# 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 REPLY BRIEF FOR OBJECTOR-APPELLANT R & M OBJECTORS

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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

This brief is submitted by R&M Objectors in reply to the answering brief of Appellees.[1] It replies to the arguments of Class Counsel for the settling plaintiffs in this singular class action, the "largest-ever cash settlement in an antitrust class action[.]" *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 827 F.3d 223, 234 (2d Cir. 2016) [*"Interchange Fees II"*], *rev'g and vacating* 986 F.Supp.2d 207 (E.D.N.Y. 2013) [*"Interchange Fees I"*]. The Court, in its 2016 decision, cut through directly to the problem giving birth to the instant appeal. With the original settlement agreement at their fingertips and $544.8 million dollars in legal fees close at hand, Class Counsel, who "stood to gain enormously if they got the deal done," overlooked an elemental conflict of interest between the two classes of plaintiffs they represented in that original settlement. 827 F.3d at 234.

R&M Objectors, a collection of individual merchants and small retailers, did not. They first brought to the attention of the district court that the settlement it had so carefully shepherded from 2004-2012 was fatally flawed; that it contained within it a virus so pervasive that it challenged the very life of that settlement itself. The primary rule of fair representation and the appropriate actions of supposedly independent counsel representing two independent classes of plaintiffs had been

[1] R&M Objectors join in the arguments of other objectors challenging the orders below to the extent that they support the positions taken in this reply and R&M Objectors main brief.

ignored. The two classes, a (b)(2) class and a (b)(3) class, had competing interests, but only *one* Class Counsel representing *both*. The proposed original settlement agreement only recognized the interests of *one* of those classes, the (b)(3) class.

Why? The answer, which the district court failed to appreciate of its own accord, was plain. The (b)(2) class was an injunctive class while the (b)(3) class was a damages class. It was the latter class where the money was and it was money which drove the proposed $7.25 billion settlement. "Class counsel stood to gain enormously if they got the deal done." *Id.* So what they did was settle the action in favor of one set of clients at the expense of the other. "[C]lass counsel knew at the time the Settlement Agreement was entered into that this relief was virtually worthless to vast numbers of class members." *Id.* at 238.

R&M Objectors have two primary areas of focus in this reply. The first is that class counsel improperly received compensation based on conflicted time; time for which they worked *against the best interests of their clients.* The second is that R&M Objectors were a substantial force in bringing that issue to the attention of the district court and later to this Court in the *Interchange Fees II* appeal, and should be awarded fees and expenses in return for those efforts.

The class, as beneficiaries, are now entitled to compensation as restitution, as Class Counsel seek to benefit themselves at the expense of the class on legal fees based on conflicted time. To reward Class Counsel here with fees expended to

benefit the (b)(3) class at the expense of the (b)(2) class is plainly wrong. In essence, Class Counsel is being paid for time used to damage its clients' best interests rather than promote them. Moreover, those efforts were not passive, but active. Consequently, Class Counsel's request for attorney's fees on conflicted time requires reversal of the district court's decision to approve those attorney's fees.

Where there is a conflict, fee forfeiture is the general remedy. But Class Counsel made no effort to itemize the time it spent in working for the (b)(3) class at the expense of the (b)(2). As a result, there was no way whatsoever for the district court to discern what the conflicted time amounted to; no way to discount the total award of fees for those hours of conflict; no way to charge Class Counsel for its wasted hours working to the (b)(2) class' detriment. Class counsel should have provided full disclosure and itemized records for the class members to review. Without this full disclosure to the class, including an accounting and itemization of conflicted time, the district court abused its discretion in approving fees for this conflicted time.

With respect to its fee request, R&M Objectors obtained positive, beneficial relief for absent class members whose rights had been traded away with the 2012 settlement agreement. *Interchange Fees II* at 226. To suggest otherwise, is to rewrite the history of this case. The relief obtained by R&M Objectors *was* a substantial benefit to the class and the record reflects those efforts.

R&M Objectors' efforts in obtaining this relief are supported by the district court's references to points advocated by R&M Objectors, R&M Objectors submissions in the record and proof of work, and expert opinion which analyzes the effect of that work. But, perhaps the most significant factor is the admission of Class Counsel in their brief that R&M Objectors were in the position to share in Class Counsel's settlement of fee issues with the objector group represented by Goldstein & Russell, P.C., counsel in the prior appeal. Appellees' Br 84 at note 40.

