UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *et al.*,
Plaintiffs,

v.

AMERICAN EXPRESS CO., *et al.*,
Defendants.

Civil Action No.:
1:10-CV-04496-NGG-RER

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO ENFORCE PERMANENT INJUNCTION

Dated: December 1, 2015

Amex's Memorandum obscures the main issue: does the relief in the Permanent Injunction apply to co-brand merchants, or does the Permanent Injunction grant Amex the unilateral right to decide that the NDPs continue to block these merchants from steering? The Permanent Injunction broadly prohibits Amex from enforcing any "agreement" or "Rule" that blocks steering. The only exceptions with respect to "existing agreements" are those falling into the narrow categories in sections III.B.1 and III.B.2. But Amex takes such an expansive view of III.B.2 that it would sweep in all co-brand agreements and categorically deny these merchants the relief in the Permanent Injunction. Thus, under its reading, Amex could continue to enforce the very NDPs that this Court found violated the Sherman Act. Amex's interpretation, however, is in direct conflict with the purpose of the Permanent Injunction, which is to prevent Amex from imposing anti-competitive restraints with its market power and to free merchants to influence their customers' payment choices.

Amex argues that its position is supported by the plain language of the Permanent Injunction. It is not. Rather, Amex asks this Court to interpret the Permanent Injunction to mean that a merchant's act of signing a co-brand contract and a separate acceptance contract containing NDPs – even if signed years apart and negotiated without reference to each other – means that the merchant has willingly waived any right to steer. *See* Amex Br. at 5 (arguing that co-brand partners "agreed" to the conditions in III.B.2 in "two separate" agreements). But Amex's position ignores the Court's findings that the NDPs were imposed by Amex on merchants in a market in which Amex held market power. Amex cites no evidence that co-brand merchants willingly agreed to give up their steering rights. Nor does it provide any reason to believe that these merchants are not in the same position as any of the other merchants who were required to accept the NDPs as a condition of accepting Amex cards. Amex also ignores the

testimony of Amex's own co-brand partners, cited in Plaintiffs' opening brief, demonstrating that these merchants do not support the steering restrictions in the NDPs.[1]

Amex's interpretation is also incorrect because III.B.2 contemplates a freely negotiated mutual promotional arrangement in which the merchant promotes the co-brand card but not other cards. The NDPs that Amex seeks to maintain, by contrast, were imposed by market power. In Amex's view, III.B.2 would operate simply as a backdoor way to maintain NDPs on co-brand merchants.[2] Such a reading would allow Amex to benefit from its anti-competitive exercise of market power. That result would be inconsistent with both the Plaintiffs' intent in proposing this language and the Court's goal of creating a remedy that will "eliminate the consequences of Defendants' past violation of the Sherman Act and . . . encourage a functional and fair market in the future." *United States v. American Express Co.*, No. 10-cv-4496, 2015 WL 1966362, at *2 (E.D.N.Y. Apr. 30, 2015). This Court has rejected a previous attempt by Amex to disable merchant steering rights – in that instance, by asserting an unconditional right to refuse to deal. The Court held that such a right would have allowed Amex to "use its market power to impose the same exact harm on competition" as the NDPs, and would have rendered "the Government's vindication of the public's rights entirely illusory." *Id.* at *9. Here, Amex's interpretation of III.B.2 would have the same effect on co-brand merchants by rendering their steering rights

[1] Amex also fails to explain why the same language Plaintiffs included in the Consent Decree should have a different meaning here. Under the Decree, Visa and MasterCard, with Plaintiffs' approval, sent identical notices to all merchants, including co-brand partners, and all merchants received the same modifications to the networks' steering rules.

[2] Amex's argument based on the structure of another provision, III.B.3, misses the point. Section III.B.2 contemplates a mutual arrangement struck in the competitive market for co-brand issuance. By contrast, III.B.3 recognizes that there is not a competitive market for card acceptance and that a network might try to exploit its market power to obtain exclusivity. The requirements that (a) the exclusivity arrangement be in a separate, non-standard document and (b) acceptance of Amex cards be "unrelated to and not conditioned upon" exclusivity are to ensure that these bargains are struck in a more competitive market, one in which Amex cannot threaten to withhold acceptance and the merchant can freely seek out other network partners.

illusory and allowing Amex to benefit from its prior exercise of market power. It cannot be the case, as Amex argues, that section III.B.2 is simply the NDPs under another name.[3]

