UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PIZZA HAZEL, INC., NUNAN FLORIST AND GREENHOUSES, INC., and SKIN REJUVENATION CENTER AND SPA, INC., on behalf of themselves and others similarly situated, Plaintiffs, v. AMERICAN EXPRESS COMPANY and AMERICAN EXPRESS TRAVEL RELATED SERVICES CO. INC., Defendants.	Case No. 1:24-cv-12505 **CLASS ACTION COMPLAINT** **JURY TRIAL DEMANDED**

This class action seeks damages and injunctive relief against American Express Company and American Express Travel Related Services Co. Inc. (together "American Express" or "Amex") on behalf of the eight million or so merchants in the United States who accept Amex-branded cards under American Express's OptBlue® program ("OptBlue") subject to the current (April 2024, as of this writing) version of the American Express Merchant Operating Guide ("MOG").

I. PRELIMINARY STATEMENT

1. Over the past twenty years, U.S. merchants have sought relief from the inflated swipe fees that the major payment networks impose on every credit-card transaction. Beginning in 2005, merchants brought antitrust litigation challenging the networks' "anti-steering rules," which artificially inflate swipe fees by barring

merchants from giving customers inducements to use cheaper card products. At that time, the rules of the three dominant credit card networks—Visa, Mastercard, and Amex—all barred merchants from offering a discount to customers for using a cheaper payment product, or from assessing a small fee (or "surcharge") for using more expensive cards, or even from simply asking customers to please use a cheaper credit card. The core of the merchants' claim was that these anti-steering rules protect the networks against having to engage in price competition on the fees they charge merchants. After all, if merchants cannot steer customers to use cheaper products, credit-card networks have no incentive to drop their swipe fee rates. With the steering ban in place, senior card-network executives have acknowledged, "lowering your price does not drive incremental sales" and "no one's business strategy is to be cheaper than the next guy."

2. Through the court system, U.S. merchants have made substantial progress in their efforts to obtain relief from these anticompetitive rules. In response to a merchant class action and related litigation, Visa and Mastercard have rescinded their long-standing bans on merchant steering, including their ban on credit-card surcharges. The revised rules of Visa and Mastercard (and Discover as well) now *permit* merchants to offer a discount for using a competitor's cheaper card product, or to post signage indicating a payment-brand preference, or to impose a small fee for accepting credit cards. But a merchant that accepts all major cards cannot do any of those things without violating Amex's restrictive rules. And 99% of U.S. card-accepting merchants accept Amex cards.

3. In the wake of Visa and Mastercard's rescission of their own rules, Amex's anti-steering rules—and Amex's rules alone—now protect the entire payment card industry from having to engage in price competition on merchant swipe fees. If Amex's anti-steering rules were rescinded like their competitors' rules have been, then each payment card network would be forced to compete on price, lest merchants steer customers away from that network's cards.

4. Merchants have further obtained meaningful monetary relief from Visa and Mastercard, receiving more than $6 billion in damages settlements based on the networks' maintenance of anti-steering rules and related conduct. These settlements include a $5.6 billion class action settlement that was approved by the Second Circuit Court of Appeals in 2023, as well as opt-out settlements, including a reported $525 million payout for a group of major retailers whose suit was solely focused upon the anti-steering rules.

5. And yet—even as Amex's competitors have paid billions of dollars in damages settlements and rescinded their own anti-steering rules, and even as Amex's rules have become the sole impediment to actual competition in the marketplace—Amex has remained unscathed, thus far evading all responsibility for its own anti-steering rules.

6. Amex has managed to avoid liability for one reason and one reason only: mandatory arbitration.

II. ARBITRATION

7. Unlike its competitors, Amex has long mandated that Amex-accepting

merchants must be bound to arbitration provisions that prohibit any form of collective action inside the arbitral forum. In 2013, the Supreme Court upheld Amex's clause. *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013). *Italian Colors* held that Amex's ban on class actions does not necessarily deprive arbitral claimants of the opportunity to effectively vindicate their rights under federal antitrust laws. But it specifically recognized that the so-called "effective vindication" doctrine could bar a clause imposing "filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable." 133 S. Ct. at 2310-11. Following *Italian Colors*, the relevant test is whether the arbitration-specific fees a plaintiff would owe, under an arbitration fee-splitting arrangement, amount to more than the damages the plaintiff claims.

8. In the wake of *Italian Colors*, Amex took pains to ensure that the costs of arbitration to the merchant would not jeopardize the enforceability of its arbitration requirement. Thus, the 2015 version of Amex's standard arbitration agreement provided:

> **ix.** Costs of Arbitration Proceedings. You will be responsible for paying your share of any arbitration fees (including filing, administrative, hearing or other fees) but only up to the amount of the filing fees you would have incurred if you had brought a Claim in court. We will be responsible for any additional arbitration fees.

