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In The United States Court Of Appeals For The Second Circuit

IN RE PAYMENT CARD INTERCHANGE
FEE AND MERCHANT DISCOUNT
ANTITRUST LITIGATION

On Appeal from the United States District Court
for the Eastern District of New York

FINAL FORM BRIEF FOR PLAINTIFFS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

The parties to this brief complied with Rule 26.1 of the Federal Rules of Appellate Procedure by submitting a Compendium of Corporate Disclosure Statements on June 16, 2014. *See* D.E. 988.

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INTRODUCTION

This settlement was the culmination of eight years of arms-length, hard-fought litigation before a highly experienced judge, including four years of adversarial mediation before two distinguished independent mediators. The settlement secures up to $7.25 billion in damages, as well as unprecedented, immediately effective structural reforms of the payment card networks that "may very likely exceed the value of the monetary relief in the long run." SPA67. The district court, with its extensive experience with the relevant issues and knowledge of the litigation, correctly deemed that settlement a "significant success." SPA61.

A small group of objectors—many of whom supported a near-identical version of the settlement submitted to the district court three months before its execution—claims to be dissatisfied with the scope of structural reforms achieved as a result of this litigation. Objectors have channeled those frustrations into various attacks on the settlement classes, suggesting that certification of an injunctive-relief class alongside a damages class in this action gave rise to "cohesion," "due process," and "adequacy" problems. But many of objectors' complaints call into question common and unobjectionable practices, such as litigating Rule 23(b)(2) and 23(b)(3) classes simultaneously and foreclosing future challenges to agreed-upon, going-forward conduct. There is absolutely nothing improper about those prototypical uses

of Rule 23, and the district court considered and properly rejected each of objectors' arguments.

Objectors' stated concerns about the structure of the classes ultimately devolve into complaints about the overall fairness of the settlement. But the district court, after exhaustive evaluation, approved the settlement as both procedurally and substantively fair. That fact-intensive determination is well-supported by the robust structural assurances of fair and adequate representation of all interests in the proceedings overseen by the two mediators who wholeheartedly endorsed the settlement. It accords with the settlement's "massive" and "meaningful" relief, particularly when measured against the likely complexity, expense, delay, and risk of proceeding to trial. SPA15, 61. And the district court's holding is bolstered by the "'strong judicial policy in favor of settlements, particularly in the class action context.'" *McReynolds v. Richards-Cantave*, 588 F.3d 790, 803 (2d Cir. 2009).

Objectors' criticisms of the scope of the settlement relief and release do not come close to a "clear showing that the District Court has abused its discretion." *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001). Objectors dramatically understate the importance of the rule reforms obtained. Those reforms permit merchants, for the first time ever, to engage in surcharging—a tool by which merchants can inform customers about the costs of credit card acceptance, direct customers toward less costly payment methods, and recoup acceptance costs.

Conversely, objectors dramatically overstate the scope of the settlement's release of future claims. That release employs standard language that courts have repeatedly approved, and the Due Process Clause provides the ultimate assurance that claims will not—indeed, cannot—be impermissibly released. Objectors' further challenges to the reasonableness of the attorneys' fee award and the settlement notice are equally meritless.

In short, the settlement reflects a remarkable accomplishment, providing monetary and injunctive relief of unprecedented value and scope. The district court's determinations that the settlement, fee award, and notice were appropriate lie well within its broad discretion and should be affirmed.

STATEMENT OF THE ISSUES

1. Whether the district court acted within its broad discretion in concluding that the Rule 23(b)(2) injunctive-relief and Rule 23(b)(3) damages classes conform with their respective class certification requirements.

2. Whether the district court acted within its broad discretion in approving the settlement—which included $7.25 billion in money damages and unprecedented injunctive relief—as "fair, reasonable, and adequate" under Rule 23(e).

3. Whether the district court acted within its broad discretion in calculating and approving the attorneys' fee award as reasonable.

4. Whether the district court acted within its broad discretion in approving the settlement notice as reasonable.

STATEMENT OF THE CASE

A. The Payment Card Industry

Visa and MasterCard were created as bank-owned joint ventures a half-century ago, and were subsequently owned and controlled by the largest banks in the United States. The banks were members of Visa and MasterCard, owned stock in Visa and MasterCard, placed representatives on the Visa and MasterCard boards of directors and committees, and issued Visa and MasterCard payment cards. Through those influential positions, the member banks predictably established and enforced network rules that produced ever-increasing "interchange fees"—the fees that a merchant must pay to a card-issuing bank in order to accept Visa or MasterCard-branded cards. *See* JA868-70 (Second Consolidated Amended Class Action Complaint ¶¶94-100).

Visa and MasterCard have grown exponentially over the last four decades. In 1970, only 16% of U.S. families had a credit card, and less than one million U.S. merchants—approximately 20%—accepted payment cards. By 2006, 77% of U.S. adults had at least one credit card, and merchant acceptance was ubiquitous. In 2007 alone, transaction volume on bank-issued credit cards topped two trillion dollars, and Visa and MasterCard transactions accounted for roughly 75% of that volume. JA873, 884-85 (¶¶126, 274-276).

As their market power grew, the interchange fees Visa and MasterCard levied on merchants rose as well. Merchants faced a schedule of "default interchange fees" for every transaction on the network. In practice, because private agreements to deviate from the "default" rates were exceptionally rare, these were not just default fees, but actual fees. Along with payroll and rent, interchange fees became one of the largest operating costs for many businesses. By the mid-2000s, card-issuing banks were reaping more than $30 billion annually in interchange fees. JA1305-06 (Wildfang Decl. ¶17).

Interchange fees were not the only anticompetitive restraint adopted by the networks and the banks that controlled them. They also adopted various "anti-steering restraints" as network rules that every card-accepting merchant was required to follow. Coupled with merchants' obligations to pay default interchange fees and to "Honor-all-Cards" bearing the Visa or MasterCard brand regardless of the issuing bank or the amount of the interchange fee, these anti-steering restraints enabled banks to demand exorbitant sums at the expense of merchants that had no alternative but to continue paying the fees.

The "foremost example" of an anti-steering restraint was the *anti-surcharging rule*, which prohibited merchants from adding a surcharge at the point of sale to alert customers to the costs of payment options and recoup the costs associated with credit card usage. JA924 (Pls.' Mot. for Class Cert. at 3). This rule prevented merchants—

who were unable, as a practical matter, to stop accepting Visa and MasterCard—from using surcharges to "steer" customers towards less-expensive payment methods that did not carry the same fees. Customers, in turn, were left in the dark about those costs that they were indirectly bearing in the form of higher prices. This disabled both merchants and customers from exerting downward competitive pressures on interchange fees. JA879-81 (¶¶189-199).

Similarly, Visa's and MasterCard's *anti-minimum purchase rules* prevented merchants from requiring a minimum cost before they would accept Visa and MasterCard cards. In addition, their *anti-discounting rules* (or anti-"discrimination" rules) prohibited merchants from offering discounts and other benefits for purchases made with non-Visa and non-MasterCard products. *See* JA861 (¶8) (defining "Anti-Steering Restraints" as "the No-Surcharge Rule; the No-Minimum Purchase Rule; and the Networks' so-called 'anti-discrimination rules'").

B. Eight Years of Hard-Fought Litigation

In June 2005, merchants filed the first of over 40 class-action complaints alleging that Visa and MasterCard and their member banks conspired, *inter alia*, to impose and fix the price of interchange fees in violation of the Sherman Act. The class actions were consolidated later that year along with 19 individual cases before Judge John Gleeson in the Eastern District of New York.

From the outset, plaintiffs requested certification of *both* a damages class under Rule 23(b)(3) *and* an injunctive-relief class under Rule 23(b)(2). *See* JA830-31 (First Consolidated Amended Class Action Complaint ¶97); JA871 (¶108). Plaintiffs sought both "monetary damages to compensate them for the overcharges caused by th[e] illegal conspiracy" and "equitable relief to protect themselves against continuing and future harm." JA825. Both types of relief were premised on identical facts and evidence about the defendants' uniform course of anticompetitive conduct. And both types of relief were equally "important" in ensuring an effective remedy. JA928.

The settlement that ultimately emerged was the result of eight years of hard-fought litigation that consumed enormous resources and was closely monitored by the district court. The parties went toe-to-toe over discovery, which commenced in 2005 and took more than five years. That process entailed "more than 400 depositions, the production and review of more than 80 million pages of documents, the exchange of 17 expert reports, and a full 32 days of expert deposition testimony." SPA9. The parties' expert reports covered nearly 5,000 pages.

The parties also vigorously disputed class certification. Plaintiffs moved for certification of the Rule 23(b)(2) and 23(b)(3) classes in 2008. Defendants opposed certification and challenged the opinions of plaintiffs' class certification expert. The

district court received briefing over nearly fourteen months and held oral argument on class certification in November 2009.

The parties additionally engaged in multiple rounds of briefing on motions to dismiss. After one round of briefing and argument on plaintiffs' First Supplemental Class Action Complaint (post-IPO period), the district court partially dismissed with leave to re-plead. Defendants then launched a second round, moving to dismiss the First Amended Supplemental Class Action Complaint, Second Consolidated Amended Class Action Complaint, and Second Supplemental Class Action Complaint. The district court heard oral argument on these motions in November 2009.

The parties also exchanged cross-motions for summary judgment. In 2011, plaintiffs sought partial summary judgment and defendants sought judgment as to the entirety of the case. The district court received briefing over five months and held oral argument on the cross-motions in November 2011. The parties also filed eight *Daubert* motions in conjunction with the summary judgment briefing.

C. Industry Reforms During, and Due to, the Litigation

Plaintiffs' litigation efforts brought public (and Department of Justice) attention to the networks' anticompetitive practices and spurred major industry developments. Indeed, several reforms sought by plaintiffs were achieved outside the courtroom, often as a direct result of this litigation. While those reforms marked

a great accomplishment for merchants, they also injected delay and uncertainty into the litigation process.

Corporate Restructurings. Shortly after the first class action was filed, and in part to avoid "ruinous" antitrust liability, the networks abandoned their longstanding joint venture structures. JA857 (First Amended Supplemental Class Action Complaint ¶149(d)). MasterCard—a joint venture for over four decades—restructured in 2006. Visa—a joint venture since 1970—followed in early 2008. Both became publicly owned and operated, with the banks divesting their ownership and relinquishing their board memberships and voting control over network rules. This formal separation of the networks and banks, whereby the banks no longer control the business decisions of Visa and MasterCard, marked a tectonic industry shift. *Cf. United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961) (divestiture is the "most drastic … of antitrust remedies").

Durbin Amendment. Beginning in 2009, class counsel also became significantly involved in developing and drafting legislative reforms of the networks' practices. Class counsel recommended to leading merchant groups that, instead of seeking public-utility-like regulation of interchange fees, they focus on limiting fees on debit card transactions to give merchants a low-cost alternative to which merchants could eventually steer customers. The new strategy worked, and

culminated in the Durbin Amendment to the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

The Durbin Amendment limited the networks' anti-discounting rules, restricting their ability to "inhibit the ability of any person to provide a discount or in-kind incentive" to steer consumers at the point of sale toward less-expensive forms of payment. 15 U.S.C. § 1693o-2(b)(2)(A). It also limited the networks' anti-minimum purchase rules, preventing them from "inhibit[ing] the ability … of any person to set a minimum dollar value for the acceptance by that person of credit cards." *Id*. § 1693o-2(b)(3)(A). And, critically, the Durbin Amendment authorized the Federal Reserve Board to cap interchange fees on Visa and MasterCard debit card transactions to ensure that they are "reasonable and proportional to the cost incurred by the issuer." *Id.* § 1693o-2(a)(3)(A). By limiting debit interchange fees, Congress rendered debit cards a substantially lower-priced form of payment other than cash to which merchants could steer consumers.

Department of Justice Consent Judgment. As early as 2006, DOJ and several state attorneys general contacted class counsel and expressed interest in the litigation. In 2008, at the urging of class counsel, DOJ opened an antitrust investigation into Visa's and MasterCard's anti-steering restraints. After it issued a Civil Investigative Demand on plaintiffs seeking "all products of discovery relating to the Anti-Steering Rules," class counsel granted extraordinary access to their

document and deposition databases, work product, and advice over the next three years. JA1337-41. That assistance directly resulted in DOJ filing its own suit against Visa and MasterCard.

As the district court later observed, "the plaintiffs did not piggyback on previous government action—indeed, the government piggybacked on their efforts." SPA59. In 2011, DOJ entered a Consent Judgment against Visa and MasterCard that secured critical modifications to the anti-discounting rules, enabling merchants to offer discounts at *both* the brand level (*e.g.,* discounts on cards other than Visa credit cards) and product level (*e.g*., discounts on cards other than higher-cost Visa Signature cards or MasterCard World Elite cards). In the Consent Judgment, Visa and MasterCard also committed to providing free services to help merchants determine the costs of accepting particular cards.

D. Mediation and Settlement

1. In the wake of these significant industry reforms, the completion of discovery, and briefing and argument on class certification, dismissal, and summary judgment, the parties agreed at an advanced stage of the litigation to settle their claims. The settlement was the culmination of a painstakingly thorough and inclusive four-year mediation process spearheaded by two of the most experienced mediators in the country, Retired Chief Magistrate Judge Edward Infante and Professor Eric Green.

The parties jointly selected Judge Infante and Professor Green after months-long negotiations. JA1359 (¶177). Between April 2008 and December 2011, the parties met, either jointly or separately, with one or both of the mediators approximately 45 times, and exchanged hundreds of calls and e-mails in an attempt to make progress toward settlement. JA1358-60 (¶¶175, 181). The district court (with assistance from the mediators) also held several multi-day settlement conferences. Proposed class representatives—including many current-objectors—were repeatedly invited to participate. They did participate, and were heard at length by the mediators and the court. JA1134 (¶7); JA1142-43 (¶¶22-28).

