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# [***In re Am. Express Anti-Steering Rules Antitrust Litig.***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HT9-40M1-F04F-02GJ-00000-00&context=)

United States District Court for the Eastern District of New York

January 7, 2016, Decided; January 7, 2016, Filed

11-MD-2221 (NGG) (RER); 08-CV-2315 (NGG) (RER); 08-CV-2316 (NGG) (RER); 08-CV-2317 (NGG) (RER); 08-CV-2380 (NGG) (RER); 08-CV-2406 (NGG) (RER); 11-CV-0337 (NGG) (RER); 11-CV-0338 (NGG) (RER)

**Reporter**

2016 U.S. Dist. LEXIS 3332 \*; 2016-1 Trade Cas. (CCH) P79,457; 2016 WL 748089

IN RE: AMERICAN EXPRESS ANTI-STEERING RULES ***ANTITRUST*** LITIGATION. This Document Relates to: All Individual Merchant Plaintiff Actions, 08-CV-2315 (NGG) (RER), 08-CV-2316 (NGG) (RER), 08-CV-2317 (NGG) (RER), 08-CV-2380 (NGG) (RER), 08-CV-2406 (NGG) (RER), 11-CV-0337 (NGG) (RER), 11-CV-0338 (NGG) (RER)

**Prior History:** [*Rite-Aid Corp. v. Am. Express Travel Related Servs. Co., 2008 U.S. Dist. LEXIS 59545 (E.D.N.Y., Aug. 4, 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4T5D-3030-TXFR-J341-00000-00&context=)

**Core Terms**

merchant, damages, collateral estoppel, summary judgment, services, statute of limitations, no-surcharge, parties, discount rate, laches defense, ***antitrust***, discount, speculative, summary judgment motion, purchaser, issues, speculative damages, overt act, four-year, surcharge, insurer, laches, prices, tolled, continuing violation, card, genuine issue of material fact, overcharges, Injunction, estimated

**Case Summary**

**Overview**

HOLDINGS: [1]-Collateral estoppel did not apply to establish the market definition in ***antitrust*** actions by merchants alleging that credit card issuers unlawfully prohibited differential surcharging, since a prior action by federal and state governments against the issuers which determined the relevant market was the subject of a pending appeal on the merits; [2]-Under the continuing violation exception to the statute of limitations for ***antitrust*** actions, the merchants' claims for damages were not barred to the extent they were based on fee adjustments that issuers implemented within the limitations before the merchants filed suit; [3]-The merchants presented sufficient evidence to permit inferences that the issuers' no-surcharge rule had an adverse effect on competition and that the pro-competitive justifications of the no-surcharge rule did not outweigh any anticompetitive effects.

**Outcome**

Motion for summary judgment denied, and cross-motion denied in part and reserved in part.

**LexisNexis® Headnotes**

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > Pretrial Matters > Conferences > Pretrial Orders

[***HN1***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HT9-40M1-F04F-02GJ-00000-00&context=&link=LNHNREFclscc1)[] **Amendment of Pleadings, Leave of Court**



Although [*Fed. R. Civ. P. 15*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F103-00000-00&context=) provides that a court should freely grant leave to amend when justice so requires, [*Fed. R. Civ. P. 15(a)(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F103-00000-00&context=), [*Fed. R. Civ. P. 16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8JD7-4G92-8T6X-702K-00000-00&context=) further provides that a pre-trial scheduling order may be modified only for good cause and with the judge's consent, [*Fed. R. Civ. P. 16(b)(4)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8JD7-4G92-8T6X-702K-00000-00&context=). Good cause depends in part on the diligence of the moving party. In addition, the court may, in its discretion, consider other relevant factors including, in particular, whether allowing the amendment of the pleading at the stage of the litigation will prejudice defendants. In addition, even where the movant shows good cause under [*Rule 16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8JD7-4G92-8T6X-702K-00000-00&context=), it must also show that the amendment would comply with Rule 15—in other words, that amendment is not futile, is not the product of undue delay or bad faith, and would not overly prejudice the non-movant.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

[***HN2***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HT9-40M1-F04F-02GJ-00000-00&context=&link=LNHNREFclscc2)[] **Estoppel, Collateral Estoppel**



The doctrine of non-mutual offensive collateral estoppel allows a plaintiff who was not a party to a prior judgment to use that judgment offensively to prevent a defendant from relitigating issues resolved in the earlier proceeding. Issue preclusion may only apply where: (1) the issues in both proceedings are identical; (2) the issue in the prior proceeding was actually litigated and actually decided; (3) there was full and fair opportunity to litigate in the prior proceeding; and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits. The specific legal claims asserted in the second action need not be identical to those asserted in the prior action for collateral estoppel to apply. With respect to the fourth element, an issue is necessary to a prior judgment for issue preclusion purposes if its disposition was the basis for the holding with respect to the issue and not mere dictum.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

[***HN3***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HT9-40M1-F04F-02GJ-00000-00&context=&link=LNHNREFclscc3)[] **Estoppel, Collateral Estoppel**



In the Second Circuit, each of two alternative, independent grounds for a prior holding is given effect for collateral estoppel purposes. However, if an appeal is taken and the appellate court affirms on one ground and disregards the other, there is no collateral estoppel as to the unreviewed ground. In addition, in the Second Circuit, a lower court judgment is final for purposes of collateral estoppel even while an appeal of that judgment is pending.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

[***HN4***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HT9-40M1-F04F-02GJ-00000-00&context=&link=LNHNREFclscc4)[] **Estoppel, Collateral Estoppel**



A trial court has broad discretion in determining whether collateral estoppel should apply, and it should not apply the doctrine where doing so would be unfair to a defendant. For example, application of collateral estoppel may be unfair where the defendant did not have incentive to litigate the issue(s) in the first action vigorously or could not foresee follow-on actions, where the resolution of the first action is inconsistent with other previous decisions, or where procedural opportunities available to the defendant in the second action were unavailable in the first action and may have led to a different result. Finally, where collateral estoppel does apply, a plaintiff may use its application as a basis for seeking summary judgment in full or in part.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

[***HN5***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HT9-40M1-F04F-02GJ-00000-00&context=&link=LNHNREFclscc5)[] **Summary Judgment, Evidentiary Considerations**



Summary judgment must be granted when there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. [*Fed. R. Civ. P. 56(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2421-6N19-F165-00000-00&context=). A fact is material if it might affect the outcome of the suit under the governing law. No genuine dispute of material fact exists if the record taken as a whole could not lead a rational trier of fact to find for the non-moving party. In evaluating a motion for summary judgment, the court is required to construe the evidence in the light most favorable to the non-moving party and to draw all reasonable inferences in its favor.

Civil Procedure > ... > Summary Judgment > Evidentiary Considerations > Absence of Essential Element

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

[***HN6***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HT9-40M1-F04F-02GJ-00000-00&context=&link=LNHNREFclscc6)[] **Evidentiary Considerations, Absence of Essential Element**



A party moving for summary judgment bears the initial burden to show an absence of genuine factual dispute. Summary judgment will be granted if the opposing party then fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. To defeat summary judgment, the opposing party must do more than demonstrate some metaphysical doubt as to the material facts, and may not rely on conclusory allegations.

***Antitrust*** & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

***Antitrust*** & Trade Law > Sherman Act > Defenses

[***HN7***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HT9-40M1-F04F-02GJ-00000-00&context=&link=LNHNREFclscc7)[] **Actual Monopolization, Claims**



The date on which a monopolization claim accrues depends on the relationship that the plaintiff has with the defendant as either a competitor or as a purchaser of the defendant's products and services. A purchaser plaintiff's cause of action accrues when he or she actually pays an overcharge.

***Antitrust*** & Trade Law > Clayton Act > Defenses

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Laches

[***HN8***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HT9-40M1-F04F-02GJ-00000-00&context=&link=LNHNREFclscc8)[] **Clayton Act, Defenses**



After the laches period based on a statute of limitations expires, a court may, in its discretion, allow an action for equitable relief to go forward if it determines: (1) that sufficient reasons cognizable in equity excuse the delay; or (2) that the delay caused defendants no prejudice.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Laches

[***HN9***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HT9-40M1-F04F-02GJ-00000-00&context=&link=LNHNREFclscc9)[] **Affirmative Defenses, Laches**



A defendant has been prejudiced by a delay when the assertion of a claim available some time ago would be inequitable in light of the delay in bringing that claim. Specifically, prejudice ensues when a defendant has changed his position in a way that would not have occurred if the plaintiff had not delayed.

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For Supervalu Inc., Plaintiff (1:11md2221): David P. Germaine, PRO HAC VICE, Vanek Vickers & Masini, P.C., Chicago, IL USA; James Almon, Kenny Nachwalter, P.A., Miami, FL USA; John P. Bjork, Vanek Vickers & Masini, Chicago, IL USA; Joseph Michael Vanek, PRO HAC VICE, Vanek, Vickers & Masini, P.C., Chicago, IL USA; Linda P. Nussbaum, Grant & Eisenhofer**[\*12]** P.A., New York, NY USA; Mitchell H. Macknin, Sperling & Slater, P.C., Chicago, IL USA; Paul E. Slater, Sperling Slater & Spitz, Chicago, IL USA; Richard A. Arnold, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; Susan R. Schwaiger, Grant & Eisenhofer, PA., New York, NY USA.

For Cvs Pharmacy, Inc., Plaintiff (1:11md2221): David P. Germaine, PRO HAC VICE, Vanek Vickers & Masini, P.C., Chicago, IL USA; James Almon, Kenny Nachwalter, P.A., Miami, FL USA; John P. Bjork, Vanek Vickers & Masini, Chicago, IL USA; Joseph Michael Vanek, PRO HAC VICE, Vanek, Vickers & Masini, P.C., Chicago, IL USA; Linda P. Nussbaum, Grant & Eisenhofer P.A., New York, NY USA; Mitchell H. Macknin, Sperling & Slater, P.C., Chicago, IL USA; Paul E. Slater, Sperling Slater & Spitz, Chicago, IL USA; Richard A. Arnold, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; Robert N. Kaplan, Kaplan, Kilsheimer & Fox, LLP, New York, NY USA; Susan R. Schwaiger, Grant & Eisenhofer, PA., New York, NY USA.

For Bi-Lo, Llc, Plaintiff (1:11md2221): David P. Germaine, Vanek Vickers & Masini, P.C., Chicago, IL USA; Eric Bloom, Hangley Aronchick Segal Pudlin & Schiller, Harrisburg, PA USA; James Almon, Kenny Nachwalter, P.A.,**[\*13]** Miami, FL USA; Linda P. Nussbaum, Grant & Eisenhofer P.A., New York, NY USA; Maureen Smith Lawrence, PRO HAC VICE, Hangley Aronchick Segal Pudlin & Schiller, Philadelphia, PA USA; Paul E. Slater, Sperling Slater & Spitz, Chicago, IL USA; Richard A. Arnold, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; Zachary R. Davis, Hangley Aronchick Segal & Pudlin, Philadelphia, PA USA.

For H.E. Butt Grocery Company, Plaintiff (1:11md2221): Brian K. O'Bleness, Stinson Morrison Hecker LLP, Kansas City, MO USA; David P. Germaine, Vanek Vickers & Masini, P.C., Chicago, IL USA; Douglas H. Patton, Kenny Nachwalter, P.A., Miami, FL USA; James Almon, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; Linda P. Nussbaum, Grant & Eisenhofer P.A., New York, NY USA; Paul E. Slater, Sperling Slater & Spitz, Chicago, IL USA; Richard A. Arnold, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA.

For The Kroger Co., Plaintiff (1:11md2221): David P. Germaine, Vanek Vickers & Masini, P.C., Chicago, IL USA; Douglas H. Patton, Kenny Nachwalter, P.A., Miami, FL USA; James Almon, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; Kenny**[\*14]** Nachwalter, Miami, FL USA; Paul E. Slater, Sperling Slater & Spitz, Chicago, IL USA; Richard A. Arnold, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA.

For Safeway Inc., Plaintiff (1:11md2221): David P. Germaine, Vanek Vickers & Masini, P.C., Chicago, IL USA; Douglas H. Patton, Kenny Nachwalter, P.A., Miami, FL USA; James Almon, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; Kenny Nachwalter, Miami, FL USA; Paul E. Slater, Sperling Slater & Spitz, Chicago, IL USA; Richard A. Arnold, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA.

For Ahold U.S.A. Inc., Plaintiff (1:11md2221): David P. Germaine, Vanek Vickers & Masini, P.C., Chicago, IL USA; Douglas H. Patton, Kenny Nachwalter, P.A., Miami, FL USA; James Almon, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; Kenny Nachwalter, Miami, FL USA; Paul E. Slater, Sperling Slater & Spitz, Chicago, IL USA; Richard A. Arnold, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA.

For Albertson's Llc, Plaintiff**[\*15]** (1:11md2221): David P. Germaine, Vanek Vickers & Masini, P.C., Chicago, IL USA; Douglas H. Patton, Kenny Nachwalter, P.A., Miami, FL USA; James Almon, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; Kenny Nachwalter, Miami, FL USA; Paul E. Slater, Sperling Slater & Spitz, Chicago, IL USA; Richard A. Arnold, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA.

For Hy-Vee, Inc., Plaintiff (1:11md2221): David P. Germaine, Vanek Vickers & Masini, P.C., Chicago, IL USA; Douglas H. Patton, Kenny Nachwalter, P.A., Miami, FL USA; James Almon, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; Kenny Nachwalter, Miami, FL USA; Paul E. Slater, Sperling Slater & Spitz, Chicago, IL USA; Richard A. Arnold, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA.

For The Great Atlantic & Pacific Tea Company Inc., Plaintiff (1:11md2221): David P. Germaine, Vanek Vickers & Masini, P.C., Chicago, IL USA; James Almon, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; Kenny Nachwalter, Miami, FL USA; Paul E. Slater, Sperling Slater & Spitz, Chicago,**[\*16]** IL USA; Richard A. Arnold, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA.

For Treehouse, Inc., Plaintiff (1:11md2221): Brian G. Weber, Johns, Flaherty & Collins, S.C., La Crosse, WI; Jason S. Kilene, PRO HAC VICE, Gustafson Gluek PLLC, Minneapolis, MN USA; Joseph G. Veenstra, Johns, Flaherty & Collins, S.C., La Crosse, WI USA.

For Il Forno, Inc., Plaintiff (1:11md2221): Gary B. Friedman, LEAD ATTORNEY, Friedman Law Group LLP, New York, NY USA; Mark Reinhardt, LEAD ATTORNEY, Reinhardt Wendorf & Blanchfield, St. Paul, MN USA; Benjamin D. Brown, PRO HAC VICE, Cohen, Milstein, Sellers & Toll, P.L.L.C, Washington, DC USA; David A. Young, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Washington, DC USA; J. Douglas Richards, Cohen Milstein Sellers and Toll PLLC, New York, NY USA; R. Alexander Saveri, Saveri & Saveri, Inc., San Francisco, CA USA; Robert Winslow Cohen, Robert W Cohen, APC Law Offices, Los Angeles, CA USA; Scott H. Levy, Cohen Milstein Sellers & Toll PLLC, New York, NY USA; Tracey L. Kitzman, Cohen Milstein Sellers & Toll PLLC, New York, NY USA.

