PUBLIC REDACTED VERSION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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IN RE: AMERICAN EXPRESS ANTI-STEERING RULES ANTITRUST LITIGATION

11-MD-02221 (NGG) (RER)

This Document Relates To:
CONSOLIDATED CLASS ACTION

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

13-CV-07355 (NGG) (RER)

Plaintiff,

- against -

AMERICAN EXPRESS COMPANY et al.,

Defendants.

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CLASS PLAINTIFFS' MEMORANDUM IN RESPONSE TO QUESTION NUMBER TWO POSED BY THE COURT IN ITS ORDER DATED APRIL 30, 2015

July 28, 2015

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INTRODUCTION

Class Plaintiffs respectfully submit this Memorandum in response to the following question posed by the Court in its Order dated April 30, 2015: "(2) How, if at all, is the court's review of the proposed class settlement affected by the documents and communications recently disclosed pursuant to [certain enumerated disclosure stipulations]?"

The answer is that none of the communications between class co-lead counsel Gary Friedman and former Willkie Farr & Gallagher LLP partner Keila Ravelo (the "Communications") detracts from the conclusion that this settlement represents the *best feasible settlement* for the merchant class, and is fair and adequate by any measure. This Court has entertained extensive briefing on the final approval motion and on the impact of Professor Hemphill's report, a full day of oral argument, and briefs on the impact of the Permanent Injunction and decisions in the DOJ case. Nowhere have the 7-Eleven, Target and Home Depot objectors (the "Nonparty Objectors") or the Individual Merchant Plaintiff objectors (the "IMPs") suggested how there could be a better resolution for the 3.4 million merchant class members. It is beyond dispute that Amex will never voluntarily allow unfettered differential surcharging in the United States. And all of the objectors have opined that Amex's ubiquitous arbitration provisions, which bar class-wide or group-wide injunctive relief, are fully enforceable – such that broad differential surcharging rights are not obtainable through the judicial or arbitral process. Meanwhile, the class settlement *does* deliver potent differential surcharging tools in the wake of the Permanent Injunction – namely, the "surcharge-based steering" options discussed in Class Plaintiffs' June 1 brief responding to the Court's Question No. 1, Dkt. 585.

The Communications alter none of those facts and should have no bearing on the Court's evaluation of the proposed settlement. At the outset, two of the three co-lead counsel firms that approved this settlement are not the subject of any allegations by objectors at all. Even if there

were anything to support the objectors' allegations – *and there is not* – the unquestioned independence of these co-lead counsel would be dispositive of the question posed by the Court. [1]

In any event, the Communications do not help the objectors here. They do not support any claim of collusion. They contain no suggestion that Mr. Friedman ever took any actions to the detriment of the merchant class, here or in MDL 1720. They actually *fortify* the conclusion that the settlement is beneficial to class members; in fact, they show the IMPs praised the settlement and the "excellent" representation provided by class counsel "to all of the merchants." And objectors' assertions regarding violations of the protective order have no bearing on the question presented. As courts in this Circuit routinely hold, "Objector[s'] … allegations of Class Counsel's ethical failures do not have any bearing on Class Counsel's qualifications, experience, or ability to conduct the litigation and therefore are not relevant to Class Counsel's adequacy." *Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 616 (S.D.N.Y. 2012).

BACKGROUND

In February 2015, Willkie informed the court in MDL 1720 that its former partner Ms. Ravelo and her husband Melvin Feliz had been charged with fraud in the District of New Jersey and that, in the course of reviewing Ms. Ravelo's emails, it had identified certain documents that it wished to bring to the attention of the court and parties. (MDL 1720 Dkt. 6406, 6417.) At a conference before Magistrate Judge Orenstein, objectors pressed for additional disclosure of personal communications between Mr. Friedman and Ms. Ravelo, conjecturing that perhaps

[1] Co-lead counsel Mark Reinhardt and his firm are seasoned practitioners with a demonstrated ability to try class actions to verdict. Over 40-plus years, they have played a lead or substantial role representing businesses in dozens of national class actions. Co-lead counsel Read McCaffrey, until recently a senior member of Patton Boggs LLP, is a Fellow of the American College of Trial Lawyers and has led scores of complex cases around the U.S. (including in this District, where he was designated co-chair in the Pan Am 103/Lockerbie case).

these documents would show a compromising romantic or financial relationship, or perhaps some involvement by Mr. Friedman in the alleged criminal conduct. (Feb. 26, 2015 Tr. 34-35.)

