UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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

No. 11-MD-02221-NGG-RER
REDACTED VERSION

THIS DOCUMENT RELATES TO:

Individual Plaintiff Actions

No. 08-CV-2315
No. 08-CV-2316
No. 08-CV-2317
No. 08-CV-2380
No. 08-CV-2406
No. 11-CV-0337
No. 11-CV-0338

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO THE INDIVIDUAL PLAINTIFFS' ONE-SIDED AND AMEX-ONLY MARKET CLAIMS

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PRELIMINARY STATEMENT

The Supreme Court held as a matter of law that the relevant antitrust market must include both sides of Amex's credit card platform. That holding was based on the same economic activity in the same market as is alleged here. Plaintiffs are suing the same defendant for the same allegedly unlawful practices during the same time period. Plaintiffs cannot avoid binding precedent by pointing to supposed new facts that *were* present in the Government's case and that do not, and cannot, make any difference to the Supreme Court's analysis. Amex is entitled to summary judgment on Plaintiffs' one-sided market theories. *See infra* Part I.

Plaintiffs' single-brand, Amex-only market theories also clash with the Supreme Court's holding that credit card networks compete for *transactions*, not merchants or cardholders in isolation. Plaintiffs rely on allegations of demand elasticity on just one side of the two-sided market and therefore their Amex-only market fails as a matter of law. Regardless, single-brand market theories are almost always implausible, and Plaintiffs' are no exception. Amex also is entitled to summary judgment on Plaintiffs' single-brand market theories.[1] *See infra* Part II.

ARGUMENT

I. BINDING SUPREME COURT PRECEDENT PRECLUDES A ONE-SIDED MARKET DEFINITION.

A. The Supreme Court Articulated a Clear Rule that Was not Dependent upon Specific Facts that Could Be Subject to Dispute in this Case.

The Supreme Court's holding was unambiguous: "[C]ourts must include both sides of the platform—merchants and cardholders—when defining the credit-card market."

[1] Amex's motion was originally styled as a motion to dismiss under Rule 12, or in the alternative for summary judgment under Rule 56. Amex's Mot. to Dismiss or in the Alternative for Summary Judgment ("Amex Br.") at 2 (Aug. 17, 2018). Pursuant to the Court's September 26, 2018 Order (ECF No. 831), in this Reply, Amex has restyled its motion as one only seeking summary judgment with respect to Plaintiffs' one-sided and Amex-only market definitions.

Ohio v. American Express Co. ("*Ohio v. Amex*"), 138 S. Ct. 2274, 2286 (2018). The Court reached that decision based on a clear rule: for "two-sided transaction markets"—when "platforms facilitate a single, simultaneous transaction between participants"—"one market should be defined". *Id.* at 2286-87.[2] In so holding, the Supreme Court did not rely on any particular way the Government sought to prove the nature of the market or competition, nor did it say it was constrained to hold that credit cards operate in a two-sided market based on the specific facts presented to it. To the contrary, it grounded its ruling on fundamental economic principles applied to basic, indisputable facts about the structure of the credit card market: that Amex's transaction platform connects merchants and cardholders to "facilitate a single, simultaneous transaction". *Ohio v. Amex*, 138 S. Ct. at 2286. That ruling certainly applies here, where it is essentially the same case. Declining to follow the Supreme Court's holding that the relevant market in which Amex operates is two-sided as a matter of law would be error.

Plaintiffs try to evade that binding precedent on the theory that the Supreme Court did not mean what it said. However, "[w]hen the Supreme Court declines to limit the legal or factual reach of its decisions, 'it is the principle [that] controls and not the specific facts [on] which the principle was decided'", and courts are "required to apply [the precedent] to cases presenting similar facts and analogous legal issues". *MT Props., Inc. v. Transp.-Commc'ns Int'l Union*, 914 F.2d 1083, 1089 (8th Cir. 1990) (rejecting a party's attempt to interpret a controlling

[2] Plaintiffs claim Amex's only support for this contention is Justice Breyer's dissent. Pls.' Response to Defs.' Mot. to Dismiss or in the Alternative for Summary Judgment ("MP Opp.") at 7-8. Contrary to Plaintiffs' assertion that "the majority opinion says no such thing", MP Opp. 8, Justice Breyer himself noted that "*[t]he majority defines the phrase* as covering a business that . . . 'cannot make a sale to one side of the platform without simultaneously making a sale to the other' side of the platform". *Ohio v. Amex*, 138 S. Ct. at 2298 (Breyer, J., dissenting) (emphasis added) (quoting *id*. at 2280 (majority op.)).

