EXHIBIT 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BARRY'S CUT RATE STORES INC.; DDMB, INC. d/b/a EMPORIUM ARCADE BAR; DDMB 2, LLC d/b/a EMPORIUM LOGAN SQUARE; BOSS DENTAL CARE; RUNCENTRAL, LLC; CMP CONSULTING SERV., INC.; TOWN KITCHEN, LLC d/b/a TOWN KITCHEN & BAR; GENERIC DEPOT 3, INC. d/b/a PRESCRIPTION DEPOT; and PUREONE, LLC d/b/a SALON PURE,

Plaintiffs,

v.

VISA, INC.; MASTERCARD INCORPORATED; MASTERCARD INTERNATIONAL INCORPORATED; BANK OF AMERICA, N.A.; BA MERCHANT SERVICES LLC (f/k/a DEFENDANT NATIONAL PROCESSING, INC.); BANK OF AMERICA CORPORATION; BARCLAYS BANK PLC; BARCLAYS BANK DELAWARE; BARCLAYS FINANCIAL CORP.; CAPITAL ONE BANK, (USA), N.A.; CAPITAL ONE F.S.B.; CAPITAL ONE FINANCIAL CORPORATION; CHASE BANK USA, N.A.; CHASE MANHATTAN BANK USA, N.A.; CHASE PAYMENTECH SOLUTIONS, LLC; JPMORGAN CHASE BANK, N.A.; JPMORGAN CHASE & CO.; CITIBANK (SOUTH DAKOTA), N.A.; CITIBANK N.A.; CITIGROUP, INC.; CITICORP; and WELLS FARGO & COMPANY,

Defendants.

MDL No. 1720

Docket No. 05-md-01720-MKB-VMS

MERCHANT TRADE GROUPS' MEMORANDUM OF LAW IN OPPOSITION TO EQUITABLE RELIEF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AS PROPOSED

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Intervenors the National Retail Federation ("NRF") and the Retail Industry Leaders Association ("RILA") (collectively "Merchant Trade Groups") submit this brief in opposition to Equitable Relief Plaintiffs' motion for class certification under Rule 23(b)(2).

PRELIMINARY STATEMENT

The class the Equitable Relief Plaintiffs ask this Court to certify is unprecedented in breadth and number, quite possibly the largest mandatory class in the history of Rule 23(b)(2) given the size of the present and future industry it seeks to encompass. Indeed, it would bind tens of millions of merchants of all sizes—nearly every merchant in the country now as well as millions that will arise over the next eight plus years—with no opportunity for even sophisticated business merchants to decide for themselves how to litigate their claims. It would include, by its express terms, merchants that do not currently exist, without any showing that such future merchants should be included in this already sprawling class. Merchant Trade Groups ask that class members be given opt-out rights, just as the Court provided to the Rule 23(b)(3) class members in the settlement it approved, and that any certified class not include merchants that have not yet formed.

Because this proposed mandatory class is so unprecedented and changes to Defendants' practices are so vital to reining in the burdensome cost of rising credit acceptance fees, NRF and RILA have joined together to object to the proposed class certification. As trade associations, NRF and RILA speak not just for themselves but have unique insight into the merchant community given the thousands of large and small merchants from across the retail industry that are their members.

If this class is certified as proposed, every merchant's injunctive claims will be governed by the Equitable Relief Plaintiffs' litigation or settlement strategy, even if those merchants vociferously disagree with it. And many will disagree, because this is not a case

where there is a single injunctive remedy that each class member would, perforce, desire—the Supreme Court's standard for mandatory classes. Instead, there is a range of potential injunctive changes to Visa's and Mastercard's thousands of pages of rules, some far more effective than others (as the unpopular vacated 2013 injunctive settlement amply demonstrates). Merchants, many of them quite sophisticated, may very well choose relief that is different from what the Equitable Relief Plaintiffs will choose. Additionally, the breadth of the proposed class means that any injunctive change would not affect all class members equally. For example, depending on the types of changes proposed, a small grocer whose customers chiefly pay by presenting cards in person would be affected differently by any changes in Visa and Mastercard rules than would a large mass market store with robust e-commerce sales and multiple payment options. Class members should be permitted the opportunity to decide for themselves whether to be bound by this class or whether to preserve their right to go it alone**,** hiring their own counsel and pursuing their own litigation strategy**,** whether right now or years in the future.

The Court has ample power to permit Rule 23(b)(2) class members the right to opt out, as even the Equitable Relief Plaintiffs concede. And it has a clear example to follow: *Visa Check*, a previous class action on behalf of all U.S. merchants challenging Visa and Mastercard tying practices, permitted opt-outs. *In re Visa Check/MasterMoney Antitrust Litig.* ("*Visa Check*"), 280 F.3d 124, 146–47 (2d Cir. 2001). And the class was able to reach a negotiated resolution for those who did not opt out, obtaining a complete rescission of the practice at issue.

The proposed class here also includes, without explanation, future class members that do not exist and will not begin to accept Visa or Mastercard for nearly a decade after the litigation closes. Equitable Relief Plaintiffs' decision to include future merchants in its proposal primarily benefits *Defendants*, not the merchant community. It is *Defendants* that want to

preclude or release future claims, because such a release would give Defendants *carte blanche* to continue to mandate acceptance and to fix interchange rates without fear of future suits to rectify those practices—one of the chief concerns that animated the Second Circuit to vacate the 2013 Settlement. Moreover, this Court cannot evaluate those future class members' claims or injuries, if only because technological changes will undoubtedly create new and unforeseeable payment mechanisms in the next decade or so. This concern is likewise relevant to today's merchants—such as Merchant Trade Groups—who may desire to challenge anticompetitive rules burdening such new payment systems in the future without being bound to a resolution of this case.

