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 — ECF ACTION

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

Plaintiff,

- against -

AMERICAN EXPRESS COMPANY et al.,

Defendants.

13-CV-07355 (NGG) (RER)

ECF ACTION

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MEMORANDUM OF LAW IN RESPONSE TO OBJECTIONS TO CLASS COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND COSTS AND FOR LEAVE TO DISTRIBUTE SERVICE AWARDS

July 11, 2014

Class Counsel respectfully submits this memorandum of law and the accompanying Reply Declaration of Mark A. Wendorf ("Wendorf Reply Decl.") in response to objections that have been submitted to Class Counsel's Motion For An Award Of Attorneys' Fees And Costs And For Leave To Distribute Service Awards To The Class Representatives.

PRELIMINARY STATEMENT

Class Counsel's wide-ranging, decade long efforts to change American Express's anti-competitive merchant restraints have been extensively chronicled in Class Plaintiffs' opening and reply briefs in support of final approval of the proposed class settlement (the "Settlement"), as well as in our opening brief on this instant motion. Likewise, those briefs discuss in detail the ground-breaking injunctive relief that is at the core of the Settlement, and they explain how the Settlement translates into tens of billions of dollars in savings for U.S. merchants (and by extension their customers).

To bring about a settlement with American Express, Class Counsel devoted more than 176,000 hours of professional time during the course of eleven years of intense litigation and invested well over $5 million in cash.[1] The requested award of $75 million in attorneys' fees and costs, which will result in Class Counsel being compensated at less than their standard hourly billing rates, is extremely reasonable in the context of this litigation and the results obtained, and should be ordered by the Court.

[1] The April 15, 2014 Declaration of Mark A. Wendorf ("Wendorf Decl.") detailed Class Counsel's expenses and the time that Class Counsel had devoted to the litigation as of that date. Since that filing, Class Counsel has devoted and will continue to devote substantial time and resources to the litigation in order to ensure final approval of the Settlement.

RESPONSE TO OBJECTIONS

There have been but a handful of objections filed to Class Counsel's motion for attorneys' fees and costs. These objections, many of which are only nominally filed on behalf of actual merchants, represent an infinitesimal percentage of the millions of merchants in the settlement class. Class Counsel's responses to the objections are set below, with similar objections being grouped together for the Court's convenience.

A. Objections Filed By Professional Objectors

1. The Pentz Objection

John J. Pentz, who represents Unlimited Vacations and Cruises, Lasko Enterprises, and The Silk House in their collective objection, DE 395, has filed objections in scores of other class actions. As numerous courts have recognized, Mr. Pentz is a serial objector who routinely makes meritless objections to class action settlements and fee requests, and then lodges appeals to the routine denials of those objections in order to leverage a fee for himself. *See, e.g.*, *In re Wal-Mart Wage & Hour Emp't Practices Litig.*, 2010 U.S. Dist. LEXIS 21466, at *17 (D. Nev. Mar. 8, 2010) (Pentz has a "documented history of filing notices of appeal from orders approving other class action settlements, and thereafter dismissing said appeals when [he] and [his] clients were compensated by the settling class or counsel"); *Barnes v. Fleetboston Fin. Corp.*, 2006 U.S. Dist. LEXIS, at *3, 4 (D. Mass. Aug. 22, 2006) (Pentz is a "professional objector" who seeks to "make a living simply by filing frivolous appeals and thereby slowing down the execution of settlements").[2] Mr. Pentz's objection here is no different.

[2] *See also In re Initial Pub. Offering Sec. Litig.*, 721 F. Supp. 2d 210, 214, 215 (S.D.N.Y. 2010) (Scheindlin, J.) (concluding that Pentz is a "serial objector" and there was evidence that he acted in "bad faith" and engaged in "vexatious conduct"); *In re AOL Time Warner ERISA Litig.*, No. 02 Cv. 8853 (SWK), 2007 U.S. Dist. LEXIS 99769, at *3 & n.2 (S.D.N.Y. Nov. 28, 2007) (Kram, J.) (Pentz's

Pentz's objection to the attorneys' fee application is premised on the erroneous assertion that "this case when filed was primarily a case for past monetary damages, not a case to permit surcharging in the future." Pentz Obj. at 5-6. This litigation, at its core, has always been about reforming Amex's merchant rules. Class Counsel told Amex counsel the first day they met that the case was about injunctive relief first and last, and that the Class would make a decision about seeking damages after reviewing the evidence. And it is the strength of that claim for injunctive relief that allowed the Class to oppose Amex's motion to compel arbitration and to reach the Settlement.

According to the Pentz Objection, "Class Counsel should receive no compensation for the time that it spent pursuing compensatory damages on behalf of the class." Pentz Obj. at 6. There is no support for this objection. First, any time spent "pursuing" damages claims was time spent establishing Amex's *liability*. The issue of Amex's liability is central to the Class's injunctive claim, as well as any damages claims. Second, under the terms of the Settlement, every merchant that brings a damages arbitration will have the full benefit of the litigation record that Class Counsel created. If Mr. Pentz wants to seek damages for his clients in arbitrations, he is welcome to the copious documents, depositions and databases that Class Counsel amassed over the past decade. And he need not pay Class Counsel for that service.

