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' 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 Holding 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

Federal Cases

Other

PRELIMINARY STATEMENT

As part of the settlement in this case, the district court certified a Rule 23(b)(2) settlement class that did not give any of the millions of absent class members, including Objectors, the right to opt out and choose their own counsel. Objectors have set forth, in the pending appeal, the various grounds on which they have challenged the (b)(2) class. Even under the district court's analysis, however, the (b)(2) settlement class here could only have been certified, consistently with the Due Process Clause of the U.S. Constitution, if, under a heightened scrutiny standard, the class received representation that was free of conflicts and that protected the class's interests. The recently disclosed secret communications between senior MDL 1720 Class Counsel Gary Friedman and former MasterCard counsel Keila Ravelo (the "Friedman/Ravelo communications"), however, reveal that this mandatory class received anything but the level of representation necessary to support its certification under Federal Rule of Civil Procedure 23 and consistent with due process.

As demonstrated by (i) Mr. Friedman's and Class Counsel's sworn statements, (ii) the sworn statements of the named class representatives working with Mr. Friedman and Class Counsel, (iii) contemporaneous documents, and (iv) the fact that Mr. Friedman and Class Counsel have sworn that Mr. Friedman incurred over $10 million in time and expenses in this litigation: Mr. Friedman had primary responsibility for prosecuting the class's injunctive claims against Visa's and MasterCard's surcharging rules, and played a key role—if not the leading role—in negotiating the surcharging-rules relief that Class Counsel has consistently touted as the centerpiece of the (b)(2) settlement's structural reforms. Throughout his supposed representation of the (b)(2) class's interests, Mr. Friedman violated the most basic obligations an attorney owes

to his client: the duty of loyalty and the duty to maintain confidentiality. Without authorization, he repeatedly shared privileged and confidential class information with Ms. Ravelo, who was co-lead counsel for the class's adversary MasterCard, including about the class's negotiating positions with respect to the surcharging-rules relief. He provided Ravelo with information that was critical to the resolution of the (b)(2) class's claims, which he did ***not*** provide to the MDL 1720 class representatives or, apparently, even his co-counsel for the class. He even coached Ravelo [redacted][1] even though effective competition among Visa, MasterCard, and American Express was one of the fundamental objectives of this lawsuit.

In short, even the limited evidence to which Objectors have had access shows that Mr. Friedman was helping Ms. Ravelo represent MasterCard to the detriment of the (b)(2) class. In the expert opinion of Roy Simon, one of the nation's leading authorities on lawyers' standards of conduct and who has been advising class-action lawyers for over 20 years: "I have never seen such repeated violations of professional duties by an attorney representing a class." These extraordinary facts compel de-certification of the Rule 23(b)(2) settlement class on the ground that it did not receive adequate representation.

Mr. Friedman's conduct compromised the adequacy of representation the (b)(2) class received during the negotiation of the MDL 1720 Settlement in two fundamental ways. First, he disclosed his work product as lead counsel in *In re American Express Anti-Steering Rules Antitrust Litig.*, No. 11-MD-2221(NGG)(RER) (E.D.N.Y.) ("*American Express*") to Ms. Ravelo, while keeping that information secret from the MDL 1720 class representatives and Class

[1] Ex. 5, GBF00002459 (emphasis added).

Counsel. The details are fleshed-out below, but the key point is that Mr. Friedman knew, from his work in *American Express*, that if the MDL 1720 Class agreed to the level-playing-field ("LPF") term in the settlement, then that could lead to "parity surcharging" rather than "differential surcharging" based on how American Express was likely to respond. Friedman also knew from his work in *American Express* that parity surcharging would benefit MasterCard (and its competitors) relative to differential surcharging by limiting competition among credit-card brands—all to the detriment of the merchants comprising the (b)(2) class. But Mr. Friedman never advised his clients—the MDL 1720 class representatives—or class co-counsel about *any of this*. Instead, the only person he told was *MasterCard's counsel.* The facts he shared in this unconscionable breach of professional duty are even described [redacted] Ex. 6, GBF00001488 (noting [redacted]). In short, Mr. Friedman breached the *American Express* Protective Order to help his *adversary* in MDL 1720, while making no effort to provide this information to his clients or to help them avoid the harm that parity surcharging would cause.

Second, while the MDL 1720 Settlement was being negotiated, Mr. Friedman consistently fed privileged and confidential MDL 1720 materials to Ms. Ravelo, including internal strategic communications among the Lead Counsel Group. Critically, during the last phases of the negotiations in late May and early June 2012, Mr. Friedman twice sent Ms. Ravelo [redacted].

To make matters worse, on several occasions Mr. Friedman counseled Ms. Ravelo on [redacted]. This conduct persisted through June 2012 when the details of the settlement were finalized.

And the evidence disclosed to date is likely just the tip of the iceberg. The protocol that enabled the production of the Friedman/Ravelo communications was limited primarily to emails that still existed on their work email accounts. The record also indicates, however, that Mr. Friedman and Ms. Ravelo regularly spoke on the phone, [redacted] about MDL 1720 and *American Express*. The protocol provided no way to probe those oral communications, nor did it provide a way to gain discovery into how Ms. Ravelo used the information she received from Mr. Friedman. Common sense and logic, however, lead to the conclusion that, given her long history representing and advising MasterCard as a partner at three law firms and her senior role on its defense team, she used the information Mr. Friedman secretly provided to her to counsel MasterCard on the litigation and settlement.

Without discovery, no one—including the Court—can know for certain the full extent of the malfeasance here, how it harmed the class's interests, and how it impacted the final letter of the settlement. But, given the remarkable extent of the disclosures and their importance, they cannot be characterized as innocent or immaterial to the adequacy of representation this mandatory class received. The conclusion is inescapable that Mr. Friedman had no business representing a class of merchants against MasterCard—particularly merchants who had no power

whatsoever to choose another lawyer—and that he exploited his position to help Ms. Ravelo and her client MasterCard to the detriment of the class.

Rule 60(b)(6) grants the Court broad equitable power to do substantial justice by granting relief from a "final judgment, order, or proceeding" in extraordinary circumstances. Such extraordinary circumstances are present here given Mr. Friedman's key role in negotiating the core (b)(2) relief and his abject betrayal of the (b)(2) class to favor its adversary MasterCard. And because of Mr. Friedman's gross misconduct, it is impossible to have any confidence in the structural features of the settlement. That other parties to the negotiations, including the mediators and the Court, were unaware of his malfeasance reinforces the fact that the negotiations were tainted because these checks could not possibly have functioned to guard against conduct that was kept hidden from them. How could the Court or mediators guard against the implications of MasterCard possessing material information that was kept from the MDL 1720 class representatives or class counsel? How could they know that what they assumed was an arm's length negotiation was fundamentally tainted in this fashion? No protective layer could have guarded against the implications of such a material disparity in information related to the structural relief on the table in this area of the negotiations. For these reasons, as the Supreme Court forcefully declared in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 622 (1997), a settlement resulting from a process that included such conflict-ridden and inadequate representation cannot be salvaged by claiming that the outcome was substantively fair.

