IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, et al., Plaintiffs,	)	**MEMORANDUM IN SUPPORT OF PLAINTIFF STATES' MOTION FOR A PROTECTIVE ORDER REGARDING REQUESTS FOR DISCOVERY DIRECTED AT PUBLIC ENTITIES**
v.	)	
AMERICAN EXPRESS COMPANY, et al., Defendants.	)	Civil Action No. CV-10-4496 (NGG)(RER)

The seventeen Plaintiff States (the "States"), have filed this law enforcement action in their sovereign capacities to enjoin the defendants' unlawful merchant restraints. Defendants American Express Company and American Express Travel Related Services, Inc. (collectively "American Express") have served the States with discovery requests that seek documents from potentially all state agencies, municipalities and other political subdivisions of the States. These entities, however, are not parties to this antitrust law enforcement case; they are not named as plaintiffs; nor are damages sought on their behalf. Further, the Attorneys General, as independent and separate government officials, do not have possession, custody or control over the documents of other state agencies, municipalities and other political subdivisions. Nor do the Attorneys General have the authority or practical ability to produce these documents. American Express is not entitled to these documents through party discovery.

The States, therefore, seek a protective order (1) requiring that American Express treat "Government Entities" and "Government Accepting Entities," as those terms are defined in its discovery requests, as third parties under the Federal Rules of Civil Procedure and (2) quashing Interrogatories 1 and 3 through 6, and Document Requests 2 through 46. Any other result would impose an undue burden on the Attorneys General to find and produce materials from a vast

number of public entities over which they exercise no real control. Imposing such a burden would have dire consequences for state law enforcement here and in future cases.

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ANALYSIS

I. American Express has the burden of showing that it is entitled to obtain the information it seeks as party discovery from the State Attorneys General.

American Express served the States through their Attorneys General with nearly identical discovery requests under Federal Rules of Civil Procedure 33 and 34. The Requests seek information or documents from "Government Accepting Entities," which includes potentially all state agencies, municipalities and other political subdivisions (collectively "Public Entities") in every Plaintiff State.[1] The States objected on many grounds, including that, of the many thousands of Public Entities, none are parties subject to requests under Rules 33 and 34. No state agencies, municipalities or other political subdivisions are named as plaintiffs and the Attorneys General do not seek damages on their behalf.

This Motion for Protective Order is not about whether American Express is entitled to obtain the information it seeks. Rather, the question is whether as both a legal and a practical matter, it may do so using interrogatories and requests for production under Federal Rules of Civil Procedure 33 and 34.[2] In order to receive such party discovery, American Express must establish either (1) that the thousands of state agencies, municipalities and other political subdivisions are actually parties to this litigation; or (2) that (a) the information sought is within the control of the State Attorneys General and (b) American Express has no compulsory processes available to obtain the information directly from these Public Entities.

As the party seeking production, American Express bears the burden of demonstrating that the State Attorneys General have "control over the documents sought." *In re Flag Telecom*

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[1] *See* Interrogatories 1 and 3-6 and Document Requests 2-46 attached as Exhibits "A" and "B" (American Express' First Set of Discovery Requests to Vermont). American Express specifically identified Wolcott (population 1,456), among other Vermont towns, as an example of a "Government Accepting Entity." Vermont's objections and responses are attached as Exhibit "C," and the objections of the other States are substantially similar to Vermont's.

[2] For a full chronology of the procedural history of this dispute as well as copies of all relevant correspondence and minute entries, see Exhibit "D," *Certification of Attempt to Resolve Discovery Dispute,* dated June 24,2011.

