UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION	MDL No. 1720(MKB)(JO) Civil No. 05-5075(MKB)(JO)
This Document Relates To: ALL ACTIONS.	RETAILER AND MERCHANT OBJECTORS' MOTION FOR AWARD OF ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS Judge: The Honorable Margo K. Brodie Date: November 7, 2019 Time: 10:00 a.m. Courtroom: 6F

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE that on November 7, 2019, at 10:00 a.m., at the United States District Court for the Eastern District of New York, 225 Cadman Plaza, Brooklyn, New York, or as soon thereafter as counsel may be heard before the Honorable Margo K. Brodie, United States District Judge, Class Members previously identified as the Retailer and Merchant Objectors (the "R&M Objectors")[1] will and hereby move for orders and/or judgments: (1) awarding their counsel a percentage of the common fund, which has been enhanced as a result of their efforts, to reasonably and fairly compensate counsel for their services in increasing the benefits now available to the Class; (2) awarding $20,344.65 to reimburse counsel for the R&M Objectors for expenses

[1] Specifically, the R&M Objectors are Class Members Landers McLarty Bentonville, LLC; Landers McLarty Bentonville Nissan, LLC; Bessemer AL Automotive, LLC; Shreveport Dodge, LLC; RML Branson MO, LLC; RML Burleson TX, LLC; RML Bel Air, LLC; Landers McLarty Fayetteville TN, LLC; RML Ft. Worth TX, LLC; RML Huntsville Chevrolet, LLC; RML Huntsville AL, LLC d/b/a Landers McLarty Dodge Chrysler Jeep – Huntsville, Alabama; RML Huntsville AL Automotive, LLC, RML Huntsville Nissan, LLC; RML Huntsville, AL, LLC d/b/a Landers McLarty Subaru – Huntsville, AL; Landers McLarty Lee's Summit MO, LLC; RML Olathe II, LLC; RML Waxahachie Dodge, LLC; RML Waxahachie Ford, LLC; RML Little Rock, Inc. d/b/a Landers Harley Davidson – Little Rock, Arkansas; RML Little Rock, Inc. d/b/a Landers Harley Davidson – Hot Springs, Arkansas; RML Little Rock, Inc. d/b/a Landers Harley Davidson – Conway, Arkansas; Landers Auto Group No. 1 d/b/a Landers Scion – Little Rock, Arkansas; Landers Auto Group No. 1 d/b/a Landers Toyota – Little Rock, Arkansas; Landers Auto Group No. 1 d/b/a/ The Boutique at Landers Toyota – Little Rock, Arkansas; Landers CDJ, Inc.; Landers CDJ, Inc. d/b/a Steve Landers Chrysler Dodge Jeep – Little Rock, Arkansas; Landers of Hazelwood, Inc.; A&D Wine Corp.; A&Z Restaurant Corp.; 105 Degrees, LLC; The Pantry Restaurant Group, LLC; PPT Inc.; Sansole's Tanning Salon; Greenhaw's, Inc.; Roberson's Fine Jewelry, Inc.; Don's Pharmacy, Inc.; Gossett Motor Cars, Inc. – Memphis, Tennessee; Gossett Motor Cars, Inc. – Atlanta, Georgia; JB Cook, LLC; Storage World Limited Partnership, LLC; Leisure Landing RV Park; Pinnacle Valley Liquor Store, Inc.; The Tennis Shoppe, Inc.; The Grady Corporation; The Grady Corporation II; Coulson Oil Company; Diamond State Oil LLC; Superstop Stores, LLC; PetroPlus, LLC; Port Cities Oil, LLC; New Mercury, LLC; New Vista, LLC; New Neptune, LLC; SVI Security Solutions; Shepherd's Flock; AIMCO Equipment Company, LLC; Desert European Motorcars, Ltd.; Newport European Motorcars, Ltd.; San Diego European Motorcars, Ltd.; Park Hill Collections, LLC; Riverbike of Tennessee, Inc.; Par's Custom Cycle, Inc.; V.I.P. Motor Cars Ltd.; and RR #1 TX, LLC. (ECF No. 6175.)

directly related to this litigation; and (3) authorizing the payment of Service Awards to the R&M Objectors.

This motion is based upon the Memorandum of Points and Authorities in Support of the Retailer and Merchant Objectors' Motion for Award of Attorneys' Fees, Expenses, and Service Awards (submitted as Exhibit 1 to this motion), all other pleadings and matters of record (some of which are submitted as Exhibits 2-17 to this motion), and such additional evidence or argument as may be presented in the R&M Objectors' motion or at the hearing addressing the motion.

Dated this seventh day of June, 2019.

Respectfully Submitted,

By: /s/ Jay L.T. Breakstone

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EXHIBIT 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION	MDL No. 1720(MKB)(JO) Civil No. 05-5075(MKB)(JO)
This Document Relates To: ALL ACTIONS.	MEMORANDUM IN SUPPORT OF R&M OBJECTORS' MOTION FOR AWARD OF ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS Judge: The Honorable Margo K. Brodie Date: November 7, 2019 Time: 10:00 a.m. Courtroom: 6F

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I. INTRODUCTION

The Retailer and Merchant Objectors, or "R&M Objectors," have moved this Court to approve the allowance of a reasonable attorneys' fee and the reimbursement of litigation expenses to their counsel, and to grant the R&M Objectors Service Awards, in recognition of their significant contributions to the much improved Superseding and Amended Definitive 23(b)(3) Class Settlement Agreement (the "Superseding Settlement") now pending.[1] As shown throughout this Memorandum, the R&M Objectors and their attorneys are a substantial cause of the new benefits made available to the Class via the Superseding Settlement. In fairness and in recognition of these efforts, they should both be entitled, in some small way, to share in those augmented proceeds. As such, the R&M Objectors' Motion for Award of Attorneys' Fees, Reimbursement of Litigation Expenses, and Service Awards (the "Motion") should be granted.[2]

II. RELEVANT BACKGROUND

The R&M Objectors are a diverse group of restaurants, clothing stores, gas stations, and all manner of small to mid-sized businesses hailing from 13 states across the heart of the country. In 2012, as they began to develop a picture of the Original Settlement through news reports and other similar sources, the first R&M Objectors[3] approached the undersigned counsel with

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[1] Movants have been known as the R&M Objectors since first objecting to the original Class Settlement (the "Original Settlement") on October 18, 2012. The material terms of the Original Settlement were made public as part of a Memorandum of Understanding filed on July 13, 2012. (ECF No. 1588 (Ex. 2).)

[2] The R&M Objectors' counsel worked on a contingency fee basis and have not been paid for any of the work, effort, or expenses described in this Memorandum.

[3] As word spread of their determination to speak up for the smaller enterprises otherwise deprived of a voice in the proposed settlement of this action, additional entities joined the group of R&M Objectors. Numbering 38 when they first cautioned that the Original Settlement did not merit even preliminary approval (*see* ECF No. 1653 (Ex. 3)), the membership of the R&M Objectors had swelled to over 60 just months later when they filed an objection to final approval (*see* ECF Nos. 2281 (Ex. 4), 2421 (Ex. 5)).

questions and concerns regarding various aspects of the Original Settlement. Those opening inquiries led to investigation, research, and further consultations, ultimately ending with the R&M Objectors' decision to challenge the Original Settlement on the general grounds set forth below. As demonstrated in the succeeding paragraphs, the R&M Objectors' unwillingness to accept unreasonable settlement terms, a position ultimately shared by the Second Circuit, has helped to create a Superseding Settlement that has, among other improvements, made available an additional $900 million to the Class.

A. As The First Non-Parties To Oppose The Original Settlement, The R&M Objectors Vigorously And Persistently Fought For Fairness Since The Earliest Disclosure Of That Initial Agreement

When they opposed the Original Settlement on October 18, 2012, the R&M Objectors distinguished themselves as the first non-parties to docket shortcomings in the terms of that compromise.[4] (ECF No. 1653 (Ex. 3).)[5] From there, the R&M Objectors made themselves active participants in the effort to undo a deficient settlement. By way of example, only days after publicly voicing their disagreement with the settlement, counsel for the R&M Objectors wrote Judge Gleeson to recommend creation of a Proposed Objectors' Committee to be given access to the "400 depositions and 50 million pages of discovery which led to the [Original Settlement]," for the purpose of "pooling resources to examine, analyze and . . . report on the viability of any proposed objections." (ECF No. 1657 (Ex. 7).) Although this proposed committee never materialized, observations made by the R&M Objectors apparently made an impression. In an Order which soon followed, the Court specifically mentioned that it had "received a request from

[4] Certain Plaintiffs and Class Representatives, represented by the Constantine Cannon law firm, also objected to the Original Settlement (the "Plaintiff-Objectors") and had already voiced their disapproval to the Court. (*See, e.g.*, ECF No. 1621 (Ex. 6).)

[5] Exhibit designations refer to a document's position as an exhibit to the Motion.

a large group of retailers and merchants" (ECF No. 1668 (Ex. 8), at 1) before announcing an intention to break with its "[o]rdinar[y]" custom of "not schedul[ing] oral argument of preliminary approval motions" (*id.* at 2). Significantly, the R&M Objectors had previously requested just such a hearing on preliminary approval, given the important issues at play in this massive litigation. (*See* ECF No. 1653 (Ex. 3) ¶ 20, at 14.) The Court followed through to schedule such an oral argument here, citing the "expectation among some interested parties that the preliminary approval process should be more involved in this case than in the usual class action." *Id.*

Counsel for the R&M Objectors attended the November 9, 2012 hearing addressing preliminary approval, but the Court at that early stage concluded that the Original Settlement bore no marks such as "indications of a collusive negotiation, unduly preferential treatment of class representatives or segments of the class, or excessive compensation of attorneys" necessary to justify denial of preliminary approval. (ECF No. 1732 (Ex. 9), at 61.) Nonetheless, the Court acknowledged the presence of "a number of issues that have been well-briefed by the objecting parties that are going to require significantly more careful scrutiny before there is any final approval of the proposed settlement." *Id.* at 62. In the following months, the R&M Objectors did their best to sharpen their approach so that their arguments would carry the day as the Original Settlement was subject to the heightened scrutiny of final approval, to which the Court had alluded.

In furtherance of this mission, the R&M Objectors on May 15, 2013 filed a 31 page objection to final approval containing much more developed and refined versions of the arguments they had previously raised. (ECF No. 2281 (Ex. 4); *see also* ECF No. 2421 (Ex. 5), adding eight additional objectors on May 24, 2013).) The substance of that objection is discussed more thoroughly in the next subsection of this Memorandum, but it presently suffices to say that the R&M Objectors pointed out to the Court that the Original Settlement violated due process because

it (i) purported to release future antitrust liability under the guise of a Rule 23(b)(2) mandatory class[6] (ECF No. 2281 (Ex. 4), at 8-11); (ii) inappropriately sought to release future antitrust liability on behalf of a (b)(3) class (*id.* at 11-20); and (iii) undertook to release conduct far more extensive than Defendants' actions at the center of the litigation (*id.* at 20-22). In addition to these rather glaring incidents of impermissible overreach, the R&M Objectors raised more nuanced issues as well. First, the Notice to the Class offered no real ability to opt-out, because the concomitance of a mandatory (b)(2) Class meant that, opt-out or not, future antitrust claims against Defendants were set to be released nonetheless. *Id.* at 22-24. Next, one supposed feature of the settlement – the ability to surcharge – was illusory to many because of numerous states' prohibitions on surcharging. To that substantial portion of R&M Objectors (and the Class), the theoretical ability to surcharge was worthless. *Id.* at 24-27.

The R&M Objectors' opposition to final approval again sought limited discovery to allow "a meaningful inquiry on cross-examination into the merits of the [Original] Settlement." (ECF No. 2281 (Ex. 4), at 31.) This was not forthcoming. Undeterred, however, counsel for the R&M Objectors communicated with Professor Alan Sykes of the NYU School of Law, who had been appointed by the Court to review "economic issues related to the [Original Settlement]" (ECF No. 5873 (Ex. 10)), to recommend specific categories of discovery that might aid his analysis (ECF No. 5948 (Ex. 11)). Moreover, at the same time they were presenting their objections to final approval, counsel for the R&M Objectors were simultaneously filing "conditional" opt-outs applicable to members of the group who wanted no part of the broad, perpetual release granted

[6] The Original Settlement was fatally flawed, from the outset, because it presumed to compromise claims on behalf of a (b)(3) class, with the mandatory prerogative to opt-out, and also a (b)(2) class, with no opt-out rights, at whose expense, it would be argued, the Original Settlement had been reached. *Cf.* Fed. R. Civ. P. 23(b)(2)-(3).

Defendants under the Original Settlement. (*See* ECF Nos. 2422 (Ex. 12), 2618 (Ex. 13).) The conditional Notice of Opt-Outs filed on behalf of some R&M Objectors described the impossible position into which those entities had been thrust by the Original Settlement:

> All of the businesses opting out by way of this notice of opt-out feel compelled to do so in an attempt to preserve future claims against Defendants . . . . Both of the settlement classes described in the Notice of Settlement waive these future claims, but it is presently unclear whether this Court will approve that waiver. These potential Class members do not believe a waiver of future claims is valid under either Rule 23(b)(2) or 23(b)(3). . . .
>
> Given the uncertainty surrounding this settlement, the unclear and confusing class notice, and with no way of knowing what this Court will ultimately approve, these businesses feel forced to opt-out of the Rule 23(b)(3) class at this time to preserve their substantive rights and not be bound by a judgment entered in this case.

(ECF Nos. 2422 (Ex. 12), 2618 (Ex. 13).)

As was so at the preliminary approval hearing, counsel for the R&M Objectors attended the final approval hearing. R&M counsel addressed the Court to reiterate what the group viewed as the most significant impediments to approval: The confounding notice, as an inevitable product of the blend of (b)(2) and (b)(3) classes for the purposes of this settlement, and the worthless surcharge. (ECF No. 6094 (Ex. 14), at 173-77.) Still, when all was said and done, final approval was granted. (ECF No. 6124.)

The R&M Objectors remained vigilant and on the front lines of an issue that went to the very core of their businesses. As appeals followed, the R&M Objectors were intimately involved in the process by filing separate briefs – emphasizing their own arguments about the inadequacy of notice and the worthlessness of the surcharge "benefit" – and coordinating with counsel for Plaintiff-Objectors to ensure that the appellate arguments for the R&M Objectors and the Plaintiff-Objectors were consistent, cogent, and persuasive. In the end, the years of work put in by the

R&M Objectors were successful when the Second Circuit ultimately adopted objectors' arguments to dismantle the Original Settlement.

The preceding summary shows that counsel for the R&M Objectors diligently worked, from the time the Original Settlement was first announced through the conclusion of the successful appeal, to ensure that the unfair and unreasonable Original Settlement would not be consummated. The following subsection establishes that the value of the points made by the R&M objections matched the intensity of those efforts.

B. Over The Years, The R&M Objectors Made Significant And Meaningful Arguments Against The Original Settlement, And These Were A Substantial Cause Of The Second Circuit's Rejection Of The Agreement

Back in October of 2012, when they posited the first objection to the Original Settlement by an absent Class Member, the R&M Objectors generally alerted the Court to the most grievous attributes of the agreement, such as its vastly overbroad release[7] and its woefully inadequate injunction (which would have prevented Defendants from engaging in similar anticompetitive activity for *only 8 months*). (*See* ECF No. 1653 (Ex. 3) ¶¶ 40, 49, 51, 54, at 8, 11-14.) These arguments would mature more fully months later when the R&M Objectors filed their formal opposition to final approval. At that time, after directing the Court to the established case law which questioned the efficacy of the Original Settlement on due process grounds (*see* ECF No. 2281 (Ex. 4), at 8-22), the R&M Objectors turned to the core of their objection. Specifically, the R&M Objectors sounded the alarm that the blending in this action of both (b)(2) and (b)(3) classes

[7] Throughout the settlement approval process, the R&M Objectors maintained that the proposed release was excessively overbroad because it purported to bind unknown parties not yet in existence, claimed to shield Defendants from future antitrust liability into perpetuity, and supposedly required Class Members to abandon claims related to *any* Visa or Mastercard rule then in existence. (*See* ECF No. 1653 (Ex. 3) ¶¶ 40(c), at 8; ECF No. 1703 (Ex. 15), at 6; ECF No. 2281 (Ex. 4), at 8-22.)

served to nullify class notice, and that the settlement's authorization of a surcharge was worthless to many Class Members.

With regard to the ineffective notice caused by the rush to settle clams on behalf of both (b)(2) and (b)(3) classes, the R&M Objectors highlighted the predicament of Class Members:

> This settlement is so fundamentally flawed, and the Notice is so intrinsically deficient, that even the most legally astute Class Member would be uncertain of what action to take upon receiving this Notice. As things stand now, all absent Class Members have been told that even if they opt-out of the Rule 23(b)(3) Class, they will lose the ability to sue Visa/Mastercard in the future [because of the mandatory (b)(2) release]. In this circumstance, even if a merchant disagrees with the relief afforded by the . . . "damages" settlement, it is likely to stay in the class so as to retain the ability to object to the more significant waiver of future rights. Should this Court agree that the relinquishment of future damage claims under a mandatory Rule 23(b)(2) class is improper, or conclude that such a release is inappropriate under Rule 23(b)(3), or both, the entire analysis surrounding a decision to opt out is altered. In that scenario, if a business could preserve future damage claims by opting out of the 23(b)(3) class – without being forced to accept the loss of future damage claims [under 23(b)(2)] – it may well decide to opt-out even though it is not doing so now. On the other hand, if this Court invalidates future damages releases under both 23(b)(2) and 23(b)(3), the same Class Member might determine that it makes sense to remain a party [as] to the claim for current damages. Basically, the point is that a ***new notice, containing a new – and legitimate – opportunity to opt out,*** will be required should this Court revise the aspect of the [Original Settlement] releasing future damages claims.

(ECF No. 2281 (Ex. 4), at 23-24 (emphasis in original).) On the subject of the surcharge, the R&M Objectors advised that a significant and growing number of states prohibited these assessments. *Id.* at 25. Moreover, as a practical matter, many businesses in the Class would be unlikely to pass along to customers a credit card surcharge. *Id.* at 26-27. Most fundamentally, as a component of the (b)(2) settlement, it was imperative that the surcharge be part of "an individual injunction *benefitting all its members at once*," *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362, 131 S. Ct. 2541, 2558 (2011) (emphasis added), and the surcharge relief fell far short of this. As argued by the R&M Objectors: "The surcharge, proposed as an element of class relief, is *not* nationwide relief and does *not* benefit the entire class. Class members are treated differently." (ECF No. 2281

(Ex. 4), at 25.) Summing it up, the surcharge featured as a "benefit" of the Original Settlement actually had no value for many Class Members and thus impaired the entirety of the deal. *See generally id.* at 24.

Counsel for the R&M Objectors stressed the notice and surcharge issues during his remarks at the final approval hearing. (*See* ECF No. 6094 (Ex. 14), at 173-77.) After this Court approved the Original Settlement over the objections, the R&M Objectors continued the fight before the Second Circuit. In close consultation with attorneys for the Plaintiff-Objectors, the R&M Objectors made the unique notice and surcharge arguments the centerpiece of their appellate briefs (*see* Opening Brief for Appellant Retailer & Merchant Objectors ("R&M Opening Brief"), No. 12-4671, at 13-30 (2d Cir.) (Ex. 16); Reply Brief for Appellant Retailer & Merchant Objectors ("R&M Reply Brief"), No. 12-4671 (2d Cir.) (Ex. 17), specifically illustrating the real-world impact of the illusory surcharge relief on R&M members. The R&M Objectors used as examples the situations of 105 Degrees (an Oklahoma business denied the ability to surcharge under that state's law) and Whole Hog (an Arkansas business unable to surcharge because of rules applicable to those who, like Whole Hog, also accept American Express cards). (*See* R&M Opening Brief (Ex. 16), at 30-42; R&M Reply Brief (Ex. 17), at 2-8.)

The Second Circuit took heed of these arguments. In reversing approval of the Original Settlement, the court explained that intractable conflict between the (b)(2) and (b)(3) classes made simultaneous representation of both impossible. *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 827 F.3d 223, 231-36 (2d Cir. 2016). As the R&M Objectors had been arguing for years, it was this inherent tension between the classes that made the notice unworkable. (*See* ECF No. 2281 (Ex. 4), at 23-24; ECF No. 6094 (Ex. 14), at 173-77.) And when it came to surcharge, the Second Circuit echoed the arguments of the R&M Objectors:

> [I]t is imperative that the (b)(2) class in fact benefit from the right to surcharge. But that relief is less valuable for any merchant that operates in New York, California, or Texas (among other states that ban surcharging), or accepts American Express (whose network rules prohibit surcharging . . .). Merchants in New York and merchants that accept American Express can get no advantage from the principal relief their counsel bargained for them.

In re Payment Card Interchange Fee, 827 F.3d at 238. Continuing on, the court concluded that "[t]here is no basis for this unequal intra-class treatment: the more valuable the right to surcharge . . ., the more unfair the treatment of merchants that cannot avail themselves of surcharging." *Id.*

The Second Circuit reversed approval of the Original Settlement on largely the same grounds championed by the R&M Objectors since Day One. The R&M Objectors were a substantial cause of the eventual disapproval of the unfair and unreasonable Original Settlement.

C. The R&M Objectors Are A Substantial Cause Of The New And Improved Benefits Available Through The Superseding Settlement

The Superseding Settlement now before the Court exhibits none of the defects that caused the R&M Objectors to challenge the Original Settlement. New notice has issued to Class Members, and it is intelligible with a real opportunity to opt-out. (*Cf.* ECF No. 2281 (Ex. 4) (R&M Objection to Final Approval), at 23 ("The notice [issued in conjunction with the Original Settlement] does not provide a legitimate opportunity to opt-out . . . .").) The Superseding Settlement does not delve into surcharging at all. (*See* ECF No. 7257-2 (Superseding Settlement).) It also includes a reasonable release that only insulates Defendants for 5 years (as opposed to indefinitely) and is only applicable to claims that could have been alleged relating to the subject matter of this litigation. (*Compare* ECF No. 2281 (Ex. 4) (R&M Objection to Final Approval), at 11-22 (objecting to Original Settlement because it contained those offensive attributes), *with* ECF No. 7257-2 ¶ 31(a), at 30 (new release).) The superseding release does *not* presume to sacrifice claims belonging to entities not yet in existence, but applies only to merchants that accepted Visa

or Mastercard between January 1, 2004, up to the date of preliminary approval. (*Compare* ECF No. 2281 (Ex. 4) (R&M Objection to Final Approval), at 18 ("[F]uture claims of unknown entities cannot be released . . . ."), *with* ECF No. 7257-2 ¶ 4, at 17-18 (defining settlement class).) Importantly, the Superseding Settlement increases by $900 million the cash available to the Class. *See* Chris Isidore, *Visa and MasterCard Agree to Settle Swipe Fee Class Action for $6.2 billion*, CNN.com, https://money.cnn.com/2018/09/18/news/companies/visa-mastercard-lawsuit-settlement/index.html (last visited June 1, 2019) (Class Counsel has acknowledged that "[t]he amended settlement represents a $900 million increase over the previous one.").

The R&M Objectors played a key role in the creation of the new and improved settlement benefits. The next section of this Memorandum establishes that the law entitles the R&M Objectors and their counsel to share in the results of their efforts.

III. ARGUMENT

A. Counsel For The R&M Objectors Should Receive A Reasonable Attorneys' Fee Because They Were A Substantial Cause Of The Improved Benefits Now Available To The Class

It has long been the law in this circuit that objectors to a class action settlement "are entitled to an allowance as compensation for attorneys' fees and expenses where a proper showing has been made that the settlement was improved as a result of their efforts." *White v. Auerbach*, 500 F.2d 822, 828 (2d Cir. 1974). This is so because "objectors have a valuable and important role to perform in preventing collusive or otherwise unfavorable settlements." *Id.* One court put it like this:

> Class counsel and defendant's counsel may reach a point where they are cooperating in an effort to consummate the settlement. Courts, too, are often inclined toward favoring the settlement, and the general atmosphere may become largely cooperative. Thus, objectors serve as a highly useful vehicle for class members, and for the court and for the public generally. *From conflicting points come clear thinking.* Therefore, a lawyer for an objector who raises pertinent

> questions about the terms or effects, intended or unintended, of a proposed settlement renders an important service.

Great Neck Capital Appreciation Inv. P'ship, L.P. v. PricewaterhouseCoopers, L.L.P., 212 F.R.D. 400, 412-13 (E.D. Wis. 2002) (emphasis added) (citations omitted).

The possibility of compensation is necessary to entice "objectors [to] serve as a highly useful vehicle for class members." *Great Neck*, 212 F.R.D. at 412; *see also In re Anchor Sec. Litig.*, No. CV-88-3024, 1991 WL 53651, at *1 (E.D.N.Y. Apr. 8, 1991) (Sifton, J.) ("In order to encourage persons with potentially meritorious objections, attorney's fees are available to counsel for objectors who make the proper showing."). Any reluctance to award fees to counsel for a meritorious objector undercuts the class settlement process, for "'it is desirable to have as broad a range of participants in the class action fairness hearing as possible.'" *Park v. Thompson Corp.*, 633 F. Supp. 2d 8, 11 (S.D.N.Y. 2009) (quoting *Mirfasihi v. Fleet Mortg. Corp.*, 551 F.3d 682, 687 (7th Cir. 2008)).

Whether an objector has "improved" a settlement, thereby justifying receipt of a fee, is not merely a matter of dollars and cents. *See MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 367 (E.D.N.Y. 2010) (Weinstein, J.) ("An award of attorneys' fees for an objector does not require that an economic benefit to the class occur, or that the objection influence the court's decision."). Even when an objector's impact cannot be measured financially, attorney's fees may follow if the objector "assisted the court, and/or enhanced the recovery in any discernible fashion." *In re Anchor Sec.*, 1991 WL 53651, at *1 (quotations omitted); *see also Frankenstein v. McCrory Corp.*, 425 F. Supp. 762, 767 (S.D.N.Y. 1977) ("[W]here the objections filed produced a beneficial effect upon the progress of the litigation, an award of fees is appropriate."). Indeed, "[s]ome courts have also 'rewarded objectors' counsel for advancing non-frivolous arguments and transforming the settlement hearing into a truly adversarial proceeding.'" *Park*, 633 F. Supp. at 11 (quoting *In re*

AOL Time Warner ERISA Litig., No. 02 Cv. 8853 (SWK), 2007 WL 4225486, at *2 (S.D.N.Y. Nov. 28, 2007)).

In the final analysis, the critical inquiry is whether the objector was a "'substantial cause of the benefit obtained.'" *In re: Petrobras Sec. Litig.*, 320 F. Supp. 3d 597, 599 (S.D.N.Y. 2018) (quoting *In re Holocaust Victim Assets Litig.*, 424 F.3d 150, 157 (2d Cir. 2005)). Because the R&M Objectors are a substantial cause of the improved benefits available to the Class as a result of the Superseding Settlement, their counsel should receive a reasonable fee, and the R&M Objectors should receive a reasonable Service Award.

1. The R&M Objectors Are A Substantial Cause Of The Increased Benefits Available By Virtue Of The Superseding Settlement

From the initial announcement of the Original Settlement, the R&M Objectors led the charge of absent Class Members in questioning its reasonableness. (*See, e.g.*, ECF No. 1653 (Ex. 3) (representing first objection filed by an absent Class Member).) The dedicated tenacity of the R&M Objectors is exemplified by the fact that this Court mentioned them in the first Order regarding preliminary approval of the Original Settlement (ECF No. 1668 (Ex. 8) ("I have received a request from a large group of retailers and merchants . . . .")), and they were still on the scene years later when the Second Circuit essentially adopted and repeated their arguments regarding the worthless surcharge, *see In re Payment Card Interchange Fee*, 827 F.3d at 238. These bookends leave no doubt that, at the very minimum, the R&M Objectors during the course of this litigation "cast in sharp focus the question of the fairness and adequacy of the settlement," *Frankenstein*, 425 F. Supp. at 767, which alone merits approval of their fee request, *see In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 358 (N.D. Ga. 1993) ("If objectors' appearance sharpens the issues and debate on the fairness of the settlement, their performance of the role of devil's advocate warrants a fee award."). But the R&M Objectors did much more than that.

The new, improved Superseding Settlement incorporates virtually every ground raised by the R&M Objectors when challenging the Original Settlement. The R&M Objectors argued that the surcharge "benefit" of the Original Settlement had no value to many businesses, and the Second Circuit agreed that "[t]here is no basis for this unequal intra-class treatment." *In re Payment Card Interchange Fee*, 827 F.3d at 238. The Superseding Settlement eliminates any mention of a surcharge. Consider also:

Objection: The R&M Objectors complained that the notice for the Original Settlement was incomprehensible and offered no legitimate opt-out rights.

Result: There has been new notice of the Superseding Settlement with a real chance for Class Members to opt-out.

Objection: The R&M Objectors insisted that the release accompanying the Original Settlement violated due process because it released future antitrust conduct into perpetuity and presumed to release claims for unknown entities who did not yet exist

Result: The superseding release extends only to conduct over the next 5 years, and it applies only to merchants who accepted Visa or Mastercard between January 1, 2004 through the date of preliminary approval.

Objection: The Original Settlement's release applied to conduct relating to any Mastercard or Visa rule in existence.

Result: The superseding release is valid only as to claims that could have been alleged relating to the subject matter of this litigation.

Most tellingly, of course, the Superseding Settlement has an increased value to Class Members of $900 Million. This benefit would never have been available had the R&M Objectors not objected to the grossly unfair and unreasonable Original Settlement. The R&M Objectors are a substantial cause of the enhanced monetary and other benefits of the Superseding Settlement.

2. Because The R&M Objectors Are A Substantial Cause Of The Increased Value Of The Superseding Settlement, Their Counsel Should Receive A Reasonable Fee

The R&M Objectors are a substantial cause of the additional $900 Million and other new benefits available by way of the Superseding Settlement. That being so, under the law of the Second Circuit, their counsel is entitled to a reasonable fee. In determining an appropriate fee, the trend in the Second Circuit is to award lawyers a percentage of the fund in whose creation they have played a part, because this will allow a judge "to focus on 'a showing that the fund conferring a benefit on the class resulted from the lawyers' efforts,' rather than [on] collateral disputes over billing." *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 485 (S.D.N.Y. 1998) (quoting *Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991)); *see also Blum v .Stenson*, 465 U.S. 886, 900 n.16 (1984) (1984) ("[U]nder the 'common fund doctrine,' . . . a reasonable fee is based on a percentage of the fund bestowed on the class."). In cases in which an objection has favorably altered the terms of a class settlement, courts have been inclined to award the objector's counsel some percentage of the enhanced settlement. *See In re: Prudential Ins. Co. of Am. Sales Practices Litig.*, 273 F. Supp. 2d 563, 572 (D.N.J. 2003) (awarding objector's counsel 1.4% of Class Counsel's fee award); *In re Domestic Air Transp.*, 148 F.R.D. at 359-60 (determining it appropriate to award objector's counsel .266% of common fund); *Howes v. Atkins*, 668 F. Supp. 1021, 1027 (E.D. Ky. 1987) (awarding objector's counsel 10% of settlement fund).

The R&M Objectors respectfully suggest that their counsel should receive a small percentage of whatever fees are ultimately awarded by the Court in this case. *Cf. In re: Prudential*, 273 F. Supp. 2d at 572 (awarding objector's counsel 1.4% of Class Counsel's fee award). The R&M Objectors commend Lead Counsel for the work they have performed in this case, and the R&M Objectors agree that Lead Counsel has produced an impressive result after years of hard-

fought litigation. However, it was the flawed Original Settlement which caused the R&M Objectors to embark on their own years-long effort to put something better in place. In these circumstances, the R&M Objectors respectfully suggest that it would be fitting to award a percentage fee to counsel for the R&M Objectors. Because the Class should not be responsible for any of this, the R&M Objectors further respectfully suggest that their counsel's fees should be paid from the overall fee awarded in the case.

B. Counsel For The R&M Objectors Should Be Allowed To Recover Their Litigation Costs

Where an objector has shown that it is a substantial cause of increased settlement benefits, the law in the Second Circuit allows objector's counsel to recover its litigation costs. *See White*, 500 F.2d at 828. This is in keeping with general circuit law that to award litigation costs to an appropriate applicant. *See In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 525 (E.D.N.Y. 2003) (Gleeson, J.) (referring to the "common practice in this circuit of granting expense requests). R&M Objectors respectfully request that this Court reimburse their counsel reasonable litigation expenses in the sum of $20,344.65. Itemization of the costs will be made available to the Court upon request.

C. The R&M Objectors Should Receive Reasonable Service Awards

The R&M Objectors respectfully request that the Court approve reasonable service awards for each of them. The R&M Objectors first filed their objections to the Original Settlement in 2012, and over the past seven years they have shown their commitment to ensure that the Class would be presented a fair and reasonable settlement. That has now occurred, and the R&M Objectors respectfully suggest that they should be recognized for their willingness to stand up for the Class. *See Yarrington v. Solvay Pharms., Inc.*, 697 F. Supp. 2d 1057, 1068 (D. Minn. 2010) ("Small incentive awards, which serve as premiums to any claims-based recovery from the

Settlement, promote the public policy of encouraging individuals to undertake the responsibility of representative lawsuits."). The Plaintiffs and Class Representatives have indicated that they will seek service awards of up to $250,000 apiece. In these circumstances, the R&M Objectors believe that it would be appropriate for each of them to receive a reasonable service award.

IV. CONCLUSION

For the reasons stated in this Memorandum, the R&M Objectors respectfully request that the Motion be granted.

Dated this seventh day of June, 2019.

Respectfully Submitted,

By: /s/ Jay L.T. Breakstone

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EXHIBIT 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION **This Document Applies to: All Cases.**	**No. 05-MD-1720 (JG) (JO)**

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding sets out the parties' binding obligation to enter into a Class Settlement Agreement in the form attached as Exhibit 1, subject to and promptly after satisfaction of all of the following conditions:

(1) the parties' successful completion of all Appendices to Exhibit 1 hereto, which, except as to the Plan of Administration and Distribution, the parties shall negotiate in good faith with the intent of completing on or before September 21, 2012, and as to the Plan of Administration and Distribution the plaintiffs shall develop and complete, with timely and regular consultation with defendants, on or before September 21, 2012; provided, however, that if all of the Appendices are not mutually agreed to by September 21, 2012, then the parties shall confer with the Court, at a time convenient to the Court, regarding any open issues pertaining to such Appendices (the Appendices, together with Exhibit 1 hereto, constitute the "Definitive Settlement Agreement");

(2) the successful negotiation of a settlement agreement between and among the parties to the non-class actions now pending as part of MDL 1720;

(3) any necessary approvals of the Definitive Settlement Agreement by the board of directors or other comparable decision-making body of any party, which the parties shall seek promptly upon completion of the Definitive Settlement Agreement; and

(4) approval of the Definitive Settlement Agreement by the requisite vote of the members of Visa U.S.A. Inc. entitled to vote thereon, which Visa U.S.A. Inc. shall seek to obtain promptly after each of the foregoing conditions is satisfied.

In addition, from the date of execution of this Memorandum of Understanding to the execution of the Class Settlement Agreement, the Visa Defendants shall provide Class Counsel with advance notice of any material changes to their by-laws, rules, operating regulations, practices, policies, or procedures that pertain to Paragraphs 40-45 and 48 of Exhibit 1 hereto, and the MasterCard Defendants shall provide Class Counsel with advance notice of any material changes to their by-laws, rules, operating regulations, practices, policies, or procedures that pertain to Paragraphs 53-58 and 61 of Exhibit 1 hereto.

This Memorandum of Understanding may be executed in counterparts.

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(4) approval of the Definitive Settlement Agreement by the requisite vote of the members of Visa U.S.A. Inc. entitled to vote thereon, which Visa U.S.A. Inc. shall seek to obtain promptly after each of the foregoing conditions is satisfied.

In addition, from the date of execution of this Memorandum of Understanding to the execution of the Class Settlement Agreement, the Visa Defendants shall provide Class Counsel with advance notice of any material changes to their by-laws, rules, operating regulations, practices, policies, or procedures that pertain to Paragraphs 40-45 and 48 of Exhibit 1 hereto, and the MasterCard Defendants shall provide Class Counsel with advance notice of any material changes to their by-laws, rules, operating regulations, practices, policies, or procedures that pertain to Paragraphs 53-58 and 61 of Exhibit 1 hereto.

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July 13, 2012

EXHIBIT 3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION **This Document Applies to: All Cases.**	**No. 05-MD-1720 (JG) (JO)**

RETAILERS & MERCHANTS' OBJECTION TO PROPOSED CLASS SETTLEMENT AGREEMENT

COME NOW the following retailers and merchants, by and through their counsel Jerrold Parker, Parker Waichman, LLP, Lee Bialostok, Platte, Klarsfeld, Levine & Lachtman, LLP, and Richard Arsenault, Neblett, Beard & Arsenault and for their Objection to the Proposed Class Settlement Agreement, state as follows:

I. Retailer & Merchant Objectors

1. Objector 1, A & D Wine Corp., is a small business located in New York, New York with a primary business being a restaurant. A & D Wine Corp. is a full-service restaurant that relies heavily on the use of customers paying their bill with a Visa or Mastercard. Objector 1 objects to the Class Settlement Agreement for the reasons stated below.

