

1 MILBERG WEISS BERSHAD
HYNES & LERACH LLP
2 BONNY E. SWEENEY (176174)
CHRISTOPHER M. BURKE (214799)
3 401 B Street, Suite 1700
San Diego, CA 92101
4 Telephone: 619/231-1058
619/231-7423 (fax)

5 HULETT HARPER STEWART, LLP
6 DENNIS STEWART (99152)
550 West C Street, Suite 1770
7 San Diego, CA 92101
Telephone: 619/338-1133
8 619/338-1139 (fax)

9 SCHRAG & BAUM, P.C.
10 THOMAS SCHRAG
JAMES BAUM
11 MICHAEL SCHRAG
280 Panoramic Way
12 Berkeley, CA 94704
Telephone: 510/849-1618
13 510/841-6050 (fax)
Attorneys for Plaintiffs

STEYER LOWENTHAL BOODROOKAS
ALVAREZ & SMITH LLP
ALLAN STEYER
D. SCOTT MACRAE
One California Street, 3rd Floor
San Francisco, CA 94111
Telephone: 415/421-3400
415/421-2234 (fax)

ENDORSED
FILED
ALAMEDA COUNTY

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CLERK OF THE SUPERIOR COURT
By Shantal R. Vinuya, Deputy

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15 SUPERIOR COURT OF THE STATE OF CALIFORNIA
16 COUNTY OF ALAMEDA
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RG03089146

18 ENVIRONMENTAL LAW FOUNDATION, a)
Non-Profit Organization, on Behalf of the)
19 General Public, CONSUMER ACTION, a Non-)
Profit Membership Organization, on Behalf of)
20 the General Public, WILLIAM S. BARRETT,)
WRAY MARACLE and HELEN MARACLE,)
21 on Behalf of Themselves and All Others)
Similarly Situated and on Behalf of the General)
22 Public,)

23 Plaintiffs,

24 vs.

25 AMERICAN EXPRESS COMPANY, a New)
York Corporation, AMERICAN EXPRESS)
26 TRAVEL RELATED SERVICES, INC., a New)
York Corporation, AMERICAN EXPRESS)
27 CENTURION BANK, a New York Corporation)
and DOES 1-50, inclusive,)
28

Defendants.

) CASE NO.:
)
) CLASS ACTION
)
) COMPLAINT FOR INJUNCTIVE RELIEF,
) RESTITUTION AND DISGORGEMENT OF
) PROFITS UNDER BUS. & PROF. CODE
) §§17200, *ET SEQ.* & CALIFORNIA
) CONSUMERS LEGAL REMEDIES ACT,
) CIVIL CODE §§1750, *ET SEQ.*

) DEMAND FOR JURY TRIAL

1 1. Plaintiffs Environmental Law Foundation, a non-profit organization, on behalf of the
2 general public, Consumer Action, a non-profit organization, on behalf of the general public, and
3 William S. Barrett, Wray Maracle and Helen Maracle on behalf of themselves and all others similarly
4 situated and on behalf of the general public, by and through their undersigned attorneys, bring this
5 action based on information and belief and investigation of counsel, except for information based on
6 personal knowledge, against defendants American Express Company, American Express Travel Related
7 Services, Inc., and American Express Centurion Bank (collectively, "American Express") and hereby
8 allege the following.

9 **INTRODUCTION AND OVERVIEW**

10 2. This case concerns a hidden transaction fee which American Express charges a
11 cardholder every time he uses his American Express card¹ to make a purchase of goods or services, the
12 price of which is denominated in a non-U.S. dollar currency (hereinafter "foreign currency"). This fee,
13 which will be referred to in this complaint as a "foreign currency transaction fee," was 1% of the
14 purchase price until on or about June 15, 1999, when American Express raised the amount of this
15 hidden fee to 2% of the purchase price. American Express charges this foreign currency transaction fee
16 whenever a cardholder makes a purchase of goods and services demonstrated in a foreign currency
17 (hereinafter a "foreign purchase") but fails to disclose either the existence or the amount of the fee on
18 cardholder billing statements or in solicitations directed to prospective cardholders. Rather than
19 disclose the fee on billing statements, American Express conceals the fee by embedding the amount of
20 the fee in the transaction amount, which is shown on the cardholder's bill in U.S. dollars. Thus, a
21 cardholder who makes a purchase in Italy denominated in Euros using his American Express card is
22 billed an amount translated to U.S. dollars without any indication that a transaction fee of 2% has been
23 added to and embedded in the transaction amount, which is shown on the bill in U.S. dollars. Plaintiffs
24 bring this action for injunctive relief to require disclosure and restitution of the foreign currency
25 transaction fees paid by citizens of the State of California and the proposed class as a result of this
26 unfair, deceptive, and illegal business practice.

