SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA



WILLIAM D. HOFFMAN, et al.,

Plaintiffs,

vs.

AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC., et al.,

Defendants.

Case No. 2001-022881

**STATEMENT OF DECISION**

**PHASE 2**

Phase 1: November 3, 2008
Phase 2: January 12, 2009
Dept.: 607
Judge: Hon. George C. Hernandez, Jr.

Complaint Filed: September 6, 2001

On March 26, 2009, the Court issued its Tentative Decision, Motion for Judgment, Phase II. The Tentative Decision directed Defendant to prepare a Statement of Decision and a Proposed Judgment. On April 6, 2009, Plaintiffs filed their Request for Statement of Decision Re: Phase 2. On April 24, 2009, Defendants filed their Proposed Statement of Decision Phase 2. On July 10, 2009, Plaintiffs filed various Objections to Defendants' Proposed Statement of Decision as well as their own Proposed Statement of Decision, Phase 2. After reviewing Plaintiffs' objections, the Court modified Defendants' Proposed Statement of Decision and directed Defendants to resubmit Defendants' Proposed Statement of Decision, Phase 2, after incorporating the Court's changes.

Having considered the Defendants' initial Proposed Statement of Decision, Phase 2, Plaintiffs' Objections to Defendants' Proposed Statement of Decision, Phase 2, and Plaintiffs' proposed alternative, Statement of Decision, the Court hereby adopts Defendants' Proposed Statement of Decision, Phase 2 as modified by the Court on August 11, 2009, as the Court's Statement of Decision as requested by Plaintiffs on April 6, 2009, attached hereto as follows:

Defendant American Express Travel Related Services Company, Inc. ("AETRS") offers fee-based per-trip travel insurance programs to holders of American Express charge cards. Defendant Amex Assurance Company underwrites most, but not all, of those insurance programs. There are four such programs at issue in this class action: Airflight; Baggage; Travel Delay; and Hospital Cash ("the Programs"). The Programs provided insurance, as defined by the terms of coverage, when enrolled American Express cardholders ("enrollees") charged covered airline trips to their American Express cards. Defendants' contracts and solicitation materials stated that there may be occasions when enrollees also are billed insurance premiums when they used their American Express cards to charge non-covered transactions (such as ticket upgrades or itinerary changes), airline tickets that they later cancelled, and airline tickets for persons who were not covered under the terms of the policies. At the time of enrollment, enrollees agreed that they would contact American Express to obtain a credit or refund if any such insurance charges were billed to them.

In this case, Plaintiffs contended that the way in which AETRS billed and refunded premiums breached the contract between Defendants and enrolled class members. Plaintiffs further contended that the contract, if given the construction advanced by Defendants, would be unconscionable. Plaintiffs also contended that Defendants' advertising of the Programs contained language that would deceive consumers about the manner in which AETRS billed and refunded premiums for the Programs. Finally, Plaintiffs contended that the manner in which the Defendants billed and refunded premiums constituted a deceptive and unfair business practice.

The first phase of this trial was tried before the Court from November 3, 2008 to November 20, 2008. The purpose of Phase 1, held without a jury, was to determine what documents constitute the relevant contracts in this case and to resolve disputes about the meaning of certain contract terms. On November 21, 2008, the Court issued its tentative decision for Phase 1. As set forth in greater detail in the Statement of Decision for Phase 1, the Court found that the contract terms at issue are not ambiguous; that they expressly authorize the billing practices that Plaintiffs alleged were breaches; that Defendants had no contractual obligation to refund or credit premium charges

unless the cardholder contacted AETRS to request a refund or credit; that the enrolled cardholders had a contractual obligation to contact AETRS to request refunds or credits of incorrect premium charges; and that cardholders' obligation to contact AETRS in such circumstances was a condition precedent to Defendants' obligation to provide a refund.[1]

On December 10, 2008, Plaintiffs submitted a trial plan and the Court determined that the issues presented would be heard by the Court without a jury. On January 12, 2009, Phase 2 of the trial commenced. The issues to be decided in Phase 2 were as follows:

a. Plaintiffs contended that Defendants' billing and refund practices and related marketing materials for the fee-based per-trip travel insurance Programs violated California Business & Professions Code §§ 17200 and 17500 and New York G.B.L. § 349.

b. Plaintiffs contended that the contracts for the Programs at issue in this case, as construed by the Court in Phase 1, are unconscionable because they permit AETRS to bill premiums in connection with non-covered airline charges and require cardholders to contact AETRS to receive a credit or refund of those premiums.

c. Plaintiffs contended that the Court should equitably excuse them and other class members from having failed to request refunds of premium charges in order to avoid a forfeiture of the unrequested refunds.

On March 24, 2009, Plaintiffs rested their case, and on March 25 Defendants moved for judgment pursuant to Code of Civil Procedure section 631.8, as they had previously stated they would do. On March 26, 2009, having considered the admitted evidence, the demeanor and the other factors appropriate to determine the credibility of the witnesses, and the arguments of counsel, the Court issued a tentative decision

[1] The Statement of Decision for Phase 1, entered February 6, 2009, is incorporated herein by reference.

granting Defendants' motion. On April 6, 2009, Plaintiffs filed their Request for Statement of Decision Re: Phase 2. Section 632 of the Code of Civil Procedure requires the Court to issue a Statement of Decision "explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial."

The Court now issues its Statement of Decision for Phase 2 as follows.

## I. FACTS

The Court has given careful consideration to all of the admissible evidence presented to the Court, including the testimony of live witnesses and of witnesses whose testimony was presented by videotape. Based on all of the evidence, the Court's consideration of the demeanor and credibility of the witnesses, and the other factors to be considered under Evidence Code § 780, the Court finds the following facts.[2]

*The Insurance Programs*

AETRS offers a variety of group insurance policies to holders of American Express charge cards. Some of these insurance policies are included in the services offered to all charge card holders at no additional cost; others are separately purchased by cardholders who voluntarily decide to enroll and pay an additional fee. One kind of insurance that AETRS offers is travel insurance. Holders of certain American Express charge cards are entitled to a certain amount of travel insurance pursuant to the basic cardholder agreement. All charge card holders are also eligible to sign up for additional, "fee-based" travel insurance, which provides additional coverage when the cardholder uses the American Express card to purchase airline tickets for persons covered under the terms of the policies. There are two kinds of "fee-based" travel

[2] On the motion of the Plaintiffs, all of the testimonial evidence that had been received in Phase 1 was admitted in Phase 2. (4463:4-9; 4464:10-19; 4596:4-23.) Plaintiffs later argued that they had wanted to offer only their testimonial evidence from Phase 1; however since the evidence was already admitted, the Court stated that it would require a motion to exclude, which the Plaintiffs did not file. In any event, the testimonial evidence presented by Defendants in Phase 1 is not essential to the Court's decision in Phase 2.

insurance: annual programs, for which the cardholder pays a flat fee premium regardless of how often the card is used to purchase tickets on scheduled airlines, and "per-trip" programs, for which the cardholder agrees to pay a specified premium each time the cardholder uses the American Express card to purchase scheduled airline tickets for covered persons. This case concerns the fee-based per-trip travel insurance programs. Amex Assurance underwrites most, but not all, of those insurance programs; AETRS is the group policy holder.

There are four fee-based per-trip travel insurance programs at issue in this class action: (1) Airflight, which was offered throughout the class period and which provides coverage for accidental death and dismemberment in connection with an airplane flight; (2) Baggage, which was offered throughout the class period and provides coverage in the event that a covered person's bags are lost or delayed in connection with airline travel; (3) Travel Delay, which was offered beginning around 2000 and provides cash payments in connection with certain expenses incurred as a result of delays in airline travel; and (4) Hospital Cash, which was also offered beginning around 2000 and provides cash payments in the event that a covered person is hospitalized during a covered trip. The Programs provided insurance, as defined by the terms of coverage, when enrolled American Express cardholders charged covered airline tickets for covered persons on their American Express cards.

In general, the policies provided that a "covered person" was the cardholder, the cardholder's spouse, the cardholder's dependent children under age 23 (under age 19 in New York), "additional" or "supplemental" cardholders, and the spouses and dependent children of "additional" or "supplemental" cardholders. At some point around 2003, the definition of covered person was expanded to include domestic partners of cardholders and additional cardholders, as well as business associates of small business cardholders. For corporate cards, coverage was provided for any covered trip charged to the enrolled account.

In Phases 1 and 2, Plaintiffs called Professor Tom Baker, a law professor who

was qualified as an expert in insurance law and policy.[3] (3928:21-3929:14.) Professor Baker's testimony was helpful to the Court. Professor Baker testified that the insurance products at issue in this case were "peace of mind" insurance. The consumers' motivating reason to sign up for programs like this is to provide the consumer with peace of mine by ensuring that the enrollees and other covered persons are covered every time that they purchase a scheduled airline ticket with their American Express cards. There are other travel insurance products available (4904:25-4905:6), and he opined that the products at issue here are valuable (*e.g.*, 422:1-3; 425:27-426:3).[4] Based on the testimony of Professor Baker and other evidence presented to the Court, the Court finds that the fee-based per-trip travel insurance programs at issue in this case were "peace of mind" insurance that are attractive and are very valuable to cardholders.

The Court found it significant that there was no testimony, implication, argument or even suggestion during Phase 1 or 2 of this case that any member of the class did not get exactly what they expected from American Express: "peace of mind" when they flew. Plaintiffs' position is not that Plaintiffs did not get exactly what they wanted from the Defendants: "peace of mind." Plaintiffs' position is that, occasionally, after the fact, they were charged inappropriately by the Defendants.

*Prior Class Action Litigation*

Around 1981, two class actions, *Lifschitz v. American Express Co.*, No. 80-0279 (E.D. Pa.), and *Corrado v. American Express Co.*, No. 80 CH 7671 (Cir. Ct. Cook

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[3] In Phase 2, Plaintiffs sought to qualify Professor Baker as an expert in behavioral economics as well. The Court initially sustained Defendants' objection to such qualification on the ground that Plaintiffs did not designate Professor Baker as an expert in behavioral economics in their original or amended expert witness declaration. However, after Defendants withdrew their objection on that ground (4885:22-4887:11), Plaintiffs elected to conclude their examination of Professor Baker without further proffering him as an expert in behavioral economics.

[4] Throughout the Statement of Decision, record citations are provided for illustrative purposes. They do not necessarily identify all of the supporting evidence in the record for the matter referred to and they do not specifically identify all of the evidence on which the Court has relied.

County, Ill.) were brought on behalf of American Express cardholders enrolled in the airflight insurance program. In Phase 1, Defendants offered, and the Court reviewed, the entire videotaped deposition of Lowell Sachnoff. Mr. Sachnoff is a graduate of Harvard Law School, an experienced class action attorney, and now a partner with the law firm of Reed Smith LLP in Chicago. Before he became associated with Reed Smith, Mr. Sachnoff was counsel to the plaintiff class in the *Lifschitz* and *Corrado* actions.

The plaintiffs in those lawsuits made allegations similar to those in the present case – among other things, that American Express did not adequately disclose (1) that it would bill insurance premiums on non-ticket charges and on tickets purchased for non-covered persons; and (2) that it would not automatically refund premiums for cancelled tickets. At the time of the *Lifschitz* and *Corrado* actions, counsel for that plaintiff class alleged and understood that American Express charged an insurance premium every time an enrolled class member had any transaction with an airline, including charges for cancelled tickets and for uninsured persons. The class counsel in the prior litigation also understood that, as of 1983, American Express was unable to modify its computer systems to avoid those charges or provide automatic refunds.

With that understanding, Mr. Sachnoff and counsel for the plaintiff class negotiated a settlement of the two coordinated actions in 1983. The negotiations were arms' length and adversarial, and the class was represented by experienced, sophisticated class action attorneys. As part of the settlement, American Express agreed to modify the form that cardholders signed when they enrolled in the insurance program to state that "there may be occasions" when charges are billed to the cardholder "for cancelled trips, uninsured persons, itinerary changes, ticket upgrading, non-scheduled airline flights, baggage or other such non-covered airline services." (DX 5100.) As modified by the settlement, the enrollment form also included an agreement by the cardholder to contact American Express for a refund of any such charges. In addition, American Express agreed to include a refund coupon with the cardholder's statement

whenever there was an insurance premium charge on the bill. The cardholder could use the coupon to deduct any insurance premiums that were eligible for refunds, without paying them at all.

With the implementation of those changes, Mr. Sachnoff and other plaintiffs' counsel in the prior actions were satisfied that American Express's solicitation materials and enrollment forms were adequate in describing American Express's billing practices for the insurance programs. Plaintiffs' counsel in *Lifschitz* and *Corrado* were also satisfied that the refund process that they had negotiated, which required enrollees to contact American Express to seek refunds, was fair and adequate. Plaintiffs' counsel in *Lifschitz* and *Corrado* represented to the reviewing courts that the changes they had negotiated for included "new procedures designed to disclose fully the circumstances under which . . . insurance premium charges under the Plan may be imposed." (DX 5102.) Each of the courts responsible for reviewing the settlement found it fair and adequate,[5] and the federal district court in Pennsylvania expressly noted that, as a result of the negotiated changes, "information about the charging and refund methods will be clearly stated to new as well as current enrollees." (DX 5107.) At that time, the Pennsylvania court observed, American Express charged a premium on every airline transaction that an enrollee had on his or her American Express card. (DX 5107.)[6]

*Solicitations and Advertising*

[5] In Phase 1, Defendants offered the testimony of William Rubenstein, a law professor and expert in class actions. Professor Rubenstein identified various factors that supported the conclusion that the *Lifschitz* and *Corrado* settlement was fair and adequate, including evidence that plaintiffs' counsel in those cases vigorously and faithfully negotiated on behalf of the class. For example, class counsel was experienced and well-qualified, counsel obtained valuable relief for the class, and the terms and nature of the settlement demonstrated the absence of collusion between class counsel and defense counsel. (669:3-680:10.)

[6] In their Request for a Statement of Decision, Plaintiffs ask what effect the *Corrado-Lifschitz* settlement had on the Court's determination of the disputed issues in Phase 2. As discussed below, the Court finds that it is relevant evidence with respect to certain issues, but that it is not dispositive of any question decided by the Court. The Court would reach the same conclusions in the absence of any evidence related to the 1983 settlement.

Although the class period is from September 6, 1995 through February 12, 2008, the class includes cardholders who were enrolled at any time during that period, regardless of when they first enrolled. The Airflight program has been offered since some time prior to 1981, and the class includes cardholders who enrolled even before that date. Enrollment was offered to all types of cardholders – consumer cards, small business cards, and corporate cards – and the certified class includes charge cardholders of all three types.

