

CANADA

PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL

NO: 500-06-000549-101

(Class Action)  
SUPERIOR COURT

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**9085-4886 QUEBEC INC.**

and

**P. BAKOPANOS**

*Petitioners*

-vs.-

**VISA CANADA CORPORATION**, legal person duly incorporated, having its corporate counsel located at Blakes, Cassels & Graydon LLP, 199 Bay Street, Suite 2800, Commerce Court West, City of Toronto, Province of Ontario, M5L 1A9

and

**MASTERCARD INTERNATIONAL INCORPORATED**, legal person duly incorporated, having its corporate counsel located at Lang Michener LLP, Brookfield Place, 181 Bay Street, Suite 2500, P.O. Box 747, City of Toronto, Province of Ontario, M5J 2T7

*Respondents*

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**MOTION TO AUTHORIZE THE BRINGING OF A CLASS ACTION  
&  
TO ASCRIBE THE STATUS OF REPRESENTATIVE  
(Art. 1002 C.C.P. and following)**

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TO ONE OF THE HONOURABLE JUSTICES OF THE SUPERIOR COURT,  
SITTING IN AND FOR THE DISTRICT OF MONTREAL, YOUR PETITIONERS  
STATES AS FOLLOWS:



## I. GENERAL PRESENTATION

### A) THE ACTION

1. Petitioners wish to institute a class action on behalf of the following respective groups, of which each is a member, namely:

#### Merchant Class

- all residents in Canada who accepted as a method of payment for the sale of a good or service a credit card put onto the marketplace directly or indirectly by the Respondents, or any other group to be determined by the Court;

Alternately (or as a subclass)

- all residents in Quebec who accepted as a method of payment for the sale of a good or service a credit card put onto the marketplace directly or indirectly by the Respondents, or any other group to be determined by the Court;

#### Consumer Class

- all residents in Canada who purchased a good or service from a Merchant Class member, or any other group to be determined by the Court;

Alternately (or as a subclass)

- all residents in Canada who purchased a good or service from a Merchant Class member, or any other group to be determined by the Court;

2. The Respondents, Visa Canada Corporation ("Visa") and MasterCard International Incorporated ("MasterCard"), operate the two largest credit card networks in Canada. In 2009, the Respondents processed more than 90% of all general purpose credit card transactions in Canada, representing approximately \$240 billion in purchases;
3. Every time a customer uses one of the Respondents' credit cards to pay a merchant for a good or service, that merchant must pay a fee, commonly referred to as a "Merchant Discount Fee" or "Card Acceptance Fee". In aggregate, Card Acceptance Fees are a significant cost for Canadian merchants. In 2009 alone, merchants in Canada paid approximately \$5 billion in Card Acceptance Fees;

4. Visa and MasterCard have each implemented and continue to enforce agreements or arrangements imposing significant restrictions on the terms upon which credit card network services may be supplied to merchants (the "Merchant Restraints"). These Merchant Restraints prevent merchants from effectively encouraging customers to use lower-cost methods of payment and from declining to accept certain Visa and MasterCard credit cards, including those with higher Card Acceptance Fees. The Merchant Restraints impede or constrain competition for credit card network services, including competition with respect to Card Acceptance Fees;
5. Merchants typically pass some or all of the increased costs resulting from high Card Acceptance Fees onto their customers in the form of higher retail prices for goods and services. These costs are borne by all customers of a merchant, including those that use other methods of payment, such as cash, debit cards or credit cards with lower Card Acceptance Fees;
6. Petitioners contends that the Respondents' conduct has violated section 76 of the Federal *Competition Act*, which states that:

“(a) a person referred to in subsection (3) directly or indirectly

(i) by agreement, threat, promise or any like means, has influenced upward, or has discouraged the reduction of, the price at which the person's customer or any other person to whom the product comes for resale supplies or offers to supply or advertises a product within Canada, or

(ii) has refused to supply a product to or has otherwise discriminated against any person or class of persons engaged in business in Canada because of the low pricing policy of that other person or class of persons; and

(b) the conduct has had, is having or is likely to have an adverse effect on competition in a market.”

