UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, et al.,
Plaintiffs

v.

AMERICAN EXPRESS CO., et al.,
Defendants

No. 10-CV-04496 (NGG) (RER)

PUBLIC VERSION

PLAINTIFFS' POST-TRIAL MEMORANDUM

September 18, 2014

Table of Contents

Table of Contents i

Table of Authorities iv

Introduction 1

Argument 4

I. Amex's Anti-Steering Rules cause actual adverse effects on competition 4

A. Amex's Anti-Steering Rules harm the competitive process. 5

1. Amex's Anti-Steering Rules prevent merchants from directing more business to networks offering low prices 5

2. Amex's Anti-Steering Rules block low-price interbrand competition by Discover. 9

3. Amex's Anti-Steering Rules block interbrand competition from Visa and MasterCard 11

a. Amex's Anti-Steering Rules blocked "We Prefer Visa." 12

b. Amex's Anti-Steering Rules block MasterCard preference campaigns. 13

B. Prices for credit card network services are higher because of Amex's Anti-Steering Rules. 14

C. Amex's Anti-Steering Rules impede innovation. 15

D. Merchants would steer if the Anti-Steering Rules did not prevent them from doing so. 17

II. Market analysis proves that Amex has the ability to cause adverse effects on competition. 20

A. Plaintiffs proved a market of GPCC card network services to all merchants. 20

1. Debit card network services are not reasonably interchangeable with GPCC card network services. 21

a. Professor Katz's application of the hypothetical monopolist test proves a relevant market of GPCC card network services 21

b. Merchant trial testimony proves GPCC card and debit card network services are not close substitutes. 24

c. Merchants do not regard GPCC and debit card network services as close substitutes. 25

2. Amex focuses incorrectly only on cardholders' substitution, rather than merchants' substitution. 26

B. Amex has market power for GPCC card network services provided to all merchants. 29

1. Amex's market share shows market power. 29

2. Cardholder insistence confers market power on Amex. 30

3. Amex exercised its market power through the profitable "Value Recapture" program. 32

4. High barriers to entry protect Amex's market power. 33

C. Plaintiffs proved that Amex has market power in a market for GPCC card network services to travel-and-entertainment merchants. 34

D. Amex's fails to show it lacks market power. 35

1. Amex has market power even though some small merchants do not accept Amex cards. 35

2. Amex has market power even though it negotiates the Anti-Steering Rules or its discount rate with a small number of merchants. 36

3. Amex has market power even if cardholder insistence stems from continuing payments. 37

III. Amex did not prove that its Anti-Steering Rules have procompetitive effects. 38

A. Protecting Amex from competition is not a procompetitive effect...................... 38

1. The evidence did not establish that Amex would go out of business if merchants could offer more choices to customers. 39

2. Amex's claim that it should be protected from competition is invalid as a matter of law. 42

B. Potential antitrust violations by Visa do not justify Amex's Anti-Steering Rules. 44

C. Amex's free-riding claims do not justify its Anti-Steering Rules. 44

IV. Amex's two-sided platform arguments seek to misdefine the relevant market and to upset settled law. 46

A. Plaintiffs incorporated relevant facts about two-sidedness throughout their case. 47

B. The relevant product is network services to merchants, not "transactions." 47

C. There is no precedent for Amex's claim that Plaintiffs must prove harm to competition outside of the relevant market. 50

D. Plaintiffs proved that the ASRs harm merchants more than they benefit cardholders. 52

Conclusion 54

Table of Authorities

Cases

AD/SAT, Div. of Skylight, Inc. v. Assoc. Press,
181 F.3d 216, 229 (2d Cir. 1999)....................38

Cargill, Inc. v. Monfort of Colo., Inc.,
479 U.S. 104 (1986)....................8, 53

Chicago Prof'l Sports Ltd. P'ship v. NBA,
961 F.2d 667 (7th Cir. 1992) 45

Deiter v. Microsoft Corp.,
436 F.3d 461 (4th Cir. 2006) 36

Drug Mart Pharmacy Corp. v. Am. Home Prods. Corp.,
472 F. Supp. 2d 385 (E.D.N.Y. 2007) 8-9, 53

Eastman Kodak Co. v. Image Technical Servs., Inc.,
504 U.S. 451 (1992).................... 49-50

FTC v. Ind. Fed'n of Dentists,
476 U.S. 447 (1986)....................4, 18, 42

Geneva Pharms. Tech. Corp. v. Barr Labs. Inc.,
386 F.3d 485 (2d Cir. 2004)....................20, 27, 33, 49, 50, 52

Hertz Co. v. City of New York,
1 F.3d 121 (2d Cir. 1993) 52

In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.,
562 F. Supp. 2d 392 (E.D.N.Y. 2008) 49

In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.,
986 F. Supp. 2d 207, 2013 WL 6510737 (E.D.N.Y. 2013)....................18

In re Visa Check/MasterMoney Antitrust Litig.,
No. 96-CV-5238, 2003 WL 1712568 (E.D.N.Y. 2003) 49

K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.,
61 F.3d 123 (2d Cir. 1995)....................20

Leegin Creative Leather Prods., Inc. v. PSKS, Inc.,
551 U.S. 877 (2007)....................6, 39

Nat'l Soc'y of Prof'l Eng'rs v. United States,
435 U.S. 679 (1978).................... 39, 41, 43-44

NCAA v. Bd. of Regents of Univ. of Okla.,
468 U.S. 85 (1984)....................39, 42

Port Dock & Stone Corp. v. Oldcastle Northeast, Inc.,
507 F.3d 117 (2d Cir. 2007)....................36

Todd v. Exxon Corp.,
275 F.3d 191 (2d Cir. 2001)....................32

Times-Picayune Publ'g Co. v. United States,
345 U.S. 594 (1953).................... 27, 51-52

United States v. Aluminum Co. of Am.,
148 F.2d 416 (2d Cir. 1945)....................27

United States v. Am. Express Co.,
No. 10-cv-4496, 2014 WL 1817427 (E.D.N.Y. May 7, 2014)....................6, 29, 32

United States v. E.I. du Pont de Nemours & Co.,
351 U.S. 337 (1956)....................29, 49

United States v. H&R Block, Inc.,
833 F. Supp. 2d 36 (D.D.C. 2011)....................27

United States v. Phila. Nat'l Bank,
374 U.S. 321 (1963)....................51

United States v. Topco Assocs., Inc.,
405 U.S. 596 (1972)....................51

United States v. Visa U.S.A., Inc.,
163 F. Supp. 2d 322 (S.D.N.Y. 2001).................... 21-22, 29, 30, 32, 33, 44

United States v. Visa U.S.A., Inc.,
344 F.3d 229 (2d Cir. 2003)....................21, 29, 30, 32, 36, 46, 48, 50, 52

Other Authorities

2 Phillip E. Areeda & Herbert Hovenkamp,
Antitrust Law (3d ed. 2013) 37

2B Phillip E. Areeda, Herbert Hovenkamp & John L. Solow,
Antitrust Law (3d ed. 2007) 34

13 Herbert Hovenkamp,
Antitrust Law (3d ed. 2012) 45

Horizontal Merger Guidelines § 4.1.4 (2010)...34

Introduction

Credit and charge card "swipe fees" generate over $50 billion annually for the nation's four general purpose credit and charge ("GPCC") card networks. Millions of merchants of all sizes and in scores of industries pay those fees. Market revenues alone might suggest that there would be intense price competition among the four networks as they jockey to gain revenue at each other's expense. The trial record shows otherwise. When it comes to merchant fees, price competition is almost non-existent and, as the evidence establishes, for decades the networks have not competed on price.

The principal reason for this absence of price competition has been rules imposed by each of the networks that limit merchants' ability to take advantage of a basic tool to keep prices competitive. That tool – commonly used elsewhere in the economy – is merchants' freedom to "steer" transactions to a network willing to lower its price. Each network has long prohibited such steering to lower-cost cards. Now that Visa and MasterCard have reformed their anti-steering rules, American Express ("Amex") remains as the last barrier to competition.

At trial, an array of merchants came forward to explain both the substantial costs they incur when their customers pay with credit cards and their inability to ignite competition among the networks to reduce those costs. In fact, there is no real dispute about the purpose or the effect of the Amex Anti-Steering Rules ("ASRs"). Amex concedes that they are designed to prevent merchants that accept Amex cards from influencing customer choice of credit cards. The rules not only prevent merchants from offering their customers lower prices or other incentives for choosing a less costly card, they even block merchants from informing their customers about the cost of swipe fees of different credit cards. Amex, through its ASRs, has

succeeded in defeating the operation of the free market in setting the prices of GPCC card network services to merchants.

The dramatic anticompetitive effects of the ASRs were established at trial. When Discover attempted to compete by offering merchants low and simple pricing, it was stopped dead in its tracks by the inability of merchants to shift business to Discover. When Visa launched its "We Prefer Visa" campaign in the early 1990's, which zeroed in on Amex's high fees, competition roiled the GPCC card market. Though Amex initially considered several procompetitive responses to Visa's campaign (such as cutting fees, doing more marketing, and increasing cardholder rewards), Amex opted instead to restrain competition. Amex strengthened and aggressively enforced its ASRs. Price competition was thwarted. Amex continues to impede competitor efforts to employ preference campaigns, as it did, for example, when MasterCard and Travelocity entered into a preference arrangement. And Amex's ASRs have also stymied innovative technology that would enable merchants like Sinclair Oil and Official Payments to reward with lower prices customers who use lower-cost cards.

The trial record unambiguously establishes that Amex's ASRs quash price competition among networks at the point of sale. Merchant after merchant testified to that fact, as did Discover and MasterCard. Amex did not really dispute the point. A senior Amex pricing executive (Jack Funda) could not have been more clear when testifying about the state of competition in the industry: "I don't think anybody's business strategy is to be cheaper than the next guy . . . . So no, we don't compete on costs." FOF 6. Pressure on pricing is therefore a one-way ratchet – upwards. As a Southwest Airlines executive succinctly observed from the witness stand: "the market is broken." FOF 168.

As is discussed below and as is detailed in Plaintiffs' accompanying Proposed Findings of Fact and Conclusions of Law, Plaintiffs have carried their burden of establishing, by a preponderance of the evidence, that the Amex ASRs have harmed and continue to harm competition. Amex's defenses fall into two broad categories. Amex first argues – incorrectly – that, in addition to directly proving harm to competition, Plaintiffs must separately prove that there is a relevant product market and that Amex has a sufficient share of that market to be able to exercise "market power." Essentially Amex contends that, even though the ASRs actually restrain price competition, a court is powerless to remedy the competitive harm unless Plaintiffs satisfy these additional requirements. That is not the law. As this Court has recognized, it may find a violation of the antitrust laws from proof of actual harm to competition. In any event, overwhelming evidence established two relevant antitrust markets in which Amex has substantial power and has used that market power unreasonably to obstruct competition. No matter which path is taken to prove anticompetitive effects, Plaintiffs surpassed their burden.

Amex's second category of defenses is that restraints on point-of-sale competition among GPCC networks are beneficial. According to Amex, restraining competition among GPCC networks over merchant fees allows it to pay out more for cardholder rewards programs, prevents point-of-sale offerings that might confuse or embarrass merchants' customers, preserves a "welcoming" environment for Amex cardholders, and enables Amex to survive against aggressive competition or unspecified, hypothetical future anticompetitive conduct by Visa. And, says Amex, there is sufficient competition among credit card networks and issuers to dispel worries over merchant fees. Amex tries to justify its defenses by virtue of the fact that it operates a "two-sided platform." But, as explained below, none of its arguments hold up either under the weight of the evidence at trial or long-settled principles of antitrust law.

