No.20-339-cv(L)

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

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In Re: Payment Card Interchange Fee and
Merchant Discount Antitrust Litigation

Appeal from the United States District Court
for the Eastern District of New York (Hon. Margo K. Brodie)

APPELLANT KEVAN MCLAUGHLIN'S REPLY BRIEF

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I. The District Court Could Not Extend Immunity Indefinitely for "Substantially Similar" Future Conduct Merely by Declaring It to be Within the "Identical Factual Predicate" Doctrine

Approving the settlement release, the district court extended immunity for an indeterminate number of years into the future by declaring that "substantially similar" conduct would fall within the "identical factual predicate" doctrine. Assuming the application of the doctrine to be determinative, the district court brushed aside significant objections that public policy prevented such prospective immunity in antitrust class actions, and that the indeterminate duration of the release seriously undercut and obscured the actual value of the settlement to the class. McLaughlin Opening Brief at 17-22.

Defending the district court's approach, the Settling Parties make the same mistake, conflating the application of the "identical factual predicate" doctrine to release claims based on past conduct with hypothetical future claims based on future conduct. That argument only confirms the district court's error: in class action settlements, the identical factual predicate doctrine does not automatically and equally apply to future conduct that is similar to conduct released in the settlement. The district court misconstrued the scope of the doctrine, and should have given a far more stringent examination of any proposal to settle an antitrust class action involving prospective immunity for future conduct.

Analyzing the release of claims in the Settlement, the district court made no distinction between past and future conduct, construing the collective caselaw to imply that future conduct, if similar enough to be considered within the "identical factual predicate" of prior conduct, could be released with equal dispatch. JA7375/DE7821:52 & n.20. The Settling Parties, consistent with the district court's approach, argue that there is no essential difference between releasing existing claims for past conduct and releasing future claims for conduct yet to occur, so long as the future conduct is sufficiently similar to the past conduct. Defendants' Answering Brief, 65-66; Plaintiffs' Answering Brief (Final Approval Order), 63.

The Settling Parties misconstrue the identical factual predicate doctrine, confusing the release of *existing* claims that were not or could not be brought, and releasing future claims that "could not be brought" because the conduct has not happened yet. There is a substantial difference between releasing existing and future claims based on completed acts, on the one hand, and releasing future claims based on future acts, on the other. *See generally*, *e.g.*, James Grimmelmann, *Future Conduct and the Limits of Class-Action Settlements*, 91 N.C. L. REV. 387 (2012).

One relevant difference is that there are classes of cases—including antitrust cases—for which public policy prevents the preemptive release of future conduct altogether. *See* Grimmelmann, 91 N.C. L. REV. 387, 410-411 & n.85 (antitrust law is subject to "substantive rule against future-conduct releases" because "its *raison d'être* is to prohibit forms of private ordering that have serious negative effects for competition and consumers.") citing *Three Rivers Motor Co. v. Ford Motor Co.*, 522 F.2d 885, 896 n.27 (3d Cir. 1975) (stating that a release may not "waive damages from future violations of antitrust laws" and citing cases).

A release of claims based on future conduct is therefore precluded, regardless of whether Defendants' later conduct could be considered "identical" or not. However, the district court here found the identical factual predicate doctrine to control, and therefore declined to apply the rule, holding "these cases largely contemplate impermissibly broad releases that released all types of claims, including "future" entirely unrelated antitrust claims not circumscribed to an identical factual predicate…." JA7377/DE7821:54. Distinguishing the Supreme Court's guidance in *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), the district court asserted there were "many reasons" that an arbitration agreement differed from a class settlement agreement, but related none of those reasons.[1]

Although courts occasionally permit the preclusion of future claims based on past conduct in class actions, that is entirely different from releasing future-conduct claims. *See* Grimmelmann, 91 N.C. L. Rev. 387, 410 (explaining and diagramming the distinction between future-claim and future-conduct releases). Releases purporting to

