UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In Re PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION	MASTER FILE NO. 05-MD-1720 (MKB)(JO)
This Document Relates To: (1) Rule 23(b)(3) Class Action; and (2) Friedman claim in intervention	[PROPOSED] COMPLAINT IN INTERVENTION
GARY B. FRIEDMAN and FRIEDMAN LAW GROUP LLP, Intervenor-Plaintiffs, —against— ROBINS KAPLAN LLP, BERGER & MONTAGUE, P.C. and ROBBINS GELLER RUDMAN & DOWD LLP, Defendants-In-Intervention.	JURY TRIAL DEMANDED

As their complaint in intervention in this action, intervenor-plaintiffs Gary B. Friedman and Friedman Law Group LLP ("FLG") state as follows:

INTRODUCTION

1. In December 2005, co-lead counsel for the merchant class ("lead counsel") contracted with Friedman to lead the merchants' challenge to the no-surcharge rules ("NSRs") of the Visa and MasterCard networks. Over the preceding year, Friedman had conceived the NSR claims, developing cases in consultation with top antitrust economists and then filing suit on behalf of merchant clients. Meanwhile, lead counsel had filed cases challenging the networks' setting of "interchange fees" as a form of illegal price fixing. The JPML then centralized the NSR and interchange cases in this District, leaving to the transferee court the appropriate "extent and

manner" of consolidation of the NSR and interchange claims. 398 F. Supp. 2d 1356 (JPML October 20, 2005). In the wake of that transfer order, lead counsel sought to assemble a team steeped in the NSR issues, as well as the interchange claims that had been lead counsel's sole focus.

2. And so, in December 2005, lead counsel entered into an agreement with Friedman and his colleagues—referred to collectively in the written contract as the "NSR Group"—under which Friedman and his co-counsel Mark Reinhardt agreed to assume "primary responsibility" for litigating the NSR claims (the "Agreement"). In consideration, the Agreement provided that the NSR Group would receive attorneys' fees in proportion to the group's collective approved "lodestar" (i.e., hours worked times hourly rate), such that the NSR Group would receive, say, 10% of the overall attorneys' fees if it accounted for 10% of the overall lodestar. The Agreement further provided that Friedman and Reinhardt would receive the fees payable to the NSR Group and determine how to allocate and distribute those fees among the NSR Group lawyers.

3. The Agreement, annexed as Exhibit 1, consists of (i) a letter dated November 29, 2005, from co-lead counsel Craig Wildfang to Friedman and Reinhardt; (ii) a letter dated December 29, 2005 from Friedman to Mr. Wildfang and his co-counsel, and (iii) acknowledgements executed by the firms comprising the NSR Group, agreeing to be bound by the terms of the Agreement.

4. Over the ensuing decade, Friedman fully discharged his obligations under the Agreement, forming a law firm that logged tens of thousands of hours on the case and incurred expenses in the seven figures. Along the way, Friedman and his team achieved remarkable results for the merchants, driving the networks to relinquish their long-held NSRs in 2013 and to leave them off the books in the years since. Friedman further launched successful constitutional

challenges to state anti-surcharging statutes around the country, thereby eliminating the principal defense to the class plaintiffs' damages claims based on the NSRs. And the discovery efforts of Friedman's team elicited powerful evidence that, when merchants around the world are truly armed with the power to surcharge, they are able to drive credit card acceptance costs substantially lower – evidence that helped pave the way to the $6.24 billion settlement that received the preliminary approval of the Court in January 2019.

5. On the eve of filing the joint fee petition in these class settlement proceedings, lead counsel breached the 2005 Agreement. In a letter to Friedman dated May 6, 2019, lead counsel declared that they "will not include" in the joint fee petition "any portion of the lodestar time or expenses of the Friedman Law Group and any predecessor firms."

6. By excluding Friedman and FLG from the joint petition, lead counsel stand to capture for themselves all of the fees that would have gone to FLG if lead counsel had honored the contract. The presence or absence of FLG lodestar in the joint petition does not affect the amount sought. Lead counsel has already told this Court that "an individual attorney's lodestar… does not impact the amount that is awarded under the percentage of the fund method," so long as a "lodestar cross-check [ ] confirm[s] the reasonableness of the attorneys' fee award," which it easily will "in a mega-fund case." Class Br. Opp. R 60 Mo., Dkt. 6533 at 3. By excluding Friedman and FLG from the joint petition—in violation of the Agreement and lead counsel's fiduciary obligations—lead counsel stand to unjustly enrich themselves by many millions of dollars.

