No. 20-339 (Lead)

Nos. 20-304, 20-340, 20-341, 20-342, 20-343, and 20-344 (Con)

(Docket Number in District Court: 05-md-1720 (MKB)(JO))

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION

Appeal from the United States District Court
for the Eastern District of New York

FINAL ANSWERING BRIEF (FEES AND SERVICE AWARDS) OF PLAINTIFFS-APPELLEES

ROBBINS GELLER RUDMAN
& DOWD LLP
PATRICK J. COUGHLIN
JOSEPH D. DALEY
ALEXANDRA S. BERNAY
CARMEN A. MEDICI
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058

ROBINS KAPLAN LLP
K. CRAIG WILDFANG
THOMAS J. UNDLIN
RYAN W. MARTH
2800 LaSalle Plaza
800 LaSalle Avenue South
Minneapolis, MN 55402-2015
Telephone: 612/349-8500

BERGER MONTAGUE PC
H. LADDIE MONTAGUE, JR.
MERRILL G. DAVIDOFF
MICHAEL J. KANE
1818 Market Street, Suite 3600
Philadelphia, PA 19103
Telephone: 215/875-3000

Attorneys for Rule 23(b)(3) Class Plaintiffs-Appellees
[Additional counsel appear on signature page.]

In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation, Second Circuit No. 20-339 (Lead), Nos. 20-304, 20-340, 20-341, 20-342, 20-343, and 20-344 (Con)

CORPORATE DISCLOSURE STATEMENT

Rule 23(b)(3) Class Plaintiffs-Appellees submit this Corporate Disclosure Statement under Federal Rule of Appellate Procedure 26.1(a): Photos Etc. Corporation DBA ScanMyPhotos.Com; Traditions, Ltd.; Capital Audio Electronics, Inc.; CHS Inc.; Discount Optics, Inc.; Leon's Transmission Service, Inc.; Parkway Corporation; and Payless Inc., do not have parent corporations or any publicly held corporation that owns more than 10% of any of their shares.

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STATUTES, RULES AND REGULATIONS

I. COUNTERSTATEMENT OF THE ISSUES

1. This Court will affirm an attorney-fee award where "the record shows that the district court adequately addressed the issue of the reasonableness of the fee request and did not abuse its discretion in determining plaintiffs' award." *Haley v. Pataki*, 106 F.3d 478, 484 (2d Cir. 1997). Here, where the district court, the Hon. Margo K. Brodie presiding: (i) was fully familiar with the Settlement's merits and the 14-year litigation's challenges; (ii) held a fairness/final-approval hearing while addressing both the fee request and fee objections; and (iii) issued a fee-award order replete with specific findings, did the district court act within its discretion in awarding the percentage fee at issue?[1]

2. In recognizing the unique role that representative plaintiffs play in private litigation, courts overseeing class actions may grant "service awards"—payments over and above pro rata disbursements from a settlement fund—to parties that spearhead the litigation on behalf of the absent class, when warranted. *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 483 (S.D.N.Y. 2013). Given the district court's litigation oversight and noting the Class Plaintiffs' contributions corroborated by an extensive

[1] Citations and footnotes are omitted and *emphasis* is added throughout, unless noted otherwise.

record, did the district court abuse its discretion in approving service awards to Class Plaintiffs?

3. Given the district court's decade-plus oversight of this litigation, supplemented by a fulsome record, did the court act within its discretion in denying attorneys' fees and service awards to certain objectors that it found made no substantial contributions to improving the Class's recovery?

II. COUNTERSTATEMENT OF THE CASE[2]

A. Co-Lead Counsel's resolute efforts over many years ultimately result in a multi-billion-dollar class-action settlement.

1. Pre-filing preparation.

The $5.6 billion Settlement was reached through the herculean efforts of three nationally known law firms: Robins Kaplan LLP, Berger Montague PC, and Robbins Geller Rudman & Dowd LLP (together, "Co-Lead Counsel").[3] They were assisted by law firms Hulett Harper Stewart LLP and Freedman Boyd Hollander Goldberg Urias

[2] This section provides a distilled overview of the extensive work that Co-Lead Counsel performed. Those litigation efforts are detailed in the Wildfang 2018 Declaration (A-4031-126/ECF7257-3), as well as the Second Supplemental Wildfang Declaration (A-2956-65/ECF6366-2).

[3] The district court occasionally referred to Co-Lead Counsel as "Class Counsel" in its orders; this Brief follows that convention when quoting the court.

& Ward P.A. as to key decisions involving litigation strategy over the case's entire course. A-4041-42/ECF7257-3:¶24.

Robins Kaplan began investigating in 2004 the claims alleged in this case, after learning of retail merchants' widespread dissatisfaction over exorbitant interchange fees. A-4038-39/ECF7257-3:¶¶16, 19. That effort included consultation with economists, industry experts, academic antitrust experts, and merchants. A-4039/ECF7257-3:¶19.

Eventually two small merchants, Photos Etc. Corp. and Traditions Ltd., agreed to step forward to litigate an antitrust class action on behalf of all similarly situated merchants. A-4038-39/ECF7257-3:¶¶16-17. They did so despite fearing retaliation from the large banks upon which their businesses depended.[4]

At the same time, established class-action firms Berger Montague and Robbins Geller had developed a background in unrelated litigation involving payment cards, in particular, by pursuing a series of complex cases alleging various antitrust violations by several of the Defendants in this case.[5]

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[4] A-2958-60,61/ECF6366-2:¶¶5-11, 17; *see also* Declaration of Mitch Goldstone, ECF6385-3:¶7; Declaration of Michael Schumann, ECF6385-8:¶¶7-9.

[5] *See, e.g.*, *In re Currency Conversion Fee Antitrust Litig.*, MDL 1409 (S.D.N.Y) (settled for $386 million, including settlement with American Express); *Schwartz v. Visa Int'l Corp., et al.*, No. 822404-4 (Cal Super. Ct. Alameda Cnty.).

2. The case's prosecution involves years of hard-fought litigation.

a. Leadership, pleadings, and class certification.

In early 2006, the district court appointed the three firms as Interim Co-Lead Counsel. *See* ECF279; *see also* A-4041-42/ECF7257-3:¶24. In April 2006, Co-Lead Counsel filed a consolidated amended complaint alleging 16 antitrust counts. A-4043-45/ECF7257-3:¶¶27-30. Shortly thereafter they filed a supplemental complaint alleging antitrust violations under the Clayton and Sherman Acts arising from Mastercard's intervening corporate restructuring that had culminated in its initial public offering. A-4045-47/ECF7257-3:¶¶31-36. This was a novel claim, as no other case had ever challenged the transformation from a joint venture into a publicly traded corporation as an antitrust violation. A-4046/ECF7257-3:¶34.

Defendants moved to dismiss both complaints—the earlier one in part, and the latter one in its entirety. A-4047-49/ECF7257-3:¶¶40-47. They were only partially successful; the district court thereafter granted leave to re-plead, and Class Plaintiffs filed an amended pleading. A-4049/ECF7257-3:¶47.

Based on substantial discovery, in early May 2008 Co-Lead Counsel filed a class-certification motion supported by a 78-page memorandum, comprehensive expert report, and over 1,000 pages of exhibits. ECF7471-1:12. Defendants' comprehensive response raised myriad factual and legal defenses that they supported

with expert reports and voluminous exhibits. *Id*. Class Plaintiffs' reply papers were more extensive than the initial submission, touching on industry-specific factual and expert issues far afield from those raised in any previous antitrust class action. *Id*. This process culminated in a day-long oral argument, followed by more briefing. ECF7471-1:13.

Concurrent with their class-certification reply submission, Class Plaintiffs filed several complaints re-pleading and adding various antitrust claims. *Id*.; A-4062-63/ECF7257-3:¶¶102-105. Defendants moved to dismiss each of those complaints in their entirety, to strike allegations against Defendant Chase Paymentech, and to disqualify Class Plaintiffs' class expert. A-4063/ECF7257-3:¶¶106-108. Plaintiffs responded to each motion. A-4064/ECF7257-3:¶109. None were decided by the district court.

b. Phase One discovery

During Phase One discovery, Class Plaintiffs collaborated with Individual Plaintiffs to serve 718 document requests and 631 interrogatories, and five requests for admissions.[6] Defendants, represented by able counsel from large, prestigious

[6] In Phase One of the litigation, a group of large chain merchants (including grocery chains such as Kroger and drug-store chains such as Walgreens), litigated the case alongside Class Plaintiffs. ECF7471-1:13 n.11. These merchants were known as the "Individual Plaintiffs." *Id*.

firms, sought to limit the amount and use of any discovery they produced. A-4049/ECF7257-3:¶¶48-50. The parties extensively negotiated the discovery requests' scope, and engaged in motion practice over disputed discovery issues.[7] *See, e.g.*, A-4049,51-52/ECF7257-3:¶¶48, 58-60.

Defendants produced 56 million pages that Class Plaintiffs' counsel then reviewed and analyzed.[8] A-4050-51/ECF7257-3:¶¶53, 57. Such a massive undertaking required educating, coordinating, and overseeing personnel comprising dozens of supporting class counsel. A-4051/ECF7257-3:¶57.

Co-Lead Counsel and the Class Plaintiffs compiled and produced their own evidence in response to 135 document requests and 295 interrogatories, while at the same time preparing for and defending Class Plaintiffs' depositions. A-4054-55/ECF7257-3:¶¶71-75. Co-Lead Counsel also issued subpoenas to numerous non-parties, met and conferred with their counsel, engaged in motion practice, gathered and reviewed their documents, and took third-party depositions. A-4055/ECF7257-

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[7] Magistrate Judge James Orenstein embraced Class Plaintiffs' suggestion that the court hold regularly scheduled status conferences to keep matters current, with joint status reports to be filed shortly before each conference. A-4042-43/ECF7257-3:¶25. That encouraged the parties to resolve routine discovery disputes, leaving only the most-contentious ones for Judge Orenstein to decide—some 35-plus conferences by the Final Approval Order's entry.

[8] In addition, Co-Lead Counsel obtained from Defendants the many terabytes of data necessary for their experts to analyze and determine impact and damages.

3:¶¶76-78. Ultimately, Co-Lead Counsel took or defended more than 370 depositions in Phase One. A-4104-14/ECF7257-3:Exhibits 2 & 3.

c. Expert discovery, dispositive motions, and trial preparation.

After Phase One fact discovery concluded, Co-Lead Counsel served on Defendants five experts' reports, including a comprehensive report by Dr. Alan Frankel—the leading expert on the economics of payment-card networks—addressing the substantive aspects of Class Plaintiffs' claims. A-4065/ECF7257-3:¶115; ECF7471-1:15.

Defendants responded with 12 expert reports from some of the most-esteemed testifying experts available. A-4065-66/ECF7257-3:¶117. Class Plaintiffs deposed each of Defendants' experts. A-4066/ECF7257-3:¶119. That process was followed by six expert rebuttal reports, and the defense of Class Plaintiffs' experts' depositions. A-4066/ECF7257-3:¶120; ECF7471-1:15. Defendants even served sur-rebuttal reports by two experts. ECF7471-1:15.

Summary judgment and *Daubert* motions followed. Co-Lead Counsel expended substantial time and effort preparing for oral argument on the pending summary judgment and *Daubert* motions, which the district court heard in November

2011. A-4070-71/ECF7257-3:¶¶136-138. Those motions hadn't been decided when the 2012 Settlement was reached.[9]

Trial was scheduled for September 2012. In preparation, Co-Lead Counsel worked closely with jury consultants, drafted jury instructions, verdict forms and motions *in limine*, selected trial exhibits, and assessed their admissibility. A-4071-72/ECF7257-3:¶¶140-143.

d. Co-Lead Counsel petitions all three branches of the federal government on the Class's behalf.

Early in this litigation, Robins Kaplan retained a lobbying/consulting firm to assist the merchant community in securing federal legislation regulating interchange fees. All Co-Lead Counsel joined in this effort.

Ultimately, in 2010, Congress passed the "Durbin Amendment" to the Dodd-Frank Wall Street Reform and Consumer Protection Act, which capped debit-card interchange fees based on Defendants' costs in processing debit-card transactions. A-4057-59/ECF7257-3:¶¶89-93. Co-Lead Counsel also drafted an *amicus* brief defending the Durbin Amendment in *TCF Nat'l Bank v. Bernanke*, No. 4:10-cv-04149 (D.S.D.), in which a card-issuing bank attacked the Durbin Amendment on

[9] This Brief refers to the initial settlement as the "2012 Settlement" given the year it was finalized, while the Fee Opinion calls it the "2013 Settlement" given its final-approval date. Both monikers refer to the same event.

constitutional grounds. ECF7471-1:16. After that district court denied a preliminary-injunction request, Co-Lead Counsel filed another *amicus* brief in the United States Court of Appeals for the Eighth Circuit, which subsequently affirmed the denial; the case was later dismissed. *TCF Nat'l Bank v. Bernanke*, 643 F.3d 1158 (8th Cir. 2011). *See generally* A-4059-60/ECF7257-3:¶¶95-96.

In addition, while this action was pending the Department of Justice ("DOJ") and several states' attorneys general began investigating certain network rules at issue here. ECF7471-1:17. The DOJ asked Co-Lead Counsel to produce discovery materials from this action—first informally, and then via a civil investigative demand. *Id*. The DOJ could not see, store, or use those materials without substantial assistance from Co-Lead Counsel; over Defendants' vigorous opposition Co-Lead Counsel secured an amended protective order allowing for their release, and a court order (over Defendants' objections) ensuring that such work-product sharing wouldn't waive work-product-privilege protections. *Id*.

For three years the DOJ enjoyed unfettered access to this action's document and deposition databases, and the sprawling universe of associated work product—all at a minimal cost. *Id*. The DOJ subsequently filed antitrust claims challenging certain anti-steering rules of Visa, Mastercard, and American Express, and secured a consent judgment against Visa and Mastercard. *Id*. The consent judgment addressed several

of Visa's and Mastercard's rules targeted in this action, thus obtaining some of the relief Class Plaintiffs sought here. A-4060-61/ECF7257-3:¶98. Significantly, the DOJ did *not* challenge the Defendants' default-interchange-fee rules, honor-all-cards rules, or surcharge rules that also were at issue here. ECF7471-1:17.

In 2009, the Supreme Court granted *certiorari* in *Am. Needle, Inc. v. Nat'l Football League*, 538 F.3d 736 (7th Cir. 2008), in which the Seventh Circuit had held that the NFL and its 32 teams were a "single entity" for the purposes of that antitrust case involving an exclusive-licensing agreement. *Id*. at 744. The Court's affirmance of *American Needle* could have undermined the conspiracy-based claims in this action, which challenged conduct during the time Defendant banks operated joint ventures under the Visa and Mastercard umbrellas.

Working with antitrust experts and other interested parties, Co-Lead Counsel drafted and filed an *amicus* brief urging *American Needle*'s reversal. The Supreme Court ultimately agreed with Co-Lead Counsel's position, and reversed. *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183 (2010).

