UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE AMERICAN EXPRESS ANTI-STEERING RULES ANTITRUST LITIGATION (II)	No. 11-MD-02221-NGG-RER
THIS DOCUMENT RELATES TO: Individual Plaintiff Actions No. 08-CV-2315 No. 08-CV-2316 No. 08-CV-2317 No. 08-CV-2380 No. 08-CV-2406 No. 11-CV-0337 No. 11-CV-0338	

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

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PRELIMINARY STATEMENT

Despite the Supreme Court's decision in *Ohio v. American Express Co.* ("*Ohio v. Amex*"), 138 S. Ct. 2274 (2018), affirming the Second Circuit's decision in *United States v. American Express Co.* ("*U.S. v. Amex*"), 838 F.3d 179 (2d Cir. 2016), Plaintiffs[1] continue to pursue claims based on two types of market definitions that directly contradict the Supreme Court's decision and the Second Circuit's precedents.

First, in claiming that the relevant market is one-sided, Plaintiffs seek to overrule the Supreme Court. *Ohio v. Amex* leaves no doubt that Amex[2] and other credit card networks are simultaneous two-sided transaction platforms to which a two-sided relevant market definition must apply. Plaintiffs attempt to distinguish the Supreme Court's decision on the facts, but their arguments are wrong, and they were presented to, but not accepted by, the Supreme Court. *Ohio v. Amex* was based on economic principles applied to the basic structure of credit card networks, which Plaintiffs' new allegations do not and cannot change. Plaintiffs' one-sided market claims cannot stand. *See infra* Section I.

Second, notwithstanding clear precedent establishing that the relevant market includes other credit card networks, Plaintiffs continue to allege that Amex is a monopolist in a single-brand, Amex-only market. Plaintiffs' theory is contradicted by the Supreme Court's analysis of two-sided markets: as the Supreme Court explained, card networks compete for

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[1] Plaintiffs Ahold U.S.A., Inc., Albertson's LLC, The Great Atlantic & Pacific Tea Company, Inc., BI-LO, LLC, CVS Pharmacy Inc., H.E. Butt Grocery Co., Hy-Vee, Inc., The Kroger Co., Meijer, Inc., Publix Super Markets, Inc., Raley's Inc., Rite Aid Corp., Rite Aid Hdqtrs. Corp., Safeway Inc., Supervalu, Inc. and Walgreen Co.

[2] Defendants American Express Company and American Express Travel Related Services Company, Inc.

transactions, not for cardholders or merchants in isolation. Plaintiffs concede that card networks compete for transactions by fighting for cardholders and their spending. That undisputed fact disproves their claim that Amex exists in its own market, free from competition. Plaintiffs rely only on allegations about demand elasticity for merchant services while ignoring cardholders, which is directly contrary to *Ohio v. Amex*. Moreover, even setting the Supreme Court decision aside, Plaintiffs have no basis to avoid the general rule that single-brand markets are inherently implausible. *See infra* Section II.

Plaintiffs' claims based on one-sided and Amex-only market definitions should be dismissed for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). In the alternative, summary judgment on these claims is warranted because undisputed facts make clear that Amex is entitled to judgment as a matter of law. *Id.* R. 56. In either case, Plaintiffs' one-sided and Amex-only market claims fail.

SUMMARY OF PLAINTIFFS' CLAIMS

Based on non-discrimination provisions ("NDPs") in their merchant acceptance agreements with Amex, Plaintiffs claim that Amex violated Section 1 of the Sherman Act by unreasonably restraining trade and Section 2 through actual or attempted monopolization. Until recently, Plaintiffs claimed that the relevant market was one-sided and Amex-only: it included only Amex services to merchants, not Amex services to cardholders and not any services by another network. Now, after the Second Circuit's ruling in *U.S. v. Amex* and the Supreme Court's decision in *Ohio v. Amex*, Plaintiffs have amended their complaint to bring claims based on four alternative markets: (1) their original one-sided, Amex-only market; (2) a one-sided market that includes all general purpose credit and charge cards ("GPCC"); (3) a two-sided, Amex-only market that includes Amex services to merchants and cardholders; and (4) a two-

sided, all-GPCC market. Pls.' First Am. & Consol. Compl. ("Am. Compl.") ¶¶ 56-57, 64 (July 27, 2018) (ECF No. 814). This motion seeks dismissal or summary judgment for all claims based on the first three relevant markets—those with one-sided or Amex-only market definitions.[3]

