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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 06-1871-cv

IN RE AMERICAN EXPRESS MERCHANTS' LITIGATION,

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

v.

AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, AMERICAN EXPRESS COMPANY,
Defendants-Appellees.[1]

Argued: Dec. 10, 2007

Decided: Feb. 1, 2012

POOLER and SACK, *Circuit Judges*.[2]

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[1] The Clerk of the Court is directed to amend the official caption as shown above.

[2] The Honorable Sonia M. Sotomayor, originally a member of this panel, was elevated to the Supreme Court on August 8, 2009. The remaining two panel members, who are in agreement, have determined the matter. *See* 28 U.S.C. § 46(d); Second Circuit IOP E(b), available at http://www.ca2.uscourts.

POOLER, *Circuit Judge*:

We turn to this case for the third time, as the Supreme Court released its latest views on class arbitration waivers in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), just weeks after we issued our decision in *In re American Express Merchants' Litigation*, 634 F.3d 187 (2d Cir. 2011) ("*Amex II*"). *Amex II* returned to us from the Supreme Court, after defendants American Express Company and American Express Travel Related Services Co. (together, "Amex") sought review from the Supreme Court following our decision in *In re American Express Merchants' Litigation*, 554 F.3d 300 (2d Cir. 2009) ("*Amex I*"). In *Amex I*, we considered the enforcement of a mandatory arbitration clause in a commercial contract also containing a "class action waiver," that is, a provision which forbids the parties to the contract from pursuing anything other than individual claims in the arbitral forum. We found the class action waiver unenforceable, "because enforcement of the clause would effectively preclude any action seeking to vindicate the statutory rights asserted by the plaintiffs." *Amex I*, 554 F.3d at 304.

The Supreme Court granted Amex's petition for a writ for certiorari, then vacated and remanded for reconsideration in light of its decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010). Finding our original analysis unaffected by *Stolt-Nielsen*, we again reversed the district court's decision and remanded for further proceedings. *Amex II*, 634 F.3d at 199-200. On April 11, 2001, we placed a hold on the mandate in *Amex II* in order for

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gov/clerk/Rules/IOP/IOP_E.htm; *United States v. DeSimone*, 140 F.3d 457, 458-59 (2d Cir. 1998).

Amex to file a petition seeking a writ of certiorari. While the mandate was on hold, the Supreme Court issued its decision in *Concepcion*, 131 S. Ct. 1740 (2011). The *Concepcion* Court held that the Federal Arbitration Act preempted a California law barring the enforcement of class action waivers in consumer contracts. *Id.* at 1750-51. The parties submitted supplemental briefing discussing the impact, if any, of *Concepcion* on our previous decisions, and we find oral argument unnecessary. As discussed below, *Concepcion* does not alter our analysis, and we again reverse the district court's decision and remand for further proceedings.

BACKGROUND

Because the only issue before us is the narrow question of whether the class action waiver provision contained in the contract between the parties should be enforced, we provide but a brief recitation of the facts.

A. Procedural Posture.

The plaintiffs appealed from the March 20, 2006 judgment of the United States District Court for the Southern District of New York, which granted Amex's motion to compel arbitration pursuant to the Federal Arbitration Act ("FAA") and Federal Rule of Civil Procedure 12(b). *See In re Am. Express Merchs. Litig.*, No. 03 CV 9592, 2006 WL 662341 (S.D.N.Y. Mar. 16, 2006) (Daniels, *J.*).

B. The Parties.

The amended complaint alleges that Amex "is the leading issuer of general purpose and corporate charge cards to consumers and businesses in the United States and throughout the world. It is also the leading provider of charge card services to mer-

chants." The named plaintiffs are: (1) California and New York corporations which operate businesses which have contracted with Amex and (2) the National Supermarkets Association, Inc. ("NSA"), "a voluntary membership-based trade association that represents the interests of independently owned supermarkets."

The named plaintiffs seek to represent the following class:

> all merchants that have accepted American Express charge cards (including the American Express corporate card), and have thus been forced to agree to accept American Express credit and debit cards, during the longest period of time permitted by the applicable statute of limitations . . . throughout the United States. . . .

C. The Plaintiffs' Substantive Claims.

The plaintiffs' dispute with Amex rests upon the distinction between "charge cards" and "credit cards."[3] The district court explained the distinction:

> A charge card requires its holder to pay the full outstanding balance at the end of a standard billing cycle. A credit card, by contrast, allows the cardholder to pay a portion of the amount owing at the close of a billing cycle, subject to interest charges. In plain terms, the credit card is a means of financing purchases, the charge card is a method of payment.

In re Am. Express Merchs., 2006 WL 662341, at *1, n. 6.

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[3] Plaintiffs bring claims pursuant to both the Sherman and Clayton Acts, 15 U.S.C. § 1 et seq., which bar certain anticompetitive conduct in trade.

According to the plaintiffs, Amex had until recent years centered its business on the issuance of corporate and personal charge cards to corporate clients and affluent consumers. The plaintiffs further assert that "[h]olders of charge cards are more affluent than credit cardholders, and a vastly higher percentage of charge cards than credit cards are held by businesses and used for business travel and other corporate purposes." In fact, the plaintiffs allege that Amex itself contends that "the average purchase on an American Express card is 17% higher than the average purchase made on a credit card." Thus, the holder of a charge card is likely to be "a higher class of customer" and, as such, is particularly attractive to merchants such as the plaintiffs.

As a result of this distinction, Amex has traditionally been able to charge high "merchant discount fees," which are the fees a card issuer withholds as a percentage of each purchase made with its card at the merchant's establishment. These fees, the plaintiffs aver, "are at least 35% higher than competitive rates" applicable to mass-market credit cards such as Visa, MasterCard, and Discover. Over the last decade, the plaintiffs allege, Amex's "business in the markets for credit card issuance and credit card services has grown dramatically." By leveraging its market power in corporate and personal charge cards, however, plaintiffs allege that American Express was able to compel merchants to accept "its new revolving credit card product[s] at the same elevated discount rate, which vastly exceeded the rate for comparable Visa, MasterCard or Discover products."

According to the plaintiffs, the vehicle of this compulsion is the "Honor All Cards" provision contained

in the Card Acceptance Agreement. Under the Agreement, a merchant does not contract to accept any one Amex product as a form of payment. Rather, the Agreement applies:

> to your acceptance of American Express© Cards . . . . American Express Card(s) . . . shall mean any card or other account access device issued by American Express Travel Related Services Company, Inc., or its subsidiaries or affiliates or its or their licensees bearing the American Express name or an American Express trademark, service mark or logo.

The plaintiffs assert that, by means of the "Honor All Cards" provision, merchants are faced with the choice of paying supracompetitive merchant discount fees (i.e., fees above competitive levels) on Amex's new mass-market products or "inevitably los[ing] a significant portion of the sales they receive from businesses, travelers, affluent consumers, and others" who are the traditional users of Amex charge cards. This, the plaintiffs claim, amounts to an illegal "tying arrangement," in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.[4]

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[4] In a definition that has become classic, the Supreme Court has defined a tying arrangement as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5-6 (1958). A tying arrangement will violate Section 1 of the Sherman Act if "the seller has appreciable economic power in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market." *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 462 (1992) (internal quotation marks omitted).

D. The Card Acceptance Agreement.

The basic contractual relationship between Amex and the plaintiffs was set forth in an affidavit of an Amex executive:

> American Express issues card products to its cardmembers, which cardmembers then use in making purchases from participating merchants. Participating merchants with annual charge volume expected to be less than $10 million agree that, by submitting charges for payment by American Express, their relationship will be governed by the "Terms and Conditions for American Express© Card Acceptance" ("the Card Acceptance Agreement").

The Card Acceptance Agreement is a standard form contract issued by Amex. It may be terminated by either party "at any time by sending written notice to the other party." Further, Amex reserves the right:

> to change this Agreement at any time. We will notify you of any change in writing at least ten (10) calendar days in advance. If the changes are unacceptable to you, you may terminate this Agreement as described in the section entitled "TERMINATING THIS AGREEMENT."

According to Amex, the Card Acceptance Agreement has "expressly permitted amendments upon notice" for more than twenty-five years. The Card Acceptance Agreement also contains a choice of law provision designating New York law as governing and, as Amex states, there is no dispute that the agreement "has always" contained this provision.

By contrast, it is only since 1999 that the Card Acceptance Agreement has contained a mandatory arbitration clause:

> For the purpose of this Agreement, Claim means any assertion of a right, dispute or controversy between you and us arising from or relating to this Agreement and/or the relationship resulting from this Agreement. Claim includes claims of every kind and nature including, but not limited to, initial claims, counterclaims, cross-claims and third-party claims and claims based upon contract, tort, intentional tort, statutes, regulations, common law and equity. We shall not elect to use arbitration under this arbitration provision for any individual Claim that you properly file and pursue in a small claims court of your state or municipality so long as the Claim is pending only in that court.
>
> . . .
>
> Any Claim shall be resolved upon the election by you or us, by arbitration pursuant to this arbitration provision and the code of procedure of the national arbitration organization to which the Claim is referred in effect at the time the Claim is filed. Claims shall be referred to the National Arbitration Forum (NAF), JAMS/Endispute (JAMS), or the American Arbitration Association (AAA), as selected by the party electing to use arbitration. If a selection by us of one of these organizations is unacceptable to you, you shall have the right within thirty (30) days after you receive notice of our election to select one of the other organizations listed to serve as arbitrator administrator.

At the heart of the instant appeal is the following provision contained in the Agreement:

> IF ARBITRATION IS CHOSEN BY ANY PARTY WITH RESPECT TO A CLAIM, NEITHER YOU

> NOR WE WILL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR HAVE A JURY TRIAL ON THAT CLAIM. . . . FURTHER, YOU WILL NOT HAVE THE RIGHT TO PARTICIPATE IN A REPRESENTATIVE CAPACITY OR AS A MEMBER OF ANY CLASS OF CLAIMANTS PERTAINING TO ANY CLAIM SUBJECT TO ARBITRATION. THE ARBITRATOR'S DECISION WILL BE FINAL AND BINDING. NOTE THAT OTHER RIGHTS THAT YOU WOULD HAVE IF YOU WENT TO COURT MAY ALSO NOT BE AVAILABLE IN ARBITRATION.
>
> There shall be no right or authority for any Claims to be arbitrated on a class action basis or on any basis involving Claims brought in a purported representative capacity on behalf of the general public, other establishments which accept the Card (Service Establishments), or other persons or entities similarly situated. Furthermore, Claims brought by or against a Service Establishment may not be joined or consolidated in the arbitration with Claims brought by or against any other Service Establishment(s), unless otherwise agreed to in writing by all parties.

(emphasis in the original). The Card Acceptance Agreement thus not only precludes a merchant from bringing a class action lawsuit, it also precludes the signatory from having any claim arbitrated on anything other than an individual basis.

E. The District Court's Decision.

Amex moved to compel arbitration pursuant to the terms of the Card Acceptance Agreement. In its March 16, 2006 opinion, the district court granted Amex's motion, first holding that the arbitration

clause in the Agreement was "a paradigmatically broad clause" which was certainly applicable to the dispute between the parties. *In re Am. Express Merchs. Litig.*, 2006 WL 662341, at *4. The district court also held that "[t]he enforceability of the collective action waivers is a claim for the arbitrator to resolve. Issues relating to the enforceability of the contract and its specific provisions are for the arbitrator, once arbitrability is established." *Id.* at *6. Thus, the district court concluded that all of the plaintiffs' substantive antitrust claims, as well the question of whether or not the class action waivers were enforceable, were subject to arbitration. Having so decided, the district court dismissed plaintiffs' cases against Amex. *Id.* at *10.

F. Our Original Decision, *Amex I.*

The plaintiffs filed a timely appeal. We first decided that the issue of the class action waiver's enforceability was a matter for the court, not the arbitrator. *Amex I*, 554 F.3d at 310. Neither party takes issue with that holding, which we find survives *Stolt-Nielsen* and *Concepion*.

Turning to the question of whether the class action waiver in the Card Acceptance Agreement was enforceable, we found that *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), controlled our analysis:

> to the extent that [*Green Tree*] holds that when "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." 531 U.S. at 92, 121 S. Ct. 513. We find that the district court erred in ruling that the plaintiffs had failed to bear this burden

> because they had "ignore[d] the statutory protections provided by the Clayton Act." *In re American Express Merchants Litigation*, 2006 WL 662341, at *5. On the contrary, the record abundantly supports the plaintiffs' argument that they would incur prohibitive costs if compelled to arbitrate under the class action waiver. The Card Acceptance Agreement therefore entails more than a speculative risk that enforcement of the ban will deprive them of substantive rights under the federal antitrust statutes.

Amex I, 554 F.3d at 315-16. Based in part on plaintiffs' submission of an affidavit from an economist detailing the fiscal impracticality of pursuing individual claims, we concluded that:

> [since] Amex has brought no serious challenge to the plaintiffs' demonstration that their claims cannot reasonably be pursued as individual actions, whether in federal court or in arbitration, we find ourselves in agreement with the plaintiffs' contention that enforcement of the class action waiver in the Card Acceptance Agreement "flatly ensures that no small merchant may challenge American Express's tying arrangements under the federal antitrust laws." The effective negation of a private suit under the antitrust laws is troubling because such "private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979).

Id. at 319. Thus, we held that:

> the class action waiver in the Card Acceptance Agreement cannot be enforced in this case because

> to do so would grant Amex de facto immunity from antitrust liability by removing the plaintiffs' only reasonably feasible means of recovery. As already set forth, Section 2 of the [Federal Arbitration Act], 9 U.S.C. § 2, provides that an agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Given that we believe that a valid ground exists for the revocation of the class action waiver, it cannot be enforced under the FAA.

Id. at 320. Amex timely filed a petition for a writ of certiorari. *Am. Express Co. v. Italian Colors Rest.*, 130 S. Ct. 2401 (2010). The Supreme Court granted Amex's petition, vacated our original decision, and remanded for further consideration in light of its holding in *Stolt-Nielsen*.

G. The *Stolt-Nielsen* Decision.

In *Stolt-Nielsen*, petitioners were shipping companies. *See* 130 S. Ct. at 1764. The charter party – a maritime contract governing the relationship between the parties – provided, in relevant part

> Arbitration. Any dispute arising from the making, performance or termination of this Charter Party shall be settled in New York, Owner and Charterer each appointing an arbitrator, who shall be a merchant, broker or individual experienced in the shipping business; the two thus chosen, if they cannot agree, shall nominate a third arbitrator who shall be an Admiralty lawyer. Such arbitration shall be conducted in conformity with the provisions and procedure of the United States Arbitration Act [i.e., the FAA],

> and a judgment of the Court shall be entered upon any award made by said arbitrator.

Id. at 1765. Respondent AnimalFeeds, along with other charterers, sued Stolt-Nielsen, alleging price fixing, and eventually served a demand for class arbitration. *Id.* The parties agreed to have an arbitration panel decide the threshold issue of whether the charter party permitted class arbitration, and stipulated before the panel that the arbitration clause was silent on the issue of class arbitration. *Id.* at 1765-66. The panel concluded that the expert testimony offered did not demonstrate an "inten[t] to preclude class arbitration." *Id.* (alteration in original). After finding that the issue was controlled by the Supreme Court's decision in *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003), the panel concluded *Bazzle* and policy considerations dictated finding the clause permitted class arbitration. *Id.*

The Supreme Court found that the arbitration panel "imposed its own policy choice," rather than "identifying and applying a rule of decision derived from the FAA or either maritime or New York law," and "thus exceeded its powers." 130 S. Ct. at 1770. Tackling the issue itself, the Court found the FAA controlling, *id.* at 1773, and reaffirmed that "arbitration is simply a matter of contract between the parties." *Id.* at 1774 (alterations omitted). The Court concluded that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 1775 (emphasis in the original).

H. Our Decision in *Amex II*.

On remand from the Supreme Court, we found *Stolt-Nielsen* did not require us to depart from our

original analysis. The key issue, we concluded, was whether the mandatory class action waiver in the Card Acceptance Agreement is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement of the waiver would be to preclude their bringing Sherman Act claims against Amex. *In re American Express Merchants' Litigation*, 634 F.3d 187, 196 (2d Cir. 2011). We concluded enforcement of the class action waiver would indeed bar plaintiffs from pursuing their statutory claims because the "record evidence before us establishe[d], as a matter of law, that the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws." *Id.* at 197-98.

We relied on detailed testimony from Gary L. French, Ph.D., an economist associated with Nathan Associates Inc., a financial consulting firm retained by the plaintiffs. Dr. French submitted a detailed affidavit to the district court, in which he opined, inter alia, that "[i]n my experience, even a relatively small economic antitrust study will cost at least several hundred thousand dollars, while a larger study can easily exceed $1 million . . . after reviewing the complaint and doing some preliminary research in this case, it is my opinion that . . . the cost for this case will fall in the middle of the range . . . ." (Joint Appendix at p. 362-63, ¶ 4). Dr. French then opined that it was not economically rational to pursue an individual action against Amex in light of these substantial expert witness costs. (Joint Appendix at p. 365, ¶ 10-11). *Amex II*, 634 F.3d at 198. We found that "Dr. French's affidavit demonstrates that the only economically feasible means for enforcing their

statutory rights is via a class action," and remanded the case to the district court. *Id.*

ANALYSIS

Shortly after we issued our opinion in *Amex II*, the Supreme Court handed down its opinion in *Concepcion*, 131 S. Ct. at 1740. In *Concepcion*, the Supreme Court held that the FAA preempted California common law deeming most class-action arbitration waivers in consumer contracts unconscionable. *Id.* at 1746. Amex argues that *Concepcion* applies a fortiori here, requiring reversal of our holding in *Amex II*. It is tempting to give both *Concepcion* and *Stolt-Nielsen* such a facile reading, and find that the cases render class action arbitration waivers per se enforceable. But a careful reading of the cases demonstrates that neither one addresses the issue presented here: whether a class-action arbitration waiver clause is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to vindicate their federal statutory rights.

The specific preemption question addressed by the Supreme Court in *Concepcion* was "whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." *Id.* at 1744. Under California's common law, class action waivers contained in arbitration clauses were regularly found unconscionable, especially in consumer contracts. *Id.* at 1746. The Supreme Court began its analysis by reaffirming the "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Id.* at 1749 (internal quotation marks). By requiring the "availability of classwide arbitration," the Court held,

the California rule "interfere[d] with fundamental attributes of arbitration and thus create[d] a scheme inconsistent with the FAA." *Id.* at 1748. In response to the dissent's discussion of the benefits of class-arbitration as a means of addressing multiple small claims, the majority concluded that "[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.* at 1753.

Concepcion plainly offers a path for analyzing whether a state contract law is preempted by the FAA. Here, however, our holding rests squarely on "a vindication of statutory rights analysis, which is part of the federal substantive law of arbitrability." *Amex I*, 554 F.3d at 320; *see also Kristian v. Comcast Corp.*, 446 F.3d 25, 47-48 (1st Cir. 2006) (severing as unenforceable provision of arbitration agreement limiting availability of treble damages under anti-trust statute); *Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478 n.14 (5th Cir. 2003) (severing restriction on available remedies from arbitration agreement after finding that "ban on punitive and exemplary damages is un-enforceable in a Title VII case"); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) (holding that "[w]hen an arbitration clause has provisions that defeat the remedial purpose of the statute . . . the arbitration clause is not enforceable" and language insulating employer from damages and equitable relief rendered clause unenforceable).

Concepcion and *Stolt-Nielsen*, taken together, stand squarely for the principle that parties cannot be forced to arbitrate disputes in a class-action arbi-tration unless the parties agree to class action arbi-tration. *Concepcion*, 131 S. Ct. at 1750-51 ("class arbitration, to the extent it is manufactured by [state

law] rather than consensual, is inconsistent with the FAA")[5]; *Stolt-Nielsen*, 130 S. Ct. at 1775 ("a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so."). We plainly acknowledged in *Amex II* that we could not, and thus were not, ordering the parties to participate in class arbitration. 634 F.3d at 200 ("*Stolt-Nielsen* plainly precludes us from ordering class-wide arbitration.").

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[5] In *Compucredit Corp. v. Greenwood*, 10-948, – S.Ct. –, 2012 WL 43517 (Jan. 10, 2012), the Supreme Court addressed whether the Credit Repair Organizations Act, 15 U.S.C. § 1679, et seq., precluded enforcement of an arbitration agreement. The Court concluded that because the Act is silent on whether claims brought under the Act can be arbitrated, the FAA requires that the arbitration agreement be enforced according to its terms. *Id.* at *4-*6. To support its analysis, the Court cited to a number of statutes that "restrict[] the use of arbitration." *Id.* Plaintiffs here do not allege that the Sherman Act expressly precludes arbitration or that it expressly provides a right to bring collective or class actions, but instead argue that enforcement of the class arbitration waiver would effectively deprive them of their ability to vindicate their statutory rights.

As aptly noted by Justice Sotomayor's concurrence in *Compucredit*, the majority's opinion does not "hold that Congress must speak so explicitly in order to convey its intent to preclude arbitration of statutory claims." *Id.* at *8. Indeed, the Supreme Court has "on numerous occasions . . . held that proof of Congress' intent may also be discovered in the history or purpose of the statute in question." *Id.* at *8. Although the Sherman Act does not provide plaintiffs with an express right to bring their claims as a class in court, forcing plaintiffs to bring their claims individually here would make it impossible to enforce their rights under the Sherman Act and thus conflict with congressional purposes manifested in the provision of a private right of action in the statute.

What *Stolt-Nielsen* and *Concepcion* do not do is require that all class-action waivers be deemed per se enforceable. That leaves open the question presented on this appeal: whether a mandatory class action waiver clause is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to bring federal antitrust claims. While we cannot rely on *Concepcion* or *Stolt-Nielsen* to answer the question before us, we continue to find useful guidance in other Supreme Court decisions addressing the issue of vindicating federal statutory rights via arbitration.

We begin our analysis with the well-settled rule that class action lawsuits are suitable as a vehicle for vindicating statutory rights. Supreme Court precedent recognizes that the class action device is the only economically rational alternative when a large group of individuals or entities has suffered an alleged wrong, but the damages due to any single individual or entity are too small to justify bringing an individual action. The Court made the point forcefully more than thirty years ago in the context of an antitrust action:

> A critical fact in this litigation is that petitioner's individual stake in the damages award he seeks is only $70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all.

Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161 (1974). As the Court later opined, "'[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a

solo action prosecuting his or her rights.'" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)); *see also Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338 (1980) ("[A class action] may motivate [plaintiffs] to bring cases that for economic reasons might not be brought otherwise . . . [, thereby] vindicating the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost.") (footnote omitted); *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("[T]he realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30." (emphasis omitted)).

Arbitration is also recognized as an effective vehicle for vindicating statutory rights, but only "so long as the prospective litigant may *effectively* vindicate its statutory cause of action in the arbitral forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 632 (1985) (emphasis added). Indeed, in dicta the *Mitsubishi* Court noted that should clauses in a contract operate "as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy." *Id.* at 637, n.19. As we observed in *Amex II*:

> While dicta, it is dicta based on a firm principle of antitrust law that an agreement which in practice acts as a waiver of future liability under the federal antitrust statutes is void as a matter of public policy. More than a half-century ago, the Supreme Court stated that "in view of the

> public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action," an agreement which confers even "a partial immunity from civil liability for future violations" of the antitrust laws is inconsistent with the public interest. *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 329 (1955); *see also Minnesota Mining and Mfg. Co. v. Graham-Field, Inc.*, No. 96 cv 3839, 1997 WL 166497, at *3 (S.D.N.Y. Apr. 9, 1997) ("GFI could not have waived [its antitrust] claim in the releases because a prospective waiver of an antitrust claim violates public policy.").

