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**

FINAL FORM INITIAL BRIEF OF OBJECTORS-APPELLANTS JACK RABBIT, LLC & CAHABA HEIGHTS SERVICE CENTER, INC. D/B/A CAHABA HEIGHTS CHEVRON

Paul S. Rothstein **Florida Bar Number: 310123** **Co-counsel for Appellants Jack Rabbit, LLC & Cahaba Heights Service Center, Inc. d/b/a Cahaba Heights Chevron** **Attorney Paul S. Rothstein, P.A.** **626 N.E. 1st Street** **Gainesville, FL 32601** **(352) 376-7650** **(352) 374-7133 (Fax)** **E-Mail: psr@rothsteinforjustice.com**	**N. Albert Bacharach, Jr.** **Florida Bar Number: 209783** **Co-counsel for Appellants Jack Rabbit, LLC & Cahaba Heights Service Center, Inc. d/b/a Cahaba Heights Chevron** **N. Albert Bacharach, Jr., P.A.** **4128 NW 13th Street** **Gainesville, FL 32609-1807** **(352) 378-9859** **(352) 338-1858 (Fax)** **E-Mail: N.A.Bacharach@att.net**

LOCAL RULE 26.1(a) CORPORATE DISCLOSURE STATEMENT

Neither Appellant Jack Rabbit, LLC nor Appellant Cahaba Heights Service Center, Inc. d/b/a Cahaba Heights Chevron are subsidiaries of a parent corporation, and no publicly held corporation owns 10% or more of the stock in either Appellant.

TABLE OF CONTENTS

---

[1] For clarity regarding legal standing, in the nomenclature of this brief, a person who purchases a good or service, pursuant to an *Illinois Brick* "preexisting cost-plus contract," is referred to as a Cost Plus Direct Purchaser.

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

INTRODUCTION/PRELIMINARY STATEMENT

In *Hanover Shoe, Inc. v. United Shoe Machinery Corp*., 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968) ("*Hanover Shoe*") and *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977) ("*Illinois Brick*") the US Supreme Court created a bright line rule ("the *Illinois Brick* rule") to simplify determining damages in antitrust actions where an anti-competitively priced product sold by the manufacturer, may be sold, and resold, numerous times down the chain of distribution, linking the manufacturer to the ultimate consumer.

The *Illinois Brick* rule provides that for simplicity and manageability courts will presume that the antitrust injury, arising out of the purchase of an anticompetitively priced product, is only suffered by the first purchaser who is directly injured by the purchase. Everyone else down the economic chain of distribution is then ignored. Thus, pursuant to *Illinois Brick* the proper antitrust plaintiff is almost always the first purchaser.

However, there is a major exception to the "almost always" first purchaser simplicity of the *Illinois Brick* rule. That exception applies when the first purchaser has avoided antitrust-injury by having previously contracted to sell the product or service to a customer on a cost-plus basis[2]. i.e., Whenever the first purchaser is economically unaffected by the manufacturer's anticompetitive pricing because the customer is contractually obligated to absorb all of the first purchaser's cost, plus an agreed profit, the first purchaser's customer is the party directly injured by the manufacturer's anticompetitive pricing.

The Supreme Court reasoned that because the cost-plus customer, and not the first purchaser, has suffered the cognizable antitrust injury, it is the cost-plus purchaser who has sustained the antitrust injury; which in turn gives rise to Article III standing. As a result, the cost plus buyer, as a Cost Plus Direct Purchaser becomes the proper plaintiff to pursue the antitrust defendant.

In this matter, Appellants, Jack Rabbit LLC ("Jack Rabbit"), and Cahaba Heights Service Center, Inc. d/b/a Cahaba Heights Chevron ("Cahaba Heights Chevron"), like 168,000 other class members that are retail gas stations owners,

---

[2] "this Court in *Hanover Shoe* indicated the narrow scope it intended for any exception to its rule barring pass-on defenses by citing, as the only example of a situation where the defense might be permitted, **a preexisting cost-plus contract**. In such a situation, the purchaser is insulated from any decrease in its sales as a result of attempting to pass on the overcharge, because its customer is committed to buying a fixed quantity regardless of price." *Illinois Brick, supra* at 22. (emphasis added)

("Retail Gas Station Owners[3]") who accept Visa[4] and MasterCard[5] credit[6] and debit cards for payment[7] at the pump, and in their respective convenience stores. As shown fully below, Appellants Jack Rabbit, and Cahaba Heights Chevron, are, without question or doubt, Cost Plus Direct Purchasers, with Article III standing under the *Illinois Brick* contractual cost plus exception.

---

[3] Other Retail Gas Station Owner appellants may, in their briefs, may refer to themselves as "Branded Operators".

[4] Visa refers collectively to Visa, Inc., Visa U.S.A., Inc., and Visa International Service Association, and each of their respective subsidiaries, successors, purchasers, and assigns (including an acquirer of all or substantially all of their respective assets, stock, or other ownership interests).

[5] MasterCard refers collectively to MasterCard International Incorporated and MasterCard Incorporated, and each of their respective subsidiaries, successors, purchasers, and assigns (including an acquirer of all or substantially all of their respective assets, stock, or other ownership interests).

[6] Credit Cards access a card holder's line of credit or otherwise defer payment of debt, whereas debit cards debit a card holder's asset or deposit account.

[7] There are five steps to every electronic credit card payment. The steps are: 1. The purchaser swipes a Visa or MasterCard payment card at the seller's point of sale terminal; 2. The point of sale terminal sends the payment card information to the bank which process payment card purchases for the seller (the "Acquiring Bank"); 3. The Acquiring Bank relays the credit card information over the Visa or MasterCard network to the bank which issued the payment card to the purchaser (The "Issuing Bank"); 4. Assuming the purchaser is within their credit limit, the Issuing Bank authorizes the sale and immediately pays the Acquiring Bank the amount of cardholders' purchase, less the Interchange Fee; The Acquiring Bank then deducts its own fee, called the "Merchant Discount Fee" for its processing services, and pays the net to the seller.

During the class period, both Jack Rabbit, and Cahaba Heights Chevron purchased the petroleum products sold at their Retail Gas Stations and convenience stores from oil distributors "Oil Distributors."

As a matter of law, Class Counsel are incorrect in asserting to the district court (and thereby leading the court to error) that the Oil Distributors are *Illinois Brick* Direct Purchasers; they are not. In this matter, the Retail Gas Station Owners, such as Jack Rabbit, and Cahaba Heights Chevron fall within the cost plus contract exception to the *Illinois Brick* rule.

At the fairness hearing on November 7, 2019, Class Counsel argued that simply because the Retail Gas Station Owner's sales are processed through their respective Oil Distributors Acquiring Bank, the Oil Distributer are the Direct Purchasers with the Rule 23(b)(3) class claim. (Fairness Hr'g. Tr., Joint Appendix "JA" at A-7048 – A-7211).

They are not Direct Purchasers because Oil Distributors have a cost plus fixed fee contractual relationship with their retail gas station customers. In the cost plus fixed fee relationship, the Retail Gas Station Owners, such as Jack Rabbit and Cahaba Heights Chevron, pay the Oil Distributors 100% of the wholesale petroleum cost, 100% of the delivery cost, 100% of the Interchange Fee cost charged by appellants' customers' Issuing Banks, 100% of the Oil Distributor's Acquiring

Bank's "Merchant Discount Fee[8] cost," and a plus amount equaling the Oil Distributors profit.

The problem with the class definition is evident when one considers how appellants' industry works. Oil Distributors, who sell at wholesale, either branded or unbranded petroleum products, provide as part of their contract with retail gas stations, gas pumps which include point-of-sale terminals[9]. In turn, these point-of-sale gas pump terminals route the gas-station customer's credit card payment for the purchase of gasoline through the Oil Distributor's merchant account at the Oil Distributor's Acquiring Bank.

Thus, to the best of the antitrust Defendant's knowledge they were only charging illegal Interchange Fees to Oil Distributors. Which gets one back to the problem of using the Defendant's records of Interchange Fee amounts attributable to Oil Distributor for Visa-and MasterCard-branded card transactions during the class period, in order to provide an approximation of who is a class member.

There are sound (and obvious) economic reasons, including factoring, for the

---

[8] The merchant discount fee (also referred to simply as a "discount fee") is paid by a merchant (Oil Distributor) to its Acquiring Bank for services related to the processing of the merchant's card transactions.

[9] The Oil Distributor also provides inside terminals for the gas station's convenience store.

Oil Distributor to provide point-of-sale gas pump terminals which route all payment card purchases through the Oil Distributor's merchant account at the Oil Distributor's Acquiring Bank. One reason is that it insures that the Oil Distributor will be paid for the wholesale gasoline provided to the retailer at the cost plus fixed fee price. In this business model, the net of every retail gasoline purchase (the gross sale less the Interchange Fee, less the Merchant Discount fee) is paid into the Oil Distributor's Merchant Account. The Oil Distributor then adds up all the costs (the wholesale cost of the gasoline per gallon, the delivery cost of the gasoline, the Interchange Fee on the sale of that gallon, the Merchant Discount Fee on the sale of the gallon) and their fixed fee or profit, and forwards the difference to the retail gas station owner. This cost plus fixed fee contractual approach allows Oil Distributors to insure that their profit is completely unaffected by the bank rates charged for both the Interchange Fee and the Merchant Discount Fee.