2. Objector 2, A & Z Restaurant Corp., is a small restaurant business located in New York, New York with its primary business as a restaurant. A & Z Restaurant Corp. is a full-service restaurant that relies heavily on the use of customers paying their bill with a Visa or Mastercard. Objector 2 objects to the Class Settlement Agreement for the reasons stated below.

3. Objector 3, 105 Degrees LLC, is a small business located in Oklahoma City, Oklahoma with a primary business as a restaurant and culinary academy. 105 Degrees LLC is a full service restaurant and culinary school that relies heavily on the use of customers and

students paying their restaurant bill and/or student tuition with a Visa or Mastercard. Objector 3 objects to the Class Settlement Agreement for the reasons stated below.

4. Objector 4, The Pantry Restaurant Group, LLC, is an Arkansas limited liability corporation located at 11401 Rodney Parham Road, Little Rock, Arkansas 72212, which relies heavily on the use of customers paying their restaurant bill with a Visa or Mastercard. Objector 4 objects to the Class Settlement Agreement for the reasons stated below.

5. Objector 5, PPT Inc., d/b/a/ Graffiti's Restaurant, located at 7811 Cantrell Road, Little Rock, Arkansas 72227, relies heavily on the use of customers paying their restaurant bill with a Visa or Mastercard. Objector 5 objects to the Class Settlement Agreement for the reasons stated below.

6. Objector 6, Sansole' Tanning Salon, located at 1506 Market Street, Little Rock, Arkansas 72211, relies heavily on the use of customers paying their salon bill with a Visa or Mastercard. Objector 6 objects to the Class Settlement Agreement for the reasons stated below.

7. Objector 7, Greenhaw's, Inc., located at 10301 Rodney Parham Road, Little Rock, Arkansas 72207, relies heavily on the use of customers paying their retail clothes bill with a Visa or Mastercard. Objector 7 objects to the Class Settlement Agreement for the reasons stated below.

8. Objector 8, Roberson's Fine Jewelry, Inc., located at 11525 Cantrell Road, Suite 703, Little Rock, Arkansas 72212, relies heavily on the use of customers paying their retail jewelry bill with a Visa or Mastercard. Objector 8 objects to the Class Settlement Agreement for the reasons stated below.

9. Objector 9, Don's Pharmacy, Incorporated, located at 8609A West Markham Street, Little Rock, Arkansas 72205, relies heavily on the use of customers paying their retail

pharmacy bill with a Visa or Mastercard. Objector 9 objects to the Class Settlement Agreement for the reasons stated below.

10. Objector 10, Gossett Motor Cars, Inc. ("Gossett Motors") is a car dealership located at 1900 Covington Pike, Memphis, Tennessee 38128-6981. Gossett Motors relies heavily on the use of customers paying their retail automotive bill with a Visa or Mastercard. Objector 10 objects to the Class Settlement Agreement for the reasons stated below.

11. Objector 11, Landers McClarty Ford Chrysler Dodge Jeep, is located at 2609 South Walton Road, Bentonville, Arkansas 72712. This auto dealership relies heavily on the use of customers paying their retail automotive bill with a Visa or Mastercard. Objector 11 objects to the Class Settlement Agreement for the reasons stated below.

12. Objector 12, Landers McClarty Nissan, is located at 2501 SE Moberly Lane, Bentonville, Arkansas 72712. This auto dealership relies heavily on the use of customers paying their retail automotive bill with a Visa or Mastercard. Objector 12 objects to the Class Settlement Agreement for the reasons stated below.

13. Objector 13, Landers McClarty Dodge Chrysler Jeep, is located at 5080 Academy Lane, Bessemer, Alabama 35022. This auto dealership relies heavily on the use of customers paying their retail automotive bill with a Visa or Mastercard. Objector 13 objects to the Class Settlement Agreement for the reasons stated below.

14. Objector 14, Landers Dodge Chrysler Jeep, is located at 2701 Benton Road, Bossier City, Louisiana 71111. This auto dealership relies heavily on the use of customers paying their retail automotive bill with a Visa or Mastercard. Objector 14 objects to the Class Settlement Agreement for the reasons stated below.

15. Objector 15, Tri-Lakes Motors, is located at 180 State Highway F & 65, Branson, Missouri 65616. This auto dealership relies heavily on the use of customers paying their retail automotive bill with a Visa or Mastercard. Objector 15 objects to the Class Settlement Agreement for the reasons stated below.

16. Objector 16, Burleson Nissan, is located at 300 North Burleson Blvd., Burleson, Texas 76028. This auto dealership relies heavily on the use of customers paying their retail automotive bill with a Visa or Mastercard. Objector 16 objects to the Class Settlement Agreement for the reasons stated below.

17. Objector 17, Bel Air Honda, is located at 1800 Bel Air Road, Fallston, Maryland 21047. This auto dealership relies heavily on the use of customers paying their retail automotive bill with a Visa or Mastercard. Objector 17 objects to the Class Settlement Agreement for the reasons stated below.

18. Objector 18, Landers McClarty Toyota Scion, is located at 2970 Huntsville Highway, Fayetteville, Tennessee 37334. This auto dealership relies heavily on the use of customers paying their retail automotive bill with a Visa or Mastercard. Objector 18 objects to the Class Settlement Agreement for the reasons stated below.

19. Objector 19, Nissan of Fort Worth, is located at 3451 W. Loop 820 South, Fort Worth, Texas 76116. This auto dealership relies heavily on the use of customers paying their retail automotive bill with a Visa or Mastercard. Objector 19 objects to the Class Settlement Agreement for the reasons stated below.

20. Objector 20, Landers McClarty Chevrolet, is located at 4930 University Drive, Huntsville, Alabama 35816. This auto dealership relies heavily on the use of customers paying

their retail automotive bill with a Visa or Mastercard. Objector 20 objects to the Class Settlement Agreement for the reasons stated below.

21. Objector 21, Landers McClarty Huntsville Dodge Chrysler Jeep, is located at6533 University Drive NW, Huntsville, Alabama 35806. This auto dealership relies heavily on the use of customers paying their retail automotive bill with a Visa or Mastercard. Objector 21 objects to the Class Settlement Agreement for the reasons stated below.

22. Objector 22, Mercedes Benz of Huntsville, is located at 6520 University Drive, NW, Huntsville, Alabama 35806. This auto dealership relies heavily on the use of customers paying their retail automotive bill with a Visa or Mastercard. Objector 22 objects to the Class Settlement Agreement for the reasons stated below.

23. Objector 23, Landers McClarty Nissan of Huntsville, is located at 6520 University Drive, NW, Huntsville, Alabama 35806. This auto dealership relies heavily on the use of customers paying their retail automotive bill with a Visa or Mastercard. Objector 23 objects to the Class Settlement Agreement for the reasons stated below.

24. Objector 24, Landers McClarty Subaru, is located at 5790 University Drive, Huntsville, Alabama 35806. This auto dealership relies heavily on the use of customers paying their retail automotive bill with a Visa or Mastercard. Objector 24 objects to the Class Settlement Agreement for the reasons stated below.

25. Objector 25, Lee's Summit Dodge Chrysler Jeep Ram, is located at 1051 SE Oldham Parkway, Lee's Summit, Missouri 64081. This auto dealership relies heavily on the use of customers paying their retail automotive bill with a Visa or Mastercard. Objector 25 objects to the Class Settlement Agreement for the reasons stated below.

26. Objector 26, Lee's Summit Nissan, is located at 1025 SE Oldham Parkway, Lee's Summit, Missouri 64081. This auto dealership relies heavily on the use of customers paying their retail automotive bill with a Visa or Mastercard. Objector 26 objects to the Class Settlement Agreement for the reasons stated below.

27. Objector 27, Olathe Dodge Chrysler Jeep, is located at 15500 West 117th Street, Olathe, Kansas 66062. This auto dealership relies heavily on the use of customers paying their retail automotive bill with a Visa or Mastercard. Objector 27 objects to the Class Settlement Agreement for the reasons stated below.

28. Objector 28, Waxahachie Dodge Chrysler Jeep, located at 2405 North I-35 E, Waxahachie, Texas 75165. This auto dealership relies heavily on the use of customers paying their retail automotive bill with a Visa or Mastercard. Objector 28 objects to the Class Settlement Agreement for the reasons stated below.

29. Objector 29, Waxahachie Ford-Mercury, is located at 2401 N I-35 E, Waxahachie, Texas 75167. This auto dealership relies heavily on the use of customers paying their retail automotive bill with a Visa or Mastercard. Objector 29 objects to the Class Settlement Agreement for the reasons stated below.

30. Objector 30, Landers Harley-Davidson – Little Rock, is located at 10210 Interstate 30, Little Rock, Arkansas 72209. This auto dealership relies heavily on the use of customers paying their retail automotive bill with a Visa or Mastercard. Objector 30 objects to the Class Settlement Agreement for the reasons stated below.

31. Objector 31, Landers Harley – Davidson – Hot Springs, is located at 205 Garrison Road, Hot Springs, Arkansas 71913. This auto dealership relies heavily on the use of customers

paying their retail automotive bill with a Visa or Mastercard. Objector 31 objects to the Class Settlement Agreement for the reasons stated below.

32. Objector 32, Landers Harley-Davidson – Conway, is located at 1110 Colliers Drive, Conway, Arkansas 72032. This auto dealership relies heavily on the use of customers paying their retail automotive bill with a Visa or Mastercard. Objector 32 objects to the Class Settlement Agreement for the reasons stated below.

33. Objector 33, Landers Auto Group No. 1 d/b/a Landers Scion, ("Landers Scion") is located in Little Rock, Arkansas 72201. Landers Scion relies heavily on the use of customers paying their retail automotive bill with a Visa or Mastercard. Objector No. 33 objects to the Class Settlement Agreement for the reasons stated below.

34. Objector 34, Landers Auto Group No. 1 d/b/a Landers Toyota ("Landers Toyota"), is located in Little Rock, Arkansas 72201. Landers Toyota relies heavily on the use of customers paying their retail automotive bill with a Visa or Mastercard. Objector No. 34 objects to the Class Settlement Agreement for the reasons stated below.

35. Objector 35, Landers Auto Group No. 1 d/b/a The Boutique at Landers Toyota ("Landers Boutique"), is located in Little Rock, Arkansas 72201. Landers Toyota relies heavily on the use of customers paying their retail automotive bill with a Visa or Mastercard. Objector No. 35 objects to the Class Settlement for the reasons stated below.

36. Objector 36, Landers Auto Sales, LLC d/b/a Landers Chrysler Jeep Dodge ("Landers Chrysler Jeep Dodge"), is located in Little Rock, Arkansas 72201. Landers Chrysler Jeep Dodge relies heavily on the use of customers paying their retail automotive bill with a Visa or Mastercard. Objector No. 36 objects to the Class Settlement for the reasons stated below.

37. Objector 37, Landers Auto Sales, LLC d/b/a Landers Pre-Owned ("Landers Pre-Owned"), is located in Little Rock, Arkansas 72201. Landers Pre-Owned relies heavily on the use of customers paying their retail automotive bill with a Visa or Mastercard. Objector No. 37 objects to the Class Settlement for the reasons stated below.

38. Objector 38, Landers Auto Sales, LLC d/b/a Landers Suzuki ("Landers Suzuki"), is located in Little Rock, Arkansas 72201. Landers Suzuki relies heavily on the use of customers paying their retail automotive bill with a Visa or Mastercard. Objector No. 38 objects to the Class Settlement for the reasons stated below.

II. Reasons for Objection

39. Plaintiffs in this lawsuit propose a global settlement agreement to settle all claims pertaining to interchange, commonly referred to as "swipe" fees. *See, e.g.*, Second Consolidated Amended Class Action Complaint (Doc. 1153) and Class Settlement Agreement (Doc. 1588-1). In exchange for this settlement, businesses who are members of the Proposed Class, would release any and all claims. Class Settlement Agreement ¶ 31-35 (Rule 23(b)(3) Settlement Class; ¶ 66-71 (Rule 23(b)(2) Settlement Class.

40. Objectors object to the proposed settlement as not fair, reasonable and adequate for four primary reasons:

a. The monetary fund and proposed refund is inadequate for the class;

b. The injunctive relief is inadequate for the class;

c. The release is excessive and overbroad; and

d. In light of the minimal relief provided and overbroad nature of the release, the proposed attorney's fees award is excessive.

41. A settlement agreement, which seeks to settle claims for all class members must be fair, reasonable and adequate, not a product of collusion and must adequately represent class members' interests. *See, e.g., In re Warner Communications Securities Litig.*, 798 F.2d 35, 37 (2d Cir. 1986); *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277 (7th Cir. 2002). Further, it "is desirable to have as broad a range of participants in the fairness hearing as possible because of the risk of collusion over attorney's fees and the terms of settlement generally." 288 F.3d at 288 (citing *Gottlieb v. Barry*, 43 F.3d 474, 490-91 (10th Cir. 1994); *Fisher v. Procter & Gamble Mfg. Co.*, 613 F.2d 527, 547 (5th Cir. 1980); *White v. Auerbach*, 500 F.2d 822, 828 (2d Cir. 1974)). *See also In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litig.*, 55 F.3d 768 (1995) (reversing approval of class settlement).

42. Further, in determining whether a settlement-only class should be approved and certified, the court must be assured the requirements for class certification are satisfied. *Amchem Products, Inc. v. Windsor*, 177 S.Ct. 2231 (1997).

43. The proposed class representative and class counsel are fiduciaries to the class and have the full duty of honesty, loyalty, good-faith and fair dealing. *See, e.g., Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 331 (1980) (stating that class representatives have a responsibility "to represent the collective interest of the putative class" in addition to their private interests); *see also Sondel v. Northwest Airlines, Inc.* 56 F.3d 934, 938-39 (8th Cir. 1995) (stating that certified class representatives and class counsel assume fiduciary responsibilities to the Class).

44. Objectors are small and large businesses located around the United States who utilize electronic payment systems, including the Mastercard and Visa networks. As part of their

business operation, Objectors as merchants are charged fees, including Interchange Fees, for customers payments. These fees are the subject matter of this proposed settlement.

45. Interchange Fees greatly impact merchants who provide a credit card service for payment of goods and services. Price-fixing and unilateral imposition of fees and fee increases by large corporates that control a market are harmful business practices and adversely affect small and large businesses who are already enduring many issues in the marketplace from a sluggish economic recovery, to less consumption of goods and services. Any unlawful fees impact the profit of small and large businesses that must absorb the unlawful fees.

46. The district court, as a fiduciary for the absent class members, has oversight must ensure this settlement treats the class members fairly, particularly with objections and objecting proposed class representatives. *See, e.g., In re "Agent Orange" Product Liability Litig.*, 996 F.2d 1425, 1438 (2d Cir. 1993) ("A judge in a class action is obligated to protect the interests of absent class members."), cert. denied, 510 U.S. 1140 (1994). Hence, where there is a dispute between the class counsel and proposed class representatives as to the proposed settlement, the decision cannot "rest entirely with either the named plaintiffs or with class counsel." *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1176-77 (5th Cir. 1978), cert denied, 439 U.S. 1115 (1979). Objectors respectfully submit, at this point, all indications are that the proposed settlement agreement does not treat the class members fairly, including said Objectors. Evidence of the unfairness is the mass exodus of the proposed class representatives from the proposed settlement. Moreover, the amount and variety of objection to the class settlement at this point in the process is significant and requires strict scrutiny of the proposed terms of relief and award of attorney's fees.

47. The proposed class settlement has not been viewed favorably by many groups, entities and individuals. Notably, United States Senator Richard Durbin of Illinois, a strong advocate for retailers and merchants, expressed these comments on the Senate Floor:

> The bottom line is that this proposed settlement does not make our credit card system better. Instead, it gives Visa and Mastercard free reign to carry on their anti-competitive swipe fee system with no real constraints and no legal accountability to the millions of American businesses that are forced to pay their fees.
>
> This is a stunning giveaway to Visa and Mastercard, all for a payout of a mere 2 months worth of swipe fees. This is a bad deal.

Cong. Rec. S5961 (daily ed. August 2, 2012) (statement of Sen. Durbin) (emphasis added).

48. Further, a proposed Class Representative, the National Association of Convenience Stores (NACS), formally withdrew from the proposed settlement agreement and hired its own law firm, Constantine Cannon, almost immediately after the settlement agreement was announced. NACS, a proposed representative, has such problems with the settlement agreement that it withdrew as a fiduciary for the class, indicating "absent" class members were not being treated fairly. Recently, several other proposed class representatives have withdrawn from the settlement agreement so they can object to it. This wholesale withdrawal from the proposed settlement process by those representatives closest to the process indicates a serious fundamental problem to relief proposed, which would bind the absent class members.

49. Many other national associations, individuals and entities have objected to the proposed settlement. There are obvious problems with the proposed fairness, reasonableness and adequacy of the settlement. The monetary relief and future injunctive relief (which is very short) are not sufficient for a full release of any and all claims that could be brought against Visa and Mastercard now or in the future. The inadequacy and unreasonableness of the proposed

settlement has been succinctly analyzed by a faculty member at Georgetown University Law Center.[1]

50. In his analysis, Georgetown Law Professor Mr. Levitin comments: "Yet in many ways the payment is paltry. $7.25 billion amounts to around only three months' worth of interchange fees."[2] Mr. Levitin proposes that a 25% settlement figure would be reasonable.[3] This would be equivalent to a $30 billion dollar figure.[4] This would be equivalent to 10% of the damages that could be obtained at trial.

51. Moreover, this settlement permit the wrongdoers to avoid true reform in the Interchange Fee system because class members would be bound by the paltry refund and short injunctive (prospective) relief, which is not significant in time to effectuate any type of marketplace change since Visa and Mastercard have been engaged in this wrongful behavior for decades. Eight months is far too short to change the marketplace behavior for this type of cartel behavior. Further, the proposition that merchants recoup the Interchange Fee through a surcharge on consumers penalizes the class members and benefits the wrongdoers.

52. For this deal, the class counsel receive an extraordinarily large attorney's fee while Visa and Mastercard are able to walk away with immunity from future lawsuits for wrongdoing. Objectors respectfully submit this proposed settlement needs to provide additional monetary and injunctive relief for class members in exchange for a full and final release of all

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[1] Adam J. Levitin, AN ANALYSIS OF THE PROPOSED INTERCHANGE FEE LITIGATION SETTLEMENT, Georgetown Law and Economics Research Paper No. 12-033 (August 21, 2012), which can be downloaded without charge from SSRN: http://ssrn.com/abstract=2133361.

[2] *Id.* at 5.

[3] *Id.* at 6.

[4] *Id.*

claims. The monetary fund should fully compensate retailers for past unlawful fees retained by Visa and MasterCard. There is ample legal ammunition. Federal antitrust law provides for treble damages to deter such unlawful activity. Section 4 of the Clayton Act, 15 U.S.C. § 15. If this matter proceeded to trial, treble damages would be a significant deterrent and monetary recovery for the class. Estimated damages would be around $300 billion.[5] The proposed settlement is far south of this number, not even 10% of the potential recoverable damages should this case be tried.

53. Notwithstanding this strong deterrence in federal law for anticompetitive behavior, the monetary fund sought to be recovered is not adequate for the unlawful fees retained by Visa and Mastercard in the proposed settlement. At a minimum, all unlawful fees should be refunded as restitution to the class.

54. The injunctive relief is for a very short period of time, only eight months. It fails to prevent Visa and Mastercard from resuming unlawful practices in the future. Rather, because of the full and final release, Visa and Mastercard could resume with impunity since retailers would have no legal ability to stop unlawful activity pertaining to the Interchange Fees.[6] Visa and Mastercard had this unlawful behavior nailed down to an ongoing unlawful art. As an example, paragraph 171 of the Second Consolidated Amended Class Action Complaint provides: "Unlike in the early days of the Networks, Visa and Mastercard now, jointly and separately, have market power in the market for General Purpose Network Services. Even in the face of frequent and significant increases in Interchange Fees, Merchants have no choice but to continue to accept Visa's and Mastercard's dominant Credit Cards." Eight months is not sufficient time for Visa and

[5] Levitin, AN ANALYSIS OF THE PROPOSED INTERCHANGE FEE LITIGATION SETTLEMENT, at 6.

[6] Levitin, AN ANALYSIS OF THE PROPOSED INTERCHANGE FEE LITIGATION SETTLEMENT, at 16.

Mastercard's market power and ability to engage in anti-competitive behavior to subside and be absorbed because of marketplace competition. Objectors respectfully submit the injunctive fee should be extended for five years into the future to allow the marketplace to regulate this behavior. Otherwise, with such a short injunctive window and no ongoing monitoring or oversight, Visa and Mastercard have no disincentive to refrain from unlawful behavior since they are entrenched in the marketplace and merchants have no choice but to "accept Visa's and Mastercard's dominant Credit Cards." *Id.*

55. In sum, these significant issues regarding the fairness, adequacy and reasonableness of the proposed settlement should be fully aired and discussed at the fairness hearing and any preliminary approval hearing. The proposed settlement agreement is not fair, reasonable and adequate; would be binding and fully impacts the rights of retailers and merchants who by the excessive and overbroad release language would not be able to sue or vindicate their rights for unlawful actions engaged in by the Defendants in the future with regard to the Interchange Fees.

56. Objectors respectfully request a hearing on the approval of this settlement agreement and reserve all rights to engage in discovery, participate in the discovery and hearing process and have a fair opportunity to be heard.

Respectfully submitted,

/s/ Jerrold Parker
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CERTIFICATE OF SERVICE

This objection has been electronically filed and served on class counsel this 18th day of October, 2012.

/s/ Jerrold Parker

EXHIBIT 4

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
---------- X

IN RE PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION

05-md-1720 [JG] [JO]

---------- X

RETAILERS AND MERCHANTS' OBJECTION TO FINAL APPROVAL OF THE CLASS ACTION DEFINITIVE SETTLEMENT AGREEMENT

I. INTRODUCTION AND PRELIMINARY STATEMENT

In the Definitive Class Settlement Agreement (the "Settlement Agreement"), the Visa Defendants, Mastercard Defendants, and Bank Defendants (collectively "Visa/Mastercard") – along with fewer than half of the originally proposed class representatives willing to support the settlement[1] (the "Class Representatives") – have agreed to grant Visa/Mastercard immunity from liability stemming from any *future* application, interpretation, or conduct under their presently effective rules governing merchants. In exchange, Visa/Mastercard have committed to pay to a class "comprised of *millions*" of members (Mem. Law Supp. Mot. Class Cert. 30) an amount roughly

[1] In the initial motion for class certification, Class Counsel offered "nineteen Plaintiff class representatives." (Redacted Mem. Law Supp. Mot. Class Cert. 7.) When it became time to provisionally certify the Class for purposes of preliminary approval of this settlement, only *nine* remained. (Mem. Supp. Mot. Class Settlement Prelim. Approval 1 n.2.) Gone are merchants and organizations such as D'Agostino Supermarkets, Inc., the National Restaurant Association, the National Association of Convenience Stores, and the National Grocers Association (*cf.* First Consol. Am. Class Action Compl. ¶¶ 18, 23-27, 40-46), leaving others like Payless ShoeSource, Inc. and Leon's Transmission Service, Inc. to fend for the Class (*see* Mem. Supp. Mot. Class Settlement Prelim. Approval 1 n.2).

equivalent to the sum collected over *a couple of months* from credit card "swipe" fees, even though the operative pleadings allege that Visa/Mastercard carried on their antitrust conspiracy for *years*. Visa/Mastercard have additionally approved changes to a few of the numerous rules subject to the applicable releases, and the Settlement Agreement requires them to offer a discounted swipe fee, or "interchange" rate, for a period of a scant eight months. After that, should the Court approve the settlement, Visa/Mastercard may proceed with their anticompetitive conduct with impunity, comfortable that they are free to do so thanks to the releases within the Settlement Agreement.

Visa/Mastercard and the Class Representatives seek to accomplish the relinquishment of future antitrust damage claims through the imposition of a mandatory, non-opt-out, class under Rule 23(b)(2) of the Federal Rules of Civil Procedure. The use of a Rule 23(b)(2) non-opt-out class to release future claims "exceeds what the Court may permit." *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666, 677 (S.D.N.Y 2011) (denying final approval to a settlement that would have released future claims, even in a Rule 23(b)(3) class which would have allowed opt-outs). Moreover, "[t]he defendants would obtain these releases without agreement to permanently alter the conduct which gave rise to the lawsuit," *Schwartz v. Dallas Cowboys Football Club, Ltd.*, 157 F. Supp. 2d 561, 580 (E.D. Pa. 2001), and the releases would cover *all* Visa/Mastercard rules presently in effect, rather than the few at issue in this dispute, so that they then would "extend far beyond the conduct challenged in the litigation," *id.* at 576. For these and other reasons discussed throughout this objection, final approval of the Settlement Agreement should be denied.

II. THE OBJECTING PARTIES

The objectors opposing the Settlement Agreement in this Objection are those retailers and merchants originally named in the Retailers & Merchants Objection to Proposed Class Settlement Agreement [Document 1653], filed on October 18, 2012 (the "R&M Objectors"), and additional retailers and merchants who oppose final approval of the Settlement Agreement after having received notice of the settlement. These retailers and merchants are:

1. Landers McLarty Bentonville, LLC d/b/a Landers McLarty Ford Dodge Chyrsler Jeep – Bentonville, Arkansas
2. Landers McLarty Bentonville Nissan, LLC d/b/a Landers McLarty Nissan, LLC – Bentonville, Arkansas
3. Bessemer AL Automotive, LLC d/b/a Landers McLarty Dodge Chrysler Jeep – Bessemer, Alabama
4. Shreveport Dodge, LLC d/b/a Landers Dodge – Bossier City Louisana
5. RML Branson MO, LLC d/b/a Tri Lakes Motors – Branson, Missouri
6. RML Burleson TX, LLC d/b/a Burleson Nissan – Burleson, Texas
7. RML Bel Air, LLC d/b/a Bel Air Honda – Falston, Maryland
8. Landers McLarty Fayetteville TN, LLC d/b/a Landers McLarty Toyota – Fayetteville, Tennessee
9. RML Ft. Worth TX, LLC d/b/a Nissan Ft. Worth – Fort Worth, Texas
10. RML Huntsville Chevrolet, LLC d/b/a Landers McLarty Chevrolet –

Huntsville, Alabama

11. RML Huntsville AL, LLC d/b/a Landers McLarty Dodge Chrysler Jeep – Huntsville, Alabama

12. RML Huntsville AL Automotive, LLC d/b/a Mercedes Benz of Huntsville – Huntsville, Alabama

13. RML Huntsville Nissan, LLC d/b/a Landers McLarty Nissan – Huntsville, Alabama

14. RML Huntsville, AL, LLC d/b/a Landers McLarty Subaru – Huntsville, Alabama

15. Landers McLarty Lee's Summit MO, LLC d/b/a Lee's Summit Chrysler Jeep Dodge – Lee's Summit, Missouri

16. RML Lee's Summit MO, LLC d/b/a Lee's Summit Nissan – Lee Summit, Missouri

17. RML Olathe II, LLC d/b/a Olathe Dodge Chrysler Jeep – Olathe, Kansas

18. RML Waxahachie Dodge, LLC d/b/a Waxahachie-Dodge Chrysler Jeep – Waxahachie, Texas

19. RML Waxahachie Ford, LLC d/b/a Waxahachie Ford Mercury – Waxahachie, Texas

20. RML Little Rock, Inc. d/b/a Landers Harley Davidson – Little Rock, Arkansas

21. RML Little Rock, Inc. d/b/a Landers Harley Davidson – Hot Springs, Arkansas

22. RML Little Rock, Inc. d/b/a Landers Harley Davidson – Conway, Arkansas

23. Landers Auto Group No. 1 d/b/a Landers Scion – Little Rock, Arkansas

24. Landers Auto Group No. 1 d/b/a Landers Toyota – Little Rock, Arkansas

25. Landers Auto Group No. 1 d/b/a The Boutique at Landers Toyota – Little Rock, Arkansas

26. Landers CDJ, Inc. – Little Rock, Arkansas

27. Landers CDJ, Inc. d/b/a Steve Landers Chrysler Dodge Jeep – Little Rock, Arkansas

28. Landers of Hazelwood, Inc. – Hazelwood, Missouri

29. A&D Wine Corp. – New York, New York

30. A&Z Restaurant Corp. – New York, New York

31. 105 Degrees, LLC – Oklahoma City, Oklahoma

32. The Pantry Restaurant Group, LLC – Little Rock, Arkansas

33. PPT Inc., d/b/a Graffiti's Restaurant – Little Rock, Arkansas

34. Sansole's Tanning Salon – Little Rock, Arkansas

35. Greenhaw's, Inc. – Little Rock, Arkansas

36. Roberson's Fine Jewelry, Inc. – Little Rock, Arkansas

37. Don's Pharmacy, Inc. – Little Rock, Arkansas

38. Gossett Motor Cars, Inc. – Memphis, Tennessee

39. Gossett Motor Cars, Inc. – Atlanta, Georgia

40. JB Cook, LLC. d/b/a Downtown Oil & Lube – Hope, Arkansas

41. Storage World Limited Partnership, LLC – Little Rock, Arkansas

42. Leisure Landing RV Park – Hot Springs, Arkansas

43. Pinnacle Valley Liquor Store, Inc. – Little Rock, Arkansas

44. The Tennis Shoppe, Inc. – Little Rock, Arkansas

45. The Grady Corporation d/b/a Whole Hog Barbeque (Northwest Arkansas) – Bentonville, Arkansas

46. The Grady Corporation II d/b/a Whole Hog Barbeque (Northwest Arkansas) – Fayetteville, Arkansas

47. Coulson Oil Company – North Little Rock, Arkansas

48. Diamond State Oil LLC – North Little Rock, Arkansas

49. Superstop Stores, LLC – North Little Rock, Arkansas

50. PetroPlus, LLC – North Little Rock, Arkansas

51. Port Cities Oil, LLC – North Little Rock, Arkansas

52. New Mercury, LLC – North Little Rock, Arkansas

53. New Vista, LLC – North Little Rock, Arkansas

54. New Neptune, LLC – North Little Rock, Arkansas

55. SVI Security Solutions – Olive Branch, Mississippi

55. Shepherd's Flock – Townshend, Vermont

The retailers and merchants represented in this objection to final approval of the Class Settlement Agreement are a broad-based, diverse group of businesses representing restaurants, clothing stores, oil and gas companies, convenience stores, car dealerships, jewelry shops, beverage retailers, and other type of trades in numerous states, including,

but not limited to New York, Vermont, Maryland, Arkansas, Tennessee, Mississippi, Alabama, Georgia, Kansas, Missouri, Oklahoma, Texas and Louisiana. These objecting retailers and merchants sell goods to consumers in exchange for payment by credit cards and pay interchange ("swipe") fees.

From the original objection, by approximately half of the original class representatives this past summer, to the large group of objectors present at the preliminary approval hearing held on November 9, 2012, the objection to this proposed class settlement is significant, material and continues to grow.[2] The reasons are simple: This settlement: (1) proposes to bind absent class members to the settlement and release future claims related to the swipe fees while providing immunity to Visa/Mastercard and member banks for future anticompetitive behavior; (2) violates the due process rights of Class Members by providing no legitimate right of opt-out to Class Members; (3) releases Visa/Mastercard from liability for conduct completely unrelated to matters litigated in this case; (4) contains deficient notice because the notice does not provide a legitimate opt-out opportunity; and (5) provides illusory and non-uniform and class-wide relief in the form of a surcharge, which many absent class members will not impose on their customers for several reasons.

Further, the exodus of a large group of class representatives from the settlement illustrates its inherent flaws and unfairness. The Settlement Agreement is materially flawed in its current form. For these reasons, and as discussed in further detail below,

[2] By way of comparison, the Court's approval of the settlement agreement in *In re Visa Check/Mastermoney Antitrust Litigation*, 297 F. Supp. 2d 503 (E.D.N.Y. 2003) (Gleeson, J.), while it involved some 5 million merchants, only had 18 merchant objectors. 297 F. Supp. 2d at 409.

R & M Objectors respectfully submit the settlement is not reasonable, adequate or fair to the entire class bound by the Settlement Agreement.

III. ARGUMENT

A. The Settlement Agreement Violates Due Process

By its very nature, a proposed class action settlement that violates the Due Process Clause of the United States Constitution can be neither "fair, reasonable, [nor] adequate," Fed. R. Civ. P. 23(e)(2), which is the standard governing the propriety of final approval, *see id.* The Settlement Agreement violates due process in a variety of ways, among them the proposed – and mandatory – release of Visa/Mastercard from liability for any future damages in derogation of the nation's antitrust laws, without any legitimate right to opt-out. The Settlement Agreement is wholly improper, and final approval should not be forthcoming.

1. The Release Of *Future* Antitrust Liability By Way Of A Mandatory 23(b)(2) Class Is Completely Impermissible Under United States Supreme Court Precedent

The present settlement includes a Class to be certified under Rule 23(b)(2) of the Federal Rules of Civil Procedure, thus affording no opportunity for any of the millions of Class Members to opt out of the terms which would bind that aggregation of merchants. *See* Fed. R. Civ. P. 23(b)(2), (c)(2)(A) (confirming that a (b)(2) class includes no right to "opt-out"). Thus, should final approval occur, the individuals and businesses within this enormous class will have had no choice but to release Visa/Mastercard from any causes of action regarding *future* damages for violations of antitrust laws. The United States Supreme Court has rejected collusive settlements just like this.

In *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), the Supreme Court considered the permissibility under Rule 23 of a settlement that would relinquish class members' future claims without giving them an opportunity to opt out. *Id.* at 843-48 . After emphasizing the "serious constitutional concerns raised by the mandatory class resolution of individual legal claims, *especially where a case seeks to resolve future liability in a settlement only action*." *id.* at 842 (emphasis added),[3] the Court wasted no time in rejecting the settlement before it. *Id.* at 830, 864-65; *see also Molski v. Gleich*, 318 F.3d 937, 948-49 (9th Cir. 2003) ("[T]he Supreme Court in *Ortiz* expressed its growing concern regarding the constitutionality of certifying mandatory classes when damages are at issue.").

The Court made clear that a class settlement which would sacrifice monetary damages claims possessed by individual members of the class, with no chance to opt out of that result, is beset with Constitutional infirmities. First of all, "the certification of a mandatory class followed by settlement of its action for money damages obviously implicates the Seventh Amendment jury trial rights of absent class members." *Ortiz*, 527 U.S. at 845-46. Continuing on, the Court explained, "By its nature . . . a mandatory

[3] Elsewhere in the *Ortiz* opinion, the Court reiterated the increased concern for absent class members necessary whenever certification occurs only to facilitate settlement of classwide claims. *Ortiz*, 527 U.S. at 842, 848-49; *see also Schwartz v. Dallas Cowboys Football Club, Ltd.*, 157 F. Supp. 2d 561, 570 (E.D. Pa. 2001) (exercising "*great care* in reviewing the settlement" because it had "only conditionally certified the class" (emphasis added)). Of course, certification here occurred only in the context of settlement. (*See* Order of 7/17/2012 (deeming Plaintiffs' Motion for Class Certification "withdrawn" in light of anticipated settlement); Prelim. Approval Order ¶ 6 ("[T]he Court *provisionally* certifies, *for settlement purposes only*, a Rule 23(b)(2) *Settlement Class*, from which exclusions shall not be permitted . . . . " (emphases added).)

settlement-only class action with legal issues and future claimants compromises [class action plaintiffs'] Seventh Amendment rights without their consent." *Id.* at 846.

In addition to violating class members' rights under the Constitution's Seventh Amendment, mandatory, settlement-only classes also run afoul of the Due Process Clause. The *Ortiz* opinion elaborated:

> The inherent tension between representative suits and the day-in-court ideal is only magnified if applied to damage claims gathered in a mandatory class. Unlike Rule 23(b)(3) class members, objectors to the collectivism of a mandatory [class] action have no inherent right to abstain. The legal rights of absent class members (which in a class like this one *would include claimants who by definition may be unidentifiable when the class is certified*) are resolved regardless either of their consent, or, in a class with objectors, their express wish to the contrary.

Ortiz, 527 U.S. at 846-47(emphasis added). As such, the Court confirmed "that before an absent class member's right of action [is] extinguish[ed] due process require[s] . . . *at a minimum* [that] an absent plaintiff . . . be provided with an opportunity to remove himself from the class." *Id.* at 848 (emphasis added and quotation omitted).

The mandatory, non-opt-out, settlement-only class created by the Settlement Agreement does not at all live up to the minimum constitutional requirements emphasized in *Ortiz*. *See Molski*, 318 F.3d at 949 n.13 (observing that the concerns highlighted in *Ortiz* "appl[y] to any mandatory class, whether under 23(b)(1) or (b)(2)"). The R&M Objectors submit that the Rule 23(b)(2) class now before the Court, by releasing unliquidated *future* damages claims with respect to rules of Visa/Mastercard *unrelated to this litigation*, contains a damages component that is more than "incidental" to the

injunctive relief. *See Robinson v. Metro-N. Commuter R.R.*, 267 F.3d 147, 164 (2d Cir. 2001) ("By definition . . . incidental damages must be susceptible to computation by means of objective standards and not dependent in any significant way on . . . intangible, subjective differences." (quotation omitted)). Consequently, the ***only*** way this Class can be salvaged is through the issuance of a ***new*** notice affording Class Members a chance to opt out. *Cf. id.* at 166 ("[A]ny due process risk posed by (b)(2) class certification of a claim for non-incidental damages can be eliminated by the district court simply affording notice and opt out rights to absent class members . . . .").