The Pentz Objection also asserts that "if American Express were not pleased with the overall deal" it would not have agreed to pay Class Counsel's attorney's fees. Pentz Obj. at 7. Putting aside Pentz's flawed tautological logic, this assertion is fundamentally an attack on the fairness of the Settlement, and Class Counsel respectfully refers the Court to our submissions in support of final approval of the Settlement.

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objection "contained several arguments that were irrelevant or simply incorrect," were "counterproductive," and were supported by "*no* evidence whatsoever") (emphasis in original).

2. Center For Class Action Fairness Objection

The Center for Class Action Fairness claims that it is not a professional objector because CCAF pledges not to seek compensation from Class Counsel or the Court in connection with its objection. CCAF Obj. at 4, DE 414 But CCAF is paid to object to class action settlements. Although not disclosed in its brief or on its website, CCAF is a program of the Donor's Trust, Inc., which provides funding for partisan groups that promote a variety of conservative causes. *See* Wendorf Reply Decl., ¶ 2 and Ex. A. In the case of CCAF, that cause is combating class actions by objecting broadly to attorneys' fee petitions. Whatever its political merits, this objective is at direct odds with the interests of the millions of merchants that are represented by the Class. And it is notable that CCAF's objection does not seek different or more stringent revisions of Amex's merchant rules, as CCAF has no interest in actually improving the terms of the Settlement, but rather is committed to discouraging plaintiffs and counsel from bringing class actions in the first instance.[3]

What CCAF does argue is that American Express's agreement to pay Class Counsel's fees directly should be viewed as an indicator that there is a "conflict of interest between class counsel and the class," CCAF Obj. at 29, relying on the Ninth's Circuit's decision in *Jones v. GN Netcom, Inc. (In re Bluetooth Handset Prods. Liab. Litig.)*, 654 F. 3d 935 (9th Cir. 2011). But *Bluetooth* only stands for the proposition that courts, in cases with agreed-upon fees, should be "particularly vigilant" for "signs that class counsel have allowed pursuit of their own self-interests . . . to infect the negotiations." 654 F. 3d at 947. In this case, Class Counsel welcomes the highest possible levels of scrutiny and vigilance. While we do not believe *Bluetooth* has any

[3] Class Counsel's arguments here apply equally to the objection of Kevin Scheunemann (DE 465), an objector whose work has earned him a citation for frivolous litigation and who raises the same objections as CCAF. *See* Wendorf Reply Decl., ¶ 4.

application here, that issue is moot: we already assume that the Settlement will be examined under the strictest level of scrutiny, and we are confident it meets that standard.

In addition, CCAF claims that Class Counsel should have submitted "detailed lodestar records to allow the court (and objecting class members) to vet them properly."[4] CCAF Obj. at 29. Class Counsel disagrees that the law of this Circuit demands any such review. None of the cases cited by CCAF in support of its request for detailed billing records involved a class settlement; rather, all involved contested fee shifting pursuant to civil rights and labor laws. *See Scott v. City of New York*, 626 F.3d 130 (2d Cir. 2010) (FLSA § 216(b)); *NYS Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136 (2d Cir. 1983) (42 U.S.C.§ 1988); *Lacovara v. Hard Rock Café, Int'l (USA) Inc.*, 2012 U.S. Dist. LEXIS 24023 (S.D.N.Y. Feb. 24, 2012) (New York State Labor Law).

The documentary standards applicable to court-approved fees in civil rights and FSLA cases are not applicable in class action settlements where fees are being paid by a defendant directly, or even where they are drawn from a common fund. *See, e.g., In re Payment Card Interchange Fee & Merch. Discount Antitrust Litig.*, 2014 U.S. LEXIS 3351 (Jan. 10, 2014) (awarding attorneys' fees and costs based upon lodestar submissions that provided summary information as to time billings and did not include detailed time billing records); *Blessing v. Sirius XM Radio, Inc.*, 2011 U.S. Dist. LEXIS 94723, at *17 (S.D.N.Y. Aug. 24, 2011), *aff'd*, 507 Fed. App'x 1 (2d Cir. 2012) (awarding attorneys' fees and costs in negotiated fee context

[4] It bears noting that Lead Counsel, prior to its submission to this Court of lodestar information, did undertake the review that CCAF urges, including reviewing time records to ensure that work was performed by attorneys with the appropriate level of experience, in particular that junior-level work was performed by junior attorneys, that work was not needlessly duplicated, that billings did not increase post-settlement, that appropriate rates and sound billing judgment was exercised, and that the Court was apprised of the multiplier that was sought (which in this case is a negative multiplier). *See* CCAF Obj. at 31; Wendorf Decl., ¶¶ 15-20. CCAF does not dispute that Lead Counsel undertook the extensive review of time and expense records detailed in April 15, 2014 Wendorf Declaration, nor does it offer any reason why the Court should find Lead Counsel's efforts insufficient.

with counsel submitting summary information regarding time billings). Class Counsel's submission of time and expense summaries rather than detailed time billing records is wholly consistent with the practice in this district and Circuit. Requesting the Court to review over a decade of billing records – and worse yet, overseeing inevitable satellite litigation by professional objectors over those records – would be an enormous waste of judicial resources. The lodestar information provided by Class Counsel is more than sufficient for this Court to, as CCAF admonishes, "avoid awarding 'windfall fees' and . . . avoid every appearance of having done so." *Detroit v. Grinnell Corp.*, 495 F.2d 448, 469 (2d Cir. 1974).