Holdings, Ltd. Securities Litig., 236 F.R.D. 177, 180 (S.D.N.Y. 2006). American Express cannot meet that burden. "[A] party is not obliged to produce, at the risk of sanctions, documents that it does not possess or cannot obtain." *Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 138 (2d Cir. 2007). As explained in section III, below, under the "dual executive" structure of state government, the State Attorneys General do not the control documents in the possession of Public Entities, including executive branch agencies under the control of the State Governors. But American Express can use compulsory process against these third parties. *See id.* at 138. American Express can use third party subpoenas, depositions and state freedom of information laws (collectively referred to as "FOIA") to compel Public Entities to produce information. Requiring American Express to use those methods, as a practical matter, is more efficient than directing Rule 33 and 34 interrogatories and requests for production at the State Attorneys General. Moreover, such a requirement would further sound public policy by not imposing a chilling party discovery burden upon State Attorneys General when they seek to enforce antitrust laws.

II. Public Entities are not parties for purposes of discovery because this lawsuit is a law enforcement action brought on behalf of the People.

This lawsuit is strictly a law enforcement action brought by the States to enjoin the defendants' unlawful merchant restraints. Although the Attorneys General could file an antitrust lawsuit to seek relief for particular Public Entities, they did not do so here. The States are not seeking damages or any other particular benefit for any specific Public Entities. Thus, no Public Entities are parties.

When a State sues, it need not make every government entity in the state a party to that lawsuit. Nor, conversely, does a State's filing of a suit automatically render all Public Entities parties to the lawsuit. For example, in *New York ex rel. Boardman v. National Railroad*

Passenger Corp., 233 F.R.D. 259 (N.D.N.Y. 2006) (hereinafter "*Amtrak*"), the State of New York and its Department of Transportation sued Amtrak over a contract dispute. Amtrak issued discovery requests to the plaintiffs seeking documents from the Comptroller, who had performed auditing work relevant to the contract. Amtrak argued that the State of New York, a named plaintiff, was a single, superior entity that controlled all state agencies and, under basic agency principles, all state agencies would be subject to a Rule 34 demand for discovery. *Id.* at 262.

The court rejected Amtrak's view. It determined that the Department of Transportation was the plaintiff in the lawsuit, not the Comptroller, which was instead a separate state entity under the New York State Constitution. *Id.* at 263-64. "For reasons of federalism and comity, we give great deference to the State and its Legislature to define how governmental entities are to be separate and distinct and how they may relate to one another as a whole; this is 'uniquely an exercise in state sovereignty.'" *Id.* at 264 (quoting *Lyes v. City of Riviera Beach*, 166 F.3d 1332, 1343-44 (11th Cir.1999)). The Court refused to aggregate state agencies and denied Amtrak's discovery request. 233 F.R.D. at 266-67, 270.

This doctrine has been extended to discovery in state antitrust actions. "*Amtrak* firmly supports the view that, where two government agencies are neither interrelated nor subject to common executive control, they will not be aggregated together for purposes of discovery." *Colorado v. Warner Chilcott Holdings Co. III, Ltd.*, No. 05-2182, slip. op. at 8 (D.D.C. May 8, 2007) (Kay, Mag. J.) (attached as Exhibit "G"). In *Warner Chilcott*, several State Attorneys General sued pharmaceutical companies alleging that the companies had agreed not to compete by delaying the introduction a generic version of the drug Ovcon, and had violated the Sherman Act and state antitrust laws. The defendants sought as party discovery documents from state Medicaid agencies concerning their payments for Ovcon, arguing that the documents could show

that without the agreement, the States would have actually paid more for Ovcon. As in the present case, the State Attorneys General were suing in their sovereign capacities, not on behalf of the State Medicaid Agencies, and were seeking only injunctive relief and civil penalties. As in the present case, the States made no claims for damages. The Magistrate Judge determined that although their evidence was relevant to the lawsuit, the State Medicaid Agencies were not parties. Thus, Rule 34 could not be used to obtain Medicaid records. *Id*. at 3-5.