2. **The Release Of *Future* Antitrust Liability By The Rule 23(b)(3) Class Is Inappropriate**

Perhaps doubting the sustainability of the proposed 23(b)(2) class, Visa/Mastercard and Class Representatives also included releases of future antitrust claims in the Rule 23(b)(3) "damages" class described in the Settlement Agreement. (*See, e.g.*, Definitive Class Settlement Agreement ¶ 33(h) (affirming that Rule 23(b)(3) release includes claims "based on or relating to . . . the *future* effect in the United States of the continued imposition of or adherence to any Rule of [Visa/Mastercard] in effect in the United States as of the date of the Court's entry of the [Preliminary Approval Order]" (emphasis added)). Because this Rule 23(b)(3) class does not offer Class Members a legitimate opportunity to opt out of a settlement that releases future damages,[4] this release, too, falls short of constitutional demands. This is especially so given the heightened scrutiny directed

[4] As explained in Section III.B. of this Objection, the Notice itself is constitutionally defective because, as a practical matter, it does not offer class members a legitimate opportunity to opt-out of the proposed relief.

toward this settlement-only class. *Ortiz*, 527 U.S. at 848-49, 119 S. Ct. at 2316 ("When a district court . . . *certifies for class action settlement only*, the moment of certification requires 'heightene[d] attention' to the justification for binding the class members." (emphasis added)).

The Supreme Court's opinion in *Ortiz*, as well as its decision in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997), stand as towering authorities for the general proposition that, when it comes to releases for *future* conduct, "the interests of present and future victims are so unavoidably opposed that the one group cannot 'fairly and adequately protect the interests' of the other." James Grimmelmann, FUTURE CONDUCT AND THE LIMITS OF CLASS-ACTION SETTLEMENTS, 91 N.C. L. Rev. 387, 391 (2013) (citing Fed. R. Civ. P. 23(a)(4), *Ortiz*, *supra* and *Amchem*, *supra*)).

The Settlement Agreement seeks to release future claims and insulate Visa/Mastercard from future transgressions of an anticompetitive nature. The Court's own docket is filled with substantial opposition to this unfair term of the Settlement Agreement. The large numbers of objections to the settlement agreement and opt outs with valid concerns weighs heavily against approving the class settlement as fair, reasonable and adequate. *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666, 676 (S.D. N.Y. 2011) (citing *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 785, 812 (3d Cir. 1995)). Moreover, it is significant that the Settlement Agreement proposes to release *future* antitrust conduct engaged in by the Defendants on a class-wide basis. District courts have generally held that in cases involving antitrust law, future

violations cannot be waived in the context of a class action settlement. *See Schwartz v. Dallas Cowboys Football Club, Ltd.*, 157 F. Supp. 2d 561 (E.D. Pa. 2001); *Three Rivers Motor Co. v. Ford Motor Co.*, 522 F.2d 885, 896 n.27 (3d Cir. 1975) (citing cases from several circuits that while a general release of antitrust violations is permitted, a release may not "waive damages from future violations of antitrust laws").

Schwartz is persuasive and its reasoning applies here. In *Schwartz*, the district court rejected a Rule 23(b)(3) class settlement in an antitrust lawsuit, finding the release in the settlement agreement was too broad. *Schwartz*, 157 F. Supp. 2d at 577-78. The district court regarded the release too broad "because it bars later claims based on future conduct." *Id.* at 578. The *Schwartz* court held it was improper to "bar later claims based not only on past conduct but also future conduct." *Id.* The district court also held that because the release was so broad there was a lack of consideration for the class members bound by the settlement agreement. The court reasoned:

> Under the release proposed by the parties, defendants could potentially expand their alleged bundling activities in other non-exempt channels of communication (such as the Internet) and face no potential liability with respect to the 1.8 million class members as long as they provide Single Sunday Ticket for satellite distribution under the terms expressed in the Settlement Agreement. *Such a result offers the possibility of far greater protection for defendants than is justified from the benefits obtained by the class.*

Id.

Here, the Settlement Agreement would prevent lawsuits against the Defendants for future wrongful conduct that is the same or ***similar*** to the wrongful conduct challenged. Defendants can violate the law eight (8) months after the class settlement is approved and

all class members would be unable to vindicate their rights and stop the unlawful conduct. Generally, injunctive relief preventing violations of antitrust law is ***permanent***. Not with this settlement. There is a short period of injunctive relief and then tremendous loopholes for Defendants to tweak their market behavior and set high, lock-step swipe fees, which retailers and merchants would be forced to pay after the injunction. In light of the minimal injunctive (prospective) relief, the settlement provides far greater protection for the Defendants than is "justified from the benefits obtained by the class." *Schwartz*, 157 F. Supp. 2d at 578.[5] This attempt by Visa/Mastercard and the Class Representatives and Class Counsel to bind absent (even unknown or not yet conceived) class members for years into the future from bringing suit for antitrust or other violations is unprecedented in scope, unconstitutional, fundamentally flawed and unfair. *Cf. Ortiz*, 527 U.S. at 847, 119 S. Ct. at 2315 (indicating that a court must be especially vigilant to protect absent class members "who by definition may be unidentifiable when the class is certified"); James Grimmelmann, FUTURE CONDUCT AND THE LIMITS OF CLASS-ACTION SETTLEMENTS, 91 N.C. L. Rev. 387, 394 (2013) (stating that the proposed Visa Mastercard settlement would "prevent businesses-including ones not yet in business-from objecting to many of their policies until 2021"); Adam J. Levitin, AN ANALYSIS OF THE PROPOSED INTERCHANGE FEE

[5] Tellingly, the Court in *Schwartz* expressed strong criticism for a settlement that would have prevented the defendants from engaging in the challenged conduct for at least one, but possibly no more than two, years. *Schwartz*, 157 F. Supp. 2d at 573. This Settlement Agreement does not even go that far. Even more than *Schwartz*, then, the prospective relief in this case "provides limited additional consumer choice to the members of the class" and "is minimal at best." *Id.*

LITIGATION SETTLEMENT 14-19 (Aug. 21, 2012).[6]

The United States Court of Appeals for the Second Circuit has held that class member's rights to due process are violated where a Rule 23(b)(3) class settlement releases unaccrued future claims. *Stephenson v. Dow Chemical Co.*, 273 F.3d 249, 259-61 (2d Cir. 2001), *aff'd in part by an equally divided court, vacated in part on other grounds*, 539 U.S. 111 (2003). Similarly, recently faced with a proposed class settlement involving release of future claims, the United States District Court for the Southern District of New York rejected the settlement. *Google*, 770 F. Supp. 2d at 677. The release of defendant Google from liability for *future* acts was in excess of what the district court viewed as permissible, and this aspect of the class settlement at issue was not fair, reasonable, or adequate. *Id.* The district court cited the United States Supreme Court reasoning in *Amchem*: "'Rule 23 . . . must be interpreted with fidelity to the Rules Enabling Act and *applied with the interests of absent class members in close view.*'" 770 F. Supp. 2d at 677 (emphasis added) (quoting *Amchem*, 521 U.S. at 629, 117 S. Ct. 2252)). Thus, even though class counsel may be highly qualified, it is the interests and substantive rights of absent class members that have to be protected by the district court and not abridged or modified by a class settlement, lest the Rules Enabling Act be offended. *Id.*

Objectors respectfully submit the Settlement Agreement, which purports to cram-down an unfair settlement on absent class members with no right to opt-out, unconstitutionally impairs the right to due process afforded absent retailers and merchants

[6] Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2133361.

by the United States Constitution and should not be judicially approved. *Alchem*, *Ortiz*, *Stevenson*, *Google*, and *Schwartz*. The release of future claims possessed by a future class of entities presently known and unknown (as the releasing parties) impairs or abridges substantive rights of absent class members. *See, e.g., Ortiz*, 527 U.S. at 856. Therefore, Objectors respectfully submit, it is incumbent that the Court reject this part of the settlement as not fair, adequate or reasonable under, among other things, the Rules Enabling Act. *See* 28 U.S.C. § 2072(b) (directing that procedural rules "shall not abridge, enlarge or modify any substantive right"); *Amchem*, 521 U.S. at 629, 117 S. Ct. at 2252 ("Rule 23 . . . must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view.").

Further, the release of the "future effect in the United States of any conduct" by any Settlement Class Released Party if it is "substantially similar to the conduct of any Rule 23(b)(3) Settlement Class Released Party related to or arising out of interchange rules, interchange fees, or interchange rates, *any* Rule[7] of any Visa Defendant or MasterCard Defendant" (*see, e.g.*, Settlement Agreement ¶ 33(h)) is excessively broad and vague in scope such that it encompasses other conduct in the future that is not directly related to this case, but which may be an unlawful variation, which substantially affects retailers and merchants. This overly broad language in the release was conspicuously not addressed at the preliminary hearing. Notably, neither Visa nor Mastercard referred to this

[7] A *select few* rules of Visa/Mastercard were at issue in this litigation (*see* Second. Am. Compls. ¶ 23(G)-(K) (listing rules at issue), but the releases cover future claims over *any* provision in rulebooks spanning *hundreds* of pages (*see, e.g.*, Settlement Agreement ¶¶ 33(g), (h), 35(g), (h)). Consequently, as demonstrated in Section III.A.3. of this Objection, the Settlement is invalid as overbroad.

overreaching, overarching and overlybroad language that releases future claims and conduct "substantially similar to the conduct of any Rule 23(b)(3) Settlement Class Relased Party related to or arising out of interchange rules, interchange fees, interchange rates . . . . " This specific language, buried in the subsections of paragraph 33 of the Settlement Agreement, is yet another reason that this Settlement Agreement violates due process, and it speaks volumes that class counsel did not address this at the preliminary approval hearing. To summarize, this due process violation in the release goes far beyond what the United States Supreme Court allows in nationwide class settlements and should be stricken. *Id.* In fact, neither Visa nor Mastercard has ever publically explained why this unfair, unreasonable and inadequate hidden language on the 25th page of the Long Form Notice at paragraph 68(h) in the release does not violate due process.

The district court in *Google* was concerned about the release of future conduct and rejected the class settlement. The district court in *Schwartz* was concerned about the release of future conduct and rejected the class settlement. R&M Objectors respectfully submit the class settlement here should be rejected as unfair, unreasonable and inadequate for class members.

Significantly, in addition to large opposition, the withdrawal of several class representatives from approving the settlement reached indicates the settlement is not fair, reasonable or adequate. Rather, it further demonstrates, the non-opt-out settlement is largely one-sided in favor of the Defendants, who give little to gain a lot, including insulation and immunity from future claims brought against them for unlawful conduct, as

yet uninvented, that may touch upon the swipe fee. This procedural and constitutional dilemma for the Plaintiffs' Class Counsel and remaining Class Representatives requires a higher bar and scrutiny for approval because of the fiduciary interests and the constitutional rights that must be protected and not abridged or modified through the Rule 23 class procedure. *Amchem*, *supra*. The district court, as a fiduciary for the absent class members, must ensure this settlement treats the class members fairly, particularly with objections and objecting proposed class representatives. *See, e.g.*, *In re "Agent Orange" Product Liability Litig.*, 996 F.2d 1425, 1438 (2d Cir. 1993) ("A judge in a class action is obligated to protect the interests of absent class members."), *cert. denied*, 510 U.S. 1140 (1994). Where a dispute exists between the class counsel and proposed class representatives as to the proposed settlement, the decision cannot "rest entirely with either the named plaintiffs or with class counsel." *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1176-77 (5th Cir. 1978), *cert denied*, 439 U.S. 1115 (1979).

There are at least three conflicts present in this class settlement. First, there is a large segment of class representatives who have withdrawn. *Pettway*, *supra*. Second, the Supreme Court has held that future claims of unknown entities cannot be released and present class representatives cannot adequately represent and release these claims for future entities. Grimmelmann, FUTURE CONDUCT AND THE LIMITS OF CLASS-ACTION SETTLEMENTS, 91 N.C. L. Rev. at 391 (citing to Fed. R. Civ. P. 23(a)(4), *Ortiz* and *Amchem*.). Third, absent Class Members are not given a legitimate opportunity to opt-out of the settlement class. With these real conflicts and objections, the class settlement agreement as currently written, cannot be judicially approved as "fair, reasonable, and adequate" under Fed. R.

Civ. P. 23(e)(2). *Ortiz*, *Amchem*, *Google*, and *Schwartz* While the Settlement Agreement is touted as unprecedented for the $6 billion monetary fund, Defendants will, as a practical matter, recoup any monetary amount paid out in this class settlement (which amounts to only 2-3 months worth of swipe fees) by *increasing* the swipe fee imposed upon retailers and merchants to 4% (and potentially higher) after the eight month injunction period expires. Notably, United States Senator Richard Durbin of Illinois, a strong advocate for retailers and merchants, expressed these comments on the Senate Floor:

> The bottom line is that this proposed settlement does not make our credit card system better. Instead, it gives Visa and Mastercard free reign to carry on their anti-competitive swipe fee system with no real constraints and no legal accountability to the millions of American businesses that are forced to pay their fees. This is a stunning giveaway to Visa and Mastercard, all for a payout of a mere two months worth of swipe fees. This is a *bad deal*.

Cong. Rec. S5961 (daily ed. August 2, 2012) (statement of Sen. Durbin) (emphasis added). There is no disincentive for the Defendants in this class settlement to agree to pay a couple of months' worth of fees, after which they will raise the fee percentage to a higher amount for all credit transactions (which is a large part of the overall goods purchased), and then be immune from suit for agreeing to raise the swipe fee. If Defendants want to charge an anti-competitive rate in the future, the nationwide market suffers, the consumer suffers, retailers and merchants suffer and so does the Constitution, because there is no avenue to seek recourse for future wrong conduct since the release language is overbroad and excessive. Settlement of this class action on the terms proposed exceeds the bounds of fairness and adequacy because any future claims and rights are released. *Google*. The

withdrawing class representatives understood this and oppose this settlement because it is not fair, reasonable or adequate.

In sum, releasing future claims, in the circumstances presented here, is unconstitutional. It is also inappropriate under the Rules of Civil Procedure as unfair, inadequate, and unreasonable for absent class members whose individual rights are taken away, with no right to opt-out. *See, e.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974) (holding "there can be no prospective waiver of an employee's rights under Title VII."); *see also* Grimmelmann, FUTURE CONDUCT AND THE LIMITS OF CLASS-ACTION SETTLEMENTS, 91 N.C. L. Rev. at 410 (citing to *Three Rivers Motor Co. v. Ford Motor Co.*, 522 F.2d 885, 896 n.27 (3d Cir. 1975) (citing cases from several circuits that while a general release of antitrust violations is permitted a release may not "waive damages from future violations of antitrust laws")). Certification of this settlement as a class to bind absent retail and merchant class members (some not yet known), should ***not*** be approved and future claims should not be released. *Ortiz,* 527 U.S. at 842-43.

3. The Settlement Agreement Violates Due Process Because It Releases Conduct Far Beyond What Has Been Litigated In This Action

The R&M Objectors recognize that "class action releases may include claims not presented and even those which could not have been presented" in a lawsuit. *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 107 (2d Cir. 2005). This authority is not limitless, however, in that any settled claims must satisfy the "identical factual predicate" doctrine. *See id.*; *Google Inc.*, 770 F. Supp. 2d at 675 ("[T]he released conduct [must] arise[] out of the identical factual predicate as the settled conduct." (quotation omitted)).

Applying this analysis, the Second Circuit has suggested that released claims occupy the same factual predicate as those litigated when they "have been central to [a] case from its inception" or involve "essentially the same issues." *Wal-Mart Stores*, 396 F. 2d at 108-09. Stated another way, a release may encompass claims that were not pleaded in an action only so long as they "arise from the 'same nucleus of operative fact'" as pleaded claims. *Schwartz*, 157 F. Supp. 2d at 577. The releases in the Settlement Agreement waive claims completely *extraneous* to the "nucleus of operative fact" animating this litigation.

More specifically, the releases here abandon all causes of action related to "the continued imposition of or adherence to [or conduct regarding] *any Rule* of any Visa Defendant or MasterCard Defendant in effect in the United States as of the date of the Court's entry of the Class Settlement Preliminary Approval Order." (Settlement Agreement ¶¶ 33(g), (h), 35(g), (h).) This proceeding, by contrast, revolved around only a very distinct subset of those rules. (*See* Second. Am. Compls. ¶ 23(G)-(K) (specifying rules at issue.) By releasing Visa/Mastercard from liability for conduct surrounding *any* of their rules – which are found in rulebooks numbering hundreds of pages, *see* Mastercard Rules (December 12, 2012) (Exhibit 1); Visa Int'l Operating Regulations (Oct. 15, 2012) (Exhibit 2) – when this action involved only a select few of those rules, the Settlement Agreement exceeds the bounds of the "identical factual predicate" rule. Many unpleaded claims released by the Settlement Agreement bear no relation to the "nucleus of operative fact" actually litigated here. *See Google Inc.*, 770 F. Supp. at 678-79 (determining that settlement would "release claims well beyond those contemplated by the pleadings," when

releases authorized Google to sell full versions of books scanned online, but case only challenged the practice of making available "snippets" of those copyrighted works); *Schwartz*, 157 F. Supp. 2d at 576-78 (concluding that release "extend[ed] far beyond the conduct challenged in the litigation" when it would insulate Defendants from claims related to events shown on cable television or the internet, even though the lawsuit dealt exclusively with satellite broadcasts).

The Settlement Agreement does not comply with the "identical factual predicate" doctrine. On this additional ground, final approval should be denied.

B. The Notice to the Class Is Deficient Because It Does Not Provide Class Members With Notice Of Any Real Opportunity To Opt-Out

Effective notice is an essential prerequisite to the final approval of a class settlement. "Adequate notice is necessary to bind absent class members." *Stephenson v. Dow Chemical Co.*, 273 F.3d 249, 261 n.8 (2d Cir. 2001). The reason for this is straightforward: "[C]lass notice serves as the class members' primary, if not exclusive, source of information for deciding how to exercise their rights under Rule 23." *Wal-Mart Stores, Inc.*, 396 F. 3d at 115. Because the ability to opt out is a constitutional prerogative possessed by all Rule 23(b)(3) class members, *see Stephenson*, 273 F.3d at 260 ("Due process requires . . . an opportunity to opt out."), the notice must contain any information that might be an "essential factor" in a class member's decision whether to opt out of the class, *see Wal-Mart Stores, Inc.*, 396 F.3d at 115.

The notice here is insufficient because it only advises class members of an ability

to opt out of an insignificant portion of the settlement,[8] while informing them that they have no option but to accept the most meaningful aspect of the deal: The waiver of any ability to sue Visa/Mastercard in the future. Faced with this Hobson's Choice, a merchant will most likely elect not to opt-out, in order to preserve a meaningful objection (which would be unavailable upon opting out from the Rule 23(b)(3) Class) to the settlement of future damages, which is the most significant and offensive aspect of the settlement. The notice does not provide a legitimate opportunity to opt-out to protect individual claims against the Defendants for their future conduct.

This settlement is so fundamentally flawed, and the Notice is so intrinsically deficient, that even the most legally astute Class Member would be uncertain of what action to take upon receiving this Notice. As things stand now, all absent Class Members have been told that even if they opt-out of the Rule 23(b)(3) Class, they will lose the ability to sue Visa/Mastercard in the future. In this circumstance, even if a merchant disagrees with the relief afforded by the current "damages" settlement, it is likely to stay in the class so as to retain the ability to object to the more significant waiver of future rights.[9] Should this Court agree that the relinquishment of future damage claims under a

[8] Class Counsel will undoubtedly trumpet the total dollar amount of the settlement, but it must be remembered that it will be divided among "millions" of Class Members (Mem. Law Supp. Mot. Class Cert. 30). That being so, the amount any individual Class Member might expect to receive from this settlement is negligible.

[9] In this unique settlement, which involves a merger of 23(b)(2) and 23(b)(3) classes, it is anything but clear whether a Class Member could object to the 23(b)(2) release of future claims even while opting out of the 23(b)(3) class. If there is disagreement among lawyers whether this might theoretically be possible, there is assuredly great confusion among the laymen comprising the Classes.

mandatory Rule 23(b)(2) class is improper, or conclude that such a release is inappropriate under Rule 23(b)(3), or both, the entire analysis surrounding a decision to opt out is altered. In that scenario, if a business could preserve future damage claims by opting out of the 23(b)(3) class – without being forced to accept the loss of future damage claims – it may very well decide to opt-out even though it is not doing so now. On the other hand, if this Court invalidates future damages releases under both 23(b)(2) and 23(b)(3), the same Class Member might determine that it makes sense to remain a party to the claim for current damages. Basically, the point is that a ***new notice, containing a new – and legitimate – opportunity to opt out,*** will be required should this Court revise the aspect of the Settlement Agreement releasing future damage claims.

In essence, the notice presents Class Members with no opportunity to opt out at all – at least no opportunity to effectively do so – and it is therefore defective.[10] Final approval of the settlement should be denied.

C. The Surcharge is Illusory and Non-Uniform Class Relief

Class certification is impermissible where the proposed relief among class members is not uniform. *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2557 (2011).

[10] It is also important to bear in mind that the releases apply to *future* causes of action that have not yet materialized. As such, those who will possess those claims have no way of presently deciding whether they should opt out or not. It was in just this sort of situation that the Supreme Court in *Amchem* doubted whether notice could ever be effective. *Amchem*, 521 U.S. at 591 ("Even if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out."). Of course, this case is even worse than *Amchem*, given that a merchant who makes an "intelligent" decision to opt out of the Rule 23(b)(3) class, attempting to preserve future damages claims, will still be bound by the mandatory 23(b)(2) release. This settlement is hopelessly flawed.

Ten states prohibit retailers and merchants from imposing surcharges on customers. These states are California, Colorado, Connecticut, Florida, Kansas, Maine, Massachusetts, New York, Oklahoma and Texas. Other states such as New Jersey and Rhode Island are also looking at regulating the surcharge on consumers. This surcharge prohibition eliminates a large percentage of transactions from achieving any benefit from the settlement, (*Prelim. Approval Hr'g. Tr.* at 51, lines 21:24), and it places the absent class member in conflict with state law so the benefit cannot be realized. *See, e.g.*, *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768, 808 (3d Cir. 1995) ("One sign that a settlement may not be fair is that some segments of the class are treated differently from others."); *True v. American Honda Motor Co.*, 749 F.Supp.2d 1052, 1067 (C.D. Cal. 2010) ("Courts generally are wary of settlement agreements where some class members are treated differently than others.").

Under the Supreme Court's holding in *Dukes*, *supra*, that "an indivisible injunction" must benefit "all its members at once," or the court must undertake a case-specific inquiry into whether class issues predominate or whether the class action is a superior method of adjudicating the dispute. Predominance and superiority are not self-evident. *Id.* The surcharge, proposed as an element of class relief, is not nationwide relief and does not benefit the entire class. Class members are treated differently. Nevertheless, the class release binds absent class members and releases their substantive rights in the prohibited states. Thus, class members release rights to past and future conduct and do not receive the same benefits. Since the entire class does not benefit, nationwide class

certification is, therefore, inappropriate. *Id.* Further, binding class members to the entire settlement to force settlement violates due process. *Amchem.*

As a practical matter, a majority of retailers and merchants in states where the surcharge is not expressly prohibited, will not impose a surcharge on their customers purchasing goods with a credit card. To begin with, customers want less, not more fees. As one article in the New York Times shortly after the agreement was reached noted:

> Given a shaky economy, many restaurants and other retailers said they had no plans to charge more when customers paid with credit cards.
>
> "Shopping with a credit card is a convenience for our customers and is an important part of our customer service," said Carolyn Beem, a spokeswoman for L.L. Bean. "We have absolutely no plans to add a surcharge for credit card purchases."
>
> Rick Camac, chief executive of the Fatty Crew group of six restaurants, including Fatty Crab, said that "customers might see it as another way you're trying to get at them." (emphasis added).
>
> "I think you have to take the hit, or make it up by adjusting your prices," Mr. Camac said of paying for the credit card fees.

Stephanie Clifford, Stefanie Strom, *Merchants Considering Credit Card Surcharges*, N.Y. TIMES, July 16, 2012.

Recent articles indicate even the Defendants acknowledge that retailers will not surcharge. *See* Emily Jane Fox, *Credit card checkout fee taking effect*, CNNMONEY.com, Tuesday, January 29, 2013 (stating: "Mastercard said it doesn't expect most merchants to put the surcharge into effect, since stores won't want to drive away business."). Even though credit card swipe charges have grown nine times since 1995 of his business, the

chain Redner's nor other chains will pass that expense to customers acknowledging "such a move would probably turn some away."[11]

The surcharge is also a concern to the Court regarding "the economic effect of the proposed rules change." *Prelim. Approval Hr'g. Tr.* at 63, lines 20:21. Retailers and merchants, in the states that permit a surcharge, will have to make all types of disclosures to customers that the charge is on the cost of goods and must also display the surcharge on the receipt. The retailer and merchant must treat cards similarly to avoid complaints and will encounter customers who leave the establishment, or even lawsuits from customers for imposing such a surcharge for all goods.

The surcharge is not permitted in all states and will likely not be utilized by many retailers and merchants who are members of the class to recoup Defendants' unlawful behavior. The surcharge is not legitimate class-wide relief and makes class certification improper, *see, e.g. Dukes*. Further, it pits the retailer and merchant class members against the customer for an illegal fee exacted by the Defendants. Retailers and merchants would be unfairly penalizing customers for Defendants' unlawful actions in charging the excessive swipe fee and would be releasing current and future claims against the Defendants. The class settlement agreement as written is not fair, reasonable or adequate. Fed. R. Civ. P. 23(e)(2).

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[11] *Retailers, consumers take swipe at credit card surcharge*, February 18, 2013, readingeagle.com, http://readingeagle.com/mobile/article.aspx?id=453496.

D. R&M Objectors Essential Discovery for Evaluating the Fairness, Adequacy and Reasonableness of Settlement Agreement

R & M Objectors have requested that an essential compendium of documents be made available in order to give Objectors a meaningful opportunity to exercise their rights with respect to the Settlement Agreement, as to fairness, adequacy and reasonableness. See, October 22, 2012 Letter from R&M Objectors requesting discovery, Document 1657.

The evidence requested is necessary for R&M Objectors to effectively examine the fairness, reasonableness and adequacy of the merits of the Proposed Settlement, which is a Settlement Only Class. The request is not burdensome and is directly relevant to the Settlement Agreement and examination of its terms, fairness, reasonableness and adequacy. Objectors respectfully request a reasonable and meaningful opportunity to examine the merits for absent class members, to prepare experts and to cross-examine experts at the Final Fairness Hearing with documents pertaining to settlement and execution of the Settlement Agreement. *See, e.g., Girsh v. Jepson*, 521 F.2d 153, 157 (1975) ("As an objector, Frackman was in an adversary relationship with both plaintiffs and defendants and was entitled to at least a reasonable opportunity to discovery against both."). The request is narrow in scope and focuses on two areas of relevant documents: (1) all communication pertaining to settlement negotiations and execution of the Settlement Agreement and (2) discovery of all drafts and documents pertaining to development of draft settlement documents through final execution of the Settlement Agreement. These documents are necessary, relevant and important for the Objectors to examine the merits of the Proposed Settlement, to properly evaluate the terms of the

Settlement Agreement on the record at the Final Fairness Hearing and to ensure that the Settlement Agreement is fair, reasonable and adequate for absent class members. To expect objectors to exercise their rights as to a Settlment Agreement in any meaningful way, tools must be developed to allow for thorough review.

Discovery is appropriate for objectors where lead counsel has not conducted adequate discovery or if the discovery conducted by lead counsel is not made available to objectors. *In re Community Bank of Northern Virginia*, 418 F.3d 277, 316 (3d Cir. 2005) (citing *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975)). Discovery may be made available to objectors for review. *See City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 n.8 (1974).

In *Grinnell Corp.*, a document depository was made available for objectors to inspect and examine documents in support of their objection to a proposed class settlement. *Id.* The Second Circuit discussed what the depository contained in detail:

> The inventory of the depository includes documents produced to the government, depositions taken in the government case, the entire record in the government case, documents produced by and depositions of defendants taken in the Philadelphia actions, as well as hundreds of thousands of additional documents demanded pursuant to Rule 34 by the plaintiffs in these cases. In addition many documents produced by the discovery procedures in the instant cases were placed in the depository. These documents include many spreadsheets of painstakingly assembled transaction data and calculations requested by plaintiffs to support damage theories they planned to assert. One answer by one defendant alone contains hundreds of thousands of statistics on transactions with subscriber plaintiffs. In addition, the documents produced by defendant ADT include the most detailed financial data (e.g., full revenue and cost analyses for each of its approximately 125 central stations) and more than 50,000 competition reports detailing the significant competitive factors pertinent to individual bids and transactions.

Id.

In *Grinnell Corp.*, a tremendous amount of discovery was made readily available to objectors. Here, the R&M Objectors are not seeking a large production of documents or depository, such as discussed in *Grinnell Corp*. Rather, the R&M Objectors have provided a narrow, specific request that is not unduly burdensome and is relevant to evaluating the fairness, adequacy and reasonableness of the Settlement Agreement. The request confirms adequate discovery was obtained for the class action and settlement discussion and execution was not a product of collusion or slanted because of the availability of large attorney fees. *See, e.g., In re Warner Communications Securities, Litig.*, 798 F.2d 35, 37 (2d Cir. 1986) (providing that a class settlement agreement must be fair, reasonable and adequate, not a product of collusion and must adequately represent class members' interests); *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 288 (7th Cir. 2002) (providing that participation in fairness hearing is to evaluate risk of collusion over attorney's fees and the terms of the settlement). Second, the discovery request provides objectors an opportunity to review information actually obtained, discussed and reviewed during the actual settlement process. Objectors respectfully submit as a matter of due process that they have the opportunity to examine documents pertaining to development of settlement dialogue through the final execution of the Settlement Agreement. Discovery of this nature is narrow, focused, not unduly burdensome and provides objectors a meaningful opportunity to cross-examine the merits of a proposed class settlement by being able to view some of the discovery provided in the case.

R&M Objectors submit that they have no greater or lesser right to discovery than as was granted in *Grinnell Corp*. These objectors have purposefully narrowed their focus and

the scope of the discovery request to a discovery area relevant to examining the fairness, adequacy and reasonableness of the Settlement Agreement. E-mail correspondence and drafts of the settlement will be helpful in illuminating the course of settlement discussions, whether settlement was arms-length, what terms were evaluated, how the terms were evaluated and why the final Settlement Agreement was executed. R&M Objectors respectfully submit their request is in accord with legal authority, is not unduly burdensome and permits objectors a meaningful opportunity to develop the record and support their examination of the merits by cross examination and argument to the court. *Grinnell*, *supra*; *In re Community Bank of Northern Virginia*, *supra*.

In sum, the R&M Objectors respectfully submit their discovery request is narrow in scope, in accord with legal authority, is not unduly burdensome and permits access to relevant information to make a meaningful inquiry on cross-examination into the merits of the Proposed Settlement. *In re Community Bank of Northern Virginia*, 418 F.3d 277, 316 (3d Cir. 2005) (citing *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975)).

CONCLUSION

For the reasons stated herein, it is respectfully submitted that approval of the Settlement Agreement is not appropriate under the circumstances presented to this Court. Approval of the Settlement should, therefore, be denied.

Dated this 15th day of May, 2013.

Respectfully Submitted,

By: *s/ Jerrold S. Parker*

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CERTIFICATE OF SERVICE

On this 15th day of May, the above and foregoing has been sent by United States mail to the following:

Payment Card Interchange Fee Settlement
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s/ Jerrold S. Parker
Jerrold S. Parker

EXHIBIT 5

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
---------- X

IN RE PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION

05-md-1720 [JG] [JO]

---------- X

RETAILERS AND MERCHANTS' OBJECTION TO FINAL APPROVAL OF THE CLASS ACTION DEFINITIVE SETTLEMENT AGREEMENT

I. INTRODUCTION AND PRELIMINARY STATEMENT

In the Definitive Class Settlement Agreement (the "Settlement Agreement"), the Visa Defendants, Mastercard Defendants, and Bank Defendants (collectively "Visa/Mastercard") – along with fewer than half of the originally proposed class representatives willing to support the settlement[1] (the "Class Representatives") – have agreed to grant Visa/Mastercard immunity from liability stemming from any *future* application, interpretation, or conduct under their presently effective rules governing merchants. In exchange, Visa/Mastercard have committed to pay to a class "comprised of *millions*" of members (Mem. Law Supp. Mot. Class Cert. 30) an amount roughly

[1] In the initial motion for class certification, Class Counsel offered "nineteen Plaintiff class representatives." (Redacted Mem. Law Supp. Mot. Class Cert. 7.) When it became time to provisionally certify the Class for purposes of preliminary approval of this settlement, only *nine* remained. (Mem. Supp. Mot. Class Settlement Prelim. Approval 1 n.2.) Gone are merchants and organizations such as D'Agostino Supermarkets, Inc., the National Restaurant Association, the National Association of Convenience Stores, and the National Grocers Association (*cf.* First Consol. Am. Class Action Compl. ¶¶ 18, 23-27, 40-46), leaving others like Payless ShoeSource, Inc. and Leon's Transmission Service, Inc. to fend for the Class (*see* Mem. Supp. Mot. Class Settlement Prelim. Approval 1 n.2).

equivalent to the sum collected over *a couple of months* from credit card "swipe" fees, even though the operative pleadings allege that Visa/Mastercard carried on their antitrust conspiracy for *years*. Visa/Mastercard have additionally approved changes to a few of the numerous rules subject to the applicable releases, and the Settlement Agreement requires them to offer a discounted swipe fee, or "interchange" rate, for a period of a scant eight months. After that, should the Court approve the settlement, Visa/Mastercard may proceed with their anticompetitive conduct with impunity, comfortable that they are free to do so thanks to the releases within the Settlement Agreement.

Visa/Mastercard and the Class Representatives seek to accomplish the relinquishment of future antitrust damage claims through the imposition of a mandatory, non-opt-out, class under Rule 23(b)(2) of the Federal Rules of Civil Procedure. The use of a Rule 23(b)(2) non-opt-out class to release future claims "exceeds what the Court may permit." *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666, 677 (S.D.N.Y 2011) (denying final approval to a settlement that would have released future claims, even in a Rule 23(b)(3) class which would have allowed opt-outs). Moreover, "[t]he defendants would obtain these releases without agreement to permanently alter the conduct which gave rise to the lawsuit," *Schwartz v. Dallas Cowboys Football Club, Ltd.*, 157 F. Supp. 2d 561, 580 (E.D. Pa. 2001), and the releases would cover *all* Visa/Mastercard rules presently in effect, rather than the few at issue in this dispute, so that they then would "extend far beyond the conduct challenged in the litigation," *id.* at 576. For these and other reasons discussed throughout this objection, final approval of the Settlement Agreement should be denied.

II. THE OBJECTING PARTIES

These objectors opposing the Settlement Agreement in this Objection are in addition to those retailers and merchants originally named in the Retailers & Merchants Objection to Proposed Class Settlement Agreement [Document 1653], filed on October 18, 2012 (the "R&M Objectors"), and additional objections of retailers and merchants who oppose final approval of the Settlement Agreement after having received notice of the settlement, Objection filed May 15, 2013 [Document 2281]. The following additional retailers and merchants (collectively "R&M Objectors") are:

1. AIMCO Equipment Company, LLC – Little Rock, Arkansas
2. Desert European Motorcars, Ltd. – Rancho Mirage, California
3. Newport European Motorcars, Ltd. – Newport Beach, California
4. San Diego European Motorcars, Ltd. – San Diego, California
5. Park Hill Collections, LLC – Little Rock, Arkansas
6. Riverbike of Tennessee, Inc. – Nashville, Tennessee
7. Par's Custom Cycle, Inc. – Oklahoma City, Oklahoma
8. V.I.P. Motor Cars Ltd. – Palm Springs, California

These retailers and merchants represented in this objection to final approval of the Class Settlement Agreement are a broad-based, diverse group of businesses in Arkansas, Tennessee, Oklahoma and California. These objecting retailers and merchants sell goods to consumers in exchange for payment by credit cards and pay interchange ("swipe") fees.

From the original objection filed by the R&M Objectors, by approximately half of

the original class representatives this past summer, to the large group of objectors present at the preliminary approval hearing held on November 9, 2012, the objection to this proposed class settlement is significant, material and continues to grow.[2] The reasons are simple: This settlement: (1) proposes to bind absent class members to the settlement and release future claims related to the swipe fees while providing immunity to Visa/Mastercard and member banks for future anticompetitive behavior; (2) violates the due process rights of Class Members by providing no legitimate right of opt-out to Class Members; (3) releases Visa/Mastercard from liability for conduct completely unrelated to matters litigated in this case; (4) contains deficient notice because the notice does not provide a legitimate opt-out opportunity; and (5) provides illusory and non-uniform and class-wide relief in the form of a surcharge, which many absent class members will not impose on their customers for several reasons.

Further, the exodus of a large group of class representatives from the settlement illustrates its inherent flaws and unfairness. The Settlement Agreement is materially flawed in its current form. For these reasons, and as discussed in further detail below, these R & M Objectors respectfully submit the settlement is not reasonable, adequate or fair to the entire class bound by the Settlement Agreement.

[2] By way of comparison, the Court's approval of the settlement agreement in *In re Visa Check/Mastermoney Antitrust Litigation*, 297 F. Supp. 2d 503 (E.D.N.Y. 2003) (Gleeson, J.), while it involved some 5 million merchants, only had 18 merchant objectors. 297 F. Supp. 2d at 409.

