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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR AMICI CURIAE MERCHANTS AND RETAIL TRADE ORGANIZATIONS IN SUPPORT OF PLAINTIFFS-APPELLEES AND SUPPORTING AFFIRMANCE

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7-Eleven, Inc., Academy, Ltd. d/b/a Academy Sports + Outdoors, Alimentation Couche-Tard Inc., American Eagle Outfitters, Inc., Ashley Furniture Industries Inc., Barnes & Noble, Inc., Barnes & Noble College Booksellers LLC, Beall's, Inc., Best Buy Co., Inc., Boscov's, Inc., Brookshire Grocery Company, Buc-ee's Ltd., The Buckle, Inc., The Children's Place Retail Stores, Inc., Coborn's Incorporated, Cracker Barrel Old Country Store, Inc., D'Agostino Supermarkets, Inc., David's Bridal, Inc., DBD, Inc., David's Bridal Canada Inc., Dillard's, Inc., Drury Hotels Company, LLC, Express, LLC, Family Express Corporation, 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 Menomonie, 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, Nike, Inc., 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., WFM Hawaii, Inc., WFM Southern Nevada, Inc., Whole Foods Market, Rocky Mountain/ Southwest, L.P., The William Carter Company, and Yum! Brands, Inc.

CORPORATE DISCLOSURE STATEMENT OF AMICI CURIAE

Pursuant to FRAP 26.1, undersigned counsel for *amici curiae* provide the following disclosures:

Represented by Bondurant Mixson & Elmore LLP:

1. Home Depot USA, Inc. states that The Home Depot, Inc. is its ultimate parent corporation and that no publicly held corporation owns 10% or more of the stock of The Home Depot, Inc.

Represented by Constantine Cannon:

2. 7-Eleven, Inc. is a subsidiary whose parent corporation is Seven & I Holdings Co. Ltd, a publicly held Japanese corporation that owns 10% or more of the stock of 7-Eleven, Inc.

3. Academy, Ltd. is a Texas limited partnership ("Academy") doing business as Academy Sports + Outdoors. Academy has no parent corporation. The sole limited partner of Academy is Associated Investors, L.L.C., a Texas limited liability company, and the sole general partner of Academy is Academy Managing Co., L.L.C., a Texas limited liability company, neither of which is publicly traded. Each of Associated Investors, L.L.C. and Academy Managing Co., L.L.C. may be deemed to be controlled by investment funds affiliated with KKR & Co. L.P. ("KKR") through an indirect ownership interest in these entities. KKR is publicly traded on the New York Stock Exchange.

4. Alimentation Couche-Tard Inc. ("Couche-Tard") has no parent company. Metro Inc., a publicly held Canadian corporation, owns 10% or more of Couche-Tard's stock.

5. American Eagle Outfitters, Inc. has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

6. Ashley Furniture Industries Inc. has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

7. Barnes & Noble, Inc. ("Barnes & Noble") has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

8. Barnes & Noble College Booksellers LLC is wholly-owned by Nook Media LLC, of which Microsoft Corp., a publicly held corporation, owns more than 10% of its stock. Nook Media LLC is majority owned by Nook Media, Inc., which is wholly-owned by Barnes & Noble Booksellers Inc., which is wholly-owned by Barnes & Noble, Inc.

9. Beall's, Inc. has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

10. Best Buy Co., Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

11. Boscov's, Inc. has no parent company and there is no publicly held corporation that owns 10% or more of its stock.

12. Brookshire Grocery Company ("Brookshire") is a subsidiary whose parent is BGC Management, Inc., who in turn is a subsidiary of Brookshire Holdings, Inc. There is no publicly held corporation that owns 10% or more of Brookshire's stock.

13. Buc-ee's Ltd. has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

14. The Buckle, Inc. has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

15. The Children's Place Retail Stores, Inc. ("The Children's Place") has no parent corporation. BlackRock Inc., a publicly held corporation, owns 10% or more of the stock of The Children's Place.

16. Coborn's Incorporated has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

17. Cracker Barrel Old Country Store, Inc. ("Cracker Barrel") has no parent corporation. Biglari Holdings, Inc., a publicly held corporation, owns 10% or more of the stock of Cracker Barrel.

18. D'Agostino Supermarkets, Inc. has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

19. David's Bridal, Inc., DBD, Inc., and David's Bridal Canada Inc. (collectively, "David's Bridal") are wholly owned subsidiaries of CDR DB

Investors, Inc. There is no publicly held corporation that owns 10% or more of David's Bridal's stock.

20. Dillard's, Inc. has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

21. Drury Hotels Company, LLC ("Drury") is a limited liability company whose members are DDC Hotels, Inc., which is a wholly owned subsidiary of Drury Development Corporation, and DSW Industries, Inc., which is a wholly owned subsidiary of Drury Southwest, Inc. There is no publicly held corporation that owns 10% or more of the stock of Drury.

22. Express, LLC is a wholly owned subsidiary of Express, Inc., a publicly held corporation.

23. Family Express Corporation has no parent company and there is no publicly held corporation that owns 10% or more of its stock.

24. Fleet and Farm of Menomonie, 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., and Fleet and Farm of Alexandria, Inc., are subsidiaries whose parent is Mills Properties, Inc., a privately-held corporation. There is no publicly held corporation that owns 10% or more of the stock of these companies.

25. Fleet and Farm of Green Bay has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

26. Mills E-Commerce Enterprises, Inc. ("Mills E-Commerce") is a subsidiary whose parent is Fleet and Farm of Green Bay. There is no publicly held corporation that owns 10% or more of the stock of Mills E-Commerce.

27. Fleet Wholesale Supply Co. Inc. has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

28. Mills Fleet Farm, Inc. ("Mills Fleet Farm") is a subsidiary whose parent is Fleet Wholesale Supply Co. Inc. There is no publicly held corporation that owns 10% or more of the stock of Mills Fleet Farm.

