

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

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IN RE: AMERICAN EXPRESS ANTI-STEERING
RULES ANTITRUST LITIGATION

This Document Relates To:
CONSOLIDATED CLASS ACTION

11-MD-02221 (NGG) (RER)

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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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DECLARATION OF KENNETH R. FEINBERG

I, KENNETH R. FEINBERG, hereby declare as follows:

1. I am a lawyer, mediator and arbitrator, and a principal of Feinberg Rozen LLP. I submit this Declaration in support of the motion of the class plaintiffs in the above-captioned action to approve the class action settlement.

2. I have served as a mediator or special master in a vast number of complex litigations, including the Agent Orange class action arising out of Vietnam Veterans' exposure to the herbicide Agent Orange while serving in Vietnam, the mediation of the class action dispute involving the closing of the Shoreham Nuclear Plant on Long Island, and thousands of individual commercial disputes in various Federal and State courts throughout the Nation. I have also designed, implemented and administered compensation programs for the distribution of settlement proceeds to eligible claimants, including the Federal September 11 Victim

Compensation Fund of 2001, The Gulf Coast Claims Facility arising out of the BP Oil Spill in the Gulf of Mexico, Hurricane Katrina claimants, the Virginia Tech shootings, and the Boston Marathon bombings.

3. Both American Express and Class Counsel approached me in May 2013 to design and administer a voluntary, nonbinding and confidential mediation concerning potential settlement of the class claims in *In re American Express Anti-Steering Rules Antitrust Litigation*, and *Marcus Corp. v. American Express*. I agreed to act as mediator, along with my colleague Jacqueline Zins. At our direction, the parties commenced the mediation by furnishing us written materials. We thereafter conducted separate in-person meetings with each side.

4. In early June 2013, we held a confidential two-day mediation session at the offices of Cravath Swaine & Moore in New York. The class plaintiffs were represented by Gary Friedman, Tracey Kitzman, Mark Wendorf, Christopher Hellmich, Kate Woodall and Benjamin Brown. American Express was represented principally by Philip Korologos and Kevin Orsini of the Boies Schiller and Cravath firms, respectively, as well as in-house litigation counsel Mark Califano and the head of American Express's merchant business, Mr. Ramon Martin.

5. At my direction, the parties initiated the in-person mediation session by making formal presentations to each other concerning their positions. It was apparent from the outset that the parties' views on the substantive issues were widely divergent and their expectations for settlement were very far apart. Over the course of the two day session, each side proved deeply committed to its position and vigorously resistant to ceding any ground. Some limited progress towards settlement was made.

6. Although the June session did not achieve a comprehensive resolution, the parties were able to agree upon the basic contours of appropriate injunctive relief that would apply (in broad strokes) in the event that the Class Plaintiffs were to lose in the Supreme Court in the pending case of *American Express v. Italian Colors Restaurant*.

7. During the summer and fall of 2013, after the Supreme Court decided *Italian Colors* in favor of American Express, I engaged in numerous telephone conversations with counsel for Class Plaintiffs and American Express. On multiple occasions, attempts to reconvene the mediation were unsuccessful.

8. On November 6, 2013, we finally reconvened the mediation at Boies Schiller in New York. This session was businesslike and productive. The class plaintiffs were represented by Gary Friedman, Tracey Kitzman, Mark Wendorf, Mark Reinhardt, and Read McCaffrey. American Express was represented principally by Philip Korologos, Kevin Orsini and Mark Califano. Through shuttle mediation, we solidified and reaffirmed the terms of the injunctive settlement and confirmed that the parties shared a basic understanding concerning the scope of the release. The parties then turned to the issue of the level of attorneys' fees that American Express would pay. The parties only mediated the issue of attorneys' fees and costs *after* they had already reached accord on the basic terms of the settlement.

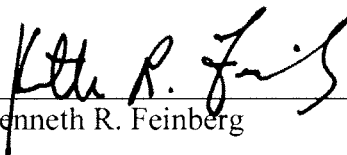
9. Through a painstaking, incremental, bid-ask process, the parties reached an agreement. The negotiation of attorneys' fees was hard fought and arms' length. American Express wanted to pay a great deal less; class counsel wanted to receive a fair amount more. Each side had to gauge whether it would have likely fared better or worse if the amount of attorneys' fees were simply left for the Court to decide. The agreed upon amount reflects a true

mediation and negotiation between sophisticated parties who were bargaining at arms' length and with dedication and zeal.

10. This was a very complicated antitrust mediation, conducted by highly experienced and able antitrust lawyers who had lived with the case for many years before mediating their differences. The lawyers on both sides were deeply committed to their long-held positions. To say they dealt with each other at arms' length is a real understatement. To say that this case was hard-fought is even more of an understatement. It was my observation that every inch of ground in this mediation was earned; nothing was given.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: April 7, 2014.



Kenneth R. Feinberg