9. This same clause was still in effect in early August 2023, when merchants began to submit arbitration demands against Amex to AAA, seeking injunctive relief and damages under the federal antitrust laws. See April 2023 version of American Express's Merchant Operating Guide ("MOG"), §13.1 ¶ ix. These

merchants sought to pursue their claims by the only means available: by filing individual arbitrations subject to the cost allocation provisions of the then-operative arbitration terms, quoted above. By mid-August 2023, some 8,000 merchants had filed claims at AAA.

10. Once merchants showed that they actually would seek to pursue their antitrust claims in arbitration, Amex changed the terms of its arbitration clause to make that impracticable. On August 18, 2023, Amex posted on its website an "Unscheduled Change" to its arbitration rules eliminating Amex's commitment to pay arbitration costs. Marked "Effective Immediately," the amendment to the MOG makes the merchant responsible for paying half of all arbitration costs and fees.

11. As subsequently amended in October 2023 and again in April 2024, the operative arbitration clause in the Merchant Operating Guide fully thwarts the ability of plaintiffs and other OptBlue merchants to vindicate their rights under the antitrust laws in the arbitral forum. The current Amex arbitration provision is shot through with unenforceable provisions, including (in no particular order) the following.

12. ***First***, the clause would force plaintiffs to pay tens of thousands of dollars in arbitrators' fees and other non-recoupable costs for a chance to win substantially less than that amount in damages. In *Italian Colors*, the Court observed that "the antitrust laws do not guarantee an affordable procedural pathway to the vindication of every claim." But the Court recognized a key distinction. On the one hand, it held that "costs involved in *proving*" a claim—such as the expert witness

costs each plaintiff may have to bear, absent a class action—do not implicate the effective-vindication rule, even if they make it too expensive to bring a case. On the other hand, the Court reaffirmed its earlier statements that the effective vindication rule could invalidate an agreement imposing "filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable." 570 U.S. at 235, citing *Green Tree Financial Corp.–Ala. v. Randolph*, 531 U.S. 79, 90 (2000) ("It may well be that the existence of large arbitration costs could preclude a litigant from effectively vindicating her federal statutory rights").

13. In this case, abundant evidence demonstrates that the non-recoupable "fees attached to arbitration" under Amex's arbitration provision would outstrip each plaintiff's potential damages, making access "impracticable." Based on their charge volume, plaintiffs can calculate the upper bound of the damages that they are seeking. And they can compare that potential reward with the unavoidable costs of arbitration, based on the actual invoices of actual arbitrators in similar cases, among other non-speculative data sources. Indeed, actual evidence shows that, under the MOG, the fees attendant to having an arbitrator resolve a threshold motion—e.g, a motion as to the enforceability of the MOG itself—outstrip the potential rewards of arbitration.

14. ***Second***, the arbitration provision is unenforceable because it would prevent plaintiffs from asserting their statutory right under the Clayton Act to seek market-wide injunctive relief. *See Italian Colors,* 570 U.S. at 236 (the "effective vindication" doctrine "would certainly" bar "a provision in an arbitration agreement

forbidding the assertion of certain statutory rights"). Section 16 of the Clayton Antitrust Act confers upon private plaintiffs the right "to sue for and have injunctive relief…under the same conditions and principles as injunctive relief…is granted by courts of equity." 15 U.S.C. § 26. The injunctive relief sought here—an order striking down Amex's anti-steering rules—is well within the scope of injunctive relief that courts of equity could grant under the Clayton Act. Indeed, affording private actors the right to obtain broad market-correcting relief was at the very core of Congress's intent in enacting Clayton Act § 16.

15. And yet, as Amex has repeatedly acknowledged, its arbitration "agreement ***prohibits*** Plaintiffs from obtaining market-wide injunctive relief." *In re Am. Exp. Anti-Steering Rules Antitrust Litig.*, 433 F. Supp. 3d 395, 403 (E.D.N.Y. 2020) (emphasis added). Indeed, Amex specifically states that any arbitration must be conducted on an individual basis with no effect on any other merchant's rights or contract. The agreement is thus unenforceable under the effective-vindication principle of *Italian Colors*.

16. ***Third,*** the operative arbitration agreement allows Amex to amend its arbitration rules, without providing advance notice to the merchant, at any time—including *after* a claim notice has been served and submitted to the arbitration provider—simply by posting the new terms on the Amex website and stating that the terms are effective immediately. This is not conjecture; this is precisely what Amex has done. On August 18, 2023, more than a week after merchants submitted their demands to AAA and served Amex, Amex posted to its website new and restrictive

MOG terms under the banner "*Effective Immediately*." And it specifically amended the MOG to provide that, after a merchant has "submit[ted] a Claim notice" to JAMS or AAA, and after its "arbitration demand is filed with the organization selected," Amex can change the rules governing that very claim at any time up until the arbitral body issues the parties invoices and the merchant "pay[s] [its] share of arbitration filing fees." April 2024 MOG § 13.1.c.vii. This process—from notice of claim to receipt of initial invoices—takes months in mass-filed cases. Thus, even after a claimant submits its claim, Amex asserts the right to change the arbitration terms in any way that serves its interest.

