UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION	MDL No. 1720 Docket No. 05-md-01720 (MKB) (JAM)
This Document Applies To: *Barry's Cut Rate Stores, Inc., et al v. Visa Inc., et al, No. 05-md-01720 (E.D.N.Y)* also now known as *DDMB, Inc., et al. v. Visa, Inc., et al., No. 05-md-01720 (E.D.N.Y.) (MKB) (JAM)*	

OBJECTION OF AMERICAN ECONOMIC LIBERTIES PROJECT, CONSUMER REPORTS, AND UNITED STATES PUBLIC INTEREST RESEARCH GROUP TO FINAL APPROVAL OF PROPOSED CLASS SETTLEMENT

American Economic Liberties Project, Consumer Reports, and United States Public Interest Research Group submit this Objection to the proposed settlement of the Rule 23(b)(2) Class Plaintiffs and the Defendants in *In re Interchange Fee and Merchant Discount Antitrust Litigation* (the "Proposed Settlement"). Each of our organizations is a member of the Rule 23(b)(2) Class due to our organizations' acceptance of Visa and Mastercard payments and the proposed settlement's prohibition on Class members opting out. The reasons supporting this Objection are set forth below and are grounded in our organizations' support for greater competition and consumer welfare, which this proposed settlement does not achieve.

INTEREST IN THE PROPOSED SETTLEMENT

American Economic Liberties Project ("AELP") is an independent nonprofit organization that works to promote competition, combat monopolistic corporations, and advance economic liberty for all. It advocates for policies that address today's crisis of concentration through

legislative efforts and public policy debates. AELP is non-profit and non-partisan and does not accept any funding from corporations. It has accepted credit cards since its founding in 2020.

Founded in 1936, Consumer Reports (CR) is an independent, non-profit and nonpartisan organization that works with consumers to create a fair and just marketplace. CR is included in the two merchant classes in this litigation as it has in the past accepted, and continues to accept, MasterCard and Visa credit card payments from its subscribers and donors. Known for its rigorous testing and ratings of products, CR advocates for laws and company practices that put consumers first. CR is dedicated to amplifying the voices of consumers to promote safety, digital rights, financial fairness, and sustainability. The organization surveys millions of Americans every year, reports extensively on the challenges and opportunities for today's consumers, and provides ad-free content and tools to over 6 million members across the U.S.

United States Public Interest Research Group (U.S. PIRG) is a leading consumer advocacy group with broad knowledge about the history of credit cards. U.S. PIRG has accepted credit cards from its members for many years. U.S. PIRG is a 501(c)(4) independent, non-partisan organization that advocates for the public interest. We speak out for the public and stand up to special interests on problems that affect the public's health, safety and wellbeing. U.S. PIRG has long advocated on the issue of swipe fee reform. U.S. PIRG believes that cash customers should not pay more to subsidize credit card reward programs and supports efforts to make the costs of credit transparent to consumers. We believe that the interests of our organization and all consumers are not advanced by this proposed settlement, and we object.

Each of the organizations submitting this Objection has a strong interest in achieving meaningful interchange fee reform that corrects the anticompetitive cartel pricing system established between Visa, Mastercard, and their card-issuing banks. Our organizations support

vigorous and fair marketplace competition as key to advancing consumer, independent business, and worker interests. Visa and Mastercard, however, have structured their interchange fee systems to insulate the fees from normal marketplace competition, and this has harmful impacts on entities that accept card payments and on consumers.

Interchange fees are fees that are deducted from transaction amounts as Visa and Mastercard card payments are processed and are awarded to the financial institution that issued the card. Visa and Mastercard each establish a uniform schedule of interchange fee rates that is used by all the card-issuing financial institutions within the Visa and Mastercard networks. Thus, the card-issuing financial institutions receive fees that they do not set for themselves, and because the fees are centrally-fixed the financial institutions do not have to compete with one another over the fees they receive. As a result, merchants and other entities that accept Visa and Mastercard cards as payment—which most merchants and entities have no choice but to do because Visa and Mastercard control approximately 80% of the credit and debit network market—have had to pay interchange transaction fees that exceed what would be sustained in a normal competitive market. Visa and Mastercard credit card interchange fees typically range between two and three percent, and since the fees are deducted from transaction amounts, merchants are compelled to raise retail prices to cover the cost of the fees. This means that all consumers, including those who do not pay with plastic, ultimately bear the fees' cost.

Our organizations have a strong interest in the fairness of the proposed settlement, since the resolution of litigation over Visa and Mastercard's interchange fees would have significant impacts on consumers, independent businesses, and workers. Our organizations believe that the proposed settlement falls far short of a fair and reasonable outcome, as it fails to sufficiently address anticompetitive behavior and promote competition in the interchange fee system. The

proposed settlement would also be detrimental to worker interests, both because workers are consumers and because excessive interchange fees take away resources that merchants could otherwise invest in their workforce. Visa and Mastercard's anticompetitive centralized fixing of interchange fee rates would not be corrected by this settlement, and in fact would become further entrenched due to the proposed settlement's inadequate relief and the broad mandatory release of claims that the settlement would impose upon all acceptors of Visa and Mastercard cards.