29. Mills Motor, Inc., Mills Auto Enterprises, Inc., Willmar Motors, LLC, Mills Auto Center, Inc., and Brainerd Lively Auto, LLC have no parent corporation and there is no publicly held corporation that owns 10% or more of the stock of these companies.

30. Foot Locker, Inc. has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

31. The Gap, Inc. has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

32. HMSHost Corporation is a subsidiary whose parent is Autogrill S.p.A., a publicly traded Italian corporation.

33. IKEA North America Services LLC ("IKEA North America") is a subsidiary whose indirect parent corporation is IKEA Holding US, Inc. There is no publicly held corporation that owns 10% or more of the stock of IKEA North America.

34. Kwik Trip, Inc. has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

35. Lowe's Companies, Inc. has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

36. Marathon Petroleum Company LP is a subsidiary of parent corporation Marathon Petroleum Corporation, a publicly held corporation.

37. Martin's Super Markets, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

38. Michaels Stores, Inc. ("Michaels") is a subsidiary whose parent is Michaels Holdings, LLC. There is no publicly held corporation that owns 10% or more of the stock of Michaels.

39. National Association of Convenience Stores (NACS) has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

40. National Grocers Association (NGA) has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

41. National Restaurant Association (NRA) has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

42. NIKE, Inc. has no parent company and there is no publicly held corporation that owns 10% or more of its stock.

43. Official Payments Corporation is a wholly-owned subsidiary of ACI Worldwide, Inc., a publicly traded corporation.

44. Pacific Sunwear of California, Inc. has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

45. P.C. Richard & Son, Inc. ("P.C. Richard") is a subsidiary whose parent is A.J. Richard & Sons, Inc. No publicly held corporation owns 10% or more of P.C. Richard's stock.

46. Panda Restaurant Group, Inc. has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

47. PetSmart, Inc. is a wholly-owned subsidiary of Argos Holdings, Inc., a privately held corporation.

48. RaceTrac Petroleum, Inc. has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

49. Recreational Equipment, Inc. has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

50. Republic Services, Inc. has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

51. Retail Industry Leaders Association has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

52. Sears Holdings Corporation has no parent company and, based on SEC filings by the company's stockholders, there is no publicly held corporation that owns 10% or more of its stock.

53. Speedway LLC is a subsidiary whose parent is Marathon Petroleum Corporation, a publicly held corporation.

54. Stein Mart, Inc. has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

55. Swarovski U.S. Holding Limited ("Swarovski") is a subsidiary whose parent corporation is Swarovski International Holding AG, a privately held Swiss corporation. No publicly held corporation owns 10% or more of the stock of Swarovski.

56. Wal-Mart Stores, Inc. has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

57. 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., WFM Hawaii, Inc., and WFM Southern Nevada, Inc. are wholly owned subsidiaries of Whole Foods Market, Inc., a publicly held corporation.

58. Whole Foods Market Rocky Mountain/Southwest, L.P. is a limited partnership whose general and limited partners are privately held corporations wholly owned by Whole Foods Market, Inc., a publicly held corporation.

59. The William Carter Company is a subsidiary that is wholly owned by Carters, Inc., a publicly held corporation.

60. Yum! Brands, Inc. has no parent company, and there is no publicly held corporation that owns 10% or more of its stock.

Represented by Vorys, Sater, Seymour and Pease, LLP:

61. Target Corporation has no parent companies, and there is no publicly held corporation that owns 10% or more of its stock.

62. Staples, Inc. has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

63. Office Depot, Inc. has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

64. Ascena Retail Group, Inc. has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

65. Abercrombie & Fitch has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

66. OfficeMax Incorporated has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

67. Saks Incorporated is a subsidiary whose ultimate parent company is Hudson Bay Trading Company LP., a publicly traded company, and no other publicly held corporation owns 10% or more of Hudson Bay Trading Company LP.'s stock.

68. The Bon-Ton Stores, Inc. has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

69. Chico's Fas, Inc. has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

70. Luxottica U.S. Holdings Corp. is a subsidiary whose parent corporation is Luxottica Group S.p.A, a publicly traded company, and no other publicly held corporation owns 10% or more of the Luxottica Group S.p.A's stock.

71. American Signature, Inc. is a subsidiary whose parent corporation is Schottenstein Stores Corporation, which is not publicly traded. No publicly held corporation owns 10% or more of the stock of American Signature, Inc.

72. Lord & Taylor Acquisitions, Inc. is a subsidiary whose parent company is Hudson Bay Trading Company LP., a publicly traded company, and no other publicly held corporation owns 10% or more of the Hudson Bay Trading Company LP.'s stock.

73. National Retail Federation has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

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2A Phillip Areeda and Herbert Hovenkamp, Antitrust Law ¶ 521 (Rev. ed. 1996) 25

IDENTITY OF *AMICI CURIAE*

The *amici* are 89 merchants and five retail trade associations. Each of the merchants accepts credit cards issued by American Express Co. ("AMEX") and other credit card networks. Each is subject to AMEX's anti-steering rules, sometimes referred to as Non-Discrimination Provisions ("NDPs").

The *amici* represent a broad cross-section of American retailing. Many are among the largest retailers in the world. Collectively, they pay billions of dollars a year to accept credit cards as a form of payment. The four trade associations represent hundreds of thousands of additional merchants, the vast majority of which accept credit cards. The *amici* believe that the prices that U.S. merchants pay to AMEX and other payment card networks have long been sustained at supra-competitive levels by anti-steering rules and that those prices will drop if AMEX is enjoined from enforcing those rules. The *amici* file this brief with the express consent of all parties.[1]

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[1] Pursuant to Fed. R. App. P. 29(c)(5), counsel certify that this brief was authored by counsel for the *amici*. Counsel for a party did not author any part of the brief, nor did any party or counsel for any party contribute any money to fund the preparation or submission of the brief. No person other than the *amici* and their counsel contributed any money for the preparation of this brief.

