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:	:	
Rule 23(b)(3) Class Action	:	

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION OF GARY B. FRIEDMAN AND FRIEDMAN LAW GROUP LLP FOR LEAVE TO INTERVENE PURSUANT TO FED. R. CIV. P. 24

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Movants Gary Friedman and Friedman Law Group LLP (together, "FLG") submit this reply memorandum in further support of their motion to intervene in this action.

I. INTERVENTION OF RIGHT UNDER RULE 24(a)

A. Intervention is necessary to protect FLG's contractual interests.

Lead Counsel are trying to distract the Court from a straightforward analysis of FLG's right to intervention. Simply put, there is a contract between FLG and Lead Counsel governing the division of fees. Lead Counsel have already breached that contract by not submitting FLG's hours to the Court, and they have expressly disavowed any intention to pay FLG according to the contract terms. FLG therefore has a legal claim against Lead Counsel for breach of contract.

Lead Counsel have proposed replacing FLG's legal claim with an equitable claim. Specifically, they have asked this Court to deny FLG any opportunity to raise its legal claim and they have suggested that FLG instead submit a fee petition for the Court to consider under its equitable powers. But that is exactly backwards. Where legal and equitable claims "have common issues of fact, and a jury trial has been properly demanded with respect to the legal claims," the legal claims take precedence under the Seventh Amendment. *Wade v. Orange Cty. Sheriff's Office*, 844 F.2d 951, 954 (2d Cir. 1988). "[T]he jury must decide the legal claims prior to the court's determination of the equitable claims, in order to prevent the court's determination of a common factual issue from precluding, by collateral estoppel effect, a contrary determination by the jury." *Id.*, citing *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959) and *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962) (emphasis added). *See also*, *Brown v. Sandimo Materials*, 250 F.3d 120, 127-28 (2d Cir. 2001) ("under *Dairy Queen*, the legal claims involved in the action must be determined prior to any final court determination of respondents' equitable claims");

Lore v. City of Syracuse, 670 F.3d 127, 167 (2d Cir. 2012) (a "jury's verdict on the common factual issues precludes a contrary finding of fact by the court.") [1]

Fed. R. Civ. P. 24(a)(2) turns on the movant's "ability to protect its interest" in the absence of intervention. In the present dispute, without intervention, there would be no forum in which FLG can enforce its contractual rights. There is no diversity jurisdiction in a dispute between FLG and Lead Counsel, so FLG cannot simply file a breach-of-contract suit in federal court. And this Court would presumably enjoin a state court filing under the All Writs Act. That leaves this Court as the only available forum to resolve the contract dispute. Denial of FLG's request for intervention would therefore "impair or impede" FLG's "ability to protect" its legal claim and contractual interests. *See* Rule 24(a)(2).[2]

Moreover, despite their objections, Lead Counsel themselves seem to understand that the question of FLG's entitlement is a private contract issue. In recent correspondence, Lead Counsel have clarified that the issue to be addressed in an FLG "petition" would be "whether [FLG is] entitled to a portion of any fee and expense award made to Class Counsel." Friedman Reply Decl., Ex. 1; *see also* LC Br. at 15-16 (fee could be "paid out of any fee this Court may award Class Counsel.") But a filing that seeks a portion of the fees awarded to Lead Counsel, based on a contract with Lead Counsel, is not a fee petition; it is a lawsuit. Lead Counsel ask the Court to

[1] Lead Counsel cannot argue that Rule 23(h), which provides that a court evaluating a fee petition "may hold a hearing and must find the facts," authorizes equitable fact-finding that may affect the resolution of legal claims. As the Supreme Court held in *Beacon Theaters*, the Federal Rules of Civil Procedure must be read to "preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution." *Beacon Theaters*, 359 U.S. at 510 n.16 (quoting the original Rules Enabling Act, 28 U.S.C. §2072). The framers of the Federal Rules likewise made clear that "[t]he right of trial by jury as declared by the Seventh Amendment to the Constitution… is preserved to the parties inviolate." Fed R. Civ. P. 38(a).

[2] In addition, FLG believes that this Court is the most appropriate forum in which to resolve this dispute. The conduct at issue occurred in the context of landmark litigation in this Court. And this Court uniquely understands the relevant history and has a singular interest in ensuring the integrity of the settlement.

require FLG to submit a neither-fish-nor-fowl creature of Lead Counsel's own construction—a filing that would seek nothing from defendants or class members, and would operate like a private lawsuit against Lead Counsel, only without defined rules of decision, burden-of-proof allocations, or other protections. The Court should decline this invitation and treat the private contract claim as what it in fact is—a private contract claim.