III. ARGUMENT

A. The Settlement Agreement Violates Due Process

By its very nature, a proposed class action settlement that violates the Due Process Clause of the United States Constitution can be neither "fair, reasonable, [nor] adequate," Fed. R. Civ. P. 23(e)(2), which is the standard governing the propriety of final approval, *see id.* The Settlement Agreement violates due process in a variety of ways, among them the proposed – and mandatory – release of Visa/Mastercard from liability for any future damages in derogation of the nation's antitrust laws, without any legitimate right to opt-out. The Settlement Agreement is wholly improper, and final approval should not be forthcoming.

1. The Release Of *Future* Antitrust Liability By Way Of A Mandatory 23(b)(2) Class Is Completely Impermissible Under United States Supreme Court Precedent

The present settlement includes a Class to be certified under Rule 23(b)(2) of the Federal Rules of Civil Procedure, thus affording no opportunity for any of the millions of Class Members to opt out of the terms which would bind that aggregation of merchants. *See* Fed. R. Civ. P. 23(b)(2), (c)(2)(A) (confirming that a (b)(2) class includes no right to "opt-out"). Thus, should final approval occur, the individuals and businesses within this enormous class will have had no choice but to release Visa/Mastercard from any causes of action regarding *future* damages for violations of antitrust laws. The United States Supreme Court has rejected collusive settlements just like this.

In *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), the Supreme Court considered

the permissibility under Rule 23 of a settlement that would relinquish class members' future claims without giving them an opportunity to opt out. *Id.* at 843-48 . After emphasizing the "serious constitutional concerns raised by the mandatory class resolution of individual legal claims, *especially where a case seeks to resolve future liability in a settlement only action*." *id.* at 842 (emphasis added),[3] the Court wasted no time in rejecting the settlement before it. *Id.* at 830, 864-65; *see also Molski v. Gleich*, 318 F.3d 937, 948-49 (9th Cir. 2003) ("[T]he Supreme Court in *Ortiz* expressed its growing concern regarding the constitutionality of certifying mandatory classes when damages are at issue.").

The Court made clear that a class settlement which would sacrifice monetary damages claims possessed by individual members of the class, with no chance to opt out of that result, is beset with Constitutional infirmities. First of all, "the certification of a mandatory class followed by settlement of its action for money damages obviously implicates the Seventh Amendment jury trial rights of absent class members." *Ortiz*, 527 U.S. at 845-46. Continuing on, the Court explained, "By its nature . . . a mandatory settlement-only class action with legal issues and future claimants compromises [class

[3] Elsewhere in the *Ortiz* opinion, the Court reiterated the increased concern for absent class members necessary whenever certification occurs only to facilitate settlement of classwide claims. *Ortiz*, 527 U.S. at 842, 848-49; *see also Schwartz v. Dallas Cowboys Football Club, Ltd.*, 157 F. Supp. 2d 561, 570 (E.D. Pa. 2001) (exercising "*great care* in reviewing the settlement" because it had "only conditionally certified the class" (emphasis added)). Of course, certification here occurred only in the context of settlement. (*See* Order of 7/17/2012 (deeming Plaintiffs' Motion for Class Certification "withdrawn" in light of anticipated settlement); Prelim. Approval Order ¶ 6 ("[T]he Court *provisionally* certifies, *for settlement purposes only*, a Rule 23(b)(2) *Settlement Class*, from which exclusions shall not be permitted . . . . " (emphases added).)

action plaintiffs'] Seventh Amendment rights without their consent." *Id.* at 846.

In addition to violating class members' rights under the Constitution's Seventh Amendment, mandatory, settlement-only classes also run afoul of the Due Process Clause. The *Ortiz* opinion elaborated:

> The inherent tension between representative suits and the day-in-court ideal is only magnified if applied to damage claims gathered in a mandatory class. Unlike Rule 23(b)(3) class members, objectors to the collectivism of a mandatory [class] action have no inherent right to abstain. The legal rights of absent class members (which in a class like this one *would include claimants who by definition may be unidentifiable when the class is certified*) are resolved regardless either of their consent, or, in a class with objectors, their express wish to the contrary.

Ortiz, 527 U.S. at 846-47(emphasis added). As such, the Court confirmed "that before an absent class member's right of action [is] extinguish[ed] due process require[s] . . . *at a minimum* [that] an absent plaintiff . . . be provided with an opportunity to remove himself from the class." *Id.* at 848 (emphasis added and quotation omitted).

The mandatory, non-opt-out, settlement-only class created by the Settlement Agreement does not at all live up to the minimum constitutional requirements emphasized in *Ortiz*. *See Molski*, 318 F.3d at 949 n.13 (observing that the concerns highlighted in *Ortiz* "appl[y] to any mandatory class, whether under 23(b)(1) or (b)(2)"). The R&M Objectors submit that the Rule 23(b)(2) class now before the Court, by releasing unliquidated *future* damages claims with respect to rules of Visa/Mastercard *unrelated to this litigation*, contains a damages component that is more than "incidental" to the injunctive relief. *See Robinson v. Metro-N. Commuter R.R.*, 267 F.3d 147, 164 (2d Cir.

2001) ("By definition . . . incidental damages must be susceptible to computation by means of objective standards and not dependent in any significant way on . . . intangible, subjective differences." (quotation omitted)). Consequently, the ***only*** way this Class can be salvaged is through the issuance of a ***new*** notice affording Class Members a chance to opt out. *Cf. id.* at 166 ("[A]ny due process risk posed by (b)(2) class certification of a claim for non-incidental damages can be eliminated by the district court simply affording notice and opt out rights to absent class members . . . .").

2. **The Release Of *Future* Antitrust Liability By The Rule 23(b)(3) Class Is Inappropriate**

Perhaps doubting the sustainability of the proposed 23(b)(2) class, Visa/Mastercard and Class Representatives also included releases of future antitrust claims in the Rule 23(b)(3) "damages" class described in the Settlement Agreement. (*See, e.g.*, Definitive Class Settlement Agreement ¶ 33(h) (affirming that Rule 23(b)(3) release includes claims "based on or relating to . . . the *future* effect in the United States of the continued imposition of or adherence to any Rule of [Visa/Mastercard] in effect in the United States as of the date of the Court's entry of the [Preliminary Approval Order]" (emphasis added)). Because this Rule 23(b)(3) class does not offer Class Members a legitimate opportunity to opt out of a settlement that releases future damages,[4] this release, too, falls short of constitutional demands. This is especially so given the heightened scrutiny directed toward this settlement-only class. *Ortiz*, 527 U.S. at 848-49, 119 S. Ct. at 2316 ("When a

[4] As explained in Section III.B. of this Objection, the Notice itself is constitutionally defective because, as a practical matter, it does not offer class members a legitimate opportunity to opt-out of the proposed relief.

district court . . . *certifies for class action settlement only*, the moment of certification requires 'heightene[d] attention' to the justification for binding the class members." (emphasis added)).

The Supreme Court's opinion in *Ortiz*, as well as its decision in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997), stand as towering authorities for the general proposition that, when it comes to releases for *future* conduct, "the interests of present and future victims are so unavoidably opposed that the one group cannot 'fairly and adequately protect the interests' of the other." James Grimmelmann, FUTURE CONDUCT AND THE LIMITS OF CLASS-ACTION SETTLEMENTS, 91 N.C. L. Rev. 387, 391 (2013) (citing Fed. R. Civ. P. 23(a)(4), *Ortiz*, *supra* and *Amchem*, *supra*)).

The Settlement Agreement seeks to release future claims and insulate Visa/Mastercard from future transgressions of an anticompetitive nature. The Court's own docket is filled with substantial opposition to this unfair term of the Settlement Agreement. The large numbers of objections to the settlement agreement and opt outs with valid concerns weighs heavily against approving the class settlement as fair, reasonable and adequate. *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666, 676 (S.D. N.Y. 2011) (citing *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 785, 812 (3d Cir. 1995)). Moreover, it is significant that the Settlement Agreement proposes to release *future* antitrust conduct engaged in by the Defendants on a class-wide basis. District courts have generally held that in cases involving antitrust law, future

violations cannot be waived in the context of a class action settlement. *See Schwartz v. Dallas Cowboys Football Club, Ltd.*, 157 F. Supp. 2d 561 (E.D. Pa. 2001); *Three Rivers Motor Co. v. Ford Motor Co.*, 522 F.2d 885, 896 n.27 (3d Cir. 1975) (citing cases from several circuits that while a general release of antitrust violations is permitted, a release may not "waive damages from future violations of antitrust laws").

Schwartz is persuasive and its reasoning applies here. In *Schwartz*, the district court rejected a Rule 23(b)(3) class settlement in an antitrust lawsuit, finding the release in the settlement agreement was too broad. *Schwartz*, 157 F. Supp. 2d at 577-78. The district court regarded the release too broad "because it bars later claims based on future conduct." *Id.* at 578. The *Schwartz* court held it was improper to "bar later claims based not only on past conduct but also future conduct." *Id.* The district court also held that because the release was so broad there was a lack of consideration for the class members bound by the settlement agreement. The court reasoned:

> Under the release proposed by the parties, defendants could potentially expand their alleged bundling activities in other non-exempt channels of communication (such as the Internet) and face no potential liability with respect to the 1.8 million class members as long as they provide Single Sunday Ticket for satellite distribution under the terms expressed in the Settlement Agreement. *Such a result offers the possibility of far greater protection for defendants than is justified from the benefits obtained by the class.*

Id.

Here, the Settlement Agreement would prevent lawsuits against the Defendants for future wrongful conduct that is the same or ***similar*** to the wrongful conduct challenged. Defendants can violate the law eight (8) months after the class settlement is approved and

all class members would be unable to vindicate their rights and stop the unlawful conduct. Generally, injunctive relief preventing violations of antitrust law is ***permanent***. Not with this settlement. There is a short period of injunctive relief and then tremendous loopholes for Defendants to tweak their market behavior and set high, lock-step swipe fees, which retailers and merchants would be forced to pay after the injunction. In light of the minimal injunctive (prospective) relief, the settlement provides far greater protection for the Defendants than is "justified from the benefits obtained by the class." *Schwartz*, 157 F. Supp. 2d at 578.[5] This attempt by Visa/Mastercard and the Class Representatives and Class Counsel to bind absent (even unknown or not yet conceived) class members for years into the future from bringing suit for antitrust or other violations is unprecedented in scope, unconstitutional, fundamentally flawed and unfair. *Cf. Ortiz*, 527 U.S. at 847, 119 S. Ct. at 2315 (indicating that a court must be especially vigilant to protect absent class members "who by definition may be unidentifiable when the class is certified"); James Grimmelmann, FUTURE CONDUCT AND THE LIMITS OF CLASS-ACTION SETTLEMENTS, 91 N.C. L. Rev. 387, 394 (2013) (stating that the proposed Visa Mastercard settlement would "prevent businesses-including ones not yet in business-from objecting to many of their policies until 2021"); Adam J. Levitin, AN ANALYSIS OF THE PROPOSED INTERCHANGE FEE

[5] Tellingly, the Court in *Schwartz* expressed strong criticism for a settlement that would have prevented the defendants from engaging in the challenged conduct for at least one, but possibly no more than two, years. *Schwartz*, 157 F. Supp. 2d at 573. This Settlement Agreement does not even go that far. Even more than *Schwartz*, then, the prospective relief in this case "provides limited additional consumer choice to the members of the class" and "is minimal at best." *Id.*

LITIGATION SETTLEMENT 14-19 (Aug. 21, 2012).[6]

The United States Court of Appeals for the Second Circuit has held that class member's rights to due process are violated where a Rule 23(b)(3) class settlement releases unaccrued future claims. *Stephenson v. Dow Chemical Co.*, 273 F.3d 249, 259-61 (2d Cir. 2001), *aff'd in part by an equally divided court, vacated in part on other grounds*, 539 U.S. 111 (2003). Similarly, recently faced with a proposed class settlement involving release of future claims, the United States District Court for the Southern District of New York rejected the settlement. *Google*, 770 F. Supp. 2d at 677. The release of defendant Google from liability for *future* acts was in excess of what the district court viewed as permissible, and this aspect of the class settlement at issue was not fair, reasonable, or adequate. *Id.* The district court cited the United States Supreme Court reasoning in *Amchem*: "'Rule 23 . . . must be interpreted with fidelity to the Rules Enabling Act and *applied with the interests of absent class members in close view.*'" 770 F. Supp. 2d at 677 (emphasis added) (quoting *Amchem*, 521 U.S. at 629, 117 S. Ct. 2252)). Thus, even though class counsel may be highly qualified, it is the interests and substantive rights of absent class members that have to be protected by the district court and not abridged or modified by a class settlement, lest the Rules Enabling Act be offended. *Id.*

These Objectors respectfully submit the Settlement Agreement, which purports to cram-down an unfair settlement on absent class members with no right to opt-out, unconstitutionally impairs the right to due process afforded absent retailers and merchants by the United States Constitution and should not be judicially approved. *Alchem*, *Ortiz*,

[6] Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2133361.

Stevenson, *Google*, and *Schwartz*. The release of future claims possessed by a future class of entities presently known and unknown (as the releasing parties) impairs or abridges substantive rights of absent class members. *See, e.g., Ortiz*, 527 U.S. at 856. Therefore, Objectors respectfully submit, it is incumbent that the Court reject this part of the settlement as not fair, adequate or reasonable under, among other things, the Rules Enabling Act. *See* 28 U.S.C. § 2072(b) (directing that procedural rules "shall not abridge, enlarge or modify any substantive right"); *Amchem*, 521 U.S. at 629, 117 S. Ct. at 2252 ("Rule 23 . . . must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view.").

Further, the release of the "future effect in the United States of any conduct" by any Settlement Class Released Party if it is "substantially similar to the conduct of any Rule 23(b)(3) Settlement Class Released Party related to or arising out of interchange rules, interchange fees, or interchange rates, *any* Rule[7] of any Visa Defendant or MasterCard Defendant" (*see, e.g.,* Settlement Agreement ¶ 33(h)) is excessively broad and vague in scope such that it encompasses other conduct in the future that is not directly related to this case, but which may be an unlawful variation, which substantially affects retailers and merchants. This overly broad language in the release was conspicuously not addressed at the preliminary hearing. Notably, neither Visa nor Mastercard referred to this

[7] A *select few* rules of Visa/Mastercard were at issue in this litigation (*see* Second. Am. Compls. ¶ 23(G)-(K) (listing rules at issue), but the releases cover future claims over *any* provision in rulebooks spanning *hundreds* of pages (*see, e.g.,* Settlement Agreement ¶¶ 33(g), (h), 35(g), (h)). Consequently, as demonstrated in Section III.A.3. of this Objection, the Settlement is invalid as overbroad.

overreaching, overarching and overlybroad language that releases future claims and conduct "substantially similar to the conduct of any Rule 23(b)(3) Settlement Class Relased Party related to or arising out of interchange rules, interchange fees, interchange rates . . . . " This specific language, buried in the subsections of paragraph 33 of the Settlement Agreement, is yet another reason that this Settlement Agreement violates due process, and it speaks volumes that class counsel did not address this at the preliminary approval hearing. To summarize, this due process violation in the release goes far beyond what the United States Supreme Court allows in nationwide class settlements and should be stricken. *Id.* In fact, neither Visa nor Mastercard has ever publically explained why this unfair, unreasonable and inadequate hidden language on the 25th page of the Long Form Notice at paragraph 68(h) in the release does not violate due process.

The district court in *Google* was concerned about the release of future conduct and rejected the class settlement. The district court in *Schwartz* was concerned about the release of future conduct and rejected the class settlement. These R&M Objectors respectfully submit the class settlement here should be rejected as unfair, unreasonable and inadequate for class members.

Significantly, in addition to large opposition, the withdrawal of several class representatives from approving the settlement reached indicates the settlement is not fair, reasonable or adequate. Rather, it further demonstrates, the non-opt-out settlement is largely one-sided in favor of the Defendants, who give little to gain a lot, including insulation and immunity from future claims brought against them for unlawful conduct, as yet uninvented, that may touch upon the swipe fee. This procedural and constitutional

dilemma for the Plaintiffs' Class Counsel and remaining Class Representatives requires a higher bar and scrutiny for approval because of the fiduciary interests and the constitutional rights that must be protected and not abridged or modified through the Rule 23 class procedure. *Amchem*, *supra*. The district court, as a fiduciary for the absent class members, must ensure this settlement treats the class members fairly, particularly with objections and objecting proposed class representatives. *See, e.g.*, *In re "Agent Orange" Product Liability Litig.*, 996 F.2d 1425, 1438 (2d Cir. 1993) ("A judge in a class action is obligated to protect the interests of absent class members."), *cert. denied*, 510 U.S. 1140 (1994). Where a dispute exists between the class counsel and proposed class representatives as to the proposed settlement, the decision cannot "rest entirely with either the named plaintiffs or with class counsel." *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1176-77 (5th Cir. 1978), *cert denied*, 439 U.S. 1115 (1979).

There are at least three conflicts present in this class settlement. First, there is a large segment of class representatives who have withdrawn. *Pettway*, *supra*. Second, the Supreme Court has held that future claims of unknown entities cannot be released and present class representatives cannot adequately represent and release these claims for future entities. Grimmelmann, FUTURE CONDUCT AND THE LIMITS OF CLASS-ACTION SETTLEMENTS, 91 N.C. L. Rev. at 391 (citing to Fed. R. Civ. P. 23(a)(4), *Ortiz* and *Amchem.*). Third, absent Class Members are not given a legitimate opportunity to opt-out of the settlement class. With these real conflicts and objections, the class settlement agreement as currently written, cannot be judicially approved as "fair, reasonable, and adequate" under Fed. R. Civ. P. 23(e)(2). *Ortiz*, *Amchem*, *Google*, and *Schwartz* While the Settlement Agreement

is touted as unprecedented for the $6 billion monetary fund, Defendants will, as a practical matter, recoup any monetary amount paid out in this class settlement (which amounts to only 2-3 months worth of swipe fees) by *increasing* the swipe fee imposed upon retailers and merchants to 4% (and potentially higher) after the eight month injunction period expires. Notably, United States Senator Richard Durbin of Illinois, a strong advocate for retailers and merchants, expressed these comments on the Senate Floor:

> The bottom line is that this proposed settlement does not make our credit card system better. Instead, it gives Visa and Mastercard free reign to carry on their anti-competitive swipe fee system with no real constraints and no legal accountability to the millions of American businesses that are forced to pay their fees. This is a stunning giveaway to Visa and Mastercard, all for a payout of a mere two months worth of swipe fees. This is a *bad deal.*

Cong. Rec. S5961 (daily ed. August 2, 2012) (statement of Sen. Durbin) (emphasis added). There is no disincentive for the Defendants in this class settlement to agree to pay a couple of months' worth of fees, after which they will raise the fee percentage to a higher amount for all credit transactions (which is a large part of the overall goods purchased), and then be immune from suit for agreeing to raise the swipe fee. If Defendants want to charge an anti-competitive rate in the future, the nationwide market suffers, the consumer suffers, retailers and merchants suffer and so does the Constitution, because there is no avenue to seek recourse for future wrong conduct since the release language is overbroad and excessive. Settlement of this class action on the terms proposed exceeds the bounds of fairness and adequacy because any future claims and rights are released. *Google.* The withdrawing class representatives understood this and oppose this settlement because it is not fair, reasonable or adequate.

In sum, releasing future claims, in the circumstances presented here, is unconstitutional. It is also inappropriate under the Rules of Civil Procedure as unfair, inadequate, and unreasonable for absent class members whose individual rights are taken away, with no right to opt-out. *See, e.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974) (holding "there can be no prospective waiver of an employee's rights under Title VII."); *see also* Grimmelmann, FUTURE CONDUCT AND THE LIMITS OF CLASS-ACTION SETTLEMENTS, 91 N.C. L. Rev. at 410 (citing to *Three Rivers Motor Co. v. Ford Motor Co.*, 522 F.2d 885, 896 n.27 (3d Cir. 1975) (citing cases from several circuits that while a general release of antitrust violations is permitted a release may not "waive damages from future violations of antitrust laws")). Certification of this settlement as a class to bind absent retail and merchant class members (some not yet known), should ***not*** be approved and future claims should not be released. *Ortiz,* 527 U.S. at 842-43.

3. **The Settlement Agreement Violates Due Process Because It Releases Conduct Far Beyond What Has Been Litigated In This Action**

These R&M Objectors recognize that "class action releases may include claims not presented and even those which could not have been presented" in a lawsuit. *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 107 (2d Cir. 2005). This authority is not limitless, however, in that any settled claims must satisfy the "identical factual predicate" doctrine. *See id.*; *Google Inc.*, 770 F. Supp. 2d at 675 ("[T]he released conduct [must] arise[] out of the identical factual predicate as the settled conduct." (quotation omitted)). Applying this analysis, the Second Circuit has suggested that released claims occupy the

same factual predicate as those litigated when they "have been central to [a] case from its inception" or involve "essentially the same issues." *Wal-Mart Stores*, 396 F. 2d at 108-09. Stated another way, a release may encompass claims that were not pleaded in an action only so long as they "arise from the 'same nucleus of operative fact'" as pleaded claims. *Schwartz*, 157 F. Supp. 2d at 577. The releases in the Settlement Agreement waive claims completely *extraneous* to the "nucleus of operative fact" animating this litigation.

More specifically, the releases here abandon all causes of action related to "the continued imposition of or adherence to [or conduct regarding] *any Rule* of any Visa Defendant or MasterCard Defendant in effect in the United States as of the date of the Court's entry of the Class Settlement Preliminary Approval Order." (Settlement Agreement ¶¶ 33(g), (h), 35(g), (h).) This proceeding, by contrast, revolved around only a very distinct subset of those rules. (*See* Second. Am. Compls. ¶ 23(G)-(K) (specifying rules at issue.) By releasing Visa/Mastercard from liability for conduct surrounding *any* of their rules – which are found in rulebooks numbering hundreds of pages, *see* Mastercard Rules (December 12, 2012) (Exhibit 1); Visa Int'l Operating Regulations (Oct. 15, 2012) (Exhibit 2) – when this action involved only a select few of those rules, the Settlement Agreement exceeds the bounds of the "identical factual predicate" rule. Many unpleaded claims released by the Settlement Agreement bear no relation to the "nucleus of operative fact" actually litigated here. *See Google Inc.*, 770 F. Supp. at 678-79 (determining that settlement would "release claims well beyond those contemplated by the pleadings," when releases authorized Google to sell full versions of books scanned online, but case only challenged the practice of making available "snippets" of those copyrighted works);

Schwartz, 157 F. Supp. 2d at 576-78 (concluding that release "extend[ed] far beyond the conduct challenged in the litigation" when it would insulate Defendants from claims related to events shown on cable television or the internet, even though the lawsuit dealt exclusively with satellite broadcasts).

The Settlement Agreement does not comply with the "identical factual predicate" doctrine. On this additional ground, final approval should be denied.

B. The Notice to the Class Is Deficient Because It Does Not Provide Class Members With Notice Of Any Real Opportunity To Opt-Out

Effective notice is an essential prerequisite to the final approval of a class settlement. "Adequate notice is necessary to bind absent class members." *Stephenson v. Dow Chemical Co.*, 273 F.3d 249, 261 n.8 (2d Cir. 2001). The reason for this is straightforward: "[C]lass notice serves as the class members' primary, if not exclusive, source of information for deciding how to exercise their rights under Rule 23." *Wal-Mart Stores, Inc.*, 396 F. 3d at 115. Because the ability to opt out is a constitutional prerogative possessed by all Rule 23(b)(3) class members, *see Stephenson*, 273 F.3d at 260 ("Due process requires . . . an opportunity to opt out."), the notice must contain any information that might be an "essential factor" in a class member's decision whether to opt out of the class, *see Wal-Mart Stores, Inc.*, 396 F.3d at 115.

The notice here is insufficient because it only advises class members of an ability to opt out of an insignificant portion of the settlement,[8] while informing them that they

[8] Class Counsel will undoubtedly trumpet the total dollar amount of the settlement, but it must be remembered that it will be divided among "millions" of Class Members (Mem.

have no option but to accept the most meaningful aspect of the deal: The waiver of any ability to sue Visa/Mastercard in the future. Faced with this Hobson's Choice, a merchant will most likely elect not to opt-out, in order to preserve a meaningful objection (which would be unavailable upon opting out from the Rule 23(b)(3) Class) to the settlement of future damages, which is the most significant and offensive aspect of the settlement. The notice does not provide a legitimate opportunity to opt-out to protect individual claims against the Defendants for their future conduct.

This settlement is so fundamentally flawed, and the Notice is so intrinsically deficient, that even the most legally astute Class Member would be uncertain of what action to take upon receiving this Notice. As things stand now, all absent Class Members have been told that even if they opt-out of the Rule 23(b)(3) Class, they will lose the ability to sue Visa/Mastercard in the future. In this circumstance, even if a merchant disagrees with the relief afforded by the current "damages" settlement, it is likely to stay in the class so as to retain the ability to object to the more significant waiver of future rights.[9] Should this Court agree that the relinquishment of future damage claims under a mandatory Rule 23(b)(2) class is improper, or conclude that such a release is inappropriate under Rule 23(b)(3), or both, the entire analysis surrounding a decision to opt out is altered. In that scenario, if a business could preserve future damage claims by

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Law Supp. Mot. Class Cert. 30). That being so, the amount any individual Class Member might expect to receive from this settlement is negligible.

[9] In this unique settlement, which involves a merger of 23(b)(2) and 23(b)(3) classes, it is anything but clear whether a Class Member could object to the 23(b)(2) release of future claims even while opting out of the 23(b)(3) class. If there is disagreement among lawyers whether this might theoretically be possible, there is assuredly great confusion among the laymen comprising the Classes.

opting out of the 23(b)(3) class – without being forced to accept the loss of future damage claims – it may very well decide to opt-out even though it is not doing so now. On the other hand, if this Court invalidates future damages releases under both 23(b)(2) and 23(b)(3), the same Class Member might determine that it makes sense to remain a party to the claim for current damages. Basically, the point is that a ***new notice, containing a new – and legitimate – opportunity to opt out,*** will be required should this Court revise the aspect of the Settlement Agreement releasing future damage claims.

In essence, the notice presents Class Members with no opportunity to opt out at all – at least no opportunity to effectively do so – and it is therefore defective.[10] Final approval of the settlement should be denied.

C. The Surcharge is Illusory and Non-Uniform Class Relief

Class certification is impermissible where the proposed relief among class members is not uniform. *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2557 (2011). Ten states prohibit retailers and merchants from imposing surcharges on customers. These states are California, Colorado, Connecticut, Florida, Kansas, Maine, Massachusetts, New York, Oklahoma and Texas. Other states such as New Jersey and Rhode Island are also

[10] It is also important to bear in mind that the releases apply to *future* causes of action that have not yet materialized. As such, those who will possess those claims have no way of presently deciding whether they should opt out or not. It was in just this sort of situation that the Supreme Court in *Amchem* doubted whether notice could ever be effective. *Amchem*, 521 U.S. at 591 ("Even if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out."). Of course, this case is even worse than *Amchem*, given that a merchant who makes an "intelligent" decision to opt out of the Rule 23(b)(3) class, attempting to preserve future damages claims, will still be bound by the mandatory 23(b)(2) release. This settlement is hopelessly flawed.

looking at regulating the surcharge on consumers. This surcharge prohibition eliminates a large percentage of transactions from achieving any benefit from the settlement, (*Prelim. Approval Hr'g. Tr.* at 51, lines 21:24), and it places the absent class member in conflict with state law so the benefit cannot be realized. *See, e.g., In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768, 808 (3d Cir. 1995) ("One sign that a settlement may not be fair is that some segments of the class are treated differently from others."); *True v. American Honda Motor Co.*, 749 F.Supp.2d 1052, 1067 (C.D. Cal. 2010) ("Courts generally are wary of settlement agreements where some class members are treated differently than others.").

Under the Supreme Court's holding in *Dukes*, *supra*, that "an indivisible injunction" must benefit "all its members at once," or the court must undertake a case-specific inquiry into whether class issues predominate or whether the class action is a superior method of adjudicating the dispute. Predominance and superiority are not self-evident. *Id.* The surcharge, proposed as an element of class relief, is not nationwide relief and does not benefit the entire class. Class members are treated differently. Nevertheless, the class release binds absent class members and releases their substantive rights in the prohibited states. Thus, class members release rights to past and future conduct and do not receive the same benefits. Since the entire class does not benefit, nationwide class certification is, therefore, inappropriate. *Id.* Further, binding class members to the entire settlement to force settlement violates due process. *Amchem*.

As a practical matter, a majority of retailers and merchants in states where the surcharge is not expressly prohibited, will not impose a surcharge on their customers

purchasing goods with a credit card. To begin with, customers want less, not more fees. As one article in the New York Times shortly after the agreement was reached noted:

> Given a shaky economy, many restaurants and other retailers said they had no plans to charge more when customers paid with credit cards.
>
> "Shopping with a credit card is a convenience for our customers and is an important part of our customer service," said Carolyn Beem, a spokeswoman for L.L. Bean. "We have absolutely no plans to add a surcharge for credit card purchases."
>
> Rick Camac, chief executive of the Fatty Crew group of six restaurants, including Fatty Crab, said that "customers might see it as another way you're trying to get at them." (emphasis added).
>
> "I think you have to take the hit, or make it up by adjusting your prices," Mr. Camac said of paying for the credit card fees.

Stephanie Clifford, Stefanie Strom, *Merchants Considering Credit Card Surcharges*, N.Y. TIMES, July 16, 2012.

Recent articles indicate even the Defendants acknowledge that retailers will not surcharge. *See* Emily Jane Fox, *Credit card checkout fee taking effect*, CNNMONEY.com, Tuesday, January 29, 2013 (stating: "Mastercard said it doesn't expect most merchants to put the surcharge into effect, since stores won't want to drive away business."). Even though credit card swipe charges have grown nine times since 1995 of his business, the chain Redner's nor other chains will pass that expense to customers acknowledging "such a move would probably turn some away."[11]

[11] *Retailers, consumers take swipe at credit card surcharge*, February 18, 2013,

The surcharge is also a concern to the Court regarding "the economic effect of the proposed rules change." *Prelim. Approval Hr'g. Tr.* at 63, lines 20:21. Retailers and merchants, in the states that permit a surcharge, will have to make all types of disclosures to customers that the charge is on the cost of goods and must also display the surcharge on the receipt. The retailer and merchant must treat cards similarly to avoid complaints and will encounter customers who leave the establishment, or even lawsuits from customers for imposing such a surcharge for all goods.

The surcharge is not permitted in all states and will likely not be utilized by many retailers and merchants who are members of the class to recoup Defendants' unlawful behavior. The surcharge is not legitimate class-wide relief and makes class certification improper, *see, e.g. Dukes*. Further, it pits the retailer and merchant class members against the customer for an illegal fee exacted by the Defendants. Retailers and merchants would be unfairly penalizing customers for Defendants' unlawful actions in charging the excessive swipe fee and would be releasing current and future claims against the Defendants. The class settlement agreement as written is not fair, reasonable or adequate. Fed. R. Civ. P. 23(e)(2).

CONCLUSION

For the reasons stated herein, it is respectfully submitted that approval of the Settlement Agreement is not appropriate under the circumstances presented to this Court. Approval of the Settlement should, therefore, be denied.

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readingeagle.com, http://readingeagle.com/mobile/article.aspx?id=453496.

Dated this 24th day of May, 2013.

Respectfully Submitted,

By: */s/Jerrold S. Parker*

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CERTIFICATE OF SERVICE

On this 24th day of May, 2013, the above and foregoing has been sent by United States mail to the following:

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EXHIBIT 6

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BY ECF

September 19, 2012

Hon. James Orenstein
United States District Court
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, MDL No. 05-1720

Dear Judge Orenstein:

Objecting Plaintiffs[1] bring this pre-trial dispute to the Court to obtain copies of certain nonpublic materials in the record from their former attorneys, Class Counsel. Pursuant to Individual Rule III.A.1 and Local Rule 37.3, this issue is ripe for resolution despite good faith efforts, beginning in early August, by phone, in person, and correspondence to resolve the dispute.[2]

As named parties, Objecting Plaintiffs are legally entitled to the record in this case, and as former clients, to Class Counsel's entire file. Key expert and other materials necessary to fully oppose the settlement are sealed or not filed at all. To eliminate burden and expedite access to such materials, Objecting Plaintiffs seek only unredacted copies of all (i) expert reports, with attachments and exhibits; (ii) expert depositions and exhibits; and (iii) summary judgment and *Daubert* filings, including in the Individual Plaintiffs' actions.[3] Class Counsel contest Objecting Plaintiffs' right to these materials and further defer to objections from Visa, MasterCard, and Individual Plaintiffs.

A. Objecting Plaintiffs Are Entitled to These Materials as Parties and Former Clients

Objecting Plaintiffs seek only to restore what they had before they objected to the settlement: representation by counsel with access to the nonpublic record. To deny Objecting Plaintiffs that right is tantamount to removing them as named plaintiffs and denying their right to choose counsel simply because they oppose the settlement. There is no authority for this proposition. It is particularly inappropriate given, as this Court has noted, it has not yet certified a class or determined that Class Counsel or any named plaintiff is an adequate class representative. 7/25/12 Order. Indeed, opposition to the settlement from both named plaintiffs and putative class members mounts daily.[4]

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[1] Objecting Plaintiffs are the National Association of Convenience Stores (NACS), National Grocers Association (NGA), National Community Pharmacists Association (NCPA), and National Cooperative Grocers Association (NCGA).

[2] The Court has authority to order the transfer of files from former counsel. *See, e.g., Lippe v. Bairnco Corp.*, 96 Civ. 7600 (DC), 1998 WL 901741, *1 (S.D.N.Y. 1998); *Misek-Falkoff v. IBM Corp.*, 829 F. Supp. 660, 662-63 (S.D.N.Y. 1993); *Goldsmith v. Pyramid Commc'ns, Inc.*, 362 F. Supp. 694, 698 (S.D.N.Y. 1973).

[3] Objecting Plaintiffs reserve their rights to additional material from the record or Class Counsel's file.

[4] *See, e.g.*, Django Gold, *Opposition To $7B Visa, MasterCard Swipe Fee Deal Grows*, Law360, 9/11/12 (opposition from National Retail Federation and plaintiff NATSO "only the latest for the settlement, which . . . has been criticized by several retailers and associations"). Of the six trade association named plaintiffs, five oppose the settlement.

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On the contrary, the federal rules require all parties to this case to provide materials in the record to Objecting Plaintiffs – parties to the case. *See, e.g.*, Fed. R. Civ. P. 5(a)(1) (papers that "must be served on every party" include discovery papers and motions); 26(a)(2) (parties "must disclose to the other parties" their expert reports). Moreover, it is black letter law that Objecting Plaintiffs are presumptively entitled to "full access to the entire attorney's file" of former counsel. *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn L.L.P.*, 91 N.Y.2d 30, 34 (1997).[5]

Despite their ethical duty to provide files to Objecting Plaintiffs, *see* N.Y. R.P.C. 1.16(e), Class Counsel are deferring to purported confidentiality concerns from Visa, MasterCard, and Individual Plaintiffs. This is a red herring. Like all other counsel in this case, Constantine Cannon is bound by the Protective Order. 8/22/12 Tr. at 22; Dkt. 1312-1. Visa's assertion that Constantine Cannon should not receive access to commercially sensitive information given its representation of other payment industry participants is baseless. *See* Dkt. 1618 at 16, 19. Visa and MasterCard and many other parties to this case purport to be competitors and have not objected to outside counsel having access to their information on that basis. Similarly, to the extent any of the Individual Plaintiffs' expert reports were not filed with the Court, Constantine Cannon is bound by the May 8, 2009 Joint Prosecution and Confidentiality Agreement between the Class and the Individual Plaintiffs, to which Objecting Plaintiffs (as "Class Plaintiffs") are parties. Dkt. 1616-2 at 6-7. In fact, much of the record on the issue of surcharging was derived from the Individual Plaintiffs' cases and has been used liberally in the class case by Class Counsel.[6] *See, e.g.*, Dkt. 1538, Class Pls. Mem. in Supp. of Summ. J. at 7, 8, 79, 80 (citing reports of Individual Plaintiffs' experts Vellturo, Stiglitz, and Ariely); Dkt. 1539, Class Pls. Reply Mem. at 20, 21 (citing expert reports of Ariely and Vellturo, and paragraphs from Dkt. 1541, Individual Pls. R. 56.1 Counter Stmt.); Dkt. 1545, Class Pls. Response to Defs. R. 56.1 Stmt. at 99-104, 120-121 (citing expert report and testimony of Vellturo and incorporating by reference numerous paragraphs from Dkt. 1541, Individual Pls. R. 56.1 Counter Stmt.).

B. Objecting Plaintiffs' Access Should Not Be Frustrated by Attorney Liens

Generally, "the file belongs to the client" and "attorneys have no possessory rights in the client files other than to protect their fee." *Bronx Jewish Boys v. Uniglobe, Inc.*, 633 N.Y.S.2d 711, 713 (N.Y. Co. Sup. Ct. 1995). There is no basis to prevent Objecting Plaintiffs from accessing the record by imposing a retainer lien at this juncture to protect Class Counsel's fee.[7] Such a lien can

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[5] *See* Restatement of the Law Governing Lawyers (Third) § 46(2) (lawyer must allow former client access to "any document possessed by the lawyer relating to the representation"); Dkt. 1618 at 5-6 (citing additional authority); *cf. Wyly v. Milberg Weiss Bershad & Schulman, LLP*, 12 N.Y.3d 400, 412 (2009) (in contrast to named plaintiffs, under state law absent class members not entitled to presumption of full access).

