UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, et al., v. AMERICAN EXPRESS CO., et al.	Civil Action No.: 1:10-CV-04496-NGG-RER

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO CONSOLIDATE FOR THE PURPOSE OF TRIAL

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The United States and Plaintiff States (collectively, "Government Plaintiffs") respectfully oppose the Motion to Consolidate for the Purposes of Trial (ECF Docket Entry 286) filed by Defendants American Express Company and American Express Travel Related Services Company, Inc. (collectively, "Amex").

PRELIMINARY STATEMENT

Amex's motion to consolidate this antitrust enforcement action with 15 private damages cases should be denied. Amex completely ignores a critical issue: significant public policy counsels that antitrust enforcement actions should not be consolidated for trial with private damages claims. The statutory framework and judicial decisions recognize that government antitrust enforcement trials are entitled to priority status over related private claims. Government Plaintiffs' trial should not be lengthened or encumbered by the many extraneous issues in the private cases.

Even under a standard Rule 42(a) analysis, Amex has failed to meet its burden. Although there are some common issues between the cases, the witnesses, legal claims, relevant markets, experts, and remedies all differ. In fact, Amex admits it seeks a joint trial not because of common issues, but because of *different* issues Amex hopes to exploit for tactical advantage. The United States would be prejudiced in a lengthy joint trial, which would accomplish only confusion, burden, and delay. In contrast, Amex can present its defenses to two distinct actions in two separate trials without prejudice.

Nor would judicial economy be well served by consolidation here. The Government Plaintiffs' case is a suit in equity to be tried to the Court. The private plaintiffs will try their damages claims to a jury. A joint trial with *separate fact-finders*—including a jury whose task

would be more complicated and whose service would be lengthened—imposes needless complexities and management challenges on the Court.

The larger context of Amex's request also should not be overlooked. Visa and MasterCard already agreed to abandon similar rules by consent decree entered by this Court over two years ago. Merchants today still cannot take advantage of the Court's order because Amex's rules block them from doing so. Millions of merchants awaiting relief from Amex's rules would be prejudiced by the delay inherent in a lengthy consolidated trial.

Major government antitrust cases are routinely tried separately from related private actions, even where fact discovery was coordinated. *See, e.g., Texas v. Penguin Group (USA) Inc.*, Nos. 12 Civ. 3394 (DLC), 11 MD 2293 (DLC), 2013 WL 1759567, at *2 (S.D.N.Y. Apr. 24, 2013). Indeed, to our knowledge, no court has ever ordered the United States to try an antitrust enforcement action jointly with private plaintiffs over the United States' objection. We urge the Court to decline Amex's invitation to be the first. Amex's motion should be denied, and Government Plaintiffs' bench trial should be scheduled "as soon as may be." 15 U.S.C. §4.

STATEMENT OF FACTS

In this antitrust law-enforcement action, the United States (joined by 17 state plaintiffs) seeks equitable remedies on behalf of the general public. Specifically, the suit seeks to enjoin Amex from obstructing millions of merchants across the nation from offering discounts, promotions, and other incentives to customers to use a payment card of Amex's competitors. (Ex. 1, Amended Complaint, ¶¶ 28-31; 69-75).[1] Government Plaintiffs allege two relevant product markets: (1) the provision of general purpose credit and charge card network services to all merchants (¶¶ 34-40), and (2) a price discrimination market for the provision of such services

[1] All citations to "Ex." herein refer to the Exhibits to the Declaration of Mark Hamer filed with this memorandum.

to "travel and entertainment" ("T&E") merchants (¶¶ 41-50). Government Plaintiffs seek equitable remedies under Section 1 of the Sherman Act. (*Id*. at p. 28). The relief would benefit all Amex-accepting merchants and consumers nationwide.

Private plaintiffs are 15 supermarket and drug store companies each bringing individual (non-class) claims for damages under Sections 1 and 2 of the Sherman Act. In addition to Amex's anticompetitive conduct at issue in the government case, the private plaintiffs also challenge the Amex restraints for blocking the private plaintiffs from "[i]mposing on customers . . . a surcharge" reflecting the higher cost of using Amex. (Ex. 2, Rite Aid Complaint, ¶ 20b).[2] Further, in contrast to the Government Plaintiffs, private plaintiffs allege a relevant antitrust market of "Amex payment card services provided to merchants" in which Amex possesses "monopoly power" under Section 2 of the Sherman Act (¶¶ 33, 35). Private plaintiffs, unlike Government Plaintiffs, seek damages and demand trial by jury. (*Id.* at pp. 18-19).

When the United States filed this case in 2010, five of the 15 private cases were already pending in this Court (since 2008), and shortly thereafter the Judicial Panel coordinated all of the private antitrust actions against Amex in this Court for pre-trial purposes as MDL 2221. *In re: American Express Anti-Steering Rules Antitrust Litigation (No. II), MDL No. 2221 ("MDL 2221")*, 764 F. Supp. 2d 1343 (J.P.M.L. 2011).[3] *U.S. v. Amex* is not part of MDL 2221 because, as the Judicial Panel expressly acknowledged when creating MDL 2221, the United States as antitrust plaintiff *cannot* be ordered into a multidistrict litigation proceeding. 28 U.S.C. § 1407(g); *MDL 2221*, 764 F. Supp. 2d at 1344 n.1.

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[2] While the private plaintiffs have multiple separate complaints, their complaints are, in all relevant respects, the same, and this memorandum references the Rite Aid Amended Complaint filed February 28, 2011 as an exemplar of the allegations. (*Rite Aid Corp. et al. v. American Express Co., Inc., et al.*, 08-cv-02315-NGG-RER, D.E. 109).

[3] The class cases within MDL 2221 are stayed because of issues relating to enforceability of class arbitration provisions.

