



United States et al. v. American Express Co.

October 9, 2014



“[T]he market is broken.”

– Christopher Priebe (Southwest Airlines), Trial Tr. 2440:4-15.



“I don’t think anybody’s business strategy is to be cheaper than the next guy. . . .

So, no, we don’t compete on costs.”

– Jack Funda (Amex), Trial Tr. 2667:23-2668:9.



Q: Mr. Hochschild, in your view, is a low price strategy for merchants viable without the ability to shift share from competitors to Discover at the point of sale?

A: No.

– Roger Hochschild (Discover), Trial Tr. 853:19-854:3.



“Simply put, the parties agree on one basic point: merchant steering works.”

– Amex Post-Trial Brief at 3.



Steering Could Lead to Price Competition, Which Could Lead to Lower Prices

“Well, we would be fighting to retain the business by any means necessary, right. So, yes, we may need to increase incentives to consumers. We may need to reduce pricing to merchants.”

– Jack Funda (Amex), Trial Tr. 2754:21-2755:6.

“I believe that we would have been able to negotiate on price significantly based on our creativity and how we could have leveraged that right that we currently don’t have.”

– Christopher Priebe (Southwest Airlines), Trial Tr. 2418:3-17.



Effects of Amex's Restraint on Competition

- ☐ There is no price competition among credit card networks on merchant discount rates.
- ☐ If merchant steering were allowed, there would be price competition among credit card networks on merchant discount rates.
- ☐ Amex's restraint blocks price competition.



Sherman Act Rule of Reason Analysis Is Three Steps

Step 1 (Plaintiffs)

Adverse effect on competition

Either Through:

- ☐ Direct path – actual anti-competitive effects
- ☐ Indirect path
 - ☐ Market definition
 - ☐ Market power
 - ☐ Likely anti-competitive effects

Step 2 (Defendant)

Claimed pro-competitive effects

Step 3 (Plaintiffs)

Whether any pro-competitive effect could be achieved by less anti-competitive means



Anticompetitive Effects



Anticompetitive Effects

- The antitrust laws “are designed primarily to protect interbrand competition, from which lower prices can later result.”
 - *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 895 (2007).

- “Identifying ‘anticompetitive effects’ under the rule of reason involves analysis of whether the competitive process itself has been harmed.”
 - *U.S. v. Visa U.S.A., Inc.*, 163 F.Supp.2d 322, 344 (S.D.N.Y. 2001), *aff’d*, 344 F.3d 229 (2d Cir. 2003).

- Restraints can harm competition if they “disrupt the proper functioning of the price-setting mechanism of the market.”
 - *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 461-62 (1986).



Merchants Confirmed That Steering Is A Common Type of Competition

Q: Has Ikea ever experimented with steering in the past?

A: Yes. . . .on a routine and ordinary course of business, we do sales steering all the time in our stores. And we've also done steering in other areas. . . .

Q: And has it been effective in encouraging your customers to use the products or services that you were steering towards?

A: Yes, it is.

– John Robinson (Ikea), Trial Tr. 398:8-399:23.



Merchants Want To Foster Network Competition And Lower Prices By Steering

☐ Merchants testified they would steer in creative ways to foster network competition if permitted. *See* PFOF ¶¶ 230-250.

☐ Alaska Airlines

☐ Official Payments

☐ Best Buy

☐ Sears

☐ Crate & Barrel

☐ Sinclair

☐ Enterprise

☐ Solitude

☐ Grand America

☐ Southwest Airlines

☐ Hilton

☐ Sprint

☐ Ikea

☐ Home Depot



Amex Concedes The Fundamental Facts About Anticompetitive Effects

- Mr. Quagliata confirmed the Anti-Steering Rules block discounts and promotions by competitors, even where Amex is “not mentioned.” PFOF ¶ 2; Joseph Quagliata (Amex), Trial Tr. 671:7-22.
- Mr. Funda confirmed Amex may need to “reduce prices to merchants” and “increase incentives to consumers” without the Anti-Steering Rules. Jack Funda (Amex), Trial Tr. 2754:25-2755:3.
- Mr. Chenault confirmed Amex has aggressively enforced the Anti-Steering Rules, even by terminating some merchants. Kenneth Chenault (Amex), Trial Tr. 4491:6-18.



Low Prices In Return for More Volume Is Fundamental to Competition

“[C]utting prices to increase business is the very
essence of competition.”

– *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S.
451, 478 (1992) (internal quotation and citation omitted).



Steering Was Essential for Discover's Low-Priced, Merchant-Friendly Strategy

Q: Why wasn't Discover able to execute a low price strategy without using steering to shift shares to Discover?

A: Providing a lower price to merchants isn't transparent to customers. They don't, right now, know the interchange or the pricing that a merchant might pay.

So if you don't also let the merchant shift share, you'll be giving away money in the form of a lower interchange rate without getting any benefit in return. . . .

– Roger Hochschild (Discover), Trial Tr. 849:8-15; 853:19-854:3.



Because Low Prices Cannot Increase Volume, Discover Raised Its Prices

Q: So given these roadblocks you described, the rules on steering [of] Visa and MasterCard and American Express, what did Discover do?

A: Discover shifted our pricing strategy with merchants and started increasing our prices to more closely match those of Visa and MasterCard.

– Roger Hochschild (Discover), Trial Tr. 849:8-15; 853:19-854:3.



Discover's Low-Priced, Merchant-Friendly Strategy Was Blocked

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Discover Will Renew Its Low-Priced, Merchant-Friendly Strategy if Amex's Restraint Is Removed

Q: Mr. Hochschild, if there were no restrictions on what Discover could do with respect to steering at the point of sale, how would Discover act?

A: To the extent that merchants could steer transactions to Discover network at the point of sale, Discover would aggressively pursue a strategy of lowering our prices and providing incentives to merchants that would steer incremental volume to Discover.

– Roger Hochschild (Discover), Trial Tr. 872:3-10.



Visa's "We Prefer" Campaign Encouraged Merchants to Steer to Visa and Save Money

AMERICAN EXPRESS SALES VOLUME (\$)

DISCOUNT RATE PREMIUM (%)

VISA

PRE-TAX PROFIT IMPACT (\$)

EXAMPLE: Say that your American Express Discount Rate is 4.0%, your Visa Discount Rate is 2.5%, and your annual American Express sales volume is \$1 million. By subtracting your Visa discount (2.5%) from your American Express discount (4.0%), your decrease in your American Express Discount Rate Premium of 1.5%. Locate that figure on the inner wheel, then find your sales volume figure (\$1,000,000) on the outer wheel, and rotate the wheel until the figures line up. The bottom window shows your annual non-pre-tax profit of \$25,000.

This calculator is designed to help you determine if you are able to cut that cost and significantly improve your profits. It's as easy as 1, 2, 3.

Plaintiff's Exhibit
US v. AMEX
104-60408
PX0082

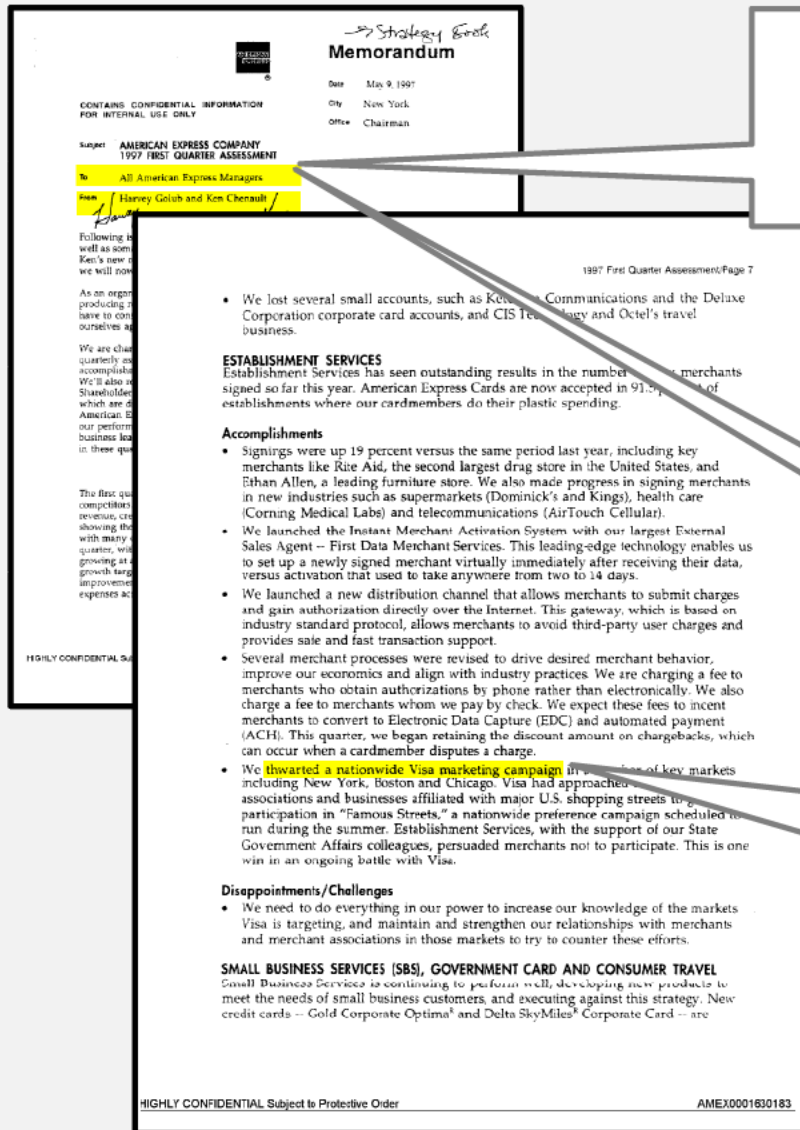
EXHIBIT
Plaintiff's
58203

HIGHLY CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER AMEXNDR16479543

PX0082 at AMEXNDR16479543



Amex “Thwarted” Visa’s “We Prefer” Campaign



“To All American Express Managers”

“From Harvey Golub and Ken Chenault”

“We thwarted a nationwide Visa marketing campaign in key markets . . .” (emphasis added).