At various points in time, the Programs were marketed to cardholders through direct mail, outbound telephone solicitations, inbound telephone solicitations, and over the internet.[7] The content of these communications varied in some respects, but none of the advertising, marketing, or solicitations that were admitted into evidence contained language that, when considered in context and under the circumstances, was likely to deceive or mislead consumers.

The format of the direct mail pieces varied. Many of the direct mail pieces consisted of two pieces of paper, printed on both sides. The first page would be a cover letter describing one of the insurance programs, the second page would have the "Highlights of Plan," the third page would have an enrollment form to be signed and agreed to by the cardholder, and the fourth page would have Terms and Conditions. Not all direct mail pieces had this precise format, but all included Terms and Conditions. As part of the regulatory approval of the insurance products, the master policy agreements for the products, a summary of the master policies (called

[7] The Court was not directed to any evidence that would establish what percentage of the class enrolled by any particular means. In their objections to the Proposed Statement of Decision, Plaintiffs pointed to testimony by one of their expert witnesses; however, the expert was not qualified to testify about facts concerning enrollment methods. While the witness's beliefs are relevant to his expert opinions, his testimony does not establish enrollment statistics, of which the witness had no direct or personal knowledge. Moreover, although some class members enrolled before 1995, the Court was not directed to any solicitation materials or advertising from before 1995, except for DX 5629 (examples filed in the 1981 *Lifschitz* and *Corrado* litigation, discussed below), and DX 5854 (plaintiff Greg Carr's 1991 upgrade form).

"Descriptions of Coverage") and the enrollment forms were submitted to insurance commissions for the situs state of each policy. (91:11-20.)

Some of the direct mail pieces contained the phrase "pay only when you fly" in various contexts.[8] For example, one solicitation letter contains the following language: "There is no cost to enroll. You pay only when you fly and charge a Scheduled Airline Ticket to your enrolled Corporate Card account." (DX 5491.) Another stated, "Simply enroll once – you will automatically be covered each time you fly on scheduled airline flights. And there's no cost to enroll – you pay a premium only when you fly." (DX 5482.) A third example states,

> The Automatic Flight Insurance Plan is the simple and convenient way to give yourself and your lived ones the reassurance of extra security, when you fly. It's free to enroll and your acceptance is guaranteed. You're automatically covered every time you fly and charge a Scheduled Airline ticket to your American Express card. You pay a low per-trip premium only when you fly.

(DX 5510.)

The direct mail materials also explain, in clear and easily understandable terms, that there may be occasions when enrollees also are billed insurance premiums when they charge non-covered transactions (such as ticket upgrades or itinerary changes), when they charge airline tickets but later cancel them, and when they purchase airline tickets for persons who were not covered under the terms of the policies. Direct mail pieces included the following explanation as part of the enrollment form and Terms and Conditions:

> I understand that there may be occasions when premium charges are billed to me for cancelled trips, uninsured persons, itinerary changes, ticket upgrading, non-scheduled airline flights, baggage or other such non-covered airline services. If any such premium charges are billed to me, I agree to contact American Express Travel Related Services Company, Inc. ("American Express") for a refund.

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[8] Not all of the solicitation materials had the phrase "pay only when you fly." (*E.g.*, DX 5476, 5494, 5539.) Plaintiffs did not present evidence to establish which members of the class received marketing material with the phrase "pay only when you fly" or when such language may have been used.

(*E.g.*, DX 5854.)[9]

Some portion of the class enrolled in response to telephone solicitations rather than direct mail advertising. For outbound telephone marketing, Defendants used scripts, some of which may have included variations on the expression "pay only when you fly." For inbound and outbound telephone marketing, enrollees were read language from the Terms and Conditions, including language explaining that enrollees may be billed insurance premiums when they charged non-covered transactions, airline tickets that they later cancelled, and airline tickets for persons who were not covered under the terms of the policies. Regardless of the method of enrollment, each enrollee expressed orally or in writing that they understood and agreed to the Terms and Conditions of the Programs.

Shortly after their enrollment was accepted by Defendants, enrollees received additional written information about the Programs in a "welcome kit." The welcome kit included a cover letter, a Description of Coverage for the relevant policy, and Frequently Asked Questions. As the Court found in the Statement of Decision for Phase 1, the Description of Coverage once again stated in clear and unambiguous language that

> Premiums: A [dollar amount] premium charge will be billed to the enrolled American Express Card account each time a Scheduled Airline fare is charged to that Account. As long as the Basic Cardholder remains a Cardholder, this coverage will be automatically renewed until the Cardholder contacts American Express and cancels. There may be occasions when premiums are billed to the enrolled Account for cancelled trips, Uninsured Persons, itinerary changes, ticket upgrading, non-Scheduled Airline flights, baggage, or other such non-covered airline services. If any such charges are billed to the enrolled Account, the Cardholder must contact American Express for a refund.

The Frequently Asked Questions included in the welcome kit generally reiterated this information. For example, one FAQ brochure (PX 1017) stated as follows:

[9] After 2003, similar language was used to notify cardmembers of the need to request refunds if they were billed for non-covered charges, and the same "there may be occasions" language continued to appear in the Descriptions of Coverage sent to enrollees

**Q. When I'm enrolled in the per-trip Plan, how do I obtain a credit if I don't use my ticket or if I incur an inappropriate charge?**

**A.** When you are enrolled in Executive Baggage Protection, a $5.50 premium charge is automatically added to your billing statement every time you place an airline charge on your enrolled Card account. The charge appears even if you do not use your ticket, or if you charge the airfare of an uninsured person, incur a separate baggage charge, change itinerary on an otherwise Covered Trip, upgrade to First Class, or charge any other airline service that does not related to air travel. Naturally, we want to refund these charges. However, we depend upon you to tell us when you are due a premium refund. So any time an airline charge appears on your statement, a premium refund slip will be enclosed. If you are due a refund for one of the above reasons, simply deduct the amount for the premium refund from your payment, complete the refund slip and return it with your payment, or call the telephone number on your bill.

*Operation of the Programs*

Under the terms of the policies, enrollees are covered whenever they use their American Express cards to purchase scheduled airline tickets for covered persons and those covered persons fly. Under some circumstances, there is coverage even if the insured does not fly, but suffers a covered event while in transit to, or at, the airport. (*E.g.*, DX 5510.)

When American Express cardholders use their cards to purchase tickets or other services from airlines, the airlines or travel agencies send AETRS information about the transaction.[10] However, the information that airlines submitted during the class period did not allow Defendants to know whether a particular transaction was for an airline ticket (as opposed to an upgrade charge or an excess baggage fee, for example), whether the ticket was actually used, or whether the passenger for the ticket was a non-covered person. Consequently, as Defendants repeatedly disclosed in the solicitation materials,

[10] Some online merchants that sell airline tickets did not provide detailed information about the transaction, or provide it in a format that AETRS requested for airline transactions. As a result, Defendants did not charge premiums on transactions for those merchants at all, although insurance was still provided for those covered trips.

the Frequently Asked Questions, the Descriptions of Coverage, and the cardholder statements, there "may be occasions when premium charges are billed to the enrolled account for cancelled trips, uninsured persons, itinerary changes, ticket upgrading, non-scheduled airline flights, baggage or other such non-covered airline services."

During Phase 1 and 2, the Court viewed and heard excerpts of deposition testimony from more than thirty current and former employees of AETRS and Amex Assurance, some of whom had been designated as persons most qualified on particular topics. Some of the witnesses were employed in divisions related to AETRS's data management and computer systems; others were AETRS and Amex Assurance employees who handled the marketing, compliance, accounting, and other business aspects of the Programs. The testimony covered a wide variety of topics.

The testimony indicated that the data submitted to AETRS by airline merchants was not always consistent or reliable, and that it is difficult for AETRS to control the quality of the data that it receives from merchants. (*E.g.*, 9/26/2008 Butler Tr. at 29:24-31:9 (played on 2/4/2009); 11/15/2006 Hollingshead Tr. at 32:5-13 (PX 3894); 3/14/2008 Squeri Tr. at 16:13-17:6 (played on 1/27/2009).) Changes to the process by which AETRS obtained data from its merchants were complex and, in some cases, required years of effort to resolve issues concerning those submissions. (*E.g.*, 4/12/2006 Arndt Tr. at 30:4-33:12 (PX 3927).)

Although not required by the *Lifschitz* and *Corrado* settlement, at some point between the 1983 settlement and the beginning of the class period in September 1995, Defendants modified the computer systems that imposed insurance premium charges to try to avoid billing premiums on certain transactions that were considered less likely to be tickets. Prior to the start of the class period, AETRS designed its computers to avoid billing premiums on transactions for enrollees that were below a certain dollar threshold (the precise amount varied from $40 to $49 at various points in time during the class period). In addition, AETRS specified "batch codes" for airlines to use for transactions that were non-passenger revenue, and it designed its computers to avoid billing

premiums on these transactions as well. After the start of the class period, AETRS began using yet another criterion, called the "document code" or "document type," to exclude still more airline transactions from consideration for premium billing. The document type is a two-digit code that corresponds to a list of possible transaction types. Airlines were asked to provide a document type for each transaction when they submitted charges to American Express for settlement. However, this data was not always provided or consistent or reliable. Near the end of the class period, in January 2008, AETRS began applying still more criteria to exclude transactions from premium billing. These new criteria included the form of the ticket number, certain codes that the International Air Transport Association ("IATA") recommends its members use as part of the ticket number, the absence of routing information or the presence of certain codes in the routing fields, and the absence of fare basis information. Like the document codes, this data was not always consistent or reliable. In addition to these other changes, in 2006, AETRS began to issue premium credits automatically to enrollees whenever they received certain airline credits in excess of $45.

Plaintiffs called Daniel Regard to testify in Phase 2 as a software code expert. The Court qualified Mr. Regard as an expert to render opinions based on his analysis of computer code used by American Express to assess and refund premium charges and to print those charges on monthly statements.[11] (1315:25-1316:1.) Mr. Regard offered his opinion that American Express could have applied the 2008 premium billing and credit logic in 1995, and that doing so would have required a minimal number of additional computer cycles. (*E.g.*, 1478:15-1479:15.) Having considered Mr. Regard's testimony on that issue, as well as his demeanor and credibility in general, the Court is not persuaded that it would have been practical or feasible to apply the billing and refund

[11] Plaintiffs also proffered Mr. Regard as an expert on the state of the art for computing during the class period, but failed to establish that he was an expert in that area. (1317:2-5.) The Court permitted Plaintiffs to further examine Mr. Regard if they wished to extend his initial qualifications (1317:27-1318:7), but Plaintiffs did not conduct any further examination on his qualifications.

processes of 2008 thirteen years earlier, in 1995. Mr. Regard did not have the qualifications or experience to testify whether, as a practical or business matter, American Express could have in fact implemented those processes in 1995. In his testimony in Phase I, Robert Brunner, an expert designated by Defendants, identified a number of factors which, in his opinion, would have made it difficult or impossible to implement the 2008 processes in 1995, including software design and implementation, hardware, network and through-put, underlying system architecture, and resource prioritization and planning allocation. (839:4-12.) Mr. Regard's testimony failed to address and resolve all of these issues. Mr. Regard also demonstrated no expertise to address any hardware requirements, which further limited the usefulness of this opinion.

AETRS's accounts-receivable systems were complex, processing millions of transactions each day, and passing those transactions onto various statementing systems, which would print cardholders' monthly billing statements. (9/26/2008 Butler Tr. at 19:10-20:12 (played on 2/4/2009).) The systems were designed to process charges as efficiently as possible, which limited the transaction detail passed through certain programs. (9/26/2008 Butler Tr. at 42:12-43:21 (played on 2/4/2009).) Several years into the class period in this case, merchants were still migrating from the submission of paper records of charge to electronic records. (1/9/2009 Chenault Tr. at 13:12-24, 15:5-16:5, 22:3-12 (PX-3946).) Over the 13 year class-period, there were technological changes that made it feasible for AETRS's computers to do more in 2008 than they could have done in 1995. (*E.g.*, 10/22/2008, Noplos Tr. at 11:9-24, 37:1-38:23 (PX 3888).)

The AETRS and Amex Assurance witnesses described efforts to make changes to AETRS's systems to make the Programs easier for cardholders, although they concluded that some changes were not feasible at particular times and that there was no way to eliminate the need for cardholders to seek refunds. (*E.g.*, 10/3/2005 Codispoti Tr. at 42:9-43:18 (DX 5680); 7/30/2008 Sharnak Tr. at 47:16-23 (PX 29).) Nonetheless, over time a number of changes were implemented, including the use of

more conservative billing filters (i.e., that prevent a greater number of airline charges from triggering a premium) and, beginning in 2006, automatic premium credits for certain airline credits. (8/5/2008 Garrison Tr. at 21:12-22:3; 24:2-25:6 (PX 32).) As a result of the filters put in place to limit premium billing, some number of airline tickets did not trigger a premium in AETRS's billing systems. (11/15/2006 Hollingshead Tr. at 39:19-40:6 (PX 3894).) At all times, AETRS tried to bill as accurately as possible. (7/30/2008 Sharnak Tr. at 36:7-12, 49:3-9, 235:11-15 (PX29).) The Court found the witnesses to be forthcoming and sincere, even in response to questioning that was at times argumentative and irrelevant. Many witnesses emphasized Defendants' commitment to customer service, and there was testimony and evidence that the Programs had very high levels of customer satisfaction. (*E.g.*, 8/12/2002 Hendley Tr. at 140:15-141:19 (DX-5679).)

In Phase 2, Plaintiffs offered testimony from Paul Neylan, an expert in airline industry data. Mr. Neylan had worked for Virgin Airlines in the United Kingdom, and then later as a consultant to several Canadian airlines and one African airline. Mr. Neylan explained that, in the airline industry, IATA establishes standardized codes to be used by airlines. Among these codes is the form code, the fourth through sixth digits of the ticket number, which IATA recommends that its members use to identify the nature of the transaction. Mr. Neylan also testified as to industry standard formats for the fare basis (coach, business, etc.), the routing (which uses three-letter airport codes), and the passenger name.

Mr. Neylan's testimony established that, notwithstanding efforts at standardization, there is still substantial variation in airline data. Not all airlines are members of IATA and follow its standards. Low-cost airlines in particular tend not to be members. For example, Southwest Airlines, which is one of the largest domestic carriers, is not a member of IATA. (1767:11-22.) When Mr. Neylan reviewed a sample of Southwest transactions submitted to American Express, he found that the data was "messy," and "not consistent" in the use of IATA codes. (1934:15-1935:9.) For those

airlines that are IATA members and attempt to follow the standards, there are 1,000 form codes published by IATA. The form codes are changed from time to time. One hundred of those individual codes are not standardized at all – they are "reserved for individual airline use" and may be used however the individual airline chooses. (1890:13-1891:20.) Other codes are unassigned. Mr. Neylan agreed that where an airline uses a form code that is reserved for individual airline use, or is unassigned, it is not possible to tell from that code whether the transaction is a ticket or not. (1893:13-19.) Other form codes, such as "miscellaneous charge orders" and "multi-purpose documents" can properly be used both for tickets and for non-tickets. (1816:24:1817:3; 1918:24-28) Mr. Neylan admitted that he had done no analysis of how consistently airlines comply with IATA standards. (1769:17-21.)