Because history does not reveal its alternatives, we will never know what a settlement unaffected by Mr. Friedman's conduct would have looked like. But we do know that, because of the mandatory nature of this antitrust settlement, Mr. Friedman's corruption could harm

competition and virtually every U.S. merchant and their customers for years to come. The unprecedented nature and scope of Mr. Friedman's ethical breaches compromised the adequacy of representation that the (b)(2) class received at the same time as it compromised the Court's ability to protect the broad public interests at issue here as a fiduciary for the (b)(2) class. The Constitution and Rule 23 thus prohibit binding class members to the settlement that Mr. Friedman helped negotiate to the class's detriment.

Objectors bring this motion pursuant to (1) Federal Rule of Civil Procedure 60(b)(6), (2) the Court's continuing duty under Rule 23, as fiduciary for absent class members, to ensure that the mandatory Rule 23(b)(2) class received adequate representation, and (3) the Court's inherent authority to preserve the integrity of the adversarial process. We respectfully urge the Court, as a fiduciary of the (b)(2) class, to hold that it would grant Objectors' motion to vacate its order certifying the (b)(2) settlement class if the court of appeals remands for that purpose. *See* Fed. R. Civ. P. 62.1. Alternatively, we ask the Court to hold that the motion raises a substantial question meriting further discovery, *see id.*, so that the class and the Court can determine the full extent and ramifications of Mr. Friedman's malfeasance.

FACTUAL BACKGROUND

I. The MDL 1720 and *American Express* Settlements, and the Friedman/Ravelo Relationship

A. The "Level-Playing-Field" Provision and the Proposed *American Express* "Parity Surcharging" Settlement

In order to understand the detrimental effect of Mr. Friedman's massive ethical breaches, it is necessary to understand a few key features of the MDL 1720 Settlement—especially the level-playing-field ("LPF") provision and how it interacts with the *American Express* litigation.

We begin with those features, before explaining how Mr. Friedman compromised them through his ongoing and improper communications with Ms. Ravelo.

The LPF provision allows Visa and MasterCard effectively to borrow the surcharging rules of "Competing Credit Card Brands" that are deemed more expensive and which restrict surcharging in any way. Because American Express is generally more expensive than Visa and MasterCard[2] and also restricts surcharging, the LPF requires merchants, who wish to surcharge Visa/MasterCard credit-card transactions, to do so on the same terms as merchants can or actually do surcharge American Express transactions. Therefore, when the surcharging relief was being negotiated in the MDL 1720 Settlement, it was known that its value depended significantly upon the resolution of the then-pending putative *American Express* class action which challenged, among other things, American Express's surcharging rules.

The impact of the *American Express* case on the MDL 1720 Settlement was revealed when, just six days after final approval in MDL 1720, Gary Friedman—as lead counsel for the class in the American Express case—announced that *American Express* had settled for parity surcharging. Under the proposed deal, American Express agreed to eliminate its requirement that merchants must surcharge all payments cards, including debit cards, if they surcharge American Express. But the class agreed that American Express could replace that rule with a parity-surcharging requirement limited to credit cards, whereby merchants that surcharge American Express transactions must equally surcharge all other credit-card brands, including

[2] *United States v. Am. Express Co.*, 10-CV-4496 (NGG) (RER), 2015 U.S. Dist. LEXIS 20114, at *157 (E.D.N.Y. Feb. 19, 2015) ("American Express has successfully pursued a premium pricing strategy for decades, most recently in 2013—the last year for which data was provided to the court—maintaining an 8 basis point and 3 basis point premium over Visa and MasterCard, respectively, on a mix-adjusted basis.").

Discover.[3] Because under parity surcharging merchants cannot differentially surcharge less expensive competitive networks like Discover (or not surcharge them at all), merchants cannot use parity surcharging to steer consumers to use lower-priced credit cards. Parity surcharging thus protects the dominant networks from price competition.[4]

Like the MDL 1720 Settlement, merchants cannot opt out of the proposed American Express Settlement. Thus, the consequence of the two settlements that Gary Friedman helped negotiate is that, if the American Express Settlement is approved and because the LPF applies American Express's parity-surcharging rule to Visa and MasterCard, the industry structure going forward will be parity surcharging, i.e., all credit-card networks must be equally surcharged if a merchant wants to surcharge any of them. Merchants will be unable to use differential surcharging to foster price competition. And merchants will be unable to challenge this outcome, even if they had always opposed it and can later prove that it is plainly anticompetitive.

In the absence of the LPF provision, this would not be the case. It is that provision alone which prevents merchants from surcharging Visa and MasterCard transactions on a differential basis. It was accordingly critical to the MDL 1720 class's negotiation of the LPF provision

[3] *See* [Proposed] Class Settlement Agreement ¶ 8(b), *In re American Express Anti-Steering Rules Antitrust Litig.*, No. 11-MD-2221(NGG)(RER) (E.D.N.Y. Jan. 7, 2014), ECF No. 306-2 ("American Express Settlement") (surcharge on American Express transactions "must not be any higher than any surcharge imposed on transactions effected with any other Credit Card"). Because American Express is typically more expensive to merchants, no rational merchant would surcharge American Express lower than other credit cards.

[4] After a seven-week trial in the United States' case against American Express, Judge Garaufis held that American Express's non-discrimination rules that prohibit merchants from steering consumers to alternative forms of payment, e.g., via discounting, violated the Sherman Act § 1 because, among other things, they effectively prevented merchants from differentially steering American Express (and Visa and MasterCard) transactions to Discover. *United States v. Am. Express Co.*, 10-CV-4996 (NGG) (RER), 2015 U.S. Dist. LEXIS 20114, at *201 (E.D.N.Y. Feb. 19, 2015) ("Since customers can neither independently access nor account for the costs of different forms of payment when deciding which to use, a lowest-cost provider strategy cannot succeed in the network services market if merchants are unable to shift share among the various networks."); *id.* at 226 (calling differential surcharging "a particularly strong form of steering" but not ruling on surcharging).

whether: (1) parity surcharging was a major concession relative to differential surcharging; and (2) American Express was likely to insist on parity surcharging in its case. As explained below, Mr. Friedman had critical knowledge on both scores which he shared with *MasterCard's* counsel, but not with the MDL 1720 class he purported to represent on a mandatory basis in its suit *against MasterCard*.

B. Gary Friedman Played a Key Role in Both MDL 1720 and *American Express*

[redacted] Mr. Friedman served as lead counsel for the class in the *American Express* litigation, a litigation which also dealt with ASRs (or, as American Express calls them, "anti-discrimination provisions" ("ADPs")), including American Express's surcharging rules. But the best evidence of Mr. Friedman's responsibilities are the sworn statements that he and co-counsel have made to this Court and to the *American Express* court in support of his claims for attorneys' fees. In MDL 1720, Class Counsel submitted that Mr. Friedman had incurred over $10 million in time and expenses, largely for prosecuting and negotiating the class's surcharging-related claims. Mr. Friedman has asked for $79 million for his role in *American Express*.

