No. 15-1672

In the United States Court of Appeals
for the Second Circuit

UNITED STATES OF AMERICA, *et al.*,

Plaintiffs-Appellees,

v.

AMERICAN EXPRESS COMPANY, *et al.*,

Defendants-Appellants.

(Full caption commences inside cover)

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF OF *AMICI CURIAE* AHOLD U.S.A., INC.; ALBERTSONS LLC; BI-LO LLC; CVS PHARMACY, INC.; THE GREAT ATLANTIC AND PACIFIC TEA COMPANY, INC.; H.E. BUTT GROCERY CO.; HY-VEE, INC.; THE KROGER CO.; MEIJER, INC.; PUBLIX SUPER MARKETS, INC.; RALEY'S INC.; RITE AID CORPORATION; SAFEWAY INC.; SUPERVALU, INC.; AND WALGREEN CO. IN SUPPORT OF THE PLAINTIFFS-APPELLEES AND THE AFFIRMANCE OF THE ORDER ENTERED BELOW

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UNITED STATES OF AMERICA, STATE OF MARYLAND, STATE OF MISSOURI, STATE OF VERMONT, STATE OF UTAH, STATE OF ARIZONA, STATE OF NEW HAMPSHIRE, STATE OF CONNECTICUT, STATE OF IOWA, STATE OF MICHIGAN, STATE OF OHIO, STATE OF TEXAS, STATE OF ILLINOIS, STATE OF TENNESSEE, STATE OF MONTANA, STATE OF NEBRASKA, STATE OF IDAHO, STATE OF RHODE ISLAND, *et al.*,

Plaintiffs-Appellees,

STATE OF HAWAII,

Plaintiff,

v.

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

Defendants-Appellants,

MASTERCARD INTERNATIONAL INCORPORATED, VISA INC.,

Defendants,

CVS PHARMACY, INC., MEIJER, INC., PUBLIX SUPER MARKETS, INC., RALEY'S, SUPERVALU, INC., AHOLD U.S.A., INC., ALBERTSONS LLC, THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., H.E. BUTT GROCERY CO., HYVEE, INC., THE KROGER CO., SAFEWAY INC., WALGREEN C., RITE-AID CORP., BI-LO LLC, HOME DEPOT USA INC., 7-ELEVEN, INC., ACADEMY, LTD., DBA ACADEMY SPORTS + OUTDOORS, ALIMENTATION COUCHE-TARD INC., AMAZON.COM, INC., AMERICAN EAGLE OUTFITTERS, INC., ASHLEY FURNITURE INDUSTRIES INC., BARNES & NOBLE, INC., BARNES & NOBLE COLLEGE BOOKSELLERS, LLC, BEALL'S, INC., BEST BUY CO., INC., BOSCOVS, INC., BROOKSHIRE GROCERY COMPANY, BUC-EE'S LTD., THE BUCKLE, INC., THE CHILDRENS PLACE RETAIL STORES, INC., COBORNS INCORPORATED, CRACKER BARREL OLD COUNTRY STORE, INC., D'AGOSTINO SUPERMARKETS, INC., DAVIDS BRIDAL, INC., DBD, INC., DAVIDS BRIDAL CANADA, INC., DILLARD'S, INC., DRURY HOTELS COMPANY, LLC, EXPRESS LLC, FLEET AND FARM OF GREEN BAY, FLEET WHOLESALE SUPPLY CO. INC., FOOT LOCKER, INC., THE GAP, INC., HMSHOST CORPORATION, IKEA NORTH AMERICA SERVICES, LLC, KWIK TRIP, INC., LOWE'S COMPANIES, INC., MARATHON PETROLEUM COMPANY LP, MARTIN'S SUPER MARKETS, INC., MICHAELS STORES, INC., MILLS E-COMMERCE ENTERPRISES, INC., MILLS FLEET FARM, INC., MILLS MOTOR, INC., MILLS AUTO ENTERPRISES, INC., WILLMAR MOTORS, LLC, MILLS AUTO CENTER, INC., BRAINERD LIVELY AUTO, LLC, FLEET AND FARM OF MONOMONIE, INC., FLEET AND FARM OF MANITOWOC, INC., FLEET AND FARM OF PLYMOUTH, INC., FLEET AND FARM SUPPLY CO. OF WEST BEND, INC., FLEET AND FARM OF WAUPACA, INC., FLEET WHOLESALE SUPPLY OF FERGUS FALLS, INC., FLEET AND FARM OF ALEXANDRIA, INC., NATIONAL ASSOCIATION OF CONVENIENCE STORES, NATIONAL GROCERS ASSOCIATION, NATIONAL RESTAURANT ASSOCIATION, OFFICIAL PAYMENTS CORPORATION, PACIFIC SUNWEAR OF CALIFORNIA, INC., P.C. RICHARD & SON, INC., PANDA RESTAURANT GROUP, INC., PETSMART, INC.,

RACETRAC PETROLEUM, INC., RECREATIONAL EQUIPMENT, INC., REPUBLIC SERVICES, INC., RETAIL INDUSTRY LEADERS ASSOCIATION, SEARS HOLDINGS CORPORATION, SPEEDWAY LLC, STEIN MART, INC., SWAROVSKI U.S. HOLDING LIMITED, WAL-MART STORES INC., WHOLE FOODS MARKET GROUP, INC., WHOLE FOODS MARKET CALIFORNIA, INC., MRS. GOOCH'S NATURAL FOOD MARKETS, INC., WHOLE FOOD COMPANY, WHOLE FOODS MARKET PACIFIC NORTHWEST, INC., WFM-WO, INC., WFM NORTHERN NEVADA, INC., WHOLE FOODS MARKET, ROCKY MOUNTAIN/SOUTHWEST, L.P., THE WILLIAM CARTER COMPANY, YUM! BRANDS, INC., SOUTHWEST AIRLINES CO.,

Movants.