LEGAL STANDARDS

To survive a motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face". *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The Court "must take all the factual allegations in the complaint as true, [but is] not bound to accept as true a legal conclusion couched as a factual allegation". *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

Summary judgment, which Amex seeks in the alternative, is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law". Fed. R. Civ. P. 56(a). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986) (citations omitted). Summary judgment "serves a vital function" in antitrust cases, *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 95 (2d Cir. 1998), where it is "particularly favored", *PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 104-05 (2d Cir. 2002).

[3] Pursuant to the Court's August 9 and 17, 2018 Orders, Amex anticipates filing an additional summary judgment motion concerning claims based on a two-sided, all-GPCC market at a later date.

ARGUMENT

I. PLAINTIFFS' ONE-SIDED MARKET ALLEGATIONS FAIL.

After nearly a decade of litigation, the Supreme Court has confirmed that the relevant market in this case is two-sided—the market must include the merchants and cardholders on both sides of Amex's two-sided platform. Any attempt by Plaintiffs to avoid the Supreme Court's decision fails.

Ohio v. Amex sets a clear rule: for a simultaneous two-sided transaction platform like Amex, "competition cannot be accurately assessed by looking at only one side of the platform in isolation". 138 S. Ct. at 2287. Amex is a special type of two-sided platform—a two-sided *transaction* platform—that "cannot make a sale to one side of the platform without simultaneously making a sale to the other". *Id.* at 2280. "Because they cannot make a sale unless both sides of the platform simultaneously agree to use their services, two-sided transaction platforms exhibit more pronounced indirect network effects and interconnected pricing and demand." *Id*. at 2286 (citation omitted). Amex supplies one product—transactions—which are "jointly consumed by a cardholder, who uses the payment card to make a transaction, and a merchant, who accepts the payment card as a method of payment". *Id.* at 2286.[4]

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[4] Plaintiffs' experts agree about this fundamental, defining feature of the credit card market. *See, e.g.*, Vellturo I ¶ 23 (describing a credit card transaction); Stiglitz I ¶ 9 (similar); Dep. of Joseph Stiglitz (July 22, 2013) at 17:12-15 (testifying that Visa, MasterCard and Amex "link cardholders to merchants"); Facts ¶¶ 1-4; *see also id*. ¶¶ 5-9.

Excerpts from certain reports submitted by the parties in this case are attached to the Declaration of Peter T. Barbur ("Barbur Decl."), submitted herewith. Reports by Drs. Vellturo, Stiglitz, Ariely and McCormack were submitted by Plaintiffs. Reports by Drs. Bernheim and Hay were submitted by Amex. The opening, rebuttal and sur-rebuttal reports are referred to by the convention [Expert] I, [Expert] II and [Expert] III, respectively. For purposes of the present motion, Amex assumes that Plaintiffs' expert opinions are admissible. Amex reserves the right to move against Plaintiffs' expert reports if trial is necessary.

"Accordingly", the Supreme Court concluded, a court must "analyze the two-sided market for credit-card transactions as a whole to determine whether the plaintiffs have shown that Amex's antisteering provisions have anticompetitive effects". *Id.* at 2287.

Seeking to avoid the Supreme Court's holding, Plaintiffs allege that they "will present evidence that was not presented in the Government Case against Amex and that satisfies the Supreme Court test for when a two-sided platform should be treated as a one-sided market". Am. Compl. ¶ 57. Plaintiffs misapprehend the Supreme Court's ruling. In requiring a two-sided market definition, the Supreme Court did not rely on any particular way the Government sought to prove the nature of the market or competition. Rather, the Supreme Court grounded its ruling in fundamental economic principles applied to basic, indisputable facts about the structure of the credit card market.[5] As Justice Breyer recognized in his dissent, the majority's rule requires a two-sided market definition when platforms have "four relevant features", which Amex indisputably does: "[T]hey (1) offer different products or services, (2) to different groups of customers, (3) whom the 'platform' connects, (4) in simultaneous transactions." *Ohio v. Amex,* 138 S. Ct. at 2298 (Breyer, J., dissenting). For these claims in this market, the Supreme Court has defined the relevant market. Plaintiffs' claims relate to the same market.

