

**FILED**  
IN CLERK'S OFFICE  
U.S. DISTRICT COURT E.D.N.Y.

★ JUN 10 2008 ★

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK**

B.H.  
S.I

<p>RITE AID CORPORATION and RITE AID HDQTRS. CORP.,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">vs.</p> <p>AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC., and AMERICAN EXPRESS COMPANY,</p> <p style="text-align: center;">Defendants.</p>
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**08 23 15**

Civil Action No. \_\_\_\_\_

Jury Trial Demanded

**GLEESON, J.**

**J. ORENSTEIN, M.J.**

**COMPLAINT**

Plaintiffs Rite Aid Corporation and Rite Aid HDQTRS. Corp. (collectively "Rite Aid") bring this complaint against defendants, American Express Company ("American Express") and its wholly owned subsidiary American Express Travel Related Services Company, Inc. ("American Express Travel") (collectively "AmEx"), pursuant to the antitrust laws of the United States. For their complaint against defendants, plaintiffs state as follows:

**Nature of the Action**

1. This is a civil antitrust action challenging the legality under Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1 and 2) of certain rules imposed on the plaintiffs and other merchants by AmEx. Specifically, plaintiffs had an agreement with American Express Travel, dated December 30, 1996 and effective, as amended, through June 30, 2005 (the "Agreement"). During that time, the Agreement, and similar agreements that American Express Travel had with other merchants that accepted AmEx cards, required that the merchant abide by certain anti-steering rules. The anti-steering rules prohibit the plaintiffs and the other merchants from a)

doing anything that would lead - or “steer” - a retail purchaser to use a payment card product that costs the merchant less to accept than an AmEx card; b) offering to a retail customer, who has presented an AmEx card, any alternative payment card product that costs the merchant less to accept than an AmEx card; c) “criticizing” the AmEx card or services; d) publishing or stating a preference for any other payment card product that costs the merchant less to accept than an AmEx card; e) promoting the use of any other payment card that costs the merchant less to accept than an AmEx card; or f) refusing to accept for payment any payment card issued by AmEx or its affiliates or licensees and bearing the AmEx name, trademark, servicemark, or logo.

2. The purpose and effect of these anti-steering rules was to 1) prevent plaintiffs and other merchants from charging retail customers who use an AmEx card for the higher cost to the merchant of that payment card product; 2) prevent the merchants from discounting or lowering the price paid by retail customers who use payment products or methods that are less costly to the merchant than AmEx payment cards; and 3) prevent merchants from truthfully informing retail customers that their use of an AmEx payment card imposes higher costs on the merchant than other payment card products or payment methods and that those higher costs result in higher retail prices to consumers.

3. The anti-steering rules were anticompetitive in that they nullified the operation of the price mechanism by (1) precluding consumers from learning that AmEx is a higher-cost payment product; (2) preventing consumers from receiving any price reduction for using a lower-cost form of payment than an AmEx payment card; and (3) eliminating any economic or competitive incentive for AmEx to lower its prices to the merchant in order to avoid losing sales (measured in card transactions and/or card transaction volume).

4. The result of these anti-steering rules was that (1) the cost of using an AmEx card was opaque to the merchant and to the retail customer at the point of sale when the customer selected a payment method to use; (2) AmEx was able to evade and nullify the operation of the price mechanism that, in the absence of the anticompetitive steering rules, would have led merchants to charge lower prices to customers who used less costly payment methods than AmEx cards (or be able credibly to threaten to do so) which, in turn, would have caused AmEx to reduce the price it charged merchants to a competitive rate; (3) merchants, including the plaintiffs, were forced to raise the prices they charged to all customers -- even those who did not use an AmEx card -- in order to cover the high and anticompetitively elevated cost of transactions where the customer used an AmEx payment card; (4) AmEx was able to charge merchants supracompetitive prices for its payment card services and is further able to obtain and maintain monopoly power, which is the power to raise price substantially above the competitive level without losing so much sales volume so as to render the price increase unprofitable; and (5) consumer welfare was reduced as the supracompetitive prices charged by AmEx were necessarily incorporated into the retail prices paid by all consumers.

