UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DAVID MOSKOWITZ, *et al*., Plaintiffs, v. AMERICAN EXPRESS COMPANY and AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC., Defendants.	Case No. 1:19-cv-00566 (NGG)(JRC) **CLASS ACTION**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF PROPOSED SETTLEMENT

Date filed: January 23, 2026

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I. INTRODUCTION

Plaintiffs[1] and Defendants American Express Company and American Express Travel Related Services Company, Inc. (hereinafter "Defendants" or "Amex") have reached an agreement to settle this class action (the "Action"). The settlement with Amex is entered by the certified classes,[2] inclusive of the class representatives, and individual plaintiffs[3] who had at various times had been parties to the Action. The settlement, if approved, will bring an end to the litigation brought in January 2019 and litigated through a three-week trial in August 2025 to a split jury verdict.

The proposed settlement provides for $17,500,000.00 in cash. In exchange, the settlement provides a release of the certified classes' and individual plaintiffs' claims, and is conditioned on a judgment to be entered dismissing with prejudice the Plaintiffs' claims asserted against Amex and setting aside the jury verdict. A copy of the Stipulation and Agreement of Settlement ("Settlement Agreement") is the **Appendix** to this Memorandum.

The proposed settlement represents an excellent result in light of the outcome of the trial. The jury awarded the Illinois non-rewards credit card class a total of just over $12.5 million in compensatory and punitive damages on its Illinois Consumer Fraud and Deceptive Practices Act

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[1] "Plaintiffs" means the Debit Card Classes for Alabama, District of Columbia, Kansas, Maine, Mississippi, North Carolina, Ohio, Oregon, Utah and Illinois and the Non-Rewards Credit Card Classes for District of Columbia, Kansas and Illinois, inclusive of the Class Representatives, and all other individual plaintiffs who at any time have been parties to the Action: Anthony Oliver, Terry Gayle Quinton, Susan Burdette, Gianna Valdes, Zachary Draper, Nate Thayer, Michael Thomas Reid, Gary Accord, Nanci-Taylor Maddux, Joseph Realdine, Marilyn Baker, Sherie McCaffrey, and Ellen Maher.

[2] The certified classes are the Debit Card Classes for Alabama, District of Columbia, Kansas, Maine, Mississippi, North Carolina, Ohio, Oregon, Utah and Illinois, and the Non-Rewards Credit Card Classes for District of Columbia, Kansas and Illinois.

[3] Anthony Oliver, Terry Gayle Quinton, Susan Burdette, Gianna Valdes, Zachary Draper, Nate Thayer, Michael Thomas Reid, Gary Accord, Nanci-Taylor Maddux, Joseph Realdine, Marilyn Baker, Sherie McCaffrey, and Ellen Maher.

claim. The jury returned a verdict for Amex on all of the other classes' antitrust claims, and found no damages to the Illinois debit card class for its claim under the Illinois Consumer Fraud and Deceptive Practices Act. By reaching a settlement now to resolve the litigation, before any entry of final judgment, the parties avoid the mutual risk of continued litigation of post-trial motions and almost certain appeals.

Plaintiffs propose to distribute settlement monies to the one class that prevailed on its claim at trial, the Illinois non-rewards credit card class. The proposed distribution plan is itself not part of the parties' settlement agreement. Plaintiffs concurrently file a separate Motion for Approval of Plan of Distribution that sets forth the rationale and legal authority for distributing the settlement monies to the Illinois non-rewards credit card class, and describes the proposed administrative claims procedures for effectuating the distribution. Plaintiffs also concurrently file a Motion to Appoint Notice and Claims Administrator and Authorize Dissemination of Notice, which describes the proposed notice plan.

II. RELEVANT BACKGROUND

A. Procedural History

1. Original complaint and Rule 12 motions

Various individual plaintiffs brought a class action complaint on January 29, 2019, alleging on behalf of non-Amex credit- and debit-card holders that Amex's anti-steering rules imposed in merchant acceptance agreements across the United States caused inflation of retail prices paid by consumers. (*Oliver v. Am. Express Co.*, 1:19-cv-00566 (NGG), Complaint (Dkt. No. 1).) The plaintiffs alleged that Amex's rules were unreasonable restraints of trade under federal antitrust laws and various state antitrust laws, and constituted an unfair trade practice under various state consumer protection statutes. The plaintiffs sought an injunction under the federal antitrust law

and damages under state antitrust and consumer protection laws, and restitution for unjust enrichment. (*Id.*)

Amex moved to dismiss the entire Action under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) and subsequently sought judgment on the pleadings as to various state law claims pursuant to Rule 12(c). The Court's rulings in April 2020 and February 2021 granted Amex's motions in part and denied them in part. (*See* Mem. & Order (Apr. 30, 2020), Dkt. No. 43 (deciding 12(b)(1) and 12(b)(6) motions) & Am. Mem. & Order (Feb. 1, 2021), Dkt. No. 66 (deciding 12(c) motion).) Together, these rulings resulted in the Court's dismissal of Plaintiffs' claims for injunctive relief under the Sherman Act and Clayton Act, claims for unjust enrichment, claims asserted under the antitrust laws of Arizona, California, Illinois, Iowa, Maryland, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Dakota, Rhode Island, South Dakota, Tennessee, and Wisconsin, and claims asserted under the consumer protection laws of California, District of Columbia, Florida, Massachusetts, and New Mexico. The Court dismissed various individual named plaintiffs in accordance with the granting in part of the Rule 12 motions.