All of this activity showed Defendants that Co-Lead Counsel were committed to furthering the class-member merchants' interests.

3. The 2012 Settlement, and efforts to protect the class from misleading information.

Even while embroiled in the complex and difficult litigation, for more than five years Co-Lead Counsel and Defendants undertook protracted, arms-length settlement negotiations under the guidance of two experienced mediators—Hon. Edward A. Infante (Ret.) and Professor Eric D. Greene. A-4072-73/ECF7257-3:¶¶144-148. Counsel for the two sides participated in 45 meetings with one or both mediators, as well as hundreds of telephone calls and emails. *Id*.

In July 2012, the parties reached an agreement to settle the action ("2012 Settlement") on behalf of two classes: a Rule 23(b)(3) damages class, and a Rule 23(b)(2) class for injunctive relief that would result in modifications to certain of Visa's and Mastercard's challenged rules. A-4073-74/ECF7257-3:¶¶145-152.

After the 2012 Settlement's preliminary approval, Co-Lead Counsel learned that opponents to the 2012 Settlement had launched a website containing misleading information about Class Members' rights and options. This led to motion practice resulting in an order requiring the third-party website to correct the misleading information. A-4081-82/ECF7257-3:¶¶179-180.

Co-Lead Counsel also spent significant time protecting absent Class Members from misleading and confusing statements about the nature and terms of the 2012 Settlement. Certain third-party claims filers had communicated that their services

were necessary for Class Members to recover under the 2012 Settlement. A-4082-83/ECF7257-3:¶¶182-184. The district court ordered evidentiary hearings concerning the alleged misconduct, which required Co-Lead Counsel to obtain discovery from several third-party claims filers. A-4083/ECF7257-3:¶184. After the hearings, in October 2014 the district court enjoined one third-party claims filer from providing services related to the 2012 Settlement, while observing that others had also deceived merchants. ECF6349:59. The district court noted that Co-Lead Counsel had been "vigilant in policing the conduct of [third-party filers], contacting them directly when their statements are misleading, and even working out corrective communications directly with them," and commended Co-Lead Counsel for "those actions, and for the professionalism and thoroughness that has characterized their conduct of the five evidentiary hearings on the subject." ECF6349:60.

4. District-court final approval of 2012 Settlement and fee request.

In mid-December 2013, the district court, the Hon. John Gleeson presiding, granted final approval of the 2012 Settlement. *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.* ("*Payment Card I*"), 986 F. Supp. 2d 207 (E.D.N.Y. 2013), *rev'd*, 827 F.3d 223 (2d Cir. 2016). That approval reflected myriad considerations, including the excellent results obtained as well as Co-Lead Counsel's efforts to maintain a streamlined litigation machine in the face of daunting obstacles.

On their own, Co-Lead Counsel had taken a scalpel to their lodestar calculations, reducing the initial total lodestar by approximately $13.9 million, or approximately 7.93%. ECF2113-2:¶¶ 8-9, 12. Then, Co-Lead Counsel engaged the accounting firm of Clifton Larson Allen ("CLA") to audit their lodestar submissions for consistency with relevant fee-analysis criteria. ECF7471-1:41. As a result of CLA's "forensic data analysis," the lodestar was further reduced by approximately $690,000. *Id.*; ECF5940-1:¶¶2-6; ECF7471-2:¶5. The result was a lodestar of approximately $160 million, based on approximately 500,000 hours billed at *historical* rates, as opposed to current rates. *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.* ("*Payment Card II*"), 991 F. Supp. 2d 437, 439 (E.D.N.Y. 2014).

Co-Lead Counsel requested a fee of 10% of the common fund (after it was reduced for opt-outs), amounting to approximately $570 million. Applying the "*Goldberger*" factors from *Goldberger v. Integrated Rsch., Inc.*, 209 F.3d 43 (2d Cir. 2000) and a lodestar cross-check, the district court awarded attorneys' fees in the amount of $544.8 million—9.56% of the settlement common fund. *Payment Card II*, 991 F. Supp. 2d at 437-47. That fee equated to a 3.41 multiplier of Co-Lead Counsel's lodestar based on historical rates. *Id.* at 447-48.

The district court found the fee justified, noting that "this case stands out in size, duration, complexity, and in the nature of the relief afforded to both the injunctive relief and damages classes. Class Counsel took on serious risks in prosecuting the case." *Id*. at 439. Based on its examination of the fee petition, arguments made in briefs and at the final approval hearing, and its knowledge of the case, the district court concluded that it was "confident" that the overall fee and multiplier were both "reasonable." *Id*. at 448.

5. This Court vacates the 2012 Settlement.

This Court vacated the 2012 Settlement on June 30, 2016. *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig*. ("*Payment Card III*"), 827 F.3d 223 (2d Cir. 2016).

The Court found that at the settlement stage, the interests of the (b)(2) class had warranted separate representation, and therefore concluded that Rule 23's "adequacy" requirement was not met. *See id*. at 233. In particular—at least in the context of negotiating a settlement—it found "[u]nitary representation of separate classes that claim distinct, competing, and conflicting relief" could not meet the adequacy-of-representation requirement. *Id*. at 234. The Court reasoned that at least some members of the (b)(2) class had an interest in maximizing injunctive relief to prevent *future* harm, while at least some of the (b)(3) class members had an interest in

maximizing monetary relief to redress *past* harm. *Id.* at 233. Those divergent interests resulted in an essential allocation decision that required separate, not single, representation for each class to maximize benefits to both. *Id.* at 233-34.

Nevertheless, this Court clarified that it found no fault with Co-Lead Counsel despite the two classes' differing aims: "*We expressly do not impugn the motives or acts of class counsel*." *Id.*[10]

B. Following remand the Class Plaintiffs commence the Phase Two litigation, resulting in the operative Settlement on appeal.

After remand, the litigation's Phase Two commenced on November 30, 2016. The same three firms were appointed as interim Co-Lead Counsel—but this time only for the proposed (b)(3) damages class. ECF6754:1.

1. An amended omnibus complaint and renewed discovery.

Co-Lead Counsel's immediate task was to revise the operative complaint to reflect factual and legal developments in the market since the last complaints had been filed in 2009. Co-Lead Counsel combined three standalone complaints into a single

[10] The panel further recognized there is no inherent conflict in the same counsel representing both a (b)(3) class and (b)(2) class: "None of this is to say that (b)(3) and (b)(2) classes cannot be combined in a single case, or that (b)(3) and (b)(2) classes necessarily and always require separate representation.... Of course we have blessed multi-class settlements that were the product of unitary representation, but those were entered into *after* class certification." *Id.* at 235-36.

pleading. The new complaint also pleaded a two-sided market that included both merchants and cardholders, to address the *American Express* decision. A-4087-88/ECF7257-3:¶¶198-200.

Defendants objected to the amended complaint's filing on grounds that the two-sided market allegations could not relate back. This spurred more motion practice. A-4087-88/ECF7257-3:¶200. Although Magistrate Judge Orenstein agreed with Defendants, his holding was reversed on appeal. ECF7244.

Because the original discovery record closed in 2010, Co-Lead Counsel had to develop a factual record showing that Defendants' *ongoing* activities continued to restrain competition, despite a variety of changes in the payment-card industry—including Visa's and Mastercard's continuation of the rules changes negotiated in the 2012 Settlement agreement. In litigation brought by merchants who had opted out of the 2012 Settlement ("Direct Action Plaintiffs"), Defendants had produced approximately 100 million pages of new documents that needed to be analyzed.

Co-Lead Counsel used state-of-the-art "targeted assisted review" technology to find the most-relevant documents, resulting in a universe of 5 million pages. This core set of documents was then reviewed and analyzed. Targeted searches were also conducted in connection with deposition preparation and expert work. Co-Lead Counsel coordinated with Direct Action Plaintiffs to serve additional document

requests and obtain supplemental productions from Defendants, including many terabytes of data from Visa, Mastercard, and the banks to supplement Phase One productions. Co-Lead Counsel also obtained supplemental document productions from banks that were Defendants in the (b)(3) class action, but not in the Direct Action Plaintiffs' cases. A-4088-91/ECF7257-3:¶¶202-208, 212.[11]

Depositions commenced immediately upon Co-Lead Counsel's appointment. During an 18-month period, Co-Lead Counsel participated in nearly 150 depositions, including defense witnesses, third-party witnesses, and Class Plaintiffs. *Id.* at A-4089-90,93/ECF7257-3:¶¶205, 209-211, 222-223.

Co-Lead Counsel also worked closely with economic experts to address the competitive conditions in the marketplace and damages as they had evolved since the filing of class- and merits-expert reports in Phase One. A-4093-95/ECF7257-3:¶¶224-228.

[11] Defendants also served new wide-ranging discovery requests, requiring Class Plaintiffs to search archived files for documents going back to 2002, to address Defendants' two-sided market arguments. In response, Class Plaintiffs produced more than 500,000 pages of additional documents. A-4091-93/ECF7257-3:¶¶215-221. There was motion practice related to these new requests as well.

2. New mediation, and a superseding multi-billion-dollar settlement.

This Court's reversal triggered the possibility of the 2012 Settlement agreement being terminated. That termination would have required the unwinding of the settlement infrastructure, including escrow agreements and accounts.

To avoid these consequences, the parties agreed to a series of extensions that maintained the Settlement Fund in an escrow account, subject to recall by Defendants, while litigation re-commenced. At the same time, the Class Plaintiffs explored the possibility of new settlement discussions with the Defendants. A-4096/ECF7257-3:¶232.

Starting in February 2017, Co-Lead Counsel initiated a new round of settlement discussions solely on behalf of the (b)(3) damages class. With the renewed assistance of Judge Infante and Professor Greene, both of whom already had extensive knowledge of the litigation from their past mediation efforts, Co-Lead Counsel conducted a dozen in-person mediation sessions with the Defendants over 14 months, and held numerous telephonic meetings with Defendants and one or both of the mediators. *See* ECF7257-5:¶¶12-27[12]; ECF7257-4:¶9[13]; A-4097/ECF7257-3:¶235.

[12] Declaration of Hon. Edward A. Infante in Support of Rule 23(b)(3) Class Plaintiffs' Motion for Preliminary Approval of Settlement, dated June 27, 2018.

To facilitate meaningful discussions during the sessions, the parties frequently exchanged draft settlement terms or proposed settlement language. A-4097/ECF7257-3:¶235.

Ultimately, in June 2018, Class Plaintiffs and Defendants accepted the mediators' proposal and reached an agreement in principle. ECF7257-5:¶¶26-27; ECF7257-4:¶¶11-12; A-4098/ECF7257-3:¶239. After further negotiation, this agreement in principle was documented in a written settlement agreement that the parties signed in September 2018. *See* Superseding and Amended Definitive Class Settlement Agreement of the Rule 23(b)(3) Class Plaintiffs and the Defendants (the "Settlement"). ECF7257-2.

The prior settlement agreement's structure provided the basis for negotiating the operative Settlement. Importantly, approximately $5.34 billion of funds from the 2012 Settlement was still held in escrow accounts. ECF7471-1:23. That money was included in the new Settlement along with Defendants' payment of an additional $900 million (which was reduced to $200 million after reduction for opt-outs). ECF7471-1:23 n.16. Claims administrator Epiq, and its work done with respect to notice and settlement administration in the 2012 Settlement, remained in place. ECF7471-1:23.

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[13] Declaration of Eric Green in Support of Rule 23(b)(3) Class Plaintiffs' Motion for Preliminary Approval of Settlement, dated September 10, 2018.

Co-Lead Counsel worked closely with Epiq to provide the Class with notice of the Settlement in a timely, efficient manner. ECF7471-1:24. To update the merchant database, Co-Lead Counsel again served subpoenas on the largest acquirers, participated in dozens of negotiations, and filed a motion to compel. *Id*. The Defendant Banks, Visa, and Mastercard also produced merchant-identifying data. *Id*. Substantial additional merchant-identifying data was given to Epiq. *Id*.[14] More than 16 million notices were mailed. *Id*. Co-Lead Counsel also prepared a notice and mailed it to merchants (and their related entities) who had opted out of the 2012 Settlement, filed lawsuits, and then settled those claims prior to the present Settlement ("Dismissed Plaintiffs"). *Id*.

C. The district court approves Co-Lead Counsel's attorney fees and expenses.

Contemporaneously with its Final Approval Order, the district court in a 57-page opinion cogently explained its reasoning in granting $523,269,585.27 in attorney fees to Co-Lead Counsel, which fees represented 9.31% of the Settlement Fund. *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig*. ("*Payment Card V*"), No. 05-md-1720, 2019 WL 6888488, at *25 (E.D.N.Y. Dec. 16, 2019) ("Fee Opinion" at A-7398-454/ECF7822). Following this Court's seminal fee-award opinion in

[14] *See also* ECF7469-7:¶16.

Goldberger and its progeny, the district court assessed the reasonableness of the percentage-of-the-fund it awarded before "cross-check[ing]" that award against the "multiplier" of Co-Lead Counsel's lodestar that it represented. A-7446-52/ECF7822:49-55.[15] The district court supported its decision with an analysis of the extensive record,[16] as well as its experience managing this litigation, and addressed all objections to counsel's fee request.

1. *Goldberger* factor 1: counsel's time and labor.

Analyzing Co-Lead Counsel's investment in the case—approximately 630,000 hours in time resulting in approximately $214.8 million in lodestar based on historical

[15] *Goldberger* evaluates attorney fee awards by analyzing six factors: "'(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation...; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.'" *Goldberger*, 209 F.3d at 50.

[16] Co-Lead Counsel submitted a voluminous record supporting their fee request, including the 243-paragraph Wildfang 2018 Declaration (A-4031-126/ECF7257-3) that detailed the work performed from the first investigation of the case in 2004 and the results—both in terms of monetary relief and structural reforms—that Co-Lead Counsel helped achieve over the ensuing years. That declaration incorporated by reference earlier declarations as well, including detailed declarations by each of the three Co-Lead Counsel firms setting forth their lodestar and expenses (as well as the lodestar and expenses for other contributing firms); and a declaration from a well-known scholar on attorney fees, Professor Charles Silver, supporting the reasonableness of Co-Lead Counsel's requested fee. *See* ECF7471-5 (Second Declaration of Professor Charles Silver Concerning the Reasonableness of Class Counsel's Request for an Award of Attorneys' Fees).

rates,[17] and $38.2 million in out-of-pocket expenses—the district court found that the time and labor expended justified the requested fee. A-7419/ECF7822:22 (noting that it was "difficult to find cases to compare" to the Settlement, but citing *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, No. 14-CV-7126(JMF), 2018 WL 6250657, at *1 (S.D.N.Y. Nov. 29, 2018); *In re BioScrip, Inc. Sec. Litig.*, 273 F. Supp. 3d 474, 498 (S.D.N.Y. 2017); *aff'd sub nom.*, *Fresno Cnty. Emps' Ret. Ass'n v. Isaacson/Weaver Family Trust*, 925 F.3d 63 (2d Cir. 2019); *Cassese v. Williams*, 503 F. App'x 55, 59 (2d Cir. 2012); *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 129 (S.D.N.Y. 2009), *aff'd sub nom.*, *Priceline.com, Inc. v. Silberman*, 405 F. App'x 532 (2d Cir. 2010); and *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 508 (S.D.N.Y. 2009)). The district court found that Co-Lead Counsel had "devoted an enormous number of hours and many years to this case, through discovery, class certification, and summary judgment briefing, as well as additional briefing and discovery after the Second Circuit's remand," and "acknowledged the extraordinary labor that this case involved on the part of the attorneys." A-7418/ECF7822:21.