As one would expect, Mr. Friedman's large billings reflect his central role in the case. In his declaration in support of final settlement approval, Co-Lead Counsel for the Class described

[5] Ex. 69, LOG-A-00002148, [redacted]

Mr. Friedman as a "senior member[] of the Co-Lead Counsel Firms."[6] [redacted]

[redacted][10]

[6] 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.")

[7] Ex. 69, [redacted]

[8] *Id.* ¶ 3.

[9] *Id.* ¶ 4 (emphasis added).

[10] *Id.* ¶ 5.

Mr. Friedman and his firm also [redacted][11]

Notably, both the MDL 1720 and *American Express* classes used the same expert, Dr. Alan Frankel, on surcharging issues. Mr. Friedman and his firm [redacted][12]

Given his expertise in this area, Mr. Friedman and his firm [redacted][13] Mr. Friedman and his firm [redacted][14]

[11] *Id.* ¶ 6.

[12] *Id.* Contemporaneous documents confirm Mr. Friedman's leadership with respect to the ASRs and NSRs. *See, e.g.*, [redacted]

[13] Ex. 69, [redacted] (emphasis added). *Accord* Declaration of Gary B. Friedman in Support of (1) Class Plaintiffs' Motion for Final Approval of Class Action Settlement and (2) Class Counsel's Motion for an Award of Attorneys Fees and Costs, and for Leave to Distribute Service Awards ¶ 6, *In re American Express Anti-Steering Rules Antitrust Litig.*, 11-MD-02221 (NGG) (RER) (E.D.N.Y. Apr. 15, 2014), ECF No. 364 (Friedman Law Group "also developed the challenge to Visa and MasterCard's no-surcharge rules and took a laboring oar in litigating and then negotiating the settlement of the no-surcharge side of the MDL 1720 class action.").

[14] Ex. 69, [redacted]

The Friedman/Ravelo communications themselves confirm [redacted] For example, the documents show [redacted].[15] They also show Mr. Friedman [redacted].[16]

[15] *See e.g.*, [redacted].

[16] Ex. 19, LOG-A-00002047-50; Ex. 20, LOG-A-00001467; Ex. 21, LOG-A-00001469; Ex. 22, LOG-A-00001413 [redacted]; 11-md-2221 ECF No. 366-1 at Exhibit 1 and 2 (April 2013 memoranda from Gary Friedman to Mark Merley and Keila Ravelo re: Visa and MasterCard Operating Regulations).

Based on their first-hand experience, the former named plaintiffs in MDL 1720 also confirm Mr. Friedman's central role [redacted]. *See* Exs. 2-4, Decls. of Thomas Wenning, Lyle Beckwith, and Douglas Kantor. Several times, Lead Counsel in MDL 1720 characterized Mr. Friedman as the subject-matter expert on surcharging who was best positioned to protect the interests of the class in those complex and detailed negotiations. Kantor Decl. ¶¶ 4, 5, 7, 9; Beckwith Decl. ¶ 6; Wenning Decl. ¶ 5. In fact, Mr. Friedman organized calls with the class representatives to brief them on the surcharging negotiations, at times handling the calls himself without Lead Counsel participating. Wenning Decl. ¶ 7. Former class representatives met directly with Mr. Friedman to discuss surcharging issues, and he led the meetings where these representatives' concerns were discussed with Class Counsel. Kantor Decl. ¶¶ 4-8. [redacted] *Id.* ¶ 9; Wenning Decl. ¶ 8.

Mr. Friedman's relationship with Ms. Ravelo was never disclosed to the class representatives. Nor were they advised that a LPF settlement would be welcomed by American Express because it could pave the way for, and increase the likelihood of, a parity-surcharging result in the *American Express* case. Wenning Decl. ¶¶ 9-10; Beckwith Decl. ¶ 8-9; Kantor Decl. ¶¶ 10-11. Instead, Mr. Friedman advocated to the class representatives that the proposed surcharging relief would be "a valuable remedy," Wenning Decl. ¶ 9, frequently citing the Australia experience "as evidence that surcharging lowers merchant acceptance costs." Kantor Decl. ¶ 10. In doing so, he never explained to them that [redacted]

[redacted]. *See id.* Mr. Friedman did not inform the class representatives that, [redacted][17] *See id.*, Wenning Decl. ¶ 9.

For Mr. Friedman's senior role in the case, Co-Lead Class Counsel submitted a declaration stating that Mr. Friedman put $9.6 million worth of time and $892,044.20 in expenses, after reductions and auditing, into MDL 1720. *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. As Mr. Undlin informed the Court, "the time and expense records of law firms that worked on this matter have been reviewed three times—first by a responsible partner for the submitting firms, second by Class Counsel leadership attorneys on a line-by-line basis, and third by [the outside accounting firm of CliftonLarsonAllen LLP]." With its nearly $10 million in time entries, Mr. Friedman's small firm was the largest biller to MDL 1720 after the three co-lead counsel firms. *See* Supplemental Decl. of Thomas J. Undlin ¶ 2 (E.D.N.Y. Aug. 16, 2013), ECF No. 5940-1.

Mr. Friedman has stated that MDL 1720 and *American Express* represent the vast bulk of the work he and his firm have performed, as "[t]he almost singular focus of FLG and its predecessor firm [Friedman & Shube] for the past decade has been the prosecution of antitrust litigation on behalf of merchants against credit card companies, and related activities. More than 60% of FLG's partner time since inception has been spent on the litigation against American

[17] Ex. 22, GBF00002186, GBF00002188.

Express, and most of the remainder has been spent on litigation against Visa and MasterCard, in MDL 1720." 11-md-2221 ECF No. 364 ¶ 4. In the American Express case, Mr. Friedman has asked the Court to approve a payment of $79 million in fees and expenses. 11-md-02221 ECF No. 306-1 at 16.[18]

C. Keila Ravelo Played a Key Role in MDL 1720 for MasterCard

Keila Ravelo was co-lead counsel for MasterCard in this litigation. She argued a portion of the motion to dismiss and was involved in all elements of the case. Along with Kenneth Gallo, she attended the mediation sessions and settlement-negotiation meetings on MasterCard's behalf.[19] Basic facts establish that Ms. Ravelo has long been a trusted advisor to MasterCard. Between 1996 and 2014, Ms. Ravelo represented MasterCard in several payment-card antitrust litigations, including *In re Visa Check/MasterMoney Antitrust Litigation*, MDL 1720, and the Department of Justice investigation and lawsuit against Visa, MasterCard, and American Express regarding their no-discrimination and no-discounting rules. Over nearly two decades, she maintained a relationship with MasterCard as a partner at three major law firms, Clifford Chance, Hunton & Williams LLP, and, lastly, Willkie Farr & Gallagher LLP, where she represented MasterCard as co-lead counsel in MDL 1720 from November 2010 until her resignation from the firm in November 2014. Ms. Ravelo's resignation was triggered by Willkie's discovery that she was under investigation by the U.S. Attorney's Office in the District of New Jersey for allegedly defrauding Willkie Farr, Hunton & Williams, and MasterCard by

[18] As Mr. Friedman stated in his declaration in support of that settlement, his firm "has very substantial obligations owing out of any award of attorney fees in this case. A corollary is that our receipts at the end of the day will be substantially less than appears on the face of the application." 11-md-2221 ECF No. 364 ¶ 5.

