20-339(L)

20-304(CON), 20-340(CON), 20-341(CON), 20-342(CON), 20-343(CON), 20-344(CON)

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

JOINT REPLY BRIEF OF APPELLANTS GNARLYWOOD LLC, AND QUINCY WOODRIGHTS, LLC, (20-341 CON), AND UNLIMITED VACATIONS AND CRUISES, INC., AND USA PETS LLC (20-343 CON)

Kendrick Jan
Kendrick Jan, APC
402 West Broadway, Suite 1520
San Diego, CA 92101
Tel: (619) 231-7702
kj@jan-law.com

John J. Pentz
19 Widow Rites Lane
Sudbury, MA 01776
Tel: (978) 261-5725
jjpentz3@gmail.com

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INTRODUCTION

Gnarlywood Appellants are concerned with the fundamental unfairness of the proposed settlement's release provisions and plan of distribution, as well as the district court's award of common fund attorneys' fees to compensate for matters unrelated to the recovery of damages suffered by the Rule 23(b)(3) class, and the grant of incentive awards.

The answering briefs of Plaintiffs-Appellees and Defendants-Appellees fail to directly and meaningfully address the substantive FRCP Rule 23(e)(2)(A) and 23(e)(2)(D) issues presented by the proposed settlement; including the inadequacy of representation by both Class Plaintiffs and Class Counsel demonstrated by the uncompensated waiver of future antitrust damages, and the inequitable distribution of settlement proceeds among class members.

As well, the fee brief of Plaintiffs-Appellees artfully dodges every one of the major issues presented by the district court's fee award in this case. They have no real answer for – and no authority to support – the district court's inadequate *Goldberger* time and labor analysis made without discrimination between compensable productive attorney time and time spent pursuing things other than (b)(3) damages. They further fail to adequately answer issues regarding Class Counsel's overreaching lodestar compilation and the district court's misinformed cross-check, or the impermissible incentive awards to Class Plaintiffs.

ARGUMENT

I. APPELLEES FAIL TO ADDRESS ONE OF THE TWO DOCTRINES THAT TOGETHER PERMIT THE RELEASE OF FUTURE CLAIMS, AND THE SETTLEMENT'S UNCOMPENSATED RELEASE OF FUTURE ANTITRUST CLAIMS IS IMPERMISSIBLE DUE TO A LACK OF ADEQUATE REPRESENTATION.

Plaintiffs-Appellees claim "[i]t is well-settled in this Circuit that a class-action settlement can extinguish future-accruing claims that fall within the "identical factual predicate" of the litigation." Plaintiffs-Appellees' Answering Brief (Final Approval Order) (2d Cir. ECF 208) ("Settlement Brief"), p. 34. They fail to address, however, the faulty "prospective waiver" of the right to recover for future antitrust injury, and that these released future claims were not "adequately represented prior to settlement." *Wal-Mart Stores*, 396 F.3d at 106 (2d Cir. 2005).

The authority of class action plaintiffs to release future claims "that were or could have been pled in exchange for settlement relief" is "limited by the 'identical factual predicate' *and 'adequacy of representation' doctrines*." (Emphasis added.) *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, 827 F.3d 223, 236-237 (2d Cir. 2016) (citing *Wal-Mart Stores*, 396 F.3d 96, 106 (2d Cir. 2005) ("*Together*, these legal constructs allow plaintiffs to release claims that share the same integral facts as settled claims, *provided that the released claims are adequately represented prior to settlement*." (Emphasis added)).

The district court cites this two-prong doctrinal release requirement in its Memorandum and Order, but then goes on to hold that "[b]ecause there is no limit on the language allowing for release of claims other than that it must be based on an "identical factual predicate," it does not appear that there is any prohibition of the release of *future* claims, as long as those claims fall within the identical factual predicate test." JA A-7371 – 7372, and A-7375. Nowhere in its order does the district court consider the adequacy-of-representation doctrine in view of settlement's lack of redress for antitrust claims arising during the Extended Release Period. The uncompensated release of future antitrust claims is an impermissible "prospective waiver" of the right to recover for antitrust injury. *American Exp. Co v. Italian Colors Restaurant*, 570 U.S. 228 at 244 (Kagan, J., dissenting).

Plaintiffs-Appellees accuse the Gnarlywood Appellants of making "a broad-sided attack on two features that are common in class-action settlements: pro rata distributions, and prospective releases." Plaintiffs-Appellees' Settlement Brief, p. 81. This comment entirely misses the point. Each of these settlement features is permissible in isolation, but when proposed in combination the law requires harmonious application.

Defendants-Appellees assert "the release of future claims in exchange for a *pro rata* distribution is fair, and there has been no inadequacy of representation by virtue of the release." Defendants-Appellees' Brief (2d Cir. ECF 209), p. 65.

"Because each class member receives a *pro rata* share of its own damages … there has been no inadequacy of representation by virtue of the release of future claims." Defendants-Appellees' Brief, p. 69. These statements are brazenly misleading. There is no *pro rata* distribution contemplated for the release of future claims. Further, while a *pro rata* distribution of the settlement fund across all released claims would be fair, Defendant-Appellees blithely gloss over the fact that future claims are simply not compensated at all. Consequently, the interest of those who will suffer future injury has not been adequately represented by Class Plaintiffs or Class Counsel.

It is generally accepted there must be compensation for a release of claims. *In re WorldCom, Inc. Securities Litigation* (S.D.N.Y., Nov. 12, 2004, No. 02 CIV 3288(DLC)) 2004 WL 2591402, at *12 ("It is essential, however, that there be … compensation for released claims.") Citing *Super Spuds*, 660 F.2d 9, 16 and 18 (2d Cir 1981). Here, the proposal is that two chronologically differentiated sets of identical claims arising out of Defendants' exact same underlying wrongful conduct be released – one set is compensated (i.e. based on transactions between January 1, 2004 and January 24, 2019), and the other set is uncompensated (i.e. those based on transactions following January 24, 2019). There's the rub.