The district court also addressed the argument levied by several objectors that Co-Lead Counsel should not be compensated for hours expended on behalf of the

[17] The submitted lodestar includes only time billed through January 31, 2019; it thus predates (and doesn't include) any work Co-Lead Counsel did seeking final approval and settlement administration since then.

(b)(2) class before this Court's 2016 reversal. The district court rejected this argument, reasoning that it would wrongly "punish[] ... [Co-Lead Counsel] for work that was reasonable for them to do at the time for both classes." A-7422/ECF7822:25 (citing this Court's observation that dual representation of (b)(3) and (b)(2) classes is "not uncommon," *Payment Card III*, 827 F.3d at 235).

The district court determined that excluding that time would be inappropriate because "the majority of Class Counsel's work leading up to the 2013 Settlement Agreement would have been aimed generally at proving antitrust violation[s], regardless of the particular remedy sought or class represented." A-7421/ECF7822:24. The district court also noted that Co-Lead Counsel weren't seeking compensation for appellate work relating to the 2012 Settlement, and that their work on behalf of the (b)(2) class benefitted *all* merchants—the relief secured remains in place, and it contributed to the creation of the initial Settlement Fund. *Id*.

Finally, the district court also rejected these objections because—as this Court had noted in 2016—Co-Lead Counsel sought compensation only as a percentage of the *monetary relief* secured for the (b)(3) class, and *not* based on the value of any injunctive relief they had secured. A-7438/ECF7822:41 ("[t]hat fund exists for the Superseding Settlement Agreement, separate and apart from the previously secured relief"); *see also Payment Card III*, 827 F.3d at 234 (district court's calculation of fees

from 2012 Settlement "explicitly did not rely on any benefit that would accrue to the (b)(2) class, [], and class counsel did not even ask to be compensated based on the size or significance of the injunctive relief").

The district court concluded that to accept objectors' argument would be "to not acknowledge or compensate Class Counsel for any work completed up to and including 2016, when the Second Circuit remanded the settlement for further consideration, would be unjust, and would penalize counsel for not predicting exactly what turns the case would take." A-7438/ECF7822:41.

2. *Goldberger* factor 2: litigation magnitude and complexities.

The district court found that the complexity of this litigation—which it characterized as "extremely protracted, occurring in multiple iterations, and ... includ[ing] extensive briefing at nearly every major stage of litigation"—also supported a "substantial award." A-7423/ECF7822:26. The court further found that this "case involved uncertainty as to success and complex legal antitrust questions that created a certain amount of risk." *Id*.

"In addition," the district court observed, "notable factual and legal developments took place during the course of the action that increased [its] complexity." *Id*. The changes included a United States Supreme Court decision that could undercut Class Plaintiffs' attempts to prove an antitrust relevant market, and a

DOJ consent decree that removed some of Visa's and Mastercard's restrictions that Class Plaintiffs had claimed were anticompetitive. *Id*. (citing *Ohio v. Am. Express Co*., __ U.S. __ , 138 S. Ct. 2274 (2018)).[18]

Finally, the district court noted that Judge Gleeson had found that "[t]his case was more challenging" than the *Visa Check* antitrust action, having presided over both cases. A-7425/ECF7822:28.[19]

3. *Goldberger* factor 3: litigation risk.

Observing that this Circuit has "historically" labeled the risk of success as ""perhaps the foremost"" factor to be considered in determining whether to award an enhancement"' (A-7426/ECF7822:29), the district court noted "'[i]n particular'" the tripartite composition of that risk: (i) the risks "'inherent in the litigation itself'" of establishing liability; (ii) the risks of recovery from a defendant that may be unable to

[18] Some of the other legal and factual changes that Co-Lead Counsel presented to the district court included: (i) passage of the "Durbin Amendment" to the Dodd-Frank Act, which eliminated other restraints for which Class Plaintiffs sought compensation and capped debit-card interchange fees (arguably limiting damages to the class); (ii) Visa's and Mastercard's initial public offerings, which could have placed the networks' interchange fees outside of the reach of Sherman Act §1; and (iii) the roll-back of the networks' prohibitions on merchant surcharging as a result of the 2012 Settlement. *See Payment Card I*, 986 F. Supp. 2d at 215-16 (describing reforms).

[19] *See In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 525 (E.D.N.Y. 2003), *aff'd sub nom.*, *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96 (2d Cir. 2005). *Visa Check* resulted in a $3.05 billion settlement fund, from which Judge Gleeson awarded $220 million in fees. *Id*. at 507-08.

pay "'any ultimate award'"; and (iii) contingency-fee risks—*i.e.*, that counsel may not be compensated at all for their work. A-7427/ECF7822:30. Focusing on the first and third elements, the district court concluded that "this *Goldberger* factor *weighs in favor of a substantial fee award*" (A-7428/ECF7822:31), explaining:

- as previously recognized by both Judge Gleeson and the district court, the litigation "itself was substantively risky from the outset" (A-7428/ECF7822:31);
- indeed, Judge Gleeson had previously noted that the risk was "'enormous,'" given the "'existential threats to this litigation'" (*id.*);
- when the litigation commenced in 2005, "'only one court had ruled on an antitrust challenge'" to the setting of interchange fees—*and that court had "'found in favor of the defendant'"* (*id.*) (citing *Nat'l Bancard Corp. (NaBanco) v. VISA U.S.A., Inc.*, 779 F.2d 592 (11th Cir. 1986));
- the class faced challenges to their antitrust standing given *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977) and Defendants' insistence that the class members were indirect purchasers lacking such standing, claiming the acquiring banks were actually the direct purchasers (A-7428/ECF7822:31);
- Defendants had also argued that *all* of the case's claims had been released by the *Visa Check* settlement release (A-7429/ECF7822:32);
- Co-Lead Counsel had initiated this case on their own "without the benefit of a prior government investigation." *Id.* Indeed, "the reverse occurred"—for it was the *government* that "'piggybacked on *their* efforts.'" (*id.*); and
- Co-Lead Counsel initiated the case knowing they'd be litigating "against some of the best defense counsel" in the country, and

> against the "largest banks, and largest household-known corporations without the benefit of a prior government inquiry," setting themselves up to litigate the matter "for years on contingency and without pay." *Id*.

Together, "[t]hese considerations weigh in favor of a substantial award." *Id*.; *see also id*. at A-7428/ECF7822:31 ("The Court finds that this *Goldberger* factor weighs in favor of a substantial fee award"). Notably, "[n]o objector appears to make a specific argument under this *Goldberger* factor." A-7426/ECF7822:29.

4. *Goldberger* factor 4: quality of representation.

The district court lauded Co-Lead Counsel's efforts on behalf of the Class:

> Class Counsel has without question done a tremendous job in litigating this case. They represent some of the best plaintiff-side antitrust groups in the country, and the size and skill of the defense they litigated against cannot be overstated. They have also demonstrated the utmost professionalism despite the demands of the extreme perseverance that this case has required, litigating on behalf of a class of over 12 million for over fourteen years, across a changing legal landscape, significant motion practice, and appeal and remand. Class Counsel's pedigree and efforts alone speak to the quality of their representation.

A-7432-33/ECF7822:35-36.

The district court acknowledged that the monetary recovery as a percentage of estimated damages fell short of the recovery in other cases where this factor supported fee awards. A-7434/ECF7822:37. Notwithstanding the smaller percentage recovery, however, the court also noted Co-Lead Counsel's "quality representation" and "role in obtaining injunctive relief ... [that] remains in place." A-7435-36/ECF7822:38-39.

Thus, Co-Lead Counsel achievements overall were "immensely commendable," and produced a "good result for the class" relative to the risks of bringing the case to judgement. A-7436/ECF7822:39.

Over several pages the district court considered, and then rejected, an assertion by some objectors that because this Court had found a structural conflict in simultaneous representation of both classes, Co-Lead Counsel must have committed an ethical violation for which they should not be compensated. A-7436-38/ECF7822:39-41.

The district court found that this Court's "conflict" ruling did not mean that Co-Lead Counsel had violated the New York Rules of Professional Conduct. A-7437/ECF7822:40. Although this Court had rejected the 2012 Settlement, it "'expressly d[id] not impugn the motives or acts of class counsel.'" A-7438/ECF7822:41 (quoting *Payment Card III*, 827 F.3d at 234). Nor did it criticize Co-Lead Counsel's "representation of the Rule 23(b)(3) class interests." *Id*. And the conflict with the injunctive-relief class had been sufficiently addressed "through the assignment of separate counsel" for each class. *Id*.

In addition, Co-Lead Counsel sought compensation reflecting a "percentage of the settlement fund secured for the Rule 23(b)(3) class"—*not* for the "relief previously secured for the (b)(2) class." A-7438/ECF7822:41. The present common fund existed

only for the operative Settlement, "*separate and apart* from the previously secured relief." *Id*. To adopt the objectors' contrary position would fail to acknowledge any of Co-Lead Counsel's efforts prior to 2016. *Id.*

Accordingly, the district court found that the fourth *Goldberger* factor supported the requested fee's approval. *Id*.

5. *Goldberger* factor 5: size of requested fee in relation to settlement fund.

The district court applied the fifth *Goldberger* factor by looking at Co-Lead Counsel's time and work in this case to ensure the award would not be a windfall, the unique circumstances of this case, and by comparing the percentage of the fund requested by Co-Lead Counsel—9.56%—to percentage awards that were approved in other antitrust settlements above $1 billion. A-7442/ECF7822:45; *see also id*. at A-7441/ECF7822:44 (given the Settlement Fund's sheer size, "there are relatively few cases that provide adequate comparisons"—but "several large antitrust settlements are nonetheless useful points of comparison, despite the small sample size").

Those comparative attorney-fee ranged from a low of 6.5%[20] to a high of 28.6% of their respective settlement funds, with many clustered around the 13% mark. A-

[20] The 6.5% was awarded in the *In re Visa Check* class action, which was presided over by then-Judge Gleeson, who also oversaw *this* litigation until 2014. In awarding Co-Lead Counsel a fee equaling 9.56% of the 2012 Settlement Fund, Judge Gleeson explicitly found that this litigation was "more challenging" than the *Visa Check*

7441-42/ECF7822:44-45. Based on these best-available comparators, as well as recognizing the "unique circumstances of this case," the district court concluded that Co-Lead Counsel's requested percentage "falls within a similar range of fees awarded in other multi-billion-dollar antitrust actions," and "aligns with the Second Circuit's sliding scale approach, and does not warrant a downward adjustment based on percentage alone." A-7442/ECF7822:45; *see also id*. at A-7443/ECF7822:46 (rejecting objectors' distinguishable comparators, and expressly "find[ing] that the requested percentage aligns with those percentages granted in other similar types of actions").[21]

6. *Goldberger* factor 6: public-policy considerations.

After noting that no class member had objected to the proposed fee on public-policy grounds, the district court concluded that public-policy considerations favored a "substantial award." A-7444/ECF7822:47.

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litigation and therefore justified a higher percentage award. *Payment Card II*, 991 F. Supp. 2d at 444. Judge Brodie relied in part on Judge Gleeson's assessment in her Fee Award in connection with the 2018 Settlement. *See, e.g.*, A-7425/ECF7822:28; A-7428/ECF7822:31.

[21] In addition to *Visa Check*, the district court compared Co-Lead Counsel's fee request to fee awards in another four antitrust cases with award percentages ranging from 13% to 28.6%. A-7441-42/ECF7822:44-45.

The district court found that on behalf of "millions of merchants," Co-Lead Counsel had brought a class action that "challeng[ed] an economic structure that has become entirely ubiquitous in our society"—but was a structure that the merchants believed was both illegal and "unfairly harms them." A-7445/ECF7822:48. Thus, the district court concluded, there is an "*enormous public policy interest* in bringing [such lawsuits]" that have "the potential to impact the way nearly all business is conducted in this country." *Id*. To accomplish that, there is also a public-policy interest in awarding fees that both "incentivize[] and attract[] capable counsel to bring such protracted and difficult lawsuits." *Id*.

7. A lodestar cross-check confirms the reasonableness of Co-Lead Counsel's fee.

Finally, to ensure the reasonableness of the fee as a percentage of the common fund, the district court performed a lodestar cross-check. A-7446-52/ECF7822:49-55. Harkening to this Circuit's precedents, the district court noted that a multiplier is "'typically'" applied to the lodestar figure to account for: (i) the litigation's risk; (ii) complexity of issues; (iii) the matter's contingent nature; and (iv) skill of the attorneys, as well as "'"other factors."'" *Id*. at A-7447/ECF7822:50. As this Court's *Goldberger* opinion advises, when used as a cross-check the documented hours "'need not be exhaustively scrutinized.'" *Id*.

The district court found that Co-Lead Counsel's proposed 2.5 multiplier resulting from a lodestar based on historical hourly rates "falls well within a range of multipliers that have been deemed acceptable, especially in complex actions." *Id.* (collecting cases). The court recognized that in undertaking "a crosscheck [it] need not heavily scrutinize the lodestar," but made "a slight downward adjustment of the lodestar ... based on its review of the post-2012 hourly rates submitted." A-7449/ECF7822:52.[22] The court found that the adjusted lower lodestar resulted in a multiplier that still fell within a generally acceptable range, noting that "Judge Gleeson previously approved a lodestar multiplier of 3.41" in this same case. A-7450-51/ECF7822:53-54.

The district court rejected an objector's argument that common-fund fee awards "'ought to be tethered ... to the basic lodestar,'" and the related argument that a straight lodestar would be presumptively reasonable. A-7446/ECF7822:49; *see also* A-7451/ECF7822:54 (objectors insist that lodestar "itself is presumptively sufficient"). In this Circuit when dealing with *common-fund* recoveries "as opposed to where fees are awarded pursuant to a fee-shifting provision, courts retain greater discretion to award multipliers of the lodestar." *Id.* (citing *Fresno Cnty. Emps' Ret.*

[22] The court for several reasons excluded the post-2012 time of the Friedman Law Group. *Id.* That exclusion isn't relevant to this appeal.

Ass'n v. Isaacson/Weaver Family Trust, 925 F.3d 63, 67 (2d Cir. 2019), *cert. denied*, __ U.S. __, 140 S. Ct. 385 (2019)).

The district court also rejected objectors' arguments that Co-Lead Counsel's lodestar couldn't reflect activities that also benefited the (b)(2) class or that were outside of the litigation's four corners, such as consulting with the DOJ in its investigation into Defendants' practices, or lobbying Congress in support of the Durbin Amendment. A-7451-52/ECF7822:54-55. These activities were properly included for purposes of the lodestar cross-check because they ultimately inured to the Class's benefit. *Id*.

