UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION	**MDL Docket No. 1720**
This Document Relates to:	**MASTER FILE NO. 12:05-md-1720-MKB-JO**
ALL CASES	

REPLY MEMORANDUM OF R&M OBJECTORS

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I. THE ORIGINAL SETTLEMENT VIOLATED DUE PROCESS AND RULE 23 UNTIL R&M OBJECTORS' CHALLENGED ITS PROPRIETY

Class Counsel takes the position that R&M Objectors "had nothing to do" with the Superseding Settlement. ECF No. 7635 ("Class Mem") at 4. However, the Superseding Settlement was not *born* of the advocacy of Class Counsel, but in *spite* of it. More correctly, the Superseding Settlement was the result of serious deficits in Class Counsel's representation of people just like those composing R&M Objectors – little people and small businesses who were having their rights ignored. After exhausting some ten years of litigation (and the fees and expenses it entailed,) it was not until R&M Objectors challenged the original settlement proposed by Class Counsel that the Second Circuit rejected the original settlement as anything *but* fair and reasonable. As that court introduced its opinion, "[o]n this appeal, numerous objectors and opt-out plaintiffs argue that this class action was improperly certified and that the settlement was *unreasonable and inadequate*. We conclude that the class plaintiffs were *inadequately represented* in violation of Rule 23(a)(4) and the Due Process Clause. Accordingly, we vacate the district court's certification of this class action and reverse the approval of the settlement." *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, 827 F.3d 223, 227 (2d Cir. 2016).

Now, three years later, Class Counsel, essentially composed of the same attorneys chastised by the Second Circuit for inadequate representation of the cohort represented by R&M Objectors in the original settlement, make the argument that these same objectors, who took an "unreasonable and inadequate" settlement and dragged it kicking and screaming into a reasonable and adequate one, did *nothing*. The hubris of such an argument defies reason.

"The current settlement," Class Counsel assures the Court, "was made possible by Rule 23(b)(3) Class Counsel's . . . litigation efforts over nearly fourteen years." Class Mem at 5. That

statement, however, is far from the whole story, for the settlement originally proposed as reasonable and adequate by Class Counsel (in its prior incarnation) was rejected by the Second Circuit. While Class Counsel undoubtedly did extensive work for *some* of the class, it ignored the interests of the absent class members and failed to cover critical issues to the entire class. That original settlement agreement identified two classes, *viz.*, the Rule 23(b)(3) class, which "covers merchants that accepted Visa and/or MasterCard from January 1, 2004 to November 28, 2012, and the Rule 23(b)(2) class which "covered merchants that accepted (*or will accept*) Visa and/or MasterCard from November 28, 2012 onwards f*orever*." *In re Payment Card*, 827 F.3d at 229. The "then and now" (b)(3) class would get up to $7.25 billion dollars, while the "forever after" (b)(2) class would only get injunctive relief in the form of changes in some of the cards' rules. Moreover, the "then and now" (b)(3) class could opt-out of their proposed monetary settlement, but the "forever after" (b)(2) class could not; its settlement was set in stone. *Id.* Finally, the injunctive relief enjoyed by the hostage (b)(3) class – relief of dubious worth – would terminate in 2021, though the release of claims extracted from the "forever after" (b)(3) class had "no end date . . . operating in perpetuity[.]" 827 F.3d at 230. There would be no future lawsuits by defendants' victims.

The actions taken by R&M Objectors' counsel drove the challenge of the proposed original settlement through the district court's hearing, its denial of discovery in aid of that hearing, the final settlement approval, and the Second Circuit's rejection of that approval. The current settlement is the product of those efforts. Without them, the fatally flawed original settlement proposed by Class Counsel would be all that remained. Those efforts, it appears, were scarcely meaningless.

Professor Adam J. Levitin of the Georgetown University Law Center, a noted expert in the field of consumer finance and particularly, interchange regulation, makes the point rather succinctly: "It is my opinion that the objections to the Original Settlement, including those made by

the R&M Objectors, by and through their counsel, the Law Firms, were a *sine qua non* for the negotiation of the Superseding Settlement Agreement. The Superseding Settlement Agreement represents a substantial improvement over the Original Settlement. The Superseding Settlement Agreement would not have come into existence but for the objections of the Law Firms and other objectors that resulted in in the reversal of the Original Settlement by the Second Circuit Court of Appeals." Declaration of Professor Adam J. Levitin ("Levitin Dec"), dated August 14, 2019, annexed as Exhibit 3, at ¶ 23. It was the objections of R&M Objectors, expressed by their counsel in this Court and the circuit court, that changed the outcome of this case. "[W]ithout them, class members would have been bound to a markedly inferior settlement." *Id.*

