SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

WILLIAM D. HOFFMAN, et al.,

Plaintiffs,

vs.

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

Defendants.

Case No. 2001-022881

[Assigned to the Hon. George C. Hernandez, Jr. Department 607]

STATEMENT OF DECISION

PHASE I

Trial Date: November 3, 2008

Complaint Filed: September 6, 2001

This case concerns the billing of premiums for Defendants' fee-based per-trip travel insurance programs. There are four such programs at issue: Airflight; Baggage; Travel Delay; and Hospital Cash ("the Programs"). The Programs provided insurance, as defined by the terms of coverage, for enrolled American Express cardmembers ("enrollees") who charged covered airline trips to their American Express cards.[1] The Plaintiffs' allegations concern instances when Defendants billed, and did not automatically refund, premiums for the Programs based on airline tickets that were later cancelled, airline tickets for passengers who were not insured under the terms of the policies, and airline charges for services other than tickets. Plaintiffs contend that such conduct breached the contract between Defendants and the Plaintiff class. Defendants respond that this conduct was expressly contemplated and authorized by the contract, which disclosed the circumstances under which such charges could occur and established a process by which enrollees may obtain refunds of those charges.

On November 3, 2008, the parties commenced Phase 1 of the trial in this action. The purpose of Phase 1, held without a jury, was to determine what documents constitute the relevant contracts in this case and to resolve disputes about the meaning of certain contract terms. The Court: (1) admitted into evidence as Defendants' Exhibits 1A, 1B, 1C, 5000, 5001 and 5462, and Plaintiffs' Exhibits 17 and 17A the documents that the parties stipulate comprise the relevant contracts ("the Contract") for the Programs and for the American Express charge cards; and (2) provisionally received extrinsic evidence, which includes marketing and other materials sent to class members, testimony from class representatives, American Express employees, and experts, to aid in determining the meaning of the Contract.

On November 21, 2008, the Court issued its tentative decision. On Plaintiffs' motion, the Court extended the time to request a Statement of Decision until December 5, 2008. On that date, Plaintiffs filed their Request for Statement of Decision Re: Phase I ("Request"). Section 632 of the Code of Civil Procedure requires a Statement of Decision "explaining the factual and legal basis for its

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[1] American Express offers the Programs to its credit and charge card holders. The class in this case is limited to charge card holders whose charge card agreements were governed by New York law, and the case involves only charge card transactions.

decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial."

The Court now issues its Statement of Decision as follows.

The Controverted Issues

The controverted issues to be resolved by the Court in Phase 1 of the proceedings may be summarized as follows:

1. What documents constitute the contract between American Express Travel Related Services Company, Inc. ("AETRS") and Amex Assurance Company, on one side, and American Express cardmembers enrolled in the Programs ("enrollees"), on the other side?
2. What terms of the contracts govern the billing and refunding of premium charges for the Programs?
3. Are any of these terms ambiguous?
4. If the terms are not ambiguous, what does the unambiguous language of the contractual terms allow or require the parties to do?
5. If the billing terms are ambiguous, how should the language of the contracts be construed?

Procedure

To resolve the controverted issues, the Court followed California procedure and provisionally received extrinsic evidence from the parties. *See Wolf v. Walt Disney Pictures & Television*, 162 Cal. App. 4th 1107 (2008).

Defendants argued that the Court should follow New York law, which does not permit courts to consider extrinsic evidence unless the court first finds that the contract is ambiguous on its face. Because there is no ambiguity, latent or otherwise, in the relevant terms of the Contract, either process produces the same result.

Apart from the issue of whether the Court should receive extrinsic evidence to determine whether there was an ambiguity, no party contended that there was any difference between New York and California law (or any other state law) with respect to the contract interpretation issues to be decided in Phase 1. Both Plaintiffs and Defendants relied primarily on New York law in their trial briefs, and accordingly the

Court has applied New York law to substantive issues of contract interpretation. [1.b.][2]

Evidence

In addition to the contract documents, the parties offered several categories of extrinsic evidence, including the following:[3]

Marketing and other materials sent to card holders. The parties stipulated that certain marketing materials and "Frequently Asked Questions" brochures were sent to American Express cardmembers. There were different versions of these documents that used different language. (DX-5628, PX-0027, PX-0041.) The evidence also included billing statements for the class representatives (DX-5028 – DX-5050, DX-5052 – DX-5060, DX-5063), which included information and forms related to requesting a refund of premium charges.

Evidence related to the 1983 settlement. Some of the disputed contract terms were drafted and implemented as part of the 1983 settlement of two class action lawsuits filed against American Express by a class of cardmembers enrolled in its Airflight insurance program. Defendants offered court filings and orders from those actions (DX-5629), as well as the deposition testimony of Lowell Sachnoff, who was one of the lawyers representing the class in the 1983 settlement, and the live expert testimony of Professor William Rubenstein.

Testimony of live witnesses. Plaintiffs called Professor Tom Baker as an expert on insurance law. Defendants called Micki Koehler, an employee of Defendant Amex Assurance Company; Robert Brunner, a data expert; and Professor William Rubenstein, a class action expert.

