

20-1766

*In re American Express Anti-Steering Rules Antitrust Litigation*

**In the  
United States Court of Appeals  
FOR THE SECOND CIRCUIT**

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AUGUST TERM 2020

No. 20-1766

**IN RE AMERICAN EXPRESS ANTI-STEERING RULES ANTITRUST  
LITIGATION,**

**LAJOLLA AUTO TECH, INC., QWIK LUBE LLC,  
*Plaintiffs-Appellants,***

**RITE AID CORPORATION, WALGREEN CO., FIREFLY AIR SOLUTIONS,  
LLC, PLYMOUTH OIL CORPORATION, RITE AID HEADQUARTERS  
CORP., JASA, INC., ON BEHALF OF THEMSELVES AND ALL SIMILARLY  
SITUATED PERSONS, ANIMAL LAND, INC., ROOKIES, INC., ITALIAN  
COLORS RESTAURANT, COHEN RESE GALLERY, INC., LOPEZ-DEJONGE,  
INC., BAR HAMA LLC, MEIJER, INC., PUBLIX SUPER MARKET, INC.,  
RALEY'S, SUPERVALU INC., CVS PHARMACY, INC., BI-LO, LLC, H.E.B.  
GROCERY COMPANY, THE KROGER CO., SAFEWAY INC., AHOLD  
U.S.A. INC., ALBERTSON'S LLC, HY-VEE, INC., THE GREAT ATLANTIC  
& PACIFIC TEA COMPANY INC., TREEHOUSE, INC., IL FORNO, INC.,  
NATIONAL SUPERMARKETS ASSOCIATION, INC., ON BEHALF OF ITS  
MEMBERSHIP, AND ALL OTHER SIMILARLY SITUATED PERSONS,  
PLAINTIFFS, ALL CLASS PLAINTIFFS, THE MARCUS CORPORATION,  
BILL MCCAULEY, READ MCCAFFREY, HILLARY JAYNES, ANTHONY  
OLIVER, BERNADETTE MARTIN, BRYAN HUEY, JAMES EATON, PAUL  
KASHISHIAN, GIANNA VALDES, CHAD TINTROW, MATTHEW  
MORIARTY, ANDREW AMEND, IGOR GELMAN, ZACHARY DRAPER,  
SHAWN O'KEEFE, FRANCISCO ROBLETO, JR., MICHAEL THOMAS REID,**

**PLYMOUTH OIL CORP., CLAM LAKE PARTNERS LLC,**  
*Plaintiffs,*

v.

**AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC.,  
AMERICAN EXPRESS COMPANY,**  
*Defendants-Appellees,*

**SUSAN BURDETTE,**  
*Defendant,*

**CIRCUIT CITY LIQUIDATING TRUST, THE RSH LIQUIDATING TRUST,  
HOLIDAY COMPANIES, GANDER MOUNTAIN COMPANY,  
COMMONWEALTH HOTELS, INC., KEILA RAVELO,**  
*Intervenors.\**

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On Appeal from the United States District Court  
for the Eastern District of New York

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ARGUED: DECEMBER 16, 2020  
DECIDED: NOVEMBER 22, 2021

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Before: CHIN, BIANCO, and MENASHI, *Circuit Judges.*

The plaintiffs-appellants are commercial merchants that sought monetary and injunctive relief under both federal and California antitrust laws against the defendants-appellees—American Express

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\* The Clerk of Court is directed to amend the caption as set forth above.

Travel Related Services Co., Inc., and American Express Co.—alleging that the appellees’ anti-steering rules caused merchant fees to rise across the market. The appellants do not accept American Express cards and therefore proceeded under an “umbrella” theory of liability. The district court considered the four “efficient enforcer” factors, concluded that the appellants lacked antitrust standing, and dismissed the claims. The appellants challenge that holding, arguing that the four efficient-enforcer factors support antitrust standing for the “umbrella” plaintiffs in this case.

We disagree. The efficient-enforcer factors structure a proximate cause analysis according to which there must be a sufficiently close relationship between the alleged injury and the alleged antitrust violation to establish antitrust standing. Here, that relationship is lacking. After considering the efficient-enforcer factors and the relevant state laws, we **AFFIRM**.