At that time, the Government Plaintiffs agreed to "voluntary coordination" of fact discovery with MDL 2221. *Id*. at 1344. When doing so, Government Plaintiffs cited the "[s]trong public policy" requiring expeditious resolution of cases brought by the United States and stated, "[a]t present, the Government Plaintiffs have concluded that coordination is consistent with the public interest because matching the previously ordered schedule in the Private Cases provides for expeditious resolution" with "fact discovery closing on May 31, 2012." (Ex. 4, DOJ Letter Brief 2/15/11).[4] From the outset, Government Plaintiffs expressly emphasized that consolidation for trial was inappropriate.[5]

There are some common issues of fact and law across the cases, but the cases remain different in important ways that will become increasingly significant at trial:

- The government case is a law enforcement action brought on behalf of the public; the private cases are brought by 15 supermarkets and drug stores.
- The government case alleges a market for all general purpose credit and charge cards; the private cases allege a market consisting only of Amex.
- The government case alleges a separate market for services to "travel and entertainment" merchants; the private cases do not, and none of the private supermarket and drug store plaintiffs are part of that market.
- The government case seeks to eliminate Amex's restraints on merchant discounting and promotions of competing cards; the private cases also seek the right to add a surcharge for Amex's higher-priced cards.
- The government case alleges a Sherman Act Section 1 claim; the private cases also allege a Section 2 "monopolization" claim.

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[4] When agreeing to the coordination stipulation, the Government Plaintiffs requested a fact discovery cutoff of May 31, 2012, matching the length of fact discovery—14 months—under the previously ordered schedule in the private cases. (Ex. 4, DOJ Letter Brief 2/15/11, D.E. 84). Amex argued for an extra year of fact discovery because of the additional issues raised by the government case. (Ex. 5, Amex Letter Brief 2/15/11, D.E. 83). Ultimately, fact discovery was completed on January 31, 2013 and expert discovery concluded on September 5, 2013.

[5] The Stipulation and Order coordinating fact discovery expressly provided that it "addresses only coordination, not consolidation. Nothing in this Order shall be construed to imply that any party consents to consolidation of any of the Amex Cases, or that such consolidation is appropriate." (Ex. 12, D.E. 92, 10-cv-04496, ¶ 4; *see also* Ex. 3, Tr. of 3/2/11 Hearing at 8).

- The government case does not assert any damages claims; the private cases assert 15 separate claims for damages that Amex contests.

- Perhaps most significantly, the government case must be tried to the Court and the private cases must be tried to a jury.

Indeed, Amex highlighted distinctions among the cases during discovery. Amex argued for a longer schedule and substantial additional depositions because of new issues raised by the government case that were not present in the private cases. (Ex. 5, Amex Letter Brief 2/15/11, at 3-4 ("Amex is also entitled to additional depositions to address the new issues raised by the Government Action, such as the allegation of a discrete antitrust market in 'T&E'" which "includes numerous significant merchants in the airline, hotel, car rental, restaurant, and other similar industries."))

For example, Amex argued that its defense to Government Plaintiffs' claims required an extensive new discovery campaign directed at federal and state government agencies (both party and non-party) relating to acceptance of credit cards. (Ex. 5, Amex Letter Brief 2/15/11, at 4). Amex served 85 non-party document subpoenas to such agencies, collected over 1 million documents from party and non-party government agencies, and took 25 depositions of such entities.[6] (Hamer Decl., ¶14). The individual merchant plaintiffs did not attend these depositions. (*Id.*).

The trial of Government Plaintiffs' claims will affect all merchants, not just the 15 private plaintiffs, and the profile of Government Plaintiffs' discovery reflected this distinction. The United States subpoenaed 33 non-party merchant witnesses for depositions, more than half of which were merchants in the "T&E" market that is alleged in the government case but not the

[6] Amex targeted entities like the Texas Historical Commission, the Ohio Expositions Commission, and the Idaho State Liquor Division, which have no possible relevance to MDL 2221. (Hamer Decl., ¶13).

private cases. (Hamer Decl., ¶15). The individual merchant plaintiffs only attended one of those depositions. (*Id*.).

Similarly, substantial discovery occurred in the private cases that would not have arisen in the government case. Amex obtained over 3 million documents and 3 terabytes of data from private plaintiffs. Amex also took 67 depositions of private plaintiffs, many of which explored issues of damages and of negotiation histories pertinent only to particular plaintiffs. (Hamer Decl., ¶16). Much of this discovery is unlikely to be presented as evidence in the government trial.

The 2011 coordination order addressed only fact discovery, and it expressly excluded expert discovery. (Ex. 12, D.E. 92, 10-cv-04496, ¶3). Plaintiffs in both cases objected to coordinated expert discovery given the wide disparity of expert issues. (*See* Ex. 6, DOJ Letter Brief, 6/7/13). Government and private plaintiffs have different experts with differing opinions; and each of Amex's five experts have many opinions relevant only to one of the two cases.[7] When the cases were first coordinated, Amex itself even argued that more expert discovery time was required because "the various groups of plaintiffs have alleged significantly different relevant product markets that will be the subject of extensive expert testimony." (Ex. 5, Amex Letter Brief 2/15/11, at 8).

All fact and expert discovery has now concluded, and Government Plaintiffs' case is ready to be scheduled for trial.

[7] *See* Ex. 7, Tr. of 6/13/13 Hearing, p. 33-35 (detailing how Amex's expert reports reveal substantial opinions relating only to one case, not the other).

ARGUMENT

The strong public policy protecting government antitrust enforcement from interference by private claims provides a sufficient basis to deny Amex's motion without even reaching the traditional Rule 42 factors. Even under Rule 42, however, Amex has failed to meet its burden. A joint trial would impose significant burdens on Government Plaintiffs and would undermine, rather than further, judicial economy. Amex has failed to show sufficient commonality that would yield efficiencies to outweigh these concerns, and its claimed prejudice is overstated. For all these reasons, Amex's motion should be denied.