PX0152 at AMEX0001630183



Point-of-Sale Preference Steering Is Important to MasterCard

Q: But there's more value to MasterCard to have the logo on the actual payments page?

A: The closer I get to the point of sale or the point of interaction, it becomes much more important for MasterCard to deliver that message to use your MasterCard.

Q: Is MasterCard willing to offer more financial incentives to merchants to get closer to that point of interaction?

A: Yes.

Q: Is MasterCard willing to offer more financial incentives to merchants to express a preference as opposed to other types of marketing?

A: Yes.

– Nina Biornstad (MasterCard), Trial 3240:18-3241:5.



Amex's Anti-Steering Rules Blocked Competition From MasterCard

Fred P. Gore
Senior Vice President
North America/Acceptance

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North America Region
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914 249-5341
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Internet Home Page:
<http://www.mastercard.com>

COPY

MasterCard
International



Via Facsimile & UPS Overnight Mail

January 14, 2004

Mr. Paul Nelson
Senior Vice President
Travelocity.com LP
303 Second Street, suite 5005
San Francisco, CA 94107

RE: Joint Marketing Agreement

Dear Paul:

We were dismayed to learn that Travelocity removed the MasterCard preference language from www.travelocity.com at the demand of American Express.

As you know, MasterCard and Travelocity entered into a Joint Marketing Agreement, dated November 1, 2002, (the "Agreement") in which Travelocity agreed, among other things, to "...promote MasterCard at its exclusive payment systems sponsor and preferred payment brand of Travelocity and the Travelocity Website." Travelocity's removal of the phrase, "Travelocity Prefers MasterCard" and replacing it with "Travelocity's Official Card..." is not acceptable to MasterCard. Travelocity's actions are inconsistent with the terms of the Agreement and diminish the value of MasterCard as Travelocity's preferred brand.

Further, we are disappointed that Travelocity has permitted American Express, one of our major competitors, to interfere with our Agreement. If Travelocity were under any obligations in its acceptance agreement with American Express that would restrict it from entering into a preferred marketing relationship with MasterCard, Travelocity should not have assumed such preference obligations under the Agreement.

We have had a relationship with Travelocity for the past 4 years, and are surprised that Travelocity would now permit American Express to put this relationship in jeopardy. MasterCard will not allow the terms of our marketing relationship and Agreement to be

Plaintiffs' Exhibit
US v AMEX
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Q: So Mr. Gore writes in the first sentence, "We were dismayed to learn that Travelocity removed the MasterCard preference language from www.Travelocity.com at the demand of American Express." And that's what, in fact, happened; it was removed at their demand?

A: Yes.

Q: A little farther down in the second paragraph at the bottom, Mr. Gore says, "Travelocity's removal of the phrase 'Travelocity Prefers MasterCard' and replacing it with 'Travelocity's Official Card' is not acceptable to MasterCard. Travelocity's actions are inconsistent with the terms of the agreement and diminish the value of MasterCard as Travelocity's preferred brand." Did I read that right?

A: Yes. . . .

Q: And Mr. Gore goes on to say, "Further, we are disappointed that Travelocity has permitted American Express, one of our major competitors, to interfere with our agreement." Is that how you viewed it at the time?

A: Yes.

– Nina Biornstad (MasterCard), Trial Tr. 3251:1-25.

PX1324 at MCW_DOJ_00369615



Value Recapture Also Demonstrates Price Effects of Amex's Restraint

Q: [I]f . . . the rules prohibiting steering were in place in the timing of the 2009 negotiations, could Southwest have mitigated the size of the price hike by telling American Express that it would steer card holders to the other cards, could that price hike go into --

A : Can I be absolutely clear on that question? Did you say if those rules weren't in place?

Q: If they weren't in place, right. If you had the ability to steer in 2009, how would that have changed the negotiation dynamics, if at all?

A: I believe that we would have been able to negotiate on price significantly based on our creativity and how we could have leveraged that right that we currently don't have.

– Chris Priebe (Southwest Airlines), Trial Tr. 2418:3-17.



Amex's Restraint Harms Innovation

- Discover's Project Monet
 - Roger Hochschild (Discover). PFOF ¶ 70.
- MCX
 - Christopher Priebe (Southwest Airlines). PFOF ¶ 123.
- Sinclair Oil's Mobile App
 - Russell Gibson (Sinclair Oil). PFOF ¶ 2119.
- Official Payments' Choice Pay site
 - Benjamin Mitchell (Official Payments). PFOF ¶ 257.
- Official Payments' developing technology
 - Benjamin Mitchell (Official Payments). PFOF ¶¶ 120-122.



Anticompetitive Effects of Amex's Anti-Steering Rules

- Plaintiffs Proved:
 - Harm to the Competitive Process
 - Effect on Prices
 - Effect on Output, Quality or Innovation
- Through:
 - Merchant Testimony
 - Testimony of All Three Competitors
 - Amex Concessions and Documents
 - Expert Testimony



MARKET DEFINITION



Market Definition Standard Is “Reasonable Interchangeability”

- ☐ “The relevant market is defined as all products ‘reasonably interchangeable by consumers for the same purposes’” *Geneva Pharms. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 496 (2d Cir. 2004) (citation omitted).
- ☐ **Merchants** are the relevant consumers. *See* PCOL ¶ 51.
- ☐ “Reasonable interchangeability” standard focuses on how **price changes** affect merchant demand. *See* PCOL ¶ 50.
- ☐ Different from “functional interchangeability.”
See PCOL ¶¶ 55-56.



Hypothetical Monopolist Test Provides Analytical Framework for Assessing Reasonable Interchangeability

- Test is used by the Second Circuit and district courts. *See* PCOL ¶¶ 53-54.
- Professor Katz applied the hypothetical monopolist test and found relevant markets for:
 - GPCC card network services to merchants. *See* PFOF ¶¶ 327-33.
 - GPCC card network services to T&E merchants. *See* PFOF ¶¶ 633-38.
- Amex's economists regularly use the hypothetical monopolist test – but did not apply it in this case. *See* PFOF ¶¶ 308, 312.



Prof. Katz Applied the Hypothetical Monopolist Test

- ☐ Merchant demand is derived from customer demand.
See PFOF ¶ 21.
- ☐ Some customers use only credit cards for certain kinds of transactions. *See PFOF ¶¶ 386-94.*
- ☐ Merchants cannot reach those core credit customers without accepting credit cards, so merchants do not consider debit card network services to be reasonably interchangeable with GPCC card network services. *See PFOF ¶¶ 316-320.*



Prof. Katz Identified Core Credit Customers

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Prof. Bernheim Identified Core Credit Customers

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Merchants Testified That They Cannot Drop Credit Cards and Rely Solely on Debit Cards

- Ikea steered customers to PIN debit using price incentives on two separate occasions, and found that few customers switched from credit cards to debit cards, and concluded that there are “different customers” using credit and debit cards. *See* PFOF ¶ 342.

Dale - direct - Ewalt 1683

1 Q would Sprint stop accepting credit cards?

2 A No, we would not stop.

3 Q Why not?

4 A We feel that we need to continue to accept credit cards

5 in order to stay competitive in the telecommunication field.

6 Q Who are Sprint's principal competitors?

7 A Verizon, AT & T, T-Mobile.

8 Q Do those companies accept credit cards?

9 A Yes.

10 Q Why does Sprint feel that it needs to accept credit cards

11 to remain competitive with them?

12 A That we could potentially lose consumers if we did not

13 have the same -- offer the same payment forms as our

14 competitors.

Dale - direct - Ewalt 1684

24 Q If Sprint's cost of accepting credit cards, that number

25 reported in column G, row 18, were to rise by ten percent,

1 would Sprint stop accepting credit cards?

2 A No, we would not stop.

3 Q Why not?

4 A We feel that we need to continue to accept credit cards

5 in order to stay competitive in the telecommunication field.

6 Q Who are Sprint's principal competitors?

7 A Verizon, AT & T, T-Mobile.

8 Q Do those companies accept credit cards?

9 A Yes.

10 Q Why does Sprint feel that it needs to accept credit cards

11 to remain competitive with them?

12 A That we could potentially lose consumers if we did not

13 have the same -- offer the same payment forms as our

14 competitors.