CORPORATE DISCLOSURE STATEMENTS OF *AMICI CURIAE*

Pursuant to Federal Rule of appellate Procedure 26.1, the undersigned counsel for the *Amici* certifies the following:

Amicus Curiae Ahold U.S.A., Inc. states that it is a wholly-owned subsidiary of Koninklijke Ahold N.V. Koninklijke Ahold N.V. is incorporated in the Netherlands and its shares are publicly traded.

Amicus Curiae Albertson's LLC states that it is an indirect wholly-owned subsidiary of AB Acquisition LLC, which is privately held.

Amicus Curiae BI-LO LLC states that it is an indirect wholly-owned subsidiary of Southeastern Grocers LLC, which is privately held.

Amicus Curiae CVS Health, Inc. states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Amicus Curiae The Great Atlantic & Pacific Tea Company, Inc. states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Amicus Curiae HEB Grocery Company, L.P. states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Amicus Curiae Hy-Vee, Inc. states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Amicus Curiae The Kroger Co. states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Amicus Curiae Meijer, Inc. states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Amicus Curiae Publix Super Markets, Inc. states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Amicus Curiae Raley's states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Amicus Curiae Rite Aid Corporation states that it has no parent corporation and T. Rowe Price is the only entity that owns 10% or more of Rite Aid Corporation's stock.

Amicus Curiae Safeway Inc. states that it is an indirect wholly-owned subsidiary of AB Acquisition LLC, which is privately held.

Amicus Curiae SuperValu, Inc. states that it has no parent corporation and that BlackRock Inc., a publicly held corporation, owns 10% or more of the stock of SuperValu, Inc.

Amicus Curiae Walgreen Co. states that it is a wholly-owned subsidiary of Walgreens Boots Alliance, Inc. Walgreens Boots Alliance, Inc. is a Delaware corporation and its shares are publicly traded.

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IDENTITY OF *AMICUS CURIAE*

The *Amici* are fifteen grocery and drug store chain merchants and include some of the largest retailers in the United States.[1] Each of the *Amici* accepts all major credit card brands, including MasterCard, Visa, Discover and American Express ("Amex"). Each of the *Amici* has executed a written card acceptance agreement with Amex. Each agreement contains the Non-Discrimination Provisions ("NDPs"), which are the subject of the District Court's February 19, 2015 decision (cited as "SPA at ___") and this appeal.

Collectively, the *Amici* pay more than a billion dollars per year in payment card fees (sometimes referred to as "swipe fees") to the card networks and hundreds of millions of dollars per year to Amex. The *Amici* believe and the District Court found that Amex's NDPs (sometimes referred to as "anti-steering rules") obstruct horizontal, interbrand price competition among the various credit card networks with regard to services offered to merchants and cause the merchants to pay significantly higher swipe fees to all of the credit card networks

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[1] The *Amici* are: Ahold U.S.A., Inc.; Albertsons LLC; BI-LO LLC; CVS Pharmacy, Inc.; The Great Atlantic and Pacific Tea Company, Inc.; H.E. Butt Grocery Co.; Hy-Vee, Inc.; The Kroger Co.; Meijer, Inc.; Publix Super Markets, Inc.; Raley's Inc.; Rite Aid Corporation; Safeway Inc.; Supervalu, Inc.; and Walgreen Co. This brief was authored by counsel for the *Amici*. No party or counsel for any party contributed any money to fund the preparation of this brief. No person other than the *Amici* and their counsel contributed any money for the preparation of this brief.

than they would otherwise pay. The *Amici* respectfully submit that they have a vital interest in the outcome of this litigation.

The United States of America, the seventeen state plaintiffs[2] and the Amex defendants have consented to the filing of this *amicus* brief.

I. Amex's NDPs Obstruct Interbrand Price Competition and Block the Pro-Competitive Reforms in the Credit Card Industry

Beginning in 2005, the *Amici* in individual (non-class action) cases challenged Visa's and MasterCard's anti-steering rules for obstructing interbrand price competition for merchant network services. In 2008, the *Amici* challenged Amex's anti-steering rules on the same basis. Visa's, MasterCard's, and Amex's anti-steering rules had been in effect for decades, and had resulted in U.S. merchants paying swipe fees that were among the highest in the developed world. The *Amici*'s litigation efforts over the last 10 years have given them a unique insight into the significance of the Government's successful challenge to Amex's anti-steering rules and the soundness of the factual and economic findings supporting the District Court's decision.

[2] The United States and the seventeen state plaintiffs are hereinafter referred to as the "Government."

A. The Cases Against MasterCard and Visa

In 2005, the *Amici* filed individual antitrust suits against MasterCard and Visa.[3] The *Amici* alleged that the MasterCard and Visa anti-steering rules, which closely parallel Amex's NDPs, obstructed interbrand price competition for credit card network services provided to merchants. Class actions alleging similar claims were subsequently filed against both MasterCard and Visa. The individual claims of the *Amici* and the class claims were consolidated for pretrial proceedings before Judge Gleeson of the Federal District Court for the Eastern District of New York.

