UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION This document refers to: All Rule 23(b)(3) Class Actions	MDL No. 1720 Case No. 1:05-md-1720-MKB-JO

RULE 23(b)(3) CLASS PLAINTIFFS' REPLY MEMORANDUM IN FURTHER SUPPORT OF SETTLEMENT FINAL APPROVAL

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I. Introduction

After this Court preliminarily approved the Superseding Settlement Agreement, Rule 23(b)(3) Class Plaintiffs added to the factual basis for final approval by submitting declarations that confirmed the reasonableness of the settlement in absolute terms, in relation to other "mega-fund" settlements, and in relation to the risks posed by continued litigation. After an extensive direct-mail and media-notice campaign, only a miniscule percentage of the class objected. Broadly speaking, these objections challenge the settlement amount, the class release, the plan of allocation, and the issues that the settlement may raise between oil companies and the "Branded Operators" of stations that sell their gasoline. But as fully set forth below, none of these objections should alter the Court's preliminary-approval conclusions and Rule 23(b)(3) Class Plaintiffs respectfully request that this Court order final approval of the proposed settlement.

II. The Reaction of the Class Supports Final Approval.

The reaction of the class has been overwhelmingly positive and supports final approval. Since preliminary approval of the proposed settlement, Class Counsel has mailed out more than 16.3 million class notices advising class members of the settlement terms. These 16.3 million class notices elicited only 176 objections and 676 exclusion requests. 2019 Rep. of Class Admin. ¶ 11, ECF No. 7641-1, Aug. 7, 2019; Bernay Decl. ¶ 9. Further, of the 176 objections that have been submitted, 142 – or approximately 80% – of them assert the same objections on boilerplate forms by "Branded Operators," Bernay Decl. ¶ 10, such that their number should therefore not be ascribed significant weight. *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, 986 F.Supp.2d 207, 223 (E.D.N.Y. 2013). These boilerplate objections are a factually inaccurate and legally erroneous attempt to transform a potential contractual dispute over the

right to claim settlement funds between themselves and certain oil companies into an "intra-class conflict." *Id*. ¶ 11. As discussed below, these and the other Branded Operator objections do nothing to undermine the fairness, reasonableness, and adequacy of the proposed settlement. *See infra.*, Section V.

Courts view the overwhelming indicia of general support and lack of significant opposition as a factor weighing in favor of final approval. *D'Amato v. Deutsche Bank*, 236 F.3d 78, 86-87 (2d Cir. 2001) (affirming District Court's approval of a settlement where 0.06% of class members objected); *see also* Alba Conte & Herbert Newberg, Newberg on Class Actions § 11.41, at 108 (4th ed. 2002) ("[A] certain number of objections are to be expected in a class action with an extensive notice campaign and a potentially large number of class members. If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement."). Because the class members include many large, sophisticated merchants, some of which have been intensely engaged in this litigation, *see Payment Card I*, 986 F.Supp.2d at 223, the lack of serious objections—especially when compared to the 2012 settlement—is even more persuasive. *See In re Bisys Sec. Litig*., No. 04 Civ. 3840, 2007 WL 2049726, at *1 (S.D.N.Y. July 16, 2007) (noting that lack of objections by class members "who presumably had the means, the motive, and the sophistication to raise objections).

III. The Scope of Released Claims is Consistent with Second Circuit Law.

In pertinent part, the release extinguishes claims based on conduct or acts that "that are or have been alleged or otherwise raised in the Action, or that could have been alleged or raised in the Action relating to the subject matter thereof, or arising out of or relating to a continuation or continuing effect of any such conduct." *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig*., 330 F.R.D. 11, 44 (E.D.N.Y. 2019) ("*Payment Card IV*"). The release

further clarifies, "for avoidance of doubt," that it extends "to, but only to, the fullest extent permitted by federal law." The settlement notice adds that the release's "resolution and release of these claims is intended to be consistent with and no broader than federal law on the identical factual predicate doctrine." (Revised Class Notices G1-4, G2-10.)

A. The settlement releases only claims that fall within the Identical Factual Predicate of the litigation.

Nonetheless, the Mattress Firm, Inc., Watsco, Inc, and Easy Breathe, LLC (the "Mattress Firm Objectors") argue that "[t]he release unlawfully waives future claims that challenge interchange rules," because it releases "claims that has [*sic*] not accrued, but that will accrue between January 14, 2019 and 'five years following the court's approval of the settlement and the resolution of all appeals.'" Obj. of Mattress Firm, et al. at 3, ECF No. 7558, Jul. 23, 2019. The Mattress Firm Objectors argue that this release "necessarily releases future claims for damages, which is in itself impermissible." *Id.* at 3. Similarly, Objector Kevan McLaughlin objects to the settlement's supposed "five-year waiver of financial liability for future conduct," claiming that the release "goes beyond the release of claims that might arise later from pre-settlement conduct, and comprises a waiver of future liability for future *conduct* violative of the antitrust laws." (McLaughlin Obj. & Notice of Intent to Appear at 2–3, ECF No. 7571, July 23, 2019; *see also* Obj. of Gnarlywood & Quincy Woodrights at 8, ECF No. 7617, July 24, 2019 (making similar assertions).)

