberger ignores the fact that the interchange reductions in Australia were the result of regulatory action, and such regulatory intervention would be expected to serve at least as a tacit constraint on competitive responses by Visa and MasterCard, such as the alternatives suggested by Dr. Snyder. Indeed, MasterCard and Visa believed that they could not have undertaken changes in Australia like those that Dr. Snyder has outlined, given the regulatory constraints in that country.[47] Once again, this makes Australia an inappropriate test for whether competition in Dr. Bamberger's but-for worlds would lead to the changes Dr. Snyder analyzes.

In the end, plaintiffs provide no basis for their naked, speculative assertion that MasterCard and Visa would allow their issuers and cardholders to absorb tens of billions of dollars in annual costs instead of doing what they actually considered (and did) in the real world, according to plaintiffs' own complaints – *i.e.*, implement structural changes at the network level. It is plaintiffs, in fact, who offer nothing but speculation. And, given the varying impacts these network changes would have on merchants – which are undisputed – plaintiffs have not met their burden of demonstrating that fact of injury can be proven with classwide evidence, and that the predominance requirement is satisfied.

II. Application of Plaintiffs' New Methodology For Their *Inter*-network Conspiracy Claims Would Be Unworkable And Cause Individual Issues To Predominate.

In their opening submissions, with respect to the inter-network claim, plaintiffs and Dr. Bamberger defaulted on their obligation to come forward with a common methodology to show injury and damages for all members of the proposed class. For the first time in reply, plaintiffs and Bamberger have attempted to outline the "benchmark" analysis they intend to use – even

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[47] Selander Decl. ¶¶ 3-4; Steele Decl. ¶¶ 3-4.

though Dr. Bamberger previously testified that he had no opinion regarding what an appropriate benchmark would be, or when the conspiracy even began.[48]

Plaintiffs now purport to show injury and damages by claiming that the conspiracy, which they now allege began in the first half of 2002, caused a claimed "gap" between Visa and MasterCard interchange rates to decline; this alleged decline in the gap in rates between the "before" period (or "benchmark") and the "after" period is plaintiffs' measure of fact-of-injury and damages.[49] And the *only* injury or damages their methodology addresses stem from an alleged decrease in the "gap" between Visa and MasterCard rates.[50]

Dr. Bamberger's new proposed analysis demonstrates why class certification should *not* be granted: He admits that it requires a calculation of (1) the actual average interchange rate and volumes applicable to each individual merchant for each year since at least 2002, and (2) the but-for interchange rate that would have applied to that merchant for each year during the putative class period had the gap between Visa and MasterCard not declined.[51] Accordingly, plaintiffs' method requires individual calculations as to millions of merchants.

Not only are individual calculations required to establish injury-in-fact – a requirement of any liability finding – but Dr. Bamberger's new methodology also admittedly does not even address fundamental questions of *causation* which will necessarily vary merchant-to-merchant and raise yet additional individual issues of fact with respect to whether a merchant was injured-

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[48] Ex. 1 to Novoselsky Decl., Bamberger Dep. at 318-25; *see also* Bamberger Decl. ¶ 112.

[49] Bamberger Reply Decl. ¶¶ 158-60.

[50] As Dr. Bamberger has admitted, his new methodology does not seek to establish or measure as injury or damages any potential increase in overall effective interchange rates. Ex. A to Nagin Decl., Bamberger Reply Dep. 65:23-66:6 ("Q: Right, so both for injury and for damages, it's your methodology only focuses on the gap; it doesn't focus on any alleged injury or damages that flowed from the increase in MasterCard or Visa rates? . . . A: Yes, correct.").

