

No. _____

IN THE
Supreme Court of the United States

JACK RABBIT, LLC,

Petitioner,

v.

**VISA INC.,
MASTERCARD INCORPORATED, ET AL.,**

Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 2019 the district court approved a \$5.6 billion Rule 23(b)(3) damages settlement in this multidistrict antitrust litigation, defining the class as every entity that “accepted” a Visa or Mastercard card during the class period. The Second Circuit affirmed in 2023, holding the class ascertainable because the definition is “objectively guided by federal antitrust standards.” In 2024, on the Visa and Mastercard respondents’ motion to enforce the settlement’s release, the district court construed “accepted” to reach millions of sub-merchant customers of payment facilitators, and directed that they share in the fund. The Second Circuit affirmed, treating the question as one of the settling parties’ contractual intent, and stated twice that it was not deciding whether those members are direct purchasers, or are otherwise entitled to recover, under the federal antitrust laws.

The questions presented are:

1. Whether a federal court may direct that a fixed common fund created to satisfy the claims of a certified Rule 23(b)(3) damages class be distributed to persons whom no court has found entitled to recover under the statute upon which the class’s claims rest, on the basis that the settling parties intended to include them.

2. Whether a court of appeals may affirm such an order while expressly declining to decide whether the persons admitted to the class have any claim under the statute upon which the class's claims rest.

PARTIES TO THE PROCEEDING

Petitioner Jack Rabbit, LLC was the Objector-Appellant below.

Respondents Visa Inc. (NYSE: V) and Mastercard Incorporated (NYSE: MA) were the Defendants-Appellees below.

Respondents, Plaintiffs-Appellants below, were 803 Kava LLC; CryoServices, Inc. d/b/a Anderson Cryotherapy d/b/a Athletic Recovery Center; Dell Fox Jewelry LLC; Maureen Roxberry; Hayley Lanning; SBG Designs, LLC d/b/a Goldfine Jewelry; Shen Shu Acupuncture, PLLC; and Camp Grounds Coffee, LLC (the “Square Sellers”). Under this Court’s Rule 12.6, each of them is a respondent in this Court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court’s Rule 29.6, petitioner Jack Rabbit, LLC states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

RELATED PROCEEDINGS

United States Court of Appeals for the Second Circuit:

In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation, Nos. 24-1653(L), 24-1808(CON), judgment entered May 4, 2026; rehearing denied June 24, 2026.

Old Jericho Enterprise, Inc. v. Visa Inc., No. 24-2678, judgment entered May 4, 2026 (companion published opinion).

Fikes Wholesale, Inc. v. HSBC Bank USA, N.A., No. 20-339, 62 F.4th 704, judgment entered March 15, 2023 (affirming approval of the settlement over petitioner's objection).

In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation, Nos. 12-4671 et al., 827 F.3d 223, judgment entered June 30, 2016 (vacating approval of a prior settlement).

United States District Court for the Eastern District of New York:

In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation, No. 05-md-1720, final approval and judgment entered December 20, 2019; memorandum and order granting motion to enforce settlement agreement entered May 28, 2024, reported at 735 F. Supp. 3d 249.

Old Jericho Enterprise, Inc. v. Visa Inc., No. 20-cv-02394, memorandum and order entered September 5, 2024.

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	iii
CORPORATE DISCLOSURE STATEMENT	iii
RELATED PROCEEDINGS.....	iii
TABLE OF AUTHORITIES	vii
INTRODUCTION	1
OPINIONS BELOW	2
JURISDICTION.....	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE.....	3
REASONS FOR GRANTING THE PETITION	8
I. This Case Presents The Question In The Posture <i>Tyson Foods</i> Said Would Present It, And In A Form The Pending Petitions Do Not.....	8
II. The Courts Of Appeals Are Divided Three Ways On The Certification Question.	11
III. The Decision Below Is Wrong.	17
IV. The Question Is Exceptionally Important, And This Is The Last Chance To Decide It For This Fund.	19

CONCLUSION.....	20
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APPENDIX

Appendix A - Summary Order, United States Court of Appeals for the Second Circuit (May 4, 2026)	1a
---	----

Appendix B - Opinion, <i>Old Jericho Enterprise, Inc. v. Visa Inc.</i> , United States Court of Appeals for the Second Circuit (May 4, 2026)	12a
--	-----

Appendix C - Memorandum and Order, United States District Court for the Eastern District of New York (May 28, 2024).....	31a
--	-----

Appendix D - Order Denying Rehearing, United States Court of Appeals for the Second Circuit (June 24, 2026)	77a
---	-----

Appendix E - Constitutional and Statutory Provisions Involved.....	80a
--	-----

TABLE OF AUTHORITIES

CASES

<i>Amchem Products, Inc. v. Windsor</i> , 521 U.S. 591 (1997).....	11, 16, 19
<i>Apple Inc. v. Pepper</i> , 587 U.S. 273 (2019)	18
<i>In re Asacol Antitrust Litig.</i> , 907 F.3d 42 (1st Cir. 2018)	12, 13, 17
<i>Avritt v. Reliastar Life Ins. Co.</i> , 615 F.3d 1023 (8th Cir. 2010).....	12
<i>City of Cleveland v. Pickett</i> , No. 25-677 (U.S. filed Dec. 8, 2025)	10
<i>Comcast Corp. v. Behrend</i> , 569 U.S. 27 (2013)	16
<i>Cordoba v. DIRECTV, LLC</i> , 942 F.3d 1259 (11th Cir. 2019)	14
<i>Denney v. Deutsche Bank AG</i> , 443 F.3d 253 (2d Cir. 2006)	12, 14
<i>In re Deepwater Horizon</i> , 739 F.3d 790 (5th Cir. 2014)	12, 14
<i>Devlin v. Scardelletti</i> , 536 U.S. 1 (2002)	9
<i>Drazen v. Pinto</i> , 41 F.4th 1354 (11th Cir. 2022), vacated on reh’g en banc, 74 F.4th 1336 (11th Cir. 2023)	15
<i>Drazen v. Pinto</i> , 74 F.4th 1336 (11th Cir. 2023) (en banc)	15

<i>Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.</i> , 62 F.4th 704 (2d Cir. 2023).....	4, 5, 7, 11
<i>Flecha v. Medicredit, Inc.</i> , 946 F.3d 762 (5th Cir. 2020)	13, 14
<i>Halvorson v. Auto-Owners Ins. Co.</i> , 718 F.3d 773 (8th Cir. 2013).....	12
<i>Illinois Brick Co. v. Illinois</i> , 431 U.S. 720 (1977) .	4, 6, 18
<i>Johannesson v. Polaris Indus. Inc.</i> , 9 F.4th 981 (8th Cir. 2021).....	13
<i>Kohen v. Pac. Inv. Mgmt. Co.</i> , 571 F.3d 672 (7th Cir. 2009)	14
<i>Laboratory Corp. of Am. Holdings v. Davis</i> , 605 U.S. 327, 145 S. Ct. 1608 (2025).....	2, 8, 9, 10, 15
<i>Lexmark Int’l, Inc. v. Static Control Components, Inc.</i> , 572 U.S. 118 (2014).....	18
<i>Messner v. Northshore Univ. HealthSystem</i> , 669 F.3d 802 (7th Cir. 2012)	14
<i>Neale v. Volvo Cars of N. Am., LLC</i> , 794 F.3d 353 (3d Cir. 2015).....	12, 14
<i>Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC</i> , 31 F.4th 651 (9th Cir. 2022) (en banc) .	14
<i>Ortiz v. Fibreboard Corp.</i> , 527 U.S. 815 (1999)	11
<i>In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.</i> , 827 F.3d 223 (2d Cir. 2016)	4

<i>In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.</i> , No. 05-md-1720, 2024 WL 1014159 (E.D.N.Y. Mar. 8, 2024)	18
<i>In re Rail Freight Fuel Surcharge Antitrust Litig.</i> , 725 F.3d 244 (D.C. Cir. 2013)	13
<i>In re Rail Freight Fuel Surcharge Antitrust Litig.</i> , 934 F.3d 619 (D.C. Cir. 2019)	13
<i>Speerly v. General Motors, LLC</i> , 143 F.4th 306 (6th Cir. 2025) (en banc)	14
<i>Sunoco, Inc. (R&M) v. Cline</i> , No. 26-1 (U.S. filed June 26, 2026)	1, 10
<i>Takeda Pharm. Co. v. Painters & Allied Trades Dist. Council 82 Health Care Fund</i> , No. 25-625 (U.S. Mar. 23, 2026)	10
<i>TransUnion LLC v. Ramirez</i> , 594 U.S. 413 (2021). 11, 17	
<i>Tyson Foods, Inc. v. Bouaphakeo</i> , 577 U.S. 442 (2016)	1, 8, 9, 17
<i>United States v. Williams</i> , 504 U.S. 36 (1992)	20
<i>Wal-Mart Stores, Inc. v. Dukes</i> , 564 U.S. 338 (2011)	16

OTHER AUTHORITIES

1 Joseph M. McLaughlin, <i>McLaughlin on Class Actions</i> § 4:28 (20th ed. 2023)	12
1 William B. Rubenstein, <i>Newberg and Rubenstein on Class Actions</i> § 2:3 (6th ed. 2024)	12

8 Julian O. von Kalinowski et al., Antitrust Laws and Trade Regulation § 166.03[4][b][ii] (2d ed. 2024)	12
---	----

CONSTITUTION, STATUTES AND RULES

U.S. Const. art. III, § 2	3
15 U.S.C. § 15.....	3, 18
28 U.S.C. § 1254(1)	3
Fed. R. Civ. P. 23(b)(3).....	4, 8, 9, 11, 13, 16

PETITION FOR A WRIT OF CERTIORARI

Petitioner Jack Rabbit, LLC respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

INTRODUCTION

A decade ago this Court granted certiorari to decide whether a damages class may include members who were not injured. It did not reach the question, and said why: “It is not, however, a question yet fairly presented by this case, because the damages award has not yet been disbursed, nor does the record indicate how it will be disbursed.” *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 461 (2016). Last Term the Court granted certiorari again, in *Laboratory Corp. of America Holdings v. Davis*, No. 24-304, and dismissed the writ as improvidently granted over a dissent. 605 U.S. 327, 145 S. Ct. 1608 (2025). A third petition presenting the question, from a final judgment after trial, is before the Court now. *Sunoco, Inc. (R&M) v. Cline*, No. 26-1.

This case presents the question in the one posture none of those cases could: after the money is fixed and while it is being paid out. The settlement fund is \$5.6 billion. Judgment was entered in 2019 and affirmed in 2023. Four years after judgment, on a motion to enforce the release, the district court construed the class definition to reach millions of sub-merchants of payment facilitators and directed that they share in the fund. The Second Circuit affirmed. But it did so by treating the question as one of the settling parties’

contractual intent, reviewed for clear error, and it said twice that it was not deciding whether the added members have any claim under federal antitrust law.

The petition asks a narrow question. It does not ask the Court to construe the settlement agreement, and it does not ask the Court to decide who is a direct purchaser of card-acceptance services. It asks, first, whether a federal court may distribute a common fund created to satisfy federal antitrust damages claims to persons whom no court has found entitled to recover under the federal antitrust laws; and, second, whether a court of appeals may affirm that distribution while expressly declining to decide the first question.

Justice Kavanaugh’s dissent in *Labcorp* stated the governing rule: “[f]ederal courts may not certify a damages class under Rule 23 when, as here, the proposed class includes both injured and uninjured class members.” 145 S. Ct. at 1609 (Kavanaugh, J., dissenting). Whatever else that rule means, it means a court must determine who is entitled to recover before it directs that they be paid. The court below did not.

OPINIONS BELOW

The summary order of the court of appeals (App. 1a-11a) is unreported. The companion published opinion of the same panel, *Old Jericho Enterprise, Inc. v. Visa Inc.*, No. 24-2678 (App. 12a-30a), on which the summary order rests, is reported at 175 F.4th 172 (2d Cir. 2026). The memorandum and order of the district court (App. 31a-76a) is reported at 735 F. Supp. 3d 249 (E.D.N.Y. 2024).

JURISDICTION

The court of appeals entered judgment on May 4, 2026. Petitioner filed a petition for panel rehearing and rehearing en banc on May 18, 2026, which the court of appeals denied on June 24, 2026. App. 77a-79a. This petition is filed within ninety days of that denial. *See* Sup. Ct. R. 13.3. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, § 2 of the United States Constitution provides in relevant part that “[t]he judicial Power shall extend to all Cases . . . [and] Controversies.”

Section 4 of the Clayton Act, 15 U.S.C. § 15(a), provides in relevant part that “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained.”

Article III, § 2, cl. 1 of the Constitution, section 4 of the Clayton Act, 15 U.S.C. § 15(a), 28 U.S.C. § 1254(1), and Federal Rule of Civil Procedure 23(b)(3) are reproduced at App. 80a-84a.

STATEMENT OF THE CASE

A. The interchange-fee litigation and the 2019 settlement

This multidistrict litigation began in 2005. Merchants alleged that Visa and Mastercard conspired with their member banks to fix the interchange fees charged on every payment-card transaction. In 2019, after an

earlier settlement had been vacated on appeal, *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, 827 F.3d 223 (2d Cir. 2016), Visa and Mastercard agreed to pay approximately \$5.6 billion to settle the claims of a Rule 23(b)(3) damages class.

The Settlement Agreement defines the class as “all persons, businesses, and other entities that have accepted any Visa-Branded Cards and/or Mastercard-Branded Cards in the United States at any time from January 1, 2004 to the Settlement Preliminary Approval Date.” App. 5a. Throughout the litigation Visa and Mastercard maintained that acquiring banks, not merchants, are the direct purchasers of card-acceptance services, and that every merchant is an indirect payor barred from recovering damages under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). They compromised that defense to reach the settlement and, in their words, “to this day have maintained the defense for all other purposes.” Br. of Defendants-Appellees 4; see App. 28a n.3.

Petitioner, a gasoline retailer in Alabama, is a member of the settlement class. It objected to the 2019 settlement and appealed. The Second Circuit affirmed approval in *Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*, 62 F.4th 704 (2d Cir. 2023). It rejected petitioner’s argument that the class was not ascertainable because “accepted” is ambiguous, on the ground that “the class definition is . . . objectively guided by federal antitrust standards.” *Id.* at 716 (quoting the district court). Judge Jacobs wrote separately to observe that the antecedent question, who may sue to vindicate the claim, remained unsettled. *Id.* at 728-30 (Jacobs, J., concurring).

B. The payment facilitators and the May 28, 2024 order

Payment facilitators (“facilitators”) such as Block, Inc. (formerly Square) and Intuit hold a master merchant account with an acquiring bank and provide sub-accounts to small businesses, known as sub-merchants, as part of a bundle of services. The sub-merchants have no contractual relationship with Visa, Mastercard, or any acquiring bank, and they do not pay interchange to anyone. App. 41a-42a. Square and Intuit opted out of the settlement class and filed their own antitrust actions against Visa and Mastercard. App. 5a.

In 2021 a group of Square sub-merchants, respondents here who were Plaintiffs-Appellants below (the “Square Sellers”), filed a putative class action of their own, contending that they were never members of the settlement class. Visa and Mastercard moved to enforce the settlement’s release against them. On May 28, 2024, the district court granted the motion. App. 31a-76a. It found the word “accepted” ambiguous as applied to a facilitator and its sub-merchants; found that the settling parties intended that “only one entity is entitled to make a claim of the settlement fund” for any transaction; and found, on the basis of Square’s merchant agreement, the networks’ operating rules, the sub-merchants’ own declarations, and “the way real-world transactions are conducted,” that the sub-merchant, not the facilitator, “accepted” the card. App. 7a-8a; App. 61a-67a.

The district court did not decide whether the sub-merchants are direct purchasers or cost-plus direct purchasers under *Illinois Brick*, or whether they are

otherwise entitled to recover under section 4 of the Clayton Act. In their reply in support of the motion, Visa and Mastercard acknowledged that the opposing parties “spill much ink arguing that the [submerchants] are indirect purchasers,” and answered: “Defendants agree.” Defs.’ Reply in Supp. of Mot. to Enforce Settlement Agreement, No. 05-md-1720, ECF No. 9103, at 21.