The district court found that all released claims share an identical factual predicate, but did not make findings as to the adequacy of representation of all

released claims in view of the Extended Release Period in response to Gnarlywood Appellants' objection. Adequate representation is "not solely an assessment of effort," but requires an "examination of the interests of the settling plaintiffs and of the [settlement's] effect on those who would be bound by it." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 110 (2d Cir. 2005). The "focus at this point is on the actual performance of counsel acting on behalf of the class." Fed. Rules Civ. Proc., Rule 23, Advisory Committee Notes on Rules – 2018 Amendment, Subdivision (e)(2), Paragraphs (A) and (B). Here, the release of future claims is without compensation. Therefore, Class Plaintiffs and Class Counsel have failed to adequately represent the interests of class members who will suffer future injury, in violation of Rule 23(e)(2)(A).[1]

Had the settlement set aside a portion of the fund to compensate future claims at the end of the Extended Release – possibly 25% of the total fund, in rough proportion to the number of years covered by the release – then perhaps the settlement would pass muster under both of the 23(e)(2)(A) adequacy of

[1] Consider X and Y, both of whom have or will suffer financial injuries resultant of the same conduct of Bad Actor. In First Period X suffers ten units of loss and Y suffers only one, but in Second Period the numbers may be switched and X will suffer one unit of loss while Y will suffer loss of ten. X, representing the interests of both X and Y, works a settlement with Bad Actor by which: (i) all First and Second Period claims are released; (ii) Bad Actor agrees to pay a fixed settlement amount; and (iii) the settlement fund will be distributed pro rata to X and Y according to their respective damages suffered in period 1, only. Has X adequately represented the interests of Y?

representation and 23(e)(2)(D) equitable treatment of class members prongs. As currently written, the proposed settlement does not.

The district court abused its discretion by overlooking Class Plaintiffs' and Class Counsel's failures to advocate for the Extended Release Period claims, and their release of these equally valid claims without redress.

II. APPELLEES DO NOT MEANINGFULLY ADDRESS THE SETTLEMENT'S FAILURE TO TREAT CLASS MEMBERS EQUITABLY RELATIVE TO EACH OTHER WITHIN THE MEANING OF RULE 23(e)(2)(D).

Both Plaintiffs-Appellees and Defendants-Appellees contest Gnarlywood Appellants' position that the settlement violates the requirement of Rule 23(e)(2)(D) that class members be treated "equitably relative to each other."

The district court found the settlement's "*pro rata* distribution scheme is sufficiently equitable," citing *Christine Asia C. v. Yun Ma*, No. 15-MD-02631, 2019 WL 5257534, at *15 (S.D.N.Y. Oct. 16, 2019) (finding this factor satisfied where claimants would each "receive their *pro rata* share" of the settlement fund) and *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 667 (S.D.N.Y. 2015) (finding a *pro rata* allocation plan "appear[ed] to treat the class members equitably . . . and has the benefit of simplicity"). JA A-7381 – 7382. Yet while the scope of the release applies uniformly to class members, the plan of allocation does not correspond with the scope of the release and is neither pro rata nor equitable.

Plaintiffs-Appellees argue that "in any settlement with a *pro rata* distribution, claimants that purchased more of the defendant's products or were subject to their conduct for longer periods of time will receive greater compensation than those that were less exposed." (Emphasis added.) Plaintiffs-Appellees' Settlement Brief, p. 82. The problem is the pro rata distribution period is artificially truncated by the settlement, which arbitrarily cuts off compensability of equally meritorious claims in the middle of the Release Period.

Before approving a settlement, a district court must find the proposal fair, reasonable, and adequate. With the 2018 passage of Rule 23(e)(2), Congress codified four "core concerns" the Advisory Committee described as "the primary procedural considerations and substantive qualities that should always matter to the decision whether to approve the proposal." Fed. R. Civ. P. 23 Committee Notes on Rules – 2018 Amendment, Subdivision (e)(2). The second such substantive concern requires the district court examine a settlement proposal to determine whether "the proposal treats class members equitably relative to each other." FRCP 23(e)(2)(D). The instant settlement fails to satisfy this provision, and the district court abused its discretion in finding otherwise.

Where no special provision is made for compensation of future damages, an equitable pro rata distribution of settlement proceeds among class members holding equally meritorious claims should apportion the fund according to relative economic

damages suffered during that period for which claims are released. Otherwise, the settlement will disproportionately parcel relief among class members, favoring those with greater transactions during the early part of the release period. Truly proportionate distribution is determined according to damages from all released claims. Class Counsel cite no case that holds otherwise.[2]

Defendants-Appellees mischaracterize Gnarlywood's argument as being that "the release here creates a conflict under Rule 23(e)(2)(D)." Defendants-Appellees' Brief, p. 66. Nowhere in Objector-Appellants' brief is it suggested the release gives rise to a conflict under Rule 23(e)(2)(D).

"Put simply, the court's goal is to ensure that similarly situated class members are treated similarly." 4 Newberg on Class Actions §§ 13:56 (5th ed.). "Any obvious differential treatment requires an obvious justification." *Id.* at 13:39. The holders of released claims are all similarly situated, and the differential treatment according to timing within the Release Period cannot be justified.

The district court has abused its discretion by failing to examine the settlement's inequitable differential treatment of class members holding released

[2] With regard to the Rule 23(e)(2)(D) equity issue, Class Counsel's cite to *Wal-Mart*, 396 F.3d 96 (2d Cir. 2005) is misplaced. *Wal-Mart* does not involve future claims, it does not refer to Rule 23(e)(2), and never mentions equitable apportionment of settlement funds among class members holding uniform claims.

claims of the same legal merit, and by approving the Settlement's incomplete pro rata distribution scheme.[3]

III. CLASS COUNSEL AND THE DISTRICT COURT HAVE FAILED TO ADEQUATELY ADDRESS *GOLDBERGER*'S PRIMARY TIME AND LABOR FACTOR.

Class Counsel do not address the district court's failure to meaningfully examine Class Counsel's claimed time and labor, and to identify and compensate only that portion of time spent pursuing redress of (b)(3) class damages.

