UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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

11-MD-02221-NGG-RER
ECF CASE

Judge Garaufis

THIS DOCUMENT RELATES TO:
CONSOLIDATED CLASS ACTION

THE MARCUS CORP., On behalf of itself and all similarly situated persons,

13-CV-07355-NGG-RER
ECF CASE

Plaintiff,

-against-

AMERICAN EXPRESS COMPANY, et al.,

Defendants.

MEMORANDUM OF THE TARGET OBJECTORS IN RESPONSE TO COURT ORDER DATED APRIL 30, 2015

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PRELIMINARY STATEMENT

The Target Objectors[1] submit this brief to address the impact of this Court's rulings in *United States v. American Express Co.*, Case No. 10-CV-4496-NGG-RER (the "Decision"), on this Court's review of the proposed settlement in this case.[2]

The Decision adds force to the Target Objectors' prior arguments against both class certification and approval of the proposed class settlement. By holding that American Express has engaged in anticompetitive practices that harm merchants, the Decision demonstrates that merchants have strong damages claims that cannot be resolved through a non-opt-out class. The Decision also reinforces the unfairness of the settlement, in which merchants are forced to give up significant claims – claims that the Decision strengthens through operation of collateral estoppels principles – in exchange for highly circumscribed surcharging "relief" that perpetuates the anticompetitive effects of parallel prohibitions enforced by the three major networks.

ARGUMENT

The Target Objectors have argued that this Court should reject the settlement for three main reasons. *First*, the settlement would violate the Rules Enabling Act by nullifying dispute resolution processes required by contracts between various Target Objectors and American Express. *Second*, because American Express' merchant agreements contain a wide variety of

[1] The Target Objectors are Target Corporation, Macy's, Inc., Kohl's Corporation, the TJX Companies, Inc., Staples, Inc., J.C. Penney Corporation, Inc., Office Depot, Inc., L Brands, Inc., Big Lots Stores, Inc., PNS Stores, Inc., C.S. Ross Company, Closeout Distribution, Inc., Ascena Retail Group, Inc., Abercrombie & Fitch, OfficeMax Incorporated, Saks Incorporated, the Bon-Ton Stores, Inc., Chico's FAS, Inc., Luxottica U.S. Holdings Corp., American Signature, Inc., and Lord & Taylor Acquisition, Inc. Objectors PHS Stores, Inc., C.S. Ross Company, and Closeout Distribution, Inc. are affiliated with Big Lots Stores, Inc.

[2] By Order dated April 30, 2015, this Court invited objectors to submit briefs addressing this issue and the impact of certain communications involving Gary Friedman, lead counsel for the proposed class. The Target Objectors will brief that issue after disputes concerning disclosure of documents reflecting such communications have been resolved. *See* Order, May 14, 2015.

mandatory alternative dispute resolution obligations, the proposed settlement class does not satisfy the commonality, typicality, and adequacy of representation criteria of Rule 23(a); in addition, the proposed class cannot be certified under Rule 23(b)(2) because it resolves individualized claims for monetary damages without permitting opt-out rights, in violation of the Due Process Clause. *Third*, the settlement is not substantively fair, reasonable, or adequate. *See* Omnibus Objections of the Target Objectors, ECF No. 490.

The Decision is directly relevant both to the Rule 23(b)(2) and due process argument and to analysis of the substantive fairness of the settlement. This Court's factual and legal conclusions, *see* Decision, *U.S. v. American Express Co.*, Case No. 10-CV-4496, Feb. 19, 2015, ECF No. 619, confirm that American Express's anticompetitive conduct inflicts substantial monetary harm on merchants – harm that gives rise to damages claims that will continue until the conduct ceases and its unlawful effects are eliminated. The proposed settlement violates Rule 23(b)(2) and the Due Process Clause because it bargains away those individual monetary claims of merchant class members without allowing them to opt out and protect their own interests. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557, 2559 (2011).

Ironically, American Express itself recognizes that these damages claims are of crucial importance to merchants. In its reply brief in support of its motion for a stay pending appeal American Express argued: "the fact that merchants can seek full compensation for any damages proximately caused by the NDPs during the stay period shows that the purported harm is neither irreparable nor significant." Defs' Reply Mem. of Law in Support of Defs' Motion to Stay Pending Appeal, at 7-8 & n.3, ECF No. 661. What American Express overlooked is that the settlement it promotes would force merchants to release their claims for damages caused by its NDPs and other anticompetitive rules and practices. *See* Settlement Agreement ¶¶ 1(uu), 1(aaa),

8-9, 27, 31, 40, 44(i); *see also* Class Settlement Preliminary Approval Order ¶ 33(iii), ECF No. 333. Under the Due Process Clause these individual merchant damages claims, which American Express acknowledges serve as an essential defense mechanism against the anticompetitive conduct of American Express, simply cannot be precluded through a mandatory settlement in a non-opt-out class action.