To make matters worse, Plaintiffs' argument relies on a theory that was actually presented to the Supreme Court, which declined to accept it. They claim that Amex is a "mature

[5] The Supreme Court cited, among others: Klein, Lerner, Murphy & Plache, *Competition in Two–Sided Markets: The Antitrust Economics of Payment Card Interchange Fees*, 73 Antitrust L.J. 571, 580, 583 (2006); Evans & Schmalensee, *Markets With Two–Sided Platforms*, 1 Issues in Competition L. & Pol'y 667 (2008); Evans & Noel, *Defining Antitrust Markets When Firms Operate Two–Sided Platforms*, 2005 Colum. Bus. L. Rev. 667, 668; and Filistrucchi, Geradin, Van Damme & Affeldt, *Market Definition in Two–Sided Markets: Theory and Practice*, 10 J. Competition L. & Econ. 293, 296 (2014).

payment system" because Amex is accepted at most major merchants. Am. Compl. ¶¶ 58-59. As a result, they say, acceptance by an additional merchant will not significantly increase cardholders' desire to use the card, and merchants who already accept Amex receive no benefit from greater Amex card use. *Id.* ¶ 59. This argument is irreconcilable with the Supreme Court's decision.[6] The test from *Ohio v. Amex* turns on whether a platform is a simultaneous two-sided transaction platform, which leaves no room for any consideration of market "maturity" as a condition of a two-sided analysis. 138 S. Ct. at 2280. That rule is dictated by concepts that are the same here: "To optimize sales, the network must find the balance of pricing that encourages the greatest number of matches between cardholders and merchants." *Id.* at 2286. And, because "[o]nly other two-sided platforms can compete with a two-sided platform for transactions", "[e]valuating both sides of a two-sided transaction platform is also necessary to accurately assess competition". *Id.* at 2287.

In announcing the clear rule that a two-sided analysis applies to simultaneous two-sided transaction platforms such as Amex, the Supreme Court found that, contrary to supposed maturity, output in the market—transaction volume—has grown substantially in recent

[6] In two amicus briefs, Plaintiffs' expert, Dr. Stiglitz, argued that the credit card market in *Amex* was mature and that "[t]here is no evidence that significant two-sided externalities remain—that is, that merchant acceptance would increase if Amex increased its cardholding base, or vice versa". Barbur Decl. Ex. 65 (Brief for Amici Curiae John M. Connor, *et al*. in Support of Petitioners at 7, *Ohio v. Amex* (July 6, 2017)); *see also* Barbur Decl. Ex. 66 (Brief for Amici Curiae John M. Connor *et al*. in Support of Petitioners at 4, n.4, *Ohio v. Amex* (Dec. 14, 2017)) ("Before reconfiguring the established and well-understood Rule of Reason analysis for a mature network like Amex, careful analysis should be conducted to ascertain the significance of any feed-back effects from pricing to each side from the other side (two-sided externalities).").

years, and continues to grow.[7] Again, the transactions involved in this case are the same transactions, in the same market, as the Supreme Court has addressed.

Plaintiffs have conceded the same unassailable market facts on which the Supreme Court based its decision by describing the links between the merchant and consumer sides of the Amex platform. For example, undisputed evidence from Plaintiff H.E. Butt Grocery Co.'s ("HEB") experience with its own co-brand credit card establishes that cardholder rewards incentivize spending and are linked to merchant discount rates. As one HEB official explained about HEB's co-brand card, "our rates are competitive but our rewards are AWESOME" because competitors' cards "have traded low rates for low rewards", which "really is something we have to explain to others in terms of the whole picture". Barbur Decl. Ex. 60. (HEBAMXED03047232) at HEBAMXED03047232; Facts ¶ 10. Further conceding the interdependence between cardholder rewards and merchant fees, the HEB official continued: "If you just look at rates you are only getting half the picture. I think our rewards . . . speak volumes for our card." *Id.* Another HEB official testified in this case that HEB offered a rewards credit card because "the rewards component is the incentive to get the customer to use it" and "[t]here's other cards in their wallet that would be competing for the H-E-B card". Barbur Decl. Ex. 15 (Dep. of James Callahan (HEB), Nov. 6, 2012) at 38:16-25. The same official explained that rewards for its cobrand card were funded by merchant fees, *id.* at 122:7-123:21, and that "[t]he