7. Petitioners also contend that the Respondents' conduct has caused:
  - i) the charging to the Merchant Class of credit card processing fees and associated costs at a supracompetitive rate;
  - ii) the charging to the Consumer Class of goods and services at artificially inflated prices to take into account the Merchant Class' credit card processing fees and associated costs, which have been passed on in part to the Consumer Class;

## **B) THE RESPONDENTS**

8. Respondent Visa Canada Corporation (“Visa”) is incorporated under the laws of Nova Scotia with its principal place of business in Toronto, Ontario. Visa operates the largest credit card network in Canada and processed approximately 1.6 billion credit card transactions in 2009, representing approximately \$162 billion in purchases. Visa is a subsidiary of Visa Inc., a publicly-traded corporation incorporated under the laws of the State of Delaware;
9. Respondent MasterCard International Incorporated (“MasterCard”) is incorporated under the laws of the State of Delaware. MasterCard operates the second-largest credit card network in Canada and processed approximately one billion credit card transactions in 2009, representing approximately \$79 billion in purchases. MasterCard is a subsidiary of MasterCard Incorporated, a publicly-traded corporation incorporated under the laws of the State of Delaware;

## **C) THE SITUATION**

10. Each of the Respondents operates a network that provides infrastructure and services enabling merchants to obtain authorization, clearance and settlement of transactions (collectively, "Credit Card Network Services") for merchants' customers that pay using that Respondent's own brand of credit cards;
11. Credit cards offer a number of unique features, such as deferred payment options, that distinguish them from cash, cheques, debit cards and other methods of payment;
12. Canadian merchants pay significant Card Acceptance Fees for Credit Card Network Services. Card Acceptance Fees are generally set as a percentage of the transaction price and are typically withheld from the funds reimbursed to merchants through the credit card network. For example, a Card Acceptance Fee of 2% would result in a merchant being reimbursed \$98 for a \$100 retail transaction, with the remaining \$2 constituting the Card Acceptance Fee;
13. Card Acceptance Fees reflect a number of underlying components. The most significant component of a Card Acceptance Fee, typically representing at least 80% of the total, is the "Interchange Fee" retained by the financial institutions (commonly referred to as "Issuers") that issue Visa and MasterCard credit cards to cardholders;

14. The amount of the Card Acceptance Fees (and the underlying Interchange Fee component) charged to a merchant varies depending on a number of factors, including the type of credit card used by the customer. If a customer uses a so-called "premium" credit card, such as the Visa Infinite or MasterCard World Elite, the merchant typically pays higher fees than if a customer uses a basic credit card, such as a Visa Classic or a basic MasterCard;
15. The use by a merchant's customer of another method of payment, such as cash or debit, usually results in lower costs for the merchant. For example, processing an Interac debit card transaction typically costs a merchant about 12 cents per transaction, regardless of the amount of the transaction. In contrast, if a customer uses a credit card to make a \$100 purchase, a merchant will generally pay approximately \$2.00 in Card Acceptance Fees, 17 times more than the 12 cents per transaction that would typically be paid by the merchant had the customer used Interac debit to make the same purchase;
16. Visa and MasterCard supply Credit Card Network Services indirectly to merchants through financial institutions commonly referred to as "Acquirers". In their agreements or arrangements with Acquirers, both Visa and MasterCard require Acquirers to impose significant restrictions (previously defined as the "Merchant Restraints") on the terms upon which Acquirers may supply Credit Card Network Services to merchants. Visa and MasterCard require Acquirers to impose and enforce the Merchant Restraints on merchants and require Acquirers to incorporate these restrictions into agreements or arrangements between Acquirers and merchants relating to the supply of Credit Card Network Services. Merchants must abide by the Merchant Restraints in order to obtain Credit Card Network Services, which are essential in order to accept payments by customers using a Respondent's credit cards;
17. As a result of the Merchant Restraints imposed by Visa and MasterCard, merchants are impeded or constrained in their ability to encourage their customers to use lower-cost methods of payment, such as cash, debit cards and credit cards with lower Card Acceptance Fees. The Merchant Restraints impede or constrain merchants from: (i) discouraging the use of more expensive credit cards by customers in favour of lower-cost methods of payment; (ii) declining to accept certain credit cards, such as those with higher Card Acceptance Fees; and/or (iii) applying a surcharge to transactions where the customer uses more expensive credit cards of the Respondents;
18. The Merchant Restraints impede or constrain the ability of merchants to foster competition on the level of Card Acceptance Fees. Since merchants are unable to effectively encourage customers to utilize credit cards with lower