634 F.3d at 197.

Applying its rule regarding the arbitrability of federal statutory claims from *Mitsubishi*, in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Supreme Court permitted the arbitration, rather than litigation, of a plaintiff's Age Discrimination in Employment Act claim. *Id.* at 28 (quoting *Mitsubishi Motors*, 473 U.S. at 637). In *Gilmer*, the Court concluded that the plaintiff in that case could effectively vindicate his asserted rights in the arbitral forum. The plaintiff, a manager at a brokerage firm, asserted that he had been terminated by the firm in violation of the ADEA. *Id.* at 23. After the plaintiff filed suit in federal district court, the defendant firm moved to compel arbitration pursuant to a mandatory arbitration provision contained in the rule of the New York Stock Exchange ("NYSE"), to which the plaintiff had agreed to be bound when he became a registered securities representative. *Id.* at 23-24. The *Gilmer* Court held that because "[i]t is by now clear that statutory claims may be the subject of an arbitration agreement," the arbitration clause

was enforceable "unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* at 26 (quoting *Mitsubishi*, 473 U.S. at 628).

The Court rejected plaintiff's contention that "arbitration procedures cannot further the purposes of the ADEA because they do not provide for broad equitable relief and class actions." *Id.* at 32. Rather, the Court found that:

> arbitrators do have the power to fashion equitable relief. Indeed, the NYSE rules applicable here do not restrict the types of relief an arbitrator may award, but merely refer to "damages and/or other relief." The NYSE rules also provide for collective proceedings. But even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the ADEA provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.

Id. (citations, internal quotation marks, and brackets omitted).[6]

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[6] The Amex plaintiffs do not proffer the argument rejected in *Gilmer* – namely, that the class action waiver in the Card Acceptance Agreement is enforceable because the relevant statute allows class actions. "Rather, the conundrum presented by the instant appeal is more nuanced: whether the mandatory class action waiver in the Card Acceptance Agreement is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement of the waiver would be to preclude their bringing Sherman Act claims against Amex in either an individual or collective capacity." *Amex II*, 634 F.3d at 196.

Gilmer's conclusion that where the plaintiff's statutory rights could effectively be vindicated through arbitration does not affect the case before us, because here plaintiffs have demonstrated that their statutory rights cannot be vindicated through individual arbitrations. Nearly a decade after *Gilmer*, in *Green Tree Financial Corp.-Alabama v. Randolph*, the Supreme Court acknowledged in dicta "that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum." 531 U.S. 79, 90 (2000). Among the costs at issue were "payment of filing fees, arbitrators' costs, and other arbitration expenses." *Id.* at 84. In the end, the *Green Tree* Court found plaintiff failed to submit sufficient evidence to demonstrate the costs of arbitration would effectively prohibit her from vindicating her statutory rights, dooming her attempt to have the arbitration clause declared unenforceable:

> It would also conflict with our prior holdings that the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration. We have held that the party seeking to avoid arbitration bears the burden of establishing that Congress intended to preclude arbitration of the statutory claims at issue. Similarly, we believe that where, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs. Randolph did not meet that burden. How detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence is a

> matter we need not discuss; for in this case neither during discovery nor when the case was presented on the merits was there any timely showing at all on the point.

Id. at 91-92.

As the Tenth Circuit explained:

> Thus, *Gilmer* reaffirmed the Arbitration Act's presumption in favor of enforcing agreements to arbitrate – even where those agreements cover statutory claims. While we recognize this presumption, we conclude that it is not without limits. As *Gilmer* emphasized, arbitration of statutory claims works because potential litigants have an adequate forum in which to resolve their statutory claims and because the broader social purposes behind the statute are adhered to. This supposition[] falls apart, however, if the terms of an arbitration agreement actually prevent an individual from effectively vindicating his or her statutory rights.

Shankle v. B-G Maint. Mgmt. of Colo., Inc., 163 F.3d 1230, 1234 (10th Cir. 1999) (citations omitted); *see also Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1060 (11th Cir. 1998) (holding that arbitration agreement which proscribed award of Title VII damages was unenforceable because it was fundamentally at odds with the purposes of Title VII); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1468 (D.C. Cir. 1997) ("We do not read *Gilmer* as mandating enforcement of all mandatory agreements to arbitrate statutory claims; rather we read *Gilmer* as requiring the enforcement of arbitration agreements that do not undermine the relevant statutory scheme.")

Neither *Stolt-Nielsen* nor *Concepcion* overrules *Mitsubishi*, and neither makes mention of *Green Tree*. We continue to find *Green Tree* "controlling here to the extent that it holds that when 'a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.'" *Amex II*, 634 F.3d at 197 (quoting *Green Tree*, 531 U.S. at 92). Other Circuits permit plaintiffs to challenge class-action waivers on the grounds that prosecuting such claims on an individual basis would be a cost prohibitive method of enforcing a statutory right. *See, e.g.*, *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 285 (4th Cir. 2007) ("[I]f a party could demonstrate that the prohibition on class actions likely would make arbitration prohibitively expensive, such a showing could invalidate an agreement.") (citation omitted); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 557 (7th Cir. 2003) ("In the present case, the [plaintiffs] have not offered any specific evidence of arbitration costs that they may face in this litigation, prohibitive or otherwise, and have failed to provide any evidence of their inability to pay such costs . . . ."); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002) ("[Lead plaintiff] makes no showing of the specific financial status of any of the plaintiffs at the time this action was brought. He provides no basis for a serious estimation of how much money is at stake for each individual plaintiff."). In each of these cases, plaintiffs' attempts to avoid the waiver clause failed because plaintiffs were unable to demonstrate the class-action waivers barred them from vindicating their statutory rights. Their failures speak to the quality of the evidence presented, not the viability of

the legal theory. The fact that plaintiffs so often fail in their attempts to overturn such waivers demonstrates that the evidentiary record necessary to avoid a class-action arbitration waiver is not easily assembled, and that the courts are capable of the scrutiny such arguments require.

Thus, we continue to find *Green Tree* "controlling here to the extent that it holds that when 'a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.'" *Amex I*, 554 F.3d at 315 (quoting *Green Tree*, 531 U.S. at 92). Since there is no indication in *Stolt-Nielsen* or *Concepcion* that the Supreme Court intended to overturn either *Green Tree* or *Mitsubishi*, both cases retain their binding authority. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

The evidence presented by plaintiffs here establishes, as a matter of law, that the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws. Dr. French stated that the purpose of his affidavit was "to provide an expert opinion concerning the likely costs and complexity of an expert economic study concerning the liability and damages" relating to this action, and to "provide my opinion as to whether it would be economically rational for such a merchant

to pursue recovery of damages given the likely out-of-pocket costs of the arbitration or litigation proceeding." (Joint Appendix, at p. 362, ¶ 4)

Dr. French continued:

> In summary, the cost of [Nathan Associates'] expert assistance in individual plaintiff antitrust cases has ranged from about $300 thousand to more than $2 million. However, after reviewing the complaint and doing some preliminary research in this case, it is my opinion that . . . the cost for this case will fall in the middle of the range of [Nathan Associates'] experience.

(Joint Appendix at p. 362-63, ¶ 4) Dr. French then considered the economic rationality of bringing an individual action against Amex in light of these substantial expert witness costs:

> The median volume merchant, with half of the named plaintiffs having more and half having less American Express charge volume, and having reported $230,343 American Express Card volume in 2003, might expect four-year damages of $1,751, or $5,252 when trebled. . . . The largest volume named plaintiff merchant, with reported American Express Card volume of $1,690,749 in 2003, might expect four-year damages of $12,850, or $38,549 when trebled.
>
> In my opinion as a professional economist . . . it would not be worthwhile for an individual plaintiff . . . to pursue individual arbitration or litigation where the out-of-pocket costs, just for the expert economic study and services, would be at least several hundred thousand dollars, and might exceed $1 million.

(Joint Appendix at p. 365, ¶ 10-11)

Dr. French's affidavit demonstrates that the only economically feasible means for plaintiffs enforcing their statutory rights is via a class action. As discussed in our earlier opinion, the district court did not directly address Dr. French's affidavit, focusing instead on the damages provision of the Clayton Act, 15 U.S.C. § 15(a). *See Amex I*, 554 F.3d at 317. We found that while the Clayton Act does provide for treble awards along with the recovery of attorneys' fees and expenses, that was unlikely to assist plaintiffs where, as here, "the trebling of a small individual damages award is not going to pay for the expert fees Dr. French has estimated will be necessary to make an individual plaintiff's case." *Id.* We also found the Clayton Act's fee-shifting provisions inadequate to alleviate our concerns given the low expert witness reimbursement rate. *Id.* at 318. "Even with respect to reasonable attorney's fees, which are shifted under Section 4 of the Clayton Act, the plaintiffs must include the risk of losing, and thereby not recovering any fees, in their evaluation of their suit's potential costs." *Id.*

We again find "Amex has brought no serious challenge to the plaintiffs' demonstration that their claims cannot reasonably be pursued as individual actions, whether in federal court or in arbitration." *Amex I*, 554 F.3d at 319. The "enforcement of the class action waiver in the Card Acceptance Agreement 'flatly ensures that no small merchant may challenge American Express['s] tying arrangements under the federal antitrust laws.'" *Id.* Eradicating the private enforcement component from our antitrust law scheme cannot be what Congress intended when it included strong private enforcement mechanisms and incentives in the antitrust statutes. *See*

Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979) ("[P]rivate suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations."); *see also* Dando B. Cellini, *An Overview of Antitrust Class Actions*, 49 Antitrust L.J. 1501, 1506 (1980) (discussing private, class action antitrust lawsuits and observing that "it is obvious from the experience over the last fifteen years since the 1966 amendments to Rule 23 were adopted that linking an antitrust claim with a class action allegation can be devastatingly effective.").

Thus, as the class action waiver in this case precludes plaintiffs from enforcing their statutory rights, we find the arbitration provision unenforceable. We again emphasize our holding comes with caveats. *See Amex I*, 554 F.3d at 320 ("We emphasize two important limitations upon our holding.") Our decision in no way relies upon the status of plaintiffs as "small" merchants. We rely instead on the need for plaintiffs to have the opportunity to vindicate their statutory rights. *See*, *e.g.*, *Raniere v. Citigroup, Inc.*, No. 11 Civ. 2248, 2011 WL 5881926, at *13 (S.D.N.Y. Nov. 22, 2011) ("even if *AT & T* is read broadly to acquiesce to the enforcement of an arbitral agreement that as a practical matter would prevent the vindication of state rights in the name of furthering the strong federal policy favoring arbitration, that would not alter the validity of the federal statutory rights analysis articulated in *Mitsubishi*, *Green Tree* [and] *American Express*"); *Chen-Oster v. Goldman, Sachs & Co.*, No. 10 CIV 6950, 2011 WL 2671813, at *2-5 (S.D.N.Y. July 7, 2011) (declining to apply *Concepcion* where the question before the court involved the plaintiff's ability to vindicate a federal

statutory right); *Sutherland v. Ernst & Young, LLP*, 768 F. Supp. 2d 547, 550-55 (S.D.N.Y. 2011) (finding *Amex I* "retains its persuasive force" following *Stolt-Nielsen*).

We do not hold today that class action waivers in arbitration agreements are per se unenforceable, or even that they are per se unenforceable in the context of antitrust actions. Rather, as demonstrated by the different outcomes in our sister Circuits, we hold that each waiver must be considered on its own merits, based on its own record, and governed with a healthy regard for the fact that the FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24.

Our earlier opinion refrained from ordering the parties to submit to class arbitration, instead permitting Amex the choice between arbitration and litigation. *Amex I*, 554 F.3d at 321. *Stolt-Nielsen* plainly precludes any court from compelling the parties to submit to class-wide arbitration where the arbitration clause is silent as to class-wide arbitration. 130 S.Ct. at 1775 (a party does not agree "to submit to class arbitration unless there is a contractual basis for concluding that a party agreed to do so").

Which leads to the issue of how to proceed from here. As detailed above, we are persuaded by the record before us that if plaintiffs cannot pursue their allegations of antitrust law violations as a class, it is financially impossible for the plaintiffs to seek to vindicate their federal statutory rights. Since the plaintiffs cannot pursue these claims as class arbitration, either they can pursue them as judicial class action or not at all. If they are not permitted to pro-

ceed in a judicial class action, then, they will have been effectively deprived of the protection of the federal antitrust-law. The defendant will thus have immunized itself against all such antitrust liability by the expedient of including in its contracts of adhesion an arbitration clause that does not permit class arbitration, irrespective of whether or not the provision explicitly prohibits class arbitration.

Therefore, in light of the fact that the arbitration provision at issue here does not allow for class arbitration, under *Stolt–Nielsen* and by its terms, if the provision were enforced it would strip the plaintiffs of rights accorded them by statute. We conclude that this arbitration clause is unenforceable. We remand to the district court with the instruction to deny the defendant's motion to compel arbitration.

CONCLUSION

For the reasons given above, the decision of the district court is reversed. We remand to the district court for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 06-1871-cv

IN RE AMERICAN EXPRESS MERCHANTS' LITIGATION,

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

v.

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

Argued: Dec. 10, 2007

Decided: Mar. 8, 2011

Before: POOLER and SACK, Circuit Judges.[1]

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[1] The Honorable Sonia M. Sotomayor, originally a member of this panel, was elevated to the Supreme Court on August 8, 2009. The remaining two panel members, who are in agreement, have determined the matter. *See* 28 U.S.C. § 46(d); Second Circuit Internal Operating Procedure E(b); *United States v. DeSimone*, 140 F.3d 457, 458-59 (2d Cir.1998).

POOLER, Circuit Judge:

This case returns to us from the Supreme Court. Defendants American Express Company and American Express Travel Related Services Company Inc. (together, "Amex") sought review from the Supreme Court following our decision in *In re American Express Merchants Litigation*, 554 F.3d 300 (2d Cir.2009). There, we considered the enforcement of a mandatory arbitration clause in a commercial contract also containing a "class action waiver," that is, a provision which forbids the parties to the contract from pursuing anything other than individual claims in the arbitral forum. We found the class action waiver unenforceable, "because enforcement of the clause would effectively preclude any action seeking to vindicate the statutory rights asserted by the plaintiffs." *In re Am. Express*, 554 F.3d at 304.

On May 3, 2010, the Supreme Court granted Amex's writ for certiorari, vacating and remanding for reconsideration in light of its decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, ––– U.S. –––, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010). The parties submitted supplemental briefing discussing the impact, if any, of *Stolt-Nielsen* on our original decision, and we find no need for oral argument. Finding our original analysis unaffected by *Stolt-Nielsen*, we again reverse the district court's decision and remand for further proceedings, as discussed below.

BACKGROUND

Because the only issue before us is the narrow question of whether the class action waiver provision contained in the contract between the parties should be enforced, we provide but a brief recitation of the facts.

A. Procedural Posture. The plaintiffs appealed from the March 20, 2006 judgment of the United States District Court of the Southern District of New York, which granted Amex's motion to compel arbitration pursuant to the Federal Arbitration Act ("FAA") and Fed.R.Civ.P. 12(b). *See In re Am. Express Merchs. Litig.*, No. 03 cv 9592, 2006 WL 662341 (S.D.N.Y. March 16, 2006) (Daniels, J.).

A. The Parties. The amended complaint alleges that Amex "is the leading issuer of general purpose and corporate charge cards to consumers and businesses in the United States and throughout the world. It is also the leading provider of charge card services to merchants." The named plaintiffs are: (1) California and New York corporations which operate businesses which have contracted with Amex and (2) the National Supermarkets Association, Inc. ("NSA"), "a voluntary membership-based trade association that represents the interests of independently owned supermarkets."

The named plaintiffs seek to represent the following class:

> all merchants that have accepted American Express charge cards (including the American Express corporate card), and have thus been forced to agree to accept American Express credit and debit cards, during the longest period of time permitted by the applicable statute of limitations . . . throughout the United States . . . .

C. The Card Acceptance Agreement. The basic contractual relationship between Amex and the plaintiffs was set forth in an affidavit of an Amex executive:

> American Express issues card products to its card-members, which cardmembers then use in making purchases from participating merchants. Participating merchants with annual charge volume expected to be less than $10 million agree that, by submitting charges for payment by American Express, their relationship will be governed by the "Terms and Conditions for American Express© Card Acceptance" ("the Card Acceptance Agreement").

The Card Acceptance Agreement is a standard form contract issued by Amex. It may be terminated by either party "at any time by sending written notice to the other party." Further, Amex reserves the right:

> to change this Agreement at any time. We will notify you of any change in writing at least ten (10) calendar days in advance. If the changes are unacceptable to you, you may terminate this Agreement as described in the section entitled "TERMINATING THIS AGREEMENT."

According to Amex, the Card Acceptance Agreement has "expressly permitted amendments upon notice" for more than twenty-five years. The Card Acceptance Agreement also contains a choice of law provision designating New York law as governing and, as Amex states, there is no dispute that the agreement "has always" contained this provision.

By contrast, it is only since 1999 that the Card Acceptance Agreement has contained a mandatory arbitration clause:

> For the purpose of this Agreement, Claim means any assertion of a right, dispute or controversy between you and us arising from or relating to this Agreement and/or the relationship resulting

> from this Agreement. Claim includes claims of every kind and nature including, but not limited to, initial claims, counterclaims, cross-claims and third-party claims and claims based upon contract, tort, intentional tort, statutes, regulations, common law and equity. We shall not elect to use arbitration under this arbitration provision for any individual Claim that you properly file and pursue in a small claims court of your state or municipality so long as the Claim is pending only in that court.
>
> * * *
>
> Any Claim shall be resolved upon the election by you or us, by arbitration pursuant to this arbitration provision and the code of procedure of the national arbitration organization to which the Claim is referred in effect at the time the Claim is filed. Claims shall be referred to the National Arbitration Forum (NAF), JAMS/Endispute (JAMS), or the American Arbitration Association (AAA), as selected by the party electing to use arbitration. If a selection by us of one of these organizations is unacceptable to you, you shall have the right within thirty (30) days after you receive notice of our election to select one of the other organizations listed to serve as arbitrator administrator.

At the heart of the instant appeal is the following provision contained in the Agreement:

> IF ARBITRATION IS CHOSEN BY ANY PARTY WITH RESPECT TO A CLAIM, NEITHER YOU NOR WE WILL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR HAVE A JURY TRIAL ON THAT CLAIM . . . FURTHER, YOU WILL NOT HAVE THE RIGHT TO PAR-

> TICIPATE IN A REPRESENTATIVE CAPACITY OR AS A MEMBER OF ANY CLASS OF CLAIMANTS PERTAINING TO ANY CLAIM SUBJECT TO ARBITRATION. THE ARBITRATOR'S DECISION WILL BE FINAL AND BINDING. NOTE THAT OTHER RIGHTS THAT YOU WOULD HAVE IF YOU WENT TO COURT MAY ALSO NOT BE AVAILABLE IN ARBITRATION.
>
> There shall be no right or authority for any Claims to be arbitrated on a class action basis or on any basis involving Claims brought in a purported representative capacity on behalf of the general public, other establishments which accept the Card (Service Establishments), or other persons or entities similarly situated. Furthermore, Claims brought by or against a Service Establishment may not be joined or consolidated in the arbitration with Claims brought by or against any other Service Establishment(s), unless otherwise agreed to in writing by all parties.

The Card Acceptance Agreement thus not only precludes a merchant from bringing a class action lawsuit, it also precludes the signatory from having any claim arbitrated on anything other than an individual basis.

D. The District Court's Decision. Amex moved to compel arbitration pursuant to the terms of the Card Acceptance Agreement. In its March 16, 2006 opinion, the district court granted Amex's motion, first holding that the arbitration clause in the Agreement was "a paradigmatically broad clause" which was certainly applicable to the dispute between the parties. *In re Am. Express Merchs. Litig.*, 2006 WL 662341, at *4. The district court also held

that "[t]he enforceability of the collective action waivers is a claim for the arbitrator to resolve. Issues relating to the enforceability of the contract and its specific provisions are for the arbitrator, once arbitrability is established." *Id.* at *6. Thus, the district court concluded that all of the plaintiffs' substantive antitrust claims, as well the question of whether or not the class action waivers were enforceable, were subject to arbitration. Having so decided, the district court dismissed plaintiffs' cases against Amex. *Id.* at *10.

E. Our Original Decision, *In re American Express Merchants' Litigation*, 554 F.3d 300 (2d Cir.2009). The plaintiffs filed a timely appeal. We first decided that the issue of the class action waiver's enforceability was a matter for the court, not the arbitrator. *Id.* at 310. Neither party takes issue with that holding, which we find survives *Stolt-Nielsen*.

We then turned to the question of whether the class action waiver in the Card Acceptance Agreement was enforceable. We found that *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000), controlled our analysis:

> to the extent that it holds that when "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." 531 U.S. at 92, 121 S.Ct. 513. We find that the district court erred in ruling that the plaintiffs had failed to bear this burden because they had "ignore[d] the statutory protections provided by the Clayton Act." *In re American Express Mer-*

> *chants Litigation*, 2006 WL 662341, at *5. On the contrary, the record abundantly supports the plaintiffs' argument that they would incur prohibitive costs if compelled to arbitrate under the class action waiver. The Card Acceptance Agreement therefore entails more than a speculative risk that enforcement of the ban will deprive them of substantive rights under the federal antitrust statutes.

In re Am. Express, 554 F.3d at 315-16. Based in part on plaintiffs' submission of an affidavit from an economist detailing the fiscal impracticality of pursuing individual claims, we concluded that:

> Amex has brought no serious challenge to the plaintiffs' demonstration that their claims cannot reasonably be pursued as individual actions, whether in federal court or in arbitration, we find ourselves in agreement with the plaintiffs' contention that enforcement of the class action waiver in the Card Acceptance Agreement "flatly ensures that no small merchant may challenge American Express's tying arrangements under the federal antitrust laws." The effective negation of a private suit under the antitrust laws is troubling because such "private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979).

Id. at 319. Thus, we held that:

> the class action waiver in the Card Acceptance Agreement cannot be enforced in this case because to do so would grant Amex de facto immunity from antitrust liability by removing the plain-

> tiffs' only reasonably feasible means of recovery. As already set forth, Section 2 of the [Federal Arbitration Act], 9 U.S.C. § 2, provides that an agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Given that we believe that a valid ground exists for the revocation of the class action waiver, it cannot be enforced under the FAA.

Id. at 320. Amex timely filed a petition for certiorari. *Am. Exp. Co. v. Italian Colors Restaurant*, ––– U.S. –––, 130 S.Ct. 2401, 176 L.Ed.2d 920 (2010). The Supreme Court granted Amex's petition, vacated our original decision, and remanded for further consideration in light of its holding in *Stolt-Nielsen*. The parties submitted supplemental briefing, and we find no need for further oral argument.

ANALYSIS

As this case was returned to us to consider the applicability of *Stolt-Nielsen*, that is where we begin. In *Stolt-Nielsen*, petitioners were shipping companies. *Stolt-Nielsen*, 130 S.Ct. at 1764. Shipping company customers, including AnimalFeeds International Corp., ship their "goods pursuant to a standard contract known in the maritime trade as a charter party." *Id.* There are "[n]umerous charter parties in use and charterers like AnimalFeeds, or their agents – not the shipowners – typically select the charter party that governs their shipments." *Id.* at 1764-65. AnimalFeeds shipped its goods pursuant to a charter party that provided in relevant part:

> Arbitration. Any dispute arising from the making, performance or termination of this Charter Party shall be settled in New York, Owner and Charterer each appointing an arbitrator,

> who shall be a merchant, broker or individual experienced in the shipping business; the two thus chosen, if they cannot agree, shall nominate a third arbitrator who shall be an Admiralty lawyer. Such arbitration shall be conducted in conformity with the provisions and procedures of the United States Arbitration Act [i.e., the FAA], and a judgment of the Court shall be entered upon any award made by said arbitrator.

Id. at 1765 (internal quotation omitted).

