20-339(L)

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UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

IN RE PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK
No. 05-1720

FINAL FORM REPLY BRIEF OF OBJECTORS-APPELLANTS JACK RABBIT, LLC & CAHABA HEIGHTS SERVICE CENTER, INC. D/B/A CAHABA HEIGHTS CHEVRON

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INTRODUCTION

Computer processed credit and debit payment card purchases are integral to our national economy, and tracing the steps involved is critical to applying the proper legal analysis to the issue of Article III standing, raised by Appellants Jack Rabbit and Cahaba Heights Chevron. There are five steps to every payment card transaction. The steps are: (1) The purchaser swipes or inserts a payment card at a merchant/retail seller's point of sale terminal; (2) The point of sale terminal sends the payment card information to the bank that processes payment card purchases for the merchant/retail seller. That bank is known as the "Acquiring Bank"; (3) The Acquiring Bank relays the payment card information to the bank that issued the payment card to the purchaser. That bank is known as the "Issuing Bank"; (4) Assuming the purchaser is within their credit limit, the Issuing Bank authorizes the sale and immediately transfers the amount of cardholder's purchase, less an Interchange Fee, to the Acquiring Bank; and. (5) the Acquiring Bank then deducts its own fee, called the "Merchant Discount Fee" for its processing services, and transfers the net to the merchant/retail seller's bank account. Henry H. Perritt, Jr., *Legal and Technological Infrastructures for Electronic Payment Systems*, 22 Rutgers Computer & Tech. L.J. 1, 20-30 (1996).

In 2005, a putative class of over twelve million merchants brought antitrust

actions under the Sherman Act, 15 U.S.C. §§ 1 and 2, and state antitrust laws, against Defendants Visa and MasterCard networks, as well as various Issuing Banks and Acquiring Banks. *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207 (E.D.N.Y. 2013), *rev'd and vacated*, 827 F.3d 223 (2d Cir. 2016)[1].

The gravamen of this matter is that sellers of goods and services, generically referred to as merchants in this litigation, alleged antitrust claims against Visa and MasterCard, as well as their member banks, relating to their setting the aforementioned Interchange Fee charged by the Issuing Bank in any particular transaction. These Interchange Fees, are normally imposed upon, as opposed to negotiated with, the merchant/retail seller. As a result, Defendants were able to set the Interchange Fee at an artificially high rate, in violation of antitrust law. Although the Interchange Fee may vary depending on whether or not the purchaser is using a premium reward (cash back or points) card or basic no-frills card, the Interchange Fee is never competitive, and merchants are directly injured by the Defendants' anti-competitive behavior.

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[1] A factual and procedural history of this litigation, is set forth by Judge Gleeson in In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 986 F. Supp. 2d 207, 214-15 (E.D.N.Y. 2013), and by this Court as part of its reversal in 2016, 827 F.3d 223 (2d Cir. 2016), cert. denied, 137 S. Ct. 1374 (2017).

After this Court's 2016 remand, Class Counsel and the Defendants again reached a settlement in this matter. This is an appeal from the judgment of the U.S. District Court for the Eastern District of New York (Brody, J.), approving a final class-action settlement and certifying a Rule 23(b)(3), settlement-only, class consisting of:

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

In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., No. 05-MD-1720 (MKB) (JO), 2019 U.S. Dist. LEXIS 217583 (E.D.N.Y. Dec. 16, 2019), (D.E. 7818].

APPELLANTS

Appellants Jack Rabbit, and Cahaba Heights Chevron, like 163,000 other class members are Retail Gas Stations Owners, all accept Visa and MasterCard payment cards for payment at the gas pump, and in their respective convenience stores. Appellants are, as a matter of law, Cost Plus Direct Purchasers under *Illinois Brick's* cost plus exception to the Indirect Purchaser Rule. *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 97 S. Ct. 2061 (1977).