Similarly, in *California ex rel. Lockyer v. Superior Court*, 19 Cal. Rptr. 3d 325 (Cal. Ct. App. 2004), the State of California, through its Attorney General, sued to enforce statutes concerning the relationships between opticians and eyeglass sellers. The eyeglass sellers sought discovery from state agencies, which the district court granted. In overturning the district court, the court of appeals ruled that the State, simply by virtue of prosecuting the action, did not have possession, custody or control over documents of any state agency. The court held that state agencies "are distinct and separate governmental entities, third parties under the discovery statutes that can be compelled to produce documents only upon a subpoena." *Id.* at 337.
The Court concluded that, "to obtain documents and witnesses from state agencies, *other than documents reflecting an agency's investigation related to this litigation,* [the defendants were] required to serve subpoenas directly upon the agencies from which they sought this information." *Id.* at 338 (emphasis added).

Under these cases, unnamed state agencies are not parties to this law enforcement action. American Express is still entitled to party discovery: the nonprivileged documents of the Attorneys General gathered during their investigation. To obtain any other documents however, American Express should be required to use third-party discovery.

III. The State Attorneys General do not have possession, custody or control of the documents of Public Entities.

As provided by the Constitutions and laws of the Plaintiff States, Governors and Attorneys General are independent from each other, have unique roles within their governments, and have control over separate governmental functions. Almost universally, each State's Attorney General is an independently elected public official, not subject to removal or discipline at the whim of the Governor.[3] Indeed, the Attorney General may belong to a different political party from the Governor,[4] and may have different law enforcement priorities.

In this "dual executive" system of government, the States' Governors and Attorneys General have distinctly separate areas of authority The States' Attorneys General are typically independently accountable for overseeing the general legal affairs of the States, and for enforcing specific laws.[5] Accordingly, while State Attorneys General are designated to act as legal counsel for state agencies, they do not have the authority to set agency policies or priorities, and they do not have the practical ability to produce agency documents, absent compulsory process directed to the agency. Governors typically control executive branch agencies.

The dual executive system allows a State Attorney General to sue executive branch state agencies under the control of the Governor. Indeed, it even allows a single State Attorney General's Office to represent different state agencies on opposite sides of the same lawsuit. For example, in *Connecticut Committee on Special Revenue v. Connecticut Freedom of Information*

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[3] The Attorney General of New Hampshire is appointed by the Governor, subject to the advice and consent of the New Hampshire Executive Council. Once confirmed, the Attorney General serves a fixed four year term that overlaps the two year term of the Governor. The Attorney General of Tennessee is appointed by the Tennessee Supreme Court and is completely independent of the executive branch of government. *See* Exhibit "F" for specific citations concerning the election or selection of each State's Attorney General.

[4] Currently, the Attorney General and the Governor are from different political parties in Iowa, Rhode Island and Tennessee; when this suit was filed, that was also the case in Connecticut and Vermont.

[5] Each State in this lawsuit has statutorily authorized its Attorney General to enforce antitrust laws. *See, e.g.,* Md. Code Ann. Com. Law §§ 11-208, 11-209.

Committee, 387 A.2d 533 (Conn. 1978), the Connecticut Supreme Court upheld the ability of the Connecticut Attorney General's Office to represent agencies on both sides of a lawsuit because "[t]he Attorney General's responsibility is not limited to serving or representing the particular interests of State agencies, including opposing State agencies, but embraces serving or representing the broader interests of the State." *Id.* at 537 (quoting *EPA v. Pollution Control Bd.*, 372 N.E.2d 50, 52-53 (Ill. 1977)). In the present case, as American Express concedes, the State Attorneys General are representing the "broader interests of the State" and not "the particular interests of State agencies."[6]

The dual executive form of government contrasts directly with the federal system. The United States Attorney General is a member of the President's cabinet who is appointed by the President and who serves at the pleasure of the President. The United States Department of Justice is an integrated part of the Executive Branch of the Federal Government, under the direct control of the President. It is reasonable to assume that the United States Attorney General is attempting to further the President's law enforcement objectives through this lawsuit.

