UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, et al., Plaintiffs v. AMERICAN EXPRESS CO., et al., Defendants	No. 10-CV-04496 (NGG)

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO AMERICAN EXPRESS'S MOTION FOR A STAY PENDING APPEAL

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I. INTRODUCTION

After a full trial on the merits, this Court found that Defendants' anti-steering rules impede competition and constitute an unreasonable restraint of trade in violation of Section 1 of the Sherman Act. The Court's decision is well grounded in the relevant rule of reason case law and amply supported by record evidence. The Court's straightforward remedy—enjoining enforcement of the anticompetitive restraints—ends the violation and paves the way for competition at the point of sale. That competition should begin now.

American Express ("Amex") cannot carry its burden of demonstrating that it is entitled to a stay. First, Amex has not demonstrated that its appeal is likely to succeed. Nowhere in its memorandum does Amex explain how this Court made a clearly erroneous finding of fact or erred on the law, let alone an error warranting reversal. Amex's argument as to likelihood of success on the merits consists of little more than identification of the subject matter of arguments it might raise on appeal. Second, the benefit to the public of allowing the Court's Permanent Injunction to take effect now outweighs any effects on Amex. To whatever extent the onset of competition harms Amex, a stay that forestalls such competition would sacrifice the substantial benefits that such competition will deliver to the public.

Amex's restraints significantly impede competition at the point of sale. Merchants and consumers are entitled to begin exercising the freedoms to which the Court has determined they are entitled. The stay should be denied.

II. BACKGROUND

Following over four years of discovery, pretrial proceedings, and a seven-week trial, this Court held that Amex's "Non-Discrimination Provisions" (NDPs) violate Section 1 of the Sherman Act, 15 U.S.C. § 1. *United States v. American Express Co.*, No. 10-cv-4496, slip op. at

150 (E.D.N.Y. Feb. 19, 2015), ECF No. 619 ("Decision"). The Court concluded that, by prohibiting merchants from steering customers among cards, the NDPs impede competition among card networks, block alternative business models, stifle innovation, and result in higher prices to merchants and consumers. The NDPs "caused actual anticompetitive effects on interbrand competition." Decision at 6. "Elimination of American Express's anti-steering rules would restore merchants' responsiveness to changes in network pricing and, in turn, unlock an important avenue of competition among the credit card networks." *Id.* at 116.

III. LEGAL STANDARD

"A stay is not a matter of right, even if irreparable injury might otherwise result," but "is instead an exercise of judicial discretion, and the propriety of its issue is dependent upon the circumstances of the particular case. The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Nken v. Holder*, 556 U.S. 418, 433-34 (2009) (citations and internal quotation marks omitted).

In determining whether to issue a stay pending appeal, this Court must consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *SEC v. Citigroup Global Mkts. Inc.*, 673 F.3d 158, 162 (2d Cir. 2012) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). A sliding scale applies such that "'more of one [factor] excuses less of the other.'" *Thapa v. Gonzales,* 460 F.3d 323, 334 (2d Cir. 2006) (quoting *Mohammed v. Reno,* 309 F.3d 95, 101 (2d Cir. 2002)). A balancing of these factors demonstrates that Amex is not entitled to a stay.

IV. AMEX IS NOT LIKELY TO SUCCEED ON APPEAL

The first factor is "whether the stay applicant has made a strong showing that he is likely to succeed on the merits." *Hilton*, 481 U.S. at 776. This strong showing requires "more than a mere possibility of relief." *Nken*, 556 U.S. at 434 (internal quotation marks omitted). "It is not enough that the chance of success on the merits be 'better than negligible.'" *Id.*

Amex has failed to make a "strong showing" of its likelihood of success on appeal, or even a "substantial possibility" of success or "serious questions" going to the merits. *See* Amex Mem. 4, 11. It makes only weak attempts to explain *what* legal error it believes that the Court committed or *what* factual finding it considers clearly erroneous. Neither "repeat[ing] objections and arguments that already have been considered" nor "provid[ing] a list of issues" to be "raise[d] before the Court of Appeals" suffices to "rais[e] serious legal questions." *Malarkey v. Texaco, Inc.*, 794 F. Supp. 1248, 1250 (S.D.N.Y. 1992).