GUTIERREZ - CROSS / BONANNO 5297

GUTIERREZ - CROSS / BONANNO 5298

1 Q If the fees that Strictly Bicycles paid for debit cards

2 were to change, that wouldn't influence your decision

3 regarding whether the company should continue to accept credit

4 cards; correct?

5 A No, it wouldn't.

6 Q Let's turn to the Plum card that you discussed during

7 your direct testimony. Do you remember that, sir?

8 A Yes.

9 Q

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19 Q Mr. Gutierrez, the fees that Strictly Bicycles pays for

20 debit cards have no impact on its decision to accept credit

21 cards; correct?

22 A Correct.

23 Q And Strictly Bicycles has never considered dropping

24 acceptance of all credit cards; correct?

25 A Never.

1 Q If the fees that Strictly Bicycles paid for debit cards

2 were to change, that wouldn't influence your decision

3 regarding whether the company should continue to accept credit

4 cards; correct?

5 A No, it wouldn't.



Debit Dispute: Amex Sets Its Prices by Comparison to Credit, Not Debit

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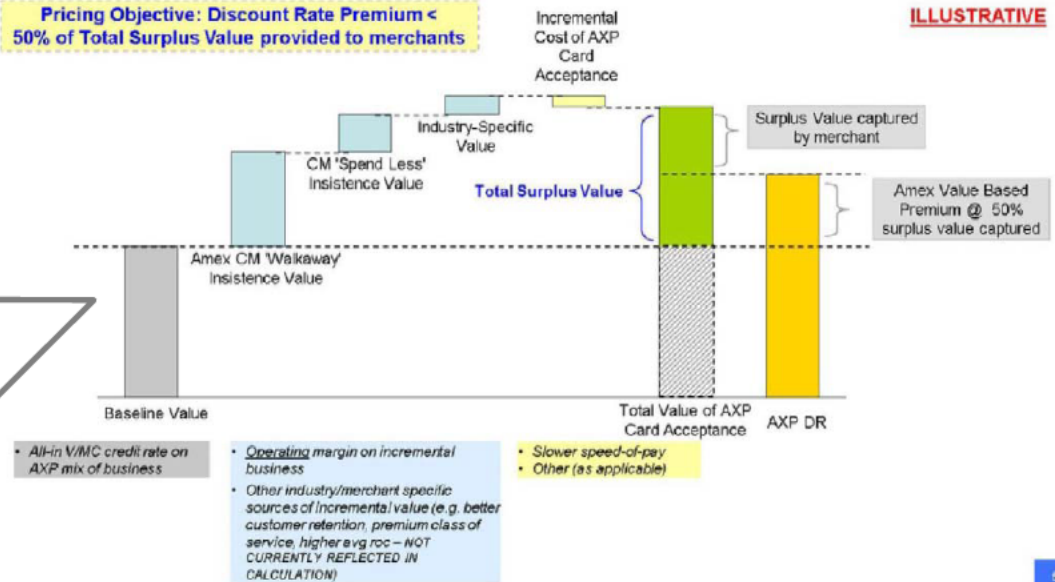


Value Based Merchant Pricing Methodology

This methodology attempts to quantify the incremental business and economic profits to merchants driven by their decision to accept AXP cards.

Pricing Objective: Discount Rate Premium < 50% of Total Surplus Value provided to merchants

ILLUSTRATIVE



American Express Proprietary and Confidential Information; DRAFT; May not reflect the views of Senior Management

5

Baseline Value

- All-in V/MC credit rate on AXP mix of business

PX1240 at AMEXNDR19210091



Debit Dispute: Amex Sets Its Prices by Comparison to Credit, Not Debit

5 | Q And when we're talking about the baseline, we're
6 | looking at only Visa and MasterCard credit and we're not
7 | including all those debit costs; is that correct?
8 | A For pricing purposes, we benchmark to Visa/MasterCard
9 | credit, correct.

2563

1 | little fees that we charge in addition to
2 | interchange; is
3 | A That's fine. It's comprised of interchange, network
4 | fees, and acquisition fees.
5 | Q And when we're talking about the baseline, we're
6 | looking at only Visa and MasterCard credit and we're not
7 | including all these debit costs; is that correct?
8 | A For pricing purposes, we benchmark to Visa/MasterCard
9 | credit, correct.
10 | Q Now, when we talk about value on this methodology, the
11 | value we're talking about is the cardholder insistence
12 | value; is that correct?
13 | A The value is actually the incremental business that we
14 | bring to our merchants. And mind you that is just one of
15 | many components of value that we bring to our merchants.
16 | Q When we're going through the American Express pricing
17 | methodology, the value that is used in coming to what the
18 | number should be is the value from cardholder insistence,
19 | correct?
20 | A Right. The metric that we use to back into how much
21 | incremental value we bring to our merchants is an
22 | insistence-based metric, yes.
23 | MR. GLASS: Your Honor, may I approach?
24 | THE COURT: Yes, you may.
25 | MR. GLASS: Your Honor, I've handed up what has

Jack Funda (Amex), Trial Tr. 2563:5-9

FUNDA - DIRECT - GLASS 2730

1 | Q So when we're thinking about how American Express
2 | prices, we've seen that American Express doesn't tag its
3 | price against cash, it tags its price against credit,
4 | correct?
5 | A Correct.
6 | Q And it doesn't tag its price against debit, it tags its
7 | price against credit?
8 | A Correct.
9 | Q So it's fair to say that when you're looking at all
10 | these different payment methods, that American Express most
11 | closely competes with credit cards, Visa and MasterCard
12 | credit cards, correct?
13 | A I would say that we compete with all payment methods,
14 | but when we think about the fair pricing for our products,
15 | we compare that to the most similar competitive pricing
16 | product we know of, which would be Visa/MasterCard credit.
17 | Q And you don't compare it to some blend of
18 | Visa/MasterCard credit and debit, correct?
19 | A We don't, because we think that credit, as you said, is
20 | a different enough product with a sufficiently different
21 | feature set from, let's say, debit, and a sufficiently
22 | different cost structure than debit, that it should be
23 | priced on its own merits, not combined with debit.
24 | Q Now, going back to your amendment, so I'll ask
25 | you to remember back to the beginning of 2010 when

17 | Q And you don't compare it to some blend of
18 | Visa/MasterCard credit and debit, correct?
19 | A We don't, because we think that credit, as you said, is
20 | a different enough product with a sufficiently different
21 | feature set from, let's say, debit, and a sufficiently
22 | different cost structure than debit, that it should be
23 | priced on its own merits and not combined with debit.

Jack Funda (Amex), Trial Tr. 2730:17-23



Debit Dispute: Like Amex, Discover Does Not Consider Debit in Setting Its Credit Prices

HOCHSCHILD-DIRECT-HAMER 818

1 A The primary difference between a debit card and a credit
2 card is the credit facility. Credit cards do not need to be
3 paid in full when the bill comes at the end of the month.
4 Debit cards, each transaction is individually authorized and
5 is paid immediately out of the checking account.

6 Q You mentioned the Pulse network when you were talking
7 morning. What is that?

8 A The pulse is a PIN debit and ATM network that Discover
9 offers.

10 Q Can credit card transactions go over the Pulse network?

11 A No.

12 Q Does Discover issue debit card products to small businesses?

13 A Discover has a very small checking account business. We
14 do issue debit cards to those customers. It's probably
15 less than 100,000 customers.

16 Q When Discover sets prices for its credit card network
17 services for merchants, does it consider the prices of the
18 debit card networks?

19 A No.

20 Q When setting credit card network prices for merchants,
21 which competitors prices does Discover look to?

22 A Discover looks to the pricing of Visa, MasterCard, and
23 American Express' credit card volumes.

24 Q Mr. Hochschild, are you familiar with the Durbin
25 Amendment?

16 Q When Discover sets prices for its credit card network
17 services for merchants, does it consider the prices of the
18 debit card networks?

19 A No.

Roger Hochschild (Discover), Trial Tr. 818:16-19



Debit Dispute: Lack of Merchant Response to the Durbin Amendment

- Durbin Amendment caused all-in debit discount fees to fall by [____]%. Trial Tr. 3926:10-3929:4 (Katz).
- Merchants testified that they did not stop accepting credit cards to take advantage of dramatically lower debit costs. *See* PFOF ¶ 377.

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FUNDA - DIRECT - GLASS 2723

1 A Correct, fair.
2 Q Now, since you did this slide in 2010, we've had a
3 couple of years of the actual Durbin Amendment, correct?
4 A Correct.
5 Q Are you aware of any merchants that stopped accepting
6 credit all together and relied solely on debit?
7 A I can't say that I'm aware of any merchant who has done
8 that.

2 Q Now, since you did this slide in 2010, we've had a
3 couple of years of the actual Durbin Amendment, correct?
4 A Correct.
5 Q Are you aware of any merchants that stopped accepting
6 credit all together and relied solely on debit?
7 A I can't say that I'm aware of any merchant who has done
8 that.