Argument

I. Amex's Anti-Steering Rules cause actual adverse effects on competition.

Plaintiffs may satisfy their initial burden under the rule of reason by presenting evidence that a restraint disrupts the competitive process, leads to higher prices, reduces innovation, or otherwise harms competition. *See FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 461-62 (1986) (explaining that actual adverse competitive effects are shown by conduct "likely enough to disrupt the proper functioning of the price-setting mechanism of the market . . . even absent proof that it resulted in higher prices"). "Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition," a finding that the challenged restraint has "actual, sustained adverse effects on competition" is "legally sufficient to support a finding that the challenged restraint [is] unreasonable even in the absence of elaborate market analysis." *Id* at 460-61*; see also id.* ("Proof of actual detrimental effects . . . can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects.") (internal quotation marks omitted). Professors Katz and Gilbert agree that, as a matter of sound economics, when a plaintiff shows adverse competitive effects from a restraint, inquiries into market definition and market power are not necessary. FOF 303-04.

In *Indiana Federation*, the Court determined that actual anticompetitive effects were shown by proof that dentists agreed to withhold x-rays from insurers because the dentists' conduct was "[a] concerted and effective effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular purchase is cost justified." *Id*. at 461. The evidence here is that Amex's ASRs are a much more intrusive obstruction of competition. Amex's ASRs not only block information that could benefit competition, they block the competition itself. Amex's ASRs impede millions of merchants

from using steering to create incentives for networks to compete on price. The ASRs more directly harm the competitive price-setting process than did the dentists' withholding of x-rays, and they give rise to market-wide, actual anticompetitive interbrand effects on price competition among credit card networks. The evidence showing that Amex's ASRs substantially reduce price competition among card networks is alone sufficient to justify a finding of liability.

A. Amex's Anti-Steering Rules harm the competitive process.

1. Amex's Anti-Steering Rules prevent merchants from directing more business to networks offering low prices.

An Amex economic expert, Professor Richard Gilbert, admitted – as the evidence shows – that Amex's ASRs block credit card network competition at the point of sale. FOF 2. Merchants share Professor Gilbert's view. For example, Christopher Priebe testified that credit card networks do not compete for Southwest Airlines' business and that "the market is broken." FOF 2. Mr. Priebe's statement was corroborated by an internal Amex email about Southwest, which stated that "[w]e should not compete on costs vs. V[isa]/M[asterCard]." FOF 6. Amex is not alone. Visa and MasterCard issuers "compete to win cardmembers," but, according to Joshua Silverman, Amex's President of Consumer Card Services, "what [Visa and MasterCard] don't compete [on] is discount rate at the merchant." FOF 140.

As this evidence shows, the market is indeed "broken" because Amex's ASRs reduce credit card networks' incentives to offer merchants lower prices. They disrupt the price-setting mechanism by severing the usual link between prices and sales. The ASRs prohibit merchants from:

- offering customers discounts or other incentives to pay with cards that cost merchants less than Amex cards;
- informing customers that they would prefer payment with lower-cost cards;

- displaying the logos of low-cost cards more prominently than the Amex logo; and even
- informing their customers of the costs of accepting different cards.

FOF 47. If Amex's ASRs did not limit merchants' freedom to encourage customers to pay with lower-cost cards, merchants could "choose how much of Amex's services they purchase" and "how much they will purchase from Amex's competitors." *See United States v. Am. Express Co.*, No. 10-cv-4496, 2014 WL 1817427, at *11 (E.D.N.Y. May 7, 2014) [hereinafter *Amex*].

Amex's ASRs are at war with the antitrust laws, which "are designed primarily to protect interbrand competition, from which lower prices can later result." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 895 (2007). As Professor Gilbert acknowledged, "[i]f merchants had unfettered freedom to steer customers at the point of sale, it is likely that they would encourage customers to use the card that has the lowest merchant discount fee." FOF 3. Similarly, an internal Amex analysis explained, "[m]erchants will always have an incentive to offer selective discounting against Amex unless . . . [the] [m]erchant's margin is very high. . . ." FOF 3. Merchants actually steer today in the limited situations where they are "allowed" to do so by Amex, such as limited term promotions. FOF 206-14. Amex itself encourages co-brand partners (such as Delta, JetBlue, Starwood, and Hilton) to steer customers toward their Amex co-brand cards. FOF 160. Amex's travel agency business steers customers to "preferred" airlines, hotels, and rental car companies and uses steering to prevent suppliers from adopting policies that have a negative impact on Amex. FOF 145-54. Pat Corbett, Amex's Vice President for Global Supplier Relations, agreed that such steering from non-preferred suppliers to preferred suppliers fosters competition among those suppliers, resulting in lower prices for Amex and Amex's travel customers. FOF 145. The limited situations in which Amex permits steering

demonstrate that steering is effective in sparking competition, and that firms are willing to steer if given the chance.

Amex's ASRs, however, block merchants from using similar tools to foster competition among credit card networks. For example, a merchant cannot:

- say "please keep in mind that credit and charge expenses are some of our highest costs";
- communicate that its prices would be lower if its credit card costs were lower;
- tell customers that Amex cards cost the merchant more to accept than other credit cards;
- offer a discount or other incentive to use a credit card that is less costly for the merchant;
- offer to share the cost savings with the customer if the customer uses a card that costs the merchant less;
- state a preference for a credit card other than Amex; or
- answer the phone by saying: "Thank you for calling us, we proudly accept the Discover card."

FOF 48.

Amex's ASRs prohibit merchants from posting signs that display the costs of accepting the different credit card networks, even if the sign is truthful and accurate. FOF 48, 274-75. Amex's claim that merchants cannot easily or accurately determine the costs of different credit cards does not hold up. In fact, Amex itself demonstrated for Riggins Oil that such an analysis can be done with information currently provided by merchants' acquiring banks. FOF 273. Although some merchants testified that they would inform customers about their card acceptance costs, and others testified that they would not, the critical point is that Amex's ASRs prohibit all merchants from engaging in steering that provides more information and choice to their customers. FOF 274-81.

Amex's ASRs are so far-reaching that they block merchant steering between other credit card networks even when Amex is not mentioned. FOF 2. Their obstructive scope was shown during the following exchange between Joseph Quagliata, head of Amex's Regional Client Group, and the Court:

> THE COURT: So if that sign said, We do our best to keep our costs and your prices down, if you're planning to use a MasterCard or a Visa and you have a Discover card in your wallet, we'd rather have you use a Discover card, would that in any way be in violation of the terms of your contract with the merchant regarding the use of the American Express Card, because it raises the specter of the American Express Card having a certain cost, even though it's not mentioned?
>
> THE WITNESS: Yes, absolutely so. And I think that's where the line is crossed because in the communication that you just outlined, it could be misconstrued by the card member, the American Express Card member saying not only is Discover a more advantageous product to use versus Visa or MasterCard, but also American Express.
>
> THE COURT: Even though it's not mentioned?
>
> THE WITNESS: Even those it's not mentioned, yes.

FOF 2.

Jack Funda, Amex Senior Vice President for Global Merchant Pricing, acknowledged that, if Amex had no ASRs, it might respond to steering by lowering its merchant discount rate, providing more merchant benefits, increasing its cardholder benefits, or some combination of these actions. FOF 14. Professor Gilbert also opined that "[i]f such steering were pervasive, it might force Amex to charge a lower merchant discount fee . . . ." FOF 15. Although lower merchant discount rates might reduce the profits of Amex and other credit card networks, Mr. Silverman admitted that such healthy competition would be good for consumers. FOF 14. It would be a "perverse result" to "hold that the antitrust laws protect competitors from the loss of profits due to . . . price competition." *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 116 (1986); *see also Drug Mart Pharmacy Corp. v. Am. Home Prods. Corp.*, 472 F. Supp. 2d 385,

402 (E.D.N.Y. 2007) ("[T]he antitrust laws are not intended to protect profit margins but consumer welfare.") (internal quotation marks omitted).

Even merchants that choose not to steer would benefit from ending Amex's ASRs because, when setting prices, Amex and other credit card networks would have to consider the risk that the merchant might steer. FOF 5. As Mr. Quagliata testified:

> Q So if merchants could provide a discount for credit cards other than American Express, that would put discount rate pressure on American Express?
>
> A Sure, it would.

FOF 16.

Merchants' customers also would benefit from vigorous price competition among credit card networks, as they would receive discounts or other incentives from merchants encouraging customers to use low-cost cards. FOF 231-68. If merchants reduce their costs of accepting credit cards, many would likely pass savings along to all of their customers in the form of lower prices or higher quality goods and services. FOF 261-68. Finally, consumers also might receive increased cardholder rewards as GPCC card networks seek to make their cardholders less amenable to steering incentives. FOF 14.

2. Amex's Anti-Steering Rules block low-price interbrand competition by Discover.

Compelling trial evidence showed that Amex's ASRs blocked competition from Discover that was highly beneficial to both merchants and cardholders. Amex had no answer.

Discover launched in 1985, offering low fees to merchants and, with the industry's first rewards program: cash back to cardholders. FOF 60, 75. Discover saw an opportunity created by its competitors' high fees to persuade merchants "to shift their business to [Discover's] lower-priced network." FOF 61. Thus, for example, it suggested specific steps that merchants might take to encourage consumers to pay with Discover, including signs promoting Discover at the

point of sale. FOF 66. As Discover's President and COO, Roger Hochschild, testified, point-of-sale signage "has always been viewed as key in the industry" because that is "when consumers are deciding which payment vehicle to use." FOF 66.

Discover determined that low merchant fees would encourage merchants to steer customers to pay with Discover and thus generate high transaction volume. FOF 64. Increased sales "would be Discover's competitive reward . . . for having given the merchants a good deal." FOF 61. In other words, what would be good for merchants and their customers would also be good for Discover.

The evidence at trial was that Discover's efforts to work closely with merchants to have them steer volume to Discover was blocked by the anti-steering rules of its competitors, including Amex. FOF 67. Discover found that, because of those rules, "[m]erchants have largely not responded to simple, low prices and our challenge to drive Discover share." FOF 67. Unlike competitive industries, when it comes to credit card merchant fees, "lowering your price . . . does not drive incremental sales." FOF 68. In a classic case of "if you can't beat them, join them," Discover saw no benefit in continuing with its low-price strategy and it raised its rates from as low as [REDACTED] under its [REDACTED] to as high as [REDACTED] as Discover sought to [REDACTED] FOF 69. Discover has continued since then to set its prices near Visa's and MasterCard's. FOF 69.

If Amex's ASRs were eliminated, Discover confirmed that it would again "aggressively pursue" lowering its prices and providing incentives for merchant steering. FOF 72. Consistent with its continued belief in the merits of a low-price strategy, Discover analyzed the prospects for steering at its 100 largest merchants to take advantage of the Visa and MasterCard

settlements in this litigation. But Discover determined that all of those merchants accept Amex cards, so Amex's ASRs continue to block them from steering customers to Discover. FOF 74.

Amex offered no evidence at trial to undercut the evidence of the ASRs' serious anticompetitive effects on competition from Discover. Its two economic experts did not contest the proposition that Discover's strategy had the potential to be highly procompetitive or that Discover's low-price business model was blocked and continues to be blocked by Amex's ASRs. The anti-steering rules undoubtedly dealt a serious blow to the competition that Discover tried to bring to a highly concentrated, high-priced market. Standing alone, the continuing impact of squelching Discover's competition is sufficient evidence of anticompetitive effects arising from Amex's ASRs to carry Plaintiffs' initial burden under the rule of reason.