Pursuant to contract: Jack Rabbit and Cahaba Heights Chevron, and all other Retail Gas Stations[10], pay their Oil Distributor an agreed price per gallon for the

[10] In 2005 gasoline stations in the United States sold $378.92 billion of gasoline. That number peaked in 2012 at $555.42 billion. In 2018 gas stations sold $503.92 billion of gasoline. *https://www.statista.com/statistics/197637/annual-gasoline-station-sales-in-the-us-since-1992/*. In 2018 a 2/100 of one percent Interchange Fee overcharge by Visa and MasterCard would cost gasoline retailers $100.784 million. Conversely, it would have cost their Oil Distributors nothing.

gasoline supplied by the Oil Distributor to the retail gas station; and, 100% of the Interchange Fee charged by their customers' Issuing Banks plus 100% of the Oil Distributor's Acquiring Bank's Merchant Discount Fee, plus an agreed profit. Thus, the Interchange Fee and the Merchant Discount Fee are irrelevant to the Oil Distributor because, in this cost plus fixed fee industry, the Interchange Fee and Merchant Discount Fee have absolutely no effect whatsoever on the Oil Distributor's bottom line.

According to the Federal Government, "[t]here are 168,000 retail locations in the U.S. that sell fuel to the public."[11] However, despite the brand name on the Retail Gas Station sign and pump, only about 3% of Retail Gas Stations are owned by major integrated oil companies like Valero, Exxon Mobil Corp. or Chevron.[12]

The remaining 97% are a subclass of 163,000 Retail Gas Stations who, during the class period, paid anticompetitive Interchange Fees on approximately $9 trillion worth of retail sales. During the class period, the Retail Gas Stations, like the Appellants, and not the Oil Distributors, paid the Visa or MasterCard network' s Interchange Fee charged by their customers' Issuing Banks and 100% of their Oil

---

[11] *Fueleconomy*.gov, U.S. Dep't of Energy, https://tinyurl.com/y5esj7j8.

[12]https://247wallst.com/economy/2014/05/22/why-are-there-115000-or-150000-gas-stations-in-america/

Distributor's Acquiring Bank's Merchant Discount Fee as well.

Furthermore, although Appellants Jack Rabbit and Cahaba Heights Chevron and the other 163,000 gasoline retailers in the United States comprise a 23(a)(4) subclass of Cost Plus Direct Purchasers class members, who have suffered an antitrust injury, with Article III standing, no such subclass was represented by separate counsel. And, despite Jack Rabbit and Cahaba Heights Chevron explaining all of the foregoing in their papers, and at their fairness hearing presentation, the district court failed to require the creation of a subclass with its own independent counsel. By ignoring Jack Rabbit and Cahaba Heights Chevron and failing to require the creation of a subclass represented by independent counsel, the district court violated its fiduciary duty to protect "unnamed class members 'from unjust or unfair settlements affecting their rights,'" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, (1997).

In the Superseding and Amended Definitive Class Settlement Agreement ("SAD Class Settlement Agreement") (JA A-3747 – A-4030). Rule 23(b)(3) Class Counsel created the problem giving rise to this appeal by failing to define with any degree of precision who is, and who is not, a class member. i.e, Class Counsel left out that a 23(b)(3) must have suffered damage arising from Defendant's illegal behavior.

That class definitional problem was not resolved in the Plan of Administration and Distribution (SAD Class Settlement Agreement APPENDIX I, JA at A-4009 et seq.).

JURISDICTION

The District Court had jurisdiction under 28 U.S.C. §§ 1331, 1332, 1337, 2201, and 2202. This Court has jurisdiction under 28 U.S.C. § 1291.

The District Court entered: a FINAL APPROVAL ORDER [Order and Final Judgment approving the Superseding Settlement Agreement] (SPA-89, JA A-7288), on December 13, 2019; a MEMORANDUM & ORDER [approving the Superseding Settlement Agreement] (SPA-125, JA A-7324), on December 16, 2019; a MEMORANDUM & ORDER [granting attorney fees and expenses] (SPA-199, JA A-7398), on December 16, 2019; an ORDER [granting expenses and service awards o the Rule 23(b)(3) Class Plaintiffs] (SPA-256, JA A-7455) on December 16, 2019; and, a JUDGMENT (SPA-260, JA A-7459) on December 20, 2019. Appellants timely filed their Notice of Appeal on January 3, 2020 (JA A-7496).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did Class Counsel and the district court chose to ignore that Class Counsel's true legal position is adverse to Appellants, and all similarly situated retail gas station owners, who suffered direct antitrust injury, and are a subclass of Cost Plus Direct Purchasers, with Article III standing under *Illinois Brick's* bright line rules?

2. Did the district court err, as a matter of law, in finding rule 23(A)(4)'s adequacy requirements were satisfied because: class membership is not ascertainable; and, there is an intrinsic conflict in the unitary settlement class because the class definition of "all persons, businesses, and other entities that have accepted any Visa-Branded cards and/or MasterCard- Branded cards in the united states at any time ..." fails to additionally require "and were damaged thereby"?

3. Assuming arguendo that the class was ascertainable; did the district court breach its fiduciary duty to protect the subclass of Retail Gas Station Owners, who, like Appellants, are Cost Plus Direct Purchasers who have suffered a direct antitrust injury, by failing to create a subclass of Retail Gas Station Owners and appointing counsel to advocate for the interests of the subclass and by passing off the court's decision making responsibility to a special master.

STATEMENT OF THE CASE

A. THE NATURE OF THE CASE

In 2005, a putative class of over twelve million merchants brought antitrust actions under the Sherman Act, 15 U.S.C. §§ 1 and 2, and state antitrust laws, against Defendants Visa and MasterCard networks, as well as various issuing and acquiring banks. *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207 (E.D.N.Y. 2013), *rev'd and vacated*, 827 F.3d 223 (2d Cir. 2016).[13]

This is an appeal from a judgment of the U.S. District Court for the Eastern District of New York (Brody, J.), certifying a Rule 23(b)(3) settlement-only class "consisting of all persons, businesses, and other entities that have accepted any Visa-Branded Cards and/or Mastercard-Branded Cards in the United States at any time from January 1, 2004 to the Settlement Preliminary Approval Date, except that the Rule 23(b)(3) Settlement Class shall not include (a) the Dismissed Plaintiffs, (b) the United States government, (c) the named Defendants in this Action or their directors, officers, or members of their families, or (d) financial institutions that have

[13] A factual and procedural history of this litigation, is set forth by Judge Gleeson in *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207, 214-15 (E.D.N.Y. 2013), and by this Court as part of its reversal in 2016, 827 F.3d 223 (2d Cir. 2016), cert. denied, 137 S. Ct. 1374, 197 L. Ed. 2d 568 (2017)

issued Visa-Branded Cards or Mastercard-Branded Cards or acquired Visa-Branded Card transactions or Mastercard-Branded Card transactions at any time from January 1, 2004 to the Settlement Preliminary Approval Date ” and approving a final class-action settlement.[14] (JA A-7288).

Computer processed payment card purchases are integral to our national economy. As set forth above, there are five steps to every electronic credit card payment. The steps are: 1. The purchaser swipes a Visa or MasterCard payment card at the seller’s point of sale terminal; 2. The point of sale terminal sends the payment card information to the bank which process payment card purchases for the seller (the “Acquiring Bank”); 3. The Acquiring Bank relays the credit card information over the Visa or MasterCard network to the bank which issued the payment card to the purchaser (The “Issuing Bank”); 4. Assuming the purchaser is within their credit limit, the Issuing Bank authorizes the sale and immediately pays the Acquiring Bank the amount of cardholders' purchase, less the Interchange Fee; The Acquiring Bank then deducts its own fee, called the “Merchant Discount Fee” for its processing services, and pays the net to the seller.

---

[14] The opinion is not yet reported but is available at *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-MD-1720 (MKB) (JO), 2019 U.S. Dist. LEXIS 217583 (E.D.N.Y. Dec. 16, 2019)

This matter arose from a consolidated class-action Complaint in which sellers of goods and services, generically referred to as merchants in this litigation, alleged antitrust claims against Visa and MasterCard, as well as their member banks, relating to setting the Interchange Fee charged by the bank which issued the Visa or MasterCard payment card to the purchaser. These Interchange Fees, are normally imposed upon, as opposed to negotiated with, the seller. As a result, Defendants were able to set the Interchange Fee at an artificially high rate. Although the Interchange Fee may be higher on certain premium reward (cash back or points) cards, from the highest to the lowest level, the Interchange Fee is never competitive.