[1] The district court's use of the term "jointly negotiated" suggests one reason might be a belief that class counsel's negotiation of the release obviated any rule against immunizing future conduct in antitrust cases. DE7821:56 (JA7379). McLaughlin is not aware of any such exception to the rule. In reality, defendants have an incentive to negotiate the broadest possible release, and class counsel's acquiescence in a release of future conduct claims is not evidence that the release accords with public policy or the interests of the class they represent. On the breadth of release, class counsel have an incentive to accede to a broader release in exchange for a larger gross fund, even if class members are not made concomitantly better off. Grimmelmann, 91 N.C. L. REV. 387, 415-16.

immunize future conduct, particularly in large commercial class actions, present serious problems not present in future-claim releases. *See id*. at 387 (summarizing the problems with future-conduct settlements: "Even more than the 'future claims' familiar to class-action scholars, future-conduct releases pose severe informational problems for class members and for courts. Worse, they create moral hazard for the defendant, give it concentrated power, and thrust courts into a prospective planning role they are ill-equipped to handle.") *see also id*. at 416-27 (discussing each of these problems in detail).

Nevertheless, the district court failed to recognize the distinction, finding 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 on the release of *future* claims, as long as those claims fall within the identical factual predicate test." JA7375/DE7821:52.

Defending that ruling here, the Settling Parties consistently conflate the continuing effects of prior released conduct and later volitional conduct itself. Plaintiffs cite *Moulton v. U.S. Steel Corp*., 581 F.3d 344, 35049–51 (6th Cir. 2009). Plaintiffs' Answering Brief (Final

Approval Order), 75. But the Sixth Circuit there only approved the release of future claims for pre-settlement conduct:

> By releasing future claims only for pre-settlement conduct, the agreement sensibly—and reasonably—accommodates U.S. Steel's interest in protecting itself from suits based on identical claims that existed at the time of the complaint (and settlement) without extinguishing the class's right to file distinct claims in the future.

Similarly, Defendants assert that "courts have approved releases with no time limit," Defendants' Answering Brief, 66, citing *In re General American Life Insurance Co. Sales Practices Litigation*, 357 F.3d 800, 803 (8th Cir. 2004). But that case did not approve a release with no time limit. Although the plaintiff there argued that her claims arose independently after the settlement, the court disagreed and found that the claims existed at the time of settlement, but were unknown to the plaintiff. *See id.* at 804 (concluding that "There is no doubt that a person, as a matter of contract, may release, in exchange for consideration she deems adequate, claims existing at the time but not known to her."). *In re General American Life Insurance* is not an example of the release of future conduct, much less upon the identical factual predicate doctrine.[2]

Proceeding from the incorrect premise that claims for future "identical" conduct are released, Plaintiffs actually portray the five-year release of future-accrued claims as a *benefit*, on the theory that Defendant could theoretically insist on a perpetual release of those claims. Plaintiffs Answering Brief (Final Approval Order), 67-68. For the same reason, Plaintiffs do not attempt to defend their decision to commence the five-year limit only after the conclusion of all appeals, a feature that is arbitrary at best and demonstrably punitive in effect.

[2] The Settling Parties both cite *Melito* v. *Experian Marketing Solutions, Inc.*, 923 F.3d 85, 95-96 (2d Cir. 2019). *Melito* was not an antitrust case, and does not actually analyze the issues presented in this case. For reasons not apparent in the opinion, this Court did not acknowledge the potential differences between pre- and post-settlement conduct, and instead dismissed the argument as "unrealistic." Plaintiffs' reliance on *VKK Corp. v. Nat'l Football League*, 244 F.3d 114 (2d Cir. 2001) is similarly unsupportable. That case arose under wildly different factual circumstances involving a series of related disputes between a football team owner and the NFL. This Court there was construing the "part and parcel" doctrine, which applies to circumstances not alleged in this case. *See id*. at n.6 (presenting hypothetical illustrating the doctrine). None of this Court's commentary in the case can be stretched into a broad rule permitting the release of antitrust claims based entirely on future conduct.

The district court accepted that premise, ruling in a footnote that, although sympathetic, it "was not persuaded" by McLaughlin's arguments because the district court believed there is no limit to the release of future claims under the identical factual predicate doctrine. JA7375/DE7821:52, n.20. But the premise—that the identical factual predicate doctrine would automatically release claims for later conduct perpetually unless the parties agreed to curtail it—is incorrect.