Both Plaintiffs and Defendants showed Mr. Neylan examples of transaction data and asked him to apply the data standards as he understood them to determine whether specific transactions were tickets. Mr. Neylan's efforts highlighted the inconsistencies and contradictions in the data, and illustrated the significant problems with the premise that airline transactional data can be used to identify non-ticket charges. In some cases, Mr. Neylan was simply unable to say what the transaction was. (*E.g.*, 1917:13-1919:20.) In other cases, Mr. Neylan noted that the data in the record was self-contradictory, such as a transaction containing one code that Mr. Neylan interpreted as excess baggage and a second code that he interpreted as passenger ticket. (*E.g.*, 1920:7-1921:21; 1928:13-1932:07.) Mr. Neylan admitted that the only way for him to know with certainty what a transaction was would be to look at the actual ticket printed out by the airline. (1931:26-1932:7.)

In Phase 2, Plaintiffs also played video excerpts from the deposition of Terrell Jones, an expert retained by Defendants. Mr. Jones previously served as the Chief Information Officer of the Sabre division of American Airlines, and as the Chief Executive Officer of Travelocity. Based on that testimony, the Court qualified Mr. Jones as an expert in the travel industry, and as an expert in computing related to the

travel industry. (3715:26-3716:20.)

Plaintiffs presented only fragments of Mr. Jones's testimony. However, Mr. Jones provided some context for changes in the travel industry, explaining that at the beginning of the class period in 1995 airlines were still issuing manual tickets, and that the percentage of tickets issued by travel agents has fallen since that time. He also testified that most charges by travel agents are tickets, and that other types of airline charges generally are not issued by travel agencies. With respect to system design and airline data, Mr. Jones opined that it is reasonable to begin with a set of choices about the data, and to refine that system over time. He testified that airline data is not always reliable, and that AETRS's current method of identifying airline tickets is very conservative and likely causes AETRS to fail to bill premiums on airline charges that are for tickets. He explained that a businessperson making decisions about system design and modification must consider a variety of factors, including customer satisfaction, the cost of handling customer service calls, the information provided to the customer about the product, the availability and reliability of airline data, and the costs of making particular changes. The Court found Mr. Jones's testimony persuasive on these matters.

The data submitted by airlines to AETRS contains significant inconsistencies and contradictions. For example, the testimony from Mr. Neylan established that IATA codes are not used consistently in the airline industry or by all IATA participants, and that it requires substantial expertise to interpret and apply the codes as IATA has devised them. Airlines that are not members of IATA may use codes that appear to be in the IATA format, but not with IATA's intended meaning. Plaintiffs' expert in data analysis, Kirthi Kalyanam, identified what he called "bulk anomalies" in the IATA codes that appeared in tens of millions of dollars of transactions submitted by just one airline, Southwest Airlines.[12] At the same time, American Express has also published

[12] Dr. Kalyanam used the term "bulk anomaly" to refer to patterns in which large numbers of transactions were coded in a way that was obviously inconsistent with IATA standards.

codes, such as the document codes, for airlines to use when submitting transactions. As with the IATA codes, these are not consistently applied by airlines. Dr. Kalyanam identified tens of millions of dollars in "bulk anomalies" in the document codes submitted by just one airline, Northwest Airlines. Moreover, a substantial percentage of the time, one of the various codes provided by an airline suggests that the transaction is a ticket, while another code suggests that it is not. For example, Dr. Kalyanam determined that in almost 20% of the transactions he considered, the IATA code and the document code disagreed as to whether the underlying transaction was a ticket. Mr. Brunner, a data expert retained by Defendants who testified in Phase 1, analyzed more than a billion transactions submitted by airline merchants, and he identified a number of variations and inconsistencies in that transactional data. For instance, some airlines never submitted any transaction using a particular batch code, and other airlines submitted all transactions using a particular batch code. (754:1-7.) There were also a large number of transactions where the merchants had not provided any document type code at all. (754:8-12.) As a result of the evidence presented, the Court finds that Defendants do not receive from the airlines information that would allow Defendants to know that a given airline transaction is not a ticket.

The Court also finds that Defendants do not receive information from airlines that would allow Defendants to know whether the passenger on a particular airline ticket is a covered person. Although airlines do often submit a passenger name along with the transaction data, a name alone is not enough for Defendants to determine whether the passenger satisfies the definition of a covered person under the terms of the policies.

The Court also finds that Defendants do not consistently receive information from airlines that would allow them to know whether a ticket has been used, or whether a ticket has not been used but there was still a covered event. When an enrollee purchases a refundable ticket from an airline, and does not use that ticket, the enrollee may subsequently receive a credit from the airline for some or all of the original ticket

price. However, the information submitted by airlines on credit transactions does not always contain information that would allow for the identification of the original, underlying transaction, which may or may not have been a ticket in the first place. (765:28-766:7; 1958:8-20.) Moreover, airlines do not send any information at all to Defendants when enrollees cancel non-refundable tickets.

Professor Baker testified that, despite an initial effort to research the question, he did not form an opinion that Defendants' insurance products operated in a manner contrary to any insurance law or regulation (*e.g.*, 4915:27-4916:2), and agreed that nothing in insurance law would prohibit the enforcement of the contracts at issue in this case if the terms were disclosed to cardholders (4942:10-4944:10).[13] Professor Baker testified that it is common for insurance companies to rely on information provided by their insureds, and agreed that when cardholders receive and check their billing statements, they have better knowledge than Defendants do about what was purchased. (*E.g.*, 440:12-441:13; 4948:25-4949:4.) Professor Baker testified that, with the participation of cardholders as set forth in the contract, the billing system would be very accurate, except that cardholders are unlikely to correct errors when Defendants failed to bill premiums that were in fact owed. (*E.g.*, 4082:23-4083:11; 4918:9-4920:7.) He agreed that cardmembers had an incentive to ask for refunds and that it was easy to do so. (*E.g.*, 4917:22-4918:7.)[14]

In contrast to Defendants' lack of knowledge as to whether a specific transaction

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[13] The Court has found that the contract terms were in fact disclosed to cardholders.

[14] Although Professor Baker assisted the Court with respect to certain issues, the Court does not credit all of his testimony. Several opinions were conclusory and went beyond Professor Baker's expertise and experience. Professor Baker assisted Plaintiffs with their opposition to Defendants' summary judgment motion (416:27-420:22); he offered opinions at trial not disclosed at his deposition (*e.g.*, 4965:13-4967:7); at trial he testified inconsistently with some of his deposition testimony (*e.g.*, *compare* 4929:5-9 (quoting Deposition Tr. 219:13-18) *with* 4938:28-4939:8; 4910:25-4914:21); he did not inquire into certain issues that could potentially have undermined his opinions (*e.g.*, 4922:13-4925:5; 4950:23-4953:28); and he made assumptions that were not warranted based on the evidence presented at trial (*e.g.*, 4931:14-4934:12).

is a covered flight for a covered persons, the individual cardholder knows whether a transaction was for a ticket, who the ticket was for, and whether the ticket was used. The statements that AETRS sent to enrollees throughout the class period contained detailed information, to the extent provided by the merchant, that would assist the cardholder in identifying each airline transaction, including the name of the airline, the date of the transaction, the itinerary, the passenger name, and the amount. The insurance premium charges themselves were clearly identified on separate lines on the statements.

The admitted evidence fails to persuade the Court that Defendants could have, or reasonably should have, implemented a different or better billing and refund process than they did. The admitted evidence also fails to persuade the Court that Defendants could have, or reasonably should have, made changes to the billing and refund processes earlier than they in fact did. Based on the testimony reviewed, the Court finds that Defendants managed the Programs appropriately, worked in good faith to improve them for cardmembers in light of technological and other challenges, and were careful to ensure that the terms of the Programs were properly and fully disclosed. Based on the testimony of the witnesses, including the employees of AETRS and Amex Assurance, Professor Baker, Mr. Neylan, Mr. Jones, and Dr. Kalyanam, the Court finds that, throughout the class period, Defendants reasonably relied upon the enrollees to determine whether a transaction was eligible for a refund by virtue of being a non-covered airline service, a ticket for a non-covered person, or a cancelled ticket, and reasonably relied upon the enrollees to deduct those amount or seek those refunds when appropriate.

*The Class Representatives*

The nationwide class was represented by Greg Carr and Aviation Data Systems, Inc. ("ADI").[15] The statutory claims were asserted by California and New York

[15] The Court appointed Law Enforcement Systems, Inc. ("LES") as the class representative as the successor in interest to ADI, but ADI remained the relevant entity.

subclasses, and were represented, respectively, by Mr. Carr (a California resident) and ADI (a New York resident).

The Court viewed portions of Mr. Carr's videotaped deposition testimony during Phase 1 (DX 5672), and he testified in person during Phase 2. Mr. Carr recalled receiving a letter that contained the phrase "pay only when you fly" before he enrolled in the per-trip airflight program (1660:21-1661:2), but did not expressly testify that he relied on that representation in deciding to enroll. Mr. Carr testified that he enrolled in the airflight program to obtain additional insurance for his family. (1661:8-10.) Mr. Carr enrolled prior to 1991, and upgraded his enrollment to a higher coverage level in 1991. (DX 5854.)

Based on the Court's assessment of Mr. Carr's testimony, the Court finds that Mr. Carr was not misled or confused by the solicitation or Program materials and understood how the Programs worked. He understood he would be billed a premium every time he purchased a ticket using his American Express card. (1672:24-27.) He understood that he could be billed a premium when he had a non-ticket airline charge on his American Express card (1716:26-1717:3), and that he would need to contact American Express for a refund if that happened (1729:18-23; 1729:24-27; DX 5672, 87:1-7). He understood that not all people for whom he might purchase tickets were insured, and that he would need to contact American Express for a refund if he purchased tickets for uninsured persons. (1729:18-23; 1729:24-27; DX 5672, 87:1-7.) Mr. Carr also understood that he needed to contact American Express for a refund if he cancelled or did not use a ticket. (1729:18-23; 1729:24-27; DX 5672, 87:1-7.)

Mr. Carr identified only two premiums during the class period that were billed in connection with non-covered airline charges, in both cases when Carr purchased tickets for uninsured persons. (PX 3746, C144, C265.)[16] Mr. Carr believes he was never

[16] Mr. Carr identified other premiums billed to his father's card that he contended were in connection with non-covered airline charge. For one premium billed to his father's card, Mr. Carr testified that the underlying charge was a "freight" charge based only on the words printed on his father's American Express monthly billing statement. Mr. Carr did not know anything

personally billed a premium in connection with a non-ticket airline charge (1717:24-27), and did not claim to have ever cancelled any ticket charged to his American Express card. Of the two premiums he disputed, Mr. Carr had already sought and obtained a refund for one. (1718:26-1719:2; PX 3746, C147; *see also* DX 5672, 170:7-10.) He chose to pay the other premium, knowing that he did not have to pay, and then chose not to seek a refund because he decided it was not worth his time. (1734:7-16; DX 5672, 56:23-58:9.)

Richard Carrier was the president of ADI. The Court viewed portions of Mr. Carrier's videotaped deposition testimony during Phase 1. (DX 5681.) Mr. Carrier did not recall reading any advertisements from American Express concerning the per-trip Programs. (DX 5681, 98:14-20.) Mr. Carrier enrolled himself and ADI in the flight insurance programs to obtain increased insurance coverage for his family, not in reliance on any American Express advertising. (DX 5681, 101:14-20, 111:20-25, 113:2-6.) Mr. Carrier enrolled ADI in the airflight program in 1998. (DX 5681, 105:24-106:25.) He later upgraded certain enrollments to obtain additional coverage. (DX 5681, 103:23-104:3, 107:21-25.)

Based on the Court's assessment of Mr. Carrier's videotaped testimony, the Court finds that Mr. Carrier understood how the Programs worked. Mr. Carrier understood a premium would be billed every time a ticket was charged to his American Express card. (DX 5681, 102:17-103:1.) He understood a premium could be billed when he had a non-ticket airline charge on his American Express card (DX 5681, 104:23-105:1), and that he would need to contact American Express for a refund on such occasions. He understood that not all people for whom he might purchase tickets were insured, and that he would need to contact American Express for a refund if he purchased tickets for uninsured persons. Carrier also understood that he needed to contact American Express for a refund if he cancelled or did not use a ticket. Carrier in

about what that charge was actually for. (1/16/2009, 1717:28-1718:19.)

fact contacted American Express for refunds on multiple occasions, individually or through others. (DX 5681, 150:17-23.)[17] Mr. Carrier was able to identify the premiums that were eligible for refunds based on his review of his billing statements. Indeed, in his videotaped testimony, Mr. Carrier repeatedly was able to state with confidence whether a transaction was a ticket, whether he flew, and whether a premium was owed, merely by reviewing the statement, even years after the underlying transaction.

During Phase 1, the Court also viewed deposition testimony from Marilyn Fox, the bookkeeper for LES and ADI from March 1996 to March 2006, and who reported to Mr. Carrier. (DX 5676, 11:3-19, 12:2-5, 15:2-10.) Ms. Fox testified that Mr. Carrier always reviewed the American Express statements, that he would determine whether the premiums had been charged correctly, and that he directed her to apply for a refund for any premium billed in connection with a non-covered airline charge. Ms. Fox stated, persuasively, that it was straightforward and easy to obtain refunds. (DX 5676, 30:2-11, 33:11-18, 37:18-21, 91:24-93:10, 94:22-95:7.) The Court agrees with Ms. Fox.

*Class Period Charges*

Plaintiffs asserted that (1) the data that airline merchants submitted to AETRS during the class period allowed Defendants to determine whether a particular charge was eligible to be billed an insurance premium; (2) Plaintiffs, through their experts, were able to analyze that data after the fact and identify ineligible airline charges on which a premium was nonetheless billed; and similarly, (3) Plaintiffs were able to determine the total amount of money, in excess of refunds obtained, that class members paid in premiums billed in connection with non-covered airline charges. The magnitude of that amount was offered as a basis, among other things, to find Defendants' business practices unfair, to find the contracts unconscionable, and to find that Plaintiffs' non-

[17] On one occasion, Mr. Carrier called American Express and requested a $265 premium refund. (DX 5681, 60:15-25, 62:15-67:20.) This request was part of a "test" performed by Mr. Carrier. He made up the amount and called to see if American Express would give him a refund without documentation. Mr. Carrier testified that American Express gave him the refund. (DX 5681, 65:19-25.)

performance under the contracts should be equitably excused to avoid a disproportionate forfeiture.