B. THE COURSE OF PROCEEDINGS AND DISPOSITION BELOW

The facts and extensive procedural history as set forth in *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207, 213, 223 (E.D.N.Y. 2013) ("*Interchange Fees I*") *rev'd and vacated*, 827 F.3d 223 (2d Cir. 2016) ("*Interchange Fees II*"); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-MD-1720, 2017 U.S. Dist. LEXIS 160045, 2017 WL 4325812, (E.D.N.Y. Sept. 27, 2017), order set aside, No. 05-MD-1720, 2018 U.S. Dist. LEXIS 148316, 2018 WL 4158290 (E.D.N.Y. Aug. 30, 2018); and *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-MD-1720, 2017 U.S. Dist. LEXIS 170103, 2017 WL 4620988 (E.D.N.Y. Oct. 13, 2017).

A synopsis of that history shows that in 2005, a putative Rule 23(b)(3) class of over twelve million nationwide merchants brought an antitrust action under the Sherman Act, 15 U.S.C. §§ 1 and 2, and state antitrust laws, against Defendants Visa and MasterCard networks, as well as various issuing and acquiring banks. First Consolidated Am. Class Action Complaint (JA A-966).

Rule 23(b)(3) Plaintiffs are merchants that accept(ed) Visa-and MasterCard-branded cards, and have alleged that Defendants harmed competition and charged the merchants supracompetitive fees by creating unlawful contracts and rules and by engaging in various antitrust conspiracies. *Interchange Fees I* at 213*; Interchange Fees II*, 827 F.3d at 228-29.

In this MDL, Plaintiffs sought both injunctive and monetary relief. In 2012 after seven years of litigation, former District Judge Gleeson granted preliminary approval of a jointly submitted class settlement agreement (the "Original Settlement Agreement"). *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-MD-1720, 2012 WL 12929536, at *1 (E.D.N.Y. Nov. 27, 2012). Judge Gleeson also provisionally certified two separate classes for settlement purposes only – a mandatory Rule 23(b)(2) settlement class seeking injunctive relief, from which class members could not opt out, and a Rule 23(b)(3) opt out class seeking damages. *See id.* at 1-2. After publication of notice to the class and the passage of the requisite time within which class members were to object to, or opt out of the settlement, the parties moved for final approval of the settlement. (Class Plaintiffs' Notice of Motion and Joint Motion for Award of Attorneys' Fees, Expenses and Class Plaintiffs' Awards, JA A-2476).

After holding a fairness hearing on September 12, 2013, Judge Gleeson granted final approval of the Original Settlement Agreement on December 13, 2013. See *Interchange Fees I*, 986 F. Supp. 2d at 213, 240. Under the terms of the Original Settlement Agreement, the Defendants agreed to pay $7.25 billion, before reductions for opt outs, attorney's fees, attorneys' costs, and the expense of administration, to the Rule 23(b)(3) class members, and to implement reforms of the Defendants' rules and practices to settle the claims of the Rule 23(b)(2) class.

Objectors to the settlement and plaintiffs that chose to opt out of the class prior to final approval appealed to this Court arguing that the "class action was improperly certified and that the settlement was unreasonable and inadequate." *Interchange Fees* II, 827 F.3d at 227. This Court reversed after finding that the class was improperly certified, and finding that the class certification requirement of adequate representation under Rule 23(a)(4) had not been satisfied. *Id.*

This Court also found that **an inherent conflict of interest existed because a**

single set of counsel represented both the (b)(2) and (b)(3) class interests. See *id*. at 233-35. As a result this Court concluded that "members of the (b)(2) class were inadequately represented . . . ." *Id*. at 231. Relying on Supreme Court precedent, this Court further held that settlement classes that consist of holders of present claims, such as the (b)(3) class seeking monetary relief for past harm, and holders of future claims, such as the (b)(2) class seeking injunctive relief to reform current and future rules and policies of the defendants, must be divided "into homogenous subclasses . . . with separate representation." *Id*. at 234 (quoting *Ortiz v. Fibreboard Corp*., 527 U.S. 815, 856, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999)).

Additionally, this Court also found that the issues stemming from the failure to divide the class into homogenous subclasses with separate representation were exacerbated by the inability of members of the (b)(2) injunctive relief class to opt out of the settlement or from their release of claims against the Defendants. *See id*. at 231, 234; id. at 241 (Leval, J., concurring). This Court also expressed concern that the injunctive relief secured for the (b)(2) class would not apply uniformly to benefit all (b)(2) class members. *See id.* at 238. This Court noted that (b)(2) merchants that operated in certain states would be prohibited by state law from surcharging costs to customers at the point of sale, as permitted under the Original

Settlement Agreement, while merchants that operated in other states, without such restricted laws, would not be so prohibited. *See id.* at 230-31 (noting that "[t]he incremental value and utility of surcharging relief is limited, however, because many states, including New York, California, and Texas, prohibit surcharging as a matter of state law." (citations omitted)); *Id. at 238-39* ("A significant proportion of merchants in the (b)(2) class are either legally or commercially unable to obtain [even] incremental benefit from the primary relief . . . and **class counsel knew at the time the Settlement Agreement was entered into that this relief was virtually worthless to vast numbers of class members**[15]." (emphasis added).

Admittedly, this Court's decision was primarily focused on the representation of, and relief afforded to, the (b)(2) injunctive class.

This Court acknowledged the due diligence and extensive time and labor that accompanied the 2014 final approval process, stating:

> "Discovery included more than 400 depositions, 17 expert reports, 32 days of expert deposition testimony, and the production of over 80 million pages of documents. The parties fully briefed a motion for class certification, a motion to dismiss supplemental complaints, and cross-motions for summary judgment. Beginning in 2008, the parties

[15] Plus ça change, plus c'est la même chose.

> participated in concurrent settlement negotiations assisted by well-respected mediators. At the end of 2011, the district judge and the magistrate judge participated in the parties' discussions with the mediators. In October 2012, after several more marathon negotiations with the mediators (including one more with the district court and magistrate judges), the parties executed the [Original] Settlement Agreement." *Id*. at 229.

After remand, the district court held a case management conference on August 11, 2016, to discuss, among other items, this Court's decision. (JA A-2984). On November 30, 2016 the district court addressed this Court's concerns regarding unitary representation of the classes, and, pursuant to Rule 23(g)(3), appointed two separate groups of interim co-lead counsel to represent (1) merchants seeking certification under Rule 23(b)(2) for injunctive relief, and (2) merchants seeking certification under Rule 23(b)(3) for monetary damages. *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 2017 U.S. Dist. LEXIS 160045, 2017 WL 4325812.

As a result, the district court entered an interim order appointing the Nussbaum Law Group, P.C., Hilliard & Shadowen LLP, Freed Kanner London & Millen LLC, and Grant & Eisenhofer P.A. to serve as interim Rule 23(b)(2) Class

Counsel for the merchants seeking injunctive relief; and reappointed, the same three firms that represented the entire consolidated class in the proceedings before Judge Gleeson, i.e., Robins Kaplan LLP, Berger & Montague P.C., and Robbins Geller Rudman & Dowd LLP (the "Robins Group") to serve as interim Rule 23(b)(3) Class Counsel for the merchants seeking damages relief. (JA A-2992).

Early on the Defendants expressed a bias to the district court regarding how they were interpreting who would be able to recover under the settlement; coming down in favor of the Oil Distributors. See, e.g., Status Report, June 20, 2014 [JA A-2915]; Speedy Stop Food Stores, LLC v. Visa Inc. (Tex. Dist. Ct., Victoria City, No. 13-10-75377-A); and Defendants' pre-motion request to Judge Brodie, Oct. 11, 2018 [JA A-4139].

Class Counsel was dismissive of Retail Gas Sation Owners claims when they responded to the Branded Operators letter of October 30, 2018 (JA A-4147) "Branded Operators make no such claim here. Instead, they invoke the buzz words "intra-class conflict" to mischaracterize only potential contractual disputes between them and certain oil companies. (JA A-4147, A-4148). Because the settlement does not treat groups of class members differently, Branded Operators raise no cognizable "intra-class conflict." According to Branded Operators, they accept Visa and Mastercard branded cards for purchases and those transactions are processed by oil companies through a contract so that "[t]he payment transactions involving the Branded Operators and the oil companies necessarily overlap such that they are competing for the same set of settlement funds." *Id*. They disagree how the settlement funds associated exclusively with the card transactions at Branded Operators' level should be allocated between them. The contractual nature of Branded Operators' "objection" is exemplified by their complaint that Valero entered into a settlement agreement with defendants, independent of the class settlement, in which Valero allegedly[16] released claims owned by Branded Operators. *Id*." Class Counsel was no help resolving this issue, as they contended Class members are easily ascertainable[17] and identifiable based on objective criteria.