[51] Ex. A to Nagin Decl., Bamberger Reply Dep. 319:22-25 ("What I've laid out here is a methodology to formulaically estimate, on a merchant-by-merchant basis, individual damages"); Bamberger Reply Decl. ¶ 160.

in-fact by the alleged conspiracy. Instead of analyzing these matters, Dr. Bamberger testified in his recent deposition that his methodology *assumes* a showing of injury-in-fact as part of an assumption that plaintiffs would prevail on their claims.[52] But this begs the question of how injury-in-fact and causation will be demonstrated on a common basis. Moreover, Dr. Bamberger's assumption is plainly insufficient because – even if plaintiffs are able to establish a conspiracy – in the real world there are numerous non-conspiratorial reasons why the gap in interchange fees would change for a particular merchant over time – as Dr. Bamberger himself has acknowledged in his recent deposition.[53] These factors, which would need to be taken into account for purposes of ascertaining injury and damages as to any given merchant, include:

- Changes to the interchange categories applicable to a particular merchant;
- The interchange volume tier applicable to a merchant;
- The mix of card types applicable to a particular merchant's transactions; and
- The average transaction size for a merchant.[54]

In his initial report, Dr. Bamberger himself suggested that for purposes of a benchmark analysis for this claim he may need to take into account changes in the share of merchant's sales accounted for by different types of cards, which provides an obvious non-conspiratorial reason why interchange rates for a particular merchant would change.[55] Apparently recognizing the substantial individual issues of fact this presents, however, Dr. Bamberger has now flip-flopped from his initial position, asserting that analysis of the factor is unnecessary because it and other factors are unlikely to change over a "relatively short time."[56] Of course, the *seven or eight-year*

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[52] Ex. A to Nagin Decl., Bamberger Reply Dep. 46:13-50:19, 63:11-64:14.
[53] Ex. A to Nagin Decl., Bamberger Reply Dep. 82:12-85:19, 319:6-15; Snyder Sur-Reply Decl. ¶¶ 7-10.
[54] Ex. A to Nagin Decl., Bamberger Reply Dep. 82:12-85:19; Snyder Sur-Reply Decl. ¶ 8.
[55] Bamberger Decl. ¶ 113.
[56] Bamberger Reply Decl. at 80 n.245.

period over which plaintiffs claim damages is not "relatively short," and this and other factors will necessarily change over that time period, as Dr. Snyder explains.[57]

Nor does Dr. Bamberger's reply take into account the large number of merchants who have come into existence during the class period, and therefore do not have a "before" period comparison, which is critical for his methodology.[58] When confronted with this obvious problem in his recent deposition, Dr. Bamberger suggested that perhaps injury and damages for a new merchant can be calculated by identifying "comparable" pre-existing merchants and then assuming that the new merchant's "gap" would have been similarly affected by the purported conspiracy.[59] But this too would involve multiple individual inquiries, including a determination of which merchant to use as a comparable based on a multitude of factors – a matter requiring judgment as to each merchant, as Dr. Bamberger acknowledges.[60]

In the end, then, plaintiffs' new methodology raises numerous, complex individual issues of fact with respect to injury-in-fact and damages for each of the millions of putative class members. Despite plaintiffs' conclusory and unsupported assertion to the contrary,[61] it is well established that such individual issues related to fact-of-injury render any class proceeding unmanageable and unfeasible, and overwhelm whatever "common" issues might exist, requiring denial of class certification. *Sample v. Monsanto Co.*, 218 F.R.D. 644, 650-51 (E.D. Mo. 2003) (denying class certification because, among other things, proof of antitrust impact from the

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[57] Snyder Sur-Reply Decl. ¶ 7.

[58] Snyder Sur-Reply Decl. ¶ 10 & n.13; Ex. A to Nagin Decl., Bamberger Reply Dep. 102.

[59] Ex. A to Nagin Decl., Bamberger Reply Dep. 328:9-329:1.

[60] Ex. A to Nagin Decl., Bamberger Reply Dep. 330:6-10; Snyder Sur-Reply Decl. ¶ 10.

[61] Despite making the conclusory claim that any common issues predominate even if defendants' arguments are correct (Plffs. Reply at 6), plaintiffs nowhere attempt to distinguish authority to the contrary, or cite case law to support their position that a class may be certified even if fact of injury cannot be established on a classwide basis. As noted above, that position is contrary to well established law.

alleged price-fixing of heterogeneous, genetic seeds required "highly individualized, fact-intensive inquir[ies] that necessarily require[d] consideration of factors unique to each potential class member").[62]