Appellants Jack Rabbit, and Cahaba Heights Chevron timely objected to the proposed settlement. In addition, Jack Rabbit solely moved to intervene and argued:

> "It appears that two operators of gasoline stations have filed complaints in this action: Seaway Gas & Petroleum Inc. and Abdallah Bishara d/b/a Uncle Abe's Phillip 66. Neither of these original complaints raise the legal issue of their entitlement to recovery over non-retail distribution chain entities who may have arranged the processing of their sales, but suffered no actual damage. Similarly, neither of these two plaintiffs adequately negotiated the conflict inherently created in the settlement agreement. When presented with Defendants' interpretation of [the Oil Distributors] standing, neither plaintiff advocated for the protection of the [Retail gas Station Owners' interests] Operators' interests. When challenged by Class Counsels' obfuscation of entitlement to relief under the settlement, neither plaintiff presented the truth about the nature of the [interclass] conflict and the lack of contractual governance. For these reasons, the current gasoline operator plaintiffs have laid an express history of inadequate representation for Proposed Intervenors."

(JA A-6926)

By declaration (JA A-7017), and by oral argument at the November 7, 2019 fairness hearing, Appellant's Jack Rabbit, and Cahaba Heights Chevron, informed the district court that they, and all similarly situated class members, comprised an unrepresented subclass of Retail Gas Station Owners who were the direct purchasers injured by the defendants' monopolistic practices. Conversely, they argued that the Oil Distributors who supplied Jack Rabbit, and Cahaba Heights Chevron on a cost plus basis, had no injury or damages because both the Interchange Fee and the Merchant Discount Fee are included in the Oil Distributor's

cost-plus contract with Appellants.

As a matter of law, because the Oil Distributors have entered into cost plus contracts with the Retail Gas Stations Owners, the Oil Distributors lack actual damages and thus they lack Article III standing.

As a matter of law, because the Oil Distributors have entered into cost plus contracts with the Retail Gas Stations, the Oil Distributers did not suffer actual damages and, as a result, the Oil Distributors lack Article III standing. With regard to the standing of the Oil Distributors and similarly situated class members Class Counsel and the Defendants led the district court to error. However, Appellants Jack Rabbit, and Cahaba Heights Chevron unequivocally argued that Article III standing of class members was a legal issue that the court needed to resolve.

> MR. BACHARACH: My name is Albert Bacharach I represent one client who has two LLCs, one of which sells at the merchant level branded gasoline and one that sells unbranded gasoline. And my client, rather than the oil distributor, has Article III standing because my client actually paid the antitrust interchange fees and his oil suppliers didn't.
>
> THE COURT: **So you're arguing this is a legal issue**[2]. (emphasis

[2] Appellant's declaration confirms that no factual issue remains for the Special Master, as there is no contract governing the ownership of the claim to recovery under the settlement. (JA A-7017, 7019) ("[D]uring the relevant time period, every contract entered into with a supplier by Jack Rabbit, LLC and 280 Station LLC, provided: that the retail locations would accept payment cards and that the retail location shall pay any payment card processing fee that may be assessed. Therefore, under the simple language of the contract, the retailer is the direct purchaser, or

added)

MR. BACHARACH: It is, in fact, a legal issue that the Court can --

THE COURT: So why hasn't anyone made a motion for the Court to decide this as a legal issue?

MR. BACHARACH: I don't know, your Honor. I have been unclear as I worked through the objection and looked at the voluminous papers that have been filed in this case why the issue hasn't come up. ...” (Fairness Hearing Transcript (“FHT”), page15, lines 3-18)

MR. BACHARACH: **We don't believe that the oil distributors are a member of the class or a subclass because they don't have Article III standing** which is where I started. (emphasis added)

THE COURT: **Okay. So then if they're not a member of the class, we have no conflict, we have no dispute. It's just a matter of claim administration.** You submit your claim, and if there is a dispute at that point it gets resolved.

(Fairness Hearing Transcript “FHT” at A-7069:8–14) (emphasis added).

Subsequently, the district court, in error, approved the class-action settlement despite uncontradicted evidence that the class definition included class members, such as Appellants Jack Rabbit, and Cahaba Heights Chevron, who have Article III standing, and class members, such as the Oil Distributor for Appellants Jack Rabbit, and Cahaba Heights Chevron, who are without Article III standing.

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direct payor, of the interchange fees."); see also Fikes Wholesale Br. 37 at 37-38 (Declaration by the general counsel of a branded operator that states that the contracts between oil companies and branded operators "do not address which entity is entitled to settlement funds from this class action[] and do not address which party is the first 'payor' of the interchange fees.").