Plaintiffs did not prove these various factual assertions. The Court finds that the transaction data that Defendants received during the class period would not permit non-ticket, cancelled ticket, or uninsured persons charges to be identified consistently or reliably.

Plaintiffs did not call anyone denominated as a damages expert, but rather called Dr. Kalyanam, a marketing professor, who was qualified as an expert in quantitative marketing, statistics, the use of survey data, data analysis, data mining, the analysis of large datasets, and econometrics. (2520:15-2521:12.) Dr. Kalyanam analyzed the data produced by Defendants to calculate, in the aggregate, the amount of premium charges that were billed to the nationwide class and California and New York subclasses for non-ticket airline charges, tickets that were cancelled, and tickets for uninsured persons. Dr. Kalyanam did not attribute any of these charges to individual class members or identify class members who had already obtained refunds of particular charges. Dr. Kalyanam had never previously been retained as a consultant in a lawsuit to calculate overcharges or damages suffered by a party. (2479:2-12.)

Dr. Kalyanam's calculations of "overcharges" to the class and subclasses were based on his own analyses of some of the data, analyses performed by a non-testifying expert named Vicki Lazear (who is the sister-in-law of one of Plaintiffs' attorneys, and who was not called as a witness herself), and a survey performed by another marketing expert, Joel Steckel. Dr. Kalyanam also relied on portions of the testimony of Mr. Neylan. Plaintiffs' evidence, including Dr. Kalyanam's opinions, analyses, and calculations failed to persuade the Court that the national class, the California sub-class, or the New York sub-class if they were damaged, such damage was unconscionable.

First, Dr. Kalyanam's analyses depended on a database of airline transactions that had been created by Mr. Regard and then narrowed down by Ms. Lazear. Mr. Regard initially testified that he and his team had correctly loaded American Express

computer files, containing nearly one billion airline transaction records, into a database. (1323:2-7.) However, Mr. Regard later stated that he had mistakenly loaded the wrong files by including transactions from Canadian submitters, and attributed the mistake to Ms. Lazear. (1536:7-1537:17.) Dr. Kalyanam, however, testified that the database he used to testify at trial included Canadian transactions (3393:23-3394:19), and it was unclear whether Dr. Kalyanam was using a different database from the one Mr. Regard had testified to, or whether that database had been recreated after Mr. Regard testified. Plaintiffs did not offer the data or the database created by Mr. Regard into evidence.

Second, Dr. Kalyanam relied on Mr. Regard's opinion that the premium billing logic used by AETRS during the class period could be applied to the transactions in his database to determine the difference, if any, between the number of premiums actually billed and the number that would have been billed using different criteria. Mr. Regard and his team prepared slides summarizing the premium billing and credit logic used by American Express at different times during the class period. (PX 3178, 3733-39.) However, Mr. Regard could not confirm that certain information in his slides was correct, and he admitted that other information was wrong. (*E.g.*, 1552:3-7; 1559:18-28; 1568:18-1569:6.)

Mr. Regard's errors undermined the credibility of Dr. Kalyanam's calculations. Those calculations required that Plaintiffs analyze the computer code that AETRS used throughout the class period to determine which transactions would have been billed premiums in fact, and which would have been billed premiums had a different set of criteria been applied. Dr. Kalyanam testified that Ms. Lazear wrote computer code to identify non-ticket charges and that Mr. Regard reviewed that code she used, but that Mr. Regard had not done so until after he had left the stand in Phase 2. (3492:4-3493:1.) The Court lacks confidence in Dr. Kalyanam's calculations because it is unclear whether Mr. Regard made similar mistakes in reviewing Ms. Lazear's work; there was no way for the Court to otherwise evaluate this testimony because the code written by Ms. Lazear was not offered into evidence.

Third, Dr. Kalyanam's method of determining which transactions were tickets and which were not was an interesting theoretical approach but ultimately not convincing. Dr. Kalyanam's testimony (as well as Mr. Neylan's testimony) demonstrated that the identification of tickets from airline data is difficult and imprecise. Dr. Kalyanam admitted that the airline data does not identify what is a ticket and what is not. (3688:27-3689:21.) He testified that there are indicators in the data that he believed made it more or less likely that a charge is a ticket, but he identified substantial disagreement among the various indicators. (2651:3-3658:2; PX 3858) Dr. Kalyanam also described various "bulk anomalies" that caused him to categorize a large number of transactions as non-tickets when, according to Dr. Kalyanam himself, some of them likely were tickets. (2978:8-10.)

Despite these substantial disagreements and contradictions in the data, Dr. Kalyanam considered a transaction to be a non-ticket charge if almost any indicator suggested that the transaction might not be a ticket. (2967:16-18.) Thus, if the document code was one that Dr. Kalyanam determined was for a ticket, but the IATA form code was one that he determined was not for a ticket, he relied on the form code and classified the charge as a non-ticket. At the same time, if the IATA form code was one that Dr. Kalyanam considered to be a ticket, but the document code was not, he relied on the document code, not the IATA form code, and once again classified the transaction as a non-ticket. If the IATA form code and the document code were both codes that Dr. Kalyanam considered to be tickets, but another code was missing or not in the form that he expected to see, he ignored both the form code and the document code, and classified the transaction as a non-ticket.[18]

[18] Dr. Kalyanam testified that his methods were similar to what American Express began doing in 2008. However, he had no personal knowledge of what American Express did, and had not reviewed any of the underlying computer code. Further, the Court is not convinced that the assumptions employed by American Express in the operation of its business are a proper or accurate measure of whether a transaction is or is not a ticket. For example, Mr. Jones testified that the methodology employed by Defendants as of 2008 is very conservative and likely excludes charges that are in fact airline tickets. Based on the criteria employed by Defendants

Fourth, neither Dr. Kalyanam's testimony, nor any other evidence offered by Plaintiffs, provide the Court with information about the number of transactions that were screened out by the criteria that Defendants actually used. Dr. Kalyanam made no calculation of the number or percent of transactions that Defendants excluded from consideration for premium billing because the transactions were less than the dollar thresholds, disqualified by the batch codes, or disqualified by the document codes. As a result, Plaintiffs' evidence failed to show the level of accuracy or inaccuracy in Defendants' billing processes.

Fifth, Dr. Kalyanam did not make any effort to calculate "unbilled premiums" – covered airline ticket charges on which AETRS failed to bill a premium as a result of the billing processes employed by its computer systems. (3690:18-23.) The criteria employed by Defendants throughout the class period resulted in some number of unbilled premiums, and the alternative billing and refund criteria described by Dr. Kalyanam would cause them to increase. Although Plaintiffs contended that the billing and refund processes used by Defendants were unfair and unconscionable, evidence presented to the Court indicated that for at least some, if not all, class members, the inconsistencies in airline data, the evolving nature of Defendants' billing criteria, and Defendants' customer-friendly refund policy resulted in class members paying fewer premiums than they would have paid under a hypothetical 100 percent accurate billing system. For this reason, among others, Plaintiffs' evidence failed to convince the Court that the criteria that Defendants used during the class period favored Defendants over class members.

For example, Mr. Carrier was shown multiple ADI statements during his testimony, and identified only two premiums that he believed were billed to ADI in connection with non-covered airline charges, both for non-ticket airline charges. (DX

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and the testimony by Mr. Jones, Dr. Kalyanam, Mr. Neylan, and AETRS witnesses, the Court agrees with Mr. Jones's opinion.

5681, 178:7-180:6, 184:7-17, 191:2-25.) Mr. Carrier testified that he performed certain "tests" by intentionally charging non-ticket airline purchases to see whether a premium would be billed, and agreed that the first premium, billed in 2001, could have been one of his tests. The second was billed in 2003. Mr. Carrier did not identify any premiums billed to ADI for cancelled tickets or tickets for uninsured persons. Mr. Carrier also identified three ticket charges on ADI's statements for which no premium was ever billed. (DX 5681, 171:3-13, 175:11-24, 176:1-177:2.) In other words, even with Mr. Carrier's "tests," ADI had more unbilled premiums than it had premiums billed in connection with claimed non-covered airline charges.

Sixth, it appeared that much of the data analysis was performed not by Dr. Kalyanam, but by Ms. Lazear. Ms. Lazear provided the transactional data files to Mr. Regard to build a database (1536:7-28), gave transactional data to Mr. Neylan for him to analyze (1776:10-24), and selected a sample of refund coupons for Dr. Steckel to analyze (3244:28-3245:12). She then wrote the computer code to analyze the data (*e.g.*, 3057:22-3058:14; 3343:3-21), and prepared spreadsheets for Dr. Kalyanam that contained the results of her analysis and the calculations of premiums billed in connection with non-covered airline charges. (*E.g.*, 3055:2-3056:10.) She also provided Dr. Kalyanam and Mr. Regard with other calculations that they used to create PowerPoint slides from which they testified in court. (*E.g.*, 3380:13-22.)

While it is proper and often necessary for an expert to rely upon the work of other experts, Dr. Kalyanam's oversight of Ms. Lazear's work does not appear to have been extensive. It was not his decision to work with her, she was not retained or employed by him, and he had never worked with her before this case. He did not directly supervise her, and did not know how she was paid for her work. (3532:7-3533:26.) Dr. Kalyanam testified that he did only basic validity checks on her calculations (*e.g.*, 3056:11-3057:2), and in many cases did not check the information she provided to him (*e.g.*, 3841:10-3842:6; 3843:12-3844:5; 3850:17-3851:8). Dr. Kalyanam was unable to answer many questions about what she did, and by extension,

about the calculations presented to the Court. (*E.g.*, 2998:20-24; 2999:7-10; 3522:13-3523:11; 3525:22-3526:7; 3004:13-3005:14; 3295:19-27; 3425:2-4; 3414:4; 3430:9-11; 3424:11-2; 3559:20-3560:28; 3570:19-23.) To take one example, during cross-examination, Dr. Kalyanam was questioned about the accuracy of the total premium charges that Ms. Lazear had input in the overcharges model, on which all of his overcharge numbers relied. Dr. Kalyanam was unable to explain how the total premium charges in Defendants' data had been input into his model. The next day, while still on cross-examination, Dr. Kalyanam admitted that he had spoken to Ms. Lazear the evening before, and she had informed him that his calculations of non-ticket charges were overstated as a result of an input error. (3557:9-3558:11.) Dr. Kalyanam had no knowledge of the error or its magnitude, other than what he had been told by Ms. Lazear. The rules of evidence of course allow experts to rely upon hearsay or other inadmissible information in reaching their opinions. However, the extent of Dr. Kalyanam's reliance on Ms. Lazear, coupled with his frequent inability to explain the details of work by her on which he relied, called his opinions and analyses into doubt.

Seventh, Dr. Kalyanam relied not only on an absent witness, but also on information that was not offered at trial. Plaintiffs did not offer the underlying transactional data on which almost all of Dr. Kalyanam's analyses were performed. The computer code written and used by Ms. Lazear to generate the calculations was not offered into evidence. Dr. Kalyanam allocated premium refunds among the different categories of charges (non-flight charge, cancelled ticket, uninsured person) based on an allocation prepared by Dr. Steckel (3079:10-26), but neither the allocation nor the bases for it were in evidence.[19] In connection with his efforts to calculate the number of

[19] With respect to the refund tabulation, Dr. Steckel testified that the analysis was done by someone else, based on a sample of refund requests compiled by Ms. Lazear, and that he only saw the final product. (3249:28-3250:9.) The tabulation itself was not offered into evidence. Dr. Steckel was not asked to make sure the tabulation was representative of all refund requests. (3253:9-11.) The tabulation did not take into account telephone refund requests. (3253:22-25.) He did not know if the tabulation took into account reduced refunds as a result of automatic refunds. (3254:14-17.)

charges for uninsured persons, Dr. Kalyanam testified that he prepared histograms and conducted a regression analysis, but he did not produce that work to Defendants or bring it to court. (3355:25-3356:7; 3358:26-3359:23.)

Eighth, Dr. Kalyanam's calculation of premiums billed for uninsured passenger tickets was unreliable and unpersuasive. Admitting that it was impossible to calculate uninsured persons charges from the data that Defendants received, Dr. Kalyanam relied on Dr. Steckel's survey of class members. The purpose of Dr. Steckel's survey was to obtain the names of the covered persons for a sample of the class, so that Dr. Kalyanam could compare those names to the names that appeared in the transactional data, calculate a percentage of transactions that were for presumed uninsured persons, and generalize that rate to the larger population of class members. (3151:24-28; 3156:22-3157:6; 3174:20-3175:13.) Like Dr. Kalyanam, Dr. Steckel relied upon Ms. Lazear. Dr. Steckel did not consult with Dr. Kalyanam about the survey until after it was complete. (3172:15-3173:21.)[20]

The Court finds that Dr. Steckel's survey was flawed and was not a reliable source of data for Dr. Kalyanam's analyses. Dr. Steckel admitted that his survey contained typographical errors and ambiguous questions, and that such errors and ambiguities tend to undermine the reliability of the survey itself. (3209:11-3211:13; 3211:20-3212:14; 3212:28-3215:27; 3216:5-3217:19; 3232:7-3233:6.) Although "additional" or "supplemental" cardholders and their spouses, domestic partners, and dependent children are covered persons, Dr. Steckel failed to obtain the names of any of

[20] Dr. Steckel first testified that he had never directed his associates to obtain information from Ms. Lazear about what she was doing. (3247:15-24.) When confronted, on cross-examination, with an email that he had sent to his associates the evening before his deposition, Dr. Steckel admitted that this was incorrect, and that he had in fact directed his associates to get information from Ms. Lazear. (3247:25-3249:3.) Moreover, as he stated in his email, Dr. Steckel wanted to know what Ms. Lazear was doing with the survey data because he wanted to "have as consistent a story as possible." (DX 6086.) The Court considers this evidence, along with the other testimony and the demeanor of Dr. Steckel, in assessing credibility and determining how much weight to give to the opinions of the experts.

those persons in his survey. (3239:12-3243:7.) For example, the Court heard testimony from Mr. Carr that his father was an additional card holder, and thus covered under the Program. Dr. Steckel's survey, however, omitted anyone similarly situated to Mr. Carr's father. As a result, Dr. Kalyanam likely included transactions as having been for uninsured persons when they were not.

Dr. Steckel also failed to identify business associates by name, making it impossible for Dr. Kalyanam to determine whether passengers whose tickets were purchased with small business or corporate cards were in fact covered persons. (3243:8-3244:16.) Dr. Kalyanam testified that he attempted to adjust for this error by disregarding transactions for small business "OPEN" cards for the period when business associates were covered. (2933:11-25.) However, he admitted that he made no similar adjustment for corporate cards. (3324:15-28.) As a result, Dr. Kalyanam again included transactions as having been for uninsured persons when they were not. Dr. Steckel also failed to account for name changes by class members as a result of marriage, divorce, and other issues. This too likely caused Dr. Kalyanam to overstate the number of uninsured persons charges.

