20-339-cv(L)

20-304-cv (CON), 20-340-cv (CON), 20-341-cv (CON), 20-342-cv (CON), 20-343-cv (CON), 20-344-cv (CON)

In the United States Court of Appeals for the Second Circuit

IN RE PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK (CIV. NO. 05-1720) (THE HONORABLE MARGO K. BRODIE, J.)

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CORPORATE DISCLOSURE STATEMENT

Defendants-appellees are Bank of America, N.A.; Bank of America Corporation; BA Merchant Services LLC f/k/a National Processing, Inc.; FIA Card Services, N.A.; and MBNA America Bank, N.A.; Capital One Bank; Capital One, F.S.B.; Capital One Bank (USA), N.A.; and Capital One Financial Corporation; Chase Bank USA, N.A.; JPMorgan Chase & Co.; JPMorgan Chase Bank, N.A.; and Chase Paymentech Solutions, LLC; Citibank, N.A., and Citigroup Inc.; Fifth Third Bancorp; First National Bank of Omaha; HSBC Bank USA, N.A.; HSBC Finance Corporation; HSBC Holdings PLC; and HSBC North America Holdings Inc.; Barclays Financial Corporation, Juniper Financial Corporation, Barclays Bank PLC, and Barclays Bank Delaware; Mastercard Inc. and Mastercard International Inc.; SunTrust Banks, Inc. and SunTrust Bank; Texas Independent Bancshares, Inc.; PNC Financial Services Group, Inc.; National City Bank of Kentucky; and National City Corporation; Visa International Service Association, Visa U.S.A. Inc., and Visa Inc.; and Wells Fargo & Company; Wells Fargo Bank, N.A.; Wells Fargo Merchant Services, LLC; Wachovia Corporation; and Wachovia Bank, N.A.

Appellee FIA Card Services, N.A., no longer exists, but its successor is appellee Bank of America, N.A. Bank of America, N.A., is an indirect wholly owned subsidiary of appellee Bank of America Corporation. Bank of America Corporation has no parent corporation; based on the Securities and Exchange

Commission's rules regarding beneficial ownership, Berkshire Hathaway Inc. beneficially owns more than 10% of Bank of America Corporation's outstanding common stock.

Appellee BA Merchant Services LLC, formerly known as National Processing, Inc., is an indirect subsidiary of Fiserv Corporation. Fiserv Corporation has no parent corporation, and no publicly held company owns 10% or more of its stock.

Appellee Barclays Financial Corporation f/k/a Juniper Financial Corporation was dissolved on September 10, 2010. Appellee Barclays Bank Delaware is an indirect wholly owned subsidiary of appellee Barclays Bank PLC, which is a wholly owned subsidiary of Barclays PLC. Barclays PLC has no parent corporation, and no publicly held company owns 10% or more of its stock.

Appellee Capital One, F.S.B., no longer exists, but its successor is appellee Capital One Bank (U.S.A.), N.A. Appellees Capital One Bank and Capital One Bank (U.S.A.), N.A., are wholly owned subsidiaries of Capital One Financial Corporation. Capital One Financial Corporation has no parent corporation, and no publicly held company owns 10% or more of its stock.

Chase Manhattan Bank USA, N.A., changed its name to Chase Bank USA, N.A. Appellee Chase Bank USA, N.A., no longer exists, but its succes-

sor is appellee JPMorgan Chase Bank, N.A. Appellee Chase Paymentech Solutions, LLC, no longer exists, but its successor is Paymentech, LLC. Paymentech, LLC, is a direct wholly owned subsidiary of JPMorgan Chase Bank, N.A. JPMorgan Chase Bank, N.A., is a direct wholly owned subsidiary of appellee JPMorgan Chase & Co. JPMorgan Chase & Co. has no parent corporation, and no publicly held company owns 10% or more of its stock.

Citibank (South Dakota), N.A., no longer exists, but its successor is appellee Citibank, N.A. Citibank, N.A., is an indirect wholly owned subsidiary of appellee Citigroup Inc. Citigroup Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

Appellee Fifth Third Bancorp has no parent corporation, and T. Rowe Price Associates, Inc. currently owns 10% or more of its stock.

Appellee First National Bank of Omaha is a subsidiary of First National of Nebraska, Inc. First National of Nebraska, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

Appellee HSBC Bank USA, N.A., is an indirect wholly owned subsidiary of appellee HSBC North America Holdings Inc. Appellee HSBC Finance Corporation is a wholly owned subsidiary of HSBC North America Holdings Inc. HSBC North America Holdings Inc. is an indirect wholly owned subsidiary of appellee HSBC Holdings PLC. HSBC Holdings PLC has no parent corporation, and no publicly held company owns 10% or more of its stock.

Appellee Mastercard International Inc. is a wholly owned subsidiary of appellee Mastercard Inc. Mastercard Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

Truist Bank is the successor by merger to appellee SunTrust Bank. Truist Financial Corporation is the successor by merger to appellee SunTrust Banks, Inc. Truist Bank is a wholly owned subsidiary of Truist Financial Corporation. Truist Financial Corporation has no parent corporation, and no publicly held company owns 10% or more of its stock.

Appellee Texas Independent Bancshares, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

Appellees National City Corporation and National City Bank of Kentucky no longer exist, but their successor is PNC Bank, N.A. PNC Bank, N.A., is a wholly owned subsidiary of appellee PNC Financial Services Group, Inc. PNC Financial Services Group, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

Appellees Visa U.S.A. Inc. and Visa International Service Association are subsidiaries of appellee Visa Inc. Visa Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

Appellees Wachovia Bank, N.A., and Wachovia Corporation no longer exist, but their successors are appellees Wells Fargo & Company and Wells

Fargo Bank, N.A. Wells Fargo Bank, N.A., is an indirect wholly owned subsidiary of Wells Fargo & Company. Wells Fargo & Company has no parent corporation, and no publicly held company owns 10% or more of its stock.

Appellee Wells Fargo Merchant Services, LLC, is a subsidiary of Wells Fargo Bank, N.A., and an indirect subsidiary of Fiserv, Inc. Fiserv, Inc., has no parent corporation; based on a Schedule 13D filed with the Securities and Exchange Commission, New Omaha Holdings L.P. and its affiliates own 10% or more of the stock of Fiserv, Inc.

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STATEMENT OF THE ISSUES

1. Whether the district court acted within its discretion in determining that the representation of a settlement class was adequate where there will be certain limited future disputes about the ownership of claims to class settlement funds.

2. Whether the district court acted within its discretion in deciding that it will appoint a special master to resolve future disputes about claim ownership, subject to review by the court, as part of the claims-administration process.

3. Whether the district court acted within its discretion in determining that the class was ascertainable.

4. Whether the district court acted within its discretion in approving a release of future claims, based on the continuation of the settled conduct, that accrue within a finite time period.

5. Whether the district court acted within its discretion in approving a notice scheme that apprised recipients of the options available to them.

STATEMENT OF THE CASE

This case arises out of the largest antitrust class-action settlement in history—a settlement resolving the claims of approximately 12 million merchants against Visa, Mastercard, and numerous banks that serve as payment-card issuers for those networks. Now, after fifteen years of litigation and the

payment of over $5.6 billion in settlement funds, a tiny fraction of those 12 million merchants have objected to the settlement. Those objections boil down to an argument that ownership disputes over a small percentage of the claims give rise to a disqualifying intra-class conflict. Objectors' position is not supported by the law or the facts, and it should not be permitted to delay the long-awaited dispersal of billions of dollars to millions of merchants. Because objectors have identified no error, much less an abuse of discretion, in the district court's reasoned approval of the settlement, the judgment of the district court should be affirmed.

A. Factual Background

Visa and Mastercard operate two of the world's leading payment-card networks. When a consumer uses a Visa- or Mastercard-branded credit or debit card to pay for a good or service, that transaction typically goes through a multistep, virtually instantaneous approval process: (1) the merchant collects the card information; (2) the information is sent to the merchant's bank (the acquiring bank); (3) the acquiring bank forwards the information to the appropriate network (Visa or Mastercard); (4) the network relays the transaction to the bank that issued the customer's card (the issuing bank); and (5) the issuing bank confirms that the customer has sufficient credit or funds to cover the purchase. *See* J.A. 2849; *In re Payment Card Interchange Fee & Mer-*

chant Discount Antitrust Litigation, 827 F.3d 223, 228 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 1374 (2017). When each of those steps is complete, the issuing bank transmits its approval back through the chain to the acquiring bank, which in turn relays it to the merchant at the point of sale. *See* J.A. 2849.

The issuing bank provides the funds via the appropriate network to the acquiring bank, less an "interchange fee." *See* J.A. 2849. While issuing and acquiring banks are free to agree on an applicable interchange fee, Visa and Mastercard each set default interchange fee schedules to apply in the absence of such an agreement to transactions conducted over their respective networks. The applicable default fees vary depending on a number of factors, including the network, the type of payment card, and type of merchant. Neither Visa nor Mastercard retains the interchange fees; it is the issuing bank that actually obtains the interchange fee from the acquiring bank. *See* J.A. 2850; *Interchange Fee*, 827 F.3d at 228.

The merchant's acquiring bank, in turn, pays the merchant under their own contractual arrangement. In exchange for its services, the acquiring bank charges the merchant what is known as a "merchant discount fee," which covers the acquiring bank's expenses associated with its network participation (typically including the interchange fee) and includes a discrete fee charged by the acquiring bank for its own services in processing transactions. *See* J.A. 2849-2850. As a result, when a transaction is approved, the merchant receives

the purchase price minus the merchant discount fee. *See id.*; J.A. 4671 n.2. The issuing bank has the right to demand payment from the consumer and bears the risk of non-payment.