In determining a reasonable common fund fee – whether using the lodestar *or* percentage of the fund method – the district court must first assess "time and labor expended by counsel."[4] *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 50

[3] Also implicating the proposed settlement's lack of equitable treatment of class members is the deduction from the "Cash Fund" of the maximum "Total Class Exclusion Takedown Amount" of $700 million, which amount thereby becomes unavailable for distribution to remaining class members. JA A-3566, fn. 2, and a-3329 – 3332, ¶ 19-23. The insurmountable problem is that a significant number of the "Opt Out" class members whose exclusion election triggered the $700 million takedown were franchisors who suffered no damages under *Illinois Brick*, but who were allotted settlement takedown monies rightfully belonging to their Cost-Plus Direct Purchaser franchisees – who possess the continuing right to make claims against the Net Cash Settlement Fund. The reduction of the Cash Fund by takedown amounts attributed to uninjured franchisors – who fully pass damages through to their Cost-Plus Direct Purchaser franchisees – invites a double dip on claims rightfully owned by their franchisees, and the consequent dilution renders inequitable the distribution of settlement funds among class members in violation of Rule 23(e)(2)(D). Fairness Hearing Tr., JA A-7125, A-7129, A-7131 – 7133, A-7165 – 7166.

[4] Although "time and labor" and "lodestar" are not synonymous, Class Counsel use them that way – e.g., in discussing "time and labor expended," they claim to have

(2d Cir. 2000), citing *Grinnel I*, 495 F.2d 448, 470 (2d Cir. 1977). The relevant time and labor is limited to work spent advancing the litigation interests of the client being asked to pay the fee, and "fairly earned in effecting the result indicated by the final decree." *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116, 124 (1885).

Gnarlywood Appellants agree that time and labor spent "attempting to prove" facts and theories that would have benefitted the (b)(3) class at trial should – along with litigation specific pleading, negotiation, case management, and law and motion practice – be considered in the *Goldberger* time and labor analysis.[5] On the other hand, time spent advocating the distinct interests of an adverse class, and promoting legislative and administrative action outside the scope of this case and beyond the purview of the district court, cannot be regarded as time and labor expended by counsel to be paid for by the Rule 23(b)(3) class.

Far from asking for a "microscopic review," or a "burdensome, searching inquiry" of Class Counsel's time sheets, Gnarlywood Appellants merely request the fee award "be assessed based on scrutiny of the unique circumstances of [the] case

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"devoted approximately 630,000 hours, resulting in a lodestar of approximately $203,753,749.78." Consequently, Gnarlywood Appellants have used the term "lodestar" both according to its formal definition (i.e. the product of reasonable hours times a reasonable rate) and when discussing *Goldberger*'s "time and labor" factor.

[5] See, however, the alternative discussion pertaining to Class Counsel's conflicted representation of the (b)(3) and (b)(2) classes at III.a.(1), and IV.a. and c., *infra*.

and "a jealous regard to the rights of those who are interested in the fund."" *Goldberger* 209 F.3d at 53.

At a minimum, the district court should have considered the broad descriptions of time and labor set forth in the declarations submitted by Class Counsel, inquired into the extra-judicial efforts made at the request of Class Counsel's unidentified "merchant clients,"[6] and made findings regarding a fair apportionment of time and labor expended toward recovery of (b)(3) class damages. The district court made no such efforts. The unique circumstances of the case – in particular Class Counsel's extensive extra-judicial efforts described in their fee request – fairly shout of an abuse of discretion by the district court's failure to examine these issues, make appropriate findings, and grant a corresponding fee award.

a. The interests of the adverse Rule 23(b)(2) class.

(1) Class Counsel fail to address that some portion of their (b)(2) work was not spent pursuing the interest of the (b)(3) class.

This Court has found a clear conflict "between the merchants of the (b)(3) class, which are pursuing solely monetary relief, and merchants in the (b)(2) class,

[6] Mr. Wildfang describes that in 2009 he "was asked by several of [his] merchant clients in MDL 1720 to become involved in strategizing with merchant groups to try to find a more effective, and hopefully more successful, legislative strategy." JA A-2554. It is not clear whether this request was made by a Class Plaintiff, but it is immaterial whether it was or not. Outside lobbying work is not compensable simply because it was performed at the behest of a class member.

defined as those seeking only injunctive relief." *In re Payment Card*, 827 F.3d 223, 233 (2d Cir. 2016). As acknowledged by Class Counsel, the district court found "the *majority* of Class Counsel's work leading up to the 2013 Settlement Agreement would have been aimed generally at proving antitrust violation[s] regardless of the particular remedy sought or class represented." (Emphasis added) Plaintiffs-Appellees' Answering Brief (Fees and Service Awards) ("Fee Brief") (2d Cir. 210), p. 36. The district court's use of the word "majority" is a concession that not all of Class Counsel's time was spent pursuing the interest of the (b)(3) class. Yet, in examining Class Counsel's time and labor, the district court regarded all pre-2016 hours as having been spent pursuing the interest of the (b)(3) class – not just a majority, but all 500,000 hours.

The district court's own language undermines the sufficiency of its finding. The district court concedes that some percentage of Class Counsel's time was spent pursuing matters outside the (b)(3) damages class action. Class Counsel bear the burden of establishing what portion of their claimed 500,000 hours were actually spent in pursuit of redress for the damages suffered by the (b)(3) class. *Cruz v. Local Union No. 3 of the Int'l Bhd. Of Elec. Workers,* 34 F.3d 1148, 1160 (2d Cir. 1994), citing *Hensley v. Exkerhart*, 461 U.S. 424, 437 (1983). Without this fundamental proof the district court's time and labor analysis is misinformed, and the fee award based thereon cannot be well founded.

(2) Non-existent (b)(2) relief.