Supreme Court holding as applying on a case-by-case basis). Nothing about the Supreme Court's decision in *Ohio v. Amex* is limited to law or facts absent here. Even if there were factual distinctions, "[t]he system could not function if lower courts were free to disregard such guidelines whenever they did not precisely match the facts of the case in which the guidelines were announced". *United States v. Underwood*, 717 F.2d 482, 486 (9th Cir. 1983).[3]

B. Plaintiffs' "Different" Facts Were Equally Present in the Government Case and Make No Difference Here.

Prior to the Second Circuit's decision in *United States v. American Express Co.* ("*U.S. v. Amex*"), 838 F.3d 179, 205 (2d Cir. 2016), Plaintiffs conceded that the basic facts and law in the Government case and their own are identical. Pls.' Br. Addressing Pls.' Motion for Collateral Estoppel at 12 (Aug. 19, 2015) (ECF No. 668) ("The issues of fact and law that were determined in the Government case are identical issues that must be decided in the MPs' case."). Now, however, Plaintiffs say the Supreme Court holding (which affirmed the Second Circuit's judgment) does not apply because they will present two types of "different" evidence: (1) that Amex operates in a "mature" market; and (2) that the two sides of Amex's platform are not "interconnected" or "balanced". MP Opp. §§ III.A and III.B. The types of facts to which Plaintiffs point were in the record before the district court, Second Circuit and Supreme Court in

[3] Indeed, Plaintiffs' attempts to avoid the Supreme Court's ruling are directly contrary to the case law showing that lower courts are bound by such holdings. *See, e.g.*, *Montana Shooting Sports Ass'n v. Holder*, 727 F.3d 975, 981-82 (9th Cir. 2013) (rejecting plaintiff gun manufacturer's attempt to limit binding Supreme Court precedent to its facts to avoid its adverse implications for the outcome); *Haith ex rel. Accretive Health, Inc. v. Bronfman*, 928 F. Supp. 2d 964, 971 (N.D. Ill. 2013) (rejecting defendants' attempt to limit a Supreme Court holding to a specific factual scenario, holding that "[t]he reach of Supreme Court decisions are [sic] not limited to the particular facts and circumstances presented in the case being decided; lower courts must apply the reasoning of those decisions even to cases that are factually dissimilar").

the Government case; the Supreme Court nevertheless held, as a matter of law, that a two-sided analysis applies.

First, Plaintiffs contend that Amex's platform does not exhibit indirect network effects because it operates in a "mature" market, MP Opp. § III.A, but the record in the Government case was full of references to the same type of "maturity". *See*, *e.g.*, Trial Transcript in Civil Action No. 10-cv-04496 (NGG) (RER) ("Gov't Trial Tr.") at 4363:16-19 (Chenault/Amex) (noting that "we all know there are a few [merchants] who don't accept credit cards, but the reality is the vast majority of merchants" do and "you can really count the ones who don't"); *id*. at 5747:14-16 (Gilligan/Amex) (discussing the competitive pressures in an environment in which credit cards "are accepted by every merchant" and "every consumer is carrying a [credit card] in their wallet"). Nothing about "maturity" is a "different" "evidentiary fact" Plaintiffs will introduce in the record. MP Opp. 11-12. Indeed, Plaintiffs' expert Dr. Stiglitz argued for the same maturity theory based on these facts in the Government case in two amicus briefs to the Supreme Court, claiming it foreclosed a two-sided market.
Amex Br. 6, n.6.[4]