Even regarding a prospective release as a legitimate, bargained-for term of the settlement, the existence and duration of the prospective release has material implications for the value of the settlement to class members, which is diluted with each passing day. To approve the settlement consistent with Rule 23 and due process, the district court necessarily would have to consider the effect on the value of the settlement to the class, including passing on the reasonableness of the arbitrary and punitive tolling of the release period during appeals. Grimmelmann, 91 N.C. L. Rev. 387, 435-38 (arguing courts should employ high scrutiny to ensure class members are adequately compensated for any future conduct release, participate critically in their design to minimize risks to the class and hold counsel accountable, and ensure the that the release will not create perverse economic incentives for defendants). Yet the district court here pointedly declined any such inquiry, believing it to be foreclosed by the identical factual predicate doctrine. JA7375/DE7821:52 & n.20.

The reach of Settling Parties' release far exceeds the doctrine upon which they rely. Tacitly acknowledging its infirmity, Plaintiffs suggest the offending clause is saved by boilerplate language that the release should not be construed to be broader than the law permits. Plaintiffs' Answering Brief (Final Approval Order) at 75. No doubt; but what precisely the law permits is the question before this Court. The matter can and should be resolved now.[3] The law does not permit a future-conduct release in this case and, even if it did, the district court did not adequately scrutinize its fairness to the class.

[3] McLaughlin submits that agreeing to a void clause and leaving class members to challenge it in subsequent litigation is inconsistent with the adequate representation. If Plaintiffs' Counsel understood that the clause was unenforceable, they should have stood firm at the negotiating table rather than relying on a "void if prohibited" dodge.

II. In Setting the Fee Award, the District Court Departed from Controlling Circuit Precedent Resting Upon Recent Supreme Court Precedent

Plaintiffs cannot explain how lawyers suing under an antitrust statute with a fee-shifting clause can, merely by settling for a sum of money, remove their fee calculation out of fee-shifting jurisprudence and into another realm where they are, in fact, paid more for the same work and risk. McLaughlin Opening Brief, 39-45. There is nothing in the statute itself that suggests that approach, nor is there any practical explanation for it. The disparity finds no support in the Supreme Court's extant analyses of either statutory fee-shifting or the common fund doctrine.

Plaintiffs' explication of the percentage award and lodestar cross-check in this case only confirms McLaughlin's point. Plaintiffs must concede that the *Goldberger* factors do not include instructions to compare requested percentages with those awarded in other settlements, but they argue the practice is well-established and that it does not amount to the "benchmark" prohibited in *Goldberger* and employed "in jurisdictions like the Ninth Circuit." Plaintiffs' Answering Brief (Fees) at 69-70 citing *Goldberger v. Integrated Res. Inc.*, 209 F.3d

43 (2d. Cir. 2000). But courts in the Ninth Circuit certainly do use similar cases for comparison in benchmark analysis, leaving Plaintiffs with no explanation for how the process they describe actually differs from a benchmark analysis. *See, e.g.*, *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1049-50 & n.4 (9th Cir. 2002) (Ninth Circuit benchmark method takes into consideration "the circumstances of the case and the range of fee awards out of common funds of comparable size."); *In re Cylink Sec. Litig.*, 274 F. Supp. 2d 1109, 1115-16 (N.D. Cal. 2003) (noting Ninth Circuit's 25% benchmark percentage but finding 16% fee reasonable in light of comparison to lodestar multipliers awarded in similar cases). If there is any practical distinction in the method used in this case and the benchmark method described in Ninth Circuit cases like *Vizcaino*, Plaintiffs have not identified it.

Regardless of the terminology, reliance on percentages in other cases departs from *Goldberg*er's essential command that a district court make an award tied to the specific work of the specific attorneys in the specific case before it. But that is only part of the problem: as McLaughlin pointed out, there are plenty of examples of courts calculating percentage awards that result in multipliers far exceeding what would permissibly be awarded in a fee-shifting lodestar calculation. Plaintiffs are thus free to urge that a certain percentage was accepted in a "comparable" case, so it is reasonable, and also that the resultant high lodestar multiplier does not suggest otherwise, because the same multiplier can be found in that case, or in others. The result is a circular fee jurisprudence that is self-inflating in practice, and which results in routine overcompensation for non-compensable risk in common fund cases. The problem is obvious enough that several district courts in this Circuit have pointed it out. McLaughlin Opening Brief, 32-35.

