UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION	MDL Docket No. 1720 (JG)(JO)

CLASS PLAINTIFFS' BRIEF IN OPPOSITION TO TARGET OBJECTORS' MOTION TO EXCLUDE DR. FRANKEL

K. Craig Wildfang
Thomas J. Undlin
Ryan W. Marth

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.
800 LaSalle Avenue, Suite 2800
Minneapolis, MN 55402
Tel: 612–349–8500
Fax: 612–339–4181

Patrick J. Coughlin
Bonny E. Sweeney
David W. Mitchell
Alexandra S. Bernay

ROBBINS GELLER RUDMAN & DOWD LLP
655 West Broadway, Suite 1900
San Diego, CA 92101
Tel: 619–231–1058
Fax: 619–231–7423

H. Laddie Montague
Merrill Davidoff
Bart D. Cohen
Michael J. Kane

BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
Tel: 215–875–3000
Fax: 215–875–4604

Co-Lead Counsel for MDL 1720 Class Plaintiffs

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

Rules

Treatises

I. INTRODUCTION

The Target Objectors move to exclude solely that aspect of Dr. Alan Frankel's economic opinions and analyses relating to an estimate of the magnitude of the potential savings to merchants over the next decade as result of the ability to surcharge, as provided for by the proposed settlement. The motion is fundamentally flawed. The motion is procedurally improper as the Federal Rules of Evidence, including Rule 702 and the requirements for the admissibility of expert testimony pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), do not apply at a class settlement fairness hearing. Moreover, the concerns underlying *Daubert* are absent here. There is no chance the Court will be misled by Dr. Frankel's cost savings estimate because the Court has appointed its own independent economic expert as its consultant on issues such as the value of the Rule 23(b)(2) settlement. As the Court of Appeals recently recognized, while "valuing nonmonetary antitrust settlements [ ] is an inherently imprecise business," courts should use their "'informed economic judgment.'" *Blessing v. Sirius XM Radio Inc.*, 507 Fed. Appx. 1, 4 (2d Cir. 2012) (citing and quoting *Merola v. Atl. Richfield Co.*, 515 F.2d 165, 172 (3d Cir. 1975) ("[C]ourts should apply their 'informed economic judgment' and any 'probative evidence of the monetary value' of the remedy when assessing nonmonetary antitrust settlement value.))."

But, even if the Court addresses the merits of this improper motion, Dr. Frankel's analysis fully satisfies *Daubert*. The Target Objectors do not dispute that Dr. Frankel is qualified to provide his economic analyses. He is one of the world's preeminent experts on the economics of payment card networks. The Target Objectors' challenges to Dr. Frankel's cost savings estimate go to the weight of his analysis not the reliability of his methodology. Thus, there is no basis for excluding this part of Dr. Frankel's economic analyses and opinions. To the contrary, Dr. Frankel's cost savings estimate provides this

Court with information to assist it in determining the fairness, reasonableness and adequacy of the rule modifications provided for under the Rule 23(b)(2) class settlement. Accordingly, the Court should deny the Target Objectors' motion.

II. SUMMARY OF DR. FRANKEL'S ECONOMIC ANALYSES AND OPINIONS

Dr. Frankel uses his expertise and approximately twenty years of experience analyzing and studying the economics of payment card systems to analyze and explain the economic impact of the relief obtained on behalf of the Rule 23(b)(2) Settlement Class. The Target Objectors do not seek to exclude Dr. Frankel's economic analyses and opinions explaining how and why merchants will benefit from the rules modifications and other relief obtained, and in particular the right to surcharge, provided for under the terms of the class settlement.

Dr. Frankel relies on established economic principles and market forces to explain that surcharging results in greater price transparency which is essential to a competitive marketplace. Prior to this litigation, Visa and MasterCard had adopted and enforced a number of rules which prevented merchants from surcharging, discounting and other actions – known as anti-steering restraints – which would incentivize their customers to pay with forms of payment cheaper than Visa and MasterCard branded credit cards. These anti-steering restraints had the effect of preventing price transparency and thwarting the competitive forces that would exert pressure on the networks to lower interchange fee rates. Declaration of Alan S. Frankel, Ph.D. Relating to the Proposed Settlement (Dkt. No. 2111-5) at ¶¶ 8-12 (hereinafter "Frankel Declaration"). Modifying or eliminating the anti-steering restraints makes the payment card market more competitive because "[t]he more competitive tools that merchants have available to them to discourage the use of the Networks' high-priced cards, the more competitive pressure those tools will tend to put on the networks to keep their fees low." *Id*. at ¶ 19.