In short, under the facts and circumstances, compensation is warranted. *White v. Auerbach*, 500 F.2d 822, 828 (2d Cir. 1974). R&M Objectors submit that denial of the request below by the district court was an abuse of discretion.

## POINT I

## THE SUGGESTION THAT R&M OBJECTORS WAS GIVEN THE OPPORTUNITY TO SETTLE ANY FEE ISSUE WITH CLASS COUNSEL IS INCORRECT

In a curious footnote that leads off Class Counsel's answering brief as it pertains to R&M Objectors, Class Counsel chides R&M Objectors for having "apparently decided not to be part of the agreement reached with the Goldstein group to pay the group some attorneys' fees out of any fee awarded by the district court." Appellees' Br 84 at note 40. The source cited to support that statement is a July 23, 2019, letter from Class Counsel to the district court and magistrate judges advising

them that "an agreement has been reached related to the Goldstein group's request for fees; it will be folded in with Class Counsel's request, such that it will not increase the overall fee request of 9.56% of the settlement fund." JA-6686**.** As a result of the agreement outlined in the letter, "the Goldstein group will not be filing a separate fee request[.]" *Id.* However, there is nothing in Class Counsel's letter that states that R&M Objectors were ever given the opportunity to come to any agreement with Class Counsel with respect to attorney's fees, hence the coy use of the word "apparently" in Appellees' Brief to suggest otherwise. Though outside of the record at this point in time, what should be "apparent" to the Court is that Class Counsel knew full well of R&M Objectors' close coordination with the Goldstein group during the briefing and argument of *Interchange Fees II* and chose to enter into a settlement agreement regarding attorney's fees with only the Goldstein group, leaving out R&M Objectors intentionally. This was a decision by the parties to that agreement, Class Counsel and the Goldstein group, not R&M Objectors.

The reason for that that decision is not germane to this appeal, but the belief of Class Counsel (and the Goldstein group it settled with) that R&M Objectors, as a result of their legal work, were justified in being part of that settlement agreement respecting fees for legal work is. The record demonstrates that R&M Objectors was not mere "me too" counsel, toddling behind the Goldstein group, but active co-workers for the common good. The Goldstein group not only had R&M Objectors

commenting on and vetting their brief, but *specifically assigned* R&M Objectors to independently brief the notice issue on appeal, while it joined with the Goldstein group on the main brief. JA-6811. Prior to its settlement with Class Counsel, the Goldstein group specifically advised the district court that it would be filing a request for counsel fees, noting that R&M Objectors had already done so on its own behalf. JA-6548. The Goldstein group, who Class Counsel now admits were in a position to make a joint fee settlement with R&M Objectors, stated to the district court that it "agree[d] 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[.]" *Id.* Neither the acts and statements of Class Counsel nor the Goldstein group are supportive of any view of the efforts of R&M Objectors other than they were unjustly denied attorney's fees for their work in securing a new and fair settlement in this action.

## POINT II

## R&M OBJECTORS OBJECTED EARLY AND WITH ISSUES THAT WENT TO THE HEART OF THE ORIGINAL SETTLEMENT

R&M Objectors participation was both early and direct after the initial settlement agreement was signed. R&M Objectors filed the first objection for purely absent class members. The only other objection at that time had been made for

plaintiffs who eventually withdrew from the original settlement represented by Constantine Cannon and were primarily associations and groups. R&M Objectors brought a large cross-section of merchants and small retailers who were directly impacted by the original settlement's defects. Their arguments specifically addressed notice to the class, the worthless surcharge relief, and a challenge to Class Counsel's fees. Objections, first raised on October 18, 2012, continued unabated through appellate briefing in this Court. Quoting from distinguished Georgetown Law Professor, and payment and finance expert, Adam Levitin[2], R&M Objectors argued that the $7.25 billion settlement proffered amounted to only three months' worth of interchange fees. JA-2038. Thus, R&M Objectors directly challenged the amount of (b)(3) damages and their objection contained the only challenge to excessive attorney fees. As counsel for retailers and small merchants affected by the relief, R&M Objectors made specific, unique arguments regarding the confusing notice patched onto a deal that took away class members' rights; notice which was integral to Rule 23 settlements and part and parcel of the due process afforded class members. There is nothing ancillary about the arguments made by R&M Objectors in *Interchange Fees II*, and to argue otherwise is folly.