Deposition testimony. The parties offered deposition testimony of the class

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[2] Plaintiffs' Request for Statement of Decision sought findings on 14 issues, some with multiple subparts. (There was no paragraph numbered "2" in Plaintiffs' Request.) The Court refers in brackets to the paragraphs in Plaintiffs' Request that are addressed in the particular paragraph in the Statement of Decision. These references are for ease of reference only and do not limit the application or construction of the Statement of Decision. Paragraphs from Plaintiffs' Request may be addressed in additional places in the Statement of Decision not indicated in brackets.

[3] Defendants offered extrinsic evidence subject to their objection that the Court should not receive extrinsic evidence on the ground that the contract terms are not ambiguous.

representatives Gregg Carr and Aviation Data, Inc. (through its president, Richard Carrier, and its former employee, Marylyn Fox); former and current American Express employees; and Lowell Sachnoff.

Written discovery. The parties offered responses to interrogatories and requests for admission.

There were no significant factual conflicts in the extrinsic evidence received by the Court insofar as it concerns the issues submitted for decision in Phase 1. There were no questions or issues of credibility in the testimony or evidence provisionally received. The Court has reviewed all of the extrinsic evidence and finds that it is consistent with and supports the Court's interpretation of the contract as set forth herein. [1.a.]

Findings

I. Contract Documents

The relevant insurance contract documents consist of the exhibits contained in DX 1A, 1B, and 1C. Generally, the insurance contract documents consist of versions of the master insurance policy agreements, the descriptions of coverage, and the enrollment forms. The relevant Cardmember Agreements consist of PX 17 and 17A and DX 5000 and 5001.

II. Cardmember Agreement Clause

The parties disputed whether a clause in certain American Express Cardmember Agreements applies to the Programs. The clause is as follows:

> If you use the Card to pay insurance premiums, you give us permission to pay those premiums for you when due. You agree to repay us according to the terms of this Agreement. You must tell us in writing if you no longer wish us to pay any premiums for you. If your Account is cancelled, we will stop paying those premiums for you. (PX 17, 17A.)

Plaintiffs argued that this clause applies to the Programs because premiums are billed to the enrollee's American Express card and are paid by AETRS to Amex Assurance Company. Defendants argued that the clause does not apply because it only governs situations in which a card holder uses the card to pay recurring premiums to a third party insurer and does not concern the billing of insurance charges that is at issue in this lawsuit, and because there are express billing terms in the master policies, the

Descriptions of Coverage, and the enrollment forms that specifically govern the Programs.

The Court finds that the Cardmember Agreement clause quoted above is not ambiguous and concludes that it does not apply to the Programs. The clause unambiguously refers to the situation in which a card holder uses the card to pay recurring premiums to a third party insurer. Moreover, the clause does not address the issue in dispute in this lawsuit, *i.e.*, whether the contract allowed Defendants to bill enrollees insurance premiums for non-covered airline services. Further, each one of the Programs is governed by a specific, separate contract which contains the applicable billing terms. (DX 1A, B, C.) *See John Hancock Mut. Life Ins. Co. v. Carolina Power & Light Co.*, 717 F.2d 664, 670 n.8 (2d Cir. 1983). Because the parties entered into a separate and specific contract for each Program, the Court finds that the terms of that contract govern the billing of premiums and the enrollee's payment obligation in each such Program. Furthermore, most of the master policies for the travel insurance programs at issue in this lawsuit contain integration clauses and none of those clauses includes the Cardmember Agreement among the documents that are integrated into the insurance contract.

Based on extrinsic evidence, including the testimony by Micki Koehler, the Court finds the following facts, which support its conclusion that the cited clause in the Cardmember Agreement does not apply to the Programs:

(1) Enrollment in the travel insurance programs at issue in this lawsuit may be cancelled over the telephone, whereas the clause in the Cardmember Agreement states that notice must be given in writing.

(2) Each American Express cardholder receives a Cardmember Agreement, whereas only those who choose to enroll in the Programs receive the contract documents for those Programs.

(3) Documents that contain contract terms applicable to the Programs (and other insurance programs underwritten by Amex Assurance Company) typically refer to the program's master policy number, but the disputed clause in the Cardmember Agreement does not refer to any master policy number.

(4) Amex Assurance is involved in the preparation of the contract documents for the travel insurance programs it underwrites, and was not involved in the

preparation of this clause in the Cardmember Agreement.

(5) Amex Assurance files documents that contain contract terms applicable to the Programs with state Departments of Insurance. The Cardmember Agreement is not filed with any state Department of Insurance.

(6) While Amex Assurance Company maintains contract documents for the travel insurance programs it underwrites and sends them to enrollees, it does not maintain copies of the Cardmember Agreement and does not have it available to send to enrollees.

(7) The clause on which Plaintiffs rely is not contained in all Cardmember Agreements during the class period.[4]

(8) Card holders enter into the Cardmember Agreement at the time they obtain an American Express card, whereas they enter into the insurance contract only if and when they enroll in one of the Programs.