Petitioner did not seek to leave the class. *See* App. 28a n.4. It appealed from the May 28, 2024 order as an objector contending that a federal court may not direct that a fixed fund created to satisfy federal antitrust claims be shared by persons whose entitlement to recover under the federal antitrust laws no court has determined, and that doing so reduces the recovery of every member who is so entitled.

C. The decision below

The Second Circuit affirmed in a summary order that rests on the reasoning of the published opinion in *Old Jericho*, decided the same day by the same panel. App. 1a-11a. The court held that the district court’s task was to construe the Settlement Agreement “in accord with the parties’ intent,” that the settling parties’ intent was a question of fact, and that the district court’s findings were not clearly erroneous. App. 6a-9a. It declined to resolve class membership “by identifying the party that directly paid Defendants for payment card processing services,” App. 6a, and it observed that “[n]one of the parties in this appeal contests” the district court’s characterization of the settling parties’ intent that only one entity may claim for each transaction. App. 7a. Petitioner’s objection

was not to that characterization. It was to the court's authority to act on it.

The court of appeals did not decide whether the sub-merchants are entitled to recover under federal law. It explained that “the parties settled partly to avoid resolving Defendants’ indirect purchaser defense,” and that a rule requiring a court to identify the direct purchaser “would undermine the purpose of the Settlement Agreement by requiring a final resolution of the very issue the parties sought to avoid.” App. 9a. In a footnote it repeated what it had said in *Fikes*: that it “accept[s] that interpretation of federal antitrust law for the purposes of this appeal, without opining on its soundness.” App. 7a n.1. The published companion opinion is to the same effect: whether merchants or acquiring banks are the direct purchasers “remains an open question,” and the court “express[ed] no opinion on this issue.” App. 28a n.3.

The summary order addresses the arguments of the Square Sellers, who sought to leave the class, and disposes of “the Square Sellers’ remaining arguments.” App. 11a. It does not separately address petitioner’s argument that the court lacked authority to admit the sub-merchants to the fund without determining their entitlement to damages. The companion opinion refers to petitioner once, as a gas retailer that “draws the opposite legal conclusion and seeks to remain in the settlement class.” App. 28a-29a n.4.

Petitioner sought panel rehearing and rehearing en banc on May 18, 2026, which the court of appeals denied on June 24, 2026. App. 77a-79a. Distribution of the fund is under way. The claims of the sub-

merchants admitted by the May 28, 2024 order are held in a dedicated account pending final resolution of this proceeding. Mot. for Second Partial Distribution, No. 05-md-1720, ECF No. 9869 (E.D.N.Y. May 26, 2026).

REASONS FOR GRANTING THE PETITION

This Court has twice granted certiorari to decide whether a Rule 23(b)(3) damages class may include and bind members who are not entitled to recover, and has twice been unable to reach the question. A third petition is pending. This case presents the question in a posture the others do not: the class has been certified, the judgment is final, the fund is fixed and being distributed, and a court has directed that it be shared by millions of persons whose entitlement to damages no court has determined. If the “sort it out later” answer to the question is ever correct, it is not correct here, because there is no later.

I. This Case Presents The Question In The Posture *Tyson Foods* Said Would Present It, And In A Form The Pending Petitions Do Not.

A. *Tyson Foods* and *Labcorp*

In *Tyson Foods*, this Court granted certiorari to decide “whether a class may be certified if it contains ‘members who were not injured and have no legal right to any damages.’” 577 U.S. at 460. It called the question one of “great importance.” *Id.* at 461. But it declined to reach it, and it explained precisely what was missing: “It is not, however, a question yet fairly presented by this case, because the damages award has not yet been disbursed, nor does the record indicate how it will be disbursed.” *Id.* The objection

could be renewed “when the case returns to the District Court for disbursal of the award.” *Id.* at 461-62. The Chief Justice, concurring, added that “Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not.” *Id.* at 466 (Roberts, C.J., concurring).

That is this case. The fund is fixed. The May 28, 2024 order under review decided who shares in it. Petitioner is a class member whose share the order reduces and who appealed on that ground. *See Devlin v. Scardelletti*, 536 U.S. 1, 14 (2002).

Last Term the Court granted certiorari in *Labcorp* and dismissed the writ as improvidently granted after argument revealed a dispute about which certification order was before the Court. 145 S. Ct. at 1608. Justice Kavanaugh dissented. He would have held that “[f]ederal courts may not certify a damages class under Rule 23 when, as here, the proposed class includes both injured and uninjured class members,” *id.* at 1609 (Kavanaugh, J., dissenting), and he grounded that conclusion in Rule 23(b)(3)’s predominance requirement rather than in Article III. Neither difficulty that ended *Labcorp* exists here. One order, entered May 28, 2024, decided who shares in a fund already fixed by a judgment already affirmed. One panel affirmed, across two opinions. The parties agree on what the district court did; they disagree only about whether it was permitted.

B. The pending petitions

Two petitions now before the Court present the question in the certification posture. *Sunoco, Inc. (R&M) v. Cline*, No. 26-1 (filed June 26, 2026), arises

from a final judgment after a bench trial for a class of royalty owners, and asks whether Rule 23 or Article III permits a court “to certify a class and award all members damages” when the class has identified no feasible way to determine who has standing to recover. *City of Cleveland v. Pickett*, No. 25-677 (filed Dec. 8, 2025), arises from an interlocutory affirmance of class certification under Rule 23(f). Earlier this year the Court denied review in a third, *Takeda Pharm. Co. v. Painters & Allied Trades Dist. Council 82 Health Care Fund*, No. 25-625 (Mar. 23, 2026), also from a Rule 23(f) affirmance.

Petitioner is not suggesting that this case should displace those. It suggests that the question they present has a second aspect, which this case presents and the others do not. Each of them asks what a court must determine before it certifies a class and adjudicates its claims. This case asks what happens after: whether a court may, years after entering judgment on a settlement class, direct that a fixed fund be distributed to persons it has not found entitled to recover, on the ground that the settling parties intended to include them. If the Court grants review in *Sunoco* or *Pickett*, this petition presents the natural companion. If it does not, this petition presents the question in the form in which the “weed out uninjured members . . . after a class has been certified” answer, see Reply Br. 9, *Labcorp*, No. 24-304 (describing respondents’ argument), has already failed, because there is no later stage.

C. The consequences here are concrete

Every entity added to this class takes a pro rata share of the fixed \$5.6 billion fund. The settlement as

approved in 2019 covered roughly twelve million merchants, with an average recovery of about \$325 if every member claims every dollar. *Fikes*, 62 F.4th at 728 (Jacobs, J., concurring). Every member admitted by the May 28, 2024 order without a determination of entitlement reduces the share of every member who is entitled. The distribution issue is not hypothetical; the second partial distribution of the settlement fund began this month.

Nor does the relief petitioner seeks disturb the settling parties' bargain. Petitioner asks for a determination that a federal court may not direct payment from the fund to persons no court has found entitled to recover. How the settling parties and the district court then proceed, whether by determining entitlement, by amending the plan of allocation, or otherwise, is for them on remand, as it was in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

II. The Courts Of Appeals Are Divided Three Ways On The Certification Question.

A. The three-way split

Since *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021), the courts of appeals have divided three ways on whether a Rule 23(b)(3) damages class may be certified when it contains members who were not injured. The division is acknowledged by the courts and the treatises alike. See *In re Asacol Antitrust Litig.*, 907 F.3d 42, 56-57 (1st Cir. 2018) (Kayatta, J.) (acknowledging “the divergence evident in the manner in which our sister circuits have addressed the treatment of uninjured putative class members,”

some “through the lens of Article III” and others “through the prism of Rule 23(b)(3) predominance”); *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 365-67 (3d Cir. 2015) (analyzing the “circuit split” among the courts of appeals); *In re Deepwater Horizon*, 739 F.3d 790, 800-01 (5th Cir. 2014) (identifying a “roughly even split of circuit authority”); 1 William B. Rubenstein, Newberg and Rubenstein on Class Actions § 2:3 (6th ed. 2024) (question is “unresolved” and “has generated differing approaches”); 1 Joseph M. McLaughlin, McLaughlin on Class Actions § 4:28 (20th ed. 2023); 8 Julian O. von Kalinowski et al., Antitrust Laws and Trade Regulation § 166.03[4][b][ii] (2d ed. 2024) (courts of appeals “have divided on whether certification must be denied where the proposed class includes persons who have suffered no injury”).

The Second and Eighth Circuits require that every member have standing. In the Second Circuit the rule is categorical: “no class may be certified that contains members lacking Article III standing.” *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006). Any class “must therefore be defined in such a way that anyone within it would have standing.” *Id.* at 265. The Eighth Circuit is the same. *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010); *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 778 (8th Cir. 2013) (“[i]n order for a class to be certified, each member must have standing”); *Johannessohn v. Polaris Indus. Inc.*, 9 F.4th 981, 988 & n.3 (8th Cir. 2021). Individual judges of the Fifth Circuit have taken that view as well, *Flecha v. Mediacredit, Inc.*, 946 F.3d 762, 770-71 (5th Cir. 2020) (Oldham, J.,

concurring), though the circuit itself has left the question open.

The First and District of Columbia Circuits permit certification only where the uninjured are *de minimis*, and both reach the question through Rule 23(b)(3) predominance rather than Article III. The D.C. Circuit asked “when does the need for individualized proof of injury and causation destroy predominance?” and answered that a class containing 12.7% uninjured members could not be certified, a figure well beyond the “5% to 6%” it treated as the outer limit. *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619, 624-26 (D.C. Cir. 2019). Earlier it had held that plaintiffs “must also show that they can prove, through common evidence, that all class members were in fact injured.” *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013). The First Circuit tolerates only a “very small absolute number” of uninjured members, and reaches the issue as one of predominance. *Asacol*, 907 F.3d at 51-54.

The third group permits certification even where the uninjured are more than *de minimis*, on the view that individual entitlement is sorted out after certification. Sitting en banc, the Ninth Circuit expressly rejected any rule barring “certification of a class that potentially includes more than a *de minimis* number of uninjured class members.” *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 (9th Cir. 2022) (en banc); *see id.* at 691-92 (Lee, J., dissenting) (identifying the split). The Third Circuit holds that “unnamed, putative class members need not establish Article III standing” at all, so long as a class representative has it. *Neale*, 794 F.3d at 362.

The Seventh Circuit draws the line only at a “great many” uninjured members, *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009), and has acknowledged that “[t]here is no precise measure for ‘a great many,’” *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012). The Eleventh Circuit asks whether a “large portion” of the class is uninjured. *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1277 (11th Cir. 2019).

The Fifth and Sixth Circuits have left the question open. The Fifth Circuit has declined to choose between *Kohen* and *Denney*. *Deepwater Horizon*, 739 F.3d at 801-02; *Flecha*, 946 F.3d at 768. The Sixth Circuit, sitting en banc, vacated certification on predominance grounds and did not decide the standing question, over separate opinions that would have reached it. *Speerly v. General Motors, LLC*, 143 F.4th 306 (6th Cir. 2025) (en banc); see *id.* at 336 (Thapar, J., concurring); *id.* at 346 (Nalbandian, J., concurring).

Two decisions deserve mention because respondents will invoke them. In *Deepwater Horizon* the Fifth Circuit affirmed approval of a settlement over the objection that it paid claimants without proof of injury, but it did so by applying both competing standing tests and finding the class satisfied each: the named plaintiffs had standing, and the class was defined by reference to “[l]oss of income, earnings or profits . . . as a result of the DEEPWATER HORIZON INCIDENT.” 739 F.3d at 800-02. The definition itself carried the injury. Here it does not, and no court has supplied it. And in *Drazen v. Pinto* the Eleventh Circuit panel vacated approval of a settlement, 41 F.4th 1354, 1360-62 (11th Cir. 2022), vacated on reh’g en banc, 74 F.4th 1336 (11th Cir. 2023), precisely

because the class definition swept in persons who had received a single text message and might therefore have no claim; the en banc court then held that a single text is a concrete injury, 74 F.4th at 1345, which resolved the problem rather than tolerating it. *Drazen* is a settlement-stage decision, and it supports petitioner’s position.

This is the circuit division on which the Court granted certiorari in *Labcorp*, and which the *Labcorp* dismissal left unresolved.

B. The decision below rests on a premise none of the three circuit split positions accepts

Every position in the split shares a premise: a court determines who was injured, and then asks how many uninjured members Rule 23 will tolerate. The circuits disagree about the level of tolerance. They do not disagree about the premise. The de minimis rule requires a court to know the proportion of uninjured members. The permissive rule requires it to know that the uninjured are not a great many. Even the Third Circuit’s rule, which asks nothing of absent members, assumes that the class definition describes persons with claims.

The premise is the minimum that Rule 23 demands. Certification is not a “mere pleading” exercise; the proponent of a class must “affirmatively demonstrate” that the class satisfies the Rule. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-51 (2011); *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013). Rule 23(b)(3) was an “adventuresome innovation” whose greater reach was paired with “greater procedural protections,” *Wal-Mart*, 564 U.S. at 362, the most important of

which is a predominance requirement that ensures the class is “sufficiently cohesive to warrant adjudication by representation,” *Amchem*, 521 U.S. at 623. Those protections apply irrespective of whether the class is a settlement class or a litigation class. *Id.* at 620.

The court below neither found that the added class members were injured nor found that they were uninjured. It did not find that some tolerable percentage was uninjured. It simply held that the settling parties intended to include them, and it said twice that it was not deciding whether they have any claim. App. 7a n.1; App. 28a n.3.

This Court has said that “class certification issues” may be “logically antecedent to the existence of any Article III issues.” *Amchem*, 521 U.S. at 612. That is a rule about the order in which standing questions may be taken up. It is not a grant of permission to distribute a fund with the question still unanswered.

C. The circuit division makes review here uniquely necessary

Because the circuits differ, the rights of class members ordinarily vary with the forum. This settlement removes that variation. It releases the claims of class members in every circuit. A merchant whose class could not have been certified in the First Circuit under *Asacol*, or in the District of Columbia Circuit under *Rail Freight*, is bound just the same. And no other court of appeals will revisit the question: the judgment binds nationwide, review lies only here, and the fund is being administered now.

III. The Decision Below Is Wrong.

In *TransUnion* this Court held that “[e]very class member must have Article III standing in order to recover individual damages,” and that “Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not.” 594 U.S. at 431 (quoting *Tyson Foods*, 577 U.S. at 466 (Roberts, C.J., concurring)). The Court reserved “the distinct question whether every class member must demonstrate standing before a court certifies a class.” *Id.* at 431 n.4. This case does not require the Court to answer the reserved question, because the order under review was entered more than four years after class certification and directs payment now. Whatever a court must determine before certifying a class, it must determine entitlement before it directs that a member be paid from a fund created to satisfy a federal claim. That is what *Tyson Foods* contemplated when it said the objection could be renewed at disbursal, 577 U.S. at 461-62, and it is what the Chief Justice meant when he wrote that a court may not “order relief to any uninjured plaintiff.” *Id.* at 466 (Roberts, C.J., concurring).

Petitioner’s point does not solely depend on Article III. Section 4 of the Clayton Act (“Section 4”) confers a right of action on a “person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws.” 15 U.S.C. § 15(a). Whether a given claimant is such a person is a question of federal law that this Court has answered. Only a direct purchaser or a cost-plus direct purchaser may recover the overcharge. *Illinois Brick*, 431 U.S. at 728-36; *Apple Inc. v. Pepper*, 587 U.S. 273, 280-84 (2019). Whether a plaintiff falls within the class of persons a

statute authorizes to sue is a question about the statute's meaning that a court must decide. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 & n.4 (2014). A class whose federal claims rest on Section 4 is a class of persons entitled to recover under Section 4, or it is not a class at all. The settlement fund here exists solely to satisfy Section 4 claims.