I. PUBLIC POLICY REQUIRES THE UNITED STATES' ANTITRUST ENFORCEMENT ACTION TO BE TRIED SEPARATELY.

Amex's motion ignores a fundamental issue. There is a strong public policy demanding a separate trial of an antitrust action brought by the United States even where traditional Rule 42 factors would favor consolidation with related private antitrust litigation. The Congressional statutory structure for complementary government and private antitrust enforcement—embodied in several independent provisions and principles—all confirm that government cases should be tried separately, before parallel private damages suits.

First, this public policy is manifested in the well-established principle that private plaintiffs cannot intervene in government antitrust suits. The Supreme Court has acknowledged the "unquestionably sound policy of not permitting private antitrust plaintiffs to press their claims against alleged violators in the same suit as the Government." *Sam Fox Publishing Co., Inc. v. United States*, 366 U.S. 683, 693 (1961). Likewise, the Second Circuit has observed that in "government antitrust actions," the intervention of private plaintiffs would "defeat[] the policy of not encumbering government antitrust suits with a multitude of collateral issues and of assuring to the government full control of the prosecution and settlement of such public antitrust

actions." *Int'l Mort. & Inv. Corp. v. Von Clemm*, 301 F.2d 857, 862 (2d Cir. 1962).[8] Here, had private plaintiffs sought to participate in the government trial, they would certainly have been barred. Amex's consolidation motion—essentially, an attempt to compel an "intervention" by bringing the private plaintiffs into the government trial—should not yield a different outcome.

Second, 15 U.S.C. §16(a) (Clayton Act § 5(a)) "articulates the public policy of recognizing the priority of federal antitrust enforcement actions over private antitrust suits." *U.S. v. Dentsply Intl*., 190 F.R.D. 140, 145 (D.Del. 1999). By making judgments and findings in government enforcement cases prima facie evidence in private antitrust litigation, it "giv[es] private individuals . . . the right to found their (antitrust) suits for redress on the facts and judgments proved and entered in suits by the Government where the Government has . . . won its suit." *Emich Motors Corp. v. General Motors Corp*., 340 U.S. 558, 567-68 (1951) (quoting legislative history).[9] However, "[t]he full benefits of government proceedings are not available until there has been a full determination in the action, including a final determination on the relief to be granted." *Russ Togs, Inc. v. Grinnell Corp*., 426 F.2d 850, 856 (2d Cir. 1970) (construing the companion Clayton Act Section 5(b), which extends the statute of limitations for

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[8] *See also U.S. v. International Business Machines Corp*., 62 F.R.D. 530, 532 n.1 (S.D.N.Y. 1974) ("It is a firmly established general principle that a private party will not be permitted to intervene in government antitrust litigation."); *U.S. v. Visa U.S.A., Inc.*, 98-CV-7076, 2000 WL 1174930, at *1 (S.D.N.Y. Aug. 18, 2000) (denying motion to intervene because "in government antitrust actions, courts have uniformly recognized that the government represents the public interest in competition, unless a private party makes an extraordinary showing to the contrary"); *U.S. v. Charmer Indus., Inc.*, CR-81-00009, 1981 WL 2098, at *1 n.1 (E.D.N.Y. July 1, 1981) ("[I]ntervention of individual plaintiffs in government antitrust proceedings is proscribed . . .).

[9] Congress amended Section 16 in 1980 " to 'permit application of the (collateral estoppel) doctrine to eliminate wasteful retrying of issues and reduce the costs of complex antitrust litigation to the courts and parties.'" *GAF Corp. v. Eastman Kodak Co*., 519 F. Supp. 1203, 1211 (S.D.N.Y. 1981) (quoting legislative history). *See also Eagle Lion Studios, Inc. v. Loew's, Inc*., 248 F.2d 438, 442 (2d Cir. 1957), *aff'd per curiam*, 358 U.S. 100 (1958) ("A government (antitrust) suit, while primarily in the public interest, if successful, also accrues to the immediate benefit of these injured by the wrongful conduct.") (internal quotation omitted); *U.S. v. Nat'l Ass'n of Broadcasters*, 553 F. Supp. 621, 623 (D.D.C. 1982) (a policy behind Section 16(a) is to enable private parties to "piggyback" on "prior antitrust judgments."); *City of Burbank v. Gen. Elec. Co*., 329 F.2d 825, 831, 835 (9th Cir. 1964) ("Thus, undoubtedly one purpose. . . was to make it easier for private antitrust plaintiffs to recover" with "prima facie evidence, through government effort, upon which the injured private litigant could later rely. . . .").

private claims until final resolution of government actions). This statutory framework ensures a prior government judgment will "provid[e] private antitrust plaintiffs with a powerful weapon" and "promote[] judicial efficiency by fostering settlement." *Dentsply*, 190 F.R.D. at 145. A consolidated trial here would undermine the policy goals of Section 16(a) by denying private plaintiffs the benefit of any judgment the government may secure in its trial.

Finally, and significantly, public policy prohibits consolidation with private cases where it would delay or impede resolution of the United States' action. In 15 U.S.C. § 4, Congress directed that Sherman Act enforcement actions brought by the United States "shall proceed, as soon as may be, to the hearing and determination of the case." The public policy is also illustrated by 28 U.S.C. §1407, which expressly forbids United States' antitrust enforcement actions from being ordered into multidistrict litigation proceedings. *Dentsply*, 190 F.R.D. at 143-44 (denying motion to consolidate government and private antitrust suits for pre-trial discovery, even though "the standard factors under Rule 42(a) would counsel consolidation in this case."); *MDL 2221*., 764 F. Supp. 2d at 1344 n.1 (noting that *this case* could not be part of MDL 2221).[10]

As the Court is aware, discovery in this case has been long and contentious. Amex argued for a lengthy discovery schedule from the outset, and ultimately discovery took three years to complete. (*See supra* n.4). But now, fact and expert discovery are over and the case can proceed to trial expeditiously. The trial should not be prolonged and confused by consolidation. Amex predicts a consolidated trial will require three months of the Court's time, *twice* the time