Class Counsel's argument that the (b)(2) "*relief secured remains in place*"[7] is irrelevant. (Emphasis added.) Plaintiffs-Appellees' Fee Brief, p. 36. Defendants' voluntary self-constraint is not the product of an enforceable order. Defendants-Appellees can stop abiding by the 2012 settlement terms tomorrow. *See Union of Needletrades, Indus. & Textile Emples. v. INS*, 336 F.3d 200 (2d Cir. 2003). Further, as this Court found, the (b)(2) relief "was virtually worthless to vast numbers of class members."[8] *In re Payment Card*, 827 F.3d at 238. Defendants' voluntary compliance with the now defunct (b)(2) settlement terms is irrelevant to the calculation of attorneys' fees for the monetary recovery.

(3) Class Counsel's conflation of issues is an attempt to obscure the validity of arguments offered in the alternative.

Class Counsel deceptively state the "district court concluded that to accept objectors' argument would be "to not acknowledge or compensate Class Counsel for any work completed up to and including 2016, when the Second Circuit remanded the settlement for further consideration, would be unjust, and would penalize counsel

[7] Class Counsel refer to the district court's inaccurate mention that "injunctive relief achieved under the 2013 Settlement Agreement remains in place." JA A-7421.

[8] This Court also described "many members of the (b)(3) class have little to no interest in the efficacy of the injunctive relief because they no longer operate, or no longer accept Visa or Mastercard, or have declining credit card sales." *In re Payment Card*, 827 F.3d at 234.

for not predicting exactly what turns the case would take."" Plaintiffs-Appellees' Fee Brief, p. 37.

Gnarlywood Appellants have suggested examining Class Counsel's time and labor based on a segregation of time by category, but Class Counsel refused the possibility and the district court spurned the approach. Fairness Hearing Tr., JA A-7160 – 7162, and A-7163 – 7165. Class Counsel bear the burden of establishing their time and labor under *Goldberger*, but failed to satisfy that burden with particularity to the (b)(3) class. An appropriate remedy for this failure would be the exclusion of all Class Counsel's conflicted pre-2016 hours. *Silbiger v. Prudence Bonds Corp.*, 180 F.2d 917, 920-921 (2d Cir. 1950). Treating *all* of these hours as (b)(3) time and labor is a clear abuse of discretion.

b. Class Counsel's extra-judicial activities should not be considered as *Goldberger* time and labor.

Rule 23(b)(3) class claims and issues are to be adjudicated by the district court, alone. FRCP Rule 23(e). All of Class Counsel's extra-judicial work is

inherently unconnected to the adjudication of this case and should not be regarded as *Goldberger* time and labor[9] in the calculation of a reasonable common fund fee.[10]

(1) Class Counsel's extra-judicial efforts did nothing to advance the damage claims of the Rule 23(b)(3) class.

However else Class Counsel may spend their time, the justiciable interest of the (b)(3) class client is pursued through litigation of a Rule 23(b)(3) class action. Whether spent promoting legislative or regulatory changes, or supporting third-party litigation in other courts, Class Counsel's time spent *other than in pursuit of a (b)(3) damages claim* is not time and labor reasonably expended on the litigation of the interest of the (b)(3) class. Such time should not have been considered in the district court's *Goldberger* time and labor analysis, and the district court abused its discretion by so doing.

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[9] The Notice of Class Action Settlement describes the settlement being the product only of traditional "extensive negotiations," "mediation," "thirteen years of extensive litigation," "[review and analysis of] more than 60 million pages of documents," "[participation] in more than 550 depositions," and "[briefing and argument of] motions to dismiss, motions for summary judgment, motions to exclude expert testimony, and the motion for class certification." JA A-3534. No disclosure of Class Counsel's extra-judicial work was provided in the notice.

[10] Any of Class Counsel's costs associated with extra-judicial work should likewise not be charged to the (b)(3) class. Class Counsel describe "Early in this litigation, Robins Kaplan retained a lobbying/consulting firm to assist the merchant community in securing federal legislation regulating interchange fees. Plaintiffs-Appellees' Fee Brief, p. 21. Prior to 2013, Class Counsel incurred $12,467,299.95 in "Professional Fees (Experts, Investigators, Accountants, Consultants)." JA A-2500. Any fees charged by the "lobbying/consulting" firm should not be recoverable.

Further, all of the work Class Counsel devoted to changing federal law and assisting the DOJ actually weakened the (b)(3) class's case. Class Counsel argued at the fairness hearing that the passage of the Durbin Amendment, for example, *increased* the risk that they would not recover damages or would recover lower damages. Fairness Hearing Tr., JA A-7147. In other words, Class Counsel were actually working *against* the interest of their Rule 23(b)(3) clients when they were pursuing legislative and regulatory reforms.

Class Counsel are simply wrong when they claim the district court was required to credit all of their claimed hours, simply because those hours were devoted to things that might "inure to the benefit" of (b)(3) class members. There is no such rule in this Circuit or any other. The closest doctrine to Class Counsel's asserted right to compensation for every hour worked for the potential benefit of class members is the *catalyst theory*, which was rejected by this Court in *Union of Needletrades, Indus. & Textile Emples. v. INS*, 336 F.3d 200 (2d Cir. 2003), following the Supreme Court's opinion in *Buckhannon Board and Care Home v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598 (2001). In *Needletrades*, this Court held that a plaintiff's attorney may not receive attorneys'

fees for work unrelated to securing "a judgment on the merits or a court-ordered consent decree." *Needletrades* at 206.[11]

Class Counsel seek compensation for every hour they spent helping the DOJ with unrelated consent decrees, lobbying Congress, advocating in regulatory rule making, submitting *amicus* briefs in third-party litigation in the Seventh Circuit, yet none of those activities resulted in the recovery of (b)(3) damages by judgment or court order in the Eastern District of New York.

(2) Class Counsel have failed to establish the value of extra-judicial time spent lobbying Congress and the Federal Reserve Board, and supporting third-party litigation.