[19] Declaration of Eric D. Green ¶ 8, *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. 2111-3.

falsely billing them for litigation-support services through two shell vendors. Ms. Ravelo was indicted on December 19, 2014, and arrested on December 22, 2014. *See* Criminal Complaint ¶¶ 1(f), 1(g), 7, *United States v. Ravelo*, 14-mj-06800-JAD (D.N.J.).

D. Willkie Farr Discloses "Inappropriate" Communications Between Friedman and Ravelo

In February 2015, Willkie Farr disclosed to the parties and objectors in this case that—while looking for documents responsive to a grand jury subpoena—the firm had discovered what it called "inappropriate" communications between Mr. Friedman and Ms. Ravelo. This Court and the *American Express* court entered parallel stipulations and orders governing the disclosure of the documents reflecting these inappropriate communications. *See* ECF Nos. 6435, 6445, 6449; 11-md-2221 ECF Nos. 557, 561, 562. Logs were prepared of more than 4,000 records amounting to tens of thousands of pages, and many of the documents have been disclosed.

After the existence of these improper communications was disclosed, Class Counsel stated that lead counsel "never approved or authorized any of the communications between Mr. Friedman and Ms. Ravelo" and "had no knowledge that such communications ever occurred." ECF No. 6467 at 5.

The document disclosures to date have been largely limited to communications between Mr. Friedman and Ms. Ravelo that were found on their work emails at the Law Offices of Gary Friedman, Willkie Farr, and Hunton & Williams.

E. The Multifaceted Relationship Between Friedman and Ravelo and the Conflicts It Presented

According to Mr. Friedman's counsel in the *American Express* case: "Mr. Friedman and Ms. Ravelo have been friends for more than 20 years. They first met as associates at Sidley

Austin in the early 1990s and, after Mr. Friedman married his wife and Ms. Ravelo married Mr. Feliz (a former pro bono client of Mr. Friedman and Ms. Ravelo), the couples continued to socialize. Once they both had children, the families grew close and often vacationed together."[20] Ms. Ravelo turned to Mr. Friedman for legal advice as she was investigated and arrested on fraud charges, and when her husband was arrested for narcotics trafficking.[21] Mr. Friedman also [redacted] for unknown reasons.[22] Friedman and Ravelo referred business to each other, advised each other on professional issues, shared clients as co-counsel, and jointly explored various non-legal business activities.[23]

As demonstrated in the accompanying Declaration of Roy Simon—one of the nation's leading authorities on legal ethics—these conflicting personal interests in one's adversary themselves raise serious concerns about Mr. Friedman's ability to represent the class. Mr. Friedman faced a constellation of conflicts of interest—personal, professional, and litigation-related—which were kept secret. Not only were the conflicts undisclosed—and therefore neither the clients nor the Court ever consented to the conflicted representation—there is abundant

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[20] Letter from S. Issacharoff, Esq., to Hon. J. Orenstein, at 1 (E.D.N.Y. Mar. 5. 2015), ECF No. 6431.

[21] *Id.*

[22] Ex. 24, GBF00001498-505 [redacted]

[23] *See, e.g.*, Ex. 26, LOG-B-00000081 [redacted]

evidence that they led directly to the harm that the ethical rules are designed to guard against: the sharing of key confidential and privileged information, and the methodical violation of protective orders, *over the course of years*. Ex. 1, Decl. of Professor Roy D. Simon, Jr.

Professor Simon concludes:

> In my three decades studying professional responsibility for lawyers – more than 20 of those years advising class action lawyers – I cannot recall ever seeing such repeated and serious violations of professional duties by an attorney representing a class, or such willing participation in those violations by an attorney for a defendant in a class action. In my view, Mr. Friedman's disregard of his professional responsibilities was prejudicial to the administration of justice and creates an intolerable appearance of impropriety.[24]

II. Friedman Provided Ravelo with Privileged and Confidential Information for the Benefit of MasterCard, Rather than the Class

A. Friedman Regularly Provided Ravelo with Privileged and Confidential Material in Both MDL 1720 and *American Express*

Even though Ms. Ravelo represented MasterCard, whose interests were aligned with American Express—and adverse to merchants—on the anti-steering rules, Mr. Friedman apparently treated her as a secret member of his litigation team in *American Express*. Mr. Friedman disclosed virtually all aspects of that case to her, including drafts of complaints and briefs, damages analyses, appellate strategy, and settlement strategy.[25] Mr. Friedman did not disclose Ms. Ravelo's role to the class representatives in *American Express* or to his co-counsel. Ms. Ravelo was so thoroughly involved in the case over the course of a decade that, even though

[24] Ex. 1, Declaration of Roy D. Simon, Jr. ¶ 15.

[25] From the document disclosures, it appears that Ms. Ravelo [redacted] Ex. 33, EM04-0000065_001-010.

they were not informed of her involvement at the time, Mr. Friedman's co-counsel now states that [redacted] Letter of Mark Reinhardt, May 8, 2015, ECF No. 572, at 2 (filed under seal).

In addition to regular disclosures of privileged and confidential material from *American Express*, the documents show that Mr. Friedman disclosed substantial privileged and confidential MDL 1720 class information and attorney work product to Ms. Ravelo, beginning shortly after the case was filed in January 2006 and continuing after it was settled, through 2014.[26] The documents show that Mr. Friedman [redacted]

[26] *See, e.g.*, Ex. 34, EM02-0000191_001 [redacted]

[redacted].[27] There is also evidence that Mr. Friedman and Ms. Ravelo communicated regularly about both MDL 1720 and *American Express* outside of their written communications: on the phone [redacted].[28] It is therefore clear that there is much information about their relationship and communications that remains unknown.

What is known, and is discussed more fully below, is that this inappropriate flow of information from both cases went to the heart of the settlement negotiations over the injunctive relief afforded the (b)(2) class in MDL 1720, in which Mr. Friedman was deeply influential. Mr. Friedman repeatedly shared with Ms. Ravelo key internal Class Counsel communications and memoranda regarding the MDL 1720 Class's position on the surcharging-rules relief and the LPF when the MDL 1720 Settlement was being negotiated, supposedly at arms' length.[29]

[27] For example, on October 6, 2010, [redacted].