Finally, if Lead Counsel are in fact alleging that Friedman's conduct was so egregious that it empowers them to nullify the contract, then investigation by the Court is critical before the settlement fairness determination.[3] If the Court were to approve the settlement, and only subsequently evaluate the communication between Friedman and Ravelo, it would be impossible for any stakeholder to know if this evidence would have impacted the fairness decision. That uneasiness would exist regardless of whether FLG or Lead Counsel ultimately prevails. And after fourteen years of litigation, all stakeholders should have confidence that the Court made its fairness decision with full knowledge of the relevant facts.

B. Neither *Reed Smith* nor other cited authority changes that conclusion.

Lead Counsel rely on *Reed Smith* for the proposition that a federal class action court has "ancillary jurisdiction" to entertain collateral disputes regarding attorney fees. LC Br. at 10, 11. And no one disputes that. But *Reed Smith* does not support privileging equitable proceedings over the resolution of related state-law claims in federal court. While the district court enjoined Reed Smith from proceeding in the state court, it was careful to explain that "[we] do not rule on whether

[3] It is simply impossible for Friedman's conduct to have been so egregious as to warrant nullification of the contract, but not egregious enough to warrant investigation prior to the approval of the settlement. After all, Lead Counsel has purported to nullify the FLG contract for the reasons "set forth in the Rule 60 Motions" filed by objectors (*see* LC Fee Pet. Br., Dkt. 7471-1 at 22, n.21)—motions that accused Friedman of conspiring with Ravelo in the formulation of a settlement that disfavors the merchant class. That allegation, which is the heart of Lead Counsel's position and the heart of the Rule 60 motion, has implications both for the FLG contract dispute and for the settlement itself.

Reed Smith is entitled to attorneys' fees under the tort-based theories alleged in the State Court Action. Reed Smith has never offered those theories in this Court and, consequently, the merits of those theories have not been fully explored here." *Kaplan v. S.A.C. Capital Advisors, L.P.*, 12-CV-9350, 2017 U.S. Dist. LEXIS 202631 (S.D.N.Y. November 16, 2017), *aff'd sub nom Kaplan v. Reed Smith LLP*, 919 F.3d 154 (2d Cir. 2019). The Second Circuit affirmed this precise point. *Id*. at 160-61. And because Reed Smith never filed in federal court, it never invoked its right to have its legal claims resolved before its equitable claims. That right only applies in federal court, not state court, since it springs from the Seventh Amendment. *See Colgrove v. Battin*, 413 U.S. 149, 169 n.4 (1973) (Marshall, J., dissenting) ("The Seventh Amendment is one of the few remaining provisions in the Bill of Rights which has not been held to be applicable to the States.")

None of the other decisions relied on by Lead Counsel remotely hold that legal claims can be addressed after related equitable proceedings. It is undisputed that this Court has "ancillary jurisdiction to hear fee disputes" relating "to the main action." *Kalyawongsa v. Moffett*, 105 F.3d 283, 287 (6th Cir. 1997). The question is whether to prioritize an equitable proceeding or legal claims founded on the same facts. *In re Goldstein*, 430 F.3d 106 (2d Cir. 2005) likewise did not implicate a claim on a contract; rather, the court imposed sanctions for a lawyer's gross negligence that damaged the client, including a fee reduction to "protect the client from excessive fees." *In re E. Sugar Antitr. Lit.,* 697 F.3d 524 (3d Cir. 1982) is similar. Lead Counsel's other cases are similarly unhelpful to its argument.[4]

[4] Lead Counsel cite *In re Holocaust Victim Assets Litig*., 225 F.3d 191, 197-99 (2d Cir. 2000) for the proposition that intervention is unnecessary where "other channels were available to the proposed intervenor." LC Br. at 9. In that case, the court held: "because appellants remain free to file a separate action, they have not established that they will be prejudiced if their motion to intervene is denied." By contrast, FLG would have no ability to file a separate lawsuit, as discussed above, and would thus suffer extreme prejudice if the motion is denied.

II. THE CLAIM FOR DECLARATORY RELIEF IS RIPE

Lead Counsel argue that the contract claim is not ripe because the Court has not yet awarded fees, or because there is no "Court-approved lodestar." LC Br. at 14. But Lead Counsel have already breached the contract. Lead counsel did not include FLG's lodestar in the joint fee petition. And Lead Counsel explicitly disavowed the contract in its May 6, 2019 letter to Friedman. Friedman Decl. Ex. 6, Dkt. 7470-9. So, regardless of whether the claim for money damages is ripe, the claim for declaratory judgment is certainly ripe.