Dr. Frankel further explains that surcharging gives merchants a substantial tool to create price transparency and steer customers to cheaper payment forms because consumers respond more strongly to surcharging than to discounts.[1] It is a well-accepted economic principle that consumers are loss averse meaning they will actively seek to avoid paying a surcharge but will not necessarily take action to obtain a discount. Surcharging credit card transactions therefore will likely result in the surcharged card brand being used less which puts pressure on that card brand to lower its rates. *Id*. at ¶¶ 29, 48-51.

Relying on empirical evidence, Dr. Frankel opines that given the ability to do so some merchants will surcharge to recover their costs and put pressure on fees charged by Visa and MasterCard. For example, in the United States certain types of merchants have been allowed to charge, and have charged, "convenience fees" (a form of surcharging) on Visa and MasterCard credit card transactions which has resulted in consumers switching to a different payment method to avoid the surcharge. *Id*. at ¶¶ 30, 42. Europe and Australia provide further evidence that some merchants will take advantage of the ability to surcharge. For example, in Australia, although merchants at first (in 2003) were slow to adopt surcharging, as of December 2010, approximately 30% of merchants imposed a surcharge on at least one credit card they accepted. In Australia, merchants have the incentive to surcharge the more expensive Amex and

---

[1] The class plaintiffs also challenged Visa's and MasterCard' rules which prevented or limited discounting for cheaper payment forms and providing different discounts or benefits at the point of sale for different card brands. These rules limited merchants from steering cardholders in these ways to cheaper payments forms and thus limited competition. During the course of this litigation, Congress, via the Dodd-Frank Act, and the Department of Justice, through settlements with Visa and MasterCard, reformed these rules. Dr. Frankel explains that merchants benefit by having these additional steering tools which contribute to making the marketplace more competitive. *Id*. at ¶¶ 20-26. But there is no guarantee that these rules modifications will remain in place. The settlement requires that these rules changes remain in effect even if the relevant provisions of the Dodd Frank Act and/or DOJ settlements are repealed or modified. Accordingly, these provisions of the settlement benefit merchants. *Id*. at ¶ 28.

Diners Club credit card brands and in fact do so resulting in customers paying with a cheaper payment form. *Id*. at ¶¶ 33-42. The empirical evidence shows that the competitive pressure asserted by both the threat of surcharging and actual surcharging has led to Amex and Diners Club to lower their rates in Australia. *Id*. at ¶¶ 44-47. Accordingly, the ability to surcharge increases competition in the marketplace and benefits merchants by: 1) increasing the transparency of the costs of various payment mechanisms; 2) enabling merchants to recover all, or a portion of, the costs associated with card transactions; 3) encouraging customers to pay with lower cost payment forms thus reducing merchants' overall average costs; and 4) incentivizing Visa and MasterCard to set lower interchange fees "because the [Visa and MasterCard] will lose more transactions if they maintain high interchange fees with surcharging than without surcharging," which benefits all merchants, whether or not they surcharge." *Id*. at ¶ 32.[2]

Having analyzed and explained how and why merchants benefit from the ability to surcharge provided for under the class settlement, Dr. Frankel then "show[s] that even modest responses to the threat of surcharging or modest amounts of surcharging will result in substantial savings and recoupment of costs by merchants." *Id*. at ¶ 66. The purpose of this economic analysis is to illustrate the magnitude of the amount that merchants could save over the next decade with the ability to surcharge. Dr. Frankel is not estimating future or past damages and is not employing a regression analysis or future forecast model. He recognizes that his cost savings estimate is not a prediction of what will happen in the future but rather is an illustration based on certain economic assumptions and factors. *Id*. at ¶ 65. Dr. Frankel explains the economic bases for his

[2] Dr. Frankel also explains why merchants benefit from surcharging even if there are certain state statutes that might restrict surcharging (*Id*. at ¶ 59) and American Express's no-discrimination rule might hamper surcharging by some merchants (*Id*. at ¶ 64). He also explains how merchants benefit from the ability to not accept Visa and MasterCard credit cards at all of their banners (*Id*. at ¶ 54) and from the ability to form buying groups (*Id*. at ¶ 57).

