UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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

DEFENDANTS' CORRECTED MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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PRELIMINARY STATEMENT

Plaintiffs' motion for class certification should be denied because—despite plaintiffs' suggestion to the contrary—this is not a typical antitrust case, and it fails to meet the requirements of Rule 23 in many crucial ways. Although plaintiffs slap the pejorative label "collusion" on the activities they challenge, their core challenge is to each network's practice of setting default interchange rates for certain transactions *among the networks' members*[1]—an element of each network's structure that not only has existed openly for decades, but was long ago adjudicated and found to be lawful. *National Bancard Corp (NaBanco) v. Visa U.S.A., Inc.*, 596 F. Supp. 1231, 1263-65 (S.D. Fla. 1984), *aff'd* 779 F.2d 592 (11th Cir. 1986). An entire industry has since successfully been built around this fundamental structure, which in turn has facilitated much of this nation's commerce. Indeed, the system that the named plaintiffs seek to destroy has benefited merchants and consumers for many years, during which there has been tremendous expansion of output (cards and volume) on both the Visa and MasterCard networks—the hallmark of a pro-competitive outcome. Now, decades later, plaintiffs seek to turn upside down the fundamental premises of the entire industry structure, using the threat of class certification to achieve that goal.

Given the extent of their burden under *Miles v. Merrill Lynch & Co.*, 471 F.3d 24, 41-42 (2d Cir. 2006), one would have expected plaintiffs and their expert, Dr. Gustavo Bamberger, to offer a thorough analysis of the record and the marketplace, including both the anticompetitive environment they claim has prevailed for so long and the competitive "but-for" world that they assert would have existed in the absence of the alleged unlawful conduct.

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[1] In their recently-proposed amended complaint, plaintiffs have abandoned all claims for damages based on what they characterize as "anti-steering restraint" rules maintained by each of the networks. Accordingly, as discussed further below, the remaining damages claims pertain solely to default interchange fees.

In fact, plaintiffs have provided nothing of the sort. And, in their urgency to certify their class, they ask this Court to permit them to represent all of the seven million merchants in the putative class, which range from small mom-and-pop corner stores to giants like Wal-Mart and The Home Depot, without addressing the substantial differences among them. The Second Circuit's recent decision in *Miles* requires plaintiffs to confront these questions and provide evidence that each of Rule 23's requirements for class certification has been met. *Id.* at 41-42. Plaintiffs' failure to meet their burdens under *Miles* alone justifies a denial of their motion.

We discuss in the body of the brief the full details of plaintiffs' failure to carry this burden, including that (1) they are not adequate class representatives under Rule 23(a)(4); (2) the putative class is not sufficiently cohesive to certify an injunctive relief class under Rule 23(b)(2); and (3) a damages class cannot be certified under Rule 23(b)(3), given the numerous ways in which individualized issues would predominate over common ones. Three examples illustrate plaintiffs' complete failure to make the required showing.

1. With respect to the purported inter-network conspiracy between Visa and MasterCard to fix interchange rates, plaintiffs' expert merely asserts—*without providing any supporting analysis whatsoever*—that each putative class member's injury-in-fact could potentially be proved with classwide evidence. But that assertion is unsupported. Instead, Dr. Bamberger merely describes the generic, analytical components that might go into such a possible analysis. It is true that a plaintiff *might* be able to prove injury by comparing actual price levels to some "benchmark" unaffected by the alleged conspiracy, as Dr. Bamberger suggests. And it is equally true that because the chosen benchmark may be different in various respects from the market at issue, it is theoretically possible that some form of regression analysis may be necessary to *attempt* to identify the portion of any price differential attributable to the allegedly unlawful

conduct. But Dr. Bamberger stops at saying that such theoretical possibilities exist, without demonstrating that they will actually work in this case to prove injury with classwide evidence. Dr. Bamberger has not identified what benchmark he would use and what variables he would consider for a regression analysis, and has not determined whether necessary data is available. In short, he has failed to do the work required to sustain plaintiffs' burden of demonstrating the existence of a viable method of proof common to all putative class members. Numerous courts have denied class certification in such circumstances.

2. With respect to the alleged intra-network conspiracy, *i.e.*, the conspiracy among the card-issuing members of each of the Visa and MasterCard networks, Dr. Bamberger's analysis is similarly insufficient to carry plaintiffs' burden under *Miles*. Dr. Bamberger offers an entirely made up but-for world—one with an interchange rate of zero percent—that lacks any basis in economic reality and that was concocted merely to get this case past class certification.

The implausibility of Dr. Bamberger's zero-interchange world is obvious when viewed in light of the core attributes of the Visa and MasterCard systems. A key benefit for every merchant participating in these systems—indeed, in any U.S. card network—is the ability to get guaranteed, prompt payment on cardholder purchases at its stores without the transaction costs of extending credit to their customers themselves. The merchant bears none of the risks of collection; it is also largely relieved of other risks such as fraud. And because the merchant is paid well before payment is received from the cardholder, it does not suffer the economic cost of a "float." As with any arrangement where one party buys another's receivables and takes on such risk, the party selling the receivables sells them at a discount. Here, that discount is the default interchange rate that is deducted from the amount the issuing bank pays the merchant's acquiring bank for the transaction receivable.

All of this is made possible in the card networks through an interdependent set of network rules which require and ensure that the merchant's acquiring bank agrees to accept and pay for any transaction "paper" presented by the merchant, regardless of issuer; and forward it on (through the network) to the issuing bank for payment to the acquiring bank. The rules also require that issuers agree to "honor all paper" on the payment cards they have issued by advancing funds to pay the acquiring bank for the transaction receivable, regardless of whom the acquirer or merchant may be, knowing that it will be compensated for doing so by the acquiring bank through the discount on the receivable—*i.e.*, the default interchange rate plaintiffs seek to eliminate.

In the course of this litigation, plaintiffs' attack on this system had seemingly focused on the claim that it is unnecessary for the network "collectively" to establish the default payment terms on which acquiring banks and issuing banks must deal with one another on these matters—the implication being that these are matters that could simply be left to bilateral negotiations without any default payment rules at all. But having reached the class certification stage, that theory is nowhere to be found in plaintiffs' submissions.[2] The reason why is simple (albeit unstated by plaintiffs): A world of such bilateral, individualized negotiations would result in very different outcomes, depending on the merchant, the acquirer and the issuer.[3] Individualized factual inquiries would be needed at any trial to figure out what those deals would be and

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[2] It bears noting that in their motion for class certification plaintiffs have abandoned their previous attack on the networks' respective "honor all cards" rules, which require, *inter alia*, every merchant to accept cards from every issuer on the network's system. (Ex. 1 to *Declaration of Jennifer Novoselsky in Support of Defendants' Opposition to Plaintiffs' Motion for Class Certification*, Bamberger Dep. at 520:10-15). (All other exhibits to the Noveselsky declaration are cited in the form "Ex. __.") Once again, it is predictable that the absence of such a rule would necessitate individualized negotiations, creating numerous individual issues.

[3] For example, large merchants with greater market power would get better deals. Small merchants would get worse deals and pay a higher discount. Some merchants might not get deals of any sort because the risk to the issuers might be too large and the transactions costs of dealing with small merchants too great.

whether, in fact, any given merchant would be better off or worse off in that but-for world, thereby precluding class certification.

Plaintiffs and Dr. Bamberger, recognizing that they need the uniformity produced by a default set of payment rules for class certification purposes,[4] but having attacked the processes that create such rules as "collusive," now attempt a sleight-of-hand. Specifically, plaintiffs' principal but-for world assumes that each network would keep its rules *requiring* issuing banks to pay for and "honor all paper" for cards they have issued from the merchant-side, but would simply *eliminate* the related default interchange fee payment. By slicing-and-dicing the network's payment rules in this fashion, plaintiffs seek to create a hypothetical scenario in which, in effect, instead of paying a discounted percentage of the receivable to the acquiring bank (*e.g.*, 98.5%, assuming a 1.5% default interchange fee), the issuing bank is required to pay 100% of the receivable (or "par"). (From an economic perspective, this is also the equivalent of setting a "zero dollar" default interchange fee.) Since issuers would be *required* to accept all paper without having any right to any payment from the merchant-side, and to pay the full amount without any deduction, plaintiffs assert that no merchant (or acquirer) would voluntarily pay for something it could get for free, and that "interchange" would be zero.

In other words, without any economic analysis whatsoever, Dr. Bamberger has created an unprecedented but-for world in which the allegedly collusive price was replaced with a price of zero, rather than with the price that analysis demonstrates would have existed in a competitive environment. And this allegedly uniform "zero" rate is what, in turn, allows plaintiffs' expert to claim that injury-in-fact and damages could easily be established for each and every merchant that accepted any MasterCard or Visa transactions. This approach to class certification is wrong

[4] That point is underscored by plaintiffs' expert's "alternative" but-for world in which default interchange still continues to be set by each network, but merely at some lower level.

as a matter of law, because plaintiffs may not *assume* the key elements of the but-for world (such as the continued existence of the honor-all-paper rule), but rather must prove that the alleged but-for world is realistic and plausible as a matter of fact. This alone requires denial of plaintiffs' motion.

This zero rate but-for world—in which issuers would supposedly be required by the networks to provide substantial and costly benefits to the merchant-side without any merchant-side compensation at all—is wholly implausible. It is plaintiffs' *ipse dixit* assertion of what the but-for world would be—nothing more—crafted for no other purpose than getting by class certification. There is no general purpose card system in the United States in which merchants get something for nothing, and are paid for their receivables without some discount being applied or other merchant-side compensation being received by card issuers. And, significantly, plaintiffs' expert did not testify that any such world would have come into being as a result of natural forces in the U.S. competitive marketplace—especially given the presence of competing networks—*e.g.*, American Express ("Amex") and Discover.

Instead, Dr. Bamberger claimed that it was his understanding of an "overcharge" analysis that he was not only permitted, but required, to remove only the "default interchange fee" while leaving "all else constant"—regardless how intertwined the various network requirements are, and regardless how unrealistic the resulting but-for world might be. As discussed below, this was legally improper; nothing in antitrust law permits, much less requires, an assessment of injury based on a contrived but-for world that is utterly implausible and that bears no relationship to marketplace realities. In fact, as discussed in the Declaration of Dr. Edward A. Snyder, defendants' expert, even assuming the illegality of each network's alleged "collective" setting of default interchange, there are far more realistic scenarios that would have more likely developed.

Plaintiffs do not consider these more likely alternatives because they would have had disparate impacts on merchants and would necessitate extensive individualized inquiry in order to determine whether any given merchant would have been better off.

3. Dr. Bamberger's incomplete analyses and baseless conclusions are, at bottom, efforts to conceal the fundamental problem with certifying a class here: Plaintiffs seek to represent merchants that are differently situated with respect to their interest in the interchange fees built into the networks. Among the *seven million* merchants in the putative class are corner shops, America's largest retailers, and everything in between. The widely varying circumstances of this broad array of merchants creates not only unavoidably individualized issues, but also conflicts between the named plaintiffs and a substantial portion of the class they seek to represent.

Thousands of these merchants have a direct financial stake in the interchange system, including negotiated interchange-determined rebates or interchange-funded benefits through co-brand arrangements, and some merchants even issue cards and receive interchange fees themselves. Indeed, REDACTED of the volume on Visa or MasterCard cards occurs at merchants with co-brand programs, or at merchants that issue a Visa or MasterCard themselves. Many of the merchants that participate in these programs obtain a share of interchange revenues on transactions with other merchants and thus have a stake in those interchange revenues. And beyond these direct interests in the interchange system, many merchants benefit from interchange through a competitive advantage they obtain over their rivals in their businesses. The named plaintiffs simply ignore these benefits.

The named plaintiffs ignore these variations because to confront them would reveal not only the overwhelming individual issues their putative class raises, but also the conflicts among members of the putative class. Tellingly, plaintiffs concede that it may be "necessary" to

"exclude[] from the class" those thousands of "merchants who have co-brand or affinity card arrangements with issuing banks."[5] But burying the conflict in the 154th footnote of their brief does not make it go away.

* * *

Following a background discussion, the argument in this memorandum proceeds as follows:

In light of the conflicts within the putative class, plaintiffs are not adequate class representatives under Rule 23(a)(4). And because Rule 23(a)(4) is one of the prerequisites to class certification, failure to meet that standard is, by itself, sufficient to deny the motion in its entirety. But even if the plaintiffs were adequate representatives, their request for certification of an injunctive relief class under Rule 23(b)(2) would still need to be denied for related reasons: Such a class cannot be certified where the requested equitable relief will injure some members of the proposed class. Here, the requested systemic relief would do precisely that. In refusing to delve into the significance of the interchange system to numerous members of the class, but falsely treating all members of the putative class as if they were the same, the named plaintiffs have failed to meet their burden to prove the class is cohesive, without conflicts.

Likewise, the named plaintiffs have not established that a damages class under Rule 23(b)(3) should be certified. With respect to the inter-network conspiracy claims, they have not even begun to sketch a picture of how they will prove their claims with classwide proof, which is necessary to satisfy their burden to establish that common issues will predominate. With respect to the intra-network conspiracy claims, they likewise have failed to demonstrate that common issues will predominate in a world that would develop if interchange were reduced or

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[5] *See* Plaintiffs' Brief ("Pls.' Br.") at 68 n.154.

eliminated—including, for example, a world in which bilateral negotiations among acquiring and issuing banks displaces the default interchange rate. Their contrived but-for worlds that merely replace the present (allegedly unlawful) default interchange rate with their preferred rate provide neither a legally nor factually acceptable basis for allowing this case to proceed as a class action.

In addition, the Rule 23(b)(3) damages class should be rejected as to both the alleged inter- and intra-network conspiracies because proof of the quantum of damages would be predominantly individual. Likewise, individual issues will predominate with respect to whether the indirect-purchaser rule of *Illinois Brick* will preclude recovery. And even the question of market power presents non-common issues that preclude class certification.

For these reasons and others discussed below, the motion should be denied.

BACKGROUND

I. VISA AND MASTERCARD OPERATE OPEN NETWORKS IN A COMPLEX TWO-SIDED MARKET

A. The Visa And MasterCard Networks' Two-Sided Markets

Visa and MasterCard operate in the middle of a two-sided market.[6] On the issuer side, the networks compete for issuer customers, primarily banks, to issue their branded cards to consumers. On the merchant side, networks compete through their acquirers for merchants to accept their branded cards. In so doing, the networks must balance the demand for payment cards by both consumers and merchants—the greater the number of consumers who use payment cards, the more valuable the network is to merchants that accept those payment cards, and the greater the number of merchants that accept those payment cards, the more cardholders value

[6] October 6, 2008 Declaration of Edward A. Snyder, submitted concurrently with this memorandum ("Snyder Decl.") ¶¶ 18, 42; Ex. 1, Bamberger Dep. at 633:19-634:17.

those cards.[7] Each group values payment cards only if the other does, too. Thus, if one side bears too much of the total costs in the system, and therefore has less incentive to use the network, its value decreases for the other side as well.

B. Open and Closed Loop Networks

Payment card transactions typically involve either a "closed loop" or "open loop" system. Visa and MasterCard are open loop networks. Amex and Discover are primarily proprietary, closed loop systems.

The first payment card systems, established in the late 1940s and 1950s, were closed loop systems.[8] In such systems, networks such as Amex and Diners Club issued cards directly to select consumers (primarily wealthy and traveling businesspersons) and contracted directly with merchants to acquire their card transaction receivables. The predecessor to the Visa network began as a closed loop system as well. These closed loop systems charged merchants a discount fee and imposed various rules on merchants.

Beginning in the late 1960s, a number of systems, including those that became known as Visa and MasterCard, changed this model, and formed or transformed themselves into open-loop networks, which they remain today. As open loop networks, Visa and MasterCard do not have direct relationships with consumers or most merchants. Visa and MasterCard, for example, do not issue credit or debit cards to consumers. Rather, member banks such as Bank of America, Chase, and Citi issue cards to consumers and typically "own" all aspects of those relationships.

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[7] Ex. 1, Bamberger Dep. at 633:24-634:5; Benjamin Klein et al., *Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees*, 73 Antitrust L. J. 571, 580 (2006) ("The demands of these two classes of customers are interdependent, such that the value of a payment system to consumers increases with the number of merchants that accept the card and the value of the payment system to merchants increases with consumer use of the card.").

[8] For a concise history of the origins and early development of the paying card system, *see* David S. Evans & Richard Schmalensee, *Paying with Plastic: The Digital Revolution in Buying and Borrowing*, 53-85 (2005) ("*Paying with Plastic*").

The issuing banks compete fiercely for cardholder customers. Visa and MasterCard also do not acquire payment card transaction receivables from merchants; instead acquiring banks do so, and those acquiring banks compete fiercely for merchant customers. The network rules establish sets of inter-related requirements for their members, including rules that call for acquirers to either directly or indirectly acquire receivables from merchants, and that call for issuers to purchase the receivables from acquirers for collection from cardholders.

From the merchant's standpoint, this system has many of the attributes of "factoring." Acquirers purchase credit and debit card transaction receivables from merchants at a discount, known as the "merchant discount." Acquirers then sell those receivables to issuers at a discount, known as the "interchange fee." In setting the merchant discount, acquirers take into account their costs, as well as the interchange rate attributable to transaction receivables they interchange with payment card issuers.[9]

In contrast with Visa and MasterCard, Amex and Discover continue to operate primarily as closed loop systems. While class plaintiffs do not challenge any aspect of Amex's business in this litigation, Amex historically has charged, and continues to charge, its merchants a far greater merchant discount on average than in the Visa and MasterCard systems for the same services. In 2004, for example, the average Amex merchant discount rate was percent, as compared to the Visa and MasterCard average discount rates of percent, respectively.[10]

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Since the late 1990s, Amex and Discover have modified their traditional network structures to compete directly with Visa and MasterCard for issuing banks. Not surprisingly, both Amex and Discover have introduced their own versions of interchange rates to compensate

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[9] *Id.* at 9-12, 155-56; *see also* Sujit Chakravorti, *Theory of Credit Card Networks: A Survey of the Literature*, 2 Rev. of Network Econs. Issue 2, at 53-54 (June 2003).

[10] Snyder Decl. Ex. 12; *see also* Ex. 1, Bamberger Dep. at 501:3-13.

bank issuers and compete with Visa and MasterCard to attract issuers to their networks.[11] As a result of the differential between discount rates in the Visa and MasterCard systems, on the one hand, and the higher Amex discount rates, on the other, Amex has greater currency to compensate issuers, and to strike deals with them. In the last four years, many of the biggest Visa and MasterCard card-issuing banks, including Bank of America, Barclays, Citi, HSBC, and GE Money Bank, have agreed to issue Amex cards.

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C. Mechanics Of Transactions

The mechanics of transactions on the Visa and MasterCard systems are governed by a complex set of interdependent network rules. Typically, a consumer wishing to purchase goods or services presents her credit or debit card (or account number, if the transaction is not in person) at the point of sale.[14] If the transaction is authorized and completed in accordance with

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[11] REDACTED Amex and Discover payments to issuers are the same in substance and effect as interchange fees. For simplicity, this memorandum of law uses interchange rates and issuer's rates interchangeably unless otherwise noted.

[12] Ex. 24, REDACTED

[13] Ex. 32, ; *see also* Mara Der Hovanesian, *Charge!*, Business Week, Aug. 9, 2004, at 48 ("American Express CEO Ken Chenault is about to launch a huge credit-card war. Backed by an antitrust ruling, he's gunning for Visa and MasterCard. Let the fight begin"), *available at* http://www.businessweek.com/magazine/content/04_32/b3895001_mz001.htm (last visited Oct. 2, 2008).

[14] For a more detailed description of payment card transactions, see Snyder Decl. ¶¶ 54-57, and *National Bankcard Corp. (NaBanco) v. Visa U.S.A., Inc.*, 779 F.2d 592, 594-95 (11th Cir. 1986); *see also* James M. Lyon, Fed. Reserve Bank of Minneapolis, *The Interchange Fee Debate: Issues and Economics* (2006), *available at* http://minneapolisfed.org/publications_papers/pub_display.cfm?id=3235 (last visited Sept. 26, 2008).

network requirements, the merchant transmits the cardholder's transaction record to its acquirer or processor as part of the clearing process. Assuming a $100 transaction, the acquirer or processor buys the receivable from the merchant at a contractually-set discount—*e.g.*, $98.00. The difference between the transaction amount and the amount paid by the acquirer or processor is the merchant discount. The acquirer then "interchanges" the transaction receivable through the Visa or MasterCard network in accordance with network rules, selling the receivable to the issuing bank. The issuing bank, per its obligations under network rules to accept receivables for transaction on all cards it issues,[15] then takes on the risk of collecting from the consumer and typically pays the acquirer a slightly less discounted amount as part of the settlement process—*e.g.*, $98.50. The difference between the amount of the transaction and the amount the issuing bank pays the acquirer is the interchange rate (here, $1.50). For credit card transactions, the issuing bank "floats" the cost of the transaction pursuant to network rules, bearing the risks of fraud and collection from its cardholder under the terms of the cardholder's contract with the issuer.[16]

As plaintiffs note, Visa and MasterCard each have rules adopting default interchange rate schedules, which apply in the absence of a bilateral agreement to use a different rate, and which provide compensation to issuers for the corresponding obligations outlined above.[17] The rate

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[15] *See, e.g.*, Ex. 25, Visa U.S.A. Inc. Operating Regulations, Vol. 1—Gen. Rules, May 15, 2007, Section 6.2.A.4 ("Financial Responsibilities"), at VUSAMDL00176378 (VUSAMDL00175837-6966) ("A Member is responsible for any amount due, as specified in the *Visa U.S.A. Inc. Operating Regulations*, for all Transaction Receipts bearing its BIN and resulting from a Merchant or another Member honoring a valid, properly presented Card"); Ex. 26, MasterCard Worldwide, "MasterCard Rules," Mar. 7, 2008, Section 3.8.6, at MCI_MDL02_11822173 (MCI_MDL02_11822076-295) ("Each Member must, in accordance with the Standards . . . Accept and pay for records of Transactions received from another Member arising from the use of any Card or Access Device issued by it.").

[16] Snyder Decl. ¶¶ 15, 53, 57; *Paying with Plastic*, *supra* note 8, at 11.

[17] *See* Pls.' Br. at 13, 15; MasterCard Worldwide, *MasterCard Worldwide Fact Sheet: Interchange and the Payments Industry* 2 (May 2007), *available at* http://www.mastercard.com/us/company/en/docs/Interchange%20backgrounder.pdf (last visited Sept. 26,

schedules apply different rates for different interchange categories, each of which is tailored to account for numerous criteria, including the (i) industry classification and payment volume of the merchant, (ii) type of card presented by the cardholder, (iii) size of the transaction, (iv) use of security features to verify the transaction, and (v) manner in which the merchant or its acquirer processes the transaction.[18] Between them, Visa and MasterCard have had hundreds of different rates for various interchange categories during the putative class period.[19]

II. THE INTERCHANGE RATES AND RULES CHALLENGED BY THE NAMED PLAINTIFFS ARE CORE ELEMENTS OF THE VISA AND MASTERCARD NETWORKS

Visa's and MasterCard's rules related to default interchange rates and merchant rules—which have equivalents in the Amex and Discover networks—are core to Visa's and MasterCard's basic design and ongoing operation as open networks in competition with closed networks such as Amex.

