20-339-cv(L),
20-304-cv(CON), 20-340-cv(CON), 20-341-cv(CON), 20-342-cv(CON), 20-343-cv(CON), 20-344-cv(CON)

United States Court of Appeals

for the

Second Circuit

FIKES WHOLESALE, INC.,

Plaintiff-Appellant,

PLAINTIFFS IN CIVIL ACTIONPHOTOS ETC. CORP. v. VISA U.S.A., INC. 05-cv-5071JG-JO, CHS INC., LEONS TRANSMISSION SERVICE, INC., TRADITIONS, LTD., PLAINTIFFS IN CIVIL ACTION PARKWAY CORP. v. VISA U.S.A., INC. 05-cv-5077 JG-JO, PLAINTIFFS IN CIVIL ACTION DISCOUNT OPTICS, INC., et al. v. VISA U.S.A., INC., et al. 05-cv-5870 JG-JO, PAYLESS SHOE SOURCE, INC., CAPITAL AUDIO ELECTRONICS, INC.,

Plaintiffs-Appellees,

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

FINAL FORM BRIEF FOR OBJECTOR-APPELLANT R & M OBJECTORS

JAY L. T. BREAKSTONE
PARKER WAICHMAN LLP
Attorneys for Objector-Appellant
R & M Objectors
Six Harbor Park Drive
Port Washington, New York 11050
(516) 466-6500

PLAINTIFFS IN CIVIL ACTION JETRO HOLDING, INC. et al v. VISA U.S.A., INC. et al 05-cv-4520 JG-JO, PLAINTIFFS IN CIVIL ACTION NATIONAL ASSOCIATION OF CONVENIENCE STORES et al v. VISA U.S.A., INC. et al 05-cv-4521 JG-JO, PLAINTIFFS IN CIVIL ACTION SUPERVALU INC. v. VISA U.S.A. INC. et al 05-cv-4650 JG-JO, PLAINTIFFS IN CIVIL ACTION SEAWAY GAS & PETROLEUM, INC. v. VISA U.S.A., INC. et al 05-cv-4728-JG-JO, PLAINTIFFS IN CIVIL ACTION RALEY'S v. VISA U.S.A. INC. et al 05-cv- 4799 JG-JO, PLAINTIFFS IN CIVIL ACTION EAST GOSHEN PHARMACY, INC. v. VISA U.S.A., INC. 05-cv-5073 JG-JO, PLAINTIFFS IN CIVIL ACTION NATIONAL GROCERS ASSOCIATION et al v. VISA U.S.A., INC. et al 05-cv- 5207 JG-JO, PLAINTIFFS IN CIVIL ACTION AMERICAN BOOKSELLERS ASSOCIATION v. VISA U.S.A., INC. et al 05-cv-5319 JG-JO, PLAINTIFFS IN CIVIL ACTION ROOKIES, INC. v. VISA U.S.A., INC. 05-CV-5069 JG-JO, PLAINTIFFS IN CIVIL ACTION JASPERSON v. VISA U.S.A., INC. 05-cv-5070 JG-JO, PLAINTIFFS IN CIVIL ACTION ANIMAL LAND, INC. v. VISA U.S.A., INC 05-cv-5074 JG-JO, PLAINTIFFS IN CIVIL ACTION BONTE WAFFLERIE, LLC v. VISA U.S.A., INC. 05-cv-5083 JG-JO, PLAINTIFFS IN CIVIL ACTION BROKEN GROUND, INC. v. VISA U.S.A., INC. 05-cv-5082 JG-JO, PLAINTIFFS IN CIVIL ACTION BALTIMORE AVENUE FOODS, LLC v. VISA U.S.A., INC. 05-cv-5080 JG-JO, PLAINTIFFS IN CIVIL ACTION FAIRMONT ORTHOPEDICS & SPORTS MEDICINE, PA v. VISA U.S.A., INC. 05-cv-5076 JG JO, PLAINTIFFS IN CIVIL ACTION TABU SALON & SPA, INC. v. VISA U.S.A., INC. 05-cv-5072 JG-JO, PLAINTIFFS IN CIVIL ACTION LAKESHORE INTERIORS v. VISA U.S.A., INC. 05-cv-5081JG JO, PLAINTIFFS IN CIVIL ACTION NUCITY PUBLICATIONS, INC. v. VISA U.S.A., INC. 05-cv-5075 JG-JO, PLAINTIFFS IN CIVIL ACTION HYMAN v. VISA INTERNATIONAL SERVICE ASSOCIATION, INC. 05-cv-5866 JG-JO, PLAINTIFFS IN CIVIL ACTION LEE et al v. VISA U.S.A. INC. et al 05-cv-3800 JG-JO, PLAINTIFFS IN CIVIL ACTION RESNICK AMSTERDAM & LESHNER P.C. v. VISA U.S.A., INC. et al 05-cv-3924 JG-JO, PLAINTIFFS IN CIVIL ACTION HY-VEE, INC. v. VISA U.S.A., INC. et al 05-cv-3925-JG-JO, PLAINTIFFS IN CIVIL ACTION MEIJER, INC. et al v. VISA U.S.A. INC. et al 05-cv-4131-JG-JO, PLAINTIFFS IN CIVIL ACTION LEPKOWSKI v. MASTERCARD INTERNATIONAL INCORPORATED et al 05-cv-4974 JG-JO, PLAINTIFFS IN CIVIL ACTION KROGER CO. v. VISA U.S.A., INC. 05-cv-5078 JG-JO, PLAINTIFFS IN CIVIL ACTION FITLIFE HEALTH SYSTEMS OF ARCADIA, INC. v. MASTERCARD INTERNATIONAL INCORPORATED et al 05-cv-5153 JG-JO, PLAINTIFFS IN CIVIL ACTION HARRIS STATIONERS, INC., et al. v. VISA INTERNATIONAL SERVICE ASSOCIATION, et al. 05-cv-5868 JG-JO, PLAINTIFFS IN CIVIL ACTION DR. ROY HYMAN, et al v. VISA INTERNATIONAL SERVICE ASSOCIATION, INC., et al . 05-cv-5866 JG-JO, PLAINTIFFS IN CIVIL ACTION PERFORMANCE LABS, INC. v. AMERICAN EXPRESS TRAVEL RELATED SERVICES CO., INC., et al. 05-cv-5869 JG-JO, PLAINTIFFS IN CIVIL ACTION LEEBER COHEN, M.D. v. VISA U.S.A., INC., et al. 05-cv-5878 JG-JO, PLAINTIFFS IN CIVIL ACTION G.E.S. BAKERY, INC. v. VISA U.S.A., INC., et al. 05-cv-5879 JG-JO, PLAINTIFFS IN CIVIL ACTION CONNECTICUT FOOD ASSOCIATION, INC., et al. v. VISA U.S.A., INC.,

