UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE

PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION

This Document Relates To:

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MASTER FILE 05-MD-1720(JG)(JO)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS OR, ALTERNATIVELY, TO STRIKE PLAINTIFFS' PRE-2004 DAMAGES CLAIMS

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PRELIMINARY STATEMENT

Almost three years after this Court carefully assessed the reasonableness of the June 2003 settlement agreements in *In re Visa Check/MasterMoney Antitrust Litigation*, the proper scope of their releases and the due process concerns of any objectors regarding the adequacy of notice, this same putative class of merchants now seeks to unravel that settlement through an untimely and unfounded collateral attack.

CACC Plaintiffs' opposition does not dispute that they are class members bound by those settlements, in which plaintiffs agreed to release all claims "relating in any way to any conduct prior to January 1, 2004 concerning any claims alleged in the Complaint . . . , including, without limitation, claims which have been asserted or could have been asserted in this litigation . . . ." (Visa Settlement Agreement ¶ 28; MasterCard Settlement Agreement ¶ 30.) It is also undisputed that the agreements did not place any limitation on Visa's or MasterCard's credit interchange fees. (Visa Settlement Agreement ¶ 8; MasterCard Settlement Agreement ¶ 8.) This Court and the Second Circuit affirmed those Settlement Agreements as fair and reasonable on December 19, 2003 and January 4, 2005, respectively, finding the releases properly barred interchange claims and the settlement notices provided to class members had adequately apprised them that the releases would bar interchange claims. *See In re Visa Check/MasterMoney Antitrust Litig.*, 297 F. Supp. 2d 503, 512-16 (E.D.N.Y. 2003), *aff'd sub nom. Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 106-15 (2d Cir. 2005).

CACC Plaintiffs now purport to collaterally attack these settlements by (i) claiming that the releases are ambiguous and should not be interpreted to apply to any conduct post-dating the 1999, last-filed complaint; (ii) challenging the application of the releases to interchange price-fixing claims arising out of the 2003 credit interchange rate announcements of Visa and MasterCard; (iii) contending that Visa and MasterCard fraudulently induced the class to

enter the agreements by "concealing" their plans to raise credit interchange rates to fund the settlement obligations; and (iv) asserting that their due process rights were violated by an inadequate Notice of Pendency.

None of CACC Plaintiffs' contentions provides a legal basis for avoiding the Court-approved settlement releases. First, CACC Plaintiffs' claim that the releases should not apply to conduct post-dating the 1999 Second Consolidated Amended Complaint is without merit. There is no ambiguity in the releases on this matter, and CACC Plaintiffs' attempt to invent one founders on the releases' express end date of January 1, 2004. Under CACC Plaintiffs' theory, that end date would be rendered meaningless, because the only claims at issue would be those pertaining to the period before the 1999 filing.

In addition, CACC Plaintiffs' theory is inconsistent with the time period for the damages claims asserted by the merchant class at the time the *In re Visa Check* trial was about to commence. When these settlements were reached on the eve of trial in 2003, plaintiffs sought damages through the anticipated completion of trial in July 2003. Their damages claims were by no means limited to 1999 and before.[1] Most importantly, the CACC Plaintiffs' flawed theory ignores the legion of cases recognizing that the timing (or any other aspect of the scope) of a settlement release can be broader than, and need not precisely parallel, the scope of the claims contained in an underlying complaint. Here, by their terms, the releases applied to "all manner" of claims "relating in any way to any conduct prior to January 1, 2004" as long as that conduct related to "claims alleged in the Complaint." (Visa Settlement Agreement ¶ 28; MasterCard Settlement Agreement ¶ 30.)

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[1] Plaintiffs' theory also ignores the provisions of the federal rules that allow pleadings to be conformed to the proof, even after a full trial. *See* Fed. R. Civ. P. 15(b).