Following that conference, Willkie, Hunton & Williams LLP (Ms. Ravelo's former law firm) and Mr. Friedman produced more than 18,000 pages of emails, personal text messages and other documents, most reflecting professional and personal communications between Ravelo and Friedman. (*See* Declaration of Theresa Trzaskoma, dated July 28, 2015.) The Communications range in date from April 3, 1998 to February 13, 2015 and include messages to and from Ms. Ravelo's personal and law firm email accounts. *Id.* at ¶ 3. The produced documents also include records reflecting personal loans by Mr. Friedman to Ms. Ravelo and/or Mr. Feliz, and full repayment of those loans. *Id*. at ¶ 7. The documents reflect no other payments of any sort. *Id*.

The disclosure of communications between Mr. Friedman and Ms. Ravelo has been extraordinary in scope. And yet, nothing in this extensive discovery casts any doubt on the fairness of the proposed class settlement or the adequacy of class counsel's representation.

ARGUMENT

I. NONPARTY OBJECTORS' CONSPIRACY THEORY IS BASELESS

Since February, Nonparty Objectors have strained to articulate a coherent theory of how any of the Communications could have possibly affected the settlement in this case (or in MDL 1720). Most recently, they argued that the settlement agreement was the product of a supposed conspiracy between Mr. Friedman and Ms. Ravelo, one of the attorneys for MasterCard in MDL 1720. (Dkt. 594-1 at 2-3.) The gist of the theory appears to be that there was a nefarious deal in place whereby Mr. Friedman and Ms. Ravelo agreed to trade off settlement terms in this case and in MDL 1720 as quid pro quos, in order to obtain unspecified benefits for themselves. *Id.*

This conspiracy theory – in which the IMPs do <u>not</u> join (*see* Dkt. 605 at 4) – has no support. First, there is not a single reference in any of the Communications to any understanding

or arrangement between Mr. Friedman and Ms. Ravelo regarding settlement terms in the two cases. (*See* Trzaskoma Decl. at ¶ 5.) [2]

Second, neither Mr. Friedman nor Ms. Ravelo had any authority to reach any kind of agreement at all – either in MDL 1720 or here. As co-lead counsel for the merchant class in MDL 1720 wrote to Judge Reyes, Mr. Friedman was not a co-lead counsel in that case, but served in a subordinate role reporting to the lead counsel group. (Dkt. 603 at 1.) And Ms. Ravelo had no responsibility for negotiating the rules provisions on her side. As lead MasterCard counsel wrote to Judge Reyes, objectors have failed to "articulate a theory supported by any evidence that the communications affected any term of the Interchange settlement. Nor did Mr. Friedman or Ms. Ravelo have decision-making authority or play a lead role on either side of the Interchange case, which had multiple plaintiffs and defendants all represented by sophisticated counsel." (Dkt. 604 at 4.) Nor could Mr. Friedman speak for the class here, without the agreement of his two co-lead counsel. In addition to its other defects, Nonparty Objectors' collusion theory fails to account for these highly experienced co-lead counsel. (*See* fn. 1, above).

Finally, it is undisputed that none of the Communications were ever "shared with MasterCard, MasterCard's lead counsel in the Interchange Litigation, Paul, Weiss, or any of MasterCard's co-defendants in the Interchange Litigation." (Dkt. 574; *see* MDL 1720 Dkt. 6418 at 2.) And Ms. Ravelo's former employers' productions show that she never forwarded *any* Amex-related thinking or information that Mr. Friedman emailed her. (Trzaskoma Decl. ¶ 5.d.)

