



## News Report Activity: Case 2

Case 2: *Class lawyer's misconduct 'fatally tainted' Amex deal* (Reuters: 2015).

Alison Frankel

### Judge: Class lawyer's misconduct 'fatally tainted' Amex deal

By Alison Frankel | August 4, 2015

**Gary Friedman** of the **Friedman Law Group** can now put a price tag on the cost of his horribly misguided decision to share privileged and confidential documents from his antitrust class action against American Express with his old friend **Keila Ravelo**, a lawyer for MasterCard in a parallel case: \$75 million.

After a ruling Tuesday by U.S. District Judge **Nicholas Garaufis** of Brooklyn, Friedman and his co-counsel in the Amex case are no longer in line for that \$75 million, which they were slated to receive for a settlement that permits merchants to impose a surcharge on customers who use Amex credit cards, as long as those retailers impose the same surcharge when consumers use other credit cards. The judge denied final approval of the settlement, finding that Friedman didn't provide class members with adequate representation.

Garaufis' ruling adds devastating details to previously bare-bones allegations about the documents Friedman gave Ravelo. As you probably recall, the misconduct first surfaced after federal prosecutors charged Ravelo with setting up a fake legal services company that she and her husband allegedly used to defraud MasterCard and two law firms where she had been a partner, **Willkie Farr & Gallagher** and **Hunton & Williams**. Willkie's internal investigation of Ravelo turned up evidence that Friedman had been sending documents from the Amex case to her, even as she defended MasterCard in a separate class action raising similar swipe-fee antitrust allegations against Visa and MasterCard.

Merchants that didn't like the terms of the Amex settlement or the \$5.7 billion settlement in the MasterCard case have argued that Friedman's disclosures tainted both deals, even though MasterCard was not a defendant in the Amex case Friedman led and Friedman wasn't lead counsel for the class suing Visa and MasterCard.

Their briefs have been heavily redacted. Judge Garaufis' opinion is not. His decision shows that Friedman gave Ravelo pretty much his entire case file: confidential Amex documents (at least 33), confidential documents from members of the class he was representing (22 of those), even his own work product, including strategy memos and emails amongst his co-counsel.

Friedman's lawyers, New York University law professor **Samuel Issacharoff** and **Theresa Trzaskoma** of **Brune & Richard**, have said he used Ravelo as an informal sounding board, to the benefit of the class. Judge Garaufis said instead that his disclosures to a lawyer for MasterCard called his loyalty to his clients into question.

"Whether Friedman exchanged confidential and/or privileged materials with Ravelo and consulted with her regarding these actions for financial reasons, out of personal loyalty, due to a misplaced sense that her advice would in fact benefit the merchant class and was not improper, and/or for some other reason(s), is something this court cannot currently, and need not, determine," he wrote. "Whatever his reason for doing so, Friedman's bringing MasterCard's counsel into the negotiating process created a conflict between class members and class counsel, and specifically a risk that Friedman, with Ravelo in his ear, negotiated settlement terms that are worse for class members than the terms he might have negotiated absent that conflict."

The judge said Friedman's co-counsel, **Reinhardt Wendorf & Blanchfield** and **Read McCaffrey**, showed their own questionable judgment by sticking with Friedman in a brief attempting to rescue the settlement, rather than acknowledging his wrongdoing. "This gives the appearance that Friedman's co-counsel may be more interested in protecting Friedman, their settlement, and their attorneys' fees application, than they are in protecting the merchant class that they purport to represent," the judge said. He removed Friedman as class counsel and ordered the other lead lawyers to submit briefs on why he shouldn't bounce them as well.





Garaufis' opinion is full of surprising revelations, like Friedman and Ravelo's plan to jointly represent merchants in arbitrations against American Express or to buy a Gulfstream jet and start an air charter business. Friedman, according to the judge, knew full well that it was wrong of him to share documents from the Amex case with Ravelo. He sent some sensitive messages to Ravelo's personal email account, rather than her work addresses, "suggesting an intention to keep the communications from being discovered," Judge Garaufis wrote. And in at least two emails to Ravelo, the judge said, Friedman wrote, "Burn after reading."

Breaching attorney client privilege might have been enough of an offense to justify a finding that Friedman did not adequately represent the merchants in the class, the judge said, "but this is not where the misconduct ends, and it does not constitute the complete story of the inadequacy of representation in this case."

That is where Judge Garaufis' opinion gets really interesting. He discusses the intersection of the now-rejected Amex settlement with merchants' \$5.7 billion settlement with MasterCard and Visa, suggesting a motive for Friedman to push for a certain provision in the MasterCard deal. Retailers with objections to the MasterCard settlement have struggled to convince the magistrate judge in their case that Friedman's improper disclosures should spend the final judgment entered against MasterCard and Visa.

Garaufis' opinion should help them hone their theory. According to the judge, the two settlements were inextricably connected, and Friedman – who assisted class counsel in the MasterCard case in negotiations on injunctive relief – had an incentive to argue for a provision in that settlement that would help him reach a deal with Amex.

The judge quoted an email from November 2011 in which Friedman told Ravelo that Amex's "fantasy resolution" of the swipe fee litigation was surcharge parity, in which merchants can tack on fees for Amex users as long as they charge the same fees when customers use Visa and MasterCard credit cards. The way to obtain that "fantasy," Friedman said, was to include a provision in the merchants' settlement with Visa and MasterCard to require a "level playing field" for such surcharges.

Friedman was in constant touch with Ravelo during MasterCard's settlement negotiations, according to Garaufis, providing her with the plaintiffs' strategy memos and even volunteering to draft a paragraph on the level playing field provision for Ravelo to present to MasterCard. At the same time, the judge said, he passed to her information about Amex's negotiating position and the class posture in that case.

"This interaction between the (MasterCard) settlement and the (Amex) settlement agreement illustrates why Friedman's apparent collaboration with Ravelo is so troubling," Judge Garaufis said. "Friedman's ability to be a zealous advocate for the class was compromised by his collaboration with counsel for MasterCard, an entity with interests divergent to those of the class; there is reason to be concerned that he was not acting solely in the class's interests when he, teamed with Ravelo, engaged in settlement negotiations and decision-making."

The judge effectively outlines the interdependence of the two settlements. But the challenge for objectors in the MasterCard case will be to show Friedman or Ravelo had decision-making authority over that settlement. That won't be easy. The class was represented by lead counsel from **Robins Kaplan; Robbins Geller Rudman & Dowd**; and **Berger & Montague**, with Friedman just in a supporting role. MasterCard's lead counsel was **Ken Gallo** of **Paul Weiss Rifkind Wharton & Garrison**, not Keila Ravelo.

And as settlement proponents in the MasterCard case have said repeatedly, their deal – including the level playing field provision – was proposed by an independent mediator in December 2011. Much of the correspondence between Friedman and Ravelo that Judge Garaufis cites came after the mediator had already suggested the provision.

Overtaking the MasterCard settlement is still a very long shot, but Judge Garaufis' Amex ruling may improve the odds for settlement detractors. Objectors have submitted briefs calling for judgment in the case to be vacated to Visa, MasterCard and class counsel. Settlement proponents have until Aug. 18 to respond.

