

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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IN RE PAYMENT CARD INTERCHANGE FEE
AND MERCHANT DISCOUNT ANTITRUST
LITIGATION

This document refers to: ALL ACTIONS

SUA SPONTE
REPORT AND
RECOMMENDATION

05-MD-1720
(Brodie, C.J.)
(Marutollo, M.J.)

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JOSEPH A. MARUTOLLO, United States Magistrate Judge:

Throughout this long-running multidistrict litigation, efforts have consistently been made to proactively protect class members from deception. *See, e.g., In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 706 F. Supp. 3d 365 (E.D.N.Y. 2023) (addressing a false website that sought to mirror the official Court-approved website); Text Order, Dkt. No. 6147 (“It is clear to the Court that the overwhelming majority of the members of the merchant class need protection from overreaching claims filing services, and [the Court] intend[s] to provide that protection proactively. Preventing confusion and deception before they can happen is far preferable to taking remedial measures after they happen.”).

On December 4, 2024, counsel for the Fed. R. Civ. P. 23(b)(3) Class (“Class Counsel”) alerted the Court that two new entrants in the claims-filing realm—a website called Cardsettlement.org and an entity called Merchant Stronghold¹—had submitted numerous fraudulent submissions to class administrator Epiq Class Action & Claims Solutions, Inc., (“Epiq”). *See* Dkt. Nos. 9489, 9492. Following the Court’s issuance of an Order to Show Cause

¹ According to a publicly-available website, “Merchant Stronghold have [*sic*] its Head quartered [*sic*] in Clearwater, Florida. It provides credit card processing services for businesses of all sizes.” *See* <https://merchant-stronghold4.webnode.page/about-us/> (last accessed Jan. 17, 2025).

with respect to Class Counsel’s allegations against Cardsettlement.org and Merchant Stronghold, and following Court-ordered limited discovery into Class Counsel’s allegations, Class Counsel filed a motion for sanctions against Cardsettlement.org and Merchant Stronghold on January 13, 2025. *See* Dkt. No. 9544.

In its motion for sanctions, Class Counsel sought the following relief: “(1) [t]hat both [C]ardsettlement.org and Merchant Stronghold be permanently enjoined from any role in the Settlement; (2) that all of [C]ardsettlement.org’s class member claims be administratively filed by [Epiq]; (3) that [C]ardsettlement.org receive no portion of any class members’ settlement benefits; (4) that [C]ardsettlement.org pay the costs associated with its prior misleading conduct as well as the costs incurred by Epiq in administratively filing claims; and (5) that [C]ardsettlement.org pay the reasonable attorney’s fees and costs of Class Counsel associated with this matter.” Dkt. No. 9544-1 at 7.²

On January 15, 2025, Class Counsel and Cardsettlement.org reached an agreement whereby Class Counsel now states that their “motion for sanctions as to Cardsettlement.org is no longer necessary.” *See* Dkt. No. 9546 at 3.

For the reasons set forth below, this Court *sua sponte* respectfully recommends that Chief Judge Brodie grant Class Counsel’s motion to permanently enjoin Merchant Stronghold from any role in the settlement in this action. The Court also respectfully recommends that, in light of Class Counsel and Cardsettlement.org’s agreement, Class Counsel’s motion for sanctions against Cardsettlement.org be denied as moot, subject to the additional conditions that the Court recommends below.

² Page citations are to the ECF-stamped pages.

I. Relevant Factual and Procedural Background

This multidistrict litigation arises out of the claims of a putative class of over twelve million nationwide merchants who allege that Visa, MasterCard, and numerous banks that serve as payment-card issuers for those networks had adopted and enforced rules and practices relating to payment cards that had the combined effect of injuring merchants by allowing Visa and MasterCard to charge supercompetitive fees (known as “interchange fees”) on each payment card transaction. *See, e.g., Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*, 62 F.4th 704, 712 (2d Cir. 2023); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 706 F. Supp. 3d 365, 368 (E.D.N.Y. 2023). After nearly fifteen years of litigation, this Court approved a class settlement in this antitrust action of \$5.6 billion (“the Settlement”). *See, e.g., Fikes Wholesale, Inc.*, 62 F.4th at 712.

