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 SUPPORT OF CLASS COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND COSTS AND FOR LEAVE TO DISTRIBUTE SERVICE AWARDS

April 15, 2014

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Class Counsel[1] respectfully submits this memorandum in support of their motion for an award of attorneys' fees and costs and for leave to distribute service awards to the class representatives in the above-captioned cases.

INTRODUCTION

For the past eleven years, Class Counsel has worked without interruption to challenge the anti-competitive practices of American Express and to provide U.S. merchants market-based tools for combating the high and seemingly intractable costs of payment card acceptance. To wage this fight, Class Counsel expended either $83.5 million or $99 million worth of attorney and paralegal time (depending on how one accounts for time-value-of-money); invested more than $5 million in cash, to cover out-of-pocket expenses including experts and database management; and, in some cases, sacrificed entire law practices. *See* accompanying Declarations of Mark A. Wendorf, ¶¶ 11-12, and Gary B. Friedman, ¶ 4.

The risks were enormous at every stage, as was the opposition that Class Counsel encountered from American Express and its formidable legal team on matters large and small. Along the way, co-lead counsel and some 30 or so law firms working under their direction participated in over 160 depositions; reviewed and produced documents totaling in the many tens of millions of pages; fully briefed and argued cross-motions for summary judgment supported by hundreds of exhibits; fully briefed and argued *Daubert* motions directed at three separate experts; extensively briefed and argued motions to dismiss on statutes of limitations and arbitration grounds; prepared numerous expert reports and took and defended multiple expert

[1] As used in this memorandum, the term "Class Counsel" refers to the three co-lead counsel firms – Friedman Law Group LLP, Patton Boggs LLP and Reinhardt Wendorf & Blanchfield – as well as the 31 other firms that worked on these cases under their direction, as identified in the accompanying Declaration of Mark A. Wendorf.

depositions on merits and class certification issues; fully briefed and argued a class certification motion; and prosecuted an appeal through the Second Circuit (three separate rounds of briefing plus oral argument) and to the U.S. Supreme Court (two separate rounds of certiorari briefing and one full-blown merits proceeding).

This massive and sustained effort resulted in the settlement that is currently before the Court for final approval. As more fully detailed in Class Plaintiffs' Memorandum of Law In Support of Final Approval of Class Settlement ("Final Approval Mem."), filed contemporaneously with the instant motion, the proposed settlement would give U.S. merchants, for the first time ever, the ability to use transparent price signals at the point of sale to recoup their credit card acceptance costs and to induce their customers to use dramatically less expensive forms of payment – principally debit cards, the price of which is regulated by the Federal Reserve. While no one can predict with precision the level of savings that U.S. merchants will realize from the instant settlement, Class Plaintiffs' expert Dr. Alan Frankel has shown that if a mere 10% of U.S. merchants (measured by volume) come to surcharge – and, by way of illustration, some 40% of Australian merchants are now surcharging – then U.S. merchants will save more than $37 billion over a ten year period. *See* Final Approval Mem. at 7.

Class Counsel now seeks approval of an agreed-upon award of $75 million to be paid by American Express in satisfaction of all attorneys' fees, expenses and service awards. While the fees and costs incurred by Class Counsel were substantially higher, as discussed below, the $75 million figure represents a compromise – a settlement reached by sophisticated parties who were bargaining with the assistance of a nationally respected mediator, Kenneth R. Feinberg. As Mr. Feinberg affirms in a supporting declaration submitted together with this motion, the parties only negotiated attorneys' fees *after* agreeing upon the injunctive relief and basic release terms that

comprise the core of this settlement. Feinberg Decl., ¶ 8. At that point, as Mr. Feinberg further attests, the parties engaged in hard bargaining, at arms' length, and with their own money. *Id.* at ¶ 9. The parties were not bargaining with money that would otherwise go to class members, as in a common fund case. Every dollar that American Express did not agree to pay in fees and costs is a dollar it gets to keep. American Express wanted to pay less, and Class Counsel wanted to receive more. The parties struck an arms' length compromise to which this Court should give full effect.

As shown in Section I of the Argument, courts recognize 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 ultimately received." *Blessing v. Sirius XM Radio, Inc.*, 507 Fed. App'x 1, 4 (2d Cir. 2012). As further shown in Section II, the fee would also be justified as reasonable under the familiar *Goldberger* standard, even if the parties had not reached agreement. Additionally, as shown in Sections III and IV, the out-of-pocket costs and service awards requested on this application are reasonable and should be approved.