2. Discovery

The parties engaged in fact discovery from late 2020 through 2022, including voluminous party document discovery, interrogatories, requests for admission, interrogatories and depositions, as well as third party discovery of over forty financial institutions and merchants.

3. Class certification, Daubert motions, and Rule 23(f) petitions

Plaintiffs' Motion for Class Certification and accompanying expert reports were fully briefed by the parties in March 2023, wherein Plaintiffs sought certification of a credit-card class and a debit-card class for each of thirteen states and the District of Columbia (Dkt. Nos. 138–40

(under seal versions); 144–46 (public versions).) In July 2023, the Court held an evidentiary hearing on class certification and the parties' motions to exclude expert testimony under *Daubert*.

On January 9, 2024, the Court issued a memorandum and order granting in part and denying in part Plaintiffs' motion for class certification. (Mem. & Order, Dkt. No. 220.) Specifically, the Court granted Plaintiffs' motion to certify the debit-card classes for Alabama, D.C., Illinois, Kansas, Maine, Mississippi, North Carolina, Ohio,[4] Oregon, and Utah, denied Plaintiffs' motion to certify the debit-card classes for Hawaii, Montana, Vermont, and West Virginia, and denied Plaintiffs' motion to certify each of the credit card-classes for those states. (*Id.* at 58–59.) The certified debit-card classes were represented by named plaintiffs Angela Clark and Allie Stewart/Willingham (Alabama), Sarah Grant (D.C.), Ricky Amaro (Illinois), Drew Amend (Kansas), Abigail Baker (Maine), Steele Robbins, Debbie Tingle, and Emily Counts (Mississippi), Shawn O'Keefe (North Carolina), David Moskowitz (Oregon), and Wyatt Cooper (Utah).

The Court found each Class Representative had provided and would provide adequate representation for his or her respective class(es) in satisfaction of Rule 23(a)(4). *Id.* at 32–37, 58 & n.17.

In the same order, the Court denied Amex's motion to exclude Plaintiffs' expert economist's opinion testimony pursuant to *Daubert* and granted in part Plaintiffs' motion to exclude the expert testimony of one of Amex's three expert witnesses. (*Id.* at 22, 26, 58.)

On January 19, 2024, the Court granted Plaintiffs' request to certify non-rewards credit-card classes for D.C., Kansas, and Illinois, and denied certification of a non-rewards credit-card

[4] The Ohio claim was later dismissed in the Court's decision on summary judgment. (Mem. & Order, Dkt. No. 236.)

class for North Carolina. (Mem. & Order, Dkt. No. 224.) The order certified non-rewards credit-card classes represented by named plaintiffs Sarah Grant (D.C.), Drew Amend (Kansas), and Ricky Amaro (Illinois). The Court found each of these Class Representatives had provided and would provide adequate representation for his or her respective class(es) in satisfaction of Rule 23(a)(4). *Id*. at 2.

Amex sought immediate appellate review of the Court's class certification orders, filing two petitions with the United States Court of Appeals for the Second Circuit pursuant to Rule 23(f). (*See Am. Express Co. v. Oliver*, No. 24-238 (2d Cir. July 30, 2024).) On July 30, 2024, the Second Circuit denied Defendants' petitions for leave to immediately appeal the district court's orders granting class certification. (Mandate, Dkt. No. 235.)

4. Summary judgment

Amex moved for summary judgment, and Plaintiffs for partial summary judgment. The Court heard oral argument on the summary judgment motions and on August 23, 2024, the Court issued a memorandum and order granting in part and denying in part Plaintiffs' motion for partial summary judgment and granting in part and denying in part Defendants' motion for summary judgment. (Mem. & Order, Dkt. No. 236.)

5. Notice of pendency, opportunity to opt out, class counsel appointment

On January 24, 2025 the Court ordered notice to the certified classes. The Court appointed A.B. Data, Ltd., as notice administrator and authorized dissemination by publication of notice of the pendency of the certified class action, and the opportunity for class members to exclude themselves from the class(es). (Mem. & Order, Dkt. No. 257.)

In the same order the Court appointed as class counsel under Rule 23(g) the law firms of Berman Tabacco; Gordon Ball PLLC; Lovell Stewart Halebian Jacobsen LLP; Miller Law LLC;

Stamell & Schager, LLP; Stearns Weaver Miller Weissler Alhadeff & Sitterson; Saltz, Mongeluzzi & Bendesky, P.C.; Wagstaff & Cartmell, LLP; and Kahn Swick & Foti, LLC. (*Id.* at 6.)

6. Trial and jury verdict

In the spring of 2025, the parties filed, and the Court decided, more than a half dozen motions in limine. The parties' pretrial exchanges of trial witness lists, exhibits, proposed jury instructions and verdict sheets occurred in accordance with the Court's pre-trial practices and directives. Trial was originally scheduled to start in October 2025, but was moved up to July 2025. A trial commenced in July 2025 but ended in mistrial during jury selection. Trial was re-scheduled and Plaintiffs' claims were tried to a jury from August 11 to August 28, 2025.

The jury returned a verdict for Defendants on all claims brought by all certified classes, with the exception of the claim brought by the Illinois Non-Rewards Credit Card Class pursuant to the Illinois Consumer Fraud and Deceptive Practices Act. (Final Verdict Sheet, Dkt. No. 383.) For that claim, the jury awarded compensatory damages of $6,006,339.55 and punitive damages of $6,500,000. (*Id*. at 11–12 (Question Nos. 10–11).)