Card Acceptance Fees or other lower cost methods of payment at the point of sale, the Respondents and other participants in each Respondent's credit card network have no meaningful incentive to compete with respect to Card Acceptance Fees, such as through lower Interchange Fees;

19. The Merchant Restraints eliminate a significant source of competitive discipline on Card Acceptance Fees by prohibiting merchants from distinguishing between credit cards, refusing to accept credit cards with higher Card Acceptance Fees or otherwise effectively encouraging customers to use lower-cost payment options. In the absence of the Merchant Restraints, merchants could choose to refuse or selectively surcharge higher-cost credit cards, thereby encouraging competition with respect to Card Acceptance Fees;
20. The Merchant Restraints influence upward or discourage the reduction of the prices paid by merchants for Credit Card Network Services on the Visa and MasterCard networks. In the absence of the Merchant Restraints, the Card Acceptance Fees paid by merchants would be significantly lower;
21. The Respondents conduct of entering into, imposing or enforcing, either directly or indirectly, the Merchant Restraints or any other agreements, arrangements, policies, rules or regulations have:
  - i) impeded or limited the ability of merchants to engage in any practice that discriminates against or discourages the use of particular credit cards in favour of any other credit card, or any other method of payment;
  - ii) impeded or limited the ability of merchants to apply surcharges on particular credit cards or set prices for customers based on the particular credit card used; and
  - iii) impeded or limited the ability of merchants to refuse to accept particular credit cards;
22. The result of such conduct has adversely affected competition in the supply of Credit Card Network Services in Canada in a number of ways, including, without limitation, by:
  - a) influencing upward or discouraging the reduction of Card Acceptance Fees. In the absence of the Merchant Restraints, Card Acceptance Fees would be lower than in the presence of the Merchant Restraints;
  - b) distorting or harming the competitive process and proper functioning of the price-setting mechanism for Card Acceptance Fees. The Merchant Restraints prevent or constrain merchants from undertaking actions to foster competition in respect of Card Acceptance Fees, such as by



- refusing to accept credit cards with higher Card Acceptance Fees or applying surcharges to such higher-cost credit cards;
- c) increasing retail prices for customers of merchants. As merchants need to cover payment processing costs, merchants pass some or all of the increased costs from higher Card Acceptance Fees onto customers in the form of higher retail prices for goods and services. These costs are borne by all customers of the merchant, including those that use other, lower-cost methods of payment, such as cash or debit cards. Given the volume of transactions and the level of Card Acceptance Fees, the costs to merchants and consumers are significant;
  - d) preventing competition with respect to Card Acceptance Fees. In the absence of the Merchant Restraints, competition between and within credit card networks would be more significant and effective. In the absence of the Merchant Restraints, merchants and consumers would benefit from competition between credit card networks with respect to the prices paid by merchants for Credit Card Network Services. Moreover, different types of cards (e.g. "premium" and "basic") within each network issued by different Issuers would be forced to compete with one another on the basis of, among other things, the price of Credit Card Network Services;
  - e) reducing competition between the Respondents, as well as between the Respondents and other rival credit card networks and within each Respondent's network. As a result of the Merchant Restraints, each of the Respondents is effectively insulated from competition from the other Respondent and from any other competitor for the supply of Credit Card Network Services. The Merchant Restraints reduce incentives for the Respondents to offer lower Card Acceptance Fees. Owing to the Merchant Restraints, the Respondents are able to maintain higher Card Acceptance Fees without the risk of losing a material volume of transactions to credit cards with lower Card Acceptance Fees or other less expensive methods of payment;
  - f) reducing output of lower-cost payment methods. The Merchant Restraints constrain or prevent merchants from promoting the use of lower-cost methods of payment and, as such, result in reduced use of these less-expensive methods of payment; and
  - g) creating or increasing already significant barriers to entry or expansion for lower cost credit card networks. The Merchant Restraints deny the ability of new entrants in the supply of Credit Card Network Services to effectively compete on the basis of lower Card Acceptance Fees. The limitations on the ability of merchants to take active steps to encourage customers to use less-costly credit card networks or types of credit cards

with lower Card Acceptance Fees makes it more difficult for such potential competitors to enter the relevant market;