[2] Levitin, *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=213361

### A. The district court abused its discretion in awarding a fee award to Class Counsel on conflicted time without full itemization of its time records

Class Counsel asks for fees for conflicted time; time which the Court has designated as such. The conflict created was actual, not possible. Under these facts, it is not unreasonable for the district court to have required more of Class Counsel than merely its own confidence to justify attorney's fees and payment to Class Counsel instead of restitution of those conflicted fees to class members.

A fiduciary may not engage in self-dealing under any state's view of the law. *Birnbaum v. Birnbaum*, 73 N.Y.2d 461, 466 (1989) [fiduciary owes undivided loyalty, "requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty."] That duty was violated here by Class Counsel and the tenor of the Court's opinion in *Interchange Fees II* is consistent with the depth of the duty violated. "This opinion," the Court stated, "concludes that class plaintiffs were inadequately represented. Accordingly, the settlement and release that resulted from this representation are nullities." *Interchange Fees II* 827 F.3d at 236.

The district court, itself intimately involved in the years and years of work which produced the original settlement, responded to the Court's multiple cautions in *Interchange Fees II* by continuing Class Counsel in its role, but now representing the lucrative (b)(3) class which had been benefited by the conflicted work at the

expense of the (b)(2) class in the original agreement, and appointed new counsel for the (b)(2) class in the new settlement agreement to follow.

Under these circumstances and following the impact of the Court's decision in *Interchange Fees II*, more was required to justify Class Counsel's fee award and separate it from the work done in conflict with the (b)(2) class, who were then, but not now, Class Counsel's clients. There is no authority for paying counsel, which is conflicted, legal fees that result from that conflict and, more important, fees that represent time spent working in derogation of the conflicted client's best interests.

Motives of class counsel are generally not dispositive on fees and they are not impugned here. However, even innocent self-dealing is proscribed and, under any standard, more scrutiny is required in such a case, not less. Where there is conflict, typically the remedy is disgorgement of fees, notwithstanding any express finding of an ethics breach. Here, rather than refunding the value of such conflicted services, Class Counsel seeks to get paid for them.

R&M Objectors provided measurable value to the post-*Interchange II* settlement process by holding Class Counsel to its proof that the legal time it was getting paid for was not legal time it expended to the (b)(2) class' detriment. Consequently, detailed, clear, and transparent records are necessary for class members to review and consent to any attorney's fee payment. In short, Class

Counsel cannot avoid disgorgement by failing to produce time records that would prove the conflicted hours which, no one disputes, it cannot be paid for.

While Class Counsel claims that R&M Objectors somehow waived any argument relating to conflicted fees, such an argument is without merit. R&M Objectors have objected to fees since October 18, 2012. There was nothing "late" about R&M Objectors' objections in the district court. Neither that court nor the magistrate before it had any problem with R&M Objectors submissions, specifically assessing them notwithstanding the time of their submission. See JA-7473. Class Counsel itself was amending and substituting documents on their fee petition right before the final approval hearing.

The answering brief is correct. R&M Objectors has been consistently "argu[ing] that the district court erred by awarding attorney fees without reviewing individual time entries from Co-Lead Counsel over this litigation's life span." Answering Brief at 50. The district court erred in ignoring this argument and permitting Class Counsel to be awarded fees on conflicted time and not paying restitution to class members.

**B. R&M Objectors made substantial contributions to improving the settlement**

The original settlement agreement was completely vacated. R&M Objectors spent considerable effort and argument in achieving that goal. But the effect was not just the discarding of the original settlement, but changing the procedural nature

and substance of the new settlement as well. Those efforts, the record reflects, benefited the class and provided value in the damages amount by an additional $900 million to class members. Without the rebuke of the original settlement by the Court, there would be no new settlement agreement, but only one, unfair to the (b)(2) class, with less money and an internal conflict that would have destroyed it from within. This was the work done by R&M Objectors on its own, but in cooperation with others – others who have been paid an unknown amount in settlement with Class Counsel.

The efforts of Class Counsel to minimize R&M Objectors' work below ring hollow. Professor Levitin made no mistake when he found that R&M Objectors *were* part of the effort that resulted in the substantial benefit afforded by the new settlement agreement. The fee settlement with the Goldstein group and the evidence in the record demonstrating that R&M Objectors' brief below was not only with *permission* of the Goldstein group *but at its direction*, shows that R&M Objectors' entitlement to attorney's fees is as well-grounded in fact as those of the Goldstein group – fees which Class Counsel has agreed to pay out of the settlement.

