UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

B & R SUPERMARKET, INC., d/b/a Milam's Market, GROVE LIQUORS LLC, STROUK GROUP LLC, d/b/a Monsieur Marcel, and PALERO FOOD CORP. and CAGUEYES FOOD CORP., d/b/a Fine Fare Supermarket,

Plaintiffs,

v.

MASTERCARD INTERNATIONAL INC., VISA INC., VISA U.S.A., INC., DISCOVER FINANCIAL SERVICES, and AMERICAN EXPRESS COMPANY,

Defendants.

MEMORANDUM & ORDER
17-CV-02738 (MKB) (JO)

MARGO K. BRODIE, United States District Judge:

Plaintiffs B & R Supermarket, Inc., doing business as Milam's Market ("B & R Supermarket"), Grove Liquors LLC, Strouk Group LLC, doing business as Monsieur Marcel ("Monsieur Marcel"), and Palero Food Corp. and Cagueyes Food Corp., doing business as Fine Fare Supermarket ("Fine Fare Supermarket"), commenced this putative class action against Defendants MasterCard International Inc. ("Mastercard"), Visa Inc. and Visa U.S.A., Inc. (collectively "Visa"), Discover Financial Services ("Discover"), and American Express Company ("American Express"), alleging violations of the Sherman Act, 15 U.S.C. §§ 1, 3, and state antitrust and consumer protection laws of California, Florida, and New York, and asserting unjust enrichment claims. (Compl., Docket Entry No. 1; Am. Compl., Docket Entry No. 291.) Plaintiffs' claims arise out of Defendants' process for adopting EMV technology for card transactions in the United States.[1] Plaintiffs allege that Defendants violated antitrust laws by entering into a conspiracy to (1) adopt the same policy via nearly identical rules for shifting billions of dollars in liability from banks to merchants ("Liability Shift" or "Fraud Liability Shift" or "FLS") for fraudulent charges ("chargebacks"); and (2) make the Liability Shift effective on the same day and in the same manner for all four networks, to prevent merchants from steering customers to use cards with more lenient terms or concessions such as reduced

[1] EMV technology is a global standard for credit cards that uses computer chips and chip readers to authenticate (and secure) chip-card transactions. (*See* Am. Compl. ¶¶ 65, 67.) It allows for secure transmittance of "dynamic" card information by creating a unique electronic signature for each transaction. (*Id.*) Prior to the adoption of EMV technology, payment cards relied entirely on magnetic stripes, which can only communicate "static" information such as the card number and expiration date. (*Id.* ¶¶ 63, 65.)

interchange or merchant discount fees.[2] (*See* Mem. & Order dated Sept. 30, 2016 ("Sept. 2016 Order") 4, Docket Entry No. 346); *B & R Supermarket, Inc. v. Visa, Inc.* (*B&R I*), No. 16-CV-01150, 2016 WL 5725010, at *2 (N.D. Cal. Sept. 30, 2016); (Am. Compl. ¶¶ 2, 4, 7, 9).

Currently before the Court is Plaintiffs' renewed motion for class certification, seeking to certify a nationwide class under Rule 23(a) and Rule 23(b)(3) of the Federal Rules of Civil Procedure. (Pls. Renewed Mot. for Class Certification ("Pls. Mot."), Docket Entry No. 706; Pls. Mem. of Law in Supp. of Pls. Mot. ("Pls. Mem."), Docket Entry No. 706-1.) Defendants oppose the motion. (Defs. Mastercard, Visa, and Discover Opp'n to Pls. Mot. ("Defs. Opp'n"), Docket Entry No. 706-18; Def. American Express Opp'n to Pls. Mot ("AmEx Opp'n"), Docket Entry No. 706-24.)[3] Also before the Court is Mastercard, Visa, and Discover's motion to exclude expert testimony, (Defs. Mot to Exclude Expert ("Defs. Mot. to Exclude"), Docket Entry No. 708-1; Defs. Mem. in Supp. of Defs. Mot. to Exclude ("Defs. Mem. to Exclude"), Docket Entry No. 708-2), which Plaintiffs oppose, (Pls. Opp'n to Defs. Mot. to Exclude, Docket Entry No. 708-4).

For the reasons set forth below, the Court denies Defendants' motion to exclude expert testimony and grants Plaintiffs' renewed motion for class certification.

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[2] Plaintiffs allege that had Defendants not conspired to impose the Liability Shift at the same time, at least one Defendant would have offered more lenient terms such as no "Liability Shift component, an exten[sion of the] Liability Shift date, a break on fees, equipment or other more favorable terms." (Am. Compl. ¶ 9.) They allege that "[i]n a truly competitive environment, at least one of these entities would or should have broken ranks and offered merchants a break on any number of terms." (*Id.*)

[3] American Express joins in sections I and III of Mastercard, Visa, and Discover's opposition regarding Plaintiffs' failure to meet Rule 23(b)(3)'s predominance requirement, and also offers two separate reasons why Plaintiffs' renewed motion should be denied as to American Express. (AmEx Opp'n 1.)

I. Background

The Court assumes familiarity with the underlying facts as detailed in *B & R I*, 2016 WL 5725010; *B & R Supermarket, Inc. v. MasterCard Int'l Inc.* (*B & R II*), No. 17-CV-2738, 2018 WL 1335355 (E.D.N.Y. Mar. 14, 2018); and *B & R Supermarket v. Visa, Inc.* (*B & R III*), No. 17-CV-2738, 2018 WL 4921661 (E.D.N.Y. July 20, 2018), *report and recommendation adopted sub nom. B & R Supermarket, Inc. v. MasterCard Int'l Inc.*, No. 17-CV-2738, 2018 WL 4445150 (E.D.N.Y. Sept. 18, 2018). The Court therefore only provides a summary of the pertinent facts and procedural background.

a. Procedural history

i. Motion to dismiss and transfer to this Court

Plaintiffs commenced this action in March of 2016 in the Northern District of California, before District Judge William Alsup. (Compl.) On July 15, 2016, Plaintiffs filed an Amended Complaint,[4] (Am. Compl.), which Defendants later moved to dismiss,[5] (Defs. Mot. to Dismiss, Docket Entry No. 303).

On September 30, 2016, Judge Alsup granted in part and denied in part the motions to dismiss the Amended Complaint. *B & R I*, 2016 WL 5725010. Judge Alsup dismissed the claims against all Defendants other than Mastercard, Visa, Discover, and American Express. *Id.* Based on the forum selection provisions in American Express' Card Acceptance Agreements

[4] The Amended Complaint named the following additional Defendants: Bank of America, N.A., Capital One Financial Corporation, Chase Bank USA, National Association, Citibank (South Dakota), N.A., Citibankn, N.A., PNC Bank, National Association, U.S. Bank National Association, and Wells Fargo Bank, N.A. (collectively, the "Issuing Banks"), and EMVCo. (Am. Compl.)

[5] Discover and the Issuing Banks, together with EMVCo, separately moved to dismiss the Amended Complaint. (Bank Defs. Mot. to Dismiss, Docket Entry No. 301; Discover Mot. to Dismiss, Docket Entry No. 305.)

("CAA") with merchants, Judge Alsup severed and transferred the claims by B & R Supermarket and Monsieur Marcel against American Express to the United States District Court for the Southern District of New York. *Id.* Judge Alsup also granted Fine Fare Supermarket's motion to intervene against the above-named Defendants, including American Express.[6] *Id.*

On March 10, 2017, Plaintiffs moved for class certification. (Pls. Mot. for Class Certification, Docket Entry No. 425.) By Order dated May 4, 2017, Judge Alsup transferred the case to this Court pursuant to 28 U.S.C. § 1404(a), citing judicial efficiency and Discover's concerns with regard to potential inconsistent liability theories alleged by putative class members in this case and the cases consolidated in the multi-district litigation, *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litigation*, No. 05-MD-01720 (E.D.N.Y. filed Oct. 20, 2005), pending before this Court. (Order dated May 4, 2017, Docket Entry No. 518.)

ii. Prior class certification denial

In September of 2017, the parties filed supplemental briefing in support of their respective class certification positions, identifying Second Circuit authority where different from Ninth Circuit authority. (Pls. Suppl. Br. in Supp. of Mot. for Class Certification ("Pls. Suppl. Br."), Docket Entry No. 589; Defs. Suppl. Br. in Supp. of Opp'n to Mot. for Class Certification ("Defs. Suppl. Br."), Docket Entry No. 588.) The Court held a hearing on the motion on November 29, 2017. (Min. Entry dated Nov. 29, 2017; Nov. 29, 2017 Hr'g Tr., Docket Entry

[6] Fine Fare Supermarket is not a party to a CAA with American Express and does not accept its cards. (Pls. Letter dated Oct. 20, 2017, Docket Entry No. 604.) Because Judge Alsup transferred B & R Supermarket's and Monsieur Marcel's direct claims against American Express to the Southern District of New York pursuant to the CAA, Fine Fare Supermarket is the only named Plaintiff with claims against American Express. However, because Fine Fare Supermarket does not accept American Express and has no agreement with American Express, it seeks only joint and several liability against American Express based on chargebacks by Mastercard, Visa, and Discover. (*Id.*)

No. 622.)

By Memorandum and Order dated March 11, 2018 (the "March 2018 Order"), the Court found that Plaintiffs had satisfied the explicit requirements of Rule 23(a) — numerosity, commonality, typicality, and adequacy of both class representatives and counsel. (Mar. 2018 Order 12–19, Docket Entry No. 643); *B & R II*, 2018 WL 1335355, at *7–10. However, because Plaintiffs had failed to satisfy Rule 23(a)'s implied requirement of ascertainability, the Court denied Plaintiffs' motion for class certification without prejudice. *B & R II*, 2018 WL 1335355, at *13–14.

Plaintiffs had sought to certify a "class of '[m]erchants who have been unlawfully subjected to the Liability Shift for the assessment of Master[c]ard, Visa, Discover and/or American Express payment card chargebacks, from October 2015 until the anticompetitive conduct ceases.'"[7] *Id.* at *3. Plaintiffs suggested four potential end dates for the class, ranging from November of 2016 to October of 2019. *Id.* at *13. While the Court noted that "[a]ny one of the[] dates could . . . make the class ascertainable, if sufficiently substantiated," the Court found that "Plaintiffs' proposal of four different class periods, some of which appear[ed] to be completely arbitrary," did not satisfy the implied ascertainability requirement of Rule 23(a) because Plaintiffs had not proposed a class period that bore a relationship to their proposed liability theory. *Id.*

[7] Plaintiffs also sought "to certify three subclasses of merchants from California, Florida, and New York, each of whom brings claims under their respective state's antitrust and consumer protection laws." *B & R I*, at *3. Because Plaintiffs failed to show how each of the subclasses met the Rule 23 class certification requirements, the Court denied the request for subclass certification. *Id.* at *3 n.7. In their renewed motion for class certification, Plaintiffs appear to only request certification of a nationwide class, and do not request subclass certification. (*See* Pls. Mem. 2.)

b. Plaintiffs' claims

Plaintiffs allege that Defendants conspired by entering into an agreement to (1) adopt the same policy via nearly identical rules for shifting billions of dollars in liability from banks to merchants for fraudulent charges; and (2) make the Liability Shift effective on the same day and in the same manner for all four networks, to prevent merchants from steering customers to use cards with more lenient terms or concessions such as reduced interchange or merchant discount fees. (*See* Am. Compl. ¶¶ 2, 4, 7, 9); *B & R I*, 2016 WL 5725010, at *2.

Prior to the adoption of EMV technology, credit cards used magnetic stripes to communicate relevant information such as the card number and expiration date. (Am. Compl. ¶ 63.) In contrast, EMV technology transmits card information by creating a unique electronic signature for each transaction and is believed to be more secure than the magnetic stripes. (*Id.* ¶¶ 65, 67.)

Prior to October 1, 2015, issuing banks generally absorbed liability for fraudulent transactions. (*Id.* ¶¶ 3, 71–72.) According to Plaintiffs, to facilitate the transition process from magnetic stripes to EMV technology, Defendants conspired to establish October 1, 2015 as an artificial date by which merchants had to have installed and certified[8] the EMV technology, otherwise merchants, rather than the banks, would be responsible for any chargebacks. (*See id.* ¶¶ 286–92.) Thus, on or after October 1, 2015, if a customer presented an EMV chip card to a merchant but the merchant failed to use a certified EMV chip card reader to process the transaction, the merchant became liable for any fraudulent charges incurred. (*See id.* ¶¶ 2–3.)

Plaintiffs contend that merchants had to wait lengthy periods for Defendants to certify

[8] The certification of the EMV payment system consists of multiple steps and involves "numerous entities," such as PIN pad manufacturers, EMVCo, bank-acquirers, and others. (Am. Compl. ¶ 85.)

their EMV technology. (*Id.* ¶¶ 86–95.) Thus, even if a merchant installed the EMV technology, the merchant could still be subject to liability for fraudulent transactions if Defendants failed to timely certify the merchant's equipment. (*Id.* ¶¶ 82–84.)

Plaintiffs further contend that imposing the Liability Shift on the same date was not necessary for transition to EMV technology, and that in other countries where Defendants introduced the EMV technology prior to its introduction in the United States, Defendants implemented Liability Shifts and transitioned to EMV technology at staggered times rather than on the same day. (*Id.* ¶¶ 100–07.) For example, in Canada, some Defendants gave merchants a six-month extension to upgrade to EMV technology. (*Id.* ¶¶ 111–12.) In other countries, Defendants offered merchants interchange fee concessions to help defray the costs of the Liability Shift or offered to cover certain costs of upgrading to EMV technology. (*Id.* ¶¶ 108–10.) In contrast, in the United States, Defendants implemented the Liability Shift on the same day through their individual networks and did not offer any concessions to the merchants to ease the transfer process. (*Id.* ¶¶ 73–76 (Mastercard); ¶¶ 77–78 (Visa); ¶¶ 79–80 (Discover); ¶ 81 (American Express).)

Plaintiffs allege that there was widespread knowledge, including among Defendants, that significant numbers of merchants would not be ready for the Liability Shift and would incur significant costs as a result. (*Id.* ¶¶ 90–92, 113.)

c. Plaintiffs' renewed motion for class certification

In their renewed motion for class certification, Plaintiffs seek to certify the following damages class under Rule 23(a) and Rule 23(b)(3):

> Merchants who incurred one or more unreimbursed chargeback(s) between October 1, 2015 through and including September 30, 2017, pursuant to the Fraud Liability Shift for the assessment of Mastercard, Visa, Discover and/or Amex payment card chargebacks

> (the "Class"). Excluded from the Class are members of the judiciary and government entities or agencies.

(Pls. Mem. 2.) Because the Court previously found that Plaintiffs had satisfied the Rule 23(a) requirements of numerosity, commonality, typicality, and adequate representation, Plaintiffs' renewed motion only addresses Rules 23(a)'s implied requirement of ascertainability and the Rule 23(b) requirements of predominance and superiority. (*Id.* at 1.)

Now presenting a concrete end date for the class period, Plaintiffs argue that the class is ascertainable, and that September 30, 2017 "reflects the most likely alternate FLS date, but-for Defendants' collusion." (*Id.*) They argue that evidence shows that absent collusion, "the [n]etworks would have delayed the FLS by two years, starting with an announcement of a delay by Visa, and with the other [n]etworks following closely behind." (*Id.* at 1–2.) Plaintiffs also argue that the predominance and superiority requirements are satisfied because "no significant individualized issues vitiate the far greater efficiencies to be gained . . . by proceeding as a class action." (*Id.* at 2.)

d. Defendants' opposition to class certification

i. Mastercard, Visa, and Discover's opposition[9]

Mastercard, Visa, and Discover argue that the end date for Plaintiffs' proposed class — September 30, 2017 — "remains arbitrary, contrary to overwhelming evidence, and inconsistent with Plaintiffs' revised case theory."[10] (Defs. Opp'n 1.) They argue that "Plaintiffs rely only on

[9] Defendants incorporate their original opposition briefs into their renewed opposition. (Defs. Opp'n 4 n.1 (citing Defs. Opp'n to Pls. Mot. for Class Certification ("Defs. Original Opp'n"), Docket Entry No. 460; Defs. Suppl. Br.).)

