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IN THE  
**Supreme Court of the United States**

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AMERICAN EXPRESS COMPANY, ET AL.,  
*Petitioners,*

v.

ITALIAN COLORS RESTAURANT, ON BEHALF OF ITSELF  
AND ALL SIMILARLY SITUATED PERSONS, ET AL.,  
*Respondents.*

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**On Writ of Certiorari  
to the United States Court of Appeals  
for the Second Circuit**

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**JOINT APPENDIX**

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MICHAEL K. KELLOGG  
*Counsel of Record*

AARON M. PANNER

DEREK T. HO

KELLOGG, HUBER, HANSEN,

TODD, EVANS & FIGEL,

P.L.L.C.

1615 M Street, N.W.

Suite 400

Washington, D.C. 20036

(202) 326-7900

(mkellogg@khhte.com)

*Counsel for Petitioners*

PAUL D. CLEMENT

*Counsel of Record*

MICHAEL H. MCGINLEY

BANCROFT PLLC

1919 M Street, N.W.

Suite 470

Washington, D.C. 20036

(202) 234-0090

(pclement@bancroftpllc.com)

*Counsel for Respondents*

December 21, 2012

*(Additional Counsel Listed On Inside Cover)*

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**PETITION FOR A WRIT OF CERTIORARI FILED: JULY 30, 2012  
CERTIORARI GRANTED: NOVEMBER 9, 2012**

LOUISE M. PARENT  
MARK G. CALIFANO  
BERNADETTE MIRAGLIOTTA  
AMERICAN EXPRESS TRAVEL  
RELATED SERVICES, INC.  
200 Vesey Street, 49th Floor  
New York, NY 10285  
(212) 640-1008

JULIA B. STRICKLAND  
STROOCK & STROOCK  
& LAVAN LLP  
2029 Century Park East  
Suite 1800  
Los Angeles, CA 90067  
(310) 556-5800  
*Counsel for Petitioners*

DEEPAK GUPTA  
BRIAN WOLFMAN  
GREGORY A. BECK  
JONATHAN E. TAYLOR  
GUPTA BECK PLLC  
1625 Massachusetts Ave., N.W.  
Suite 500  
Washington, D.C. 20036  
(202) 470-3826

GARY B. FRIEDMAN  
TRACEY KITZMAN  
FRIEDMAN LAW GROUP LLP  
270 Lafayette Street  
14th Floor  
New York, New York 10012  
(212) 680-5150

READ K. MCCAFFREY  
CHRISTOPHER W. HELLMICH  
PATTON BOGGS LLP  
2550 M Street, N.W.  
Washington, D.C. 20037  
(202) 457-6000

MARK REINHARDT  
MARK WENDORF  
REINHARDT, WENDORF &  
BLANCHFIELD  
332 Minnesota Street  
St. Paul, Minnesota 55101  
(651) 287-2100  
*Counsel for Respondents*

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## NOTICE

The following documents have been omitted in the printing of this Joint Appendix but may be found in the appendix to the petition for a writ of certiorari in this case:

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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No. 3:03-cv-03719-SI

ITALIAN COLORS RESTAURANT, ON BEHALF OF ITSELF  
AND ALL SIMILARLY SITUATED PERSONS,  
*Plaintiff,*

v.

AMERICAN EXPRESS TRAVEL RELATED SERVICES  
COMPANY, INC., ET AL.,  
*Defendants.*

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CIVIL DOCKET

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Date Filed	#	Docket Text
8/8/03	1	[CLASS ACTION] COMPLAINT & Demand for Jury Trial – [Summons Issued] against American Express Travel Related Services Company, Inc. & American Express Company, [Filing Fee: \$150.00, receipt number 3350417]. Filed by Plaintiff Italian Colors Restaurant. (tn) Additional attachment(s) added on 8/21/2003 (tn, COURT STAFF). (Entered: 8/11/2003)
		* * * * *
9/5/03	17	MOTION to Appoint Lead Plaintiff and Lead Counsel ( <i>Notice of Motion</i> )

- filed by Italian Colors Restaurant. Motion Hearing set for 10/14/2003 09:00 AM. (Eng, Kevin) (Entered: 09/05/2003)
- 9/5/03 18 MEMORANDUM of points & authorities in support of Plaintiff's Motion to consolidate, appoint lead counsel & grant other relief.....>>>MOTION to Appoint Lead Plaintiff and Lead Counsel (*Memorandum In support*) Filed by Plaintiff Italian Colors Restaurant. Motion Hearing set for 10/14/2003 09:00 AM. (Eng, Kevin) .....>>>Modified on 9/9/2003. (tn, COURT STAFF). (Entered: 9/5/2003)
- 9/5/03 19 DECLARATION in Support re 17, 18 *Motion To Consolidate, Appoint Lead Counsel, Grant Other Relief* filed by Italian Colors Restaurant. (Related document(s) 17, 18) (Eng, Kevin) (Entered: 9/5/2003)
- 9/5/03 20 DECLARATION in Support re 17, 18 *Motion To Consolidate, Appoint Lead Counsel, Grant Other Relief* filed by Italian Colors Restaurant. (Attachments: #1 Exhibit Exhibits To Declaration of Read McCaffrey)(Related document(s) 17, 18) (Eng, Kevin) (Entered: 09/05/2003)
- 9/5/03 21 DECLARATION in Support re 17, 18 *Motion To Consolidate, Appoint Lead Counsel, Grant Other Relief* filed by Italian Colors Restaurant. (Related

document(s) 17, 18) (Eng, Kevin)  
(Entered: 09/05/2003)

9/5/03 22 [Proposed Order No.1] .....>>>  
MOTION to Appoint Lead Plaintiff  
and Lead Counsel (*Proposed Order*)  
Filed by Italian Colors Restaurant.  
Motion Hearing set for 10/14/2003  
09:00 AM. (Eng, Kevin)... Modified  
on 9/9/2003 (tn, COURT STAFF).  
(Entered: 09/05/2003)

\* \* \* \* \*

9/18/03 30 MOTION to Appoint Lead Plaintiff  
and Lead Counsel (*Amended Notice  
of Motion*) filed by Italian Colors  
Restaurant. Motion Hearing set for  
11/7/2003 09:00 AM. (Attachments:  
#1 Proposed Order #2 Proof of  
Service) (Eng, Kevin) (Entered:  
9/18/2003)

\* \* \* \* \*

10/3/03 35 MOTION to Transfer Case filed by  
American Express Company, American  
Express Travel Related Services  
Company, Inc. Motion Hearing set for  
11/7/2003 09:00 AM. (Attachments:  
#1 Declaration of Bruce H. Schneider  
#2 Declaration of Amy Alterman  
#3 Proposed Order re Defs' Motion to  
Transfer Venue) (Newman, Stephen)  
(Entered: 10/03/2003)

10/16/03 36 Memorandum in Opposition re 22, 17,  
18, 30 *Plaintiff's Motion to Consol-  
idate, Appoint Lead Counsel and*



- Grant Other Relief*, filed by American Express Company, American Express Travel Related Services Company, Inc. (Newman, Stephen) (Entered: 10/16/2003)
- 10/17/03 37 Memorandum in Opposition re 35 filed by Italian Colors Restaurant. (Eng, Kevin) (Entered: 10/17/2003)
- 10/17/03 38 DECLARATION of Edward Zusman in Opposition to 35 filed by Italian Colors Restaurant. (Attachments: #1 Exhibit) (Related document(s) 35) (Eng, Kevin) (Entered: 10/17/2003)
- 10/24/03 39 Reply Memorandum to Motion re 17 *In Further Support of Motion To Consolidate, Appoint Lead Counsel, Grant Other Relief* filed by Italian Colors Restaurant. (Eng, Kevin) (Entered: 10/24/2003)
- 10/24/03 40 Declaration of Edward S. Zusman in Support of 39 *In Further Support Motion To Consolidate, Appoint Lead Counsel, Grant Other Relief* filed by Italian Colors Restaurant. (Attachments: #1 Exhibit) (Related document(s) 39 ) (Eng, Kevin) (Entered: 10/24/2003)
- 10/24/03 41 Reply Memorandum to Motion re 35 *to Transfer Case* filed by American Express Company, American Express Travel Related Services Company, Inc. (Attachments: #1 Supplemental Declaration of Bruce H. Schneider in

Support Thereof) (Newman, Stephen)  
(Entered: 10/24/2003)

\* \* \* \* \*

11/10/03 46 ORDER by Judge Illston denying 30  
Motion to Appoint Lead Plaintiff and  
Lead Counsel, granting 35 Motion to  
Transfer Case, denying 17 Motion to  
Appoint Lead Plaintiff and Lead Coun-  
sel, denying 18 Motion to Appoint  
Lead Plaintiff and Lead Counsel (ts,  
COURT STAFF) (Entered: 11/10/2003)

\* \* \* \* \*

11/18/03 Certified copy of docket entries, certi-  
fied copy of transferral order and  
original case file documents mailed  
to USDC for Southern District of  
New York via US Certified mail. (ys,  
COURT STAFF) (Entered: 11/12/2003)

\* \* \* \* \*

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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No. 3:03-cv-04768-SI

COHEN RESE GALLERY, INC., IL FORNO, INC., AND  
MAI JASMINE CORP., ON BEHALF OF THEMSELVES  
AND ALL SIMILARLY SITUATED PERSONS,  
*Plaintiffs,*

v.

AMERICAN EXPRESS COMPANY, ET AL.,  
*Defendants.*

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CIVIL DOCKET

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Date Filed	#	Docket Text
10/23/03	1	COMPLAINT; <i>DEMAND FOR JURY TRIAL</i> against American Express Company, American Express Travel Related Services Company, Inc. (Filing fee \$150.00 receipt number 3352845). Filed by Cohen Rese Gallery, Inc., IL Forno, Inc., Mai Jasmine Corporation. (gba, COURT STAFF) Additional attachment(s) added on 11/3/2003 (gba, COURT STAFF). (Entered: 10/27/2003)

\* \* \* \* \*

11/17/03 8 AMENDED COMPLAINT against all defendants. Filed by Cohen Rese Gallery, Inc., IL Forno, Inc., Mai Jasmine Corporation. (Entered: 11/17/2003)

\* \* \* \* \*

11/24/03 12 MOTION to Transfer Case filed by American Express Company, American Express Travel Related Services Company, Inc. Motion Hearing set for 1/9/2004 09:00 AM. (Attachments: #1 Declaration of Bruce H. Schneider and Amy Alterman in Support Thereof (Volume 1 of 3) #2 (Volume 2 of 3) #3 (Volume 3 of 3) #4 Proposed Order) (Newman, Stephen) (Filed on 11/24/2003) (Entered: 11/24/2003)

\* \* \* \* \*

12/9/03 15 STIPULATION *and [Proposed] Order Granting Defendants' Motion to Transfer Venue to the Southern District of New York (re 12)* submitted by American Express Company, American Express Travel Related Services Company, Inc. (Newman, Stephen) (Filed on 12/9/2003) (Entered: 12/09/2003)

\* \* \* \* \*

12/17/03 17 ORDER transferring case. Signed by Judge Illston on 12/16/03. (ts, COURT STAFF) (Filed on 12/17/2003) (Entered: 12/17/2003)

\* \* \* \* \*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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No. 1:03-cv-09517-GBD

DRF JEWELER CORP., INDIVIDUALLY AND ON BEHALF OF  
ALL OTHERS SIMILARLY SITUATED,  
AND MIMS ENTERPRISES, INC.,  
*Plaintiffs,*

v.

AMERICAN EXPRESS COMPANY, ET AL.,  
*Defendants.*

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CIVIL DOCKET

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Date Filed	#	Docket Text
12/1/03	1	COMPLAINT against American Express Company, American Express Travel Related Services Company, Inc. (Filing Fee \$ 150.00, Receipt Number 492383) Document filed by DRF Jeweler Corp. (gf.) Modified on 12/4/2003 (gf.). (Entered: 12/02/2003)  * * * * *
1/16/04	7	MOTION for an order for appointment of lead counsel and for consolidation of cases 03cv9517, 03cv9592 and 04-266. Proposed order attached. Document filed by DRF Jeweler Corp.

(dle.) Modified on 1/27/2004 (dle.).  
(Entered: 01/27/2004)

1/16/04 8 MEMORANDUM OF LAW in Support  
re: 7 MOTION to Consolidate Cases.  
Document filed by DRF Jeweler Corp.  
(dle.) (Entered: 01/27/2004)

1/16/04 9 DECLARATION of Mark Reinhardt.  
Document filed by DRF Jeweler Corp.  
(dle.) (Entered: 01/27/2004)

\* \* \* \* \*

3/12/04 12 MEMORANDUM OF LAW in Support  
re: 7 MOTION to Consolidate Cases  
*and to Appoint Co-Lead Counsel*. Docu-  
ment filed by Mims Enterprises, Inc.  
(Trinko, Curtis) (Entered: 03/12/2004)

3/12/04 13 MEMORANDUM OF LAW in Support  
of 7 MOTION to Consolidate Cases.  
Document filed by Mims Enterprises,  
Inc. (sb.) (Entered: 03/17/2004)

\* \* \* \* \*

4/30/04 MOTION for an Order Dismissing  
these actions against American Ex-  
press in favor of arbitration, MOTION  
for an Order dismissing the claims  
of plaintiff National Supermarkets  
Association with prejudice, MOTION  
for an Order Staying these proceed-  
ings pending arbitration. Declarations  
of Cathryn A. Snyder and Donald  
Blumenthal in support attached.  
Document filed by American Express  
Company, American Express Travel  
Related Services Company, Inc.