The very case Lead Counsel rely on, LC Br. at 14, proves the point. In *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 261 F. Supp. 2d 293, 295 (S.D.N.Y. 2003), the defendant insurer's obligation to pay only arose 30 days after presentation of proof of loss, which plaintiff had not filed at the time of suit. Because "payment by defendant [was] not yet due," plaintiff's damages claims were premature, and the Court dismissed them without prejudice. *Id.* But the court upheld the claims seeking declaratory relief, because an actual controversy existed between the parties, and the "[declaratory] judgment would almost certainly resolve the primary issue in this case as to scope of coverage." Id. at 296. See also *Beazley Ins. Co. v. Ace Am. Ins. Co.*, 150 F. Supp. 3d 345, 354-55 (S.D.N.Y. 2015) (declaratory judgment claim is ripe even if damages claim for breach is not).

The standard for ripeness in a declaratory judgment action is whether there is a "substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Duane Reade,* 261 F. Supp. 2d at 295. The "immediacy of a claim must be judged, in large part, by 'the hardship to the plaintiff which will flow from withholding judicial review.'" *Pedre Co. v. Robins*, 901 F. Supp. 660, 663 (S.D.N.Y. 1995) (citations omitted). Indeed, the whole point of declaratory relief is "to enable parties to

adjudicate disputes before either side suffers great damage." *In re Combustion Equipment Assocs., Inc.*, 838 F.2d 35, 37 (2d Cir. 1988).

Here, the "adverse legal interests" of the parties are clear and defined. Lead Counsel have explicitly disavowed the Agreement, in writing, and FLG seeks to enforce the Agreement. And the "hardship to the [movant] which will flow from withholding judicial review" is equally clear. If this declaratory judgment action is not entertained via intervention, then Friedman and FLG stand to lose the right to enforce their contract according to the substantive law of contracts. [5]

III. THE CLAIM FOR DECLARATORY RELIEF CAN BE HANDLED EXPEDITIOUSLY

This contract dispute can proceed swiftly and efficiently, making permissive intervention likewise appropriate under Rule 24(b). All of the relevant communications are already in the possession of Lead Counsel and have been for four years. Friedman is willing to submit to questioning, whether by Lead Counsel or the Court, at any time. In fact, Friedman has offered to discuss and explain any (or every) document to Lead Counsel for years, but Lead Counsel has declined. And the Court has procedural tools, including Rule 57, to accelerate the resolution of this contract dispute. Under Rule 57, the "court may order a speedy hearing of a declaratory-judgment action," including a jury proceeding. *See* 12 James WM. Moore et al., MOORE'S FEDERAL PRACTICE § 57.03 (3d ed. 2010).

[5] Importantly, the claim for declaratory judgment on breach of contract is entitled to the same priority over equitable claims as monetary damages claims on the same count. "A declaratory judgment action is neither inherently equitable nor inherently legal. The right to a jury trial in such a case depends upon the nature of the underlying claim… So, for example, there would be a right to a jury in a suit by the maker of a promissory note for a declaration that the note had been paid because there would be such a right in an action for damages on the note." *Chevron Corp. v. Donziger*, 800 F. Supp. 2d 484, 494-95 (S.D.N.Y. 2011); *see Simler v. Conner,* 372 U.S. 221, 223, (1963) ("courts below erred in denying petitioner the jury trial guaranteed him by the Seventh Amendment" because declaratory judgment action "was in its basic character a suit to determine and adjudicate the amount of fees owing to a lawyer by a client under a contingent fee retainer contract, a traditionally 'legal' action"); 12 James WM. Moore et al., MOORE'S FEDERAL PRACTICE § 57.64 (3d ed. 2010).

In fact, promptly upon being permitted to intervene, FLG intends to file a motion for summary judgment based on the untimeliness of Lead Counsel's assertion that Friedman's conduct gives Lead Counsel the right to nullify the contract. In *Ballow Brasted O'Brien & Rusin P.C. v. Logan*, 435 F.3d 235, 243 (2d Cir. 2006), the Second Circuit held that when a law firm became aware of co-counsel's alleged ethical violations, waited for four years, and only then notified co-counsel that the fee agreement between the law firms was to be nullified based on those ethical violations, the law firm's nullification was "manifestly untimely." And as this Court has held, under *Ballow Brasted* and related case-law, "it is irrelevant whether the [party contesting rescission] suffered prejudice" from the delay. *U.S. Liab. Ins. Co. v. WW Trading Co.*, No. 16-CV-3498 (CBA) (JO), 2018 U.S. Dist. LEXIS 222925, at *27 (E.D.N.Y. Sep. 28, 2018). Thus, following an identical four-year delay, Lead Counsel's purported nullification of the agreement in this case is "manifestly untimely" under Second Circuit law.

