UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION	:	No. 1:05-MD-1720(MKB)(JO)
This Document Relates To:	:	
ALL ACTIONS	:	**ORAL ARGUMENT REQUESTED**

OBJECTORS' REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO VACATE JUDGMENT OR, IN THE ALTERNATIVE, TO GRANT FURTHER DISCOVERY

CONSTANTINE CANNON LLP
Jeffrey I. Shinder
A. Owen Glist
Ankur Kapoor
Gary J. Malone
335 Madison Avenue
New York, New York 10017
Telephone: (212) 350-2700
Facsimile: (212) 350-2701
Email: jshinder@constantinecannon.com

Attorneys for Objectors 7-Eleven, Inc.; Academy, Ltd. d/b/a Academy Sports + Outdoors; Affiliated Foods Midwest; Amazon.com, Inc.; Beall's, Inc.; Best Buy Stores, L.P.; Boscov's, Inc.; Brookshire Grocery Company; Buc-ee's Ltd.; The William Carter Company; Coborn's Incorporated; Costco Wholesale Corporation; Cracker Barrel Old Country Store, Inc.; Euromarket Designs, Inc. d/b/a Crate & Barrel and CB2; Meadowbrook, L.L.C. d/b/a The Land of Nod; Cumberland Farms Inc.; D'Agostino Supermarkets, Inc.; David's Bridal Inc.; Dillard's, Inc.; Drury Hotels Company, LLC; Family Express Corporation; Foot Locker, Inc.; The Gap Inc.; HMSHost Corporation; IKEA North America Services, LLC; Marathon Petroleum Company LP; Martin's Super Markets, Inc.; Michaels Stores, Inc., Mills Motor, Inc., Mills Auto Enterprises, Inc., Willmar Motors, LLC, Mills Auto Center, Inc., Fleet and Farm of Alexandria, Inc., Fleet Wholesale Supply of Fergus Falls, Inc., Fleet and Farm of Green Bay, Inc., Fleet and Farm of Menomonie, Inc., Mills

Fleet Farm, Inc., Fleet and Farm of Manitowoc, Inc., Fleet and Farm of Plymouth, Inc., Fleet and Farm Supply Company of West Bend, Inc., Fleet and Farm of Waupaca, Inc., Mills E-Commerce Enterprises, Inc., Brainerd Lively Auto, LLC; National Association of Convenience Stores (NACS); National Cooperative Grocers Association (NCGA); National Community Pharmacists Association (NCPA); National Grocers Association (NGA); National Restaurant Association (NRA); Pacific Sunwear of California, Inc.; Panda Restaurant Group, Inc.; PetSmart Inc.; Recreational Equipment, Inc. (REI); Republic Services, Inc.; Retail Industry Leaders Association (RILA); Roundy's Supermarkets, Inc.; Sears Holdings Corporation; Speedway LLC; Thermo Fisher Scientific, Inc.; Wal-Mart Stores, Inc.

Stephen R. Neuwirth
Steig D. Olson
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, New York 10010

Attorneys for Objector Home Depot U.S.A., Inc.

Michael J. Canter
Robert N. Webner
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street
Columbus, Ohio 43215

Attorneys for Objectors Target Corporation, Macy's, Inc., Kohl's Corporation, the TJX Companies, Inc., Staples, Inc., J.C. Penney Corporation, Inc., Office Depot, Inc., L Brands, Inc., Big Lots Stores, Inc., PNS Stores, Inc., C.S. Ross Company, Closeout Distribution, Inc., Ascena Retail Group, Inc., Abercrombie & Fitch, OfficeMax Incorporated, Saks Incorporated, the Bon-Ton Stores, Inc., Chico's FAS, Inc., Luxottica U.S. Holdings Corp., American Signature, Inc., and Lord & Taylor Acquisition, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

PRELIMINARY STATEMENT

The MDL 1720 Settlement's Proponents' briefs do not dispute the key fact supporting Objectors' motion: the secret and unethical collaboration between a key member of class counsel's team and counsel for Defendant MasterCard, which fatally compromised—and rendered inadequate—the representation of the Rule 23(b)(2) settlement class.

Gary Friedman indisputably betrayed his ethical duties and obligations to the class by secretly colluding with Keila Ravelo, counsel for MasterCard, for years. The written record of his misconduct, consisting of hundreds of unauthorized communications that have only recently been disclosed, is extensive and shocking. This record establishes that Mr. Friedman gave Ms. Ravelo, counsel for the class's adversary in this case, the most sensitive work product attorneys can generate—including the class's settlement strategies in the midst of critical negotiation sessions. It establishes that he provided her with important confidential information about the *American Express* class action, including information regarding its likely disposition that he uniquely possessed. And it establishes that, while sharing this information with Ms. Ravelo, he withheld it from the class and his co-counsel, despite the fact that it was directly relevant to the efficacy of the surcharging relief at the core of the (b)(2) class settlement.

In the *American Express* action, Judge Garaufis held that Mr. Friedman's egregious misconduct—which the court found spanned that case and MDL 1720—meant that a nearly identical proposed class of merchants was not adequately represented and therefore could not be certified.[1] Judge Garaufis found that "Friedman's ability to be a zealous advocate for the class was compromised by his collaboration with counsel for MasterCard, an entity with interests divergent to those of the class; there is reason to be concerned that he was not acting solely in the

[1] *In re Am. Express Anti-Steering Rules Antitrust Litig.*, 11-md-02221 (NGG)(RER), 2015 U.S. Dist. LEXIS 102714, at *51 (E.D.N.Y. Aug. 4, 2015).

class's interests . . . ."[2] Judge Garaufis held that Mr. Friedman's serial breaches of his duties of loyalty and confidentiality rendered the class's representation inadequate and created an unacceptable risk that the mandatory class in that case was bound to a "fatally tainted" settlement.[3]

That same unacceptable risk exists here and, in fact, was realized. Indeed, the gravity of Mr. Friedman's conduct is magnified in this case because Ms. Ravelo represented the class's *direct* adversary in this matter. Thus, Mr. Friedman's "collaboration" with Ms. Ravelo necessarily prejudiced the class's interests. Ms. Ravelo's declaration, submitted with this brief, confirms what is self-evident from the fact that she co-led the representation of MasterCard throughout this litigation: When she advised MasterCard and worked with her co-counsel throughout the litigation, including on "the negotiation and finalization of the settlement," she "drew upon all the information in [her] possession that affected MasterCard's interests, including the information [she] was provided by Gary Friedman."[4] Proponents' carefully crafted declarations elide this fact, and should be disregarded.[5]

Proponents concede that Mr. Friedman's actions were "unjustifiable," "appall[ing]," and "indefensible," Class Mem. 1, 2; Def. Mem. 1, but argue that his misconduct made no difference. None of their arguments undercuts the fundamental reality that Judge Garaufis recognized: members of a mandatory Rule 23(b)(2) class cannot be forced to accept the risk that the litigation or settlement was influenced by disloyal and conflicted counsel who may have acted, and here

---

[2] *Id.* at *69.

[3] *Id.* at *47-48, *51.

[4] Ex. 70, Decl. of Keila Ravelo ¶ 5 (Aug. 30, 2015).

[5] Ms. Ravelo further states that she will appear for her deposition on these matters. While the present record is fully sufficient to grant Objectors' motion in this case, as it was in the *American Express* case, to the extent the Court is not inclined to grant the motion on the present record, it should order both that deposition and Mr. Friedman's deposition to take place.

did act, against the class's best interests. Under both Rule 23 and the Due Process Clause, the class must be freed from the restraints of a settlement that is irremediably tainted by Mr. Friedman's collaboration with the class's adversary.