Received in night deposit box on 4/30/04 at 5:02 p.m. Original entry in 03cv9592 document number 20. (yv,) (Entered: 05/04/2004)

\* \* \* \* \*

12/14/04 ORDER: that cases 03cv10271, 03cv9517, 04cv266, 04cv366 and 04cv1558 are hereby consolidated as Member cases in Lead case 03cv9592 for all proceedings before this Court (case 04cv5432 shall not be included in this consolidation). All related actions that are subsequently filed in, or transferred to, this District shall be consolidated into 03cv9592 for pre-trial purposes. This Order shall apply to every such related action, absent order of the Court. Every pleading filed in the consolidated action shall bear the following caption: In re AMERICAN EXPRESS MERCHANTS' LITIGATION (Master File No: 03civ.9592 (GBD)) as further set forth in said Order. Original document filed in Lead case 03cv9592 (GBD), document #28. (Signed by Judge George B. Daniels on 12/10/04) (db,) (Entered: 12/24/2004)

\* \* \* \* \*

3/20/06 CLERK'S JUDGMENT That for the reasons stated in the Court's Memorandum Opinion and Order dated March 15, 2006, American Express's motion to compel arbitration of all

claims against it is granted; plaintiffs' cases against American Express is dismissed; American Express's motion to intervene and to dismiss the claims of plaintiffs against the banks in National Supermarket is denied; the bank defendants' motion to dismiss the claims in National Supermarket is denied; the bank defendants' motion to stay the action in National Supermarket pending the arbitration of related claims against American Express is granted; and the Cohen Rese plaintiffs' motion for partial summary judgment on their fifth claim against American Express is denied without prejudice. (Orig. filed in case no. 03 Civ. 9592 (GBD) as doc. #36). (Signed by J. Michael McMahon, clerk on 3/20/06) (ml.) (Entered: 03/20/2006)



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

---

No. 1:03-cv-09592-GBD

IN RE AMERICAN EXPRESS MERCHANTS' LITIGATION

ITALIAN COLORS RESTAURANT, ON OR BEHALF OF  
ITSELF AND ALL SIMILARLY SITUATED PERSONS, ET AL.,

*Plaintiffs,*

v.

AMERICAN EXPRESS TRAVEL RELATED SERVICES  
COMPANY, INC., ET AL.,

*Defendants.*

---

CIVIL DOCKET

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Date Filed	#	Docket Text
12/3/03		CASE TRANSFERRED IN from the United States District Court – Northern District of California; Case Number: 3:03-cv-3719 (SI). Original file with documents numbered 1, 2, 4-7, 25, 26, 42, 43, 46, certified copy of transfer order and docket entries received. Document filed by American Express Company, American Express Travel Related Services Company, Inc. (gf.) (Entered: 12/08/2003)

\* \* \* \* \*

- 12/24/03 3 AMENDED COMPLAINT against American Express Company, American Express Travel Related Services Company, Inc. Document filed by Bunda Starr Corp, 492 Supermarket Corp, Italian Colors Restaurant, National Supermarkets Association, Phoung Corp. (jco,) (Entered: 01/05/2004)
- 12/29/03 5 MOTION to Approve appointment of lead counsel and MOTION to Consolidate Cases related proceedings. Document filed by Bunda Starr Corp, 492 Supermarket Corp, Italian Colors Restaurant, National Supermarkets Association, Phoung Corp. Return Date set for 1/30/2004 02:30 PM before Judge Richard Owen. Return Date set for 1/30/2004 02:30 PM before Judge Richard Owen. (db,) (Entered: 01/14/2004)
- 12/29/03 6 MEMORANDUM OF LAW in Support re: 5 MOTION to Approve appointment of lead counsel. MOTION to Consolidate Cases of related proceedings. Document filed by Bunda Starr Corp, 492 Supermarket Corp, Italian Colors Restaurant, National Supermarkets Association, Phoung Corp. (db,) (Entered: 01/14/2004)
- 12/29/03 7 DECLARATION of Read K. McCaffrey in Support re: 5 MOTION to Approve appointment of lead counsel.

MOTION to Consolidate Cases.  
MOTION to Consolidate Cases.  
Document filed by Bunda Starr Corp,  
492 Supermarket Corp, Italian Colors  
Restaurant, National Supermarkets  
Association, Phoung Corp. (db,)  
(Entered: 01/14/2004)

\* \* \* \* \*

1/16/04 MOTION for an order for appointment of lead counsel and for consolidation of 03cv9517, 03cv9592 and 04cv266. Document filed by DRG Jeweler Corp. Original document filed in case #03cv9517, document #7. (dle,) (Entered: 01/27/2004)

1/16/04 MEMORANDUM OF LAW in Support re: MOTION to Consolidate Cases. Document filed by DRF Jeweler Corp. Original document filed in case #03cv9517, document #8. (dle,) (Entered: 01/27/2004)

1/16/04 10 MEMORANDUM OF LAW in Opposition re: 5 MOTION to Approve appointment of lead counsel. MOTION to Consolidate Cases. MOTION to Approve appointment of lead counsel. Document filed by DRF Jeweler Corp. (dle,) (Entered: 01/27/2004)

\* \* \* \* \*

3/12/04 MEMORANDUM OF LAW in Support of MOTION to Consolidate Cases. Document filed by Mims Enterprises,

Inc.'s. Original document #13 filed in  
03-cv-9517. (sb,) (Entered: 03/17/2004)

\* \* \* \* \*

4/30/04 20 MOTION for an Order Dismissing these actions against American Express in favor of arbitration. MOTION for an Order dismissing the claims of plaintiff National Supermarkets Association with prejudice. MOTION for an Order Staying these proceedings pending arbitration. Declarations of Cathryn A. Snyder and Donald Blumenthal in support attached. Document filed by American Express Company, American Express Travel Related Services Company, Inc. Received in night deposit box on 4/30/04 at 5:02 p.m. (yv,) (Entered: 05/04/2004)

4/30/04 21 MEMORANDUM OF LAW in Support re: 20 MOTION to Dismiss. MOTION to Stay. MOTION to Dismiss. MOTION to Stay. MOTION to Dismiss. MOTION to Stay. Document filed by American Express Company, American Express Travel Related Services Company, Inc. Received in night deposit box on 4/30/04 at 5:03 p.m. (yv,) (Entered: 05/04/2004)

\* \* \* \* \*

6/21/04 24 MEMORANDUM OF LAW in Opposition re: 20 Motion to Compel Arbitration Document filed by Bunda Starr Corp, 492 Supermarket Corp, Italian

Colors Restaurant, National Supermarkets Association, Phoung Corp. (tp.) (Entered: 06/23/2004)

\* \* \* \* \*

12/8/04 26 MEMORANDUM OF LAW in Opposition to motion to compel arbitration. Document filed by Bunda Starr Corp, 492 Supermarket Corp, Italian Colors Restaurant, National Supermarkets Association, Phoung Corp. (jp.) (Entered: 12/15/2004)

\* \* \* \* \*

12/14/04 28 ORDER: that cases 03cv10271, 03cv9517, 04cv266, 04cv366 and 04cv1558 are hereby consolidated as Member cases in Lead case 03cv9592 for all proceedings before this Court (case 04cv5432 shall not be included in this consolidation). All related actions that are subsequently filed in, or transferred to, this District shall be consolidated into 03cv9592 for pre-trial purposes. This Order shall apply to every such related action, absent order of the Court. Every pleading filed in the consolidated action shall bear the following caption: In re AMERICAN EXPRESS MERCHANTS' LITIGATION (Master File No: 03civ.9592 (GBD)) as further set forth in said Order. (Signed by Judge George B. Daniels on 12/10/04) (db.) (Entered: 12/24/2004)

\* \* \* \* \*

12/23/04 30 DEFENDANTS' SUPPLEMENTARY  
MEMORANDUM OF LAW. Document  
filed by American Express Company.  
(jmi,) (Entered: 12/28/2004)

\* \* \* \* \*

4/22/05 32 MEMORANDUM OF LAW in Opposi-  
tion re: 20 MOTION to Dismiss the  
Complaint in favor of arbitration...  
MOTION to Stay the proceedings...  
Document filed by National Super-  
markets Association, 492 Supermar-  
ket Corp, Bunda Starr Corp, Phoung  
Corp, Italian Colors Restaurant.  
(mde,) (Entered: 04/29/2005)

\* \* \* \* \*

3/16/06 34 MEMORANDUM AND OPINION  
that American Express' motion to  
compel arbitration of all claims  
against it is granted. Since this court  
finds that all of plaintiffs' claims  
against American Express are subject  
to arbitration it further orders that  
plaintiffs' cases against American  
Express be dismissed. American  
Express' motion to intervene and to  
dismiss the claims of plaintiffs  
against the banks in National Super-  
market is denied. The bank dfts'  
motion to dismiss the claims in  
National Supermarket is denied. The  
bank dfts' motion to stay the action in  
National Supermarket pending the  
arbitration of related claims against  
American Express is granted. The

Cohen Rese plaintiffs' motion for partial summary judgment on their fifth claim against American Express is denied without prejudice. (Signed by Judge George B. Daniels on 3/15/06) (dle.) (Entered: 03/16/2006)

\* \* \* \* \*

- 3/16/06 35 MEMORANDUM AND OPINION & ORDER #92862 that American Express's motion to compel arbitration of all claims is granted. Since this Court finds that all of plntfs' claims against American Express are subject to arbitration, it further orders that plntfs' cases against American Express be dismissed. American Express's motion to intervene and to dismiss the claims of plntfs against the banks in National Supermarket is denied. The bank defts' motion to dismiss the claims in National Supermarket is denied. The bank defts' motion to stay the action in National Supermarket pending the arbitration of related claims against American Express, is granted. The Cohen Rese plntfs' motion for partial summary judgment on their fifth claim against American Express is denied without prejudice. (Signed by Judge George B. Daniels on 3/15/06) (cd.) (Entered: 03/16/2006)
- 3/20/06 36 CLERK'S JUDGMENT That for the reasons stated in the Court's Memorandum Opinion and Order dated

March 15, 2006, American Express's motion to compel arbitration of all claims against it is granted; plaintiffs' cases against American Express is dismissed; American Express's motion to intervene and to dismiss the claims of plaintiffs against the banks in National Supermarket is denied; the bank defendants' motion to dismiss the claims in National Supermarket is denied; the bank defendants' motion to stay the action in National Supermarket pending the arbitration of related claims against American Express is granted; and the Cohen Rese plaintiffs' motion for partial summary judgment on their fifth claim against American Express is denied without prejudice. (Signed by J. Michael McMahon, clerk on 3/20/06) (ml) (Entered: 03/20/2006)

\* \* \* \* \*

- 3/30/06 37 MOTION to Alter Judgment re: 36 Clerk's Judgment. Document filed by DRF Jeweler Corp., National Supermarkets Association, 492 Supermarket Corp, Bunda Starr Corp, Phoung Corp, Italian Colors Restaurant. (cd) (Entered: 03/31/2006)
- 3/30/06 38 MEMORANDUM OF LAW in Support re: 37 MOTION to Alter Judgment re: 36 Clerk's Judgment. Document filed by DRF Jeweler Corp., National Supermarkets Association, 492 Supermar-



ket Corp, Bunda Starr Corp, Phoung Corp, Italian Colors Restaurant. (cd.) (Entered: 03/31/2006)

\* \* \* \* \*

4/12/06 39 MEMORANDUM OF LAW in Opposition re: 37 MOTION to Alter Judgment re: 36 Clerk's Judgment. Document filed by American Express Company. (djc.) (Entered: 04/13/2006)

\* \* \* \* \*

4/18/06 40 NOTICE OF APPEAL from 36 Clerk's Judgment, 35 Memorandum & Opinion. Document filed by DRF Jeweler Corp., National Supermarkets Association, 492 Supermarket Corp, Bunda Starr Corp, Phoung Corp, Italian Colors Restaurant. Filing fee \$455.00, receipt number E 576295. Copies of Notice of Appeal mailed to Attorney(s) of Record: Stroock & Stroock & Lavan, L.L.P., Wilson Sonsini Goodrich & Rosati LLP, Cravatj Swaine & Moore LLP, Morrison & Foerster LLP, and Sidley Austin LLP. (nd.) (Entered: 04/18/2006)

\* \* \* \* \*

6/12/06 41 ORDER, plaintiffs motion for reconsideration is denied. Plaintiffs alternative request for clarification for the benefit of the arbitrator is also denied. So Ordered. (Signed by Judge George B. Daniels on 9/12/2006) (jmi.) (Entered: 06/12/2006)

8/23/06 42 Appeal Record Sent to USCA (Index). Notice that the Original index to the record on Appeal for 40 Notice of Appeal, filed by DRF Jeweler Corp., Italian Colors Restaurant, Phoung Corp, Bunda Starr Corp, 492 Supermarket Corp, National Supermarkets Association, USCA Case Number 06-1871-cv, 3 Copies of the index, Certified Clerk Certificate and Certified Docket Sheet were transmitted to the U.S. Court of Appeals. (nd,) Additional attachment(s) added on 8/30/2006 (dt.). (Entered: 08/23/2006)

\* \* \* \* \*

2/1/12 50 TRUE COPY OPINION of USCA as to 40 Notice of Appeal, filed by 492 Supermarket Corp, Italian Colors Restaurant, National Supermarkets Association, Bunda Starr Corp, Phoung Corp, DRF Jeweler Corp. USCA Case Number 06-1871-cv. For the reasons given above, the decision of the District Court is reversed. We remand to the District Court for further proceedings consistent with this opinion. Catherine O'Hagan Wolfe, Clerk USCA for the Second Circuit. Certified: 02/01/2012. (nd) (Entered: 02/01/2012)

\* \* \* \* \*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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No. 1:03-cv-10271-GBD

COHEN RESE GALLERY, INC., IL FORNO, INC., AND  
MAI JASMINE CORP., ON BEHALF OF THEMSELVES  
AND ALL SIMILARLY SITUATED PERSONS,  
*Plaintiffs,*

v.