[6] Shortly before the filing of this letter, the individual plaintiffs proposed a compromise but the Objecting Plaintiffs could not accept it. Although the vast majority of the record on surcharging -- the centerpiece of the settlement -- comes from the individual cases, the individual plaintiffs' proposal would force us to relinquish our ability to use that material before we have seen it. This would equally prejudice our clients' ability to oppose the settlement, especially if the material is cited by Class Counsel. Nonetheless, a compromise is still possible.

[7] Class Counsel failed to assert any attorney liens as part of four motions to withdraw, as required by Local Civil Rule 1.4. *See* Comm. Note (rule "amended to require that the affidavit in support of a motion to withdraw state whether or

only be justified if the attorney has been discharged without cause, ceases to work on the file, and is entitled to an appropriate quantum meruit award. *See Casper v. Lew Lieberbaum & Co., Inc.*, 1999 WL 335334, *8-9 (S.D.N.Y. 1999). Objecting Plaintiffs are not seeking to discharge Class Counsel of their responsibilities as Class Counsel through this motion. As such, the question of whether and under what circumstances a retainer lien might be justified in this case should have no bearing on the issue at hand. This conclusion is reinforced by the fact that Class Counsel are functioning in this case as "private attorneys general," and in cases such as this where fee-shifting statutes are involved, courts have held that "retention of files should rarely if ever be permitted." *Id.* at *9.[8] For these distinct reasons, our clients' rights as named plaintiffs to counsel with access to the nonpublic record should not be impeded by the inapposite question of whether a retainer lien is warranted.

C. Counsel's Lack of Access Prejudices Objecting Plaintiffs' Ability to Frame Opposition to the Settlement

Indeed, preventing access to these materials threatens to prejudice Objecting Plaintiffs' ability to fully oppose the settlement. "In deciding whether to approve a proposed class settlement, the most significant factor for the district court is the strength of the claimants' case balanced against the settlement offer." *Plummer v. Chem. Bank*, 668 F.2d 654, 660 (2d Cir. 1982).

For example, the settlement relinquishes merchants' longstanding claims regarding interchange and instead provides merchants a limited ability to surcharge. Therefore the scope and efficacy of this right to surcharge is critical to examining the settlement. The nonpublic record includes extensive testimony from expert and fact witnesses in both the Class and Individual Plaintiffs' cases that might bear upon whether the settlement's surcharging limits will frustrate merchants' ability to use surcharging to discipline interchange rates. This includes expert reports, certain defendants' documents, defendants' and other networks' submissions to regulators abroad, and testimony from U.S. merchants, including Individual Plaintiffs, all addressing surcharging. *See, e.g.*, Dkt. 1543, Class Pls. 56.1 Stmt. at 92-94, 97-98.[9]

Depriving Objecting Plaintiffs of this material because they oppose the settlement is unfair, particularly given its relevance to the adequacy of the relief in the settlement. This unfairness will be particularly evident if the proponents of the settlement cite to this material and Objecting Plaintiffs have not had a chance to review it. Objecting Plaintiffs are entitled to access the record in this litigation through outside counsel and the fact that they are opposing the settlement does not change that.

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not a retaining or charging lien is being asserted"); Dkt. 1590 (contested on the basis of an information-sharing dispute); Dkt. 1597, Dkt. 1603, Dkt. 1606.

[8] "The statute provides a potential source of fees to prevailing counsel; in return counsel may not obstruct the course of the litigation." *Misek-Falkoff v. IBM Corp.*, 829 F. Supp. 660, 664 (S.D.N.Y. 1993); *see Hossain v. The Roger Smith Hotel/Unit No. 3*, 1999 WL 195049, *2 (S.D.N.Y. 1999) ("because a retaining lien inevitably slows the progress of the litigation, it is rarely if ever granted in a fee-shifting case"); *Casper*, 1999 WL 335334 at *9 (denying retaining lien and declining to fix amount of charging lien); *Cower v. Albany Law Sch. of Union Univ.*, 2005 WL 1606057, *6 (S.D.N.Y. 2005) (same).

[9] Objecting Plaintiffs do not have access to expert reports, the heart of any antitrust case. At least nine experts opined on surcharging alone: Ariely, Frankel, Vellturo, Topel, Wecker, Kahn, Houston, Stiglitz, and Klein.

CONSTANTINE | CANNON

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Respectfully,

/s

Jeffrey I. Shinder

cc: All counsel of record via ECF

EXHIBIT 7

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October 22, 2012

Via Electronic Court Filing

Hon. John Gleeson
United States District Judge
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: ***In Re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation***
No. 05-MD-1720 (JG) (JO)

Honorable Sir:

We are the attorneys for a large group of retailers and merchants, from approximately half of the continental United States, who are objectors to the proposed class settlement agreement in the referenced matter [*"Objectors"*], as indicated in the Retailers & Merchants' Objection to Proposed Class Settlement Agreement [*"Objection"*] filed on October 18, 2012 as Document 1653.

The proposed settlement agreement has already generated considerable discussion and, in keeping with the position of the Objectors, significant concern. Objection at ¶¶ 47-54. For these reasons, the Objectors concluded that "these significant issues regarding the fairness, adequacy and reasonableness of the proposed settlement should be fully aired and discussed at the fairness hearing and any preliminary approval hearing." *Id.* at ¶ 55.

We write in furtherance of that principle, that the Objectors be given every opportunity to examine the proposed settlement agreement, the specific information upon which it is based, and its efficacy, both now and in the future, so that they may properly and appropriately form and support their objections. Nine of the nineteen (19) named class members have informed Co-Lead Class Counsel that they have decided to reject, oppose and remove their names from the proposed Settlement Agreement, confirming that there is much work to be done in this regard. We fully recognize that though the period to object is short, there are some 400 depositions and 50 million pages of discovery which led to the proposed settlement agreement. On some level, the Objectors have to parse and understand this material before they can meaningfully exercise their right to object to a proposed settlement agreement which will change the way in which they do business now and in the future. It would be irresponsible not to do so in light of warnings such as these, from a commentator on the proposed settlement: "To accept this settlement is short-sighted to the point of near blindness, and will leave merchants and ultimately the US economy's payments infrastructure at the mercy of the card networks' profit motive, rather than subject to the competitive dynamics of the marketplace." Levitin, *An Analysis of the Proposed Interchange Fee Litigation Settlement*, Georgetown Law and Economics Research paper No. 12-033 (August 12, 2012), http://ssrn.com/abstract=2133361 at 24.

The Objectors would suggest that the Court organize a Proposed Objectors' Committee to allow for a pooling of resources to examine, analyze and, if necessary, report on the viability of any proposed objections. While the task is daunting, it must be done in order for the Objectors to study the proposed settlement agreement and interpose only those objections that are real and based in fact, rather than unsupported conjecture or opinion. If the proposed settlement agreement is a fair and equitable one, this will allow the Objectors to discover that for themselves. As of now, the Objectors are at a distinct disadvantage, for they do not have access to the facts, figures and supporting documentation which gave genesis to the proposed settlement. It is not enough that objectors have the text of the proposed agreement; they should also have available to them the materials discovered in the case. *Weinberger v. Kendrick*, 698 F.2d 61, 72 (2d Cir. 1982), *cert. den. sub nom Coyne v. Weinberger*, 464 U.S. 818 (1983); see also, *City of Detroit v. Grinnell*, 495 F.2d 448 (2d Cir. 1974). Due to the volume, breadth and complexity of these materials in the proposed settlement agreement, only a Proposed Objectors' Committee could make intelligent examination of those materials a reality.

In closing, the Objectors would ask that the Court authorize the formation of a Proposed Objectors' Committee and that that the Committee be given full and unfettered access to all discovery materials in this matter, together with all summaries, abstracts and digests produced by the Plaintiffs' Committee in handling such materials. In addition, the Objectors would ask the Court to set a reasonable schedule for the presentation of the Proposed Objectors' Committee report.

Respectfully submitted,

By: _____

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- and -

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Attorneys for Objectors

EXHIBIT 8

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NOT FOR PUBLICATION

IN RE PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION

ORDER
05-MD-1720 (JG) (JO)

JOHN GLEESON, United States District Judge:

The class plaintiffs have moved for preliminary approval of what they have termed the Definitive Class Action Settlement Agreement ("the Settlement Agreement").

In response, I have received a request from a large group of retailers and merchants that I organize a Proposed Objectors' Committee, grant it certain discovery, and set a schedule for a report from that committee. ECF No. 1657. I have received a separate request from certain named plaintiffs and absent members of the proposed class that I clarify whether I will require absent class members to move to intervene in order to apprise the court of their objections to the application for preliminary approval. ECF No. 1667.

I understand from both filings in the case and the considerable media coverage of the proposed settlement that there are objections to the proposal, and I assume there will be more such objections in the future. As in every case, those objections deserve, and will get, careful consideration by the Court.

I am mindful, however, that the threshold for preliminary approval of a proposed class action settlement is meaningfully lower than the threshold for final approval. Preliminary approval is appropriate where the proposal appears to be the product of serious negotiation and further appears to be within the range of possible final approval. *See, e.g., In re Nasdaq Market-*

Markers Antitrust Litig., 176 F.R.D. 99, 102 (S.D.N.Y. 1997). Preliminary approval, followed by a subsequent notice of the proposed settlement to the class, is always without prejudice to objections, argument, a fairness hearing, and, ultimately, potential rejection of final approval. *See, e.g., Sheppard v. Consol. Edison Co.*, No. 94 Cv. 403(JG), 2000 WL 33313540 (E.D.N.Y. Dec. 21, 2000).

Considerations of judicial economy counsel strongly in favor of not converting the preliminary approval process into something akin to the plenary process that attends an application for final approval. I have reviewed the Settlement Agreement, and at first blush it appears to satisfy the threshold requirements for preliminary approval. The parties who contend otherwise shall be heard, in writing, on or before October 31, 2012.

Ordinarily I do not schedule oral argument of preliminary approval motions. However, based on my review of the parties' submissions and consultation with Magistrate Judge Orenstein, it seems clear that there is an expectation among some interested parties that the preliminary approval process should be more involved in this case than in the usual class action. Therefore, oral argument shall occur on November 9, 2012 at 11:30 a.m., and anyone wishing to make that point, or to speak against or in support of preliminary approval, will be permitted to do so.

I see no need to form an Objectors' Committee or to arrange for the discovery requested. The parties seeking that relief have a great deal of sophistication and familiarity with both the terms of the Settlement Agreement and the course of the negotiations that culminated in that agreement. I also see no need to establish procedures for absent class members – who will have ample rights to be heard before any final approval is even considered – to intervene so they

can be heard in connection with the pending application for preliminary approval. Accordingly, those requests are denied.

So ordered.

John Gleeson, U.S.D.J.

Dated: October 24, 2012
Brooklyn, New York

EXHIBIT 9

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - X

	05-MDL-01720 (JG)(JO)
In re: PAYMENT CARD	
	United States Courthouse
INTERCHANGE FEE AND MERCHANT	Brooklyn, New York
DISCOUNT ANTITRUST LITIGATION,	Friday, November 9, 2012 11:30 a.m.

- - - - - - - - - - - - - - - - - - X

TRANSCRIPT OF CIVIL CAUSE FOR ORAL ARGUMENT
BEFORE THE HONORABLE JOHN GLEESON
UNITED STATES DISTRICT JUDGE

APPEARANCES: SEE FOLLOWING PAGES

Court Reporter: VICTORIA A. TORRES BUTLER, CRR
225 Cadman Plaza East
Brooklyn, New York 11201
VButlerRPR@aol.com

Proceedings recorded by mechanical stenography, transcript produced by Computer-Assisted Transcription.

AFTERNOON SESSION

(In open court.)

(Judge JOHN GLEESON enters the courtroom.)

THE COURTROOM DEPUTY: All rise.

THE COURT: Thank you, please be seated, everyone.

(Pause in the proceedings.)

THE COURT: The motion for preliminary approval of the proposed settlement agreement is granted.

I want to emphasize what I alluded to briefly in the order that directed that this proceeding occur, and that is, that preliminary approval of the proposed class action settlement is an initial evaluation by a court of the fairness of the proposed settlement and there are limits to that inquiry.

Specifically, it involves a determination that there are no obvious deficiencies such as indications of a collusive negotiation, unduly preferential treatment of class representatives or segments of the class, or excessive compensation of attorneys, for example.

I am paraphrasing from ***McLaughlin on Class Actions***, Section 6:7.

I have also found guidance in the ***Manual For Complex Litigation***, the West publication, David Herr is the author, Section 21.632.

I don't mean to suggest for a moment that there

aren't a number of issues that have been well-briefed by the objecting parties that are going to require significantly more careful scrutiny before there is any final approval of the proposed settlement. I think -- and I'm going to leave it at this, I don't intend to litigate these issues in the same way twice.

I think the arguments made at this stage regarding the scope of the release, the value of the proposed rules changes, the adequacy of Counsel to represent the class, the appropriateness of a (b)(2) class, in a way they remind me of statements one reads often in opinions. I know I've read them in Second Circuit opinions, Jon Newman is frequently fond of writing that you always see these Cassandra-like statements in dissents about what the majority has just held that tend to overstate the point.

As I read the very-able Counsels' objections and listened to their arguments, I think the degree to which these facets of the proposed settlement are problematic have been overstated. I don't mean to suggest that they might not prevail when it comes to whether this settlement ought to be finally approved, but I am not persuaded that they constitute that these perceived deficiencies are the obvious deficiencies that ought to derail preliminary approval.

So, the application is granted, in its entirety.

The applications for certification for interlocutory

appeal of this preliminary approval are denied.

If there are any issues, I'd like the moving parties, the proponents of the proposed settlement, to provide to the Court a proposed schedule with specific dates and the like, for the steps contemplated along the way towards the motion for final approval and a fairness hearing.

One thing I will share with you. It's a preliminary thought and if it hardens into something more than that, you'll know because I'll issue an order, but you may as well start thinking about it is, there's an obvious difference of opinion among you as to the value to the class of the rules change that would allow surcharging. It couldn't be more obvious reading this papers.

You can't all be right about the value of that proposed rules change and as I say, it's only a preliminary thought now, but I want to share it with you so you can know it and to the extent it becomes the subject of an order, you won't be surprised and maybe you'll have given some thought to it, but I am thinking of appointing an expert to advise the Court with regard to that issue; the economic effect of the proposed rules change.

I am sure you will have your own experts or I expect you have your own experts, but I may. In connection with the securitization of the remaining settlement funds in the Wal-Mart case, I appointed my own expert to advise the Court

regarding the wisdom of that and I found that really useful.

The reason I mention it is that if I do it, and I'm likely to do it, in the first instance I'll give the parties -- the objecting parties, the class Counsel, the defendants -- an opportunity to put their heads together, maybe in an effort to agree upon one or more experts. If you can't do that, I'll fend for myself, but give that some thought.

Thank you all. Have a good day.

ALL: Thank you.

(WHEREUPON, the proceedings were adjourned.)

* * *

EXHIBIT 10

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NOT FOR PUBLICATION

IN RE PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION

ORDER
05-MD-1720 (JG) (JO)

JOHN GLEESON, United States District Judge:

I have appointed Dr. Alan O. Sykes to advise the Court with respect to economic issues related to the proposed settlement. This order sets forth the procedures by which Dr. Sykes will render his assistance.

The purpose of the appointment is simply stated: though the Court expects to receive useful input from the parties and the objectors to the proposed settlement and from experts retained by them, I feel the need for an impartial, independent assessment of the economic issues that will be the subject of dispute.

The parties and objectors shall provide to Dr. Sykes a copy of each of the expert reports that a party or objector has submitted in this case. They shall also provide to him, upon his request, any other documents that the party or objector has filed or served in the case. The parties and objectors shall not provide Dr. Sykes with any materials that have not already been filed or served in this case without first receiving written authorization from the Court. Upon the provision of any material to Dr. Sykes, the providing party or objector shall file a notice identifying the material provided.

The parties and objectors shall provide Dr. Sykes with the name and contact information for a primary and alternate contact person for each group (*i.e.*, defendants, class

plaintiffs, individual plaintiffs, and any objectors who wish to provide contact information) whom Dr. Sykes can contact should he seek additional information in the record, have any questions, or need to contact any experts in this case.

Dr. Sykes's task is to review the papers filed in support of and in opposition to the proposed settlement and to assist the Court with respect to all disputed issues on which he feels qualified to render assistance. Those issues include the economic value to merchants of the proposed rules changes and the breadth of the proposed release, but they are by no means limited to those issues. I want the full benefit of Dr. Sykes's expertise.

All substantive communications between the Court and Dr. Sykes will be a matter of public record. To facilitate his full assistance to the Court he is encouraged to call or email chambers with respect to ministerial matters, scheduling, clarifications, etc. Those communications shall not address the merits of substantive issues. To the extent that, in the Court's judgment, fairness requires the disclosure of the substance of any such communications to the parties and objectors, such disclosure will be made.

Dr. Sykes's report to the Court shall be filed by Wednesday, August 28, 2013. The parties and objectors may respond in writing to Dr. Sykes's submission on or before September 4, 2013.

Because Professor Sykes has not been appointed for the purpose of providing testimony, he will not be deposed or cross-examined.

So ordered.

John Gleeson, U.S.D.J.

Dated: July 2, 2013
Brooklyn, New York

EXHIBIT 11

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August 20, 2013

Via FedEx and Email: sykesa@exchange.law.nyu.edu

Prof. Alan O'Neil Sykes
New York University School of Law
40 Washington Square South, 308A
New York, New York 10012

Re: *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation,* Case No. 1:05 –md-01720 [JG-JO] (E.D.N.Y.)

Dear Professor Sykes:

Please treat this correspondence as a follow-up to your appointment by Hon. John Gleeson to assist in review of the Proposed Class Action Settlement in the referenced matter. This firm, together with the Duncan Firm, P.A. and Thrash Law Firm, represent absent retail and merchant objectors from many states. In accordance with our continued efforts to have documents and the fairness of this lawsuit critically examined, we have proposed 21 document review recommendations for evaluation of the Class Action Settlement for its fairness, adequacy and reasonableness.

The Court by Order (Doc. 5873) dated July 2, 2013, has described your role as an expert for the Court with "respect to economic issues related to the proposed settlement." The economic issues to be reviewed include "the economic value to merchants of the proposed rules changes and the breadth of the proposed release." However, the economic issues are not limited to those criteria alone. *Id.* Your appointment by Judge Gleeson provides a unique opportunity for opening the curtain and looking behind the settlement, to the development of the issues in the settlement, the analysis of those economic issues and an evaluation of whether the settlement is fair, reasonable and adequate for millions of absent class members who are permanently bound

by the agreement and whose rights of redress against the same and similar violations are forever foreclosed. The economic impact of those issues are enormous.

A significant portion of the purchase of goods and services in our modern marketplace is through a credit card. However, the use of credit cards by customers of retailers and merchants comes with a significant cost to those retailers and merchants. There are many questions surrounding this settlement. Is the settlement truly fair, reasonable and adequate to the millions of absent retailer and merchant class members? What is the actual value to the absent retailer and merchant class members around the country? What is the value to Visa, Mastercard and banks? These questions need to be thoroughly reviewed and the answers analyzed and discussed. This should, by necessity, include an examination of the underlying settlement documents filed and served in this lawsuit and the documents underlying the major issues at issue in this settlement, all of which should have been addressed in discovery and served or filed.

Soon after the settlement was announced, R&M Objectors proposed a method of viewing the discovery documents for thoroughly assessing and probing the value of the settlement as to monetary relief, injunctive relief and the broad, far-reaching release of claims, including future claims as well. R&M Objectors are absent class members from a large and representative cross-section of the merchants in the United States, representing small, middle-class and larger businesses, including car dealers, gas stations, clothing stores, jewelry stores, restaurants, wine retailers and others. R&M Objectors include absent class members from states that regulate and prohibit surcharging of customers. The interchange and other fees charged by Visa, Mastercard and member banks are a significant portion of the costs incurred by these businesses in providing goods and services throughout the United States. The nature of the settlement with limited

injunctive relief and far-reaching, unprecedented release of claims is of grave concern to these businesses.

Although originally proposing a discovery committee to flesh out the economic issues at stake in this massive proposed class settlement, R&M Objectors have not been provided documentation showing the discussion and analysis of the various components of the settlement, or its economic value and effect on absent class members in the 50 states, including differences in treatment and reasons for that differing treatment. Further, there has been no documentation provided showing the benefit to the Defendants of obtaining such an extensive release of not only present, but future claims as well, with respect to the interchange fee.

The Court's Order appointing you to review economic issues present in this lawsuit; to ascertain what the proposed settlement really means to absent class members across the United States now and in the future after the temporary injunctive relief is ended; and the full extent and breadth of the release of claims is in effect, is a unique opportunity which should encompass a thorough review of the underlying documentation pertaining to the settlement and the critically and constitutionally important issues involving adequacy of class notice, treatment of class members, differences in treatment, release of future claims and value to absent class members under Fed. R. Civ. P. 23.

As part of due process, the fairness, adequacy and reasonableness of a proposed settlement, which seeks to bind millions of retailers and merchants, must be able to be thoroughly cross-examined. In that light, discovery materials, particularly those pertaining to settlement under critical evaluation, analysis, discussion, and the adequacy of notice to absent class members must be scrutinized so the rights of absent class members are fully protected. Many absent class members are still learning about the settlement. However, there is still much

confusion and much at stake economically, now and in the future for retailers and merchants. As expected, the use of credit cards for purchase of goods contemplates the majority of transactions for R&M Objectors and will only continue to grow eventually becoming the dominant means of purchasing goods and service.

R&M Objectors respectfully submit that recommended specific documents from existing case documents should be evaluated for review of the economic issues presented by this proposed class settlement. As an appointed expert, your role should present a high avenue to independent review of every pertinent document. R&M Objectors have attached their proposed document review recommendations to this letter.

Your time and consideration of these documents, filed or served, in evaluating the economic fairness of the class settlement is much appreciated.

Respectfully submitted,

Jerrold S. Parker

Attachment

Via E-mail and Overnight Delivery
cc. All Counsel of Record via CM/ECF system

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION

No. 05-MD-1720 (JG)(JO)

This Document Applies to: All Cases.

OBJECTORS' RECOMMENDED SPECIFIC MATERIALS FROM THE EXISTING CASE DOCUMENTS FOR PROFESSOR SYKES REVIEW

1. All documents, including but not limited to, notes, memorandums, writings, e-mails, drafts, research, correspondence and information which include any reference to the release language in paragraphs 33, 68 subsections (g)(h) in both paragraphs concerning future damage claims, future activities and/or future rule violations because the release language uses the word "similar" instead of "identical factual predicate." The purpose of this request is for Dr. Sykes to review the specific communications on the effect of the release language in paragraphs 33, 68 subsections (g)(h) analyzing any difference of treatment of class members who are located in states where surcharges are prohibited as opposed to states where surcharges are permitted.

2. All documents and information, including but not limited to, notes, memorandums, writings, e-mails, drafts, research, correspondence and information which include any reference to the effect of the notice in non-surcharge states as opposed to surcharge states and advising those absent class members in "plain language" as to the release of claims including any release of future claims under the proposed preliminary settlement agreement.

3. All documents, including but not limited to, notes, memorandums, writings, e-mails, drafts, research, correspondence and information that include any reference to the settlement negotiations and discussions about the decrease in financial value to the class settlement fund for states where the surcharge is prohibited by state law.

4. All documents, including but not limited to, notes, memorandums, writings, e-mails, drafts, research, correspondence and information that mentions the wording used to describe the surcharge and its availability to absent class members in states, which prohibit a surcharge.

5. All drafts of the Settlement Agreement, including notice provisions, which discuss, mention or address the explanation of the "limitations" of the value of the settlement to the putative class members in states, which prohibit a surcharge.

6. All documents, including but not limited to correspondence, e-mails, documents, memorandums, notes and communication that include any reference to the

implementation of surcharge in the states, including specifically those states where surcharges are not allowed by state law, and the difference in available relief afforded to those putative class members in states where the Defendants' interchange fee overcharge could not be passed onto customers.

7. All correspondence, including e-mails, documents, memorandums, notes and communication that contains any reference to initial settlement dialogue between the Plaintiffs' class counsel and the Defendants' counsel, including all explanations of terms, dialogue, versions and revisions to execution of the final version of the Settlement Agreement and the imposition of a surcharge, including states where a surcharge is prohibited, and the publication in "plain language" to absent class members of the difference in treatment for absent class members in states where the surcharge is prohibited.

8. All correspondence, including e-mails, documents, memorandums, notes and communications used in the financial calculation and benefit of the class settlement as a whole factoring in the loss of settlement value to absent class members in states where the surcharge is prohibited and the reason for the difference in treatment of putative class members.

9. All correspondence, including e-mails, documents, memorandums, notes and communications discussing publication and notice to absent class members without disclosing in "plain language" the difference in treatment for absent class members in states where the surcharge is prohibited.

10. All documents, including, but not limited to correspondence, e-mails, documents, memorandums, notes and communication that contain any reference to why the settlement and class notice does not include and advise putative class members that the surcharge would be prohibited in certain states.

11. All documents, including, but not limited to, correspondence, e-mails, documents, memorandums, notes and communication that contain any reference to the difference in treatment to the absent class members in those states where the surcharge was prohibited.

12. All documents, including, but not limited to, correspondence, e-mails, documents, memorandums, notes and communication that contain any reference to the difference in value to the absent class members in those states where the surcharge was prohibited.

13. All documents, including, but not limited to, correspondence, emails, documents, memorandums, notes, communication, economic analysis and charts pertaining to the economic value of the injunctive relief as compared to the global release of claims and Defendants' ability to recoup and increase the interchange fee after the injunctive relief ends without any recourse by absent class members in all 50 states.

14. All documents, including, but not limited to, correspondence, emails, documents, memorandums, notes, communication, economic analysis, graphs and charts pertaining to

the economic value of settlement as compared to the limitation of the global release for absent class members in all 50 states.

15. All documents, including, but not limited to, correspondence, emails, documents, memorandums, notes, communication, economic analysis, graphs and charts pertaining to the differences in anticipated economic value by absent class members within all 50 states, and a state-by-state comparison of the differences in anticipated economic value.

16. All documents, including, but not limited to, correspondence, e-mails, documents, memorandums, notes, communication, economic analysis, graphs and charts pertaining to the actual usage and realized value of the surcharge equitable relief provision by absent retailers and merchant class members in all 50 states.

17. All documents, including, but not limited to, correspondence, e-mails, documents, memorandums, notes, communication, economic analysis, graphs and charts pertaining to the actual revenues and costs per transaction to Defendants, including issuing banks, for processing credit card payments in the United States.

18. All documents, including, but not limited to, correspondence, e-mails, documents, memorandums, notes, communication, economic analysis, graphs and charts comparing and differentiating debit and credit card costs per transaction to Defendants, including issuing banks, for processing payments in the United States.

19. All documents, including, but not limited to, correspondence, e-mails, documents, memorandums, notes, communication, economic analysis, graphs and charts pertaining to the difference and reason for the larger interchange and processing fees charged to absent retailers and merchant class members in the United States as compared to the amount of fees charged to retailers and merchants in Europe.

20. All documents, including, but not limited to, correspondence, e-mails, documents, memorandums, notes, communication, economic analysis, projections, graphs and charts pertaining to the economic value realized by the Defendants for the release of future claims similar to those brought in this lawsuit.

21. All documents, including, but not limited to, correspondence, e-mails, documents, memorandums, notes, communication, economic analysis, projections, graphs and charts pertaining to the full scope and breath of the release on individuals and entities within the scope of and impacted by the release.

EXHIBIT 12

NOTICE OF OPT OUTS

UNITED STATES DISCTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation	:	No. 05-MD-01720 (JG)(JO)

I. PRELIMINARY STATEMENT REGARDING OPT-OUTS

The Notice of Settlement the class received regarding the Definitive Settlement Agreement ("Settlement Agreement") was confusing regarding the substantive rights of absent class members and whether these substantive rights would be impaired by the binding effect of a judgment entered in this case. As stated in the Class Notice and Settlement Agreement, businesses would release future claims because of the form of the release contained in the Settlement Agreement and notice plan. In particular, but not limited to: *Settlement Classes*, paragraphs 33, subparts g-h, and 68, subparts g-h of the Settlement Agreement waive future claims as published in the Notice of Settlement to the class.

All the businesses opting out by way of this notice of opt-out feel compelled to do so in an attempt to preserve future claims against Defendants involving Defendants' Rules. Both of the settlement classes described in the Notice of Settlement waive these future claims, but it is presently unclear whether this Court will approve that waiver. These potential Class Members do not believe a waiver of future claims is valid under either Rule 23(b)(2) or 23(b)(3). The businesses identified in this Notice are opting out in case the Court allows the waiver to remain a part of the Rule 23(b)(3) settlement. If the Court determines that the waiver of future claims made under Rule 23(b)(2) is invalid, these businesses would still sacrifice the right to bring future claims against Defendants by not opting out of the Rule 23(b)(3) class.

Given the uncertainty surrounding this settlement, the unclear and confusing class notice, and with no way of knowing what this Court will ultimately approve, these businesses feel forced to opt-out of the Rule 23(b)(3) class at this time to preserve their substantive rights and not be bound by a judgment entered in this case. However, depending upon the settlement structure ultimately sanctioned by this Court, the analysis surrounding the opt-out decision could change dramatically. If, for instance, the Court allows the waiver of future claims to remain a part of both the 23(b)(2) and 23(b)(3) releases – such that opting out of the Rule 23(b)(3) class will not, in any event, allow these businesses to seek future redress from Defendants under their Rules – these businesses may very well determine that it makes no sense to opt out of the Rule 23(b)(3) class. The same conclusion might follow should the Court ***disallow*** the relinquishment of future claims for both classes. In light of this confusing scenario, these businesses respectfully request that new notice be delivered to the class, with a new opportunity to opt-out or reverse an earlier decision to opt out, after the Court definitively passes upon the terms of the settlement and its binding effect on absent class members for both the 23(b)(2) and (b)(3) Settlement Classes as to future claims. Thus, in sum, the following businesses conditionally opt-out.

To repeat, the businesses identified in this notice are now opting out because they feel constrained to do so as the only possible way they might somehow rescue their ability to bring future claims against the Defendants.

II. OPT-OUTS

I, Thomas P. Thrash, Phillip Duncan and Jay Breakstone, attorneys for the following merchants, want to exclude them from the Cash Settlement Class of the settlement in the case called *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*:

- Landers McLarty Bentonville, LLC d/b/a Landers McLarty Ford Dodge Chrysler Jeep – Bentonville, Arkansas

  Taxpayer ID Number: XXXX
  Business Location: 2609 South Walton Road
  Bentonville, Arkansas 72712

- Landers McLarty Bentonville Nissan, LLC d/b/a Landers McLarty Nissan, LLC – Bentonville, Arkansas

  Taxpayer ID Number: XXXX
  Business Location: 2501 SE Moberly Lane
  Bentonville, Arkansas 72712

- Bessemer AL Automotive, LLC d/b/a Landers McLarty Dodge Chrysler Jeep – Bessemer, Alabama

  Taxpayer ID Number: XXXX
  Business Location: 5080 Academy Lane
  Bessemer, Alabama 35022

- Shreveport Dodge, LLC d/b/a Landers Dodge– Bossier City, Louisiana

  Taxpayer ID Number: XXXX
  Business Location: 2701 Benton Road
  Bossier City, Louisiana 71111

- RML Branson MO, LLC d/b/a Tri Lakes Motors – Branson, Missouri

  Taxpayer ID Number: XXXX
  Business Location: 180 State Highway F & 65
  Branson, Missouri 65616

- RML Burleson TX, LLC d/b/a Burleson Nissan – Burleson, Texas

  Taxpayer ID Number: XXXX
  Business Location: 300 North Burleson Boulevard
  Burleson, Texas 76028

- RML Bel Air, LLC d/b/a Bel Air Honda – Falston, Maryland

  Taxpayer ID Number: XXXX
  Business Location: 1800 Bel Air Road
  Fallston, Maryland 21047

- Landers McLarty Fayetteville TN, LLC d/b/a Landers McLarty Toyota– Fayetteville, Tennessee

  Taxpayer ID Number: XXXX
  Business Location: 2970 Huntsville Highway
  Fayetteville, Tennessee 37334

- RML Ft. Worth TX, LLC d/b/a Nissan Ft. Worth – Fort Worth, Texas

  Taxpayer ID Number: XXXX
  Business Location: 3451 W. Loop 820 South
  Fort Worth, Texas 76116

- RML Huntsville Chevrolet, LLC d/b/a Landers McLarty Chevrolet – Huntsville, Alabama

  Taxpayer ID Number: XXXX
  Business Location: 4930 University Drive
  Huntsville, Alabama 35816

- RML Huntsville AL, LLC d/b/a Landers McLarty Dodge Chrysler Jeep – Huntsville, Alabama

  Taxpayer ID Number: XXXX
  Business Location: 6533 University Drive, NW
  Huntsville, Alabama 35806

- RML Huntsville AL Automotive, LLC d/b/a Mercedes Benz of Huntsville – Huntsville, Alabama

  Taxpayer ID Number: XXXX
  Business Location: 6520 University Drive, NW
  Huntsville, Alabama 35806

- RML Huntsville Nissan, LLC d/b/a Landers McLarty Nissan– Huntsville, Alabama

  Taxpayer ID Number: XXXX
  Business Location: 6520 University Drive, NW
  Huntsville, Alabama 35806

- RML Huntsville, AL, LLC d/b/a Landers McLarty Subaru – Huntsville, Alabama

  Taxpayer ID Number: XXXX
  Business Location: 5790 University Drive
  Huntsville, Alabama 35806

- Landers McLarty Lee's Summit MO, LLC d/b/a Lee's Summit Chrysler Jeep Dodge – Lee's Summit, Missouri

  Taxpayer ID Number: XXXX
  Business Location: 1051 SE Oldham Parkway
  Lee's Summit, Missouri 64081

- RML Lee's Summit MO, LLC d/b/a Lee's Summit Nissan – Lee's Summit, Missouri

  Taxpayer ID Number: XXXX
  Business Location: 1025 SE Oldham Parkway
  Lee's Summit, Missouri 64081

- RML Olathe II, LLC d/b/a Olathe Dodge Chrysler Jeep – Olathe, Kansas

  Taxpayer ID Number: XXXX
  Business Location: 15500 West 117th Street
  Olathe, Kansas 66062

- RML Waxahachie Dodge, LLC d/b/a Waxahachie-Dodge Chrysler Jeep – Waxahachie, Texas

  Taxpayer ID Number: XXXX
  Business Location: 2405 N. I-35 E
  Waxahachie, Texas 75165

- RML Waxahachie Ford, LLC d/b/a Waxahachie Ford Mercury – Waxahachie, Texas

  Taxpayer ID Number: XXXX
  Business Location: 2401 N. I-35 E
  Waxahachie, Texas 75167

- RML Little Rock, Inc. d/b/a Landers Harley-Davidson – Little Rock, Arkansas

  Taxpayer ID Number: XXXX
  Business Location: 10210 Interstate 30
  Little Rock, Arkansas 72209

- RML Little Rock, Inc. d/b/a Landers Harley-Davidson – Hot Springs, Arkansas

  Taxpayer ID Number: XXXX
  Business Location: 205 Garrison Road
  Hot Springs, Arkansas 71913

- RML Little Rock, Inc. d/b/a Landers Harley-Davidson – Conway, Arkansas

  Taxpayer ID Number: XXXX
  Business Location: 1110 Colliers Drive
  Conway, Arkansas 72032

- Landers Auto Group No. 1 d/b/a/ Landers Scion – Little Rock, Arkansas

  Taxpayer ID Number: XXXX
  Business Locations: 10825 Colonel Glenn Road
  Little Rock, AR 72204

- Landers Auto Group No. 1 d/b/a Landers Toyota – Little Rock, Arkansas

  Taxpayer ID Number: XXXX
  Business Locations: 10825 Colonel Glenn Road
  Little Rock, AR 72204

- Landers Auto Group No. 1 d/b/a The Boutique at Landers Toyota – Little Rock, Arkansas

  Taxpayer ID Number: XXXX
  Business Locations: 10825 Colonel Glenn Road
  Little Rock, AR 72204

- Landers CDJ, Inc. – Little Rock, Arkansas

  Taxpayer ID Number: XXXX
  Business Locations: 10825 Colonel Glenn Road
  Little Rock, AR 72204

- Landers CDJ, Inc. d/b/a Steve Landers Chrysler Dodge Jeep – Little Rock, Arkansas

  Taxpayer ID Number: XXXX
  Business Locations: 10825 Colonel Glenn Road
  Little Rock, AR 72204

- Landers of Hazelwood, Inc. – Hazelwood, Missouri

  Taxpayer ID Number: XXXX
  Business Locations: 9091 Dunn Road
  Hazelwood, MO 63042

- A&D Wine Corp. – New York, New York

  Taxpayer ID Number: XXXX
  Business Locations: 65 Second Ave.
  New York, NY 10003

- A&Z Restaurant Corp. – New York, New York

  Taxpayer ID Number: XXXX
  Business Locations: 65 Second Ave.
  New York, NY 10003