17. Where a party has the right to alter or eliminate the terms governing arbitration on an "effective immediately" basis, without providing advance notice to the counterparty, or after a claim has been submitted to the arbitral body, then that arbitration agreement was illusory from the outset, such that no valid agreement to arbitrate was formed. The arbitration provision of the MOG is illusory and unenforceable under these well-established principles.

18. ***Fourth,*** in a shockingly one-sided provision, the operative arbitration contract allows Amex—but not the merchant-claimant—to appeal an adverse award to a three-arbitrator panel. Before merchants began asserting claims seeking injunctive relief in August 2023, Amex's MOG provided that "either party can initiate an appeal" of a final award to a three-arbitrator panel "[i]f a Claim is for $100,000 or more, or includes a request for injunctive relief." April 2023 MOG at § 13.1 ¶ vii. Amex then amended the arbitration clause to provide that appeal to the three-

arbitrator panel is available only "where injunctive relief is *ordered* by the arbitrator" or following "*awards* of $500,000 or more." October 2023 & April 2024 MOGs at §13.1.c.vii (emphasis added). Plainly, the intent and effect of this provision is to ensure that only Amex can appeal an adverse award.

19. Moreover, the appeal right that Amex has conferred upon itself provides that the panel "shall reconsider *de novo* any aspect requested of th[e] award"—meaning that Amex is entitled to deference-free reconsideration of any factual or legal aspect of the case that it challenges before the appellate panel.

20. ***Fifth***, Section 4 of the Clayton Act provides that a prevailing plaintiff "shall recover threefold the damages by him sustained, and the cost of suit, *including a reasonable attorney's fee*." 15 U.S.C. § 15 (emphasis added). Before merchants began submitting claims against Amex in arbitration, the MOG made no reference to legal fees. But now, the operative arbitration clause provides that each claimant, irrespective of whether they prevail, "will be responsible for paying [its] own legal fees." April 2024 MOG § 13.1(c)(ix). This remedy-stripping clause is unenforceable because it "forbids the assertion of [the] statutory right" to recovery of attorney's fees and costs in antitrust cases. *Italian Colors,* 570 U.S. at 236.

21. ***Sixth***, among the arbitrations filed against Amex in August 2023 were a substantial number of "damages only" cases, brought by merchants who are no longer in business and thus do not seek injunctive relief. In October 2023, Amex responded to these filings by amending the MOG to provide that a claimant seeking up to $100,000, in a damages only case, is entitled to "no discovery." October 2023 &

April 2024 MOGs §13.1(c)(vii). Under the operative clause, then, merchants must prosecute complex antitrust damages claims without a lick of disclosure – no documents, no depositions, and no expert report based on any discovery—while Amex is free to use all of the data, documents, executive testimony, and expert analysis that it wishes, including transactional data regarding the merchant claimant.

22. ***Finally***, Amex's arbitration agreement itself is a contract that unreasonably restrains trade in violation of Sherman Act § 1. The arbitration terms of the MOG are a vertical restraint ensuring that Amex's anti-steering rules are not subject to review in any forum that has the power and ability to enjoin their application. But for the arbitration terms, Amex's anti-steering rules would be subject to rescission – just as its competitors' rules were. The class-banning arbitration provision is a necessary and critical component of Amex's scheme to ensure that price competition does not break out in the business of providing card acceptance services to U.S. merchants.

III. JURISDICTION AND VENUE

23. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. § 1331, because this action seeks damages and injunctive relief under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, to redress and restrain violations of Section 1 of the Sherman Act, 15 U.S.C. § 1.

24. This Court has personal jurisdiction over the defendants because, among other things, they actively promote Amex-branded card acceptance services to

merchants in Massachusetts and have executed agreements containing the challenged NDPs with merchants located in Massachusetts.

25. Venue is proper in this district under 15 U.S.C. § 22, because the Defendants may be found or transact business within this district, and under 28 U.S.C. § 1391, because the events or omissions giving rise to the claims of representative plaintiffs occurred in this district.

IV. THE PARTIES

26. Plaintiff Pizza Hazel, Inc. is a corporation organized under Massachusetts law with its principal place of business in Lowell, Massachusetts. Pizza Hazel, Inc. owns and operates Pizza Hazel, a restaurant in Lowell, where it accepts all major payment cards including American Express.