[28] *See, e.g.*, Ex. 51, EM02-0000183_001-85_012 [redacted].

[29] *See* Ex. 58, GBF00002175 [redacted].

B. Friedman Gave Critical Portions of the *American Express* Record to MasterCard's Lawyer But Not to His Co-Counsel in MDL 1720

In violation of the *American Express* protective order, Mr. Friedman repeatedly shared key information with Ms. Ravelo about, among other things, American Express's experience with surcharging in Australia. The Australian market uniquely has substantial experience with surcharging, as Australian regulations have prohibited credit-card networks from banning surcharging since 2003. [redacted] Mr. Friedman told Ms. Ravelo that American Express would gladly resolve the class case against it for parity surcharging [redacted]. Mr. Friedman's insight from this information was never disclosed, even in summary form, to the MDL 1720 class representatives.

Nor does it appear that Mr. Friedman shared this critically important information with his co-counsel in MDL 1720. MDL 1720 Class Counsel did not attempt to gain access to the *American Express* record until after the close of discovery, when they moved to compel

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[redacted].

American Express to produce the documents. Even though that record obviously became pertinent to the MDL 1720 Settlement when the LPF provision became part of the settlement negotiations, Class Counsel did not renew their motion to compel until *after* the settlement was finalized. In short, courtesy of Mr. Friedman, MasterCard's attorney had highly material information that the class representatives and Class Counsel lacked as the MDL 1720 Settlement was being negotiated.[30]

In their December 2012 motion, Class Counsel argued 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. . . . More specifically, we understand that the documents focus largely on Amex's experiences beginning in 2007-08, when merchant surcharging in Australia began to take hold." ECF No. 1760 (emphasis added). "According to counsel in that litigation—some of whom are also among Class counsel and Individual Plaintiffs' counsel in MDL 1720—these documents 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." *Id.* (emphasis added).

[30] In their motion to compel, Class Counsel asserted that they did not have access to the Australian record which we now know was secretly handed to Ms. Ravelo. While two emails contain Mr. Friedman [redacted]. Critically, in these emails Friedman does not [redacted]

Remarkably, Mr. Friedman's misbehavior ensured that *MasterCard's lawyer* had these documents that could have exposed "the real value and efficacy of merchant surcharging" before the MDL 1720 Settlement was finalized, and yet his clients and co-counsel did not.

C. Friedman's Exploitation of the *American Express* Record to Help MasterCard to the Detriment of the MDL 1720 Class in the Settlement Negotiations

Mr. Friedman kept Ms. Ravelo fully informed as to every development in the *American Express* case and other aspects of Mr. Friedman's merchant-related legal work, from the filing of the case through settlement. He used that record to help MasterCard—not the MDL 1720 class—throughout the negotiations of the MDL 1720 Settlement where, because of the LPF, the *American Express* case became a critical issue.

The Friedman/Ravelo communications suggest that Friedman's plan throughout the *American Express* case was to position it to resolve for parity surcharging. As early as April 2006, Mr. Friedman shared with Ms. Ravelo a document entitled [redacted].[31]

On November 29, 2011, right before the first critical December 2 – 3, 2011, mediation session with Judge Gleeson and Magistrate Judge Orenstein that kick-started the final negotiations in MDL 1720, Mr. Friedman sent Ms. Ravelo an explicit signal that the American Express case was positioned to settle for parity surcharging if Visa and MasterCard settled for a level-playing-field right to surcharge in MDL 1720:

[31] Ex. 7, EM02-0000182_001-003 at 003.

[redacted] Amex's fantasy resolution of all of this litigation is a world where merchants are free to surcharge Amex cards but only if (i) the merchant also surcharges v/mc and (ii) surcharges v/mc at the same *level*. [redacted] then AmEx is half-way home.[32]

Critically, [redacted] Through Mr. Friedman's communications, MasterCard's lawyer understood the potential implications of LPF [redacted] but the MDL 1720 class representatives and Class Counsel did not. [redacted]

The Friedman/Ravelo communications further reveal that, over the next eight months during the key negotiating period in MDL 1720, Mr. Friedman and Ms. Ravelo utilized [redacted]. Starting in approximately January 2012, [redacted]

[32] Ex. 60, LOG-A-00001191 (italics in original).

[33] [redacted]

[redacted] These are materials that Ms. Ravelo and MasterCard had no right to see under the protective order in the American Express litigation.

[redacted] Ex. 61, LOG-A-00006996-98, LOG-A-00007013-14.

This massive breach of the *American Express* Protective Order occurred between approximately January 2012 and July 2012, when the MDL 1720 Settlement was being hotly negotiated. In fact, just one week after the MDL 1720 Settlement was announced, on July 20, 2012, an internal Willkie Farr email [redacted]

[redacted][34]

[redacted] MasterCard, like American Express, has typically maintained a higher-price strategy relative to Visa[35] which likely would have been compromised had MDL 1720 settled for an unqualified right to differentially surcharge. [redacted] For this reason, MasterCard and American Express had aligned interests against merchants to ensure that parity surcharging was the ultimate outcome of these cases.

D. Friedman Improperly Discloses Privileged and Confidential MDL 1720 Class Information to Ravelo

While Mr. Friedman was secretly feeding select portions of the *American Express* record to Ms. Ravelo, his communications with her also subverted the class's position in the MDL 1720 class settlement negotiations. In an April 30, 2012, memorandum sent by Mr. Friedman on behalf of the Class Plaintiffs' Lead Counsel Group to the MDL 1720 Defendants, [redacted][36] However, after numerous improper disclosures by Mr. Friedman to Ms. Ravelo during the course of the next two months,

[34] Ex. 6, GBF00001487-91.

[35] *See, e.g.*, *United States v. Am. Express Co.*, 10-CV-4496 (NGG) (RER), 2015 U.S. Dist. LEXIS 20114, at *157 (E.D.N.Y. Feb. 19, 2015) ("American Express has successfully pursued a premium pricing strategy for decades, most recently in 2013—the last year for which data was provided to the court—maintaining an 8 basis point and 3 basis point premium over Visa and MasterCard, respectively, on a mix-adjusted basis.").

[36] Ex. 12, GBF00002445.

Mr. Friedman and Class Counsel agreed [redacted].

Over the course of the ensuing negotiations, Mr. Friedman repeatedly disclosed privileged material, including class counsel communications, to Ms. Ravelo. As the negotiations entered the final phase, Mr. Friedman sent, to Ms. Ravelo's personal Gmail account, [redacted][37] [redacted] Ex. 14, GBF00002451-55. [redacted] Mr. Friedman secretly provided this highly sensitive internal class document to counsel for the class's adversary at the height of the negotiations. *Id.*

On June 1, 2012, Ms. Ravelo, from her Gmail account, asked Mr. Friedman, [redacted][38] On June 2, 2012, Mr. Friedman emailed Ms. Ravelo's Gmail account and responded with the following: [redacted]

[37] Ex. 14, GBF00002451-55.