AMERICAN EXPRESS COMPANY, ET AL.,  
*Defendants.*

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CIVIL DOCKET

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Date Filed	#	Docket Text
12/30/03		CASE TRANSFERRED IN from the United States District Court – Northern District of California; Case Number: 3:03-cv-4768 (SI). Original file with documents numbered 1, 2, 9, 17, certified copy of transfer order and docket entries received. Document filed by Cohen Rese Gallery, Inc., IL Forno, Inc., Mai Jasmine Corporation. (dle.) (Entered: 01/06/2004)
		* * * * *
2/6/04	3	MOTION for Partial Summary Judgment, directing judgment in favor of

plaintiffs on the fifth claim for relief stated in their amended class action complaint. Document filed by Cohen Rese Gallery, Inc., IL Forno, Inc., Mai Jasmine Corporation. (sb,) (Entered: 02/11/2004)

2/6/04 4 MEMORANDUM OF LAW in Support of 3 MOTION for Partial Summary Judgment. Document filed by Cohen Rese Gallery, Inc., IL Forno, Inc., Mai Jasmine Corporation. (sb,) (Entered: 02/11/2004)

2/6/04 5 DECLARATION of Gary B. Friedman in Support of 3 MOTION for Summary Judgment. Document filed by Cohen Rese Gallery, Inc., IL Forno, Inc., Mai Jasmine Corporation. (sb,) (Entered: 02/11/2004)

\* \* \* \* \*

3/12/04 MEMORANDUM OF LAW in Support of MOTION to Consolidate Cases. Document filed by Mims Enterprises, Inc.'s. Original document #13 filed in 03-cv-9517. (sb,) (Entered: 03/17/2004)

\* \* \* \* \*

4/30/04 MOTION for an Order Dismissing these actions against American Express in favor of arbitration. MOTION for an Order dismissing the claims of plaintiff National Supermarkets Association with prejudice. MOTION for an Order Staying these proceedings pending arbitration. Declarations

- of Cathryn A. Snyder and Donald Blumenthal in support attached. Document filed by American Express Company, American Express Travel Related Services Company, Inc. Received in night deposit box on 4/30/04 at 5:02 p.m. Original entry in 03cv9592 document number 20. (yv,) (Entered: 05/04/2004)
- 4/30/04 9 MEMORANDUM OF LAW in Opposition re: 3 MOTION for Summary Judgment. Document filed by American Express Company, American Express Company, American Express Travel Related Services Company, Inc. Received in night deposit box on 4/30/04 at 5:03 p.m. (yv,) (Entered: 05/04/2004)
- 4/30/04 10 COUNTER STATEMENT TO 2 Rule 56.1 Statement. Document filed by American Express Company, American Express Company, American Express Travel Related Services Company, Inc. Received in night deposit box on 4/30/04 at 5:02 p.m. (yv,) (Entered: 05/04/2004)
- 4/30/04 11 DECLARATION of Bruce H. Schneider in Support re: 9 Memorandum of Law in Opposition to Motion. Document filed by American Express Company, American Express Travel Related Services Company, Inc. Received in night deposit box on 4/30/04 at 5:02 p.m. (yv,) (Entered: 05/04/2004)

\* \* \* \* \*

- 6/21/04 12 REPLY MEMORANDUM OF LAW in Support re: 3 MOTION for Summary Judgment. Document filed by Cohen Rese Gallery, Inc., IL Forno, Inc., Mai Jasmine Corporation. (db,) (Entered: 06/24/2004)
- 6/21/04 13 PLAINTIFFS' APPENDIX of Declarations and Exhibits in Opposition to Motion to Compel Arbitration. Document filed by Cohen Rese Gallery, Inc., IL Forno, Inc., Mai Jasmine Corp., Inc. (db,) (Entered: 06/24/2004)

\* \* \* \* \*

12/14/04 ORDER: that cases 03cv10271, 03cv9517, 04cv266, 04cv366 and 04cv1558 are hereby consolidated as Member cases in Lead case 03cv9592 for all proceedings before this Court (case 04cv5432 shall not be included in this consolidation). All related actions that are subsequently filed in, or transferred to, this District shall be consolidated into 03cv9592 for pre-trial purposes. This Order shall apply to every such related action, absent order of the Court. Every pleading filed in the consolidated action shall bear the following caption: In re AMERICAN EXPRESS MERCHANTS' LITIGATION (Master File No: 03civ.9592 (GBD)) as further set forth in said Order. Original document filed in Lead case 03cv9592 (GBD), document #28. (Signed by Judge George B.

Daniels on 12/10/04) (db,) (Entered:  
12/24/2004)

\* \* \* \* \*

3/20/06

CLERK'S JUDGMENT That for the reasons stated in the Court's Memorandum Opinion and Order dated March 15, 2006, American Express's motion to compel arbitration of all claims against it is granted; plaintiffs' cases against American Express is dismissed; American Express's motion to intervene and to dismiss the claims of plaintiffs against the banks in National Supermarket is denied; the bank defendants' motion to dismiss the claims in National Supermarket is denied; the bank defendants' motion to stay the action in National Supermarket pending the arbitration of related claims against American Express is granted; and the Cohen Rese plaintiffs' motion for partial summary judgment on their fifth claim against American Express is denied without prejudice. (Orig. filed in case no. 03 Civ. 9592 (GBD) as doc. #36). (Signed by J. Michael McMahon, clerk on 3/20/06) (ml,) (Entered: 03/20/2006)

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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No. 1:04-cv-00266-GBD

CHEZ NOELLE RESTAURANT, INDIVIDUALLY AND ON  
BEHALF OF ALL OTHERS SIMILARLY SITUATED,  
*Plaintiff,*

v.

AMERICAN EXPRESS COMPANY, ET AL.,  
*Defendants.*

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CIVIL DOCKET

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Date Filed	#	Docket Text
1/14/04	1	COMPLAINT against American Express Company, American Express Travel Related Services Company, Inc. (Filing Fee \$150.00, Receipt Number 496442) Document filed by Chez Noelle Restaurant. (gf.) (Entered: 01/16/2004)
		* * * * *
1/16/04		MOTION for an order for appointment of lead counsel and for consolidation of 03cv9517, 03cv9592 and 04cv266. Original document filed in case #03cv9517, document #7. Docu-



ment filed by DRF Jeweler Corp.  
(dle,) (Entered: 01/27/2004)

1/16/04 MEMORANDUM OF LAW in Support  
re: MOTION to Consolidate Cases.  
Original document filed by DRF  
Jeweler Corp. Original document filed  
in case #03cv9517 document #8. (dle,)  
(Entered: 01/27/2004)

\* \* \* \* \*

3/12/04 MEMORANDUM OF LAW in Support  
of MOTION to Consolidate Cases.  
Document filed by Mims Enterprises,  
Inc.'s. Original document #13 filed in  
03-cv-9517. (sb,) (Entered: 03/17/2004)

4/30/04 MOTION for an Order Dismissing  
these actions against American Ex-  
press in favor of arbitration. MOTION  
for an Order Dismissing the claims  
of plaintiff National Supermarkets  
Association with prejudice. MOTION  
for an Order Staying these proceed-  
ings pending arbitration. Declarations  
of Cathryn A. Snyder and Donald  
Blumenthal in support attached.  
Document filed by American Express  
Company, American Express Travel  
Related Services Company, Inc.  
Received in night deposit box on  
4/30/04 at 5:02 p.m. Original entry in  
03cv9592 document number 20. (yv,)  
(Entered: 05/04/2004)

\* \* \* \* \*

12/14/04 ORDER: that cases 03cv10271, 03cv9517, 04cv266, 04cv366 and 04cv1558 are hereby consolidated as Member cases in Lead case 03cv9592 for all proceedings before this Court (case 04cv5432 shall not be included in this consolidation). All related actions that are subsequently filed in, or transferred to, this District shall be consolidated into 03cv9592 for pre-trial purposes. This Order shall apply to every such related action, absent order of the Court. Every pleading filed in the consolidated action shall bear the following caption: In re AMERICAN EXPRESS MERCHANTS' LITIGATION (Master File No: 03civ.9592 (GBD)) as further set forth in said Order. Original document filed in Lead case 03cv9592 (GBD), document #28. (Signed by Judge George B. Daniels on 12/10/04) (db.) (Entered: 12/24/2004)

\* \* \* \* \*

3/20/06 CLERK'S JUDGMENT That for the reasons stated in the Court's Memorandum Opinion and Order dated March 15, 2006, American Express's motion to compel arbitration of all claims against it is granted; plaintiffs' cases against American Express is dismissed; American Express's motion to intervene and to dismiss the claims of plaintiffs against the banks in National Supermarket is denied; the

bank defendants' motion to dismiss the claims in National Supermarket is denied; the bank defendants' motion to stay the action in National Supermarket pending the arbitration of related claims against American Express is granted; and the Cohen Rese plaintiffs' motion for partial summary judgment on their fifth claim against American Express is denied without prejudice. (Orig. filed in case no. 03 Civ. 9592 (GBD) as doc. #36). (Signed by J. Michael McMahon, clerk on 3/20/06) (ml.) (Entered: 03/20/2006)

\* \* \* \* \*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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No. 1:04-cv-00366-GBD

MASCARI ENTERPRISES D/B/A SOUND STATIONS,  
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS  
SIMILARLY SITUATED,  
*Plaintiff,*

v.

AMERICAN EXPRESS COMPANY, ET AL.,  
*Defendants.*

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CIVIL DOCKET

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Date Filed	#	Docket Text
1/16/04	1	COMPLAINT against American Express Company, American Express Travel Related Services Company, Inc. (Filing Fee \$150.00, Receipt Number 496681) Document filed by Mascari Enterprises. (gf) (Entered: 01/20/2004)
		* * * * *
4/30/04		MOTION for an Order Dismissing these actions against American Express in favor of arbitration. MOTION for an Order Dismissing the claims of plaintiff National Supermarkets

Association with prejudice. MOTION for an Order Staying these proceedings pending arbitration. Declarations of Cathryn A. Snyder and Donald Blumenthal in support attached. Document filed by American Express Company, American Express Travel Related Services Company, Inc. Received in night deposit box on 4/30/04 at 5:02 p.m. Original entry in 03cv9592 document number 20. (yv,) (Entered: 05/04/2004)

\* \* \* \* \*

12/14/04

ORDER: that cases 03cv10271, 03cv9517, 04cv266, 04cv366 and 04cv1558 are hereby consolidated as Member cases in Lead case 03cv9592 for all proceedings before this Court (case 04cv5432 shall not be included in this consolidation). All related actions that are subsequently filed in, or transferred to, this District shall be consolidated into 03cv9592 for pre-trial purposes. This Order shall apply to every such related action, absent order of the Court. Every pleading filed in the consolidated action shall bear the following caption: In re AMERICAN EXPRESS MERCHANTS' LITIGATION (Master File No: 03civ.9592 (GBD)) as further set forth in said Order. Original document filed in Lead case 03cv9592 (GBD), document #28. (Signed by Judge George B.

Daniels on 12/10/04) (db,) (Entered:  
12/24/2004)

\* \* \* \* \*

3/20/06

CLERK'S JUDGMENT That for the reasons stated in the Court's Memorandum Opinion and Order dated March 15, 2006, American Express's motion to compel arbitration of all claims against it is granted; plaintiffs' cases against American Express is dismissed; American Express's motion to intervene and to dismiss the claims of plaintiffs against the banks in National Supermarket is denied; the bank defendants' motion to dismiss the claims in National Supermarket is denied; the bank defendants' motion to stay the action in National Supermarket pending the arbitration of related claims against American Express is granted; and the Cohen Rese plaintiffs' motion for partial summary judgment on their fifth claim against American Express is denied without prejudice. (Orig. filed in case no. 03 Civ. 9592 (GBD) as doc. #36). (Signed by J. Michael McMahon, clerk on 3/20/06) (ml,) (Entered: 03/20/2006)

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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No. 1:04-cv-01558-GBD

MIMS ENTERPRISES, INC. D/B/A MIMS RESTAURANT,  
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS  
SIMILARLY SITUATED,  
*Plaintiff,*

v.

AMERICAN EXPRESS COMPANY, ET AL.,  
*Defendants.*

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CIVIL DOCKET

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Date Filed	#	Docket Text
		* * * * *
2/24/04	1	COMPLAINT against American Express Company, American Express Travel Related Services Company, Inc. (Filing Fee \$150.00, Receipt Number 500610) Document filed by Mims Enterprises, Inc. (gmo,) (Entered: 02/25/2004)
		* * * * *
3/12/04		MEMORANDUM OF LAW in Support of MOTION to Consolidate Cases. Document filed by Mims Enterprises,

Inc.'s. Original document #13 filed in 03-cv-9517. (sb,) (Entered: 03/17/2004)

4/30/04

MOTION for an Order Dismissing these actions against American Express in favor of arbitration. MOTION for an Order Dismissing the claims of plaintiff National Supermarkets Association with prejudice. MOTION for an Order Staying these proceedings pending arbitration. Declarations of Cathryn A. Snyder and Donald Blumenthal in support attached. Document filed by American Express Company, American Express Travel Related Services Company, Inc. Received in night deposit box on 4/30/04 at 5:02 p.m. Original document filed in case no. 03cv9592, doc. #20. (kkc,) (Entered: 05/04/2004)

\* \* \* \* \*

12/14/04

ORDER: that cases 03cv10271, 03cv9517, 04cv266, 04cv366 and 04cv1558 are hereby consolidated as Member cases in Lead case 03cv9592 for all proceedings before this Court (case 04cv5432 shall not be included in this consolidation). All related actions that are subsequently filed in, or transferred to, this District shall be consolidated into 03cv9592 for pre-trial purposes. This Order shall apply to every such related action, absent order of the Court. Every pleading filed in the consolidated action shall bear the following caption: In re



AMERICAN EXPRESS MERCHANTS' LITIGATION (Master File No: 03civ.9592 (GBD)) as further set forth in said Order. Original document filed in Lead case 03cv9592 (GBD), document #28. (Signed by Judge George B. Daniels on 12/10/04) (db,) (Entered: 12/24/2004)

\* \* \* \* \*

3/20/06

CLERK'S JUDGMENT That for the reasons stated in the Court's Memorandum Opinion and Order dated March 15, 2006, American Express's motion to compel arbitration of all claims against it is granted; plaintiffs' cases against American Express is dismissed; American Express's motion to intervene and to dismiss the claims of plaintiffs against the banks in National Supermarket is denied; the bank defendants' motion to dismiss the claims in National Supermarket is denied; the bank defendants' motion to stay the action in National Supermarket pending the arbitration of related claims against American Express is granted; and the Cohen Rese plaintiffs' motion for partial summary judgment on their fifth claim against American Express is denied without prejudice. (Orig. filed in case no. 03 Civ. 9592 (GBD) as doc. #36). (Signed by J. Michael McMahon, clerk on 3/20/06) (ml,) (Entered: 03/20/2006)

\* \* \* \* \*

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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No. 06-1871-cv

IN RE AMERICAN EXPRESS MERCHANTS' LITIGATION,

ITALIAN COLORS RESTAURANT, ON OR BEHALF OF  
ITSELF AND ALL SIMILARLY SITUATED PERSONS,  
NATIONAL SUPERMARKETS ASSOCIATION,  
492 SUPERMARKET CORP., BUNDA STARR CORP.,  
PHOUNG CORP.,  
*Plaintiffs-Appellants,*

v.