On September 12, 2025 the parties submitted a proposed briefing schedule for post-trial motions. (Joint Letter Mot., Dkt. No. 386.) For its part, Amex sought to file motions pursuant to Rule 50 for judgment as a matter of law and pursuant to Rule 59 for a new trial and/or amending the judgment. (*Id*. at 2.)

By docket order on September 18, 2025, the Court deferred entry of judgment under Rule 58(b)(2) pending resolution of the parties' respective post-trial motions.

7. Settlement negotiations

Prior to trial, in April 2025 the parties engaged in a mediation session with mediator Gregory P. Lindstrom of Phillips ADR Enterprises. (*See* Declaration of Todd A. Seaver ("Seaver Decl.") ¶¶ 2–6) The mediation did not resolve the case. Arms-length negotiations re-started after

trial, with continued dialogue through the mediator in September 2025 and continuing through October 2025. On October 23, 2025, the parties reached an agreement in principle to resolve the Action and executed a term sheet setting forth the principal terms of agreement. (*Id*.) The Class Representatives are informed of, and agree to, the settlement's principal terms, and agree to the proposed distribution of net settlement funds solely to the Illinois non-rewards credit card class members. (*Id.* ¶¶ 7–8.)

III. SETTLEMENT TERMS AND PLAN OF DISTRIBUTION

Settling Plaintiffs. The Settlement[5] with Amex is entered on behalf of Plaintiffs. The Plaintiffs are the certified classes, inclusive of the Class Representatives, and individual plaintiffs who had previously been parties to the Action. (*See* Settlement Agreement (Appendix) ¶¶ 1.aa & 9.)

Consideration. The proposed Settlement provides for Amex to pay $17.5 million in cash shortly after an order preliminarily approving the settlement. (*Id.* ¶¶ 1.jj & 11.) Amex agrees to release any claims against Plaintiffs arising from institution of the Action. In exchange, Plaintiffs agree to release their claims (*id.* ¶ 6), and agree that the Settlement is conditioned on a Judgment to be entered that dismisses with prejudice the Plaintiffs' claims asserted against Amex and sets aside the jury verdict. (*Id.* ¶¶ 1.b, 1.u, 34, & Exhibit B (Proposed Final Judgment).)

Use of the Settlement Fund. The Settlement Fund is a common fund. It will be used to pay for (i) Notice (up to $250,000), (ii) Administrative Costs, (iii) any Litigation Expenses awarded by the Court, (iv) any attorneys' fees awarded by the Court, (v) any service awards approved by the Court, and (vi) and other costs, fees or expenses, including Taxes, permitted by the Court. (*Id.*

[5] Capitalized terms are terms as defined in the Settlement Agreement (the **Appendix** hereto).

¶¶ 13, 18.) The balance remaining in the Settlement Fund is the Net Settlement Fund that will be distributed to Authorized Claimants. (*Id*.)

Class certification. The Settlement does not contemplate nor does it require certification of any class for settlement purposes that is new or different from the Classes already certified pursuant to Rules 23(a) and 23(b)(3) by the Court orders dated January 9, 2024 (Mem. & Order, Dkt. No. 220) and January 19, 2024 (Mem. & Order, Dkt. No. 224).

No opt-outs. The Settlement provides that the Parties agree it is unnecessary to provide a second opportunity for Class Members to opt out. (Settlement Agreement (Appendix) ¶ 19.) The Classes were already provided an opportunity to opt-out in connection with the notice of pendency provided to the Classes in accordance with the Court's prior January 24, 2025 appointment of a notice administrator and authorization of dissemination by publication of notice of the pendency of the certified class action. (Mem. & Order, Dkt. No. 257.)[6]

No reversion. The Settlement is not a claims-made settlement, and there is no reversion to Amex providing the Settlement becomes Final. (Settlement Agreement (Appendix) ¶ 17.)

Plan of Distribution. The Settlement does not provide for any particular Plan of Distribution of the Net Settlement Fund. Plaintiffs concurrently file a separate Motion for Approval of Plan of Distribution.

IV. THE COURT WILL BE ABLE TO APPROVE THE SETTLEMENT

A. Legal Standard

The Federal Rules, as amended on December 1, 2018, provide that the Court can authorize class notice of a proposed settlement if the Court determines that it likely will be able to grant final

[6] The Claims Administrator received no requests for exclusion. (*See* Declaration of Elaine Pang ("Pang Decl.") ¶ 44.)

approval of the settlement. Fed. R. Civ. P. 23(e)(1)(B). Final approval will be granted if the Court finds that the proposed settlement is "fair, reasonable, and adequate," after considering the following four factors:

> (A) whether the class representatives and class counsel have adequately represented the class;
>
> (B) whether the proposal was negotiated at arm's length;
>
> (C) whether the relief provided for the class is adequate, taking into account:
>
> (i) the costs, risks, and delay of trial and appeal;
>
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
>
> (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) whether the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

The factors at (A) and (B) are "procedural" factors that address "the conduct of the litigation and of the negotiations leading up to the proposed settlement." Fed. R. Civ. P. 23 advisory committee's note to 2018 amendment; *see also Rosenfeld v. Lenich*, No. 18-cv-6720 (NGG) (PK), 2021 WL 508339, at *3 (E.D.N.Y. Feb. 11, 2021) (Garaufis, J.) (quoting Fed. R. Civ. P. 23 advisory committee's note to 2018 amendment). The factors at (C) and (D) address "substantive" matters concerning the "relief that the settlement is expected to provide to class members." *Id*.