AnimalFeeds, along with other charterers, sued Stolt-Nielsen, alleging illegal price fixing. As a result of various court decisions, AnimalFeeds and Stolt-Nielsen were required to arbitrate their antitrust dispute. *Id.* AnimalFeeds served a demand for class arbitration. *Id.* The parties agreed to have an arbitration panel decide the threshold issue of whether the charter party permitted class arbitration, and stipulated before the panel that the arbitration clause was silent on the issue of class arbitration. *Id.* at 1765-66. The arbitration panel heard evidence and argument, including testimony from Stolt-Nielsen's experts regarding arbitration customs and usage in the maritime trade. *Id.* at 1766. The panel concluded that the expert testimony offered did not demonstrate an "inten[t] to preclude class arbitration." *Id.* (bracket in original). After finding that the issue was controlled by the Supreme Court's decision in *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003), the panel concluded *Bazzle* and policy considerations dictated finding the clause permitted class arbitration. *Id.*

Stolt-Nielsen sought to vacate the arbitration award in the United States District Court for the Southern District of New York. *Stolt-Nielsen SA v. Animal-*

Feeds Int'l Corp., 435 F.Supp.2d 382 (S.D.N.Y.2006). The district court found the arbitration panel's decision was made in "manifest disregard" of the law. The district court found *Bazzle* controlling only to the extent that the decision about class arbitrability was one for the arbitration panel to decide, and that *Bazzle* did not speak to the issue of whether the clause permitted class arbitration. *Id.* at 384-85. The district court also found that if the panel had undertaken a "meaningful" choice of law analysis, it would have concluded that maritime and New York state law applied. *Id.* at 385. The Court then concluded that the clause precluded class arbitration. *Id.* at 386.

On appeal, our Court reversed. *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85 (2d Cir.2008). Noting that at oral argument counsel for Stolt-Nielsen conceded that the issue was one of first impression, we concluded that the relevant maritime and state law was inconclusive on the issue. *Id.* at 98. In the absence of a clear maritime or state rule on the issue, we found that the arbitration panel could not have been in manifest disregard of the law. *Id.* at 98–100.

The Supreme Court reversed. *Stolt-Nielsen*, 130 S.Ct. at 1768-73. The Court found that the arbitration panel "imposed its own policy choice," rather than "identifying and applying a rule of decision derived from the FAA or either maritime or New York law," and "thus exceeded its powers." *Id.* at 1770. Tackling the issue itself, the Court found the FAA controlling, *id.* at 1773, and reaffirmed that "arbitration is simply a matter of contract between the parties." *Id.* at 1774 (emphasis and brackets omitted). The Court continued:

> It falls to courts and arbitrators to give effect to these contractual limitations, and when doing so, courts and arbitrators must not lose sight of the purpose of the exercise: to give effect to the intent of the parties.

Id. at 1774-75. Applying those principles to the case before it, the Court concluded that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 1775 (emphasis in the original).

Amex urges that our decision cannot stand in the wake of *Stolt-Nielsen*, reading the decision as "repeatedly emphasiz[ing] courts' obligation to faithfully *enforce* (not just construe) the parties' arbitration agreement." (Amex. Supp. Reply Br. at 1) Amex argues that:

> *Stolt-Nielsen*'s holding that courts may not impose class arbitration on unwilling parties cannot be reconciled with appellants' contention that courts can invalidate the parties' agreement . . . based on the absence of class procedures.

(Amex Supp. Reply Br. at 2) We disagree. *Stolt-Nielsen* states that parties cannot be forced to engage in a class arbitration absent a contractual agreement to do so. It does not follow, as Amex urges, that a contractual clause barring class arbitration is per se enforceable. Indeed, our prior holding focused not on whether the plaintiffs' contract provides for class arbitration, but on whether the class action waiver is enforceable when it would effectively strip plaintiffs of their ability to prosecute alleged antitrust violations.

Section 2 of the FAA, 9 U.S.C. § 2, provides that an agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." As "the primary substantive provision," Section 2 "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the" FAA. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). In our previous opinion, we jointed [sic] other Circuits that evaluate the enforceability of the class action waivers under the federal substantive law of arbitrability. *See Gay v. CreditInform*, 511 F.3d 369, 394-95 (3d Cir.2007) (holding class action waiver to be enforceable under Section 2 of the FAA notwithstanding claim that waiver was unconscionable under state law); *Kristian v. Comcast Corp.*, 446 F.3d 25, 63 (1st Cir.2006) ("Although Plaintiffs' challenges to the enforceability of the arbitration agreements could be evaluated through the prism of state unconscionability law, we have chosen to apply a vindication of statutory rights analysis, which is also part of the body of federal substantive law of arbitration . . .").

Class action lawsuits are well-recognized by the Supreme Court as a vehicle for vindicating statutory rights. This is especially true with respect to the Court's recognition that the class action device is the only economically rational alternative when a large group of individuals or entities has suffered an alleged wrong, but the damages due to any single individual or entity are too small to justify bringing an individual action. The Court made the point forcefully more than thirty years ago in the context of an antitrust action:

> A critical fact in this litigation is that petitioner's individual stake in the damages award he seeks is only $70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all.

Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). Thus, as the Court later opined, "'[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.'" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir.1997)); *see also Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980) ("[A class action] may motivate [plaintiffs] to bring cases that for economic reasons might not be brought otherwise[, thereby] vindicating the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost."); *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir.2004) ("[T]he realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30." (emphasis omitted)).

The Court addressed the use of class actions as a vehicle for vindicating statutory rights in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991). *Gilmer* involved a claim under the Age Discrimination in Employment

Act ("ADEA"), 29 U.S.C. § 621 et seq. Specifically, the plaintiff, a manager at a brokerage firm, asserted that he had been terminated by the firm in violation of the ADEA. *Id.* at 23, 111 S.Ct. 1647. After the plaintiff had filed suit in federal district court, the defendant firm moved to compel arbitration pursuant to a mandatory arbitration provision contained in the rules of the New York Stock Exchange ("NYSE"), to which the plaintiff had agreed to be bound when he became a registered securities representative. *Id.* at 23-24, 111 S.Ct. 1647. The *Gilmer* Court held that because "[i]t is by now clear that statutory claims may be the subject of an arbitration agreement," the arbitration clause was enforceable "'unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'" *Id.* at 26, 111 S.Ct. 1647 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)). Even though the Court acknowledged that "the ADEA is designed not only to address individual grievances, but also to further important social policies," *id.* at 27, 111 S.Ct. 1647, it discerned no Congressional intent to preclude ADEA claims from being subject to arbitration. The Court also considered the plaintiff's argument to the effect "that arbitration procedures cannot adequately further the purposes of the ADEA because they do not provide for broad equitable relief and class actions." *Id.* at 32, 111 S.Ct. 1647. The Court rejected this contention, finding that:

> arbitrators do have the power to fashion equitable relief. Indeed, the NYSE rules applicable here do not restrict the types of relief an arbitrator may award, but merely refer to "damages and/or other relief." The NYSE rules also provide

> for collective proceedings. But even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the ADEA provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.

Id. (citations, internal quotation marks, and brackets omitted).

The Third Circuit, among others, relied on the final sentence of this passage to uphold a mandatory arbitration clause. *Johnson v. W. Suburban Bank*, 225 F.3d 366 (3d Cir.2000), dealt with a claim under the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 et seq. The plaintiffs argued that their class action claim in federal court was not subject to mandatory arbitration because TILA:

> effectively create[s] an unwaivable right to bring a class action . . . [In TILA,] Congress enacted a scheme in which the court hearing a class action could set a damage figure up to a certain amount for certain patterns of conduct. This judicial flexibility in imposing damages up to $500,000 only exists if a class action is allowed, as individual plaintiff claims are generally capped at $1,000. Therefore, a right of classes to a judicially crafted punitive remedy is lost if this court orders arbitration of Johnson's claims.

Id. at 377.

The Third Circuit held that "[t]his argument is unavailing in light of" *Gilmer*. *Id.* The court noted that *Gilmer* involved a claim under the ADEA, a statute which explicitly provides in its text for the bringing of class actions. *Id.* (citing 29 U.S.C. § 626(b)). In

spite of this, the court concluded, "the Supreme Court still ruled that the ADEA did not preclude arbitration notwithstanding the unavailability of the class action remedy there." *Id.*; *see also Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir.2004) ("[W]e reject the [plaintiffs'] claim that their inability to proceed collectively [in arbitration] deprives them of substantive rights available under the [Fair Labor Standards Act.] The Supreme Court rejected similar arguments concerning the ADEA in *Gilmer* . . . .").

We cannot agree with this view of *Gilmer* because a collective and perhaps a class action remedy was, in fact, available in that case. As set forth above, the Supreme Court explicitly noted that the arbitration rules of the NYSE provided for the conduct of collective arbitration. *Gilmer*, 500 U.S. at 32, 111 S.Ct. 1647. At the time *Gilmer* was decided, the NYSE's rules may also have permitted arbitration claims submitted as class actions. *Compare* NYSE Rule 600(d) (2008) ("A claim submitted as a class action shall not be eligible for arbitration under the Rules of the Exchange.") *with* NYSE Rule 612(d) (1991) (containing no prohibition on class actions). The statement in *Gilmer* that the arbitration clause would be enforceable "even if" class remedies were available evidences that the Court itself was uncertain, but acknowledged the probability, that class actions were feasible under the NYSE's rules. Moreover, it is dicta that does not apply here. The plaintiffs do not proffer the argument rejected in *Gilmer*, namely that the class action waiver is unenforceable merely because the relevant statute allows class actions. Rather, the conundrum presented by the instant appeal is more nuanced: whether the man-

datory class action waiver in the Card Acceptance Agreement is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement of the waiver would be to preclude their bringing Sherman Act claims against Amex in either an individual or collective capacity.

Green Tree Financial Corp.-Alabama v. Randolph also involved the enforcement of a statutory right, this time under the TILA. 531 U.S. 79, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000). The specific issue to be decided was "whether an arbitration agreement that does not mention arbitration costs and fees is unenforceable because it fails to affirmatively protect a party from potentially steep arbitration costs." *Randolph*, 531 U.S. at 82, 121 S.Ct. 513. The plaintiff argued "that the arbitration agreement's silence with respect to costs and fees creates a 'risk' that she will be required to bear prohibitive arbitration costs if she pursues her claims in an arbitral forum, and thereby forces her to forgo any claims she may have had against [the defendants]." *Id.* at 90, 121 S.Ct. 513. The Supreme Court rejected this argument because the plaintiff had proved no more than that the asserted "risk" was hypothetical:

> It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum. But the record does not show that Randolph will bear such costs if she goes to arbitration. Indeed, it contains hardly any information on the matter . . . The record reveals only the arbitration agreement's silence on the subject, and that fact alone is plainly insufficient to render it unenforceable. The "risk" that Randolph will be saddled with

> prohibitive costs is too speculative to justify the invalidation of an arbitration agreement.

Id. at 90-91, 121 S.Ct. 513.

Other Circuits also observed that a plaintiff could challenge a class action waiver clause on the grounds that it would be a cost prohibitive method of enforcing a statutory right, provided that a plaintiff set forth sufficient proof to support such a finding. *See, e.g.*, *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 285 (4th Cir.2007) ("[I]f a party could demonstrate that the prohibition on class actions likely would make arbitration prohibitively expensive, such a showing could invalidate an agreement."); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 557 (7th Cir.2003) ("In the present case, the [plaintiffs] have not offered any specific evidence of arbitration costs that they may face in this litigation, prohibitive or otherwise, and have failed to provide any evidence of their inability to pay such costs . . . ."); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir.2002) ("[Lead plaintiff] makes no showing of the specific financial status of any of the plaintiffs at the time this action was brought. He provides no basis for a serious estimation of how much money is at stake for each individual plaintiff.").

We continue to find *Randolph* "controlling here to the extent that it holds that when 'a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.'" *In re Am. Express*, 554 F.3d at 315 (quoting *Randolph*, 531 U.S. at 92, 121 S.Ct. 513). The Supreme Court also recognized that public policy concerns might bar enforcement of an agreement to arbitrate in *Mitsubishi Motors Corp. v. Soler*

Chrysler-Plymouth, Inc., 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). The *Mitsubishi* Court recognized, however, that there might be instances in which an arbitration agreement contained provisions that would be unenforceable because they would prevent a prospective litigant from vindicating its rights under the Sherman Act in an arbitral forum. *Id.* at 637, 105 S.Ct. 3346. Specifically, the amici in *Mitsubishi* speculated that the choice-of-forum and choice-of-law clauses in the arbitration agreement at issue would effectively preclude the arbitrator from determining the plaintiff's substantive claims in accordance with the terms of the Sherman Act. *Id.* at 637, n.19, 105 S.Ct. 3346. The Court responded that it would not prevent the case from going to arbitration based upon mere conjecture as to what body of law the arbitrator would apply, but also continued as follows:

> We merely note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.

Id. at 637 n. 19, 105 S.Ct. 3346. While dicta, it is dicta based on a firm principle of antitrust law that an agreement which in practice acts as a waiver of future liability under the federal antitrust statutes is void as a matter of public policy. More than a half-century ago, the Supreme Court stated that "in view of the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action," an agreement which confers even "a partial immunity from civil liability for future violations" of the antitrust laws is inconsis-

tent with the public interest. *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 329, 75 S.Ct. 865, 99 L.Ed. 1122 (1955); *see also Minnesota Mining and Mfg. Co. v. Graham-Field, Inc.*, No. 96 cv 3839, 1997 WL 166497, at *3 (S.D.N.Y. Apr. 9, 1997) ("GFI could not have waived [its antitrust] claim in the releases because a prospective waiver of an antitrust claim violates public policy.").

We find the record evidence before us establishes, as a matter of law, that the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws. Plaintiffs submitted to the district court a detailed affidavit from Gary L. French, Ph.D., an economist associated with Nathan Associates Inc., a financial consulting firm retained by the plaintiffs. Dr. French stated that the purpose of his affidavit was "to provide an expert opinion concerning the likely costs and complexity of an expert economic study concerning the liability and damages" relating to this action, and to compare this with "the potential recovery of damages by an American Express Card merchant with annual sales volume of $10 million or less, such as most if not all of the named plaintiffs in this litigation, and to provide my opinion as to whether it would be economically rational for such a merchant to pursue recovery of damages given the likely out-of-pocket costs of the arbitration or litigation proceeding." (A362, ¶ 4)

Dr. French continued:

> Due to the complexity and analytical intensity of an antitrust study, total expert fees and expenses usually are substantial, even in a non-class action involving an individual plaintiff. In my

> experience, even a relatively small economic antitrust study will cost at least several hundred thousand dollars, while a larger study can easily exceed $1 million . . . . In summary, the cost of [Nathan Associates'] expert assistance in individual plaintiff antitrust cases has ranged from about $300 thousand to more than $2 million. However, after reviewing the complaint and doing some preliminary research in this case, it is my opinion that . . . the cost for this case will fall in the middle of the range of [Nathan Associates'] experience.

(A362-63, ¶ 4) Dr. French then considered the economic rationality of bringing an individual action against Amex in light of these substantial expert witness costs:

> The median volume merchant, with half of the named plaintiffs having more and half having less American Express charge volume, and having reported $230,343 American Express Card volume in 2003, might expect four-year damages of $1,751, or $5,252 when trebled . . . . The largest volume named plaintiff merchant, with reported American Express Card volume of $1,690,749 in 2003, might expect four-year damages of $12,850, or $38,549 when trebled.
>
> In my opinion as a professional economist . . . it would not be worthwhile for an individual plaintiff . . . to pursue individual arbitration or litigation where the out-of-pocket costs, just for the expert economic study and services, would be at least several hundred thousand dollars, and might exceed $1 million.

(A365, ¶ 10-11)

Dr. French's affidavit demonstrates that the only economically feasible means for enforcing their statutory rights is via a class action. As discussed in our earlier opinion, the district court did not directly address Dr. French's affidavit, focusing instead on the damages provision of the Clayton Act, 15 U.S.C. § 15(a). *In re Am. Express*, 554 F.3d at 317. We found that while the Clayton Act does provide for treble awards along with the recovery of attorneys' fees and expenses, that was unlikely to assist plaintiffs here, where "the trebling of a small individual damages award is not going to pay for the expert fees Dr. French has estimated will be necessary to make an individual plaintiff's case." *Id.* We also found the Clayton Act's fee-shifting provisions inadequate to alleviate our concerns given the low expert witness reimbursement rate. *Id.* at 318. "Even with respect to reasonable attorney's fees, which are shifted under Section 4 of the Clayton Act, the plaintiffs must include the risk of losing, and thereby not recovering any fees, in their evaluation of their suit's potential costs." *Id.*

As we did earlier, we find "Amex has brought no serious challenge to the plaintiffs' demonstration that their claims cannot reasonably be pursued as individual actions, whether in federal court or in arbitration." *In re Am. Express*, 554 F.3d at 319. We again conclude "that enforcement of the class action waiver in the Card Acceptance Agreement 'flatly ensures that no small merchant may challenge American Express's tying arrangements under the federal antitrust laws.'" *Id.* Eradicating the private enforcement component from our antitrust law scheme cannot be what Congress intended when it included strong private enforcement mechanisms

and incentives in the antitrust statutes. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 344, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979) ("[p]rivate suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations."); *see also* Dando B. Cellini, "*An Overview of Antitrust Class Actions*," 49 Antitrust L.J. 1501, 1506 (1980) (discussing private, class action antitrust lawsuits and observing that "it is obvious from the experience over the last fifteen years since the 1966 amendments to Rule 23 were adopted that linking an antitrust claim with a class action allegation can be devastatingly effective.").

Thus, as the class action waiver in this case precludes plaintiffs from enforcing their statutory rights, we find the arbitration provision unenforceable. The two caveats we articulated in our original opinion still apply. *In re Am. Express*, 554 F.3d at 320. Our decision in no way relies upon the status of plaintiffs as "small" merchants. We rely instead on the need for plaintiffs to have the opportunity to vindicate their statutory rights. In this case, the record demonstrates that the size of any potential recovery by an individual plaintiff will be too small to justify the expense of bringing an individual action. Moreover, we do not conclude here that class action waivers in arbitration agreements are per se unenforceable. We also do not hold that they are per se unenforceable in the context of antitrust actions. Rather, we hold that each case which presents a question of the enforceability of a class action waiver in an arbitration agreement must be considered on its own merits, governed with a healthy regard for the fact that the FAA "is a congressional declaration of a liberal federal policy favoring arbitration agree-

ments." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24, 103 S.Ct. 927.

Amex argues that *Stolt-Nielsen* expressly rejects the use of public policy as a basis for finding contractual language void. We disagree. While *Stolt-Nielsen* plainly rejects using public policy as a means for divining the parties' intent, nothing in *Stolt-Nielsen* bars a court from using public policy to find contractual language void. We agree with plaintiffs that "[t]o infer from *Stolt-Nielsen*'s narrow ruling on contractual construction that the Supreme Court meant to imply that an arbitration is valid and enforceable where, as a demonstrated factual matter, it prevents the effective vindication of federal rights would be to presume that the *Stolt-Nielsen* court meant to overrule or drastically limit its prior precedent." (Plaintiffs' Supp. Brief, p. 7) Following the *Stolt-Nielsen* decision, our court reached a similar conclusion in considering a different iteration of the issue: whether class action waivers are unconscionable as a matter of state law. *Fensterstock v. Educ. Fin. Partners*, 611 F.3d 124, 140 (2d Cir.2010).

As *Fensterstock* recognizes, however, *Stolt-Nielsen* does alter what relief this Court may order. *Stolt-Nielsen* plainly precludes us from ordering class-wide arbitration, but we did not do so earlier. *Fensterstock*, 611 F.3d at 139-41; *In re Am. Express*, 554 F.3d at 321. Indeed, we specifically stated in our earlier opinion that we were remanding to the district court to "allow Amex the opportunity to withdraw its motion to compel arbitration," *In Re Am. Express*, 554 F.3d at 321, and it appears that Amex did so, choosing litigation over arbitration. (Amex Supp. Br. p. 5, n.1) Our ruling does not disrupt the current

status quo. Hence, we remand to the district court for further proceedings consistent with this opinion.

CONCLUSION

For the reasons given above, the decision of the district court is REVERSED. We REMAND to the district court for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 06-1871-cv

IN RE AMERICAN EXPRESS MERCHANTS' LITIGATION,

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

v.

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

Argued: Dec. 10, 2007

Decided: Jan. 30, 2009

POOLER, SACK, and SOTOMAYOR, Circuit Judges.

POOLER, Circuit Judge:

This Court frequently enforces mandatory arbitration clauses contained in commercial contracts. We do so on the principle that "it is difficult to overstate the strong federal policy in favor of arbitration, and it is a policy we have often and emphatically applied."

Arciniaga v. General Motors Corp., 460 F.3d 231, 234 (2d Cir.2006) (quotation marks omitted). On this appeal, however, we are asked to consider the enforcement of a mandatory arbitration clause in a commercial contract that also contains a "class action waiver," also referred to as a "collective action waiver," that is, a provision which forbids the parties to the contract from pursuing anything other than individual claims in the arbitral forum. This is a matter of first impression in our Court.[7]

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[7] We note that two district courts in our Circuit have found class action waivers in mandatory arbitration clauses to be enforceable. In *Sherr v. Dell, Inc.*, No. 05cv10097, 2006 WL 2109436 (S.D.N.Y. July 27, 2006), a consumer brought a putative class action suit against Dell alleging that certain of the latter's products had a dangerous tendency to overheat. The plaintiff asserted claims under the statutory and common law of New York. *Id.* at *1. Dell moved to compel arbitration and for the enforcement of a class action waiver contained in its sales contract, the terms of which were not even available to the consumer before purchase short of his calling a special telephone number or visiting a Dell internet site. *Id.* The district court granted the motion to compel, holding that the "plaintiff is not entitled to a class action suit or class-wide arbitration to vindicate the rights of everyone else with a similar problem. The [Federal Arbitration Act's] primary purpose is not to create a right to sue as a class. Its main purpose is to ensure that private agreements to arbitrate are enforced according to their terms." *Id.* at *7 (quotation marks omitted). The case was decided according to the law of Texas, which, the district court found, had incorporated the Federal Arbitration Act as part of its substantive law. *Id.*

Dumanis v. Citibank (South Dakota), N.A., No. 07cv6070, 2007 WL 3253975 (W.D.N.Y. Nov.2, 2007), was an action involving credit card interest rates brought under the federal Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, and the New York General Business Law. The contract at issue had a South Dakota choice of law clause, and the decision was based upon the law of that state, not the federal law of arbitration. *Id.* at *2-*3. The

One commentator has recently contended that "[t]he outright banning of class action in mandatory arbitration clauses has become a standard policy for many corporations that transact with consumers." Bryan Allen Rice, "Comment: Enforceable or Not?: Class Action Waivers in Mandatory Arbitration Clauses and the Need for a Judicial Standard," 45 *Hous. L.Rev.* 215, 224 (2008).[8] We acknowledge at the outset, as have other courts that have considered questions arising from the enforcement of class action waivers, in both consumer and commercial contracts, that the wisdom and utility of these provisions have become the subject of intense debate. *See Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 63 (1st Cir.2007) ("We recognize that there is a policy debate about whether class action waivers essential-

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district court enforced the class action waiver contained in the contract's mandatory arbitration clause, both because the plaintiff could have "opt[ed] out" of the arbitration clause by not renewing his credit card and because the plaintiff had not been stripped of any substantive remedies; he merely could not pursue them "in the arguably more-favorable context of a class action." *Id.*

We note that in neither *Sherr* nor *Dumanis* does it appear that the plaintiff made a substantial demonstration – which we hold that the plaintiffs have made here – to the effect that an inability to pursue arbitration on a class basis would be tantamount to an inability to assert their claims at all.