assumptions and factors. The real world experience in Australia, a natural experiment, provides the bases for some of his assumptions. For example, if competitive pressure is put on fees in the United States similar to what has occurred in Australia, it would narrow the gap by .04% per year resulting in significant savings to merchants. *Id*. at ¶¶ 68-71. Dr. Frankel also uses Australia as the basis for the percentage of merchants that might surcharge in the United States to estimate the amounts merchants could recoup in fees on surcharged transactions and save in costs as a result of customers switching payments to cheaper debit cards. *Id*. at ¶ 72. Finally, to reflect the potential effects of American Express' no-discrimination policy and the states that may prohibit surcharging, Dr. Frankel reduces all values used in his analysis by a significant amount – 75%. *Id*. at ¶ 73. Dr. Frankel's illustration shows that a modest amount of surcharging or modest responses to the threat of surcharging could result in significant savings for merchants estimated to range from approximately $26 to $94 billion over a ten year period. *Id*. at Figures 1 and 2.

III. THE TARGET OBJECTORS' MOTION SHOULD BE DENIED AS IMPROPER

The Target Objectors' motion should be denied because the *Daubert* requirements, and the Federal Rules of Evidence, do not apply at a class settlement fairness hearing. *Int'l Union, United Auto., Aerospace and Agric. Workers of America v. General Motors Corp.*, 497 F.3d 615, 636-37 (6th Cir. 2007); *American Int'l Grp., Inc. v. ACE INA Holdings, Inc.*, Nos. 07 CV 2898, 09 C 2026, 2012 WL 651727, at *20 (N.D. Ill. Feb. 28, 2012) (rejecting argument that a portion of an expert declaration should be excluded under *Daubert* because "the Federal Rules of Evidence and the requirements of *Daubert* and its progeny do not apply at a fairness hearing"). That is because a fairness hearing is an information gathering process to provide the Court with information sufficient to determine whether the proposed settlement is fair, reasonable and adequate, and not a full trial on the merits. *See Initial Pub. Offering Sec. Litig.*, 226 F.R.D. 186, 189-90 (S.D.N.Y. 2005) ("The

trial judge must 'apprise herself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated.' The court should not go so far as to effectively conduct a trial on the merits, but should make 'findings of fact and conclusions of law whenever the propriety of the settlement is seriously in dispute.' The court must also scrutinize the negotiating process leading up to the settlement"); *In re Visa Check/MasterMoney Antitrust Litig.*, 297 F. Supp. 2d 503, 509 (E.D.N.Y. 2003) (while the court must assure itself that the settlement is fair, reasonable and adequate, it should not engage in the type of investigation it would if conducting a trial). As the Court of Appeals for the Sixth Circuit explained in rejecting the contention that expert opinions should have been excluded at a fairness hearing for failing to meet the *Daubert* standards:

> The Rule 702 argument, again, overlooks the differences between a full trial and a fairness hearing. In a trial, the judge must strictly screen expert opinions for "evidentiary relevance and reliability" because a jury often has difficulty assessing such evidence. [ ] In a fairness hearing, the judge does not resolve the parties' factual disputes but merely ensures that the disputes are real and that the settlement fairly and reasonably resolves the parties' differences. The *Daubert* objection suffers from the same problem, and, what is more, this screening requirement remains "a flexible one."

Int'l Union, United Auto., Aerospace and Agric. Workers of America, 497 F.3d at 636-37. *See also Williams v. Quinn*, 748 F. Supp. 2d 892, 897 (N.D. Ill. 2010) ("In determining whether to approve a settlement, the Federal Rules of Evidence do not apply. Case law supports that any information can be considered, including affidavits and other items not normally admissible at trial, that will aid the court in reaching an informed and reasoned decision."); *United States v. City of New Orleans*, No. 12-1924, 2013 WL 2351266, at *20 (E.D. La. May 23, 2013) ("Contrary to the City's assertions otherwise, the Court was not required to conduct the Fairness Hearing in the nature of a trial on the merits strictly adhering to the Federal Rules of Evidence. . . . The Court is entitled to elicit

whatever information is necessary to determine whether a consent decree is fair, adequate, and reasonable.").[3]

Moreover, contrary to the Target Objectors' assertion, Dr. Frankel's challenged opinion is not being offered to establish any requirement under Rule 23(b)(2) of the Federal Rules of Civil Procedure.[4] *See* Target Objectors' Br. at 3-5 (Dkt. No. 2533-1). Dr. Frankel's analyses and opinions are being offered to assist the Court in determining whether the proposed settlement is fair, adequate and reasonable under Rule 23(e). Accordingly, the *Daubert* standards are not applicable to Dr. Frankel's analysis and opinion regarding the magnitude of the potential cost savings to merchants from the ability to surcharge and the Target Objectors' motion to exclude should be denied.