Finally, Merchant Trade Groups take no position on whether an injunctive class could be certified here. But the class as proposed—one that permits no opt-outs and includes millions of future merchants—should be rejected.

BACKGROUND

As this Court is aware, this multidistrict litigation ("MDL") originated in 2005. In the sixteen years since this MDL was created, substantial changes have taken place in the rules and policies governing the credit card industry, including Visa's and Mastercard's initial public offerings ("IPOs"), the "Durbin Amendment," and a 2011 consent decree with the Department of Justice permitting discounting. *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.* ("*Payment Card II*"), 827 F.3d 223, 229 (2d Cir. 2016). But "[n]one of these developments affected the honor-all-cards or no-surcharging rules, or the existence of a default interchange fee," the core restrictive rules that enable Visa and Mastercard to extract high, and still rising, interchange fees without facing downward pricing pressure. *Id.* Indeed, despite industry changes and critical technological advances (like the smartphone), the market for payment card

acceptance remains broken and non-competitive—merchants and consumers continue to pay continually higher prices.[1]

In 2012, the parties proposed a settlement with two classes: a Rule 23(b)(2) class that would receive injunctive relief but no right to opt out, and a Rule 23(b)(3) class, where those who did not opt out could receive monetary relief (the "Settlement"). *Payment Card II*, 827 F.3d at 229. Citing the breadth of the mandatory release compared to the largely illusory injunctive relief, thousands of merchants objected to the mandatory (b)(2) Settlement; additionally, over 7,500 merchants opted out of the (b)(3) class. Report of Exclusion Requests, Dkt. 6154-2. *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.* ("*Payment Card I*"), 986 F. Supp. 2d 207, 223 (E.D.N.Y. 2013), *rev'd and vacated*, 827 F.3d 223 (2d Cir. 2016). Merchant Trade Groups were among the objectors and opt-outs. Greenberger Decl. Ex. 2 (Obj. of Retail Industry Leaders Association to Final Approval of the Settlement, Dkt. 2469); Greenberger Decl. Ex. 3 (National Retail Federation Statement of Objection to Final Approval of the Proposed Rule 23(b)(2) Agreement, Dkt. 2538).

After the District Court approved the Settlement, Merchant Trade Groups, along with numerous other objectors and opt-out plaintiffs, appealed. Appeal, Dkt. 6148; Notice of Appeal, Dkt. 6251. NRF and RILA joined together to submit one of the two primary merchant briefs opposing the Settlement before the Second Circuit. Greenberger Decl. Ex. 4 (Br. For Objectors-Appellants, *In Re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, No. 12-4671, at 3 (2d Cir. June 16, 2014), Dkt. 55).

[1] *See, e.g.*, David Heun, *Card brands postpone fee hike, but merchants want interchange reform*, PaymentsSource (Mar. 16, 2021), https://www.paymentssource.com/news/card-brands-postpone-fee-hike-but-merchants-want-interchange-reform.

In 2016, the Second Circuit vacated the class certification and reversed the approval of the Settlement, holding that class counsel was conflicted because the "class counsel and class representatives who negotiated and entered into the Settlement Agreement were in the position to trade diminution of (b)(2) relief for increase of (b)(3) relief." *Payment Card II*, 827 F.3d at 234. And that improper trade-off, in fact, occurred: "the bargain that was struck between relief and release on behalf of absent class members is so unreasonable that it evidences inadequate representation." *Id.* The Court particularly highlighted the broad future-looking relief of injunctive claims, which had no end date, binding class members *in perpetuity*: "This release permanently immunizes the defendants from any claims that any plaintiff may have now, or will have in the future, that arise out of, *e.g.*, the honor-all-cards and default interchange rules. . . . The defendants never have to worry about future antitrust litigation based on their honor-all-cards rules and their default interchange rules." *Id.* at 239.

Following the Second Circuit's decision, Merchant Trade Groups joined former class plaintiffs in requesting that the Court comprehensively reconsider class representation. They urged the Court to appoint independent counsel "who are willing to reconsider, and, as appropriate, deviate from, prior counsel's (conflicted) decisions about prospective relief—such as the decision to seek certification of a mandatory (b)(2) class and the decision to focus on meaningless surcharging relief." Greenberger Decl. Ex. 5 at 2–3 (Merchant Trade Groups' Mem. of Law in Supp. of Appointment of Kirby/Goldstein, Dkt. 6697).

In 2017, Equitable Relief Plaintiffs filed a new class action complaint. Equitable Relief Class Action Compl., Dkt. 6892 (sealed), Dkt. 6910 (redacted). Equitable Relief Plaintiffs now consist of just seven small merchants located in Illinois, Texas, Florida, and Georgia, and seek to represent a class of millions of merchants across the nation that accept Visa and/or

Mastercard. *Id.* at 3, 11–12. Meanwhile, although certain merchants decided to litigate their individual claims against Defendants, Merchant Trade Groups elected not to do so.[2]

Instead, beginning in mid-2017, counsel and representatives from Merchant Trade Groups began discussions with appointed Equitable Relief Counsel, who Merchant Trade Groups understood were appointed to represent all merchants in the class, including Merchant Trade Groups and their members. Merchant Trade Groups were uniquely situated to share not only their own views but the views of a much broader member community than that to which the Equitable Relief Counsel had access, because the Equitable Relief Plaintiffs are few in number and do not have insight into large portions of the retail industry. In contrast, Merchant Trade Groups are in regular contact with a large number of merchants because of their wide and varied memberships. Merchant Trade Groups sought to share privileged information with their putative appointed counsel about their views regarding the appropriate certification of any Rule 23(b)(2) class and what equitable relief would be meaningful to the broad merchant community beyond Equitable Relief Plaintiffs. These discussions included multiple in-person meetings where Merchant Trade Groups brought member retail representatives with deep experience with the payment industry to share their views with Equitable Relief Counsel.