- 105 Degrees, LLC – Oklahoma City, Oklahoma

  Taxpayer ID Number: XXXX
  Business Locations: 5820 N. Classen Blvd., Ste. 1
  Oklahoma City, OK 73118

- Roberson's Fine Jewelry, Inc. – Little Rock, Arkansas

  Taxpayer ID Number: XXXX
  Business Locations: 11525 Cantrell Road, Suite 703
  Little Rock, AR 72212

- Gossett Motor Cars, Inc. – Memphis, Tennessee

  Taxpayer ID Number: XXXX

  Business Locations: Kia – Covington Pike
  1900 Covington Pike
  Memphis, TN 38128

Mazda/Hyundai/Mitsubishi
1870 Covington Pike
Memphis, TN 38128

Volkswagen/Audi/Porsche
1875 Covington Pike
Memphis, TN 38128

Chrysler/Jeep/Dodge
1901 Covington Pike
Memphis, TN 38128

- Gossett Motor Cars, Inc. – Memphis, Tennessee

Taxpayer ID Number: XXXX
Business Locations: Fiat
Wolfchase Mall
2760 N. Germantown Parkway
Memphis, TN 38133

Volkswagen Germantown
7420 Winchester
Memphis, TN 38125

Kia South
2660 Mt. Moriah
Memphis, TN 38115

Hyundai South
2680 Mt. Moriah
Memphis, TN 38115

- JB Cook, LLC d/b/a Downtown Oil & Lube – Hope, Arkansas

Taxpayer ID Number: XXXX
Business Locations: 218 West 3rd Street
Hope, AR 71801

- The Tennis Shoppe, Inc. – Little Rock, Arkansas

Taxpayer ID Number: XXXX
Business Locations: 8212 Cantrell Road
Little Rock, AR 72227

- The Grady Corporation d/b/a Whole Hog Barbeque (Northwest Arkansas) – Bentonville, Arkansas

  Taxpayer ID Number: XXXX
  Business Locations: 1400 SE Walton Boulevard
  Bentonville, AR 72712

- The Grady Corporation II d/b/a Whole Hog Barbeque (Northwest Arkansas) – Fayetteville, Arkansas

  Taxpayer ID Number: XXXX
  Business Locations: 3009 North College
  Fayetteville, AR 72703

- Coulson Oil Company – North Little Rock, Arkansas

  Taxpayer ID Number: XXXX
  Business Locations: 1434 Pike Avenue
  North Little Rock, AR 72114

  * Please see attached spreadsheet for individual location information

- Diamond State Oil LLC – North Little Rock, Arkansas

  Taxpayer ID Number: XXXX
  Business Locations: 1434 Pike Avenue
  North Little Rock, AR 72114

  * Please see attached spreadsheet for individual location information

- Superstop Stores, LLC – North Little Rock, Arkansas

  Taxpayer ID Number: XXXX
  Business Locations: 1434 Pike Avenue
  North Little Rock, AR 72114

  * Please see attached spreadsheet for individual location information

- PetroPlus, LLC – North Little Rock, Arkansas

  Taxpayer ID Number: XXXX
  Business Locations: 1434 Pike Avenue
  North Little Rock, AR 72114

  * Please see attached spreadsheet for individual location information

- Port Cities Oil, LLC – North Little Rock, Arkansas

  Taxpayer ID Number: XXXX
  Business Locations: 1434 Pike Avenue
  North Little Rock, AR 72114

  * Please see attached spreadsheet for individual location information

- New Mercury, LLC – North Little Rock, Arkansas

  Taxpayer ID Number: XXXX
  Business Locations: 1434 Pike Avenue
  North Little Rock, AR 72114

  * Please see attached spreadsheet for individual location information

- New Vista, LLC – North Little Rock, Arkansas

  Taxpayer ID Number: XXXX
  Business Locations: 1434 Pike Avenue
  North Little Rock, AR 72114

  * Please see attached spreadsheet for individual location information

- New Neptune, LLC – North Little Rock, Arkansas

  Taxpayer ID Number: XXXX
  Business Locations: 1434 Pike Avenue
  North Little Rock, AR 72114

  * Please see attached spreadsheet for individual location information

- RR #1 TX, LLC – Texarkana, Arkansas

  Taxpayer ID Number: XXXX
  Business Locations: 1434 Pike Avenue
  North Little Rock, AR 72114

  * Please see attached spreadsheet for individual location information

- SVI Security Solutions – Olive Branch, Mississippi

  Taxpayer ID Number: XXXX
  Business Locations: 9065 Goodman Road
  Olive Branch, MS 38654

- AIMCO Equipm2ent Company, LLC – Little Rock, Arkansas

  Taxpayer ID Number: XXXX
  Business Locations: 10001 Colonel Glenn Road
  Little Rock, AR 72204

- Park Hill Collections, LLC – Little Rock, Arkansas

  Taxpayer ID Number: XXXX
  Business Locations: 4717 Asher Avenue
  Little Rock, AR 72204

- Riverbike of Tennessee, Inc. – Nashville, Tennessee

  Taxpayer ID Number: XXXX

  Business Locations: 401 Fesslers Lane
  Nashville, TN 37210

  Boswell's Harley-Davidson
  401 Fesslers Lane
  Nashville, TN 37210

  Ring of Fire Harley-Davidson
  2200 Gallatin Pike N.
  Madison, TN 37115

  Boswell's Harley-Davidson of Cookeville
  1424 Interstate Drive
  Cookeville, TN 38502

  Boswell's Music City Harley-Davidson
  180 Second Avenue N.
  Nashville, TN 37201

- Par's Custom Cycle, Inc. – Oklahoma City, Oklahoma

  Taxpayer ID Number: XXXX

  Business Locations: 6904 West Reno Avenue
  Oklahoma City, OK 73127

  Harley-Davidson World
  6904 W. Reno Avenue
  Oklahoma City, OK 73127

Harley-Davidson World Shop
3433 S. Broadway
Edmond, OK 73013

- V.I.P. Motor Cars Ltd. – Palm Springs, California

Taxpayer ID Number: XXXX

Business Locations: 3737 East Palm Canyon Drive
Palm Springs, CA 92264

Mercedes Benz of Palm Springs
4095 E. Palm Canyon Drive
Palm Springs, CA 92264

BMW of Palm Springs
3737 E. Palm Canyon Drive
Palm Springs, CA 92264

Palm Springs Infiniti
4057 E. Palm Canyon Drive
Palm Springs, CA 92264

Palm Springs Hyundai
3919 E. Palm Canyon Drive
Palm Springs, CA 92264

We are authorized to file opt-outs for exclusion from the Rule 23(b)(3) Settlement Class for the businesses identified in this Notice, and our personal information it as follows:

Name: Thomas P. Thrash, Esq.
Position: Attorney
Name of Merchants: See above
Phone No.: (501) 374-1058
Address: 1101 Garland Street
Little Rock, AR 72201

Name: Philip Duncan, Esq.
Position: Attorney
Name of Merchants: See above
Phone No.: (501) 228-7600
Address: 900 S. Shackleford, Suite 725
Little Rock, AR 72211

Name: Jay L.T. Breakstone, Esq.
Position: Attorney
Name of Merchants: See above
Phone No.: (516) 723-4620
Address: 6 Harbor Park Drive
Port Washington, NY 11050

Our position at the businesses that gives us authority to exclude them from the Cash Settlement Class is as follows: Legal counsel for all businesses opting out via this Notice. The telephone numbers for each Class Member is Counsel's telephone numbers above.

Respectfully Submitted,

/s/ Jerrold S. Parker

Jerrold S. Parker
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phillip@duncanfirm.com
richard@duncanfirm.com

CERTIFICATE OF SERVICE

On this 24th day of May, the above and foregoing has been sent by United States mail to the following:

Payment Card Interchange Fee Settlement
P.O. Box 2530
Portland, OR 97208-2530

Alexandra S. Bernay
Bonny E. Sweeney
Robbins, Geller, Rudman & Dowd, LLP
655 W. Broadway, Suite 1900
San Diego, CA 92101

Wesley R. Powell
Wilkie, Farr & Gallagher, LLP
787 Seventh Ave.
New York, NY 10019

K. Craig Wildfang
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800 LaSalle Ave.
Minneapolis, MN 55402

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

Matthew A. Einstein
Arnold & Porter, LLP
555 Twelfth Street NW
Washington, DC 20004

Peter E. Greene
Skadden, Arps, Slate Meagher & Flom, LLP
4 Times Square
New York, NY 10036

/s/ Jerrold S. Parker
Jerrold S. Parker

COULSON OIL	4/15/2013											
1	870-234-3101	870-836-9416	C	S	COC	307 HWY 79	Magnolia	71753	Lydia Kim	714-271-1157	UK Gas Station Corp.	Columbia
2	870-836-9416	870-887-8425	C	S	COC	1390 Hwy 4 By-Pass	Camden	71701	Sam Esmail	501-951-0817	Camden Shell Popeyes	Ouachita
3	870-887-8425	870-887-8425	C	S	COC	105 East Main	Prescott	71857	Fred Dharamsi	727-421-2927	Prescott Shell Superstop	Nevada
8	870-246-7984	870-246-8516	C	S	COC	3111 Pine Street (G SHINES)	Arkadelphia	71923	Carol Gills	870-230-2112	Stuckey's Shell	Clark
10	501-223-2220	501-519-2350	C	S	SSS	12524 Chenal Parkway	Little Rock	72212	Nick Siddique	501-960-3405	Chenal Superstop	Pulaski
15	501-372-1403	501-375-3530	C	S	SSS	800 S Broadway	Little Rock	72202	Nick Siddique	960-3405	Downtown Shell	Pulaski
18	501-399-9316	501-562-1101	C	S	COC	721 E. 9th	Little Rock	72202	Yallabhai Bandrapalli (V	501-307-9532	9th Street Shell	Pulaski
21	501-223-3052	501-223-3056	OP	S	SSS	1200 South Shackleford	Little Rock	72211	Lynne Sheridan	501-786-2464	Road Runner #21	Pulaski
22	501-562-0033	501-907-0639	C	S	COC	10105 I-30 (Baseline)	Little Rock	72209	Mohammed Qassas	952-3536	Baseline Shell	Pulaski
23	501-562-0152	501-568-4920	C	S	COC	8000 Geyer Springs	Little Rock	72209	Maurice Mahoud	347-3685	Geyer Springs Shell	Pulaski
26	501-666-5056	501-298-9144	C	S	COC	7400 Cantrell	Little Rock	72217	Nick Siddique	960-3405	Cantrell Shell	Pulaski
27	501-219-1364	501-219-1364	C	S	SSS	11401 Cantrell	Little Rock	72212	Tom Atchison	501-219-1364	Woodland Heights Shell	Pulaski
29	501-219-8749	501-219-8749	C	S	COC	1400 Barrow Road	Little Rock	72204	Chang ho Lee	501-612-3636	Barrow Shell	Pulaski
34	501-224-9780	n/a	C	S	COC	9718 Rodney Parham Rd.	Little Rock	72207	Jason Han	501-807-5299	Shell Superstop #34	Pulaski
38	501-455-4224	501-455-2573	C	S	COC	13400 I-30	Little Rock	72209	Toby White / Vatinda, Mc	350-3227	County Line Shell	Pulaski
44	501-851-4091	n/a	C	CP	PCO	18820 MacArthur (I-40 & Morgan)	NLR	72118	Majid Kameli	690-5050	Morgan Phillip 66	
45	501-753-7726	n/a	C	S	PCO	2701 MacArthur (Scenic Hill)	NLR	72118	Severns & Timmons	501-993-6263	Pike Ave Shell	Pulaski
48	501-835-8364	501-835-8364	C	S	COC	8604 Sylvan Hills Hwy.	NLR	72116	Asif Sied Siddiqui		Shell Superstop#48	
50	501-376-1339	501-376-1339	SPLIT	SS	PCO	1424 Locust	NLR	72114	Mike Lashbrook	501-249-1702	Superstop 50	Pulaski
51	501-833-0377	501-833-0377	C	S	COC	14508 Hwy 107	Jacksonville	72076	Jung Oh (OZ Industry In	501-240-0989	Lucky Mart	Pulaski
52	501-835-7549	501-835-7543	C	CP	PCO	2428 Wildwood Avenue	Sherwood	72120	Hassan Honarmand	501-352-1909	Zone Mart	Pulaski
53	501-758-9408	501-758-9408	C	S	COC	3100 JFK Blvd.	NLR	72116	Mohammed Tasneem	960-5794	Parkhill Shell	Pulaski
55	501-327-0751	n/a	C	S	COC	545 Hwy 65N.	Conway	72032	Donnie Miller	501-472-5047	Hwy 65 Shell	Faulkner
67	870-672-7250	n/a	C	S	COC	902 North Buerkle	Stuttgart	72160	Jason Han / Jackie, cont	501-960-4568	Stuttgart Shell #67	Arkansas
80	501-332-2111	501-223-2800	C	S	COC	1885 Hwy 270 N	Malvern	72104	Ike Mandani	407-616-6468	Malvern Shell	Hot Spring
81	870-245-2322	870-245-2322	C	S	COC	169 Valley Street(Jordan's Kwik Stop III)	Arkadelphia	71923	Jackie McClure	870-243-6243	Jordan's	Clark
83	870-777-2700	870-777-2700	C	S	COC	1201 North Hervey (I-30 & Hwy 4)	Hope	71801	Adam Muberek	501-613-8386	Superstop 83	Hempstead
84	870-777-5681	870-777-8210	C	S	COC	2605 Hazel	Hope	71801	Ashok Thakar	870-768-5573	Triple JJJ	
88	870-255-3519	870-255-3769	C	S	SSS	4369 Hwy 63N	Hazen	72064	Muhammed (Abass) Mia	405-206-1283	All Star Travel Plaza	Prarie
90	479-967-2200	479-880-1552	C	U	COC	2704 N. Arkansas Ave.	Russellville	72801	Donnie Miller	501-472-5047	Superstop #90	Pope
99	479-632-5614	479-632-5614	C	S	PCO	510 Hwy. 71 N (POB 167)	Alma	72921	Keith Wheeler	479-632-1608	Alma Shell	Crawford
102	479-621-0441	479-621-0441	C	S	PCO	1845 South 8th Street	Rogers	72757	Tariq Afzal	479-366-0563	Rogers Shell	Benton
109	479-643-3277	479-643-3065	C	S	PCO	2001 N. Center	Elkins	72727	Tariq Afzal	479-466-1098	Elkins Shell	Washington
123	501-767-8172	501-767-5456	OP	S	SSS	3039 Albert Pike	Hot Springs	71913	Candida Lengram	501-249-7440	Road Runner #123	Garland
124	501-625-7617	501-624-7790	C	S	COC	1600 Malvern	Hot Springs	71901	Arun Doshi	501-276-3342	Malvern Avenue Shell	Garland
127	501-624-2743	501-525-9999	C	S	COC	2224 Malvern Rd	Hot Springs	71901	Harvey Couch	501-282-1287	Golf Links Shell	Garland
130	501-984-5075	501-984-5076	C	S	COC	4401 Hwy. 7 N.	Hot Springs	71901	Sherry / Jim Yarbrough	501-884-5839	Top Of The Mountains Shell	Garland
132	870-230-1253	870-230-1253	C	CP	PCO	147 E. Valley	Arkadelphia	71923	Amy & Fred Dhardmsi	727-421-8673	Superstop #132	Clark
142	501-767-8310	501-760-6087	C	S	COC	5704 Albert Pike	Royal	71968	Sherry / Jim Yarbrough	501-844-5839	Royal Shell	Garland
144	501-623-0064	501-623-3619	C	CP	PCO	100 Hwy. 7 N.	Hot Springs	71901	Harvey Couch	501-282-1287	Fountain Lake 66	Garland
147	501-767-1485	501-627-1921	C	V	DSO	2070 Airport Rd (AB&C Gro)	Hot Springs	71913	Severns & Timmons	501-993-6263	Lake Hamilton Superstop	Garland
148	501-321-0042	501-525-9999	C	S	COC	3636 Central Avenue	Hot Springs	71913	Harvey Couch	501-282-1287	Lien's Shell	Garland

150	501-624-5754	501-624-5754	C	S	COC	868 Park Avenue	Hot Springs	71901	Majid Kameli	501-690-5050	Shell Superstop #150	Garland
155	501-525-9999	501-525-9999	C	S	PCO	1609 Higdon Ferry Road	Hot Springs	71913	Harvey Couch	501-282-1287	Higdon Ferry Superstop	Garland
161	479-498-2230	n/a	C	CP	PCO	1600 Elmira	Russellville	72801	Donnie Miller	501-472-5047	Russellville Superstop 161	Pope
326	501-354-1365	n/a	C	S	SSS	1830 Hwy 9	Morrilton	72110	Severns & Timmons	501-993-6263	Morrilton Shell	Conway
350	501-374-2880	501-375-3776	C	V	DSO	605 E. Broadway	NLR	72114	Majid Kameli	501-690-5050	Superstop 350	Pulaski
404	870-589-2012	n/a	C	S	PCO	1201 North Hwy 49	Brinkley	72021	Jason Han / Jackie, cont	501-960-4568	Brinkley Shell	Monroe
411	870-630-9898		C	S	COC	100 Holiday Drive	Forrest City	72335	Mohammed Qassas	601-613-8908	Forrest City Superstop	St. Francis
412	870-762-0300	870-762-5300	C	S	COC	3702 S. Division	Blytheville	72315	Waqar Salim			Mississippi
433	501-753-5221	501-851-6494	C	S	SSS	4822 Camp Robinson	NLR	72118	Jason Han / Jackie, cont	501-851-6815	B & J Superstop	Pulaski
461	870-836-6655	870-836-8110	C	V	DSO	775 Cash Road SW	Camden	71701	Lydia Kim	714-271-1179	Valero Superstop#461	Ouachita
462	501-327-2087	n/a	C	V	DSO	375 East Oak	Conway	72032	Donnie Miller	501-472-5047	Oak Street Valero	Faulkner
463	479-521-6574	479-521-6574	C	V	DSO	357 N. College	Fayetteville	72701	Tariq Afzal	479-336-0663	Fayetteville Valero	Washington
464	479-783-6800	479-366-0663	C	V	DSO	5727 Kelly Hwy	Fort Smith	72901	Donnie Miller	501-472-5047	Kelley Hwy Valero	Sebastain
465	479-478-6585	n/a	C	V	DSO	6320 Rogers Highway	Fort Smith	72901	Michael Ritchey	479-806-4199	Rogers Hwy Valero	Sebastain
466	870-722-6622	870-777-8210	C	V	DSO	2112 N Hazel	Hope	71801	Ashok Thakar	870-768-5573	Superstop #466	Hempstead
467	501-623-2134	501-609-9189	C	V	DSO	3228 Central Avenue	Hot Springs	71901	Harvey Couch	501-282-1287	Central Valero	Garland
468	501-982-1157	501-851-6494	C	V	DSO	2215 North 1st	Jacksonville	72076	Jacqui Sturba	501-851-6815	J & J Superstop	Pulaski
469	501-490-0554	501-490-0554	C	CP	PCO	8824 Fourche Dam Pike	Little Rock	72206	Syed Shah	870-292-9858	Fourche Dam Phillips 66	Pulaski
471	501-851-7100	501-851-1657	C	V	DSO	18823 MacArthur	NLR	72118	Toby White	350-3227	Morgan Valero	Pulaski
472	870-541-9399	870-541-9399	C	V	DSO	3000 E. Harding	Pine Bluff	71601	Mario Hyon	501-944-2169	Harding Street Valero	Jefferson
473	870-534-4457	870-534-4457	C	V	DSO	101 N. Blake Street	Pine Bluff	71601	Harpreet Singh	845-283-5299	Superstop #473	Jefferson
474	479-968-2591	479-968-2591	C	CP	PCO	1100 N. Arkansas	Russellville	72801	Larry Bryant	479-857-9709	Superstop #474	Pope
475	870-672-7120	870-672-7120	C	V	DSO	901 N. Buerkle	Stuttgart	72160	Jason Han / Jackie, cont	501-960-4568	Stuttgart Valero	Arkansas
661	501-753-2429	501-758-7537	C	CP	PCO	4601 North Hills Blvd.	NLR	72116	Donnie Miller	501-472-5047	North Hills Phillips	Pulaski
662	501-945-6108	501-945-5233	C	CP	PCO	4300 McCain Blvd.	NLR	72117	Hassan Honarmand	501-352-1909	Zone Mart II	Pulaski
663	501-227-5452	501-227-8392	C	CP	PCO	11615 Cantrell Road	Little Rock	72212	V Bandrapalli	501-307-9532	Cantrell Shell	Pulaski
664	501-624-7790	501-624-7790	C	CP	PCO	1308 Albert Pike	Hot Springs	71913	Arun Doshi	501-276-3342	Albert Pike 66	Garland
667	501-455-8693	n/a	C	CP	PCO	12624 Vimy Ridge	Alexander	72002	Rick Severns d/b/a Sev	501-993-6263	Vimy 66	Saline
678	501-477-2925	501-477-2925	C	V	DSO	1827 Hwy 9 North	Morrilton	72110	Severns & Timmons	501-993-6263	Morrilton Valero	Johnson
679	479-754-6231	479-754-6231	C	V	DSO	1221 Rogers	Clarksville	72830	Chuck Patton	479-754-0436	Clarksville Valero	Johnson
760	501-206-0401	501-206-0289	OP	CP	COC	1500 Bypass Road	Heber Springs	72543	Mellisa Dyer	501-410-2585	Sugarloaf 66	Cleburne
1007	501-663-1022	501-663-1022	C	S	NV	1200 S University	Little Rock	72204	Seung Chan Yang	501-412-2609	Max Mart	Pulaski
1009	501-868-1322	n/a	C	S	NV	16900 Cantrell	Little Rock	72223	Jason Han	501-960-4568	The Ranch Shell	Pulaski
1012	501-490-0917	501-490-4153	C	S	NV	8701 Fourche Dam Pike	Little Rock	72206	Harry Hiren	501-749-4848	Fourche Dam Shell	Pulaski
1014	501-821-2551	n/a	C	S	NV	16800 Chenal Parkway	Little Rock	72223	Hany Eid	501-240-6879	Chenal Shell	Pulaski
1015	501-843-4577	501-843-4577	C	S	NM	3185 Hwy 367 South	Cabot	72023	Larry Davison	501-772-1436	MaxMart 1015	Pulaski
1016	501-329-5922	n/a	C	S	NM	350 E. Oak	Conway	72032	Donnie Miller	501-472-5047	Oak Street Shell	Pulaski
1026	501-796-8644	n/a	C	S	NN	1820 Hwy 64 West	El Paso	72045	Donnie Miller	213-249-2661	El Paso Shell	Pulaski
1027	501-847-7775	800-506-0836	C	S	NN	3220 N Reynolds	Bryant	72022	M K Lee	501-519-4597		Pulaski
1028	501-868-5232	n/a	C	S	NV	19500 Cantrell	Little Rock	72223	Hany Eid	501-240-6879	Hwy 10 Shell	Pulaski
1030	501-835-6227	n/a	C	S	NM	6915 JFK Blvd	NLR	72116	Yeong Lee (Paragon, In	501-247-6737	Indian Hills Shell	Pulaski
1031	501-835-7062	501-835-7044	C	S	NM	2429 Wildwood	Sherwood	72120	Kyung Un Hyon (Mario)	501-944-2169	Wildwood Shell	Pulaski
1032	501-851-6815	501-851-6494	C	S	NM	20515 Hwy 365 N	Morgan	72113	Jason Han / Jackie, cont	501-960-4568	Morgan Shell	Pulaski
1038	501-955-9096	501-955-9096	C	S	NM	4400 McCain	NLR	72117	Yeong Lee	501-773-8666	Shell 1038	Pulaski

1039	501-985-1051	501-985-1051	C	S	NM	1527 Main	Jacksonville	72076	Kelly Gold	501-368-3837	Gold Express	Pulaski
1040	501-223-3499	501-851-6494	C	S	NV	10100 Rodney Parham	Little Rock	72227	Jason Han / Jackie, cont	501-851-6815	Sturbridge Shell	Pulaski
1042	501-565-0142	n/a	C	S	NV	4111 S University	Little Rock	72204	Charles Hwang	501-786-3350	Shell Max Mart	Pulaski
1043	501-847-4707	501-851-6494	C	SS	NV	23190 I-30	Byrant	72022	Jason Han / Jackie, cont	501-851-6815	Bryant Superstop	Pulaski
1044	501-296-9625	501-296-9625	C	S	NV	4100 W Markham	Little Rock	72205	Hany Eid	501-240-6879	Markham Shell	Pulaski
1045	501-661-0942	n/a	C	CP	NV	3723 Cantrell	Little Rock	72202	Donnie Miller	501-472-5047	Hwy 10 Shell	Pulaski
1058	501-753-7475	n/a	C	S	NM	5919 Crystal Hill Road	NLR	72118	Majid Kamelli	501-690-5050	Crystal Hill Shell	Pulaski
1068	501-882-2323	n/a	C	S	NN	2415 W Center	Beebe	72012	David Stokes		Beebe Shell	Pulaski
1069	501-945-0507	n/a	C	S	NM	2522 Hwy 161	NLR	72117	Yeong or Sara Lee	501-773-8666	Shell Hope Mart	Pulaski
1075	501-565-3864	n/a	C	S	NV	2628 65th Street	Little Rock	72209	Charles Hwang	501-952-5983	65th Street Shell	Pulaski
1078	501-372-7822	n/a	C	S	NV	709 E Roosevelt	Little Rock	72206	Yop Ryan	501-912-3155	Roosevelt Shell	Pulaski
1079	501-455-3511	n/a	C	CP	NV	8900 Stagecoach Road	Little Rock	72209	Hany Eid	501-240-6879	Stagecoach Phillips 66	Pulaski
1080	501-562-6116	501-562-6116	C	S	NV	3200 S University	Little Rock	72205	John Kim	412-4612 / John	UALR Shell	Pulaski
1092	501-753-5600	501-851-6494	C	S	NM	4800 MacArthur Drive	NLR	72118	Yong Kim	501-920-3279	Mac Arthur Shell	Pulaski
1101	903-223-9676	903-223-9776	OP	RR	RR1TX,LLC	4101 North Kings Highway	Texarkana, TX	75503	Randall Brian	903-691-8873	Road Runner #1101	
1102	870-774-8055	870-774-8062	OP	RR	PP	5720 Four States Parkway	Texarkana, AR	71854	Elsie Washington	903-691-8105	Road Runner #1102	
1103	501-329-1809	501-329-1809	OP	RR	PP	801 Hogan Lane	Conway	72034	Bill Connell	501-269-2616	Road Runner #1103	
				SS		Superstop						
				CP		ConocoPhillips						
				S		Shell						
				pp		Petro Plus						
				V		Valero						
				Shm		Shamrock						
						BRAND						
				RR		Roadrunner						
				OP								

EXHIBIT 13

NOTICE OF OPT OUTS

UNITED STATES DISCTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation	:	No. 05-MD-01720 (JG)(JO)

I. PRELIMINARY STATEMENT REGARDING OPT-OUTS

The Notice of Settlement the class received regarding the Definitive Settlement Agreement ("Settlement Agreement") was confusing regarding the substantive rights of absent class members and whether these substantive rights would be impaired by the binding effect of a judgment entered in this case. As stated in the Class Notice and Settlement Agreement, businesses would release future claims because of the form of the release contained in the Settlement Agreement and notice plan. In particular, but not limited to: *Settlement Classes*, paragraphs 33, subparts g-h, and 68, subparts g-h of the Settlement Agreement waive future claims as published in the Notice of Settlement to the class.

All the businesses opting out by way of this notice of opt-out feel compelled to do so in an attempt to preserve future claims against Defendants involving Defendants' Rules. Both of the settlement classes described in the Notice of Settlement waive these future claims, but it is presently unclear whether this Court will approve that waiver. These potential Class Members do not believe a waiver of future claims is valid under either Rule 23(b)(2) or 23(b)(3). The businesses identified in this Notice are opting out in case the Court allows the waiver to remain a part of the Rule 23(b)(3) settlement. If the Court determines that the waiver of future claims made under Rule 23(b)(2) is invalid, these businesses would still sacrifice the right to bring future claims against Defendants by not opting out of the Rule 23(b)(3) class.

Given the uncertainty surrounding this settlement, the unclear and confusing class notice, and with no way of knowing what this Court will ultimately approve, these businesses feel forced to opt-out of the Rule 23(b)(3) class at this time to preserve their substantive rights and not be bound by a judgment entered in this case. However, depending upon the settlement structure ultimately sanctioned by this Court, the analysis surrounding the opt-out decision could change dramatically. If, for instance, the Court allows the waiver of future claims to remain a part of both the 23(b)(2) and 23(b)(3) releases – such that opting out of the Rule 23(b)(3) class will not, in any event, allow these businesses to seek future redress from Defendants under their Rules – these businesses may very well determine that it makes no sense to opt out of the Rule 23(b)(3) class. The same conclusion might follow should the Court ***disallow*** the relinquishment of future claims for both classes. In light of this confusing scenario, these businesses respectfully request that new notice be delivered to the class, with a new opportunity to opt-out or reverse an earlier decision to opt out, after the Court definitively passes upon the terms of the settlement and its binding effect on absent class members for both the 23(b)(2) and (b)(3) Settlement Classes as to future claims. Thus, in sum, the following businesses conditionally opt-out.

To repeat, the businesses identified in this notice are now opting out because they feel constrained to do so as the only possible way they might somehow rescue their ability to bring future claims against the Defendants.

II. OPT-OUTS

I, Thomas P. Thrash, Phillip Duncan and Jay Breakstone, attorneys for the following merchants, want to exclude them from the Cash Settlement Class of the settlement in the case called *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*:

- PPT Inc., d/b/a Graffiti's Restaurant – Little Rock, Arkansas

  Taxpayer ID Number: xxxx
  Business Locations: 7811 Cantrell Rd. #6
  Little Rock, AR 72227

  1000 West Second Street
  Little Rock, AR 72201

- Greenhaw's, Inc. – Little Rock, Arkansas

  Taxpayer ID Number: xxxx
  Business Locations: 10301 N. Rodney Parham Rd.
  Little Rock, AR 72227

- Don's Pharmacy, Inc. – Little Rock, Arkansas

  Taxpayer ID Number: xxxx
  Business Locations: 8609 W. Markham
  Little Rock, AR 72205

We are authorized to file opt-outs for exclusion from the Rule 23(b)(3) Settlement Class for the businesses identified in this Notice, and our personal information it as follows:

Name: Thomas P. Thrash, Esq.
Position: Attorney
Name of Merchants: See above
Phone No.: (501) 374-1058
Address: 1101 Garland Street
Little Rock, AR 72201

Name: Philip Duncan, Esq.
Position: Attorney
Name of Merchants: See above
Phone No.: (501) 228-7600
Address: 900 S. Shackleford, Suite 725
Little Rock, AR 72211

Name: Jay L.T. Breakstone, Esq.
Position: Attorney
Name of Merchants: See above
Phone No.: (516) 723-4620
Address: 6 Harbor Park Drive
Port Washington, NY 11050

Our position at the businesses that gives us authority to exclude them from the Cash Settlement Class is as follows: Legal counsel for all businesses opting out via this Notice. The telephone numbers for each Class Member is Counsel's telephone numbers above.

Respectfully Submitted,

s/ Jerrold S. Parker
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Jay L.T. Breakstone
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900 S. Shackleford, Suite 725
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phillip@duncanfirm.com
richard@duncanfirm.com

CERTIFICATE OF SERVICE

On this 28th day of May, the above and foregoing has been sent by United States mail to the following:

Payment Card Interchange Fee Settlement
P.O. Box 2530
Portland, OR 97208-2530

Alexandra S. Bernay
Bonny E. Sweeney
Robbins, Geller, Rudman & Dowd, LLP
655 W. Broadway, Suite 1900
San Diego, CA 92101

Wesley R. Powell
Wilkie, Farr & Gallagher, LLP
787 Seventh Ave.
New York, NY 10019

K. Craig Wildfang
Robins, Kaplan, Miller & Ciresi, LLP
2800 LaSalle Plaza
800 LaSalle Ave.
Minneapolis, MN 55402

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

Matthew A. Einstein
Arnold & Porter, LLP
555 Twelfth Street NW
Washington, DC 20004

Peter E. Greene
Skadden, Arps, Slate Meagher & Flom, LLP
4 Times Square
New York, NY 10036

s/ Jerrold S. Parker
Jerrold S. Parker

EXHIBIT 14

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x
IN RE PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION

MDL No. 1720 (JG)(JO)
UNITED STATES DISTRICT COURT
BROOKLYN, NEW YORK
----------x
September 12, 2013
9:30 A.M.

TRANSCRIPT OF FAIRNESS HEARING
BEFORE THE HONORABLE JOHN GLEESON,
UNITED STATES DISTRICT COURT JUDGE

A P P E A R A N C E S:

ROBINS, KAPLAN, MILLER & CIRESI, L.L.P.
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402-2015
BY: K. CRAIG WILDFANG, ESQ.

BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
BY: MICHAEL J. KANE, ESQ.
H. LADDIE MONTAGUE,JR., ESQ.
BART D. COHEN, ESQ.'s

ROBBINS GELLER RUDMAN & DOWD LLP
655 W Broadway, Suite 1900
San Diego, CA 92101
BY: BONNY E. SWEENEY, ESQ.

BEGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
BY: MERRILL DAVIDOFF, ESQ.
MICHAEL J. KANE, ESQ.
BART D. COHEN, ESQ.

MR. THRASH: Good afternoon, judge.

THE COURT: Good afternoon.

MR. THRASH: My name is Tom Thrash, I'm from Little Rock, Arkansas. I represent, along with Jay Breakstone and Parker Waichman, over 60 absent class members, 14 states, primarily located in the southern states: Arkansas, Mississippi, Alabama, Missouri, Texas, Oklahoma, Kansas. And judge, I'm going to be very brief.

The main concern that our clients have is understanding and interpreting the notice and the language and the breath, as it describes the breath of the release.

And the amount of damages that might be awarded under the (b)(3) class was not even an issue to our clients because of their struggle with understanding what the release was and understanding that language. And the huge ramification that we have with a future release that's this broad.

And so when they brought their concerns to me I went and looked at the notice, went and looked at the release. And based on my interpretation, which admittedly is a southern interpretation, the release language appeared to me to be so broad that it encompassed all future activities based on or related to the entire rule book or any similar rule that they may come up with in the future. And what does that mean?

The notice doesn't explain what all these rules

include, and we have no way of knowing what we're releasing. And, you know, it appears to my clients that any future activity related to any of their rules is released.

And based on that language, my advice to our clients was, you got to opt out. No matter how -- what the settlement payments are, the settlement awards and the recovery in the settlement, no matter how great they are it's not worth releasing future claims on MasterCard and Visa. But the problem was in the notice. As it's worded, there's really no right of opt out. I can opt out but I'm still in. I'm stuck with the broad release of the (b)(2) settlement no matter what I do.

So unless the court strikes down the broad release in the (b)(2) settlement, there's really no opt out in the (b)(3) settlement -- in the (b)(3) class.

And judge, think about the class members who did not opt out. Class members who did not opt out may have just taken no action because there's really no right to opt out. They can't get away from this release.

Opting out of the (b)(3) class isn't going to get them away from their release in the (b)(2), so why opt out? And given a real right of opt out, these class members may have elected to opt out. We don't know because they weren't given that right.

And we filed a conditional opt out for our clients

based on our understanding of this broad release. And it was conditional. If the court strikes down the broad release language in the (b)(2) class, we didn't want to be in the (b)(3) class in consenting to that release.

(Continued on the next page.)

MR. THRASHER: So if the Court strikes down the (b)(2), we didn't want to voluntarily be in the (b)(3). But if the Court strikes down the broad release in both the (b)(2) and the (b)(3) Class, then we may want to reconsider our opt-out. We may want to participate in the damages.

THE COURT: I understand.

MR. THRASHER: But as the notice stands today, there's really no valid right of opt-out that satisfies due process for the (b)(3) Class.

The notice also is defective in other ways. The notice misrepresents to the class members that they have -- that they can now surcharge their customers. But it doesn't tell them that if they accept American Express, or they live in one of the states that have barred or prohibited surcharges, they can't surcharge. So I have to tell my clients, no, you can't surcharge because of these reasons. That surcharge is no value to my clients.

So, your Honor, we submit to the Court that the (b)(2) Class is not designed to benefit the class messages at all. Its only there to give Visa and MasterCard immunity from future liability on all their rules and nobody can opt-out, not even future businesses who are not even class members and they have no -- didn't even give notice.

And so, in conclusion, your Honor, we respectfully ask the Court to strike down the release of future damages in

both the (b)(2) and (b)(3) Class and direct that new notice be provided to class members disclosing in plain language the terms of the release in providing a real opportunity to opt out; or, the Court could deny certification of the (b)(2) Class, or at least allow class members to opt-out of the (b)(2) Class. Either one of those would create a valid right of opt-out for the (b)(2) Class.

And, Judge, I thank you for allowing me to be heard.

THE COURT: Thank you have a good day.

How are we doing on Mr. Shinder's list?

MR. FURMAN: My name is Joshua Furman and I represent John Zimmerman who is a class member and an objector. I am last on the list and with the least of the parties in front of you.

There are a lot of very loud voices in this room coming from very big places, we're not one of them. My client is a sole proprietorship. He doesn't have billions in fees.

THE COURT: I understand.