FACTUAL BACKGROUND

The procedural history relevant to this motion is set forth in detail in the accompanying Final Approval Memorandum, at 8-13, and will not generally be repeated here. However, certain features of the lengthy litigation history that preceded the instant settlement are especially relevant on this attorneys' fee application. Also, because the *Marcus Corp. v. American Express Co.*, 13-CV-07355 (NGG) (RER) ("*Marcus*") and *In re American Express Merchants Litig.*, Master File No. 03-CV-9592 ("*Italian Colors*") matters may be less familiar to this Court than the *In re American Express Anti-Steering Rules Antitrust Litig.*, 11-MD-2221 (NGG) (RER) ("*Amex ASR*"), certain nuances of those cases warrant mention here.

The initial multi-million page tranches of document production in this case were made in 2005 and 2006. At that time, before the 2007 amendment of Federal Rule of Civil Procedure 34, producing parties were not obligated to produce electronic documents in a searchable format. And in the *Marcus* litigation, Amex produced roughly two million pages in a "naked TIFF" format – without meta-data, without optical character recognition ("OCR") and utterly unsearchable. Indeed, Class Counsel's vendors determined that the OCR had been stripped off the documents before they were produced, and the vendors' efforts to apply OCR were imperfect and unreliable. The initial years of document review in this case were thus extremely labor intensive. Manual review proceeded on a staged basis, with line reviewers making an "in-or-out" determination before senior reviewers categorized the documents produced. Lacking a means to force American Express to produce documents in a more user-friendly way, Class Counsel was compelled to incur many millions of dollars in document review time billing.

Still, laborious though it was, the *Marcus* document review paid off handsomely. As discussed in the Final Approval Memorandum, it was *Marcus* discovery that unearthed the "critical loss" evidence that all plaintiffs groups, including the Government and the Individual Merchant Plaintiffs, continue to rely upon in demonstrating Amex's market power. And it was *Marcus* discovery that demonstrated to Class Counsel and our economic experts that Amex's anti-steering rules (and those of its competitors) were exerting a profound anticompetitive effect on the marketplace. Indeed, packaging the fruits of its discovery efforts in *Marcus*, Class Counsel went to great lengths to encourage the Department of Justice to investigate and challenge Amex's rules, including submitting a white paper to the department in October 2009 entitled "Why The Antitrust Division Should Challenge American Express's Anti-Steering Rules."

Like *Marcus*, the efforts undertaken in prosecuting the *Italian Colors* appeal conferred a direct and, indeed, profound benefit on class members. Of course, the headline feature of *Italian Colors* is a Supreme Court decision that broadly upholds Amex's collective action ban as against a challenge rooted in the "vindication of rights" doctrine. *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2309-11 (2013). However, the top level argument of the Petitioner American Express and especially its amicus Chamber of Commerce, was that there is no vindication of rights doctrine constraining the mandate of FAA § 2 to enforce arbitration agreements precisely as they are written. Amex and the Chamber argued that the Class Plaintiffs were relying on mere *dicta* that the Court should disavow.[2] And Amex lost that point: the Court did not disavow the vindication rule but reaffirmed it in a way that allowed Class Plaintiffs to argue before this Court that Amex's arbitration clause is unenforceable to the extent that it would ban merchants from seeking class-wide reform of Amex's rules and practices. *See In re: American Express Anti-Steering Rules Antitrust Litig.*, 11-md-02221, DEs 262-269. This was a key point driving settlement: If Amex and the Chamber had prevailed in their top-level argument at the Supreme Court, we almost certainly would not be here. Private litigation would have been totally neutered as a force for market reform, leaving no room for a transformational settlement like this one.

This Court is more generally familiar with the extensive discovery efforts in the *Amex ASR* litigation, where the private plaintiffs' activities were coordinated with those of the Government under carefully negotiated protocols approved and then administered by Judge

[2] Brief of The Chamber of Commerce of The United States of America and Business Roundtable as *Amicus Curiae* in Support of Petitioners in *American Express Co. v. Italian Colors Restaurant*, No. 12-133, 2012 U.S. S. Ct. Briefs LEXIS 5493, at *21-22 (Dec. 28, 2012); Reply Brief For Petitioners in *American Express Co. v. Italian Colors Restaurant*, No. 12-133, 2012 U.S. S. Ct. Briefs LEXIS 5472, at *26, 37-38 (Dec. 21, 2012).