The last such meeting was in April 2019. It was not intended to be the final meeting, and the parties contemplated another meeting in the summer of 2019. But then, without explanation, Equitable Relief Counsel stopped responding to Merchant Trade Groups' repeated communications, including ignoring emails in May 2019, July 2019, and December 2019; a

[2] In December 2019, Defendants reached a settlement *with opt-out rights* for the Rule 23(b)(3) class. Final Approval Order, Dkt. 7818. Future merchants were not part of that Rule 23(b)(3) class and did not release any claims. Merchant Trade Groups were among the 675 class members that opted out. Report of Exclusion Requests, Dkt. 7796-2.

voicemail in December 2019; and a letter in February 2020. Only in March 2020, after nearly a year of silence, did Merchant Trade Groups receive a response; but Equitable Relief Counsel remained uninterested in scheduling a further meeting. There have not been any further meetings or discussions since, though Equitable Relief Plaintiffs have publicly stated they are having settlement discussions with Defendants. *See* Dkt. 7281, 8009.

ARGUMENT

I. ANY RULE 23(B)(2) CLASS CERTIFICATION HERE SHOULD PERMIT MERCHANTS TO OPT OUT

Although Rule 23(b)(2) classes are mandatory by default, "the language of Rule 23 is sufficiently flexible to afford district courts discretion to grant opt-out rights in . . . (b)(2) class actions." *Batalla Vidal v. Wolf*, No. 16-CV-4756 (NGG) (VMS), 2020 WL 6695076, at *12 (E.D.N.Y. Nov. 14, 2020) (quoting *McReynolds v. Richards-Cantave*, 588 F.3d 790, 800 (2d Cir. 2009)) (cleaned up); *Eubanks v. Billington*, 110 F.3d 87, 96 (D.C. Cir. 1997) ("Like the Second Circuit, we view Rule 23(d)(5) to be broad enough to permit the court to allow individual class members to opt out of a (b)(1) or (b)(2) class when necessary . . ." (citing *Cty. of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1304 (2d Cir. 1990)). The Court should exercise its discretion to do so here because merchants should be permitted to decide for themselves whether they agree or disagree with Equitable Relief Plaintiffs' litigation or settlement strategy in light of the broad range of possible options for resolving these injunctive claims.

In considering whether to grant opt-out rights, it bears noting that this case is ultimately about the merchant community's bottom line. While Equitable Relief Plaintiffs seek only injunctive relief, their claims—and other class members' potential claims—are essentially about the amount of money Defendants can extract from merchants over the course of their business relationships. At the end of this case, one of two outcomes will arise: either Visa and

Mastercard will be able to maintain the anti-competitive policies—particularly Honor-all-Cards[3] and default interchange[4]—they use to extract inflated interchange fees from merchants who have little choice but to accept them; or Defendants will be required to change those policies, resulting in merchants paying less in interchange fees. Indeed, this litigation has been so hard fought because Defendants recognize that if these anti-competitive rules are eliminated, competition will increase and interchange rates will fall, affecting Defendants' (substantial) profits.[5]

Under the federal rules, cases about monetary relief generally fall under Rule 23(b)(3), which requires opt-out rights so that class members have the right to make individual decisions affecting their bottom line. The principles underlying obligatory opt-out rights under Rule 23(b)(3) support an opt-out right here. Seven non-representative class plaintiffs should not control the economic destiny of the entire multi-faceted merchant community without an opportunity for individual merchants to exit the class and control their economic fates.

A. Opt-Out Rights Are Necessary Because All Plaintiffs Would Not Necessarily Seek the Same Injunctive Relief

As the Supreme Court has made clear, when Rule 23's drafters developed the rules for class-based equitable relief under Rule 23(b)(2), they had in mind "a series of decisions involving challenges to racial segregation—conduct that was remedied by a single classwide

[3] "Honor-all-Cards" is Visa's and Mastercard's requirement that any merchant who accepts a Visa or Mastercard issued by one bank must accept every Visa or Mastercard issued by *any* bank—thereby ensuring that no bank will have any incentive to compete on price.

[4] The amount of the interchange fee charged by a bank on a particular card-type or transaction-type is set by standard rate tables published by Visa and MasterCard. Dkt. 1543 ¶¶ 47, 58. This is known as "default interchange."

[5] One bank reports that 9.4% of the entire bank's noninterest income comes from interchange fees. Bank of America Annual Report 133 (2020), http://investor.bankofamerica.com/static-files/0e712cac-e67e-46fa-be63-0b117a6418cc (reporting $3.95 billion in interchange fees, out of $42.2 billion in total noninterest income).

order." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 361 (2011). In a civil rights case ordering a school to be desegregated, for example, "opting out of a (b)(2) action for injunctive relief has little practical value or effect" because "class members who opted out could not avoid the effects of the judgment." *Messier v. Southbury Training Sch.*, 183 F.R.D. 350, 356 (D. Conn. 1998). The necessary injunctive relief would be a desegregation order and the school would be desegregated for all pupils, including the opt-outs, so notice and opt-out rights would be unnecessary.

Importantly, because in such paradigmatic cases the relief sought is an "indivisible injunction benefiting all its members at once," absent class members generally feel no need to object to certification or assert a right to opt out, *Dukes*, 564 U.S. at 362–63, so courts certifying Rule 23(b)(2) classes rarely consider whether opt-out rights should be provided. The very fact that the Merchant Trade Groups and others have long and loudly objected to a mandatory class is clear evidence that opting out *would* have "practical value [and] effect." *Messier*, 183 F.R.D. at 356.