The district court awarded Co-Lead Counsel 9.31% of the Settlement Fund. A-7452/ECF7822:55.[23]

8. The district court grants service awards to the Class Plaintiffs.

Concurrently with its Fee Opinion, the district court separately granted a motion for class-representative service awards ranging from $50,000 to $200,000. *See* A-7455-58/ECF7823 ("Service Award Order").[24]

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[23] That percentage equated to a dollar amount of $523,269,585.27. A-7453-54/ECF7822:56-57. The district court also granted Co-Lead Counsel's request for reimbursement of out-of-pocket expenses totaling $39,155,068.01. *Id*.

[24] The district court also granted reimbursement of the Class Plaintiffs' expenses, to which no objector appealed.

Class Plaintiffs supported their motion with individual declarations, detailing their activities undertaken in support of the litigation, and setting forth the time expended and out-of-pocket expenses borne to help advance the Class's cause, including document production and depositions.[25] In addition to typical litigation activities, several Class Plaintiffs had lobbied Congress and DOJ in support of merchant-friendly reforms to Visa's and Mastercard's rules.[26]

Based on this record, the district court found that Class Plaintiffs had "spent an enormous amount of time and resources ... over a decade" in fulfilling their duties, while certain of them "expended additional effort that far exceeded what an average class representative might do to advocate on behalf of the class." A-7456-57/ECF7823:3 (Class Plaintiffs weren't seeking seek additional compensation beyond previous award in 2012 Settlement, despite devoting significant additional time following remand).

[25] *See* ECF7472-3 through ECF7472-10 (declarations attached as exhibits to ECF7472).

[26] ECF6385-8:¶11; ECF6385-1:¶4; ECF6385-7:¶66; ECF6385-3:¶33.

D. The district court denies fees and service awards to R&M Objectors for not making any substantial contributions to improving the Settlement.

A group of merchants calling themselves the "Retailer and Merchant Objectors" ("R&M Objectors") were among the objectors to the 2012 Settlement. Fast forward several years: in connection with *this* Settlement, R&M Objectors sought attorney fees for their counsel and service awards for themselves—claiming that they had contributed to this Court's reversal of the 2012 Settlement. ECF7474.

The district court denied both requests in a 23-page Memorandum & Order. A-7473-95/ECF7836.

Regarding attorney fees, the district court noted that although successful objectors may be entitled to an attorney fee, such awards are proper only when the objector has made substantial contribution to improving the settlement. A-7487-88/ECF7836:15-16. That wasn't the case here: earlier, the court repeated Magistrate Orenstein's findings that *other* objectors' counsel had performed the majority of work on appeal from the 2012 Settlement, and was unable to identify any significant contribution that R&M Objectors had made. A-7482-83/ECF7836:10-11 (magistrate's report and recommendation labeled R&M Objectors' efforts "'cumulative,'" and found they hadn't "'made any difference to the result in the circuit court'"). The district court further reasoned that attorney fees for R&M

Objectors were improper because they were not the party that raised the issues leading this Court to reverse the 2012 Settlement. A-7489-90/ECF7836:17-18.

III. STANDARD OF REVIEW

This Court "'reviews a district court's decision to grant or deny an award of attorneys' fees for abuse of discretion, reviewing de novo any rulings of law.'" *Fresno Cnty.*, 925 F.3d at 67.

The abuse-of-discretion standard—"already one of the most deferential standards of review—takes on special significance when reviewing fee decisions." *Goldberger*, 209 F.3d at 47. The district court, "'which is intimately familiar with the nuances of the case, is in a far better position to make [such] decisions than is an appellate court, which must work from a cold record.'" *Id*. at 48.

A district court abuses its discretion "only if the [] court '"bases its ruling on a mistaken application of the law or a clearly erroneous finding of fact."'" *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 411 F.3d 384, 388 (2d Cir. 2005); *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 169 (2d Cir. 2001). And, to hold that a district court's "'factual finding is "clearly erroneous,"'" this Court "'must be left with the definite and firm conviction that a mistake has been committed.'" *United States v. Murtha*, 803 F. App'x 425, 427 (2d Cir. 2020).

IV. SUMMARY OF THE ARGUMENT

The district court was well within its discretion when it awarded Co-Lead Counsel 9.31% of the common-fund Settlement, confirmed the Fee Award's reasonableness with an optional lodestar cross-check, and awarded Class Plaintiffs service awards. Binding precedents and the fulsome, 14-year record all support the district court's discretionary decision.

The Appellants disagree, but each of their arguments fails given the district court's reasoned explication of factual findings and legal authorities.[27]

Although Appellants acknowledge the district court's discretion to award a reasonable percentage fee from the common fund while applying this Court's seminal *Goldberger* factors, they only pay lip service to that tried-and-true method. Gnarlywood makes Co-Lead Counsel's *lodestar* the central focus of its Fee Award attacks—claiming the district court should have eliminated any lodestar not expended *exclusively* for the (b)(3) class's benefit, and that only post-2016-remand lodestar can be counted. R&M Objectors make much the same point, arguing that the district court should have reviewed each of Co-Lead's time entries over the litigation's life span.

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[27] The Appellants contesting the district court's Fee Opinion, Service Award Order, and denial of their *own* fees and service awards comprise: (i) Kevan McLaughlin (No. 20-342(Con)); Gnarlywood LLC and Quincy Woodrights LLC (No. 20-341(Con)) along with Unlimited Vacations, Cruises, Inc. and USA Pets LLC (No. 20-343(Con)) (together "Gnarlywood"); and R&M Objectors (No. 20-304(Con)).

And McLaughlin repeatedly insists that an unenhanced lodestar represents a reasonable fee in this common-fund recovery.

That singular focus on lodestar principles contradicts this Court's consistent fee-award jurisprudence. In this Circuit, courts considering common-fund fees have the discretion to choose *between* a lodestar calculation or a percentage-of-the-fund. *Fresno Cnty.*, 925 F.3d at 72. It is equally well-established that, when using lodestar to cross-check a percentage's reasonableness, the district court need not scrutinize individual time entries. *Goldberger*, 209 F.3d at 50. And yet that enervating, cumbersome task is what the Appellants wrongly insist the district court should have undertaken. *Id*. ("where used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized").

Equally misguided is Appellants' argument that *none* of Co-Lead Counsel's pre-remand time warrants inclusion in the lodestar cross-check because we also represented the (b)(2) class at that time. Appellants thus seek to obliterate 11 years of intensive litigation efforts on behalf of *both* classes by proposing that: (i) the (b)(2) and (b)(3) classes were fatally-adverse clients that entire time; and (ii) Co-Lead Counsel shouldn't be rewarded for that (supposedly) adverse representation by including any of that time in the lodestar cross-check calculation.

The district court strongly rejected those propositions.

It repeated the truism, stated by this Court, that "it is not uncommon for one set of counsel to represent multiple classes." A-7422/7822:25; *see also Payment Card III*, 827 F.3d at 235. It found that "the majority" of Co-Lead Counsel's work leading up to the 2012 Settlement had been aimed *generally* at proving Defendants' antitrust violations, "regardless of the particular remedy sought or class represented." A-7421/ECF7822:24. There was "no convincing evidence" in the record that Co-Lead Counsel's efforts prior to the 2012 Settlement "did not benefit the Rule 23(b)(3) class." A-7422/ECF7822:25. And the fees awarded represented a percentage of the damages fund, and not "a percentage of any value of injunctive relief"—which fact *this* Court had recognized. *Id*.

Based on these findings, the district court expressly "reject[ed] the notion that 'there was a lot of time spent here that did not help the class.'" A-7421/ECF7822:24. To deny Co-Lead Counsel fees for their pre-2016 efforts would wrongly "punish" counsel "for work that was reasonable for them to do at the time *for both classes*." A-7422/ECF7822:25. Those conclusions, and the findings supporting them, warrant this Court's deference.[28]

[28] By demanding that Co-Lead Counsel's pre-remand efforts be deemed a nullity, that's just another way of saying Appellants will get the full benefit of the multi-billion-dollar Settlement without having to compensate the efforts made securing it. It's black-letter law that *that* inequitable result is forbidden. *Fresno Cnty.*, 925 F.3d at

So do the district court's additional analyses of the lodestar cross-check.

The percentage fee awarded "may exceed the lodestar," and the reasonableness of that lodestar "can be tested by the court's familiarity with the case." *Goldberger*, 209 F.3d at 50. The calculated lodestar, in turn, can be enhanced to reflect the attorneys' performance, and various litigation risks. *Id*. at 47.

That's exactly what happened here, given the 14-year record and the district court's familiarity with the litigation players and their efforts, as well as with the enormous risks—both those existing at the matter's outset and continuing throughout the litigation. The court supplemented that knowledge with a comparison of *other* multipliers in similar complex actions, and concluded that the multiplier here "falls well within a range of multipliers that have been deemed acceptable." A-7447/ECF7822:50; *see also Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 123 (2d Cir. 2005) (affirming a "reasonable" 3.5 multiplier, and noting that "'multipliers of between 3 and 4.5 have become common'").

The Appellants' misplaced focus on unenhanced "lodestar" to the exclusion of a reasonable percentage fee and the factors justifying it reaches its zenith with several of McLaughlin's arguments.

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68 ("'persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense'").

He harkens to lodestar awards in *fee-shifting* matters, where risk enhancements are disfavored. Page Proof Brief of Appellant Kevan McLaughlin ("McLaughlin Brf.") at 26-28. But McLaughlin's argument was recently rejected by this Court. *See City of Birmingham Ret. and Relief Sys. v. John W. Davis,* 806 F. App'x 17, 18 (2d Cir. 2020) ("The presumption in favor of the lodestar and the restrictions on lodestar multipliers that apply to fee awards made pursuant to fee-shifting statutes *do not apply in common fund cases* like this one."); *accord Fresno Cnty.*, 925 F.3d at 67-68.

McLaughlin also says that this Court regards the lodestar itself as "the presumptively reasonable fee" (McLaughlin Brf. at 24 (citing *Fresno Cnty.*, 925 F.3d at 72)), but *Fresno County* actually holds the opposite—distinguishing presumptive unenhanced lodestars in fee-shifting matters from lodestars in common-fund matters: the latter "can yield a fee that is less than, equal to, *or greater than* the lodestar fee." 925 F.3d at 68.

McLaughlin really stretches when he charges that the district court erred in analyzing lodestar risk enhancement by looking to pre-*Fresno County* fee-award cases. McLaughlin Brf. at 36. He claims that *Fresno County* made it clear that *contingency risk* alone, and "not any other *Goldberger* risk factors," figures into lodestar multipliers. *Id*. at 36-37.

He's wrong. *Fresno County* did not—and could not—overrule *Goldberger*. *See 4 Pillar Dynasty LLC v. N.Y. & Co., Inc.*, 933 F.3d 202, 211 n.8 (2d Cir. 2019) ("We are bound by the decision of prior panels 'until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court.'"). *Goldberger*, as well as both its descendants and its progeny, remain good law. The district court utilized them to conclude, based on seven pages of analysis and record-based findings, that the litigation *risk* here undeniably supported a cross-checked lodestar multiplier. A-7425-31/ECF7822:28-34.

The remainder of the district court's rulings also are supported by record evidence and the application of precedent.

The district court's grant of service awards to the Class Plaintiffs was not unusual, and well within its discretionary powers. *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 333 n.65 (3d Cir. 2011) ("'[i]ncentive awards are not uncommon in class action litigation and particularly where ... a common fund has been created for the benefit of the entire class'"). That's especially true in this Circuit. *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 200 (S.D.N.Y. 1997) (in the Second Circuit, courts "have, with some frequency, held that a successful Class action plaintiff, may … apply for and, in the discretion of the Court, receive an additional award, termed an incentive award"). In

doing so, the district court based its decision on the record, relevant case law, and comparable awards in other high-stakes cases. A-7456/ECF7823:2.

Appellants attack the awards on two fronts, but neither succeeds.

McLaughlin, despite conceding that service awards are routinely granted, insists that two Supreme Court decisions from the late 1800s must mean the awards are prohibited. McLaughlin Brf. at 50-53. But *this* Court has already considered McLaughlin's precise argument based upon those decisions—and roundly rejected it. *See Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 96 (2d Cir. 2019), *cert. denied*, __ U.S. __, 140 S. Ct. 677 (2019) ("The cases cited by [objector] for this proposition are inapposite."). With *Melito* fatal to McLaughlin's argument, he suggests that the panel there didn't "engage the legal issues" sufficiently (McLaughlin Brf. at 53), but that suggestion fails: *Melito* remains this Court's binding precedent. *In re Jaylaw Drug, Inc.*, 621 F.2d 524, 527 (2d Cir. 1980) ("we see no sufficient reason to depart from our decision in [a prior case] even if this panel had the power to do so, which it does not").

Unlike McLaughlin, Gnarlywood doesn't oppose the service awards themselves, but instead disputes the *amounts* awarded. It argues that they should reflect only reasonable time expended, and be capped at no more than ten times the

party's claim. Page Proof of Appellants Gnarlywood, LLC, et al. ("Gnarlywood Brf.") at 61. Neither argument enjoys legal support.

The first ignores that service awards aren't limited to lost wages and out-of-pocket expenses except in the narrow context of private federal *securities* litigation. *Cf.* 15 U.S.C. §78u-4(a)(4). That statutory limit doesn't apply to antitrust actions. And the second uses an arbitrary, made-up formula that doesn't acknowledge myriad factors ordinarily considered in service-award calculations—including the representative's time and effort, "other burdens sustained," any "special circumstances including ... personal risk," and the "ultimate recovery." *Roberts*, 979 F. Supp. at 200. These are precisely the factors that the district court considered in this case (A-7455-58/ECF7823), and which deserve this Court's deference. *Duane Reade*, 411 F.3d at 388.

Finally, R&M Objectors haven't shown that the district court abused its discretion when it denied them fees, expenses, and service awards. While class-action objectors on occasion *may* be entitled to a fee award, that's only when they've made a "proper showing" that their efforts were "a substantial cause" of improving a settlement. *In re Petrobras Sec. Litig.*, 786 F. App'x 274, 277-78 (2d Cir. 2019); *In re Holocaust Victim Assets Litig.*, 424 F.3d 150, 156-57 (2d Cir. 2005).

That showing wasn't made here. *See, e.g.*, A-7487/ECF7836:15 (R&M Objectors "'were not a "substantial cause"'" of this Court's overturning the 2012 Settlement.). And the district court supported that holding with detailed findings that R&M Objectors haven't shown were clearly erroneous. A-7489-90/ECF7836:17-18. Nor were R&M Objectors a substantial cause of the benefits conferred on the (b)(3) class by the operative Settlement. A-7490-92/ECF7836:18-20. Instead, that Settlement's increased value arose out of Co-Lead Counsel's continuing efforts after remand—efforts "*which R&M Objectors had no involvement in*." A-7492/ECF7836:20. Each of these findings and conclusions are amply supported by the record, and thus not an abuse of discretion.

