UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re AMERICAN EXPRESS ANTI-STEERING RULES ANTITRUST LITIGATION	:	11-md-2221(NGG)(RER)
This Document Relates To: ALL CLASS ACTIONS	:	

THE 7-ELEVEN OBJECTORS' SUBMISSION REGARDING THE IMPACT OF THE FRIEDMAN-RAVELO COMMUNICATIONS ON THE COURT'S REVIEW OF THE PROPOSED SETTLEMENT

The 7-Eleven Objectors: 7-Eleven, Inc.; Academy, Ltd. d/b/a Academy Sports + Outdoors; Aldo US Inc. d/b/a Aldo and Call It Spring; Amazon.com, Inc.; American Eagle Outfitters, Inc.; Ashley Furniture Industries, Inc.; Barnes & Noble, Inc.; Barnes & Noble College Booksellers, LLC; Beall's, Inc.; Best Buy Stores, L.P.; Boscov's, Inc.; Brookshire Grocery Company; Buc-ee's Ltd.; The Buckle, Inc.; Euromarket Designs, Inc. d/b/a Crate & Barrel and CB2, Meadowbrook, L.L.C. d/b/a The Land of Nod; Dillard's, Inc.; Drury Hotels Company, LLC; Express, LLC; Foot Locker, Inc.; The Gap Inc.; HMSHost Corporation; IKEA North America Services, LLC; Lowe's Companies, Inc.; Marathon Petroleum Company LP; Martin's Super Markets, Inc.; Michaels Stores, Inc.; Mills Motor, Inc., Mills Auto Enterprises, Inc., Willmar Motors, LLC, Mills Auto Center, Inc., Fleet and Farm of Alexandria, Inc., Fleet Wholesale Supply of Fergus Falls, Inc., Fleet and Farm of Green Bay, Inc., Fleet and Farm of Menomonie, Inc., Mills Fleet Farm, Inc., Fleet and Farm of Manitowoc, Inc., Fleet and Farm of Plymouth, Inc., Fleet and Farm Supply Company of West Bend, Inc., Fleet and Farm of Waupaca, Inc., Mills E-Commerce Enterprises, Inc., Brainerd Lively Auto, LLC; National Association of Convenience Stores (NACS); National Grocers Association (NGA); National Restaurant Association (NRA); Pacific Sunwear of California, Inc.; Panda Restaurant Group, Inc.; Panera, LLC; PetSmart, Inc.; RaceTrac Petroleum, Inc.; Recreational Equipment, Inc. (REI); Republic Services, Inc.; Retail Industry Leaders Association (RILA); Roundy's Supermarkets, Inc.; Sears Holdings Corporation; Speedway LLC; Starbucks Corporation; Stein Mart, Inc.; Wal-Mart Stores, Inc.; The Wet Seal, Inc., and YUM! Brands, Inc.

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The 7-Eleven Objectors respectfully make this submission concerning the impact of communications between Gary Friedman, lead class counsel in this case and a senior member of the class counsel firms in MDL 1720, and Keila Ravelo, longtime counsel for MasterCard.[1]

PRELIMINARY STATEMENT

There are powerful new reasons for the Court to reject this unfair settlement that seeks to bind millions of merchants and has drawn objections from the nation's largest retailers. The Court should reject this settlement because its architect, lead counsel Gary Friedman, has betrayed the class he purports to represent by secretly collaborating with Keila Ravelo, longtime counsel for MasterCard, adversary to the merchant class.

As lead counsel, Mr. Friedman challenged American Express's anti-steering rules, including rules against surcharging. The most important goal of this litigation was injunctive relief that would revise these rules to allow merchants to use differential steering, a "dynamic" otherwise "ubiquitous" in retail, but "absent in the credit card industry."[2] Visa, MasterCard, and American Express, the three dominant players, long maintained similar, interlocking anti-steering rules, and they shared a keen common interest to block or minimize any changes that could strengthen the bargaining position of merchants through differential surcharging.

Astoundingly, while purporting to represent mandatory classes of virtually all of the nation's merchants in this case and in MDL 1720, Mr. Friedman was covertly collaborating with Ms. Ravelo, longtime counsel for MasterCard.[3] Friedman effectively treated Ravelo as a member

[1] For the Court's information, Objectors and Discover have served a motion in MDL 1720 seeking to reopen the final judgment approving the settlement in that case based on the Friedman/Ravelo communications.

[2] *United States v. Am. Express Co.*, 2015 U.S. Dist. LEXIS 20114, at *8, *164 (E.D.N.Y. Feb. 19, 2015).