The seamless nature of that system—essential to modern-day commerce—is made possible through various rules imposed at the network level. For example, "honor-all-cards" rules require any merchant that accepts a Visa- or Mastercard-branded credit card to accept all credit cards of that brand, regardless of bank issuer or card type. *See Interchange Fee*, 827 F.3d at 228. This ensures that consumers can use their particular type of Visa or Mastercard card at any establishment where Visa or Mastercard is accepted.

Visa and Mastercard further ensure a uniform, acceptable, and reliable customer experience with their respective "no-surcharge" rules. *See* J.A. 2851. Those rules have generally aimed to prevent merchants from imposing surcharges that would effectively undermine the "honor-all-cards" rules.

Each network's establishment of default interchange rules promotes efficiencies within the systems. Absent such default rules, each of the thousands of issuing banks and acquiring banks would need to negotiate appropriate interchange fees covering every possible combination of merchant, transaction value, and specific card product. *See* J.A. 2850-2851. Such negotiations would entail substantial transaction costs and be logistically cumbersome, if not entirely impractical.

B. Procedural History

1. The Lawsuits And The Initial Settlement

The various antitrust actions relevant to this appeal were filed beginning in 2005 and were consolidated by the Judicial Panel on Multidistrict Litigation before Judge John Gleeson in the United States District Court for the Eastern District of New York. On April 24, 2006, plaintiffs, various merchants, filed a consolidated class-action complaint against Visa, Mastercard, and various issuing banks (the parties to this brief), followed by several amended complaints. *See* J.A. 966, 1064, 1104, 1152, 1338. The then-operative complaints alleged that various rules discussed above, including the default interchange, honor-all-cards, and no-surcharge rules, were anticompetitive and violated the Sherman Act and certain state laws. *See* J.A. 1187-1198, 1287-1327, 1403-1410. Plaintiffs' complaints alleged two discrete classes of merchants that accepted Visa- and Mastercard-branded payment cards: a Rule 23(b)(3) class seeking damages, and a Rule 23(b)(2) class seeking declaratory and injunctive relief. *See* J.A. 1245, ¶ 108(a)-(b).

Over the next six years, the parties actively litigated the case. Discovery included the production and review of more than 80 million pages of documents; the exchange of 17 expert reports; and more than 400 depositions, including 32 days of expert deposition testimony. *See* J.A. 2851.

In October 2012, after several years of negotiations, the parties executed a settlement agreement. *See* J.A. 2042; *Interchange Fee*, 827 F.3d at 229. Consistent with the complaint, the proposed settlement agreement included two classes. The first—the Rule 23(b)(3) class—covered merchants that accepted Visa or Mastercard from January 1, 2004, to November 28, 2012. *See Interchange Fee*, 827 F.3d at 229. Members of the (b)(3) class were collectively eligible to receive payments totaling approximately $5.3 billion after "takedown payments" to defendants based on opt-outs from the class. *See* J.A. 3268, 3279, 4675. Consistent with the rules governing Rule 23(b)(3) classes, members of the proposed class had the ability to opt out of the settlement. *See* J.A. 4675.

The settlement agreement also contemplated a second class—the Rule 23(b)(2) class, from which opt-outs were not permitted—which covered all merchants that accepted Visa or Mastercard on or after November 28, 2012. *See Interchange Fee*, 827 F.3d at 229. Under the terms of the proposed settlement, members of the (b)(2) class received injunctive relief in the form of changes to Visa's and Mastercard's network rules. *See id.* For example, the (b)(2) class secured a rule change that "permit[ted] merchants to surcharge credit cards at both the brand level (*i.e.*, Visa or MasterCard) [or] at the product level (*i.e.*, different kinds of cards, such as consumer cards, commercial cards, premium cards, etc.), subject to acceptance cost and limits imposed by

other networks' cards." J.A. 2857. Both of the proposed settlement classes were represented by the same court-appointed counsel. *See* J.A. 963.

On November 27, 2012, the district court preliminarily approved the settlement agreement. *See* J.A. 2854. Notice of the proposed settlement was then provided to potential class members through more than 20 million mailings and more than 400 publications. *See id.* On December 13, 2013, the district court issued its final approval order, rejecting a number of objections to the settlement. *See* J.A. 2897. The objectors argued that the (b)(2) class should not have been certified and the settlement was unreasonable and inadequate. *See Interchange Fee*, 827 F.3d at 230.

2. The Prior Appeal

The objectors appealed. On June 30, 2016, this Court vacated the district court's judgment approving the settlement. *See Interchange Fee*, 827 F.3d at 240. The Court agreed with the objectors that the members of the (b)(2) class were inadequately represented, in violation of the requirement of Rule 23(a)(4) and the Due Process Clause, because the (b)(2) class and the (b)(3) class were represented by the same counsel despite the conflicting interests of their members. *Id.* at 231, 233-234.

First, the Court concluded that a "fundamental" conflict between (b)(2) and (b)(3) class members required structural protections. *Interchange Fee*, 827 F.3d at 233, 236. Specifically, the Court explained that the interest of (b)(3)

class members was to "maximize cash compensation for past harm," and the class members had "little to no interest in the efficacy of the injunctive relief because [many members] no longer operate[d], or no longer accept[ed] Visa or MasterCard." *Id.* at 233-234. By contrast, the interest of (b)(2) class members was to "maximize restraints on network rules to prevent harm in the future," and the class members had "little to no interest in the size of the damages award because they [all] did not operate or accept Visa or MasterCard before November 28, 2012." *Id.* Because of that conflict of interest, the Court determined that the two classes must be divided into "homogenous subclasses . . . with separate representation." *Id.* at 234 (internal quotation marks and citations omitted).

In particular, the Court focused on the relief and representation afforded to the (b)(2) class members. The Court explained that (b)(2) class members were comparatively "worse off" under the settlement because its structure created an incentive to "trade diminution of (b)(2) relief for increase of (b)(3) relief." *Interchange Fee*, 827 F.3d at 234. In other words, that structure "sapped class counsel of the incentive to zealously represent" the (b)(2) class. *Id.* at 236. The Court "[did] not impugn the motives or acts of class counsel," but it concluded that "class counsel was charged with an inequitable task." *Id.* at 234.

Second, the Court stated that the "substance" of the settlement—in particular, the combination of the relief provided to the mandatory (b)(2) class members and the indefinite release of claims—"confirmed" that the (b)(2) class was inadequately represented. *Interchange Fee*, 827 F.3d at 236. The Court noted that some (b)(2) class members—those that would begin accepting payment cards after July 20, 2021—"gain[ed] no benefit at all" because defendants' obligation to provide injunctive relief would terminate on that date. *Id.* at 238, 239. At the same time, the release "operate[d] indefinitely" and "permanently immunize[d]" defendants from future claims. *Id.* at 239.

The Court did not express any concern about the sufficiency of the (b)(3) settlement terms or the representation provided to members of the (b)(3) class.

3. Settlement Renegotiation

While the appeal was pending in this Court, the case was reassigned to Judge Margo Brodie following Judge Gleeson's retirement. On remand, Judge Brodie addressed this Court's concerns by appointing two separate groups of interim co-lead counsel—one to represent the merchants seeking certification under Rule 23(b)(2) for injunctive relief, and the other to represent merchants seeking certification under Rule 23(b)(3) for monetary damages. *See* J.A. 4678-4679. Although this Court had expressed concerns about

the adequacy of the representation of the (b)(2) class, it had also "acknowledged the due diligence and extensive time and labor" that went into the initial settlement, including discovery, the use of "well-respected mediators," and several "marathon negotiations." J.A. 4678 (quoting *Interchange Fees*, 827 F.3d at 229). The district court therefore appointed the same three law firms that had previously served as class counsel to serve as counsel only for the 23(b)(3) class going forward. *See* J.A. 2992.

On October 30, 2017, the currently operative version of the complaint (the third amended consolidated complaint) was filed on behalf of the putative (b)(3) class. *See* J.A. 3107. The complaint alleged that the plaintiff merchants "directly [paid] [i]nterchange [f]ees," and it again sought relief against defendants for violations of the Sherman Act under the Clayton Act (and against some defendants under California law). J.A. 3156. A separate complaint was filed by different counsel on behalf of a putative (b)(2) class, which sought injunctive relief. J.A. 2999.

With respect to the newly separated (b)(3) class, the parties conducted further discovery, which included the taking of 170 additional depositions and the reviewing of millions of additional documents. *See* J.A. 4702-4703. At the same time, the parties conducted extensive further negotiations in an effort to reach a new settlement. J.A. 4703. On September 18, 2018, after the parties

reached an agreement, class counsel moved for preliminary approval of the new settlement as to the (b)(3) class alone. *See* J.A. 3250.

The settlement agreement defines the class as follows:

> [A]ll persons, businesses, and other entities that have accepted any Visa-Branded Cards and/or Mastercard-Branded Cards in the United States at any time from January 1, 2004 to the Settlement Preliminary Approval Date, except that the Rule 23(b)(3) Settlement Class shall not include (a) the Dismissed Plaintiffs, (b) the United States government, (c) the named Defendants in this Action or their directors, officers, or members of their families, or (d) financial institutions that have issued Visa-Branded Cards or Mastercard-Branded Cards or acquired Visa-Branded Card transactions or Mastercard-Branded Card transactions at any time from January 1, 2004 to the Settlement Preliminary Approval Date.

J.A. 3324, ¶ 4. That class definition is substantially the same as the (b)(3) definition in the initial settlement—a definition that was not challenged in the prior appeal. *See* J.A. 2065, ¶ 2.

