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

IN RE: PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION.

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

FINAL FORM BRIEF FOR OBJECTORS-APPELLANTS FIKES WHOLESALE, INC., MIDWEST PETROLEUM COMPANY, SLIDELL OIL COMPANY, LLC, THE SOCIETY OF INDEPENDENT GASOLINE MARKETERS OF AMERICA ("SIGMA"), THE NATIONAL ASSOCIATION OF SHELL MARKETERS, INC. ("NASM"), AND THE PETROLEUM MARKETERS ASSOCIATION OF AMERICA ("PMAA") ("BRANDED OPERATORS' BRIEF") (20-344-cv CON)

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CORPORATE DISCLOSURE STATEMENT

The Appellants in Case No. 20-344—the Branded Operators—submit this Corporate Disclosure Statement pursuant to Federal Rule of Appellate Procedure 26.1: Fikes Wholesale, Inc., the Society of Independent Gasoline Marketers of America ("SIGMA"), the National Association of Shell Marketers, Inc. ("NASM"), the Petroleum Marketers Association of America ("PMAA"), and Midwest Petroleum Company do not have parent corporations or any publicly held corporations that own more than 10% of any of their shares; Slidell Oil Company, LLC is owned by the Baker Family Holding, LLC, a multi-member limited liability company.

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INTRODUCTION

Appellants Fikes Wholesale, Inc., Midwest Petroleum Company, Slidell Oil Company, LLC, (collectively, the "Branded Operators") along with the Society of Independent Gasoline Marketers of America ("SIGMA"), the National Association of Shell Marketers, Inc. ("NASM"), and the Petroleum Marketers Association of America ("PMAA") (the "Associations") bring this appeal to protect their interests as prejudiced class members. The class settlement should be reversed because it contains fundamental intra-class conflicts that pit subgroups of class members – virtually every franchisor and franchisee in the country – against one another for recovery of the exact same settlement dollars on the exact same consumer transactions. One of those subgroups will be compensated through the settlement fund, and the other will not, but both groups will forever be bound by the release. Such fundamental intra-class conflicts require subclassing and separate legal representation – none of which happened here. The settlement also fails to provide adequate notice and opt-out rights to large segments of the class. This Court previously reversed approval of a settlement in this case for lack of adequate representation. The same flaw and additional errors require that the district court's settlement approval, once again, must be reversed. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 827 F.3d 223 (2d Cir. 2016) ("*Interchange Fees II*").

JURISDICTION

The district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331, 1332, 1337, 2201, and 2202. (Third Consolidated Am. Class Action Compl. ("TAC") ¶¶ 6-7, Docket Entry ("DE") No. 7123/JA-3107). On December 13, 2019, the Honorable Margo K. Brodie, United States District Judge, granted final approval of a Class Action Superseding Settlement Agreement (the "Final Approval Order") (DE 7818/JA-7288). A subsequent Memorandum & Order ("Mem. & Order") detailing the reasons for the Final Approval Order was issued on December 16, 2019 (DE 7821/JA-7324), which incorporated the related preliminary approval January 28, 2019 Memorandum & Order ("Prelim. Approval Order") (DE 7363/JA-4670). On December 20, 2019, a final judgment was entered (DE 7832/JA-7459). Pursuant to Fed. R. App. P. 4(a)(1)(A), the parties to this brief timely filed their notice of appeal on January 13, 2020 (DE 7853/JA-8588). This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

Objectors-Appellants are retail merchants that sell branded gasoline for major oil brands and associations that represent tens of thousands of fuel and convenience store retailers nationwide. The Branded Operators and Associations oppose the class settlement and raise the following issues for review:

1. Whether the district court erred by granting final approval to a class settlement that is not fair, adequate and reasonable because it includes a fundamental intra-class conflict between large groups of class members who must compete against each other for the same settlement proceeds on the same consumer transactions?

2. Whether the district court erred in finding that a special master can make threshold determinations of class membership, standing, and claim entitlement after final approval of the settlement class?

3. Whether Class Counsel and the class representatives failed to adequately represent the interests of franchisee class members such as the Branded Operators?

4. Whether the district court erred in granting final approval to a class settlement that did not provide all members of the class with an opportunity to opt-out or object to the settlement?

STATEMENT OF THE CASE

This is an appeal from a judgment of the U.S. District Court for the Eastern District of New York (Brodie, J.), certifying a settlement-only class and approving a final class settlement. The final approval opinion is available as 2019 WL 6875472 (E.D.N.Y. Dec. 16, 2019), and the district court's incorporated preliminary approval opinion is available as 330 F.R.D. 11 (E.D.N.Y. Jan. 28, 2019). This Court

previously reversed approval of an earlier settlement in this case, and its decision is reported as 827 F.3d 223 (2d Cir. 2016).

I. The Branded Operators and Other Merchants Sued to Challenge Visa and Mastercard's Practice of Fixing Interchange Fees for Credit and Debit Cards.

This case arises from a consolidated class action complaint that asserts antitrust claims against Visa and Mastercard, as well as their member banks. (TAC, DE 7123/JA-3107). The Complaint seeks relief on behalf of a class of all merchants that "have accepted Visa and/or MasterCard Credit and/or Debit Cards in the United States at any time from and after January 1, 2004." *Id*., ¶ 66. The Complaint asserts claims under § 16 of the Clayton Act, 15 U.S.C. § 26, to prevent and restrain violations of § 1 of the Sherman Act, 15 U.S.C. § 1, and for damages under § 4 of the Clayton Act, 15 U.S.C. § 15, and §§ 16700 and 17200 *et seq*. of the California Business and Professions Code.

The Complaint describes generally how the payment process works:

> When a consumer makes a payment with a Credit or Signature Debit Card, the Merchant sends an electronic transmission to its Acquiring Bank or Third-Party Processor. The Acquiring Bank or processor then sends an electronic transmission to the Networks. The Networks relay the transaction to the Cardholder's Issuing Bank or its Third-Party Processor, which makes a payment to the Acquiring Bank, through the Networks for the purchase amount minus the Interchange Fee. The Acquiring Bank then credits the Merchant's account for the transaction amount minus the Merchant Discount Fee, the largest component of which is the Interchange Fee. Finally, the Issuing Bank charges the Cardholder's credit account for the full amount of the purchase. Under this system, the Issuing Bank earns revenue from annual fees and

> interest charged to Cardholders, as well as the amount of the Interchange Fee, while the Acquiring Bank earns revenue from the difference between the Merchant-Discount Fee and the Interchange Fee.

Id. at ¶ 90.

The plaintiffs' core allegation is that the defendants fix interchange fees by adhering to published schedules of so-called "default" rates. *See id.* at ¶¶ 89-97. These schedules provide a rate that merchants are charged for Visa or Mastercard transactions in the absence of a bilateral agreement between a merchant and a given bank. However, as alleged in the Complaint, the default rate is the actual rate charged for virtually every transaction. *Id.* at ¶ 93. Because the default rates, along with other anticompetitive practices, eliminate any incentive for the banks to compete with each other and to negotiate with merchants over rates or terms of acceptance, the default rates are set at supra-competitive levels and the banks are able to apply those rates without risk that their competitors will offer a lower rate. *See id.* at ¶¶ 59-60.

II. Reviewing the District Court's Approval of a Prior Class Action Settlement, this Court Reversed for Lack of Adequate Representation.

On June 30, 2016, this Court vacated the district court's approval of a prior class settlement because the settlement included claimants with conflicting interests and "class plaintiffs were inadequately represented in violation of Rule 23(a)(4) and the Due Process Clause." *Interchange Fees II*, 827 F.3d at 226. This Court also held that class representatives had interests antagonistic to those of some of the class

members they were representing and "[t]he fault lines were glaring as to matters of fundamental importance." *Id.* at 233.

After this Court's reversal, the district court appointed separate counsel to represent a putative class of plaintiffs seeking class certification pursuant to Federal Rule of Civil Procedure 23(b)(2) (the "Injunctive Relief Action"). (DE 6754/JA-2992). The Injunctive Relief Action, entitled *Barry's Cut Rate Stores, Inc., et al. v. Visa, Inc., et al.* was filed on March 31, 2017. The district court reappointed the same law firms that had proposed the prior class settlement to serve as Class Counsel for the settlement class challenged here, a settlement class certified under Federal Rule of Civil Procedure 23(b)(3). (DE 6754/JA-2992).

III. On Remand, the District Court Approved a New Settlement Including a Broad Release and a Term Providing for *Pro Rata* Benefits that Pits Class Members against Each Other.