Amex next argues that its interpretation of III.B.2 is justified because Amex pays "billions of dollars" to co-brand partners and the co-brand contracts are so "inextricably intertwined" with the acceptance contracts that Amex "would never have" entered into a co-brand relationship absent the NDPs. Amex Br. at 1, 8. Amex essentially asks the Court to assume that the co-brand partners must have gone along with this Amex desire. But this Amex argument is an attempt to resurrect its claim at trial that acceptance contracts and co-brand contracts are inherently linked and must be analyzed together. However, as this Court recognized, co-brands are issuing agreements that are separate from the network services acceptance agreements, both legally and economically. *See United States v. American Express Co.*, 88 F. Supp. 3d 143, 203-204, 227-230 (E.D.N.Y. 2015). Moreover, as a factual matter, it is incorrect that Amex "never would have entered into a partnership with a merchant intending to steer its customers to other GPCC cards." Hilton, an Amex co-brand partner, also has a co-brand card with Visa that it promotes and steers its customers to. Trial Tr. 1655:9-19; 1656:5-15. Thus, the fact that a merchant may intend to steer to non-Amex cards does not prevent the formation of a co-brand partnership.[4] The Hilton example also illustrates that merely signing a

[3] Amex tries to twist Plaintiffs' argument into one that the NDPs are "too lenient" or "too permissive." The point is that III.B.2 envisions a partnership between Amex and a merchant in which both parties deliberately commit to all terms of the relationship. Amex's NDPs, imposed through market power and separately from the co-brand discussions, do not entail such a conscious commitment on the part of the merchants – as their testimony confirms.

[4] Amex argues that the Court should interpret III.B.2 under the assumption that a merchant entering a co-brand agreement with Amex must have meant to devote all of its promotional efforts to the Amex brand. Yet Amex does not apply a parallel assumption to itself – it has co-brands with competing hotel chains Starwood and Hilton.

co-brand contract with Amex does not demonstrate the merchant's intent to waive its rights to steer to other cards.

Amex's argument that the "billions of dollars" it spends on co-brands necessitates the NDPs is fatally undercut by its admission that "[i]t is extremely unlikely, for a variety of reasons, that merchants would steer their customers away from their own co-brand Cards in a world without American Express's Non-Discrimination Provisions." Amex Br. at 5 n.1. Amex thus admits that its investments in the co-brand cards are protected because these cards are unlikely to be subject to steering. This makes sense because these merchants derive a financial benefit when the co-brand card is used. With respect to all other Amex cards, however, there is no issuing relationship and the merchant stands in the same position as any other merchant that accepts Amex cards. A merchant might well draw a distinction between co-branded cards and ordinary Amex cards and consider steering away from the latter. *See* Ex. C to Pls.' Br. Amex fails to offer any reason why co-brand merchants should not be permitted to steer away from these other Amex cards, as all other merchants are under the Permanent Injunction.[5]

Amex's claim that "the Government has conceded that limiting steering by American Express's co-brand partners does not harm competition" is incorrect. Amex Br. at 8. Limiting steering does harm competition when it is imposed as a condition of acceptance in circumstances where Amex has market power. Going forward, with the NDPs unenforceable, merchants are in a very different position. If they desire to voluntarily negotiate an exclusive promotional arrangement with Amex as permitted in section III.B, they are free to do so.

[5] Nor has Amex explained why it should be allowed to maintain NDPs that block these merchants from steering "even when American Express is not mentioned" (*e.g.*, from Visa to Discover). *Amex*, 88 F. Supp. 3d at 165, 228. But that is the effect of its reading of III.B.2.

Finally, Amex's argument that the competitive outcome would not have been any different if the NDPs had been part of the co-brand agreement rather than the acceptance agreement is a red herring. The co-brand negotiations took place in a competitive environment, while the card acceptance negotiations did not. Amex is not entitled to assume that the existing NDPs would have been the outcome if both negotiations had taken place in a competitive environment.

Amex's position is an attempt to cling to the remnants of its anticompetitive NDPs. This dispute aptly illustrates the Court's observation that no "violator of the antitrust laws will relinquish the fruits of his violation more completely than the court requires him to do." *Amex*, 2015 WL 1966362, at *2 (quoting *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 698 (1978)). Accordingly, the Court should find that Amex's co-brand partners are permitted to exercise the steering rights protected by the Permanent Injunction.

Respectfully Submitted,

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