[8] Two commentators have suggested that this is particularly so in the credit card industry: "Credit card companies have shown themselves to be even less enthusiastic about classwide arbitration than about class action litigation. The 'devil you know' phenomenon is compounded by the uncertainty of judicial review of class certification in arbitration and the concomitant fear of a 'renegade arbitrator' certifying a class and exposing a company to massive liability." Samuel Issacharoff & Erin F. Delaney, "Credit Card Accountability," 73 *U. Chi. L.Rev.* 157, 179 (2006).

ly act as exculpatory clauses, allowing for violations of laws where individual cases involve low dollar amounts and so will not adequately address or prevent illegality."). The opposing positions in this frequently impassioned debate have been dispassionately described as follows:

> Companies' use of class action waivers is motivated by the view that plaintiffs exploit the class action procedure in order to wrest large and unfair settlements from defendants . . . . Class action waivers are viewed by these companies as a way to defend themselves from consumers who are ganging up on companies through the leverage inherent in the aggregation of large numbers of claims. In further support of these waivers, corporations argue that the many (perceived) advantages of arbitration to a plaintiff make up for any disadvantages or inconveniences that the plaintiff may incur by sacrificing the ability to be part of a class action.
>
> . . . Opponents of class action waivers contend that the ability to aggregate claims is crucial to protect the rights of those individuals . . . who do not have the resources to litigate individual claims. Further, many individual claims are only viable if brought on a class-wide basis. Indeed, by prohibiting class actions in . . . lawsuits[] where the expected recovery is dwarfed by the cost of litigating or arbitrating the claim, individuals are effectively prevented from pursuing their claims. As a result, businesses are able to engage in unchecked market misbehavior . . . .

J. Maria Glover, "Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agree-

ments," 59 *Vand. L.Rev.* 1735, 1746-47 (2006) (footnotes and internal quotation marks omitted).

Both of these positions have been proffered to the Court by amici. *Compare* Brief of Atlantic Legal Foundation at 4 ("For several decades, providers of products and services in the United States have been beset with a litigious environment that has evoked criticism of many observers and applauded only by those professionals who have harvested the substantial financial rewards the civil justice system has produced by way of attorneys' fees . . . . Recognizing the risks of defending against class action litigation, many businesses have elected to have disputes resolved by individual arbitrations and to adopt collective action waivers as part of their arbitration clauses with their business customers to insure that result.") *with* Brief of Trial Lawyers for Public Justice at 27 ("It is . . . crucial to understand that any ban on class arbitration is essentially a ban on class treatment altogether, as arbitration clauses in standardized corporate contracts are made broader and broader, to encompass all conceivable types of disputes . . . . Under a regime where such prohibitions are enforced, such clauses are tantamount to a clause banning all claims against a corporation, unless they are so large that they justify the outlay of the extraordinary expense involved.").[9]

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[9] Interestingly, when it enacted the Class Action Fairness Act of 2005, Congress itself found both utility and danger in the use of the class action device. *Compare* Pub.L. No. 109-2, § 2(a)(1), 119 Stat. 4 (2005) ("Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated . . . .") *with id.* at § 2(a)(2) ("Over the past decade, there have been abuses of the class

We note that two standard treatises on the conduct of class action litigation appear to take opposing positions as well. *Compare* 1 Joseph M. McLaughlin, *McLaughlin on Class Actions: Law and Practice*, § 2:14 (3d ed. 2006) ("As the potential availability of class-wide arbitration threatens to multiply exponentially the exposure on what is facially a single-consumer issue, companies should strongly consider including in their standard arbitration agreements an express provision barring class action litigation or arbitration.") *with* 3 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, § 9:67 n. 2 (4th ed. 2008) ("The bar on class arbitration threatens the premise that arbitration can be a fair and adequate mechanism for enforcing statutory rights.").

While we are conscious of this debate, we are thankful that we need not resolve it on this appeal. That is, we do not decide whether class action waiver provisions are either void or enforceable *per se*. Rather, we are concerned solely with the class action waiver contained in the contract between the parties before us on this appeal. We conclude that, on the record before us, the plaintiffs have adequately demonstrated that the class action waiver provision at issue should not be enforced because enforcement of the clause would effectively preclude any action seeking to vindicate the statutory rights asserted by the plaintiffs.

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action device that have – (A) harmed class members with legitimate claims and defendants that have acted responsibly; (B) adversely affected interstate commerce; and (C) undermined public respect for our judicial system.").

FACTS

A. Procedural Posture. The plaintiffs appeal from the judgment, dated March 20, 2006, memorializing the memorandum opinion and order, dated March 15, 2006, of the United States District Court of the Southern District of New York, which granted defendants American Express Company and American Express Travel Related Services Company, Inc.'s (collectively "Amex") motion to compel arbitration. *See In re American Express Merchants Litig.*, No. 03cv9592, 2006 WL 662341 (S.D.N.Y. March 16, 2006) (Daniels, J.). The earliest iteration of the plaintiffs' claims was made in August 2003, with the filing of a class action complaint in the United States District Court for the Northern District of California ("the *Italian Colors* action"). This action, and another subsequently filed class action, were transferred, on Amex's motion, brought pursuant to 28 U.S.C. § 1404(a), to the United States District Court for the Southern District of New York. (JA 14, 85) By an order, dated December 10, 2004, that court consolidated these two actions, pursuant to Rule 42(a) of the Federal Rules of Civil Procedure, with several class actions that had been filed in the Southern District of New York. Any subsequently filed related actions were also made subject to this consolidation order.

Because we consider here only the narrow question of whether the class action waiver provision contained in the contract between the parties should be enforced, a prolix description of the plaintiffs' claims is unnecessary. (And, needless to say, we take no position on the merits of these claims.) In their briefs on this appeal, the parties describe the plaintiffs' claims largely by reference to the amended com-

plaint, filed December 24, 2003, in the *Italian Colors* action. We will do so as well.

B. The Parties. The plaintiffs allege that Amex "is the leading issuer of general purpose and corporate charge cards to consumers and businesses in the United States and throughout the world. It is also the leading provider of charge card services to merchants." The named plaintiffs are: (1) California and New York corporations which operate businesses which have contracted with Amex and (2) the National Supermarkets Association, Inc. ("NSA"), "a voluntary membership-based trade association that represents the interests of independently owned supermarkets." The named plaintiffs seek to represent the following class, pursuant to Rule 23 of the Federal Rules of Civil Procedure:

> The class is comprised of all merchants that have accepted American Express charge cards (including the American Express corporate card), and have thus been forced to agree to accept American Express credit and debit cards, during the longest period of time permitted by the applicable statute of limitations . . . throughout the United States . . . .

C. The Card Acceptance Agreement. The basic contractual relationship between Amex and the plaintiffs is set forth in an affidavit of an Amex executive:

> American Express issues card products to its cardmembers, which cardmembers then use in making purchases from participating merchants. Participating merchants with annual charge volume expected to be less than $10 million agree that, by submitting charges for payment by American Express, their relationship will be

> governed by the "Terms and Conditions for American Express© Card Acceptance" ("the Card Acceptance Agreement").[10]

The Card Acceptance Agreement is a standard form contract issued by Amex. It may be terminated by either party "at any time by sending written notice to the other party." Further, Amex reserves the right

> to change this Agreement at any time. We will notify you of any change in writing at least ten (10) calendar days in advance. If the changes are unacceptable to you, you may terminate this Agreement as described in the section entitled "TERMINATING THIS AGREEMENT."

According to Amex, the Card Acceptance Agreement has "expressly permitted amendments upon notice" for more than twenty-five years. The Card Acceptance Agreement also contains a choice of law provision designating New York law as governing and, as Amex states, there is no dispute that the agreement "has always" contained this provision.

By contrast, it is only since 1999 that the Card Acceptance Agreement has contained a mandatory arbitration clause. That clause is nothing if not capaciously worded:

> For the purpose of this Agreement, *Claim* means any assertion of a right, dispute or controversy between you and us arising from or relating to this Agreement and/or the relationship resulting from this Agreement. Claim includes claims of every kind and nature including, but not limited

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[10] Amex confirmed at oral argument that this $10 million figure relates to purchases made with Amex products, not to purchases made by credit cards generally.

to, initial claims, counterclaims, cross-claims and third-party claims and claims based upon contract, tort, intentional tort, statutes, regulations, common law and equity. We shall not elect to use arbitration under this arbitration provision for any individual Claim that you properly file and pursue in a small claims court of your state or municipality so long as the Claim is pending only in that court.

* * *

Any Claim shall be resolved upon the election by you or us, by arbitration pursuant to this arbitration provision and the code of procedure of the national arbitration organization to which the Claim is referred in effect at the time the Claim is filed. Claims shall be referred to the National Arbitration Forum (*NAF*), JAMS/Endispute (JAMS), or the American Arbitration Association (*AAA*), as selected by the party electing to use arbitration. If a selection by us of one of these organizations is unacceptable to you, you shall have the right within thirty (30) days after you receive notice of our election to select one of the other organizations listed to serve as arbitrator administrator.

At the heart of the instant appeal is the fact that the Agreement also contains the following provision:

IF ARBITRATION IS CHOSEN BY ANY PARTY WITH RESPECT TO A CLAIM, NEITHER YOU NOR WE WILL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR HAVE A JURY TRIAL ON THAT CLAIM . . . . FURTHER, YOU WILL NOT HAVE THE RIGHT TO PARTICIPATE IN A REPRESENTATIVE CAPACITY OR AS A MEMBER OF ANY CLASS OF

> CLAIMANTS PERTAINING TO ANY CLAIM SUBJECT TO ARBITRATION. THE ARBITRATOR'S DECISION WILL BE FINAL AND BINDING. NOTE THAT OTHER RIGHTS THAT YOU WOULD HAVE IF YOU WENT TO COURT MAY ALSO NOT BE AVAILABLE IN ARBITRATION.
>
> There shall be no right or authority for any Claims to be arbitrated on a class action basis or on any basis involving Claims brought in a purported representative capacity on behalf of the general public, other establishments which accept the Card (*Service Establishments*), or other persons or entities similarly situated. Furthermore, Claims brought by or against a Service Establishment may not be joined or consolidated in the arbitration with Claims brought by or against any other Service Establishment(s), unless otherwise agreed to in writing by all parties.

Thus, the Card Acceptance Agreement not only precludes a merchant from bringing a class action lawsuit, it also precludes the signatory from having any claim arbitrated on anything other than an individual basis. The Card Acceptance Agreement further provides as follows:

> This arbitration provision is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act, 9 U.S.C. Sections 1-16, as it may be amended (*the FAA*). The arbitrator shall apply applicable substantive law consistent with the FAA . . . . In conducting the arbitration proceeding, the arbitrator shall not apply the Federal or any state rules of civil procedure or rules of evidence. The

> arbitrator shall apply the applicable provisions of the Code of Procedure of the NAF, JAMS or AAA, as applicable to matters relating to evidence and discovery.[11]

D. The Plaintiffs' Substantive Claims. The plaintiffs' dispute with Amex rests upon the distinction between "charge cards" and "credit cards." The district court explained the distinction as follows:

> A charge card requires its holder to pay the full outstanding balance at the end of a standard billing cycle. A credit card, by contrast, allows the cardholder to pay a portion of the amount owing at the close of a billing cycle, subject to interest charges. In plain terms, the credit card is a means of financing purchases, the charge card is a method of payment.

In re American Express Merchants Litig., 2006 WL 662341, at *1 n. 6.

According to the plaintiffs, Amex had until recent years centered its business on the issuance of corporate and personal charge cards to corporate clients and affluent consumers. Amex is alleged to be the undisputed leader in this market, to the extent that it "issues Corporate Cards to at least 70% of the

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[11] The plaintiffs make no challenge to this preemption of the Federal Rules of Civil Procedure by the rules of the various arbitration firms listed in the Card Acceptance Agreement. We note, however, that some commentators have argued that plaintiffs are placed at a distinct disadvantage by class arbitration rules of these firms. *See* Daniel R. Higginbotham, "Buyer Beware: Why the Class Arbitration Waiver Clause Presents a Gloomy Future for Consumers," 58 *Duke L.J.* 103, 123 (2008) ("Regarding many important issues . . . the rules [of arbitration firms] are either silent or diverge significantly from the Federal Rules of Civil Procedure, raising serious questions as to the ability of class arbitration to adequately resolve disputes.").

companies included in the Fortune 500, and is likewise the leading issuer of Corporate Cards to middle-market companies . . . and small businesses." The plaintiffs further assert that "[h]olders of charge cards are more affluent than credit cardholders, and a vastly higher percentage of charge cards than credit cards are held by businesses and used for business travel and other corporate purposes." In fact, the plaintiffs allege that Amex itself contends that "the average purchase on an American Express card is 17% higher than the average purchase made on a credit card."

Thus, the holder of a charge card is likely to be "a higher class of customer" and, as such, is particularly attractive to merchants such as the plaintiffs. Amex is certainly not unaware of this attraction, and as a result of it, Amex has traditionally been able to charge high "merchant discount fees," which are the fees a card issuer withholds as a percentage of each purchase made with its card at the merchant's establishment. These fees, the plaintiffs aver, "are at least 35% higher than competitive rates" applicable to mass-market credit cards such as Visa, MasterCard, and Discover.

Over the last decade, however, the plaintiffs contend that Amex's "business in the markets for credit card issuance and credit card services has grown dramatically." Specifically, Amex has in recent years created new credit card products "marketed to college students, young adults and others who would certainly not produce the high per-transaction spending that Amex uses to justify [the] high [merchant] discount fees. By leveraging its market power in corporate and personal charge cards, however, American Express was able to compel merchants to accept its

new revolving credit card product[s] at the *same* elevated discount rate, which vastly exceeded the rate for comparable Visa, MasterCard or Discover products."

According to the plaintiffs, the vehicle of this compulsion is the "Honor All Cards" provision contained in the Card Acceptance Agreement. Under the Agreement, a merchant does not contract to accept any one Amex product as a form of payment. Rather, the Agreement applies

> to your acceptance of American Express© Cards . . . . *American Express Card(s)* . . . shall mean any card or other account access device issued by American Express Travel Related Services Company, Inc., or its subsidiaries or affiliates or its or their licensees bearing the American Express name or an American Express trademark, service mark or logo.

The plaintiffs assert that, by means of the "Honor All Cards" provision, merchants are faced with the choice of paying supracompetitive merchant discount fees (i.e., fees above competitive levels) on Amex's new mass-market products or "inevitably los[ing] a significant portion of the sales they receive from businesses, travelers, affluent consumers, and others" who are the traditional users of Amex charge cards. This, the plaintiffs claim, amounts to an illegal "tying arrangement," in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.[12]

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[12] In a definition that has become classic, the Supreme Court has defined a tying arrangement as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5-6, 78

E. The District Court's Decision. Amex moved to compel arbitration pursuant to the terms of the Card Acceptance Agreement. In its March 15, 2006 opinion, the district court granted Amex's motion, first holding that the arbitration clause in the Agreement was "a paradigmatically broad clause" which was certainly applicable to the dispute between the parties. *In re American Express Merchants Litig.*, 2006 WL 662341, at *4. The district court proceeded to consider the plaintiffs' contention that enforcement of the class action waiver would effectively strip them of the ability to assert their claims because "each individual plaintiff would have to incur discovery costs amounting to hundreds of thousands of dollars, despite seeking average damages of only $5000." *Id.* The district court expressed skepticism that this argument amounted to much:

> Plaintiffs' contention . . . that the costs of individual arbitration would eclipse the value of any potential recovery, ignores the statutory protections provided by the Clayton Act. Section 4 of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. 15(a) . . . .

Id. at *5 (footnote omitted).

S.Ct. 514, 2 L.Ed.2d 545 (1958). A tying arrangement will violate Section 1 of the Sherman Act if "the seller has appreciable economic power in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market." *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 462, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992) (internal quotation marks omitted).

This observation was quickly reduced to dicta, however. This is because the district court proceeded to hold that "[t]he enforceability of the collective action waivers is a claim for the arbitrator to resolve. Issues relating to the enforceability of the contract and its specific provisions are for the arbitrator, once arbitrability is established." *Id.* at *6. Thus, the district court concluded that all of the plaintiffs' substantive antitrust claims, as well the question of whether or not the class action waivers were enforceable, were subject to arbitration.

The plaintiffs also made two additional arguments before the district court. First, they contended that the class action waiver could not be enforced against those named plaintiffs who had contracted with Amex before the 1999 inclusion of the mandatory arbitration clause in the Card Acceptance Agreement. Amex purportedly informed these plaintiffs of the inclusion of the clause by means of an amendment to the Agreement. The plaintiffs contended, however, that (1) Amex had not produced sufficient evidence of the fact that the "pre-1999 plaintiffs" had ever received this amendment and (2) even if the plaintiffs had received the amendment, their original merchant contract with Amex did not allow the subsequent introduction of an arbitration clause. The district court rejected these arguments, concluding that the plaintiffs had not successfully rebutted the presumption of mailing to which Amex is entitled and that the arbitration amendment constituted a reasonable addition to the original merchant contract. *Id.* at *7-*9.

Second, the plaintiffs contended that the class action waiver was not enforceable against named plaintiffs and class members who were citizens of

California because the waivers were unconscionable under that State's law. The district court concluded that this was "a substantive matter[] to be raised before the arbitrator." *Id.* at *9.

The district court concluded as follows: "[Amex's] motion to compel arbitration of all claims against it is granted. Since this Court finds that all of plaintiffs' claims against [Amex] are subject to arbitration, it further orders that plaintiffs' cases against [Amex] be dismissed." *Id.* at *10. The plaintiffs filed a timely appeal.

ANALYSIS

Before we proceed to the weighing of the parties' arguments, we think it would be helpful to set forth some of the issues which are not raised on this appeal. Specifically, these are issues which are commonly raised in the general run of arbitration cases with which this Court is faced.

First, the plaintiffs are not contending that the mandatory arbitration clause contained in the Card Acceptance Agreement is not broad enough to cover their antitrust claims. *See JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 175 (2d Cir.2004) (holding that antitrust claims were arbitrable under a broad arbitration clause even though the claims concerned "matters beyond the making of a particular contract between the parties and the performance of its terms"). Further, while they certainly do not deny that this case is one of considerable legal and evidentiary complexity, the plaintiffs do not argue that their claims are too complex to be properly handled in arbitration. *See id.* at 181 (rejecting argument that claims involving a "horizontal price-fixing conspiracy" were beyond the capabilities of an arbitral panel). Nor do the plaintiffs take issue with the dicta

in *JLM* to the effect that this Court would view "skeptically" any argument positing that the "assertion of class claims should serve as a bar or deterrent to sending" a case to arbitration. *Id.* at 180 n. 9. On the contrary, the plaintiffs expressly aver that they "are not averse to proceeding in a class-wide arbitration."[13] (Blue 29) The plaintiffs are therefore not seeking to revive "the ancient judicial hostility to arbitration" as a form of dispute resolution. *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 200 (2d Cir. 1998). In asking us to hold that the class action waiver in the Card Acceptance Agreement is unenforceable, however, the plaintiffs are implicitly asking us to limit the principle that "many features of arbitration by contract, including . . . procedure and choice of substantive law," *Hall Street Assocs., LLC v. Mattel, Inc.*, — U.S. —, 128 S.Ct. 1396, 1404, 170 L.Ed.2d 254 (2008), are to be left to the discretion of the contracting parties, unsupervised by judi-

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[13] It is apparent that "[c]lass arbitration is a swiftly growing phenomenon. In late 2003, the American Arbitration Association ('AAA') introduced procedures for class arbitrations . . . . As of September 27, 2007, the AAA was administering more than 190 class arbitrations, and from July 10, 2006 until September 27, 2007 alone, the number of AAA-administered class arbitrations increased by more than 50%." David S. Clancy & Matthew M.K. Stein, "An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History," 63 *Bus. Law.* 55, 56 (2007). Clancy and Stein go on to argue that when Congress passed the Federal Arbitration Act, in 1925, it specifically envisioned arbitration as "something inherently prompt, inexpensive, and streamlined," and "did not expect that arbitrators would adjudicate anything like the modern class action . . . ." *Id.* at 61, 67. Although the argument that class proceedings in arbitration are incompatible with the Federal Arbitration Act is an intriguing one, we are presented with no such argument on this appeal.

cial review.[14] Although we believe that it is a close question, we believe that the plaintiffs are correct.

A. Jurisdiction. Section 16(a)(3) of the FAA, 9 U.S.C. § 16(a)(3), provides that an appeal may be taken from "a final decision with respect to an arbitration that is subject to this title." Because "an order compelling arbitration and dismissing a party's underlying claims is a 'final decision with respect to an arbitration,'" *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 82, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000), there is no dispute that this Court has jurisdiction to hear the instant appeal.

B. Who Should Decide Whether the Class Action Waiver is Enforceable? The plaintiffs argue – and we do not see that Amex posits any argument to the contrary – that the district court erred in holding that the question of the class action waiver's enforceability is a matter for the arbitrator, not the court. This is plainly correct.

In *Buckeye Check Cashing, Inc. v. Cardegna*, the Supreme Court stated that

> [c]hallenges to the validity of arbitration agreements . . . can be divided into two types. One type challenges specifically the validity of the agreement to arbitrate. The other challenges the contract as a whole, either on a ground that

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[14] The principle was limited by the Court itself in *Hall Street* which held that parties are not free to compose arbitration agreements which provide for a greater scope of federal court review of arbitral awards than that set forth in the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, because this would be at odds with the FAA's "substantiat[ion of] a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway." 128 S.Ct. at 1405.

> directly affects the entire agreement (*e.g.* the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid.

546 U.S. 440, 444, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006) (citation omitted). The Court then held that if there is a challenge to "'the arbitration clause itself – an issue which goes to the making of the agreement to arbitrate – the federal court may proceed to adjudicate it. But [the FAA] does not permit the federal court to consider claims [which challenge] the contract generally.'" *Id.* at 445, 126 S.Ct. 1204 (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-404, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967)).

The plaintiffs are plainly challenging the Card Acceptance Agreement's arbitration clause insofar as they dispute the enforceability of its class action waiver and, by extension, the validity of the parties' agreement to arbitrate. Their "challenge is to the arbitration clause itself," *id.*, rather than to the entirety of the Card Acceptance Agreement.[15] This appeal therefore involves "a gateway dispute about whether the parties are bound by a given arbitration clause," a dispute which "raises a question of arbritrability for a court to decide." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002) (internal quotation marks omitted); *accord Kristian v. Comcast Corp.*, 446 F.3d 25, 55 (1st Cir.2006); *Jenkins v. First Am. Cash*

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[15] The plaintiffs' challenge to the enforceability of the class action waiver is distinct from any contention to the effect that Amex's alleged tying arrangement renders the entire Card Acceptance Agreement invalid. *See* Amex Brief at 49. The latter issue is not before us.

Advance of Georgia, LLC, 400 F.3d 868, 877 (11th Cir.2005).[16] We will therefore proceed to consider whether the class action waiver contained in the Card Acceptance Agreement is enforceable.

C. The Enforceability of Class Action Waiver Provisions: General Considerations. The FAA was "enacted . . . to replace judicial indisposition to arbitration," *Hall Street*, 128 S.Ct. at 1402, and is, as we acknowledged at the outset of this opinion, an expression of "a strong federal policy favoring arbitration as an alternative means of dispute resolution." *Hartford Accident & Indem. Co. v. Swiss Reinsurance Am. Corp.*, 246 F.3d 219, 226 (2d Cir.2001). The favoring of arbitration is, however, somewhat tempered by the fact that "[a]rbitration is strictly a matter of contract." *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 779 (2d Cir.1995). Enhancing the federal policy favoring arbitration is therefore largely a matter of "mak[ing] arbitration agreements as enforceable as other contracts, *but not more so*." *Opals on Ice Lingerie v. Bodylines, Inc.*, 320 F.3d 362, 369 (2d Cir.2003) (internal quotation marks omitted).