Accordingly, the Court concludes that the clause in the Cardmember Agreement cited by Plaintiffs does not apply to the Programs. [3.]

III. Insurance Contract Billing Term

The parties disputed the meaning of the billing term that appears in the Descriptions of Coverage (referred to herein as the "Billing Term") for each insurance program. The Billing Term is as follows:

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

Sentences similar to those in the Billing Term appear in other contract documents,

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[4] By stipulation, DX 5000 and DX 5001 were also admitted into evidence as versions of the Cardmember Agreements between AETRS and members of the class. Neither DX 5000 nor DX 5001 has the clause on which Plaintiffs rely. No evidence was offered to show which enrollees would have been parties to which version of the Cardmember Agreement at any particular point in time.

including enrollment forms and master policies. The evidence showed that not all class members received or signed enrollment forms, but no party contended that there were material differences in contract terms as they appear in Descriptions of Coverage as compared to other contract documents.[5]

The parties disagree over the meaning of the first, third, and fourth sentences of the Billing Term and over the rights and obligations of the parties as set forth in the Billing Term. The basic rules governing contract interpretation are not in dispute. "Well-established principles under New York law governing the interpretation of insurance contracts provide that the unambiguous terms of an insurance policy must be accorded their plain and ordinary meaning." *R & D Maidman Family LP v. Scottsdale Ins. Co.*, 783 N.Y.S.2d 205, 211 (N.Y. Supr. 2004). "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." *See* Cal. Civ. Code § 1641; *W.W.W. Assocs., Inc. v. Giancontieri*, 77 N.Y.2d 157, 162-63 (1990). A contract is not rendered ambiguous just because one of the parties attaches a different, subjective meaning to one of its terms. *See Bethlehem Steel Co. v. Turner Constr. Co.*, 2 N.Y.2d 456, 460 (N.Y. 1957); *see also Nycal Corp. v. Inoco PLC*, 988 F. Supp. 296 (S.D.N.Y. 1997) (testimony concerning subjective, uncommunicated intent or understanding does not establish meaning of contract terms).

The Court finds that the Billing Term quoted above is not ambiguous. The Court has also considered the extrinsic evidence and concludes that it is consistent and does not expose any ambiguity in the Billing Term. Finally, assuming *arguendo* that the language was ambiguous, based on the extrinsic evidence, the Court would reach the same conclusions about the meaning of the contract language set forth herein. [4.b.]

A. The "each time" sentence

[5] In their Request, Plaintiffs ask for the Court's finding on whether there are conflicts or materially different terms as they appear in the Description of Coverage versus in other contract documents, and ask the "legal and factual basis for isolating the Billing Term . . . from all of the other terms of the contract documents and solicitation materials." Plaintiffs are entitled to a Statement of Decision that addresses the principal controverted issues at trial. Code Civ. Pro. § 632. This requested finding does not involve a controverted issue because no party asserted that such conflicts or differences exist. In any event, the Court has not isolated the Billing Term. The Court has considered the term in the context of the contract as a whole and in light of the extrinsic evidence provisionally received. [4.a; 5.a.]

Plaintiffs contended that the first sentence of the Billing Term means that a premium will be billed only for a covered trip by a covered person, and when the ticket is actually used. Defendants contended that the first sentence permits American Express to bill a premium charge each time a scheduled airline fare is charged, regardless of whether the ticket is for a covered person and regardless of whether the ticket is ultimately used.

The term states that a premium charge will be billed "each time" a scheduled airline fare is charged, and does not state that a charge will be billed only when there is a scheduled airline fare for a covered person and the covered person uses the ticket. The sentence is not ambiguous, and Plaintiffs' proffered interpretation is contrary to its plain language and meaning. The phrase "each time" consists of common words that are used in a manner consistent with their plain meaning. Plaintiffs failed to establish that there is more than one reasonable way to interpret the sentence. [4.b; 8.a.]

Accordingly, the Court finds that the Contract expressly permitted American Express Travel Related Services Company, Inc. to bill a premium charge for the Programs to an enrolled cardmember account each time a Scheduled Airline fare was charged to the cardmember's account, regardless of whether the passenger was a covered person and regardless of whether the ticket was used. The Court has considered this term in light of the contract as a whole, and has considered whether there are other terms in the contract that are inconsistent with this term or that render it ambiguous. The parties have identified no other terms in the contract that are inconsistent with the Billing Term or that render it ambiguous.

In their Request, Plaintiffs ask whether the Billing Term is "the only relevant contract term for determining whether the contract 'permitted' American Express to bill a premium charge each time a scheduled airline fare was charged to the cardmember's account or for non-flight goods or services." As noted above, to construe the meaning of the Billing Term, the Court has reviewed the contract as a whole to determine whether there are any other terms inconsistent with the Billing Term, and has considered the terms identified by Plaintiffs in particular, and has found no inconsistent terms. [6.]

B. The "there may be occasions" sentence

Plaintiffs argued that the "there may be occasions" sentence of the Billing Term permits only rare or infrequent billing mistakes that have non-systematic causes. Defendants argued that the contracts permitted American Express Travel Related Services Company, Inc. to bill enrolled cardmembers when those cardmembers used their cards to purchase airline services other than tickets and that the sentence does not contain a representation about how frequently the occasions will occur for any given card holder or what will cause those occasions to occur.