The mediators presented a settlement proposal in December 2011. After weeks of discussions, the parties—including many current-objectors—accepted that proposal. By then, all parties were intimately familiar with the strengths and weaknesses of their claims. Class counsel concluded that accepting the mediators' proposal was "far preferable to the only alternative, which was many more years of litigation while merchants continued to be hamstrung by the no surcharge rules of Visa and MasterCard and remaining anti-steering rules." JA1362-63 (¶185). In class counsel's view, settlement was particularly attractive "when compared … to what was reasonably likely to be obtained by injunction in a trial before Judge Gleeson." *Id.* Class counsel recognized that even after many more years of delay and further

litigation, victory was by no means assured; plaintiffs faced a number of potential risks in their efforts to establish liability and damages and maintain a class action.

By February 2012, the parties—again, including many current-objectors—agreed to negotiate toward a final settlement through the process laid out by the mediators and the court. JA1134 (¶8); JA1143-44 (¶29). The mediators guided months of careful debate over nearly every settlement term, with all parties recognizing the far-reaching impact the settlement would have on the costs and mechanics of payment card acceptance.

In July 2012, the parties—still including many current-objectors—reached a final settlement and agreed to "set[] out the parties' binding obligation to enter into" the terms outlined in a Memorandum of Understanding. JA1043-44. The district court then tabled "all pending motions for relief (including motions concerning discovery, class certification, dismissal, summary judgment, and the preclusion of expert opinion testimony)." JA547 (7/17/2012 Order).

After the Memorandum of Understanding was filed, however, in the midst of an aggressive objection campaign, several then-class representatives (now-objectors) reversed course. Class counsel emphatically did not "fire[] their clients," Merchant Appellants' Br. ("MA-Br.") 69, as objectors contend. To the contrary, class counsel moved to withdraw as their counsel only *after* those objectors withdrew their "binding" support for the settlement and often only after new counsel appeared on

their behalf. The final settlement, virtually identical to the July 2012 agreement, was executed in October 2012.

2. The settlement secures substantial relief for plaintiffs. It achieves the largest-ever cash relief in an antitrust case—two funds totaling an estimated $7.25 billion[1] (before opt-out reductions)—to compensate "all persons, businesses, and other entities that have accepted" Visa or MasterCard cards in the United States from January 1, 2004 to the preliminary settlement approval date (November 27, 2012). SPA118 (Settlement ¶2(a)). It also achieves an unprecedented bundle of network rule reforms for all merchants that "accept" Visa and MasterCard cards in the United States "as of" November 27, 2012 or after. SPA118 (Settlement ¶2(b)).

Chief among the rule reforms is the lifting of the networks' prohibition on surcharging, SPA141-49 (Settlement ¶42), which had been the most potent anti-steering restraint. *See* JA842-43 (¶238) ("The Anti-Steering Restraints (and *particularly the No-Surcharge Rule*) are anticompetitive vertical restraints.") (emphasis added). In class counsel's view, "[w]inning the surcharging tool is the most consequential and empowering development yet in the long battle U.S. merchants have waged to counter the anticompetitive practices and legacies in the

[1] The $7.25 billion is composed of two funds: a $6.05 billion cash settlement and an estimated $1.2 billion fund based on a holdback of ten basis points in interchange fee payments by class members during an eight-month period after the opt-out period. SPA121-23 (Settlement ¶¶10-13).

credit-card industry." JA1366 (¶195). For the first time, the networks cannot prevent merchants from imposing surcharges on Visa and MasterCard transactions at the brand or product level to "steer" customers towards lower-cost payment methods. Because the amount of any surcharge is disclosed before it is incurred (and on the receipt after purchase), customers are also educated about the costs of credit card acceptance and may in turn opt for cheaper payment methods. Indeed, even the *threat* of surcharging helps incentivize networks to moderate or lower their fees to stay competitive.

Additional rule reforms further enhance the surcharging tool. The networks are now required to negotiate in good faith for better rates with bona fide merchant buying groups; permit merchants to use different acceptance strategies at different outlets; and lock in the discounting, minimum price, and other reforms of the Durbin Amendment and DOJ Consent Judgment until July 2021. SPA140-50, 153-64 (Settlement ¶¶41, 42(g), 43, 54, 55(g), 56).

Both mediators attested that settlement negotiations were "fair, adversarial, and always conducted at arms-length." JA1135 (¶12); *accord* JA1144 (¶33). Both lauded counsel for "zealously represent[ing] the interests of their clients," JA1135 (¶12), and giving their "best professional effort," JA1144 (¶33). And both declared that the settlement terms were fair, reasonable, and adequate, "taking into account the risks, strengths and weaknesses of [the parties'] respective positions on the

substantive issues of the case and the risks and costs of continued litigation." JA1144 (¶33); *accord* JA1135-36 (¶13).

E. Settlement Review and Approval

The district court approved the settlement after an exhaustive review of both the settlement process and the substantive terms. The court held a preliminary approval hearing at which it heard from objectors and reviewed supporting evidence. After granting preliminary approval and provisionally certifying the (b)(2) and (b)(3) settlement classes, the court invited objectors to file written submissions and "appear at the final approval hearing." JA1106 (¶21). The court also appointed Dr. Alan Sykes of New York University School of Law to offer independent analysis of the economic issues raised by the settlement. And, at the final approval hearing, the court heard again from objectors.

The district court issued a 55-page decision granting final approval of the settlement. *See In re Payment Card Interchange Fee Antitrust Litig*., 986 F. Supp. 2d 207 (E.D.N.Y. 2013). The court first deemed the settlement procedurally fair, concluding that the "record … demonstrates *beyond any reasonable doubt* that the negotiations were adversarial and conducted at arm's length by extremely capable counsel." SPA21 (emphasis added). It emphasized that "there is no indication that the Settlement Agreement is the product of collusion," and that "the negotiation process fairly protected the interests of the settlement class." SPA21-22. Even many

objectors "were deeply involved in the settlement negotiations and mediation, and indeed accepted the mediators' proposal that outlined the key components of what became the Settlement." SPA21.

The district court then found that the settlement fell well "within the range of reasonableness" under the multi-factor standard of *Detroit v. Grinnell Corp.*, 495 F.2d 462, 463 (2d Cir. 1974). The court noted that the advanced stage of litigation gave all involved "a more than adequate basis for assessing the claims" after "more than eight years" of "full-throttle" litigation. SPA9, 11, 25. It emphasized that further litigation would entail lengthy delays. "Numerous motions remain[ed] pending," the class certification motion would inevitably entail "interlocutory review by the Second Circuit," "a trial would take several months," and the "losing parties would likely appeal any adverse jury verdicts." SPA22. And, even after many more years of litigation, the class would still face "the prospect of uncertain relief." SPA35. By contrast, the settlement affords a certain and largely immediate recovery, enabling class members to "take advantage of rules changes *now*" and receive "significant monetary compensation in the *near future*." SPA23.

The district court thoroughly considered and rejected the concerns of objectors, who comprised 0.05%, or *one-twentieth* of 1%, of the estimated class. The court lamented that "[t]he behavior of a small number of objectors has threatened to undermine the efforts of the others" with "needless hyperbole,"

"vitriol," and the improper use of "websites that disseminated false and misleading information." SPA13-14, 23.[2] The objectors, moreover, appeared to "assum[e] that a complete victory on the merits is a foregone conclusion." SPA26. In fact, a "wide range of outstanding issues" created substantial risks and uncertainties if litigation were to proceed. SPA25-26. For instance, "objectors assume that default interchange is inherently illegal, but in reality it is a very complicated issue." SPA29. Objectors similarly assumed the illegality of the Honor-all-Cards rule, even though there was record evidence and analogous caselaw suggesting that this rule would be found "*procompetitive* under the Rule of Reason." SPA31. And plaintiffs faced additional "complexities … in proving damages to the jury" and risks associated with class certification. SPA32-34.

Objectors also "underestimated the significance of the Rule 23(b)(2) relief." SPA25. The district court declared surcharging "an indisputably procompetitive development that has the potential to alter the very core of the problem this lawsuit was brought to challenge." SPA35-36. For merchants, the surcharging relief removes "a central piece" of the problem. SPA37. Merchants can now provide

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[2] The district court observed that "90% of the objections [were generated] on boilerplate forms" downloaded from the websites, which were established "for the precise purpose of drumming up objections and opt-outs" and misled merchants about their options. SPA13, 23. The court had previously been forced to issue injunctive relief to address this misinformation campaign and "came close to holding certain entities in contempt." SPA14.

customers with clear signals of "what it costs the merchant to accept a particular card," giving them valuable leverage to encourage the use of cheaper payment methods and brands. SPA37. Customers, meanwhile, have a choice between surcharged payment methods and lower-cost payment methods. And networks will face incentives to "moderate or lower their interchange fees to avoid being disfavored." SPA37. As the court explained, "[e]ven if the objectors are right in contending that additional dominoes must fall before the alleged anticompetitive behavior of Visa and MasterCard is eradicated"—whether independent constraints on surcharging posed by state laws or third parties—"those dominoes will have to fall in other forums." SPA18.

The district court similarly dismissed criticisms of the release. Consistent with precedent, the settlement releases only "claims that are or could have been alleged based on the identical factual predicate of the claims in this case." SPA46. Though the release "appropriately limit[s] future damages claims based on the pre-settlement conduct of the networks," it does *not* release claims "based on new rules or new conduct or a reversion to the pre-settlement rules." SPA46. And, again, objectors underestimated the significance of the (b)(2) relief by painting the release as giving away valuable claims for nothing. SPA45.

The district court squarely rejected objectors' contention that the (b)(2) class should have afforded members a "due process right to opt out." SPA46. The (b)(2)

claims sought "injunctive relief from [a] bundle of network rules" that are "precisely" the "proper subject of a (b)(2) class from which no opt outs are permitted." SPA46. The court also rejected criticisms of the settlement notice.

Separately, the district court issued a 17-page decision approving a $544.8 million attorneys' fee—9.56% of the damages fund, after opt-out reductions—as "a reasonable overall fee" in light of the "unique … size, duration, complexity, and … relief" of this case. SPA69-70. *See In re Payment Card Interchange Fee Antitrust Litig.*, 991 F. Supp. 2d 437 (E.D.N.Y. 2014). Applying the multi-factor standard of *Goldberger v. Integrated Resources*, 209 F.3d 43, 47-48 (2d Cir. 2000), the court again emphasized that the substantial injunctive relief "may very likely exceed the value of the monetary relief in the long run." SPA67. This far-reaching relief confirmed the court's judgment that class counsel "litigated the case with skill and tenacity" and that the settlement "would not exist" but for counsel's assumption of risk and extraordinary efforts. SPA59, 61.

To calculate the fee, the court used a sliding scale that awarded counsel diminishing percentages of the settlement fund as the fund increased. SPA69. It further confirmed that the lodestar multiplier was "comparable to multipliers in other large, complex cases." SPA70.

SUMMARY OF ARGUMENT

I. The structure of the settlement classes, including the uncontroversial coexistence of Rule 23(b)(2) and (b)(3) classes in a single case, fully satisfied Rule 23. The (b)(2) class was a paradigmatic (b)(2) class seeking exclusively injunctive, indivisible relief—namely, the elimination or modification of nationwide network rules that apply generally to *all* card-accepting merchants. Precisely because that class sought indivisible relief, no opt-outs from the class were feasible, let alone necessary. The (b)(3) class, in contrast, sought and obtained substantial monetary relief, and fully comported with the (b)(3) opt-out and notice requirements.

Although objectors seek to characterize the inclusion of a non-opt-out (b)(2) class and opt-out (b)(3) class in one action as anomalous, such arrangements are common in situations—like this one—where both injunctive relief and damages are needed to provide an adequate remedy. Far from evading any legal requirements of (b)(2) and (b)(3), the class structure hewed carefully to each subsection and fully heeded the dictates of *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011). Class certification was therefore proper under a straightforward application of Rule 23.

Objectors' efforts to conjure up a "due process" problem from that class structure are wholly without merit. Objectors concede that the (b)(2) *claims for relief* are exclusively injunctive, but argue that opt-out rights must be provided because the settlement bars certain future damages claims by (b)(2) class members against

defendants. But that is neither unusual nor legally problematic. The propriety of (b)(2) certification turns only on the *claims for relief*, which are exclusively injunctive and fully compliant with (b)(2). That a settlement releases future challenges to the agreed-upon, going-forward conduct—including hypothetical and uncertain future damages claims—is not surprising. Such releases are common inducements for defendants to settle, and appropriate injunctive relief should limit future damages claims based on the new regime, since it is designed to address the challenged conduct prospectively. And, of course, the propriety of both the injunctive relief and any associated releases will be properly considered as part of the analysis of the settlement's fairness under Rule 23(e).

There is absolutely no basis for a novel bright-line rule that classes certified under (b)(2) can never, in a settlement release, foreclose a hypothetical future claim seeking damages. Such a rule would prove unworkable and run afoul of the Rules Enabling Act. Unsurprisingly, objectors cite no caselaw whatsoever for the proposition that a (b)(2) class is no longer a (b)(2) class solely because potential future challenges to the agreed-upon conduct are foreclosed as part of a comprehensive settlement.

Objectors' efforts to manufacture an adequacy-of-representation problem fare no better. As the district court correctly concluded, class representatives and counsel were adequate representatives of both the (b)(2) and (b)(3) classes. The structural

assurances of fair and adequate representation in the settlement negotiations were at their apex given the involvement of Judge Gleeson, Magistrate Judge Orenstein, and the two highly-regarded mediators. There is, moreover, no conflict of interest, much less a fundamental conflict going to the heart of the litigation, between the (b)(2) and (b)(3) classes. To the contrary, the class memberships overlap almost entirely; they exist as two classes by virtue of Rule 23, and not by virtue of different claims, different facts, or antagonistic interests. The substantial (b)(2) relief and massive (b)(3) damages fund confirm only that neither class interest was left out in the cold, and both classes reaped significant benefits from class counsel's zealous advocacy.