In their reply brief, plaintiffs also make various assertions that a class may be certified because they rely on "list prices" and a presumption of classwide impact due to a purported uniform increase in rates. But their "gap" methodology has nothing whatsoever to do with "list prices," and does not even involve alleged increases in the overall level of interchange rates – as Dr. Bamberger has admitted[63] – so those cases do not help them meet their burden here. In fact, none of the legal authority they rely on related to "list prices" – which they misconstrue in any event[64] – relates in any manner whatsoever to the "gap" methodology they have proposed for proving injury and damages.[65]

Similarly, their new, conclusory assertion that "each interchange fee would have been reduced by approximately the same amount," purportedly because merchant "elasticities of demand" would not change in the but-for world,[66] has nothing to do with the "gap" methodology they rely on either. And it is not even supported by either of Dr. Bamberger's declarations.

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[62] *See also In re Agric. Chems. Antitrust Litig.*, No. 94-40216-MMP, 1995 WL 787538, at *7 (N.D. Fla. Oct. 23, 1995) (denying class certification where, among other things, range of factors affecting price of alleged price-fixing of pesticides made case "particularly unsuitable for class treatment" because it would be "extremely difficult for one to determine – on a class-wide basis – the price that would have been charged on a transaction absent the alleged conspiracy"); *Kenett Corp. v. Mass. Furniture & Piano Movers Ass'n, Inc.*, 101 F.R.D. 313, 316-17 (D. Mass. 1984) (denying class certification where "[f]or each move made by a class member, individual inquiry would be necessary to determine how much that particular defendant would have charged for the move absent the alleged conspiracy"); *see also State of Ala. v. Blue Bird Body Co., Inc.*, 573 F.2d 309, 328 & n.36 (5th Cir. 1978) (vacating class certification on the ground that the "diverse nature of the school bus market" precluded plaintiffs from proving "in a manageable manner . . . that [the alleged conspiracy] did in fact cause damage" where "it would be most difficult, if not impossible, to establish any sort of 'competitive' price because of the variety of bus models and the various marketing schemes").

[63] *See* note 50.

[64] *See* Df. Mem. at 49.

[65] Plffs. Reply at 70-71.

[66] Plffs. Reply at 69.

Instead, the only evidence or analysis they refer to in support of this assertion is deposition testimony of Dr. Bamberger that *relates to an entirely different claim* – i.e., the *intra-network* conspiracy claim and his "reduced interchange" but-for world (where he assumes that reductions would be evenly spread across various merchant *categories*) – and which has no bearing on or relevance to plaintiffs' *inter-network* claim.[67] In short, plaintiffs' conclusory assertions – which are not even supported by their own expert's multiple reports in this case – do not meet their burden. Plaintiffs have offered no basis whatsoever that would support certification of their inter-network conspiracy claims.

III. Plaintiffs' New Arguments Related to Application of *Illinois Brick* Do Not Meet Their Burden.

As defendants demonstrated in their initial brief, determining whether each merchant has standing under the *Illinois Brick* indirect purchaser doctrine will require analysis of substantial individual evidence related to the payment relationships of each merchant, causing individual issues to predominate. In fact, plaintiffs have not disputed the evidence that large numbers of merchants pay processing fees to a third party processor, independent sales organizations or franchisor ("processors" hereafter), rather than to a defendant, and that analysis of this issue will require consideration of substantial individualized evidence for each merchant.[68] In response, plaintiffs rely extensively on a new argument that did not appear anywhere in the *Illinois Brick* argument in their opening brief – *i.e.*, the argument that the these processors to whom most[69]

[67] *Compare* Plffs. Reply at 69 & n.193 (discussing *inter-network* claim) *with* Ex. 1 to Novoselsky Decl., Bamberger Dep. 292-99 (cited by plaintiffs, discussing "28%" world for *intra-network* claim).

[68] Although plaintiffs assert that "merchants pay interchange fees," they have not even attempted to rebut the undisputed record evidence that many of the plaintiffs themselves pay their processing fees directly to a third party processor, rather than to a defendant, which is the relevant inquiry for purposes of *Illinois Brick*. *See* Df. Mem. at 83 nn. 193-95.

