UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION	:	MDL No. 1720(JG)(JO)
This Document Relates To:	:	**STATEMENT OF OBJECTIONS AND AMICI CURIAE BRIEF OF STATES TO FINAL APPROVAL OF THE SETTLEMENT**
ALL CLASS ACTIONS.	:	

I. INTRODUCTION AND SUMMARY OF OBJECTIONS

The States of Ohio, Alaska, Arizona, California, Georgia, Indiana, Maryland, Virginia, and Wisconsin, through their attorneys general ("Objecting States"),[1] file this statement of objections to final approval of the MDL 1720 Visa and MasterCard Settlement. Additionally, the States of Ohio, New York, Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming through their attorneys general ("Amici States"), file this amici curiae brief in support of the objections raised by the Objecting States. (Collectively, the Objecting States and the Amici States shall be referred to as “the Objecting/Amici States.”)

[1] For purposes of these Objections, the Attorneys General of the Objecting States represent numerous governmental entities that may be members of either or both settlement classes provided for in the proposed settlement. The Objecting States identify certain specific class members on the attached Addendum 1in accordance with the requirements of Paragraph 20 of the Preliminary Approval Order, Dkt. No. 1745.

The parties to this action have negotiated a settlement agreement (the "Settlement Agreement") in which the parties attempt to release *parens patriae* and other claims for various forms of relief including damages and "fines, civil or other penalties." *Parens patriae* claims, however, belong uniquely and exclusively to the states acting (usually) through their attorneys general, and cannot be brought or released through private class actions. Similarly, "fines, civil or other penalties" are governmental remedies that are not available in a private class action, either as a claim or as an element of a negotiated release.

While the Objecting/Amici States are always concerned about overreach, our concern is magnified because the Settlement Class Releasing Parties[2] may include state governmental units and related entities that accept credit cards. As drafted, the Settlement Agreement opens the door for Defendants to assert settlement releases against attorneys general or other law enforcement agencies in future law enforcement actions related to the payment card industry, through creative arguments that state attorneys general and the States themselves are, *e.g.*, the "legal representatives," "agents," "affiliates" or "parents" of state government-related, credit card-accepting entities that fall within the definition of "Settlement Class Releasing Parties." Read plainly, the settlement agreement purports to release claims that are uniquely and exclusively claims belonging to the States as sovereigns.[3]

Defendants are not entitled to, and Class Plaintiffs cannot provide, a release encompassing state law enforcement or *parens patriae* claims. All references to *parens patriae*, and to fines and civil or other penalties, must be deleted from the release language, and the

[2] Unless otherwise noted, capitalized terms have the same meaning as in the Definitive Class Settlement Agreement, Dkt. No. 1656-1.

[3] References to the States as sovereign must be qualified with respect to the District of Columbia, which is not itself sovereign but does have governmental claims based on its "quasi-sovereign interest in the . . . well-being . . . of its residents in general." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982) (applying analysis to Puerto Rico).

Settlement Agreement should state expressly that no state or local governmental entity or official (including state attorneys general) that acts in a law enforcement or *parens patriae* capacity is a Settlement Class Releasing Party. Only claims that arise solely from a state or local government entity's activities as a merchant may be released, and then only if that entity elects to remain in the (b)(3) class.

The Objecting/Amici States have alerted the settling parties to the issue raised here, and have met with Defense counsel, as well as communicated with all parties' counsel on several occasions. Because they are unwilling to modify the release language in the Settlement Agreement to exclude *parens patriae* references, we submit this Statement of Objections and Amici Curiae Brief.