MR. FURMAN: He doesn't have issues like AMEX where we're talking about antagonistic standing --

THE COURT: Tell me about the issues he does have.

MR. FURMAN: Your Honor, nowhere is the Court's duty under Rule 23 more pronounced. We join in the issue that you raised by Mr. Pence and Mr. Siegel at least Ill be very, very brief.

EXHIBIT 15

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
---------- X

IN RE PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION

05-md-1720 [JG] [JO]

---------- X

MEMORANDUM IN OPPOSITION TO PRELIMINARY APPROVAL OF DEFINITIVE CLASS ACTION SETTLEMENT AGREEMENT

INTRODUCTION

This memorandum is submitted in opposition to the application of the class plaintiffs for preliminary approval of the Definitive Class Action Settlement Agreement [*"Settlement Agreement"*]. The objectors opposing the Settlement Agreement in this memorandum are those retailers and merchants named in the Retailers & Merchants Objection to Proposed Class Settlement Agreement [Document 1653], filed on October 18, 2012 [*"R & M Objectors"*], and those retailers and merchants named in the Amended Retailers & Merchants' Objection to Proposed Class Settlement Agreement being filed concurrently with this Memorandum.

In its order, dated October 24, 2012 [Document 1668], the Court asked that objectors who did not believe that the Settlement Agreement satisfied the threshold requirements for preliminary approval set forth their opposition to such preliminary approval in writing. This memorandum is filed in response to that invitation.

Preliminary Statement

As the Court noted in its October 24th order, this case and its proposed Settlement Agreement have received considerable media attention. Document 1668 at 1. Not the least of this attention has been due to the large number of objectors, both named plaintiffs and otherwise, who have taken issue with the Settlement Agreement. Indeed, as the Court foresaw, this group of objectors continues to grow. *Id.* By way of comparison, the Court's approval of the settlement agreement in *In re Visa Check/Mastermoney Antitrust Litigation*, 297 F.Supp. 2d 503 (E.D.N.Y. 2003) [*Gleeson, J.*], while it involved some 5 million merchants, only had 18 merchant objectors. 297 F.Supp.2d at 409. This case and this Settlement Agreement are quite different. By way of example: (1) Release of future claims related to the swipe fee provides no relief to the class and gives immunity to Visa/Mastercard for future anticompetitive behavior; (2) an entire sub-class has withdrawn and objected from the proposed settlement agreement; (3) nine of the original nineteen class representatives have requested to withdraw and object to the proposed settlement; (4) the monetary relief is grossly disproportionate to the prospected trial damages of $300 billion dollars; (5) the proposed surcharge conflicts with the laws of at least nine states; (6) the surcharge relief forces the merchants to pass on an unlawful charge to its customers as a remedy; and (7) a material change has occurred since settlement because of the constant growing number of objectors.

While the Court is correct that there is a lower threshold for preliminary approval of proposed class action settlement than for final approval of the settlement, the

sheer number of objectors and the enormity of the proposed settlement in the case at bar makes preliminary approval an expedient way in which to narrow issues and ensure what is a continuing process, *i.e.*, that the objectors be empowered to render meaningful and knowing objections and that those objections be given due consideration.

THE SETTLEMENT AGREEMENT IS UNFAIR AND IS OBVIOUSLY DEFICIENT

Preliminary approval of a proposed settlement agreement is a two-step process. The first deals with the facial fairness of the agreement, while the second deals with the adequacy of the notice to be given to class members of the final approval hearing. *In re NASDAQ Market-Makers Antitrust Litigation*, 176 F.R.D. 99,102 (S.D.N.Y. 1997). "The Court first reviews the proposed terms of the settlement and makes a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms." *Nieves v. Community Chose Health Plan of Westchester, Inc.*, No. 08 CV 321 (VB), 2012 WL 857891, *4 (S.D.N.Y., Feb. 24, 2012). "Where the proposed settlement appears to be the product of serious, informed, non-collusive, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval, preliminary approval is granted. *In re NASDAQ Market-Makers Antitrust Litigation* , 176 F.R.D. at 102.

Therein lies the problem, identified by the M & R Objectors, with the Settlement Agreement. The proposed agreement appears to be obviously deficient with respect to its fairness, reasonableness and adequacy in not only its terms, but its effect on

the objectors and the American economic system. In exchange for very little actual relief for the 8 year class period, nothing is given in the Settlement Agreement, which changes or alters the market behavior of the defendants. Further, the Settlement Agreement gives Visa/Mastercard a shield for unlawful and anticompetitive conduct after a brief respite of 8 months. The remedy posited by the Settlement Agreement merely passes on Visa/Mastercard's anticompetitive and illegal charges to consumers. If the essence of the preliminary approval process is "a preliminary evaluation of the fairness of the settlement," then a proposed settlement agreement which is "obviously deficient" cannot be approved. *Mazon v. Wells Fargo Bank, N.A.*, Civil No. 10-700 (RBK/KMW), 2011 WL 6257149, *1 (D.N.J. Dec. 14, 2011).

The Objectors Are in Need of Access to Discovery

Notwithstanding the Court's reliance on the sophistication of objectors' counsel or their familiarity with the terms of the Settlement Agreement, the M & R Objectors can only take the Settlement Agreement at face value, for without access to the discovery already obtained by the class plaintiffs[1] and sitting in the files of their counsel, the M & R Objectors can merely guess at the facts and figures which support the fairness and reasonableness of the Settlement Agreement. While the Court has denied the formation of an Objector's Committee to review this discovery, that decision does not afford objectors, either at this stage or the final approval stage, of discovery for which they

[1]This is not a request for *additional* discovery, but for discovery already obtained; discovery which apparently led to the settlement contained in the Settlement Agreement. *Compare Vaughn v. American Honda Motor Co., Inc.*, Civil Action No. 2:04-CV-142 (TJW), 2007 WL 2220924, *2 (E.D.Texas, July 31, 2007).

will ultimately be assessed via counsel fees. A greater problem is that delaying access to this discovery until a later time, *i.e.*, at the final fairness hearing, makes such access too late to be useful. *See* Jack B. Weinstein and Karin S. Schwartz, *Notes From the Cave: Some Problems of Judges in Dealing With Class Action Settlements,* 163 F.R.D. 369, 377 1995).[2]

With this in mind, the settlement review process can be open to ways to evaluate merits without full blown litigation, where discovery on specific focused points allows all parties an opportunity to fully probe the background respecting the monetary relief and shorter injunctive relief proposed by the Settlement Agreement; an agreement which purports to bind all current merchant and future generations of merchants. Objectors respectfully seek:

- Access to necessary financial records to evaluate the damages component;
- Access to necessary financial documents for cost analysis;
- Analysis of documents for determining transparency and disclosure of fee process imposed; and
- Analysis of documents for determining change in marketplace as a result of injunctive relief.

This type of large scale settlement opens up an opportunity for the Court to allow the parties to exchange information outside of a hearing or even at a mediated conference table thus ensuring the effectiveness of the relief, particularly as to objecting merchants, retailers, plaintiffs and the entire objecting sub-class.

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[2]The Court's decision to permit oral argument of this motion can be viewed as a logical extension of Judge Weinstein's endorsement of "preliminary approval conferences" among the parties, to objectors. 163 F.R.D. at 380.

OBJECTION No. 1

THE RELEASE IS OVERBROAD

The release proposed in the Settlement Agreement would bind class members and future generations. It is overbroad on its face and constitutionally suspect. The class period begins on January 1, 2004. As part of this global settlement, class members will be bound by an overarching release for current and future claims and litigation. Class members will have no recourse against the Settlement Released Defendants for future wrongful conduct concerning the imposition of interchange fees that are artificially inflated because of the lack of competition in the marketplace. By virtue of this short injunctive relief coupled with an excessively broad release, defendants have ensured themselves immunity from future prosecution in exchange for, in reality, two-three months worth of refunds and eight months of injunctive relief. There will be no change in the marketplace at all. This is unacceptable relief for R&M Objectors.

OBJECTION No. 2

CLASS RELIEF IS ILLUSORY OR INADEQUATE ON ITS FACE

The proposed relief for class members is illusory and facially inadequate. As part of this settlement, class members will receive two-three months of refund and eight months of injunctive relief. There is no permanent stop or cessation of the wrongful conduct, nor any change in the marketplace. The anti-competitive system will stay in place.

Further, the "surcharge" or "checkout fee" proposed in the settlement agreement is inadequate relief for several reasons:

(i) First, it pits retailers and merchants against consumers for the defendants' unlawful price-fixing – consumers do not like surcharges or additional fees;

(ii) Second, several states prohibit surcharges, thus, the relief is not class-wide and is illusory;

(iii) Third, the surcharge or checkout fee will be very difficult to administer for the various payment cards, requiring the retailer and merchant to have to understand and explain to the customer why the fee is imposed; disclosing the need for the fee, which is unduly burdensome on the retailer and merchant;

(iv) The differences in rates for the types of payment cards, debit and credit is very confusing, not transparent and difficult to explain to consumers. Further, it gives the defendants incentives to engage in wrongful price-fixing in the future because the relief proposed is simply to "pass-it-on." This type of relief is illusory, inadequate and misguided.

OBJECTION No. 3

THE ANTI-COMPETITIVE PAYMENT CARD INTERCHANGE FEE MARKEPLACE STAYS THE SAME

The R&M Objectors want a competitive payment card marketplace. The Settlement Agreement does not change the marketplace as is. It merely places a fee Band-Aid on the problem, but leaves the broken, anti-competitive system in place with an overbroad release, after an eight month hiatus, to protect the current system an.

The interchange fee is generally known to have become a "revenue enhancer" for the defendants since 2004. The interchange fees have no real basis in cost for the continued lock-step increase and are susceptible to continued anti-competitive conduct. After eight months, there is no deterrent to defendants increasing the interchange fees and maximizing their profits.

CONCLUSION

For an agreement which purports to settle the largest piece of antitrust litigation in the history of the United States, the Settlement Agreement has attracted an unusually large number of objectors from all walks of mercantile life. These include named plaintiffs, mercantile groups, commentators, and individual objectors such as the M & R Objectors here. Something is afoot, and the Court should expand the ability of these objectors to discover what that is. Facially deficient, the Settlement Agreement seems neither fair nor reasonable. It provides defendants with a "golden ticket" to engage in some of the same conduct complained of in the future; it provides insufficient compensation for past wrongful acts; and it fails to provide any meaningful operational improvements, while endangering the national economy. The Settlement Agreement should not receive preliminary approval.

Respectfully submitted,

s/ Jerrold Parker
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Port Washington, NY 11050

and

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and

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Little Rock, Arkansas 72211

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically on November 5, 2012 with the Clerk of the Court for the U.S. District Court for the Eastern District of New York by using the CM/ECF system, which will send notification of such filing to all CM/ECF participants.

I further certify that a copy of the foregoing was served on November 1, 2012, by electronic mail upon:

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EXHIBIT 16

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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

PAGE PROOF BRIEF FOR APPELLANT RETAILERS AND MERCHANTS OBJECTORS

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JURISDICTIONAL STATEMENT

The R&M Objectors objected to this class action settlement (the "Settlement") in the district court (JA _____, ____ (DE 2281, 2421)), and they timely appealed from the Settlement's approval (JA ____, ____ (DE 6175, 6263)).

The R&M Objectors otherwise adopt the Jurisdictional Statement from the Joint Merchant Appellants' Brief (the "JMA Brief").

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. The Notice Of The Settlement Received By Class Members Was Constitutionally Infirm.

A. Because the structure of the Settlement makes it impossible for Class Members to understand how the decision to opt-out will affect their claims for future damages, Class Members deserve new notice and another opportunity to opt-out, in order to allow them to make an informed, intelligent decision of whether to participate in the Settlement.

B. Where the plain terms of the Notice and the Settlement documents describing the release of future claims contradict the Named Parties' representations made at the Fairness Hearing regarding the breadth of the Settlement's Releases, Class Members are entitled to new notice clarifying and accurately describing the Releases and Settlement.

C. The Notice inaccurately described the benefits of the Settlement to the Class, thereby depriving Class Members of the ability to make informed, intelligent decisions of whether to participate in or opt-out of the 23(b)(3) Class, in violation of their constitutional due process rights

II. The Substantive Terms Of The Settlement Are Not "Fair, Reasonable, And Adequate," Where Essential "Benefits" It Supposes To Confer Upon The Class Are Worthless To Many, If Not Most, Class Members.

STATEMENT OF THE CASE

The R&M Objectors are a broad-based, diverse group of 65 separate business entities operating more than 150 retail outlets in 13 states across the country. All of the R&M Objectors pay interchange, or "swipe," fees when they accept payment by credit card for goods sold to consumers. They all ask this Court to invalidate the oppressive and onerous class action Settlement to which they objected before its approval by Judge John Gleeson of the United States District Court for the Eastern District of New York. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-MD-1720 (JG) (JO), 2013 WL 6510737 (E.D.N.Y. Dec. 13, 2013).

As convincingly set forth in the JMA Brief and the industry brief on the fairness of the Settlement filed by the Retail Industry Leaders Association ("RILA") and the National Retail Federation ("NRF"), the substantive terms of this Settlement fall short not only of constitutional requirements, but also of the baseline procedural command that any compromise of claims binding absentee class members be "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The R&M Objectors wholeheartedly join in the JMA Brief, along with the brief filed by RILA and the NRF.

The R&M Objectors write separately, however, to emphasize the inadequacy of the Notice they received of the Settlement and to highlight the due process

shortcomings of a Settlement featuring benefits that were falsely represented in the Notice to Class Members and are of ***no value*** to many of them.

I. The Deficient Notice

Established law teaches that the Settlement is invalid given the failure of its Notice to (i) provide absent Class Members with their constitutional right to opt-out of classes involving monetary damages, (ii) adequately describe the breadth of applicable releases, and (iii) accurately inform Class Members of what the Settlement achieves.

A. The Notice Did Not Provide Class Members With Their Constitutional Right To Opt-Out Of Classes Affecting Claims For Monetary Damages

Even though the U.S. Constitution demands that absentee class members receive an opportunity to make an informed decision of whether to exclude themselves from a settlement that bargains away their claims for monetary damages, the Notice in this litigation did not – as a practical matter – afford them that right. This Brief demonstrates that a Class Member attempting to decrypt the deficient Notice here could not have made a rational, informed decision on whether to exercise "opt-out" rights, considering that the underlying Settlement made any opt-out election pointless when it purported to release all future damages claims on behalf of both of the substantially overlapping classes certified under, respectively,

Rule 23(b)(2) and 23(b)(3) of the Federal Rule of Civil Procedure. (JA ____ (Notice ¶¶ 25-26, at 18-27).)

The release of future claims is by far the most significant feature of this deal to the R&M Objectors,[1] and each of them would have elected ***not*** to participate in this Settlement if that could have preserved the ability to bring a future claim for damages. Significantly, though, the Notice informed them that their right to opt-out and avoid the release of future claims only extended to the Rule 23(b)(3) class, with the release of future claims contained in the Rule 23(b)(2) class presented as "mandatory" with no right to opt-out. (JA __ (Notice ¶¶ 12-13, at 11-12).)

Given this scenario, which renders meaningless any decision to opt-out, it is easy to see why some R&M objectors decided to remain a part of the 23(b)(3) class, on the theory that they may as well collect some compensation – however nominal – for their sacrifice of substantial rights. Others elected to withdraw from the (b)(3) class, in the hope that the courts would eventually recognize the constitutional infirmities in the purported release of future damages claims under Rule 23(b)(2), and not wanting to have consented to the release of future claims by not opting out of the (b)(3) class should that judicial relief occur. Basically, the Notice, as drafted, placed the R&M Objectors, and all Class Members, in an impossible position, unable in the circumstances to make any rational

[1] In light of the amount and content of objections to this Settlement, it appears that the same is true for a significant portion, if not a majority, of Class Members.

determination as to how to best protect their rights. (*See, e.g.*, JA ____ (DE 2422, Notice of Opt-Outs, at 1).)

B. The Notice Did Not Adequately Describe The Breadth Of Its Releases

The express wording of the Releases, as reproduced in the Notice (JA _____ (Notice ¶¶ 25-26, at 18-27)), claims to bar all future claims regarding "*any Rule* of any Visa Defendant or MasterCard Defendant in effect in the United States as of the date of the Court's entry of the Class Settlement Preliminary Approval Order" or "any . . . substantially similar . . . Rule." (SPA 135-36, 171 (Settlement Agreement ¶¶ 33(g), (h); 68(g), (h) (emphasis added)).) The R&M Objectors, as with any reasonable Class Member, took this language to mean what it says: Based on the terms of the Settlement, merchants would be forever prohibited from challenging any of Defendants' voluminous rules then in effect and any similar rules adopted in the future.

At the Final Approval Hearing, though, counsel advocating the Settlement vigorously denied that the Releases are so sweeping. (*See, e.g.*, JA ___ (Tr. Final Approval Hr'g 33-36).) As one attorney for Defendants put it, the notion that the Releases "cover every rule . . . in the Master Card rule book" is just "wrong." (JA _ (Tr. Final Approval Hr'g 36 ll.10-11).) Taking him at his word, and assuming that the Releases are not as vast as their own language suggests, Class Members are entitled to new notice explaining the correct terms of the Settlement, and allowing

Class Members to make an informed decision on whether to opt-out or stay in the classes.

C. The Notice Improperly Assumed Credit For Independent Occurrences

The first page of the Notice summarizes the terms of the injunctive relief for the (b)(2) class:

- **The settlement will also require Visa and MasterCard to change some rules for merchants who accept their cards, including to allow merchants to do the following:**
  - **Charge customers an extra fee if they pay with Visa or MasterCard credit cards,**
  - **Offer discounts to customers who pay with payment forms less expensive than Visa or MasterCard credit or debit cards,**
  - **Accept Visa or MasterCard cards at fewer than all of the merchant's trade names or banners, and**
  - **Form "buying groups" that meet certain criteria to negotiate with Visa and MasterCard.**

(JA ___ (DE 1656-1, Notice, Sett. F-1).)

The publication notice contained the same summary:

OTHER BENEFITS FOR MERCHANTS

Merchants will benefit from changes to certain MasterCard and Visa rules, which will allow merchants to, among other things:

- Charge customers an extra fee if they pay with Visa or MasterCard credit cards,
- Offer discounts to customers who do not pay with Visa or MasterCard credit or debit cards, and
- Form buying groups that meet certain criteria to negotiate with Visa and MasterCard.

Merchants that operate multiple businesses under different trade names or banners will also be able to accept Visa or MasterCard at fewer than all of the merchant's trade names and banners.

(JA__ (DE 1656-1, F1-2).)

With one exception, each of these claims was false.

II. Because Critical Provisions Of The Settlement Are Unavailable, And Therefore Worthless, To Many Class Members, The Settlement Is Not "Fair, Reasonable, and Adequate"

Aside from the crippling flaws in the Notice, the terms of the Settlement reveal that it is anything but "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The many reasons advanced in the JMA Brief make it plain that the Settlement fails this basic standard mandated by Rule 23, but the unfairness, unreasonableness, and inadequacy of the Settlement is especially apparent when its provisions are applied to Class Members such as the Oklahoma enterprise known

as 105 Degrees, LLC ("105 Degrees") and the northwest Arkansas restaurants doing business as Whole Hog Barbecue ("Whole Hog").[2]

As shown by the succeeding portions of this Brief, neither of these businesses is in a position to benefit from key components of the Settlement, yet each is required to relinquish valuable rights in return for others that do not apply to them and many other Class Members. The district court recognized that scores of Class Members are in this same predicament (SPA 38-41 (Opinion, 2013 WL 6510737, at *18-20)), but the court nonetheless ratified a Settlement lacking in consideration to many Class Members. The R&M Objectors respectfully submit that the ability of select Class Members to fully enjoy all aspects of the Settlement, while many of their peers have no opportunity to share in the same relief, destroys the cohesion necessary for the certification of a settlement class under Rule 23(b)(2).

In the final analysis, the JMA Brief establishes that the ostensible release of damages claims by the Rule 23(b)(2) settlement class cannot stand, *see Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2559 (2011) ("[I]ndividualized monetary claims belong in Rule 23(b)(3)."), and the release of future antitrust causes of action by its Rule 23(b)(3) counterpart is equally as tenuous, *see Minn. Mining & Mfg. Co. v. Graham-Field, Inc.*, No. 96-CV-3839 (MBM), 1997 WL 166497, at *3

[2] The Grady Corporation and The Grady Corporation II operate, respectively, as Whole Hog Barbecue in the cities of Bentonville and Fayetteville, Arkansas.

(S.D.N.Y. Apr. 9, 1997) ("[A] prospective waiver of an antitrust claim violates public policy."). Should this Court undo one, or both, of these releases, it would totally reshape Class Members' analysis of whether or not to exclude themselves from the 23(b)(3) class. Moreover, because the Settlement extends its benefits to only certain Class Members, while leaving others out in the cold, it does not provide the "uniform remedy" essential to the approval of a settlement under Rule 23(b)(2).

For these and other reasons addressed in this Brief, the R&M Objectors respectfully request that this Court reverse the district court's approval of this Settlement, remanding for further proceedings to include, at minimum, the issuance of a new notice clearly and accurately explaining the settlement and the scope of any releases.

SUMMARY OF THE ARGUMENT

The Settlement and its Notice approved by the district court violated due process rights granted by the U.S. Constitution by releasing Class Members' ongoing and future damages claims without giving them an opportunity to opt-out of the Rule 23(b)(2) class.

Although the Notice did inform Class Members that they had an ability to opt-out of the class certified under Rule 23(b)(3), the Notice at the same time

advised that the Rule 23(b)(2) class – which also relinquished ongoing and future damages claims – offered no opt-out rights and was "mandatory." The structure of the Settlement therefore conflicts with the Supreme Court's instruction that "individualized monetary claims belong in Rule 23(b)(3)," *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2341, 2558 (2011), and the Notice made it impossible for Class Members to make an informed and intelligent decision about whether to opt-out.

If it is the case that the Settlement's proponents accurately described the scope of the Releases at oral argument on final approval, the Notice did not accurately convey to Class Members the scope of the Releases being granted on their behalf. Moreover, the Notice incorrectly led Class Members to believe that approval of the Settlement would produce certain benefits when in fact those benefits already existed. This false and inaccurate description of the Settlement deprived Class Members of an opportunity to make an intelligent and informed decision to opt-out or stay in the class. Furthermore, the classes underlying the Settlement lacked the cohesion necessary for certification, in that key benefits generated by the Settlement could not be used by – and were therefore worthless to – many Class Members.

For all these reasons, along with others described in the JMA Brief, and in the RILA/NRF brief, the R&M Objectors respectfully request that this Court reverse the district court's certification of settlement classes under Rule 23(b)(2)

and (b)(3), and/or order the issuance of new Notice providing Class Members an effective opportunity to opt-out of classes involving claims for and/or releases of monetary damages, and which understandably and accurately describes the terms of the Settlement and the breadth of the Releases.

ARGUMENT

I. Standard Of Review

The review of a mandatory, settlement-only class – like the classes at issue here – should be searching. The Supreme Court has required this by instructing that a district court must act as a fiduciary for the class when applying ***heightened scrutiny*** to evaluate the threshold class certification question for a class action resolved by settlement. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 848-49 (1999). "A court can endorse a settlement only if 'the compromise is fair, reasonable, and adequate.'" *In re Masters Mates & Pilots Pension Plan & IRAP Litig.*, 957 F.2d 1020, 1026 (2d. Cir. 1992) (quoting *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982) (Friendly, J.)). This Court has further observed that "where the rights of one who is not a party to a settlement are at stake, the fairness of the settlement to the settling parties is not enough to earn the judicial stamp of approval." *Id.*

While a district court generally has discretion in deciding whether to approve a settlement, this Court reviews the district court's decision de novo where

an appellant's challenge to the authority of the district court to approve the settlement raises novel issues of law. *In re Masters*, 957 F.2d at 1026; *Gerber v. MTC Elec. Tech. Co.*, 329 F.3d 297, 302 (2d Cir. 2003) (Sotomayor, C.J.); *Weinberger*, 698 F.2d at 73. Moreover, "[a] district court 'abuses' or 'exceeds' the discretion accorded to it when (1) its decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding, or (2) its decision – though not necessarily the product of a legal error or a clearly erroneous factual finding – cannot be located within the range of permissible decisions." *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 169 (2d Cir. 2001).

In the end, a district court must separate the class certification inquiry from its consideration of the overall fairness of the settlement to avoid any "gestalt judgment or overarching impression of the settlement's fairness." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 621 (1997).

II. The Notice Of The Settlement Received By Class Members Was Constitutionally Infirm

A. Because the structure of the Settlement makes it impossible for Class Members to understand how the decision to opt-out will affect their claims for future damages, Class Members deserve new notice and another opportunity to opt-out, in order to allow them to make an informed, intelligent decision of whether to participate in the Settlement

The United States Supreme Court has construed Rule 23(b)(3) to guarantee that "each class member shall be advised that he has the right to exclude himself

from the action on request." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 154, 173 (1974). The Court has further held that the Constitution extends this fundamental right to "opt-out" to any class action affecting claims for money damages. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2341, 2558-59 (2011) (regarding the ability to opt-out as mandatory "in the context of a class action predominately for money damages," and acknowledging a "serious possibility" that the opt-out right is required even "where the monetary claims do not predominate"); *cf. Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992) (requiring "minimal due process . . . [i]n order to bind an absent plaintiff concerning a claim for money damages"), *cert. dismissed*, 511 U.S. 117 (1994). As such, when it comes to a class action settlement touching upon class members' individual claims for monetary relief, "due process requires *at a minimum* that an absent plaintiff be provided with an opportunity to remove himself from the class." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (emphasis added).

The R&M Objectors, like all Class Members, were deprived of this most basic due process protection by the settlement, for they received no opportunity to opt-out of releases purporting to relinquish their right to bring future claims for money damages. *Cf. Dukes*, 131 S. Ct. at 2558-2559; *Shutts*, 472 U.S. at 812. The wholesale elimination of ongoing and future monetary claims by the (b)(3) and (b)(2) classes was the most important, and offensive, attribute of this settlement to

the R&M Objectors, but they were given no right to opt-out of the Settlement containing the release of future monetary claims.

Even if Class Members opted out of the class certified under Rule 23(b)(3), they would still be stuck with the objectionable release by virtue of the settlement engineered on behalf of the "mandatory" 23(b)(2) class. With no way to avoid the only part of the Settlement that mattered to them, many Class Members who otherwise would have opted out undoubtedly did not do so because the effort would have been pointless. The exercise of their constitutional right to opt-out would have offered Class Members no relief from the oppressive release, so why bother? After all, if there is no way to prevent the release of future monetary claims, there is little reason to reject whatever meager reparations were available to individual Class Members under the 23(b)(3) settlement.

On the other hand, some of the millions of Class Members were assuredly aware of the Supreme Court's recent admonition that "individualized monetary claims belong in Rule 23(b)(3)," *Dukes*, 131 S. Ct. at 2558, and those Class Members may have opted out of the (b)(3) class on the expectation that a court would not allow a (b)(2) class to release ongoing and future monetary damages. If that occurs, these Class Members did not want to have voluntarily consented to be in a (b)(3) class containing a release of future monetary damages.

What is more, the entire analysis changes if the release of future monetary damages in the (b)(2) class is disallowed. The Joint Merchant Appellants' Brief has quite persuasively shown that the release of ongoing and future monetary damages claims for the 23(b)(2) class violated the Constitution, *see Dukes*, 131 S. Ct. at 2558 ("[W]e think it clear that individualized monetary claims belong in Rule 23(b)(3)."), and this Court's adherence to that principle will totally reshape Class Members' evaluation of whether they should opt out of the Settlement. In such a scenario, which would allow a Class Member to truly preserve future damages claims by opting out of the 23(b)(3) class – *without* being forced to accept the same outcome by way of 23(b)(2) – Class Members may very well decide to opt out even though they did not do so before.

The decisional process changes yet again should this Court invalidate the future damages releases under *both* 23(b)(2) and 23(b)(3), which is very possible. *See Minn. Mining & Mfg. Co. v. Graham-Field, Inc.*, No. 96-CV-3839 (MBM), 1997 WL 166497, at *3 (S.D.N.Y. Apr. 9, 1997) ("[A] prospective waiver of an antitrust claim violates public policy."). In that instance, once the prospect of losing the right to bring future anti-trust claims against the Defendants has been removed from the equation, the same Class Member might determine that it makes sense to remain a part of the 23(b)(3) class and receive the settlement payment for

damages arising out of Defendants' past conduct.[3] (*See, e.g.*, JA ____ (ECF No. 2473 ¶ 10, at 3 (Objection of The Wendy's Company (stating that the "calculation concerning the value of opting out may have been different had we been permitted to challenge the ongoing imposition of interchange on Wendy's, as the going forward implications of this continuing damage is more important to our company than past damages")))).)

In the final analysis, the critical point is not how any particular Class Member may have assessed the situation, but that the Notice of settlement, as fashioned, made it impossible for anyone to make an "informed decision[] on whether . . . to . . . opt out of the class." *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 180 (3d Cir. 2013). In similar circumstances, Judge Posner was recently unimpressed that notice of a class action "provoked few objections" given that the named parties had crafted it so that "it was not intended to; *it was incomplete and misleading*." *Eubank v. Pella Corp.*, Nos. 13-2091, -2133, -2136, 2162, 2202, 2014 WL 2444388, at *11 (7th Cir. June 2, 2014) (emphasis added). The same is true here: The Notice sent to Class Members "was not neutral and it did not provide a truthful basis for deciding whether to opt out." *Id.*

[3] It is for these very reasons, with the import of their opt-outs fluctuating depending upon the courts' treatment of the releases of future damages claims, that the R&M Objectors submitted "conditional" opt-outs reserving the right to reconsider the decision as appropriate upon the outcome of the Courts' decision on the applicability of the release of future damages claims. (*See* JA _____ (DE 2422)).

The R&M Objectors are confident that this Court will vindicate their due process rights in this appeal – much as the Seventh Circuit did for the class before it in *Eubank* – redefining the scope of the settlement of future claims to remove the release of future damages claims from either, or both, settlement classes. After this Court issues its opinion bringing clarity to this unresolved issue, the Class Members are entitled to new notice of the settlement advising them of the resolution of the issues surrounding the release of future damage claims and the extent of their right to opt-out of the Settlement. *See In re Baby Prods Antitrust Litig.*, 708 F.3d 163, 180 (3d Cir. 2013); *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1105 (5th Cir. 1977) (insisting that notice "contain information that a reasonable person would consider to be material in making an informed, intelligent decision of whether to opt out or remain a member of the class").

B. Where the plain terms of the Notice and the Settlement documents describing the release of future claims contradict with the Named Parties' representations made at the Fairness Hearing regarding the breadth of the Settlement's Releases, Class Members are entitled to new notice clarifying and accurately describing the Releases and Settlement

The Notice sent to Class Members contained copies of the Releases included as part of the settlement, and those paragraphs purported to protect the Defendants from any future causes of action related to "the continued imposition of or adherence to [or conduct regarding] *any Rule* of any Visa Defendant or MasterCard Defendant in effect in the United States as of the date of the Court's

entry of the Class Settlement Preliminary Approval Order" or "any . . . substantially similar . . . Rule." (SPA 135-36, 171 (Settlement Agreement ¶¶ 33(g), (h); 68(g), (h) (emphasis added)).) A plain reading of this language informs Class Members that the proposed settlement bars a future challenge to "any" of the thousands of "Rule[s]" currently imposed by Defendants and any substantially similar ruled enacted in the future.[4] This reasonable interpretation, however, directly contradicts the repeated assurances of Class Counsel at the Fairness Hearing that the releases do not, in fact, extend to "any Rule" or substantially similar future rule under which Class Members operate. (*See, e.g.*, JA _____ (Tr. Final Approval Hr'g 33-36).).

It is critical that any class notice be in an "understandable format," 7AA Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1787, at 511-12 (3d ed. 2005), and the affirmations of Class Counsel show that the Notice here violates that cardinal principle. If the releases cover something less than "any Rule" now in place, the Class Members must receive new notice explaining how this is so, and Class Members must have a right to reconsider their decisions to opt-out of what was, on its face, an overly broad

[4] The Releases not only covered *all* of Defendants current Rules, but also any future rules that are "substantially similar" to any existing Rules. (*E.g.*, Settlement Agreement ¶ 33(h).) Because Class Members cannot possibly know what rules Defendants may enact in the future, they are at a loss to determine the full extent of the Releases, and the future claims they propose to prohibit.

release. This clarification is particularly essential given the reality that, in any future proceeding, Defendants are certain to argue for the broadest possible construction of the term, "any Rule" or "substantially similar" rule.

C. The Notice inaccurately described the benefits of the Settlement to the Class, thereby depriving Class Members of the ability to make informed, intelligent decisions of whether to participate in or opt-out of the 23(b)(3) Class, in violation of their constitutional due process rights

1. The Notice Contained Numerous False Claims

With the following representation appearing on its first page, the Notice falsely summarized the benefits of the Settlement:

> **The settlement will also require Visa and MasterCard to change some rules for merchants who accept their cards, including to allow merchants to do the following:**
>
> - **Charge customers an extra fee if they pay with Visa or MasterCard credit cards,**
> - **Offer discounts to customers who pay with payment forms less expensive than Visa or MasterCard credit or debit cards,**
> - **Accept Visa or MasterCard cards at fewer than all of the merchant's trade names or banners, and**
> - **Form "buying groups" that meet certain criteria to negotiate with Visa and MasterCard.**

(JA __ (Notice at 1).) That the Settlement is responsible for these "change[s]" to various "rules" is repeated in the body of the Notice, in answer to the question,

"What do the members of the Rule Changes Settlement Class Get?" (JA _____ (Notice at F-9).)[5] In actuality, although the Notice states that the Settlement "will require" Visa and MasterCard to "change some rules . . . to allow merchants" to engage in these practices, merchants were already allowed to engage in all of them, except for surcharging, before the Settlement.

Most significantly, in 2010, "Visa and MasterCard . . . agreed to modify [their] 'no discount' and 'no discrimination' rules as part of the settlement of a lawsuit brought by the Department of Justice and certain state attorneys general" – not because of ***this*** Settlement. (JA __ (DE 1551 at 18); SPA 139-40, 153 (Sett. ¶¶ 40, 53); JA _____ (DE 1656-1 at J-5).)

The false claim that the Settlement empowered merchants to discount for cheaper brands when, in fact, the DOJ provided that relief years earlier is far from the only misstatement in the Notice. As another example, the Settlement purports to "require Visa and MasterCard to change some rules . . . to allow merchants to . . . [a]ccept Visa or MasterCard cards at fewer than all of the merchant's trade names

[5] The Notice states that, "[i]f the Court approves the settlement, Visa and MasterCard will make changes to their rules and practices . . ." and these "changes will benefit the Rule Changes Settlement Class." (JA ___ (Notice at F-9).) In addition to the "changes" outlined on the first page of the Notice, this section includes a reference to the "$10 Minimum Rule" – a rule which allows merchants to set up to a $10 minimum purchase for Visa and MasterCard credit cards that was mandated by the Durbin Amendment, not the Settlement. *See* 15 U.S.C. § 1693o-2(b)(3) (prohibiting limitations on credit card minimums up to $10, provided the minimums do not differentiate between card network or issuing bank).

or banners" after preliminary approval, but that is another misstatement because Visa and MasterCard did not need to make ***any*** such rule changes inasmuch as the practice was not prohibited by their rules.[6]

The same was true for "buying groups." After obtaining preliminary approval of the proposed settlement – and sending out the Notice touting group buying benefits as a beneficial rules "change" the Settlement "will require" – Class Counsel admitted in final approval papers that "Visa and MasterCard rules did not previously prohibit merchants from engaging in joint negotiations." (JA ___ (DE 2111-1 at 39).) As with the "all outlets" rule, in the end, Visa and MasterCard did not find it necessary to change any rules to permit group buying.[7]

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[6] *See* JA ___ (Shinder Decl. Ex. 76 (containing no modifications to any "all outlets" rule)); JA _ (Shinder Decl. Ex. 77 (setting forth surcharging rule changes but including "all outlets" provision under "Additional MasterCard Rules and Policies Impacted by Settlement")); JA ____ (Shinder Decl. Ex. 78 (same, including trade name or banner provision under "Additional Practices and Policies")).

[7] *See* JA _____ (Shinder Decl. Ex. 76 (containing no new rules on buying groups)); JA _____ (Shinder Decl. Ex. 77 (setting forth surcharging rules changes but including group buying under "Additional MasterCard Rules and Policies Impacted by the Settlement"); JA ____ (Shinder Decl. Ex. 78 (same, including group buying under "Additional Practices and Policies").

2. The False Claims In The Notice Violated Due Process

The Supreme Court has made it clear that notice of an impending class action settlement performs a critical due process function. *See Amchem*, 521 U.S. at 628 (explaining that notice must be "sufficient under the Constitution and Rule 23"); *Ortiz*, 527 U.S. at 847-48 ("[D]ue process require[s] that the [absent class] member 'receive notice plus an opportunity to be heard and participate in the litigation,' and . . . that 'at a minimum . . . an absent plaintiff [must] be provided with an opportunity to remove himself from the class.'" (quoting *Shutts*, 472 U.S. at 812)).