For National Supermarkets Association, Inc., on behalf**[\*17]** of its membership, and all other similarly situated persons, Plaintiff (1:11md2221): Benjamin D. Brown, PRO HAC VICE, Cohen, Milstein, Sellers & Toll, P.L.L.C, Washington, DC USA; David A. Young, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Washington, DC USA; Gary B. Friedman, Friedman Law Group LLP, New York, NY USA; J. Douglas Richards, Cohen Milstein Sellers and Toll PLLC, New York, NY USA; Noah Shube, New York, NY USA; Tracey L. Kitzman, Cohen Milstein Sellers & Toll PLLC, New York, NY USA.

For Plaintiffs, All Class Plaintiffs, Plaintiff (1:11md2221): Bernard Persky, Labaton Sucharow LLP, New York, NY USA; David P. Germaine, PRO HAC VICE, Vanek Vickers & Masini, P.C., Chicago, IL USA; Jason S. Kilene, PRO HAC VICE, Gustafson Gluek PLLC, Minneapolis, MN USA; Rachel Kopp, Spector Roseman Kodroff & Willis PC, Philadelphia, PA USA; Steven J. Greenfogel, Lite DePalma Greenberg LLC, Philadelphia, PA USA.

For The Marcus Corporation, Plaintiff (1:11md2221): Mark Reinhardt, LEAD ATTORNEY, Reinhardt Wendorf & Blanchfield, St. Paul, MN USA; Christopher William Hellmich, PRO HAC VICE, Hellmich Law Offices, Costa Mesa, CA USA; Dean Martin Solomon, Levitt & Kaizer, New York, NY USA; Gary**[\*18]** B. Friedman, Friedman Law Group LLP, New York, NY USA; Joe R. Whatley, Jr., Whatley Drake & Kallas LLC, New York, NY USA; Read K. McCaffrey, The Law Offices of Marc Seldin Rosen, Baltimore, MD USA; Richard P. Rouco, Quinn Connor Weaver Davies & Rouco, Birmingham, AL USA; Tracey L. Kitzman, Cohen Milstein Sellers & Toll PLLC, New York, NY USA.

For Bill Mccauley, Plaintiff (1:11md2221), Pro se.

For Read Mccaffrey, Plaintiff (1:11md2221), Pro se.

For Hillary Jaynes, Plaintiff (1:11md2221): Joseph J. Tabacco, Jr., LEAD ATTORNEY, BERMAN DEVALERIO, San Francisco, CA USA.

For Anthony Oliver, Plaintiff (1:11md2221): Joseph J. Tabacco, Jr., LEAD ATTORNEY, BERMAN DEVALERIO, San Francisco, CA USA.

For Bernadette Martin, Plaintiff (1:11md2221): Joseph J. Tabacco, Jr., LEAD ATTORNEY, BERMAN DEVALERIO, San Francisco, CA USA.

For Bryan Huey, Plaintiff (1:11md2221): Joseph J. Tabacco, Jr., LEAD ATTORNEY, BERMAN DEVALERIO, San Francisco, CA USA.

For James Eaton, Plaintiff (1:11md2221): Joseph J. Tabacco, Jr., LEAD ATTORNEY, BERMAN DEVALERIO, San Francisco, CA USA.

For Paul Kashishian, Plaintiff (1:11md2221): Joseph J. Tabacco, Jr., LEAD ATTORNEY, BERMAN DEVALERIO, San Francisco, CA USA.

For Gianna Valdes, Plaintiff**[\*19]** (1:11md2221): Joseph J. Tabacco, Jr., LEAD ATTORNEY, BERMAN DEVALERIO, San Francisco, CA USA.

For Chad Tintrow, Plaintiff (1:11md2221): Joseph J. Tabacco, Jr., LEAD ATTORNEY, BERMAN DEVALERIO, San Francisco, CA USA.

For Matthew Moriarty, Plaintiff (1:11md2221): Joseph J. Tabacco, Jr., LEAD ATTORNEY, BERMAN DEVALERIO, San Francisco, CA USA.

For Andrew Amend, Plaintiff (1:11md2221): Kim Elaine Miller, LEAD ATTORNEY, Kahn Gauthier Swick, LLC, New York, NY USA; Melinda Ann Nicholson, LEAD ATTORNEY, Kahn Swick & Foti, LLC, Madisonville, LA USA.

For Igor Gelman, Plaintiff (1:11md2221): Kim Elaine Miller, LEAD ATTORNEY, Kahn Gauthier Swick, LLC, New York, NY USA; Melinda Ann Nicholson, LEAD ATTORNEY, Kahn Swick & Foti, LLC, Madisonville, LA USA.

For Zachary Draper, Plaintiff (1:11md2221): Kim Elaine Miller, LEAD ATTORNEY, Kahn Gauthier Swick, LLC, New York, NY USA; Melinda Ann Nicholson, LEAD ATTORNEY, Kahn Swick & Foti, LLC, Madisonville, LA USA.

For Shawn O'Keefe, Plaintiff (1:11md2221): Joseph J. Tabacco, Jr., LEAD ATTORNEY, BERMAN DEVALERIO, San Francisco, CA USA.

For Francisco Robleto, Jr., Plaintiff (1:11md2221): Joseph J. Tabacco, Jr., LEAD ATTORNEY, BERMAN DEVALERIO, San Francisco, CA USA.**[\*20]**

For Michael Thomas Reid, Plaintiff (1:11md2221): Joseph J. Tabacco, Jr., LEAD ATTORNEY, BERMAN DEVALERIO, San Francisco, CA USA.

For Plymouth Oil Corp., Plaintiff (1:11md2221): Scott Allan Martin, Hausfeld LLP, New York, NY USA.

For American Express Travel Related Services Company, Inc, Defendant (1:11md2221): Peter T. Barbur, LEAD ATTORNEY, Cravath Swaine Moore LLP, Ny, NY USA; Alanna Rutherford, Boies, Schiller & Flexner LLP, New York, NY USA; Athena N. Cheng, Cravath, Swaine & Moore LLP, New York, NY USA; Damien Jerome Marshall, Boies, Schiller & Flexner, LLP(NYC), New York, NY USA; Daniel Ryan, Hinshaw & Culbertson Llp, Chicago, IL USA; David John Hanus, Hinshaw & Culbertson, LLP, Milwaukee, WI USA; Donald L. Flexner, PRO HAC VICE, Boies, Schiller & Flexner LLP, New York, NY USA; Elizabeth L. Grayer, Cravath, Swaine & Moore LLP, New York, NY USA; Eric Brenner, Boies, Schiller & Flexner LLP, New York, NY USA; Evan R. Chesler, Cravath, Swaine & Moore, New York, NY USA; John Francis LaSalle, Boies Schiller & Flexner LLP, New York, NY USA; Kevin J Orsini, Cravath, Swaine & Moore LLP, New York, NY USA; Matthew S. Tripolitsiotis, Boies Schiller & Flexner LLP, Armonk, NY USA; Philip M. Bowman,**[\*21]** Boies, Schiller & Flexner LLP, New York, NY USA; Philip C. Korologos, Boies, Schiller & Flexner LLP, New York, NY USA; Robert M. Cooper, Boies, Schiller & Flexner LLP, Washington, DC USA; Tamara Rubb, PRO HAC VICE, Cravath, Swaine & Moore LLP, New York, NY USA; William T. Thomas, Boies Schiller & Flexner, Fort Lauderdale, FL USA.

For American Express Company, Defendant (1:11md2221): Peter T. Barbur, LEAD ATTORNEY, Cravath Swaine Moore LLP, Ny, NY USA; Alanna Rutherford, Boies, Schiller & Flexner LLP, New York, NY USA; Athena N. Cheng, Cravath, Swaine & Moore LLP, New York, NY USA; Damien Jerome Marshall, Boies, Schiller & Flexner, LLP(NYC), New York, NY USA; Daniel Ryan, Hinshaw & Culbertson Llp, Chicago, IL USA; David John Hanus, Hinshaw & Culbertson, LLP, Milwaukee, WI USA; Donald L. Flexner, PRO HAC VICE, Boies, Schiller & Flexner LLP, New York, NY USA; Elizabeth L. Grayer, Cravath, Swaine & Moore LLP, New York, NY USA; Eric Brenner, Boies, Schiller & Flexner LLP, New York, NY USA; Evan R. Chesler, Cravath, Swaine & Moore, New York, NY USA; John Francis LaSalle, Boies Schiller & Flexner LLP, New York, NY USA; Kevin J Orsini, Cravath, Swaine & Moore LLP, New York, NY USA; Matthew**[\*22]** S. Tripolitsiotis, Boies Schiller & Flexner LLP, Armonk, NY USA; Philip M. Bowman, Boies, Schiller & Flexner LLP, New York, NY USA; Philip C. Korologos, Boies, Schiller & Flexner LLP, New York, NY USA; Robert M. Cooper, Boies, Schiller & Flexner LLP, Washington, DC USA; Tamara Rubb, PRO HAC VICE, Cravath, Swaine & Moore LLP, New York, NY USA; William T. Thomas, Boies Schiller & Flexner, Fort Lauderdale, FL USA.

For Susan Burdette, Defendant (1:11md2221): Kim Elaine Miller, LEAD ATTORNEY, Kahn Gauthier Swick, LLC, New York, NY USA; Melinda Ann Nicholson, LEAD ATTORNEY, Kahn Swick & Foti, LLC, Madisonville, LA USA.

For Government Plaintiffs in 10-Cv-4496, Interested Party (1:11md2221): Anne E. Schneider, Attorney General of Missouri, Jefferson City, MO USA; Mark Hamer, Department of Justice, Washington, DC USA.

For Target Corporation, Interested Party (1:11md2221): Alycia Nadine Broz, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY USA; Michael J. Canter, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA.

For Staples, Inc., Interested Party (1:11md2221):**[\*23]** Alycia Nadine Broz, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY USA; Michael J. Canter, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA.

For The Bon-Ton Stores, Inc., Interested Party (1:11md2221): Alycia Nadine Broz, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY USA; Michael J. Canter, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA.

For Willkie Farr & Gallagher Llp, Interested Party (1:11md2221): Robert J. Jossen, LEAD ATTORNEY, Dechert LLP, New York, NY USA.

For Gary Friedman, Interested Party (1:11md2221): Samuel Issacharoff, Samuel Issacharoff, Esq., New York, NY USA; Theresa Trzaskoma, Brune & Richard LLP, New York, NY USA.

For Dfs Services Llc, Interested Party (1:11md2221): Jennifer M. Selendy, LEAD ATTORNEY, Kirkland & Ellis, New York, NY USA.

For Discover Home Loans, Inc., Interested Party (1:11md2221): Jennifer M. Selendy, LEAD ATTORNEY, Kirkland & Ellis, New York, NY USA.

For**[\*24]** Discover Bank, Interested Party (1:11md2221): Jennifer M. Selendy, LEAD ATTORNEY, Kirkland & Ellis, New York, NY USA.

For Squire Patton Boggs (Us) Llp, Interested Party (1:11md2221): Mitchell Rand Berger, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC USA; Thomas Michael Guiffre, LEAD ATTORNEY, Patton Boggs LLP, Washington, DC USA.

For Hausfeld, Llp, Interested Party (1:11md2221): Michael D. Hausfeld, LEAD ATTORNEY, PRO HAC VICE, Hausfeld LLP, Washington, DC USA; Scott Allan Martin, LEAD ATTORNEY, Hausfeld LLP, New York, NY USA.

For Prof. Myriam Gilles, Interested Party (1:11md2221): Noah Shube, New York, NY USA.

For 7-Eleven, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Academy, Ltd., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For**[\*25]** Affiliated Foods Midwest Cooperative, Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Aldo US Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For American Eagle Outfitters, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Barnes & Noble, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Barnes & Noble College**[\*26]** Booksellers, Llc, Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Bealls, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Best Buy Stores, L.P., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Boscovs, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Brookshire Grocery Company, Objector (1:11md2221): Adam Owen**[\*27]** Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Buc-Ees Ltd., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For The Buckle, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Dillards, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Coborns Incorporated, Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan**[\*28]** Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Dagostino Supermarkets, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Drury Hotels Company, Llc, Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Euromarket Designs, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Meadowbrook, L.L.C., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon**[\*29]** LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Express, Llc, Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Hmshost Corporation, Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Ikea North America Services, Llc, Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Lowes Companies, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone,**[\*30]** Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Martins Super Markets, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For National Grocers Association, Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Petsmart, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Recreational Equipment, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP,**[\*31]** New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Republic Services, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Urban Outfitters, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Wal-Mart Stores, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Whole Foods Market Group, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey**[\*32]** Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Whole Foods Market Rocky Mountain/Southwest, L.P., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Whole Foods Market California, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Mrs. Goochs Natural Food Markets, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Whole Food Company, Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York,**[\*33]** NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Whole Foods Market Pacific Northwest, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Wfm-Wo, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Wfm Northern Nevada, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Wfm Hawaii, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder,**[\*34]** Constantine Cannon LLP, New York, NY USA.

For Wfm Southern Nevada, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Macy's Inc., Objector (1:11md2221): Alycia Nadine Broz, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY USA; Michael J. Canter, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA.

For Kohl's Corporation, Objector (1:11md2221): Alycia Nadine Broz, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY USA; Michael J. Canter, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA.

For The Tjx Companies, Inc., Objector (1:11md2221): Alycia Nadine Broz, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY USA; Michael**[\*35]** J. Canter, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA.

For J.C. Penney Corporation, Inc., Objector (1:11md2221): Alycia Nadine Broz, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY USA; Michael J. Canter, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA.

For Office Depot, Inc., Objector (1:11md2221): Alycia Nadine Broz, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY USA; Michael J. Canter, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA.

For L Brands, Inc., Objector (1:11md2221): Alycia Nadine Broz, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY USA; Michael J. Canter, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA.

For Big Lots Stores, Inc., Objector (1:11md2221):**[\*36]** Alycia Nadine Broz, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY USA; Michael J. Canter, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA.

For Pns Stores, Inc., Objector (1:11md2221): Alycia Nadine Broz, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY USA; Michael J. Canter, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA.

For C.S. Ross Company, Objector (1:11md2221): Alycia Nadine Broz, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY USA; Michael J. Canter, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA.

For Closeout Distribution, Inc., Objector (1:11md2221): Alycia Nadine Broz, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY USA; Michael J. Canter, Vorys, Sater, Seymour**[\*37]** and Pease LLP, Columbus, OH USA; Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA.

For Acena Retail Group, Inc., Objector (1:11md2221): Alycia Nadine Broz, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY USA; Michael J. Canter, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA.

For Abercrombie & Fitch Co., Objector (1:11md2221): Alycia Nadine Broz, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY USA; Michael J. Canter, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA.

For Officemax Incorporated, Objector (1:11md2221): Alycia Nadine Broz, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY USA; Michael J. Canter, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA.

For Saks Incorporated, Objector (1:11md2221): Alycia Nadine Broz, Vorys,**[\*38]** Sater, Seymour and Pease LLP, Columbus, OH USA; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY USA; Michael J. Canter, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA.

For Chico's Fas, Inc., Objector (1:11md2221): Alycia Nadine Broz, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY USA; Michael J. Canter, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA.