Like the prior proposed class settlement, Class Counsel and the defendants negotiated a monetary settlement that included every person or business that accepted payment cards during the relevant period. The settlement class certified under Rule 23(b)(3) was defined to include:

> [a]ll persons, businesses, and other entities that have accepted any Visa-Branded Cards and/or Mastercard-Branded Cards in the United States at any time from January 1, 2004 to the Settlement Preliminary Approval Date, except that the Rule 23(b)(3) Settlement Class shall not include (a) the Dismissed Plaintiffs, (b) the United States government, (c) the named Defendants in this Action or their directors, officers, or members of their families, or (d) financial institutions that have issued Visa-Branded Cards or Mastercard-Branded Cards or acquired Visa-

> Branded Card transactions or Mastercard-Branded Card transactions at any time from January 1, 2004 to the Settlement Preliminary Approval Date.

(Mem. & Order, DE 7821/JA-7324, at 5) (emphasis added). Although the settlement class includes all persons that "accepted" Visa or Mastercard, neither the order nor any of Class Counsel's submissions in support of the settlement define the term "accepted." As a result, the class includes both franchisors, who "accepted" payment cards through their processing networks for transactions occurring at the franchisee retail level, *as well as* the individual franchisees, who "accepted" payment cards – on those exact same consumer transactions – from consumers at the retail level.

Members of the settlement class that did not opt-out would presumably receive payments from a cash fund with a value of roughly $5.6 billion. (Mem. & Order, DE 7821/JA-7324, at 6). The Superseding Settlement Agreement provided for a fund of $6.3 billion before opt-out reductions and expense takedowns. *Id*. Based on the transaction volume attributed to the merchants who opted-out of the class settlement, the fund was reduced by the maximum of $700 million. *Id*.

Settlement Class members that did not opt-out of the settlement were supposed to "receive the same benefit – a *pro rata* share of the monetary fund based on the interchange fees attributable to their transactions during the class period." *Id*. (quoting JA-3263; Plan of Administration and Distribution I-2, 3 DE 7257-2/JA-4014). Neither the Order nor the Plan of Administration identify which class member

along the payment chain, i.e., franchisors or franchisees, would receive that *pro rata* share. The settlement does not permit the same *pro rata* share, attributable to the same consumer transaction, to be paid to two different sets of claimants. Nov. 7, 2019 Final Approval Hr'g Tr. ("Hr'g Tr.")/JA-7048, 7:14-16 ("[t]here's only one class member that is eligible to claim as to any particular transaction").

The class-wide release provided "[i]n return for a *pro rata* share of the fund," all class members were required to release all existing and future claims arising out of or relating to acts that were alleged or that could have been alleged in the Third Amended Consolidated Class Action Complaint, other than the claims pending in the Injunctive Relief Action. (Mem. & Order, DE 7821/JA-7324, at 6-7). The released claims included the claims alleged in the complaint. (TAC, DE 7123/JA-3107). The released claims also include claims that were or could have been alleged in the action relating to, among other things, interchange fees, anti-steering rules, and honor-all-card rules. (Mem. & Order, DE 7821/JA-7324, at 6-7). Thus, in addition to federal antitrust laws, which are intended to provide relief to direct purchasers, any class member's unasserted state law indirect purchaser claim would also fall within the scope of "released claims."

IV. In Light of the Adequacy Problems Dooming the First Settlement, the Branded Operators Raised Objections at Both Preliminary and Final Approval.

On September 18, 2018, Class Counsel moved for preliminary approval of the class settlement. (DE 7257/JA-3250). The Branded Operators notified the district court that they intended to object to the proposed settlement because it had deficiencies that needed to be addressed before any settlement could be preliminarily approved. (Letter of Intention to Object, Oct. 30, 2018, DE 7280/JA-4143).

A. Preliminary Approval: The district court overruled the Branded Operators' objections raising issues as to adequacy, the scope of the settlement class, and whether all class members to be bound had received sufficient notice.

In their initial letter to the district court prior to preliminary approval, the Branded Operators objected to the settlement based on three primary grounds. *First*, the proposed settlement contained an intra-class conflict because it included at least two sets of class members – franchisors and franchisees -- competing for the identical settlement dollars. *Id*. at 2. Specifically, the settlement class includes the Branded Operator franchisees, who "accepted" Visa and Mastercard branded cards from consumers at their retail locations, but it also includes the major oil company franchisors (e.g., Shell, Chevron, Valero, etc.), who "accepted" payment cards when they provided payment card operating and processing services to the Branded Operator franchisees on the same set of consumer transactions. *Id*. Branded Operators argued that because the payment transactions involving the Branded

Operators and the oil brands overlapped, the settlement created a conflict among those competing class members. *Id.*

Second, Branded Operators informed the Court that the settlement wrongly excluded the claims of hundreds of Branded Operators that were not identified anywhere in the proposed notice plan, underscoring the intra-class conflict noted above. *Id.* Specifically, the proposed settlement excluded "Dismissed Plaintiffs" identified on Appendix B to the Settlement Agreement, but also excluded from the class all other entities identified in any exclusion list submitted by those companies to the claims administrator. *Id.* at 2-3 (citing to Par. 3(t) of the Settlement Agreement at DE 7257-2/JA-3759). The list of excluded entities submitted by the Valero Energy Corporation (which was not included among the materials supplied to the court by Class Counsel in support of the proposed settlement, but was subsequently submitted by Objectors, DE 7300-5/JA-4370) identified more than 400 Valero locations and Branded Operators that were purportedly excluded from the class settlement, without their knowledge or consent. *Id.* at 3.

Third, Branded Operators informed the district court that they could not determine from the face of the class settlement whether the settlement purported to exclude them from recovery based on sales of unbranded gasoline or non-Valero gasoline sold at these same excluded locations. *Id.* The letter explained that "the Branded Operators have no way of knowing whether they are included or excluded

from the class for credit card sales that had nothing to with Valero." *Id*. Branded Operators asked the district court for permission to file objections and appear at the preliminary approval hearing. *Id*.

Class Counsel filed their response to Branded Operators' objections on November 15, 2018. (Class Counsel's Nov. 15 Response, DE 7294/JA-4147). Class Counsel argued that Branded Operators had no right to object at preliminary approval and needed to wait until final approval, after the opt-out deadline, to raise their objections. *Id*. They then confirmed that Branded Operators were class members: "It appears that Branded Operators accept cards for payment thereby under the class definition owning the claims relating to the transactions they accept unless by contract they transferred those claims to oil companies." *Id.* at 3.

Class Counsel also argued that there was no intra-class conflict because the settlement did not treat groups of class members differently and claimed that "[n]o conflict exists here because the ultimate resolution of these disputes will not change the compensation associated with transactions at Branded Operators [locations]." *Id*. Class Counsel suggested that disputes between franchisor and franchisee class members could be determined later, by a special master during the claims administration phase. *Id*. Finally, Class Counsel dismissed Branded Operators' objection that hundreds of Valero marketers were excluded from the proposed settlement without notice and without their consent, by stating that "[a]ny class

member can contact the class administrator if it has questions about whether it is included in an exclusion list." *Id*.

On November 20, 2018, Branded Operators filed their formal objections to preliminary approval of the settlement, including declarations from each of the objecting class members. ("Mem. in Opp'n to Prelim. Approval," DE 7300/JA-4161). In addition to the arguments previewed by their letter to the district court, the Branded Operators also argued that their interests, and those of other franchisees, were not adequately represented because Class Counsel could not represent two sets of class members with directly competing claims (franchisors and franchisees). *Id*. at 19.

The Associations separately objected, echoing the concerns expressed by the Branded Operators, and emphasizing the importance of the issue to the retail petroleum industry– an industry that serves 160 million people per day and processes over 80 billion payment transactions per year. (DE 7301/JA-4409, at 3). The Associations explained that, notwithstanding the size and scope of the retail petroleum industry, it is essentially an industry of small businesses. *Id*. Because these small businesses actually pay the interchange fees at issue in the litigation, the intra-class conflict risked unfairly depriving these merchants recovery through the class mechanism, even though they would be bound by the release. *Id*. The Associations advised the district court that they were "inundated with questions and

concerns from [their] members, expressing widespread confusion about whether they are going to recover anything through the settlement." *Id*. The Associations asked the district court to deny preliminary approval so that the lack of clarity in the proposed settlement could be addressed, before its members were required to decide whether to remain in the class or opt-out. *Id*.

B. The district court's decision granting preliminary approval.

Notwithstanding these objections, the district court preliminarily approved the proposed settlement. (Prelim. Approval Order, DE 7363/JA-4670). In denying the objections of the Branded Operators and Associations, the district court explained:

> The Court further finds that the "conflict" raised by the Branded Operators — that certain putative class members may have competing claims — does not rise to the level of a "fundamental" conflict sufficient for the Court to find that Rule 23(b)(3) Class Plaintiffs have not adequately represented the Branded Operators. . . . The Court agrees with Rule 23(b)(3) Class Counsel that the conflict does not amount to an "intra-class conflict," because the Superseding Settlement Agreement "does not treat groups of class members differently." Rather, as Class Counsel notes, the Branded Operators' concerns appear to stem from a contractual issue regarding the ownership of claims. Thus, because the conflict is not between class members, but between entities disputing who has the right to claim class status, there is no intra-class conflict or inadequate representation; Class Counsel and Class Plaintiffs are not responsible to, and do not represent, the entity that loses the dispute over the right to claim settlement funds.