II. The district court's determination that the settlement as a whole fell within a "range of reasonableness," *Grinnell*, 495 F.2d at 463, was an appropriate exercise of its broad discretion. The notion that the largest-ever cash relief in an antitrust class action settlement was "reasonable" hardly requires extended comment. And, as the district court recognized, the injunctive reforms of the networks' longstanding merchant restraints may prove even more valuable in the long run.

Chief among these reforms is the removal of anti-surcharging restraints, which for decades prevented merchants from imposing surcharges on Visa and MasterCard transactions to steer customers to less-costly methods of payment and incentivize the networks to lower their interchange fees. Other reforms, such as the

buying group provision and all-outlets provision, will only enhance merchants' new surcharging opportunities and exert further downward pressures on interchange fees.

The release in exchange for that injunctive relief, moreover, is a standard-form release that courts have repeatedly approved. Objectors insinuate that the settlement releases certain future challenges in violation of due process or public policy. But as the district court found and as the parties agreed below, the releases merely foreclose challenges to the going-forward regime agreed upon in the settlement and, in any event, must be interpreted to reflect, not violate, due process limits. Objectors seek no less than an improper advisory opinion to predetermine issues that the release does not even raise.

III. The district court's determination that an attorneys' fee of 9.56% of the damages fund was "'reasonable' under the circumstances," *Goldberger*, 209 F.3d at 47, was likewise an appropriate exercise of its broad discretion. The district court grounded its analysis in the "unique … size, duration, complexity, and … relief" of this case, and appropriately lauded class counsel and the nearly 60 additional law firms that worked on this case over eight years for their "skill and tenacity" in achieving the "significant success" of the settlement. SPA56, 61. Objectors dispute the district court's assessment of counsel's performance and the settlement relief, and quibble with the specific percentages used in its sliding-scale percentage

calculation of the fee amount. But those arguments merely rehash their meritless criticisms of the settlement as substantively unreasonable.

IV. Finally, the district court's determination that the settlement notice was "reasonable[]," *Soberal-Perez v. Heckler*, 717 F.2d 36, 43 (2d Cir. 1983), was also an appropriate exercise of its broad discretion. The notice need only fairly apprise prospective class members of the terms of the settlement and of options available to them moving forward. The notice here—which described the litigation and settlement terms, quoted the releases, described the request for attorneys' fees, and explained the procedures for filing objections and opting out—readily met that standard. Objectors posit various misstatements and omissions in the notice, but the district court considered and rejected those arguments several times. The district court's judgment should be affirmed in all respects.

STANDARD OF REVIEW

This Court will "disturb a judicially-approved settlement only when an objector has made a '*clear showing* that the district court has abused its discretion.'" *D'Amato*, 236 F.3d at 85 (emphasis added). A court abuses its discretion only "when its decision rests on an error of law or a clearly erroneous factual finding, or when its decision cannot be located within the range of permissible decisions." *Charron v. Wiener*, 731 F.3d 241, 247 (2d Cir. 2013). This "considerable deference" is rooted in a recognition that the district court is uniquely "'exposed to the litigants, and their

strategies, positions and proofs.'" *Joel A. v. Giuliani*, 218 F.3d 132, 139 (2d Cir. 2000).

Similarly, this Court will disturb a district court's determination on class certification, as well as its rulings that individual Rule 23 requirements have been met, only upon an abuse of discretion. *In re IPO Sec. Litig.*, 471 F.3d 24, 31–32 (2d Cir. 2006). Where the district court has granted class certification, this Court accords "noticeably more deference than when we review a denial." *In re Salomon Analyst Metromedia Litig*., 544 F.3d 474, 480 (2d Cir. 2008).

This Court likewise reviews attorneys' fee awards, and the form and content of notice to class members, for an abuse of discretion. *See Goldberger*, 209 F.3d at 47-48; *Masters v. Wilhelmina Model Agency*, 473 F.3d 423, 438 (2d Cir. 2007).

ARGUMENT

I. The Structure Of The Settlement Classes Conforms Precisely To Bedrock Certification Requirements Under Rule 23.

From the inception of this litigation—with the support of all class representatives, including many current-objectors—plaintiffs consistently sought certification of two classes: a class seeking prospective injunctive relief under Rule 23(b)(2), and a class seeking retrospective monetary relief under Rule 23(b)(3). Those classes readily satisfied their respective subsections of Rule 23. The (b)(2) class sought exclusively indivisible, generally applicable injunctive relief and fully complied with all requirements for a (b)(2) class. The (b)(3) class, in turn, sought

monetary relief, and fully complied with all requirements of Rule 23(b)(3), including notice to the class and an opportunity to opt-out. The district court thus correctly concluded that certification of these classes was proper.

Objectors attempt to channel their *substantive* objections to the settlement—issues that are properly addressed in a review of the settlement's fairness under Rule 23(e), *see infra* Part II—into various attacks on the "structure" of the classes. But as Rule 23(a) and (b) arguments, the objections are simply misplaced. The district court considered and rejected all of objectors' arguments and correctly concluded that this case involves a textbook case for certification under Rule 23.

A. The Rule 23(b)(2) Class Unquestionably Brought Claims For "Indivisible" Relief.

1. Rule 23(b)(2) allows class treatment when the alleged wrongdoer "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2); *see also* 7AA Wright & Miller, *Federal Practice and Procedure* § 1775 (3d ed. 1998) ("[T]wo basic factors … must be present … (1) the opposing party's conduct or refusal to act must be 'generally applicable' to the class and (2) final injunctive or corresponding declaratory relief must be requested for the class"). It is well-settled that the "key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the

notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'" *Dukes*, 131 S. Ct. at 2557.

That characteristic does *not* require class members to be in "an identical situation," *Rich v. Martin Marietta*, 522 F.2d 333, 340 (10th Cir. 1975), or have "suffered identical injuries," *Parsons v. Ryan*, 754 F.3d 657, 688 (9th Cir. 2014), or indeed even "be aggrieved by or desire to challenge defendant's conduct." Wright & Miller § 1775; *see also* Fed. R. Civ. P. 23 advisory committee notes (1966) ("Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class"). Instead, all that is required to proceed as a (b)(2) class is that "the relief sought must perforce affect the entire class." *Dukes*, 131 S. Ct. at 2558.

As the Supreme Court has underscored, "[t]he procedural protections attending the (b)(3) class—predominance, superiority, mandatory notice, and the right to opt out—are … unnecessary to a (b)(2) class" precisely because "[w]hen a class seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute." *Id.* at 2558. Those characteristics are simply self-evident. Indeed, even an individual suit enjoining defendants' nationwide operations would affect all members of the class;

thus the requirements of Rule 23(a) and (b)(2) provide class members with additional protection, and the (b)(3) factors are unnecessary.

This case presents a paradigmatic use of Rule 23(b)(2). The (b)(2) class consists of merchants that "accept any Visa-Branded Cards and/or MasterCard-Branded Cards in the United States." SPA118. Those merchants challenged and sought to change nationwide network rules that apply to *all merchants* that accept Visa and MasterCard. *See* Wright & Miller § 1775 ("What is necessary is that the challenged conduct … be premised on a ground that is applicable to the entire class."). The analysis of the *legality* of those network rules under the Sherman Act and Clayton Act is exactly the same for each and every merchant that is subject to the rules. In short, plaintiffs' antitrust claims allege that Visa and MasterCard have "acted or refused to act on grounds that apply generally to the class." Fed. R. Civ. P. 23(b)(2).

Moreover, the (b)(2) class sought injunctive relief—structural rule reforms—that was indivisible and generally applicable to all merchants. When the challenged nationwide network rules changed based on the agreed-upon injunction, the relief necessarily affected all members of the class. Among other relief, the plaintiffs sought to eliminate or modify the anti-surcharging rules, the default interchange rules, and the Honor-all-Cards rules for *all* merchants that accept Visa and MasterCard. A complaint that seeks to enjoin uniform, nationwide merchant

restraints necessarily "redesigns the relationship between … each merchant and the networks in precisely the same manner." SPA52.

Because this case involves challenges to nationwide, generally applicable network rules, it is far afield from a scenario in which "each individual class member would be entitled to a *different* injunction … against the defendant." *Dukes*, 131 S. Ct. at 2557; *see also In re IKO Roofing Prods. Litig*., 757 F.3d 599, 602 (7th Cir. 2014) (unlike in *Dukes*, "[i]n a suit alleging a defect common to all instances of a consumer product … the conduct does not differ"). Because Visa and MasterCard are nationwide networks each with uniform rules, it would have been impossible to have a patchwork of injunctions that enjoined the challenged network rules only with respect to certain merchants. The district court thus had little difficulty concluding that this is "precisely" the kind of case for which Rule 23(b)(2) was intended. SPA46; *see also* Fed. R. Civ. P. 23 advisory committee notes (1996) (citing example of a (b)(2) "class of purchasers, say retailers of a given description, against a seller alleged to have undertaken to sell to that class at [discriminatory] prices").

Making the application of (b)(2) even more straightforward, the (b)(2) claims here consist *exclusively* of claims for injunctive relief. In *Dukes*, the Supreme Court made clear that claims for monetary relief cannot be litigated in a (b)(2) class alongside bona fide claims for injunctive or declaratory relief, "at least where … the monetary relief is not incidental to the injunctive or declaratory relief." 131 S. Ct.

at 2557. Because the Supreme Court expressly left open the possibility that some truly incidental monetary relief might still be allowed in a (b)(2) action, objectors overstate matters by asserting, based on *Dukes*, that Rule 23(b)(2) "applies only when the case consists *exclusively* of common claims." MA-Br. 33. But in all events, the (b)(2) class at issue here seeks *only* indivisible injunctive relief, which *Dukes* confirmed unquestionably belongs in Rule 23(b)(2).

2. Objectors' assertion that the (b)(2) class is not "cohesive" is badly misplaced. MA-Br. 46-64. As an initial matter, class "cohesion" is not expressly required by the text of Rule 23(b)(2) or any Supreme Court precedent interpreting that rule. But even if "cohesion" is required, it is shorthand for the need for generally applicable, class-wide injunctive relief, which is amply satisfied here. This Court has observed, in the few instances where it used the term in passing, that "a Rule 23(b)(2) class seeking declaratory and injunctive relief is cohesive by nature." *Handschu v. Special Servs. Div.*, 787 F.2d 828, 833 (2d Cir. 1986). That is, "[w]here class-wide injunctive or declaratory relief is sought in a (b)(2) class action for an alleged group harm, there is a presumption of cohesion and unity between absent class members and the class representatives." *Robinson v. Metro-North*, 267 F.3d 147, 165 (2d Cir. 2001).

Objectors do not come close to overcoming this "presumption" of cohesion. To the contrary, this effort to reform the practices employed in a nationwide network

is the very paradigm of a (b)(2) case. Objectors' core argument is that the (b)(2) class was not cohesive because it was very large, and included merchants that had "varying interests" in the relief ultimately obtained. MA-Br. 51-59. But that is wrong for a number of reasons. Whatever differences there may be among class members in terms of their "size[s]" and "business models," MA-Br. 52, they are all subject to the defendants' generally applicable network rules and practices, which will be impacted on a nationwide basis by the going-forward relief. That is all the cohesion Rule 23(b)(2) would demand.

Objectors cite a smattering of decisions from other jurisdictions rejecting (b)(2) classes as non-cohesive, but the facts of those cases only underscore the lack of any cohesion issue here. Most of those decisions arose in the mass tort context, where courts "employ[] Rule 23(b)(2) sparingly" because "factual differences among individual class members *may affect critical elements of plaintiffs' claims*, such as proximate causation, reliance and defendant's affirmative defenses." 1 *McLaughlin on Class Actions* § 5:15 (10th ed.) (emphasis added). For example, the Eighth Circuit decertified a (b)(2) class of artificial heart valve patients seeking a medical-monitoring injunction because "each plaintiff's need (or lack of need) for medical monitoring is highly individualized," based on the patient's "medical history" and "risk factors," the "different elements triggering culpability," and other considerations. *In re St. Jude Medical*, 425 F.3d 1116, 1122 (8th Cir. 2005); *see also*

Barnes v. Am. Tobacco, 161 F.3d 127, 146 (3d Cir. 1998) (denying certification of medical-monitoring class in suit against cigarette manufacturers).

Here, in contrast, the injunctive reforms sought are generally applicable, and the same rules and rule modifications apply to all merchants. And objectors identify no way in which the purported differences among class members would affect the *elements* of a claim for that injunctive relief under the Sherman Act and Clayton Act. The identity of the particular merchant-plaintiff would have no bearing whatsoever on whether the challenged network rules were the product of unlawful restraints of trade.