THE PARTIES

7. Intervenor Gary Friedman is a resident of New York State and a member of the Bar of the State of New York and of this Court. Friedman entered a Notice of Appearance in this action on February 1, 2006 (Dkt. 204).

8. Intervenor Friedman Law Group LLP is organized under New York law with its principal place of business in New York City. FLG is controlled by Friedman.

9. Defendant-In-Intervention Robins Kaplan LLP is a Minnesota limited liability partnership with its principal place of business in Minneapolis, Minnesota. Robins Kaplan also maintains an office in New York State and, upon information and belief, the firm has partners who reside in New York State, such that the firm is a New York citizen for diversity purposes. Under the leadership of its partner K. Craig Wildfang, Robins Kaplan was one of three firms appointed interim co-lead class counsel by the Court in 2006 and, by Order of the Court dated January 24, 2019, was appointed co-lead counsel for the Rule 23(b)(3) class.

10. Defendant-In-Intervention Berger & Montague, P.C. is, upon information and belief, a professional corporation organized under Pennsylvania law, with its principal place of business in Philadelphia, Pennsylvania. Berger & Montague, under the leadership of its partner H. Laddie Montague, was one of three firms appointed interim co-lead class counsel by the Court in 2006 and, by Order of the Court dated January 24, 2019, was appointed co-lead counsel for the Rule 23(b)(3) class.

11. Defendant-In-Intervention Robbins Geller Rudman & Dowd LLP is, upon information and belief, a limited liability partnership organized under California law, with its principal place of business in San Diego, California. Robbins Geller (or a predecessor firm) was one of three firms appointed interim co-lead class counsel by the Court in 2006 and, by Order of the Court dated January 24, 2019, was appointed co-lead counsel for the Rule 23(b)(3) class.

JURISDICTION AND VENUE

12. This Court has supplemental jurisdiction over this complaint in intervention under 28 U.S.C. § 1367(a), which provides that "district courts shall have supplemental jurisdiction over"

any claims that "are so related to" the claims over which the court has original jurisdiction "that they form part of the same case or controversy." These principles specifically apply, under §1367(a), to "claims that involve the joinder or intervention of additional parties."

13. Venue is proper in this District under 28 U.S.C. § 1391(b)(2) because the events at issue took place substantially in this District and the underlying class action into which intervention is sought is pending in this District.

FACTUAL ALLEGATIONS

Formation of MDL 1720

14. In 2004, based upon his own original research, Friedman conceived and developed antitrust claims against the major credit card networks focused upon their rules against merchants steering customers to use lower cost methods or brands of payment, and especially the networks' "no-surcharge rules" or NSRs.

15. On May 5, 2005, Friedman and colleagues filed the first class action, and indeed the first lawsuit, in what would later become MDL 1720. *Animal Land Inc. v. Visa USA Inc.* The *Animal Land* case challenged the NSRs (defined broadly throughout this Complaint to include rules against merchant steering) as violations of federal antitrust law.

16. Seven weeks later, the Robins Kaplan law firm filed a case challenging the Visa and MasterCard networks' setting of interchange fees as unlawful price-fixing. Like Friedman's NSR case, the Robins Kaplan filing was the product of original thought and research. But unlike Friedman's case, the Robins Kaplan case did not touch on the concept of NSR or steering in any way, focusing instead upon the interchange system.

17. Soon after that, numerous law firms around the country filed suit, including lawyers affiliated with Friedman who filed NSR claims against Visa, MasterCard, American Express and Discover.

18. MDL proceedings were commenced. Before the JPML, in the fall of 2005, Friedman's group argued for treating the NSR cases separately—a position the other parties resisted. In its ruling, the JPML transferred all cases to this District under 28 U.S.C. § 1407, but explicitly left open for the transferee court the question of whether and how to consolidate or coordinate the NSR and interchange fee cases.