First, after describing the Court's factual observations regarding markets with two-sided platforms, Amex asserts that the Court concluded that the NDPs' "competitive effects are not 'obvious.'" Amex Mem. 13. Amex cites to the Court's footnoted preliminary observation that the "complexities in this case" and the non-"obvious" effects of the NDPs require a full rule-of-reason analysis, rather than a "truncated" or "quick look" analysis. Decision at 33 n.7. Amex neglects the fact that the Court proceeded to conduct a full rule of reason analysis and reached the unequivocal conclusion that the NDPs "have resulted in the absence of inter-network [i.e., interbrand] price competition at the point of sale." *Id.* at 134.

Amex further asserts that there is an "absence of controlling authority" concerning how to analyze competitive effects in markets with a two-sided platform. Amex. Mem. 13 (citing Decision at 135). But Amex fails to note the ample authority the Court cites for the propositions

that, "[a]s a general matter . . . a restraint that causes anticompetitive harm in one market may not be justified by greater competition in a different market," Decision at 135 & n. 54 (citing, inter alia, *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972) and *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 370 (1963)), and that the "law does not permit American Express to decide on behalf of the entire market which legitimate forms of interbrand competition should be available and which should not," *id.* at 136 (citing *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. 679, 695 (1978) and *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 423-24 (1990)). To the extent Amex hints that the Court erred by not accepting Amex's arguments about how to account for the NDPs' effects on the other side of the two-sided platform, the Court observed that "Defendants cite[d] no legal authority" before or during trial for the "proposition" that it must do so, Decision at 134, nor have they provided authority for that proposition in their present motion. Furthermore, the Court concluded that, even if it were to accept that novel and legally unsupported "proposition," Amex "failed" to establish any facts that demonstrated that "NDPs are reasonably necessary to robust competition on the cardholder side of the GPCC platform, or that any such gains offset the harm done in the network services market." *Id.* at 135. Amex's motion does not explain how it can cure that failing. Amex's "two-sided" argument is aimed at the Court's detailed factual findings on "market definition, market power and competitive effects," Amex. Mem. 13-14, all of which are reviewed for clear error.[1] No clear error is

[1] *See, e.g.*, *Heerwagen v. Clear Channel Commc'ns*, 435 F.3d 219, 229 (2d Cir. 2006) ("we review the district court's factual determination as to the bounds of the relevant geographic market for clear error") overruled on other grounds by *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006); *Todd v. Exxon Corp.*, 275 F.3d 191, 199-200 (2d Cir. 2001) ("[M]arket definition is a deeply fact-intensive inquiry."); *ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 569 (2d Cir. 1990) ("Like many matters of fact, the competitiveness of a market and the market power of a seller may be ascertained with the aid of expert opinions, whose persuasive force is itself a factual matter within the purview of the fact-finder."); *Hayden Publ'g Co. v. Cox Broad. Corp.*, 730 F.2d 64, 70 n.8 (2d Cir. 1984) ("[A] pronouncement as to market

identified.

Second, Amex contends that the Court's liability decision raises questions about "the proper use of pricing evidence" in two-sided industries and even asks rhetorically "which 'price' is the proper price to assess, what the relevant two-sided price is and how that price and the margins related to it can and must be measured." *See* Amex Mem. 14. Amex omits any of "the Court's findings regarding price," which were based on the Court's conclusion that the price calculations of Amex's expert, Dr. Bernheim, were "unreliable" and "flawed in a number of respects." Decision at 91-92. Amex does not explain how it will likely succeed on appeal in showing that the expert evidence it offered at trial was, in fact, reliable.