[69] Plaintiffs deny that a majority of merchants have a relationship with a third party processor, but they are clearly mistaken: They point to evidence that the acquirers who are defendants make up a majority of the *acquiring* market, but that is the wrong question, because it does not account for the fact that there is an

class members pay card processing fees are merely "delivery agents" for defendants who purchase nothing themselves, and are therefore not true intermediaries for purpose of *Illinois Brick.*[70]

Plaintiffs cannot, however, avoid individual issues by creating a blanket "agency" exception to *Illinois Brick*, because the Supreme Court has never adopted such an exception and has strongly discouraged the creation of new exceptions to that doctrine. *In re Brand Name Prescription Drugs Antitrust Litig*, 123 F.3d 599, 605 (7th Cir. 1997); *see also Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 216-17 (1990).[71] But even if it were a recognized exception, the test for "agency" is fact-intensive and would require analysis of substantial non-common evidence regarding the following factors: "[W]hether the agent performs a function on behalf of his principal other than securing an offer from a buyer for the principal's product; the degree to which the agent is authorized to exercise his discretion concerning the price and terms under which the principal's product is to be sold; and finally whether use of the agent constitutes a separate step in the vertical distribution of the principal's product." *Diskin v. Daily Racing Form, Inc.*, Nos. 92 Civ. 6347 (MBM), 1994 WL 330229, *4 (S.D.N.Y. July 7, 1994) (cited by plaintiffs). And the required individualized evidence will show that many merchants' processors do not act as mere "agents." To give just one significant example, the evidence is indisputable that many processors take on the risk of fluctuating interchange rates, such that they could not possibly be considered mere "agents" of the acquirer.[72] Accordingly, plaintiffs' new argument

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intermediary between the acquirer and millions of merchants in the putative class.

[70] Plffs. Reply at 77 – 78.

[71] Plaintiffs' argument that there is an exception to the indirect purchaser doctrine when there is no "realistic probability" that the direct purchaser will sue fails for the same reason: It is not an exception previously recognized by the Supreme Court, and is therefore not a valid exception to *Illinois Brick*. And, as detailed in Defendants opening brief, it appears that not even the Ninth Circuit, where that exception used to be recognized, accepts the exception now. Df. Mem. at 85 n.200.

[72] *See, e.g.*, Ex. 80 to Novoselsky Decl., 2/23/04 Transcom Payment Services Memorandum, NCGA

calls for inquiries into each relationship between a processor and merchant, raising countless individual issues of fact and cannot be demonstrated on a classwide basis.

It is no answer for plaintiffs to say that the exception can be established for all merchants because network rules require the acquirer to sign on to any contract between the processor and merchant. Plaintiffs cite no authority whatsoever for this argument, which is directly contrary to the well-established principle that contractual privity is not relevant to the *Illinois Brick* analysis, which Defendants pointed out in their opening brief, and plaintiffs have failed to respond. [73] Instead of privity, the relevant question is *who pays whom*, which is a question that raises substantial individual issues of fact for each merchant, as defendants demonstrated with evidence in their opening brief that stands unrebutted by plaintiffs.[74]

Moreover, plaintiffs' unsupported suggestion that merchants who pay fees to processors should receive blanket exemption from *Illinois Brick* would create a substantial risk of double recovery, which is one of the primary risks that *Illinois Brick* is intended to prevent.[75] Processors do sue the networks, including on interchange claims, which plaintiffs nowhere deny. It was a third party processor, after all, that chose to sue Visa in *NaBanco v. Visa U.S.A., Inc.*, raising the same sort of claims that plaintiffs make here, 596 F. Supp. 1231, 1239-40, 1246-47 (S.D. Fla.

003199 (third party processor stating "we're going to absorb about 36% of the interchange increase on swiped card sales because we feel that an .11% cost pass thru wouldn't be well received"). Indeed, Dr. Bamberger himself has admitted that processors or acquirers do not always pass on the full amount of interchange changes. Ex. 1 to Novoselsky Decl., Bamberger Dep. 509-10; 641-43. Although Dr. Bamberger asserts in his Reply declaration (p. 72, n. 218) that the relevant question is not whether changes in interchange are passed on, but instead whether the merchant discount fee is ever lower than the interchange fee, his argument raises precisely the sort of complicated tracing inquiry that *Illinois Brick* expressly prohibits, so that his argument fails as a matter of law. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 731-33 (1977).