5. AmEx exploited its monopoly power, created and perpetuated by its anticompetitive steering rules, to charge retail merchants, including plaintiffs, supracompetitive monopoly prices for its payment cards services. Indeed, the anti-steering rules were created and enforced by AmEx for the specific anticompetitive purpose of insulating AmEx from price competition from other payment forms or services; obstructing the operation of the price mechanism as described in paragraphs 3-4 above; eliminating or dampening cross-elasticity of demand between AmEx and any other payment product, and allowing AmEx to maintain its

monopoly power so that it could continue to charge supracompetitive prices without losing sales to other payment card products or other payment methods. Thus, AmEx monopolized or attempted to monopolize the market for the sale of American Express payment services to merchants within the meaning of Section 2 of the Sherman Act (15 U.S.C. §2) and imposed on merchants anticompetitive contract terms that unreasonably restrained competition within the meaning of Section 1 of the Sherman Act (15 U.S.C. §1). Plaintiffs seek relief for the injury that they suffered as a result of AmEx's unlawful conduct.

**Parties**

6. Plaintiffs Rite Aid Corporation and Rite Aid HDQTRS. Corp. are corporations organized and existing under the laws of the State of Delaware, with their principal place of business at 30 Hunter Lane, Camp Hill, Pennsylvania 17011. Rite Aid and its affiliates own and operate approximately 5,000 drugstores in 31 states and the District of Columbia, including in this District.

7. From at least April 2002 through June 30, 2005, pursuant to the Agreement, Rite Aid accepted AmEx cards in payment for goods and services. During that time, Rite Aid paid AmEx supracompetitive, artificially inflated payment card fees as a result of the anticompetitive rules that the Agreement imposed on Rite Aid. Since July 1, 2005, Rite Aid has continued to accept AmEx cards pursuant to a different contract, but Rite Aid does not in this complaint complain of or seek relief from or in consequence of any AmEx conduct under that contract or any AmEx conduct occurring on or after July 1, 2005.

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

9. Defendant, American Express Travel is a Delaware corporation, with its principal place of business in New York, New York. American Express Travel is a wholly owned subsidiary of American Express and, during the relevant period, was actively managed and controlled by American Express.

10. American Express actively directed and participated in the anticompetitive acts alleged herein and determined that those acts be undertaken by itself and its wholly owned subsidiary, American Express Travel.

#### **Jurisdiction and Venue**

11. The claims set forth herein arise under Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2) and seek treble damages pursuant to Section 4 of the Clayton Act (15 U.S.C. §15(a)). This Court has subject matter jurisdiction over these claims pursuant to 28 U.S.C. §§ 1331 and 1337(a).

12. Venue is proper in this Court pursuant to Section 12 of the Clayton Act (15 U.S.C. §22) and 28 U.S.C. §1391, in that each defendant is an inhabitant of this District or is found and transacts business in this District.

#### **Nature of Trade and Commerce**

13. AmEx provided financial services in interstate commerce throughout the United States. In particular, AmEx provided payment card services to both consumers (*i.e.*, buyers) and to retail merchants (*i.e.*, sellers).

14. A “payment card” is a wallet-sized plastic card that a purchaser can present to a merchant in order to effectuate payment for a purchase transaction.

15. In order to provide payment card services, AmEx issued payment cards to millions of individuals and businesses, who are sometimes referred to herein as “cardholders.” AmEx and the cardholders agreed that when the cardholder presented an AmEx payment card to a merchant and the merchant accepted the card in payment for goods or services, AmEx would advance payment to the merchant and would bill the cardholder monthly in the amount of the cardholder’s AmEx payment card transactions. The cardholder then paid AmEx the billed amount pursuant to payment plans that were available for different types of AmEx payment cards. For example, the AmEx Gold Card and AmEx Platinum Card are charge cards, where the cardholder paid the full amount of the bill each month. Other of the AmEx payment cards were revolving credit cards, where the cardholder had the option of paying the bill in full or carrying a balance due and paying interest on the unpaid portion of the bill.