Debit Dispute: Discover Saw No Changes From the Durbin Amendment

819

1 A. Yes.

2 Q. Can you briefly describe your understanding of what the

3 Durbin Amendment is?

4 A. The Durbin Amendment refers to a law that provided for

5 significant changes to the debit market. In particular, it

6 mandated a lower interchange rate for debit transactions for

7 banks with assets over \$10 billion. It also required that

8 each debit card have more than one unaffiliated network so

9 that cardholders could choose between the two networks on a

10 debit card.

11 Q. When were the Durbin-related pricing changes for debit

12 implemented?

13 A. I think it would have been late 2011 or early 2012.

14 Q. Did Discover observe any substitution between debit cards

15 and credit cards following the Durbin price change?

16 A. No.

17 Q. Do you have any understanding as to why consumers, in

18 your view, did not switch between debit and credit after the

19 Durbin price change?

20 A. Consumers seem to have very strong preferences in terms

21 of the products they use. Credit cards are used by

22 transactors, people who do not carry a balance. They tend to

23 use credit cards for every purchase. And then there would be

24 higher income consumers. More affluent and lower income

25 consumers may not have the availability of credit or may be

14 Q Did Discover observe any substitution between debit cards
15 and credit cards following the Durbin price changes?
16 A No.

820

1 carrying a balance, and so frequently will prefer the control

2 and discipline of a debit card. Especially for their

3 day-to-day purchases such as gas, groceries, drug stores,

4 et cetera. So they're relatively strong preferences by

5 consumers for either credit or debit.

6 Q. After the Durbin-related pricing change to debit, did

7 Discover change the price of its credit lines?

8 A. No.

9 Q. Let me backup and ask you a little bit more about the

10 history of Discover. When did the Discover network launch?

11 A. Discover launched its network and credit card in 1986.

12 Q. And since Discover launched its network, has there been

13 any other entrants into the credit card network services

14 market?

15 A. Not in the U.S.

16 Q. To your knowledge, has any other companies attempted to

17 launch new credit card networks in the United States?

18 A. There may have been attempts. I can't think of any that

19 made any noticeable progress.

20 Q. So over the years, no new firms were able to accomplish

21 what Discover accomplished?

22 A. No.

23 Q. Why was Discover able to launch a network successfully in

24 the '80s?

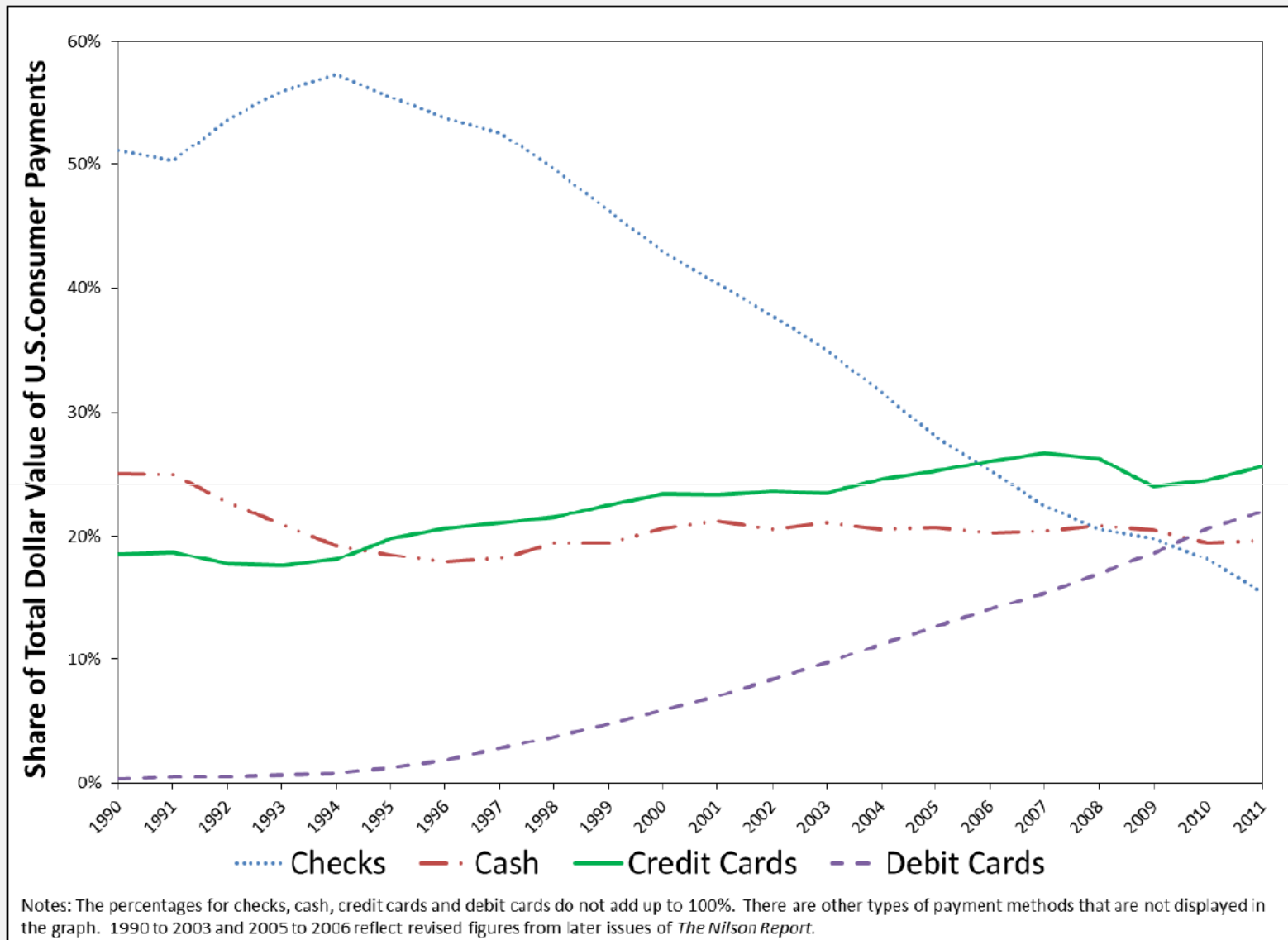
25 A. Discover, in the '80s, had a breakthrough value

6 Q After the Durbin related pricing change to debit, did
7 Discover change the price of its credit lines?
8 A No.

Roger Hochschild (Discover), Tr. 819:14-820:8.



Debit Dispute: Consumer Use of Debit Cards Has Grown at the Expense of Checks, Not Credit Cards

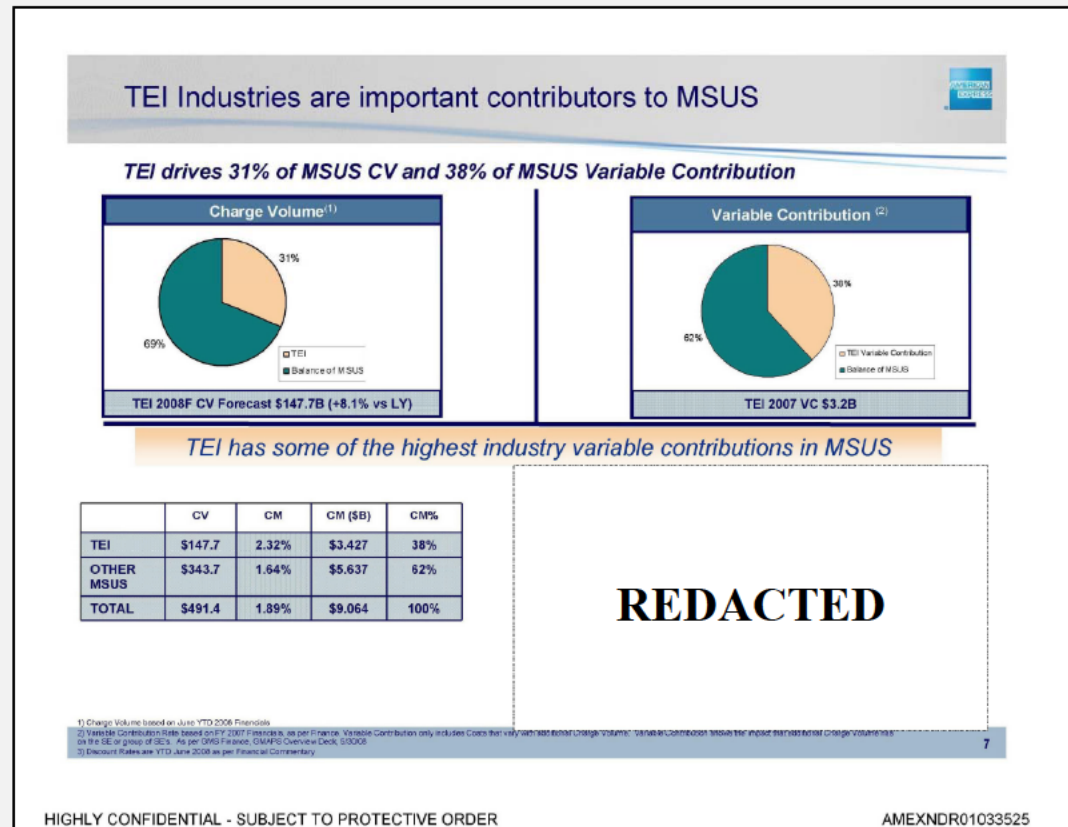


PX2779 at 3; PX2702 at 40



Travel & Entertainment Market Dispute: Amex Price Discriminates

- Relevant question is whether a hypothetical monopolist could price discriminate against T&E merchants, not whether Amex actually does. *See* Michael Katz, Trial Tr. 6645:10-6646:14.
- Evidence shows that Amex does price discriminate. *See* FOF ¶¶ 545-46.