Class Counsel ask the (b)(3) class to pay for lobbying the "government" in support of the Durbin Amendment to the Dodd-Frank Act at the prompting of unnamed "merchant clients" who asked Mr. Wildfang to work with unidentified "merchant groups to push a more effective, legislative strategy." Plaintiffs-Appellees' Fee Brief, p. 67. See also JA A-3615. Class Counsel also want to be paid for "assisting the DOJ," "filing of amicus briefs," and for having "met with and corresponded with the staff at the Federal Reserve Board that were responsible for the development of [rules consequent to Dodd-Frank]," providing "assistance to the

[11] As well, that Defendants-Appellees continue to voluntarily abide the (b)(2) provisions of the rejected 2012 settlement is indistinguishable from the voluntary compliance in *Needletrades* that was insufficient to support award of a fee. *Needletrades* at 206.

lawyers for the FRB in formulating their response to the TCF lawsuit," and filing another *amicus* brief. Plaintiffs-Appellees' Fee Brief, p. 67. See also JA A-3616 – 3617.

Class Counsel claim class members will be "unjustly enriched" unless Class Counsel are compensated for its substantial time spent pursuing these extra-judicial matters. Plaintiffs-Appellees' Fee Brief, p. 67-68. Class Counsel argue all their extra-judicial and out-of-case "efforts and the relief obtained [] benefitted *all* merchants,"[12] and posit the merchant "benefit" – as defined by Class Counsel and offered without supporting evidence or objective standard – itself merits tapping the (b)(3) common fund for fees.

Again, unless Class Counsel's extra-judicial efforts resulted in an enforceable order in the Eastern District of New York, none of their time spent pursuing such things is compensable out of the settlement recovery. *Union of Needletrades, Indus. & Textile Emples. v. INS*, 336 F.3d 200 (2d Cir. 2003). Clearly, the Durbin Amendment of Dodd-Frank does not form part of the settlement on appeal, neither do the FRB's rules, nor the DOJ consent orders. Class Counsel may not in their

[12] Co-lead Counsel, class action litigation firms collectively employing over 500 attorneys, describe it was their extra-judicial activity that "showed Defendants that Co-Lead Counsel were committed to further the class member merchants' interests." Plaintiffs-Appellees' Fee Brief, p.23. Given the distraction, their extra-judicial efforts more likely demonstrated a lack of focus on their singular job of recovering (b)(3) damages.

request for fees take credit for any of those things; they were not performed in pursuit of redress for their client and were not part of the case or controversy before the district court.

The district court abused its discretion by failing to exclude this considerable extraneous time from Class Counsel's compensable time and labor.[13]

IV. THE DISTRICT COURT'S LODESTAR CROSS-CHECK MUST BE LIMITED TO LODESTAR SPECIFICALLY RELATED TO THIS CASE AND THE RECOVERY OF DAMAGES.

a. Exclusion of Class Counsel's pre-2016 lodestar.

The district court would be well within its discretionary authority to exclude all Class Counsel's pre-2016 lodestar from its cross-check because Class Counsel were operating under a conflict created by the complaint and their joint representation of adverse classes. *See Silbiger*, *supra.* Class Counsel are incorrect in asserting the conflict in this case arose only at the settlement stage. They themselves admit in their Answering Brief (Fees) there was an unavoidable tradeoff between injunctive relief to prevent future harm and monetary relief to remedy past harm. Plaintiffs-Appellees' Fee Brief, p. 15. ("Those divergent interests resulted in an essential allocation decision that required separate representation for each class

[13] The district court makes no finding regarding the Durbin Amendment other than noting that Class Counsel "worked toward" its passage, which passage "increased the complexity" of the case. JA A-7423, and A-7435.

to maximize benefits to both.") These interests diverged from the very outset of this case. Short of an outright plaintiffs' victory at trial, there was always going to be an allocation decision dividing relief between the (b)(2) and (b)(3) classes.

In this case, Class Counsel's allocation of time, according to both their conflicted representation of the adverse classes and their extra-judicial endeavors, must be considered and apportioned by the district court in its lodestar cross-check. It is reversible error for the court to include every pre-2016 hour without regard to whether they directly contributed to the (b)(3) recovery.

b. Risk on remand.

It is clear from Class Counsel's Brief that large portions of their post-2016 lodestar were unproductive. For example, Class Counsel contend they were required to prove that Defendants' post-2012 conduct constituted an antitrust violation, even though Defendants were voluntarily complying with the injunctive provisions of the 2012 settlement. The only acceptable motivation behind such an endeavor would be to substantially increase the monetary settlement to cover the expanded claims period. Instead, while Class Counsel purportedly recovered an additional $200 million, by 2018 the (b)(3) class had grown from 12 million members[14] to 16 million members,[15] thereby substantially reducing the recovery on each compensable

[14] JA A-7433.

[15] Plaintiffs-Appellees' Settlement Brief, p. 31.

interchange fee.[16] There is no reason to assume the Defendants would not have been willing to enter into the exact same monetary settlement with the same settlement class they agreed to in 2012, even after this Court rejected that settlement and remanded. After all, Defendants continued to voluntarily abide the injunctive provisions of that settlement despite its rejection by this Court, and they agreed to leave the $5.3 billion in escrow rather than exercise their right to terminate the entire deal. Not only was Class Counsel's post-2016 lodestar substantially less productive, it was generated at little or no risk, rendering it worthy of, at most, a 1x multiplier.

c. Class Counsel must differentiate compensable from non-compensable time in their lodestar submission to the district court.

While caselaw does not require a district court to scrutinize time records when performing a lodestar cross-check, there is likewise no rule requiring a court to credit every hour *claimed* by class counsel. In its lodestar cross-check the district court must exclude categories of Class Counsel's time not directly contributing to recovery of an enforceable monetary settlement; it is Class Counsel's duty to present their time in a format that allows the district court to efficiently discharge this duty.

[16] Put another way, for an additional $200 million Defendants-Appellees bought the release of claims from an additional 4 million merchants at a per-merchant rate of $50, compared to a 2012 per-merchant rate of $441.