For Luxottica U.S. Holdings Corp., Objector (1:11md2221): Alycia Nadine Broz, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY USA; Michael J. Canter, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA.

For American Signature, Inc., Objector (1:11md2221): Alycia Nadine Broz, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY USA; Michael J. Canter, Vorys, Sater, Seymour and Pease LLP,**[\*39]** Columbus, OH USA; Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA.

For National Retail Federation, Objector (1:11md2221): Alycia Nadine Broz, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY USA; Michael J. Canter, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA.

For Kevin S. Scheunemann, Objector (1:11md2221), Pro se, Kewaskum, WI USA.

For Home Depot U.S.A., Inc., Objector (1:11md2221): Alison Berkowitz Prout, PRO HAC VICE, Bondurant Mixson & Elmore, LLP, Atlanta, GA USA; Frank M. Lowrey, PRO HAC VICE, Bondurant Mixson & Elmore, LLP, Atlanta, GA USA.

For The Buckeye Institute For Public Policy Solutions, Objector (1:11md2221): Adam E. Schulman, LEAD ATTORNEY, PRO HAC VICE, Competitive Enterprise Institute, Washingion, DC USA.

For Brenda Howell, Objector (1:11md2221): Denise H. Gibbon, LEAD ATTORNEY, PRO HAC VICE, Attorney at Law, New York, NY USA.

For Blue Cross Blue Shield Entities, Objector (1:11md2221): Adam P. Feinberg, LEAD ATTORNEY, Miller & Chevalier Chartered, Washington, DC USA; Anthony F. Shelley, LEAD ATTORNEY,**[\*40]** Miller & Chevalier Chartered, Washington, DC USA.

For Wellpoint, Inc., Objector (1:11md2221): Adam P. Feinberg, LEAD ATTORNEY, Miller & Chevalier Chartered, Washington, DC USA; Anthony F. Shelley, LEAD ATTORNEY, Miller & Chevalier Chartered, Washington, DC USA.

For Unlimited Vacations And Cruises, Inc., Objector (1:11md2221): John Jacob Pentz, III, LEAD ATTORNEY, PRO HAC VICE, John J. Pentz, Esq., Sudbury, MA USA.

For Lasko Enterprises, Inc., Objector (1:11md2221): John Jacob Pentz, III, LEAD ATTORNEY, PRO HAC VICE, John J. Pentz, Esq., Sudbury, MA USA.

For Annamarie Falvo, Objector (1:11md2221): John Jacob Pentz, III, LEAD ATTORNEY, PRO HAC VICE, John J. Pentz, Esq., Sudbury, MA USA.

For Alaska Airlines, Inc., Objector (1:11md2221): David P. Germaine, Vanek Vickers & Masini, P.C., Chicago, IL USA; Jason A. Zweig, Hagens Berman Sobol Shapiro LLP, New York, NY USA; Joseph Michael Vanek, Vanek, Vickers & Masini, P.C., Chicago, IL USA; Paul E. Slater, Sperling Slater & Spitz, Chicago, IL USA.

For Southwest Airlines, Inc., Objector (1:11md2221): David P. Germaine, Vanek Vickers & Masini, P.C., Chicago, IL USA; Jason A. Zweig, Hagens Berman Sobol Shapiro LLP, New York, NY USA; Joseph Michael**[\*41]** Vanek, Vanek, Vickers & Masini, P.C., Chicago, IL USA; Paul E. Slater, Sperling Slater & Spitz, Chicago, IL USA.

For Restoration Hardware, Inc., Objector (1:11md2221): Joe V. Demarco, DeVore & DeMarco LLP, New York, NY USA.

For Lord & Taylor Acquisitions, Inc., Objector (1:11md2221): Gregory Alan Clarick, LEAD ATTORNEY, Clarick Gueron Reisbaum LLP, New York, NY USA; Alycia Nadine Broz, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Michael J. Canter, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA.

For United States of America, Objector (1:11md2221): Gregg I. Malawer, Department of Justice, ***Antitrust*** Division, Washington, DC USA.

For Amazon.Com, Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Ashley Furniture Industries Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Costco Wholesale Corp., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Footlocker, Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For The Gap, Inc., Objector**[\*42]** (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Marathon Petroleum Company LP, Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Michaels Stores, Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For National Association of Convenience Stores, Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Panda Restaurant Group, Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Panera, Llc, Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Racetrac Petroleum, Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Retail Industry Leaders Association, Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Roundy's Supermarkets, Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Sears Holdings Corporation, Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Speedway Llc, Objector (1:11md2221): Jeffrey**[\*43]** Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Starbucks Corporation, Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Stein Mart, Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For The Wet Seal, Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Yum! Brands, Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Mills Motor, Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Mills Auto Enterprises, Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Willmar Motors, L.L.C., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Mills Auto Center, Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Fleet And Farm of Alexandria, Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Fleet Wholesale Supply of Fergus Falls, Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon**[\*44]** LLP, New York, NY USA.

For Fleet And Farm of Green Bay, Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Fleet And Farm of Menomonie, Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Mills Fleet Farm Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Fleet And Farm of Manitowoc, Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Fleet And Farm of Plymouth, Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Fleet And Farm Supply Co. of West Bend, Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Fleet And Farm of Waupaca, Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Mills E-Commerce Enterprises, Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Brainerd Lively Auto, L.L.C., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Newegg, Inc., Objector (1:11md2221): David P. Germaine,**[\*45]** Vanek Vickers & Masini, P.C., Chicago, IL USA; Jason A. Zweig, Hagens Berman Sobol Shapiro LLP, New York, NY USA; Joseph Michael Vanek, Vanek, Vickers & Masini, P.C., Chicago, IL USA; Paul E. Slater, Sperling Slater & Spitz, Chicago, IL USA.

For Airtran Airways, Inc., Objector (1:11md2221): David P. Germaine, Vanek Vickers & Masini, P.C., Chicago, IL USA; Jason A. Zweig, Hagens Berman Sobol Shapiro LLP, New York, NY USA; Joseph Michael Vanek, Vanek, Vickers & Masini, P.C., Chicago, IL USA; Paul E. Slater, Sperling Slater & Spitz, Chicago, IL USA.

For Dsw Inc., Objector (1:11md2221): David P. Germaine, Vanek Vickers & Masini, P.C., Chicago, IL USA; Jason A. Zweig, Hagens Berman Sobol Shapiro LLP, New York, NY USA; Joseph Michael Vanek, Vanek, Vickers & Masini, P.C., Chicago, IL USA; Paul E. Slater, Sperling Slater & Spitz, Chicago, IL USA.

For Assistech Special Needs, Objector (1:11md2221), Pro se, Tucson, AZ USA.

For Les Petits Bisous! Llc, Objector (1:11md2221), Pro se, Havre De Grace, MD USA.

For Bailey H. Squier Associates, Objector (1:11md2221), Pro se, Burleson, TX USA.

For The Crow Hill Company, Inc., Objector (1:11md2221), Pro se, Highland, NY USA.

For Sales Growth Specialists, Objector**[\*46]** (1:11md2221), Pro se, Long Lake, MN USA.

For Sports Coverage, Inc., Objector (1:11md2221), Pro se, Dallas, TX USA.

For Sigmapac, Objector (1:11md2221), Pro se, Fairfax, VA USA.

For The Fuel Foundation, Objector (1:11md2221), Pro se, Fairfax, VA USA.

For Ports Petroleum Company Inc., doing business as Fuel Mart, Objector (1:11md2221), Pro se, Wooster, OH USA.

For Brooks Brothers Group, Inc., Objector (1:11md2221), Pro se, New York, NY USA.

For Rue21, Inc., Objector (1:11md2221), Pro se, Warrendale, PA USA.

For The Estee Lauder Companies, Inc., Objector (1:11md2221), Pro se, New York, NY USA.

For New Vista,Llc, Objector (1:11md2221), Pro se, North Little Rock, AR USA.

For Sigma, Objector (1:11md2221), Pro se, Fairfax, VA USA.

For Diamond State Oil, Llc, Objector (1:11md2221), Pro se, North Little Rock, AR USA.

For Coulson Oil Company, Inc., Objector (1:11md2221), Pro se, North Little Rock, AR USA.

For New Neptune, Llc, Objector (1:11md2221), Pro se, North Little Rock, AR USA.

For Cumberland Farms, Inc., Objector (1:11md2221), Pro se, Framingham, MA USA.

For Gulf Oil Limited Partnership, Objector (1:11md2221), Pro se, Framingham, MA USA.

For Rr #1 Tx, Llc, Objector (1:11md2221), Pro se, North Little**[\*47]** Rock, AR USA.

For Port Cities Oil, Llc, Objector (1:11md2221), Pro se, North Little Rock, AR USA.

For Cracker Barrel Old Country Store, Inc., Objector (1:11md2221), Pro se, Lebanon, TN USA.

For Petroplus, Llc, Objector (1:11md2221), Pro se, North Little Rock, AR USA.

For New Mercury, Llc, Objector (1:11md2221), Pro se, North Little Rock, AR USA.

For Superstop Stores, Llc, Objector (1:11md2221), Pro se, North Little Rock, AR USA.

For O'Reilly Automotive, Inc., Objector (1:11md2221), Pro se, Springfield, MO USA.

For Autozone, Inc., Objector (1:11md2221), Pro se, Memphis, TN USA.

For Spirit Airlines, Inc., Objector (1:11md2221), Pro se, Miramar, FL USA.

For Bluegalaxy Digital, Objector (1:11md2221), Pro se, Beavercreek, OH USA.

For The Comic King, Objector (1:11md2221), Pro se, Melrose, MA USA.

For Dairy Queen, Objector (1:11md2221), Pro se, Kewaskum, WI USA.

For Hot Topic, Inc., Objector (1:11md2221), Pro se, City Of Industry, CA USA.

For Erich Neumann, Objector (1:11md2221), Pro se, Miami, FL USA.

For Skeeter's Automotive Repair, Objector (1:11md2221), Pro se, Santa Ana, CA USA.

For Pacific Sunwear of California, Inc., Objector (1:11md2221), Pro se, Anaheim, CA USA.

For Prestigiousbullion/Coppercapowns,**[\*48]** Objector (1:11md2221), Pro se, Millsboro, DE USA.

For Kathy Goodhart-Walker, Objector (1:11md2221), Pro se, Benson, AZ USA.

For Christopher & Banks Corporation, Objector (1:11md2221), Pro se, Plymouth, MN USA.

For Fl Snyder And Son Inc., Objector (1:11md2221), Pro se, Albany, OR USA.

For The Children's Place Retail Stores, Inc., Objector (1:11md2221), Pro se, Secaucus, NJ USA.

For Akamaru Japanese Restaurant, Objector (1:11md2221), Pro se, Visalia, CA USA.

For Family Express Corporation, Objector (1:11md2221), Pro se, Valparaiso, IN USA.

For Incredible Creations, Objector (1:11md2221), Pro se, Buford, GA USA.

For The Water Brewerey, Inc., Objector (1:11md2221), Pro se, Costa Mesa, CA USA.

For The Water Brewerey, Inc., Objector (1:11md2221): Scott A. Kron, LEAD ATTORNEY, PRO HAC VICE, Kron & Card LLP, Laguna Hills, CA USA.

For Belk, Inc., Objector (1:11md2221), Pro se, Charlotte, NC USA.

For Andersson Technologies Llc, Objector (1:11md2221), Pro se, Phoenixville, PA USA.

For Ntt Corporation, Objector (1:11md2221), Pro se, Los Angeles, CA USA.

For Swarovski North America Limited, Objector (1:11md2221), Pro se, Cranston, RI USA.

For Shabakas, Objector (1:11md2221), Pro se, Clinton, MS USA.

For Tiffany**[\*49]** And Company, Objector (1:11md2221), Pro se, New York, NY USA.

For I.L. "lonnie" Morris, Cpa & Company, Objector (1:11md2221), Pro se, Plano, TX USA.

For Siringo Optometry Associates, Pllc, Objector (1:11md2221), Pro se, Denver, CO USA.

For Arthur Howard, Ph.D., Objector (1:11md2221), Pro se, Hemet, CA USA.

For Rite Aid Corporation, Plaintiff (1:08cv2315): Steve D. Shadowen, LEAD ATTORNEY, Hangley Aronchick Segal & Pudlin, Harrisburg, PA USA; Eric Bloom, Hangley Aronchick Segal & Pudlin, Harrisburg, PA USA; Jason L. Reimer, PRO HAC VICE, Hangley Aronchick Segal & Pudlin, Harrisburg, PA USA; Linda P. Nussbaum, Grant & Eisenhofer P.A., New York, NY USA.

For Rite Aid Hdqtrs.Corp., Plaintiff (1:08cv2315): Steve D. Shadowen, LEAD ATTORNEY, Hangley Aronchick Segal & Pudlin, Harrisburg, PA USA; Hangley Aronchick Segal & Pudlin, Harrisburg, PA USA; Jason L. Reimer, PRO HAC VICE, Hangley Aronchick Segal & Pudlin, Harrisburg, PA USA; Linda P. Nussbaum, Grant & Eisenhofer P.A., New York, NY USA.

For Walgreen Co, Plaintiff (1:08cv2315): James Almon, Kenny Nachwalter, P.A., Miami, FL USA.

For American Express Travel Related Services Company, Inc., Defendant (1:08cv2315): Evan R. Chesler, LEAD ATTORNEY,**[\*50]** Cravath, Swaine & Moore, New York, NY USA; Philip M. Bowman, LEAD ATTORNEY, Boies, Schiller & Flexner LLP, New York, NY USA; Philip C. Korologos, LEAD ATTORNEY, Boies, Schiller & Flexner LLP, New York, NY USA; Eric Brenner, Boies, Schiller & Flexner LLP, New York, NY USA; Kevin J Orsini, Cravath, Swaine & Moore LLP, New York, NY USA.

For American Express Company, Defendant (1:08cv2315): Evan R. Chesler, LEAD ATTORNEY, Cravath, Swaine & Moore, New York, NY USA; Philip M. Bowman, LEAD ATTORNEY, Boies, Schiller & Flexner LLP, New York, NY USA; Philip C. Korologos, LEAD ATTORNEY, Boies, Schiller & Flexner LLP, New York, NY USA; Eric Brenner, Boies, Schiller & Flexner LLP, New York, NY USA; Kevin J Orsini, Cravath, Swaine & Moore LLP, New York, NY USA.

For Cvs Pharmacy, Inc., Plaintiff (1:08cv2316): Linda P. Nussbaum, LEAD ATTORNEY, Grant & Eisenhofer P.A., New York, NY USA; Mitchell H. Macknin, LEAD ATTORNEY, Sperling & Slater, P.C., Chicago, IL USA; Paul E. Slater, LEAD ATTORNEY, Sperling Slater & Spitz, Chicago, IL USA; Robert N. Kaplan, LEAD ATTORNEY, Kaplan, Kilsheimer & Fox, LLP, New York, NY USA; David P. Germaine, PRO HAC VICE, Vanek Vickers & Masini, P.C., Chicago, IL USA; Joseph**[\*51]** Michael Vanek, PRO HAC VICE, Vanek, Vickers & Masini, P.C., Chicago, IL USA.