Next, CACC Plaintiffs' attempt to carve out from the releases the period of August 2003 through December 2003 — because of alleged increases in credit interchange rates that occurred in August 2003 — fares no better. CACC Plaintiffs admit that the August 1, 2003, credit interchange rate increases were publicly announced and publicized in the media. (Wildfang Dec. ¶ 10.) But CACC Plaintiffs do not and cannot claim that they, or any other class member, ever objected that those increases were inconsistent with the settlements or should not be covered by the settlement releases — at either the fairness hearing eight weeks later on September 25, 2003, or in the following months before this Court finally approved the settlements as fair on December 19, 2003. *See In re Visa Check*, 297 F. Supp. 2d at 526. The first time CACC Plaintiffs raised any issue about the August 2003 credit interchange rates increases was in their opposition papers to the instant motion, filed here almost four years later and more than three and a half years after this Court approved the settlement releases and held that they extinguished claims based on pre-2004 conduct with respect to interchange.

In any event, well-settled principles of release and *res judicata* preclude CACC Plaintiffs from circumventing the enforcement of an adjudicated release merely by pointing to a post-complaint instance of the same alleged conduct that was subject to this Court's approved settlement. That is especially true here given that the releases, by their terms, encompassed any claims that a releasing party might "hereafter" have relating to conduct prior to January 1, 2004. (Visa Settlement Agreement ¶ 28; MasterCard Settlement Agreement ¶ 30.)

Nor is there any basis at all for, much less some factual issue regarding, CACC Plaintiffs' conclusory assertion of fraudulent inducement. The terms of the Settlement

Agreement are a matter of public record (and subject to judicial notice).[2] Far from there being some false "inducement," there is no promise anywhere in the relevant documents that there would be no increases in credit interchange rates. Rather, the settlements provided only for an interim decrease in *debit* interchange rates, as well as a substantial $3 billion payment. In short, CACC Plaintiffs' assertion of wrongful "inducement" is an attempt to invent a non-existent settlement term — which is why they are unable to support their "inducement" claim with any specific cite. Indeed, the credit interchange increases plaintiffs now invoke were publicly disclosed prior to the September 2003 settlement fairness hearing and merely confirmed the interchange adjustments that defendants had been predicting to the Court and to the parties in *In re Visa Check* for years.

Finally, CACC Plaintiffs' belated objection to the Notice of Pendency is irrelevant and unfounded. CACC Plaintiffs simply ignore the fact that the Notice of Pendency was not the last communication with the class members in *In re Visa Check* before the settlement hearing. The CACC Plaintiffs also received notice of the proposed settlement and had an opportunity to object. In any event, the Notice of Pendency fairly apprised all class members of the nature of the claims at stake in *In re Visa Check*.

In short, CACC Plaintiffs' arguments neither constitute a valid legal challenge to the Settlement Agreements nor identify any factual issues that warrant denial of defendants' motion. Having failed to raise any of these issues at the *In re Visa Check* settlement fairness hearing or by Rule 60 motion despite an opportunity to do so, CACC Plaintiffs are bound by the

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[2] Judicial notice may be taken of a settlement agreement and release. *E.g., In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 289 n.2 (2d Cir. 1992); *In re XO Commc'ns, Inc.*, 330 B.R. 394, 418-19 (S.D.N.Y. 2005).

releases that extinguish their ability in this case to assert claims for damages incurred during the period prior to January 1, 2004.

ARGUMENT

I. THE RELEASES APPLY TO CLAIMS FOR CONDUCT POST-DATING THE 1999 AMENDED COMPLAINT IN *IN RE VISA CHECK* ARISING OUT OF ALLEGED INTERCHANGE PRICE-FIXING

CACC Plaintiffs assert that the language of the releases is ambiguous because it was limited to conduct prior to January 1, 2004 "*concerning any claims alleged in the Complaint. . . .*" (Pls.' Opp. at 11 (emphasis added).) They first contend the releases therefore could not cover claims based on any conduct that had not yet occurred when the operative complaint was filed in 1999. (*Id.*) This collateral attack, however, is contrary to the *express* language of the releases, which applies to "all manner" of claims "relating in any way to any conduct prior to January 1, 2004" as long as that conduct related to "claims alleged in the Complaint." (Visa Settlement Agreement ¶ 28; MasterCard Settlement Agreement ¶ 30.) The parties thus bargained for and agreed upon releases covering from the alleged price-fixing damages period up until January 1, 2004 in exchange for substantial payments and other relief.

