UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
---x

IN RE: AMERICAN EXPRESS ANTI-STEERING
RULES ANTITRUST LITIGATION

This Document Relates To: 11-MD-02221 (NGG) (RER)
CONSOLIDATED CLASS ACTION
---x

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.
---x

DECLARATION OF SCOTT LEVY

Scott Levy declares, pursuant to 28 U.S.C. § 1746, as follows:

    1.   I am a member of Friedman Law Group LLP, co-lead counsel in the above-

captioned class actions, and am duly admitted to practice before this Court. I submit this

declaration in support of Class Plaintiffs' Motion for Final Approval of Settlement.

    2.   Since 2007, I have been involved in antitrust litigation related to Visa,

MasterCard and American Express's surcharging rules. In the MDL 1720 settlement process, my

firm was integral to the negotiations restructuring the surcharging rules. Since the

implementation of Visa and MasterCard's new surcharging rules, I have worked closely with

1

payment card networks, acquirers/processors,[1] independent sales organizations (ISOs),[2]
merchants and others in the industry who are looking to bring compliant surcharging solutions
to the market.

3.   On January 27, 2013, Visa and MasterCard's new surcharging rules took effect.
These rules require, among other things, that transactions with surcharges comply with the
following: the surcharge amount must be populated in separate authorization and clearance
fields;[3] the transaction receipts must include a separate line item with the surcharge amount;
and a surcharge cannot be applied to debit transactions. For merchants to surcharge in
compliance with these new rules, several significant modifications need to be made to point-of-
sale terminals as well as payment gateways[4] and to the processing platforms along which the
transactions run. Implementing these modifications is expensive and mostly outside of the

---

[1] Acquiring banks frequently contract with third parties to perform functions associated with merchant
acquiring. For example, many acquiring banks – including Bank of America and Wells Fargo – contract
with third-party processors ("processors") to perform transaction processing. Other acquiring banks
process payments in-house.

[2] ISOs solicit new merchants of behalf of acquiring banks. In addition to soliciting merchants who do not
presently accept credit cards, ISOs (and the acquirers they represent) compete to induce merchants to
switch acquirers. The ISOs working to bring surcharging solutions to market believe that the ability to
offer an automated surcharging service would provide the ISO a differentiated sales proposition and
assist with the solicitation of merchants.

[3] Processing a payment card transaction involves two steps: (1) Authorization – where an electronic
request is sent to the cardholder's bank for approval; and (2) Clearing and Settlement – where all parties
settle their accounts and the merchants get paid. The Visa and MasterCard regulations that implement
the rules changes set forth this requirement of populated data fields. The matter was not addressed in
the MDL 1720 settlement agreement itself.

[4] A payment gateway is an online application for processing payment card or other payment
transactions. It is the virtual equivalent of a physical point-of-sale terminal located in most retail
outlets.

control of merchants. The following is a list of some of the difficulties related to implementing

compliant, automated surcharging:

    a. A bottleneck at the acquirer/processor level has significantly limited

surcharging in the marketplace thus far. As mentioned above, the surcharge amount must be

transmitted in a separate authorization and clearance field. Here, the burden is squarely on the

acquirers/processors to roll out the additional fields. It is my understanding that of the nation's

eight major acquirers/processors – who collectively account for 98% of U.S. processing volume[5]

– only TSYS has fully introduced the new authorization and clearance fields. Elavon (formerly

Nova/U.S. Bank), another major processor, advised us in March that it is in the process of

rolling the fields out. Meanwhile, First Data, a payment processor that handles roughly 45% of

U.S. plastic processing volume,[6] has stated that is presently not able to "implement support"

for surcharging due to the "complexity to implement the infrastructure across various acquiring

platforms." When we recognized this roadblock, my colleague, Gary Friedman wrote to Visa

and MasterCard seeking clarification that merchants were allowed to surcharge even if their

acquirers/processors had not yet added these new fields. See Friedman memos, Ex. 1 hereto.