This principle is set forth in Section 2 of the FAA, 9 U.S.C. § 2, which provides that an agreement to arbitrate "shall be valid, irrevocable, and enforceable,

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[16] In *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003), the Supreme Court was faced with an arbitration agreement which was ambiguous as to whether it permitted arbitration proceedings to be conducted on a class basis. The Court concluded that this was a matter of contract interpretation which "should be for the arbitrator, not the courts, to decide." *Id.* at 453, 123 S.Ct. 2402. Here, we do not face an issue of contract interpretation; the Card Acceptance Agreement is unambiguous in forbidding arbitration to proceed on a class basis.

save upon such grounds as exist at law or in equity for the revocation of any contract." Section 2 is "the primary substantive provision" of the FAA which "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the" FAA. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). We join other Circuits that have evaluated arbitration clauses containing class action waivers under the federal substantive law of arbitrability. *See Gay v. CreditInform*, 511 F.3d 369, 394-95 (3d Cir.2007) (holding class action waiver to be enforceable under Section 2 of the FAA notwithstanding claim that waiver was unconscionable under state law); *Kristian*, 446 F.3d at 63 ("Although Plaintiffs' challenges to the enforceability of the arbitration agreements could be evaluated through the prism of state unconscionability law, we have chosen to apply a vindication of statutory rights analysis, which is also part of the body of federal substantive law of arbitration . . . ."). We conclude that the plaintiffs here have demonstrated that enforcement of the class action waiver in the Card Acceptance Agreement to cover their claims against Amex under federal antitrust statutes would be incompatible with the federal substantive law of arbitration.

We begin by recognizing that insofar as a plaintiff may be said to possess a "right" to litigate an action in federal court as a class action under Rule 23 of the Federal Rules of Civil Procedure, the right "is a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980). Nevertheless, the Supreme Court has repeat-

edly recognized the utility of the class action as a vehicle for vindicating statutory rights. This is especially true with respect to the Court's recognition that the class action device is the only economically rational alternative when a large group of individuals or entities has suffered an alleged wrong, but the damages due to any single individual or entity are too small to justify bringing an individual action. The Court made the point forcefully more than thirty years ago in the context of an antitrust action:

> A critical fact in this litigation is that petitioner's individual stake in the damages award he seeks is only $70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all.

Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). Thus, as the Court later opined, "'[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.'" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir.1997)); *see also Roper*, 445 U.S. at 338, 100 S.Ct. 1166 ("[A class action] may motivate [plaintiffs] to bring cases that for economic reasons might not be brought otherwise[, thereby] vindicating the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost."); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 549 F.3d 137, 144

(2d Cir.2008) ("[C]lass actions are designed in large part to incentivize plaintiffs to sue when the economic benefit would otherwise be too small, particularly when taking into account the court costs and attorneys' fees typically incurred."); *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("[T]he *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.00.").

The Supreme Court has at least implicitly held that a provision in an arbitration agreement barring class procedures is not *per se* unenforceable because, as noted above, it held in *Bazzle* that the question of whether or not an ambiguous arbitration clause contained a class action ban was a matter for the arbitrator, not the court, to decide. 539 U.S. at 453, 123 S.Ct. 2402. Beyond this oblique ruling, however, the Supreme Court has yet to squarely face the question of whether or not there are conditions under which a class action ban would be incompatible with the FAA. But, as both parties here acknowledge, the Court has decided cases which involved matters which, if ancillary, are certainly pertinent to this question.

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991), involved a claim under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* Specifically, the plaintiff, a manager at a brokerage firm, asserted that he had been terminated by the firm in violation of the ADEA. *Id.* at 23, 111 S.Ct. 1647. After the plaintiff had filed suit in federal district court, the defendant firm moved to compel arbitration pursuant to a mandatory arbitration provision contained in the rules of the New York Stock Exchange ("NYSE"), to

which the plaintiff had agreed to be bound when he became a registered securities representative. *Id.* at 23-24, 111 S.Ct. 1647.

The Court held that because "[i]t is by now clear that statutory claims may be the subject of an arbitration agreement," the arbitration clause was enforceable "'unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'" *Id.* at 26, 111 S. Ct. 1647 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)). Even though the Court acknowledged that "the ADEA is designed not only to address individual grievances, but also to further important social policies," *id.* at 27, 111 S.Ct. 1647, the Court could discern no Congressional intent to preclude ADEA claims from being subject to arbitration. The Court also considered the plaintiff's argument to the effect "that arbitration procedures cannot adequately further the purposes of the ADEA because they do not provide for broad equitable relief and class actions." *Id.* at 32, 111 S.Ct. 1647. The Court rejected this contention:

> As the court below noted, however, arbitrators do have the power to fashion equitable relief. Indeed, the NYSE rules applicable here do not restrict the types of relief an arbitrator may award, but merely refer to "damages and/or other relief." The NYSE rules also provide for collective proceedings. But even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the ADEA provides for the possibility of bringing a collective action does not mean that

> individual attempts at conciliation were intended to be barred.

Id. (citations, internal quotation marks, and brackets omitted).

Amex directs our attention to the final sentence of this passage, and other courts have relied upon it in upholding mandatory arbitration clauses. Amex Brief at 19. In particular, the Third Circuit, in *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir.2000), dealt with a claim under the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq*. The plaintiffs argued that their class action claim in federal court was not subject to mandatory arbitration because TILA

> effectively create[s] an unwaivable right to bring a class action . . . . [In TILA,] Congress enacted a scheme in which the court hearing a class action could set a damage figure up to a certain amount for certain patterns of conduct. This judicial flexibility in imposing damages up to $500,000 only exists if a class action is allowed, as individual plaintiff claims are generally capped at $1,000. Therefore, a right of classes to a judicially crafted punitive remedy is lost if this court orders arbitration of Johnson's claims.

Id. at 377.

The Third Circuit held that "[t]his argument is unavailing in light of" *Gilmer*. *Id.* The court noted that *Gilmer* involved a claim under the ADEA, a statute which explicitly provides in its text for the bringing of class actions. *Id.* (citing 29 U.S.C. § 626(b)). In spite of this, the court concluded, "the Supreme Court still ruled that the ADEA did not preclude arbitration notwithstanding the unavailability of the

class action remedy there." *Id.*; *see also Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir.2004) ("[W]e reject the [plaintiffs'] claim that their inability to proceed collectively [in arbitration] deprives them of substantive rights available under the [Fair Labor Standards Act.] The Supreme Court rejected similar arguments concerning the ADEA in *Gilmer* . . . .").

We cannot agree with this view of *Gilmer* because a collective, and perhaps a class action remedy, in fact *was* available in that case. As set forth above, the Supreme Court explicitly noted that the arbitration rules of the NYSE provided for the conduct of collective arbitration. 500 U.S. at 32, 111 S.Ct. 1647. At the time *Gilmer* was decided, the NYSE's rules may also have permitted arbitration claims submitted as class actions. *Compare* NYSE Rule 600(d) (2008) ("A claim submitted as a class action shall not be eligible for arbitration under the Rules of the Exchange.") *with* NYSE Rule 600 (1991) (containing no prohibition on class actions). The statement in *Gilmer* that the arbitration clause would be enforceable "even if" class remedies were available evidences that the Court itself was uncertain, but acknowledged the probability, that class action were feasible under the NYSE's rules. Moreover, it is dicta that does not apply here. The plaintiffs do not proffer the argument rejected in *Gilmer*, namely that the class action waiver is unenforceable merely because the relevant statute allows class actions. Rather, the conundrum presented by the instant appeal is more nuanced: whether the mandatory class action waiver in the Card Acceptance Agreement is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement of the waiver would be to

preclude their bringing Sherman Act claims against Amex in *either* an individual or collective capacity.

After the Third Circuit's decision in *Johnson*, the Supreme Court came somewhat closer to this issue in *Green Tree Financial Corp.-Alabama v. Randolph*. That case also involved a claim under TILA and a consideration of the enforcement of a mandatory arbitration clause. The specific issue to be decided was "whether an arbitration agreement that does not mention arbitration costs and fees is unenforceable because it fails to affirmatively protect a party from potentially steep arbitration costs." *Green Tree*, 531 U.S. at 82, 121 S.Ct. 513. Specifically, the plaintiff argued "that the arbitration agreement's silence with respect to costs and fees creates a 'risk' that she will be required to bear prohibitive arbitration costs if she pursues her claims in an arbitral forum, and thereby forces her to forgo any claims she may have had against [the defendants]." *Id.* at 90, 121 S.Ct. 513. The Court rejected this argument because the plaintiff had proved no more than that the asserted "risk" was hypothetical:

> It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum. But the record does not show that Randolph will bear such costs if she goes to arbitration. Indeed, it contains hardly any information on the matter . . . . The record reveals only the arbitration agreement's silence on the subject, and that fact alone is plainly insufficient to render it unenforceable. The "risk" that Randolph will be saddled with prohibitive costs is too speculative

> to justify the invalidation of an arbitration agreement.

Id. at 90-91, 121 S.Ct. 513 (footnote omitted); *see also In re Cotton Yarn Antitrust Litigation*, 505 F.3d 274, 285 (4th Cir.2007) ("[I]f a party could demonstrate that the prohibition on class actions likely would make arbitration prohibitively expensive, such a showing could invalidate an agreement.").

Although the Court in *Randolph* declined to consider whether the arbitration agreement was unenforceable because it may have precluded the plaintiff from bringing her claims under TILA as a class action, 531 F.3d at 92 n. 7, courts have relied upon its holding to uphold such bans. *See In re Cotton Yarn Antitrust Litigation*, 505 F.3d at 285 ("This kind of uninformed speculation about cost falls far short of satisfying the plaintiffs' burden of proving that the costs of proceeding individually against the defendants would be prohibitive and thus would prevent them from effectively vindicating their statutory rights."); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 557 (7th Cir.2003) ("In the present case, the Livingstons have not offered any specific evidence of arbitration costs that they may face in this litigation, prohibitive or otherwise, and have failed to provide any evidence of their inability to pay such costs . . . ."); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir.2002) ("Adkins makes no showing of the specific financial status of any of the plaintiffs at the time this action was brought. He provides no basis for a serious estimation of how much money is at stake for each individual plaintiff.").

D. Is the Class Action Waiver in the Card Acceptance Agreement Enforceable? *Randolph* is controlling here to the extent that it holds that

when "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." 531 U.S. at 92, 121 S.Ct. 513. We find that the district court erred in ruling that the plaintiffs had failed to bear this burden because they had "ignore[d] the statutory protections provided by the Clayton Act." *In re American Express Merchants Litigation*, 2006 WL 662341, at *5. On the contrary, the record abundantly supports the plaintiffs' argument that they would incur prohibitive costs if compelled to arbitrate under the class action waiver.[17] The Card Acceptance Agreement therefore entails more than a speculative risk that enforcement of the ban will deprive them of substantive rights under the federal antitrust statutes.

This argument is compellingly set forth in an affidavit filed in the district court by Gary L. French, Ph.D., an economist associated with Nathan Associates Inc., a financial consulting firm retained by the plaintiffs. Dr. French states that the purpose of his affidavit is "to provide an expert opinion concerning

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[17] "We review . . . mixed questions of law and fact either de novo or under the clearly erroneous standard depending on whether the question is predominantly legal or factual." *United States v. Selioutsky*, 409 F.3d 114, 119 (2d Cir.2005) (internal citations omitted). The plaintiffs' estimated expert witness fees were essentially undisputed. We review de novo the district court's application of the Clayton Act to undisputed facts. *See Village of Grand View v. Skinner*, 947 F.2d 651, 656 (2d Cir. 1991) ("Because the issues presented on this appeal involve the application of a statutory standard to undisputed facts, the appropriate standard of review is de novo."). We note, however, that our ruling would not be different under a clearly erroneous standard.

the likely costs and complexity of an expert economic study concerning the liability and damages" relating to this action, and to compare this with "the potential recovery of damages by an American Express Card merchant with annual sales volume of $10 million or less, such as most if not all of the named plaintiffs in this litigation, and to provide my opinion as to whether it would be economically rational for such a merchant to pursue recovery of damages given the likely out-of-pocket costs of the arbitration or litigation proceeding." Dr. French continues:

> Due to the complexity and analytical intensity of an antitrust study, total expert fees and expenses usually are substantial, even in a non-class action involving an individual plaintiff. In my experience, even a relatively small economic antitrust study will cost at least several hundred thousand dollars, while a larger study can easily exceed $1 million . . . . In summary, the cost of [Nathan Associates'] expert assistance in individual plaintiff antitrust cases has ranged from about $300 thousand to more than $2 million. However, after reviewing the complaint and doing some preliminary research in this case, it is my opinion that . . . the cost for this case will fall in the middle of the range of [Nathan Associates'] experience.
>
> An economic antitrust study . . . is necessarily complex and costly because it involves investigating several antitrust liability and damages issues and, potentially involves numerous tasks and services. The antitrust liability and damages issues that an expert economist will study in this matter will likely include:

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

Dr. French then proceeds to consider the economic rationality of bringing an individual action against Amex in light of these substantial expert witness costs:

> Based upon publicly available information . . . I have estimated that a small merchant with $10 million of annual sales, on average, might calculate and expect $754 of economic damages for the year 2001, which is roughly the midpoint of the damage period covered by this litigation . . . . Multiplying the $754 damage figure by four, gives a rough estimate of $3,015 total damages for the whole four-year damage period, or $9,046 when trebled, assuming that the merchant's sales remain constant at $10 million for the four-year period.

> . . . The median volume merchant, with half of the named plaintiffs having more and half having less American Express charge volume, and having reported $230,343 American Express Card volume in 2003, might expect four-year damages of $1,751, or $5,252 when trebled . . . . The largest volume named plaintiff merchant, with reported American Express Card volume of $1,690,749 in 2003, might expect four-year damages of $12,850, or $38,549 when trebled.
>
> In my opinion as a professional economist . . . it would not be worthwhile for an individual plaintiff . . . to pursue individual arbitration or litigation where the out-of-pocket costs, just for the expert economic study and services, would be at least several hundred thousand dollars, and might exceed $1 million.

In *Kristian*, the First Circuit found that expert affidavits similar to Dr. French's "demonstrat[ed] that without some form of class mechanism – be it class action or class arbitration – a consumer antitrust plaintiff will not sue at all." 446 F.3d at 58. We hold that the plaintiffs here have also demonstrated that their antitrust claims against Amex can, for all intents and purposes, only be pursued through the aggregation of individual claims, either in class action litigation or in class arbitration.

The district court, which held that the enforceability of the class action waiver in the Card Acceptance Agreement was a matter to be determined in arbitration, did not deal head on with Dr. French's affidavit. Dr. French's conclusion that "in a non-class action involving an individual plaintiff . . . even a relatively small economic antitrust study will cost at least several hundred thousand dollars" was essentially

uncontested. Instead of addressing this figure, the district court misinterpreted and misapplied the statutory protections available to the plaintiffs. Citing Section 4 of the Clayton Act, 15 U.S.C. § 15(a), the district court noted that a plaintiff who had established a Sherman Act claim against a defendant "shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." *In re American Express Merchants Litig.*, 2006 WL 662341, at *5; *see also Dambrosio v. Comcast Corp.*, No. Civ.A.03-6604, 2005 WL 3543794, at *16 (E.D.Pa. Dec.27, 2005) (asserting that Section 4 of the Clayton Act "expressly provides for the recovery of attorneys' fees and expenses, [thereby] making the arbitral forum accessible to individual plaintiffs and allowing them to vindicate the full range of substantive rights granted to them" under the federal antitrust laws), *vacated on other grounds*, 2006 WL 2058643 (E.D.Pa. Apr.12, 2006).

This is true, but, as the plaintiffs correctly point out, the Clayton Act simply does not solve their problem. Besides the fact that the trebling of a small individual damages award is not going to pay for the expert fees Dr. French has estimated will be necessary to make an individual plaintiff's case here, there is an even more important legal consideration that the district court did not consider. In *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, the Supreme Court addressed fee-shifting for expert witnesses under Rule 54(d) of the Federal Rules of Civil Procedure in an antitrust case, holding that "when a prevailing party seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound by the limit of [28 U.S.C.] § 1821(b) . . . ." 482 U.S. 437, 439,

107 S.Ct. 2494 (1987).[18] We note that that figure is now set at a $40 per diem. Further, as the plaintiffs assert, there are no provisions "in the rules of any of the arbitral bodies designated [in the Card Acceptance Agreement] that would allow such costs to be awarded where they are not authorized by the applicable fee shifting statute." Even with respect to reasonable attorney's fees, which are shifted under Section 4 of the Clayton Act, the plaintiffs must include the risk of losing, and thereby not recovering any fees, in their evaluation of their suit's potential costs.[19] Thus, Amex's reply to the effect that "[a]n arbitrator can award the same reasonable costs that are recoverable by statute," plainly does not solve the problem.

Amex also informs us that a putative antitrust class action challenging the "Honor All Cards" provision in the Card Acceptance Agreement has been brought in the U.S. District Court for the Southern District of New York by a merchant plaintiff who is apparently not subject to the class action waiver

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[18] Quoting *Paschall v. Kansas City Star Co.*, 695 F.2d 322, 338-39 (8th Cir.1982), Amex suggests that if an expert's findings prove "to be so 'crucial' and 'indispensable' that an arbitrator determines that the case absolutely could not have been pursued without them, the arbitrator might award such costs." Amex Brief at 28. We are skeptical, however, that an arbitrator might follow *Paschall* because it appears unlikely that its holding survives *Crawford Fitting Co. See Gilbert v. City of Little Rock, Ark.*, 709 F.Supp. 856, 862 (E.D.Ark.1987) (holding that *Paschall* is inconsistent with the holding of *Crawford Fitting* to the effect that expert witness fees are to be determined solely in accordance with 28 U.S.C. § 1821(b)).

[19] The plaintiffs' counsel has submitted a detailed affidavit which estimates that the cost of depositions and document management would exceed $300,000.

provision in the Agreement. *See The Marcus Corp. v. American Express Co.*, No. 04cv5432, 2005 WL 1560484 (S.D.N.Y. July 5, 2005). Further pointing out that the plaintiffs in that action are represented by the same counsel who represent the plaintiffs here, Amex speculates that "[p]resumably" the plaintiffs here, "the *Marcus* plaintiff, and their common attorneys and experts could reach an agreement as to how the experts' cost of preparation could be shared." This is an intriguing proposition, but we do not believe it can survive the application of the following provision of the arbitration clause in the Card Acceptance Agreement: "The arbitration proceeding and all testimony, filings, documents and any information relating to or presented during the arbitration proceedings shall be deemed to be confidential information not to be disclosed to any other party." Thus, any proposal that the plaintiffs share the services of expert witnesses employed in the *Marcus* action runs aground on the fact that the individual plaintiffs have contracted with Amex not to share such information with *anyone*.[20]

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[20] One of the amici makes the following suggestion: "Whatever costs the Merchant Plaintiffs might ultimately bear in procuring expert testimony in this case, those costs may be offset by the cost savings of conducting an arbitration proceeding, rather than an all-out federal trial." Brief of Business Roundtable at 16. But this misses the point. While it may be true that an individual arbitration brought by a plaintiff will likely cost less than a trial in federal district court, the fact remains that the plaintiffs have demonstrated to our satisfaction that *neither* an individual arbitration, *nor* an individual litigation would make any economic sense in light of the likelihood that expert fees far in excess of any likely individual recovery would need to be expended in either action.

Concluding that Amex has brought no serious challenge to the plaintiffs' demonstration that their claims cannot reasonably be pursued as individual actions, whether in federal court or in arbitration, we find ourselves in agreement with the plaintiffs' contention that enforcement of the class action waiver in the Card Acceptance Agreement "flatly ensures that no small merchant may challenge American Express's tying arrangements under the federal antitrust laws." The effective negation of a private suit under the antitrust laws is troubling because such "private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979). This may be especially true with respect to private antitrust suits brought as class actions. *See* Dando B. Cellini, "An Overview of Antitrust Class Actions," 49 *Antitrust L.J.* 1501, 1506 (1980) ("I think it is obvious from the experience over the last fifteen years since the 1966 amendments to Rule 23 were adopted that linking an antitrust claim with a class action allegation can be devastatingly effective.").

In *Mitsubishi*, the Supreme Court held that there is by no means any necessary reason to prevent sending a Sherman Act claim to arbitration because "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." 473 U.S. at 637, 105 S.Ct. 3346. The *Mitsubishi* Court recognized, however, that there might be instances in which an arbitration agreement contained provisions that would be unenforceable because they would prevent

a prospective litigant from vindicating its rights under the Sherman Act in an arbitral forum. Specifically, the plaintiff in *Mitsubishi* speculated that the choice-of-forum and choice-of-law clauses in the arbitration agreement at issue would effectively preclude the arbitrator from determining the plaintiff's substantive claims in accordance with the terms of the Sherman Act. The Court responded that it would not prevent the case from going to arbitration based upon mere conjecture as to what body of law the arbitrator would apply, but also continued as follows:

> We merely note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.

Id. at 637 n. 19, 105 S.Ct. 3346.

We readily acknowledge that this statement is dicta, but it is nevertheless dicta grounded upon a firm principle of antitrust law to the effect that an agreement which in practice acts as a waiver of future liability under the federal antitrust statutes is void as a matter of public policy. More than a half-century ago, the Supreme Court stated that "in view of the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action," an agreement which confers even "a partial immunity from civil liability for future violations" of the antitrust laws is inconsistent with the public interest. *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 329, 75 S.Ct. 865, 99 L.Ed. 1122 (1955); *see also Minnesota Mining and Mfg. Co. v. Graham-Field, Inc.*, No. 96cv3839, 1997 WL 166497, at *3 (S.D.N.Y. Apr.9, 1997) ("GFI could not

have waived [its antitrust] claim in the releases because a prospective waiver of an antitrust claim violates public policy.").

We believe that one of the amici has correctly applied the principle just set forth to the facts of the instant case:

> Plaintiff[s]-appellants' antitrust claims are complex and plaintiffs established for the record below that if they are precluded from participating in a collective action, the cost to each individual consumer to prosecute his or her claim is prohibitive relative to the consumer's potential recovery. If the collective action waiver is enforced, American Express will be shielded from liability, even where it may have violated the antitrust laws. Eradicating the private enforcement component from our antitrust law scheme cannot be what Congress intended when it included strong private enforcement mechanisms and incentives in the antitrust statutes. Because the class action waiver precluded the plaintiff[s]-appellants from enforcing their statutory rights, the arbitration provision is unenforceable.

Brief of American Antitrust Institute at 15; *see also Dale v. Comcast Corp.*, 498 F.3d 1216, 1224 (11th Cir.2007) ("Corporations should not be permitted to use class action waivers as a means to exculpate themselves from liability for small value claims.").

We therefore hold that the class action waiver in the Card Acceptance Agreement cannot be enforced in this case because to do so would grant Amex de facto immunity from antitrust liability by removing the plaintiffs' only reasonably feasible means of recovery. As already set forth, Section 2 of the FAA, 9 U.S.C. § 2, provides that an agreement to arbitrate

"shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Given that we believe that a valid ground exists for the revocation of the class action waiver, it cannot be enforced under the FAA.

E. Two Caveats. We emphasize two important limitations upon our holding. First, our decision in no way rests upon the status of the plaintiffs as "small" merchants. The plaintiffs repeatedly refer to themselves as "small merchants" and as "small businesses." But Amex is correct when it counters that the plaintiffs "undoubtedly hope that, by labeling themselves as 'small,' they can benefit from one line of case law where individual *consumers* have alleged that arbitration agreements were imposed as a result of unequal bargaining power." *See*, *e.g.*, *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, 1219 (9th Cir.2008) (holding class action waiver contained in cellular telephone unconscionable under Washington law); *Skirchak*, 508 F.3d at 60 (holding class action waiver in employment agreement unconscionable under Massachusetts law); *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 984 (9th Cir.2007) (holding class action waiver in cellular phone contract unconscionable under California law). We do not follow these cases because they all rely on findings of unconscionability under state law, while we have relied here on a vindication of statutory rights analysis, which is part of the federal substantive law of arbitrability. Applying the latter, we have found that plaintiffs have demonstrated the necessity of some class mechanism in order to bring their claims against Amex. This demonstration is in no way dependant on the "size" of any or all of the merchant

plaintiffs; it depends upon a showing that the size of the recovery received by *any* individual plaintiff will be too small to justify the expenditure of bringing an individual action.