Proponents are left to try to sweep these extraordinary facts under the rug. They argue that Mr. Friedman's (and Ms. Ravelo's) misconduct did not matter because the level-playing-field provision ("LPF") that tied the MDL 1720 and *American Express* class settlements together in an anticompetitive manner did not originate with Mr. Friedman. Instead, they argue, [redacted]

But that argument ignores the history of Mr. Friedman and Ms. Ravelo's secret collaboration, which corrupted the litigation process and the settlement negotiations before the mediators' proposals were made. For example, on the eve of the very talks that produced the mediators' proposals for resolution of the class action, Mr. Friedman secretly coached Ms. Ravelo on how an LPF could enable American Express and, by extension, MasterCard to obtain a "fantasy resolution of all this litigation" against the dominant credit-card companies.[6] The very premise of Proponents' argument (that everything was settled as of the mediators' proposals) is also belied by a subsequent communication by defense counsel that, [redacted][7] This left ample room for Mr. Friedman's improper disclosures to undermine the

[6] Ex. 60, LOG-A-00001191. *See also American Express*, 2015 U.S. Dist. LEXIS 102714, at *65 ("The resolution of the Amex Class Actions therefore effectively determines for the entire credit card industry whether parity, differential, or no surcharging will occur.").

[7] Ex. 12, GBF00002442, at 2443 (emphasis added).

class's bargaining position. Mr. Friedman should have been steadfastly advocating for the class's interests and highlighting the dangers of the LPF, not coaching MasterCard, through its counsel, on how to use the LPF to achieve a "fantasy resolution" for the three dominant credit-card companies. His betrayal of the class's interests simply cannot be ignored.

Co-Lead Counsel further contend that, given their ultimate decision-making authority, Mr. Friedman's misdeeds are irrelevant. Shockingly, after placing Mr. Friedman in a leading role on surcharging issues and authorizing him to bill nearly $10 million of his time, they suggest that the class should not be concerned that he collaborated with its adversary. This argument is untenable. It withers under Co-Lead Counsel's concessions about Mr. Friedman's substantial role in the prosecution and settlement of the class's surcharging claims, and under Co-Lead Counsel's decision to deploy him, as a "good resource," to negotiate the final terms of the surcharging relief.

Indeed, Co-Lead Counsel's assurances that none of Mr. Friedman's brazen misconduct affected the class's interests ring utterly hollow. Co-Lead Counsel acknowledge that they had no idea that Mr. Friedman was secretly colluding with Ms. Ravelo throughout the case; they have no idea why he did so; and they *still* have not investigated what exactly he did. Instead, they accuse Objectors of "gamesmanship" for even filing this motion. But if Objectors had not pursued this issue—in the face of hostility from every other interest aligned to keep this settlement alive—this record never would have been developed. Neither the *American Express* Court nor this Court would have known what happened here. The mandatory class of merchants—which Co-Lead Counsel are supposed to represent—would have been dealt an injustice with permanent consequences. Co-Lead Counsel should have been among those

demanding an accounting from Mr. Friedman, instead of offering blithe assurances that his collaboration with Ms. Ravelo did not matter or, worse, arguing that the class deserved no better.

Rule 60(b)(6) preserves a court's historic ability to grant relief from a judgment when "extraordinary circumstances" warrant, and Rule 23 allows a court to revisit the certification of a settlement class when appropriate. The circumstances of this case meet any definition of "extraordinary." Mr. Friedman acted against the interests of the class that he was supposed to be representing by disclosing highly confidential information that armed opposing counsel with insider knowledge and by often withholding that same information from the class. He did so [redacted] while settlement negotiations reached their crescendo (and, in fact, did so even after the settlement was reached). And Ms. Ravelo used the information Mr. Friedman provided to advise MasterCard and strategize with her co-counsel every step along the way.

These extraordinary circumstances led Judge Garaufis to refuse to bind absent members of a nearly identical mandatory settlement class—the type of class most in need of adequate representation—because of the failure of Rule 23's procedural protections. This Court should do the same. Objectors' motion should be granted.

ARGUMENT

I. The (b)(2) class received inadequate representation.

A. Mr. Friedman breached his fundamental ethical obligations to the (b)(2) class.

Proponents do not dispute that Mr. Friedman violated his fundamental duties of loyalty and confidentiality to the (b)(2) class he represented, by: (1) secretly collaborating with MasterCard's counsel for years, including during the negotiations of the settlement in this case, through improper communications concerning overlapping issues in this case and the *American*

Express case; (2) informing MasterCard's counsel that the LPF [redacted] in this case could result in a parity-surcharging "fantasy resolution" for the dominant credit-card companies of the litigation against them; (3) withholding that critical information from Co-Lead Counsel and the class representatives; and (4) then disclosing the class's confidential negotiating strategies which gave MasterCard's counsel an advantage in counseling her client to obtain such a "fantasy resolution" of the litigation against the (b)(2) class's interests, *see American Express*, 2015 U.S. Dist. LEXIS 102714, at *65-69.

1. Mr. Friedman secretly collaborated with MasterCard's counsel on the MDL 1720 Settlement.

Proponents do not dispute Judge Garaufis's finding that "Friedman and Ravelo were in frequent, possibly constant, communication regarding the negotiating process and status of both the 1720 MDL settlement and the [*American Express*] Class Settlement Agreement." 2015 U.S. Dist. LEXIS 102714, at *57. Judge Garaufis specifically found that, "before the 1720 MDL settlement" was finalized, Mr. Friedman "forwarded to Ravelo email discussions and outlines regarding 1720 MDL settlement negotiations, status, strategy, and proposed provisions," including about surcharging and the LPF, *id.* at *57-58, notwithstanding that Ms. Ravelo was counsel for the (b)(2) class's direct adversary in this case, *id.* at *69.

Proponents also do not dispute that "Mr. Friedman and Ms. Ravelo communicated regularly about both MDL 1720 and *American Express* outside of their written communications: on the phone [redacted]" Obj. Mem. 20. It is therefore undisputed that the present record of Mr. Friedman's collaboration with Ms. Ravelo is incomplete and thus understates the extent of their collaboration.

Ms. Ravelo's declaration confirms that Mr. Friedman's misconduct affected the advice MasterCard was given by its counsel: "When advising MasterCard and communicating with co-counsel in MDL 1720, including regarding the negotiation and finalization of the settlement and in connection with mediation sessions, I drew upon all the information in my possession that affected MasterCard's interests, including the information I was provided by Gary Friedman." Ex. 70, Ravelo Decl. ¶ 5. Defendants argue that there is no evidence that Ms. Ravelo utilized the information she received from Mr. Friedman to counsel MasterCard. Def. Mem. 3, 16. Her declaration puts that argument, which is belied by common sense, to rest.[8]

Defendants state that none of the improper communications was forwarded to them directly and that "[n]o one at MasterCard or Paul, Weiss is aware of having received" confidential information. Def. Mem. 4. Even if it were true that no one at MasterCard or Paul, Weiss received confidential information,[9] that does not mean that Ms. Ravelo did not draw upon the information Mr. Friedman sent her in advising MasterCard, which she attests she did. Ms. Ravelo simply may have been more careful than Mr. Friedman in covering the tracks of their illicit exchanges. Ms. Ravelo was MasterCard's counsel at two law firms (Hunton & Williams LLP and Willkie Farr & Gallagher LLP) in multiple antitrust litigations—including this one—over the course of two decades. Consistently with her role, she advised MasterCard (and managed a large team at Willkie) throughout the course of this litigation, and she did so with the

[8] Defendants' argument that Ms. Ravelo did not have a lead role *in court appearances* is also irrelevant. The problem here is not about what MasterCard's counsel argued in open court; it is that Mr. Friedman funneled information to MasterCard's counsel behind closed doors.

[9] The document production protocol was limited to communications between Mr. Friedman and Ms. Ravelo and did not reach Ms. Ravelo's or Willkie's communications with MasterCard or with Paul, Weiss.

benefit of Mr. Friedman's improper disclosures. That fact alone fatally taints the settlement of this action.[10]

2. Mr. Friedman had a substantial role in the prosecution of the (b)(2) class's claims.

Co-Lead Counsel do not dispute their sworn statements in support of their fee petition that Mr. Friedman and his firm put in nearly $9.6 million worth of time and $900,000 in expenses, with Co-Lead Counsel's review and approval.[11] Nor do they dispute that Mr. Friedman's firm was the largest biller to MDL 1720 after the three co-lead counsel firms.