The propriety of R&M Objectors' participation in counsel fees and expenses to be awarded to objectors in this case is also identified and shared by the Plaintiff-Objectors' counsel in the successful prosecution of the appeal to the Second Circuit, Goldstein & Russell ("Goldstein group"), counsel for those larger merchant objectors, who have already settled their fee application with Class Counsel. [1]ECF No. 7569. Obviously, since such counsel have been paid by their clients separate and apart from any fee award here, their interests are not identical those of the R&M Objectors' counsel, who have no other source for their fees and expenses. *See also, id.* (Goldstein group's request for additional fee award to be "folded in" with Class Counsel's request and they will not be filing "a separate fee request as anticipated.") Nonetheless, as the Goldstein group, with whom counsel for R&M Objectors worked closely and coordinately throughout the research, briefing and argument in the Second Circuit, even going so far as to file a planned separate brief on additional points and agree to cede argument time for the greater good, states in a letter to the

[1] Counsel for R&M Objectors would suggest that a reasonable fee award should be equal to that of the Goldstein group, who were also paid by their own clients. In addition, a service award for each of the R&M Objectors of $1,500 would also appear to be fair and reasonable under the circumstances. Contrary to Class Counsel's claim that counsel for R&M Objectors cannot substantiate their fees and expenses, the Court is directed to Exhibit 2.

Court: "Counsel for the R&M objectors filed a motion for objector fees on June 7, 2019 – the same day as class counsel filed their motion. Counsel for the merchant objectors agree with the R&M objectors' position that a portion of the fees requested by class counsel should be reserved for counsel for the successful objectors[.]" Letter of Eric Citron, Esq., June 10, 2019, at 2 (ECF No. 7478).

The unified efforts of the opt-out plaintiff objectors and R&M Objectors produced the result before the Court today. Class Counsel's conduct in trying to fillet those efforts into separate, smaller parts to prove their insignificance is strange, though understandable. In assailing Class Counsel in the original settlement, the Second Circuit found that the "fundamental conflict" between the (b)(3) and the (b)(2) classes which "sapped class counsel of the incentive to zealously represent the latter" was created by the obvious incentive of fees. "Apparently, the only unified interests served by herding these competing claims into one class are the interests served by settlement: (i) the interest of class counsel in fees, and (ii) the interest of defendants in a bundled group of all possible claimants who can be precluded by a single payment." Nothing has changed.

The record tells the tale of work and effort of R&M Objectors to ascertain the adequacy of the original settlement, seek the district court's cooperation in examining the propriety of that agreement, and then, in light of the district court's approval of the original settlement, successfully challenge that agreement and have the circuit court not only overturn the original settlement, but direct the manner in which it might pass Rule 23 and Due Process muster. This included direct and incisive requirements to ensure fair and adequate representation of plaintiffs like R&M Objectors in any new settlement. The timeline narrative of those efforts appears at Exhibit 1.

The work of R&M Objectors bore fruit when the Second Circuit vacated the original settlement relying, in part, on the "Worthless Surcharge" argument. Even after the original settlement

was vacated, R&M Objectors continued to actively participate in this case and sought to prosecute this lawsuit toward a different settlement agreement that would protect the interests of the small retailer and merchant. R&M Objectors presented a petition for appointment as separate injunctive relief counsel, which was denied by the district court. ECF No. 6754.

The Superseding Settlement agreement was filed in September 2018 (ECF No. 7257-2) and preliminary approval granted. ECF No. 7363. That preliminary approval contained this reflection on the improved process and adequacy of representation, items which had confounded the propriety of the former settlement until the intercession of R&M Objectors. "The Court notes that, based on the objections received during the preliminary approval process, as compared to the objections received during the prior preliminary approval process for the Original Settlement Agreement before Judge Gleeson, it appears that the class' reaction to the Superseding Settlement Agreement is more favorable, as the Court has received fewer objections both in volume and substance. (*See, e.g.*, Objecting Pls. Opp'n to Class Pls. Mot. for Prelim. Approval of Proposed Class Settlement, Docket Entry No. 1681 (objecting to preliminary approval on behalf of the majority of the named plaintiffs in the action); Amicus Br. From ATMIA Challenging Prelim. Approval of Class Settlement, Docket Entry No. 1683 (objecting to preliminary approval on behalf of the ATM Industry Association on the basis that the definition of the settlement class was overbroad, the scope of the injunctive relief, and the breadth of the release); Retailers & Merchants' Obj. to Proposed Class Settlement Agreement, Docket Entry No. 1701 (*objecting to preliminary approval on behalf of a wide range of businesses, including retailers, restaurants, oil companies, and pharmacies, and objecting on the basis that the size of the settlement fund was inadequate, that the release was excessive and overbroad, that the attorneys' fees were excessive, and that the injunctive relief was inadequate).).*" ECF No. 7363 at 24, n. 23.