Second, we stress that we do not hold here that class action waivers in arbitration agreements are *per se* unenforceable. We also do not hold that they are *per se* unenforceable in the context of antitrust actions.[21] Rather, we hold that *each* case which presents a question of the enforceability of a class action waiver in an arbitration agreement must be considered on its own merits, governed with a healthy regard for the fact that the FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hosp.*, 460 U.S. at 24, 103 S.Ct. 927. We believe that the Eleventh Circuit has posited something like the correct approach:

> [T]he enforceability of a particular class action waiver in an arbitration agreement must be determined on a case-by-case basis, considering the totality of the facts and circumstances. Relevant

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[21] We note that the Fourth Circuit, in *In re Cotton Yarn Antitrust Litigation*, has upheld the enforcement in an antitrust action of a collective action ban contained in a contract between commercial parties. The case presented a claim of antitrust conspiracy, and the court pointed out that a bar upon joining the two defendants, who were jointly and severally liable, did not preclude the arbitrability of the claim because "co-conspirators are not necessary parties; a plaintiff can prove the existence of a conspiracy in an action against just one of the members of the conspiracy." 505 F.3d at 284. The court also noted "[t]he absence of an evidentiary record on . . . the actual cost of individual proceedings and . . . about the ability of the corporate plaintiffs to bear those speculative costs." *Id.* at 285. Again, such a record exists in the instant case.

> circumstances may include, but are not limited to, the fairness of the provisions, the cost to an individual plaintiff of vindicating the claim when compared to the plaintiff's potential recovery, the ability to recover attorneys' fees and other costs and thus obtain legal representation to prosecute the underlying claim, the practical affect the waiver will have on a company's ability to engage in unchecked market behavior, and related public policy concerns.

Dale, 498 F.3d at 1224.

F. The Plaintiffs' Other Claims. Because we hold that the class action waiver in the Card Acceptance Agreement is unenforceable as to all plaintiffs under the federal substantive law of arbitration, the plaintiffs' contention that the waiver is not enforceable against named plaintiffs and class members who were citizens of California because the waivers are unconscionable under that State's law is moot. Similarly, the plaintiffs' appeal of the district court's holding that the class action waiver could be enforced against those named plaintiffs who had contracted with Amex before the 1999 inclusion of the mandatory arbitration clause in the Card Acceptance Agreement is also moot.

G. Relief. Because the plaintiffs have declared themselves amenable to proceeding to arbitration, we need not consider whether the class action waiver in the Card Acceptance Agreement is severable from the remainder of the arbitration provision contained therein. Further, in light of the fact that Amex declared at oral argument that it would reconsider its intention to proceed to arbitration should this Court not enforce the class action waiver, we remand

to the district court to allow Amex the opportunity to withdraw its motion to compel arbitration.

CONCLUSION

The decision of the district court is REVERSED. We REMAND to the district court for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Master File No. 03 CV 9592 (GBD)

IN RE AMERICAN EXPRESS MERCHANTS' LITIGATION

GEORGE B. DANIELS, DISTRICT JUDGE:

American Express Company and American Express Travel Related Services Company, Inc., (collectively "American Express") move to compel arbitration of plaintiffs' claims and to dismiss these related actions consolidated for pretrial purposes or stay them pending arbitration.[1] American Express also moves to intervene and to dismiss in favor of arbitration the claims of plaintiffs in the separate case filed by plaintiffs against the banks entitled *National Supermarket Association, Inc., et al. v. MBNA America Bank, N.A., et al.* ("*National Supermarket*").[2] The bank defendants in National Supermarket move to dismiss the claims of plaintiffs in favor of arbitration or, in the alternative, to stay the action pending the

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[1] The consolidated cases are: *Italian Colors Restaurant, et al. v. American Express Co., et al.*, 03 cv 9592; *Cohen Rese Gallery, Inc., et al. v. American Express Co., et al.*, 03 cv 10271; *DFR Jeweler Corp. v. American Express Co., et al.*, 03 cv 9517; *Chez Noelle Restaurant v. American Express Co., et al.*, 04 cv 266; *Mascari Enterprises v. American Express Co., et al.*, 04 cv 366; and *Mims Enterprises, Inc. v. American Express Co., et al.*, 04 cv 1558.

[2] *National Supermarket Association, Inc., et al. v. MBNA America Bank, N.A., et al.*, 04 cv 10318, is also consolidated for pretrial purposes. Plaintiffs in *National Supermarket* are also plaintiffs in a number of the other consolidated cases.

arbitration of the related claims against American Express. Finally, the plaintiffs in *Cohen Rese Gallery, Inc., et al. v. American Express Co., et al.* ("*Cohen Rese*"), who are California merchants, move for partial summary judgment on the fifth claim for relief set forth in their amended complaint.[3]

American Express's motion to compel arbitration is granted, and plaintiffs' claims against American Express are dismissed. American Express's motion to intervene and to dismiss the claims of plaintiffs against the banks in *National Supermarket* is denied. Defendants' MBNA America Bank, N.A., MBNA Corporation, Citibank (South Dakota), N.A., and Citigroup, Inc. ("bank defendants") motion to dismiss the claims in *National Supermarket* is denied. The bank defendants' motion to stay the action in *National Supermarket* pending the arbitration of related claims against American Express, is granted. Finally the *Cohen Rese* plaintiffs' motion for partial summary judgment on their fifth claim against American Express is denied without prejudice.

BACKGROUND[4]

Plaintiffs are merchants who accept defendant American Express's payment card products. They can be divided into two different geographic groups:

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[3] Claim five asserts that the defendants are in violation of the California Unfair Competition Law by forcing small merchants to waive the right to participate in both class actions and class-wide arbitrations as a condition of doing business with American Express through the collective action waivers in the merchant contracts.

[4] The factual background underlying these actions is set forth in greater detail in the related case of *Marcus Corp. v. American Express*, No. 04 Civ. 05432 (S.D.N.Y. July 6, 2005) (denying defendants' motion to dismiss).

those plaintiffs whose primary place of business is in the state of New York ("New York merchants"), which includes Italian Colors Restaurant,[5] ("Italian Colors"), DRF Jewelers Corp., ("DRF"), Chez Noelle Restaurant, ("Chez Noelle"), Mascari Enterprises, ("Mascari"), and Mims Enterprises, Inc., ("Mims"); and those plaintiffs based in California ("California merchants"), Cohen Rese Gallery, Inc., ("Cohen Rese"), Il Forno, Inc., ("II Forno"), and Mai Jasmine Corp., ("Mai Jasmine"). Each merchant plaintiff contracted with American Express to accept its corporate, charge, and credit cards.[6]

American Express and its competitors Visa, MasterCard, and Discover collectively dominate the payment card industry.[7] Visa and MasterCard operate as joint ventures with the banks that issue their payment cards to consumers. American Express, by contrast, has until recently issued payment cards directly to the consumer, without partnering with banks. Having accepted a customer's payment card, merchants tender requests for payment to American

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[5] Plaintiff Italian Colors Restaurant consists of a previously consolidated group of New York merchants, including Phuong Corp., Bunda Starr Corp., 492 Supermarket Corp., and National Supermarkets Association, Inc.

[6] A charge card requires its holder to pay the full outstanding balance at the end of a standard billing cycle. A credit card, by contrast, allows the cardholder to pay a portion of the amount owing at the close of a billing cycle, subject to interest charges. In plain terms, the credit card is a means of financing purchases, the charge card is a method of payment.

[7] The payment card industry has been extensively discussed in recent litigation. Undisputed industry facts cited in this order are derived from *United States v. Visa U.S.A., Inc.*, 163 F.Supp.2d 322 (S.D.N.Y. 2001), *aff'd*, 344 F.3d 229 (2d Cir. 2003), *cert. denied*, 125 S. Ct. 45 (2004).

Express or, in the case of Visa and MasterCard, to the card-issuing bank.[8] Both the Visa/MasterCard and American Express models derive revenue by withholding a "merchant discount fee" from each tendered transaction. Plaintiffs allege that American Express charges a supra-competitive 3% merchant discount fee that greatly exceeds the fee charged by Visa and MasterCard. Plaintiffs contend that this supra-competitive fee can be sustained only through enforcement of an Honor All Cards ("HAC") provision, included in every merchant contract, that unlawfully ties American Express's charge and credit card services in violation of § 1 of the Sherman Act.[9]

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[8] In 2003, the Second Circuit affirmed a ruling that Visa and MasterCard violated antitrust statutes by colluding to require that their credit card-issuing bank partners refuse to issue American Express products; this collusion had effectively barred American Express from the credit card market. Prior to the resolution of the Department of Justice ("DOJ") litigation, Visa and MasterCard collectively controlled upwards of 90% of the credit card market. Since obtaining competitive access to card-issuing banks, however, American Express has moved aggressively into the market while maintaining its position as the leading issuer of corporate and consumer charge cards in the United States. Since the resolution of the DOJ litigation, American Express has negotiated card-issuing agreements with two of the nation's largest card-issuing banks, MBNA and Citibank.

[9] A typical tying arrangement is "an agreement by a party to sell one (tying) product but only on the condition that the buyer also purchases a different (or tied) product." *Eastman Kodak Co. v. Image Tech. Svcs., Inc.*, 504 U.S. 451, 461-62 (1992) (quoting *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5-6 (1958)). The Supreme Court identifies the "essential characteristic" of an unlawful tying arrangement as "the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at

Put simply, merchants who choose to accept the charge card must agree to accept all American Express cards.[10]

The merchant contract, or Card Acceptance Agreement ("Agreement"), is a 'form contract,' such that merchants do not negotiate its terms with American Express. Since 1999, American Express has included an arbitration provision in the Agreement. It requires arbitration of all claims "arising from or relating to this Agreement and/or the relationship resulting from this Agreement," upon the election of either party. 2001 American Express Card Acceptance Agreement, Defs.' Ex. A. The arbitration provision reads, in relevant part:

> For the purpose of this Agreement, Claim means any assertion of a right, dispute or controversy between you and us arising from or relating to this Agreement and/or the relationship resulting from this Agreement . . .
>
> This section sets out the circumstances and procedures under which Claims may be arbitrated instead of litigated in court . . .
>
> Any Claim shall be resolved upon the election by you or us, by arbitration pursuant to this arbitration provision and the code of procedure of the national arbitration organization to which

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all, or might have preferred to purchase elsewhere on different terms." *Jefferson Parish v. Hyde*, 466 U.S. 2, 12 (1984).

[10] "*American Express Card* or *Card* shall mean any card or other account access device issued by American Express Travel Related Services Company, Inc. or its subsidiaries or affiliates or its or their licensees bearing the American Express name or an American Express trademark, service mark or logo." 1999 American Express Card Acceptance Agreement, Pls.' Ex. 2, Decl. of Noah Shube.

> the Claim is referred in effect at the time the Claim is filed. Claims shall be referred to the National Arbitration Forum (*NAF*), JAMS/ Endispute (*JAMS*), or the American Arbitration Association (*AAA*), as selected by the party electing to use arbitration. If a selection by one of these organizations is unacceptable to you, you shall have the right within thirty (30) days after you receive notice of our election to select one of the other organizations listed to serve as arbitrator administrator.

In addition to prescribing binding arbitration of all claims, the Card Acceptance Agreement imposes a collective action waiver that precludes merchants from bringing or participating in class-wide actions regarding issues subject to arbitration. The provision reads, in relevant part:

> IF ARBITRATION IS CHOSEN BY ANY PARTY WITH RESPECT TO A CLAIM, NEITHER YOU NOR WE WILL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR HAVE A JURY TRIAL ON THE CLAIM, OR TO ENGAGE IN PRE-ARBITRATION DISCOVERY EXCEPT AS PROVIDED IN THE CODE OR PROCEDURES OF THE NAF, JAMS, OR AAA, AS APPLICABLE. FURTHER, YOU WILL NOT HAVE THE RIGHT TO PARTICIPATE IN A REPRESENTATIVE CAPACITY OR AS A MEMBER OF ANY CLASS OF CLAIMANTS PERTAINING TO ANY CLAIM SUBJECT TO ARBITRATION. THE ARBITRATOR'S DECISION WILL BE FINAL AND BINDING. NOTE THAT OTHER RIGHTS THAT YOU WOULD HAVE IF YOU WENT TO COURT MAY ALSO NOT BE AVAILABLE IN ARBITRATION.

The Card Acceptance Agreement also includes a New York choice of law provision that reads:

> THIS AGREEMENT WILL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK APPLICABLE TO AGREEMENTS NEGOTIATED, EXECUTED AND PERFORMED ENTIRELY WITHIN THE STATE OF NEW YORK.

The complaints filed by the New York and California plaintiffs are largely identical, with slight variance in the number and type of claims.[11] All plaintiffs state three claims against American Express under Section 1 of the Sherman Act: 1) unlawful tying of charge card services and credit card services; 2) unlawful tying of corporate card services and credit card services; and 3) unlawful tying of charge or corporate card services and debit card services. Each New York plaintiff also states an additional claim under Section 2 of the Sherman Act, alleging that American Express maintains a monopoly by imposing a collective action waiver in each of its merchant contracts. Certain New York plaintiffs[12] also state a common law claim of unjust enrichment, alleging that the imposition of the supra-competitive merchant discount fee conferred an illegal benefit on American Express. California plaintiffs Cohen Rese,

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[11] Plaintiffs in the related case of *National Supermarket* have separately alleged that the bank defendants 1) conspired to violate section 1 of the Sherman Act by furthering the alleged tying by American Express of corporate charge card and credit card services, and 2) aided and abetted American Express's alleged violations of section 1 of the Sherman Act by rendering assistance to American Express in its alleged tying of corporate charge card and credit card services.

[12] DRF, Chez Noelle, Mascari, and Mims.

Il Forno, and Mai Jasmine additionally claim that the collective action waivers violate California's Unfair Competition Law.

DISCUSSION

American Express moves pursuant to 9 U.S.C. § 1 et seq. and Fed.R.Civ.P. 12(b) to compel plaintiffs to arbitrate their claims, and asks that this court either dismiss plaintiffs' complaints or stay the proceedings pending arbitration. Under the Federal Arbitration Act ("FAA"),[13] a district court may dismiss or stay proceedings if it finds a valid arbitration agreement exists and may compel arbitration when a party refuses to comply with that agreement. 9 U.S.C. §§ 3-4.

"The question of 'substantive arbitrability' is for the court not for the arbitrator to decide." *Livingston v. John Wiley & Sons, Inc.*, 313 F.2d 52, 55 (2d Cir. 1963) (citing *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962)). In order to determine whether or not a particular dispute is arbitrable, a court must decide "whether the parties agreed to arbitrate, and if so, whether the scope of that agreement encompasses the asserted claims." *Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela*, 991 F.2d 42, 45 (2d Cir. 1993) (quoting *David L. Threlkeld & Co. v. Metallgesellschafr Ltd.*, 923 F.2d 245, 149 (2d Cir. 1991)). While there is a strong federal policy favoring arbitration, a party may only be compelled to arbitrate a dispute to the extent he or she has agreed to do so. *Bell v. Cedent Corp.*, 293 F.3d 563,

[13] The Arbitration Provision expressly states that the parties' agreement to arbitrate "is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act." *See* Cathryn A. Snyder Decl., Ex. B and D; Donald Blumenthal Decl., Ex. A.

566-67 (2d Cir. 2002); *John Hancock Life Ins. v. Wilson*, 254 F.3d 48, 58 (2d Cir. 2001). Where the scope of the arbitration agreement is ambiguous, any doubt should be resolved in favor of arbitration. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). "Another way of expressing this is to say that arbitration must not be denied unless a court is positive that the clause it is examining does not cover the asserted dispute." *Spear, Leeds & Kellogg v. Central Life Assur. Co., et al.*, 85 F.3d 21, 28 (2d Cir. 1996) (citing *AT&T Technologies, Inc. v. Communications Workers of America, et al.*, 475 U.S. 643, 650 (1986)). Absent some ambiguity, however, it is the language of the contract that defines the scope of disputes subject to arbitration. *Equal Employment Opportunity Comm. v. Waffle House, Inc.*, 534 U.S. 279 (2002).

American Express contends that plaintiffs are obliged to arbitrate their claims pursuant to the arbitration provision in their merchant contracts. In opposition, plaintiffs argue, *inter alia*, that to arbitrate their anti-trust claims individually would impose such punishing costs as to preclude vindication in that forum. All plaintiffs also argue that Claim IV of their amended complaints, which challenges the imposition of the collective action waiver provisions as an anti-trust violation in its own right, is inherently inarbitrable. The California plaintiffs, in their motion for partial summary judgment, claim that American Express's imposition of the collective action waiver provisions violated the California Unfair Competition Law by forcing small merchants to waive their right to participate in both class actions and class-wide arbitrations as a condition of doing business with American Express. Those plaintiffs

who signed merchant contracts prior to 1999 (the "pre-1999 plaintiffs")[14] deny having received defendant's mailing of that year imposing the arbitration and collective action waiver provisions. The pre-1999 plaintiffs further claim that the change-in-terms clause of their original contracts did not authorize the addition of an arbitration provision.

A. Enforceability of the Arbitration Agreement

The FAA established a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24; *see also Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 25 (1991). The FAA instructs courts that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2005). Congress enacted the FAA for the purpose of "revers[ing] the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the United States Supreme Court directed that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." 473 U.S. 614, 626 (1985); *see also Paine Webber, Inc. v. Bybyk*, 81 F.3d 1193, 1198 (2d Cir. 1996). Thus, courts are to "construe arbitration clauses as broadly as possible." *Oldroyd v. Elmira Savings Bank, FSB*, 134 F.3d 72, 76 (2d Cir. 1998) (quoting *Collins & Aikman Prod. Co. v. Build-*

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[14] The pre-1999 plaintiffs are Italian Colors, Bunda Starr, Chez Noelle, Mascari, Il Forno, and 492 Supermarket Corp. *See* Snyder Decl. at 3-6.

ing Sys., Inc., 58 F.3d 16, 19 (2d Cir. 1995) (The parties were required to submit to arbitration "any claim or controversy arising out of or relating to th[e] agreement." The Second Circuit Court of Appeals found this to be "the paradigm of a broad clause," and further held that the claims at issue there were "presumptively arbitrable" pursuant to the clause)).

The arbitration provision in the merchant plaintiffs' card acceptance agreements is also a paradigmatically broad clause, thereby justifying a presumption of arbitrability. *See Oldroyd*, 134 F.3d at 76 (enforcing a clause requiring arbitration of "[a]ny dispute, controversy or claim arising under or in connection with" appellee's employment agreement); *Mehler v. Terminex Int'l Co. L.P.*, 205 F.3d 44, 49 (2d Cir. 2000) ("There is no dispute that the arbitration clause at issue is a classically broad one. . . . The clause provides for arbitration of 'any controversy or claim between [the parties] arising out of or relating to' the Agreement."). Plaintiffs' claims fall within the broad scope of the arbitration provision of the merchant Card Acceptance Agreement which covers "any claim, dispute or controversy between you and us arising from or relating to this Agreement." Snyder Decl., Ex. B and D; Blumenthal Decl., Ex. A. The Agreement applies to claims "based upon contract, tort, intentional tort, statutes, regulations, common law and equity." *Id.* The arbitration clause at issue here is enforceable absent an exception to the strong policy in favor of enforcing arbitration agreements.

1. The Costs of Individual Arbitration

Plaintiffs contend that the arbitration clause, which includes the contractual prohibition on collective action, should not be enforced. In order to effectively arbitrate their anti-trust claims under the

existing contractual rubric, plaintiffs argue that each individual plaintiff would have to incur discovery costs amounting to hundreds of thousands of dollars, despite seeking average damages of only $5000. Pls.' Mem. in Opp. to Mot. to Compel Arbitration, 1-7. Plaintiffs seize upon the United States Supreme Court's suggestion in *Green Tree Corp. v. Randolph* that "[i]t may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating . . . federal statutory rights in the arbitral forum." 531 U.S. 79, 90 (2000). Plaintiffs, however, misconstrue the nature of the judicial inquiry into arbitration costs to which the Supreme Court alludes in *Green Tree* and *Gilmer*. A litigant seeking to evade a contractual arbitration clause must "show a likelihood that he or she will be responsible for significant arbitrators' fees, *or other costs which would not be incurred in a judicial forum*. *Ball v. SFX Broadcasting, Inc.*, 165 F.Supp.2d 230, 240 (N.D.N.Y. 2001) (emphasis added); *see also Bradford v. Rockwell Semiconductor*, 238 F.3d 549, 556 (4th Cir. 2001) (finding that the "crucial inquiry" is whether "the arbitral forum in a particular case is an adequate and accessible substitute to litigation . . ."). Plaintiffs neither allege nor present evidence that arbitration would be any more costly than litigation.

Specifically, plaintiffs argue that "in the absence of the Collective Action Waivers, the small merchant plaintiff may vindicate its statutory rights by joining its claims with those of other merchants and pooling the costs of litigation (or attracting counsel willing to advance such costs.) In the presence of the Collective Action Waivers, the small merchant flatly cannot vindicate its statutory rights." Pls.' Memo. in Opp. to Mot. to Compel Arbitration at 2. Plaintiffs present

an affidavit from a "professional economist with substantial experience with individual and class action antitrust litigation" who asserts that "it would not be worthwhile for an individual plaintiff . . . to pursue individual arbitration or litigation where the out-of-pocket costs, just for the expert economic study and services, would be at least several hundred thousand dollars, and might exceed $1 million." Decl. of Gary L. French, Ph.D, Pls.' App. of Decls. and Exs. in Opp. to Compel Arbitration, Ex. 5.

Plaintiffs' contention, however, that the costs of individual arbitration would eclipse the value of any potential recovery, ignores the statutory protections provided by the Clayton Act. Section 4 of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."[15] 15 U.S.C.A. 15(a) (2005); *see Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002) (rejecting, in a RICO action, plaintiff's argument that a collective action waiver was un-

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[15] Plaintiffs do not dispute that the full extent of remedies under the Clayton Act would be available in arbitration by any one of the contractually identified arbitrators (the National Arbitration Forum, JAMS/Endispute, and the American Arbitration Association). *See*, *e.g.*, *In re Universal Service Fund Telephone Billing Practices Litigation*, 300 F.Supp.2d 1107, 1137 (D.Kan. 2003) ("*Universal Service Fund I*") (enforcing a class action waiver in an arbitration provision in a case which involved anti-trust claims and noting that "[there is no] irreconcilable conflict between a ban on class actions and the substantive rights provided by [the Sherman and Clayton Acts]. Congress already provided ample statutory incentives for plaintiffs to vindicate their rights under those statutes by, for example, being able to recover treble damage and attorneys fees . . .").

enforceable because "without the class action vehicle, [plaintiff] will be unable to maintain her legal representation given the small amount of her individual damages."); *see also Plant v. Blazer Fin. Svcs.*, 598 F.2d 1357, 1365-66 (5th Cir. 1979) (holding, in a Truth in Lending Act action, that "[a]s a practical matter, the award of attorney's fees is a critical and integral part of this section"); *accord Johnson v. West Suburban Bank*, 225 F.3d 366, 374 (3d Cir. 2000) (holding, in a TILA action, that "while arbitrating claims that might have been pursued as part of class actions potentially reduces the number of plaintiffs . . . arbitration does not eliminate plaintiff incentives to assert rights under the Act").