PX0457 at AMEXNDR01033525



Travel & Entertainment Market Dispute: T&E Merchants Are Identifiable

TEI Managed Account Portfolio



	Managed Accounts*	# of Accounts
Airlines	Air France, Aer Lingus, El Al, Emirates, Iberia, Lufthansa, Swiss, Virgin Atlantic, SouthWest, AirTran, Continental, Frontier, Alaska Airlines, JetBlue, Virgin America, American, Delta, MidWest, Northwest, United Airlines, Spirit, Sun Country, US Airways, Bombardier, Delta Elite, Peter Le Bas, SkyJet.com, Sentient Jet, Atlantic Aviation, Virgin Charter, Our Plane, Mesa Airlines	32
Lodging	Marriott, Choice, Morgan's Hotel Group, Omni Hotels, Peninsula, Leading, Hyatt, Preferred, Gaylord, IHG, Canyon Ranch, Loews, Best Western, Relax & Chateau, Blackstone, Destination Hotel & Resorts, Four Seasons, Starwood, Kerzner International, Wyndham International, Exclusive Resorts, Carlson Companies, Hilton, Mandarin, Rosewood	25
Growth & Emerging Industries	American Golf Corp, Century Golf - Arnold Palmer Golf Mgmt, Kemper Sports Management, ClubCorp, EAGLE - Evergreen Alliance; PGA Tour Properties - Tournament Players Club, Troon Golf; Ticketmaster, Shubert, Regal Cinemas, AMC, Tickets.com, Fandango, Nederlander, Live Nation which includes SFX Entertainment, MusicToday, UltraStar Entertainment, House of Blues, Epiphany, Ultimate Escapes	18
Restaurant	McD's, BK, Wendys, Subway, Dairy Queen, Arbys, Taco Bell, Pizza Hut, KFC, Long John Silver, Dunkin Donuts, Applebees, Bold Foods, Carlson, Dinex, Foodcraft, IHOP, Palm Management, Panera Bread, The Inn at Little Washington, Metro Media Group, Brinker, Cheesecake Factory, Compass Group, Mortons, Patina, 4th Wall, Smith & Wolensky, The French Laundry, Thomas Keller, Gordon Ramsey, Wolfgang Puck, BR Guest, China Grill, McCormick & Schmick, OSI, PF Changs, Ruby Tuesdays, Darden Restaurants, Ruth's Chris Steak House, Union Square Hospitality Group, B&B Hospitality Group, Myriad Restaurant Group, Jean Georges Management Group, Starbucks (Sept 08)	45
Leisure Travel	Residencia Resorts, Royal Caribbean, Celebrity, Azamara, Princess, Cunard, Seadream, Crystal, Regent Seven Seas, Silversea, Viking River Cruises, Hurtigruten, Holland America, Fraser Yachts, Sacks Group, International Yacht Collection, Carnival, Costa, Seabourn, NCL, Orient, Oceania, Star Clippers, MSC, Windjammer, Universal, Disney, Abercrombie & Kent, Apple Vacations, Classic Custom Vacations, Expedia, Orbitz, Priceline, Tauck, The Mark Travel Corp, Brendan Vacations, The Travel Corp, Travel Impressions, Travelocity, World Travel Holdings, Premier Getaways, WWTE, Alamo/National/Enterprise, Avis Budget, Dollar Thrifty, Hertz	43
TOTAL TEI		163

* # of accounts based on May 2008 CV Report. Excludes associations.

**Carnival, Costa, Cunard, Holland America, Princess are all one company; did not count their brands individually.



Travel & Entertainment Market Dispute: Carte Blanche and Diners Club

- Issue is whether a hypothetical monopolist would find it profitable to target some customers, not whether a single firm could survive if it served only some potential customers.
See PCOL ¶¶ 62, 65.
- Airline city pairs show fallacy of Amex's argument.
See PFOF ¶ 632.



MARKET POWER



U.S. v. Visa Provides a Road Map for Market Power Analysis

U.S. v. Visa

344 F.3d 229, 239-40 (2d Cir. 2003)

- **Anticompetitive effect:** “Visa [and MC] have demonstrated their power in the . . . market by effectively precluding their largest competitor from [competing].”
- **Customer insistence:** “[M]erchants . . . could not refuse to accept Visa or [MC] . . . because of consumer preference.”
- **Price increases:** “[D]espite recent increases in . . . fees, no merchant had discontinued acceptance.”
- **Market share:** “large shares of a highly concentrated market . . . [MC had] 26%.”

U.S. v. American Express

(EDNY 2014)

- **Anticompetitive effect:** Amex obstructs competition from Discover, Visa, and MasterCard.
- **Customer insistence:** Amex to airlines: “It is essential to accept American Express Cards”
- **Price increases:** Amex imposed “Value Recapture” price increases on 65% of charge volume “purely . . . because we can” with little loss of acceptance
- **Market share:** Amex now has 26% of an equally concentrated market



Amex Uses Insistence Calculations When Setting Merchant Discount Rates



Price/Value Assessment – Insistence

= Data is based on general value claims
 = Outstanding or Incomplete
x% = Recent update

Industry Category	2009 AXP CV	Consumer walkaway insistence	Consumer spend less insistence	Total Consumer insistence (spend less + walkaway)	Consumer portion of spend	Total Corporate insistence (spend less + walkaway)	Corporate portion of spend	Total insistence
TEI	OSR	3,577,419,227	5%	24%	10%	78%	50%	19%
	Car Rental	5,339,680,633	25%	14%	28%	62%	50%	36%
	Lodging	31,375,506,311	10%	29%	16%	65%	50%	28%
	Travel Related (TA/TO + Cruise)	12,979,667,652	14%	0%	14%	90%	50%	10%
	Entertainment	6,806,568,636	8%	29%	14%	90%	50%	10%
	Restaurant	27,986,922,165	7%	27%	12%	79%	50%	21%
	Airlines	34,593,305,304	--	--	37%	58%	50%	42%
REI	Electronics & Computers	7,036,103,583	10%	38%	18%	94%	50%	6%
	Telecom	10,626,031,092	5%	38%	13%	78%	50%	22%
	Home Improvement & Furniture	18,422,208,241	9%	33%	16%	94%	50%	6%
	Mass Merch / Warehouse Clubs	8,585,005,384	19%	28%	25%	97%	50%	3%
	Oil	13,629,672,393	14%	40%	22%	58%	50%	42%
	Drug Stores	3,893,554,491	7%	41%	15%	79%	50%	21%
	Department Stores	6,605,667,565	5%	37%	12%	97%	50%	3%
	Misc Retail	34,934,480,979	5%	14%	8%	94%	50%	6%
	Office Supply	2,971,732,612	16%	8%	17%	80%	50%	20%
	Supermarkets	16,447,742,813	9%	30%	15%	81%	50%	19%
	Mail Order / Internet Retail	37,641,522,917	7%	38%	15%	91%	50%	9%
	Auto-Related	10,883,446,295	7%	16%	10%	90%	50%	10%
Costco	23,203,236,139	N/A	N/A	N/A	N/A	N/A	N/A	N/A
B2B & Other	Prof/Fin Services	29,284,310,107	5%	42%	13%	79%	50%	21%
	Services	17,029,252,944	8%	46%	17%	79%	50%	21%
	Healthcare	8,480,772,027	6%	40%	14%	97%	50%	3%
	B2B - Construction/Industrial/Other	15,215,008,445	5%	49%	15%	N/A	N/A	N/A
	B2B - Medical	6,416,369,446	7%	44%	16%	N/A	N/A	N/A
	B2B - Wholesale	14,162,977,425	3%	27%	10%	N/A	N/A	N/A
Government/Education	12,766,583,624	4%	4%	4%	90%	23%	10%	

17

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Merchants Recognize That Insistence Is Real

- Merchants testified that they can't drop Amex because they would lose too much business. *See* PFOF ¶¶ 466-485.
- When merchants have doubted that insistence is real, they've suffered the consequences.
 - Walgreens backed down after announcing they would drop Amex. *See* PFOF ¶¶ 489-497.
 - Jeffrey Rein: "In hindsight, it was a mistake." Trial Tr. 1391:18-20.
 - Murphy Oil dropped Amex, and Amex tracked its cardholders. *See* PFOF ¶¶ 463-464.
 - "[Cardmember] insistence, as demonstrated by [cardmember] behavior, appears to be ~28% (almost double the claims research insistence numbers of 14-16%)." PX0031 at AMEXNDR12149668.