19. In the wake of that transfer order, Friedman and colleagues met multiple times with Mr. Wildfang and representatives of the other co-lead counsel firms to discuss how the lawyers might all work together for the benefit of merchants. By late November 2005, the two sides had reached an understanding for how to structure the leadership of a class action that attacked both interchange and NSR, and that tapped the expertise of the lawyers familiar with each set of issues.

The Agreement

20. The Agreement was memorialized in a November 29, 2005 letter from co-lead counsel K. Craig Wildfang of Robins Kaplan to Friedman and his colleague Mark Reinhardt, and a December 29, 2005 letter from Friedman to Wildfang and other co-lead counsel, enclosing signed acknowledgements from various law firms and lawyers agreeing to be bound by the terms of the Agreement.

21. The Agreement assigned Friedman and his team primary responsibility for attacking the NSRs of the defendant networks, including "briefing and arguing motions relating to the NSR claims, taking and noticing depositions related to the NSR Claims, conducting all NSR-

related discovery, working with experts on the NSR claims, staffing the NSR claims and other activities consistent with the foregoing."

22. In return, the parties agreed that Friedman and his team, referred to as the NSR Group in the Agreement, would receive a share of any award of attorneys' fees, to be determined by a formula based upon the approved billings (or "lodestar") of the NSR Group:

> "The NSR group will, as a group, receive a percentage of all attorneys' fees in this action that is equal to the percentage of the approved lodestar that the NSR Group accounts for. So by way of example, if the NSR Group accounts for 10% of the approved lodestar (hours times hourly rate) of all plaintiffs' counsel, then the NSR Group shall receive 10% of all attorneys' fees awarded, irrespective of whether the NSR claim(s) result in any relief of any nature, and irrespective of whether the interchange claim(s) result in any relief of any nature. The two of you [i.e., Friedman and Reinhardt] will be responsible for the allocation within the NSR group, and the members of that group agree not to seek additional fees from the other plaintiffs' counsel or from the Court."

Performance Under The Agreement

23. Friedman has performed his responsibilities under the Agreement, beginning with his work in drafting the NSR components of the Consolidated Class Action Complaint, leading discovery efforts aimed at NSR-related issues (including promulgating and negotiating discovery requests, overseeing document review operations, and taking and assigning/supervising depositions) and briefing summary judgment as it pertained to NSR issues.

24. Among other achievements, Friedman and his team drove the Visa and MasterCard networks to rescind their long-held and fiercely-defended NSRs, persuaded federal courts around

the country to strike down state statutes banning credit-card surcharges on constitutional grounds, and convinced state legislatures to defeat anti-surcharging bills that were introduced in some twenty states after the defendants dropped their NSRs.

25. The class plaintiffs and defendants announced to the Court on June 21, 2012 that they had reached a settlement and the Court entered a sealed order (since unsealed) to that effect on June 25, 2012. On July 13, 2012, the settling parties filed their proposed settlement agreement with the Court.

26. As part of the settlement process, class plaintiffs filed a petition for attorneys' fees on April 11, 2012. In preparing that petition, lead counsel had all firms prepare their time records according to certain specifications and submit them for detailed review by lead counsel. See Undlin Decl. Dkt. 2113-2. FLG submitted its detailed records and, after a rigorous review by lead counsel and its accounting firm, 99% of FLG's lodestar was approved. No other major participant in the case—including the co-lead counsel firms—had as high a percentage of its time approved in this vetting process. *See id.* at Ex A, Master Lodestar Report.

The Rule 23(b)(3) Case

27. The District Court approved the settlement and, in January 2014, awarded attorneys' fees based upon lead counsel's fee petition.

28. In 2015, certain parties who had objected to the settlement alleged that certain communications between Friedman and an opposing counsel warranted district court action overturning the approval of the settlement. Friedman offered to address any questions or issues lead counsel may have regarding the communications, but lead counsel declined. After reviewing all of the relevant communications, lead counsel dismissed the objectors' assertions that Friedman

acted against class member interests as "patently false," "flatly and demonstrably false," and "pure fantasy." Dkt 6555 at 27, 29.