Courts in the Second Circuit construe the procedural factors (A)–(B) and substantive factors (C)–(D) as clarifying and supplementing the Second Circuit's traditional factors set out in

City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974).[7] *See Moses v. New York Times Co*., 79 F.4th 235, 242 (2d Cir. 2023) (explaining the 2018 Rule 23 amendments do not displace *Grinnell* factors but rather "focus the court and the lawyers on the core concerns of procedure and substance."); *Rosenfeld*, 2021 WL 508339, at *3 (describing amended Rule 23(e) factors as "clarifying and supplementing the *Grinnell* factors, rather than displacing them.").

Finally, an important further consideration is the "strong judicial policy in favor of settlements, particularly in the class action context." *Berni v. Barilla S.p.A*., 964 F.3d 141,146 (2d Cir. 2020) (quoting *In re Painewebber Ltd. P'ships Litig.*, 147 F.3d 132, 138 (2d Cir. 1998)).

B. The Settlement is procedurally fair.

1. The Classes have been adequately represented.

The adequacy requirement in Rule 23(e)(2)(A) is meant to protect class members from a potential conflict of interest and requires an inquiry into whether: "1) plaintiff's interests are antagonistic to the interest of other members of the class and 2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation." *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc*., 502 F.3d 91, 99 (2d Cir. 2007) (quoting *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000)). This factor is "nearly identical to the Rule 23(a)(4) prerequisite of adequate representation in the class certification context." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig*., 330 F.R.D. 11, 30 n.25 (E.D.N.Y. 2011).

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[7] The *Grinnell* factors evaluate the fairness, adequacy, and reasonableness of a class action settlement with consideration of: (1) the expense, complexity, and likely duration of the litigation; (2) the class's reaction to the settlement; (3) the stage of the proceedings and amount of discovery completed; (4) the risks of establishing liability ; (5) the risks of establishing damages; (6) the risks of maintaining the class throughout the litigation; (7) defendants' ability to withstand a greater judgment; (8) the range of reasonableness of the settlement amount considering the best possible recovery; and (9) the range of reasonableness of the settlement amount given the risks of litigation. *Grinnell*, 495 F.2d at 463.

a) *Adequacy of Class Representatives*

The Court concluded in its class certification orders that the Class Representatives would adequately represent their respective classes. (*See* Dkt. Nos. 220 (Mem. & Order, Jan. 9, 2024), 224 (Mem. & Order, Jan. 19, 2024).) Since certification, nothing has given rise to any doubt about the Class Representatives' adequacy.

A principal purpose of assessing adequate representation is to "uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). "A class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348–49 (2011) (citation modified). The analysis of whether a class representative is adequate "is twofold: the proposed class representative must have an interest in vigorously pursuing the claims of the class, and must have no interests antagonistic to the interests of other class members." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006).

Here, each statewide Class has enjoyed separate representation by one or more class representatives through the end of trial and through reaching the Settlement. There are not, and there have not been, any conflicts of interest between the Class Representatives and the respective statewide Classes they each represent. For example, Wyatt Cooper represented the Utah debit card class. Mr. Cooper has had an interest in vigorously pursuing the antitrust claim of the Utah debit card class. That is, Mr. Cooper had an incentive to prove liability and damages for that Utah class. Mr. Cooper has had no interests antagonistic to the interests of fellow Utah debit card class members. In the time since class certification, he effectively represented the Utah class with his testimony at trial on direct and cross examination, which advanced the Utah class's antitrust claims (and also aided the chances of success for all Classes at trial). Mr. Cooper has further represented

the interests of the Utah debit card class by being informed of, and agreeing to, the principal terms of the Settlement and the Plan of Distribution. (Seaver Decl. ¶ 8 (Mr. Cooper's informed assent to the Settlement and Distribution Plan).) As Mr. Cooper's service representing the Utah Class has demonstrated, each statewide Class has been adequately represented by a plaintiff with an interest in vigorously pursuing the claims of that class, and without any interests antagonistic to the interests of other members of the class he or she represents.

b) *Adequacy of Class Counsel*

Since appointment as Class Counsel under Rule 23(g) on January 24, 2025 (Mem. & Order, Dkt. No. 257), Class Counsel have continued to adequately represent the Classes. Class Counsel marshalled resources and assembled a trial team to try this complex antitrust matter to a partial jury verdict for Plaintiffs, demonstrating that they are qualified, experienced and able to conduct the litigation. Following trial, Class Counsel renewed settlement negotiations through an experienced mediator to reach the proposed Settlement.

2. The Settlement is the product of an arms-length negotiation.

A class action settlement reached through arm's-length negotiations between experienced, capable counsel knowledgeable in complex class litigation is a strong indication of procedural fairness. *Moses*, 79 F.4th at 243. Here, settlement negotiations were carried out with the assistance of a mediator, a fact which "weighs in favor of a finding of [procedural] fairness because it 'helps to ensure that the proceedings were free of collusion and undue pressure.'" *Hunter v. Blue Ridge Bankshares, Inc.*, No. 23-cv-8944, 2025 WL 1649323, at *15 (E.D.N.Y. June 11, 2025) (quoting *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001)).

C. The Settlement is substantively fair, reasonable, and adequate.

1. The relief provided is adequate.

To evaluate whether a settlement provides adequate relief, "the court must consider: '(i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class …; (iii) the terms of any proposed award of attorney's fees …; and (iv) any agreement required to be identified under Rule 23(e)(3).'" *Rosenfeld*, 2021 WL 508339, at *5 (quoting Fed. R. Civ. P. 23(e)(2)(C)).

a. The costs, risks, and delay of trial and appeal

In the context of this settlement, the most important factor is the "costs, risks, and delay of trial and appeal."[8] As the case is through trial, the risks of litigating through trial are manifest, for both parties. The jury's verdict bears out that the risk to Plaintiffs was high when it came to proving that Amex's anti-steering rules constitute an unreasonable restraint of trade under the various state antitrust laws. (*See* Final Verdict Sheet at 4 (Question No. 3), Dkt. No. 383.) Likewise, there was real risk to Amex that a jury could find its anti-steering rules to constitute an unfair act affecting consumers, meriting compensatory and punitive damages. (*Id.* at 7–12 (Question Nos. 6–11).)