Third, Amex asserts that the Court should not have relied on cardholders' insistence (on using their Amex card) in finding that Amex possesses market power. *See* Amex. Mem. 14-15. Amex cites no authority for its position that the Court erred in relying upon the extensive testimony and evidence regarding cardholder insistence, and the most relevant precedent, *United States v. Visa*, 344 F.3d 229 (2d Cir. 2003), directly contradicts Amex's position. *Compare Visa*, 344 F.3d at 240 (affirming market power finding for both Visa and MasterCard (with a 26% share), based on "the fact that merchants testified that they could not refuse to accept payment by Visa or MasterCard, even if faced with significant price increases, because of customer preference"), *with* Decision at 71-75.

Amex tries to distinguish *Visa*, claiming that cardholders' insistence for Visa or for MasterCard were "durable" in that case because of those networks' "ubiquity," while Amex

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definition is not one of law, but of fact."); *see also Gordon v. Lewistown Hosp.*, 423 F.3d 184, 211 (3d Cir. 2005) ("Determination of market power is a determination of fact; therefore we review the District Court's conclusions to determine if they are clearly erroneous."); *United States v. Rockford Mem'l Corp.*, 898 F.2d 1278, 1285 (7th Cir. 1990) (Posner, J.) (on "market definition[]," the court is "bound to review the judge's determination under the deferential 'clearly erroneous' standard . . . .").

cardholders' insistence is transitory because it depends on Amex not imposing "effective price increases through a loss in Card Member benefits." *See* Amex Mem. 14-15. The Court found that the "durability of Defendants' power is ensured by the sustained high barriers to entry" and the "lack of any meaningful entry into the market since 1985," factual findings for which Amex asserts no clear error. Decision at 78. Moreover, the Second Circuit in *Visa* did not allude to ubiquity in affirming the district court's finding on market power, and Amex cites nothing to support its claim that "ubiquity" was the essential fact leading to cardholder insistence for Visa or MasterCard. *See Visa*, 344 F.3d at 239-40. In any event, the *Visa* court did not need to delve into the source of cardholder insistence because the central point was that *cardholder* insistence gave the networks power over *merchants*. The same is true today for Amex, and its arguments about insistence raise no "substantial possibility" of success in an appeal of the Court's liability decision.

Moreover, Amex's arguments concerning market power cannot justify a stay because the Second Circuit can also affirm the conclusion that Amex's anti-steering rules violate the Sherman Act without concluding that Amex possesses market power. Plaintiffs proved directly that the Rules "caused actual anticompetitive effects on interbrand competition," Decision at 6, and that proof suffices to establish the violation, *see id.* at 35 ("Two independent avenues exist by which [plaintiffs'] burden may be discharged," one of which is "directly, by 'show[ing] an actual adverse effect on competition.'") (citing *K.M.B. Warehouse Distribs., Inc. v Walker Mfg. Co.*, 61 F.3d 123, 129 (2d Cir. 1995)).

Fourth, Amex makes factual and legal arguments about why "the relevant market should include debit cards." *See* Amex Mem. 15-16. On the facts, Amex alludes to evidence about "consumer" (i.e., cardholder) behavior, but the Court rejected arguments based on that evidence

because "the market in this case cannot be defined solely by reference to cardholders' views." *See* Decision at 53-54 & n.16. Without explaining any error in the Court's reasoning, Amex's apparent plan to rehash these facts on appeal raises no "serious legal questions." *See Malarkey*, 794 F. Supp. at 1250.

Amex avers that the Court's liability decision is "in tension" with the Third Circuit's decision in *Queen City Pizza v. Domino's Pizza, Inc.*, 124 F.3d 430 (3d Cir. 1997)—a case rejecting a "single brand" market definition in a franchising context that is far afield from the issues here. Amex Mem. 15-16. Amex cites no authority explaining why *Queen City* sets forth a standard for market definition that the Court should have applied here, or why doing so would change the market definition decision here—with a decision well-grounded in findings of fact for which no clear error is identified or alleged. Without more, this vague reference cannot support a conclusion that Amex has any chance of success on appeal.