Since their infancy, each of the open networks has needed to adopt its own interconnected sets of rules in order to create predictable costs, rights and obligations for issuers, acquirers and merchants. These commitments include, for example, requirements that acquirers honor all authorized transactions involving each issuer's cards, and that issuers honor all receivables generated on cards they issued for properly submitted transactions originating from

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2008); Visa, Inc., Annual Report (Form 10-K), at 59 (Dec. 21, 2007), *available at* http://www.sec.gov/Archives/edgar/data/1403161/000119312507270394/d10k.htm (last visited Sept. 27, 2008).

[18] *See* Visa U.S.A., Inc., *Visa USA Interchange Reimbursement Fees* (July 18, 2008), *available at* http://usa.visa.com/download/merchants/visa-usa-july2008-interchange-rates.pdf (last visited Sept. 26, 2008); MasterCard Worldwide, *MasterCard Worldwide U.S. and Interregional Interchange Rates*, Oct. 2008, *available at* http://www.mastercard.com/us/wce/PDF/MasterCard%20Interchange%20Rates%20and%20Criteria%20-%20October%202008%20%20-%20final.pdf (last visited Sept. 26, 2008).

[19] *See* Snyder Decl. Exs. 9A-C, 10A-C (listing Visa and MasterCard default interchange schedules for credit and debit cards).

any acquirer (and thereby from any merchant).[20] Because of these rules, all merchants can accept all cards bearing the Visa or MasterCard logo, regardless of the location, size, or identity of the card-issuing bank, and be guaranteed that they can effectively sell the receivables promptly for a known price. When a merchant submits for payment a charge on a Chase Visa card, it knows the acquirer will accept it, and the acquirer in turn knows that Chase will accept it in exchange for a prearranged payment—all in accordance with network rules and requirements. And, perhaps most importantly for the merchant, Chase *must* accept the receivable under the networks' rules (absent certain minor exceptions not relevant here). Thus, in exchange for paying the merchant discount, the merchant receives guaranteed payment for the transaction. This honor-all-paper principle (which each network has adopted) is central to the networks' sets of interdependent rules, and enables transactions among parties that have no contractual relationship. Naturally, the named plaintiffs do not challenge this requirement. Indeed, their theory of the case relies on it remaining unchanged.[21]

The networks' rules adopting default interchange rates are a corollary to the networks' honor-all-paper rules.[22] Issuers can agree, in advance, to buy all receivables from acquirers only

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[20] For examples of issuer obligations, see note 15. For examples of acquirer obligations, see Ex. 25, Visa U.S.A. Inc. Operating Regulations, Vol. 1—Gen. Rules, May 15, 2007, Section 5.2.P.3.b at VUSAMDL00176331 (VUSAMDL00175837-6966) ("The Acquirer must not waive, release, abrogate, or otherwise assign to a nonmember its obligation to guarantee and ensure payment for all Transactions in which the Merchant honored a valid Visa Card or Visa Electron Card properly presented for payment."), and Ex. 26, MasterCard Worldwide, "MasterCard Rules," Mar. 7, 2008, Section 5.2.1, at MCI_MDL02_11822191 (MCI_MDL02_11822076-295) ("Each Acquirer must acquire all Transactions properly presented to it from each of its Merchants on such terms as set forth in the Merchant Agreement.").

[21] *See* Ex. 1, Bamberger Dep. at 532:6-25 ("Q: For purposes of the but-for worlds you are using for your damages analyses, in paragraph 109 and 110 [of Dr. Bamberger's report], 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 conduct, which is the requirement to pay interchange and the anti-steering restraints.").

[22] Snyder Decl. ¶ 16. Indeed, it is precisely the default setting of these rules and the default setting of interchange rate that permits open-loop systems such as Visa and MasterCard to compete with closed-loop networks while at the same time enabling the competition and innovation that is created by the operation of open-loop systems.

if they know, in advance, what the prices will be, just as merchants get certainty that issuers will accept their paper. As a result, payment card networks throughout the world have adopted rules requiring that cardholder receivables be transferred to issuers at a default discount. Each open general purpose card payment system operating in the U.S. (and comparable systems elsewhere) has adopted default pricing rules requiring that a positive interchange fee (or some other equivalent means of compensation) be paid to issuers in the transfer of cardholder receivables.

III. INTERCHANGE FEES FUND BENEFITS TO CARDHOLDERS

The existing network balance, and the nature of the card network itself, would be fundamentally changed if, as plaintiffs appear to propose, interchange fees were eliminated altogether, and nothing else changed. Many issuers would, in fact, immediately become unprofitable in those circumstances.[23] Although interchange is one of several revenue streams for issuers, it is obviously an important one, with issuers earning more than from interchange in the Visa and MasterCard systems every year.[24]

Issuers' interchange revenue is a primary source of funds for rewards to cardholders,[25] and allows issuers to keep cardholder fees low. Such rewards (*e.g.*, cash back or airlines miles) and low fees often drive cardholders' choice of which payment card to use.[26] The network rules embody this connection between interchange and rewards; they require a portion of the interchange fees on premium cards to be spent on rewards. Thus, for example, when Visa and MasterCard introduced their "Signature" and "World" cards with higher default interchange

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23 Snyder Decl. ¶¶ 82, 88.

24 Snyder Decl. ¶ 28. Dr. Bamberger apparently was unaware of the total interchange fees on the Visa and MasterCard networks, underestimating them by more than 50%. Ex. 1, Bamberger Dep. at 396:4-397:24.

25 *See. e.g.*, Snyder Decl. at 54 n.166.

26 Snyder Decl. ¶ 51.

rates, they also imposed on issuers higher rewards funding requirements for those cards.[27] These cards are designed to attract the high-spending cardholders targeted by Amex[28] and their rewards are largely funded by interchange.[29] Indeed, the intense competition for cardholders creates an "overwhelming incentive for issuers to pass increases in their interchange fees on to consumers."[30] And interchange fees allow issuing banks to offer no-fee cards to consumers.[31]

IV. MERCHANTS BENEFIT FROM NETWORK SERVICES AND INTERCHANGE

Unsurprisingly, merchants also benefit substantially from the features of payment card networks. For example, the card systems guarantee payments to merchants—a guarantee that the merchant would not receive if a consumer paid with a check, rather than a payment card.

Merchants also benefit from incremental sales generated by payment cards. They serve as a promotional vehicle for merchants, who advertise on the street and the internet that cards are welcome. They enable internet sales that could not otherwise take place. And they enable customers to make purchases without carrying large sums of cash or imposing on the merchants the costs and risks of personal checks.

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27 Snyder Decl. at p.7 n.17; Ex. 27, E-mail from Albert Banisch to Tracy Cless and William Sheedy re: "Draft of Wells Discussion Document," Jan. 20, 2004 (VUSAMDL1-08822697–711) (W. Sheedy 30(b)(6) Dep. Ex. 24000); Ex. 28, "Visa Business Review," November 2004, VUSAMDL1-03237662 – 7666; Ex. 29, "Visa USA Consumer Credit Strategy," July 2006 (VUSAMDL2-00011823–836); Ex. 30, "U.S. Region – Marketing," Jan. 17, 2007, (S. Jonas 30(b)(6) Dep. Ex. 23176) (MCI_MDL02_11795186–205); Ex. 17, W. Sheedy 30(b)(6) Dep. at 232:15-233:14, June 17-18, 2008; Ex. 31, E. Buse, "Increasing Usage and Loyalty Through Enhanced Value of Consumer Credit with New Visa Traditional Rewards," Visa Business Review–Gen., Issue No. 041109, Nov. 2004 (VUSAMDL1-00311348-352).

28 Ex. 32, REDACTED

29 Snyder Decl. at p.7 n.17.

30 Timothy J. Muris, *Payment Card Regulation and the (Mis)Application of the Economics of Two-Sided Markets*, 2005 Colum. Bus. L. Rev. 515, 521 (2005) ("Because competition between the issuers is so intense, the issuers use the [interchange] fee to provide benefits to consumers, including rebating some of it directly to the cardholder through a cash refund or providing additional benefits to cardholders, such as 24-hour customer service, car rental insurance, and ancillary benefits like frequent flyer miles or affinity card programs with nonprofit organizations.") (footnote omitted).

31 *Paying with Plastic*, *supra* note 8, at 156.

Moreover, innovations such as airline miles, cash back, rewards, warranties and other consumer benefits effectively lower the price consumers pay for goods or services, giving them an incentive to spend more. Consumers' willingness to spend actually may increase by 100% or more when they pay with credit cards rather than cash.[32] As CHS, one of the class plaintiffs, explained:

> Consumer research supports what we've always believed about credit card purchases. The average convenience store customer spends twice as much per visit when he uses his credit card than when he pays with cash.[33]

Putative absent class member, 7-Eleven, echoed that sentiment, stating that "[o]ur customers spend more money when they spend with plastic."[34] And, according to a U.S. Government Accountability Office report, if Amtrak did not accept payment cards, "the number of people who ride their trains would decline significantly."[35]

A host of other payment card features benefit merchants, including:

- **Reduced fraud risk.** Issuers usually take on the risks of fraud as long as the merchant follows the requisite steps, such as verifying the cardholder's signature.[36]
- **Reduced personnel costs.** Pay "at the pump" automated fuel dispensers or self-service checkout lanes, such as those offered by The Home Depot, Target, Wal-Mart and grocery stores, reduce some merchants' personnel costs.[37]

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32 *See* Drazen Prelec & Duncan Simester, *Always Leave Home Without It: A Further Investigation of the Credit-Card Effect on Willingness to Pay*, 12 Marketing Letters 5, 5-6 (2001).

33 Ex. 68, CENEX AMPRIDE Credit Card Newsletter Discussing Industry Updates and Marketing Opportunities for Cenex and Farmland/Ampride Sites, Vol. 4 at 2 (Jan. 2000) (CHS026691) (CHS026682-704).

34 *Chase Adding Credit Card Chips to Speed Up Retail Transactions*, Fort Worth Star-Telegram (Jan. 10, 2006), *available at* http://www.redorbit.com/modules/news/tools.php?tool=print&id=353178 (last visited Sept. 26, 2008).

35 Gen. Accounting Office, *Federal Entities Are Taking Actions to Limit Their Interchange Fees, but Additional Revenue Collection Cost Savings May Exist*, GAO-08-558, at 16-17, (May 2008), *available at* http://www.gao.gov/new.items/d08558.pdf (last visited Oct. 2, 2008).

36 *See Paying with Plastic*, *supra* note 8, at 118; Ex. 5, Chris Coward Dep. at 47:2-6 (merchant benefits from fraud protection); Ex. 11, Denise Grace Dep. at 149:2-17 (issuers bear risk of fraudulent transactions); Ex. 9, Sandra Estep Dep. at 77:24- 78:8 (credit cards offer fraud protection to merchants).

- **Reduced acceptance costs.** Merchants with historically high costs associated with check and cash acceptance—*e.g.*, check processing fees, employee error, theft and robbery—substantially reduce their costs by accepting payment cards.[38]

- **Administrative benefits.** Merchants can process transactions faster,[39] simplify their record keeping[40] and monitor their employees more easily by accepting payment cards.[41]

Many merchants, large and small, also derive significant financial benefits in varying amounts from Visa's and MasterCard's interchange fees. For instance, thousands of merchants actively participate in the Visa and MasterCard systems either as issuers or as partners with issuers in lucrative co-brand programs, and are paid interchange fees either directly or indirectly. Many merchants also negotiate their own interchange discounts or rebates, giving them a significant competitive cost advantage over rivals who do not have such arrangements, as detailed below.

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37 Consumers are "on track to spend $1.3 trillion a year at Self-Service Machines by 2011." IHL Group, *Consumers on Track To Spend $1.3 Trillion a Year at Self-Service Machines by 2011* (July 17, 2007), *available at* http://www.ihlservices.com/ihl/press_detail.cfm?PressReleaseID=55 (last visited Sept. 26, 2008).

38 *See* Daniel D. Garcia-Swartz et al., *The Move Toward a Cashless Society: Calculating the Costs and Benefits*, 5 Rev. of Network Econs., Issue 2 at 201-02 (2006), *available at* http://www.rnejournal.com/artman2/uploads/1/garcia_swartz_2_RNE_june_2006.pdf (last visited Sept. 26, 2008).

39 *Paying with Plastic*, *supra* note 8, at 93 (estimating that payments using cards take seventeen seconds while it takes seventy-three seconds using checks).

40 Garcia-Swartz et al., *supra* note 38.

41 Ex. 15, Marty Oliver Dep. at 42:9-43:16 (credit cards are quicker to process than checks); Ex. 2, Michael Carter Dep. 157:15-21 (accepting credit cards for online purchases was "more efficient . . . than what we were doing previously"). For all of these reasons, named plaintiff Parkway Corporation posts signs in its parking facilities that encourage customers to use credit cards at the exit. Ex. 21, Robert Zuritsky Dep. at 88:8-89:6 (Parkway posts signs stating "for quick exit pay with credit card at exit gate" in order "to encourage customers to use credit cards"). As one Parkway executive testified, "[w]e prefer that [customers] pay with credit cards for a number of reasons; speed is one of them." Ex. 13, Paul Ierubino Dep. at 86:16-18; *see also id.* 220:14-19 ("in all the locations where Parkway accepts credit cards, it prefers that customers use credit cards to pay for parking"). The other reasons include the "reduction of cash and slippage" and the "benefits on the expense side and reduction in staffing." *Id.* at 86:16-87:6.

ARGUMENT

I. CLASS CERTIFICATION STANDARDS AFTER *MILES*

Plaintiffs suggest that the class motion should be granted here because it was granted in *In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. 68 (E.D.N.Y. 2000) ("*Visa Check I*").[42] To the contrary, the Second Circuit has expressly acknowledged that it has adopted a new, more demanding standard since *Visa Check* for determining whether to certify a class. *Miles v. Merrill Lynch & Co.*, 471 F.3d 24, 40 (2d Cir. 2006) (stating that standard applied in *Visa Check* for evaluating whether an expert's report is sufficient to support an order certifying a class no longer applies).

In *Miles*, the Second Circuit rejected as overly "lenient" the standard it had previously adopted in *Visa Check*, which held, among other things, that the plaintiffs' methodology for establishing proof on a classwide basis was sufficient so long as it was "not fatally flawed." *Id.* at 36 (quoting *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 135 (2d Cir. 2001) ("*Visa Check II*")). *Miles* has now made clear that, under current Second Circuit law, the "rigorous analysis" that the Supreme Court has said must apply to class certification motions, *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 157, 161 (1982), imposes a heavy burden on the plaintiffs. As the advocates of class certification, they bear the burden of establishing that Rule 23's requirements have been satisfied. *Miles*, 471 F.3d at 40; *Visa Check I*, 192 F.R.D. at 79. In making its "definitive assessment of Rule 23 requirements," the district court must now "resolve[] factual disputes relevant to each Rule 23 requirement," even if "such determinations ... overlap [with] ... a merits issue." *Miles*, *Id.* at 41; *see also In re Salomon Analyst Metromedia Litig.*, No. 06-3225-cv, 2008 U.S. App. Lexis 20570, at *18 (2d Cir. Sept. 30,

[42] Pls.' Br. at 1.

2008). And it is both appropriate and necessary to evaluate the expert presentations and determine whether an expert's conclusions are supported by underlying facts. *Miles*, 471 F.3d at 41-42. No longer can the court refuse to critically evaluate expert presentations on the ground that it would necessitate weighing the expert presentations by both sides. *Id.* at 41-42.[43]

Plaintiffs here have not met their burden under *Miles*. First, they have not shown that they meet the adequacy of representation requirement of Rule 23(a)(4), which requires a plaintiff to affirmatively "demonstrate" that its own interests are not antagonistic to the interests of other members of the putative class.[44] *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 99, 103 (2d Cir. 2007). In fact, there are substantial conflicts of interest within plaintiffs' proposed classes, because many absent class members would be injured by the relief plaintiffs seek. For the same reasons, the injunctive relief class plaintiffs seek to certify under Rule 23(b)(2) is not cohesive, and cannot be certified. *See Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 142-43 (3d Cir. 1998).

Second, the proposed damages class that plaintiffs seek to certify also cannot meet the requirements of Rule 23(b)(3), which provides that a class may be certified only if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." The "predominance" requirement of Rule 23(b)(3) is "far more demanding" than the commonality requirement of

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[43] *See also In re Graphics Processing Units Antitrust Litig.*, No. C 06-07417 WHA, MDL No. 1826, 2008 WL 2788089, at *17 (N.D. Cal. July 18, 2008), which states:

> In recent years, many courts have exhibited greater willingness to test the viability of methodologies that experts propose to show class wide impact and injury using common proof, and are increasingly skeptical of plaintiffs' experts who offer only generalized and theoretical opinions that a particular methodology may serve this purpose without also submitting a functioning model that is tailored to market facts in the case at hand.

[44] Defendants do not challenge either the numerosity or commonality requirements of Rule 23(a).

Rule 23(a), and courts must take a "close look" before certifying a class under Rule 23(b)(3). *Amchem Prods. v. Windsor*, 521 U.S. 591, 615, 624 (1997). Here, several aspects of plaintiffs' claims cannot be analyzed with classwide evidence, including fact of injury, the quantum of damages, application of the indirect purchaser doctrine and market power. They cannot, therefore, meet their burden of demonstrating that common issues predominate.[45]

II. THE PROPOSED CLASSES CANNOT BE CERTIFIED BECAUSE OF CONFLICTS WITHIN THE PUTATIVE CLASS

Included within the broad, seven-million merchant class plaintiffs ask this Court to certify are putative class members whose interests would be harmed by the very relief plaintiffs seek. These conflicting interests preclude certification under both Rule 23(a)(4) and Rule 23(b)(2).

The named plaintiffs do not even try to demonstrate, with references to the record, that all members of the putative class share the same interest in attacking the interchange system. Instead, they simplistically assert that they need only show that defendants are generally overcharging them through interchange fees.[46] The "rigorous analysis" required to certify a class does not permit such a shortcut; the bald assertion of overcharge cannot be considered in isolation, but must be evaluated in light of any offsetting benefits from the challenged interchange practices that reflect the full economic impact on putative class members of the relief being sought. *See Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1193 (11th Cir. 2003).

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[45] For the same reasons, plaintiffs' claims cannot be characterized as "typical" of the class, as required under Rule 23(a)(3).

[46] Pls.' Br. 35.

A. Rule 23 Standards Relevant to Conflicts of Interest Between Named Plaintiffs and Absent Class Members Preclude Class Certification Here

1. *Rule 23(a)(4)'s Fair and Adequate Representative Prerequisite to Class Certification*

A court does not even need to consider whether the putative class satisfies the requirements of any of the standards under Rule 23(b) if the named plaintiffs fail to carry their burden under any of the Rule 23(a) "prerequisites" to certification. *See Miles*, 471 F.3d at 41-42. One of those prerequisites is Rule 23(a)(4)'s requirement that the named plaintiffs "will fairly and adequately protect the interests" of the members of the class. As an essential part of this requirement, plaintiffs must "demonstrate" that "their interests are not antagonistic to the interest[s] of other members of the class." *Cordes*, 502 F.3d at 99, 103 (citation and quotations omitted).

A fundamental conflict of interest that precludes certification exists when "some class members claim to have been harmed by the same conduct that benefited other members of the class." *Valley Drug*, 350 F.3d at 1189-90 ("To our knowledge, no circuit has approved of class certification where some class members derive a net economic benefit from the very same conduct alleged to be wrongful by the named representatives of the class."); *Pickett v. Iowa Beef Processors*, 209 F.3d 1276, 1280 (11th Cir. 2000) ("[A] class cannot be certified when its members have opposing interests or when it consists of members who benefit from the same acts alleged to be harmful to other members of the class."). Plaintiffs cannot advance claims here that are antagonistic to the interests of merchants they purport to represent. *Phillips v. Klassen*, 502 F.2d 362, 366 (D.C. Cir. 1974); *Valley Drug*, 350 F.3d at 1194 ("the defendant does not have to show actual antagonistic interest; the potentiality is enough").

Put simply, this Court may not properly certify any class when the record indicates that interchange fees benefit some members of the putative class. *See, e.g., Danvers Motor Co. v.*

Ford Motor Co., No. 07-2287, 2008 U.S. App. LEXIS 19354, at **16-19, 23-24 (3d Cir. Sept. 12, 2008) (decertifying class of Ford dealers because some dealers benefited from the alleged unlawful conduct through, among other things, rebates and increased sales). As discussed more fully below, there is concrete evidence that numerous members of the putative class do benefit from the interchange system that plaintiffs seek to adjudicate as unlawful, and ultimately to enjoin. Because the same counsel and plaintiffs seek to make identical claims on behalf of all members of both the putative damages and injunctive relief classes, this conflict permeates the case and requires denial of class certification in its entirety.

2. *Rule 23(b)(2)'s "Cohesive Class" Requirement*

The prohibition against permitting certification of a class when the named plaintiffs have interests antagonistic to some members of the class applies with equal (if not greater) force to plaintiffs' request to certify an injunctive relief class under Rule 23(b)(2). Rule 23(b)(2) demands that the proposed class be "cohesive." *Barnes*, 161 F.3d at 142-43; *see also In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. 61, 75 (S.D.N.Y. 2002). As with Rule 23(a)(4), if the proposed relief has the *potential* to harm absent class members, a Rule 23(b)(2) class cannot be certified. *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). And where, as here, the proposed injunctive relief class is so diverse that individualized inquiry will be needed to determine the effect of the proposed relief on class members, the class should not be certified. *Barnes*, 161 F.3d at 143; *MPT*, 2006 WL 38937, at *9.

With respect to a Rule 23(b)(2) class, the concerns regarding litigating on behalf of the interests of absent class members are heightened not only because of the absence of opt-out

rights from such classes, but also because of the systemic nature of the relief sought. Courts must be vigilant in ensuring that the proposed relief will not harm members of the proposed class; whether or not there are opt out rights, class representatives may not force unwanted relief on unsuspecting absent class members, or litigate in their name for systemic market changes that are not in their interests. For this reason the cohesion requirement of Rule 23(b)(2) sets a high bar. *See, e.g., In re St. Jude Med., Inc.*, 425 F.3d 1116, 1121-22 (8th Cir. 2005); *Larsen v. JBC Legal Group, P.C.*, 235 F.R.D. 191, 197 (E.D.N.Y. 2006) ("Rule 23(b)(2) certification presumes that the class is cohesive, a presumption which can be destroyed by showing individualized issues as to liability or remedy.").[47]

To determine whether to certify an injunctive relief class under Rule 23(b)(2), courts must look to the impact of the proposed prospective relief on members of the putative class. Here, the named plaintiffs seek injunctive relief eliminating default interchange rates and the challenged network rules.[48] As explained below, *infra* at Section II.B., imposing this new world (and it would have to be imposed because it is not a result that any competitive environment would generate) would harm many putative class members, making certification of the Rule 23(b)(2) class improper.