On March 31, 2017, the Rule 23(b)(2) Class Counsel filed a complaint on behalf of the Rule 23(b)(2) representative class plaintiffs, and a putative Rule 23(b)(2) class. (JA A-2999). Thereafter, on October 30, 2017, the Rule 23(b)(3)

---

[16] Those claims were actually released and Class Counsel noticed those Retail Gas Station subclass members that they had been excluded from the settlement class. "THE COURT: I think with the notice of exclusion even though we said if you think you have a claim you can still assert it, it could be confusing for most if they got a notice saying you're excluded from the settlement. So I think that needs to be cured. And they do need to receive notice that tells them they may have a claim and what they need to do to proceed with that claim." Fairness Hearing Transcript page 96 line 25 - page 97 line 4 (JA A-7143:25 – A-7144:4)

[17] That turns out not to be the case; hence this brief.

Class Counsel filed a Third Consolidated Amended Class Action Complaint on behalf of the Rule 23(b)(3) representative class plaintiffs. (JA A-3107).

The Third Consolidated Amended Class Action Complaint alleges that Defendants, in violation of Section 1 of the Sherman Act (15 U.S.C. § 1), Section 7 of the Clayton Act (15 U.S.C. § 18), the California Cartwright Act (Section 16700 et seq. of the California Business and Professions Code), and the California Unfair Competition Law (Section 17200 et seq. of the California Business and Professions Code), entered into "contracts, combinations, conspiracies, and understandings" that harmed competition and the Rule 23(b)(3) Class Plaintiffs through supracompetitive fixed prices, unfair acts and practices, and unreasonable restraints of trade. Class Plaintiffs alleged that these practices resulted in a common antitrust injury to an entire class of merchants, and sought triple damages under Section 4 of the Clayton Act, 15 U.S.C. § 15.

After engaging in additional discovery and mediation efforts, the Rule 23(b)(3) Class Plaintiffs and Defendants reached an superseding and amended definitive settlement agreement in principle in the Summer of 2018. That Fall the Rule 23(b)(3) Class Counsel, moved for preliminary approval of the SAD[18] Settlement Agreement. Ignoring this Court's previously expressed concerns in

[18] Superseding and Amended Definitive Class Settlement Agreement

Interchange Fees II, *supra*, 23(b)(3) Class Counsel moved for preliminary certification of a **unitary** Rule 23(b)(3) settlement class.

The Superseding Settlement Agreement defines the proposed Rule 23(b)(3) Settlement Class as: "[a]ll persons, businesses, and other entities that have accepted any Visa-Branded Cards and/or MasterCard-Branded Cards in the United States at any time from January 1, 2004 to the Settlement Preliminary Approval Date Superseding and Amended Definitive Class Settlement Agreement." (JA A-3747 – A-4030, at A-3767 ¶ 4).

The SAD Settlement Agreement provides for a settlement *res* of approximately $6.26 billion, before reductions of the fund for opt-outs, attorney's fees, costs litigation and the costs of class administration. Under the terms of the SAD settlement agreement, settlement fairness will be distributed on a *pro rata* basis and the "Rule 23(b)(3) Class Counsel propose distributing the Cash Fund to members of the Rule 23(b)(3) Settlement Class entitled to receive a payment from the Cash Fund ("Claimants") through a process that: (a) is fair and equitable; (b) distributes the Cash Fund in accordance with the relative economic interests of the Claimants as measured by the Interchange Fee amounts attributable to their Visa- and MasterCard-Branded Card transactions during the Class Period ("Interchange Fees Paid"); and (c) ensures that the administration is as simple and cost-effective and imposes as minimal a burden on Claimants as possible. The Plan will rely, to the extent possible, on data available to Rule 23(b)(3) Class Counsel and the Class Administrator to achieve these goals." (SAD Class Settlement Agreement APPENDIX I – Plan of Administration and Distribution) (JA A-4010 – A-4011).

In return, class members will release their claims arising out of or relating to conduct or acts that were alleged or raised or that could have been alleged or raised relating to the subject matter of this litigation, (*Id.* at 2), that have accrued through the date of the Court's preliminary approval of the settlement, *i.e.*, January 24, 2019, and that accrue no later than five years after the Settlement Final Date (SAD Settlement Agreement ¶ 31(a) (stating that class members 'fully, finally, and forever . . . release [Defendants] from . . . claims . . . that have accrued as of the Settlement Preliminary Approval Date or accrue no later than five years after the Settlement Final Date arising out of or relating to any conduct . . . alleged or otherwise raised . . . or that could have been alleged or raised . . .or arising out of or relating to a continuation or continuing effect of any such conduct . . . .")). (JA A-3990 ¶ 31(a)). The released claims also encompass claims that were or could have been alleged in this action relating to, among other things, interchange fees, anti-steering rules, and honor-all-card rules. (SAD Settlement Agreement ¶ 31(b)(i –vi), JA A-3991).

The SAD Settlement Agreement does not release the right of any Rule

23(b)(3) class member to participate in the Rule 23(b)(2) action, "solely as to injunctive relief claims . . . ." (¶ 34(a), JA A-3991).

On November 6, 2018, the District court ordered that any objections to the preliminary approval of the proposed SAD Class Settlement be filed, on or before November 20, 2018. In response to that order the District court received three objections from Oil Distributors and Retail Gas Station Owners referred to as the "Branded Operators." The Branded Operators own and operate gas stations and convenience stores that sell petroleum products that are produced and branded by major oil refiners, such as Shell and ConocoPhillips.

The Branded Operators argued that preliminary settlement approval should not be granted because an intra-class conflict exists and class members will have competing claims over funds for the same merchant transactions. According to the District court "the Branded Operators contend[ed] that the major oil companies will attempt to make claims for funds that the Branded Operators are allegedly owed." And that they argue that "[u]nless it is clear who will receive distributions from the settlement for the transactions accepted by Branded Operators, class members will not know whether they can or should participate in the settlement or opt out. *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11 at 111 (E.D.N.Y. 2019)

The Branded Operators also argued that Rule 23(b)(3) Class Counsel were not adequately representing the Branded Operators; "class counsel is inherently conflicted based on its representation of a class that contains dueling class members." And, the district court was informed that the Branded Operators were concerned that some of them had already been excluded from the class because "the Defendants have been allowing the Oil Brands to negotiate opt-out settlement agreements on behalf of all of their branded operators without the consent of the operators." To prove that point and demonstrate the intraclass conflict created by the SAD settlement agreement, the Branded Operators told the district court how Valero Energy Corporation, a manufacturer and marketer of transportation fuels had opted out and extinguished the claims of more than 400 branded operators.

Nevertheless, despite the objections to preliminary approval, the district court decided to grant pulmonary approval to the SAD settlement agreement, with the proviso that the parties submit a revised proposed preliminary approval order and Class Notices incorporating clarifying language in the Class Notices to the putative class and that Class Counsel were to "submit all relevant updated documents to the Court for review."

Thereafter, on January 24, 2019, the District court entered an order which preliminarily approved the SAD Settlement Agreement and preliminarily granted class certification for the purposes of settlement, appointed Class Counsel and the Class Administrator, and approved the proposed Notice Plan, Class Notices, and Plan of Administration and Distribution. *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11 at 208 (E.D.N.Y. 2019).

Jack Rabbit, and Cahaba Heights Chevron, who like 163,000 other class members that are Retail Gas Stations Owners who accept Visa and MasterCard credit cards for payment at the pump, and in their respective convenience stores, are, as a matter of law, Cost Plus Direct Purchasers under *Illinois Brick's* cost plus exception to the Indirect Purchaser Rule, who timely objected to the SAD Settlement Agreement.

Additionally, Jack Rabbit moved to intervene and argued (JA A-6926) that "[i]t appears that two operators of gasoline stations have filed complaints in this action: Seaway Gas & Petroleum Inc. and Abdallah Bishara d/b/a Uncle Abe's Phillip 66. Neither of these original complaints raise the legal issue of their entitlement to recovery over non-retail distribution chain entities who may have arranged the processing of their sales, but suffered no actual damage. Similarly, neither of these two plaintiffs adequately negotiated the conflict inherently created in the settlement agreement. When presented with Defendants' interpretation of [the Oil Distributors] standing, neither plaintiff advocated for the protection of the

[Retail gas Station Owners' interests] Operators' interests. When challenged by Class Counsel's obfuscation of entitlement to relief under the settlement, neither plaintiff presented the truth about the nature of the [interclass] conflict and the lack of contractual governance. For these reasons, the current gasoline operator plaintiffs have laid an express history of inadequate representation for Proposed Intervenors."