[7] *See, e.g.*, *Ohio v. Amex*, 138 S. Ct. at 2289 ("There is no such evidence [of reduced output] in this case. The output of credit-card transactions grew dramatically from 2008 to 2013, increasing 30%." (citing *U.S. v. Amex*, 838 F.3d at 206)); *id*. ("[W]hile these [NDP] agreements have been in place, the credit-card market experienced expanding output and improved quality. . . . Indeed, between 1970 and 2001, the percentage of households with credit cards more than quadrupled, and the proportion of households in the bottom-income quintile with credit cards grew from just 2% to over 38%.").

level and rate of credit card rate increases is expected to keep increasing at a rapid rate, not only in terms of the rate itself, but also as a result of high fee rewards-type cards recently introduced by Visa and MasterCard in an attempt to compete with American Express and Discover". *Id.* at 59:15-60:7; Facts ¶ 11.[8]

Plaintiffs cannot avoid the Supreme Court's decision in *Ohio v. Amex*, which established that a two-sided relevant market definition applies for the analysis of *Amex*'s two-sided transaction platform. Amex respectfully requests that its motion for dismissal or summary judgment be granted for all claims based on a one-sided market.

II. PLAINTIFFS' AMEX-ONLY MARKET ALLEGATIONS FAIL.

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

The Supreme Court decision in *Ohio v. Amex* also forecloses Plaintiffs' Amex-only market allegations. The Supreme Court made clear that two-sided platforms compete to produce *transactions*, not services to merchants or cardholders in isolation. The Supreme Court also made clear—and Plaintiffs repeatedly have conceded—that credit card networks compete fiercely for those transactions. Therefore, there *is* substitution among networks in the relevant

[8] Other Plaintiffs similarly acknowledge the link between cardholders and merchants across Amex's two-sided transaction platform. *See, e.g.*, Barbur Decl. Ex. 13 (Dep. of John Briggs (Hy-Vee), Dec. 13, 2012) at 141:5-22 (recognizing the benefit to the merchant of customers using credit cards with benefits); Barbur Decl. Ex. 29 (Dep. of Dennis Stokely (Safeway), Nov. 15, 2012) at 356:19-24 (recognizing the link between merchant fees and card rewards); Barbur Decl. Ex. 61 (KRGAMX00272018) at KRGAMX00272018 (Feb. 12, 2005 email from K. Hanna to senior officials of The Kroger Co. stating that MasterCard introduced a new high-fee, high-rewards card to "compete with American Express cards" and recognizing the financial impact this would have on Kroger); Barbur Decl. Ex. 62 (MEIJER-00264261) at MEIJER-00264279 (Meijer recognizing the benefits of rewards); *see also* Facts ¶¶ 12-15.

market, and an Amex-only market fails. Plaintiffs' attempt to analyze substitutability only from the merchants' perspective is wrong under *Ohio v. Amex*.

Defining a relevant market for antitrust purposes requires an analysis of "the interchangeability of use or the cross-elasticity of demand" for the relevant product and any potential alternatives. *Todd v. Exxon Corp.*, 275 F.3d 191, 200 (2d Cir. 2001) (citation omitted). It is a "rule of reasonable interchangeability" that must account for all "substitute products". *City of New York v. Grp. Health Inc.*, 649 F.3d 151, 155 (2d Cir. 2011) (citation omitted).