Indeed, both this Court and the Second Circuit interpreted the temporal scope of the releases consistent with their plain language. In approving the Settlement, this Court explained that the Settlement provides for "the release of Visa and MasterCard from claims arising out of the conduct at issue in the action prior to January 1, 2004." *In re Visa Check*, 297 F. Supp. 2d at 508. Similarly, the Second Circuit recognized that "[t]he Settlement's release precludes actions for conduct occurring prior to January 1, 2004 that was or could have been alleged in the complaint." *Wal-Mart*, 396 F.3d at 104.

It is CACC Plaintiffs, not Defendants, who have proffered an interpretation of the scope of the releases that makes express terms of the releases superfluous and distorts their plain

language. First, under CACC Plaintiffs' construction of the releases, the January 1, 2004 end date is rendered entirely meaningless because the only released claims would be those arising during the period before the 1999 filing of the Second Consolidated Amended Complaint. Second, while CACC Plaintiffs focus on the phrase "claims alleged in the Complaint," they have taken it out of context and ignored what comes both before and after this phrase. It is not "claims alleged in the Complaint" that are released. It is claims "relating in any way to any conduct prior to January 1, 2004 concerning" any alleged claims that are released. The releases also expressly included claims that "could have been asserted in this litigation." (Visa Settlement Agreement ¶ 28; MasterCard Settlement Agreement ¶ 30.) Again, under CACC Plaintiffs' convoluted construction, which excludes any post-1999 conduct, that phrase would be rendered meaningless. CACC Plaintiffs themselves admit that the complaint could have been amended to include subsequent time periods, thereby underscoring that these are matters which "could have been asserted in this litigation." (Pls.' Opp. at 14.)[3]

Moreover, the Second Circuit has held that "[a]s long as the overall settlement is found to be fair and class members were given sufficient notice and opportunity to object to the fairness of the release," there is "no reason why the judgment upon settlement cannot bar a claim that would have to be based on the identical factual predicate as that underlying the claims in the settled class action." *TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982).

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[3] This problem with CACC Plaintiffs' argument is not merely hypothetical. In fact, the trial that was about to go forward in *In re Visa Check* included damages claims up to and through trial. (Supp. Expert Rep. of Franklin M. Fisher ¶ 74, attached to the Second Dec. of Brett Kitt as Ex. A ("For historical or past damages suffered by the plaintiff class, I have updated my estimates to coincide with the expected ending date of trial, July 31, 2003."); *id.* ("As for the future damages, or the value of injunctive relief, I have updated my estimates to cover the period August 2003 through December 2010.").) In effect, CACC Plaintiffs want this Court to find that the releases in *In re Visa Check* do not apply to damages claims that the class plaintiffs there actually made.

As the Second Circuit reiterated in *In re Visa Check*, "[t]he law is well established in this Circuit and others that class action releases may include claims not presented *and even those which could not have been presented* as long as the released conduct arises out of the 'identical factual predicate' as the settled conduct." *Wal-Mart*, 396 F.3d at 107 (quoting *TBK Partners*, 675 F.2d at 460) (emphasis added); *see also, e.g., Martens v. Smith Barney, Inc.*, 181 F.R.D. 243, 266 (S.D.N.Y. 1998) ("There is no general rule against settlements that limit additional claims" not asserted in a class action complaint "and many settlements featuring such limitations earn Second Circuit approval.") (citations omitted).[4]