23. All of the above alleged actions and conduct on the part of the Respondents appear more fully from a copy of the Commissioner of the Competition Bureau's Notice of Application filed on December 15<sup>th</sup> 2010 and produced herewith as if recited at full length herein, produced as **Exhibit R-1**;

## **II. FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY THE PETITIONERS**

9085-4886 QUEBEC INC.

24. The company 9085-4886 Quebec Inc. has had no more than fifteen (15) employees over the last twelve (12) month period;
25. It operates as a restaurant and uses the credit card processing services of TD Merchant Services;
26. It is charged 7 (seven) cents when customers use their Interac debit cards, 1.61% when customers use their regular Visa cards, and 2.10% when customers use their regular MasterCard cards, the whole as appears more fully from a copy of its November 2010 statement, produced herein as **Exhibit R-2**;
27. As can be seen from Exhibit R-2, the Petitioner is also charged an additional percentage rate when customers use a premium card put onto the marketplace directly or indirectly by the Respondents;
28. Notwithstanding the fact that the Petitioner could save money by encouraging its customers to pay by cash or Interac debit cards, it is prevented by the Respondents from imposing a surcharge to those customers that pay by using credit cards;
29. In addition, the Petitioner could also save money by either refusing to accept the Respondents premium credit cards or by imposing a surcharge to those customers that pay using such cards, but it is prevented from doing so by the Respondents;
30. Further, by the Respondents' conduct, the Petitioner is deprived of being charged credit card processing fees and costs that would reflect an open competitive market in this area and is instead paying supracompetitive rates for its credit card processing;

31. Finally, the Petitioner is not able to pass all of these costs and charges on to its customers (although some are being passed on) because the consumer simply won't bear it;
32. Petitioner's damages are a direct and proximate result of the Respondents' conduct;
33. In consequence of the foregoing, Petitioner is justified in claiming damages;

#### PETER BAKOPANOS

34. Petitioner Bakopanos is an average consumer that purchases numerous goods and services in his daily life;
35. Many, if not all, of such goods and services are from merchants that accept as payment credit cards put onto the marketplace directly or indirectly by the Respondents;
36. Due to the Respondents' conduct, he has paid inflated retail prices for the goods and services that he has purchased;
37. Petitioner's damages are a direct and proximate result of the Respondents' conduct;
38. In consequence of the foregoing, Petitioner is justified in claiming damages;

### **III. FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY EACH OF THE MEMBERS OF THE GROUP**

39. Every member of the Merchant Class processed credit cards that were put onto the marketplace directly or indirectly by the Respondents;
40. Each member of the Merchant Class has paid supracompetitive credit card processing fees and costs due to the Respondents' unlawful and anticompetitive conduct;
41. Every member of the Consumer Class has purchased goods and services from a merchant that processes credit cards that were put onto the marketplace directly or indirectly by the Respondents;
42. Each member of the Consumer Class has paid artificially inflated prices for goods and services due to the Respondents' unlawful and anticompetitive conduct;

43. All of the damages to the class members are a direct and proximate result of the Respondents' conduct;
44. In consequence of the foregoing, members of the class are justified in claiming damages;

