UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE AMERICAN EXPRESS ANTI-STEERING RULES ANTITRUST LITIGATION (II)

11-MD-02221-NGG-RER
ECF CASE

Judge Garaufis

THIS DOCUMENT RELATES TO:
CONSOLIDATED CLASS ACTION

THE MARCUS CORP., On behalf of itself and all similarly situated persons,

13-CV-07355-NGG-RER
ECF CASE

Plaintiff,

-against-

AMERICAN EXPRESS COMPANY, et al.,

Defendants.

PUBLIC REDACTED VERSION

MEMORANDUM OF THE TARGET OBJECTORS IN RESPONSE TO COURT ORDER DATED APRIL 30, 2015

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I. PRELIMINARY STATEMENT

For years, Gary Friedman, lead counsel for the putative class, routinely sent confidential information about this case to his close friend Keila Ravelo – who also happened to be outside counsel for MasterCard. MasterCard was directly adverse to the putative class of merchants in MDL 1720, and thus to the merchants that would make up the class in this case, including the Target Objectors.[1] Astonishingly, Mr. Friedman gave MasterCard's counsel attorney work product that discussed settlement strategy, American Express documents that are covered by a protective order, and materials subject to a common interest agreement with other counsel.

Mr. Friedman's improper conduct means that he could not provide, and did not provide, adequate representation to the class. Especially in a case seeking to certify a *mandatory* class, class members should not be saddled with lead counsel whose conduct is so reckless, so inappropriate, and so unmoored from prevailing standards of professional conduct.

Other counsel for the putative class and counsel for American Express ("Amex"), like police officers standing behind the yellow tape at a crime scene, ask the objectors to just move along and accept their assurances that there is nothing to see here. They contend it is *objectors'* burden to prove that Mr. Friedman's misconduct directly affected the pending settlement. Such arguments are wrong. It is class counsel's burden to establish that Mr. Friedman was an adequate representative and, in view of his obvious misconduct, they cannot do so.

Months have passed since this issue was first raised, and still Mr. Friedman has not told the class that he was supposed to be representing *why* he engaged in such baffling misconduct. The communications that have been disclosed show that he helped broker the surcharging relief

[1] Target Corporation, Macy's, Inc., Kohl's Corporation, the TJX Companies, Inc., Staples, Inc., J.C. Penney Corporation, Inc., Office Depot, Inc., L Brands, Inc., Big Lots Stores, Inc., PNS Stores, Inc., C.S. Ross Company, Closeout Distribution, Inc., Ascena Retail Group, Inc., Abercrombie & Fitch, OfficeMax Incorporated, Saks Incorporated, the Bon-Ton Stores, Inc., Chico's FAS, Inc., Luxottica U.S. Holdings Corp., American Signature, Inc., and Lord & Taylor Acquisition, Inc.

in MDL 1720 and negotiated the settlement in this case, that he regularly sent Ms. Ravelo confidential information about the classes' positions as the settlements were being negotiated, and that the two settlements interconnect so that this settlement would block even the limited surcharging relief in the MDL 1720 settlement. Did Mr. Friedman's inexplicable disclosures operate to disadvantage the class through those interlocking settlements – as it appears – while producing a $75 million payday for class counsel in this case? The adequacy of representation requirement exists so that the class members are not required to assume that risk.

Because class counsel cannot show that Mr. Friedman was adequate class counsel, this Court should decline to certify the settlement class and reject the proposed settlement.

II. BACKGROUND

The Target Objectors have no desire to belabor what has been said already. In brief, the disclosed communications reveal that Mr. Friedman and Ms. Ravelo were very close friends. They and their families socialized and vacationed together; [redacted] and Mr. Friedman also claims to have served as Ms. Ravelo's personal attorney on several occasions.[2]

Mr. Friedman played a major role in this case. He was co-lead counsel for the class plaintiffs, and he describes his role as "running the cases against American Express." *See* Decl. of Gary B. Friedman, ECF No. 364, ¶¶ 1, 6. Amex states that Mr. Friedman "played a leading role in the settlement negotiations in this case." Supp. Mem. of American Express, ECF No. 587, at 7 (redacted version). All the while, Mr. Friedman was sending Ms. Ravelo confidential

[2] *See, e.g.*, Letter of Jeffrey Shinder, July 2, 2015, ECF No. 633 (filed under seal); Letter of Theresa Trzaskoma, July 6, 2015, ECF No. 636 (filed under seal); Letter of Mark Reinhardt, July 6, 2015, ECF No. 635 (filed under seal); Letter of Mark Reinhardt, May 8, 2015, ECF No. 573 (redacted version); *see also* Letter of Samuel Issacharoff, March 5, 2015, *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, Case No. 05-MD-01720 (MKB) (JO), ECF No. 6431.

information about this case and about MDL 1720, where he also was representing the putative class.