Here, by contrast—as illustrated by the overturned 2013 Settlement—there is no "single classwide order" that is the necessary result of a settlement or liability victory. *Dukes*, 564 U.S. at 361. Although the overturned 2013 Settlement provided some injunctive relief, such as narrow tweaks in the networks' "No-Surcharge" rules,[6] the relief was illusory for most

[6] Visa and Mastercard's "No-Surcharge" rules had prohibited merchants from imposing an extra charge on consumers who use more expensive rewards cards. The 2013 Settlement purported to relax these rules, but most merchants would still not have been allowed to surcharge because many states outlaw credit-card surcharging. Moreover, the Settlement permitted surcharging only under conditions that merchants who accept American Express could not meet and the few remaining merchants would have been unlikely to surcharge. These distinctions highlight the divisible nature of the rules change. Moreover, even the modest changes to Visa and Mastercard's surcharging rules required merchants to register before imposing surcharges—demonstrating that the relief was in fact quite easily divisible. Merchants who do not register may not surcharge. *See, e.g.*, Visa, *Surcharging Credit Cards–Q&A for Merchants*,

merchants. Thousands of merchants, including the Merchant Trade Groups, appealed, arguing (successfully) that the limited surcharging relief provided little value to their businesses. Yet there are *other* changes that the Merchant Trade Groups believe would meaningfully reform Defendants' unlawful practices, namely remedying Honor-all-Cards and "default interchange." Because these anti-competitive rules ensure banks have no incentive to compete on price, relief from those rules is necessary to reduce interchange fees, which will ultimately benefit both merchants *and* consumers.[7]

As is clear from the 2013 Settlement, relief from Honor-all-Cards and default interchange is not the only injunctive relief that a plaintiff could seek. Visa's and Mastercard's rulebooks span thousands of pages. A plaintiff could well resolve this case through other injunctive changes, either because their injunctive focus at trial is at odds with the Merchant Trade Groups' views or because they decide for any number of obvious or opaque reasons to settle for other (likely largely meaningless) relief.

Because there are multiple potential injunctive resolutions of this case, there is no need for a mandatory class and, instead, class members should be granted the right to opt out if they wish to pursue their preferred injunctive resolution.

1. Equitable Relief Plaintiffs Likely Value Potential Injunctive Relief Differently Than Do the Merchant Trade Groups

The Merchant Trade Groups' concern about the injunctive relief that could be sought in this case is not hypothetical or abstract. There are troubling indicia that the Equitable

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https://usa.visa.com/dam/VCOM/download/merchants/surcharging-faq-by-merchants.pdf (last visited Mar. 26, 2021) (merchants must notify acquirers 30 days in advance).

[7] Consumers face higher prices for goods and services that reflect inflated interchange fees. This injury is borne disproportionately by poorer customers, as they are more likely to use cash or cards without benefits/rewards. They face the same higher prices but do not receive the benefits provided by rewards credit cards.

Relief Plaintiffs' view of appropriate injunctive relief may not align with those of the Merchant Trade Groups—and the Merchant Trade Groups' views are informed by having access to the experiences of their many member merchants, as well as their own experiences. While the Equitable Relief Plaintiffs have not given the Merchant Trade Groups access to the full confidential filings,[8] the limited redacted documents provided focus on "removing the No-Surcharge Rule," whose elimination, the Equitable Relief Plaintiffs claim, "would be profound." Mem. in Supp. of Equitable Relief Pls.' Mot. for Class Cert. ("Equitable Relief Pls.' Br.") at 39; *see also id.* at 41 ("eliminating the No-Surcharge Rule would put strong competitive pressure on future Interchange Fees—exactly the relief sought by the Equitable Relief Plaintiffs in this case"); *id.* at 3 ("Absent the No-Surcharge Rule, Defendants would be forced to reduce Interchange Fees and Total Prices to encourage Merchants to forgo surcharging."); *id.* at 40 ("surcharging is an effective means of steering customers").

But, as detailed above, Merchant Trade Groups—and many others—have already made clear in their objection to the 2013 (b)(2) Settlement and subsequent appeal. Defendants' antitrust violations cannot be remediated for Merchant Trade Groups or the merchant community more broadly unless the Honor-all-Cards and default interchange rules are eliminated. Removing the No-Surcharge Rule would not alone have a "profound" effect for Merchant Trade Groups or the vast majority of merchants in the overall community, as Equitable Relief Plaintiffs claim. Equitable Relief Pls.' Br. at 39.

[8] On December 19, 2020, the Merchant Trade Groups' counsel requested the class certification papers from Equitable Relief Counsel. Over a month later, on January 26, 2021, Equitable Relief Counsel provided their brief in support of class certification with extensive redactions and the expert report of Professor Leffler, also with redactions. They did not provide unredacted versions of either document, any version of the other documents attached to their motion papers, or Professor Leffler's deposition transcript, despite the undersigned's specific request and offer to sign the protective order. Greenberger Decl. ¶ 4.

Additionally troubling is that since April 2019, after nearly two years of engagement, Equitable Relief Plaintiffs have refused to continue discussions with Merchant Trade Groups despite numerous calls, emails, and letters. Given Merchant Trade Groups' continuous focus on changes to Honor-all-Cards and default interchange (not changes to the No-Surcharge rule) as the necessary relief for Merchant Trade Groups and the broad number of merchants with whom Merchant Trade Groups are in regular contact, as well as Merchant Trade Groups' repeated emphasis on the importance of opt-out rights, Equitable Relief Plaintiffs' unwillingness to engage with Merchant Trade Groups—while engaging in settlement talks with Defendants, according to public filings—generates numerous questions. Perhaps Equitable Relief Plaintiffs' settlement talks focus on surcharging relief (given the Defendants' willingness to tinker with their No-Surcharge rules in the 2013 Settlement) despite Merchant Trade Groups' concerns about the sufficiency of that relief? Perhaps Equitable Relief Plaintiffs have a different view about the necessity of removing Honor-all-Cards and default interchange to remedy Defendants' antitrust violations? Merchant Trade Groups have no way of knowing at this point, but Equitable Relief Counsel's refusal to engage for almost two years underscores the need for Merchant Trade Groups to be able to exclude themselves from the class and not be forced into representation by counsel who appear to have different priorities.