27. Plaintiff Nunan Florist and Greenhouses Inc. is a corporation organized under Massachusetts law with its principal place of business in Georgetown, Massachusetts. Nunan Florist and Greenhouses Inc. owns and operates Nunan Florist and Greenhouses in Georgetown, where it accepts all major payment cards including American Express.

28. Plaintiff Skin Rejuvenation Center and Spa, Inc. is a corporation organized under Massachusetts law with its principal place of business in Danvers, Massachusetts. Skin Rejuvenation Center and Spa, Inc. owns and operates the Skin Rejuvenation Center and Spa in Danvers, where it accepts all major payment cards including American Express.

29. Defendant American Express Company is a New York corporation with its principal place of business in New York, New York.

30. Defendant American Express Travel Related Services Company, Inc. is a New York corporation, with its principal place of business in New York, New York, and is a wholly-owned subsidiary of American Express Company. American Express Travel Related Services Company, Inc. is generally responsible for all aspects of the payment card business conducted under the American Express brand, including the operation of the American Express network.

V. FACTUAL BACKGROUND

A. Overview

31. Each time a customer uses a credit card, the merchant pays a swipe fee, also known as a "merchant discount fee." For most U.S. merchants, the average merchant discount fee on credit-card transactions is more than 3% of the sale price. With a 3% merchant discount fee, if a customer buys an item for $100, the merchant will receive $97 in its bank account. The $3 discount fee is then retained by the card network—or, more accurately, split among the network, the card issuer, and the "merchant acquirer" or processor that services the merchant account.

32. On the American Express card network, the card issuer is usually Amex itself (although a handful of banks are licensed to issue some Amex-branded cards as well). Until the mid- 2010s, Amex also served as the exclusive (or nearly exclusive) acquirer for Amex transactions. As the merchant acquirer, Amex signed bilateral contracts with the merchant and was responsible for such matters as providing

hardware and software for card acceptance, depositing funds into the merchants account, and serving as the point of contact between the merchant and the Amex network.

33. In the mid-2010s, Amex began allowing third-party merchant acquirers, including the major acquirers who handle most Visa and Mastercard transactions in the U.S., to sign up new merchants for Amex acceptance and to take over existing small merchant accounts. Under this program, which Amex refers to as OptBlue, third-party acquirers have helped the Amex network grow by roughly 50% over the past decade, to almost nine million merchants. At this point, more than 99% of Amex-accepting merchants are OptBlue participants, accounting collectively for roughly 25% of all transaction volume.

34. Under OptBlue, Amex charges a "wholesale" rate to the acquirer, and the acquirer marks that rate up and charges its merchant client a retail merchant discount rate. So, for example, Amex might set the wholesale rate for a certain merchant category at 2.75% and the acquirer may charge the merchant 3%. Visa and Mastercard work much the same way. Those networks set a wholesale rate, consisting of the so-called "interchange fee" (which flows to the card-issuing bank) and certain network fees, and then the acquirer marks that wholesale price up and collects the all-in merchant discount fee. On all three networks, the vast majority of the merchant discount fee is comprised of the wholesale fees.

35. The acquiring market in the U.S. is highly competitive. Acquirers are constrained by market forces in the merchant discount rates they can charge

merchants, because merchants can and often do switch acquirers to save money.

36. But wholesale rates—and hence all-in merchant discount fees—are not set by competitive forces. Ordinary price competition does not operate in the card-acceptance business because anti-steering rules ensure that a network which lowers its price will not gain volume as a result.

37. Amex's anti-steering rules—which Amex refers to as its non-discrimination provisions, or "NDPs"—bar merchants from using discounts, surcharges, verbal prompting, signage, and other techniques to incentivize shoppers to use cheaper payment cards. Amex's NDPs restrain competition across the marketplace, on all brands. As discussed, the rules of Amex's competitor networks now *permit* merchants to offer a discount for using a competitor's cheaper credit card product, or to post signage indicating a payment-brand preference, or to reveal to shoppers the swipe fees the merchant incurs on the various credit card brands. But a merchant that accepts all major cards cannot do any of those things without violating Amex's NDPs.

38. In a competitive market, a firm that lowers its price will increase its sales volume, all else being equal. With the NDPs in place, however, a card network that offers merchants cheaper swipe fees than its competitors will not gain any transaction volume, even if it offers the same exact rewards to cardholders as its rivals do. Thus, Discover's CEO complained in sworn testimony that—because of anti-steering rules—"lowering your price" as a credit card network "does not drive incremental sales." Similarly, Amex's own head of merchant pricing has testified

that, in the U.S. card market, "no one's business strategy is to be cheaper than the next guy." And the sole reason why ordinary price competition does not work in the U.S. card market is Amex's NDPs. Were it not for the NDPs, card networks would compete with one another on the prices they offer both merchants and cardholders.