3. Amex's Anti-Steering Rules block interbrand competition from Visa and MasterCard.

Amex does not dispute that preference campaigns are proven and effective ways to move market share between credit card networks and that Amex's ASRs prevent merchants from expressing a preference for use of other networks' cards. Preference campaigns would enable merchants to encourage customers to use less expensive credit cards, and thereby put competitive pressure on higher-priced networks to lower their prices. FOF 79, 106. Merchants would benefit from preference campaigns because, as Mr. Funda conceded, absent Amex's ASRs, merchants might benefit from agreeing to preference campaigns with Visa or MasterCard in exchange for reduced merchant prices or other incentives. FOF 17; *see also* FOF 79.

As discussed below, Amex used its ASRs to prevent merchants from engaging in preference campaigns with Amex's rival networks. Although Amex claims it did so to preserve a welcome acceptance environment for its cardholders, and not to block competition, the fact is that Amex uses the term "welcome acceptance" to mean "no competition from rivals."

a. Amex's Anti-Steering Rules blocked "We Prefer Visa."

In the early 1990s, Visa endeavored to "do a better job of telling the Visa story to merchants" and to focus on "the key Amex vulnerability": the wide spread between Amex's 3.25 percent average merchant discount rate and Visa's 1.75 percent average rate. FOF 81. Visa distributed "profit improvement calculators" to show how much merchants could save by shifting business from Amex cards to Visa cards. FOF 87. The Visa materials also included instructions suggesting that merchants "[i]nstall signage which favors your most profitable payment options" and train sales people to adopt "inoffensive, yet effective" messages to encourage Visa use, such as "Would you like to put this on your Visa?" FOF 83.

Visa's efforts to have merchants steer transactions from Amex to Visa's less costly network were successful. FOF 86. During the Visa preference campaigns of the 1990s, Amex recognized that there was "[p]roven evidence of share shift from Amex to Visa." FOF 86. Consumers used Visa cards more often than they had used them, and Amex's share of credit card spending fell.

Amex generally rejected competing on the merits against "We Prefer Visa" in favor of blocking all network preference campaigns with its ASRs. In March 1992, Amex convened a group of executives for a "creative brainstorming" session to consider how Amex might persuade merchants not to engage in a Visa preference campaign. FOF 88. The executives discussed a variety of competitive responses on both the merchant side and the issuing side of their business, including reducing Amex's discount rates and increasing cardholder rewards. FOF 88. Similarly, Amex considered "disrupt[ing] Visa's superior financial leverage by persuading [service establishments] (rationally and emotionally) that they will make more money and be seen to be more customer-oriented by allowing the customer to choose the preferred payment method." FOF 89.

But instead of pursuing any of those competitive options, Amex opted for an anticompetitive response, and used its ASRs to prohibit merchants from stating or displaying a "preference" for Visa or any other card network. FOF 105. Amex went so far as to terminate acceptance at some merchants that refused to comply, FOF 93, "trying to teach a lesson or make an object lesson for other merchants." FOF 93. Amex's prohibitions on "preference" are in every Amex merchant contract today, and Amex vigilantly enforces them. FOF 43, 52-53, 92-93.

b. Amex's Anti-Steering Rules block MasterCard preference campaigns.

Amex's ASRs also prevented MasterCard from engaging in preference campaigns. According to Nina Biornstad, MasterCard's Vice President for the travel-and-entertainment industry, merchant statements of preference produced market share increases for MasterCard. FOF 97. For example, when Travelocity displayed the slogan "Travelocity Prefers MasterCard" on the part of its website where customers enter their payment card information, it succeeded in shifting volume to MasterCard. FOF 98-99. When Amex learned of this preference campaign it threatened to terminate its contract with Travelocity. FOF 98. Fearing the loss of Amex cardholders as customers, Travelocity agreed to remove all "preference" language from its website. FOF 98. After Travelocity stopped referring to MasterCard as its preferred card, MasterCard observed less share movement. FOF 99. MasterCard then reduced its financial consideration to Travelocity. FOF 99.

MasterCard remains interested today in entering preference relationships with merchants. FOF 103. If Amex's ASRs did not block merchants from expressing a preference for MasterCard, MasterCard would once again seek to establish preference relationships with merchants and would allocate funds to such efforts. FOF 103.

B. Prices for credit card network services are higher because of Amex's Anti-Steering Rules.

Amex's ASRs have allowed Amex, Visa, MasterCard, and Discover to raise their discount rates more easily and more profitably because they insulate all of the networks from competitive pressure. Between 2006 and 2009, Amex implemented its Value Recapture initiative and successfully raised prices that merchants paid on [redacted] of Amex's U.S. charge volume. Amex increased discount rates, imposed additional fees, and reduced other payments to merchants, increasing its discount rates by 8.8 basis points over what they would otherwise have been and producing a cumulative revenue benefit to Amex of more than $1.3 billion by 2010. FOF 530-33.

Amex increased its already relatively high merchant discount rates more – and more easily – during Value Recapture because the ASRs restricted merchants from responding to the price increases by moving share to less expensive credit card networks. FOF 112-13. Merchant testimony confirms that, if not for the ASRs, merchants would have steered to counteract the price increases they faced. For example, Southwest, if it had been possible to do so, would have used steering to "mitigate [Amex's] price hike." FOF 119.

While the facts surrounding Amex's Value Recapture program were not disputed, Amex still claims that its average discount rates have declined over time. This contention ignores the reason for the apparent change. Amex based its claim on figures that failed to account for mix effects – the increased usage of Amex cards, in recent years, at lower-priced, "everyday spend" merchants. But after adjusting for mix effects, the evidence shows, comparing "apples to apples," that Amex's discount rates have increased. FOF 549-50, 574. Amex's other testifying expert, Professor Douglas Bernheim, presented an error-ridden analysis purporting to show a decline in Amex's prices. But that apparent decline was driven by a made-for-litigation

adjustment to the price for a single major merchant, Delta. Professor Bernheim's implausible assertion is that Amex provides Delta with merchant services – and that Amex pays Delta for the privilege. Every other merchant contract in the country is the other way around. After correcting Professor Bernheim's errors, the evidence showed that Amex's prices increased. FOF 568-575.

Amex was not alone in raising price to merchants under the safe protection of anti-steering rules. When Amex's Value Recapture program was increasing its discount rates, Visa and MasterCard also were increasing their prices. Visa and MasterCard raised their merchant discount rates from 1.81% and 1.84% in 1997 to 2.31% and 2.34% in 2009 – without (because of the anti-steering rules) losing significant market share to Amex or Discover. FOF 11.

C. Amex's Anti-Steering Rules impede innovation.

One of the important purposes of the antitrust laws is to protect innovation that may benefit competition and consumers. Restraints that stunt or block innovation are anticompetitive. COL 30. The freedom to steer would give merchants incentives to develop ways to steer and to invest in technology that facilitates steering. It also would give networks incentives to innovate to become the favored network. The evidence at trial revealed several examples of how Amex ASRs harm competition by interfering with innovation. This evidence supports the conclusion that the ASRs violate the antitrust laws.

One promise of technology is that merchants could obtain tools that allow customers to easily identify which payment options are less costly than others. Merchants also could offer discounts or other incentives to customers who select favorable payment methods. For example, Sinclair Oil currently uses technology it developed to steer customers to its proprietary charge and ACH cards. FOF 117. If a customer uses a Sinclair-branded card, the gasoline dispenser automatically "rolls back" to a lower price per gallon, usually 5-10 cents lower. FOF 117.

Amex's ASRs bar Sinclair stations from using this technology to steer customers to lower-cost general purpose credit cards. FOF 118. The ASRs also prevent Sinclair's use of a forthcoming mobile commerce application to steer customers to preferred card networks. FOF 119. Because the ASRs prevent Sinclair and other merchants from taking advantage of these kinds of innovative products, the ASRs diminish firms' incentives to develop similar products in the future.

Another merchant, Official Payments, is [redacted] FOF 120. Ben Mitchell, the company's vice president of client services and card processing, testified that Official Payments is [redacted] FOF 120. If successful, Official Payments will [redacted] But, as Mitchell testified, Amex's ASRs limit the use of [redacted] FOF 121-22.

Indeed, the ASRs have already demonstrably quashed innovation. Project Monet was a network venture involving Discover and large merchants. A principal goal was to create an efficient way to control card acceptance costs. The effort evaporated when the merchants determined that GPCC card network anti-steering rules prevented them from promoting the venture. Because steering was central to its success, this innovative venture could not get started. FOF 70.

Similarly, Southwest Airlines is one of approximately forty merchants that have joined together to create Merchant Customer Exchange, the aim of which is to facilitate the use of mobile phones to select low-cost payment options. FOF 123. But Amex's ASRs prohibit

merchants from offering customers cost comparisons of different credit cards. So the Merchant Customer Exchange is struggling to see how it can move forward. FOF 123, 281.

In the absence of Amex's ASRs, credit card networks would also face pressure to simplify their rate structures, and to innovate in the ways that they price to merchants. As part of "restructur[ing] [its] pricing to match the market," after the ASRs blocked Discover's low-price strategy, *see supra* Part I.A.2, Discover shifted away from its "very straightforward bundled rate" to the more complicated, unbundled pricing structure maintained by Visa and MasterCard. FOF 69. But if Amex's ASRs were eliminated, Discover's President and COO, Roger Hochschild, testified that Discover could return to simpler pricing. FOF 72. If merchants desire a simple, single, low rate, steering will empower them to reward the network that provides that feature.

D. Merchants would steer if the Anti-Steering Rules did not prevent them from doing so.

Amex observes that, following entry of Plaintiffs' consent decree with Visa and MasterCard, merchants that do not accept Amex cards have been permitted to steer, and suggests that the lack of widespread steering (or significant changes to Visa's and MasterCard's pricing) indicates that merchants would not steer even if the ASRs were eliminated. *See* Trial Tr. 169:3-170:9 (Amex opening statement). This suggestion ignores, of course, the facts that many merchants testified at trial that they have attempted to steer in the past, would like to steer today, and would consider steering strategies going forward. FOF 206-50. The evidence further shows that Amex substantially over-reads the lessons of the settlements. Following Visa's and MasterCard's elimination of their anti-steering rules, Discover created an internal task force to consider whether meaningful opportunities existed to work with merchants that did not accept Amex cards. As Mr. Hochschild testified, the natural place for steering to take root at first is

with large merchants, which have sizeable sales to shift and where Discover stands to gain the most volume, so that is where Discover focused its post-settlement efforts. FOF 74, 128-29. Discover found, however, that each of its top 100 merchants accepted Amex also and therefore continued to be blocked by Amex's ASRs, despite the Visa and MasterCard settlements. FOF 129; *see also* FOF 132 (large merchants "led the way" on steering in Australia).

The vast majority of retail transactions remain restrained by Amex's ASRs and that is one reason why relief in this case is warranted. Judge Gleeson called this the "American Express problem." *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207, 2013 WL 6510737, at *20 (E.D.N.Y. 2013) (internal quotation marks omitted). Removal of Amex's ASRs will foster networks' engagement in campaigns to attract additional transaction volume by offering terms that induce merchants to steer customers.

Steering takes time to plan, design, and implement and more time still for credit card networks to respond. Australia's government ordered the credit card networks to permit surcharging beginning in 2003, but it was not until 2006 that "merchants beg[a]n to react to [the] surcharge option," it was not until 2007 that "[s]ignificant increases in merchant adoption [were] witnessed," and it was not until 2007-09 that credit card networks started to use "pricing and marketing concessions" to reduce surcharging. FOF 134.