IV. THE TARGET OBJECTORS HAVE NOT MET THE *DAUBERT* STANDARD TO EXCLUDE DR. FRANKEL'S OPINIONS

Even if the Court addresses the Target Objectors' improper motion, they have not met the *Daubert* standard to exclude Dr. Frankel's analysis and opinion estimating costs savings. In describing that admissibility standard, the Target Objectors ignore that *Daubert* – and Rule 702 – articulates a *liberal* standard for the admission of expert testimony. As the Second Circuit has recognized, *Daubert* "loosen[ed] the strictures on

---

[3] Although the Target Objectors cite three cases where courts have addressed a *Daubert* challenge to expert opinions in support of a class action settlement, in none of the cases did the court expressly address the argument that a *Daubert* motion is inappropriate at a fairness hearing and in none of those cases did the court grant the *Daubert* motion. *See Butler v. Am. Cable & Tel., LLC*, No. 09 CV 5336, 2011 U.S. Dist. LEXIS 74512, at *31-35 (N.D. Ill. July 12, 2012) (rejecting proposed settlement but denying *Daubert* motion because arguments went to the weight of the testimony not its admissibility); *In re Fuel Temperature Sales Practices Litig.*, 271 F.R.D. 263, 276 (D. Kan. 2010) (overruling *Daubert* motion because the court did not need to rely on the expert declaration in deciding whether to approve the proposed settlement); *In re Johnson & Johnson Derivative Litig.*, 900 F. Supp. 2d 467, 491-94 (D. N.J. 2012) (finding that plaintiffs' experts opinions were reliable and considered them in approving settlement).

[4] Class Plaintiffs have previously stated that in support of settlement class certification, they also rely on their initial and reply memoranda and supporting material for class certification and their motion for preliminary approval of the settlement (Dkt. Nos. 1165, 1167 and 1656-2). See Dkt. No. 2111-1 at 41, n. 55.

scientific evidence set by *Frye*, [and therefore,] *Daubert* reinforce[d] the idea that there should be a presumption of admissibility of evidence." *Borawick v. Shay*, 68 F.3d 597, 610 (2d Cir. 1995). The Federal Rules of Evidence have a "liberal thrust" and "liberal admissibility standards" that "recognize[ ] that our adversary system provides the necessary tools for challenging reliable, albeit debatable, expert testimony." *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 265, 267 (2d Cir. 2002). *See also Nimely v. City of New York*, 414 F.3d 381, 395 (2d Cir. 2005) ("It is a well-accepted principle that Rule 702 embodies a liberal standard of admissibility for expert opinions, representing a departure from the previously widely followed, and more restrictive, standard of *Frye*.").

Under *Daubert*, the court serves a "gatekeeping" function by "ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." 509 U.S. at 579, 597. As gatekeeper, the court must determine whether the following three requirements for admissibility are met: (1) the witness must be "'qualified as an expert' to testify as to a particular matter"; (2) the expert's opinion must be "based upon reliable data and methodology"; and (3) "the expert's testimony (as to a particular matter) [must] assist the trier of fact." *Nimely*, 414 F.3d at 397 (internal quotes and cites omitted).

When reviewing expert testimony for admissibility, the Court should admit testimony even if it believes the expert's technique has flaws that may render the conclusions inaccurate. As the Second Circuit recognized, "A minor flaw in an expert's reasoning or a slight modification of an otherwise reliable method [does] not render an expert's opinion per se inadmissible." *Amorgianos*, 303 F.3d at 267.