II. INTEREST OF AMICI CURIAE

Objecting/Amici States, through their Attorneys General – the chief law enforcement officers of their States – have a duty to enforce the law and protect their States and citizens. States are authorized to bring suit under federal law in their *parens patriae* capacity to protect their general economies and their citizens. *See Georgia v. Pennsylvania R.R.,* 324 U.S. 439, 446-47 (1945). The attorneys general are empowered to "secure monetary relief" on behalf of "natural persons residing" in their states under the Clayton Act, 15 U.S.C. § 15c. Many states are also authorized under state statutory and common law to proceed as *parens patriae* to enforce state and federal antitrust laws on behalf of their citizens and their general economies. Those state authorizations often go beyond Clayton Act *parens patriae,* to authorize suits related to downstream purchasers as well as direct purchasers, and businesses as well as natural persons. This is in addition to the attorneys general's representation of government entities, state agencies, municipalities, and political subdivisions that can be harmed by antitrust violations and

other unlawful acts and practices. Attorneys General have enforcement rights accorded sovereigns, which are different and distinct from the rights accorded class representatives.

The Objecting/Amici States have a strong interest in preserving the rights and powers that are integral to the performance of their duty to protect their states' economies and their citizens. For this reason, the Objecting States object to the proposed settlement and the Amici States submit this amici curiae brief to protect their sovereignty and the law enforcement authority granted attorneys general.

III. THE ALLEGATIONS OF THE CASE

Plaintiffs in this litigation challenge Visa's and MasterCard's Honor All Cards rules, default interchange rules, anti-steering rules and initial public offerings ("IPOs"). The Honor All Cards rules allegedly require merchants to accept all Visa/MasterCard credit cards or all Visa/MasterCard debit cards regardless of issuer. The default-interchange rules allegedly force merchants to pay supracompetitive interchange fees on all Visa and MasterCard transactions – credit or debit. The anti-steering rules allegedly are illegal restraints on trade. *See, e.g.*, Dkt. No. 1153 at ¶¶ 4, 8(c), (d), (s), (v), (w), (x), (y), 190-99, 247, 288, 308(h); Dkt. No. 1538 at 5-6. Visa's and MasterCard's IPOs allegedly in and of themselves violated Section 1 of the Sherman Act, 15 U.S.C. §1, and Section 7 of the Clayton Act, 15 U.S.C. §18.

IV. THE PROPOSED SETTLEMENT

A. The Settlement Classes

The proposed settlement sets forth two settlement classes: a damages settlement class (the "(b)(3) class") that includes "all persons, businesses, and other entities" that accepted Visa-Branded Cards and MasterCard-Branded Cards from January 1, 2004 to November 28, 2012 (Dkt No. 1656-1 at ¶ 2(a)), and a mandatory injunctive settlement class (the "(b)(2) class") that includes "all persons, businesses, and other entities" that accepted Visa-Branded Cards and

MasterCard-Branded Cards at the time the settlement was preliminarily approved or that do so at any time in the future. Dkt. No. 1656-1 at ¶ 2(b).

B. Damages

The settlement includes a cash recovery of up to $6.05 billion payable after the settlement is finally approved as compensation for past harm to members of the putative (b)(3) class that do not opt out. Dkt. No. 1656-1 at ¶¶ 9-10, 28-30. It also provides for payments of about $1.2 billion to members of the putative (b)(3) class for Visa and MasterCard credit card transactions occurring after final approval.

C. The Releases

The settlement contemplates two releases: a (b)(3) class release from which putative class members may opt out,[4] and a mandatory (b)(2) class release – with nearly identical provisions – from which opt outs are not permitted.[5] Thus, even if a governmental entity opts out of the (b)(3) class for damages, that entity would remain subject to the release because the proposed settlement provides it no ability to opt out of the (b)(2) class.

The States object to the proposed settlement and the settlement releases because they reach or purport to reach state law enforcement claims and other claims that may be brought only by States in their *parens patriae* capacities. The settlement *expressly* releases *parens patriae* claims and claims for fines and penalties. Paragraph 33 of the proposed settlement agreement provides in relevant part:

> Settlement Class Releasing Parties hereby expressly and irrevocably waive, and fully, finally, and forever settle, discharge, and release the . . . Settlement Class Released Parties from any and all manner of claims, demands, actions, suits, and causes of action,

[4] If (b)(3) class members elect to object or opt out, they must do so by May 28, 2013.

[5] Some state entities appear to be members of the (b)(3) class to the extent that they are "entities" that accept credit cards. State entities also appear to be members of the (b)(2) class to the extent that they accept Visa or MasterCard now or in the future.