Id. at 29-30. While the Court "acknowledge[d] that the issue of competing claims is a genuine issue that will need to be addressed in the future," at the hearing and in its

Order, the district court "expressed the belief that the issue could be taken care of through a subsequent administrative process." *Id*. at 30, n.26.

C. The exclusion of thousands of franchisees from the class.

In partial recognition of the Branded Operators' objections, the district court required notice be sent to certain class members who had been excluded from the class, informing them that they would not receive settlement funds. (Mem. & Order, DE 7821/JA-7324, at 9). "Pursuant to the Court's request, Class Counsel submitted a 'Notice of Exclusion' to be sent to Dismissed Plaintiffs — i.e., entities and their affiliates that have previously dismissed their lawsuits against the Defendants — in order to notify the Dismissed Plaintiffs that they will be ineligible to receive settlement funds." (Prelim. Approval Order, DE 7363/JA-4670, at 18).[1] Between March 25, 2019 and April 24, 2019, the Class Administrator mailed 6,100 Dismissed Plaintiff notices of exclusion; another 518 exclusion notices were mailed on June 5, 2019. (Mem. & Order, DE 7821/JA-7324, at 9). The exclusion notices advised thousands of franchisee class members that they had been excluded from participating in the class settlement based on their purported relationship to one of the merchants on the list of Dismissed Plaintiffs, but stated that the class member

[1] A copy of the Notice of Exclusion is annexed to the Proposed Preliminary Approval Order, as Exhibit 2 (DE 7354-1/JA-4498).

was not excluded from the settlement if the merchant "also accepted Visa or Mastercard cards in a different capacity." (DE 7354-1/JA-4587, at G3-2).

Although these notices informed class members that they had been excluded from the settlement, the notice did not rectify the core problem raised by Branded Operators: that thousands of franchisee class members had been excluded from the settlement simply because of their franchisor/franchisee relationship, without their knowledge or consent, and without having had the benefit of counsel advocating on their behalf. The district court also failed to address the Branded Operators' warning that the wrongful exclusion of these franchisee class members from the settlement served as a harbinger of what was to come: that the franchisees' claims would continue to be wiped out by franchisors (inside or outside the class), with the tacit approval of Class Counsel.

D. Notice to competing class members.

Despite undisputed evidence that franchisors and franchisees were competing for the same settlement dollars as members of the same settlement class, notice was sent to both sets of class members. Based on merchant records from Visa, Mastercard, and the large U.S. payment processors, direct notice was sent to more than 16 million merchants. (Mem. & Order, DE 7821/JA-7324, at 8). However, because hundreds of thousands of franchisees were believed to operate under the tax identification number of a franchisor, and these franchisees would not otherwise

have been identified and notified of the settlement, the claims administrator separately sent notice to 671,161 merchants believed to be franchisees. (2019 Decl. of Nicole Hamann on Class Administrator's Implementation of Settlement Notice Plan ("Hamann Decl."), DE 7469-7/JA-5259 (June 7, 2019) at 9).

The notice disseminated to these hundreds of thousands of franchisees was identical in content to the notice sent to franchisor merchants: each were advised that "the Defendants' records show that you are probably in the Rule 23(b)(3) Settlement Class, consisting of: All persons, businesses, and other entities that have accepted any Visa-Branded Cards and/or Mastercard-Branded Cards in the United States at any time from January 1, 2004 to January 25, 2019," and each were advised that "the amount paid from the settlement fund will be based on your actual or estimated interchange fees attributable to Visa and Mastercard card transactions (between you and your customers) from January 1, 2004 through January 25, 2019." (Long Form Notice, DE 7354-1/JA-4446, at G2-7). The Notice did not advise franchisee class members that they would be competing against their franchisors for a share of the settlement proceeds.

E. Final Approval: Despite the Branded Operators' objections regarding adequate representation and confusion on who exactly was in the class, the district court approved the settlement.

After notice of the class settlement was disseminated, Class Counsel moved for final approval of the settlement. (DE 7469/JA-4758). Class Counsel separately

moved for an award of attorneys' fees, expenses and class plaintiffs' service awards on June 7, 2019.

On July 23, 2019, the Branded Operators and Associations submitted their objections to final approval of the settlement. (DE 7559/JA-6561 and 7561/JA-6673). More than 100 other companies in the petroleum industry also filed individual objections to the settlement, advising the district court of their concern that, by remaining in the settlement, they were being asked to release their claims without being offered any assurance that they would be entitled to any recovery.[2] (Mem. and Order, DE 7821/JA-7324, at 16-17).

The Branded Operator objectors filed individual declarations explaining, *inter alia*, that they unfairly risked receiving no recovery for their branded locations because of the conflicting interests of franchisee and franchisor class members, even though the payment process that occurs at their branded locations is no different than the process that occurs at their unbranded retail locations. *See*, *e.g.*, Decl. of Tate A. Seideman ("Seideman Decl."), ¶¶ 5-6, annexed to Fikes Wholesale Obj. as Ex. 1, DE 7559-1/JA-6592). The same concerns were expressed in affidavits by Objectors

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[2] Jack Rabbit LLC and Cahaba Heights Service Center, Inc. (the "Jack Rabbit Objectors"), self-identified as petroleum dealers engaged in the retail sale of branded fuel, also filed their own objections through counsel. (DE 7574/JA-6704). Additional objections were filed on grounds unrelated to this appeal.

Slidell Oil Company, LLC (DE 7559-2/JA-6601) and Midwest Petroleum Company (DE 7559-3/JA-6609).

As Seideman explained, it was the Fikes Retailers "that actually paid and sustained injury as a result of the overcharge," and the only relevant difference between branded and unbranded locations was that payments at branded locations were processed through the major oil supplier franchisors, while payments at unbranded locations were processed through other payment processors. (Seideman Decl., DE 7559-1/JA-6592, at ¶¶ 5-6). Each of the Branded Operators explained that nothing in the agreements between fuel distributors and their oil brand suppliers changed the fact that Operators paid the interchange fee. *Id.* at ¶ 6.

The Branded Operators also reminded the district court that the conflict between franchisee and franchisor class members had surfaced years earlier when, in 2014, the defendants took the position that, because the franchisors ran the processing mechanics and had the relationship with the acquiring bank, the franchisors are the rightful class claimants. (DE 7559/A-6561, at 6) Despite having knowledge of these conflicts among franchisor and franchisee class members for years before the settlement was proposed, both sets of competing class members were included in the class definition of the new settlement. *Id*. at 12-16.

The Branded Operators argued that the district court should deny final approval and appoint separate counsel to represent them and other franchisees,

expanding upon the arguments set forth in the Branded Operators' objections to preliminary approval. *Id*. at 3-7. The Associations joined in the objections filed by the Branded Operators, and separately objected to highlight the prejudice to the industries they represent if approval of the settlement were granted without resolving the issues raised in the Branded Operators' objections. (DE 7561/JA-6673, at 3).

F. The district court's decision granting final approval.

On December 13, 2019, the district court overruled the objections made by the Branded Operators and Associations, and granted final approval to the settlement. (DE 7818/JA-7288). The district court also separately awarded Class Counsel attorneys' fees in the amount of approximately $523 million and granted an expense award of approximately $39 million. (DE 7822/JA-7398, at 57). The district court separately issued class representative service awards and expenses. (DE 7823/JA-7455).

In its Memorandum & Order explaining the basis for its December 13, 2019 Order granting final approval to the settlement, the Court rejected each of the objections made by the Branded Operators and Associations.

First, the Court indicated that it "remain[ed] unpersuaded" that Plaintiffs' interests were antagonistic to the Branded Operators' interests or that Class Counsel could not adequately represent the Rule 23(b)(3) class. (Mem. & Order, DE

7821/JA-7324, at 36). The Court restated its comments made at the final approval hearing:

> [P]art of the argument that's been made by [B]randed [O]perators is that this is a class counsel conflict . . . [but] Class Counsel here is representing everyone who's in the class. Anyone who has an interest. [The] argument to the Court is that the interest is [Branded Operators'], not that of the distributor. And so, why is that a conflict with [C]lass [C]ounsel as opposed to simply a disagreement as to who should collect from the fund[?] . . . [I]f a mechanism is put in place . . . why isn't this a resolvable issue?

Id. at 37 (quoting Hr'g Tr./JA-7048, 19:23−20:10).