By declaration (JA A-7017), and by oral argument at the November 7, 2019 fairness hearing, Jack Rabbit, and Cahaba Heights Chevron, informed the district court that they, and all similarly situated class members, comprised an unrepresented subclass of Retail Gas Station Owners who were the direct purchasers[19] injured by the defendants monopolistic practices. Conversely, they argued that the Oil Distributors who supplied Jack Rabbit, and Cahaba Heights Chevron on a cost plus basis, with both the Interchange Fee and the Merchant

---

[19] "6. Following the general trade usage and contractual practice in the industry, our Suppliers, rather than the petroleum products retail marketers, such as Jack Rabbit, LLC and 280 Station LLC, have the relationship with the acquiring bank processing the credit card transactions at the retail gas stations and convenience stores owned and operated by Jack Rabbit, LLC and 280 Station LLC . 7. Following the general trade usage and **contractual practice** in the industry, the petroleum products retail marketers, such as Jack Rabbit, LLC and 280 Station LLC, **are solely and completely responsible for payment of the entire interchange fee, and any and all other Visa or Mastercard processing fees, paid to either the issuing bank or the merchant bank on all payment card transactions at their retail locations**. As a result, any and all antitrust overcharges regarding the interchange fee are incurred solely and completely by the petroleum products retail marketer." (JA A-7017, A-7018) (emphasis added)

Discount Fee included in the Oil Distributor's cost, had no injury or damages. Implicit, but not specifically elucidated to the district court by Appellant's counsel, because the Oil Distributors lacked actual damages, they also lacked Article III standing. It is unclear whether the District court was unconvinced by Jack Rabbit, and Cahaba Heights Chevron's objections and argument, or whether the court believed that the legal issue wasn't properly before the court.

> MR. BACHARACH: My name is Albert Bacharach I represent one client who has two LLCs, one of which sells at the merchant level branded gasoline and one that sells unbranded gasoline. And my client, rather than the oil distributor, has Article III standing because my client actually paid the antitrust interchange fees and his oil suppliers didn't.
>
> THE COURT**: So you're arguing this is a legal issue**. (emphasis added)
>
> MR. BACHARACH: It is, in fact, a legal issue that the Court can --
>
> THE COURT: So why hasn't anyone made a motion for the Court to decide this as a legal issue?
>
> MR. BACHARACH: I don't know, your Honor. I have been unclear as I worked through the objection and looked at the voluminous papers that have been filed in this case why the issue hasn't come up. ..." (Fairness Hearing Transcript "FHT", at A-7062:3–18)

MR. BACHARACH: We don't believe that the oil distributors are a member of the class or a subclass because they don't have Article III standing which is where I started.

THE COURT: Okay. So then if they're not a member of the class, we have no conflict, we have no dispute. It's just a matter of claim administration. You submit your claim, and if there is a dispute at that point it gets resolved. (FHT, at A-7069:8–14)

After the November 7, 2019 fairness hearing, the district court entered: a Final Approval Order [Order and Final Judgment approving the Superseding Settlement Agreement] (JA A-7288), a Memorandum & Order approving the Superseding Settlement Agreement (JA A-7324), a Memorandum & Order granting attorney fees and expenses (JA A-7398), and an Order granting expenses and service awards to the Rule 23(b)(3) Class Plaintiffs (JA A-7455).

Jack Rabbit, and Cahaba Heights Chevron then timely appealed to this Court.

SUMMARY OF ARGUMENTS

1. Class Counsel and the district court have chosen to ignore that Class Counsel's true legal position is adverse to appellants, and all similarly Situated Retail Gas Station Owners, who suffered direct antitrust injury, and are a subclass

of Cost plus Direct Purchasers, with Article III standing, under *Illinois Brick*'s bright line rules. i.e., while claiming to be agnostic, and refusing to commit to a position on the question of whether the Oil Distributors or the Retail Gas Station Owners have the legal claim to the settlement fund, Class Counsel do so with a nod and a wink to the Oil Distributors. As the Apostle Matthew said "No man can serve two masters: for either he will hate the one, and love the other; or else he will be devoted to the one, and despise the other ..." So it is important to understand that, in this matter, Class Counsel has consistently, and only, shown devotion to the Oil Distributors.

As Appellants stated at the Fairness Hearing "It's open and obvious now, after listening to this and the presentation by the class counsel, listening to the various objectors' counsel with regard to the issue that class counsel has not represented the subclass of class members that my client and their clients are in. That subclass deserved undivided loyalty from somebody and it wasn't Class Counsel because this issue didn't [just] magically appear" at the fairness hearing. (FHT at A-7120:18–25).

Pursuant to *Illinois Brick*, there can only be one claim per antitrust injury. That claim belongs either to the first purchaser (Direct Purchaser), or, if the first purchaser has a cost plus contract with their customer, that includes the antitrust injury amount in the cost, then the claim belongs to the cost plus customer (Cost

Plus Direct Purchaser).

Class Counsel and the Oil Distributors see the Oil Distributors as Direct Purchasers, who own the claim. As a result, in this matter, the creation of a Rule 23(a) subclass of Retail Gas Stationers, with court appointed representation from independent counsel is required.

2. The district court erred, as a matter of law, in finding rule 23(a)(4)'s adequacy requirements were satisfied because: class membership is not ascertainable; and, there is an intrinsic conflict in the unitary settlement class because the class definition of "all persons, businesses, and other entities that have accepted any visa-branded cards and/or mastercard- branded cards in the united states at any time ... " fails to additionally require "and were damaged thereby." Although in some circumstances, a reference to damages or injuries caused by particular wrongful actions taken by the defendants will be sufficiently objective criterion for proper inclusion in a class definition, that is not true in this matter.

This Court has "recognized an implied requirement of ascertainability in Rule 23," which sets an objective standard that a class definition be "sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member." *Brecher v. Republic of Argentina*, 806 F.3d 22, 24 (2d Cir. 2015). In this matter, class membership is not ascertainable from a review of the

SAD Settlement; and a class settlement cannot be certified if the class contains members, such as the Oil Distributors who lack standing. In this matter the interclass conflict arises out of the definition of class membership which fails to define an ascertainable class.

3. Assuming arguendo that the class was ascertainable, then the district court further breached its fiduciary duty to protect the subclass of Retail Gas Station Owners, who, like appellants, are cost plus direct purchasers who have suffered a direct antitrust injury by passing off the court's decision making responsibility to a special master. In class actions within this circuit, the district court has a recognized fiduciary duty to the class. The court's fiduciary duty to unnamed class members extends to scrutiny of the class description in proposed in class certification, as class membership must be well defined. By failing to even address the class definition issue in its Rule 23(b) analysis, and instead deferring the issue thus created for a special master to decide, the district court breached its fiduciary duty. The district court cannot repair that breach to its fiduciary duty to Appellants Jack Rabbit and Cahaba Heights Chevron, and all other similarly situated Retail Gas Station Owners by delegating the duty to protect these unnamed class members to a special master. Class Counsel, in presenting the idea of cutting the Gordian knot with the appointment of a special master, fail to cite to any authority that holds that such an

appointment may be employed by the court, instead of Rule 23(b)(3) subclasses.

STANDARD OF REVIEW

The applicable appellate standard of review for certification of a settlement class and settlement approval is abuse of discretion. i.e., whether the decision (i) rests on a legal error or clearly erroneous factual finding, or (ii) falls outside the range of permissible decisions. The district court's factual findings are reviewed for clear error; its conclusions of law are reviewed *de novo. Interchange Fees II*, 827 F.3d at 231.

ARGUMENT

I.
CLASS COUNSEL AND THE DISTRICT COURT HAVE CHOSEN TO IGNORE THAT CLASS COUNSEL'S TRUE LEGAL POSITION IS ADVERSE TO APPELLANTS AND ALL SIMILARLY SITUATED RETAIL GAS STATION OWNERS, WHO SUFFERED DIRECT ANTITRUST INJURY, AND ARE A SUBCLASS OF COST PLUS DIRECT PURCHASERS, WITH ARTICLE III STANDING, UNDER *ILLINOIS BRICK'S* BRIGHT LINE RULES

While claiming to be agnostic, and refusing to commit to a position on the question of whether the Oil Distributors or the Retail Gas Station Owners have the legal claim to the settlement fund, they do so with a nod and a wink to the Oil

Distributors.

Matthew (at 6:24) said “No man can serve two masters: for either he will hate the one, and love the other; or else he will be devoted to the one, and despise the other ...” So it is important to understand that, in this matter, Class Counsel has consistently, and only, shown devotion to the Oil Distributors.

Nowhere, was that devotion to the Oil Distributors more evident than at the November 7, 2019 Fairness Hearing[20].

> The Court: Okay. So how do you address the argument that they're making which is because the class is so broadly defined, everyone in the chain of process in the payment is a member of the class. I understood the class to be limited to anyone who paid the fees, but the objectors are suggesting because of the manner in which the fees are paid that somehow the class also includes the suppliers. So not just the operators.
>
> And in terms of how they've explained the process, The Court understands it to work in the sense that the suppliers are processing the payment, but that the operators actually accept the card at the location and the operators all claim that they paid the fees.

---

[20] In the following Fairness Hearing Transcript excerpts Mr. Wildfang is arguing on behalf of Class Counsel.

So the question is, then, if that's the definition, and if the definition is limited to only those who paid the fees, there is no dispute as to who's a member of case.