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28 ¹ The American Express cards referenced to in this complaint include both charge cards, *e.g.* the
green card, and credit cards, *e.g.* the blue card or Optima card.

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JURISDICTION AND VENUE

3. Pursuant to California Code of Civil Procedure §410.10 and Business & Professions Code §§17203 & 17204, the defendants are subject to the jurisdiction of the courts of the state of California by virtue of their extensive business dealings and transactions within this state. The injuries caused by defendants, including violations of Bus. & Prof. Code §17200, occurred in California. The defendants do business in California and have sufficient minimum contacts with California or otherwise avail themselves of the credit card market in California through the marketing, promotion, issuance and use of their credit cards and charge cards so as to render the exercise of jurisdiction by the courts of California permissible and appropriate.

4. The California Superior Court has jurisdiction over this action pursuant to Constitution Article VI, §10 which grants the Superior Court original jurisdiction in all cases except those given by statute to trial courts. The statutes under which this action is brought do not grant jurisdiction to any other trial court.

5. Venue is proper in this county pursuant to Cal. Civ. Proc. Code §§395 & 395.5 and Bus. & Prof. Code §17203 because the defendants issue credit cards in substantial number to residents of the county and acquire transactions from a substantial number of merchants in this county and have collected a substantial amount of the currency conversion fees from cardholders in this county.

PARTIES

6. Plaintiff William S. Barrett is a resident of the State of California and of the County of Alameda. Plaintiff sues as a private attorney general pursuant to Bus. & Prof. Code §17200 for injunctive relief and restitution on behalf of California residents. Plaintiff also brings this action as representative of the proposed class defined herein. Plaintiff incurred a foreign charge using his American Express card within the four years preceding this complaint and was charged and paid a foreign currency transaction fee to American Express.

7. Plaintiff Wray Maracle is a resident of the state of California and of the County of San Diego. Plaintiff sues as a private attorney general pursuant to Bus. & Prof. Code §17200 for injunctive relief and restitution on behalf of California residents. Plaintiff also brings this action as a representative of the proposed class defined herein. Plaintiff incurred a foreign charge using his

1 American Express card within the four years preceding this complaint and was charged and paid a
2 foreign currency transaction fee to American Express.

3 8. Plaintiff Helen Maracle is a resident of the state of California and of the County of San
4 Diego. Plaintiff sues as a private attorney general pursuant to Bus. & Prof. Code §17200 for injunctive
5 relief and restitution on behalf of California residents. Plaintiff also brings this action as a
6 representative of the proposed class defined herein. Plaintiff incurred a foreign charge using her
7 American Express card within the four years preceding this complaint and was charged and paid a
8 foreign currency transaction fee to American Express.

9 9. Plaintiff Environmental Law Foundation is a non-profit organization based in Oakland,
10 California, dedicated to environmental and consumer protection. Plaintiff Environmental Law
11 Foundation brings this action as a private attorney general on behalf of the general public.

12 10. Plaintiff Consumer Action is a non-profit membership organization based in San
13 Francisco, California dedicated to consumer protection. Plaintiff Consumer Action brings this action
14 as a private attorney general on behalf of the general public.

15 11. Plaintiffs Wray and Helen Maracle and William S. Barrett (collectively "Class
16 Plaintiffs") assert all claims stated in the First and Second Causes of Action on behalf of themselves
17 and as representatives of a proposed class defined herein.

18 12. Plaintiffs Environmental Law Foundation, Consumer Action, and Class Plaintiffs, Wray
19 and Helen Maracle and William S. Barrett (collectively "Plaintiffs") assert all claims stated in the First
20 Cause of Action on behalf of the General Public of California.

21 13. Defendant American Express Company is a New York corporation doing business in the
22 state of California and the County of Alameda.

23 14. Defendant American Express Travel Related Services, Inc., a wholly owned subsidiary
24 of American Express Company, is a New York corporation doing business in the State of California
25 and the County of Alameda.