Even if, contrary to the evidence, steering ultimately does not develop in this country, Amex "would still not be justified in deciding on behalf of [merchants] that they did not need the [ability to steer]: presumably, if that were the case, the discipline of the market would itself soon result in the [merchants] abandoning [steering]. [Amex] is not entitled to pre-empt the working of the market by deciding for itself that its [merchant] customers do not need that which they demand." *See Indiana Federation*, 476 U.S. at 462.

Amex also expressed fears that merchants, if permitted to steer, might engage in conduct that makes Amex cardholders feel embarrassed or unwelcome. But there is no evidence that merchants will, as Amex claims, engage in steering that would risk driving away their customers – particularly the valuable and high spending Amex cardholders; indeed, merchants said that they would be careful because they need to keep their customers. FOF 282-91. The story Mr. Quagliata told about a merchant that displayed a "no Amex" sign, with a red strike through the Amex logo, provides a useful example. FOF 292. Mr. Quagliata acknowledged that the merchant that displayed the sign did not accept Amex cards. When the merchant began accepting Amex, it removed the sign. FOF 292. As Mr. Hochschild testified, credit card networks such as Discover have incentives to seek steering in a way that do not detract from the customer experience. FOF 72.

Amex's view is that it knows better than merchants how to treat the merchants' customers at the point of sale. But in the absence of Amex's ASRs, merchants would have the incentive to obtain accurate information regarding credit card network costs (once that information is useful) and will make customers comfortable while finding ways to encourage increased use of lower-cost cards. FOF 270-91. It defies credibility for Amex to argue that Amex cardholders would feel embarrassed or unwelcome if they received offers for discounts or other benefits for paying with lower-cost cards, saw logos of lower-cost cards displayed more prominently, or learned that a merchant prefers that they use lower-cost cards. FOF 282-91, 701-05. In any event, Amex did not prove its assertions that cardholders would react poorly to merchant steering efforts.

Amex also contends that, if Plaintiffs win this case, it would be forced to do business with merchants with which it does not want to do business. But the settlements with Visa and

MasterCard show that the relief against Amex that Plaintiffs seek would not allow merchants to disparage Amex. Final Judgment as to Defendants MasterCard International Incorporated and Visa Inc. (ECF # 143) ("Final Judgment") ¶ IV.C. The relief achieved from the Visa and MasterCard settlement does not limit their ability to cancel merchants for fraud or non-payment. But Visa and MasterCard can no longer cancel a merchant simply because that merchant is steering to another credit card network. Final Judgment ¶ IV.A. Nor should Amex be allowed to do so.

II. Market analysis proves that Amex has the ability to cause adverse effects on competition.

In addition to showing actual adverse effects on competition, Plaintiffs can prevail alternatively by making an indirect showing of anticompetitive effects. To succeed on the alternative path, a plaintiff must show both that a defendant possesses market power and that there are "other grounds to believe that the defendant's behavior will harm competition market-wide." COL 7 (citing *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 129 (2d Cir. 1995)). The evidence discussed in Part I provides "other grounds" to find that Amex's ASRs harm competition among networks at millions of Amex-accepting merchants, and this Part highlights the trial evidence that shows that Amex possesses significant market power.

A. Plaintiffs proved a market of GPCC card network services to all merchants.

"Evaluating market power begins with defining the relevant market." *Geneva Pharms. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 496 (2d Cir. 2004). Relevant markets have both geographic and product dimensions; the parties agree that the relevant geographic market is the United States. The key market-definition question is whether the product market is GPCC card network services to merchants, as Plaintiffs contend, or whether the market also includes network services for debit cards, as Amex contends. The trial evidence proves that Plaintiffs'

market definition is correct. It also is consistent with the relevant product market that the district court and Second Circuit found in *Visa* and with the market definition that Amex long advocated in its judicial and other public filings. And it is consistent with how the credit card networks treat credit and debit in making decisions in the regular course of business.

1. Debit card network services are not reasonably interchangeable with GPCC card network services.

a. Professor Katz's application of the hypothetical monopolist test proves a relevant market of GPCC card network services.

The district court in *Visa* held that "general purpose card network services . . . constitute a product market because merchant consumers exhibit little price sensitivity and the networks provide core services that cannot reasonably be replaced by other sources." *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 338 (S.D.N.Y. 2001). The Second Circuit affirmed the district court's market definition, agreeing that there was a relevant market consisting of "the network services market for general purpose cards." *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 238-39 (2d Cir. 2003).

Until Plaintiffs brought this case, Amex advocated the exclusion of debit card network services from a market of credit and charge card network services. FOF 305-07. In 2008, Professor Gilbert, testifying for Amex, found the market to be "general-purpose credit and charge cards." FOF 307. And only months before this case was filed, Amex's SEC Form 10-K recognized that "[t]he ability to substitute debit cards for credit and charge cards is limited because there is no credit extended and the consumer must have sufficient funds in his or her demand deposit account to pay for the purchase at the time of the transaction." FOF 305.

Excluding debit cards from the market remains appropriate today. In *Visa*, both the Court and the United States' expert economist, Professor Michael Katz, used the hypothetical monopolist test to define the relevant market. *Visa*, 163 F. Supp. 2d at 335. The Court adopted

Professor Katz's opinion that "there would be no loss to network transaction volume in the face of even a 10% increase in price for network services" because the card networks' customers (banks in that case) could not have provided network services themselves and it was implausible that those customers would have stopped buying network services "in response to such a small increase in price." *Visa*, 163 F. Supp. 2d at 339. The Second Circuit approved the hypothetical monopolist test as an appropriate way to define markets. COL 53.

All three testifying economic experts agreed that the hypothetical monopolist test is a standard approach to market definition. But only Professor Katz used the test here. FOF 311-12. To account for the two-sided features of this industry, Professor Katz focused on "network fees," the implicit fees paid by merchants and issuers for network services. FOF 327-28. He first assessed whether a monopolist over GPCC card network services could profitably increase merchant fees by an amount equivalent to 10% of the network fees. FOF 329. Professor Katz held the price to cardholders constant in order to account, in the simplest possible manner, for both sides of the platform. FOF 329. In a separate application of the test, he then assessed whether a monopolist of GPCC card network services could profitably increase the merchant discount rate by 5%. FOF 332. Again, by holding the cardholder side constant Professor Katz accounted for the two-sided features of the market. FOF 332. Amex's economic expert, Professor Gilbert, agreed that both of these applications were sound approaches to market definition in the credit card industry. FOF 334.

In applying the hypothetical monopolist test, Professor Katz evaluated what would likely happen if a monopolist increased the network price, considering both sides of the two-sided platform. FOF 328-39, 333. Because cardholders do not pay the price increase, it was essential to examine possible merchant reactions. The only meaningful possible reaction would be to stop

accepting credit cards. FOF 313-15. Professor Katz found it implausible that so many merchants would stop accepting GPCC cards altogether (and accept only debit cards and other payment forms) that it would make the price increases unprofitable. FOF 331. Because a monopolist of GPCC card network services would likely impose a significant price increase, Professor Katz concluded that GPCC card network services constitute a relevant antitrust market. Using the latest data available to perform this test and under the current market conditions, he confirmed that the GPCC card network services market continues to be the relevant antitrust market today. FOF 298, 327-35.

The Durbin Amendment provided a natural economic experiment to test Professor Katz's conclusion. After the final regulations implementing the Durbin Amendment took effect, interchange fees and discount rates for debit both fell significantly and merchants were authorized to steer from credit cards to debit cards. FOF 313, 369-71. If debit card network services and GPCC card network services were in fact in the same market, the significant decline in debit fees would have caused merchants to take advantage of debit cards' lower costs by steering their GPCC card customers to debit cards or ceasing to accept GPCC cards. FOF 372-79. But Amex's own analysis determined that merchants were unlikely to stop accepting credit cards, even if debit were significantly less expensive than credit, because sufficient credit-insistent customers existed. FOF 380. Amex executives, testifying at trial, also could not identify any merchant that had stopped accepting credit cards and accepted only debit cards. FOF 378. Nor did Amex or any of Amex's competitor networks reduce their prices in response to the dramatic decline of debit prices, as they would have if they had feared that merchants would shift business from GPCC cards to debit cards or believed that lower debit card prices placed competitive pressure on GPCC card discount rates. FOF 372-75. Neither credit card

acceptance nor credit card usage declined in the significant way that would have been expected if debit and credit were in the same market. FOF 379-81. This real-world experience shows that debit card acceptance is not a close substitute for credit card acceptance.

b. Merchant trial testimony proves GPCC card and debit card network services are not close substitutes.

Merchant testimony also shows that debit and credit networks are not close substitutes and that merchants cannot realistically drop credit cards. FOF 336-62. Merchants testified that (1) credit users and debit users constitute largely discrete groups of customers; (2) a substantial number of customers need or want to use the credit function that is not available with debit cards; (3) corporate cardholders generally want to use credit cards; and (4) customers' use of a credit card provides convenient security for certain purchases. FOF 337-59. Merchants continue to accept credit, in addition to debit, despite credit's substantially higher price. FOF 360-62, 377-78.

An executive of Alaska Airlines testified that he views credit and debit to be distinct products that do not compete with each other and cannot substitute for each other, and a Crate & Barrel executive testified similarly that credit cards and debit cards are "totally different products." FOF 336. Between 2003 and 2006, IKEA offered discounts on future purchases to customers paying with PIN debit. It found that the promotion encouraged only its customers who had been paying with checks to switch to debit cards. FOF 342. When IKEA offered a similar deal between 2008 and 2012, customers switched primarily from signature debit cards to PIN debit cards. FOF 342.

c. Merchants do not regard GPCC and debit card network services as close substitutes.

A senior Amex executive wrote in a 2010 email that it was a "fact that debit and credit are not substitutes in the consumer's (or Durbin's) mind." FOF 378. Consequently, Amex sets its merchant discount rates based on Visa's and MasterCard's credit rates, excluding consideration of their debit rates. FOF 363. Mr. Funda testified that Amex does not compare its prices to a blend of Visa and MasterCard credit and debit prices because credit "is a different enough product with a sufficiently different feature set" than debit and "a sufficiently different cost structure than debit, that it should be priced on its own merits and not combined with debit." FOF 364.

Discover's price-setting process also compares its GPCC card network services prices only to other GPCC prices and not to debit prices. FOF 368.

Even on the cardholder side, Amex compares its credit products with other GPCC products, but not with debit products. For example, Amex stated that its platinum card competes "predominantly versus Chase, United and Citi Advantage." FOF 367. Those products are credit cards, not debit cards. FOF 367. Amex also identified only credit cards as the "Key Competitors" to the Amex Blue Cash card. FOF 367. For its EveryDay card, Amex has identified only credit cards as its "top competitors." FOF 367. Even Amex's trial demonstrative of "Select Competitor Products" (DX7754) fails to list a single debit product. FOF 367. And missing also from all of these comparisons is Amex's own non-GPCC prepaid product BlueBird, which Amex touts as "[t]he debit and checking alternative." FOF 367.

