UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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IN RE: AMERICAN EXPRESS ANTI-STEERING RULES ANTITRUST LITIGATION (II)

This Document Relates To:
CONSOLIDATED CLASS ACTION

11-MD-02221 (NGG) (RER)
ECF Case

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THE MARCUS CORPORATION,
on behalf of itself and all similarly situated persons,

13-CV-07355 (NGG) (RER)

Plaintiff,

– against –

AMERICAN EXPRESS COMPANY, et al.,

Defendants.

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RESPONSE OF AMERICAN EXPRESS TO OBJECTORS' SUBMISSIONS REGARDING QUESTION 1 OF THE APRIL 30, 2015 ORDER

BOIES, SCHILLER & FLEXNER LLP
575 Lexington Avenue, 7th Floor
New York, New York 10022
Tel.: (212) 446-2300
Fax: (212) 446-2350

CRAVATH, SWAINE & MOORE LLP
825 Eighth Avenue
New York, New York 10019
Tel.: (212) 474-1000
Fax: (212) 474-3700

June 4, 2015

The American Express Defendants ("Amex") submit this response to the submissions of Objectors in connection with the Court's April 30, 2015, Order (the "Order").[1] As set forth below, the Objectors have not shown any reason why the Settlement should not be approved. Given the volume of the submissions and the page limits for this memorandum, while there are many arguments objectors make with which we disagree, the fact that American Express does not address every argument presented by the Objectors is without waiver of American Express's rights concerning any positions taken in the Objectors' submissions.

First, Objectors misstate the significance of the DOJ Decision on merchants' surcharging claims. It is not true that "virtually all of the elements" of a differential surcharging challenge "have been preclusively determined against American Express." (Br. of 7-Eleven Objectors at 3.) Even putting aside Amex's strong belief in the merits of its appeal arguments and even assuming merchants will benefit from the Court's findings on market definition and market power, it remains the case that the Court made no preclusive determination on the core issue of the competitive effects of the provisions in the NDPs restricting merchant surcharging.

Certain objectors have claimed that if Amex cannot lawfully prevent differential discounts, it cannot lawfully prevent differential surcharges. (Br. of Home Depot Objectors at at 1.) But this argument is not supported by the DOJ Decision, which only addressed the legality of differential discounting. The DOJ Decision never reached the question of whether contract provisions protecting Amex Cardmembers from being charged an additional fee for using their American Express Card might raise different issues under the antitrust laws. Notably, no

[1] This response is limited to Question 1 in the Order regarding how, if at all, the Court's review of the class settlement agreement in this case (the "Settlement") is affected by the Court's Decision / Findings of Fact and Conclusions of Law and Permanent Injunction (collectively, the "DOJ Decision") in United States v. American Express (the "DOJ Action"). The briefing on Question 2 is not yet complete, as the Class and many Objectors will not be making their submissions for several weeks. See 5/14/16 and 5/26/15 Minute Orders.

Objector confronts the fact that the Government Plaintiffs chose not to challenge Amex's surcharging provisions and settled their investigation of Visa's and MasterCard's steering provisions through a Court-approved consent decree that did nothing to prevent those two firms from continuing to enforce their rules prohibiting surcharging. While Objectors assert that "there is no analytical difference" between differential discounting and differential surcharging (Br. of Individual Merchants at 3), no objector even attempts to deal with the far different competitive effects analysis required for surcharging. The Objectors are too quick to disregard the litigation risks that the Class continues to face, even putting appeal issues in the DOJ Action aside.

A number of objectors point to the Court's reference to differential surcharging as a "particularly strong form" of steering (DOJ Decision at 124) as purported evidence that Amex's prohibitions on differential surcharging are unlawful. But the "strong" negative impact of surcharging on consumers who are harmed by paying yet higher prices for goods and services is undisputed. Indeed, it is precisely why regulators, legislators, and Courts have routinely dealt with surcharging differently from other forms of steering. For example, recognizing that merchant surcharging is an anti-consumer practice, at least ten state legislatures passed statutes that are more expansive than Amex's NDPs in prohibiting merchants from imposing any surcharges on credit card payments (even while these statutes continue to permit discounting). Similarly, in the Durbin Amendment, Congress generally permitted merchants to steer by offering customers a benefit—i.e., a "discount or in-kind incentive", while protecting consumers against hidden surcharges by defining a "discount" to exclude "any means of increasing the price that customers are informed is the regular price." See 15 U.S.C. § 1693o-2(c)(4). And, as discussed at length in Amex's pending summary judgment motion in the Individual Merchant case, the appellate courts have also recognized that contractual prohibitions on surcharging in

particular do not unreasonably restrain trade because they are "obviously a proconsumer device" in protecting customers from higher prices. See, e.g., Tennessean Truckstop, Inc. v. NTS, Inc., 875 F.2d 86, 90 (6th Cir. 1989) (citations omitted). These principles all remain true today, just like before the DOJ Decision, notwithstanding Objector bluster about the supposed inevitability of their future victories. There is thus no merit to the merchant objections that wrongly assume away the risk that they continue to face in attacking parts of the NDPs that the Government Plaintiffs chose not challenge.