16. In addition to entering into agreements with cardholders for the issuance of payment cards, AmEx also entered into agreements with merchants for the acceptance of the AmEx payment cards. Pursuant to these agreements, the merchants agreed to obtain electronic authorization from AmEx to accept an AmEx payment card for a particular transaction and, if authorization was granted, to accept the AmEx payment card in satisfaction of payment for the goods and/or services. AmEx, in turn, agreed to pay the merchant the amount of the authorized transaction less a “merchant discount fee.” The merchant discount fee, which was retained by AmEx, was the price that AmEx charged the merchant for providing payment card services.

17. The vast majority of AmEx’s payment card services were delivered pursuant to the “Three-Party Model” described above. In this system, the three parties were AmEx, the cardholder, and the merchant.

18. AmEx also provided payment card services in the United States pursuant to a four-party model. In this system, an AmEx trademarked or logoed credit card was issued to a cardholder by a bank that had entered into a license with AmEx. The merchants that entered into acceptance agreements with AmEx were required by those agreements to accept all cards bearing the AmEx trademark or logo, including these bank-issued AmEx cards.

19. In this four-party model, AmEx paid the merchant the transaction amount less the merchant's usual discount fee. The issuing bank billed the cardholder for the amount of the transaction and paid that amount less an "issuer rate discount" to AmEx. Because the merchant discount fee (*i.e.*, the fee retained by AmEx) was a higher percentage of the transaction than the issuer rate discount (*i.e.*, the fee retained by the issuing bank), the difference between the two generated a positive return for AmEx.

20. During the relevant time, AmEx's business grew enormously both in terms of the number of sales being transacted with AmEx cards and the dollar volume being transacted with AmEx cards. This increase in the volume of AmEx's business and improved technology led to substantial reductions in AmEx's unit cost for providing payment card services to the plaintiffs and other merchants. In the absence of the anti-steering rules that are complained of herein, price competition would have prevented AmEx prices from rising so dramatically while its unit costs declined.

#### **The Anti-Steering Rules and Their Anticompetitive Effects**

21. There are a number of ways that a retailer can use the price mechanism to steer retail customers to less expensive and more efficient payment forms. These include:

- a) Offering the customer a discount for using a less expensive payment product such as a debit card, or a less expensive credit or charge card.

Such a discount would reward consumers who use less expensive payment products and drive consumers to such products. The resulting loss of business, or the threat thereof, would - if not prevented by the anti-steering rules - cause high-cost payment services providers, such as AmEx, either to lower their price or suffer the competitive consequence of lower sales;

- b) Imposing on customers who use a high-cost payment product, such as an AmEx Card, a surcharge on account of the additional cost to the merchant of accepting that high-cost payment product. Such a surcharge would invoke the price mechanism to dissuade many consumers from using expensive payment products and cause them to switch to less expensive payment forms. Again, the resulting loss of business, or threat thereof, would - if not prevented by the anti-steering rules - cause high-cost payment service providers, such as AmEx, to either lower their prices or suffer the competitive consequence of lower sales;
- c) Verbally advising the customer at the check-out counter that the payment product they have presented, such as an AmEx Card, is a high-cost product that results in higher consumer prices and asking the customer to use a less expensive payment product;
- d) Posting signage in the retail stores identifying and stating a preference for less expensive payment products and explaining that more expensive payment products result in higher consumer prices;
- e) Posting decals on entryway doors and signs inside the store with the logo or trademark of less expensive payment methods and not posting the logo or trademark of the more expensive payment products, such as AmEx Cards;
- f) Taking any other action to direct consumers away from more expensive and toward less expensive payment products that merchants would devise if they were not constrained by the anti-steering rules from doing so.

22. All of the agreements that AmEx entered into with merchants, including the Agreement with plaintiffs, strictly prohibited the merchants from engaging in any of these efficiency-enhancing, procompetitive practices and prevented the price mechanism from directing consumers to lower-cost payment services or methods.