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[10] Indeed, delays at *trial* caused by consolidation would impair the public policy of unobstructed government antitrust enforcement significantly more than mere delays during discovery. *See Liberty Media Corp. v. Universal, S.A.*, 842 F. Supp. 2d 587, 592 (S.D.N.Y. 2012) (quoting *Garber v. Randell*, 477 F.2d 711, 716 (2d Cir. 1973)) ("[T]he Second Circuit has explained that there is a difference between a consolidation order which 'merely requires the parties, in the interest of avoiding needless duplicative expenditure of time and money, to join in common pretrial discovery and preparation,' and an order which 'goes beyond these permissible objectives to deny a party his due process right to prosecute his own separate and distinct claims or defenses without having them so merged into the claims or defenses of others that irreparable injury will result.'").

predicted by the United States for a separate government trial. (Amex Mem., p.14). A joint trial would take even longer than Amex predicts, because Amex overstates the efficiencies and understates the inefficiencies consolidation would bring. Amex also fails to acknowledge the inherent pre-trial and trial delays that will spring from imposing a complex jury trial into the government case. Trial logistics and disputes related to the jury—and to accommodating the presentations and evidence of a separate group of plaintiffs with diverse priorities—will needlessly lengthen the trial. Relief for consumers could be further delayed with post-trial and appellate issues driven by the private cases that may never arise in a government-only trial. These serious distractions can be avoided by setting a separate bench trial.

The fact that discovery has already occurred on a parallel track with the private cases does not suggest that delays and confusion in the trial itself can be ignored. Very recently, in *U.S. v. Apple*, the Court cited the "statutory priority" articulated by Section 4 and noted that "the Sherman Act grants *priority status* to the Government's claims" and "the DOJ action may not be slowed as a result of any related [private] action." *Penguin Group*, 2013 WL 1759567, at *2 (emphasis added). It ordered a separate non-jury trial of the government plaintiffs' equitable claims even though, as here, pre-trial discovery was coordinated with—and proceeded on the same timetable as—the related private action for damages. *Id*. at *3.

To the best of our knowledge, no court has ever ordered the Justice Department to try an antitrust enforcement case jointly with private damages actions over our objection. Amex's motion neither addresses nor even acknowledges these important policy concerns, and provides no reasons why they can be disregarded here. [11]

[11] Amex cites only *Cmty. Publishers, Inc. v. Donrey Corp.*, 892 F. Supp. 1146 (W.D. Ark. 1995), which is inapposite. There the United States *requested* consolidation with a parallel private non-jury trial—shortly before the private trial was scheduled to begin—to accelerate resolution of the United States' case significantly. As *Dentsply*

II. A CONSOLIDATED TRIAL WOULD PREJUDICE THE UNITED STATES.

Although the "strong public policy" against consolidation of government antitrust claims means that a "case-by-case weighing" of Rule 42 factors is not needed, *Dentsply*, 190 F.R.D. at 146, the present circumstances nonetheless highlight the wisdom of this public policy. A joint trial would prejudice the United States.

A. Consolidation is Improper Where It Would Prejudice a Party or Expand the Scope of its Trial.

The decision on consolidation rests within this Court's discretion, but the "discretion to consolidate is not unfettered." *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1285 (2d Cir. 1990). Even if it finds "that the actions involve common questions of law or fact," the court "must balance the efficiency gained through consolidation against possible prejudice to the parties." *Haas v. Brookhaven Mem'l Hosp.*, No. 07-CV-4788, 2008 WL 822121, at *2 (E.D.N.Y. Mar. 26, 2008) (Garaufis, J.) (internal quotation omitted). "'[E]fficiency cannot be permitted to prevail at the expense of justice—consolidation should be considered when 'savings of expense and gains of efficiency can be accomplished *without sacrifice of justice*.'" *Devlin v. Transportation Comm. Int'l. Union*, 175 F.3d 121, 130 (2d Cir. 1999) (emphasis in original) (internal citation omitted); *Delre v. Perry*, 288 F.R.D. 241, 246 (E.D.N.Y. 2012) (same). "Considerations of convenience and economy must yield to a paramount concern for a fair and impartial trial," *Celotex*, 899 F.2d at 1285, and "[t]he benefits of efficiency can never be purchased at the cost of fairness." *Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993).

Specifically, consolidation should be denied where it "would likely increase the scope of trial" for the parties "litigating in one case but not the other." *Curry v. American Standard*, Nos.

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acknowledges, there is no "per se" ban on consolidation in a government antitrust case, "[h]owever, in cases where the Government *objects* to consolidation, as in this case, public policy concerns underlying 28 U.S.C. § 1407(g) outweigh other considerations in favor of consolidation." 190 F.R.D. at 145 (emphasis added).

7:08-CV-10228, 7:07-CV-4771, 2010 WL 6501559, at *2 (S.D.N.Y. Dec. 13, 2010); *Flintkote Co. v. Allis-Chalmers Corp.*, 73 F.R.D. 463, 465 (S.D.N.Y. 1977) ("[I]f the cases were consolidated, the trial of each would be impeded by the introduction of voluminous irrelevant evidence . . . ."); *Garber*, 477 F.2d at 714 ("[W]here the claims against, or defenses of, some parties are substantially different from those of others, some may be prejudiced by consolidation . . . ."); *see also In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853 (2d Cir. 1992) ("The systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice . . . ."). In short, "[c]onsolidation is inappropriate when it will adversely affect the rights of parties." *Liberty Media Corp.*, 842 F. Supp. 2d at 592.