[10] Defendants argue that "[t]o try to address ascertainability, Plaintiffs have had to abandon (and reverse) key aspects of their prior liability theory." (Defs. Opp'n 5.) Defendants argue that Plaintiffs have changed their theory as to (1) "[n]ecessity of [L]iability [S]hifts"; (2) "[w]hether alignment of [L]iability [S]hift dates requires collusion or is a competitive outcome";

[redacted]

(*Id.* at 1–2.)

Defendants further argue that "Plaintiffs fail to cure . . . predominance issues" of commonality of injury-in-fact and causation that existed in their original motion for class certification,[11] and that "Plaintiffs' new but-for world[12] also introduces *new* predominance problems . . . [m]ost fundamentally, Plaintiffs have provided no analysis of how merchants

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and (3) "[f]ear of merchant steering as the motive for competing to have the latest [L]iability [S]hift." (*Id.* at 5–6.)

In support, Defendants argue that (1) while Plaintiffs' prior but-for world included networks with no Liability Shift, in their revised but-for world, all Defendants would have eventually imposed the Liability Shift; (2) while previously Defendants' "'lock-step implementation' of [the] [L]iability [S]hift[] was because of (and a plus factor for) collusion," in Plaintiffs' revised theory, "absent collusion, all networks would have synchronized initial dates, and then delayed to 2017 in 'lockstep'"; and (3) while previously, Plaintiffs alleged that Defendants "viewed having an earlier [L]iability [S]hift date than other networks to be a competitive advantage because they expected that merchants would steer volume to networks with later dates," and therefore "an agreement to hold the same early dates was . . . necessary for networks not to compete to delay," Plaintiffs' expert's "new report does not mention merchant steering as an influence," and "[n]ow, [Defendants] had independent, pro-competitive business reasons for not being 'out of sync' with other networks and viewed having a later [L]iability [S]hift date as a competitive disadvantage." (*Id.* (alterations and emphasis omitted) (quoting Am. Compl. ¶ 150).)

[11] In the March 2018 Order, the Court noted that "if Plaintiffs choose to renew their motion for class certification, in addition to addressing the ascertainability requirement, Plaintiffs must also further address the predominance issues raised by Defendants and discussed at the hearing, in particular, the issues of commonality of injury and causation." *B & R II*, 2018 WL 1335355, at *13 n.24.

[12] In price-fixing antitrust cases, injury and damages are typically determined by comparing prices resulting from the antitrust violation to prices in the world free of the defendants' antitrust violation. *See, e.g.*, *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 97 (2d Cir. 2007). This construct of the world without Defendants' antitrust violation is known as the "but-for world." *Id.*; *In re Digital Music Antitrust Litig.*, 321 F.R.D. 64, 91 (S.D.N.Y. 2017).

would have responded to all four networks adopting the same, later [L]iability [S]hift date of October 2017." (*Id.* at 2–3.) Defendants also argue that Plaintiffs' new but-for world emphasizes that individual questions predominate as to causation because "individualized proof is required to determine whether any particular merchant incurred chargebacks due to the alleged conspiracy or, by contrast, whether the chargebacks were caused by the merchant's own business decision as to when, and if, to adopt EMV technology or otherwise take readily available steps to avoid chargeback liability." (*Id.* at 4.)

ii. American Express' separate grounds for opposing Plaintiffs' motion

American Express asserts two separate reasons why Plaintiffs' renewed motion for class certification should be denied as to American Express.[13]

First, American Express argues that Plaintiffs cannot meet the Second Circuit's ascertainability standard because "Plaintiffs cannot and do not provide any method by which they can determine which purported class members have claims against American Express and which do not." (AmEx Opp'n 1.) In support, American Express notes that "the only claims against American Express in this action are those brought on behalf of merchants that do *not* accept American Express cards," and argues that "Plaintiffs' class certification and damages expert offers no way to distinguish between merchants that do and do not accept American Express and instead lumps together *all* chargebacks for *all* merchants from *all* four credit card networks." (*Id.*)

Second, American Express argues that, in their renewed motion, Plaintiffs allege a new "theory of conspiracy that contradicts the theory pleaded in the operative complaint and under

[13] American Express joins Mastercard, Visa, and Discover's opposition as to their objection that Plaintiffs have not satisfied the Rule 23(b)(3) predominance requirement. (*See* AmEx Opp'n 1.)

which American Express could not be held liable as a matter of law." (*Id.* at 2.) American Express argues that Plaintiffs' original liability theory rested on the notion that "but for the alleged conspiracy," the card networks would have implemented the Liability Shift "on different dates and would have steered business to [n]etworks with a later [Liability Shift]." (*Id.*) It argues that this liability theory, i.e., different dates and steering, "was the only way Plaintiffs convinced Judge Alsup" to deny the motion to dismiss, but that "Plaintiffs now advance a theory under which (a) all four [n]etworks would have implemented [Liability Shifts] on the same day and steering would be irrelevant and (b) based on alleged collusion between Visa and Mastercard, those two [n]etworks would have postponed their [Liability Shifts] until October 2017 and [American Express] would simply have followed suit."[14] (*Id.*)

e. Expert reports

i. Plaintiffs' expert

In support of their motion, Plaintiffs rely on the expert reports of Dr. Micah S. Officer, Professor of Finance at Loyola Marymount University, which include two reports submitted in support of Plaintiffs' prior motion, and two supplemental reports submitted in support of Plaintiffs' renewed motion.[15]

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[14] Discover also argues that, "[f]or the reasons articulated" by American Express, the Court should not grant Plaintiffs' renewed motion as to Discover because "the only specific assertion in Plaintiffs' brief as to Discover is that it 'aligned,' and their only evidence cited reflects Discover's intent to follow the industry." (Defs. Opp'n 33 n.34.) Discover argues that "these allegations of mere parallel conduct are not enough to sustain a claim . . . against Discover," in light of "Plaintiffs' revised . . . theory [with] a but-for world in which ***competition*** would have caused all four networks to set the same [L]iability [S]hift date." (*Id.*)

[15] (*See* Expert Report of Micah S. Officer in Supp. of Pls. Mot. for Class Certification ("Officer Report I"), annexed to Decl. of Alexandra S. Bernay ("Bernay Decl.") as Ex. 29, Docket Entry No. 424-32; Rebuttal Expert Report of Micah S. Officer in Supp. of Pls. Mot. for Class Certification ("Officer Report II"), annexed to Reply Decl. of Alexandra S. Bernay ("Bernay Reply Decl.") as Ex. 33, Docket Entry No. 502-7; Officer Report in Supp. of Pls. Mot.

In support of their renewed motion, Plaintiffs submit a supplemental report by Officer, in which Plaintiffs asked him to "address three issues": [redacted]

1. Liability Shift in the but-for world

In his initial report, submitted in support of Plaintiffs' prior motion for class certification, Officer contended that [redacted]

In a subsequent report, submitted in response to Defendants' expert's report, Officer included [redacted] [16] [redacted] Officer opined that [redacted]

("Officer Report III"), annexed to Decl. of George C. Aguilar ("Aguilar Decl.") as Ex. 1, Docket Entry No. 698-3; Rebuttal Expert Report of Micah S. Officer in Supp. of Pls. Mot. ("Officer Report IV"), annexed to Reply Decl. of George C. Aguilar ("Aguilar Reply Decl.") as Ex. 1, Docket Entry No. 706-30.)

[16] [redacted]

[redacted]

[redacted][17][redacted]

[redacted]

2. Methodology for determining injury and damages

Officer relies on data provided by Defendants to determine [redacted]

[redacted]

[17] [redacted]

[redacted]

A. Absorption

In opposing Plaintiffs' prior motion, Defendants argued that Officer's methodology cannot show whether putative class members incurred any FLS chargebacks. *B & R II*, 2018 WL 1335355, at *5. Defendants asserted, and Plaintiffs did not dispute, that the FLS Chargeback Codes only track the chargebacks to the bank-acquirer, and do not identify whether the chargebacks were passed on to the merchants.[18] *Id.* Defendants challenged Officer's methodology as not accounting for the fact that some bank acquirers and other third parties offset the chargebacks by absorbing those chargebacks and therefore not passing them on to the merchants, or reimbursing the merchants for the chargebacks. *Id.*

In his supplemental report in support of Plaintiffs' renewed motion, Officer addresses

[redacted]

[18] The process of assessing chargebacks begins with a complaint for a fraudulent charge from a cardholder to the issuing bank. The chargeback is then traced from the issuing bank through the network to the acquiring bank. Plaintiffs argue that the chargebacks are then passed on to the merchants, but Defendants' data does not show whether any of the chargebacks are actually passed on to the merchants. (Nov. 29, 2017 Hr'g Tr. 36–38.)

[redacted][19] [redacted]

[redacted][20] [redacted]

19 [redacted]

20 [redacted]

[redacted][21] [redacted]

B. Non-Liability Shift chargebacks

Defendants previously argued that the FLS Chargeback Codes that Plaintiffs rely on include chargebacks that are not related to the Liability Shift because some chargebacks would have been incurred regardless of the Liability Shift. *B & R II*, 2018 WL 1335355, at *6.

To refute Defendants' claim that the FLS Chargeback Codes include chargebacks unrelated to the Liability Shift, Officer compares [redacted]

In response to Defendants' expert's claim that Officer's substation analysis "does not

[21] As discussed further below, pursuant to Rule 702 of the Federal Rules of Evidence, Defendants seek to exclude Officer's opinions as to the likely delay of the FLS in the but-for world, as well as his methodology to show class-wide injury and damages. (*See* Defs. Mem. to Exclude.)

control for other economic factors that might have caused chargebacks to change over time," Officer opines that, [redacted]

ii. Defendants' expert

In support of their opposition to Plaintiffs' motion, Defendants rely on the expert reports of economist David P. Kaplan, submitted in response to Officer's report in support of Plaintiffs' prior motion, as well as his report in support of Plaintiffs' renewed motion.[22]

II. Discussion

a. Standard of review

The purpose of the class action mechanism is to aggregate the numerous but relatively small potential recoveries associated with individual cases into a single action with a potential recovery that is sufficiently large to warrant an attorney's labor. *See Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 81–82 (2d Cir. 2015) (citing *Mace v. Van Ru Credit Corp.,* 109 F.3d 338, 344 (7th Cir. 1997)); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997). However, because a class action "is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only," to depart from the rule, "a class

[22] (*See* Expert Report of David P. Kaplan in Supp. of Defs. Opp'n to Pls. Mot. for Class Certification ("Kaplan Report I"), annexed to Decl. of Michelle K. Parikh ("Parikh Decl.") as Ex. 1, Docket Entry No. 460-1; Expert Report of David P. Kaplan in Supp. of Defs. Opp'n ("Kaplan Report II"), annexed to Decl. of Laura J. Butte ("Butte Decl.") as Ex. 1, Docket Entry No. 706-19.)

representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348–49 (2011).

"To obtain certification of a class action for money damages, a plaintiff must satisfy prerequisites of numerosity, commonality, typicality, and adequacy of representation," pursuant to Rule 23(a), and "must also establish that 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," pursuant to Rule 23(b)(3). *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 460 (2013); *Sykes*, 780 F.3d at 80. In addition to the explicit requirements of Rule 23, the class must satisfy the implied requirement of ascertainability. *In re Petrobras Sec.*, 862 F.3d 250, 266 (2d Cir. 2017).

"Rule 23 does not set forth a mere pleading standard." *Wal-Mart Stores, Inc.*, 564 U.S. at 350. "The party seeking class certification must affirmatively demonstrate . . . compliance with the Rule, and a district court may only certify a class if it is satisfied, after a rigorous analysis, that the requirements of Rule 23 are met." *In re Am. Int'l Grp., Inc. Sec. Litig.*, 689 F.3d 229, 237–38 (2d Cir. 2012) (citations and internal quotation marks omitted). "To certify a class, a district court must find that each Rule 23 requirement is established by at least a preponderance of the evidence." *In re SunEdison, Inc. Sec. Litig.*, 329 F.R.D. 124, 132 (S.D.N.Y. 2019) (quoting *In re Petrobras Sec.*, 862 F.3d at 260); *Myers v. Hertz Corp.*, 624 F.3d 537, 547 (2d Cir. 2010) ("The party seeking class certification bears the burden of establishing by a preponderance of the evidence that each of Rule 23's requirements has been met." (citations omitted)). "In determining whether a proposed class meets these requirements, the court must resolve any factual disputes and find any facts relevant to this determination." *Audet v. Fraser*, No. 16-CV-

0940, 2019 WL 2562628, at *5 (D. Conn. June 21, 2019) (citing *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006)).

"The Second Circuit has emphasized that Rule 23 should be given liberal rather than restrictive construction, and it seems beyond peradventure that the Second Circuit's general preference is for granting rather than denying class certification." *Espinoza v. 953 Assocs. LLC*, 280 F.R.D. 113, 124 (S.D.N.Y. 2011) (quoting *Gortat v. Capala Bros., Inc.*, 257 F.R.D. 353, 361 (E.D.N.Y. 2009), *aff'd*, 568 F. App'x 78 (2d Cir. 2014)). "The district court is afforded broad discretion in class certification questions because it is often in the best position to assess the propriety of the class action." *Zivkovic v. Laura Christy LLC*, 329 F.R.D. 61, 68 (S.D.N.Y. 2018) (citing *Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 139 (2d Cir. 2001)).

b. Defendants' motion to exclude expert testimony

Mastercard, Visa, and Discover move to exclude the testimony of Plaintiffs' expert, Officer, pursuant to Rule 702 of the Federal Rules of Evidence. (Defs. Mot. to Exclude; Defs. Mem. to Exclude.) In support, Defendants argue that Officer does "exactly what courts have said experts are not permitted to do: offer conclusions derived from their judgments about the credibility of the factual record, use benchmarks that are fundamentally different, and adopt methodologies directed by counsel without an independent assessment of their validity." (Defs. Mem. to Exclude 1.)

In response, Plaintiffs argue that Officer's "models and opinions for both a class period and class-wide injury are relevant to the [Rule 23] issues before the Court and rest on sound and reliable economic theory and methodology." (Pls. Opp'n to Defs. Mot. to Exclude 1, Docket Entry No. 708-4.) Plaintiffs further argue that, "[a]t most, . . . Defendants' objections go to the

weight the Court should attribute to Dr. Officer's opinion for the purposes of class certification." (*Id.*)

i. Opinions Defendants seek to exclude

Defendants seek to exclude Officer's opinions that (1) absent Defendants' alleged collusion, the Liability Shift date would have been delayed for two years, (*id.* at 7–19), and (2) "injury can be determined on a class-wide basis using common evidence," (*id.* at 19–24).

1. Liability Shift delay in the but-for world

As discussed above, in his supplemental report in support of Plaintiffs' renewed motion, Officer was asked to address the [redacted] Officer employs two methodologies to answer this question.

A. Comparison to AFD market

First, Officer [redacted]

[redacted]

[redacted]

B. Review of internal statements

[redacted]

[23] [redacted]

[redacted]

[23] [redacted]

[redacted]

C. Conclusion as to likely delay

[redacted]

2. Methodology to demonstrate class-wide injury

Officer's methodology for demonstrating class-wide injury relies in part on Defendants' data to assess FLS chargebacks imposed on merchants during the class period, as well as data from third-party payment processors [redacted] Because the Court describes this methodology in detail elsewhere in this Memorandum and Order, and, for the reasons discussed below, finds that Defendants' objections are better addressed under the Rule 23(b) predominance inquiry than under Rule 702's admissibility standard, the Court does not repeat its description of the methodology here.

ii. Rule 702

Defendants argue that "Officer's opinions on the proposed but-for world and his failed efforts to show class-wide injury should be excluded under Rule 702." (Defs. Mem. to Exclude 24.)

Rule 702 provides that "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702. "While the proponent of expert testimony has the burden of establishing by a preponderance of the evidence that the admissibility requirements of Rule 702 are satisfied, . . . the district court is the ultimate gatekeeper." *United States v. Jones*, 965 F.3d 149, 161 (2d Cir. 2020) (alteration in original) (quoting *United States v. Williams*, 506 F.3d 151, 160 (2d Cir. 2007)); *see also United States v. Farhane*, 634 F.3d 127, 158 (2d Cir. 2011) ("The law assigns district courts a 'gatekeeping' role in ensuring that expert testimony satisfies the requirements of Rule 702." (citation omitted)), *cert. denied*, 565 U.S. 1088 (2011).