AMERICAN EXPRESS TRAVEL RELATED SERVICES  
COMPANY, AMERICAN EXPRESS COMPANY,  
*Defendants-Appellees.*

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DATE	DOCKET ENTRY
4/18/06	Copy of notice of appeal and district court docket entries on behalf of APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Restaurant, National Supermarkets Association, ET AL, filed. [Entry date Apr 26 2006] [JP]
	* * * * *
9/11/06	APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Res-

tauriant, National Supermarkets Association, ET AL, brief FILED with proof of service. [Entry date Oct 3 2006] [JP]

9/11/06 APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Restaurant, National Supermarkets Association, ET AL, joint appendix filed w/pfs. [Entry date Oct 3 2006] [JP]

9/11/06 APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Restaurant, National Supermarkets Association, ET AL, Joint Appendix filed w/pfs. (volume #2) [Entry date Oct 3 2006] [JP]

9/11/06 APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Restaurant, National Supermarkets Association, ET AL, special appendix filed (w/pfs) [Entry date Oct 3 2006] [JP]

\* \* \* \* \*

9/18/06 AMICUS CURIAE American Antitrust Institute, brief filed with proof of service. [Entry date Oct 11 2006] [JP]

9/20/06 AMICUS CURIAE Trial Lawyers for Public Justice, brief filed with proof of service. [Entry date Oct 11 2006] [JP]

\* \* \* \* \*

11/1/06 APPELLEE American Express Company, American Express Travel Related Services Company, Inc., brief filed with proof of service. [Entry date Nov 8 2006] [JP]

\* \* \* \* \*

11/13/06 Movants Hayward D. Fisk and Robert Lonergan, et al, brief received. (Motion Pending) [Entry date Nov 15 2006] [JP]

\* \* \* \* \*

11/14/06 AMICUS CURIAE Business Roundtable, brief filed with proof of service. [Entry date Nov 15 2006] [JP]

\* \* \* \* \*

11/17/06 APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Restaurant, National Supermarkets Association, ET AL, reply brief filed with proof of service. [Entry date Nov 28 2006] [JP]

\* \* \* \* \*

9/13/07 Amicus Curiae Hayward D. Fisk, et al brief filed with proof of service. [Entry date Sep 24 2007] [AV]

9/13/07 Order FILED GRANTING motion to file brief as amicus curiae by Movant Hayward Fisk, Movant Robert Lonergan, Movant Clifford Storms, Movant Earnest Patrikis, Movant William Lytton, endorsed on motion dated 11/13/2006. [Entry date Sep 24 2007] [AV]

\* \* \* \* \*

11/16/07 APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Restaurant, National Supermarkets Association, ET AL, 28(J) letter FILED. [Entry date Nov 19 2007] [LY]

- 11/29/07 APPELLEES American Express Company and American Express Travel Related Services Company, Inc., 28(J) letter received. [Entry date Nov 29 2007] [TM]
- 12/4/07 APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Restaurant, National Supermarkets Association, ET AL, 28(J) letter FILED. [Entry date Dec 5 2007] [LY]
- 12/10/07 Case heard before POOLER, SACK, SOTOMAYOR, C.JJ CD DATE: 12/10/07 [Entry date Dec 10 2007] [RD]
- \* \* \* \* \*
- 12/26/07 APPELLEE American Express Company, American Express Travel Related Services Company, Inc., 28(J) letter FILED. [Entry date Dec 26 2007] [LY]
- \* \* \* \* \*
- 1/3/08 APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Restaurant, National Supermarkets Association, ET AL, 28(J) letter FILED. [Entry date Jan 4 2008] [LY]
- \* \* \* \* \*
- 3/11/08 APPELLEE American Express Company, American Express Travel Related Services Company, Inc., 28(J) letter received. [Entry date Mar 11 2008] [YS]
- \* \* \* \* \*
- 5/1/08 APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Res-

taurant, National Supermarkets Association, ET AL, 28(J) letter received. [Entry date May 1 2008] [YS]

\* \* \* \* \*

5/2/08 APPELLEE American Express Company, American Express Travel Related Services Company, Inc., 28(J) letter received in response to the Appellants 28(j) letter. [Entry date May 5 2008] [EM]

11/12/08 APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Restaurant, National Supermarkets Association, ET AL, 28(J) letter dated 11/10/08 received. [Entry date Nov 13 2008] [EM]

11/12/08 APPELLEE American Express Company, American Express Travel Related Services Company, Inc., response to the 28(J) letter of the Appellant, received. [Entry date Nov 13 2008] [EM]

1/30/09 Judgment of the district court is REVERSED and REMANDED by published signed opinion filed. (RSP) [Entry date Jan 30 2009] [AM]

1/30/09 Judgment filed. [Entry date Jan 30 2009] [AM]

\* \* \* \* \*

2/20/09 Judgment MANDATE ISSUED. CLOSED [Entry date Feb 20 2009] [HT]

\* \* \* \* \*

- 6/5/09 Notice of filing petition for APPELLEE American Express Company, American Express Travel Related Services Company, Inc., dated May 29, 2009, filed. Supreme Court #: 08-1473. [Entry date Jun 5 2009] [DB]
- 5/7/10 Writ of Certiorari GRANTED [Entry date May 12 2010] [AS]
- 6/18/10 Supreme Court judgment and costs filed. [Entry date Jun 21 2010] [AS]
- 7/30/10 REINSTATEMENT, pursuant to Supreme Court of the United States judgment dated 06/04/2010 and this court's order dated 07/30/2010, FILED. Reinstatement Code: M. [Entry date Jul 30 2010] [AG]
- 7/30/10 ORDER, each party shall submit a written brief limited to the issue of how Stolt-Nielsen applies to this case, no later than 08/23/2010 and reply briefs no later than 09/08/2010, by RDS, RSP, FILED. [Entry date Jul 30 2010] [AG]
- \* \* \* \* \*
- 8/23/10 SUPPLEMENTAL BRIEF, on behalf of APPELLANTS Italian Colors Restaurant, 492 Supermarket Corp., National Supermarkets Association, ET AL., FILED. [Entry date Aug 24 2010] [DB]
- 8/24/10 SUPPLEMENTAL BRIEF, on behalf of APPELLEE American Express Company, American Express Travel Related Services Company, Inc., FILED. [Entry date Aug 24 2010] [DB]

- 9/8/10 SUPPLEMENTAL REPLY BRIEF, on behalf of APPELLEES American Express Company and American Express Travel Related Services Company, Inc., FILED. [Entry date Sep 8 2010] [DB]
- 9/8/10 SUPPLEMENTAL REPLY BRIEF, on behalf of APPELLANTS Italian Colors Restaurant, 492 Supermarket Corp, Bunda Starr Corp, National Supermarkets Association, ET AL., FILED. [Entry date Sep 8 2010] [DB]
- 9/8/10 Case submitted before POOLER, SACK, C.JJ. [Entry date Mar 7 2011] [MR]
- 3/8/11 OPINION, district court judgment reversed and remanded, FILED (RSP). [Entry date Mar 8 2011] [CM]
- \* \* \* \* \*
- 3/8/11 Judgment filed. [Entry date Mar 10 2011] [CM]
- 3/9/11 APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Restaurant, National Supermarkets Association, ET AL, 28(J) letter FILED. [Entry date Mar 16 2011] [CM]
- \* \* \* \* \*
- 3/28/11 MOTION, to stay the mandate, on behalf of Appellee American Express Travel Related Services Company, Inc., Appellee American Express Company FILED. [Entry date Mar 29 2011] [CM]



4/4/11 OPPOSITION PAPERS, on behalf of Appellant Italian Colors Restaurant et al FILED. [Entry date Apr 5 2011] [CM]

\* \* \* \* \*

4/11/11 RESPONSE PAPERS, to the opposition of motion to stay mandate on behalf of Appellee American Express Company, American Express Travel Related Services Company, Inc., RECEIVED. [Entry date Apr 12 2011] [CM]

4/11/11 ORDER, Appellant Italian Colors Restaurant, Appellant National Supermarkets Association, Appellant 492 Supermarket Corp, Appellant Bunda Starr Corp, Appellant Phoung Corp, Appellee American Express Company, Appellee American Express Travel Related Services Company, Inc.'s motion to stay the mandate granted, FILED. [Entry date Apr 11 2011] [CM]

5/9/11 ORDER, dated 05/09/2011, it is hereby Ordered that each party shall submit a letter brief, not to exceed ten (10) double-spaced pages, limited to the issue of how Concepcion applies to this case. Parties shall submit their briefs concurrently no later than June 3, 2011, FILED. (RSP, RDS). [Entry date May 9 2011] [CM]

\* \* \* \* \*

5/31/11 Notice from Supreme Court granting APPELLEE American Express Company, American Express Travel Related

Services Company, Inc., extension of time in which to file a writ of certiorari. [Entry date Jun 1 2011] [CM]

6/3/11 APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Restaurant, National Supermarkets Association, ET AL, LETTER BRIEF filed with proof of service. [Entry date Jun 6 2011] [CM]

\* \* \* \* \*

6/6/11 APPELLEE American Express Company, American Express Travel Related Services Company, Inc., LETTER BRIEF filed with proof of service. [Entry date Jun 6 2011] [CM]

6/13/11 LETTER, dated 06/13/2011, on behalf of Appellee American Express RECEIVED. [Entry date Jun 14 2011] [CM]

8/1/11 ORDER, dated 08/01/2011, In light of the Supreme Court's decision of April 27, 2011 in AT&T Mobility LLC v. Conception, — U.S. —, 2011 WL 1561956 (2011), this panel is sua sponte considering rehearing, No additional briefing is necessary at this time, FILED (RSP, RDS). [Entry date Aug 1 2011] [CM]

\* \* \* \* \*

11/30/11 FRAP 28(J) LETTER, dated 11/29/2011, on behalf of Appellants 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Restaurant, National Super-

- markets Association, et al, RECEIVED. [Entry date Nov 30 2011] [CM]
- 12/1/11 LETTER, dated 11/30/201, in response to plaintiffs' Rule 28(j) letter, on behalf of Appellee American Express RECEIVED. [Entry date Dec 1 2011] [CM]
- 1/18/12 28(J) letter on behalf of Plaintiffs-Appellants RECEIVED. [Entry date Jan 19 2012] [CM]
- 1/24/12 LETTER, dated 01/23/2012, in response to Plaintiffs-Appellant's Rule 28(J) letter RECEIVED. [Entry date Jan 24 2012] [CM]
- 2/1/12 PETITION OPINION, the decision of the district court is reversed and remanded, by RSP, RDS, FILED. [Entry date Feb 1 2012] [CM]
- \* \* \* \* \*
- 2/14/12 PETITION FOR REHEARING EN BANC on behalf of Appellee American Express Travel Related Services Company, Inc., Appellee American Express Company motion petition for rehearing en banc FILED. [Entry date Feb 16 2012] [CM]
- 2/15/12 AMICUS CURIAE The Chamber of Commerce of the U.S.A. RECEIVED. [Entry date Feb 16 2012] [CM]
- \* \* \* \* \*
- 3/6/12 Amicus Curie Brief on behalf of Chamber of Commerce of the United States of

America, FILED. [Entry date Mar 6 2012] [CM]

\* \* \* \* \*

3/19/12 28(J) letter on behalf of Appellees American Express Company, American Express Travel Related Services Company, Inc., RECEIVED. [Entry date Mar 19 2012] [CM]

3/30/12 28(J) letter on behalf of Appellee American Express Company, RECEIVED. [Entry date Apr 4 2012] [CM]

5/29/12 Non-dispositive concurring opinion filed. [Entry date May 29 2012] [CM]

5/29/12 Non-dispositive dissenting opinion filed. [Entry date May 29 2012] [CM]

5/29/12 Non-dispositive dissenting opinion filed. [Entry date May 29 2012] [CM]

5/29/12 Non-dispositive dissenting opinion filed. [Entry date May 29 2012] [CM]

\* \* \* \* \*

5/29/12 ORDER, petition en banc denied, FILED. [Entry date May 29 2012] [CM]

6/1/12 MOTION, to stay the mandate, on behalf of Appellee American Express Travel Related Services Company, Inc., Appellee American Express Company FILED. [Entry date Jun 5 2012] [CM]

\* \* \* \* \*

6/11/12 MOTION ORDER, granting motion stay the mandate filed by Appellee American Express Company, Appellee American

Express Travel Related Services Company, Inc., by RSP, RDS, FILED. [Entry date Jun 11 2012] [CM]

8/1/12

U.S. SUPREME COURT NOTICE of writ of certiorari filing dated 07/30/2012, U.S. Supreme Court docket #12-133, RECEIVED. [Entry date Aug 1 2012] [CM]

## SUPREME COURT OF THE UNITED STATES

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 No. 08-1473

 AMERICAN EXPRESS COMPANY, ET AL.,  
*Petitioners,*

v.

 ITALIAN COLORS RESTAURANT, ET AL.,  
*Respondents.*


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DATE	PROCEEDINGS AND ORDERS
	* * * * *
May 29 2009	Petition for a writ of certiorari filed. (Response due June 29, 2009)
	* * * * *
Jun 18 2009	Order extending time to file response to petition to and including July 21, 2009.
Jun 26 2009	Brief amici curiae of American Bankers Association, et al. filed.
Jun 29 2009	Brief amicus curiae of Business Roundtable filed.
Jun 29 2009	Brief amici curiae of Verizon Com- munications Inc., et al. filed.
Jul 21 2009	Brief of respondents Italian Colors Restaurant, et al. in opposition filed.
	* * * * *

Aug 5 2009 Reply of petitioners American Express Company, et al. filed. (Distributed)

\* \* \* \* \*

May 3 2010 Petition GRANTED. Judgment VACATED and case REMANDED for further consideration in light of Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp., 559 U.S. \_\_\_\_ (2010). Justice Sotomayor took no part in the consideration or decision of this petition.