Dr. Steckel or his associates made changes to the name data supplied by survey respondents, and in doing so introduced errors. Ms. Lazear then reviewed the name data and the transactional data to allow Dr. Kalyanam to calculate a median uninsured persons rate for the survey respondents, but Dr. Kalyanam was unable to present any of the underlying work used to generate that rate. In generalizing this result to the larger population, Dr. Kalyanam erroneously multiplied the uninsured persons "rate" to all premium transactions. The original sample for Dr. Steckel's survey was a subset of the class who appeared to have at least one transaction for a person other than the cardholder. As a result, the survey population had more transactions, and more uninsured persons transactions, than other members of the class. This error also caused Dr. Kalyanam to overstate the number of uninsured persons charges.

Ninth, Dr. Kalyanam's analysis suffered from other adjustments that undermined

his analysis. For example, his calculations changed significantly between the time he testified at his deposition in December 2008 and the time he testified at trial in February 2009, by as much as $150 million, or more than 30 percent. (3545:7-21.) Dr. Kalyanam also admitted that Ms. Lazear may have incorrectly input the total premium figures on which he relied, resulting in double-counting. (3557:19-3558:7.) Dr. Kalyanam's calculations erroneously included amounts billed to cardholders enrolled in the programs that charge a single annual premium and cardholders who were not residents of the United States. (3575:1-3578:20.) For cancelled tickets, Dr. Kalyanam offered conflicting testimony about how he matched charges and credits and whether he used the passenger name. (3004:26-3005:1; 3295:21-24.) Dr. Kalyanam also applied IATA form codes in his calculations without properly accounting for changes in those codes, and without knowing when and to what extent airlines adopted those changes. (3851:16-3852:2; 3551:3-3552:19.) On re-direct, Dr. Kalyanam testified that he had examined the impact of certain changes in the IATA form codes in or about September 2008. (3800:21-3801:3; 3851:9-15.) But he testified at his deposition in December 2008 that he did not even know that IATA form codes changed. (3854:20-3855:25.) Further, Mr. Neylan and Dr. Kalyanam admitted that they did not have all versions of the document listing the IATA form codes for the class period (1929:14-28; 3851:16-3852:2), so Dr. Kalyanam could not have fully evaluated the impact of any changes there may have been with those form codes.

In addition, Dr. Kalyanam's calculations were based on amounts billed, not paid, and there was insufficient evidence about how much had already been refunded to class members. Dr. Kalyanam testified that, in his calculations, he disregarded some amount of credits and refunds that AETRS actually gave to enrollees (3079:28-3080:12), but no evidence was ever offered that established that these refunds or credits were in fact improper, or that they should be ignored for the purpose of calculating harm to the class. Accordingly, Dr. Kalyanam's decision to disregard a percentage of refunds affected the value of his opinion.

The Court observed Dr. Kalyanam's demeanor over eight days of testimony. While some of the shortcomings of Dr. Kalyanam's presentation were the result of errors by other individuals on which he relied, ultimately the Court finds that Dr. Kalyanam's opinions were inadequately supported by admissible evidence and are insufficient to support a finding with respect to the amount of premiums billed to or paid by class members in connection with non-covered airline charges. Dr. Kalyanam's testimony helped convince the Court that the data submitted to Defendants by airlines and other submitters was not of the consistency or quality that could justify calculations of "overcharges" for the purpose of Phase 2.

In sum, Plaintiffs failed to persuade the Court that the class suffered the type of damages, or any other loss of money or property as a result of the advertising, billing, and refunding practices that were contested at trial that would make the contract unconscionable.

*Discovery Process*

Plaintiffs presented evidence related to the discovery process in the litigation, and in particular, to the production of computer data. Plaintiffs called David Sporkin, who served as the court-appointed computer data discovery neutral, to describe the data production process. Mr. Sporkin testified about certain representations made to him during discovery and the production of data. Through his testimony, Plaintiffs sought to establish grounds for the Court to draw an adverse inference against Defendants based on conduct in discovery. (*E.g.*, 2013:2-11; 2028:9-14; 2028:24-2029:10; 2071:1-8; 2156:22-2157:8.)

The Court finds that such an adverse inference is not warranted, and declines to draw it. Mr. Sporkin testified that Defendants had provided him with everything he asked for. (2059:21-2060:6; 2087:13-2088:2.) Defendants produced a very large volume of transactional data, and Dr. Kalyanam never suggested that the data was insufficient for him to make his calculations, nor did he propose any modifications to

his calculations based on any incompleteness of any data.[21] Further, the Court observed the videotaped deposition testimony of over thirty AETRS and Amex Assurance witnesses, including witnesses on data issues. The good faith conduct, candor, and general demeanor of those witnesses also weighs against any adverse inference for alleged lack of candor.

## II. EVALUATION OF PLAINTIFFS' LEGAL CLAIMS

As set forth below, the Court finds that Plaintiffs did not prove that Defendants engaged in deceptive or unfair business practices in violation of Cal. Bus. & Prof. Code §§ 17200 or 17500, or in violation of N.Y. G.B.L. § 349. The Court further finds that Plaintiffs did not establish any entitlement to relief on these statutory claims because they failed to prove any injury that was caused by Defendants' allegedly unfair or deceptive practices. The Court finds that the contracts at issue in this case were not unconscionable, and that Plaintiffs' failure to perform under those contracts should not be equitably excused. Finally, based on those findings, and on the findings from Phase 1 of the trial, the Court finds that Defendants are entitled to judgment on Plaintiffs' claim for breach of contract.

### A. Plaintiffs' Failure to Prove False Advertising or Deceptive Business Practices in Violation of N.Y. G.B.L. § 349 or Cal. Bus. & Prof. Code §§ 17500 and 17200 (Fraudulent Business Practices))

Plaintiffs argued that Defendants used false or misleading advertising in violation of §§ 17500 and 17200 and that they engaged in deceptive business practices in

[21] Plaintiffs' counsel argued in particular that Defendants had failed to disclose the existence of a computer database called IDN until the deposition of Stephen Squeri in April 2008, contending that this alleged conduct should be considered by the Court in evaluating whether Defendants had been candid in disclosing data sources, and that a determination that Defendants had not been candid could warrant an adverse inference. (2156:22-24; 2167:6-2168:16; 2185:19-22.) Again, no such inference is warranted. Contrary to Plaintiffs' counsel's contentions, it was established during the examination of Mr. Sporkin that the same counsel, Mr. Folkenflik, had deposed an AETRS witness about the IDN database in detail in 2006, and that a transcript of that deposition was given to Mr. Sporkin in 2007. (2288:3-2289:11; 2289:24-2296:15.) Accordingly, counsel's assertions about Defendants' alleged concealment of the database were not accurate.

violation of G.B.L. § 349 and § 17200. A plaintiff asserting a claim under the fraudulent or false advertising prongs of § 17200 or under § 17500 must prove that "members of the public are likely to be deceived." *Comm. on Children's Television v. Gen. Foods Corp.*, 35 Cal.3d 197, 211 (1983); *see also Williams v. Gerber Prods. Co.*, 523 F.3d 934, 938 (9th Cir. 2008) ("these laws prohibit not only advertising which is false, but advertising which, although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public."). Under G.B.L. § 349, the plaintiff must prove that the act or practice is "likely to mislead a reasonable consumer acting reasonably under the circumstances." *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 24 (1995).

Plaintiffs contended that the advertising and Program materials were misleading because they created the impression to the reasonable consumer that the Program was designed to bill cardholders only when a scheduled airline flight was purchased and that cardholders would not be charged a premium except when a covered person took a covered flight. (Pl.'s Trial Br. at 11.) At trial, Plaintiffs also offered a somewhat different theory that consumers would have a "default expectation," before receiving any material from Defendants, that they would only be billed a premium on covered airline charges, and that a significant number of consumers either would not read the material advising them that they could be billed for non-covered charges, or would not alter their default expectation after reading it. Plaintiffs also contended that it was misleading and deceptive for Defendants to collect and retain premiums on airline charges that were ineligible for coverage and on which no insurance was provided. (Pl.'s Trial Br. at 9.)

*Advertising Materials and Disclosures*

Plaintiffs argued that the "pay only when you fly" and other similar phrases would mislead a reasonable consumer to believe that no premium would be **billed**

unless the cardholder actually flew.[22] The evidence did not establish this contention. The Court finds, based on its review of the materials and the testimony of the witnesses, that a reasonable consumer would understand these phrases to mean that a cardholder would not be required to **pay** a premium unless he or she flew. The evidence showed that the products at issue in this case compete with other automatic travel insurance products that charge a fixed premium for a given period of time, regardless of the number of trips taken by the insured during that period. A reasonable consumer would understand the "pay only when you fly" advertising to distinguish Defendants' automatic per-trip travel insurance products from these fixed-premium alternatives; the phrase refers to the fact that, unlike in fixed-premium, fixed-period insurance, the amount owed depends on how often the cardholder travels.

Accordingly, "pay only when you fly" accurately described how the Programs worked and was not likely to deceive, mislead, or confuse consumers. The enrollment materials, descriptions of coverage, and Frequently Asked Questions brochures clearly disclosed that cardholders could be billed premiums when they had non-covered airline charges, and that they could obtain credits of those premiums by contacting American Express. Those disclosures were consistent with the phrase "pay only when you fly," because they confirm that cardholders were not required to pay when they did not fly. Indeed, billing statements instructed cardholders to deduct any premiums that had been billed in connection with non-covered airline charges.

Plaintiffs argued that, in determining whether consumers were confused or misled, the Court should apply a "reasonable consumer" standard. Defendants argued that judgment for or against the class depended on whether the evidence showed that the class representatives themselves were confused or misled. The Court does not need to decide this issue, however, because whether the Court applies a "reasonable consumer"

[22] This phrase was used in some, but not all, of the advertising materials used during the class period, and Plaintiffs did not present evidence to establish which members of the class received marketing material with that phrase.

standard, or looks to the class representatives themselves, the Court finds that Plaintiffs did not prove their claims.[23]

The class representatives were not confused or misled. Their testimony established that they knew they were not required to pay if they did not fly, and they knew that they could be billed premiums in connection with non-covered airline charges, for which they could obtain a credit from American Express. Evidence from other cardholders also demonstrated an understanding of, and satisfaction with, the billing and refund process. (DX 5114, DX 5119, DX 5120.) Likewise, cardholders used the refund process during the class period, which indicates that cardholders understood the process.

The Court also finds that the disclosure that "there may be occasions" when the cardholder could be billed premiums for non-covered airline charges was accurate and would not be likely to mislead or confuse a reasonable consumer, and did not mislead or confuse the representative plaintiffs. In Phase 1, the Court found that this phrase was part of contract term negotiated in connection with the 1983 nationwide settlement of the *Lifschitz* and *Corrado* actions, with the intent of disclosing American Express's billing practices to enrollees in the airflight insurance program. While the genesis of the phrase undermines any suggestion that the language was intended to deceive or mislead, liability under sections 17500 and 17200 and G.B.L. § 349 may be found even in the absence of such an intent if there is nonetheless a likelihood of confusion or deception.

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[23] The parties disputed whether an adjudication of the class representatives' claims at trial should bind the class. Defendants contended that the failure of the class representatives to establish their claims should defeat the claims of the class as a whole unless the evidence showed that the failure of proof as to the class representatives was attributable to some way in which they were not typical of the class. Plaintiffs contended that the ability of the class representatives to prevail with respect to their individual claims was irrelevant because the Court must apply a "reasonable consumer" standard under the statutory claims, pursuant to which Plaintiffs need not show that anyone (including the class representatives) was actually deceived or confused. As noted above, the Court need not resolve this dispute, because it finds both that there was not a likelihood that reasonable consumer would be confused or misled and that the class representatives themselves were not confused or misled.

In this case, however, the evidence did not establish such a likelihood.

The "there may be occasions" disclosure language properly advised cardholders that they could be billed premiums on non-covered airline charges. The language would not create an impression about the possibility of such charges that was inconsistent with the operation of the Programs.

Plaintiffs argued that the word "may" was inaccurate or misleading and that cardholders should have been told that there "will" be occasions on which they would incur premiums for non-covered airline charges. Plaintiffs cited *Broder v. MBNA Corp.*, 281 A.D.2d 369 (2001), in which the court declined to dismiss a claim under G.B.L. § 349 based on the defendant's alleged representation that it "may" allocate credit card payments to promotional balances first, when its alleged practice was to do so always. In this case, however, the meaning and structure of the phrase are different and so are the facts. As explained in the Statement of Decision for Phase 1, it would have been inaccurate to represent to all cardholders that there "will" be occasions on which they would incur premium charges for non-covered airline charges, because it depended on card usage and the evidence indicates that many cardholders were never billed such premiums. There were also filters throughout the class period that prevented the billing of premiums on certain airline charges. Finally, cardholders were told that a premium would be billed "each time" they charged a scheduled airline fare to their account, which necessarily included tickets that were not used or that were purchased for uninsured passengers. Accordingly, Defendants' billing practices were accurately and fully explained by the disclosures provided to cardholders.

Plaintiffs also contended that the "there may be occasions" language would lead cardholders to believe that they would only infrequently need to request a refund. The evidence did not establish this contention. The disclosure does not represent how often such charges would occur, and a reasonable consumer can be expected to understand that the frequency of such billing would depend on one's use of the card. But even if the Court were to conclude that the disclosure created an impression that the

"occasions" would be infrequent, the evidence did not establish that in practice a typical cardholder would need to request a refund anything other than infrequently, or that any cardholder in fact needed to requests refunds other than infrequently. The testimony of the class representatives revealed that they were only infrequently billed premiums for non-covered charges. Defendants' expert Mr. Brunner provided analysis during his testimony in Phase 1 regarding the distribution of premium charges that, coupled with the fact that there were filters in place during the class period that prevented premiums from being billed on certain airline charges, indicated that typically a class member would need to request a refund infrequently, if at all. Mr. Brunner's testimony indicated that many class members were never billed a premium for any non-covered airline charge. Accordingly, the evidence did not establish that the typical cardholder's experience of the Programs would have been inconsistent with the impression Plaintiffs alleged was created by the "there may be occasions" phrase.

Finally, Plaintiffs argued that the "there may be occasions" language could suggest the possibility of inadvertent billing mistakes, but not intentional misbilling. However, the evidence did not establish any intentional misbilling. Throughout the class period, there were limitations in the data received from airline merchants, with the result that Defendants could not reliably identify non-covered charges (and with respect to non-covered passengers, Defendants had no means of identifying them at all). During the class period, Defendants acted in good faith, providing accurate disclosures to cardholders and employing a variety of filters that prevented premiums from being billed on certain charges. Those filters did not prevent premiums from being billed on all non-covered charges, but they also caused the billing system not to charge a premium on some airline charges that likely were eligible for insurance coverage. There were errors in both directions, and such mistakes are fairly characterized as inadvertent even if their existence was a foreseeable result of the inability of the system to distinguish covered from non-covered charges.

