

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, et al.,
Plaintiffs

v.

AMERICAN EXPRESS CO., et al.,
Defendants

No. 10-CV-04496 (NGG)

**PLAINTIFFS' MEMORANDUM IN REPLY
TO NON-PARTY FILINGS REGARDING REMEDY**

Plaintiffs appreciate the submissions of the 7-Eleven Merchants (ECF No. 631), the MDL 2221 Class Plaintiffs (ECF No. 634), and Southwest Airlines (ECF No. 635) opposing Amex's Proposal and supporting entry of Plaintiffs' Proposed Judgment. As merchants likely to steer as envisioned by the Court's Decision, they offer important perspectives on the ways in which Amex's proposal might undermine that Decision.

Plaintiffs provide this brief response to address issues raised by the 7-Eleven Merchants. Plaintiffs share the 7-Eleven Merchants' desire to assure that the judgment not be susceptible of any interpretation that undermines effective relief. Plaintiffs believe, however, that our Proposed Judgment provides adequate assurance while minimizing variance between the Proposed Judgment and the Visa/MasterCard Judgment. With meaningful enforcement provisions, Plaintiffs will be well-positioned to enforce the judgment to prevent any conduct by Amex that undermines effective relief.

First, the 7-Eleven Merchants suggest clarifying that the types of steering set forth in § IV.A of the Proposed Judgment are non-exhaustive. This addition is unnecessary. The Proposed Judgment "broadly prohibits [Amex] from any anti-steering practice." Mem. and Order (ECF No. 142) at 6 (citing to Visa/MC Judgment § IV.A, D). As the Proposed Judgment says, "[t]his Final Judgment should be interpreted to promote [steering] efforts and not limit them." Proposed Judgment § IV.A. The list in § IV.A plainly is non-exhaustive because clause IV.A.8 expressly extends to "any other practices substantially equivalent to the practices" enumerated. Presumably, Amex will confirm in its response that it too understands the list to be non-exhaustive and thus there will be no need for additional language. Nonetheless, Plaintiffs have no objection to adding the sentence proposed by the 7-Eleven Merchants at page 2 ("This

Final Judgment should also be interpreted to protect all such efforts with the exception of surcharging and disparaging conduct.”).

Second, the 7-Eleven Merchants seek language clarifying that merchants may steer across multiple networks and are not limited to steering toward one network at a time. The Proposed Judgment, however, contains nothing restricting steering to one network at a time. As Plaintiffs said about the Visa/MasterCard Judgment, allowing steering to multiple payment forms at once falls within § IV.A. Resp. of Pl. United States to Public Comment on the Proposed Final J. (ECF No. 119-1) (“Public Comment Response”) at 26 (explaining that the Visa/MasterCard Judgment allows “the display of ‘separate prices at the point of sale for purchases made on various methods of payment’”). Presumably Amex will confirm in its response that it too understands the Proposed Judgment to permit steering across multiple networks and thus there will be no need for additional language.

Third, the 7-Eleven Plaintiffs propose an explicit definition of surcharging, although this case did not address the legality of Amex’s prohibition of surcharges.¹ Decision at 26. Amex’s rule bars merchants from imposing “‘fees’ when accepting American Express cards that are not ‘imposed equally on all Other Payment Products,’ except for ACH, cash or check.” Decision at 26 (quoting PX0002 at 16). The Proposed Judgment does not prohibit Amex from maintaining that language in its rules, and no further definition of surcharging is needed in the Proposed Judgment. However, Amex must allow merchants to use discounts to steer. *See* Proposed Judgment § IV. To the extent Amex attempts to use an overbroad interpretation of its no-surcharge prohibition to inhibit discounting by merchants, its actions would violate, *inter alia*, § IV.A of the Proposed Judgment, and Plaintiffs would take enforcement action to ensure

¹ Plaintiffs maintain the ability to challenge Amex’s current surcharging rule in a separate action.

that the discounting envisioned by the Court's Decision is not impeded. *See* Public Comment Response at 26-27 ("If a merchant adopts a steering practice to encourage consumers to use lower-cost payment forms that is protected by Section IV.A of the proposed [Visa/MasterCard] Final Judgment (such as a 'discount or rebate'), then Visa and MasterCard cannot prohibit or restrain the practice even if they try to argue the practice involves the imposition of a surcharge in violation of their [no-surcharge] rules.").

Fourth, the 7-Eleven Plaintiffs request an explicit definition of disparagement to ensure Amex does not block steering under the guise of a non-disparagement rule. Plaintiffs share the concern but believe the Proposed Judgment protects against this behavior while permitting Amex to protect itself against disparagement. *See* Mem. in Supp. of Proposed Final J. (ECF No. 622) at 23-26; *see also* Pls.' Reply Mem. in Supp. of Proposed Final J. (ECF No. 626) at 9. The Proposed Judgment clarifies that Amex's non-disparagement rule is subject to the protected steering provisions in § IV.A, ensuring that Amex cannot block protected steering by characterizing it as disparagement. Proposed Judgment § IV.C.

To be clear, given Amex's long history of blocking steering and treating it as disparagement, Plaintiffs share the concern that Amex might misconstrue protected conduct as disparagement or surcharging, and thereby inhibit steering. That is precisely why the Proposed Judgment includes reporting and compliance provisions, which are critical for ensuring effective relief. These provisions will not only help deter Amex from attempting to undermine the judgment, but also help Plaintiffs uncover any efforts to do so. Plaintiffs can then take appropriate action, either by enforcing the broad steering protections in the judgment or, if necessary, requesting modification of the judgment in the context of the specific circumstances at issue. Proposed Judgment § VII.B.

Respectfully submitted,

Dated: April 17, 2015

U.S. DEPARTMENT OF JUSTICE

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