et al. 05-cv-5880 JG-JO, PLAINTIFFS IN TWISTED SPOKE v. VISA U.S.A., INC., et al. 05-cv-5881 JG-JO, PLAINTIFFS IN CIVIL ACTION LOMBARDO BROS., INC. v. VISA U.S.A., INC. 05-5882 JG-JO, PLAINTIFFS IN CIVIL ACTION ABDALLAH BISHARA, etc. v. VISA U.S.A., INC. 05-cv-5883 JG-JO, PLAINTIFFS IN CIVIL ACTION 518 RESTAURANT CORP. v. AMERICAN EXPRESS TRAVEL RELATED SERVICES CO., INC., et al. 05-cv-5884 JG-JO, PLAINTIFFS IN CIVIL ACTION JGSA, INC. v. VISA U.S.A., INC., et al. 05-cv-5885 JG-JO, PLAINTIFFS IN CIVIL ACTION THE KROGER CO., et al. v. MASTERCARD INC., et al., 06-cv-0039 JG-JO, PLAINTIFFS IN CIVIL ACTION RITE AID CORPORATION et al. v. VISA U.S.A., INC. et al. 05-cv-5352 JG-JO, PLAINTIFFS IN CIVIL ACTION FRINGE, INC. v. VISA, U.S.A., INC et al 05-cv-4194 JG-JO, PLAINTIFFS IN CIVIL ACTION BI-LO, LLC. et al v. VISA U.S.A., INC. et al 06-cv-2532 JG-JO, PLAINTIFFS IN CIVIL ACTION BI-LO, LLC. et al v. MASTERCARD INCORPORATED et al 06-cv-2534 JG-JO, PLAINTIFFS IN CIVIL ACTION 06-cv-5583, ESDACY, INC. v. VISA USA, INC. et al, QVC, INC., GMRI, INC., NATSO, INCORPORATED, PLAINTIFFS IN CIVIL ACTION BKS. v. VISA U.S.A., INC. et al 09-cv-2264-JG-JO, PLAINTIFFS IN CIVIL ACTION GULFSIDE CASINO PARTNERSHIP. v. VISA U.S.A., INC. et al 09-cv-03225 JG-JO, KEITH SUPERSTORES, BKS, INC., BKS of LA, Inc. d/b/a Keith Superstores, and Keithco Petroleum, Inc., KEITHCO PETROLEUM, INC., BKS, INC., BKS of LA, Inc. d/b/a Keith Superstores, and Keithco Petroleum, Inc., NATIONAL COMMUNITY PHARMACISTS ASSOCIATION, NATIONAL COOPERATIVE GROCERS ASSOCIATION, COBORN'S INCORPORATED, D'AGOSTINO SUPERMARKETS, INC., NATIONAL RESTAURANT ASSOCIATION, AFFILIATED FOODS MIDWEST, GIELEN ENTERPRISES, INC., RICE PALACE, INC., TOBACCO PLUS, INC., CVS PHARMACY, INC., PLAINTIFFS IN DELTA AIRLINES INC et all v. VISA INC et al, 1:13-cv-04766-JG-JO, COX COMMUNICATIONS, INC., COX ENTERPRISES, INC., COX MEDIA GROUP, INC., G6 HOSPITALITY LLC, LIVE NATION ENTERTAINMENT, INC., MANHEIM INC., MOTEL 6 OPERATING LP, E-Z MART STORES, INC., JACKSONS FOOD STORES, INC./PACWEST ENERGY LLC, KUM & GO, L.C., SHEETZ, INC., SUSSER HOLDINGS CORPORATION, THE PANTRY, INC., PLAINTIFFS IN TARGET CORPORATION, et al. v. VISA INC., et al., 13-cv-03477, DSW INC., JETBLUE AIRWAYS CORPORATION, PLAINTIFFS IN CIVIL ACTION 7-ELEVEN INC., et al. v. VISA INC. et al, 1:13-cv-05746-JG-JO, MINNESOTA TWINS LLC, CRYSTAL ROCK LLC, PLAINTIFFS IN CIVIL ACTION TARGET CORPORATION, et al. v. VISA INC. et al., 13-cv-4442, PLAINTIFFS IN CIVIL ACTION PUBLIX SUPERMARKETS, INC. v. VISA U.S.A. INC. et al 05-cv-4677 - JG-JO, PLAINTIFFS IN CIVIL ACTION LDC, INC. v. VISA U.S.A., INC., et al 05-cv-5871 JG-JO, ROBERSONS FINE JEWLERY, INC., SUNOCO, INC. (RM), EINSTEIN NOAH RESTAURANT GROUP, INC., FURNITURE ROW BC, INC., GOOGLE, INC., GOOGLE PAYMENT CORPORATION, BASS PRO GROUP, LLC, AMERICAN SPORTSMAN HOLDINGS CO., BASS PRO OUTDOOR WORLD, LLC, BPIP, LLC, BPS DIRECT, LLC, BIG CEDAR, LLC, FRYINGPAN RIVER RANCH, LLC,

Plaintiffs,

– v. –

HSBC BANK USA, N.A., CAPITAL ONE BANK, CAPITAL ONE, F.S.B., CAPITAL ONE FINANCIAL CORPORATION, WELLS FARGO & COMPANY, JUNIPER FINANCIAL CORPORATION, NATIONAL CITY BANK OF KENTUCKY, NATIONAL CITY CORPORATION, MASTERCARD INCORPORATED, HSBC FINANCE CORPORATION, HSBC NORTH AMERICA HOLDINGS INC., CITIBANK, N.A., CITIGROUP INC., CHASE BANK USA, N.A., JPMORGAN CHASE & CO., FIFTH THIRD BANCORP, BANK OF AMERICA, N.A., FIRST NATIONAL BANK OF OMAHA, BARCLAYS FINANCIAL CORP., CHASE PAYMENTECH SOLUTIONS, LLC, VISA INTERNATIONAL SERVICE ASSOCIATION, VISA U.S.A. INC., BANK OF AMERICA CORPORATION, TEXAS INDEPENDENT BANCSHARES, INC., WELLS FARGO MERCHANT SERVICES, LLC, VISA INC., CAPITAL ONE BANK, (USA), N.A., JP MORGAN CHASE BANK, N.A., BARCLAYS BANK PLC, BARCLAYS BANK DELAWARE, MBNA AMERICA BANK, N.A., HSBC FINANCE CORPORATION, HSBC HOLDINGS PLC, HSBC NORTH AMERICA HOLDINGS, INC, PNC FINANCIAL SERVICES GROUP, INC., SUNTRUST BANK, SUNTRUST BANKS INC, WELLS FARGO BANK, N.A., WACHOVIA CORPORATION, WACHOVIA BANK, NATIONAL ASSOCIATION, BA MERCHANT SERVICES LLC, FKA National Processing, Inc., FIA CARD SERVICES, N.A., MASTERCARD INTERNATIONAL INCORPORATED,

Defendants-Appellees,

DEFENDANTS IN CIVIL ACTION JETRO HOLDING, INC. et al v. VISA U.S.A., INC. et al 05-cv-4520 JG-JO, DEFENDANTS IN CIVIL ACTIONNATIONAL ASSOCIATION OF CONVENIENCE STORES et al v. VISA U.S.A., INC. et al 05-cv-4521 JG-JO, DEFENDANTS IN CIVIL ACTION SUPERVALU INC. v. VISA U.S.A. INC. et al 05-cv-4650 JG-JO, DEFENDANTS IN CIVIL ACTION PUBLIX SUPERMARKETS, INC. v. VISA U.S.A. INC. et al 05-cv-4677-JG-JO, DEFENDANTS IN CIVIL ACTION SEAWAY GAS & PETROLEUM, INC. v. VISA U.S.A., INC. et al 05--cv-4728 JG-JO, DEFENDANTS IN CIVIL ACTION RALEY'S v. VISA U.S.A. INC. et al 05-cv-4799- JG-JO, DEFENDANTS IN CIVIL ACTION EAST GOSHEN PHARMACY, INC. v. VISA U.S.A., INC 05-cv-5073-JGJO, DEFENDANTS IIN CIVIL ACTION NATIONAL GROCERS ASSOCIATION et al v. VISA U.S.A., INC. et al 05-cv- 5207 JG -JO, DEFENDANTS IN CIVIL ACTION AMERICAN BOOKSELLERS ASSOCIATION v. VISA U.S.A., INC. et al 05-cv-5319 JG -JO, DEFENDANTS IN CIVIL ACTION ROOKIES, INC. v. VISA U.S.A., INC. 05-cv-5069-JG-JO, DEFENDANTS IN CIVIL ACTION JASPERSON v. VISA U.S.A., INC. 05-cv-5070-JG-JO, DEFENDANTS IN CIVIL ACTION ANIMAL LAND, INC. v. VISA U.S.A., INC. 05-cv-5074-JG-JO, DEFENDANTS IN CIVIL ACTION BONTE WAFFLERIE, LLC v. VISA U.S.A., INC. 05-cv-5083 JG-JO, DEFENDANTS IN CIVIL ACTION BROKEN GROUND, INC. v. VISA U.S.A., INC. 05-cv-5082 JG-JO, DEFENDANTS IN CIVIL ACTION BALTIMORE AVENUE FOODS, LLC v. VISA U.S.A., INC. 05-cv-5080 JG-JO, DEFENDANTS IN CIVIL ACTION FAIRMONT ORTHOPEDICS & SPORTS MEDICINE, PA v. VISA U.S.A., INC. 05-cv-5076-JG-JO, DEFENDANTS IN CIVIL ACTION TABU SALON & SPA, INC. v. VISA U.S.A., INC. 05-cv-5072 -JG-JO, DEFENDANTS IN CIVIL ACTION