It is instructive to compare Amex's bare bones approach to the actual showing as to the first factor by the litigants in *A2P SMS Antitrust Litig.*, No. 12-cv-2656, 2014 WL 4247744 (S.D.N.Y. Aug. 27, 2014)—an unpublished decision Amex cites several times in its brief. By the time of the *A2P* decision Amex cites, the litigants had already clearly stated the contested issue—i.e., "Defendants claim that these cases hold that "[w]hether class proceedings are available in arbitration is a 'gateway dispute' that 'raises a question of arbitrability for a court to decide,'" *A2P SMS Antitrust Litig.*, Op. at 11 (ECF No. 251) (May 29, 2014), and the litigants had identified the numerous Supreme Court, Second Circuit, and other Circuits' opinions that provided support for their urged positions, *id*. at 11-16. This allowed the *A2P* court to describe and assess the merits of the litigants' positions, ultimately emphasizing that not only had "the legal landscape shifted during the course of this proceeding," but "the Supreme Court has yet to

definitely answer the question" at hand and "appellate courts addressing this issue . . . have arrived at divergent results," thus making the "issue . . . a close one." *Id.* at 6, 8, 15-16, 20. Here, Amex makes no remotely similar showing, instead relying on conclusory claims that the Decision is wrong. That does not even show a chance on appeal that is "better than negligible." *Nken*, 556 U.S. at 434.

Amex's skeletal description of legal issues it intends to contest, and its veiled and unsupported attacks on the Court's extensive factual findings, fail to establish a likelihood of success on appeal. While there is a "sliding scale" in assessing whether a stay should issue, the movant must place something of substance on the "likelihood of success" side of that scale.

V. AMEX'S "IRREPARABLE HARM" CLAIMS ARE INADEQUATE

Stripped of predictions the Court already has deemed unfounded and additional vague claims made now for the first time, Amex's "irreparable harm" argument boils down to this: Amex will face additional competition from rival networks once the Permanent Injunction becomes effective, and thus would need to adjust its business model to become more attractive to its merchant customers. Competition inherently has such effects. In view of Amex's weak showing on the likelihood of success factor and facts found in this Court's liability decision, Amex's private interest in maintaining its anticompetitive restraints does not outweigh the substantial public interest in competition.

Amex's claims of irreparable harm largely rehash the rejected procompetitive justifications it offered at trial (i.e., that "were the network unable to rely on the NDPs to control merchants' conduct toward its cardholders at the point of sale, the company's ability to pursue its differentiated business model would be invariably and irreparably harmed."). Decision at 66. Amex's assertion that it would be "unable" to "compet[e] effectively" if forced to adapt to

absence of its anticompetitive restraints, Amex Mem. at 6, was rejected as a factual matter after a full trial, *see, e.g.*, Decision at 137 ("Even if Defendants' proffered justification were legally cognizable, the Court finds that the dire prediction of how business will be impacted by removal of the NDPs—namely, that American Express will cease to exist or be relegated to a niche competitor in the GPCC market—is not supported by the evidentiary record.").

Moreover, even Amex's less dramatic claims that competition, especially price competition, will erode its market share and profit margins are undercut by evidence from the trial. For example, Amex fears that competition will produce activities like the "We Prefer Visa" campaigns of the 1990s but fails to note that Amex itself invited the merchant preference for Visa by maintaining a dramatic price differential: Visa prices of 1.75% versus Amex prices of 3.25%. Trial Tr. 3317:15-3318:15 (Morgan/Visa); PX0132 at -879-80, -882. The Court has already found that Amex is "not, as they might have the court believe, powerless in a world in which merchants and customers are able to jointly determine which payment product is used at the point of sale." Decision at 70. Amex's argument that it will necessarily "lose market share" in a world with steering is not supported by the record. *Compare* Amex Mem. at 7 *with* Decision at 129 n.50. After all, "merchant steering and a positive payment experience are not necessarily mutually exclusive." Decision at 134 n.53. These findings are fatal to Amex's claim that harm to it should outweigh the benefits to third parties and to competition, and Amex has cited no basis to suggest how or why these factual findings are clearly erroneous.