Mr. Friedman was placed in this significant role by Co-Lead Counsel because of his perceived expertise on the surcharging and anti-steering issues most directly relevant to the mandatory (b)(2) class. *See, e.g.*, Class Mem. 13 ("Mr. Friedman was very knowledgeable about the effect of anti-steering rules on competition based on his many years of advocating on the subject in a variety of *fora*."). Notably, Co-Lead Counsel do not dispute Mr. Friedman's sworn statement that, based on a structure he worked out with Co-Lead Counsel, Mr. Friedman [redacted][12] Mr. Wildfang's

[10] Defendants spend several pages attempting to show that Ms. Ravelo's husband's litigation-support company, ALITS, was a sham company that did not create the work product summarizing critical *American Express* documents. Def. Mem. 17-20. Whether ALITS generated the work product is a red herring. In our opening brief, Objectors acknowledged that [redacted] Obj. Mem. 24 n.33. The salient point remains undisputed: Important work product and confidential information from *American Express* was given to Ms. Ravelo, and she used that information to counsel MasterCard. Even after Objectors' opening brief was served, Willkie produced several detailed spreadsheets [redacted] *See, e.g.*, Ex. 73, LOG-A-00009011-020.

[11] *See* Ex. A to Decl. of Thomas J. Undlin in Support of Class Plaintiffs' Joint Motion For Award Of Attorneys' Fees, Expenses and Class Plaintiffs' Awards and Ex. A to Supp. Decl. of Thomas J. Undlin, 05-md-1720(MKB)(JO) (E.D.N.Y. Apr. 11, 2013), ECF No. 2113-2; Supplemental Decl. of Thomas J. Undlin, at 15 (E.D.N.Y. Aug. 16, 2013), ECF No. 5940-1.

[12] Ex. 69, LOG-A-00002148, Decl. of Gary B. Friedman [redacted]

declaration states only that Friedman "was never in charge of, and had no definitive say about, how Co-Lead Counsel chose to attack the rules or resolve their reformation." Wildfang Decl. ¶ 5 at 3. Whether or not Mr. Friedman had a "definitive say" regarding the prosecution of the no-surcharging claim, he was placed in a position to exert influence over the direction of those claims [redacted].

Indeed, in Mr. Wildfang's declaration in support of final settlement approval *in this case*, he described Mr. Friedman as a "senior member[] of the Co-Lead Counsel Firms."[13] Mr. Wildfang now attempts to backpedal from that sworn statement, by claiming that he meant to refer to Mr. Friedman "as a leader of the *Amex* case." Wildfang Decl. ¶ 7 at 5 n.2. That contention is not credible. It would have made no sense for Mr. Wildfang to refer to Mr. Friedman's role in *American Express* in a declaration about the attorney roles in MDL 1720.[14]

Even though Mr. Wildfang acknowledges that Mr. Friedman's firm was "a member of the class counsel roster," Wildfang Decl. ¶ 6 at 4, Co-lead Counsel and Defendants both argue that Mr. Friedman was not subject to Rule 23 and had no fiduciary obligations to the class simply because he was not formally appointed lead counsel. Under this logic, no attorneys other than lead counsel have any fiduciary obligations to their clients. That is not the law. The cases Defendants cite for this proposition do not address the circumstance where, as here, class counsel

---

[redacted] (emphasis added).

[13] Declaration of K. Craig Wildfang, Esq. in Support of Class Plaintiffs' Motion for Final Approval of Settlement and Class Plaintiffs' Joint Motion for Award of Attorneys' Fees, Expenses and Class Plaintiffs' Awards ¶ 125, *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, No. 05-md-1720-JG-JO (E.D.N.Y. Apr. 11, 2013), ECF No. 2113-6 ("Especially in the late stages of the [DOJ] investigation, I was often joined by the senior members of the Co-Lead Counsel firms, including Bonny Sweeney, Merrill Davidoff, Laddie Montague and Gary Friedman.").

[14] Mr. Wildfang also has put his credibility into question by publicly stating that Mr. Friedman had "zero" role in the settlement negotiations. *See* Ex. 71, Melissa Lipman, *Retailers Want $7B Interchange Fee Deal Nixed On Misconduct*, *Law360*, July 27, 2015. That assertion cannot be reconciled with the factual record.

enlists the services of an attorney to participate in the representation of the class.[15] The mandatory settlement class here was entitled to adequate representation from *all* of the lawyers representing it, including Mr. Friedman. Any suggestion to the contrary, e.g., Def. Mem. 26 & n.97; Class Mem. 32-33, would subvert the protections of Rule 23. It would free lead class counsel to select attorneys to work with them who were not appointed by the court, who have conflicts, who breach ethical obligations and protective orders, or who are otherwise unqualified—all outside the purview of Rule 23 and with no fiduciary duty owed to the class. Proponents' argument is untenable.[16]

3. Mr. Friedman had a substantial role in the settlement of the (b)(2) class's claims.

While Proponents argue in conclusory terms that Mr. Friedman played a minor role in representing the class in the settlement of the (b)(2) class's claims, when they describe Mr. Friedman's actual role they are forced to admit that it was quite substantial.

Co-Lead Counsel concede that "Mr. Friedman was knowledgeable about and provided input on structural reform to Visa's and MasterCard's anti-steering rules," Wildfang Decl. ¶ 5 at 3, the supposed "structural reform" that is the centerpiece of the (b)(2) class settlement. They concede that Mr. Friedman "helped Co-Lead Counsel to analyze the impact and efficacy of

[15] *See Plumbers & Pipefitters Nat'l Pension Fund v. Burns*, 292 F.R.D. 515, 523 (N.D. Ohio 2013) (independent counsel retained by class representative to assist in carrying out its duty to supervise class counsel); *Scheffer v. Civil Serv. Employees Ass'n, Local 828*, No. 05-CV-6700, 2006 U.S. Dist. LEXIS 101170, **16-17 (W.D.N.Y. Oct. 24, 2006) (discussing the high standards demanded by Rule 23 where *class counsel* had alleged conflict of interest). Even where non-class counsel is retained by a class representative to help it fulfill its duty to the class to oversee class counsel, that counsel must be free of conflicts with the class. *Feder v. Elec. Data Sys. Corp.*, 429 F.3d 125, 132 (5th Cir. 2005) ("[A] proposed class representative [may] hir[e] an outside attorney (not affiliated with class counsel) to help the class representative in carrying out its role as such and in overseeing proposed class counsel, as long as that outside attorney has no conflicts with the class.").

[16] When the Court appointed Co-Lead Counsel in February 2006, it ordered that Co-Lead Counsel could collaborate with attorneys not appointed to the leadership team by "[d]elegat[ing] specific tasks to other counsel or committees of counsel in a manner to ensure that pretrial preparation for the class plaintiffs is conducted efficiently and effectively," and that in doing so Co-Lead Counsel was obligated to "[m]onitor the activities of co-counsel." Order, Feb. 24, 2006, ECF No. 279, at 2. These directives were not fulfilled with regard to Mr. Friedman.

structural reforms and helped Co-Lead Counsel to decide how best to achieve a meaningful settlement in MDL 1720." Class Mem. 14. And they acknowledge that they "asked Mr. Friedman to assist in drafting portions of the final written settlement agreement to memorialize the principal terms of the Mediators' Proposal." *Id.*

Co-Lead Counsel admit that "Mr. Friedman was very knowledgeable about the effect of anti-steering rules on competition based on his many years of advocating on the subject in a variety of *fora*." Class Mem. 13. In other words, Co-Lead Counsel relied on Mr. Friedman specifically because of his experience in *American Express*. In fact, as a result of that experience, Co-Lead Counsel describe Mr. Friedman as having been "*a good resource* for information on structural reform [to the anti-steering rules] in addition to the class' experts and the Australian experience." *Id.* (emphasis added).

Mr. Wildfang also does not dispute the sworn declarations of his former clients—the trade-association named plaintiffs whose focus was the (b)(2) relief—stating that Mr. Wildfang characterized Mr. Friedman as the subject-matter expert on surcharging who was best positioned to protect the interests of the settlement class in the complex and detailed negotiations over the (b)(2) relief. Nor does Mr. Wildfang dispute these former named plaintiffs' statements that Mr. Friedman [redacted] Mr. Wildfang states only that his "recollection . . . differs" and that he [redacted] Wildfang Decl. ¶ 7 at 5 (emphasis added).