> whether individual, class, representative, *parens patriae*, or otherwise in nature, for damages, interest, costs, expenses, attorneys' fees, fines, civil or other penalties, or other payment of money, or for injunctive, declaratory, or other equitable relief, whenever incurred . . . .

Dkt. No. 1656-1 at ¶ 33 (emphasis added); *see also* ¶ 68 (while the release given by the (b)(2) class does not release fines and penalties, it does purport to release "parens patriae" claims).

The releases to be provided by members of both classes are exceedingly broad. They extend to claims of absent members of the putative classes along with their "agents, employees, legal representatives" and "parents, subsidiaries, divisions and affiliates" as Releasing Parties. Dkt. No. 1656-1 at ¶¶ 31, 66. This language could be interpreted to include an entire sovereign state and any local government body, such as a city or county. As discussed below, the releases invite the mischievous and overreaching argument that they bar law enforcement actions by state and local governmental law enforcers, such as a city or county prosecutor or a state attorney general's office. If given credence, such an argument would undermine law enforcement authority, both now and as to future claims.

The parties improperly have attempted to immunize the Settlement Class Released Parties (including the Visa and MasterCard Defendants) from liability in law enforcement actions. Accordingly, the States seek to limit the exceedingly broad language of the releases and also seek an express statement that the settlement and the releases do not extend to quasi-sovereign or sovereign claims, even if governmental entities for which the Attorneys General may or may not provide counsel are members of the (b)(3) and (b)(2) classes as merchants.[6]

[6] As long as the Defendants eliminate overbroad and vague language and reduce the scope of the release language, those changes do not require additional notice to the class members. The proposed changes would "bind" the Defendants but otherwise not impose additional burdens upon the class members who could only benefit from changes that make the releases less restrictive.

V. ARGUMENT

A. The Parties' Attempt to Release State Law Enforcement Claims Is Contrary to the Requirements of Article III Standing, the Class Standing Doctrine and Rule 23

Under *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982), "a State has a quasi-sovereign interest in the health and well-being – both physical and economic – of its residents in general." *Id*. at 607. Under the antitrust laws, the States are authorized to bring suit in their *parens patriae* capacity to protect their general economies, *see Georgia v. Pennsylvania R.R.*, 324 U.S. at 446-47, to "secure monetary relief" on behalf of the "natural persons residing" in their states, 15 U.S.C. § 15c, and to represent government entities, state agencies, municipalities, and political subdivisions that can be harmed by antitrust violations. Additionally, state law gives attorneys general different and often broader authority to represent the state, governmental entities and its consumers in a *parens patriae* or other representative capacity. *See, e.g.*, *In re Lorazepam & Clorazepate Antitrust Litigation*, 205 F.R.D. 369, 386-87 (D.D.C. 2002) (surveying authority).

Final approval of the proposed settlement as currently drafted must be denied because the proposed settlement improperly attempts to release claims brought in States' *parens patriae* capacities, and, if a governmental enforcement entity is deemed to be a member of the class or otherwise a Releasing Party under the settlement, all state law enforcement claims pertaining to consumer protection, antitrust and other matters as well. The proposed settlement makes express reference to *parens patriae* claims and would release "any and all manner of claims, demands, actions, suits, and causes of action, whether individual, class, representative, *parens patriae*, or otherwise in nature" and also refers expressly to claims for "fines [and] civil or other penalties[.]" Dkt. No. 1656-1 at ¶¶ 33, 68.

To represent absent class members in a federal class action, a class representative must satisfy Article III standing requirements, class standing requirements and the requirements of Rule 23 of the Federal Rules of Civil Procedure. All Class Plaintiffs are non-governmental entities and cannot satisfy these requirements as to claims brought by States in their quasi-sovereign or sovereign capacities, including their *parens patriae* capacities. Final approval of the proposed settlement must therefore be denied.