In 2010, the Government filed suit in the District Court for the Eastern District of New York against MasterCard, Visa and Amex, alleging that their anti-steering rules injured interbrand competition among credit card networks and resulted in merchants paying higher fees to the credit card networks than they would in an unfettered market. SPA at 1. The case was assigned to Judge Garaufis. On the same day that the Government complaint was filed, MasterCard and Visa entered into consent decrees and agreed to "remove or revise the bulk of their challenged restraints." SPA at 2. Specifically, MasterCard and Visa agreed to rescind their restraints that barred merchants from (1) offering a customer a discount, rebate or free goods or services if the customer used a particular form of payment or brand of payment card; (2) encouraging or providing benefits and

[3] Eleven of the *Amici* filed suit in 2005. The remainder filed thereafter.

incentives to customers who use a particular form of payment or brand of payment card; (3) promoting or stating a preference for a particular brand of payment card; or (4) informing its customers of the costs incurred by the merchant to accept a particular brand of payment card. Dkt. 143, 5-7 (Sec.IV.A., ¶¶1-8). Unlike MasterCard and Visa, Amex did not settle the Government case. The Amex case was tried in 2014 and resulted in the decision that is now on appeal.

In 2012, the *Amici* and the class plaintiffs settled their cases against MasterCard and Visa. MasterCard and Visa again agreed to eliminate their anti-steering rules, giving the merchant community the right to enforce those concessions. The class settlement was approved by Judge Gleeson on December 13, 2013. Some class members objected to the settlement because the elimination of the MasterCard and Visa anti-steering rules would not be effective as long as Amex's anti-steering rules were still in place. *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, 986 F. Supp. 2d 207, 233-34 (E.D.N.Y. 2013). The reason for this is simple. Virtually all large merchants accept Amex cards. SPA at 125. As long as they are prohibited by Amex from steering customers to lower-cost cards, they remain powerless to reward a price-cutting credit card network with greater volume, and are therefore unable to stimulate interbrand price competition by offering greater volume to a credit card network in return for lower swipe fees.

Judge Gleeson referred to this as "the American Express problem." *Id.* at 234. He agreed that the "merchant restraints imposed by American Express" would "undermine the relief" in the MasterCard/Visa class settlement, but pointed out that the "American Express problem … must be (and in fact is being) addressed elsewhere." *Id*. at 233-34. Clearly, Judge Gleeson was looking to the anti-steering cases pending against Amex to solve the "American Express problem" and remove the last impediment to industry-wide reform and interbrand price competition.

When the Government entered into the consent decrees with MasterCard and Visa, it too recognized that the removal of the MasterCard and Visa anti-steering rules would not lead to greater price competition among the credit card networks until the Amex anti-steering rules were also removed. In the Competitive Impact Statement submitted in support of the consent decree, the United States advised the court that despite the elimination of the MasterCard and Visa anti-steering rules, "[m]erchants that accept American Express cards, including the vast majority of the major retailers in the United States, will be unable to influence customers' payment methods because the anticompetitive American Express Merchant Restraints will continue to constrain those merchants" until the Amex rules are eliminated. (Dkt. 5, at 14). The United States also advised the court that

"American Express stands as the last obstacle to achieving the full benefits of competition now suppressed by the challenged Merchant Restraints." *Id.*

B. The Cases Against Amex

In 2008, the *Amici* filed suit against Amex, alleging that its anti-steering rules injure interbrand price competition and violate the Sherman Act.[4] The *Amici* did so in order to solve the "American Express problem" and allow merchants to reward a card network with greater card volume in return for lower fees so that credit card networks would have an incentive to compete against each other on price. *See* SPA at 6, 98, 102, 127.

In their complaints, the *Amici* alleged, and the court below has now found, that Amex's anti-steering rules obstruct horizontal, interbrand price competition. SPA at 6, 25, 100, 127.[5] More specifically, the *Amici* alleged, and the court below has now found, that Amex's anti-steering rules prevent merchants from using price, benefits, rewards or truthful price information to incentivize retail customers to use the credit card of a network that charges the merchant a lower swipe fee. SPA at 25-26. For example, if Amex charges a merchant a fee of 2-1/2%, but

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[4] In 2008, five of the *Amici* filed suit against Amex. In 2011, the remaining ten *Amici* filed suit.

[5] Contrary to Amex's assertion, the court below did not "recognize" that "steering endangers the cardholder's purchasing experience and therefore endangers the network [*i.e.*, Amex] itself. SPA 24." Amex Main Br. at 2. The sentence that Amex quotes is not a holding of the District Court. It is the court's recitation of the Amex position, which the court then rejects. *See* SPA at 24.

Discover charges that merchant only 1%, the merchant might offer a retail customer a 1% discount if he or she switches from an Amex card to a Discover card.[6] A retail customer who wants to avail him or herself of the discounted price would switch from using an Amex card to using a Discover card. *See* SPA at 109-11. Retail customers who believe that Amex's service or rewards are worth the extra charge would continue to use the Amex card and, in effect, pay for the Amex services and reward points they receive – as they should – by reimbursing the merchant for Amex's higher fee. However, if the customer did not believe that the Amex rewards or service were worth the additional cost, he or she could switch to the lower-cost Discover card. In that event, Amex would face the paradigm competitive choice: (1) it could compete on price against Discover and reduce its merchant fees, in which case the merchant would no longer have any incentive to steer customers away from Amex, or (2) it could suffer the procompetitive loss of volume due to its comparatively high price. In either event, consumer welfare would be enhanced by the interbrand price competition and the prices paid by

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[6] This example is modeled on proven facts. The District Court found that Discover had a business plan to lower its fees to merchants in return for greater transactional dollar volume. SPA at 108-110. Discover's lower prices, however, failed to generate any additional sales because the Amex anti-steering rules prohibited all of the major merchants in America from steering customers to the lower-cost Discover card. *Id*. Discover's CEO, Roger Hochschild, testified that Discover is anxious to return to this business model if the Amex anti-steering rules are eliminated. SPA at 120.

merchants to credit card networks and by retail customers to merchants would both go down. SPA at 4, 6, 98, 102, 111, 113-14, 127.