29. In June 2016, the U.S. Court of Appeals for the Second Circuit reversed the District Court's decision approving the settlement, reasoning that lead counsel's "unitary representation" of the equitable relief and damages classes created potential conflicts. Accordingly, on remand, the District Court appointed separate counsel for the (b)(3) and (b)(2) classes, with the Defendants-In-Intervention being named lead counsel for the damages-only class under Rule 23(b)(3).

30. In February 2017, lead counsel filed its damages-only complaint (Dkt. 6923), which relied heavily on the NSR challenge, making well over one hundred references to merchant surcharging and steering, and substantially incorporating material drafted by Friedman years earlier, in the first consolidated class action complaint.

31. In June 2018, media reports surfaced that the class plaintiffs and defendants had reached a new agreement in this action. On June 29, 2018, Friedman emailed lead counsel, reiterating his offer to address any concerns and asking to have a discussion "at your earliest convenience but before any decisions are made that might affect me or my law firm."

32. On September 18, 2018, lead counsel and the defendants executed and filed a settlement agreement that calls for cash payment of up to $6.24 billion. Dkt. 7257-2. Contemporaneously, lead counsel submitted a proposed class notice representing that lead counsel would file a single *integrated* fee petition covering "all of the lawyers and their law firms that have worked on the class case." That notice was subsequently approved and distributed to millions of U.S. merchants.

33. On April 9, 2019, Friedman again wrote Wildfang, asking lead counsel to affirm its intention to abide by the Agreement and reiterating his offer to address any concerns or

questions lead counsel may have. Neither Wildfang nor any other member of lead counsel responded to Friedman's emails of September 18, 2018 or April 9, 2019. On May 6, 2019, Friedman again contacted lead counsel, this time by email and voicemail.

The Breach Of The Agreement

34. On the evening of May 6, 2019, lead counsel wrote Friedman that they refuse to include the hours and expenses of FLG within the joint petition for attorneys' fees in this class action, as the Agreement requires them to do. Instead, lead counsel wrote, "[i]f you wish to apply for a fee and expense award for your firm's work in *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, 05-md-01720, you will need to file an independent fee petition with the Court."

35. But filing "an independent fee petition" is irreconcilable with the clear terms of the 2005 Agreement. Under the Agreement, lead counsel must take the portion of the fee award that is allocable to the NSR Group, as determined by application of the formula in the Agreement, and pay those funds over to Friedman and Reinhardt, jointly, for them to then allocate and distribute among the NSR Group member firms, including their own firms. That whole structure is rendered impossible if Friedman and FLG are outside of the joint fee petition, applying for their own fees.

36. The invitation to go file an additional petition also contravenes the Court's Order granting preliminary approval of this proposed settlement, which provides lead counsel will file "*all* motions and supporting papers seeking . . . the Court's approval of *any* Attorneys' Fee Awards." (Emphasis added). And it violates the Court-approved Long Form Notice, which informed class members that "*Class Counsel* will ask the Court for an amount . . . to compensate *all of the lawyers and their law firms* that have worked on the class case." (Emphasis added). Both

the Order and the Long Form Notice were drafted by lead counsel *after* Friedman reached out in his June 29, 2018 email.

37. In essence, lead counsel invited Friedman to make an application that lead counsel had *promised* class members would never be made. They promised class members that there would be one fee application, covering all of the fees for all of the lawyers, such that no additional lawyers would come along asking for money in addition to the joint petition. And then they invited Friedman to go ask the Court to award him money *in addition to* the joint petition. If Friedman were to make such an application, he would appear as an unwelcome interloper seeking to take advantage of class members. The petition would be met with overwhelming objections. And rightly so.

38. By disavowing the 2005 Agreement, excluding FLG from the joint petition and informing Friedman he must file an independent petition that would trample on the settled expectations of class members and violate court orders plus the Agreement itself, lead counsel acted with malice. And their actions have cut off any path for Friedman and FLG to obtain compensation for their decade-plus of impactful work for the merchant class—other than the path of suing lead counsel for damages.

