DECLARATION OF PROFESSOR ADAM J. LEVITIN

In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation

05-MDL-1720 (E.D.N.Y.)

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INTRODUCTION & QUALIFICATIONS

1. My name is Adam Jeremiah Levitin. I was retained by the Thrash Law Firm, P.A., the Duncan Firm, P.A., and Parker Waichman, LLP, (collectively, the "Law Firms"), counsel to the Retail and Merchant Objectors (the "R&M Objectors"), to provide an expert declaration in the litigation captioned *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation,* MDL No. 1720 (E.D.N.Y.) (the "Litigation" or "MDL 1720") regarding the Law Firms' fee application.

2. I am the Agnes N. Williams Research Professor and Professor of Law at the Georgetown University Law Center in Washington, D.C., where I have taught as a full-time faculty member since 2007. I have held tenure at Georgetown University Law Center since 2011.

3. At Georgetown University Law Center, I teach courses in consumer finance, regulation of financial institutions, bankruptcy, contracts, payment systems, secured lending, and structured finance. As part of my courses in consumer finance I regularly teach about the economics and regulation of payment card interchange fees.

4. I have previously served as the Bruce W. Nichols Visiting Professor of Law at Harvard Law School; as the Robert Zinman Scholar in Residence at the American Bankruptcy Institute; as a faculty member for the Practicing Law Institute's Consumer Financial Services program; and as the faculty instructor for the Federal Trade Commission's training program for its Division of Financial Practices attorneys.

5. Payment card interchange fees and the network rules that buttress them have been a major focus of my academic research for my entire career. I have authored over fifty academic books, articles, book chapters, and encyclopedia entries. Among these publications are eleven articles that focus on interchange-related issues, including the interplay between interchange fees and card network data security rules and the application of the honor all cards rule to digital wallets.[1] I am also the author of the first law school textbook devoted

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[1] *Pandora's Digital Box: The Promise and Perils of Digital Wallets*, 166 PENN. L. REV. 305 (2018); *Pandora's Digital Box: Competitive and Business Risks of Mobile Wallets* (2016), *at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2819146; *The Economics of Retail Payments Security: Commentary* THE PUZZLE OF PAYMENTS SECURITY: FITTING THE PIECES TOGETHER TO PROTECT THE RETAIL

to consumer finance and its regulation, CONSUMER FINANCE: MARKETS AND REGULATION. It includes several chapters on payment systems, including regulation of the interchange fee and associated card network rules. Additionally, I am also a co-author of the National Consumer Law Center's treatise on CONSUMER BANKING AND PAYMENTS LAW, a volume to which I contributed many of the payment system provisions.

6. Also among my scholarship is an extended analysis and critique of the 2012 Original Settlement in this Litigation that was rejected by the Second Circuit Court of Appeals.[2] My analysis identified several of the substantive problems with the proposed injunctive relief that the Second Circuit ultimately found problematic.

7. My work has been published in leading law, economics, and finance journals and has been awarded prizes from the American College of Consumer Financial Services Lawyers (twice), the *American Bankruptcy Law Journal*, the George Washington University Center for Law, Economics and Finance, and the *Yale Journal on Regulation*. A complete list of my academic publications may be found along with my curriculum vitae in Appendix A to this declaration.

8. My scholarship has been cited in numerous judicial opinions, including by state supreme courts in California, Maine, New Jersey, and New Mexico, and by several federal circuit courts of appeals.

9. My scholarship on payment card networks rules in particular has been cited repeatedly by courts, including this one, in litigation relating to interchange fees or state no-surcharge laws.[3] Likewise, my comments to the Federal Reserve on the regulatory implementation of the Durbin Amendment, regulating debit card interchange fees and certain credit and debit card network rules, were cited in the litigation regarding that rulemaking.[4]

10. I have previously advised groups with very different positions regarding interchange fees. I was retained by the Credit Union National Association (CUNA), the trade association for the credit union movement, to advise it on the Durbin Amendment rulemaking. I was also commissioned by the Filene Institute, a credit union movement think tank, to write a