These objections fail to understand that the feature of the settlement that they characterize as a fatal defect—the fact that the release extinguishes only claims that accrue within five years of the Settlement Final Date—is actually a *benefit* to the class. So long as the plaintiffs release claims that are within the "identical factual predicate" of the settled litigation and that relate to

pre-settlement conduct or continuations of pre-settlement conduct, the law places no limit on how long into the future a settlement release may act to extinguish claims. *See Madison Sq. Garden, L.P. v. NHL*, No. 07-cv-8455 (LAP), 2008 WL 4547518, at *7 (S.D.N.Y. Oct. 10, 2008) (holding that 1994 consent agreement, reaffirmed in 2005, barred claims based on continuations of pre-1994 conduct that were asserted in 2007 lawsuit); *Record Club of Am., Inc. v. United Artists Records, Inc.*, 611 F. Supp. 211, 217 n.8 (S.D.N.Y. 1985) (holding that 13-year-old settlement agreement and release barred antitrust claims because "all of the harm alleged flow[ed] from and [was] related to the terms and conditions under which [the plaintiff] settled the original antitrust lawsuit."); *see also In re Managed Care Litig.*, No. 00–MD–1334–MORENO, 2010 WL 6532985, at *12 (S.D. Fla. Aug. 15, 2010) (applying *Madison Sq. Garden* and *Record Club of Am.* in class-action context). Thus, by specifying that the release extinguishes *only* those claims that accrue within five years after the Settlement Final Date, the release in the Superseding Settlement Agreement is actually *narrower* temporally than what is typical and permissible. *See id*. Because these objections rest on a fundamental misinterpretation of Second Circuit law and the plain meaning of the proposed settlement, they should be rejected.

B. Second Circuit precedent allows class-action settlements to release future damages based on the continuation of conduct that is within the identical factual predicate of the litigation.

As a threshold matter, "[t]he compromise of complex litigation is encouraged by the courts and favored by public policy." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116–17 (2d Cir. 2005) ("*Wal-Mart*"); *see also Elkind v. Revlon Consumer Prod. Corp.*, No. CV-14-2484, 2017 U.S. Dist. LEXIS 24512, at *17 (E.D.N.Y. Feb. 17, 2017) (noting same). This policy is particularly strong in the class-action context. *Wal-Mart*, 396 F.3d at 116–17.

In the interests of facilitating the settlement of complex litigation, "[t]he law is well established in this Circuit and others that class action releases may include claims not presented and even those which could not have been presented as long as the released conduct arises out of the 'identical factual predicate' as the settled conduct." *Id.* at 107 (quoting *TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982)). Courts therefore routinely approve and enforce settlements that release claims based on the continuation of pre-settlement conduct. As the Second Circuit has observed: "It is not uncommon, we assume, for a release to prevent the releasor from bringing suit against the releasee for engaging in a conspiracy that is later alleged to have continued after the release's execution." *VKK Corp. v. NFL*, 244 F.3d 114, 126 (2d Cir. 2001); *see also*, *e.g.*, *Smith v. Dada Entm't, LLC*, No. 11-CV-7066, 2012 WL 4711414, at *6 (S.D.N.Y. Sept. 27, 2012) (concluding that class member could not relitigate "whether the charges that were the subject matter of the previous lawsuit [settled in 2009], even those that continued to accrue after January 7, 2010, were fraudulently billed"); *Madison Sq. Garden*, 2008 WL 4547518, at *8 (finding in an antitrust action that "the public policy considerations differ when the only 'prospective' application of the release in question is the continued adherence to a pre-release restraint").

In *Melito v. Experian Marketing Solutions,*, 923 F.3d 85 (2d Cir. 2019), for example, a class member objected to a class-action settlement in a lawsuit that sought compensation for unsolicited text messages under the Telephone Consumer Protection Act because the settlement extinguished claims for text messages that were sent after the class period. The Second Circuit affirmed the district court's rejection of that argument, reasoning that because text messages sent after the class period arose out of the identical factual predicate as those sent during the class period, they could properly be released. *Melito*, 923 F.3d at 95.

Moulton v. U.S. Steel Corp. is similarly instructive. 581 F.3d 344, 348 (6th Cir. 2009). In that case, the plaintiffs settled a public-nuisance class action related to a steel plant's discharge of harmful metal flakes, and released claims that arose out of "the maintenance of any structures, any acts, any operations, or any conditions that existed, began, or were initiated . . . prior to the Settlement Effective Date and that continue for an indefinite period of time." *Id.* at 347. Rejecting an objection that this release "unconscionabl[y]" extinguished future tort claims, the Sixth Circuit approved the release, finding that it barred only continuing nuisance claims "arising out of conditions that existed prior to the settlement." *Id.* at 349–50; s*ee also Shane v. Humana, Inc.*, No. 00-MD-1334-MORENO, 2009 WL 7848518, at *4–9 (S.D. Fla. Nov. 5, 2009) (report and recommendation concluding that class-action settlement released claims that were asserted by subsequent plaintiffs, which alleged a continuation of the previously released conduct and rejecting argument that release violated public policy)*, adopted sub nom In re Managed Care Litig.*, 2009 WL 7848638 (S.D. Fla. Dec. 1, 2009); *Madison Sq. Garden,* 2008 WL 4547518, at *6–10 (holding that release that extinguished hockey club's claims "which exist as of the date of execution . . . relating to or arising from any NHL activity . . . ," released claims based on continuing conduct that existed at the time of settlement, and that such a release did not violate public policy).

The case law upon which McLaughlin and the Mattress Firm Objectors rely does not support their objections.