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SCOTT MARTIN, Hausfeld LLP, New York, NY (Michael D. Hausfeld, Hausfeld LLP, Washington, DC, and Irving Scher, Jeanette Bayoumi, and Kimberly Fetsick, Hausfeld LLP, New York, NY, *on the brief*), *for Plaintiffs-Appellants*.

EVAN R. CHESLER (Peter T. Barbur, Kevin J. Orsini, and Rory A. Leraris, *on the brief*), Cravath, Swaine & Moore LLP, New York, NY, *for Defendants-Appellees*.

Eric F. Citron, Goldstein & Russell, P.C., Bethesda, MD, *for Amici Curiae Eighteen Professors of Antitrust Law*.

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MENASHI, *Circuit Judge*:

The appellants, on behalf of a class of commercial merchants, allege that the Anti-Steering Rules promulgated by the appellees, the American Express Company and American Express Travel Related Services Company, Inc. (together, “Amex”), violate the antitrust laws.

The appellants do not accept American Express cards but claim to be harmed by Amex’s policies nevertheless. These merchants “seek monetary and injunctive relief for overcharges paid to Visa, MasterCard, and Discover,” not to Amex, “caused by Amex’s imposition of ‘Anti-Steering Rules’ in its agreements with merchants who accept Amex cards.” Appellants’ Br. 1-2. The appellants claim that “Amex’s Anti-Steering Rules have stifled interbrand competition throughout the relevant market, causing the credit card transaction fees charged to Appellants by Visa, MasterCard, and Discover to prevail at supracompetitive levels under Amex’s pricing umbrella.” *Id.* at 2.

The U.S. District Court for the Eastern District of New York (Garaufis, J.) dismissed the appellants’ claims under Federal Rule of Civil Procedure 12(b)(6) and ruled that the class lacked antitrust standing because it did not include “efficient enforcers” of the antitrust laws relative to Amex’s challenged anticompetitive conduct. *In re Am. Express Anti-Steering Rules Antitrust Litig.*, 433 F. Supp. 3d 395, 407-13 (E.D.N.Y. 2020). The appellants “seek reversal of the district court’s dismissal of their claims because Amex’s anticompetitive conduct has directly injured them, and recognizing their standing would ensure efficient enforcement of the antitrust laws.” Appellants’ Br. 2. Amex contends that the district court was correct that the appellants “lack antitrust standing because they are

not efficient enforcers” of the antitrust laws and the alleged damages are “too indirect” and “speculative.” Appellees’ Br. 3-4.

We affirm the district court’s judgment. To determine whether a party can sue under the antitrust laws—whether the party has “antitrust standing”—we apply the “efficient enforcer” test. The efficient-enforcer test is an elaboration on the proximate cause requirement of *Associated General Contractors of California, Inc. v. California State Council of Carpenters (AGC)*, 459 U.S. 519, 535-36 (1983). In cases of economic harm, proximate cause is demarcated by the “first step” rule, which limits liability to parties injured at the first step of the causal chain of the defendants’ actions. *See id.* at 534. Here, at the first step, Amex restrained trade to raise its own prices; only later did its competitors follow suit. Because the appellants were harmed at that later step, the claims here fail the first-step test. After considering the four AGC factors, we conclude that—taking the allegations of the complaint as true—the appellants are not efficient enforcers of the antitrust laws and therefore lack antitrust standing.

### BACKGROUND<sup>1</sup>

The appellants challenge Amex’s Anti-Steering Rules, or what Amex calls its non-discrimination provisions, contained in its Card Acceptance Agreement with merchants. The appellants allege that “Amex’s Anti-Steering Rules unreasonably restrain interbrand price competition with the other major [credit card] networks because the Rules: (1) stifle interbrand competition among the networks; (2) impose supracompetitive merchant fees, without corresponding

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<sup>1</sup> For purposes of this appeal, we accept as true all facts alleged in the second amended complaint (“SAC”). *Henry v. County of Nassau*, 6 F.4th 324, 328 (2d Cir. 2021).

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