Reyes. One of Class Counsel's primary areas of focus was on unearthing the details of the Australian experience with legal surcharging. Starting long before the MDL transfer of the *Amex ASR* litigation to this Court from Judge Pauley, Class Counsel dove into the task of marshalling a record of the Australian surcharge experience that is unavailable anywhere else in the world. Another area of Class Counsel's focus was unpacking the byzantine and often incompatible pricing data of Amex and its competitors to capture a true picture of their relative rate structures.

Among the key findings, which were instrumental in structuring the instant settlement, was evidence concerning the extent to which cardholders faced with a surcharge will pay the surcharge, or switch to a non-surcharged substitute payment form, rather than leave the store. *See* Frankel Decl., ¶ 55. Also highly relevant was the overwhelming evidence that widespread differential surcharging in Australia came about because of a giant gap in pricing between Amex and rate-regulated substitute products, just like the giant gap in this country between credit cards and debit cards. Final Approval Mem. at 22.

All of this evidence, and much more, led Class Counsel to negotiate a settlement that provides merchants the ability to leverage the giant gap between credit cards and Durbin-regulated debit cards by imposing surcharges on credit cards, but not on debit cards, and inducing consumers to switch to the non-surcharged substitute payment form.

ARGUMENT

I. THE COURT SHOULD APPROVE THE REQUESTED FEES AND COSTS AS A REASONABLE, MARKET-SET FEE AGREEMENT

A. The Governing Standard

Courts in the Second Circuit routinely give effect to agreements to pay class counsel's fees where "the fee is a separate obligation that will not come out of the Settlement amount, and

was negotiated after the terms of the Settlement had been agreed upon." *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, 4 (2d Cir. 2012). *See also Dupler v. Costco Wholesale Corp.*, 705 F. Supp. 2d 231, 243 (E.D.N.Y. 2010) (enforcing agreement to pay fees where "the requested attorneys' fees . . . will not be drawn from a common fund, but rather paid directly by defendant" and "the issues of attorneys' fees was not raised during the Settlement negotiations until after the parties had already agreed upon the benefit to the class"); *Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 71 (S.D.N.Y. 2003) (fact that fees were negotiated separately from settlement weighed in favor of approval).

In cases outside the "common fund" context, the Supreme Court has made clear that settlements of requests for attorneys' fees should be encouraged and respected; indeed, it is only where parties *fail* to reach agreement on fees that courts should scrutinize fee requests: "A request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee. Where settlement is not possible, the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Courts in the class action context routinely apply these principles, noting that "[t]he negotiation of fee agreements is generally encouraged." *In re Sony Corp. SXRD Rear Projection TV Class Action Litig.*, 2008 U.S. Dist. LEXIS 36093, at *43 (S.D.N.Y. May 1, 2008), citing *Hensley*, 461 U.S. at 424.

The process of determining a reasonable fee in a case like this one, where the parties have reached an arms' length agreement, is totally distinct from the exercise undertaken by courts in the common fund class action damages settlement context. In a common fund case, the district court exercises its role as a fiduciary safeguarding the funds that would otherwise go to the class

members as it evaluates the class counsel's fee request. *See, e.g., Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423 (2d Cir. 2007); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F. 3d 96 (2d Cir. 2005). In these familiar scenarios, where class counsel's fees come out of class settlement funds, defendants' agreements to fee amounts are fairly meaningless. Defendants can and do costlessly agree to give "clear sailing" to class counsel's fee application, when it is the class footing the bill.

When the defendant itself is paying the fees with its own money, courts recognize that a distinct legal framework applies: "In a case where the attorneys' fees are to be paid directly by defendant, and, thus, 'money paid to the attorneys is entirely independent of [the relief] awarded to the class, the Court's fiduciary role in overseeing the award is greatly reduced, because there is no conflict of interest between attorneys and class members.'" *Dupler*, 705 F. Supp. at 243, quoting *McBean v. City of New York*, 233 F.R.D. 377, 392 (S.D.N.Y. 2006). *See also Jermyn v. Best Buy Stores, L.P.*, 2012 U.S. Dist. LEXIS 90289, at *24 (S.D.N.Y. June 27, 2012) ("Thus, regardless of the size of the fee award, class members . . . will receive the same benefit; the fee award does not reduce the recovery to the class. Under these circumstances, the danger of conflicts of interest between attorneys and class members is diminished"), quoting *In re Sony Corp. SXRD Rear Projection TV Class Action Litig.*, 2008 U.S. Dist. LEXIS 36093, at *43; *Steinberg v. Nationwide Mut. Ins. Co.*, 612 F. Supp. 2d 219, 224 (E.D.N.Y. 2009) (noting "with approval that the fee award will not be drawn from the common fund but will be paid directly by [defendant]. In this regard, the fee award, however substantial, will have no effect on the monetary relief afforded to the class."); *Blatch v. Hernadez*, 2008 U.S. Dist. LEXIS 92984, at *21-22 (S.D.N.Y. Nov. 3, 2008) ("In light of the fact that this settlement does not involve a settlement fund from which attorneys' fees are being allocated and includes the condition that if