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[47] Those limitations are particularly apparent in complex commercial cases, where the proposed relief often has varying effect on the putative class members. In contrast, these tensions rarely appear in civil rights cases—the prototypical (b)(2) cases. Rule 23(b)(2) was "designed specifically for civil rights cases seeking broad declaratory or injunctive relief for a numerous and often unascertainable or amorphous class of persons." *Barnes*, 161 F.3d at 142 (quotations omitted); *see also Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 162 (2d Cir. 2001) (23(b)(2) class actions are "intended for cases where broad, class-wide injunctive relief is necessary to redress a group-wide injury.").

[48] Although the Complaint does not specify the injunctive relief plaintiffs' seek (*e.g.*, First Amended Complaint ¶ 311), it presumably tracks the but-for worlds plaintiffs have proposed in their memorandum in support of class certification.

B. The Record Demonstrates Fundamental Conflicts Between The Named Plaintiffs' Interests In The Interchange System And The Interests Of Thousands Of Members Of The Putative Class

1. *The Thousands Of Merchants Who Partner With Visa And MasterCard Member Banks To Offer Co-Branded Cards Benefit From The Current Interchange System And Would Be Harmed By The Proposed Relief*

Thousands of merchants have partnered with card issuers to offer co-branded credit cards. This includes numerous major U.S. merchants, as well as many smaller ones.[49] And co-brand merchants account for a sizeable percentage of total purchase volume on the networks. For example, in 2007, approximately of MasterCard's total volume and of Visa's total volume occurred at merchants with Visa or MasterCard co-brand deals.[50]

As detailed below, co-branding opens opportunities for increasing merchant revenue in several ways, including sharing with issuers the very interchange fee revenue challenged by the named plaintiffs here. Whether the revenue stream flows directly or indirectly from interchange, the connection to interchange holds: Co-branding programs in their many forms are funded largely by interchange fees.[51]

And the named plaintiffs' attack on interchange fees is not the only way they are pursuing goals antagonistic to the thousands of co-brand merchants in the putative class. The named plaintiffs are also challenging the network rules that allegedly restrain merchants from discouraging the use of higher-interchange cards at the point of sale. These higher-cost cards include the co-brand cards that are so valuable to the thousands of co-brand merchants.

The named plaintiffs know that the co-brand merchants have an interest in the current interchange system that is fundamentally at odds with their own. In their brief, they implicitly

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[49] Snyder Decl. ¶ 108.

[50] Snyder Decl. ¶ 107.

[51] Snyder Decl. ¶¶ 103-105.

acknowledge that "merchants who have co-brand or affinity card arrangements with issuing banks" may be made worse off than they are at present, and that such merchants "could be . . . excluded from the class if necessary."[52] But excluding those merchants with current co-brand or affinity agreements from the proposed class would not resolve the potential conflicts between putative Rule 23(b)(2) class members, because it is not possible to know in advance which merchants would be offered a co-brand or affinity card arrangement, and would therefore be harmed by the future injunctive relief plaintiffs seek. In any event, such an acknowledgment is telling, even in this vastly understated form. The record does not permit the named plaintiffs to represent the class they ask this Court to certify.

a. *Co-Brand Merchants Receive Substantial Revenues from the Interchange Fees Challenged by the Named Plaintiffs*

1. Interchange revenue generated from transactions at other merchants flows back to co-brand merchants. To begin with, many putative class members receive interchange revenue as a percentage of purchases made on their co-brand cards from other putative class members. Such arrangements mean that some members of the class directly benefit from the interchange fees generated by cardholder transactions with other members (which are challenged in this litigation). Examples are numerous.

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[52] Pls.' Br. at 67-68 & n. 154.

[53] Snyder Decl. ¶ 104.

[54] REDACTED

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The impact of the relief the named plaintiffs seek on this substantial source of income to thousands of co-brand merchants could not be more direct. These revenues are tied to the volume on purchases with other merchants—*i.e.*, other putative class members. Indeed, Dr. Snyder has analyzed the financial terms and results from several such co-brand arrangements, concluding that a decrease in interchange fees will cost many merchants more than it would benefit them.[58] Accordingly, the interests of many putative class members with co-brand agreements and those without are directly antagonistic.

2. *Interchange revenue to co-brand merchants from profit sharing programs*. Under the terms of many co-brand agreements, issuers are required to pay co-brand merchants a part of the issuers' profits, to which interchange fees contribute.[59] The Chase-TJX co-brand arrangement provides one example of a co-brand agreement under which the merchant shares interchange fees with the issuer. Under the agreement, TJX Companies, Inc. (T.J. Maxx's parent company) shares in the profits on the co-brand program, including, among other things, profits from

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55 Snyder Decl. Ex. 17.

56 Snyder Decl. Ex. 17.

57 *See generally* Snyder Decl. Ex. 17 (listing interchange payments to several co-brand merchants); Ex. 4, B.

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58 Snyder Decl. ¶¶ 116; 136.

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As Dr. Snyder outlines, if the named plaintiffs were to succeed in this litigation, merchants like would lose revenues from their co-brand deals, including interchange, basis points on purchases with other merchants and marketing support payments.[63] Other merchants that receive a share of their programs' profits under their own co-brand deals would likewise lose those same sources of revenue.

3. Rewards programs funded by interchange generate incremental sales and revenue to co-brand merchants. In addition, the vast majority of co-brand programs have an associated rewards program supported by interchange revenue.[64] These rewards programs generally award points to cardholders based on spending. These programs generate revenue for co-brand merchants in a variety of ways.

Some programs involve the issuing bank purchasing from the co-brand merchant the "rewards" that will be distributed to consumers. REDACTED

[60] Ex. 39,

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[61] CHASE003415465 ("Upon the execution hereof, Bank shall pay to Company ten million dollars ($10,000,000) ('Prepaid Program Fee').").

[62] *Id.* at § 2.06(b) (CHASE003415380). Although Bamberger reviewed this co-brand contract (one of only two that he read), he could not predict whether Chase would have in a but-for world without interchange fees or with greatly reduced interchange fees. Ex. 1, Bamberger Dep. at 471:21-473:3. Indeed, he had no view on whether the terms of the would be the same in his but-for world and acknowledged that examination of the actual terms of any given co-brand contract would be necessary to make that determination. *Id.* at 470:16-471:14, 479:23-480:13.

[63] Snyder Decl. ¶¶ 105, 136.

[64] *Id.*

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Even Dr. Bamberger admitted that these programs generate "substantial revenues" for participating merchants totaling in the billions of dollars.[68] The named plaintiffs attack the interchange fees that fund those same revenues.

Rewards programs are also beneficial to co-brand merchants for other reasons. On average, rewards card portfolios have "25% higher activation rates, 25% higher revolving balances, 230% higher spend and 70% lower attrition rates than non-rewards portfolios."[69] This increased activation and spending immediately translates into additional revenues for the co-brand merchants, because, as discussed above, those merchants (i) receive payments from issuing banks or networks based on purchases at other merchants; and (ii) sell their rewards points or miles to issuers.

And the benefits extend still further. Some rewards programs are designed to direct

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65 Ex. 69, Chase-United Program Agreement (July 1, 2001), CHASE003421288-373, at CHASE003421369.

66 Snyder Decl. Ex. 17.

67 Ex. 70, US Airways, Inc.-Bank of America, N.A. Co-Brand Card and Merchant Services Agreement (May 20, 2003), at § 6.1 (BOFAIC06513368) (BOFAIC06513336-462).

68 Ex. 1, Bamberger Dep. at 455:21-456:4, 456:9-15 ("A: The co-brand contracts sometimes involve the sale by the merchant to the issuer of certain products and, so, REDACTED . . A: Well, I recall the -or actually, maybe a different frequent flyer mile deal that I remember reading about; it was in the . So if you include all that, it would very well be that it's more than ").

69 Ex. 71, Packaged Facts, Marketresearch.com, *Co-Branded and Affinity Credit Cards in the U.S.* 42 (May 2007).

future sales back to the co-brand merchant and build customer loyalty. Starbucks Duetto Visa cardholders, for example, earn Duetto Dollars on purchases with Starbucks and other merchants, and they may redeem their Duetto Dollars for purchases at Starbucks.[70] Similarly, Marriott Rewards Visa Signature cardholders earn Marriott Rewards points that, among other things, may be redeemed for merchandise.[71]

In short, co-brand merchants benefit in myriad ways from interchange fees. The relief sought by the named plaintiffs threatens those benefits and creates a clear conflict between the interests of the named plaintiffs and the co-brand merchants they seek to represent.[72]

b. *Co-Brand Merchants Benefit from the Challenged Network Rules*

It is not only the attack on interchange fees that places the named plaintiffs at odds with co-brand merchants. It is also their challenge to network rules that prohibit merchants from discriminating among different types of cards, by, for example, surcharging one card instead of another. Co-brand merchants would be adversely affected by elimination of those rules. The core purpose of plaintiffs' challenge to the networks' rules is to permit merchants to discourage the use of higher cost cards by imposing surcharges on them or otherwise discouraging their use

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70 *See* Starbucks Duetto Visa Card Rewards and Benefits, http://www.starbucks.com/card/duetto_rewards.asp (last visited Oct. 2, 2008).

71 *See* Marriot Rewards, http://www.marriott.com/rewards/use-points.mi (last visited Oct. 2, 2008).

72 Two of the named plaintiffs (Payless and CHS) have co-brand programs. . Ex. 40, CHS-National City "Affinity Credit Card Agreement," at Article 3.1-3.2 (July 8, 2004) (NC IF 120031887-96). . Ex. 4, B. Cooke Dep. at 344:10-346:8. It has high expectations for the card's success. Snyder Decl. ¶¶ 111-12. Named plaintiff National Association of Community Pharmacists ("NCPA") apparently had a co-brand program at one point. *See* Ex. 41, Addendum to the National Association of Retail Druggists Amended and Restated Agreement (NCPA 000018-23). But the operative agreement lapsed years ago, *id.*, and NCPA produced no documents showing that it renewed that co-brand program or commenced a new one, or other evidence regarding the terms of any current co-branding arrangement. These deals aptly illustrate the custom-made terms and unique circumstances found in thousands of co-brand and affinity arrangements, each of which requires careful review to determine the parties' rights, obligations and benefits.

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at the point of sale. But, as noted above, the higher cost cards include the very co-brand cards that produce such substantial and varied benefits to many members of the putative class.

Removing the rules preventing surcharging weakens the value to the co-brand merchant of the co-brand relationship. For example, Starbucks risks having other coffee shops impose surcharges on its Duetto Visa card. Such surcharges would harm Starbucks by (i) increasing the cost to the consumer of using it; (ii) as a result of the higher cost, diminishing the frequency of the card's use, and REDACTED ; and (iii) denigrating the Starbucks brand because of the inconvenience and/or added costs for Starbucks Duetto cardholders. Even plaintiff Payless's Director of Customer Relationship Management recognized the potential negative impact surcharging could have on its co-brand card, testifying that if competitors imposed surcharges on the Payless Possibilities co-brand card, it "would adversely impact the program['s] performance."[73] The same "adverse effect" would be felt by the thousands of other co-brand merchants that the named plaintiffs seek to represent.[74]

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[73] Ex. 4, B. Cooke Dep. at 352:18-354:7.

[74] Moreover, determining whether specific putative class members—including merchant issuers and merchants with co-brand programs—would be harmed by the proposed injunctive relief would require a detailed inquiry into the potential benefits and costs to each merchant. This, too, mandates denial of the Injunctive Relief Class because such inquiries defeat the purpose of 23(b)(2) classes. For example, in *Rezulin*, the court denied a motion to certify a Rule 23(b)(2) class seeking medical monitoring where "the need and desire of individual subclass members for such a remedy varies considerably." 210 F.R.D. at 75; *see also Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 317 (5th Cir. 2007) (vacating certification of 23(b)(2) class because, among other things, some class members may have profited from alleged wrongdoing). Similar problems mandated denial of an injunctive relief class in *In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation*, 209 F.R.D. 323 (S.D.N.Y. 2002), a class action arising from alleged well contamination. There, the court denied certification because of differences in "how the contamination affects each plaintiff" and the "nature of relief that each will require." *Id.* at 344.

2. *Many Merchants Negotiate Interchange Reductions Or Rebates Directly With Visa And MasterCard And Would Be Harmed By The Relief The Named Plaintiffs Seek*

Co-brand relationships are not the only way members of the putative class benefit from the current interchange system. Many U.S. merchants benefit from unique deals with Visa, MasterCard, and their member banks that directly and substantially reduce their payment card acceptance costs.

REDACTED

In the last 6 years alone, at least merchants have negotiated reduced interchange or interchange rebates directly with Visa and/or MasterCard; the transactions for such merchants represent about of MasterCard's total volume.[77] The payoff for these merchants is significant. For example, obtained interchange rebates from , reducing 2007 aggregate debit interchange fees applicable to transactions at

REDACTED

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[75] *See, e.g.*, Ex. 42,

REDACTED

This stands in stark contrast to this Court's finding eight years ago that neither Visa nor MasterCard had, at that time, "ever engaged in merchant-specific pricing for any of its products." *Visa Check I*, 192 F.R.D. at 85.

[76] Visa's volume-based tier structure for supermarket interchange categories provides one example of how larger merchants have lower interchange rates than their smaller competitors. Visa U.S.A., Inc., *Visa USA July 2008 Interchange Reimbursement Fees* 2-4 (July 18, 2008), *available at* http://usa.visa.com/download/merchants/visa-usa-july2008-interchange-rates.pdf (last visited Sept. 26, 2008); *see also* Ex. 7, Delhaize 30(b)(6) Dep. at 160:15-161:4; Ex. 81, Safeway 30(b)(6) Dep. at 293:12-294:5; Ex. 12, Kathy Hanna Dep. at 235:15-237:6.

[77] Snyder Decl. ¶ 122, Exs. 19, 20A-B.

[78] Other merchants, such as REDACTED have negotiated similar interchange reductions and rebates.[79]

As Dr. Bamberger conceded, the current interchange system provides an opportunity for such merchants to achieve a competitive cost advantage over others.[80] That advantage in the market in which the merchant competes is valuable, and can allow them to gain greater market share, particularly for those merchants who market themselves aggressively based on low prices.[81] The named plaintiffs, who are asking this Court to eliminate network-established default interchange rates, are seeking relief in order to eliminate such a competitive advantage on the part of many merchants with which they compete. Indeed, one class plaintiff—National Grocers Association—even recognized this conflict, stating in its internal documents that top national retail chain merchants have been able to "negotiate sharply discounted interchange fees directly with Visa, MasterCard" while the majority of grocery retailers—*i.e.*, "second and third tier" grocers, which is NGA's constituency—"are essentially subsidizing the lower interchange fees of their largest retail competitors."[82] Among other things, NGA's explicit response included

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[78] REDACTED

[79] *See* Snyder Decl. Exs. 19, 20A-B, 21; *cf.* Ex. 7, , Dep. at 130:10-131:8; Ex. 12, Dep. at 267:7-20, 306:24-308:15; Ex. 5, Dep. at 67:11-19; Ex. 8, Dep. at 516:8-517:7.

[80] Ex. 1, Bamberger Dep. at 400:24-401:17 ("Q: Let me just ask you a question about those special rebate deals. If a merchant has a special relationship that results in lower net interchange for it then for its competitor do you agree that that represents a competitive advantage for that merchant because it lowers that merchant's overall cost? A: All else equal, I think a firm that has lower costs than its rivals, that can be a competitive advantage for it. Q: Did you make any inquiry in an attempt to quantify the competitive advantage that merchants with special interchange deals have over their competitors, over their rivals? A: No, again, I didn't view that as relevant to my analysis.").

[81] Ex. 19, G. Taylor Dep. at 66:4-19 ("Q: Okay. Now, if we shifted to a world where, for whatever reason, all merchants paid the same interchange, so Wal-Mart and the convenience stores are now paying the same interchange, one effect would be that Wal-Mart would lose its current competitive advantage over convenience stores as you just described. Is that -- do you agree? ... A: I agree that they would lose a competitive advantage in pricing, yes.").

[82] Ex. 51, *A Special Report to the NGA Membership*, July 28, 2005 (NGA 02734 – 35).

bringing this litigation, to seek to end this competitive advantage enjoyed by the very class members that NGA now seeks to represent.[83]

To the extent other merchants, including the proposed class representatives, have not negotiated such arrangements, their interests are not aligned with those merchants that have entered into such arrangements.

3. *Merchants That Issue Cards On The Visa And MasterCard Networks Benefit From Interchange Fees*

Some U.S. merchants also *issue* Visa and MasterCard cards, and are members of Visa and MasterCard. These include Target, Nordstrom, State Farm, GE and Cabela's, among others. In all relevant respects these merchants are situated identically to other issuers, including the bank defendants. They receive interchange revenue on purchases made with their cards from other merchants—*i.e.*, other members of the putative class. Like other issuers, the higher the spending on their cards, the more interchange-based revenue they receive. Merchant issuers would lose all of that interchange revenue if interchange rates were reduced to zero. For example, Target's pre-tax income from its card business was $714 million, just in 2007.[84] These merchant issuers benefit from higher interchange rates and therefore would be harmed by the relief the named plaintiffs seek here.[85]

Merchant issuers, like other issuers, also benefit from network rules the named plaintiffs seek to eliminate. As explained above, those rules promote acceptance and usage of the Visa and MasterCard cards they issue. Indeed, these issuers in particular count on the rules to ensure that other, competing merchants—like the named plaintiffs—will accept their cards without surcharging or otherwise discriminating against them.

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[83] *Id.*

[84] *See* Snyder Decl. ¶ 119.

[85] *See* Snyder Decl. ¶¶ 121, 136.

Not surprisingly, card-issuing merchants have expressed their opposition to plaintiffs' efforts to cap interchange rates. For example, Kevin Knight, the head of Nordstrom's card business, wrote to members of Congress expressing his opposition to plaintiffs' lobbying efforts there. Nordstrom believes that if its interchange revenue were reduced, it would need to increase the interest and fees it charges to its cardholders or decrease the benefits those cardholders now receive.[86] In essence, Nordstrom would "much prefer market competition to regulated pricing," which is exactly what the plaintiffs seek here by demanding interchange rates set at either zero or some other artificially imposed level.[87]

4. Numerous Other Merchants Could Be Harmed By The Relief Plaintiffs Seek

The proposed relief would also affect numerous other merchants, and in many cases, merchants would be harmed by it:

- **Shifts to Amex and Other Methods of Payment.** If, as Dr. Bamberger reasons, a reduction in interchange fees would lead to higher cardholder fees and lower rewards on Visa- and MasterCard-branded cards, this would lead some cardholders to increase their usage of other methods of payment—including Amex, checks and cash—that are more expensive for many merchants.[88]

- **Rewards redemption merchants.** Reducing or eliminating interchange fees would reduce rewards, and the corresponding payments issuers make to merchants to fund such rewards. As noted above, issuers fund rewards programs through interchange fees.[89]

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86 Ex. 52, Letter from Kevin Knight, Executive VP Nordstrom, Inc. and Chairman/CEO Nordstrom fsb, to H. Comm. on the Judiciary (regarding H.R. 5546).

87 *Id.*

88 Snyder Decl. ¶¶ 128, 134; *see infra* note 186 (outlining significant costs to merchants from methods of payment other than Visa and MasterCard cards).

89 *See, e.g.*, Ex. 20, P. Wesner Dep. at 126:25-127:7 (*Discover Fin. Servs. v. Visa U.S.A. Inc.*, 04-CV-7844, S.D.N.Y., Apr. 5-7, 2007); Ex. 53, E-mail from Ed Ebel to Valerie Gelb, MEMO: COF Superprime Transactor Product," April 12, 2002, MCI_MDL02_08002323 - 25 at MCI_MDL02_08002324.

In short, there is no cohesion or uniformity of interest among co-brand merchants, merchants that negotiate rate reductions, merchant issuers, and other members of the putative class. The widely divergent impact of the relief requested here—potentially benefiting some merchants, while actually harming others—precludes class treatment in this case.

C. The Named Plaintiffs Have Not Even Tried To Carry Their Burden To Establish That Their Interests In This Litigation Are Not Fundamentally Antagonistic With Those Of Other Putative Class Members

Notwithstanding these facts, in a single page of their brief, the named plaintiffs try to assure the Court that their interests are not in conflict with those of other putative class members. To the extent there is any argument at all in defense of this conclusory assertion, the named plaintiffs appear to be asserting that whenever they assert a right "to recover for overcharges for Sherman Act violations, their interests coincide with those of the class."[90] This bald (and erroneous) legal assertion floats free from even the most basic facts. It falls far short of what the law requires plaintiffs to demonstrate before they may represent a class with interests as varied as those here.

The named plaintiffs' assertion of lack of conflict fails at the most basic level. Quite apart from plaintiffs' inaccurate characterization of current interchange rates as an "overcharge," plaintiffs seek more than damages here. They also seek an injunction that would, on a going forward basis, preclude the networks from establishing default interchange rates. The named plaintiffs have simply said *nothing* at all about how their request for such relief can be squared with the interests of the numerous class members discussed above who benefit from interchange.

The law neither requires nor allows courts to ignore business realities and economic complexity in evaluating the potential for conflicts of interests in an antitrust class action. Rule

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[90] Pls.' Br. 34-35.

23(a)(4) (and Rule 23(b)(2)) preclude a named plaintiff from representing a class "where the economic reality of the situation leads some class members to have economic interests that are significantly different from—and potentially antagonistic to—the named representatives purporting to represent them." *Valley Drug*, 350 F.3d at 1195. Defendants have described in detail above the complex "economic circumstances" that give rise to fundamentally "different economic interests" between the named plaintiffs and thousands of putative members of the class. The named plaintiffs ignore those economic realities, and have therefore failed to meet their burden to establish the absence of a conflict.

For substantially the same reason, even if the plaintiffs had satisfied Rule 23(a)(4)'s adequacy requirement, which they have not, this Court still should reject the motion to certify an injunctive relief class under Rule 23(b)(2). Rule 23(b)(2) is not a permissible mechanism for merchants like the proposed class representatives to impose a legislative solution that would harm many members of the putative class. Yet that is exactly what they seek to do here. Plaintiffs implicitly recognize as much by claiming only that "virtually all" class members have been injured by defendants' alleged conduct.[91] Dr. Bamberger acknowledged that he has not concluded that no putative class members would be harmed by the injunctive relief the named plaintiffs seek.[92] Rule 23(b)(2) requires more than that because if the (b)(2) class is certified, *all* merchants will be affected by the judgment. *See MPT*, 2006 WL 38937, at *9.