#### **IV. CONDITIONS REQUIRED TO INSTITUTE A CLASS ACTION**

- A) The composition of the class renders the application of articles 59 or 67 C.C.P. difficult or impractical
45. The use of credit cards by consumers and the processing of these credit cards by merchants is extremely widespread in Quebec and Canada;
46. Petitioners are unaware of the specific number of residents who used credit cards and/or process credit cards, however, given their tremendous popularity, it is safe to estimate that it is in the millions;
47. Class members are numerous and are scattered across the entire province and country;
48. In addition, given the costs and risks inherent in an action before the courts, many people will hesitate to institute an individual action against the Respondents. Even if the class members themselves could afford such individual litigation, the court system could not as it would be overloaded. Further, individual litigation of the factual and legal issues raised by the conduct of Respondents would increase delay and expense to all parties and to the court system;
49. Also, a multitude of actions instituted in different jurisdictions, both territorial (different provinces) and judicial districts (same province), risks having contradictory judgements on questions of fact and law that are similar or related to all members of the class;
50. These facts demonstrate that it would be impractical, if not impossible, to contact each and every member of the class to obtain mandates and to join them in one action;
51. In these circumstances, a class action is the only appropriate procedure for all of the members of the class to effectively pursue their respective rights and have access to justice;
- B) The questions of fact and law which are identical, similar, or related with respect to each of the class members with regard to the Respondents and that which the Petitioners wish to have adjudicated upon by this class action



52. Individual questions, if any, pale by comparison to the numerous common questions that predominate;
53. The damages sustained by the class members flow, in each instance, from a common nucleus of operative facts, namely, Respondents' misconduct;
54. The recourses of the members raise identical, similar or related questions of fact or law, namely:
- a) Did the Respondents engage in any restrictive conduct to fix, raise, maintain, or stabilize the rates, fees, and/or costs of credit card processing services to merchants of goods and services?
  - b) Did the Respondents' conduct cause rates, fees, and/or costs of credit card processing services be charged to merchants at supracompetitive levels?
  - c) Did the Respondents' conduct cause the artificial inflation of the price of goods and services paid by consumers to merchants who use credit card processing services?
  - d) Were members of the class prejudiced by the Respondents' conduct, and, if so, what is the appropriate measure of these damages?
  - e) Are members of the class entitled to, among other remedies, injunctive relief, and, if so, what is the nature and extent of such injunctive relief?
  - f) Are the Respondents liable to pay compensatory, moral, punitive and/or exemplary damages to member of the class, and, if so, in what amount?
55. The interests of justice favour that this motion be granted in accordance with its conclusions;

## **V. NATURE OF THE ACTION AND CONCLUSIONS SOUGHT**

56. The action that the Petitioners wish to institute on behalf of the members of the class is an action in damages;
57. The conclusions that the Petitioners wish to introduce by way of a motion to institute proceedings are:

GRANT the class action of the Petitioners and each of the members of the class;

DECLARE the Defendants solidarily liable for the damages suffered by the Petitioners and each of the members of the class;

ORDER the Defendants to permanently cease from continuing or maintaining to engage in unlawful and anticompetitive conduct as alleged herein;

CONDEMN the Defendants to pay to each member of the class a sum to be determined in compensation of the damages suffered, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay to each of the members of the class, punitive damages, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay interest and additional indemnity on the above sums according to law from the date of service of the motion to authorize a class action;

ORDER the Defendants to deposit in the office of this court the totality of the sums which forms part of the collective recovery, with interest and costs;

ORDER that the claims of individual class members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;

CONDEMN the Defendants to bear the costs of the present action including expert and notice fees;

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the class;

A) The Petitioners request that they be attributed the status of representative of the Class

58. Petitioners are members of their respective classes;

59. Petitioners are ready and available to manage and direct the present action in the interest of the members of the class that they wish to represent and are determined to lead the present dossier until a final resolution of the matter, the whole for the benefit of the class, as well as, to dedicate the time necessary for the present action before the Courts of Quebec and the *Fonds d'aide aux recours collectifs*, as the case may be, and to collaborate with his attorneys;

60. Petitioners have the capacity and interest to fairly and adequately protect and represent the interest of the members of the class;

61. Petitioners have given the mandate to their attorneys to obtain all relevant information with respect to the present action and intends to keep informed of all developments;
62. Petitioners, with the assistance of their attorneys, are ready and available to dedicate the time necessary for this action and to collaborate with other members of the class and to keep them informed;
63. Petitioners are in good faith and have instituted this action for the sole goal of having their rights, as well as the rights of other class members, recognized and protecting so that they may be compensated for the damages that they have suffered as a consequence of the Respondents' conduct;
64. Petitioners understands the nature of the action;
65. Petitioners' interests are not antagonistic to those of other members of the class;
- B) The Petitioners suggests that this class action be exercised before the Superior Court of justice in the district of Montreal
66. A great number of the members of the class reside in the judicial district of Montreal and in the appeal district of Montreal;
67. The Petitioners' attorneys practice their profession in the judicial district of Montreal;
68. The present motion is well founded in fact and in law.