To accord with due process, the information and notice must be objective, neutral and accurate to ensure that absent class members make informed decisions based on reliable information. *See Eubank*, 2014 WL 2444388, at *11 (excoriating notice that "was not neutral and . . . did not provide a truthful basis for deciding whether to opt out"); *Vasalle v. Midland Funding LLC*, 708 F.3d 747, 759 n.2 (6th Cir. 2013) (right to opt out "illusory . . . when the class notice form failed to inform [unnamed class members] of their most significant ground of objection"); *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 759 (E.D.N.Y. 1984) ("Notice must be 'scrupulously neutral' . . . ."). [8] A misleading or inaccurate notice calls

[8] *See also* 7B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1797.6, at 213 (3d ed. 2005) ("[P]roposed notice that is incomplete or erroneous or that fails to apprise the absent class members of their

into question the integrity of the entire settlement, mandating disapproval. *Vasalle*, 708 F.3d at 759 (reversing approval of settlement where notice failed to satisfy due process); *In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 198-99 (5th Cir. 2010) (rejecting misleading notice).

The Notice in this case failed to meet these standards. The Notice falsely attributed certain rules changes – including, most importantly, the no-discounting rule – to the Settlement, when those changes predated the Settlement. Such false claims cannot be considered "scrupulously neutral" or "accurate."

The problems created by the Notice are aggravated dramatically by the fact that the false claim about discounting was designed to obscure one of the central reasons why a mandatory class should never have been certified – that the surcharging relief at the heart of the Settlement was unavailable to a substantial portion of the class. Unlike surcharging, which is banned by at least 10 states, its close cousin, discounting, is permitted nationwide.[9] That being so, the false claim

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rights . . . [is] ineffective to ensure due process."); 3 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 8:39, at 282 (requiring clarity and objectivity); *id.* § 8:32, at 261 (requiring "accuracy and completeness"); 5 James Wm. Moore et al., *Moore's Federal Practice* § 23.162[3] (3d. ed. 2013) ("The right to object is meaningless if the class members lack information about the terms of the proposed settlement . . . .").

[9] While some economists have called out the close similarity between offering discounts for cheaper forms of payment and surcharging the more expensive tender types, the practices, and their impact on consumer behavior, are different. The Antitrust Division, for example, chose to challenge Visa's and MasterCard's rules against discounting and not their prohibitions against surcharging. *See United*

about discounting could have suppressed objections to the Settlement, thereby rendering the certification of a (b)(2) class all the more egregious.[10] *Cf. Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 119 (2d Cir. 2005) (describing the "favorable reaction of the overwhelming majority of class members" as "perhaps the most significant factor in our *Grinnell* inquiry"). Thus, the district court's failure to specifically consider the misstatements in the Notice is another instance of its failure to apply the required "heightened attention" to both the certification of the (b)(2) settlement class and the fairness of the settlement. *See Amchem*, 521 U.S. at 620; *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 249 (2d Cir. 2011).

The district court's treatment of this issue is particularly troubling because the court implicitly, and erroneously, held that there is no due process right to truthful statements about the achievements of a settlement in the notice. After noting that certain objectors complained about "false statements" concerning the achievements of the Settlement, the court held that there was no due process violation because the Notice accurately summarized *other* matters, including the litigation and the Settlement's terms. (SPA 50-51 (Opinion, 2013 WL 6510737, at

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States v. Am. Express Co., 10-cv-04496 (NGG)(RER), DOJ Letter to Judge Garaufis, ECF No. 273, at 2 (E.D.N.Y. June 21, 2013).

[10] The false claims in the Notice may well have also suppressed the number of opt-outs and thus is relevant to the fairness and certification of the (b)(3) settlement class. Nonetheless, the primary focus here is on the (b)(2) class, where the district court's obligation to closely review the settlement process is at its height.

*25-26).) By approving the dissemination of such a blatantly, and materially, inaccurate Notice and by failing even to consider the effect of indisputably false statements about the achievements of the Settlement in the Notice provided to a class of merchants who had no right to opt out of the Settlement, the district court committed error as a matter of law.

III. The Substantive Terms Of The Settlement Are Not "Fair, Reasonable, And Adequate," Where Essential "Benefits" It Supposes To Confer Upon The Class Are Worthless To Many, If Not Most, Class Members

A. Background

The district court recognized that the "heart" of the Settlement's rules changes are those lifting, subject to certain limits, the Visa and MasterCard prohibitions against surcharging, which would involve merchants passing along to consumers some portion of the higher cost attributable to credit card transactions. (SPA 15 (Opinion, 2013 WL 6510737, at *6).) Because many R&M Objectors, like many Class Members, for various reasons are unable to derive any benefit from the "heart" of the Settlement, the agreement is nothing approaching "fair, reasonable, and adequate," as required by Rule 23. Fed. R. Civ. P. 23(e)(2).

To be more specific, 105 Degrees is an R&M Objector operating in Oklahoma. Along with nine other states, the State of Oklahoma prohibits surcharging, making the main injunctive relief of the Settlement unavailable to 105 Degrees and others like it.

The situation is similar for Whole Hog, one of the many R&M Objectors from Arkansas. Whole Hog must accept American Express to remain competitive, and that competing credit card effectively forbids surcharging, meaning that Whole Hog is subject to the Settlement's "'level-playing-field' provision, [which] conditions a merchant's ability to surcharge a Visa or MasterCard credit card on a requirement that it also surcharge other payments" such as American Express. (SPA 41 (Opinion, 2013 WL 6510737, at *20).)

Consequently, Whole Hog and 105 Degrees are similar to many merchants that, as the district court found, "will, as a practical matter, be precluded from surcharging Visa and MasterCard products." (*Id.*)

In exchange for a right to surcharge that they cannot use, the Class Representatives traded away rights that are meaningful to 105 Degrees and Whole Hog, such as their capacity to bring claims against Visa and MasterCard. Whole Hog and 105 Degrees objected to the Settlement because the predominant relief in the Settlement was of no value to them and because they consider the release of any claims they might have against Visa's and MasterCard's rules and practices, as of November 27, 2012, and all substantially similar rules and practices going forward, forever, as far too broad. Whole Hog and 105 Degrees opted out of the Rule 23(b)(3) class and would have opted out of the Rule 23(b)(2) class had they been permitted to do so.

2 Notwithstanding the objections of 105 Degrees and Whole Hog to the Settlement, the district court certified a Rule 23(b)(2) settlement class that included them. It did so, concluding that the surcharging rules changes "affect all (b)(2) class members equally." (SPA 52 n.20 (Opinion, 2013 WL 6510737, at *26 n.20).) In reaching that conclusion, the district court disregarded their objections, and those of other merchants, which were based on the incontrovertible fact that valuable rights were being swapped for relief that is unavailable and useless to them.

B. The District Court Committed Error By Certifying A Mandatory Settlement Class That Received Injunctive Relief That Many Within The Class Cannot Use

Because a Rule 23(b)(2) class does not provide class members notice or opt-out rights, the law requires a higher degree of cohesion for such classes than it does for classes certified under Rule 23(b)(3), where notice and opt-out rights are provided. *Robinson v. Metro-N. Commuter R.R. Co.*, 267 F.3d 147, 165 (2d Cir. 2001) (remarking that a Rule 23(b)(2) class is based on "a presumption of cohesion and unity between absent class members and the class representative such that adequate representation will generally safeguard absent class members' interests and thereby satisfy the strictures of due process"); *Lemon v. Int'l Union of Operating Eng'rs*, 216 F.3d 577, 580 (7th Cir. 2000) ("Rule 23(b)(2) operates under the presumption that the interests of the class members are cohesive and

homogeneous such that the case will not depend on adjudication of facts particular to any subset of the class nor require a remedy that differentiates materially among class members."); *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 142-43 (3d Cir. 1998) ("Indeed, a (b)(2) class may require more cohesiveness than a (b)(3) class.").

Moreover, the Supreme Court has made clear that a mandatory Rule 23(b)(2) class cannot be certified unless there is a "single injunction or declaratory judgment [that] would provide relief to each member of the class." *Dukes*, 131 S. Ct. at 2557; Fed. R. Civ. P. 23(b)(2) ("A class action may be maintained if[, among other things,] final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."). These requirements mean that persons should not be forced into a mandatory class when their interests diverge such that they would be interested in different claims and different relief from that negotiated by class representatives. As the Supreme Court has acknowledged, persons with different interests in the requested relief should not be forced into the same mandatory class when a settlement is negotiated "with results almost certainly different from the results that those with" different interests "would have chosen." *Ortiz*, 527 U.S. at 857.

Here, there can be no doubt that the many merchants that are precluded from surcharging would have chosen a different remedy from a limited right to surcharge that they cannot use. Indeed, that is exactly what objecting merchants

that cannot surcharge – such as 105 Degrees and Whole Hog – told the district court. The district court committed error when it ignored these complaints to certify a mandatory Rule 23(b)(2) class.

1. 105 Degrees Should Not Have Been Forced To Relinquish Valuable Rights In Exchange For Surcharging Relief It Is Precluded From Using

105 Degrees cannot take advantage of the principal surcharging relief because it operates in Oklahoma, which prohibits surcharging. This fact is undisputed and it, standing alone, should have ended any discussion of certifying a mandatory class that precludes 105 Degrees from pursuing its own individualized legal claims. That the district court, nonetheless, certified a mandatory class – including numerous merchants who cannot surcharge even if they wanted to do so – cannot be squared with its obligation to apply "heightened scrutiny" and certify a Rule 23(b)(2) class only if "a single injunction or declaratory judgment would provide relief to each member of the class." *Dukes*, 131 S. Ct. at 2557.

Given Oklahoma's ban on surcharging, Visa's and MasterCard's revisions to their surcharging rules are of no value to 105 Degrees. Because of this legal ban on surcharging, Visa's and MasterCard's previous rules prohibiting surcharging were superfluous to 105 Degrees and its new rules permitting limited surcharging are irrelevant. 105 Degrees would have had absolutely no interest in asserting any claims that sought injunctive relief achieving such modifications to Visa's and

MasterCard's prohibitions on surcharging. Yet, 105 Degrees was given no opportunity to opt out of the mandatory Rule 23(b)(2) class that traded its ability to vindicate its rights in the future for useless surcharging relief. (*See, e.g.*, JA _ (Settlement ¶¶ 1(nn), 2(b) (containing no exclusions for Rule 23(b)(2) class members)).)

The district court's rationale for concluding that the surcharging relief might eventually prove beneficial to 105 Degrees, and similarly situated merchants, is fatally flawed and inconsistent with the precedents cited above requiring a high degree of cohesion among members of a mandatory settlement class. *See, e.g., Dukes*, 131 S. Ct. at 2557 ("Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class.").

Far from finding the injunctive relief indivisible, the district court found that the majority of the class would be "precluded" from using the limited right to surcharge either because of legal prohibitions or because of Visa's and MasterCard's agreement to align their surcharging restrictions with those of American Express. (SPA 38-41 (Opinion, 2013 WL 6510737, at *18-20).) Similarly, the court found that the limited right to surcharge would provide an immediate benefit only to the minority of the class possessing an ability to surcharge, by "allow[ing] them to steer customers to less costly cards or to other

payment mechanisms, decreasing their card-acceptance costs." (SPA 38 (Opinion, 2013 WL 6510737, at *18).)

By contrast, the district court found the limited right to surcharge only had the "potential" to benefit the majority of the class precluded from surcharging. The court found that surcharging by a minority of merchants would cause "market forces" to "exert downward pressure" on interchange fees, and that as a result, "surcharging (or the threat of surcharging) by merchants in the states where it is permitted *may well* inure to the benefit of merchants in those ten states" that do not allow surcharges, and has "the *potential* to ameliorate the precise anticompetitive effect—supracompetitive interchange fees—that these lawsuits were brought to challenge." (SPA 42 (Opinion, 2013 WL 6510737, at *18, *20 (emphasis added)).)

The district court's conclusions that the Settlement's injunctive relief would provide an actual direct benefit to merchants that can surcharge, but only a potential indirect benefit to merchants – like 105 Degrees – that cannot, conclusively establishes that the (b)(2) class lacks the cohesion required by Rule 23. This is vividly demonstrated by two other R&M Objectors: PetroPlus, LLC and Diamond State Oil, LLC. Petro Plus operates a convenience store in Texarkana, Arkansas, literally across the street from the Texas state line. While merchants in Texas cannot surcharge, those in Arkansas theoretically can do so,

although businesses like PetroPlus cannot realistically surcharge and remain competitive with its competition one block away, but in a different state. Likewise, Diamond State Oil operates in Fort Smith, Arkansas, less than a mile from Oklahoma, where surcharging is illegal.

This conflict between those who may "directly" benefit and those – across or perhaps down the street – who may only "indirectly" benefit is made even worse in light of the concession by the proponents of the Settlement that it might take "*years*" for surcharging to take hold. (JA___ (Indiv. Pls. Opp. to Objecting Pls. Mot. to Stay Class Sett. Prelim. Approval Order, Dkt. 1751, at 3, 4).) Even if surcharging by a minority of merchants has the potential to eventually benefit non-surcharging merchants, such a belated and indirect benefit fails the requirements for a (b)(2) class that the relief sought must be a "single injunction [that] would provide relief to each member of the class," and would benefit "all its members *at once*." *Dukes*, 131 S. Ct. at 2557, 2558 (emphasis added).

The district court's acceptance of this disparity between actual and potential benefits establishes that it failed to apply the required "heightened" scrutiny of the mandatory (b)(2) class. During the years that it would take for the supposed benefits of surcharging to trickle down to non-surcharging merchants, surcharging merchants in states that permit surcharging would benefit, while merchants such as 105 Degrees would not. If that happens, some merchants will benefit at the

expense of their competitors. A settlement that, at best, benefits some class members at the expense of their competitors should not have been certified under Rule 23(b)(2). *See, e.g., Kartman v. State Farm Mut. Auto. Ins. Co.*, 634 F.3d 883, 893 (7th Cir. 2011) ("Where a class is not cohesive such that a uniform remedy will not redress the injuries of all plaintiffs, class certification is typically not appropriate."); *Casa Orlando Apartments, Ltd. v. Fed. Nat. Mortg. Ass'n,* 624 F.3d 185, 200 (5th Cir. 2010) (finding "forty percent of the class benefiting from an injunction is not sufficient to certify under (b)(2)"); *Albertson's, Inc. v. Amalgamated Sugar Co.*, 503 F.2d 459, 463-64 (10th Cir. 1974) (affirming denial of class certification because of "diversity of interest" that arose from class plaintiffs' requesting relief that would change defendants' pricing system, which would substantially change the competitive positions of class members); *In re Managerial, Prof'l & Technical Emps.*, No. MDL 1471, 02-CV-2924 (GEB), 2006 WL 38937, at *9 (D.N.J. Jan. 5, 2006) (deeming certification under (b)(2) inappropriate when requested relief would not be "generally applicable to the class because it would have potentially conflicting effects on different members").

The district court's failure to give heightened scrutiny to the mandatory settlement class is also demonstrated by its failure to make any findings concerning the "potential" that merchants that could not surcharge due to state law would nonetheless eventually benefit, or how long it would take for any such benefit to

materialize. Tellingly, the court's own appointed independent expert, Professor Alan O. Sykes, undermined the notion that surcharging would have class-wide benefits, when he characterized surcharging's potential as "highly uncertain and [possibly] small." (JA __ (Memorandum of Prof. Sykes at 43, Aug. 28, 2013, ECF No. 5965.) That conclusion was bolstered by Professor Sykes' acknowledgment that virtually the entire Rule 23(b)(2) class probably will not surcharge under the Settlement. According to his analysis, 90% of the volume in the class accepts American Express, and therefore cannot surcharge, and the remaining 10% are mainly smaller merchants that likely will not surcharge for fear of losing sales to their larger competitors that cannot (and therefore) will not surcharge. *Id.* at 42 (noting how the 90-plus % of merchants by volume that cannot surcharge will incentivize the remaining 10% not to surcharge "because [the 10%] know that competitors who take American Express will not match any surcharges" and therefore the 10% would lose sales to the 90-plus %).

The district court's conclusions were further contradicted by the objections of numerous national merchants that operate in states that prohibit surcharging. Those merchants testified that in addition to not surcharging in states that ban the practice, they would not implement different surcharging practices in states that permit surcharging as opposed to those that do not because of the high costs and

administrative burden of doing so.[11] That large national merchants likely will not surcharge further supports Professor Sykes' ultimate conclusions about the speculative and likely small benefits of surcharging.[12] The district court ignored all of this undisputed evidence to arrive at its conclusions.

The district court also justified its conclusion that the Settlement might benefit merchants such as 105 Degrees by suggesting that the state laws do not really mean what they say, or might, in any event, be repealed. (SPA 38-41 (Opinion, 2013 WL 6510737, at *18-19).) This, too, was error. The district court, for example, suggested that "there is *reason to believe* that *at least* some state laws are enforced in a manner that prohibits surcharging only when the merchant fails to sufficiently disclose the increased prices for credit card use." (SPA 38 (Opinion, 2013 WL 6510737 at *18 (emphasis added)).) The district court neither explained

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[11] *See, e.g.*, BJ's Wholesale Obj. ¶¶ 17-20, ECF No. 2433; David's Bridal Obj. ¶¶ 16-21, ECF No. 2434; Best Buy Obj. ¶¶ 22-25, ECF No. 2445; Carter's Obj. ¶¶ 12-16, ECF No. 2446; Michaels Stores Obj. ¶¶ 14-17, ECF No. 2460; Wet Seal Obj. ¶¶ 13-17, ECF No. 2471; Wendy's ¶¶ 17-21, ECF No. 2473; Crate & Barrel Obj. ¶¶ 15-20, ECF No. 2534; Gap Obj. ¶¶ 15-19, ECF No. 2536; Aldo Obj. ¶¶ 17-19, ECF No. 2432; Family Dollar Obj. ¶¶ 16-18, ECF No. 2441; Panera Obj. ¶¶ 17-19, ECF No. 2466; Sears Obj. ¶¶ 22-24, ECF No. 2470.

[12] Moreover, the independent expert dismantled the expert report of Dr. Alan S. Frankel, which was submitted by the proponents to show that surcharging might drive down interchange rates over time. (*See* JA __ (Mem. of Prof. Sykes at 38, 43 (concluding that the calculation of class-wide benefits proffered by Dr. Frankel "is of no value," because it is premised on "shaky" and "questionable" conclusions drawn from Australia and "imagin[ed]" assumptions about the extent to which merchants in the United States would surcharge Visa/MasterCard transactions)).) It speaks volumes that the district court did not rely on that independent expert report for its conclusions.

its basis for this belief, nor detailed which states interpret their state restrictions – which unambiguously prohibit the practice – in this fashion.[13] As such, the district court's speculation comes nowhere near the degree of scrutiny that is required to certify a settlement class, let alone a mandatory class that binds even class members that object.

Given the express terms of the applicable Oklahoma statue, there is no question that 105 Degrees would be exposing itself to legal liability if it ever attempted to surcharge. Indeed, Visa suggests on its website[14] that consumers that are subjected to surcharging in "Oklahoma" and the other nine states that currently prohibit surcharging may want to "report the retailer to their state attorney general's office."

Similarly, the Court should not give any deference to the district court's suggestion that simply because "things change," the fact that New York's prohibition against surcharging was struck down under New York's constitution means the statutes in the other 10 states might suffer the same fate. Again, the district court offered no support for this conclusion. It made no attempt to analogize New York's provision with those on the books in the other 10 states. The district court also did not analyze whether Judge Rakoff's analysis

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[13] *See* SPA 215-32 (reproducing relevant statutes from the no-surcharging states).

[14] *See* JA ___ (ECF No. 2670, Shinder Decl. Ex. 73 ("States Where No Surcharge Laws Protect Consumers," http://usa.visa.com/personal/get-help/checkout-fees.jsp (accessed May 16, 2014))).

might be followed in other Circuits. In fact, the district court conceded that those laws were not before it (SPA 40 (Opinion, 2013 WL 6510737 at *20)), and thus, its *ipse dixit* regarding the viability of these statutes should be disregarded.[15]

2. Whole Hog Should Not Have Been Forced To Relinquish Valuable Rights In Exchange For Surcharging Relief It Is Precluded From Using

Whole Hog cannot take advantage of the Settlement's primary relief because it must accept American Express and therefore is prohibited by the "level-the-playing-field requirement" from surcharging under the Settlement. (SPA 141-44, 154-57 (Settlement ¶¶ 42(a), 55(a)).) The district court found that because of this provision "most merchants will, as a practical matter, be precluded from surcharging Visa and MasterCard products." (SPA 41 (Opinion, 2013 WL 6510737 at *20).) This finding that the Settlement's centerpiece relief is available to some merchants and not to others should have ended the inquiry into the viability of the (b)(2) settlement class.

[15] Even if the district court is correct in its speculation that the 10 state prohibitions might be rescinded over time, that conclusion does not support the certification of a mandatory class. The district court acknowledged that the state prohibitions will reduce the effectiveness of the settlement in the near term. (*See* SPA 40 (Opinion, 2013 WL 6510737, at *35 ("Will those laws diminish, at least in the near term, the efficacy of the proposed relief here? Of course.").) Thus, even under the most optimistic scenario there will be an interim period where some class members can surcharge and others cannot. That result is inconsistent with the indivisibility that is required to certify a mandatory class. *See Dukes*, 131 S. Ct. at 2557.

Whole Hog would have had absolutely no interest in asserting any claims that sought injunctive relief achieving a right to surcharge Visa and MasterCard products that it is precluded from exercising. Although Whole Hog cannot take advantage of the main injunctive relief offered by the Settlement, neither can it opt out of the mandatory Rule 23(b)(2) class. Instead, Whole Hog is forced to accept the Class Representatives' trading of its ability to pursue future claims, for surcharging relief that it is precluded from using.

What is more, the level-the-playing-field restriction is facially anticompetitive, and the district court's decision to approve this *per* se unreasonable restraint of trade was error. As the Supreme Court has made clear, agreements among horizontal competitors "formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980). The level-the-playing-field restriction has the purpose and effect of both fixing and stabilizing prices.[16]

[16] This case law establishes that if Visa and MasterCard had met by themselves and agreed that they would both implement the level-the-playing-field restriction, that agreement would amount to a per se violation of the Sherman Act. The only thing that even arguably saves this unreasonable restraint of trade from being considered per se *illegal* is the fact that it is part of a court-approved settlement.

The level-the-playing-field restriction restrains competition by opening the door to the elimination of merchants' ability to use differential surcharging to stimulate competition between the networks. Under this provision, if a "Competitive Credit Card Brand" that is as or more expensive limits surcharging "in any manner," the merchant can surcharge Visa or MasterCard credit card transactions "only on either the same conditions on which the merchant would be allowed to surcharge transactions of that Competitive Credit Card Brand … or on the terms on which the merchant actually does surcharge transactions of that Competitive Credit Card Brand…." (SPA 141, 144-45, 154-55, 158 (Settlement ¶¶ 42(a)(iv), (b)(iv), 55(a)(iv), (b)(iv)).) If Visa and MasterCard maintain price parity the Settlement will classify them as Competitive Credit Card Brands of each other. And American Express is classified as a Competitive Credit Card Brand of both Visa and MasterCard.

As such, this provision exposes the industry to the entirely predictable, and anticompetitive, possibility that the three leading networks could eliminate differential surcharging by maintaining price parity. Given that Visa and MasterCard post their average cost of acceptance for purposes of the Settlement's surcharge caps, it would not be difficult for them to align their pricing to achieve this result. That being so, a Settlement intended to introduce much needed

competition could, in reality, *eliminate* merchants' ability to play any of the three dominant networks off against each other to drive down rates.[17]

This result – which Visa and MasterCard collusively engineered by implementing identical rules changes via a jointly negotiated Settlement – is, in effect, a *per se* unreasonable restraint of trade under the above-cited Supreme Court opinions construing Section 1 of the Sherman Act. The agreement facilitates price fixing because it depends upon Visa and MasterCard maintaining price parity.

Moreover, while such a collusive adoption of competitive terms is *per se* unreasonable – making analysis of the effects unnecessary – it is clear that such an agreement would raise prices to merchants and eliminate interbrand competition. It would raise prices because this restraint on differential surcharging will motivate the networks to implement lock-step price increases to avoid the threat of surcharging. (*See* JA _ (Declaration of Alan S. Frankel, Ph.D. (Apr. 10, 2014), 11-md-2221 (E.D.N.Y.), ECF No. 370, ¶ 22 ("Differential pricing or promotion at retail is a principal mechanism by which competition between

[17] In this way the level-the-playing-field requirement is tantamount to an agreement, and an invitation, not to compete. American Express recently took Visa and MasterCard up on their offer when it settled a separate class action against it by agreeing to permit surcharging of its credit and charge cards, provided that the same surcharge be applied to all other credit card brands as well. If that settlement is approved, and American Express's rules are amended consistent with it, differential surcharging between the dominant networks will be permanently eliminated.

merchants' *suppliers* occurs")).) But when differential surcharging is effectively limited by the settlement that restraint on price increases does not exist. And this restriction eliminates interbrand competition for price or surcharging among the dominant networks. As long as they maintain their current relative pricing parity, each of them is immune from network competition via merchant threats to surcharge.

The district court failed to even address this issue, let alone consider how the level-the-playing-field restriction contradicts its optimism about the benefits of the surcharging relief. The district court held that the surcharging relief "has the potential to alter the very core of the problem this lawsuit was brought to challenge" (SPA 36 (Opinion, 2013 WL 6510737 at*17)), a problem the district court repeatedly characterized as rules that insulated Visa and MasterCard from network competition. (SPA 37, 41-42 (Opinion, 2013 WL 6510737 at *18, 20).) But the level-the-playing-field requirement does the opposite; it perpetuates, rather than alters, the very core of the problem. The district court never grappled with this anticompetitive deficiency at the heart of this settlement. As this horizontal agreement is clearly a *per se* unreasonable restraint of trade, it should not have been approved by the district court.

CONCLUSION

The R&M Objectors respectfully request that this Court reverse the district court's certification of classes under Rule 23(b)(2) and (b)(3), which release Class Members' ongoing and future damages claims without providing them an opportunity to opt-out, and/or order that upon remand, a new notice be issued which provides Class Members an effective opportunity to opt-out of classes involving claims for and/or releases of monetary damages, and which understandably and accurately describes the terms of the Settlement and the breadth of the Releases.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b) and this Court's order dated May 27, 2014 (ECF No. 936), because this brief contains 9,997 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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EXHIBIT 17

12-4671

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

PAGE PROOF REPLY BRIEF FOR APPELLANTS RETAILERS AND MERCHANTS OBJECTORS

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PRELIMINARY STATEMENT

Appellants Retailers and Merchants ("R&M") Objectors—a diverse group of 65 businesses operating retail outlets in 13 states—joined in the opening briefs filed by the Merchant Appellants [ECF No. 983] and the Merchant Trade Groups [ECF No. 973], and join in the reply briefs filed by these Appellants. The R&M Objectors submit this separate reply brief to highlight the failure of Settlement Proponents to justify a Settlement that was falsely represented in the Notice, and provides ***no value*** to many R&M Objectors.[1]

Settlement Proponents offer no justification for constructing a Settlement of the diverse claims of a class of merchants (certified under Rule 23(b)(2) of the Federal Rules of Civil Procedure) by directing the Settlement's primary relief—a limited right to surcharge credit cards—to only a portion of the class. Proponents' briefs implicitly confirm that the Settlement gives virtually nothing to the majority of the (b)(2) class that, in the words of the district court, "will, as a practical matter, be precluded from surcharging Visa and MasterCard products." SPA41.

[1] As Appellants stated in their opening briefs and in support of their motion for case management relief, Appellants coordinated their briefs to avoid duplication. Defendants' observation that the R&M Merchants and others failed to cite *Illinois Brick* or to grapple with the underlying merits of the class case overlooks this effort to coordinate. *See, e.g.*, Defs. Br. at 41.

The R&M Objectors' opening brief vividly illustrated the inadequacy of the Settlement and the conflicts it creates among such class members. For example, R&M Objectors like 105 Degrees—a restaurant in Oklahoma that is barred by state law from surcharging—and Whole Hog Barbecue—a merchant that accepts American Express, and thus is barred from surcharging by the Settlement's anticompetitive level-playing-field provision—never would have released their valuable injunctive and monetary damages claims for an unavailable "right" to surcharge if their interests had been separately represented at the negotiating table.

Similarly, even merchants that are not legally barred from surcharging have differing interests in gaining a "right" to surcharge. Merchants that operate in the center of states that permit surcharging have a different interest in surcharging from the interests of merchants like those R&M Objectors that operate in Texarkana and Fort Smith, Arkansas, where they are theoretically permitted to surcharge, but operate *across the street* from businesses in Texas that are legally barred from doing so.

Settlement Proponents respond to the fact of these divergent interests by alternating between pretending all merchants have gained the ability to surcharge, and treating the many merchants that are precluded from surcharging as second class

citizens whose interests must take a back seat to the interests of merchants that are being awarded an actual right to surcharge.

I. Settlement Proponents Fail to Justify the Settlement's Disregard of the Interests of Merchants Such as 105 Degrees and Whole Hog Barbecue—Who Cannot Surcharge

The opening brief of the R&M Objectors highlighted the absolute lack of interest merchants like 105 Degrees and Whole Hog Barbecue have in the Settlement's obtaining of a limited right to surcharge—that is unavailable to them. Settlement Proponents' response to this showing actually demonstrates the short shrift that was given to the interests of such merchants.

Settlement Proponents repeatedly—and inaccurately—characterize the Settlement's limited right to surcharge as a universal right that has been bestowed on all merchants in the (b)(2) class. For example, Defendants claim that merchants "won the ability" to surcharge. Defs. Br. at 15. Similarly, Class Plaintiffs refer to "merchants' newfound ability to surcharge." Class Br. at 69. In fact, merchants such as 105 Degrees and Whole Hog did not win any such "ability to surcharge" due to state laws barring surcharging and Settlement Proponents' own act in crafting a level-playing-field provision the precludes merchants that accept American Express from having any such ability.

Even when Settlement Proponents implicitly acknowledge that merchants such as 105 Degrees and Whole Hog do not actually have any such ability, they

reveal that the interests of such merchants were secondary to architects of the Settlement. Settlement Proponents' response to 105 Degrees and the millions of merchants located in no-surcharge states is to point out that "[m]erchants in those states previously faced *two* independent obstacles to surcharging—prohibitions from the networks and from the states—and now face only one." Class Br. at 64 (emphasis in original).

This is cold comfort to merchants like 105 Degrees, still barred from surcharging yet bound to a mandatory (b)(2) class and its broad release of existing and future claims. Class Plaintiffs also falsely suggest that these laws only "impede" the ability to surcharge, Class Br. at 64, rather than ban it with unmistakably clear language. SPA229 ("No seller in any sales transaction may impose a surcharge on a cardholder who elects to use a credit card or debit card in lieu of payment by cash, check or similar means.").

Class Plaintiffs also repeat the district court's suggestion that there is "reason to believe" that "'at least some state laws are enforced in a manner that prohibits surcharging only when the merchant fails to sufficiently disclose the increased prices for credit card use.' SPA38." Class Br. at 65. However, as the R&M Objectors pointed out in their opening brief, R&M Opening Br. at 36-37, neither Class Plaintiffs nor the district court cite anything in support of this "belie[f]," which

is actually contradicted by the uniformly plain language of the no-surcharge statutes. *See* SPA215-32. Visa's own website urges consumers facing surcharges in states like Oklahoma to "report the retailer to their state attorney general's office." JA___ [Dkt. 2670-8, Ex. 73, Shinder Decl.].

For many merchants in states that permit surcharging, the situation is similar. Whole Hog, one of many R&M Objectors from Arkansas, must accept American Express to remain competitive. Whole Hog cannot take advantage of the Settlement's primary relief because it is prohibited by the "level-playing-field requirement" from surcharging under the Settlement. SPA141-44, 154-57 (Settlement ¶¶ 42(a), 55(a)).

Class Plaintiffs argue that the Settlement cannot be held to account for the "choice" of merchants who "choose to maintain their relationships" with American Express. Class Br. at 63-64. Putting aside the odd stance Class Plaintiffs adopt—that an antitrust settlement with two dominant payment networks ought to result in merchants ending their "relationships" with the third—Class Plaintiffs have no answer to the charge that it is the *Settlement* that enabled Visa and MasterCard to adopt identical surcharging rules to eliminate the possibility of inter-brand competition through a facially anticompetitive "level-playing-field" provision. And while Class Plaintiffs cite the recent proposed (and not yet approved) settlement of

the American Express class action, that settlement would only make inter-brand competition *less* likely.

Indeed, as the R&M Objectors explained in their opening brief, by the terms of *this Settlement*, the three networks, Visa, MasterCard, and American Express, have the potential to engineer identical surcharge rules to eliminate competition between them. As long as the dominant networks maintain their current relative pricing parity, under the Settlement, each of them is immune from network competition via merchant threats to surcharge, and each lacks any incentive to change its surcharging rules adopted in tandem through this Settlement.

Settlement Proponents act as if the competitive card brand limitation is a force of nature, and the American Express "problem" an "external" one beyond the reach of the Settlement. Class Br. at 64. But this is a problem of their making, not nature's. Settlement Proponents deliberately crafted a provision of *this Settlement* that imports the rules of American Express, rather than offer a clean rescission of Visa or MasterCard rules that might allow some merchants outside of the 10 states a meaningful choice of whether to surcharge.

Settlement Proponents' discounting of preexisting "problems" affecting the interests of class members as beyond the scope of the Settlement reveals that the interests of merchants who are precluded from surcharging have been sacrificed to

the interests of merchants that have won a limited ability to surcharge. Given that most merchants will be precluded from surcharging, the "ability" to surcharge is granted to all merchants only in the same sense that the law (as Anatole France observed) forbids rich and poor alike from sleeping under bridges.

Tellingly, Settlement Proponents ignore the district court's expert, Professor Alan O. Sykes, who undermined the notion that surcharging would have class-wide or nationwide benefits. Professor Sykes "conclude[d] that the value of surcharging . . . is highly uncertain and may be small." JA____ [Memorandum of Prof. Sykes at 43, Aug. 28, 2013, ECF No. 5965]. That conclusion was bolstered by Professor Sykes' acknowledgment that virtually the entire Rule 23(b)(2) class probably will not surcharge under the Settlement—90% of the volume in the class is processed by merchants that accept American Express, and therefore cannot surcharge, and the remaining 10% of volume is processed mainly by smaller merchants that are unlikely to surcharge for fear of losing sales to their larger competitors that cannot (and therefore will not) surcharge. *Id.* at 42.

Significantly, Settlement Proponents never dispute the R&M Objectors' showing that merchants such as 105 Degrees and Whole Hog had no interest in sacrificing their valuable injunctive and damages claims for a limited "right" to surcharge that would, in effect, be given only to other members of the (b)(2) class—

but not to them. Far from rebutting this conflict among the members of the class, Settlement Proponents practically concede it by admitting that obtaining this limited ability to surcharge was one of the "primary goals" of Class Counsel. Def. Br. at 46. Despite being forced into that class, merchants such as 105 Degrees and Whole Hog never had any interest in giving up their rights for a rules change that would enable other members of the class—but not them—to surcharge.

In exchange for a "right" to surcharge that is not available to 105 Degrees and Whole Hog, the class representatives here traded away rights that are meaningful to 105 Degrees and Whole Hog, such as their capacity to bring claims against Visa and MasterCard for ongoing damages and injunctive relief in the future.

II. Settlement Proponents Fail to Justify the False Claims in the Notice

The R&M Objectors' opening brief showed that the Notice falsely claimed that the Settlement would "require" Visa and MasterCard to "change some rules," when in fact those rules had already been changed or did not prohibit the conduct supposedly allowed by the Settlement. In fact, while the Notice stated on the first page in bold type that the Settlement "will require" Visa and MasterCard to "change some rules . . . to allow merchants" to engage in four separate practices, merchants were already allowed to engage in *all of them, except for surcharging*, before the Settlement.

Class Plaintiffs rely heavily on the fact that the district court rejected claims concerning these false statements brought to the lower court's attention before and after the Notice was approved. Class Br. at 84. Class Plaintiffs insist that the Notice "appropriately refers to anti-discounting rule changes" because the Settlement creates an obligation to "lock-in" these earlier reforms. *Id.* If the Notice had merely made that statement—putting aside that obligation's featherweight—that statement would have been accurate. Instead, neither the district court nor Class Plaintiffs have explained why the Notice falsely states—on the first page, and repeated in the body of the Notice, that the Settlement will require "change[s]" to "rules" when this simply isn't true, as merchants were already allowed to engage in the practice of discounting, group buying, and varying acceptance by trade banner, well before the Settlement.

The problems created by the Notice's false statements are aggravated by the fact that the false claim about discounting was designed to obscure one of the central reasons why a mandatory class should never have been certified in this case—that the surcharging relief at the heart of the Settlement was completely unavailable to millions of class members. Unlike surcharging, which is banned by at least 10 states, discounting, group buying, and varying acceptance by trade banner is permitted nationwide.

Such false claims about the value of the Settlement to merchants cannot be considered "scrupulously neutral" or "accurate," as the case law requires. *See* R&M Opening Br. at 23-24. These deceptive statements in the Notice provide a separate ground for reversal.

CONCLUSION

For the reasons stated above and in the R&M Objectors' opening brief, R&M Objectors respectfully request that this Court reverse the district court's (1) certification of classes, and (2) approval of a Settlement and Notice that failed to provide Class Members an effective opportunity to opt out of classes releasing claims for monetary damages, and which failed to describe accurately the terms of the Settlement and the breadth of the Releases.

Respectfully Submitted,

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