Objectors also claim that the (b)(2) class was not cohesive because some states would prohibit merchants from surcharging credit card transactions even if surcharging were permitted by the terms of the settlement. In support of that argument, objectors cite *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997), for the proposition that "variations in state law" can undermine (b)(2) cohesion. But *Amchem* involved a class seeking monetary relief under Rule 23(b)(3), and the differing state laws went to the very availability of plaintiffs' *causes of action* (and thus whether common issues "predominated" among the class). As the Court explained, state law "varied widely on such critical issues as 'viability of [exposure-

only] claims [and] availability of causes of action for medical monitoring.'" *Id.* at 609-10.[3]

There is no comparable concern in this case or in (b)(2) classes more broadly. State anti-surcharging laws hardly immunize defendants' conduct under the federal antitrust laws, and at most limit the extent to which some class members will benefit from the relief obtained. But that does not change the reality that defendants' rules and conduct will change on a nationwide basis in a manner applicable to all class members. The fact that some class members may not be able to take full advantage of the change because of independent state-law obstacles to changing the class members' conduct does not create a Rule 23(b)(2) problem. *See* 2 *Newberg on Class Actions* § 6:15 (4th ed. 2002) ("That not all members of the class may seek or desire the same relief, or may otherwise have disparate interests, will not … bar the certifying of a class action seeking injunctive and declaratory relief").[4]

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[3] Objectors also cite *In re AIG Sec. Litig*., 689 F.3d 229, 243 (2d Cir. 2012), but that case merely cited *Amchem* and noted that the district court should address in the first instance whether "variations in state law might cause class members' interests to diverge." Here, Judge Gleeson fully considered such issues and concluded that any state-by-state variation in surcharging rules was insufficient to defeat class certification. SPA38-41.

[4] Related speculation that health insurers might be actually or effectively prevented from surcharging by federal and state regulations—including wholly hypothetical effects of the Affordable Care Act's Medical Loss Ratio rules—likewise has no bearing on Rule 23(b)(2) cohesion in the relevant sense. *See* Blue Cross Br. 18-21.

Objectors, moreover, confuse an expectation of some minimal cohesion with a standard of equal benefit or after-the-fact satisfaction from the relief obtained. MA-Br. 56-64; *cf. Amchem*, 521 U.S. at 623 (noting that (b)(3) predominance inquiry "trains on the legal or factual questions that … *preexist any settlement*") (emphasis added). There is absolutely no support for such an impossible-to-satisfy standard. A (b)(2) class does not unravel merely because certain class members are "more sanguine" about, or realize "'greate[r] savings'" from, the relief obtained. MA-Br. 56, 61. At bottom, objectors' so-called "cohesion" arguments are just challenges to the *substantive fairness* of the settlement rather than the propriety of class certification. Any concerns about whether certain class members received *enough* relief from the ultimate settlement, *see* MA-Br. 56-59, are certainly relevant to whether the settlement was "fair, reasonable, and adequate" under Rule 23(e). But those concerns do not change the fact that Visa and MasterCard applied the challenged network rules to *all* merchants, and that any modifications to the network rules effectuated by this litigation would apply to each and every merchant that accepts Visa and MasterCard.

* * *

In short, this class falls in the heartland of Rule 23(b)(2). "[A]ll the members of the injunctive relief class were subject to the same rules, … the relief afforded by that class is a change to those rules," and all members of the (b)(2) class sought

injunctive relief and injunctive relief alone. SPA53 n.20. The district court did not abuse its discretion in finding the criteria for Rule 23(b)(2) certification satisfied.

B. The Rule 23(b)(2) Class Required No Opt-Out Rights; All Claims for Individualized Monetary Relief Were Separately and Properly Certified Under Rule 23(b)(3).

1. Precisely because the hallmark of a (b)(2) class is a claim for indivisible injunctive or declaratory relief, (b)(2) classes provide "no opportunity for ... class members to opt out, and do[] not even oblige the district court to afford them notice of the action." *Dukes*, 131 S. Ct. at 2558. Since the relief obtained through a (b)(2) class action is—by definition—generally applicable to all class members, an individual cannot request exclusion and pursue relief individually. As the district court explained, "[i]f merchants could opt out of the (b)(2) class, they would reap the benefits of that relief anyway." SPA46; *see also Jefferson v. Ingersoll*, 195 F.3d 894, 897 (7th Cir. 1999) ("individual suits would confound the interest of other plaintiffs ... when an injunction affects everyone alike").

Indeed, "[t]he procedural protections attending the (b)(3) class" are inapplicable precisely because "[w]hen a class seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute." *Dukes*, 131 S. Ct. at 2558. As the Rule 23 Advisory Committee explained, given the "characteristics of the [(b)(2)] class,"

there is "no right to request exclusion." Fed. R. Civ. P. 23 advisory committee notes (2003). Requiring notice would not only be pointless but counterproductive, creating "the risk that notice costs may deter the pursuit of class relief" and thereby "crippl[ing] actions that do not seek damages." *Id.* Whereas the opt-out right in (b)(3) classes follows directly from the ability to pursue individual claims for damages, asserting an opt-out right in a (b)(2) class is a non sequitur.

2. The district court fully understood these basic principles and certified both a valid (b)(2) mandatory class and an equally valid (b)(3) opt-out class.[5] As the court easily concluded, "[e]ach class … satisfies its respective subsection of Rule 23(b)" and "certification is proper." SPA53 n.20.

Including two valid classes in a single action is neither remarkable nor problematic. *See* Fed. R. Civ. P. 23 advisory committee notes (2003) (noting notice requirements for the (b)(3) class only where "a Rule 23(b)(3) class is certified in conjunction with a (b)(2) class"). Two rights do not somehow make a wrong. "'[W]here injunctive relief and damages are both important components of the relief requested, court[s] have regularly certified an injunctive class under Rule 23(b)(2) and a damages class under Rule 23(b)(3) in the same action.'" *In re NASDAQ*

[5] A number of merchants chose to exercise their right to opt-out of the (b)(3) class. Those plaintiffs' individual claims for money damages remain pending before the district court.

Antitrust Litig., 169 F.R.D. 493, 515 (S.D.N.Y. 1996); *see also Gooch v. Life Investors Ins.*, 672 F.3d 402, 428-29 (6th Cir. 2012) (appropriate to certify distinct (b)(2) and (b)(3) classes, where (b)(2) relief "is a separable and distinct type of relief").[6]

Here, from the outset of the litigation, plaintiffs requested certification of *both* a (b)(3) class for "monetary damages to compensate them for … overcharges" *and* a (b)(2) class for "equitable relief to protect themselves against continuing and future harm." JA825. The damages provided relief for excessive interchange fees already paid, while the injunctive relief addressed defendants' anticompetitive practices going forward. Plaintiffs consistently maintained—long before settlement even entered the picture—that the injunctive relief was "as important as the damages." JA928 (Pls.' Mot. for Class Cert. at 39); *see also Velez v. Novartis*, 244 F.R.D. 243, 271 (S.D.N.Y. 2007) ("If Plaintiffs prevail on the merits … it would serve little purpose to award money damages for discrimination without addressing the institutional structure that perpetuates it.").

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[6] *E.g.*, *Huyer v. Wells Fargo*, 295 F.R.D. 332, 345 (S.D. Iowa 2013); *Bristol v. Louisiana-Pacific*, 916 F. Supp. 2d 357, 370 (W.D.N.Y. 2013); *Stinson v. City of N.Y.*, 282 F.R.D. 360, 381 (S.D.N.Y. 2012); *In re Vitamin C Antitrust Litig.*, 279 F.R.D. 90 (E.D.N.Y. 2012); *Easterling v. Dep't of Corr.*, 278 F.R.D. 41 (D. Conn. 2011); *Jermyn v. Best Buy*, 276 F.R.D. 167 (S.D.N.Y. 2011).

The district court agreed, suggesting that a damages-only award would permit the networks' "merchant restraints [to], in effect, place the merchants back where they started," thus allowing the networks to simply "recoup[] any associated lost revenues by tinkering with … other fees." SPA16. Injunctive relief targeted at those merchant restraints was therefore "crucial" because it would avert such circumvention and permit merchants themselves to exert competitive pressures on interchange fees. SPA18.

Objectors are thus flatly wrong to characterize the structure of the classes as an "artificial contrivance that inverted the design of Rule 23." MA-Br. 44. There is nothing at all anomalous or unusual about pairing a non-opt-out (b)(2) class and an opt-out (b)(3) class in the same case. The existence of both classes was a necessary byproduct of the distinct subsections of Rule 23(b) and plaintiffs' position that defendants had violated the antitrust laws (thus, the (b)(3) class) and would continue to do so absent injunctive relief (thus, the (b)(2) class).

3. Given the need for *both* backward-looking monetary relief *and* forward-looking injunctive relief, the (b)(2) class was not in any way a "sham request[] for injunctive relief [to] provide cover for (b)(2) certification of claims that are brought essentially for monetary recovery." *Robinson*, 267 F.3d at 164; *cf. Kartman v. State Farm*, 634 F.3d 883, 889 (7th Cir. 2011) (noting "technique of

recasting a straightforward claim for damages as a claim for damages *and* injunctive relief" to "make [a] case more amenable to class certification").

For that reason, objectors' efforts to shoehorn this case into a *Dukes* scenario are unavailing. In *Dukes*, the plaintiffs sought injunctive relief, declaratory relief, and backpay, all in a single (b)(2) class. The Supreme Court rejected that maneuver, holding that because the individualized backpay claims were more than "incidental to the injunctive or declaratory relief," they instead "belong[ed] in Rule 23(b)(3)." 131 S. Ct. at 2557-58.

The (b)(2) and (b)(3) classes in this case are consistent with both the letter and spirit of *Dukes.* This is not an attempt to smuggle damages claims into a (b)(2) class, as the existence of the parallel (b)(3) class attests. There was no such parallel (b)(3) class in *Dukes*, which suffices to distinguish it. That the (b)(2) settlement foreclosed future efforts to obtain damages based on the agreed-upon, going-forward conduct is an entirely distinct issue and entirely unobjectionable, as explained next.

C. There Is Nothing Improper About Having a Rule 23(b)(2) Class Settlement Foreclose Possible Future Claims Seeking Damages.

1. The (b)(2) class here sought injunctive relief and injunctive relief alone. Thus, objectors' claim to an opt-out right depends not on the claims for *relief* of the (b)(2) class, which are wholly unobjectionable, but entirely on the fact that the settlement featured a *release* that foreclosed future challenges to the networks'

agreed-upon, going-forward conduct, including unknown future claims seeking damages based upon that conduct.

That argument mixes apples and oranges. It wholly rewrites the established certification criteria, under which "[t]he dispositive factor that must be assessed in determining whether a class may be certified under Rule 23(b)(2) is the type of relief the plaintiffs actually seek"—not the type of future claims released by the settlement. 1 *McLaughlin on Class Actions* § 5:15. As the Supreme Court explained in *Dukes*, (b)(2) certification turns on the "relief sought," "requests for … relief," "claims for … relief," "remedy warranted," and relief "entitled to." 131 S. Ct. at 2557. The "relief" sought by the (b)(2) class here—changes to defendants' network rules—was classic injunctive relief that unquestionably belonged in (b)(2).

Objectors' so-called "due process" complaint about the release of hypothetical and uncertain future damages claims as part of the settlement of a non-opt-out class is untethered to the specifics of this case. They are essentially advancing a bright-line rule under which (b)(2) classes can *never* release a future damages claim in settlement. Tellingly, however, objectors fail to identify even a single case, and to our knowledge there is none, that has ever based the propriety of (b)(2) class certification on the nature of future claims foreclosed by a settlement *release*, as opposed to the existing claims for which *relief* is sought.

To the contrary, numerous (b)(2) settlement classes have released future claims seeking relief for going-forward conduct. *See, e.g., San Diego Police Officers' Ass'n v. San Diego City Emps.' Ret. Sys.*, 568 F.3d 725, 734-36 & n.7 (9th Cir. 2009); *Nottingham Partners v. Trans-Lux*, 925 F.2d 29, 32-34 (1st Cir. 1991); *TBK Partners v. W. Union*, 675 F.2d 456, 459-60 (2d Cir. 1982); *Scarver v. Litscher*, 371 F. Supp. 2d 986, 997 (W.D. Wis. 2005); *Ass'n For Disabled Ams. v. Amoco*, 211 F.R.D. 457, 472 (S.D. Fla. 2002). More often, (b)(2) certification cases simply do not address the released claims, which go more to the settlement's fairness under Rule 23(e) than the Rule 23(b)(2) criteria.

Each of the cases cited by objectors in support of their purported opt-out rights, *see* MA-Br. 31-42, is readily distinguishable. Objectors primarily rely on cases involving classes certified under *(b)(3)*. For instance, they cite the Supreme Court's statement in *Phillips Petroleum v. Shutts* that if a court "wishes to bind an absent plaintiff concerning a claim for *money damages or similar relief at law*, it must provide minimal procedural due process protection," including "an opportunity to remove himself from the class." 472 U.S. 797, 811-12 (1985) (emphasis added). But *Shutts* involved claims for money damages certified under the state-law equivalent of a (b)(3) class.

Objectors also note this Court's quotation of *Shutts* in *Stephenson v. Dow Chemical*, 273 F.3d 249, 258 (2d Cir. 2001), but *Stephenson* likewise involved a

(b)(3) class with retrospective damages claims. And objectors mistakenly rely on *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124 (2d Cir. 2001), claiming that this Court affirmed the certification of a (b)(3) class to avoid "'the primary concern … about Rule 23(b)(2),' *i.e.*, 'the absence of mandatory notice and opt-out rights.'" MA-Br. 35. In fact, the Court stated in *Visa Check* that "the primary concern *about certifying a class with significant damages* under Rule 23(b)(2) is the absence of mandatory notice and opt-out rights." 280 F.3d at 147 (emphasis added). This Court's precise concern was with certifying "significant damages" claims in a non-opt-out class, and it did not reach the propriety of (b)(2) certification.

The other cases objectors cite involved individualized monetary claims that, although improperly certified under a different subsection, manifestly belonged in (b)(3). For instance, *Dukes* noted the importance of opt-out rights, but in the context of already-accrued claims for individualized monetary backpay, which the Court held should have been certified under (b)(3). *Hecht v. United Collection Bureau*, 691 F.3d 218 (2d Cir. 2012), similarly underscored the importance of opt-out rights, but in an even-more-extreme circumstance: the class, though somehow certified under (b)(2), had *only* sought damages claims in its complaint.