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EUROPEAN MOTORCARS, LTD. NEWPORT BEACH, CALIFORNIA, NEWPORT EUROPEAN MOTORCARS, LTD. NEWPORT BEACH, CALIFORNIA, DENNIS D GIBSON, UNLIMITED VACATIONS AND CRUISES INC., TOP GUN WRECKER, ORANGE COUNTY BLDG MATERIALS, BISHOP, DBA Hat & Gown, ENTERPRISE HOLDINGS, INC., RAGLAND BROS. RETAIL COS., INC., ABP CORPORATION, NJ APPLEBEE'S (PARAMUS), RIVER VALLEY MARKET, LLC, DURANGO NATURAL FOODS, THE REAL GOOD FASHION STORE, INC., PAYMENTECH, LLC, LAJ, INC., DBA Grapevine Wines an Spirits, LANE COURKAMP, PREMIER ENTERPRISES GROUP, CLASS ACTION RECOVERY SERVICE, DISCOVER, REFUND RECOVERY SERVICES, LLC, ELECTRONIC PAYMENT SYSTEMS, LLC, DAVISS DONUTS AND DELI, JONBRO, VISA EUROPE LIMITED, VISA EUROPE SERVICES INC., CHASE MANHATTAN BANK USA, N.A., CITIBANK (SOUTH DAKOTA), N.A., BA MERCHANT SERVICES LLC, FKA National Processing, Inc., FIA CARD SERVICES, N.A., BASS PRO SHOPS WHITE RIVER CONFERENCE AND EDUCATION CENTER, LLC, SUNTRUST BANK HOLDING COMPANY,

Defendants,

– v. –

JACK RABBIT LLC, CAHABA HEIGHTS SERVICE CENTER, INC., DBA Cahaba Heights Chevron, R & M OBJECTORS, FALLS AUTO GALLERY, DBA Falls Car Collection, GNARLYWOOD LLC, QUINCY WOODRIGHTS, LLC, KEVAN MCLAUGHLIN, UNLIMITED VACATIONS AND CRUISES INC., PETS USA LLC, SLIDELL OIL COMPANY, LLC, NATIONAL ASSOCIATION OF SHELL MARKETERS, INC., PETROLEUM MARKETERS ASSOCIATION OF AMERICA, MIDWEST PETROLEUM COMPANY, SOCIETY OF INDEPENDENT GASOLINE MARKETERS OF AMERICA,

Objectors-Appellants.

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PRELIMINARY STATEMENT

R&M Objectors, a group of retailers and merchants from numerous states, including New York, California, Texas and others, appeal the district court's orders granting class counsel attorney's fees and denying R&M Objectors attorney's fees in the settlement of this matter.

JURISDICTIONAL STATEMENT

The court below had subject matter jurisdiction over the federal claims filed under Section 16 of the Clayton Act, 15 U.S.C. §§ 26, 15 U.S.C. §§ 1 and 2 and damages under Section 4 of the Clayton Act, 15 U.S.C. § 15. This jurisdiction is pursuant to 28 U.S.C. §§ 1331, 1337, 2201, and 2202. The court also had original jurisdiction over the state-law claims under 28 U.S.C. § 1332. The aggregate amount in controversy for this class action exceeds $5,000,000 and less than one-third of all class members reside in New York. The court had supplemental jurisdiction over the state-law claims pursuant to 28 U.S.C. § 1367.

This Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291. Final judgment was entered in the court below on December 20, 2019. (JA - 7459) Appellant filed a timely notice of appeal and amended notice of appeal on January 7, 2020. (JA-7497, 8038)

The appeal is from a final judgment that disposes of all of R&M Objectors claims in this action and the claims of the class representatives and defendants. This

appeal is also from all orders that dispose of R&M Objectors' motion for attorney's fees, expenses and class incentive awards and class counsel's motion for attorney's fees and expenses. (JA-7497, 8038)

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Is it error for the district court to approve attorneys' fees for work performed by (b)(3) class counsel towards a class settlement agreement for that class alone, when at significant times, the same counsel simultaneously represented the (b)(2) class in a relationship that the Court has held to be literally and strategically in conflict?
2. Where the Court has held that class counsel had a conflict by virtue of representing members of both the (b)(2) and (b)(3) class at the same time and at contrary interests, is it error for the district court to broadly approve of class counsel fees for the representation of one class without a separately itemized accounting indicating that such time was only for work not in conflict with the rights of the other class?
3. Is it error to deny an application for attorney's fees by a group of objecting retailers and merchants that participated, both individually and as part of a team, in the substantial cause of new relief for class members and the disposal of a settlement agreement that violated due process?

STATEMENT OF THE CASE

While this case presents as a Rule 23(b)(3) class action of "over twelve million nationwide merchants brought [as] an antitrust action under the Sherman Act, 15 U.S.C. §§ 1 and 2, and state antitrust laws, against Defendants Visa and Mastercard networks, as well as various issuing and acquiring banks" (JA-7324), it is much more than that. What began as a massive antitrust action involving both damages

plaintiffs, the 23(b)(3) class, and injunctive relief plaintiffs, the 23(b)(2) class, joined together in a single action with a single class counsel, devolved into the (b)(3) plaintiffs taking advantage of the (b)(2) plaintiffs through the actions of what the (b)(2) plaintiffs believed was their own counsel acting in their best interests. No one saw that as a problem until intervenors began to recognize what had occurred at the point a settlement agreement was proposed to the district court. Those intervenors, including Retail and Merchant Objectors[1] ("R&M Objectors") here, began to piece together the overwhelming conflict and then take apart that original settlement agreement, exposing its faults. The attack on the original settlement agreement was multi-faceted and eventually became a cooperative effort, resulting in an appeal of the district court's approval of the original settlement to this Court. R&M Objectors not only vetted and commented on the main brief submitted to the Court, but at the express request of the team of objectors, undertook to file their own separate brief on allied issues addressing notice to the classes. On oral argument, R&M Objectors agreed to cede its time to appellants' lead counsel for the common good.

[1] R&M Objectors is a large, diverse group of small, independent retailers and merchants from enough states to be representative of the interests of all states. R&M Objectors operate businesses directly affected by the original proposed settlement agreement and payment of default interchange fees or "swipe fees." These objectors are private retailers and merchants in diverse industries, including restaurant businesses, clothing stores, oil and gas companies, convenience, car dealership, jewelry, beverage retailer and other type of trades in numerous states, including, New York, Vermont, Maryland, Arkansas, Tennessee, Mississippi, Alabama, Georgia, Kansas, Missouri, Oklahoma, Texas, Louisiana and others. These objecting retailers and merchants sell goods to consumers in exchange for payment by credit cards and pay swipe fees.

The Court first saw this matter in 2016 when it then reversed and remanded the district court's approval of the original settlement agreement which had attempted to join the interests of the (b)(3) and (b)(2) classes and had been negotiated by the same class counsel, who had represented both classes simultaneously. The Court was clear in its vision. The (b)(2) class was fodder for the settlement secured for the (b)(3) class and the reason was obvious. "Class counsel stood to gain enormously if they got the deal done. The (up to) $7.25 billion in relief for the (b)(3) class was the largest-ever cash settlement in an antitrust action.' For their services, the district court granted class counsel $544.8 million in fees." *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 827 F.3d 223, 234 (2d Cir. 2016) [*"Interchange Fees II"*] (internal citations omitted), *rev'g and vacating* 986 F.Supp.2d 207 (E.D.N.Y. 2013) [*"Interchange Fees I"*].[2]

This appeal does not repeat the arguments successfully made in *Interchange Fees II* without rhyme or reason. Class counsel, now representing the (b)(3) class alone, knows full well what it did there and for what reason it was done. The Court concluded that the fundamental conflict between the (b)(2) and (b)(3) classes would sap the strength of class counsel by removing any incentive to "zealously represent" the (b)(2) class, which is precisely what happened. "Apparently, the only unified

[2] This brief adopts the shortened version of appliable decisions suggested by the district court. *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 19 at n. 1 (E.D.N.Y. 2019) [*"Interchange Fees III"*]

interests served by herding these competing claims into one class are the interests served by settlement: (i) the interest of class counsel in fees, and (ii) the interest in defendants in a bundled group of all possible claimants who can be precluded by a single payment." *Interchange Fees II* at 236.

The settlement agreement in *Interchange 1* was originally filed in July 2012 and approved by the district court in 2013 [*"2013 Agreement"*]. When approved, the 2013 Agreement contained the fundamental conflict between (b)(2) and (b)(3) classes of retailers and merchants that the Court identified in *Interchange Fees II*. The definitive settlement agreement contained problems for relief to absent class members, including no relief for many of the R&M Objectors. As a result, R&M Objectors filed the *first* pleading objecting to the Rule 23(b)(2) settlement class and initial settlement agreement for injunctive relief, and the Rule 23(b)(3) settlement class for damages on October 18, 2012. (JA - 2027). In this objection, R&M Objectors also objected to attorney's fees. (JA – 2044), with citations to the report of their expert, Prof. Adam J. Levitin, a renowned Georgetown Professor of Law and Finance. (JA - 6800)**.** R&M Objectors also requested discovery on the class settlement and the formation of a discovery committee for the objectors in order to comprehensively examine no only class counsel's conflict, but the efficacy of the proposed settlement for (b)(2) class members like R&M Objectors. (JA - 2455)**.** R&M Objectors hired two independent experts and filed Prof. Levitin's affidavit in

the record. (JA - 6800). In that affidavit, Prof. Levitin concluded that R&M Objectors were a substantial cause of the relief obtained.