The settlement provides for a collective award of over $5.6 billion (after reductions for opt-outs), which exceeds the amount of the initial settlement after the reductions for opt-outs from that agreement. *See* J.A. 7329 n.8. The accompanying plan of administration states that the amount of "[i]nterchange [f]ees [p]aid" attributable to each claimant during the class period will be determined "based upon the best available information or a reasonable estimate." J.A. 3567. Following that determination, each claimant will receive a *pro rata* share of the monetary fund "in accordance with the relative economic interests of the [c]laimants as measured by the [i]nterchange [f]ee amounts

attributable to their Visa- and Mastercard-[b]randed [c]ard transactions during the [c]lass [p]eriod." *Id.*

In return for that award, each participating class member agreed to release all claims "arising out of or relating to" any conduct or acts that "are or have been alleged or otherwise raised in the [litigation], or that could have been alleged or raised in the [litigation] relating to the subject matter thereof, or arising out of or relating to a continuation or continuing effect" of such conduct or acts. J.A. 3336, ¶ 31. The release covers all such claims that either have accrued through the court's preliminary approval of the settlement, or will "accrue no later than five years after the Settlement Final Date" (which is eleven business days after the date on which appeals from the settlement become final). J.A. 3321, ¶ 3(ss), 3336, ¶ 31(a).

Notably, the release in the present settlement is significantly narrower than the corresponding release in the initial settlement. While the initial release "fully, finally, and forever settle[d], discharge[d] and release[d]" defendants from claims based on the continuation of the settled conduct, J.A. 2081, ¶ 33, the present release is finite in duration—ending approximately five years after the appeals from the settlement become final, *see* J.A. 3337, ¶ 31(a). In addition, the present release does not "release the right of any Rule 23(b)(3) class member to participate in the Rule 23(b)(2) action 'solely as to injunctive relief claims.'" J.A. 7329-7330 (quoting J.A. 3341, ¶ 34(a)). And the release is

also substantively narrower: although the release in the initial settlement included claims relating to any Visa or Mastercard rules, the present release covers only claims relating to conduct that was or could have been raised in relation to this action. *Compare* J.A. 2081, ¶ 33(a), *with* J.A. 3337, ¶ 31(b).

4. Preliminary Approval

After class counsel moved for preliminary approval of the settlement, *see* J.A. 3250, three objections were filed on behalf of so-called branded operators—retail merchants that own or operate service stations selling gasoline produced and branded by major oil companies. *See* J.A. 4158, 4161, 4409. According to objectors, the major oil companies process the payment-card transactions for the stations operating under those companies' brands. *See* J.A. 4176. Objectors asserted that it was the branded operators that "accepted" payment cards under the "plain meaning" of the class definition, but noted that many major oil companies had "taken the contrary position that *they* are proper claimants by virtue of their role in processing the transactions." J.A. 4166. Accordingly, objectors contended that there was a dispute between the branded operators and oil companies as to which entities were the "direct payors" of the interchange fee under federal antitrust law and thus eligible to receive payment from the settlement fund. J.A. 4176-4177. As a result of that dispute, objectors argued, the settlement gave rise to an intra-class conflict

and the branded operators were inadequately represented by class counsel. *See* J.A. 4167-4168.

In addition, certain objectors raised concerns about the settlement's exclusion of the so-called "Dismissed Plaintiffs"—a defined term in the agreement referring to nearly 200 merchants that had opted out of the initial settlement and had filed and dismissed with prejudice a separate action against a defendant (*i.e.*, after separately settling their claims). *See* J.A. 3316. The Dismissed Plaintiffs also included related entities that the merchants had identified in their exclusion requests from the initial settlement. *See id.* Objectors argued that certain branded operators had sales processed by other oil companies or third parties, and the branded operators had no way of knowing whether they were excluded from the settlement "based on *all* sales at *all* of their locations" or only for those sales that were processed by the Dismissed Plaintiff to which they were related. J.A. 4184.

To address the latter issue, the district court asked class counsel to submit a revised proposed preliminary approval order for the Rule 23(b)(3) class. *See* J.A. 4427. The proposed order included a "notice of exclusion" from the settlement designed to provide notice to any entity excluded from the settlement as a Dismissed Plaintiff. J.A. 4471. The notice explained that the recipient had been identified as a Dismissed Plaintiff and would thus be "excluded from the class" unless the recipient "also accepted Visa and Mastercard cards

in a capacity other than as a 'Dismissed Plaintiff.'" *Id.* If the recipient accepted cards in such a capacity, it could "still . . . make a claim for settlement funds." J.A. 4472. Further, the notice stated that, if the recipient had questions about why it was identified as a Dismissed Plaintiff, or "d[id] not believe that [it] should be considered" a Dismissed Plaintiff, it should contact class counsel. *Id.*

On January 24, 2019, the district court granted preliminary approval of the settlement. *See* J.A. 4657. In determining that it would likely grant final approval of the settlement, the district court considered the factors specified in Rule 23(e)(2) and outlined by this Court in *City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974). *See* J.A. 4691. The district court noted, among other things, that defendants had raised certain defenses to liability, which weighed in favor of settlement. *See* J.A. 4708. One such defense was that the class plaintiffs' claims were "barred by the doctrine of *Illinois Brick*." J.A. 4708 n.31. Specifically, defendants argued that the plaintiff merchants were indirect payors under *Illinois Brick*, and thus barred from recovery, because the acquiring banks and not the merchants paid interchange fees to the issuing banks. *See* J.A. 1988. The district court did not "take a position" on the merits of the defenses, but it acknowledged that they "present[ed] risks" to the class plaintiffs. J.A. 4708 n.31.

With respect to the objections, the district court explained that they arose from a dispute about "who has the right to claim class status," not a conflict "between class members." J.A. 4699. Because relationships between a branded operator and an oil company are governed by contract, the court explained, the question of which entity owns any individual claim is simply a "contractual issue," requiring resolution on a case-by-case-basis. *Id.* But for any given transaction, only one of the entities, either the branded operator or the oil company, actually possesses the "right to claim class status." *Id.* As a result, the court explained, there is no intra-class conflict or inadequate representation, because class counsel advocated for all of the class members, *i.e.*, the entities that have claims. *See id.* As the court put it, class counsel "do not represent[] the entity that loses the dispute over the right to claim settlement funds." *Id.*

Following preliminary approval, over 221 million merchant records were collected from Visa, Mastercard, and large domestic payment processors, which resulted in a database of over 16 million merchants. *See* J.A. 5263, 5268. Based on that information, 16.3 million notices were mailed to "likely" class members. *See* J.A. 5267-5268. Notice was published in some 354 print publications (with a combined circulation of almost 40 million), and it was also published over the Internet, with 689 million banner impressions. *See* J.A. 7331. During the notice process, more than 6,000 "notices of exclusion" were sent to

Dismissed Plaintiffs. *See* J.A. 7332. In addition, the district court and class counsel actively monitored concerns regarding the branded operators and other franchisees, with class counsel providing supplemental notices as necessary. J.A. 7332-7333; *see, e.g.*, J.A. 6550, 6899.

5. Final Approval

After the completion of the notice period, class counsel moved for final approval of the settlement. *See* J.A. 4758. Out of an estimated 12 million class members, the district court received only 675 opt-out requests (significantly fewer than the 7,807 opt-out requests from the initial settlement), and only 176 objections. *See* J.A. 2697, ¶ 7, 7024, ¶ 6, 7356-7357.

Although the settlement covers—and benefits—the full range of the merchant community, ranging from grocers to electronics stores to restaurants to online retailers, the large majority of the objections—approximately 140 of the 176—were filed on behalf of branded operators. All but 10 of those objections were boilerplate forms. *See* J.A. 7339; *see, e.g.,* J.A. 6561, 6673, 6704. The objections largely restated the arguments that had been made at the preliminary-approval stage regarding the alleged intra-class conflict and inadequate representation. *See* J.A. 7358-7362. Proceeding from the premises that both a branded operator and the corresponding oil company were members of the class with respect to a given claim, and that both would be subject to the release regardless of any determination as to who owned the claim in

question, objectors argued that there was an intra-class conflict and further argued that "[the branded operators'] claims would be released, even [though] they would receive no compensation whatsoever" from the settlement. J.A. 6570.

Objectors also raised an argument concerning a subset of branded operators, particularly those associated with the oil company Valero. As part of a separate, earlier opt-out settlement, Valero had settled claims on behalf of itself and its branded operators. *See* J.A. 7142. Consequently, both Valero and its branded operators were considered Dismissed Plaintiffs excluded from the class. *See* J.A. 4371, 7392 (quoting J.A. 6598, ¶¶ 16-17). The branded operators associated with Valero argued that Valero did not have the right to settle claims on their behalf. *See* J.A. 7392.

At the final fairness hearing, the district court conducted an extensive inquiry into the objections. The court noted that class counsel "is representing everyone who's in the class" and indicated that a dispute over claim ownership does not amount to an intra-class conflict. J.A. 7066-7067. As the court explained, "if there's a dispute as to [a] claim . . . then the dispute gets resolved pursuant to the plan or if need be, the [c]ourt or a special master." J.A. 7068-7069. While class counsel initially suggested that the oil companies would ultimately be found to be the owners of the disputed claims, based on contracts

counsel had seen, counsel ultimately stated that they were "agnostic" about "who owns the claim." J.A. 7112.