39. Not only do the NDPs thwart price competition among credit-card networks, but they absolutely foreclose important dimensions of competition among merchants. Merchants compete every day with one another on such dimensions as whether and how much to charge for shipping, or for parking, or wi-fi or any number of other services. These are important avenues of horizontal, inter-brand competition between merchants. Merchants would likewise compete with one another on the dimension of whether and how much to charge for card acceptance service. But the NDPs flatly foreclose any such competition.

B. Amex's NDPs

40. The plaintiffs and all other Amex-accepting merchants in the U.S. are obligated to follow Amex's non-discrimination provisions, which are set forth in § 3.2 of American Express's Merchant Operating Guide and are incorporated by reference or substantially mirrored in Amex's bilateral card acceptance agreements with larger (non-OptBlue) U.S. merchants. Amex also requires that third-party acquirers who offer Amex card acceptance to merchants must contractually obligate each merchant to follow the NDPs. *See also* MOG at § 1.2 (the MOG "sets forth the policies and procedures governing your acceptance of the American Express® Card. It is a part of,

and is hereby incorporated by reference into, the Merchant Agreement with your Merchant Services Provider").

41. Under Amex's NDPs, the merchant:

a. may not state a preference for any other credit card or type of card – e.g., the merchant may not say verbally or via signage that "we prefer Discover" or "we prefer debit cards" or "help us keep prices down, please use debit if you can";

b. may not reveal to its customers the cost it incurs to accept transactions on Amex and other networks, including debit, even if the information is accurate and truthful;

c. may not offer the customer a discount in exchange for using a competing credit card, such as Discover;

d. may not impose a "differential surcharge" on Amex transactions, meaning a surcharge in which at least one other credit card brand is surcharged at a lower amount than Amex or not at all; and

e. may not impose a "parity surcharge" on credit card transactions, meaning a surcharge in which the merchant assesses the same surcharge amount on all credit card brands and does not surcharge debit cards at all.

42. Amex's NDPs govern card acceptance on all brands across the entire U.S. marketplace. Amex has gone from being accepted at 60% or so of all credit-card

accepting merchants in 2013 to 99% today. Thus, because of the NDPs, some 99% of merchants that accept credit cards in the U.S. today are unable to offer a discount for using a credit card that has lower swipe fees, or to steer in favor of such cards verbally or via signage, or to disclose their acceptance costs to customers. Thus, even though Mastercard rules permit steering, a merchant cannot use verbal prompting or signage to steer a Mastercard holder to use debit because that practice would violate Amex's NDPs. Nor can the merchant offer discounts to induce a Visa cardholder to use Discover because that practice would violate Amex's NDPs. In sum, it makes no difference what Visa, Mastercard or Discover rules may permit. Amex's ban on steering controls what merchants may do across the entire U.S. marketplace.

43. Likewise, Amex's NDPs prevent surcharging on rival networks' credit card transactions as well as on Amex transactions. Visa and Mastercard previously maintained surcharge bans, but they dropped those anticompetitive rules in response to class litigation. *See In re Payment Card Interchange Fee & Merchant Discount Antitr. Litig.*, 986 F. Supp. 2d 207, 232 (E.D.N.Y. 2013). Now, the rules of both Visa and Mastercard provide that merchants may freely surcharge Visa or Mastercard transactions – but only if and when Amex drops its ban on surcharging. Mastercard's rules, for example, provide "the merchant may surcharge Mastercard Transactions [only] on the same terms under which [Amex] permits the merchant to surcharge [Amex] transactions." Visa's rules are the same, as are Discover's. Moreover, it gains a merchant nothing to impose surcharges specifically on the cards of Amex's

competitors, because that would only drive consumers to use Amex cards, which are generally more costly than other cards.

44. Merchants have testified that they would deeply value the opportunity to use incentives to shift transaction volume to cheaper cards, and to encourage card networks to lower fees in exchange for increased volume. Home Depot, for example, has testified that it would like to tell the card networks "to the extent you lower my costs, I could move volume your way." Southwest Airlines has testified that it wants "the competitive tool" of being able "to reward the credit card network that… offers [Southwest] the lowest price." Alaska Air has testified that it wants "tools to play one credit card network against the other," just as it does with vendors in all other facets of its business. None of these patently procompetitive strategies are possible with the NDPs in place.

C. History of Related Litigation

45. In *U.S. v. American Express*, 88 F. Supp. 3d 143 (E.D.N.Y. 2015) ("*Amex I*"), the U.S. Department of Justice and 17 states sued Amex, challenging its anti-steering rules. Following a six-week trial, the district court found that Amex's rules harmed competition because, among other things, they increased the price of transactions and prevented competitors from making inroads in the marketplace by offering lower prices. 88 F. Supp. 3d at 149. The court thus held that Amex's rules

constitute an unreasonable restraint of trade in violation of Section One of the Sherman Act.