26 15. Defendant American Express Centurion Bank, a wholly owned subsidiary of American
27 Express Company, is a Utah corporation doing business in the State of California and the County of
28 Alameda.

1 16. Defendants Does 1-50 inclusive are sued herein under fictitious names. Their true names
2 and capacities are unknown to Plaintiffs. When their true names and capacities are ascertained,
3 Plaintiffs will amend this complaint to name them. Plaintiffs believe that each of the fictitiously named
4 defendants is responsible for the violations alleged in this complaint.

5 17. At all times mentioned in the complaint, each of the defendants was an agent of each and
6 every other defendant. In doing the things alleged in this complaint, each defendant was acting within
7 the course and scope of this agency and was acting with the consent, permission and authorization of
8 each of the other defendants.

9 **FACTUAL ALLEGATIONS**

10 18. American Express is in the business, among other things, of issuing credit and charge
11 cards to members of the public, including to citizens of the state of California. American Express also
12 contracts with merchants in California and throughout the world to accept its credit and charge cards
13 in satisfaction of the payment obligation of an American Express cardholder who tenders the card as
14 a payment device for goods or services sold by the merchant to the American Express cardholder.

15 19. The American Express cards at issue in this case confer on the holder the right to use the
16 card either to access a dollar denominated line of credit extended to the cardholder by American Express
17 or its agent or acquire goods and services by agreeing to pay American Express for the cost thereof in
18 U.S. dollars at a later date, generally within 30 days of being presented with a bill for the charges by
19 American Express.

20 20. When a consumer uses his American Express card to make a foreign purchase, there is
21 no obligation for the consumer to deliver the purchase amount in the foreign currency to the merchant.
22 Rather the cardholder is obligated to deliver the U.S. dollar equivalent of the foreign charge to
23 American Express or its agent.

24 21. When the consumer incurs a foreign charge, American Express undertakes to translate
25 that foreign charge into U.S. dollars on the cardholder's bill using an exchange rate, which it unilaterally
26 determines. After translating the amount of the foreign charge to U.S. dollars, American Express
27 imposes a 2% foreign currency transaction fee (previously 1%), which it embeds in the transaction
28 amount in U.S. dollars where it is invisible to the consumer. Neither the fact that American Express

1 has levied a fee, nor the amount of the fee, is disclosed anywhere on the bill. The foreign currency
2 transaction fee is the only fee levied on cardholders by American Express which is not disclosed on the
3 billing statement. It is the only fee which is embedded in the transaction amount billed to the
4 cardholder.

5 22. In addition, in the ordinary course of its business, American Express solicits members
6 of the public to apply for, receive and use an American Express card. In the course of that process, it
7 directs and has directed the mailing of millions of solicitations and applications to prospective credit
8 card holders. While the solicitations and applications disclose all other charges and fees a cardholder
9 would be charged when he uses his American Express card, they do not disclose either the existence
10 or amount of the 2% foreign currency transaction fee.

11 23. The only place where American Express mentions the foreign currency transaction fee
12 is in the small print legalese of the prolix cardholder agreements, which the cardholder only receives
13 after she has applied for and received her card.

14 24. The cardholder agreement as described in detail below is a contract of adhesion in that
15 it is a standardized contract drafted entirely by American Express, without any negotiation with the
16 consumer, which, due to American Express' greater economic power, knowledge, experience and
17 resources, enjoys vastly superior bargaining power compare to consumers who are issued the card.
18 Consumers have no bargaining or negotiating power whatsoever. American Express imposes the
19 contract on consumers giving them only the choice of adhering to the contract or rejecting it in its
20 entirety.

21 25. It is important for consumers to know of the existence and amount of American Express'
22 foreign currency transaction fee. The fee directly affects the cost of using an American Express card
23 to purchase goods or services in a foreign currency and the consumer's decision as to which credit card
24 to use.

25 26. The foreign currency transaction fee charged by American Express may be the most
26 significant fee charged to a consumer when she uses her card to purchase goods or services in a foreign
27 currency and, indeed, in many cases may be the only charge levied for use of the card in any given
28 month.