In sum, the abuse-of-discretion standard that applies here, admittedly "already one of the most deferential standards of review—takes on special significance when reviewing fee decisions." *Goldberger*, 209 F.3d at 47. Given the extensive record, the district court's familiarity with the parties and issues, and relevant case law, the resulting Fee Award, Class Plaintiffs' service awards, and denials of certain Appellants' own fees and service awards, should be affirmed.

V. ARGUMENT

A. The district court acted within its broad discretion in awarding Co-Lead Counsel 9.31% of the common-fund Settlement.

This Court has long-recognized that "attorneys whose efforts created [a common] fund are entitled to a reasonable fee—set by the court—to be taken from the fund." *Goldberger*, 209 F.3d at 47. Those attorneys should receive a reasonable fee to "prevent[] unjust enrichment of those benefitting from a lawsuit without contributing to its cost." *Id*. Whether applying the percentage-of-the-fund or lodestar method, a court considers the following factors to calculate a reasonable fee: "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation ...; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." *Id.* at 50.

As detailed above, that is precisely the analysis the district court performed here, supported by a detailed examination of the record, in awarding Co-Lead Counsel fees equaling 9.31% of the common fund.

Appellants mostly ignore the district court's thorough analysis and detailed findings applying the *Goldberger* factors. They do not seriously challenge the result achieved for the (b)(3) damages class through Co-Lead Counsel's tireless efforts—

i.e., an approximately $5.6 billion settlement, comprising the largest-ever class action antitrust settlement in history. Nor do they undercut the district court's determination that the litigation's risks and complexity were enormous—failing to show that any of the court's factual findings supporting that determination were clearly erroneous, such as:

> Every aspect of the case appears to be noteworthy ... the case involved uncertainty as to success and complex legal antitrust questions that created a certain amount of risk. In addition, notable factual and legal developments took place during the course of the action that increased the complexity, some of which resulted in the filing of amended pleadings, including the restructurings and initial public offerings of Mastercard and Visa, the Supreme Court's decision in *Ohio* [, 138 S. Ct. 2274], requiring that harm now be considered in a two-sided market, and changes to Mastercard's and Visa's network rules via a consent decree with the [DOJ], and the Durbin Amendment to the Dodd-Frank Act.

A-7423/ECF7822:26.

Similarly, Appellants do not dispute that from the outset Class Plaintiffs faced three significant legal risks: (i) a prior opinion finding that interchange fees *were* lawful; (ii) the possibility that class merchants would be deemed to *not* be direct purchasers under *Illinois Brick*; and (iii) that arguably the class's claims had already been released in a prior settlement. A-7428-29/ECF7822:31-32.

Other risks included whether the methodology for setting interchange fees is price-fixing, and that this case was filed without the benefit of a government investigation. *Id*. As Judge Gleeson had noted, "[t]he more progress the merchants

make—through private lawsuits, government cases, and legislation—the more difficult it becomes to establish an antitrust violation." *Payment Card II*, 991 F. Supp. 2d at 444. Plainly, any of the litigation risks could have ended this case with no recovery for the Class or counsel compensation. Appellants ignore those grave risks, and thus haven't challenged the district court's discretionary conclusions about how those risks figured into Co-Lead Counsel's Fee Award.

Appellants also disregard that the touchstone of a fee award in this Circuit is *reasonableness*. *Goldberger*, 209 F.3d at 47. It is not, as some erroneously posit, "the minimization of attorneys' fees." *See* Gnarlywood Brf. at 20. Appellants' attacks on the court-awarded fee are thus disconnected from binding precedent and the circumstances of this case and, ultimately, serve no purpose other than to attempt to punish Co-Lead Counsel in furtherance of their clear objective to minimize attorneys' fees as much as possible, rather than reward counsel for the result achieved and counsel's time and effort.

Appellants acknowledge that the district court had discretion to calculate the fee based on a percentage of the common fund guided by the *Goldberger* factors. *See, e.g.*, Gnarlywood Brf. at 38-39; McLaughlin Brf. at 23. Nevertheless, they disregard the court's decision to use the percentage-of-the-fund method and the *Goldberger*

factors, and instead make Co-Lead Counsel's *lodestar* the central focus of their fee-award criticisms.

Gnarlywood argues that the court should have eliminated any lodestar not expended exclusively for the benefit of the (b)(3) class, but also asserts that Co-Lead Counsel's fee should be limited to no more than their lodestar *after* the case was remanded to the district court in 2016. *See, e.g.*, Gnarlywood Brf. at 45-49.

That's incorrect under this Court's precedents.

Having calculated the fee using the percentage-of-the-fund methodology, the district court was not required to closely scrutinize the submitted lodestar as it would have done had it calculated fees using the lodestar methodology. *Goldberger*, 209 F.3d at 50 ("Of course, where used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court."). Moreover, as explained below, the district court correctly acted within in its discretion when it rejected arguments to exclude Co-Lead Counsel's lodestar prior to remand from this Court in 2016 or, alternatively, to exclude any time that benefitted the (b)(2) class but (purportedly) not the (b)(3) class.[29] In disagreeing with the fee awarded, Appellants

[29] The district court had before it detailed descriptions of *all* of Co-Lead Counsel's activities. *See, e.g.*, Co-Lead Counsel's declarations at A-2956-65/ECF6366-2 and A-4031-126/ECF7257-3. Further, Co-Lead Counsel volunteered to produce time records should the court find that necessary.

fail to establish that the district court abused its discretion in calculating that fee or that any of its well-supported findings or reasoning were clearly erroneous.

1. The district court was not required to scrutinize Co-Lead Counsel's time entries when it calculated fees using a percentage-of-the-common-fund methodology.

As this Court has recognized, the percentage-of-the-fund method dispenses with the "'cumbersome, enervating, and often surrealistic process of lodestar computation.'" *Goldberger*, 209 F.3d at 50. It is well-established that, when using lodestar as a cross-check, the district court need not scrutinize individual time entries. *Id.*; *Lunday v. City of Albany*, 42 F.3d 131, 134 (2d Cir. 1994). The district court therefore acted within its discretion when it forewent this gargantuan, unnecessary task.[30] The time-and-labor *Goldberger* factor assesses the totality of Co-Lead Counsel's efforts—not a task-by-task review.

But that microscopic review is precisely what Gnarlywood demands, arguing the district court abused its discretion "by allowing inclusion of time spent on behalf of the Rule 23(b)(2) class" as part of its analysis under the time-and-labor *Goldberger* factor. Gnarlywood Brf. at 40. R&M Objectors similarly argue that the district court erred by awarding attorney fees without reviewing individual time entries from Co-

[30] Given the 630,000-plus hours that was spent litigating this case on the Class's behalf, it is difficult to imagine the massive expenditure of district-court time and resources that would be required to undertake Gnarlywood's suggested examination.

Lead Counsel over this litigation's life span. *See*, *e.g.*, Page Proof Brief for Objector-Appellant R&M Objectors ("R&M Brf.") at 23-25, 29.[31]

They're wrong. Appellants' argument impermissibly substitutes a burdensome, searching inquiry for what's supposed to be a *less*-intensive cross-check into the overall reasonableness of the percentage fee itself. *Kornell v. Haverhill Ret. Sys., et al.*, 790 F. App'x 296, 298 (2d Cir. 2019) (where used "'as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court'"); *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306 (3d Cir. 2005) ("The lodestar cross-check calculation need entail neither mathematical precision nor bean-counting."). Instead, the claimed lodestar's reasonableness "can be tested by the court's familiarity with the case (as well as encouraged by the strictures of Rule 11)." *Goldberger*, 209 F.3d at 50. The district court here was fully familiar with Co-Lead Counsel's efforts, and thus its analysis satisfied *Goldberger*.

Gnarlywood's argument is also unsupported by *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Gnarlywood Brf. at 41 (painting Co-Lead Counsel's pre-remand efforts the equivalent of "partial or limited success"). Gnarlywood points out that *Hensley* requires that "'the fee applicant bears the burden of establishing entitlement to an

[31] R&M Objectors have waived this argument. *See infra* §V.E.

award and documenting the appropriate hours expended'" as between separate claims or clients. *Id*. at 43.

That's an inapt comparison. Unlike this common-fund case, *Hensley* concerned the award of a reasonable fee for a prevailing party under a *fee-shifting* statute. *Hensley*, 461 U.S. at 433. In calculating that sort of fee using the lodestar methodology, the Supreme Court recognized the unremarkable proposition that hours not "'reasonably expended'" for that litigation should be excluded from the lodestar. *Id*. at 434. The Supreme Court also noted that hours attributable to an unsuccessful claim shouldn't be included in a fee award where that claim is obviously unrelated to the successful claim. *Id*. at 435.

However, as the Supreme Court further explained, the fee award should include *all* hours expended in a litigation where multiple claims involve a core set of facts or related legal theories—even if one of the claims is unsuccessful:

> In other cases, the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. [Accordingly,] [m]uch of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.

Id.

That is precisely what the district court did here—recognizing that Co-Lead Counsel's pre-2016 time was expended on classwide claims involving common facts and related legal theories:

- "under the circumstances of this case, reducing Class Counsel's lodestar calculation in such a manner is not warranted" (A-7420/ECF7822:23);
- "the majority of Class Counsel's work leading up to the 2013 Settlement Agreement would have been aimed generally at proving antitrust violation, regardless of the particular remedy sought or class represented" (A-7421/ECF7822:24);
- "Class Counsel should not be punished for work that was reasonable for them to do at the time for both classes; indeed, it is not uncommon for one set of counsel to represent multiple classes, and the Second Circuit acknowledged as much" (A-7422/ECF7822:25);
- "there is no convincing evidence to support a conclusion that Class Counsel's effort in trying to prove its case prior to the 2013 Settlement Agreement did not benefit the Rule 23(b)(3) class" (*id.*);
- "as the Second Circuit previously recognized in its decision in the appeal of this case, the fees awarded are sought and will be awarded as a percentage of the damages fund, and not as a percentage of any value of injunctive relief, rendering any argument regarding Class Counsel's efforts towards the Rule 23(b)(2) class unpersuasive" (*id.*); and
- based on these findings, the court explicitly "reject[ed] the notion that 'there was a lot of time that was spent here that did not help the class'" (A-7421/ECF7822:24).

Gnarlywood ignores, and thus fails to challenge, the district court's findings and rationales.

Instead, it makes unfounded assumptions, such as claiming that Co-Lead Counsel K. Craig Wildfang's and the Anti-Steering Group counsel's time was spent *exclusively* on behalf of the (b)(2) class. Gnarlywood Brf. at 42-44.

Gnarlywood's assumption and argument both fail. It misapprehends the difference between *proving* an antitrust violation and securing *relief* for that antitrust violation. As the district court correctly found, Co-Lead Counsel's time and effort were justifiably expended attempting to prove the alleged antitrust violations based on a core set of facts and related legal theories that applied to *both* classes. If Class Plaintiffs had done so at trial, then (b)(3) class members would recouped damages for past harm, while (b)(2) class members would have been entitled to injunctive relief acknowledging the threat of future harm. Thus, Co-Lead Counsel's efforts benefitted both classes, and the district court's explicit finding deserves deference unless clearly erroneous. *Duane Reade*, 411 F.3d at 388.

There's no error in the district court's finding. The related litigation efforts undertaken included: (i) lobbying the government in support of the Durbin Amendment to the Dodd-Frank Act; (ii) assisting the DOJ to understand the record in this case and anticompetitive effects of Visa's and Mastercard's rules—which helped

the DOJ to obtain consent decrees with Visa and Mastercard to change certain rules, the modification of the no-surcharge rule and other rules in this case (rules modifications which remain in place today); (iii) filing amicus briefs; and (iv) the sheer mass of other work supporting this case's litigation efforts. Those efforts and the relief obtained thus benefitted *all* merchants—including (b)(3) class members.

And yet Gnarlywood suggests it should receive these benefits gratis, demanding that Co-Lead Counsel's fee be reduced by the amount of time spent achieving those benefits, and have that time stricken from their lodestar as if it had never been spent. That's hardly equitable, and contradicts long-settled common-fund principles. *See, e.g.*, *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (common-fund "doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense"); *Goldberger*, 209 F.3d at 47 ("The rationale for the doctrine is an equitable one."). It's also inconsistent with the truism that a reasonable fee should be determined from the plaintiffs' perspective, and thus "must reflect 'the actual effort made by the attorney to benefit the class….'" *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.* ("*Merck-Medco*"), 504 F.3d 229, 249 (2d Cir. 2007).

Gnarlywood's contention "that courts have denied attorneys' fees for efforts aimed at pursuing collateral actions that don't confer a benefit on the class" is also

premised on inapposite cases. In both cases, the result turned on the unique fact that the class didn't benefit from work done by *another* counsel, and neither one held that a court abuses its discretion by considering *all* of counsel's time rather than artificially segregating the time between damages and injunctive relief claims.

In *Churchill Village, L.L.C. v. Gen. Elec.*, 361 F.3d 566 (9th Cir. 2004) the same counsel did not represent two classes simultaneously in the same action. To the contrary, one counsel had filed two putative class-action cases in Florida; they were unsuccessful. *Id*. at 577-78. When a separate class action brought in California by different counsel settled, the Florida counsel then sought fees under a California fee-shifting statute. *Id*. at 578. Florida counsel were denied fees because they lacked standing under that statute to be awarded fees, as they neither represented a successful party nor were themselves a successful party in the California action. *Id*. at 577-80. There's simply no comparison between *Churchill Village* and the present matter.

Wininger v. S.I. Mgmt., L.P., 301 F.3d 1115, 1125 (9th Cir. 2002) is equally inapposite. In *Wininger*, an objector sought fees for, *inter alia*, objecting to plaintiffs' counsel's fee request. Although the court awarded the objector a lodestar fee, it excluded from that calculation all time "expended in unsuccessful efforts unrelated to their success challenging Plaintiffs' counsel's fee request…." *Id*. at 1125.

Unlike *Churchill Village* or *Wininger*, Co-Lead Counsel were not pursuing separate, unrelated cases in other jurisdictions, or challenging a fee request. To the contrary, since this case's 2005 inception, Co-Lead Counsel have been litigating on behalf of merchants to prove that Defendants' alleged conduct violated the antitrust laws. Co-Lead Counsel successfully settled this case for approximately $5.6 billion (after reduction for opt-outs), and the injunctive relief they previously negotiated with Defendants remains in place. The other work they did, including lobbying the government and assisting the DOJ, resulted in industry changes that benefitted all merchants, including members of the (b)(3) class. As the district court recognized, this Court has noted that "'the fee awarded must reflect "the actual effort made by the attorney to benefit the class."'" A-7416/ECF7822:19 (quoting *Merck-Medco*, 504 F.3d at 249). Thus, the district court acted within its discretion by considering the entirety of Co-Lead Counsel's lodestar and effort expended as a cross-check on the percentage-of-the-fund awarded while determining a reasonable attorneys' fee.