It is no coincidence that objectors' opt-out authorities all involve either (b)(3) actions or cases that should have been (b)(3) actions. Courts are justifiably concerned about efforts to evade the protections of (b)(3) by shoehorning damages

claims into a (b)(2) class. But that is manifestly not the problem in a case like this, where the damages claims are placed into a separate (b)(3) class with full opt-out rights. *Cf. Robinson*, 267 F.3d at 165 ("Where class-wide injunctive or declaratory relief is sought in a (b)(2) class action … adequate representation will generally safeguard absent class members' interests and thereby satisfy the strictures of due process.").

Moreover, in a (b)(2) settlement, a release of hypothetical and uncertain future damages claims based on the injunction-modified, going-forward conduct is an unobjectionable feature. Particularly in a (b)(2) class that includes substantial prospective injunctive relief designed to address future violations, the future claims "released" may well *not exist* if the injunction works as intended and helps restore competitive conditions. Thus, objectors' concerns amount to no less than a sweeping contention that Rule 23(b)(2)—which does contemplate such settlements but does not provide an opt-out right—is unconstitutional on its face. There is simply no basis for arguing that due process, Rule 23, or anything else supports a *per se* rule against foreclosing hypothetical future damages claims in a (b)(2)-certified class.

2. Objectors' proposed bright-line rule—that a hypothetical future claim seeking damages can *never* be foreclosed in the resolution of a (b)(2) class action—is not only wholly unsupported, but unworkable. It would mean that (b)(2) classes could be unproblematically certified for litigation, but become impossible to settle.

No rational defendant would enter a settlement by which it commits to restructuring its practices without some assurance of peace from claims based on the newly-modified practices. It would be cold comfort indeed if defendants were to make the changes sought by the (b)(2) class, but then face suits for damages based on those agreed-upon changes. As this Court has noted, "[c]lass action settlements simply will not occur if the parties cannot set definitive limits on defendants' liability." *Wal-Mart v. Visa*, 396 F.3d 96, 106 (2d Cir. 2005).

Objectors' rule would thus create a world where class actions are easier to certify for litigation than for settlement—a worst-of-all-worlds scenario that not even the most strident of class action skeptics would support. That would be entirely impractical and antithetical to the "'strong judicial policy in favor of settlements, particularly in the class action context.'" *McReynolds*, 588 F.3d at 803.

Objectors' approach, moreover, would run directly afoul of the Rules Enabling Act of Rule 23. The Act mandates that rules of procedure "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). In other words, Rule 23 is supposed to be a procedural device, not transform the substance of the underlying claim or limit or expand the available relief.

There can be no dispute that an individual merchant would be free to foreclose future damages claims in exchange for injunctive relief that will obviate future violations (and thus render future litigation unnecessary). Yet objectors would deem

a similar settlement of the same underlying substantive claim unlawful if it were negotiated by a *class* of merchants. Using the limited procedural device of Rule 23 to put class action plaintiffs on an *inferior* footing to individual plaintiffs in this manner would squarely "abridge" substantive rights. *Cf. Ortiz v. Fibreboard*, 527 U.S. 815, 845 (1999) (noting potential Rules Enabling Act problem based on "tension between the limited fund class action's pro rata distribution in equity and the rights of individual tort victims at law"). As the Supreme Court has stated, "[a] class action … merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits," and "leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic v. Allstate*, 559 U.S. 393, 406-08 (2010) (plurality opinion).

In the end, objectors fail to avoid the commonsense conclusion that this (b)(2) class seeking only injunctive relief is a proper (b)(2) class. Though objectors have concerns about the breadth of the relief and release, those arguments ultimately have little to do with class certification and everything to do with the fairness of the settlement. *E.g.,* MA-Br. 36 (settlement "releases such claims entirely [for] no changes … aside from limited surcharging relief"). Such concerns certainly do not support a bright-line rule that class certification under Rule 23(b)(2) categorically prohibits foreclosing future damages claims. None of this is to say that the release

of future claims should escape judicial scrutiny altogether, but it is to say that the proper place for that analysis is in Rule 23(e).

D. Both the Rule 23(b)(2) Class and Rule 23(b)(3) Class Were Adequately Represented.

1. Litigating (b)(2) and (b)(3) classes in tandem avoids problems by protecting the opt-out rights of the members of the (b)(3) class; it does not remotely introduce an adequacy-of-representation problem under Rule 23(a)(4). Adequacy requires that the "representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "[D]istrict courts must make sure that the members of the class possess the same interests, and that no fundamental conflicts exist among the members." *Charron*, 731 F.3d at 249. As is well-settled in this Court, "[a] conflict or potential conflict alone will not … necessarily defeat class certification—the conflict must be 'fundamental,'" *Denney v. Deutsche Bank*, 443 F.3d 253, 268 (2d Cir. 2006), and go "'to the very heart of the litigation.'" *Charron*, 731 F.3d at 250.

Based on its deep familiarity with the litigation and parties, the district court did not abuse its discretion in concluding that class representatives and counsel "adequately represente[d] both the (b)(2) and the (b)(3) settlement classes." SPA52. Over an eight-year period, "experienced and able" class counsel "litigated the case with skill and tenacity," expending 500,000 hours of work on the case. SPA21, 61. They "reviewed more than 50 million pages of documents in discovery and deposed

more than 400 witnesses." SA103. And both the district court and the mediators concluded that the intensive settlement negotiations were "fair," "adversarial," and "conducted at arm's length." SPA21.

Indeed, this Court has said repeatedly that the inclusion of independent mediators "helps to ensure that [settlement] proceedings were free of collusion and undue pressure." *D'Amato*, 236 F.3d at 85; *Suffolk Cnty. v. Long Island Lighting*, 907 F.2d 1295, 1323 (2d Cir. 1990). Here, counsel for the parties met jointly or separately with one or both mediators—mediators the parties jointly selected—on approximately *45* occasions. JA1358-60 (¶¶175, 181). And those "structural assurance[s] of fair and adequate representation" were further enhanced by the participation of Judges Gleeson and Orenstein, pursuant to the request of all parties, near the end of the process. *Amchem*, 521 U.S. at 627. Class representatives, meanwhile, "participated in discovery, in mediation, in court sessions, in the evaluation of the mediators' proposals, and in the formulation of the Settlement Agreement," readily "fulfill[ing] all of the obligations associated with being class representatives." SPA52.

Beyond that, the settlement as a whole provides no "evidence of prejudice to the interests of a subset of plaintiffs." *In re Literary Works Copyright Litig.*, 654 F.3d 242, 252 (2d Cir. 2011). This was not a "pre-packaged" settlement that was indicative of collusion between the lead plaintiffs and the defendants. Class counsel

recommended settlement to the court only *after years of hard-fought litigation.* Discovery was complete, motions for dismissal, summary judgment, and class certification had been fully briefed and argued, and the parties had engaged in an arduous four-year mediation process. Nor was this a settlement conceived of by class counsel in collusion with the defendants; it was "the mediators' proposal that outlined the key components of what became the Settlement" (notably, a proposal accepted by many current-objectors). SPA21. The mediators were not somehow complicit in an effort to disadvantage an underrepresented subset of the class.

Nor was this a lowball settlement; it secures the largest-ever cash recovery in an antitrust class action settlement and historic reforms of decades-old network rules. The class representatives properly discharged their obligation to represent "the best interests of the class as a whole," "rather than … any individual members of it," Fed. R. Civ. P. 23 advisory committee notes (2003), achieving results that were not merely adequate, but outstanding. *See infra* Part II.

2. Objectors nonetheless insist that there was a fundamental conflict of interest between the (b)(2) and (b)(3) classes that rendered class representatives and counsel incapable of adequately representing (b)(2) class members.[7] Objectors

[7] Objectors' assertion that "class counsel *fired their clients* … so that all that remained were class representatives committed to a deal that gave the (b)(3) class money in exchange for a broad release from the (b)(2) class" misstates the record. MA-Br. 69. The objectors that were formerly class representatives all agreed to the mediators' settlement proposal and participated in settlement conferences. Of those

primarily attempt to analogize this case to *Amchem, Ortiz,* and other cases "involving subgroups with … antagonistic interests." MA-Br. 66. In those cases, objectors contend, the Supreme Court emphasized the importance of creating subclasses and appointing separate counsel for such "antagonistic" subgroups. But objectors overread *Amchem* and *Ortiz* and, in search of a real conflict, imagine tradeoffs here between retrospective damages and prospective injunctive relief.

Amchem and *Ortiz* do not remotely impose a *per se* requirement of separately represented subclasses whenever there is tension among class members. Instead, the Supreme Court required that intra-class conflicts be addressed by "structural assurance[s] of fair and adequate representation," of which subclasses are but one example. *See Amchem*, 521 U.S. at 627 ("structure of the negotiations" matters as well). Here, Judge Infante, Professor Green, Judge Gleeson, and Magistrate Judge Orenstein all confirmed "a record that demonstrates *beyond any reasonable doubt* that the negotiations were adversarial and conducted at arm's length." SPA21 (emphasis added).

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former class representatives, *all but one* agreed to the July 2012 Memorandum of Understanding committing to the final settlement. Only after those then-class representatives changed their minds, and often only after new counsel of record appeared on their behalf, did class counsel move to withdraw as their counsel. *See* Fed. R. Civ. P. 23 advisory committee notes (2003) ("class representatives do not have an unfettered right to 'fire' class counsel" and "cannot command class counsel to accept or reject a settlement proposal").

Moreover, *Amchem* and *Ortiz* involved "parties mov[ing] jointly for conditional class certification and approval of a settlement agreement" where "[t]he district court granted the motion without any litigation." *Joel A.*, 218 F.3d at 139 (distinguishing *Amchem* on this ground). Here, by contrast, the adequacy of representation was demonstrated through years of contested litigation. Imposing a separate representation requirement at the tail end would be wholly impractical, and contrary to the interests of *both* classes by making simultaneous settlements of damages and injunctive relief claims virtually impossible.

More fundamentally, the (b)(2) and (b)(3) classes here are not "subgroups with … antagonistic interests." Indeed, they are not subgroups at all—they are largely one and the same group. Any merchant that was in business before November 27, 2012 and continues to operate going forward will receive monetary relief through the (b)(3) class (subject to an opt-out) *and* will benefit from the rule changes obtained through the (b)(2) class.

Objectors note that the overlap between the two classes is not *total*. MA-Br. 74. But objectors cite no cases applying that stringent of a standard in evaluating adequacy. Indeed, objectors primarily rely on *Amchem*, which involved a conflict between two *mutually exclusive* groups—plaintiffs that were "currently injured" by asbestos, and "exposure-only plaintiffs" that faced only potential future injuries. 521 U.S. at 595. There was thus a far more serious risk that counsel would be unable to

simultaneously represent the interests of both groups. *Id.*; *see also Ortiz*, 527 U.S. at 857 ("presently injured" versus "future claimants"; "Pre-1959 claimants" versus "post-1959 claimants"); *Eubank v. Pella*, 753 F.3d 718, 721 (7th Cir. 2014) ("customers who had already replaced or repaired their defective windows" versus "those who hadn't").

Nor does this case remotely resemble *In re Literary Works*, 654 F.3d 242, in which three categories of claims (A, B, and C) vied for an allocation of funds from a *fixed sum*. Any increase in C's allocation required a corresponding decrease in A and B's allocation. And if the claims exceeded the fixed sum, Category C claims exclusively bore the brunt of any necessary reductions. In that context, this Court reasonably found that Category C-only plaintiffs—the "largest contingent" of class members—had diverging interests "as to the distribution of that recovery" from plaintiffs with Category A and B claims. *Id.* at 252, 254. Here, those distribution and tradeoff concerns have no bearing at all. The vast majority of plaintiffs had *both* (b)(2) and (b)(3) claims, and both categories of plaintiffs sought distinct types of relief that were not capped.

The near-total overlap between the (b)(2) and (b)(3) classes, moreover, reinforces their complementary, not "antagonistic," relationship. Objectors posit a "structural dilemma" in (b)(2) and (b)(3) relief, whereby class representatives are inherently driven to trade future-looking (b)(2) interests for present (b)(3) benefits.

See MA-Br. 70 ("Representatives with present interests simply cannot fight for the best possible relief for future-looking claims."). But (b)(2) and (b)(3) have peacefully co-existed for decades, and litigants routinely combine them when seeking both prospective and retrospective relief. *See supra* n.6. There is simply no support for objectors' suggestion that these two standard forms of class actions somehow become volatile when combined either in this case or more generally.

Here, the district court correctly recognized that the two types of relief worked as essential and complementary components of one fair, reasonable, and adequate remedy. And, precisely because (b)(2) and (b)(3) interests are typically aligned and rooted in common claims, objectors fail to cite a single case citing a conflict of interest between a (b)(2) and (b)(3) class that rendered class counsel unable to represent both groups simultaneously. They exist as two "classes" *not* because of factual "'differences among members of a class … such that subclasses must be established,'" *Amchem*, 521 U.S. at 627, but by virtue of Rule 23(b).[8]

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[8] Certain objectors contend that, although they are members of the merchant class, they were not adequately represented because they do *additional* business in a non-merchant capacity. *See* American Express Br. 15-24; First Data Br. 25-34. As the district court correctly held, "[t]hese objectors seek to make something of nothing." SPA47. The settlement unambiguously "does not bar claims that a class member may have in its capacity as a payment-card competitor, an ATM operator, or *any other capacity other than as a merchant* that accepts Visa and MasterCard credit cards" in the United States. SPA47 (emphasis added).