The materials Mr. Friedman gave to Ms. Ravelo included documents that Amex produced pursuant to the protective order and work product covered by a common interest agreement among class counsel, counsel for the individual merchant plaintiffs, and the United States. *See* Supp. Mem. of American Express, ECF No. 587, at 1, 6; Letter of David Germaine, June 11, 2015, ECF No. 609, at 1 (redacted version [redacted] *E.g.*, LOG-A-00001191 (Ex. A); GBF00002175 (Ex. B), GBF00002190 (Ex. C). [redacted] *See* GBF00002451-55 (Ex. D); GBF00002459-63 (Ex. E); GBF00002464 (Ex. F). [redacted] (Ex. G); [redacted] (Ex. H); GBF0002631-32 (Ex. I); GBF00004105-06 (Ex. J).

Mr. Friedman has not offered this Court or the class any explanation for this conduct.

III. ARGUMENT

This Court need not dive deeply into the nature or extent of the disclosure of confidential materials by Mr. Friedman to appreciate the magnitude of his misconduct. Amex says he

committed "knowing" and "sanctionable" violations of the protective order. Supp. Mem. of American Express, ECF No. 587, at 1, 7 (redacted version). Counsel for the individual merchant plaintiffs say he engaged in "inexcusable conduct," "cavalierly and shockingly ignored his obligations to this Court, his colleagues, and his clients," and betrayed "the trust of Individual Plaintiff Merchants and their counsel as well as the parties' Common Interest Agreement." Individual Merchant Plaintiffs' Supp. Mem., ECF No. 611, at 6 (redacted version); Letter of David Germaine, June 11, 2015, ECF No. 609, at 1 (redacted version). The MDL 1720 class counsel say that they "never approved or authorized any of the communications between Mr. Friedman and Ms. Ravelo" and "had no knowledge that such communications ever occurred." Joint Case Status Report, *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, No. 05-MD-01720 (MKB) (JO), ECF No. 6467, at 5.

Amazingly, class counsel and Amex contend that co-lead counsel's misconduct should not affect this Court's evaluation of whether to certify the proposed class or to approve the settlement that Mr. Friedman negotiated. Amex argues:

> [W]hile Mr. Friedman played a leading role in the settlement negotiations in this case, his court-appointed co-counsel Mark Reinhardt participated, as did the Patton Boggs firm. . . . There is nothing in the Friedman Materials that suggests the settlement negotiations between Amex and these other Class Counsel were somehow tainted by Mr. Friedman's inappropriate conduct. They each had their own independent fiduciary duties to the Class. <u>They also each had their own economic incentive to ensure the best settlement possible to maximize their chance of receiving an attractive attorneys' fees award from the Court</u>.

Supp. Mem. of American Express, at 7-8 (redacted version) (emphasis added). Class counsel also suggest it is objectors' burden to prove that Mr. Friedman's misconduct negatively affected the settlement and thus hurt class members. *See* Letter of Mark Reinhardt, May 8, 2015, ECF No. 573, at 1 (redacted version) (objectors "can proffer no theory for how the communications

between former Willkie partner Keila Ravelo and Mr. Friedman could have influenced the class settlement").

This argument turns the adequacy of representation requirement of Rule 23 on its head. It is well-settled law that settlement proponents bear the burden of showing compliance *in fact* with the criteria of Rule 23, including adequate representation. *See Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541, 2551 (2011). By contending that class members have the burden of proving that their would-be counsel's misconduct affirmatively harmed their interests, Amex and class counsel act as if there were a presumption that class members were adequately represented. As *Dukes* confirms, there is no such presumption. *See also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 n.31(1999); *Amchem Prods. v. Windsor*, 521 U.S. 591, 626 n.20 (1997).

Class counsel have the burden of showing that Mr. Friedman *in fact* provided adequate representation – despite his repeated violations of a protective order, breaches of obligations under a common interest agreement, and routine disclosures of confidential work product to counsel for a party adverse to the class in another matter. To articulate that burden is to show why class counsel want to shirk it. No rational litigant would contend that counsel who engaged in "knowing", "sanctionable" misconduct, "violate[d] the trust" of fellow counsel, and put the interests of the class at risk through his improper disclosures of confidential information as crucial settlement terms are being negotiated provided adequate representation. Particularly in a case that has been wrongly structured as a Rule 23(b)(2) class, where class members cannot opt out, class members cannot be forced to accept representation by counsel whose behavior is so abhorrent that it fairly raises questions about what motivated that behavior – and whether it really sought to benefit not the class, but rather the personal interests of counsel and/or his long-time close friend, sometimes client, and potential business partner.