1 27. American Express' foreign currency transaction fee is hidden in the transaction amount,
2 which American Express shows on its monthly billing statements. Consumers expect that if fees are
3 to be charged for the use of the card, those fees will be disclosed on the billing statement. Hiding the
4 foreign currency transaction fee by embedding it in the transaction amount shown on American Express
5 billing statements is likely to mislead consumers as to the existence and amount of the fees charged by
6 American Express for using a card to purchase goods or services in a foreign country. The monthly
7 billing statement is by far the most relevant document received by cardholders when it comes to
8 communicating the amount of charges imposed by American Express for the use of the card to purchase
9 goods or services. Consumers are likely to notice, attend to, comprehend and retain information about
10 fees associated with particular credit or charge card purchases when those fees are disclosed along with
11 the record of the purchases with which they are associated on the billing statement.

12 28. Billing statements are mailed regularly to cardholders and contain information such as
13 the cost of credit that consumers know is important to their economic interests. Consumers are much
14 more likely to review their billing statements than any other communication sent by American Express
15 to them in the ordinary course of their business. If the foreign currency transaction fees charged by
16 American Express were disclosed on billing statements, consumers would likely become informed
17 rather than misled about the existence of, and amounts of, the foreign currency transaction fees.

18 29. It is eminently feasible for American Express to disclose the amount of the foreign
19 currency transaction fee on billing statements and solicitations. Certain competitors in the marketplace
20 currently disclose the existence and amount of these fees in solicitations and billing statements.

21 30. Disclosure of the foreign currency transaction fees in credit and charge card solicitations
22 is also important to consumers. Consumers often review credit and charge card solicitations when
23 making a decision whether to apply for a particular card and to compare the advantages and costs of
24 competing card products. Consumers reviewing solicitations are likely to focus particular attention on
25 terms relating to costs, charges and fees when comparing card plans. Consumers would more likely
26 become informed of American Express' foreign currency transaction fee if it were disclosed on
27 solicitations and applications.

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1 31. A consumer receives his American Express cardholder agreement only after the
2 cardholder has applied for and received his card. A consumer is unlikely to retain, or even review the
3 terms of the cardholder agreement. Such agreements are written in fine print and are dense documents
4 written in legalese. American Express' decision to bury the only disclosure of the foreign currency
5 transaction fee in the small print of the dense cardholder agreement is likely to mislead consumers by
6 effectively concealing the fee. American Express' practice of failing to disclose the foreign currency
7 transaction fee in solicitations or on billing statements, and the embedding of the fee in the reported
8 transaction amount on the bill, has the effect of depriving consumers of sufficient information to make
9 informed choices about the costs of her options for making purchases denominated in foreign
10 currencies. When consumers are prevented from detecting and responding to prices, the competitive
11 process cannot function. If foreign currency transaction fees were disclosed in solicitations, applications
12 and billing statements, they would be easier for consumers to detect, and it would be more likely that
13 competition would be generated over the level of fees and that such fees would be reduced and/or
14 eliminated. Without adequate disclosure and consequent consumer awareness of foreign currency
15 transaction fees, there is no incentive for American Express to compete over the level of foreign
16 currency transaction fees.

17 32. Knowing in advance the fees charged for the use of a particular credit card to purchase
18 goods and services in a foreign currency is a practical and reliable way to determine which card will
19 result in the lower billed transaction price.

20 33. Imposing a hidden foreign currency transaction fee every time a cardholder uses her
21 American Express card to make a purchase denominated in a foreign currency is a deceptive and unfair
22 business practice that causes injury to consumers and to the competitive process. A consumer wishing
23 to use a credit or charge card to make a purchase in a foreign country has no choice but to incur a
24 foreign currency transaction fee. Every credit or charge card issued in the United States that can be used
25 to purchase goods and services in a foreign currency, be it an American Express, Visa, MasterCard or
26 Diners Club card, carries with it a foreign currency transaction fee.

27 34. The credit or charge cards which are the subject of this complaint confer on the holder
28 the right to access a dollar denominated line of credit or defer payment for a charge in dollars to

1 American Express. Using one's American Express card to make a purchase in a foreign country does
2 not create any obligation to deliver foreign currency to the merchant or American Express. A consumer
3 uses his American Express card to make such a purchase precisely to avoid having to obtain and deliver
4 foreign currency. Thus, using an American Express card to purchase goods and services in a foreign
5 currency contrasts with retail currency exchange where foreign currency is actually bought sold or
6 exchanged.