1. Class Plaintiffs Lack Article III Standing to Assert or Release *Parens Patriae* Claims

To demonstrate constitutional standing, a plaintiff must satisfy the Article III minima of injury-in-fact, causation and redressability. *See Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59, 62 (2d Cir. 2012). Article III standing requirements must be satisfied in every federal action, but are particularly important here because of the effect the proposed settlement would have on state law enforcement authority. "The law of Article III standing . . . is built on separation-of-powers principles." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013). It "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Id*. The parties in this case are attempting to use the Court's authority under Rule 23(e) of the Federal Rules of Civil Procedure to foreclose state law enforcement actions authorized by state legislatures and prosecuted by elected officials. Such an attempt should be of special concern to this Court. One purpose of Article III is to limit the reach of judicial power into such areas. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) ("[A]llowing courts to oversee legislative or executive action would significantly alter the allocation of power . . . away from a democratic form of government." (quotations and citations omitted)).

Here, Class Plaintiffs lack standing with regard to *parens patriae* claims because they cannot satisfy the injury-in-fact requirement of Article III. Under the *parens patriae* doctrine,[7] "'States litigate to protect 'quasi-sovereign' interests.'" *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 215 (2d Cir. 2013), quoting *Connecticut v. Cahill*, 217 F.3d. 93, 97 (2d Cir. 2000). A State's quasi-sovereign interests are "distinct from the interests of particular private parties" and include a State's "interest in the health and well-being — both physical and economic — of its residents in general." *Id*., quoting *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 607.[8] In a *parens patriae* action, a State satisfies the injury-in-fact requirement of Article III by demonstrating an injury to its quasi-sovereign interests. *See Alfred L. Snapp & Son, Inc*., 458 U.S. at 601 ("[T]o have . . . standing the State must assert an injury to . . . a 'quasi-sovereign' interest.").

As private parties, Class Plaintiffs have no quasi-sovereign interests. By definition, quasi-sovereign interests are "distinct from the interests of particular private parties[.]" *See Purdue Pharma L.P.*, 704 F.3d at 215. Because they have no quasi-sovereign interests, Class Plaintiffs cannot demonstrate any injury-in-fact to those interests. Class Plaintiffs therefore have no Article III standing with regard to the States' *parens patriae* claims.

Class Plaintiffs cannot remedy their lack of Article III standing to bring *parens patriae* claims by showing injury-in-fact for other claims. "It is well established that a plaintiff must demonstrate standing for each claim [s]he seeks to press. . . . *[W]ith respect to each asserted*

[7] States may also pursue litigation in other capacities. *See Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 215 (2d Cir. 2013), quoting *Connecticut v. Cahill*, 217 F.3d 93, 97 (2d Cir. 2000): "States generally file suit in federal court in one of three capacities: (1) proprietary suits in which the State sues much like a private party suffering a direct, tangible injury; (2) sovereignty suits requesting adjudication of boundary disputes or water rights; or (3) *parens patriae* suits in which States litigate to protect quasi-sovereign interests.").

[8] *See also generally Purdue Pharma L.P.*, 704 F.3d at 215, quoting *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972) ("'The *parens patriae* (i.e., "parent of the country") doctrine has its antecedent in the common-law concept of the "royal prerogative," that is, the king's inherent power to act as the guardian for those under legal disabilities to act for themselves.'")

claim, [a] plaintiff must always have suffered a distinct and palpable injury to [her]self." *Mahon*, 683 F.3d at 64 (emphasis in original; quotations and citations omitted). Even if there is an arguable basis for *parens patriae* standing for putative class members (such as, for example, certain governmental entities that have accepted the payment cards at issue in the litigation), that fact would not establish Article III standing. Class Plaintiffs *themselves* must have Article III standing and injury-in-fact. *Id*. (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996): "That a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." (citations and quotations omitted)). *See Cent. States SE. & SW. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 433 F.3d 181, 199 (2d Cir. 2005) (quoting *Allee v. Medrano*, 416 U.S. 802, 828-29 (1974) (Burger, C.J., concurring and dissenting): "[A] named plaintiff cannot acquire standing to sue by bringing his action on behalf of others who suffered injury which would have afforded them standing had they been named plaintiffs; it bears repeating that a person cannot predicate standing on injury which he does not share. Standing cannot be acquired through the back door of a class action.").