**FOR THESE REASONS, MAY IT PLEASE THE COURT:**

**GRANT** the present motion;

**AUTHORIZE** the bringing of a class action in the form of a motion to institute proceedings in damages;

**ASCRIBE** the Petitioners the status of representative of the residents included in the class herein described as:

Merchant Class

- all residents in Canada who accepted as a method of payment for the sale of a good or service a credit card put onto the marketplace directly or indirectly by the Respondents, or any other group to be determined by the Court;



Alternately (or as a subclass)

- all residents in Quebec who accepted as a method of payment for the sale of a good or service a credit card put onto the marketplace directly or indirectly by the Respondents, or any other group to be determined by the Court;

### Consumer Class

- all residents in Canada who purchased a good or service from a Merchant Class member, or any other group to be determined by the Court;

Alternately (or as a subclass)

- all residents in Canada who purchased a good or service from a Merchant Class member, or any other group to be determined by the Court;

**IDENTIFY** the principle questions of fact and law to be treated collectively as the following:

- Did the Respondents engage in any restrictive conduct to fix, raise, maintain, or stabilize the rates, fees, and/or costs of credit card processing services to merchants of goods and services?
- Did the Respondents' conduct cause rates, fees, and/or costs of credit card processing services be charged to merchants at supracompetitive levels?
- Did the Respondents' conduct cause the artificial inflation of the price of goods and services paid by consumers to merchants who use credit card processing services?
- Were members of the class prejudiced by the Respondents' conduct, and, if so, what is the appropriate measure of these damages?
- Are members of the class entitled to, among other remedies, injunctive relief, and, if so, what is the nature and extent of such injunctive relief?
- Are the Respondents liable to pay compensatory, moral, punitive and/or exemplary damages to member of the class, and, if so, in what amount?

**IDENTIFY** the conclusions sought by the class action to be instituted as being the following:

GRANT the class action of the Petitioners and each of the members of the class;

DECLARE the Defendants solidarily liable for the damages suffered by the Petitioners and each of the members of the class;

ORDER the Defendants to permanently cease from continuing or maintaining to engage in unlawful and anticompetitive conduct as alleged herein;

CONDEMN the Defendants to pay to each member of the class a sum to be determined in compensation of the damages suffered, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay to each of the members of the class, punitive damages, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay interest and additional indemnity on the above sums according to law from the date of service of the motion to authorize a class action;

ORDER the Defendants to deposit in the office of this court the totality of the sums which forms part of the collective recovery, with interest and costs;

ORDER that the claims of individual class members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;

CONDEMN the Defendants to bear the costs of the present action including expert and notice fees;

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the class;

**DECLARE** that all members of the class that have not requested their exclusion, be bound by any judgement to be rendered on the class action to be instituted in the manner provided for by the law;

**FIX** the delay of exclusion at thirty (30) days from the date of the publication of the notice to the members, date upon which the members of the class that have not exercised their means of exclusion will be bound by any judgement to be rendered herein;

**ORDER** the publication of a notice to the members of the class in accordance with article 1006 C.C.P. within sixty (60) days from the judgement to be rendered herein in LA PRESSE and the NATIONAL POST;



**ORDER** that said notice be available on the various Respondents' websites with a link stating "Notice to Visa and MasterCard users";

**RENDER** any other order that this Honourable court shall determine and that is in the interest of the members of the class;

**THE WHOLE** with costs including publications fees.

Montreal, December 17, 2010

(s) Jeff Orenstein

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CONSUMER LAW GROUP INC.  
Per: Me Jeff Orenstein  
Attorneys for the Petitioners