Moreover, were this Court to reach the substantive issues, the standard is clear: fee forfeiture would require proof that Friedman acted against the interests of class members. The Restatement (Third) of the Law Governing Lawyers § 37 (2000) provides: "[a] lawyer engaging in a clear and serious violation of a duty to a client may be required to forfeit some or all of the lawyer's compensation for the matter." (Emphasis added). Critically, this "Section refers only to duties that a lawyer owes to a client, not to those owed to other persons. That a lawyer, for example, harassed an opponent in litigation without harming the client does not warrant relieving the client of any duty to pay the lawyer." *Id.*, at Comment *c*. Where the lawyer violates duties owed to others—*e.g*, by violating a protective order—he may be exposed to "other remedies in such situations," *id.*, but he cannot be held to have forfeited his rights to payment from his client.

And the notion that Friedman ever acted against the interests of the class is absurd. Even Lead Counsel has recognized that absurdity. When objectors contended in the Rule 60 motions that Friedman conspired with Ravelo in the formulation of a settlement that disfavors the merchant class, Lead Counsel described the allegations as "flatly and demonstrably false" and "pure fantasy." Dkt 6555 at 27, 29. We agree. Whatever Friedman has done wrong here, he never acted against the interests of the merchants.

Relatedly, Lead Counsel has gone to great lengths to take credit for FLG's contributions to this litigation, including Friedman's conception and execution of the plan to challenge the constitutionality of the state anti-surcharging statutes, and his efforts to lobby legislators to prevent new anti-surcharging statutes. See LC Fee Mem., Dkt. 7471-1, Part I.E. Why would Lead Counsel take credit for those contributions? Because those efforts, when properly attributed to Friedman, completely destroy the false narrative that Friedman was working against the interests of the class.[6]

IV. LEAD COUNSEL MISCHARACTERIZES *AMEX ASR*

Lead Counsel repeatedly invoke Judge Garaufis's 2015 opinion in the *Amex ASR* case, implying that it supports a partial forfeiture of Friedman's fees. LC Br. at 5, 6, 16 and n.6. But Judge Garaufis specifically acknowledged that Friedman may have shared information with Ravelo believing "that her advice would in fact benefit the merchant class." 2015 U.S. Dist.

[6] The false narrative that Friedman was working against the interests of the class is further undermined by the valuable information that Friedman brought back to Lead Counsel. For example, Ravelo told Friedman in February 2011 that the defendants were nearing a settlement with the individual plaintiffs that would have implied a $4 billion settlement for the class. Friedman immediately shared that information with Craig Wildfang, and Friedman and Wildfang then shared that information in a meeting with the broader lead counsel group. That information clearly came from the defense side of the table, and it was clearly the product of strong personal relationships. Not a single lawyer at that 2011 meeting viewed Friedman's backchannel discussions with defense counsel as inappropriate or somehow contrary to the interests of the class. In fact, the entire legal team immediately focused on using that information to derail the undesirable settlement talks, since the class was seeking a settlement of $6 billion or more. *See* September 2, 2015 Friedman Decl., ¶¶ 34-39, Dkt. 6576-2 (under seal).

LEXIS 102714, at *73 (emphasis added). In other words, Judge Garaufis specifically did not conclude, and for his purposes had no need to conclude, that Friedman was working against the merchant class.

Lead Counsel's attempted reliance on Judge Garaufis's decision is further misplaced because Friedman never had any opportunity to respond to the far-fetched conspiracy theory that the *Amex* objectors proposed. With events unfolding rapidly and a proposed settlement already sub judice, Judge Garaufis ordered FLG and objectors to file simultaneous briefs on the question of how, if at all, the Friedman-Ravelo communications should influence settlement approval. FLG and the main objectors thus filed on July 28, 2015. Amex ASR Dkt. 644-647. The objectors' papers came as a surprise to Friedman; the narrative they created with out-of-context emails was, as Lead Counsel would later describe it, "pure fantasy." But that very evening, Judge Garaufis issued an Order directing that neither FLG nor the objectors would be permitted to respond to the other's briefing. See *Amex ASR.*, July 28, 2015 Scheduling Order. He issued his decision soon thereafter. *See generally*, Open Letter, FLG Br. at 4 n. 2.

For these reasons among others, Lead Counsel cannot rely on Judge Garaufis's Amex decision to establish that Friedman worked against the interests of the merchant class. If Lead Counsel want to advance that argument in order to defend their nullification of the contract, they should be required to make that case on the merits.

CONCLUSION

For all the foregoing reasons, and those stated in FLG's opening brief, the motion to intervene should be granted.

Dated: New York, New York
August 14, 2019

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