Second, Plaintiffs assert that the Court never evaluated the allegedly "unchallenged assumption[ ]" that the two sides of Amex's platform are interconnected in a simultaneous way. MP Opp. 14. That is simply wrong. The Government argued extensively that Amex's platform was not interconnected. *See*, *e.g.*, Gov't Trial Tr. 3853:22-24 (Katz) ("[I]f you look at value recapture that when American Express raised the prices they were charging the

[4] Plaintiffs' citation to *U.S. Airways, Inc. v. Sabre Holdings Corp.* to suggest market maturity forecloses a two-sided market definition is inapposite: that non-binding case was decided before the Supreme Court decision in *Ohio v. Amex*, and is currently on appeal. No. 11-cv-2725 (LGS), 2017 WL 1064709 (S.D.N.Y. Mar. 21, 2017).

merchants, they did not pass that through to cardholders."); *id*. at 4039:23-25 (Katz) (concluding that "the merchants pay higher prices and that less than the full amount is passed on to cardholders").

Nor can Plaintiffs credibly argue this information was not "brought to the attention of the [Supreme] Court nor relied upon". MP Opp. 12 (citation omitted).[5] Each court in the Government case addressed arguments about the disputed interconnectedness of Amex's two-sided platform. *United States v. American Express Co.*, 88 F. Supp. 3d 143, 215 (E.D.N.Y. 2015) (addressing whether Amex's "price increases were [ ] wholly offset by additional rewards expenditures or otherwise passed through to cardholders"); *U.S. v. Amex*, 838 F.3d at 205 (considering "evidence on the record [that] suggests . . . that not all of Amex's gains from increased merchant fees are passed along to cardholders in the form of rewards"); *Ohio v. Amex*, 138 S. Ct. at 2287-88 ("evaluating both sides of a two-sided transaction platform" when "plaintiffs did offer evidence that Amex increased the percentage of the purchase price that it charges merchants" and "this increase was not entirely spent on cardholder rewards"). Despite this evidence and these arguments, the Supreme Court held that a two-sided analysis is required.

Even if the "different" facts were not previously litigated, Plaintiffs' reliance on *Taylor v. Sturgell*, 553 U.S. 880 (2008) and *Allen v. McCurry*, 449 U.S. 90 (1980) to suggest due process requires their presentation in this action is unavailing. Those cases concerned collateral estoppel and *res judicata*—they do not disrupt the conclusion that *stare decisis* prohibits parties

[5] Indeed, Plaintiffs themselves cite to testimony from the Government case about these "different" facts. *See* MP Opp. 10 (quoting testimony from Joshua Silverman at Amex that Amex operates in "a very mature market"); MP Opp. 13-14 (quoting testimony from Mr. Silverman on the degree of the relationship between merchant pricing and cardholder benefits).

from questioning conclusions of law established by the Supreme Court. Unlike these cases, Amex is not arguing that Plaintiffs are estopped from making their arguments, but rather that their arguments are foreclosed by the Supreme Court's holding that rejects them.[6]

II. PLAINTIFFS' AMEX-ONLY SUBMARKET IS UNSUPPORTABLE.

A. Plaintiffs' Amex-Only Market Theory Is Inconsistent with *Ohio v. Amex*.

Plaintiffs also contend that the relevant market should be limited to Amex cards and should exclude all credit card competitors. *Ohio v. Amex* makes clear that Plaintiffs are wrong and that the relevant market must include all credit card networks.

The Supreme Court held that two-sided platforms compete to produce *transactions*, not services to merchants or cardholders in isolation.[7] *Ohio v. Amex*, 138 S. Ct. at 2285 & n.7. Plaintiffs concede that the proper question in a two-sided transaction market, then, is whether there is competition and substitutability for *transactions*, and not whether competition exists just on one side of the platform or the other. MP Opp. 21. The Supreme Court answered that question, concluding that Amex does compete with other card networks to create transactions. *Ohio v. Amex*, 138 S. Ct. at 2287. That conclusion forecloses the possibility of an Amex-only market. Still, however, Plaintiffs claim an Amex-only market exists because

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[6] Plaintiffs rely on other off-point authority to argue that they are not bound by the Supreme Court decision because of allegedly new facts. Neither of the cases they cite involved a Supreme Court ruling, and here the economic activity and the basic facts are the same. *See Complaint of Tug Helen B. Moran, Inc.*, 607 F.2d 1029, 1031-32 (2d Cir. 1979) (holding that a district court's apportionment of liability for one tug boat accident did not require the same apportionment for a different collision involving different events and different negligent acts); *United States v. Nolan*, 136 F.3d 265, 269-70 (2d Cir. 1998) (affirming criminal convictions and finding no conflict between Second Circuit precedents; referring to *stare decisis* only in brief dicta).