Value Recapture Shows How Amex Uses Its Market Power

- In *Visa*, one factor supporting the district court’s finding of market power was that the networks “raised . . . rates charged to merchants a number of times, without losing a single merchant customer as a result.” 163 F. Supp. 2d at 340. The Second Circuit concurred. *See Visa*, 344 F.3d at 240.
- Amex’s Value Recapture documents are market power illustrated.
 - Amex imposed price increases on merchants. *See, e.g.*, PFOF ¶¶ 525-539.
 - Amex lost no large merchants. *See* PFOF ¶¶ 530, 533.
 - It only lost a small number of small merchants, but they describe those losses as negligible. *See* PFOF ¶¶ 531-532.



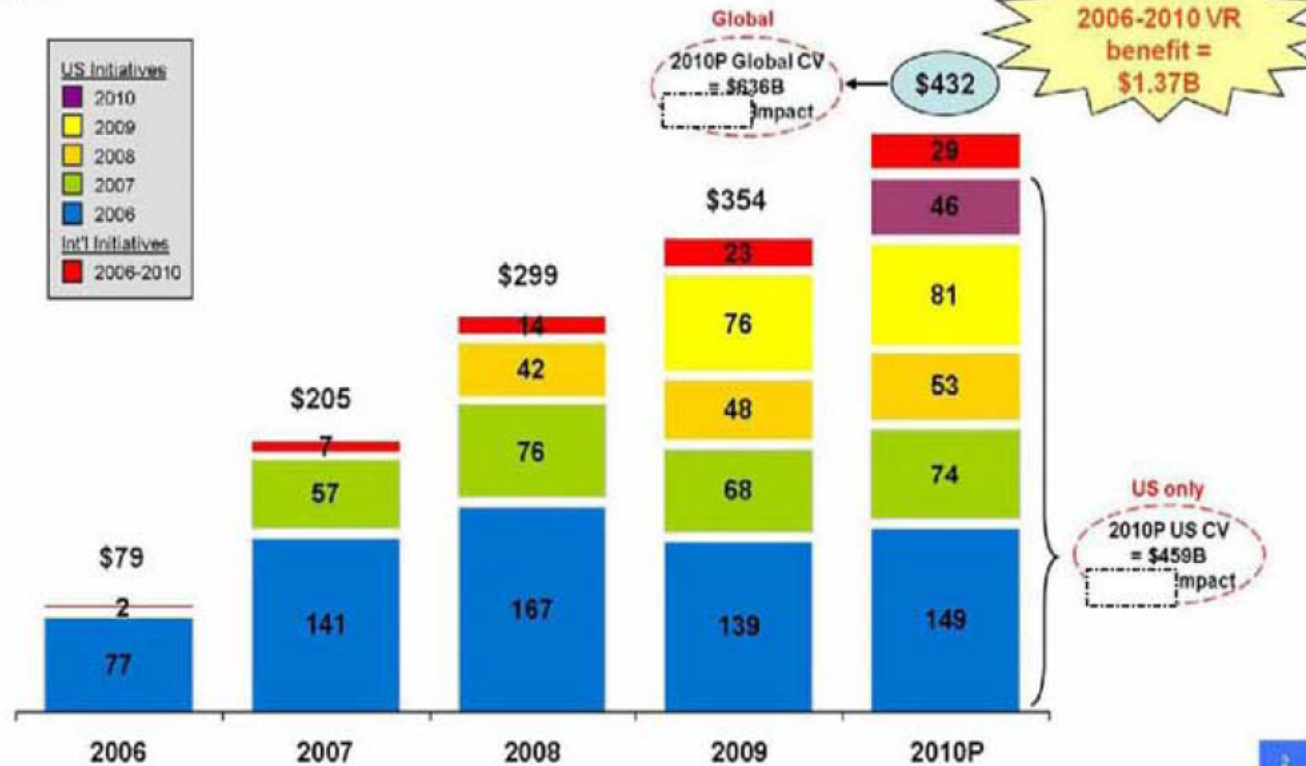
Amex Profited Over \$1 Billion From Value Recapture Price Increases

PRIVILEGED AND CONFIDENTIAL: PREPARED AT REQUEST OF COUNSEL/ATTORNEY WORK PRODUCT.



Global Cumulative Benefit of the Value Recapture Programs (\$MM)

By the end of 2010, value recapture program will have delivered \$1.37B in incremental PTI and a [] in improvement in Global Discount Rate.



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PX1240 at AMEXNDR19210088



Amex Expanded the Scope of Value Recapture "Because We Can"

From: CN=Tom Pojera/OU=AMER/OU=TRS/O=AEXP
To: kathleen.pierce-gilmore@aexp.com
Subject: Fw: MGP Threshold Reduction to \$50K
Date: 05/04/2009 18:39:52 UTC

We will be lowering the threshold for MPG from \$100k to \$50k. Purely being done because we can and it will generate incremental (\$1.4mm) revenue.

We will be lowering the threshold for MPG from \$100k to \$50k. Purely being done because we can and it will generate incremental (\$1.4mm) revenue.
Tom

Subject Fw: MGP Threshold Reduction to \$50K

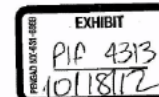
GM's,
One of the things that got lost in the Monthly Gross Pay fee discussion was a decision to lower the CV threshold from \$100k to \$50k. Below are the LIF and revenue impacts, which not surprisingly is weighted most heavily to Tier 4. Given that Tom is comfortable moving forward with this adjustment for Tier 4 and given the \$1.4MM positive impact on revenue, I would recommend we move to implement this change. There is no notification required and GND is ready to execute as soon as they have our input.

Are each of you comfortable with this decision?

Beverly Anderson
American Express
Vice President, Account Strategy & Merchant Development
Merchant Services Americas
200 Vesey Street
New York, NY 10285
Office: 212-640-1851

----- Forwarded by Beverly M Anderson/AMER/TRS/AEXP on 05/04/2009 01:49 PM -----

Greg M Pond/AMER/TRS/AEXP
04/30/2009 09:05 PM
To: Beverly M Anderson/AMER/TRS/AEXP@AMEX
cc: Ryan A Johnson/AMER/TRS/AEXP@AMEX
Subject: MGP Threshold Reduction to \$50K



Today the MGP rolling 12 month CV threshold is at \$100K. If we lower the threshold to \$50K, we would qualify and fee an additional ~68K merchant's with an average of \$21/year/LIF. We have ~58K unmanaged LIF and ~10K managed LIF. The average revenue per Merchant TOC ranges between \$400 and \$650/year. Listed below is the summary and attached is the detail. This can be implemented if we get approval from CLM GMs and Tom P on the

Redacted for Privilege



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AMEXNDR18084021

PX1168 at AMEXNDR18084021



Amex Surveyed Its Merchants on the Value of Its Services

DOCUMENT REDACTED



Amex's Claims of Decreasing Prices Are False

- Changes to the mix of merchants in Amex's network matters.
 - Amex has long acknowledged that merchant mix affects their average rate. *See* PFOF ¶ 550.
- Bernheim made improper adjustments to discount rates.
 - Delta: Amex prepaid Delta for a billion dollars' worth of frequent flyer miles. *See* PFOF ¶¶ 569-570.
 - JetBlue: Amex paid JetBlue for co-brand participation, with the discount rate negotiated separately according to the rate table. *See* PFOF ¶ 651.
- These errors affect the T&E rate averages, and are large enough to affect overall discount rate calculations as well.



Bernheim's Selective Adjustments for Co-Brand Agreements Create Negative Discount Rates

DOCUMENT REDACTED



Accounting for Mix and Amex's Pre-Purchase of Delta Miles, Amex's Discount Rate Increased

DOCUMENT
REDACTED

PX2779 at 29; PX2778 at 5

DOCUMENT
REDACTED

PX2779 at 31; PX2778 at 7



Amex's Market Share Equals MasterCard's Market Share in *U.S. v. Visa*

- *U.S. v. Visa*: MasterCard was the #2 general purpose card network with 26% market share (1999).
- *U.S. v. Amex*: Amex was the #2 general purpose card network with 26% market share (2010). *See* PX2779 at 15; PX2702 at 74.
 - Amex was the #2 general purpose card network with 34% market share across Travel & Entertainment merchants. *Id.*



Amex Agreed That MasterCard Had Market Power in *U.S. v. Visa* and *Amex v. Visa*

Case 1:04-cv-08967-BSJ-DFE Document 1 Filed 11/15/04 Page 19 of 45

- d. setting fees and assessments for use of the network's products and services, including, directly or indirectly, the "merchant discount" rate (the amount subtracted from what a merchant ultimately receives for a general purpose card transaction); and
- e. inventing, developing, and implementing innovations to general purpose card features and functionalities.

75. The "general purpose card network services market" or "network services market" is a distinct "Relevant Product Market."

The Relevant Geographic Market

76. Almost all of the general purpose cards issued by banks based in the United States are issued to domestic cardholders, who in turn use the cards for transactions chiefly within the United States. Accordingly, general purpose card network systems must have a national card base and national merchant acceptance networks in order to compete.

77. Moreover, card issuers, which are the buyers of general purpose card network services, also compete at the national level.

B. Market Power

79. Visa and MasterCard, jointly and separately, have and exercise market power in the general purpose card network services market.