The same cannot be said of the States. Each State Attorney General makes legal decisions to enforce antitrust laws on behalf of his or her sovereign state, independent of control by the State's Governor. No State Attorney General was required to consult with or obtain approval from any Public Entity before initiating this action. No State Attorney General is claiming to represent any Public Entity in this case, and no Public Entity is a party to this case.

Although the Public Entities are independent from the State Attorneys General and are not parties to this action, American Express could still argue that they are entitled to the

[6] In a letter responding to the States' objection that is the basis for this motion, counsel for American Express stated: "The Attorneys General are not suing to enforce their own rights or the rights of a particular agency, they are suing to enforce the rights of their respective states and the citizens thereof." Exhibit D-2, *Letter from Kevin J. Orsini to Patrick E. O'Shaughnessy* (March 21, 2011), pg. 3.

production of documents from the State Attorneys General pursuant to Federal Rule of Civil Procedure 34(a)(1) to the extent that those documents are within the "responding party's possession, custody, or control." With very limited exceptions,[7] the Discovery that American Express seeks to obtain by means of Document Requests 2 through 46, which seek documents from or about the "Government Accepting Entities," are not within the physical possession or custody of the State Attorneys General. The same is true of the underlying information necessary to answer Interrogatories 1 and 3 through 6.[8] The key question is whether documents and information in the physical possession and custody of Public Entities are, nonetheless, within the control of the State Attorneys General.

American Express has not even attempted to meet its burden of showing that the State Attorneys General control the documents and information sought in the Discovery Requests that are within the possession or custody of Public Entities. As discussed above, to meet that burden, American Express would have to show that the relevant State's Attorney General "has the legal right or the practical ability to obtain the documents" sought in each specific Discovery Request of each Public Entity. *In re Flag Telecom Holdings, Ltd. Securities Litig.*, 236 F.R.D. 177, 180 (S.D.N.Y. 2006) (quotation omitted).

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[7] For example, each State's Attorney General may have documents in the case files that pertain to this case.

[8] The concept of "possession, custody or control" of information necessary to answer interrogatories is not stated explicitly in Federal Rule of Civil Procedure 33. However, the Interrogatories that are at issue in this motion can only be intelligently answered by reference to documents and information in the possession and custody of the "Government Accepting Entities." For example, Interrogatory number 1 states: "Identify each [State] Government Accepting Entity by name." The State Attorneys General do not possess in their investigative files lists of every state agency, municipality and other political subdivision that "accepts, has accepted, or has considered accepting any general purpose card on any Network as a Payment Form either directly or through a Third Party Service Provider." Even answering that preliminary interrogatory will require the cooperation of independent state agencies, municipalities and other political subdivisions that are not within the control of the State Attorneys General. The information required to intelligently and usefully answer Interrogatories 3 through 6 is far more detailed and would require far more cooperation from Public Entities. Thus, the concept of control is relevant to the States' argument that they should not be required to answer the disputed Interrogatories.

The private structure of corporations and their component divisions and subsidiaries is not analogous to state structures. "States are not the equivalent of corporations or companies, and local government bodies are not the same as subsidiaries." *Amtrak*, 233 F.R.D. at 267 (quotation omitted). In other regards, the Offices of the Attorneys General are like a law firm that has many different clients. Just as a law firm does not subject all its clients to party discovery when it sues on behalf of only one client, an Attorney General does not subject all state agencies to party discovery when it sues on behalf of one client—here, the People. A State Attorney General does not have authority to fire or discipline an official from a Public Entity for not turning over requested documents, nor do those documents belong as a matter of law to the State Attorney General. Even state statutes that may require other state public officials, when requested, to provide information or assistance to their Attorney General are "an insufficient basis upon which to conclude, across the board, that the State Attorneys General have a legal right to obtain [such] documents" without bringing a legal action to compel production. *Warner Chilcott* at 10.