2. Amex focuses incorrectly only on cardholders' substitution, rather than merchants' substitution.

Likely recognizing the results would be unavailing, Amex made no attempt to evaluate the obvious question: the extent to which merchants would substitute debit card network services for credit card network services. Instead of analyzing merchant responses to price changes, Amex's arguments amount to saying that the relevant market should be determined by the functional substitutability of credit and debit cards for some cardholders. Although Amex tried to argue that merchant demand is the same as cardholder demand because merchant demand is "derived" from cardholder demand, that claim oversimplifies the economics and ignores key facts. FOF 316. A merchant is likely to accept all four major credit card brands to cater to the tastes of all its various customers, while no cardholder has any comparable interest in carrying all of the credit card brands. For example, virtually all merchants that accept Visa also accept MasterCard, even though many consumers carry Visa but not MasterCard.

Even from a cardholder's point of view, debit cards are not good functional substitutes for credit cards. Debit cards are "pay now" products that remove funds from a cardholder's bank account immediately upon purchase, while GPCC cards allow cardholders to "pay later." FOF 345-47, 383. Debit's limited functional substitutability for credit has not changed since its inclusion in the relevant market was rejected by the courts in *Visa*, and since Amex's exclusion of debit from the market for almost a decade. *See* FOF 305-07, 383-85.

Controlling case law rejects reliance on mere functional substitutability. Though evidence of functional interchangeability is a threshold factor in defining the relevant market, it is only an "indication that consumers of one product might be willing to switch to the other in the face of a non-trivial price increase" because it does not incorporate any consideration of price or preference. *Geneva Pharmaceuticals*, 386 F.3d at 496. As the Supreme Court explained:

> For every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range. The circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn; in technical terms, products whose 'cross-elasticities of demand' are small.

Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 612 n.31 (1953). Accordingly, courts exclude merely functionally interchangeable products from a relevant market if the hypothetical monopolist test or other evidence demonstrates that, when pricing and consumer preference are considered, the products are not reasonably interchangeable. *Geneva Pharmaceuticals*, 386 F.3d at 496; *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424-25 (2d Cir. 1945); *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 54 (D.D.C. 2011).

Professor Gilbert admitted at trial that functional interchangeability alone is an insufficient reason to include products in the same relevant antitrust market. FOF 300. His recent testimony in the *Apple* e-books case provides a useful analogy. There the question was whether e-books and print books were in the same market. FOF 300. The e-book and print editions of any particular title share many functional similarities, most prominently identical text. FOF 300. But when Professor Gilbert considered their reasonable interchangeability, applying the hypothetical monopolist test, he found that print books were not in the same antitrust market as e-books. FOF 300, 335.

While Amex's experts did not study merchant behavior, they did study the relationship between cardholder behavior and payment costs through Professor Bernheim's review of a survey of cardholder perceptions. FOF 396. He purported to analyze the impact of cardholder perceptions of the costs of GPCC cards on use of those cards, but he erroneously based his analysis on comparisons among different people. FOF 396. When Professor Katz used those data to compare the same person's perceptions over time, he found no support for Professor

Bernheim's claim that cardholders would substitute debit for credit based on their perceptions of the cost of credit and debit. FOF 396.

Amex seeks to rebut the "pay later" versus "pay now" difference for cardholders by alleging that the ability to defer payment does not "sufficiently differentiate[]" GPCC cards from debit cards. Trial Tr. 6244:12-18 (Bernheim). But overdraft protection on a checking account tied to a debit card is not a substitute for the use of the credit facility and float available to users of credit cards.[1]

Finally, Professor Bernheim used both data available publicly and data obtained in this litigation through discovery from supermarket and drugstore plaintiffs. FOF 395-97. These data show that debit usage has grown since 2001 and that many consumers use both credit and debit cards. FOF 389-94, 402. As Professor Gilbert admitted, these observations do not tell much about market definition. FOF 400. The increase in cardholders' debit usage – which came largely at the expense of checks – does not speak to substitution by merchants or to substitutability induced by price changes. Returning to the e-books analogy, Professor Gilbert testified that e-books and print books are not in the same antitrust market, even though e-books were growing exponentially and at the expense of print books. FOF 401. Professor Gilbert's e-

[1] While Professor Bernheim claimed that overdraft protection on checking accounts provided a credit facility for debit cards, he acknowledged that overdraft carries high fees and is much more expensive than interest rates on credit cards. Trial Tr. 6525:9-6526:6, 6522:21-25 (Bernheim). Mr. Silverman of Amex testified that overdraft protection on checking account carries an effective interest rate of "hundreds of percent." Trial Tr. 3726:22-3727:6 (Silverman/Amex). As for Professor Bernheim's suggestion that charge cards lack any credit facility, he is mistaken. Charge cards, like credit cards, give users the benefit of a zero-interest loan between when a purchase is made and when the bill is paid. Trial Tr. 6244:20-6245:13 (Bernheim). And charge cards, like credit cards, also allow payment in installments – a point Professor Gilbert made on behalf of Amex in *Marcus v. American Express* ("developments in AmEx's Lending on Charge program have further blurred the distinction between charge and credit cards"). FOF 385.

books analysis, applied to this case, demonstrates that rapid growth of debit does not preclude a finding of a GPCC card network services market.

B. Amex has market power for GPCC card network services provided to all merchants.

Market power is "the 'power to control prices or exclude competition.'" *Visa*, 344 F.3d at 239 (quoting *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 337, 391 (1956)). The direct evidence above in Part I shows that Amex has maintained prices above the competitive level and has excluded competition that merchant steering would bring. And the *Visa* decision "provides useful guidance for . . . understanding how a court might determine market power in this particular two-sided market." *Amex*, 2014 WL 1817427, at *10. In *Visa*, the district court concluded that both Visa and MasterCard "have market power in the general purpose card network services market, whether measured jointly or separately," and the Second Circuit agreed. *Visa*, 163 F. Supp. 2d at 342; *Visa*, 344 F.3d at 239. Both courts emphasized three types of evidence supporting the market-power finding: (1) high market share; (2) cardholder insistence; and (3) continued merchant acceptance despite price increases. *Visa*, 163 F. Supp. 2d at 340-42; *Visa*, 344 F.3d at 239-40. Similar evidence here demonstrates that Amex possesses market power today.

1. Amex's market share shows market power.

In concluding that MasterCard and Visa each possessed market power, the *Visa* district court found that "both have large market shares in a highly concentrated network market with only four significant competitors." *Visa*, 163 F. Supp. 2d at 341. The Second Circuit agreed. *Visa*, 344 F.3d at 240. MasterCard's market share then stood at approximately 26%. *Visa*, 344 F.3d at 240. Amex endorsed that finding when, in an antitrust suit against MasterCard (ultimately settled for $1.8 billion), it argued that MasterCard's market share was "sufficient to

establish its . . . possession of market power." PX1497 at 25-26. Mirroring the finding used by the court in *Visa* and endorsed by Amex in subsequent litigation, Amex's 26% share of purchase volume on all GPCC cards in the United States in 2012 supports a finding here that Amex possesses market power today.

In the Second Circuit, there is no numerical threshold for market power. COL 74-75. Such a threshold would be particularly inappropriate in this market, in which Amex's 26% market share significantly understates the power and influence it has as a gatekeeper to its cardholders. Amex's ASRs have market-wide effect, despite its share of charge volume, because virtually all large merchants accept Amex to keep their Amex-insistent customers. FOF 596-97, 602-03. Focusing on Amex's 26% share of charge volume ignores that its ASRs block all of these Amex-accepting merchants from steering; such focus thus would understate the loss of competition among GPCC card networks due to Amex's ASRs.

2. Cardholder insistence confers market power on Amex.

The *Visa* court specifically recognized cardholder insistence as a source of market power, a holding that Amex now largely ignores. There, the district court attributed the defendant card networks' market power to the fact that merchants "cannot refuse to accept Visa and MasterCard even in the face of significant price increases because the cards are such preferred payment methods that customers would choose not to shop at merchants who do not accept them." *Visa*, 163 F. Supp. 2d at 340. The Second Circuit also recognized that such evidence tended to prove market power. *Visa*, 344 F.3d at 240. Similarly, the evidence at this trial established that merchants accounting for the vast majority of credit card transactions must accept Amex because many Amex cardholders so strongly prefer to pay with Amex that they will "walk away" from or "spend less" at any merchant that does not accept Amex. FOF 426. Amex itself refers to those cardholders as "insistent" in its business records, and it recognizes that cardholder insistence

allows it to charge merchants high prices. FOF 426, 439-45. To Amex, "insistence" is a technical term, and means the amount of a merchant's profit that is at risk if the merchant does not accept Amex cards, or the "foregone profit if American Express were not accepted." FOF 444. The key point for antitrust purposes is that cardholder insistence gives rise to Amex market power over merchants.

Amex suggested at trial that its use of insistence was merely a marketing ploy. FOF 447. But Amex has, in fact, used insistence-based calculations to develop its pricing strategy and to convince merchants that they should accept Amex's Value Recapture discount rate increases. FOF 439-45, 450-51. When Amex raised prices for the entire airline industry, it reminded airlines that billions of dollars of sales came from Amex's "highly insistent customers" and warned them that "[i]t is essential to accept American Express." FOF 450. The "Restaurant Value Recapture Deck," which Amex gave its employees to use with restaurants receiving discount rate increases, demonstrated to merchants that a significant portion of those merchants' business would be lost by not accepting Amex:

> Even customers who are familiar and loyal to your restaurant are affected by card acceptance. Almost half would not return, would return less often, and/or would spend less if they did return if American Express was not accepted. This addresses the objection that in the restaurant, the consumer belongs to the merchant and not American Express. Clearly, the consumer is shared.

FOF 452.

A recent "natural experiment" also supports a finding of market power by showing that Amex's measurements of cardholder insistence may have understated the amount of business a merchant put at risk by discontinuing Amex acceptance. When Murphy Oil stopped accepting Amex, Amex tracked Murphy Oil customers and learned that Amex cardholder insistence "as demonstrated by card[holder] behavior appears to be . . . almost double" Amex's previous estimates. FOF 463. "Bottom line, this case sample suggests that cardmember insistence in oil

is real and strong. We should be able to make use of this data in our merchant negotiations." FOF 463. Murphy Oil once again now accepts Amex. FOF 464.

Finally, Amex has argued that the Court should ignore insistence because Amex sets its prices at a level below the Maximum Rational Price that Amex's calculations reflect rational merchants would pay to accept Amex cards. Though Amex may not charge the full Maximum Rational Price, Professor Gilbert agrees that decision does not show a lack of market power. FOF 535.

3. Amex exercised its market power through the profitable "Value Recapture" program.

The Visa district court, in support of its finding that Visa and MasterCard separately possessed market power, relied also on evidence that those networks had "recently raised [prices] charged to merchants a number of times," without losing enough merchants to make the price increase unprofitable. *Visa*, 163 F. Supp. 2d at 340. The Second Circuit approved the district court's reasoning. *Visa*, 344 F.3d at 240; *accord Amex*, 2014 WL 1817427, at *7 (observing that "this Circuit has suggested that actual adverse effect on competition may in some instances demonstrate market power") (citing *Todd v. Exxon Corp.*, 275 F.3d 191, 206 (2d Cir. 2001) (then-Judge Sotomayor stating that actual adverse effect 'arguably is more direct evidence of market power than calculations of elusive market share figures')).

Amex, too, has repeatedly and profitably raised the prices it charges to merchants. Between 2006 and 2009, Amex raised the prices that merchants paid on [redacted] of Amex's U.S. charge volume by increasing discount rates, imposing additional fees, and reducing other payments to merchants. FOF 530. For the largest merchants, Amex experienced no cancellations due to Value Recapture, FOF 530, and, while some small merchants cancelled, the charge volume Amex lost was negligible. FOF 532. Amex estimated that its Value Recapture

price increases would generate cumulative revenue benefits of more than $1.3 billion between 2006 and 2010. FOF 531.