> It is my opinion that the objections to the Original Settlement, including those made by the R&M Objectors, by and through their counsel, the Law Firms, were a *sine qua non* for the negotiation of the Superseding Settlement Agreement. The Superseding Settlement Agreement represents a substantial improvement over the Original Settlement. The Superseding Settlement Agreement would not have come into existence but for the objections of the Law Firms and other objectors that resulted in the reversal of the Original Settlement by the Second Circuit Court of Appeals. Thus, the objections prosecuted by the Law Firms significantly changed the outcome of the case, and without them, class members would have been bound to a markedly inferior settlement.

(JA -6800, ¶ 23).

The district court then issued an order setting a preliminary approval hearing, which was not the district court's usual procedure. That hearing was a direct result of the R&M Objector's filings and the filing of an additional filing by another objector group. As the court conceded, based upon the its understanding from "both filings in the case and the considerable media coverage of the proposed settlement that there are objections to the proposal [.]" (JA -2457). R&M Objectors also filed an amended objection on November 5, 2012. (JA - 2460).

R&M Objectors next filed a written objection to final approval of the original definitive class settlement agreement on May 15, 2013. (JA – 2657). A provisional opt-out provision was also filed on May 28, 2013. (JA - 2690). R&M Objectors

filed an objection to the superseding class settlement agreement on July 23, 2019. (JA – 6711) An amendment was filed on September 27, 2019. (JA - 6906)

STATEMENT OF FACTS

Following the Court's decision in *Interchange Fees II*, class counsel jettisoned the (b)(2) class as clients and continued to represent the (b)(3) class. In 2019, a new Superseding Settlement Agreement was reached on behalf of the (b)(3) class. (JA-7288) The new settlement now granted class counsel nearly $545 Million in fees, without designating what hours expended on the (b)(3) settlement over the years were hours jointly spent on the (b)(2) class settlement as well, hours that the Court had determined were expended not in justifiable representation, but in conflict, for which no legal fee was due class counsel.

Class counsel filed the Superseding Settlement Agreement on September 18, 2018. (JA – 3748) This agreement was only on behalf of retailers and merchants under Rule 23 (b)(3) – the damages class. *Id.* The district court entered an order preliminarily approving the Superseding Settlement Agreement on January 24, 2019. (JA – 4657). A Memorandum and Order was entered on January 28, 2019. (JA - 4670). The district court cited the R&M Objectors for the propositions in their objection that the basis of the settlement fund was inadequate, that the release was excessive and overbroad, that the attorney fees were excessive, and that the injunctive relief was inadequate. *Id.* at 24, fn. 23. R&M Objectors filed a motion for

attorney's fees (JA - 6285) and the district court set a hearing. After the September 5, 2019, hearing R&M counsel provided documents requested by the district court in support of their time records, including e-mails showing work performed cooperatively with Constantine Cannon, the leader of the objecting group, particularly on briefing the first appeal of the class settlement. (JA - 6811).

Class Counsel filed their motion for attorneys' fees without separate time records outlining time performed and claimed. (JA - 7012)**.** There was no effort to tally the hours of legal time spent doing work deemed "fundamentally conflict[ed]" by this Court. The entire time records filed by Class Counsel consisted of a one-page filing, now claiming fees in the amount of $537,320,863[3] without any other support.

The district court entered a separate order on R&M Objectors' application for attorney's fees, dated January 2, 2020. (JA- 7473) The order cited R&M Objectors' October 18, 2012, objection, noting that there were four primary reasons articulated for that objection: (1) the "monetary fund and proposed refund [was] inadequate for the class; (2) the "injunctive relief [was] inadequate for the class"; (3) the "release [was] excessive and overbroad"; and (4) "the proposed attorney[s'] fees awards [was] excessive". *Id.* at 3.

[3] The district court had initially approved class counsel's fee of $544.8 million in fees in the original settlement agreement, which included the conflicted hours. *Interchange Fees II* at 234.

Class counsel petitioned for attorney's fees. (JA – 4758, 5901, 6180). That petition was approved by the court. The petition did not contain a detailed itemization and accounting of all hours performed by class counsel on non-conflicted work.

Class counsel's fee petition contained work that was of no benefit to (b)(2) class members. The (b)(2) class is a separate class. The class counsel petition did not contain a publicly available detailed, itemized accounting showing what time was claimed for (b)(3) relief and for (b)(2) relief prior to June 30, 2016.

R&M Objectors submitted a motion for attorney's fees. (JA - 6285). R&M Objectors supplied proof showing their direct participation in the consolidated objectors' briefing before the Court. This joint briefing and oral argument resulted in the district court's certification of the class being vacated and approval of the settlement reversed and remanded for further proceedings. The Magistrate issued his Report and Recommendation to deny R&M Objectors any attorney's fees on October 11, 2019. (JA - 6981). R&M Objectors filed their written objections to the Magistrate's Report and Recommendation on October 24, 2019. (JA - 6993). The district court adopted the Report and Recommendation and denied R&M Objectors' motion for attorney's fees on January 2, 2020. (JA - 7473).

R&M Objectors appeal from the district court's final approval order. (JA – 7288), the memorandum and order explaining the court's decision. (JA - 7324), the

final order approving class counsel attorney's fees, costs and incentive awards. (JA - 7398, ECF Dkt. No. 7822), the final judgment. (JA - 7459) and the order denying their motion for attorney's fees. (JA - 7473).

SUMMARY OF THE ARGUMENT

The district court's decision is a product of a clear error of law and abuse of discretion. R&M Objectors had participated in this lawsuit since October 18, 2012, and advanced several points for reversal of the original settlement agreement, including a challenge to class counsel's fees.

The class counsel petition for attorney's fees was not presented with itemized accounting of all work performed. The fee petition, therefore, claimed compensation for work subject to the precise conflict found by the Court in *Interchange Fees II*. Class counsel's claim for attorney's fees was not thoroughly and openly discussed and addressed by the district court, for that court required no specificity at all before granting them. It had before it neither the time expended by the attorneys comprising "class counsel" nor any idea how many of those hours were expended in work that was conflicted out of such computation. This lack of transparency and filing information on conflicted attorney work time is prejudicial to both class members, (b)(3) and (b)(2) alike, for it pays attorneys for doing work either on behalf of non-settling clients or against the interests of settling clients, contrary to law and an abuse of discretion. A remand of the attorney's fees award is appropriate. Additionally, R&M Objectors' respectfully submit that their counsel be awarded attorney's fees and that the orders denying such attorney's fees be reversed.

STANDARD OF REVIEW

This Court reviews approval of a class certification order on an abuse of discretion standard whether the decision (i) rests on a legal error or clearly erroneous factual finding, or (ii) falls outside the range of permissible decisions. *Interchange Fees II* at 231. The district court's factual findings are reviewed for clear error; its conclusions of law are reviewed de novo.

An award of attorney's fees may be made to class counsel from a common fund. This a reasonable fee taken from the common fund set by the district court. *See Goldberger v. Integrated Services*, 209 F.3d 43, 47 (2d Cir. 2000), citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)).

Awards of fees to an objector are reviewed under an abuse of discretion standard. Objectors are entitled to an allowance as compensation for attorneys' fees and expenses where a proper showing has been made that the settlement was improved as a result of their efforts. *White v. Auerbach*, 500 F.2d 822, 828 (2d Cir. 1974). "The actions of the party seeking to recover costs must, however, be a substantial cause of the benefit obtained." *In re Holocaust Victim Assets Litig*., 424 F.3d 150, 157 (2d Cir. 2005).

A R G U M E N T

POINT I

INITIALLY JOINING (b)(2) AND (b)(3) CLASSES CREATED A FUNDAMENTAL CONFLICT THAT REQUIRED CAREFUL EXCISION OF ALL CONFLICTED TIME FROM CLASS COUNSEL'S REQUEST FOR FEES

In *Interchange Fees II* the Court found that joining the Rule 23 (b)(2) injunctive and (b)(3) damages classes was a fundamental conflict which violated due process and was grounds to vacate the original class action settlement agreement, reverse and remand the matter to the district court.

The Court found in its analysis that the conflict of class counsel affected the relief for absent class members. This conflict between (b)(2) and (b)(3) classes was well reasoned and described in the Court's opinion with stark practicality in mind. Class counsel had traded the interests of one class for the benefit of the other, with the only unifying interest being "the interest of class counsel in fees" and "the interest of defendants in a bundled group of all possible claimants who can be precluded by a single payment." *Interchange Fees II* at 238.