With respect to the objections concerning the claims of Valero's branded operators, the Court acknowledged that the "notice of exclusion" previously sent to the franchisees informed them that, depending on their relationship with Valero or any similarly situated company, it was still possible for them to "make a claim to [the] class settlement funds." J.A. 4423; *see* J.A. 7144-7145. Class counsel emphasized that the same notice indicated that any recipient that did not believe it should be excluded should contact class counsel. *See* J.A. 7143. And defendants noted that, if a branded operator "submits a claim and that claim is accepted by the claims administrator," defendants would not "stop that party from being paid." J.A. 7142. Nonetheless, out of an abundance of caution, the court requested that a further notice be sent to the entities that had received the "notice of exclusion" to inform them that "they may have a claim and what they need to do to proceed with that claim." J.A. 7143-7144.

Following the final fairness hearing, class counsel prepared such a notice, which stated:

> [I]f you believe that [a listed entity] did not have authority to settle and release your claims in its individual lawsuit, this Notice applies to you. This Notice is to inform you that you can make a claim for class settlement funds if [the listed entity] did not have authority to settle and release your claims.

See J.A. 7220. The district court approved the form of that notice. *See* J.A. 7395-7396.

In addition, at the request of the district court, class counsel submitted proposed procedures for a special master. *See* J.A. 7213. Class counsel proposed that a special master would resolve any disputes arising out of the settlement administration and distribution, including the resolution of claims made to the settlement fund. *See id.* According to the proposal, parties must raise such disputes to the class administrator in the first instance, and parties can appeal the class administrator's determinations to the special master. *See id.* The special master's report and recommendation on each matter must be filed on the docket; any interested party can file objections to those recommendations, and the district court shall review the special master's recommendations de novo. *See* J.A. 7214.

On December 13, 2019, the district court granted final approval of the settlement. *See* J.A. 7288. In a 74-page opinion, the district court determined that the settlement was fair, reasonable, and adequate under Rule 23(e), and it rejected the objections to the settlement. As is relevant here, the district court reasoned that, while "the dispute over who has a claim to a share of the settlement fund, [b]randed [o]perators or major oil suppliers, franchisees or franchisors, is a dispute that needs to be resolved," it "need not be resolved through creation of subclasses or appointing new class representatives or

counsel." J.A. 7360. As to the membership of the class, the court explained that the interpretation of the class definition is "objectively guided by federal antitrust standards." J.A. 7390. The court noted that, consistent with federal antitrust law, class counsel represented that they brought suit only for "'the direct purchaser[]' and not every entity in the payment chain." J.A. 7390 (quoting J.A. 7125-7126). For that reason, the court concluded, class counsel were "advocating" for all class members, *i.e.*, "those who have a claim." J.A. 7360.

The district court further reasoned that, although disputes about which entity is entitled to recover under that definition "will inevitably arise," determination of "who holds a claim"—*i.e.*, who is the class member—could be decided in the course of the claims-administration process. J.A. 7389. The court made clear that a special master would be appointed to "resolve such disputes," and the court would have "ultimate authority to adjudicate" them. J.A. 7367-7368. The court noted that, despite objecting to the settlement, "at no time ha[d] any [b]randed [o]perator filed a motion over the issue of whether they own[ed] the claim to a *pro rata* share of the settlement, or whether the major oil suppliers own[ed] the claim." J.A. 7362 n.13.

Addressing the objections concerning the claims of Valero's franchisees, the district court stressed that the supplemental notice to be sent to entities excluded through the Valero settlement (and similarly situated entities) would

inform them that they may have claims. *See* J.A. 7395-7396; p. 19, *supra*. The court explained that "any entity in a franchisee-franchisor relationship that believes it has been wrongly excluded[] may file a claim, which can be assessed for validity through a claims administration process." J.A. 7393.

Finally, the district court rejected objections to the settlement's release of claims, based on the continuation of the settled conduct, that accrue in the five-year period after the settlement becomes final and is no longer subject to appeal. Applying the "well established" law of this Court, the district court determined that the settlement's release of future claims was appropriate. *See* J.A. 7374-7379.

These consolidated appeals from objectors follow.

SUMMARY OF ARGUMENT

Aside from their objections to class counsel's fees (which defendants do not address here), objectors raise various arguments concerning an alleged intra-class conflict and inadequate representation, the authority of a special master, the ascertainability of the class, the release of future claims, and the adequacy of notice. Although the arguments differ in form, they are largely variations on a theme: that the tension between the relatively small number of branded operators and oil companies rises to the level of a conflict that undoes the settlement for all class members. But objectors fail to grapple with the central and fatal flaw in their argument: only one entity is entitled to a

recovery in the settlement for any given transaction, and so only that single entity is a class member based on the transaction. For that reason, objectors are not describing an intra-class conflict; they are instead describing a potential future dispute between a class member and a non-class member. Although that dispute may understandably be of significance to the entities that are parties to it, it has no bearing on the overall propriety of the settlement. And in the absence of an intra-class conflict, objectors' other arguments collapse. Objectors cannot point to any error in the district court's reasoning, much less an abuse of discretion. The district court correctly approved the settlement, and its judgment should be affirmed.

I. There was no intra-class conflict or inadequate representation. Settled law makes clear that a class definition must be read against the background of federal law—in this case, the familiar rule of federal antitrust law that indirect payors generally cannot sue for antitrust damages. Although defendants have maintained that *all* merchants are indirect payors and thus barred from recovery, defendants compromised that defense to reach a settlement. But there has never been a dispute that, consistent with federal law, only one entity can recover in the settlement for any given transaction. As a result, and as the parties have long understood about the settlement, only the merchant that is the more direct payor of the interchange fee can recover in the settlement. And it is that merchant—and no other—that is encompassed

in the class definition. Where there is a dispute between a branded operator and an oil company as to who should recover for a single transaction, those entities are disputing which of them owns the claim. But only the claim owner is a class member based on that transaction. And by definition, a dispute over claim ownership cannot give rise to an intra-class conflict.

II. It was well within the district court's discretion to determine that it will assign a special master to resolve any dispute over which entity is entitled to recover in the settlement. The court's decision to do so here comports with common practice in this jurisdiction and others. Because the special master is tasked with determining only claim *ownership*—not questions of liability or the like—and because its determination will be subject to review by the district court, there is nothing problematic about the assignment of that responsibility to the special master in the first instance. Objectors have pointed to no authority saying otherwise.

III. To the extent that objectors repackage their class-conflict argument as an argument about ascertainability, that effort is unavailing. This Court has made clear that ascertainability requires only that a class definition use objective criteria and contain definite boundaries. The definition here meets those requirements. Although objectors complain that referrals to the

special master will make the process of ascertaining class membership infeasible, this Court has specifically declined to impose such an administrative-feasibility requirement in determining ascertainability.

IV. Settled law likewise disposes of objectors' complaint that the release of claims improperly extends into the future. Although objectors contend that the release presents an issue of fundamental fairness, this Court has previously approved the release of future claims relating to conduct that arises out of the same factual predicate as the settled conduct. Objectors cannot distinguish this Court's case law; indeed, they do not even attempt to do so.

V. Finally, certain objectors complain that the supplemental notice to the Dismissed Plaintiffs was inadequate because it did not provide them with an opportunity to opt out of the present settlement. But the Dismissed Plaintiffs do not need an opportunity to opt out of the present settlement because the status quo is that they are not considered class members: they are entities that opted out of the initial settlement and separately settled their claims, as well as related entities identified by those settling entities. The supplemental notice was reasonable: it simply informed the recipients that they may submit claims in the present settlement if they believe they are entitled to recover because their claims were separately settled without their authority.

In sum, objectors provide no good reason for this Court to reverse the district court's well-reasoned approval of the settlement, which will benefit

millions of merchants across the United States. The district court's judgment should be affirmed.

STANDARD OF REVIEW

This Court reviews a district court's decision to certify a class and to approve a settlement agreement for abuse of discretion. *See*, *e.g.*, *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litigation*, 827 F.3d 223, 231 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 1374 (2017); *In re Bank of America Corp. Securities, Derivative, & Employee Retirement Income Security Act (ERISA) Litigation*, 772 F.3d 125, 132 (2d Cir. 2014). A district court abuses its discretion when its decision "rests on a legal error or clearly erroneous factual finding" or "falls outside the range of permissible decisions." *Interchange Fee*, 827 F.3d at 231. As is always true under an abuse-of-discretion standard, this Court reviews the district court's factual findings for clear error and its conclusions of law de novo. *See id.*

ARGUMENT

I. CLASS COUNSEL ADEQUATELY REPRESENTED ALL OF THE MEMBERS OF THE CLASS

The district court correctly rejected objectors' argument that the branded operators were inadequately represented by class counsel because of an intra-class conflict. It is undisputed that, for any single transaction in which an interchange fee was paid, only one merchant is entitled to recover in the

settlement. Under the class definition—properly read in light of federal antitrust law and the operative settlement documents—if two merchants at different levels of the payment chain submit claims for the same transaction, only the entity that is entitled to recover from the settlement fund is a class member based on that transaction.

Once that is understood, objectors' complaints quickly collapse: a dispute between two entities as to who is a class member based on a given transaction simply cannot amount to an intra-class conflict. As the district court reasoned, class counsel adequately represented all class members in reaching the settlement, and any disputes over claim ownership—*i.e.*, disputes about *who* is a class member—can be handled through the claims-administration process. Objectors' contrary arguments lack merit.

A. The Adequacy-Of-Representation Inquiry Serves To Uncover Fundamental Conflicts Between Class Members

In order to approve a class-action settlement, a district court must determine, among other things, that "the representative parties . . . fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4); *see In re American International Group, Inc., Securities Litigation*, 689 F.3d 229, 238 (2d Cir. 2012). That rule "serves to uncover conflicts of interest between named parties and the class they seek to represent," as well as the "competency and conflicts of class counsel." *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591, 625, 626 n.20 (1997).