Amex's Market Share Underestimates Its Market Power

- Of the 100 largest retailers in the country, the 98 that accept credit cards all accept Amex. *See* PFOF ¶ 41.
- If a merchant accepts Amex, the ASRs restrict pricing and choice for all transactions, not just Amex transactions. *See, e.g.,* PFOF ¶ 2.
- Amex has well over 90% spend coverage. *See* PFOF ¶ 597.



Amex Recognizes That a Higher Price May Result in Less Coverage

Proposed Pricing Architecture

“100% coverage and premium price may be incompatible”

- Each component of value to be identified, assessed and priced (and sold and delivered) accordingly
- Testing, and defending pricing tables is the only way to “prove” that our price is “fully valued”
 - 100% coverage and premium price may be incompatible
- Multiple relationships should be encouraged, but priced independently to avoid “domino” or “house of cards” effect



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Amex's Market Power Is Even More Apparent in GPCC for Travel & Entertainment

- All Market Power factors are here, but even more so.
- Amex's T&E market share is 34%. *See* PFOF ¶ 639.
 - Amex's T&E spend coverage is even higher than its overall spend coverage. *See* PFOF ¶ 597.
- Insistence is stronger for T&E merchants. *See* PFOF ¶¶ 640-642.
 - Corporate card insistence matters for T&E merchants. *See* PFOF ¶ 641.
- Value Recapture – Amex had special campaigns for T&E industries (restaurants, airlines), which are most vulnerable to exercises of market power. *See* PFOF ¶¶ 645-655.
- Amex's margins are higher for T&E merchants than non-T&E merchants. *See* PX2779 at 20; PX2702 at 87.



Amex's Alleged Procompetitive Effects



Amex's Alleged Procompetitive Effects

- ☐ “Welcome acceptance”
- ☐ “Free riding”
- ☐ “Two-sidedness”
- ☐ “Amex will go out of business”
- ☐ “Protect our differentiated business model”



“Welcome Acceptance”

- Prior to trial, Amex claimed in that the ASRs were necessary to prevent “embarrassment caused by discriminatory treatment at the point of sale.” Amex Pre-Trial Memorandum at 88.
- At trial Amex conceded that the purpose of the ASRs is not to prevent its card holders from being embarrassed at the point of sale because “it would be foolish for [Amex] to stand on that.” Thomas Pojero (Amex), Trial Tr. 3068:13-17.



“Welcome Acceptance”

Q: Are you able to engage in these promotions without annoying or offending your customers?

A: Yes.

Q: And is that important to Ikea?

A: Yes, it is.

– John Robinson (Ikea), Trial Tr. 398:8-399:23.



Amex Prohibits Exclusive Discover Checkout Lanes . . .



12 Q Under merchant regulation 3.2, may a retailer post a sign
 13 above a checkout lane that looks something like PX 2630?
 14 A I believe this is a pictorial version of what you just
 15 said verbally. Under our standard non-discrimination
 16 provisions, the answer would be no.

QUAGLIATA-DIRECT-GLASS 687

1 A Under our standard non-discrimination provisions, the
 2 answer would be no.

3 Q Under merchant regulation 3.2, may a retailer offer an
 4 exclusive Discover checkout lane?

5 A Under the standard provisions, no.

6 MR. GLASS: Your Honor, may I approach?

7 THE COURT: Yes, you may.

8 MR. GLASS: Your Honor, we have created a
 9 demonstrative and marked it for identification purposes as
 10 2630.

11 THE COURT: 2630. Go ahead.

12 Q Under merchant regulation 3.2, may a retailer post a sign
 13 above a checkout lane that looks something like PX 2630?

14 A I believe this is a pictorial version of what you just
 15 said verbally. Under our standard non-discrimination
 16 provisions, the answer would be no. The intent of the
 17 standard NDPs in our contracts is just to be treated fairly
 18 and equally with the other payment networks. Nothing more and
 19 nothing less. This would show preferential treatment for
 20 someone who was using a Discover card at that particular
 21 merchant, which is a violation of our standard
 22 non-discrimination provision. We want equal treatment and we
 23 just want parity.

24 Q If a merchant posted a sign offering a checkout that
 25 looks something like PX 2630, and a customer saw it, and the

RONALD E. TOLKIN, RPR, RMR, CRR
 OFFICIAL COURT REPORTER



... But Had Exclusive Amex-Only Ticket Windows

"American Express" - Includes American Express Travel Related Services Company, Inc. and its subsidiaries, affiliates and licensees that issue Cards or participate in the American

(iii) Exclusive Window for American Express Card

Members: RCMH will designate one Radio City Music Hall Box Office window exclusively for ticket sales for American Express Card purchases during peak ticket sales periods (defined as any period during which three or more RCMH Box Office windows are open for ticket sales, but specifically not including the first day of ticket sales for wristbanded events; e.g., the third box office window opened shall be designated the "American Express window"). This window will be identified by signs and decals as an "American Express window," provided that such identification is at American Express' cost and subject to RCMH's prior reasonable approval. RCMH personnel shall announce to its patrons that such window is available for the exclusive use of American Express Cardmembers and shall direct Cardmembers to such window. It is understood that if no Cardmembers are on line for this window, the window may be used for other transactions.

(iv) ~~Marquee Club~~: If and upon establishment of the RCMH VIP "Marquee Club" (or similar club offering premium seating, separate entrance and private lounge to fee-paying members), American Express Cards shall be the exclusive charge, credit, or debit card accepted for food, beverages and other

91866.1
June 10, 1994

- 2 -

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AMEX0001420036

PX0150 at AMEX000140036



“Welcome Acceptance”

A defendant cannot “impose [its] views of the costs and benefits of competition on the entire marketplace.”

– *National Society of Professional Engineers*, 435 U.S. 679, 695 (1978).



“Free Riding”

- Merchant analytics: separate payment is an alternative.
 - “When payment is possible, free-riding is not a problem because the ‘ride’ is not free.” *Chicago Professional Sports*, 961 F.2d at 675; 13 *Areeda & Hovenkamp* ¶ 2223b3, at 422 (3d ed. 2012).
- Costs of data gathering for analytics and promotions can be recouped via fees for analytics and promotions.
- Evidence did not support a purported “halo” or “brand association” effect.
 - Amex does not screen merchants for quality. *See* PFOF ¶ 672.
 - Amex acknowledges that it is not an indicator of high levels of customer service or premium quality. *See* PFOF ¶ 670.



“Two-Sidedness”

“[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 one of these markets.”

– *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 610 (1953).

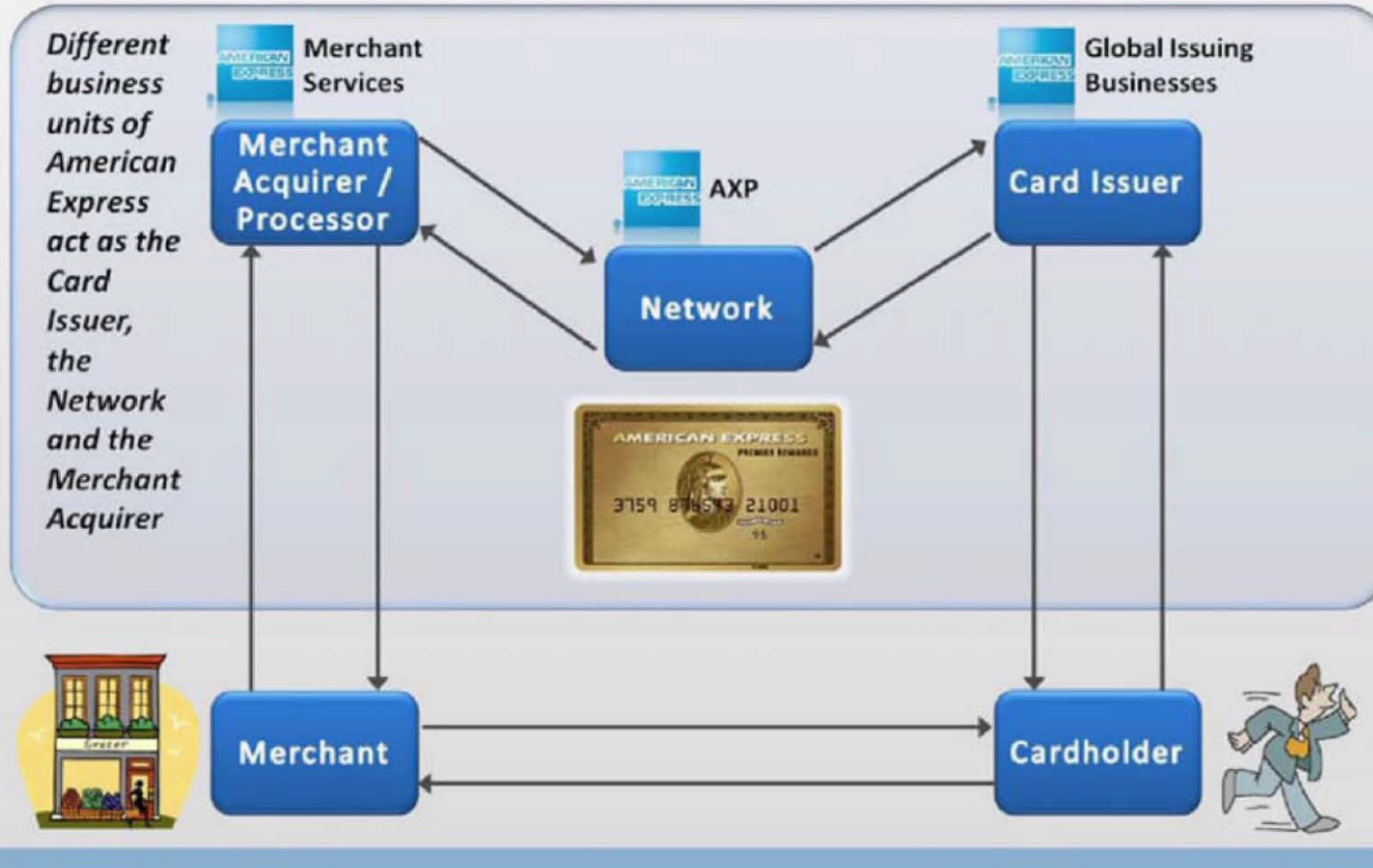
“[T]his case involves two interrelated, but separate, product markets: (1) ... the market for charge cards and credit cards, and (2) the network services market for general purpose cards.”