PAYMENTS SYSTEM 69 (Fed. Res. Bank of K.C. 2016); *An Analysis of the Proposed Interchange Fee Litigation Settlement*, Geo. L. & Econ. Research Paper, No. 12-033, *at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2133361; *Private Disordering? Payment Card Fraud Liability Rules*, 5 BROOK. J. OF CORP., FIN. & COMM. LAW 1 (2011); *Cross-Routing: PIN and Signature Debit Interchangeability Under the Durbin Amendment*, 2 LYDIAN J.16 (Dec. 2010); *Interchange Regulation: Implications for Credit Unions*, Research Brief #224, The Filene Research Institute, November 2010; *Priceless? The Costs of Credit Cards*, 55 UCLA L. REV. 1321 (2008); *Priceless? The Social Costs of Credit Card Merchant Restraints*, 45 HARV. J. ON LEGIS. 1 (2008); *Payment Wars: The Merchant-Bank Struggle for Control of Consumer Payment Systems*, 12 STAN. J. L., BUS. & FIN. 425 (2007); *The Merchant-Bank Struggle for Control of Payment Systems*, 17 J. FIN. TRANSFORMATION 73 (2006); *The Antitrust Super Bowl: America's Payment Systems, No-Surcharge Rules, and the Hidden Costs of Credit*, 3 BERKELEY BUS. L.J. 265 (2005).

[2] *An Analysis of the Proposed Interchange Fee Litigation Settlement*, Geo. L. & Econ. Research Paper, No. 12-033, *at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2133361.

[3] *See Expressions Hair Design v. Schneiderman*, 803 F.3d 94, 98-99 (2d Cir. 2015); *Expressions Hair Design v. Schneiderman*, 808 F.3d 118, 123 (2d Cir. 2015); *Dana's R.R. Supply v. AG*, 807 F.3d 1235, 1247 n.9 (11th Cir. 2015); *United States v. Am. Express Co.*, 88 F. Supp. 3d 143, 217 (E.D.N.Y. 2015); *Expressions Hair Design v. Schneiderman*, 975 F. Supp. 2d 430, 437 (S.D.N.Y. 2013).

[4] *NACS v. Bd. of Governors of the Fed. Reserve Sys.*, 958 F. Supp. 2d 85, 114 (D.D.C. 2013).

study about the impact of interchange fee regulation on credit unions.[5] More recently, I was commissioned by the Merchants Advisory Group, a trade association representing merchant interests on payment issues, to write a study about the application of the Honor All Cards rule to digital wallets.[6] The research that supports that study included in-depth interviews with the payments teams at a number of merchants. I was also previously engaged as a consulting expert by a firm that sought be become co-class-counsel in MDL 1720.

11. Since 2008, I have testified thirty times before Congress on financial regulatory issues, including on interchange fee regulation. I have also testified regarding consumer finance before the Financial Crisis Inquiry Commission and twice before the Government Accountability Office.
12. I have presented on interchange regulation issues at conferences sponsored by the Federal Reserve Banks of Chicago and Kansas City and served on panels regarding mobile wallets at the Consumer Financial Protection Bureau and the Federal Trade Commission.
13. From 2008-2010, I served as Special Counsel to the Congressional Oversight Panel that supervised the Troubled Asset Relief Program (TARP).
14. From 2012-2015, I served as a member of the statutory Consumer Advisory Board for the Consumer Financial Protection Bureau (CFPB).
15. In 2013, I received the American Law Institute's Young Scholar's Medal, which is awarded every two years to "one or two outstanding early-career law professors whose work is relevant to the real world and has the potential to influence improvements in the law."
16. I hold a J.D., *cum laude* from Harvard Law School. I also hold a Bachelor of Arts (A.B.) degree *magna cum laude with highest honors in field* from Harvard College, a Master of Arts (A.M.) degree and a Master of Philosophy (M.Phil) degree from Columbia University.
17. I have served as law clerk to the Honorable Jane R. Roth on the United States Court of Appeals for the Third Circuit and am admitted to practice before the bars of the State of New York, the Supreme Court of the United States, the United States Court of Appeals for the Third Circuit, the United States District Court for the Southern District of New York, and the United States District Court for the Eastern District of New York.
18. Based on the foregoing experiences, as well as my research following my engagement in this case, I am familiar with the history of MDL 1720 and the settlements that have been presented to the court for approval in the litigation.
19. My compensation for preparing this declaration is at the rate of $1,000/hour plus reimbursement of approved expenses. My compensation is not dependent either on the opinions I express in this declaration or the outcome of the Law Firms' fee application or this Litigation.