[73] *See* Df. Mem. at 85 n.198.

[74] Df. Mem. at 83 & nn. 193-95, & 85 n. 198.

[75] *Illinois Brick*, 431 U.S. at 730.

1984), and processors have sued Visa and MasterCard in other contexts in the past.[76] Although plaintiffs point out that Visa argued in *Nabanco* that third party processors lack standing under *Illinois Brick*, Visa *lost* that argument, and in fact *NaBanco* – the processor – was found to have standing. *Id.* at 1247. Acceptance of plaintiffs' arguments would therefore lead to a real risk of multiple recoveries.[77]

Accordingly, plaintiffs' "agency" method for proving standing fails to rebut the fact that establishment of standing for each merchant will require analysis of substantial individual evidence. And given the significance of the individual evidence required for each of millions of merchants, proof on this element of plaintiffs' claims would easily swamp common issues at trial. Plaintiffs, once again, have simply not met their burden with respect to the predominance requirement under *Miles*.

IV. Plaintiffs' New Arguments Related to Co-brands Demonstrate That The Proposed Classes Should Not Be Certified Due to Conflicts of Interest Within the Putative Class.

Based on recent testimony and evidence from Dr. Bamberger himself, the factual basis for the conflict of interest arising from the injunctive relief plaintiffs seek is now largely undisputed. In particular, in his recent deposition, *Dr. Bamberger admitted that co-brand*

[76] *See also PSW, Inc. v. Visa U.S.A., Inc.*, C.A. No. 04-347T, 2006 U.S. Dist. LEXIS 11763, at **3, 28-29 (D.R.I. Feb. 3, 2006), *aff'd*, C.A. No. 04-347T, 2006 U.S. Dist. LEXIS 12157, at *1 (D.R.I. Feb. 28, 2006).

[77] Plaintiffs also misconstrue *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 474-75 (1982), which involved a plaintiff's claim that Blue Shield failed to reimburse her for amounts she had actually paid. There was no issue of an intermediary, because she had already paid her physician, and the question was whether Blue Cross should reimburse her directly for that payment. *Id.* at 474-75. This stands in stark contrast to plaintiffs' case here, where many merchants pay processing fees to a middleman processor. Plaintiffs also cannot rely on *In re G-Fees Antitrust Litig.*, 584 F. Supp. 2d 26 (D.D.C. 2008), which stands for the unremarkable proposition that if a defendant "controls" the intermediary, the *Illinois Brick* bar does not apply. Here, they cannot seriously contend that defendants "control" processors, and if they do make such a claim, it raises substantial issues of fact that cannot be resolved on a classwide basis.

payments would "likely" decline if interchange were eliminated or substantially reduced.[78] He has also admitted that some co-brand agreements may disappear altogether, and has simply not analyzed how likely that would be.[79] This is because, according to Dr. Bamberger, issuers would be less profitable. Moreover, the payments would decline because the value of a co-brand agreement would be substantially less to an issuer if interchange were eliminated or substantially reduced.[80]

Indeed, the new Australian co-brand evidence which Dr. Bamberger himself cites suggests that regulation of interchange in the U.S. would harm co-brands here. In particular, the report he relies on notes that results for co-brands in the U.S. "are not transferable to the Australian market" because issuers earn higher interchange fees in the U.S. than in Australia.[81] Accordingly, Dr. Bamberger's own Australian evidence strongly suggests that interchange fees fund co-brands in the U.S., and a decline in such fees in the U.S. would have negative consequences for co-brand arrangements in the U.S.