CACC Plaintiffs' contention that conduct occurring after the filing of a complaint is not subject to damages in an antitrust case, but must be the subject of a new case or amended complaint (Pls.' Opp. at 14) is a red-herring. Regardless what the rule may be for recovery of damages based on the filing date of an antitrust complaint, this has little relevance to the scope of the settlement releases here, which are clearly intended to cover the time period through 2003.[5]

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[4] Other Circuit Courts of Appeal have reached the same conclusion. *See, e.g., In re Gen. Am. Life Ins. Co. Sales Practices Litig.*, 357 F.3d 800, 805 (8th Cir. 2004); *City P'ship Co. v. Atl. Acquistion Ltd. P'ship*, 100 F.3d 1041, 1044 (1st Cir. 1996); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1287 (9th Cir. 1992); *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 221 (5th Cir. 1981); *Patterson v. Stovall*, 528 F.2d 108, 110 n.2 (7th Cir. 1976).

[5] Likewise, CACC Plaintiffs' discussion of *Reyn's Pasta Bella LLC v. Visa U.S.A., Inc.*, 442 F.3d 741 (9th Cir. 2006) is inapposite. The Ninth Circuit did not address the question of whether the Settlement Agreements could bar plaintiffs from seeking *damages incurred before January 1, 2004*, or even whether plaintiffs could pursue claims based on post-complaint conduct that occurred before January 1, 2004. Instead, the Ninth Circuit merely addressed whether plaintiffs could pursue a claim based solely on post-complaint "acts committed after January 1, 2004," when all claims based on pre-complaint conduct had been released. *Id.* at 749.

II. THE RELEASES APPLY TO ALL CLAIMS REGARDING THE AUGUST 2003 INTERCHANGE FEE INCREASES

A. PLAINTIFFS HAVE NO LEGAL GROUNDS TO VOID THE RELEASES' EFFECT ON CLAIMS ARISING FROM AUGUST TO DECEMBER 2003

Next, CACC Plaintiffs contend the releases could not cover claims based on any conduct that had not yet occurred when the settlement agreements were entered into in June 2003. (Pls.' Opp. at 11.) CACC Plaintiffs do not dispute that the releases cover alleged interchange price-fixing;[6] rather, they point to Visa's and MasterCard's respective credit interchange rate announcements in August 2003 and assert that "by the terms of the Release, claims relating to the alleged August 2003 price-fixing agreements — claims which could not have been asserted in the *Visa Check* litigation — were not released." (*Id.* at 10, 13.)

This collateral attack, however, again is contrary to the express language of the releases, which applies to "all manner of claims . . . that any Releasing Party . . . *hereafter can, shall or may have relating in any way to any conduct prior to January 1, 2004* concerning any claims alleged in the Complaint." (Visa Settlement Agreement ¶ 28; MasterCard Settlement Agreement ¶ 30 (emphasis added).) Because the August 2003 interchange announcement upon which CACC Plaintiffs' rely concerns the same conduct alleged in the *In re Visa Check* Complaint — *i.e.*, purported price fixing related to interchange fees — any damages arising during this period fall within the express language of the release. CACC Plaintiffs have no basis for carving out a five-month period from this express agreement.

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[6] Indeed, in a recent submission to this Court, CACC Plaintiffs stipulated that "the United States Court of Appeals for the Second Circuit determined that the credit card interchange fees that are at issue in the above-captioned [MDL 1720] action constituted a factual predicate for the plaintiffs' allegations in [*In re Visa Check*]." (Stip. and Order, Aug. 9, 2006.)

CACC Plaintiffs' reliance on the August 2003 interchange announcements is also precluded by principles of *res judicata*. The Settlement Agreement involved the same putative class as alleged here. This Court's January 23, 2004 Order incorporating the settlement, subsequently affirmed by the Second Circuit on January 5, 2005, constitutes a final adjudication on the merits. *See Boguslavsky v. S. Richmond Sec., Inc.*, 225 F.3d 127, 130 (2d Cir. 2000). In these circumstances, *res judicata* bars any subsequent action by the class seeking pre-2004 damages allegedly stemming from post-complaint and August 2003 conduct.