[5] *Interchange Regulation: Implications for Credit Unions*, Research Brief #224, The Filene Research Institute, November 2010.

[6] *Pandora's Digital Box: Competitive and Business Risks of Mobile Wallets* (2016), *at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2819146. *See also Pandora's Digital Box: The Promise and Perils of Digital Wallets*, 166 PENN. L. REV. 305 (2018).

SUMMARY OF OPINION

20. The Law Firms have requested that I opine in this declaration on its contribution to the negotiation of the Superseding and Amended Definitive Class Settlement Agreement of the Rule 23(b)(3) Class Plaintiffs and Defendants (the "Superseding Settlement Agreement") in MDL 1720. It is my understanding that the Law Firms are seeking court approval of its application for fees and expenses for its work in the Litigation and that the standard for such approval is that the Law Firms were a "substantial cause" of the benefits available to the class.

21. I do not offer an opinion on any legal question or on the ultimate issue of whether the Law Firms' fee application should be approved. Similarly, I do not offer any opinion regarding the appropriate amount of compensation for the Law Firms, if their motion for fees is approved.

22. The opinion I offer here is based on my knowledge of the events in MDL 1720, the Definitive Class Settlement Agreement (the "Original Settlement") terms, and the Superseding Settlement Agreement, as well as the pleadings in the Litigation.

23. It is my opinion that the objections to the Original Settlement, including those made by the R&M Objectors, by and through their counsel, the Law Firms, were a *sine qua non* for the negotiation of the Superseding Settlement Agreement. The Superseding Settlement Agreement represents a substantial improvement over the Original Settlement.[7] The Superseding Settlement Agreement would not have come into existence but for the objections of the Law Firms and other objectors that resulted in in the reversal of the Original Settlement by the Second Circuit Court of Appeals. Thus, the objections prosecuted by the Law Firms significantly changed the outcome of the case, and without them, class members would have been bound to a markedly inferior settlement.

24. The bases for my opinion are elaborated below.

I. THE ORIGINAL SETTLEMENT AND OBJECTIONS THERETO

25. The Original Settlement that was approved by Judge Gleeson in 2013 was the product of many years of litigation. It was also a settlement that was highly controversial from the get-go. Many of the named plaintiffs (including the largest and most sophisticated among them) objected to the settlement, as did a group a small and mid-sized businesses known as the R&M Objectors, represented by the Law Firms.

26. The Law Firms, on behalf of the R&M Objectors, raised objections to several points regarding the Original Settlement, including that:

    - The concomitant Rule 23(b)(2) and Rule 23(b)(3) classes denied class members due process because the ability to opt-out of the Rule 23(b)(3) class was limited by inclusion in the Rule 23(b)(2) class;
    - The surcharging provisions were of illusory benefit to many class members;

[7] My opinions here should in no wise be taken as an endorsement of the Superseding Settlement Agreement.

- o The scope of the Rule 23(b)(2) class violated due process of future merchants who would be bound by its release without obtaining any benefit;
- o The release was overly broad, covering conduct beyond that at issue in the litigation.

27. The R&M Objectors were not the only objectors to raise these points, although they were the first to docket some of them.[8] The R&M Objectors vigorously prosecuted these objections through the entire settlement approval process, however, including the appeal to the Second Circuit.[9]

II. THE SECOND CIRCUIT'S REVERSAL OF THE ORIGINAL SETTLEMENT

28. The order approving the Original Settlement was reversed by Second Circuit Court of Appeals in 2016.[10] The Second Circuit reversed the Original Settlement because it included both a mandatory Rule 23(b)(2) injunctive relief class and an opt-out Rule 23(b)(3) monetary damages class, which had materially different interests, yet were being represented by the same class counsel. The class composition substantially overlapped, with the major difference being that the Rule 23(b)(2) injunctive relief class included future merchants in addition to existing merchants.