ARGUMENT AND CITATION OF AUTHORITY

I. Retailers Want the Freedom to Choose Among Pro-competitive Methods to Reduce Their Costs of Credit Card Acceptance, Such as By Steering Their Customers to Lower Cost Cards.

The district court heard trial testimony from over a dozen retail merchants attesting to the followings facts. First, retail merchants—particularly large, multi-location retailers—generally cannot refuse to accept AMEX without losing an unacceptable portion of their sales to competitors who accept that card.[2] Second, that reality has allowed AMEX to impose a steady succession of price increases upon merchants without any corresponding increase in its services.[3] This is true even where the merchant has delivered increased charge volume to AMEX and thus would expect a price decrease in a more typical vendor negotiation.[4]

Third, even the largest retailers in the country cannot induce price competition among the major credit card networks, including AMEX, because merchants lack the ability to reward lower prices with additional charge volume.[5] Special Appendix, Dkt. No. 128 ("SPA")100-16. They lack that ability because AMEX rules and practices, including anti-steering rules, prevent merchants from

[2] Trial Transcript ("Tr.") 208-09, 232-48, 389-90, 573-74, 1262-63, 1401, 1606-07, 1687-90, 2159-61, 2183, 2322-23, 2359, 2411-12, 2416, 3146-47, 6126.

[3] Tr.244, 363, 395, 569-70, 1400, 1608-09, 2395, 2407-10, 2414-15, 2518.

[4] *Id.*

[5] Tr.223-24, 1347, 1379, 1402, 1483-85, 1623, 2440.

employing various methods of encouraging competition between the payment card networks. *Id.* These methods include incentivizing consumers to use cards with lower acceptance costs via discounts, rebates, benefits, signage or even a mere suggestion at the point of sale. *Id.*

This dysfunction contrasts markedly with the free market dynamics that characterize essentially every other aspect of a retailer's business. Retailers select their suppliers and vendors through competitive bidding, not take-it-or-leave-it ultimatums.[6] They steer volume to those vendors in exchange for lower prices.[7] And they would like the option of using the same strategies to lower the ever-increasing card acceptance fees that have become one of their most significant costs of doing business.[8]

For some major multi-location retailers, the costs of payment card acceptance are their highest operational costs, after real estate, healthcare and payroll.[9] For all retailers, these costs are substantial and increasing.[10] Retailers

[6] Tr.219-24, 381-82, 395-96, 398-99, 1259-61, 1344-47, 1400, 2370-71, 2394-95, 2411-12.

[7] *Id.*

[8] Tr.260-64, 350-51, 368-69, 408-13, 413, 456-57, 497-99, 501-02, 580-81, 1244-45, 1267-69, 1273-74, 1277, 1539-44, 1615-17, 1671-72, 1691-92, 1699-1706, 2171, 2237, 2327-29, 2353-54, 2418, 2424-28, 2432-33, 2440-41, 2517, 2527-30, 3149-50, 3161, 3170-71, 3219-20, 6131, 6189.

[9] Tr.386-87, 1222-23.

have variously responded by attempting to negotiate out of the anti-steering rules,[11] by attempting to negotiate price reductions,[12] by threatening to terminate their acceptance of AMEX, and, in a very few cases, by following through on that threat.[13] None of those strategies has worked, even for the largest retailers in the country. *Id.* By contrast, as the district court found, the ability to steer volume to lower priced networks—or even the ability to threaten such steering in negotiations—would inject the interbrand price competition sorely lacking from this market. SPA116-27.

AMEX dismisses the testimony of the merchant witnesses as "self-serving" and "self-interested," while freely invoking the testimony of current AMEX employees and its paid expert witnesses. AMEX Br. at 3, 29 n.9. Unlike the witnesses for AMEX, whose interest is defeating the government's claims at any cost to the larger economy, the only interest of the merchant witnesses is to reduce their costs by inducing interbrand price competition. That interest is carefully

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[10] Tr.207-08, 386-87, 392-93, 449-55, 481, 1222-23, 1255-57, 1351-52, 1527-29, 1608-09, 2169, 2182-83, 2234-35, 2398, 2405, 2523, 3155-56.

[11] Tr.261-66, 270, 402, 1258, 1322, 1612-13.

[12] 203-08, 218-19, 239, 244, 369, 394-95, 570-72, 1255-57, 1261-62, 1352-56, 1365-1392, 1396-97, 1608-09, 1622-23, 1666, 1694-99, 1763, 2169-71, 2183, 2412-16, 2523-24.

[13] Tr.389-90, 486-94, 570-72, 1365-1392, 1518-19, 1529-36, 1687-90.

safeguarded by the antitrust laws, as our national economic policy. *Nat'l Soc'y. of Prof'l Engineers v. United States*, 435 U.S. 679, 695 (1978).

Reducing merchants' costs of credit card acceptance would in turn benefit retail consumers. SPA120-22. The district court's factual finding to that effect is supported by merchant testimony that a substantial portion of cost reductions find their way to customers in the form of lower prices.[14] Indeed, retail merchants have little choice—if one merchant does not pass on cost savings, its competitors will. *Id.* That is the difference between the competitive market in which retailers operate and the market for credit card network services, where AMEX has been able to raise price without fear of merchant attrition or competitive response. SPA78-83.

II. The Government Met its Burden to Prove that Anti-Steering Rules Harm Interbrand Price Competition in the Market as a Whole.

The district court found that AMEX's anti-steering rules, or "NDPs," play a critical role in insulating its pricing from the market forces that would ordinarily drive those prices down to competitive levels:

> American Express's merchant restraints sever the essential link between the price and sales of network services by denying merchants the opportunity to influence their customers' payment decisions and thereby shift spending to less expensive cards. With the NDPs in place, merchants lack any meaningful means of controlling their

[14] Tr.219-24, 383, 581-82, 1278, 1406-07, 1523, 1539, 1544, 2328-29, 2371-72, 3150, 3164.