Although plaintiffs claim that the arbitration and collective action waiver provisions of their contracts combine to "give Amex a 'free pass'" by discouraging litigation, the very statute under which they bring suit provides sufficient financial incentive to pursue their claims in the form of treble damages, costs, and attorneys' fees. Moreover, plaintiffs' attack on the enforceability of the collective action waivers is not an argument against arbitrability, but an argument against enforcing the collective action waiver provisions, whether the claims proceeded in arbitration or court.[16] Accordingly, plaintiffs' opposition to arbitration because of the collective action waiver provisions, on the theory that the costs preclude vindica-

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[16] "The sin of the agreements that Amex has imposed upon the small merchant plaintiffs is not that they mandate arbitration at all; it is that they bar collective action. If the arbitration clauses allowed for a class-wide arbitration, then there would not be a 'cost differential between arbitration and litigation in court . . . [that] is so substantial as to deter the bringing of claims.'" Pls.' Mem. in Opp. to Mot. to Compel Arbitration, 11 (internal citations omitted).

tion of individual plaintiff's statutory rights, is unpersuasive.

2. Arbitrability of Plaintiffs' Anti-Trust Claim

In claim IV of plaintiffs' respective amended complaints, they "allege that the imposition of the arbitration clause *with* its Collective Action Waivers thus constitutes an illegal contract in restraint of trade and an unlawful monopoly maintenance device, under §§ 1 and 2 of the Sherman Act." Pls.' Mem. in Opp. to Mot. to Compel Arbitration, 16 (emphasis added). Plaintiffs' contend that this claim is inherently inarbitrable because it "directly challenges the legality of the very clause that would support sending the case to arbitration in the first place." *Id.* Again, plaintiffs are actually challenging the enforcement of the collective action waivers, rather than making an argument about inherent inarbitrability. Indeed, arbitration agreements containing class action waivers are not inherently unenforceable as anti-competitive. *See, e.g.*, *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 637-38 (4th Cir. 2002); *Randolph v. Green Tree Financial Corp.*, 244 F.3d 814, 818 (11th Cir. 2001); *Johnson v. West Suburban Bank*, 225 F.3d 366, 378 (3d Cir. 2000); *Livingston v. Associates Finance, Inc.*, 339 F.3d 553 (7th Cir. 2003); *Universal Service Fund I*, 300 F. Supp. at 1137 (concluding that the "inability to bring a class action . . . cannot by itself suffice to defeat the strong congressional preference for an arbitral forum").

The enforceability of the collective action waivers is a claim for the arbitrator to resolve. Issues relating to the enforceability of the contract and its specific provisions are for the arbitrator, once arbitrability is established. *See Buckeye Check Cashing, Inc. v. Cardegna et al.*, 126 S. Ct. 1204, 1209 (2006) ("[U]nless

the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance"); *see also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 396-97, 404-06 (1967) (holding that an arbitrator should resolve a claim of "fraud in the inducement of the contract generally" since "a federal court may consider only issues relating to the making and performance of the agreement to arbitrate"); *Campaniello Imports, Ltd. v. Saporiti Italia S.P.A. et al.*, 117 F.3d 655, 667 (2d Cir. 1997). Moreover, procedural questions, which grow out of the dispute and bear on its final disposition, are presumptively not for the judge, but for an arbitrator to decide. *See John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964); *see also Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002).

In addition, the United States Supreme Court has cautioned against the use of anti-trust defenses to contract actions. *See Kelly v. Kosuga*, 443 F.2d 783, 785-6 (1959) ("[t]he plea of illegality [of a contract] on violation of the Sherman Act has not met with much favor in this Court"). The Supreme Court made clear that a plaintiff may raise an anti-trust defense to a contract only where enforcement "would make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act." *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 81 (1982). In *Viacom Inter'l, Inc. v. Tandem Productions, Inc.*, the Second Circuit Court of Appeals explained the Supreme Court's concern "that the successful interposition of anti-trust defenses is too likely to enrich parties who reap the benefits of a contract and then seek to avoid the corresponding burdens." 526 F.2d 593, 599 (2d Cir. 1975).

Plaintiffs further claim that if this Court compels arbitration of their anti-trust claim, the Court will be party to defendant's alleged anti-trust violation, i.e. the enforcement of the Honor All Cards provision. However, the collective action waiver does not apply simply to the Honor All Cards provision. According to the merchant contract, plaintiffs may not engage in collective litigation or arbitration with regard to *any* claims arising out of *any terms* of the contract, and not simply when challenging the Honor All Cards provision. In ordering arbitration of plaintiffs' Sherman Act claim in accordance with the language of the contract, this Court is enforcing a binding agreement entered into by the parties, rather than acting as a party to any of the alleged anti-trust actions on the part of defendant. Plaintiffs offer no persuasive argument why an arbitrator cannot adequately consider and resolve all issues of enforceability of the terms of the contract, including plaintiffs' claims regarding the collective action waivers. All of plaintiffs' claims, including their anti-trust claim, are therefore arbitrable.

3. The pre-1999 Plaintiffs, the Change-in-Terms Provision, and the 1999 Amendment

Further contesting defendant's motion to compel arbitration, the pre-1999 plaintiffs contend that 1) the change-in-terms provision in their original merchant contracts with defendant did not allow the later introduction of an arbitration clause, and 2) that, despite discovery on the issue, defendant has failed to establish that the pre-1999 plaintiffs received the mailing imposing the arbitration clause in 1999. The change-in-terms clause in the pre-1999 plaintiffs' merchant contracts provides: "[American Express] has the right to amend this agreement at

any time. We will notify you in writing at least ten (10) days in advance. If the changes are unacceptable to you, you may terminate this agreement . . ." Snyder Decl., Ex. A. The parties do not dispute that in 1999 American Express mailed an arbitration agreement amendment to thousands of contracting merchants. The pre-1999 plaintiffs, however, dispute that they received this mailing.

Plaintiffs draw this court's attention to *Stone v. Golden Wexler & Sarnese, P.C.*, a recent case that invalidated an arbitration agreement added to a contract via mailing. 341 F. Supp. 2d 189 (E.D.N.Y. 2004). The *Stone* court found the supplementary arbitration agreement invalid on the ground that the change-in-terms provision[17] in the original contract was drafted in such a way that the consumer plaintiffs could not "have anticipated that the Bank would change the method and forum for resolving disputes." *Id.* at 197. Since the contract as a whole lacked any mention of terms relating to dispute resolution, the court found that an arbitration agreement was not reasonably within the "universe of terms which could be altered or affected pursuant to the clause." *Id.* at 198. In a similar case, an Eastern District of Pennsylvania court held a supplementary arbitration

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[17] The Change in Terms provision at issue in the *Stone* case between consumers and the Bank read in pertinent part: "We may amend or change any part of your Agreement, including the periodic rates and other chargers, or add or remove requirements at any time . . . Changes to the annual percentage rate(s) will apply to your account balance from the effective date of the change . . . Changes to fees and other charges will apply to your account balance." *Stone*, at 197. The surrounding sections of the Customer Agreement in *Stone* dealt with such topics as credit limits, membership fees, periodic statements, and finance charges. *Id.* at 197-98.

agreement void when the terms of the original contract failed to "alert a consumer to the fact that [defendant] might later impose a term abrogating their rights." *Perry v. FleetBoston Fin. Corp.*, No. 04-507, 2004 U.S. Dist. LEXIS 12616, at *13 (E.D.P.A. July 6, 2004) (noting elsewhere that "no mention of dispute resolution – either in an arbitral or judicial forum – existed in their original Cardholder Agreements").

The change-in-terms clause in the instant case, however, when coupled with other terms in the pre-1999 plaintiffs' merchant contracts, rendered the arbitration amendment at issue a reasonable addition to the original contracts.[18] The original contracts[19] included several terms relating to disputes and their

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[18] In contrast to the *Stone* change in terms provision, American Express' pre-1999 merchant contracts stated in pertinent part: "We have the right to change this Agreement at any time. We will notify you of any change in writing at least ten (10) days in advance. If the changes are unacceptable to you, you may terminate this Agreement." *See* Snyder Decl., Ex. A, C, and E. The surrounding sections in addition to discussing the parameters of the parties' financial relationship also discuss topics such as bankruptcy, indemnification, compliance with laws, governing law, waiver, assignment, and terminating the agreement.

[19] American Express was only able to provide copies of the merchant contracts in existence on the date of their agreement for three of the six pre-1999 plaintiffs. The merchant contract in effect in 1993 when Italian Colors signed an agreement with American Express is Exhibit A of the Snyder Declaration; the 1989 contract applicable to Bunda Starr is Exhibit C of the Snyder Declaration; and the 1991 contract applicable to Mascari is Exhibit E of the Snyder Declaration. Copies of the contracts in effect for Chez Noelle in 1982, Il Forno in 1988, and 492 Supermarket Corp. in 1996 were not located. *See* Snyder Decl. at 4-5 ¶¶ 7, 9 and 12.

resolution, including: a section entitled "Full Recourse" which "means that we [American Express] are entitled to payment from you [the merchant] for amounts payable or paid to you" in the event of any disputed charges or non-compliance with the terms of the contract; a section entitled "Disputed Charges," explaining that the merchant must respond in writing to any "claim, complaint, or question about any charge" if American Express requests and that American Express will have the right to "Full Recourse" from the merchant if a cardmember continues to withhold payment after the merchant's reply and the "[c]ard-member has the right under applicable law" to do so; a section entitled "Indemnification," whereby the merchant agrees to indemnify American Express and others "from and against all damages, losses and expenses . . . including reasonable attorneys' fees and costs" in "any suit or claim" arising out of certain situations under the agreement; a provision terminating the Agreement if the merchant becomes insolvent or involved in bankruptcy proceedings; and a "Governing Law" section identifying New York law as governing the agreement. *See*, *e.g.*, Snyder Decl., Ex. A, C, and E.[20]

Since the pre-1999 merchant contracts contained provisions concerning the resolution of disputes, including sections pertaining to various legal proceedings such as bankruptcy and lawsuits in which the merchant would indemnify American Express and pay their attorneys' fees, the original contract sufficiently alerted plaintiffs that the defendants' might later amend the terms of the contract with respect to

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[20] The quoted sections can be found in the 1993 merchant agreement. Snyder Decl., Ex. A. Sufficiently similar provisions under various headings can be found in Exhibits C and E.

the resolution of disputes between the parties. *Cf. Perry*, 2004 U.S. Dist. LEXIS 12616 at *13 (holding that an "ambiguous" change in terms provision did not allow Fleet "to make previously uncontemplated, unilateral changes to the Cardholder Agreement" like the arbitration provision since "no mention of dispute resolution – either in an arbitral or judicial forum – existed in their original Cardholder Agreements"). The 1999 arbitration amendment was reasonably within the "universe of terms which could be altered or affected pursuant to the clause." *Cf. Stone*, 341 F. Supp. 2d at 198. Moreover, unlike *Stone*, and virtually all of the cases upon which it relies, the agreement at issue in the instant case is an agreement between commercial parties, rather than one involving consumers. If American Express' 1999 arbitration amendment was not acceptable to any of the plaintiff merchants, each merchant was free to terminate its relationship with American Express rather than be subject to the amendment. Instead, the plaintiffs elected to continue their relationship with American Express well after the arbitration amendment was put into place.

The pre-1999 plaintiffs also deny having received the 1999 arbitration amendment. In light of documents produced by both parties during discovery on the limited issue of receipt of the amendment, however, plaintiffs have not successfully rebutted the presumption of mailing to which defendants are entitled. Under New York law, "when . . . there is proof of the office procedure followed in a regular course of business, and these procedures establish that the required notice has been properly addressed and mailed, a presumption arises that notice was received." *Leon v. Murphy*, 988 F.2d 303, 309 (2d

Cir. 1993) (citing *Nassau Insurance Co. v. Murphy*, 46 N.Y.2d 828, 829-30 (1978)). Once defendants have adduced sufficient evidence to merit that presumption, "[t]he mere denial of receipt does not rebut [it]." *Leon*, 988 F.2d at 309.

Defendants have presented evidence that establishes the following: in 1999 American Express compiled a list of merchants from whom it had processed charges in the previous twelve months; each of the plaintiffs submitted charges during that time period; each of the plaintiffs conceded having received other mailings from American Express during the relevant time period; a professional mailing company determined that 99.7% of the roughly 1.5 million merchant addresses given it by American Express could be reached by mail; and an American Express executive affirmed via affidavit that normal business practices were employed in the course of the mailing. Plaintiffs do not dispute, or produce evidence to challenge, these assertions. Although plaintiffs deny having received the amendments, this self-serving assertion is insufficient to rebut the presumption of mailing. Plaintiffs' presentation of a handful of e-mails reflecting frustration on the part of several of defendant's employees who conducted the mailing is similarly inconclusive. *See Meckel v. Continental Resources*, 758 F.2d 811 (2d Cir.1985) ("There must be – in addition to denial of receipt – some proof that the regular office practice was not followed or was carelessly executed so the presumption that notice was mailed becomes unreasonable"). The arbitration amendment is therefore not rendered unenforceable for lack of receipt by the pre-1999 plaintiffs.

B. California's Unfair Competition Law

In the fifth claim of their amended complaint, the California plaintiffs claim that the collective action waivers violate California's Unfair Competition Law. Whether or not the defendants violated the California Unfair Competition Law by allegedly forcing small merchants to waive the right to participate in both class actions and class-wide arbitrations as a condition of doing business with American Express, is not a bar to sending all of the plaintiffs to arbitration pursuant to their contractual agreement with American Express. Rather, both the Sherman Act anti-trust claim and the California Unfair Competition claim are substantive matters to be raised before the arbitrator. *See, e.g.*, *Zurich Ins. Co. v. Ennia General Ins. Co.*, 882 F.Supp. 1438, 1440 (S.D.N.Y. 1995) (holding that the issue of the law to be applied is a question for the arbitration panel, not the court once it determined that a binding agreement to arbitrate existed and the underlying dispute between the parties fell within its scope); *see also ATSA of Calif., Inc. v. Continental Ins. Co.*, 702 F.2d 172, 175 (9th Cir. 1983), *amended*, 754 F.2d 1394 (9th Cir. 1985) ("when parties agree to submit disputes to arbitration it is presumed that the arbitrator is authorized to determine all issues of law and fact necessary to resolve the dispute"). Indeed, in determining arbitrability, the court may not consider the merits of the parties' claims or the likelihood of success at arbitration, since the parties agreed to submit "any claim" to arbitration, not just those claims which the court determines are meritorious. *See Spear, Leeds & Kellogg*, 85 F.3d at 28-29. The California plaintiffs'

concede as much in their motion papers.[21] Therefore their motion for partial summary judgment is denied without prejudice and the issue may be raised in the arbitral forum.

CONCLUSION

American Express's motion to compel arbitration of all claims against it is granted. Since this Court finds that all of plaintiffs' claims against American Express are subject to arbitration, it further orders that plaintiffs' cases against American Express be dismissed. *See Lewis Tree Serv., Inc. v. Lucent Technologies, Inc.*, 239 F. Supp. 2d 332, 340 (S.D.N.Y. 2002) (where "no useful purpose will be served by granting a stay" the action should be dismissed); *see also Wilson v. Wells Fargo Financial Acceptance, Inc.*, No. 3:02-0383, 2003 WL 1877336 (M.D. Tenn. Apr. 9, 2003) (dismissing case in favor of arbitration, and holding that "if all of the issues in dispute are governed by the arbitration agreement, then it would generally be an inefficient use of the court's docket to enter a stay, when the arbitration will likely be dispositive of all the issues").

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[21] "Finally this motion is not about arbitration. No one disputes the strong public policies supporting arbitration or the broad scope of the FAA. This motion, rather, is about Collective Action Waivers, which violate California law because they cut off plaintiffs' rights to participate in *both* class actions *and* class-wide arbitration. In this case, there would be no violation of applicable law if the defendants' agreements allowed small merchants either to participate in class actions or to take part in class-wide arbitrations. The arbitral organizations identified in the defendants' agreements with small merchants all have rules authorizing and governing class-wide arbitration." Pls.' Mem. in Sup. of Mot. for Partial Summary Judgment, 3 (emphasis in original).

American Express's motion to intervene and to dismiss the claims of plaintiffs against the banks in *National Supermarket* is denied. The bank defendants' motion to dismiss the claims in *National Supermarket* is denied. The bank defendants' motion to stay the action in *National Supermarket* pending the arbitration of related claims against American Express, is granted.

The *Cohen Rese* plaintiffs' motion for partial summary judgment on their fifth claim against American Express is denied without prejudice.

Dated: March 15, 2006

New York, New York

SO ORDERED:

/s/ George B. Daniels

GEORGE B. DANIELS

United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 1st day of August, two thousand eleven,

Present:

Rosemary S. Pooler[1],
Robert D. Sack,
Circuit Judges.

IN RE AMERICAN EXPRESS MERCHANTS' LITIGATION,

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

v. (06-1871-cv)

AMERICAN EXPRESS TRAVEL RELATED SERVICES CO., AMERICAN EXPRESS CO.,
Defendants-Appellees.

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[1] The Honorable Sonia M. Sotomayor, originally a member of the panel, was elevated to the Supreme Court on August 10, 2009. The remaining members of the panel, who are in agreement, have determined the matter. See 28 U.S.C. § 46(d); Local Rule 0.14(2); *United States v. Desimone*, 140 F.3d 457 (2d Cir. 1998).

[filed Aug. 1, 2011]

In light of the Supreme Court's decision of April 27, 2011 in *AT&T Mobility LLC v. Concepcion*, -- U.S. --, 2011 WL 1561956 (2011), this panel is *sua sponte* considering rehearing. No additional briefing is necessary at this time.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
/s/ CATHERINE O'HAGAN WOLFE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 06-1871-cv

IN RE AMERICAN EXPRESS MERCHANTS' LITIGATION,

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

v.

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

[Filed May 29, 2012]

ROSEMARY S. POOLER, Circuit Judge, concurs by opinion in the denial of rehearing in banc.

DENNIS JACOBS, Chief Judge, joined by JOSÉ A. CABRANES and DEBRA ANN LIVINGSTON, Circuit Judges, dissents by opinion from the denial of rehearing in banc.

JOSÉ A. CABRANES, Circuit Judge, dissents by opinion from the denial of rehearing in banc.

REENA RAGGI, Circuit Judge, joined by RICHARD C. WESLEY, Circuit Judge, dissents by opinion from the denial of rehearing in banc.

ORDER

Following disposition of this appeal on February 1, 2012, an active judge of the Court requested a poll on whether to rehear the case *in banc*. A poll having been conducted and there being no majority favoring *in banc* review, rehearing *in banc* is hereby **DENIED**.

ROSEMARY S. POOLER, Circuit Judge, concurring in the denial of rehearing en banc:

I respectfully concur in the denial of the rehearing en banc. I write briefly to emphasize that the limited holding in this case is not governed by the Supreme Court's reasoning in *AT&T Mobility LLC v. Concepcion*, ––– U.S. –––, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011). *Concepcion* holds that the Federal Arbitration Act ("FAA") preempts state laws hostile to arbitration, and focuses its analysis on preemption issues. In contrast, analysis in *Amex III* rests squarely on a vindication of statutory rights analysis – an issue untouched in *Concepcion*.

Amex III strives to give full effect to the Supreme Court's teachings that where a contractual agreement functions "as a prospective waiver of a party's right to pursue statutory remedies," then the contractual agreement may not be enforced. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637, n. 19, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985); *see also Green Tree Fin. Corp. Alabama v. Randolph*, 531 U.S. 79, 90, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000). *Amex III* is carefully cabined to

hold that this waiver, on this record, is unenforceable. It creates no broad new rights.

While *Concepcion* addresses state contract rights, *Amex III* deals with federal statutory rights – a significant distinction. In analyzing *Concepcion*, the Court reasoned that although the FAA's saving clause, 9 U.S.C. § 2, preserves a generally applicable contract defense, "nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." 131 S.Ct. at 1748. The Court reasoned that invalidating a class waiver would allow a party to an arbitration agreement to demand a class-wide arbitration that is not consensual, thereby making arbitration slower, more formal and more costly, and greatly increasing risks to defendants. *Id.* at 1750-52. Because its analysis focused wholly on the issue of preemption of state law by federal law, *Concepcion* is silent on the holdings of the Court's earlier cases which enforce arbitration clauses only when those clauses permit parties to effectively vindicate their federal statutory rights.

In stark contrast, *Amex III* raises a different issue: whether the FAA always trumps rights created by a competing federal statute, as opposed to rights existing under a common law of unconscionability. At issue here is not the right to proceed as a class, but the ability to effectively vindicate a federal statutory right that predates the FAA. Vindication of statutory rights analysis is the method of analysis proposed by the Supreme Court in *Mitsubishi* for addressing whether an arbitration clause will be enforced where the dispute implicates a federal statute. 473 U.S. at 637, 105 S.Ct. 3346; *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28, 111 S.Ct. 1647, 114

L.Ed.2d 26 (1991). This analysis is not foreign to our Court. *See*, *e.g.*, *Brooks v. Travelers Ins. Co.*, 297 F.3d 167, 168 (2d Cir.2002) (analysis of arbitration agreement required finding that agreement "provide[d] adequately for vindication of federal statutory rights"). There is no indication in *Concepcion* that the Supreme Court intended to overrule its previous holdings.

Mitsubishi holds that parties may agree to prosecute statutory rights via arbitration instead of litigation only where "the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum." 473 U.S. at 637, 105 S.Ct. 3346. *Gilmer* reaffirmed that principle. 500 U.S. at 28, 111 S.Ct. 1647. Nearly ten years later, the Supreme Court cited the proposition again, in *Green Tree Fin. Corp.*, 531 U.S. at 90, 121 S.Ct. 513; *see also 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 129 S.Ct. 1456, 1474, 173 L.Ed.2d 398 (2009) (recognizing principle and stating that "a substantive waiver of federally protected civil rights will not be upheld"). Our sister Circuits also engage in a vindication of rights analysis. *See*, *e.g.*, *Kristian v. Comcast Corp.*, 446 F.3d 25, 47-48 (1st Cir.2006) (severing as unenforceable provision of arbitration agreement limiting availability of treble damages under antitrust statute); *Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478 n. 14 (5th Cir.2003) (severing restriction on available remedies from arbitration agreement after finding that "ban on punitive and exemplary damages is unenforceable in a Title VII case"); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 657-60 (6th Cir.2003) (en banc) (deciding when cost-sharing deprives employees of substantive statutory rights); *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1234 (10th Cir.1999) ("an

arbitration agreement that prohibits use of the judicial forum as a means of resolving statutory claims must also provide for an effective and accessible alternative forum"); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1060 (11th Cir.1998) (holding that arbitration agreement which proscribed award of Title VII damages was unenforceable because it was fundamentally at odds with the purposes of Title VII); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1468 (D.C.Cir.1997) ("We do not read *Gilmer* as mandating enforcement of *all* mandatory agreements to arbitrate statutory claims; rather we read *Gilmer* as requiring the enforcement of arbitration agreements that do not undermine the relevant statutory scheme.").

Equally unavailing is any reliance on *Coneff v. AT&T Corp.*, 673 F.3d 1155 (9th Cir.2012). *Coneff* – like *Concepcion* – examines when the FAA preempts state contract law. Unlike *Amex III*, the *Coneff* court was not focused on individual plaintiffs lacking an effective means of enforcing their rights. Rather, the question addressed in *Coneff* was, given the small damages awards in any individual arbitration, whether the plaintiffs would have an adequate *incentive* to vindicate their rights. The Ninth Circuit expressly recognized the difference between incentive and ability. *Coneff*, 673 F.3d at 1158-60 n. 3 (distinguishing *Amex III*, 667 F.3d 204, 218 (2d Cir.2012) on the ground that in *Amex III* "the *only economically feasible means* for plaintiffs enforcing their statutory rights is via a class action.")(emphasis in original).