Jun 4 2010 JUDGMENT ISSUED.

[Attorney Names/Addresses Omitted]

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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ITALIAN COLORS RESTAURANT,	:
PHUONG CORP., BUNDA STARR CORP.,	:
492 SUPERMARKET CORP. AND	:
NATIONAL SUPERMARKETS ASSOCIATION,	:
INC., ON BEHALF OF THEMSELVES AND	:
ALL SIMILARLY SITUATED PERSONS,	:
	:
Plaintiffs,	:
- against -	:
	:
AMERICAN EXPRESS COMPANY AND	:
AMERICAN EXPRESS TRAVEL RELATED	:
SERVICES COMPANY, INC.,	:
	:
Defendants.	:

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03 Civ. 9592 (RO)

[Filed Dec. 24, 2003]

**AMENDED COMPLAINT**

Plaintiffs Italian Colors Restaurant, Phuong Corp., Bunda Starr Corp., 492 Supermarket Corp. and the National Supermarkets Association, Inc., on behalf of themselves and all others similarly situated, allege for their class action complaint against American Express Company (“American Express”) and American Express Travel Related Services Company, Inc. (“TRS”) (together, except as the context requires,



“American Express”), upon knowledge with respect to their own acts and upon information and belief with respect to all other matters, as follows:

## I.

### INTRODUCTION

1. American Express is the leading issuer of general purpose and corporate charge cards to consumers and businesses in the United States and throughout the world. It is also the leading provider of charge card services to merchants. In the words of the country’s leading credit card firm, Visa U.S.A., “American Express holds a near monopoly in the charge card market.”

2. American Express leverages its “near monopoly” and market power in the market for charge card services by requiring that merchants, as a condition of being permitted to accept American Express charge cards or corporate cards, agree to accept American Express-branded credit cards and debit cards (including so-called “Travel Funds Cards”) at grossly supra-competitive prices (the “Tying Arrangements”).

3. This action challenges the Tying Arrangements as unlawful restraints of trade under the federal antitrust laws. Brought on behalf of all merchants that accept American Express products or that have accepted American Express products during the Statutory Period (as defined below), this class action seeks an injunction permanently restraining American Express from tying the provision of credit or debit card services to the charge card and corporate card services that it offers merchants, as well as monetary damages.

**II.****JURISDICTION AND VENUE**

4. Pursuant to section 16 of the Clayton Act, 15 U.S.C. § 26, this action seeks to prevent and restrain violations of section 1 of the Sherman Act, 15 U.S.C. § 1. In addition, the Plaintiffs seek damages pursuant to section 4 of the Clayton Act, 15 U.S.C. § 15.

5. Venue is proper in this District pursuant to 28 U.S.C. § 1391 and 15 U.S.C. §§ 22 and 26, because American Express “may be found or transacts business” within this District. Among other things, American Express and its subsidiary TRS have marketed their charge card services, along with the unlawfully tied credit card services, to thousands of merchants within this District. The interstate commerce that is affected by the antitrust violations alleged in this action is carried on, in part, within this District.

**III.****THE PARTIES**

6. Plaintiff Italian Colors Restaurant, a California partnership, owns and operates the Italian Colors Restaurant in Oakland, California, where it accepts American Express cards.

7. Plaintiff Phuong Corp., a New York corporation, owns and operates the Nam Phuong Restaurant in New York City, where it accepts American Express cards.

8. Plaintiff Bunda Starr Corp. is a New York corporation with its principal place of business in New York, New York. Bunda Starr Corp. owns and operates Brite Buy Wines & Spirits, where it accepts American Express Cards.

9. Plaintiff 492 Supermarket Corp. is a New York corporation, with its principal place of business in Brooklyn, New York. 492 Supermarket Corp. owns and operates an Associated Supermarket, where it accepts American Express cards.

10. Plaintiff National Supermarkets Association, Inc. (the “NSA”) is a not-for-profit corporation organized under the laws of New York. The NSA operates as a voluntary membership-based trade association that represents the interests of independently owned supermarkets. The NSA currently represents approximately 500 independently owned supermarkets, and has close to 200 full members. The NSA’s members own and operate supermarkets, typically as franchisees of large national or regional supermarket chains.

11. Many of the members of the NSA accept American Express cards at their supermarkets and otherwise have standing to sue in this action. The interests that the NSA seeks to protect by its participation in this action are germane to its organizational mission, and appearance in this action by the individual members of the NSA is not required in order to achieve the objects of the litigation. NSA disclaims any interest in money damages, but seeks injunctive relief on behalf of its members.

12. Defendant American Express Company is a New York corporation with its principal place of business in New York, New York.

13. Defendant American Express Travel Related Services Company, Inc. is a Delaware corporation, with its principal place of business in New York, New York. TRS is a wholly owned subsidiary of American Express.

## IV.

**CLASS ACTION ALLEGATIONS**

14. Plaintiffs bring this action as a class action under Fed. R. Civ. P. 23(b)(2) to restrain an unlawful practice under section 1 of the Sherman Act. Plaintiff also seeks certification as a class action under Rule 23(b)(1) and (b)(3).

15. The class is comprised of all merchants that have accepted American Express charge cards (including the American Express corporate card), and have thus been forced to agree to accept American Express credit and debit cards, during the longest period of time permitted by the applicable statute of limitations (the “Statutory Period”) throughout the United States (the “Class”). The Class does not include American Express, its subsidiaries, directors, officers, or members of their families.

16. The Tying Arrangements affect each merchant that accepts American Express cards. The members of the Class are so numerous that joinder of all members is impracticable.

17. There exist no conflicts of interest as between the named plaintiffs and the other Class members. Plaintiffs have retained counsel that is competent and experienced in federal antitrust litigation. Plaintiffs and their counsel will fairly and adequately represent the interests of the Class.

18. In relevant respect, American Express has acted and continues to act on grounds that are generally applicable to the Class, such that final injunctive relief with respect to the Class as a whole is appropriate.

19. This class action is superior to any other method for the fair and efficient adjudication of this dispute. The damages suffered by many members of the Class are small in relation to the expense and burden of individual litigation and therefore it is highly impractical for individual Class members to attempt to vindicate their interests individually. There will be no extraordinary difficulty in the management of this Class action.

20. Throughout the Statutory Period, American Express uniformly imposed the Tying Arrangements upon all Class members. All Class members have been damaged in precisely the same fashion, by precisely the same conduct. The degree of damages suffered by individual Class members is readily calculable according to an ascertainable formula. For all of these reasons, questions of law and fact will predominantly be common to the Class. Among the questions of law and fact common to the Class are:

- (i) Whether American Express demands from merchants, as a condition of being permitted to accept American Express general purpose or corporate charge cards, that the merchant must also accept American Express branded credit and debit cards and services;
- (ii) Whether American Express's Tying Arrangements are *per se* unlawful, because: (a) American Express possesses and exercises monopoly or market power in the market for charge card services, or in the market for corporate card services; or (b) American Express possesses economic power sufficient to make probable the coercive Tying Arrangements; and

- (iii) Whether the merchant discount rates that members of the Class have been forced to pay for American Express-branded credit and debit card transactions exceed the rates that would prevail in the absence of the Tying Arrangements, or in otherwise competitive markets for credit and debit card services.

## V.

### **FACTUAL BACKGROUND**

21. Founded in 1850, American Express is primarily engaged in the business of providing travel related services, financial advisory services and international banking services throughout the world.

#### **The Core Charge Card Business**

22. Through its wholly owned subsidiary, TRS, American Express issues to consumers general purpose charge cards that include the American Express Green Card (also known as the “Personal” card), American Express Gold Card, and American Express Platinum Card, among others. Charge cards, according to descriptive materials disseminated by American Express, “are primarily designed as a method of payment and not as a means of financing purchases of goods or services.” Charge cards require payment by the cardholder of the full amount billed each month, and no finance charges are assessed (although accounts that are past due are subject, in most cases, to a delinquency assessment). Charge cards also generally carry no pre-set spending limits. For purposes of this Complaint, the term “general purpose” charge cards is used to refer to those charge cards that are issued directly to consumers (as opposed to a corporate charge card) and that are accepted at a wide

variety of merchants (as opposed to a proprietary card, such as a Macy's charge card).

23. In addition to issuing American Express-branded general purpose charge cards to consumers, TRS acts as a "merchant acquirer," meaning that it "acquires" merchants for the American Express network, and it manages all aspects of the relationship with that merchant. TRS signs up new merchants through a variety of sales channels, including a proprietary sales force, third party sales agents, the Internet, telemarketing and by receiving in-bound inquiries from merchants who seek to do business with American Express. Approximately four million merchants have been acquired for the American Express network.

24. Once a merchant enters into an agreement with TRS to accept American Express products as a method of payment for goods and services, that merchant becomes known as a "service establishment" in the vernacular of American Express. When a cardholder (known as a "Cardmember") presents the charge card for payment, the service establishment creates a record of charge for the transaction and submits it to TRS for payment.

25. Before making payment to the service establishment, TRS deducts its fee, known as the "merchant discount fee." This discount fee is calculated by taking the amount of the charge submitted by the service establishment and multiplying it by the applicable "discount rate." As of April 2003, the discount rate for service establishments published on American Express's website was three percent; in reality, many merchants are charged a rate higher than three percent. At the three percent rate, a

merchant submitting a charge of \$100 would receive from TRS payment of \$97. TRS then receives payment of the \$100 from the Cardmember within 30 days. To finance the float, TRS sells most charge card receivables to American Express Credit Corporation, another subsidiary, which in turn issues commercial paper and sells medium- and long-term notes to the public markets.

26. While the discount rate charged by TRS does vary somewhat with the type of participating establishment and the charge volume, it is generally far higher than the discount rate that merchants pay in connection with credit cards (other than American Express-branded credit cards). The merchant discount rate for Visa, for example (including the “interchange fee” paid by the “acquiring” bank to the card-issuing bank, along with the acquirer’s fee and the fees due to the Visa association) is generally in the vicinity of 1.8% – more than 35% lower than the fees charged by American Express.

27. Merchants are willing to pay American Express’s higher fees (to the extent they are) in order to access a higher class of customer, to create incremental sales and to register higher average per-purchase dollar amounts. Holders of charge cards are more affluent than credit cardholders, and a vastly higher percentage of charge cards than credit cards are held by businesses and used for business travel and other corporate purposes. Thus, in a marketing presentation to Wal-Mart several years ago, American Express emphasized that seven million holders of American Express charge cards were business customers who “are usually required by the company to use The Card for business purposes.” As American Express pointed out, other payment cards are not



substitutes for these cardholders and, thus, from the merchant's point of view these transactions represent valuable incremental sales.

28. In general, according to American Express, the average purchase on an American Express card is 17% higher than the average purchase made on a credit card. Thus, American Express observes in its most recent SEC Form 10K that "TRS has generally been able to charge higher discount rates to participating establishments than its competitors as a result of TRS' attractive Cardmember base."

#### American Express And The Corporate Card Market

29. In addition to the general purpose charge cards that TRS issues to individual consumers, American Express, through its Global Corporate Services Group ("GCSG"), issues corporate charge cards to corporations and other business entities ("Corporate Cards").

30. According to the definition employed by GCSG, a Corporate Card is a charge card issued to individuals through a corporate account established by their employer for business purposes. GCSG issues Corporate Cards to at least 70% of the companies included in the Fortune 500, and is likewise the leading issuer of Corporate Cards to middle-market companies (which GCSG defines as U.S. firms with annual revenues of \$10 million to \$1 billion and annual travel and entertainment expenditures between \$100,000 and \$10 million) and small businesses.

31. American Express possesses a commanding market share in the U.S. market for Corporate Card services. Indeed, as American Express notes in its marketing presentations to merchants, many companies require their employees to use the Amer-

ican Express Corporate Card for business related purchases. American Express's competitors in the domestic market for Corporate Card services include Diner's Club, Visa U.S.A. ("Visa") and MasterCard International ("MasterCard").

#### American Express And The Credit Card Market

32. Unlike a charge card, a "credit card" is a product that provides access to a revolving credit facility in order to finance the purchase of goods and services. At the time they receive the monthly bill, credit cardholders have the option of "revolving" their balance over into the next month and paying a predetermined interest rate to the issuer. The dominant credit card networks in the United States are Visa and MasterCard, which together account for more than 90% of all transaction volume on credit cards. In contrast to American Express's typical discount rates of three percent or more (which the company applies uniformly to its credit and charge card offerings), MasterCard's typical credit card discount rate is approximately 1.9% or, in the language of the industry, 190 "basis points." Visa's ordinary discount rate is slightly lower.

33. The merchant discount rate charged by Discover Card is lower yet – generally 30% below the rates charged by Visa. The Discover Card rate is the best measure of a true competitive discount rate in the U.S. credit card market, as Discover Card has no monopolistic pricing power.

34. American Express participates in the market for general purpose credit cards through American Express Centurion Bank ("Centurion Bank"), a wholly owned subsidiary and FDIC-insured deposit institution. Centurion Bank issues Blue from American

Express, the Optima Card, and all other American Express-branded revolving credit products in the United States. Whereas receivables in the charge card business are financed by American Express Credit Corporation, the receivables generated by American Express's activities in the credit card market are financed by Centurion Bank through the sale of notes and certificates of deposit.

35. As detailed below, American Express's business in the markets for credit card issuance and credit card services has grown dramatically over the last decade, and particularly in the past several years. Substantially all of that growth is attributable to the unlawful practice of tying the provision of credit card services to the provision of general purpose charge card and Corporate Card services.

36. American Express first launched the Optima credit card in the late 1980's. Upon information and belief, American Express service establishments were required by the terms of merchant services agreements to accept Optima as a condition of being allowed to accept the American Express charge cards upon which they depended. As a result, Optima experienced no difficulty in penetrating the merchant community; it simply leveraged the massive installed base that American Express had developed in the market for charge card services.