In *Amtrak* the court expanded upon the general principles of control and looked at an array of factors before deciding that Amtrak had failed to meet its burden of showing that the State Comptroller's audit materials were within the control of the New York Department of Transportation. These factors are:

> (1) the use or purpose to which the materials were employed; (2) whether the materials were generated, acquired, or maintained with the party's assets; (3) whether the party actually generated, acquired, or maintained the materials' use, location, possession, or access; (4) who actually had access to and use of the materials; (5) the extent to which the materials serve the party's interests; (6) any formal or informal evidence of a transfer of ownership or title; (7) the ability of the party to the action to obtain the documents when it wants them; (8) whether and to what degree the nonparty will receive the benefits of any award in the case; and (9) the nonparty's connection to the transaction at issue.

233 F.R.D. at 268 n.10 (citing 7 Moore's Federal Practice §§ 34.14[2][b] & [c][2]).

Under that standard, not a single factor supports a finding of control by the State Attorneys General. Because the State Attorneys General typically had nothing to do with any Public Entity's use, generation, acquisition, or maintenance of the information requested by American Express, factors (1) through (4) offer no support for a finding of control. The State Attorneys General have not put specific monetary harm to state government at issue in this case, and are not relying upon the sought Discovery to further their case. Thus, factor (5) is inapplicable. There have been no transfers of ownership or title under factor (6), and American Express has not met its burden for factor (7) of showing for each Public Entity that the relevant State Attorney General can obtain the discovery simply by asking for it.[9] Finally, the Public Entities will receive no more benefit from this case, and have no more connection to the transactions at issue, than any other non-parties who accept credit cards. In fact, because Public Entities have the ability to force citizens to absorb credit card costs in the form of convenience fees permitted by credit card companies, they may receive little if any direct benefit. Therefore, factors (8) and (9) also do not support a finding of control.

In their original letter briefs, both American Express and the States cited to *United States v. AT&T*, 461 F. Supp. 1314 (D.D.C. 1978)) on this issue of control.[10] The *AT&T* decision was cited by both sides in *Warner Chilcott* as well, but the court agreed with the States' interpretation. *Warner Chilcott* at 6-7. In *AT&T* the defendant sought substantial discovery of evidence in the possession of numerous federal agencies from the U.S. Department of Justice.

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[9] Indeed, as part of the meet and confer process leading up to this memorandum, American Express identified four to six entities in each state as "priorities" and asked: "Whether each of the Government Accepting Entities is willing to produce, without a subpoena, documents responsive to American Express' First Request for Production of Documents." Exhibit D-8, *Letter from Kevin J. Orsini to Patrick E. O'Shaughnessy* (May 23, 2011), pg. 2. In response, most states indicated that they could not secure voluntary cooperation from any of the designated entities; moreover, those few that indicated they could potentially secure some level of intergovernmental cooperation conditioned such voluntary productions upon the need for negotiations with regard to the scope of the Discovery. See Exhibit "D," *Certification Of Attempt To Resolve Discovery Dispute*, at ¶ 15 and Exhibits D-9 through D-12.

[10] *See* State's Letter Brief, pgs. 2 - 3 (Docket No. 99); American Express' Letter Brief, pg. 2 (Docket No. 101).

The court reasoned that "it simply makes no sense to hold that the Department of Justice, which essentially is a law office, alone comprises the United States." 461 F. Supp. at 1333. On that basis, under the "relatively unique" facts of that case, the court ordered that AT&T could compel the Department of Justice to produce documents from the agencies under the control of the federal executive branch directed by the President. *Id*. at 1334. Whatever merit that part of the court's analysis may have, it does not apply to the dual executive structure of the States. While the U.S. Department of Justice may be "essentially a law office" that carries out the will of the Executive Branch under the direction of the President, the same cannot be said for the State Attorneys General, who have broad independent law enforcement authority and who do not answer directly to the executive branches or Governors of their states.