[38] Ex. 62, GBF0002458.

[redacted][40]

Over the next two weeks, Mr. Friedman continued to feed privileged information to Ms. Ravelo to help her counsel MasterCard. Ex. 5, GBF00002459-60 [redacted]; Ex. 63, GBF00002466 [redacted]; Ex. 18, GBF00002474-75 [redacted]; Ex. 64, LOG-A-00001279 [redacted]; Ex. 65, GBF00002472 [redacted] This conduct persisted until the settlement was finalized in late June 2012. Ex. 66, GBF00002489 [redacted]

A few months after the MDL 1720 Settlement was finalized, Mr. Friedman sent to Ms. Ravelo's Gmail account [redacted] That email also stated that, [redacted]

[39] Ex. 5, GBF00002459 (emphasis added).

[40] *See* Ex. 5, GBF00002460-63.

[redacted][41] [redacted]

[redacted]

[redacted]

[redacted] Mr. Friedman concluded by noting that [redacted]

[redacted][42]

At this point in time, November 2012, both Mr. Friedman and Ms. Ravelo had been involved in negotiating the LPF in MDL 1720. Therefore, both knew that parity surcharging in the *American Express* case would result in parity surcharging industry-wide if both settlements were approved with parity surcharging. This begs the question why Mr. Friedman would have engineered a result which [redacted]

[redacted]

[redacted]

The most likely answer is that this anticompetitive result is precisely what Mr. Friedman and Ms. Ravelo intended. Ms. Ravelo wanted to protect her client, MasterCard, from competition, just like American Express would be protected from competition in its "fantasy resolution of all of this litigation." Mr. Friedman saw a path to settle the MDL 1720 and *American Express* classes' surcharging-rules claims favorably for the credit-card companies, thereby securing his enormous attorneys' fees in both cases. American businesses suffered.

[41] Ex. 67, GBF00002631.

[42] *Id.*

ARGUMENT

I. LEGAL STANDARDS

A. Federal Rule of Civil Procedure 60(b)(6)

Under Rule 60(b)(6), relief from a "final judgment, order, or proceeding" is available for any "reason that justifies relief." "Clause (6) . . . has been described by Professor Moore as 'a grand reservoir of equitable power to do justice in a particular case when relief is not warranted by the preceding clauses' . . . which, in a proper case, is to be 'liberally applied.'" *United States v. Cirami*, 563 F.2d 26, 32 (2d Cir. N.Y. 1977) (quoting 7 *Moore's Federal Practice* ¶ 60.27 [2] at 352, 375 (2d ed. rev. 1975)); *accord Grace v. Rosenstock*, 85-CV-2039 (DGT), 2004 U.S. Dist. LEXIS 29654, at **28-31 (E.D.N.Y. Oct. 4, 2004) (quoting *First Fidelity Bank, N.A. v. Gov't of Antigua & Barbuda-Permanent Mission*, 877 F.2d 189, 196 (2d Cir. 1989)) ("Rule 60(b)(6) 'should be liberally construed when substantial justice will thus be served.'"). "[A] 'proper case' for Rule 60(b)(6) relief is only one of 'extraordinary circumstances' . . . or 'extreme hardship.'" *Cirami*, 563 F.2d at 32. Although "[t]he Rule does not particularize the factors that justify relief . . . it provides courts with authority 'adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.'" *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864-65 (1988) (internal citation omitted).

Counsel's failure to disclose conflicts of interest to its client or to the court has constituted an extraordinary circumstance justifying vacatur of a prior judgment under Rule 60(b)(6). *See Church & Dwight Co. v. Kaloti Enters. of Mich., L.L.C.*, 07 Civ. 0612 (BMC), 2011 U.S. Dist. LEXIS 110955, at **23-25 (E.D.N.Y. Sep. 27, 2011) (counsel's "failure to deal with the conflict ethically weakened Chen's position in the case and further justifies relief under

Rule 60(b)(6)"); *In re E. Sugar Antitrust Litig.*, 697 F.2d 524, 528, 532 (3d Cir. 1982) (holding that district court abused its discretion in denying Rule 60(b) motion when district court failed to consider "whether an appearance of impropriety emerged from the failure of [class counsel] to disclose its merger negotiations [with a firm that represented defendants] at least to the district court"); *Marderosian v. Shamshak*, 170 F.R.D. 335, 342 (D. Mass. 1997) (vacating judgment and ordering new trial where it was "obvious that there was an actual conflict of interest" between defendant and his counsel).

Rule 62.1 allows a trial court to take certain action on a Rule 60 motion for relief when an appeal is pending and would otherwise divest the district court of jurisdiction. The trial court may: "(1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue." Fed. R. Civ. P. 62.1.

B. Federal Rule of Civil Procedure 23

As the Supreme Court has held, settlement class actions "demand undiluted, even heightened, attention . . . ." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). This is because "in settlement-only class actions the procedural protections built into the Rule to protect the rights of absent class members during litigation are never invoked in an adversarial setting." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 847 (1999). Heightened scrutiny is even more essential in a mandatory settlement class where, as here, "[t]he legal rights of absent class members . . . are resolved regardless either of their consent, or, in a class with objectors, their express wish to the contrary." *Id.*

"Under Rule 23, the trial judge 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." *In re Fine Paper Antitrust Litig.*, 617 F.2d 22, 27-28 (3d Cir. 1980) (internal citations omitted); *see also Boucher v. Syracuse Univ.*, 164 F.3d 113, 118 (2d Cir. 1999) ("[U]nder Rule 23(c)(1), courts are required to reassess their class rulings as the case develops.") (internal quotations omitted).

If the district court becomes aware of facts (or law) which counsel reexamination of a prior class certification, the court has the authority to decertify the class. *See Gavin v. NVR, Inc.*, 2015 U.S. App. LEXIS 8928, at *3 (2d Cir. 2015) (affirming district court's order decertifying class where, after further discovery, district court determined that Rule 23's requirements were not met); *Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 572 (2d Cir. 1982) ("[A] district court may decertify a class if it appears that the requirements of Rule 23 are not in fact met."). The court retains this authority even after judgment has been entered. *See Kimber v. Tallon*, 556 F. App'x 27, 28 (2d Cir. 2014) ("The law of the case doctrine does not foreclose any option to achieve this goal—including decertification of the class or appointing new class counsel for the currently certified class."); *In re Advanced Battery Techs. Secs. Litig.*, 298 F.R.D. 171, 178 (S.D.N.Y. 2014) ("Defendants may have moved to decertify the Class before trial or on appeal at the conclusion of trial, as class certification may always be reviewed. Indeed, Federal Rule of Civil Procedure 23(c) authorizes a court to decertify a class at any time.").