The entitlement of the added members was never determined, and it is genuinely in doubt. Visa and Mastercard told the district court that the sub-merchants are indirect purchasers and that "Defendants agree." ECF No. 9103, at 21. They told the court of appeals that all merchants are indirect payors. Br. of Defendants-Appellees 4. Square and Intuit, which opted out, are litigating their own claims for the same overcharge on the theory that they, not their sub-merchants, purchased card acceptance. App. 5a. The district court has found that whether merchants are direct purchasers presents a "dispute of material fact." *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, No. 05-md-1720, 2024 WL 1014159, at *16 (E.D.N.Y. Mar. 8, 2024). And the panel below said twice that it was not deciding that issue. Petitioner does not ask this Court to decide the question. Rather, petitioner asks this Court to answer whether a court may direct payment without deciding it.

The court of appeals' answer was that the settling parties intended to include the sub-merchants, and that requiring a court to determine entitlement "would undermine the purpose of the Settlement Agreement by requiring a final resolution of the very issue the parties sought to avoid." App. 9a. That

answer is constitutionally incorrect. Parties may compromise their claims and defenses. But they may not, by agreement, authorize a federal court to distribute a fund created to satisfy federal claims to persons who have no federal claim. A settlement class remains subject to Rule 23, *Amchem*, 521 U.S. at 620, and a federal court's power to order relief remains subject to Article III whatever the parties intended. If the reasoning below is correct, a district court may, years after judgment, on extrinsic evidence of what the settling parties meant, direct payment from a class fund to new class members whom no court has found entitled to it, and a court of appeals may affirm while expressly declining to decide whether they were injured. That is neither the law nor a logical extension of it.

IV. The Question Is Exceptionally Important, And This Is The Last Chance To Decide It For This Fund.

This is the largest antitrust class settlement in the country's history. The class spans two decades and roughly twelve million merchants. The 2024 order admitted millions more. The fund is fixed, and every dollar paid to a member without a cognizable injury claim is a dollar taken from a member with one.

The legal importance of the issue is broader than this fund and the issue will recur. Aggregated litigation increasingly resolves through settlements whose class definitions are written in commercial rather than doctrinal terms: who "accepted," who "used," who "purchased." When membership under such a definition is later contested, the approach taken below permits a court to resolve it as a question of

contractual intent, reviewed for clear error, without ever deciding whether the persons admitted to the class have a claim based on a cognizable injury.

The question is cleanly presented. Petitioner raised it in the court of appeals, Br. of Objector-Appellant 23-26, 39-40, which did not address it and denied rehearing; a question pressed below may be considered here whether or not the court below passed upon it. *United States v. Williams*, 504 U.S. 36, 41 (1992). The record is closed. The controlling passages are two sentences in two opinions, both of which say the court was not deciding whether the added members were injured and entitled to recover damages. No factual development is required; no alternative ground supports the judgment; and the case does not turn on any peculiarity of Second Circuit law. If this Court does not take the question here, the largest class settlement in the country's history will be distributed on the premise that the injury to, and entitlement of, its members need not be determined by any federal court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel of Record

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APPENDIX

JACK RABBIT, LLC,

Petitioner,

v.

VISA INC., MASTERCARD INCORPORATED,

ET AL.,

Respondents.

Appendix to the Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

TABLE OF CONTENTS

Appendix A — Summary Order, United States Court of Appeals for the Second Circuit (May 4, 2026)	1a
Appendix B — Opinion, Old Jericho Enterprise, Inc. v. Visa Inc., United States Court of Appeals for the Second Circuit (May 4, 2026)	12a
Appendix C — Memorandum and Order, United States District Court for the Eastern District of New York (May 28, 2024).....	31a
Appendix D — Order Denying Rehearing, United States Court of Appeals for the Second Circuit (June 24, 2026)	77a
Appendix E — Constitutional and Statutory Provisions Involved.....	80a

APPENDIX A

Summary Order of the United States Court of
Appeals for the Second Circuit
Nos. 24-1653(L), 24-1808(CON)
Entered May 4, 2026

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 4th day of May, two thousand twenty-six.

PRESENT:

DENNIS JACOBS,
PIERRE N. LEVAL,
MICHAEL H. PARK,
Circuit Judges.

In re Payment Card Interchange Fee and Merchant
Discount Antitrust Litigation

Nos. 24-1653(L); 24-1808(CON).

803 KAVA LLC, CRYOSERVICES, INC. D/B/A
ANDERSON CRYOTHERAPY D/B/A ATHLETIC
RECOVERY CENTER; DELL FOX JEWELRY LLC;
MAUREEN ROXBERRY; HAYLEY LANNING; SBG
DESIGNS, LLC D/B/A GOLDFINE JEWELRY;
SHEN SHU ACUPUNCTURE, PLLC; CAMP
GROUNDS COFFEE, LLC,

Plaintiffs-Appellants,

v.

JACK RABBIT, LLC,

Objector-Appellant,

v.

VISA, INC., MASTERCARD INCORPORATED,

*Defendants-Appellees.**

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INCORPORATED:

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Tannenbaum, Nina Kovalenko, Gary Carney,
Paul, Weiss, Rifkind, Wharton & Garrison LLP,
New York, NY.

FOR AMICI CURIAE INTUIT INC.; INTUIT
PAYMENT SOLUTIONS, LLC; BLOCK, INC. F/K/A
SQUARE, INC.; AND ACI PAYMENTS, INC., IN
SUPPORT OF PLAINTIFFS-APPELLANTS:

Marc L. Greenwald, Steig D. Olson, Manisha M.
Sheth, David M. Cooper, Quinn Emanuel
Urquhart & Sullivan, LLP, New York, NY; Adam
B. Wolfson, Quinn Emanuel Urquhart &
Sullivan, LLP, Los Angeles, CA; Justin T.
Reinheimer, Quinn Emanuel Urquhart &
Sullivan, LLP, San Francisco, CA.

Appeal from a memorandum and order of the United States District Court for the Eastern District of New York (Brodie, C.J.).

* The Clerk of Court is respectfully directed to amend the caption accordingly.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is AFFIRMED.

In 2019, Defendants settled a federal antitrust class action with a class of merchants that accepted their credit cards during the class period. The Settlement Agreement defines the class, in relevant part, as “all persons, businesses, and other entities that have accepted any Visa-Branded Cards and/or Mastercard-Branded Cards in the United States at any time from January 1, 2004 to the Settlement Preliminary Approval Date.” App’x at 7577. Amici Intuit Inc., Intuit Payment Solutions, LLC (together, “Intuit”); Block, Inc. f/k/a Square (“Square”); and ACI Payments, Inc. provide payment facilitation services to customers. Intuit and Square opted out of the class action settlement and filed their own complaints asserting antitrust claims against Defendants.

Plaintiffs-Appellants (together, the “Square Sellers”) are merchants and customers of Square that use Square’s payment card facilitation services to process credit card purchases. They did not opt out of the Settlement Agreement, but in 2021, they filed a

putative antitrust class action complaint against Defendants. The Square Sellers appeal from a memorandum and order granting Defendants’ motion to enforce the Settlement Agreement and finding that the Square Sellers are members of the settlement class. We assume the parties’ familiarity with the facts and the issues on appeal, which are discussed at greater length in our opinion in the tandem case of *Old Jericho v. Visa*, No. 24-2678, filed simultaneously with this summary order.

First, the Square Sellers argue that the district court erred in concluding that they are members of the settlement class because they are neither direct purchasers nor direct payors of the challenged fees. For substantially the reasons stated in *Old Jericho v. Visa*, No. 24-2678, we reject the Square Sellers’ argument that the district court must resolve disputes over class membership by identifying the party that *directly paid* Defendants for payment card processing services. Instead, the district court’s task is to construe the Settlement Agreement “in accord with the parties’ intent.” *Revitalizing Auto Cmtys. Env’t Response Tr. v. Nat’l Grid USA*, 92 F.4th 415, 441 (2d Cir. 2024) (quotation marks omitted). If the class definition is ambiguous as to potential class members, the district court can consider “extrinsic evidence of the parties’ intent” on a developed factual record to resolve that ambiguity. *Id.* at 442.

The district court did so here. It first concluded that the word “accepted” in the Settlement Agreement is ambiguous as applied to the Square Sellers and Square, which can both “credibly claim to have ‘accepted’ payment cards.” *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 735 F. Supp. 3d 249, 262 (E.D.N.Y. 2024). Next, the district court concluded that the parties intended that “as between competing claimants, only one entity is entitled to make a claim of the settlement fund.” *Id.* at 264. None of the parties in this appeal contests this characterization of the settling parties’ intent.¹ The district court then found that the Square Sellers “accepted” payment cards for each transaction and were thus members of the settlement class. It based this finding on (1) Square’s merchant agreement, which states that Square allows merchants “to *accept* Cards from customers,” *id.*; (2) Square’s Complaint, which alleges that Square “helps Sellers (merchants who utilize Square to *accept* payment cards...) start, run, and grow their businesses, including by enabling

¹Although the parties do not dispute this contention, in *Fikes* we explained that we “accept that interpretation of federal antitrust law for the purposes of this appeal, without opining on its soundness.” *Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*, 62 F.4th 704, 716 n.5 (2d Cir. 2023); see generally *id.* at 730-32 (Leval, J., concurring). We accept this interpretation of the Settlement Agreement, but we again do not opine on the soundness of this interpretation as a matter of federal antitrust law.

Sellers to *accept* card payments,” *id.*; (3) Visa’s rules, which distinguish between a “Payment Facilitator” and a “Merchant” and provide that an entity cannot simultaneously act as both a payment facilitator and a merchant, *id.* at 265; (4) Mastercard’s rules, under which Sellers “accept” payment cards while payment facilitators facilitate the acquiring of transactions, *id.* at 266; (5) the Square Sellers’ own declarations, which describe themselves as businesses that *accept* credit and debit cards, *id.*; (6) the “way real-world transactions are conducted” in which the “cardholder hands her card to a Seller, who ‘accepts’ it for payment at the point of sale,” *id.* at 264; and (7) the incongruence of interpreting the word “accepted” to mean that Square “‘accepts’ a payment card, but the [Square] Seller ‘accepts’ cash, for two otherwise identical transactions,” *id.* at 265.

We decline the invitation of the Square Sellers and amici to second-guess the district court’s finding that the settling parties intended to include the Square Sellers, rather than Square, in the settlement class. “Few persons are in a better position to understand the meaning of a settlement than the district judge who oversaw and approved it,” and a “trial court’s findings regarding the parties’ intentions will be respected on appeal unless they are clearly erroneous.” *W. Alton Jones Found. v. Chevron U.S.A., Inc.*, 97 F.3d 29, 33 (2d Cir. 1996) (cleaned up). The

district court carefully reviewed the record and considered evidence about how payment facilitators function, as well as how the parties themselves characterized who “accepts” credit cards in a given transaction. Based on this record, the district court’s findings as to the settling parties’ intent regarding which entities should be deemed part of the settlement class were not clearly erroneous.

For substantially the reasons stated in *Old Jericho v. Visa*, 24-2678, we also reject the Square Sellers’ argument that the district court’s order impermissibly created an intra-class conflict by placing direct and indirect purchasers in the same settlement class. As explained in that opinion, the parties settled partly to avoid resolving Defendants’ indirect purchaser defense. The Square Sellers’ argument that the district court was required to avoid “including both direct and indirect purchasers in the settlement class,” Square Sellers’ Br. at 43, thus rests on an assumption about which entities are indirect purchasers. This interpretation relying on such an assumption would undermine the purpose of the Settlement Agreement by requiring a final resolution of the very issue the parties sought to avoid.

Finally, the Square Sellers argue that the Settlement Agreement violates due process because they did not receive individual notice of it. When approving a 23(b)(3) class action settlement, the

district court “must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” Fed. R. Civ. P. 23(c)(2)(B). Under this rule, “[i]ndividual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort.” *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974).

Whether class members can be identified through reasonable effort “is a finding of fact, and must be accepted unless clearly erroneous.” *In re Agent Orange Prod. Liab. Litig. MDL No. 381*, 818 F.2d 145, 169 (2d Cir. 1987). The district court expressly recognized its obligation to direct “individual notice to all members who can be identified through reasonable effort” when approving the notice plan. *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 58 (E.D.N.Y. 2019). We identify no clear error in the district court’s finding that the notice plan was reasonable under the circumstances. *See id.* at 59 (finding “reasonable the manner in which the notices will be provided” in the settlement); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05MD1720MKBJO, 2019 WL 6875472, at *36 (E.D.N.Y. Dec. 16, 2019) (“[T]he Court finally approved the Superseding Settlement Agreement as

fair, reasonable and adequate, including the Notice Plan, Class Notices, and Plan of Administration and Distribution.”).

* * *

We have considered the Square Sellers’ remaining arguments and find them to be without merit. For the foregoing reasons, the order of the district court is AFFIRMED.

FOR THE COURT:

Catherine O’Hagan Wolfe, Clerk of
Court

APPENDIX B

Opinion of the United States Court of Appeals
for the Second Circuit

Old Jericho Enterprise, Inc. v. Visa Inc.

No. 24-2678

Argued November 20, 2025 · Decided May 4, 2026

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2025

Argued: November 20, 2025

Decided: May 4, 2026

No. 24-2678

OLD JERICHO ENTERPRISE, INC., 32T, LLC,
BUCKS, INC., CHANDLER OIL-1 CORPORATION,
COFFEE CUP FUEL STOP, INC., H&H
ENTERPRISES, INC., HEINZ ENTERPRISES,
INC., KOEHNENS STANDARD SERVICE, INC.,
MINERAL SPRING AVENUE GETTY, INC., MOX
LLC, OKY LLC, PIT ROW, INC., POINTE SERVICE
CENTER LLC, RED EAGLE, INC., VICTORY
ENERGY, LLC, VILLAGE CENTER AUTO CARE,
INC., W.L.F. AUTOMOTIVE, INC., WESCO, INC.,
ZARCO USA, INC., ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

VISA, INC., MASTERCARD, INC.,

*Defendants-Appellees.**

* The Clerk of Court is respectfully directed to amend the
caption accordingly.

Appeal from the United States District Court
for the Eastern District of New York
Nos. 05-md-1720; 20-cv-02394
Margo K. Brodie, Chief Judge.

Before: JACOBS, LEVAL, and PARK, Circuit
Judges.

In 2019, Visa and Mastercard agreed to pay \$5.6 billion to settle a federal antitrust class action with a class of merchants that accepted payment cards during the class period. Appellants here (the “Old Jericho Plaintiffs”) did not opt out of the Settlement Agreement. But a year later they filed their own putative class action complaint asserting state-law antitrust claims and seeking damages for the same allegedly supra-competitive interchange fees based on the same alleged antitrust violations. They contend that their gasoline suppliers are the direct payors of the challenged fees and the appropriate class members. The district court (Brodie, C.J.) concluded that the Old Jericho Plaintiffs are members of the settlement class and the Settlement Agreement bars the claims they now assert.

We AFFIRM. First, we reject the Old Jericho Plaintiffs’ contention that our prior decision in *Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*, 62 F.4th 704 (2d Cir. 2023), requires the district court to determine class membership solely by identifying the

“direct payor” of the challenged fees. The district court did not clearly err in determining that the settling parties intended to include the Old Jericho Plaintiffs in the settlement class. Second, we conclude that the Old Jericho Plaintiffs’ claims were validly released because they were adequately represented in the Settlement Agreement and rest on the same factual predicate as the other released claims.

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Michael S. Shuster, Demian A. Ordway, Jayme Jonat, Gregory J. Dubinsky, Holwell Shuster & Goldberg LLP, New York, NY; Matthew A. Eisenstein, Rosemary Szanyi, R. Stanton Jones, Arnold & Porter Kaye Scholer LLP, Washington, DC, for Defendant-Appellee Visa Inc.

PARK, Circuit Judge:

In 2019, Visa and Mastercard agreed to pay \$5.6 billion to settle a federal antitrust class action with a class of merchants that accepted payment cards during the class period. Appellants here (the “Old Jericho Plaintiffs”) did not opt out of the Settlement Agreement. But a year later they filed their own putative class action complaint asserting state-law antitrust claims and seeking damages for the same allegedly supra-competitive interchange fees based on the same alleged antitrust violations. They contend that their gasoline suppliers are the direct payors of the challenged fees and the appropriate class members. The district court concluded that the Old Jericho Plaintiffs are members of the settlement class and the Settlement Agreement bars the claims they now assert.