More relevant to this case is the part of *AT&T* that discusses the Federal Communications Commission—a separate agency. The court found that the FCC was designed to operate independently and outside of the control of the U.S. Department of Justice. *Id*. at 1335. An independent agency which may take positions at odds with those of the Executive Branch does not become a party plaintiff just because the Department of Justice files a lawsuit on behalf of the United States. *Id*. Moreover, the court found that "[i]n view of the quasi-legislative status of the Federal Communications Commission, a requirement that it produce documents as a party to an Executive Branch suit might well raise serious constitutional, separation-of-power problems." *Id.* at 1335 n.62.

The *AT&T* court also pointed to the fact that "a party cannot produce that which it does not have." *Id*. at 1335. An independent regulatory agency like the FCC, with Commissioners who are not subject to removal or discipline by the President, is in essence "immune from executive direction." *Id*. at 1336. The court further stated that finding the FCC to be "part of the

'plaintiff'" in the Justice Department's lawsuit "would not only contradict over forty years of legal history, but would effectively leave the conduct of this lawsuit, and perhaps of other actions brought by the government, vulnerable to a virtual veto by one or more independent regulatory agencies." *Id.*

All of these concerns apply equally to the Attorneys General and the Public Entities in this case. State Attorneys General often take positions inconsistent with those of Governors, the various state agencies controlled by Governors, and other elected officials. Under the dual executive form of state government, the Attorney General stands apart from the rest of the government, particularly the Governor and executive agencies. Thus, an order mandating executive agencies under the direction of State Governors to produce documents to the State Attorneys General would raise serious separation-of-power problems under state constitutions. Finally, "a party cannot produce that which it does not have," and ordering the State Attorneys General to produce documents in the possession of Public Entities would in effect subject this lawsuit, and perhaps others, to "a virtual veto" by, among others, the Governors of the States, the heads of various executive branch agencies, other elected officials, state university presidents, the clerks of various state courts, and the Selectboard of Wolcott, Vermont.

IV. It is procedurally more efficient for American Express to obtain discovery directly from Public Entities.

Under Federal Rule of Civil Procedure 26(C)(1), a court can make an order "specifying terms … for the disclosure or discovery" or "prescribing a discovery method other than the one selected by the party seeking discovery." Thus, even if the Court were persuaded that the State Attorneys General could be compelled to produce documents in the possession, custody or control of the Public Entities, prudential considerations suggest that the court should order American Express to use methods other than party discovery to obtain the desired information.

The States' motion for a protective order does not seek to prevent American Express from obtaining any particular documents or information. The relief sought by the States would merely preclude American Express from seeking documents and information from Public Entities as party discovery. Options available to American Express include third party subpoenas (either duces tecum or deposition), and state FOIA requests. American Express may also be able to get much of the information that it seeks from other parties.

Regardless of the outcome of this motion, there will still be a need to discuss and resolve discovery issues on an entity-by-entity basis. Individual Public Entities may be subject to specific federal and state law that governs issues such as confidentiality and disclosure. The burdens of compliance, regardless of whether through party discovery or third-party methods, will vary significantly from one Public Entity to another, and will affect the reasonableness of ordering discovery. Even issues such as relevance require entity-by-entity analysis. For example, American Express seeks discovery from any Public Entity that "accepts, has accepted, or has considered accepting any general purpose card." Obviously, an entity that never accepted a credit card, but which once considered doing so, could raise specific objections to the relevance of the entity's internal documents and whether those documents are protected by specific privileges such as the "deliberative process privilege." *See, e.g., United States ex rel. Dye v. ATK Launch Systems, Inc.*, No. 1:06-cv-00039-CW, 2011 WL 60176, at *3-*4 (D. Utah Jan. 7, 2011) (discussing deliberative process privilege). Likewise, an entity that accepts credit cards could argue that even if deemed to be a "Government Accepting Entity," its records are not relevant because it is not a "Merchant" within the meaning of this lawsuit.