As noted above, throughout this long-running litigation, the Court has endeavored to proactively protect class members from deception. On September 25, 2018, Class Counsel informed the Court that it had “received a number of calls from various third-parties seeking guidance regarding the appropriate language to use in solicitations and marketing materials.” Dkt. No. 7259. Class Counsel requested that the Court enter an order to help ensure that merchants receive accurate information. *See id.*

On September 26, 2018, the Court entered an order in response to Class Counsel’s request. *See* Dkt. No. 7260. The Court noted that, “since 2012, the Court has determined that certain solicitations of class members regarding third-party claims filing services have been misleading,” and that “the Court has expressed concern about additional instances of class member confusion.” *Id.* The Court recognized that, in light of the anticipated settlement agreement, “various third-party entities [will] seek new business relationships based on the proposed settlement.” *Id.* The

Court thereby ordered that:

All third-party claims filing companies wishing to represent merchants are required to include in any solicitation to prospective clients the following to ensure that any solicitation is truthful and accurate []:

1. A statement that claim forms are not yet available.
2. A statement making clear that class members need not sign up for a third-party service in order to participate in any monetary relief and explaining that no-cost assistance will be available from the Class Administrator and Class Counsel during the claims-filing period.
3. [D]irecting class members to the Court-approved website for additional information.

Id. Further, the Court ordered that:

1. The proposed relief outlined above must be included in any solicitation, in any form including websites, mail and email solicitations, contracts, telephone and in-person solicitations;
2. Solicitations that do not contain the required information (as set forth above), may be deemed misleading and following notice and an opportunity to cure, those entities may be enjoined permanently from taking any role in the settlement; and
3. Class Counsel is ordered to alert all known third-party claims filing entities of the requirements within five days of entry of this Order.

Id.

The litigation continued over the next several years. At a September 7, 2023 Status Conference, the Court requested that Class Counsel provide monthly reports to the Court regarding issues relating to third-party claim filers. These reports are to provide general information regarding third-party issues and, to the extent relevant, information regarding any entity-specific matters.

On October 5, 2023, Class Counsel filed a status report in which it stated, *inter alia*, that “[f]or the past several years, formally since November 2019, Class Counsel has tasked Epiq Systems, Inc. [“Epiq”] with providing monthly reporting regarding class member concerns or

complaints regarding third-party claims-filing entities as well as claim-buying entities.” *See* Dkt. No. 8982. Class Counsel noted that it addresses these concerns or complaints informally and without court intervention wherever possible. *See id.* Class Counsel noted that “Epiq continues to alert Class Counsel to new issues as they arise in addition to the monthly reporting process already in place.” *Id.*

“Beginning in early November 2024,” Class Counsel received reports that a website called Cardsettlement.org was connected to “videos on YouTube that contained numerous false and/or misleading statements about the [S]ettlement.” *See* Dkt. Nos. 9491-1 at 2, 9544-1 at 11. Class Counsel claims that they sought to work cooperatively with Cardsettlement.org after discovery of said videos. Dkt. No. 9544-1 at 11. Class Counsel conferred with Cardsettlement.org to address the misleading statements, which included, for instance, Cardsettlement.org’s claim that it had “direct access to the Claims Administrator,” which misleadingly implied that Cardsettlement.org had special access to Epiq. *Id.* (citations omitted). Cardsettlement.org also “failed to display the Court-ordered disclaimers and made it appear that class members were directly filing claims as opposed to signing up for claims-filing services.” *Id.* Class Counsel notes that “[m]aterials attached to the YouTube video of its referral partner falsely claimed that ““CardSettlement (our partner) makes it simple for you to file a claim. They pull transaction data directly from Visa / Mastercard, they calculate a claim in 5-7 days”” *Id.* at 8-9. Significantly, Cardsettlement.org “also included baseless statements regarding claim amounts to be expected and false information regarding the number of claims filed.” *Id.* at 9.

According to Class Counsel, Cardsettlement.org removed the misleading and inaccurate videos, and “emails were sent to merchants who may have signed up with the company after viewing the videos or receiving solicitations from the referral partners who published the videos.”

Id. Cardsettlement.org’s website was also updated to make Class Counsel’s suggested corrections.