We affirm. First, we reject the Old Jericho Plaintiffs’ contention that our prior decision in *Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*, 62 F.4th 704 (2d Cir. 2023), requires the district court to determine class membership solely by identifying the “direct payor” of the challenged fees. The district court did not clearly err in determining that the settling parties intended to include the Old Jericho Plaintiffs in the settlement class. Second, we conclude that the Old Jericho Plaintiffs’ claims were validly released because they were adequately represented in the

Settlement Agreement and rest on the same factual predicate as the other released claims.

I. BACKGROUND

After nearly 15 years of litigation, Defendants agreed to settle a federal antitrust class action by paying over \$5.6 billion for allegedly supra-competitive interchange fees. In exchange, class members agreed to release all claims arising out of or relating to the alleged conduct to the fullest extent permitted by federal law. The Settlement Agreement defines the class as “all persons, businesses, and other entities that have accepted any Visa-Branded Cards and/or Mastercard-Branded Cards in the United States at any time from January 1, 2004 to the Settlement Preliminary Approval Date [January 24, 2019],” with certain exceptions not relevant here. App’x at 207. The district court approved this settlement in 2019 and we affirmed in 2023. We assume familiarity with the facts and procedural history, which are set forth in our opinions in *Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*, 62 F.4th 704, 713-14 (2d Cir. 2023), and *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litigation*, 827 F.3d 223, 227-30 (2d Cir. 2016). We summarize here only the facts necessary to explain our decision in this appeal.

In a typical credit card transaction, when a customer gives a payment card to a merchant, the merchant transmits data to its bank (the acquiring bank), which forwards that information to the appropriate network (Visa or Mastercard), which relays the information to the bank that issued the customer's card (the issuing bank). *Fikes*, 62 F.4th at 713. The issuing bank then provides funds through the appropriate network to the acquiring bank, minus the interchange fee that Defendants charge. The acquiring bank in turn pays the merchant the purchase price minus a “merchant discount fee” that covers the interchange fee and an additional amount to compensate the acquiring bank. *Id.*

The class action complaint principally asserted antitrust claims under federal law on behalf of merchants who claimed to be injured by Defendants' interchange fees. In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the Supreme Court “established a bright-line rule that authorizes suits by *direct* purchasers but bars suits by *indirect* purchasers.” *Apple Inc. v. Pepper*, 587 U.S. 273, 279 (2019). Before settling, Defendants argued that the class plaintiffs did not directly purchase card acceptance services or directly pay the challenged interchange fees because there are intermediaries in the payment chain between the merchant and Defendants. So Defendants argued that the acquiring banks are the

direct purchasers and that class plaintiffs are indirect purchasers without federal antitrust standing. In approving the settlement, the district court recognized that the indirect-purchaser defense posed a litigation risk and awarded class counsel substantial attorneys' fees in part in consideration of this risk. *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-md-1720, 2019 WL 6888488, at *13-14 (E.D.N.Y. Dec. 16, 2019).

Illinois Brick bars indirect purchasers from asserting *federal* antitrust claims, but state antitrust laws may permit indirect-purchaser recovery. *California v. ARC Am. Corp.*, 490 U.S. 93, 105-06 (1989). The Old Jericho Plaintiffs are branded gasoline retailers operating in states that allow indirect purchasers to bring antitrust claims. They contract with large gas brands such as BP, Cenex, Chevron, and Shell ("Suppliers") for both gasoline and card acceptance services. When a customer uses a credit card to purchase gas, the Supplier acts as an intermediary between the Old Jericho Plaintiffs and the acquiring bank. On the front end, the Old Jericho Plaintiffs transmit data to the Suppliers, which then relay that information to the acquiring banks. And on the back end, the acquiring banks transfer funds to the Suppliers, which then remit the funds to the Old Jericho Plaintiffs after deducting fees that may

include credit card processing fees and the wholesale price of fuel.

The Old Jericho Plaintiffs did not opt out of the Settlement Agreement. But in May 2020, after the opt-out period expired, they filed their own putative class action complaint asserting state-law indirect-purchaser antitrust claims seeking damages for the same allegedly supra-competitive interchange fees based on the same alleged antitrust violations by Defendants. Defendants raised an affirmative defense that the Settlement Agreement bars the Old Jericho Plaintiffs' claims.

The Old Jericho Plaintiffs moved for summary judgment on whether they are bound by the release in the Settlement Agreement. In a memorandum and order signed September 5, 2024, the district court concluded that the Old Jericho Plaintiffs are members of the settlement class and bound by the release. *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-md-1720, 2024 WL 4224160 (E.D.N.Y. Sept. 18, 2024) ("Old Jericho Order"). So the court entered judgment for Defendants on the Old Jericho Plaintiffs' claims. This appeal followed.

II. DISCUSSION

We consider the Old Jericho Plaintiffs' arguments in two parts. First, the Old Jericho Plaintiffs contend that they are not part of the

settlement class. They argue that under *Fikes*, the district court was required to identify the “direct payor” of the challenged fee for each transaction, which was the Supplier. Second, the Old Jericho Plaintiffs claim that even if they are part of the settlement class, the district court erred in concluding that the Settlement Agreement released the state-law claims they now seek to assert.

We reject both arguments. First, the district court’s finding that the settling parties intended to include the Old Jericho Plaintiffs, rather than their Suppliers, in the settlement class is not clearly erroneous under *Fikes*. Second, the Old Jericho Plaintiffs’ claims were validly released because they arise out of the same factual predicate as the other class members’ claims and were adequately represented in the Settlement Agreement.

A. Class Membership

“In reviewing a district court’s interpretation of the terms of a settlement agreement, we review conclusions of law *de novo* and findings of fact for clear error.” *In re Am. Exp. Fin. Advisors Sec. Litig.*, 672 F.3d 113, 135 (2d Cir. 2011). When a term in a settlement agreement is ambiguous, “principles governing the interpretation of contracts and judgments authorize reference to extrinsic evidence” to resolve the ambiguity and ascertain the settling

parties' intent. *W. Alton Jones Found. v. Chevron U.S.A., Inc.*, 97 F.3d 29, 37 (2d Cir. 1996). "A trial court's findings regarding the parties' intentions will be respected on appeal unless they are clearly erroneous." *Id.* at 33.

The Old Jericho Plaintiffs urge a different standard. They argue that the district court was not free to conduct its own inquiry into the settling parties' intentions and that our opinion in *Fikes* required the district court "to use 'federal antitrust standards' to 'identify the direct payor or payors in any given transaction' and deem that party the Settlement class member." Reply Br. at 4 (quoting *Fikes*, 62 F.4th at 718). So they ask us to review *de novo* whether the district court complied with our mandate in *Fikes*. *Id.* at 4-5 n.1; see *Brown v. City of New York*, 862 F.3d 182, 184 (2d Cir. 2017) ("We determine *de novo* the meaning of a previous mandate of this Court.").

1. Fikes does not require the district court to use a "direct payor" test to determine class membership

The Old Jericho Plaintiffs contend that our opinion in *Fikes* required the district court to "identify the direct payor or payors in any given transaction." Appellants' Br. at 29 (quoting *Fikes*, 62 F.4th at 718). In support, they point to language in *Fikes* stating

that “the *only* entities that could fall within the class definition were those deemed to be *direct payors* of the challenged fees.” *Id.* (quoting *Fikes*, 62 F.4th at 716).

This argument overreads our prior decision. We recognized in *Fikes* that “the word ‘accepted’ lends itself to ambiguity,” and concluded that the class was ascertainable because this ambiguity could be resolved by “identifying the direct payor for each transaction.” 62 F.4th at 716-17. But opinions are “read with a careful eye to context,” and this language must be understood with reference to the “particular context” in which it appears and the “particular work” it does. *Nat’l Pork Producers Council v. Ross*, 598 U.S. 356, 374 (2023).

Fikes addressed an ascertainability challenge to the class action settlement the Old Jericho Plaintiffs contest here. In deciding that issue, “[t]he only relevant inquiry is whether determinations as to class membership are ‘objectively possible.’” *Fikes*, 62 F.4th at 717 (quoting *In re Petrobras Sec.*, 862 F.3d 250, 270 (2d Cir. 2017)). In this context, we explained that the class definition is “objectively guided by federal antitrust standards,” so considering class counsel’s claim that they represent “the direct purchaser, and not every entity in the payment chain,” we concluded that the ascertainability challenge failed because “Appellants do not contend that identifying the direct

payor for each transaction is impossible.” *Id.* at 716-17.

Our conclusion in *Fikes* about ascertainability does not supplant the general rule that the district court should resolve disputes over class membership by construing the Settlement Agreement “in accord with the parties’ intent” as required by New York contract law.¹ *Revitalizing Auto Cmtys. Env’t Response Tr. v. Nat’l Grid USA*, 92 F.4th 415, 441 (2d Cir. 2024) (quotation marks omitted). *Fikes* stated that the class definition is “objectively guided by federal antitrust standards,” not that federal antitrust law replaces the parties’ intent. 62 F.4th at 716. Moreover, recognizing that the inquiry into class membership might turn on facts not in the appellate record, we made “no ruling as to how damages should be allocated as between branded oil companies and their branded service station franchisees,” leaving the district court to consider the issue on a “developed factual record.” *Id.* at 727.

We thus reject the argument that *Fikes* reduced all disputes over class membership to a “direct payor” test. This argument conflates the different legal standards governing an ascertainability challenge and a district court’s interpretation of a settlement

¹The Settlement Agreement provides that it “shall be governed, construed, enforced, and administered in accordance with the laws of the State of New York.” App’x at 249.

agreement, and it ignores our instruction that the district court decide class membership based on a “developed factual record.” *Id.*; see, e.g., *Collins v. Harrison- Bode*, 303 F.3d 429, 434 (2d Cir. 2002) (concluding that a settlement agreement is ambiguous and remanding for “the district court to provide the parties an opportunity to present extrinsic evidence”).²

2. The district court did not clearly err in finding that the parties intended the Old Jericho Plaintiffs, not their Suppliers, to be members of the settlement class

The district court concluded that “the term ‘accepted’ is ambiguous... because suppliers and gas stations can both credibly claim to have ‘accepted’ payment cards.” Old Jericho Order at *10. After recognizing that the class definition is objectively guided by federal antitrust standards, it turned to extrinsic evidence to decide whether the Old Jericho Plaintiffs or their Suppliers “accepted”

²Nor did the district court abuse its discretion by declining to invoke judicial estoppel to bar Defendants from renouncing “the Direct Payor Test.” Judicial estoppel typically requires that the party against whom it is being asserted “has succeeded in persuading a court to accept that party’s earlier position” because “absent success in a prior proceeding, a party’s later inconsistent position introduces no risk of inconsistent court determinations, and thus poses little threat to judicial integrity.” *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001) (cleaned up). As explained, this Court did not accept a “direct payor test.”

See payment cards within the meaning of the Settlement Agreement. *Revitalizing Auto Cmtys.*, 92 F.4th at 442 (“If a contract is ambiguous, extrinsic evidence of the parties’ intent may be considered.”). The district court first considered contracts between the Old Jericho Plaintiffs and their Suppliers, many of which say that the Supplier authorizes the gas station to “accept” cards. And it reasoned that “the way real-world transactions are conducted supports the conclusion that Old Jericho Plaintiffs... ‘accept’ payment cards” because in a prototypical transaction “the cardholder swipes her card at a gas station, or hands it to the gas station operator, and the gas station ‘accepts’ the card for payment at the point of sale.” Old Jericho Order at *12. Further, many of the Old Jericho Plaintiffs contract directly with acquirers for ancillary businesses, such as convenience stores and restaurants, so they accept payment cards for many transactions where the Suppliers are not intermediaries. Considering this evidence, the court found that the Old Jericho Plaintiffs, not their Suppliers, “accepted” cards within the meaning of the Settlement Agreement.

Although the Old Jericho Plaintiffs argue that the district court should have considered contrary evidence about the parties’ intent, we discern no clear error in the district court’s determination that the settling parties intended the Old Jericho Plaintiffs to

be class members. *See W. Alton Jones Found.*, 97 F.3d at 33.

B. Release of Claims

“Plaintiffs’ authority to release claims is limited by the ‘identical factual predicate’ and ‘adequacy of representation’ doctrines.” *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 106 (2d Cir. 2005). “Together, these legal constructs allow plaintiffs to release claims that share the same integral facts as settled claims, provided that the released claims are adequately represented prior to settlement.” *Id.* If these two requirements are satisfied, a class action settlement may “bar claims that were not and could not have been asserted in the class action.” *TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982). We agree with the district court that the Settlement Agreement satisfies both requirements.

The Old Jericho Plaintiffs allege that they suffered the same antitrust injury and are harmed by the same interchange fees as the rest of the settlement class. The different factual predicate they identify is “the presence or absence of an intermediary [*i.e.*, the Supplier] between the violator and the purchaser.” Appellants’ Br. at 65. But this argument ignores the fact that every merchant in the settlement class has an intermediary between it and Defendants. The class

plaintiffs allege that when a customer makes a payment, “the Merchant sends an electronic transmission to its Acquiring Bank or Third-Party Processor,” which “then sends an electronic transmission to [Defendants’] Networks.” Old Jericho Order at *14; *see supra* at 5. The Old Jericho Plaintiffs fail to explain why the presence of a *second* intermediary should be determinative. The class plaintiffs argue that they are direct purchasers with federal antitrust standing despite the presence of intermediaries, while the Old Jericho Plaintiffs assert that they are indirect purchasers and have only indirect-purchaser claims due to the presence of intermediaries.³ We conclude, as the district court did, that the Old Jericho Plaintiffs are asserting claims based on a different legal theory but the same factual predicate as those in the Settlement Agreement.⁴

³The parties settled partly to avoid deciding whether merchants or the acquiring banks are direct purchasers under federal antitrust law. This remains an open question: in opt-out litigation, the district court held that there is a “dispute of material fact as to whether merchants are direct purchasers of card-acceptance services” despite the presence of intermediaries. In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., No. 05-md-1720, 2024 WL 1014159, at *13 (E.D.N.Y. Mar. 8, 2024). This appeal is about membership in a class action settlement, not the underlying issues of federal antitrust law, and we express no opinion on this issue.

⁴The submissions of other gas retailers wishing to remain in the settlement class highlight that this is a legal, rather than factual, distinction. For example, Jack Rabbit LLC is a gas retailer similarly situated to the Old Jericho Plaintiffs but draws the

Nor are we persuaded by the Old Jericho Plaintiffs' argument that their claims were inadequately represented in the Settlement Agreement. "[A]dequate representation of a particular claim is determined by the alignment of interests of class members, not proof of vigorous pursuit of that claim." *Wal-Mart*, 396 F.3d at 113. As we explained in *Fikes*, representation was adequate because both gas franchisees and franchisors "shared an interest in maximizing the recovery for all class members." 62 F.4th at 718. And under the Settlement Agreement, the Old Jericho Plaintiffs were compensated for the release of their claims by entitlement to "a pro rata share of the monetary fund 'in accordance with [their] relative economic interests,'" just like every other class member. *Id.* at 714.⁵

If the Old Jericho Plaintiffs wanted "to avoid the risk of being bound by the Settlement Agreement and the Release, the appropriate course of action was to timely opt out of the Class." Old Jericho Order at *15. They failed to do so, and we agree with the district court that the Settlement Agreement bars the claims they now try to assert.

opposite legal conclusion and seeks to remain in the settlement class.

⁵A trust account has been established to ensure that the Old Jericho Plaintiffs receive their pro rata portion of the Settlement Amount at the conclusion of this appeal.

III. CONCLUSION

The judgment of the district court is affirmed.⁶

⁶Although this panel previously retained jurisdiction in this case, Fikes, 62 F.4th at 727 n.18, any subsequent appeal will be assigned to a new panel in the ordinary course.