37. The development of Optima highlights the distinctness of the credit and charge card markets. When American Express introduced Optima, Visa urged its member banks to boycott American Express products, such as traveler's checks, stressing that the new Optima credit cards, unlike the traditional American Express charge card, were "directly com-

petitive” with Visa credit cards. Indeed, Visa’s CEO wrote the banks that the new Optima product “is positioned to be directly competitive with your Visa and MasterCard portfolios . . . [Y]ou may wish to rethink your position in offering American Express products.”

38. While American Express was able to leverage dominance in one market to gain a foothold in another, the initial experience with Optima underscores the difficulty of navigating sharply distinct market environments. As a new entrant in the credit card market, American Express applied risk screening criteria and models drawn from its experience in the charge card market. The result was disastrous, and by 1993 American Express had losses of over \$2 billion from bad loans in the credit card market.

39. Undeterred, American Express soon redoubled its efforts to leverage its charge card market power and thereby gain market share in credit cards. “In late 1994,” according to an American Express 10K filing, “the Company began aggressively to expand its credit card business.” Since that time – and particularly with the recent launch of its “Blue” credit card – American Express’s growth in the credit card business “has been among the top tier of card issuers.”

40. Indeed, the growth of American Express’s credit card business has been extraordinary. Over the past five years, the point-of-sale dollar volume of American Express’s credit cards has increased at least ten times more than that of any other credit card network.

41. The launch of Blue was specifically designed to extend American Express into a new market. As a

senior American Express executive has stated: “Blue has accomplished our primary purpose, which was to establish American Express as more than a charge card company . . . Blue has been a breakthrough, setting us up as a credit card issuer.”

42. In 2001, the last year for which pertinent information is available, American Express credit card point-of-sale volume totaled more than \$42 billion – almost one-quarter the size of American Express’s \$181 billion charge card volume. Since 2001, American Express has waged aggressive marketing campaigns in the credit card market on behalf of Blue. Presumably, American Express’s volume and share in the credit card markets have continued to grow since that time.

43. Looking forward, there is reason to expect that American Express’s acquisition of market share in the credit card market is about to accelerate sharply, fueled by the unlawful Tying Arrangement. Beginning in or around the mid-1990’s, American Express initiated a strategy whereby it would invite banks and other qualified financial institutions in the United States to license the American Express logo and begin issuing credit cards on the American Express network (the “Bank Strategy”). The lynchpin of the Bank Strategy – and the value proposition that underlay American Express’s approach to banks – was the unlawful Tying Arrangement. Because of the unlawful tie-in to American Express charge cards, issuing banks would be assured that merchants would accept the American Express branded credit card offerings, notwithstanding that those offerings were priced above competitive rates by a factor of roughly 35%.

44. The Bank Strategy did not work, however, for one reason: the rules and policies of Visa and MasterCard in the United States called for expulsion of members who issue credit cards branded with the marks of American Express, Discover Card or any entity other than Visa or MasterCard. In response to its inquiries, American Express found no banks that were willing to forfeit membership in Visa or MasterCard, and the Bank Strategy appeared dead in its tracks.

45. In 1998, however, the U.S. Department of Justice, responding in part to concerns voiced by American Express, initiated an action in the United States District Court for the Southern District of New York against Visa and MasterCard, alleging that the associations' rules violate federal antitrust laws to the extent that they preclude member banks from issuing credit cards that carry the logos of American Express or other brands other than Visa or MasterCard (the "DOJ Case"). In October 2001, the district court ruled in favor of the Justice Department and was subsequently upheld on appeal by the U.S. Court of Appeals for the Second Circuit. As a result, the approximately 680 banks that comprise the Visa and MasterCard networks are or soon will be contractually free to issue credit cards (and debit cards) bearing the American Express logo.

#### American Express's Plans After The DOJ Case

46. American Express has stated that it intends to approach these commercial banks as soon as the appeal of the DOJ Case is favorably decided or settled. Upon information and belief, defendants have begun this process. More particularly, American Express is in the process of inviting commercial

banks to issue American Express-branded credit cards, secure in the knowledge that: (a) all American Express service establishments will be forced to accept those credit cards lest they forfeit the ability to accept American Express general purpose charge cards and Corporate Cards; and (b) the merchants will be forced to pay discount fees (including an interchange fee to the issuing bank) that are far higher than the rates charged by Visa and MasterCard, and at least 50% higher than the true competitive rate.

47. American Express's "value proposition" – to allow issuer banks to share in monopoly profits – is potentially even more powerful in the debit card market, which American Express likewise intends to exploit. Pursuant to the terms of 2003 settlement agreements that have been entered into by Visa and MasterCard in *In Re Visa Check/Mastermoney Antitrust Litigation*, Visa and MasterCard are required to untie credit and debit card services. As a result, the typical interchange rates charged for off-line debit transactions by Visa and MasterCard have already been slashed, on a prospective basis, to approximately 85 basis points, or roughly 0.85%. Accordingly, an issuing bank that provides access to the demand deposit accounts of its depositors via an off-line debit card bearing the Visa flag or MasterCard logo will receive 0.85% of the dollar volume consummated on that card.

48. Banks issuing off-line debit products under the American Express logo stand to reap several times the interchange fees that an off-line debit issuer may earn with Visa or MasterCard. In the wake of the *Visa Check* settlement, only American Express has the power to tie the provision of debit card services to

its other services (in this case, charge and Corporate Card services), and thereby exact supracompetitive rents in the tied product market. Faced with the opportunity to double, and possibly triple their profits, banks will eventually commit to American Express branded debit products virtually all of the resources they have available for the promotion of off-line debit.

#### The Unlawful Tying Arrangement

49. The standard form “Agreement For American Express Card Acceptance” which TRS uses with merchants in the retail industry (the “Merchant Agreement”) provides that the merchant must accept “any card issued by [American Express] bearing [its] name, trademark, service mark or logo.” Pursuant to the terms of the Merchant Agreement, a retailer may not accept American Express charge cards unless it also agrees to accept American Express-branded credit cards and all other American Express-branded cards. Likewise, a retailer may not accept American Express Corporate Cards unless it also agrees to accept American Express-branded credit cards.

50. American Express charges merchants the same discount rates on all American Express-branded products, including charge, corporate charge, credit, and debit cards.

51. Merchants are also precluded under the Merchant Agreements from seeking to “steer” or induce customers at the point of sale to use less expensive payment media, such as other credit cards, cash, or debit cards. American Express defines such merchant conduct as “suppression” of American Express cards, and it employs a policy of “canceling merchants who suppress usage of the American Express Card.”



52. The net result of American Express's policies is that merchants are forced to accept American Express-branded credit cards at supracompetitive prices. But for the Tying Arrangement, the vast majority of merchants that accept American Express would not accept American Express branded credit cards at the supracompetitive discount rate charged by TRS. Most merchants would not willingly pay discount fees that are at least 35% higher than competitive rates. They do not believe that accepting American Express branded credit cards attracts incremental customers or generates larger purchases, relative to alternative means of payment.

53. However, even for those merchants who *do* believe that accepting American Express credit cards attracts incremental customers or generates larger purchases – i.e., even for those merchants who would accept American Express branded credit cards absent the coercive Tying Arrangements – the Tying Arrangements nevertheless cause economic injury because, in the absence of the ties, the discount rate for American Express credit cards could not exceed competitive levels. Given the opportunity, enough merchants would decline American Express-branded credit cards that the merchant discount fees associated with those credit cards would come down to a competitive level, which is best measured by the merchant discount fees charged by Discover Card.

## VI.

### RELEVANT MARKETS

54. General purpose charge card services form the product dimension of a relevant market. The geographic dimension of this market is the United

States (the “General Purpose Charge Card Services Market”).

55. The dominant participant in the General Purpose Charge Card Services Market is American Express. According to an informational bulletin issued by Visa, “American Express holds a near monopoly in the charge card market. Its only significant competitor is Diner’s Club.” In fact, Diners Club, which is owned by Citicorp, has less than one fifteenth the market share of American Express in the market for general purpose charge cards. Many consumers do not consider other payment systems suitable substitutes for their use of charge cards.

56. Corporate Card services form the product dimension of another relevant market (or sub-market), the geographic dimension of which is the United States (the “Corporate Card Services Market”). American Express possesses a commanding share of the Corporate Card Services Market. From the point of view of the cardholder, other payment systems are not suitable substitutes for Corporate Cards.

57. General purpose credit card services form the product dimension of another relevant market, the geographic dimension of which is the United States (the “Credit Card Services Market”).

58. General purpose credit cards are a unique product and bundle of services. Many consumers do not consider other payment systems suitable substitutes for their use of general purpose credit cards.

59. Because of these consumer attitudes, the acceptance of general purpose or corporate charge cards is not a substitute for the acceptance of credit cards from the point of view of merchants. Merchants who refuse to accept credit cards will inevitably

lose a significant portion of the sales they receive from consumers who value access to revolving credit. Merchants who refuse to accept general purpose charge cards or Corporate Cards will inevitably lose a significant portion of the sales they receive from businesses, travelers, affluent consumers, and others who value the features of the general purpose charge card or the Corporate Card.

60. In addition, as measured under the guidelines established by the United States Department of Justice and the Federal Trade Commission, there exists sufficiently low cross-elasticity of demand as between (i) general purpose charge cards or Corporate Cards, on the one hand, and (ii) general purpose credit cards, on the other, to compel the conclusion that American Express commands market power in a market for charge card services. American Express is able to – and has – maintained prices for its core charge card services at levels that are more than 5% greater than a competitive baseline price without losing appreciable merchant acceptance, notwithstanding the existence of lower priced credit card services providers, such as Visa and MasterCard. Indeed, if American Express has experienced any erosion in merchant acceptance it is only because price levels are some 30% or more above a competitive baseline – far higher than the DOJ Guidelines require.

## VII.

### HARM TO COMPETITION AND TO CONSUMERS

61. As a result of the Tying Arrangements, American Express is able to extract from merchants discount fees in the tied market for credit card ser-

vices that are far higher than its competitors' fees for credit card services. At the same time, the fees that American Express charges merchants for services in the tying product market for charge card services (or, more narrowly, for corporate charge card services) exceed the fees charged by American Express's competitors.

62. Accordingly, merchants pay significantly more for the tied bundle of services than they would pay in the absence of the coercive tie-in. As merchants pass these costs along, prices rise and consumers are injured.

63. Another effect of the Tying Arrangement is to effectively preclude a competitive low cost provider such as Discover Card, or any future credit card market entrant, from accessing the critical issuing and marketing resources of third party issuers, specifically commercial banks. By dint of the Tying Arrangements, the banks have the ability to share in supracompetitive profits by issuing American Express-branded credit cards. Their finite issuing and marketing resources, therefore, will not be available to Discover or any future entrant attempting to provide a lower cost service.

64. In addition, American Express's ability to charge merchants supracompetitive fees and share them with issuing banks will result in the foreclosure of a significant portion of the credit card issuing market, as issuing banks that had previously committed resources to Visa and MasterCard will dedicate their issuing and marketing resources to American Express branded cards.

65. The Tying Arrangements will further dramatically foreclose competition in the market for off-line

debit. In the wake of the *In Re Visa Check/Mastermoney Antitrust Litigation*, only American Express will be able to promise the banks: (a) that an installed base of millions of merchants will be required to accept its off-line debit product; and (b) that those merchants will be forced to pay a supracompetitive interchange fee to the issuing bank – perhaps 500% higher than the competitive rate. As set forth above, American Express’s ability to tie debit card services to general purpose and corporate charge card services will thus absorb the finite issuing and marketing resources of issuing banks and foreclose the ability of other firms to compete.

**FIRST CLAIM FOR RELIEF**

For Violation Of Sherman Act § 1 Through  
Unlawful Tying Of (A) Charge Card Services  
And (B) Credit Card Services

66. Plaintiffs repeat and reallege each of the foregoing allegations as though fully set forth herein.

67. Beginning at a time that is presently unknown to plaintiffs, but not later than four years before the date of filing the instant action, American Express instituted its policy of requiring service establishments to accept American Express-branded credit cards as a condition of being permitted to accept American Express charge cards.

68. The Tying Arrangement affects a substantial amount of interstate commerce. In particular, more than four million service establishments in every U.S. state are forced to accept American Express-branded credit cards at supracompetitive rates.

69. The tying product, charge card services, is distinct from the tied product, credit card services.

Among other things, the distinctness of the two products is evident in the very structure of American Express's businesses, as well as the company's numerous statements and disclosures, such as the American Express website, which divides all American Express cards into charge card products and credit card products.

70. American Express and TRS have actually tied the provision of charge and credit card services, as the Tying Arrangement has been implemented in millions of merchant agreements.

71. American Express has appreciable market power in the tying product market. As set forth above, American Express has a virtual monopoly in the market for charge card services.

72. Even if it were considered that the product dimension of a relevant market were the provision of credit and charge card services, American Express would still possess appreciable market power (albeit without possessing a commanding market share), as evidenced by its ability to impose the Tying Arrangement upon merchants and to extract supra-competitive prices for the tied product, credit card services.

73. The maintenance of the Tying Arrangement has the effect of foreclosing competition and is otherwise anticompetitive.

74. The Tying Arrangement is per se unlawful. Alternatively, to the extent it is measured under a "rule of reason" analysis, the adverse effect of the Tying Arrangement upon competition as a whole in the relevant market is not outweighed by any pro-competitive virtue, and any pro-competitive virtue

could be achieved through alternative means that are less restrictive of competition.

75. In the absence of appropriate injunctive relief, American Express's violations of the antitrust laws will continue unabated and the Class will continue to suffer the harms complained of in this action.

76. As a direct, foreseeable and proximate result of American Express's violation of the Sherman Act, section 1, plaintiffs and the Class have been injured in an amount to be determined at trial.