29. The Second Circuit held that tied dual class arrangement meant that the Rule 23(b)(2) injunctive relief class members were inadequately represented,[11] particularly because they lacked an ability to opt-out of the Original Settlement, even if they received little if any benefit from it.[12] Likewise, the opt-out ability of the Rule 23(b)(3) monetary damages class was constrained because Rule 23(b)(3) class members would be bound by the injunctive relief and release by virtue of also being members of the Rule 23(b)(2) class, even if they forwent the monetary damages.

30. The Second Circuit also held that "the bargain that was struck between relief and release on behalf of absent class members is so unreasonable that it evidences inadequate representation."[13] In other words, the Original Settlement was so substantively flawed, that it could only be a product of a procedural infirmity. In particular, the Second Circuit emphasized the inability of many merchants in the Rule 23(b)(2) class to take advantage of the Original Settlement's surcharging provisions, either because they were located in states with no-surcharge laws or because of the settlement's most-favored nation provision, which required merchants to treat MasterCard and Visa products at least as well as any competitor's products.[14] This meant that merchants that accepted American

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[8] *See* ECF No. 1653.

[9] *See* Opening Brief for Appellant Retailer & Merchant Objectors, No. 12-4671 (2d Cir.); Reply Brief for Appellant Retailer & Merchant Objectors, No. 12-4671 (2d Cir.).

[10] *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 827 F.3d 223 (2d Cir. 2016).

[11] *Id.* at 233-34

[12] *Id.* at 234. *See also id.* at 240-41 (Leval, J. concurring) (emphasizing the due process problem with the tying of the mandatory Rule 23(b)(2) injunctive relief class to the opt-out Rule 23(b)(3) monetary relief class, such that the Rule 23(b)(2) class members were bound by the deal struck by the Rule 23(b)(3) class).

[13] *Id.* at 236.

[14] *Id.* at 238.

Express cards would be precluded from surcharging for MasterCard and Visa products because of American Express's no-surcharge rule.[15]

31. Another substantive flaw highlighted by the Second Circuit was that the Original Settlement covered not only existing merchants, but future merchants who would come into existence after the lapse of the Original Settlement's injunctive relief provisions. Those future merchants would, under the Original Settlement, be bound by the release, but would not receive the benefit of the injunctive relief.[16]

32. A related substantive flaw identified by the Second Circuit is the scope of the release in the Original Settlement. The Original Settlement would have released all claims based on defendant card networks' rules, excluding those rules explicitly changed by the Original Settlement—namely the no-surcharge rule. The ability to challenge any other card network rule in existence at the time of the Original Settlement, such as the honor-all-cards rule or the default interchange rule, would have been irrevocably waived for *all* merchants.[17]

33. The (non-exclusive) flaws identified by the Second Circuit with the Original Settlement were the very ones that formed the basis for the Law Firms' objections on behalf of the R&M Objectors.[18]

III. THE SUPERSEDING SETTLEMENT AGREEMENT

34. Subsequent to the Second Circuit's reversal of the Original Settlement, a Superseding Settlement Agreement was negotiated by Class Counsel and the Defendants and presented the Court for approval in September 2018.

35. From the perspective of class members, the 2018 Superseding Settlement Agreement represents a substantial improvement on the 2012 Original Settlement. The Superseding Settlement Agreement has only a single Rule 23(b)(3) class. It does not include a mandatory Rule 23(b)(2) class, and the Superseding Settlement Agreement's Rule 23(b)(3) class is given a real opt-out opportunity with clear notice because it is no longer tied to a mandatory Rule 23(b)(2) class. This change is of substantial value to class members because it means that they now have a meaningful choice about whether to participate in the settlement or not.

36. Similarly, the Superseding Settlement Agreement does not cover future merchants; these merchants benefit from not having their rights affected without adequate representation or compensation.

37. The Superseding Settlement also has a much more limited scope both temporally and substantively. Temporally, it contains a release that extends for only five years after the

[15] *Id.*

[16] *Id.* at 238-39.

[17] *Id.* at 239.

[18] The Law Firms raised additional objections that were not addressed by the Second Circuit; the magnitude of problems with the Original Settlement that the Second Circuit did address was such that it was unnecessary to address additional and potentially meritorious bases for objection.