the parties cannot agree the Court will determine the appropriate amount, the Court finds this aspect of the settlement to be reasonable.")

In these circumstances, where "denial of fees earned by plaintiffs' counsel . . . would accrue only to the benefit of defendants," *Schneider v. Citicorp Mortgage, Inc.*, 324 F. Supp. 2d 372, 379 (E.D.N.Y. 2004), courts recognize that there is no fiduciary interest to be served by failing to respect a fee agreement that was reached without collusion or fraud. In *Schneider*, the FTC objected to counsel's fee application, arguing that even if the fees did not come from class members' pockets, they will be borne by the defendant's shareholders and future customers. The court rejected that argument: "This statement ignores that the court's role under Rule 23 is not to protect defendants' shareholders or its future customers; defendants' interests are protected by its counsel." *Id.* at 378-79. The court thus approved the application, observing that "the attorneys' fee and expense amount was separately negotiated and funded." *Id.* at 378.

B. The Fees And Costs Settlement Was Arms' Length And Non-Collusive

Measured against these standards, the agreement as to the amount of attorneys' fees and costs to be paid in this case should be fully respected. Every dollar of the fees and costs that American Express agreed to pay will come directly from the coffers of American Express. Every dollar that American Express did *not* agree to pay – every dollar that it saved – will remain in the coffers of American Express. To say the least, American Express is a well-represented, hard-nosed bargainer that can be expected to look after its own interests. Class Counsel would have greatly preferred an agreement to receive $100 million, and American Express would have greatly preferred to pay $50 million. But the parties, endowed with firsthand knowledge of all the intricacies of this decade-long litigation, settled at $75 million, and that settlement should be respected.

Critically, in this case, as the Second Circuit observed in *Blessing*, "the fee was negotiated only after settlement terms had been decided." 507 Fed. App'x at 4. In fact, during the mediation, the parties under the supervision of mediator Feinberg took the extraordinary step of writing down the key injunctive terms by hand, on a sheet of paper, just to make sure both sides had them clearly locked in their minds before turning to the issue of money. *See* Friedman Decl., ¶11; *see generally*, Feinberg Decl., ¶ 8.

Finally, there is nothing in the Settlement Agreement itself to suggest collusion or anything of the sort. On the contrary, the instant settlement delivers a level of value to the merchant class that is quite potentially unprecedented in the entire history of private antitrust enforcement. Accordingly, for all the foregoing reasons, Class Counsel respectfully submit the Court should give full effect to American Express's agreement and direct attorneys' fees and costs in the exact amount of $75 million.

II. THE REQUESTED FEES AND COSTS ARE REASONABLE UNDER THE GOLDBERGER STANDARD

Even if there had not been agreement between the parties, the requested award would be amply justified under the applicable standards for determining a reasonable attorneys' fee award.[3]

In the Second Circuit, courts look to the factors specified in *Goldberger v. Intergrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000), in determining the overall reasonableness of a fee award. The *Goldberger* factors are: "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of the

[3] Even in non-common-fund cases where fees are agreed to, courts often provide a "belts-and-suspenders" observation that the fees would be deemed reasonable under the analysis applicable in contested or common fund cases. *See, e.g.*, *Dupler*, 705 F. Supp. 2d at 243 ("[E]ven if the fees somehow affected the benefit to the class, the Court finds that the requested attorneys' fees are reasonable under both the percentage and lodestar methods for the reasons set forth below.")

representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." *Id.* at 49 (internal citations and quotations omitted).

An analysis of the six *Goldberger* factors readily demonstrates the appropriateness of granting Class Counsel's fee request.