> consumption of network services in response to changes in price, short of dropping acceptance altogether. Thus, by disrupting the price-setting mechanism ordinarily present in competitive markets, the NDPs reduce American Express's incentive—as well as those of Visa, MasterCard, and Discover—to offer merchants lower discount rates and, as a result, they impede a significant avenue of horizontal interbrand competition in the network services market. On the basis of the record developed at trial, the court finds that the challenged restraints have impaired the competitive process in the network services market, rendering low-price business models untenable, stunting innovation, and resulting in higher prices for merchants and their consumers.

SPA98.

Despite the findings summarized above and documented throughout the decision below, AMEX insists that the government failed to meet even its initial burden under the Rule of Reason.

> Under the rule of reason, the plaintiffs bear an initial burden to demonstrate the defendants' challenged behavior "had an *actual* adverse effect on competition as a whole in the relevant market." [*Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 543 (2d Cir. 1993)]. Because the antitrust laws protect competition as a whole, evidence that plaintiffs have been harmed as individual competitors will not suffice. If the plaintiffs satisfy their initial burden, the burden shifts to the defendants to offer evidence of the pro-competitive effects of their agreement. Assuming defendants can provide such proof, the burden shifts back to the plaintiffs to prove that any legitimate competitive benefits offered by defendants could have been achieved through less restrictive means. Ultimately, the factfinder must engage in a careful weighing of the competitive effects of the agreement—both pro and con—to determine if the effects of the challenged restraint tend to promote or destroy competition.

Geneva Pharms. Tech. Corp. v. Barr Labs. Inc., 386 F.3d 485, 506-07 (2d Cir. 2004) (some citations omitted).

According to AMEX, it was not enough for the government to prove that anti-steering rules restrict interbrand price competition for credit card network services, resulting in higher prices for millions of merchants and their customers. Instead, AMEX contends, the government could meet its initial Rule of Reason burden only by somehow netting out those higher prices against the rewards that AMEX provides to its cardholders. Otherwise, says AMEX, the government has not proved an "adverse effect on competition *as a whole* in the relevant market." *Geneva*, 386 F.3d at 506-07 (emphasis added). That argument is wrong for multiple reasons.

A. AMEX Seeks to Collapse Multiple Steps of the Rule of Reason Analysis into the Government's Initial Burden of Proof.

AMEX's argument combines at least the first two steps of the Rule of Reason inquiry into one, improperly shifting its burden of proof to the government in the process. The government met its initial burden by showing that the three million merchants who accept AMEX pay more for network services because anti-steering rules impede interbrand price competition. SPA111-16. The supposedly beneficial effect of anti-steering rules on AMEX cardholders (in the form of richer card benefits) does not eliminate the higher prices merchants pay because of those rules. If those cardholder benefits are properly cognizable at all in this case, they

are at most countervailing "pro-competitive effects" to be proved by AMEX in step two of the Rule of Reason analysis, not something that the government must balance out (or disprove) to meet its initial burden. *Geneva*, 386 F.3d at 506-07.

If AMEX were correct about what the first Rule of Reason step entails, there would be nothing left to do in the second and third steps. Proof in the first step that the harm to competition outweighs the alleged pro-competitive benefits would complete the case. Instead, the factfinder should "consider the harms and benefits of the challenged behavior" *after* the plaintiff shows "an" adverse effect on competition. *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 96 (2d Cir. 1998).

Review of AMEX's most heavily-cited authorities quickly reveals the error in its argument. In *Geneva*, the plaintiff met its initial Rule of Reason burden with evidence that "the exclusive dealing arrangement reduced the supply of clathrate [a critical input] available to generic manufacturers" and thus "had the potential to freeze competitors out of the generic warfarin sodium market." 386 F.3d at 509. "The burden then shift[ed] to defendants to offer pro-competitive justifications for the arrangement." *Id.* This Court acknowledged that there was evidence of such a justification: "this exclusive arrangement could have *significant pro-competitive benefits* both to the signatories and *to competition overall*." *Id.* at 509 (emphasis added). By AMEX's account, the plaintiff was obligated to balance out these

potential "significant" benefits "to competition overall" as part of its initial burden under the Rule of Reason. *Id.* But that is not how this Court approached the burdens of proof. *Id.*

Similarly, in *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003), the government satisfied its initial Rule of Reason burden by showing that Visa and MasterCard's exclusive rules prevented two substantial market participants—American Express and Discover—from competing to sell network services to card-issuing banks. *Id.* at 241-43. The ostensible benefits of these rules—by facilitating cohesive networks that could serve as powerful competitors—did not come into play until step two. *Id.* at 243.

Thus, even if cardholders and their rewards belong in the same market as the network services paid for by merchants, as AMEX wrongly insists, the government was not obligated in step one of the Rule of Reason analysis to somehow balance out the effects of anti-steering rules on merchant prices and cardholder benefits. Proof that the three million AMEX-accepting merchants pay more for network services because anti-steering rules impede interbrand price competition satisfied the government's initial burden. It then fell to AMEX to prove that this harm to competition is redeemed by the alleged benefits enjoyed by cardholders.

B. **AMEX's Argument Takes the Phrase "Market as a Whole" Out of Context.**

AMEX's account of the government's initial burden invokes the "market as a whole" language out of context. Courts do not use that language to signify that competitive harm to a significant portion of the market—here, all three million AMEX-accepting merchants—would not satisfy step one of the Rule of Reason unless the plaintiff also balances out any pro-competitive benefits for other market participants. Instead, the "market as a whole" language distinguishes restrictions that do not meaningfully threaten competition because they affect only isolated buyers or sellers, rather than "a significant fraction" of the market. *Geneva*, 386 F.3d at 508. As this Court has explained:

> This requirement [of showing injury to competition in the market as a whole] ensures that otherwise routine disputes between business competitors do not escalate to the status of an antitrust action. The Sherman Act protects competition as a whole in the relevant market, not the individual competitors within that market, so that a plaintiff may succeed only when the loss he asserts derives from activities that have a "competition-*reducing*" effect.