Further, plaintiffs rely on the decision in *Visa Check II* for their broad, unqualified contention that "overcharge cases" always lack conflicts. But *Visa Check II* stands for no such thing. It concerned a rule requiring merchants who accepted credit cards to also accept debit cards bearing the same network brand. There was no argument in that case that the relief sought

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[91] Pls.' Br. 63.

[92] Ex. 1, Bamberger Dep. at 430:13-431:17.

would cause absent class members to forfeit sources of revenue they receive as the result of defendants' supposedly conspiratorial activity. Here, by contrast, thousands of absent class members stand to lose those revenues and other benefits if the named plaintiffs succeed.[93] Those conflicts prevent class certification.

III. INDIVIDUALIZED ISSUES WOULD PREDOMINATE IN ANY EFFORT TO LITIGATE THE PLAINTIFFS' INTER-NETWORK DAMAGES CLAIM AS A CLASS

Even if plaintiffs could satisfy the requirements of Rule 23(a)(4), they would still need to demonstrate that common issues will predominate over individual issues under Rule 23(b)(3) with respect to their damages claims. Here, injury in fact is an essential element of plaintiffs' claims, and it cannot be demonstrated with classwide proof. *See Cordes*, 502 F.3d at 106 (stating that an "antitrust cause of action" requires the plaintiff to prove that it "has indeed suffered harm, or injury-in-fact") (internal quotations omitted).[94] Because a class action is supposed to establish (or defeat) a right of recovery in the entire class, it is "of utmost importance" to determine "whether 'impact' should be considered an issue common to the class and subject to generalized proof, or whether it is instead an issue unique to each class member, and thus the type of question which might defeat the predominance requirement of 23(b)(3)." *Alabama v. Blue Bird*

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[93] Plaintiffs' reliance on *Fears*, *Carbon Black*, and *Polyester Staple* is likewise incorrect. None of those cases concerned intra-class conflicts where some class members would actually be worse off financially if the plaintiffs succeeded, as is the case here. For example, in *Fears*, a class of models sued modeling agencies alleging that the agencies fixed commissions, but the class did not include any models who profited because of the alleged conspiracy. *Fears v. Wilhelmina Model Agency, Inc.*, No. 02 Civ. 4911 HB, 2003 WL 21659373, at **3, 6 (S.D.N.Y. July 15, 2003) (noting that all class members "share a common interest in proving the existence, scope and effect" of alleged conspiracy). *Carbon Black* and *Polyester Staple* are inapposite for the same reason. *See In re Carbon Black Antitrust Litig.*, No. Civ. A. 03-10191-DPW, MDL No. 1543, 2005 WL 102966, at **1, 13-14 (D. Mass. Jan. 18, 2005) (noting that named plaintiffs had "same core objectives as would absent class members"); *In re Polyester Staple Antitrust Litig.*, MDL No. 3:03CV1516, 2007 WL 2111380, at **11-12 (W.D.N.C. July 19, 2007) (finding that differences among class members in degree of injury was, by itself, insufficient to defeat certification under Rule 23(a)(4)).

[94] Of course, ultimately the plaintiff must prove that it has suffered an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). As discussed below, the question whether putative class members suffered any harm of any type at all is individualized and not amenable to classwide resolution.

Body Co., 573 F.2d 309, 320 (5th Cir. 1978). If injury-in-fact can only be determined after consideration of individualized facts, and is not susceptible to generalized proof at trial, class certification should be denied. *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 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").[95]

As discussed above, *Miles* requires plaintiffs to put forward now the factual basis they and their experts will rely upon to demonstrate injury on a classwide basis. 471 F.3d at 41-42. The record that plaintiffs and their expert have compiled, and the assertions they put forth, do not withstand even casual critical analysis, much less the "rigorous scrutiny," *Falcon*, 457 U.S. at 161, that this Court should apply. As set forth below, there is no basis for certifying a damages class to litigate either the inter-network conspiracy claim or the intra-network conspiracy claims.

A. Plaintiffs Have Failed to Meet Their Burden To Demonstrate That They Can Establish Fact of Injury With Classwide Evidence

For their inter-network conspiracy claim, the named plaintiffs posit a but-for world "in which Visa and MasterCard do not conspire with each other to raise interchange fees" but rates are still "collective[ly] set" within each network, and the challenged network rules are still

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[95] *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, the range of factors affecting the price of the alleged price-fixing of pesticides made "the 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 Blue Bird*, 573 F.2d at 328 & n.36 (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")

imposed.[96] To demonstrate they can prove classwide injury for this claim, they offer nothing more than Dr. Bamberger's report and testimony that defendants had an "incentive" and ability to raise rates, and an unspecified benchmark/regression methodology.[97] These unsupported assertions are plainly insufficient to meet their burden under *Miles*.

Dr. Bamberger's proposed method proceeds in two steps. First, he claims he will compare actual, allegedly conspiratorial interchange levels to some "benchmark" unaffected by the alleged conspiracy. Dr. Bamberger acknowledges, however, that this comparison might not work because market conditions in his benchmark may be different from market conditions in the actual world he would be analyzing.[98] So he recognizes that he may need to undertake a second step, which is a regression analysis to eliminate any non-conspiratorial reasons for the differences in rates between the real and benchmark worlds.[99] In outlining this method, Dr. Bamberger has merely stated that he knows what rudimentary statistical processes may—or may not—be successful in measuring whether there was any classwide overcharge from an alleged price fixing conspiracy.

Plaintiffs' own authority indicates that Dr. Bamberger has failed to undertake even the most basic components of the empirical analyses that a proponent of class certification is obliged to produce. In *In re Linerboard Antitrust Litig*, 305 F.3d 145 (3d Cir. 2002), for example, the plaintiffs' expert conducted an "extensive empirical investigation," studied the structure of the industry, analyzed correlations in prices, supported the work with empirical "charts and studies," and "explained that the necessary data was available" before the court agreed to certify the class.

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96 Bamberger Decl. ¶ 95.

97 Pls.' Br. at 64.

98 *See* Bamberger Decl. ¶ 112; Ex. 1, Bamberger Dep. at 318:14-324:19.

99 Bamberger Decl. ¶ 112.

Id. at 153-54; *cf.* 2A Phillip E. Areeda et al., *Antitrust Law* ¶ 394a, at 355 (3d ed. 2007) (describing "basic steps in regression" as identifying variables that may be relevant, specifying a formula, collecting data, applying the regression technique, and interpreting the results).

Here, in contrast, Dr. Bamberger has no idea how he will conduct his hypothetical analysis, much less whether he will find any classwide answers. He has not confronted even the most basic choices regarding how to proceed. He has not decided what kind of benchmark he would use, whether it would be a foreign country, or whether he would instead choose the U.S. during a period of time before the alleged conspiracy began.[100] Indeed, he does not even know whether "pre-conspiracy data is available,"[101] which is to say that he does not even know whether there is any usable benchmark. If it is possible, and if he decides to use a purported pre-conspiracy time period as a benchmark, he does not even know when the purported conspiracy began. If he decides to use a foreign country as a benchmark, he has not chosen which one among hundreds to use.[102]

Because he has done nothing regarding the benchmark comparison he suggests, Dr. Bamberger also has no way of knowing whether he would need to conduct a regression to control for non-conspiratorial variables impacting rates. As for what variables he would control for in such a regression analysis, Dr. Bamberger does not know that either. He was only able to come up with three possible variables he "might" use in his regression.[103] He has not analyzed what other variables might be necessary to explain differences between the real world and his

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[100] Bamberger Decl. ¶ 112; Ex. 1, Bamberger Dep. at 318:14-24.

[101] *See* Ex. 1, Bamberger Dep. at 318:25-324:19; Bamberger Decl. ¶ 112.

[102] Ex. 1, Bamberger Dep. at 325:18-326:5.

[103] The three factors he identified are "(1) the degree of issuing-bank concentration; (2) the degree of acquiring bank concentration; and (3) the share of merchant sales accounted for by a particular payment card type." Bamberger Decl. ¶ 113.

unspecified benchmark,[104] or whether data is even available for all of these as-yet undetermined variables in his unspecified benchmark worlds.[105] He has not even considered such confounding factors as competition between the networks and Amex and Discover, and differences between the various networks in the level of card benefits offered.

At this point it is almost redundant to point out that Dr. Bamberger has no idea whether the rates were higher for all merchants during the relevant period than they would have been absent defendants' alleged conduct. Indeed, he has not studied the terms of any merchant's actual acquisition deal, in which the merchant discount rate (*i.e.*, what the merchant actually pays) is set,[106] so he cannot explain how his as-yet undefined methodology could prove impact on the rate any particular merchant actually paid. Nor has he reviewed a single document produced by any named plaintiff in this litigation.[107] In sum, given his absence of study and analysis of the facts pertinent to this case, Dr. Bamberger cannot say whether this alleged inter-network conspiracy negatively affected all of the different merchants (and categories), or whether some particular regression methodology (which remains wholly unspecified) would work at all here.[108]

Plaintiffs ask that this case be certified as a class, with all the litigation leverage that such a decision would entail, on the basis of Dr. Bamberger's speculation that he might later be able

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104 Ex. 1, Bamberger Dep. at 327:2-8.

105 *Id.* at 323:6-324:19.

106 *Id.* at 508:2-15.

107 *Id.* at 486:19-487:7 ("Q: Let me ask you: Did you review, at any time, any discovery documents produced by any plaintiff in this litigation? A: I don't recall reviewing Plaintiffs' documents, but colleagues of mine may have. Q: For these questions, I'm interested only in what you personally reviewed. So you personally do not recall reviewing any plaintiff-produced documents; is that correct? A: I don't recall. I don't recall reviewing plaintiff-produced documents.").

108 *Id.* at 330:12-331:17; Snyder Decl. ¶¶ 25, 69-75. This is underscored by the fact that in his report, in discussing how the regression method works, he asks the Court to "*suppose*" that after the work was completed it showed that the inter-network conspiracy increased rates 0.2 percent. Bamberger Decl. ¶ 115 (emphasis added).

to develop some as-yet unknown way to determine injury on a classwide basis. Even before *Miles*, such hopes (it can hardly be called an opinion) fell well short of the standards for certifying a class. *See, e.g., Piggly Wiggly Clarksville, Inc. v. Interstate Brands Corp.*, 100 Fed. Appx. 296, 299-300 (5th Cir. 2004) (affirming denial of class certification where plaintiffs' expert "did not offer a formula based on regression analysis, but merely opined that one could be found"); *Blades v. Monsanto Co.*, 400 F.3d 562, 575 (8th Cir. 2005) (finding no common impact because plaintiffs' expert failed to demonstrate how he could prove damage to each class member).[109] To certify this class in the face of *Miles's* more demanding standard would run entirely against the Second Circuit's insistence that a plaintiff provide evidence upon which a district court can base a determination that "each Rule 23 requirement has been met." 471 F.3d at 41.

B. There Is No Legal Presumption Of Classwide Injury-In-Fact

Because plaintiffs and their expert cannot point to any *facts* that support their view that common evidence will predominate on injury-in-fact, they invent a purported *legal* rule to do the work for them. Plaintiffs assert that, in a price-fixing case alleging an overcharge, the law assumes classwide injury-in-fact.[110] This attempt to invoke the so-called *Bogosian* shortcut, named for the Third Circuit's 1977 decision in *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 455 (3d Cir. 1977), cannot do the work that plaintiffs are unable to do for themselves.

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[109] *See also, e.g., In re Graphics Processing Units Antitrust Litig.* ("*GPU*"), No. C. 06-07417, 2008 WL 2788089, at *20 (N.D. Cal. July 18, 2008) (plaintiffs' expert's "[c]onclusory statements are not enough."); *Allied Orthopedic Appliances, Inc. v. Tyco Healthcare Group L.P. ("Tyco")*, 247 F.R.D. 156, 176-77 (C.D. Cal. 2007) (denying class certification where expert failed "to conduct any meaningful economic analysis that could persuade the Court that the benchmark in [defendant's] documents, or any other benchmark, could serve as a basis for a workable damage formula."); *In re Med. Waste Servs. Antitrust Litig.*, No. 2:03MD1546 DAK, 2006 WL 538927 at *8 (D. Utah Mar. 3, 2006) (It is "simply not enough that Plaintiffs merely promise to develop in the future some unspecified workable damages formula. A concrete, workable formula must be described before certification is granted."); *Klein v. Henry S. Miller Residential Servs, Inc.*, 94 F.R.D. 651, 661 (N.D. Tex. 1982) ("The Court finds the lack of data fatal to the Plaintiffs' offer of generalized proof . . . .").

[110] Pls.' Br. 64-66.

As an initial matter, the Second Circuit has never adopted the *Bogosian* shortcut, and it cannot be squared with *Miles*, which eliminated such presumptions in connection with class certification and required district courts to resolve factual disputes at the class certification stage. *Miles*, 471 F.3d at 41.[111] But the invocation of *Bogosian* is misguided for additional reasons as well.

The *Bogosian* shortcut is a doctrine that does not apply unless the plaintiffs come forward with some evidence that *every member of the class* has been injured in fact by allegedly unlawful conduct. *Bogosian*, 561 F.2d at 454 ("[W]hen an antitrust violation impacts upon a class of persons who *do have standing*, there is no reason in doctrine why proof of the impact cannot be made on a common basis so long as the common proof adequately demonstrates some damage to each individual") (emphasis added). *Bogosian* itself was careful *not* to adopt a rule that injury-in-fact has been established on a classwide basis whenever a plaintiff alleges a violation. The "'Bogosian short cut' . . . does not allow a court to *presume* antitrust injury because a *per se* violation occurred." *Weisfeld v. Sun Chem. Corp.*, 84 Fed. Appx. 257, 261 (3d Cir. 2004) (emphasis added).

Even in the Third Circuit, which decided *Bogosian*, courts will not apply the shortcut where, as here, plaintiffs fail to come forward with supporting evidence of classwide injury-in-fact. *See, e.g., Am. Seed Co. v. Monsanto Co.*, 238 F.R.D. 394, 398, 400 (D. Del. 2006) ("The

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[111] Plaintiffs will likely point to the Second Circuit's citation of *Bogosian* in *Visa Check II*, but that court did not adopt the *Bogosian* shortcut, and in any event, the Second Circuit specifically rejected its own reasoning in *Visa Check II* in *Miles*. 471 F.3d at 40.

And *Cordes*, upon which Plaintiffs rely, did not apply any presumption of injury-in-fact merely because the plaintiffs there alleged a horizontal price-fixing conspiracy. Rather, the Second Circuit in *Cordes* discussed how both parties' experts had offered competing formulas to determine whether class members were injured in fact, with the plaintiffs' expert purportedly offering a classwide method and the defendants' expert asserting that only individualized methods could produce an answer. 502 F.3d at 106-07. The Second Circuit sent the case back to the district court to make a finding as to which of the experts was correct. This Court should follow the same procedure—*i.e.*, determine which expert has better explained and empirically supported his conclusions—and refuse to certify the class.

Bogosian presumption of impact does not support class certification where there is no additional evidence of class-wide impact" and where plaintiffs' expert "has not supported his theory of presumed impact with any supporting documentation."), *aff'd*, 271 Fed. Appx. 138, 141 (3d Cir. 2008) ("[P]ost-*Linerboard* it is important that a putative class's presumption of impact under *Bogosian* be supported by some additional amount of empirical evidence."). For example, in *American Seed*, the Third Circuit recently refused to apply the shortcut because of inadequate expert analysis that mirrors Dr. Bamberger's shortcomings here. 271 Fed. Appx. at 141-42. In so doing, the court affirmed the district court's denial of class certification because, among other things, the plaintiffs' expert (i) admitted during his deposition that he had merely assumed "that all of the allegations in the complaint were true;" and (ii) acknowledged that "he had not substantiated his assumed theory by, for example, performing any analysis of the data made available to [plaintiffs] in discovery." *Id.*

Courts in other circuits have rejected similar attempts by plaintiffs to shortcut the impact analysis by relying merely on assertions, rather than actual evidence or analysis. In denying class certification, one court explained:

> Simply put, plaintiffs *presume* class-wide impact without any consideration of whether the markets or the alleged conspiracy at issue here actually operated in such a manner so as to justify that presumption. [Plaintiffs' expert] *assumes* the answer to this critical issue and plaintiffs, in turn, have asked the Court to rely on this *conclusion* as support for class certification. [The Court] cannot "presume" or "assume"—much less "conclude"—class-wide impact here because the evidence submitted during the class certification hearing demonstrates that such a presumption would be improper.

Blades, 400 F.3d at 570 (quoting and affirming district court's denial of class certification) (quotations omitted).[112]

[112] *See also In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 28-29 (1st Cir. 2008) (rejecting plaintiffs' attempt "to rely on an inference that any upward pressure on national pricing would necessarily raise the prices paid by individual consumers;" plaintiffs' theory "must include some means of

In sum, plaintiffs may not sidestep their obligation to demonstrate how they will prove fact of injury at trial through common evidence by misapplying the *Bogosian* shortcut.

C. Individualized Evidence Will Predominate At Trial For Plaintiffs' Inter-Network Conspiracy Claim

It is not hard to understand why plaintiffs and Dr. Bamberger have not dug into the facts and the economic circumstances of this market. Any thorough review of the marketplace would allow only one conclusion: In light of the hundreds of interchange categories and the thousands of merchants who individually negotiated interchange-related agreements, classwide proof of injury from the alleged inter-network conspiracy cannot be found.[113]

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determining that each member of the class was in fact injured"); *Tyco*, 247 F.R.D. at 168-69 (refusing to presume common impact where plaintiffs were not simply challenging a single price-fixing agreement that could reasonably be assumed "directly" to "affect[ ] purchasers in the same way"; "proof of fact of injury requires much more than a simple showing that the plaintiffs purchased an item in a world where average prices were inflated"); *Agric. Chems.*, 1995 WL 787538, at *4 (no presumption of impact where plaintiffs' expert "did no empirical study" and failed to show that "'the price structure in the industry is such that nationwide the conspiratorially affected prices . . . fluctuated in a range which, though different in different regions, was higher in all regions than the range which would have existed in all regions under competitive conditions'") (*quoting Bogosian*, 561 F.2d at 454); *cf. Linerboard*, 305 F.3d at 153 (affirming class certification where instead of relying exclusively on a presumption of impact due to the price structure of the industry, the district court also credited the testimony of plaintiffs' expert supported by "extensive empirical investigation" into the pricing patterns in the industry, industry structure, elasticity of consumer demand and the fungible nature of the relevant products).

[113] Dr. Bamberger's own analysis, if accepted, suggests that the alleged inter-network conspiracy would have minimal effect on interchange rates. He claims that Visa- and MasterCard-branded cards are not even reasonable substitutes, from the merchant perspective (Bamberger Decl. ¶¶ 65-66), indicating that he believes they do not compete to any significant degree. If he were correct, a conspiracy between Visa and MasterCard to not compete would have little effect on interchange levels. A class should not be certified in the face of an expert's contradictory assertions.

Moreover, without actually reaching any sort of unlawful agreement or "meeting of the minds," competitors in a concentrated industry—as plaintiffs claim the network industry is—often engage in "consciously parallel," or interdependent pricing that lead them to *lawfully* price above what Bamberger deems to be a "competitive" price. *See* 6 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶¶ 1428 – 29, 1432a-1432b, 1433a (2d ed. 2003) (stating that Sherman Act § 1 requirement of a "contract, combination, or conspiracy" is not satisfied by uniform pricing that results merely from recognized interdependence, and such "tacit price coordination among oligopolists" may result in "higher prices than would exist if the market were competitive"); *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 253-54 (2d Cir. 1987) ("[P]arallel conduct alone will not suffice as evidence of such a conspiracy . . . ."). Any such alleged interdependent pricing would necessarily remain in the but-for world, however, because it is lawful; plaintiffs can point to no evidence that it would have produced a different result from the real world. To the extent plaintiffs claim this is not the case, it will require an analysis for each interchange category, and each merchant that individually negotiates interchange.

There are *thousands* of merchants that have entered into individual interchange negotiations with Visa and MasterCard, or co-brand negotiations with issuing banks. Dr. Snyder's report demonstrates that, in 2007, merchants that have (or recently had) individually negotiated interchange rate arrangements accounted for approximately of MasterCard purchase volume, and, as noted above, merchants with Visa or MasterCard co-brand arrangements accounted for about of MasterCard purchase volume and of Visa purchase volume.[114] For these merchants, which already use their individual bargaining power to negotiate individual deals that are different from (and better than) standard default interchange rates set by Visa or MasterCard, it cannot be assumed that they would have gotten any different individually negotiated deal if the default rates *not* applicable to them were different. Determining whether any particular merchant would have received a lower interchange level in the but-for world would require analysis of each of these thousands of individually unique relationships, which cannot be done formulaically, as Dr. Snyder demonstrates.[115] Under similar circumstances where prices are individually negotiated, courts have repeatedly refused to certify a class. *Blades*, 400 F.3d at 570 (affirming denial of class certification because determining whether individual class members actually paid premiums "would involve a fact-intensive inquiry"); *Robinson v. Tex. Auto. Dealers Ass'n*, 387 F.3d 416, 423-24 (5th Cir. 2004) (holding that class certification in price-fixing litigation was inappropriate because of differences in car purchasers' negotiation techniques).[116]

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[114] *See* Snyder Decl. ¶¶ 107, 122.

[115] *See Id.* ¶¶ 35, 105, 109, 115-16, 118.