In addition to preventing merchants from using lower prices to steer customers to lower-cost card services, Amex's rules prevent the merchants from offering reward points, free goods, or improved services (faster checkout lane, free delivery, etc.) to incentivize customers to use a lower-cost card. The Amex rules even prevent the merchants from truthfully informing their customers that Amex cards cost the merchant more to accept than other types of cards and that the merchant would prefer that the customers use a lower-cost card. SPA at 30.

The effect of Amex's anti-steering rules is to eliminate interbrand price competition between Amex, MasterCard, Visa and Discover. SPA at 6, 25, 65, 100, 127. The Amex rules prevent a competing credit card network or a new entrant from reaping the competitive reward of greater sales volume in return for offering a lower price. As the District Court held:

> [Amex's] NDPs short-circuit the ordinary price-setting mechanism in the network services market by removing the competitive "reward" for networks offering merchants a lower price for acceptance services. The result is an absence of price competition among American Express and its rival networks.

SPA at 6; *see also id*. at 98, 102, 127. Thus, the Amex anti-steering rules not only protect Amex from losing sales volume due to its comparatively high merchant prices, but also remove the "incentive" for any other card network to compete on

price by "sever[ing] the essential link between price and sales of network services." SPA at 98; *id*. at 127.

Discover did, in fact, attempt to compete against Amex and the other credit card networks by "aggressively" pricing its network services "significantly below those of its competitors" in an effort to increase its sales volume. SPA at 108. The plan, however, failed due to the inability of merchants to use price or other incentives to direct customers to the lower-cost Discover cards. *Id*. at 108-09. The District Court found that Discover "[r]ecognizing that its lower prices would not drive incremental volume to its network in a market subject to limitations on merchant steering, … abandoned its low-price business model." SPA at 109-10. The District Court further found "that market prices [for network services] have risen dramatically in the absence of merchant steering" (SPA at 6) and that "American Express's merchant restraints have allowed all four networks to raise their swipe fees more easily and more profitably than would have been possible were merchants permitted to influence their customers' payment decisions." SPA at 111. Amex does not claim that any of these findings are clearly erroneous.

Over the last ten years, great progress has been made. MasterCard and Visa have agreed with the Government and the merchant community to eliminate their anti-steering rules. Discover has testified that it is anxious to return to its aggressive low price strategy if merchants are not prevented by the Amex rules

from rewarding it with greater volume in return for its lower prices. SPA at 120. Only the Amex anti-steering rules stand in the way of this industry-wide reform[7] and the interbrand price competition that will come with the affirmance of the decision below. Amex has blocked the forces of competition for long enough. It is time for its anti-steering rules to be removed and price competition among the card networks for merchant acceptance to commence.

II. Amex Failed to Meet Its Burden of Offering Evidence of Procompetitive Effects

A. The Burden of Showing a Procompetitive Justification for the NDPs Shifted to Amex

The District Court determined that Amex's anti-steering rules violate §1 of the Sherman Act (15 U.S.C. §1) under the rule of reason. SPA at 33. The rule of reason involves a three-step burden shifting analysis. SPA at 35. First, the plaintiff "bear[s] the initial burden to demonstrate an actual adverse effect on competition." *Geneva Pharm. Tech. Corp. v. Barr Labs., Inc.*, 386 F.3d 485, 509

[7] The industry-wide reforms also includes the Durbin Amendment to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, § 1075, 124 Stat. 1376, 2068 (codified in relevant part at 15 U.S.C. § 1693o-2). The Durbin Amendment allows merchants to give discounts to consumers who use debit cards. *Id*.; *see also* R.C.F.R. §235. The Amendment does not, however, allow a merchant to specify which debit cards will receive a discount by the identity of the issuer or the brand of the card. *Id*. As a result, a merchant cannot give a discount to the debit card of one of the networks but not the others so as to reward a network with greater volume in return for lower prices. *See id*. Thus, the Durbin Amendment does not give merchants the ability to play one network off against the others so as to incentivize interbrand price competition.

(2d Cir. 2004). Second, "the burden then shifts to defendants to offer procompetitive justifications for the arrangement." *Id*. at 509. Third, if the defendants "can provide such proof, the burden shifts back to the plaintiffs to prove that any legitimate competitive benefits offered by the defendants could have been achieved through less restrictive means." *Id*. at 507; SPA at 35-36.

Amex claims that in order for the Government to meet its initial burden, it had to show not only an adverse effect on interbrand price competition on network services offered to the merchants, but also to *disprove* that benefits to the cardholders offset the adverse effects on price competition for network services sold to merchants. Amex Main Br. at 2-4, 40, 42, 51-52. In fact, Amex goes so far as to argue that (1) the Government was obligated to calculate a single "two-sided price" by measuring the amount by which prices paid to Amex by the merchants went up against the amount by which Amex hypothesizes that the price paid by Amex cardholders went down as a result of increased reward points funded by the higher merchant fees and (2) Amex bore no burden to present evidence of the purported procompetitive effects of its conduct until the Government first disproved that the (imagined) procompetitive benefits outweighed the demonstrated adverse effects on competition. *Id*.