APPENDIX C

Memorandum and Order of the
United States District Court for the
Eastern District of New York
Nos. 05-md-1720, 20-cv-02394 (Brodie, C.J.)
Entered May 28, 2024
Reported at 735 F. Supp. 3d 249

MEMORANDUM & ORDER

MARGO K. BRODIE, United States District Judge:

I. Background

- a. Procedural history
 - i. Procedural history of the Rule 23(b)(3) Class
- b. Factual overview of the payment facilitators

II. Discussion

- a. Standard of review
 - i. Motion to enforce a settlement agreement
 - ii. Summary judgment
- b. Square and Intuit are not members of the Settlement Class
 - i. The term "accepted" as used in the Settlement Agreement is ambiguous
 - ii. The term "accepted" is "guided by federal antitrust standards"
 - iii. The Court finds that Sellers "accepted" payment cards
- c. Lanning Plaintiffs are members of the Settlement Class
- d. The Court denies Intuit's cross-motion for partial summary judgment

III. Conclusion

On January 31, 2024, Defendants¹ in this multidistrict litigation moved to enforce the Superseding and Amended Definitive Class Settlement Agreement of the *Rule 23(b)(3)* Class

¹Defendants consist of the Visa and Mastercard networks (the "Network Defendants") as well as "various issuing and acquiring banks" (the "Bank Defendants"). In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 330 F.R.D. 11, 18 (E.D.N.Y. 2019) (Interchange Fees III).

Plaintiffs and Defendants (the "Settlement Agreement"), or, in the alternative for summary judgment, seeking to dismiss claims brought by Plaintiffs Block, Inc., f/k/a Square, Inc. ("Square"), and Intuit Inc. and Intuit Payment Solutions, LLC (collectively, "Intuit"), that are based on transactions in which Square or Intuit served as a "payment facilitator" for their merchant customers.² Square,³ Intuit,⁴ and *Lanning and Camp Grounds* Plaintiffs

²(Defs.' Mot. to Enforce Settlement Agreement or, in the Alternative, for Summ. J. ("Defs.' Mot."), Docket Entry No. 9056; Defs.' Mem. in Supp. of Defs.' Mot. ("Defs.' Mem."), Docket Entry No. 9057; Defs.' Reply in Supp. of Defs.' Mot. & Opp'n to Pls.' Cross-Mots. for Partial Summ. J. ("Defs.' Reply"), Docket Entry No. 9083; Defs.' R. 56.1 Stmt. ("Defs.' 56.1"), Docket Entry No. 9058; Defs.' R. 56.1 Counter-Stmt. in Opp'n to Pls.' Cross-Mots. for Partial Summ. J., Docket Entry No. 9084; Defs.' Resp. in Opp'n to Intuit's R. 56.1 Stmt., Docket Entry No. 9085; Defs.' Resp. in Opp'n to Square's R. 56.1 Counter-Stmt., Docket Entry No. 9086; Defs.' Resp. in Opp'n to Lanning & Camp Grounds R. 56.1 Stmt., Docket Entry No. 9087.)

³(Pl. Square's Opp'n to Defs.' Mot. & Mem. in Supp. of Joinder in Lanning & Camp Grounds Pls.' Cross-Mot. for Partial Summ. J. ("Square Mem."), Docket Entry No. 9066; Pl. Square's Reply in Supp. of Joinder in Lanning & Camp Grounds Pls.' Cross-Mot. for Partial Summ. J. ("Square Reply"), Docket Entry No. 9091; Pl. Square's Resp. & Counter-Stmt. to Defs.' 56.1 ("Square Counter 56.1"), Docket Entry No. 9067; Pl. Square's Resp. to Defs.' Counter 56.1, Docket Entry No. 9092.)

⁴(Pl. Intuit's Cross-Mot. for Partial Summ. J. Finding Intuit Has Standing on its Payment Facilitator Claims ("Intuit's Mot."), Docket Entry No. 9060; Pl. Intuit's Opp'n to Defs.' Mot. & Mem. in Supp. of Intuit's Mot. ("Intuit Mem."), Docket Entry No. 9061; Pl. Intuit's Reply in Supp. of Cross-Mot. for Partial Summ. J. Finding Intuit Has Standing on its Payment Facilitator Claims ("Intuit Reply"), Docket Entry No. 9089; Pl. Intuit's R. 56.1 Stmt.,

(collectively " *Lanning* Plaintiffs"),⁵ opposed the motion and cross-moved for partial summary judgment, seeking a ruling that Intuit has antitrust standing to bring claims based on the transactions at issue, and a ruling that *Lanning* Plaintiffs are not members of the *Rule 23(b)(3)* Class (the "Settlement Class").⁶ At the Court's direction, class counsel for the *Rule 23(b)(3)* Class ("Class Counsel") filed a letter on March 19, 2024, regarding Class Counsel's position on certain merchants' status as members of the Settlement Class.⁷ Square, Intuit, and *Lanning* Plaintiffs responded to Class Counsel's letter on March 22, 2024.⁸ Defendants responded to Square's,

Docket Entry No. 9062; Pl. Intuit's Resp. to Defs.' 56.1 ("Intuit 56.1 Resp."), Docket Entry No. 9063; Pl. Intuit's Resp. to Defs.' Counter 56.1, Docket Entry No. 9090.)

⁵(*Lanning* Pls.' Cross-Mot. for Summ. J. ("*Lanning* Mot."), Docket Entry No. 9070; *Lanning* Pls.' Mem. in Supp. of *Lanning* Mot. ("*Lanning* Mem."), Docket Entry No. 9072; *Lanning* Pls.' Reply in Supp. of Cross-Mot. for Partial Summ. J. ("*Lanning* Reply"), Docket Entry No. 9094; *Lanning* Pls.' R. 56.1 Stmt., Docket Entry No. 9073; *Lanning* Pls.' Resp. to Defs.' Counter 56.1, Docket Entry No. 9095.)

⁶Square "joined" the *Lanning* Plaintiffs' motion and filed a memorandum in support of their motion. (See Square Mem.)

⁷(Letter from Class Counsel re: Order dated Mar. 13, 2024 ("*Class Counsel* Letter"), Docket Entry No. 9158.)

⁸(Pl. Square's Resp. to Class Counsel Letter, Docket Entry No. 9176; Pl. Intuit's Resp. to Class Counsel Letter, Docket Entry No. 9163; *Lanning* Pls.' Resp. to Class Counsel Letter, Docket Entry No. 9164.)

Intuit's and *Lanning* Plaintiffs' letters on March 26, 2024.⁹

For the reasons discussed below, the Court grants Defendants' motion to enforce the settlement agreement and denies Intuit's and the *Lanning* Plaintiffs' cross-motions for partial summary judgment.

I. Background

The Court assumes familiarity with the facts and extensive procedural history as set forth in prior decisions. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207 (E.D.N.Y. 2013) (*Interchange Fees I*), rev'd and vacated, 827 F.3d 223 (2d Cir. 2016) (*Interchange Fees II*); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11 (E.D.N.Y. 2019) (*Interchange Fees III*); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 714 F. Supp. 3d 65, 2024 U.S. Dist. LEXIS 13670, 2024 WL 278565 (E.D.N.Y. Jan. 8, 2024) (*Interchange Fees IV*); *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, No. 05-MD-1720, 2024 U.S. Dist. LEXIS 41269, 2024 WL 1014159 (E.D.N.Y. Feb. 22, 2024) (*Interchange Fees V*).

⁹(Defs.' Resp. to Mar. 22, 2024 Letters Filed by Intuit, Square & Lanning Pls., Docket Entry No. 9182.)

a. Procedural history

i. Procedural history of the Rule 23(b)(3) Class

In October of 2005, several complaints asserting similar antitrust claims against Visa, Mastercard, and various issuing banks were consolidated for pretrial purposes and transferred to the Eastern District of New York, where they were joined by other similar cases. *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-MD-1720, 2008 U.S. Dist. LEXIS 1369, 2008 WL 115104, at *1 (E.D.N.Y. Jan. 8, 2008). The consolidated cases included both class actions and individual actions. *Id.* In April of 2006, plaintiffs in the putative class actions ("Class Plaintiffs") filed a consolidated amended class complaint that defined two classes: one seeking damages and the other seeking equitable relief. 2008 U.S. Dist. LEXIS 1369, [WL] at *1-2. In November of 2012, the Court provisionally certified a class and preliminarily approved a class settlement agreement between the Class Plaintiffs and Defendants. *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-MD-1720, 2012 WL 12929536, at *1-2 (E.D.N.Y. Nov. 27, 2012). In 2013, the Court approved the settlement, *Interchange Fees I*, 986 F. Supp. 2d at 241, but, in 2016, the Second Circuit vacated certification of the class and reversed

approval of the settlement, *Interchange Fees II*, 827 F.3d at 240.¹⁰

In November of 2016, the Court appointed counsel to two putative classes under *Rule 23(b)(2)* (the "Equitable Relief Class") and *Rule 23(b)(3)* (the "Damages Class"). *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-MD-1720, 2016 U.S. Dist. LEXIS 205692, 2016 WL 8138988, at *1 (E.D.N.Y. Nov. 30, 2016). In December of 2019, the Court granted final approval to the Settlement Agreement between Defendants and the Damages Class. *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-MD-1720, 2019 U.S. Dist. LEXIS 217583, 2019 WL 6875472, at *36 (E.D.N.Y. Dec. 16, 2019). The Settlement Agreement defines the Damages Class as "all persons, businesses, and other entities that have accepted any Visa-Branded Cards and/or Mastercard- Branded Cards in the United States at any time from January 1, 2004 to the Settlement Preliminary Approval Date [of January 24, 2010 [sic]]." (Settlement Agreement ¶ 4, annexed to *Rule 23(b)(3)* Class Pls.' Mot. for Class Settlement Preliminary Approval as Ex. 1, Docket Entry No. 7257-2.) The Settlement Agreement further provides that each class member who files a claim will

¹⁰The case was reassigned from Judge John Gleeson to the undersigned on December 17, 2014. (Order Reassigning Case, Docket Entry No. 6359.)

receive a *pro rata* share of the settlement fund "in accordance with the relative economic interests of the [class member] as measured by the Interchange Fee amounts attributable to their Visa-and Mastercard-Branded Card transactions during the Class Period." (*Id.* § I-2.) In exchange, each class member would release claims "arising out of or relating to" any conduct or acts that were or could have been alleged in the litigation. (*Id.* ¶ 31(a).)

Before final approval of the Settlement Agreement, the Court received objections from a group of entities that own or operate gas stations and convenience stores that sell petroleum products produced and branded by major oil refiners such as Shell and ConocoPhillips (collectively, the "Branded Operators"). *In re Payment Card*, 2019 U.S. Dist. LEXIS 217583, 2019 WL 6875472, at *5. The Branded Operators expressed concern that some portion of them would be excluded from the Settlement Class due to separately negotiated agreements entered into by the major oil suppliers and brands themselves. *Id.* Among the Branded Operators who objected were Fikes Wholesale, Inc., Midwest Petroleum Company, and Slidell Oil Company, LLC (collectively, the "Fikes Wholesale Objectors"), who "own and operate dozens of gas stations and convenience stores" and argued that "they are entities that accepted Visa-and MasterCard-branded cards at their stores and paid

the alleged overcharges; therefore, they are quintessential settlement class members." (Obj. to Class Action Settlement filed by Fikes Wholesale Objectors ("Fikes Wholesale Obj.") 1, Docket Entry No. 7559.) In their view, "[t]he settlement and notice [could] be read to advise both Branded Operators and Oil Brands that they are proper claimants to the same portion of settlement funds corresponding to the same transactions." (*Id.* at 12.)

The Court interpreted the Branded Operators' challenge as one under *Rule 23(a)* for "ascertainability" of the class definition, and concluded that "[t]he term 'accepts' is objective enough by its plain English usage to satisfy the ascertainability requirement." *In re Payment Card, 2019 U.S. Dist. LEXIS 217583, 2019 WL 6875472, at *30-31; see also Fed. R. Civ. P. 23(a)*. The Court agreed that "disputes will inevitably arise," and that "proof of who holds a claim may ultimately need to be analyzed during a claims administration process," but held that this was "not a sufficient basis to reject class certification," especially where "the class definition is also objectively guided by federal antitrust standards." *In re Payment Card, 2019 U.S. Dist. LEXIS 217583, 2019 WL 6875472, at *31*. Accordingly, the Court held that the class definition was objectively defined, and granted certification for

the purposes of a settlement class. *2019 U.S. Dist. LEXIS 217583, [WL] at *32.*

In March of 2023, the Second Circuit affirmed in all material respects this Court's decision certifying the Settlement Class and approving the Settlement Agreement. *Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*, 62 F.4th 704, 727 (2d Cir. 2023). In relevant part, the court affirmed that the class was sufficiently ascertainable, because "[t]he only relevant inquiry is whether determinations as to class membership are 'objectively possible.'" *Id. at 717*. The Second Circuit further affirmed this Court's decision to refer any disputes over class membership to a special master, subject to *de novo* review by this Court. *Id. at 719*.

In July of 2023, Square filed a complaint in this District against Visa and Mastercard asserting violations of the antitrust laws. (See Compl., *Block, Inc. v. Visa, Inc.*, No. 23-CV-5377 (E.D.N.Y. July 14, 2023).) Previously, in February of 2021, Intuit filed a complaint in the Northern District of California against Visa and Mastercard asserting violations of the antitrust laws. (Compl., *Intuit, Inc. v. Visa Inc.*, No. 21-CV-1175 (E.D.N.Y. Feb. 19, 2021).) Intuit's action was transferred to this Court in March of 2021, where it was consolidated with *In re Payment Card and Merchant Discount Antitrust Litigation*. (See Order Transferring Case dated Mar. 5, 2021, *Intuit*, No. 21-CV-1175 (E.D.N.Y. Mar. 5, 2021).) Both Square

and Intuit timely opted out of the *Rule 23(b)(3)* Settlement Class.¹¹ (See Intuit Opt-Out Letter dated July 23, 2019, annexed to Decl. of Adam B. Wolfson ("Wolfson Decl.") as IPX 14, Docket Entry No. 9065-8; Square Opt-Out Letter dated July 19, 2019, annexed to Decl. of Marc L. Greenwald ("Greenwald Decl.") as Ex. S16, Docket Entry No. 9069-16.)

b. Factual overview of the payment facilitators

Typically, merchants who wish to accept payment cards enter into agreements with acquiring banks ("Acquirers").¹² Acquirers facilitate merchants' acceptance of payment cards by, among other things, providing the hardware necessary to accept payment cards, transmitting payment information across the payment card network (*e.g.*, Visa, Mastercard, American Express, or Discover), and settling funds

¹¹The deadline to opt out of the Rule 23(b)(3) Class was July 23, 2019. See *In re Payment Card*, 2019 U.S. Dist. LEXIS 217583, 2019 WL 6875472, at *5; (see also Order Approving Preliminary Settlement dated Jan. 24, 2019 ¶ 16, Docket Entry No. 7361 ("[A]ny member of the Rule 23(b)(3) Settlement Class that does not wish to participate in the Rule 23(b)(3) Settlement Class shall have until one hundred eighty days after the Court's entry of this Rule 23(b)(3) Settlement Preliminary Order — *i.e.*, [until July 23, 2019] — to submit a request to become an Opt Out and be excluded from the Rule 23(b)(3) Settlement Class.")).

¹²The background provided in this section is for the benefit of the reader and is drawn from the parties' briefs, Rule 56.1 statements, and expert reports, and from the Court's prior decisions. It is not relied upon by the Court in deciding the motions.

received on behalf of merchants from issuing banks ("Issuers"). For these services, merchants pay a fee known as the "merchant discount fee" or "merchant discount," which is typically a per-transaction fee that includes the full amount of any applicable interchange fees and network fees, in addition to the Acquirer's own fees. *See generally Interchange Fees V*, 2024 U.S. Dist. LEXIS 41269, 2024 WL 1014159, at *4-5.