Consistent with that reflection, in a letter to the Court on June 10, 2019, Eric Citron, Esq., on behalf of the Goldstein group stated: "*Counsel for the merchant objectors agree with the R&M objectors' position that a portion of the fees requested by class counsel should be reserved for counsel for the successful objectors*, and presently intend to complete their own, more-detailed filing to that effect by July 23." ECF No. 7478 (emphasis added).

The recognition of the significant work done by R&M Objectors has been plain. At the July 9, 2019, hearing before the Court, Patrick Coughlin, Esq., speaking on behalf of the class, stated to the Court: "I think that we should still shoot for them filing on the 23rd. *I mean we are in contact with them, talking to them, both parties, both the R&M objectors and the merchant objectors or the Goldstein objectors. So we are trying to work it out and we are talking to them.*" Tr. Pages 31-32, lines 18-25, 1-2 (emphasis added).

II. CLASS COUNSEL'S ARGUMENT THAT R&M OBJECTORS' EFFORTS DID NOTHING TO SUBSTANTIALLY CHANGES BENEFITS IS SERIOUSLY FLAWED

Class Counsel, which in its prior iteration produced an original settlement which not only raised disturbing questions of conflict(s) of interest in representation, inadequate remedies to one class to bolster the return to another class, byzantine notice provisions to absent plaintiffs who would be affected by the proposed settlement until the end of time, claims here that R&M Objectors did nothing to improve the 23(b)(3) settlement to its class members. ECF No. 7635 at 10. Professor Levitin addresses this argument. By way of example:

> The R&M Objectors were not the only objectors to raise these points, although they were the first to docket some of them,8 and influenced the Court to make a more adversarial process by holding a hearing at the preliminary approval stage. The R&M Objectors vigorously prosecuted these objections through the entire settlement approval process, however, including the appeal to the Second Circuit.

Levitin Dec at ¶ 27 (footnotes omitted). What Class Counsel's argument fails to appreciate is that until they were forced to face their failure to produce a viable settlement by the Second Circuit,

there was no settlement. In fact, worse than that, there was a proposed settlement which, in the Second Circuit's opinion, had Class Counsel pitting one class against another in order to benefit one class over another while claiming to represent *both*. Instead, Class Counsel points the Court only to the *money*: "R&M Objectors do not, and cannot, link any of their particular objections, or litigation efforts, at final approval or on appeal to the $900 million increase in the Superseding Settlement." *Id.* In other words, Class Counsel would have been quite content to let their original settlement be confirmed despite its abject failure to treat the (b)(2) and (b)(3) classes fairly and adequately, had they not been caught by R&M Objectors' appeal to the Second Circuit and ordered not to do so. Levitin Dec at ¶¶ 42-44.

The Second Circuit examined the original settlement and found it deficient for multiple reasons, each argued below by the objectors. To the court, Class Counsel's actions were a veritable primer on what not to do in class action settlements. It was the absent class members, those which were not "named parties" but would still be "bound by litigation" who defined the adequacy or inadequacy of both settlement and representation in that settlement. 827 F.3d at 231. Rule 23(a)(4) was designed to do precisely that, examine whether "'the representative parties ... fairly and adequately protect the interests of the class," and "'uncover conflicts of interest between named parties and the class they seek to represent'," while putting to the test the " 'competency and conflicts of class counsel'." *Id.* quoting *Amchem Prods., Inc. v. Windsor*, 472 U.S. 797, 812 (1985). These were the precise issues that R&M Objectors and their co-appellants raised in the circuit court and were the pivotal reasons for that court rejecting the original agreement. "Class actions and settlement that do not comply with Rule 23(a)(4) and the Due Process Clause cannot be sustained." 827 F.3d at 231. To avoid interests "antagonistic" to that principle *any fundamental conflict that goes*

to the very heart of the litigation is to be addressed, not just the "money." *Id.* citing *Charron v. Wiener*, 731 F.3d 241, 249-250 (2d Cir. 2013).