The Supreme Court has held that "disparate interests" between class members, and the resulting "incentive" of counsel to favor certain members, can defeat class certification. *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 852, 857 (1999); *see Amchem*, 521 U.S. at 626-627. As this Court has explained, the Supreme Court's decisions require that a "fundamental conflict" between class members—one that "goes to the very heart of the litigation"—"be addressed with a structural assurance of fair and adequate representation for the diverse groups and individuals among the plaintiffs." *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litigation*, 827 F.3d 223, 231 (2d Cir. 2016) (internal quotation marks and citations omitted), *cert. denied*, 137 S. Ct. 1374 (2017). One way in which to provide such assurance is to divide class members into subclasses "with separate representation to eliminate conflicting interests of counsel." *Id.* (internal quotation marks and citation omitted).

At the settlement stage, the adequacy of representation is determined "independently" of the general fairness of the settlement. *See Interchange Fee*, 827 F.3d at 232. The Supreme Court has stated that, when a district court approves a settlement at the same time as it certifies a class, the "focus" of the adequacy inquiry remains on any "inequity and potential inequity" of the certification. *Ortiz*, 527 U.S. at 858. At the same time, this Court has recognized

the "strong judicial policy in favor of settlements, particularly in the class action context." *Wal-Mart Stores, Inc.* v. *Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005). Indeed, "[t]he compromise of complex litigation is encouraged by the courts and favored by public policy." *Id.* at 117 (quoting 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 11:41, at 87 (4th ed. 2002)).

B. Under The Class Definition, Only One Entity Per Transaction Is A Class Member

The branded-operator objectors, Fikes Wholesale and Jack Rabbit, contend that the settlement "pits franchisors and franchisees against one another for the exact same share of settlement funds" for the same transactions. Fikes Wholesale Br. 34-39, 47-52; *see* Jack Rabbit Br. 55-57. The settlement agreement defines the class to include, with certain exceptions, "all persons, businesses, and other entities that have accepted any Visa-Branded Cards and/or Mastercard-Branded Cards in the United States" during the specified time period. J.A. 3324, ¶ 4. Objectors specifically contend that, because the class definition includes all persons that "accepted" Visa or Mastercard payment cards, both franchisees and franchisors are members of the class based on the very same transactions. *See* Fikes Wholesale Br. 7. But that misconstrues the class definition. Properly interpreted, only one entity in a payment chain "accepted" a payment card for a given transaction and is thus a class member based on the transaction under the settlement.

1. As a "general rule, a class definition is interpreted according to the substantive law that provides the basis for the class action." *In re Motorola Securities Litigation*, 644 F.3d 511, 517 (7th Cir. 2011); *see also*, *e.g.*, *In re American Continental Corp./Lincoln Savings & Loan Securities Litigation*, 49 F.3d 541, 543 (9th Cir. 1995). In *Rothstein* v. *AIG*, 837 F.3d 195 (2016), this Court applied that rule in the context of the settlement of a securities class action. In order to resolve a dispute over whether the appellant employee benefit plans were class members under the class definition, the Court consulted federal securities law to interpret an undefined term in the definition. *See id.* at 197, 206. Based on that interpretation, the Court concluded that the appellants were class members. *See id.*; *see also American Continental*, 49 F.3d at 543 (interpreting the word "purchased" in the class definition "against the backdrop of the federal securities laws which provide the basis for the class action").

In this case, federal antitrust law informs the meaning of the class definition. The complaint itself alleged that the named plaintiffs "represent a class of millions of [m]erchants that have accepted" Visa and Mastercard payment cards. J.A. 3111, ¶ 4; *see* J.A. 3324. The complaint sought relief for violations of the Sherman Antitrust Act, 15 U.S.C. § 1, under the Clayton Act, 15 U.S.C. § 15. *See* J.A. 3221-3245. The settlement agreement confirms that plaintiffs

were pursuing claims for violations of the Sherman Act that allegedly resulted in fee overcharges. *See* J.A. 3308.

The class definition thus must be interpreted in light of the rule that indirect payors of an alleged overcharge generally cannot sue for antitrust damages under federal law. *See Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 729-731 (1977); *cf. California* v. *ARC America Corp.*, 490 U.S. 93, 104-105 (1989) (noting that, in a class-action settlement of both federal and state-law antitrust claims, "whatever amount is allocable to federal claims will be distributed only to direct purchasers"). Indeed, the complaint alleged that plaintiffs "directly [paid] [i]nterchange [f]ees." J.A. 3156. Likewise, before the initial settlement, plaintiffs argued that merchants are "direct payors" of interchange fees. *See* J.A. 1615.

Although defendants dispute that proposition (because in fact it is the acquiring banks that pay interchange fees to issuing banks in the Visa and Mastercard systems), defendants compromised their indirect-purchaser defense in this class action in order to reach a settlement. Put another way, for purposes of settlement-class membership, defendants agreed to draw a different line under *Illinois Brick* than they advocated early in the litigation. And there is no dispute that, for any given transaction, only one interchange fee was paid and only one claimant is entitled to recover based on that fee. *See*

Fikes Wholesale Br. 30. Consistent with that approach, and with the understanding of the parties in reaching the settlement, only the claimant that is the more direct payor of interchange fees as between two claimants owns the claim. Any more remote entity in the payment chain is not a class member based on that transaction.

Objectors themselves contend that a class must be "defined in such a way that anyone within it would have standing." Fikes Wholesale Br. 41 (quoting *Denney* v. *Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006)). But rather than embracing the straightforward conclusion that the class definition must be read in light of federal antitrust law, objectors would have this Court hold that class counsel defined the class in a way that is inconsistent with the governing law. That is contrary to the law and logic.

2. Objectors make several additional arguments in support of their contention that both franchisees and franchisors are class members. None has merit.

a. Objectors first argue that class counsel, in a letter to the court responding to objections to preliminary settlement approval, "acknowledged that franchisees were class members who 'accepted' payment cards." Fikes Wholesale Br. 37. But that letter simply echoed the branded operators' assertion that they were class members and stated that it "appear[ed]" branded operators accepted cards under the class definition. J.A. 4149. In the same

letter, class counsel emphasized that the franchisee-franchisor question was a "potential claims allocation issue" that could be decided by a claims administrator or special master and "ultimately" by the court. *Id.* In other words, class counsel took the branded operators at their word but recognized that the ultimate allocation determination would belong to the court through the claims-administration process. If anything, the letter supports what class counsel made clear at the approval hearing: class counsel were "agnostic" about "who owns the claim." J.A. 7112-7113. Although class counsel have at various times suggested that the branded operators or the oil companies may recover, that is not class counsel's call to make: class counsel simply represent whoever is determined to own the claim.

b. Objectors next contend that any conflict does not arise from a "contract dispute" between the franchisors and franchisees. Fikes Wholesale Br. 37. In support, objectors cite a declaration by the general counsel of a branded operator that states that the contracts between oil companies and branded operators "do not address which entity is entitled to settlement funds from this class action[] and do not address which party is the first 'payor' of the interchange fees." Br. 38. That conclusory statement from a single executive is insufficient to show that the contracts are irrelevant to the determination of class membership. In any event, it is beside the point. When there is a

dispute between multiple claimants, the special master—under the supervision of the district court—will consult the underlying contracts (and any other relevant source) to determine which entity owns the claim for a given transaction.

c. Objectors also complain that "franchisee class members received the same notice that was sent to their franchisors, thereby requiring hundreds of thousands of class members to vie against their franchisors for the same settlement dollars." Fikes Wholesale Br. 31. But there is nothing improper about sending notices to entities that may not ultimately be in the class. In fact, Federal Rule of Civil Procedure 23(c)(2)(B) requires the "best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." It is not only common, but entirely appropriate, to provide notice in a form that inevitably reaches non-class members, such as notice through publication in a newspaper or website, and notice does not guarantee recovery. *See, e.g.*, *Wal-Mart*, 396 F.3d at 105 (stating that notice was published "in publications with a combined circulation of more than 151 million"); *Macarz* v. *Transworld Systems, Inc.*, 201 F.R.D. 54, 60-61 (D. Conn. 2001) (requiring individual notice using data that contained "the universe of class members" even though it was "twenty-five percent over-inclusive"); 3 William Rubenstein et al., *Newberg on Class Ac-*

tions §§ 8:29, 8:30, at 313-314, 320-321 (5th ed. 2011) (*Newberg on Class Actions*). To the extent that some branded operators also own unbranded stores, moreover, it was appropriate for them to receive notice so that they could pursue their claims for transactions at those stores.

C. There Is No Intra-Class Conflict Requiring Subclasses or Separate Representation

Because only one entity in a payment chain owns a claim for any given transaction, there is no intra-class conflict that would require subclasses or separate representation. The special master will determine whether a branded operator or an oil company—or a franchisee or a franchisor—qualifies as the entity that has "accepted" the card for a particular contested transaction. Accordingly, certain of the entities at issue—either branded operators or oil companies—are not class members based on that transaction, and it necessarily follows that there is no *intra-class* conflict. Objectors resist that straightforward conclusion, but all of their arguments fail.