That is the very circle this Court attempted to square in *Fresno County*, which clarified that percentage awards in common fund cases are bound by substantially the same criteria as lodestar awards in fee-shifting cases and, although it concluded that a common-fund fee may be "less than, equal to, or greater than the lodestar" (*Fresno Ctny.*, 925 F.3d at 68), its discussion of compensable risk makes clear that the difference cannot logically be as large as that seen here. McLaughlin Opening Brief, 35-39 citing *Fresno Cnty. Emps' Ret. Ass'n v.*

Isaacson/Weaver Family Trust, 925 F.3d 63 (2d Cir. 2019) *cert. denied*, __ U.S. __, 140 S. Ct. 385 (2019).

Plaintiffs argue that *Fresno County* cannot be interpreted to limit compensation of risk discussed in *Goldberger*, and that the district court therefore did not err in failing to limit its risk analysis to contingency risk pursuant to *Fresno County*. Plaintiffs Answering Brief (Fees), 66 (citing *4 Pillar Dynasty LLC v. New York & Co., Inc.*, 933 F.3d 202, 211 n.8 (2d Cir. 2019)). But Plaintiffs' supporting citation only reiterates that this Court is bound by prior panel opinions. If this Court is faced with conflicting prior panel opinions, it does not simply assume that the later one is void. In this instance, *Fresno County* occurred after the Supreme Court's opinion in *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542 (2010), and *City of Burlington v. Dagu*e, 505 U.S. 557, 562 (1992). The *Fresno County* opinion devotes considerable analysis to explaining and reconciling the essential holding of those cases—that lodestar is a presumptively reasonable fee and can only be enhanced rarely and slightly for contingent risk—in the context of both statutory fee-shifting and common-fund awards (whether as a method of calculation or as a cross-check). Those cases serve as an intervening authority sufficient to justify a refinement of prior panel precedent. *See* Phillip M. Kannan, *The Precedential Force of Panel Law*, 76 Marq. L. Rev. 755, 761 (1993).

Finally, McLaughlin does not understand Plaintiffs' charge that his "storytelling" faults the district court for "an analysis it did not undertake." Plaintiffs' Answering Brief (Fees), 66-67. Plaintiffs do not explain what argument they are addressing, and their subsequent argument is not responsive to any argument McLaughlin made. Plaintiffs are indulging in a bit of storytelling of their own by pretending to tear down arguments McLaughlin did not make.

The method of fee calculation Plaintiffs urged upon the district court is not valid under either *Goldberger* or *Fresno County*, and the district court's adoption of that method resulted in a fee that was excessive, to the detriment of the class.

III. "Service Awards" are Precluded by Controlling Supreme Court Precedent

McLaughlin's Opening Brief anticipated and foreclosed Plaintiffs' arguments in support of the "service awards" made to each of the named plaintiffs. Plaintiffs' essential argument remains that the lower courts' practices of making the awards, along with their assertion that such awards are necessary, stand as "precedents" that outweigh a clear

Supreme Court prohibition on the practice. The precedents Plaintiffs rely on are subordinate to, and plainly contradict, binding Supreme Court authority. In addition, as Plaintiffs barely mention in a footnote, the Eleventh Circuit has recently issued a decision adopting the very position McLaughlin asserts here and rejecting each of the arguments Plaintiffs make in response.

The Supreme Court's foundational decisions recognizing the common fund doctrine set forth a clear prohibition on "service" awards to class representatives. McLaughlin Opening Brief, 46-52 (citing *Internal Imp. Fund Trs. v. Greenough*, 105 U.S. 527 (1882), and *Cent. Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885)). Lower courts abided by the prohibition for years, but recently started a practice of making service awards from common funds without recognizing the prohibition on them. Plaintiffs' abortive observation that the cases predate Rule 23, for example, never gets off the ground in the face of McLaughlin's preemptive arguments. McLaughlin Opening Brief, 52-55.