Having recognized the conflict, having created two class counsel groups, one for each class, and having overseen the work of these new class counsel groups for a substantial amount of time, the district court, nonetheless, simply ignored the Court's finding of conflict. Instead, it rewarded the original offending class counsel,

now representing the far more lucrative (b)(3) damages class, by accepting, in whole, a fee request that still included the conflicted activity. In other words, the district court paid class counsel for its conflicted hours.

Certainly, class counsel could have filed an appropriate accounting, specifying which hours were conflicted and conceding that these hours were to be removed from its fee demand. Instead, class counsel reminded the district court that such records are not really needed in this circuit and that attorney fees are "generally awarded on a percentage of the fund obtained by class counsel," citing *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 34 (2d Cir. 2000). (JA- 6924) But this was not the ordinary situation and without time records, there was no way for the district court to ascertain how many conflicted hours were contained in class counsel's omnibus fee request. As far as the record is concerned, class counsel simply failed to separate and make an accounting of its hours spent on this fundament conflict where it was "sapped of the incentive to zealously represent" the (b)(2) class of which R&M Objectors were members. *Interchange Fees II* at 236. The compromise of work performed for a fee was not for the good of a fundamentally flawed settlement agreement, nor was it cured by sectioning out the (b)(2) class following the Court's reversal and remand and then allowing the same class counsel, now ostensibly only representing the (b)(3) class, to impermissibly inflate their attorney's fee request with *the very same conflict hours*. Indeed, allowing such a mechanism

is to produce two injuries from the single act of conflict of representation. The first time, the (b)(2) class was subjugated to less than full and complete legal representation, while the second time, the (b)(3) was made to pay for it, essentially reducing the recovery of that class. The only entity to benefit from any of this was class counsel itself, who managed to get paid for the hours of conflict. The Court, in calling class counsel to task in *Interchange Fees II*, exercised the role of gatekeeper to the original definitive class settlement agreement so as to ensure fiduciary duties were not breached, overturning that agreement on these very principles. It should do no less here.

Class counsel are fiduciaries to the class. *See, e.g., Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 331 (1980); *Rodriguez v. West Publishing Corp*., 563 F.3d 948 (9th Cir. 2009); *Sondel v. Northwest Airlines, Inc*., 56 F.3d 934, 938-39 (8th Cir. 1995). (JA - 2035). A fiduciary has the full duty of honesty, loyalty, good-faith and fair dealing. For the relationship of counsel and clients, this unique fiduciary role imposes on the attorney "[t]he duty to deal fairly, honestly and with undivided loyalty superimposes onto the attorney-client relationship a set of special and unique duties, including maintaining confidentiality, avoiding conflicts of interest, operating competently, safeguarding client property and honoring the clients' interests over the lawyer's." *Matter of Cooperman*, 83 N.Y.2d 465, 472 (1994)

Under the fundamental conflict of the original definitive class action settlement agreement, class counsel was under a heightened duty and obligation to itemize and prove the value of its fees toward (b)(3) recovery. Any hours claimed for violating (b)(2) members due process and the settlement traded away should not have been counted. However, without a full, itemization and public record, there is no ability for class members in either class to appropriately examine what time is claimed for "conflicted" hours. For the size of the fee award to class counsel, this is not an unreasonable task. Rather, it is necessary to ensure integrity for absent class members who are paying class counsel for relief. Relief, which in the original class action settlement agreement, was vacated.

Central to the heart of the conflict, the Court suggested class members' relief was a confiscation because many class members, including many of the R&M Objectors, received a scant monetary award for a release and no available relief for those in states, which prohibit a surcharge. R&M Objectors had addressed the release problem early on and the surcharge with its representatives from fourteen states, many affected by the surcharge provision.

This was the entirety of the negotiated relief that was found unreasonable, unfair and inadequate. The Court, in reasoned detail, showed the lack of value and fundamental conflict and the sale of (b)(2) class members with the interest of class counsel fees and the defendants' interests colliding with the due process rights of

absent class members. R&M Objectors, in many cases, received no appreciable benefits in the Original Settlement. Other future merchants were precluded from bringing future claims, having the opportunity to opt-out, and precluded from the opportunity to object, and allowed all claims past or future to be released forever. The Court held:

> Merchants in the (b)(2) class that accept American Express or operate in states that prohibit surcharging gain no appreciable benefit from the settlement, and merchants that begin business after July 20, 2021 gain no benefit at all. In exchange, class counsel forced these merchants to release virtually any claims they would ever have against the defendants. Those class members that effectively cannot surcharge and those that begin operation after July 20, 2021 were thus denied due process.

Interchange Fees II at 238.

The R&M Objectors argued this very point to protect absent class members.

Thus, to allow class counsel all of its claimed fees without full itemization and accounting of hours, when that work produced none of these benefits, which then forced R&M Objectors to object to obtain those benefits for their clients, is inequitable and contrary to principles of equity and disgorgement. There should not be personal benefit for class counsel with conflicted time.

R&M Objectors had objecting members from New York, California, Texas, and numerous other states. Many of these states prohibited the retailer and merchant from surcharging the customer at the point of sale. Thus, R&M Objectors were

adequately and vigorously representing this very issue with absent members with actual standing, which was a key point of discussion for the Second Circuit.

> No one disputes that the most valuable relief the Settlement Agreement secures for the (b)(2) class is the ability to surcharge at the point of sale. To the extent that the injunctive relief has any meaningful value, it comes from surcharging, not from the buying-group provision, or the all-outlets provision, or the locking-in of the Durbin Amendment and DOJ consent decree. For this reason, it is imperative that the (b)(2) class in fact benefit from the right to surcharge. But that relief is less valuable for any merchant that operates in New York, California, or Texas (among other states that ban surcharging), or accepts American Express (whose network rules prohibit surcharging and include a most-favored nation clause). Merchants in New York and merchants that accept American Express can get no advantage from the principal relief their counsel bargained for them.

Id. at 238.

Another point argued throughout the district court proceedings by R&M Objectors was the immunizing effect of the release negotiated by class counsel. This compounded the problem that R&M Objectors faced as retail stores. In states that prohibited a surcharge to customers, the release provided ultimate peace to defendants:

> Merchants that cannot surcharge, and those that open their doors after July 20, 2021, are also bound to an exceptionally broad release. The Settlement Agreement releases virtually any claim that (b)(2) class members would have had against the defendants for any of the defendants' thousands of network rules. And unlike the relief, which expires on July 20, 2021, the release operates indefinitely. Therefore, after July 20, 2021, the (b)(2) class remains bound to the release but is guaranteed nothing. This release permanently immunizes the defendants from any claims that any plaintiff may have now, or will

> have in the future, that arise out of, e.g., the honor-all-cards and default interchange rules.

Id. at 239.

During this time period between filing the case and the opinion on June 30, 2016, the work performed by (b)(3) class counsel and (b)(2) created conflicting and inadequate relief for both classes. The enormity of this conflict required reversal of the district court's approval of the flawed settlement agreement. Upon remand, separate counsel was finally obtained for the (b)(2) class of retailers and merchants and the classes are now represented by separate counsel, the need for which was never identified by the district court on its own.

A. The conflict of interest between (b)(3) class and (b)(2) class is grounds for restitution to class for conflicted class counsel fees.

R&M Objectors objected to the original class action settlement agreement on several grounds, among which was that the fees to class counsel were too large and that restitution should be made to absent class members. (JA - 2027)**.** The work performed by class counsel on developing the original settlement agreement was found by the Court to be not fair, reasonable and adequate. The Court found a fundamental conflict between (b)(2) and (b)(3) classes and the relief that would have signed away in the overbroad and unprecedented perpetual release thrust upon class members who would appear sometime in the future.

Nonetheless, with this conflict central to reversal of the original settlement, conflicted class counsel blithely petitioned the district court for *all* the attorney's fees and costs and benefits to the classes. Class counsel did not itemize out work performed solely for the (b)(3) class. Two large problems existed with class counsel's claim for fees and costs. Class counsel's work performed, although in conflict, was not separately broken out for the Superseded Settlement Agreement and publicly filed for examination during the approval phase for that agreement. Second, class counsel requested payment for work defined as conflicted by the Court in *Interchange Fees II*. Rather, than provide restitution or benefit to the absent class members for this part of the settlement, class counsel received the conflicted monies. At a minimum, this conflicted amount should be paid as restitution to absent class members or the decision remanded for a more thorough record and accounting of the conflict and affect on class members' fees. It is not a simple as assigning a percentage of the settlement amount and walking away. The district court must make a finding as to what hours were conflicted and what effect that conflict created. In other words, did the conflicted hours create more work for the (b)(3) and, if so, at whose expense? Class members' or class counsel? Importantly, this would also help avoid a double payment of attorney's fees since as a result of the original settlement agreement being vacated, there are two separate lawsuits, one for monetary damages, and one for injunctive relief. So, the class members, be they the

settling (b)(3) class or the remaining (b)(2) class, will get hit twice for fees. Under this scenario, there must be the utmost transparency for absent class members to evaluate time records for class counsel.