Id.

Days after the changes were made to the website and the misleading YouTube videos were removed, Epiq contacted Class Counsel about “several additional proof of authority documents that [C]ardsettlement.org had submitted that appeared to be fraudulent.” *Id.* Class Counsel points to a proof of authority from the *Harry Potter* author J.K. Rowling that was submitted by Cardsettlement.org; the proof was even signed by a *Harry Potter* character. *Id.* Other submissions included names that used profanity. *Id.* at 9.

Class Counsel contacted Cardsettlement.org about these clearly fraudulent submissions. Cardsettlement.org explained that the *Harry Potter* submission had mistakenly been submitted as a test account. *Id.* Cardsettlement.org, however, did not explain why the profanity-laden submissions were submitted. *Id.* Nonetheless, Cardsettlement.org committed to reviewing all prior submissions. *Id.*

According to Class Counsel “[a] few days later,” Cardsettlement.org “provided a list with 96 entities that it sought to withdraw from” Epiq, “for one reason or another.” *Id.* Epiq purportedly “spent significant time managing this issue.” *Id.*

On December 4, 2024, Class Counsel filed a letter with the Court regarding a proposed order to show cause involving Cardsettlement.org. *See* Dkt. No. 9489. As noted in its letter, Class Counsel reported that:

On December 3, 2024, Epiq alerted Class Counsel to other issues with [C]ardsettlement.org. A class member who was told that his claim was “in conflict” with a third party claims filing company explained that he alone had filed his claim and that he had never signed up with [C]ardsettlement.org. According to an email sent by [C]ardsettlement.org to this class member, a referral partner of cardsettlement.org called Merchant Stronghold “engaged in unethical and inappropriate actions that violated the trust we strive to maintain with all our clients. Specifically, we found evidence indicating that Merchant Stronghold used your

business information to sign agreements with CardSettlement.org on your behalf – without your knowledge or explicit consent.” Cardsettlement.org did not tell Class Counsel about this issue. It was only because a class member was purportedly “in conflict” that this was surfaced. Cardsettlement.org, when confronted with this information, claimed that it was investigating the issue and planned to raise it with Class Counsel. The reality, however, is that it did not. Class Counsel called the class member and spoke at length with him. The DocuSign showed that the “contract” was signed in Florida (where Merchant Stronghold is based) even though the class member was across the country. He explained that he had no business whatsoever with this entity and did not know how they obtained any of his information. Epiq has confirmed that the conflict has been removed.

Dkt. No. 9489 at 2. Cardsettlement.org “claims to have severed ties with Merchant Stronghold.”

Id. Dkt. No. 9544-1 at 10. After further investigation, however, “48 fake contracts from Merchant Stronghold were discovered among Cardsettlement.org’s putative contracts.” Dkt. No. 9544-1 at 10.³

Class Counsel also wrote to the owner of Merchant Stronghold after receiving the information about Cardsettlement.org’s communications with the class member at issue. *Id.* Class Counsel “requested information regarding whether there were additional merchants signed up without consent apart from the 48 that Class Counsel was aware of.” *Id.* Merchant Stronghold “never provided the information and has failed to respond to numerous follow-ups seeking the information.” *Id.* Class Counsel reports that “[a] response was received from Merchant Stronghold that questioned why the issue was being brought to the Court’s attention.” *Id.* at 11. Class Counsel claims that they “explained the seriousness of the conduct and that it is under orders to provide the Court with information regarding matters related to third parties affecting class members.” *Id.*

³ According to the email to the class member at issue, Cardsettlement.org was “currently taking aggressive steps to hold Merchant Stronghold accountable for their actions. Furthermore, we are working to identify any individuals associated with Merchant Stronghold who were directly involved in this misconduct. Should any additional violations come to light, we are prepared to take further action against those responsible.” Dkt. No. 9544-1 at 10 (citation omitted).

Additionally, in its December 3, 2024 letter to the Court, Class Counsel reported that it received an email from a “concerned class member forwarding an email from a Cardsettlement.org referral partner that contained significant false and/or misleading information,” including the following statements:

Most businesses never learned about this because only a single postcard was ever sent out, and that’s why we are contacting you. We have been contracted to provide the details to businesses in the USA.[]

To start the process for claiming your portion of the Visa Mastercard settlement, please click the GET YOUR SETTLEMENT AMOUNT button below. It takes just 60 seconds and there are no upfront costs or risks.