23. More specifically, the Agreement prohibited plaintiffs from (1) offering a retail customer a discount for using a less-expensive payment product or payment card; (2) imposing a surcharge on retail customers who use AmEx's high-cost payment cards to effectuate purchase transactions; (3) truthfully informing customers that the AmEx payment cards are high-cost products that increase the merchants' costs of doing business and result in higher retail prices to consumers; (4) trying in any way to persuade, influence or steer a retail customer to use any alternative payment card; (5) refusing to accept any payment card bearing AmEx's trademark, servicemark or logo - regardless of its cost; (6) failing to mention, orally or in a sign, the AmEx card is a card that the merchant accepts if the merchant mentions any card at all; (7) offering to effectuate a sales transaction with any other charge, credit or payment card when presented with an AmEx card; (8) truthfully criticizing AmEx's high prices or payment card policies; (9) stating or publishing a preference for any other payment card or charge, credit or debit service; and (10) promoting any charge, credit, debit or other card service more actively than it promotes AmEx.

24. AmEx devoted significant resources to the aggressive enforcement of these anti-steering rules and canceled agreements with merchants who violated them by steering consumers to less expensive payment methods. AmEx preferred to lose a merchant account rather than permit a cardholder/consumer to knowingly choose to spend less money by using a less expensive payment product than an AmEx Card.

25. The intended purpose and actual effect of AmEx's anti-steering rules was to almost totally insulate AmEx from price competition from other providers of payment card services to merchants. A potential competitor might have offered high quality payment card services to merchants at a fraction of the price charged by AmEx, but this procompetitive

strategy would not have allowed the potential competitor to gain market share. This is because the anti-steering rules prevented merchants from using the price mechanism or truthful procompetitive market information to induce consumers to use the lower cost payment card product. Indeed, consumers, who decided which payment method to use, were unaware that alternative payment methods were less expensive and, in any event, were unable to experience any cost savings or price reduction by using the alternative payment card services.

26. The decision as to what payment option to use at the point of sale was made by the retail customer. The anti-steering rules ensured (1) that the cost to the merchant of the retail customer using an AmEx Card was unknown to the retail customer at the point of sale, and (2) that the customer had no economic incentive, such as the ability to receive a lower price, to use a less expensive payment method. Thus, the anti-steering rules allowed AmEx to extinguish completely the cross-elasticity of demand at the point of sale between its product and other payment card products such as MasterCard, Visa, or Discover; rendered AmEx virtually impervious to price competition; and allowed AmEx to maintain its monopoly power and continue to charge supracompetitive prices to merchants without losing any sales.

27. Theoretically, each individual merchant could, of course, have simply refused to accept AmEx Cards. As a practical matter, however, such a decision was not economically feasible or realistic. A great many of each plaintiffs' customers regularly used an AmEx Card and if the merchant stopped accepting AmEx Cards it would have lost many of those customers to competitive retailers. The profits lost as a result would have been greater than the anti-competitive overcharge suffered at the hands of AmEx. This is true for the vast majority of large retailers and retail chains in the United States.

28. In the absence of AmEx's anti-steering rules, the supra-competitive fees that AmEx was able to charge merchants for payment card services would have been greatly diminished. Merchants would have incurred lower fees and passed along the benefits to consumers in the form of lower prices.

29. The anti-steering rules ensure that merchants, who must recover their costs of doing business from the prices they charge, must raise prices to all customers, including cash customers, debit card users and those who would otherwise seek to avoid the high cost of AmEx's payment card services. In the absence of the anti-steering rules, the merchants, through discounting or surcharging, would have been free to impose the high AmEx charges only on customers who choose to use the expensive AmEx payment card. The price of goods and services to all other customers would have fallen because the merchant would have no longer needed to recover the cost of the high AmEx fees from all customers without regard to what payment method they employed.