Visa and MasterCard both confirmed that merchants were free to surcharge even if the fields

had not been created. See Visa/MC Responses, Ex. 2 hereto. Acquirers/processors, however,

presumably remain liable to the networks if transactions with surcharges are processed on their

platforms without the surcharge amount data populating the surcharge field. For this reason,

acquirers/processors and ISOs have been reluctant to allow merchants to surcharge on their

---

[5] Mercator Advisory Group, Merchant Acquiring in 2013, p. 6,
http://www.paymentsjournal.com/WorkArea/DownloadAsset.aspx?id=19371

[6] *Id.*

systems until the new fields are created. And even after the acquirers/processors have created the fields, point-of-sale terminal manufacturers and payment gateways must be reprogrammed to populate these fields with the surcharge amount data. Until these processes are modified, merchants will be unable to surcharge in compliance with the rules.

b.   Printing receipts with the surcharge amount on a separate line item, as required in the instant Settlement Agreement and the MDL 1720 settlement agreement as well as the Visa and MasterCard rules implementing that agreement, also requires the reprogramming of point-of-sale terminals. While newer model point-of-sale terminals can be reprogrammed over an internet connection, older models require an in-person visit. Point-of-sale terminal manufacturers have been slow to upgrade terminals and firmware to meet this requirement.

c.   Because surcharging debit card transactions is not allowed, merchants must be able to recognize in real-time when a debit card is swiped.   Though debit cards can be identified by Bank Identification Numbers (BINs), very few merchants have the sophisticated processing solutions necessary to store and update BINs. While it's true that debit cards are physically labeled "debit," it is unrealistic to expect store clerks to examine each card and then apply surcharges only to credit cards.

4.   Nonetheless, solutions are just now coming onto the marketplace providing merchants with the ability to apply surcharge in an automated fashion in full compliance with the Visa and MasterCard rules. I have consulted with an ISO based in Omaha, Nebraska that has developed a compliant surcharge solution for both online and retail merchants that runs on the compliant TSYS platform. For online transactions, the payment gateway recognizes in real-

time when debit and credit cards are entered into an online hosted payment page. When a credit card is recognized, the payment gateway processes the transaction with a surcharge. And when a debit card is recognized, the transaction is processed without a surcharge. Face-to-face transactions are processed using Verifone point-of-sale terminals, which are connected to the payment gateway. These terminals are programmed to distinguish between debit and credit cards, automatically apply preset surcharges to credit card transactions and print receipts with the surcharge amount on a separate line item. It is my understanding that this ISO spent over one year to develop this solution.

5.   I have likewise consulted with representatives of a large ISO, based in Ohio, who have contracted with a technology company to develop a payment gateway that applies compliant surcharges. It is my understanding that this ISO, which processes with Elavon, spent close to a million dollars to develop this solution. This company is also developing plans to market its surcharge-enabling service broadly as a "hassle-free" solution that will minimize or eliminate merchants' credit card processing costs.

6.   Finally, in the event that First Data or other processors remain unable to roll out new authorization and clearance fields that separately break out surcharge amounts for carriage on the Visa and MasterCard networks, as mandated by the new Visa and MasterCard regulations, then our position (which we will present to Judge Gleeson if necessary) is that those regulations must be stricken because they run contrary to the clear terms of the MDL 1720 settlement agreement. As my colleague Mr. Friedman informed Visa and MasterCard in the memoranda attached as Ex. 1:

> This bottleneck, in my view, runs contrary to the Settlement
> Agreement, under which Visa and MC retained the right to

enact implementing regs that are "<u>more</u> permissive of a merchant's ability to engage in" surcharging – and not less. SA ¶ 46, 57. These regs . . . are clearly <u>less</u> permissive of merchant surcharging.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York
       April 14, 2014

_____
SCOTT LEVY

6

Exhibit 1

FRIEDMAN LAW GROUP LLP

270 Lafayette Street 14th Floor New York, New York 10012-3327
tel. 212 680.5150   fax. 646 277.1151   www.flgllp.com

Confidential Settlement Communication

MEMORANDUM

To: Mark Merley
From: Gary Friedman
Date: April 29, 2013
Re: **Problems with Visa Op Regs**

        This memo addresses two problems that have come to our attention with the surcharge provisions of the new Visa Op Regs. For the time being, please regard that the positions stated here are solely mine, as I have just now raised these issues with the leadership group. For your convenience, the new regs are at http://usa.visa.com/download/merchants/operating-regulations-merchant-litigation-settlement.pdf

PROBLEM # 1—TAX ISSUE

        The Op Reg entitled US Credit Card Surcharge Assessment (p. 8 from above link) provides a "Surcharge may only be assessed on the final total amount of the goods or services, after any discount or rebate has been applied, but before the application of any tax." The highlighted portion is inconsistent with the Settlement Agreement, which provides the surcharge may be applied "to a Visa Credit Card Transaction." ¶ 42(a). A "Visa Credit Card Transaction" does not exclude tax; indeed, the transaction submitted into interchange always includes sales and use taxes. Moreover, the merchant discount fee is the "total transaction amount" (including tax) minus whatever the merchant receives. So the Op Reg, in addition to violating the provision that allows a surcharge on the "Visa Credit Card Transaction," also wrongfully precludes the merchant from surcharging the entire merchant discount fee, by mandating that he assess the surcharge only on the pre-tax subtotal.