B. A Joint Trial Would Expand the Number of Witnesses and the Scope of Examination in the Government Trial.

A joint trial guarantees the Government Plaintiffs would be burdened and distracted with countless issues that otherwise would not arise in the government trial. Government Plaintiffs currently expect that very few of the witnesses in their case-in-chief will be common to the private cases. Of the 15 private plaintiffs—each of which presumably will contribute multiple individual trial witnesses in that action—Government Plaintiffs currently expect no more than two individual witnesses will be called in the government case. Government Plaintiffs currently expect to call many non-party merchant witnesses that are unlikely to appear in the private trial, including many in the T&E market that is not at issue there.

As for Amex witnesses, private plaintiffs deposed six Amex executives in Australia who are knowledgeable about surcharging there. Private plaintiffs also deposed four lower-level Amex executives who dealt with their clients directly. The United States currently expects to call none of these witnesses. While some other Amex witnesses may reappear in a subsequent private trial (if one proves necessary), there will certainly not be an exact match. *See Kelly v.*

Kelly, 911 F.Supp. 66, 69 (N.D.N.Y. 1996) ("While the actions share some of the same witnesses, they do not share all, or even most of the same witnesses," and consolidation could thus "impose unnecessary burdens upon all sides.").

The logistics of expert and lay witness testimony at a joint trial highlights the delay, burden, and prejudice inherent in consolidation. The combined trial would involve 12 experts on the plaintiffs' side rather than just five (three affirmative, plus two potential rebuttal experts) in a government-only trial. Given Amex's stated aim of highlighting distinctions among them, trial time for *each* plaintiff expert likely would need to be lengthened to accommodate examination by the other plaintiff group. Such questioning would be unnecessary in separate trials, meaning the total trial time for each expert would be *less in two trials* than in a joint trial. With this many experts, the impact on total trial time would be substantial. Fact witnesses raise similar concerns. Thus, a joint trial would inherently demand more court time than separate trials because additional time must be allotted for each group of plaintiffs to examine the many witnesses who would otherwise not appear in their case.[12]

C. A Joint Trial Would Focus on Legal Claims and Defenses Irrelevant to Government Plaintiffs' Case.

Amex cannot deny that the private cases raise legal theories the Government Plaintiffs would not need to confront in a government-only trial.[13] Amex concedes that Plaintiffs "disagree

[12] Any solution to such delay that "streamlined" the joint trial—by, for example, forcing diverse plaintiffs to divide and curtail their respective examination time compared to that available to Amex—would be even more prejudicial to Government Plaintiffs.

[13] "It is simply not enough that the two actions allege the same theories of recovery." *Liberty Lincoln Mercury, Inc. v. Ford Marketing Corp.*, 149 F.R.D. 65, 80-82 (D.N.J. 1993) (denying consolidation of two actions involving the same warranty reimbursement policy of the same defendant under the same statute, because liability must be determined based on facts that are "highly specific" to each plaintiff). *See also E.E.O.C. v. Pan Am. World Airways*, Nos. C-81-3636, C-81-4590, 1987 WL 97215, *2 (N.D. Cal. Dec. 3, 1987) (denying consolidation of E.E.O.C. and private cases where, "[i]n spite of considerable factual overlap, these two cases are completely dissimilar in law"

on the fundamental question of which products are included in the relevant market" (Amex Mem., p.19), and the two plaintiffs seek different remedies. Private Plaintiffs, unlike Government Plaintiffs, allege a Section 2 monopolization claim. Each of these differences adds legal arguments, evidence, and trial time to the Government Plaintiffs' case.

Amex's remarkable assertion that its "defense does not vary between the cases" (Amex Mem., p.15) is refuted directly by the two very different summary judgment motions now pending before this Court. Each raises different legal arguments and cites different evidence. In a common trial, the government trial record would be burdened with testimony and exhibits detailing whether each of the 15 private plaintiffs knew facts in past years sufficient to support Amex's limitations defense.[14] Amex would likely attack the individual damages claims of each plaintiff with fact and expert testimony, exhibits, and quantitative data unique to each private plaintiff but irrelevant to the United States suing in its law-enforcement capacity. All of this would prejudice the United States.[15]

This prejudice entails more than asking government counsel to sit idly through additional weeks of trial. To protect the record, Government Plaintiffs would need to prepare to address (and rebut) any evidence relating to the private cases that Amex may use to confuse or undermine the record in the government case. Government Plaintiffs would inevitably be pulled

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and "[i]ntroducing evidence" and "elucidating the law applicable therein would inject substantial intricacy into an already complex trial.")

[14] *See, e.g.*, Merchant Plaintiff Letter to Judge Garaufis, June 28, 2013 (*MDL 2221*, 1:11-md-02221 NGG-RER, D.E. 284) (explaining that Amex's limitations and single-brand-market defenses require extensive factual and legal analysis, including "the factual circumstances relat[ing] to the various Merchant Plaintiffs affected by Amex's argument.").

[15] *See Curry*, 2010 WL 6501559, at *2 (denying consolidation where defendants "are likely to assert dissimilar defenses in the two cases" which "would likely require presentation of different, complex evidence in each case," and "parsing dissimilar, and potentially contradictory, defenses may result in considerable delay and jury confusion, thus further mitigating against the potential efficiency of consolidation.")

into pre-trial as well as post-trial issues that would otherwise not arise in the government action. And a joint trial multiplies the opportunities for Amex to claim error or prejudice—especially in a jury trial—that could trigger issues on appeal to delay entry of any judgment Government Plaintiffs may secure. Amex, in contrast, would need to address all issues in both cases whether they were combined or separate, making the relative burden of either option far less stark for Amex.

For all these reasons, the total trial costs to Government Plaintiffs will rise substantially in a joint trial. This fact is an independent reason to deny the motion. "When exercising its discretion, the court must consider," among other factors, "'the relative expense to all concerned of the single-trial, multiple-trial alternatives.'" *Celotex*, 899 F.2d at 1285 (internal citation omitted).

In short, "[t]he potential confusion and prejudice to the plaintiff that consolidation would create weigh in favor of keeping these actions separate." *Johnson v. Kerney*, No. CV-91-4028, 1993 WL 547466, at *6 (E.D.N.Y. Dec. 22, 1993).