[7] Plaintiffs again insist this was a specific factual finding of the Supreme Court. MP Opp. 21-22. However, as discussed in Part I, *supra*, the Supreme Court's conclusion did not depend on specific facts presented by the Government. Therefore, the proper analysis is not to look at the "'separate' sale of services to merchants", as Plaintiffs claim. *Id*. at 22.

there is no cross-elasticity of demand on the merchant side of the market. MP Opp. 18, 20. As the Supreme Court held, Plaintiffs "miss[ ] the mark because the product that credit-card companies sell is transactions, not services to merchants, and the competitive effects of a restraint on transactions cannot be judged by looking at merchants alone". *Ohio v. Amex*, 138 S. Ct. at 2287. Therefore an Amex-only market is untenable.

Nor can Plaintiffs avoid this holding by claiming that Amex's agreements with third-party issuing banks constitute horizontal restraints of trade such that they need not define a relevant market. MP Opp. 14, n.4. [redacted] *See, e.g.*, Slater Decl. Ex. 197 (AMEXNDR06673932 at AMEXNDR06673941). Amex's NDPs place requirements on *merchants*, and as such are vertical agreements, as the Supreme Court made clear. *Ohio v. Amex*, 138 S. Ct. at 2284, 2285 & n.7.

B. Plaintiffs' Other Arguments in Support of an Amex-Only Market Fail.

1. Single-Brand Markets Are Generally Disfavored and Found Only in Very Limited Circumstances.

Contrary to Plaintiffs' assertion, Amex does not contend that single brands may never constitute a relevant market. MP Opp. 24. However, courts have only found single-brand markets in rare circumstances, none of which is present here. Amex Br. 17-18. Plaintiffs are incorrect that *Kodak* and *Leegin* stand for anything more than a narrow exception to the general rule against single-brand markets. *See Eastman Kodak Co. v. Image Technical Servs. Inc.*, 504 U.S. 451, 457-58, 482 (1992); *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 418 (5th Cir. 2010). In *Kodak*, the Supreme Court found a Kodak-only market because "Kodak equipment is unique" such that "service and parts for Kodak equipment are not interchangeable with other manufacturers' service and parts". 504 U.S. at 456, 482. In *Leegin*, the Fifth Circuit

similarly found that single-brand markets exist "[i]n rare circumstances . . . limited to situations in which consumers are 'locked in' to a specific brand by the nature of the product". 615 F.3d at 418. Though the additional cases cited by Plaintiffs do not involve a specific "lock-in" exception, they similarly illustrate the "unique" circumstances under which single-brand markets have been found—none of which is present here. *See NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 111 (1985) (noting that "intercollegiate football telecasts generate an audience uniquely attractive to advertisers and that competitors are unable to offer programming that can attract a similar audience"); *id.* at 112 (explaining that *Int'l Boxing Club of N.Y. v. United States*, 358 U.S. 242, 249-252 (1959), depended on the finding "that championship boxing events are uniquely attractive to fans and hence constitute a market separate from that for non-championship events"). The credit card market exhibits no such uniqueness—there is strenuous competition in the market for transactions.[8]

2. Plaintiffs' Single-Brand Market Definition Theory Relies on the Same Concept of Insistence that the Second Circuit Rejected.