CACC Plaintiffs accordingly have no legal grounds upon which they can rely to avoid the releases.

B. PLAINTIFFS CANNOT INVALIDATE THE *IN RE VISA CHECK* SETTLEMENT AGREEMENT ON THE BASIS OF FRAUDULENT INDUCEMENT

CACC Plaintiffs next argue that "principles of equity demand that the [CACC Plaintiffs] be allowed to seek to avoid or limit the Release due to Defendants' decision to increase Interchange Fees [in August 2003] to fund the settlement." (Pls.' Opp. at 16.) They assert that Defendants "conceal[ed] their plans [from CACC Plaintiffs] to collectively increase credit-card Interchange Fees" to fund the settlement in order "to induce the Class into releasing its claims, on which class counsel justifiably relied." (*Id.* at 16-17.)

But CACC Plaintiffs do not, and cannot, point to a provision in the Settlement Agreements that restricted defendants' ability to set credit interchange rates in August 2003. To the contrary, the class in *In re Visa Check* bargained for and received interim *debit* interchange rate relief, along with substantial payments amounting to more than $3 billion. (*See* Visa Settlement Agreement ¶¶ 3, 8; MasterCard Settlement Agreement ¶¶ 3, 8.) Under the agreements, defendants remained free to set *credit* interchange rates in accordance with the

market.[7] CACC Plaintiffs' argument here amounts to an attempt to create a new contractual obligation between the parties outside the four corners of the releases.

Even assuming, *arguendo*, there had been such a contractual term, CACC Plaintiffs also cannot point to any concealment of a credit interchange increase. They concede that "[i]t is known from publicly available sources that Visa and MasterCard increased their credit card interchange fees effective August 1, 2003." (Wildfang Dec. ¶ 10 (emphasis omitted) (citing American Banker Online article dated August 1, 2003).) If *In re Visa Check* class counsel or any class member genuinely believed that they had been duped, they surely would have brought this to the Court's attention during the fairness hearing on the settlement held two months later.

In fact, Visa and MasterCard had been predicting throughout the *In re Visa Check* litigation that credit interchange rates would rise if debit was unbundled from credit acceptance (the effect of the Settlements). During the *In re Visa Check* class certification proceeding, defendants' expert, Richard Schmalensee, testified that elimination of the networks' respective "Honor All Cards" rules would likely result in an increase in credit interchange rates, testimony that this Court discussed in its 2000 class certification opinion. *See In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. 68, 75 (E.D.N.Y. 2000) ("Schmalensee suggests

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[7] Plaintiffs claim that there is a duty to disclose where one party has superior information, but they only partially recite the standard contained in the authority on which they rely, *Frontier-Kemper Constructors, Inc. v. Am. Rock Salt Co.*, 224 F. Supp. 2d 520 (W.D.N.Y. 2002). *Frontier-Kemper* actually holds that a duty to disclose arises where one party possesses superior knowledge not readily available to the other *and* "knows that the other is acting on the basis of mistaken knowledge." *Id.* at 530. CACC Plaintiffs fail both parts of this test: defendants in *In re Visa Check* clearly did not have "superior knowledge," or have reason to know plaintiffs were allegedly mistaken, because information concerning a likely increase in interchange rates was readily available to plaintiffs. Moreover, *Nelson v. Stahl,* 173 F. Supp. 2d 153 (S.D.N.Y. 2001), upon which CACC Plaintiffs rely extensively, is readily distinguishable, as that case involved both deceptive partial disclosures and a fiduciary duty to disclose the information at issue, neither of which are present here. *Id.* at 160-61.