III. A JOINT TRIAL WOULD PREJUDICE BOTH TRIERS OF FACT AND CAUSE DELAY, CONFUSION, AND WASTED RESOURCES.

Here, a joint trial would *undermine*—not promote—judicial efficiency and economy. It would create manageability hardships for the Court and make the tasks of both fact-finders more complex. This additional reason supports denial of the motion. *See Haas*, 2008 WL 822121, at *2 (denying motion to consolidate where the moving party "made no showing on the record that consolidation would assist judicial economy or that unnecessary delays or confusion in the resolution of these proceedings would be avoided by consolidation.").

A. The Inefficiencies Inherent In a Joint Bench/Jury Trial Outweigh Efficiencies From Consolidation.

Most cases cited by Amex involved a common trier of fact, and thus potential gains in judicial efficiency from consolidation were far clearer. Where the two matters have *separate* fact-finders, forcing the cases into a single proceeding would magnify rather than solve management problems. "Additional confusion would arise out of the fact that whereas jury demands have been made in [one], [the other] will be tried to the court." *Tucker v. Arthur Andersen* & Co., 73 F.R.D. 316, 318 (S.D.N.Y. 1976) (denying consolidation of jury and non-jury cases arising from the same embezzlement scheme). *See also Garfinkle v. Arcata National Corp*., No. 72-CIV-5344, 1974 WL 389, at *2 (S.D.N.Y. Apr. 17, 1974) ("[A] jury trial has been requested in the second action but not in the first, making it likely that separate trials will occur."); *Transmirra Products Corp. v. Monsanto Chemical Co*., 27 F.R.D. 482, 483 (S.D.N.Y. 1961) ("The joint trial of jury and non-jury issues is undesirable under these circumstances and would only result in confusion and difficulty."); *U.S. Environmental Protection Agency v. City of Green Forest, Arkansas*, 921 F.2d 1394, 1403 (8th Cir. 1991) (denying Rule 42 motion in part because "the citizens' claims were to be tried before a jury, while the EPA action was to be tried before the court.").

"Federal courts have often declined to consolidate cases requiring two different fact-finders," and "while the Court could take steps to shield the jury from confusing or prejudicial testimony, such efforts would consume judicial resources and risk 'transform[ing] the jury box into a carousel[,] with the jury moving in and out as each witness' testimony was fragmented to insure that the witness would not be able to testify before the jury as to that evidence which was solely admissible in the [non-jury] action." *Servants of the Paraclete, Inc. v. Great American Ins. Co*., 866 F. Supp. 1560, 1573 (D.N.M. 1994) (quoting *Turner v. Transportacion Maritima*

Mexicana S.A., 44 F.R.D. 412, 419 (E.D. Pa 1968)).[16] This needless burden is easily avoided with separate trials.

B. An "Advisory Jury" Compounds Rather Than Solves the Inefficiencies and Prejudice of Combining Two Fact-Finders in a Joint Trial.

Amex's solution is to suggest that the merchant plaintiffs' jury can simply serve double duty as an "advisory jury" in the government action. (Amex Mem., p. 17 n.6). This suggestion is surprising, because Amex recently *opposed* empanelling an advisory jury in another antitrust case. Noting that "courts rarely grant such requests," Amex argued that an advisory jury would "generate a litany of unnecessary inefficiencies" and "require that the Court and the parties invest a considerable amount of additional time and resources." (Ex. 8, Amex Brief, pp. 1, 2). Amex warned that an advisory jury "will (at a minimum) completely wipe away any economies that could be realized through consolidation and will likely *double* the time and resources required for trial." *Id*. at p. 7 (emphasis added). The Court there agreed with Amex:

> If this Court empanelled an advisory jury, the parties and the Court would expend resources addressing voir dire, jury instructions, and evidentiary rulings. And regardless of the jury's recommendations, this Court will ultimately make its own findings of fact and draw its own conclusions. . . . Therefore, concerns of judicial efficiency militate against empanelling an advisory jury.

In re Currency Conversion Fee Antitrust Litig., MDL No. 1409, 2012 WL 4361443, at *2 (S.D.N.Y. Sept. 11, 2012); *see also DeFelice v. Am. Int'l Life Assurance Co. of N.Y.*, 112 F.3d 61, 65 (2d Cir. 1997) (even with advisory jury, court must "make its own factual findings and

[16] The prejudice that would be caused by a combined jury and non-jury trial here is far greater than mere "possible conflicts among counsel as to trial strategy." *Golden Trade R.L. v. Lee Apparel Co.*, 1997 WL 373715, at *2 (S.D.N.Y. June 25, 1997). In *Golden Trade*, upon which Amex relies heavily, the two near-identical cases involved invalidity of the very same patent (one a jury claim by plaintiffs for infringement, one a mirror-image non-jury declaratory judgment claim by certain defendants). The evidence and legal arguments in both patent cases were nearly identical, so judicial economy from a joint trial was far greater than here. The motion was contingent on one particular trial occurring first, confirming there was no actual prejudice caused by consolidation itself. And of course, in *Golden Trade* there were no federal antitrust enforcement policy concerns at stake. *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412 (2d Cir. 1995) provides even less support; it provides no discussion of why consolidation was ordered, nor even reveals whether consolidation was opposed.

conclusions"); *In re Pan Am Corp.*, No. 93-CIV-7125, 1994 WL 174318, at *4 (S.D.N.Y. May 3, 1994) (denying motion for advisory jury because "interests of judicial economy would not be served.").[17] There is no reason to impose on the jury in the private case the extra burden of addressing (or even sitting through) the evidence and issues in the government case.[18]

C. Separate Trials Would Yield Significant Efficiencies.

It will be far easier for the Court to manage Government Plaintiffs' separate and shorter bench trial. The Court will not need to navigate the inevitable disputes about whether certain evidence can be heard by the jury. The risk of jury confusion, despite the best intentions of all concerned, would be heightened in a joint trial given the significant government evidence (such as T&E market evidence) that has nothing to do with their task. In a bench trial, the Court would have more flexibility to ask questions of witnesses, including experts, without weighing how the jury might be influenced by the question. And if Amex is correct that common issues abound, the Court will get a head start in thinking about (and, possibly, preclusively resolving) some evidentiary and legal issues it may face in the subsequent jury trial. Separate trials thus enable a more efficient management of the jury's time than may be the case in a sprawling combined proceeding.