The Court finds that neither the word "occasions" nor the sentence as a whole is ambiguous. Plaintiffs' reading would require qualifiers and restrictions about frequency and causation that do not exist in the plain language of the contract term. The language of the sentence does not state that the causes of any such occasions must be non-systematic or that the occasions will occur with a particular frequency. Accordingly, the Court concludes that the contracts permitted American Express Travel Related Services Company, Inc. to bill premiums for the Programs to enrollees in connection with charges other than for scheduled airline tickets. [5.e; 7; 8.a; 8.c.]

The extrinsic evidence did not expose any ambiguity in the meaning of the sentence, and assuming *arguendo* that there were an ambiguity, the Court would reach the same conclusion based on that evidence. [5.e.] Defendants presented undisputed evidence to show that the "there may be occasions" term was negotiated as part of the nationwide settlement of two class actions in 1983, *Lifschitz v. American Express Co.*, No. 80-0279 (E.D. Pa.), and *Corrado v. American Express Co.*, No. 80 CH 7671 (Cir. Ct. Cook County, Ill.). The lawsuits, brought on behalf of American Express card holders enrolled in the airflight insurance program, made allegations similar to those in the present lawsuit – among other things, that American Express did not adequately disclose (1) that it would bill insurance premiums on non-ticket charges and on tickets purchased for non-covered persons; and (2) that it would not automatically refund premiums for cancelled tickets. As part of the settlement, American Express agreed to modify the enrollment form to state that "there may be occasions" when charges are billed to the card holder "for cancelled trips, uninsured persons, itinerary changes, ticket upgrading, non-scheduled airline flights, baggage or other such non-covered airline services."

Based on the evidence, the Court finds the following facts supporting its

construction of the "there may be occasions" term:

(1) The "there may be occasions" term was negotiated in the settlement of the *Corrado* and *Lifschitz* actions.

(2) The settlement negotiations were conducted at arm's length.

(3) The negotiating parties in *Corrado* and *Lifschitz* understood that American Express would bill a premium charge on every airline charge made by an enrolled cardmember, whether or not it was for a ticket, whether or not the passenger was a covered person, and whether or not the ticket was ultimately used.

(4) The negotiating parties in *Corrado* and *Lifschitz* intended by the "there may be occasions" language to disclose this billing practice to enrollees in the insurance program.

(5) The *Corrado* and *Lifschitz* settlement, which included this contract term, was approved as fair, reasonable, and adequate by the courts presiding over those actions.

Thus, the evidence shows that, when the "there may be occasions" term was negotiated, American Express would bill a premium charge on every airline charge. This supports the Court's conclusion that the contract permitted American Express Travel Related Services Company, Inc. to bill enrollees premiums in connection with charges other than for scheduled airline tickets. [5.e; 7; 8.a.]

In their trial brief, Plaintiffs contended that "occasion" means "something special or out of the ordinary, and infrequent."[6] It would be unreasonable to attribute that connotation in this context. An occasion is simply an occurrence or happening, and "there may be occasions" means simply that there might be instances when the account is billed a premium in connection with non-covered charges. The phrase is not ambiguous in the context of the Billing Term or with respect to the contract documents and solicitation materials considered as a whole. [5.e; 7.]

Plaintiffs' contention that the sentence refers to "mistakes, rather than insurance charges that are routinely or systematically imposed for non-flight charges," presents a false choice. The evidence showed that during the class period

[6] In their objections to the proposed statement of decision, Plaintiffs contend that they did not argue that the word "occasions" connoted a particular frequency, but only that it signified non-systematic mistakes, whether rare or not. Plaintiffs may now have abandoned their previous position, but their trial brief argued that "occasions" are "infrequent."

American Express's billing systems employed various filters to prevent non-flight charges from triggering premiums, but that not all such charges were screened by the filters. The resulting premium charges are fairly characterized as mistakes even if their occurrence is systematic as a result of the way in which the computers are programmed. The evidence showed that, in the context of the Programs, the Program disclosures, and the computer systems used to bill premium charges, a premium charge that a cardmember is not required to pay under the terms of the Programs because it is billed in connection with a non-covered airline charge would fairly be characterized as a mistake.[7] Finally, Plaintiffs' assertion that the cause of the "occasions" may not be systematic is also inconsistent with the evidence from the *Corrado-Lifschitz* settlement, which shows that, when the term was negotiated, the parties understood that those premium charges would be billed systematically on airline charges because of the way in which the computers were programmed. [5.c; 7.]

Plaintiffs argued that "there may be occasions" should read "there **will** be occasions" if construed in the manner advocated by Defendants. The Court disagrees. Defendants could not predict in advance whether any particular enrollee would incur any noncovered charges. As Defendants' expert Robert Brunner testified, a significant number of class members had no airline charges at all, and therefore it would not have been accurate to say to all enrollees that "there will be occasions" on which they are billed premium charges in connection with non-covered airline services. Even those enrollees with airline charges might never have any charges for non-covered airline services. Therefore, Defendants could not say with certainty that any particular enrollee would be billed premiums based on those charges. Accordingly, Plaintiffs' reading of the term is unsupported by the clear language and the extrinsic evidence, and they have failed to establish that there is more than one reasonable interpretation of the term. [5.b; 5.c; 7.]