To establish that Defendants' solicitation materials and disclosures were likely to

mislead or confuse a reasonable consumer, Plaintiffs sought to rely on the testimony of Dr. Carol Scott, a marketing professor who was retained by Defendants and who, by stipulation of the parties, was qualified as an expert in the field of consumer research, marketing, and survey work. (4664:17-4665:2.) Dr. Scott conducted a survey to evaluate what the phrases that Plaintiffs alleged were deceptive – "pay only when you fly" and "there may be occasions" – would cause consumers to believe about the circumstances under which premium charges would appear on their statements. (*E.g.*, 5432:10-23; 5447:8-22.) Some survey participants – none of whom were American Express cardholders or members of the class – were shown marketing materials or heard a telephone solicitation with the challenged language, whereas others were exposed to written materials or oral solicitations that did not have that language.

Dr. Scott testified that she found no significant difference in the results between the two groups and concluded that the language challenged by Plaintiffs did not cause survey participants to misunderstand how the billing process operated. (*E.g.*, 5512:14-24; 5519:18-5520:19.) Dr. Scott testified that her survey was designed to test specific language at issue in the case and she did not show participants all the material that enrollees in the Programs received. For example, she did not show survey participants a Frequently Asked Questions brochure (5484:21-5485:5, *admitted into evidence at* 5505:13-5506:22) containing the language that disclosed the billing and refund process; and she did not show participants the section of the Description of Coverage that defined Covered Persons (5460:26-5461:22). Dr. Scott's survey results do not show what a consumer who reviewed the complete set of materials sent to enrollees in the Programs would understand.

According to Dr. Scott, regardless of what language is used to describe these Programs or similar products from other insurance or credit card companies, one could not expect 100 percent of consumers to correctly answer all questions about their operation. (*E.g.*, 5520:6-19; 5612:24-5613:17.) Dr. Scott's survey does not establish to what extent incorrect answers were caused by particular language or would have been

avoided through the use of different language in the Program materials. Dr. Scott testified that she did not conduct research to develop an expert opinion on that question, and Plaintiffs did not present testimony from any other expert on that issue.

Accordingly, the Court finds that Plaintiffs did not establish a likelihood that a reasonable consumer would be deceived or misled.

*Failure to Read*

Plaintiffs offered a somewhat different theory through Dr. Ravi Dahr, a marketing professor, who was qualified as an expert in consumer behavior, consumer psychology, consumer decision making, and marketing strategy. (2561:12-2562:5.) Without citing to any specific research or evidence, Dr. Dahr testified that, in his opinion, many consumers would likely have a "default" expectation – before receiving any material from American Express – that in an insurance product of this sort they would not be billed premiums based on non-covered charges. (4353:16-4354:6.) Dr. Dhar opined that a significant number of people would not pay attention to the material provided by Defendants that explained the actual billing process. (2733:21-2734:1.) Dr. Dhar also testified that a significant number of people who did read the material would not change their default expectation about how the billing process would work. (2754:24-2756:10.) Dr. Dhar admitted that consumers have a default understanding that billing mistakes can happen (4355:10-12), but opined that they would understand the "there may be occasions" phrase in the Program materials to mean that premium charges based on non-covered charges would happen infrequently. (2754:24-2756:10.)

Ultimately, in light of all the evidence presented to the Court, the Court was not persuaded by his opinions.[24] Dr. Dhar admitted that businesses would review the

[24] Dr. Dhar admitted on cross-examination that he was unable to offer any opinion as to how many cardholders still would have enrolled in the programs if the disclosures had been perfect in the opinion of Dr. Dhar. He admitted that he could not quantify the number of enrollees whose decision to enroll had been affected by the "pay only when you fly" language; indeed, he did not even try to determine how many consumers enrolled because they saw that phrase. Dr. Dhar was unable to offer any opinion or evidence to establish that the "pay only when you fly" or "there may be occasions" language was material to consumers, or that any number of

advertising materials and make decisions whether to enroll differently from consumers. Dr. Dhar also admitted that consumers who had some pre-existing information about how the Programs worked (such as cardholders who had received solicitation letters in the past, had spoken with Defendants' telephone operators in the past, or had actually been enrolled in one of the other available Programs), would understand the information in the Program materials differently from other consumers. Nonetheless, Dr. Dhar admitted that he assumed that enrollees had no pre-existing information. (4394:27-4396:17.) As a result, the Court finds that Dr. Dhar's opinions could not be applied to class members with pre-existing information.[25]

Dr. Dhar's opinions were not supported by any empirical investigation into what cardholders actually read or understood, or by a comparative analysis of consumer insurance products. Neither Dr. Dhar nor any other expert conducted a survey of class members to evaluate what they read and understood. Dr. Dhar admitted that he could not quantify, and did not attempt to quantify, the percentage of consumers whom he believed would simply ignore the materials they received from American Express and the percentage of those who would read them in a way that failed to alter their "default" expectation. Furthermore, even if Dr. Dhar were correct that some number of consumers would not read the material provided to them or would not alter their default expectations after reading it, his testimony did not persuade the Court that this would be attributable to any deceptive conduct by Defendants, because the Court finds that

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consumers enrolled because of that language, rather than for some other reason. (4432:28-4437:7.) In fact, Mr. Carr remained enrolled in the airflight program even after he claimed to have discovered how it actually worked, because he believed the benefits outweighed the nuisance of having to seek refunds. (1734:7-16; DX 5672, 173:17-23.) Dr. Dhar also relied on certain telephone scripts, but was unfamiliar with testimony by American Express employees, which he admitted had been provided to him by Plaintiffs' counsel, indicating that the scripts he reviewed and relied on for his opinions were drafts that American Express did not use. (*E.g.*, 4280:10-4281:12, 4281:26-4282:26.)

[25] Mr. Brunner testified in Phase 1 that at least 1.47 million class members made changes in their enrollment by adding another program or changing their coverage level in a program. (786:26-787:10.)

disclosures regarding the billing and refund process were conspicuous, repeated on Program materials and billing statements, and written in clear and accurate language.

In support of Dr. Dhar's theory, Plaintiffs cited *Williams v. Gerber*, in which the Ninth Circuit reversed the dismissal (at the pleading stage) of a UCL claim in which the plaintiffs alleged that the defendant falsely advertised its products as "fruit juice snacks," accompanied by pictures of fruit. The court found that a reasonable consumer could not be expected to look beyond the misleading representations on the front of the box to discover the truth – that there was no real fruit juice in the container – from a small-print ingredient list on the side of the box. 523 F.3d at 940.[26]

This case is not analogous. First, there was no deceptive advertising here. As explained above, the phrases "pay only when you fly" and "may be occasions" did not misrepresent the insurance and were not likely to mislead or confuse a reasonable consumer. Second, insurance is not like juice. The Court finds that a reasonable consumer would expect insurance to be subject to terms and conditions that cannot be set forth in a few lines of advertising (no matter how clear), and would understand the importance of such supplemental material. Third, in that context, the billing and refund disclosures were not hidden. They were contained in terms and conditions provided with solicitation letters, on enrollment forms, in descriptions of coverage, and in Frequently Asked Questions brochures. The language used was easy to understand; indeed, Professor Baker agreed that the language in Frequently Asked Questions brochures he was shown on cross-examination was clear. Disclosures (along with a refund coupon) appeared again on cardholder billing statements, and there was no evidence that the language on the billing statements was misleading, ambiguous, or confusing. On the contrary, testimony by the class representatives indicated that they

[26] Although Plaintiffs cited the version of *Williams* appearing at 523 F.3d 934, the court subsequently modified its opinion at 552 F.3d 934 (2008). *Williams* involved a ruling on a motion to dismiss. Here, by contrast, the Court is ruling after the presentation of evidence at trial.

believed the language was clear, and they understood that they could request and receive a credit if they were billed a premium on a non-covered airline charge.

The Court finds that a reasonable consumer would read the disclosure material provided by Defendants and would understand it. If some consumers fail to read the material, that failure is not caused by any wrongful or deceptive conduct by Defendants. Similarly, if some consumers have a default expectation that they do not alter after reading the material, that is not because it was written in a way that a reasonable consumer would not understand. Finally, even if the Court had been persuaded by Dr. Dhar's opinion concerning "default" expectations of consumers, his testimony did not establish that cardholders had an expectation about the billing process that was actually inconsistent with the operation of the Programs for a typical cardholder. As noted above, the evidence indicated that the majority of cardholders would have to request a refund only infrequently.

*Billing and Refund Practices*

The evidence also did not establish that Defendants engaged in a deceptive business practice by collecting and retaining premiums that were billed in connection with non-covered airline charges.

The practice was not deceptive because the billing and refund process was fully disclosed in an unambiguous contract and explained in other Program materials. *See Citipostal, Inc. v. Unistar Leasing*, 283 A.D.2d 916, 918 (2001); *Van Ness v. Blue Cross of Cal.*, 87 Cal.App.4th 364, 368, 376-77 (2001). Under that disclosed process, cardholders had to identify premiums billed in connection with non-covered charges and to ask American Express to credit those premiums.

Plaintiffs argued that the Programs were deceptive because the language in certain solicitation or enrollment materials (as opposed to the descriptions of coverage) did not say that the cardholder "must contact" American Express for a refund, but used somewhat different language such as "I agree to contact American Express for a refund," "please contact us for a refund," or "just let us know and we will issue a

credit." There was no evidence that any of these phrases would cause a reasonable consumer to believe that the cardholder did not need to contact American Express for a refund or that refunds would be provided automatically. To the contrary, all of these phrases would cause reasonable consumers to understand that they needed to contact American Express to obtain a refund.[27]

Plaintiffs argued that Defendants unfairly took advantage of a foreseeable failure by cardholders to request refunds, citing *Drizin v. Sprint*, 3 A.D.3d 388 (2004) and 12 A.D.3d 245 (2004). In *Drizin*, the plaintiff alleged that the defendants maintained numerous toll-free call service numbers that were nearly identical (except for one digit) to the toll-free numbers of competing long distance telephone service providers, that consumers who misdialed one of these numbers were not aware that they had been routed to a different long-distance provider, and that they were charged rates far in excess of those charged by their intended provider. The evidence at trial did not show any comparable conduct by Defendants in this case.

There was no evidence that Defendants established the refund process to profit from enrollees' failure to request refunds, and no evidence that Defendants tried to deceive or mislead them when premiums were billed in connection with non-covered

[27] All enrollees also received the "must contact" language in the description of coverage, which was part of the contract. Plaintiffs argued that the "must contact" language came later, and that having cardholders sign a statement that they "agree" to contact American Express for a refund was different because under New York law the words "I agree" cannot create a condition precedent. (Pl.'s Trial Br. at 10 n.3.) The evidence did not establish that the sentence, "I agree to contact American Express for a refund," means something different to a reasonable consumer than the sentence, "the cardholder must contact American Express for a refund." Furthermore, Plaintiffs' contention that "I agree" cannot create a condition precedent was not supported by the authority cited. In *Manning v. Michaels*, 149 A.D.2d 897, 898 (1989), the case cited by Plaintiffs in their trial brief, the sentence at issue was the following: "By signing this Rider, Seller's attorney has agreed to act as escrow agent as provided above." The question before the court was whether the signing of the rider was a condition precedent to contract formation, not whether what the party "agreed" to do – act as escrow agent – was a condition precedent to some obligation of the other party to the contract. In short, the phrase alleged to be a condition precedent was "by signing," not the phrase "has agreed." Accordingly, the court's ruling did not depend on the use of the particular words "has agreed."

airline charges. Rather, the refund process existed because the airline data did not clearly identify non-covered charges and enrollees were in the best position to do so. The evidence established that an enrollee who called or sent in a coupon with a valid refund request would receive a full credit. From the time of enrollment, cardholders were advised of the need to request refunds, and the process was easy. The billing statements were not misleading because they showed the airline charge, separately indicated where a premium was billed in connection with that charge, and directed the cardholder to deduct the premium if the underlying airline charge was not covered. In addition, while Plaintiffs emphasize that premiums were billed for non-covered charges, there was also evidence – including evidence from ADI – that there were other errors in cardholders' favor because filters employed by AETRS prevented premiums from being billed on certain ticket charges.

Accordingly, the Court finds that Defendants did not engage in a deceptive business practice or use false or misleading advertising.

**B. Plaintiffs' Failure to Prove Unfair Business Practices in Violation of Cal. Bus. & Prof. Code § 17200 (Unfair Business Practices)**

The Supreme Court has not yet articulated a test for an unfairness claim brought by a consumer under § 17200, and the courts of appeal have used three different tests: (1) the "balancing" test that pre-dated the Supreme Court's decision in *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal.4th 163 (1999), *see, e.g., McKell v. Wash. Mut., Inc.*, 142 Cal.App.4th 1457 (2006); (2) the test announced in *Cel-Tech* for unfairness claims brought by a competitor, *see, e.g., Buller v. Sutter Health*, 160 Cal.App.4th 981, 991 (2008); and (3) the three-part test under section 5 of the FTC Act, *see, e.g., Camacho v. Automobile Club of Southern California*, 142 Cal.App.4th 1394, 1403 (2006).

Under the "balancing" test, an unfair business practice is one that "offends an established public policy or ... is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *People v. Casa Blanca Convalescent Homes,*

*Inc.*, 159 Cal.App.3d 509, 530 (1984). The court examines the practice's "impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer. In brief, the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim." *Motors, Inc. v. Times-Mirror Co.*, 102 Cal.App.3d 735, 740 (1980). Courts applying the *Cel-Tech* test to claims brought by a consumer hold that the allegedly unfair business practice must be "tethered" to a legislatively declared policy or must have some actual or threatened impact on competition. *Buller*, 160 Cal.App.4th at 991. Finally, under the FTC Act test, (1) the consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided. The Court need not resolve which test applies because Plaintiffs failed to prove that Defendants engaged in an unfair business practice under any of these standards.

In general terms, Plaintiffs contended that the operation of the Programs was unfair because Defendants billed insurance premiums on charges that they knew or should have known were ineligible for coverage; because Defendants needlessly placed the burden on enrollees to request credits or refunds when they were billed for non-covered charges, knowing that many of them would fail to do so; and because it would be unfair to allow Defendants to keep premiums that were billed for non-covered charges, but that class members did not ask to have refunded, when Plaintiffs can identify those unrefunded premiums now.