Is there a question here? (FHT at A-7054:17 – A-7055:7)

MR. WILDFANG: Your Honor, there is not a question. Under federal antitrust laws, The Court certainly knows only direct purchasers have standing to bring antitrust claims. **So that means the first payer of interchange fees** in the chain is the class member. The materials that have been submitted by the brand operators suggest that they may be indirect purchasers. And it's not unusual at all for indirect purchasers to pay some or all of an overcharge. (emphasis added) (FHT at A-7055:9–16)

The Court: Who is an indirect purchaser? The operator or the supplier? Supplier, I'm referring to the oil company. (FHT at A-7055:17)

MR. WILDFANG: **The oil companies are, to the best of our knowledge, the first payer of [the] interchange [fee]**. At least the material that is we have seen. And they, as I understand it, sell a bundle of services related to acceptance of payment cards to their retailers, and the retailers pay that bundled fee. And the interchange fee may be in that bundled fee but they are paying other things as well. (emphasis added)(FHT at A-7055:20 – A-7056:1)

THE COURT: That's not how the operators are explaining it to The Court. So **you seem to be suggesting that your understanding is that the oil companies, the suppliers, are the actual ones who are paying the fee here**?

MR. WILDFANG: Your Honor, that based on what we've seen today or to date, we believe that to be the case. But the other issue is this is a question of fact, and if the facts --

THE COURT: **It becomes more than a question of fact**, Counsel, if there is a question as to who owns that claim. There is one thing if the argument is there is no question that the operators own the claim because they're the ones accepting the card and they're the ones paying the interchange fee. But if what you're saying to the Court is, well, they may not own that claim, **then it is a conflict between who can collect and that, I think, creates an issue. Don't you[?]** (emphasis added) (FHT at A-7056:10–17)

MR. WILDFANG: No, your Honor. And the reason going back to my discussion about direct purchasers is if the operators are paying the fee indirectly, in other words, not directly to the bank, then they don't have standing under federal antitrust law to assert a claim. Only the first payer of interchange. And, again, we're not prejudging this. **What we're saying is**

based upon what we have seen to date, the oil companies appear to have that direct relationship with the acquiring bank and they, therefore, are the first payer of the interchange fee. ... (emphasis added)(FHT at A-7056:18 –A-7057:3)

THE COURT: **So then you're really saying to me that the branded operators are not part of this class**.

MR. WILDFANG: **[yes] For any particular transaction**. Now, it's possible they might be part of the class because of other transactions that didn't go through their supplier. But for those transactions, again, speaking based on what we know to date, the oil supplier is the first payer of interchange fees. ... (emphasis added) (FHT at A-7057:12 –18)

MR. WILDFANG: Based on what we know today. I personally have seen are documents from Sunoco, Shell, and Exxon with attachments of contracts that appear to say that it is the oil supplier: Exxon, Sunoco, and Shell that have the direct relationship with the acquiring bank and, therefore, are the first payer of the interchange fee.

So for any transaction, if that's true, then the supplier is the class member and owns the claim. (FHT at A-7058:2–9)

MR. WILDFANG: ... But let me just add a couple of things to the record because, based upon what the Branded Operators have submitted to us, **I think the oil companies have a better argument.** Again, we're not deciding that now but let me read from the declaration that was filed just yesterday afternoon by Jack Rabbit.

So in paragraph 6 of the declaration they say: The following general trade usage and contractual practice in the industry following that industry practice, are suppliers rather than the petroleum products retail marketers such as Jack Rabbit and 280 Station, have the relationship with the acquiring bank processing the credit card transaction.

So they are saying that's the standard in the industry. They then go on to say in paragraph 8: The supplier receives the money paid for the sale by the customers' issuing bank less the interchange fee. Then the supplier pays themselves the wholesale price of the petroleum product owed to the supplier by the retail marketers and then pays the money that remains to the retail marketers.

That says they are an indirect purchaser. They are admitting that in the first instance the supplier is the one who gets the money through the system less the interchange fee. And if, because of contractual relationships, **the outcome is that the oil supplier is the direct purchaser and has a claim, and their downstream buyer does not have a claim because they are an indirect**

purchaser and they don't have standing, then they're not in the class and the --

JUDGE ORENSTEIN: A question, Mr. Wildfang.

Somebody is going to have to -- presumably some court is going to have to decide who owns the claim between Jack Rabbit and its supplier at some point and it's not you, obviously, right?

MR. WILDFANG: Right.

JUDGE ORENSTEIN: And you, up to this point, I thought your position has been, I don't have a dog in that fight, I'm fighting for whoever owns the claim.

MR. WILDFANG: That is our position.

JUDGE ORENSTEIN: **Why are you arguing to us that Jack Rabbit loses that fight, because they may be your client**.

MR. WILDFANG: **They may be my client**.

JUDGE ORENSTEIN: **So why are you arguing that they lose**?

MR. WILDFANG: Okay. Strike my comments. I was trying to provide information to The Court.

JUDGE ORENSTEIN: This is the issue we're struggling with.

THE COURT: Right. **And so when you said it this morning it was why I think I opened my eyes and looked at you because that was the first time I**

was hearing from class counsel that you believe that the suppliers have the stronger argument here as to who gets to collect from the fund.

MR. WILDFANG: Your Honor, I thought I was explicit earlier that class counsel are agnostic at this point as to who owns the claim. I was trying to give information to The Court --

THE COURT: **But you understand why Branded Operators feel like their interest isn't being represented if class counsel is already predetermining or pre-suggesting that the claim really belongs to someone else**. (FHT at A-7110:8 – A-7112:21)

MS. EISINGER: My name is Jana Eisinger, I'm co-counsel with Mr. Tarnor and I know you've heard a lot on the branded objector issue, I just wanted to make a few brief points.

THE COURT: Sure.

MS. EISINGER: One is that we're here today because it's class counsel's responsibilities to define the class in the way that we can all understand and I think Your Honor expressed the same lack of understanding of who actually is in the class and who is not in the class, as we all have and as our clients have. And today for the first time when Mr. Wildfang said that the brands actually own the claim, it would have been nice if we had known that when we objected at preliminary approval because that would have changed the parameters of our argument because now it seems crystal clear that our clients are releasing their claims and are going to be getting nothing. (FHT at A-7095:8–24)

JUDGE ORENSTEIN: You were agnostic as to whether the membership in the putative class was held by the Valero Branded Operators or Valero, correct --

MR. WILDFANG: Yes.

JUDGE ORENSTEIN: -- whoever paid for that. And your representation was zealous on behalf of whoever owns those claims, right?

THE COURT: Other than Valero, since Valero has already settled.

JUDGE ORENSTEIN: No, no, I'm saying in the contract --

MR. WILDFANG: Before the settlement.

JUDGE ORENSTEIN: -- before the settlement.

MR. WILDFANG: Yes.

JUDGE ORENSTEIN: And the same is the true for the other Branded Operators who haven't settled, correct? MR. WILDFANG: Yes.

JUDGE ORENSTEIN: So you're agnostic, right? And your answer to the current issue by most of the Branded Operators whose suppliers haven't settled is, no problem because whoever owns the claim is in the class and they can assess whether this is a good settlement for them or not and either they own the claim or they don't, we'll sort that out with you eventually, right?

MR. WILDFANG: Yes.

JUDGE ORENSTEIN: But for Valero you're telling the Branded Operators, to whom you are essentially saying before, you may or may not be in the class, you're agnostic, if you are we're fighting for you. Once Valero settles, you're saying to those operators, we're no longer agnostic, we're no longer fighting for you. Even if it turns out you later do have a claim, we decided to stop fighting for you, we're settling and you're out, you're not getting any of the benefit.

So the question I think we're both trying to figure out is, how is that not a conflict with respect to your representation of the people who you were formerly saying you were fighting for if you have a claim. They are now people who may have claim who you have excluded." (FHT at A-7102:25 –A-7104:13).

JUDGE ORENSTEIN: Okay, so never mind, but -- **so you're saying the reason the Valero Branded Operators, who may turn out to have a valid claim, the reason they are not entitled to any loyalty from you is because *you never represented them in any meaningful sense* and so if you cut them out of the settlement, that's fine** because they can still opt out and pursue their claims -- well, not opt out, they can still pursue their claims. (emphasis added)

MR. WILDFANG: They can still pursue their claim. Their claim has not been compromised by class counsel. (FHT at A-7106:13 –22)

MR. WILDFANG: Yes, Your Honor. I think that each of these objections was addressed in our reply brief, but I would like to go through and address a few of them. I would start by saying to the Branded Operators, they are parties to contracts with the suppliers. The class is not party to those contracts. They have opportunities to try to adjust those contracts with their suppliers to make it clear that they are the owner of the claim. I'm not deciding who owns the claim today, it's a question of fact. All I'm saying is, based upon what I have seen, at least for the major oil companies, it appears that they claim that they're owner of the claim and they submitted documentation that seems to support that. It's odd, I think, that none of the Branded Operators have submitted any of the documents that they claim are their relationships with their supplier, so that strikes me as a little odd."