B. O'Reilly Automotive, Inc., Autozone, Inc. and Spirit Airlines

O'Reilly Automotive, Inc., Autozone, Inc. and Spirit Airlines each filed nearly identical six paragraph objections to the settlement. DEs 460, 461, 462 (collectively, the "O'Reilly Objectors") In the last paragraph of each filing, the O'Reilly Objectors state that the Settlement "takes away valuable rights of the Company" and "does not provide for needed relief" and, as such, "Amex's payment of up to $75 million to the Class lawyers and $0 to the Class seems unreasonable." O'Reilly Obj. at ¶6.

It is not clear if the O'Reilly Objectors statements are challenging the fees or approval of the Settlement or both.[5] As stated above, the Settlement readily withstands the highest level of scrutiny by the Court.

Class Counsel's fee petition does as well. Neither the O'Reilly Objectors nor any other objector dispute that negotiated fees should be fully approved where, as here, "the fee was negotiated only after settlement terms had been decided and did not . . . reduce what the class

[5] The objections of The Water Brewery (DE 478), Yoga Loka (DE 398) and Erich Newmann (DE 467) similarly focus primarily on the perceived value of the Settlement compared to the request for attorneys' fees and costs. Class Counsel's response to the O'Reilly Objectors apply equally to those objections.

ultimately received." *Blessing v. Sirius XM Radio, Inc.*, 507 Fed. App'x 1, 4 (2d Cir. 2012). *See also, Dupler v. Costco Wholesale Corp.*, 705 F. Supp. 2d 231 (E.D.N.Y. 2010); *Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55 (S.D.N.Y. 2003). Likewise, neither the O'Reilly Objectors nor any other objector dispute that Class Counsel's fee request is reasonable under the Second Circuit's test established in *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000). As set forth at length in Class Counsel's opening brief (pages 11-18), each of the six *Goldberger* factors is readily satisfied and demonstrates the reasonableness of Class Counsel's request for an award of $75 million in attorneys' fees and costs.

C. Remaining Objections

Many of the remaining objections simply rail against the size of the fee request in absolute terms – *e.g.*, the fee request is "TRULY PART OF THE PROBLEM WITH THIS SOCIETY" (Goodhardt-Walker Obj. at ¶ 4, DE 471); "The lawyer's fees are not only absurd, they are OBSCENE!!" (Baily H. Squier Obj. at ¶ 3, DE 438). Other objections plainly misapprehend the terms of the Settlement. *See, e.g.*, Assistech Special Needs Obj. at ¶ 2, DE 432 (stating that Visa, MasterCard and Discover cannot be surcharged and that "[t]here is no reason why we merchants should pay for these [attorney] fees[.]"); I.L. "Lonnie" Morris, CPA Obj. at ¶ 3, DE 486 (asserting the court could create a common fund and "award the remaining 70% to the class."); NTT Corp. Obj. at 4, DE 481 (stating that the settlement "forces all class members . . to waive all rights to seek compensation for their economic damages")

Plainly, none of these objections have merit.

D. Class Counsel's Request For Expenses and For Leave to Distribute Service Awards

None of the objectors appear to take issue with Class Counsel's request for costs, which is included in the requested award of $75 million. Nor do the objectors contend that Class

Counsel should not be permitted to distribute service awards to the class representatives. Two objectors – NTT Corporation and Mr. Schuenemann – reference incentive awards. NTT Corporation incorrectly states that "class representatives will receive undisclosed incentive payments". DE 481. The amount of each service award that Class Counsel seeks to distribute, and the reason for the award, are clearly set forth in Class Counsel's opening brief at pages 19-20. Mr. Schuenemann includes in his objection several inapposite paragraphs, which were copied from an objection filed (and recently rejected) in another litigation and to which no rational response is even possible. Wendorf Reply Decl., ¶ 4 and Ex. B.

The essentially unopposed service awards that Class Counsel seek leave to pay are extremely modest given the time that each class representative devoted to the litigation and in accord with the practice and decisions of courts in the Second Circuit. *See, e.g.*, *Jermyn v. Best Buy Stores, L.P.*, 2012 U.S. Dist. LEXIS 90289 (S.D.N.Y. June 27, 2012); *Dupler*, 705 F. Supp. at 245-46.

CONCLUSION

For the foregoing reasons, Class Counsel respectfully requests that the Court approve the application for attorneys' fees and costs in the amount of $75,000,000 and grant Counsel leave to pay services awards to the class representatives totaling $109,000 from the award of attorneys' fees and costs.

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