1. Objectors rely on seminal class-action-settlement cases from the Supreme Court and this Court to argue that there is a conflict here, *see* Fikes Wholesale Br. 48-51, but that reliance is misplaced. Those cases make clear that only a fundamental conflict between *class members* requires separate representation and subclasses.

a. In *Amchem, supra*, the Supreme Court considered a settlement class that consisted of two types of individuals: those who had already manifested asbestos-related injuries and those who had not yet suffered injuries. 521 U.S. at 603. The Court determined that the class representatives could not adequately represent the single proposed class because of the "disparity" between the two groups of class members, both of which had viable tort claims, reasoning that the groups had competing interests in "immediate payments" versus a "fund for the future." *Id.* at 626-627. Those "antagonistic interests" of two groups—each of which was undisputedly composed of class members—were "so pronounced, on an issue so crucial, that the settlement required a 'structural assurance of fair and adequate representation for the diverse groups and individuals.'" *Interchange Fee*, 827 F.3d at 232 (quoting *Amchem*, 521 U.S. at 627).

b. In a later asbestos case, the Supreme Court again determined that representation was inadequate, emphasizing that it was "obvious after *Amchem* that a class divided between holders of present and future claims" required separate representation and subclasses. *Ortiz*, 527 U.S. at 856. As this Court has explained, the Supreme Court reasoned in *Ortiz* that the "fault lines" between the different groups of class members "were so fundamental

that they required 'structural protection' in the form of subclasses with separate counsel." *Interchange Fee*, 827 F.3d at 232 (quoting *Ortiz*, 527 U.S. at 857).

c. In *In re Literary Works in Electronic Databases Copyright Litigation*, 654 F.3d 242 (2d Cir. 2011), this Court examined a class-action settlement that capped the defendants' overall liability and was "less generous" to one category of claims. *Interchange Fee*, 827 F.3d at 232-233. The Court held that class members with claims only in that category required separate representation, because there was otherwise a "great risk" that class representatives "would sell out [that] category of claims for terms that would tilt toward the others." *Id.* at 233.

d. In its prior decision in this case, the Court identified a conflict between merchants in the (b)(3) class pursuing monetary relief and those in the (b)(2) class seeking injunctive relief, since at least some of the former "would want to maximize cash compensation for past harm" and at least some of the latter "would want to maximize restraints on network rules to prevent harm in the future." *Interchange Fee*, 827 F.3d at 233. The Court concluded that those "divergent interests" required separate counsel, reasoning that class counsel would otherwise be "in the position to trade diminution of (b)(2) relief for increase of (b)(3) relief." *Id.* at 233-234. The "[s]tructural defects" in the class action created a "fundamental conflict" between class members and

"sapped class counsel of the incentive to zealously represent" the (b)(2) members. *Id.* at 236.

e. The settlement at issue here contains none of the "ingredients of conflict" identified by the Supreme Court and this Court in the foregoing decisions. *Literary Works*, 654 F.3d at 251. The flaws of the initial settlement in this case were resolved when the district court split the settlement class into separate (b)(2) and (b)(3) classes. The resulting (b)(3) settlement class consists of a fixed group of merchants with similar claims for monetary relief—those who "accepted" payment cards from January 1, 2004, to the date of preliminary approval of the settlement. *See* J.A. 3324. Under the accompanying plan of administration, all class members are entitled to recover the same benefit: a *pro rata* share of the monetary fund based on the interchange fees paid during the class period. *See* J.A. 3567.

Under the approved settlement, therefore, groups of class members do not have competing interests with respect to the settlement, and class counsel had no incentive to trade the claims of one group of class members for those of another. *See Interchange Fee*, 827 F.3d at 233-234, 236; *Literary Works*, 654 F.3d at 254. Instead, the interests of all class members were aligned: class counsel had an incentive to maximize the monetary settlement amount so that the *pro rata* share for each class member would be higher. And class counsel

appropriately represented all of the class members in seeking to accomplish that goal.

Importantly, all of the decisions that have required separate representation involved fundamental conflicts between individuals who were undisputedly members of the classes at issue. *See* pp. 36-37, *supra*. The class members in those cases had competing interests with respect to the amount and type of settlement relief because of the differing nature of their claims; they did not have disputes about who owned a given claim. Notably, objectors do not cite a single case in which a court has found an intra-class conflict or inadequate representation because two entities might contest ownership of a settlement claim. It is not unusual that, in cases involving "finite settlements" such as the one here, disputes will sometimes arise after settlement over "who gets a 'slice' of the settlement 'pie.'" *Rothstein*, 837 F.3d at 198. But that is no reason for a court to reject the settlement. Put simply, a dispute about *claim ownership* does not give rise to a conflict between *class members*.

2. Objectors complain that class counsel "knew for years" about the possibility of disputes between franchisees and franchisors and "did nothing to resolve it," even after defendants raised the issue in a status report. Fikes Wholesale Br. 48 (citing J.A. 2919). But the district court was not required to resolve potential claimant disputes that were fact-bound and not yet ripe for resolution. No party asked the court to *decide* such disputes; defendants had

simply suggested "schedul[ing] a conference to *discuss procedures* for resolving franchisor-franchisee issues." J.A. 2921 (emphasis added). It was well within the court's discretion not to schedule such a conference at that time, while the prior appeal was pending before this Court. It does not follow from the fact that class counsel (and defendants) foresaw that disputes over claim ownership would arise, that class counsel provided inadequate representation to class members. If anything, the status report indicates that defendants have long understood that only one entity can recover in the settlement for a given transaction, and that entity is the merchant that is the more direct payor of the interchange fee. *See* J.A. 2918.

3. Objectors also contend that the district court's determination that there was adequate representation is "troubling from a due process perspective" because class counsel "defined the class to include both franchisors and franchisees, they sought settlement certification on behalf of both groups, gave defendants a release on behalf of both groups, and secured an enormous attorney fee award for a settlement that includes both groups." Fikes Wholesale Br. 39. But that argument proceeds from the mistaken premise that the class definition includes multiple payors for a given transaction. To the contrary, a particular franchisor or franchisee is a class member if it accepted a payment card and is the more direct payor of interchange fees under federal

antitrust law. *See* pp. 30-32, *supra*. As discussed above, the operative complaint alleges that plaintiffs "directly" paid interchange fees; the class definition cannot plausibly be read to cover both the franchisor and franchisee based on the same transaction. *See* J.A. 3156.

Further, objectors are wrong that both the franchisees and franchisors "will be bound by the release" even though only one group will be able to recover from the settlement. Fikes Wholesale Br. 30. Non-class members "cannot be bound by any orders or judgments entered in respect to the settlement." *Rothstein*, 837 F.3d at 204 (internal quotation marks and citation omitted); *see also* 4 *Newberg on Class Actions* § 13:22, at 357-358. Thus, a franchisor or franchisee that is deemed not to be the appropriate claimant for any of its Visa or Mastercard transactions is not a class member and thus not bound by the release. If that non-class member has a claim—for example, because it is an indirect payor with a claim under state law—it will retain that claim, subject to any applicable defenses.

* * * * *

At bottom, objectors' gripe appears to be that the settlement does not specify whether branded operators and other franchisees are entitled to payment from the settlement fund. But that does not go to the adequacy of representation. As the district court recognized, the dispute identified by objectors is one that can appropriately be resolved in the context of the familiar

process of claims administration. As for the threshold process of settlement approval, the district court correctly determined that class counsel adequately represented all of the members of the class, and this Court should uphold that determination.

II. THE DISTRICT COURT COULD PROPERLY REFER DISPUTES ABOUT CLAIM OWNERSHIP TO A SPECIAL MASTER

The district court's decision to refer disputes over claim ownership to a special master does not violate Rule 23 and does not warrant reversal of the approval of the settlement. Special masters are typically granted broad latitude to manage the claims-administration process, including to adjudicate the ownership of claims. The district court's decision here is entirely consistent with the practice of other courts confronted with large class actions, both in this circuit and across the country.

1. Building on their incorrect contention that this settlement suffers from an intra-class conflict, objectors contend that disputes among class members over which entities have claims under federal antitrust law must be resolved before settlement approval in order to comport with the requirements of Rule 23. *See* Fikes Wholesale Br. 40-43. But that argument fails because the disputes are not among competing class members, but among competing owners of a particular claim. *See* pp. 30-32, *supra.* And contrary to the contention of the Jack Rabbit objectors (Br. 62-63), there is nothing exceptional

about determining claim ownership after settlement approval. *See, e.g.*, *Rothstein*, 837 F.3d at 199, 201-202 (noting that, after settlement approval, a claims administrator determined whether an entity was a class member under the class definition); *Motorola*, 644 F.3d at 515 (same); Order, Dkt. 1264, *In re Visa Check/MasterMoney Antitrust Litigation*, Civ. No. 96-5238 (E.D.N.Y. Feb. 28, 2006) (referring the determination of "whether the [particular entities] are class members and may participate in the distribution of settlement funds" to a special master).

2. Objectors next argue that "[the] administration and special master process contemplated here does not protect class members' due process rights" because the process will require "complicated and adversarial" proceedings. Fikes Wholesale Br. 43-45. Even assuming that objectors are correct about the complexity of such proceedings, there is nothing improper about a referral to a special master or claims administrator.

Courts routinely appoint special masters to supervise the claims-administration process, evaluate claims, and render final judgments for class members, including after final approval of the settlement. *See, e.g.*, *In re Educational Testing Services Praxis Principles of Learning & Teaching: Grades 7-12 Litigation*, 447 F. Supp. 2d 612, 616-617 (E.D. La. 2006); *In re Phenylpropanolamine (PPA) Products Liability Litigation*, 227 F.R.D. 553, 558 (W.D. Wash. 2004); *see also Sullivan* v. *DB Investments, Inc.*, 667 F.3d 273, 288 (3d

Cir. 2011) (en banc) (noting that, after preliminary approval of the settlement, a special master recommended a distribution plan and the division of funds between subclasses). Indeed, a special master can be appointed to "develop a proposed plan of allocation and distribution" of a limited settlement fund, including determining who among class members should take "priority" for distributions. *In re Holocaust Victim Assets Litigation*, 424 F.3d 132, 137, 139-140 (2d Cir. 2005). A special master may appropriately adjudicate the ownership of disputed claims as part of the claims-administration process. *See, e.g.*, *Allapattah Services, Inc.* v. *Exxon Corp.*, 454 F. Supp. 2d 1185, 1197 (S.D. Fla. 2006).