Apparently recognizing that the facts are not in their favor, Dr. Bamberger and plaintiffs in reply attempt to obfuscate the matter by misstating and selectively quoting[82] Dr. Snyder's opinion, which is not that *all* co-brands will necessarily disappear if interchange is eliminated or

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[78] Ex. A to Nagin Decl., Bamberger Reply Dep. 341:18 – 342:2.
[79] Ex. A to Nagin Decl., Bamberger Reply Dep. 336:25 – 338:12
[80] Snyder Sur-Reply Decl. ¶ 28.
[81] Ex. C to Nagin Decl., Datamonitor, *The future of co-branded credit cards in Australia* at 17, 19 (April 25, 2007) (BAMB 09075 – 9115).
[82] *See, e.g.*, Plffs. Reply at 48 (quoting Dr. Snyder as stating in ¶ 105 of his initial report that co-branding agreements "would not likely have existed," when *in fact* Dr. Snyder stated in that paragraph that such agreement "would not likely have existed, or *at least not in a remotely similar fashion*" and "[i]f interchange had been substantially reduced, *some or all of* the benefits provided to co-brand merchants (such as a share of revenue on co-brand cards) would have been *substantially reduced*") (emphasis added).

substantially reduced, but instead that some would likely be eliminated, and that – in all events – payments to the remaining co-brand merchants would substantially decline.[83]

In light of the undisputed evidence, noted above, that payments to co-brand partners would *in fact* likely decline if plaintiffs are able to obtain the relief they seek, most of plaintiffs' arguments are simply irrelevant. Thus, for example, their assertions that co-brand payments are in consideration of separate services co-brand merchants provide issuers, and that they are not directly related to interchange, are not only untrue (and contrary to prior statements by both plaintiffs and Dr. Bamberger),[84] but more importantly do not even address the relevant question – *i.e.*, whether the injunctive relief plaintiffs seek will harm co-brand merchants by decreasing payments made to them. On that point, as noted above, Dr. Bamberger does not dispute Dr. Snyder's analysis. Nor does he dispute the fact that at least some merchants receive far more in co-brand payments than the interchange fees applicable to their transactions, such that even a small decrease in co-brand payments will injure some members of the putative class. Although Dr. Bamberger is critical of Dr. Snyder's selection of co-brand merchants to analyze, Dr. Bamberger himself has conducted no analysis whatsoever of the extent of this obvious conflict, which is plaintiffs' burden. *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 99, 103 (2d Cir. 2007) (holding that a plaintiff must "demonstrate" lack of conflict).

Not having a basis to dispute the facts regarding this conflict of interest, plaintiffs attempt to confuse the law by conflating the conflicts analysis related to *injunctive* relief with the "overcharge" analysis for *damages* purposes. Thus, they suggest, since co-brand payments are

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[83] October 6, 2008 Snyder Decl. ¶ 105.

[84] Plffs. Br. at 14 n.36 ("[p]ursuant to co-branding and affinity agreements, banks pay merchants what are in essence rebates [of interchange fees]"); Ex. 1 to Novoselsky Decl., Bamberger Dep. 41:3-15 ("some of the [co-brand] arrangements are characterized as the reimbursement from the issuer to the merchant of some portion, or all of the interchange payments made by the merchant to the issuer on a subset of cards"); Snyder Sur-Reply Decl. at 17 n.58 (citing additional evidence).

purportedly not relevant to an overcharge *damages* analysis, they also cannot be relevant to the conflicts arising from the *injunctive* relief they seek either. They are wrong, however, as a matter of law: As plaintiffs themselves expressly admit in their Reply, those cases limiting consideration of net losses and benefits to class members are based on the purported *Illinois Brick/Hannover Shoe* requirement that *damages* are limited to "overcharges."[85] The *Illinois Brick/Hanover Shoe* doctrine has no bearing on injunctive relief claims, as numerous courts have recognized. *See Leider v. Ralfe*, No. 01 Civ 3137 (HB), 2003 WL 22339305, at *3 (S.D.N.Y. Oct. 10, 2003).[86] Instead, for injunctive relief purposes, the relevant question is whether the injunctive relief plaintiffs seek will in fact harm members of the putative class plaintiffs seek to represent. *See In re Comp. of Managerial, Prof'l & Technical Employees Antitrust Litig.*, No. MDL 1471, 02-CV-2924 (GEB), 2006 WL 38937, at *9 (D.N.J. Jan. 5, 2006) ("*MPT*") (denying Rule 23(b)(2) class certification because, among other things, injunctive relief "could in theory injure" some class members).[87] Plaintiffs nowhere analyze the actual effects the injunctive relief will have on co-brand merchants – who represent a very considerable portion of the transaction

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[85] Plffs. Reply at 13. Plaintiffs' argument is incorrect even as to the overcharge analysis related to damages. *See* Df. Mem. at 77.