The reason why Amex advances this facially implausible interpretation of the burden-shifting aspects of rule of reason is simple. Amex tried to carry its

burden of proving offsetting procompetitive benefits by having its expert economist, Prof. Bernheim, calculate a "two-sided price" by subtracting the supposedly greater "negative price" paid by Amex cardholders (*i.e.*, the value of rewards to the cardholder funded by the increase in price paid by the merchants) from the increase in price paid by the merchants. Prof. Bernheim's calculation, however, was plainly deficient and it was rejected by the District Court as unreliable. SPA at 91-93.[8] On appeal, Amex does not even attempt to defend Prof. Bernheim's unreliable calculation. As a result, Amex is left with no evidence of a procompetitive justification. If the Government carried its initial burden of showing an adverse effect on competition, the case is over.

To avoid that result, Amex attempts to reconfigure the burden-shifting rule of reason test beyond recognition. Amex argues that the Government must initially predict what Amex's evidence of procompetitive effects will be and then disprove the existence of those hypothetical procompetitive effects before the burden shifts

[8] Prof. Bernheim subtracted billions of dollars of payments made by Amex to a "handful" of merchants in connection with co-brand relationships from the swipe fees paid by all merchants to reach an average discount fee rate. SPA at 91-92. The co-brand payments, however, are essentially marketing expenses paid by Amex to a few merchants to help Amex increase its number of cardholders and is separate from the swipe fees paid by the merchants to Amex for card network services. SPA at 92. The court was also not persuaded that Prof. Bernheim had properly measured the value of reward points paid to the Amex cardholders. SPA at 92. As a result, the court held that Prof. Bernheim had not provided a "reliable basis" for calculating a two-sided price. SPA at 93.

to Amex to offer any evidence of such effects. In effect, Amex claims that even if the Government demonstrates an adverse effect on interbrand price competition on services offered to the merchants, and Amex offers no evidence of a procompetitive justification; the Government still loses unless it has disproved the existence of a hypothetical procompetitive justification that is unsupported by any evidence. Not surprisingly, Amex has never been able to cite any authority in support of this position. SPA at 43, 134-35.

Amex attempts to justify its extraordinary approach to burden-shifting by reading exactly three words completely out of context. Purporting to quote from *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 127 (2d Cir. 1995), Amex argues that the burden of presenting evidence of a procompetitive justification does not shift to the defendant until the plaintiff has proved "an actual adverse effect on competition **as a whole** in the relevant market." Amex Main Br. at 38 (emphasis original). Amex interprets the words "as a whole" to mean that the Government must prove that the injury to price competition among card networks on services offered to merchants outweighs the hypothesized benefit to competition for cardholders before the burden shifts to Amex to offer evidence of a procompetitive benefit. Amex Main Br. at 2-4, 38-42.

The above quote on which Amex relies does not actually come from *K.M.B. Warehouse*. It is a passage from *Capital Imaging Assocs. P.C. v. Mohawk Valley*

Med. Assocs., 996 F.2d 537, 543 (2d Cir. 1993), which is quoted by *K.M.B. Warehouse*. *See* at 61 F.3d 127. In *Capital Imaging*, the Court was merely making the point that the Sherman Act requires an injury to competition and that harm to "an individual competitor will not suffice." *Id*. at 543. The other cases cited by Amex similarly hold only that the Sherman Act protects competition, not individual competitors. *See Tops Mkt., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 96 (2d Cir. 1998) (cited at Amex Main Br. at 38) (plaintiff must initially show "an actual adverse effect on competition as a whole.… [Proof that] it has been harmed as an individual competitor will not suffice"); *Todd v. Exxon Corp.*, 275 F.3d 191, 213-14 (2d Cir. 1998) (cited at Amex Main Br. at 42) (antitrust plaintiff "must allege not only cognizable harm to herself, but an adverse effect on competition market-wide").

Here, Amex does not even contend that its anti-steering rules merely injured an individual competitor as opposed to interbrand price competition between the four major credit card networks with regard to network services offered to merchants.[9] Nor do any of the cases cited by Amex hold or even address the issue of whether a plaintiff must disprove procompetitive effects hypothesized by the

[9] Indeed, the District Court took Amex to task for arguing that it should be protected from competition from other card networks and pointed out that the antitrust laws protect competition, not individual competitors, like Amex. SPA at 132.

defendant before the burden shifts to the defendant to come forward with evidence of such procompetitive effects. Furthermore, if the plaintiff must initially prove an adverse effect on competition and disprove the existence of offsetting procompetitive effects, the burden of coming forward with evidence of procompetitive effects could never shift to the defendant. If the entire burden falls on the plaintiff, as Amex contends, the burden-shifting framework of the rule of reason would be meaningless.

The manner in which burden-shifting under the rule of reason actually works is well demonstrated by this Court's ruling in *Geneva Pharmaceutical*. In that case, the defendant was alleged to have entered into an unlawful exclusive dealing arrangement on the chemical compound clathrate. This Court pointed out that exclusive dealing arrangements can harm competition by preventing competitors from obtaining a supply of a needed input, but can also "have procompetitive purposes and effects." 386 F.3d at 508. This Court then held that the plaintiff met its "initial burden to demonstrate an actual adverse effect on competition" because it "presented evidence that the exclusive dealing arrangement reduced the supply of clathrate available to [competing] generic manufacturers." *Id*. at 509. *Geneva Pharmaceutical*, like *K.M.B. Warehouse* and *Capital Imaging*, requires an adverse effect on competition "as a whole" (386 F.3d at 506-07), but this Court did not hold that the plaintiff also had to disprove the existence of procompetitive benefits

within the clathrate market before the burden shifted to the defendant to come forward with such evidence. To the contrary, once the plaintiff introduced evidence that the supply of clathrate to other competitors was restricted, this Court held that "[t]he burden then shifts to defendants to offer procompetitive justifications for the arrangement." *Id*. Contrary to Amex's argument, the plaintiff was not obligated to prove that the harm to competition in the clathrate market was not outweighed by benefits to competition in that same market in order to show that competition "as a whole" was injured.