B. Merchants Encompassed by the Broad Proposed Class Have Important Differences, as Plaintiffs Concede, Further Supporting an Opt-Out Right

Equitable Relief Plaintiffs' superficial claim that any change to the Visa and MasterCard rules "applies to all Merchants similarly situated whether they are formally a member of the class or not," Equitable Relief Pls.' Br. at 33, is belied by the unprecedented size and breadth of the proposed class, which means that a rule that nominally "applies" to a class

member may not benefit them all, as well as by the Equitable Relief Plaintiffs' repeated admissions about differences *within* the class.

The proposed Rule 23(b)(2) class is likely the largest mandatory class ever proposed. This class would contain *over twenty million* merchants. *See Payment Card I*, 986 F. Supp. 2d at 217. Even just the future merchant component of the class dwarfs other certified mandatory classes: In 2020 alone, over 800,000 new retail businesses were formed in the United States, and nearly all accept Visa and/or Mastercard.[9] Even if this case were resolved tomorrow, at the current rate, Equitable Relief Plaintiffs' proposed class would bind over 6.4 million *additional* businesses that begin accepting Visa or Mastercard in the next eight years.

The proposed class encompasses merchants of all sizes, from individual solo proprietorships to multi-billion-dollar corporations. A small handful of putative class members have had the economic power to negotiate limited deals with Visa and Mastercard as to the fees they pay to accept cards; most have not. Many merchants are legally sophisticated entities with their own general counsel and professionals with payments expertise that make decisions about how to engage with—or to bring suit against—Visa and Mastercard as business decisions. Some merchants want to accept new payment mechanisms (e.g., Venmo) existing now or emerging soon, while others only accept traditional cards.

These economic actors should be permitted to make their own business decisions about what's best for them, their employees, and their customers without being bound by the judgments of *other* businesses about what is best for *them*. Yet Equitable Relief Plaintiffs

[9] *See Business Formation Statistics Time Series / Trend Charts*, United States Census, https://bit.ly/3c4XeWE (last accessed Mar. 24, 2021) (selecting "Retail Trade" as "Industry or Category"); Joe Resendiz, *Where and How Widely Are Visa, Mastercard, Discover and American Express Credit Cards Accepted?*, ValuePenguin (Jan. 28, 2021), https://www.valuepenguin.com/where-visa-mastercard-american-express-discover-accepted.

propose that just seven class representatives, all very small merchants, should control the legal destiny of the entire 20 million plus class. (If the roles were reversed, the seven small retailers would surely object to having their economic fate decided by the nation's seven largest retailers.)

Indeed, the Equitable Relief Plaintiffs repeatedly acknowledge that not all merchants share their injuries or relief priorities, admitting that: some merchants have economic leverage to negotiate interchange fees (though most do not); some small number of merchants benefitted from the prior settlement's surcharging provisions, while the majority did not; some merchants accept mobile payments, while many do not; Visa has different rules than Mastercard and some proposed class members only accept one or the other; and some merchants accept American Express—and are thus bound by those rules—while others do not. *See* Equitable Relief Pls.' Br. at 8 ("While both networks permit bilateral interchange arrangements in theory, in practice such agreements affect a small minority of large Merchants . . . ."); *id.* at 9 ("*almost all* Merchants have no negotiating power as to Interchange Fees" (emphasis added)); *id.* at 12 ("the overwhelming majority of Merchants have been unable to take advantage of those settlement provisions [referring to the prior, vacated settlement]"); *id.* at 13 n.36 (describing American Express's rules and stating that "it is impossible for a merchant to surcharge American Express while fully complying with Visa and Mastercard Rules"); *id.* at 14 ("While Visa did recently change its rules to allow discounting by issuer, Mastercard still maintains a No-Discount Rule to prohibit discounting by issuer."); *id.* at 18–19 (describing the distinctions between class members who accept American Express and those that do not); *id.* at 31 (acknowledging that merchants might need to "negotiate additional relief specific to themselves and their own business needs" and that "marginal conflicts among Merchants might exist"); *id.* at 33

("Defendants' conspiracy injured virtually all Merchants"); *id.* at 12 ("Extension of the Honor All Cards Rule to mobile devices inhibits future market competition . . . .").

The implication of these endemic differences is that "the relief sought" will *not* in fact "perforce affect the entire class at once," as is required for mandatory classes. *Dukes*, 564 U.S. at 360–61 ("Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class."). As a result, each member of the class will not *necessarily* benefit at all from the rule changes secured by litigation or settlement.

For example, under Visa's and Mastercard's current rules (which resulted from the 2013 Settlement and remain in force despite the Circuit's vacatur), class members that accept American Express cannot surcharge, while those that do not accept American Express have limited surcharging rights. Therefore, any changes to the No-Surcharge rules will affect these class members differently and would not "provide relief to each member of the class." *Id.* As another example, merchants that do not take mobile payments will not be benefitted by injunctive relief targeted to eliminating anti-competitive Visa and Mastercard rules concerning mobile payments. To take a third example, large merchants that may have some limited ability to negotiate around network rules may not receive "relief" from changes to such rules and may even be harmed if the injunction limits their ability to try to reach independent deals with Visa and Mastercard.

And, once again, Equitable Relief Plaintiffs admit that if merchants could opt out, they would be able to pursue relief better suited to them. *See id.* at 50 ("In short, allowing opt-outs would permit individual Merchants to monetize for themselves an asset—the claim for injunctive relief—that is valuable precisely because it would benefit all Merchants.").