First, R&M Objectors' initial objection was recognized by the district court. The court referenced the intensity of the early objection to preliminary approval and request for discovery, JA-2458**.** This effort helped change the proceedings to a more

adversary-like proceeding to vet out additional arguments, which also helped other objectors file objections and participate in oral argument.

Normally, as the district court explained, it would not have permitted oral argument on such an application. Thus, R&M Objectors' efforts helped other objectors who filed objections after R&M Objectors and this helped change the proceedings to include the airing of objections in oral argument at the preliminary approval hearing.

Second, the R&M Objectors' amended objection was cited by the district court in its decision approving the Superseding Agreement. JA–4693, n. 23.

Third, R&M Objectors submitted the affidavit of a well-recognized expert on this very issue. This affidavit states that R&M Objectors were a *sine qua non* for the negotiation of the Superseding Settlement Agreement. This expert affidavit was unrebutted as expert proof.

Fourth, R&M Objectors submitted time sheets. Class Counsel acknowledged the involvement of R&M Objectors. R&M Objectors worked closely with the Goldstein group and litigation counsel, Constantine Cannon. The latter specifically tasked R&M Objectors to address, in more detail, the major due process argument of inadequate Rule 23 notice of the surcharge provision. This proof was also presented upon request to the district court in this matter after the September 5, 2019, hearing. JA-6811.

Fifth, following the hearing on September 5, 2019, after being specifically requested by the Court to do so, R&M Objectors filed documentation of their efforts, submitting time sheets, including specific e-mails showing their coordinated briefing efforts and performance of specific tasks relating to the notice issue.

Denying compensation to R&M Objectors would unfairly give short-shrift to an objector who moved early, stayed on attack, and worked in a team approach that was successful. R&M Objectors did precisely what objectors are expected to do, i.e., prevent "collusive or otherwise unfavorable settlements[.]" *In re MetLife Demutualization Litigation*, 689 F.Supp.2d 297, 367 (E.D.N.Y. 2010) (*Weinstein, J.*) An objector may well satisfy that role by playing the devil's advocate or transforming what otherwise might be pro forma proceeding into a truly adversarial one, even if the settlement in question is not improved. "An award of attorneys' fees for an objector does not required that an economic benefit to the class occur, or that the objection influence the court's decision." *Id.* It only requires that the effort be "a substantial cause of the benefit obtained." *In re Holocaust Victims Assets* Litigation, 424 F.3d 150, 157 (2d Cir. 2005), citing *Savoie v. Merchants Bank*, 84 F.3d 52, 57 (2d Cir. 1996). Consequently, it need not be *the* cause of the settlement, but need only be a material benefit in producing it. Nonetheless, in this case, R&M Objectors changed the complexion of the settlement proceedings into a truly litigated, adversarial proceeding, which exposed not only the conflict of Class

Counsel, but expanded the monetary recovery of the class significantly. Moreover, the conflicted fees which Class Counsel hopes to keep in the new settlement agreement, if disgorged as would be appropriate, stand to increase the class' recovery even more. It would be contrary to the spirit of a beneficial objection in this specific lawsuit, under these particular facts and circumstances, to deny R&M Objectors a fee award. *White*, 500 F.2d at 828.

The case law for objectors' participation is meant to encourage counsel for objectors to provide participants with meritorious arguments. *In re: S.S. Body Armor I Inc. f/k/a Point Blank Solutions, Inc*., 961 F.3d 216, 226-227 (3rd Cir. 2020) (analyzing case law and holding that objectors' fees may be awarded for non-monetary contributions as well as monetary). Class counsel's argument is self-serving and advocates for a closed-door settlement process, restricted adversarial argument, and a lack of incentives for objector counsel to challenge unfairness. It was Class Counsel's lack of incentive that sapped its strength to work on a fair agreement in the first instance. Even with this background, Class Counsel audaciously asks for compensation on what R&M Objectors has shown to be conflicted time, while in the same breath, claiming that the denial of any compensation to R&M Objectors is somehow fair.

Adequately compensating objectors ensures fully vetted arguments and avoids collusion, especially as respects a settlement class, such as the one at bar.