The district court also recounted Class Counsel's comments made at the final approval hearing, noting that the same issue raised by the Branded Operators is "going to come up again like with . . . hotel operators . . . so it is going to be an issue but it's not an intra-class issue. Somebody owns the claim and somebody does not." *Id*. at 37 (quoting Hr'g Tr./JA-7048, 76:23−77:2).

At the hearing, Class Counsel initially expressed their opinion, consistent with the views previously expressed by the defendants, that between the two, it was the franchisors, not franchisees, that have the strongest claim to compensation through the class fund. Class Counsel Craig Wildfang explained: "I'm not deciding who owns the claim today, it's a question of fact. All I'm saying is, based upon what I have seen, at least for the major oil companies, it appears that they claim that they're owner of the claim and they submitted documentation that seems to support that." (Hr'g Tr./JA-7048, at 51:16-20). Later in the hearing, Class Counsel again reiterated

their belief that "the oil companies have a better argument" that they are entitled to recovery from the class fund. *Id.* at 63:10-11. After these comments, Magistrate Judge Orenstein questioned Class Counsel about the adequacy of their representation of franchisees in the class.

> JUDGE ORENSTEIN: Why are you arguing to us that [one of the branded operator objectors] loses that fight, because they may be your client.
> MR. WILDFANG: They may be my client.
> JUDGE ORENSTEIN: So why are you arguing that they lose?
> MR. WILDFANG: Okay. Strike my comments. I was trying to provide information to the Court.

Id. at 64:23-65:5.

After this exchange, Class Counsel retreated from their prior comments in support of franchisors, stating that they remain "agnostic" as to who is the proper class member, and even arguing that they "hope" franchisees are in the class "because we want to give them money if they were the ultimate damaged party." *Id.* at 66:1-3.

Notwithstanding these comments, the district court found that Class Counsel adequately represented the interests of franchisees within the class. The district court concluded that it was sufficient that Class Counsel was "advocating for those who have a claim," and it was not necessary for Class Counsel to identify which set of competing class members had that claim, and which did not. (Mem. & Order, DE 7821/JA-7324, at 37-38).

The district court did, however, express its concern that Class Counsel may have created a conflict by failing to defend the interests of the franchisees who were excluded from the class. (Hr'g Tr./JA-7048, at 77:3-21). As a result, Class Counsel agreed to permit those franchisees to rejoin the class. (Hr'g Tr./JA-7048, at 96:3-97:22).

Class Counsel also opined that if franchisees were ultimately excluded from recovery because they were found not to be "the owners of the claim," then "they are not members of the class and therefore not bound by the settlement agreement and at that point if they want to bring indirect purchaser claims they can. They could have at any time while this case was pending." (Hr'g Tr./JA-7048, at 62:7-11). However, nothing in the settlement agreement or the district court's order finally approving the settlement permits class members who "accepted" Visa or Mastercard to be subsequently excluded from the class definition or the class-wide release.

Second, the district court rejected the Branded Operators' argument that franchisees needed to know *before* the settlement was finally approved, whether or not they were going to be able to recover from the settlement fund. Instead, the district court stated that a special master would be appointed "to determine claim ownership in franchisor/franchisee disputes such as those that the Branded Operators have raised." (Mem. & Order, DE 7821/JA-7324, at 44).

Third, the district court concluded that the settlement did not treat class members inequitably in relation to each other even though there were class members at different levels of the payment chain that had engendered conflicts. *Id.* at 57. The district court approved the *pro rata* distribution plan without addressing the Branded Operators' argument that the distribution plan was inequitable because only one of the competing class members would recover a *pro rata* share, while the other would get nothing. *Id.* at 43-44.

Finally, the Court rejected the argument that the class definition was overbroad and the parameters of the class unclear, concluding that the definition was not so vague as to make it unascertainable. *Id.* at 64-67. The district court held: "The fact that disputes will inevitably arise and proof of who holds a claim may ultimately need to be analyzed during a claims administration process is not a sufficient basis to reject class certification. The class definition is not so vague as to make it such that the Court cannot ultimately determine who is a class member." *Id*. at 66.

Relying on Class Counsel's comment at the final approval hearing that, in line with federal antitrust law, they represent "only the first payer, [they] sued for the first payer, the direct purchaser," the district court concluded that the class definition would be objectively guided by federal antitrust standards, even though the class settlement papers, the class definition, and the release say no such thing. *Id*. at 67 (quoting Hr'g Tr./JA-7048, at 78:9–79:15). Accordingly, even though the class

definition swept in anyone along the payment chain that "accepted" payment cards (directly or indirectly), the district court concluded that Class Counsel was deemed to represent only direct payers, and not "every entity in the payment chain." *Id*. at 67. The district court did not explain how Class Counsel's purported representation of only direct payers could be reconciled with the language of the class definition that included anyone that "accepted' payment cards, or the release that broadly dismissed the claims of direct and indirect payers.

V. The District Court Approved a Supplemental Notice to the Branded Operators Advising They Were Class Members But Providing No Opportunity to Object or Opt Out.

After the district court questioned Class Counsel's ability to adequately represent the thousands of franchisee class members that Class Counsel had previously jettisoned from the class, Class Counsel reversed course and agreed to reinstate them back into the settlement class. (Hr'g Tr./JA-7048, at 96:3-97:22). Class Counsel prepared a notice that informed the class members that they could make a claim for class settlement funds if they believed they had been wrongly excluded. (DE 7791-1/JA-7219, at 2). This notice was approved by the district court on December 9, 2019. (Mem. & Order, DE 7821/JA-7324, at 72). The notice did not inform class members that they would release their claims against the defendants if they elected to participate, nor did it indicate whether the class-wide release would still apply to all class members who received the notice, regardless of whether they

decided to submit a claim. Class members were simply notified that they were reinstated into the class and were told that they could submit a claim "if [Name of Dismissed Plaintiff from Appendix B] did not have authority to settle and release your claims." (DE 7791-1/JA-7219, at 2). The notice did not advise these franchisee class members that a special master would determine whether they could still recover under the settlement, despite the fact that damages for the interchange fees they paid had already been recouped by their franchisor, nor did it explain what process or proof would be required by them to support their claim. Finally, although these franchisees were seemingly reinstated into the certified settlement class, the notice did not provide them with an opportunity to object or opt-out of the settlement. *Id.*

VI. Delegating its Rule 23 Responsibility, the District Court Appointed a Special Master to Oversee a Complex Claims Process While Providing No Guidance for How Intra-Class Conflicts Could be Addressed.

In its decision granting final approval to the settlement, the district court explained that it "cannot answer all questions about what will happen during the claims administration process," however "the Court acknowledges that a process needs to be in place to determine claim ownership in franchisor/franchisee disputes such as those that the Branded Operators have raised, i.e., as to disputes over who has the right to claim settlement funds and will appoint a special master to resolve such disputes." (Mem. & Order, DE 7821/JA-7324, at 44). The district court did not describe the process that the special master would follow, delineate the scope of his

or her authority, or identify the specific factual and/or legal issues that the special master would decide.

The district court noted that the issues the special master would decide "will likely implicate who in a given situation or within a certain contractual or processing relationship or corporate structure might have standing under federal antitrust laws." *Id*. at 45. The question of how class members without individual representation would be able to present complex legal and/or factual arguments to the special master to support a contention that they had standing to proceed with claims under federal antitrust laws was not addressed.

The district court implied that Class Counsel could assume that role, but only in a fail-safe capacity, after the class member had already demonstrated his or her entitlement to a recovery. In particular, the district court noted that, although Class Counsel had suggested at the final approval hearing that they believed the major oil suppliers and not the Branded Operators would be able to file claims, "[a]fter being pressed by the Court as to whether Class Counsel was actually taking a position on the matter, Class Counsel assured the Court that if a Branded Operator is ultimately deemed to own a claim, they would be represented by Class Counsel and would be able to file a claim." *Id*. at 45, n. 17.

In addition to proposing special master candidates, Class Counsel submitted a proposed order to the district court that set forth some of the duties and

responsibilities of the special master. (DE 7791-3/JA-7249). The proposed order makes clear that Class Counsel expected the special master to determine things like "the proper scope of a requested exclusion from the Rule 23(b)(3) Settlement Class," and whether excluded claims, like the Valero settlement, served to extinguish the competing claims of a class member. *Id.* at 1. The procedures proposed by Class Counsel would require class members who wished to raise a matter with the special master, to "provide the Special Master with an application describing the nature of the dispute, a suggested resolution, and basis for that resolution." *Id.* The opposing party would then have 15 days to respond and the proponent would have five business days to submit reply papers. *Id.* The special master would then prepare a report and recommendation on each matter, including all evidence considered by the special master in making or recommending any findings of fact. *Id.* at 2. Parties could again object to the special master's recommendation, which would ultimately be determined de novo by the Court. *Id.*

When asked at the final approval hearing how the special master could adjudicate tens of thousands of claims involving competing class members, Class Counsel opined that these determinations could be made en masse for claims between franchisors and potentially hundreds or thousands of franchisees. (Hr'g Tr./JA-7048, 67:3-16).