This Court also has the inherent authority and "independent institutional responsibility to supervise the members of its bar and to exercise sufficient control of their conduct to 'preserve the

integrity of the adversary process.'" *Gray v. Dummitt*, CV 06-0322 (ERK) (JO), 2007 U.S. Dist. LEXIS 93993, at **12-13 (E.D.N.Y. Dec. 21, 2007) (quoting *Hempstead Video, Inc. v. Incorporated Vill. of Valley Stream*, 409 F.3d 127, 132 (2d Cir. 2005)). "From that responsibility springs the court's obligation to intervene when a conflict of interest impairs an attorney's representation of her client." *Id.* (citing *Dunton v. County of Suffolk*, 729 F.2d 903, 908-09 (2d Cir. 1984)).

II. FRIEDMAN'S EXTRAORDINARY MISCONDUCT ESTABLISHES THAT THE CLASS RECEIVED INADEQUATE REPRESENTATION UNDER RULE 23(g)

"The touchstone of the client-lawyer relationship is the lawyer's obligation to assert the client's position under the rules of the adversary system, to maintain the client's confidential information except in limited circumstances, and to act with loyalty during the period of the representation." New York Rules of Professional Conduct, Preamble: A Lawyer's Responsibilities. As Professor Simon confirms, here Mr. Friedman violated both his fundamental duties of confidentiality and loyalty in his representation of the class and engaged in a pattern of misconduct that is antithetical to the concept of adequate representation.

As detailed above, Mr. Friedman, a senior member among Class Counsel and the one with primary responsibility for prosecuting and resolving the class's claims against Visa's and MasterCard's surcharging rules, was actively and intentionally helping counsel for the class's adversary MasterCard to obtain a "fantasy resolution of all of this litigation" against the dominant credit-card companies.[43] He provided Ms. Ravelo with key insights on [redacted] which he did not disclose to the MDL 1720 class representatives or, apparently, class counsel. As Professor Simon attests, Mr. Friedman thereby doubly violated his duty of loyalty to

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

the MDL 1720 class, "turning the adversary system on its head." Simon Decl. ¶¶ 24, 32. Mr. Friedman further provided Ms. Ravelo with information [redacted] from the *American Express* record in violation of the protective order in that case, without taking steps during the MDL 1720 settlement negotiations to obtain access to that information legitimately for the class's benefit. He proposed relief that would [redacted][44] He wholly disregarded the ethical boundaries that should have been in place between him and Ms. Ravelo and ignored the clear impropriety of providing her with highly sensitive, privileged, and confidential internal class memoranda and communications, including on the LPF. Simon Decl. ¶¶ 36-38. And this extraordinary conduct is only what we know of based on the bare record of only some of Mr. Friedman's and Ms. Ravelo's direct, written communications with each other that were preserved.

To say that Mr. Friedman's conduct failed to provide the adequacy of representation that the Supreme Court and Second Circuit require of class counsel—most crucially in mandatory (b)(2) settlement classes—is an exercise in understatement.

A class is entitled to loyal, "conflict-free counsel." *Ortiz*, 527 U.S. at 863 (citing Rule 23 and *Amchem*). While the conflict inquiry under Rule 23 typically concerns intra-class conflicts among class members, the Supreme Court recognized in *Ortiz* and *Amchem* "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*, 521 U.S. at 626 n.20).[45] "Adequacy of

[44] Ex. 5, GBF00002459.

[45] Prior to the 2003 amendments to Rule 23, the adequacy of class counsel was assessed under Rule 23(a)(4). Advisory Committee Notes on Rule 23 2003 Amendments. Since the 2003 amendments, the adequacy of class counsel is assessed under Rule 23(g), which provides that "[c]lass counsel must fairly and adequately represent the

representation is generally considered to be the most important *Shutts* due process requirement." *Hege v. Aegon USA, LLC*, 780 F. Supp. 2d 416, 432 (D.S.C. 2011).

Whether and how Mr. Friedman's 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." *Ortiz*, 527 U.S. at 858-59; *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 254 (2d Cir. 2011) ("Even if we were to conclude that, as a matter of deferential review, the Settlement fairly compensates Category C claims, we cannot rely on that fact to affirm class certification, because doing so would conflate Rule 23(a)(4)'s adequacy of representation analysis with Rule 23(e)(2)'s fairness, adequacy, and reasonableness analysis."); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 270 (2d Cir. 2006) ("Before certification is proper for any purpose—settlement, litigation, or otherwise—a court must ensure that the requirements of Rule 23(a) and (b) have been met. These requirements should not be watered down by virtue of the fact that the settlement is fair or equitable.").

This is because of "the due process 'principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process,'" unless that non-party's interests have been "'adequately represented by someone with the same interests who is a party.'" *Ortiz*, 527 U.S. at 846 (internal citations omitted). Absent satisfaction of the other

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interests of the class." This provision was added in 2003 to address "growing concerns with the adequacy of representation by class counsel." *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 917 (7th Cir. 2011).

procedural safeguards of Rule 23, one cannot be bound by a judgment even if that judgment is fair under Rule 23(e). *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 502 (7th Cir. 2012) ("principles of due process prevent individual named plaintiffs from binding—through litigation or court-approved settlement—absent class members the plaintiffs do not legally represent"); *see Hege*, 780 F. Supp. 2d at 432 (concluding that "the representation Plaintiffs received was constitutionally inadequate" because there was "an intractable conflict of interest" created by a preexisting agreement between class counsel and the defendant; denying defendant's motion for summary judgment based on class-settlement release).[46]

In a mandatory class action under Rule 23(b)(2), it is even more imperative that absent class members not be bound by a judgment obtained by conflicted or inadequate counsel. *Ortiz*, 527 U.S. at 846. In an opt-out action under Rule 23(b)(3), objectors can vote with their feet and avoid being bound by the judgment. But a mandatory (b)(2) class action binds absent class members, even against their will. Here, the settlement binds nearly all American merchants, including those that do not yet exist, to a settlement that was infected by Mr. Friedman's misconduct.

The teaching of the Supreme Court's and the Second Circuit's jurisprudence on Rule 23 is that absent class members, whose rights were bargained away by an ethically compromised attorney, should not be put to the task of constructing a hypothetical "but-for world" in which the relief was negotiated by an unconflicted lawyer representing the class in conformity with ethical and professional standards and comparing that result with the actual settlement to determine the damage caused by the inadequate representation. The harm was caused by the conflict and

[46] To be clear, Objectors maintain that the Settlement was procedurally and substantively unfair for the reasons set forth in Objectors' objections to final approval and in Objectors' appeal of the Court's final approval of the Settlement. The instant motion, however, is not premised on the Settlement's unfairness.

misconduct itself, because the class is entitled to "arms-length bargaining, unhindered by any considerations tugging against the interests of the parties ostensibly represented in the negotiation." *Ortiz*, 527 U.S. at 852; *see also Ackerman v. Nat'l Prop. Analysts*, 887 F. Supp. 510, 518 (S.D.N.Y. 1993) (prejudice to client in disclosure of its confidential information is in the information's use by an adverse party). As the Second Circuit explained in *Literary Works*, "in the absence of independent representation" it is impossible to determine the worth of the settled claims and therefore impossible to determine what was bargained away by conflicted counsel. 654 F.3d at 253. "The rationale is simple: how can the value of any subgroup of claims be properly assessed without independent counsel pressing its most compelling case?" *Id.*

Nor does "the participation of impartial mediators and institutional plaintiffs" cure the problem:

> [T]he participation of impartial mediators and institutional plaintiffs does not compensate for the absence of independent representation. Although the mediators safeguarded the negotiation process, and the institutional plaintiffs watched out for the interests of the class as a whole, no one advanced the strongest arguments in favor of Category C's recovery. Even in the absence of any evidence that the Settlement disfavors Category C-only plaintiffs, this structural flaw would raise serious questions as to the adequacy of representation here.