[116] *See also Exhaust Unlimited, Inc. v. Centas Corp.*, 223 F.R.D. 506, 513 (S.D. Ill. 2004) (finding that class certification was inappropriate because, among other things, "[p]rices and other contract terms may be individually negotiated and cover both the total invoice price and each component of that price," which led to "a diverse mix of base prices and ancillary charges and of products and services, with total invoice prices varying from customer to customer"); *Piggly Wiggly Clarksville, Inc. v. Interstate Brands Corp.*, 215 F.R.D. 523, 530-31 (E.D. Tex. 2003) (noting that, although bidding process began with a "fixed" wholesale price list, several

The named plaintiffs suggest that these individual negotiations are immaterial because they have alleged a conspiracy to set "list prices."[117] Putting aside the manifest flaws in their attempted equation of the networks' interchange fees with commodity price lists, the cases regarding "list prices" are clear that common impact cannot simply be assumed, and actual evidence must be examined. *See, e.g., In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 29 (1st Cir. 2008) (denying certification where plaintiffs merely assert that the alleged conspiracy led to an increase in car prices nationally; further evidence was needed to establish "that purchasers of those affected cars paid higher retail prices"); *Allied Orthopedic Appliances, Inc. v. Tyco Healthcare Group L.P. ("Tyco")*, 247 F.R.D. 156, 168-70 (C.D. Cal. 2007) (rejecting "list price" argument to establish common impact where plaintiffs failed to demonstrate that every class member paid an overcharge because of the alleged conspiracy).[118]

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factors affected the price actually paid by class members, including the "discount negotiated off the wholesale price list, and potentially the negotiating skills of the purchaser and the sales representative"), *aff'd*, 100 Fed. Appx. 296 (5th Cir. 2004); *Tyco*, 247 F.R.D. at 173-75 (predominance requirement not met where determining the defendant's "pricing in the but-for world will likely require a detailed look into the individual circumstances surrounding purchasers"); *In re Pharm. Indus. Average Wholesale Price Litig.*, 230 F.R.D. 61, 89 (D. Mass. 2005) ("Numerous courts have held that the need to examine individual negotiations or individual contracts to determine injury weighs against class certification") (citation and quotations omitted); *Agric. Chems.*, 1995 WL 787538, at **7, 9 (finding no predominance because plaintiffs' expert "offers no systematic way of determining, on a class-wide basis, the price each [class] member would have paid in the absence of the conspiracy" and criticizing plaintiffs' expert's failure to consider "various forms of rebates, discounts, and other means . . . routinely used to lower the effective price paid by customers," which "would be necessary . . . to reflect accurately the economic reality of these transactions"); *Burkhalter Travel Agency v. MacFarms Int'l, Inc.*, 141 F.R.D. 144, 154 (N.D. Cal. 1991) (finding that common issues did not predominate where "defendants price[d] nuts in different ways and purchasers ha[d] varying degrees of leverage over defendants"); *In re Beef Indus. Antitrust Litig.*, MDL Docket No. 248, 1986 U.S. Dist. LEXIS 24731, at *5 (S.D. Tex. June 3, 1986) (rejecting proposed class where "the evidence strongly indicates that prices actually paid . . . resulted from a multitude of varying factors differing from one area to another"); *Am. Custom Homes v. Detroit Lumberman's Ass'n*, 91 F.R.D. 548, 550 (E.D. Mich. 1981) (common issues did not predominate because, among other things, individual negotiations and discounts affected price).

[117] Pls.' Br. 66-67.

[118] *See also Freeland v. AT&T Corp.*, 238 F. Supp. 2d 130, 151 (S.D.N.Y. 2006) (plaintiffs failed to demonstrate that the alleged conspiracy inflated prices of all the handsets purchased by class members); *Beef Indus.*, 1986 U.S. Dist. LEXIS 24731, at *5 (rejecting class where actual prices paid by plaintiffs deviated from "Yellow Sheet" list prices "for a multitude of varying factors").

Here, as noted above,[119] the actual evidence demonstrates that many categories and individual merchants have used their bargaining power to gain competitive advantages and profit from the current interchange system. Extensive individual evidence would be required to determine whether they have been harmed by the alleged conduct.

Moreover, even as to merchants that do not have individually-negotiated rates, analysis of injury will still need to be performed separately for hundreds of interchange categories. To provide just one concrete example, Visa and MasterCard have actually *reduced* interchange rates for numerous categories[120] during the existence of the supposed inter-network conspiracy *whose aim was allegedly to raise or stabilize* rates, suggesting that the alleged conspiracy may have had no impact whatsoever on such categories. For example, Visa offered reduced interchange rates to utilities, quick service restaurants and gas stations to encourage acceptance of Visa cards.[121] Separate evidence would be needed as to each category to demonstrate that any conspiracy was actually effective. There is no simple "one-size-fits all" method of proof that would allow demonstration of common impact.

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[119] *See* section II, *supra*.

[120] Snyder Decl. ¶ 140, Exs. 9A-C, 10A-C.

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IV. PLAINTIFFS HAVE NOT MET THEIR BURDEN TO DEMONSTRATE THAT COMMON EVIDENCE WILL PREDOMINATE ON PROOF OF INJURY ARISING FROM THEIR INTRA-NETWORK CONSPIRACY CLAIMS

In an attempt to show that common proof exists for their *intra*-network conspiracy claims, plaintiffs and Dr. Bamberger advance two "alternative" but-for scenarios: (i) a "zero interchange" world, and (ii) a "reduced interchange" world. (Plaintiffs have also proposed a but-for world related to their claims challenging the corporate reorganizations of Visa and MasterCard, but proof of injury for those claims is wholly dependent on proof of injury for their intra-network conspiracy claims, as Dr. Bamberger admits.[122]) These jerry-rigged, unprecedented but-for worlds are fundamentally unsound, both legally and factually, and cannot provide a basis for class certification.

Plaintiffs' but-for worlds are impermissible as a matter of law, because they ultimately amount to nothing more than an impermissible challenge to *price levels*, which the antitrust laws do not recognize here. (*See* Part A below). Plaintiffs' but-for worlds are based on the *assumption* that everything about the bank card networks other than the interchange rates will remain unchanged. The law, however, is clear that plaintiffs must *prove* as a factual matter, and cannot just assume, the key elements of the but-for world before a class is certified. Because they have not done so, they have not met their burden to demonstrate that they can prove fact of injury with classwide evidence. (Part B.1).

In addition, the but-for worlds are unrealistic and implausible as a matter of fact. With respect to the zero interchange but-for world, plaintiffs' and Dr. Bamberger's analysis fails to address how elimination of interchange fees would fundamentally alter the *product* defendants offer to merchants, and therefore does not meet their burden of establishing they can prove

[122] Ex. 1, Bamberger Dep. at 562:12-565:22.

impact to merchants with classwide evidence. (*Id.*). And, even under plaintiffs' constricted view of their flawed but-for worlds, individualized inquiries would still be required with respect to interchange-based payments made to co-brand and issuer merchants, which make up a substantial volume of transactions on the Visa and MasterCard systems and cannot be analyzed formulaically with classwide evidence. (Part B.2). Plaintiffs' "reduced interchange" but-for world suffers from the same defects as plaintiffs' "zero interchange" world, and therefore cannot serve as a basis for class certification either. (Part C).

Critically, Bamberger made no attempt to perform any investigation or analysis to support his economically irrational "zero interchange" or "reduced interchange" but-for worlds:

- He undertook no analysis to determine how his proposed but-for worlds would have occurred in a competitive environment.
- He did not take into account the inevitable changes that Visa and MasterCard would be compelled to make to their networks to compete with other networks, like Amex and Discover, which would offer higher interchange payments to issuers and superior benefits to cardholders.
- He undertook no analysis regarding whether, in fact, there would be changes in interrelated network rules if default interchange fees were declared unlawful or substantially reduced—changes which could lead to higher discount rates for many merchants.[123]
- As discussed below, his foreign and domestic benchmarks are grossly inapposite, and he has done almost nothing to investigate them.[124] For example, only one of his "zero interchange" benchmarks (Iceland) even concerns credit cards, rather than debit cards or the Automatic Clearinghouse ("ACH") system.[125]
- He undertook no separate analysis of how plaintiffs could prove injury or damages related to debit cards,[126] despite claiming that such cards have "different characteristics" from credit cards.[127]

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[123] Ex. 1, Bamberger Dep. at 531:13-533:4.

[124] Snyder Decl. ¶¶ 84-87; Ex. 1, Bamberger Dep. at 227:9-235:13.

[125] Bamberger Decl. ¶¶ 76-77.

[126] Bamberger Decl. ¶¶ 89-94, 109-10.

[127] Bamberger Decl. ¶¶ 11-12, 42.

A. Plaintiffs Offer No Legal Or Economic Basis For Fixing All Interchange Rates At Zero, or Another Reduced Level

Throughout this litigation, and even in their current brief, plaintiffs have claimed to be challenging each network's rule-making activity as improperly "collusive." Based on that assertion, it initially appeared that plaintiffs would claim that interchange rates should be left to individual negotiations among the thousands of member institutions of Visa and MasterCard, or among issuers and millions of merchants; it seemed that plaintiffs were attacking each network's practice of imposing a single schedule of default rates across the network.

Only now, on their motion for class certification, do plaintiffs reverse field and state that they do *not* advocate a decentralized but-for world where merchants or acquirers negotiate with individual issuers to determine interchange arrangements. They do this now because, on this motion for class certification, plaintiffs must avoid treating their claims as if they present individual issues of fact regarding the rate levels that would be negotiated.

So, rather than individual negotiations, plaintiffs now propose that interchange ought to be set by default across the network—but at a level of *zero*. Although plaintiffs and Dr. Bamberger have tried to disguise this through semantics, this but-for world continues to involve the alleged network price-setting to the same extent as the current world, only at a lower rate. In particular, as Dr. Bamberger acknowledges, what plaintiffs propose is a world in which network rules *require* issuers to accept transactions from any merchant at the face amount of the cardholder receivable, and do so without the payment of a network-set default interchange fee.[128] By mandating that issuers accept merchants' receivables without a network default interchange rate, they are mandating a zero default interchange rate.

In their zeal to certify a class, plaintiffs have put forward a theory that renders their claim

[128] Ex. 1, Bamberger Dep. at 82:14-87:22, 200:14-203:9.

at odds with basic principles of antitrust law. Plaintiffs' assault on price levels here bears a striking resemblance to the attack on interchange fees that was rejected as a matter of law in the litigation related to ATM interchange fees. Notably, Dr. Bamberger was also plaintiffs' expert in that case, and offered testimony in support of plaintiffs' attempt to eliminate interchange fees. *In re ATM Fee Antitrust Litig.*, 554 F. Supp. 2d 1003, 1009 (N.D. Cal. 2008). The court flatly rejected plaintiffs' argument because it "goes to whether the *amount* of the interchange fee is appropriate, not to whether the fee should be *fixed*." *Id.* at 1016. As the court in that case recognized, a claim that interchange fees should have been set at zero "is not an antitrust argument at all, for it amounts to a dispute over prices and competition law is not concerned with setting a proper price." *Brennan v. Concord EFS, Inc.*, 369 F. Supp. 2d 1127, 1132 (N.D. Cal. 2005).[129]

Plaintiffs are thus asking this Court to cure an allegedly unlawful price fixing arrangement by replacing the network's default pricing—not with the price that would be determined by an allegedly competitive market—but rather with a price chosen by the plaintiffs. And, significantly, they are premising their but-for worlds on the assumption they can obtain a form of relief to which they are not entitled. They attempt to justify this result by arguing that joint ventures must set interchange levels "in the manner least 'restrictive of free

[129] *See also Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 24, 25 (1st Cir. 1990) (noting that "courts normally avoid direct price administration"); *Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593, 597 (7th Cir. 1996) ("the antitrust laws do not deputize district judges as one-man regulatory agencies."); *Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1340 (7th Cir. 1986) (courts should not become "little versions of the Office of Price Administration") (citation omitted); *Yankees Entm't & Sports Network, LLC v. Cablevision Sys. Corp.*, 224 F. Supp. 2d 657, 674-675 (S.D.N.Y. 2002) (asking a court to determine whether a price is "reasonable" amounts to "nothing less than price regulation of the kind undertaken by regulatory agencies—something for which both the federal courts and the antitrust litigation process are extremely ill-suited and which is, in any event, inconsistent with antitrust's fundamental market orientation") (quoting 3B Phillip E. Areeda & Herbert Hovenkamp., *Antitrust Law* ¶ 771b, at 195 (3d ed. 2008)) (internal quote marks omitted).

competition'"—which they define as "the level necessary to maintain . . . economic viability."[130]

Plaintiffs' arguments are wrong as a matter of law. In the first place, there is no "least restrictive" requirement for the setting of joint-venture *price levels,* which is a core activity of a joint venture and thus not subject to antitrust review. The case law on which plaintiffs rely has nothing to do with price levels. Indeed, plaintiffs' approach is directly at odds with substantial authority that courts are not permitted to regulate price levels under the guise of antitrust law. *See Berkey Photo v. Eastman Kodak Co.*, 603 F.2d 263, 294 (2d Cir. 1979) ("[J]udicial oversight of pricing policies would place the courts in a role akin to that of a public regulatory commission. We would be wise to decline that function unless Congress clearly bestows it upon us.").[131]

Second, there is no "least restrictive" requirement even for ancillary activities undertaken by joint venturers. To the contrary, the test applicable to such activities is whether they are "reasonably necessary" to the efficiency enhancing objectives of the venture.[132]

Third, there is no basis at all for plaintiffs' assertion that an alleged restraint is permitted only to ensure "economic viability." The question for purposes of plaintiffs' claims is whether an alleged restraint is pro- or anti-competitive—not whether price levels are necessary for "viability." *See United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 238 (2d Cir. 2003).

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130 Pls.' Br. 62.

131 *See also* 3A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 720b, at 7 (3d ed. 2007) ("The courts correctly regard as uncongenial and foreign to the Sherman Act the burden of continuously supervising economic performance, particularly the firm's day-to-day pricing decisions."); *supra* note 129.

132 *See generally* Fed. Trade Comm'n and United States Dep't of Justice, *Antitrust Guidelines for Collaborations Among Competitors* 24 (Apr. 2000) ("The Agencies consider only those efficiencies for which the relevant agreement is reasonably necessary. . . . In making this assessment, the Agencies consider only alternatives that are practical in the business situation faced by the participants; the Agencies do not search for a theoretically less restrictive alternative that is not realistic given business realities."); *see also United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1368 (5th Cir. 1980) (permitting multiple listing service operator to impose "reasonably ancillary restraints"; "Certainly the antitrust laws must allow reasonably ancillary restraints necessary to accomplish . . . procompetitive objectives.").

Admittedly, whether plaintiffs' alternative but-for worlds are impermissible because they attempt to set a lower price is a merits question. But, as demonstrated below, plaintiffs' construction of this unprecedented but-for world leads them to make other errors, and to entirely ignore individual issues of fact necessary for analysis of injury in plaintiffs' but-for worlds.

B. Plaintiffs Have Not Met Their Burden of Demonstrating that Common Evidence Will Predominate on Proof of Injury for Their Zero Interchange World

1. *Plaintiffs' Zero Interchange World Does Not Meet Their Burden To Demonstrate Injury With Classwide Evidence Because It Is Inappropriately Limited and Economically Irrational*

In addition to taking the unprecedented step of arguing that interchange rates should have been set at a level of zero, plaintiffs and Dr. Bamberger also argue that this reduction in interchange levels is the *only* fact the Court may consider in determining whether class members suffered injury in fact. Thus, plaintiffs argue that the Court need not—indeed, *must* not—consider whether other aspects of the inter-related network rules would change, much less the impact of likely changes on members of the proposed class.[133] As Dr. Bamberger testified, he believed he was required as a legal matter to keep "all else constant"—presumably, at the direction of counsel—for an "overcharge" analysis of injury. Plaintiffs have thus transformed the injury inquiry into a tautology: Plaintiffs can require prices to be set at a lower level, and no considerations other than price may be taken into account, therefore all class members have been injured.

This "all else equal" analysis ignores that setting a default interchange rate of *zero* would necessarily require restructuring the inter-dependent nature of the rights and obligations of all Visa and MasterCard participants. In the real world, if issuers lost over per year in

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[133] Pls.' Br. 64-67; Bamberger Dep. at 92-94, 141-43, 154-56, 168-72, 532-33, 542-44.

interchange revenue, their obligations to merchants, set by Visa and MasterCard rules, would necessarily change, as detailed below. This fundamental change to the very product offered to merchants must, as an economic and legal matter, be taken into account in the injury analysis. Because plaintiffs and Dr. Bamberger failed to even consider this issue, and instead have "held all else equal," plaintiffs have not conducted the required analysis of injury, and have not met their burden of establishing that they can prove injury with classwide evidence.

a. *There is No Legal Basis for Analyzing the Effects of Eliminating Interchange While Holding Constant All Other Rights and Obligations Defined by Network Rules*

Plaintiffs' "all else equal" analysis is contrary to substantial authority that, at the time of class certification, a but-for world must be grounded in economic reality. *See Blades v. Monsanto Co.*, 400 F.3d 562, 570 (8th Cir. 2005) (denying class certification and noting that "Plaintiffs cannot determine the 'but-for' marketplace necessary to establish antitrust impact without a reliable methodology to determine the premiums paid by farmers"); *Allied Orthopedic Appliances, Inc. v. Tyco Healthcare Group L.P. ("Tyco")*, 247 F.R.D. 156, 165 (C.D. Cal. 2007) (rejecting plaintiffs' common impact theory because "it does not adequately account for, evaluate, or even consider, the complexities in the" relevant markets).[134]

In particular, 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 just ignore the effect that a change in one term would have upon another in a but-for world. Simply put, plaintiffs are "not entitled to reformulate only part of the contract" between them and their acquirers to suit their needs on class certification. 2A Areeda et al., *Antitrust Law* ¶ 395f, at 400 (3d ed. 2007) ("[T]he plaintiff must determine the net effect of reformulating the entire

[134] *See also Exhaust Unlimited, Inc. v. Centas Corp.*, 223 F.R.D. 506, 511, 513 (S.D. Ill. 2004) (denying class certification because plaintiffs failed to propose a methodology for determining the but-for price that would reflect changes over time in the competitive dynamics of the market).

contract."). Plaintiffs cannot mandate a zero price and refuse to consider how this would otherwise alter the rights and responsibilities of merchants—*i.e.*, how the product offered to merchants would change.

In the bundling and tying context, for example, courts have adopted the common sense view that economically interrelated parts of a single contract cannot be isolated from one another in a "but for" world. In *Visa Check I*, this Court recognized that for purposes of an injury-in-fact "overcharge" analysis, courts may have to look at the "but-for" alleged impact on more than just the portion of the contract alleged to be illegal, even when different products are involved. 192 F.R.D. at 83-84. Accordingly, in *Visa Check I*, this Court examined not only whether there was evidence that the alleged price of the "tied" debit interchange rate would have declined for all merchants, but also whether there was common evidence that the "tying" credit card interchange rate would in turn not have risen sufficiently to offset the decline. *Id.*[135]

In the face of this common sense reasoning and case law—both of which prevent courts from adopting plaintiffs' blinkered methodology of dispensing with real world facts—plaintiffs argue that their disregard of economic reality is required by authority holding that where an "overcharge" analysis is performed, demonstration of a price overcharge is sufficient to show injury. But plaintiffs' "all else equal" assumption is inconsistent with the overcharge line of cases, because it would require the Court to ignore how their but-for world would have led to

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[135] *Cf. Nichols v. Mobile Bd. of Realtors, Inc.*, 675 F.2d 671, 677 (5th Cir. 1982) (affirming denial of class certification where services offered affected real estate commission actually charged); *Piggly Wiggly Clarksville, Inc. v. Interstate Brands Corp.*, 215 F.R.D. 523, 530 (E.D. Tex. 2003) (denying class certification, despite fact that bidding process for bread products began with "fixed" wholesale price list, because several factors affected price actually paid by putative class members, including "amount of products purchased, . . . the particular services included with each purchase, [and] delivery costs"); *Agric. Chems.*, 1995 WL 787538, at *7 (denying class certification where price paid was affected by "variety of factors," including services provided and "mix of product and service"); *Kenett Corp. v. Mass. Furniture and Piano Movers Ass'n*, 101 F.R.D. 313, 315-16 (D. Mass. 1984) (denying class certification where prices charged to customers of furniture moving services depended on "bundle of moving services that differs from mover to mover and customer to customer" and that "fixed" hourly rates were "only one factor in determining the total price that a customer will pay").

other changes to the payment system that impact the fees merchants would, in fact, have paid. In particular, as detailed below, the economic reality is that in plaintiffs' but-for world network rules would likely have changed, and led to compensation, in one form or another, of issuers by the acquirer/merchant side of the business (either via bilateral negotiations of interchange or otherwise). Nothing in the overcharge line of cases dictates that the Court must ignore these facts; to the contrary, the overcharge line of cases actually requires analysis of what the resulting charges to merchants would have been. *See, e.g., In re Visa Check I*, 192 F.R.D. at 82-85 (analyzing the effect that removal of alleged tie would have on interchange levels).

Moreover, plaintiffs themselves have not even conducted an overcharge analysis here: Under the "overcharge" approach, a plaintiff proposes the removal of an unlawful restraint in a but-for world—*i.e.*, an unlawful price-fixing agreement or tying restriction, as in *Visa Check*—and then determines what the price would have been in that more competitive world without the restraint. *See, e.g., id.*; *In re Cardizem CD Antitrust Litigation*, 200 F.R.D. 297, 302 (E.D. Mich. 2001) ("'overcharge' damages are measured as the price differential between what class members actually paid for the brand . . . and the lesser amount these favored purchasers . . . would have paid due to the larger discounts that would have been offered once generic competition entered the market."). Here, plaintiffs and Dr. Bamberger have done no such analysis. Rather than removing a restraint, and then determining what the price would have been in the then-more competitive environment, they assume they can have the price eliminated by judicial decree.

In circumstances where an overcharge analysis can be appropriate, as in a typical price fixing or tying case, it may make sense to hold, as some courts do, that demonstration of a classwide overcharge is sufficient to show injury. In that situation, the primary change that takes

place is that the removal of competitive restraints leads to lower prices. *Only* the price changes; *the product itself does not*. The goods in the cases relied on by plaintiffs—catfish, carbon black and a prescription drug like Cardizem—would not change in nature if their prices were lower; network services, in contrast, *would* change in the absence of interchange fees, as described below.[136] Here elimination of interchange fees would necessarily result in changes in the product itself—*i.e.*, the set of contractual obligations and standards running between the participants in a card transaction. Notably, *none* of the overcharge cases on which plaintiffs rely involves but-for worlds where the very product offered by defendants changes in such a fundamental manner, or where plaintiffs simply seek to dictate a zero price.[137] There is no logic in the case law or in economics for disregarding such a fundamental change for injury purposes.

In short, there was never any legal or other basis for Dr. Bamberger to ignore how eliminating or reducing default interchange fees would affect interdependent network rules, such as the honor all paper requirement, or impact putative class members. Yet Dr. Bamberger failed to undertake any such inquiry or analysis, conveniently leading him to render a set of opinions that has virtually nothing to do with the real world or realistic "but for" economic responses in a competitive marketplace. Plaintiffs have accordingly not carried their burden on this motion because they simply have not analyzed the relevant changes that would take place, and the individualized impacts such changes would likely have on the putative class.

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[136] Snyder Decl. ¶¶ 23a, 28, 89-92. *See Nat'l Auto Brokers Corp. v. Gen. Motors Corp.*, 60 F.R.D. 476, 490 (S.D.N.Y. 1973) (denying class certification and distinguishing cases involving commodity products like "salt, brass pipes, pharmaceuticals, gasoline, books, etc." from services, where "the amount of service required and the amount of compensation and basis for compensation vary according to the individual situation").