B. Class counsel has a fiduciary duty to claim a fee only on non-conflicted hours.

Inherent in any class action is the potential for conflicting interests, among the class representatives, class counsel, and absent class members. *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1077 (2d. Cir. 1995). Both class representatives and class counsel have responsibilities to absent members of the class. *Id.*

Once the action has been certified to proceed as a class action, "it is incumbent on the class representatives to be alert for, and to report to the court, any conflict of interest on the part of class counsel, as for example, counsel's greater concern for receiving a fee than for pursuing the class claims." *Id*. at 1078 (citing 7A C. Wright, A. Miller, & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE § 1769.1, at 386-87 (1986)).

Under, this fiduciary role, there is a requirement on class counsel to show its work benefits the class and not its self-interest or the defendants as "the deal that promotes the self-interest of both class counsel and the defendant and therefore optimal from the standpoint of their private interests." *Creative Montessori Learning Centers v. Ashford Gear LLC*, 662 F.3d 913, 918 (7th Cir. 2011).

The Court reasoned that class counsel's work produced no benefits for some class members and, as to other absent class members, work deprived them of their due process rights. The Court set forth the significant problem with the entire settlement:

> This is not a case of some plaintiffs forgoing settlement relief. A significant proportion of merchants in the (b)(2) class are either legally or commercially unable to obtain incremental benefit from the primary relief negotiated for them by their counsel, and class counsel knew at the time the Settlement Agreement was entered into that this relief was virtually worthless to vast numbers of class members.

Interchange Fees II at 238.

The Court further reasoned that this was done by class counsel who should have known better. "This is a matter of class counsel trading the claims of many merchants for relief they cannot use: they actually received nothing." *Id*.

Indeed, the problem was so severe that the original settlement agreement took away the rights of other absent class members and future merchants, as well as released all claims past and future forever. R&M Objectors, as advocates for absent class members, filed their objections to obtain due process and the benefits which class counsel failed to effectuate in the original settlement. While settlements may be beneficial to Defendants and class counsel, the benefits "of litigation peace do not outweigh class members' due process right to adequate representation." *Id.* at 240.

Without a more thorough record and submission of itemized time for class counsel fees, there is danger that class counsel would be unjustly enriched at the expense of absent class members if the class counsel fee award is based on the hours that created the original settlement agreement and were exhausted in the conflict between the (b)(2) and (b)(3) classes. The amount of money from work performed in conflict should not be awarded. Rather, conflicted amount of money should stay in the common fund for the benefit of class members.

If class counsel wanted to personally claim this fee for work performed in conflict, rather than make it available to the class members, it is incumbent upon class counsel, as fiduciaries, to provide an accurate accounting of their hours and then defend being paid for conflicted hours. Despite the district court's approval of the original settlement agreement and its approval of all class counsel's fee request in the Superseding Settlement Agreement, the district court required the filings and briefings of intervenors like R&M Objectors in the first instance and the objections of intervenors like R&M Objectors in the second to bring these issues to the forefront. The district court did not do so on its own. An accurate, detailed time should be transparent and reveal the time performed for work that did not directly benefit the (b)(3) class and was spent on (b)(2) relief. Otherwise, the class is penalized, and class counsel unjustly and inequitably enriched at the expense of the absent class members. Further, without full transparency, disclosure and accounting

of their hours in conflict between the two classes, in addition to unjust or inequitable gain by class counsel, there would be lost confidence in absent class members that class counsel "would prosecute the case in the interest of the class, of which they are the fiduciaries." *Creative Montessori Learning Centers v. Ashford Gear LLC*, 662 F.3d at 917. The Court has already cautioned that only "unified interests" in the conflicted hours, as far as class counsel was concerned, was in fees. *Interchange Fees II* at 236.

Class counsel are seeking fees as a whole without accounting for non-conflicted fees, which would be potential grounds for forfeiture under general principles governing attorney representation with a conflict of interest. With self-interest of class counsel and the interests of defendants found to be an issue with the original settlement agreement, its lack of relief and violation of due process rights, restitution is due the absent class members for conflicted hours. *Id*. Not only is restitution appropriate here, it also good policy where *a fundamental conflict has already been found – that is, it is not a mere probability,* and class counsel has not taken, on its own, the required diligence and transparency to its represented (b)(3) clients to show them the unconflicted hours for which it seeks substantial compensation and monetary award.

As fiduciaries for such a large class and claim for a large fee, this accounting is not unreasonable in lieu of a complete forfeiture of a fee, if class counsel wants to

submit time on conflicted hours. This type of accounting requirement to the class is a requirement, since class counsel seeks payment out of the class fund. Otherwise, the class members who are presented by class counsel are paying class counsel for work of no benefit – and perhaps a detriment – as a result of the conflict. *See, e.g. Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 968 (9th Cir. 2009). In *Rodriguez*, the Ninth Circuit outlined the duty of counsel where a conflict arises in a class action. "'The responsibility of class counsel to absent class members whose control over their attorneys is limited does not permit even the appearance of divided loyalties of counsel.'" *Id.* at 968, citing *Kayes v. Pac. Lumber Co.*, 51 F.3d 1449, 1465 (9th Cir. 1995), quoting *Sullivan v. Chase Inv. Servs. of Boston, Inc.*, 79 F.R.D. 246, 258 (N.D. Cal. 1978). In addition, class counsel's fiduciary duty is to the class *as a whole* and it includes reporting potential conflict issues. *Id*. at 968.

Here, R&M Objectors represent smaller retailers and merchants in several states. These clients are busy taking care of their retail business and do not have the "sophistication in legal and commercial matters that would motivate and enable them to monitor the efforts of class counsel on their behalf." *Creative Montessori Learning Centers*, 662 F.3d at 917. Class counsel did not report the conflict between (b)(2) and (b)(3) classes and the district court did not identify it in its approval of the original settlement agreement. Yet, "class counsel knew at the time the Settlement Agreement was entered into that this relief was virtually worthless to vast numbers

of class members." *Interchange Fees II* at 238. This fundamental conflict was important because it prejudiced the combined classes. The release provided immunity to Defendants. "But the benefits of litigation peace do not outweigh class members' due process rights to adequate representation." *Id.* at 240. It was the intervention of R&M Objectors and others, together with the appeal of the district court's approval of the original settlement agreement, that resulted in the district court's certification being vacated and approval reversed. These are significant grounds for evaluating the disclosure of conflicted hours. The role of R&M Objectors in changing the adversarial nature of the preliminary approval and final approval process for the original definitive class action settlement agreement cannot be minimized in bringing such a conflict to light.

Due to the massive extent and complexity of this settlement and tremendous impact on the retailers and merchants, the objectors for smaller mom and pop retailers played a very valid and vital role, not only as watch dogs, but also to engage in serious debate over the fairness of the original definitive class action settlement agreement. R&M Objectors early and consistent participation helped to change the whole adversarial nature of this process and to actively participate in causing substantial change to the original settlement. Without the challenges to the district court's approval, there would have no change; with it, the entire agreement was vacated.

Indeed, without participation of R&M Objectors and class representatives who withdrew from the agreement, the district court would have rubber-stamped the original agreement without oral argument. As the district court plainly stated in its order of October 24, 2012, after R&M Objectors had filed a written objection:

> Ordinarily I do not schedule oral argument of preliminary approval motions. However, based on my review of the parties' submissions and consultations with Magistrate Judge Orenstein, it seems clear that there is an expectation among some interested parties that the preliminary approval process should be more involved in this case than in the usual class action. Therefore, oral argument shall occur on November 9, 2012 at 11:30 a.m., and anyone wishing to make that point, or to speak against or in support of preliminary approval, will be permitted to do so.

(JA - 2458).