Each decision in the Government action scrutinized the relevant market. None suggested that the relevant market could be limited to Amex alone; instead each included other credit card networks—Visa, MasterCard and Discover. This Court first found that the relevant market was a "GPCC Card Network Services Market"—not limited to Amex. *United States v. Am. Express Co.*, 88 F. Supp. 3d 143, 171 (E.D.N.Y. 2015). The Second Circuit similarly defined the relevant market to include all GPCC networks. *U.S. v. Amex*, 838 F.3d at 196-200. And the Supreme Court left no doubt that the relevant market includes all GPCC networks: Amex, Visa, MasterCard and Discover.[9] *Ohio v. Amex*, 138 S. Ct. at 2282.

Nevertheless, Plaintiffs continue to assert their single-brand, Amex-only market allegations on the ground that "[t]here is virtually no cross-elasticity of demand between the credit card services sold by Amex *to merchants* and the credit card[] services sold to merchants by other credit card networks" because the "Amex restraints eliminate any incentive by other card networks to charge lower merchant fees than Amex (and vice versa)". Am. Compl. ¶ 67

[9] *See* Facts ¶¶ 19-31.

(emphasis added). In other words, Plaintiffs say that there is no substitution between networks on the *merchant* side.

But Plaintiffs agree that there *is* demand elasticity and substitution on the cardholder side of the market. As Plaintiffs recently told this Court, "[o]n the cardholder side of the market . . . there is cross-elasticity of demand between the services offered by Amex and the services offered by other credit card networks". Merchant Pls.' Supp. Mem. in Support of Mot. to File Am. Compls. at 5-6 (May 12, 2017) (ECF No. 799). That admission is fatal to Plaintiffs' Amex-only market. As the Supreme Court explained, competition between two-sided transaction platforms does not exist just on one side of the platform or the other. Instead, card networks compete with each other to create transactions that necessarily connect both sides:

> A credit-card company that processed transactions for merchants, but that had no cardholders willing to use its card, could not compete with Amex. Only a company that had both cardholders and merchants willing to use its network could sell transactions and compete in the credit-card market. Similarly, if a merchant accepts the four major credit cards, but a cardholder only uses Visa or Amex, only those two cards can compete for the particular transaction. Thus, competition cannot be accurately assessed by looking at only one side of the platform in isolation.

Ohio v. Amex, 138 S. Ct. at 2287. Because credit card networks compete for *transactions*, not for merchants or cardholders in isolation, Plaintiffs' attempt to segment the substitutability analysis is directly contrary to the Supreme Court's decision. Plaintiffs do not and cannot question the strenuous competition in the market for transactions.

Plaintiffs' concessions and theories throughout this case underscore this same competitive reality. Plaintiffs' experts have opined that Visa, MasterCard and Amex "compete with one another", Barbur Decl. Ex. 28 (Dep. of Joseph Stiglitz, July 22, 2013) at 17:7-17; Facts ¶ 44, and that substitutability "between AmEx and other third party payments cards (including at

least other credit cards and likely debit cards as well) is high because these cards offer merchants very similar functionality and value and are thus relatively undifferentiated". Vellturo III ¶ 18; *see also* Facts ¶¶ 16-18, 37-66; Vellturo II ¶ 61; Ariely I ¶ 50. Further, contrary to their market definition allegations, Plaintiffs' damages theory is premised on the idea that Amex and other payment cards are functional equivalents that should be priced similarly. Vellturo I ¶¶ 522-24; Facts ¶ 42. The relief requested by Plaintiffs in this litigation—the ability to steer Amex cardholders to other credit and debit card products—itself proves that Plaintiffs know that Amex cards are interchangeable with other forms of payment and therefore part of the same relevant product market.[10]

B. No Legal Theory Can Support an Amex-Only Market.

While *Ohio v. Amex* alone precludes an Amex-only market, Plaintiffs' claims fail for other reasons, too, consistent with the prevailing rule against single-brand antitrust markets. Plaintiffs' Amex-only market allegations are based on a cardholder insistence theory that the Second Circuit rejected. Plaintiffs impermissibly rely on the challenged contract provisions to exclude otherwise interchangeable products from the relevant market. And Plaintiffs have no basis for an exception to the rule that "courts in the Second Circuit generally reject efforts to define a market as consisting of a single brand, and will dismiss a complaint that alleges only such a market". *Bel Canto Design, Ltd. v. MSS HiFi, Inc.*, No. 11-CV-6353, 2012 WL 2376466, at *10 (S.D.N.Y. June 20, 2012); *see Integrated Sys. & Power, Inc. v. Honeywell Int'l, Inc.*, 713