While a special master cannot "determin[e] a fundamental question of liability . . . in the face of a contemporaneous objection," he can resolve "complex quantitative issues bearing on damages" and determine certain "issue[s] of law." *Stauble* v. *Warrob, Inc.*, 977 F.2d 690, 694-695 (1st Cir. 1992). The special master here would do no more, and likely considerably less—at most, he would determine which competing merchant that accepted Visa or Mastercard payment cards was the more direct payor of interchange fees for the transaction at issue. *See* pp. 30-32, *supra*. That fact-bound, limited inquiry is nothing like the full-blown mini-trials on liability issues that courts have held to be impermissible. *See Stauble*, 977 F.2d at 694-695.

What is more, there is good reason to think that the claims-administration process will not be as complex as objectors suggest. As the district court noted, a special master was assigned to adjudicate the ownership of claims in the *Visa Check* litigation. In that case, this Court affirmed the district court's approval of a settlement in which the class was also defined as all entities that "accepted" Visa or Mastercard credit cards and were therefore required to accept its debit cards as well. *See Wal-Mart Stores, Inc.* v. *Visa U.S.A. Inc.*, 396 F.3d 96, 102 (2d Cir. 2005). After settlement approval, the district court appointed a special master to address disputes between franchisors and franchisees regarding their claims to settlement funds—just as the district court indicated that it will do here. *See* Order, Dkt. 1244, *In re Visa Check/MasterMoney Antitrust Litigation*, Civ. No. 96-5238 (E.D.N.Y. Jan. 19, 2006). Objectors have not suggested that the claims-administration process in that case proved to be unworkable.

Notably, courts have enlisted the help of special masters before settlement approval to decide the question of who is a direct purchaser. For example, in *In re Cathode Ray Tube (CRT) Antitrust Litigation*, 911 F. Supp. 2d 857, 863-864 (N.D. Cal. 2012), the special master recommended factual findings and legal conclusions as to whether certain named plaintiffs were indirect purchasers and thus barred from recovery. A special master appointed after

settlement approval would take on a similar role, and such a role is equally appropriate.

3. Objectors also contend that the claims process "will result in one group of class members releasing claims for nothing of value, to the benefit of another group." Fikes Wholesale Br. 46. As discussed above, however, that contention is simply incorrect: merchants that are found not to be class members are not subject to the release. *See* p. 41, *supra*. And the Fifth Circuit case on which objectors rely is inapposite. There, the court held that a mandatory limited-fund settlement of tort claims under Rule 23(b)(1)(B) required decertification because it did not contain procedures for treating *differently situated class members* fairly, and the district court could not resolve that defect by delegating the "difficult question" of equitable apportionment to a special master. *In re Katrina Canal Breaches Litigation*, 628 F.3d 185, 193-194 (5th Cir. 2010). By contrast, the instant settlement does not involve the fairness problems of a mandatory limited-fund settlement, and the settlement is entirely proper under Rule 23(b)(3). As discussed above, there is no intra-class conflict, and the special master will simply decide which entity owns a disputed claim. *See* pp. 35-39, *supra*.

4. In any event, objectors' concerns about the assignment of responsibility to the special master are unfounded because the district court can review the special master's recommendations and has the ultimate authority to

resolve disputes between potential claimants. *See* J.A. 7368-7369. Under Rule 53, the district court's authority to appoint a special master "necessarily includes the power—as well as the responsibility—to supervise the special master and to investigate and determine whether the special master is in fact carrying out his duties." *Cordoza* v. *Pacific States Steel Corp.*, 320 F.3d 989, 999 (9th Cir. 2003). Objectors have not identified any impropriety in having a special master undertake routine determinations regarding claim ownership that will affect only a small portion of the claimants and that will be subject to the district court's review.

III. THE CLASS DEFINITION IS ASCERTAINABLE

Perhaps recognizing that their arguments are a poor fit for principles of intra-class conflict and inadequacy of representation, the Fikes Wholesale and Jack Rabbit objectors attempt to repackage their arguments under the guise of ascertainability. Those efforts fail.

To begin with, any argument about ascertainability was barely preserved below (if at all). The Fikes Wholesale objectors included one throwaway line in their objection to final approval, merely noting that it is the "burden of [c]lass [c]ounsel to clearly and appropriately define the class so that class members can ascertain whether or not they are included." J.A. 6578. And the Jack Rabbit objectors, the only other group to raise the question of

ascertainability now, failed to mention ascertainability to the district court at all.

In any event, this Court should reject that argument on the merits. Ascertainability requires only that determination of class membership is objectively possible—*i.e.*, that "a proposed class is defined using objective criteria that establish a membership with definite boundaries." *In re Petrobras Securities*, 862 F.3d 250, 269 (2d Cir. 2017). Consistent with that requirement, the class definition here sets out objective criteria for class membership: class members must have accepted Visa- or Mastercard-branded payment cards. And it establishes boundaries of both geography and time: the class is limited to entities that accepted payment cards in the United States between January 1, 2004, and the date of preliminary approval of the settlement. *See* J.A. 3324, ¶ 4.

Despite those clear boundaries, objectors focus on the word "accepted," suggesting that it is too vague to provide a standard against which to measure potential claimants. But for the reasons discussed above, pp. 29-32, *supra*, that word does not give rise to any ambiguity, especially when the class definition is properly read against the backdrop of federal law. As the district court found, "accepts" is "objective enough by its plain English usage." J.A. 7389. And even if it were otherwise, "the class definition is nonetheless not 'indeterminate in some fundamental way' warranting a finding that the class

is not ascertainable." *In re LIBOR-Based Financial Instruments Antitrust Litigation*, 299 F. Supp. 3d 430, 569 (S.D.N.Y. 2018) (quoting *Petrobras*, 862 F.3d at 269).

Despite objectors' intimations to the contrary, in determining whether a class is ascertainable, this Court does not analyze whether plaintiffs can readily offer *proof* of class membership. *See*, *e.g.*, *Petrobras*, 862 F.3d at 269. Nor does it analyze whether the class, as defined, is administratively feasible. *See id.* Instead, the relevant inquiry is whether it is "objectively *possible*" to determine class membership, not whether that determination is "practical[]." *Id.* at 270 (emphasis omitted). In any event, ascertaining class membership here would be both possible and practical: the process of determining who owns a given claim for a small subset of the class is a practical and common one that the district court, aided by a special master, is well equipped to handle. *See* pp. 40, 43-45, *supra*.

Objectors fail to cast doubt on the district court's well-reasoned conclusion that the class definition is ascertainable. The Fikes Wholesale objectors cite *Petrobras* to contend that a "poorly defined" class could be read to include both franchisors and franchisees and must therefore create an intra-class conflict. Br. 36; *see also* Jack Rabbit Br. 58-59. But the Fikes Wholesale objectors cannot simultaneously contend that the class definition clearly includes them, as they argued just pages earlier, and that the class definition is so unclear

that they cannot know whether they belong. And as explained above, the class definition is clear—and class membership determinable—when it is read, as it must be, against the backdrop of federal law. *See* pp. 29-32, *supra*.

To the extent that application of the class definition to any individual potential class member requires a more in-depth assessment of that particular entity's individual contractual arrangements, a special master can make that decision. *See* pp. 42-47, *supra*. Objectors have cited no authority for the proposition that a class is non-ascertainable where some limited number of disputes about claim ownership might arise—but that is effectively what they ask this Court to hold. As the Fikes Wholesale objectors correctly point out, *Petrobras* precludes the certification of a class that would require a "mini-hearing on the merits of each case." Br. 38 (quoting *Petrobras*, 862 F.3d at 264). But a dispute about who *owns* a particular claim does not require anything resembling a hearing on the merits, much less a finding on liability.

For their part, the Jack Rabbit objectors, citing *Brecher* v. *Republic of Argentina*, 806 F.3d 22 (2d Cir. 2015), argue that a class definition must be "administratively feasible." Br. 58. But since *Brecher*, this Court has explicitly rejected such an administrative-feasibility requirement, reasoning that it is "neither compelled by precedent nor consistent with Rule 23." *Petrobras*, 862 F.3d at 264. The Jack Rabbit objectors also complain that the class is

"poorly define[d]" because it "fail[ed] to require a class member to be damaged." Br. 58-59. As discussed above, however, when the class definition is properly understood, the members of the class are those merchants that accept Visa and Mastercard payment cards and thus are entitled to recover from the fund as the more direct payors of interchange fees. *See* pp. 29-32, *supra*. And class plaintiffs of course cannot be required to use a so-called "fail-safe" class definition—one that is circularly defined in terms of liability—as courts have routinely rejected that type of definition. *See, e.g.*, *Mullins* v. *Direct Digital, LLC*, 795 F.3d 654, 660 (7th Cir. 2015); *Byrd* v. *Aaron's Inc.*, 784 F.3d 154, 167 (3d Cir. 2015).

IV. THE SETTLEMENT'S RELEASE OF FUTURE CLAIMS IS APPROPRIATE

The Gnarlywood objectors and Kevan McLaughlin separately argue that the settlement's release of class members' claims is faulty simply because it extends into the future. *See* Gnarlywood Br. 25-31; McLaughlin Br. 17-22. Those arguments have no basis in the law. It is well settled in this Court and others that the release of future claims based on the continuation of the settled conduct is appropriate. Here, the release of future claims in exchange for a *pro rata* distribution is fair, and there has been no inadequacy of representation by virtue of the release.