Because this is not a case where "a single injunction . . . would provide relief to each member of the class"—which is no surprise given the breadth and variety of the proposed class, the complexity of the payment industry, and the vast Visa and Mastercard rules that limit competition—notice and the right to opt out would permit merchants to decide their preferred approach for themselves. *Dukes*, 564 U.S. at 360–61.

C. Opt-Out Rights Are the Traditional "Escape Valve" for Intra-Class Disputes

If the Court decides to certify a (b)(2) class here, it can and should resolve the issue of varying injuries, legal theories, and claims for relief by requiring notice and the ability for class members to opt out, as it unquestionably has the power to do.

The Second Circuit highlighted the problems with mandatory classes in this very case: "[t]he trouble with unitary representation here is exacerbated because the members of the worse-off (b)(2) class could not opt out. The (b)(2) merchants are stuck with this deal and this representation." *Payment Card II*, 827 F.3d at 234. It is in everyone's interest in finality and efficient resolution of this matter if merchants who may later be displeased with the resolution of this matter—whether by settlement or litigation—are not "stuck with this deal and this representation," *id.*, but are instead permitted to opt out and chart their own course.

In the fairly unusual circumstance where class members object to a (b)(2) certification (generally, *defendants* oppose certification, while absent class members rarely appear and object), courts across the country have addressed such concerns by requiring opt-out rights. For example, in a class action challenging an employer's failure to provide ERISA-required benefits, the court noted that, although class members may have common claims, "individual class members may be able to make even stronger claims based on their own individual circumstances." *Fuller v. Fruehauf Trailer Corp.*, 168 F.R.D. 588, 605 (E.D. Mich. 1996). The court certified a Rule 23(b)(2) class *with* notice and opt-out rights, expressly

reasoning that if "individual[s are] not given notice and the opportunity to opt out, the preclusive effect of an adverse judgment could potentially deprive these individuals of procedural due process." *Id.* In another antitrust class action challenging telecommunications companies' practices of surcharging customers, the court required opt-out rights, noting that a mandatory (b)(2) action could prevent individual class members from pursuing their own claims. *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 219 F.R.D. 661, 670 n.5, 681 (D. Kan. 2004).

Courts have also permitted opt-outs where some class members are simply not interested in the relief sought by class plaintiffs—or where they would be actively harmed by class plaintiffs' litigation. *See, e.g.*, *Friedman v. Cal. State Emps. Ass'n*, No. Civ. S000101 WBS GGH, 2000 WL 288468, at *5 (E.D. Cal. Mar. 15, 2000) (permitting class members to opt out of a (b)(2) constitutional challenge where "it [wa]s possible that, given proper notice, some fair share fee payers [we]re happy to pay their fair share of union dues to cover the benefits of collective bargaining and do not want the statute to be overturned").

Moreover, the last major merchant challenge to Visa's and Mastercard's interchange fees demonstrates that opt-out rights are both workable and the better course to avoid concerns about binding unwilling merchants. In *Visa Check*, the Second Circuit held that a class of merchants seeking both injunctive and monetary relief should all receive notice and an opportunity to opt out. 280 F.3d at 146–47. Providing opt-out rights and certification under Rule 23(b)(3) would avoid the "thorny question" of whether merchants could be bound to a mandatory Rule 23(b)(2) class where plaintiffs sought injunctive relief in addition to damages. *Id.* at 147. The result proved workable: some merchants opted out, many did not, and the parties negotiated an injunctive settlement that released only past, not future, claims. Though the negotiated settlement did not include the opt-out merchants, that did not derail the class settlement, which

achieved complete rescission of the challenged rules of Visa and Mastercard tying their debit and credit card products and the largest antitrust class action settlement at the time.[10]

This litigation has already demonstrated the feasibility and utility of requiring such notice and opt-out rights, as 675 class members, including the Merchant Trade Groups, opted out of the 2019 Rule 23(b)(3) settlement class following notice. Report of Exclusion Requests, Dkt. 7796-2. This Court can and should act, once again, to ensure that class members whose interests and injuries do not align with those of the Equitable Relief Plaintiffs are not bound by a settlement or judgment that would prevent them from securing their own relief in the future.

II. ANY (B)(2) CLASS CERTIFICATION HERE SHOULD NOT INCLUDE FUTURE CLASS MEMBER MERCHANTS

The Equitable Relief Plaintiffs seek certification of a class defined as "[a]ll persons, businesses, and other entities (referred to herein as 'Merchants') that accept Visa and/or Mastercard Credit and/or Debit cards in the United States at any time during the period between December 18, 2020 *and 8 years after the date of entry of Final Judgment in this case*." Equitable Relief Pls.' Br. at 12 (emphasis added). Yet nowhere in their briefing do the Equitable Relief Plaintiffs explain critical elements of their proposal, such as: why such non-existent merchants should be part of the class; the basis for choosing eight years—no more, no less; or how this Court could evaluate such future merchants' circumstances to satisfy commonality and typicality under Rule 23(a). As trade groups, NRF and RILA see it as part of their mission to speak for these merchants, who, by definition, cannot bring their views before the Court.

[10] The *Visa Check* case is instructive in another way: the class representatives were a mix of large (e.g., Walmart, The Limited, Sears, Safeway, Circuit City) and small merchants and merchant trade groups—including both NRF and RILA's predecessor association (IMRA).

If inclusion of future merchants is the prelude to precluding or releasing future merchants' claims, such inclusion would primarily benefit Defendants. A settlement (like the vacated 2013 Settlement) where future merchants would be forced to release their claims "permanently immunizes the defendants" who "never have to worry about future antitrust litigation based on their honor-all-cards rules and their default interchange rules." *Payment Card II*, 827 F.3d at 239. By contrast, Defendants, in settlement, could agree to make changes that also affect future merchants *without* demanding a release from non-existent merchants. Indeed, the *Visa Check* settlement benefitted future merchants *without* releasing post-judgment claims. *See Payment Card II*, 827 F.3d at 238. And a class action judgment could preclude—a decade-plus hence—a future injunctive case, even if changes in market conditions mean that a future merchant has an even stronger antitrust challenge.