The Court was very clear about the relief that was unavailable to the (b)(2) class with "an exceptionally broad release." R&M Objectors, in many cases, received no appreciable benefits in the original class action settlement agreement. R&M Objectors raised these issues early and consistently before the preliminary approval hearing, at the final approval hearing and also assisting in the appellate briefing before this Court. Other future merchants were precluded from bringing future claims, having the opportunity to opt-out, and precluded from the opportunity to object, thus allowing all claims past or future to be released forever, whether they liked it or not. Thus, the district court was not fair or equitable in evaluating the work performed on conflicted hours. R&M Objectors counsel presented the

problems with the original settlement agreement. The district court, however, denied compensation for these efforts. However, on-the-other-end, class counsel stands fully compensated for this conflicted work. And without having provided its billing records, asks the class to take its word for the omission, though this is contrary to common representation of clients and where the rights of many are at issue. To allow class counsel all of the fees, when its work produced none of these benefits that R&M Objectors were forced to object to obtain for their clients is inequitable and contrary to class counsel's fiduciary obligation. The fee petition and record below for class counsel fails to adequately support monetary award for conflicted time, that is earning money against the class relief for work that produced no value.

As the class counsel for (b)(3) will also be petitioning for attorney fees, the discrepancy and conflict between the two classes has not been identified or disclosed in the class counsel fee petition. This is bad precedent without a thorough record examination that class members are not paying for conflicted time or will be paying double fees for the same work.

The R&M Objectors have gleaned from the filings and affidavits that class counsel have not publicly separated the fees that class counsel claim for work performed for (b)(3) damages for class members and for (b)(2) injunctive relief, including surcharge provisions and credit card rules. The opinion of the Court required "separate" counsel be appointed "after" the opinion came down on June 30,

2016 (twelve years after the original filing). Therefore, the problem with development of the original settlement is compounded with any fees and time claimed by the current (b)(3) class counsel for work after July 30, 2016.

Further, because the corresponding (b)(2) relief is not presented here, the (b)(3) class counsel, as a fiduciary for the class sought to be bound by the damages award, should be required to provide even more detail of their work on a case where the original agreement contained a conflict between two classes. This was not done, thus, the class who participated in the damages part of the superseding settlement agreement are penalized and may be paying for work of no benefit during a time period of no relief. The burden was on class counsel to detail this information out and if appropriate work was performed, then the trial court could award fees. However, the order approving the fees and expenses does not explain or address the central issue of conflict time.

Since the (b)(3) class counsel were disqualified from conflict, as a fiduciary for class members, there is a duty of loyalty and full disclosure on any fees and time claimed for work that was performed which was a conflict between two types of relief. Therefore, from 2004 through 2016, this time has to be itemized and disclosed for the public what work was for the benefit of the (b)(3) damages class members and what work was for the (b)(2) members. Any fee earned in a

disqualified or conflicted work should be scrutinized and disgorged for the benefit of the absent class members who are bound by the terms of this settlement.

POINT II

R&M OBJECTORS WERE A SUBSTANTIAL CAUSE OF THE NEW BENEFIT OBTAINED, TRANSFORMING THE CLASS SETTLEMENT PROCESS INTO AN ADVERSARIAL PROCEEDING AND ARE ENTITLED TO A LEGITIMATE AWARD OF COUNSEL FEES

R&M Objectors active participation in their objection helped provide different terms of relief, fairness and better notice for retailers and merchants. "[O]bjectors have a valuable and important role to perform in policing class action settlements," and therefore "are entitled to an allowance as compensation for attorneys' fees and expenses where a proper showing has been made that the settlement was improved as a result of their efforts." *White v. Auerbach*, 500 F.2d 822, 828 (2d Cir. 1974). "The actions of the party seeking to recover costs must, however, be a substantial cause of the benefit obtained." *In re Holocaust Victim Assets Litig*., 424 F.3d 150, 157 (2d Cir. 2005).

Compensation may be awarded to objectors who advance non-frivolous arguments and transform a settlement hearing into a truly adversarial process. *In re Petrobras Securities Litig*., 320 F.Supp.3d 597 (S.D.N.Y. 2018); *Park v. Thomson Corp*., 633 F.Supp.2d 8, 11-12 (S.D.N.Y. 2009); *see also Prudential Ins. Co. Am. Sales Practices Litig*., 273 F.Supp.2d 563 (D. N.J. 2003); *Great Neck Capital*

Appreciation Inv. P'ship, L.P. v. PricewaterhouseCoopers, L.L.P., 212 F.R.D. 400, 413 (E.D. Wis. 2002); *In re Ikon Office Solutions, Inc., Sec. Litig.*, 194 F.R.D. 166, 197 (E.D. Pa. 2000). An award of attorney's fees for an objector does not require that an economic benefit to the class occur, or that the objection influence the court's decision. *See, e.g., In re MetLife Demutualization Litig.*, 689 F.Supp.2d 297, 367 (E.D.N.Y. 2010), citing *Park v. Thomson Corp.*, 633 F.Supp.2d 8, 11 (S.D.N.Y. 2009)).

R&M Objectors reviewed the voluminous case record, pleadings and decisions of the trial court, examined the structure of the settlement agreement, reviewed the class notice, examined the terms of the settlement agreement, researched legal issues, drafted multiple pleadings, hired a legal and economic expert and participated in writing the notice section of the appellate brief for the Court's appellate review of the original definitive settlement agreement.

On October 18, 2012, R&M Objectors filed an objection to the original settlement agreement, filed on July 13, 2012. (JA - 2027). This objection was filed prior to the preliminary approval hearing. R&M Objectors maintained that "significant issues regarding the fairness, adequacy and reasonableness of the proposed settlement" needed to be fully aired and discussed at the preliminary approval hearing.

On October 19, 2012, class counsel filed the definitive original settlement

agreement. (JA - 2044). Three days later, on October 22, 2012, R&M Objectors filed a letter to the district court requesting an opportunity to review the depositions and discovery which led to that proposed settlement agreement. (JA - 2455).

R&M Objectors retained a well-recognized law and payment finance expert, Professor Levitin, who provided an affidavit in support of their efforts on behalf of absent class members and fee petition. In their final objection, R&M Objecotrs filed the first objection for absent class members with specific reference to legal authority, including the analysis of the unfair settlement, from Professor Levitin's "AN ANALYSIS OF THE PROPOSED INTERCHANGE FEE LITIGATION SETTLEMENT." Georgetown Law and Economics Research paper No. 12-033 (August 12, 2012), <http://ssrn.com/abstract=2133361>. (JA -6763, 6800). This effort for retailers and merchants was more than passive.

R&M Objectors made a specific request to form a Proposed Objectors' Committee so that such a committee could be given full access to the discovery materials. R&M Objectors also requested presentation of a report from this Proposed Objectors' Committee report. This request was made very early in the preliminary settlement process. This discovery material would have helped the objectors and the district court better review the terms of the settlement and its procedural mechanics, including notice. Had this been granted, the problems with joinder of the (b)(2) and (b)(3) class could have been addressed early on.

R&M members had valid concerns with notice, the actual benefit of the surcharge and benefit of the settlement agreement for a full release, which provided global peace and permanent immunity to Defendants from honor-all-cards and default interchange rules. *Interchange Fees II* at 239. R&M Objectors also found the award of class fees was too high and that restitution should be provided to the absent class members.

On October 24, 2012, the district court responded to R&M Objectors and the objecting plaintiffs, identifying the request from the retailers and merchants to "organize a Proposed Objectors Committee, grant it certain discovery, and set a schedule for a report from that committee." (JA - 2457). The court noted that the threshold for preliminary approval was less than for final approval. The district court requested written objections on or before October 31, 2012. Further, the district court admitted that:

> Ordinarily I do not schedule oral argument of preliminary approval motions. However, based on my review of the parties' submissions and consultations with Magistrate Judge Orenstein, it seems clear that there is an expectation among some interested parties that the preliminary approval process should be more involved in this case than in the usual class action. Therefore, oral argument shall occur on November 9, 2012 at 11:30 a.m., and anyone wishing to make that point, or to speak against or in support of preliminary approval, will be permitted to do so.

(JA - 2458).

On November 5, 2012, R&M Objectors filed an Amended Objection to Preliminary Approval of Proposed Settlement before the preliminary approval hearing, which added twenty-two additional retailers and merchant objectors, for a total of 60, and additional points in contention. (JA - 2460). In this filing, R&M Objectors continued its request for discovery documents so that actual facts and figures provided in the documents could be used to assess the fairness and reasonableness of the proposed settlement.

Counsel for R&M Objectors appeared at the November 9, 2012 preliminary approval hearing. The district court gave final approval to the definitive settlement agreement. On May 15, 2013, R&M Objectors filed their objection to final approval. (JA - 2657). R&M Objectors filed a notice of intent to appear at the final approval hearing and provided an additional notice filing and conditional notice of opt-out form due to the confusing nature of the notice provided by the definitive settlement agreement involving the substantive rights of class members and the binding effect of a judgment. (JA - 2690).