In addition, the States are suing American Express for imposing restraints on merchants that restrict them from steering customers to other payment forms. One such restraint prevents

merchants from charging a convenience fee—that is, a fee that passes to the customer some or all of the merchant's cost of accepting an American Express credit card. American Express, however, has a program that exempts government agencies from this restraint, allowing them or their third-party servicers to charge a convenience fee. This government-agency program marginalizes—if not nullifies—the effects of the challenged restraints for participating state agencies. As a result, individual Public Entities may raise relevancy or other arguments.

It is much more efficient for American Express to resolve these issues directly through third party discovery addressed to specific Public Entities, rather than indirectly through discovery addressed to the "State." As the *Lockyer* court observed, requiring a defendant "to seek documents and witnesses directly from the involved state agencies will allow those agencies to protect their particular interests, of which the People may have no knowledge, expertise or understanding." 19 Cal. Rptr. 3d at 338.

The assistant attorneys general who represent the States in this lawsuit are antitrust lawyers and may lack specialized legal or factual knowledge regarding specific Public Entities. Other counsel with that specialized knowledge typically would compile and examine the Discovery for each entity, making objections and claims of privilege. Although certain Public Entities may be represented by assistant attorneys general in that context, such is not always the case. Those state agency counsel may or may not be assistant attorneys general.[11] It is conceivable that each Public Entity may raise unique issues of law or fact like the deliberative process privilege. If such issues were required to be litigated in the Eastern District of New York, they could impose considerable burden upon both the state agencies as well as this Court.

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[11] For example, as part of the meet and confer process American Express sought discovery from "the 'flagship' state university in each Plaintiff State." Exhibit D-8, *Letter from Kevin J. Orsini to Patrick E. O'Shaughnessy* (May 23, 2011), pg. 2. State universities typically have in-house legal departments. *See, e.g.,* University of Texas System, Rules and Regulations of the Board of Regents, Rule 10501, § 2.8 *et seq*. *See also Foley v. Benedict*, 55 S.W.2d 805, 808 (Tex. 1932) (rules and regulations of University of Texas Board of Regents have the force of statutes).

By contrast, if American Express seeks documents through third party discovery or FOIA requests, those issues will be resolved in local venues that have experience with both the particular entity and applicable law. Subpoenas typically would be resolved in local federal district courts, while FOIA requests would be resolved using local administrative processes. This court would only need to resolve global issues like the current motion.

FOIA requests are a particularly good option for American Express to obtain necessary information in most States.[12] FOIA requests usually result in fast initial responses.[13] Also, many objections that are commonly raised in response to discovery requests are inapplicable to FOIA requests. For example, there is generally no concept of "relevancy." If the document is publicly available it is produced. Most of the documents sought in the discovery requests, like contracts and negotiation documents, are likely to be publicly available.

Seeking documents directly from Public Entities could also encourage American Express to tailor its discovery efforts to documents that are of some potential importance to its analysis of the case. The discovery as written seriously overreaches: American Express has requested almost everything related to actual or contemplated credit card use by every hamlet, community college and agency in each State since the invention of credit cards. During the meet and confer process, American Express limited the list to four to six "priority" Public Entities per state,

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[12] Some states restrict the use of FOIA to obtain documents for litigation purposes when subpoenas are available. *See, e.g.*, Idaho Code § 9-343(3) (Idaho Public Records Law is not available to supplement, augment, substitute or supplant discovery procedures in any federal or state civil action governed by the rules of discovery); Mich. Comp. Laws § 15.243(1)(v) (exempts from disclosure "records or information relating to a civil action in which the requesting party and the public body are parties")

[13] *See, e.g.,* Mo. Rev. Stat. § 610.023.3 (requested records are to be made available within three business days, unless there is reasonable cause for a later production); Neb.Rev.Stat. § 84-712(4) (requested records are to be made available within four business days, unless there is reasonable cause for a later production); Utah Code Ann. § 63G-2-204(3) (requested records are to be made available within ten business days, unless there is reasonable cause for a later production).

