

dl/f

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ORDER

-----X

IN RE: AMERICAN EXPRESS ANTI-
STEERING RULES ANTITRUST LITIGATION

11-MD-02221 (NGG) (RER)

-----X

THE MARCUS CORPORATION

Plaintiffs,

13-CV-7355 (NGG) (RER)

-against-

AMERICAN EXPRESS CO., et al.,

Defendants.

-----X

NICHOLAS G. GARAUFGIS, United States District Judge.

On December 23, 2013, Judge George B. Daniels of the Southern District of New York entered an order approving the Class Settlement Agreement in the Marcus Corporation action. (No. 13-CV-7355 (Dkt. 130).) He then transferred the case to this court on December 27, 2013. (No. 13-CV-7355 (Dkt. 131).) On February 11, 2014, the court granted preliminary approval of the Class Settlement Agreement in In re American Express Anti-Steering Rules Antitrust Litigation (No. 11-MD-2221), an agreement substantially the same as that in the Marcus action. (Dkt. 333.)¹ Also on February 11, the court entered an order adopting Judge Daniels's Preliminary Approval Order. (No. 13-CV-7355 (Dkt. 143).)

As previously noted, the court expects that both the parties and objectors will submit expert evidence with respect to the economic issues involved in final approval of the agreement. In seeking to understand these issues, the court would be helped by an impartial, independent

¹ Unless otherwise noted, docket numbers refer to docket numbers in In re: American Express Anti-Steering Rules Antitrust Litigation.

assessment. The court therefore appoints Professor C. Scott Hemphill of Columbia Law School as technical advisor in this case under its inherent authority. Manual for Complex Litigation, Fourth § 21.632 (2012). The court discussed this possible appointment with the parties on February 6, 2014, and has received no objection. (See Feb. 7, 2014, Minute Entry.) This Order sets forth the procedures by which Professor Hemphill will assist the court:

1. Professor Hemphill's task is to review submissions in support of and in opposition to the Class Settlement Agreement and to assist the court with respect to those issues on which he is qualified to render assistance. Such issues include, among other things, conflicting economic models, the economic value and effect of the proposed rule changes, the interaction between the Class Settlement Agreement and the settlement in In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation (No. 05-MD-1720), as well as arguments that the parties may put forward with regard to the effect of United States v. American Express et al. (No. 06-CV-4496). However, Professor Hemphill is an advisor only with regard to the court's consideration of the Class Settlement Agreement and will not advise the court on the substance of any other case or provide legal counsel.
2. To accomplish this goal, Professor Hemphill will prepare a report to be filed with the court no later than August 11, 2014. The parties and any objectors who wish to do so may file any comments on or objections to the report no later than September 2, 2014.
3. The parties and objectors shall provide Professor Hemphill with a copy of any expert reports they rely on in relation to final approval, by e-mail when appropriate. They shall also provide to him, upon his request, any other documents that the party or objector has filed in this case. The parties and objectors shall not provide Professor Hemphill with any material that has not already been filed or served in this case without first receiving

written authorization from the court. Whenever a party or objector provides any material to Professor Hemphill, the party or objector shall file a notice identifying the material provided.

4. The parties and objectors shall provide Professor Hemphill with the name and contact information for a primary and alternate point of contact for each group (such as Defendants, Class Plaintiffs, objectors, etc.). Professor Hemphill may contact the designated person should he require additional information in the record, have any questions, or need to contact any expert in this case.
5. Paragraphs 13-14 of the court's May 22, 2009, Protective Order is amended to include the court's technical advisor as a person who may receive Confidential and Highly Confidential Information as defined in that Order. (No. 08-CV-2315 (Dkt. 42).) To the extent that Professor Hemphill becomes privy to information that remains subject to the Protective Order, or to any subsequent order, he will use that information only for the purposes of writing his report and will destroy the materials at the conclusion of his work.
6. The court declines the invitation of some objectors to order disclosure of all materials submitted to Professor Hemphill, including sealed expert reports. (Feb. 21, 2014, Ltr. (Dkt. 337).) Individual Merchant Plaintiffs and Defendants oppose this disclosure. (Feb. 25, 2014, Ltr. (Dkt. 342); Feb. 27, 2014, Ltr. (Dkt. 343).) Professor Hemphill is neither a Rule 706 expert nor an adjudicator, and there is no basis for the disclosure request at this time. Should Professor Hemphill's final report rely on materials to which the objectors do not have access, they may renew their request for access at that time.
7. From time to time, the court may deem it necessary to contact Professor Hemphill or Professor Hemphill may deem it necessary to contact the court. To the extent that contact

with the court involves discussion of substantive matters, Professor Hemphill will document this contact in an appendix to his report.

8. Because Professor Hemphill has not been appointed for the purpose of providing testimony under Federal Rule of Evidence 706, he will not be deposed or cross-examined.
9. Professor Hemphill will be compensated for his work on this case at an hourly rate to be determined and reimbursed for any expenses he incurs. Professor Hemphill shall submit a monthly fee request to the court. Costs shall be borne equally by Class Plaintiffs and Defendants.

SO ORDERED.

s/Nicholas G. Garaufis

Dated: Brooklyn, New York
February 27, 2014

NICHOLAS G. GARAUFIS
United States District Judge