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[17] Amex cites *U.S. v. Carilion Health Sys.*, 707 F. Supp. 840, 841-42 (W.D. Va. 1989), as the lone example of an advisory jury ever being used in an antitrust enforcement case. Far from furthering judicial economy, the process there complicated the Court's task. As the Fourth Circuit observed on appeal, after the district court submitted three questions to an advisory jury, "[t]he district court then made its own findings of fact," and even "*rejected* the jury's findings as to the relevant product market and relevant geographic market." *U.S. v. Carilion Health Sys.*, 892 F.2d 1042, 1989 WL 157282 , at *1 (4th Cir. Nov. 29, 1990) (emphasis added). In fact, the advisory jury's contrary finding was cited as support for an argument on appeal that the district court's finding was in error. *Id.* at *2.

[18] It would also impose burden on Government Plaintiffs by transforming this non-jury trial into a jury trial. "Any good trial lawyer will testify that there are significant tactical differences in presenting and arguing a case to a jury as opposed to a judge." *Thompson v. Parkes*, 963 F.2d 885, 888 (6th Cir. 1992) (internal citation omitted).

Of course, Amex presumes that both cases will be tried, and ignores the possibility that, regardless of the outcome of the government trial, the private cases may settle, making a second trial unnecessary. *Dentsply*, 190 F.R.D. at 145 (separate trials, with the government enforcement action first, "promotes judicial efficiency by fostering settlement" of similar private antitrust actions); *Transeastern Shipping Corp. v. India Supply Mission*, 53 F.R.D. 204, 206 (S.D.N.Y. 1971) (denying consolidation where, "because of the similarity of issues in the ten cases, it is likely that a disposition in one will encourage settlement in the others."). Opportunities for settlement after the first trial rise exponentially, regardless of the result in the first trial, and would be lost if the cases are tried simultaneously.

IV. AMEX HAS NOT MET ITS BURDEN OF SHOWING SUFFICIENT COMMONALITY.

Certainly, some common issues of fact and law do exist here. But Amex has not met its burden under Rule 42 of demonstrating sufficient commonality to show that efficiencies would overcome the substantial factors discussed above that weigh against consolidation.[19] There are many important differences on virtually every relevant metric: legal claims, defenses, relevant markets, merchant segments, experts, witnesses, remedies, and fact-finders. Plaintiffs' counsel in the two trials will have different views about how to conduct the trial and how to address their

[19] As "[t]he party moving for consolidation," Amex "bears the burden of showing commonality of factual and legal issues in the actions it seeks to consolidate." *Delre*, 288 F.R.D. at 246 (internal quotation omitted); *see also In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 373 (2d Cir. 1993). Courts often deny motions to consolidate government and private actions where commonality is far greater than here. *See, e.g.*, *Dentsply*, 190 F.R.D. at 142 (one of the parallel private antitrust complaints was a "nearly verbatim" replica of the government complaint, yet the motion to consolidate was denied); *Green Forest*, 921 F.2d at 1403 (affirming denial of motion to consolidate EPA enforcement action with nearly identical citizen action because latter sought private remedies).

divergent interests and issues.[20] These differences suggest that efficiencies from a joint trial are overstated.

Indeed, Amex wants a joint trial not because of common issues, but because of *different* issues among Plaintiffs. Ex. 7, Tr. of 6/13/13 Hearing at 21 (arguing that in separate trials, it would be "very difficult, if not impossible, for us to cross examine a witness in the Government case with the inconsistencies of the conclusions that the private plaintiffs' experts have reached on the very same issues."). Any alleged disagreements among experts of two unaffiliated plaintiff groups with separate claims are irrelevant to either case. Such questions would arise only as a tactic in a combined trial. Rather than eliminating prejudice, Amex's request for a joint trial would *insert* prejudice into both actions.

Amex argues that since Government Plaintiffs agreed the cases were common enough to coordinate discovery, they must be common enough for trial. (Amex Mem., pp.2-4; 18). Merely because two cases were consolidated for pre-trial discovery does not mean that consolidation for *trial* is appropriate.[21] Courts often order pre-trial coordination while holding separate trials, even where the claims are nearly identical. *See Penguin Group*, 2013 WL 1759567, at *2-3 (noting

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[20] Many cases cited by Amex involve common plaintiffs' counsel across the consolidated cases. *See, e.g.*, *BD ex rel Jean Doe v. DeBuono*, 193 F.R.D. 117 (S.D.N.Y. 2000). Here, the plaintiffs' counsel are different. That factor, while not dispositive, further weighs against consolidation. *See Celotex*, 899 F.2d at 1285 (listing the fact that "all plaintiffs were represented by the same counsel" as favoring consolidation); *Malcolm*, 995 F.2d at 352 (noting the fact that plaintiffs were represented by five different firms when reversing consolidation order); *In re Asbestos Litig.*, 173 F.R.D. 81, 85 (S.D.N.Y. 1997) ("Several courts have noted that the fact that plaintiffs share one counsel favors consolidation.").