[]Once you submit and allow authorization, the Claims Administrator for the Settlement will contact Visa/MC to obtain the total credit card volume you processed from 2004 – 2019. Immediately following will be the amount of your settlement. This normally takes 3-5 business days.

Id. (citing Dkt. No. 9489 at 3-4).

When Class Counsel contacted Cardsettlement.org about this, Cardsettlement.org’s counsel stated that a cease and desist letter had been sent to this entity and that Cardsettlement.org was trying to determine how many merchants may have received such false and/misleading information from the entity. Dkt. No. 9544-1 at 11-12. Cardsettlement.org stated that it might take a day or two to ascertain the exact number of merchants affected. *Id.* at 12.

On December 4, 2024, Class Counsel filed a letter for the Court’s endorsement of a proposed Order to Show Cause. *See* Dkt. No. 9489.

Further, on December 6, 2024, Class Counsel received an email from the original class member who had been told his claim was “in conflict.” Dkt. No. 9544-1 at 12. This class member had reportedly received another email from Cardsettlement.org on the same day, encouraging him to contact Epiq and let it know that he wished to have Cardsettlement.org represent him, despite

Cardsettlement.org's prior communication to him that the contract was fraudulently entered into and had been voided. The email to this class member stated as follows:

The purpose of this email is to confirm that . . . (the "Client") has engaged the company CardSettlement.org, by and through . . . , signer of the Authority To Represent document for [C]ardsettlement (collectively, "CardSettlement.org"), to act as its representative with respect to assisting with the processing and submission of its claim in this matter.

In accordance with the conflict resolution guidelines set forth in the payment card settlement, we have included the email address of the person identified as "Owner/Employee", . . . in the Conflict.

If . . . agrees with this, we ask that . . . please use the REPLY ALL option to respond to this email, including all recipients, and type the following statement: "I agree to allow CardSettlement.org to represent me with the Visa/Mastercard settlement."

Id. at 12 (citing Dkt. No. ECF 9495 at 2).

Class Counsel immediately contacted this class member to assure him that Epiq was aware of this issue and that his claim was unaffected. *Id.* Class Counsel then contacted Cardsettlement.org, and stated that this issue would be brought before the Court, that Class Counsel would seek to cancel all of Cardsettlement.org's claim-filing service contracts and otherwise bar its further participation in the instant settlement, and that referral to the U.S. Attorney's office might be warranted. *Id.* at 12-13.

On December 9, 2024, Class Counsel and counsel for Cardsettlement.org conferred via telephone. *See id.* at 13. Cardsettlement.org stated that it had contacted that merchant at issue and advised it of the error. *Id.* Class Counsel states that it also separately learned Cardsettlement.org had not yet withdrawn the 48 Merchant Stronghold contracts previously identified as fraudulent; Cardsettlement.org appears to have subsequently withdrawn these claims. *Id.*

Also on December 9, 2024, Class Counsel moved for a second Order to Show Cause, "seek[ing] to cancel all contracts [C]ardsettlement.org has submitted to [Epiq] and to have

[C]ardsettlement.org pay any associated costs associated with the cancellation and notice process related to the many thousands of contracts it has submitted to Epiq.” Dkt. No. 9495 at 1.

The Court scheduled a telephonic status conference on the proposed Order to Show Cause on December 11, 2024. At the conference, Class Counsel raised numerous issues that it had described in its first and second letters seeking Orders to Show Cause. *See* Dkt. Nos. 9505 (Transcript) at 3:17-23, 9489, 9495. The Court then ordered Class Counsel to provide a copy of the second Order to Show Cause, which the Court then entered later that day. *See* December 11, 2024 Text Order; Dkt. No. 9503.