Notwithstanding these facts, Proponents claim that Mr. Friedman's conduct had no impact because he was not involved in the negotiations prior to the issuance of the mediators'

proposals, and once those proposals were accepted they became "the settlement in principle, setting forth the principal terms of settlement" which were not to be further negotiated. Class Mem. 24. This contention fails for two reasons.

First, as discussed further below, Mr. Friedman's misconduct tainted the settlement negotiations *before* the mediators issued their proposals for settling this class action. He did so most egregiously by secretly coaching Ms. Ravelo, prior to the court conference that preceded the mediators' proposals, on how an LPF could enable American Express and, by extension, MasterCard to obtain a "fantasy resolution of all this litigation" for the dominant credit-card companies.[17] At the same time, he withheld that critical information from Co-Lead Counsel and the class representatives.

Second, Proponents' characterization of the substantive import of the mediators' proposals is, at best, deliberately misleading if not downright false. Proponents vastly understate the extent to which critical issues were still unresolved after the mediators' proposal was accepted. [redacted]

[17] Ex. 60, LOG-A-00001191.

[redacted][18]

As Judge Garaufis correctly found, [redacted]—Mr. Friedman improperly forwarded to Ms. Ravelo the "outlines regarding 1720 MDL settlement negotiations, status, [and] strategy," including about surcharging and the LPF. 2015 U.S. Dist. LEXIS 102714, at *57-58. Those blueprints for the class's negotiating positions on surcharging and the LPF—which Mr. Friedman twice shared with Ms. Ravelo less than a month before the settlement was finalized—covered a host of important outstanding issues regarding the LPF and the proposed surcharging relief, such as the requirement for the LPF to sunset.[19] Mr. Friedman thus shared class counsel's most sensitive documents concerning the (b)(2) settlement precisely when the parties were negotiating the important details of those provisions. In so doing, Mr. Friedman fatally undermined the adequacy of representation the (b)(2) class received.

4. Mr. Friedman failed to disclose the implications of the LPF to Co-Lead Counsel or the class representatives, and instead gave his unique insights to Ms. Ravelo.

As Objectors argued in their opening brief, Obj. Mem. 7-8, and as Judge Garaufis subsequently recognized: "parity surcharging 'lacks [the] tools' that would put pressure on the credit card networks to lower their fees, and 'preserves the inability to reward . . . lower-priced networks.'" 2015 U.S. Dist. LEXIS 102714, at *67 (quoting the report of court-appointed expert

[18] Ex. 12, GBF00002442, at 2443.

[19] Exs. 5 and 14. Notwithstanding Mr. Friedman's opinion that [redacted] he negotiated no such sunset. Contrary to Proponents' claim, the LPF does not sunset, even if American Express's surcharging prohibitions are wholly rescinded. *See* Def. Mem. 31-32. The LPF applies to all "Competitive Credit Card Brands," including Discover and PayPal. Co-Lead Counsel also misstate the LPF's terms as requiring a sunset "when a competitive card brand does not have rules that *prevent* surcharging." Class Mem. 30 (emphasis added). To the contrary, the LPF remains in place so long as any Competitive Credit Card Brand "*limits*"—"in any manner"—the merchant's ability to surcharge. MDL 1720 Settlement ¶¶ 42(a), 55(a) (emphasis added).

Professor Hemphill). Parity surcharging is thus a bad outcome for competition and for merchants, *see id.* at *68-69, and Mr. Friedman failed to inform the class representatives and Co-Lead Counsel of the serious risk that the LPF would result in that outcome.

Worse, instead of fulfilling his duty to his clients, Mr. Friedman was "collaborat[ing] with counsel for MasterCard, an entity with interests divergent to those of the class." *Id.* He informed Ms. Ravelo that the LPF would get American Express "half-way home" to a "fantasy resolution of all this litigation,"[20] i.e., parity surcharging which avoids "pressure on the credit card networks to lower their fees," *id.* at *67. In so doing, he coached her on how to obtain a settlement of the class's surcharging claims to MasterCard's advantage and the class's detriment—a gross betrayal of the class's interests and violation of his professional duties.

Because they cannot dispute these facts, Proponents instead attack straw men: they claim that Objectors contend that Mr. Friedman invented the LPF to help him settle *American Express*; and that Mr. Friedman and Ms. Ravelo "conspired" to create the LPF.[21] Objectors never made these arguments. The origins of the LPF concept are beside the point. What matters is the undisputed fact that, once the LPF became a potential feature of the emerging settlement in MDL 1720 and thereby tied this case to *American Express*, Mr. Friedman knew what effect that provision could have because he was Lead Counsel for the class in *American Express* and therefore was in a position to agree to a class-wide parity-surcharging settlement.

[20] Ex. 60, LOG-A-00001191.

[21] Class Mem. 3 ("[A]though central to Movants' arguments, Mr. Friedman and Ms. Ravelo did not suggest, and were not responsible for, including the LPF as a settlement term."); *id.* at 13 (Movants "surmise that the LPF provision emanated from Mr. Friedman"); *id.* at 14 ("Movants contend that Mr. Friedman conceived of the LPF term and inserted it into the MDL 1720 settlement as a Trojan horse . . . ."); *id.* at 15 ("Nor was the LPF the brain child of either Mr. Friedman or Ms. Ravelo. . . ."); Def. Mem. 1 ("We write, instead, to debunk the story the Objectors' brief tells of a conspiracy that corrupted the settlement of this case . . . by manipulating the outcome in a separate class action against American Express to include 'parity surcharging.'"); *id.* ("Objectors assert that in 2011 Mr. Friedman caused the level playing field provision to be part of the Settlement . . . ."); *id.* at 3 ("The level playing field did not originate in some conspiracy between Mr. Friedman and Ms. Ravelo."); *id.* at 31 ("This history, supported by the evidence, renders illusory any notion that Ms. Ravelo and Mr. Friedman somehow colluded to foist the level playing field on unwitting Co-Lead Class Counsel, merchants, mediators, and the Court.").

Defendants state, "all interested persons knew that American Express would prefer parity surcharging over differential surcharging, if it could achieve that result." Def. Mem. 5. While it is true that American Express would have readily agreed, and did agree, to industry-wide parity surcharging, the key clause is "if it could achieve that result." Among the attorneys in MDL 1720, only Mr. Friedman was in a position to know that and only Mr. Friedman was uniquely positioned to influence that outcome. Mr. Friedman's failure to share this information with the class representatives and co-counsel—which is now undisputed—while improperly disclosing it to the class's adversary polluted the negotiations of the MDL 1720 Settlement once those negotiations resumed in late 2011.[22]

Co-Lead Counsel admit that they had no idea from Mr. Friedman that *American Express* could settle for parity surcharging and therefore that, via the LPF, parity surcharging could prevail industry-wide to the (b)(2) class's detriment. *See* Wildfang Decl. ¶ 4 at 2 ("Co-Lead Counsel had no knowledge of the communications at issue between Gary Friedman and Keila Ravelo"); *id.* ¶ 10 at 9 ("Co-Lead Counsel knew nothing of the prospects for a settlement between the *Amex* class and American Express, nor did we know or have reason to believe that the Amex settlement would include a parity surcharging provision"). Co-Lead Counsel also do not dispute that the class representatives were not informed of the LPF's potential implications.

Co-Lead Counsel instead argue that Objectors' concern over market-wide parity surcharging "has vanished" because of Judge Garaufis's disapproval of the proposed *American Express* settlement, and that "[m]erchants' right to differentially surcharge obtained in the MDL 1720 settlement remains undisturbed." Class Mem. 4-5. Co-Lead Counsel's argument misses the mark, for two reasons. First, because Mr. Friedman's misconduct compromised the

[22] It is now clear that Co-Lead Counsel never should have put Mr. Friedman in the position to link the two settlements together in such an anticompetitive manner. At a minimum, Mr. Friedman's work in this case should have been closely monitored and his motivations carefully vetted. Clearly, that did not occur.

adequacy of representation the class received, and thus corrupted the settlement negotiations, it does not matter that his scheme was ultimately discovered. His conduct eviscerated the procedural protection that is necessary to bind a mandatory settlement class to *any* result. Indeed, because Co-Lead Counsel confess that, even now, they are "ignorant" of Mr. Friedman's purpose or intent, Class Mem. 1 n.3, they cannot credibly reassure the Rule 23(b)(2) class that his misconduct did not adversely affect the class's interests in connection with other settlement provisions.