39. Following lead counsel's letter disavowing the Agreement, FLG partner Tracey Kitzman wrote Wildfang on May 20, 2019. She proposed that, if lead counsel wished to exclude Friedman's fees from the joint petition, on the grounds that they were troubled by certain interactions between Friedman and opposing counsel, they could at least include the fees indisputably owed to herself and other FLG lawyers who had no role in those communications. Kitzman offered to provide affidavits from herself and former partner Noah Shube, confirming they had "nothing to do with the interactions that appear to trouble" Mr. Wildfang, and further

confirming that Friedman would not receive any of the fees paid to her and Shube from the joint petition. Friedman too was amenable to such an arrangement, under which he alone would be left to litigate against lead counsel.

40. On May 29, 2019, lead counsel wrote back, rejecting Kitzman's proposal. Without explanation, lead counsel simply refused to allow Kitzman or others to be compensated out of the fee pool generated by the joint petition.

41. The damages suffered as a direct result of lead counsel's breach of the Agreement are substantial, and include:

(i) the entirety of FLG's lodestar multiplied by the "case multiplier" (defined as total aggregate attorneys' fees awarded divided by total aggregate lodestar of all firms), ***plus***

(ii) FLG's compensable expenses of approximately $895,000, ***plus***

(iii) the total lodestar-times-case-multiplier for the NSR Group firms, minus the amounts that those firms would have been paid by Friedman and Reinhardt using the same or similar criteria employed by lead counsel for compensating other non-lead lawyers doing similar work, less a portion of this item that would flow to Mr. Reinhardt's firm, ***minus***

(iv) such moneys as FLG may recoup via 42 U.S.C. § 1988 from state attorneys general as a consequence of the successful constitutional litigations undertaken on behalf of the merchant class, under the supervision of lead counsel.

FIRST CLAIM FOR RELIEF

(Breach of Contract)

42. Friedman and FLG incorporate the foregoing allegations as though they were set forth here.

43. The 2005 Agreement is a valid contract.

44. Friedman and FLG fully performed under the Agreement and complied with all of its obligations.

45. By refusing to include FLGs time and expenses in the joint fee petition, lead counsel have breached the Agreement.

46. As a direct and foreseeable consequence of lead counsel's breach of the Agreement, Friedman and FLG have suffered and stand further to suffer injury as outlined above.

47. In the absence of a judicial declaration of the parties' rights and liabilities under the 2005 Agreement, Friedman and FLG stand to suffer harm of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

SECOND CLAIM FOR RELIEF

(Breach of Fiduciary Duty)

48. Friedman and FLG incorporate the foregoing allegations as though they were set forth here.

49. Lead counsel in this case owes fiduciary duties to all of the non-lead class counsel, including Friedman. Kitzman and FLG. By performing work on and investing in the instant class action litigation, the non-lead firms reposed their trust and confidence in lead counsel. Lead counsel alone was entrusted to seek and receive legal fees on behalf of the non-leads. Moreover, lead counsel is vested with total discretion in how to discharge that serious responsibility—e.g., whether to pursue a common fund settlement, whether to apply for fees based on a percent-of-fund or lodestar, and so on. Indeed, lead counsel has even argued that it alone, to the exclusion of the Court, is responsible for allocating fees among non-lead counsel: "The Settlement Agreement provides that *Class Counsel* shall allocate any fees awarded among Class Plaintiffs' counsel. The Court therefore need not be burdened with that task." (Class Mem. 4/11/13, Dkt. 2113-1, at 24

n.20) (emphasis added; citation omitted). As the parties entrusted to apply for attorneys' fees on behalf of all the lawyers who worked on the class action, and then to allocate and distribute those fees to the non-lead attorneys, lead counsel have assumed fiduciary duties.

50. The fiduciary duties that lead counsel owe to non-lead counsel exist independent of any co-counseling or fee-sharing agreements, or the Agreement.

51. Lead counsel has knowingly and intentionally injured Friedman and FLG in violation of their fiduciary duties by refusing to include FLG lodestar or expenses in the joint petition, and by directing Friedman and Kitzman to file independent petitions in order to receive any attorneys' fees or expense reimbursement when, in fact, class members have been told no such petitions will be forthcoming—much less petitions that will impose millions of dollars in additional costs upon class members.