In its December 11, 2024 Order to Show Cause, and “[i]n light of the alleged fraudulent activity associated with the website [C]ardsettlement.org and its referral partner, Merchant Stronghold (*see* Dkt. Nos. 9489, 9495),” the Court ordered Cardsettlement.org not to submit any new claims or contracts to Epiq. Dkt. No. 9503 at 1. Additionally, the Court ordered Cardsettlement.org to “[p]rovide a written response to the Court explaining why all of [its] claim-filing contracts should not be cancelled, at [its own] expense[,]” why “[C]ardsettlement.org should not be permanently barred from any settlement-related services[,]” and why, sanctions should not be imposed on it, including administrative costs to Epiq associated with cancelling and providing notice to class members who signed up for claims-filing services with Cardsettlement.org, in light of Cardsettlement.org’s admissions that it had filed numerous fraudulent contracts with Epiq. *Id.* Moreover, the Court ordered Cardsettlement.org, by December 16, 2024, to provide “a complete list of referral partners and agents as well as all versions of written processes and procedures . . . that have been provided to [] partners and agents to sign up merchants for third-party claim filing services[,]” and confirm that all merchants who had been signed up for

Cardsettlement.org's claim filing services had actually consented to working with Cardsettlement.org. *Id.* at 2.

Additionally, the Court's Order to Show Cause directed Merchant Stronghold, by December 16, 2024, to "[p]rovide a written response to the Court outlining why Merchant Stronghold should not be permanently barred from any settlement-related services following the admission that it signed up merchants for claims-filing services without their knowledge or consent"; and to "[p]rovide all written processes and procedures that were implemented, and the date of implementation, associated with signing up merchants for third-party claim filing services by [C]ardsettlement.org and to confirm that that merchants had in fact consented to sign up for [C]ardsettlement.org's claim filing services." *Id.* at 2.

On December 16, 2024, Cardsettlement.org filed its response to the Order to Show Cause. Dkt. Nos. 9510. Class Counsel filed its letter in response to Cardsettlement.org's response on December 20, 2024. Dkt. No. 9515.

Merchant Stronghold failed to file any response to the Order to Show Cause, and has not filed any response to date.

On December 21, 2024, this Court permitted expedited discovery into Cardsettlement.org's practices and its referral partners in connection with its motion for sanctions against Cardsettlement.org. *See* December 21, 2024 Text Order. Class Counsel served discovery on December 30, 2024, including interrogatories, requests for admission, document requests, and a single deposition notice on Cardsettlement.org, and interrogatories and document requests on Merchant Stronghold. Dkt. No. 9544-1 at 14. Responses were due January 6, 2025. *See* December 21, 2024 Text Order.

Class Counsel argues that they "sent numerous emails to Merchant Stronghold, including

copies of the Court’s orders and all have been ignored.” Dkt. No. 9544-1 at 5. Class Counsel adds that “[d]iscovery was served on Merchant Stronghold and no responses were received on January 6, 2025 or thereafter.” *Id.*

As Class Counsel noted in its letter dated January 7, 2025, the Cardsettlement.org’s responses were insufficient. *See Id;* Dkt. No. 9536. The Court thereafter ordered Cardsettlement.org to respond to Class Counsel’s concerns regarding the discovery and to explain its position regarding the deposition by January 8, 2025. *See* January 7, 2025 Text Order. Cardsettlement.org’s January 8, 2025 response remained insufficient, prompting this Court to order Cardsettlement.org to file another response on January 9, 2025. *See* January 8, 2025 Text Order. Ultimately, after further insufficient responses from Cardsettlement.org on January 9, 2025, and after two meet-and-conferrals with Class Counsel, Cardsettlement.org provided amended responses to Class Counsel’s discovery requests on January 12, 2025. Dkt. No. 9544-1 at 15.