[21] *See The European Community v. RJR Nabisco, Inc.*, 150 F. Supp. 2d 456, 461 (E.D.N.Y. 2001) (Garaufis, J.) ("Consolidation promoted the fair and efficient resolution of various motions and housekeeping issues that have come up concerning these cases. . . . Continued consolidation, however, will delay the resolution of these cases unnecessarily, and the cost of such delay is not outweighed by the fact that" the cases "to some extent share common legal and factual issues."); *Behrend v. Klein*, Nos. 04-CV-5413 (NGG)(SMG), 04-CV-5414 (NGG)(SMG), 2006 WL 2729257, at *3 (E.D.N.Y. Sept. 25, 2006) (Garaufis, J.) (parties "consented to consolidate the cases for the purposes of discovery" and the "similarities of Plaintiffs' complaints justified their consolidation for the limited purpose of pre-trial discovery" but consolidation for trial was "premature" because, in part, "Plaintiffs may rely on different legal theories to support their claims at trial" and "it is not clear at this time whether consolidation for trial purposes would result in judicial economy or prejudice to the parties.").

government antitrust case and pre-existing similar private damages cases were coordinated for discovery, but scheduled for separate trials). In fact, when it was a plaintiff in *Amex v. Visa*, Amex also embraced this principle with respect to the parallel claim by Discover against the same defendants. (Ex. 9, *Stipulation and Order Regarding Fact Discovery* ("The plaintiffs in both the *American Express* and *Discover* cases maintain that the claims and issues involved in their respective cases are such that formal coordination of these cases *for any purposes other than fact discovery* is neither warranted nor efficient.") (emphasis added)). Like Amex there, Government Plaintiffs here made it clear that consenting to fact discovery coordination did not mean a consolidated *trial* was proper. (Ex. 12, D.E. 92, Discovery Coordination Order, ¶ 4).[22]

V. ANY PREJUDICE TO AMEX IS MINIMAL AND OUTWEIGHED BY MANY FACTORS FAVORING SEPARATE TRIALS.

Amex claims that "holding separate trials would create a substantial risk of inconsistent adjudications" because "Amex's defense generally does not vary between the cases." (Amex Mem., p.15). As discussed above, the defenses *do* vary here, as Amex's two very distinct summary judgment motions confirm. Moreover, Amex's professed concern over inconsistent adjudications is hard to reconcile with its arguments in 2009 opposing creation of a MDL proceeding for all private cases addressing its merchant restraints. Amex was willing to bear the risk of the "possibility of inconsistent rulings with respect to the statute of limitations motion and

[22] The conclusions Amex draws from coordinated discovery captions are wrong. Jointly served discovery propounded under a coordination order does not reveal which plaintiff sought it. (*See* Ex. 7, Tr. of 6/13/13 Hearing, Statement of DOJ counsel, 11:11-19: "Your Honor, I hope our two-year history of cooperation with the plaintiffs isn't inadvertently held against us because we work very hard to come to a common position. I know what the court sees is that we have a common position but it doesn't mean that we always have the same interests and we've worked very hard not to burden the court with different views. I know the court won't misinterpret that parallelism and the work we put into that as meaning we've got the same position because we don't necessarily"). *See also Gristede's Foods, Inc. v. Poospatuck (Unkechauge) Nation*, 06-CV-1260, 2009 WL 3644159, at *4 (E.D.N.Y. Oct. 27, 2009) (denying motion to consolidate in part because one plaintiff was a "governmental entity" and the other a "private entity" whose "interests are not necessarily aligned.").

other 'substantive issues'" because "it is routine for pending cases in different courts to involve identical or similar issues of law." (Ex. 10, Amex Brief 9/21/09, pp.11). Amex contended that "[t]he mere fact that the judges handling such cases may ultimately need to reach the same issues is not a sufficient basis to centralize such cases in one court." (*Id.*). A combined proceeding was not needed to mitigate the risk of inconsistent rulings on Amex defenses then, nor is it now.

Amex also argues that it will suffer prejudice because it will be "expensive" to try two cases, not just because of the "actual financial cost" but, "even more significantly, the diverted attention of its most senior business executives" who would testify in both cases. (Amex Mem., p.15). At the same time, Amex is also asking this Court to splinter the merchant class action in MDL 2221 into countless individual arbitration proceedings. (Amex Motion to Dismiss Proceedings in Favor of Arbitration, 8/5/13, 11-MD-02221, D.E. 262-1). Rather than resolve those merchant claims collectively in a single class proceeding, Amex prefers seriatim arbitrations where its executives and experts would re-testify again and again on the same issues and defenses. It is unclear why the prospect of two appearances here would cause any greater "diverted attention" for its executives than the repetitive arbitrations that Amex is demanding. [23]

Finally, Amex claims that private plaintiffs will get a "tactical advantage" in a second trial by watching the government trial. This claim is surprising, since Amex openly hopes to gain tactical advantage for itself in a joint proceeding by highlighting differences among experts. Even if it were true, this argument is unavailing; public policy *encourages* private parties to take

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[23] Additionally, when Amex successfully requested a stay of the class cases while arbitrability issues were litigated, Amex expressly accepted the risk that its executives might be deposed twice. "[W]e recognize that there are likely to be some inefficiencies, but that burden is on American Express, not on the class plaintiffs. The class plaintiffs won't be deposed twice; it's my clients' witnesses that might end up being deposed twice if this case comes back as a class action. And that's not a burden on—on the plaintiffs here, your Honor; that's a burden on American Express." (Ex. 11, *In re American Express*, Tr. of 5/27/10 Hearing, p.6). The prospect of two trial appearances should pose no greater burden than two depositions.

tactical advantage of any prior government victory in a subsequent trial. *See* 15 U.S.C. §16(a). And, significantly, there is no tactical advantage to *Government Plaintiffs* if our trial goes first.

CONCLUSION

A consolidated trial would undermine the public policy protecting government antitrust enforcement, would prejudice the United States and the public interest, and would impose needless case management burdens on the Court. In contrast, two separate trials will give Amex the full and fair opportunity to defend itself against two distinct claims. Amex's motion should be denied.

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Respectfully submitted,

U.S. DEPARTMENT OF JUSTICE

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