2. Co-Lead Counsel's previous representation of both classes provides no reason to reduce the fee.

Gnarlywood asserts that the district court abused its discretion in calculating the Fee Award because: (i) it ignored Co-Lead Counsel's (supposed) "repeated ethical lapses"; and (ii) the two classes were fatally adverse clients during 2005-2016. Gnarlywood Brf. at 36, 49.

The district court expressly rejected these assertions, supported by this Court's prior opinion, case law, and the extensive record showing Co-Lead Counsel's wide-ranging efforts that benefitted both classes.[32]

a. Co-Lead Counsel's conduct from the time of the matter's inception onward was ethical.

Gnarlywood's "ethical lapses" argument is largely predicated on the premise that Co-Lead Counsel's representation of both classes during that earlier period was a *per se* ethics violation. Gnarlywood Brf. at 47-49.

But the premise is a false one: addressing it below, the district court found that the objectors had "failed to establish that Class Counsel has committed *any* ethical violation of the New York Rules of Professional Conduct based on the Second Circuit's ruling that a conflict of interest existed in the unitary representation of the Rule 23(b)(3) and Rule 23(b)(2) classes" at the settlement stage. A-7437/ECF7822:40. Nor did *this* Court breathe one word about "ethics" or "ethical lapses" when it remanded the prior fee decision. *See generally Payment Card III*, 827 F.3d 223.

[32] Gnarlywood makes a particularly scurrilous suggestion relegated to a footnote: it insists that Co-Lead Counsel only included both (b)(2) and (b)(3) classes in the original complaint in order to maximize their fees (if successful). Gnarlywood Brf. at 49 n.18. The Court should ignore this personal attack based on nothing more than *ipse dixit*.

On appeal, Gnarlywood still doesn't cite any New York Rule of Professional Conduct that was allegedly violated, and thus fails to show the district court's findings were clearly erroneous. Instead, Gnarlywood casually accuses Co-Lead Counsel of an ethics violation while relying on an inapposite out-of-Circuit decision. Gnarlywood Brf. at 48 (citing *Rodriguez v. Disner*, 688 F.3d 645 (9th Cir. 2012)).

That reliance is misplaced. It was undisputed in *Rodriguez*—even by the challenged law firm itself—that class counsel *had* committed an ethical violation under California's rules of professional conduct. *Rodriguez*, 688 F.3d at 656 ("McGuireWoods does not dispute that its representation of conflicting interests constituted an ethical violation"). At the case's inception, the *Rodriguez* class counsel had entered into retainer agreements with class representatives that tied the level of incentive rewards later requested to various monetary settlement amounts—thus engaging in willful, affirmative misconduct that created an irreconcilable conflict of interest. *Id*. at 656-57. Those agreements had not been disclosed to either the court or the class. *Id*. at 657-58 ("McGuireWoods took no steps 'to disclose their agreement to the court, and to the class,' in violation of its 'fiduciary duties to the class and duty of candor to the court.'"). Little wonder, then, that the Ninth Circuit agreed that the conflict of interest manufactured by the law firm was "knowing and willful" and egregious, and fees were correctly denied. *Id*. at 657-58.

By contrast, the conflict of interest here was neither fundamental nor created by Co-Lead Counsel through improper conduct; indeed, everyone knew that Co-Lead Counsel was dedicated to representing *both* classes from the case's inception. *See* §II.A. *supra* (cataloguing Co-Lead Counsel's extensive efforts on behalf of both classes over several years, including efforts that benefitted only (b)(2) class members). That unitary representation wasn't *per se* improper—as this Court was careful to point out. *See Payment Card III*, 827 F.3d at 235 ("None of this is to say that (b)(3) and (b)(2) classes cannot be combined in a single case, or that (b)(3) and (b)(2) classes necessarily and always require separate representation.").

Thus, the district court recognized that Co-Lead Counsel had not been ethically suspect in undertaking years of effort on behalf of both classes. Instead, given the circumstances of this case, it "would be unjust, and would penalize counsel for not predicting exactly what turns the case would take" to *not* acknowledge or compensate Co-Lead Counsel for their "work completed up to and including 2016." A-7438/ECF7822:41.

That finding is not clearly erroneous, and supports the district court's discretionary decision to not let Co-Lead Counsel's reasonable fee request be undermined by a conflict of interest that arose later in connection with the 2012 Settlement.

b. Traditional litigation-conflict rules don't apply in class actions.

Gnarlywood implies that Co-Lead Counsel's previous simultaneous representation of the (b)(2) and (b)(3) classes at the case's inception made those two classes litigation adversaries.

But the implication is patently wrong, for when this case was commenced the membership of the two classes was virtually identical.[33] Moreover, had this case gone to trial rather than reach a settlement in 2012, the jury's determination of whether Defendants' conduct violated the antitrust laws would have applied equally to *both* classes. No litigation conflict would have arisen from Co-Lead Counsel continuing to represent both classes at a trial proving the alleged antitrust violations.

Moreover, the litigation *context* surrounding this lawsuit—it being a class action, versus an individual action—matters. As the district court recognized, in this Circuit "'the traditional rules concerning conflict-free representation, applicable in non-class lawsuits, "should not be mechanically applied to the problems that arise in the settlement of class action litigation."'" A-7437/ECF7822:40 (quoting *In re*

[33] When this case was commenced every member of the (b)(2) class also belonged in the (b)(3) class. The only difference between the two classes had to do with timing: merchants who accepted Visa or Mastercard on January 1, 2004 *but then ceased accepting* those cards before this litigation commenced were members of the (b)(3) class only. Naturally, those merchants had only damages claims—but not injunctive ones.

Austrian & German Bank Holocaust Litig., 317 F.3d 91, 102 (2d Cir. 2003)); *see also In re Agent Orange Prod. Liab. Litig.*, 800 F.2d 14, 19 (2d Cir. 1986) (same).

Gnarlywood ignores these precedents. Instead, it asserts that under this Court's decision in *Silbiger v. Prudence Bonds Corp.*, 180 F.2d 917 (2d Cir. 1950), the settlement-related conflict of interest means that Co-Lead Counsel cannot be compensated for *any* of their pre-2016 time and effort spent on behalf of both the (b)(2) and (b)(3) classes. Gnarlywood Brf. at 47.

That assertion is misplaced, for at least three reasons.

First, *Silbiger* is consistent with this Court's precedents cautioning that conflict rules cannot be applied mechanically to class-action settlements. In that case, attorney Silbiger had been granted a fee award out of a bankruptcy reorganization despite having represented multiple clients with adversarial financial interests centering on two series of corporate bonds. *Silbiger*, 180 F.2d at 919-21. One of Silbiger's clients held only one of the two bond types at issue in the reorganization, and thus "was *certain to lose* by the success" of Silbiger's efforts on behalf of the second group of bondholders. *Id*. at 920. Unsurprisingly, this Court held that Silbiger was conflicted, as his duty extended to *both* categories of bondholders he represented. *Id*. The remedy for Silbiger's stark conflict was to reduce his fee by at least one-third—which reduction this Court left to the district court's discretion. *Id*. at 921.

Unlike the unique circumstances in *Silbiger*, here the two classes are not zero-sum adversaries where a dollar secured for one reduces the other's recovery by the same dollar. Indeed, a finding of liability through Co-Lead Counsel's efforts would have benefitted both classes equally. No one has suggested that Co-Lead Counsel couldn't have adequately represented both classes through a trial to a final disposition; it was only in the unique context of a *settlement*-certified class that the conflict arose.

Second, the (b)(2) class is not responsible for paying any fees to Co-Lead Counsel, despite the extensive work done on their behalf pre-2016. Instead, as the district court found, the fees are to be paid from of a common fund that "exists for the Superseding Settlement Agreement, *separate and apart* from the previously secured relief, and to not acknowledge or compensate Co-Lead Counsel for any work completed up to and including 2016 … would be unjust." A-7438/ECF7822:41. That correct finding further bolsters the district court's discretionary conclusion.

Finally, although Gnarlywood advocates the complete denial of any pre-2016 fees, that draconian step ignores that "[f]ee forfeiture is an equitable remedy that requires careful consideration of all the relevant circumstances." *Austrian & German Bank Holocaust Litig.*, 317 F.3d at 102. The "relevant circumstances" here include the fact that Co-Lead Counsel labored for years (and spent tens of millions of dollars in expenses and lodestar) on behalf of *both* classes prior to 2016, with their efforts at

the time benefitting *both* classes—and the district court carefully considered as much. *See* A-7421/ECF7822:24 ("the majority of Co-Lead Counsel's work leading up to" the initial settlement "would have been aimed generally at proving an antitrust violation, regardless of the particular remedy sought or class represented"); *see* A-7422/ECF7822:25 (to deny pre-2016 fees would be to wrongly "punish[] [Co-Lead Counsel] for work that was reasonable for them to do at the time for both classes").

These findings warrant deference, and Gnarlywood hasn't demonstrated that they are erroneous. *Duane Reade*, 411 F.3d at 388.

3. This case posed significant risk of non-recovery from its inception, supporting the reasonableness of the Fee Award.

As detailed *supra*, this case was rife with risk from the start. Some, but not all, of those tabulated risks included:

- "'[w]hen the litigation began in 2005, only one court had ruled on an antitrust challenge to the manner in which interchange rates are set, and it had found in favor of the defendant'" (A-7428/ECF7822:31);
- "at the time of filing, Plaintiffs faced challenges under antitrust standing grounds pursuant to *Illinois Brick* [431 U.S. at 736]" (*id.*);
- "Class Counsel initiated this case on their own, without the benefit of a prior government investigation" (A-7429/ECF7822:30); and
- "Defendants also argued that 'all the claims in this case were released by the release in the *Visa Check* settlement'" (A-7429/ECF7822:32).

It was a risky litigation endeavor, as Judge Gleeson had previously found—and which finding was reaffirmed by Judge Brodie post-remand—in which that risk was "'enormous,'" given the "'existential threats to this litigation.'" A-7428/ECF7822:31. Appellants have not contested these findings.

Instead, they engage in flimsy, lodestar-driven arguments that disregard precedent and the litigation record, and take aim at the post-remand risk that still existed. None of their shots hit their mark.

For instance, McLaughlin charges the district court with incorrectly analyzing risk by looking to this Court's fee-award cases "predat[ing] *Fresno County*." McLaughlin Brf. at 36. He argues that the "discussion of multipliers in *Fresno County* makes clear that it is contingency risk, and not any other *Goldberger* risk factors, such as the difficulty of the case or a defendant's potential insolvency, that is being compensated by a lodestar multiplier in common-fund cases." *Id*. He then asserts that the district court committed "manifest" error by not confining itself to this newly-minted standard that the *Fresno County* panel supposedly constructed. *See id*. at 37 (district court erred by considering "non-contingent risks *outside of those permitted*" by *Fresno County*).

But these assertions are fatally flawed, for several obvious reasons.

First, McLaughlin's suggestion that this Court's risk analyses in *Goldberger* and its ancestors have been cast aside by *Fresno County* solely in favor of "contingency risk" is absurd. All of this Court's extensive writings on measuring "risk" while considering fee awards and lodestar enhancements remain good law, and are relevant to the district court's analysis here. *See, e.g.*, *Goldberger*, 209 F.3d at 54 ("We have historically labeled the risk of success as 'perhaps the foremost' factor to be considered in determining whether to award an enhancement"); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 471 (2d Cir. 1974) ("'risk of litigation'" factors include asking whether "has a relevant government action been instituted or, perhaps, even successfully concluded against the defendant; have related civil actions already been instituted by others; and, are the issues novel and complex or straightforward and well worn"), *abrogated on other grounds by Goldberger*, 209 F.3d 43; *see also BioScrip, Inc.*, 273 F. Supp. 3d at 498 (citing *Goldberger*, and explaining that "[i]n particular, [courts] address three categories of risk: (1) risks inherent in the litigation itself (*i.e.* hurdles to successfully establishing liability); (2) risks that the defendant may be unable to pay any ultimate award (*i.e.* risks of recovery); and (3) contingency fee risks").

Despite McLaughlin's claim, the *Fresno County* panel didn't excise *Goldberger*'s far-ranging exploration of just what comprises "risk"—nor could it.

See, *e.g.*, *4 Pillar Dynasty*, 933 F.3d at 211 n.8. The district court was correct in not limiting its analysis of risk to "contingency" risk.

Equally mistaken, McLaughlin faults the district court for an analysis it did not undertake. Contrary to his storytelling, the district court did not award a lodestar fee and then analyze the litigation risk to determine whether a multiplier enhancement was appropriate. Rather, the court considered litigation risk as one of *several* factors it must consider under *Goldberger* to calculate a reasonable fee as a percentage of the fund. A-7425-31/ECF7822:28-34; *see also Goldberger*, 209 F.3d at 47 (when awarding percentage-of-the-fund fees, courts *look to the same factors* "that are used to determine the multiplier for the lodestar").

Only then, as part of a separate and distinct lodestar cross-check analysis, did the district court calculate a lodestar multiplier. A-7446-52/ECF7822:49-55. Relying on this Court's precedents, the court explained that it was doing this analysis "[t]o ensure the reasonableness of a fee that constitutes a percentage of a common fund." A-7446-47/ECF7822:49-50. The district court applied the correct legal standard, and its broad discretion in reaching its decision should be honored. *Goldberger*, 209 F.3d at 47.

Gnarlywood criticizes the district court's litigation-risk analysis by claiming this case contained no litigation risk *after* remand. *See* Gnarlywood Brf. at 22, 50.

This Court has rejected a similar argument that litigation risk vanishes once some, but not all defendants settle, explaining that the argument "runs counter to *Goldberger*'s rule that 'litigation risk must be measured as of when the case is filed.'" *Kornell*, 790 F. App'x at 298 (quoting *Goldberger*, 209 F.3d at 55). In addition, "this contention ignores that claims against the other defendants remained unresolved." *Id*.

And so it is here. The enormous litigation risks existing at the outset persisted throughout the case: as the district court recognized when deciding whether preliminary approval was warranted, legal and factual developments continued the matter's risk and complexity even as it progressed. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.* ("*Payment Card IV*"), 330 F.R.D. 11, 37 & 39 (E.D.N.Y. 2019) (tabulating myriad significant "risks of further litigation," and expressly finding "that these developments introduce additional risks to Class Plaintiffs"). That finding wasn't clearly erroneous. *Duane Reade*, 411 F.3d at 388.[34]

Moreover, the post-remand litigation shows that a renewed settlement was not a *fait accompli*. Co-Lead Counsel spent substantial time and effort keeping litigation pressure on Defendants: *e.g.*, drafting an amended complaint, engaging in motion

[34] Not only is Gnarlywood factually mistaken, but it's legally off target, too. As the district court pointed out, *Goldberger*'s "litigation risk" inquiry focuses on the risk existing when the case is filed. A-7426/ECF7822:29 n.13. Even if Gnarlywood were correct that the risk eventually evaporated—which premise the record demonstrates is false—that wouldn't have lessened the relevant litigation risk.

practice related to that complaint, and engaging in extensive discovery to develop the factual record and expert analysis relevant to proving the claims alleged in the operative Complaint.[35] Only because of Co-Lead Counsel's *continued* exhaustive efforts, in the face of Defendants' fiercely contested position that their conduct was lawful, was the latest Settlement reached.