Second, even assuming the final substantive outcome matters, most merchants now face a potentially permanent prohibition against surcharging. With Judge Garaufis's rejection of the proposed *American Express* settlement, American Express's surcharging prohibitions remain in place. Because of the LPF in *this* settlement, merchants that accept American Express—over 90 percent of merchants in the U.S. by transaction volume and approximately two-thirds by number[23]—cannot surcharge *at all*.[24]

As Judge Gleeson recognized, because of the LPF, "most merchants will, as a practical matter, be precluded from surcharging Visa and MasterCard products." *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, 986 F. Supp. 2d 207, 233 (E.D.N.Y. 2013); *accord American Express*, 2015 U.S. Dist. LEXIS 102714, at *21-22 ("for any merchant that also accepts American Express, the LPF provision effectively ties that merchant's ability to make use of certain of the relief obtained in the 1720 MDL settlement agreement—the

[23] *See* 10-cv-4496 ECF No. 512 at 7 & n.2 ("About 6.4 million merchant locations in a wide variety of industries accept Amex cards"); Mem. in Supp. of Class Plaintiffs' Motion for Final Approval of Settlement, ECF No. 2111-1 at 37-38.

[24] Because American Express's current surcharging rules require merchants to surcharge *debit* cards if they wish to surcharge *credit* cards, and Visa/MasterCard's rules prohibit surcharging debit cards, the LPF forces merchants into a Catch-22 situation where they cannot surcharge in accord with all three networks' rules and therefore cannot surcharge at all. *Accord* Def. Mem. 34 ("the level playing field meant: merchants could have the ability to surcharge Visa and MasterCard credit cards on a parity or differential basis, ***or not at all***, depending on the outcome of the American Express case") (emphasis added).

opportunity to surcharge Visa and MasterCard credit cards, on either a parity or differential basis—to Amex's own surcharging rules"). This outcome belies Proponents' repeated claims that the MDL 1720 Settlement actually provided differential-surcharging relief to the (b)(2) merchant class.

B. Judge Garaufis's finding—that Mr. Friedman was an inadequate representative of the (b)(2) merchant class in *American Express*—applies to Mr. Friedman's representation of the (b)(2) merchant class in this case.

Although Proponents discuss Judge Garaufis's order, they do not challenge that court's findings that Mr. Friedman and Ms. Ravelo engaged in improper communications concerning the litigation and settlement of both this case and *American Express*, and that those findings compelled the conclusion that the (b)(2) class in *American Express* was inadequately represented and so could not be certified.

Judge Garaufis held that Mr. Friedman was an inadequate representative of merchants given his "improper" and "egregious" disclosure, to MasterCard's counsel, of the confidential attorney work product and other information of the merchant class he represented in *American Express*. *See* 2015 U.S. Dist. LEXIS 102714, at *47-48, *51-53, *57-58, *68-69. Judge Garaufis found: "Friedman's ability to be a zealous advocate for the class was compromised by his collaboration with counsel for MasterCard, an entity with interests divergent to those of the class; there is reason to be concerned that he was not acting solely in the class's interests." *Id.* at *69.

That conclusion applies with even greater force in this case. "[N]early all" of the *American Express* merchants are a part of the (b)(2) settlement class here; Friedman "forwarded to Ravelo email discussions and outlines regarding 1720 MDL settlement negotiations, status, strategy, and proposed provisions," including about the LPF, *see id.* at *57-58; and Ravelo was counsel for the (b)(2) class's direct adversary in this case "with interests divergent to those of the class."

Judge Garaufis further found that Mr. Friedman's misconduct harmed merchants through his disclosure of confidential strategies and information to merchants' adversary in this case.

Judge Garaufis held that the harm to merchants in *American Express* (who comprised the vast majority of the (b)(2) class in this case) was "a *risk* that Friedman, with Ravelo in his ear, negotiated settlement terms that are worse for class members than the terms he might have negotiated absent that conflict. This *risk* requires the court to deny approval of the Settlement." *Id.* at *73 (emphasis added). That same risk was present and realized in the negotiations of the MDL 1720 Settlement, over which Mr. Friedman had significant influence because of his unique knowledge about the implications of the LPF and his material role in negotiating [redacted] during the final negotiations of the settlement.[25] In fact, the risk here was even greater. Ms. Ravelo represented the class's direct adversary in this proceeding; she was not just a voice in Mr. Friedman's ear.

Judge Garaufis's holding—that the *risk* created by the conflict requires a finding that the representation the class received was inadequate under Rule 23(g)—accords with Supreme Court and Second Circuit precedent that whether and how class counsel's conflicts or misconduct "caused a result unfair to the Rule 23(b)(2) class under Rule 23(e) is not the proper enquiry under Rule 23(g), because Rule 23's procedural protections guard 'against inequity and potential inequity at the pre-certification stage, quite independently of the required determination at postcertification fairness review under subdivision (e) that any settlement is fair in an overriding sense.'" Obj. Mem. 35-37 (quoting *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 858-59 (1999)). "The harm was caused by the conflict and misconduct itself, because the class is entitled to 'arms-length bargaining,

[25] The risk of harm to merchants was also present throughout the years (more than a decade) that Friedman was collaborating with Ravelo about both this litigation and *American Express*, [redacted]

unhindered by any considerations tugging against the interests of the parties ostensibly represented in the negotiation.' *Ortiz*, 527 U.S. at 852." Obj. Mem. 36-37.[26]

C. Co-Lead Counsel were unable to ensure adequate representation for the (b)(2) class.

Proponents, nonetheless, contend that Judge Garaufis's decision should not apply here because Mr. Friedman was not lead counsel in this case and Co-Lead Counsel protected the interests of the MDL 1720 class. But that form-over-substance argument withers under Co-Lead Counsel's admission that they had no idea what Friedman was up to throughout the relevant time period, and so had no meaningful ability to protect against the implications of his conduct.

Co-Lead Counsel argue that the class received adequate representation from Co-Lead Counsel because they were supervising Mr. Friedman at all times. Co-Lead Counsel's papers offer no specifics of how they supposedly supervised Mr. Friedman, however. In fact, they admit that they had no clue that Mr. Friedman was secretly collaborating with MasterCard's counsel over the course of a decade, including throughout the negotiations of the MDL 1720 Settlement. Nor do they dispute that they were in the dark about the fact that the LPF could potentially result in industry-wide parity surcharging, an anticompetitive outcome for merchants. Given the extent of the malfeasance here, whatever supervision may have existed was plainly inadequate. For this reason, the suggestion that Co-Lead Counsel's formal supervisory position somehow cures Mr. Friedman's misconduct cannot withstand scrutiny.[27]

---

[26] Defendants claim that Objectors "have distorted" the Supreme Court's decisions in *Ortiz* and *Amchem* because those cases concerned "conflicts between different categories of class members" and not class counsel's conflicts. Def. Mem. 27 n.100. To the contrary, the *Ortiz* Court, citing *Amchem*, clearly differentiated between the adequacy of the named plaintiffs and the adequacy of class counsel, and held that class members are equally entitled to adequate and unconflicted counsel: "In *Amchem*, we concentrated on the adequacy of named plaintiffs, but we recognized that the adequacy of representation enquiry is also concerned with the 'competency and conflicts of class counsel.'" *Ortiz*, 527 U.S. at 856 n.31 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 n.20 (1997)).

[27] For similar reasons, the mediators' declarations that the *American Express* decision does not change their conclusions regarding the procedural fairness of the MDL 1720 settlement negotiations should be given no weight. The mediators had no idea that Mr. Friedman and Ms. Ravelo were secretly collaborating and they cannot possibly

Notably, to this day, Co-Lead Counsel remain "ignorant" of Mr. Friedman's intent, *see* Class Mem. 1 n.3, and of the full extent of his misconduct and its impact. When Mr. Friedman's misconduct came to light, Co-Lead Counsel only instructed Mr. Friedman and his firm to stop work on the litigation—long after the horse had left the barn.[28] Co-Lead Counsel has undertaken *no* investigation of the extent of the malfeasance here or its impact, despite its plain significance to the class they represent and despite Objectors' request that they do so.[29] Given this lack of investigation, Co-Lead Counsel's assertion that Mr. Friedman's misconduct "could not have had, and did not have, any impact" on the settlement, *see* Class Mem. 29, smacks of little more than wishful thinking.