The court assigned evaluation of the definitive settlement agreement to Professor Alan O'Neil Sykes, appointed to assist the court in reviewing the definitive settlement agreement for fairness, adequacy and reasonableness. On August 20, 2013, R&M Objectors sent a seven-page letter to Professor Sykes outlining the concerns with the definitive settlement agreement and including recommended

specific materials from the existing case documents for Professor Sykes to review. (JA - 2835). These discovery requests were twenty-one enumerated paragraphs of documents to evaluate the various terms of the definitive settlement agreement, including factors involving valuing the settlement agreement where there is information on the availability of the surcharge to class members in some states, but not others, "which prohibit a surcharge," "loss of settlement value to absent class members in states where the surcharge is prohibited," "the actual usage and realized value of the surcharge" provision, and "economic value of the settlement," impact of the release on individuals and entities. (JA – 2839-2840). This discovery request, presented to the Magistrate, was consistent with earlier efforts by R&M Objectors to obtain discovery by requests in filings with the district court and a request for the appointment of a discovery committee.

On November 12, 2013, counsel for R&M Objectors appeared and argued at the final fairness hearing assessing the definitive class action settlement agreement. The district court approved the definitive class action settlement agreement. On January 10, 2014, R&M Objectors appealed the district court's approval of the definitive class action settlement agreement.

R&M Objectors cooperated and worked with a group of counsel on appellate briefing to this Court. Beyond this cooperation and vetting of the main brief, R&M Objectors were tasked to file a separate brief dealing with the inadequate notice

contained in the definitive class action settlement agreement. Consequently, R&M Objectors not only provided supplemental arguments for the due process arguments contained in the brief, but drafted a separate R&M brief with separate arguments on conflicts with absent class members. This briefing portion contained additional arguments on notice and the "worthless surcharge," not as fully developed in the plaintiff objectors' main brief.

R&M Objector's version of the notice argument, that the class members deserved a new notice because the opt-out right was illusory, does not appear in plaintiff objectors' brief. While the "worthless surcharge" argument claim appears in only a few sentences of the main brief, it occupies ten pages or more as major argument in R&M Objectors' brief.

By the same token, following the filing of opening briefs, R&M Objectors participated and worked with plaintiff objectors' appellate counsel on a reply brief while also filing their own, separate, reply brief emphasizing points made in R&M Objectors opening brief. Finally, R&M Objectors yielded their own argument time to benefit a single, unified entire argument before the Court.

On June 30, 2016, the Court issued its opinion vacating the definitive class action settlement agreement. That opinion finds a fundamental conflict between (b)(2) and (b)(3) classes, violation of due process, an overbroad release, which provides permanent immunity to defendants on honor-all-cards and default

interchange rules, and finds the surcharge term of the settlement worthless and of no value. *Interchange Fees II*. After the definitive class action settlement agreement was vacated, R&M Objectors continued to actively participate in this case to ensure the substitution of a fair settlement agreement.

When R&M Objectors finally sought compensation for their efforts in creating a more adversarial process and advancing meritorious arguments, their application was rebuked by the district court. Following the report and recommendation of the Magistrate (JA-6981), the district court adopted the report and recommendation in its entirety and denied the application of R&M Objectors for attorney's fees, expenses, and service awards and promised its reasons for doing so to follow in a separate opinion**.** (JA-7473)

The district court's opinion supporting its complete denial of R&M Objector's application belittled its efforts in successfully challenging and overturning the original settlement agreement. Following the Magistrate's suggestions, the district court agreed that R&M Objectors opposition to the original settlement agreement did nothing to advance the interests of the (b)(3) class, the only class to whom the new Superseding Settlement Agreement pertained; that this Court expressed no concern about the original settlement agreement's effect of members of the (b)(3) class; that this Court made no suggestion that the undoing of the original settlement agreement would help the (b)(3) class; that R&M Objectors did not "substantially

cause" the benefits conferred by the Superseding Settlement Agreement and that it would "blink reality" to assume otherwise; and that R&M Objectors' participation in the briefing in this Court was only cumulative and made no difference to the result in this Court or the Superseding Settlement Agreement in the district court. *Id.*

The district court's finding that while R&M Objectors "objected early and consistently," but did not address "the adequacy of class counsel's inherently conflicted representation or the problems with the surcharge benefits" is belied by the court's citation to portions of those early objections which dealt with the injunctive relief being inadequate for the class, the release being excess and overbroad, and the attorney's fee aware being excessive. *Id.* at 17. Nonetheless, the district court that R&M Objectors was not a substantial cause of any increased benefits conferred by the Superseding Settlement Agreement. *Id.* at 19.

Given that were it not for R&M Objectors and coordinated briefing in this Court, both the Magistrate and the district court would have approved a settlement agreement that violated due process, was the product of attorney conflicts in representation, took undue advantage of a litigant class in that agreement, and then billed both (b)(2) and (b)(3) classes for those conflicted hours, the failure to appreciate that R&M Objectors was *a* substantial cause of short-circuiting such error was an abuse of discretion. There is no requirement of law that an objector be *the* substantial cause of change, but that the efforts of that objector were part of that

cause, albeit a "substantial" part. The comment by the district court that R&M Objectors merely joined in the briefs filed by others objectors is not supported by the record. (JA-7474)

In fact, it is. Counsel for the main objectors' group specifically asked R&M Objectors to draft a brief addressing the notice issue on appeal. It was agreed that this would be done and that R&M Objectors would join in the main brief on all other issues. (JA-6814) In originally advising the district court that they intended to file a request for counsel fees on their own behalf, Goldstein & Russel, P.C., attorneys for the merchant objectors, noted that counsel for R&M Objectors had already filed it motion for attorney's fees on the same day that class counsel had filed theirs. These attorneys, who coordinated efforts in the briefing to this Court and specifically requested the participation of R&M Objectors to not only vet the main brief but to file its own brief on a particular point, stated that they "agree with the R&M objector's position that a portion of the fee requested by class counsel should be reserved for counsel for the successful objectors[.]" (JA-6549) R&M Objectors did not just join in a written by others; it joined in briefing it had a part in creating as part and parcel of a coordinated strategy, assuming the role of filing its own brief at the specific request of the coordinating attorneys to further that common good. This is not the "me too" participation that the district court presumed in denying R&M Objector's counsel fees.

The Court has recognized the "valuable and important role" of objectors for precisely the reasons best represented by this case, those that speak of preventing the unfavorable or collusive settlement. *White v. Auerbach*, 500 F.2d 822, 828 (2d Cir. 1974) "They are entitled to an allowance as compensation for attorneys' fees and expenses where a proper showing has been made that the settlement was improved as a result of their efforts." *Id.* But an award of attorney's fees and expenses to a successful objector does not require that an economic benefit to the class occur or even that the objection influenced the court's decision. Courts have awarded counsel fees where the arguments advanced were "non-frivolous arguments" that "transformed the settlement hearing into a truly adversarial proceeding." *In re MetLife Demutualization Litigation*, 689 F.Supp.2d 297, 367 [internal citations omitted].

The original settlement agreement here was flawed and produced as a violation of due process resulting from a fundamental conflict that permeated class counsel's representation. That fundamental conflict would have never been seen had it not been for R&M Objectors' efforts in the district court and in this Court. Had the original settlement agreement been allowed to proceed on the district court's approval, not only would the (b)(2) class been irreparably damaged, but the (b)(3) class would have been forced to pay for conflicted time alleged to have been expended on its behalf. To suggest that such efforts were of no value is patently

unfair and does serious damage to the objector's counsel who does his job.

CONCLUSION

R&M Objectors respectfully request compensation for their efforts on behalf of absent class members, as part of the substantial cause of the vacated agreement and creating a more adversarial process and advancing meritorious arguments for members in numerous affected states. The Court should either vacate the class counsel fee award or, in the alternative, remand for further proceedings and requirement of itemization of time records for non-conflicted work.

Respectfully submitted,

By: /s/Jay L.T. Breakstone

Jay L. T. Breakstone
Parker Waichman LLP
6 Harbor Park Drive
Port Washington, New York 11050
(516) 466-6500
jbreakstone@yourlawyer.com

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I hereby certify pursuant to Fed. R. App. P. 32(a)(7) that the attached brief is proportionally spaced, has a typeface (New Times Roman) of 14 points, and contains 9,758 words (excluding, as permitted by Fed. R. App. P. 32(a)(7)(B), the corporate disclosure statement, table of contents, table of authorities, and certificate of compliance), as counted by the Microsoft Word process system used to produce this brief.

Dated: December 29, 2020

/s/Jay L.T. Breakstone

Jay L. T. Breakstone