Each of the organizations submitting this Objection is also a member of the Rule 23(b)(2) Class, which the proposed settlement defines as "all persons, businesses, and other entities that accept Visa-Branded Cards and/or Mastercard-Branded Cards in the United States at any time during the period between December 18, 2020 and the date of entry of the Rule 23(b)(2) Class Settlement Order and Final Judgment, and from which no exclusions are permitted." Each organization submitting this Objection has accepted, and continues to accept, Visa and Mastercard card payments from donors or contributors whose support sustains the organizations' work. As a result, each organization submitting this Objection has had interchange fees deducted from transaction amounts paid to the organization over Visa and Mastercard cards. Because the Rule 23(b)(2) Class permits no exclusions, each of our organizations would continue to bear the excessive cost of Visa and Mastercard's interchange fees going forward, and would also be obligated to irrevocably waive and release Visa, Mastercard, and 15 of their largest card-issuing banks from any claim or cause of action arising from the conduct at issue in the current litigation. As discussed below, we believe such a release of claims would be detrimental to our organizations and to consumer welfare overall.

As organizations that are dedicated to advocating for competition, labor and consumer rights, and as payors of interchange fees and as members of the Rule 23(b)(2) Class, we have a

strong interest in this proposed settlement and seek to assist the Court in evaluating what we see as significant shortcomings in its fairness.

BASES OF OBJECTION

I. THE PROPOSED SETTLEMENT NOT ONLY FAILS TO ADDRESS VISA AND MASTERCARD'S CENTRALIZED FIXING OF INTERCHANGE FEES, BUT IT ENTRENCHES IT

At its core, the proposed settlement would enable Visa and Mastercard to continue fixing interchange fees on behalf of their card issuers in perpetuity, and would enable them to do so without the prospect of having those fees constrained by potential challenges in court. While the settlement would provide for temporary credit card interchange rate reductions of four basis points, this represents a tiny fraction of Visa and Mastercard's typical credit interchange rates which are generally set between 200 and 300 basis points. After this temporary reduction expires, Visa and Mastercard would be able to further raise interchange rates well above pre-settlement levels, while merchants and other acceptors of card payments would have conceded their rights to seek declaratory, injunctive, or equitable relief in court. And the settlement does not meaningfully change Visa and Mastercard's "honor all cards" rules; those anticompetitive rules structure interchange pricing as a cartel where all card-issuing banks and all cards within the Visa and Mastercard networks must be treated as one. Under this proposed settlement, Visa and Mastercard would be empowered to continue their practice of centrally fixing an excessive, hidden, and anti-competitive interchange toll on every card transaction, with consumers ultimately bearing the burden in the form of inflated retail prices.

Not only does the proposed settlement fail to meaningfully rein in anticompetitive interchange fees, but it does not prevent Visa and Mastercard from continuing to increase network fees upon merchants—and in fact Mastercard has already done just that since the

announcement of the proposed settlement. The proposed settlement does, however, obligate all members of the Rule 23(b)(2) Class to release any claim seeking declaratory, injunctive or equitable relief relating to Visa's or Mastercard's setting of "any other merchant fee." This term is defined to include network fees as well as "any amount that reduces from the face amount of a transaction the funds that a merchant receives in the settlement of a Credit Card or Debit Card transaction" – a description that covers yet-to-be-introduced fees. In exchange for minimal and temporary credit interchange rate reductions, all merchants and acceptors of card payments would be compelled under the proposed settlement to irrevocably waive all claims against Visa and Mastercard regarding the host of other ways that those networks charge fees that are deducted from transaction amounts on either credit or debit transactions. For example, networks could easily increase their network fees on merchants during the settlement period and beyond by claiming they are doing so in response to market conditions, thus cancelling out any savings merchants and consumers might see from the minimal interchange rate reductions. The proposed settlement's forced waiver of network fee claims is a loophole that Visa and Mastercard could drive truck-sized fees through, and consumers would again ultimately bear the cost.

II. THE PROPOSED SETTLEMENT DOES NOT MITIGATE THE CURRENT INTERCHANGE SYSTEM'S HARM TO CONSUMERS AND INDEPENDENT BUSINESSES.

The proposed settlement purports to provide several types of relief regarding the interchange fee system, but these relief measures are almost certain to be ineffective in bringing competition to the interchange fee system and they will not benefit consumers or indepedent businesses.