On January 9, 2025, Class Counsel deposed Cardsettlement.org representative Lawrence Rapoport, who confirmed the existence of documents responsive to Class Counsel’s discovery requests, including scripts and other materials provided to its referral partners that were withheld from production. *Id.* During this deposition, Rapoport characterized certain of Cardsettlement.org’s advertisements as “explainers” and “educational” and thus not solicitations subject to the Court’s mandated disclaimers. *Id.* at 15. Rapoport also stated that false and/or misleading statements on Cardsettlement.org’s original video and website were only changed to “appease” counsel and that neither were solicitations subject to the Court-ordered disclaimer language. *Id.*

During his deposition, Rapoport stated that Cardsettlement.org had not signed up a single merchant for claims-filing services directly, and that all 13,265 merchants had been signed up through Cardsettlement.org's roughly 2,000 referral partners. *Id.* at 16. Moreover, when asked whether Cardsettlement.org monitored "all of the outgoing material that [its] referral partners use[,]" Rapoport stated that doing so is "not humanly possible." *Id.*

On January 15, 2025, Class Counsel and Cardsettlement.org filed a joint status report with the Court. *See* Dkt. No. 9546. In the joint status report, Class Counsel and Cardsettlement.org reported that they had reached an agreement whereby,

1. Letters will be sent to clients that require affirmative consent in order for Cardsettlement.org to service those clients.

2. Cardsettlement.org will pay Epiq's reasonable costs incurred due to issues with cardsettlement.org dating from early November 2024 to present.

3. Cardsettlement.org will add a disclaimer to its website to make clear that it is not the official Court-approved website. Cardsettlement.org will add the following disclaimer:

Please be aware, this is not the Court-approved website. Cardsettlement.org is a private business providing claims-filing services. The official Court-approved website is: paymentcardsettlement.com.

4. Class Counsel will be allowed to review responses received to the letters sent to clients.

5. Cardsettlement.org must remind all those in its referral network that they are to cease marketing.

6. Cardsettlement.org will immediately report to Class Counsel any issues it learns of regarding referral partners.

7. Cardsettlement.org agrees that no new claims be submitted to Epiq beyond the 17,000+ that are in process.

Dkt. No. 9546 at 2-3. In light of this agreement, Class Counsel reports that they are "satisfied that the motion for sanctions as to cardsettlement.org is no longer necessary." *Id.* at 3.

II. Legal Standards

As part of its obligation to protect class members, the Court has broad authority to regulate the behavior of non-parties in their dealings with the class. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-MD-1720, 2014 WL 4966072, at *1 (E.D.N.Y. Oct. 3, 2014) (“The Court’s authority is clear, and its obligation to protect class members is strong.”). This authority includes maintaining “ultimate control over communications among the parties, third parties, or their agents and class members on the subject matter of the litigation to ensure the integrity of the proceedings and the protection of the class.” *Id.* (citation omitted). The Court is authorized to “take curative action—such as requiring the distribution of corrective notices or entering injunctive relief—where misleading or false statements are made to class members.” *Id.*; *see also Amerisource Corp. v. Rx USA Int’l Inc.*, No. 02-CV-2514 (JMA), 2010 WL 2730748, at *5 (E.D.N.Y. July 6, 2010), *aff’d sub nom. N.Y. Credit & Fin. Mgmt. Grp. v. Parson Ctr. Pharmacy, Inc.*, 432 F. App’x 25 (2d Cir. 2011) (recognizing the Court’s “inherent power to sanction” non-party shareholder and chief executive for “litigation misconduct” and exercising such power). The Court’s “authority in this context may have either a procedural basis, under Federal Rule of Civil Procedure 23(d), or an equitable basis, under the All Writs Act.” *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 2014 WL 4966072, at *1 (citation omitted).

The All Writs Act, 28 U.S.C. §1651(a), authorizes courts to enter curative orders in the context of class action settlement agreements as necessary “to protect the settlement from threats by both parties and non-parties.” *In re Visa Check/Mastermoney Antitrust Litig.*, No. 96-CV-5238, 2006 WL 1025588, at *4 (E.D.N.Y. Mar. 31, 2006) (citing *In re Baldwin-United Corp.*, 770 F.2d 328, 336 (2d Cir. 1985)). The curative orders may extend to anyone “in a position to frustrate the

implementation of a court order or the proper administration of justice.” *United States v. New York Tel. Co.*, 434 U.S. 159, 174 (1977); *see also Pennwalt Corp. v. Durand-Wayland, Inc.*, 708 F.2d 492, 494 (9th Cir. 1983) (explaining that sanctions against a nonparty would be available under the Court's “inherent power” “for abuse of the judicial process.”). Courts can “prohibit communications with class members entirely, compel communications correcting misleading statements, and declare contracts between third parties and class members void.” *In re Visa Check/Mastermoney Antitrust Litig.*, 2006 WL 1025588, at *5.