A. Time And Labor Expended

The starting point for assessing the reasonableness of Class Counsel's request for fees is an examination of the time and labor expended – *i.e.*, counsel's "lodestar," representing the total number of hours spent times the applicable hourly rates. In the Second Circuit, it is well established that lodestar calculations are appropriately adjusted to reflect the time value of money – *i.e.*, to "compensate for the delay in receiving compensation, inflationary losses, and the loss of interest." *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 724 F. Supp. 160, 163 (S.D.N.Y. 1989) (citations omitted). *See also Missouri v. Jenkins*, 491 U.S. 274, 284 (1989) (recognizing "an appropriate adjustment for delay in payment—whether by the application of current rather than historic hourly rates or otherwise"); *LeBlanc-Sternberg v. Fletcher*, 143 F. 3d 748, 764 (2d Cir. 1998) ("The lodestar should be based on 'prevailing market rates' … and current rates, rather than historical rates, should be applied in order to compensate for the delay in payment"); *Velez v. Norartis Pharms. Corp.*, 2010 U.S. Dist. LEXIS 125945, at *64 (S.D.N.Y. Nov. 30, 2010) ("The use of current rates to calculate the lodestar figure has been repeatedly endorsed by courts as a means of accounting for the delay in payment inherent in class actions and for inflation."), quoting, *In re Veeco Instruments, Inc. Secs. Litig.*, 2007 U.S. Dist. LEXIS 16922, at *9 n. 7 (S.D.N.Y. Mar. 9, 2007).

In some cases, the time value is accounted for by using attorneys' current rates at the end of the case, rather than the historic rates applicable to each hour worked. *See, e.g., In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 724 F. Supp. at 164. But the adjustment can be made "otherwise." *Missouri v. Jenkins*, 491 U.S. at 284. And often, the use of current rates will be a very poor proxy for time value – for example, where attorneys' rates have not escalated over time. In the instant case, much of the work performed many years ago was document review work, where the particular lawyers are no longer with the firms that engaged them and thus have no "current rate" to speak of. Wendorf Decl, ¶ 8. Current rates are not a fair proxy in these circumstances. A far better measure would be an interest rate, such as the simple interest provided for in the New York prejudgment interest statute, CPLR §5004.

In any event, Class Counsel has calculated its attorneys' fee lodestar on three alternative metrics as follows:

Basis	**Lodestar**	**Multiplier (based on fee award of $69.8mm plus costs)**
Historic Rates	$73,796,376	0.95
Current Rates	$83,535,658	0.84
Historic Rates With Statutory Simple Interest (CPLR §5004)	$99,142,213	0.70

Wendorf Decl, ¶¶ 6-8.

No matter how the lodestar is calculated, it is clear that the attorneys' fee award here will be less than lodestar. The total award of fees and costs sought is $75 million, and the current hard out-of-pocket costs total $5,173,094, leaving an attorneys' fee award of $69.8 million. As

the chart above shows, that award comprises either 0.95 or 0.84 or 0.70 times lodestar. Moreover, Class Counsel will continue to expend time and resources on this litigation as the settlement moves through final approval and perhaps even appellate litigation.

Courts routinely recognize that a fee request that is less than the lodestar "strongly suggests that the requested fee is reasonable." *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 146 (S.D.N.Y. 2010) (approving fee request that was 87.6% of lodestar). Fee requests that result in an award that is less than lodestar present "no real danger of overcompensation." *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 515 (S.D.N.Y. 2009). *See also In re Flag Telecom Holdings*, 2010 U.S. Dist. LEXIS 119702, at *77 (S.D.N.Y. Nov. 5, 2010) (fact that requested fee was less than lodestar was indication of reasonableness); *In re Sony Corp. SXRD Rear Projection TV Mktg, Sales Practices & Prods. Liab. Litig.*, 2010 U.S. Dist. LEXIS 87643, at *28 (S.D.N.Y. Aug. 24, 2010) (same); *In re NTL, Inc. Sec. Litig.*, 2007 U.S. Dist. LEXIS 13661, at *30-31 (S.D.N.Y. Mar. 1, 2007) (collecting cases approving fees involving multipliers of less than 1.0).