30. The anti-steering rules also resulted in inefficient and anticompetitive subsidies running from the least affluent consumers to the most affluent. Because merchants must mark up the price of all goods to cover the cost of accepting AmEx's payment cards, the anti-steering rules effectively result in cash customers and users of other low-cost payment forms paying higher retail prices to cover the cost of payment card services and benefits, including frequent flyer miles, car rental insurance, free gifts and other rewards that are received by the AmEx cardholders.

31. The anti-steering rules had a substantially adverse effect on competition and resulted in higher prices and lower output than would have existed in the absence of those rules.

There were no procompetitive justifications for the anti-steering rules, and even if there were, there were less restrictive means for achieving any purported benefits.

**Market Definition and Monopoly Power**

32. The relevant geographic market is the United States.

33. The relevant product market is AmEx payment card services provided to merchants, including authorization, settlement and clearance. Due to the anticompetitive conduct alleged herein there was virtually no cross-elasticity of demand between AmEx payment card services and other payment card services such as MasterCard, Visa or Discover or between AmEx payment card services and other methods of payment. AmEx's anti-steering rules eliminated any incentive by other payment card vendors to charge lower fees than AmEx (and vice-versa) because those lower fees would not have been visible to consumers and thus would not have led to increased usage. Those rules thereby severed the connection that would exist in a properly functioning market between higher merchant fees and lower AmEx card usage.

34. In the relevant market, the seller was AmEx and the purchasers were merchants, such as plaintiffs. The "merchant discount fee" was the price paid to AmEx by the merchants for the payment card services. Retail merchants as a group paid billions of dollars per year to purchase AmEx payment card services.

35. AmEx possessed monopoly power within the relevant market. More specifically, during the relevant time AmEx had the power to raise the merchant discount fee substantially above the competitive level without losing sufficient business to make the price increase unprofitable. It was not economically feasible for merchants simply to stop accepting AmEx payment cards, and the price mechanism could not be used to steer AmEx cardholders to lower

cost payment methods due to the anti-steering rules. As a result, AmEx had the power to raise its prices to supracompetitive monopoly levels unfettered by competitive pressure and completely shielded from the proper functioning of the price mechanism or cross-elasticity of demand.

36. AmEx's monopoly power was demonstrated by, among other things: (1) its ability to raise the merchant discount fees without losing business to other sellers or other payment methods; (2) its ability to price discriminate by charging different merchant classes and types significantly different prices; (3) its ability to substantially raise prices while its unit costs were decreasing and sales volume increasing; (4) the fact that increasing prices led to increasing sales, instead of decreasing sales; (5) AmEx's ability to set the merchant discount fee without regard to the cost of providing payment card services to the merchants and without fear that its increasing prices would cause retail customers to switch to any other payment card or method; (6) its abnormally high price/cost margin; and (7) its ability to force merchants to accept the anti-steering rules.

37. There were significant barriers to entering into the business of providing payment card services. No company has successfully entered this line of business since 1985. Entry is estimated to cost over \$1 billion to overcome the impediment to market entry of having enough cardholders to induce merchants to accept the cards before having signed up enough merchants to induce consumers to become cardholders - and vice versa. In addition, as explained in detail above, the existence of the anti-steering rules was itself a significant barrier to entry.

**Violations Alleged**

**Count I:**

**Monopolization in Violation of §2 of the Sherman Act**

38. Plaintiffs reallege paragraph 1-37 as set forth above.

39. During the relevant time, AmEx possessed monopoly power in the relevant market and willfully exercised that power to set the prices that merchants paid for AmEx payment card services at levels that were substantially above the competitive rate.

40. AmEx willfully obtained and maintained monopoly power by anticompetitive conduct, namely, the imposition on merchants of its anti-steering rules. Those anti-steering rules ensured that AmEx was immune to the competitive impact of the price mechanism and that no competitor took sales transactions away from AmEx by offering lower prices or more efficient payment card services.

41. AmEx's monopoly power was not achieved by superior skill, business acumen or historic accident.

42. As a direct and proximate result of AmEx's anticompetitive conduct, the plaintiffs were injured in their business or property by (1) being compelled to adhere to the anti-steering rules, and (2) being charged supracompetitive, monopoly prices by AmEx that far exceeded the prices that would have obtained in an unfettered market in the absence of the anti-steering rules.