Before permitting a person to testify as an expert under Rule 702, the court must make the following findings: (1) the witness is qualified to be an expert; (2) the opinion is based upon reliable data and methodology; and (3) the expert's testimony on a particular issue will "assist the trier of fact." *Nimely v. City of New York*, 414 F.3d 381, 396–97 (2d Cir. 2005); *see also United States v. Napout*, 963 F.3d 187–88 (2d Cir. 2020) (explaining that the court is tasked with "ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task

at hand" (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993))); *United States v. Cruz*, 363 F.3d 187, 192 (2d Cir. 2004) (same). In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court set forth a list of factors, in addition to the criteria set forth in Rule 702, that bear on the determination of reliability: "(1) whether a theory or technique has been or can be tested; (2) 'whether the theory or technique has been subjected to peer review and publication;' (3) the technique's 'known or potential rate of error' and 'the existence and maintenance of standards controlling the technique's operation;' and (4) whether a particular technique or theory has gained general acceptance in the relevant scientific community." *Williams*, 506 F.3d at 160 (quoting *Daubert*, 509 U.S. at 593–94); *see also United States v. Morgan*, 675 F. App'x 53, 55 (2d Cir. 2017) (same); *Zaremba v. Gen. Motors Corp.*, 360 F.3d 355, 358 (2d Cir. 2004) (same). The *Daubert* inquiry for reliability is a "flexible one" and does not "constitute a definitive checklist or test," and thus, the *Daubert* factors "neither necessarily nor exclusively appl[y] to all experts or in every case." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141, 150 (1999) (citation omitted).

The district court is afforded "the same broad latitude when it decides *how* to determine reliability as it enjoys [with] respect to its ultimate reliability determination." *Id.* at 142. Expert testimony should be excluded if it is "speculative or conjectural." *Jones*, 965 F.3d at 162 (quoting *Boucher v. U.S. Suzuki Motor Corp.*, 73 F.3d 18, 21 (2d Cir. 1996)); *Major League Baseball Prop., Inc. v. Salvino, Inc.*, 542 F.3d 290, 311 (2d Cir. 2008) (same). When an expert's opinion is based on data or methodologies "that are simply inadequate to support the conclusions reached, *Daubert* and Rule 702 mandate the exclusion of that unreliable opinion testimony." *Ruggiero v. Warner-Lambert Co.*, 424 F.3d 249, 253 (2d Cir. 2005) (citation omitted); *see also Nimely*, 414 F.3d at 396 ("[N]othing in either *Daubert* or the Federal Rules of Evidence requires

a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." (alteration in original) (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997))). Nevertheless, "in accordance with the liberal admissibility standards of the Federal Rules of Evidence, only serious flaws in reasoning or methodology will warrant exclusion." *In re Fosamax Prods. Liab. Litig.*, 645 F. Supp. 2d 164, 173 (S.D.N.Y. 2009) (citing *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002)); *see also Adams v. Liberty Maritime Corp.*, 407 F. Supp. 3d 196, 202 (E.D.N.Y. 2019) (same).

"Although '[t]he Supreme Court has not definitively ruled on the extent to which a district court must undertake a *Daubert* analysis at the class certification stage,' it has 'offered limited dicta suggesting that a *Daubert* analysis may be required at least in some circumstances.'" *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, No. 13-CV-7789, 2019 WL 4171032, at *3–4 (S.D.N.Y. Sept. 3, 2019) (alteration in original) (quoting *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 129 (2d Cir. 2013)). Similarly, "the Second Circuit has not resolved whether and to what extent *Daubert* applies at the class certification stage." *Royal Park Invs. SA/NV v. U.S. Bank Nat'l Ass'n*, 324 F. Supp. 3d 387, 393 (S.D.N.Y. 2018) (citing *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 299 F. Supp. 3d 430, 470 (S.D.N.Y. 2018) (collecting cases)). "Despite this lack of clarity, courts in the Second Circuit regularly 'subject expert testimony to *Daubert*'s rigorous standards insofar as that testimony is relevant to the Rule 23 class certification analysis.'" *Bowling v. Johnson & Johnson*, No. 17-CV-3982, 2019 WL 1760162, at *7 (S.D.N.Y. Apr. 22, 2019) (quoting *Scott v. Chipotle Mexican Grill, Inc.*, 315 F.R.D. 33, 55 (S.D.N.Y. 2016)). "In these instances, the 'scope of the *Daubert* analysis is cabined by its purpose at this stage: the inquiry is limited to whether or

not the expert reports are admissible to establish the requirements of Rule 23.'" *Id.* (quoting *Chen-Oster*, 114 F. Supp. 3d at 115). "In other words, '[t]he question is not . . . whether a jury at trial should be permitted to rely on [the expert's] report to find facts as to liability, but rather whether [the court] may utilize it in deciding whether the requisites of Rule 23 have been met.'" *Ge Dandong v. Pinnacle Performance Ltd.*, No. 10-CV-8086, 2013 WL 5658790, at *13 (S.D.N.Y. Oct. 17, 2013) (alterations in original) (quoting *In re Visa Check/Mastermoney Antitrust Litig.*, 192 F.R.D. 68, 77 (S.D.N.Y. 2000)).

iii. Opinions as to two-year delay of Liability Shift in the but-for world

In support of their argument that the Court should exclude Officer's opinion that in the but-for world, Defendants would have delayed the Liability Shift date by two years, Defendants argue that neither of the methodologies on which Officer relies are reliable economic expert methodologies under Rule 702. (Defs. Mem. to Exclude 6–7.)

1. Comparison to AFD market

Defendants argue that "Officer does not come close to doing the work necessary to use AFDs as a benchmark to predict a but-for world for POS terminals," and even "admits that AFDs are not an appropriate benchmark for predicting whether or for how long Visa or any other network would have delayed its FLS for POS terminals." (*Id.* at 8.) Because Officer's analysis does not satisfy "what is required of a reliable 'benchmark' analysis," Defendants argue that "[w]hatever happened in the AFD market . . . is irrelevant to whether or for how long the networks may have delayed for POS terminals in a but-for world, and should not be considered by the Court." (*Id.* at 11.)

In response, Plaintiffs argue that while "Dr. Officer acknowledge[s] the differences between the AFD and POS markets," Defendants either "miss" or "ignore . . . the comparative

nature of the two markets as it relates to the implementation of EMV, a comparison that renders the AFD market an appropriate benchmark." (Pls. Opp'n to Defs. Mot. to Exclude 13.) Plaintiffs further argue that Defendants also "miss" or "ignore" another basis for Officer's analysis — "that Defendants made their decisions about the AFD market knowing that their collusion with respect to the POS market was under scrutiny." (*Id.* at 14.) This "cost-benefit analysis" employed by Officer supports his conclusion that Defendants' conduct in "implementing the FLS in [the AFD] market resembled a competitive market benchmark for decisions on the imposition of the FLS in a but-for POS world." (*Id.*) Plaintiffs further argue that courts do not require that "comparative benchmarks" be "aligned in all respects" in order to satisfy the *Daubert* standard, and that "Defendants' objections to the model go to, at most, the weight the Court should attribute to Dr. Officer's opinion for the purposes of class certification." (*Id.* at 15–16.)

The Court finds that Officer's benchmark methodology is admissible under Rule 702. In his supplemental rebuttal report submitted in support of Plaintiffs' reply, Officer [redacted]

[redacted][24]

[redacted]

Second, Officer emphasizes that [redacted]

[redacted]

[24] [redacted]

[redacted]

[redacted]

The Court finds that Officer's opinions based on his observations of Defendants' behavior in the AFD market to predict Defendants' likely behavior in the but-for world are admissible under Rule 702. While other experts in the field might ultimately disagree as to the similarity between the two markets, Officer relies on established and reliable methods in the field of economics to reach his conclusions and applies them in a reliable way to the facts of this case. *See Hughes v. The Ester C. Co.*, 317 F.R.D. 333, 341 (S.D.N.Y. Sept. 30, 2016) ("Deference to experts is particularly appropriate when expert testimony concerns soft sciences like economics. Because these disciplines require the use of professional judgment, expert testimony is less likely to be excluded because challenges may ultimately be viewed as matters in which reasonable experts may differ." (quoting *In re Air Cargo Shipping Servs. Antitrust Litig.*, 06-MD-1175, 2014 WL 7882100, at *8 (E.D.N.Y. Oct. 15, 2014), *report and recommendation adopted*, No. 06-MD-1775, 2015 WL 5093503 (E.D.N.Y. July 10, 2015))); *see also Amorgianos*, 303 F.3d at

267 ("A minor flaw in an expert's reasoning or a slight modification of an otherwise reliable method will not render an expert's opinion *per se* inadmissible. . . . This . . . accords with the liberal admissibility standards of the federal rules and recognizes that our adversary system provides the necessary tools for challenging reliable, albeit debatable, expert testimony.").

The cases Defendants cite in which courts have excluded expert testimony are distinguishable. For example, in *In re Electronic Books Antitrust Litigation*, No. 11-MD-2293, 2014 WL 1282293 (S.D.N.Y. Mar. 28, 2014), the court excluded in its entirety the defense expert's testimony attempting to rebut the plaintiffs' expert's damages model calculating e-book prices absent the defendants' antitrust conspiracy. *Id.* at *2–3, 5. The court found, in part, that the defense expert's finding that there was "pervasive dispersion and churning among e-book prices" was directly contradicted by the undisputed evidence at the liability trial, *id.* at *7–8 (internal quotation marks omitted), and that his model "fail[ed] to control for systematic factors affecting prices," such as "a title's publisher, genre, popularity, age, and the availability of hardback and paperback editions," *id.* at *10.

Accordingly, the Court finds that Officer's opinions based on his use of the AFD market to predict Defendants' likely behavior absent the alleged collusion are admissible under Rule 702.

2. Review of internal statements

Defendants argue that Officer's review of Defendants' internal statements is "an attempt to disguise fact-finding as expert testimony and must be excluded." (Defs. Mem. to Exclude 11–12.) Defendants argue that Officer's second proposed methodology involves "nothing more than a credibility determination, which is the classic and exclusive province of the factfinder," and thus should be excluded. (*Id.* at 13.) Defendants further argue that Officer "has done no more

than review select discovery documents, without first-hand knowledge, and reach a conclusion about the parties' motivations," and that courts have found such expert testimony to be inadmissible. (*Id.*)

Defendants further argue that Officer's opinion should be excluded "because his evidentiary review is unquestionably (and deliberately) incomplete," as Officer (1) "only reviewed documents provided to him by" Plaintiffs; (2) "did *not* define what documents he considered 'relevant'"; (3) "did *not* conduct his own searches of the record evidence"; and (4) "did *not* review or search publicly available information." (*Id.* at 15 (first citing *In re Wireless Tel. Servs. Antitrust Litig.*, 385 F. Supp. 2d 403, 428 (S.D.N.Y. 2005); and then citing Officer Dep. 23:14–19, 23:24–24:4, 25:18–22, 139:13–16).) Defendants argue that Officer's analysis fails to consider the "host of evidence that disproves his two-year opinion and in fact disproves the notion of a delay of any length," (*id.*), and that he merely "cherry-pick[s] the documents he likes and disregard[s] those documents (or portions thereof) that are not helpful," (*id.* at 19).

In response, Plaintiffs argue that Officer, "as 'a professional economist,' utilized a 'special skill' of interpreting documents and other materials in the context of other evidence that he has analyzed," and "his review and work in this regard serves as a 'useful reality-check' for the AFD model." (*Id.* at 17 (quoting Officer Report IV ¶ 43).) Plaintiffs argue that "[c]ourts have accepted this type of review and analysis in the context of expert opinion," and that Officer "is not engaged in credibility findings amongst . . . percipient witnesses," "is not offering factual or legal conclusions," and "has [not] engaged in the intent or state of mind determinations" that courts have excluded. (*Id.* at 17–18.) Plaintiffs further argue that any concerns about the "purported selective nature of the documents Dr. Officer reviewed . . . lend themselves most

efficiently to what Defendants[] have availed themselves of here — cross-examination and presentation of arguments against class certification." (*Id.* at 18–19.)

Experts may use the facts from the evidentiary record in order to show how "a document is supportive of an opinion" but cannot "go beyond recitation" of the facts by "characteriz[ing] . . . the document for the purposes of having the fact finder accept that interpretation as fact." *Scentsational Techs., LLC v. Pepsi Inc.*, No. 13-CV-8645, 2018 WL 1889763, at *4 (S.D.N.Y. Apr. 18, 2018). An expert's testimony may be inadmissible if, for example, the expert makes "[i]nferences about the intent or motive of the parties," *In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 547 (S.D.N.Y. 2004), or if the testimony "describes 'lay matters which a jury is capable of understanding and deciding without the expert's help,'" *id.* at 546 (quoting *Andrews v. Metro N. Commuter R.R. Co.*, 882 F.2d 705, 708 (2d Cir. 1989)). While a court is required to serve as the "gatekeeper" to "prevent [the factfinder] from being overwhelmed by speculation cloaked as 'expertise,'" the court "need not censor every assumption, calculation, or opinion capable of being challenged by opposing counsel." *Aventis Envl. Sci. USA LP v. Scotts Co.*, 383 F. Supp. 2d 488, 515 (S.D.N.Y. 2005).

In order to meet Rule 702's reliability standard, an expert's opinion must be more than a "subjective belief or unsupported speculation." *Daubert*, 509 U.S. at 590. When an expert "bases his testimony on practical experience rather than scientific analysis, courts recognize that '[e]xperts of all kinds tie observations to conclusions through the use of . . . "general truths derived from . . . specialized experience."'" *Fort Worth Emps.' Ret. Fund v. J.P. Morgan Chase & Co.*, 301 F.R.D. 116, 129 (S.D.N.Y. 2014) (first and third alterations in original) (quoting *Kumho Tire Co., Ltd.*, 526 U.S. at 149–50). A court may exclude expert testimony based on specialized experience where it is "'speculative or conjectural,' or if it is 'based on assumptions

that are so unrealistic and contradictory as to suggest bad faith or to be in essence an apples and oranges comparison,' [however] '[o]ther contentions that the assumptions are unfounded go to the weight, not the admissibility, of the testimony.'" *Id.* (second alteration in original) (quoting *Zerega Ave. Realty Corp. v. Hornbeck Offshore Transp., LLC*, 571 F.3d 206, 214 (2d Cir. 2009)).

In his rebuttal report, Officer emphasizes that [redacted]

Defendants argue that Officer's expert opinion is inadmissible for the same reasons as the expert opinion excluded by the court in *Highland Capital Management, L.P. v. Schneider*, 379 F. Supp. 2d 461 (S.D.N.Y. 2005). (Defs. Mem. to Exclude 13.) In *Highland Capital Management, L.P.*, an attorney hired as an expert witness for trial in a securities law case wrote a facts section

based on deposition testimony and documentary evidence. 379 F. Supp. 2d at 468. The court found that the expert had "rehash[ed] otherwise admissible evidence about which he ha[d] no personal knowledge" in his facts section "solely for the purpose of constructing a factual narrative based upon record evidence"; this portion of the expert's report was inadmissible because it "contain[ed] a factual narrative of the case and addresse[d] 'lay matters which a jury is capable of understanding and deciding without the expert's help.'" *Id.* at 468–69 (quoting *Andrews*, 882 F.2d at 708). The court further found that the narrative was inadmissible because the expert had included "his own speculation regarding the state of mind and motivations" of the parties involved in the suit, "often without citation to any record evidence." *Id.* at 469.

The Court finds that Officer's analysis of Defendants' statements is distinguishable from the opinion excluded by the court in *Highland Capital Management, L.P.* Like in *Highland Capital Management L.P.*, Officer took portions of the evidentiary record in order to assess what proposed delay seemed to fit with the theme of the overall record; this type of "rehashing" of the factual record is not admissible if it is "solely for the purpose of constructing a factual narrative." *Id.* at 468–69. However, Officer did not "rehash[]" the factual record for the purpose of drafting a facts section and speculating about Defendants' agents' state of mind and motivations, as in *Highland Capital Management L.P.*, *id.* at 469, but for the purpose of evaluating whether this "secondary evidence" was consistent with his conceived but-for world, (*see* Officer Report IV ¶ 43).

