

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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

v.

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

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

PUBLIC VERSION

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

The Order Entering Permanent Injunction as to the American Express Defendants (“Permanent Injunction”) (Dkt. 638) required that Amex give notice to merchants of the new steering rights permitted by this Court’s Decision. Permanent Injunction § IV.C. Amex, however, proposes to notify an important class of merchants – Amex co-brand partners – that they *cannot* engage in the steering permitted by the Decision because the terms of their existing card acceptance agreements “are not altered by [the Court’s] ruling” and “remain in full force and effect.” Exhibit B. This interpretation of the Permanent Injunction cannot be reconciled with its plain language. As the Court is aware, co-brand merchants have two distinct relationships with Amex: a card-issuing relationship under a co-brand agreement, and a merchant acceptance relationship under a separate card acceptance agreement. The latter agreement contains the non-discrimination provisions (“NDPs”) that have been enjoined. Co-brand merchants, like other merchants, have been liberated from the anticompetitive NDPs in those card acceptance agreements and should be notified that they are free to steer if they choose.

Plaintiffs respectfully seek an Order clarifying that the steering rights afforded by the relief in this case are applicable to all merchants, including Amex co-brand partners, unless the

merchant has expressly negotiated an agreement that falls within one of the exceptions in Section III.B of the Permanent Injunction. Pursuant to Section VI.A of the Permanent Injunction, Plaintiffs further request that the Court direct Amex to comply with Section IV.C by issuing written notifications to all of its domestic co-brand merchant partners in the form attached hereto as Exhibit A.

ARGUMENT

This dispute arises because Amex has proposed to notify all of its domestic co-brand partners that the Amex NDPs in their acceptance contracts – as they existed prior to the Permanent Injunction in this case – remain in force. The United States and the Plaintiff States believe that the merchant steering rights provided for in the Permanent Injunction are fully applicable to co-brand partners, and that Amex cannot continue to block these merchants from steering.

In justifying its position, Amex would take what is intended to be a narrow exception under Section III.B.2 for negotiated exclusive steering agreements and transform it into a flat ban on steering by Amex co-brand partners. Amex's position rests on the underlying assumption that co-brand merchants implicitly agreed to give up their ability to steer by signing a co-brand agreement, even where the subject of steering was not addressed in the co-brand agreement and never arose in the negotiations preceding the agreement. This reading is not supported by the text or the purpose of the Permanent Injunction, and it is in conflict with the Court's Decision and the underlying factual record in this case.

The purpose of Section III.B.2 is to allow Amex and co-brand partners to negotiate and enter into an arrangement whereby Amex issues a co-brand card and the merchant agrees to

devote some, or even all, of its promotional efforts to that co-brand card. Section III.B.2 provides that nothing in the Permanent Injunction prevents Amex from:

enforcing existing agreements or entering into agreements pursuant to which a Merchant agrees that it will encourage Customers to use co-branded or affinity General Purpose Cards bearing both the American Express Brand and the co-brand or affinity partner's name, logo, or brand as payment for goods and services and will not encourage Customers to use Other General Purpose Cards.

This language is drawn almost verbatim from the Plaintiffs' Consent Decree with Visa and MasterCard entered by this Court in July 2011, and was not negotiated with Amex. *Compare* Final J. as to Defs.' MasterCard & Visa (Dkt. 143) § IV.B.2.

The type of agreement contemplated by Section III.B.2 is more restrictive than the NDPs that were at issue in this case – under those NDPs, merchants sometimes had the limited ability to encourage the use of other cards, for example through an “official card” sponsorship or limited-duration promotion with competing networks. Indeed, as explained at trial, several of Amex's co-brand partners have in their acceptance contracts a provision allowing them to engage in certain promotions with other card networks.¹ Section III.B.2 would allow co-brand merchants to negotiate to give up all rights to encourage the use of other cards. It is a variation on the exclusive arrangements permitted by the immediately-preceding and -succeeding paragraphs of the Permanent Injunction. *See* §§ III.B.1 (allowing exclusive acceptance agreements); III.B.3 (allowing exclusive forms of promotion). On their face, none of Amex's “existing agreements” with co-brand partners falls within the scope of Section III.B.2, and Amex has not identified any such agreements despite requests from Plaintiffs to do so.