Second, contrary to Objectors' arguments, the Court's finding in the DOJ Decision that debit and credit are in two different markets does not show that steering to debit is worthless. As the Court knows from the remedy proceedings in the DOJ Action, the Government Plaintiffs sought entry of a Permanent Injunction that would have required Amex to remove all relevant prohibitions in the NDPs with respect to any "Form of Payment," including payment forms like debit that were not within the Court's antitrust market. (Joint Submission as to Remedy, Appendix 1, Section IV.) The Government Plaintiffs argued, "'limited substitutability' of debit" is not "*no* substitutability." (DOJ Mem. in Support of Proposed Final Judgment and Remedial Order as to the American Express Defendants at 13 (emphasis in original).) Even accepting the correctness of the Court's market definition, Objectors cannot ignore the value of steering to debit, as the Government Plaintiffs' remedy filings in the DOJ Action underscore.

Third, the Target Objectors' arguments misunderstand the scope of the damages release in the Settlement. It is undisputed that the Settlement has no impact on merchants' ability to bring opt-out damages claims relating to the period before the parity surcharging rules contemplated by the Settlement take effect. The Target Objectors, however, focus on the release of future damages claim in the Settlement. Specifically, they complain that in arguing for a stay,

Amex stated that merchants would be free to pursue damages claims for the period when the stay is in effect even though the Settlement "would force merchants to release their claims." (Br. of Target Objectors at 2.) According to the Target Objectors, this highlights the unfairness in requiring a release of merchants with respect to future damages claims. (*Id.* at 3.)

Amex's prior filings have shown why, as a general matter, such a release is both necessary and proper, just as Judge Gleeson decided in connection with a similar release in MDL 1720. See In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig., 986 F. Supp. 2d 207, 235-36 (E.D.N.Y. 2013). More particularly, there is no inconsistency in Amex's stay filings. Consistent with the Settlement's terms, Amex will not implement any new parity steering rules in advance of the inevitable appeal from the Court's settlement approval decision (in the event that the Settlement is approved). And, given that Amex has consented to expedited resolution of the appeal of the DOJ Action, it is expected that the appeal in that case will be resolved before a settlement approval appeal. This eliminates the issue the Target Objectors raise: the damages release in the Settlement does not take effect until Amex changes its rules regarding surcharging (Agreement ¶¶ 1(uu), 1(aaa), 9, 27), which means that, based on the expected timing of the appeal in the DOJ Action, merchants would not be deprived of any damages claims they think they have while a stay is in place. To eliminate any doubt on this issue, Amex commits that if the Settlement is approved and the Second Circuit grants a stay in the DOJ action, it will not implement the rules changes contemplated by the Settlement unless and until the Court gives permission to do so.

Finally, Objectors are wrong to claim that the Settlement somehow "blocks the very limited differential surcharging permitted under the settlement in MDL 1720." (Br. of Target Objectors at 4; see also Br. of Individual Merchants at 3.) Amex could not, and the Settlement

does not, define what rights merchants have to surcharge Visa and MasterCard. Objectors' real complaint is that the MDL 1720 settlement makes certain additional steering rights vis-à-vis Visa and MasterCard conditional on the elimination of Amex's rules regarding differential surcharging. The Settlement in this case, however, cannot be judged unfair because it fails to overcome limitations that were negotiated with Visa and MasterCard (and approved by a federal judge) in a completely different case. Moreover, Objectors would only be able to obtain the additional rights under the MDL 1720 settlement if Amex's rules against differential surcharging no longer exist—a result that, for the reasons discussed above, the Objectors cannot simply assume.

* * *

Objectors' arguments continue to assume that merchants should get everything they want, without regard for the compromises that all settlements require. Nothing in the DOJ Decision makes that position any more reasonable than it was at the original fairness hearing. For these reasons and the reasons set forth in Amex's prior submissions and argument, Amex respectfully requests that the Court grant final approval of the Settlement.

Dated: June 4, 2015
New York, New York

Respectfully submitted,

/s/ Philip C. Korologos
Donald L. Flexner
Philip C. Korologos
Eric J. Brenner
BOIES, SCHILLER & FLEXNER LLP
575 Lexington Avenue, 7th Floor
New York, New York 10022
Tel.: (212) 446-2300
Fax: (212) 446-2350

/s/ Kevin J. Orsini
Evan R. Chesler
Peter T. Barbur
Kevin J. Orsini
CRAVATH, SWAINE & MOORE LLP
825 Eighth Avenue
New York, New York 10019
Tel.: (212) 474-1000
Fax: (212) 474-3700

Counsel for Defendants American Express Travel Related Services Company, Inc. and American Express Company