Officer's model is necessarily concerned with speculating about how Defendants would have behaved in the but-for world — after all, that is precisely what he has been tasked with as an expert in this antitrust litigation. However, he does not engage in the types of baseless speculations about a party's state of mind or awareness that courts have found inadmissible

under Rule 702. *See Scentsational Techs., LLC*, 2018 WL 1889763, at *12–14 (finding that the expert could not testify as to the knowledge or desires of a party based on inferences from their actions); *Highland Cap. Mgmt., L.P.*, 379 F. Supp. at 469 (finding that the expert's testimony that "an individual involved in the transaction was 'likely aware' that certain parties to the transaction could be preparing to sell stock and that this individual was 'also likely concerned' that the sale of the stock could 'depress the market price of [certain] stock'" was inadmissible); *Envtl. Sci. USA LP*, 383 F. Supp. 2d at 516 (finding that the expert could not testify that competition from a party "was not a factor in the development of [another party's] business strategy or choice of potential partners" (citation omitted)).

While Officer's analysis of Defendants' statements, on its own, may not satisfy Rule 702, the Court finds that, as a secondary "reality-check" for his primary model, grounded in more traditional economic methods, his opinions based on this methodology are admissible. *See Daubert*, 509 U.S. at 596 ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence . . . . These conventional devices, rather than wholesale exclusion under an uncompromising 'general acceptance' test, are the appropriate safeguards where the basis of scientific testimony meets the standards of Rule 702."); *In re Processed Egg Prods. Antitrust Litig.*, 81 F. Supp. 3d 412, 424 (E.D. Pa. 2015) ("[I]t is consistent with sound economic practice to review the factual record and formulate a hypothesis that can then be tested using economic theory — the examination of the factual record is necessary to determine which tests to run and to confirm that the stories drawn from the data and from the factual record are consistent.").

Accordingly, the Court denies Defendants' motion to exclude Officer's opinions as to the

likely delay of the Liability Shift in the but-for world.

iv. Methodology for determining class-wide injury

Defendants argue that the Court should "exclude Officer's opinion that injury can be determined on a class-wide basis using common evidence for the same reasons set forth in Part I of" their opposition to Plaintiffs' renewed motion. (Defs. Mem. to Exclude 19.) In support, Defendants argue that Officer's methodology (1) "still shows FLS chargebacks only to acquirers and not merchants"; (2) "still includes [redacted] merchants whose chargebacks were absorbed by entities other than merchants"; and (3) "still cannot even estimate with any reliability the number of merchants that, in a but-for world, would have paid, at least, the same chargebacks that they did in the real world, or that . . . would likely have paid *more* chargebacks" in the but-for world. (*Id.* at 19–20.)

In response, Plaintiffs note that Defendants' "Rule 702 and [*Daubert*] objections appear to be confined to the same arguments and objections as their Rule 23 arguments," and argue that "Dr. Officer has identified and used a damages methodology that is sound and reliable, [which is] all that is required under Rule 702." (Pls. Opp'n to Defs. Mot. to Exclude 19–20.) Plaintiffs further argue that Defendants' contention that "the class damages model should account for post but-for world chargebacks" is "inconsistent with the assessment of damages in antitrust economics," and that there is "no economic rationale" for Defendants' argument that Officer's model must "account for rising fraud levels during the two-year but-for period or for the continued lack of merchant readiness." (*Id.* at 21–22.)

In support of their motion to exclude Officer's expert testimony as to his proposed methodology to demonstrate class-wide injury, Defendants advance identical arguments to those set forth in their opposition to Plaintiffs' renewed motion for class certification as to why

Plaintiffs have failed to satisfy the Rule 23(b) predominance inquiry as to injury-in-fact. The Court finds that those arguments are appropriately addressed in the context of the Court's Rule 23(b) predominance analysis, and does so in detail below, and that Defendants have not demonstrated that Officer's analysis raises legitimate Rule 702 and *Daubert* concerns.

Accordingly, the Court denies Defendants' motion to exclude Officer's testimony regarding his methodology to demonstrate class-wide injury, and addresses Defendants' arguments in the context of the Rule 23(b) predominance requirement.

c. Rule 23(a) implied requirement of ascertainability

The Court previously denied class certification based on Plaintiffs' failure to satisfy Rule 23(a)'s implied ascertainability requirement. In the March 2018 Order, the Court highlighted that instead of identifying a single end date for their proposed class, Plaintiffs suggested several different end dates:

> (1) October of 2017, the date identified in Visa's plans for delaying the Liability Shift; (2) a thirteen to fifteen month period after October of 2015 based on the timeframe for which the chargeback data was made available; (3) August of 2018, by comparing Visa's implementation timeframe of the Liability Shift in the European Union (E.U.) and the United States from the date Visa announced its plans to adopt EMV in the E.U. and the United States respectively; and (4) October of 2019, based on the four-year statute of limitations under the Sherman Act, which was proposed by Plaintiffs at the hearing.

B & R II, 2018 WL 1335355, at *13 (citations omitted). The Court noted that "to satisfy the ascertainability requirement, Plaintiffs must propose a class period that bears a relationship to Plaintiffs' proposed liability theory," and found that "Plaintiffs' proposal of four different class periods, some of which appear to be completely arbitrary, does not satisfy this requirement." *Id.* Despite finding that the ascertainability requirement had not been met, the Court emphasized that "[a]ny one of the[] dates could be acceptable to make the class ascertainable, if sufficiently

substantiated." *Id.*

Plaintiffs' revised proposed class definition is essentially bounded by the first end date that Plaintiffs suggested in their original motion for class certification, i.e., two years after the actual Liability Shift date, and reads as follows:

> Merchants who incurred one or more unreimbursed chargeback(s) between October 1, 2015 through and including September 30, 2017, pursuant to the Fraud Liability Shift for the assessment of Mastercard, Visa, Discover and/or Amex payment card chargebacks (the "Class"). Excluded from the Class are members of the judiciary and government entities or agencies.

(Pls. Mem. 2.) Plaintiffs argue that "[t]he revised class period set forth in the proposed class definition renders the class ascertainable and addresses the Court's directive in this regard." (*Id.* at 4.) They state that "common evidence demonstrates" that but-for Defendants colluding behavior, they would have delayed the Liability Shift by two years. (*Id.* at 5.) They contend that four types of evidence support their argument:

(1) [redacted]

(*Id.* at 5–6.)

In response, Mastercard, Visa, and Discover argue that Plaintiffs' proposed class "remains unascertainable" and that their newly proposed end date "remains arbitrary, contrary to overwhelming evidence, and inconsistent with Plaintiffs' revised case theory." (Defs. Opp'n 1, 19.) They argue that Plaintiffs not only fail to establish that Defendants would have delayed the

Liability Shift by two years in the but-for world, but also cannot substantiate *any* length of delay, and "ignore[] overwhelming record evidence [redacted] on December 18, 2013, Target announced a data breach, involving [forty] million credit and debit cards, that shook the industry [redacted]" (*See id.* at 20–22, 26–27.) Defendants further argue that, to the extent the Court finds that Plaintiffs can substantiate a delay of the Liability Shift in the but-for world, the evidence supports, at most, a delay of only six months. (*Id.* at 23–26.)

American Express argues that Plaintiffs do not satisfy the ascertainability requirement as to American Express because they "provide no method to determine which purported class members have claims against American Express." (AmEx Opp'n 9.)

Rule 23(a) contains an implied requirement of ascertainability. *In re Petrobras Sec.*, 862 F.3d at 266 ("Most circuit courts of appeals have recognized that Rule 23 contains an implicit threshold requirement that the members of a proposed class be readily identifiable, often characterized as an 'ascertainability' requirement."). Unlike other circuits, the Second Circuit does not have a "heightened" requirement of ascertainability — it requires only that a "class be defined using objective criteria that establish a membership with definite boundaries," and does not require "administrative feasibility" of identifying each class member based on that objective criteria. *Id.* (distinguishing the Second Circuit's approach to ascertainability from the circuits with a heightened ascertainability requirement); *see also Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561, 567 (S.D.N.Y. 2014) ("The standard for ascertainability is 'not demanding' and is 'designed only to prevent the certification of a class whose membership is truly indeterminable.'" (quoting *Gortat v. Capala Bros., Inc.*, 2010 WL 1423018, at *2 (E.D.N.Y. Apr. 9, 2010))); *Charron v. Pinnacle Grp. N.Y. LLC*, 269 F.R.D. 221, 229 (S.D.N.Y. 2010) ("To be ascertainable, the class

must be 'readily identifiable, such that the court can determine who is in the class and, thus, bound by the ruling.'" (quoting *McBean v. City of N.Y.*, 260 F.R.D. 120, 132–33 (S.D.N.Y. 2009))); *In re Methyl Tertiary Butyl Ether ("MTBE") Prod. Liab. Litig.*, 209 F.R.D. 323, 337 (S.D.N.Y. 2002). "The ascertainability requirement, as defined in this Circuit, asks district courts to consider whether a proposed class is defined using objective criteria that establish a membership with definite boundaries." *In re Petrobras Sec.*, 862 F.3d at 269.

i. Plaintiffs' proposed class definition is objectively defined

In contrast to the class definition previously proposed by Plaintiffs, Plaintiffs' revised "proposed class is defined using objective criteria that establish a membership with definite boundaries." *Id.* at 269; *see also BlackRock Balanced Cap. Portfolio (FI) v. Deutsche Bank Nat'l Tr. Co.*, No. 14-CV-9367, 2018 WL 5619957, at *7 (S.D.N.Y. Aug. 7, 2018) ("The [c]ourt restricts its analysis to whether [the] proposed class definition contains objective criteria."). The Second Circuit has instructed that ascertainability is a "modest threshold requirement [that] will only preclude certification if a proposed class definition is indeterminate in some fundamental way," and "does not directly concern itself with the plaintiffs' ability to offer *proof of membership* under a given class definition, an issue that is already accounted for in Rule 23." *In re Petrobras Sec.*, 862 F.3d at 269; *see also In re Signet Jewelers Ltd. Sec. Litig.*, No. 16-CV-6728, 2019 WL 3001084, at *9 (S.D.N.Y. July 10, 2019) ("This implied requirement is designed to prevent the certification of a class whose membership is 'truly indeterminable.'" (quoting *In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 312 F.R.D. 332, 353 (S.D.N.Y. 2015))).

Plaintiffs' proposed class consists of those merchants who incurred at least one unreimbursed chargeback during a specified two-year period due to the Liability Shift imposed by Defendants, and are not members of the judiciary or government entities or agencies.

Plaintiffs' proposed class definition is objectively defined, with clear boundaries, and does not lack "a clear sense of who is suing about what."[25] *In re Petrobras Sec.*, 862 F.3d at 269; *see also Langan v. Johnson & Johnson Consumer Cos., Inc.*, 897 F.3d 88, 91 n.2 (2d Cir. 2018) (noting that where a class is "'identified by subject matter, timing, and location,' . . . it [is] 'objectively possible' to ascertain members" (quoting *In re Petrobras Sec.*, 862 F.3d at 269–70)).

ii. Plaintiffs' proposed class definition aligns with their theory of liability

In its prior decision denying class certification, the Court noted that while "Plaintiffs do not have to establish the [Liability] Shift date in the but-for world with absolute certainty," *B & R II*, 2018 WL 1335355, at *13 (citing *In re Elec. Books Antitrust Litig.*, 2014 WL 1282293, at *27), in order "to satisfy the ascertainability requirement, Plaintiffs must propose a class period that bears a relationship to Plaintiffs' proposed liability theory," *id.* The Court concluded that "Plaintiffs' proposal of four different class periods, some of which appear[ed] to be completely arbitrary, [did] not satisfy this requirement." *Id.*

[25] *Cf., e.g.*, *In re Signet Jewelers Ltd. Sec. Litig.*, No. 16-CV-6728, 2019 WL 3001084, at *9 (S.D.N.Y. July 10, 2019) ("The proposed [c]lass definition clearly delineates the [c]lass's boundaries by the dates of investors' transactions in Signet stock."); *Audet v. Fraser*, No. 16-CV-0940, 2019 WL 2562628, at *12 (D. Conn. June 21, 2019) ("[T]he criteria for class membership in this case — purchases of designated products during a specified timeframe by all persons or entities except government agencies and those with certain relationships to a defendant — are clearly objective."); *BlackRock Balanced Cap. Portfolio (FI) v. Deutsche Bank Nat'l Tr. Co.*, No. 14-CV-9367, 2018 WL 5619957, at *7 (Aug. 7, 2018) ("Class members are those who 'purchased or otherwise acquired a beneficial interest in a security issued from the Trusts . . . between the date of offering and [sixty] days from the final order certifying the class and who hold the beneficial interest in the security through the date of final judgment . . . .' This definition incorporates a temporal limitation, avoiding any concern that a class membership without explicit start and end dates would constantly shift, thereby rendering it unascertainable." (first and third alterations in original)); *Alexander v. Price*, 275 F. Supp. 3d 313, 327 (D. Conn. 2017) ("The class is defined with objective criteria, including the individual's status as a Medicare beneficiary, the date of hospitalization, and an initial determination that the hospital services were observation services covered under Medicare Part B. These create clear boundaries for class membership.").

In their renewed motion, Plaintiffs now propose one single class period — October 1, 2015 through September 30, 2017 — reflecting the two-year delay in the Liability Shift that Plaintiffs contend would have been most likely in the but-for world. (Pls. Mem. 5.) Plaintiffs' revised class period bears a clear relationship to Plaintiffs' proposed liability theory: Plaintiffs claim that, absent Defendants' alleged collusion, Defendants would have delayed the Liability Shift date by at least two years, "ensur[ing] merchants and the necessary industry players had sufficient time to migrate to EMV, and [allowing] merchants [to] avoid[] two years of FLS chargebacks." (Pls. Reply 15–16, Docket Entry No. 706-27.)

iii. Plaintiffs' proposed class definition is sufficiently substantiated

Mastercard, Visa, and Discover do not appear to dispute that Plaintiffs' proposed class definition is objectively defined and bears a clear relationship to their proposed liability theory. Instead, Defendants devote their entire ascertainability argument section to refuting Plaintiffs' proposed end date and reliance on the notion of a two-year delay — or any delay at all — in the but-for world. (Defs. Opp'n 19–34.)

Defendants argue that Plaintiffs have not established the two-year delay by a preponderance of the evidence and "have not met their burden to substantiate a class period," and emphasize that "[c]ourts in the Second Circuit routinely modify class periods where the proposed time period is not supported by evidence." (*Id.* at 19 & n.16, 34 (citations omitted).) In support, Defendants contend that Plaintiffs "cherry pick" evidence from the record and rely only on a [redacted] and "ignore[] overwhelming record evidence of [redacted] — the Target data breach, announced on December 18, 2013, which "shook the industry [redacted] (*Id.* at

20, 27.) Defendants argue that "[i]n proposing a but-for world, Plaintiffs cannot fairly ignore . . . evidence [regarding the Target data breach], which is independent of any alleged collusion." (*Id.* at 27.) Defendants further argue that, at most Plaintiffs can substantiate a six-month delay, based on [redacted] (*Id.* at 23 (quoting Pls. Mem. 23).)

In response, Plaintiffs argue that the "detailed recitation of evidence" in their renewed motion "demonstrate[s] that, in the but-for world, Defendants most likely would have delayed the FLS by two years," and that "Defendants' arguments — more suited for summary judgment than to address whether the requirements of Rule 23 are met — are misplaced given that 'absolute certainty' as to the end date is not required." (Pls. Reply 7–8 (quoting *B & R II*, 2018 WL 1335355, at *13); *see id.* at 7 ("[Defendants] ignore controlling legal authority that the relevant Rule 23 inquiry . . . , while 'rigorous,' does not grant a 'license to engage in free-ranging merits inquiries at the class certification stage.'" (quoting *Amgen Inc.*, 568 U.S. at 465–66)).) Plaintiffs further argue that "Defendants' self-serving interpretation of . . . Plaintiffs' evidence on the length of the FLS delay does not render the proposed class unascertainable." (*Id.* at 8.) In support, Plaintiffs catalog various contemporaneous documents and statements indicating that [redacted] (*Id.* at 8–11.)

The Court finds that Plaintiffs have sufficiently substantiated the proposed class period.

In support of a two-year delay of the Liability Shift in the but-for world, Plaintiffs point to evidence that [redacted][26] (*Id.*)

Plaintiffs argue that this abrupt shift away from a two-year delay was the result of collusion between Defendants. (*Id.* at 8.) In support, they point to [redacted]

[26] The Court omits citations to exhibits submitted in support of Plaintiffs' renewed motion throughout its discussion of the evidence substantiating the class period.