Nor can Amex reasonably claim that the changes demanded by the Permanent Injunction are so challenging to implement that they constitute irreparable harm. The Court's Permanent Injunction does not require a potentially irreversible corporate action like breaking up the company or divesting a key product or business unit. *Int'l Boxing Club of N.Y., Inc. v. United*

States, 358 U.S. 242, 260-61 (1959) (sustaining dissolution of two international boxing clubs). Rather, Amex will have to face more merchant steering than it has in the past. As the Court found, Amex already permits merchant steering in some instances—for co-brand cards, short-term promotions, or "sponsorship" agreements. Decision at 129-30, n.50, n.53; Tr. 4575:7-4563:6, 4564:2-4565:16 (Chenault/Amex). Amex also is required to permit certain debit steering under the Durbin Amendment, yet apparently has suffered no irreparable harm from that 2010 change to its merchant rules. While the additional competition permitted by the Permanent Injunction will be significant, *id*. at 136-37, 139-41, and will lead to significant benefits, *id.* at 136-37, 139-41, it is not as if Amex has never faced any steering before. And, of course, Amex itself steers. *Id*. at 117-18.

Amex claims that it will be irreparably harmed because it will have to cease enforcing its illegal restraints, or, in its words, "immediately and materially modify the contractual rights of American Express and its large merchant partners." Amex Mem. 9. Amex claims that this will result in "disruption of the structure of the business relationship between American Express and its merchant customers." *Id*. These consequences are overstated. Amex can implement the Permanent Injunction reforms by notifying the contracting parties that it will not enforce the NDPs that constitute the violation; the Permanent Injunction provides a mechanism for this. And Amex can reform its contracts to comply with the Permanent Injunction while protecting itself by negotiating clauses providing for reversion to the original terms in the unlikely contingency that the court of appeals reverses. In the unlikely event that Amex prevails, it can re-institute the provisions in the same manner as it modified its practices when the Durbin Amendment came into force.

Finally, Amex's argument that competition itself inflicts irreparable harm justifying a stay is impossible to reconcile with Amex's prior litigation positions. In *United States v. Visa*, where Amex opposed a stay, it argued that "[t]he antitrust laws do not permit Defendants 'to label increased competition as a harm,' *Blue Shield of Virginia v. McCreedy*, 457 U.S. 465, 484 n.19 (1982), much less the 'irreparable harm' necessary to support a stay pending appeal." Memorandum of American Express Company as Amicus Curiae in Opposition to Defendants' Motions for a Stay Pending Appeal, *United States v. Visa, U.S.A., Inc.*, No. 98 Civ. 7076 (BSJ) (S.D.N.Y. Jan. 14, 2002). *Id*. at 5. In Amex's words:

> Increased competition is not harm; it is one of the core values that the antitrust laws promote. The answer to increased competition is for Visa and MasterCard to provide competition in return. It is not to eliminate the competition by rule or, in this instance, through a stay pending appeal.

Id. at 6. Amex can give those words meaning by competing during its appeal, rather than using a stay to perpetuate its anticompetitive restraints.

Ironically, Amex relies heavily on the stay it opposed in *Visa*. But that stay was granted under materially different circumstances and for reasons not present here. The Court issued a stay because many of "this court's critical factual findings did not require credibility determinations, and therefore may be treated with less deference by the Court of Appeals than findings that do involve credibility assessments." *United States. v. Visa U.S.A., Inc*., 2002 WL 638537, at *1 (S.D.N.Y. Feb. 7, 2002). Here, the Court made relevant factual findings based on credibility assessments of witnesses. Decision at 7 ("credibility of the parties' respective witnesses and their testimony" a factor in the Court's determination), 88 ("the court is hesitant to rely on the self-interested statements of Defendants' executives absent" documentation), 137 (testimony of Amex executives and experts was "notably inconsistent" concerning the viability of Amex's current business model in a market in which merchant steering is permitted); 138

("Defendants are not, as they might have the court believe, powerless in a world" without the NDPs). Additionally, the *Visa* court noted "potentially irreversible consequences" of its injunction rescinding dedication agreements; if issuers left Visa and MasterCard and issued Amex cards, the card portfolio changes might be permanent. Here, the injunction simply allows Amex's competitors to compete for more charge volume and merchants to do more steering than they currently are allowed. A successful appeal would enable Amex to re-impose the restraints blocking such competition. In contrast, Visa or MasterCard could not force a card issuer that had issued cards on Amex's network to recall its new card portfolio.