First, the proposed settlement would marginally increase merchants' ability to impose surcharges when consumers seek to pay with certain credit cards. However, the restrictive

conditions the settlement would impose on such surcharges make it unlikely they would ever be widely used. For example, the proposed settlement would allow Visa and Mastercard to charge higher interchange fee rates for merchants that surcharge compared to merchants that do not, thus creating a strong disincentive for merchants to surcharge. The settlement would also limit the amount of surcharging a merchant could impose on Visa or Mastercard credit card transactions to one percent (which is less than Visa and Mastercard's typical interchange rates), though it would increase that permissible surcharge amount to three percent if the merchant stops accepting "comparator credit card brands" including American Express and Discover. Imposing this condition on surcharges is clearly an attempt by Visa and Mastercard to incentivize merchants to stop accepting American Express and Discover, which would further diminish network competition. Additionally, surcharges are a blunt and consumer-unfriendly tool for responding to the core problem of anticompetitive and excessive interchange fees. Merchants risk facing consumer backlash when they surcharge, and consumers would be better served by pro-competitive interchange reforms that obviate the need for any surcharges to cover excessive interchange fees.

Second, the proposed settlement purports to permit merchants to organize buying groups to negotiate fees with Visa and Mastercard. However, the option of forming buying groups is already available to merchants today, but they do not have the leverage to compel Visa and Mastercard to strike fair and reasonable agreements with them and the proposed settlement would not obligate Visa and Mastercard to do that. Instead, the proposed settlement would only obligate Visa and Mastercard to negotiate in good faith and to exercise business judgment in considering the buying groups' proposals.

Third, the proposed settlement would revise Visa's and Mastercard's rules to permit merchants to essentially discriminate against credit and debit cards issued by smaller financial institutions. The settlement would do so by authorizing merchants to offer discounts to encourage consumers to pay with cards issued by certain types of issuers. This would change the status quo in the debit card system to the detriment of small financial institutions and their cardholding customers. The 2010 Durbin Amendment was carefully crafted to reform the debit interchange system while protecting the ability of small banks and credit unions to compete in the debit card issuance market—allowing those smaller issuers to receive far higher interchange fee rates than big bank issuers and disallowing merchants form discriminating between debit cards within a payment network on the basis of the issuer that issued the card. The proposed settlement would undermine this structure and encourage merchants to offer consumers discounts to pay with lower-fee big-bank debit cards instead of higher-fee cards issued by small banks and credit unions. This aspect of the proposed settlement would reaffirm the close alliance between Visa and Mastercard and the giant banks that are their co-defendants in this litigation, while undermining small banks' and credit unions' ability to remain viable competitors in the debit card issuance market. Over the long term, consumers will be negatively impacted if the giant debit card issuers are able to use this provision of the proposed settlement to reduce their competition in the debit issuance market.

III. THE PROPOSED SETTLEMENT'S RELEASE OF CLAIMS WOULD BE FORCED UPON MERCHANTS AND OTHER ENTITIES THAT DID NOT NEGOTIATE IT AND DO NOT SUPPORT IT, WOULD SHIELD VISA AND MASTERCARD FROM CLAIMS INVOLVING FEES AND RULES BEYOND INTERCHANGE FEES, AND WOULD HARM CONSUMER INTERESTS.

The breadth of the liability release that the proposed settlement would impose on all acceptors of Visa and Mastercard cards is staggering. The Rule 23(b)(2) Class is defined by the

proposed settlement to cover all persons, businesses, and other entities that accepted Visa or Mastercard cards in the United States at any point since December 2020, and no exclusions are permitted. The proposed settlement then provides that the Rule 23(b)(2) Class Releasing Parties, which include all members of the Class whether or not they object to the settlement, must irrevocably waive and release Visa, Mastercard, and 15 giant financial institutions from any claim or cause of action relating to any conduct that was raised in this litigation or that could have been raised, for conduct that may have accrued as of the settlement approval date "or arising out of or relating to a continuation or continuing effect of any such conduct." The settlement expressly waives claims not only regarding any interchange fees or any network rule relating to interchange fees, but also claims relating to any other "merchant fee" imposed by networks on credit or debit transactions and to of a lengthy list of Visa and Mastercard network rules.

This waiver of claims would lock into place Visa and Mastercard's current interchange fee system and the set of network rules that enables it, while also shielding many other types of fees that Visa and Mastercard can impose on merchants from liability. And the waiver of claims relating to Visa and Mastercard's rules would prevent court challenges to rules relating to such matters as card security (e.g., the waiver encompasses claims relating to "card authentication or cardholder verification rules") and "routing rules" that Visa and Mastercard might use to discourage or prevent transactions from being routed over competing networks. The breadth of the waiver of claims has significant potential to further damage competition and innovation, to the detriment of consumers and independent businesses.

Our organizations would not advise consumers to agree to a proposed settlement with a broad release of rights like this. And we would not agree to this proposed settlement ourselves.

However, the proposed settlement does not permit us to opt out as members of the Rule 23(b)(2) class, and if the settlement is approved we would be bound by its terms notwithstanding the harm that its extinguishing of rights would cause to the consumer, competition, and labor interests we support. Consumers, workers, and independent businesses will ultimately pay the price if Visa's and Mastercard's anticompetitive fees and rules are entrenched and immunized from accountability in court, as this release of claims would do.

For these reasons, we strongly object to this release of claims and to its applicability to our own organizations.

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The lawyers who negotiated the settlement did not adequately represent the interests of the organizations that have joined this Objection. For these reasons, we respectfully object to the settlement proposal.

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