The factual assertions on which these arguments depend were not established by the evidence presented at trial. Plaintiffs presented no evidence that Defendants knew or could have known when a cardholder purchased an airline ticket for an uninsured passenger. Similarly, the evidence showed that airline data was inconsistent and unreliable, and did not clearly identify the nature of the charge. Plaintiffs' airline expert, Mr. Neylan, was frequently unable to say whether charges were for tickets when he reviewed transaction records received by AETRS. Dr. Kalyanam testified that

nothing in the data states whether a charge is actually for a ticket, and he referred to conflicts and anomalies in the data. Mr. Jones testified that airline data is not always reliable and that Defendants currently use a very conservative method that likely treats certain airline tickets as non-ticket charges. Plaintiffs offered no evidence that there was any process or information that would have allowed Defendants to credit premiums automatically where there was no credit from an airline, and failed to establish that, where AETRS did receive such credits, its billing systems could match them to previous airline charges and determine the cardmember's entitlement to a premium refund. The evidence did not establish that Defendants knew or could have known when cardholders had airline charges that were ineligible for insurance coverage, or that Defendants had the power to cause airlines to provide different or better data.

Defendants' reliance on enrollees to identify premiums that were billed in connection with non-covered charges was not only reasonable but unavoidable. It was easy for enrollees to deduct charges or obtain refunds, and Defendants depended on the information provided by cardholders to determine whether credits were due. The refund process was clearly disclosed in the Program materials, and the testimony by the class representatives demonstrated that they knew from the time they enrolled that they would need to request refunds of premiums billed in connection with non-covered charges, and in fact did so on some occasions. On other occasions, they chose not to deduct the charge or request a refund, even though they knew they were entitled to do so. The failure of class members to deduct charges or claim refunds on certain occasions when they may have been entitled to do so is not fairly attributable to Defendants.

Plaintiffs argued that, whether or not Defendants' billing and refund practices were wrongful, Plaintiffs have now identified premiums that were billed for non-covered airline charges and it would be unfair to allow Defendants to keep them. As summarized above, Plaintiffs' experts revealed limitations and inconsistencies in the data, rendering the identification of non-covered charges speculative and unreliable in the absence of information provided by cardholders themselves. Moreover, evidence

that was unpersuasive in the aggregate was altogether absent with respect to individual accounts.

The Court also disagrees with the premise that Defendants should be held liable even if they did not engage in wrongful conduct. While the UCL protects consumers from deceptive and unfair practices, no such practices were proved in this case. The billing and refund terms of the Programs were disclosed to cardholders, were set forth in unambiguous contracts, and there were instructions and refund coupons included on billing statements telling cardholders to deduct any premiums that had been billed for non-covered airline charges. The process had a reasonable rationale because the data did not clearly identify charges as ineligible for insurance coverage, whereas individual cardholders possessed the necessary information to identify them. The failure of some cardholders to exercise their right under the contract to obtain a refund, when that option is made easy and plainly and repeatedly disclosed to them, is not something for which the law holds Defendants liable and under the facts here is not a proper occasion for judicial intervention. Moreover, in this case, there is an existing refund process through which cardholders may still obtain a refund of premiums they paid for non-covered airline charges, without any time limit.

Defendants' conduct was not "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." The Programs were clearly described and disclosed to cardholders, had high levels of customer satisfaction, and operated under lawful contracts. There were unavoidable limitations in the airline data, and Defendants acted in good faith and worked to make the Programs more convenient for cardholders. Throughout the class period, AETRS's billing systems used different filters that prevented premiums from being billed on certain airline charges. The use of such filters reduced the number of occasions on which cardholders had to contact American Express for a refund, but also caused AETRS not to bill premiums on charges that were for airline tickets. The fact that AETRS added filters and made refinements over time does not indicate that each previous system was unfair.

Defendants' efforts to enhance the convenience of the Programs through the use of billing filters and automatic credits had to be balanced against the need to collect premiums on covered risks in order to create and maintain funds out of which claims could be paid. Defendants' billing and refund practices during the class period fell within the scope of proper business decision-making and Defendants were not required to employ the most conservative billing filters, particularly where doing so would result in a failure to bill premiums on airline ticket charges. Plaintiffs did not establish that the operation of the Programs was contrary to any legislatively declared policy or had some actual or threatened impact on competition.[28]

Plaintiffs also did not demonstrate that there was a substantial injury to consumers that would support a finding of unconscionability. Moreover, under the circumstances here, identifying the amount of unrefunded premiums billed or paid for non-covered charges would not by itself establish a substantial injury because the

[28] Plaintiffs argued that insurance law generally does not permit an insurance company to retain a premium where no risk has attached. However, the entity that collected the money from Plaintiffs was Defendant AETRS and, according to Professor Baker, AETRS was not an insurance company. The insurance policies in this case were group policies. In group policies the insurance is underwritten by a regulated insurance company, here Amex Assurance Company. The group policy is underwritten on a group basis rather than an individual basis. The contracts of insurance are "master policies" issued to the group representative, here AETRS. The group representative usually charges the members of the group and then pays the premium to the insurance company. The premium paid by the group representative is determined by group characteristics and often discounted as a result. Certificates are then issued to individual members of the group defining the individual's coverage. This division of duties and responsibilities between AETRS and Amex Assurance explained, in part, why Professor Baker was unable to define the payments made by cardmembers to the Defendants. They were not premiums, because "premiums" as used in the insurance context relate to compensation to an insurance company for their exposure to risk. Money collected by AETRS for non-covered situations cannot be called "premiums." Whatever the charges were called it was undisputed in this case that enrollees were entitled to deduct the premium charge, or obtain a refund, if it was billed in connection with a non-covered airline charge. The contract set forth a lawful process through which premiums would be returned, and Professor Baker stated that he found no violation of insurance laws or regulations by Defendants. Moreover, to determine whether the underlying airline charge was eligible for coverage, Defendants depended on information provided by enrollees. The evidence presented by Plaintiffs did not establish which premiums were paid where no risk attached, nor did it establish that Defendants could have made that determination without receiving information from enrollees.

contract between the parties expressly permitted the challenged conduct and there was no violation of class members' rights. *See, e.g., Missing Link v. eBay, Inc.*, No. C-07-04487 RMW, 2008 WL 1994886 at *6 (N.D. Cal. May 5, 2008) (citing *Camacho*, 142 Cal.App.4th at 1406).

Plaintiffs failed to prove an injury that was not outweighed by countervailing benefits to consumers or competition. The Programs are attractive and valuable, particularly in that they provide consumers with peace of mind in knowing that coverage will be provided whenever they use their American Express cards to purchase airline tickets for covered persons. Given the limitations in the airline data and the inability to distinguish between insured and uninsured persons, Plaintiffs did not establish that these Programs could be offered without the need for cardholders to request refunds. Mr. Carr, the representative of the California subclass, testified that the benefits of the insurance outweighed the nuisance of having to send in a refund coupon. The evidence showed not only that there was very high customer satisfaction with the Programs, but that there was very high customer satisfaction among people who had sought refunds for ineligible charges. The availability of automatic per-trip travel insurance was valuable to consumers and provided an alternative to competing products that billed fixed premiums on a periodic basis or could be purchased separately for specific trips.

Finally, the injury claimed by Plaintiffs is one that was reasonably avoidable by enrollees in any event. *See, e.g., Shadoan v. World Sav. & Loan*, 219 Cal.App.3d 97, 103, 106 (1990); *Shvarts v. Budget Group, Inc.*, 81 Cal.App.4th 1153, 1159-60 (2000). Enrollees were entitled to avoid payment of premiums billed for non-covered airline charges by deducting them from their payments to American Express. The process was clearly disclosed and straightforward and easy to use.

**C. Plaintiffs' Failure to Prove Causation**

To prevail on any claim under §§ 17200 or 17500, or under G.B.L. § 349, Plaintiffs must prove that the injury was caused by Defendants' conduct. Cal. Bus. &

Prof. Code §§ 17204, 17535; *In re Firearm Cases*, 126 Cal.App.4th 959, 980-81 (2005); N.Y. G.B.L. § 349(h); *Small v. Lorillard Tobacco Co., Inc.*, 94 N.Y.2d 43, 55 (1999). Plaintiffs did not establish causation.[29]

First, with respect to the class representatives, the evidence did not establish that they enrolled in one of the Programs as a result of reading allegedly misleading statements. Mr. Carrier testified that he learned about the insurance from his wife, and could not recall whether he ever saw any solicitation material from Defendants. Mr. Carr recalled seeing material that had language similar to "pay only when you fly," but did not rely on that statement in deciding to enroll. *See Laster v. T-Mobile USA, Inc.*, 407 F. Supp. 2d 1181, 1194 (S.D. Cal. 2005); *Gale v. Int'l Bus. Machs. Corp.*, 9 A.D.3d 446, 447 (2004).[30] With respect to the class, Plaintiffs did not prove that the allegedly deceptive statements were material, such that reliance or causation could be presumed or inferred on a class-wide basis.

Causation was lacking for another reason. Plaintiffs claim that class members were injured by paying premiums billed on non-covered airline charges. But the evidence established that enrollees were not required to pay those premiums, and in fact were instructed on billing statements to deduct them from their payments to American Express. No testimony or other evidence established that the language on billing statements was unclear or inconspicuous. Indeed, testimony by the class representatives indicated that they paid the premiums knowing that they were not required to do so and could have obtained a credit at that time or subsequently. Thus, the evidence

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[29] The California Supreme Court recently held that, for the purpose of class certification, absent class members need not satisfy the requirements of injury and causation that Proposition 64 added to sections 17204 and 17535. *In re Tobacco II Cases*, 46 Cal.4th 298, 324 (2009); Cal. Bus. & Prof. Code §§ 17204, 17535. Class-wide causation may nonetheless be relevant to determining whether a challenged business practice is unfair. *See, e.g., Firearm Cases*, 126 Cal.App.4th at 980-81.

[30] Furthermore, neither of the class representatives was confused or misled about the operation of the insurance programs. Both testified that they knew they could be billed premiums in connection with non-covered charges, and knew that they were not required to pay them. Neither one paid any such premium under a misimpression or misunderstanding.

established that the asserted injury was caused not by Defendants' conduct but by class members' decision to pay charges that they were not required to pay, and were instructed not to pay. *See Brown v. Bank of Am., N.A.*, 457 F. Supp. 2d 82, 89 (D. Mass. 2006).

Plaintiffs argued that under G.B.L. § 349, the injury need not be pecuniary, and suggested that the "hassle" of requesting a refund could constitute a non-pecuniary injury caused by Defendants' conduct. But the evidence indicated that the refund process was quick and easy, and the Court finds that the act of filling out a coupon or making a phone call in that context does not constitute an injury. Furthermore, it is not caused by a deceptive business practice. The need to request refunds was disclosed to cardholders in advance, and the evidence showed that a refund process is unavoidable in this kind of automatic, per-trip insurance. Consumers who wished to avoid the alleged "hassle" of requesting a refund could have obtained travel insurance that billed fixed premiums on a periodic basis, or purchased standalone insurance to cover them on specific trips. Finally, the evidence did not establish which members of the class suffered this alleged non-pecuniary injury, or how often.

**D. Plaintiffs' Failure to Prove that the Contracts Are Unconscionable**

Plaintiffs argued that the contracts for the Programs at issue in this case are unconscionable. Plaintiffs' arguments were similar to the arguments they made concerning the alleged unfairness of the Programs. The Court finds that the contracts are not unconscionable.

"An unconscionable contract [is] one which is 'so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforceable according to its literal terms.'" *Gillman v. Chase Manhattan Bank*, 73 N.Y.2d 1, 10 (1988). A determination of unconscionability generally requires proof of both procedural and substantive unconscionability. *Id.* at 10-11.

Procedural unconscionability "requires an examination of the contract formation process and the alleged lack of meaningful choice." *Id.* at 10. "The focus is on such

matters as the size and commercial setting of the transaction, whether deceptive or high-pressured tactics were employed, the use of fine print in the contract, the experience and education of the party claiming unconscionability, and whether there was disparity in bargaining power." *Id.* at 10-11.

The Court finds that there was no procedural unconscionability. The contract terms were unambiguous, written in plain language, and clearly disclosed. *See, e.g.*, *Morris v. Snappy Car Rental, Inc.*, 637 N.E.2d 253, 256-57 (N.Y. 1994). Although not negotiated by individual cardmembers, one of the terms at issue, the "there may be occasions" billing term, was negotiated in the settlement of the *Corrado-Lifschitz* actions by attorneys representing a class of American Express cardholders. Those attorneys included the "there may be occasions" language with the intent of fully disclosing American Express's billing practices in the airflight insurance program. The refund process itself was negotiated by the same experienced plaintiffs' attorneys in the same class action settlement. Furthermore, Defendants did not use deceptive or high pressured tactics in marketing the insurance, and there was no unfair surprise. Cardholders also had meaningful alternative choices. First, cardholders had automatic insurance simply by possessing an American Express card and using it to purchase airline tickets, at no additional cost above the card's annual fee. Second, cardholders could have purchased competing travel insurance products that billed fixed premiums on a periodic basis or provided coverage for single trips. *See, e.g.*, *Ranieri v. Bell Atlantic Mobile*, 304 A.D.2d 353, 354 (2003); *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.*, 505 F.2d 989, 1002-03 (2d Cir. 1974). Plaintiffs did not prove that class members, which included consumer, small business, and corporate American Express charge card holders, were unsophisticated, though the Court concludes that Defendants' billing and refund practices were disclosed clearly enough that the contracts still would not be unconscionable even if class members are assumed to be relatively unsophisticated consumers.

Substantive unconscionability "entails an analysis of the substance of the bargain

to determine whether the terms were unreasonably favorable to the party against whom unconscionability is urged." *Gillman*, 73 N.Y.2d at 12. The substance of the bargain was "peace of mind" when airline tickets were purchased. No class member was denied this benefit. Plaintiffs argued that the billing terms of the contract were unconscionable because they allegedly allowed Defendants to bill premiums when they knew no risk would attach and relieved Defendants of any obligation to bill correctly.

As noted above, the evidence did not show that Defendants could identify non-covered airline charges from the data alone and that they knew or could have known when cardholders had incurred ineligible charges. The billing terms of the contract had a reasonable and cogent rationale given the special nature of insurance – the need to collect premiums for the assumption of risk – and the unreliability and limitations of the airline data.[31] In that context, the terms were not unreasonably favorable to Defendants, and under the contract cardholders could avoid payment of those premiums by deducting them or obtaining a refund. *See Guerra v. Hertz Corp.*, 504 F. Supp. 2d 1014 (D. Nev. 2007) (avoidable charge not unconscionable). Under the contract, insurance was provided for all covered trips regardless of whether a premium was billed.[32]

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[31] Unconscionability is assessed at the time of contract formation. *State v. Avco Fin. Serv. of N.Y. Inc.*, 50 N.Y.2d 383, 390 (1980); *Don King Prods., Inc. v. Douglas*, 742 F. Supp. 778 (S.D.N.Y. 1990). Here, the evidence indicated that some class members had been enrolled in the insurance program since long before the class period; indeed, some were members of the *Corrado-Lifschitz* settlement class in 1983. However, Plaintiffs argued that a contract that is not unconscionable at the time of its formation may become so later on, citing *Lawrence v. Miller*, 11 N.Y.3d 588 (2008). *Lawrence* involved a law firm's contingency fee arrangement, and the Court of Appeals stated that its analysis of circumstances that arose after contract formation was based on the special role of the courts in closely scrutinizing contingent fee agreements between attorneys and their clients. *Id.* at 596. In any event, the evidence in this case did not establish that there was a point at which existing contracts became unconscionable.