Including future merchants could bind an additional 6 million plus merchants who come into existence within the following eight years to the already massive class. As the rest of this litigation unfolds and for the eight years following final judgment, market conditions and merchant relationships with Defendants will only continue to evolve in unknown ways.

While the Merchant Trade Groups have no objection to future class members receiving whatever injunctive relief this case ultimately provides, including them in the certified class in order to preclude or release their post-judgment claims would be improper and raise due process concerns, as future class members could be bound by a judgment in a case wherein they had no opportunity to object to either class certification or settlement. By excluding future class members and providing for opt-out rights in a 23(b)(2) certified class, the Court would ensure that any certified class is cohesive, protect future class members' due process rights, and guard against additional post-judgment litigation in this already nearly-two-decade-old litigation.

A. Including Future Class Members Is Inappropriate Because Their Claims and Injuries Are Too Hypothetical and Speculative

Courts routinely refuse to include future class members in class definitions where, as here, future class members consist of a broad, imprecise group whose relationships with defendants, potential claims, and potential relief are speculative and varied. For example, in an action against Visa, Mastercard, and member banks for fixing foreign currency conversion fees, the court excluded future cardholders from the class because they had "no cognizable injury when this action commenced" and any future injury was hypothetical. *In re Currency Conversion Fee Antitrust Litig.*, 229 F.R.D. 57, 63 (S.D.N.Y. 2005), *appeal granted, order amended*, No. M 21-95, 2005 WL 1871012 (S.D.N.Y. Aug. 9, 2005); *see also Scott v. Univ. of Del.*, 601 F.2d 76, 89 (3d Cir. 1979) ("[W]e do not think that future faculty members, whose possible claims are only speculative and can only be formulated in a highly abstract and conclusory fashion, should provide, and possibly be prejudiced by, membership in the class which Scott seeks to represent."), *abrogated on other grounds by EF Operating Corp. v. Am. Bldgs.*, 993 F.2d 1046 (3d Cir. 1993).

While it may be permissible to include future class members in a class definition under Rule 23(b)(2) where class plaintiffs are challenging a specific policy or practice that will affect future class members both predictably and identically to current class members, that is not this case. Here, future class members do not fall into a narrow, clearly defined, predictable group. Instead, future class members are defined extremely broadly to include any person, business, or entity that accepts Visa and/or Mastercard Credit and/or Debit cards in the United States, with absolutely no precision as to what claims they might have against Visa and/or Mastercard. Not-yet-existent persons, businesses, and entities are swept into the class regardless of their size, structure, market niche, customer base, and level of financial dependence on Visa or

Mastercard acceptance. Moreover, the operative complaint does not challenge a single policy or practice but rather challenges a range of anti-competitive policies and practices, each of which affects merchants differently.

Equitable Relief Plaintiffs also fail to offer a single reason, much less any argument, for why future merchants should be included at all. It is therefore unclear why inclusion of such a broad range of entities with hypothetical claims and interests, who may yet come into existence over the next decade-plus, should be considered in the first place.

Including future merchants is particularly concerning because there have been significant changes in how consumers pay for transactions over the last decade, and the next decade is likely to bring further changes still. When this MDL began, smartphones were not generally available. Now, consumers routinely use their smartphones to pay for purchases, and merchants can similarly accept payments through their smartphones (generally with hardware add-ons). New peer-to-peer payment systems, such as Venmo and its competitors, have been developed. Such changes are predicted to accelerate.[11] Desperate to maintain their market share and profits, Defendants will likely continue to impose troubling rules addressing mobile and ecommerce purchases. Future merchants should have the right to decide for themselves whether to challenge such rules as they are applied to new forms of payment and new technologies, and not be bound in a class certified in 2021.

[11] For example, Visa sought to merge with Plaid Inc., a company that develops technology to operate payment platforms. DOJ filed an antitrust lawsuit to block the merger, alleging that changes in the payments market are likely to increase as new companies innovate financial technology: "By acquiring Plaid, Visa would eliminate a nascent competitive threat that would likely result in substantial savings and more innovative online debit services for merchants and consumers." Compl., *USA v. Visa Inc.*, 4:20-cv-07810-JSW (N.D. Cal. Nov. 5, 2020), Dkt. 1. Visa and Plaid abandoned the merger in response to the DOJ's suit.

Under these facts, the Court cannot find "with any certainty . . . that a future member will share common questions of law and fact with current class members [as required under Rule 23(a)], because post-judgment changes in the governing law or factual circumstances surrounding the dispute may cause the interests of present and future class members to diverge." Elizabeth R. Kaczynski, *The Inclusion of Future Members in Rule 23(b)(2) Class Actions*, 85 Colum. L. Rev. 397, 412 (1985) ("Kaczynski, *Future Members*").

Equitable Relief Plaintiffs acknowledge that class members already have differing interests and relief priorities arising from the same set of restraints imposed by Defendants. *See supra* Section I.B. Such differences may be compounded for future class members by intervening changes in the law or in the market. For these reasons, the Court should exclude future class members from any certified class.

B. Inclusion of Future Class Members in Order to Preclude or Release Their Claims Would Raise Due Process Concerns

The inclusion of future class members for the purpose of precluding or releasing their post-judgment claims raises serious fairness and due process concerns.