46. On appeal, the U.S. Court of Appeals for the Second Circuit reversed. 838 F.3d 179 (2d Cir. 2016) ("*Amex II*"). The *Amex II* court accepted that the anti-steering rules increase the price of credit-card transactions to merchants, and that the rules have prevented competitors from gaining share by offering lower prices to merchants. But the Second Circuit ruled it is insufficient to show that the NDPs cause price increases *to merchants*, or that they prevent networks from competing based on offering lower prices *to merchants*. Rather, the plaintiffs were obliged to also present evidence of the effect on cardholders. If the increased costs to merchants are offset and outweighed by increased benefits provided to cardholders, the *Amex II* court reasoned, then the rules do not harm competition *overall*, taking cardholders and merchants together. And, the Second Circuit ruled, the government plaintiffs failed to adduce evidence on the cardholder side of the "two-sided market." Thus, for that reason alone, it reversed the trial court and directed judgment against the government. The Second Circuit's decision was then affirmed by the Supreme Court in *Ohio v. American Express,* 138 S. Ct. 2274 (2017).

47. Following *Amex II* and *Ohio*, courts have recognized a simple formula for determining whether a challenged rule has increased prices in a two-sided market. Courts now ask whether the price increase on one side of the market (to merchants, in this case) is outweighed by rebates and rewards provided to the other

side (to cardholders, in this case). *See, e.g., US Airways, Inc. v. Sabre Holdings Corp.*, 938 F.3d 43, 56 (2d Cir. 2019).

48. Likewise, to show competitive harm based on barriers to entry and expansion, courts must now ask whether the challenged rule prevents competitors from entering the market, or from gaining share in the market, by offering lower prices *on a two-sided basis*, and not simply on the merchant side. *Id.*

D. The NDPs Are Unlawful Under The Rule Of Reason.

49. This case is governed by the so-called "rule of reason" test for determining unlawful restraints of trade under antitrust law.

50. Under the rule of reason, the claimant bears the prima facie burden of showing harm to competition. In cases involving a two-sided market—such as the payment card markets—a claimant may satisfy this burden by adducing evidence that a challenged restraint has increased two-sided prices in the market, or that it has made entry or expansion in that market "extraordinarily difficult" for a firm that seeks to compete by offering lower two-sided prices.

51. Where the claimant provides direct evidence of harm to competition, the prima facie burden is satisfied.

52. Alternatively, where plaintiffs are unable to present direct evidence of harm to competition, they may satisfy their burden under the "indirect method" of proof, by showing that the defendant possesses market power in a rigorously defined market and that the restraint is "likely" to cause harm.

53. Here, plaintiffs will present real-world direct evidence showing that the NDPs increase the two-sided price of transactions and impose extraordinary barriers to entry and expansion in the relevant market. The relevant market for assessing harm to competition in this case can be defined either as (i) the U.S. market for credit and debit card transactions, or (ii) the U.S. market for credit-card transactions. It makes no difference in this case which of these definitions is employed. Additionally, plaintiffs will show that Amex has market power in the relevant market.

54. Once a plaintiff has made its prima facie showing of harm to competition, the burden shifts to the defendant to prove by a preponderance of the evidence that procompetitive benefits of the challenged restraint justify the harm to competition.

55. If the defendant can do that, the burden shifts back to the plaintiff to show that the procompetitive benefits could be achieved by means less restrictive of competition. In this case, there are no procompetitive justifications for the NDPs, and any potential justifications that Amex may identify can be achieved by means less restrictive of competition.

E. The NDPs Harm Competition By Creating Barriers To Entry And Barriers To Expansion.

56. The NDPs harm competition by making it impossible for new entrants or a maverick network to compete by offering lower merchant fees, even if that network also offers cardholder rewards on par with rival networks.

57. Evidence that a restraint makes it "extraordinarily difficult" to compete or enter based on offering lower two-sided prices is a "type[] of harm that [is]

cognizable when analyzing both sides of a two-sided platform." *US Airways*, 938 F.3d at 62 (citing *Ohio*, 138 S. Ct. at 2284). Here, the NDPs have made it "extraordinarily difficult" for a network to enter or expand in the market for credit-card transaction services by charging a lower two-sided price than its competitors charge.

58. Discover CEO Roger Hochschild has testified at length that Amex's NDPs and the since-rescinded similar rules of Visa and Mastercard fully thwarted attempts by Discover to use lower merchant prices, coupled with its industry-leading cash-back awards, to gain volume from its competitors. *See Amex I*, 88 F. Supp. 3d at 213-14.