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[7] Plaintiffs argued that "the dominant form" or "most" of the Frequently Asked Questions brochures characterized premium charges for non-covered services as "mistakes." (Tr. 929.) However, other versions of the brochures did not use that word, and no evidence was in fact presented to demonstrate the percentage of the class that received one version as opposed to another, or which versions were sent to which class members. Accordingly, the Court cannot find that one version was "the dominant form" or that "most" of the class received a particular version.

C. The "each time" sentence and the "there may be occasions" sentence read together

Plaintiffs argued that there is a conflict between the statement that a premium charge will be billed "each time" a scheduled airline fare is charged and the subsequent statement that "there may be occasions" when premiums are billed based on non-covered airline charges. The Court finds no such conflict. The "each time" sentence does not imply that premiums will be billed **only** when the card holder charges a scheduled airline fare, or that every scheduled airline fare is a covered trip. Read together, the sentences explain that (1) American Express will bill the enrollee a premium charge each time a scheduled airline fare is charged to an enrolled card, and (2) there may be occasions when American Express will bill the enrollee premium charges for non-covered airline services, which may or may not be tickets. The extrinsic evidence offered at trial did not expose any latent ambiguity in these terms or suggest any conflict between them. To the contrary, the extrinsic evidence leads to the same conclusion concerning the meaning of this clause. [5.a.]

Plaintiffs suggested that the sentence in at least some enrollment forms, "I agree to **pay** per-trip charges billed to my Account for each Covered Person for each Covered Trip" (emphasis added), is inconsistent with interpreting the "each time" sentence to permit American Express to **bill** a premium in connection with noncovered charges. The Court disagrees. The verbs "bill" and "pay" are common words and are used in a manner consistent with their plain meanings. The contract expressly states that American Express will **bill** premiums that enrollees are not required to **pay**, and contains a term stating that enrollees must contact American Express for a refund if they do pay.[8]

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[8] Plaintiffs objected to the proposed Statement of Decision on the ground that it failed to list as material terms of the contract this "I agree to pay" sentence, the Cardmember Agreement clause discussed above, and the following term that appeared in some, but not all, of the master policies: "A premium is due for each Covered Trip for which a Covered Person's Scheduled Airline ticket is charged to the enrolled Account." (In other master policies, there was a term that stated: "Earned premium is calculated at $[ ] for each airline trip for which a Covered Person is insured under the Policy. This single premium charge shall also apply to any changes in airline itinerary…" In some of the master policies, neither term appeared.) Plaintiffs did not ask for a list of all material contract terms in their Request for a Statement of Decision. Moreover, with the exception of the Cardmember Agreement clause, there was no dispute about the meaning of these terms. Plaintiffs relied on these terms in making arguments about the meaning of the disputed terms that are addressed in this Statement of Decision, and the Court has considered them for that purpose. The Court finds that they are not otherwise material to this dispute. The Cardmember Agreement clause is

The extrinsic evidence reinforces this plain language. For example, the 1983 settlement negotiations secured the ability of enrollees to avoid payment of premiums billed in connection with noncovered charges, and the monthly billing statements tell enrollees how they can avoid payment when such premiums are billed. Plaintiffs identified no contract term that imposed upon Defendants an obligation to avoid billing premiums in connection with noncovered charges.

D. The "must contact" sentence

The contracts state that "if any such charges" appear on a statement – referring to premiums "billed to the enrolled Account for cancelled trips, Uninsured Persons, itinerary changes, ticket upgrading, non-Scheduled Airline flights, baggage, or other such non-covered airline services" – then "the Cardmember must contact American Express for a refund."

This quoted language appears as the final sentence in the Billing Term in the Description of Coverage that was received by every class member. Similar terms appeared in enrollment forms, although the evidence presented at trial indicated that not every member of the class received or signed an enrollment form.[9] Similar terms in the enrollment forms are consistent with the above-quoted term from the Description of Coverage and do not render it ambiguous. In any event, all class members received a Description of Coverage with this sentence. [9.]

The phrase "must contact" consists of common words that are used in a manner consistent with their plain meaning. The plain meaning of this sentence is that cardmembers were obligated to "contact American Express for a refund" if any premium charges were billed to their accounts for cancelled trips, Uninsured Persons, itinerary changes, ticket upgrading, non-Scheduled Airline flights, baggage, or other such non-covered airline services. This conclusion follows from the clear and unambiguous language of the contract. Furthermore, none of the extrinsic evidence revealed any ambiguity. Even assuming *arguendo* that there were an ambiguity, the

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not material, because it does not apply to the programs at issue in this lawsuit. Apart from the dispute regarding the applicability of the Cardmember Agreement clause, no party contended that class members were subject to materially different contracts.