Further, in both *Coneff* and *Concepcion* the individual damages awards available to any single plaintiff were small, but fee-shifting provisions ensured that a damaged plaintiff could be made whole. The

reason that a plaintiff may not bring suit was not because he would not be likely to recoup his costs, but rather because the small amount of damages was not worth his trouble. In *Amex III*, however, plaintiffs were faced with substantial upfront expenditures to prosecute their antitrust rights – costs that were only economically feasible if the plaintiffs prosecuted their claims as a class. *Amex I* explained why the Clayton Act's treble-damages and fee-shifting provisions would not make an individual plaintiff whole:

> [Not only is] the trebling of a small individual damages award [] not going to pay for the expert fees Dr. French has estimated will be necessary to make an individual plaintiff's case here, there is an even more important legal consideration that the district court did not consider. In *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, the Supreme Court addressed fee-shifting for expert witnesses under Rule 54(d) of the Federal Rules of Civil Procedure in an antitrust case, holding that "when a prevailing party seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound by the limit of [28 U.S.C.] § 1821(b). . . ." 482 U.S. 437, 439, 107 S.Ct. 2494, 96 L.Ed.2d 385 (1987). We note that figure is now set at a $40 per diem. Further, as the plaintiffs assert, there are no provisions "in the rules of any of the arbitral bodies designated [in the Card Acceptance Agreement] that would allow such costs to be awarded where they are not authorized by the applicable fee shifting statute." Even with respect to reasonable attorney's fees, which are shifted under Section 4 of the Clayton Act, the plaintiffs must include the risk of losing,

> and thereby not recovering any fees, in their evaluation of their suit's potential costs.

554 F.3d 300, 317-18 (2d Cir.2009) (footnotes omitted); *see also* 15 U.S.C. § 15.

We need not tarry long in addressing a final concern: that *Amex III* permits plaintiffs to evade enforcement of class action arbitration waivers simply by manufacturing an affidavit or choosing pricey attorneys. The business plaintiffs here are prosecuting antitrust claims that will likely require complex discovery and expert testimony. Other statutory claims may not require such extensive proof. The courts are perfectly capable of doing the analysis necessary to determine if the plaintiffs have made the necessary showing. *See*, *e.g.*, *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 502 (4th Cir.2002) (refusing to strike class arbitration waiver where plaintiff failed to make required showing that he would incur prohibitively high expenses in prosecuting claim individually); *Ornelas v. Sonic-Denver T, Inc.*, 2007 WL 274738, at *6 (D.Colo. Jan. 29, 2007) (refusing to strike class arbitration waiver because the evidence did not demonstrate the costs of pursuing arbitration would effectively "preclude the plaintiff from pursuing his claims"); *see also Bonanno v. Quizno's Franchise Co., LLC*, 2009 WL 1068744, at *16 (D.Colo. April 20, 2009) (enforcing contract clause barring class actions where plaintiffs failed to demonstrate they would incur excessively high costs in proceeding individually). *Amex III* specifically admonishes that each case will need to stand on its own merits.

Amex III gives full effect to a long line of Supreme Court precedent preserving plaintiffs' ability to vindicate federal statutory rights, rather than eviscerating more than 120 years of antitrust law by closing

the courthouse door to all but the most well-funded plaintiffs. For these reasons, I concur in the denial of rehearing en banc.

DENNIS JACOBS, Chief Judge, with whom Judge CABRANES and Judge LIVINGSTON join, dissenting from the denial of rehearing in banc:

I respectfully dissent from the denial of rehearing *in banc*.

In 1968, it became law in this Court that, for public policy reasons, federal antitrust claims could not be arbitrated. *See Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 827-28 (2d Cir.1968). The Supreme Court rejected that public policy approach in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). And in 1991, it reiterated that federal statutory claims can be subject to valid arbitration agreements. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991).

Now the panel opinion in this case uses public policy to hold that arbitration agreements containing class-action waivers are unenforceable when applied to federal statutory claims *if* (as is always so easy to assert) a claim would not be "economically rational" to pursue individually. *In re Am. Express Merchs.' Litig.*, 667 F.3d 204, 214 (2d Cir.2012) (*Amex III*). The panel opinion thus impairs the Federal Arbitration Act's strong federal policy favoring the enforcement of arbitration agreements, and frustrates the goals of arbitration by multiplying claims, lawsuits, and attorneys' fees. "[T]he longstanding judicial hostility to arbitration agreements," *Gilmer*, 500 U.S. at 24, 111 S.Ct. 1647, is undiminished.

At issue is a provision, of a kind commonly used in arbitration agreements, that bars class actions. The underlying arbitration involves an antitrust claim. In *In re American Express Merchants' Litigation*, 554 F.3d 300 (2d Cir.2009) (*Amex I*), the panel held that such a bar ran afoul of the federal substantive law of arbitration because the litigation expense of the antitrust suit – expert testimony, in particular – would render separate arbitrations too expensive. So the panel ruled that a class action may proceed in court notwithstanding the agreement to arbitrate. *Id.* at 320. The Supreme Court granted certiorari and vacated *Amex I* in light of *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, ––– U.S. –––, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010). *Am. Express Co. v. Italian Colors Rest.*, ––– U.S. –––, 130 S.Ct. 2401, 176 L.Ed.2d 920 (2010).

Stolt-Nielsen holds that a party to an arbitration agreement cannot be compelled to submit to class arbitration absent a "contractual basis for concluding that the party *agreed* to do so . . . because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." 130 S.Ct. at 1775. On remand the (by then) two-judge panel reached the same conclusion as in *Amex I*. *See In re Am. Express Merchs.' Litig.*, 634 F.3d 187, 199 (2d Cir.2011) (*Amex II*).

Shortly after *Amex II* was published but before the mandate issued, the Supreme Court decided *AT&T Mobility LLC v. Concepcion*, ––– U.S. ––––, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011), which holds that state law may not be used to invalidate a class-action waiver in an arbitration agreement on the ground

that the only economical way to litigate the claim is through a class action. *Id.* at 1748. After soliciting briefing on the impact of *Concepcion*, the panel issued its third opinion. In *Amex III*, the panel yet again concludes that the class-action waiver is unenforceable on the ground that the only effective way to litigate the antitrust claims was by a class action in court. *Amex III*, 667 F.3d at 218-19.

As I undertake to show, the public policy rationale which *Amex III* relies upon is wrong because: [1] it runs counter to the public policy that the Supreme Court has made paramount in the context of the Federal Arbitration Act ("FAA"); [2] it employs a dubious ground of distinction to overcome *Concepcion*, which teaches that the FAA does not allow courts to invalidate class-action waivers even if "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system," *Concepcion*, 131 S.Ct. at 1753; and [3] the dicta on which the panel precariously relies – that large "arbitration costs" cannot be allowed to prevent a plaintiff from "effectively vindicating" a statutory right – is pulled out of context and distorted.

I

Amex III cannot be squared with the FAA, as it has been applied and explained by the Supreme Court. In banc review is needed because [A] the panel opinion is unbounded and can be employed to defeat class-action waivers altogether; [B] it makes the district court the initial theater of arbitral conflict on the merits (how else does a district court estimate the cost of a litigation?); and [C] it is already working mischief in the district courts.

A

Amex III is a broad ruling that, in the hands of class action lawyers, can be used to challenge virtually every consumer arbitration agreement that contains a class-action waiver – and other arbitration agreements with such a clause. While it purports to require a case-by-case approach, its wording is categorical: "Supreme Court precedent recognizes that the class action device is the only economically rational alternative when a large group of individuals or entities has suffered an alleged wrong, but the damages due to any single individual or entity are too small to justify bringing an individual action." *Amex III*, 667 F.3d at 214. Thus every class counsel and every class representative who suffers small damages can avoid arbitration by hiring a consultant (of which there is no shortage) to opine that expert costs would outweigh a plaintiff's individual loss.

The breadth of the holding is illustrated in the opinion. *Amex III* uncritically adopts the affidavit of a paid consultant to find that expert costs would be so high relative to potential damages, that "the only economically feasible means for plaintiffs enforcing their statutory rights is via a class action [in court]." 667 F.3d at 218.

However, Section 4 of the Clayton Act provides for the recovery of costs, including expert costs, and attorneys' fees. *See* 15 U.S.C. § 15(a) ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."). The *Amex* panel is evidently of the view that the incentivizing fees and cost afforded by the statute would not fully compensate plaintiffs

for the costs of pursuing their claims. *See Amex III*, 667 F.3d at 218. But Congress deems these incentives sufficient to encourage private suits. The judgment of Congress in such a matter is entitled to deference, not the panel opinion's dismissive treatment.

Amex III does not vouchsafe what is meant for a suit to be "economically feasible," or when a hypothetical "economically rational" plaintiff might be willing to pursue a claim. *Id.* at 218. It cannot mean that a potential plaintiff must have the opportunity to be made whole and happy by recovery of damages, costs, attorneys' fees, expert charges, etc., because such a result is rarely achieved by even the most successful litigants. Moreover, *Amex III* demands more than such complete victory; it demands a "risk-of-losing" premium. *Id.* at 218 ("Even with respect to reasonable attorney's fees [,] . . . the plaintiffs must include the risk of losing, and thereby not recovering any fees, in their evaluation of their suit's potential costs."). This formulation betrays a dominant consideration – that, without the class-action vehicle, no lawyer will be incentivized to pursue these claims. That may be; but *Concepcion* rejected this very policy rationale. *See Concepcion*, 131 S.Ct. at 1753 (rejecting argument that "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system," because rules inconsistent with the FAA cannot be imposed "even if desirable for unrelated reasons"); *see also Coneff v. AT&T Corp.*, 673 F.3d 1155, 1159 (9th Cir.2012) (rejecting argument that plaintiffs had insufficient incentive to pursue individual claims as "primarily a policy rationale" that "cannot undermine the FAA").

B

Under the panel opinion, arbitration must now begin in federal court – and be litigated there on the merits in many critical respects. The courtroom inquiry that the panel requires to be undertaken before any class arbitration can in fact take place is searching. Whether a dispute may require expert testimony is a question inseparable from the merits (and raises *Daubert* and other vexed questions). Without a close inquiry into the merits, no court can decide what expert testimony would be required, or how much discovery is needed. And it cannot be decided whether any discovery or testimony is needed at all without deciding if the claim is dismissible – or such prior questions as the statute of limitations and laches, controlling law, res judicata, etc., etc., not to mention little things like whether the putative class is duly constituted and properly represented, without which there is no class claim.

Under the FAA, however, all those questions are for the arbitrator to decide. *See*, *e.g.*, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-404, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). By requiring the district court to consider this at the threshold, *Amex III* effectively displaces arbitration with a trial court proceeding whenever lawyers assert a class claim. (And they will, often.) Even if arbitration is given a green light at the end of the judicial proceeding, the party seeking to arbitrate may have already spent many times the cost of an arbitral proceeding just enforcing the arbitration clause. And the partial list of issues above will create fertile ground for appeal, adding yet more delay, expense, and uncertainty. The predictable upshot is

that *Amex III* will render arbitration too expensive and too slow to serve any of its purposes.

Amex III is incompatible with the FAA. The FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 & n. 32, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). The federal substantive law of arbitration "is a congressional declaration of a liberal federal policy favoring arbitration agreements." *Id.* at 24, 103 S.Ct. 927. This is particularly true in light of *Concepcion*'s reaffirmance of the "overarching purpose" of the FAA:

> The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.

Concepcion, 131 S.Ct. 1740.

C

In the six years *Amex* has been pending in this Court, its several iterations have been relied upon no fewer than three times in the Southern District of New York alone. *See Raniere v. Citigroup, Inc.*, 827 F.Supp.2d 294, —— (S.D.N.Y.2011); *Chen-Oster v. Goldman, Sachs & Co.*, No. 10 Civ. 6950, 2011 WL 2671813, at *2-5 (S.D.N.Y. July 7, 2011); *Sutherland v. Ernst & Young, LLP*, 768 F.Supp.2d 547, 550-54

(S.D.N.Y.2011).[1] Given the recurrent influence of *Amex*, this Court should subject it to *in banc* review.

That responsibility is even more compelling because the panel opinion now splits with a recent holding of the Ninth Circuit Court of Appeals. *See Coneff v. AT&T Corp.*, 673 F.3d 1155, 1158 n. 2, 1159 n. 3 (9th Cir.2012). In *Coneff*, a putative class of AT&T wireless customers sued AT&T on a variety of claims, including a violation of the Federal Communications Act. *Id.* at 1157. The Ninth Circuit held that *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000), was no obstacle to the enforcement of the arbitration agreement containing a class-action waiver because under the FAA it is irrelevant whether customers "have insufficient incentive" "to vindicate their rights." *Id.* at 1159 (citing *Concepcion*, 131 S.Ct. at 1753).

II

Amex III is thus incompatible with the longstanding principle of federal law, embodied in the FAA and numerous Supreme Court precedents, favoring the validity and enforceability of arbitration agreements. It should come as no surprise, then, that the panel opinion finds no support in the Supreme Court's case law. Instead, *Amex III* proceeds by selective quotation from Supreme Court dicta, and by aggressive measures to distinguish away the Supreme Court's recent holding in *Concepcion*.

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[1] These three cases also happen to be the only citations in *Amex III* that support its "vindication of rights" analysis. *See Amex III*, 667 F.3d at 219. This is of course self-referential: the citation of Second Circuit opinions by the district courts of this Circuit is not a form of endorsement.

A

Concepcion, decided after the second iteration of *Amex*, vindicated the FAA against an unconscionability challenge that was materially indistinguishable from the challenge upheld in *Amex*. In *Concepcion*, the Supreme Court rejected a common-law rule, developed by the California Supreme Court, that was applied to void class-action waivers in contracts of all types. This is what the discredited California opinion had said:

> [B]ecause . . . damages in consumer cases are often small and because a company which wrongfully exacts a dollar from each of millions of customers will reap a handsome profit, the class action is often the only effective way to halt and redress such exploitation. . . . Such one-sided, exculpatory contracts in a contract of adhesion, at least to the extent they operate to insulate a party from liability that otherwise would be imposed under California law, are generally unconscionable.

Discover Bank v. Superior Court, 36 Cal.4th 148, 161, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (2005) (internal quotation marks, citations, and alterations omitted).

The Supreme Court ruled that this attempt by California to police arbitration agreements was inconsistent with the FAA. *Concepcion*, 131 S.Ct. at 1748. Refuting the dissent's argument that "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system," the majority affirmed that rules inconsistent with the FAA cannot be imposed "even if desirable for unrelated reasons." *Id.* at 1753.

After the *Amex* panel solicited briefing from the parties on the effect of *Concepcion*, the panel reissued *Amex* (in the form of *Amex III*), evading the broad language and clear import of *Concepcion*. Again in *Amex III*, the panel found that a class-waiver provision in an arbitration agreement is unenforceable if "the only economically feasible means for plaintiffs enforcing their statutory rights is via a class action." *Amex III*, 667 F.3d at 218.

Amex III tries to narrow *Concepcion* to (in the words of *Amex III*) a "path for analyzing whether a state contract law is preempted by the FAA." *Amex III*, 667 F.3d at 213. In so doing, *Amex III* conceives the following distinction: *Concepcion* decided only whether California's doctrine of unconscionability was preserved by the FAA's savings clause for "grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, whereas *Amex III* invalidates the arbitration agreement (for the same reason of unconscionability) on the ground that the underlying antitrust claim was federal, a circumstance that the panel dresses up rhetorically as a "federal substantive law of arbitrability," *Amex III*, 667 F.3d at 213 (quotation marks omitted). This labored analysis does not rise to a distinction, and treats the reasoning of *Concepcion* as an obstacle to be surmounted or evaded. Since, as the Supreme Court has held, the FAA preempts even state law that permits evasion of a class action waiver clause, it is hard for me to see any justification for a rule permitting *precisely* the same sort of evasion as part of the "federal substantive law of arbitrability."

B

The panel opinion leans on the distortion of dicta from *Green Tree Financial Corp. v. Randolph*, 531

U.S. 79, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000). In *Green Tree*, a lender sought to compel a borrower to arbitrate claims she had raised under certain federal statutes. *Id.* at 83, 121 S.Ct. 513. The question was "whether [her] agreement to arbitrate is unenforceable because it says nothing about the costs of arbitration, and thus fails to provide her protection from potentially substantial costs of pursuing her federal statutory claims in the arbitral forum." *Id.* at 89, 121 S.Ct. 513. The Court reconfirmed "that federal statutory claims can be appropriately resolved through arbitration," *id.* at 89, 121 S.Ct. 513, and "rejected generalized attacks on arbitration that rest on a 'suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would be complainants,'" *id.* at 89-90, 121 S.Ct. 513 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989)). And the challenge failed for want of evidence of the "cost" of the arbitration. *Id.* at 90, 121 S.Ct. 513.

A passage in dicta (relied upon in *Amex III*) added that "the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights." *Id.* at 90, 121 S.Ct. 513. However, "large arbitration costs" is not a reference to expense generally. *Green Tree* uses the phrase to reference the cost of access to an arbitral forum and is about the price of admission: "payment of filing fees, arbitrators' costs, and other arbitration expenses." *Green Tree*, 531 U.S. at 84, 121 S.Ct. 513. Only *Amex III* has suggested that a claim that may be expensive to litigate – whether in court *or* in arbitration – can for that reason be deemed to entail preclusive "arbitration costs." In any event, even if the *Green*

Tree dicta were to have the meaning the panel ascribes to it, it is nonetheless still dicta. And it loses any persuasive power it might once have had in light of the Supreme Court's holding in *Concepcion*, which is more clear and more recent – and authoritative.

Similarly misleading is the panel's quotation of *Mitsubishi*, for the proposition that "should clauses in a contract operate 'as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.'" *Amex III*, 667 F.3d at 214 (quoting *Mitsubishi*, 473 U.S. at 637 n. 19, 105 S.Ct. 3346). The Court was there concerned with a hypothetical arbitral panel that might, relying on provisions concerning choice of forum or choice of law, refuse to apply American law to a federal statutory claim. *Mitsubishi*, 473 U.S. at 637 n. 19, 105 S.Ct. 3346.

Other circuit cases have excised provisions from arbitration agreements for the precise reasons anticipated by *Green Tree* and *Mitsubishi*. *See Kristian v. Comcast Corp.*, 446 F.3d 25, 47-48 (1st Cir.2006) (severing waiver of treble damages); *Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478 n. 14 (5th Cir.2003) (noting that waiver of exemplary and punitive damages is unenforceable); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1060 (11th Cir.1998) (holding that arbitration agreement cannot force a party to arbitrate a statutory right and at the same time bar it from being awarded damages in the arbitral forum). All of these three cases involved an arbitration agreement that entirely foreclosed a *remedy* to which one of the parties was otherwise entitled to seek at law. None of them invalidated an arbitration

agreement on the ground that the claims were costly to litigate individually.[2]

In *Amex*, there is zero evidence that any "arbitration costs" – within the meaning of *Green Tree* – would hamper the plaintiffs' ability to vindicate their statutory rights. None of the three panel opinions references the size of the filing fees, or any arbitrators' fees that would befall the plaintiffs. In finding that claim-by-claim litigation would not be "economically feasible," *Amex III*, 667 F.3d at 204, the panel relies solely on the affidavit of a paid consultant, Gary French, who opined that preparing an antitrust study would cost "at least several hundred thousand dollars, while a larger study can easily exceed $1 mil-

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[2] *Amex III* asserts that "[o]ther Circuits permit plaintiffs to challenge class-action waivers on the grounds that prosecuting such claims on an individual basis would be a cost prohibitive method of enforcing a statutory right," *Amex III*, 667 F.3d at 216-17 (citing *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 285 (4th Cir.2007)); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 555, 557 (7th Cir.2003); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 502-03 (4th Cir.2002). Each of those opinions quotes the "prohibitive costs" passage of *Green Tree*, but none uses the phrase as *Amex III* uses it – and all find in favor of the party seeking to enforce the arbitration clause. For one thing, the plaintiffs in each case failed to provide non-conclusory cost evidence. Notably, in *Livingston* and *Adkins* (upon which *Cotton Yarn* relies) the plaintiffs had raised the specter of prohibitive arbitration fees – not expenses incident to litigation. *See Livingston*, 339 F.3d at 557 ("Tellingly, [plaintiffs'] only 'evidence' of prohibitive arbitration costs is an unsubstantiated and vague assertion that discovery in an unrelated arbitration matter disclosed fees of nearly $2,000 per day."); *Adkins*, 303 F.3d at 503 ("[Plaintiff] does not even provide any evidence about the most basic element of this challenge: the size of the allegedly 'prohibitive' arbitration fee itself."). These cases were thus concerned about the price of admission.

lion." *Id.* at 212.[3] His preliminary review of the particular claim yielded a guess of nearly one million dollars. *Id.* However, that is beside the point: The ability to spread costs among a class is only a procedural right, the absence of which cannot render arbitration costs prohibitive. *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 25, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991), is instructive: an employee sought to avoid arbitrating his ADEA claims on the ground that "arbitration is inconsistent with the ADEA." *Id.* at 30, 111 S.Ct. 1647. The Supreme Court characterized that argument as "rest[ing] on suspicion of arbitration as a method of weakening the protections afforded in substantive law to would-be complainants, and as such, . . . far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." *Id.* (internal quotation marks omitted).

Gilmer's argument about the unavailability of class actions was expressly rejected:

> It is also argued that arbitration procedures cannot adequately further the purposes of the ADEA because they do not provide for broad equitable relief and class actions. . . . But even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.

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[3] It evidently did not occur to French or the panel that the rules of evidence do not govern arbitration, and that an arbitrator can consult treatises and articles for relevant antitrust and economic principles, and should do so in some cases.

Id. at 32, 111 S.Ct. 1647 (internal quotation marks omitted). As the passage from *Gilmer* reflects, the ADEA expressly provides for a collective action; *a fortiori*, the same result obtains under the antitrust laws, which do not. The only right to an antitrust class action is "merely a procedural one, arising under Fed.R.Civ.P. 23, that may be waived by agreeing to an arbitration clause." *Johnson v. W. Suburban Bank*, 225 F.3d 366, 369 (3d Cir.2000) (enforcing, due to absence of congressional intent to the contrary, a bilateral arbitration clause "even though [such clauses] may render class actions to pursue statutory claims . . . unavailable").

JOSÉ A. CABRANES, Circuit Judge, dissenting from the denial of rehearing in banc:

I concur fully in the thorough opinion of Chief Judge Jacobs dissenting from the denial of *in banc* review. I write separately simply to underscore that the issue at hand is indisputably important, creates a circuit split, and surely deserves further appellate review. This is one of those unusual cases where one can infer that the denial of *in banc* review can only be explained as a signal that the matter can and should be resolved by the Supreme Court.

REENA RAGGI, Circuit Judge, with whom Judge WESLEY joins, dissenting from the denial of rehearing en banc:

I respectfully dissent from the denial of *en banc* review in this case. The panel decision to hold a class action waiver unenforceable is at odds with *Coneff v. AT&T Corp.*, 673 F.3d 1155 (9th Cir.2012). This circuit split appears unwarranted in light of controlling Supreme Court precedent for the reasons

forcefully advanced by Chief Judge Jacobs in his opinion dissenting from the denial of rehearing *en banc*. While I identify much merit in the Chief Judge's analysis, I do not join in his opinion because I think it would be useful to have the issues explored further by the full court in the adversarial context of an *en banc* argument. To the extent a majority of the court maintains this circuit split without further consideration, I must dissent.

STATUTORY PROVISIONS INVOLVED

1. Section 1 of the Sherman Act, 15 U.S.C. § 1, provides:

15 U.S.C. § 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

2. Section 2 of the Sherman Act, 15 U.S.C. § 2, provides:

15 U.S.C. § 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

3. Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides:

9 U.S.C. § 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

4. Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4, provides:

9 U.S.C. § 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be

served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

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

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

May 24, 2011

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

Re: American Express Company, et al.
v. Italian Colors Restaurant, on or Behalf of
Itself and All Similarly Situated Persons, et al.
Application No. 10A1146

Dear Mr. Kellogg:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Ginsburg, who on May 24, 2011 extended the time to and including August 5, 2011.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
by KYLE R. RATLIFF

Kyle R. Ratliff
Case Analyst

[attached notification list omitted]