Tops Mkts., 142 F.3d at 96 (quoting *Atlantic Richfield Co. v. USA Petroleum Co.,* 495 U.S. 328, 342-44 (1990)) (internal citation omitted) (emphasis in original). Proof that millions of AMEX-accepting merchants pay higher prices because anti-steering rules restrict interbrand price competition is harm to "a significant fraction" of the market (*Geneva*, 386 F.3d at 508), and that harm results from the "competition-reducing" effect of those rules (*Atlantic Richfield,* 495 U.S. at 342-

44). That is all the government needed to prove to pass the burden of proof to AMEX.

C. AMEX's Argument Improperly Asserts Alleged Benefits Conferred in a Different Market.

The government bore the initial burden of proving an "adverse effect on competition as a whole in the *relevant* market." *Geneva*, 386 F.3d at 507 (emphasis added). The *relevant* market here is the one in which merchants purchase general purpose credit card network services from AMEX and its competitors. SPA37-60.

AMEX compounds the error of its burden-shifting argument by insisting that, in step one of the Rule of Reason analysis, the government must factor in alleged pro-competitive effects on a different market—the one in which card issuers compete to attract cardholders. The network services and card issuance markets may well be interrelated, as many markets are, but they are "*separate* product markets." *Visa*, 344 F.3d at 238 (emphasis added). As this Court explained:

> Whereas in the market for general purpose *cards,* the issuers are the sellers, and cardholders are the buyers, in the market for general purpose card *network services,* the four networks themselves are the sellers, and the issuers of cards [*i.e.*, banks] and merchants are the buyers.

Id. at 239 (emphasis in original). In other words, this Court has already determined that the card issuance and network services markets are different markets with different products and different buyers.

Although expressed in various ways, AMEX's fundamental argument is that it can lawfully shield itself from interbrand price competition in the network services market because it uses part of the proceeds generated by that restraint to finance the rewards it offers its cardholders in the card-issuance market. But AMEX cites no case—not one—where a restraint impairing horizontal interbrand price competition in one market was justified because it allegedly financed the defendant's efforts to compete in a different market. Nor would there be any principled way to resolve that inquiry—should a dollar of reward benefits to a cardholder offset a dollar in overcharge paid by a merchant or an overall increase in retail prices paid by all customers? It is futile to search for some common denominator that could convert the harm to merchants (in the network services market), the alleged benefits to cardholders (in the card issuance market) and the higher prices passed on to all customers (in the countless retail markets affected here) into one net value for our economy, be it negative or positive. AMEX was not able to credibly do that at trial. SPA91-93. Instead, AMEX hopes to avoid antitrust liability by shifting the burden of that standard-less inquiry to the government and claiming a failure of proof.

The Supreme Court has long recognized the "inability [of courts] to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 609-10 (1972). And it has rejected less daunting multi-market complexities than the one urged by AMEX. For example, an antitrust violator may not avoid liability by proving that its wholesale customers passed on supra-competitive prices to their own customers in the retail market. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 493 (1968). The effort to determine the effect of the overcharge on downstream markets "would greatly complicate and reduce the effectiveness of already protracted treble-damages proceedings." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 731-32 (1977). That was "[t]he principal basis for the decision in *Hanover Shoe*." *Id.*

Thus, AMEX could not defend this case with evidence that merchants pass on the overcharge in the network services market to their retail customers. It certainly cannot defend the case with evidence that AMEX itself passes on some portion of that overcharge to its own cardholder customers in the card-issuance market. That would be even less feasible and appropriate than the type of pass-on at issue in *Hanover Shoe*, which at least reduces the overcharge absorbed by the wholesale purchaser. Here, AMEX is simply sharing the overcharge paid by the

merchant with AMEX's cardholder customer, without reducing the merchant's injury at all.

Ultimately, AMEX cites no case where a restraint of interbrand price competition in one market was redeemed because the defendant shared the fruits of that restraint with its customers in a different market. Instead, AMEX merely attacks the cases cited by the district court. First, it criticizes the district court's reliance on *Visa*. To be sure, both the district court and appellate opinions in *Visa* noted the competitive harm to various segments of the economy, just as the district court did here (SPA111-16). However, this Court affirmed the finding of competitive harm in *Visa* based on the restraint of competition among the four networks in the sale of network services. 344 F.3d at 240-41. The Court acknowledged that competition in the *card issuance* market was robust; it focused instead on the reduction of price and quality competition among the four major networks in their network services:

> The most persuasive evidence of harm to competition is the total exclusion of American Express and Discover from a segment of the market for network services. As noted, there are only four major payment card network providers in the United States. While competition among (and within) these networks is robust at the issuing level (where 20,000 separate issuers compete to provide products to consumers), at the network level (where four major networks seek to sell their technical, infrastructure, and financial services to issuer banks) competition has been seriously damaged by the defendants' exclusionary rules.

Id. at 240. So *Visa* teaches that reduction of interbrand competition for credit card network services is sufficient to constitute an injury to competition in the relevant market as a whole. *Visa* did not—by noting the harms to consumers and cardholders—require the government to show injury to card-issuance competition as part of its prima facia case under the Rule of Reason.

AMEX also wrongly dismisses *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953), which was a Section 1 challenge involving another two-sided platform—newspapers. As the Supreme Court explained:

> [E]very newspaper is a dual trader in separate though interdependent markets; it sells the paper's news and advertising content to its readers; in effect that readership is in turn sold to the buyers of advertising space. *This case concerns solely* <u>*one*</u> *of these markets*. The Publishing Company stands accused not of tying sales to its readers but only to buyers of general and classified space in its papers. For this reason, dominance in the advertising market, *not in readership*, must be *decisive* in gauging the legality of the [challenged restraint].