7 35. Retail currency exchange and credit cards have different features and advantages and are
8 not competitive products. The inferiority of retail currency exchange combined with the inability of
9 consumers to detect the foreign currency transaction fees which have been hidden by American Express
10 and others have given American Express the ability to exploit cardholders by charging them fees
11 without fear of significant numbers of them choosing the alternative of purchasing with local currency
12 obtained from retail sellers. Retail currency exchange offers different and mostly inferior features than
13 using a credit charge card to purchase goods or services in a foreign country.

14 36. American Express' practice of hiding foreign currency transaction fees in the transaction
15 amount billed to cardholders as alleged in this Complaint offends several legislatively declared policies,
16 including the policy of disclosing fees charged to cardholders, the policy against unfair, anticompetitive
17 and deceptive business practices, policies underlying the prohibition against business torts, and policies
18 promoting the fundamental rules of honesty and fair dealing in contracts generally, and in adhesion
19 contracts with consumers, particularly.

20 37. The foreign currency transaction fee charged by American Express is designed and
21 implemented so that the fee would be paid by, but concealed from its cardholders. The foreign currency
22 transaction fee charged to cardholders by American Express is the only fee which it embeds in the
23 transaction amount and which is not separately itemized on the billing statement. Concealing the
24 currency conversion fee causes or is likely to cause injury to consumers and to competition. Consumers
25 cannot make informed decisions without adequate information about these fees, and American Express'
26 business practice of concealing the fees deprives them of price information, to their injury and to the
27 injury of the competitive process.

28

1 38. There is no social or other benefit to obscuring currency conversion fees by embedding
2 them, unnoticed, in the billed transaction amount, and certainly no benefit which would outweigh the
3 injury to consumers and to the competitive process.

4 **AMERICAN EXPRESS' UNCONSCIONABLE LIMITATION OF**
5 **REMEDIES IN CARDHOLDER AGREEMENTS**

6 39. In its cardholder agreements, American Express imposes unconscionable limitations on
7 liability and arbitration provisions ("legal remedies limitations") in an attempt to eviscerate consumers'
8 ability to obtain redress in violation of Civil Code §§1670.5 and 1770(e)(19), which prohibit the
9 imposition of such unconscionable terms in contracts.

10 40. The unconscionable terms that American Express unilaterally imposes in its cardholder
11 agreements in relevant part reads as follows:

12 IF ARBITRATION IS CHOSEN BY ANY PARTY WITH RESPECT
13 TO A CLAIM, NEITHER YOU NOR WE WILL HAVE THE RIGHT
14 TO LITIGATE THAT CLAIM IN COURT OR HAVE A JURY TRIAL
15 DISCOVERY EXCEPT AS PROVIDED FOR IN THE NAF CODE.
16 FURTHER, YOU WILL NOT HAVE THE RIGHT TO PARTICIPATE
17 AS A REPRESENTATIVE MEMBER OR ANY CLASS OF
18 CLAIMANTS PERTAINING TO ANY CLAIM SUBJECT TO
19 ARBITRATION.

20 41. Although, upon information and belief, Plaintiffs believe that American Express does
21 not currently enforce the arbitration provisions of its cardholder agreements as to California residents,
22 it has reserved the right to implement these provisions at any time and may elect to do in the future.

23 42. American Express' legal remedies limitations are unlawful, unconscionable and
24 unenforceable as against public policy. The legal remedies limitations are procedurally and
25 substantively unconscionable in scope, operation and effect. Consumers have no meaningful choice
26 with respect to the legal remedies limitations because they are not presented with them until after they
27 applied for the cards. The legal remedies limitations are not set forth on the cards. Rather, the legal
28 remedies limitations are presented on a take-it-only basis as part of a series of non-negotiated
adhesionary terms in dense policy cardholder agreements and cardholders are unlikely to read or retain.
Thus, the legal remedies limitations are effectively hidden from consumers and are included in pre-
determined terms and conditions drafted entirely by American Express with no opportunity for

1 negotiation, modification or waiver. As a result, consumers have no meaningful choice with respect
2 to the legal remedies limitations.