Rule 23(d) of the Federal Rules of Civil Procedure also gives courts the authority to regulate communications by parties and their counsel with class members. As the Supreme Court has explained, “[b]ecause of the potential for abuse, a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties.” *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981); *Erhardt*, 629 F.2d at 846. Rule 23(d) extends not only to communications that mislead or coerce, but also to those that “threaten to create confusion and to influence the threshold decision whether to remain in the class.” *In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d 237, 252 (S.D.N.Y. 2005).

Courts have required corrective remedies under Rule 23(d) when class members have received unauthorized communications that contain misleading information that could affect their decisions regarding the case. *See, e.g., In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 706 F. Supp. 3d at 368; *In re Visa Check/Mastermoney Antitrust Litig.*, 2006 WL 1025588, at *5; *see also Gortat v. Capala Bros., Inc.*, No. 07-CV-3629 (ILG) (SMG), 2010 WL 1879922, at *6 (E.D.N.Y. May 10, 2010) (ordering defense counsel to cease communications with class members “on any matter related to this litigation” without prior consent of the Court or class

counsel); *Georgine v. Amchem Prod., Inc.*, 160 F.R.D. 478, 490 (E.D. Pa. 1995) (ordering new opt-out phase where objectors sent misleading communications to class counsel that “contain[ed] one-sided attacks on the proposed settlement without any mention of its benefits”).

III. Discussion

A. The Court respectfully recommends that Merchant Stronghold be permanently enjoined from any role in the Settlement

Class Counsel argues that “the actions of [Merchant Stronghold] are so egregious that it should be barred from having any role in the settlement.” Dkt. No. 9544-1 at 11. This Court agrees.

As Class Counsel notes, “a federal court has the inherent power to impose sanctions against a party or non-party who has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.” *Am. Tr. v. Sabino*, 230 F.3d 1357 (6th Cir. 2000) (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46-50 (1991) and *Corder v. Howard Johnson & Co.*, 53 F.3d 225, 232 (9th Cir. 1995)); *see also Sundby v. Marquee Funding Grp., Inc.*, No. 19-CV-00390 (GPC) (AHG), 2020 WL 5709445, at *5 (S.D. Cal. Sept. 24, 2020) (citations omitted) (The Court has “the authority to sanction the conduct of a nonparty who participates in abusive litigation practices, or whose actions or omissions cause the parties to incur additional expenses.”). This power to mitigate bad faith and fraudulent conduct that impedes the adjudication of class action litigation and the claims administration process also emanates from a Court’s authority under Fed. R. Civ. P. 23 and the All Writs Act. *See Visa Check*, 2006 WL 1025588, at *5; Fed. R. Civ. P. 23(d).

Indeed, conduct that abuses the judicial process is sanctionable, even when committed by a non-party, such as Merchant Stronghold. *See Amerisource Corp.* 2010 WL 2730748, at *5 (recognizing the Court’s “inherent power to sanction” non-party shareholder and chief executive for “litigation misconduct” and exercising such power); *Arrowhead Cap. Fin., Ltd. v. PicturePro*,

LLC, 2022 WL 1843136, at *1 (C.D. Cal. Apr. 11, 2022) (citing *Pennwalt Corp. v. Durand-Wayland, Inc.*, 708 F.2d 492, 494 (9th Cir. 1983) (as amended)). Courts have held that there must be a specific finding of bad faith before a court can exercise its inherent power to impose sanctions to a non-party for violation of a court order. *See Amerisource Corp.*, 2010 WL 2730748, at *5.

Here, there is sufficient evidence of Merchant Stronghold’s bad faith to assess sanctions against it pursuant to the Court’s inherent power, Federal Rule of Civil Procedure 23(d), and the All Writs Act. In short, Merchant Stronghold signed up merchants for claims-filing services without their knowledge or consent. As noted above, at least 48 contracts submitted to Epiq by Cardsettlement.org were fraudulently signed by Merchant Stronghold and not the class members themselves. Merchant Stronghold has provided no explanation as to why “at least 48 contracts were submitted to Epiq that admittedly were signed not by the class members but by Merchant Stronghold without consent.” Dkt. No. 9544-1.