Literary Works, 654 F.3d at 253. Conflicts "that tainted the negotiation of the global settlement . . . cannot be undone" after the fact. *Ortiz*, 527 U.S. at 859 n.33.

Here, too, the involvement of other class counsel, independent mediators, and the Court in the settlement negotiations could not have "compensate[d] for the absence of independent representation" for the (b)(2) class. When it came to the (b)(2) surcharging-rules relief, Mr. Friedman *was* the supposed independent, adequate representation. And because of his failure to

disclose both the conflicts created by his relationship with Ms. Ravelo and his serial misconduct to the class's detriment, no safeguards were put in place to prevent the harm that was occurring. Class Counsel "never approved or authorized any of the communications between Mr. Friedman and Ms. Ravelo" and "had no knowledge that such communications ever occurred." ECF 6467 at 5. Moreover, the only "institutional plaintiffs" among the representatives—the six trade associations, NACS, NGA, NCGA, NCPA, NRA, NATSO—were unable to "watch[] out for the interests of the class as a whole", *Literary Works*, 654 F.3d at 253, because they too were misled by Mr. Friedman. *See* Wenning Decl.; Beckwith Decl.; Kantor Decl.

Mr. Friedman gave MasterCard's counsel the advantage in the settlement negotiations of knowing how the LPF provision would likely protect MasterCard from competition. He failed to inform the class how the LPF conversely would harm merchants by opening the door to parity surcharging. Wenning Decl. ¶¶ 9-10; Beckwith Decl. ¶¶ 8-9; Kantor Decl. ¶¶ 10-11. And he further disclosed to Ms. Ravelo [redacted].[47] Mr. Friedman's disclosures of these internal settlement analyses and strategies were detrimental to the (b)(2) class because they gave the class's adversary the advantage of knowing the class's settlement positions on the surcharging relief—from the class's lead negotiator of this relief—in advance of the parties' final courthouse settlement negotiations from June 19 to 20, 2012, which culminated in the settlement.

It is impossible to reconstruct the settlement negotiations in a world where Mr. Friedman did not betray the class, and Supreme Court and Second Circuit precedent do not require such an

[47] Ex. 14, GBF00002451-55; Ex. 5, GBF00002460-63.

exercise in futility to show that class certification cannot stand after such flawed representation. *See Ortiz*, *supra*; *Literary Works*, *supra*. The seriousness of Mr. Friedman's misconduct, and his repeated breaches of his duties of loyalty and confidentiality by themselves render the class's representation inadequate. Simon Decl. ¶¶ 15, 18-20; *see Kulig v. Midland Funding, LLC*, 13 Civ. 4715 (PKC), 2014 U.S. Dist. LEXIS 137254, at *8-9 (S.D.N.Y. Sep. 26, 2014) (counsel's ethical breach necessitated denial of class certification because counsel was inadequate); *Eubank v. Pella Corp.*, 753 F.3d 718, 723-24 (7th Cir. 2014) (conflict of interest made adequate representation impossible); *Hege*, 780 F. Supp. at 432 (concluding that "the representation Plaintiffs received was constitutionally inadequate" because there was "an intractable conflict of interest"); *Huston v. Imperial Credit Commercial Mortg. Inv. Corp.*, 179 F. Supp. 2d 1157, 1167 (C.D. Cal. 2001) ("putative class counsel are subject to a 'heightened standard' which they must meet if they are to be allowed by the Court to represent absent class members"; disqualifying counsel from representing class because of counsel's breach of duty of confidentiality to former client); *Lewis v. NFL*, 146 F.R.D. 5, 11-12 (S.D.N.Y. 1992) (denying class certification; class counsel's conflict of interest rendered counsel inadequate under Rule 23); *Wagner v. Lehman Bros. Kuhn Loeb, Inc.*, 646 F. Supp. 643, 662 (N.D. Ill. 1986) ("Gomberg's violation of the canons of ethics requires a finding that he may not represent the class.").

As the Seventh Circuit has held, "Misconduct by class counsel that creates a serious doubt that counsel will represent the class loyally requires denial of class certification." *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 917 (7th Cir. 2011). Here, there is no doubt that Mr. Friedman was acting disloyally and against the class's interests. Absent

plaintiffs should not be bound against their will to a judgment in which such conduct, by an attorney not of their choosing, played a major role.

III. DISCOVERY IS WARRANTED IF THE COURT DENIES RELIEF AT THIS TIME

The above showing is sufficient to demonstrate that the Rule 23(b)(2) class received inadequate representation (to put it mildly) inconsistent with the demands of due process. If the Court disagrees that a sufficient evidentiary showing has been made, then the appropriate course is to grant Objectors the discovery requested in their Notice of Motion, to ascertain the full truth and consequences of this unprecedented violation of class counsel's ethical duties to the class. *See, e.g., Wyly v. Weiss*, 697 F.3d 131, 135-36 (2d Cir. 2012) (describing discovery of 23 boxes of documents ordered by district court to adjudicate Rule 60(b) motion to vacate class settlement); *In re Computer Assocs. Class Action Sec. Litig. V. Artzt*, 98-CV-4839 (TCP), 02-CV-1226 (TCP), 03-CV-4199 (TCP), 2007 U.S. Dist. LEXIS 67928, at *9 (E.D.N.Y. Sep. 12, 2007) (scheduling depositions for same).[48]

CONCLUSION

For the foregoing reasons, 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 remands for that purpose, or, in the alternative, that the Court hold that the motion raises a substantial question meriting the further discovery which Objectors have requested in their Notice of Motion. *See* Fed. R. Civ. P. 62.1.

[48] *See also Salazar v. District of Columbia*, 671 F.3d 1258, 1266 (D.C. Cir. 2012); *In re Wachovia Corp. "Pick-a-Payment" Mortg. Mktg. & Sales Practices Litig.*, 2014 U.S. Dist. LEXIS 88053, at *14-17 (N.D. Cal. Jun. 26, 2014) (denying motion without prejudice to renew after additional discovery, including depositions); *In re VMS Sec. Litig.*, 1992 U.S. Dist. LEXIS 18100, at *2 (N.D. Ill. Nov. 30, 1992).

DATED: New York, New York
July 28, 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 Holding 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.