For American Express Travel Related Services Company, Inc., Defendant (1:08cv2316):: Philip M. Bowman, LEAD ATTORNEY, Boies, Schiller & Flexner LLP, New York, NY USA; Philip C. Korologos, LEAD ATTORNEY, Boies, Schiller & Flexner LLP, New York, NY USA; Eric Brenner, Boies, Schiller & Flexner LLP, New York, NY USA.

For American Express Company, Defendant (1:08cv2316):: Philip M. Bowman, LEAD ATTORNEY, Boies, Schiller & Flexner LLP, New York, NY USA; Philip C. Korologos, LEAD ATTORNEY, Boies, Schiller & Flexner LLP, New York, NY USA; Eric Brenner, Boies, Schiller & Flexner LLP, New York, NY USA.

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For American Express Travel Related Services Company, Inc., Defendant (1:08cv2317): Philip**[\*52]** M. Bowman, LEAD ATTORNEY, Boies, Schiller & Flexner LLP, New York, NY USA; Philip C. Korologos, LEAD ATTORNEY, Boies, Schiller & Flexner LLP, New York, NY USA; Eric Brenner, Boies, Schiller & Flexner LLP, New York, NY USA.

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For Bi-Lo, Llc, Plaintiff (1:08cv2380): Steve D. Shadowen, LEAD ATTORNEY, Hangley Aronchick Segal & Pudlin, Harrisburg, PA USA; Eric Bloom, Hangley Aronchick Segal & Pudlin, Harrisburg, PA USA; Jason L. Reimer, PRO HAC VICE, Hangley Aronchick Segal & Pudlin, Harrisburg, PA USA; Linda P. Nussbaum, Grant & Eisenhofer P.A., New York, NY USA.

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For H.E. Butt Grocery Company, Plaintiff (1:08cv2406): Douglas H. Patton, LEAD ATTORNEY, Kenny Nachwalter, P.A., Miami, FL USA; William Jay Blechman, LEAD ATTORNEY, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; Brian K. O'Bleness, Stinson Morrison Hecker LLP, Kansas City, MO USA; David E. Everson, PRO HAC VICE, Stinson Morrison Hecker LLP, Kansas City, MO USA; James Almon, Kenny Nachwalter, P.A., Miami, FL USA; Linda P. Nussbaum, Grant & Eisenhofer P.A., New York, NY USA; Richard A. Arnold, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA.

For American Express Travel Related Services Company, Inc., Defendant (1:08cv2406): Philip M. Bowman, LEAD ATTORNEY, Boies, Schiller & Flexner LLP, New York, NY USA; Philip C. Korologos, LEAD ATTORNEY, Boies, Schiller & Flexner LLP, New York, NY USA; Eric Brenner, Boies, Schiller & Flexner LLP, New York, NY USA.

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For The Kroger Co., Plaintiff (2:11cv337): Douglas H. Patton, Kenny Nachwalter, P.A., Miami, FL USA; James Almon, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; Kenny Nachwalter, Miami, FL USA; Richard A. Arnold, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA.

For Safeway Inc., Plaintiff (2:11cv337): Douglas H. Patton, Kenny Nachwalter, P.A., Miami, FL USA; James Almon, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; Kenny Nachwalter, Miami, FL USA; Richard A. Arnold, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA.

For Ahold U.S.A., Inc., Plaintiff (2:11cv337): Douglas H. Patton, Kenny Nachwalter, P.A., Miami, FL USA; James Almon, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; Kenny Nachwalter, Miami, FL USA; Richard A. Arnold, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter,**[\*55]** P.A., Miami, FL USA.

For Albertson's Llc, Plaintiff (2:11cv337): Douglas H. Patton, Kenny Nachwalter, P.A., Miami, FL USA; James Almon, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; Kenny Nachwalter, Miami, FL USA; Richard A. Arnold, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA.

For Hy-Vee, Inc., Plaintiff (2:11cv337): Douglas H. Patton, Kenny Nachwalter, P.A., Miami, FL USA; James Almon, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; Kenny Nachwalter, Miami, FL USA; Richard A. Arnold, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA.

For The Great Atlantic & Pacific Tea Company, Inc., Plaintiff (2:11cv337): Douglas H. Patton, Kenny Nachwalter, P.A., Miami, FL USA; James Almon, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; Kenny Nachwalter, Miami, FL USA; Richard A. Arnold, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA.

For American Express Travel Related Services Company, Inc., Defendant (2:11cv337): Donald L. Flexner, Boies, Schiller**[\*56]** & Flexner LLP, New York, NY USA; Eric Brenner, Boies, Schiller & Flexner LLP, New York, NY USA.

For American Express Company, Defendant (2:11cv337): Donald L. Flexner, Boies, Schiller & Flexner LLP, New York, NY USA; Eric Brenner, Boies, Schiller & Flexner LLP, New York, NY USA.

For Meijer, Inc., Plaintiff (2:11cv338): David P. Germaine, PRO HAC VICE, Vanek Vickers & Masini, P.C., Chicago, IL USA; Joseph Michael Vanek, PRO HAC VICE, Vanek, Vickers & Masini, P.C., Chicago, IL USA; Linda P. Nussbaum, Grant & Eisenhofer P.A., New York, NY USA; Mitchell H. Macknin, Sperling & Slater, P.C., Chicago, IL USA; Paul E. Slater, Sperling Slater & Spitz, Chicago, IL USA; Susan R. Schwaiger, Grant & Eisenhofer, PA., New York, NY USA.

For Publix Super Markets, Inc., Plaintiff (2:11cv338): David P. Germaine, PRO HAC VICE, Vanek Vickers & Masini, P.C., Chicago, IL USA; Joseph Michael Vanek, PRO HAC VICE, Vanek, Vickers & Masini, P.C., Chicago, IL USA; Linda P. Nussbaum, Grant & Eisenhofer P.A., New York, NY USA; Mitchell H. Macknin, Sperling & Slater, P.C., Chicago, IL USA; Paul E. Slater, Sperling Slater & Spitz, Chicago, IL USA; Susan R. Schwaiger, Grant & Eisenhofer, PA., New York, NY USA.

For Raley's,**[\*57]** Plaintiff (2:11cv338): David P. Germaine, PRO HAC VICE, Vanek Vickers & Masini, P.C., Chicago, IL USA; Joseph Michael Vanek, PRO HAC VICE, Vanek, Vickers & Masini, P.C., Chicago, IL USA; Linda P. Nussbaum, Grant & Eisenhofer P.A., New York, NY USA; Mitchell H. Macknin, Sperling & Slater, P.C., Chicago, IL USA; Paul E. Slater, Sperling Slater & Spitz, Chicago, IL USA; Susan R. Schwaiger, Grant & Eisenhofer, PA., New York, NY USA.

For Supervalu Inc., Plaintiff (2:11cv338): David P. Germaine, PRO HAC VICE, Vanek Vickers & Masini, P.C., Chicago, IL USA; Joseph Michael Vanek, PRO HAC VICE, Vanek, Vickers & Masini, P.C., Chicago, IL USA; Linda P. Nussbaum, Grant & Eisenhofer P.A., New York, NY USA; Mitchell H. Macknin, Sperling & Slater, P.C., Chicago, IL USA; Paul E. Slater, Sperling Slater & Spitz, Chicago, IL USA; Susan R. Schwaiger, Grant & Eisenhofer, PA., New York, NY USA.

For American Express Travel Related Services Company, Inc., Defendant (2:11cv338): Eric Brenner, Boies, Schiller & Flexner LLP, New York, NY USA.

For American Express Company, Defendant (2:11cv338): Eric Brenner, Boies, Schiller & Flexner LLP, New York, NY USA.

**Judges:** NICHOLAS G. GARAUFIS, United States District Judge.

**Opinion by:** NICHOLAS**[\*58]** G. GARAUFIS

**Opinion**

**MEMORANDUM & ORDER**

NICHOLAS G. GARAUFIS, United States District Judge.

In this set of consolidated ***antitrust*** actions (the "MP Actions"), Merchant Plaintiffs (the "MPs")[[1]](#footnote-0)1 challenge under *Sections 1* and *2* of the Sherman ***Antitrust*** Act the contracts that they have entered into with Defendants American Express Travel Related Services Company, Inc. and American Express Company (together, "Amex" or "Defendants"). Specifically, the MPs challenge Defendants' anti-steering rules, referred to as the Non-Discrimination Provisions ("NDPs"), which are contained in merchant agreements entered into between Amex and each MP. The MPs seek an order enjoining Amex from enforcing the NDPs, as well as treble damages for the injuries the MPs allege they have sustained on account of the NDPs.

Pending before the court are the parties' cross-motions for summary judgment, as well as the MPs'**[\*59]** motions for leave to modify the Scheduling Order and amend the operative pleadings, and motion for the application of collateral estoppel. For the reasons discussed below, the MPs' motion to modify the Scheduling Order and for leave to amend is DENIED WITHOUT PREJUDICE, the MPs' motion for the application of collateral estoppel is DENIED WITHOUT PREJUDICE, and the MPs' motion for partial summary judgment is DENIED WITHOUT PREJUDICE. The court DENIES Amex's motion for summary judgment with respect to the no-surcharge rule and Amex's statute of limitations and laches defenses, and RESERVES JUDGMENT on Amex's motion for summary judgment with respect to the existence of an Amex-only market.

**I. BACKGROUND AND RELEVANT PROCEDURAL HISTORY**

The MP Actions comprise part of a multi-district litigation ("MDL") pending before the court, and the court addresses the parties' motions with the benefit of having presided over the coordinated litigation for several years,[[2]](#footnote-1)2 as well as the seven-week bench trial in the related case captioned United States, et al. v. American Express Co., et al., No. 10-CV-4496 (E.D.N.Y.) (NGG) (RER), appeal docketed, No. 15-1672-CV (2d Cir.) (the "Government Action"). See**[\*60]** [*Rite Aid Corp. v. Am. Express Travel Related Servs. Co., 708 F. Supp. 2d 257 (E.D.N.Y. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YBX-0JD1-2R6J-211C-00000-00&context=) (the "SOL Decision") (denying Defendants' motion for judgment on the pleadings in the MP Actions); [*United States v. Am. Express Co., 88 F. Supp. 3d 143 (E.D.N.Y. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FBC-TJ91-F04F-00V2-00000-00&context=) (the "Government Decision") (findings of fact and conclusions of law in the Government Action); [*United States v. Am. Express Co., No. 10-CV-4496 (NGG) (RER), 2015 U.S. Dist. LEXIS 56945, 2015 WL 1966362 (E.D.N.Y. Apr. 30, 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FWB-9R51-F04F-02TM-00000-00&context=) (setting forth reasoning behind terms of Permanent Injunction in the Government Action).

In order to describe and address the parties' pending motions, the court first must provide a brief outline of the procedural history of the MP Actions. In 2008, certain of the MPs filed ***antitrust*** actions against Amex in this court.[[3]](#footnote-2)3 After answering each Complaint, Amex moved for judgment on the pleadings, arguing that all of the MPs' claims are barred by the *Sherman Act's* four-year statute of limitations. On March 3, 2010, the court denied the motion, holding that the MPs alleged facts that, if true, would allow both their *Section 1* and *2* claims to proceed under exceptions to the *Sherman Act's* four-year statute of limitations. See generally SOL Decision, [*708 F. Supp. 2d at 264-72*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YBX-0JD1-2R6J-211C-00000-00&context=); see also infra Part III.B.3 (addressing Amex's motion for summary**[\*61]** judgment on its statute of limitations and laches defenses).

In October 2010, the Department of Justice and the attorneys general of eighteen states filed the Government Action against Amex, MasterCard, and Visa. In 2011, several new MPs filed ***antitrust*** actions against Amex, asserting claims similar to those alleged by the original MPs.[[4]](#footnote-3)4 The MP Actions (including those actions filed in 2008 and those filed in 2011) and the Government Action against Amex[[5]](#footnote-4)5 proceeded to coordinated discovery.

In late 2013, Amex moved for summary judgment in both the Government Action and the MP Actions, and moved to consolidate the actions for trial. (See Not. of Mot. for Summ. J. (Dkt. 276)[[6]](#footnote-5)6; Not. of Mot. to Consolidate for the Purpose of Trial (Dkt. 279); Not. of Mot. for Summ. J. (Dkt. 281 in Gov't Action).) In the MP Actions, Amex argued that: (1) the MPs' alleged Amex-only market fails as a matter of law; (2) the MPs' claims related to Amex's NDP prohibiting differential surcharging (the "no-surcharge rule") should be dismissed; and (3) the evidentiary record reflects that no exceptions to the four-year statute of limitations apply, and the claims of all MPs except Albertson's LLC ("Albertsons") are therefore time-barred.[[7]](#footnote-6)7 (See Mem. of Law in Supp. of Defs.' Mot. for Summ. J. ("Defs.' Original Mem.") (Dkt. 277-1) (filed under seal); Reply Mem. of Law in Further Supp. of Defs.' Mot. for Summ.**[\*63]** J. ("Defs.' Original Reply") (Dkt. 308-1) (filed under seal).) The MPs opposed Amex's motion, but they did not cross-move for summary judgment at that time. (MPs' Opp'n to Defs.' Mot. for Summ. J. ("MPs' Original Mem.") (Dkt. 287-1) (filed under seal); MPs' Sur-Reply in Opp'n to Defs.' Mot. for Summ. J. (Dkt. 324).) In connection with Amex's motion, the parties filed voluminous factual materials and 56.1 statements, which the court has reviewed.

On March 19, 2014, the court held oral argument on Amex's motions for summary judgment in the Government Action and the MP Actions. (See Mar. 20, 2014, Min. Entry.) The court denied Amex's motion for summary judgment in the Government Action in May 2014. (See May 7, 2014, Mem. & Order (Dkt. 369 in Gov't Action).) Separately, the court denied Amex's motion to consolidate the actions for the purpose of trial (see generally Feb. 11, 2014, Order (Dkt. 335)), and stayed the MP Actions during the**[\*64]** pendency of a motion for final settlement approval in consolidated class actions that comprise part of the MDL and in which the MPs are putative class members[[8]](#footnote-7)8 (see Class Settlement Preliminary Approval Order (Dkt. 333)). At that time, the court reserved judgment on Amex's motion for summary judgment in the MP Actions.

The Government Action proceeded to trial before the court during the summer of 2014. On February 19, 2015, the court issued the Government Decision, see [*88 F. Supp. 3d at 143*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FBC-TJ91-F04F-00V2-00000-00&context=), finding by a preponderance of the evidence that the specific NDPs challenged by the Government[[9]](#footnote-8)9 violate *Section 1*.[[10]](#footnote-9)10 After receiving additional briefing from the parties to the Government Action, as well as other interested parties including the MPs, the court issued a Permanent Injunction on April**[\*65]** 30, 2015 (see Order Entering Permanent Injunction as to the American Express Defs. (Dkt. 638 in Gov't Action)), as well as a Memorandum setting forth its reasoning concerning the scope of the Permanent Injunction, see [*Am. Express Co., 2015 U.S. Dist. LEXIS 56945, 2015 WL 1966362*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FWB-9R51-F04F-02TM-00000-00&context=).