Class Counsel's hourly rates, moreover, are firmly in the range of reasonableness. The billing rates ranged from $195 for newly admitted attorneys up to an $800 cap for senior partners. Wendorf Decl., ¶ 9.[4] These rates fall squarely within the range of rates charged for counsel with the expertise necessary to prosecute a case of this complexity. *See National Law Journal* samplings of law firm billing rates from 2003-2013, Wendorf Decl., ¶ 9 and Exs. C-G. And the rates are well within the range of hourly rates that have been approved in recent cases

[4] A small handful of senior lawyers in the broader class plaintiff group, who performed a modest amount of work on these cases, maintain regular hourly rates that are in excess of $800. However, Class Counsel imposed a cap of $800 per hour across all counsel for all cases subject to this application, causing some firms to write down a portion of their time. Wendorf Decl., ¶ 19.

involving complex class actions. *See In re Comverse Tech, Inc.*, 2010 U.S. Dist. LEXIS 63342, at *13 (E.D.N.Y. June 23, 2010) (attorney and support time ranging from $125 to $880 per hour "are not extraordinary for top New York law firms," including specifically plaintiffs class action firms such as Class Counsel); *In re Gilat Satellite Networks, Ltd.*, 2007 U.S. Dist. LEXIS 68964, at *54 (E.D.N.Y. Sept. 18, 2007) (attorney rates from $325 to $725 were "not out of line with the rates of major law firms engaged in this type of litigation," including specifically plaintiffs class action firms); *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 2007 U.S. Dist. LEXIS 9450, at *73 (S.D.N.Y. Jan. 31, 2007) (hourly rates of $650-$850 for partners and $515 for senior associate were "not inordinate").[5]

Additionally, both the Friedman Law Group and Reinhardt Wendorf & Blanchfield, as well as several of the non-lead Class Counsel firms, are among the class counsel in *In re Air Cargo Shipping Services Antitrust Litigation*, 06-MD-1775(JG) (VVP) and *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 05-MD-1720 (JG)(JO) ("MDL 1720"), where this Court has approved fees on the basis of the same billing rates that these firms have submitted here.

[5] This is not a case where it would make sense to look towards prevailing rates in Brooklyn under the so-called "forum rule," such as was the case in *United States v. City of New York (Vulcan Society)*, 2013 U.S. Dist. LEXIS 25461, at *15-20 (E.D.N.Y. Aug. 30, 2013). First, both *Marcus* and *Amex ASR* were filed in Manhattan; the former was fully litigated there and the latter in some substantial measure. Second, Martindale Hubbell fails to list any Brooklyn-based antitrust class action firms at all, and a review of the 130 MDL antitrust class actions filed since *Marcus* shows not a single Brooklyn firm appearing as counsel, much less lead counsel. Wendorf Decl., ¶10. All of this clearly indicates that "in-district counsel were unable or unwilling to take this case," or that it "required special expertise beyond the competence of forum district law firms." *Vulcan Society*, 2013 U.S. Dist. LEXIS 125461, at *16, 18.

B. Magnitude And Complexities Of The Litigation

"The complexity of federal antitrust litigation is well known," *In re Visa Check/MasterMoney Antitrust Litig.*, 297 F. Supp. 2d 503, 510 (E.D.N.Y. 2003), *aff'd sub nom. Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96 (2d Cir. 2005), and "class actions have a well-deserved reputation as being most complex." *In re Nasdaq Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 477 (S.D.N.Y. 1998). This case was no exception. In fact, the complexity and magnitude of the litigation are unparalleled in the considerable experience of plaintiffs' co-lead counsel. As Judge Gleeson commented, speaking of the MDL 1720 litigation, "[a]though every case is unique, this case stands out in size, duration, complexity, and the nature of relief afforded[.]" *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 2014 U.S. Dist. LEXIS 3351, at *93 (E.D.N.Y. Jan. 10, 2014). Plainly, and by any measure, that observation is equally apt here.

C. Risk Of The Litigation

"The level of risk associated with litigation," the Second Circuit has held, "is 'perhaps the foremost factor' to be considered in assessing the propriety of a multiplier." *McDaniel v. County of Schenectady*, 595 F.3d 411, 424 (2d Cir. 2010), quoting *Goldberger*, 209 F. 3d at 54. As a general matter, "litigation risk must be measured as of when the case is filed." *Goldberger*, 209 F. 3d at 55; *see also In re Payment Card Antitrust Litig.*, 2014 U.S. Dist. LEXIS 3351, at *97. But courts should also take stock of the risk encountered along the way, and particularly "existential threats" to the case. *Id.*

Here, the risk assumed by Class Counsel was extraordinary at the inception of *Marcus*, at the inception of the *Amex ASR* litigation, and at all times since. Adding to the risk profile is the fact that Class Counsel developed this entire litigation effort from scratch – both the Honor All

Cards tying case and the anti-steering rules case that grew out of it. Unlike many antitrust cases, where the private bar piggy-backs on the efforts of the Justice Department or other public enforcers, or upon a competitor suit, it was Class Counsel that theorized, developed and launched these cases, first in 2003-04 (*Italian Colors* and *Marcus*) and then in 2005-06 (anti-steering rules cases). The Individual Merchants followed suit in 2008, and the Government and plaintiff states filed suit in 2010.