In addition, the novelty of the theory or its application does not render the opinion inadmissible as long as it based on a reliable methodology. *Deutsch v. Novartis Pharm.*

Corp., 768 F. Supp. 2d 420, 437 (E.D.N.Y. 2011). "[S]cience is constantly evolving, and the fact that a theory is new or in the process of becoming generally accepted does not prevent its admission in court." *In re Baycol Prods. Litig.*, 532 F. Supp. 2d 1029, 1066 (D. Minn. 2007). In a *Daubert* challenge, the proponents "'do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are *correct*, they only have to demonstrate by a preponderance of evidence that their opinions are reliable. . . . The evidentiary requirement of reliability is lower than the merits standard of correctness.'" *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 744 (3d Cir. 1994) (emphasis in original).

"*Daubert* neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance." *Ruiz-Troche v. Pepsi Cola of Puerto Rico Bottling Co.*, 161 F.3d 77, 85 (1st Cir. 1998). The focus of the court's evaluation "must be solely on principles and methodology, not on the conclusions that they generate." *Daubert*, 509 U.S. at 595.[5] As a result, the "rejection of expert testimony is the exception, rather than the rule." *See* Fed. R. Evid. 702 advisory committee's notes (2000). As aptly noted by a court denying a *Daubert* motion in an antitrust class action:

> In many '*Daubert* hearings,' the party opposing admissibility of an expert's testimony essentially asks the court to weigh or evaluate the expert's opinion under the pretense of fulfilling its *Daubert* gatekeeping role. In many of the motions, arguments couched in terms of sufficiency of the data, or reliability of methodology, in reality were assertions that this court should reject certain data - facts, of course - in favor of others. The court may not resolve factual disputes in performing a *Daubert* analysis. From that, it follows that if the resolution of a *Daubert* issue involves a mixed question of fact and law, the expert's opinion should be admitted into evidence.

---

[5] *See also Amorgianos*, 303 F.3d at 266 (stating that the court must "focus on the principles and methodology employed by the expert, without regard to the conclusions the expert has reached or the district court's belief as to the correctness of those conclusions.").

In re Southeastern Milk Antitrust Litig., No. 2:08-MD-1000, 2010 WL 5102974, at *9-10 (E.D. Tenn. Dec. 8, 2010).

Dr. Frankel's analyses and opinions fully satisfy the Second Circuit's requirements for admissibility since (1) he is qualified as an expert; (2) his opinions are based on reliable methodology; and (3) his opinions will assist the Court.

1. Dr. Frankel is well-qualified.

The Target Objectors concede, as they must, that Dr. Frankel is well-qualified to provide expert economic opinions in this case. Dr. Frankel is one of the leading authorities and experts on the economics of payment card networks, including the competitive effects of Visa's and MasterCard's anti-steering restraints.[6] Dr. Frankel has been studying and analyzing the history and structure of payment card networks, including the economic effects of the conduct challenged in this litigation, since 1990. His economic analyses and opinions on these issues have been published in ten peer-reviewed articles – including articles co-authored with Professor Dennis Carlton.[7] He has been recognized by courts, agencies and tribunals as an expert on economics and payment systems. He has performed economic analyses and formed opinions regarding the competitive effects of fixed interchange fees and the anti-steering restraints in connection with government/regulatory investigations around the world, including the European Commission, United Kingdom, New Zealand, and Australia. In two of those investigations – U.K. Office of Fair Trading and New Zealand Commerce Commission – Dr. Frankel was retained by the regulatory authorities to assist them in discharging

---

6 Dr. Frankel's *curriculum vitae* is Exhibit 1 to the Frankel Declaration.

7 Dr. Carlton is the co-author of the leading treatise on industrial organization economics, *i.e.* the study of the economics of competition and restraints on competition. *See* Dennis W. Carlton & Jeffrey M. Perloff, Modern Industrial Organization (4th ed. 2005).

their public duties to evaluate the economic issues raised by the restraints imposed by Visa and MasterCard in payment card market in their jurisdictions.

Dr. Frankel has spoken at numerous conferences around the world about the history and competitive effects of payment card networks, including interchange fees. Several of these conferences have been sponsored by the Federal Reserve Banks of New York, St. Louis, Chicago, and Kansas City.

2. Dr. Frankel's Cost Savings Estimate is Based on a Reliable Methodology.

In antitrust cases, economists apply economic theory and analyze empirical evidence to determine the challenged conduct's competitive effects in the relevant markets. *See Southeastern Milk Antitrust Litig.*, 2010 WL 5102974, at *11 (expert economists "explain the economic causes and effects of particular actions").