Amex subsequently moved to stay the implementation of the Permanent Injunction pending its appeal of the Government Decision; the court denied the motion on May 19, 2015, holding, among other things, that Amex could not show that there was a substantial possibility that it would prevail on the merits of its appeal. (See May**[\*66]** 19, 2015, Order (Dkt. 663 in Gov't Action).) Amex thereafter filed a notice of appeal (Not. of Appeal (Dkt. 664 in Gov't Action)), and sought a stay pending appeal from the Second Circuit. On June 16, 2015, a three-judge panel of the Second Circuit denied the motion. (See June 16, 2015, Order of U.S. Court of Appeals (Dkt. 687 in Gov't Action).)

During a status conference on July 7, 2015, the court lifted the stay of the MP Actions and set a trial date; the court also granted the MPs leave to file a motion to amend the operative pleadings and a cross-motion for summary judgment on the basis of collateral estoppel. (See July 7, 2015, Min. Entry.) Accordingly, the following motions are now pending before the court: (1) Amex's motion for summary judgment (filed in the fall of 2013 and discussed above); (2) the MPs' motion for leave to amend the operative pleadings (see MPs' Mot. to Suppl. or Amend Compls. (Dkt. 667)); (3) the MPs' motion for collateral estoppel (see MPs' Mot. for Collateral Estoppel (Dkt. 663)); and (4) the MPs' motions for partial summary judgment on liability under *Sections 1* and *2* (see Albertson's LLC's Mot. for Partial Summ. J. on Liability under *§ 1* (Dkt. 664); MPs' Mot. for Partial**[\*67]** Summ. J. under *§ 1* (Dkt. 665); MPs' Mot. for Partial Summ. J. on Liability under *§ 2* (Dkt. 666)).[[11]](#footnote-10)11 With respect to the MPs' motions, the parties have filed consolidated briefs discussing the impact of the Government Action as well as the factual record developed in the MP Actions. (See MPs' Omnibus Mem. ("MPs' Suppl. Mem.") (Dkt. 668-1) (filed under seal); Defs.' Mem. of Law in Further Supp. of Defs.' Mot. for Summ. J. and in Opp'n to MPs' Mots. ("Defs.' Suppl. Mem.") (Dkt. 687-1) (filed under seal); MPs' Reply Br. in Supp. of Mots. (Dkt. 694-1) (filed under seal).) On November 12, 2015, the court heard oral argument on the pending motions in the MP Actions. (See Nov. 13, 2015, Min. Entry.)

On December 17, 2015, a panel of the Second Circuit held oral argument on Amex's appeal of the Government Decision. On December 18, 2015, the panel entered on its own motion a temporary stay of the Permanent Injunction and a temporary stay of the Government Action in this court. (See Dec. 18, 2015, Order of U.S. Court of Appeals (Dkt. 697 in Gov't Action).) As of the entry**[\*68]** of this Memorandum and Order, the Second Circuit has not issued a decision in the appeal of the Government Action.[[12]](#footnote-11)12

**II. MPs' MOTIONS BASED ON GOVERNMENT DECISION**

The court first addresses the MPs' motions for leave to amend the pleadings and for the application of collateral estoppel in each of the MP Actions. For the reasons discussed below, the motions are DENIED WITHOUT PREJUDICE.

**A. Legal Standards**

1. Leave to Amend

[***HN1***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HT9-40M1-F04F-02GJ-00000-00&context=&link=clscc1)[] Although [*Federal Rule of Civil Procedure 15*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F103-00000-00&context=) provides that a court "should freely grant leave when justice so requires," [*Fed. R. Civ. P. 15(a)(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F103-00000-00&context=), [*Rule 16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8JD7-4G92-8T6X-702K-00000-00&context=) further provides that a pre-trial scheduling order "may be modified only for good cause and with the judge's consent," [*Fed. R. Civ. P. 16(b)(4)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8JD7-4G92-8T6X-702K-00000-00&context=). See also [*Parker v. Columbia Pictures Indus., 204 F.3d 326, 340 (2d Cir. 2000)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3YP5-55C0-0038-X2GX-00000-00&context=) (discussing the interaction between [*Rule 15*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F103-00000-00&context=) and [*Rule 16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8JD7-4G92-8T6X-702K-00000-00&context=) and "holding that despite the lenient standard of [*Rule 15(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F103-00000-00&context=), a district court does not abuse its discretion in denying leave to amend the pleadings after the deadline set in the scheduling order where the moving party has failed to establish good cause"). In Parker, the Second Circuit explained that good**[\*69]** cause depends in part on the diligence of the moving party. [*204 F.3d at 340*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3YP5-55C0-0038-X2GX-00000-00&context=). In addition, the court may, in its discretion, "consider other relevant factors including, in particular, whether allowing the amendment of the pleading at this stage of the litigation will prejudice defendants." [*Kassner v. 2nd Ave. Delicatessen Inc., 496 F.3d 229, 244 (2d Cir. 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4P8C-0XT0-TXFX-42N7-00000-00&context=).



In addition, even where the movant shows good cause under [*Rule 16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8JD7-4G92-8T6X-702K-00000-00&context=), it must also show that the amendment would comply with [*Rule 15*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F103-00000-00&context=)—in other words, that amendment is not futile, is not the product of undue delay or bad faith, and would not overly prejudice the non-movant.[[13]](#footnote-12)13 See, e.g., [*Joinnides v. Floral Park-Bellerose Union Sch. Dist., No. 12-CV-5682 (JS) (AKT), 2015 U.S. Dist. LEXIS 42933, 2015 WL 1476422, at \*15 (E.D.N.Y. Mar. 31, 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FMY-64V1-F04F-00RV-00000-00&context=) ("If the party seeking the amendment satisfies the 'good cause' standard of [*Rule 16(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8JD7-4G92-8T6X-702K-00000-00&context=), the court then determines whether the movant also meets the liberal standards of [*Rule 15(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F103-00000-00&context=)." (citing [*Kassner, 496 F.3d at 244*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4P8C-0XT0-TXFX-42N7-00000-00&context=))).

2. Collateral Estoppel

[***HN2***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HT9-40M1-F04F-02GJ-00000-00&context=&link=clscc2)[] The doctrine of non-mutual offensive collateral estoppel allows a plaintiff who was not**[\*70]** a party to a prior judgment to "use that judgment 'offensively' to prevent a defendant from relitigating issues resolved in the earlier proceeding." [*Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8HJ0-003B-S3S4-00000-00&context=); see also [*Montana v. United States, 440 U.S. 147, 153, 99 S. Ct. 970, 59 L. Ed. 2d 210 (1979)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8FB0-003B-S326-00000-00&context=) ("Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation."). Issue preclusion may only apply where: "(1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and actually decided, (3) there was full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits." [*In re PCH Assocs., 949 F.2d 585, 593 (2d Cir. 1991)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-78P0-008H-V4K1-00000-00&context=).[[14]](#footnote-13)14 The specific legal claims asserted in the second action need not be identical to those asserted in the prior action for collateral estoppel to apply. See [*Parklane Hosiery, 439 U.S. at 326 n.5*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8HJ0-003B-S3S4-00000-00&context=) ("Under the doctrine of collateral estoppel . . ., the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action."). With respect to the fourth**[\*71]** element, "[a]n issue is necessary to a prior judgment for issue preclusion purposes if its disposition was the basis for the holding with respect to the issue and not mere dictum." [*MTS, Inc. v. 200 E. 87th St. Assocs., 899 F. Supp. 1180, 1184 (S.D.N.Y. 1995)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-C720-001T-530B-00000-00&context=) (internal quotation marks and citations omitted); see also [*RX Data Corp. v. Dep't of Soc. Servs., 684 F.2d 192, 197 (2d Cir. 1982)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RTS-KGH0-003B-G02M-00000-00&context=) (explaining that collateral estoppel applies if the prior determination was "necessary and essential to the judgment in that action"); [*Restatement (Second) of Judgements § 27 cmt. j*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:42GD-2FB0-00YG-7015-00000-00&context=) ("The appropriate question, then, is whether the issue was actually recognized by the parties as important and by the trier as necessary to the first judgment.").



[***HN3***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HT9-40M1-F04F-02GJ-00000-00&context=&link=clscc3)[] In the Second Circuit, "each of two alternative, independent grounds for a prior holding is given effect for collateral estoppel purposes."[[15]](#footnote-14)15 [*Purdy v. Zeldes, 337 F.3d 253, 258 n.6 (2d Cir. 2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:47W0-RH60-0038-X1RC-00000-00&context=); see also [*Gelb v. Royal Globe Ins. Co., 798 F.2d 38, 45 (2d Cir. 1986)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-2GG0-0039-P32P-00000-00&context=); [*Irving Nat'l Bank v. Law, 10 F.2d 721, 724 (2d Cir. 1926)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-18P0-003B-K40G-00000-00&context=) (Hand, J.). "However, if an appeal is taken and the appellate court affirms on one ground and disregards the other, there is no collateral**[\*73]** estoppel as to the unreviewed ground." [*Gelb, 798 F.2d at 45*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-2GG0-0039-P32P-00000-00&context=). In addition, in the Second Circuit, a lower court judgment is "final" for purposes of collateral estoppel even while an appeal of that judgment is pending. See [*United States v. Int'l Bhd. of Teamsters, 905 F.2d 610, 620-21 (2d Cir. 1990)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-4YP0-003B-53NW-00000-00&context=).



[***HN4***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HT9-40M1-F04F-02GJ-00000-00&context=&link=clscc4)[] A trial court has broad discretion in determining whether collateral estoppel should apply, and it should not apply the doctrine where doing so would be unfair to a defendant. [*Parklane Hosiery, 439 U.S. at 331*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8HJ0-003B-S3S4-00000-00&context=); see also, e.g., [*PenneCom B.V. v. Merrill Lynch & Co., 372 F.3d 488, 493 (2d Cir. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4CRB-0N90-0038-X4RR-00000-00&context=) ("[C]ollateral estoppel is an equitable doctrine—not a matter of absolute right. Its invocation is influenced by considerations of fairness in the individual case."); [*Remington Rand Corp. v. Amsterdam-Rotterdam Bank, N.V., 68 F.3d 1478, 1486 (2d Cir. 1995)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-B8S0-001T-D4V2-00000-00&context=) ("Despite the economies achieved by use of collateral estoppel, it is not to be mechanically applied, for it is capable of**[\*74]** producing extraordinarily harsh and unfair results."). For example, application of collateral estoppel may be unfair where the defendant did not have incentive to litigate the issue(s) in the first action vigorously or could not foresee follow-on actions, where the resolution of the first action is inconsistent with other previous decisions, or where procedural opportunities available to the defendant in the second action were unavailable in the first action and may have led to a different result. [*Parklane Hosiery, 439 U.S. at 331-32*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8HJ0-003B-S3S4-00000-00&context=).



Finally, where collateral estoppel does apply, a plaintiff may use its application as a basis for seeking summary judgment in full or in part. See, e.g., [*id. at 324*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8HJ0-003B-S3S4-00000-00&context=) (affirming grant of partial summary judgment through application of non-mutual offensive collateral estoppel); [*Discover Fin. Servs. v. Visa U.S.A. Inc., 598 F. Supp. 2d 394, 397 (S.D.N.Y. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4T8C-R9V0-TX4N-G0BS-00000-00&context=) (granting in part and denying in part the plaintiffs motion for partial summary judgment on the basis of collateral estoppel).

**B. Discussion**

The MPs only seek leave to amend their alleged market definition to conform to the Government Action in the event that the court finds it appropriate to give preclusive effect to that issue. Accordingly, the court first turns to the MPs' motion for collateral estoppel.

The parties offer widely**[\*75]** diverging views on the appropriateness of applying collateral estoppel in this action. Under the MPs' approach, collateral estoppel would allow the court to enter summary judgment in their favor on their claims under both *Sections 1* and *2*, including claims related to the no-surcharge rule, leaving as the only triable issues of fact Amex's statute of limitations defense and damages. According to Defendants, the MPs' attempt to apply broadly the findings from the Government Action to the MP Actions is improper, and, given the number of issues that cannot be resolved by the application of collateral estoppel, there would be no efficiency gained by a more limited application.

The court first notes that the application of collateral estoppel is not uncommon in the context of private ***antitrust*** actions that follow a successful government enforcement action. See, e.g., *Univac Dental Co. v. Dentsply Intl, Inc., 702 F. Supp. 2d 465, 491 (M.D. Pa. 2010)* (adopting report and recommendation) ("These principles apply with particular force to a case such as this, where many of the questions raised in this private ***antitrust*** action arise out of the precise business practices which have been thoroughly, comprehensively and fairly litigated in the prior case brought by the United States. In such**[\*76]** instances, the use of the offensive issue preclusion doctrine to resolve fully litigated issues as a matter of law has been expressly endorsed by the courts." (citations omitted)); [*Discover, 598 F. Supp. 2d at 397-401*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4T8C-R9V0-TX4N-G0BS-00000-00&context=) (applying collateral estoppel to certain core ***antitrust*** issues following the Second Circuit's affirmance of the Government's action against Visa and MasterCard).

However, considering the current posture of the Government Decision and the court's discretion in determining whether to apply collateral estoppel, the court defers a resolution of the MPs' motion for collateral estoppel until after the Second Circuit reaches a decision in the appeal of the Government Action. The MPs have not identified any case, nor is the court aware of any case, in which a district court gave preclusive effect to such a significant set of ***antitrust*** issues during the pendency of a merits appeal of the first-decided action. To apply collateral estoppel under such circumstances—even assuming each of the four elements were met as to each issue—would be unfair to Defendants. In addition, depending on the Second Circuit's resolution of the appeal of the Government Action, the application of collateral estoppel at this stage in the**[\*77]** proceeding could, in fact, create inefficiencies. Accordingly, the court DENIES WITHOUT PREJUDICE the MPs' motion for collateral estoppel, with leave to renew the application following the Second Circuit's decision in the Government Action.

Because the court denies the MPs' motion for collateral estoppel, it need not determine whether there is good cause to amend the Scheduling Order under [*Rule 16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8JD7-4G92-8T6X-702K-00000-00&context=), or whether leave to amend should be granted under [*Rule 15*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F103-00000-00&context=). Accordingly, the court DENIES WITHOUT PREJUDICE the MPs' motions for leave to amend the Scheduling Order and to amend the operative pleadings' alleged product market, with leave to renew the motions following the Second Circuit's decision in the Government Action.

**III. CROSS-MOTIONS FOR SUMMARY JUDGMENT**

The MPs move for summary judgment on the basis of collateral estoppel and, for certain issues, collateral estoppel combined with record evidence. Because the court declines to apply collateral estoppel at this stage of the proceeding, see supra Part II.B, the MPs' motion for summary judgment is DENIED WITHOUT PREJUDICE, with leave to renew their application following the Second Circuit's decision in the Government Action and in advance of trial.

Amex**[\*78]** moves for summary judgment on three distinct issues: (1) the alleged Amex-only market, (2) the MPs' claims related to the no-surcharge rule, and (3) Amex's statute of limitations and laches defenses as to all MPs except Albertsons. For the reasons discussed below, the court (1) RESERVES JUDGMENT on Amex's motion for summary judgment on the Amex-only market until after the Second Circuit's resolution of the appeal of the Government Action, (2) DENIES summary judgment as to the no-surcharge rule, and (3) DENIES summary judgment as to Amex's statute of limitations and laches defenses.