McLaughlin expressly acknowledges that a release may validly extinguish future claims "arising from 'pre-settlement conduct,'" and the case law these objectors cite is consistent with this principle. McLaughlin Obj. at 5 (citing *Melito,* 923 F.3d at 96 and *Moulton*, 581 F.3d at

350).[1] And in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Court merely noted in dicta that if forum-selection and choice-of-law clauses in an arbitration provision "operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations," such an agreement would violate public policy. 473 U.S. 614, 637 n.19 (1985).

Nor do the cases cited by the Mattress Firm Objectors provide a basis for denying approval. *Schwartz v. Dallas Cowboys Football Club, Ltd.* rejected a class settlement in an antitrust action, but acknowledged that the release "properly bar[red] future claims regarding the bundling of NFL games on satellite television, which form[ed] the basis of this litigation." 157 F.Supp.2d 561, 577–78 (E.D. Pa. 2001). Accordingly, the court later approved a revised class-settlement release that covered "claims arising from current or past policies, practices, contracts, conduct or provisions of the NFL Constitution and Bylaws," including "a continuation of such policies, practices, contracts or provisions," related to certain subject matters. *Schwartz v. Dallas Cowboys Football Club, Ltd.*, No. Civ.A. 97-5184, 2001 WL 1689714, at *1 (E.D. Pa. Nov. 21, 2001). *Three Rivers Motors Co. v. Ford Motor Co.* upheld the validity of a general antitrust release, "provided that the release does not seek to waive damages from future violations of antitrust laws." 522 F.2d 885, 896 (3d Cir. 1975). *Redel's Inc. v. General Electric Corp.* enforced a release "that the parties did not intend . . . to apply prospectively" to "antitrust actions arising from subsequent violations." 498 F.2d 95, 101 (5th Cir. 1974). *Virginia Impression Products Co. v. SCM Corp.* expressly stated that there is "no prohibition in the statutes or in the policy behind the antitrust laws that prohibits the disclaimer of antitrust claims by a general

[1] McLaughlin questions whether an appeal of an attorney fee award to Class Counsel could extend the period for which the release extinguishes claims. The Superseding Settlement Agreement makes clear, however, that upon Final Approval, Class Plaintiffs will propose an order to the Court that, among other things, "there is no just reason for delay in entering the final judgment" such that the "Rule 23(b)(3) Class Settlement Order and Final Judgment shall be appealable." Superseding Sett. Ag. ¶ 60; *see also id.* ¶ 3 (ss) (defining Settlement Final Date). Thus, finality is in no way contingent on an attorney-fee award or an appeal of that award.

release." 448 F.2d 262, 266 (4th Cir. 1971). *Gaines v. Carrollton Tobacco Board of Trade, Inc*. held that there was no settlement between the parties to be enforced. 386 F.2d 757, 759 (6th Cir. 1967). And *Duffy Theatres, Inc. v. Griffith Consol. Theatres, Inc*. upheld the validity of an "absolute, unequivocal, and comprehensive" antitrust settlement that released "all claims in existence at the time the contract was executed." 208 F.2d 316, 323–24 (10th Cir. 1953).

IV. The Settlement Fund is Adequate, and there are no Persuasive Objections to the Contrary.

The proposed settlement is more than adequate. It constitutes the largest monetary antitrust class-action settlement in history. Under the settlement, the Defendants made additional cash payments of up to $900 million for the Class, in addition to the funds remaining from the 2012 settlement, subject to reduction for opt-outs and administrative expenses. The Mattress Firm Objectors suggest that the settlement is inadequate because, when viewed purely on a per diem or pro rata basis, the Superseding Settlement Agreement appears smaller than the 2012 settlement agreement. This objection is meritless.

A. The settlement is well above the range of reasonableness of class-action settlements typically approved by the Second Circuit.

The Second Circuit has approved – indeed, lauded – class action settlements that pale in comparison to what has been achieved here. At approximately $5.6-6.3 billion, the proposed settlement fund is approximately twice as large as the *Wal-Mart* settlement, which the Second Circuit described as "staggering" in terms of its compensatory relief. *Wal-Mart*, 396 F.3d at 119. Courts regularly approve settlements that offer significantly less compensation than the proposed settlement. *See In re Flonase Antitrust Litig*., 951 F. Supp. 2d 739, 745 (E.D. Pa. 2013) (approving a settlement fund of $150,000,000); *In re Currency Conversion Fee Antitrust Litig*., 263 F.R.D. 110, 124 (S.D.N.Y. 2009) (noting with approval settlement fund amount of

$336,000,000 for a class of credit-card users who paid foreign-transaction fees); Decl. of K. Craig Wildfang, ECF No. 7469-3, Ex. 4 at 18-22 (J. Davis & R. Kohles, 2018 Antitrust Annual Report (May 2019) (setting forth top fifty class-action settlements by dollar value that were finally approved between 2013 and 2018, ranging from $2.3 billion to $64 million)). The Mattress Firm Objectors ignore this authority and do not even attempt to call into question the econometric analysis performed by Dr. Michael Williams, which concluded that, even without controlling for risk, the proposed settlement amount "similar to, but higher than, the proposed settlement amounts predicted by [his] regression model[2] for cases with damages similar to this case." Expert Report of M. Williams ¶ 30, ECF No. 7469-5. Jun. 7, 2019.