That is exactly what Dr. Frankel has done here. Using established economic theory, including market forces, Dr. Frankel explains how and why merchants will benefit from the ability to surcharge, and other relief, under the terms of the settlement. The Target Objectors do not seek to exclude Dr. Frankel's economic analyses and opinions explaining that the ability to surcharge creates a more competitive marketplace which will exert competitive pressure on Visa and MasterCard to lower interchange rates, enable many merchants to recoup, at least, part of their costs associated with accepting credit cards, and incentivize consumers to switch to lower cost payment forms when purchasing goods and services. Those same economic factors are the predicate for Dr. Frankel's illustration of the magnitude of the amount of the potential costs savings and recoupment associated with a modest amount of surcharging or modest responses to the threat of surcharging.

Dr. Frankel recognized and explained that this analysis is not akin to a damages model. He is not constructing a but-for world to estimate how much merchants would have paid in interchange fees had they been allowed to surcharge or how much they would have recouped in interchange fees had they been allowed to surcharge or how much costs would have been reduced if they had been permitted to steer customers to lower cost payment forms. He does not need to and does not use a multiple regression analysis or some type of forecast model, such as might be used to estimate the future value of business but for the challenged conduct, to do his analysis. Frankel Decl. ¶¶ 65-66. Rather, Dr. Frankel illustrates the magnitude of the amount of costs merchants may save and recoup over the next ten years based on modest responses to the threat of surcharging or a modest amount of surcharging, which are supported by experience on other markets. His analysis is based on the following six factors that he has identified relying on his unquestionable knowledge and experience with payment card systems:

- The aggregate amount of credit card charge volume each year if there are no surcharges;
- The amount by which surcharging would depress the level of interchange fees relative to those which otherwise would exist;
- The percentage of merchant dollar charge volume that would be in states that may forbid surcharges;
- The percentage of merchant dollar charge volume that would be at merchants that will surcharge;
- The average amount of surcharges that merchants would choose; and
- Shifts in usage between payment methods from the factors above and from other changes in the economy.

Id. at ¶ 65. He then assigned values to each of those factors explaining that each is connected to real world data and information. For example, he explains that he starts with 2012 credit charge volume based on Visa and MasterCard data and applies an 8.5% growth rate because that rate is the approximate transaction volume rate of growth for

both the period before and after the recent great recession. *Id*. at ¶ 67. Dr. Frankel uses Australia as a benchmark to assign values for: 1) the amount by which interchange fees will be depressed by merchants' ability to surcharge (.04% per year); 2) the percentage of charge volume for which merchants will in fact apply surcharges (growing to 20% over a 10 year period, which is less than 30% rate in Australia); and the shift of transactions at non-surcharging merchants from credit to debit (about 18% of the interchange fees which would otherwise be collected (at current rates of about 2%) on MasterCard and Visa credit card transactions over the next decade). *Id*. at ¶¶ 70-72. Lastly, Dr. Frankel reduces each of these values by a large amount – 75% – to reflect the potential impact of American Express's non-discrimination rule and states which may prohibit surcharging because there is no known benchmark. *Id*. at ¶ 73.

The use of benchmarks is well-accepted in economic analysis. *See, e.g., In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. 68, 76 (E.D.N.Y. 2000) (denying defendants' *Daubert* motion where plaintiffs' expert cited two "empirical 'benchmarks'" based on current information from Canada and historical data from the United States); *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 522-23 (S.D.N.Y. 1996) ("'The "yardstick" approach'. . . [has] been cited with approval by numerous courts in granting class certification") (quoting ABA Antitrust Section, *Antitrust Law Developments* (3d ed. 1992) at 669-73). Benchmarks do not need to perfect to be useful in an economic analysis. Because the benchmark values used in Dr. Frankel's analysis are tied to real world data and he explains why each value is appropriate here, his assumptions are reliable unlike the unrealistic and speculative assumptions suggesting bad faith relied upon by the experts in the inapposite cases cited by the Target Objectors (*see* Target Objectors Br. at 9-14).[8] The Target Objectors' disagreement with each of the benchmark