Nor is there any conflict of interest between present and future merchants *within* the (b)(2) class. Objectors note that in *Stephenson*, certain "future" claimants were deemed inadequately represented by class representatives who previously negotiated a (b)(3) class settlement. But those "future" claimants had *retrospective* damages claims for Agent Orange-related injuries sustained in the 1960s and 1970s in Vietnam. This Court simply held that the veterans who became aware of their Agent Orange-related injuries after 1994—when the (b)(3) settlement damages fund was "deplet[ed]," leaving *no more relief*—were inadequately represented in negotiations for that relief. 273 F.3d at 258.

Here, by contrast, the (b)(2) relief is prospective and will indivisibly benefit all present and future merchants. Far from there being some radical asymmetry between present merchants and those objectors who purport to be "predominantly concerned with future injuries," Blue Cross Br. 23, all merchants similarly benefit from the rule reforms. Indeed, the vast majority of the class is composed of ongoing merchants with as much of a concern with future injuries as any future merchants that do not yet exist. *See, e.g., Dewey v. Volkswagen*, 681 F.3d 170, 185-86 (3d Cir. 2012) ("a 'past' claimant[] can continue to suffer leakage into the future to the same extent as a future claimant").

3. In the end, objectors cannot seriously dispute that class representatives and counsel shared their interest in (b)(2) relief. Objectors instead lament that class

representatives had *less* interest and put "*greater emphasis*" on (b)(3) relief. MA-Br. 66 (emphasis added). And so the alleged fundamental conflict ultimately boils down to a difference in the degree of "emphasis" between two types of relief that virtually all class members were jointly pursuing. That does not come close to an adequacy defect necessitating separate counsel. "All class settlements … strike compromises," and if "compromises automatically created subclasses that required separate representation, the class action procedure would become even more cumbersome." *Charron*, 731 F.3d at 253-54; *see also Dewey*, 681 F.3d at 186-87 ("To hold that … differing valuations [of class-wide relief] by themselves render the representative plaintiff inadequate would all but eviscerate the class action device."); *Gooch*, 672 F.3d at 429.

In all events, there was no difference in emphasis between the two types of relief. To be sure, comparing monetary to injunctive success is an imperfect exercise, *cf. Bendix v. Midwesco*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring) ("like judging whether a particular line is longer than a particular rock is heavy"), and would mean, perversely, that the greater the representatives' monetary achievement, the less adequate their representation. But as the district court properly found, the value of the injunctive relief here "may *very likely exceed* the value of the monetary relief in the long run." SPA67 (emphasis added).

Of course, objectors disagree with that assessment and think that the class representatives and counsel should have held out longer for a better deal. But again, that merely underscores that objectors' driving concerns (which are meritless, *see infra* Part II) relate to the reasonableness of the settlement relief and release. Again, those issues do not escape judicial scrutiny altogether. But any such concerns should be directed to Rule 23(e) and its analysis of the settlement's overall fairness rather than repackaged as an "adequacy" defect under Rule 23(a)(4). *See, e.g.*, *Petrovic v. Amoco*, 200 F.3d 1140, 1146 (8th Cir. 1999) (objectors' "challenge [to] the propriety of the award of compensation" was "more properly directed to the objectors' contention that the settlement was not fair, adequate, and reasonable" than adequacy).

II. The District Court Acted Well Within Its Broad Discretion In Finding The Overall Settlement Fair, Reasonable, and Adequate Under Rule 23(e).

Objectors' various attacks on class certification in the guise of cohesion, due process, and adequacy issues are really just flawed efforts to repackage unpersuasive challenges to the overall fairness of the settlement. Those arguments fare no better under the Rule 23(e) rubric where they belong. Rule 23(e)(2) does not demand that the settlement be perfect; it need only fall within a "range of reasonableness." *Grinnell*, 495 F.2d at 463.

The district court's judgment that this settlement fell within that range of reasonableness—rooted in the court's unique "expos[ure] to the litigants, and their strategies, positions and proofs"—warrants "considerable deference." *Joel A.*, 218 F.3d at 139. Indeed, the district court is owed "heightened" deference where, as here, "experience has imparted to the judge a particularly high degree of knowledge." *Id.* The court's discretionary judgment, moreover, was shared by the two independent mediators who steered the negotiations and proposed the parameters of the eventual agreement. JA1132-36 (Infante Decl.); JA1138-44 (Green Decl.); *see also Wal-Mart*, 396 F.3d at 116 (applying "presumption of fairness" to class settlement "reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery"). Those "in the best position to evaluate whether the settlement constitutes a reasonable compromise," *Handschu*, 787 F.2d at 833, pronounced this settlement a more than reasonable resolution.

A. The Relief Obtained by the Class is Outstanding.

1. The $7.25 Billion Damages Fund is the Largest-Ever Cash Relief in an Antitrust Class Action Settlement.

Against "the prospect of uncertain relief" years down the line, the settlement secures "significant monetary compensation in the near future" in the form of an estimated $7.25 billion damages fund. SPA23. That historic sum represents the largest-ever cash relief in an antitrust class action settlement, and is more than double

the recovery in any previous private antitrust action. It is also the third-largest class action settlement in history. The notion that this massive monetary recovery could somehow be inadequate beggars belief. *Cf. Wal-Mart*, 396 F.3d at 119 (describing $3 billion settlement paid over ten years as "staggering"); *In re Visa Check/MasterMoney Antitrust Litig.*, 297 F. Supp. 2d 503, 512 (E.D.N.Y. 2003) (approving $3 billion settlement paid over ten years).

Rather than attack the adequacy of this massive recovery, objectors ignore it altogether. Objectors focus singularly on the (b)(2) injunctive relief, which they denigrate as "[l]iterally nothing." MA-Br. 74. But it is well-settled that the reasonableness of a settlement must be "taken as a whole." *Maywalt v. Parker & Parsley Petrol.*, 67 F.3d 1072, 1079 (2d Cir. 1995). "[I]t is not the Court's prerogative to pick and choose terms of the settlement, [or] redact portions of the agreement." *McBean v. New York*, 233 F.R.D. 377, 382 (S.D.N.Y. 2006). Thus, courts look to the non-exhaustive "*Grinnell* factors" with a recognition that not every factor must weigh in favor of settlement; "rather the court should consider the totality of these factors in light of the particular circumstances." *Thompson v. Metro. Life*, 216 F.R.D. 55, 61 (S.D.N.Y. 2003).

Objectors even go so far as to fault the district court for not conducting a stand-alone *Grinnell* analysis "exclusively" for the (b)(2) relief. Merchant Trade Groups' Br. ("MTG-Br.") 33-35. Objectors are mistaken about the value of the

(b)(2) relief, *see infra* Part II.A-2-4, and ignore that the district court specifically addressed and affirmed that the (b)(2) relief was reasonable and reasonably justified the release. SPA36-47. Their formalistic insistence on two separate multi-factor *Grinnell* analyses—when the (b)(2) and (b)(3) analyses overlapped almost entirely—is meritless and directly at odds with the holistic Rule 23(e) inquiry. Unsurprisingly, courts addressing global settlements involving (b)(2) and (b)(3) classes have not applied the *Grinnell* factors to each class in isolation. *See, e.g.*, *Charron v. Pinnacle Grp.*, 874 F. Supp. 2d 179, 196 (S.D.N.Y. 2012) ("the Settlement … offers them redress for past injuries, while affording significant systemic benefits (protocols, monitoring, lease audit, injunction)"); *New England Carpenters Fund v. First DataBank*, 602 F. Supp. 2d 277, 281 (D. Mass. 2009) ("$2.7 million cash payment combined with the AWP rollback provisions constitutes a reasonable settlement"). Indeed, objectors fail to cite a single example of what they demand: a stand-alone "(b)(2) *Grinnell* analysis … focus[ed] exclusively on the value of the rules changes, the impact of the mandatory release, and the risks of litigating the injunctive claims." MTG-Br. 34.

In any event, there is simply no brushing aside the "massive damages fund" that promises millions of merchants long-awaited compensation for long-accumulated overcharges. SPA61. When considered together with the valuable

injunctive reforms, the relief achieved was far more than "fair, reasonable, and adequate."

2. The Removal of Restraints on Surcharging Offers Valuable Relief.

The damages fund standing alone, while massive, would risk allowing "merchant restraints [to], in effect, place the merchants back where they started," permitting the networks to simply "recoup any associated lost revenues by tinkering with … other fees." SPA16. Thus, the settlement *also* secures groundbreaking injunctive reforms of several long-entrenched merchant restraints that had allowed the networks and banks to charge excessive interchange fees—reforms that the district court found "may *very likely exceed* the value of the monetary relief in the long run." SPA67 (emphasis added). These *immediately effective* rule reforms, which "class members [could] take advantage of … *now*," further counseled against the alternative of pursuing "many more years of litigation while merchants continued to be hamstrung by the no surcharge rules of Visa and MasterCard and remaining anti-steering rules." JA1362-63 (¶185).

The "heart" of injunctive relief was the lifting of the networks' bans on surcharging. SPA22. Plaintiffs pushed "very hard to obtain" this change, and defendants steadfastly resisted it. SPA36. From the inception of the litigation, the anti-surcharging rules were viewed as a "linchpin to the problem, as far as the merchants [were] concerned." SPA9; *see also* JA924 ("foremost example" of an

anti-steering restraint). Even numerous objectors publicly touted the value of surcharging relief.[9]

"For the first time" since the networks were created a half-century ago, merchants can impose a surcharge on Visa and MasterCard credit card transactions at the point of sale to recover the full costs of acceptance of such transactions and steer customers to less costly payment methods and brands. SPA15. This marks a sea change in the payment industry. Merchants gain valuable leverage from being able to educate customers about the costs of accepting credit cards. In the district court's words, surcharges can finally "make transparent and avoidable what has been opaque and inevitable." SPA37. Levying a surcharge on credit card payments enables merchants to steer customers towards using lower-cost and non-surcharged payment methods or brands. JA1177-78, 1185-86.

A surcharge is even more effective than a discount in this regard because customers react more strongly to losses from "perceived penalties (such as a surcharge) than … perceived rewards." JA1174-77. Cash, check, and debit card customers will no longer be forced to subsidize the additional costs of serving credit

[9] *See Credit Card Interchange Fees: Antitrust Concerns? Hearing Before S. Comm. on the Judiciary*, 109th Cong. 41 (2006) (NACS witness) (anti-surcharging rule "is part of the reason why this is a broken market" and "should not exist"); *id.* at 28 (Merchants Payments Coalition) (anti-surcharging rule is "part of their anticompetitive scheme to fix interchange fees" that "reinforces … price fixing efforts").

card customers. JA1163 n.28. As customers opt for cheaper payment methods and brands, meanwhile, merchants may benefit from decreased card-acceptance costs and increased revenues from the surcharges. JA1184-86. In the long run, merchants may lower their posted retail prices (further benefitting customers) and boost their total sales.

Even the *threat* of surcharging benefits all merchants regardless of whether they surcharge. The networks will face an incentive to lower or moderate their interchange fees because they will lose more transactions if they maintain high interchange fees with surcharging than without. The district court specifically noted expert estimates that, in all, surcharging may save merchants "$26.4 to $62.8 billion in acceptance costs over the next decade." SPA35-36. It represents "an indisputably procompetitive development that has the potential to alter the very core of the problem this lawsuit was brought to challenge." SPA35.

Objectors' briefs are replete with references to the "illusory" and "limited surcharging relief." MA-Br. 36; MTG-Br. 54. But objectors do not deny, nor could they, the pro-competitive effects of surcharging. Instead, drawing on various facts external to the litigation and the settlement, they complain that lifting prohibitions on surcharging does not guarantee that *every* merchant will begin affirmatively surcharging. The district court considered and rejected each of those arguments as "unpersuasive." SPA36.

First, objectors suggest various reasons why some merchants might *choose* not to surcharge. For example, they note that some merchants operate in industries that "are so competitive that surcharging is highly unlikely." MA-Br. 54. As the district court reasoned, "the mere fact that merchants may *choose* not to avail themselves of the proposed relief … does not compel the conclusion that the indisputably procompetitive rules changes are not a valuable achievement." SPA41; *see also LaGarde v. Support.com*, 2013 WL 1283325, at *6 (N.D. Cal. 2013) (while "it is unknown as to how many class members will actually take advantage" of relief, "these deficiencies do not weigh against a finding of fairness and adequacy"); *Handschu v. Special Servs. Div*., 605 F. Supp. 1384, 1417 (S.D.N.Y. 1985), *aff'd*, 787 F.2d 828 (2d Cir. 1986) ("The settlement does not achieve everything they wish for. Few settlements do. But insisting on everything disregards the limitations … arising out of present law….").

Objectors also argue that American Express's separate anti-surcharging rule diminishes the value of surcharging relief. They contend that, because American Express generally carries higher acceptance costs than Visa and MasterCard, merchants will not surcharge Visa or MasterCard cards if it drives customers to American Express. Thus, objectors reason, merchants who choose to maintain their relationships with American Express would not be able to take advantage of surcharging opportunities immediately.

But, again, neither the court nor class counsel can control a merchant's choice to continue accepting cards issued by American Express or any other entity not a party to this lawsuit. As the district court noted, objectors have "no solution for that [American Express] problem … because there could not be one in this case," SPA42—even if plaintiffs had proceeded to trial and prevailed. But that does not mean that the "American Express problem" is intractable, just that it is the subject of a different lawsuit. In fact, American Express subsequently agreed, as part of a settlement in a different class action, to *allow* merchant surcharging in certain circumstances. *See In re Am. Express Anti-Steering Rules Antitrust Litig. (II)*, No. 11-md-2221, D.E. 306-2 ¶8(e) (E.D.N.Y. Jan. 7, 2014). Thus, the settlement of this case provided substantial relief vis-à-vis the defendants here, which is all that can realistically be expected of this lawsuit, and the value of that relief became magnified by external events.