52. Further, in taking these actions, lead counsel has declined to discuss the issues that trouble them about Friedman's interactions with opposing counsel, refusing to consider information that may actually help lead counsel to understand that Friedman has done nothing to warrant rescission of the Agreement. Friedman has offered repeatedly to answer any questions that lead counsel may have concerning his conduct and his and FLG's entitlement to attorneys' fees. Thus he wrote Mr. Wildfang in June 2018 that he "would like to have a chance to sit down with you, whether in MN or NY, at your earliest convenience but before any decisions are made that might affect me or my law firm. There's a lot of potential for misunderstanding here and I'm confident we can cut through all of it if we can sit down for an hour or so." He communicated similar offers on *five* different occasions between February 2015 and May 2019 (including orally in February 2015 in a conference room at Willkie Farr, via counsel the following month, and in the three emails referenced above). In other words, lead counsel is breaching their contractual

obligation to pay many millions of dollars—a contractual obligation based on the performance of many thousands of hours of work over a decade or more—without investing ***even one hour*** in direct or indirect discussion with their counterparty.

53. In the analogous context of class actions under the Private Securities Litigation Reform Act, the Second Circuit has held that a non-lead counsel can make out a breach of fiduciary duty claim by showing that a "lead plaintiff"—the PSLRA equivalent to lead counsel—"(a) breached fiduciary duties by proposing an allocation motivated by an interest other than the best interest of the class or (b) breached fiduciary duties by failing to 'carefully consider and reasonably investigate' non-lead counsel's fee request." *Flanagan, Lieberman, Hoffman & Swaim v. Ohio Public Employees Ret. Sys.*, 814 F.3d 652, 659 (2d Cir. 2016).

54. Here, lead counsel's actions in pushing FLG out of the joint petition were "motivated by an interest other than the best interest of the class." Whether that motivation was to keep the joint petition free of any controversy relating to Friedman, or to capture FLG's share of the attorneys' fee award for lead counsel themselves—or some combination—lead counsel's actions were undertaken to benefit *lead counsel*, and not the class members.

55. Nor did lead counsel "reasonably investigate" the basis for jettisoning FLG's lodestar and expenses. If lead counsel even remotely suspected that Friedman had breached the duty of loyalty that he owed to the class members, lead counsel would have been duty-bound to take Friedman up on his numerous offers to provide information. And if they had evidence of such a breach, they would have advised the Court to that effect four years ago, and would have rescinded the Agreement. But they did not and do not have any evidence of such a breach—in fact, they have emphatically dismissed assertions that Friedman acted against class member interests as

"patently false," "flatly and demonstrably false," and "pure fantasy." Dkt 6555 at 27, 29. And they have declined all of Friedman's offers to furnish additional information.

56. Lead counsel's actions in breaching their fiduciary obligations were intentional and harmful and manifested a conscious disregard of the rights of FLG, Friedman and Kitzman. At minimum, those actions constituted willful or wanton negligence or recklessness.

THIRD CLAIM FOR RELIEF

(Unjust Enrichment)

57. Friedman and FLG incorporate the foregoing allegations as though they were set forth here.

58. By its own acknowledgement, lead counsel's exclusion of FLG's lodestar from the joint petition "does not impact the amount" that lead counsel seeks in the joint petition. By its wrongful actions, therefore, lead counsel stand to capture the legal fees that would be paid to FLG if lead counsel had not breached its obligations. The fees are a benefit that lead counsel will capture for itself at FLG's expense and, absent relief, equity and good conscience will require restitution.

WHEREFORE, Plaintiffs-Intervenors request judgment:

A. Declaring that lead counsel has breached the 2005 Agreement;

B. Awarding compensatory damages on the First Claim for Relief;

C. Awarding compensatory and punitive damages on the Second Claim for Relief;

D. Awarding restitution on the Third Claim for Relief; and

E. Awarding such other relief as the Court may deem just and proper.

Jury Demand: Plaintiffs-Intervenors demand trial by jury of all claims so triable.

Dated: June 7, 2019
New York, New York

FRIEDMAN LAW GROUP LLP

s/ Gary B. Friedman
By: Gary Friedman
154 Grand Street
New York, NY 10013
917-568-5024
gfriedman@flgllp.com

For Plaintiffs-Intervenors