In sum, Article III "[s]tanding is a federal jurisdictional question determining the power of the court to entertain the suit. [A] plaintiff must demonstrate standing for each claim and form of relief sought." *Carver v. City of New York*, 621 F.3d 221, 225 (2d Cir. 2010) (quotations and citations omitted). Where, as here, class representatives attempt to invoke the power of a court through the class action settlement mechanism to release claims that the class representatives have no standing to assert, the proposed settlement must be rejected. *See, e.g., Ass'n for Disabled Americans, Inc. v. 7-Eleven, Inc.*, No. CIV. 3:01-CV-0230-H, 2002 WL 546478, at *5

n.4 (N.D. Tex. Apr. 10, 2002) (concluding that the Court was not authorized "to release claims by way of a settlement that the plaintiffs would have no standing to raise in any court"). As the Supreme Court has recently emphasized, "[i]n an era of frequent litigation, class actions, sweeping injunctions with prospective effect, and continuing jurisdiction to enforce judicial remedies, courts must be more careful to insist on the formal rules of standing, not less so." *Arizona Christian Sch. Tuition Org. v. Winn,* 131 S. Ct. 1436, 1449 (2011). To approve the proposed settlement in this litigation would permit the Parties to use releases to circumvent standing requirements that Class Plaintiffs fail to meet and that prevent them from pursuing claims in federal court. *Ass'n For Disabled Americans,* 2002 WL 546478 at *5 n.4 (allowing parties to release claims they have no standing to bring "would essentially allow the parties to adjudicate claims through the release clause of a class settlement that Article III precludes them from adjudicating before the Court.")

2. Class Plaintiffs Lack Class Standing to Assert or Release *Parens Patriae* Claims

In addition to Article III requirements, a plaintiff seeking to "assert claims on behalf of" others must demonstrate that it has "class standing" under a two-factor test. *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145, 158 (2d Cir. 2012) (emphasis omitted). First, the plaintiff must "'personally ha[ve] suffered some actual . . . injury as a result of the putatively illegal conduct of the defendant[s]." *Id.* at 162 (citation omitted; quoting *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982)). Second, the defendants' conduct must "implicat[e] 'the same set of concerns' as the conduct alleged to have caused injury to other members of the

putative class by the same defendants . . . ." *Id*. (citation omitted; quoting *Gratz v. Bollinger*, 539 U.S. 244, 267 (2003)).[9]

Here, Class Plaintiffs cannot meet the second requirement of the class standing test for the *parens patriae* claims. Although a class representative's circumstances need not be identical to those of absent class members, they cannot "raise . . . a 'fundamentally different set of concerns[.]'" *Id*. at 164 (quoting *Gratz*, 539 U.S. at 264). As discussed above, *parens patriae* claims are fundamentally different from the claims of non-governmental parties, such as Class Plaintiffs. *Parens patriae* claims are based on quasi-sovereign interests, such as the States' interests in the health and well-being of their residents in general, which are distinct from the interests of non-governmental parties. *See Purdue Pharma L.P.*, 704 F.3d at 215 (a State's quasi-sovereign interests are distinct from those of individual residents). Class Plaintiffs' claims in this action do not implicate "the same set of concerns" as *parens patriae* claims of the States because Class Plaintiffs, as non-governmental parties, have no quasi-sovereign interests. *NECA-IBEW Health & Welfare Fund*, 693 F.3d at 162. Thus, Class Plaintiffs lack class standing for *parens patriae* claims and cannot proceed on behalf of others with regard to such claims. *See generally Nat'l Super Spuds, Inc. v. New York Mercantile Exch.*, 660 F.2d 9, 16 (2d Cir. 1981) ("The most fundamental principles underlying class actions limit the powers of the representative parties to the claims they possess in common with other members of the class."). *Parens patriae* claims belong only to the sovereign, and only the sovereign can assert and release them. Therefore, final approval of the proposed settlement in its current form must be denied.