B. The risk of continued litigation underscores the adequacy of the settlement fund.

The Second Circuit's analysis of settlements is not limited to their nominal value, however, but evaluates their reasonableness in light of "the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Wal-Mart*, 396 F.3d at 119 (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972)). As this Court already noted, "the attendant risks and complexities of proving liability and damages, and maintaining the class action" in this proceeding are significant. *Payment Card IV*, 330 F.R.D. at 49. Since Preliminary Approval, Class Plaintiffs submitted the declaration of Hon. H. Lee Sarokin (Ret.) who concluded, based on his assessment of the risks facing the class that settlement was "mandated" because the parties faced "daunting challenges should litigation continue." (Decl. of Hon. H. Lee Sarokin ¶ 45, ECF No. 7469-4, Jun. 7, 2019.) Accordingly, and

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[2] As fully described on pages 20-23 of Class Plaintiffs' opening memorandum in support of final approval, Williams based his conclusions on a multivariate economic analysis of the relationship between potential damages and settlement amount in a database of 71 past antitrust settlements. R. 23(b)(3) Class Pls.' Mem. in Support of Final Approval at 20-23, ECF No. 7469-1, Jun. 7, 2019 ("Opening Br.").

as detailed by the Court in its preliminary-approval order, the settlement is reasonable even in light of the substantial volume of commerce implicated by Defendants' alleged violations. *Id.* at 49–50.

C. The objection that the settlement is comparatively smaller than the 2012 settlement on a per diem or pro rata basis is not persuasive.

Instead of viewing the settlement fund in light of the risks of continued litigation, as the law requires, the Mattress Firm Objectors propose a formulaic standard suggesting that the only way the superseding settlement could be deemed adequate and reasonable is if it managed to increase the previous amount dollar-for-dollar proportionate to an already record-breaking settlement. The Mattress Firm Objectors principally rely on the district court's decision in *High-Tech Employees* to support their formulaic argument. *In re High-Tech Employee Antitrust Litigation*, No. 11-cv-02509-LHK, 2014 U.S. DIST LEXIS 110064 (N.D. Cal. Aug. 8, 2014). But apart from the basic fact that that case also involved two class-action settlements, 2014 U.S. LEXIS 110064, at *28, *High-Tech Employees* has almost nothing in common with this case. That case concerned an alleged conspiracy among seven major high-technology companies in Silicon Valley to suppress the wages of their employees. *Id.* at *6–7. After their motion for class certification had been denied and while an amended class-certification motion was pending, the plaintiffs settled with three of the defendants. Meanwhile, the plaintiffs continued litigating against the non-settling defendants, during which time "the case . . . progressed consistently in the Class's favor." *Id.* at *15. The plaintiffs' amended class-certification motion was granted and the defendants' Rule 23(f) petition was dismissed. Dispositive motions and a *Daubert* motion filed by the defendants were denied. But despite these favorable developments for the plaintiffs, they settled after only a year of continued litigation, for an amount proportionally lower than the

initial settlement. *Id*. at *9–11. Under these conditions, the district court denied preliminary approval to the second settlement, because it found the "discount that Remaining Defendants . . . received vis-à-vis the Settled Defendants . . . troubling in light of the changes in the procedural posture of the case between the two settlements, changes that the Court would expect to have increased, rather than decreased, Plaintiffs' bargaining power." *Id*. at *22–23.

Unlike in *High Tech Employees*, the facts in this case did not "progress consistently in the Class's favor" since 2012. Since that time, Visa and Mastercard relaxed their anti-steering restraints, the Durbin Amendment capped debit-card interchange fees for nearly a decade, and the Supreme Court handed down its decisions in *United States v. American Express*, to name just a few developments that portended obstacles to the success of Rule 23(b)(3) class claims here. While some of these developments may have been beneficial for Class Plaintiffs as merchants, they posed a challenge to Class Plaintiffs as antitrust litigants seeking to maximizing their recovery. The Mattress Firm Objectors simply gloss over these important developments as if they had not occurred.

And even the district court in *High-Tech Employees* did not analyze the settlements in a vacuum to conclude that subsequent settlements must always match or exceed an original settlement in order to be adequate and reasonable. Rather, the court assessed the second settlement in light of the risks inherent in continued litigation. *High-Tech Employees*, 2014 U.S. Dist. LEXIS, at *21-64. The court rejected the settlement precisely because it found that the litigation risks were *lower* at the time of the second settlement than they were at the time of the initial settlement. *Id*. at *21-22. The Mattress Firm Objectors ignore this critical analysis and fail to weigh the superseding settlement against the risks inherent in continued litigation, much less offer any evidence to contradict the Class's expert opinion that the risks of continued litigation

"mandated" settlement. Sarokin Decl. ¶ 45. As explained above, the Class's risks of litigation increased since the first settlement. The Mattress Firm Objectors' formulaic per diem/pro rata objection therefore does nothing to undermine the case for approval.