Contrary to Class Counsel's argument that the sheer volume of hours they claim in this case makes scrutiny of their lodestar impossible, Gnarlywood Appellants are not asking the court to engage in the "enervating, cumbersome task" of reviewing individual time records. Instead, Appellants are asking the court to either exclude all pre-2016 time due to both Class Counsel's self-created conflict and Class Counsel's failure to segregate hours spent on extra-judicial and injunctive relief specific activities, or limit pre-2016 time to that which was of actual benefit to the litigation interests of the (b)(3) class.

Class Counsel's brief describes thousands of hours spent on non-compensable tasks, which should have been excluded from their claimed lodestar, though none were. It *is* improper for Class Counsel to simply dump their time records on the district court's desk and say "here, you find the hours not specific to this case and this subclass" and then cry that the court is under no obligation to scrutinize what is contained in the records.

It is Class Counsel's job to present their time in a format that allows the court to discharge her duty. Yet by the sheer volume of hours claimed, and their conflation of (b)(3) lodestar with tens of thousands of non-compensable pre-2016 hours spent in service to other interests, Class Counsel were intentionally derelict in their duty to the (b)(3) class and the district court, and consequently should receive credit for none of their pre-2016 hours. Refusing to consider any pre-2016 hours is a

reasonable remedy for Class Counsel's failure to make any effort to eliminate from its lodestar those hours spent on activities not directly contributing to the (b)(3) class's monetary recovery. *See Silbiger v. Prudence Bonds Corp.*, 180 F.2d 917 (2d Cir. 1950). *See also, Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116, 125 (1885), and *In re Prudential Sec. Inc. Ltd. Partnerships Litig.* 911 F.Supp. 135, 141 (S.D.N.Y. 1996), *quoting Lindy Bros. Builders, Inc. v. American Radiator, Etc.*, 540 F.2d 102, 112 (3d Cir.1976).

Class Counsel made the task so overwhelming and burdensome that Judge Brodie was prevented from discharging her duty to determine the time and labor *Goldberger* factor and perform a meaningful lodestar cross-check. The *Silbiger* solution should have been applied by the district court in its cross-check. If *Silbiger*'s approach is regarded as inapplicable, the district court must still exercise its fiduciary duty and exclude the hours unrelated to pursuing a (b)(3) remedy, which it failed to do.

V. PRE-REMAND SETTLEMENT SHOULD BE A RELEVANT CONSIDERATION WHEN ASSESSING RISK AS A LODESTAR MULTIPLIER.

Gnarlywood Appellants ask this Court to revisit its much-abused holding in *Goldberger* that "litigation risk must be measured as of when the case is filed." While this is undoubtedly true for a case that makes its way from complaint to trial with no intervening settlement offers, it is not appropriate for a case that reaches an

early settlement yet continues to be litigated for a number of years for reasons unrelated to the merits.

While "litigation risk must be measured as of when the case is filed," *Goldberger* at 55, it is equally true that settlement eliminates litigation risk. *See In re Tremont Secs. Law, State Law & Ins. Litig.*, 699 Fed. Appx. 8, 17 (2d Cir. 2017) (risk "dissipated" after case settled). This Court has held that it is improper to award any enhancement of lodestar incurred post-settlement. *Id*.

Tremont Secs. directly refutes the assertion that litigation risk measured when the case is filed obtains throughout the entire case. *Tremont Secs.* was filed in 2008, at which time risk existed, but the court awarded no multiplier for all lodestar incurred after 2011, when the case first settled. *In re Tremont Sec. Law*, 2019 U.S. Dist. LEXIS 21910 (SDNY February 11, 2019).

In *Tremont Secs.* this Court disapproved of the application of any multiplier to post-settlement time spent on a plan of allocation. Despite that the district court had awarded class counsel just 3% of the fund, which is low as a percentage compared to prior awards, this Court reversed because that award represented an enhancement of post-settlement, riskless lodestar. On remand, the district court awarded class counsel their lodestar with no enhancement for risk, pursuant to this Court's mandate, for a fee of 1.79 %. *In re Tremont Sec. Law*, 2019 U.S. Dist. LEXIS 21910 (SDNY February 11, 2019).

Simply looking at a prior case and adopting the percentage awarded there is meaningless in the absence of a careful comparison of the unique circumstances of each case. For example, *Tremont Secs.* was a $1.45 billion megafund settlement, and the fee was just 1.79 %. *See also In re Petrobras Secs. Litig.*, 317 F. Supp. 3d 858 (SDNY 2018), in which Judge Rakoff awarded a fee of 5.7% on a $3 billion settlement.

The law is clear that lodestar incurred post-settlement is entitled to no enhancement or multiplier. *See In re Ins. Brokerage Antitrust Litig*., 2007 U.S. Dist. LEXIS 74711 at n.3 (D.N.J. Oct. 5, 2007) ("attorney time spent on the case post-settlement is not included in the lodestar calculation and is not subject to adjustments for risk or quality"); *Palombaro v. Emery Fed. Credit Union*, 2018 U.S. Dist. LEXIS 165970 (S.D. Ohio Sept. 27, 2018) (no multiplier awarded on post-settlement fees after risk is removed); *Hooker v. Sirius XM Radio, Inc.*, 2017 U.S. Dist LEXIS 201809 (E.D. VA May 11, 2017) (time expended in administration and approval of settlement not includable in lodestar calculation because it does not involve risk).

Here, while the first settlement was rejected on appeal, the money that was to fund that settlement remained in escrow, and Defendants showed no inclination to walk away from the deal they had struck. According to Class Counsel, the issue on remand was how much more money the Defendants would add to that amount, and

after two years of additional discovery the parties entered into essentially the same deal using the same monies as back in 2012.

Therefore, on remand Class Counsel's risk of not getting a recovery for the (b)(3) class – and receiving no fee – was virtually non-existent, and they were operating with a $5.3 billion safety net. When performing its cross-check, the district court abused its discretion by applying an unwarranted risk multiplier to Class Counsel's risk-free post-2016 lodestar.