Other merchants, typically small-and medium-sized businesses, may not want to contract directly with Acquirers to accept payment cards. For these merchants ("Sellers"), entities such as Square and Intuit ("Payment Facilitators") provide another option.¹³ Square, for example, provides Sellers with its white, square card readers that enable cardholders to "insert, swipe, or tap" their payment cards when making purchases from Sellers. Square maintains contracts with two Acquirers to acquire transactions on behalf of Sellers, and serves as an intermediary by sending transaction information to an Acquirer who, in turn, sends the transaction information across the payment card network. Square also settles funds for Sellers that it receives from Issuers via its accounts at its Acquirers. Visa's and Mastercard's rules describe

¹³The Court refers to merchants who utilize the services of Square or Intuit as "Sellers" to distinguish them from the merchants who contract directly with Acquirers for card-acceptance

Square and Intuit as "Payment Facilitators" or "PayFacs." Intuit's payment facilitation services operate similarly, although primarily for Sellers who accept payment cards for online purchases.¹⁴

II. Discussion

a. Standards of review

i. Motion to enforce a settlement agreement

"A settlement agreement is a contract that is interpreted according to general principles of contract law." *Contant v. AMA Cap., LLC*, 66 F.4th 59, 66 (2d Cir. 2023) (quoting *Omega Eng'g, Inc. v. Omega, S.A.*, 432 F.3d 437, 443 (2d Cir. 2005)); see also *In re World Trade Ctr. Disaster Site Litig.*, 754 F.3d 114, 121 (2d Cir. 2014) (*In re WTC*) (citing *Collins v. Harrison-Bode*, 303 F.3d 429, 433 (2d Cir. 2002)). As a question of contract law, the court sits in diversity jurisdiction and "must apply the choice of law rules of the state in which it is located."¹⁵ *Benicorp Ins. Co. v. Nat'l Med. Health Card Sys.*, 447 F. Supp. 2d 329, 335 (S.D.N.Y. 2006) (citing *Schwimmer v. Allstate Ins. Co.*, 176 F.3d

¹⁴Consistent with Intuit's description of the transactions it facilitates, the Court refers to such transactions as Intuit's "PayFac transactions." (See generally Intuit Mem.)

¹⁵The parties do not dispute that the Settlement Agreement provides that it "shall be governed, construed, enforced, and administered in accordance with the laws of the State of New York without reference to its conflict of laws principles." (Settlement Agreement ¶ 79.)

648, 650 (2d Cir. 1999)); see also *Omega Eng'g*, 432 F.3d at 443 (applying "the substantive law of the forum state" to interpretation of settlement agreement); *Waldman ex rel. Elliot Waldman Pension Tr. v. Riedinger*, 423 F.3d 145 (2d Cir. 2005) (applying New York law to dispute over interpretation of settlement agreement);. In the context of enforcing settlement agreements, a court is empowered to find the facts necessary to determine the intent of the parties. *Serby v. First Alert, Inc.*, 664 F. App'x 105, 108-09 (2d Cir. 2016), as amended (Dec. 22, 2016) (finding term in settlement agreement ambiguous and remanding to district court "to consider and weigh the parties' extrinsic evidence as to the meaning of the" ambiguous term); *Collins*, 303 F.3d at 433 (finding term in settlement agreement ambiguous and remanding "for the trial court to consider and weigh extrinsic evidence to determine what the parties intended" (citing *Seiden Assocs., Inc. v. ANC Holdings, Inc.*, 959 F.2d 425, 430 (2d Cir. 1992))).

ii. Summary judgment

Summary judgment is proper only when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*; *Radwan v. Manuel*, 55 F.4th 101, 113 (2d Cir. 2022) (quoting *Fed. R. Civ. P. 56(a)*). The court must "constru[e] the evidence in the light most

favorable to the nonmoving party," *Radwan*, 55 F.4th at 113 (alteration in original) (quoting *Kuebel v. Black & Decker Inc.*, 643 F.3d 352, 358 (2d Cir. 2011)), and "resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought," *Koral v. Saunders*, 36 F.4th 400, 408 (2d Cir. 2022) (quoting *Terry v. Ashcroft*, 336 F.3d 128, 137 (2d Cir. 2003)). The role of the court "is not to resolve disputed questions of fact but only to determine whether, as to any material issue, a genuine factual dispute exists." *Kee v. City of New York*, 12 F.4th 150, 167 (2d Cir. 2021) (quoting *Kaytor v. Elec. Boat Corp.*, 609 F.3d 537, 545 (2d Cir. 2010)). A genuine issue of fact exists when there is sufficient "evidence on which the jury could reasonably find for the [nonmoving party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The "mere existence of a scintilla of evidence" is not sufficient to defeat summary judgment. *Id.* The court's function is to decide whether, "after resolving all ambiguities and drawing all inferences in favor of the nonmovant, a reasonable jury could return a verdict for the nonmovant." *Miller v. New York State Police*, No. 20-3976, 2022 U.S. App. LEXIS 10354, 2022 WL 1133010, at *1 (2d Cir. Apr. 18, 2022) (first citing *Anderson*, 477 U.S. at 248; and then citing *Garcia v. Hartford Police Dep't*, 706 F.3d 120, 127, 129 (2d Cir.

2013)). The moving party, however, need not *prove* a negative; rather, where "the burden of proof at trial would fall on the nonmoving party, the moving party 'can shift the initial burden by pointing to a lack of evidence to go to the trier of fact on an essential element of the nonmovant's claim.'" *McKinney v. City of Middletown*, 49 F.4th 730, 738 (2d Cir. 2022) (quoting *Jaffer v. Hirji*, 887 F.3d 111, 114 (2d Cir. 2018)); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) ("[W]e find no express or implied requirement in *Rule 56* that the moving party support its motion with affidavits or other materials *negating* the opponent's claim."); *El-Nahal v. Yassky*, 835 F.3d 248, 252 (2d Cir. 2016) ("[T]he movant's burden will be satisfied if he can point to an absence of evidence to support an essential element of the nonmoving party's claim." (quoting *Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir. 1995))).

b. Square and Intuit are not members of the Settlement Class

Defendants argue that Square and Intuit did not "accept" payment cards and are therefore not members of the Settlement Class. (Def.'s Mem.) Defendants offer evidence that Sellers, rather than Square or Intuit, "accepted" payment cards and are

thus in the Settlement Class.¹⁶ (*Id.* at 4-6.) In support, Defendants note that Square's and Intuit's merchant agreements specify that Sellers are the entities accepting payment cards. (*Id.* at 2 n.2 ("You [*i.e.*, the Seller] agree to accept all valid credit and debit card types and brands properly presented by a payor or cardholder." (quoting Intuit Merchant Agreement § N, annexed to Decl. of Rosemary Szanyi ("Szanyi Decl.") as Ex. 1, Docket Entry No. 9059-1)); *see also id.* ("Square is a payment facilitator that allows you to accept [c]ards from customers for the payment for goods and services." (quoting Square Payment Terms § 1, annexed to Szanyi Decl. as Ex. 6, Docket Entry

¹⁶Defendants also make various arguments relating to Square's and Intuit's statuses as indirect purchasers. They contend that Acquirers are the only direct purchasers in the payment chain, but concede that they have waived this argument for purposes of reaching a settlement. (Defs.' Mem 3 ("[A]ll entities other than acquiring banks... are indirect purchasers that are barred from seeking damages under federal law. Defendants compromised their indirect-purchaser defense solely to reach a settlement with the millions of class merchants " (emphasis omitted)); *see also id.* at 21 ("If Intuit and Square were to succeed in claiming the 'direct purchaser' mantle, the damages lawsuits brought by opt-out merchants that used payment facilitators and other intermediaries would necessarily be barred under Illinois Brick.")) Defendants contend that their motion "does not turn on which entities are direct or indirect purchasers under federal antitrust standing law." (*Id.* at 2.) Instead, "[t]he relevant inquiry is whether merchants serviced by payment facilitators are members of the Rule 23(b)(3) class and subject to the release, which can be determined by looking at the language of the Settlement Agreement and the [Third Amended Complaint] alone." (*Id.*)

No. 9059-6)).) Defendants also point to facts suggesting that Sellers are the parties accepting payment cards:

When Square serves as a payment facilitator, the consumer "presents a payment card" to the merchant (not to Square). The consumer then uses a point-of-sale device at the merchant (not Square) to "insert, swipe, or tap [the] payment card to make purchases from" the merchant. And the merchant (not Square) may then provide the consumer with a receipt. By contrast, Square describes itself a " *making the arrangements* to accept cards," "accepting payment cards for all card transactions *it facilitates* ," and accept[ing] payment cards *on behalf of* " its merchant customers.

(Defs.' Reply 9-10 (citations omitted).) Defendants note that how Sellers "accept" cards is no different from how a merchant who has contracted directly with an Acquirer, such as The Home Depot, accepts cards. (*Id.* at 9.)

Second, Defendants point to Square's and Intuit's "own contracts with merchant customers specify[ing] that they act as the merchant[s]' 'payments *agent* ,' or ' *agent* for payment processing.'" (Defs.' Mem. 2 (citations omitted).) Defendants contend that "payment facilitators act as the agents of their merchant customers," and that "[t]he contracts under which Intuit and Square operate expressly

document this agency relationship." (*Id.* at 8.) In addition, Intuit's contract with its Acquirer requires it to [TEXT REDACTED BY THE COURT] (*Id.* at 9 (citation omitted).) Defendants argue that, "[u]nder agency law principles, claims arising from the payment transactions that are the subject of these agency relationships belong to the merchant customers as principals, and they alone can decide whether to pursue or release the claims." (Defs.' Reply 10.) Defendants describe the flow of funds from Issuer, to Acquirer, to Payment Facilitator, and, finally, to the Seller's bank account and assert that "[c]laims related to any aspect of this flow of funds, including interchange, arise from Square's and Intuit's activities as agents, and thus belong to their merchant customers as principals."¹⁷ (*Id.* at 11.)

¹⁷Defendants also argue that Square and Intuit have inverted the principal—agent relationship. For example, Defendants contend that "Square has never been given the authority to opt its merchant customers out of a class settlement," because "Square's authority as [an] agent is contractually limited to 'payment processing.'" (Defs.' Reply 13.) They argue that "[a]llowing Square to effectuate a group opt-out of its millions of small-and medium-sized merchant customers would 'infringe on the due process rights of the individual class members, who have the right to intelligently and individually choose whether to continue in a suit as class members.'" (*Id.* (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1024 (9th Cir. 1998)).) The Court does not address these arguments because, for the reasons discussed below, the Court finds that Sellers "accepted" payment cards, and, thus, the Sellers' status as class members does not turn on any agency relationship with Square or Intuit.

Square argues that the Settlement Agreement did not limit the settlement class to "merchants," but rather was more broadly defined to include "all persons, business, and entities' that accepted payment cards." (Square Mem. 3.) Square argues that it "is the entity that *legally and operationally* accept[ed]" payment cards. (*Id.* at 16 (emphasis added).) Square asserts that it "ma[de] the arrangements [with Acquirers] to accept cards itself for its customers," and argues that every Visa or Mastercard transaction with a Square Seller is possible "only because *Square* entered into agreements with Visa, Mastercard, and their member banks," and because Square is the entity paying for card acceptance for those transactions. (*Id.* at 2-3.) Accordingly, Square contends that "[t]he plain language of the Settlement Agreement... straightforwardly covers Square which 'accepted' Visa/Mastercard branded cards." (*Id.* at 14.) Square's position is that Square "accepted" payment cards because it "handles every aspect of card acceptance." (*Id.* at 16.) Second, Square argues that Sellers are not direct purchasers of card-acceptance services because Square is listed as the "merchant of record" for all transactions at issue in which a Seller used Square's platform to facilitate a transaction. (*Id.* at 19.) Square

points to the contracts that Square had with [TEXT REDACTED BY THE COURT].¹⁸ (*Id.* at 19-20.)

Intuit argues that it seeks to pursue claims for which it — not its customer "submerchants" — has direct purchaser standing. (Intuit Mem. 10-15.) Like Square, Intuit argues that it was the "direct and only payor" of interchange fees for all of its PayFac transactions. (*Id.* at 11-12.) It argues that, pursuant to its contracts with Acquirers, Intuit was the only entity with a "full merchant account" with the

¹⁸In addition, Square argues that even if Square was excluded from the Settlement Agreement's class definition, as Defendants argue, the Sellers did not have the authority to release Square's antitrust damages claims. In support, Square points to cases suggesting that assignment of direct purchaser antitrust claims must be "express" because of the "highly speculative inquiries" required to determine the extent of injury. (Square Mem. 20-21 (citing *DNAML Pty, Ltd. v. Apple Inc.*, No. 13-CV-6516, 2015 U.S. Dist. LEXIS 168245, 2015 WL 9077075, at *3 (S.D.N.Y. Dec. 16, 2015)).) Intuit argues similarly, asserting that even if the "Intuit Submerchants" were settlement class members, they had no authority to release Intuit's direct purchaser claims because these claims were not assigned to these merchants. (Intuit Mem. 20-23.) The Court finds these arguments to be circular: Square argues that the Sellers could not have released Square's claims because Square did not assign its direct purchaser claims to the Sellers, but this assumes that Square was, in fact, the direct purchaser for the purpose of these transactions. The Court construes Square's argument as claiming that Square preserved its right to bring these direct purchaser claims by opting out of the Settlement Class, subject to a judicial determination that it is, in fact, a direct purchaser of card-acceptance services. However, the Court declines to address these arguments, for the same reason discussed in note 17, *supra*, because the Court does not rely on any agency relationship to conclude that Sellers are the entities that "accepted" payment cards.

Acquirer, meaning it was the only entity legally responsible for paying interchange fees on those transactions. (*Id.*) Intuit contends that "the charge[s] Intuit debits from [its Sellers'] accounts is higher than interchange, to account for the other portions of the PayFac service Intuit provided, as well as all of its various costs." (*Id.* at 12.) Intuit also argues that the Second Circuit's decision in *Paycom Billing Servs., Inc. v. Mastercard Int'l, Inc.*, 467 F.3d 283 (2d Cir. 2006), "strongly demonstrates why antitrust standing exists" in Intuit's case. (*Id.* at 15-18.) Although the Second Circuit in *Paycom* found that the plaintiff payment processor was an indirect purchaser of chargeback fees, Intuit argues that this conclusion was based on the specific conspiracy alleged — that Mastercard and issuing banks imposed chargeback fees on acquirers who were not alleged to be part of the conspiracy. (*Id.* at 17.) In contrast, Intuit argues its agreements with its Acquirers were "explicit" that Intuit is required to pay the interchange fees set by Defendants, showing why this case is different from *Paycom*. (*Id.*)

For the following reasons, the Court grants Defendants' motion to enforce the Settlement Agreement and finds that the Sellers (*i.e.*, Square's and Intuit's merchant-customers) "accepted" payment cards and are therefore members of the *Rule 23(b)(3)* Class.

i. The term "accepted" as used in the Settlement Agreement is ambiguous

The role of the Court is to construe the Settlement Agreement, as a contract, "in accordance with the parties' intent."¹⁹ *In re WTC*, 754 F.3d at 122 (quoting *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569, 780 N.E.2d 166, 750 N.Y.S.2d 565 (2002)); *Williams v. Buffalo Pub. Sch.*, No. 22-2810, 2024 U.S. App. LEXIS 8061, 2024 WL 1460134, at *1 (2d Cir. Apr. 4, 2024) ([I]t is well-settled that a court's role 'is to ascertain the intention of the parties at the time they entered into the contract.'" (quoting *Evans v. Famous Music Corp.*, 1 N.Y.3d 452, 458, 807 N.E.2d 869, 775 N.Y.S.2d 757 (2004)). "The best evidence of what the parties intended 'is what they say in their writing.'" *In re WTC*, 754 F.3d at 122 (quoting *Greenfield*, 98 N.Y.2d at 569). "[T]he key inquiry at the initial stage of interpreting a contract' is therefore 'whether it is ambiguous with respect to the issue

¹⁹The Court has jurisdiction to decide Defendants' motion to enforce the Settlement Agreement because it retained jurisdiction pursuant to the Clerk's entry of Judgment on December 20, 2019. (See Clerk's J. ¶¶ 18-20, Docket Entry No. 7832); see also *Cameron Int'l Trading Co. v. Hawk Imps., Inc.*, 501 F. App'x 36, 37-38 (2d Cir. 2012) (concluding that the district court retained jurisdiction to enforce the settlement agreement because it "so-ordered" the settlement agreement "which expressly provided for continued exclusive federal jurisdiction" (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 380, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994))).

disputed by the parties." *Glob. Reins. Corp. of Am. v. Century Indem. Co.*, 22 F.4th 83, 94 (2d Cir. 2021) (alteration in original) (quoting *Bank of N.Y. v. First Millennium, Inc.*, 607 F.3d 905, 914 (2d Cir. 2010)); *Gary Friedrich Enters. v. Marvel Characters, Inc.*, 716 F.3d 302, 313 (2d Cir. 2013) ("At the outset, the court must determine whether the language the parties have chosen is ambiguous, after giving all 'words and phrases... their plain meaning.'" (alteration in original and citations omitted)).