Further, Merchant Stronghold has failed to respond to the Court’s December 11, 2024 Order to Show Cause. Dkt. No. 9503. Nor did Merchant Stronghold file a response to Class Counsel’s motion for sanctions, which requested “Merchant Stronghold be permanently enjoined from having any role in the Settlement.” Dkt. 9515 at 2. Merchant Stronghold also failed to respond to Class Counsel’s discovery, contrary to the Court’s orders. *See* Dkt. No. 9544-1 at 14. Merchant Stronghold cannot argue that it was unaware of the Court’s orders here, given Class Counsel’s representations and the fact that Merchant Stronghold has otherwise substantially participated in the proceedings by referring at least 48 fraudulent contracts to Epiq.⁴

In consideration of the above, this Court respectfully recommends that Merchant Stronghold be enjoined from participating in any way in this action’s claims-filing and

⁴ As Class Counsel notes, Merchant Stronghold initially, and incredibly, asked Class Counsel why the present issues were being brought to the Court’s attention. *See* Dkt. No. 9515-1 at 2-3.

administration process.

B. The Court respectfully recommends that Class Counsel’s motion for sanctions against Cardsettlement.org be denied as moot, subject to the conditions set forth herein

As noted above, on January 15, 2025, Class Counsel has effectively withdrawn its motion for sanctions against Cardsettlement.org, as their agreement (Dkt. No. 9546) makes the motion “no longer necessary.” Dkt. No. 9546 at 3. Thus, the portion of Class Counsel’s motion for sanctions against Cardsettlement.org should be denied as moot.

Notwithstanding the agreement reached by Class Counsel and Cardsettlement.org and the equitable relief provided therein, the Court orders Class Counsel to provide a status report about Cardsettlement.org’s compliance with their agreement by January 24, 2025.

Further, should Chief Judge Brodie adopt this Report and Recommendation, this Court respectfully recommends that Class Counsel be ordered to post a PDF or a weblink to such an opinion and order on the Court-authorized website, as well as a link to the opinion on the Cardsettlement.org website. Posting the opinion will help reduce the effects of the potential deception stemming from Cardsettlement.org and its affiliated webpage(s). *See In re 3M Combat Arms Earplug Prod. Liab. Litig.*, No. 3:19-MD-2885, 2023 WL 7001851, at *1 (N.D. Fla. Oct. 14, 2023) (positing an order related to a “scam” on the Court’s website).

IV. Conclusion

For the reasons set forth below, this Court *sua sponte* respectfully recommends that Chief Judge Brodie grant Class Counsel’s motion to permanently enjoin Merchant Stronghold from any role in the Settlement. The Court also respectfully recommends that, in light of Class Counsel and Cardsettlement.org’s agreement, Class Counsel’s motion for sanctions against Cardsettlement.org be denied as moot, subject to the additional conditions the Court set forth herein.

A copy of this Report and Recommendation is being electronically served on counsel. Class Counsel is directed to serve a copy of this Order on Cardsettlement.org and Merchant Stronghold by January 18, 2025 and file proof of service by the same date.

Any objections to this Report and Recommendation must be filed within 14 days after service of this Report and Recommendation. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(2). *See also* Fed. R. Civ. P. 6(a) & (d) (addressing computation of days). Any requests for an extension of time for filing objections must be directed to Chief Judge Brodie. Failure to file objections within this period designating the particular issues to be reviewed waives the right to appeal the district court's order. *See* 28 U.S.C. § 636(b); Fed. R. Civ. P. 72(b)(2); *Wagner & Wagner, LLP v. Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, P.C.*, 596 F.3d 84, 92 (2d Cir. 2010); *Kotlyarsky v. United States Dep't of Just.*, No. 22-2750, 2023 WL 7648618 (2d Cir. Nov. 15, 2023); *see also Thomas v. Arn*, 474 U.S. 140 (1985).

Dated: Brooklyn, New York
January 17, 2025

SO ORDERED.

/s/ Joseph A. Marutollo
JOSEPH A. MARUTOLLO
United States Magistrate Judge