Absent the settlement reached post-trial, the parties would litigate substantial post-trial motions. Amex has signaled it would file motions pursuant to Rule 50 for judgment as a matter of law and pursuant to Rule 59 for a new trial and/or amendment of the judgment. (*See* Joint Letter Mot., Dkt. No. 386 (parties' proposed post-trial briefing schedule).) During the trial itself, Amex

[8] This factor "subsumes several *Grinnell* factors," including: "(i) the complexity, expense and likely duration of the litigation; (ii) the risks of establishing liability; (iii) the risks of establishing damages; and (iv) the risks of maintaining the class through the trial," *Payment Card*, 330 F.R.D. at 36, as well as the eighth and ninth *Grinnell* factors (comparison with the best possible recovery and recovery in light of all litigation risks).

twice moved for a mistrial. And should the verdict withstand post-trial motions, there is a near certainty of appeals to the Second Circuit.

For Plaintiffs, to recover further damages than what was recovered at trial would require reversal of the jury's verdict on the Rule of Reason antitrust claims for the debit card classes and two of the non-rewards credit card classes. This appellate strategy would be high-risk, as it would likely necessitate an appeals court overturning the jury verdict on liability (for all antitrust claims) and damages (for the Illinois debit card class claim). For recovery on dismissed consumer protection claims, Plaintiffs would have to obtain appellate reversal of the Court's considered rulings on the Rule 12(b) and 12(c) motions, obtain remand for a new trial on those consumer-protection statutory claims, and prevail at trial. In addition, in any appellate litigation, Plaintiffs would also have to defend the jury verdict in favor of the Illinois non-rewards credit card class on the Illinois consumer protection claim to preserve the recovery already obtained. All told, post-trial motions and appeals could reasonably be expected to consume two to three years, on top of the seven years the case has already been litigated. Moreover, a potential result of appeals would be remand for a new trial, adding untold cost, delay, and risk.

Neither Rule 23(e) nor the *Grinnell* factors "require the Court to adjudicate the disputed issues or decide unsettled questions; rather, the Court need *only assess the risks of litigation against the certainty of recovery under the proposed settlement*." *In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 459 (S.D.N.Y. 2004) (emphasis added) (citing *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 177 (S.D.N.Y. 2000)). "Courts favor settlement when it 'results in substantial and tangible present recovery, without the attendant risk and delay of trial [and appeal].'" *Rosenfeld*, 2021 WL 508339, at *5 (quoting *Payment Card*, 330 F.R.D. at 36).

Here, unlike a pre-trial settlement, the risks of trial are known and fixed. Amex's scope of liability is known. Recoverable damages are known. The costs of the litigation have already been high; the duration, substantial. The proposed Settlement is adequate in that it provides a substantial and tangible present recovery now. When weighed against the promised additional costs, delay, and risk that lies ahead absent the Settlement being approved, where additional recovery cannot be assumed, the balance weighs heavily in favor of settlement approval.

b. The proposed Distribution Plan will effectively distribute relief

Plaintiffs' proposed method for distributing relief is fully set out in the accompanying Motion for Approval of Plan of Distribution, which sets out in detail the rationale for allocating the settlement monies to the Illinois non-rewards credit card class and details the anticipated administrative process for encouraging class member claims and verifying valid claims.

"An adequate method is one that can 'deter or defeat unjustified claims' without imposing an undue demand on class members." *Rosenfeld*, 2021 WL 508339, at *6 (quoting Fed. R. Civ. P. 23 advisory committee's note to 2018 amendment). A plan of allocation "need not be perfect" but "need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel." *Id.* (quoting *In re EVCI Career Colleges Holding Corp. Sec. Litig.,* No. 05-cv-10240 (CM), 2007 WL 2230177, at *11 (S.D.N.Y. July 27, 2007)).

The Distribution Plan allocates as between all members of the Classes by confining distribution of the Net Settlement Fund is to the Illinois non-rewards credit card class—the only Class whose claims prevailed at trial. Within the Illinois credit card class, the proposal is for an equal, *per capita* share of the Net Settlement Fund to be distributed to valid claimants based on a straightforward, online claim form requiring sufficient information provided by the claimant to enable sophisticated and effective detection of fraudulent or otherwise ineligible claims. The

proposed method of claims administration does not include the provision of documentation by the Illinois non-rewards credit card class members to substantiate their eligibility. This recognizes the reality that requiring documentation will constitute the very type of "undue demand" discouraged by the Federal Rules advisory committee which can be expected to discourage claims response and heavily depress class members' overall participation in the settlement relief. This is a case where there is no "perfect" method for distributing the relief. But perfection is not the standard. The proposed method is rational, fair, and adequate to get the settlement money in the hands of the members of the Illinois non-reward credit card class.

c. Amount of attorneys' fees

The Settlement Agreement does not contain any agreed-to amount of attorneys' fees to Class Counsel. (*See* Settlement Agreement (Appendix) ¶ 20.) Instead, Class Counsel will move for an award of attorneys' fees from the common fund. The proposed forms of Notice will inform the Classes that Class Counsel will request an award of attorneys' fees "up to" 33.3%. The Settlement provides that the timing of the payment is no sooner than seven days after the Court grants final approval of the material terms of the Settlement. (*Id.* ¶ 21.)