VI. CONTROLLING SUPREME COURT PRECEDENT PROHIBITS SERVICE OR INCENTIVE AWARDS IN ANY AMOUNT.

Class Counsel incorrectly state in their Answering Brief (Fees) that Gnarlywood Appellants do not "oppose service awards to each of the Class Plaintiffs; [they] simply [oppose] the amount awarded." Plaintiffs-Appellees' Fee Brief, p. 94. Actually, the Gnarlywood Appellants' Joint Brief makes alternative arguments that service awards are prohibited by controlling Supreme Court precedent, and are excessive in this case *even if permissible*. Appellants' Joint Brief (2d Cir. ECF 145), p. 60. ("relating to the impermissibility of incentive or service awards of any amount. Such awards have never been authorized by the Supreme Court.") Gnarlywood Appellants also argue the excessive awards made in this case illustrate the wisdom of banning such awards in Rule 23(b)(3) cases, as a rule. Gnarlywood Appellants have adopted in full the incentive award portion

of the McLaughlin Brief, and join them in arguing this Court should follow binding Supreme Court precedent, as clarified by the recent case of *Johnson v. NPAS Sols., LLC*, 2020 U.S. App. LEXIS 29682 (11th Cir. Sept. 17, 2020).

a. Neither Rule 23, nor any other legal authority, authorizes the district court's grant of incentive awards to Class Plaintiffs.

While service or incentive awards have become common in the Second Circuit and elsewhere, the United States Court of Appeals for the Eleventh Circuit clarified in *Johnson* that such awards are not authorized by FRCP Rule 23, and have, per the United States Supreme Court, been impermissible since the 1880s. The Eleventh Circuit describes the ubiquity of incentive awards as the product of "inertia and inattention," and court's "are not at liberty to sanction a device or practice, however widespread, that is foreclosed by Supreme Court precedent." *Id*. at *27.

The two landmark cases first authorizing recovery of attorneys' fees from a common fund, *Trustees v. Greenough*, 105 U.S. 527 (1882) and *Central Railroad & Banking Co. v. Pettus* (1885), specifically prohibit recovery of any amounts by representative plaintiffs for personal services and private expenses. *Id*. at *Johnson* at 21-22. These seminal cases have been ignored by modern courts when rationalizing awards to lead plaintiffs, whether as a bounty for obtaining a settlement, remuneration for hours spent on litigation tasks, or compensation for exposure to reputational risk. None of these rationales can surmount the constraints established by *Greenough* and *Pettus*, which – while allowing the reasonable

compensation of plaintiff's counsel out of a common fund recovery – plainly prohibit compensating named plaintiffs for their personal services.

Class Counsel dismissively consign *Johnson* to a footnote, and express preference for the dissent in that case, rather than the persuasive majority opinion. Plaintiffs-Appellees' Fee Brief, p. 78. The *Johnson* dissent, however, works the same lazy analysis as previous decisions that suppose some authority for service awards – it does not point to any original or enabling authority anchoring a court's discretion to award a bounty, salary, or other personal expense award, to a class action plaintiff. Without such originating authority, all Rule 23(b)(3) service awards suffer from the same illegitimacy. Worse, the preferential treatment of lead plaintiffs caused by service awards destroys the adequacy of those plaintiffs and creates a conflict between the plaintiffs and the class members they represent.

The *Johnson* dissent preferred by Class Counsel actually concedes, citing *Newberg on Class Actions* (5th ed., June 2020 Update), that "courts have not generally addressed their legal basis for approving incentive awards." *Johnson, supra*, at *36. "[A]s of June 2020, no court has addressed its authority to approve incentive awards head on [and] courts have created these awards out of whole cloth." *Id*. at **37-38. The latter statement addresses this Court's decision in *Melito v. Experian Mktg. Sols., Inc*., 923 F.3d 85 (2d Cir. 2019) that *Greenough* and *Pettus* are factually "inapposite." *Id*. at 96. *Melito's* only citation on this point was to a

since vacated Eleventh Circuit decision, now also overruled by that Circuit's holding in *Johnson*.[17]

No other case cited by Class Counsel offers any better support for their attack on the *Johnson* panel's opinion. *Cook v. Niedert*, 142 F.3d 1004 (7th Cir. 1998) did not cite any authority for its decision to affirm the district court's approval of incentive awards. Instead, in a one paragraph analysis, *Cook* held that because a plaintiff is "an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit." *Id*. at 1016. Yet necessity is no more a justification of a payment prohibited by binding Supreme Court precedent than are habit and laziness.

In any event, the service awards in this case are not based on necessity, since Plaintiffs-Appellees have not argued the Class Plaintiffs would not have stepped forward and filed this suit but for the promised payments of up to $200,000. The service awards in this case are tantamount to the "salary" the 11th Circuit found in *Johnson* to be prohibited by *Greenough* and *Pettus*. Each Class Plaintiff submitted a declaration detailing hours spent on activities not related to the recovery of

[17] Just as the 11th Circuit did with the arguably "binding" *Holmes v. Continental Can Co*. case cited by the dissent in *Johnson*, this Panel should disregard *Melito* because it fails to confront controlling Supreme Court precedent directly on point.

damages in this litigation, including tweeting and lobbying, and the requested service awards were based on these asserted hours.[18]

b. PSLRA does not provide a legal basis for making incentive awards in antitrust cases.

The Private Securities Litigation Reform Act ("PSLRA"), in stark contrast to the antitrust statutes under which this case was brought, specifically authorizes compensation of a lead plaintiff's litigation-related time and expenses in securities class actions. The PSLRA permits "the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of the class." 15 U.S.C. § 78u-4(a)(4). *See also* H.R. Conf. Rep. No. 369, 104th Cong., 1st Sess. 35 (1995) ("[L]ead plaintiffs should be reimbursed for reasonable costs and expenses associated with service as lead plaintiff, including lost wages, and [the committee] grants the courts discretion to award fees accordingly."); S. Rep. No. 104-98 (1995) ("[T]he Committee grants

[18] For example, Mr. Goldstone, owner of Class Plaintiff Photos, etc., requested compensation for 4,680 hours spent updating his blog, tweeting about the credit card industry, and lobbying legislators. It is clear from Class Counsel's 2013 filings that most of Mr. Goldstone's work was aimed at achieving legislative and regulatory changes, not at maximizing the recovery of damages by the (b)(3) class. Mr. Goldstone participated in a public relations campaign to get lawmakers' attention, but played no part in the recovery of damages. He is therefore seeking a salary for time he spent on anything credit-card related during the time this lawsuit was proceeding.

courts discretion to award the lead plaintiff reimbursement for 'reasonable costs and expenses' (including lost wages) directly relating to representation of the class.").