With respect to conflicts between class members that opted-out of the class and then settled their claims for all locations operated by their franchisees, Class Counsel and the defendants suggested for the first time at the final approval hearing that those claims could potentially be paid twice – once outside the class for the franchisor and again inside the class for the franchisee, without altering the settlement structure or diminishing payments to other class members. *Id.* at 81:25-89:20. However, in response to the district court's request for additional information on the inclusion of previously "Dismissed Plaintiffs," Class Counsel acknowledged that "every additional claim allowed by a class member . . . to some extent 'dilutes' the claim of all others." (DE 7791/JA-7217, at 5). The extent of that dilution was not fully addressed, at least in part, because several franchisors settled their claims outside the class months after final approval was granted.[3]

[3] The defendants reported on March 6, 2020 that they had settled the claims of approximately 100 entities who had opted-out of the current class settlement, including the claims of major oil brands such as Shell and Sunoco, and major hotel chains including, e.g., Hilton and Hyatt hotels. (Joint Status Conference Statement, DE 7891/JA-8591, at 6 (noting settlement of plaintiffs in *Accor Management US Inc., et al. v. Visa Inc., et al.*, No. 19-Cv-04616 (E.D.N.Y.)). Class Counsel's conclusion, months earlier, that the fundamentals of the Settlement Agreement and "takedown" formula would not be altered by the inclusion of Valero branded operators or other "Dismissed Plaintiffs" was based only upon entities that had been excluded from the class before the current proposed settlement was announced. (DE 7791/JA-7217, at 4).

STANDARD OF REVIEW

The applicable appellate standard of review for certification of a settlement class and settlement approval is abuse of discretion, i.e., whether the decision (i) rests on a legal error or clearly erroneous factual finding, or (ii) falls outside the range of permissible decisions. The district court's factual findings are reviewed for clear error; its conclusions of law are reviewed de novo. *Interchange Fees II*, 827 F.3d at 231.

SUMMARY OF ARGUMENT

The settlement violates four separate doctrines designed to protect absent class members.

First, as occurred with the first settlement reversed by this Court, the revised settlement approved on remand contains a fundamental intra-class conflict. It is a single, massive class consisting of any person that "accepted" Visa or Mastercard payment cards during the relevant class period. The conflict arises primarily from the vague term "accepted." Branded Operators, and the tens of thousands of gas stations and other franchisees like them, "accepted" payment cards from customers at their retail locations during the class period. They are class members.

Likewise, the major oil companies like Chevron, Shell, and Valero that supply fuel and other services for their franchisees have relationships with the payment card networks and banks that dictate the mechanics for payment when a card is swiped at

a franchisee gas station. The franchisor oil companies therefore also purport to "accept" payment cards through these processing mechanics for the exact same set of consumer transactions as the franchisees. That is, when a consumer swipes a credit card to pay for gas at a local Chevron station, both the gas station owner (the franchisee) and Chevron (the franchisor) "accept" the payment card, albeit in different ways. One "accepted" the card at the retail level; the other accepted the card on that same transaction at the processing (or wholesale) level. Both groups paid the interchange fee (the same interchange fee), albeit at different levels in the payment chain.

Both groups, franchisors and franchisees, are therefore members of the settlement class and both groups received notice advising them that "the Defendants' records show that you are probably in the Rule 23(b)(3) Settlement Class." (Long Form Notice, DE 7354-1/JA-4427, at G2-7). Both groups lay claim to a *pro rata* share of the settlement fund, which is based on the interchange fee that was paid on that consumer transaction. But only one of those groups will be compensated through the settlement. The other will not. It is all or nothing. Hr'g Tr./JA-7048, 7:14-8:21 ("[t]here's only one class member that is eligible to claim as to any particular transaction"). And yet, both groups will be bound by the release. The district court acknowledged this fundamental conflict in stating that "[s]omebody owns the claim and somebody does not." (Mem. & Order, DE 7821/JA-7324, at 37)

(quoting Hr'g Tr./JA-7048, 76:23−77:2). Yet, the district court did not address the impact of this conflict on the losing class member. If franchisees cannot prove their entitlement to recovery, they will recover nothing and lose their right to recovery under any other theory, including state law indirect purchaser claims. The impact on the class is significant: roughly 700,000 franchisee class members received the same notice that was sent to their franchisors, thereby requiring hundreds of thousands of class members to vie against their franchisors for the same settlement dollars. (Hamann Decl., 7469-7/JA-5259, at 9).[4]

The district court's approval was also based on a fundamental misreading of the factual record. The district court believed, based on Class Counsel's promises alone, that this intra-class dispute was a "contractual issue" between franchisors and franchisees. But the plain factual record demonstrates that it is *not* a contractual dispute. The Branded Operators' contracts with their franchisors do not speak to this issue at all. (Seideman Decl., DE 7559-1/JA-6592, at ¶ 6). Rather, the conflict exists

[4] The number of impacted class members is likely to far exceed the 700,000 that were specifically identified by the claims administrator. As the Branded Operators advised the district court, the imprecise class definition created fault lines between other entities along the payment chain, resulting in conflict and "lack of clarity … across the board." (Hr'g. Tr./JA-7048, at 51:1-2). As just one example, the Branded Operators referred to the mobile payment platform Square, Inc., which processes payments for tens of millions of small business customers: "We also, to emphasize the lack of definition here, we know that Square opted out of the settlement, it's unclear whether or not any of the Square merchants, are they in the class or is Square the actual class member that now opted out." *Id*. at 50:21-25. The question was never answered.

because the settlement class was defined to include multiple levels of the payment chain. But regardless of whether it is a contractual or extra-contractual conflict, it is a conflict nonetheless. The settling parties' decision to structure their deal to create a fundamental conflict embodies an "egregious" and "obvious" violation of settled class-action precedents. *Ortiz v. Fibreboard Corp*., 527 U.S. 815, 853, 856 (1999).

Second, the appointment of a special master to resolve fundamental intra-class conflicts after certification violates Rule 23. Recognizing that there would be tens of thousands of class members impacted by the franchisor/franchisee conflict, the district court appointed a special master to resolve disputes at the claims administration stage about which class member subgroup – franchisor or franchisee – has standing to receive compensation. By doing so, the district court abdicated its responsibility under Rule 23 to resolve these core due process issues *before* granting final approval. Instead, it created a claims process that is adversarial, factually and legally complicated, time-consuming, and burdensome on class members. Furthermore, because neither the district court, nor Class Counsel, nor class members were able to determine, *prior* to class certification, whether franchisors or franchisees were the proper party entitled to recovery under the settlement, the class definition was not ascertainable and should never have been certified.

Third, the class was inadequately represented. Franchisees had no lawyer and no class representative whose role was solely to represent their interests as the entity

that "accepted" payment cards at retail establishments but did not have processor relationships with the defendants (like the franchisors). Not a single class representative was a Branded Operator or a merchant with a similar relationship. If there had been such representation, the conflict over who is entitled to make a claim would never have been allowed by such representation and these issues would have been resolved before class notice was approved. Class Counsel acknowledged the conflict, but waffled between being "agnostic" on the issue,[5] to downright hostile to the Branded Operators. (Hr'g Tr./JA-7048, at 51:16-20). The district court should have appointed subclass counsel to vigorously represent the interests of the Branded Operators and other similar franchisees. Instead, both subclasses were represented by the same counsel and representatives. This representation was structurally inadequate.

Fourth, the settlement suffered a fatal procedural flaw violating due process. Thousands of class members were initially excluded from the settlement by virtue of their franchisors settling claims out from under them. Those claims were subsequently "reinstated" into the class, but they were reinstated after the opt-out deadline. While being reinstated may be good news for some previously excluded franchisees, those thousands of "reinstated" class members were never given an

[5] Hr'g Tr./JA-7048, at 65:15−16 (stating that Class Counsel are "agnostic at this point as to who owns the claim.")

opportunity to opt-out or object to the settlement. This procedural flaw violates their due process rights and is an additional reason for the settlement to be overturned.

ARGUMENT

I. As with the First Settlement that this Court Reversed, the Revised Settlement Suffers from an Insurmountable Intra-Class Conflict.

This Court previously reversed approval of the first settlement in this case after it recognized that the requirements of Rule 23(a) "'demand undiluted, even heightened attention in the settlement context.'" *Interchange Fees II*, 827 F.3d at 232 (quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997)). These requirements are "designed to protect absentees by blocking unwarranted or overbroad class definitions." *Amchem*, 521 U.S. at 620. Courts must remain vigilant to ensure there is no "inequity and potential inequity at the precertification stage." *Ortiz*, 527 U.S. at 858. Rule 23(a)(4) requires class members with different claims to be subclassed with separate representation so that a group of class members' claims are not favored at the expense of another's. *Id.* at 856 (intra-class conflict "requires division into homogeneous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel").