[9] While they involve tests that include similar factors (such as an analysis of the injury suffered by the plaintiff), class standing is distinct from both Article III standing and the requirements of Rule 23(a). *See NECA-IBEW Health & Welfare Fund*, 693 F.3d at 158, 159 n.9.

3. Class Plaintiffs Cannot Satisfy Rule 23(a)(4) Adequacy Requirements as to the States' *Parens Patriae* Claims

Finally, Class Plaintiffs cannot satisfy Rule 23(a)(4) adequacy requirements as to *parens patriae* claims for the same reason they lack standing with regard to those claims: because Class Plaintiffs are non-governmental parties, they do not have any quasi-sovereign interests and therefore cannot have not suffered any injury to such interests. *See In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 249 (2d Cir. 2011) ("To satisfy Rule 23(a)(4), the named plaintiffs must possess the same interest[s] and suffer the same injur[ies] as the class members." (quotations and citations omitted)); 1 Newberg on Class Actions § 3:59 (5th ed. 2012) ("If a court finds that standing is lacking, then adequacy will be as well, for a plaintiff cannot be an adequate representative for claims she does not have standing to pursue.").

Class Plaintiffs cannot rely on any purported overall fairness of the proposed settlement to overcome Rule 23(a)(4) inadequacy. *See In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d. at 254 ("[A]dequacy of representation cannot be determined solely by finding that the settlement meets the aggregate interests of the class or 'fairly' compensates the different types of claims at issue.") The Second Circuit has held that it is necessary to inquire "independently whether the interests of all class members were adequately represented." *Id.* at 254. Where, as here, the requirements of Rule 23(a)(4) are not met, final approval of the proposed settlement must be denied. *See id*. at 245.

B. Release of States' *Parens Patriae* or Law Enforcement Claims Through a Private Class Action Settlement is Contrary to Public Policy

State attorneys general are responsible for the legal business of their states. Along with other state and local officials such as district or county attorneys, attorneys general are charged with enforcing numerous state laws and regulations for the protection of the public. By defining the (b)(3) and (b)(2) classes as excluding the United States government, but otherwise

"consisting of all persons, businesses and other entities that have accepted Visa-Branded Cards and/or MasterCard-Branded Cards in the United States," the parties provide Defendants with a means to argue in the future that this settlement releases not only the monetary claims of the government-related merchants who have "accepted" these credit cards, but also present and future law enforcement claims and *parens patriae* claims of state and local law enforcement bodies within the same state. No state is a class representative in this litigation and no state has participated in negotiations leading to the settlement. No Class Plaintiff is a governmental entity or enforcer. Including government enforcers and other governmental entities in the putative class presents unique complications that must be addressed before the settlement can be approved. Allowing imprecise and ambiguous language in settlements to jeopardize future law enforcement efforts is contrary to sound public policy.

Objecting/Amici States expect that the ambiguities explained below are curable without significantly altering the goals and intent of the settlement. Moreover, the changes suggested by Objecting/Amici States will have no negative impact on either the relief afforded to other class members or the finality reasonably expected by the Defendants as to the claims asserted in this litigation. Unfortunately, Objecting/Amici States have been unable to secure the necessary commitments and clarifications from the parties to address these concerns despite several months of discussions.

The Objecting States object to the proposed settlement, in part, due to the ambiguity inherent in the class definitions. It is unclear exactly which state entities are class members and in what capacity. State and local governmental entities functioning as merchants are covered by the class definition. Yet, they may also be considered class members in their capacities as sovereigns. This ambiguity portends a future defense effort to assert the release against a state

enforcer (potentially including a state itself) on the ground that the enforcer is a "legal representative," "agent," or even a "parent, subsidiar[y], division or affiliate" of the releasing governmental merchant. Even in settlements that have not included governmental entities as class members but have purported to "release" *parens patriae* claims that could be brought on behalf of class members, defendants have tried to use releases to halt future governmental enforcement actions. *See Spinelli v. Capital One Bank,* 2012 WL 3609028 (M.D. Fla.) (defendant's motion to enjoin a future enforcement action brought by the Attorneys General of Mississippi and Hawaii based on a private class's release of claims denied on the basis that the States of Mississippi and Hawaii were not parties to the class settlement).[10] The same could be said of the release in this action. It is no stretch to imagine a defense argument that the inclusion of some governmental entities in the release would also reach those entities and officials who enforce the states' laws.