The Decision is equally relevant to assessing whether the settlement is fair, reasonable, and adequate. The Second Circuit evaluates the fairness of class settlements by using a multi-factor balancing test that considers, *inter alia*, the complexity, expense and likely duration of the litigation, the risks of establishing liability and damages, and the range of reasonableness of the settlement in light of the best possible recovery and the attendant risks of litigation. *See D'Amato v. Deutsche Bank*, 236 F.3d 78, 86 (2d Cir. 2001). The Decision affects *all* of these factors. It dramatically changes the context in which the Court must assess fairness and adequacy, greatly strengthens merchant claims against American Express, and exposes the settlement as a terrible and unfair bargain for merchants.

This Court's factual and legal conclusions in the Decision are binding upon American Express. Moreover, through operation of collateral estoppel, those factual and legal conclusions will control the resolution of future antitrust claims against American Express by the Target Objectors and other merchants, because those potential future merchants claims would have the same factual predicates as the claims asserted by the government. *See United States v. Stauffer Chem. Co.*, 464 U.S. 165, 170-71 (1984); *United States v. Mendoza*, 464 U.S. 154, 159 n.4 (1984); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).[3]

[3] The Target Objectors recognize that American Express will argue that the Decision is likely to be reversed on appeal. Although reversal is a theoretical risk, that result is unlikely because the Decision carefully follows the opinions of the Second Circuit in *United States v. Visa* and other

Because the Decision conclusively establishes many elements of the antitrust claims that class members and objectors would bring against American Express, the complexity, expense, and duration of arbitration or litigation, and the risks involved in establishing liability, have been sharply reduced. Moreover, as a result of the Decision, the evaluations of the best possible recovery, and the risks of litigation against which the settlement must be measured, have shifted markedly in the merchants' favor.

The settlement would force merchants to give up a wide range of these now-strengthened claims – including *all* injunctive relief claims and *all* future damages claims with respect to a vast array of American Express NDPs, honor-all-cards rules, and other anticompetitive rules and practices – and would allow American Express to continue its anticompetitive conduct for at least a decade and potentially in perpetuity. *See* Settlement Agreement ¶¶ 1(vv), 24-34. The only remedy provided in exchange is a grudging rules modification that allows surcharging *only* if the merchant "imposes a surcharge for *all* Credit Cards accepted" and limits merchants to surcharges on costlier American Express transactions that are no higher than "any surcharge imposed on transactions effected with any other" payment card. *Id.* ¶¶ 8(b), 8(c), 13(b). The settlement thus locks in a facially anticompetitive practice and blocks the very limited differential surcharging permitted under the settlement in MDL 1720, through which merchants theoretically could use surcharging to steer customers to one network rather than another. *See* Mem. and Order, *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, No. 05-MD-1720 (JG) (JO), at 32-33, Dec. 13, 2013, ECF No. 6124.

The remedial provisions of the proposed settlement suffer even more by comparison to the injunction entered in the government case. *See* Order Entering Permanent Injunction As To

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pertinent cases. The risk of reversal therefore should not be assigned significant weight in this Court's analysis.

The American Express Defendants, *U.S. v. American Express Co.*, Case No. 10-CV-4496 (NGG) (RER), Apr. 30, 2015, ECF No. 638. The injunction not only establishes straightforward rules of conduct for American Express and merchants, it also gives merchants the freedom to "opt out" of the relief by negotiating their own agreements with American Express in which the steering practices permitted by the injunction may be exchanged for pricing relief or other concessions. *Id.* Sec. III(B)(3). That clear and flexible approach stands in sharp contrast to the mandatory release and anticompetitive scheme that the proposed settlement would impose.

The settlement was a desperate compromise by a class on "life support" after the Supreme Court ruled in *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013). The Decision establishes that there was no need for desperation as to the Target Objectors and other individual merchants. It confirms that merchants have strong antitrust claims, and it is neither fair nor reasonable to force merchants to release those claims, through a mandatory class action settlement, in exchange for the paltry and anticompetitive remedy the settlement provides.

The proposed settlement should be rejected because it violates the Rules Enabling Act and because, as the Decision demonstrates, it does not comply with the requirements of Rule 23(b)(2) and the due process clause. Moreover, the Decision dramatically shifts the posture in which to weigh the fairness, reasonableness, and adequacy of the settlement, by adding specific findings establishing key elements of the antitrust claims, enforceable through collateral estoppel, to the merchants' side of the scales. Rather than forcing merchants to settle for what masquerades as relief under the proposed settlement, this Court should reject the settlement and leave the Target Objectors and other merchants free to challenge American Express's remaining anti-competitive practices and to seek relief on the same basis as is provided in the injunction.

DATED: June 1, 2015

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CERTIFICATE OF SERVICE

Pursuant to paragraph 24 of the Class Settlement Preliminary Approval Order, ECF Doc. 333, the undersigned counsel hereby certifies that the foregoing Target Objectors Objections to the American Express Class Action Settlement was filed with the Court and also was served upon the following designees of Class Counsel and counsel for the Defendants, by first-class U.S. mail, on the 1st day of June, 2015:

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This response also is filed of public record and served on other participants in the above-referenced through the ECF system.

/s/Gregory A. Clarick
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