D. The fact that this settlement did not secure additional rules relief does not undercut its fairness.

Gnarlywood LLC and Quincy Woodrights, LLC (the "Gnarlywood Objectors") argue that the settlement is inadequate because of its purported "lack of rule modifications." Gnarlywood Obj. at 9–10, ECF No. 7617. As a threshold matter, there is no requirement—and the Gnarlywood Objectors cite none—that Rule 23(b)(3) class-action settlements include injunctive relief along with monetary relief. *See, e.g., In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 327 F.R.D. 483, 491–92 (S.D.N.Y. 2018) (certifying two Rule 23(b)(3) classes and granting final approval to a settlement that exclusively provided for monetary compensation). More basically, however, the Gnarlywood Objectors' argument is not with the adequacy of the Settlement, but rather with the Second Circuit's conclusion on appeal from the 2012 settlement that one counsel could not simultaneously represent classes seeking both damages and injunctive relief. A bifurcated class structure was adopted in Phase Two of this litigation precisely to fix the "structural defect" that the Second Circuit identified in the 2012 settlement. *Payment Card IV*, 2019 WL 355981, at *31. Rule 23(b)(3) Class Counsel's sole incentive in Phase Two of the litigation has been to maximize *monetary* recovery for the class. That is what Class Counsel achieved in the Superseding Settlement Agreement. Not only would it have been beyond the scope of Class Counsel's representation to seek "rule modifications" or other injunctive relief in connection with the Superseding Settlement Agreement, but trading off monetary relief in exchange for injunctive relief (or the perception of the ability or incentive to

do so) would also have been a violation of Class Counsel's responsibility to maximize *monetary* recovery for the class and would have run afoul of the Second Circuit's holding on the appeal of the prior settlement. The Gnarlywood Objectors seem to be complaining that Class Counsel adhered to the bifurcated structure mandated by the Second Circuit *too dutifully*. That is not a meritorious objection; it is further evidence that this Settlement should be approved.

Further, the Gnarlywood Objectors ignore the many important reforms that already occurred during this litigation, including:

- The issuing banks' divestiture of the Visa and Mastercard networks and their reformation as independent entities;
- The issuance of a DOJ consent decree requiring the networks to repeal many of their anti-steering restraints, including their bans on merchants giving point-of-sale discounts to consumers who used rival card brands;
- The passage of the Durbin Amendment, which capped debit-card fees, allowed merchants to establish minimum-purchase amounts for credit-card purchases, and required networks to facilitate debit-card point-of-sale steering; and
- The reforms to the networks' no-surcharge rules implemented as a result of the 2012 settlement.

See Payment Card IV, 330 F.R.D. 11, 21 n.7 (E.D.N.Y. 2019); *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, 991 F. Supp.2d 437, 441–42 (E.D.N.Y. 2014). Despite the reversal of the 2012 settlement, these reforms remain in place, to the continued benefit of the Gnarlywood Objectors and other merchants.

Finally, the Superseding Settlement Agreement *does* contemplate the possibility of additional equitable relief – under the auspices of any settlement or judgment in the Rule 23(b)(2) track of this litigation. The Superseding Settlement Agreement specifically

preserves all of the Rule 23(b)(3) class members' rights to obtain injunctive relief as members of the pending Rule 23(b)(2) action.[3]

V. The Branded Operators do not Raise Valid Objections.

The Superseding Settlement Agreement treats all class members the same: any U.S. merchant that accepted Visa or Mastercard payment cards during the class period, does not opt out, and files a valid claim will receive a pro rata distribution of the settlement proceeds commensurate with the relative share of interchange fees attributable to that merchant's transactions. *See* Opening Br. at 26-27. These class members are identifiable and ascertainable based on objective criteria: "All persons, businesses or entities that have accepted any Visa-Branded and/or Mastercard-Branded Cards in the United States" from January 1, 2004 through the Preliminary Approval Date are members of the class. The Branded Operators state that they are "undeniably class members given that they accept [payment] cards from customers at the gas stations and convenience stores they operate." Fikes Obj. at 4. Unless another entity can establish that the class member's claim belongs to it, the class member is entitled to its pro rata share of the settlement proceeds.

Certain convenience stores and gasoline stations that sell branded gasoline (the "Branded Operators") object to this straightforward class definition and equitable distribution plan. *See* Obj. of Fikes Wholesale et al., ECF No. 7559, Jul. 23, 2019. The Branded Operators couch their objection as an issue of "intra-class conflict," but in reality it appears to implicate a dispute

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[3] The Gnarlywood Objectors muse that it is "unfortunate…that settlement of the (b)(2) claims was not negotiated to coincide with settlement of the (b)(3) claims, and that these matters are not before the Court as a collective solution," to the problems caused by the Defendants' market power and practices. Gnarlywood Obj. at 11. But the timing of a (b)(2) settlement—if one ever were to occur—is not within the control of (b)(3) Class Counsel, as a result of the class and counsel structure that was adopted to address the concerns raised in the Second Circuit's reversal of the prior settlement.

between themselves and large oil companies (e.g., Shell, Chevron, Valero) from whom they purchase the "branded" gasoline they sell.

A. There is no "intra-class conflict."

The Branded Operators argue that this potential dispute between themselves and their oil-company suppliers is indicative of an "intra-class conflict." They further state that their interests are not being represented by any of the current class representatives. Fikes Obj. at 2. According to the Branded Operators, "the settlement and notice can be read to advise both Branded Operators *and* Oil Brands that they are proper claimants to the *same* portion of settlement funds." *Id*. at 2 (emphasis in original). But an apparent dispute over which entity owns a claim to settlement funds as a factual matter is not an "intra-class conflict."