4. High barriers to entry protect Amex's market power.

The *Visa* district court found that "there are significant barriers to entry into the general purpose card network services market" and that the "difficulties associated with entering the network market are exemplified by the fact that no company has entered since Discover did so in 1985." *Visa*, 163 F. Supp. 2d at 341-42. Entry is no easier today. Launching a new general purpose card network still requires substantial time and money. And a new entrant still would face "a 'chicken-and-egg' problem of developing merchant acceptance without an initial network of cardholders who, in turn, are needed to induce merchants to accept cards in the first place." FOF 418. As recently as 2013, Mr. Chenault described the "chicken-and-egg situation" and explained, "I can't tell you exactly who's the chicken and who's the egg. You need more customers to drive relevance to get more merchant coverage. You need more merchant coverage to have relevance for the customer. So you've got to do both." FOF 418.

In these circumstances, Amex's ASRs themselves impede not only entry by a network seeking to offer competitive terms, but also expansion by existing competitors, as exemplified by the networks' ASRs' defeat of Discover's efforts to expand its share of transaction volume through lower network services pricing. *See supra* Part I.A.2; *cf. Geneva Pharmaceuticals*, 386 F.3d at 491, 494, 509-10 (finding a § 1 violation where defendant's exclusive dealing arrangement with supplier of essential ingredient that was otherwise difficult to procure delayed generic-drug competitor's entry). In view of these difficulties, it is not surprising that nearly thirty years have now passed since the last new firm (Discover) entered the market. FOF 419.

C. Plaintiffs proved that Amex has market power in a market for GPCC card network services to travel-and-entertainment merchants.

It is well established that relevant antitrust markets can exist within larger relevant markets. COL 61. In this case, Plaintiffs alleged, and the evidence at trial showed, that there is a "submarket" or a "price discrimination market" consisting of GPCC card network services provided to Travel-and-Entertainment ("T&E") merchants in which Amex has a 34% share. The inquiry under the Horizontal Merger Guidelines in defining a T&E market is essentially the same as the inquiry in defining the general GPCC market: whether a hypothetical monopolist in such a market could profitably raise prices to merchants by a significant amount for a significant period of time without losing so much business that the price increase would be unprofitable. Horizontal Merger Guidelines § 4.1.4 (2010). "[T]he seller who can segregate a substantial group of buyers and charge them monopoly prices for a significant period has market power over the group of buyers who pay these prices." 2B Phillip E. Areeda, Herbert Hovenkamp & John L. Solow, *Antitrust Law* ¶ 534d(1), at 270 (3d ed. 2007). Based on substantial merchant testimony, merchant and Amex documents relating to insistence, evidence of price discrimination against T&E merchants, evidence of the strength of Amex's leading corporate card business, and an application of the Hypothetical Monopolist Test, Professor Katz concluded that there is a relevant market for T&E network services in which Amex has market power. FOF 408-09; §§ V, VI.

The merchant testimony and other evidence at trial provided powerful support for Professor Katz's market definition opinion and were in keeping with common sense. Airlines, hotels, rental car companies, and restaurants have little practical choice but to accept credit cards from their customers. FOF 339, 345, 348, 350-54, 635-36. Nor could the same merchants drop Amex, let alone drop credit cards altogether, if prices rose – a proposition Amex did not

challenge with contrary evidence. FOF § VI.B. Instead, Amex's central critique of the existence of a T&E market was that no credit card network could profitably serve just T&E merchants. FOF 632. But that misses the important point of market definition, which is to aid in identifying where a firm might exercise significant market power. For example, even though it is unlikely an airline could operate profitably by flying only between New York and Seattle, the New York-Seattle city pair likely constitutes a relevant antitrust market because a monopolist on that route would not be significantly constrained by lower prices on other routes, say between New York and Houston. There is no support in the case law for Amex's approach to market definition and it should be rejected.

D. Amex's fails to show it lacks market power.

1. Amex has market power even though some small merchants do not accept Amex cards.

Amex often cites the existence of merchants that do not accept Amex cards to argue that it lacks market power. This argument is deeply flawed. About 6.4 million merchant locations in a wide variety of industries accept Amex cards, and these merchants accommodate 94% of the general purpose card spending of Amex cardholders. FOF 595, 597. These 6.4 million merchant locations are operated by about 3.4 million different merchants. FOF 595.

Amex's own business records and practices reveal a basic flaw in its argument. According to the measure Amex believes has the most meaning, Amex has "97% T&E Spend Coverage and 94% overall Spend Coverage in 2010." FOF 597. As these figures imply, almost every merchant that does not accept Amex is tiny, smaller than "your local florist." FOF 602. Because small merchants account for so little business overall, Amex teaches its new employees that a "simple comparison" between the number of merchants that accept Amex cards and the number of merchants that accept other networks' cards is "not meaningful" and that Amex

instead "focuses on Spend Coverage as a reliable measure of determining [merchant] acceptance." FOF 599.

Amex's own business decisions and practices have limited how many merchants accept its cards. For example, Amex was late to adopt the third-party acquirer model that the other credit card networks successfully used to expand coverage. FOF 606, 608, 610. Amex also has made the strategic decision to charge merchants high prices, knowing that such prices are "incompatible" with universal acceptance. FOF 604-05, 610. Taking profit at the expense of greater output is what firms with market power do. *See Port Dock & Stone Corp. v. Oldcastle Northeast, Inc.*, 507 F.3d 117, 123 (2d Cir. 2007) (recognizing that the "danger to customers from monopolization . . . is the danger that the monopolist will raise prices and restrict output").

2. Amex has market power even though it negotiates the Anti-Steering Rules or its discount rate with a small number of merchants.

Amex also wrongly contends that it cannot have market power because it negotiates with merchants. That argument proceeds from the mistaken assumption that firms with market power always dictate terms when, in fact, even monopolists negotiate. FOF 562; COL 92-94. For example, airports negotiate with airlines over access agreements, even if the airport is a monopoly. FOF 562. Microsoft was found to have monopoly power even though some of the "prices that [its] customers paid were negotiated and, as a consequence, were both discounted and unique to each transaction." *Deiter v. Microsoft Corp.*, 436 F.3d 461, 468 (4th Cir. 2006). In the credit card industry, the Second Circuit upheld a finding that Visa and MasterCard had market power even though evidence at this trial showed that both of them also negotiate with merchants, as do the Visa and MasterCard acquirers. *See Visa*, 344 F.3d at 239; Trial Tr. 2761:6-22 (Funda/Amex); Trial Tr. 3015:20-3016:22 (Pojero/Amex).

Despite emphasizing the purported frequency of its negotiations, Amex actually negotiates with only its largest merchants. The vast majority of Amex's merchant contracts contain entirely standard language (including standard ASRs) that Amex makes non-negotiable. FOF 44. And the few merchants with which Amex does negotiate report that Amex refuses to remove the ASRs from their contracts, or makes only limited concessions. FOF 49-54. Major merchants Home Depot, Best Buy, Sprint, and Alaska Airlines tried to negotiate the elimination or modification of the ASRs, but Amex would not budge. FOF 225-27, 229.

Similarly, the few merchants with which Amex discusses contractual terms often find Amex unwilling to negotiate its discount rate seriously. For example, during 2009 contract negotiations with Southwest Airlines, Amex tried to raise Southwest's discount rate from [REDACTED] to [REDACTED] FOF 555. When Southwest resisted, Amex agreed that Southwest would pay [REDACTED] in the first year of the new contract, but [REDACTED] for at least the next four years. FOF 555. But that sort of "concession" does not suggest that Amex lacks market power. FOF 562. Indeed, Amex still raised Southwest's discount rate, and Southwest still ended up paying significantly more to accept Amex [REDACTED] than to accept Visa and MasterCard [REDACTED] FOF 555, even though Amex concedes that Visa has market power.

3. Amex has market power even if cardholder insistence stems from continuing payments.

Amex argues that cardholder insistence cannot be a source of market power because it stems from paying out rewards and other benefits to cardholders. Amex Pre-Trial Br. at 70-73; Trial Tr. 5067:6-18 (Gilbert); Trial Tr. 6350:6-6351:25 (Bernheim). Amex cited authority for the proposition that only durable market power is of concern in antitrust law. *See* Amex Pre-Trial Br. at 71 (citing 2 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 501 (3d ed. 2013) ("Market power need not trouble the antitrust authorities unless it is both substantial in

magnitude and durable."); *AD/SAT, Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 229 (2d Cir. 1999) ("[T]ransitory power may safely be ignored by antitrust law."). But that valid proposition is of no help to Amex, and no authority Amex cited supports its claim that market power is not durable if recurring expenses are required to continue its exercise.

Amex argues that it possesses market power of significance under the law only if it could substantially maintain its share while no longer "spending billions annually in order to consistently deliver industry-leading rewards and other Cardmember benefits and service." Amex Pre-Trial Br. at 72. But Plaintiffs are aware of no case that supports this remarkable proposition. In assessing the durability of Amex's market power, the issue is not whether that power would erode quickly if Amex acted irrationally, but whether that power could be exercised persistently if Amex continues to act rationally.

To the extent Amex's argument is that it does not possess market power because it is forced by competition to pay out to cardholders all that it charges merchants, that proposition is unsupported by the evidence. Professor Katz testified to the contrary, and Amex did not call the economic expert (George Hay) who was prepared to testify on the profitability of Amex. FOF 136-37.

III. Amex did not prove that its Anti-Steering Rules have procompetitive effects.

A. Protecting Amex from competition is not a procompetitive effect.

Amex argues that it needs its ASRs to protect itself from competition to sustain its current business model, which is based on offering "premium" cards to attract high-spending cardholders and charging merchants high fees to finance benefits for those cardholders. Amex asserts that, if the ASRs are removed, cardholders would use its cards less, and some merchants would cease accepting its cards altogether, triggering further declines in card usage, which Amex

calls a "downward spiral" or "negative feedback loop." The end result, according to Amex, is that, without its ASRs, it might go out of business.

But Amex's assertions, similar to those frequently made by antitrust defendants in other cases, are not supported in the record, and fundamentally amount to a claim that it deserves to be protected from competition, an argument that "is nothing less than a frontal assault on the basic policy of the Sherman Act." *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978). Accepting that argument as a procompetitive effect would turn a core antitrust principle on its head.

1. The evidence did not establish that Amex would go out of business if merchants could offer more choices to customers.

Kenneth Chenault, Amex's Chairman and CEO, testified at trial that "if NDPs are eliminated, we will not survive as a company," and that "if the NDPs go away, we will go away." FOF 677. The import of this claim is that Amex should be able to restrain competition to allow Amex to compete as it prefers. Amex's position, which suggests that "competition itself is unreasonable," "is inconsistent with the basic policy of the Sherman Act," s*ee NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 117 (1984), and ignores that "[t]he purpose of the antitrust laws . . . is the protection of competition, not competitors." *Leegin*, 551 U.S. at 906 (internal quotation marks omitted).

Equally importantly, Amex's claim is refuted by the facts. Amex is not powerless in a world with steering. Amex succeeds today even though the cardholder side of the platform is "fiercely" competitive. FOF 140. It is a highly successful company, with well-regarded management, significant assets, and a large, loyal base of cardholders. FOF 674-75. Amex's brand, which it considers to be a "strong financial asset," FOF 675.c, is worth more than Nike's, Kleenex's, and Starbucks' brands. It is worth almost double the Visa and MasterCard brands

combined. FOF 675.c. Amex's Chief Marketing Officer, John Hayes, concurred that all of its assets put Amex in a strong position to compete in a world in which steering is allowed. FOF 675.d. Amex is the second largest credit card network in the United States. It is the largest credit card issuer in the United States by purchase volume, significantly larger than the second largest issuer, Chase. FOF 675.b.