Id. at 610 (emphasis added). Notably, the Supreme Court did not require the government to balance the effect of the challenged restraint on advertisers against the effect on readers, even though advertising revenues help finance the content provided to readers and readership in turn attracts advertisers. Instead, the Court considered the effects of the restraint on only the advertising market. *Id.*

Third, AMEX criticizes the district court's citation of cases involving horizontal restraints on competition, such as the merger enjoined in *United States*

v. Philadelphia National Bank, 374 U.S. 321 (1963). There, the Supreme Court rejected the argument that "anticompetitive effects in one market could be justified by procompetitive consequences in another." *Id.* at 370. The reasoning of these cases applies here because, unlike "vertical" restraints affecting only intrabrand competition, anti-steering rules foreclose *horizontal interbrand* price competition among the major credit card networks. SPA98-116. And protecting interbrand price competition is the primary focus of antitrust law. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 890 (2007).

Finally, AMEX contends that *United States v. Dentsply International, Inc.*, 399 F.3d 181 (3d Cir. 2005) supports its position. There, the government accused Dentsply of monopolizing the sale of artificial teeth to dental laboratories. The district court *erred* in that case by finding that Dentsply's domination of sales to intermediate dealers was benign because its competitors could, at least in theory, sell directly to the laboratories. *Id.* at 191-95. So this case does not support AMEX's argument that its restraint of interbrand price competition for the network services purchased by merchants can be justified by benefits AMEX offers its cardholders.

D. The Decision Below Does Not Take the Side of Merchants Over Cardholders, as AMEX Suggests.

AMEX suggests that the task here is one of "picking winners and losers" that should be left to the legislature, not the courts. AMEX Br. at 4. But our

legislature has already spoken. "The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. … Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad." *Nat'l Soc'y of Prof'l Engineers*, 435 U.S. at 695.

Under the antitrust laws, interbrand competition determines "winners" and "losers," not private contractual restraints. "If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion, this too is a decision that must be made by Congress and not by private forces or by the courts." *Topco*, 405 U.S. at 611. The Supreme Court made that point decades ago in correcting an error much like the one that AMEX urges upon this Court:

> The District Court determined that by limiting the freedom of its individual members to compete with each other, Topco was doing a greater good by fostering competition between members and other large supermarket chains. But, the fallacy in this is that Topco has no authority under the Sherman Act to determine the respective values of competition in various sectors of the economy. On the contrary, the Sherman Act gives to each Topco member and to each prospective member the right to ascertain for itself whether or not competition with other supermarket chains is more desirable than competition in the sale of Topco-brand products.

Id. at 610-11.

The same reasoning applies here. Anti-steering rules foreclose horizontal interbrand competition among the major credit card networks for the price of their services. SPA98-116. Indeed, AMEX urges that this is an intended effect of its anti-steering rules—to ensure that it can extract enough revenue from merchants to finance the benefits it pays to its cardholders. Yet "the antitrust laws are designed primarily to protect interbrand competition, from which lower prices can later result." *Leegin*, 551 U.S. at 895. Those laws do not permit AMEX to build its cardholder rewards program through the suppression of interbrand price competition.

There is every reason to think that AMEX—the single largest credit card issuer in the country—will fare well in a competitive card-issuance market, just as it has in other countries that have allowed steering, including discounting and surcharging. SPA138 & n.56. Regardless, AMEX does not get to decide—for everyone in the nation—that lowering the cost of network services through interbrand price competition would represent too great a threat to its efforts to compete in the card-issuance market.

* * * *

In sum, the government met its initial burden to prove an actual adverse effect on competition in the network services market, shifting the burden to AMEX to come forward with a pro-competitive justification for that restraint. Assuming

that AMEX did that, it then fell to "the factfinder [to] engage in a careful weighing of the competitive effects of the agreement—both pro and con—to determine if the effects of the challenged restraint tend to promote or destroy competition." *Geneva*, 386 F.3d at 507. That is precisely what the district court did here—carefully and correctly and certainly not clearly erroneously, as AMEX would have to demonstrate in this appeal.

III. The Government Proved Market Power.

AMEX also challenges the district court's factual finding that AMEX possesses sufficient market power to injure competition. That finding is based, first, on AMEX's market share and, second, its demonstrated ability to raise its prices without attrition by merchants or fear of a competitive response. SPA65-83. Those are independent and sufficient bases to find market power in a Rule of Reason case. *Todd v. Exxon Corp.*, 275 F.3d 191, 206-07 (2d Cir. 2001).

A. Given the Nature of the Network Services Market, AMEX's Market Share is Sufficient to Confer Market Power.

The district court found that AMEX possesses a 26.4% market share, defined by transaction volume, placing it between Visa (45%) and MasterCard (23.3%). SPA 67. AMEX suggests that its share is too low as a matter of law to support a finding of market power. But that argument is foreclosed by *Visa*, where this Court upheld the finding "that Visa U.S.A. and MasterCard, jointly *and separately*, have power within the market for network services." 344 F.3d at 239

(emphasis added). That finding was based, independently, on (1) merchant testimony "that they could not refuse to accept payment by Visa or MasterCard, even if faced with significant price increases, because of customer preference;" and (2) "the defendants' large shares of a highly concentrated market." *Id.* at 240. At that time, MasterCard's share was 26%, *id.*, slightly lower than AMEX's share today. And the record here confirms that even the nation's largest retailers cannot afford to drop AMEX without an unacceptable loss of sales. *Supra* at 2-4; SPA73-77.