Moreover, as discussed in Objectors' opening brief, the current record is almost certainly the tip of a very large iceberg. The record shows, for example, that Mr. Friedman and Ms. Ravelo talked repeatedly on the phone, encouraged each other to destroy the evidence of their communications, and [redacted] Co-Lead Counsel have done nothing to investigate the full scope of what happened here, despite their relationship with Mr. Friedman and his supposed accountability to them. They cannot credibly assure the class that his years of misconduct did not matter.

---

know how the unfair advantage Mr. Friedman conferred on Defendants impacted what appeared to be an arm's-length process.

[28] March 5, 2015, Letter from Patrick Coughlin to Gary B. Friedman, Declaration of Michael J. Kane in Support of Class Plaintiffs' Opposition, Ex. 2.

[29] Ex. 72, Feb. 13, 2015, Letter to Craig Wildfang and Gary Friedman. Interestingly, although Co-Lead Counsel have not conducted any investigation of Mr. Friedman's misconduct to date, they apparently believe that "full investigation" is warranted—at least, before Co-Lead Counsel decide whether Mr. Friedman should receive any share of the enormous attorneys' fee award in this case. *See* Class Pls' Opp. to Rule 60 Motion to Vacate Fee Award to Gary Friedman, ECF No. 6533, at 4 ("We respectfully suggest that the allocation of the fee award to Mr. Freidman's [sic] firm, if any, should be left to Co-Lead Counsel's informed judgment after full investigation of these matters, after the ruling on the Fed. R. Civ. P. 60(b) and (d)(3) motions"). Co-Lead Counsel do not explain why a "full investigation" should not have occurred already, before they decided to oppose Objectors' instant motion.

Further, to the extent that Co-Lead Counsel imply that the adequate-representation requirement can be deemed satisfied if, contrary to all appearances, they took reasonable steps to supervise Mr. Friedman, they are mistaken. Even if Co-Lead Counsel did reasonably supervise Mr. Friedman, that supervision was inarguably a failure and the class was damaged as a result. Mr. Friedman's many years of funneling inside information to MasterCard's counsel and advising her of ways to further MasterCard's interests rendered the class's representation inadequate—regardless of the extent to which Co-Lead Counsel is to blame.

II. Because the (b)(2) class received inadequate representation, it should be decertified.

Proponents do not dispute the Supreme Court and Second Circuit precedent, discussed in Objectors' opening brief, holding that class members involuntarily represented by inadequate counsel under Rule 23(g) cannot be bound to the settlement as a matter of law and due process, *even if* the settlement is fair under Rule 23(e). *See* Obj. Mem. 35-37. The inquiries under Rules 23(e) and 23(g) are separate, independent inquiries. *See id.* As Judge Garaufis recognized:

> "The adequate representation requirement 'lies at the heart' of the rationale supporting class actions." "Because class counsel seeks to determine the rights of absent putative class members, 'a court must carefully scrutinize the adequacy of representation' when considering whether to certify a class." . . . "Misconduct by class counsel that creates a serious doubt that counsel will represent the class loyally ***requires*** denial of class certification."

2015 U.S. Dist. LEXIS 102714, at *49-50 (internal citations omitted) (emphasis added). In a "mandatory Rule 23(b)(2) class," as here, "concerns about adequacy" are "at their greatest." *Id.* at *75.

The adequacy of representation the (b)(2) class in this case received was similarly "fatally tainted" by Mr. Friedman's "egregious," "unjustifiable," "appall[ing]," and "indefensible" conduct. *See* 2015 U.S. Dist. LEXIS 102714, at *51; Class Mem. 1, 2; Def. Mem.

1. As Judge Garaufis recognized, the mere risk that such conflicts of interest pose "requires the court to deny approval of the Settlement." 2015 U.S. Dist. LEXIS 102714, at *73.

Moreover, the very fact of the inadequacy precludes a reconstruction of what would have happened had counsel been adequate or, as in this case, not engaged in gross misconduct. *See In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 253 (2d Cir. 2011) ("The rationale is simple: how can the value of any subgroup of claims be properly assessed without independent counsel pressing its most compelling case?"). Therefore, it is impossible to determine fully how the settlement's fairness was undermined by Mr. Friedman's misconduct, and the law does not put Objectors to the burden of doing so. This is particularly true where, as here, misconduct took place over the course of many years. As Judge Garaufis summarized:

> [T]he court need not, and does not, reach the merits of these aforementioned objections today, because it concludes that the improper and disappointing conduct of Co-Lead Class Counsel Gary B. Friedman has ***fatally tainted*** the settlement process. The procedural unfairness and failure of adequate representation (as this conduct bears on both inquiries) revealed by the Friedman/Ravelo Communications requires disapproval of the Settlement; ***the court cannot thoughtfully assess its substantive fairness without assurance that the class was properly represented in the negotiations thereof***.

2015 U.S. Dist. LEXIS 102714, at *47-48 (emphasis added). Proponents' arguments that Friedman's misconduct did not impact the letter of the settlement are therefore irrelevant.

Co-Lead Counsel characterize the risk to the class's interests here as speculative. *See* Class Mem. 4. But there is nothing speculative about this record; Mr. Friedman repeatedly and egregiously betrayed the class's interests by collaborating with counsel for the class's adversary.

Further, while Objectors do not bear the impossible burden of proving exactly how his extensive misconduct affected the letter of the settlement, it is not difficult to see how it likely corrupted the settlement negotiations. At the pivotal December 2011 courthouse mediation

session, for example, Co-Lead Counsel did not know (or did not fully know) the potential consequences of the LPF—while counsel for MasterCard did because Mr. Friedman explained them to her. Co-Lead Counsel did not know whether, because of the LPF, merchants would "have the ability to surcharge Visa and MasterCard credit cards [1] on a parity or [2] differential basis, or [3] not at all." *See* Def. Mem. 34. Because Co-Lead Counsel were completely in the dark about this critical issue, they could not possibly have adequately defended the (b)(2) class's interests [redacted].

Defendants attempt to minimize the import of these facts by asserting, for the first time, that [redacted]. Defendants state that [redacted] Def. Mem. 10; *see also id.* at 12 ("In light of the status of negotiations with the IMPs, defendants treated the [redacted]). "Visa, the IMPs and the mediators" had "central roles . . . in developing the level playing field." Def. Mem. 28. Co-Lead Counsel for the Class are notably absent from that list. Apparently, no fiduciary for the (b)(2) class was safeguarding the class's interests when the LPF became a fixture of the settlement—one upon which the scope and efficacy of the (b)(2) relief hinged. If anything, this creates an additional reason to question the adequacy of representation the (b)(2) class received in this case.

Of course, given his perceived expertise and role as lead class counsel in *American Express*, Mr. Friedman could have fought to ensure that any LPF could not be used to achieve a bad outcome for the (b)(2) class. Instead, he did the opposite. After the settlement

Memorandum of Understanding was filed in this Court in July 2012, Mr. Friedman immediately moved towards settling *American Express* for parity surcharging—an outcome that he hoped would yield him huge fees in exchange for protecting the three dominant card companies from competition.[30]

Proponents further claim that Mr. Friedman's misconduct did not matter because the LPF was non-negotiable. As noted, this claim is belied by Defendants' own contemporaneous document clearly stating that, [redacted][31] Moreover, contrary to Defendants' self-serving argument [redacted], Defendants settled similar claims the United States brought against their no-discounting rules *without* any LPF provision. In resolving the DOJ's challenge in 2011, Visa and MasterCard permitted merchants to offer discounts for alternative forms of payment, including American Express, even though American Express prohibited merchants from granting discounts to favor, e.g., Visa and MasterCard.[32]

Defendants may have been willing to settle without an LPF here, if class counsel had put up a fight. But we will never know that, because class counsel leaned on Mr. Friedman's

---

[30] *See* 2015 U.S. Dist. LEXIS 102714, at *60 ("On July 23, 2012, Friedman emailed Ravelo regarding settlement negotiations with American Express, including the negotiation of attorneys' fees. (Id., Ex. 14 (Friedman: 'Btw, phil sounded receptive. But on the issue of $ he said it was a 'huge f'ing number' that made him 'gag' and could impede his client from moving like they otherwise might. Then later he said, 'back to that # for a sec... does it include richard?').) Ravelo responded: 'Not bad.' (Id., Ex. 14.)") (footnotes omitted, explaining that "phil" apparently referred to Philip Korologos, counsel for American Express, and that "Richard" apparently referred to Richard Arnold, counsel for the IMPs).