Next, objectors point to laws on the books in approximately ten states that would impede merchants from surcharging in those jurisdictions. Merchants in those states previously faced *two* independent obstacles to surcharging—prohibitions from the networks and from the states—and now face only one. Objectors complain that the remaining state-law obstacle limits the value of the relief for merchants in those states. But removing state-law obstacles again goes well "beyond the scope of th[e] lawsuit." SPA52. As the district court concluded, "[e]ven

if the objectors are right in contending that additional dominoes must fall before the alleged anticompetitive behavior of Visa and MasterCard is eradicated, those dominoes will have to fall in other forums." SPA18.

In all events, objectors overstate the extent of the state-law obstacles and understate the extent to which the relief obtained here will itself cause other dominoes to fall. The district court noted that even in the ten states that limit surcharging, "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. Even if merchants in those states forgo surcharging altogether, the court added, the fact that "interchange fees are set on a nationwide basis" means that surcharging in other states—or even the *threat* of surcharging—will exert downward competitive pressures on interchange fees to the benefit of *all* merchants nation-wide. SPA38; *see also In re Motor Fuel Sales Practices Litig.*, 271 F.R.D. 263, 289 & n.36 (D. Kan. 2010) (all class members benefit; class members from "non-conversion" states have "a right to purchase ATC fuel from Costco in conversion states").

Indeed, the relief imposed here puts undeniable pressure on those state laws. It is one thing for state law to reinforce the uniform practice of Visa, MasterCard, and American Express. It is quite another thing for state laws to remain as the only obstacle to more-transparent pricing after contractual surcharging prohibitions have

been eliminated as part of antitrust settlements. In fact, just as the American Express issue was addressed in separate litigation, these state laws are also under attack in separate litigation. As the district court recognized, a recent decision barring enforcement of one such law on constitutional grounds, *see Expressions Hair Design v. Schneiderman*, 975 F. Supp. 2d 430 (S.D.N.Y. 2013) (appeal pending), indicates that the dominoes may already be falling, and that independent events will only magnify the already-substantial value of the surcharging relief.

Finally, objectors point to the potential for networks to enter bilateral agreements with merchants and speculate that they could "offer[] [a] merchant a break on its interchange rates in exchange for its agreement not to surcharge." MA-Br. 60-61. But far from "swallow[ing] the Settlement's surcharging relief," MTG-Br. 55, this underscores the broader benefits of that relief. As a direct result of the threat to surcharge, networks may be pressured to moderate and make concessions on interchange fees. *See* JA1366 (¶196) (after Australia rescinded anti-surcharging rules in 2003, merchants used threat of surcharging to negotiate significantly lower American Express fees).

In the end, all merchants have an interest in lifting the anti-surcharging restraints because "all merchants have the same interest in being able to inform cardholders at the point of sale of the acceptance costs of their credit cards and to either steer them to lower-cost alternatives or recoup the cost of acceptance."

SPA51. The elimination of decades-old prohibitions may not guarantee that every merchant will promptly begin surcharging, much less eradicate anticompetitive practices in the payment industry nationwide in one stroke. But none of objectors' criticisms of the limits of the surcharging relief detracts from the fact that this was a "critical accomplishment" and significant "step forward" in exposing interchange fees to competitive market forces. SPA15, 37.

3. The Other Injunctive Reforms Offer Valuable Relief.

The surcharging relief does not stand alone. The settlement contains numerous other immediately effective "meaningful" programmatic reforms that complement and enhance the effectiveness of merchants' new surcharging opportunities and will further exert downward pressure on interchange fees. SPA44.

Previously, Visa and MasterCard had an unbroken practice of refusing to negotiate over interchange fees with merchant buying groups. The settlement's *buying group provision* now ensures that if a group of merchants makes a proposal to Visa or MasterCard, the network cannot turn a blind eye. Instead, Visa and MasterCard have an affirmative duty to negotiate in "good faith" and, if the proposal provides commercially reasonable benefits, exercise "good faith" in deciding whether to accept or reject the proposal. SPA149-50, 163-64 (Settlement ¶¶43, 56). Smaller merchants are now better equipped to use collective bargaining power to "obtain the scale economies, organizational efficiencies and negotiating ability of

large merchants." JA1179-80. Objectors do not deny that the reform is pro-competitive; they merely question the extent to which it will be utilized. But again, that "unknown … do[es] not weigh against a finding of fairness and adequacy." *LaGarde*, 2013 WL 1283325, at *6. As plaintiffs' expert attested, even modest competitive pressures on interchange fees produced by buying group efforts may produce substantial savings. JA1179-80, 1184.

Meanwhile, merchants were previously compelled in practice to accept Visa or MasterCard cards at all their outlets and banners (brands) because the networks made volume discounts on interchange fees contingent on that across-the-board acceptance. The settlement's *all-outlets provision* eliminates that practice. Merchants may now accept Visa or MasterCard cards at some, but not all, of their businesses without being penalized with the volume discounts. SPA140-41, 153-54 (Settlement ¶¶41, 54). Thus, for instance, a merchant can now decline to accept the network's cards at its discount store banner to keep costs and prices as low as possible, yet continue to accept the cards in its other stores. Because the higher the fees, the more likely the merchant is to refuse acceptance of a card brand, this rule change will further "increase the elasticity of demand with respect to merchant fees, and thus intensify the competitive constraints facing the Networks over the level of their merchant fees." JA1178-79.

Finally, plaintiffs challenged Visa's and MasterCard's anti-discounting and anti-minimum-price rules, which prevented merchants from offering discounts and banned minimum purchase amounts for credit card usage. The Durbin Amendment and DOJ Consent Judgment—developments that "piggybacked on [plaintiffs'] efforts," SPA59—took superseding steps toward dismantling those rules. They enabled merchants to offer discounts, rebates, and other in-kind incentives and set minimum purchase amounts, and required Visa and MasterCard to provide, at no cost, services to help merchants determine the acceptance costs of Visa and MasterCard credit cards.

The *discounting, minimum-purchase, and cost information provisions* of the settlement now lock in, until 2021, the dismantling of those anti-steering restraints. SPA139-40, 150-51, 153, 164 (Settlement ¶¶40, 44, 53, 57). The Durbin Amendment and DOJ Consent Judgment, while achieving crucial tools, were also subject to the vagaries of modification and repeal. The settlement firmly shields those gains from erosion by the whims of public opinion or Rule 60(b) assertions of changed circumstances, ensuring that they remain valuable enhancements to merchants' newfound ability to surcharge. Merchants are now assured of their ability to offer discounts and minimum purchase rules in addition to, or in lieu of, surcharges—an empowering toolbox with which they can steer customers toward

more cost-effective payment methods, brands, and products, and incentivize networks to keep interchange fees in check.

4. The Settlement Is Not Unreasonable Merely Because It Does Not Include All of the Relief Sought by Objectors.

Based on its extensive knowledge of the litigation, the district court concluded that rule reforms achieved would "meaningfully blunt" any lingering anticompetitive effects of the Honor-all-Cards and default-interchange rules. SPA45, 61. Objectors, however, lament the fact that this settlement does not obtain the *wholesale rescission* of the Honor-all-Cards and default-interchange rules as well. MA-Br. 13, 17. That objectors (like any plaintiff) would have preferred even *more* relief is understandable. But as this Court has said time and again: "Each side gives up a number of things. This is the way settlements usually work." *Wal-Mart*, 396 F.3d at 113. "The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Grinnell*, 495 F.2d at 455 & n.2; *see also Handschu*, 605 F. Supp. at 1385 ("It is beside the point for objectors to … criticize the settlement because it falls short of a state of law they devoutly desire but have not yet achieved").

As they did below, objectors fail to grapple with the "limitations on the relief that would be available even if success were achieved" and "assum[e] that a complete victory on the merits is a foregone conclusion." SPA25-26. But continuing

with litigation was not without serious risks. *See* Defendants-Appellees Br. Part I.A-2. In fact, the district court noted that plaintiffs faced an uphill battle on their challenges to the default interchange and Honor-all-Cards rules. The district court pointedly criticized objectors for "assum[ing] that default interchange is inherently illegal, [when] in reality it is a very complicated issue." SPA29. It noted that no court had "ever held that Visa or MasterCard's default interchange rules violate the antitrust laws," and that the practices had procompetitive effects for consumers that may have outweighed any anticompetitive harm. SPA30.

The district court further questioned whether a court could even permissibly engage in "the regulation of interchange fees … if the plaintiffs obtained a complete victory on the merits." SPA14, 16. Likewise, the court noted that plaintiffs would have to confront adverse caselaw implicating the Honor-all-Cards rule that made it "no sure thing … that Class Plaintiffs will be able to prove they have anticompetitive effects to such an extent that they violate the antitrust laws." SPA32. The district court also discussed risks that plaintiffs may have faced in establishing damages and maintaining class status.

In light of the substantial delays and uncertainties that extending the litigation for many more years would entail, it was eminently reasonable to conclude that the settlement relief—most of which was immediately effective—was the best possible outcome for plaintiffs. Under the totality of the circumstances, the settlement easily

falls within a "range of reasonableness." That the settlement does not obtain all of the relief that some objectors would have preferred does not in any way take it outside that realm of reasonableness.

B. The Standard Release Conforms With All Applicable Law.

In exchange for the substantial damages and restructured network practices, the settlement releases all claims "that are alleged or which could have been alleged" by plaintiffs in this litigation.[10] SPA169 (Settlement ¶68). That is a standard form of release that courts have repeatedly approved in class settlements. It is a form of release, moreover, that this Court has recognized is "often" pivotal to "achieve comprehensive settlement of class actions." *In re Literary Works*, 654 F.3d at 247-48; *see also Wal-Mart*, 396 F.3d at 106 ("'[c]lass action settlements simply will not occur if the parties cannot set definitive limits on defendants' liability'").

Objectors complain about the release of hypothetical and uncertain future claims seeking damages, but that is really just a reprise of their mistaken criticisms of the settlement reforms as "[l]iterally nothing." MA-Br. 74. The structural reforms are, as the district court found, designed to provide substantial and "meaningful"

[10] *See* SPA169-70 (Settlement ¶68) (releasing claims "arising out of or relating in any way to any conduct, acts, transactions, events, occurrences, statements, omissions, or failures to act of any Rule 23(b)(2) Settlement Class Released Party *that are alleged or which could have been alleged* from the beginning of time until the date of the Court's entry of the Class Settlement Preliminary Approval Order") (emphasis added).

relief. SPA15. There is nothing unusual about foreclosing hypothetical future claims based on conduct addressed prospectively by a valid injunction. The injunction's immediately-effective, meaningful reforms—coupled with other industry reforms triggered by this litigation, such as the separation of the payment networks from the banks, the DOJ Consent Judgment, and the Durbin Amendment—dramatically change the landscape going forward, such that the value of any foreclosed future claims will likely be *de minimis*.

Moreover, as the district court correctly concluded, the release covers "only the claims that may properly be extinguished by the settlement of a class action." SPA44. It is of no moment that the release covers rules and practices that were not expressly challenged in this action. The four corners of a complaint have never delineated the outer bounds of a release. To the contrary, it is well-settled 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." *Wal-Mart*, 396 F.3d at 107. Time and again, this Court has approved nearly identical releases as consistent with the "identical factual predicate" test. *Cf. Visa Check*, 297 F. Supp. 2d at 512 ("'claims which have been asserted or could have been asserted'"); *In re Literary Works*, 654 F.3d at 247 ("claims that were or could have been pled").

That is all that this straightforward release does. As the district court determined, the settlement simply "releases … claims that are or could have been alleged based on the identical factual predicate of the claims in this case." SPA46. At the final approval hearing, defendants agreed unequivocally—as they reiterate here, Defendants-Appellees' Br. Part II—that "the release *is limited by the Identical Factual Predicate Doctrine* which is the law of the Second Circuit." JA2566 (emphasis added); *see also id.* (Defs: "Nobody is proposing that the release be construed beyond the Identical Factual Predicate Doctrine.").

Claims about the rules and conduct that enabled the networks to maintain supra-competitive default interchange fees, their IPOs, or their status as structural conspiracies by virtue of their rules, are thus released. Claims about any new rules and conduct are not released.[11] Claims about any reversion to the pre-settlement rules are likewise not released. *See* JA2584-85 (defendants agreeing with plaintiffs' list of conduct *not* covered by the release). The district "court's findings regarding the parties' intentions will be respected on appeal unless they are clearly erroneous." *W. Alton Jones Found. v. Chevron*, 97 F.3d 29, 33 (2d Cir. 1996). Indeed, "'[f]ew

[11] This release is thus far afield from the release rejected in *Nat'l Super Spuds v. N.Y. Mercantile Exch.*, 660 F.2d 9 (2d Cir. 1981). There, the release of claims based on "unliquidated" contracts was deemed improper when the claims, the complaint, the class certification opinion, and the settlement notice all *exclusively* concerned "liquidated" contracts. *Id.* at 16-17. Even "class action plaintiffs did not purport to represent" anyone with "claims based on unliquidated contracts." *Id.* at 17.

persons are in a better position to understand the meaning of a [settlement] than the district judge who oversaw and approved it.'" *United States v. Local 359, United Seafood Workers,* 55 F.3d 64, 68 (2d Cir. 1995).

For clarity's sake, the settlement notes that the released claims include future claims based on the networks' "continued … adherence" to (1) rules or conduct left unmodified by the settlement that are challenged or could have been challenged, (2) rules or conduct modified by the settlement, and (3) rules or conduct "substantially similar" to (1) or (2). SPA171 (Settlement ¶68(g)-(h)). That unremarkable provision merely bars collateral attacks on continued adherence to the practices agreed upon in the settlement. *See In re Literary Works*, 654 F.3d at 248 ("release of claims regarding future infringements is not improper").[12]

As the district court noted, there may well be "room for litigation over whether future rules are 'substantially similar,'" but the limitation ensures that only non-substantive changes to the agreed-upon, going-forward rules and conduct are released. SPA47. As the court reasonably explained, that limitation appropriately cabins the release, and there is no need for an advisory opinion that would "catalog here all the claims that fall within or without the release." SPA47. That accords with the settled principle "that the court conducting the action cannot predetermine

[12] Contrary to objectors' insinuations, *see* MA-Br. 74, the release would *not* apply if defendants were, after 2021, to revert to their previous rules.

the *res judicata* effect of the judgment; this can be tested only in a subsequent action." Fed. R. Civ. P. 23 advisory committee notes (1966).