4. The district court appropriately compared the fee-award percentage here to those in other billion-dollar antitrust class-action settlements.

McLaughlin asserts that the district court erred by "comparing the proposed percentage to fee awards in similar 'mega-fund' antitrust cases" because such a comparison is not among *Goldberger*'s factors. McLaughlin Brf. at 29-30 (*Goldberger* rejected practice of proceeding from fee "benchmark[s]").

He's doubly wrong.

Neither the district court—nor Co-Lead Counsel, for that matter—suggested that a reasonable percentage award should key off of some accepted "benchmark," as sometimes happens in jurisdictions like the Ninth Circuit. *Cf. In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) ("Twenty-five percent is the 'benchmark' that district courts should award in common fund cases."). Instead, Co-Lead Counsel had noted that both the percentage sought and the enhanced-multiplier cross-check were

[35] A-4087-95/ECF7257-3:¶¶198-200, 202-212, 215-228.

consonant with other awards in comparable matters, and the district court correctly acknowledged as much. A-7441/ECF7822:44 ("several large antitrust settlements are … useful points of comparison").

Moreover, looking to comparable matters to assess fees is commonplace—and even expected. *See, e.g.*, *Taubenfeld v. Aon Corp.*, 415 F.3d 597, 600 (7th Cir. 2005) (approving district court's comparison of fee with 13 others: "attorneys' fees from analogous class action settlements are indicative of a rational relationship between the record in this similar case and the fees awarded by the district court"). This Court recently rejected McLaughlin's anti-comparison argument, finding that the "district court *properly assessed the market rate* of class counsel by relying on a set of six comparator antitrust class action cases resolved through settlements with a value of $1 billion or greater." *Kornell*, 790 F. App'x at 298 (approving a $300 million fee in a multi-billion-dollar settlement).

The district court made this precise comparison, and did not abuse its discretion or apply incorrect law in so doing.

B. The district court's lodestar cross-check supported its common-fund Fee Award to Co-Lead Counsel.

This Court "encourage[s]" the use of a lodestar cross-check to test a requested percentage award's reasonableness. *Goldberger*, 209 F.3d at 50. Relatedly, the reasonableness of the claimed lodestar "can be tested by the court's familiarity with

the case." *Id*. And unquestionably a common-fund percentage fee "may exceed the lodestar." *Fresno Ctny.*, 925 F.3d at 68; *see also id*. (percentage fee "may be less than, equal to, or greater than the lodestar").

Given its familiarity with the issues, efforts, and litigation players here resulting from its multi-year supervision of this case, the district court performed a thorough lodestar cross-check analysis. As part of its cross-check, the district court noted Co-Lead Counsel's efforts to submit a conservative lodestar by using historical hourly rates and imposing strict billing and reporting requirements. A-7446/ECF7822:49. Co-Lead Counsel also reviewed time to eliminate read-and-review and redundant time, cap daily time submitted, cap rates for document reviewers, and even hired an outside accountant to further audit the pre-2013 time. *Id*. These efforts led to Co-Lead Counsel's reducing its lodestar by nearly $14 million. *Id*.[36]

The district court also reduced certain post-2012 hourly rates, and decided that post-2012 time for the Friedman Law Group should be excluded because it related to anti-surcharging statutes. A-7449-50/ECF7822:52-53. The district court thus "adjust[ed] the lodestar amount to $213,348,555." A-7453/ECF7822:56.

[36] For post-2013 time, Co-Lead Counsel imposed the same stringent time-reporting guidelines; notably, that submitted lodestar did not include any time related to seeking approval of 2012 Settlement, or to its appeal.

Given the ultimate Fee Award, the resulting lodestar multiplier was 2.45—which would have been even *lower*, had the lodestar utilized current billing rates as is done in many cases. Citing to this Court's *Wal-Mart* opinion that found a 3.5 multiplier reasonable, the district court recognized that Co-Lead Counsel's requested 2.5 multiplier "falls well within a range of multipliers that have been deemed acceptable, especially in complex actions" (A-7447/ECF7822:50) and accordingly the lower 2.45 multiplier did as well (A-7450/ECF7822:53).[37] Indeed, the 2.45 multiplier was lower than the 3.41 multiplier found reasonable by Judge Gleeson when he granted the fee relating to the 2012 Settlement. A-7450-51/ECF7822:53-54. Thus, the district court concluded, "the lodestar cross check does not weigh against Class Counsel's fee request." A-7450/ECF7822:53.

McLaughlin frames his attack on the district court's lodestar cross-check by misstating this Court's law. He says that this Court regards the lodestar used in a cross-check as "the presumptively reasonable fee." McLaughlin Brf. at 24 (citing *Fresno Cnty.*, 925 F.3d at 72).

[37] To be clear, the district court did not *award* a multiplier; it calculated the multiplier based upon its percentage award in determining its reasonableness.

But *Fresno County* says no such thing; in fact, it says *the opposite*—distinguishing the presumptive reasonableness of an unenhanced lodestar in the fee-shifting context from lodestar calculations done in the common-fund context:

> [A]n attorney seeking a fee after establishing statutory liability will presumptively receive a fee equal to the unenhanced lodestar, and an attorney seeking a fee after establishing a common fund will receive a fee calculated using either the lodestar method or a percentage-of-the-fund method, which can yield a fee that is less than, equal to, or greater than the lodestar fee.

Id. at 68. The objector-appellant in *Fresno County* had argued for a presumptive straight lodestar despite the common-fund recovery there (*id*. at 67), and this Court rejected that notion. *Id*.

Undaunted, McLaughlin nonetheless harkens to inapposite fee-shifting decisions, arguing that common-fund fee awards should "hew very closely to lodestar awards made in the other contexts, such as cases involving fee-shifting statutes." McLaughlin Brf. at 28. However, McLaughlin in the same breath concedes that this Court's precedent permits courts to "award a common-fund percentage fee exceeding base lodestar, even if the fund is generated in litigation under an applicable fee-shifting statute." *Id*.

The concession is unsurprising, for this Court recently rejected a similar argument made by McLaughlin's counsel as contrary to this Court's precedent. *Davis,* 806 F. App'x at 18 ("The presumption in favor of the lodestar and the

restrictions on lodestar multipliers that apply to fee awards made pursuant to fee-shifting statutes *do not apply in common fund cases* like this one."). McLaughlin notes that *Davis* isn't "precedential" under this Court's rules (McLaughlin Brf. at 27 n.7), but omits that the panel cited repeatedly to *Fresno County*—which *is* binding precedent—while explaining its analysis.

As the district court correctly recognized, this Court holds that unlike fee-shifting awards, in common-fund matters courts "retain greater discretion to award multipliers of the lodestar." A-7451/ECF7822:54; *see also Fresno Cnty.*, 925 F.3d at 67 ("the Supreme Court has placed greater restrictions on attorneys' fees recovered from statutory fee-shifting provisions than on fees recovered from common funds"). That's because "a reasonable fee from the plaintiff's perspective can account for contingency risk where such risk exists, and a common-fund fee may therefore exceed what would be a 'reasonable fee' in the fee-shifting context." *Id*. at 70. Thus, the 2.45 multiplier here was consistent with others that this Court has both found reasonable and acknowledged, and not a red flag. *See, e.g.*, *Wal-Mart Stores*, 396 F.3d at 123 (affirming a "reasonable" 3.5 multiplier, and noting that "'multipliers of between 3 and 4.5 have become common'"); *Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 369 (S.D.N.Y. 2002) (multiplier of 4.65 is "well within the range awarded by courts in this Circuit").

McLaughlin's policy argument that fee awards for the same work and litigation risk shouldn't vary between fee-shifting-statute litigation or a common-fund recovery (McLaughlin Brf. at 39-45), thus is inconsistent with binding precedent and, ultimately, irrelevant. McLaughlin fails to show that the district court's analysis comprised an abuse of discretion, for the court neither committed legal error nor relied upon clearly erroneous findings. *Cf. Duane Reade*, 411 F.3d at 388.

Like McLaughlin, Gnarlywood also falls short. It asserts that the awarded fee is an abuse of discretion because it supposedly results in a ten-plus multiplier. Gnarlywood Brf. at 49-51.

But that eye-popping multiplier is a fiction premised on a hypothetical lodestar of just $52 million tabulated solely from the post-remand period—inexplicably erasing *all* of Co-Lead Counsel's pre-2016 efforts on behalf of all class members as if they had never taken place.

As detailed extensively *supra* at §§II.A. and II.C.1., that erasure is both legally and factually wrong. The record shows that the district court considered and rejected arguments that Co-Lead Counsel should not be compensated for pre-2016 work. It found myriad reasons that Co-Lead Counsel's efforts proving the alleged antitrust violations had benefitted the (b)(3) Class—and that to *not* compensate Co-Lead Counsel for that time and "any work completed up to and including 2016 …would be

unjust, and would penalize [Co-Lead Counsel]" for no good reason. A-7438/ECF7822:41.

Those findings warrant deference unless clearly erroneous. *Duane Reade*, 411 F.3d at 388. Gnarlywood hasn't made that showing.

C. The district court acted within its discretion in granting reasonable services awards to deserving Class Plaintiffs.

Class representatives are "essential ingredient[s] in any class action." *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998). They "confer[] benefits on all other class members"—most of whom are strangers to them—without any guarantee of compensation. *See In re Linerboard Antitrust Litig.*, No. 1261, 2004 U.S. Dist. LEXIS 10532, at *56 (E.D. Pa. June 2, 2004). The effective enforcement of several important remedial laws, including the antitrust laws, employment laws, and consumer-protection laws, rely on private individuals stepping forward to vindicate a class's rights. *See* 15 U.S.C. §15(a); *see also Blue Shield of Va. v. McCready*, 457 U.S. 465, 473 (1982) (noting the "plain language and ... broad remedial and deterrent objectives" of Clayton Act's Section 4).

Recognizing the unique role that representative plaintiffs play in our system of private litigation, courts regularly grant service awards—payments over and above pro rata distributions from the settlement fund—to parties stepping forward to litigate on behalf of the class. *Roberts*, 979 F. Supp. at 200 ("In this [Second] Circuit, the Courts

have, with some frequency, held that a successful Class action plaintiff, may, in addition to his or her allocable share of the ultimate recovery, apply for and, in the discretion of the Court, receive an additional award, termed an incentive award."); *Wright v. Stern*, 553 F. Supp. 2d 337, 345 (S.D.N.Y. 2008) (service awards "are permitted by the case law. The amount here—$50,000—was reasonable in light of the burdens imposed by participating as a named party in litigation that spanned some ten years."). Service awards often exceed the nominal value of their time and out-of-pocket contributions. *See Khait v. Whirlpool Corp.*, No. 06-6381 (ALC), 2010 U.S. Dist. LEXIS 4067, at *26-*27 (E.D.N.Y. Jan. 20, 2010).

As with its attorney-fee award, the district court based its Service Award Order on its analysis of the record, relevant case law, and comparison with awards in other high-settlement cases. A-7455-56/ECF7823:1-2 (noting "similarly-sized" awards ranging from $50,000 to $150,000 that were granted in other cases—despite the latters' smaller settlement funds and shorter durations). This methodology is routinely employed, with similar amounts approved, in district courts within this Circuit. *See, e.g.*, *Dornberger v. Metro. Life. Ins. Co.*, 203 F.R.D. 118, 125 (S.D.N.Y. 2001) (incentive-award amount "requested by plaintiff class counsel is reasonable in light of other incentive awards"); *Wright*, 553 F. Supp. 2d at 345 (approving $50,000 each to eleven named plaintiffs as reasonable while surveying other awards); *Roberts*, 979 F.

Supp. at 187-88 (approving special master's recommended awards of $85,000 and $50,000 out of a $115 million settlement fund while reciting special master's rationales); *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775 (JG) (VVP), 2015 U.S. Dist. LEXIS 138479, at *144-*145 (E.D.N.Y. Oct. 9, 2015) (granting service awards of $90,000 each to the six class representatives while noting contributions).

The Appellants' contrary arguments fail to upend the district court's proper exercise of discretion in granting the service awards here.

1. Precedents provide sound bases for granting service awards to the Class Plaintiffs.

McLaughlin admits that district courts routinely grant, and appellate courts routinely affirm, service awards. McLaughlin Brf. at 50-53.[38] *See, e.g.*, *Sullivan*, 667 F.3d at 333 n.65 ("'[i]ncentive awards are not uncommon in class action litigation and particularly where ... a common fund has been created for the benefit of the entire

[38] Since his brief's filing one circuit court has adopted McLaughlin's position, in a 2-1 split decision with a lengthy dissent. *See Johnson v. NPAS Sols., LLC*, No. 18-12344, 2020 U.S. App. LEXIS 29682 (11th Cir. Sept. 17, 2020). In addition to its extensive discussion picking apart the majority decision, the dissent points out that the majority's analysis "disregards" earlier Eleventh Circuit precedent's analysis. *Id*. at *36; *see also id*. at *44 (majority decision "goes one step too far ... in the face of our binding precedent that recognizes a monetary award to a named plaintiff is not categorically improper").

class'"); *Cook*, 142 F.3d at 1016 (approving $25,000 service award while reciting relevant factors).

The admission torpedoes his key argument that precedent from the 1800s—long before Rule 23's adoption—prohibits such awards. McLaughlin Brf. at 46-52 (citing *Internal Imp. Fund Trs. v. Greenough*, 105 U.S. 527 (1882), and *Cent. Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885)).

Among those several courts rejecting McLaughlin's service-awards argument is *this* Court—in *Melito*, 923 F.3d 85. In unadorned text, this Court considered—and then swiftly dispatched—the same argument McLaughlin makes now:

> Bowes contends that incentive bonuses here are unlawful, given that the case involves common funds. The cases cited by Bowes for this proposition are inapposite. Neither [*Pettus*] nor [*Greenough*] provide factual settings akin to those here.

Id. at 96.

Because *Melito* is fatal to McLaughlin's argument, he's left to suggest that the panel didn't "engage the legal issues" and had distinguished *Greenough* and *Pettus* "without elaboration." McLaughlin Brf. at 53. But McLaughlin's veiled attempt to undermine the legitimacy of *Melito*'s holding fails, for this Court is "bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court." *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004); *accord Jaylaw*, 621 F.2d at 527.

McLaughlin also asserts that receiving a court-authorized service award somehow renders Class Plaintiffs inadequate representatives under Rule 23. McLaughlin Brf. at 55-57. His assertion is twice wrong.

On its face, Rule 23 doesn't prohibit service awards despite having been amended many times over the past fifty-plus years. No court has ever held that receiving a court-authorized service award violates the Rule 23 adequacy-of-representation requirement, or "raises the specter of inadequate representation" as McLaughlin suggests. McLaughlin Brf. at 56.