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[2] Moreover, the Communications that Mr. Friedman did have with Ms. Ravelo on the topic of Amex settlement terms ***post-dated*** the June 2012 MDL 1720 settlement. Apparently, only two pre-June 2012 Communications even refer to a potential resolution someday with Amex. (Trzaskoma Decl. ¶ 6 and Exs. 32 and 33.) Nothing in these communications lends any support to Nonparty Objectors' theory of a collusive tradeoff of settlement terms. Quite the contrary: both make clear that, before the Supreme Court's *Italian Colors* decision, Class Plaintiffs would ***not*** accept a parity surcharge-based resolution. (See *id*. Ex. 32, Ex. 33 at §§6.b and 6.c.)

In sum, the charges of conspiracy or collusion are not supported by any evidence, are not explained by any coherent theory and are not logically reconcilable with the facts.

II. THE COMMUNICATIONS ARE CONSISTENT WITH CLASS PLAINTIFFS' ARGUMENTS IN FAVOR OF FINAL APPROVAL

The IMPs argue that various emails and memos written by Mr. Friedman betray a belief on his part that the core settlement terms proposed here are suboptimal or even "non-approvable." (*See* Dkt. 621.) The argument is baseless.

In support, the IMPs highlight two emails. In the first, dated November 29, 2011, Mr. Friedman states that the class plaintiffs would reject settlement terms that did not include the right to surcharge differentially, and speculates that Amex would welcome such a resolution. (Trzaskoma Decl. Ex. 32.) But this email was written one and one-half years before the Supreme Court upheld Amex's arbitration clause in *Italian Colors*. In the wake of that 2013 decision, there is a real possibility that no private litigant can achieve market-wide reforms in any forum, and that 99.9% of Amex merchants can get no injunctive relief *at all*. [3] Moreover, the Durbin Amendment rate caps, which ultimately reduced debit prices by nearly half and thus made parity surcharging highly attractive, were only first "accomplished by regulation in October 2011." *U.S. v. Am. Exp. Co*., 10-CV-4496 (NGG) (E.D.N.Y. Feb. 19, 2005) slip op. at 60. Before those rate caps, and before the threat of universal differential surcharging was removed by the Supreme Court (according to all objectors), a pure parity surcharging agreement

[3] *Italian Colors* changed the settlement calculus for all merchants, including large ones. As we have explained, all merchants' interests are aligned to obtain the best possible *universally applicable* surcharging rights. No merchant – even the largest –wants to be the only one in town who can surcharge. (Reply Br., Dkt. 500-1 at 11-12.) After *Italian Colors*, there is a great risk that unfettered differential surcharging rights are not obtainable on a universal or even group basis via private actions. *Id.*

may well have been totally unacceptable to the plaintiffs. But that hardly bears on a settlement reached *after* the Durbin Amendment and *Italian Colors*.

In any event, the settlement that class counsel ultimately negotiated *does* allow for meaningful forms of differential surcharging – namely, the "surcharge-based steering" options that are enabled by the interplay between the class settlement and the Permanent Injunction issued by this Court following the DOJ trial. (*See* Dkt. 585). In the IMPs' brief on Question No. 1 (Dkt. 581), they fail even to mention these surcharge-based steering tools – a striking omission given the amount of attention devoted to surcharge-based steering possibilities at the September 2014 fairness hearing. (*See* Dkt. 585 at 2-4 & n.1).[4]

The other email that IMPs highlight is a December 1, 2013 email written by Mr. Friedman to various co-counsel and consultants (including, via a forwarding email, Ms. Ravelo) regarding negotiations with Amex. Entitled "The sole remaining, vexing issue," the email states:

> We would not have an approvable settlement agreement if our deal allowed Amex to adopt a policy under which merchants are given the following choice: "You may either (i) keep your current rate in exchange for a covenant not to surcharge, or (B) [sic] you may have the right to surcharge in exchange for a 100 bps (or 200% or whatever) increase."