        In addition, the Op Reg is out of step with the treatment that state taxing authorities accord convenience fees. We checked with the NYS Department of Taxation and Finance, Sales Tax Division, and they confirmed that convenience fees are properly applied after sales tax. So it appears there is no state-based reason for decreeing that the MDR incurred on sales tax may not be passed along via a surcharge or convenience fee. We've also checked in with our acquiring industry experts, who confirm that convenience fees are applied after sales tax.

        Note this issue appears to apply only to Visa. MasterCard has not promulgated any rule relating to the sequencing of sales tax and surcharges.

PROBLEM # 2—AUTHORIZATION FIELD

        The new Op Reg entitled Surcharge Transaction Processing (link at p. 10) provides: "an Acquirer must include the U.S. Credit Card Surcharge amount in the appropriate field of the Authorization Request and Clearing Record, as specified in the applicable VisaNet Manuals."

First Data has announced, however, that they have not created any such field and so cannot support surcharging:

> For a variety of factors, including the number of states currently or looking to prohibit surcharging, as well as the complexity to implement the infrastructure across various acquiring platforms and POS environments, First Data has decided not to implement support for this enhancement.

FDC 3/25/13 Client Alert. Most other large processors appear to be in the same boat.

We doubt the intention of the Op Reg was to create a bottleneck, whereby FDC and other large processors can preclude the possibility of compliant merchant surcharging by "decid[ing] not to implement support." But whatever the intention, the Op Reg obstructs the Settlement Agreement by introducing a requirement that, in an authorization request, acquirers must include specified information (surcharge amount) in a designated field, when that designated field does not exist, unless the processor chooses to create it.

This bottleneck, in my view, runs contrary to the Settlement Agreement, under which Visa and MC retained the right to enact implementing regs that are "more permissive of a merchant's ability to engage in" surcharging – and not less. SA ¶ 46, 57. These regs (and the tax reg discussed above) are clearly less permissive of merchant surcharging.

And the authorization field requirement appears to be totally unnecessary. There is no separate authorization field for a convenience fee. Nor is there one for sales tax. We cannot see what reason is served by requiring a separate field for surcharges (unless the networks wanted to exempt surcharges themselves from interchange and network fee calculations, which I doubt.)

Note that MC has a similar requirement. See MC Regs dated 15 Jan 2013 at 5.11.2.5.

PROPOSED REMEDY

The tax issue is best addressed by deleting any reference to how tax and surcharge are sequenced. That would allow merchants to treat tax the same way that NYS does with convenience fees.

The authorization field requirement could likewise be dropped altogether. Alternatively, the Op Reg could provide that acquirers must include the amount in the field only to the extent that the processor has in fact created such a field. If the processor (FDC, Heartland, TSYS, Global Payments etc) has not created the authorization field, then neither Visa nor the processors should be allowed to require that merchants and acquirers include the surcharge amount within such a field.

*   *   *

gbf

2

FRIEDMAN LAW GROUP LLP

270 Lafayette Street 14th Floor New York, New York 10012-3327
tel. 212 680.5150   fax. 646 277.1151   www.flgllp.com

<u>Confidential Settlement Communication</u>

<u>MEMORANDUM</u>

To: Keila Ravelo
From: Gary Friedman
Date: April 29, 2013
Re: **Problem with MC Regs**

This memo addresses a problem that has come to our attention with the surcharge provisions of the new MC Rules. For the time being, please regard that the positions stated here are solely mine, as I have just now raised these issues with the leadership group.

The new Rule 5.11.2.5 (see MC Regs dated 15 Jan 2013) requires that an acquirer include the surcharge amount as a discrete data element in the authorization and clearing messages. First Data has announced, however, that they have not created any such data element field, and so cannot support surcharging:

> For a variety of factors, including the number of states currently or looking to prohibit surcharging, as well as the complexity to implement the infrastructure across various acquiring platforms and POS environments, First Data has decided not to implement support for this enhancement.

FDC 3/25/13 Client Alert. Most other large processors appear to be in the same boat.

We doubt the intention of the Rule was to create a bottleneck, whereby FDC and other large processors can preclude the possibility of compliant merchant surcharging by "decid[ing] not to implement support." But whatever the intention, the Rule obstructs the Settlement Agreement by introducing a requirement that, in an authorization request, acquirers must include specified information (surcharge amount) in a designated field, when that designated field does not exist, unless the processor chooses to create it.