VI. A STAY WOULD HARM NON-PARTIES

As the evidence established at trial, millions of merchants—direct consumers of Amex's services—are deprived of the benefits of competition by Amex's NDPs. Moreover, those merchants' customers—ultimate consumers—are also deprived of the benefits of competition. Merchants pay over $50 billion in credit card "swipe fees" each year. The Court found that the NDPs have resulted in higher prices to merchants and consumers. Decision at 111-14. Amex essentially ignores the harm of a stay to the interests of merchants and their customers. A stay would mean that merchants, and ultimately their customers, would continue paying the higher prices that the NDPs enable.

Merchants who could efficiently and profitably use their new freedom to attract customers, Decision at 112-12, or to make customers more satisfied while providing a positive experience, Decision at 134, n. 53, or other perks, Decision at 120-21 (such as free shipping for using American Express), are deprived of those opportunities to strengthen their businesses. *See* Decision at 98-111, 115-16.

Customers who would have received discounts, rewards points, convenience, or other benefits as merchants incentivize customers to choose a particular card, Decision at 120-21 (such as 5% off for using MasterCard, a free hotel night for using Visa or Discover, or free shipping for using American Express), would be harmed by the denial of those benefits.

As the Court found, merchants eventually have to pass on their costs to their customers. As a result, customers end up paying the higher fees imposed by Amex's NDPs in the form of higher prices for the goods or services that they buy. Decision at 113-14. And, as the Court found, Amex's NDPs mean that the higher costs are passed on to all customers, not just to Amex customers or even just to credit card customers. *Id*. All these harms to third parties would be perpetuated if a stay is granted.

Moreover, now is a time when the market may be beginning wider adoption of mobile payments. Decision 115-16. And new low-cost alternatives may depend on steering for success. *Id*. at 115-16. If Amex can block emergence of such innovations, it may be able to forestall competition in the next generation of payment technology.

Amex sidesteps the "harm to others" factor entirely. In essence, Amex argues that since its successful imposition of the NDPs blocked competition for an extended period of time, it should be permitted to do so while it exhausts its appeal rights. The difference now is that there has been a full trial on the merits and an extensive, detailed set of factual findings demonstrating, among other things, the substantial harm Amex's restraints have imposed on merchants and consumers. The fact that Amex has an extensive history of imposing anticompetitive restraints does not demonstrate that the harm to merchants and their customers does not exist, or should be discounted.

Amex builds its motion on the proposition that it will need to change its business model to compete, Amex Mem. 5-6, yet ignores completely the fact—well documented in the record—that merchants across the economy have already been forced to tailor or constrain their business models to conform to Amex's anticompetitive restraints. Decision at 119-20 (citing multiple merchants that asked Amex for the ability to steer but were denied). If Amex faces harm, without a stay, from modifying its business model to stop blocking competition, then merchants undeniably face parallel harm, with a stay, from stultifying their business models because Amex continues to block competition.

VII. THE PUBLIC INTEREST IN COMPETITION IS PARAMOUNT

There is a significant "public interest in effective enforcement of the antitrust laws," *FTC v. H.J. Heinz Co*., 246 F.3d 708, 726 (D.C. Cir. 2001), and a stay would harm that public interest in competition. The premise of the Sherman Act is that competition serves the public interest by yielding "the best allocation of our economic resources, the lowest prices, and highest quality and the greatest material progress." *N. Pac. Ry. Co. v. United States,* 356 U.S. 1, 4 (1958). Delaying implementation of the remedy would deprive the public of these benefits. *See generally In re Vitamin C Antitrust Litig.,* 279 F.R.D. 90, 112 (E.D.N.Y. 2012) ("The antitrust laws were enacted 'for the protection of competition,' *Cargill*, 479 U.S. at 115, . . . and a lessening of competition is "precisely the kind of irreparable injury that injunctive relief under section 16 of the Clayton Act was intended to prevent." *California v. Am. Stores Co*., 492 U.S. 1301, 1304 . . . (1989) (internal quotation marks omitted).").