Courts have stated that the possibility of compensation is necessary to entice "objectors [to] serve as a highly useful vehicle for class members." *Great Neck Capital Appreciation Inv. P'ship v. Pricewaterhouse, L.L.P.*, 212 F.R.D. 412, 412 (E.D. Wis. 2002); *see also In re Anchor Sec. Litig.*, No. CV-88-3024, 1991 WL 53651, at *1 (E.D.N.Y. Apr. 8, 1991) (*Sifton, J.*) ("In order to encourage persons with potentially meritorious objections, attorney's fees are available to counsel for objectors who make the proper showing.")

To put the original settlement in context and truly appreciate the work of R&M Objectors in this massive, one-of-a-kind class action, involving billions upon billions of dollars is to understand what the players had invested. The litigation had progressed for years and years, with experienced class counsel, experienced defense counsel, and an experienced district court and magistrate. Yet, all worked so closely together that none ever saw the problem identified by R&M Objectors, i.e., the internal conflict between the (b)(2) and (b)(3) classes. Was resulted was an original settlement so horrible that it "violated the due process rights of those compelled to surrender their claims for money damages." *Interchange Fees II* at 240 (*Leval, J., concurring*). It was so bad that it was not a "settlement" at all. "This is not a settlement; it is a confiscation." *Id*. at 241.

R&M Objectors made the process more adversarial, were cited by the district court twice, submitted documentation, and provided expert proof by affidavit. Their

work substantially benefitted the new settlement agreement and brought relief to the class. R&M Objectors served a *necessary, beneficial purpose* with their objections and it was an abuse of discretion to deny them compensation.

> Class counsel and defendant's counsel may reach a point where they are cooperating in an effort to consummate the settlement. Courts, too, are often inclined toward favoring the settlement, and the general atmosphere may become largely cooperative. Thus, objectors serve as a highly useful vehicle for class members, and for the court and for the public generally. From conflicting points come clear thinking. *Therefore, a lawyer for an objector who raises pertinent questions about the terms or effects, intended or unintended, of a proposed settlement renders an important service*.

*Great Neck Capital Appreciation Inv. P'ship, L.P. v. PricewaterhouseCoopers, L.L.P.*, 212 F.R.D. at 412-13 (emphasis added; citations omitted).

In sum, this is a tale of two different views on work performed for the benefit of the class members. Class Counsel's attempt to keep the entire fee for itself is an impermissible shift of their burden of undivided loyalty and transparency as fiduciaries to the class members. The position of Class Counsel is contrary to all historic precedent for fees. Generally, the law provides that where counsel worked in conflict with his client, there is a complete disgorgement or forfeiture of the fee. It could not be otherwise, for this "fiduciary reliance" is "[t]he greatest trust between [people]". *Matter of Cooperman*, 83 N.Y.2d 465, 472 (1994) [bracketed material in original; internal citation omitted]. One who violates this duty to deal fairly, honestly and with undivided loyalty is not entitled to be paid for his failure to abide

by the rule. By the same token, one who intervenes, objects, and refuses to permit such a lack of fealty is to be paid for his efforts. In the end, such critical determinations should be made on a complete record, something which was not accomplished in the case at bar.

R&M Objectors have made a showing of the value of the benefit conferred upon the class by their objections. R&M Objectors' request for compensation is reasonable, proper and just for being part of the substantial cause of the original agreement being vacated. If the new settlement agreement was improved as a result of R&M Objectors' efforts or Class Counsel's fees are reduced after an appropriate hearing before the district court based on time records describing their conflicted time as opposed to their non-conflicted time, then R&M Objectors have conferred a benefit on the class and are entitled to be compensated for that effort. *In re Prudential Ins. Co. of America Sales Practices Litig.*, 273 F.Supp.2d 563, 565 (D.N.J. 2003), aff'd 103 Fed.Appx. 695 (3d Cir.) R&M Objectors' active participation benefitted the absent class members and is supported by references by the district court, its filings, and expert proof. *Id.* at 565.

## CONCLUSION

R&M Objectors respectfully request that this Court reverse the district court's memorandum, order and decision to deny compensation to R&M Objectors' counsel and affirming the award of attorney's fees to Class Counsel on conflicted time, ask that the order affirming Class Counsel's time be vacated, and remand this matter for a full disclosure, accounting and itemization of fees for the class so that no time is compensated for conflicted work.

Respectfully submitted,

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December 14, 2020

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS**

This Brief complies with the type-volume limitation of Fed. R. App. 32(a)(7)(b), because this brief contains 4,189 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 Point Times New Roman type.

Dated: December 14, 2020

/s/ Jay L. T. Breakstone
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