**A. Legal Standards**

1. Summary Judgment

[***HN5***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HT9-40M1-F04F-02GJ-00000-00&context=&link=clscc5)[] Summary judgment must be granted when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." [*Fed. R. Civ. P. 56(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2421-6N19-F165-00000-00&context=). A fact is material if it "might affect the outcome of the suit under the governing law." [*Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6H80-0039-N37M-00000-00&context=). No genuine dispute of material fact exists if "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." [*Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7P90-0039-N51W-00000-00&context=). In evaluating a motion for summary judgment, the court "is required to construe the evidence in the light most favorable to the non-moving party and to draw all reasonable inferences**[\*79]** in its favor." [*Trammell v. Keane, 338 F.3d 155, 161 (2d Cir. 2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:496H-KTY0-0038-X308-00000-00&context=); see also [*Anderson, 477 U.S. at 255*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6H80-0039-N37M-00000-00&context=) ("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.").



[***HN6***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HT9-40M1-F04F-02GJ-00000-00&context=&link=clscc6)[] The moving party bears the initial burden to show an absence of genuine factual dispute. See [*Adickes v. S. H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-F010-003B-S1XV-00000-00&context=). Summary judgment will be granted if the opposing party then "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." [*Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6HC0-0039-N37R-00000-00&context=). To defeat summary judgment, the opposing party must do more than demonstrate "some metaphysical doubt as to the material facts," [*Matsushita, 475 U.S. at 586*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7P90-0039-N51W-00000-00&context=), and may not rely on "conclusory allegations," [*Twin Labs., Inc. v. Weider Health & Fitness, 900 F.2d 566, 568 (2d Cir. 1990)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6070-003B-52TX-00000-00&context=).



2. Statute of Limitations and Laches

In the SOL Decision, the court set forth the standards governing the statute of limitations and the relevant exceptions, see [*708 F. Supp. 2d at 257*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YBX-0JD1-2R6J-211C-00000-00&context=), which the court again outlines below.

*a. Section 2 Claim*

With respect to the MPs' Section 2 claim, the court explained that [***HN7***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HT9-40M1-F04F-02GJ-00000-00&context=&link=clscc7)[] "[t]he date on which a section two monopolization claim accrues depends on the relationship that the plaintiff has with the defendant as either a competitor or as a purchaser of the defendant's products and services." SOL Decision, [*708 F. Supp. 2d at 264*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YBX-0JD1-2R6J-211C-00000-00&context=) (citing [*Berkey Photo v. Eastman Kodak Co., 603 F.2d 263, 295-96 (2d Cir. 1979))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-VNM0-0039-M0S2-00000-00&context=). "A purchaser plaintiff's cause of action [such as the MPs']**[\*80]** accrues when he or she actually pays an overcharge." Id. Accordingly, the court held, "[u]nder Berkey's purchaser rule, Plaintiffs' section two overcharge claims accrued when they paid Amex a supracompetitive merchant discount fee. The statute of limitations in this context only bars Plaintiffs' claims based on overcharges outside of the limitations period—i.e. overcharges paid more than four years before filing suit." [*Id. at 265*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-VNM0-0039-M0S2-00000-00&context=).



*b. Section 1 Claim*

With respect to the MPs' *Section 1* claim, the court first explained that "[u]nder Zenith's general accrual rule, any section one cause of action arising out Amex's merchant agreements accrued on the date that Plaintiffs' merchant agreements took effect." [*Id. at 265*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-VNM0-0039-M0S2-00000-00&context=) (citing [*Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DRC0-003B-S48H-00000-00&context=). Because all MPs other than Albertsons filed suit more than four years after their respective merchant agreements took effect, the court considered whether the speculative damages exception and/or the continuing violation exception could apply to the MPs' *Section 1* claim as alleged. [*Id. at 266-72*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-VNM0-0039-M0S2-00000-00&context=).

First, the court concluded that the MPs adequately alleged that at the time they signed their merchant acceptance agreements with Amex, damages caused by Amex's alleged overcharges were speculative, since they could not have been reasonably estimated.**[\*81]** [*Id. at 266*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-VNM0-0039-M0S2-00000-00&context=). In other words, the speculative damages exception, first announced in [*Zenith, 401 U.S. at 339*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DRC0-003B-S48H-00000-00&context=), "applies in this circuit if the fact of damage is uncertain or if the nature and amount of damages cannot be reasonably estimated." Id. The court explained that at the time each MP signed its merchant agreement, "the amount of Plaintiffs' damages arising from Amex's supracompetitive discount fees could not have been reasonably estimated," since "[t]he merchant agreements did not specify the payment schedule or the quantity of Plaintiffs' purchases of Amex payment services: when, how large, and how many Amex retail transactions Plaintiffs would process." [*Id. at 266-67*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-VNM0-0039-M0S2-00000-00&context=). Moreover, the court explained, "[e]ven if these terms could have been estimated when Plaintiffs executed the merchant agreements, Amex retained the ability to unilaterally change the discount fee after the agreements' initial terms." [*Id. at 267*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-VNM0-0039-M0S2-00000-00&context=).

Here, the court noted that Amex could present evidence following discovery showing that future damages could have been reasonably estimated, and addressed the potential interplay between the speculative damages exception and the purchaser-accrual rule under *Section 2*:

Following discovery, Amex may introduce evidence showing that future damages flowing**[\*82]** from Plaintiffs' merchant agreements could have been reasonably estimated when they became effective. If future damages were not speculative when the agreements became effective, the cause of action to collect them would also have accrued at that time. If damages were not speculative, Plaintiffs' section two claims may also be time-barred. As discussed above, Berkey's purchaser accrual rule is based on the rationale that a purchaser's damages for paying overcharges are "entirely speculative" until the purchaser actually pays the overcharge. If damages from Amex's overcharges could have been reasonably estimated based on the terms contained in the merchant agreements, the justification for the purchaser accrual rule may not apply.

[*Id. at 267*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-VNM0-0039-M0S2-00000-00&context=).

Next, the court concluded that the MPs also adequately alleged that the continuing violation exception applied. [*Id. at 267-72*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-VNM0-0039-M0S2-00000-00&context=). The court explained that "[i]n cases challenging illegal contracts made effective before the limitations period and that remain effective during the limitations period, the continuing-violation question is whether acts within the limitations period toll the cause of action challenging the underlying contract." [*Id. at 268*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-VNM0-0039-M0S2-00000-00&context=). Again noting the alleged speculative**[\*83]** nature of the MPs' damages, the court surveyed the relevant case law and held that contractual performance can qualify as an "overt act" for purposes of restarting the four-year statute of limitations where damages are otherwise speculative; here, as alleged, Amex's mere collection of discount fee payments could not qualify as an overt act as a matter of law, since such an act is not new and independent, but Amex's alleged unilateral increases to its merchant discount fee during the contractual period could qualify as an overt act, and therefore restart the statute of limitations. [*Id. at 268-72*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-VNM0-0039-M0S2-00000-00&context=). Thus, the court held, "[u]nder the continuing violation exception, Plaintiffs' section one claims are not barred to the extent that they seek damages based on fee adjustments that Amex implemented within four years before Plaintiffs filed suit." [*Id. at 272*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-VNM0-0039-M0S2-00000-00&context=).

*c. Claims for Equitable Relief*

Finally, with respect to the MPs' claims for equitable relief, the court explained that the [*Clayton Act's*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GW01-NRF4-41BN-00000-00&context=) four-year statute of limitations does not apply to claims for equitable relief, but that a four-year period of laches does apply to such claims. [*Id. at 272*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-VNM0-0039-M0S2-00000-00&context=). "After the four-year laches period expires, a court may, in its discretion, allow an action**[\*84]** for equitable relief to go forward if it determines '(1) that sufficient reasons cognizable in equity excuse the delay or (2) that the delay caused defendants no prejudice.'" Id. (quoting [*Argus Inc. v. Eastman Kodak Co., 552 F. Supp. 589, 599 (S.D.N.Y. 1982))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-8W70-0039-S284-00000-00&context=). Because the parties had not specifically addressed the applicability of the laches defense in their briefing, the court declined to reach the issue in the SOL Decision. See id.

**B. Discussion**

1. Amex-only Market

Amex continues to press its argument that a reasonable jury could not find that there is an Amex-only product market, and argues that the findings made against Amex in the Government Decision only reinforce this argument. Considering the analytical significance of the alleged product market to the MPs' claims, and that the MPs may ultimately renew their motions for leave to amend the pleadings and for the application of collateral estoppel following the Second Circuit's decision, the court RESERVES JUDGMENT on this ground.

2. No-surcharge Rule

Defendants argue that a reasonable jury could not find that the no-surcharge rule is an ***antitrust*** violation. The court disagrees. There is ample evidence in the record in the MP Actions from which a reasonable jury could find that for purposes of *Section 1*, the no-surcharge**[\*85]** rule has an adverse effect on competition and that the procompetitive justifications of the no-surcharge rule do not outweigh any anticompetitive effects, or that for purposes of *Section 2*, the no-surcharge rule is a form of maintaining monopoly power, and that there is not a valid business reason for it.[[16]](#footnote-15)16 The court again notes that the Government Action did not include a challenge to the no-surcharge rule; however, should the Second Circuit's decision in the Government Action affect the analysis of the no-surcharge rule, Defendants may seek leave to renew their motion for summary judgment on this ground in advance of trial, or move for judgment as a matter of law during or after trial.

First, contrary to Defendants' arguments, the cases they cite do not establish that, as a matter of law, the no-surcharge rule is not an unreasonable restraint and/or is pro-competitive. (See Defs.' Original Mem. at 21-24; Defs.' Original Reply at 22-23; Defs.' Suppl. Mem. at 26-28 (all discussing [*Tennessean Truckstop, Inc. v. NTS, Inc., 875 F.2d 86, 90 (6th Cir. 1989)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BTP0-003B-53X3-00000-00&context=) and [*Kartell v. Blue Shield of Massachusetts, 749 F.2d 922 (1st Cir. 1984)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-TVY0-003B-G1BB-00000-00&context=) (Breyer J.)).)

In [*Tennessean Truckstop*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BTP0-003B-53X3-00000-00&context=), the Sixth Circuit held that a merchant challenging a network services provider's contractual provision prohibiting it from imposing a surcharge over 5% of the price of the good failed to allege ***antitrust*** injury. [*875 F.2d at 87-88*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BTP0-003B-53X3-00000-00&context=). According to the Sixth Circuit, the merchant's complaint failed to allege an injury to competition and merely alleged that it lost profits due to the network services provider's conduct. [*Id. at 88*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BTP0-003B-53X3-00000-00&context=). Here, however, the MPs allege (and have offered evidence tending to show) that the no-surcharge rule prevents Amex-accepting merchants from imposing a surcharge on any credit card transaction, thereby eliminating any incentive for network services providers to compete horizontally on price. [*Tennessean Truckstop*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BTP0-003B-53X3-00000-00&context=) is therefore distinguishable**[\*87]** on at least this ground.

In [*Kartell*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-TVY0-003B-G1BB-00000-00&context=), doctors challenged a health insurer's program in which the insurer agreed to pay participating doctors a pre-set, capped price as payment in full for medical services rendered to insureds, but under which the doctors could not raise the price or surcharge insureds above the price the insurer agreed to pay. [*749 F.2d at 923-24*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-TVY0-003B-G1BB-00000-00&context=). Writing for the panel, and noting the uniqueness of the health insurance industry, then-Judge Breyer explained that the program was not an unlawful restraint in violation of *Section 1*, since the insurer "in essence 'buys' medical services for the account of others," and merely "obtained prices [on behalf of the insureds] that reflected its market power." [*Id. at 925, 928*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-TVY0-003B-G1BB-00000-00&context=). In other words, the conduct at issue was simply an agreement between a buyer (the insurer) and a seller (the doctors) regarding price—"[w]hether or not that price bargain is, in fact, reasonable is, legally speaking, beside the point." [*Id. at 928*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-TVY0-003B-G1BB-00000-00&context=). Indeed, the court noted that "the prices at issue here are low prices, not high prices," and "the Congress that enacted the *Sherman Act* saw it as a way of protecting consumers against prices that were too high, not too low." [*Id. at 930-31*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-TVY0-003B-G1BB-00000-00&context=) (emphasis in original).

Here, however, the MPs have**[\*88]** offered evidence tending to show that they, the purchasers of Amex's services, are paying higher prices as a result of the NDPs' inhibition on horizontal price competition, including through the no-surcharge rule. In addition, the MPs have also offered evidence tending to show that because merchants pass the costs of network services through to consumers, those consumers who pay with forms of payment other than Amex cards pay a higher price for those goods, "effectively subsidiz[ing] the purchases made by customers who use higher-cost Amex cards." (MPs' Original Mem. at 42.) And again, like Tennessean Truckstop, Kartell lacked any allegation by the plaintiff that the insurance program eliminated horizontal competition across the entire product market.

The facts of [*Kartell*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-TVY0-003B-G1BB-00000-00&context=) also differ from this case in an important way. As another district court has observed, the holding in Kartell flowed in large part from "the First Circuit's reliance on the concept that [the insurer] was acting as a purchaser when it purchased, on behalf of its enrollees, services from doctors at the lowest possible prices." [*United States v. Delta Dental of R.I., 943 F. Supp. 2d 172, 177 (D.R.I. 1996)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58CB-P8C1-F04C-Y0BV-00000-00&context=) (adopting report and recommendation); cf. [*Drug Mart Pharmacy Corp. v. Am. Home Prods. Corp., 472 F. Supp. 2d 385, 401 (E.D.N.Y. 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4MYF-NXG0-TVW3-P23X-00000-00&context=) ("In short, a chorus of judicial opinion has proclaimed that**[\*89]** when insurers purchase health services and pharmaceuticals for the benefit of their members, they are treated like purchasers under the ***antitrust*** laws." (emphasis in original) (footnote omitted)). But Amex does not purchase goods and services from merchants on behalf of its cardholders; rather, it provides card-payment services to cardholders and card-acceptance services to merchants as a way of facilitating a transaction between cardholder and merchant, and in doing so, collects a fee from the merchant. The MPs allege that in this capacity, and through the NDPs, Amex prohibits the merchant from expressing any preference (through a surcharge or otherwise) for any other "facilitator" (such as Visa or MasterCard) that may charge the merchant a lesser fee to facilitate the very same transaction between merchant and cardholder. Cf. [*Kartell, 749 F.2d at 925-26*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-TVY0-003B-G1BB-00000-00&context=) (limiting its analysis to "contracts in which those who directly provide goods or services to insureds have agreed to cap or forego completely additional charges to those insureds in return for direct payment by the insurer"). Amex does not "cap" the prices that merchants charge to its cardholders for goods or services—in other words, nothing in the NDPs prohibits**[\*90]** a merchant from raising the price of each of the goods it offers by $2 or 2% to account for rising costs of network services and then passing that cost through to Amex cardholders.[[17]](#footnote-16)17

Second, Defendants present a public policy argument, focusing primarily on the fact that some states, including New York, have enacted statutes prohibiting merchant surcharging but no other forms of steering; indeed, New York's statute was recently upheld by the Second Circuit following a *First Amendment* challenge by merchants, see [*Expressions Hair Design v. Schneiderman, 803 F.3d 94, 2015 WL 8537667, at \*1 (2d Cir. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5H1R-0451-F04K-J00B-00000-00&context=) (am. opinion).[[18]](#footnote-17)18 However, while this public policy argument may be relevant, it cannot establish whether, for ***antitrust*** purposes, a parallel contractual restraint imposed by a market participant with market or monopoly power survives *Sherman Act* scrutiny. Even Defendants acknowledge that their public policy arguments cannot "immunize" their conduct,**[\*91]** but rather, only serve to "reinforce the holdings of the relevant appellate case law," which the court has distinguished above. (See Defs.' Original Reply at 24.)