AMEX vainly attempts to distinguish *Visa* on the ground that the challenged rules were the product of horizontal collusion among the card-issuing banks. AMEX Br. at 71. Yet that was not why this Court affirmed the finding of market power. 344 F.3d at 239-40. Instead, this Court relied on the networks' respective market shares, the fact that merchants could not afford to terminate their acceptance of either card and the lack of merchant attribution in the face of price increases—the same factors that the district court cited here. *Id.* Nor did this Court analyze that case under the more restrictive framework governing horizontal restraints of competition; it applied the same full-blown Rule of Reason analysis that applies here. *Id.* at 237-38. So, contrary to AMEX's suggestion, market power does not mean one thing in the *Visa* case and a different thing in this case, involving the same participants in the same market.

AMEX does no better suggesting that MasterCard's 26% market share was sufficient in *Visa* only because of substantial overlap between the banks that issued Visa and MasterCards. Again, that was not this Court's rationale. *Id.* at 239-40. Instead, the Court was careful to say that MasterCard possessed market power "separately" from Visa. *Id.* at 239. Moreover, the restraint of competition at issue in *Visa*—as in this case—was within the market for *network* services, not for card issuance. The holding was that Visa and MasterCard—as *networks*—each had market power. That finding did not depend upon the number or overlap of the card-issuing banks.

In emphasizing its market share, AMEX ignores the realities of this market. Market share means one thing when a purchaser chooses among multiple substitutes, *e.g.*, whether to buy the mid-level sedan offered by Honda or Toyota or Ford or various other manufacturers. But here, as the district court found, retail merchants are generally not able to substitute Visa, MasterCard or Discover for AMEX, not without losing an unacceptable portion of their sales. SPA73-77. So the fact that AMEX represents "only" 26.4% of the relevant market does not preclude it from raising its price for network services, at least so long as anti-steering rules prohibit merchants from reacting to that price increase by steering volume to AMEX's competitors. Instead, AMEX has historically succeeded in

imposing a series of price increases without meaningful merchant attrition or, as its internal documents reveal, even the fear of such attrition. SPA78-83.

Ultimately, questions of market definition and power must be based on the realities of competition, not percentage formulas and rote assumptions. "Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law." *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466-67 (1992). The critical reality here is that the people who decide which credit card to use are not the people who pay for that choice. Cardholders have no incentive to shift their purchases to a different brand in response to the price of network services. And AMEX's anti-steering rules prevent the merchant from creating such an incentive. As a result, AMEX enjoys market power.

B. The District Court Also Properly Found Market Power Based on AMEX's Ability to Raise its Prices for Network Services Without Fear of Merchant Attrition or Competitive Response.

"In this Circuit, a threshold showing of market share is not a prerequisite for bringing a § 1 claim." *Todd*, 275 F.3d at 206. "If a plaintiff can show that a defendant's conduct exerted an actual adverse effect on competition, this is a strong indicator of market power." *Id.*

The district court found that AMEX has been able to raise its prices for network services without meaningful merchant attrition and, indeed, without fear

of such attrition. SPA78-83. That included 20 separate price increases over the five years of AMEX's self-styled "Value Recapture" initiative. *Id.* Merchant testimony confirms that even the nation's largest retailers are unable to meaningfully negotiate down AMEX's charges for network services. *Supra* at 2-4.

Perhaps more tellingly, AMEX's charges for network services are not constrained by the prices of its primary competitors, Visa and MasterCard. Because merchants cannot steer their customers to lower cost credit cards, AMEX need not match Visa or MasterCard's prices for network services to avoid the loss of charge volume. Instead, AMEX is able to set its prices higher than Visa and MasterCard, despite taking days longer to transmit funds to the merchant.[15]

In fact, AMEX has been able to ignore, not only the prices and quality-of-service of its established competitors, but also attempts at low-cost competition. In the late 1990s, Discover attempted to exploit price increases by AMEX, Visa and MasterCard by soliciting merchants to shift charge volume to the lower-priced Discover network. SPA108-09. Yet merchants were unable to avail themselves of Discover's lower pricing because anti-steering rules prevented them from encouraging their customers to use Discover. *Id.* at 109. Rather than AMEX lowering its prices in response to a low-cost rival, as would occur in a competitive

[15] Tr.216-17, 558-60, 2239-40, 2391-92. This payment delay raises the effective cost of AMEX even beyond its rates. *Id.*

market, Discover was forced to abandon its fruitless effort to secure volume with lower prices. Instead, it availed itself of the umbrella created by the dominant networks and raised its prices nearly 24%. *Id.* at 109-10. That is the opposite of how a competitive market functions.

Despite AMEX's complaint that the government failed to quantify its costs or margins, the testimony and documents analyzed by the district court were sufficient to show that its price increases were not based on costs. "Because these Value Recapture initiatives were not paired with offsetting adjustments on the cardholder side of the platform, the resulting increases in merchant pricing are properly viewed as changes to the net price charged across Amex's integrated platform." SPA79. These price hikes increased AMEX's profits, rather than simply increasing revenues to keep pace with costs. *Id.* at 79-80. Thus, the record credibly showed that AMEX raised prices above the prevailing levels for its services and those offered by its competitors because it could do so profitably, without loss of customers or fear of competitive response. That is market power.[16]

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[16] Moreover, there is no bright-line rule requiring calculation of margin before price increases can bear on the question of market power. The district court found market power in *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 342 (S.D.N.Y. 2001) and this Court affirmed, noting that "despite recent increases in both networks' interchange fees, no merchant had discontinued acceptance of their cards." 344 F.3d at 240. Notably absent from both opinions is any reference to the profit margins or costs associated with these increases. Nor would AMEX's bright-line rule make sense—a high profit margin may indicate market power, but

C. The District Court Properly Considered Cardholder "Insistence" as a Source of Market Power.

AMEX argues that the "insistence" of its cardholders on using their American Express cards is not a source of market power because it is transitory. AMEX Br. at 72-79. AMEX seeks refuge in the general principle that "[t]ransitory power may safely be ignored by antitrust law. The social costs of antitrust intervention (including its error potential) are likely to exceed the gains when market forces themselves would bring the defendant's power to an end fairly quickly." *AD/SAT, Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 229 (2d Cir. 1999) (quoting Areeda ¶ 506d). But that principle does not fit the facts of this case.