"Courts in this Circuit routinely find that requests for attorney's fees totaling one-third of the settlement fund are well within the range of reasonableness." *Rosenfeld*, 2021 WL 508339, at *6 (internal quotation marks and citation omitted). Because any attorneys' fee award here is reserved for the Court's discretion, attorneys' fees "pose no obstacle to preliminary approval." *Id.* at *7.[9]

[9] With regard to the Rule 23(e)(2)(C)(iv) requirement that the court consider any other agreements between the parties "required to be identified under Rule 23(e)(3)" there are no such other agreements.

2. The Settlement treats Class Members equitably relative to each other.

Rule 23(e)(2)(D) requires consideration of whether the proposed settlement "treats class members equitably relative to each other." To do so, "the court may weigh 'whether the apportionment of relief among class members takes appropriate account of differences among their claims'" and whether the scope of the release ought to influence one way or another the apportionment of relief. *Rosenfeld*, 2021 WL 508339, at *7 (quoting Fed. R. Civ. P. 23 advisory committee's note to 2018 amendment).

Plaintiffs' accompanying Motion for Approval of Plan of Distribution sets out the rationale and legal authority for allocating the settlement monies to the Illinois non-rewards credit card class and why that is congruent with the release provided by all Classes. Plaintiffs refer to that separate briefing for Plaintiffs' full presentation on this preliminary approval factor.

In short, the proposed Distribution Plan follows the jury's verdict by providing relief in settlement to the only class that won damages at trial. This is both rational and fair. To be sure, there are alternatives to consider. One alternative would be to permit participation in claims to the Net Settlement Fund on an equal basis to members of all the Classes. However, that would be less fair, as it would allocate money to members of those Classes whose claims lost at trial, effectively ignoring the jury verdict. Another alternative to the proposed Plan would be to attempt to weigh recovery as between the Illinois non-rewards credit card class and all the other classes in order to make a comparatively modest recovery available to members of classes while preserving the lion's share of the recovery for the Illinois non-rewards credit card class. That would be an attempt to hedge on the value of the respective Classes' legal claims. However, that too would substantially overlook and underweight the jury's verdict, which is the best evidence of the true "value" of the Classes' various legal claims.

Unlike with a pre-trial settlement where the parties and the court are left to predict or speculate on the value of class members' varied strength of claims, the trial to verdict of this Action permits a concrete recognition that the Illinois non-rewards credit card class's claim was the lone claim to come through the crucible of trial with a proven money value. Consequently, it is fair and reasonable to conclude that allocating the settlement recovery to the Illinois non-reward credit card class is the most equitable treatment of the Classes.

3. Ability of defendant to withstand greater judgment.

With respect to this *Grinnell* factor, whether Amex can withstand a greater judgment than the $17.5 million settlement payment is irrelevant here. Amex's ability to pay was not and is not a factor in the amount of the settlement payment. Unquestionably Amex has the financial wherewithal to pay substantially more, but it is irrelevant because there was no scenario where the Classes' claims, even if one hundred percent successful in obtaining the maximum damages, would have tested Amex's ability to pay. *Cf. Rosenfeld*, 2021 WL 508339, at *7 (finding even maximum damages would not implicate defendant's ability to pay).

4. Settlement is reasonable in light of the best possible recovery.

The *Grinnell* factors include the court considering "the range of reasonableness of the settlement fund in light of the best possible recovery" and "the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation." *Charron v. Wiener*, 731 F.3d 241, 247 (2d Cir. 2013). This entails the court "compar[ing] the terms of the compromise with the likely rewards of litigation." *Payment Card*, 330 F.R.D. at 48 (citation modified).

Once more, the trial to a jury verdict removes all speculation about "best possible recovery" and the "attendant risks of litigation" which are far more germane to pre-trial settlements. Here, the actual recovery at trial was $12.5 million. By comparison, the settlement fund of $17.5 million

exceeds the actual trial recovery. The risks of litigating the case to a verdict are known, as are the rewards of litigating the case through verdict. This factor weighs heavily in favor of preliminary approval.

V. A SECOND OPPORTUNITY TO REQUEST EXCLUSION IS UNNECESSARY

The Court has already determined that the Classes satisfy Rules 23(a) and 23(b)(3). The Settlement is entered on behalf of these Classes. Consequently, there is no proposal or request that the Court certify any new class for settlement purposes that is new or different from the certified Classes.

As part of the Settlement, the parties agree it is unnecessary to provide a second opportunity for Class Members to opt out. (*See* Settlement Agreement (Appendix) ¶ 19.) The Class Members were already provided with an opportunity to opt-out in connection with the notice of pendency provided to the Classes. The Claims Administrator received no opt-outs. (*See* Pang Decl. ¶ 43.)