– *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 238-239 (2d Cir. 2003).



Two-Sided Dispute: Amex Documents Recognize Market for Network Services

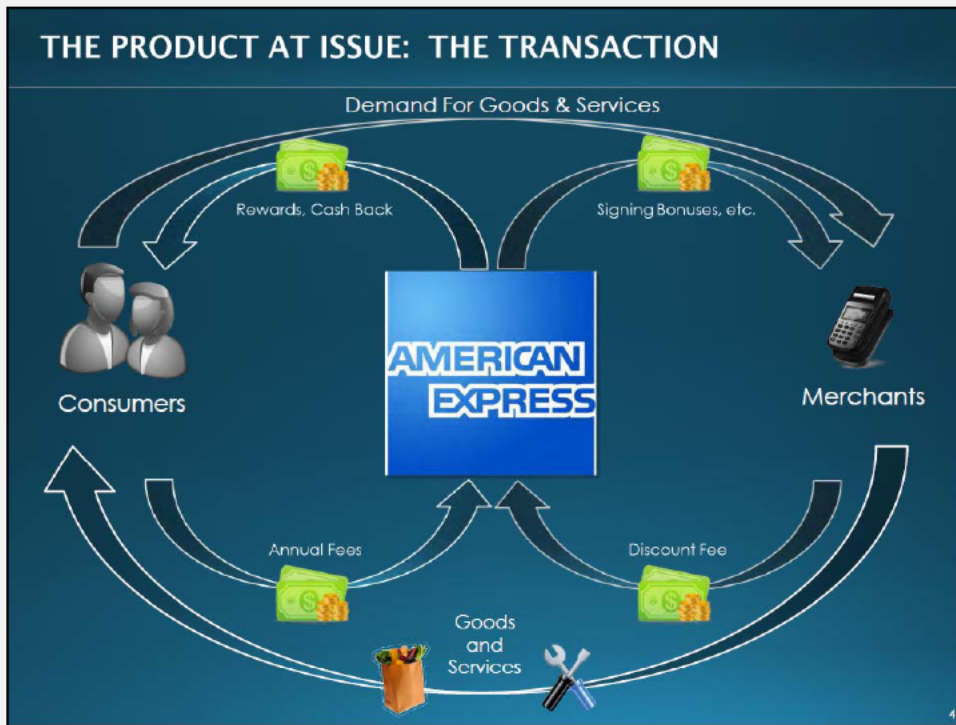
'Closed Loop' Model



DX7417 at AMEXNDR07095113



Two-Sided Dispute: Amex's Market for "Transactions" Does Not Reflect Reality



DX7808 at 4

12 And a key point that I think I expect to keep coming
 13 back to is that the transactions -- what is impacted by the
 14 NDPs is this whole transaction. **It's the flow around this**
 15 **whole loop between consumers and merchants.** It's not just one
 16 little piece of it. It's all of it.

14 NDPs is this whole transaction. **It's the flow around this**
 15 **whole loop between consumers and merchants.** It's not just one
 16 little piece of it. It's all of it.

Bernheim/Direct/Chester 6211
 1 or products, correct?
 2 A Correct.
 3 Q And have you identified what the product or products here
 4 are that should be considered as relevant to the market
 5 definition?
 6 A Yes, I have.
 7 Q And what is your conclusion with respect to that?
 8 A Well, the products that are being offered by American
 9 Express that are at issue here are transactions products,
 10 they're products for bringing consumers and merchants together
 11 and completing the transactions between them.
 12 Q I'd like you to turn to the chart that is Number 4 in the
 13 demonstratives.
 14 By the way, did you review Professor Gilbert's
 15 testimony that the product at issue in this case, the
 16 transactions, reside in a two-sided market.
 17 A I did, yes.

Richard Gilbert, Trial Tr. 5015:7-5016:16

12 Q I'd like you to turn to the chart that is Number 4 in the
 13 demonstratives.

14 By the way, did you review Professor Gilbert's
 15 testimony that the product at issue in this case, the
 16 transactions, resides in a two-sided market.

17 A I did, yes.

18 Q Do you have an opinion about that view of Professor
 19 Gilbert's?

20 A Well, **I think he's absolutely right** and I don't think
 21 that should be controversial, that is the right way to think
 22 about this market.

Douglas Bernheim, Trial Tr. 6211:12-22



“Two-Sidedness”: The Standard Approach

- The Court should hold that alleged benefits to customers are not procompetitive effects offsetting harms to merchants.
- Precedent supports refusing to allow alleged pro-competitive benefits in one market to offset anticompetitive harms in another market. *See* PCOL ¶ 111.
- *Times-Picayune* and *Visa* involved two-sided platforms, but focused on effects on one side. *See* PCOL ¶¶ 113, 115-16.
- Under this approach, Plaintiffs prevail because we proved that ASRs harm market-wide competition among networks for merchant business.



“Two-Sidedness”: An Alternative Approach

- If the Court weighs alleged benefits to customers in its analysis of competitive effects, it should treat such benefits like any other allegedly pro-competitive benefits.
- Amex bears the burden of proving that the ASRs’ allegedly pro-competitive benefits outweigh their anticompetitive harms. *See* PCOL ¶¶ 98, 117.
- Under this approach, Plaintiffs prevail because:
 - Evidence establishes that ASRs harm competition among networks for merchant business; and
 - Amex failed to prove that ASRs generate sufficient benefits for customers to outweigh their anticompetitive harms.



“Two-Sidedness”: Amex’s Incorrect Approach

- Amex argues that Plaintiffs must not only prove that ASRs harm competition for merchant business, but also disprove that ASRs generate offsetting benefits for customers.
- There is no precedent for this approach. *See* PCOL ¶¶ 112-116.
- This approach would dramatically alter antitrust analysis in every industry involving a two-sided platform (e.g., newspapers, real estate, software).
- Even under this approach, Plaintiffs prevail because the evidence shows that:
 - ASRs harm competition among networks for merchant business; and
 - Amex does not pass all revenue extracted from merchants through to cardholders. *See* PFOF ¶¶ 136-137.



Discover's View of the Two-Sided Platform

Q: When you set your prices to merchants for accepting Discover cards, do you consider the costs of your rewards?

A: No.

Q: If you increase the cost of your rewards, in your view does that justify telling a merchant that his price is higher?

A: No.

– Roger Hochschild (Discover), Trial Tr. 982:7-12.



“Amex Will Go Out of Business”

- Not supported by the evidence.
- It’s what lots of companies claim when they face the prospect of new competition that they don’t want to have to face.
 - Visa executive, August 1, 2000: “Without bylaw 2.10(e), I think that the association, as we know it, would disappear.” PX2732 at 4373:4-11.
 - MasterCard executive, August 10, 2000: “I think it could be a shattering blow to MasterCard.” PX2731 at 5603:9-15.



“Protect Our Differentiated Business Model”

- Amex doesn’t get to choose what competition it will have to face – that is for the market to choose.
 - Amex “is not entitled to pre-empt the working of the market by deciding for itself that its customers [merchants] do not need that which they demand.” *Indiana Federation*, 476 U.S. at 462.
 - Focusing competition on attributes other than price “is not the kind of procompetitive virtue contemplated under the Act, but rather one mere consequence of limiting price competition.” *U.S. v. Brown Univ.*, 5 F.3d 658, 675 (3d Cir. 1993).



“Protect Our Differentiated Business Model”

■ Professor Bernheim to Discover: be more like Amex:

“The government has and Dr. Katz has made a lot of the fact that Discover did not find it successful, for example, to lure customers to using its card by providing incentives through merchants. . . . What that misses is that Discover has the ability to incentivize the very same customers directly, by, for example, just giving them more cash rewards.”

– Douglas Bernheim, Trial Tr. 6482:13-6483:24.



“Protect Our Differentiated Business Model”

“Well, we would be fighting to retain the business by any means necessary, right. So, yes, we may need to increase incentives to consumers. We may need to reduce pricing to merchants.”

– Jack Funda (Amex), Trial Tr. 2754:21-2755:6.



United States et al. v. American Express Co.

October 9, 2014