In Canada, where Amex signed on to the Canadian Code of Conduct – which allows merchants to differentiate by payment type and network – Amex still runs a profitable business, providing superior customer service, and cardholder rewards. FOF 694.b. In Australia, after its central bank permitted steering through surcharges that can differ across brands, Amex's business remained profitable. FOF 694.a. Amex has run a successful business for more than 100 years despite having to adapt to significant setbacks, missteps, and changes to the competitive environment it faces. FOF 676.

Amex's other executives and its experts distanced themselves from Mr. Chenault's dire forecast. For example, Edward Gilligan, Amex's President, rejected the suggestion that repeal of its ASRs would cause Amex to go out of business, stating that he expects to continue to work for the company for a least ten more years. FOF 680. Professor Bernheim similarly testified that he would not go so far as to "make a prediction that American Express will vanish." FOF 681. Those witnesses instead predicted only that Amex would be less able to compete, in its role as an issuer, with issuing banks for cardholders if it had to compete with networks for merchants. But Plaintiffs seek only to allow competition to drive outcomes in the market for merchants' business, as it already does in the market for cardholders' business. Amex may find it unsettling to compete in new ways, but Congress – not Amex – has the right to decide whether competition

should occur. And Congress has established a "statutory policy [that] precludes inquiry into the question whether competition is good or bad." *Professional Engineers*, 435 U.S. at 695.

Other than Mr. Chenault's conclusory and unsupported testimony, Amex presented no evidence – no contemporaneous business documents, no stock analyst reports, no expert testimony, and no financial analysis – even suggesting that Amex will not be able to survive, or even thrive, if its ASRs are eliminated.

Both of Amex's economic experts conceded that it is not uncommon for defendants in antitrust cases to claim that enforcement of the antitrust laws would have dire consequences for their businesses. FOF 683. Such claims are often exaggerated and ultimately turn out be false. In *United States v. Visa*, for example, a Visa executive testified that enforcement of the antitrust laws against it would lead to the "destruction" of Visa and that Visa would "disappear." A MasterCard executive similarly testified that, if the government prevailed, "it could be a shattering blow to MasterCard." FOF 683. Both predictions, needless to say, failed to come true. Professor Gilbert previously explained that Microsoft made similar overstated and unfounded predictions in its case against the United States:

> In its defense, Microsoft contended that the company is a vigorous competitor that benefitted consumers by supplying high-quality innovative products. According to Microsoft, the antitrust action against it would dampen incentives for competition and slow software innovation.

FOF 683.

At bottom, Amex's position amounts to a claim that it cannot compete successfully with other card networks in a market unencumbered by its ASRs. But that view cannot be reconciled with Amex's arguments that it provides valuable services to merchants. If merchants and cardholders together receive enough value from Amex to justify its high price, Amex will continue to thrive without the ASRs. And if Amex's current strategy would be less effective

when it faces competition for both cardholder and merchant business, Amex can apply its considerable talents to adapt to a more competitive environment ultimately to the benefit of consumers.

2. Amex's claim that it should be protected from competition is invalid as a matter of law.

The Supreme Court has repeatedly rejected claims similar to those asserted by Amex. In *NCAA*, the NCAA limited the number of televised college football games and argued that its plan was "necessary to protect live attendance." 468 U.S. at 116. The Court, however, found that the NCAA was seeking to insulate itself "from the full spectrum of competition because of its assumption that the product itself is insufficiently attractive to consumers," which was "a justification that is inconsistent with the basic policy of the Sherman Act. The Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable." *Id.* at 116-17 (internal quotation marks and alteration omitted). Just as the NCAA feared that its football games would not attract enough spectators to the stadium if fans were able to watch more games on television, Amex fears that its cards will not attract enough charge volume if merchants have greater freedom to encourage their customers to pay in other ways. *NCAA* teaches that such fears cannot justify suppressing competition.

In *Indiana Federation*, the Supreme Court again rejected a defense akin to what Amex offers here. Like the dentists, who argued that competition among them to supply x-rays to insurance companies might "lead to the reduction of costs" through "unwise . . . choices," 476 U.S. at 463, Amex opposes merchants' freedom to encourage customers to pay with lower-cost cards because it believes that competition would produce a bad result. But *Indiana Federation of Dentists* explains that such an argument cannot justify the ASRs.

Finally, when a trade association of engineers adopted a "canon of ethics prohibiting competitive bidding by its members," the Supreme Court rejected its justification that the canon was needed to "minimiz[e] the risk that competition would produce inferior engineering work endangering the public safety." *See Professional Engineers*, 435 U.S. at 681. The Court rejected this justification and explained:

> The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. The heart of our national economic policy long has been faith in the value of competition. The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain – quality, service, safety, and durability – and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad.

Id. at 695 (internal quotation marks and citation omitted). Amex has used its ASRs just as the engineers used their ethical canon – to impose its own "views of the costs and benefits of competition on the entire marketplace." *Id.* Although the stakes were much higher in *Professional Engineers* – human lives, not merely rewards points, were on the line – the Supreme Court refused to excuse conduct harming competition.

Amex attempts to avoid this clear precedent by saying that it does not seek protection from competition for its own sake, but for competition's sake: if Amex has to change its business model, the argument goes, the remaining competition in the market will be fatally weakened. Amex's differentiated business model, it claims, deserves special protection. It is hard to take this seriously when one recalls how the Amex ASRs, together with those of Visa and MasterCard, crushed the differentiated business model of Discover. Professor Bernheim's response to that crushing was to suggest that Discover should do more to appeal to cardholders, rather than to merchants – in short, to become more like Amex. FOF 688. This candid admission that Amex wants to face only poor clones of itself actually illuminates the legal

principle: a competitor, such as Amex, does not get to dictate the terms on which competition will occur. Amex is entitled to a fair chance to offer its combination of price, quality, and service to the market. Indeed, the United States went to court in 2000 to secure that right. But that does not mean that Amex is entitled to obstruct others who want to offer the market a different combination. Amex cannot impose its own "views of the costs and benefits of competition on the entire marketplace." *Professional Engineers*, 435 U.S. at 695.

B. Potential antitrust violations by Visa do not justify Amex's Anti-Steering Rules.

Amex claims that it needs the ASRs to protect itself from Visa engaging in "exclusionary" practices. First, Amex's examples of other networks' allegedly "exclusionary" past conduct, such as Visa's preference campaigns, actually involved vigorous competition. *See supra* Part I.A.3.a. Second, the risk that Visa might engage in exclusionary conduct does not give rise to any procompetitive effects from Amex's ASRs that cannot be accomplished through less restrictive means – appropriate judicial actions – and therefore cannot justify Amex's ASRs, as a matter of law. FOF 699-700; COL 105. Should exclusionary conduct actually occur, Plaintiffs remain ready to challenge efforts to obstruct competition in the credit card industry, as the United States did in *Visa* and in this case. And Amex also may bring its own antitrust action if Visa violates the Sherman Act, just as it brought a previous antitrust lawsuit yielding billions of dollars.

C. Amex's free-riding claims do not justify its Anti-Steering Rules.

Courts reject alleged procompetitive justifications for restraints, including free-riding, when "evidence shows that defendants' motives are to restrict competition." *Visa*, 163 F. Supp. 2d at 401, 404-05. That is the case here. The record shows that, when Amex faced a competitive threat from Visa, it increased enforcement of its ASRs to prohibit merchants from

stating or displaying a "preference" for Visa or any other card network. FOF 87, 90-94. There is no contrary evidence indicating that Amex was motivated by fear of free-riding. The free-riding concerns are an after-the-fact rationalization, and lack record support.

There is also no evidence that there is a genuine risk of anticompetitive results from steering in the absence of the ASRs. For example, merchants cannot free ride on Amex rewards programs or other Amex promotions. If a merchant steers to another card, the customer receives no Amex rewards or promotional benefits. FOF 667-668. Amex conceded at trial, through its Chief Marketing Officer (John Hayes), that merchants do not receive a beneficial "halo" merely because they accept Amex. FOF 672. No doubt that is why many merchants opt for a "clean store" look and do not display Amex decals or signage or those of Amex competitors. FOF 673. This is the case at DryBar, one of the few merchants Amex called to testify.

All that leaves Amex with is evidence that it sells, and sometimes gives, data to merchants to help with marketing initiatives, identifying store locations, or for other purposes. The less-anticompetitive alternative solution to any free-riding concern here is for Amex to continue to charge separately for these services. "When payment is possible, free-riding is not a problem because the 'ride' is not free." *Chi. Prof'l Sports Ltd. P'ship v. NBA*, 961 F.2d 667, 675 (7th Cir. 1992); *see also* 13 Herbert Hovenkamp ¶ 2223b3, at 422 (3d ed. 2012) (concluding that "free riding would not be a problem" if seller could "price the service and the product separately"). And, of course, Amex can withhold data from merchants who act contrary to what Amex views as Amex's interests.

IV. Amex's two-sided platform arguments seek to misdefine the relevant market and to upset settled law.

Payment networks like Amex operate what Professors Katz, Gilbert, and Bernheim term "two-sided platforms."[2] The parties agree that antitrust analysis of Amex's ASRs should account for this two-sidedness, and Plaintiffs have considered the relevant two-sided features of the credit card industry throughout their case. *See infra* Part IV.A. Nevertheless, Amex accuses Plaintiffs of ignoring two-sidedness because Plaintiffs have defined relevant markets for network services provided to merchants, rather than for "transactions." But Amex's single market for "transactions" ignores the holding of *United States v. Visa*, 344 F.3d at 239, that network services and cards belong in separate markets. It also ignores the evidence that network services and cards are not reasonably interchangeable in the eyes of merchants or cardholders. *See infra* Part IV.B. Despite these inherent flaws, Amex advances a market for "transactions" as a way to broaden the relevant market – and thus saddle Plaintiffs with a heavier burden of proof than the law imposes. Amex can cite no precedent for its proposed treatment of two-sidedness, and its approach runs contrary to existing authority. *See infra* Part IV.C. But, in any event, the trial record demonstrates that Plaintiffs have carried even the improperly heavy burden that Amex would place on them. *See infra* Part IV.D.

---

[2] Although economists use the terms "two-sided platforms" and "two-sided markets" as synonyms, Trial Tr. 5022:24-5023:22 (Gilbert), the parties dispute whether this case involves one or more distinct antitrust markets. Against that backdrop, the term "two-sided market" could be interpreted as suggesting that there is a single antitrust market. "Two-sided platform" is a more neutral term that conveys the economic concept without taking a position on the legal question of whether the two sides are part of a single antitrust market.

A. Plaintiffs incorporated relevant facts about two-sidedness throughout their case.

Amex suggested throughout trial that Plaintiffs and Professor Katz ignored two-sided features of credit card networks, but Plaintiffs and Professor Katz incorporated relevant facts about those two-sided features into every step of their analysis – and in greater depth than any prior decision has required. In defining the relevant markets, Plaintiffs used two different approaches to the hypothetical monopolist test, both of which accounted for the fact that credit card networks operate two-sided platforms. *See supra* Part II.A.1. Plaintiffs' proof of market power relied, in part, on the two-sided concept that Amex acts as a gatekeeper for merchants to its insistent cardholders. That cardholder insistence explains how a network with 26% of merchant charge volume has power over merchants. *See supra* Part II.B.2. Amex exercised its market power through Value Recapture, which caused Amex's so-called two-sided price to increase merchant discount rates without increasing cardholder rewards. *See supra* Part II.B.3. In analyzing the ASRs' anticompetitive effects, Plaintiffs proved that the ASRs prevented Discover from winning more business with its strategy of offering low two-sided prices – that is, low prices to merchants and innovative cashback rewards to cardholders. *See supra* Part I.A.2. Plaintiffs also showed that existing competition for cardholders does not protect merchants from the harms caused by Amex's limitations on competition for merchant business. *See supra* Parts I.A-I.B.