[10] Plaintiffs argue that this substitutability addresses how the market would function absent the NDPs, *see, e.g.*, Vellturo III ¶ 18; Facts ¶ 40, but this only confirms that Plaintiffs are trying to (impermissibly) define a market by reference to the provisions they are challenging. *See infra* Section II.B.2. Absent the NDPs (which are irrelevant to defining the relevant market), Plaintiffs admit the relevant market would include all credit cards.

F. Supp. 2d 286, 298 (S.D.N.Y. 2010) (granting motion to dismiss and observing that courts "have consistently held that a single brand name product cannot define a relevant market").

1. Consumer Insistence Cannot Create a Single-Brand Market.

Plaintiffs' Amex-only market fails because it is based on the same type of cardholder insistence theory that the Second Circuit directly rejected as a basis for market power in *U.S. v. Amex*. Plaintiffs allege that Amex faces no competition and operates in a single-brand market because merchants are compelled to accept Amex based on cardholder preference: cardholders prefer to use their Amex cards, and some will take their business elsewhere if the Plaintiff does not accept Amex. *See, e.g.*, Vellturo I ¶ 116; Vellturo II ¶ 42; Vellturo III ¶ 65, 70; Stiglitz I ¶ 21; Facts ¶¶ 32-36. As a result, Plaintiffs assert, Amex can raise prices "without suffering any meaningful merchant attrition or loss of transactional volume". Am. Compl. ¶¶ 65-66. As Plaintiffs have conceded, their Amex-only market definition depends on their theory that "[t]he source of Amex's market power is cardholder insistence". Merchant Pls.' Opp. to Amex's Mot. for Summary Judgment at 21 (Nov. 21, 2013) (ECF No. 715); *see id.* at 20 (arguing that "Amex is insulated from competition for merchant acceptance of its cards by high insistence levels and critical loss analysis").

This is the same theory of cardholder "insistence" that the Second Circuit rejected. Instead, the Second Circuit made clear, cardholder loyalty was a sign of healthy competition because Amex was required to earn that loyalty by providing incentives to attract consumers from competing networks. *U.S. v. Amex*, 838 F.3d at 203. Plaintiffs' argument that Amex's insistent consumers insulate Amex from competition sufficiently to place Amex in its own market directly contradicts the Second Circuit's findings: "That Amex might not enjoy market power without continuing investment in cardholder benefits indicates, if anything, a *lack*

of market power; evidence showing that Amex must compete on price in order to attract consumers does not show that Amex has the power to increase prices to supracompetitive levels." *Id.* at 203. This Court, too, found that Amex's cardholders would substitute away to other cards if Amex reduced its investment in benefits, which makes clear there is significant interchangeability between networks. *United States v. Am. Express Co.*, 88 F. Supp. 3d at 195 (finding that Amex's "current market share would dissipate if the company were to stop investing in those programs that make its product valuable to cardholders"). That Amex invests in benefits to attract and retain customers is further proof that Amex competes in a broader all-GPCC market. *See* Facts ¶¶ 5-9.

No other case, for any industry, recognizes the type of consumer insistence theory advanced by Plaintiffs as a basis for a single-brand market, with good reason. It would be perverse and improper to define an Amex-only market based on loyalty that is continually subject to such vigorous competitive challenge. *See United States v. Waste Mgmt., Inc.*, 743 F.2d 976, 984 (2d Cir. 1984) ("We fail to see how the existence of good will achieved through effective service is an impediment to, rather than the natural result of, competition."); *see also, e.g.*, *Green Country Food Mkt., Inc., v. Bottling Grp., LLC*, 371 F.3d 1275, 1282 (10th Cir. 2004) ("Even where brand loyalty is intense, courts reject the argument that a single branded product constitutes a relevant market."); *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 479-80 (3d Cir. 1992) (rejecting Chrysler-only market definition, notwithstanding consumer preferences because "a market also includes actual or potential competitors who may take business away from each other"); *Global Discount Travel Services, LLC v. Trans World Airlines, Inc.*, 960 F. Supp. 701, 705 (S.D.N.Y. 1997) (finding customer insistence for TWA flights between certain city pairs insufficient to define a market and analogizing this strong