[137] Pls.' Br. 64-65.

b. *There is No Economic or Factual Basis for Assuming that The Inter-Dependent Rights and Obligations Defined by Network Rules Would Remain the Same*

Plaintiffs' and Dr. Bamberger's "all else equal" assumption is not only flawed as a legal matter, it is also wrong as a factual and economic matter. Eliminating interchange fee payments, as Dr. Bamberger's but-for world proposes, would fundamentally change the economic foundation of the payment card systems and impact merchants in widely differing ways. As noted above, Dr. Bamberger deemed this issue irrelevant as a legal matter, but he acknowledged that elimination of interchange fees must necessarily lead to changes; he believes, for example, that issuers may have increased cardholders fees and reduced rewards in his but-for worlds.[138] Indeed, it cannot be seriously disputed that significant changes would be necessary if interchange were eliminated: At least some issuers would immediately become unprofitable if they lost such revenue and "all else were held constant." REDACTED .[139] The idea that or other participants would keep acting the same way in these circumstances is a make-believe world, not an analytical but-for world.

Given the significance of this loss of revenue, the interdependent set of contractual rights and obligations defined by Visa and MasterCard rules would necessarily change. It would be economically irrational for Visa and MasterCard to maintain the inter-dependent rules as they are today—with all existing *benefits* to merchants, and *obligations* for issuers—if default interchange fees were zero. The reality of the marketplace is that Visa and MasterCard compete for issuers and cardholders with Amex and Discover (among others) using interchange

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[138] Ex. 1, Bamberger Dep. at 140:10-13 ("I do expect there to be other differences in the but-for world. I don't believe they're relevant for the overcharge analysis . . . .); *see also id.* at 174-75; Bamberger Decl. ¶ 88.

[139] Snyder Decl. ¶ 88.

revenue,[140] and would accordingly lose substantial business to them if interchange revenue were eliminated and nothing else changed. To "hold all else equal," as Dr. Bamberger proposes, would make Visa and MasterCard uncompetitive, and guarantee that certain issuers and cardholders (who Dr. Bamberger suggests would face higher fees and lower rewards within the Visa and MasterCard systems) would switch cards to Amex or Discover.[141]

Instead, to maintain a competitive position, Visa and MasterCard would necessarily alter their rules that define the rights and obligations of issuers, as Dr. Snyder explains.[142] Indeed, it has always been clear that the default interchange fees plaintiffs seek to abolish have been part and parcel with an inextricably intertwined and interdependent set of network rules that cannot simply be treated in artificial isolation from one another, as Dr. Bamberger proposes.[143] For example, as noted above, higher default interchange levels for premium cards are often expressly tied to requirements that issuers provide a threshold level of funding for cardholder rewards; thus, the *benefit* of interchange to issuers is expressly linked to their *obligation* to use such funds to pay rewards. Similarly, the current network requirement that *obligates* issuers to purchase *all* merchant receivables from acquirers—which, as noted above, is an essential component of Dr.

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[140] Ex. 19, G. Taylor Dep. at 61:13-62:22 ("Q: All right. If we turn to the second page of the exhibit, you'll see that you—the first paragraph, continues to say discussion of this new competition, and you say, 'Visa and MasterCard must now compete with card brands that by virtue of historically higher fees charged the merchant can pay the issuing banks more money.' What did you mean by that? A: What -- what I mean by this is the good news to the banks of the Second Circuit Court decision was really that they had two alternative products now, and that the competition from Discover and American Express would probably lead towards them offering to pay the bank more money for card usage of their brand because the bank is going to make or the issuer is going to make a business decision that says, 'I'm going to go with the brand that offers me the most revenue on this operation.' At the time, American Express had a higher interchange rate. At the time, Discover had a lower interchange rate than Visa and MasterCard overall. And the speculation was that if American Express could go to Chase and offer them, say, just out of the blue 20 basis points more to push the – to promote their card, that issuance may flow from – from Visa and MasterCard to the AMEX brand to get that additional revenue.").

[141] Snyder Decl. ¶ 92.

[142] *Id.* ¶¶ 23a, 28-29, 89-92.

[143] *Id.* ¶¶ 15-16, 28-29, 78, 88-92.

Bamberger's but-for world—cannot be isolated from the corresponding *benefit* issuers get from purchasing those receivables at a discount under current network rules—*i.e.*, the default interchange rates.

As Dr. Snyder outlines, it is absurd to suggest the networks would continue to require the exact same issuer obligations and merchant benefits, *e.g.*, the obligation to accept all merchant transactions, or to use interchange revenue to pay for cardholders' rewards, if the corresponding interchange benefit to issuers were reduced to zero.[144] But that is precisely what plaintiffs assume. Plaintiffs have accordingly failed to analyze how altering network rules related to default interchange rates—and the corresponding products defendants offer—would affect individual merchants, and therefore have not met their burden of establishing they can prove impact with common evidence. This failure alone requires denial of class certification under *Miles*.

c. *The Substantial Changes to Merchants' Rights And Obligations That Would Result From Plaintiffs' Zero Interchange World Would Lead to Differing Impacts on Individual Merchants*

As discussed above, a but-for scenario in which default interchange rates were entirely eliminated, but issuers retained all their obligations to the acquiring/merchant-side, with no other changes at the network level, is entirely unrealistic. Although, given the unprecedented changes proposed by the named plaintiffs, it is impossible to predict with precision what other worlds would have materialized at the network level, Dr. Snyder has identified several possibilities that are much more probable and which would have had differential impacts on merchants, leaving many no better off (and some worse off) than in the real world. As Dr. Snyder explains, three

[144] Even the President and COO of named plaintiff D'Agostino recognized the absurdity of a world where merchants would receive the benefits of payment cards without paying for them. Ex. 6, N. D'Agostino III Dep. at 137:24-138:23 ("there is no reason for me not to pay for Visa. Why should I get away with paying nothing? I'm paying something for cash. I might as well pay something for the card processing and stuff like that.").

potential alternatives for the networks would be to (i) eliminate the honor-all-paper rules, (ii) reduce issuer obligations, or (iii) impose a charge on acquirers (or merchants) for certain rights and services.[145] None of these alternative scenarios would have had consistent effects on merchants for purposes of the fact of injury analysis. Nor is any susceptible to classwide proof.

First, in the absence of default interchange rates, it is likely that network rules would change the obligations of issuers. One possibility, as noted above, would be elimination of the honor-all-paper requirements imposed on issuers, given the absence of any *ex ante* corresponding compensation obligation from participants on the acquirer/merchant side of the business. This change would almost certainly result in a system of bilateral negotiations with widely varying levels of negotiated interchange fees, leaving many merchants no better (and at least some worse) off, as Dr. Snyder details.[146] In fact, in two of plaintiffs' contemplated benchmarks—card networks in Finland and the Netherlands—where there are no centrally-set default interchange fees, that is precisely what happened: there are bilateral negotiations among system participants.[147] There is little question that such a system of bilateral negotiations on a U.S. scale would be extraordinarily inefficient and undesirable compared to the current system, and carry some significant risks of system disintegration. But compared to an unsustainable "services for free" structure of the sort posited by Dr. Bamberger, it is a far more realistic alternative.

Second, the networks could eliminate or reduce issuer obligations to provide certain guarantees and services beneficial to merchants. For example, current network rules placing the risk of default on issuers largely protect merchants from the consequences of cardholders' non-

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[145] Snyder Decl. ¶¶ 28, 89-91.

[146] *Id.* ¶ 90.

[147] *Id.* ¶¶ 86b & c.

payment. Issuer costs from such defaults are, in fact, higher than the interchange revenue they currently earn,[148] and this protection of merchants is part of what the default interchange system is intended to compensate issuers for. Eliminating the networks' requirements to provide this and other guarantees and services would leave merchants with an assortment of revised network services, affecting different merchants differently and likely leaving many no better off, and some worse off.[149]

Third, another alternative would be for Visa or MasterCard to restructure its system of charges and obligations to provide issuers with alternative economic incentives to issue Visa or MasterCard cards. For example, the network might charge merchants directly for a license fee for the ability to accept network cards and display the network's logo. The network would then use those and other fees to pay issuers to issue cards. The precise mechanism for replacing system revenue is unimportant. What is crucial is that acquirers (and indirectly, merchants) have for years willingly paid for payment card services, and there is every reason to believe that the networks and issuing banks would seek to retain some or all of that revenue. Plaintiffs have made no attempt to show that such individualized, alternative fees could be analyzed on a classwide basis.[150]

Simply put, alternative scenarios are much more realistic than plaintiffs' "zero interchange, all else equal" world, and require a merchant-by-merchant injury analysis. Plaintiffs' failure to even consider these more-plausible alternatives means they have not even

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[148] Gen. Accounting Office, *Increased Complexity in Rates and fees Heightens Need for More Effective Disclosure to Consumers,* GAO-06-929, at 99-100 (Sept. 2006), *available at* http://www.gao.gov/new.items/d06929.pdf (collecting data regarding rate of default by cardholders) (last visited Oct. 6, 2008).

[149] Snyder Decl. ¶¶ 28-29, 89-91.

[150] Plaintiffs and Dr. Bamberger cannot simply dismiss the possibility of such alternative arrangements on the ground that they would still entail "collective" action. Ex. 1, Bamberger Dep. at 651-53. As noted in section III.A, *supra*, plaintiffs' alternative but-for worlds for their intra-network conspiracy claims are both premised on the recognition that, as joint ventures, the Visa and MasterCard networks are inherently collective endeavors that require rules defining the terms on which venture members transact with one another.

begun to meet their burden under *Miles* to establish that they can prove their claims with common evidence.

d. *Plaintiffs' Foreign, ACH and Check "Benchmarks" Do Not Support Plaintiffs' Injury Analysis*

Plaintiffs' purported "benchmarks"—foreign debit systems, and U.S. ACH and check clearing systems—do not support the claim that interchange rates would be zero in the United States, without fundamental changes to the current interdependent rights and obligations of issuers, acquirers and merchants in the Visa and MasterCard systems.

To begin with, many of plaintiffs' foreign benchmarks, where there is no centrally-set default interchange, actually demonstrate that alternative forms of compensation to issuers from the acquiring/merchant side of the business would develop. For example, in some foreign debit systems relied on by plaintiffs, instead of interchange fees, the acquirers pay issuers dividends, as Dr. Snyder outlines. Moreover, as noted above, bilateral and multilateral negotiations between system participants developed in two of plaintiffs' other benchmarks. Thus, plaintiffs' own benchmarks provide concrete, real world examples demonstrating how their but-for worlds would require individualized evidence regarding the resulting impact on putative class members.

For his part, Dr. Bamberger has not even analyzed the most basic aspects of foreign markets which he seeks to use as benchmarks.[151] As outlined by Dr. Snyder, key differences that distinguish these systems from the U.S. system include:[152]

(a) *No role for interchange of transactions*. Dr. Bamberger fails to take into account that there is no role for interchange of transactions in some of the foreign countries he cites as "appropriate" benchmarks. For example, in the domestic debit system in Finland transactions are cleared via bank-to-bank connections, and not through the central network, so there is no role for default interchange rates.

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[151] Ex. 1, Bamberger Dep. at 227:9-235:13.

[152] Snyder Decl. ¶ 86.

(b) *Different ownership structure*. Dr. Bamberger fails to take into account the various ownership structures within the payment card systems. For example, the single acquirer of transactions in Denmark's Dankort system is jointly owned by the major issuers of Dankort cards, so virtually all Dankort transactions are "on us" transactions between affiliated parties.

(c) *Different size and scope of systems*. Dr. Bamberger fails to account for differences among countries in the number of participants and scope of their respective payment systems. For example, in Finland there are only eight banks that issue domestic debit cards, and three of these banks handle 85 percent of domestic debit transactions. In the U.S., in contrast, thousands of banks issue Visa and MasterCard debit and credit cards.

Moreover, the fact that interchange levels could be set at zero in some isolated foreign debit systems, or U.S. ACH and check systems, says nothing about whether a zero default interchange rate would lead to fundamental changes to the rights and obligations of card system participants in the U.S. Plaintiffs themselves claim that ACH and checks are not even in the same market as Visa and MasterCard payment cards, and accordingly do not believe they are even comparable. Of course, there are substantial differences in the rights and obligations within the Visa and MasterCard systems and plaintiffs' proposed benchmarks: Merchants are not guaranteed against customer fraud and payment defaults on checks for example, and drawee banks in check systems do not pay "float"—unlike the benefits merchants currently receive under the Visa and MasterCard interchange systems. As with Dr. Bamberger's other purported benchmarks, ACH offers no insight into how his but-for worlds could actually function or exist, or how they would affect putative class members.

2. *Even Under Plaintiffs' Constricted Version of Their Zero Interchange But-For World, Individualized Evidence Will Predominate On Injury In Fact*

Even if plaintiffs' but-for worlds were not defective *ab initio* for the reasons set forth above, they would be insufficient to certify a class because individualized evidence would still predominate. As discussed above (section II), many merchants, which make up a substantial

portion of the volume on the Visa and MasterCard systems, share in interchange revenues under the current system. Plaintiffs gloss over the need for individualized inquiries regarding whether those merchants were actually injured or damaged by defendants' alleged conduct, after taking into account the interchange-based payments they receive. Indeed, plaintiffs and Dr. Bamberger expressly chose not even to consider the individual facts on this issue for putative class members.

a. *Individualized Evidence Would Predominate With Respect to Co-Brand and Affinity Merchants* REDACTED

As discussed above, thousands of merchants receive each year from their co-brand programs with Visa and MasterCard issuers, and co-brand merchants account for approximately of the purchase volume on the MasterCard network and on the Visa network.[153] As plaintiffs themselves admit, "[p]ursuant to co-branding and affinity arrangements, banks pay merchants *what are, in essence, rebates*" on interchange fees.[154] By their nature, these interchange "rebates" affect the price merchants pay for network services, giving rise to numerous individualized questions regarding the nature and impact of their highly personalized deals with co-branding partner banks. Recognizing implicitly the problems co-brand merchants present for class certification, plaintiffs suggest (albeit in a footnote buried late in their brief) that merchants with such arrangements could be "excluded from the class if necessary,"[155] which speaks volumes about whether they belong in the class, and whether the class should be certified at all.

Although plaintiffs characterize payments to co-brand merchants as interchange "rebates," those payments actually *exceed* the interchange fees attributable to many co-brand

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[153] *See* Snyder Decl. ¶ 107.

[154] Pls.' Br. 14, n.36 (emphasis added). As noted, for purposes of this memorandum, the terms "co-brand" and "affinity" are used interchangeably unless otherwise indicated.

[155] Pls.' Br. 68 n. 154.

merchants' acceptance of Visa and MasterCard cards. For example, co-brand merchants as diverse as REDACTED are each beneficiaries under the current interchange system—*i.e.*, their card issuing partners pay them more each year than the total interchange attributable to their transactions.[156] As noted above, the benefits under these co-brand deals can total in the of dollars each year for a single merchant.[157]

Any attempt to identify (much less quantify) any injury to these and other merchants must take these "rebates" into account—a calculation fraught with highly individualized inquiries, which are not amenable to a formulaic approach.[158] As Dr. Snyder details, there is substantial variation in the terms of co-brand agreements, and it cannot be determined by simply reviewing the contracts how the payments to merchants would have been different in plaintiffs' but-for worlds. Instead, the negotiations and financial expectations of the parties must be analyzed for each co-brand relationship to determine how the terms of the agreements would change in the but-for world.

While Dr. Bamberger deemed the particulars of co-brand merchants' arrangements with banking partners irrelevant to his analysis, he acknowledged their diversity, as each is defined by a unique set of contractual terms and negotiating history.[159] Accordingly, he had little choice but to admit that "at a minimum" individualized consideration of the contracts governing co-brand arrangements would be necessary to determine whether the terms of each co-brand deal (and the resulting payments to co-brand merchants) would be the same in his but-for worlds.[160] Yet, Dr.

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[156] Snyder Decl. Ex. 17 (comparing co-brand revenue to interchange fees attributable to various co-brand merchants).

[157] *See* section II, *supra*; Snyder Decl. Ex. 17.

[158] Snyder Decl. ¶¶ 35, 103-118.

[159] Ex. 1, Bamberger Dep. at 455:9-457:14, 461:5-18.

[160] Ex. 1, Bamberger Dep. at 479:16-480:13 ("A: . . . But as I've also said, in the but-for world, the precise terms of the contract could very well be different, so the formula for profit sharing could be different and so the decline

Bamberger took essentially no steps to understand the harm to these merchants:

- He did not know how many co-brand merchants are members of the putative class.[161]
- Despite the fact that those merchants number in the thousands and his acknowledgement that co-brand deal terms vary widely, he reviewed only two co-brand agreements between members of the putative class and Visa, MasterCard, or issuing banks.[162]
- Fittingly, he could not even approximate the aggregate amount of interchange fees attributable to transactions at co-brand merchants.[163]

Plaintiffs' failure to even consider the necessary, highly-individualized inquiries for co-brands merchants demonstrates that they have not met their burden under *Miles*.

b. *Individualized Evidence Would Predominate With Respect to Merchant Issuers*

As noted above, a number of putative class members also operate their own banks and issue Visa or MasterCard cards, receiving interchange fees for the use of the cards they issue, just as defendant issuers do.[164] For example, Target issues Visa credit cards. As noted, Target's pre-tax income from its card business was $714 million in 2007 alone.[165] Not surprisingly, Nordstrom, another large issuer of Visa cards, has publicly stated that it opposes the sort of

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of return on outstandings wouldn't be the only thing that necessarily would change. Q: To evaluate whether the co-brand contract terms would be different in the but-for world, you would, at a minimum, have to look at the terms of the current co-brand deal, just as we are doing now with respect to the T.J. Maxx contract, right? . . . A: If it were relevant and if someone were interested in trying to predict the terms of this contract in a but-for world to compare to the actual contract, you'd certainly want to look at the actual contract.").

[161] Ex. 1, Bamberger Dep. at 393:21-394:12 ("Q: How many members of the putative class have co-brand arrangements? A: I don't know the precise number, but it's, as we discussed -- as was discussed yesterday, I believe it's well under 1 percent. Q: Are there a hundred such co-brand merchants in the putative classes? A: I'm sorry, are there a hundred? Q: 100; is the number 100? A: I believe there are more than 100. Q: Is it 1,000? A: It could be more than 1,000. Q: 5,000? A: I don't know whether it's more than 5,000.").

[162] Ex. 1, Bamberger Dep. at 454:23-455:8; *see also, e.g.*, Bamberger Dep. at 205:25-206:11 ("Q: Would you agree that co-brand agreements are frequently complex with varying sources and forms of consideration flowing back and forth between the parties? . . . A: I haven't done any numerical analysis to say how frequent it is, but I believe certainly the United one had a variety of different terms to it.").

[163] Ex. 1, Bamberger Dep. at 395:10-396:3, 397:17-21.

[164] *See* section II, *supra*.

[165] *See* Snyder Decl. ¶ 119.

regulation of interchange fees[166] that plaintiffs seek here. There are a number of other past and present merchant issuers of Visa cards, who, in the aggregate, account for a substantial portion of total card volume.[167] Interchange fee revenues to those merchants would have to be taken into account on an individualized basis to evaluate whether they suffered injury as "class members."[168]

But, again, Dr. Bamberger did nothing to investigate these merchants, which plaintiffs seek to represent:

- He could not name any merchant issuer other than Target, and as to Target, which is currently the twelfth largest U.S. Visa and MasterCard credit card issuer,[169] he knew nothing of its arrangements with the networks.[170]
- He knew nothing about how much interchange revenue Target (or any other merchant issuer) receives as an issuer and had not tried to quantify it or to net it against the amounts in interchange fees attributable to transactions at Target stores to determine whether it was injured by, or instead benefited from, default interchange rates.[171]
- He knew nothing about whether these members of the putative class would be in favor of the named plaintiffs' proposed remake of the Visa and MasterCard systems.[172]

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166 Ex. 52, Letter from Kevin Knight, Executive VP Nordstrom, Inc. and Chairman/CEO Nordstrom fsb, to H. Comm. on the Judiciary (regarding H.R. 5546)

167 2007 Visa Purchase Volume: Target: $12,988.6 million; Nordstrom: $4,528.6 million; and Cabela's: $2,450.8 million. Volume on these three issuers' cards comprised 1.47 percent of the $1,355.1 billion transacted on general purpose credit cards in the United States in 2007. Ex. 57, *50 Largest Visa & MasterCard Credit Card Issuers*, The Nilson Report, Jan. 2008, Issue 895, at 10.

168 Snyder Decl. ¶ 121.

169 Snyder Decl. ¶ 119.

170 Ex. 1, Bamberger Dep. at 392:13-393:8 ("Q: [The class] includes merchants who are also issuers of payment cards right? A: Do you mean issuers of Visa or MasterCard payment cards? Q: Yes I do. A: I know of one example I believe where I believe there is a merchant that I believe also owns a bank or has some affiliation of that sort and so it does have a card. Q: Which is the merchant that you're thinking of? A: I believe it's Target. Q: And Target is in the class even though it's also an issuer right? A: I believe so, yes. Q: How many merchants in the putative class also issue Visa or MasterCard cards as does Target? A: I don't know.").

171 *See, e.g.*, Ex. 1, Bamberger Dep. at 406:20-407:10 ("Q: [Do you know] [h]ow much interchange they [Target] receive as an issuer? A: No. Q: Do you know how the interchange it receives compares to the interchange it pays as a merchant? A: No.").

172 Ex. 1, Bamberger Dep. at 407:11-19 ("Q: Do you know whether Target considers itself to be at a competitive advantage over its rival department stores because it also issues Visa and MasterCard cards? A: Do I know if that's what they think? Q: Yes. A: No."); 408:5-409:13 ("Q: Do you have any idea whether [Target] would

c. *Individualized Evidence Would Overwhelm Any Common Questions at Trial*

Given that the co-brand and issuer merchants represent such a large volume of Visa and MasterCard merchant volume, the individualized inquiries that will be necessary to determine fact of injury are substantial, and require denial of class certification.

The individualized inquiries here resemble those in *Blades*, 400 F.3d at 570, where the Eighth Circuit found that negotiations "often lowered the 'overall' price" paid or led to "discounts or rebates to certain [class members] to offset any alleged premium," causing some class members to pay "no premium" at all. *Id.* As the court in *Blades* explained, the "amount of premiums paid, if any, is relevant to a determination of impact, an essential element of a price-fixing claim, . . . not merely an assessment of the amount of damages." *Id.* Accordingly, the court affirmed the district court's denial of class certification, noting that under those circumstances determining whether individual class members actually paid a premium "would involve a fact-intensive inquiry." *Id.* The facts in this case are even more problematic for plaintiffs here, because they show that class members not only negotiated lower interchange rates, but they also actually receive interchange rebates that *exceed* the interchange fees attributable to their transactions.