And Class Counsel stayed the course and continued to make extraordinary financial and human investments, even after the Supreme Court accepted certiorari in *Italian Colors*, and even after it became apparent that a class damage award (such as would have justified a significant multiplier to counsel's lodestar) would not be forthcoming. Indeed, the risks faced in *Italian Colors*, were truly an "existential threat" to the litigation – albeit one that was weathered. *See supra* at 5, and Final Approval Mem. at 13-14.

D. Quality Of Representation

Class Counsel humbly submits that it has demonstrated the ability and resources to litigate this difficult class action case zealously and effectively over a sustained period, in the face of the stiffest conceivable opposition. Courts stress that "the quality of the opposition should be taken into consideration in assessing the quality of the plaintiffs' counsel's performance." *In re Metlife Demutualization Litig.*, 689 F. Supp. 2d 297, 362 (E.D.N.Y. 2010). *See also In re Marsh ERISA Litig.*, 265 F.R.D. at 148 ("The high quality of defense counsel opposing Plaintiffs' efforts further proves the caliber of representation that was necessary to achieve the Settlement.") By that measure in particular, the quality of Class Counsel's representation is plain.

E. Requested Fee In Relation To The Settlement

As detailed more fully in the Final Approval Memorandum, the relief provided by the settlement represents some of the most consequential relief ever obtained in a private enforcement action under the U.S. antitrust laws. The injunctive relief that is at the core of settlement benefits every merchant in the United States that accepts American Express cards, while leaving class members' claims for monetary relief fully intact – indeed, it meaningfully facilitates those damage claims. In light of the settlement's benefits, the requested award, which will result in a lodestar multiplier of less than 1.0, is quite modest.

While Class Counsel would never lose sight of the fact that $75 million is a significant award in absolute terms, when it is compared to the benefit bestowed upon the class, the requested fee is so small it is literally difficult to measure as a percentage. As set forth on the chart at p. 7 of the Final Approval Memorandum, the relief here is surely worth tens of billions of dollars – and perhaps many tens of billions. By any measure, the award sought here will comprise a tiny fraction of the value provided over time.

F. Public Policy Considerations

As discussed above, this case was extremely risky when it was brought. The next similar case to come down the pike seeking broad injunctive relief will be riskier yet, given the long and growing list of hurdles that face private claimants seeking to drive market-wide reform. Now more than ever, public policy considerations demand attorneys' fees that "serve as an inducement for lawyers to make similar efforts in the future." *In re Visa Check/MasterMoney Antitrust Litig.*, 297 F. Supp. 2d at 524.

In *Italian Colors*, the Court gave voice to a public policy favoring arbitration clauses. But it did not purport to negate the strong public policy favoring vigorous prosecution of meritorious private antitrust actions. As the Solicitor General argued in support of Class Plaintiffs in that case, robust private prosecution is utterly indispensable to effective enforcement of the federal antitrust laws. *See* Brief For The United States As Amicus Curiae In Support of Respondents in *American Express Co. v. Italian Colors Restaurant*, No. 12-133, 2012 U.S. S. Ct. Briefs LEXIS 5606, at *37 (Jan. 29, 2013). And the harder that task becomes, the more important that courts reward those class counsel who navigate the risks and manage to bring meaningful and broad change to the marketplace through the federal antitrust laws.

III. CLASS COUNSEL'S LITIGATION EXPENSES ARE REASONABLE

"As a general rule**,** counsel are entitled to reimbursement for reasonable out-of-pocket expenses incurred over the course of litigating the cases." *In re Payment Card Litig.*, 2014 U.S. Dist. Lexis LEXIS, at *119. Where the defendant is paying attorneys' fees directly, litigation expenses are routinely reimbursed, either as a separate line item or part of the fee award. *See, e.g.*, *Schneider*, 324 F. Supp. 2d at 379 (approving payment of expenses that were necessary and reasonable); *Blessing*, 2011 U.S. Dist. LEXIS 94723, at *17 (approving flat payment covering fees and costs); *In re Sony Rear Projection TV Mkt. Litig.*, 2010 U.S. Dist. LEXIS 87643, at *28 (same).