[3] Even if Friedman only represented a class of American Express merchants—which he did not, and in fact put in for about $10.5 million in time and expenses in MDL 1720—virtually all Amex-accepting merchants also accept MasterCard and Visa, and thus are absent members of the mandatory classes in both cases. *See* 10-cv-4496 ECF No. 512 at 7 n.2; Decl. of Thomas J. Undlin at Exhibit A, No. 05-md-1720 ECF No. 2113-2.

of his litigation team, despite the fact that MasterCard shared American Express's interest in reducing merchant bargaining power by limiting differential steering and that Ravelo was actively defending MasterCard against similar claims brought by the merchant class in MDL 1720.[4] Yet, notwithstanding the stark opposition between the interests of MasterCard (and American Express) and those of merchants, Friedman repeatedly sought Ravelo's advice in this case.

The communications between Friedman and Ravelo reveal—at a minimum—that Friedman's multifaceted personal and professional relationship with Ravelo rendered him deeply conflicted and incapable of zealously representing the interests of merchants adverse to MasterCard's and American Express's interests.[5] Lest there be any doubt, the evidence also shows Friedman acted on these conflicts, in disregard for fundamental duties of professional responsibility—candor, confidentiality, and loyalty—owed to a lawyer's clients, colleagues, and the Court. The documents show hundreds of violations of the Court's protective order, of obligations of confidentiality, and of the duty of loyalty owed to the class. Friedman improperly took the record he had ostensibly developed to benefit the class in this case and used it to help Ravelo counsel MasterCard, even though virtually the entire class was also adverse to MasterCard in MDL 1720. And he did so to pave the way for a settlement [redacted] that served his interests and those of Ravelo, counsel for MasterCard.

I. The Friedman-Ravelo Communications Reveal Disabling Conflicts of Interest That Harmed the Class

The Friedman-Ravelo communications show a longstanding relationship that spanned decades and extended to personal, professional, and financial matters. Friedman disclosed a

[4] Friedman was a "senior member" of the MDL 1720 class counsel team. Decl. of K. Craig Wildfang ¶ 125, No. 05-md-1720 ECF No. 2113-6. Ravelo maintained a deep relationship with MasterCard over two decades as a partner at three major law firms, Clifford Chance, Hunton & Williams and Willkie Farr & Gallagher LLP.

[5] The annexed declaration from Professor Roy D. Simon, Jr., an expert in legal ethics (attached as Exhibit 1), outlines the multiple—and unprecedented—ethical conflicts reflected in the Friedman/Ravelo communications.

staggering amount of confidential information to Ravelo far too lengthy to catalog here, including key litigation and settlement strategies in both actions. While there is much that is unknown because the documents show that Friedman and Ravelo regularly arranged to speak by phone or in person, hundreds of documents highlight troubling aspects of the relationship, including frequent, covert collaboration about this case and MDL 1720. Most importantly, the documents show:

1. Friedman did not disclose his relationship with Ravelo to co-counsel or clients in this case or MDL1720. After their communications were revealed, Friedman's co-counsel stated that [redacted] ECF No. 572 at 2. Friedman and Ravelo also kept this collaboration secret from the courts and from counsel with whom Friedman cooperated under a common interest agreement.[6] Quite simply, Friedman treated Ravelo as a member of his team, sharing all aspects of the case—from draft complaints to damages analyses to appellate strategy.[7] He freely shared the settlement positions of the class and American Express.[8] According to the accompanying declaration of ethics expert Roy Simon, this amounted to a *per se* conflict that could not have been waived by the clients had it been disclosed

[6] Friedman secretly gave Ravelo vast amounts of his own work product and that of other plaintiffs suing American Express, as shown by hundreds of objections to disclosure on work product grounds. *See* ECF No. 594 at 2.

[7] [redacted]

[8] [redacted]

to them, which it was not.[9]

2. Most egregiously, Friedman worked to covertly facilitate the MDL 1720 settlement on terms favorable to MasterCard (and less favorable to the merchant class in this case and MDL 1720) to help his close friend and to set up the parity surcharging settlement currently *sub judice*. Immediately prior to a critical court conference, Friedman told Ravelo that [redacted] Over the next six months while the MDL 1720 settlement was being negotiated, Friedman provided [redacted] But Friedman provided this information to help MasterCard, directly harming the members of the American Express class, merchants who—with few exceptions—also accept Visa and MasterCard. Ravelo [redacted] While Friedman shared how American Express might react to the proposed surcharging relief in MDL

[9] *See* Declaration of Professor Roy D. Simon, Jr. ¶ 22-33, attached as Exhibit 1.