although it cautioned that this list was "by no means exhaustive."[14] There is no reason to doubt that American Express can similarly limit the scope of documents sought from these Public Entities to something more reasonable than the 48 lengthy Document Requests that American Express served upon the States.[15] Seeking information through third-party methods forces American Express itself to select those Public Entities and categories of information initially that are most important to its view of its case, thereby promoting judicial economy and efficiency.

V. Defendants in law enforcement actions should not be permitted to impair or deter state prosecutions by imposing party-discovery burdens on every Public Entity.

As the California Supreme Court held in *Lockyer*, "public policy dictates" that a defendant serve third party discovery directly on state agencies:

> It would be unduly burdensome if any time the People are a party to litigation they are required to search for documents from any and all state agencies that the propounding party demands. Further, requiring [defendants] to seek documents and witnesses directly from the involved state agencies will allow those agencies to protect their particular interests, of which the People may have no knowledge, expertise or understanding. There is no burden, on the other hand, in requiring [defendants] to serve subpoenas on the state agencies from which it wishes to obtain records.

19 Cal. Rptr. 3d at 338. In *AT&T*, the court expressed concern that an independent agency could effectively veto any government lawsuit in which it was found to be a party. 461 F. Supp. 1314 at 1336. All of the same public policy concerns apply here.

This type of multistate law enforcement action is not uncommon. Here, 17 states have sued American Express seeking to reform anticompetitive rules that American Express imposes

[14] American Express letter of May 23, 2011. Also, American Express "reserve[d] its right to pursue discovery from additional Government Accepting Entities." *See*, Exhibit D-8, pg. 3.

[15] For example, on June 11, 2011 counsel for American Express sent a letter to the Ohio Department of Administrative Services asking for voluntary production of 18 categories of documents. See, Exhibit "D-13." Similar letters were sent to a variety of entities in the States based upon information provided by the States to American Express as part of the meet and confer process. While the States believe that the current lists of documents are still too broad in scope, and are likely to be objectionable to most of the Government Accepting Entities on that basis, the reduction from 48 requests to 18 is certainly a step in the right direction.

upon merchants. Similarly, 33 states brought a law enforcement action in *Warner Chilcott* to enjoin the pharmaceutical companies from preventing cheaper generic drugs from competing in the market. In *Maryland v. Perrigo Co*., No. 1:04-cv-01398 (D.D.C. Aug. 17, 2004), 50 states, commonwealths, territories and the District of Columbia joined the Federal Trade Commission in the settlement that prevented two pharmaceutical companies from allocating the market for generic, over-the-counter Children's Motrin.

Even assuming that the Attorneys General could comply with the defendants' requests in this case, the cost in money and time of collecting, reviewing and producing discovery from a potentially vast number of state agencies, municipalities and other political subdivisions will inhibit such enforcement efforts in the future. Antitrust policy encourages deterrence; federal procedure should not create roadblocks to antitrust enforcement.

CONCLUSION

The Discovery to which the States object concerns information about and from Public Entities that are not parties to this lawsuit. The States are bringing this lawsuit through their respective Attorneys General in their sovereign capacities. The State Attorneys General are not typically in "possession, custody, or control" of the disputed Discovery. American Express can obtain the information that it needs more efficiently directly from Public Entities via subpoenas or other methods such as freedom of information act requests.

For all of the foregoing reasons, the States ask this Court to issue a protective order (1) requiring that the defendants treat all "Government Entities" (including "Government Accepting Entities") as separate third parties for purposes of discovery, and (2) quashing Interrogatories number1 and 3 through 6, and Document Requests number 2 through 46, which seek discovery about or from "Government Accepting Entities."

Dated this 24 day of June, 2011

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