Objectors' argument that the release of future claims is improper is foreclosed by precedent—as even McLaughlin has acknowledged. *See* J.A. 7086.

This Court has made clear that the release of future claims, including claims that accrue after the class period, is appropriate where the released conduct arises out of the "identical factual predicate" as the settled conduct—even if claims for the released conduct "could not have been presented" at the time. *Melito* v. *Experian Marketing Solutions, Inc.*, 923 F.3d 85, 95-96 (2d Cir. 2019). The settlement release here specifically incorporated language to "clarify that it comports with the identical factual predicate test." J.A. 7372. And as the district court properly noted, the law does not restrict "how far into the future claims can be released," and thus does not prohibit a release that extends after a settlement becomes final. J.A. 7375-7376 (collecting cases). Indeed, courts have approved releases with no time limit. *See, e.g.*, *In re General American Life Insurance Co. Sales Practices Litigation*, 357 F.3d 800, 803 (8th Cir. 2004) (holding individual lawsuit was barred by class-action settlement's release of all claims "that may or could be asserted now or in the future"). Here, the release is substantially more confined: it releases claims for only five years after the settlement becomes final and no longer subject to appeal.

The Gnarlywood objectors take a different tack. *First*, they argue that the release of future claims would render Rule 23 in violation of the Rules Enabling Act. *See* Br. 26-27. But that argument runs headlong into *Melito*, which

objectors fail even to cite. *Second*, they argue that the problem with the release here is that merchants who have been in business for only a short time have a lower damages-to-release ratio than do merchants who are receiving damages for the full fifteen years of the class period. *See* Br. 29-31. According to those objectors, the claims period should be coextensive with the release period; absent that feature, they argue, the release here creates a conflict under Rule 23(e)(2)(D), which requires a proposed settlement to "treat class members equitably relative to each other." Br. 30 (internal quotation marks omitted). For the same reasons, they argue that the newer merchants have been inadequately represented by the older-merchant class plaintiffs. *See* Br. 33.

Objectors fail to cite any authority supporting that novel theory. Indeed, objectors themselves recognize that the *pro rata* distribution of funds is "ordinarily acceptable," but contend that it is "rendered unfair" when combined with a future release provision. Br. 28. To the contrary, it is routine for courts to approve settlements providing for *pro rata* distributions in exchange for broad releases, including releases of future claims. *See, e.g.*, *Matsushita Electric Industrial Co.* v. *Epstein*, 516 U.S. 367, 371 (1996); *In re LIBOR-Based Financial Instruments Antitrust Litigation*, 327 F.R.D. 483, 496, 508 n.40 (S.D.N.Y. 2018); *Shapiro* v. *JPMorgan Chase & Co.*, Civ. No. 11-8331, 2014

WL 1224666, at *13 (S.D.N.Y. Mar. 24, 2014); *see also* J.A. 7366 (citing additional cases).

The Gnarlywood objectors nonetheless contend that the release here is inequitable and that, as a result, newer merchants have been inadequately represented by class plaintiffs "whose interests are aligned with the old merchant class members." Br. 33. According to objectors, newer merchants will recover in the settlement for "only a few years or months of transactions," but will "recover nothing" for the potential "far greater transactional charges" in the future. Br. 29. But as another court of appeals explained in rejecting a similar argument, that contention misunderstands how settlements work. In *General American*, the plaintiff argued that class members who had released certain types of insurance claims in a class-action settlement had been inadequately represented because class members with other types of claims received a "large amount of money" in the settlement, while class members with certain types of released claims received "nothing" in exchange for those claims. 357 F.3d at 805. The Eighth Circuit disagreed, emphasizing that it was "simply . . . not true" that the released claims "were given away for nothing," even though "no separately stated consideration was paid for those claims." *Id.* As the court explained, in a settlement "[e]ach side gives up a number of things," and "[n]o part of the consideration on either side is keyed to any specific part of the consideration on the other." *Id.*

So too here, the release of future claims was "one of a series of benefits conferred on the defendant[s]" in exchange for the benefits conferred on the class as a whole. *General American*, 357 F.3d at 805. The newer merchants who have chosen to remain in the class will benefit from the settlement, and "the release was part of the consideration necessary to obtain the largest antitrust settlement in history." *Wal-Mart*, 396 F.3d at 113. Class counsel adequately represented the entire class in obtaining that settlement.

Similarly, the district court was not required to create subclasses for older and newer merchants. *See* Gnarlywood Br. 33. The mere fact of economic differences between class members was insufficient to require subclasses. Indeed, "if every distinction drawn (or not drawn) by a settlement required a new subclass, class counsel would need to confine settlement terms to the simplest imaginable or risk fragmenting the class beyond repair." *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America* v. *General Motors Corp.*, 497 F.3d 615, 629 (6th Cir. 2007). A contrary rule would "threaten[]" "the Balkanization of the class action." *In re Cendant Corp. Securities Litigation,* 404 F.3d 173, 202 (3d Cir. 2005).

In short, because each class member receives a *pro rata* share of its own damages, and because there is no suggestion that class counsel failed to obtain the maximum monetary recovery possible for the class as a whole, there has been no inadequacy of representation by virtue of the release of future claims.

V. THE SUPPLEMENTAL NOTICE TO THE DISMISSED PLAINTIFFS WAS MORE THAN ADEQUATE

In a final attempt to unwind the settlement, objectors take aim at the supplemental notice, which informed entities identified as Dismissed Plaintiffs that they could make a claim for class settlement funds if they believed that their claims were released without their authority. J.A. 7219. Objectors argue that the district court failed to provide the Dismissed Plaintiffs with an opportunity to opt out. *See* Fikes Wholesale Br. 53-55. But that argument is nothing more than a shell game. As a preliminary matter, the Dismissed Plaintiffs were previously sent the standard long-form notice—which outlined the opportunity to object to the settlement or opt out—along with the original notice of their exclusion. *See* J.A. 5271, 5279.

In any event, the supplemental notice did not need separately to inform the Dismissed Plaintiffs of the opportunity to object or opt out because the status quo was that they were considered excluded: their claims purportedly had been settled, whether by Valero or by an equivalent actor that had separately settled its claims. *See* J.A. 4371. Indeed, in their objection to final approval, the branded operators acknowledged that Valero "negotiate[d] opt-out settlement agreements on behalf of all of their [b]randed [o]perators." J.A. 6588. Objectors' complaints about the adequacy of the supplemental notice are thus meritless.

Moreover, under either the Due Process Clause or Rule 23(e), the test for adequacy of a settlement notice is reasonableness. All that is required is for the notice "fairly [to] apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *Wal-Mart Stores*, 396 F.3d at 113-114 (internal quotation marks and citation omitted).

That standard is easily met here. The supplemental notice to the Dismissed Plaintiffs was sent only out of an abundance of caution. The original notice of exclusion informed the Dismissed Plaintiffs that they were excluded from the class, and would not be eligible for class settlement funds, for the unremarkable reason that their claims had already been settled. *See* J.A. 4471. In addition, it referred the Dismissed Plaintiffs to the long-form notice, which was also sent to the Dismissed Plaintiffs, and explained that recipients should contact class counsel if they did not believe they should be considered Dismissed Plaintiffs. *See id.* The supplemental notice simply made explicit that the recipient could make a claim if it believed that it had been wrongly excluded. *See* J.A. 7219.

Put another way, the supplemental notice could only benefit the entities identified as Dismissed Plaintiffs by permitting such an entity to make a claim if it believed its designation as a "Dismissed Plaintiff" was improper: for instance, if it felt that its claims had been settled without authority. *See* J.A.

7219. If an entity that was identified as a Dismissed Plaintiff did not wish to be part of the class, it did not need to take any action. Thus, there was no need—and indeed, no point—for the supplemental notice to inform the Dismissed Plaintiffs that they could opt out.

To the extent that Valero or an equivalent actor settled the Dismissed Plaintiffs' claims without the authority to do so, the Dismissed Plaintiffs' remedy is to make a claim, if they believe their designation was improper, or to sue the settling entity—not to object to the settlement. The Dismissed Plaintiffs have not alleged any harm that flows from the notice plan (rather than from Valero or an equivalent actor); if they are not in the class, they are not bound by the release. Indeed, if any Dismissed Plaintiffs tried to bring a lawsuit against defendants, defendants would direct them to the earlier release by Valero or an equivalent actor—not the release in this settlement.

In any event, the notice was eminently reasonable. It notified the Dismissed Plaintiffs that they can take advantage of the settlement, without prejudicing them if they choose to remain outside the class. That is all that the Due Process Clause and Rule 23(e) require.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Kannon K. Shanmugam, counsel for defendants-appellees and a member of the Bar of this Court, certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Second Circuit Rule 32.1(a)(4)(A), that the attached Brief of Defendants-Appellees is proportionately spaced, has a typeface of 14 points or more, and contains 13,377 words.

JANUARY 5, 2021

/s/ Kannon K. Shanmugam
KANNON K. SHANMUGAM

CERTIFICATE OF SERVICE

I, Kannon K. Shanmugam, counsel for defendants-appellees and a member of the Bar of this Court, certify that, on January 5, 2021, a copy of the attached Brief of Defendants-Appellees was filed with the Clerk through the Court's electronic filing system. I further certify that all parties required to be served have been served.

/s/ Kannon K. Shanmugam
KANNON K. SHANMUGAM