[redacted]

Plaintiffs contend that [redacted]

Next, Plaintiffs argue that, "[h]ad Visa delayed the FLS by two years, the other [Defendants] would have followed suit," and point to significant record evidence that [redacted] (*Id.* at 11–13.) Plaintiffs further argue that a delay of at least two years in the but-for world is consistent with the thirty-six-month delay in the AFD market, discussed in detail above. (*Id.* at 13–15.) Finally, Plaintiffs argue that, [redacted]

[redacted] the "myriad problems with EMV implementation leading up to the FLS would have led to a delay of at least two years given their magnitude." (*Id.* at 15.) In support, Plaintiffs cite to [redacted] (*Id.* at 15–17.)

As discussed above, Plaintiffs' expert, Officer, also concluded that a two-year delay was the most likely outcome in the but-for world, absent Defendants' collusion. (*See* Officer Report III; Officer Report IV.)

The Court finds that, between Officer's expert opinion and Plaintiffs' additional arguments, supported by record evidence, Plaintiffs have sufficiently substantiated their proposed class definition, based on a two-year delay in the Liability Shift in the but-for world.

iv. The class is ascertainable as to American Express

American Express separately argues that Plaintiffs have not satisfied the ascertainability requirement as to American Express because they "provide no method to determine which purported class members have claims against American Express." (AmEx Opp'n 9.) In support, American Express argues that because "the only claims against American Express are those brought on behalf of merchants who do not accept American Express cards, . . . to satisfy Rule 23(a)'s ascertainability requirement, the Court must be able to determine which merchants [did not] accept[] American Express cards at any point during the relevant time period and are therefore, with regard to American Express, 'bound by' any ruling in this case." (*Id.* at 10 (quoting *Charron*, 269 F.R.D. at 229).) Because Plaintiffs have not provided any "method by which the Court will be able to identify those merchants that have claims against American Express in this litigation," and instead, through their expert, "lump[] together chargebacks

purportedly issued to *all* merchants, including those that accept American Express and thus have no claims against American Express in this case," American Express argues that Plaintiffs have not satisfied the ascertainability requirement as to American Express. (*Id.*) American Express further argues that there is no "basis, given the record in this case, for Dr. Officer to segregate [American Express]-accepting and non-[American Express]-accepting merchants, even if he tried to do so," (*id.* at 10), and that "[t]his is not a matter that can be left for any post-trial claims process," as "[t]he issues here go to liability, not just damages," (*id.* at 12).

In response, Plaintiffs argue that American Express "ignores the well-established 'rule of joint and several liability, under which each member of a conspiracy is liable for all damages caused by the conspiracy's entire output.'" (Pls. AmEx Reply 3–4, Docket Entry No. 706-28 (quoting *Paper Sys., Inc. v. Nippon Paper Indus. Co.*, 281 F.3d 629, 632 (7th Cir. 2002)).) Because American Express "can be held liable for the entire amount of damages stemming from the other [Defendants'] imposition of FLS chargebacks . . . whether or not merchants that have CAAs can be segregated in the manner [American Express] demands has no bearing on [its] liability." (*Id.* at 4.) Plaintiffs further argue that American Express' claim that "there is no objective evidence to identify which merchants have a CAA with [American Express]" is implausible, (*id.*), and that "damages are quantifiable with reference to [American Express'] and the other [Defendants'] own records," and "merchants themselves have objective evidence to support any claim during a subsequent administrative process," (*id.* at 6).

As an initial matter, the Court notes that American Express misstates the law on ascertainability and asks the Court to apply a standard that the Second Circuit has explicitly rejected. (*See* AmEx Opp'n 9 (stating that the "touchstone of ascertainability is whether the class is sufficiently definite so that it is administratively feasible for the court to determine

whether a particular individual is a member" (quoting *Brecher v. Republic of Argentina*, 806 F.3d 22, 24 (2d Cir. 2015)).) As discussed above, the Second Circuit has declined to adopt an administrative feasibility requirement, and instead "requires only that a class be defined using objective criteria that establish a membership with definite boundaries." *In re Petrobras Sec.*, 862 F.3d at 264 (discussing administrative feasibility language in *Brecher* cited by American Express and clarifying that "a freestanding administrative feasibility requirement is neither compelled by precedent nor consistent with Rule 23," and "declining to adopt such a requirement").

The Court finds that the proposed class is ascertainable as to American Express. As the Court has previously noted, "Plaintiffs claim that Defendants are jointly and severally liable," based on their "alleged conspiracy to impose the Liability Shift on the same date." *B & R II*, 2018 WL 1335355, at *8. Thus, Plaintiffs have argued that even named Plaintiffs (and putative class members) whose direct claims against American Express have been transferred to the Southern District of New York "may yet maintain claims arising from American Express'[] chargebacks against Visa, Mastercard and Discover based on joint and several liability rooted in American Express'[] participation in the alleged antitrust conspiracy," because "[c]o-conspirators are liable not only for the injury caused by their own conduct, but are also jointly and severally liable for all damages caused by the conspiracy in which they participate." (Pls. Letter dated Oct. 20, 2017 ("Oct. 2017 Letter") 1, Docket Entry No. 604.) As to the one named Plaintiff who does not accept American Express cards (and similarly situated putative class members), Plaintiffs have argued that it may "seek[] to hold American Express jointly and severally liable for the fraud chargebacks imposed by Visa, Mastercard, and Discover." (*Id.* at 2.)

In the March 2018 Order, the Court rejected American Express' argument that the proposed class was overbroad because it captured claims based on American Express' conduct that, according to American Express, could not be brought in this Court. *B & R II*, 2018 WL 1335355, at *8–9. As the Court noted, "American Express concede[d] that [this action] no longer includes any claims against American Express by those merchants who have signed CAAs with American Express and are bound by the forum-selection clause in those CAAs." *Id.* at *8. The Court found that American Express had provided no basis for its claim that "Plaintiffs who are signatories to the CAA, and whose direct claims against American Express have been transferred to the Southern District of New York, cannot maintain their claims against Master[c]ard, Visa, and Discover outside of the forum agreed to in the CAA, based on joint and several liability, when Master[c]ard, Visa, and Discover are not parties to the CAA."[27] *Id.* at *9.

The Court also rejected American Express' argument that Fine Fare Supermarket "as a merchant who does not accept American Express credit cards[] cannot adequately represent those merchants who do accept its cards." *Id.* In finding that there was "no conflict . . . between the two groups in this case" to defeat the adequacy of representation or warrant the creation of subclasses, the Court noted that "the claims of joint and several liability are based on a conspiracy in which all Defendants are alleged to have participated," and "[t]he only material difference between the groups is their ability to recover against American Express if Plaintiffs obtain a favorable judgment." *Id.* at *10.

Now, in opposing Plaintiffs' renewed motion, American Express criticizes Officer for "mak[ing] no attempt to: (a) identify which merchants can assert any claim against American

[27] American Express now contends that it "never intended" to make this argument. (AmEx Opp'n 11.)

Express because they had EMV chargebacks from Visa, Mastercard or Discover at a time when they were not accepting American Express; (b) identify which merchants decided to accept or not accept American Express during the class period; or (c) identify or quantify the chargebacks that might possibly be asserted as damages against American Express at the time of the underlying fraud." (AmEx Opp'n 8.) American Express contends that Plaintiffs cannot "attempt to cure their inability to identify class members now by invoking a post-trial claims process," which would require that:

> for any merchant that received an EMV chargeback from any [Defendant], the Court would have to determine (1) whether the merchant was subject to American Express' CAA at any point during the class period and (2) which, if any, EMV chargebacks from the other [Defendants] occurred at a time when the merchant was not subject to the CAA.

(*Id.* at 13.)

The Court agrees with Plaintiffs that American Express "cannot plausibly argue that there is no objective evidence to identify which merchants have a CAA with [American Express]." (Pls. AmEx Reply 4.) Moreover, as discussed above, contrary to American Express' recitation of the law, the ascertainability requirement does not contain a feasibility requirement. Thus, even accepting American Express' claim that the "number of merchants accepting American Express is not static and can vary substantially over time," and that "the number of merchants that could conceivably assert claims against American Express . . . varied substantially over the purported class period," (AmEx Opp'n 10–11), the Court does not find that this renders the proposed class as to American Express "indeterminate in some fundamental way," *In re Petrobras Sec.*, 862 F.3d at 269.

Accordingly, the Court finds that Plaintiffs have satisfied Rule 23(a)'s implied requirement of ascertainability.

d. Rule 23(b)(3) requirements

In addition to satisfying the Rule 23(a) requirements, certification must be appropriate under Rule 23(b). *See Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013). Certification under Rule 23(b)(3) requires both that (1) "questions of law or fact common to class members predominate over any questions affecting only individual members," and that (2) "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3); *see also Amgen Inc.*, 568 U.S. at 460; *Sykes*, 780 F.3d at 80.

i. Predominance

Plaintiffs argue that "common questions predominate over individual ones for all three elements of an antitrust claim: (i) an antitrust violation; (ii) antitrust injury and causation; and (iii) damages," and that, "[i]n support of this renewed [m]otion, Plaintiffs have proffered factual evidence and expert opinion showing that . . . antitrust injury and causation[] are susceptible to generalized proof."[28] (Pls. Mem. 17.)

In response, Defendants argue that Plaintiffs have both "fail[ed] to cure those predominance issues" previously raised by Defendants, which the Court instructed Plaintiffs to address in any renewed motion, and have "introduce[d] ***new*** predominance problems," raised by "Plaintiffs' new but-for world." (Defs. Opp'n 2.) Defendants assert that Plaintiffs cannot satisfy the predominance requirement as to either injury-in-fact or causation, and that the Court should deny class certification because Plaintiffs cannot establish these elements of their antitrust claims through common proof. (*Id.* at 10–19, 34–43.)

"The 'predominance inquiry tests whether proposed classes are sufficiently cohesive to

[28] Because "[i]t is undisputed that Plaintiffs have met their burden of showing predominance on the first element of their antitrust claim," i.e. antitrust violation, Plaintiffs address predominance only as to the remaining elements. (Pls. Mem. 18.)

warrant adjudication by representation.'" *Tyson Foods, Inc. v. Bouaphakeo*, --- U.S. ---, ---, 136 S. Ct. 1036, 1045 (2016) (quoting *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 623 (1997)). According to the Supreme Court:

> This calls upon courts to give careful scrutiny to the relation between common and individual questions in a case. An individual question is one where "members of a proposed class will need to present evidence that varies from member to member," while a common question is one where "the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof."

Id. (quoting 2 Newberg on Class Actions § 4:50 at 196–97 (5th ed. 2012)).

Predominance is satisfied "if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 405 (2d Cir. 2015) (internal quotation marks omitted) (quoting *UFCW Local 1776 v. Eli Lilly & Co.*, 620 F.3d 121, 131 (2d Cir. 2010)). Typically, common issues predominate when liability is determinable on a class-wide basis, even where class members have individualized damages. *See In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 139 (2d Cir. 2001); *see also Tyson Foods, Inc.*, 136 S. Ct. at 1045 ("When 'one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages . . . .'" (footnotes omitted) (citing 7AA C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1778 at 123–24 (3d ed. 2005))).

"While predominance may be difficult to demonstrate in mass tort cases, . . . in which the 'individual stakes are high and disparities among class members great,' it is a 'test readily met in

certain cases alleging consumer or securities fraud or violations of the antitrust laws.'" *In re Am. Int'l Grp., Inc. Sec. Litig.*, 689 F.3d at 240 (quoting *Amchem Prod., Inc.*, 521 U.S. at 625). Rule 23(b)(3) "does *not* require a plaintiff seeking class certification to prove that each elemen[t] of [her] claim [is] susceptible to classwide proof." *Amgen Inc.*, 568 U.S. at 468 (alterations in original) (citations and internal quotation marks omitted). Instead, a class plaintiff is only required to show that "*questions* common to the class predominate, [and] not that those questions will be answered, on the merits, in favor of the class." *Id.* at 459. Thus, Rule 23(b)(3) contemplates the presence of individual questions as long as those questions do not predominate over the common questions which affect the class as a whole. *Sykes*, 780 F.3d at 81–82 (citing *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 815 (7th Cir. 2012)). "If the most substantial issues in controversy will be resolved by reliance primarily upon common proof, class certification will generally achieve the economies of litigation that Rule 23(b)(3) envisions." *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2014 WL 7882100, at *36.

Whether questions of law or fact common to class members predominate may require analysis of the elements of the underlying causes of action, *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011), with the possibility of reviewing the merits of the claims, *Comcast*, 569 U.S. at 28; *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 27 (2d Cir. 2006) (stating that simply because there might be overlap between a Rule 23 requirement and "an issue on the merits does not avoid the court's obligation to make a ruling as to whether the requirement is met, although such a circumstance might appropriately limit the scope of the court's inquiry at the class certification stage"), *decision clarified on denial of reh'g sub nom. In re Initial Pub. Offering Sec. Litig.*, 483 F.3d 70 (2d Cir. 2007). "To certify a class in an antitrust action, [p]laintiffs must demonstrate that the elements of their underlying claims can be proven

by common evidence." *Dial Corp. v. News Corp.*, 314 F.R.D. 108, 114–15 (S.D.N.Y. 2015), *amended*, No. 13-CV-6802, 2016 WL 690895 (S.D.N.Y. Feb. 9, 2016). "Those elements include: '(1) a violation of antitrust law; (2) injury and causation; and (3) damages.'" *Id.* (alteration omitted) (quoting *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons*, 502 F.3d 91, 105 (2d Cir. 2007)).[29]

"To satisfy the Rule 23(b)(3) predominance requirement, [p]laintiffs must demonstrate that class-wide injury or 'impact' is capable of proof at trial through evidence that is common to the class rather than individual to its members." *Dial Corp.*, 314 F.R.D. at 114–15 (citing *Comcast Corp.*, 569 U.S. at 30). As the Second Circuit has explained:

> [T]he second element of an antitrust cause of action "antitrust injury" — poses two distinct questions. One is the familiar factual question whether the plaintiff has indeed suffered harm, or "injury-in-fact." The other is the legal question whether any such injury is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."

C*ordes & Co. Fin. Servs.*, 502 F.3d at 106 (quoting *Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc.*, 429 U.S. 477, 489 (1977)). "The necessary 'antitrust injury' is an injury attributable to the anticompetitive aspect of the practice under scrutiny." *Port Dock & Stone Corp. v. Oldcastle Ne., Inc.*, 507 F.3d 117, 122 (2d Cir. 2007) (citing *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990)). "In general, the person who has purchased directly from those who have fixed prices at an artificially high level in violation of the antitrust laws is deemed to have suffered . . . antitrust injury." *Cordes & Co. Fin. Servs.*, 502 F.3d at 107 n.12 (quoting *New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065, 1079 (2d Cir. 1988)). At the class certification phase,

[29] Defendants do not appear to argue that Plaintiffs cannot satisfy the predominance inquiry as to the violation prong of an antitrust claim, nor could they meaningfully do so, as Defendants' alleged antitrust conspiracy is clearly capable of proof through common evidence.

"the question is 'whether the method by which plaintiffs propose to prove class-wide impact *could* prove such impact, not whether plaintiffs in fact *can* prove class-wide impact.'" *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2014 WL 7882100, at *41 (quoting *In re Magnetic Audiotape Antitrust Litig.*, No. 99-CV-1580, 2001 WL 619305, at *4 (S.D.N.Y. June 6, 2001)).

1. Injury-in-fact

Plaintiffs argue that "antitrust impact is established through common evidence," as "Defendants' imposition of the FLS had the effect of substantially increasing the cost of Defendants' network services to Plaintiffs and the proposed class, with few exceptions or limitations," and that Plaintiffs "demonstrate this impact through (i) contemporaneous documentary evidence . . . and (ii) the methodology put forward by Dr. Officer." (Pls. Mem. 19–20.)

In response, Defendants argue that Plaintiffs cannot satisfy predominance as to injury-in-fact because their proposed methodology does not establish class-wide injury, and that doing so would require individualized proof. (Defs. Opp'n 10–19.) In support, Defendants argue that (1) Plaintiffs and their expert improperly assume that the prices class members would have paid in the but-for world are zero, and thus their methodology is incapable of demonstrating injury, (*id.* at 10–15); and (2) Plaintiffs' methodology fails to adequately show that merchants, and not third parties, paid the FLS chargebacks during the class period, (*id.* at 15–19).

