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)

PLAINTIFFS' SUR-REPLY MEMORANDUM OF LAW IN FURTHER OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

February 12, 2014

Table of Authorities

Cases

Abbreviations

Amex	Defendants American Express Company and American Express Travel Related Services Company, Inc.
Amex Reply	Reply Memorandum of Law in Further Support of Defendants' Motion for Summary Judgment
Facts	Plaintiffs' Rule 56.1 Counter-Statement of Material Facts in Opposition to Defendants' Motion for Summary Judgment
Plaintiffs	Plaintiffs United States of America and the States of Arizona, Connecticut, Idaho, Illinois, Iowa, Maryland, Michigan, Missouri, Montana, Nebraska, New Hampshire, Ohio, Rhode Island, Tennessee, Texas, Utah, and Vermont
Pls.' Br.	Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment

Amex's opening brief ignored the Supreme Court's decision in *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986) ("*IFD*") (holding that a plaintiff need not separately prove that a defendant has market power if it proves actual adverse effects on competition), and ignored the Second Circuit cases applying *IFD*'s reasoning to vertical restraints. *See* Pls.' Br. 8-10. In its reply, Amex argues for the first time that *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), overruled this precedent. But Amex reads too much into *Leegin*'s narrow holding and ignores the rationale of the decision.

In *Leegin*, the defendant made "Brighton"-brand leather goods and enforced a "resale price maintenance" policy prohibiting retailers from discounting Brighton goods. The policy did not restrain competition between Brighton and other brands. It did, however, restrain competition on the price of Brighton goods, and one of the defendant's retailers challenged the policy under Section 1 of the Sherman Act. As a starting point, the Supreme Court noted the two ways to "test[] whether a practice restrains trade in violation of § 1": (1) the rule of reason, in which "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited"; and (2) the *per se* rule, which "treat[s] categories of restraints as necessarily illegal." *Id.* at 885-86 (quotation marks omitted). Until *Leegin*, courts had treated resale price maintenance as *per se* illegal, but *Leegin* overruled that precedent and held that such "[v]ertical price restraints are to be judged according to the rule of reason." *Id.* at 907.

According to Amex, *Leegin* undermined the Second Circuit cases applying *IFD* to vertical restraints because it "clarified that . . . reliance on horizontal rules in vertical cases is inappropriate." Amex Reply 3. But *Leegin* describes the rule of reason as "the accepted standard for testing whether a practice restrains trade in violation of § 1," without distinguishing between horizontal and vertical practices. *Leegin*, 551 U.S. at 885. And after *Leegin*, courts

within this Circuit describing the rule of reason consistently continue to recognize that, if a plaintiff proves that a vertical restraint has actual adverse effects on competition, market power need not be proven separately.[1] Although Amex asserts that it is "not aware of . . . *any* rule of reason decision in which a vertical agreement was found to violate Section 1 based on 'direct effects' evidence alone," Amex Reply 3, Amex fails to cite a single case in which a plaintiff proved that a vertical restraint had actual adverse effects on interbrand competition, yet the court declined to find a violation because there was no additional, separate proof of market power.

Amex also argues that *IFD* "applied a 'quick look' analysis." Amex Reply 1. But the Second Circuit has squarely held that vertical cases applying *IFD* "were not 'quick look' cases" and that the "use of anticompetitive effects to demonstrate market power . . . is *not* limited to 'quick look' or 'truncated' rule of reason cases." *Todd v. Exxon Corp.*, 275 F.3d 191, 207 (2d Cir. 2001) (Sotomayor, J.) (emphasis added) (citing *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.*, 61 F.3d 123 (2d Cir. 1995), and *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90 (2d Cir. 1998)). Moreover, the Supreme Court has explained that a "quick look" is simply one way to apply the rule of reason. *See California Dental Ass'n v. FTC*, 526 U.S. 756, 780-81 (1999).

Despite its heavy reliance on *Leegin*, Amex ignores the decision's rationale. *Leegin* explained that the vertical restraints at issue there should be subject to the rule of reason (rather than the *per se* rule) because they can "stimulate interbrand competition – the competition among manufacturers selling different brands of the same type of product – by reducing intrabrand competition – the competition among retailers selling the same brand." *Leegin*, 551 U.S. at 890.

[1] *See Solent Freight Servs., Ltd. v. Alberty*, 914 F. Supp. 2d 312, 323 (E.D.N.Y. 2012) (Garaufis, J.) (citing *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90 (2d Cir. 1998)); *Wellnx Life Sciences Inc. v. Iovate Health Sciences Research Inc.*, 516 F. Supp. 2d 270, 294 (S.D.N.Y. 2007); *see also Bookhouse of Stuyvesant Plaza, Inc. v. Amazon.com, Inc.*, No. 13-CV-1111, 2013 WL 6311202, at *4 (S.D.N.Y. Dec. 5, 2013); *Habitat, Ltd. v. Art of the Muse, Inc.*, No. 07-CV-2883, 2009 WL 803380, at *5 (E.D.N.Y. Mar. 25, 2009).

Leegin also emphasized that the "promotion of interbrand competition is important because the primary purpose of the antitrust laws is to protect this type of competition." *Id.* (alteration and quotation marks omitted). Unlike the restraint in *Leegin*, Amex's Merchant Restraints suppress – rather than promote – interbrand competition among card networks by obstructing lower prices from Amex's competitors. *See* Pls.' Br. 4-5, 10; Facts ¶¶ 336-476. Thus, *Leegin* provides no shield for the Merchant Restraints.

Given the substantial and undisputed evidence that the Merchant Restraints cause actual adverse effects on competition,[2] it is understandable that Amex would seek to impose on Plaintiffs and the Court the added complexity of addressing separate proof of market power before those effects can be remedied. The Supreme Court and the Second Circuit, however, have made clear that this additional step is not required.[3] Indeed, proof of actual adverse effects on competition is "a strong indicator of market power" that "arguably is more direct evidence of market power than calculations of elusive market share figures." *Todd*, 275 F.3d at 206. In demanding that market power be assessed in isolation from the challenged conduct, Amex seeks to immunize vertical agreements that indisputably harm interbrand competition, a result that would turn antitrust law on its head. And even if separate proof of market power were required, Plaintiffs have supplied such proof. *See* Pls.' Br. 11-25; Facts ¶¶ 290-315, 477-558. Amex's motion for summary judgment should be denied.

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[2] In a parenthetical within a footnote, Amex claims to "dispute[]" the evidence that the Merchant Restraints harm interbrand competition, but in the next breath asserts that it "need not address [that evidence] in detail" because it considers the evidence "irrelevant." *See* Amex Reply 4 n.6.

[3] *See IFD*, 476 U.S. at 460-61 ("[P]roof of actual detrimental effects . . . can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects.") (quotation marks omitted); *Geneva Pharms. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 509 (2d Cir. 2004) ("If plaintiff can demonstrate an actual adverse effect on competition . . ., there is no need to show market power in addition.").

Dated: February 12, 2014

Respectfully submitted,

U.S. DEPARTMENT OF JUSTICE

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