[9] Class members who enrolled by phone would not have signed an enrollment form. Plaintiffs conceded that such cardmembers are parties to the contract with Defendants, consisting of Descriptions of Coverage and master policy agreements. No evidence was presented concerning which cardmembers, or how many, enrolled by phone.

Court would reach the same conclusion based on the evidence presented. [10.]

Plaintiffs suggest that there is an ambiguity created by comparing the "must contact" sentence from the Billing Term in the Description of Coverage with other sentences stating that the cardmember "agrees" to contact American Express for refund, including the following from the Terms and Conditions of an enrollment form:

> I agree to pay per-trip charges billed to my Account for each Covered Person for each Covered Trip. I understand that there may be occasions when premium charges are billed to my Account for cancelled trips, itinerary changes, or other non-covered airline services. If any such charges are billed, I agree to contact American Express for a refund.

There is no ambiguity in these sentences either separately or taken together. Moreover, the evidence presented at trial did not establish any ambiguity in these terms. [5.d.]

Plaintiffs argued that, as part of the agreed revision to the enrollment form in the *Corrado-Lifschitz* settlement, the sentence, "If any such charges are billed, the cardmember must contact American Express for a refund" was changed to "If any such charges are billed, I agree to contact American Express for a refund." According to Plaintiffs, it was therefore "impermissible" to use the former sentence in the Descriptions of Coverage and master policy agreements. The Court disagrees. First, Plaintiffs did not present testimony from Mr. Sachnoff, or from anyone else involved in the negotiation of the settlement, regarding that sentence. Mr. Sachnoff was questioned extensively about the "there may be occasions" term, but Plaintiffs did not ask him any questions about the sentence they now argue the parties agreed to eliminate. The evidence presented did not establish that any party involved in negotiating the settlement believed that the change in the enrollment form from "must contact" to "agree to contact" was material, why it might have been material, or why no similar agreement was made to revise the Description of Coverage language or the master policy. Second, Plaintiffs have not alleged any claim for violation of the *Corrado-Lifschitz* settlement agreement, nor did they offer any argument about why such a claim, if there were one, would properly be addressed to this Court rather than to the courts that approved and retained jurisdiction over that settlement. Accordingly, Plaintiffs failed to present evidence or argument sufficient to establish that American Express could not permissibly use the "must contact" term in any

contract document. [5.f; 10.]

Plaintiffs also suggest there is "an ambiguity between" the language in the Terms and Conditions and Descriptions of Coverage and certain solicitation materials that say: "Highlights of the Plan . . . Free enrollment. Pay only when you fly. You're covered automatically each time you fly and charge a Scheduled Airline ticket to your enrolled American Express Card account. The per-trip premium is conveniently billed to your monthly statement each time you fly."[10]

The quoted language from those particular solicitation materials does not render any contract term ambiguous. The phrase "Free enrollment" is not inconsistent with any contract term because no contract term states that there is any cost to enroll. The phrase "pay only when you fly" is not inconsistent with any contract term because, under the terms of the contract, class members were not required to pay when they did not fly and could seek a refund of charges they had already paid when the ticket was not used. The contract states that there may be occasions when card holders are **billed** for non-covered charges, but the words "bill" and "pay" mean different things. The class representatives, Greg Carr and Richard Carrier (on behalf of Aviation Data, Inc.), testified that they understood that they could be billed when they did not fly and that they were not required to pay when they did not fly. The sentence "You're covered automatically each time you fly and charge a Scheduled Airline ticket to your enrolled American Express Card account" is not inconsistent with any contract terms and accurately describes the coverage as set forth in the master insurance policy. Finally, the sentence "The per-trip premium is conveniently billed to your monthly statement each time you fly" is not inconsistent with any contract terms. [5.d; 10.]

Plaintiffs also contended that the obligation to contact American Express for a refund is not a condition precedent to obtaining a refund. They argued that the purpose of the sentence was only to direct card holders to American Express Travel Related Services Company, Inc., as opposed to the underwriter, should they wish to request a refund. The contract does not support that reading. The Court finds that, based on this clear and unmistakable language in the Description of Coverage, which

[10] No evidence was presented that would indicate which, if any, class members received the solicitations cited by Plaintiffs.

every class member received, the cardmembers' contractual obligation to "contact American Express for a refund" is a condition precedent to the obligation of American Express Travel Related Services Company, Inc. or Amex Assurance Company to refund a premium charge. *See, e.g.*, *Seaport Park Condominium v. Greater New York Mut. Ins. Co.*, 828 N.Y.S.2d 381, 384 (1st Dept. 2007). Plaintiffs identified no contract term that imposed upon Defendants an obligation to provide a refund absent such a request from a card holder.[11] [11.a.]