[31] Ex. 12, GBF00002442, at 2443.

[32] Co-Lead Counsel claim that the LPF is procompetitive for merchants. *See* Class Mem. 16. Judge Gleeson, however, recognized that, because of the LPF, "most merchants will, as a practical matter, be precluded from surcharging Visa and MasterCard products." 986 F. Supp. 2d at 233. Moreover, if the LPF were procompetitive, why would Co-Lead Counsel have [redacted] *See* Wildfang Decl. ¶ 10 at 9.

expertise about the consequences of the LPF and, [redacted].

Lastly, Co-Lead Counsel attempt to salvage the adequacy of the (b)(2) class's representation (and diminish the impact of Mr. Friedman's secret funneling of American Express documents to Ms. Ravelo) by claiming that they knew the "power" of differential surcharging from American Express documents and testimony produced in this case concerning the surcharging of American Express cards in Australia. Class Mem. 17-23. But that contention is unavailing for several reasons. First, Co-Lead Counsel admit that they did not know the fact that mattered most: that Mr. Friedman knew he could manipulate his privileged position in both cases to use the LPF to settle the *American Express* case for parity surcharging. Second, contrary to Co-Lead Counsel's current claims, Co-Lead Counsel told this Court in December 2012 that American Express documents, which Co-Lead Counsel sought to compel from American Express, "will provide a *significantly clearer picture* of the real value and efficacy of merchant surcharging *than any other documents produced to date in MDL 1720*" and that "Counsel in Amex ASR have advised Class counsel, in general terms, that the documents referenced in this motion contain *singularly powerful evidence* regarding the efficacy of merchant surcharging in fostering competitive pressures in the marketplace." ECF No. 1760 (emphases added). The motion to compel was denied, so Co-Lead Counsel never saw this "singularly powerful evidence"—while Mr. Friedman provided Ms. Ravelo that same information along with his insights about it.

Co-Lead Counsel's claimed knowledge of the "power" of differential surcharging actually underscores the materiality of Mr. Friedman's *and Ms. Ravelo's* knowledge that *American Express* could leverage the LPF to yield parity surcharging—while highlighting the

significance of Co-Lead Counsel's lack of this knowledge. Co-Lead Counsel tout the IMPs' knowledge of the *American Express* record and their support of the LPF. Class Mem. 21-22. But they, too, were in the dark that Mr. Friedman was planning to use the LPF to engineer parity surcharging industry-wide. Once the *American Express* settlement was announced, "the same IMPs vehemently objected," *id.* at 21, about how "these impotent and flawed would-be class representatives have shamelessly attempted to derail the Individual Plaintiffs' attack on Amex's anticompetitive rules and help Amex in keeping its system intact."[33]

III. This Court has the authority, under Rules 60 and 23, to address the grossly inadequate representation that the (b)(2) class received in this case.

A. Relief under Rule 60(b)(6) is timely and appropriate.

Rule 60(b)(6)—which is not subject to a one-year time bar—is the proper vehicle to secure relief from a judgment due to serious ethical breaches or collusive or fraudulent conduct by one's own counsel. The Second Circuit has held that Rule 60(b)(6) "confers broad discretion on the trial court to grant relief when appropriate to accomplish justice; it constitutes a grand reservoir of equitable power to do justice in a particular case . . . and should be liberally construed when substantial justice will thus be served." *Matarese v. LeFevre*, 801 F.2d 98, 106 (2d Cir. 1986) (internal citations and quotations omitted).

Co-Lead Counsel argue that Rule 60(b)(2)—which applies to motions based on "newly discovered evidence" and is subject to a one-year limit—applies instead and therefore this motion is time-barred. This argument—which Defendants notably do not join—amounts to the assertion that a mandatory class settlement binding millions of current and future merchants in perpetuity could not be undone even if it were the product of collusion between plaintiffs' and

[33] IMPs' Obj. to Proposed American Express Class Action Settlement, at 3, *In re Am. Express Anti-Steering Rules Antitrust Litig.*, No. 11-md-2221 (NGG)(RER) (Jun. 6, 2014).

defense counsel, so long as the misconduct was successfully hidden for more than one year. Unsurprisingly, such a manifestly unjust rule does not exist.[34]

Co-Lead Counsel do not cite a single case for their made-up rule that egregious misconduct by *a moving party's own counsel* can only be addressed within one year under Rule 60(b)(2). That is because Rule 60(b)(2) applies to newly discovered evidence about the merits of the litigation that would be presented at trial; it does not apply to learning that one's own attorney was secretly engaged in unethical, collusive, or fraudulent conduct.[35] Rather, as Wright & Miller makes clear, courts address the discovery of misconduct by a party's own counsel through the lens of Rule 60(b)(6), which is not subject to the one-year bar: "Fraud by the party's own counsel, by a codefendant, or by a third-party witness does not fit within clause (3) of the rule [60(b)] . . . . *Thus, relief has been granted under clause (6) instead.*" 11 Fed. Prac. & Proc. Civ. § 2864 (3d ed.) (emphasis added). Indeed, Co-Lead Counsel acknowledge that undisclosed conflicts of interest by a party's counsel have been held to constitute "extraordinary circumstances" justifying relief under Rule 60(b)(6). *See* Class Mem. 34 (attempting to distinguish on other grounds *Church & Dwight Co., Inc. v. Kaloti Enters. of Michigan*, No. 07 Civ. 0612, 2011 U.S. Dist. LEXIS 110955 (E.D.N.Y. Sept. 28, 2011); *In re Eastern Sugar*

[34] Defendants acknowledge that the Friedman/Ravelo "communications actually came to light *nearly* a year after" Judge Gleeson's final approval order, Def. Mem. 16 (emphasis added), and Objectors were not alerted to this issue until February 2015, after a year had elapsed since Judge Gleeson's order. Defendants rightly do not join in Co-Lead Counsel's argument that Objectors' motion is untimely, because the argument is legally baseless.

[35] Rule 60(b)(2) applies to "newly discovered evidence" which goes to the "merits of the underlying litigation," and not to information which is relevant to matters "collateral to the merits of the litigation," such as class certification. *Aponte v. City of N.Y. Dep't of Corrections*, 377 F. App'x 99, 100 (2d Cir. 2010); *Schwartz v. Cap. Liquidators, Inc.*, 984 F.2d 53, 54 (2d Cir. 1993); *United States v. Benoit*, No. 08 Civ.2140, 2011 U.S. Dist. LEXIS 64731, at *5 (S.D. Cal. Jun. 16, 2011); *Weber v. Goodman*, No. CV-97-1376, 1998 U.S. Dist. LEXIS 22832, at *8 n.3 (E.D.N.Y. June 1, 1998) (granting 60(b)(1) motion seeking vacatur of class certification denial: "While plaintiff's revised attorney-client agreement might be considered new 'evidence' or facts, the language of Rule 60(b)(2) indicates that it applies to requests for relief from judgments following trials, not to orders deciding pretrial motions."). The information here does not go to the merits of the litigation, but rather to the significant, but collateral, question of whether class members received adequate representation. This is not the type of information that would be presented in a trial on the merits.