The "substantially similar" limitation likewise readily distinguishes the various cases, cited by objectors, in which courts have found releases of future claims to violate public policy. In *Lawlor v. National Screen Service*, 349 U.S. 322 (1955), for instance, the Supreme Court suggested that "a partial immunity from civil liability for future violations" would be "consistent with neither the antitrust laws nor the doctrine of *res judicata*." *Id.* at 329. The released claims, however, involved conduct that was "all subsequent to the … judgment," "did not even then exist [at the time of settlement] and … could not possibly have been sued upon in the previous case." *Id.* at 328. This release, by contrast, bars only claims "that are alleged or which could have been alleged" in this case, including future claims arising out of the practices sanctioned in the structural reforms embraced by the district court.[13]

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[13] *See also Williams v. G.E. Capital*, 159 F.3d 266, 274 (7th Cir. 1998) (enforcing release of claims that "even if … not ripe" were "closely enough related to the [released] disclosure claims that everything could be resolved in the settlement"); *In re Managed Care Litig.*, 2010 WL 6532985, at *12 (S.D. Fla. 2010) (enforcing release barring lawsuit based on continuation of pre-release conduct); *Schwarz v. Dall. Cowboys*, 2001 WL 1689714, at *1 (E.D. Pa. 2001) (approving release of "a continuation of such policies, practices, contracts, conduct or provisions"); *see also VKK Corp. v. NFL*, 244 F.3d 114, 126 (2d Cir. 2001) ("It is not uncommon … 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.").

Nor can this release be said to grant antitrust "immunity," when the challenged conduct has not been held by the courts to be "clearly illegal" under the antitrust laws. *Robertson v. NBA*, 556 F.2d 682, 686 (2d Cir. 1977). It is well-settled that a court should not reject a settlement on grounds that it authorizes illegality if "'the alleged illegality … is not a legal certainty'"; that would "in effect try the case by deciding unsettled legal questions." *Id.*; *see also Armstrong v. Bd. of Sch. Dirs.*, 616 F.2d 305, 321 (7th Cir. 1980) ("before a settlement may be rejected because it initiates or authorizes a clearly illegal or unconstitutional practice, prior judicial decisions must have found that practice to be illegal or unconstitutional as a general rule").

More generally, there is no basis to adopt objectors' maximalist interpretation of the release to conjure up a due process or public policy problem. Under bedrock canons of contract construction and constitutional avoidance, this Court need only read the release consistent with its standard terms, rather than impute an intent to invite objectors' parade of horribles. *See In re Johns-Manville*, 759 F.3d 206, 216 (2d Cir. 2014) ("common canons of contract construction call upon us to reject … an interpretation" that assumes order "bound entities without constitutionally sufficient notice"). Indeed, the Due Process Clause is the ultimate backstop. Precisely because a release cannot release claims in a manner that deprives future litigants of their due process rights, releases are interpreted to reflect, not violate,

those limits. *See id.* (interpreting order to "bar claims only by those parties that received constitutionally sufficient notice"). Any future concerns that those limits are being crossed can be addressed if and when such issues actually arise.

In short, the (b)(2) release here is a standard provision, fully consistent with due process, that reflects the importance of the structural relief and the practical necessity of giving defendants legal peace in exchange for the substantial relief obtained. The district court's considered judgment that the release is a proper component of a fair, reasonable, and adequate settlement warrants deference and should be affirmed.

III. The District Court Acted Well Within Its Broad Discretion In Finding The Fee Award Reasonable.

"In a certified class action, the court may award reasonable attorney's fees." Fed. R. Civ. P. 23(h). The key consideration is what is "'reasonable' under the circumstances." *Goldberger*, 209 F.3d at 47. The circumstances here include nearly a decade of hard-fought litigation, the largest antitrust class action settlement award in history, and injunctive relief that likely will prove more valuable still. The district court approved a $544.8 million attorneys' fee—approximately 9.56% of the net cash fund, after opt-out reductions—as a reasonable award under these "unique facts and circumstances of the settlement." SPA69. That determination, laid out in a dedicated fees opinion with painstaking transparency and detail, falls comfortably within the district court's ample discretion and should be affirmed.

The district court here grounded its analysis in the "unique … size, duration, complexity, and … relief" of this case. SPA56. Class counsel and the nearly 60 additional law firms that worked on the case went toe-to-toe with a group of the nation's largest financial institutions and their talented counsel over an eight-year period. They devoted, by conservative estimates, 500,000 hours of time to the case without assurance of any compensation. The litigation was of "singular size and complexity," raising a plethora of difficult issues that went to the heart of how the payment card industry has operated since its inception. SPA62. Each class member's share of that award was well below that which any class member would have paid to prosecute this action and below what private plaintiffs typically pay. *See* JA1263-72.

A handful of objectors take issue with the court's assessment of individual factors under the traditional six-factor framework of *Goldberger*, 209 F.3d at 50 (factors include "'(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation … ; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations'"). But none take issue with the "most important *Goldberger* factor"—the risk of the litigation—which indisputably weighed in favor of a sizeable fee. SPA59. As the district court explained, "[i]f not for the attorneys' willingness

to endure for many years the risk that their extraordinary efforts would go uncompensated, the settlement would not exist." SPA59.

Objectors instead appear to quibble with the district court's assessment of the "quality of representation" and "the requested fee in relation to the settlement," rehashing their objections to the settlement itself. *E.g.,* Unlimited Vacations Br. 9 (this "is a negative value settlement" where "[c]lass members would be better off with no settlement at all"). Those hyperbolic criticisms are as unavailing in the fee context as in the settlement context. As the district court found, the settlement secured not only a "massive damages" award, but crucial programmatic reforms of "great value" that together constitute a "significant success." SPA60-61. Nothing objectors say warrants disturbing that determination, much less overturning the court's weighing of the *Goldberger* factors as a whole.

Objectors' criticisms of the district court's graduated fee schedule similarly rest on those mistaken premises. To calculate the fee, the district court adopted a sliding scale that fixed the percentage of the fund to which counsel was entitled through a declining schedule, thus addressing the worry that "'it is not ten times as difficult to prepare, and try or settle a 10 million dollar case as it is to try a 1 million dollar case.'" *Goldberger*, 209 F.3d at 52. Thus, the court awarded counsel 33% (a common contingency fee arrangement in less complex class actions) of the first $10 million of the fund, 30% of the next $40 million, 25% of the next $50 million, and

so forth, with percentages declining as the fund increased. The schedule was based on "empirical studies" of "federal class action settlements in recent years" and "the unique facts and circumstances of the settlement." SPA64, 67, 69.

Objectors would like the scale to slide more *steeply*, rehashing their complaints about the underlying settlement. Unlimited Vacations Br. 17; *see id.* at 19 (urging "percentages of 4%, 3% and 2%, instead of Judge Gleeson's 10%, 8% and 6%"). As explained, however, class counsel more than adequately represented both the (b)(2) and (b)(3) classes. And in all events, the district court hardly exited the realm of reasonableness in using one set of numbers rather than objectors' preferred figures.

Finally, some objectors appear to view *any* increase above the lodestar amount as an undeserved windfall. In fact, courts regularly approve fees that reflect a multiplier from the lodestar, and the multiplier here—3.41—is squarely in the range of previously approved multipliers. As the district court explained, 3.41 is "comparable to (indeed, nearly identical to) the one I awarded in the *Wal–Mart* case ten years ago, and it is also comparable to multipliers in other large, complex cases." SPA70; *cf. In re WorldCom Sec. Litig.*, 388 F. Supp. 2d 319, 354–59 (S.D.N.Y. 2005) (approving multiplier of 4.0 in $3.5 billion complex securities case); *In re Enron Sec., Derivative & ERISA Litig.*, 586 F. Supp. 2d 732, 803 (S.D. Tex. 2008) ("[A] multiplier of 5.2 is warranted, given the unmatched size of the … recovery,

the obstacles and risks faced by [counsel] from the beginning, and the skill and commitment exhibited by counsel."); *In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at *10 (E.D.N.Y. 2012) ("'lodestar multiples of between 3 and 4.5 had 'become common'"). And it reflects a smaller multiplier than that approved in *Visa Check*, 297 F. Supp. 2d at 524, which this same district court presided over and regarded as substantially less "challenging." SPA63.

At bottom, there is no basis to disturb the district court's fee award as an abuse of discretion.

IV. The District Court Acted Well Within Its Broad Discretion In Finding The Settlement Notice Reasonable.

The standard for an adequate settlement notice, whether analyzed under the Due Process Clause or Rule 23, is one of reasonableness. *See Soberal–Perez*, 717 F.2d at 43; Fed. R. Civ. P. 23(e)(1). "There are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements." *Wal-Mart*, 396 F.3d at 114. This Court has said that a notice need only "'fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with [the] proceedings.'" *Weinberger v. Kendrick*, 698 F.2d 61, 70 (2d Cir. 1982). Accordingly, "[n]umerous decisions, no doubt recognizing that notices to class members can practicably contain only a limited amount of information, have approved 'very general description[s] of the proposed settlement.'" *Id.*

The district court found that the notice supplied here easily met that standard: "It described the litigation, summarized the settlement's terms, quoted the releases verbatim, described the request for attorneys' fees, expenses, and incentive awards for Class Plaintiffs, and explained the deadline and procedure for filing objections to the settlement as well as opting out of the case settlement class." SPA51. The notice also notified class members of how they could obtain more information from class counsel or the Class Administrator though a toll-free number, a website, and traditional channels including mail and telephone. To ensure accessibility to "the average class member," 4 *Newberg on Class Actions* § 11:53, class counsel even consulted a plain language expert in the drafting, and made the notice and website available in eight languages. JA1220-21 (¶9); JA1211 (¶31).

To maximize notice circulation, class counsel worked closely with the Class Administrator to identify class members and compile a database of 19,874,922 unique mailing addresses, later supplemented by an additional 969,970. *See* JA1208 (¶¶18-19). In all, the "notice and publication campaign … included more than 20 million mailings and publication in more than 400 publications." SPA12. Moreover, the notice "prompt[ed] widespread reaction from class members," further demonstrating that it had "served its due process purpose." *Handschu*, 787 F.2d at 833; *see* JA1210 (¶26) (over 93,000 calls to toll-free number from December 2012

through April 2013); JA1211 (¶¶29, 32) (over 3.743 million website pages visited in two months).

The district court considered and rejected certain objectors' claims that the notice contained false statements. Objectors raised these arguments repeatedly, at preliminary approval, at final approval, and at proceedings regarding the misleading websites some objectors had created (where the district court nearly held several objectors in contempt, SPA14). Each time, the district court rejected the challenges to the settlement notice as meritless. Nonetheless, objectors reiterate their thrice-rejected claim that the notice was misleading because any changes to the anti-discounting network rules stem from the DOJ Consent Judgment, not from the settlement. As the district court correctly held, the notice was fully accurate. It appropriately refers to anti-discounting rule changes because the settlement creates an affirmative network obligation to permit discounting, independent of the Consent Judgment. Indeed, the settlement locks in the discounting reforms of the Consent Judgment until 2021, ensuring that the changes will be unaffected even if the Consent Judgment is vacated.

Objectors further contend that the notice contains no disclosure of the size of the class, the aggregate damages suffered, the average loss per class member quantified as a percentage of the class members' sales to customers using Visa and MasterCard, and the percentage of the aggregate damages that comprise the

settlement benefit. Optical Etc. Br. 3. But those arguments fare no better. "Neither Rule 23 nor due process … requires that the notice report the estimated value of damages." *Thompson*, 216 F.R.D. at 67; *see also id.* (rejecting criticism that the notice failed to detail class member's individual benefits).

In the end, there is absolutely no basis to disturb the district court's determination that the settlement notice was "'the best practicable, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Hecht*, 691 F.3d at 224. By conveying "enough information about the settlement and its implications for participants to enable class members to make an informed decision about whether to be heard concerning the settlement or, if allowed, to opt-out," 2 *McLaughlin on Class Actions* § 6:17, the notice plainly suffices.

CONCLUSION

This class action resulted in one of the largest class recoveries ever realized. It also resulted in wide-ranging changes to the way the payment card industry operates, both directly through the injunctive relief realized, and indirectly through the federal legislation and enforcement actions that this litigation prompted. The monetary recovery and injunctive relief provided by the settlement grant significant benefits to all class members, including compensation for past harm and protection against future injury. In the judgment of the district court, and the highly

experienced mediators who assisted the court in facilitating the resolution of these complex and challenging claims, the settlement was not only appropriate, but compelling.

On this record, the district court did not abuse its considerable discretion in approving the settlement, awarding fees to class counsel, and in approving notice of the settlement to class members. The decision of the district court should be affirmed in all respects.

Respectfully submitted,

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I hereby certify that:

1. This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and the order issued on October 2, 2014 granting Plaintiffs-Appellees' motion for leave to file a brief of up to 20,000 words because it contains 19,901 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point font.

December 19, 2014

s/Candice C. Wong
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CERTIFICATE OF SERVICE

I hereby certify that, on December 19, 2014, an electronic copy of this Final Form Brief for Plaintiffs-Appellees was filed with the Clerk of Court using the ECF system, thereby serving all counsel of record.

s/Paul D. Clement
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