Plaintiffs argue that, beginning in 2006, Defendants began refunding some premium charges automatically when enrollees received certain credits from airlines, and Plaintiffs also point to deposition testimony from American Express employees who believed refunds should be provided automatically where possible. Based on this extrinsic evidence, Plaintiffs argue that the condition precedent (to contact American Express) is ambiguous. The Court disagrees. The fact that American Express did not provide automatic refunds until 2006, eleven years after the start of the class period, demonstrates that Defendants did not perform the contract as if they had a contractual obligation to provide refunds in the absence of a cardmember request.[12] Furthermore, the class representatives testified that they requested certain refunds, and that when they did not, it was for their own reasons – not because they believed that Defendants would provide the refunds automatically. Before filing this lawsuit, the class representatives sought credits or refunds in circumstances in which

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[11] Plaintiffs have suggested that the Court is reading the condition precedent to prohibit the filing of a lawfuit for damages. Defendants did not argue that the "must contact" sentence was a condition precedent to filing a lawsuit. Rather, they argued that it was a condition precedent to their obligation to refund a premium charge. Thus, the term does not prohibit the filing of a lawsuit; it makes such a lawsuit unsuccessful where, as here, the damages sought are premium charges that class members were contractually obligated to ask American Express to refund.

[12] Plaintiffs argue in their Objections that American Express automatically refunded premium charges in two other circumstances: (1) when the cardmember disputed the underlying airline charge and it was credited to the cardmember's account; and (2) to enrollees "who left the program" (Objections at 24). Neither of these examples, which refer to limited, specific situations, suggest that Defendants performed the contract as if they had a contractual obligation to provide automatic refunds. Neither of the two situations relates specifically to cancelled tickets. Furthermore, by disputing the underlying airline charge or cancelling his or her enrollment in the program, the cardmember is informing American Express that no premium should be charged. Plaintiffs contended that the contract required American Express to refund premium charges automatically without being contacted by the cardmember.

they understood credits or refunds were due them, thus demonstrating their understanding that this term was a condition precedent to obtaining a refund. In addition, in their responses to Defendants' interrogatories, Plaintiffs themselves asserted that a refund request, by completing a form or telephoning American Express, was a "prerequisite" to obtaining a refund. The class representatives did not complain to American Express about its failure to provide other refunds automatically without receiving any request. Plaintiffs' own course of performance is therefore consistent with the conclusion that the term is a condition precedent. [11.a; 11.b; 11.c.]

Plaintiffs also argued that the word "contact" in the final sentence of the Billing Term is ambiguous and could mean the filing of a lawsuit against American Express, and therefore, if there is a condition precedent, it has been satisfied by the lawsuit in this case. Defendants contended that the word "contact" refers to using the refund coupon printed on cardmembers' billing statements or calling the toll-free number provided, but does not mean "file a lawsuit."

The Court finds that the word "contact" is not ambiguous. "Contact" means to return the coupon on the cardmember's statement or to call the toll-free telephone number provided. The filing and prosecution of this lawsuit does not constitute "contact" for the purposes of that term and does not satisfy the condition precedent. The contract as a whole, and the Billing Term in particular, contemplates that American Express may bill premium charges in connection with non-covered airline services, and that cardmembers may have those charges refunded upon request. It is not a reasonable interpretation of this term to conclude that the objective intent of the parties was to provide that cardmembers could or should sue American Express to obtain a refund of these premium charges that the contract permitted American Express to bill. [12.]

The extrinsic evidence did not reveal any ambiguity in the meaning of the word "contact," and, assuming *arguendo* that any ambiguity existed, the extrinsic evidence would lead to the same conclusion. The evidence showed that American Express printed a refund coupon on cardmember statements containing premium charges or airline credits. Cardmembers could use the coupon either to avoid payment of any charges billed for non-covered airline services or to obtain refunds of

charges they had already paid. The coupon also included a toll-free number that cardmembers could call. The class representatives testified that they knew about the refund procedure and had used it in the past. This process – including the printing of coupons on billing statements and the ability to deduct charges prior to payment by sending in the coupon – was negotiated as part of the *Corrado-Lifschitz* settlement. As American Express's expert William Rubenstein testified, it is not reasonable to suppose that the *Corrado-Lifschitz* parties agreed to **settle** those earlier class actions by negotiating for a particular refund process yet also intended that cardmembers could also seek refunds by suing American Express. [12.]

Finally, in their closing argument, Plaintiffs' counsel expressly asserted that Plaintiffs do not contend that the lawsuit is a refund request. [12; 13.b.]

IV. Implied Terms

The parties also disagreed about whether the implied covenant of good faith and fair dealing establishes any implied terms with respect to billing or refunding premium charges. Plaintiffs argued that there is no specific provision of the contract that excludes implied obligations of good faith and fair dealing. However, there is no dispute about whether the law implies a covenant of good faith and fair dealing into every contract. The issue disputed by the parties is the effect of the implied covenant in light of the express contract terms related to the billing and refunding of premium charges. Plaintiffs argued that under the implied covenant, American Express had an obligation to modify its computer systems to avoid systematic billing of premium charges in connection with non-covered airline charges and to implement automatic refunds. Defendants argued that such an implied obligation would impermissibly modify or contradict express terms in the contract. [15.b.]