THE COURT: **And you don't see this as a conflict at all for class counsel here [?]**. (emphasis added)(FHT at A-7098:8 – A-7099:1).

JUDGE ORENSTEIN: A question, Mr. Wildfang. Somebody is going to have to – presumably some court is going to have to decide who owns the claim between Jack

MR. WILDFANG: That is our position.

JUDGE ORENSTEIN: **Why are you arguing to us that Jack Rabbit loses that fight, because they may be your client**.

MR. WILDFANG: They may be my client.

JUDGE ORENSTEIN: **So why are you arguing that they lose?**

MR. WILDFANG: Okay. Strike my comments. I was trying to provide information to the Court.

JUDGE ORENSTEIN: This is the issue we're struggling with.

THE COURT: **Right. And so when you said it this morning it was why I think I opened my eyes and looked at you because that was the first time I was hearing from class counsel that you believe that the suppliers have the stronger argument here as to who gets to collect from the fund.**

MR. WILDFANG: Your Honor, I thought I was explicit earlier that class counsel are agnostic at this point as to who owns the claim. I was trying to give information to the Court --

THE COURT: But you understand why Branded Operators feel like their interest isn't being represented if class counsel is already predetermining or pre-suggesting that the claim really belongs to someone else.

MR. WILDFANG: Your Honor, I was not providing that information for purposes of advocating they're in or out. I'm just telling you that this is information they have provided to the Court and it seemed to be contrary to the position they take, but I'm agnostic to that. In fact, I hope they're in the class because we want to give them money if they were the ultimate damaged party and that's something that looks like they are. But if by contract they have given up that claim, then you're not in the class. So -- which I think is what Your Honor said earlier and, if I have confused the record by reading from a declaration that was filed yesterday, I apologize for that.

THE COURT: No, but even your earlier statement when you seemed to suggest a position that I know defendants have taken that in fact the suppliers or distributors are really the ones with the claim here, which is a question I had for defendants, who I would like to hear from them as to why they believe that, but you've now stated on the record why the evidence before the Court or at least before you, I assume it's in the record somewhere, suggests that through the processing system it appears that the suppliers or the distributors are the ones with the claim.

MR. WILDFANG: Again, Your Honor, I thought I was quite explicit this morning in saying that we had not decided and --

THE COURT: I understood. I understand the decision and that's why we're here. The Branded Operators are saying we don't know, are we a member of the class or not? And --

MR. WILDFANG: And we can't decide that.

THE COURT: It has to be decided.

MR. WILDFANG: Right. Your Honor, let me make one additional point. There was comment about there are 70,000 Branded Operators in the country, but there are only a handful of major oil companies. And if Your Honor does what Judge Gleason did back in 2005, he set up a process with a special master to basically have test cases to see whether -- you know, who owned the claim in a particular franchisor/franchisee situation. So I don't think we're talking about 70,000 individual decisions, I think we're talking about a relative handful of oil supplier/Branded Operators relationships that are, according to their declarations, are standard in the industry. So it's not going to take 70,000 individual determinations.

THE COURT: Okay." (emphasis added) (FHT at A-7111:13 – A-7114:16).

As Appellants stated at the Fairness Hearing "It's open and obvious now, after listening to this and the presentation by the class counsel, listening to the various objectors' counsel with regard to the issue that class counsel has not represented the subclass of class members that my client and their clients are in. That subclass deserved undivided loyalty from somebody and it wasn't class counsel because this issue didn't [just] magically appear." (FHT at A-7120:18–25)

Addressing interclass conflict, Justice Souter wrote "and [it is] equally essential under Rule 23(a) and (b)(1)(B) that the class include all those with claims unsatisfied at the time of the settlement negotiations, with intraclass conflicts addressed by recognizing independently represented subclasses."*Ortiz v. Fibreboard Corp*. 751. "In this matter Class Counsel's 'argument is simply a variation of the position put forward by the proponents of the settlement in *Amchem*, who tried to discount the comparable failure in that case to provide separate representatives for subclasses with conflicting interests'" *Ortiz,* at 757.

Pursuant to *Illinois Brick*, there can only be one claim per antitrust injury. That claim belongs either to the first purchaser (Direct Purchaser), or if the first purchaser has a cost plus contract with their customer, that includes the antitrust injury amount in the cost, then the claim belongs to the cost plus customer (Cost Plus Direct Purchaser).

Class Counsel and the Oil Distributors, without proper analysis under *Illinois Brick*, incorrectly assume that the Oil Distributors are Direct Purchasers. In reaching that incorrect conclusion, they have failed to apply an *Illinois Brick* analysis to determine whether the Oil Distributors have cost plus contracts with the Retail Gas Stations that allows the Oil Distributors to include the Interchange Fee overcharge in their costs. Thus, the Oil Distributors and the Retail Gas Station Owners have open and obvious adverse interests leading to a fundamental conflict of interests. To avoid antagonistic interests, any "fundamental" conflict that goes "to the very heart of the litigation," *Charron*, 731 F.3d at 249–50 (internal citations omitted), must be addressed with a "structural assurance of fair and adequate representation for the diverse groups and individuals" among the plaintiffs. *Amchem Prods. v. Windsor*, 521 U.S. 591at 627, 117 S. Ct. 2231 (1997). Additionally, as this Court noted in its previous reversal in this matter, "[o]ne common structural protection is division of the class into "homogenous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel." *Ortiz v. Fibreboard Corp*., 527 U.S. 815, 856, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999)."*In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig*., 827 F.3d 223 (2d Cir. 2016)

In this matter, the creation of a subclass of Retail Gas Stationers, with court appointed representation from independent counsel is required by Rule 23(a) .

II.
THE DISTRICT COURT ERRED, AS A MATTER OF LAW, IN FINDING RULE 23(a)(4)'S ADEQUACY REQUIREMENTS WERE SATISFIED BECAUSE: CLASS MEMBERSHIP IS NOT ASCERTAINABLE; AND, THERE IS AN INTRINSIC CONFLICT IN THE UNITARY SETTLEMENT CLASS BECAUSE THE CLASS DEFINITION OF "ALL PERSONS, BUSINESSES, AND OTHER ENTITIES THAT HAVE ACCEPTED ANY VISA-BRANDED CARDS AND/OR MASTERCARD- BRANDED CARDS IN THE UNITED STATES AT ANY TIME ... " FAILS TO ADDITIONALLY REQUIRE "AND WERE DAMAGED THEREBY"

In some circumstances, a reference to damages or injuries caused by particular wrongful actions taken by the defendants will be sufficiently objective criterion for proper inclusion in a class definition. Similarly, a reference to fixed, geographic boundaries will generally be sufficiently objective for proper inclusion in a class definition. Moore's Federal Practice § 23.21. The Class definition in this matter includes neither. This Court has "recognized an implied requirement of ascertainability in Rule 23," which sets an objective standard that a class definition be "sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member." *Brecher v. Republic of Argentina*, 806 F.3d 22, 24 (2d Cir. 2015) (internal quotation marks and citations omitted).*In re Petrobras Sec. Litig.*, 862 F.3d 250 (2d Cir. 2017).

In this matter class membership is not ascertainable from a review of the SAD Settlement; and a class settlement cannot be certified if the class contains members, such as the Oil Distributors who lack standing. *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263-64 (2d Cir. 2006).

When members within a unitary class have conflicting interests, which Class Counsel find expedient to ignore, it becomes the court's responsibility to protect the unnamed class members from the machinations of Class Counsel. At all relevant times the district court was aware that there was a inchoate competition between the subclass that consists of the Oil Distributors and the subclass of Retail Gas Station Owners. The conflict arises out of the definition of class membership in this matter, which so poorly defines membership in the class by failing to require a class member to be damaged. As a result, the settlement may reasonably be read by Oil Distributors and Retail Gas Station that they are proper claimants to the same dollar of settlement fund arising out of the same purchase of a tank of gasoline at the pump. Because the Retail Gas Station Owners had no advocate, the settlement neither offers guidance regarding who is presumed to have the claim, nor specifies how the claims administrator should apportion a specific claim if it were to prove impossible to determine the proper claim holder among two competing claims.

Certification of a settlement class is supposed to bring adversarial litigation to a close. Subsequent to settlement certification the class members should not have to participate in (or pay for) hundreds of thousands of individual evidentiary claims resolutions.

Thomas Jefferson noted that some truths are self evident. The innate conflict between the Oil Distributors and the Retail Gas Station Owners, should have been self evident to Class Counsel and the district court well before preliminary approval. Even if the intrinsic conflict never occurred to Class Counsel, the record abounds with warnings of the inchoate problem of interclass conflict. However, rather than addressing the problem and working out a solution through the mechanism of independently represented subclasses of Oil Distributors and Retail Gas Station Owners, Class Counsel chose to ignore the issue and chant "we are agnostic!"

Being agnostic is antithetical to adequate class representation. It is the lawyers version of "kill them all and let God sort out the bodies" or perhaps just, "not my problem."