Moreover, Plaintiffs barely mention that their arguments were recently rejected by the Eleventh Circuit in *Johnson v. NPAS Solutions*, LLC, 975 F.3d 1244 (2020) (motions for rehearing pending). *See* Plaintiffs' Fee Brief at 91, n.38 (disclosing *Johnson* case). *Johnson* involved a class action settlement in a case alleging violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227. On the issue of incentive awards, the court there accepted the argument that *Greenough* and *Pettus* prohibited incentive awards altogether:

> We take the rule of *Greenough*, confirmed by *Pettus*, to be fairly clear: A plaintiff suing on behalf of a class can be reimbursed for attorneys' fees and expenses incurred in carrying on the litigation, but he cannot be paid a salary or be reimbursed for his personal expenses.

Johnson, 975 F.3d at 1257. The Eleventh Circuit also opined that "modern-day incentive awards present even more pronounced risks than the salary and expense reimbursements disapproved in *Greenough*" when they are taken to function as a bounty to promote litigation. *Id*. at 1258. Just as in this case, the briefs submitted in support of the award in *Johnson* recounted the many services the class representative undertook on behalf of the class and additionally asserted that he should be paid for being subject to public scrutiny and for providing "an important public service by enforcing consumer protection laws." *Id*.

Plaintiffs make essentially the same policy arguments here in support of their awards as were made in *Johnson*. Plaintiffs' Fee Brief at 89-90 (arguing service awards are appropriate because class representatives are "essential" to class actions and the "effective enforcement" of law); *see also id*. at 90 (arguing that service awards "often exceed" the value of representatives' time and expenses), and 94 (referring to the "time and resources" devoted to the litigation). Faced with those same arguments in *Johnson*, the Eleventh Circuit found that the incentive award in the case was apparently intended both as reimbursement for services and personal expenses, as well as a bonus or bounty. Either way, it could not stand: the court concluded that whether the "incentive award constitutes a salary, a bounty, or both, we think it clear that Supreme Court precedent prohibits it." *Johnson*, 975 F.3d at 1258-59. Here, as in *Johnson*, the expressed rationale for the awards serves not to justify them, but to condemn them under clear and binding authority.

Plaintiffs' chief legal argument in this case is that lower courts have consistently made these awards, so that there is "precedent" for them. Plaintiffs' Fee Brief at 91-92. The *Johnson* court explicitly rejected the idea that such "ubiquity" of practice overcame the law: "[S]o far as we can tell, that state of affairs is a product of inertia and inattention, not adherence to law. . . .Needless to say, we are not at liberty to sanction a device or practice, however widespread, that is foreclosed by Supreme Court precedent." *Johnson*, 975 F.3d at 1260 (citing *Bosse v. Oklahoma*, —— U.S. ——, 137 S. Ct. 1, 2, 196 L.Ed.2d 1 (2016)).

Plaintiffs here imply, but do not expand on the argument, that *Greenough* and *Pettus* did not apply because they predate Rule 23. Plaintiffs' Fee Brief at 91-92. McLaughlin has already explained the fallacy of that point. McLaughlin Opening Brief, 52-55. And the *Johnson* court has since agreed:

> Two problems. First, Johnson fails to engage with the logic of *Greenough*, which, while not directed to class representatives per se, involved an analogous litigation actor—*i.e.*, a "creditor seeking his rights in a judicial proceeding" on behalf of both himself and other similarly situated bondholders. 105 U.S. at 538. Second, Johnson's argument implies that Rule 23 has something to say about incentive awards, and thus has some bearing on the continuing vitality of *Greenough* and *Pettus*. But it doesn't—and so it doesn't: "Rule 23 does not currently make, and has never made, any reference to incentive awards, service awards, or case contribution awards." Rubenstein, *supra*, § 17:4. The fact that Rule

> 23 post-dates *Greenough* and *Pettus*, therefore, is irrelevant.