The question of what constitutes "agents, legal representatives, parents, subsidiaries, divisions, affiliates" in the context of a governmental or public entity is left unanswered by the proposed settlement, and thus the phrase is susceptible to multiple, and perhaps murky, interpretations of the reach of the release over the States in particular. Consider the following scenarios:

- A public agency, with local offices that accept credit cards for payment of fees, whose director is an appointee of a State's governor or which is governed by a board of such appointees or which relies significantly upon State-budgeted funds for its operations;

[10] The class settlement had released the claims of natural person class members along with "all those who claim through them or who assert claims on their behalf (including the government in its capacity in *parens patriae*)." *Spinelli,* 2012 WL 3609028 at *1.

- The registrar for professional fundraisers, housed within the State Attorney General's office, that accepts payment of annual registration fees through the use of credit cards;
- A governmental agency that accepts payments through credit cards only because another agency or, perhaps, a separate State official such as the State's treasurer, has established a master contract with a third party vendor who processes any credit card transactions in return for the consumer's payment of a "convenience fee," or
- A governmental entity or elected official that has entered into a prime vendor contract with a third party processor that enables residents to pay fees and taxes to various state agencies with their credit cards.

These examples illustrate the common connections and inter-dependencies that exist among governmental and public entities. As the proposed settlement is currently drafted, the acceptance of credit cards by a single agency – such as a division overseeing state parks and the rental of campsites – risks pulling all of a State's governmental operations into the definition of "Settlement Class Releasing Parties" under the inexact language of the Settlement Agreement. The settlement's release arguably includes entities who only "accept" payment through credit cards that are entirely processed through a third party vendor that has the actual relationship with a credit card network. To prevent overreaching, the Settlement Agreement should be clear that governmental entity claims are released *only* with respect to the entity's capacity as an actual card-accepting merchant, and that no law enforcement or *parens patriae* claims of that entity or any other governmental entity are released, regardless of any relationship between the releasor and the other entity.

Regardless of whether a state enforcer, including an attorney general's office, is deemed to be a member of a class as that class is defined, a private settlement cannot release law

enforcement or *parens patriae* claims. *See Hathorn v. Lovorn*, 457 U.S. 255, 269 (1982) (private party resolution of claims under the Voting Rights Act do not bind the Attorney General where he was not a party to the private litigation); *Herman v. South Carolina National Bank,* 140 F.3d 1413, 1425 (11th Cir. 1998) (despite a $12 million settlement and the approval by a court at a "fairness" hearing, "government is not bound by private litigation when the government's action seeks to enforce a federal statute that implicates both public and private interests"); *Spinelli,* 2012 WL 3609028 (court approval of private settlement did not bind the states of Mississippi and Hawaii because their Attorneys General did not participate in the litigation); *see also Durfee v. Duke*, 375 U.S. 106, 116 (1963) (private litigation over title to land cannot bind the state as to its sovereignty over the land in question).

Moreover, the claims of law enforcement and sovereigns in general *should not* be compromised in this way. Courts have recognized the distinct and broader role of law enforcement compared to non-governmental actions, even when a non-governmental action may obtain restitution or other relief for private parties. *See, e.g., Commodity Futures Trading Comm'n v. Commercial Hedge Servs., Inc.,* 422 F. Supp. 2d 1057, 1061 (D. Neb. 2006) (concluding that prior private settlement did not bar the CFTC from seeking restitution from defendants: "[W]hen private parties settle their disputes without the approval or consent of the Commission, those settlements cannot preclude the Commission from later seeking additional or more full restitution or any other remedy."). Non-governmental parties' dispute resolution practices are not equivalent to the distinct deterrence function reserved to law enforcement.