A. A fundamental intra-class conflict exists.

The settlement agreement defines the class as all persons that "*accepted* any Visa-Branded Cards and/or Mastercard-Branded Cards in the United States at any time from January 1, 2004 to the Settlement Preliminary Approval Date." (Mem. &

Order, DE 7821/JA-7324, at 5) (quoting Superseding Settlement Agreement, ¶ 4 DE 7257-2/JA-3305) (emphasis added).

Because the settlement agreement does not define the term "accepted," it necessarily sweeps in entities at multiple levels of the payment chain, including the Branded Operator franchisees that "accepted" payment cards at the retail level, as well as their franchisor oil companies, who accepted payment cards through the processing mechanics. A single settlement class of anyone who "accepted" payment cards pits franchisors and franchisees against one another for the exact same share of settlement funds. One party will receive payment, and the other party will get nothing. Hr'g. Tr./JA-7048, 7:14-8:21 ("[t]here's only one class member that is eligible to claim as to any particular transaction"). Indeed, as Class Counsel succinctly put it, "[s]omebody owns the claim and somebody does not." (Mem. & Order, DE 7821/JA-7324, at 37) (quoting Hr'g Tr./JA-7048, 76:23−77:2). That is true even though both "somebody's" are class members, and both will release their claims against the defendants by virtue of the settlement.

Class Counsel has known for at least six years about these conflicting interpretations of the class definition and knew they created a fundamental conflict between the tens of thousands of franchisors and franchisees. As the district court noted, as early as June 2014, the defendants raised concerns about a conflict between merchants in franchise and similar relationships and the "proper claimant to the

[settlement fund]." (Mem. & Order, DE 7821/JA-7324, at 22) (quoting June 2014 Status Report, DE 6335/JA-2915).

While Class Counsel acknowledged "there should be agreed-upon rules for determining who in the franchisee/franchisor relationship 'owns' the claim against the settlement fund and who may opt out of the Rule 23(b)(3) Class," Class Counsel minimized the need to formulate these rules until *after* the settlement agreement was approved. *Id.* at 22-23. *See also* Mem. & Order, DE 7821/JA-7324, at 23 (citing Letter Providing Ct. with Proposed Notice and Proposed Form, DE 6346/JA-2923).

This solution has it backwards. A settlement class cannot be certified under Rule 23 if there are fundamental intra-class conflicts of the type that exist here. *See* Fed. R. Civ. P. 23(e)(2)(D) (class settlements must treat "class members equitably to each other"); *Ortiz*, 527 U.S. at 864; *Amchem*, 521 U.S. at 625-26. A settlement class also cannot be certified where the class is so poorly defined that neither franchisees nor their franchisors can determine whether they "accepted" payment cards in the way contemplated by settling counsel (who has seemingly taken both sides of the dispute). *See In re Petrobras Sec.*, 862 F.3d 250, 264 (2d Cir. 2017).

B. The district court abused its discretion by disregarding the fundamental intra-class conflict.

The district court concluded that "because the [franchisor/franchisee] conflict is not between class members, but between entities disputing who has the right to claim class status, there is no intra-class conflict or inadequate representation; Class

Counsel and Class Plaintiffs are not responsible to, and do not represent, the entity that loses the dispute over the right to claim settlement funds." (Prelim. Approval Order, DE 7363/JA-4670, at 30).[6] This conclusion is based on a misreading of the class definition, an assumption that is contrary to the factual record, and a misinterpretation of the law.

First, the conflict most certainly ***is*** a dispute between class members. Franchisors and franchisees are each defined as class members because they each "accepted" payment cards during the class period. Class Counsel acknowledged that franchisees were class members who "accepted" payment cards (DE 7294/JA-4147, at 3), while at the same time opining that franchisor class members "have a better argument" that they are the class member entitled to recovery. (Hr'g Tr./JA-7048, 63:10-11). Even Class Counsel could not determine whether franchisors or franchisees were the class members entitled to recover under the class settlement they had proposed. Undoubtedly, class members could do no better. Class membership was not readily identifiable and the settlement class should not have been certified. *In re Petrobras Sec.,* 862 F.3d at 264 (members of a class must be

[6] In the district court's Final Approval Order, it "reject[ed] the Branded Operators' contention that an intra-class conflict exists" based on "the reasons set forth . . . in the Preliminary Approval Order." (DE 7821/JA-7324, at 58).

"readily identifiable" such that "identifying its members would not require a mini-hearing on the merits of each case.")

While only one group will apparently have a "right to claim settlement funds," both groups are plainly class members and will be bound by the release. That is the very heart of the conflict. The district court seems to have missed it.

Second, the conflict does not arise from a contract dispute between the franchisors and franchisees. As the Vice President and General Counsel for one of the Branded Operators confirmed in a declaration:

> **This conflict is not a "contract dispute."** The contracts between [the Petroleum] Retailers and the Refiners do not address which entity is entitled to settlement funds from this class action, and do not address which party is the first "payor" of the interchange fees such that they might be entitled to recovery under the Sherman Act. Rather, those are factual disputes (stemming from the imprecise class definition, which sweeps in multiple levels of the payment chain) that cannot be adequately resolved in an administrative settlement proceeding.

(Seideman Decl., 7559-1, ¶ 9) (emphasis added). There is no evidence in the record otherwise.

Third, even if this were a contract dispute between franchisors and franchisees, it still is an intra-class conflict. Both groups are defined as class members, both will be bound by the release, but only one will be entitled to compensation. That is true regardless of whether the dispute is rooted in contractual or extra-contractual terms.

Finally, the district court's conclusion that "Class Counsel and Class Plaintiffs are not responsible to, and do not represent, the entity that loses the [franchisor/franchisee] dispute over the right to claim settlement funds" is deeply troubling from a due process perspective. (Prelim. Approval Order, DE 7363/JA-4670, at 30). Class Counsel defined the class to include both franchisors and franchisees, they sought settlement certification on behalf of both groups, gave defendants a release on behalf of both groups, and secured an enormous attorney fee award for a settlement that includes both groups. They cannot magically abdicate their responsibility to the "loser" after the fact. This is precisely why subclasses were necessary, and why Class Counsel could not adequately represent both groups. *See Interchange Fees II*, 827 F.3d at 224 ("Unitary representation of separate classes that claim distinct, competing, and conflicting relief create unacceptable incentives for counsel to trade benefits to one class for benefits to the other in order somehow to reach a settlement.").

II. The District Court Abused its Discretion in Delegating to a Special Master Core Issues Such as Standing, Claim Ownership, Class Membership, and Fund Rights.

The district court accepted Class Counsel's special master solution and stated "the dispute over who has a claim to a share of the settlement fund, Branded Operators or major oil suppliers, franchisees or franchisors, is a dispute that needs to be resolved, but need not be resolved through creation of subclasses or appointing

new class representatives or counsel." (Mem. & Order, DE 7821/JA-7324, at 37). Instead of appointing subclass counsel to address this intra-class conflict and ensure that the rights of all class members are protected, the district court decided that resolution of the conflict could be deferred until the claims administration process.

The district court abused its discretion in deferring core issues such as standing, class membership, conflicts, and entitlement until the claims administration process because: (1) standing, intra-class conflicts, class membership and claim ownership are threshold Rule 23 requirements that must be addressed *prior to* Final Approval; (2) the contemplated special master process is too vague, complicated, and adversarial to be appropriate under Rule 23; and (3) the claims process will necessarily result in one group receiving nothing, waiving all of its claims, and being abandoned by Cass Counsel, in violation of Rule 23 and *Amchem Prods.*, 521 U.S. at 620.

A. Standing, intra-class conflicts, class membership, and claim ownership are threshold Rule 23 requirements to be decided, but never reached, by the district court.

The district court erred by deferring to the claims administrator and/or special master core legal issues such as standing, fairness, conflicts, class membership and claim-ownership.[7] Those issues are threshold requirements under Rule 23 that must

[7] The term "claim ownership" is not defined in the settlement agreement, and has been used by the district court and Class Counsel in various ways, many of which seem to conflate the distinct concepts of "federal antitrust standing," "cause of

be resolved prior to final approval, not after. MANUAL FOR COMPLEX LITIGATION, FOURTH, § 21.132 ("The court must determine whether the process for presenting claims and awarding relief to individual class members is manageable and takes account of differences among class members *without creating conflicting interests*."); *Ortiz*, 527 U.S. at 858-59 ("Rule 23 requires protections under subdivisions (a) and (b) against inequity and potential inequity at the precertification stage, quite independently of the required determination at postcertification fairness review under subdivision (e) that any settlement is fair in an overriding sense.").