As explained below, Amex's contention that the antitrust laws require a special two-sided analysis is incorrect as a matter of law. But even if a special two-sided analysis is required, Amex is incorrect in asserting that the burden did not shift to it to demonstrate the supposed procompetitive benefits to the cardholders' side of the two-sided platform. Because Amex's evidence of a supposedly lower two-sided price was rejected as unreliable (SPA at 91-93, 112), Amex failed to meet its burden. As a result, the Government proof of an adverse effect on interbrand price competition stands unrefuted and the decision below should be affirmed.

B. Other Defects in Amex's Rule of Reason Analysis

In addition to misstating the burden-shifting aspect of the rule of reason, Amex's argument is rife with other fundamental mistakes of fact and law. Some of these are discussed below.

1. The Government Was Not Obligated to Calculate a Net price to Merchants and Cardholders

Amex's contention that the Government was obligated to prove that its NDPs caused the net price paid by both the merchants and the cardholders to rise to supracompetitive levels is simply wrong. In *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986), the defendant argued that a rule of reason violation had not been proved because there was no evidence that its conduct "resulted in the provision of dental services that were more costly" than they otherwise would have been. *Id*. at 461. The Court held that such proof "is not an essential step in establishing … an unreasonable restraint of trade" and that conduct that "disrupt[s] the proper functioning of the price-settling mechanism of the market … may be condemned even absent proof that it resulted in higher prices … than would occur in its absence." *Id*. at 461-62. Here, the District Court found that Amex's "NDPs "disrupt[] the price-setting mechanism ordinarily present in competitive markets" by removing the incentive to lower price. SPA at 98, 102, 127. Amex does not attack that finding as clearly erroneous, and by itself it is sufficient to sustain the decision below.

2. Amex's Proposed Formula for Calculating a Net Price is Patently Incorrect

Even if there were a need to calculate a net price for the two-sided platform, Amex's formula for doing so is patently incorrect. According to Amex, higher merchant fees are offset by higher cardholder rewards (Amex Main Br. at 3, 40) and in order to determine whether consumer welfare has been harmed, the court should have subtracted the value of the cardholder rewards from the prices paid by the merchants. The deficiencies in this argument are almost limitless. First, the court below correctly determined that the merchants are consumers of card network services (SPA at 46), and that they experience higher prices but receive no rewards. SPA at 4 n.8, 46, 89-90, 97, 101-02, 107, 111, 136. Clearly, the consumer welfare of the merchants is harmed.

Second, Amex conveniently ignores that its reward points do not come free to retail consumers. The District Court found that in order to pay higher fees to Amex, the merchants have to raise the prices at which they sell goods to their retail customers (SPA at 4, 98, 99, 113, 114, 122), including those customers who do not use Amex cards and do not receive Amex reward points. SPA at 113-14. Those consumers experience only a price increase for the products they purchase from the merchants and they, too, are clearly worse off.

Furthermore, the District Court found that Amex does not pass on all of the increase in merchant fees to its cardholders in the form of higher rewards. SPA at

114. The Amex cardholders do, however, have to pay increased prices for products purchased from the merchants – so even they are arguably worse off. Indeed, the District Court found that the merchants "pass most, if not all, of their additional costs along to their customers in the form of higher retail prices." SPA at 113. As a result, the District Court found that the elimination of the NDPs "will inure to the benefit of merchants and customers alike." SPA at 116-17. In light of those findings, Amex clearly did not carry its burden of showing that even its cardholders receive rewards that exceed the higher prices they must pay for goods.

Even when viewed in the light most favorable to Amex, its cardholders are being subsidized by retail customers who use other payment forms, but have to pay higher prices to the merchant so that the Amex cardholders can receive their rewards. There is nothing procompetitive, however, about consumers who do not receive reward points paying higher prices to fund rewards that go to other consumers. Indeed, it is difficult to even imagine a greater distortion of the price-setting mechanism of supply and demand than imposing the cost of goods and services (*i.e.*, the reward points) on individuals who do not receive any goods or services.

3. As a Matter of Law, an Injury to Competition in One Market Cannot Be Offset by a Benefit to Competition in Another Market

Amex is also wrong, as a matter of law, when it argues that an injury to competition in the market for network services offered to merchants can be offset by an alleged benefit to competition in the market in which Amex and other credit card issuers offer services to cardholders. Two-sided platforms are not new. As the *Amicus* Brief submitted in support of Amex acknowledges, two-sided platforms cover numerous markets, including shopping malls, employment recruiting firms, online dating services, social media websites and others. Brief of *Amicus Curiae* in Support of Defendants-Appellants at 3. Yet, as the District Court pointed out, Amex "cite[s] no legal authority" in support of the proposition that a court must balance the anticompetitive effects on one side of a two-sided platform against the "procompetitive effect in a separate, though intertwined, antitrust market" (SPA at 124; also SPA at 43) and there is none.