[8] It should be noted that in the inapposite cases relied upon by the Target Objectors, the expert opinions on damages were excluded because the damages estimates were

values used in Dr. Frankel's analysis goes to the weight of his analysis but fails to demonstrate his methodology is unreliable.[9] *See Boucher v. U.S. Suzuki Motor Corp.*, 73 F.3d 18, 21 (2d Cir. 1996) (holding that – aside from testimony that is "speculative or conjectural" or assumptions that are "so unrealistic and contradictory as to suggest bad faith" or to be in essence "an apples and oranges comparison" – "other contentions that the assumptions are unfounded go to the weight, not the admissibility, of the testimony.") (internal quotes and cites omitted); *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1188 (2d Cir. 1992) (where expert's valuation for future salary potential were based on government data for average age until retirement and plaintiffs' historical salary rate increases, defendants' disagreement with those values based on Defendants' actual salary data went to the weight of the testimony not its admissibility.) Accordingly, the Target Objectors' disagreements with Dr. Frankel do not provide any basis for excluding his analysis and opinion regarding the magnitude of the amount of potential cost savings and recoupment, but rather present a credibility issue. *See Daubert*, 509 U.S. at 595; *Visa Check*, 192 F.R.D. at 78 (*quoting Iacobelli Constr., Inc. v. County of Monroe*, 32 F.3d 19, 25 (2d Cir.1994)).

3. Dr. Frankel's opinions will assist the Court.

To be admissible under *Daubert*, a reliable expert opinion must be helpful to aid in "understand[ing] the evidence or [ ] determin[ing] a fact in issue." Rule 702; *Daubert*, 509 U.S. at 591. *Accord Nimely*, 414 F.3d at 397. The Supreme Court explained that the requirement that the expert's opinion must be helpful "goes primarily to relevance," in that it "requires a valid scientific connection to the pertinent inquiry as a precondition

---

predicated on unrealistic and speculative assumptions and/or failed to take into account other known potential causes of the claimed loses.

[9] In particular, the Target Objectors' contention that Australia is not an appropriate benchmark is erroneous. To the contrary, economists frequently cite to and discuss the Australian experience in economic studies about payment card markets.

to admissibility." *Daubert*, 509 U.S. at 591-92. *See also Amorgianos*, 303 F.3d at 265 (stating that an expert witness's testimony must be relevant, *i.e.*, it must have a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence") (internal quotes and cites omitted). To satisfy the requirement, an expert's opinion does not need to establish, in and of itself, any of the ultimate issues; it only needs to constitute one "piece of the puzzle" in proving the case. *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329, 1339-40 (11th Cir. 2003) (holding that exclusion of expert affidavit on grounds of irrelevance was an abuse of discretion where relevance of expert's assertions uncontestable) (citing *City of Tuscaloosa v. Harcros Chem., Inc.*, 158 F.3d 548, 565 (11th Cir. 1998)). *Accord Fleischman v. Albany Med. Ctr.*, 728 F. Supp. 2d 130, 151-52 (N.D.N.Y. 2010); *Allen v. City of New York*, 466 F. Supp. 2d 545, 550 n.3 (S.D.N.Y. 2006).

It bears emphasis that the Target Objectors do not dispute Dr. Frankel's qualifications to render expert opinions. His economic analyses and opinions illustrating the magnitude of the amount of potential costs savings and recoupment, along with his other economic analyses and opinions explaining how and why merchants benefit from the rules modifications which are not the subject of this motion, will aid the Court in determining whether the proposed class settlement as it relates to the Rule 23(b)(2) Settlement Class is fair, reasonable and adequate.

V. CONCLUSION

For all of the above reasons, the Target Objectors' motion should be denied.

August 16, 2013

Respectfully submitted,

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.
K. Craig Wildfang
Thomas J. Undlin
Ryan W. Marth

s/ K. Craig Wildfang
K. CRAIG WILDFANG
2800 LaSalle Plaza
800 LaSalle Avenue South
Minneapolis, MN 55402-2015
Telephone: 612/349-8500
612/339-4181 (fax)

BERGER & MONTAGUE, P.C.
H. Laddie Montague, Jr.
Merrill G. Davidoff
Bart D. Cohen
Michael J. Kane

s/ H. Laddie Montague, Jr.
H. LADDIE MONTAGUE, JR.
1622 Locust Street
Philadelphia, PA 19103
Telephone: 215/875-3000
215/875-4604 (fax)

ROBBINS GELLER RUDMAN & DOWD LLP
Patrick J. Coughlin
Bonny E. Sweeney
David W. Mitchell
Alexandra S. Bernay

s/ Bonny E. Sweeney
BONNY E. SWEENEY
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

Co-Lead Counsel for Plaintiffs

84105861.1