"The decision whether to approve a settlement that does not allow a new opportunity to elect exclusion is confided to the court's discretion." *Denney v. Deutsche Bank AG*, 443 F.3d at 271; Fed. R. Civ. P. 23(e)(4). Here, the notice of pendency expressly informed Class Members that if they chose to remain in the Class "[y]ou will be legally bound by all Court orders, good or bad" and that "*[i]f you stay in the classes, you will not be able to sue Amex on your own about the claims in this lawsuit.*" Seaver Decl. ¶ 9 & Exhibit A (long form notice of pendency) at 5 (emphasis added).[10] In this circumstance, a second opt-out opportunity is not needed. *See In re Luckin Coffee*

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[10] The notice indicated in boldface type that there would not be another chance to request exclusion, warning Class Members that if they did not request exclusion, it means: **"Stay in this lawsuit. Await the outcome. Possibly get benefits. Give up certain rights."** Seaver Decl. ¶ 9 & Exhibit A (long form notice of pendency) at 1 (emphasis in original). "Give up certain rights" means Class Members were advised they would permanently relinquish the right to sue Amex on their own behalf. Staying in the Class(es) means "[Y]ou give up any rights to sue Amex on your own about the claims in this lawsuit." *Id*.

Inc. Sec. Litig., No. 1:20-cv-1293-JPC, 2021 WL 11114633, *4 (S.D.N.Y. Oct. 26, 2021) (granting preliminary approval to settlement without second opt-out period "[i]n light of the extensive notice program undertaken in connection with class certification and the ample opportunity provided to Class Members to request exclusion from the Clas at that time"); *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 345 (E.D.N.Y. 2010) (Weinstein, J.) ("Because the class members were given 'notice of the action[s], the opportunity to opt out . . . and the opportunity to object,' the court is not required to afford 'a second opportunity to opt out.'") (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 114 (2d Cir. 2005)).

The time for Class Members to request exclusion was in connection with the notice of pendency, for which the publication notice program ran in the months just prior to trial. Indeed, the notice of pendency informed Class Members that trial "is set for July 28, 2025" and "there is no guarantee that the Plaintiffs will win any money or benefits for the classes." Seaver Decl. ¶ 9 & Exhibit A (long form notice of pendency) at 6. *See Sjunde AP-Fonden v. General Electric Co.*, No. 17-cv-8457 (JMF), 2025 WL 89271, at *2 (S.D.N.Y. Jan. 14, 2025) (approving class action settlement without second opt-out opportunity because class members "would have been bound by the outcome of the trial that was scheduled to being shortly after the parties reached their settlement"); *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d at 345 ("If any class members wished to control the prosecution or settlement of their own claims, they could have opted out . . . after the notice of pendency was given.") (citing *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96 at 115).

Finally, the claims of all the Classes were tried to the jury. The jury has spoken as to which Classes proved liability and damages, and which did not. It is not reasonable to expect that a Class member, in light of the trial verdict, would exclude himself or herself for the purpose of retaining

counsel to prosecute their individual claim. Even where a Class member might be unhappy with the Settlement or the proposed Plan of Distribution, exclusion from the Class now is unlikely to improve their litigation result. Given that unlikeliness, provision of another opportunity for Class members to opt out is unnecessary. The Court is within its discretion not to require it. *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d at 346 ("The enormous cost of further prosecuting this action as well as the lack of any realistic probability of success make it almost certain that no one would want to opt out at this point in the litigation and carry it on in her or his individual behalf.").

VI. SET-ASIDE OF THE JURY VERDICT IS A REASONABLE SETTLEMENT TERM

In exchange for payment by Amex of $17.5 million, the proposed Settlement is conditioned on entry of a final judgment that sets aside the jury verdict. (*See* Settlement Agreement (Appendix) ¶¶ 1.jj, 34 & Exhibit B (Proposed Final Judgment) ¶ 7 ("The jury verdict rendered on August 28, 2025 (ECF No. 383) is hereby set aside and vacated, and shall be without any force or effect for any purpose, including for res judicata, collateral estoppel or any other preclusive purposes.").) The Settlement Agreement states that Amex has "the unilateral right to terminate the Settlement … within 30 days of …(ii) the Court's final refusal to approve the Settlement or any material part thereof; (iii) the Court's final refusal to enter the Judgment in any material respect as to the Settlement …". *Id* at ¶ 35. The set-aside of the jury verdict is a material term of the Settlement Agreement.

Here, no final judgment has been proposed or entered.[11] Set-aside of a jury verdict *before* entry of final judgment as a material term in a class action settlement is subject to the district court's ordinary (but exacting) scrutiny in determining whether a settlement is fair, reasonable,

[11] By docket order on September 18, 2025, the Court deferred entry of judgment under Rule 58(b)(2) pending resolution of the parties' respective post-trial motions.

and adequate under Rule 23(e). Courts regularly find that set-aside or vacatur of a jury verdict as a condition for a class settlement can be part of an otherwise fair and reasonable settlement.

In *Vladimir v. United States Banknote Corp*., 976 F. Supp. 266 (S.D.N.Y. 1997), a securities fraud class action was tried to a jury verdict in favor of the plaintiff class. *Id.* at 266. Prior to the determination of damages (estimated by plaintiffs to be between $5.3 million and $6.4 million), and prior to entry of judgment on the verdict, the parties entered into a settlement agreement providing for the defendant to pay between $4.2 and $4.5 million. *Id*. "The settlement [was] conditioned upon vacatur of the jury verdict and the grant of judgment as a matter of law." *Id*. Notice of the settlement was given to the class. At final approval, Judge Cedarbaum proceeded through the *Grinnell* factors and determined there was risk to the parties in continued litigation, particularly in light of a post-trial motion for judgment as a matter of law. *Id.* at 266–67. With a non-zero risk attendant to continued litigation of post-trial motions and appeals, and observing that "the settlement agreement is advantageous to the plaintiff class" (*id*. at 267), the court found that vacatur of the jury verdict was not inappropriate, and granted final approval to the settlement, finding it "fair, reasonable and adequate in every respect" (*id.* at 267–68).