Settlement Final Date (as defined in the Superseding Settlement Agreement), rather than the indefinite release in the Original Settlement.[19] Substantively, the release in the Superseding Settlement Agreement covers only claims relating to interchange fees and associated card network rules that have accrued within five years of the settlement date.[20] Thus, class members preserve their ability to litigate about subsequent changes to the rules and about the rules and interchange fees after five years.

38. Finally, the Original Settlement contained a provision suspending the Defendant card networks' no-surcharge rules, but that provision was of value only to a subset of merchants, namely those in states without no-surcharge statutes who also did not accept American Express cards because of the Original Settlement's "most-favored nation" clause. The disparate treatment of class members was one of the issues flagged by the Law Firms in their objections. The Superseding Settlement Agreement does not include a surcharging provision.

39. Whereas the Original Settlement provided value to only a subset of class members through the suspension of defendants' no-surcharge rules, the Superseding Settlement Agreement provides *all* class members with value in the form of the additional $900 million contribution. Again, this change in the terms of the settlement, which is directly responsive to the objections made by the Law Firms, is an important and equitable benefit for the class.

40. In short, many of the key changes in the Superseding Settlement Agreement are responding to the objections raised by the Law firms on behalf of the R&M Objectors.

IV. ANALYSIS OF THE CONTRIBUTIONS OF THE LAW FIRMS

41. To be sure, the Law Firms was not the only objector to the Original Settlement, nor was it the only objector to raise the particular objections noted above. This should not take away from the contribution of the Law Firms, which vigorously propounded these objections. There is no way to apportion credit for the objections among the various objectors, and indeed, there is value in having the same (correct) objections made by multiple parties. All of the objectors deserve full credit for the collective effort at reversing the deeply flawed Original Settlement.

42. Class Counsel, in its opposition to the Law Firms' fee application notes that the Law Firm did not prosecute the underlying antitrust case or negotiate the settlements.[21] That is all true, but it does not take away from the fact that without the objections made by the Law Firms and others to the Original Settlement, the class members would have been stuck with a markedly worse deal. If Class Counsel is to get any credit for the improvements in the Superseding Settlement Agreement, so too must all of the objectors who prevailed in overturning the Original Settlement because without those objections there would never have been an opportunity to improve on the Original Settlement.

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[19] Superseding Settlement Agreement, ¶ 13.

[20] Superseding Settlement Agreement, ¶ 31(a)-(b).

[21] *See* Memorandum in Opposition to R&M Objectors' Motion for Attorneys' Fees, Reimbursement of Expenses and Service Awards, at 1.

43. Indeed, it is important to recognize that the very Class Counsel that negotiated the deeply flawed Original Settlement are now the parties objecting to the Law Firms' fee application for work done to point out the shortcomings of Class Counsel's work on the Original Settlement. Had Class Counsel gotten the Original Settlement right—and the flaws in the Original Settlement were manifest from the get-go to even casual observers—the Law Firms' objections would not have been necessary and there would not have been an occasion for a fee application.

44. But for the objections of the Law Firms and others, there would not have been the improved Superseding Settlement Agreement because the Original Settlement would be in place. Thus, *all* of the key improvements in the Superseding Settlement Agreement noted above are ultimately traceable to the work the Law Firms and others did in objecting to the Original Settlement. Therefore, although the Law Firms did not negotiate the particular changes in the Superseding Settlement Agreement, they all followed directly from its objections to the Original Settlement. To that extent, the Law Firms deserve credit for these changes in the Superseding Settlement Agreement.[22]

CONCLUSION

45. I reserve the right to amend and supplement this declaration. The opinions contained herein are based on the facts of which I am aware as of the date of the declaration.

46. I declare the foregoing to all be correct and true to the best of my knowledge.

EXECUTED on the 14th day of August, 2019, in Somerset, Maryland.

[22] Moreover, because the change regarding surcharging reduced the aggregate value of the settlement, the Law Firms deserve some credit for the offsetting increase in cash payments as part of the settlement. The Superseding Settlement Agreement does not indicate how much of the additional $900 million in cash payments are to offset the lack of surcharging relief, but at least some of that value is presumably in the form of an offset, and the Law Firms deserve credit for it.

APPENDIX A. CURRICULUM VITAE OF ADAM J. LEVITIN