This is not a situation where, under the terms of the settlement, different identified categories of class members are receiving different recoveries resulting from disparate allocation methodologies. Instead, all class members are treated the same, and are subject to a unitary claims-recovery mechanism governed by uniform allocation principles. While an intra-class conflict may exist when a class settlement provides disparate treatment in its allocation formula for dividing a finite set of settlement proceeds among two separate and distinct categories of class-member claimants, that is not the case here. *See, e.g., Amchem Prods. v. Windsor*, 521 U.S. 591, 610–612 (1997) (affirming appellate court's reversal of class approval and certification based on "intra-class conflict" pitting the interests of currently afflicted and exposure-only asbestos claimants against each other in the same class); *In re Literary Works Elec. Database Copyright Litig*., 654 F.3d 242, 254 (2d Cir. 2011) (vacating class-action settlement, in which one category of claimants bore the majority of the risk of their funds being affected by an oversubscription of claims). In *Amchem*, for example, the parties to a class-action settlement with

an asbestos manufacturer structured the settlement in such a way that various categories of class members, some of whose injuries had not yet materialized, each would have competing claims against the same finite settlement fund. The Third Circuit held, in a ruling affirmed by the Supreme Court, that a fatal intra-class conflict existed, in that competing sets of differentially situated class members were each vying for the same finite sum of money and had divergent interests regarding the value of settlement terms related to inflation-protection, back-end opt-out rights, and causation were concerned. *Amchem*, 521 U.S. at 610–612.

The "conflict" found in *Amchem* and its progeny is absent from this case. In this case, some fact-finding may be required in certain circumstances to determine whether the Branded Operator or its upstream oil-company[4] supplier may recover settlement funds for a given group of transactions. But as Judge Orenstein remarked at a previous status conference where this issue was raised, the situation in which two entities seek to be compensated for a particular set of transactions is no different from one in which two children of deceased parents dispute who is entitled to claim compensation for transactions that occurred at a store owned while they were alive. Hr'g Tr. at 15:22-16:19, Dec. 6, 2018. That is not an intra-class conflict that justifies denying final approval. *Amchem*, 521 U.S. at 610–12.

B. Class membership is clear based on objective criteria.

The Branded Operators argue that the class definition is overbroad because it "gives rise to the notion that there are class members at different levels of the payment chain, which has engendered conflicts." Fikes Obj. at 14. The class definition does no such thing. But if there is a dispute and fact-finding must take place to determine which entity may be entitled to settlement

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[4] Other situations that may raise similar issues include hotel chains that claim authority to opt out independent owners or operators of hotels that operate under their banner, or payment facilitators that may purport their opt-out request to cover all transactions processed through it.

funds for a given transaction or set of transactions under some unique fact pattern, or if the entity that accepted the card for payment transferred its claim by contract to another entity, those are matters that can be addressed as a matter of claims administration or through the Court's inherent authority to oversee the settlement.

While neither Class Counsel nor the Administrator has sufficient information, at this time, to determine in each situation whether the Branded Operator or the oil company owns the claim for the Branded Operator's transactions, such information exists[5] and can be presented to a neutral party for purposes of making that determination. What is important is that the class definition provides the objective criteria to apply to the facts in order to determine which entities are class members. Accordingly, this situation is no different from one in which a settlement requires individuals or entities to come forth with sales records or other information to prove that they meet the objective criteria to be considered class members. Settlements and other claims processes that require potential claimants to prove that they are entitled to settlement funds are routinely approved. *See, e.g.*, *Precision Assocs. v. Panalpina World Transp. (Holding) Ltd.*, No. 08-cv-42 (JG) (VVP), 2015 U.S. Dist. LEXIS 152688, at *37 (E.D.N.Y. Nov. 10, 2015); *In re Air Cargo Shipping Services Antitrust Litig.*, 06-MD-1775 (JG) (VVP) (E.D.N.Y. Mar. 22, 2010); *In re Foreign Exchange Benchmark Rates Antitrust Litigation*, No. 13-cv-7789, 2016 WL 1268267, at *6–7 (S.D.N.Y. Mar. 31, 2016).

[5] Such information could include franchise agreements, license agreements, card-acceptance agreements, card-processing statements, or transaction data.

C. The Settlement Administrator, Class Counsel, and ultimately this Court can resolve any disputes as to the ownership of claims within the settlement's framework.

The Branded Operators claim that their alleged confusion over whether they or their oil-company suppliers "are the proper claimants" creates a conflict among class members. That situation is not an "intra-class conflict" that can justify rejection of a settlement, *see supra* at IV.A. Nevertheless, the settlement provides mechanisms to resolve the Branded Operators' concerns.

Broadly speaking, there are three categories of potential situations where two entities may argue that they have the right to a particular set of settlement funds, each of which may be addressed within the rubric of the settlement:

- A Branded Operator and its upstream oil-company supplier each remain in the class;
- A Branded Operator or its oil company opts out of the settlement, while the other remains in the class; or
- A Branded Operator claims that it is entitled to a portion of settlement proceeds, which its upstream oil-company supplier arguably released in connection with a prior opt-out settlement.

1. If the Branded Operator and the oil company are each in the class, any dispute between them can be resolved during claims administration.

The settlement's Plan of Administration and Distribution, contemplates a process "to challenge decisions by the Class Administrator regarding the amount or denial of any claim." ECF No. 7257-2 at I-13, Jun. 7, 2019. The Class Administrator's determination of that challenge may be elevated to Class Counsel, and ultimately to this Court. *Id*. A similar situation arose in connection with the *Visa Check* settlement, which the Court handled within the settlement-administration process without objection.