As currently drafted, the proposed settlement seeks to release claims typically brought by government enforcers asserting that a business practice violates state or federal law and regulations – including actions when the enforcer seeks recovery of monies wrongfully obtained

through an unlawful practice, such as monetary relief based on *parens patriae* standing. Government enforcers bring many actions that seek to end illegal practices through injunctions and other equitable remedies, as well as civil penalties and other ancillary relief, such as their own litigation costs. Government enforcers also bring criminal actions for fines and other relief. The parties should not be permitted to use their private settlement to place Defendants beyond the reach of state law enforcement.

Objecting/Amici States request that the Settlement be rejected unless all law enforcement or *parens patriae* claims of governmental enforcers, including governmental entities authorized to enforce any state or federal law or regulation, are expressly carved out from the entirety of the release, including from the definitions of "Releasing Party" in paragraphs 31 and 66. Some courts have remedied similarly problematic settlements by rejecting the settlement unless the parties remove all governmental entities entirely from the settlement class. *See, e.g., In re Chocolate Confectionery Antitrust Litigation*, 2011 WL 6981200*1 (M.D. Pa.) (settlement agreement modified to exclude "governmental entities"; court further clarified that "[n]either the Cadbury Settlement nor this Order is intended to or shall limit the rights of any state attorney general"). Objecting/Amici States do not seek such a draconian remedy here. Rather, Objecting/Amici States seek to limit the scope of any government claims that might be subject to compromise to those which arise solely in a merchant capacity, thus preserving *parens patriae* and enforcement claims to their rightful owners. While the Defendants' and Plaintiffs' counsel have represented to the Objecting/Amici States that the parties intend that the release be so construed, that statement of intention by itself is not sufficient.

VI. CONCLUSION

The parties to this action have negotiated a Settlement Agreement in which the Settlement Class Releasing Parties purport to release *parens patriae* claims seeking various forms of relief including damages, as well as claims seeking relief in the form of "fines, civil or other penalties." *Parens patriae* claims belong uniquely and exclusively to the states acting through their attorneys general, and cannot be brought or released through private class actions. Similarly, "fines, civil or other penalties" are governmental remedies that are not available in a private class action, either as a claim or as an element of a negotiated release.

For these reasons, the Objecting/Amici States urge the Court to reject the Settlement Agreement unless revised to prevent the overbroad release from improperly restraining the exercise of law enforcement and *parens patriae* authority by state and local law enforcement agencies, including state attorneys general.

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Addendum 1

List of Certain Class Members Provided in Compliance with Paragraph 20 of Preliminary Approval Order, Dkt. No. 1745

The Alaska Attorney General objects to the Settlement, particularly the Release Language, as a purported member of the B(2) class.

The Arizona Attorney General objects to the Settlement, particularly the Release Language, as a purported member of the B(2) class.

The Attorney General of the State of California objects to the proposed settlement in In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation on behalf of the State of California Department of Justice for all of the reasons stated in this Statement of Objections and Amici Curiae Brief of States to Final Approval of the Settlement.

The Georgia Attorney General objects to the Settlement, particularly the Release Language, as a purported member of the B(2) class.

The Indiana Attorney General objects to the Settlement, particularly the Release Language, as a purported member of the B(2) class.

The Maryland Attorney General objects to the Settlement, particularly the Release Language, as a purported member of the B(2) class.

The Ohio Attorney General objects to the Settlement, particularly the Release Language, as a purported member of the B(2) class.

The Virginia Attorney General objects on behalf of the Office of Consumer Affairs/Office of Charitable and Regulatory Programs, Virginia Department of Agriculture and Consumer Services, Oliver Hill Building, 102 Governor Street, Richmond, Virginia 23219,

objects to the Settlement, particularly the Release Language, as a purported member of the B(3) class.

The Wisconsin Attorney General objects to the Settlement, particularly the Release Language, as a purported member of the B(2) class.

The Wisconsin Attorney General objects on behalf of the Wisconsin Department of Administration, 624 East Main St., Madison, WI 53703, objects to the Settlement, particularly the Release Language, as a purported member of the B(3) class.