Johnson, 975 F.3d at 1259. If anything, the *Johnson* court noted, the actual terms of Rule 23 prohibit incentive awards. *Id*. n.10.

Plaintiffs' only discussion of the *Johnson* case is in a footnote, in which they point out one judge dissented because the result there departed from Eleventh Circuit precedent permitting incentive awards. Plaintiffs' Answering Brief (Fees), 78. However, the *Johnson* dissent is incorrect in suggesting that a circuit court could, sub silentio, overrule a prior Supreme Court decision. On the contrary, the later panel is bound to apply the Supreme Court rule. Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 818 & n.2 (1994) ("[L]ongstanding doctrine dictates that a court is *always* bound to follow a precedent established by a court 'superior' to it."); *see also id*. at 834 (discussing the historical and constitutional foundations underpinning hierarchical precedent in the federal courts and concluding that "[T]he proposition that Article III commands all inferior federal courts to obey Supreme Court precedent appears quite powerful."). The Supreme Court has itself made clear that rule applies even if the inferior court concludes that a later line of Supreme Court authority has undercut the earlier precedent. "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case [that] directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237–38 (1997) (quotation marks omitted). *Hohn v. United States*, 524 U. S. 236, 252–253 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality.").

For that reason, Plaintiffs' reliance on *Melito* v. *Experian Marketing Solutions, Inc.*, 923 F.3d 85, 95-96 (2d Cir. 2019) is misplaced. First, this Court in that case did not evaluate the legal arguments advanced here, but instead rested its decision on an unspecified factual disparity between that case and the prior Supreme Court opinions. *Id*. Based in an indeterminate distinction of fact rather than the application of law, the resolution of the incentive award issue in *Melito* cannot be taken as dispositive of any other case, and has scant analytical value here. The recent observations of one district court in the Southern District of New York are illustrative. Faced with a request for an incentive award, the court discussed the Eleventh Circuit's holding in the *Johnson* case, but then found itself frustrated attempting to discern the Second Circuit's position:

> No statute abrogates the holdings of *Pettus* or *Greenough*. However, in *Melito v. Experian Marketing Solutions, Inc.*, the Second Circuit found in passing that those holdings did not apply to the particular class-action settlement presented to them….The Court of Appeals did not elaborate—nor can this Court discern—what facts distinguished the case from binding Supreme Court precedent. This issue is deserving of congressional attention.

Hart v. BHH, LLC, No. 15CV4804, 2020 WL 5645984, at *5 n.2 (S.D.N.Y. Sept. 22, 2020) (citation omitted). *Melito* did not hold that *Greenough* and *Pettus* are no longer valid, nor that they do not apply in the Second Circuit. *Melito* could not so hold, and therefore does not stand as "precedent" permitting the district court in this case to depart from binding Supreme Court precedent.

The Supreme Court has clearly directed that the service awards approved here are unlawful. Unless and until it holds otherwise, the circuit courts are bound to follow. Meanwhile, if special awards are necessary to induce enforcement of important statutory rights, then

Congress has the authority to provide for them. However, there is presently no statutory authority for the awards made here.

Under these circumstances, McLaughlin submits that the only possible conclusion that this Court may reach is that the payments to the named representatives were improper under binding Supreme Court authority, and that the district court erred in awarding them.

IV. Conclusion

For all the foregoing reasons, the orders awarding attorney's fees, approving incentive awards, and granting final approval of the class settlement should be reversed.

DATED: January 4, 2021 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I hereby certify pursuant to Fed. R. App. P. 32(g) that the attached brief is proportionally spaced, has a typeface (Century Schoolbook) of 14 points, and contains 4344 words (excluding, as permitted by Fed. R. App. P. 32(f), the corporate disclosure statement, table of contents, table of authorities, and certificate of compliance), as counted by the Microsoft Word processing system used to produce this brief.

DATED: January 4, 2021

/s/ C. Benjamin Nutley
C. Benjamin Nutley

CERTIFICATE OF SERVICE

I certify under penalty of perjury, that on January 4, 2021, I electronically filed the document entitled Appellant Kevan McLaughlin's Reply Brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF System. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ C. Benjamin Nutley
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