Appellants Jack Rabbit and Cahaba Heights Chevron submit that it was error to approve the settlement without first ascertaining who was within the class and eligible to participate in the settlement, as standing is an issue that must be determined in any judicial proceeding.

I
THE DISTRICT COURT ERRED, AS A MATTER OF LAW, IN APPROVING THE SETTLEMENT BECAUSE, AS THE CLASS IS DEFINED, SOME CLASS MEMBERS LACK ARTICLE III STANDING

Although Class Counsel and Defendants are dismissive of the idea that a settlement of a class action must assure that the typicality and ascertainability required by Rule 23 include an assurance that class members have standing, precedent makes plain that federal courts have an unflagging and "independent obligation to examine their own jurisdiction, and standing is perhaps the most important of the jurisdictional doctrines." *United States v. Hays*, 515 U.S. 737, 742 (1995) (citation, internal quotation marks, and ellipses omitted). Article III limits the subject-matter jurisdiction of the federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2. However, there is no case or controversy if a litigant does not have standing, a metric that must be met "throughout all stages of litigation." *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013).

In fact, the case-or-controversy requirement renders standing "an essential and unchanging part" of subject-matter jurisdiction and one of the "irreducible" requirements for the exercise of federal judicial authority. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). That requirement for the exercise of federal judicial authority is not lessened by the fact that this settlement takes place in the context of

a class action.

At the pleading stage of a class action "named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong." *Spokeo, Inc. v. Robins,* 136 S. Ct. 1540, 1547 n.6 (2016) (quoting *Simon v. E. Ky. Welfare Rights Org*., 426 U.S. 26, 40 n.20 (1976)).

To meet the standing requirement of Article III, "a plaintiff must satisfy three elements: (1) injury in fact; (2) fairly traceable to the defendants unlawful conduct; and (3) that is likely to be redressed by the requested relief." *Id*. at 560-61. Unlike other litigation however, early on, at the pleading and class certification stages of the litigation, only the named plaintiffs - as opposed to the unnamed class member/plaintiffs - need demonstrate Article III standing. The issue of whether the unnamed class members have Article III standing is left for the trial or settlement phase of the class action litigation, because once certification of the class takes place both rights and obligations attach to all members of the class. *See* Theane Evangelis & Bradley J. Hamburger, *Article III Standing and Absent Class Members*, 64 Emory L.J. 383, 393-94 (2014)); *see also Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984) ("[U]nder elementary principles of prior adjudication a judgment in a properly entertained class action is binding on

class members in any subsequent litigation").

The district court, in considering approval of a proposed class action settlement, must ascertain whether the class definition limits class membership to the universe of class members who have suffered an injury in fact. In this matter, under the *Illinois Brick's* cost plus exception to the Indirect Purchaser Rule, that universe includes Cost Plus Direct Purchasers, such as Appellants Jack Rabbit and Cahaba Heights Chevron, and excludes Oil Distributors who have not suffered an injury in fact. The district court not only failed to ascertain whether the class definition limits class membership to the universe of class members who have suffered an injury in fact, the court shifted responsibility for that failure to Appellants Jack Rabbit and Cahaba Heights Chevron, and their counsel - for not presenting a motion to the court asking the court to decide which subclass of class members had Article III standing, which underscores the problem of unitary Class Counsel representing both interests. [FHT at A-7062:13–14] Moreover, while most issues require adherence to the party-presentation principle, standing does not, and the court has its own independent obligation to assure that the requirements of standing are met. *Hays, 515 U.S.* at 742.

Both subclasses cannot have standing. It has to be one or the other, i.e., the Retail Gas Stations (Branded Operators) or the Oil Distributors, because only

directly injured parties, which includes cost-plus purchasers, rather than their customers or others who may have been indirectly injured, can claim a cognizable injury. *See Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters,* 459 U.S. 519, 543 (1983) (also recognizing that the directness requirement helps keep "the scope of complex antitrust trials within judicially manageable limits.").

In class actions wherein Class Counsel and the Defendants, as in this matter, reach a settlement, the district court must determine, prior to final approval of the settlement, whether the class definition is limited to persons with Article III standing. "[N]o class may be certified that contains members lacking Article III standing." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006); cited with approval*, Mazza v. Am. Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012).