The unexplained and unjustified inclusion of future merchants for a specific period of years *after* the judgment raises the specter that Equitable Relief Plaintiffs would improperly agree to release such future merchants' claims. The vacated 2013 injunctive Settlement released future claims, and, in his concurrence to the Second Circuit's decision vacating the Settlement, Judge Leval described this future release as "particularly troublesome":

> What is particularly troublesome is that the broad release of the Defendants binds not only members of the Plaintiff class who receive compensation as part of the deal, but also binds in perpetuity, without opportunity to reject the settlement, all merchants who in the future will accept Visa and MasterCard, including those not yet in existence, who will never receive any part of the money. This is not a settlement; it is a confiscation. No merchants operating from November 28, 2012, until the end of time will ever be allowed to

> sue the Defendants, either for damages or for an injunction, complaining of any conduct (other than that enjoined) that could have been alleged in the present suit.

Payment Card II, 827 F.3d at 241 (Leval, J., concurring). While the tradeoffs between monetary and non-monetary relief Judge Leval discussed are not implicated here, the underlying concerns about releasing claims by merchants who have both "no ability to elect not to be bound by" the resolution and no ability to even *object* to the resolution are absolutely presented here. *Id.*

Ordinarily, "[d]ue process requires notice and an opportunity to be heard." *Diagnostic Cardioline Monitoring of N.Y., Inc. v. Leavitt*, 171 F. App'x 374, 376 (2d Cir. 2006). The drafters of Rule 23(b)(2) determined that where plaintiffs seek appropriate injunctive relief on behalf of a sufficiently cohesive class, adequacy of representation and the ability of absent class members to object resolved any due process concerns. *See Amara v. CIGNA Corp.*, 775 F.3d 510, 520 (2d Cir. 2014) (due process "requires that the named plaintiff at all times adequately represent the interests of the absent class members," and "[t]his obligation is particularly solemn in the Rule 23(b)(2) context").

Courts have recognized the due process concerns implicated by including broad groups of future class members where such future class members would be releasing their claims. In *Meachem v. Wing*, the court refused to include class members who "may become benefit-eligible in the future" in a 23(b)(2) settlement class, noting that "[t]he class definition is both 'sprawling' and 'amorphous.'" 227 F.R.D. 232, 234 (S.D.N.Y.), *adhered to on denial of reconsideration*, 227 F.R.D. 237 (S.D.N.Y. 2005). The court emphasized that:

> Future eligible persons would be subject to the claim preclusive effects of the settlement but would not have received meaningful notice or the opportunity to be heard prior to the approval of this settlement. Because such a result cannot be squared with Rule 23(a) or principles of due process, the settlement in its present posture is not approved under Rule 23(e).

Id.; Kaczynski, *Future Members* ("[T]he inclusion of future members in class actions is inconsistent with both the explicit requirements and the theoretical underpinnings of Rule 23, thus posing a serious threat to the due process rights of future members").

Here, the future merchants were not part of the 2019 Rule 23(b)(3) settlement, so, as of now, none have had their claims released. Including future merchants in the equitable class definition risks precluding their claims without providing any notice or opportunity to be heard. Unlike Merchant Trade Groups, who have a right under Rule 24 to intervene to object to class certification (as detailed in the accompanying motion), future class members will have no opportunity to be heard before entry of a final judgment that could bind them in perpetuity. Similarly, were this case to settle, all class members should have the right under Rule 23(e)(5) to "object to the proposal," but that right would be meaningless as to future merchants. Thus, even if the Court permits exclusion (as urged in Section I), future class members should still not be bound, because, for "class members who cannot currently identify themselves[,] . . . an opt-out right within a court-designated period of time . . . is of no beneficial use." Newberg on Class Actions § 1.23 at 1–55 (3d ed. 1992).

C. Inclusion of Future Class Members with Varying Claims Invites Litigation for Years to Come

Certifying a class to include future members—if such certification is a prelude to precluding or releasing their claims—invites additional litigation for years to come. Future class members interested in pursuing injunctive claims against Defendants, if ostensibly bound by the result in this case, will inevitably be asking a future court to determine whether the class plaintiffs in this case adequately represented them.

Generally, a judgment in a Rule 23(b)(2) class action "has res judicata effect on future class members if the class is defined to include them," *E.E.O.C. v. Children's Hosp. Med.*

Ctr. of N. Cal., 35 Fed. R. Serv. 2d 937 (9th Cir. 1982) (citing 3B J. Moore & J. Kennedy, Moore's Federal Practice § 23.40[3] (2d ed. 1982)). But if a class member's interests were not "adequately represented" by the class representatives or their objections "were not considered," res judicata may not apply. *Id.*

Where future merchants do not even exist yet, and this Court cannot know what kinds of claims such future merchants might bring or how the market will change over time, there is substantial risk that future class members will later request that they be retroactively excluded from this class for a lack of adequate representation or ability to object. Such a result would create confusion about merchants' rights and lead to inefficient and duplicative litigation. *See, e.g.*, *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326 (2d Cir. 1992) (holding that class judgment should not be given preclusive effect over certain ostensible class members that were not properly part of "overly broad" class definition).

Such extensive post facto litigation years after judgment is an evident risk here—and one that can be easily avoided. Given this risk, "a better model is to treat [future putative class members] as beneficiaries of a favorable outcome for the class, while allowing the defendant to rely only on the weaker effect of stare decisis rather than res judicata to bind them to an unfavorable result." James Grimmelmann, *Future Conduct and the Limits of Class-Action Settlements*, 91 N.C. L. Rev. 387, 474 (2013) (citing *South v. Rowe*, 759 F.2d 610, 614 (7th Cir. 1985) (allowing intervention by formerly future class member)). In a settlement scenario, binding future merchants to a settlement they could not even object to under Rule 23(e)(5), serves only the Defendants, not the class.

CONCLUSION

For the reasons above, if the Court decides to certify a class under Rule 23(b)(2) in this case, it should require notice and opt-out rights to class members and it should exclude future class members from the class definition.

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