As the Court previously noted, "[i]n price-fixing antitrust cases, injury and damages are typically determined by comparing prices resulting from the antitrust violation to prices in the world free of the defendants' antitrust violation . . . known as the 'but-for world.'" *B & R II*, 2018 WL 1335355, at *4 n.9 (first citing *Cordes & Co. Fin. Servs.*, 502 F.3d at 97, and then citing *In re Digital Music Antitrust Litig.*, 321 F.R.D. 64, 91 (S.D.N.Y. 2017)); *In re Elec. Books*

Antitrust Litig., 2014 WL 1282293, at *16 ("The proper measure of damages in a suit concerning a price-fixing conspiracy is 'the difference between the prices actually paid and the prices that would have been paid absent the conspiracy.'" (quoting *Hendrickson Bros., Inc.*, 840 F.2d at 1077)).

A. Plaintiffs' proposed methodology

Plaintiffs' proposed methodology relies in part on data provided by Defendants to determine injury and damages to merchants based on the chargebacks assessed to each merchant over the class period. (Officer Report I 14; Officer Report III 32–34.) According to Officer,

[redacted][30]

In opposing Plaintiffs' prior motion, Defendants argued that Plaintiffs' methodology was not capable of showing injury to merchants because "the [FLS] [C]hargeback [C]odes only track the [FLS] chargebacks to bank-acquirers and do not identify whether they were passed on to merchants."[31] *B & R II*, 2018 WL 1335355, at *5. Plaintiffs did not dispute that Defendants'

[30] The "related damages question" is, if a merchant paid any FLS chargebacks during the class period, "how much" it paid. *See Cordes & Co. Fin. Servs.*, 502 F.3d at 108 n.14.

[31] In addition, Defendants argued that "(1) the [FLS] chargebacks tracked by the [FLS] [C]hargeback [C]odes include[d] some chargebacks that are not related to the Liability Shift; and (2) the methodology [did] not account for the intervening causes that precluded merchants from timely installing and certifying their EMV technology." *B & R II*, 2018 WL 1335355, at *5. As

data only tracked chargebacks to acquirers, and not merchants, but contended that "the Court should assume that bank acquirers passed on those chargebacks to merchants because many bank acquirers made statements that merchants [would] be responsible for chargebacks following the Liability Shift." *Id.* The Court did not reach the issue, but directed Plaintiffs, if they renewed their motion, to "further address the predominance issues raised by Defendants," including, "in particular, the issue[] of commonality of injury." *Id.* at *13 n.24.

In the supplemental expert report submitted in support of the renewed motion, Plaintiffs asked Officer to address [redacted] The primary way in which Plaintiffs seek to answer this question is through "certain transaction data" that they "sought and . . . obtained from several large acquirers," and which Officer has analyzed in his report.[32] (Pls. Mem. 20–21.) Officer conducted [redacted] Plaintiffs assert that Officer's "various analyses" demonstrate that the "overwhelming majority of the FLS chargebacks were passed through to merchants." (Pls. Mem. 21.)

To address Defendants' claim that intermediaries in the payment processing system may have reimbursed merchants for, or "absorbed," their FLS chargebacks, Officer reviewed data from [redacted]

discussed above, Officer addresses the first concern through his substitution analysis. Defendants' intervening cause argument is addressed below.

[32] Plaintiffs note that "[b]ecause of the way transaction data is maintained, the identification and collection of the requisite data sought was challenging," and that "even identifying the proper entity holding the transaction data was challenging." (Pls. Mem. 20 n.11.) Plaintiffs further note that "given such difficulties, [they] were not able to obtain transaction data with the level of specificity originally sought." (*Id.* (citing Officer Report III ¶¶ 85–97).)

[redacted][33] [redacted]

[redacted]

[redacted][34] [redacted]

[redacted][35] [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[33] According to Officer, [redacted]

[34] This figure does not include FLS chargebacks processed by American Express, which [redacted]

[35] In his subsequent report, Officer describes [redacted]

(1) Overall absorption rates by payment processor

The first test Officer conducted [redacted][36]

[36] According to Defendants' expert, Kaplan, [redacted]

[redacted]

[redacted][38][redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[37] [redacted]

[38] Officer refers to these as [redacted] though the significance of this, if any, is not apparent to the Court.

[redacted]

[redacted][39] [redacted]

[redacted]

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[39] [redacted]

[redacted]

(2) Absorption rate at the transaction and merchant level

The second test Officer conducted [redacted]

[redacted][40]

[redacted][41]

40 [redacted]

41 [redacted]

[redacted][42] [redacted]

[redacted][43] [redacted][44] [redacted]

[42] [redacted]

[43] [redacted]

[44] Plaintiffs characterize this data differently, [redacted] This description does not appear to the Court to be consistent with the relevant portion of Officer's report, which states the following:

[redacted]

[redacted] [45] [redacted]

[redacted]

[redacted]

[45] [redacted]

[redacted][46][redacted][47][redacted]

[redacted]

[46] (*See* Officer Dep. 248:13–19.)

[47] As with the Visa data, Plaintiffs characterize this data differently, as showing that [redacted] For the same reasons discussed above regarding the Visa chargeback data, this is not how the Court reads Officer's report. (*See* Officer Report III ¶ 74.)

[redacted][48] [redacted]

(3) Merchant agreements and payment processors' annual filings

For the third test Officer conducted, [redacted]

[redacted][49] [redacted]

[48] In his rebuttal report, Officer states that he [redacted]

[49] In support of their prior motion, Plaintiffs argued that that the Court should assume that bank acquirers passed on those chargebacks to merchants because many major bank acquirers made statements that merchants will be responsible for chargebacks following the Liability Shift. (Nov. 29, 2017 Hr'g Tr. 14–15; Am. Compl. ¶¶ 185–97.) In the Amended Complaint, Plaintiffs quote statements made by the top ten acquirers recognizing merchants' responsibility for chargebacks, following the Liability Shift date by the networks. For example, Plaintiffs quote Bank of America Merchant Services, the fourth largest acquirer, stating: "All of the card organizations have chosen October 1, 2015, as the date when liability for counterfeit

B. Defendants' objections to Plaintiffs' methodology's ability to show class-wide injury-in-fact

In response to Plaintiffs' newly proffered evidence in support of their renewed motion, Defendants argue that Plaintiffs still cannot show class-wide injury with common evidence. In support, Defendants raise two objections, neither of which the Court finds persuasive enough to defeat class certification.

(1) Prices in the but-for world

Defendants argue that "Dr. Officer's calculations . . . cannot show class-wide injury," because they are based on the flawed assumption that "but-for world prices are zero." (Defs. Opp'n 10–11.) According to Defendants, this assumption improperly ignores that "a delay in the [L]iability [S]hifts would also be a delay in the incentives for merchants to upgrade to EMV," and that "[f]or many merchants, a delay in the [L]iability [S]hifts would translate to a delay in their upgrading to EMV until they started seeing (and paying) FLS chargebacks in October 2017," just as they did in the real world. (*Id.*) In addition, these merchants likely "would have faced higher FLS chargebacks in the but-for world" because "fraud would have continued to grow unabated for two years." (*Id.* at 11.) Thus, Defendants argue, these merchants would not only be uninjured, but "many would be worse off in the but-for world."[50] (*Id.*) Defendants

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fraudulent transactions will shift to the merchant if the merchant has not adopted POS solutions that are capable of processing EMV chip cards." (Am. Compl. ¶ 189.)

In support of their renewed motion, Plaintiffs argue that Officer's analysis of merchant agreements and annual filings "comports with" the "contemporaneous statements" by the "largest acquirers and processors . . . that, after the FLS on October 1, 2015, merchants would bear the costs for chargeback liability if a chip-card transaction occurred on a non-certified EMV terminal." (Pls. Mem. 21; Am. Compl. ¶¶ 185–97.)

[50] Defendants assert that "[t]his flaw was not evident in [Officer's] initial reports," which "appeared to assume a but-for world with no [L]iability [S]hifts through 'the present day,'" but that "in the new but-for world with aligned [L]iability [S]hift dates for all networks, the

further argue that this "flaw in [Officer's] methodology [cannot] be fixed with common evidence," because "any fix would have to start with assessing why each putative class member was not certified in the real world . . . , and then predicting when each individual merchant would have been certified in the but-for world and how but-for world FLS chargebacks would have compared to real-world FLS chargebacks for that merchant." (*Id.* at 14.)

In response, Plaintiffs argue that "[u]nder [their] methodology, what happens in October 2017 after the close of the class period is irrelevant," and that Defendants "ignore Plaintiffs' clear and simple theory of liability and seek improperly to impose an alternate but-for world on Plaintiffs." (Pls. Reply 16.) Plaintiffs contend that "[i]n their but-for world, merchants simply would not have paid [any] FLS-specific chargebacks during the two-year time period." (*Id.*) Under Plaintiffs' theory of liability, absent "collusion by [Defendants], the FLS would have been delayed to ensure merchants and the necessary industry players had sufficient time to migrate to EMV, and merchants would have avoided two years of FLS chargebacks." (*Id.* at 15–16.) Thus, Plaintiffs argue, Officer's failure to attempt to calculate the FLS chargebacks class members would have incurred following the Liability Shift in the but-for world is consistent with the theory of liability Plaintiffs have asserted throughout this litigation and is not "a flaw in [his] analysis." (*Id.* at 16–17.)

At least one of Officer's prior reports posited a but-for world in which no FLS had been imposed. In his opening report submitted in support of Plaintiffs' prior motion for class certification, Officer stated that a [redacted]

assumption of a 'zero' [but-for world] price is transparently wrong." (Defs. Opp'n 11 n.7 (quoting *B & R II*, 2018 WL 1335355, at *4).)

[redacted]

Defendants are correct that Officer does not attempt to calculate the FLS chargebacks merchants would have incurred following the Liability Shift in the revised but-for world. In his report submitted in support of Plaintiffs' renewed motion, Officer now posits a [redacted]

[redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]

[redacted]

[redacted]

In his rebuttal report submitted in support of Plaintiffs' reply, Officer explains further:

[redacted]

(Officer Report IV ¶ 69.)

Defendants' expert, Kaplan, finds a number of issues with Officer's report, including his calculation of but-for world prices and his failure to look at how merchants would have responded to an FLS in the but-for world. According to Kaplan, Officer [redacted] Kaplan critiques "Officer's

methodology [redacted]

[redacted]

[redacted]

In his rebuttal report, Officer describes as a [redacted]

The Court finds that Plaintiffs are not required to offer evidence of how merchants would have responded to the Liability Shift in the but-for world in order to establish injury or damages. The Court agrees with Plaintiffs that their assumption of a but-for world price of zero is

consistent with their liability theory in this case. Plaintiffs claim that, despite the apparent lack of merchant readiness to implement EMV, Defendants colluded with each other to not delay the FLS date, and that as a result of Defendants' anticompetitive behavior, merchant class members incurred FLS chargebacks during the two-year class period that they otherwise would not have incurred, but for Defendants' conduct. According to Plaintiffs' theory, in a competitive environment, Defendants would have delayed the FLS date in response to the apparent lack of merchant readiness to implement EMV, "ensur[ing] merchants and the necessary industry players had sufficient time to migrate to EMV." (Pls. Reply 15.) Even assuming that Defendants are correct that in the but-for world some merchants may still have incurred FLS chargebacks following Defendants' Liability Shifts, implemented as early as September 30, 2017, the Court is nevertheless convinced by Plaintiffs' argument that, consistent with their liability theory, any such chargebacks are irrelevant. Plaintiffs' claim is not merely that they paid *more* in FLS chargebacks due to Defendants' collusion and the resulting October 2015 Liability Shift than they would have absent Defendants' collusion — rather, their claim is that they paid FLS chargebacks that they would not have paid *at all*. Plaintiffs' proposed methodology is consistent with this theory.

(2) Absorption issues

Defendants argue that Plaintiffs have failed to adequately address the predominance issues previously raised as to injury-in-fact — that "Officer's calculations did not . . . account for chargeback reimbursement programs offered by acquiring banks, processors, and other third parties." (Defs. Opp'n 16.) Defendants assert that while "Plaintiffs now acknowledge this problem by limiting their class to merchants with 'unreimbursed' chargebacks and by asserting that the 'overwhelming majority' of chargebacks were passed through to merchants," the new

data and analysis Plaintiffs now present to the Court "capture untold thousands of merchants that had all of their chargebacks reimbursed." (*Id.*) In support, Defendants argue that Officer (1) "ignored reimbursements from other levels in the payment chain," (2) "did not have common evidence from which to draw reliable conclusions even on the acquirer/processor level," because "the overwhelming majority of the data did not permit him to track absorbed charges by merchant," and (3) to the limited extent he was able to track chargebacks to the merchant level, only demonstrates that there are more uninjured merchants than Rule 23(b) permits. (*Id.* at 16–18.) Defendants argue that "Officer's methodology sweeps in, at least, many thousands of uninjured merchants," each of whose claims to which "Defendants would have a complete defense," and that "Defendants' right to present those substantive defenses cannot be defeated by the procedural tool of Rule 23." (*Id.* at 18–19.)

In response, Plaintiffs argue that the "[a]dditional evidence . . . presented in the [renewed motion] and Dr. Officer's report confirms that the costs of FLS-specific chargebacks were borne by the merchants, not third parties, and that any absorption was rare and minimal." (Pls. Reply 17.) In support, Plaintiffs point to Officer's [redacted][51] (*Id.* at 18.) Plaintiffs argue that [redacted] In addition, Plaintiffs argue that Defendants' contention "that

[51] Plaintiffs' description of this data appears to be partially inaccurate. While Officer did [redacted]

'untold thousands' of merchants had all of their chargebacks reimbursed" is a "baseless assertion" founded on Kaplan's "review of a hodgepodge of marketing materials produced by third parties or available online," and "contradicted by the transaction and chargeback data produced by Defendants and third parties."[52] (*Id.*)

(A) Reimbursements from other levels in the payment chain

According to Defendants' expert, [redacted]

Plaintiffs argue that, contrary to Kaplan's [redacted]

[52] While Plaintiffs have not moved to exclude Kaplan's testimony, they contend that his most recent report "appears to be a result of random internet searches mixed with general statements regarding credit card fraud," and state that "[n]ot surprisingly, his unsupported, unscientific opinions have been struck in other antitrust actions," and that "in his lengthy career," Kaplan "has yet to find a class worthy of certification." (Pls. Reply 20 n.10.)

[redacted][53] [redacted]

[redacted]

[53] Plaintiffs contend that "a review of the terms of this offer paint a different picture":

[redacted]

(B) Tracking absorbed charges by merchant

Defendants emphasize that "[a]lthough Officer's review [redacted] [redacted][54] (Defs. Opp'n 17.)

As discussed above, only one of the payment processor data productions Officer analyzed had [redacted]

According to Kaplan, [redacted]

[54] The Court notes that, as discussed above, these [redacted]

[redacted]

[redacted]."[55] (*Id.* ¶ 120(a)–(c), (f)–(g).)

[55] In his rebuttal report, in response to Kaplan's claim that [redacted]

Kaplan acknowledges that Officer [redacted]

[redacted]

The Court finds that Officer's inability to conduct a merchant-by-merchant absorption analysis of the other payment processors' data productions, similar to the analysis he did of the [redacted] data, is not a barrier to class certification. While such analysis would undoubtedly be useful in determining whether significant numbers of merchants had all their FLS chargebacks reimbursed and thus were uninjured, the Court declines to find that Plaintiffs are required to produce that particular data in order to satisfy Rule 23.

As detailed above, Officer has [redacted][56] [redacted]

The Court finds that there is common evidence from which a reasonable juror could infer, in combination with other evidence, that Plaintiffs have shown by a preponderance of the evidence that the vast majority of FLS chargebacks were not reimbursed and were in fact incurred by merchants. *See In re Air Cargo Shipping Servs. Antitrust Litig.*, 2014 WL 7882100, at *46 ("None of this evidence conclusively establishes that 'all or virtually all' of the class members were impacted, but it does not need to. It is enough that a reasonable juror could rely

[56] The Court notes again that in his subsequent report, Officer describes [redacted]

on the inferences permitted by this evidence to find common impact by a preponderance standard."). This is all that is required to satisfy the predominance inquiry as to injury.[57]

C. Uninjured merchants

Defendants argue that "Officer's methodology sweeps in, at least, many thousands of uninjured merchants," representing a percentage of the total class that "exceeds the '5% to 6%' that 'constitutes the outer limits of a *de minimis* number of uninjured class members' to satisfy Rule 23(b)." (Defs. Opp'n 18 (quoting *In re Rail Freight*, 292 F. Supp. 3d 14, 137 (D.D.C. 2017)).)