This bottleneck, in my view, runs contrary to the Settlement Agreement, under which Visa and MC retained the right to enact implementing regs that are "<u>more permissive</u> of a merchant's ability to engage in" surcharging – and not less. SA ¶ 46, 57. This Rule is clearly <u>less permissive</u> of merchant surcharging.

And the authorization field requirement appears to be totally unnecessary. There is no separate authorization field for a convenience fee, as I understand it. Nor is there one for sales tax. We cannot see what reason is served by requiring a separate field for surcharges (unless the networks wanted to exempt surcharges themselves from interchange and network fee calculations, which I doubt.)

1

PROPOSED REMEDY

We believe the authorization field requirement should be dropped altogether. Alternatively, the Rule could provide that acquirers must include the amount in the field <u>only to the extent that the processor has in fact created such a field.</u> If the processor (FDC, Heartland, TSYS, Global Payments etc) has <u>not</u> created the authorization field, then neither MasterCard nor the processors should be allowed to require that merchants and acquirers include the surcharge amount within such a field.

<p style="text-align:center">*   *   *</p>
<p style="text-align:center">gbf</p>

Exhibit 2

ARNOLD & PORTER LLP

Mark R. Merley
Mark.Merley@aporter.com

+1 202.942.5321
+1 202.942.5999 Fax

555 Twelfth Street, NW
Washington, DC 20004-1206

May 24, 2013

BY ELECTRONIC MAIL

Gary B. Friedman, Esq.
Friedman Law Group LLP
270 Lafayette Street, 14th Floor
New York, NY 10012-3327

Re: MDL 1720

Dear Gary:

I write in response to your memorandum of April 29, 2013.

You cited the provision of the Visa Operating Regulations that provides as follows: "**Effective 27 January 2013,** in the U.S. Region or in a U.S. Territory, a U.S. Credit Card Surcharge may only be assessed on the final total amount of the goods or services, after any discount or rebate has been applied, but before the application of any tax." Visa intends to remove this provision from its Operating Regulations.

You also cited the provision of the Visa Operating Regulations that provides as follows: "**Effective 27 January 2013,** in the U.S. Region or in a U.S. Territory, an Acquirer must include the U.S. Credit Card Surcharge amount in the appropriate field of the Authorization Request and Clearing Record, as specified in the applicable VisaNet Manuals." Your memorandum expressed a concern that this provision could be read as an effective prohibition of surcharging for merchants whose acquirers have not yet created the appropriate field.

To address your concern, Visa clarifies that a merchant's Acquirer is responsible for complying with the provision quoted in the previous paragraph. If a merchant's Acquirer (or processor) has failed to create the appropriate data field, the merchant nonetheless may surcharge (in accordance with the other provisions of the Visa Operating Regulations) without including the Surcharge amount in that data field.

Sincerely,

Mark R. Merley

61720175v1

WILLKIE FARR & GALLAGHER LLP

WESLEY R. POWELL
212 728 8264
wpowell@willkie.com

787 Seventh Avenue
New York, NY 10019-6099
Tel: 212 728 8000
Fax: 212 728 8111

May 16, 2013

VIA ELECTRONIC MAIL

Gary B. Friedman, Esq.
Friedman Law Group LLP
270 Lafayette Street, 14th Floor
New York, NY 10012-3327

_Re:_   **_In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation_**
MDL-1720, Master File No. 05—MD-1720 (JG)(JO)

Dear Gary:

I write in response to your April 29, 2013 E-mail and memorandum concerning MasterCard Rule 5.11.2.5, which requires an acquirer for a merchant that elects to surcharge pursuant to MasterCard Rule 5.11.2 to populate certain transaction data fields with the amount of the surcharge applied by the merchant, on each surcharged transaction. As we understand it, your memorandum raises the concern that this rule could be read to effectively bar surcharging by a merchant whose acquirer is unable or unwilling to follow the data requirements of Rule 5.11.2.5.

To address your concern, MasterCard clarifies that a merchant's acquirer and/or processor is responsible for complying with Rule 5.11.2.5's requirement that the surcharge amount must be populated in the relevant data field. If a merchant's acquirer and/or processor has failed to create that data field for the merchant in accordance with Rule 5.11.2.5, then the merchant nonetheless may surcharge without including the surcharge in the relevant field. Thus, the failure of the acquirer and/or processor to provide the data field will not prevent the merchant from surcharging. MasterCard will provide written notification of this clarification to its customer financial institutions.

Please let us know if you would like to discuss this further.

Very truly yours,

Wesley R. Powell

cc: Class Counsel Leadership
   Richard Arnold, Esq.