Class Counsel in *Visa Check* described the situation as follows:

> Other types of disputes have arisen in the petroleum industry where certain oil companies are claiming entitlement to the allocation for each of the independent franchises that license and operate under their brands, whereas the franchisees are coming forward to claim the money for their stores. These emerging disputes likely will require a detailed inquiry into and determination based upon the processing and franchise relationships that vary across the petroleum industry.

See Marth Decl. Ex. 1 (Ltr. from J. Shinder to Court, *In re Visa Check/MasterMoney Antitrust Litig.*, No. 96 CV 5238(JG), ECF No. 1220, Nov. 17, 2005). In that case, this Court ordered that such disputes "between franchisors and franchisees regarding the allocation of Class funds between them" be resolved by a special master. *See* Marth Decl. Ex. 2 (Jan. 19, 2006 Or., *In re Visa Check*, No. 96 CV 5238(JG) ECF No. 1244). In this case, the Class Administrator has compiled and processed data from Visa, Mastercard, and the leading processors and acquiring banks to create a database of over 16 million merchants for purposes of sending direct-mail notice. Decl. of N. Hamann ¶¶ 12-20, ECF No. 7469-7, Jun. 7. 2019. And as they received opt-out notices, Co-Lead Counsel created a list of entities whose exclusion requests appeared to involve franchise or similar arrangements that might give rise to disputes over opt-out authority or the right to settlement funds. Status Conf. Rep. at 2–3, ECF No. 7660, Aug. 28, 2019. To the extent that contractual relationships between a Branded Operator and its supplier influence which party properly has a claim to a given set of funds, the parties to the dispute can provide that information to the Administrator, Class Counsel, or a special master, with the Court having ultimate authority to adjudicate disputes. The Court's authority to oversee class actions allows it additional freedoms to reduce disputes such as by pursuing "test cases" before the special master, *see* Marth Decl. Ex. 2, or allowing class members the opportunity to affirm their decision to opt

out or remain in the class. *In re Linerboard Antitrust Litig.,* 223 F.R.D. 357, 366–69 (E.D. Pa. 2004).

2. Where disputes arise as to one entity's authority to opt out another entity, this Court has the authority to resolve those disputes within the framework of the settlement.

To the extent that a dispute arises as to the extent of an oil company's (or any other upstream entity's) authority to opt out a Branded Operator (or any other downstream entity), this Court may resolve that dispute at a time and in a manner that it deems appropriate. If a dispute arises as to an oil company's authority to opt Branded Operators out of the class, procedures at the claims-administration level can establish (i) if a particular vicarious opt-out is or is not valid and/or (ii) who owns the claim based upon the particular transactions in dispute. Regardless of any procedure that may be adopted, when one entity has remained in the class while the other has opted out, whichever of the oil company or the Branded Operator has remained in the class will need to establish a basis for claiming settlement funds on its transactions just like any other class member.

3. Where an oil company has released a Branded Operator's claims through a prior settlement, the Branded Operator is not a class member.

The Branded Operators complain that the "settlement purports to exclude from the class all entities identified in any exclusion list submitted by the companies." Fikes Obj. at 24. But presence on an exclusion list is also an objective criterion—an objective criterion to which Class Counsel provided notice to affected entities. Notice of Excl. from Class Action Settlement, ECF No. 7354-2, Jan. 15, 2019. Thus, to the extent that a Branded Operator—or any other merchant—had their claims released by another entity's prior settlement, the Branded Operator

is not a class member and has no standing to object. *In re LIBOR*, 327 F.R.D. at 499 (S.D.N.Y. 2018) (recognizing that "[o]nly Class members have standing to object to the Settlement of a class action") (citing and quoting *In re Drexel Burnham Lambert Grp., Inc.*, 130 B.R. 910, 923 (S.D.N.Y. 1991), *aff'd*, 960 F.2d 285 (2d Cir. 1992); Superseding Sett. Ag. ¶ 4. Accordingly, in this situation, a Branded Operator's dispute is not with Class Counsel or this settlement but with the oil company that settled the Branded Operator's claims.

This is not to say that a Branded Operator is helpless if its claims were improperly settled by an upstream supplier. In this situation, a Branded Operator may well have a cause of action against the oil company for settling the Branded Operator's Claims without its authority and misappropriating funds that rightfully belong to it. But that dispute belongs in another forum and not as an objection to approval of this class-action settlement.

VI. The Plan of Allocation is Reasonable.

Finally, two objectors suggest that the plan of distribution is inequitable or unreasonable. These objections are not convincing.

A. The objections to the plan of allocation are based on speculation and an apparent belief that it is somehow "inequitable" to treat all class members the same.

First, the Gnarlywood Objectors argue that the plan of allocation is inequitable because merchants that only recently began accepting Visa or Mastercard payment cards are disproportionately affected by the release, which they equate to an inadequacy of representation. According to the Gnarlywood Objectors, relatively new class members are being treated unfairly, because these newer merchants' pro rata shares of the settlement entitles them to less total monetary compensation than merchants that have been class members for a longer period of time, while they give up claims accruing through five years after the Settlement Final Date the

same as any other merchant. Gnarlywood Obj. at 8–9. The Gnarlywood Objectors confuse adequacy of representation with the reasonableness of the plan of allocation. This objection is tantamount to arguing that the settlement is "inequitable" for treating all class members the same: every class member receives pro rata monetary compensation according to the interchange fees attributable their Visa and Mastercard-branded transactions within the class period, and every class member is subject to the same release going forward. In other words, a class member's "newness" has nothing to do with the size of its claim.