"[T]he fact that some putative class members may be uninjured does not automatically defeat predominance." *Dial Corp.*, 314 F.R.D. at 120 (first citing *In re Currency Conversion*

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[57] Defendants also argue that while "Plaintiffs' class definition includes cross-border chargebacks," neither Officer nor Plaintiffs have "identif[ied] any evidence supporting a delay" of the Fraud Liability Shift for cross-border chargebacks, and thus "[o]ne must assume . . . that the cross-border shifts would have occurred in October 2015 in a but-for world." (Defs. Opp'n 42.) Defendants argue that this raises "two predominance problems": (1) "Officer does not even know if he can identify cross-border chargebacks to quantify them in the aggregate or exclude merchants that had only cross-border chargebacks and thus were not injured," and (2) "Officer should have considered whether, which, and when merchants would have adopted EMV in response to cross-border FLS chargebacks beginning in October 2015 but domestic FLS chargebacks not starting until October 2017." (*Id.* at 42–43.)

In his rebuttal report, Officer states that he [redacted]

Fee Antitrust Litig., 264 F.R.D. 100, 117 (S.D.N.Y. 2010); and then citing *In re Elec. Books Antitrust Litig.*, 2014 WL 1282293, at *22). "Nothing in our class certification jurisprudence requires that every single class member suffer an impact or damages, regardless of the size of the class." *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2014 WL 7882100, at *44; *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig.*, No. 18-MD-2819, 2020 WL 2555556, at *10 (E.D.N.Y. May 5, 2020) ("The Supreme Court and the Second Circuit have recognized that the existence of uninjured plaintiffs does not bar class certification. . . . Consistent with this precedent, district courts in this Circuit have certified classes that likely or certainly contained uninjured class members."). "To the contrary, courts have routinely recognized what an unrealistic burden this would put on plaintiffs." *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2014 WL 7882100, at *44. "The Supreme Court and Second Circuit . . . have never suggested that a certain percentage or number of uninjured plaintiffs would automatically bar class certification."[58] *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig.*, 2020 WL 2555556, at *11. "District courts in this and other [c]ircuits have held that a class may be certified so long as a '*de minimis*' number of class members were uninjured or, conversely, 'virtually all' class members were injured." *Id.* at *12.

Because the Court agrees with Plaintiffs that the appropriate but-for world price in this case is zero, and that, in order to show injury, a merchant class member need only show that it paid a chargeback during the class period, many of the class members that Defendants argue are

[58] Defendants cite an out-of-circuit case for the proposition that 5% to 6% "constitutes the outer limits of a *de minimis* number of uninjured class members." (Defs. Opp'n 18 (quoting *In re Rail Freight*, 292 F. Supp. 3d 14, 137 (D.D.C. 2017)).) By letter dated August 20, 2019, Mastercard, Visa, and Discover notified the Court that the D.C. Circuit had affirmed the district court's decision. (Letter dated Aug. 20, 2019, Docket Entry No. 712); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619 (D.C. Cir. 2019).

potentially uninjured would, in fact, be injured class members. Of merchants associated with FLS chargebacks during the class period that are captured in Officer's damages model, the only potentially uninjured are those that had all of those FLS chargebacks reimbursed. As discussed above, in support of their renewed motion, Plaintiffs have offered evidence to establish by a preponderance of the evidence that the number of merchants in this category, while impossible to calculate precisely based on the data currently in Plaintiffs' possession, is quite small. Moreover, such merchants, by virtue of having had all their chargebacks reimbursed, would not actually be part of the class as it is now defined. Finally, because merchants with reimbursed FLS chargebacks are capable of being identified during a claims administration process, there is no risk of the Court "order[ing] relief to an[] uninjured plaintiff." *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig.*, 2020 WL 2555556, at *20 (quoting *Tyson Foods*, 136 S. Ct. at 1053 (Roberts, C.J., concurring)). Significantly, as Plaintiffs note, "members of the merchant class will be required, as part of the class administration process, to submit documentary evidence demonstrating that they did in fact incur FLS chargebacks."[59] (Pls. Reply 23.)

Accordingly, the Court finds that Plaintiffs have satisfied the Rule 23(b) predominance requirement as to injury-in-fact.

[59] Defendants' argument that a "post-trial claims administration process cannot constitutionally address individual causation and injury-in-fact," and that such a "process would 'do away with [their] rights . . . to raise plausible individual challenges on those issues' to a jury at trial and thereby deny '[D]efendants' Seventh Amendment and due process rights,'" (Defs. Opp'n 43–44 (quoting *In re Asacol*, 907 F.3d 42, 51–52 (1st Cir. 2018))), fails for similar reasons.

2. Causation

Plaintiffs argue that they have satisfied "the legal question prong of the antitrust injury element" — "whether this injury is 'injury of the type that antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" (Pls. Mem. 18 (quoting *Cordes & Co. Fin. Servs., Inc.*, 502 F.3d at 105).) In support, Plaintiffs argue that they "have proffered documentary evidence and deposition testimony that Defendants . . . engaged in a price fixing scheme . . . to eliminate price competition with respect to chargebacks when implementing EMV in the United States." (*Id.*) Plaintiffs further argue that Defendants' argument, first raised on the prior motion, that "there were numerous outside reasons for why the merchants were not certified . . . ignores a critical fact: but-for the conspiracy to impose and maintain October 1, 2015, as the FLS date, not a single merchant would have suffered a single FLS-specific chargeback . . . until at least October 1, 2017."[60] (*Id.* at 22.) Under Plaintiffs' theory of liability, "[a]s a result of Defendants' price-fixing agreement . . . Defendants set and maintained October 1, 2015, as the FLS date . . . and hundreds of thousands of merchants incurred more than [redacted] in unreimbursed FLS chargebacks as a result of the price-fixing conspiracy." (*Id.*) Plaintiffs further argue that under established antitrust principles, Defendants' "unlawful conduct need not be the sole cause of [Plaintiffs'] alleged injuries," and Plaintiffs need only show that Defendants' "conduct was a substantial or materially contributing

[60] Plaintiffs include this and other arguments in the section of their brief arguing that they have satisfied the predominance inquiry as to the damages element of their antitrust claim. (Pls. Mem. 22–25; Pls. Reply 21.) Defendants' brief, meanwhile, includes no section devoted to whether Plaintiffs have satisfied predominance as to the damages element. (*See* Defs. Opp'n.) The Court assumes that this reflects a strategic choice by the parties, given that the need for individual inquiries as to damages will generally not defeat class certification. Accordingly, the Court addresses the parties' arguments according to where they appear to logically belong, rather than where they are in the parties' briefs.

factor in producing [their injuries]." (*Id.* at 23 (internal quotation marks omitted) (quoting *In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 65 (2d Cir. 2012)).)

In response, Defendants argue, as they have previously, that "at most, Officer's methodology can demonstrate ***whether*** a merchant received a chargeback — not ***why*** a merchant received a chargeback," proof Defendants argue is required "to establish proximate cause between Defendants' alleged anticompetitive conduct and a merchant's injury." (Defs. Opp'n 34.) Defendants further argue that "[b]ecause Plaintiffs have not set forth a method of common proof that would disaggregate merchants to identify and exclude those merchants that were not injured by the 'anticompetitive effect' of Defendants' conduct," and instead by their own "[i]ndividual, [i]ndependent choices not to implement EMV," they cannot satisfy the requirements of Rule 23(b)(3)." (*Id.* at 36.)

"[T]o prevail on an antitrust claim, a plaintiff must establish that 'the injuries alleged would not have occurred *but for* [the defendant's] antitrust violation.'" *In re Publ'n Paper Antitrust Litig.*, 690 F.3d at 66 (second alteration in original) (quoting *Argus Inc. v. Eastman Kodak Co.*, 801 F.2d 38, 41 (2d Cir. 1986)). However,

> an antitrust defendant's unlawful conduct need not be the *sole* cause of the plaintiffs' alleged injuries; to prove a "causal connection" between the defendant's unlawful conduct and the plaintiff's injury, the plaintiff need only "demonstrate that [the defendant's] conduct was a substantial or materially contributing factor" in producing that injury.

Id. (alteration in original) (quoting *Litton Sys., Inc. v. AT & T Co.*, 700 F.2d 785, 823 n.49 (2d Cir. 1983)). "[A] plaintiff need not exhaust all possible alternative sources of injury in fulfilling [its] burden of proving compensable injury." *Id.* (second alteration in original) (quoting *Zenith Radio Corp. v. Hazeltine Rsch., Inc.*, 395 U.S. 100, 114 n.9 (1969)).

Plaintiffs can offer common proof in support of their claim that Defendants' conduct was

the but-for cause of their alleged injuries: under Plaintiffs' theory of liability, absent Defendants' collusion, Defendants would have delayed their FLS dates for at least two years, and thus, during the class period, no merchant would have paid an FLS chargeback. Plaintiffs can also offer a number of pieces of common proof in support of their claim that Defendants' anticompetitive conduct was a substantial cause of Plaintiffs' alleged injuries. In addition to the proof of the alleged conspiracy and the resulting October of 2015 Liability Shift, Plaintiffs can offer common proof in support of their claim that there was [redacted] significant delays in the certification process, and pervasive, industry-wide concern about merchants being capable of implementing EMV by the Liability Shift. Plaintiffs can also offer common proof of incentives and other ways that merchants would have been better situated to comply with EMV absent Defendants' alleged collusion, and that competition would have led Defendants to assist merchants in various ways.

The Court finds that Plaintiffs have shown that common questions predominate over individual ones as to causation and can be answered with common proof, and is not persuaded by Defendants' arguments otherwise.

First, Defendants raise a number of arguments in response to Plaintiffs assertion that:

> Had there been competition in the market surrounding the implementation of the FLS, . . . Defendants would not have been able to implement a lock-step FLS and ignore the real world problems in the market: that a vast number of merchants simply could not obtain timely certification. In other words, competitive forces would have resulted in steps to delay the FLS, assistance with certification, incentives, or other actions.

(Pls. Mem. 23.) Defendants argue that (1) "this statement fail[s] to address class-wide causation and appear[s] to assume what Plaintiffs must prove"; (2) "lock-step [L]iability [S]hifts are exactly what Plaintiffs themselves propose now for their competitive but-for world," and they

"cannot have it both ways"; (3) Plaintiffs have "abandoned [the] theory" that Defendants' concerns that "merchants would steer transactions to networks with later or no [L]iability [S]hifts" would have driven them to take steps to accommodate merchants, and have not provided any "substantiation or explanation" of what other "competitive forces" would have caused Defendants to delay their Liability Shift dates; and (4) "[q]uestions of 'assistance with certification' and 'incentives' only beg the individualized question as to which merchants would have qualified for or received assistance or incentives, which are inherently individual inquiries." (Defs. Opp'n 35–36.)

Plaintiffs dispute that their liability theory has changed, and argue that "[t]he minor modifications to the class definition in response to the Court's directives and the manner in which the theory has been articulated do[] not amount to alteration or abandonment." (Pls. Reply 2.) While they use the term "lockstep" to describe the non-Visa Defendants' commitment to follow Visa with any announcement of a delay, (*see* Pls. Mem. 11), Plaintiffs contend that in the but-for world, Visa would have announced its adoption of the later FLS date, and the other Defendants would have "follow[ed] suit in a competitive manner," (Pls. Reply 2).

In the March 2018 Order, the Court rejected Defendants' argument that Plaintiffs had impermissibly "changed their construction of the but-for world." *B & R II*, 2018 WL 1335355, at *13 n.22. In opposing Plaintiffs' prior motion, Defendants argued that while "in the Amended Complaint Plaintiffs argued that absent the . . . alleged conspiracy, Defendants would have shifted liability to merchants in a staggered manner, . . . in the class certification motion, Plaintiffs argue[d] that Defendants would have never imposed [the] Liability Shift." *Id.* Although Defendants "conceded" at the November 29, 2017 hearing that "Plaintiffs' argument was that Defendants would have imposed the Liability Shift at a later date, rather than never,"

Defendants still argued that "these changes violate[d] the Supreme Court's ruling in *Comcast* because the methodology for determining injury and damages [was] inconsistent with the liability theory and the but-for world alleged in the Amended Complaint." *Id.* The Court rejected this argument:

> The Court disagrees with Defendants' characterization of Plaintiffs' proposed but-for world, as Plaintiffs' proposal of a single end date is not inconsistent with the but-for world where each Defendant would have had a different date of Liability Shift. The Court understands Plaintiffs' proposed "single end date" to mean the earliest date by which any Defendant would have imposed a Liability Shift.
>
> Moreover, as discussed above, *Comcast* requires consistency between the liability theory and the damages methodology in order to ensure that the damages are calculated based on the liability theory that is before the court at the time of the certification. Here, any change in Plaintiffs' liability theory is taking place prior to certification, and therefore, any such change does not present an issue under *Comcast*.

Id.

The Court again disagrees with Defendants' characterization of Plaintiffs' proposed but-for world. Defendants assert that "lock-step [L]iability [S]hifts are exactly what Plaintiffs themselves propose now for their competitive but-for world." (Defs. Opp'n 35.) The Court understands the significance of Plaintiffs' allegation that Defendants moved in lockstep to impose the Liability Shift in the real world to be that Defendants conspired to all keep the same, noncompetitive "price," i.e., a Liability Shift date that would prove costly for their unprepared customers, rather than any Defendant breaking rank in order to offer their customers a more competitive price. Plaintiffs' contention in their renewed motion that, in the but-for world, following Visa's announcement of a delay of at least two years, the non-Visa Defendants would have moved in "lockstep" to make similar delay announcements does not support Defendants'

argument that Plaintiffs are trying to "have it both ways." (*Id.*) Plaintiffs' theory is that the non-Visa Defendants *all* would have followed suit when Visa announced a delay, consistent with their claim that, in a competitive world, no network would want to be caught with a noncompetitive price, i.e., a Liability Shift for which merchants were not prepared and which other networks had not yet imposed. This is not the same as Defendants moving in "lockstep" to impose the Liability Shift on the same day in October of 2015, knowing that merchants were not prepared. Moreover, if, in the but-for world, Defendants ultimately all imposed the Liability Shift on the same day, that would similarly not be equivalent to Defendants' alleged anticompetitive conduct in the real world, because merchants would have had an additional two years to prepare for the Liability Shift. In other words, Plaintiffs claim that a delay in the Liability Shift, as well as other competitive responses by Defendants to the challenges they knew merchants faced, would have ensured that merchants were prepared for the Liability Shift when it was finally implemented. Thus, at that point, Defendants would no longer have stood to gain the same competitive advantages over the other networks by delaying the Liability Shift, as merchants would have been prepared for it.

In support of their argument that Plaintiffs have abandoned their steering theory, Defendants point to Officer's deposition testimony that [redacted]

The Court finds that Officer's testimony does not support Defendants' argument that Plaintiffs have "abandoned [the] theory" that, in a competitive environment, Defendants' concerns about merchant steering would have led them to delay the FLS shift date, and that, contrary to Defendants' assertion, Plaintiffs do not need to "provide[] . . . [an] explanation of . . . other forces that would cause any network to want to delay" in the but-for world. (*See* Defs. Opp'n 35–36.) In Plaintiffs' proposed but-for world, steering may indeed be irrelevant to understanding what would have happened in late September and October of 2017: Plaintiffs claim that the two-year delay would have provided merchants with the necessary time to implement EMV in time for the Liability Shift, in addition to the assistance and incentives that Plaintiffs argue a competitive market would have pushed Defendants to provide. In other words, in Plaintiffs' proposed but-for world, merchants would have been prepared for the Liability Shift by the time it took place, and thus there would be no reason for Defendants to worry about steering. However, steering remains relevant to why, in the but-for world, Defendants — first Visa, and then the other networks — would delay in the first place. (*See* Officer Report III ¶ 11

(explaining that the [redacted][61]

Next, Defendants argue that Plaintiffs cannot satisfy Rule 23's predominance requirement because they "have not set forth a method of common proof that would disaggregate merchants to identify and exclude those merchants that were not injured by the 'anticompetitive effect' of Defendants' conduct." (Defs. Opp'n 36.) In support, Defendants point to: (1) "the large number of merchants [who] remained uncertified for EMV after October 2017, . . . the date Plaintiffs now say would have been reasonable and would have been possible for merchants to meet"; (2) the "[m]any merchants [that] made independent business decisions not to use EMV technology until after October 2015"; (3) the "[t]ens of thousands of putative class members [that] did not take advantage of readily available ways to avoid FLS chargebacks," and (4) the "merchants [that] simply were not diligent in implementing EMV." (*Id.* at 36–41.)