The above-cited provision of the PSLRA is the only example of a specific Congressional authorization for the reimbursement of a lead plaintiff's reasonable costs and expenses, and extends only to PSLRA claims. Nowhere else in federal statutes, Rule 23, or Supreme Court precedent are such awards authorized generally for lead plaintiffs in class actions. Instead, as explained in *Johnson*, *supra*, such awards are expressly prohibited by the holdings of *Greenough* and *Pettus*. That Congress thought it necessary to make express provision for incentive awards in PSLRA cases is further evidence Congress did not regard such awards to be generally available.[19]

c. There is a necessary relationship between the dollar amount of class member claims and Class Plaintiff awards.

The proposed $200,000 "service awards" to Traditions and Photos, Etc., are 100 times larger than those Class Plaintiffs' expected recovery, and 570 times larger than the average class member's expected recovery. These proposed payments divorce Class Plaintiffs' interest from those of absent class members, making Class

[19] The *Johnson* majority identified *Melito* as "the only circuit to have directly confronted whether *Greenough* and *Pettus* prohibit incentive awards." *Johnson*, 2020 U.S. App. LEXIS 29682 at *25, fn. 8. No other case cited by Class Counsel addresses any way these critical Supreme Court holdings, and none bears any persuasive weight on this question.

Plaintiffs inadequate to represent the much smaller claims of other class members. The proposed awards represent preferential payments to the Class Plaintiffs that render these representatives conflicted and inadequate to represent absent class members. Therefore, unless the service awards are reversed, the settlement class may not be certified for lack of adequacy, and the settlement must be rejected.

Class Counsel refer to the Gnarlywood Appellants' proffered standards as a "made-up" methodology, yet the described metrics are taken directly from Judge Gleeson's 2014 order denying the precise service awards approved by Judge Brodie. *See In re Payment Card*, 991 F. Supp. 2d 437, 448-449 (EDNY 2014). Class Counsel's argument that only in PSLRA cases are lead plaintiffs limited by their reasonable hours confuses the point, and stands the law on its head. It is only in PSLRA cases that a salary for hours dedicated to the case is permitted at all. In all other case categories, such awards have been limited to a nominal sum of $1,000 to $10,000, as argued in the Gnarlywood Appellants' opening brief. Plaintiffs-Appellees seek a departure from this modest standard here – *as if this were a PSLRA case* – but at the same time reject the limits on such awards set by the PSLRA. Named plaintiffs want to be paid for every hour spent on activities even tangentially related to credit cards, including blogging, tweeting and schmoozing in Washington, without any regard to whether those hours served the litigation interests of the (b)(3) class or led to an increased recovery for the class.

Perhaps more than anything else, the outrageous service awards approved in this case illustrate the wisdom of the Supreme Court's black letter holding in *Trustees v. Greenough* that such personal awards in any amount are impermissible. Those justices anticipated the abuses that would inevitably creep into common fund cases if named plaintiffs could thereby secure the advantage of a profitable sinecure. "It would present too great a temptation to parties to intermeddle in the management of valuable property or funds in which they have only the interest of creditors, and that perhaps only to a small amount, if they could calculate upon the allowance of a salary for their time and of having all their private expenses paid." 105 U.S. 527 at 538.

This quotation from *Greenough* aptly describes the tempting of lead plaintiffs Traditions and Photos Etc. Each has only a very modest claim against the Defendants, and each seized the opportunity of this case to bill the class for thousands of hours of time devoted to pursuing their personal crusades. The claims of Payless and CHS are measured in the millions of dollars, justifying their devotion of employee time to this case, which was modest when compared to time devoted by Traditions and Photos Etc. Nevertheless, since this is not a securities case, and because no law authorizes the award of personal expenses or salary to a lead plaintiff, the service awards to all the Class Plaintiffs must be disallowed.

CONCLUSION

For the reasons set forth above and earlier briefed, Appellants pray this Court reverse the district court's orders approving settlement, and awarding attorneys' fees and incentive awards.

Respectfully submitted,

/s/ John J. Pentz
John J. Pentz, Esq.
19 Widow Rites Lane
Sudbury, MA 01776
Phone: (978) 261-5725
jjpentz3@gmail.com

Attorney for Appellants
Unlimited Vacations and
Cruises Inc., and USA Pets LLC

/s/ Kendrick Jan
Kendrick Jan
Kendrick Jan, APC
402 West Broadway, Suite 1520
San Diego, CA 92101
Tel: (619) 231-7702
kj@jan-law.com

Attorney for Appellants
Gnarlywood LLC and
Quincy Woodrights, LLC

CERTIFICATE OF COMPLIANCE WITH FRAP 32 AND LOCAL RULE 28.1.1

1. This document complies with the type-volume limitation of Local Rule 28.1.1 because excluding the parts of the document exempted by Fed R. App. P. 32(f) this document contains 7,955 words.

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Date: December 29, 2020

/s/ John J. Pentz
Attorney for Appellants
Unlimited Vacations and
Cruises Inc., and USA Pets LLC

/s/ Kendrick Jan
Attorney for Appellants
Gnarlywood LLC and
Quincy Woodrights, LLC

CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2020, I filed the foregoing JOINT REPLY BRIEF OF APPELLANTS GNARLYWOOD LLC, AND QUINCY WOODRIGHTS, LLC, (20-341 CON), AND UNLIMITED VACATIONS AND CRUISES, INC., AND USA PETS LLC (20-343 CON) via the 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 Brief on December 29, 2020.

Date: December 29, 2020

/s/ John J. Pentz