Denney was further developed earlier this year in a Fair Credit Reporting Act class action wherein the Ninth Circuit held that every member of a class certified under Fed. R. Civ. P. 23, rather than only the class representative, must satisfy the basic requirements of Article III standing at the final stage of a money damages suit when class members are to be awarded individual monetary damages. *Ramirez v. TransUnion LLC*, 951 F.3d 1008 (9th Cir. 2020). "For the reasons explained below, we hold that every member of a class certified under *Rule 23* must satisfy the basic

requirements of Article III standing at the final stage of a money damages suit when class members are to be awarded individual monetary damages. Therefore, the dispositive question in this case is whether each of the 8,185 class members had standing on each of the class claims." *Id*. The *Ramirez* Court noted that the "holding does not alter the showing required at the class certification stage or other early stages of a case, and it does not apply to cases involving only injunctive relief." *Id.* at n.6.

The *Ramirez* Court, noting that this was a case of first impression in the Ninth Circuit went on to state: "The Supreme Court has held, albeit in a different context, that all parties seeking to recover a monetary award in their own name must show Article III standing." *See Town of Chester, N.Y. v. Laroe Estates, Inc*., 137 S. Ct. 1645, 1651 (2017) (holding that "an intervenor of right" under Federal Rule of Civil Procedure 24(a)(2) "must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing[,]" including where "both the plaintiff and the intervenor seek separate money judgments in their own names."); *see also Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring) ("**Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not. The Judiciary's role is limited 'to provid[ing] relief to claimants, in individual or class actions, who**

have suffered, or will imminently suffer, actual harm.'" (quoting *Lewis v. Casey*, 518 U.S. 343, 349, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996))). (emphasis added)

The same rule applies here. To hold otherwise would directly contravene the Rules Enabling Act, because it would transform the class action - a mere procedural device - into a vehicle for individuals to obtain money judgments in federal court even though they could not show sufficient injury to recover those judgments individually. *See* 28 U.S.C. § 2072(b) ("[Rules of procedure] shall not abridge, enlarge or modify any substantive right.").

In this matter the Superseding Settlement Agreement defines the proposed Rule 23(b)(3) Settlement Class as: "[a]ll persons, businesses, and other entities that have accepted any Visa-Branded Cards and/or MasterCard-Branded Cards in the United States at any time from January 1, 2004 to the Settlement Preliminary Approval Date Superseding and Amended Definitive Class Settlement Agreement." (JA A-3747, A-3767 ¶ 4). As Appellants pointed out in their initial brief;

> In the Superseding and Amended Definitive Class Settlement Agreement ("SAD Class Settlement Agreement") (JA A-3747) Rule 23(b)(3) Class Counsel created the problem giving rise to this appeal by failing to define with any degree of precision who is, and who is not, a class member. i.e, Class Counsel left out that a 23(b)(3) [class member] must have suffered damage arising from Defendant's illegal behavior.

([Appellants Jack Rabbit, LLC, et al. Opening Brief (D.E.163), at 15]).

The Plan of Administration and Distribution (SAD Class Settlement Agreement APPENDIX I at A-4009 et seq.) did not resolve the class definitional problem because Class Counsel and the Defendants neglected to specify that a class member must have suffered damages, arising from Defendants' illegal behavior.

In this matter, the district court ignored the drafting error attributable to Class Counsel and the Defendants. As a result, Article III standing of individual class members is not required by the class definition approved by the district court. Thus, the definition, and the settlement adopting that definition, approved by the district court, are fatally flawed because a class settlement, in a non-injunctive matter, cannot be approved if the class, as defined by the settlement, includes class members, such as the Oil Distributors in this matter, who lack Article III standing. *Denney*, 443 F.3d at 263-64.

The record confirms that the district court believed: that it could sidestep and not rule on the question of class member standing. Simply, as the matter had not previously been brought to the court's attention by a motion, the district court delegated the issue of standing to the Special Master for determination after the approval of the settlement through the process of claims administration. Both the approval of the class definition and the delegation to the Special Master of the standing issue by the district court are error as a matter of law, requiring a remand.