another consequence of [plaintiffs'] 'but-for' world [without the Honor All Cards rules]: an increase in *credit card* interchange fees.") (emphasis in original). The Second Circuit also recognized this testimony in its affirming opinion. *See In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 134 (2d Cir. 2001) ("Defendants' expert, Schmalensee, maintained that [plaintiffs'] model of how the debit card market would operate absent the alleged tie did not adequately take into account [that] . . . credit card interchange fees would increase as debit card interchange fees decreased if credit cards were no longer tied in a 'package' to debit cards . . . ."). Thus, CACC Plaintiffs have alleged no basis for their contention that defendants somehow omitted or concealed the prospect of a credit interchange rate increase.

Moreover, even assuming, *arguendo*, that CACC Plaintiffs' fraudulent inducement contentions are accepted as true, CACC Plaintiffs have long since waived their right to collaterally challenge these agreements. CACC Plaintiffs have never moved before this Court in *In re Visa Check* to modify the judgment pursuant to Federal Rule of Civil Procedure 60(b)(3).[8] Nor could they at this point. Such motion must "be made within a reasonable time, and . . . not more than one year after the judgment, order, or proceeding was entered or taken." *Id.*[9] Having forgone the opportunity to seek relief in the *In re Visa Check* proceeding, CACC Plaintiffs cannot vaguely rely upon "equity" to assert a back-door challenge to the releases through the mechanism of this lawsuit. *See Campaniello Imp., Ltd. v. Saporiti Italia S.p.A.*, 117

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[8] Rule 60(b)(3) provides that a court may, "[o]n motion and upon such terms as are just, . . . relieve a party . . . from a final judgment, order, or proceeding for . . . fraud . . . , misrepresentation, or other misconduct of an adverse party . . ." Fed. R. Civ. P. 60(b)(3).

[9] This Court entered the judgment on January 30, 2004, and the Second Circuit affirmed the final judgment on January 4, 2005. Even if one concludes either that the Second Circuit's order approving the settlement, or the Supreme Court's denial of certiorari on May 16, 2005, constitutes the final order for the purposes of Rule 60, CACC Plaintiffs have not applied to this Court in *In re Visa Check* within the one-year period prescribed by the rule, which expired at the latest on May 16, 2006.

F.3d 655, 662-63 (2d Cir. 1997) (affirming district court decision that appellants were not entitled to pursue independent equitable claim for relief from settlement agreement on basis of fraud where appellants failed to file timely motion under Rule 60(b)(3)).

III. THE NOTICE OF PENDENCY IS ADEQUATE, AND CACC PLAINTIFFS FORFEITED THEIR RIGHT TO ARGUE OTHERWISE

Finally, CACC Plaintiffs allege that "due process [does] not allow the settlement to release absent class members' Interchange Fee price-fixing claims" because the Notice of Pendency of the class action in *In re Visa Check* "did not even mention Interchange Fees, or the fact that the litigation would affect Interchange Fee price-fixing claims." (Pls.' Opp. at 6, 22.) Once again, however, this collateral attack should be precluded. CACC Plaintiffs' argument treats the Notice of Pendency as if it were the only communication received by the class members. But that is not the case. CACC Plaintiffs indisputably received the Settlement Notice setting forth the scope of the case and the release language in full and had an opportunity to object. Significantly, CACC Plaintiffs do not claim here that the Settlement Notice was deficient in its description of the claims or of the scope of what was being released. More importantly, this Court and the Second Circuit found both that plaintiffs received adequate notice of the release provisions in the Settlement Agreements and that the Settlement Agreements properly released pre-2004 interchange price-fixing claims. *In re Visa Check*, 297 F. Supp. 2d at 512-16, *aff'd sub nom. Wal-Mart*, 396 F.3d at 106-15.[10] Plaintiffs should not now be allowed to launch a due process complaint now about an alleged failure to receive information that they in fact did receive and that provided them with an opportunity to object.