3 43. The legal remedies limitations are also substantively unconscionable. By prohibiting
4 class and representative actions once American Express compels arbitration, the legal remedies
5 limitations prevent consumers from vindicating their rights to challenge the type of conduct at issue in
6 this and other cases. The potential damages recoverable by any consumer in individual proceedings are
7 insubstantial in comparison to the costs associated with recovering those damages. The currency
8 conversion fee is 2% of the transaction amounts in a foreign currency. For example, a cardholder who
9 spent \$5,000 in France would have damages of \$100 on the basis of a 2% American Express Foreign
10 Currency Transaction Fee. No reasonable person would sue or arbitrate for \$100. No consumer could
11 attract competent counsel to litigate claims of this magnitude without the availability of the class action
12 device. The filing fees alone would exceed the damages potentially recoverable by a consumer in an
13 individual lawsuit. Furthermore, this term of the legal remedies limitations is one-sided because
14 American Express would have no need or basis to litigate class claims against consumers.

15 44. The arbitration provisions and limitations of damages and remedies set forth in the legal
16 remedies limitations are likewise unconscionable. The legal remedies limitations purport to require
17 consumers to arbitrate any disputes if any party, *i.e.*, American Express, so chooses. The legal remedies
18 limitations also purport to preclude consumers from joining other disputes in any arbitration and also
19 preclude any class-wide resolution of the arbitrated dispute. In addition, the legal remedies limitations
20 also unfairly purport to vest American Express with unbridled discretion to change any and all
21 applicable terms and conditions, at any time.

22 CLASS ACTION ALLEGATIONS

23 45. This action is brought on behalf of Plaintiffs individually and, pursuant to C.C.P. §382
24 and Cal. Civ. Code §1781, on behalf of similarly situated persons within the State of California who
25 purchased goods or services in a foreign currency using their American Express card from March 1999
26 through the present (the "Class"). Excluded from the Class are American Express and its officers,
27 affiliates, directors, employees and the immediate family members of its officers, directors and
28 employees.

1 46. This action is properly brought as a class action for the following reasons. The Class
2 is composed of thousands of persons geographically dispersed throughout the state, the joinder of whom
3 in one action is impracticable. The disposition of Plaintiffs and Class members' claims in a class action
4 will provide substantial benefits to both the parties and the Court. The Class is ascertainable and there
5 is a well-defined community of interest in the questions of law or fact alleged since the rights of each
6 Class member were infringed or violated in a similar fashion based upon defendants' uniform conduct.
7 Notice can be provided through records of American Express or by publication, the cost of which is
8 properly imposed upon defendants. The Class consists of thousands of persons and is thus so numerous
9 that joinder of all members is impracticable.

10 47. The questions of law or fact common to the Class predominate over questions that may
11 affect particular Class members. Such common questions include:

12 (a) whether defendants engaged in a common course of conduct that is likely to
13 deceive Plaintiffs, Class members or the public concerning its currency conversion fee;

14 (b) whether the laws of the State of California were violated by defendants, as
15 alleged herein, by engaging in the described practices; and

16 (c) whether Plaintiffs and Class members are entitled to declaratory, injunctive and
17 other equitable relief.

18 48. Plaintiffs' claims are typical of the claims of the members of the Class. Plaintiffs will
19 fairly and adequately protect the interests of the Class in that they have no interest antagonistic to those
20 of the other Class members, and Plaintiffs have retained attorneys experienced in class action and
21 complex litigation.

22 49. A class action is superior to other available methods for the fair and efficient
23 adjudication of this controversy for at least the following reasons:

24 (a) given the size of individual Class members' claims and the expense of litigating
25 those claims, few, if any, Class members could afford to or would seek legal redress individually for
26 the wrongs defendants committed against them and absent Class members have no substantial interest
27 in individually controlling the prosecution of individual actions;

28

1 (b) this action will promote an orderly and expeditious administration and
2 adjudication of the Class claims, economies of time and effort and resources will be fostered and
3 uniformity of decisions will be ensured; and

4 (c) without a class action, Class members will continue to suffer damages, and
5 defendants' violations of law will proceed without remedy while defendants continue to reap and retain
6 the substantial proceeds of their wrongful conduct.

7 50. Plaintiffs know of no difficulty that will be encountered in the management of this
8 litigation that would preclude its maintenance as a class action.

9
10 **FIRST CAUSE OF ACTION**
(For Unfair and Deceptive, Unlawful and Fraudulent
Practices in Violation of California Business & Professions Code §§17200, et seq.)

11 51. Plaintiffs incorporate by reference the allegations set forth in the preceding paragraphs.
12 These claims are brought on behalf of the Class and the general public against all defendants.

13 52. California Business & Professions Code §§17200, et seq., prohibit acts of unfair
14 competition. Section 17200 defines unfair competition to mean and include any "unlawful, unfair or
15 fraudulent business act."