A class settlement cannot be certified if the class contains members who lack standing. *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263-64 (2d Cir. 2006). In *Denney,* this Court made clear that absent class members must be considered in the class certification equation. The Court concluded that the class must be "defined in such a way that anyone within it would have standing." *Id*. at 264.[8]

Here, the conflict regarding which class member group – franchisors or franchisees – has standing to pursue the federal antitrust claims at issue in this case was raised repeatedly, but never decided, during the litigation, including during the

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action," "entitlement to settlement funds," and the more general concept of "legal claims."

[8] The Court ultimately concluded that class certification was not improper on standing grounds because, while some class members lacked RICO standing, the district court could have properly retained jurisdiction over these class members' state law claims, thus allowing for Article III standing. *Denney*, 443 F.3d at 264.

class settlement approval process. (Mot. for Pre-Mot. Conference, DE 7271/JA-4139, at 1). While the Branded Operator franchisees and their franchisor oil companies each believe they suffered injury stemming from the exact same payment card transactions, only one of these groups will qualify as the "direct payor" who suffered *federal antitrust injury* – i.e., injury that is compensable under the federal antitrust laws.[9] That is, only one group will qualify as having antitrust standing to pursue monetary damages under the Sherman Act.

The district court did not address the critical issue of standing during its Rule 23 analysis, instead deferring the issue for a special master to decide after certification, after opt-out decisions have already been made, and after class members are already bound by the release. At that point, though, it is too late. One group of class members inevitably will have antitrust standing and, therefore, will be permitted to recover against the settlement fund and the other group will not. But both groups will be bound by the release.

While class settlements need not treat all class members the same, and they certainly need not be perfect, they must not pit two groups of class members against one another. *Amchem Prods., Inc.*, 521 U.S. at 620; *Denney*, 443 F.3d at 263 (a

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[9] The group that lacks federal antitrust standing may possess other legal claims, such as state law indirect purchaser claims, consumer protection statutory claims, and/or unjust enrichment.

scenario where one group of class members has standing to pursue a federal claim and another group does not contravenes the commonality and typicality requirements under Rule 23). The district court abused its discretion by failing to grapple with the threshold issues of standing, conflicts, class membership, and entitlement aside during the certification approval process.[10]

B. The special master process is too vague, complicated, and adversarial to pass muster under Rule 23.

Even if standing and entitlement could properly be deferred until after Final Approval and handed off to a special master – which it cannot – the claims administration and special master process contemplated here does not protect class members' due process rights. "Class-action settlements are different from other settlements." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013). "[T]he district court cannot rely on the adversarial process to protect the interests of the persons most affected by the litigation—namely, the class." *Id.* While the law does not require class settlements to provide detail about claims administration with mathematical precision (*In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 133 (S.D.N.Y. Mar. 20, 1997)), *aff'd*, 117 F.3d 721 (2d Cir. 1997) (per curiam)), a plan

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[10] In reviewing proposed settlements under Rule 23, district judges have some leeway but never to the point of violating the governing law. "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law" or, for that matter, "on a clearly erroneous assessment of the evidence." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

for allocating settlement proceeds, like the settlement itself, should only be approved if it is fair, reasonable and adequate. *In re Tyco Int'l Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249, 262 (D.N.H. 2007). "A representative who proposes that high transaction costs (notice and attorneys' fees) be incurred at the class members' expense to obtain a refund that already is on offer is not adequately protecting the class members' interests." *In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748, 752 (7th Cir. 2011); MANUAL FOR COMPLEX LITIGATION, FOURTH, § 21.132.

Neither the settlement nor the district court's order approving the special master process passes muster under Rule 23. Under the Plan of Administration and Distribution, the class administrator in the first instance will estimate the interchange fees *paid* by each claimant during the class period, and each claimant will receive a *pro rata* share of the settlement fund based on its interchange fees paid. (Plan of Administration and Distribution I-2, DE 7257-2/JA-3567). The term "paid" is undefined, and does not distinguish between direct and indirect payments. While there is no dispute that Branded Operators "paid" interchange fees, there *is* an unresolved dispute about whether they paid those fees directly to the defendants or, instead, paid them indirectly through the oil company processors, who themselves claim to have "paid" the fees to the defendants in the first instance.

Since two sets of class members "paid" the same interchange fees on the same transactions, and both entities "accepted" payment cards, the question that will need

to be decided by a special master (under the district court's process) is "*which set of class members should be preferred over the other?*" That process will be adversarial, it does not have a reasonably articulated standard, and it will necessarily benefit one class member to the detriment of the other.

So, then, how is the special master to decide which entity has the better claim to the settlement fund? Will there be a trial based on records and evidence? And if so, what evidence will the parties be allowed to submit? Will expert testimony be allowed? Will lawyers be allowed to submit legal briefs? Will civil procedure and due process issues be protected? How? These questions that address fundamental procedural rights are left unanswered. But regardless of the answer to these questions, that the claims administration process will require a complicated and adversarial proof proceedings – with a winner and a loser – renders the settlement fatally flawed. *In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d at 752; *In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 194 (5th Cir. 2010) (in limited fund case, the court stated: "[T]he settlement provides for the appointment of a special master to 'provide to the Court a recommended disposition and protocol with regard to the remaining [settlement fund], and treatment of Claims of Class members.' This arrangement simply punts the difficult question of equitable distribution from the court to the special master, without providing any more clarity as to how fairness will be achieved. The lack of any 'procedures to resolve the difficult issues of

treating such differently situated claimants with fairness as among themselves,' . . . leads us to reverse the district court's order certifying this class.") (citing *Ortiz*, 527 U.S. at 848).

C. The claims process necessarily will result in one group of class members releasing claims for nothing of value, to the benefit of another group.

If the special master agrees with the defendants, the franchisors, and Class Counsel that Branded Operators are indirect payors and therefore lack antitrust standing, then Branded Operators will receive no compensation whatsoever, despite releasing all claims – including claims under both the federal Sherman Act as well as state indirect purchaser state claims. Indeed, since "somebody owns the claim and somebody does not" (Hr'g. Tr./JA-7048, at 76:23−77:2), under this scenario, Branded Operators almost certainly will be left out of the compensation process altogether. And yet, they will still be bound by the release, which covers them because they "accepted" the relevant payment cards. That alone means that the settlement flunks the fairness test. *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 654 (7th Cir. 2006) ("The fairness of the settlement must be evaluated primarily based on how it compensates class members"); *see also Katrina Canal Breaches Litig.*, 628 F.3d at 195; *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 809–12 (3d Cir. 1995).

These concerns cannot be minimized by referencing a prior case where "the court appointed a special master to resolve disputes over claims that did 'not fit within the category of challenges contemplated by the Settlement Agreement and Plan of Allocation.'" (Mem. & Order, DE 7821/JA-7324, at 45) (quoting *In re Visa Check/Mastermoney Antitrust Litig*., No. 96-CV-5238 (E.D.N.Y.), Order dated Jan. 19, 2006, DE 1244/JA-4156); (Class Counsel's Nov. 15 Response, DE 7294/JA-4147, at 2). The *In re Visa Check/Mastermoney* case is particularly inapt because the issue of disputed claims was first raised *after* the settlement had been finally approved, i.e., had not been "contemplated by the Settlement Agreement and Plan of Allocation." *Id.* The parties had no forewarning that a conflict had arisen and no ability to properly address it at the class certification stage – unlike the case here.

Here, Class Counsel, the defendants, and the district court were fully aware, *before* approval of the settlement, that the class was not adequately defined and contained conflicts. (June 2014 Status Report, DE 6335/JA-2915, at 5 (lack of clarity on the franchisor and franchisee issue "will likely give rise to disputes regarding who is entitled to recovery based on the transactions, and lead to obvious issues of administration.")). Branded Operators raised the issue repeatedly during the approval process. The parties and the district court cannot shift their responsibilities to a special master and impose the burden on class members to separately litigate the

issue of class scope and standing. *In re Katrina Canal Breaches Litig.*, 628 F.3d at 194.

III. The Class Was Inadequately Represented.

When this Court rejected Class Counsel's first settlement attempt, it held "the benefits of litigation peace do not outweigh class members' due process right to adequate representation." *Interchange Fees II*, 827 F.3d at 240. On review of the revised class settlement, this concern remains paramount and again compels reversal. "Part of the due process inquiry (and part of the Rule 23(a) class certification requirements) involves assessing adequacy of representation and intra-class conflicts." *Id.* at 236 (quoting *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 260 (2d Cir. 2001)). This adequacy of representation requirement "also factors in competency and conflicts of class counsel." *Amchem Prods., Inc.*, 521 U.S. at 626 n.20.