Antitrust Litig., 697 F.2d 524 (3d Cir. 1982); and *Marderosian v. Shamshak*, 170 F.R.D. 335, 340-42 (D. Mass. 1997)); *see also see also McKinney v. Boyle*, 404 F.2d 632 (9th Cir. 1968) (collusive settlement by movant's own counsel not barred by one-year limitation and properly examined under 60(b)(6)); *Murphy v. Snyder*, No. 10 Civ. 1513, 2013 U.S. Dist. LEXIS 32997, at *55 (E.D.N.Y. Mar. 8, 2013) (granting relief under 60(b)(6) where counsel "failed to address . . . the blatant conflict of interest posed by his simultaneous representation" of co-defendants); *Tantillo v. Barnhart*, No. 04 Civ. 2223, 2011 U.S. Dist. LEXIS 73717, at *13 (E.D.N.Y. July 8, 2011) ("an attorney's fraudulent acts against a client may justify relief" under 60(b)(6)).[36]

Defendants also incorrectly claim that, "[a]s a general matter, an attorney's conflict of interest does not justify a reopening of a final judgment under Rule 60(b)(6) unless it results in conduct rising to the level of complete abandonment of the case." *See* Def. Mem. 25. Defendants' cases do not support that proposition. *Stefanopolous v. City of New York*, 299 F. App'x 49 (2d Cir. 2008), involved no conflict of interest. And in *In re Critical Care Support Services*, 236 B.R. 137, 144-45 (E.D.N.Y. 1999), the court "properly concluded that no conflict of interest was present."[37]

---

[36] In *Eastern Sugar*, plaintiffs' and defendants' counsel's firms merged, and the court of appeals noted that the moving party had provided no evidence that plaintiffs' counsel had provided defense counsel with confidential information. 697 F.2d at 529. To the contrary here, Mr. Friedman undeniably provided Ms. Ravelo with a host of confidential information over the course of years. Defendants also argue that "[n]o court has ever cited [*Church & Dwight*] for the proposition that failure to disclose a conflict of interest alone warrants relief under Rule 60(b)(6)," Def. Mem. 35, but fail to acknowledge that *Church & Dwight* has been cited within this district for the proposition that an undisclosed conflict of interest is an "unusual fact" weighing in favor of granting a Rule 60(b)(6) motion. *Murphy v. Snyder*, No. 10 Civ. 1513, 2013 U.S. Dist. LEXIS 32997, at *55 (E.D.N.Y. Mar. 8, 2013) (granting relief under 60(b)(6) where counsel "failed to address . . . the blatant conflict of interest posed by his simultaneous representation" of co-defendants) (*citing Church & Dwight*, 2011 U.S. Dist. LEXIS 110955, at *24); *see also Tantillo v. Barnhart*, No. 04 Civ. 2223, 2011 U.S. Dist. LEXIS 73717, at *13 (E.D.N.Y. July 8, 2011) ("an attorney's fraudulent acts against a client may justify relief" under 60(b)(6)).

[37] Both *Stefanopolous* and *Critical Care Support* also rely upon *United States v. Cirami*, 535 F.2d 736 (2d Cir. 1976), which denied a 60(b)(6) motion despite counsel's negligence because "[p]etitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of his freely selected agent," *id.* at 739-40. Here, the absent class members did not select Mr. Friedman and, moreover, his misconduct was willful, not merely negligent.

The circumstances present here are precisely the type of extraordinary circumstances that warrant relief.

B. Even assuming *arguendo* that Rule 60(b)'s one-year time bar applies, this Court retains the authority under Rule 23 to address Mr. Friedman's misconduct.

Finally, Proponents do not dispute the law cited by Objectors that, under Rule 23, the district court "'has a constant duty, as trustee for absent parties in the class litigation, to inquire into the professional competency and behavior of class counsel. The district court must renew its stringent examination of the adequacy of class representation throughout the entire course of the litigation.'" Obj. Mem. 32 (quoting *In re Fine Paper Antitrust Litig.*, 617 F.2d 22, 27-28 (3d Cir. 1980), and *Boucher v. Syracuse Univ.*, 164 F.3d 113, 118 (2d Cir. 1999)). The district court retains this authority even after judgment has been entered and the case is on appeal. *See id.*

CONCLUSION

For the reasons set forth above and in Objectors' opening brief, Objectors submit that they have made a sufficient showing that the Rule 23(b)(2) settlement class should be decertified. Objectors respectfully request that the Court hold that it would grant Objectors' motion to vacate its prior certification of the Rule 23(b)(2) class if the court of appeals were to remand for that purpose. *See* Fed. R. Civ. P. 62.1. If the Court believes that additional information is necessary to make this determination, then discovery should be permitted on the ground that Objectors' motion raises a substantial question as to the adequacy of representation that the Rule 23(b)(2) class received in this case. *See id.*

DATED: New York, New York
September 1, 2015

CONSTANTINE CANNON LLP

By: /s
Jeffrey I. Shinder
A. Owen Glist
Ankur Kapoor
Gary J. Malone

335 Madison Avenue
New York, New York 10017
Telephone: (212) 350-2700
Facsimile: (212) 350-2701
Email: jshinder@constantinecannon.com

Attorneys for Objectors 7-Eleven, Inc.; Academy, Ltd. d/b/a Academy Sports + Outdoors; Affiliated Foods Midwest; Amazon.com, Inc.; Beall's, Inc.; Best Buy Stores, L.P.; Boscov's, Inc.; Brookshire Grocery Company; Buc-ee's Ltd.; The William Carter Company, Coborn's Incorporated; Costco Wholesale Corporation; Cracker Barrel Old Country Store; Euromarket Designs, Inc. d/b/a Crate & Barrel and CB2; Meadowbrook, L.L.C. d/b/a The Land of Nod; Cumberland Farms Inc.; D'Agostino's Supermarkets, Inc.; David Bridal Inc.; Dillards; Drury Hotels Company, LLC; Family Express Corporation; Foot Locker, Inc.; The Gap Inc.; HMSHost Corporation; IKEA North America Services, LLC; Marathon Petroleum Company LP; Martin's Super Markets, Inc.; Michaels Stores, Inc., Mills Motor, Inc., Mills Auto Enterprises, Inc., Willmar Motors, LLC, Mills Auto Center, Inc., Fleet and Farm of Alexandria, Inc., Fleet Wholesale Supply of Fergus Falls, Inc., Fleet and Farm of Green Bay, Inc., Fleet and Farm of Menomonie, Inc., Mills Fleet Farm, Inc., Fleet and Farm of Manitowoc, Inc., Fleet and Farm of Plymouth, Inc., Fleet and Farm Supply Company of West Bend, Inc., Fleet and Farm of Waupaca, Inc., Mills E-Commerce Enterprises, Inc., Brainerd Lively Auto, LLC; National Association of

Convenience Stores (NACS); National Cooperative Grocers Association (NCGA); National Community Pharmacists Association (NCPA); National Grocers Association (NGA); National Restaurant Association (NRA); Pacific Sunwear of California, Inc.; Panda Restaurant Group, Inc.; PetSmart Inc.; Recreational Equipment, Inc. (REI); Republic Services, Inc.; Retail Industry Leaders Association (RILA); Roundy's Supermarkets, Inc.; Sears Holdings Corporation; Thermo Fisher Scientific, Inc.; Wal-Mart Stores, Inc.

QUINN EMANUEL URQUHART & SULLIVAN, LLP
Stephen R. Neuwirth
Steig D. Olson
51 Madison Avenue, 22nd Floor
New York, New York 10010

Attorneys for Objector Home Depot U.S.A., Inc.

VORYS, SATER, SEYMOUR AND PEASE LLP
Michael J. Canter
Robert N. Webner
52 East Gay Street
Columbus, Ohio 43215

Attorneys for Objectors Target Corporation, Macy's, Inc., Kohl's Corporation, the TJX Companies, Inc., Staples, Inc., J.C. Penney Corporation, Inc., Office Depot, Inc., L Brands, Inc., Big Lots Stores, Inc., PNS Stores, Inc., C.S. Ross Company, Closeout Distribution, Inc., Ascena Retail Group, Inc., Abercrombie & Fitch, OfficeMax Incorporated, Saks Incorporated, the Bon-Ton Stores, Inc., Chico's FAS, Inc., Luxottica U.S. Holdings Corp., American Signature, Inc., and Lord & Taylor Acquisition, Inc.