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[10] In addition, in response to objections to the Settlement Agreement from the class plaintiffs in *Reyn's Pasta Bella*, the Second Circuit expressly rejected the argument that a second opportunity to opt out should have been provided at the settlement stage. *Wal-Mart*, 396 F. 3d at 114-15.

Regardless, the Notice of Pendency plainly satisfied due process requirements. Contrary to CACC Plaintiffs' assertion that the Notice of Pendency must include a precise and comprehensive description of the claims at issue, courts require only that the Notice "include *some* description of the nature of the suit and the issues being litigated so that each class member can make a rational judgment on whether to request exclusion from the action." 7AA Charles A. Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 1787, at 512 (3d ed. Supp. 2006) (citing various decisions) (emphasis added); *see also Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 812 (1985) (stating only that notice "should describe the action"). The required description of the action need not be excessively detailed or exhaustive. *See id.* at 812 (holding that notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections") (internal quotations omitted).[11] A general description of the action is also sufficient where the description allows class members to seek further information. *See Power Travel Int'l, Inc. v. Am. Airlines, Inc.*, No. 02 Civ. 7434, 2004 WL 2428714, at *9-10 (S.D.N.Y. Oct. 29, 2004) (holding that notice of pendency need not specifically describe related case where notice provided name of case, court where it was pending, and docket number); *cf.* 7B Wright & Miller, *supra*, § 1797.6, at 214-15 (noting that "courts have approved [settlement] notices that did not

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[11] *See also In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1104 (5th Cir. 1977) (parties need not provide "overly detailed" notice of pendency that makes class members "cognizant of every material fact that has taken place prior to the mailing of their individual notice"); *In re PaineWebber L.P. Litig.*, No. 94 Civ. 8547, 1996 WL 51189, at *1 (S.D.N.Y. Feb. 7, 1996) (the content of notice of pendency "must vary with the circumstances" and need only contain "information that a reasonable person would consider to be material in making an informed, intelligent decision of whether to opt out or remain a member of the class") (internal quotations omitted); *cf. Weinberger v. Kendrick*, 698 F.2d 61, 70 (2d Cir. 1982) ("Numerous decisions, no doubt recognizing that notices to class members can practicably contain only a limited amount of information, have approved very general description[s] of the proposed settlement.") (internal quotation omitted).

contain some of the precise details of the settlement . . . as long as sufficient contact information is provided to allow the class members to obtain more detailed information about those matters").

In light of these standards, the Notice of Pendency fairly apprised CACC Plaintiffs that the *In re Visa Check* case included the alleged credit interchange price-fixing claims. The Notice of Pendency states in pertinent part that defendants' alleged conduct "caused merchants to pay excessive fees on Visa and MasterCard credit and debit transactions." (Notice of Pendency ¶ 3; Marth Dec., Ex. 6.) After cautioning that the descriptions of the case were "summaries," the Notice of Pendency then specifically referred class members to the pleadings themselves at the Court, as well as the name and address of Class Counsel to whom "[a]ny requests for additional information about the case can be submitted." (*Id.* ¶¶ 15-17.) As this Court found in *In re Visa Check*, the pleadings in that action squarely alleged credit interchange price-fixing in support of the Section 2 claims alleged in that case. *See In re Visa Check*, 297 F. Supp. 2d at 513-14 (quoting Second Am. Compl. ¶ 45.) Accordingly, as the price-fixing allegations were plainly set forth in the pleading to which class members were specifically referred in the Notice of Pendency, CACC Plaintiffs cannot now legitimately assert that they were not informed about the scope of the allegations at issue in *In re Visa Check*. This effort to sidestep the release therefore also must fail.

CONCLUSION

For the foregoing reasons, defendants respectfully request that this Court enter an order dismissing with prejudice CACC Plaintiffs' claims against defendants insofar as they seek damages incurred prior to January 1, 2004, or in the alternative, striking the portion of the CACC

Prayer for Relief pertaining to any such claim.

Dated: August 18, 2006

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