Class Counsel here knew for years about the franchisor/franchisee intra-class conflict and did nothing to resolve it, even after the defendants noted this issue would impact "thousands, if not tens of thousands of franchises" and "will likely give rise to disputes regarding who is entitled to recovery based on the transactions, and lead to obvious issues of administration." (June 2014 Status Report, DE 6335/JA-2915, at 5). *Amchem* made it obvious "that a class divided" among claimants with distinct injuries "requires division into homogenous subclasses…, with separate

representation to eliminate conflicting interests of counsel." *Ortiz*, 527 U.S. at 856 (citing *Amchem*, 521 U. S., at 627).

None of the class representatives in this case have concerns that are similar to the Branded Operators and other franchisees, and none of them are competing directly with other class members for compensation from the settlement fund. The district court determined that Class Counsel does "not have a duty to represent the Branded Operators in their dispute with other entities over which entities hold [these] rights." (Prelim. Approval Order, DE 7363/JA-4670, at 34 n.28). But that is exactly the point; no one is looking out for the interests of the Branded Operators and other franchisees.

In *In re Literary Works in Elec. Databases Copyright Litig*., 654 F.3d 242 (2d Cir. 2011), class counsel attempted to negotiate compensation from Google for three separate "categories" of class members (labeled A, B, and C) in a single settlement class. *Id*. at 246. Each category had a different statutory claim and each received a different damages formula. *Id*. There was no dispute that each category had differently valued claims, nor that the compensation for the different categories was unequal. Instead, the problem was that the class representatives were generally representing all subgroups—class representatives had claims in categories A, B, and C—but were incentivized to favor their more exclusive category A and B claims. *Id*. at 251, 252 (citing *Amchem*, 521 U.S. at 627). The Court found that "the interests of

class members who hold only Category C claims fundamentally conflict with those of class members who hold Category A and B claims." *Id*. at 254.

The Court explained that "[a]lthough all class members share[d] an interest in maximizing the collective recovery, their interests diverge[d] as to the distribution of that recovery because each category of claim is of different strength and therefore commands a different settlement value." *Id*. The Court struck the settlement on Rule 23(a)(4) grounds: the class representatives "cannot have had an interest in maximizing compensation for every category." *Id*. at 252.[11] "Only the creation of subclasses, and the advocacy of an attorney representing each subclass, can ensure that the interests of that particular subgroup are in fact adequately represented." *Id.* This Court explained why separate legal counsel is necessary to resolve an intra-class conflict:

> **The rationale is simple: how can the value of any subgroup of claims be properly assessed without independent counsel pressing its most compelling case?** It is for this reason that the participation of impartial mediators and institutional plaintiffs does not compensate for the absence of independent representation. Although the mediators safeguarded the negotiation process, and the institutional plaintiffs

[11] *See also W. Morgan-East Lawrence Water & Sewer Auth. v. 3M Co*., 737 Fed. Appx. 457 (11th Cir. 2018) (unpublished); *Dewey v. Volkswagen AG*, 681 F.3d 170, 188 (3d Cir. 2012) (finding that representative plaintiffs' "interest in excluding other plaintiffs from the reimbursement group" was "precisely the type of allocative conflict of interest that exacerbated the misalignment of interests in *Amchem*."); *Hesse v. Sprint Corp.,* 598 F.3d 581, 589 (9th Cir. 2010) ("Conflicts of interest may arise when one group within a larger class possesses a claim that is neither typical of the rest of the class nor shared by the class representative.").

> watched out for the interests of the class as a whole, no one advanced the strongest arguments in favor of Category C's recovery.

654 F.3d at 253 (emphasis added); *see also Ortiz* at 856 (holding that intra-class conflict "requires division into homogeneous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel").

This settlement is even more infirm and inadequate than the settlement set aside in *Literary Works*. Rather than three competing subgroups with varying measures of claim value, this case involves a large group of class members that will receive *no* value from the settlement, because another group of class members will take it from them. And just as in *Literary Works*, "[a]ny improvement in the compensation of, for example, [franchisee] claims would result in a commensurate decrease in the recovery available for [franchisors]." 654 F.3d at 252. Class Counsel necessarily faced a conflict in representing both groups – yet neither the district court nor Class Counsel did anything to rectify the zero-sum problem creating the conflict.

The district court underscored the inherent conflict between franchisors and franchisees when it concluded that, once a special master decides who loses the dispute, Class Counsel's duty to represent that losing group will have, at that point, retroactively – and magically – disappeared. (Prelim. Approval Order, DE 7363/JA-4670, at 30) ("Class Counsel and Class Plaintiffs are not responsible to, and do not represent, the entity that loses the dispute over the right to claim settlement funds"); (Mem. & Order, DE 7821/JA-7324, at 37-38 (quoting Hr'g Tr./JA-7048, at

65:15−16 ("Class Counsel is advocating for those who have a claim, and after being pressed on the matter, Class Counsel stated unequivocally that they are 'agnostic at this point as to who owns the claim.'")).

This is wrong, deeply troubling, and demonstrates squarely how it is impossible for Class Counsel to represent both franchisors and franchisees. The question is not, as the district court put it, whether "Class Counsel is advocating for those who have a claim." That is a false paradigm that allowed the interests of the Branded Operators to be nullified while binding them to a sweeping release of claims. Rather, Class Counsel must advocate for ***every member included in their class definition***. If different class members have competing claims, subclass counsel must be appointed. Class Counsel cannot remain "agnostic," and they cannot abdicate their responsibility to the group that loses at the claims administration stage. There is no dispute here that franchisors and franchisees are both class members, so to advocate only for "those who have a claim" – which picks one subgroup over another – abandons an entire subset of other class members and violates the adequate representation prong of Rule 23. *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 307-08 (3d Cir. 2005) ("question[ing] whether the absent class members' interests were sufficiently pursued by class counsel" where claims that were not pursued were released in settlement and noting that such "may suggest that class counsel

subrogated their duty to the class in favor of the enormous class-action fee offered by defendants").

IV. The District Court Erred by Approving a Modified Settlement Without Providing Certain Class Members With Opt-Out Rights.

Two of the procedural rights that class members in Rule 23(b)(3) class actions enjoy are the right to object to a settlement and the right to request exclusion at the time of settlement. Both rights were codified in the 2003 amendments to Rule 23. The right to object and opt-out are critical safeguards that advance the interests of class members, ensure that class settlements are fair, and honor class members' autonomy to control important decisions regarding their claims. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-812 (1985) ("minimal procedural due process protection" within the context of class actions required that plaintiffs receive notice plus an opportunity to be heard and participate in the litigation, and the opportunity to opt-out of the settlement). It is "[a]n elementary and fundamental requirement of due process" that "notice [be] reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *see also Literary Works*, 654 F.3d at 253.

The district court erred in approving the settlement without giving the thousands of "Dismissed Plaintiff" franchisees an opportunity to opt-out. The Dismissed Plaintiffs were first told in direct mailings by Class Counsel that they had

been excluded from the class settlement because of previous releases negotiated by franchisors. (Mem. & Order, DE 7821/JA-7324, at 68). Given that they were expressly excluded from the settlement, they were not given an opportunity to opt-out of or object to the settlement. Nor could they have done so, because they were not class members at that opt out time.

At the final approval hearing, the district court concluded – based on objections from the Branded Operators – that any entity in a franchisee-franchisor relationship that believes it had been wrongly excluded, may file a claim. (Mem. & Order, DE 7821/JA-7324, at 70 (citing Hr'g Tr./JA-7048, at 95:19−25 (defendants stating that if such a party "comes in and submits a claim and that claim is accepted by the claims administrator, the defendants are not going to stop that party from being paid if they can prove they own the claim[] and Valero was wrong")). The district court also ordered supplemental notice to any entity excluded through the Valero settlement, along with ordering that notice be sent to all other class members who had previously been excluded, informing the entity that it may be eligible to file a claim. (Mem. & Order, DE 7821/JA-7324, at 70). More than 6,000 class members had been notified that they were excluded from the class settlement – only to later be told that they were reinstated. (Mem. & Order, DE 7821/JA-7324, at 9, 72-73).

While Objectors agree that a supplemental notice was appropriate, in plain violation of Rule 23 and *Shutts,* 472 U.S. at 812, the district court failed to provide

those Dismissed Plaintiff franchisees an opportunity to opt-out of or object to the class settlement. Rather, they were simply told that they could submit a claim. The failure to provide those class members with an opt-out and objection opportunity violates their procedural due process rights. The proper procedure would have been for a separate class notice to be sent, notifying them of their inclusion in the class, and giving them an opportunity – like all other class members – to opt-out of the settlement or object to it. Instead, the parties pushed the settlement through without considering the procedural due process rights of the Dismissed Plaintiff franchisees that were wrongly excluded from the settlement, only to be reinstated without an opportunity to object or opt out. This too is reason to overturn the settlement.

CONCLUSION

The judgment and order approving the Settlement Agreement should be reversed.

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) and Local Rule 32.1(a)(4)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) this document contains 13,268 words.

2. This document 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 it has been prepared in a proportionately spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

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