Moreover, McLaughlin's cited cases are inapposite. In each, pursuant to a settlement agreement named plaintiffs received payments or benefits that were *not available to other class members*—thus, unsurprisingly, rendering them inadequate representatives. For instance, in *Plummer v. Chemical Bank*, 91 F.R.D. 434, 441-42 (S.D.N.Y. 1981), *aff'd & remanded*, 668 F.2d 654 (2d Cir. 1982), the settlement agreement provided for the named plaintiffs to receive promotions, raises, and monetary payments, while rank-and-file class members received none of those benefits—and yet might receive nothing despite releasing their claims. And in *Radcliffe v. Experian Info. Sols. Inc.*, 715 F.3d 1157, 1164 (9th Cir. 2013), "[t]he settlement agreement explicitly condition[ed] the incentive awards on the class representatives' support for the settlement." Finally, in *In re Dry Max Pampers Litig.*,

724 F.3d 713, 722 (6th Cir. 2013), named plaintiffs under a settlement agreement received $1,000 per child, while the class members released their claims and "and receive[d] nothing but illusory injunctive relief."

In contrast, under the Settlement here Class Plaintiffs will receive a pro-rata share of the common fund in return for releasing their claims—just like every other class member. The *separate* service awards to Class Plaintiffs were authorized by the district court using its discretion, based on decades of case law and its analysis of each Class Plaintiff's time and effort in this case. *See* A-7456/ECF7823:2 ("Class Representatives spent an enormous amount of time and resources in serving as named representatives in this complex litigation that has spanned well over a decade. Certain Class Representatives expended additional effort that far exceeded what an average class representative might do to advocate on behalf of the class.").

The district court was "intimately familiar" with Class Plaintiffs' contributions. *Goldberger*, 209 F.3d at 48. Its discretionary decision to grant service awards warrants deference.

2. The level of service awards that the district court ordered are proportionate to the extraordinary efforts that the Class Plaintiffs devoted to this litigation.

Gnarlywood doesn't oppose service awards to each of the Class Plaintiffs; it simply opposes the amount awarded. Gnarlywood Brf. at 61. It argues that service

awards should be limited to the reasonable value of time spent and capped at no more than ten times the value of a party's claim. *Id*.

Contrary to Gnarlywood's argument, service awards are not limited to lost wages and out-of-pocket expenses except in the narrow context of the Private Securities Litigation Reform Act of 1995 ("PSLRA"). *See* 15 U.S.C. §78u-4(a)(4) (limiting service awards to "reasonable costs and expenses (including lost wages) directly relating to the representation of the class"); *see also Initial Pub. Offering*, 671 F. Supp. 2d at 500 (interpreting same).

In *non*-securities litigation, however, courts are free to consider other factors, including "the time and effort expended by that plaintiff in assisting in the prosecution of the litigation or in bringing to bear added value[,]" "other burdens sustained by [the] plaintiff in lending himself or herself to the prosecution of the claim," any "special circumstances including the personal risk" borne by the representative, "and, of course, the ultimate recovery." *Roberts*, 979 F. Supp. at 200. These are precisely the factors that the district court here considered. *See* A-7455-58/ECF7823.

Gnarlywood ignores these factors and instead argues that the district court erred by not capping the service award based on the monetary value of the time spent by the largest Class Plaintiffs, and further capped by the value of each Class Plaintiff's individual claim. Gnarlywood Brf. at 60-62.

But Gnarlywood's arbitrary, made-up methodology is unfounded. In complex antitrust cases, although class representatives' individual recoveries may be small, that doesn't necessarily reflect the value of their time and effort litigating the cases on a class's behalf. While the sacrifices of large businesses should not be understated—the larger Class Plaintiffs in this case plainly bore the greatest discovery burdens—they generally have legal departments that routinely manage litigation, thereby limiting the day-to-day involvement by senior management.

In contrast, small businesses serving as class representatives have no choice but to require their key employees to participate in discovery and other aspects of litigation—actions that necessarily divert attention away from their businesses' day-to-day operations.[39] *Bradburn Parent Tchr. Store, Inc. v. 3M*, 513 F. Supp. 2d 322, 342 (E.D. Pa. 2007) (approving $75,000 award to small-business representative).

[39] Gnarlywood also argues that Class Plaintiff Traditions should not receive any service award because the company's principal worked less than full-time, and thus has no lost wages. Gnarlywood Brf. at 56-57. Gnarlywood's argument relies on cases decided under the PSLRA, which does not apply here. It is also incorrect that the Court should not consider Class Plaintiff Photos Etc.'s significant efforts supporting the litigation through management and writing a blog related to payment-card matters important to the litigation. Like class counsel, "class representatives [] conferred benefits on all other class members" and as such "deserve to be compensated accordingly." *In re Linerboard Antitrust Litig.*, No. 1261, 2004 WL 1221350, at *18 (E.D. Pa. June 2, 2004), *amended*, No. 1261, 2004 WL 1240775 (E.D. Pa. June 4, 2004).

Here, the time, effort, and various sacrifices of the Class Plaintiffs are detailed in declarations that the district court reviewed, and provide a sufficient basis for the requested service awards.

D. Given R&M Objectors' lack of substantial contributions to the multi-billion-dollar Settlement Fund, the district court acted within its discretion in denying their request for fees, expenses, and service awards.

The district court also acted within its discretion when it denied an independent attorney-fee award to R&M Objectors.

While this Court acknowledges that objectors play an important role in class litigation that may entitle them to a fee award, such awards are proper *only* when those objectors make "a proper showing" that their efforts were "a substantial cause" of improving the settlement. *Petrobras*, 786 F. App'x at 277-78; *Holocaust Victim Assets Litig.*, 424 F.3d at 156-57. That proper showing didn't exist here, for several reasons.[40]

First, the district court concluded that "R&M Objectors were not a substantial cause of the Second Circuit's decision" to overturn the 2012 Settlement. A-

[40] R&M Objectors make much of having coordinated and worked with the "main objectors' group" represented by Goldstein & Russell, P.C. ("Goldstein") in the prior appeal in this case. *See, e.g.*, R&M Brf. at 38-40. Yet, R&M Objectors 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. *See* ECF7569.

7488/ECF7836:16; *see also* A-7491-92/ECF7836:19-20 ("Given the extensive objections to the settlement, the Court is not convinced that, in the absence of R&M Objectors, the outcome on appeal would have been any different."). The district court's conclusion was supported by detailed findings:

- R&M Objectors' "initial objections did not raise any concerns about the adequacy of class counsel's inherently conflicted representation or the problems with the surcharge benefit" (A-7489/ECF7836:17);
- R&M Objectors were not the first to raise the argument that the injunctive relief would not benefit all members of (b)(2) class and, in later briefing, they "largely echoed the more comprehensive arguments of other parties' briefs, in which R&M Objectors joined" (*id.*); and
- R&M Objectors "never argued that class counsel's unitary representation of the (b)(2) and (b)(3) class was improper, as the Second Circuit ultimately found" (A-7490/ECF7836:18).

Additionally, the district court found that R&M Objectors' efforts weren't a substantial cause of the benefits conferred by the superseding Settlement agreement. A-7490-92/ECF7836:18-20.

Instead, the district court attributed the Settlement's increased value "to the years of additional discovery and renegotiation that followed the Second Circuit's decision, and *which R&M Objectors had no involvement in*." A-7492/ECF7836:20. Indeed, R&M Objectors' "primary concerns with the prior settlement" had been focused on "the notice to class members and the surcharge provision, and not to the

adequacy of the damages award." *Id*. The district court noted that when the 2012 Settlement was appealed, this Court "did not take issue with the adequacy of relief for the (b)(3) class." *Id*. Accordingly, the district court determined that R&M Objectors' "efforts cannot be said to have substantially caused the increased benefits at issue here, i.e., monetary relief to the (b)(3) class." *Id*.[41] That determination should be heeded. *E.g.*, *Petrobras*, 786 F. App'x at 278 ("[court] is in the best position to determine whether the participation of objectors assisted the court and enhanced the recovery").

Finally, the district court denied the request for service awards because R&M Objectors did not "demonstrate[] that they made any special efforts in connection with this litigation, beyond having retained counsel, who in turn made arguments on their behalf over the course of several years." A-7495/ECF7836:23.

Because the district court thoroughly analyzed R&M Objectors' involvement in this litigation to conclude that their counsel was not entitled to a fee or reimbursement of expenses—and R&M Objectors' counsel was not entitled to service fees—it acted within its discretion in so concluding, and should be affirmed. *Pandora Media, Inc. v. Am. Soc'y of Composers, Authors & Publishers*, 785 F.3d 73, 78 (2d Cir. 2015) ("'No

[41] Because the district court denied R&M Objectors' fee request, it also denied their request for reimbursement of expenses. A-7493/ECF7836:21 n.9.

legal error contributed to that finding, and the finding itself, adequately supported by the record, is not clearly erroneous.'"); *Merck-Medco*, 504 F.3d at 250 (district court's fee award to objector based on thorough analysis of objector's role in case and detailed findings was within its discretion); *Holocaust Victim Assets Litig.*, 424 F.3d at 157 (emphasizing district court's discretion when assessing objectors' fee petitions).

E. This Court should disregard R&M Objectors' two arguments that they either untimely broached in the district court some two months late, or now raise for the first time on appeal.

R&M Objectors also include two arguments that either: (i) were found untimely by the district court; or (ii) they now raise for the first time. Neither argument warrants this Court's attention. *E.g.*, *Combier v. Portelos*, 788 F. App'x 774, 779 (2d Cir. 2019) (declining to consider untimely arguments); *Wal-Mart Stores*, 396 F.3d at 124 n.29 (when a party "'advances arguments available but not pressed below ... waiver will bar raising the issue on appeal'").

1. *The untimely argument.*

In late-July 2019, R&M Objectors timely objected to the Settlement. ECF7575. Their sole complaint was that "neither the Superseding Settlement nor Class Counsel's Fee Motion provides for service awards or attorneys' fees for the R&M Objectors and their counsel. For that reason, the R&M Objectors object to Class Counsel's Fee Request and to final approval of the Superseding Settlement."

ECF7575:15. R&M Objectors asserted no other objections; indeed, they commended Co-Lead Counsel for achieving the Settlement. *Id*.

Subsequently, on September 5, 2019, the district court heard oral argument on R&M Objectors' motion for fees. During the hearing, the court asked if their contemporaneous time records had been submitted for review.[42] R&M Objectors subsequently submitted "[r]econstructed time records of counsel." ECF7690.

Only after being required to submit their own time records—and *two months after the objection deadline*—did R&M Objectors file an amended objection. ECF7710. In addition to complaining that Co-Lead Counsel's fee request didn't include fees for themselves, R&M Objectors floated an entirely new objection: "Class Counsel's attorneys' fee request should be denied because Class Counsel has failed to provide a detailed description of the work performed and has failed to submit hour and lodestar information regarding the work performed for review by class members and the public, particularly for work during the period the Second Circuit found Class Counsel was in fundamental conflict." ECF7710:15.

That single-page objection was citation-free except for noting the *Goldberger* factors. *Id*. The district court found R&M Objectors' amended objection untimely and thus declined to consider it. A-7414/ECF7822:17.

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[42] ECF7683:20-21.

R&M Objectors' brief doesn't inform this Court that the district court ruled their amended objection was untimely and thus not properly considered. That untimeliness dooms the argument's consideration. *Combier*, 788 F. App'x at 779. And even if the Court indulged R&M Objectors, their argument still fails. *Goldberger*, 209 F.3d at 50 ("where used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court…. Instead, the reasonableness of the claimed lodestar can be tested by the court's familiarity with the case (as well as encouraged by the strictures of Rule 11)").[43]

2. *The waived argument.*

On appeal R&M Objectors pivot yet again, and make the central focus of their briefing a newly minted argument that Co-Lead Counsel should be compensated only for discrete time that benefited the (b)(3) class. R&M Brf. at 13-30.

Although that argument was made by other objectors below (and now on appeal), *R&M Objectors never raised it in the district court*. Accordingly, having failed to do so, R&M Objectors cannot press the issue now. *Bogle-Assegai v. Conn.*, 470 F.3d 498, 504 (2d Cir. 2006) ("'an appellate court will not consider an issue raised for the first time on appeal'"); *accord Wal-Mart Stores*, 396 F.3d at 124 n.29.

[43] The objection misstates the record, too: in support of their fee petition, Co-Lead Counsel submitted multiple declarations setting forth both their lodestars and detailed explanations of the work performed. *See, e.g.*, A-4031-126/ECF7257-3; ECF2113-2.

VI. CONCLUSION

Crediting the district court's familiarity with Co-Lead Counsel's litigation efforts since the matter's 2005 genesis, the extensive record, and the specific issues and objections that the court considered, the resulting Fee Award and service-award grants (and denials) were firmly within the court's exercise of discretion.

DATED: January 5, 2021

Respectfully submitted,

ROBBINS GELLER RUDMAN & DOWD LLP
PATRICK J. COUGHLIN
JOSEPH D. DALEY
ALEXANDRA S. BERNAY
CARMEN A. MEDICI

s/ Patrick J. Coughlin
PATRICK J. COUGHLIN

655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

ROBINS KAPLAN LLP
K. CRAIG WILDFANG
THOMAS J. UNDLIN
2800 LaSalle Plaza
800 LaSalle Avenue South
Minneapolis, MN 55402-2015
Telephone: 612/349-8500
612/339-4181 (fax)

BERGER MONTAGUE PC
H. LADDIE MONTAGUE, JR.
MERRILL G. DAVIDOFF
MICHAEL J. KANE
1818 Market Street, Suite 3600
Philadelphia, PA 19103
Telephone: 215/875-3000
215/875-4604 (fax)

FREEDMAN BOYD DANIELS HOLLANDER
GOLDBERG URIAS & WARD, P.A.
JOSEPH GOLDBERG
20 First Plaza, Suite 700
Albuquerque, NM 87102
Telephone: 505/842-9960
505/842-1925 (fax)

Attorneys for Rule 23(b)(3) Class Plaintiffs-Appellees

RULE 32(g) CERTIFICATE

The undersigned counsel certified that FINAL ANSWERING BRIEF (FEES AND SERVICE AWARDS) OF PLAINTIFFS-APPELLEES uses a proportionally spaced Times New Roman typeface, 14-point, and that the text of the brief comprises 19,346 words according to the word count provided by Microsoft Word 2016 word processing software; that word count is below the 20,000 words allowed by the Court's October 5, 2020 Order.

s/ Patrick J. Coughlin
PATRICK J. COUGHLIN
Counsel for Rule 23(b)(3)
Class Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I hereby certify that I authorized the electronic filing of the foregoing document: FINAL ANSWERING BRIEF (FEES AND SERVICE AWARDS) OF PLAINTIFFS-APPELLEES with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on January 5, 2021.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Patrick J. Coughlin
PATRICK J. COUGHLIN
Counsel for Rule 23(b)(3)
Class Plaintiffs-Appellees