3. Statute of Limitations and Laches Defenses

Finally, the court denies Defendants' motion for summary judgment with respect to each of their statute of limitations and laches defenses.

*a. Section 2*

With respect to the Section 2 claim, the parties dispute the meaning and intent of the court's SOL Decision. According to the MPs, "Amex's limitations defense only defines the time period for which the MPs can seek damages on [their] Section 2 claims, and cannot preclude Amex's liability." (MPs' Suppl. Mem. at 35-36.) Amex counters that the court's SOL Decision left open the possibility that the timeliness of the Section 2 claim "could turn on the factual record concerning whether damages were speculative." (Defs.' Suppl. Mem. at 17.)

Although the court previously stated in its discussion of the MPs' *Section 1* claim that a showing**[\*92]** by Amex that the MPs' *Section 1* damages were not speculative may also render the purchaser-accrual rule inapplicable to the MPs' *Section 2* claims, the court remains unconvinced that, as a matter of law, a defendant who successfully challenges an ***antitrust*** plaintiff's assertion of the *Section 1* speculative damages exception thereby defeats the plaintiff's assertion of the *Section 2* purchaser-accrual doctrine. Although Berkey's discussion of the *Section 2* purchaser-accrual exception does invoke language from Zenith addressing speculative damages under *Section 1*, see [*Berkey, 603 F.2d at 295*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-VNM0-0039-M0S2-00000-00&context=) ("Plainly, at the time a monopolist commits anticompetitive conduct it is entirely speculative how much damage that action will cause its purchasers in the future."), Berkey also makes clear that "[s]o long as a monopolist continues to use the power it has gained illicitly to overcharge its customers, it has no claim on the repose that a statute of limitations is intended to provide," id. See also [*id. at 296*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-VNM0-0039-M0S2-00000-00&context=) ("The taint of an impure origin does not dissipate after four years if a monopolist continues to extract excessive prices because of it."). The core holding of [*Berkey*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-VNM0-0039-M0S2-00000-00&context=) applies here, and Defendants have cited nothing to the contrary: "[A] purchaser suing a monopolist for overcharges paid**[\*93]** within the previous four years may satisfy the conduct prerequisite to recovery by pointing to anticompetitive actions taken before the limitations period." Id. Accordingly, assuming the MPs can establish *Section 2* liability, they may, at a minimum, recover all *Section 2* damages caused within four years of the filing of each MP Action, or within four years of the commencement of the tolling of their Section 2 claims.[[19]](#footnote-18)19

*b. Section 1*

Turning to the MPs' *Section 1* claim, the court concludes that there are genuine issues of material fact that must be resolved by a jury as to both the speculative damages and continuing violation exceptions.

With respect to the speculative damages exception, the MPs have adduced evidence from which a reasonable jury could infer that as of 2002, the MPs' then-future damages were speculative.[[20]](#footnote-19)20 In particular,**[\*94]** there exist factual disputes concerning the ability of the MPs to estimate, as of 2002, critical elements of their alleged damages, such as future Amex charge volume and the future discount fees or other charges that would be imposed by Amex for that charge volume. In addition, it is undisputed that Defendants possessed the unilateral right to raise the discount rate throughout the contractual period. Viewed in the light most favorable to the MPs, these were no ordinary contracts; rather, they were long-term agreements under which the MPs had no ability to estimate accurately the core variables of any damages projection, including charge volume (dependent upon third-parties' use of the Amex card at the point-of-sale and in turn dependent on Amex's success at card issuance) and overall discount rate (dependent upon Amex's ability to change the base discount rate and effective discount rate throughout the term of the contract). Cf., e.g., [*Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp., 546 F.2d 570, 573 (4th Cir. 1976)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-1CY0-0039-M0RK-00000-00&context=) (affirming grant of summary judgment where, before entering into contract, plaintiff included in application to defendant its projections of total subscribers and gross receipts, and later "introduced no proof that cast doubt on its projections or**[\*95]** indicated that they were speculative"); [*Tex. Utils. Co. v. Santa Fe Indus., Inc., 627 F. Supp. 44, 48-49 (D.N.M. 1985)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-G750-0039-R0KM-00000-00&context=) (denying motion for summary judgment where plaintiffs offered evidence "that the prices they had to pay for coal under the contracts were indeterminable at the time these contracts were made" because, inter alia, ultimate payments under the contracts fluctuated due to yearly changes in government-calculated "implicit price deflator," based on the gross national product for each calendar year); [*In re N.M. Nat. Gas* ***Antitrust*** *Litig., MDL No. 403 (HCB), 1982 U.S. Dist. LEXIS 9452, 1982 WL 1827, at \*14 (D.N.M. Jan. 26, 1982)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-GYF0-0039-S0HS-00000-00&context=) (denying motion for summary judgment on statute of limitations defense and explaining that "[t]his is not a case where the [pre-limitations contract] finalized the rights and liabilities of the parties by fixing the price, quantity, and delivery or payment schedules so that any subsequent acts were but unabated inertial consequences of some pre-limitations action" (internal quotation marks and citations omitted)).

With respect to the continuing violation exception, genuine issues of material fact again preclude summary judgment. Defendants reference the court's statement in the SOL Decision that the MPs could ultimately prove an alleged continuing violation because "Amex's unilateral increases to its merchant discount fee do constitute overt acts." SOL Decision, [*708 F. Supp. 2d at 271*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YBX-0JD1-2R6J-211C-00000-00&context=) (emphasis added). According to Amex, the evidentiary record now shows that "the merchant discount fees have been constant—or dropped—for each Plaintiff." (Defs.' Original Mem. at 19 (footnote omitted).) The MPs respond that Amex's "hyper-technical view" of the merchant discount rate focuses**[\*98]** solely on the base discount rate, ignoring other unilateral changes imposed by Amex that affected the net price paid (the effective discount rate) by merchants to Amex for its services during the contractual period. (See MPs' Original Mem. at 31.)

The court recognizes that a narrow reading of the SOL Decision—which was based only on the court's understanding of the allegations in the original complaints in the MP Actions—could support Defendants' argument that summary judgment should be granted on the continuing violation exception due to the MPs' failure to rebut Defendants' evidence that they did not unilaterally raise base discount rates during the contractual period. However, the evidence offered by the MPs at this stage of the proceeding raises a genuine issue of material fact concerning whether Amex's other unilateral changes to the effective discount rate (such as changes to significant rebate and incentive programs) were overt acts sufficient to restart the limitations period with respect to damages caused by those acts. Indeed, the MPs have offered evidence tending to show that Amex officials viewed these changes as relevant to the effective rate paid by merchants to Amex for**[\*99]** its services.[[21]](#footnote-20)21

Defendants are correct, however, that if the MPs rely solely**[\*101]** on the continuing violation exception at trial, they can only recover damages caused by Amex's overt acts. See [*Klehr v. A.O. Smith Corp., 521 U.S. 179, 189, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S65-HY60-003B-R1DG-00000-00&context=) ("[T]he commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period."); see also [*Zenith, 401 U.S. at 338*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DRC0-003B-S48H-00000-00&context=) ("[E]ach time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and . . ., as to those damages, the statute of limitations runs from the commission of the act."); [*Bankers Trust Co. v. Rhoades, 859 F.2d 1096, 1104 (2d Cir. 1988)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-Y060-001B-K0GT-00000-00&context=) ("An action for the injury must be brought within four years, plus any additional period during which the statute of limitations may be tolled. In the context of a continuing ***antitrust*** violation with continuing injuries, this has usually been understood to mean that each time plaintiff suffers an injury caused by an illegal act of defendants, a cause of action accrues to plaintiff to recover damages based on that injury." (emphasis added) (internal citations omitted)).

*c. Claims for Equitable Relief*

Finally, Amex argues that the laches defense warrants summary judgment in its favor on the MPs' claims for injunctive relief. (See Defs.' Original Mem. at 18; Defs.' Original**[\*102]** Reply at 21.) The MPs respond by arguing that (1) exceptions to the statute of limitations, including both the speculative damages and continuing violation exceptions, also serve as exceptions to the laches defense, and (2) even if the exceptions do not apply, Amex has failed to show the prejudice required for the laches doctrine to apply. (See MPs' Original Mem. at 33-35.)

As the court explained in the SOL Decision, the [*Clayton Act's*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GW01-NRF4-41BN-00000-00&context=) four-year statute of limitations only applies to a damages action, whereas the defense of laches applies to actions in equity. See SOL Decision, [*708 F. Supp. 2d at 272*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YBX-0JD1-2R6J-211C-00000-00&context=). Many courts use the applicable statute of limitations as a starting point to analyzing a parallel laches defense. See, e.g., [*Conopco, Inc. v. Campbell Soup Co., 95 F.3d 187, 191 (2d Cir. 1996)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-11Y0-006F-M21H-00000-00&context=) (explaining, in equity action under the [*Lanham Act*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GMK1-NRF4-40C3-00000-00&context=), that "[a]lthough laches is an equitable defense, employed instead of a statutory time-bar, analogous statutes of limitation remain an important determinant in the application of a laches defense"); [*Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1057 (5th Cir. 1982)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-2XN0-003B-G2F4-00000-00&context=) ("[I]f the plaintiff's claim is brought outside the analogous limitations period, the bare fact of delay creates a rebuttable presumption of prejudice to the defendant." (internal quotation marks and citation omitted)); [*Int'l Tel. & Tel. Corp. v. Gen. Tel. & Elecs. Corp., 518 F.2d 913, 926 (9th Cir. 1975)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-3GW0-0039-M1VY-00000-00&context=) (using [*Clayton Act's*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GW01-NRF4-41BN-00000-00&context=) four-year statute of limitations**[\*103]** as "a guideline for computation of the laches period in suits" seeking equitable relief), overruled on other grounds by [*California v. Am. Stores Co., 495 U.S. 271, 283, 110 S. Ct. 1853, 109 L. Ed. 2d 240 (1990)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6WY0-003B-453C-00000-00&context=).

[***HN8***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HT9-40M1-F04F-02GJ-00000-00&context=&link=clscc8)[] "After the four-year laches period expires, a court may, in its discretion, allow an action for equitable relief to go forward if it determines (1) that sufficient reasons cognizable in equity excuse the delay or (2) that the delay caused defendants no prejudice." SOL Decision, [*708 F. Supp. 2d at 272*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YBX-0JD1-2R6J-211C-00000-00&context=) (internal quotation marks and citation omitted); see also, e.g., [*Argus, 552 F. Supp. at 600*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-8W70-0039-S284-00000-00&context=) (denying motion for summary judgment where the defendants failed to establish the absence of genuine issue of material fact with respect to whether the plaintiffs' delay caused any prejudice).



Few decisions within the Second Circuit have analyzed the applicability of the laches defense in an ***antitrust*** action where an exception to the four-year statute of limitations for damages actions tolls the damages claims, and the court did not have occasion to do so in the SOL Decision. The MPs and Defendants each point to [*Madison Square Garden, L.P. v. National Hockey League, No. 07-CV-8455 (LAP), 2008 U.S. Dist. LEXIS 80475, 2008 WL 4547518 (S.D.N.Y. Oct. 10, 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4TNN-N4V0-TXFR-J27H-00000-00&context=). There, in finding the ***antitrust*** claim seeking an equitable remedy barred by laches, the court did consider the plaintiff's argument that the continuing violation**[\*104]** exception should apply and toll the claim, but rejected the argument on the merits, as the plaintiff failed to allege an actionable overt act. See [*2008 U.S. Dist. LEXIS 80475, [WL] at \*10*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4TNN-N4V0-TXFR-J27H-00000-00&context=); see also, e.g., [*Int'l Tel. & Tel., 518 F.2d at 928-29*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-3GW0-0039-M1VY-00000-00&context=) (analyzing laches doctrine and considering both the court's equitable discretion and otherwise applicable exceptions to four-year statute of limitations, such as the continuing violation doctrine).

As laches is an equitable doctrine that the court applies in its discretion, there is limited analytical value to determining whether categorical "exceptions" to the four-year period of laches do or do not apply. But suffice it to say, here, the court already has held that there are genuine issues of material fact with respect to whether the speculative damages and continuing violation exceptions save the MPs' otherwise untimely damages claims. This determination is sufficient, at this stage of the proceeding, to support a parallel determination that genuine issues of material fact preclude the entry of summary judgment on Amex's laches defense.[[22]](#footnote-21)22

Moreover, there are genuine issues of material fact with respect to whether there is any excuse for the MPs' delay in bringing suit or whether that delay caused any prejudice to Defendants. [***HN9***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HT9-40M1-F04F-02GJ-00000-00&context=&link=clscc9)[] "A defendant has been prejudiced by a delay when the assertion of a claim available some time ago would be inequitable in light of the delay in bringing that claim. Specifically, prejudice ensues when a defendant has changed his position in a way that would not have occurred if the plaintiff had not delayed." [*Conopco, 95 F.3d at 192*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-11Y0-006F-M21H-00000-00&context=) (internal quotation marks and citations omitted) (discussing laches defense in context of [*Lanham Act*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GMK1-NRF4-40C3-00000-00&context=)). Here, the only equitable relief sought by the MPs is prospective in nature; they do not seek, for example, divestiture or to unwind a transaction, such as a merger. See 2 Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust*** Law ¶ 320, at 374 (4th ed. 2014) ("A stricter limitation is especially appropriate and should be**[\*106]** absolute where equity relief is retroactive in character, such as divestiture or illegally acquired assets. It is less true where the requested relief is merely prospective."); see also, e.g., [*Midwestern Mach. Co. v. Nw. Airlines, Inc., 392 F.3d 265, 277 (8th Cir. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4DYW-8480-0038-X176-00000-00&context=) (finding that defendant would be prejudiced where plaintiff's equitable action was filed eleven years after allegedly anticompetitive merger, and shareholders who invested in company seven years after the merger had no reason to believe that the original merger could still be the basis for an ***antitrust*** suit). Where, as here, a plaintiff seeks only an injunction, "the right to engage in ongoing anticompetitive conduct should not ordinarily be acquired by prescription." Areeda & Hovenkamp, ***Antitrust*** Law ¶ 320, at 374.



Defendants counter that they have "suffered obvious prejudice," as they "spent years operating, and investing in, a business model that relies on the NDPs that Plaintiffs now say are illegal." (Defs.' Original Mem. at 18.) But, since the initial signing of the merchant agreements, Amex has merely continued its longstanding practice of imposing NDPs on merchants, and has not, in fact, changed course or position in any significant way. The mere continuation of the very conduct challenged**[\*107]** by the plaintiff is not the type of activity or investment by a defendant that the laches doctrine is designed to protect in equity. Cf. [*Conopco, 95 F.3d at 192-93*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-11Y0-006F-M21H-00000-00&context=) (focusing prejudice analysis on fact that during the plaintiff's delay in bringing suit targeting defendant's marketing strategy, defendant lost opportunity to adopt alternative marketing strategies that were adopted by rival brands in the interim).