preference to strictly preferring Pepsi over Coke: "Pepsi is one of many sodas . . . . Likewise, tickets on TWA are like tickets on any other airline."); *Disenos Artisticos E Industriales, S.A. v. Work*, 714 F. Supp. 46, 48 (E.D.N.Y. 1989) (explaining that the "fact that some retailers echo the brand loyalties of their customers furnishes no basis for employing a single-product market definition").

As the Second Circuit concluded, "so long as Amex's market share is derived from cardholder satisfaction, there is no reason to intervene and disturb the present functioning of the payment-card industry". *U.S. v. Amex*, 838 F.3d at 204. Plaintiffs' Amex-only market fails for the same reason: where Amex's consumer loyalty is constantly challenged by competition, Amex does not operate in a market by itself.

2. Plaintiffs Cannot Use the NDPs To Define the Relevant Market.

Plaintiffs' Amex-only market theory fails for yet another reason: Plaintiffs impermissibly define the market based on the contractual restraints at issue, claiming that competition on the merchant side of the Amex platform is restrained by the NDPs in merchants' contracts with Amex. Plaintiffs argue that, without the NDPs, competition would flourish between all GPCCs. Facts ¶¶ 37-44; *see generally* Vellturo III ¶¶ 17-18 ("[W]ith the Merchant Restraints in place, AmEx operates in a product market unto itself."); Am. Compl. ¶ 67 (alleging that there is no "significant cross-elasticity of demand between Amex credit card services and other methods of payment" because the "Amex restraints eliminate any incentive by other card networks to charge lower merchant fees than Amex (and vice versa) because such lower merchant fees will not lead to increased sales"). Therefore, according to Plaintiffs, the only thing keeping other card networks out of an Amex-only market is Amex's NDPs. Barbur Decl. Ex. 30 (Dep. of Christopher Vellturo, Aug. 13, 2013) at 45:8-19 ("In a plausible economic world where

the merchant restraints don't exist the market would have expanded—or the relevant market expands."); Facts ¶ 41.

But "no court has defined a relevant product market with reference to the particular contractual restraints of the plaintiff". *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 438 (3d Cir. 1997); *see also Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81, 85 (2d Cir. 2000) ("Economic power derived from contractual arrangements affecting a distinct class of consumers cannot serve as a basis for [an antitrust] claim."), *abrogated on other grounds by Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). Where the only barrier to substitution "stems not from the market but from plaintiffs' contractual agreement", "no claim will lie"; therefore, "a court making a relevant market determination looks not to the contractual restraints assumed by a particular plaintiff when determining whether a product is interchangeable, but to the uses to which the product is put by consumers in general". *Smugglers Notch Homeowners' Ass'n v. Smugglers' Notch Mgmt. Co.*, 414 F. App'x 372, 376-77 (2d Cir. 2011) (summary order) (quoting *Queen City Pizza*, 124 F.3d at 443). Indeed, "an antitrust plaintiff may not define a market so as to cover only the practice complained of" because "this would be circular or at least result-oriented reasoning". *Adidas Am., Inc. v. NCAA*, 64 F. Supp. 2d 1097, 1102 (D. Kan. 1999) (internal quotations and citation omitted). Using the contractual restraints to limit the market fails to take into account the existing cross-elasticity of demand between competitors in the broader market, and thus "create[s] an artificially narrow market which is defined essentially in terms of the practice of which they complain". *Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton Coll.*, 106 F. Supp. 2d 406, 409-13 (N.D.N.Y. 2000) (rejecting market based on contract because the "economic forces pertinent to the definition of a relevant market for antitrust purposes must flow from the market, not from private contract").