[32] Plaintiffs argued that a contract that places no obligations on one of the parties may be unconscionable, citing *Mandel v. Liebman*, 303 N.Y. 88 (1951). At issue in that case was an entertainment management contract that the Appellate Division found unconscionable because the manager was not obligated to provide any services but was entitled to payment in perpetuity – an interpretation of the contract rejected by the Court of Appeals. In any event, no such situation is present here. The contract required Defendants to provide insurance, and there was no claim that cardholders did not receive the insurance to which they were entitled. With

Plaintiffs argued that the refund term of the contract is unconscionable because, by requiring cardholders to make individual refund requests, it prevents collective action to recover those premiums in a class action. Plaintiffs likened the refund process to a contractual provision that bars class actions or class arbitrations and thereby operates as an exculpatory clause for wrongful conduct.

The cases relied on by Plaintiffs involve contract terms that universally bar collective action to redress any claimed wrong and require the consumer to assert any claim or dispute in an individual arbitration. *See, e.g., Discover Bank v. Superior Court*, 36 Cal.4th 148, 153-54 (2005). As *Discover Bank* explained, such contract provisions have been questioned by courts because, where wrongful conduct causes only a small injury to each consumer individually, the amount of individual recovery is insufficient to justify bringing a separate action, and as a result the defendant retains the benefits of its wrongdoing. 36 Cal.4th at 156-57.

Plaintiffs' effort to liken the refund process to a contractual prohibition on collective action is misplaced, for numerous reasons.

First, lawsuits or arbitrations, even under the best of circumstances, involve effort, time, and expense (even where arbitration allows for flexible and relaxed procedures). Consumers are understandably disinclined to file an individual action where the pecuniary injury caused by the defendant's wrongful conduct is relatively insignificant. But no one is required to file a lawsuit or an arbitration to obtain a refund of a premium billed for a non-covered airline charge. Cardholders may deduct the

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respect to billing, the contract described the types of non-covered charges on which premiums could be billed, and required Defendants to refund those premiums when cardholders requested refunds in accordance with the contract's terms. The evidence showed that during the class period, AETRS employed filters that prevented its billing systems from assessing premiums on certain airline charges, including some airline tickets on which a premium may have been due. Plaintiffs' argument is not that Defendants did nothing at all but that they should have employed additional or different billing filters that would have further reduced the number of premiums billed for non-covered airline charges. As explained above, the Court finds that during the class period Defendants acted in good faith and within the scope of permissible business decision-making with respect to the billing of premiums.

charge from their payments to American Express in the first place, or they may obtain a credit for charges already paid by sending in a coupon provided with their billing statement or calling American Express at a toll-free number. Testimony at trial established that the process was simple and took only a few minutes. Moreover, unlike a lawsuit or arbitration, which is typically a contested proceeding in which elements must be proved and no particular result is guaranteed, the evidence here indicated that American Express accepted cardholders' explanations about the nature of the airline charges and issued a full credit for premiums paid on charges that cardholders identified as non-covered. While claims brought in a lawsuit or arbitration are subject to statutes of limitations, there was no time limit on cardholders' ability to obtain a refund through the contractual process. And while consumers may decide not to file an individual lawsuit or arbitration to recover $5 or $30, the evidence in this case showed that many cardholders, including the class representatives, used the refund process, and that Defendants refunded millions of dollars during the class period.

Second, given these differences between the refund process and an individual lawsuit or arbitration, it is not inequitable to hold consumers to the contractual refund process. The process was reasonable because of the limitations in the airline data. It was disclosed to cardholders in advance, and reminders and instructions were included on billing statements. It was not unduly burdensome; indeed, the evidence showed that American Express made it easy for cardholders to deduct charges or obtain refunds. Under these circumstances, the fact that some cardholders may not have asserted their right under the contract to deduct charges or obtain refunds does not make the contract unconscionable.

Third, unlike a contract term that requires all claims to be brought in an individual arbitration, the refund process is not a universal bar on any claim that might be asserted collectively against Defendants. It did not prevent Plaintiffs from filing a putative class action or from obtaining class certification in this case. But the conduct of class members in failing to request refunds in the manner agreed in the contract

prevents Plaintiffs from prevailing on the particular claims asserted in this lawsuit. That is not a prohibition on all collective action; it could be considered akin to a finding in a given case that individualized issues prevent class certification. Factors that render certain claims under particular facts unsuccessful as class actions cannot be equated with an unequivocal bar on collective action.

Fourth, the failure of some cardmembers to use the refund process does not exculpate wrongful conduct in any event. The refund process is the contractually agreed method for refunding or crediting premiums billed for non-covered charges, consistent with the billing terms of the same contract. The challenged billing practices were authorized by a lawful contract and Plaintiffs failed to establish that the practices were wrongful. Plaintiffs did not prove any intentional wrongdoing or gross negligence on the part of Defendants. Indeed, the Court found Defendants' employees' testimony about their and the company's desire to provide good customer service and their belief that the company did the best it could in charging premiums to be credible and convincing. There was no credible evidence that Defendants or their employees acted in anything other than good faith.

Fifth, Plaintiffs' argument that the refund process is unconscionable implies that there is an alternative that does not require individual refund requests from cardholders, but that was not supported by the evidence. Plaintiffs did not reliably establish which premiums were billed and paid for non-covered airline charges or prove that, without collecting information from individual cardholders, any such premiums in excess of refunds already obtained could be returned to the particular cardholders who paid them.

The same failures of proof apply to Plaintiffs' argument that the contract should be held unconscionable simply because it would allow Defendants to keep millions of dollars in premiums that cardholders were entitled, but did not ask, to have refunded. A contract is not unconscionable simply because, as a result of one party's non-performance, the other party receives or retains money that it otherwise would not. Under the contract, cardholders were not required to pay that money in the first place

and were entitled to receive a refund by requesting it as set forth in the contract. Indeed, even now, under the contract cardholders may request and obtain refunds that they paid for non-covered airline charges, to the extent they have not already obtained refunds.

Having reviewed all the evidence, the Court finds that the contract is not unconscionable.

**E. Plaintiffs' Failure to Establish that that their Non-Performance Should Be Equitably Excused**

Plaintiffs contended that they should be equitably excused from their failure to satisfy the contractual requirement of requesting refunds because otherwise that contractual condition would cause the class to forfeit millions of dollars. Plaintiffs contended that the applicable standard is set forth in *Oppenheimer & Co., Inc. v. Oppenheimer, Appel, Dixon & Co.*, 86 N.Y.2d 685, 691 (1995), which quoted section 229 of the Restatement (Second) of Contracts: "[t]o the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange." Plaintiffs also cited *Fifty States Management Corp. v. Pioneer Auto Parks, Inc.*, 46 N.Y.2d 573, 576-77 (1979), which states: "It is true that equity will often intervene to prevent a substantial forfeiture occasioned by a trivial or technical breach. To permit literal enforcement of an instrument in such circumstances, it is reasoned, is to elevate the nonperformance of some collateral act into the cornerstone for the exaction of a penalty."

The Court finds that cardholders' nonperformance should not be equitably excused. The Court sees no unfairness or inequity in requiring that class members comply with the terms of the contract, and contact American Express to obtain any refunds that they believe are due to them.

First, a refund request was "material to the agreed exchange," and the failure to make one is not a "trivial or technical breach." The evidence showed that the rationale for requiring cardholders to request a refund is that they were in the best position to

identify non-covered airline charges. As discussed above, Defendants could not reliably know from the data when cardholders incurred ineligible charges, and with respect to uninsured passenger charges, the only source of information was cardholders themselves. The refund requirement was neither unreasonable nor unduly burdensome on cardholders. Plaintiffs would substitute for this contractual refund process a probabilistic and statistical approach to try to estimate, after the fact and on an aggregate basis, the amount of premiums billed for non-covered airline charges.[33] The Court is not persuaded that this alternative approach is reliable, and it does not demonstrate that the refund process was immaterial to the parties' bargain. Furthermore, because it would replace the reliable method for the identification of non-covered charges agreed upon in the contract with one based on probabilities and significant speculation – and that suffered from errors in its execution – equitable excuse of the condition would prejudice Defendants. *See Dan's Supreme Supermarkets, Inc. v. Redmont Realty Co.*, 216 A.D.2d 512, 513 (1995).

Second, enforcement of the condition does not cause a forfeiture. *Oppenheimer*, which quoted the Restatement formulation, notes that the Restatement defines a forfeiture as "the denial of compensation that results when the obligee loses [its] right to the agreed exchange after [it] has relied substantially, as by preparation or performance on the expectation of that exchange." 86 N.Y.2d at 692 n.2. Here, the Court's decision not to equitably excuse cardholders' nonperformance does not cause cardholders to lose a right to receive a refund. Cardholders retain their right under the contract to receive a refund through the process set forth in the contract. The testimony indicated that the

[33] Features of Dr. Kalyanam's methodology render it unsuitable as a billing process that AETRS could employ in its day-to-day operations. Among other things, Dr. Kalyanam assigned certain categories of airline charges, coded the same way, a "probability" that they were tickets, in effect counting only a percentage of them as charges on which a premium should be assessed. He also tried to account for certain "bulk anomalies," but the identification of particular "anomalies" as "bulk" is something done retrospectively based on an analysis of other data.

class representatives understood their right to obtain refunds and that they could exercise it at any time. Nothing in the Court's decision prevents Carr, ADI, or any other class member from requesting and obtaining a refund directly from American Express. Plaintiffs argued that there is forfeiture because, as a practical matter, cardholders who have not previously requested refunds of particular charges are unlikely to do so now. However, Plaintiffs did not cite any authority that would warrant treating as a "forfeiture" the probable inaction of some class members in exercising their right to a refund under the contract, as opposed to the loss of that right.

Third, even if the Court were to accept Plaintiffs' argument that a forfeiture does not require the loss of any right but only a likelihood that the right will not be exercised by some significant portion of the class, Plaintiffs did not prove a disproportionate forfeiture. Plaintiffs' contention that the forfeiture was disproportionate relied on an aggregate, class-wide amount. However, the evidence was insufficient to establish in a reliable manner the aggregate amount of the premiums billed and paid for non-covered airline charges in excess of the refunds received. Furthermore, even if that amount could be and had been reliably established, it would have to be evaluated in the context of aggregate non-performance by class members. But Plaintiffs did not show how those amounts were distributed among class-members and did not prove that the total alleged forfeiture was disproportionate to the aggregate non-performance by class members.[34] The refund process was clearly disclosed, was easy to use, and reminders and instructions were included on cardholders' billing statements.

Fourth, excusing non-performance of the condition would not avoid the

[34] The evidence was insufficient as to the class representatives as well. Mr. Carr testified that he did not request certain refunds because he did not consider it worth his time given the amount of money at stake. That calculation effectively reflects a judgment on Mr. Carr's part that the "forfeiture" is not disproportionate to his failure to perform, and it does not articulate a compelling equitable reason to excuse the non-performance. Mr. Carrier, ADI's president, similarly knew he could obtain refunds, did so on some occasions, deliberately attempted to incur some premiums for non-covered charges as a "test," and requested a refund of $265 from American Express.

"forfeiture" to which Plaintiffs refer in any event. Even if cardholders were not required to request refunds, they would not be entitled to recover the money in this lawsuit without proving a breach of contract. As established by the evidence in Phases 1 and 2 of the trial, Plaintiffs did not prove a breach of contract and, therefore, independently of their failure to request refunds, are not entitled to money damages in this lawsuit.

Taking into account all the evidence presented, the Court concludes that equitable considerations do not excuse non-performance under the contract by Plaintiffs or any other class members.

**G. Plaintiffs' Failure To Prove Breach of Contract**

The evidence presented in Phase 1 and 2 of the trial establishes that Defendants are entitled to judgment on Plaintiffs' claim for breach of contract. The Court resolved factual issues relevant to that claim that require judgment for Defendants, and there are no other issues that need to be presented to a jury. *See, e.g., Nwosu v. Uba*, 122 Cal.App.4th 1229, 1241-42 (2004).

In Phase 1, the Court rejected Plaintiffs' proffered interpretation of the contract and finds in Phase 2 that the contract was not unconscionable and that class members non-performance should not be equitably excused. Accordingly, Defendants' billing practices were authorized by and consistent with the contract and there is no breach.

Moreover, because class members were required under the contract to request refunds but failed to do so as to the premiums sought in this lawsuit, the contract claim fails because of that non-performance.

In addition, to recover damages for breach of contract, the plaintiff must prove that the injury was caused by the breach. *Jorgensen v. Century 21 Real Estate Corp.*, 217 A.D.2d 533, 534 (1995). Plaintiffs cannot establish causation for breach of contract for the same reason that they cannot establish causation for the statutory claims: The alleged injury was caused not by Defendants' conduct but by the decision of Plaintiffs and class members to pay charges that they were not required to pay and were entitled

to have refunded on request. *See Cathay Pacific Airways, Ltd. v. Fly & See Travel, Inc.*, 3 F. Supp. 2d 443 (S.D.N.Y. 1998).

Finally, in Phase 2, Plaintiffs sought to establish unconscionability and forfeiture by proving the aggregate amount of premiums that class members paid for non-covered airline charges in excess of refunds obtained. The Court finds Plaintiffs' proof speculative and unreliable.

**Conclusion**

The Court finds that neither the claims of the class, nor the claims of the class representatives in particular, were established by the evidence. The Court further finds that the contracts were not unconscionable, and that class members' non-performance under the contracts should not be equitably excused. Because the Court concludes that Defendants are entitled to judgment based on Plaintiffs' failure to carry their burden of proof, the Court does not reach the affirmative defenses asserted by Defendants. Costs shall be awarded to Defendants as the prevailing parties.

Dated: 8/20/2009

Hon. George C. Hernandez

**CLERK'S DECLARATION OF MAILING**

I certify that I am not a party to this cause and that on the date stated below I caused a true copy of the foregoing STATEMENT OF DECISION – PHASE 2 to be mailed first class, postage pre paid, in a sealed envelope to the persons hereto, addressed as follows:

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I declare under penalty of perjury that the same is true and correct.
Executed on August 20, 2009

By: _____
Yolanda Estrada, Deputy Clerk
Department 607