A newspaper, for example, is a classic two-sided platform, selling papers to readers on one side and advertising space to advertisers on the other side. Amex Main Br. at 10. In *Times-Picayune Pub. Co. v. U.S.*, 343 U.S. 594 (1953), the defendant newspaper was alleged to have entered into anticompetitive agreements with advertisers. In holding the conduct unlawful, the Supreme Court noted that every newspaper sells content to readers and also sells access to its readership "to

buyers of advertising space" and is, therefore, a "dual trader" selling in "interdependent markets." *Id*. at 610. The Supreme Court did not, however, find it necessary for the plaintiff to measure the competitive effects on the readership consumer side of the platform. It held that the restraint alleged was directed "only to buyers of general and classified space" and that the defendant's ability to impact competition on only the advertising side of the platform "must be decisive in gauging the legality of the [defendant's] unit plan." *Id*.

Similarly, in *U.S. v. Visa USA, Inc.*, 344 F.3d 229 (2d Cir. 2003), this Court was called upon to analyze the competitive effect of an agreement in the credit card industry. This Court pointed out that there was a market in which card issuers, such as Amex and banks, sell services to cardholders and a second market in which card networks, such as Amex, MasterCard, Visa and Discover, sell services to merchants and card-issuing banks. *Id*. at 239. This Court held that these were "two interrelated, but separate product markets." *Id*. at 238. This Court further held that competition among card-issuers for cardholders "is robust," but that competition in the network services market had been unlawfully restrained. *Id*. at 240. Importantly, this Court did not find it necessary to determine whether competition in a combined issuing and network services market had been injured or not. It was sufficient that competition on one side of the platform was restrained, even though competition on the other side was "robust."

The District Court correctly noted that "as a general matter … a restraint that causes anticompetitive harm in one market may not be justified by greater competition in another market" and cited cases, including two from the Supreme Court, in support of that proposition. SPA at 135 and n.54.[10] Amex tries to distinguish these cases on the ground that they involved horizontal rather than vertical agreements. Amex Main Br. at 49. Amex fails, however, to provide any reason why this purported distinction makes any difference. The question in both a vertical and a horizontal agreement case is whether a market has suffered competitive harm. If that harm cannot be balanced against a benefit to competition in another market when the agreement is horizontal, then there is no reason why such balancing should be required when the harm to competition is caused by a vertical agreement. This is particularly true in a case such as the current one, where the injury to competition caused by Amex's vertical card acceptance agreements is the suppression of horizontal, interbrand price competition.

[10] *See also*, *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 719 (D.C. Cir. 2001) (holding that "no court has ever held that a reduction in competition for wholesale purchasers is not relevant unless the plaintiff can prove an impact at the consumer level"). Judge Garaufis also held that even if such "cross-market balancing" of harms and benefits to competition was appropriate, "here, defendants have failed to establish that … any such gains offset the harm done to the network services market." SPA at 135.

4. Neither Harm to Competition Nor Market Power Requires Proof of Amex's Profit Margin

Amex argues that in order to show that its "NDPs harm competition" or that it had market power (SPA at 58), the Government had to prove its "costs or profit margins." SPA at 59. Amex cites no case that supports that proposition, and it is incorrect.

First, Amex's argument is predicated on incorrect facts. The District Court found that Amex's price increases were not "paired" with offsetting cost increases and that Amex's profit margin rose. SPA at 79-80. The District Court also found that Amex was able to repeatedly and profitably increase its prices without losing any sales. SPA at 6, 67, 78, 81. That satisfies the test for market power. *K.M.B. Warehouse*, 61 F.3d at 129. Indeed, in *U.S. v. Visa U.S.A., Inc.*, 344 F.3d 229, 239-41 (2d Cir. 2003), this Court held that MasterCard and Visa were shown to have market power by evidence that they could raise the prices paid by merchants and that "no merchant had discontinued acceptance of their cards." In reaching that conclusion, this Court did not find it necessary to inquire into the costs or profit margins of Visa or MasterCard.

Second, Amex contends that its prices could not be "supracompetitive" without evidence of its costs or profit margins. Amex Main Br. at 58-60. Amex does not define the term "supracompetitive," but apparently intends it to mean that its merchant prices were not higher than they would have been in the absence of its

NDPs. *Id*. at 58.[11] The District Court, however, found that the NDPs injured interbrand price competition by preventing merchants from steering customers to less-expensive card networks, thereby eliminating the incentive "for networks offering merchants a lower price for acceptance services" and that the result was "an absence of price competition among American Express and its rivals." SPA at 6; *see also* at 98, 102, 107. The District Court further found that Amex's NDPs "have allowed all four networks to raise their swipe fees" to higher levels than otherwise would have been possible and that the NDPs "have resulted in higher all-in merchant prices across the network services market." SPA at 111. Thus, the District Court found that Amex's prices – and the prices of its competitors – rose to supracompetitive levels due to Amex's NDPs.

The above findings are not hypothetical. The District Court found that Discover had, in fact, pursued an aggressive low-price strategy, but that it abandoned its low-price business model and began raising its rates because the limitations on merchant steering prevented it from gaining additional business from its low-price strategy. SPA at 107-08, 110.

[11] The District Court held that Amex's prices would not be deemed to be "supracompetitive" or higher than warranted simply because they were higher than MasterCard's or Visa's prices. SPA at 84. The District Court also declined to hold that the premium price that Amex obtained above the MasterCard and Visa prices was evidence of market power. SPA at 90.