¹ *See, e.g.*, PX 2609 at 2 ([REDACTED]); DX 7565 at AMEXNDR07652091 (Starwood may engage in “marketing programs or promotions with other card issuers” so long as there is “no Preference Campaign”).

Amex instead seeks to read Section III.B.2 as a categorical exemption of all co-brand partners from the Permanent Injunction. In effect, Amex's position would allow the NDPs – unenforceable in the acceptance contracts – to live on as an implicit term in Amex's co-brand agreements. But a plain reading of the text provides no support for that interpretation. Moreover, had that been the intent of this Section, Plaintiffs would have suggested straightforward language expressly stating that the Permanent Injunction does not apply to co-brand partners. Plaintiffs did not do so because that was not the intent of Section III.B.2, just as it was not the intent of Plaintiffs to exclude the numerous Visa and MasterCard co-brand partners from the scope of the 2011 Consent Decree.² The impact of Amex's proposed interpretation is substantial: it would carve out several very large merchants, representing billions of dollars of charge volume, from the scope of the Permanent Injunction. Co-brand partners Delta, Hilton, Costco, and Starwood, for example, rank among the top handful of Amex's largest merchants by charge volume. *See* PX1486.

Amex has suggested that it is appropriate to continue to enforce the challenged NDP restraints against these merchants, either because co-brand partners do not desire to steer away from Amex or because these merchants willingly gave up their steering rights as part of the co-brand contract negotiations. However, these claims are contradicted by the factual record, which shows that co-brand partners, just like the other merchants that testified in this case, want broader steering rights but were forced to accept the NDPs in their card acceptance agreements as a condition of accepting Amex cards. As the Court found, Hilton is an example of a merchant that “would, in fact, steer if given the opportunity.” *United States v. American Express Co.*, 88 F. Supp. 3d 143, 221 (E.D.N.Y. 2015). Hilton sought to enter into a share-shift agreement to

² Visa and MasterCard co-brand partners were not, in fact, excluded from the Decree: those co-brand partners received the same notices as other merchants and Visa and MasterCard have never suggested to Plaintiffs that the language at issue somehow exempts co-brand partners from the scope of the Decree.

increase Visa's charge volume but was hindered in doing so by the Amex NDPs. *Id.* at 219 (citing Hilton testimony). Similarly, Starwood testified that it sought to amend the NDPs so that it could express a preference for another network; however, Amex refused to agree and the acceptance contract still prohibits Starwood from stating a preference. *See* Trial Tr. at 5920:3-13. Other Amex co-brand partners testified during discovery that they desire the freedom to promote credit cards other than the Amex co-brand card. [REDACTED]

[REDACTED]. It is clear from this and other record evidence that co-brand merchants desire the steering rights granted by the Permanent Injunction and that Amex has used its market power to inhibit those rights.

As the trial record established, card-issuing relationships are distinct from card-acceptance relationships even though co-brand merchants have both. The sweeping carve-out Amex proposes would affect significant merchant charge volume and has no basis in the trial record, the Court's Decision, or the plain language of the Permanent Injunction. Such an outcome would benefit only Amex, not the affected merchants or their customers, and would be inconsistent with the rationale of the Court's Decision and the purposes of the Permanent Injunction.

CONCLUSION

Plaintiffs respectfully request that the Court clarify that co-brand partners, like all Amex-accepting merchants, are eligible to use the steering methods enumerated in Section III.A of the Permanent Injunction and order Defendants to issue written notifications to co-brand partners under Section IV.C of the Permanent Injunction in the form attached hereto as Exhibit A.³

³ Exhibit A is identical to the notices that were sent to other Amex merchants, with the exception of a sentence explaining that the Permanent Injunction does not alter the terms of existing co-brand agreements, which was adapted from Amex's original proposed notice (Exhibit B).

Respectfully Submitted,

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