59. After Visa and Mastercard dropped their rules, Mr. Hochschild testified that if Amex's NDPs were rescinded, Discover would once again want to "aggressively pursue a strategy of lowering our prices and providing incentives to merchants that would steer volume to Discover." Until that time, however, "a lowest-cost provider strategy cannot succeed in the network services market if merchants are unable to shift share among the various networks." *Amex I*, 88 F. Supp. 3d at 152.

60. For the same reasons, a new entrant into the card network business could not make inroads by offering cheaper service. This explains why there has not been a new general purpose credit card network since Discover's launch in 1985—a staggering length of time in any industry.

F. The NDPs Harm Competition By Increasing The Two-Sided Price Of Transactions.

61. Amex's NDPs further harm competition because they increase the cost of transactions on a two-sided basis. This conclusion is supported by abundant direct evidence.

62. First, when merchants are permitted to use steering tools like surcharges and discounts for specific credit-card brands, empirical evidence shows that many cardholders switch to cheaper payment products. When cardholders make that switch—e.g., to Discover, or to debit—the merchants realize savings that are easily quantifiable, based on publicly available data. The data also show that these merchant savings greatly outweigh any diminution in rewards to cardholders.

63. For example, when an Amex cardmember responds to a prompt (whether a differential surcharge or other form of steering) by switching to Discover for a given transaction, the merchant saves roughly 15% of the swipe fee it would have incurred on that transaction, and the cardholder enjoys rewards that are as rich or richer than those it would have gotten from Amex on the transaction. Thus, the bans on differential surcharging and other steering techniques increase the two-sided price of the transaction insofar as they thwart switching volume to cheaper credit card products.

64. Likewise, to the extent the NDPs block switching to debit, they increase the two-sided price. Direct empirical evidence shows that, when all credit cards are surcharged but debit cards are not (e.g., a "parity surcharge"), cardholders shift to debit in very significant numbers. On each transaction that shifts from Amex to debit, the merchant saves roughly 65% of what it would have paid in merchant fees.

The cardmember sacrifices rewards—because debit cards do not usually offer rewards—but that diminution is vastly outweighed by the merchant savings.

65. The rule against parity surcharging thus increases the two-sided price of the transaction, as a matter of direct evidence.

66. The fact that Amex's ban on surcharging increases two-sided prices is further evident from Amex's experience in Australia, which serves as a natural experiment. In the early 2000s, all credit card networks were forced to drop their surcharge bans by Australian regulatory authorities. At the time of the rule change, the average merchant discount fee on Amex was over 2.5% in Australia – similar to the U.S. Now, the average rate is roughly half that amount. Extensive real-world evidence shows that merchants of all sizes have routinely received substantial reductions in swipe fee levels to ensure they do not differentially surcharge Amex card transactions.

67. And Amex has *increased* its rewards offerings in Australia in the face of merchant steering and surcharging. As its longtime CEO Kenneth Chenault told investors, "we actually did have a decline in our discount rate" in Australia, after differential surcharging became permissible. "However," he emphasized, "we did not strip down the loyalty products, [instead] we actually strengthened them." The reason why is clear: rewards make cardholders more "resistant to steering," as Amex's worldwide pricing chief has testified. The Australian experience thus provides powerful additional evidence that bans on merchant steering and surcharging inflate the two-sided price of transactions.

68. Empirical evidence from the United States likewise shows that, after Visa rescinded its surcharge ban in 2013, some merchants used the threat of surcharging to extract significant rate concessions, with no corresponding offset to cardholder rewards. In other words, the two-sided price of credit card transactions dropped. *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-MD-1720 (MKB), 2024 WL 278565, at *22 (E.D.N.Y. Jan. 8, 2024) (finding that the "two-sided price fell after the elimination of the [No-]Surcharge Rule" by Visa and Mastercard and holding that this "is itself evidence that the two-sided price was supracompetitive"). While merchants are no longer able to extract such concessions from Visa or Mastercard (because the threat of any merchant dropping Amex in order to surcharge rivals' transactions at this point is simply not credible, given Amex's market power), the natural experiment of Visa from 2013 shows that NDPs increase the two-sided price.

69. Moreover, extensive direct evidence shows that, with the NDPs in place, the prices charged by Amex and its rivals are supracompetitive. Like Visa and Mastercard, Amex earns profits substantially "above those needed to compensate all factors of production." *Id.*, at *23. Elimination of the NDPs will have the effect of reducing Amex's stockholder profits—and not of reducing the benefits that Amex offers to its cardholders, which Amex regards as necessary to drive spending on the Amex network. Indeed, Amex executives recognize that, if Amex were to cut back on rewards spending, its fortunes would decline precipitously.

VI. CLASS ACTION ALLEGATIONS

70. Plaintiffs bring this action as a class action under Fed. R. Civ. P. 23(b)(2), to restrain Amex's ongoing unlawful practices (the "Injunctive Class"), and under Fed. R. Civ. P. 23(b)(3), for damages (the "Damages Class").