The proposed Settlement here is closely analogous to the settlement in *In re: TFT-LCD (Flat Panel) Antitrust Litig*., MDL No. 1827, 2012 WL 12369590 (N.D. Cal. Oct. 15, 2012), where Judge Illston approved a class settlement conditioned on vacatur of a jury verdict. There, the class settled with all but one of the antitrust cartel defendants for over $443 million. *TFT-LCD* at *1. One defendant, Toshiba, proceeded to a six-week jury trial. The jury verdict found for the class plaintiffs and awarded $87 million in single damages. Toshiba filed post-trial Rule 50 motions and a motion to set off the trebled damages of $261 million by the $443 million amount in settlements with the other defendants. *Id*. The class and Toshiba mediated, and reached a post-trial, pre-

judgment settlement. The proposed settlement called for Toshiba to pay $30 million and required vacatur of the jury verdict. *Id*.

Judge Illston approved the settlement. "The Court does not lightly set aside a jury verdict. However, the Court is persuaded that the settlement is in the best interests of the class, and that the jury verdict was a significant reason that the case ultimately reached a settlement." *Id.* at *4. "[A]bsent a settlement, both sides would have engaged in further protracted and expensive litigation at the district court and appellate levels" and so "judicial economy supported preliminary approval of a settlement agreement calling for vacatur of a jury verdict" because "the Settlement obviates the need for ruling on any outstanding motion seeking to set aside the verdict, any appeal and potential remand, and any new trial that this Court or an appellate court potentially could require." *Id.* (citation modified).[12]

As in *TFT-LCD*, the proposed Settlement's condition that the jury verdict be set aside as part of a final judgment does not prevent a finding that the settlement is fair, reasonable, and adequate under Rule 23(e). Set-aside of the verdict will not affect or disturb the Court's decisions

[12] *Vladimir* and *TFT-LCD* are instructive inasmuch as they correctly distinguish between a settlement agreement that is conditioned on setting aside a jury verdict *before* reaching a final judgment versus a settlement seeking vacatur of a judgment. In the latter circumstance, the Supreme Court has required the presence of "exceptional circumstances." *U.S. Bancorp v. Bonner Mall*, 513 U.S. 18, 29 (1994) (holding that "exceptional circumstances" must be present for an appellate court to vacate the judgment of a lower court and "the mere fact that [a] settlement agreement provides for vacatur" of the judgment does not constitute exceptional circumstances). Even still, district courts do approve settlements requiring vacatur of a judgment. *See, e.g.*, *Pitterman v. Gen. Motors LLC*, No. 3:14-cv-967 (JCH), 2018 WL 6435902, at *1–4 (D. Conn. Dec. 7, 2018) (conditionally granting motion to vacate jury verdict and judgment where settlement was contingent upon court vacatur of verdict and judgment which were then on appeal).

and orders on motions to dismiss, class certification, *Daubert* or summary judgment.[13] The Settlement is in the best interests of the Classes, and the jury verdict is undoubtedly the most significant reason the parties reached a settlement. Conditioned on set-aside of the jury verdict, the proposed Settlement is fair, reasonable, and adequate.

VII. PROPOSED SETTLEMENT TIMELINE TO FINAL APPROVAL

For convenience, proposed dates and deadlines leading to a Final Approval Hearing are provided below and in the proposed order that is **Exhibit A** to the Stipulation and Agreement for Settlement.

Notice Date	Notice begins within 14 days of the Order granting Preliminary Approval
Objection deadline	70 days after Notice Date
Claims submission deadline	90 days after Notice Date
Last day for Class Counsel to file Motion for Award of Attorneys' Fees, Reimbursement of Litigation Expenses and for Service Awards to Class Representatives	50 days after Notice Date
Last day for Class Counsel to file motion for final approval of the Settlement	35 days before Final Approval Hearing
Last day to file oppositions (if any) to the motion for Award of Attorneys' Fees, Reimbursement of Litigation Expenses and for Service Awards to Class Representatives	21 days before Final Approval Hearing
Last day to file any replies in further support of the motion for final approval of the Settlement	90 days after Notice Date

[13] Here, as in *TFT-LCD*, the proposed Settlement would set aside the jury verdict only. It would not set aside or vacate any of the Court's decisions on the parties' various motions brought under Rules 12(b), and 12(c), Rule 23, Rule 56, or Fed. R. Evid. 702. *TFT-LCD* at *4 (finding significance in fact that vacatur of jury verdict would not "diminish the effect of judicial precedent or . . . unduly impinge on judicial resources").

Deadline for any replies in further support of Motion for Award of Attorneys' Fees, Reimbursement of Litigation Expenses and for Service Awards to Class Representatives	90 days after Notice Date
Final Approval Hearing	No earlier than 105 days after Notice date

VIII. CONCLUSION

For the foregoing reasons, the Court should grant preliminary approval of the Settlement.

Dated: January 23, 2026

BERMAN TABACCO

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CERTIFICATE OF WORD COUNT COMPLIANCE

I, Todd A. Seaver, an attorney duly admitted to practice before this Court, hereby certify pursuant to Local Civil Rule 7.1(c) that Plaintiffs' Memorandum of Law in Support of their Unopposed Motion for Preliminary Approval of Proposed Settlement was prepared using Microsoft Word and the document contains 7,704 words as calculated by the application's word counting function, excluding the parts exempted by Local Civil Rule 7.1(c).

I certify under penalty of perjury the forgoing statements are true and correct. Executed on this 23rd day of January, 2026 in San Rafael, California.

/s/ Todd A. Seaver
Todd A. Seaver