16 53. Defendants committed unfair and deceptive business practices in violation of Bus. &
17 Prof. Code §§17200, et seq., by failing to adequately disclose the existence of the foreign currency
18 transaction fee. Defendants have inserted vague and misleading language into the Agreements.
19 Defendants have also misled consumers by failing to disclose the foreign currency transaction fee in
20 advertising, solicitations, consumers' monthly statements or any other periodic statement.

21 54. Defendants' unfair and deceptive business acts and practices described herein present
22 a continuing threat to all consumers and members of the public in that defendants systematically impose
23 the unconscionable foreign currency transaction fee in a misleading manner on millions of consumers
24 depriving them of millions of dollars each year.

25 55. The legal remedies limitations in cardholder agreements are unlawful and unfair because
26 they violate Cal. Civ. Code §1751, which provides that "[a]ny waiver by a consumer of the provisions
27 of this title is contrary to public policy and shall be unenforceable and void." The legal remedies
28 limitations also violate Bus. & Prof. Code §17205, which provides that its remedies are cumulative to

1 each other and to the remedies and penalties available under other laws of the State of California, and
2 under Cal. Civ. Code §1668, which prohibits parties from exempting themselves from liability for
3 violations of law.

4 56. Defendants have committed further unfair and unlawful business practices because they
5 failed to adhere to the fee disclosure requirements set forth in TILA (15 U.S.C. §§1601, *et seq.*) and the
6 regulations promulgated thereunder ("Regulation Z"). Defendants failed to disclose in all applications
7 and solicitations "any transaction charge imposed for the use of the card for purchases," even though
8 Regulation Z requires such a disclosure. 12 C.F.R. §226.5a (b)(4). Regulation Z also requires
9 defendants to disclose on consumers' monthly statements "[t]he amounts, itemized and identified by
10 type, of any charges other than finance charges debited to the account during the billing cycle." 12
11 C.F.R. §226.7(h). Defendants have systematically violated this obligation by failing to inform
12 consumers on their monthly statements that defendants impose a 2% currency conversion fee on all card
13 charges made in a foreign country.

14 57. Plaintiffs further allege, as detailed more fully below, that defendants have committed
15 violations of Civil Code §§1750, *et seq.*, which constitute separate unlawful business acts and practices.

16 58. Defendants' practice of embedding and concealing the foreign currency transaction fee
17 by only disclosing its existence in small print, prolix cardholder agreements, and failing to separately
18 disclose the foreign currency transaction fee in solicitations and periodic billing statements, where
19 consumers are most likely to attend to, notice or comprehend the fee and other costs of credit also
20 constitutes a "fraudulent" business act or practice, within the meaning of Bus. & Prof. Code §17200 in
21 that such conduct is likely to deceive Class members and the general public as to the existence and
22 amount of the foreign currency transaction fee.

23 **SECOND CAUSE OF ACTION**
24 **(For Violations of the Consumers Legal Remedies Act – Injunctive Relief Only)**

25 59. Class Plaintiffs incorporate by reference the allegations set forth in the preceding
26 paragraphs. These claims are brought on behalf of the Class against all defendants.

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1 60. The California Consumers Legal Remedies Act, Cal. Civ. Code §§1750, *et seq.* (the
2 "Act"), provides California consumers with a comprehensive procedure for redressing defendants'
3 violations of various statutory rights.

4 61. Defendants' practice of imposing a hidden foreign currency transaction fee is unlawful.

5 62. Defendants' practice of embedding, imposing and concealing the currency conversion
6 fee in connection with the use of the card to purchase goods or services in a foreign currency violates
7 the Act in at least the following respects:

8 (a) In violation of §1770(a)(5) of the Act, defendants' acts and practices constitute
9 representations that the services in question have characteristics, uses or benefits which they do not;

10 (b) In violation of §1770(a)(7) of the Act, defendants' acts and practices constitute
11 representations that the services in question are of a particular standard, quality or grade, when they are
12 not;

13 (c) In violation of §1770(a)(9) of the Act, defendants' acts and practices constitute
14 the advertisement of the services in question without the intent to sell them as advertised;

15 (d) In violation of §1770(a)(14) of the Act, defendants' acts and practices constitute
16 representations that the transaction involving the services in question confers or involves rights,
17 remedies or obligations which they do not have, or which are prohibited by law;

18 (e) In violation of §1770(a)(16) of the Act, defendants' acts and practices constitute
19 representations that the subject of the transaction has been supplied in accordance with previous
20 representations when it has not; and

21 (f) In violation of §1770(a)(19) of the Act, defendants have inserted unconscionable
22 provisions in contracts.