The *Blades* court is not alone in rejecting class certification where individual negotiations affect price. *See, e.g., Tex. Auto. Dealers*, 387 F.3d at 423-24 (holding that class certification in price-fixing litigation was inappropriate because of differences in car purchasers' "haggling"

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prefer zero interchange or the current arrangement? . . . A: When you say Target, are you talking about official company position? Q: Yes. A: I don't know what their official company position is. Q: Do you know whether Target, as a company, would prefer the interchange rates and system as it currently prevails or interchange at 28 percent at the current rate? . . . A: I don't know whether they formed a view on current versus 28 percent of current. Q: Do you know whether Target would prefer to continue with the competitive advantage it has over its rivals under the current system, as both a merchant and an issuer, or whether it would prefer to have the system reformed as the plaintiffs seek to do in this lawsuit? . . . A: It seems like the same question you asked me. Q: You don't know? A: Correct.").

techniques); *Windham v. Am. Brands, Inc.*, 565 F.2d 59, 63, 66, 70 (4th Cir. 1977) (affirming denial of class certification where prevailing prices in auction bidding process varied "from day to day and [were] not uniform," which, among other things, would cause "computation of damages [to] be a complex, highly individualized task, imposing an intolerable burden on the judicial system").[173] Class certification should similarly be denied here, in light of the complex individual inquiries required for each co-brand and issuer merchant, which in the aggregate account for more than of transaction volume in the putative class.

REDACTED

C. Plaintiffs Have Not Met Their Burden to Demonstrate that Common Evidence Will Predominate on Proof of Injury for Their Reduced Interchange But-For World

Implicitly recognizing the problems presented by their proposal of a zero default interchange world (resulting from the elimination of default interchange) while holding "all else equal," plaintiffs suggest in the alternative a but-for world where interchange fees are set at the minimal, average level necessary for the Visa and MasterCard systems to remain "viable." This but-for world is, on its face, once again a demand by plaintiffs that this Court set *price levels* for interchange, which is not an antitrust claim at all and is not permitted as a matter of law, for the

[173] *See also Exhaust Unlimited*, 223 F.R.D. at 513 (finding that class certification was inappropriate because, among other things, "[p]rices and other contract terms may be individually negotiated and cover both the total invoice price and each component of that price," which led to "a diverse mix of base prices and ancillary charges and of products and services, with total invoice prices varying from customer to customer"); *Piggly Wiggly Clarksville, Inc. v. Interstate Brands Corp.*, 215 F.R.D. 523, 530-31 (E.D. Tex. 2003) (noting that, although bidding process began with a "fixed" wholesale price list, several factors affected the price actually paid by class members, including the "discount negotiated off the wholesale price list, and potentially the negotiating skills of the purchaser and the sales representative"), *aff'd*, 100 Fed. Appx. 296 (5th Cir. 2004); *Tyco*, 247 F.R.D. at 173-75 (predominance requirement not met where determining the defendant's "pricing in the but-for world will very likely require a detailed look into the individual circumstances surrounding purchasers"); *Pharm. Indus.*, 230 F.R.D. at 89 ("Numerous courts have held that the need to examine individual negotiations or individual contracts to determine injury weighs against class certification") (citation and quotations omitted); *Agric. Chems.*, 1995 WL 787538 at **7, 9 (finding no predominance because plaintiffs' expert "offers no systematic way of determining, on any class-wide basis, the price each [class] member would have paid in the absence of the alleged conspiracy" and criticizing plaintiffs' expert's failure to consider "various forms of rebates, discounts, and other means . . . routinely used to lower the effective price paid by customers," which "would be necessary . . . to reflect accurately the economic reality of these transactions"); *Beef Indus.*, 1986 U.S. Dist. Lexis 24731, at *5 (rejecting proposed class where "the evidence strongly indicates that prices actually paid . . . resulted from a multitude of varying factors differing from one area to another").

reasons outlined above with respect to plaintiffs' zero interchange world.

Moreover, as with plaintiffs' zero-interchange but-for world, plaintiffs are wrong to argue that they can reduce interchange rates by some significant (but unspecified) amount, and simply ignore for injury purposes other resulting, substantial changes to the interrelated set of network rules and services the networks would provide. If issuers' interchange revenues in the Visa and MasterCard systems were reduced to the lowest level at which issuers could avoid bankruptcy—which is essentially how Dr. Bamberger defines his "viability" standard[174]—Visa and MasterCard would be compelled to make significant changes to their networks. If they did not, they would lose the business of issuers and cardholders to Amex and Discover, which would be unconstrained by the minimal "viability" level of interchange dictated in plaintiffs' but-for world for Visa and MasterCard. For the reasons outlined above, these alternative scenarios, such as bilateral negotiation of interchange fees, are much more likely to develop and would necessarily require analysis of individual issues for millions of merchants. Plaintiffs have not met their burden because they have failed to even consider these issues.

Plaintiffs may argue that none of the more realistic, alternative but-for worlds identified by defendants—bilateral negotiations, for example—actually took place in Australia, which they propose as a possible benchmark for reduced interchange levels in the U.S. The regulations in Australia reduced interchange by *almost three times less* than plaintiffs seek to reduce average interchange rates in the U.S., however, so plaintiffs' but-for world here would necessarily have much more fundamental effects than the Australian regulation, as Dr. Snyder explains.[175]

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[174] Ex. 1, Bamberger Dep. at 239:10– 241:18.

[175] Dr. Bamberger asserts that average interchange rates in the U.S. are 1.8%. Bamberger Decl. ¶ 91. Accordingly, if such rates were reduced to the 0.5 % average regulated rates in Australia, the reduction would be approximately 1.3%. In contrast, the regulation in Australia reduced average rates by only 0.45% – from 0.95% to 0.5%. Snyder Decl. ¶ 131.

Moreover, as noted above, the more realistic but-for worlds identified by defendants did, in fact, develop in the other foreign benchmarks proposed by plaintiffs.

Moreover, as with the zero interchange world, a reduction in interchange levels will harm co-brand and issuer merchants, which must be taken into account in the injury analysis, and would require substantial individual proof. All of the effects on co-brand and issuing merchants outlined above will also vary within this reduced interchange but-for world, once again causing individual issues to predominate.

In addition to the reasons plaintiffs cannot prove fact of injury for their zero default rate world, their reduced interchange but-for world suffers from an additional defect: It would require only an *average* decrease in interchange rates for a particular network. As Dr. Bamberger acknowledges, there would be no requirement that the networks decrease all rates, and the resulting rates could vary for the numerous interchange categories and thousands of individually-negotiated interchange arrangements.[176] Indeed, that is what actually happened in Australia, which has far fewer interchange categories than in the U.S. systems: The regulatory requirement that default interchange rates be reduced by an average amount resulted in the networks *increasing* their respective commercial card rates, even while decreasing other rates.[177] Plaintiffs have offered no evidence, as is their burden under *Miles*, to show that an average reduction would have impacted each one of the millions of merchants in the U.S.

In similar circumstances, numerous courts have held that relying on average price effects from the alleged conspiracy is insufficient to demonstrate class-wide impact, requiring denial of

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[176] Ex. 1, Bamberger Dep. at 297:16-298:4

[177] Post regulation in Australia, Visa and MasterCard each introduced a new category for commercial cards with higher rates (1.15 and 1.12 percent, respectively) than the average pre-regulation interchange rate of 0.95 percent. Reserve Bank of Australia, *Reform of Australia's Payments System: Issues for the 2007/08 Review*, 5, 19-20, (May 2007) *available at* http://www.rba.gov.au/PaymentsSystem/Reforms/RevCardPaySys/Pdf/issues_for_the_2007_2008_review.pdf (last visited Oct. 4, 2008).

class certification. *In re Graphics Processing Units Antitrust Litig.* ("*GPU*"), No. C. 06-07417, 2008 WL 2788089, at *18 (N.D. Cal. July 18, 2008) (denying class certification in part and noting that "[i]f data points are lumped together and averaged before the analysis, the averaging compromises the ability to tease meaningful relationships out of the data); *Tyco,* 247 F.R.D. at 167-169 (where "[t]he clear standard in the market . . . has long been to charge a range of prices to different customers even for identical products," plaintiffs' proffered evidence on the *average* price that would prevail in the but-for world was insufficient to prove common impact).[178] The same defect requires denial of class certification here.

V. THE 23(b)(3) DAMAGES CLASS CANNOT BE CERTIFIED BECAUSE PLAINTIFFS HAVE NOT DEMONSTRATED THAT COMMON EVIDENCE WILL PREDOMINATE AT TRIAL ON PROOF OF QUANTUM OF DAMAGES

The Second Circuit recently held that courts "must consider" variation in proof of damages in deciding whether common issues predominate under Rule 23(b)(3). *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008).[179] Here, all of the individual issues identified above affecting fact of injury also apply to the question of damages, because Dr. Bamberger asserts that he would use the same methodology to prove both.[180] But additional non-common factual issues affect proof of damages because, even if the "overcharge" line of

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[178] *Cf. In re Compensation of Managerial, Professional and Technical Employees Antitrust Litig.*, MDL Docket No. 1471, slip op. at 17 (D.N.J. Aug. 20, 2008) (noting, on summary judgment, that "[a]lthough figures and statements regarding the total or average compensation all [professional, managerial and technical] employees involves many job markets, such averages and totals, by their nature, do not provide evidence of the compensation levels in any single Plaintiff's labor market").

[179] *See also Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 303-04 (5th Cir. 2003); *In re NCAA I-A Walk-On Football Players Litig.*, No. C04-1254C, 2006 WL 1207915, at *13 (W.D. Wash. May 3, 2006) ("each [plaintiff] must prove that he would have received a scholarship (injury) *and* how much it would have been (damages)").

[180] Bamberger Decl. ¶ 109; Ex. 1, Bamberger Dep. at 181:7-8 ("The overcharge analysis is the damages analysis."). *See also Tyco,* 247 F.R.D. at 176 (denying certification because "the very same flaws in the use of [plaintiffs proffered formula] to show class-wide impact apply to its use for calculation of damages on a class-wide basis"); *NCAA I-A Walk-On,* 2006 WL 1207915, at *13 (where, "rather than being a severable issue, proof of damages [was] wrapped up in proof of liability itself," court concluded that "individual damages issues join with individual liability issues to prevent class certification in this case").

cases relied on by plaintiffs applied here, they would only limit the inquiry to be considered for *injury* purposes. The overcharge cases do not limit in a similar way the evidence of non-price effects and "net benefits" that *must* be considered for damages purposes. *See, e.g., In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 297, 311-16 (E.D. Mich. 2001) (relied on by plaintiffs; collecting cases holding that net benefits should be considered, even under overcharge theory, for purposes of damages); 2A Areeda et al., *Antitrust Law* ¶ 392c, at 334 (3d ed. 2007) ("It must be emphasized that the antitrust plaintiff is entitled to recover only its *net* harm") (emphasis in original). In fact, this Court's decision in *Visa Check I*, quoting the Areeda antitrust treatise favorably, suggests that considerations other than simple "overcharge" should be considered for damages purposes.[181]

Analysis of non-price effects will necessarily vary significantly from merchant to merchant for each of plaintiffs' but-for worlds, where interchange is either reduced or eliminated. In addition to the individual issues discussed in connection with fact of injury, another issue that must be considered, for example, is the effect the reductions in interchange rates would have on individual merchants' sales volume. Dr. Bamberger asserts that reductions in interchange led issuers to increase cardholder fees and decrease rewards in Australia, which is an effective increase in the price the cardholder pays in purchasing goods from merchants.[182] He

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[181] In *Visa Check I*, defendants argued that whether a particular merchant could steer consumers between different methods of payment was relevant to the causation analysis. 192 F.R.D. at 85-86. The Court accepted that this consideration may be relevant for purposes of mitigation of damages and class certification. *Id.*

Despite recognizing that individual issues related to damages could pose a significant barrier to class certification, this Court suggested that it could wait until later stages of the litigation to address defendants' damages-related arguments. *Id.* at 85-87, n.19 (stating that it "may well be appropriate to address *before trial* the merits of some of defendants' damages-related arguments") (emphasis added.). This approach is, however, no longer viable after the Second Circuit's decision in *Miles*. 471 F.3d at 41 (holding that "a district judge may certify a class only after making determinations that each of the Rule 23 requirements has been met" and "such determinations can be made only if the judge resolves factual disputes relevant to each Rule 23 requirement and finds that whatever underlying facts are relevant to a particular Rule 23 requirement have been established").

[182] Bamberger Decl. ¶ 88; Snyder Decl. ¶ 49.

also agrees that, all else equal, such increases in prices to consumers will lead to lower sales levels for merchants.[183] Such reductions in merchant sales volume, and the resulting loss in gross margin occasioned by such sales volume reductions, must be factored into the damages analysis, and would differ for each of millions of merchants.

Similarly, as Dr. Snyder explains, elimination or reduction of interchange will cause issuers and cardholders to shift at least some of their business to Amex, which could offer better incentives to them than Visa and MasterCard in plaintiffs' but-for worlds, and which has higher levels of merchant discount fees than Visa and MasterCard.[184] This has actually happened empirically in Australia, even though the interchange reductions required by regulators there were several times smaller than those proposed by plaintiffs here.[185] Similarly, the loss of interchange, and of the incentives it provides cardholders to use cards, may cause them to pay with cash and checks more often, which have their own costs to merchants.[186]

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[183] Ex. 1, Bamberger Dep. at 147:15 – 153:7.

[184] Snyder Decl. ¶¶ 128-31.

[185] Snyder Decl. ¶ 131.

[186] According to one executive of named plaintiff Parkway, Parkway prefers that customers use credit cards given the cost of accepting cash (among other things). Ex. 13, Paul Ierubino Dep. at 86:16-87:6; *see also id.* 220:14-19; [redacted], Indeed, the costs of accepting cash may well exceed the costs of accepting payment cards for at least some merchants. Ex. 58, NACS260707-0708 ("In truth, I have seen studies where cash was clearly more costly to handle than plastic."); *see also* Ex. 16, T. Richman Dep. at 343:7-25 ("Q: What other studies were you referring to? You say in truth you have seen studies, not a Racetrack study or a study. What other studies were you referring to there? A: Similarly, a payments expert from Shell who had been very aggressive in terms of taking a look at it, their costs of payments had some data, not the full blown study, but showed that cash was still more expensive to handle than electronic payments, but in truth they had done a lot of work in terms of reducing their costs associated with card payments and continue to do so. Q: Presumably they have done as much as they could to reduce the cost of handling cash as well, wouldn't you agree? A: Yes.").

Moreover, the merchant discount that many merchants pay is not directly tied to interchange rates, so that changes in interchange rates will not necessarily lead to a one-for-one change in the amount merchants pay.[187] This, too, raises significant individual issues regarding the amount class members would pay in plaintiffs' but-for worlds.

Even if these effects do not make merchants worse off in plaintiffs' but-for worlds, under the authority above, they nevertheless *must* be considered as offsets to their damages, because they affect the net economic impact to each merchant. And these effects will necessarily vary from merchant to merchant, and cannot be considered formulaically, as explained by Dr. Snyder.[188] Dr. Bamberger and plaintiffs have considered none of this, and have therefore not met their burden.

Moreover, the extraordinary and unprecedented mini-trials necessary to adjudicate the claims of millions of merchants not only cause individual issues to predominate, but also create "likely difficulties in managing" any certified class, requiring denial of class certification under the 23(b)(3) "superiority" requirement. *See Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 21 (2d Cir. 2003) ("Where a purported class promises to cause serious manageability problems, as would surely be the case where potential class members total 12 million subscribers in 23 states, defendants correctly point out that courts do not hesitate to dismiss based on manageability concerns alone.") (quotations omitted); *see also Abrams v. Interco Inc.*, 719 F.2d 23, 29-31 (2d Cir. 1983).

Plaintiffs cannot solve this problem by simply suggesting that damages can be bifurcated from their liability case, as some courts have done in circumstances far different from those here. The Seventh Amendment does not allow bifurcation unless there are issues that are "so separable

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[187] See *infra*, note 197.

[188] Snyder Decl. ¶¶ 126-134.

that the second jury will not be called upon to reconsider findings of fact by the first." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 750 (5th Cir. 1996); 33 Fed. Proc., L. Ed. § 77:76 (2008); *see also Blyden v. Mancusi*, 186 F.3d 252, 268 (2d Cir. 1999) ("a given issue may not be tried by different, successive juries."). This rule applies where, as here, the question of damages is so interwoven with questions of liability that submission of one without the other will cause confusion and uncertainty, such that bifurcation would amount to a denial of a fair trial. *See Gasoline Prods. Co. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931); *Brooks v. Brattleboro Mem'l Hosp.*, 958 F.2d 525, 530-31 (2d Cir. 1992) (requiring both liability and damages issues to be retried because the "issues of damages and liability [we]re too interwoven" to grant a new trial on damages alone); *Ne. Tel. Co. v. AT&T Co.*, 651 F.2d 76, 95 (2d Cir. 1981) (remanding case for trial on liability and damages issues to "prevent an injustice to the parties" because the issues of damages and liability were "so interwoven" that a new trial on the damages issue alone would "amount to a denial of a fair trial").

Here, plaintiffs purport to show anti-competitive effects (an essential element of liability for their rule of reason claims) with evidence that defendants' conduct causes supra-competitive interchange levels, which is precisely the same "fact" that they purport to show for damages purposes.[189] It cannot seriously be disputed, therefore, that these issues are inextricably intertwined, and damages and liability cannot be tried separately.

Accordingly, the extensive individualized evidence required for millions of individual merchants defeats both predominance and manageability of the class, requiring denial of class certification.

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[189] Pls.' Br. at 47-48.

VI. THE 23(b)(3) DAMAGES CLASS CANNOT BE CERTIFIED BECAUSE INDIVIDUAL ISSUES OF FACT DETERMINE WHETHER PUTATIVE CLASS MEMBERS HAVE ANY INJURY COGNIZABLE UNDER THE INDIRECT PURCHASER DOCTRINE

Except in very limited circumstances, only a "direct purchaser" may bring a claim for damages under the antitrust laws "against a seller for wrongful overcharge." *Temple v. Circuit City Stores, Inc.*, Nos. 06 CV 5303(JG), 06 CV 5304(JG), 2007 WL 2790154, at *3 (E.D.N.Y. Sept. 25, 2007) (Gleeson, J.). This rule, first enunciated in *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977), bars "indirect purchasers" from recovering such damages. In so doing, it prevents multiple recoveries along chains of distribution and avoids "the complications of apportioning overcharges between direct and indirect purchasers." *Id.* at 730-33; *see also Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 208, 212 (1990).

Here, plaintiffs cannot establish with common evidence—as they must under *Miles*—that all class members are direct purchasers of network services. Millions of merchants pay discount fees to non-defendant banks, independent sales organizations ("ISOs"), or, in some instances, other intermediaries (*e.g.*, franchisors) who are not defendants in this litigation. Accordingly, the application of *Illinois Brick* here requires extensive individual proof concerning whether each putative class member is, in fact, a direct purchaser and, therefore, might have suffered an injury cognizable under the antitrust laws.

A. The Majority of Putative Class Members Are Indirect Purchasers, and Whether Any Specific Merchant is a Direct Purchaser Raises Individual Issues of Fact

There is little question that merchants are indirect purchasers of network services with respect to the networks and the issuing banks. In *Kendall*, for example, the Ninth Circuit recently held that "with respect to the interchange fee," merchants had no cognizable claims against Visa or MasterCard because they pay merchant discount fees to acquirers, not Visa or

MasterCard. *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1048-50 (9th Cir. 2008) ("[Merchants] have no contractual relationship with [Visa or MasterCard] directly, nor are they charged the interchange fee directly."). Likewise, in *Paycom*, the Second Circuit held that merchants were "indirect payor[s] of the chargebacks and chargeback fines and penalties" that MasterCard rules impose on acquiring banks. *Paycom Billing Servs., Inc. v. MasterCard Int'l, Inc.*, 467 F.3d 283, 291-92 (2d Cir. 2006) (holding that merchants could not bring claims against MasterCard under antitrust laws). And since issuers are even further removed from merchants in the network services distribution chain than Visa and MasterCard, plaintiffs cannot seriously contend they purchase network services directly from them either.

These conclusions are in harmony with Visa and MasterCard rules, which require that (i) when a transaction is processed through their networks, interchange fees are charged directly to the acquiring bank—not the merchant, and (ii) the acquiring bank is responsible for paying any interchange fees, even if the merchant refuses to pay the merchant discount fee.[190] Indeed, even Dr. Bamberger has acknowledged that merchants make payments to acquirers—not issuers: In particular, he testified in another case that, with respect to credit cards, "the merchant pays a fee *to the 'acquiring bank'* that includes the interchange fee . . . ."[191]

To be sure, there are a *minority* of U.S. merchants that pay the merchant discount directly to an acquirer that is a defendant in this action; those merchants may not be barred by the *Illinois*

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[190] *See* notes 15 & 20, *supra*.

[191] Ex. 73, 12/21/07 Bamberger Decl. (ATM Interchange litigation) ¶ 43. In fact, Plaintiffs themselves have admitted in the First Consolidated Amended Complaint in this case that putative class members "pay Interchange Fees and Merchant Discount Fees to the Visa and MasterCard member banks *through the Acquiring Bank members* of Visa and MasterCard . . . ." (¶ 92). And a substantially overlapping class in *Visa Check* expressly alleged that interchange fees are paid in the first instance *by an acquiring bank*—not merchants. (*Visa Check* Consolidated Class Complaint ¶ 8(o)) (defining "Interchange fee" as "a fee that *the bankcard acquiring institution pays* to the card issuing institution for each retail transaction where the issuer's card is used as a payment device at one of the acquirer's retail store accounts") (emphasis added). Even Dr. Bamberger's summary of the flow of payments for Visa and MasterCard card transactions demonstrates that the interchange payment is made by the acquirer to the issuer in the first instance. (Bamberger Decl. ¶ 18) (noting that the issuing bank transfers the transaction amount less the interchange fee to "to the acquiring bank . . . .").

Brick doctrine because they make payments to an alleged co-conspirator that is a defendant, and are therefore arguably not indirect purchasers under the so-called "co-conspirator" exception.[192] But only a handful of the thousands of acquirers in the U.S. are defendants in this litigation, and a majority of putative class members pay processing fees either to an acquirer *that is not a defendant*, or to an *intermediary between the acquirer and the merchant*, and therefore are merely indirect purchasers for purposes of this case.

For example, many merchants—including class plaintiffs Capital Audio, Crystal Rock, Parkway, NATSO and NCPA—pay card acceptance fees to third party processors or independent sales organizations ("ISOs"), who in turn pay a Visa or MasterCard member.[193] And plaintiff Coborn's operates convenience stores and fuel stations pursuant to a franchise agreement under which it pays card acceptance fees to its franchisor, Holiday Diversified Services.[194] To accept Visa- and MasterCard-branded payment cards at those locations, Coborn's has no direct relationship whatsoever with an acquirer, contractual or otherwise.[195]

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[192] Of the courts recognizing the co-conspirator exception, most require that the alleged co-conspirator be a named defendant in the litigation for the exception to apply. *See Howard Hess Dental Lab, Inc. v. Dentsply Intern., Inc.*, 424 F.3d 363, 370-71 (3d Cir 2005) ("We have rejected attempts to evoke the co-conspirator exception to *Illinois Brick's* bar on indirect purchaser standing when plaintiffs have not named the co-conspirators immediately upstream as defendants."); *New York v. Dairylea Coop. Inc.*, 570 F. Supp. 1213, 1215-16 (S.D.N.Y.1983) ("[M]ost courts which have addressed the [co-conspirator exception] issue in any detail have also required that the alleged co-conspirator-intermediaries, whose participation must be demonstrated if a vertical conspiracy is to be proved and *Illinois Brick* circumvented, must be named as defendants."). But even if this Court determined that plaintiffs do not need to name a co-conspirator as a defendant for this *Illinois Brick* exception to apply, it would raise numerous issues of non-common fact as to the involvement of each of thousands of Visa and MasterCard acquirers in the alleged conspiracy.