Nor can it be contended that Mr. Friedman's misconduct is not relevant to the adequacy of representation requirement. Courts must consider "the 'competency and conflicts of class counsel.'" *Ortiz*, 527 U.S. at 856-57 & n.31 (quoting *Amchem Prods.*, 512 U.S. at 626 n.20); *see Loften v. Bande*, 574 F.3d 29, 35 (2d Cir. 2009); Fed. R. Civ. P. 23(g). Because class counsel owe fiduciary obligations to putative class members, courts also should assess counsel's honesty and integrity. *See Friedman-Katz v. Lindt & Spungli (U.S.A.), Inc.*, 270 F.R.D. 150, 160 (S.D.N.Y. 2010).

As a result, "[m]isconduct 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*, 13 Civ. 4715 (PKC), 2014 U.S. Dist. LEXIS 137254, at *8-9 (S.D.N.Y. Sept. 26, 2014); *see also Creative Montessori Learning Ctr. v. Ashford Gear LLC*, 662 F.3d 913, 917, 919 (7th Cir. 2011) (vacating certification after holding that counsel's unethical conduct precluded a finding that he could adequately represent the class; counsel's actions "demonstrated a lack of integrity that casts serious doubts on their trustworthiness as representatives of the class"). As one court noted: "If . . . the lawyer, through breach of his fiduciary obligations to the class, . . . , or otherwise, demonstrates that he is not an adequate representative of the interests of the class as a whole, realism requires that certification be denied." *Culver v. City of Milwaukee*, 277 F.3d 908, 913 (7th Cir. 2002). Here, too, Mr. Friedman's record of improper, unethical, untrustworthy behavior precludes a finding that the class received adequate representation and requires that the settlement that he played a leading role in negotiating be rejected.

The fact that Mr. Friedman has not given a viable explanation for why he engaged in such misconduct compounds the adequacy of representation problem. Class counsel contend that [redacted]

[redacted] Letter of Mark Reinhardt, May 8, 2015, at 2 (filed under seal); *see also* Letter of Mark Reinhardt, July 6, 2015, ECF No. 635, at 2 [redacted] filed under seal). The notion that *counsel for MasterCard* served as a *de facto* member of the class counsel team in this case, representing the same merchant class that was *adverse to MasterCard* in another pending case, can be charitably viewed only as a fanciful, after-the-fact contrivance. It is difficult to understand how class counsel could even suggest that such an arrangement might exist consistent with the adequacy of representation requirement and ethical standards.

In a normal attorney-client relationship, clients could require Mr. Friedman to account for his improper behavior and then discharge him and reject any commitments he purported to make on their behalf. *See, e.g.*, N.Y. R. Prof. Cond. 1.4, 1.2(a), 1.16(b)(3). According to class counsel, the unfortunate members of the Rule 23(b)(2) class in this case have none of those rights. Mr. Friedman can ignore the legitimate questions raised by his conduct and can unabashedly argue that he provided adequate representation, *see* Class Plaintiffs' Mem. in Response to Question Number 1, June 2, 2015, ECF No. 585, at 9, without any explanation of *why* he acted as he did. The class cannot remove him as their counsel and must accept a settlement that he personally negotiated and that may have been tainted by his misconduct – a settlement that the Target Objectors contend is grossly unfair, anticompetitive, and runs roughshod over the contractual rights of individual merchants. Such arguments make a mockery of the adequacy of representation requirement.

Ultimately, the position of Amex and class counsel raises an important question: Who, exactly, was supposedly providing adequate representation to the members of the class? Was it Mr. Friedman, who gave confidential work product to counsel for MasterCard, violated his

obligations under a protective order, is accused of breach of trust by fellow lawyers, and recklessly put the class interests at risk while negotiating a settlement that yielded $75 million in attorneys' fees while paying no money to the class? Or was it the other class counsel, who failed to detect that Mr. Friedman was routinely breaching his obligations and then, after his misconduct was uncovered by others, have tried to shift the burden of proof onto their would-be clients so as to protect a settlement that provides counsel with a huge payment? Amex offers only the cold comfort that the adequate representation requirement should be deemed satisfied, notwithstanding Mr. Friedman's misconduct, because those other class counsel were involved and were motivated by a personal desire to maximize their own fees.

The Target Objectors submit that adequacy of representation requires more.

IV. CONCLUSION

Gary Friedman's record of misconduct establishes that the class in this case did not receive adequate representation, as Rule 23 and due process require. This Court therefore should decline to certify the settlement class and reject the proposed settlement.

DATED: July 28, 2015

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CERTIFICATE OF SERVICE

Pursuant to paragraph 24 of the Class Settlement Preliminary Approval Order, ECF Doc. 333, the undersigned counsel hereby certifies that the foregoing Public Redacted Version of the Target Objectors Objections to the American Express Class Action Settlement was filed of public record and served through the ECF system on the 29th day of July, 2015.

/s/Gregory A. Clarick
Gregory A. Clarick

EXHIBITS A-J

FILED UNDER SEAL