The Court found that Amex's NDPs imposed harmful effects marketwide. Not only were Amex's incentives to compete with lower prices diminished, so were those of Amex's horizontal interbrand competitors. Decision at 100-07 ("I don't think anybody's business strategy is to be

cheaper than the next guy." Tr. 2667:22-2668:8 (Funda/Amex)). Removal of Amex's NDPs would result in increased competition from *all* network competitors, as merchants use their new freedom to engender competition among all networks. Visa, MasterCard, and Discover would be enabled—and forced—in the absence of Amex's NDPs to respond to the new competitive environment. Ending Amex's NDPs will allow the benefits of competition to flow to merchants, consumers, and the economy as a whole. Moreover, the Court found that Amex's NDPs had "stunted innovation" and "inhibit[ed] the development of several proposed merchant-owned payment solutions." Decision at 115-16. Innovation may benefit not only the innovators, as third parties, but also the public interest in competition. Timing can be critical to innovation; Amex, in its opening statement, said that the market today could be described "as a digital tornado . . . . there's some new service emerging every single day." Tr. 167:12-15 (Opening). If Amex can block innovative low-cost payment solutions for the length of the appeal, marketplace developments may mean that the crucial moment for some of those innovations may have passed.[2]

VIII. THE EQUITIES WEIGH AGAINST GRANTING A STAY

In light of Amex's weak showing of likelihood of success, no stay is warranted when the effect on all the various interests is balanced. The claims of irreparable harm that Amex now asserts parallel claims that it made and that were rejected, at trial. While Amex will indeed need to react to the new competitive environment, any negative effect on Amex is more than offset by positive benefits for merchants, consumers, and competition itself.

In balancing the equities, the public interest in competition is important. *See Time Warner Cable of N.Y.C. v. Bloomberg L.P.,* 118 F.3d 917, 929 (2d Cir. 1997) ("Whenever a

[2] Amex states an interest in expediting the appeal process, Amex Mem. 18-19, but it has yet to file a notice of appeal to initiate that process.

request for a preliminary injunction implicates public interests, a court should give some consideration to the balance of such interests."); *Heinz*, 246 F.3d at 727 n.25 ("Private equities do not outweigh effective enforcement of the antitrust laws."). This Court's findings, subject to reversal only if clearly erroneous, make the public harm from Amex's suppression of competition palpable. Amex's arguments about its private injury do not satisfy the standard for a stay under these circumstances. To whatever degree the onset of competition harms Amex, this Court's findings make clear that the irreparable public injury from forestalling the onset of competition must be greater. Amex's failure to make any serious showing of likelihood of success mean that its insistence on a stay is unwarranted. *See Nken*, 556 U.S. at 438 ("When considering success on the merits and irreparable harm, courts cannot dispense with the required showing of one simply because there is a strong likelihood of the other.") (Kennedy, J., concurring); *Curry v. Baker*, 479 U.S. 1301, 1302 (1986) ("It is no doubt true that, absent [a stay], the applicant here will suffer irreparable injury. This fact alone is not sufficient to justify a stay") (Powell, J., in chambers); *In re Twenty–Six Realty Associates, L.P.*, No. 95 CV 126, 1995 WL 170124, at *15 (E.D.N.Y. Apr. 4, 1995) ("A showing of irreparable harm alone is insufficient to justify the grant of a stay"); *cf. Blossom South, LLC v. Sebelius*, NO. 13-CV-6452L, 2014 WL 204201, at *3 (W.D.N.Y. Jan. 17, 2014) ("What is most glaringly missing here is any significant chance of success on the merits, on appeal.").

IX. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submit that this Court should deny Amex's application for a stay of the Permanent Injunction pending appeal.

Respectfully submitted,

Dated: May 11, 2015

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