In other words, Class Counsel cannot argue here that R&M Objectors did not object to the adequacy of the settlement monies available to the (b)(3) class (ECF No. 7635 at 10), or that the worthless surcharge only affected the (b)(2) injunctive class (ECF No.7635 at 11), or that the incomprehensible notice offered R&M Objectors no legitimate opt-out rights (ECF No. 7635 at 12). If nothing else, the Second Circuit's opinion rejected the balkanization of the settlement in this case when analyzing its fairness and adequacy under Rule 23 or the Due Process Clause. "The conflict is clear between merchants of the (b)(3) class, which are pursuing solely monetary relief, and merchants in the (b)(2) class, defined as those seeking only injunctive relief. The former would want to maximize cash compensation for past harm, and the latter would want to maximize restraints on network rules to prevent harm in the future." 827 F.3d at 233. Such a conclusion could only have been applied to the proposed settlement in this case if the court understood the defects in the settlement proposed for the absent R&M Objectors, which is precisely what was accomplished on appeal. "The Settlement Agreement does manifest tension on an 'essential allocation decision': merchants in the (b)(3) class would share in up to $7.25 billion of damages, while merchants in the (b)(2) class would enjoy the benefit of some temporary changes to the defendants' network rules. The same counsel represented both the (b)(3) and the (b)(2) classes. The class counsel and class representatives who negotiated and entered into the Settlement Agreement were in the position to trade diminution of (b)(2) relief for increase of (b)(3) relief." *Id.*

Lest there be any doubt as to the value of R&M Objectors appeal, the Court need only examine the Second Circuit's discussion of the worthless surcharge "benefit": "The most consequential relief afforded the (b)(2) class was the ability to surcharge Visa- and MasterCard-branded

credit cards at both the brand and product levels. That is, a merchant could increase the price of a good at the point of sale if a consumer presents (for example) a Visa card instead of cash, or a Visa rewards card instead of a Visa card that yields no rewards. The incremental value and utility of this relief is limited, however, because many states, including New York, California, and Texas, prohibit surcharging as a matter of state law." 827 F.3d at 230 (citations omitted). Even worse, the surcharge "benefit" *disappeared* if the merchant accepted American Express cards. As the court explained: "[U]nder the most-favored-nation clause included in the Settlement Agreement, merchants that accept American Express cannot avail themselves of the surcharging relief because American Express effectively prohibits surcharging, and the Settlement Agreement permits surcharging for Visa or MasterCard only if the merchant also surcharges for use of cards issued by competitors such as American Express." *Id.* Based on these findings, those who opted out of the (b)(3) class and objected to the (b)(2) class argued that the (b)(2) class was "improperly certified" and that the proposed settlement was "inadequate and unreasonable." *Id.*[2]; *see also* Levitin Dec.

Any argument that the successful briefing of R&M Objectors to the Second Circuit had no effect on the Superseding Settlement presently before the Court is disingenuous. Perhaps, Judge Leval in his concurring opinion said it best: "One class of Plaintiffs receives money as compensation for the Defendants' arguable past violations, and in return gives up the future rights of *others*." 827 F.3d at 241 [*Leval, J., concurring*] Practically speaking, the R&M Objectors had written the Superseding Settlement. "Although no court will ever have ruled that the Defendants' practices are lawful, no person or entity will ever have the legal right to sue to challenge those practices, and no

[2] "Merchants in the (b)(2) class that accept American Express or operate in states that prohibit surcharging gain no appreciable benefit from the settlement, and merchants that begin business after July 20, 2021 gain no benefit at all. In exchange, class counsel forced these merchants to release virtually any claims they would ever have against the defendants. Those class members that effectively cannot surcharge and those that begin operation after July 20, 2021 were thus denied due process." 827 F.3d at 238.

person or entity, past, present, or future has had or will have the opportunity to refuse to be a part of the class so bound. For this reason, as well as those noted in Judge Jacobs's opinion, we must reject the settlement." *Id.* The present result confirms the substantial value of the R&M Objectors' efforts.

III. CONCLUSION

The relief requested should be granted in all respects.

Respectfully Submitted,

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