23 63. By reason of the foregoing, Class Plaintiffs and Class members have been irreparably
24 harmed, entitling them to both injunctive relief and restitution.

25 64. Pursuant to §1782 of the Act, Class Plaintiffs notified defendants in writing of the
26 particular violations of §1770 of the Act and demanded defendants rectify the actions described above
27 by providing complete monetary relief, agreeing to be bound by its legal obligations and to give notice
28

1 to all affected customers of its intent to do so. Class Plaintiffs sent this notice by certified mail, return
2 receipt requested, to American Express' principal place of business.

3 65. If defendants fail to adequately respond to Class Plaintiffs' demand within 30 days of the
4 letter pursuant to §1782 of the Act, Class Plaintiffs will amend this claim to add additional claims for
5 relief, including claims for compensatory and exemplary damages. Class Plaintiffs are already entitled
6 to the relief set forth above, along with costs, attorneys' fees and any other relief which the Court deems
7 proper.

8 66. WHEREFORE, Plaintiffs pray for judgment and relief against defendants as set forth
9 hereafter.

10 PRAYER FOR RELIEF

11 67. Plaintiffs on behalf of the general public and on behalf of the Class pray for judgment
12 and relief against defendants as follows:

13 A. For an order declaring this a class action;

14 B. For an order declaring the section of American Express cardholder agreements that
15 purport to limit defendants' legal liabilities to cardholders unconscionable and void as a matter of law;

16 C. For an order enjoining defendants from continuing to engage, use or employ their
17 practice of charging and collecting the unconscionable and illegal 2% foreign currency transaction fee;

18 D. For an order enjoining defendants from charging any type of "foreign currency
19 transaction fee" without providing a clear, obvious and comprehensive notice that such a fee will be
20 charged, including notice of such a fee on any monthly statement which includes charges made in
21 foreign countries;

22 E. For an order requiring defendants to fund a corrective advertising campaign in order to
23 remedy defendants' wrongful conduct;

24 F. For an order awarding restitution of the monies defendants wrongfully acquired by
25 imposing the unconscionable foreign currency transaction fee on California consumers who used the
26 card, plus a reasonable rate of interest, so as to restore all moneys wrongfully acquired by defendants'
27 unfair, deceptive, and unlawful business practices to those consumers forced to pay the unconscionable
28 fee;


- 1 G. For an order requiring disgorgement of monies wrongfully obtained as a result of
2 defendants' unlawful, unfair and deceptive business practices as alleged herein;
3 H. For reasonable attorneys' fees pursuant to, *inter alia*, C.C.P. §1021.5;
4 I. For interest as prescribed by law;
5 J. For costs of this suit; and
6 K. For such other and further relief as the court deems just and proper.

7 **JURY DEMAND**

8 Plaintiffs demand a trial by jury.

9 DATED: March 27, 2003

10 MILBERG WEISS BERSHAD
11 HYNES & LERACH LLP
12 BONNY E. SWEENEY
13 CHRISTOPHER M. BURKE

14 
15 _____
16 BONNY E. SWEENEY

17 401 B Street, Suite 1700
18 San Diego, CA 92101
19 Telephone: 619/231-1058
20 619/231-7423 (fax)

21 HULETT HARPER STEWART, LLP
22 DENNIS STEWART (99152)
23 550 West C Street, Suite 1770
24 San Diego, CA 92101
25 Telephone: 619/338-1133
26 619/338-1139 (fax)

27 SCHRAG & BAUM, P.C.
28 THOMAS SCHRAG
JAMES BAUM
MICHAEL SCHRAG
280 Panoramic Way
Berkeley, CA 94704
Telephone: 510/849-1618
510/841-6050 (fax)

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STEYER LOWENTHAL BOODROOKAS
ALVAREZ & SMITH LLP
ALLAN STEYER
D. SCOTT MACRAE
One California Street, 3rd Floor
San Francisco, CA 94111
Telephone: 415/421-3400
415/421-2234 (fax)

Attorneys for Plaintiffs

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