Accordingly, the court denies Defendants' motion for summary judgment on the laches defense. At trial, the parties may offer any relevant evidence addressing the MPs' delay in bringing suit or any prejudice to American Express, but the court cannot enter summary judgment on this basis.

**IV. CONCLUSION**

For the reasons discussed above, the MPs' motion to modify the Scheduling Order and for leave to amend is DENIED WITHOUT PREJUDICE, the MPs' motion for the application of collateral estoppel is DENIED WITHOUT PREJUDICE, the MPs' motion for partial summary judgment is DENIED WITHOUT PREJUDICE. The court DENIES Amex's motion for summary judgment with respect to the no-surcharge rule and Amex's statute of limitations and laches defenses, and RESERVES JUDGMENT on Amex's motion for summary judgment with respect to**[\*108]** the existence of an Amex-only market.

In addition, as noted above, the Government Action remains pending before the Second Circuit, and the merits panel has entered a stay of the Permanent Injunction entered in that case. Accordingly, the court postpones the May 2, 2016, trial date in the MP Actions, and stays all upcoming deadlines in the parties' pre-trial schedule. (See July 21, 2015, Order (Dkt. 642).) Within fourteen (14) days of the date of entry of the mandate following the Second Circuit's disposition of the appeal in the Government Action, the parties shall confer regarding potential trial dates and file a joint letter setting forth their availability.

SO ORDERED.

/s/ Nicholas G. Garaufis

NICHOLAS G. GARAUFIS

United States District Judge

Dated: Brooklyn, New York

January 7, 2016

**End of Document**

1. 1The MPs are Ahold U.S.A., Inc.; Albertson's LLC; BI-LO, LLC; CVS Pharmacy, Inc.; The Great Atlantic & Pacific Tea Company, Inc.; H.E. Butt Grocery Co.; Hy-Vee, Inc.; The Kroger Co.; Meijer, Inc.; Publix Super Markets, Inc.; Raley's Inc.; Rite Aid Corporation; Rite Aid HDQTRS Corp.; Safeway Inc.; SuperValu Inc.; and Walgreen Co. [↑](#footnote-ref-0)
2. 2Although they comprise part of the MDL, the MP Actions were originally filed in this court and therefore will also proceed to trial in this jurisdiction. [↑](#footnote-ref-1)
3. 3See Rite Aid Corp., et al. v. American Express Travel Related Services Co., Inc., et al., No. 08-CV-2315 (NGG) (RER) (E.D.N.Y.); CVS Pharmacy, Inc. v. American Express Travel Related Services Co., Inc., et al., No. 08-CV-2316 (NGG) (RER) (E.D.N.Y.); Walgreen Co. v. American Express Travel Related Services Co., Inc., et al., No. 08-CV-2317 (NGG) (RER) (E.D.N.Y.); BI-LO, LLC v. American Express Travel Related Services Co., Inc., et al., No. 08-CV-2380 (NGG) (RER) (E.D.N.Y.); H.E. Butt Grocery Co, v. American Express Travel Related Services Co., Inc., et al., No. 08-CV-2406 (NGG) (RER) (E.D.N.Y.). [↑](#footnote-ref-2)
4. 4See The Kroger Co., et al. v. American Express Travel Related Services Co., Inc., et al., No. 11-CV-337 (NGG)**[\*62]** (RER) (E.D.N.Y.); Meijer, Inc., et al. v. American Express Travel Related Services Co., Inc., et al., No. 11-CV-338 (NGG) (RER) (E.D.N.Y.). [↑](#footnote-ref-3)
5. 5Visa and MasterCard entered into consent decrees with the Government on the same day that the Government Action was initiated. Only Amex remained as a defendant. [↑](#footnote-ref-4)
6. 6Unless otherwise noted, citations to docket numbers refer to entries made in In re American Express Anti-Steering Rules ***Antitrust*** Litigation, No. 11-MD-2221 (NGG) (RER) (E.D.N.Y.). [↑](#footnote-ref-5)
7. 7The parties agree that Albertsons has timely asserted its ***antitrust*** claims. [↑](#footnote-ref-6)
8. 8On August 4, 2015, the court ultimately denied the joint motion of class plaintiffs and Amex for final approval of their proposed class action settlement. See [*In re Am. Express Anti-Steering Rules* ***Antitrust*** *Litig., No. 11-MD-2221 (NGG) (RER), 2015 U.S. Dist. LEXIS 102714, 2015 WL 4645240 (E.D.N.Y. Aug. 4, 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GKY-BW91-F04F-02YN-00000-00&context=). Various class actions related to Amex's NDPs, as well as a related class action captioned Marcus Corp. v. American Express Co., No. 13-CV-7355 (E.D.N.Y.) (NGG) (RER), remain pending before the court. [↑](#footnote-ref-7)
9. 9The MPs challenge the same NDPs at issue in the Government Action, as well as two additional provisions contained in the NDPs that the Government did not challenge: (1) the no-surcharge rule, a provision prohibiting merchants from imposing a fee for the use of an Amex card that is not imposed equally on all other payment products (i.e., prohibiting merchants from differentially surcharging Amex cards vis-a-vis its competitors' cards), and (2) a provision prohibiting merchants from mischaracterizing Amex cards or engaging in activities that harm Amex's business or brand. See Government Decision, [*88 F. Supp. 3d at 163*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FBC-TJ91-F04F-00V2-00000-00&context=). [↑](#footnote-ref-8)
10. 10The Government Action included only a ***Section 1*** claim, and did not include a ***Section 2*** claim. [↑](#footnote-ref-9)
11. 11Also pending before the court are four fully briefed motions in limine, which the court does not address in this Memorandum and Order. [↑](#footnote-ref-10)
12. 12The court does not construe the panel's December 18, 2015, Order as having any jurisdictional effect on the MP Actions, which were separately filed from the Government Action and are not currently before the Second Circuit. [↑](#footnote-ref-11)
13. 13In the context of an amendment to a pleading, certain of the typical [*Rule 15*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F103-00000-00&context=) inquiries merge, in effect, with the [*Rule 16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8JD7-4G92-8T6X-702K-00000-00&context=) inquiry, such as prejudice to the non-movant. Others, however, do not, including whether the amendment is futile even if the movant shows good cause to modify the scheduling order. [↑](#footnote-ref-12)
14. 14The MPs argue that the Supreme Court's recent decision in [*B&B Hardware Inc. v. Hargis Industries Inc., 135 S. Ct. 1293, 191 L. Ed. 2d 222 (2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FKD-7PV1-F04K-F1X1-00000-00&context=), broadened the identicality standard into an inquiry concerning whether the two issues in the two actions are not "materially unlike." (See. e.g., MPs' Suppl. Mem. at 22 ("The question is whether steering by discounting is 'materially unlike' steering by surcharging in a manner that has 'legal significance' . . . .").)

    The court is not convinced that the Supreme Court's decision in B&B Hardware went so far. There, in holding that findings from a registration challenge to a trademark in the Trademark Trial and Appeal Board ("TTAB") could apply to a later infringement action brought in federal court,**[\*72]** the Court noted that if the same usage of a trademark is at issue in the registration proceeding and the district court proceeding, then the "issues" to be decided in the context of the likelihood of confusion test are likely identical, but that if "a mark owner [later] uses its mark in ways that are materially unlike the usages in its [previous TTAB] application, then the TTAB is not deciding the same issue" as presented in the later federal action based on the later use of the mark. [*B&B Hardware, 135 S. Ct. at 1308*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FKD-7PV1-F04K-F1X1-00000-00&context=). Nothing in the Court's analysis indicates that its use of the "materially unlike" framework applies outside of the factual context of the case—i.e., whether determinations made about a usage of a mark in the first action apply to a similar analysis of a materially similar usage of a mark in the second action. Cf. id. ("A fortiori, if the TTAB considers a different mark altogether, issue preclusion would not apply."). [↑](#footnote-ref-13)
15. 15This differs from the approach of other circuits, see, e.g., [*Turney v. O'Toole, 898 F.2d 1470, 1472 n.1 (10th Cir. 1990)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-67S0-003B-540N-00000-00&context=) ("Because either proposed reason would have been a sufficient ground for granting the writ, it cannot be said that either issue was actually and necessarily decided."), as well as the Restatement of Judgments, see [*Restatement (Second) of Judgements § 27 cmt. i*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:42GD-2FB0-00YG-7015-00000-00&context=) ("If a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone."). [↑](#footnote-ref-14)
16. 16Because the court finds that summary judgment is inappropriate even if the no-surcharge rule is analyzed unbundled from the rest of the NDPs, it need not reach the MPs' argument that consideration of the no-surcharge rule in isolation is legally impermissible. (See MPs' Original Mem. at 38-40 (arguing that principles set forth in [*Continental v. Union Carbide & Carbon Corp., 370 U.S. 690, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H8B0-003B-S01X-00000-00&context=), preclude consideration of one alleged restraint without consideration of the others); Defs.' Original Reply at 23-24 (arguing that consideration of the no-surcharge rule in isolation**[\*86]** is appropriate because ***regulators*** and Congress have elected to treat discounting and surcharging differently).) [↑](#footnote-ref-15)
17. 17Of course, Amex does not make the parallel argument that the NM's' prohibition on merchant discounting (as opposed to surcharging) ensures lower prices for its cardholders. A discount offered by a merchant for the cardholder's use of an Amex card would, in fact, result in lower prices for Amex cardholders. But the NDPs prevent such conduct by merchants. [↑](#footnote-ref-16)
18. 18But see, e.g., [*Dana's R.R. v. Attorney Gen., No. 14-14426, 807 F.3d 1235, 1239, 1247 n.9 (11th Cir. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5H9C-W101-F04K-X06C-00000-00&context=) (distinguishing Expressions Hair Design and explaining that "[t]autologically speaking, surcharges and discounts are nothing more than two sides of the same coin; a surcharge is simply a 'negative' discount, and a discount is a 'negative' surcharge"). [↑](#footnote-ref-17)
19. 19Even if Amex was correct that, as a legal matter, a sufficient showing by a defendant that ***Section 1*** damages were not speculative could defeat the application of the purchaser-accrual exception under ***Section 2***, summary judgment on the Section 2 claim would not be appropriate in this case because there are genuine issues of material fact with respect to whether the MPs' ***Section 1*** damages were or were not speculative. See infra Part III.B.3.b. [↑](#footnote-ref-18)
20. 20The parties appear to agree that a purported class action challenging the NDPs filed on April 18, 2006, tolled the statute of limitations pursuant to [*American Pipe Construction Co. v. Utah, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-CFH0-003B-S4JT-00000-00&context=), through the present. (See Defs.' Original Mem. at 3 & n.2; MPs' Original Mem. at 24 n. 11.) Accordingly, for purposes of the speculative damages exception and summary judgment, the relevant inquiry**[\*96]** is whether a reasonable jury could find that the MPs' future damages were speculative as of the beginning of May 2002. If a reasonable jury would be compelled to find that damages were reasonably estimable as of May 2002, then, based on the effective dates of each merchant agreement, each MP's ***Section 1*** claim (except Albertsons) would have necessarily expired before May 2006, no claims would be tolled pursuant to American Pipe, and the MP Actions (filed in 2008 and 2011) would be time-barred.

    In other words, the parties appear to agree that damages that may have occurred in January 2002 are time-barred. Even if they were speculative as of the signing of the merchant agreement (for example, in 1996), these damages would have actually occurred (and were no longer speculative) at the very latest upon Amex actually imposing a supracompetitive discount fee for that particular month, and the MPs were therefore required to file suit for January 2002 damages by January 2006, before American Pipe tolling applied. The MPs did not file suit by January 2006, and claims related to January 2002 damages expired in January 2006. Claims related to damages that occurred in June 2002 would have similarly expired**[\*97]** in June 2006, but American Pipe tolled the expiration of the claim for June 2002 damages through 2008 and 2011, when the MPs filed suit.

    The court notes, in addition, that the filing of the Government Action in October 2010 also tolled any of the MPs' live claims as of that date. See [*15 U.S.C. § 16(i)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GR31-NRF4-44X5-00000-00&context=). However, because the Government Action was filed many years after the May 2006, class action, it is the 2006 date and American Pipe tolling that provides the MPs with the longest period of tolling and the relevant date of May 2002 for purposes of the speculative damages exception. [↑](#footnote-ref-19)
21. 21With respect to a minority of the MPs, the parties dispute whether agreements entered from 2002 through 2005, which appear to have amended each of the particular MPs' operative card acceptance agreements in order to create new, higher fuel discount rates as opposed to the pre-existing and otherwise generally applicable supermarket discount rates, constitute overt acts that inflicted new injury under the continuing violation doctrine. Amex argues that the increased fuel discount rates merely remedied a windfall that the MPs were receiving for fuel that they sold, since fuel discount rates for other fuel retailers were historically higher than supermarket discount rates. (See Defs.' Original Reply at 20-21.) In addition, Amex argues that the agreements setting forth the fuel discount rates constitute agreed-upon contracts between it and the MPs, and therefore cannot qualify as a "unilateral" increase in the discount rate. (Id. at 20.) The MPs counter that the new fuel discount rates were exactly the type of act that qualifies as an overt act inflicting new injury under the continuing violation doctrine: whereas before, the MPs did not pay Amex a premium for fuel transactions, they**[\*100]** did after the change.

    The court concludes that genuine issues of material fact preclude the entry of summary judgment on this sub-issue. If the agreements containing the new fuel discount rates are, in fact, "new" and independent agreements between the MPs and Amex, then the court's discussion in the SOL Decision regarding when performance under a long-term contract can qualify as an overt act (e.g., a unilateral increase in the discount fee) becomes irrelevant, because a new claim for damages would have accrued at that time with respect to that particular contract and any resulting damages. If, on the other hand, the rise in fuel discount rates occurred pursuant to the original merchant agreements, the MPs have raised a genuine issue of material fact regarding whether the new rate is more than a mere "reaffirmation" of a previous act, and instead qualifies as an overt act that allows them to recover damages stemming from that act. Cf., e.g., [*Madison Square Garden, L.P. v. Nat'l Hockey League, No. 07-CV-8455 (LAP), 2008 U.S. Dist. LEXIS 80475, 2008 WL 4547518, at \*10 (S.D.N.Y. Oct. 10, 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4TNN-N4V0-TXFR-J27H-00000-00&context=) (holding that the renewal of policy that does not include any substantive changes in the plaintiff's rights constitutes a reaffirmation of the prior act and not a new and independent act). [↑](#footnote-ref-20)
22. 22The court notes, as Amex points out, that there may be little reason to apply the speculative damages exception to the laches defense, as the reason justifying the exception—that the plaintiff**[\*105]** could not have known the extent of its monetary damages at the time of the unlawful act—does not apply where the plaintiff could have brought suit seeking prospective injunctive relief to stop both the unlawful act and the further accumulation of unknown and speculative damages. [↑](#footnote-ref-21)