### **SECOND CLAIM FOR RELIEF**

#### **For Violation Of Sherman Act § 1 Through Unlawful Tying Of (A) Corporate Card Services and (B) Credit Card Services**

77. Plaintiffs repeat and reallege each of the foregoing allegations as though fully set forth herein.

78. The unlawful Tying Arrangement obligates merchants to either accept American Express-branded credit cards at grossly supracompetitive rates or forfeit the ability to accept American Express Corporate Cards.

79. American Express Corporate Cards and American Express-branded credit cards are distinct products.

80. American Express exercises market power in the Corporate Card Services Market.

81. The maintenance of the Tying Arrangement has the effect of foreclosing competition, is otherwise anticompetitive, and is both per se unlawful and an unreasonable restraint of trade.

82. In the absence of appropriate injunctive relief, American Express's violations of the antitrust laws

will continue unabated and the Class will continue to suffer the harms complained of in this action.

83. As a direct, foreseeable and proximate result of American Express' violation of the Sherman Act, section 1, plaintiffs and the Class has been injured in an amount to be determined at trial.

### **THIRD CLAIM FOR RELIEF**

For Violation Of Sherman Act § 1 Through Unlawful Tying Of (A) Charge or Corporate Card Services, and (B) Debit or Pre-Paid Travel Fund Card Services

84. Plaintiffs repeat and reallege each of the foregoing allegations as though fully set forth herein.

85. Debit cards allow a cardholder to access his or her bank or brokerage account directly at the point of sale either "on-line" (via a PIN pad) or "off-line" (by signing a slip). American Express currently issues two off-line debit products, Fidelity American Express Gold Card and Fidelity American Express Platinum Cards, both of which allow users to access at the point of sale accounts maintained at Fidelity Investments.

86. American Express also issues pre-paid cards known as "Travel Funds" Cards, whereby the cardholder accesses funds that she has specifically deposited with American Express for this purpose. The Travel Funds Cards are likewise subject to defendants' coercive Tying Arrangements. A fully pre-paid card such as the Travel Funds Cards carries no appreciable fraud risk and is, for all intents and purposes, a debit card that accesses an account that is controlled by American Express. In a competitive market, the discount fees charged to merchants for pre-paid Travel Funds card services would be no



higher than the fees charged for on-line, PIN-based debit cards that access demand deposit accounts – i.e., fees that are generally less than 15 cents on a \$100 restaurant transaction. American Express, however, leverages its market power to coerce merchants to accept the Travel Funds cards and pay discount fees of roughly \$3.00 on a \$100 transaction.

87. Further, as detailed above, American Express currently has plans to engage commercial banks to issue off-line debit cards under the American Express logo.

88. The unlawful Tying Arrangement obligates merchants to either accept these American Express-branded debit products at grossly supracompetitive rates or forfeit the ability to accept American Express charge cards (including American Express Corporate Cards).

89. Debit cards and pre-paid “Travel Funds Cards” are products distinct from Corporate Cards. Debit cards and pre-paid “Travel Funds Cards” are also distinct from general purpose charge cards.

90. The maintenance of the Tying Arrangement as applied to debit cards has the effect of foreclosing competition, and is both per se unlawful and an unreasonable restraint of trade.

91. In the absence of appropriate injunctive relief, American Express’s violations of the antitrust laws will continue unabated and the Class will continue to suffer the harms complained of in this action.

**FOURTH CLAIM FOR RELIEF****For Violation Of Sherman Act §§ 1 and 2  
Based On The “Collective Action Waivers”**

92. Plaintiffs repeat and reallege each of the foregoing allegations as though fully set forth herein.

93. In pertinent part, section 2 of the Sherman Act prohibits a defendant in possession of monopoly power in the relevant market from willfully acting to maintain its ability to exercise monopoly power to the detriment of plaintiffs. Section 1 of the Sherman Act, in pertinent part, prohibits contracts in restraint of trade.

94. American Express possesses monopoly power in the relevant markets for corporate card services and charge card services.

95. American Express’s ability to maintain and exercise its monopoly power, and to propagate the Tying Arrangements, is threatened by the availability of class action lawsuits and class-wide arbitrations as tools for challenging American Express’s anti-competitive practices. Indeed, as American Express is aware, class-wide action is the only viable tool available to redress the sort of unlawful tying arrangements that are at issue in this action.

96. In order to maintain its ability to exercise monopoly power, American Express imposes upon merchants in its standard form merchant services agreements a provision designed to insulate itself from any class-wide liability for antitrust violations (the “Collective Action Waivers”). Under the terms of the Collective Action Waivers, the merchant (i) forfeits the ability to act as a representative plaintiff in any class action; (ii) forfeits the ability to participate as a passive class member (and presumably

to share in the benefit of any award) in any class action; and (iii) forfeits any right to have his or her claim consolidated or aggregated with any claim asserted by any other merchant in any arbitration. American Express's practice is to insert the Collective Action Waivers into standard form adhesion contracts with merchants that lack the power to negotiate individual terms.

97. If the Collective Action Waivers were given effect, then all merchants would suffer injury, because enough merchants would be precluded from participating in (or even being represented in) a class action that the efficacy of the action would be substantially eviscerated.

98. Defendants' actions, in forcing small merchants to execute Collective Action Waivers as a condition of being permitted to accept products in which American Express enjoys substantial market power, are reasonably calculated to protect and maintain American Express' monopoly power and its ability to use that power in restraint of trade.

99. Moreover, because the Collective Action Waivers would proscribe all meaningful relief for small merchants, defendants' practices amount to a prospective waiver of antitrust liability, in violation of Section One of the Sherman Act.

100. In the absence of an Order declaring that the Collective Action Waivers violate sections 1 and 2 of the Sherman Act and are therefore unenforceable, the Class will suffer irreparable harm.

WHEREFORE, Plaintiffs respectfully demand:

A. That the Court declare, adjudge and decree that Defendants have committed the violations of federal law alleged herein;

B. That the Court declare that the imposition of the Collective Action Waivers violate sections 1 and 2 of the Sherman Act, and that the Court permanently enjoin and restrain the enforcement of the Collective Action Waivers;

C. That the Court enter an Order pursuant to Fed. R. Civ. P. 23 permitting this action to be maintained as a class action on behalf of the Class specified herein;

D. That defendants be permanently enjoined and restrained from implementing or enforcing the Tying Arrangements, or from entering into agreements with merchants whereby the ability of the merchant to accept American Express general purpose or corporate charge cards is conditioned upon its agreement to accept American Express credit or debit cards (including "Travel Funds" Cards);

E. That the Court award damages for violations of the First and Second Claims For Relief in amounts to be determined at trial and then trebled;

F. That the Court award attorneys' fees and costs of suit; and

G. That the Court award such other and further relief as it may deem just and proper.

#### JURY DEMAND

Plaintiffs hereby demand trial by jury of all issues so triable.

Dated: New York, New York

December 23, 2003

FRIEDMAN & SHUBE

/s/ GARY B. FRIEDMAN

Gary B. Friedman (GF-2597)

Noah Shube (NS 1300)

155 Spring Street

New York, New York 10012

(212) 680-5150

Read K. McCaffrey

Christopher W. Hellmich

PATTON BOGGS LLP

2550 M Street, NW

Washington, DC 20037

(202) 457-6000

Blaine H. Bortnick (BB-3686)

LIDDLE & ROBINSON, L.L.P.

685 Third Avenue

New York, New York 10022

(212) 687-8500

David Markun

Edward Zusman

Kevin Eng

MARKUN ZUSMAN &

COMPTON LLP

601 Montgomery Street, Suite 601

San Francisco, CA 94111

(415) 438-4515

*Attorneys for the Plaintiffs*



Surely American Express expects no less. See Defendants Memorandum In Support of Application to Extend Stay of Discovery at 5 (discussing the broad and “burdensome” nature of antitrust discovery).

3. Among many other areas of inquiry that should be explored through depositions and documents in this case are:

- Competition in the payments industry in general and, more specifically, the nature and scope of competition between Amex and each of:
  - o MasterCard
  - o Visa
  - o Discover
  - o Diner’s/Citibank
- Statistics about the payments card industry in general, and broken down by many categories, including revolving credit use, charge, debit, etc.
- Amex merchant data, including the dollar volume of transactions broken down by payment type and by merchant type
- Historical, current and future discount fee pricing, broken down by merchant categories
- Historical, current and future discount fee pricing of each of Amex’s competitors, broken down by merchant categories
- Information regarding how Amex allocates its network costs as between cardholders and mechants [sic]
- Information regarding how each of Amex’s competitors allocates its network costs as between cardholders and mechants [sic]

- History of Amex's "Honor All Cards" rule; experience in US and abroad
- The costs and benefits to Amex of maintaining a single "acceptance mark"
- The "Optima Card" and Amex's experience in the 1980's of attempting to break into the revolving credit card market
- The "Blue" Card roll out and marketing
- Amex's "debit card initiative," [sic] which it discontinued in the wake of the Visa Check filing in late 1996 or early 1997, out of concerns about incurring similar liability
- Amex's "bank strategy" in the wake of the DOJ litigation
- Amex's transaction with MBNA, whereby MBNA recently agreed to issue Amex-branded revolving credit card products, and the relationship of the tying arrangement to that transaction
- Amex's enforcement of policies against merchant "steering" of consumer payment type preferences
- Amex's presentations to other banks and the importance of "premium pricing" and high discount fees to that strategy

4. The preceding list is far from exhaustive, and covers only essential areas. It is clearly reasonable to assume that well over 30 depositions will be taken (exclusive of depositions of plaintiffs) and I expect that American Express's counsel will not dispute that 30 is indeed a low estimate of the number of depositions.



5. Using this unrealistically low estimate of 30 depositions, it is clear that the out-of-pocket costs related to depositions alone will exceed \$100,000. In this case, the total out-of-pocket cost of each deposition will certainly average over \$3,333, including court reporters fees and, where applicable, travel and videotaping. I note that, in Visa Check, there were 400 depositions taken as set forth in the district court decision discussed in our accompanying brief.

6. In addition, document management in this case will begin with a review of the five million page record of Visa Check. Any plaintiff seeking to establish Amex's liability in this case would have to begin by reviewing that record. If the copying, imaging and document management costs associated with such a review were held to 5 cents per page, the cost of this one project alone would be \$250,000.

7. No merchant plaintiff could possibly hope to establish Amex's liability for unlawful tying without spending, at a bare minimum, several hundred thousand dollars for depositions and document management. Again, it is not possible to state with certainty what these items will cost. It is possible to state with total certainty that they will exceed \$300,000.<sup>1</sup> The totally separate cost of expert witness fees is the subject of the Ddeclaration [sic] of Dr. Gary L. French, submitted herewith, as well as the Declaration of Kathleen Schulte.

8. Bound together with this declaration behind the tabs indicated below are true and correct copies of the following documents, and the following declarations:

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<sup>1</sup> In the unlikely event that the defendants seriously dispute these estimates, the plaintiffs would seek an evidentiary hearing, if the Court believes the issue material to its ruling.

<u>Tab</u>	<u>Document</u>
2.	Amended Complaint of Plaintiffs Italian Colors Restaurant, et al.
3.	Representative Sample of 1997-99 Visa Check Media Coverage
4.	Terms and Conditions Of Amex Card Acceptance, October 1999
5.	Declaration of Gary French, Ph. D., with Schedules and CV
6.	Declaration of Kathleen A. Schulte
7.	Declarations of Pre-1999 Merchant Plaintiffs
8.	Excerpts from Deposition of Donald Blumenthal
9.	Excerpts from Deposition of Marc Wells
10.	Internal Amex e-mail dated July 20, 1999
11.	Merchant Matters Mailing Plans
12.	E-mail from Donald Blumenthal, dated July 16, 1999
13.	Amended Complaint of Plaintiffs Cohen Rese Galleries et al.

Dated: New York, New York  
June 21, 2004

/s/ GARY B. FRIEDMAN  
Gary B. Friedman

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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ITALIAN COLORS RESTAURANT, ET AL.,	:
	:
Plaintiffs,	:
- against -	:
	:
AMERICAN EXPRESS CO., ET AL.,	:
	:
Defendants.	:

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03 CV 9592 (GBD), 03 CV 10271 (GBD),  
03 CV 9517 (GBD), 04 CV 00266 (GBD),  
03 CV 00366 (GBD), 04 CV 1558 (GBD)

**DECLARATION OF GARY L. FRENCH, PH. D.**

Gary L. French, being first duly sworn, deposes and says:

1. I am Gary L. French, economist and senior vice president of Nathan Associates Inc., an economic and financial consulting firm established in 1946 that provides applied economic research and analysis to public and private clients in the United States and abroad. I am the manager of the litigation practice at Nathan Associates and have directed numerous client engagements involving studies of antitrust liability and damages, such as is required for this case.

2. I have been associated with Nathan Associates as an economist for 25 years. Prior to that I was an assistant professor of economics at Old Dominion University and assistant professor of economics and finance at Texas A&I University. I received a B.B.A. (1966), M.A. in economics (1971), and Ph.D. (1973)

in economics from the University of Houston. My experience includes a wide range of economic consulting and analytical work, involving both litigation and non-litigation consulting. My economic work in litigation has focused particularly on antitrust cases in a wide range of industries. This work has included matters concerning the structure and conduct of industries, the definition of relevant markets, the determination of economic impact and competitive effects, and the estimation of damages. In many instances, such analyses have concerned the issues of impact upon multiple plaintiffs and plaintiff classes, and the development of class-wide approaches that can be applied to the assessment of damages for each class member. I have provided economic analyses and testimony concerning liability and damages in numerous antitrust class action cases; examples include: *In re Disposable Contact Lens Antitrust Litigation, MDL 1030 (U.S.D.C. Middle District of Florida, Jacksonville Division)* concerning the competitive impact and damages stemming from the refusal of contact lens manufacturers to sell to mail order companies, and *Billy Cook, et al. v. Powell Buick, Hub City Ford and the Louisiana Car Dealers Association CA No. 94-1730 (U.S.D.C. Western District of Louisiana, Shreveport Division)* concerning class certification and impact of alleged price fixing by new vehicle dealers.