The related issues of typicality and ascertainability further impel immediate attention to standing. This Court has held that "[i]n a putative class action, a plaintiff has class standing if he plausibly alleges (1) that he personally has suffered some actual injury as a result of the putatively illegal conduct of the defendant, and (2) that such conduct implicates the same set of concerns as the conduct alleged to have caused injury to other members of the putative class by the same defendants." *Ret. Bd. of the Policemen's Annuity & Ben. Fund v. Bank of New York Mellon*, 775 F.3d 154, 161 (2d Cir. 2014) (citation omitted). Without that type of typicality, class certification is unavailable. Moreover, it overlaps with the essential requirement for standing of injury in fact. Thus, this Court has required a district court to "engage in a rigorous analysis of the plaintiff's legal claims and factual circumstances in order to ensure that appropriate subclasses are identified, that each subclass is tied to one or more suitable representatives, and that each subclass satisfies Rule 23(b)(2)." *Marisol A. v. Giuliani,* 126 F.3d 372, 378-79 (2d Cir. 1997). That rigorous analysis must include "(1) the discrete legal claims which are at issue, (2) the named plaintiffs who are aggrieved under each individual claim at issue, and (3) the subclasses that each named plaintiff represents." Id.

Similarly, the "touchstone of ascertainability is whether the class is 'sufficiently definite so that it is administratively feasible for the court to determine

whether a particular individual is a member.'" *Brecher v. Republic of Argentina*, 806 F.3d 22, 24 (2d Cir. 2015) (quoting 7A Charles Alan Wright & Arthur R. Miller et al., Fed. Prac. & Proc. § 1760 (3d ed.1998)). By including within the class members who do not have standing, the district court failed to discharge this non-delegable obligation.

II
THE DISTRICT COURT ERRED AS A MATTER OF LAW WHEN IT FINALLY APPROVED THE SETTLEMENT, BECAUSE IN SO DOING, IT DISREGARDED THE SUPREME COURT'S DIRECTION IN *AMCHEM PRODUCTS, INC. V. WINDSOR*, 521 U.S. 591 (1997) AND *ORTIZ V. FIBREBOARD CORP.*, 527 U.S. 815 (1999)

In response to Appellant's initial brief Class Counsel takes the position that there is no intraclass conflict in this matter. *See* 20-339, ECF Doc 208, pages 38, 55, 62. Class Counsel's position is (reframed in terms of Article III) that there can be no intraclass conflict between the Oil Distributors and the Retail Gas Station Owners because only one of the two class members has Article III standing.

"The district court also found that a dispute between a Branded Operator and an oil company over who owns a particular claim does not give rise to an "intra-class conflict," because "[s]omebody owns the claim and somebody does not." *Id*. at *18 (quoting Co-Lead Counsel's statement at fairness hearing). As there is only one "owner" of a claim for any particular transaction (and thus only one class member as a result of that transaction), the court found that subdividing the class or appointing separate counsel was unnecessary. *Id.* Any disputes over who owned a claim could be addressed through an orderly claims-administration process. *Id*. The court reasoned that this settlement was typical of other settlements, in which a determination as to who is the proper owner of a disputed claim to the settlement

funds and that it would be unacceptable to delay approval while these issues were resolved. *Id*.

The court observed that in the Visa Check case, similar claim- ownership issues had been addressed and resolved without difficulty by a court-appointed special master. *Id*. at *21. (20-339, ECF Doc 208, page 38).

A district court cannot approve a class settlement which defines a class so broadly that it includes persons who have Article III standing and persons who do not. That duality violates the law regarding the necessity that an approved class only consist of members who have Article III standing. *Denney v. Deutsche Bank AG*, *supra*; *Mazza v. Am. Honda Motor Co., supra*, *Ramirez v. TransUnion LLC, supra*

The United States Supreme Court provided a roadmap to solving this problem in the class action context.

In *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fibreboard Corp*., 527 U.S. 815 (1999) the Supreme Court directed that when, as in this matter, a class-action encompasses class members who have intraclass conflict, the solution, under rule 23(a)(4), is for the district court to create a subclass of those class members who are in conflict and to appoint counsel to represent that subclass. There can be no greater conflict within a class or subclass than between members claiming the same compensation. The requirement that each class have

adequate representation largely turns on whether the representative plaintiffs' interests are antagonistic to the interest of other members of the class. *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000). When members of the class must fight each other over the same money set aside in settlement, their interests are inherently antagonistic.

