

In the Supreme Court of the United States

MELVIN SALVESON, EDWARD LAWRENCE,
DIANA LAWRENCE, WENDY M. ADAMS,

Petitioners,

v.

JPMORGAN CHASE & CO.; JPMORGAN CHASE BANK, N.A.,
BANK OF AMERICA CORPORATION; BANK OF AMERICA N.A.;
CAPITOL ONE, F.S.B.; CAPITAL ONE FINANCIAL
CORPORATION; CAPITAL ONE BANK; HSBC FINANCE
CORPORATION, HSBC BANK USA, N.A.; HSBC NORTH
AMERICA HOLDINGS INC.; HSBC HOLDINGS PLC,

Respondents.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit**

PETITIONERS' MOTION FOR SUBSTITUTION

Pursuant to Rule 35 of the Rules of this Court, Petitioner Melvin Salveson, by and through the personal representative of his estate and undersigned counsel, seeks to amend the caption and substitute the Personal Representative of the Estate of Melvin Salveson for petitioner Melvin Salveson in this action arising out of the underlying case *Melvin Salveson, et al. v. JP Morgan Chase & Co., et al.*, case no. 14-cv-3529-MKB-JO, which was consolidated in case no. 05-md-01720-MKB-JO. Respondents opposed Salveson's motion for substitution below.

1. Petitioners brought the underlying antitrust action on behalf of themselves and a putative class of similarly situated Mastercard and Visa

cardholders alleging that the respondent banks conspired to fix the interchange fees imposed in processing credit and debit card transactions, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and California's Cartwright Act, Cal. Bus. & Prof. Code § 16720 *et seq.* The district court dismissed petitioners' complaint in 2014 and denied their motion for reconsideration in 2016, which the U.S. Court of Appeals for the Second Circuit affirmed. *See Salveson v. JP Morgan Chase & Co.*, No. 14-CV-3529 (JG), 2014 WL 12770235 (E.D.N.Y. Nov. 26, 2014); *Salveson v. JP Morgan Chase & Co.*, 166 F. Supp. 3d 242 (E.D.N.Y. 2016); *Salveson v. JP Morgan Chase & Co.*, 663 F. App'x 71 (2d Cir. 2016).

2. After this Court's decisions in *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018) and *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019), petitioners moved for relief from final judgment under Federal Rule of Civil Procedure 60(b)(6) before the district court. The district court denied petitioners' motion. On appeal, the Second Circuit affirmed. *Salveson v. JPMorgan Chase & Co.*, No. 20-2658, Dkt. 137 (June 29, 2021).

3. Petitioners' counsel belatedly became aware of the death of Dr. Melvin Salveson and moved the Second Circuit to substitute a Personal Representative of the Estate of Melvin Salveson for Dr. Salveson and to amend the caption accordingly in connection with their appeal. With the motion, petitioners filed a declaration from Dr. Salveson's son providing notice of the death of Dr. Salveson, the status of Dr. Salveson's son Eric Salveson as the executor of the estate, and consent to substituting a successor in interest representative for his father in the litigation. The Second

Circuit denied the motion as moot because it affirmed the district court's denial of petitioners' motion for relief from final judgment. *Id.* at 3 n.1.

4. Petitioners now have filed a Petition for Writ of Certiorari with this Court and, in connection with that petition, move to substitute a Personal Representative of the Estate of Melvin Salveson for Dr. Salveson and to amend the caption to reflect such substitution.

5. Rule 35 states that "the authorized representative of [a] deceased party may appear and, on motion, be substituted as a party" if a party dies after the filing of a petition for a writ of certiorari. Rule 35 further states that if the substitution is not made within six months after the death of the party, the case shall abate. Because Rule 35 "is not jurisdictional" but rather a "procedural rule[] adopted by the Court for the orderly transaction of its business," the rule "can be relaxed by the Court in the exercise of its discretion when the ends of justice so require." *See Schacht v. United States*, 398 U.S. 58, 64 (1970). As such, "[t]he exercise of this Court's power to grant an untimely motion to substitute a party is not unprecedented." *Riegel v. Medtronic, Inc.*, 552 U.S. 804, 804-05 (2007) (citing cases).

6. Relaxing the time guidelines of Rule 35 is particularly appropriate here. Petitioners sought to substitute a personal representative of petitioner Salveson in the court below. The court denied the motion as moot in the same decision in which it denied petitioners relief, which is now the subject of petitioners' petition for a Writ of Certiorari. Petitioners' motion before the Second Circuit was proper under Rule 43, which does not contain a time limitation for filing a motion to substitute, and provides

courts with discretion regarding the time period for moving to substitute a party following his or her death. *See Servidone Const. Corp. v. Levine*, 156 F.3d 414, 416 (2d Cir. 1998); *see also Zeidman v. Gen. Accident Ins. Co.* 122 F.R.D. 160, 161 (S.D.N.Y. 1988) (noting “the intended flexibility [for] enlarging the time for substitution” under Federal Rule of Civil Procedure 25(a)).

7. As background, this case has a long history, with significant periods of dormancy, and that fact contributed to delays in notification to counsel of Dr. Salveson’s death and their filing the motion to substitute. Within about three months of Dr. Salveson’s death, the district court dismissed petitioners’ federal claims and declined to exercise jurisdiction over their state law claims. These claims have not progressed since around the time of Dr. Salveson’s death. Years later, and following an appeal, petitioners’ counsel had cause to move for relief from final judgment, based on new precedent from this Court. When the district court denied that motion, petitioners promptly filed an appeal, along with a motion to substitute. Although respondents opposed the motion for substitution below, they did not claim any prejudice from the delay in the motion. Nor did they move to dismiss the case, remove Dr. Salveson from the caption, or properly serve a statement of death to trigger the time period for filing a motion to substitute in the district court, even though they admitted they were aware of his death. Their inaction is due to the shared belief among the parties that the case was largely over by the time they became aware of Dr. Salveson’s death. Three other petitioners have ably represented the plaintiffs in this case and continue to do so. The presence of these three other named petitioners

underscores the lack of any prejudice to the respondents from the delay in substituting Dr. Salveson. Dr. Salveson was the inventor of the credit card form of payment at issue in this case. Allowing his personal representative to continue his involvement in the litigation would further the interests of Dr. Salveson and his estate while honoring his professional life's work. As set forth in the declaration filed in support of the motion to substitute below, the sole beneficiaries and successors in interest to his estate support the substitution and would work to meet the obligations of the case.

CONCLUSION

For these reasons, petitioners respectfully asks the Court to grant their motion for substitution and amendment of the caption.

November 18, 2021

Respectfully submitted,

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