Although every contract includes the implied covenant of good faith and fair dealing, it "does not 'add . . . to the contract a substantive provision not included by the parties.'" *Broder v. Cablevision Sys. Corp.*, 418 F.3d 187, 198-99 (2d Cir. 2005). A party "cannot avoid the express terms of the contract by relying on the implied covenant of good faith and fair dealing." *Times Mirror Magazines, Inc. v. Field & Stream Licenses Co.*, 294 F.3d 383, 395 (2d Cir. 2002); *Delta Props. Inc. v. Fobare*

Enters. Inc., 251 A.D.2d 960, 962 , 819 (N.Y. App. Div. 1998) ("while an obligation of good faith and fair dealing is implied in every contract, that obligation cannot be construed so broadly as to effectively nullify the other express terms of the contract"). California law is the same. As the court explained in *Missing Link v. eBay*:

> [T]he implied covenant protects only the express terms of the contract; it cannot contradict the express provisions of the contract for the simple reason that implied terms in a contract cannot vary express terms. *Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal.4th 342, 374 (1992). Particularly relevant here is the rule that "if the defendant did what it was expressly given the right to do, there can be no breach" because "the conduct is, by definition, within the reasonable expectation of the parties." *Wolf v. Walt Disney Pictures & Television,* 162 Cal.App. 4th 1107, 1121 (2008). Hence, such conduct "can never violate an implied covenant of good faith and fair dealing." *Id.* (quoting *Carma Developers*, 2 Cal.4th at 376).

2008 WL 3496865 at *5. A party cannot have a reasonable expectation that the other party to a contract will act in a way that is contrary to the express terms of that contract. *Id.* ("However, in light of the language of eBay's user agreement expressly permitting eBay to increase its fees, the increase in fees for GUC listings was 'within the reasonable expectation of the parties' and thus 'can never violate an implied covenant of good faith and fair dealing.'") (citing cases). [15.a; 15.b.]

Here, there are express terms that govern the billing and refund of premium charges. It follows from the Billing Term as set forth above that the contracts did not require American Express Travel Related Services Company, Inc. or Amex Assurance Company to avoid billing premiums for uninsured persons, unused tickets, or non-ticket charges. The contracts also did not require Defendants to credit or refund premiums charged to and paid by the cardmember for charges ineligible for insurance coverage without receiving the required contact from the cardmember. Because Defendants had no contractual obligation to do these things, they had no contractual obligation to design or modify their billing systems to automatically categorize certain airline charges as ineligible for insurance premiums, or to automatically refund premium charges when certain airline credits were received. Plaintiffs' suggested implied term would contradict the express terms of the contract. Such a term would prohibit American Express from billing an insurance premium

"each time" the cardmember purchased a ticket, contrary to the plain language of the contract. Requiring American Express to have "automatic refunds" would negate the express term that the cardmember "must contact American Express" for a refund of any non-covered charges. The implied duty cannot be used to contradict express terms or to rewrite the contract. *Broder*, 418 F.3d at 198-99; *Suthers v. Amgen Inc.*, 441 F. Supp. 2d 478, 485 (S.D.N.Y. 2006). [8.a; 8.b; 8.c; 13.a; 13.b; 14; 15.a.]

Conclusion

The focus of Phase I was to determine what the contract was and the meaning of any disputed relevant terms. This is not a situation in which an interlocutory or separate judgment is proper, so the Court will not enter a judgment at this time. However, the Court's findings and conclusions with regard to the contract documents and terms will be reflected in the final judgment if and when such a judgment is filed, and in any subsequent findings and conclusions the Court must make in a subsequent phase of this trial.

Dated: 2/6/2009

Hon. George C. Hernandez, Jr.

CLERK'S DECLARATION OF MAILING

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

Max Folkenflik
Folkenflik & McGerity
1500 Broadway, 21st Floor
New York, NY 10036

Attorney for Plaintiffs

David W. Shapiro
Fred Norton
Jeremy M. Goldman
Boies, Schiller & Flexner, LLP
1999 Harrison Street, Suite 900
Oakland, CA 94612

Attorneys for Defendants

H. Tim Hoffman
Arthur W. Lazear
Hoffman & Lazear
180 Grand Ave., Suite 1550
Oakland, CA 94612

Attorneys for Plaintiffs

Theodore W. Phillips
Phillips, Greenberg & Hauser, LLP
3080 Cedar Ravine
Placerville, CA 95667

Attorney for Plaintiffs

David M. Fried
Law Offices of David M. Fried
1975 Adams Avenue
San Leandro, CA 94577

Attorney for Plaintiffs

Thomas F. Campbell
Campbell Law
100 Concourse Parkway, Suite 115
Birmingham, AL 35244

Attorney for Plaintiffs

Kimberly S. Keevers
Michael Brickman
Richardson, Patrick, Westbrook & Brickman
174 East Bay Street
Charleston, SC 29401

Attorneys for Plaintiffs

Russell Jackson Drake
Whatley, Drake & Kallas, LLC
2001 Park Place North, Suite 1000
Birmingham, AL 35203

Attorney for Plaintiffs

I declare under penalty of perjury that the same is true and correct.
Executed on February 6, 2009

By: _____
Yolanda Estrada, Deputy Clerk
Department 607