Second, Objector Nejat Kohen complains that the ability of class counsel to apply to the Court to have settlement proceeds that remain in the fund after two distributions to be distributed "as ordered by the Court" is an "arbitrary or ambiguous clause," potentially worth over $1 billion. (Kohen Obj. at 8–9.) Untrue. First, there is no basis for Kohen's speculation that greater than $1 billion in settlement funds will remain in the Settlement Escrow Account after two distributions. Moreover, the problem that Kohen complains of—unclaimed funds after a class action settlement that cannot economically be distributed to class members—is a common one that is routinely resolved by allowing class counsel to petition the court to make a *cy pres* or other beneficial payment of the remaining funds. *See, e.g.*, *In re Holocaust Victim Assets Litig.*, 311 F. Supp.2d 407, 416 (E.D.N.Y. 2004) ("When a litigated or settled aggregate class recovery cannot feasibly be distributed to individual class members or when a balance of a class recovery remains following individual distribution . . . the court may direct that such undistributed funds be applied prospectively to the indirect benefit of the class …[via] [the] *cy pres* approach . . . .") (citing and quoting *Airline Ticket Comm'n Antitrust Litig.*, 307 F.3d 679, 682 (8th Cir. 2002)). The plan of distribution and allocation is reasonable and rational.

Kohen and the Gnarlywood Objectors essentially demand perfection, as they apparently define it, from the plan of allocation and distribution. Some abstract notion of perfection is not required, however. *In re EVCI Career Colleges Holding Corp. Sec. Litig.*, No. 05-CV-10240, 2007 WL 2230177, at *11 (S.D.N.Y. July 27, 2007) (collecting cases). Especially when a settlement is recommended by experienced and competent class counsel, it need only have a "reasonable, rational basis" to warrant approval. *Payment Card IV*, 330 F.R.D. at 40; *In re WorldCom, Inc. Sec. Litig.*, 388 F.Supp.2d 319, 344 (S.D.N.Y. 2005). The plan of allocation and distribution here is eminently reasonable and rational. Courts routinely approve *pro rata* distributions of settlement funds. *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F.Supp.2d 503, 519 (E.D.N.Y. 2003) (approving settlement-allocation plan, under which merchant class members received payments in proportion to their payment-card-acceptance volume); *see also Shapiro v. JPMorgan Chase & Co.*, No. 11-CV-7961, 2014 WL 1224666, at *13 (S.D.N.Y. Mar. 24, 2014).

B. The Plan of Allocation and Distribution does not demonstrate an inadequacy of representation.

Contrary to the Gnarlywood Objectors' suggestion that "Class Members with an imbalance between the class period and additional release period" have been inadequately represented, the plan of allocation does not call into question the adequacy of representation. Gnarlywood Obj at 14–15. As already explained in its Memorandum of Law in Support of Final Approval of Class-Action Settlement, this Court already made initial determinations of adequacy when it appointed Co-Lead Counsel as interim representatives for the Rule 23(b)(3) Class. *See* Fed. R. Civ. P. 23(e)., Adv. Comm. Notes to 2018 Amendments (noting that appointment as interim representatives necessarily entails an evaluation of counsel's adequacy to represent the

class); *Payment Card I*, 986 F.Supp.2d at 239; *Payment Card IV*, 2019 WL 359981, at *24–27. At final approval, the focus is on the actual performance of counsel, as judged by the extensiveness of litigation required to reach settlement, counsel's conduct of settlement negotiations, and the result obtained relative to other cases on the same subject matter. *See* Fed. R. Civ. P. 23(e), Adv. Comm. Notes to 2018 Amendments; *D'Amato*, 236 F.3d at 85 (directing courts to analyze the negotiating process and discovery taken by class counsel). On this score, Class Counsel respectfully submits that the results they obtained and the diligence with which they litigated this case speak for themselves. *See* Opening Br. at 6–9.

Nor does the Gnarlywood Objectors' argument call into question the adequacy of the class representatives. The class representatives suffered the same legal injury as the absent class members – overpaying to accept Visa- and Mastercard-branded payment cards. They also represent a broad swath of the merchant community, a fact which this Court has already found strengthened their adequacy. *Payment Card IV*, 2019 WL 359981, at *24. The Representatives include purely internet retailers to bricks-and-mortar stores, large companies to "mom-and-pop" stores, and operate on both coasts and in the Midwest. 3d Consol. Am Class Action Compl. ¶¶ 10-18, ECF No. 6880, Mar. 31, 2017.

In accordance with the bifurcated structure adopted in Phase Two of this litigation, Rule 23(b)(3) Class Counsel and Representatives had one overriding objective: maximize monetary recovery for the class as a whole. Class Counsel achieved this objective. The fact that some class members will receive less of this monetary compensation than others because they have smaller injuries to compensate for hardly renders the plan of distribution inequitable, or class representation inadequate.

VII. Conclusion

Class Plaintiffs and Co-Lead Counsel have fought tirelessly for over fourteen years to litigate and settle this case, present it for approval, and prepare to administer the settlement. In light of the few objections to the settlement, and the lack of merit of the objections that have arisen, Class Plaintiffs respectfully request that this Court finally approve the settlement.

Respectfully submitted,

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/s/ *K. Craig Wildfang*

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