(Trzaskoma Decl. Ex. 34.) The IMPs assert that the proposed class settlement would allow Amex to adopt such a policy, rendering the deal not approvable. (Dkt 621). But that assertion is false. As part of the settlement, American Express provided a binding written acknowledgement that certain identified practices – including the *exact same* hypothetical policy described in the

[4] Nonparty Objectors, for their part, are unable to dispute that the ability to offer a surcharge-free card – while surcharging other cards – would be a powerful steering tool. But they implausibly assert that merchants cannot effectively communicate that offer under the settlement because it cannot be advertised at the cash register – even though the merchant's offer may be advertised on TV, online, in any and all other media, at the store entrance, or even "strung from the rafters" across the store. (Dkt. 586 at 7.)

December 1, 2013 email – would "not be consistent with Defendants' duty of good faith and fair dealing as required under the Settlement Agreement." (Dkt. 364-6 at Example # 2; Class Pl. Br., Dkt. 362 at 15.) It is thus baseless for the IMPs to contend this email shows the settlement represents a bad deal for the class. (Dkt. 621 at 2.)

To the contrary: the Communications corroborate that the IMPs were fully supportive of the class settlement until their own damages settlement fell through. (*See* Friedman Decl., Dkt. 512, ¶¶ 2-8.) For example, the Communications confirm that lead IMP counsel Richard Arnold got on a plane to go with Mr. Friedman and co-lead counsel Mark Wendorf to visit the DOJ team in Washington and explain the virtues of the proposed settlement. [redacted]

Likewise, in a December 19, 2013 email string entitled "Amex Class Settlement Today!," IMPs' counsel Mr. Blechman wrote that class counsel's "[redacted] (Trzaskoma Decl. ¶ 6.e and Ex. 35.) Mr. Arnold echoed the sentiment, stating that the settlement capped a "[redacted]" *Id*. None of this evidence can be squared with the IMPs' current agenda-driven posturing.

III. THE COMMUNICATIONS DO NOT AFFECT THE DETERMINATION THAT CLASS COUNSEL HAS PROVIDED ADEQUATE REPRESENTATION

At the outset, any challenge to the settlement based on adequacy of representation fails because Objectors raise no challenge whatsoever to two of the three co-lead counsel firms. Mr. Reinhardt and his seasoned class action firm (*see* n.1 above) have been intimately involved in every aspect of the litigation. Co-lead counsel Read McCaffrey and his former firm Patton

Boggs LLP were likewise integrally involved in all decision-making throughout the litigation. (*See* Dkt. 587 at 7 (Amex Br.); Dkt. 372-1 (report of law firm billings); Dkt. 369 ¶¶ 4, 8 (Decl. of K. Feinberg noting participation of both firms in negotiations.)) Even if there were otherwise cause to question the adequacy of representation here – and there is none– the presence of Mr. Reinhardt and Mr. McCaffrey is reason enough to dismiss any such challenge.

In any event, the Communications themselves belie any adequacy argument. They reflect that Mr. Friedman consulted Ms. Ravelo, who has significant defense-side experience in payment systems antitrust litigation, in an effort to benefit class members and with the understanding that the communications would remain strictly confidential. The documents show, for example, that Ms. Ravelo helped Mr. Friedman at the outset of this litigation with framing the legal issues, and later was solicited for advice on discovery processes, damages approaches, settlement strategy, final approval briefing and Mr. Friedman's slide presentation at the final fairness hearing. (*See* Trzaskoma Decl., ¶ 5.c and Exs. 22-29.) And as discussed above, Ms. Ravelo never shared Mr. Friedman's communications relating to American Express with *any* of her clients or co-counsel. Among other things, this fact proves the Communications did not and were not designed to advantage MasterCard in any way.