"A contract is unambiguous if its language has 'a definite and precise meaning,' providing 'no reasonable basis for a difference of opinion.'" *Revitalizing Auto Communities Env't Response Tr. v. Nat'l Grid USA*, 92 F.4th 415, 441 (2d Cir. 2024) (quoting *Greenfield*, 98 N.Y.2d at 569); *Lockheed Martin Corp. v. Retail Holdings, N.V.*, 639 F.3d 63, 69 (2d Cir. 2011) (recognizing that a contract provision is unambiguous "if the language it uses has a definite and precise meaning, as to which there is no reasonable basis for a difference of opinion" (citing *White v. Continental Cas. Co.*, 9 N.Y.3d 264, 267, 878 N.E.2d 1019, 848 N.Y.S.2d 603 (2007))). "The language of a contract is not made ambiguous simply because the parties urge different interpretations." *Glob. Reins.*, 22 F.4th at 94 (quoting *Seiden Assocs.*, 959 F.2d at 428). Rather, a contract term is ambiguous if it "suggest[s] more than one meaning when viewed

objectively by a reasonably intelligent person." *In re WTC*, 754 F.3d at 122 (quoting *L. Debenture Tr. Co. of N.Y. v. Maverick Tube Corp.*, 595 F.3d 458, 466 (2d Cir. 2010)); see also *Glob. Reins.*, 22 F.4th at 94 ("[A]n ambiguity exists where the... contract could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." (second alteration in original and internal quotation marks omitted) (quoting *Morgan Stanley Grp. Inc. v. New Eng. Ins. Co.*, 225 F.3d 270, 275 (2d Cir. 2000))); *Lockheed Martin*, 639 F.3d at 69 ("[T]he language of a contract is ambiguous if it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement." (citing *Krumme v. WestPoint Stevens Inc.*, 238 F.3d 133, 138-39 (2d Cir. 2000))). In determining whether a contract provision is unambiguous, a court must consider the contract as a whole. See *Glob. Reins.*, 22 F.4th at 95 ("When ascertaining the meaning of contractual language, 'it is important for the court to read the integrated agreement as a whole.'" (internal quotation marks omitted) (quoting *Lockheed Martin*, 639 F.3d at 69)). "If the document as a whole 'makes clear the parties' over-all intention,

courts examining isolated provisions should then choose that construction which will carry out the plain purpose and object of the agreement." *Id.* (quoting *Lockheed Martin*, 639 F.3d at 69); see also *Westmoreland Coal Co. v. Entech, Inc.*, 100 N.Y.2d 352, 358, 794 N.E.2d 667, 763 N.Y.S.2d 525 (2003) (stating contracts should be read "as a harmonious and integrated whole" and each part should be "interpreted with reference to the whole... to give effect to its general purpose" (quoting *Empire Properties Corp. v. Manufacturers Trust Co.*, 288 N.Y. 242, 248, 43 N.E.2d 25 (1942))).

The Settlement Agreement provides that the parties intended the Settlement Class to consist of "all persons, businesses, and other entities that have *accepted* any Visa-Branded Cards and/or Mastercard-Branded Cards in the United States at any time from January 1, 2004 to the Settlement Preliminary Approval Date [of January 24, 2010 [sic]]." (Settlement Agreement ¶ 4 (emphasis added).) The parties' only dispute is as to the meaning of the term "accepted," and the term is not defined in the Settlement Agreement, nor can its meaning be ascertained by looking within the "four corners" of the agreement. See *Ezrasons, Inc. v. Travelers Indem. Co.*, 89 F.4th 388, 395 (2d Cir. 2023) ("[I]n assessing whether a contract is ambiguous, a court looks within only the four corners of the document."). The Court

finds that the term "accepted" is ambiguous because Sellers, Square, and Intuit can all credibly claim to have "accepted" payment cards.²⁰ The term is therefore susceptible to more than one reasonable interpretation. *Id.* ("Ambiguity exists 'where [a contract's] terms are subject to more than one reasonable interpretation.'" (alteration in original) (quoting *Universal Am. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 25 N.Y.3d 675, 680, 16 N.Y.S.3d 21, 37 N.E.3d 78 (2015))); accord *Fikes*, 62 F.4th at 715 ("The word 'accepted' creates ambiguity.").²¹ Accordingly, the Court considers extrinsic evidence to determine the intent of the parties. *Revitalizing Auto Communities*, 92 F.4th at 442 ("If a contract is ambiguous, extrinsic evidence of the parties' intent may be considered." (citing *Greenfield*, 98 N.Y.2d at 569)); *Ezrasons*, 89 F.4th at 396 ("[I]f the contract is

²⁰Square, Intuit, and the Lanning Plaintiffs all claim to have accepted payment cards. Square argues, for example, that "Square is the entity that legally and operationally accepts the payment card." (Square Mem. 16 (emphasis added).) Hayley Lanning similarly declares that she "operate[s] a cosmetology business and accept[s] all major credit and debit cards." (Decl. of Hayley Lanning ("Lanning Decl.") ¶ 2, Docket Entry No. 9076.)

²¹See *Fikes*, 62 F.4th at 715-16 ("Both the franchisors and the franchisees claim to have 'accepted' the payment card from the customers at the service stations. The franchisees claim to have 'accepted' Visa and/or MasterCard from consumers paying for the gasoline dispensed at their stations, while the franchisors claim to have 'accepted' the payment cards by, inter alia, providing operating and processing services on the same set of transactions.").

ambiguous, then relevant extrinsic evidence should be admitted and considered by the factfinder to resolve the ambiguity." (citations omitted)). Finally, in the context of enforcing settlement agreements, the Court is empowered to find the facts necessary to determine the intent of the parties. *Serby*, 664 F. App'x at 108-09 (finding term in settlement agreement ambiguous and remanding to district court "to consider and weigh the parties' extrinsic evidence as to the meaning of the" ambiguous term); *Collins*, 303 F.3d at 433 (finding term in settlement agreement ambiguous and remanding "for the trial court to consider and weigh extrinsic evidence to determine what the parties intended" (citing *Seiden Assocs.*, 959 F.2d at 430)).

ii. The term "accepted" is "guided by federal antitrust standards"

The parties appear to agree that as between any particular Seller and Square or Intuit, only one entity may be in the Settlement Class for a given transaction, and the Second Circuit has confirmed that this is a dispute about class membership. *See Fikes*, 62 F.4th at 717 ("The dispute is not over which group of class members will get the recovery; the dispute is over which claimants are within the class. Whoever 'accepted' the payment cards is by definition in the class, gets compensation, and is bound by the release; an entity that did not accept the payment is

by definition excluded from the class and is not bound by the settlement."); *see also* Br. of Defendants-Appellees 24, *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 20-339 (2d Cir. Oct. 15, 2020), Docket Entry No. 209 ("[T]here has never been a dispute that, consistent with federal law, only one entity can recover in the settlement for any given transaction."). This understanding was confirmed by Class Counsel at the final approval hearing. *See In re Payment Card*, 2019 U.S. Dist. LEXIS 217583, 2019 WL 6875472, at *31 ("Class Counsel has stated that in line with federal antitrust law, they represent 'only... the direct purchaser,' and not every entity in the payment chain." (citation omitted)). The Second Circuit has also cited with approval this Court's determination that the meaning of the term "accepted" is "guided by federal antitrust standards." *Fikes*, 62 F.4th at 716 (citation omitted). The parties do not appear to dispute this understanding. Accordingly, in ascertaining the parties' intent and the meaning of the term "accepted," the Court is guided by the Supreme Court's decision in *Illinois Brick* and its progeny, which make clear that only one entity in a chain of transactions can have antitrust standing — the direct purchaser.²² Thus, the Court is

²²In *Illinois Brick Co. v. Illinois*, the Supreme Court limited standing to those who are the "direct purchasers" from antitrust violators. 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977). Recently, in *Apple Inc. v. Pepper*, the Supreme Court reaffirmed

guided by *Illinois Brick* to conclude that only one entity in the payment chain can be deemed to have

the validity of the *Illinois Brick* rule. 587 U.S., 139 S. Ct. 1514, 1519-21, 203 L. Ed. 2d 802 (2019). In *Illinois Brick*, the State of Illinois and a coalition of local government entities asserted antitrust claims against *Illinois Brick* and other manufacturers alleging a price-fixing conspiracy that had artificially and unlawfully inflated the prices of concrete blocks used in projects funded by the state entities, such as schools and housing developments. 431 U.S. at 726-27. It was undisputed that Illinois and the local governmental entities were not the direct purchasers of concrete block. *Id.* at 726. Rather, the defendants "s[old] the block primarily to masonry contractors, who submit[ted] bids to general contractors for the masonry portions of construction projects. The general contractors in turn submit[ted] bids for these projects to customers such as... the State of Illinois and 700 local governmental entities in the Greater Chicago area." *Id.* Illinois and the local governmental entities were "thus indirect purchasers of concrete block," because the block "passe[d] through two separate levels in the chain of distribution before reaching" the governmental entities. *Id.* The Court held that, as an indirect purchaser, Illinois was barred from recovering from *Illinois Brick*. *Id.* at 728-29. In *Apple*, the Supreme Court decided whether iPhone owners who purchased apps from Apple's "App Store" were direct purchasers of those apps from Apple. 139 S. Ct. at 1518-19. Apple argued that iPhone owners were not direct purchasers from Apple because the app developers set the consumers' purchase price. *Id.* at 1519. The Supreme Court's "straightforward conclusion" was that "under *Illinois Brick*, the iPhone owners were direct purchasers who may sue Apple" because it was "undisputed that the iPhone owners bought the apps directly from Apple." *Id.* at 1520. The Court reiterated that the "bright-line rule of *Illinois Brick*... means that indirect purchasers who are two or more steps removed from the antitrust violator in a distribution chain may not sue." *Id.* at 1521. As an example, "if manufacturer A sells to retailer B, and retailer B sells to consumer C, then C may not sue A. But B may sue A if A is an antitrust violator. And C may sue B if B is an antitrust violator." *Id.* According to the Supreme Court, this is "the straightforward rule of *Illinois Brick*." *Id.*

"accepted" a payment card. This understanding effectuates the intent of the parties in ensuring that, as between competing claimants, only one entity is entitled to make a claim of the settlement fund, which prevents duplicative recovery and further ensures that the Settlement Class is sufficiently ascertainable for purposes of *Rule 23 of the Federal Rules of Civil Procedure*.

iii. The Court finds that Sellers "accepted" payment cards

In finding that Sellers "accepted" payment cards, the Court relies on the undisputed record drawn from the parties' Rule 56.1 statements and other extrinsic evidence in the record, including Square's and Intuit's merchant agreements, Visa's and Mastercard's rules, and declarations of the *Lanning* Plaintiffs.

1. Square's and Intuit's merchant agreements

Square's and Intuit's agreements with their customers reinforce that Sellers "accept" payment cards. Square's Payment Terms provide: "Square is a payment facilitator that allows you to *accept* Cards from customers for the payment for goods and services." (Square Payment Terms § 1 (emphasis added).) Similarly, Intuit's Merchant Agreement provides: "You [Seller] agree to *accept* all valid credit and debit card types and brands properly presented by a payor or cardholder for payment for goods or

services without discrimination." (Intuit Merchant Agreement § N (emphasis added).)

In addition, the way real-world transactions are conducted supports the conclusion that Sellers "accept" payment cards. In the prototypical transaction, the cardholder hands her card to a Seller, who "accepts" it for payment at the point of sale, just as the Seller could have instead accepted cash from a customer.²³ This interpretation of "accept" comports with its plain-English meaning to "take or receive (something offered) willingly." *See Accept*, Oxford English Dictionary, https://www.oed.com/dictionary/accept_v (last modified Mar. 2024). Square and Intuit hold themselves out as enabling Sellers to "accept" payment cards, and admit as much in their own complaints. *See* Compl. ¶ 1, *Block*, No. 23-CV-5377 ("Square is a cohesive commerce ecosystem that helps Sellers (merchants who utilize Square to *accept* payment cards, hereafter 'Sellers') start, run, and grow their businesses, including by enabling Sellers to *accept* card payments, providing reporting and

²³Square effectively concedes as much in its briefing: To accept payment cards, Square provides to its customers point-of-sale services and hardware that facilitate a consumer's ability to insert, swipe, or tap a payment card to make purchases from a Seller.... When a consumer inserts, swipes, or taps a card (or other payment instrument) at a Square Reader, a request for authorization to conduct the transaction is submitted to Square.(Square Mem. 7.)

analytics, and facilitating next-day settlement.") (emphasis added); Compl. ¶ 24(q), *Intuit*, No. 21-CV-1175 ("[Intuit] provides merchant customers the capability to access an electronic payment system and therefore *accept* cards that can transact over the payment system...") (emphasis added).) Square and Intuit cannot now disclaim the plain meaning of a term they have used to induce Sellers to utilize their services.

Thus, contrary to Square's and Intuit's arguments,²⁴ it would strain the meaning of the word "accepted" to interpret it to mean that Square or Intuit "accepts" a payment card, but the Seller "accepts" cash, for two otherwise identical transactions.

2. Visa's rules

Visa's rules classify an entity as either "a Payment Facilitator" or "a Merchant." (Defs.' 56.1 ¶ 10.) Visa's rules provide that:

²⁴Square argues, for example, that "Square is the entity that legally and operationally accepts the payment card." (Square Mem. 16 (emphasis added).) The question, however, is who accepts payment cards as a factual matter. Intuit argues that [TEXT REDACTED BY THE COURT] citins its agreement with [TEXT REDACTED BY THE COURT] (Intuit Mem. 6 (citing Intuit 56.1 ¶¶ 45-46).) Intuit's agreement with [TEXT REDACTED BY THE COURT], however, offers little support for Intuit's claim because the agreement states in various forms that [TEXT REDACTED BY THE COURT] (See, e.g., PayFac Agreement ¶ 1.2, annexed to Peel, of Jennifer Maddux as IPX 1, Docket Entry No. 9064-1 [TEXT REDACTED BY THE COURT]).

An entity that deposits a Transaction, receives settlement from, or contracts with an Acquirer on behalf of a Merchant is classified as a Merchant if all of the following apply: (1) The entity represents itself as selling the goods or services to the Cardholder; (2) [t]he entity uses its name primarily to identify its Merchant Outlet to the Cardholder; and (3) [t]he entity provides recourse to the Cardholder in the event of a dispute. Otherwise, the entity is classified as a Payment Facilitator.

(*Id.* (internal quotation marks omitted).) Square does not dispute this definition, but contends that "an entity can act as both a payment facilitator *and* a merchant." (Square Counter 56.1 f 10.) Square's contention, however, is undermined by Visa's rule providing that an entity cannot simultaneously act as both a payment facilitator and a merchant.²⁵ (*See id.* ("An entity that acts as both a Payment Facilitator

²⁵It is undisputed that Square properly opted out of the Settlement Class for transactions in which it operated as a merchant (e.g., selling terminals and other hardware to its customers); the only disputed transactions are the ones for which Square operated as a Payment Facilitator. Defendants concede that the Settlement Agreement does not cover claims brought by Square and Intuit in their capacities as merchants because they properly opted-out of the Settlement Class for such transactions. (Defs.' Mem. 3 ("To be clear, claims brought by Intuit and Square in their capacities as merchants, i.e., those based on their acceptance of payment cards for products and services that Intuit and Square themselves sell to consumers (such as Turbo Tax products sold by Intuit or payment terminals sold by Square), are not at issue in this motion.").)

and a Merchant must comply with the Payment Facilitator rules when acting as a Payment Facilitator and with Merchant rules when acting as a Merchant.".)