B. The relevant product is network services to merchants, not "transactions."

Plaintiffs proved that there is a relevant antitrust market for GPCC card network services provided to merchants. *See supra* Part II.A. According to Amex, that was the wrong market, and Plaintiffs instead should have analyzed a market for "transactions," which Professor Gilbert

described as including "the flow around this whole loop between consumers and merchants." Trial Tr. 5015:7-5016:16 (Gilbert). Professor Gilbert's explanation seemingly encompasses (1) competition among networks to sell certain network services (including transaction processing, fraud protection, and payment guaranty) to merchants (sometimes through third party acquirers); (2) competition among networks to sell other network services (including access to a network of merchants and use of the network's brand) to issuing banks; and (3) competition among issuers (including both issuing banks such as Chase and Citibank and the issuing divisions of integrated firms such as Amex and Discover) to provide cards to cardholders. Professor Bernheim said that Professor Gilbert is "absolutely right" that "the product at issue in this case, the transactions, resides in a two-sided market," apparently meaning that the relevant product includes all of the same services that Professor Gilbert identified. Trial Tr. 6211:12-6216:25 (Bernheim); *see also* DX7828 at 4 (Bernheim demonstratives); DX7808 at 4 (Gilbert demonstratives). There are several reasons why the relevant market is not "transactions" as claimed by Amex and its experts.[3]

First, Amex's position – that there is a single market for all of the services provided to merchants and cardholders – is inconsistent with the decision in *United States v. Visa*, 344 F.3d 229 (2d Cir. 2003). There, the court defined two relevant markets – the "general purpose card market" and the "network services market for general purpose cards" – and concluded that those markets were "interrelated, but separate." *Id.* at 239. The court further held that Visa's and MasterCard's "exclusionary rules" harmed competition among the networks for issuers in the

[3] Amex's use of the term "transactions" should be distinguished from references by other parties to card networks providing "transaction services." As Professor Katz recognized, transaction services are synonymous with network services. Trial Tr. 6683:24-6684:14 (Katz). But Professor Gilbert and Bernheim apparently use the term "transactions" to encompass not only network services provided by networks to merchants and issuers, but also cardholder services provided by issuers to cardholders.

"network services market." *Id.* at 240-43. But there was no proof that the "exclusionary rules" harmed competition throughout "the flow around this whole loop between consumers and merchants."

Following *Visa*, Amex itself defined two separate relevant product markets for "general purpose card network services" and "general purpose credit and charge cards" in a suit where it extracted billions of dollars from Visa and MasterCard. *See* PX0106 ¶¶ 65-75; PX1407 at 78. Amex's allegations of two separate relevant markets in that case cannot be squared with its position here that there is a single relevant market for transactions.

Other cases have discussed markets for network services. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 562 F. Supp. 2d 392, 396-97 (E.D.N.Y. 2008) (denying motion to dismiss complaint alleging that "[t]he commodity in each product market is 'Network Services'"); *In re Visa Check/MasterMoney Antitrust Litig.*, No. 96-CV-5238, 2003 WL 1712568, at *2 (E.D.N.Y. 2003) ("Overwhelming evidence establishes that merchant demand for credit card services is distinct from merchant demand for debit card services . . . ."). Plaintiffs are not aware of any case that has defined a relevant market for transactions.

Second, it would be inconsistent with established principles of market definition to include both the network services that Amex sells to merchants and the cards that it issues to cardholders in the same relevant market. Relevant markets include only "products 'reasonably interchangeable by consumers for the same purposes.'" *Geneva Pharmaceuticals*, 386 F.3d at 496 (quoting *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956)). Yet Amex never suggested – much less proved – that cardholders find network services reasonably interchangeable with cards or that merchants find cards reasonably interchangeable with network services.

Third, when consumers do not view products as reasonably interchangeable, courts do not include them within the same relevant market even if they are sold by the same firm. For example, Kodak at one time sold both parts and service for its micrographic equipment, and it argued that there was a "unified market" for both because "there is no demand for parts separate from service." *See Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 462-63 (1992). If all products sold by an integrated firm belonged in the same relevant market, the Supreme Court would have accepted Kodak's argument. But the Court instead held that a reasonable trier of fact could conclude that parts and service were sold in separate markets. *Id.* Similarly here, the fact that Amex both sells network services to merchants and issues cards to cardholders does not suggest that network services and cards belong in a single relevant market for "transactions." *See Visa*, 344 F.3d at 239 (finding "separate" markets for network services and cards).

C. There is no precedent for Amex's claim that Plaintiffs must prove harm to competition outside of the relevant market.

To carry its initial burden under the rule of reason, a plaintiff must show only that "the defendants' challenged behavior had an *actual* adverse effect on competition as a whole *in the relevant market*" and need not prove how that behavior affects competition in any other market. *See Geneva Pharmaceuticals*, 386 F.3d at 506-07 (second emphasis added). Plaintiffs' proof that the ASRs interfere with competition among card networks for merchant business fully satisfies their initial burden. *See supra* Parts I.A-I.C.

Because Amex essentially concedes that the ASRs restrain competition over merchant discount fees, Amex necessarily argues that proof of such anticompetitive effects does not suffice to establish an antitrust violation. In other words, Amex maintains that Plaintiffs must prove more than harm to competition in the relevant market for network services to merchants.

One way that Amex articulates that position is to assert that there is a market for "transactions," and that Plaintiffs must prove harm there. Another way that Amex has made the same point is to claim that Plaintiffs must prove harm to "competition overall" – that is, across both sides of the two-sided platform.

According to Amex, Plaintiffs lack that proof because the benefits that its ASRs allegedly generate for cardholders excuse the harms that they cause to merchants. But courts have rejected the argument that "anticompetitive effects in one market could be justified by procompetitive consequences in another." *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 370 (1963); *see also United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972) (explaining that "the freedom to compete . . . cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy").

Those particular cases did not involve two-sided platforms, but courts have applied antitrust law in two-sided industries for decades, and Plaintiffs know of no case in which a court offset harms to competition in the relevant market with benefits to competition on the other side of a two-sided platform. To the contrary, despite recognizing that "every newspaper is a dual trader in separate though interdependent markets" for advertisers and readers, the Supreme Court has assessed whether a restraint affected competition among newspapers for advertisers, without considering effects on competition for readers. *See Times-Picayune*, 345 U.S. at 610, 614-21. Similarly, in *Visa*, the Second Circuit acknowledged that credit card networks separately compete both for issuing "banks' business" and "for merchants," but it focused on how, "[a]s a result . . . of the challenged policies, only two rival networks are effectively able to compete for the business of issuer banks," without discussing effects on competition for merchants. *Visa*,

344 F.3d at 239-40. These cases demonstrate that Plaintiffs need not prove that the ASRs' harmful effects on competition for merchant business outweigh their alleged benefits to competition for cardholders.

If Amex's claims concerning how its ASRs allegedly benefit cardholders are to be entertained, they can be considered, like any other allegedly procompetitive effect, in the second step of the rule-of-reason analysis. At that stage, "the burden shifts to the defendants to offer evidence of the procompetitive effects of their agreement." *Geneva Pharmaceuticals*, 386 F.3d at 507. Such an approach provides Amex with an opportunity to prove that its ASRs promote competition for cardholders in a manner that more than offsets the loss of competition at the merchant point of sale. *See Hertz Co. v. City of New York*, 1 F.3d 121, 130 (2d Cir. 1993) ("The traditional rule-of-reason approach requires the defendant to demonstrate that the procompetitive aspects of the agreement outweigh its anticompetitive aspects."); *see also Visa*, 344 F.3d at 243 (concluding that "defendants have failed to show that the anticompetitive effects of their exclusionary rules are outweighed by procompetitive benefits").

D. Plaintiffs proved that the ASRs harm merchants more than they benefit cardholders.

Regardless of which party bears the burden of proving how Amex's ASRs affect competition for cardholders, the trial record demonstrates that the ASRs have not generated cardholder benefits sufficient to offset the harms that they cause merchants. Although Amex shares with cardholders some of the revenues that it collects from merchants, cardholder benefits cannot fully offset merchant harms because Amex also retains a portion of those revenues as additional profit. FOF 136. The evidence showed, for instance, that during Value Recapture, Amex did not pass through to cardholders the proceeds from the increased merchant discount rate. FOF 110. Indeed, there was evidence of declines in the value of some Amex rewards.

FOF 578-80. Because there were no offsetting gains to the cardholder side when Amex increased prices on the merchant side, Professor Katz concluded that Value Recapture caused Amex's so-called two-sided price to increase. FOF 110. In other words, Value Recapture increased Amex's profits. FOF 530-33. But profits retained by Amex do not benefit cardholders and cannot be used to offset harms to merchants. *See Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 116 (1986) (explaining that it would be a "perverse result" to "hold that the antitrust laws protect competitors from the loss of profits due to . . . price competition"); *Drug Mart Pharmacy Corp. v. Am. Home Prods. Corp.*, 472 F. Supp. 2d 385, 402 (E.D.N.Y. 2007) ("[T]he antitrust laws are not intended to protect profit margins but consumer welfare.") (internal quotation marks omitted).

Even had Amex passed through all proceeds from Value Recapture to its own cardholders, higher merchant discount rates force merchants to raise the retail prices that they charge to all of their customers – including customers who pay with cheaper, non-rewards credit cards, debit cards, checks, and cash. FOF 137. Consumers who do not pay with rewards cards receive no rewards benefit, so Amex's ASRs harm them as well as merchants. Professor Gilbert agreed "that while non-American Express credit card users are paying the price, they're not getting the benefit of the American Express rewards" or getting "the benefit of the lower price paid by American Express cardholders." FOF 261.

Conclusion

Amex's ASRs impede the competitive process and lack redeeming procompetitive effects. Accordingly, the Court should find that Amex has violated Section 1 of the Sherman Act by adopting and enforcing the ASRs.

Dated: September 18, 2014

Respectfully submitted,

U.S. DEPARTMENT OF JUSTICE

/s/Craig W. Conrath
Craig W. Conrath
(craig.conrath@usdoj.gov)
Ethan C. Glass
(ethan.glass@usdoj.gov)
Andrew J. Ewalt
(andrew.ewalt@usdoj.gov)
Mark W. Ryan
(mark.w.ryan@usdoj.gov)
U.S. Department of Justice, Antitrust Division
450 Fifth Street, NW, Suite 4000
Washington, DC 20530
Tel: (202) 532-4560
Fax: (202) 307-9952

Counsel for Plaintiff United States of America

OFFICE OF THE ATTORNEY GENERAL
State of Ohio

/s/Mitchell L. Gentile
Mitchell L. Gentile
(mitchell.gentile@ohioattorneygeneral.gov)
Office of the Ohio Attorney General
150 East Gay Street, 23rd Floor
Columbus, OH 43215
Tel: (614) 466-4328
Fax: (614) 995-0266

Counsel for State of Ohio and on behalf of all Plaintiff States