Whether and to what extent certain Communications violated applicable protective orders are questions for another day, as Amex has recognized. (*See* Dkt. 587 at 1.) What matters for present purposes is that nothing in the Communications suggests Mr. Friedman *ever* had any purpose other than furthering the interests of the merchant class members. And nothing in the Communications indicates that he ever took any action detrimental to the members of the class, here or in MDL 1720. On the contrary, the Communications detail nonstop dedication in the service of class member welfare, prompting laudatory IMP references to "[redacted]," a

"[redacted]," and the expenditure of "[redacted]." (Trzaskoma Decl. Ex. 35.) In other words, the Communications support Mr. Arnold's statement to the Court at the preliminary approval hearing that counsel for "the class has done an excellent job of trying to represent all of the merchants here." (1/14/14 Tr. at 21).

Nor is there any basis for Mr. Shinder's poisonous innuendo that there is a "[redacted]" (Dkt. 633-1 at 6). Despite having access to thousands of email communications between Mr. Friedman and Ms. Ravelo covering more than a decade, the Nonparty Objectors can point to *nothing* that would remotely substantiate such a serious allegation, which Mr. Friedman has categorically denied. (MDL 1720 Dkt. 6431 at 2).

Nonetheless, as part of their continued effort to disrupt the settlement, Nonparty Objectors now question the adequacy of representation. The challenge is badly misguided. "When assessing the adequacy of counsel, courts are generally skeptical of ethical attacks on class counsel." *Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 616 (S.D.N.Y. 2012) (punctuation omitted). In *Morris*, an objector argued that the class settlement should be rejected because of class counsel's ethical violations. Taking note of clear precedent that such collateral allegations are best dealt with in collateral forums, the *Morris* court held: "Objector Morris's allegations of Class Counsel's ethical failures do not have any bearing on Class Counsel's qualifications, experience, or ability to conduct the litigation and therefore are not relevant to Class Counsel's adequacy"; instead, such "allegations are better suited in a disciplinary forum and do not bar class certification here." *Id*. at 617. Importantly, the *Morris* court noted that there was no basis for suggesting "that the settlement negotiations were collusive or that Class Counsel did not have sufficient experience or ability." *Id*. at 619.

The principles relied on in *Morris* are well established. *See* 1 Newberg on Class Actions § 3:42 (4th ed.) (courts have generally required parties "to bring any ethical complaints they have in the proper legal disciplinary forums and have not barred class certifications grounded on any determination of the merits of such ethical complaints"); *In re Pfizer Inc. Sec. Litig*., 282 F.R.D. 38 (S.D.N.Y. 2012) ("Defendants' contentions regarding ethical lapses can be better advanced in a proper disciplinary forum"); *In re Dynex Capital, Inc. Sec. Litig*., 2011 WL 2581755, at *6 n.8 (S.D.N.Y. 2011) (same); NYS Bar Ass'n Preamble to the Rules of Professional Conduct, Comment 12 ("[v]iolation of a Rule should not . . . create any presumption . . . warrant[ing] any other non-disciplinary remedy, such as disqualification of a lawyer in pending litigation. . . Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons") (available at NYSBA.org).

Measured against these standards, the Communications do not implicate adequacy of representation concerns. As shown above, there is simply nothing to suggest that "the settlement negotiations were collusive or that Class Counsel did not have sufficient experience or ability" to represent the Class. *Morris,* 859 F. Supp. 2d at 619. [5]

CONCLUSION

For the foregoing reasons, the Court should conclude that nothing in the recently disclosed Communications has any effect on the proposed class settlement.

Dated: July 28, 2015

[5] Finally, attorney John Pentz has filed a submission purportedly on behalf of Amex-accepting clients. Dkt. 641. The Class has previously described Mr. Pentz's long history of making objections that were found to be frivolous. Dkt. 503 at 3. The submission here contains no factual allegations whatsoever, much less any allegations that might affect the Court's analysis of the proposed settlement.

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