Visa's rules further provide that "a 'Merchant' serviced by a Payment Facilitator is referred to as a 'Sponsored Merchant' and is 'treated as a Merchant of its Payment Facilitator's Acquirer,'" and that a "Sponsored Merchant" is "[a]n entity for which Visa payment services are provided by a Payment Facilitator." (Defs.' 56.1 ¶ 11.) Square does not dispute these facts and agrees that Sellers (*i.e.*, "Sponsored Merchants") are entities for whom Visa payment services are provided by Square. (Square Counter 56.1 ¶ 11.) This rule thus provides that Sellers are regarded as "Merchants" for purposes of other applicable Visa rules. Viewed in conjunction with the rule above describing a "Merchant," the evidence suggests that Sellers accept payment cards because (1) Sellers, not Square, represent themselves as selling the goods or services to cardholders; (2) Sellers use their names to identify themselves to cardholders; and (3) Sellers provide recourse to cardholders in the event of a dispute. (*See* Defs.' 56.1 ¶ 10.)

3. Mastercard's rules

Mastercard's rules operate similarly. For example, Mastercard's rules "define a 'Submerchant'

as a 'merchant that, pursuant to an agreement with a Payment Facilitator, is authorized to accept Cards.'" (Defs.' 56.1 ¶ 13.) Square does not dispute this definition, but notes that Mastercard's rules "define [a] 'Merchant' as 'any... corporation that, pursuant to a Merchant Agreement, agrees to accept Cards.'" (Square Counter 56.1 ¶ 13.) Mastercard's rules further "define a 'Payment Facilitator' as a 'Service Provider' that 'facilitate[s] the acquiring of Transactions by the Acquirer from Submerchants.'" (Defs.' 56.1 ¶ 14.) Taken together, the Mastercard rules provide that Sellers (*i.e.*, "Submerchants") "accept" payment cards pursuant to their agreements with Square and Intuit (*i.e.*, the "Payment Facilitators").

4. *Lanning* Plaintiffs' declarations

Finally, *Lanning* Plaintiffs admit in their declarations that they "accept" payment cards. Hayley Lanning declares, for example, that she "operate[s] a cosmetology business and accept[s] all major credit and debit cards." (Lanning Decl. ¶ 2.) The declarations of the other plaintiffs assert similarly. (*See, e.g.*, Decl. of Dell Fox ¶ 2, Docket Entry No. 9074 ("Dell Fox Jewelry accepts all major credit and debit cards."); Decl. of Glenn Sieverson ¶ 2, Docket Entry No. 9075 ("I operate Andersonville Cryotherapy and Athletic Recovery Center and accept all major credit and debit

cards."); *see also* Decl. of John Saric ¶ 2, Docket Entry No. 9077; Decl. of Maureen Roxberry ¶ 2, Docket Entry No. 9079; Decl. of Norva J. Bennett ¶ 2, Docket Entry No. 9080; Decl. of Pamela Murphy ¶ 2, Docket Entry No. 9081; Decl. of Sara Beth Goldfine Baratz ¶ 2, Docket Entry No. 9082.)

On this record, the Court finds that the Sellers "accepted" payment cards within the meaning intended by the parties at the time they reached the Settlement Agreement. *Williams*, 2024 U.S. App. LEXIS 8061, 2024 WL 1460134, at *1 ("[I]t is well-settled that a court's role is 'to ascertain the intention of the parties at the time they entered into the contract.'" (quoting *Evans*, 1 N.Y.3d at 458)). Accordingly, the Court grants Defendants' motion to enforce the settlement agreement.²⁶

c. Lanning Plaintiffs are members of the Settlement Class

Lanning Plaintiffs cross-move for partial summary judgment, seeking a ruling that they "are not members of the Settlement Class." (See *Lanning* Mot. 2.) The *Lanning* Plaintiffs are a group of merchants who use Square's services to accept payment cards. (*Lanning* Mem. 7.) For the reasons

²⁶The Court declines to address Defendants' motion in the alternative for summary judgment because the Court grants their motion to enforce the settlement. (See Defs.' Mot. 1.)

discussed above, the Court finds that the merchants serviced by Square and Intuit (*i.e.*, Sellers), including the *Lanning* Plaintiffs, are members of the Settlement Class.

Accordingly, the Court denies the *Lanning* Plaintiffs' cross-motion for partial summary judgment.

d. The Court denies Intuit's cross-motion for partial summary judgment

Intuit cross-moves for partial summary judgment as to its antitrust standing to bring claims against Visa and Mastercard based on PayFac transactions, "so that this issue does not crop up unnecessarily later in the case." (Intuit Mem. 2.) In support, Intuit argues that "[t]he factual record is clear that Intuit was the direct and only payor of interchange to the 'antitrust violators' for all of its PayFac transactions." (*Id.* at 11-12 (citation omitted).) Intuit contends that it was "the only entity in PayFac transactions with a full merchant account with the acquirer," that it was "legally responsible to pay interchange," and that it "assumed all risk associated with interchange." (*Id.* at 12.) Intuit argues that Sellers, by contrast, "had no involvement in interchange payments" and that the higher fees they paid to Intuit "account[ed] for the other portions of the PayFac service Intuit provided." (*Id.*)

Intuit also argues that, contrary to Defendants' arguments in "other opt-out cases and the original class cases," Acquirers are neither the direct purchasers nor direct payors of interchange fees. (*Id.* at 12- 15.) In support, Intuit argues that "the *Illinois Brick* rule does not apply 'where the direct purchaser is owned or controlled by its customer,'" (*id.* at 13 (quoting *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 n.16, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)); Intuit Reply 8), nor does it apply "where 'plaintiffs allege that the sellers conspired with intermediates in the distribution chain to fix the price at which the plaintiffs purchased,'" (Intuit Mem. 13 (quoting *Arizona v. Shamrock Foods Co.*, 729 F.2d 1208, 1212 (9th Cir. 1984)); Intuit Reply 6-8). Intuit argues that Acquirers are "the very same banks that unquestionably adopted and promulgated" the rules being challenged "when Visa and Mastercard were associations owned and controlled by their bank members," and, therefore, that at least one of the exceptions to the *Illinois Brick* rule applies. (Intuit Mem. 14-15.)

Defendants argue that Square and Intuit are not the entities that directly pay interchange, network fees, or chargebacks, and that Acquirers are direct purchasers of card-acceptance services. (Defs.' Reply 16-19.) In support, Defendants contend that for each PayFac transaction, "Square's or Intuit's acquirer

pays the issuer of the card the interchange applicable to the transaction," and that the Acquirer likewise "pays network fees to Visa and Mastercard in connection with transactions processed over each network." (*Id.* at 17-18.) Defendants argue that Square and Intuit pay their Acquirers "a fee in connection with the processing services" they provide, and that Square and Intuit are free to "switch [A]cquirers to get better economic terms."²⁷ (*Id.* at 18-19.)

In *Illinois Brick*, the Supreme Court limited standing to bring claims under the Sherman Act to those who are "direct purchasers" from antitrust violators.²⁸ 431 U.S. at 720. Recently, in *Apple Inc. v. Pepper*, the Supreme Court reaffirmed the validity of

²⁷Defendants also argue that "if the Court grants Defendants' motion to enforce [the Settlement Agreement], there is no need to reach Intuit's cross-motion for partial summary judgment." (Defs.' Reply 16.) The Court's conclusion regarding Defendants' motion to enforce the Settlement Agreement, however, relies on an interpretation of who "accepted" payment cards under the Settlement Agreement. Even where such a finding is "guided by federal antitrust standards," *In re Payment Card*, 2019 U.S. Dist. LEXIS 217583, 2019 WL 6875472, at *31, that finding as to the meaning of a disputed contract term is not equivalent to the conclusion that no genuine dispute of fact remains as to the identity of the direct purchaser of card-acceptance services under *Illinois Brick*. The Court therefore addresses Intuit's cross-motion on the merits.

²⁸See *supra* note 22; see also *Interchange Fees V*, 2024 U.S. Dist. LEXIS 41269, 2024 WL 1014159, at *7 & n.14 (collecting cases showing that the *Illinois Brick* direct-purchaser rule has come to be treated by courts as a standing rule).

Illinois Brick 's direct purchaser rule. 587 U.S., 139 S. Ct. 1514, 1519-21, 203 L. Ed. 2d 802 (2019). In setting forth this limiting rule, the Court offered three primary rationales. First, allowing indirect purchasers to recover "would create a serious risk of multiple liability for defendants." *Illinois Brick*, 431 U.S. at 730. Second, "trac[ing] the complex economic adjustments to a change in the cost of a particular factor of production would greatly complicate and reduce the effectiveness of already protracted treble-damages proceedings." *Id.* at 732. Third, the rule would "encourag[e] vigorous private enforcement of the antitrust laws," because "uncertainty of how [any] overcharge would be apportioned among the various plaintiffs... would further reduce the incentive to sue." *Id.* at 745. In ruling on Defendants' motion for summary judgment as to the direct- purchaser status of a group of opt-out Plaintiffs, this Court observed that "while there may be direct and indirect *payors* of interchange and network fees, these fees are components of the price paid for the *purchase* of a service — namely, card-acceptance services."²⁹ *Interchange Fees V*, 2024 U.S. Dist. LEXIS 41269, 2024 WL 1014159, at *7-18. Thus, "[t]he presence of

²⁹See *Interchange Fees V*, 2024 U.S. Dist. LEXIS 41269, 2024 WL 1014159, at *12-13 (explaining why a "direct payor" test "is not an appropriate substitute for the direct purchaser rule"). End of Document

an intermediary does not necessarily mean that the party receiving the benefit of the service is an indirect purchaser of that service." 2024 U.S. Dist. LEXIS 41269, [WL] at *11.

To determine whether Intuit is a direct purchaser, the Court begins with the question of what precisely is being purchased. Consistent with the Court's prior decisions, the relevant product markets are the markets for credit-and debit-card transactions. *See id.*; *Interchange Fees IV*, 2024 U.S. Dist. LEXIS 13670, 2024 WL 278565, at *12.

As detailed above, (*supra* section II.b.iii), the facts before the Court preclude the Court from granting summary judgment in Intuit's favor on the issue of whether it is the direct purchaser of card-acceptance services. Intuit's Merchant Agreement, for example, suggests that Sellers, rather than the Payment Facilitators, are the entities purchasing card-acceptance services. (*See, e.g.*, Intuit Merchant Agreement § N ("You [Seller] agree to *accept* all valid credit and debit card types and brands properly presented by a payor or cardholder for payment for goods or services without discrimination.").) Such language suggests that Sellers are the entities purchasing card-acceptance services, while Intuit merely facilitates the provision of those services. The agreement also suggests that when Intuit helps its merchant-customers, *i.e.*, Sellers, "receive payments

from [their] customers," Intuit acts as the Sellers' "limited payments agent for the purpose of receiving, holding, and settling payments to you pursuant to this Agreement." (*Id.*) This relationship between Intuit and the Sellers is not dissimilar from that between Acquirers and those merchants that do not use Payment Facilitators, as described in the Court's prior decision addressing a similar issue. *See Interchange Fees V*, 2024 U.S. Dist. LEXIS 41269, 2024 WL 1014159, at *16 (observing, before denying summary judgment to Defendants on similar question, that "under one interpretation of the facts, Acquirers are simply facilitating the provision of card-acceptance services to merchants"); 2024 U.S. Dist. LEXIS 41269, [WL] at *17 ("Acquirers, moreover, do not accept credit cards and debit cards — merchants do. Therefore, the evidence tends to show that merchants, rather than Acquirers, are the direct purchasers of card-acceptance services and raises a triable question of fact as to this issue."). Where Intuit's own agreements define such an agency relationship, there remains a triable question of fact as to the identity of the direct purchaser of the card- acceptance services. *Cf. In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. 07-CV-5944, 2016 U.S. Dist. LEXIS 102408, 2016 WL 7805628, at *14 (N.D. Cal. Aug. 3, 2016) ("[W]here a purchasing agent purchases goods on behalf of its principal, the principal — not the purchasing agent —

is the direct purchaser"), *rev'd and remanded by 720 F. App'x 835 (9th Cir. 2017)* (finding that district court improperly applied facts to the principal—agent determination); *see also In re NASDAQ Mkt.-Makers Antitrust Litig.*, 169 F.R.D. 493, 505-06 (S.D.N.Y. 1996) (finding plaintiff-investors were direct purchasers where their purchases were made through brokers who traded "for the account of others"); *In re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D. 12, 25 (D.D.C. 2001) (same where the goods at issue were purchased through agents); *In re Toilet Seat Antitrust Litigation*, No. 75-CV-184, 1977 U.S. Dist. LEXIS 14311, 1977 WL 1453, at *2 (E.D. Mich. Aug. 24, 1977) (interpreting *Illinois Brick*'s "owned or controlled" exception to encompass role of purchasing agent and relying on control aspect of exception). *But see McCarthy v. Recordex Serv., Inc.*, 80 F.3d 842, 852 (3d Cir. 1996) (finding plaintiffs were indirect purchasers because "none of the plaintiffs retained their lawyers to act as mere purchasing agents whose sole objective and function was to buy photocopies for the clients").

Visa's and Mastercard's rules similarly create a triable issue of fact as to whether Intuit is the direct purchaser of those transactions, suggesting instead that the Sellers are direct purchasers. Visa's rules provide that entities can be classified as either "a Payment Facilitator" or "a Merchant," (Defs.' 56.1 ¶

10), and that "[a]n entity that acts as both must comply with the Payment Facilitator rules when acting as a Payment Facilitator and with Merchant rules when acting as a Merchant," (Square Counter 56.1 ¶ 10). The rules further provide that merchants who utilize a Payment Facilitator's services are to be "treated as a Merchant of its Payment Facilitator's Acquirer," likening their position to those of merchants that do not use Payment Facilitators. (*See* Defs.' 56.1 ¶ 11.) Mastercard similarly defines a Payment Facilitator as "a 'Service Provider' that 'facilitate[s] the acquiring of Transactions by the Acquirer from Submerchants.'" (*Id.* ¶ 14.)

Accordingly, the Court denies Intuit's motion for partial summary judgment as to whether it has antitrust standing based on PayFac transactions because the Court cannot determine as a matter of law that Intuit is the direct purchaser of card-acceptance services.

III. Conclusion

For the foregoing reasons, the Court grants Defendants' motion to enforce the Settlement Agreement and finds that Square's merchant-customers and Intuit's merchant-customers "accepted" payment cards and are therefore members of the *Rule 23(b)(3)* Class, denies the *Lanning*

Plaintiffs' cross-motion for summary judgment, and denies Intuit's cross-motion for summary judgment.

Dated: May 28, 2024

Brooklyn, New York

SO ORDERED:

/s/ MKB

MARGO K. BRODIE

United States District Judge

APPENDIX D

Order Denying Panel Rehearing and
Rehearing En Banc
United States Court of Appeals for the Second
Circuit
Nos. 24-1653(L), 24-1808(CON)
Entered June 24, 2026

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 24th day of June, two thousand twenty-six.

In Re: Payment Card Interchange Fee and Merchant Discount Antitrust Litigation.

ORDER

Docket Nos: 24-1653 (Lead)
24-1808 (Con)

Objector-Appellant, Jack Rabbit LLC, filed a petition for panel rehearing, or, in the alternative, for rehearing en banc. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing en banc.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

APPENDIX E

Constitutional and Statutory Provisions Involved

U.S. Const. art. III, § 2, cl. 1

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Section 4 of the Clayton Act, 15 U.S.C. § 15(a)

Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and

the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

28 U.S.C. § 1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

Federal Rule of Civil Procedure 23(b)(3)

A class action may be maintained if Rule 23(a) is satisfied and if: . . . (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.