Class Counsel has incurred out-of-pocket expenses totaling over $5 million, not to mention the cost of capital such as interest expenses and tied up lines of credit. These out-of-pocket expenses are all of the type normally incurred in complex actions and include expenses related to expert economist fees, database management, court reporting and transcription services, travel, computerized research, and courier, messenger, and outside photocopying

services. Wendorf Decl., ¶¶ 11-13. Throughout the many years of this litigation, Class Counsel were highly motivated and incentivized to control out-of-pocket expenses given the high risk that such expenses would not be reimbursed, and, if reimbursed, would be likely be outstanding for a substantial period of time.

Class Counsel submits that its claimed expenses are patently reasonable in the context of this massive litigation effort.

IV. THE CLASS REPRESENTATIVES ARE ENTITLED TO SERVICE AWARDS

Class Counsel seeks leave to make payments totaling $109,000 to the class representatives in recognition of the time that they have committed to the litigation. These awards will be paid from the Court's award of attorneys' fees and costs. Specifically, Class Counsel seeks authorization to make awards of $75,000 to The Marcus Corporation, awards of $7,500 each to Italian Colors Restaurant and Il Forno, Inc., awards of $5,000 each to Animal Land, Inc., Jasa, Inc., and Lopez-DeJonge, Inc., and awards of $2,000 each for Firefly Air Solutions, LLC and Plymouth Oil Corp. These awards will not add to American Express's payment obligation, which is capped at $75 million.

The level of requested service award relates directly to the time that each class representative devoted to the litigation. For example, Marcus Corp. produced thousands of pages of information in response to multiple set of document requests, sat for 9 depositions, participated in class certification and summary judgment briefing, and advised on numerous strategic matters in addition to the settlement negotiations. Wendorf Decl., Ex. H (Declaration of Thomas F. Kissinger on behalf of The Marcus Corporation, ¶¶ 6-9). In contrast, Animal Land was not deposed by American Express, but did respond to 139 document requests, provided input into strategy decisions, and kept in close contact with Class Counsel in order to fulfill

Animal Land's duties as a class representative. Wendorf Decl., Ex. K (Declaration of Marc Morrison on behalf of Animal Land, Inc., ¶¶ 5-9). Each Class Representative invested time in this litigation that, when viewed on an hourly basis, would result in modest compensation by any standard. Wendorf Decl, ¶ 21 and Exs. H - O, annexing and listing declarations from each proposed recipient of service award.

Traditionally, courts in the Second Circuit and elsewhere have routinely approved incentive awards for class representatives. *See., e.g.*, *Jermyn*, 2012 U.S. Dist. LEXIS 90289, at *22; *Dupler*, 705 F. Supp. at 245-46. In his fees and costs decision in MDL 1720, Judge Gleeson expressed misgivings about the routine dispensation of such awards unless they are tied to the level of service provided by the class representative. *See In re Payment Card Litig.*, 2014 U.S. Dist. LEXIS 3351, at *120-21. Mindful of these concerns, Class Counsel has taken care to calibrate the awards sought here to the service provided to the class. Such awards for class representatives "serve the dual functions of recognizing the risks incurred by named plaintiffs and compensating them for their additional efforts." *Parker v. Jekyll & Hyde Entm't Holdings, LLC*, 2010 U.S. Dist. LEXIS 12762, at *4 (S.D.N.Y. Feb. 9, 2010). Notably, the awards that Class Counsel are seeking are modest in comparison to those awarded to named plaintiffs in other class action litigations. *See, e.g.*, *Velez*, 2010 U.S. Dist. LEXIS 125945, at *68-69 (collecting cases in which courts awarded class representatives between $50,000 and $300,000).

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 Class Counsel leave to pay service awards to the class representative totaling $109,000 from that award of attorneys' fees and costs.

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FRIEDMAN LAW GROUP, LLP

/s/Gary B. Friedman
Gary B. Friedman
Tracey Kitzman
Scott Levy
Rebecca Quinn
270 Lafayette Street
New York, New York 10012
(212) 680-5150
gfriedman@flgllp.com

Mark Reinhardt, Esq.
Mark Wendorf, Esq.
REINHARDT WENDORF & BLANCHFIELD
332 Minnesota Street
St. Paul, Minnesota 55101
(651) 297-2100

Read K. McCaffrey, Esq.
PATTON BOGGS LLP
2550 M Street, NW
Washington, DC 20037
(202) 457-6000