[86] *See also In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 506 (S.D.N.Y. 1996).

[87] The case stands in clear contrast to *Jacobi v. Bache & Co., Inc*, No. 70 Civ. 3152 1972 WL 560 (S.D.N.Y. 1972) – a 36 year-old unpublished decision relied on extensively by plaintiffs – because in that case the court found the conflict merely "theoretical." Here, in contrast, the evidence is clear and undisputed that the relief plaintiffs seek will decrease payments to some merchants. Plaintiffs also rely on cases holding that certification may be appropriate even if each class member has simply *not been injured* by the challenged conduct or policy, but that is a very different question from whether a class should not be certified because *the relief plaintiffs seek will actually harm class members*. *See* Plffs. Reply at 18 n.26 (citing *Coleman v. General Motors Acceptance Corp.*, 220 F.R.D. 64, 89 (M.D. Tenn. 2004); *Walters v. Reno,* 145 F.3d 1032, 1047 (9th Cir. 1998); *Griffin v. Burns,* 570 F.2d 1065, 1073 (1st Cir. 1978)). For similar reasons, their reliance on cases where class members are merely apathetic or would simply prefer to "maintain the status quo" is misplaced. *See* Plffs. Reply at 17 & n. 25 (citing *Sharif v. New York State Educ. Dept.,* 127 F.R.D. 84, 89 (S.D.N.Y. 1989); *Wilder v. Bernstein,* 499 F. Supp. 980, 993 (S.D.N.Y. 1980); *Horton v. Goose Creek Independent School Dist.*, 690 F.2d 470, 485, 488 (5th Cir. 1982). And, in one of the cases relied on by plaintiff, the court explicitly recognized that, on the facts of that case, each member of the class would in fact benefit if the requested relief was granted, and emphasized that those individuals who would be injured by the relief were not part of the class. *Groover v. Michelin North America, Inc.,* No. 192 F.R.D. 305, 307 n.1 (M.D. Ala. 2000).

volume at issue, yet whom plaintiffs have previously suggested could perhaps be excluded from the class (Plffs. Mem. at 68 n. 154) – and therefore have not sustained their burden.

As a fallback argument, plaintiffs suggest that they can simply wait until a "later juncture" to determine the full scope of the injunctive relief they seek. But they have not even suggested what the possible alternative injunctions might be, or how they might resolve the conflict. Any suggestion that they may seek some relief other than a forced reduction in interchange fees strains credulity, based on plaintiffs' claims to date. Moreover, waiting until *after* the Court decides to bind co-brand merchants to a certified class and only *then* determine the full scope of the injunctive relief they may seek – which may harm numerous class members – merely serves to exacerbate the conflict.

In short, there can be no serious dispute that co-brand payments to merchants will in fact decline if plaintiffs obtain the injunctive relief they seek, harming members of the putative class. Plaintiffs have accordingly not met their burden of demonstrating the absence of conflicts, requiring denial of class certification.[88]

[88] Defendants' initial brief also analyzes other conflicts within the class, including conflicts plaintiffs fail to dispute. For example, plaintiffs do not dispute the evidence that cash and checks are more expensive than cards for at least some merchants, and that the injunction they seek would cause more transactions to take place with such payment methods, thereby harming some merchants. The existence of that conflict is therefore uncontested. Moreover, plaintiffs' argument that shifts to Amex will not harm class members and cause conflicts within the class is based entirely on an erroneous factual assumption regarding why Amex reduced its rates in Australia, as described at page 17 above.

Dated: New York, New York
June 25, 2009

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CERTIFICATE OF SERVICE

I, Eric H. Grush, hereby certify that, on June 25, 2009, I caused true copies of *Defendants' Sur-Reply Memorandum in Opposition to Plaintiffs' Motion for Class Certification*, and the declarations of Edward A. Snyder, Robert Selander, Tolan Steele, and Benjamin Nagin to be served by Lexis-File and Serve upon all counsel.

/s/ Eric H. Grush
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