[193] Ex. 60, Card Services Agreement ¶¶ 1, 13, at CAPAUDIO0001002-3; Ex. 61, Email from Peter Gatof to Roberta Avoletta (December 17, 2004), at CROCK01263; Ex. 62, Letter from Paul Ierubino to Amy Pape (June 7, 2006), at PARKWAY004739-41; Ex. 74, Ivancikova Dep. at 110; Ex. 63, Credit Card Merchant Statement (August 2003), at NATSO001859-61; Ex. 64, Credit Card Merchant Statement (October 2004), at NATSO001754-56; Ex. 75, Shuman Dep. at 73:25-76:25 (July 8, 2008); Ex. 65, End of Month Statement (August 2005), at NCPA025768-73; Ex. 76, End of Month Statement (June 2006), at NCPA025251-53; Ex. 66, NCPA 000025-000035.

[194] Ex. 10, Linda Fiereck Dep. at 83:4 - 86:12, 172:4 - 173:11, 185:22-186:16; Ex. 77, Franchise Agreement Between Holiday Diversified Services, Inc. and Coborn's, Incorporated (CBRN 072056 - 109); Ex. 78, Amendment to Holiday Stationstores Franchise Agreement (CBRN 072125 - 29).

[195] Ex. 10, Linda Fiereck Dep. at 185:24-186:16; Ex. 3, C. Coborn Dep. at 232:9-18.

Determining whether any given merchant purchases network services directly from a defendant or a middleman will require an individualized review of that merchant's acquiring and processing relationships throughout the putative class period.

Plaintiffs blithely assert that acquiring banks and intermediaries always pass on the entire amount of the interchange fee to merchants. This contention not only raises individual fact questions but is also irrelevant as a matter of law. As the Second Circuit has held, *Illinois Brick* bars indirect purchaser claims even if direct purchasers pass through the entire alleged overcharge to them. *Paycom*, 467 F.3d at 291-92 ("[E]ven if one hundred percent" of fees are passed-on, the merchant, "as an indirect payor . . . would still lack antitrust standing."); *see also Utilicorp*, 497 U.S. at 208. But even if that were not the case, plaintiffs here have made no attempt to satisfy their burden of showing that the entire alleged overcharge was passed through universally to all class members. *See, e.g., In re Graphics Processing Units Antitrust Litig.*, No. C 06-07417 WHA, MDL No. 1826, 2008 WL 2788089, at *32 (N.D. Cal. July 18, 2008) (denying indirect purchasers' motion for class certification because "the only way to fully assess pass-through in this action would be to conduct a wholesaler-by-wholesaler and reseller-by-reseller investigation").[196] In fact, many acquirers and processors absorb interchange fee increases, either as to particular merchants, or categories of merchants, as even Dr. Bamberger admits, which raises substantial individual issues for millions of putative class members.[197]

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[196] *See also Am. Seed*, 238 F.R.D. at 402-03 (denying class certification for indirect purchasers where plaintiffs' theory "rest[ed] upon the presumption of impact on the direct purchasers").

[197] Ex. 1, Bamberger Dep. at 509:19-510:24, 641:3-643:12; Ex. 79, 8/3/2005 F. Massingale email, CITI INT 001093329 (noting that "with the additional interchange categories, acquirers are likely to pass less of the interchange increase on to the merchants" and "the spread between interchange and discount has squeezed"); Ex. 80, 2/23/04 Transcom Payment Services Memorandum, NCGA 003199 ("we're going to absorb about of the interchange increase on swiped card sales because we feel that an cost pass thru wouldn't be well received").

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B. Application of Exceptions to the Illinois Brick Doctrine Also Raise Individual Issues of Fact

Plaintiffs further assert, without citing a single case, that various exceptions to the *Illinois Brick* doctrine apply, and that those exceptions raise common issues of fact.[198] In particular, in addition to the "co-conspirator" exception (addressed above), plaintiffs claim that an exception exists where "there is no realistic possibility that the direct purchaser will sue over antitrust violations."[199] They may also rely on what has been characterized as a "cost plus" exception.

There is, however, no exception to the *Illinois Brick* rule based on the possibility that a direct purchaser might not sue.[200] Moreover, it was a third party processor that chose to sue Visa

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[198] In an apparent attempt to avoid the bar against indirect purchaser claims, plaintiffs note that acquirers are required, under network rules, to be a signatory to any contract between a third party processor and the merchant, but that is not relevant for *Illinois Brick* purposes. What matters is the flow of payments—*i.e.*, who pays whom, rather than the existence of a contract between the plaintiff and defendant. *See Delaware Valley Surgical Supply Inc. v. Johnson & Johnson*, 523 F.3d 1116, 1122-24 (9th Cir. 2008) (holding that privity of contract is not relevant for purposes of *Illinois Brick*); *Blue Cross & Blue Shield United v. Marshfield Clinic*, 65 F.3d 1406,1414 (7th Cir. 1995) (holding that, for *Illinois Brick* purposes, the party who made payments to defendant could sue, despite fact that different party had privity of contract with defendant); *Kloth v. Microsoft Corp.*, 444 F.3d 312, 320-23 (4th Cir. 2006) (barring claims under *Illinois Brick* despite the existence of a license agreement between plaintiffs and defendant); *McCarthy v. Recordex Serv., Inc.*, 80 F.3d 842, 852-54 (3d Cir. 1996) (holding that the plaintiffs were indirect purchasers because plaintiffs' attorneys, not plaintiffs themselves, actually paid the defendants). This, of course, makes sense: As noted above, *Illinois Brick* is intended to eliminate complications from tracing of overcharges, so that what matters is an analysis of who makes payment to whom. Here, as noted above, the merchant often pays processing fees to the third party processor, which in turn pays fees to an acquirer.

Plaintiffs may also contend, as Dr. Bamberger suggests in his report that the third party processors are merely "agents" of a defendant acquirer. Bamberger Decl. at p.12 n.23. Whether or not this assertion has any legal significance, it raises substantial individual issues of fact; the test for "agency" for *Illinois Brick* purposes is fact intensive, and would require analysis for each merchant of the following factors: "whether 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). Each of these factors requires a separate analysis for each of thousands of intermediaries.

[199] Pls.' Br. 76.

[200] The exception plaintiffs purport to rely on is not really an exception at all. Although they cite absolutely no authority, they are presumably relying on the Ninth Circuit's decision in *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133 (9th Cir. 2003), which itself relied on that Circuit's decision in *Royal Printing*, 621 F.2d 323, 326 (9th Cir. 1980), and stated in *dicta* that indirect purchasers "can sue for damages if there is no realistic possibility that the direct purchaser will sue its supplier over the antitrust violation." *Freeman*, 322 F.3d at 1145-46. More recently, however, the Ninth Circuit made clear that the *Royal Printing* exception discussed in *Freeman* applies only where the direct purchaser is "owned or controlled by" the indirect

in *NaBanco v. Visa U.S.A., Inc.*, raising the same claims that plaintiffs make here, 596 F. Supp. 1231, 1239-40, 1246-47 (S.D. Fla. 1984), and franchisors, third party processors, and ISOs have sued Visa and MasterCard in other contexts in the past. *See, e.g.*, *PSW, Inc. v. Visa U.S.A., Inc.*, No. C.A. 04-347T, 2006 U.S. Dist. LEXIS 11763, at **3, 28-29 (D.R.I. Feb. 3, 2006) (third party processor alleged that Visa and MasterCard engaged in "a 'parallel pricing scheme . . . in conjunction with their member banks, whereby, *inter alia*, higher interchange and discount fees and chargeback related and other penalties are charged . . . .'"), *aff'd*, No. 04-347T, 2006 U.S. Dist. LEXIS 12157, at *1 (D.R.I. Feb. 28, 2006). Plaintiffs have not, and cannot, make any showing that they can establish with common evidence that each of thousands of intermediaries would not sue, as is their burden under *Miles*.

Moreover, to the extent there is a "cost plus" exception (which is doubtful),[201] it is inapposite here, and raises individual issues. Where the exception is applied, it requires the existence of a "full pass on" of interchange, but, as noted above, acquirers and processors at times do not pass on interchange fee increases to their merchant customers. *See Utilicorp,* 497 U.S. at 218; *New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065, 1079 (2d Cir. 1988). Analyzing the extent to which direct purchaser acquirers and ISOs fully and immediately pass on

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purchaser. *Delaware Valley*, 523 F.3d at 1121, 1123 n.1; *see also Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958, 968 n.20 (3d Cir. 1983). This clarification removes the guesswork required in determining whether there is a "realistic possibility" that the direct purchaser will sue the defendant, and brings Ninth Circuit case law in line with the Supreme Court's admonition against the recognition of new exceptions not previously articulated by the Supreme Court itself, which *Freeman's* now-superseded dicta would have done. *Utilicorp*, 497 U.S. at 216-17; *In re Brand Name Prescription Drugs Antitrust Litig*, 123 F.3d 599, 605 (7th Cir. 1997) ("*Utilicorp* implies that the only exceptions to the *Illinois Brick* doctrine are those stated in *Illinois Brick* itself"). Accordingly, plaintiffs' proposed exception not only raises individual issues of fact, but also is not even a valid exception.

[201] Some lower courts have recognized a "cost plus" exception, although the Supreme Court expressly declined the invitation to recognize such an exception, *Utilicorp,* 497 U.S. at 208, leading some lower courts to suggest that there is no such exception. *McCarthy*, 80 F.3d at 855 ("The vitality of the 'pre-existing cost-plus contract' exception is doubtful, however, in light of *Utilicorp*"); *see also Illinois ex. rel. Burris v. Panhandle E. Pipe Line Co.*, 935 F.2d 1469, 1478 (7th Cir. 1991) (the Supreme Court's "interpretation of the cost plus exception appears so narrow . . . as to preclude its application in any case . . . .").

any alleged overcharge would require a complicated factual inquiry not only for individual merchants, but also for every change in interchange rates, raising substantial individual issues. *See Illinois Brick,* 431 U.S. at 732 (the "attempt to trace the complex economic adjustments" from a change in price "would greatly complicate . . . already protracted treble damages proceedings"). Moreover, courts that recognize a cost plus exception also require a showing that the indirect purchaser has contractually agreed to buy a "fixed quantity" of the relevant goods. *See Utilicorp,* 497 U.S. at 218*; Hendrickson Bros.,* 840 F.2d at 1079. To the extent plaintiffs claim that some merchant-acquirer or processor contracts require purchases of fixed quantities, this, too, raises substantial issues of individual fact for millions of merchants.[202]

C. Plaintiffs' Remaining Argument Proposes An Exception That Raises Individual Issues of Fact

In an attempt to evade application of *Illinois Brick*, plaintiffs also seek to create a new exception to the indirect purchaser doctrine that is not only legally invalid, but, once again, raises additional individual issues of fact. In particular, they argue, without citation to any authority, that *Illinois Brick* should not be applied because the issuing bank allegedly deducts the interchange fee from the transaction amount owed by the acquirer to the merchant. This, they claim, suggests that the interchange fee is not paid *indirectly* by the merchant, but instead is paid *directly* by the merchant.

The method of accounting for the interchange fee—*i.e.*, its purported deduction from the transaction amount issuers pay to acquirers—is not relevant for purposes of *Illinois Brick*, because it does not negate the fact that acquirers and intermediaries act as middlemen between the merchant and defendants, and therefore has no bearing on the purposes behind that

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[202] Merchant-acquirer contracts are generally not for a fixed quantity. *See, e.g.,* Ex. 6, N. D'Agostino III Dep. at 155:8-156:25.

doctrine—*i.e.*, the avoidance of complex apportioning of overcharges between direct and indirect purchasers, and the need to avoid double recovery. And, as noted above, when there are changes to interchange rates, acquirers and intermediaries may not change the amount of the fee they charge merchants, so that the entire interchange fee at times is *not* deducted from the transaction amount owed to the merchant. Despite plaintiffs' assertions, therefore, determining the extent of the alleged overcharge that is actually passed on by acquirers and intermediaries to merchants would require not only the sort of complex assessment that *Illinois Brick* strictly prohibits, but also the sort of predominating individual issues that prevent class certification under Rule 23(b)(3).

Of course, Plaintiffs also provide no explanation—and cite to no authority—for the proposition that the simple billing method of deducting interchange from the transaction amount somehow immunizes their claims from application of *Illinois Brick*. This alone is dispositive because the Supreme Court has emphasized that no new exceptions should be created to the indirect purchaser doctrine for particular markets, no matter the merit. *Utilicorp*, 497 U.S. at 216-17; *In re Brand Name Prescription Drugs Antitrust Litig*, 123 F.3d 599, 605 (7th Cir. 1997). Indeed, the Supreme Court noted that the "possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule," and therefore held that "even assuming that any economic assumptions underlying the [*Illinois Brick*] rule might be disproved in a specific case, it would be an unwarranted and counterproductive exercise to litigate a series of exceptions." *Utilicorp*, 497 U.S. at 216-17. Accordingly, plaintiffs' proposed novel exception to the indirect purchaser rule should not be recognized.[203]

[203] Plaintiffs' and Dr. Bamberger's argument that acquirers do not account for interchange as revenue or expense, but instead as a pass through to merchants, also raises individual issues of fact. Acquirers and processors often account for interchange fees as an expense, as noted above. To be sure, for a minority of merchants the acquirer simply accounts for interchange as a pass through, but determining whether this is true for a particular

In short, most members of the putative class pay card processing fees to acquirers, third party processors, ISOs, franchisors and associations that are not defendants. Determining whether class members can seek antitrust relief despite *Illinois Brick*, therefore, requires analysis of complicated factual questions specific to each merchant, and cannot be assessed on a classwide basis.

VII. MARKET POWER WILL REQUIRE PROOF THAT IS NOT COMMON TO THE 23(B)(3) DAMAGES CLASS

When this Court certified a merchant class in *Visa Check I*, it expressly accepted the argument by a similar class of merchants that market power—which is an essential element of their rule of reason claims[204]—should be demonstrated by interchange *category*, rather than on a classwide basis. 192 F.R.D. at 87 (noting that, according to plaintiffs' expert, market power would be demonstrated "*by category,*" not by individual member) (emphasis added). Plaintiffs' expert in *Visa Check*, in fact, acknowledged that a separate analysis may need to be conducted for each interchange category, because Visa and MasterCard had different default interchange rates for each.[205] Similarly, Dr. Bamberger acknowledges in this case that defendants have different levels of alleged market power over different categories of merchants.[206]

In persuading this Court in *Visa Check I* that this necessary category-by-category analysis would not cause non-common issues to predominate, a similar merchant class argued (in 2001)

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merchant—and therefore whether it falls within the new exception proposed by plaintiffs—must be analyzed merchant-by-merchant, and is not susceptible to common, classwide proof. And, in any event, this "exception" has never recognized by the Supreme Court, and should therefore be rejected. *Utilicorp*, 497 U.S. 216-17; *Brand Name Prescription Drugs*, 123 F.3d at 605.

[204] *United States v. Visa*, 344 F.3d 229, 237-38 (2d Cir. 2003). All of plaintiffs' claims here are rule of reason claims, except their inter-network conspiracy claim.

[205] Ex. 67, 4/15/99 Carlton Reply Declaration in *In re Visa Check* ("Carlton Reply") at 24 n.42, ¶¶ 46-47.

[206] Ex. 1, Bamberger Dep. at 195:6-22.

that there were "at most only a small number" of such categories.[207] Plaintiffs' expert in that case also repeatedly emphasized that defendants did "not set credit or debit card interchange fees on a merchant-by-merchant basis" at the time, so that individual inquiry would not be required (emphasis in original).[208]

Applying the test proposed by plaintiffs and adopted by this Court in *Visa Check I*, it is evident that substantial non-common evidence will be required to prove market power *in this case*, because there have *not* been a "small number" of interchange categories during the putative class period. Instead, there have been *hundreds* of different fees for different merchant categories.[209] And, significantly, unlike the situation in *Visa Check*, there are also now individually-negotiated interchange arrangements for *thousands* of co-brand merchants and merchants with interchange arrangements with Visa and MasterCard.

Of course, as a matter of common sense, evidence regarding market power will be substantially different for (1) merchants like Wal-Mart, Exxon, and others that are themselves much larger than Visa and MasterCard, and use their own bargaining power to negotiate rates directly with the networks and banks; (2) mom-and-pop convenience stores; (3) internet businesses, where payment cards account for the vast majority of their transactions; and (4) public utilities, many of which have historically not even accepted payment cards.

Plaintiffs' own proposed evidence for demonstrating market power varies from category to category, and for merchants with individually negotiated interchange. Plaintiffs claim, for example, that they can prove market power with evidence that the overall "effective" interchange

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[207] Ex. 67, Carlton Reply ¶ 46; *see also id.* ¶ 45.

[208] Ex. 67, Carlton Reply at 24 n.42; ¶¶ 42, 45-46 (emphasis in original).

[209] Snyder Decl. Exs. 9A-C, 10A-C; *see also id.* ¶ 140.

rate has increased without a cost justification,[210] but this *average* effective interchange calculation masks the reality of what Dr. Bamberger himself describes as a "wide variety" of interchange rates[211] applicable to different categories during the class period. When individual interchange categories are examined, it is clear that many rates have stayed flat, and even decreased over time, including, to name just a few examples, rates for restaurants, fast food, utilities, gas stations and service industries.[212] Moreover, as noted above, thousands of merchants have individually-negotiated rates, which have decreased over time and differ significantly from default rates. Plaintiffs cannot, therefore, rely on purported increases in average default rates as classwide evidence of market power.[213]

Dr. Bamberger also claims that alleged price discrimination, and the setting of interchange fees above marginal costs, is evidence of market power. According to Dr. Bamberger, there has been no exercise of market power at all where prices are not set "substantially" above marginal cost.[214] To prove market power via price discrimination using Dr. Bamberger's test, then, plaintiffs would need to conduct an analysis for each interchange category—and each of thousands of merchants with individually negotiated rates—showing that its level of interchange fee is higher than the issuers' marginal costs for that particular category

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210 Pls.' Br. 53-54; Bamberger Decl. ¶¶ 55-56.

211 Bamberger Decl. ¶ 59.

212 *E.g.*, Snyder Decl. ¶ 140, Exs. 9A-C, 10A-C, 11B-C. Plaintiffs may claim that the mere fact that interchange fees applicable to certain categories have stayed flat or decreased may be consistent with the networks having market power, because the previous rates may had allegedly already been set at *supra*-competitive levels. Any such argument by plaintiffs misses the point: It is *their* burden to establish that they can prove market power with evidence common to the class, and their proposed evidence does not do so. It is not enough for them to point to equivocal evidence that could theoretically be consistent with market power; they must show that they can establish this "fact," and do so with common evidence.

213 *Visa Check I*, 192 F.R.D. at 68, and *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322 (S.D.N.Y. 2001), are not to the contrary, because the courts in those cases did not consider the burden caused by analyzing market power category-by-category, or for thousands of individually-negotiated interchange deals.

214 Ex. 1, Bamberger Dep. at 568:3–569:8.

or merchant. But Dr. Bamberger has admittedly not examined issuers' marginal costs,[215] and to do so for hundreds of categories and thousands of merchants with individually-negotiated deals would require considerable non-common analysis.

In short, plaintiffs' own proposed method for proving market power will require a complicated analysis of numerous non-common issues, including the changes to numerous interchange categories and thousands of individually-negotiated rates over time, and issuers' costs related to each merchant category and individually-negotiated deal. These matters, each of which require significant individual evidence, cause non-common issues to predominate.

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[215] Instead of conducting any such analysis, Dr. Bamberger relies on purported evidence that Visa and MasterCard set interchange rates based on merchant sensitivity to interchange rates, or their "elasticities of demand," rather than based on issuer costs. Ex. 1, Bamberger Dep. at 569:9-17, 575:18-576:20, 581:20-582:12. In doing so, Dr. Bamberger ignores the undisputed evidence that, while the networks consider several factors in setting interchange rates, one of those factors is indisputably issuer costs. More significantly, even if the networks did not expressly take such costs into account, the relevant question (according to Dr. Bamberger's definition of "market power") is not what factors the networks consider in setting interchange levels, but whether those levels, *in fact*, exceed issuers' marginal costs. As to that question, it cannot be disputed that interchange rates are almost always *less than* issuers' marginal costs, even when the limited cost categories that Dr. Bamberger identified as relevant are considered. *Id.* at 570:4-573:15 (stating that the product networks purportedly sell to merchants is "network services," within which he includes protection of merchants against the risk of fraud and non-payment by cardholders); September 2006 Government Accountability Office Report at p. 99 - 100, http://www.gao.gov/new.items/d06929.pdf (collecting data regarding rate of default by cardholders). To the extent plaintiffs assert that that is not the case for particular merchants or categories, it raises substantial individual issues of fact requiring a complex comparison of issuer marginal costs to interchange rates for each of hundreds of interchange categories and thousands of merchants with individual interchange arrangements.

Plaintiffs may note that issuers also recover some of their costs for cardholder non-payment from the other side of the two-sided market—*i.e.*, by charging higher APR's to other cardholders (i.e., the cardholders who do, in fact, pay off their bills). This demonstrates, of course, why Bamberger's proposed "marginal cost" requirement is inappropriate for this two-sided market; what matters is whether the alleged restraint raises the *total price*—*i.e.*, the price paid by both merchants *and cardholders*. Snyder Decl. ¶ 60, 141; *cf.* Ex. 1, Bamberger Dep. at 262:22-264:21 (acknowledging that if interchange fees do not raise issuer profitability, interchange may not be anti-competitive). But an analysis of that issue would require even more individual evidence, because not only would interchange rates and costs vary from merchant category to category, but so would the price to cardholders for the thousands of card products offered within the Visa and MasterCard networks.

CONCLUSION

For the foregoing reasons, plaintiffs' Motion for Class Certification should be denied.

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CERTIFICATE OF SERVICE

I, Eric H. Grush, hereby certify that, on October 6, 2008, I caused true copies of the forgoing *Defendants' Memorandum in Opposition to Plaintiffs' Motion for Class Certification* and the *Declaration of Edward A. Snyder Regarding Class Certification* to by served by Lexis-File and Serve upon all counsel.

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