There is no question that the district court failed to assess these antagonisms and take steps to assure adequate representation between these conflicting claims. That error proximately led to the district court's failure to determine, under the applicable antitrust law, whether the Oil Distributors or the Retail Gas Station owners were the *Illinois Brick* direct purchasers; entitled as a matter of law to damages from the settlement.

Instead of requiring the creation of a subclass of Retail Gas Station owners, and appointing counsel to represent that subclass against the interests of class counsel and the Oil Distributors, the district court decided to kick the can down the road and appoint a Special Master tasked with deciding, as a matter of claims administration, whether the Retail Gas Station or its Oil Distributor had Article III standing. However, precedent requires that decision to be part of the settlement-approval process.

The district court's solution, i.e., appointment of a Special Master disregards the district court's obligation to perform an Article III standing analysis.

Before approval of the class action settlement, the district court was required to decide which entity – the Retail Gas Station owners or the Oil Distributors, have standing, i.e., which entity has suffered a concrete and particularized "injury in fact." *See Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180-181 (2000).

III
NEITHER CLASS COUNSEL NOR MASTERCARD ADDRESSED APPELLANTS' ARGUMENT THAT CLASS COUNSEL'S TRUE LEGAL POSITION IS ADVERSE TO APPELLANTS, AND ALL SIMILARLY SITUATED RETAIL GAS STATION OWNERS, WHO SUFFERED DIRECT ANTITRUST INJURY, AND ARE A SUBCLASS OF COST PLUS DIRECT PURCHASERS, WITH ARTICLE III STANDING, UNDER *ILLINOIS BRICK*'S BRIGHT LINE RULES

As between the Oil Distributors and the Retail Gas Station Owners the question of Article III standing is settled by the major exception to the "almost always" first purchaser simplicity of the *Illinois Brick* rule.

MasterCard's position, that the direct purchaser is the Acquiring Bank is specious, as the Acquiring Bank is the agent of the merchant. Furthermore, the Acquiring Bank does not pay the interchange fee, and additionally charges the merchants an additional fee for processing the sale.

Class counsel simply ignores that the exception applies when the first purchaser has avoided antitrust-injury by having previously contracted to sell the product or service to a customer on a cost-plus basis. Whenever the first purchaser is economically unaffected by the manufacturer's anticompetitive pricing because the customer is contractually obligated to absorb all of the first purchaser's costs, plus an agreed profit, the first purchaser's customer is the party directly injured by the manufacturer's anticompetitive pricing.

In *Illinois Brick* the Supreme Court reasoned that because the cost-plus customer, and not the first purchaser, has suffered the cognizable antitrust injury, it is the cost-plus purchaser who has sustained the antitrust injury; which in turn gives rise to Article III standing. As a result, the cost-plus buyer, as a Cost Plus Direct Purchaser, becomes the only proper plaintiff to pursue the antitrust defendant and to receive damages for its injury.

In this matter, Appellants Jack Rabbit, LLC and Cahaba Heights Service Center, Inc. are Cost Plus Direct Purchasers with Article III standing. As such, it was error for the district court to place Appellants, who are proper plaintiffs, together with the oil distributor class members, who do not have Article III standing, in a competition over the same claim arising from the same transaction, leaving it to the claim administration process and the Special Master to sort out.

CONCLUSION

For all of the forgoing reasons the judgment of the district court should be reversed and this matter should be remanded with instructions to the district court to appoint counsel to represent the subclass of class members who, like Appellants Jack Rabbit and Cahaba Heights Chevron are Cost plus Direct Purchasers under *Illinois Brick*'s cost plus exceptions to the indirect purchaser rule and then proceed to determining, on the basis of Article III standing, who remains a member of the class.

Dated: January 5, 2021 Respectfully submitted

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a) Fed. R. App. P and CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b)(i) because this brief contains less than 5,220 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type styles requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect's 14 point Times New Roman font.

Dated January 5, 2021.

/s/ N. Albert Bacharach, Jr.
N. Albert Bacharach, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on January 5th, 2021 I filed the foregoing Final Form Reply Brief via the CM/ECF filing system for the United States Court of Appeals for the Second Circuit, and that as a result each counsel of record received an electronic copy of this Reply Brief on January 5th, 2021.

/s/ N. Albert Bacharach, Jr.
N. Albert Bacharach, Jr.