71. The Injunctive Class is comprised of all merchants that currently accept Amex cards via the OptBlue program.

72. The Damages Class includes all all merchants that currently accept Amex cards via the OptBlue program, plus merchants who have discontinued accepting Amex cards during the four-year period preceding the filing of this action.

73. Each of the Injunctive Class and the Damages Class are so numerous that joinder of all members is impracticable. The Injunctive Class alone contains more than eight million merchants.

74. With respect to each of the Injunctive Class and the Damages Class, there are questions of law or fact common to the class, including, among other things, whether Amex's NDPs have harmed competition in the relevant market; whether there exist non-pretextual procompetitive justifications for Amex's anticompetitive conduct; and whether any allegedly procompetitive objectives could be achieved by means less restrictive of competition than imposition of the NDPs.

75. The claims of the plaintiffs are typical of the claims of the members of each Class.

76. Plaintiffs and their counsel will fairly and adequately represent the interests of the Classes. Plaintiffs have retained counsel who are competent and experienced in federal antitrust and class action litigation.

77. Amex has acted and continues to act on grounds that are generally applicable to the Class, such that final injunctive relief with respect to the Injunctive Class as a whole is appropriate within the meaning of Fed. R. Civ. P. 23(b)(2).

78. Questions of law or fact common to members of the Damages Class predominate over any questions affecting only individual members, and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy, within the meaning of Fed. R. Civ. P. 23(b)(3).

79. The damages period in this case is four years. The members of the Damages Class are entitled to recover for overcharges incurred commencing on the date four years prior to the filing of this action and continuing through trial.

FIRST CLAIM FOR RELIEF

ON BEHALF OF THE INJUNCTIVE CLASS, FOR INJUNCTIVE RELIEF UNDER SECTION 16 OF THE CLAYTON ACT, BASED ON VIOLATION OF SHERMAN ACT SECTION 1

80. Plaintiffs repeat and reallege the foregoing paragraphs.

81. Amex's non-discrimination provisions and the Merchant Operating Guide and merchant contracts that incorporate the NDPs comprise unlawful contracts in restraint of trade, within the meaning of Section 1 of the Sherman Act, 15 U.S.C. § 1 (the "NDP Restraints").

82. Amex's class-banning arbitration provisions also comprise an unlawful contract in restraint of trade, within the meaning of Section 1 of the Sherman Act, 15 U.S.C. § 1 (the "Arbitration Restraints").

83. The Amex possesses market power such that the NDP Restraints and the Arbitration Restraints have the potential for genuine adverse effects on interbrand competition.

84. The NDP Restraints and the Arbitration Restraints have caused genuine adverse effects on interbrand competition, including (i) by increasing the two-sided price of transactions, and (ii) imposing substantial barriers to entry and expansion in the relevant market(s).

85. Plaintiffs and the Class have suffered injury to their business as a result of American Express's violation of the Sherman Act.

86. As a direct and foreseeable result of Defendants' willful and ongoing imposition and enforcement of Amex's non-discrimination provisions, the Injunctive Class has suffered irreparable injury for which there is no adequate remedy at law, including injuries that are likely to accumulate and continue if not enjoined.

87. Plaintiffs and the Class are entitled to injunctive relief pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26.

SECOND CLAIM FOR RELIEF

ON BEHALF OF THE DAMAGES CLASS, FOR DAMAGES UNDER SECTION 4 OF THE CLAYTON ACT, BASED ON VIOLATION OF SHERMAN ACT SECTION 1

88. Plaintiffs repeat and reallege the foregoing paragraphs.

89. The members of the Damages Class have each been injured in their business and property by reason of Amex's violations of the Sherman Antitrust Act, 15 U.S.C. § 1.

90. The members of the Damages Class have each suffered damages, measured by the amount that the plaintiff has paid to accept Amex cards during the Damages Period minus the amount that the plaintiff would have paid during that period if Amex did not impose the challenged anti-steering rules across the U.S. marketplace.

WHEREFORE, Plaintiffs seek:

A. Injunctive relief directing American Express to rescind its non-discrimination provisions, to an extent to be determined at trial; to modify accordingly all iterations of the card acceptance rules that Amex publishes on its websites, including the Merchant Operating Guide; and to publish information sufficient to educate the general public concerning the permissible scope of credit card steering and surcharging;

B. Damages in an amount to be determined at trial and tripled;

C. An Order directing the award of costs and attorneys' fees, pursuant to 15 U.S.C. §§ 15 and 26; and

D. Such other relief as this Court deems just and proper.

E. Plaintiffs demand trial by jury of all issues so triable.

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* *Pro hac vice motion forthcoming*