First, this Court has already recognized that, in the market for credit card network services, cardholder insistence is a sufficiently durable source of power to sustain a Rule of Reason claim. In *Visa*, "Judge Jones based her finding of market power first 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*." 344 F.3d at 240 (emphasis added). This Court affirmed.

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a low margin may result from factors other than competition. 2A Phillip Areeda and Herbert Hovenkamp, Antitrust Law ¶ 521 (Rev. ed. 1996).

Second, AMEX *has* exercised market power to raise the prices paid by merchants and "market forces" have *not* brought its "power to an end fairly quickly." *AD/SAT*, 181 F.3d at 229. As found by the district court and described above, the market forces that would temper pricing in a competitive market—customer attrition, competitor pricing or emergence of a low-cost provider—have not precluded AMEX from imposing a steady stream of durable price increases upon merchants and maintaining those high prices against all merchant attempts to obtain relief.

AMEX cites cases like *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1441 (9th Cir. 1995), which explain that a firm lacks market power if rivals "can quickly respond to any predator's attempt to raise prices above competitive levels" such that "the predator will suffer an immediate loss of market share to competitors." But, as the district court found, that is not what happened when AMEX raised prices. It did not happen—and it will not happen absent affirmance by this Court—because anti-steering rules prevent merchants from responding to price increases by shifting charge volume to lower-priced competitors.

Third, AMEX greatly overstates the legal support for its argument. It leads with *United States v. Eastman Kodak Co.*, 63 F.3d 95, 108 (2d Cir. 1995), which held that the evidence of customer preference *in that case* did not warrant reversing the district court's finding that Kodak lacked market power:

> Although consumers do state a strong preference for Kodak film when surveyed, empirical evidence introduced at trial by Kodak demonstrates, and the district court found, that "film purchasers are ... price sensitive, and will shift between Kodak, Fuji and private label film on the basis of changes in price." In this regard, the district court accepted [the defense economist's] conclusion that if Kodak were to raise prices by five percent, it would lose ten percent of its film sales. Accepting these factual findings—as we must, since they are well supported by the record—in conjunction with the small price premium for Kodak film, we cannot say that the district court erred in rejecting the government's argument that the preference of American consumers gives Kodak market power ….

Id. at 108 (citation omitted). Leaving aside that this Court was affirming a district court's factual finding rather than reversing one, as AMEX urges here, the record in *Kodak* could hardly be more different. When AMEX raises its price for network services, merchants and cardholders do not respond by shifting charge volume to its competitors. Cardholders have no incentive, because they do not pay more for network services when they use AMEX, and merchants have no ability, because of anti-steering rules.

The other two cases cited by AMEX simply stand for the proposition that brand loyalty "alone"[17] is not "sufficient to *presume* market power." *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 1991 WL 149249, at *6 (3d Cir.

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[17] *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 797 (1st Cir. 1988) ("Of course, virtually every seller of a branded product has *some* customers who especially prefer its product. But to permit that fact <u>alone</u> to show market power is to condemn ties that are bound to be harmless, including some that may serve some useful social purpose.") (underscoring added).

Aug. 9, 1991) (emphasis added), *opinion vacated* (Sept. 5, 1991), *new opinion issued on reargument*, 959 F.2d 468 (3d Cir. 1992). Neither case held that customer insistence cannot be a source of market power, particularly in a market like this one, where anti-steering rules prevent the insistent customer from perceiving changes in the price for network services and merchants cannot respond to price increases by foregoing sales to insistent customers. Under those circumstances, customer insistence is a powerful source of market power. And that is not merely theory; in practice, that insistence has allowed AMEX to profitably impose price increases on merchants over a sustained period, without fear of losing volume to merchant attrition or networks that charge substantially less for their services and offer superior payment terms. SPA71-83.

Fourth, AMEX's emphasis on competition within the *card-issuance* market is misplaced. AMEX does not explain how competition in that market disciplines AMEX's pricing in the market for network services provided to merchants. It may well be true that AMEX's cardholders would not remain insistent if AMEX stopped investing in its rewards program; after all, few businesses could maintain market share if they stopped offering an attractive product. But that does not mean that AMEX's market power is the kind of "transitory" power that antitrust law may ignore. As noted above, transitory power is benign only where market forces would quickly check its exercise. That is not true here. Market forces have not

constrained AMEX's charges to merchants for network services, nor will they do so as long as anti-steering rules "sever the essential link between the price and sales of network services by denying merchants the opportunity to influence their customers' payment decisions." SPA98.

CONCLUSION

Ultimately, all of AMEX's arguments are variations on a single theme: that it can lawfully shield itself from interbrand price competition in the network services market because it uses part of the proceeds generated by that restraint to finance the rewards it offers its cardholders in the card-issuance market. No case supports that proposition, which is contrary to fundamental antitrust law condemning private restrictions of horizontal interbrand price competition.

As a factual matter, there is no good reason to believe that AMEX—the largest single issuer of credit cards—cannot compete as an issuer in a world where all credit card networks face price competition for their network services, induced by the practice and threat of merchant steering. Whether cardholder benefits will be richer, poorer or simply different in that world must be determined by competition. Our national economic policy, as embodied in the Sherman Act, does not allow private contractual restraints on interbrand price competition to determine that outcome.

Respectfully submitted this 14th day of September, 2015.

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32

Pursuant to Rule 32(a)(7)(C)(i) of the Federal Rules of Appellate Procedure, the foregoing brief is in 14-Point Times New Roman proportional font and contains 6,905 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii), and thus in compliance with the 7,000 word limit for amicus briefs in the Federal Rules of Appellate Procedure for the Second Circuit.

Dated: September 14, 2015

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