Plaintiffs' attempt to recast their single-brand market theory as defined by "critical loss analysis" is simply an effort to avoid the Second Circuit's holding with respect to insistence. MP Opp. 18-19; 23-24. The Second Circuit described insistence as that which "effectively prevents merchants from dropping American Express". *U.S. v. Amex*, 838 F.3d at 202 (quoting *United States v. American Express Co.*, 88 F. Supp. 3d at 191-92). Plaintiffs

[8] The additional cases cited are equally unavailing. In *IBM v. United States*, an extremely old monopoly tying case, there was no discussion of the relevant market, nor whether single-brand markets are generally permitted or favored. 298 U.S. 131, 135 (1936). And in *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig*, due to the "relatively early stage of the proceedings", the court denied MasterCard's motion to dismiss but noted that the "doctrinally more exotic Single-Brand Market" alleged by the plaintiffs may later be rejected. 562 F. Supp. 2d 392, 397 (E.D.N.Y. 2008).

describe "critical loss analysis" in the same terms: it is that which "forces the MPs and all other merchants to accept Amex's anticompetitive terms" rather than refuse to accept Amex. MP Opp. 23-24. This is the same alleged constraint on the merchant. Plaintiffs cannot escape the Second Circuit's ruling with respect to insistence by renaming it "critical loss analysis".

Further, contrary to Plaintiffs' assertions, the Second Circuit's findings about insistence are equally applicable to market definition as to market power. *See* MP Opp. 18-19. Plaintiffs themselves have recognized that these concepts are intertwined:

> "The source of Amex's market power is cardholder insistence and critical loss analysis, which the merchants face when they decide to accept or cancel Amex cards. *It is because those factors leave merchants no choice but to accept Amex cards . . . that price elasticity between Amex and alternative cards for merchant acceptance is low*. This low price elasticity for acceptance matters in defining the relevant market."

Pls.' Opp. to Amex's Mot. for Summary Judgment at 21 (Nov. 21, 2013) (ECF No. 715) (emphasis added). Under Plaintiffs' own theory, cardholder insistence generates the alleged lack of cross-elasticity on which they rely to define the Amex-only market. But the Second Circuit found insistence was evidence of healthy competition among credit card networks. *U.S. v. Amex*, 838 F.3d at 203. These same competitive pressures cannot isolate Amex in a market of its own.

3. Plaintiffs' Amex-Only Market Fails Because They Cannot Use the NDPs To Define the Relevant Market.

Plaintiffs do not dispute that "economic power derived from contractual arrangements cannot serve as a basis for defining a relevant market", as courts interpreting the rule in *Queen City Pizza* have held. MP Opp. 23 (quotation and citation omitted). Instead they assert that "Amex has *pre-contract* market power that emanates from critical loss analysis [a/k/a insistence] that forces the MPs and all other merchants to accept Amex's anticompetitive terms", MP Opp. 23-24 (emphasis added), and claim that they will not attempt to define an Amex-only

market by reference to the NDPs. But Plaintiffs' own experts have already done just that, stating that, absent the NDPs, Visa, MasterCard and Amex belong in the same market. *See, e.g.*, Vellturo III ¶ 19 (Facts ¶ 37) ("[C]redit, charge and debit cards . . . should and would be largely interchangeable from the merchants' perspective; that is, they would all be in the relevant market if AmEx's Merchant Restraints did not exist."); Dep. of Christopher Vellturo, Aug. 13-14, 2013 at 43:7-44:10 (Facts ¶ 39) ("[A]s a result of the restoration of cross elasticities of demand in the but-for world [absent the NDPs], the payment products . . . would be sufficiently close substitutes that they would reside in a common market").[9] Indeed, according to Plaintiffs' experts, the only thing keeping other card networks out of an Amex-only market is Amex's NDPs, which *Queen City Pizza* holds, and Plaintiffs agree, cannot be used to define the relevant market. *Queen City Pizza, Inc. v. Domino's Pizza, Inc*., 124 F.3d 430, 438 (3d Cir. 1997). Even according to Plaintiffs, absent the NDPs, all credit card networks compete, and therefore an Amex-only market cannot stand.

CONCLUSION

Amex respectfully requests that the Court grant Amex's motion for summary judgment with respect to all claims based on a one-sided market and all claims based on an Amex-only market.

[9] *See also* Dep. of Joseph Stiglitz, July 22, 2013 at 17:7-17 (Facts ¶ 44); Vellturo III ¶ 18 (Facts ¶ 40); Amex Br. 10-11.

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