Appellants position in this matter is well supported by the Supreme Court, which, in the context of an asbestos settlement wrote:

"The very decision to treat them all the same is itself an allocation decision with results almost certainly different from the results that those with immediate injuries or claims of indemnified liability would have chosen.

Nor does it answer the settlement's failures to provide structural protections in the service of equity to argue that the certified class members' common interest in securing contested insurance funds for the payment of claims was so weighty as to diminish the deficiencies beneath recognition here. *See* Brief for Respondent Class Representatives Ahearn, et al. 31 (discussing this issue in the context of the Rule 23(a)(4) adequacy of representation requirement); id. at 35-36 (citing, e.g., *In re "Agent Orange" Product Liability Litigation*, 996 F.2d 1425, 1435-1436 (CA2 1993); *In re "Agent Orange" Product Liability Litigation*, 800 F.2d 14, 18-19 (CA2 1986)). This argument is simply a variation of the position put forward by the proponents of the settlement in Amchem, who tried to discount the comparable failure in that case to provide separate representatives for subclasses with conflicting interests, see Brief for Petitioners in *Amchem Products, Inc. v. Windsor,* O. T. 1996, No. 96-270, p. 48 (arguing that "achieving a global settlement" was "an overriding concern that all plaintiffs [held] in common"); see also id. at 42 (arguing that the requirement of Rule 23(b)(3) that there be predominance of common questions of law or fact had been met by shared interest in "the fairness of the settlement"). The current position is just as unavailing as its predecessor in Amchem. There we gave the argument no weight," see 521 U.S. at 625-628. *Ortiz v. Fibreboard Corp*., 527 U.S. 815, 857, 119 S. Ct. 2295 (1999)

Based on the well established Rule 23(a) adequacy law; and after witnessing Class Counsel's repeated repudiation of Appellants, and all similarly situated subclass members, standing and class membership at the Fairness Hearing -as set forth in detail above- the district court should have concluded, as a matter of law, that rule 23(a)(4)'s adequacy requirements were not satisfied by the proposed settlement because there is an intrinsic conflict in the unitary settlement class with regard to who, between the Oil Distributer and The Retail Gas Station Owner was entitled to be paid for the claims arising from Retail Gas Station sales. A conflict that would have been resolved had the subclass of Retail Gas Station Owners been adequately represented.

III.
ASSUMING ARGUENDO THAT THE CLASS WAS ASCERTAINABLE, THEN THE DISTRICT COURT FURTHER BREACHED ITS FIDUCIARY DUTY TO PROTECT THE SUBCLASS OF RETAIL GAS STATION OWNERS, WHO, LIKE APPELLANTS, ARE COST PLUS DIRECT PURCHASERS WHO HAVE SUFFERED A DIRECT ANTITRUST INJURY BY BY FAILING TO CREATE A SUBCLASS OF SUCH CLASSMEMBERS AND APPOINTING COUNSEL TO ADVOCATE FOR THE INTERESTS OF THE SUBCLASS AND BYPASSING OFF THE COURT'S DECISION MAKING RESPONSIBILITY TO A SPECIAL MASTER

In class actions the district court has a recognized fiduciary duty to the class. *See Martens v. Smith, Barney, Inc.*, 181 F.R.D. 243 (S.D.N.Y. 1998) (The court's fiduciary duty to unnamed class members prevents it from risking an end to its settlement review before a centerpiece of that settlement is meaningfully well-defined); *In re Holocaust Victim Assets Litig*., 528 F. Supp. 2d 109 (E.D.N.Y. 2007). (The magistrate judge reasoned that, if Neuborne had engaged in an arm's length fee negotiation, "he would have bargained with a person with a fiduciary duty to the class -- either the court or some appropriate class representative)

The court's fiduciary duty to unnamed class members extends to scrutiny of the class description in proposed in class certification, as class membership must be well defined. In this matter the class definition is a classic example of how "the interest of lawyer and class may diverge, as may the interests of different members of the class, and certain interests may be wrongfully compromised, betrayed, or "sold out" without drawing the attention of the court."' *Plummer v. Chem. Bank*, 668 F.2d 654, 658 (2d Cir. 1982) (quoting *Pettway v. Am. Cast Iron Pipe Co.,* 576 F.2d 1157, 1169 (5th Cir. 1978).

By failing to even address the class definition issue in its Rule 23(B) analysis, and instead deferring the issue thus created for a special master to decide, the district court breached its fiduciary duty. The district court cannot repair that breach to its fiduciary duty to Appellants Jack Rabbit and Cahaba Heights Chevron, and all other similarly situated Retail Gas Station Owners by delegating the duty to protect these unnamed class members to a special master.

When members within a unitary class have conflicting interests, which Class Counsel then finds expedient to ignore, it becomes the court's responsibility to protect the unnamed class members from the machinations of Class Counsel. At all relevant times the district court was aware that there was an inchoate competition between the subclass of the Oil Distributors and the subclass of Retail Gas Station Owners.

The interclass conflict arises out of the inadequate definition of class membership in this matter. The source of this ascertainability problem is Class Counsel's failure to include that the class member, in addition to being a "person, businesses, or other entity that have accepted any Visa-branded cards and/or Mastercard- branded cards ... " be damaged as a result. As a result of the ascertainability problem, the settlement may reasonably be read by Oil Distributors and Retail Gas Station that they are proper claimants to the same dollar of settlement fund arising out of the same purchase of a tank of gasoline at the pump. Because the Retail Gas Station Owners had no advocate, the settlement neither offers guidance regarding who is presumed to have the claim, nor specifies how the claims administrator should apportion a specific claim if it were to prove impossible to determine the proper claim holder among two competing claims.

Certification of a settlement class is supposed to bring adversarial litigation to a close. Subsequent to settlement certification the class members should not have to participate in (or pay for) hundreds of thousands of individual evidentiary claims resolutions.

Thomas Jefferson noted that some truths are self evident. The innate conflict between the Oil Distributors and the Retail Gas Station Owners, should have been self evident to Class Counsel and the district court well before preliminary approval. Even if the conflict never occurred to Class Counsel on their own the record abounds with warnings of the upcoming problem of interclass conflict. However, rather than addressing the problem and working out a solution through the mechanism of independently represented subclasses of Oil Distributors and Retail Gas Station Owners, Class Counsel chose to ignore the issue and chant "we are agnostic."

Appellant's position in this matter is well supported by the Manual for Complex Litigation, Fourth, § 21.132, which directs a "court must determine whether the process for presenting claims and awarding relief to individual class members is manageable and takes account of differences among class members without creating conflicting interests." Conversely, no *post hoc* series of hundreds of thousands of mini trials before a special master, no matter how well qualified and efficient, can cure the district court's failure to fulfill its fiduciary duty to protect unnamed class members.

Class Counsel, in presenting the idea of cutting the Gordian knot with the appointment of a special master, fail to cite to any authority that holds that such an appointment may be employed by the court, instead of Rule 23(b)(3) subclasses, over the vigorous objection of class members.

It is untenable for a district court to avoid the heavy lifting necessary to legally resolve interclass competing claims by appointing a special master.

.

CONCLUSION

For all of the forgoing reasons the judgment of the district court should be reversed and this matter should be remanded with instructions to the district court to appoint counsel to represent the subclass of class members who, like Appellants Jack Rabbit and Cahaba Heights Chevron are Retail Gas Station Owners who are Cost plus Direct Purchasers under *Illinois Brick*'s cost plus exceptions to the indirect purchaser rule.

Respectfully submitted,

Dated: January 5, 2021 **/s/ N. Albert Bacharach, Jr.**

Paul S. Rothstein **Florida Bar Number: 310123** **Cocounse for Appellants Jack Rabbit, LLC & Cahaba Heights Service Center, Inc. d/b/a Cahaba Heights Chevron** **Attorney Paul S. Rothstein, P.A.** **626 N.E. 1st Street** **Gainesville, FL 32601** **(352) 376-7650** **(352) 374-7133 (Fax)** **E-Mail: psr@rothsteinforjustice.com**	**N. Albert Bacharach, Jr.** **Florida Bar Number: 209783** **Cocounsel for Appellants Jack Rabbit, LLC & Cahaba Heights Service Center, Inc. d/b/a Cahaba Heights Chevron** **N. Albert Bacharach, Jr., P.A.** **4128 NW 13th Street** **Gainesville, FL 32609-1807** **(352) 378-9859** **(352) 338-1858 (Fax)** **E-Mail: N.A.Bacharach@att.net**

CERTIFICATE OF COMPLIANCE WITH RULE 32(a) Fed. R. App. P

Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b)(i) because this brief contains less than 13,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type styles requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect's 14 point Times New Roman font.

Dated January 5, 2021.

/s/ N. Albert Bacharach, Jr.
N. Albert Bacharach, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on January 5th, 2021 I filed the foregoing Final Form Initial Brief via the CM/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 Initial Brief on January 5th, 2021.

/s/ N. Albert Bacharach, Jr.
N. Albert Bacharach, Jr.