[10] Under the LPF in the MDL 1720 settlement, merchants are permitted to surcharge Visa and MasterCard only on the same terms as they are permitted to surcharge the transactions of more expensive networks such as American Express. Because of the LPF, the potential outcome of the American Express case became quite consequential to the MDL 1720 negotiations, making the material Friedman shared with Ravelo highly valuable.

[11] Due to the sensitivity of the materials—[redacted]—Objectors, as non-parties, were only permitted to review them in a conference room. [redacted]

1720, he did not share that information with his clients in MDL 1720 (comprised of a class of merchants that included virtually all of the merchants that would be bound by this settlement).[12] Nor did he inform his clients in this case that he was funneling information to MasterCard's lawyer that was not provided to class counsel or the class representatives in MDL 1720.[13] Friedman also disclosed work product from MDL 1720, including work product during the negotiations of the settlement in that case.[14] Friedman twice shared key internal memoranda detailing [redacted] as the parties were negotiating the final details of the settlement, supposedly at arm's length.[15]

3. Reflecting the depth of their relationship, Friedman and Ravelo agreed to become business partners [redacted] and explored other joint business opportunities and

[12] MDL 1720 class counsel brought an "untimely" motion to compel the production of this key evidence only after the close of discovery and settlement. *See* 05-md-1720 ECF Nos. 1531, 1760, 2/1/13 Minute Entry.

[13] [redacted]

[14] [redacted]

[15] [redacted]

investments.[16] Friedman even [redacted] Professor Simon describes these relationships as creating a "significant risk" of impropriety, a risk that clearly materialized in this case. Ex. 1 ¶ 37-38, 40.

II. The Conflicts of Interest Require Denial of Class Certification

The Supreme Court has held that class action settlements "demand undiluted, even heightened, attention . . . ." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Heightened scrutiny is even more essential in a mandatory settlement, where "[t]he legal rights of absent class members . . . are resolved regardless either of their consent, or, in a class with objectors, their express wish to the contrary." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 847 (1999). A class must receive "conflict-free counsel" who can engage in "arms-length bargaining unhindered by any considerations tugging against the interests of the parties ostensibly represented in the negotiation." *Ortiz*, 527 U.S. at 852, 863.

[16] [redacted]

[17] [redacted]

[18] [redacted]

[19] [redacted]

"[B]ecause class actions are rife with potential conflicts of interest between class counsel and class members," courts must give "careful scrutiny to the terms of proposed settlements in order to make sure that class counsel are behaving as honest fiduciaries for the class as a whole." *Eubank v. Pella Corp.*, 753 F.3d 718, 723 (7th Cir. 2014) (internal quotation and citation omitted); *see Chana Friedman-Katz v. Lindt & Sprungli (USA), Inc.*, 270 F.R.D. 150, 159-61 (S.D.N.Y. 2010) (in considering adequacy, "Court may consider the honesty and integrity of the putative class counsels, as they will stand in a fiduciary relationship with the class.").

Settlement proponents bear the burden to show adequate representation. As multiple courts have held, "Misconduct by class counsel that creates a serious doubt that counsel will represent the class loyally requires denial of class certification." *Kulig v. Midland Funding, LLC*, 2014 U.S. Dist. LEXIS 137254, at *8-9 (S.D.N.Y. Sept. 26, 2014) (citing cases).[20]

The record shows that Friedman's deep personal and professional relationship with Ravelo while she represented MasterCard, adverse to his clients in parallel litigation over similar if not identical issues, rendered him hopelessly conflicted in his representation of the class—and Friedman acted on these conflicts to the detriment of the class. Throughout the litigation, Friedman signaled to Ravelo [redacted]