3. As the manager of Nathan Associates' litigation practice I have also had administrative responsibility for studies of antitrust liability and damages in numerous class action and individual firm litigation cases in which I was not the testifying expert. Both my roles as a testifying expert and as practice manager provide me with substantial experience and expertise concerning the complexity and cost of

undertaking a study of antitrust liability and damages for the purpose of providing expert analysis and testimony. My curriculum vitae, describing my education and work experience, is attached as Appendix A.

4. I have been asked by counsel to the plaintiffs to provide an expert opinion concerning the likely costs and complexity of an expert economic study concerning the liability and damages in an antitrust case, such as that alleged in this litigation. I have also been asked to contrast the likely cost of an expert economic study with the potential recovery of damages by an American Express Card merchant with annual sales volume of \$10 million or less,<sup>1</sup> such as most if not all of the named plaintiffs in this litigation, and to provide my opinion as to whether it would be economically rational for such a merchant to pursue recovery of damages given the likely out-of-pocket costs of the arbitration or litigation proceeding.

5. Due to the complexity and analytical intensity of an antitrust study, total expert fees and expenses usually are substantial, even in a non-class action involving an individual plaintiff. In my experience, even a relatively small economic antitrust study will cost at least several hundred thousand dollars, while a larger study can easily exceed \$1 million. For example, in a non-class action case, involving an antitrust counterclaim for monopolization and tying in the medical products industry, total billings for

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<sup>1</sup> It is my understanding from plaintiffs' counsel that \$10 million of annual sales is the threshold below which American Express Card merchants are required to sign and comply with the standard merchant agreement, which includes a Collection Action Waiver that compels these smaller merchants to arbitrate their claims, and which precludes them from joining forces with other merchants in making their claims.

the expert economic study were approximately \$330 thousand during a period of less than a year. Because this case settled, trial preparation and testimony were avoided. In another individual plaintiff antitrust litigation, a health care monopolization case involving a hospital and local specialist medical practices, Nathan Associates' total billings were approximately \$500 thousand over a period of nearly three years. This case settled during trial after completion of expert testimony. At the high end of the range, in a complex, multi-year monopolization case involving an aircraft navigational product, Nathan Associates' total billings exceeded \$2 million through the trial. In my experience, based upon many years of conducting economic antitrust studies and reviewing the studies of opposing party experts, Nathan Associates billings are representative of the lower likely cost for such studies because our hourly rates and hours billed have usually been lower than those observed for opposing economic experts in the same cases. In summary, the cost of our expert assistance in individual plaintiff antitrust cases has ranged from around \$300 thousand to more than \$2 million. However, after reviewing the complaint and doing some preliminary research in this case, it is my opinion that this case is more complex than the less costly cases in which we have been involved, but probably less complex than the aircraft navigational product case in which our fees exceeded \$2 million, and therefore the cost for this case will fall in the middle of the range of our experience.

6. An economic antitrust study, such as might be undertaken for an individual plaintiff attempting to prove liability and damages in this litigation, is necessarily complex and costly because it involves investigating several antitrust liability and damages

issues and, potentially involves numerous tasks and services. The antitrust liability and damages issues that an expert economist will study in this matter likely include:

- defining the relevant tying and tied product markets and determining whether they are distinct;
- determining whether the defendant has market (monopoly) power in the tying product market, which in turn requires quantification of market share and analysis of entry barriers;
- determining whether the defendant has exercised its market (monopoly) power to enforce the tying arrangement;
- determining whether the tying arrangement has an anticompetitive effect in the tied product market;
- determining what the merchant fees would have been but for the alleged anticompetitive tying; and
- quantifying the dollar amount of damages to the plaintiffs as a consequence of the tying arrangement.

7. The tasks and services that an expert economist will potentially undertake and provide in this matter include:

- review and analysis of documents, data and depositions produced by defendants and third parties;
- interviews of third parties and industry experts;

- research, review and analysis of publicly and commercially available data and analysis concerning the industry structure and performance;
- review and analysis of the information and decisions in other relevant antitrust cases, especially the VISA Check/MasterMoney litigation and the U.S. v VISA and MasterCard litigation;
- review of economic literature relevant to the issues in the case;
- preparation of a report providing expert opinions regarding the antitrust and damages issues and the bases for those opinions;
- review of reports and depositions of the economic experts retained by the opposing parties; and
- testimony at depositions and at trial.

8. Considering the factual complexity of the liability and damages issues to be analyzed and the numerous tasks and services likely to be provided, and based upon my experience as a testifying economic expert and as the manager of Nathan Associates' litigation practice, it is my opinion that fees and expenses for conducting an economic study, preparing an expert report, and providing deposition and trial testimony and other services in this litigation matter will be at least several hundred thousand dollars, and could likely exceed \$1 million, depending upon the extent of document and data production and deposition discovery, and the consequent review and analysis required.

9. In contrast to the large out-of-pocket costs reasonably anticipated for just the economic study needed for arbitration or litigation, the expected



recovery of damages is small, even for a small American Express Card merchant at the high end of the annual sales range. Based upon publicly available information concerning the payment card industry and American Express, I have estimated that a small merchant with \$10 million of annual sales, on average, might calculate and expect \$754 of economic damages for the year 2001, which is roughly the mid-point of the damage period covered by this litigation. (See Table 1 for the calculation of estimated overcharges using industry and American Express information from 2001). Multiplying the \$754 damage figure by four, gives a rough estimate of \$3,015 total damages for the whole four-year damage period, or \$9,046 when trebled, assuming that the merchant's sales remain constant at \$10 million for the four-year period.

10. I have also estimated, based upon information provided by plaintiffs' counsel concerning the named plaintiffs' American Express Card volume in 2003, the annual, four-year, and trebled damages for both the largest volume and median volume merchants among the named plaintiffs. The median volume merchant, with half of the named plaintiffs having more and half having less American Express charge volume, and having reported \$230,343 American Express Card volume in 2003, might expect four-year damages of \$1,751, or \$ 5,252 when trebled. (See Table 2 for the calculation of estimated overcharges using individual plaintiff and American Express average information). The largest volume named plaintiff merchant, with reported American Express Card volume of \$1,690,749 in 2003, might expect four-year damages of \$12,850, or \$38,549 when trebled.

11. In my opinion as a professional economist with substantial experience with individual and class action antitrust litigation, it would not be worthwhile for an individual plaintiff, who, even at the high end of the examples discussed previously, could expect only \$12,850 recovery of economic damages, (\$38,549 when trebled), to pursue individual arbitration or litigation where the out-of-pocket costs, just for the expert economic study and services, would be at least several hundred thousand dollars, and might exceed \$1 million. This reality is especially true considering that there is a substantial possibility that the merchant could lose and not recover any damages.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and ability.

/s/ GARY L. FRENCH

Gary L. French, Ph.D.

June 18, 2004

Date

**Table 1.**


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**Calculation of Estimated Economic Damages  
(Overcharge) for an American Express  
Merchant with \$10 million Annual Sales in 2001**

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\$10,000,000 annual sales		
	<i>amount</i>	
x 23.0% <sup>(1)</sup>	<i>\$2,300,000</i>	portion paid by general purpose credit and charge cards (excludes debit cards)
x 17.25% <sup>(2)</sup>	<i>\$396,750</i>	American Express share of total general purpose credit and charge card transaction sales volume
x 19.0% <sup>(3)</sup>	<i>\$75,383</i>	revolving credit card share of total American Express charge and credit card purchases
x 1.0% <sup>(4)</sup>	<i>\$754</i>	estimate of merchant fee overcharge
	<b>\$754<sup>(5)</sup></b>	estimate annual overcharge
<hr/>		
	<b>\$3,015</b>	multiplied by four years
	<b>\$9,046</b>	trebled

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<sup>(1)</sup> General purpose and proprietary credit cards and charge cards accounted for approximately 23% of all payments for purchases in the U.S. in 2001. Cash, checks and debit cards accounted for approximately 20%, 40% and 8% of dollar payments for purchases in the U.S. in 2001. Source: The Nilson Report, No. 799, November 2003, pg. 6.

(2) American Express charge and credit cards accounted for approximately 17.25% share (\$223.9 billion of \$1,297.82 billion) of total dollar volume purchases made with general purpose and proprietary credit and charge cards in the U.S. in 2001. Source: The Nilson Report, No. 772, September 2002, pg. 7.

(3) American Express Annual Report for 2001 reports that revolving credit cards accounted for 19% of American Express' total credit and charge card dollar volume in 2001.

(4) It is claimed in the Amended Complaint that the American Express' merchant fee is approximately 3% of the purchase amount, on average, and the overcharge is approximately 1% of the purchase amount, (i.e., 1/3rd of the fee).

(5)  $\$754 = \$10,000 \times 23\% \times 17.25\% \times 19\% \times 1.0\%$ .

**Table 2. Calculation of Estimated 2003, Four-year, and Trebled Overcharge Damages for Named Plaintiffs**

Name of Plaintiff	Business Place Address	American Express Volume 2003	Estimated Revolving Credit Volume 2003 <sup>(1)</sup>	Estimated Merchant Fees at 3% <sup>(2)</sup>	Estimated Overcharge if 1% (i.e. 1/3rd) <sup>(2)</sup>	Approximate Four-year Overcharge	Trebled Overcharge
492 Supermarket Corp.	492 Myrtle Ave., Brooklyn, NY 11205	\$ 167,882	\$ 31,898	\$ 957	\$ 319	\$ 1,276	\$ 3,828
Bunda Starr Corp.	11 Ave. of the Americas, New York, NY 10013	\$ 250,261	\$ 47,550	\$ 1,426	\$ 475	\$ 1,902	\$ 5,706
Chez Noelle	34 Willowdale Ave., Prt Washington, NY 11050	\$ 230,343	\$ 43,765	\$ 1,313	\$ 438	\$ 1,751	\$ 5,252
Cohen Rese Gallery	432 Sutter St., San Francisco, CA 94108	\$ 175,780	\$ 33,398	\$ 1,002	\$ 334	\$ 1,336	\$ 4,008
DRF Jewelry Corp.	51 Willoughby St., Brooklyn, NY 11201	\$ 25,397	\$ 4,825	\$ 145	\$ 48	\$ 193	\$ 579

**Table 2. Calculation of Estimated 2003, Four-year, and Trebled Overcharge Damages for Named Plaintiffs**

Name of Plaintiff	Business Place Address	American Express Volume 2003	Estimated Revolving Credit Volume 2003 <sup>(1)</sup>	Estimated Merchant Fees at 3% <sup>(2)</sup>	Estimated Overcharge if 1% (i.e. 1/3rd) <sup>(2)</sup>	Approximate Four-year Overcharge	Trebled Overcharge
Il Forno	909 Prospect St., Suite 190, La Jolla, CA 92037; 2901 Ocean Park Blvd., Santa Monica, CA 90405	\$ 991,565	\$ 188,397	\$ 5,652	\$ 1,884	\$ 7,536	\$ 22,608
Italian Colors	2220 Mountain Blvd. #100, Oakland, CA 94611	\$ 255,156	\$ 48,480	\$ 1,454	\$ 485	\$ 1,939	\$ 5,818
Mai Jasmine Corp.	3355 Via Lido, Newport Beach, CA 92663; 844 Hermosa Ave., Hermosa Beach, CA 90254	\$ 565,100	\$ 107,369	\$ 3,221	\$ 1,074	\$ 4,295	\$ 12,884

**Table 2. Calculation of Estimated 2003, Four-year, and Trebled Overcharge Damages for Named Plaintiffs**

Name of Plaintiff	Business Place Address	American Express Volume 2003	Estimated Revolving Credit Volume 2003 <sup>(1)</sup>	Estimated Merchant Fees at 3% <sup>(2)</sup>	Estimated Overcharge if 1% (i.e. 1/3rd) <sup>(2)</sup>	Approximate Four-year Overcharge	Trebled Overcharge
Mascari Enterprises	28964 Bouquet Canyon Rd., Saugus, CA 91390	\$ 47,850	\$ 9,092	\$ 273	\$ 91	\$ 364	\$ 1,091
Mim's	235 Roslyn Rd., Roslyn Hts, NY 11577; 33 Berry Hill Rd., Syosset, NY 11791	\$ 1,690,749	\$ 321,242	\$ 9,637	\$ 3,212	\$ 12,850	\$ 38,549
<u>Phuong Corp.</u>	19 Ave. of the Americas, New York, NY <u>10013</u>	<u>\$ 72,623</u>	<u>\$ 13,798</u>	<u>\$ 414</u>	<u>\$ 138</u>	<u>\$ 552</u>	<u>\$ 1,656</u>
Mean		\$ 406,610	\$ 77,256	\$ 2,318	\$ 773	\$ 3,090	\$ 9,271
Median		\$ 230,343	\$ 43,765	\$ 1,313	\$ 438	\$ 1,751	\$ 5,252
Smallest		\$ 25,397	\$ 4,825	\$ 145	\$ 48	\$ 193	\$ 579
Largest		\$ 1,690,749	\$ 321,242	\$ 9,637	\$ 3,212	\$ 12,850	\$ 38,549

*Source: Plaintiff name address and 2003 sales volume charged to American Express Cards provided by Plaintiffs' Counsel from information produced by American Express*

(1) American Express Annual Report for 2001 reports that credit cards accounted for 19% of American Express' total credit and charge card dollar volume in 2001. This percentage, the latest reported and available, has been used for the calculations in this table.

(2) As claimed in the Amended Complaint, the American Express' merchant fee is approximately 3% of the purchase amount, on average, and the overcharge is approximately 1% of the purchase amount, (i.e., 1/3rd of the fee).



**Supreme Court of the United States  
Office of the Clerk  
Washington, DC 20543-0001**

**WILLIAM K. SUTER**  
Clerk of the Court  
(202) 479-3011

November 9, 2012

Mr. Michael K. Kellogg  
Kellogg, Huber, Hansen, Todd,  
Evans & Figel, P.L.L.C.  
1615 M Street, N.W., Suite 400  
Washington, DC 20036-3209

Re: American Express Company, et al.  
v. Italian Colors Restaurant, et al.  
No. 12-133

Dear Mr. Kellogg:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is granted. Justice Sotomayor took no part in the consideration or decision of this petition.

Sincerely,

/s/ WILLIAM K. SUTER

**William K. Suter, Clerk**