**Count II:**

**Attempt to Monopolize in Violation of §2 of the Sherman Act**

43. Plaintiffs reallege paragraphs 1-42 as set forth above.

44. During the relevant period there was a dangerous probability that AmEx would obtain or maintain monopoly power in the relevant market.

45. AmEx devised and imposed the anti-steering rules on plaintiffs and other merchants for the specifically anticompetitive purpose and with the specifically anticompetitive intent of insulating itself from price competition and obtaining and maintaining monopoly power.

46. As a direct and proximate result of AmEx's anticompetitive conduct, the plaintiffs were injured in their business or property by (1) being compelled to adhere to the anti-steering rules, and (2) being charged supracompetitive, monopoly prices by AmEx that far exceed the prices that would obtain in an unfettered market in the absence of the anti-steering rules.

**Count III:**

**Unreasonable Restraint of Competition in Violation of §1 of the Sherman Act**

47. Plaintiffs reallege paragraphs 1-46 as set forth above.

48. During the relevant time AmEx possessed and exercised market power in the relevant market.

49. The anti-steering rules that AmEx imposed on the plaintiffs and other merchants constituted contracts that unreasonably restrained competition within the meaning of the rule of reason and violated §1 of the Sherman Act (15 U.S.C. §1). Among other things, the anti-steering rules imposed on plaintiffs and other merchants were intended to and did restrain and eliminate *interbrand* price competition from other providers of payment card services and raised the prices paid by the plaintiffs and other merchants to AmEx to supracompetitive levels.

50. The anti-steering rules were also anticompetitive because plaintiffs and other merchants, in order to be profitable, were required to increase their own prices to consumers in order to recover the excessive costs imposed on them by AmEx. Plaintiffs and other merchants

unilaterally determine their own retail prices, but in doing so each must take into consideration the higher costs it incurs due to AmEx's anticompetitive conduct.

51. There were no procompetitive justifications for the anti-steering rules and, even if such justifications existed, any possible procompetitive benefits could have been obtained by less restrictive alternatives.

52. As a direct and proximate result of AmEx's imposition and enforcement of the anti-steering rules, the plaintiffs were injured in their business or property by (1) being compelled to adhere to the anti-steering rules, and (2) being charged supracompetitive prices by AmEx that far exceeded the prices that would have obtained in an unfettered market in the absence of the anti-steering rules.

**Prayer for Relief**

WHEREFORE, Plaintiffs pray for judgment against the Defendants and for the following relief:

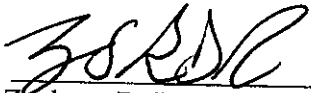
- A. An order awarding damages to the plaintiffs in an amount to be determined at trial and then trebled pursuant to §4 of the Clayton Act (15 U.S.C. §15);
- B. An order awarding plaintiffs their reasonable attorneys' fees and costs of suit; and
- C. Such other and further relief as the Court deems just, consistent with the limitation noted in Paragraph 7 above.

**JURY DEMAND**

Plaintiffs hereby demand a trial by jury of all issues so triable.

Dated: June 9, 2008

HANGLEY ARONCHICK SEGAL & PUDLIN

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HDQTRS. CORP.,

Plaintiffs,

vs.

AMERICAN EXPRESS TRAVEL RELATED  
SERVICES COMPANY, INC., and AMERICAN  
EXPRESS COMPANY,

Defendants.

**08 23 15**

Civil Action No. \_\_\_\_\_

**GLEESON, J.**


**J. ORENSTEIN, M.J.**

NOTICE OF RELATED CASE

Pursuant to the Local Rules of this Court, Plaintiffs Rite Aid Corporation and Rite Aid HDQTRS. Corp. state that this case is related to the cases coordinated at Case No. 1:05-MD-01720-JG-JO because this case involves similar facts and raises many of the same legal issues raised by those cases and its consideration as a related case will avoid unnecessary duplication of judicial effort.

Dated: June 9, 2008

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