[20] Applying this principle, courts have repeatedly denied class certification when class counsel have engaged in conduct less problematic than Friedman's. *See, e.g., Kulig*, 2014 U.S. Dist. LEXIS 137254, at *8-9 (certification denied because of counsel's failure to communicate settlement offer to client); *Wagner v. Lehman Bros. Kuhn Loeb, Inc.*, 646 F. Supp. 643, 661 (N.D. Ill. 1986) (certification denied where proposed class counsel was a silent accomplice in false testimony at deposition); *Taub v. Glickman*, 14 Fed. R. Serv. 2d 847, 1970 U.S. Dist. LEXIS 9352, at *6-7 (S.D.N.Y. 1970) (certification denied because of attorney's improper conduct in attempting to communicate with parties concerning a matter before the court, without even finding a violation of any disciplinary rule); *see also Panzirer v. Wolf*, 663 F.2d 365, 369 (2d Cir. 1981) ("lack of credibility rendered [plaintiff] an inadequate class representative"). Similarly, courts have found less egregious conflicts of interest to require denial of class certification. *See, e.g., London v. Wal-Mart Stores, Inc*, 340 F.3d 1246, 1249-50, 1255 (11th Cir. 2003) (finding plaintiff improper class representative where he and attorney had been close friends since high school, and had a previous business relationship); *Susman v. Lincoln Am. Corp.*, 561 F.2d 86, 95 (7th Cir. 1977) (where class counsel were plaintiff's brother and an attorney from a neighboring firm, plaintiff not proper class representative).

[redacted][21] That Friedman was willing [redacted] and the confidential American Express materials he gave to Ravelo strongly support such a case—f[redacted] speaks volumes about Friedman's dedication to the interests of this proposed mandatory class.[22]

That conclusion is powerfully supported by the vast record of improper communications between Friedman and Ravelo that breached this Court's protective order and compromised the interests of merchants. Throughout the MDL 1720 settlement negotiation, apparently to pave the way for this settlement, Friedman helped Ravelo counsel MasterCard, including by disclosing to her [redacted] critical information withheld from his clients in MDL 1720 (who are also members of this class). That Friedman understood that [redacted] should be sufficient, standing alone, to render him an inadequate representative for this class. It also should be sufficient to show that the settlement is substantively unfair, as it would lock in an anticompetitive result that would achieve nothing but to protect American Express (and the other dominant networks) from meaningful competition. Friedman [redacted]

[redacted]

[22] [redacted]

[redacted]

We call the Court's attention to this not because we are asking the Court to second guess the MDL 1720 settlement, but to highlight Friedman's betrayal of the putative class in this case. Friedman's insights about the LPF's potential impact on this case should not have been shared with an adversary whose interests with respect to surcharging were aligned with American Express. Those insights should have been deployed to maximize merchants' ability to achieve differential surcharging across the board, but instead they were used to help MasterCard's lawyer counsel MasterCard. MasterCard—only recently overtaken by American Express[23]—shared American Express's fear of differential surcharging because its business model, like American Express's, is based on charging merchants higher prices than Visa.[24] As virtually all of the members of the putative class in this case also accept MasterCard, sharing Friedman's learning, not to mention vast portions of the confidential record, with MasterCard's lawyer to help MasterCard (and ultimately American Express) lock in parity surcharging was diametrically opposed to the interests of the class. Yet that is exactly what Friedman did. Even though he knew what he was doing was wrong, Friedman shared work product and confidential American Express materials with his close friend to help her counsel MasterCard. The handiwork of such an ethically compromised and plainly inadequate lead counsel should not be approved.

If more is required to show Friedman's lack of credibility, the materials Friedman shared with Ravelo also refute some of the central arguments he made to support this settlement. To support the idea that parity surcharging has value for merchants, Friedman claimed that "[i]n

[23] [redacted]

[24] *United States v. Am. Express Co.*, 2015 U.S. Dist. LEXIS 20114, at *157 ("American Express has successfully pursued a premium pricing strategy for decades . . . maintaining [in 2013] an 8 basis point and 3 basis point premium over Visa and MasterCard, respectively, on a mix-adjusted basis.").

Australia, the overwhelming majority of surcharging is 'simple surcharging' . . . where the same surcharge amount is imposed on all credit card brands." ECF No. 511 at 5. [redacted] Friedman's distortions about Australia confirm his inadequacy.

Against this backdrop, this settlement cannot be salvaged by the presence of a mediator or co-counsel, as American Express suggests. ECF No. 582 at 8. Friedman was the decision-maker and lead lawyer. Moreover, none of the troubling facts here were disclosed, making it impossible to limit damage to the class.[26] Due process demands that a mandatory class deserves better—fully adequate and conflict-free counsel.

CONCLUSION

For the reasons stated above and in the 7-Eleven Objectors' previous submissions, the Court should deny the motion for final approval of the proposed settlement.

[25] [redacted]

[26] In the face of inadequate representation, the Second Circuit vacated a settlement despite Kenneth Feinberg's work as a mediator, because "in the absence of independent representation," it is impossible to determine the value of settled claims and therefore impossible to determine what was bargained away by conflicted counsel. *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 253 (2d Cir. 2011).

DATED: July 28, 2015
New York, New York

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