The Third Circuit's decision in *Queen City Pizza*—which the Second Circuit has followed—illustrates why Plaintiffs' single-brand market fails. The plaintiffs, Domino's Pizza franchisees, sued franchisor Domino's Pizza, Inc., alleging antitrust claims in the alleged market for "ingredients, supplies, materials and distribution services used in the operation of Domino's stores" based on contracts that restricted their use of other suppliers for these products and services. 124 F.3d at 437. Like Plaintiffs here, the *Queen City Pizza* plaintiffs could not dispute that substitutes existed for these products and services; instead, they argued that their contractual restrictions prevented them from using substitutes. Indeed, as with Plaintiffs' claims here, it was "the availability of interchangeable" substitutes "from other suppliers, at lower cost, that motivate[d] [the] lawsuit". *Id.* at 438. The court rejected the proposed market definition because a "court making a relevant market determination looks not to the contractual restraints assumed by a particular plaintiff when determining whether a product is interchangeable, but to the uses to which the product is put by consumers in general". *Id.* ("[T]he only cases we have found involving similar claims" based on contract-derived market definitions "rejected plaintiffs' position as a matter of law".). Because all contracts restrict competition in some sense, any other approach leads to nonsensical results: If "contractual restraints render otherwise identical products non-interchangeable for purposes of relevant market definition, any exclusive dealing arrangement, output or requirement contract, or franchise tying agreement would support a claim for violation of antitrust laws". *Id.*; *cf. Apple, Inc. v. Psystar Corp.*, 586 F. Supp. 2d 1190, 1200 (N.D. Cal. 2008) (noting the "circular nature" of counterclaimant's proposed single-brand Mac OS computer operating system market definition and rejecting claims based on that market definition).

Plaintiffs cannot rely on the NDPs in defining the relevant market. They concede that, NDPs aside, GPCC networks compete with Amex. Therefore, their attempt to define an Amex-only market fails.

3. The "Aftermarket" Exception Does Not Apply.

Plaintiffs' single-brand market claims also fail because Plaintiffs cannot rely on the limited "aftermarket" exception to the general rule against single-brand markets. "In rare circumstances, a single brand of a product or service can constitute a relevant market for antitrust purposes. But that possibility is limited to situations in which consumers are 'locked in' to a specific brand by the nature of the product." *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 418 (5th Cir. 2010) (internal citation omitted). These lock-in cases all involve an aftermarket where further purchases of complementary goods for which there is no reasonable substitute are required *after* the initial purchase. For example, in the leading case to recognize an aftermarket exception, the Supreme Court recognized that a person might be locked in to a single source for service of Kodak copy machines if, *after* the person invested to purchase a machine, Kodak stopped selling replacement parts to independent service organizations, and there were no reasonably interchangeable substitute replacement parts. *See Eastman Kodak Co. v. Image Technical Servs. Inc.*, 504 U.S. 451, 457-58, 482 (1992). Thus, aftermarket lock-in exists if a defendant concealed its policies when a customer made a purchase, or changed its policies after the fact. *See PSI Repair Servs., Inc. v. Honeywell, Inc.*, 104 F.3d 811, 819-20 (6th Cir. 1997). As the Court in *Kodak* found, for copier customers, information about aftermarket service costs was "difficult—some of it impossible—to acquire at the time of purchase". 504 U.S. at 474.

No such lock-in exists here. Plaintiffs have not argued—nor could they—that Amex changed or concealed its policies about the NDPs. A plaintiff cannot claim to be locked in

to an aftermarket by a contract that allows the plaintiff to "assess the potential costs and economic risks at the time they signed" the agreement at issue. *Queen City Pizza*, 124 F.3d at 440. Here, the NDPs were contractual terms that were "fully disclosed" to Plaintiffs when they signed their acceptance agreements with Amex. *See Hack*, 237 F.3d at 87.

All claims based on Plaintiffs' improper single-brand market definition should be dismissed, or in the alternative, summary judgment should be granted.

CONCLUSION

For the reasons set forth above, Amex respectfully requests that the Court grant Amex's motion for dismissal or, in the alternative, summary judgment with respect to all claims based on a one-sided market and all claims based on an Amex-only market.

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