Amex does not challenge any of these findings as clearly erroneous. Thus, to the extent that Amex is arguing that its prices were not higher than they would have been if interbrand price competition had not been obstructed by its NDPs, its argument has been factually rejected.

Nor do the cases cited by Amex support its argument. *See* Amex Main Br. at 58-63. The portions of the cases cited by Amex do not address whether the defendant's conduct caused an adverse effect on competition. Principally, the cases cited by Amex address whether one can infer monopoly or market power solely from the defendant's high price. Unlike the current case, these cases do not involve evidence that the defendant's conduct actually interfered with interbrand price competition and led all of the competitors to charge higher prices than they otherwise would have.

For example, in *Geneva Pharmaceutical* (Amex Main Br. at 60) the plaintiff argued that the defendant must have had monopoly power because its price came down after others entered the market. This Court held that such evidence might be indicative of monopoly power, but that without evidence of the defendant's costs or profit margin, the evidence was ambiguous. 386 F.3d at 500. Here, of course, the District Court did not conclude from Amex's high price that it had monopoly or market power. Indeed, the District Court specifically declined to do so. SPA at 84-90. Instead, the District Court found that Amex had actually raised its price

without losing any sales and that its NDPs resulted in all the competitors charging higher prices than they would have been able to charge in the absence of Amex's interference with the price-setting mechanism.

The decision in *PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101 (2d Cir. 2002), is similarly inapposite. There, Pepsi alleged that Coke had entered into distribution agreements that gave Coke a lower cost of doing business than was available to Pepsi and allowed Coke to charge supracompetitive prices. The Court, however, held that there was no evidence that Coke actually obtained a lower cost of doing business or the ability to charge supracompetitive prices. *Id*. at 108. In fact, the Court held that the challenged conduct led not to higher prices, but to "bidding wars between PepsiCo and Coca-Cola, [which] forced Coca-Cola to drastically reduce its price and profitability" (*id*.) – precisely the opposite of what Amex's conduct was found to cause here.

Nonetheless, it is apparently Amex's position that the price it and the other card networks charge cannot be found to be higher than the competitive price or evidence of market power unless the price is proved to be significantly higher than cost and excessively profitable. This contention is incorrect as a matter of both law and economics.

While it is true that persistent excessive profits are indicative of market power, it is not true that a low profit margin demonstrates a lack of market power

or anticompetitive conduct. Even a monopolist who charges a monopoly price may not earn excessive profits. As is well known, a firm with monopoly power may dissipate its monopoly rents or be subject to high costs due to the inefficiency that results from not facing any competition. Areeda & Hovenkamp, *Antitrust Law* (4th ed. 2014) at ¶¶ 516, 144, 147, 149 ("a firm with market power can still have low accounting profits when it has dissipated its profits in some other way" and "low profits might be attributable to inefficiency and thus do not negate [market] power"); Bork & Sidak, "The Misuse of Profit Margins to Infer Market Power," 9 J. of Competition & Econ., 511, 512, 519-20 (2013) ("there is no direct relationship between the firm's profit margins and the existence of market power. A firm can have market power and still have low profit margins"; "even if a monopolist is charging the monopoly price" it may still "have low profit margins"; and, the true test of market power is "whether the firm can … profitably maintain a price increase").

The caselaw is to the same effect. In *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 272 (2d Cir. 1979), this Court held that "[i]t is not a defense to liability" that the defendant has not "charge[d] more than a competitive price or extract[ed] greater than a reasonable profit." *Accord*, *U.S. v. Alcoa*, 148 F.2d 416, 427 (2d Cir. 1945) ("it is no excuse for 'monopolizing' a market that the monopoly has not been used to extract from the consumer more than a 'fair' profit"); *U.S. v.*

Microsoft Corp., 253 F.3d 34, 57 (D.C. Cir. 2001) ("a price lower than the short-term profit-maximizing price is not inconsistent with possession or improper use of monopoly power"); *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 219-23 (1940) (holding defendants' programs unlawful if they "resulted in a price rise … which but for them would not have happened" even though the price charged was a "fair … market price"). Amex's contention that its conduct could not be unlawful unless it charged a price far in excess of its costs is both economically and legally without merit.

CONCLUSION

Amex's anti-steering rules were proved to obstruct horizontal, interbrand price competition and result in (1) merchants paying higher swipe fees to all four credit card networks and (2) retail consumers paying higher prices for goods and services. MasterCard and Visa have agreed to eliminate their anti-steering rules and only Amex stands in the way of a competitive market. The *Amici* respectfully submit that Amex's anti-steering rules were proved to be unlawful and that the Decision below should be affirmed in all respects.

Dated: September 14, 2015 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 29 and Rule 32(a)(7) of the Federal Rules of Appellate Procedure, I certify under penalty of perjury that the foregoing Brief of *Amici Curiae* Ahold U.S.A., Inc.; Albertsons LLC; BI-LO LLC; CVS Pharmacy, Inc.; The Great Atlantic And Pacific Tea Company, Inc.; H.E. Butt Grocery Co.; Hy-Vee, Inc.; The Kroger Co.; Meijer, Inc.; Publix Super Markets, Inc.; Raley's Inc.; Rite Aid Corporation; Safeway Inc.; Supervalu, Inc.; and Walgreen Co. in Support of the Plaintiffs-Appellees And The Affirmance Of The Order Entered Below is prepared in a proportionally-spaced typeface (14-point Times New Roman) and contains 6,918 words, as calculated by the Microsoft Word 2010 word processing program and excluding parts of the Brief exempted by Rule 32(a)(7)(B)(iii).

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