As discussed above, to establish causation for their antitrust claim, Plaintiffs must show

[61] In explaining why a competitive response by Defendants would have resulted in a delay of the Liability Shift, Officer summarizes his opinions in his prior reports. (*See* Officer Report III ¶¶ 10–11 (citing Officer Report II ¶¶ 19, 21, 45).) [redacted]

that Defendants' conduct was a substantial cause of Plaintiffs' injuries. Even accepting that there are various factors, independent of Defendants' collusion, that might cause a merchant to choose to delay certification, that does not change that Plaintiffs can offer common proof of Defendants' conspiracy to attempt to show, at trial, that Defendants' anticompetitive conduct was a substantial cause of class members' injuries. *See In re Namenda Direct Purchaser Antitrust Litig.*, 331 F. Supp. 3d 152, 179 (S.D.N.Y. 2018) ("[A] plaintiff is only required to show that alleged illegal conduct is 'a material cause of the [antitrust] injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury.'" (quoting *Zenith Radio Corp.*, 395 U.S. at 114 n.9 (second alteration in original))); *id.* ("Plaintiffs meet their burden if they show that the defendants' unlawful facts substantially contributed to their injuries, even though other facts may have contributed significantly. An antitrust plaintiff is not required to show that the defendants' acts were a greater cause of the injury than other factors." (quoting *U.S. Football League v. Nat'l Football League*, 842 F.2d 1335, 1377 (2d Cir. 1988))). Moreover, according to Plaintiffs' theory, merchants' conduct in the real world was itself shaped by Defendants' collusion, and thus merchants' conduct in the real world cannot necessarily be used to predict their behavior in the but-for world. (*See* Pls. Mem. 2 ("Defendants' conspiracy . . . created a world where merchants' choices were shaped by Defendants' collusion . . . ."); *id.* at 22–23 ("[H]ad Defendants not conspired to implement and maintain the FLS, Defendants would have had to deal with the real world problems of implementing EMV technology, i.e. getting merchants to purchase the new equipment, getting the equipment certified, and dealing with deadlines to do so."); Officer Report IV ¶ 75 ("One of Mr. Kaplan's misconceptions . . . is that merchant behavior in the but-for world would have been identical to that in the real world. . . . The two-year delay . . . in the but-for world [would have]

created a significant and substantial amount of time for [a] hypothetical merchant" that delayed implementation of EMV in the real world until after the Liability Shift "to ready themselves for an industry-wide shift to chip-enabled (EMV) payment cards.").)

3. Damages

Plaintiffs argue that their "damages model is appropriately and directly tied to [their] theory of liability and entirely subject to class-wide proof," because "[t]he FLS and the chargebacks the putative merchant class incurred as a result of Defendants' anticompetitive conduct are at the heart of the alleged antitrust conspiracy" and the "FLS-specific chargebacks form the basis of Dr. Officer's damages calculations." (Pls. Mem. 22.)

The Supreme Court has "held that a model for determining classwide damages relied upon to certify a class under Rule 23(b)(3) must actually measure damages that result from the class's asserted theory of injury." *Roach*, 778 F.3d at 407 (citing *Comcast Corp.*, 569 U.S. at 35). "Calculations need not be exact, but at the class-certification stage (as at trial), any model supporting a 'plaintiff's damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation.'" *Comcast Corp.*, 569 U.S. at 35 (first citing *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931); and then quoting ABA Section of Antitrust Law, Proving Antitrust Damages: Legal and Economic Issues 57, 62 (2d ed. 2010)).

The Court finds that Officer's damages methodology is consistent with Plaintiffs' liability case. Plaintiffs claim that Defendants colluded to impose the same fixed Liability Shift date in October of 2015. As a result of Defendants' collusion, putative class members incurred millions of dollars in chargebacks during the two-year class period, which reflects the likely length of time by which Defendants would have delayed the Liability Shift absent their

anticompetitive conduct. As discussed above, Officer's damages model measures FLS chargebacks during the two-year class period, which, under Plaintiffs' liability theory, were imposed on Plaintiffs as a direct result of Defendants' collusion. Furthermore, Plaintiffs can show through class-wide proof that the vast majority of the FLS chargebacks were not reimbursed by third parties, and thus constitute damages.

Accordingly, the Court finds that Officer's damages model "measure[s] only those damages attributable to [Plaintiffs' liability] theory." *See Comcast Corp.*, 569 U.S. at 35.

ii. Superiority

Plaintiffs argue that a class action is the superior method to determine Plaintiffs' claims, as "common issues predominate over individual issues and merchants are unlikely to be able to effectively challenge the conduct of Defendants through individual cases." (Pls. Mem. 24–25.) Plaintiffs further argue that if putative class members were to pursue their claims individually, the result might be "inconsistent or incoherent rulings," as well as increased litigation costs and reduced judicial efficiency. (*Id.* at 25.)

A class action may be maintained under Rule 23(b)(3) if a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). To satisfy the superiority requirement, the moving party must show that the class action presents economies of "time, effort and expense, and promote[s] uniformity of decision." *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 130 (2d Cir. 2013). The superiority requirement is designed to avoid "repetitious litigation and possibility of inconsistent adjudications." *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2014 WL 7882100, at *64 (citing *D'Alauro v. GC Servs. Ltd. P'ship*, 168 F.R.D. 451, 458 (E.D.N.Y. 1996)).

The Court finds that a class action is clearly the superior method for adjudicating these

claims. Given the size of the class and the complexity of the issues, a class action will undoubtedly promote both efficiency for the Court and the parties, and uniformity. *See id.* ("As the preceding one hundred pages attest, this case presents many challenging questions of both law and fact. Consolidating the plaintiffs' claims into a single action will therefore promote their efficient adjudication, since it will spare all parties and the court itself the substantial costs and effort of repetitive litigation, while also ensuring the consistent adjudication of each plaintiff['s] claim."). Given the likelihood that some merchants' "potential recoveries" would be "relatively paltry," certification of the class in this case is also consistent with the "policy at the very core of the class action mechanism" — "to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Prods., Inc.*, 521 U.S. at 617 (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (1997)). Finally, "[e]nabling the vindication of these smaller plaintiffs' rights is a particularly compelling goal in the antitrust context because of the public interest at stake." *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2014 WL 7882100, at *65.

Accordingly, the Court finds that Plaintiffs have satisfied the superiority requirement under Rule 23(b)(3).

e. The class is certifiable as to American Express and Discover

American Express argues that Plaintiffs' renewed motion "rests on a new alleged theory of conspiracy that contradicts the theory pleaded in the operative complaint[62] and under which American Express could not be held liable as a matter of law." (AmEx Opp'n 2.) In support,

[62] American Express acknowledges that in the March 2018 Order, the Court "rejected Defendants' argument . . . that Plaintiffs' class certification theory impermissibly diverged from the theory pleaded in the [C]omplaint," but contends that Plaintiffs' renewed motion "present[s] . . . different and much more serious [issues], at least as to American Express." (AmEx Opp'n 15.)

American Express argues that (1) "this is Plaintiffs' *second* attempt to 'reformulate' their liability theory in order to support class certification," and they "should not be permitted to manipulate their theory at each stage of the case in order to advance to the next, strategically adding or removing core parts of their theory that risk defeating their claim"; and (2) "Plaintiffs' new liability theory is both (a) inconsistent with the arguments Plaintiffs made in order to survive Defendants' motion to dismiss and (b) fatally flawed as a matter of law at least as to American Express." (*Id.*)

American Express contends that Plaintiffs' original liability theory rested on the notion that "but for the alleged conspiracy," the card networks would have implemented the Liability Shift "on different dates and would have steered business to [n]etworks with a later [Liability Shift]." (*Id.*) It argues that this liability theory, i.e., different dates and steering, "was the only way Plaintiffs convinced Judge Alsup" to deny the motions to dismiss, but that "Plaintiffs now advance a theory under which (a) all four [n]etworks would have implemented [Liability Shifts] on the same day and steering would be irrelevant and (b) based on alleged collusion between Visa and Mastercard, those two [n]etworks would have postponed their [Liability Shifts] until October 2017 and [American Express] would simply have followed suit."[63] (*Id.*) American Express "does not dispute . . . that it made an internal business decision to move with the market in setting its FLS based on lessons it learned from its EMV implementations in other countries,"

[63] American Express argues that "the only specific allegation Plaintiffs make as to American Express is that, after Visa did not delay its FLS, American Express 'revealed that its entire strategy was to be "in lock-step with the industry,"'" in support of which "Plaintiffs cite two American Express documents noting that American Express intended to follow the industry in setting its FLS." (AmEx Opp'n 17–18 (first quoting Pls. Mem. 11; and then citing Pls. Mem. 11–13).) In contrast to the allegations that Mastercard and Visa colluded to abandon their plans to delay the Liability Shift, American Express argues that Plaintiffs make no such allegations as to American Express. (*Id.* at 18.)

and asserts that that is "precisely the type of 'follow the leader' behavior that . . . Dr. Officer[] claims would occur 'absent collusion.'" (*Id.* (citing Officer Report III ¶ 27).) Because the "only supporting factual allegations [as to American Express] are the same conclusory assertions of parallel conduct that [Judge Alsup] found could only survive a motion to dismiss if combined with certain 'plus factors,'" which have now "all vanished," American Express argues that the Court should deny Plaintiffs' motion as to American Express because American Express "cannot be held liable as a matter of law under Plaintiffs' new theory." (*Id.* at 19.)

Discover argues that, "[f]or the reasons articulated" by American Express, the Court should not grant Plaintiffs' motion as to Discover because "the only specific assertion in Plaintiffs' brief as to Discover is that it 'aligned,' and their only evidence cited reflects Discover's intent to follow the industry." (Defs. Opp'n 33 n.34.) Discover argues that "these allegations of mere parallel conduct are not enough to sustain a claim . . . against Discover," in light of "Plaintiffs' revised . . . theory [with] a but-for world in which ***competition*** would have caused all four networks to set the same liability shift date." (*Id.*)

In response, Plaintiffs argue that American Express "does not accurately represent Plaintiffs' theory of liability," and that contrary to American Express' contention that Plaintiffs make a "belated attempt to amend the complaint to assert new claims, . . . there are no new claims being asserted, and the methodology upon which Plaintiffs propose to establish classwide proof of antitrust injury and injury-in-fact remains unchanged."[64] (Pls. AmEx Reply 6.) Plaintiffs further argue that they "have put before the Court evidence sufficient to demonstrate that Rule 23 requirements have been met," and that the "Rule 23 inquiry cannot become a

[64] Plaintiffs note that "[t]his is the third time that one or more of the Defendants have sought dismissal based on a trumped up charged of a change in pleadings or Plaintiffs' theory of liability." (Pls. AmEx Reply 6.)

substitute for summary judgment." (*Id.* at 8.) Plaintiffs contend that American Express and Discover's "request for a determination that they cannot be held liable" because "there is no smoking gun that, according to them, establishes their liability . . . is improper" and should be denied. (*Id.*)

In the September 2016 Order, Judge Alsup found that Plaintiffs had pled "both direct and circumstantial evidence of a conspiracy," which, taken together, plausibly alleged an antitrust conspiracy between Defendants. *B & R I*, 2016 WL 5725010, at *6, 8–9. Judge Alsup found that "statements by Charlie Scharf of Visa and Krista Tedder of Master[c]ard constitute[d] direct evidence of a conspiracy." *Id.* at *6, 9. First, he reasoned that when Tedder stated that "'the card brands are not going to delay the [L]iability [S]hift date,' . . . [she] could not [have spoken] so confidently on behalf of *all* networks save and except for her knowledge of collusion, for true competition would have driven one or more networks to break ranks and offer more competitive terms." *Id.* at *6 (quoting Am. Compl. ¶ 120). Second, he found that Scharf's statement about "getting everyone 'in a room' to 'work together' . . . with respect to the Liability Shift" was direct evidence of the alleged conspiracy. *Id.* at *6–7, 9.

In addition to this direct evidence, Judge Alsup found that Plaintiffs had "also alleged certain 'plus factors' that, when considered cumulatively, nudge[d] the alleged conspiracy from conceivable to plausible." *Id.* at *7. The court found that Plaintiffs had alleged the following "plus factors": (1) "the implementation of the Liability Shift in the United States departed from the preexisting pattern elsewhere in the world," where "[i]mplementation was largely staggered . . . some of the networks offered certain accommodations . . . [and] the networks did

not march in lockstep as they did here";[65] (2) a "clear common motive to conspire as to a uniform implementation of the Liability Shift, especially in light of the networks' pre-existing sensitivity to steering," given the "then-impending demise of the networks' anti-steering rules"; (3) "the absence of competitive behavior," such as a delay in the Liability Shift or other concessions Defendants could have made to merchants, "despite the fact that any network who broke ranks would have benefitted from competition made possible with the demise of the anti-steering rules"; and (4) "the networks had an opportunity to collude." *Id.* at *7–8; *see also id.* at *9 (finding that three of the four plus factors also applied to Discover).

Judge Alsup found that Plaintiffs had plausibly alleged that Defendants had "agreed to a uniform implementation of the Liability Shift," which "included an agreement to (1) apply the same penalty (the Liability Shift); (2) on the same date; and (3) with no concessions as to timing or incentives such as reductions to interchange fees." *Id.* at *8 (first citing Am. Compl. ¶¶ 139, 150; and then citing Am. Compl. ¶¶ 108, 120); *see also id.* at *9 (same).

The Court finds that Plaintiffs have not revised their theory or claims in such a way as to undermine the basis for the September 2016 Order. First, Judge Alsup found that there was direct evidence, in the form of statements by Visa and Mastercard executives, to support the existence of the alleged conspiracy as to all Defendants, including American Express and Discover. That Plaintiffs have presented further evidence, in support of their renewed motion, of collusion between Visa and Mastercard, does not counteract Judge Alsup's findings that Plaintiffs had alleged direct evidence of the conspiracy implicating all Defendants. Second,

[65] Judge Alsup found that this plus factor did not apply to Discover, as "Discover implemented a [L]iability [S]hift in Canada and Mexico only, and in those two countries it implemented the [L]iability [S]hift on the same day as in the United States." *B & R I*, 2016 WL 5725010, at *9.

American Express and Discover misconstrue the significance of staggered Liability Shift dates and steering to the plus factors the court relied on in denying the motions to dismiss. As discussed above, Plaintiffs' claim is — and has always been — that in a competitive environment, Defendants would have responded to the overwhelming lack of merchant readiness to implement EMV by offering concessions to merchants, such as delays in their Liability Shift dates and other incentives. In Plaintiffs' proposed but-for world, Defendants would have done just that: Visa would have responded to the lack of merchant readiness by announcing a delay of at least two years, and the other networks, not wanting to be caught at a competitive disadvantage and risk merchants steering consumers to Visa or other networks, would have followed the industry leader with similar delay announcements. As discussed above, that Defendants may ultimately have all imposed Liability Shifts on the same date in the but-for world does not demonstrate that Defendants' conduct in Plaintiffs' proposed but-for world would have been the same as their alleged anticompetitive conduct in the real world. Rather, in the but-for world, by the time Defendants imposed the Liability Shift, merchants would, in theory, have been prepared, eliminating the competitive demand for Defendants to delay. In other words, the relevant behavior is what Defendants did (or did not do) in response to merchants' lack of readiness leading up to October of 2015, and that is the behavior that Judge Alsup was focused on in discussing the plus factors constituting circumstantial evidence of the alleged conspiracy.

Accordingly, the Court finds that the class is certifiable as to American Express and Discover.

III. Conclusion

For the reasons set forth above, the Court denies Defendants' motion to exclude expert testimony and grants Plaintiffs' renewed motion for class certification.

Dated: August 28, 2020
Brooklyn, New York

SO ORDERED:

s/ MKB
MARGO K. BRODIE
United States District Judge