UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE VISA CHECK/MASTERMONEY ANTITRUST LITIGATION	:	**MASTER FILE NO. CV-96-5238 (Gleeson, J.) (Mann,M.J.)**
This Document Relates To All Actions:	:	

DECLARATION OF PROFESSOR HARRY FIRST

1. I am a Professor of Law at New York University School of Law and the Director of the law school's Trade Regulation Program. My specialization is antitrust and trade regulation, an area in which I have taught, written, and practiced for more than thirty years. I have published casebooks on antitrust and government regulation, as well as authored numerous articles related to antitrust law and enforcement. From 1999-2001 I was Chief of the Antitrust Bureau of the New York State Attorney General's Office, while on leave from NYU. A copy of my curriculum vitae is attached to this declaration.

2. I submit this declaration in support of plaintiffs' application for attorneys fees and expenses. I was asked by plaintiffs' counsel to evaluate the complexity and difficulty of plaintiffs' antitrust claims against Visa and MasterCard, specifically their Section 1 tying claims and Section 2 attempt to monopolize claims, as well as to assess the riskiness of undertaking such litigation. My analysis required an evaluation of the unsettled doctrinal issues of antitrust law raised by plaintiffs' claims, the unique economic issues posed by defendants' conduct, and the factual complexity of this network industry.

3. To conduct this analysis, I reviewed the complaint, the memoranda of law submitted by the parties for, and in opposition to, class certification, the expert reports submitted by the economists for Visa, MasterCard and the plaintiffs, and the parties' summary judgment submissions (both their initial and supplemental filings). I also reviewed the district court's class certification and summary judgment decisions and the Second Circuit's affirmance of the class certification decision. I had access to any materials that were produced in the case.

4. My conclusions are that plaintiffs undertook an extremely risky case, one which was well outside the mainstream of cases generally brought by antitrust plaintiffs, and brought it to an extremely successful conclusion, successful not only from the point of view of their clients but also from the point of view of the public interest. Plaintiffs did not have the comfort of a clear *per se* rule to support their theory, nor did they have the comfort of a prior government prosecution attacking the challenged conduct. Indeed, plaintiffs sought to apply tying analysis to products and an industry for which there were no close analogues in prior court decisions. In addition, there was the magnitude of the claims themselves. Seeking to represent an extremely large class, whose damages could easily be in the billions of dollars if the plaintiffs' theories were correct, the plaintiffs took the risk that the pressure of so large a recovery could cause courts to approach their claims more conservatively than might otherwise have been the case. Faced with these factors, plaintiffs' counsel were extraordinarily effective. They successfully litigated the case at every stage, against well-defended adversaries who had historically been very successful in prior antitrust litigation, securing the partial grant of a summary judgment (rare, indeed, for plaintiffs in antitrust cases these days) and the denial of certiorari by the Supreme Court of the class certification appeal. They brought the litigation to the very eve of trial, at which point they secured the largest private damages settlement of an antitrust case in history. I

can only conclude that they applied extraordinary skill and that they achieved an extraordinary result.

5. My declaration is organized as follows. Part I presents the legal background relevant to the case. Part II discusses the tying claims. Part III discusses the attempted monopolization claims. Part IV discusses damages issues. The declaration concludes in Part V with an overall assessment of the case, placing it in the context of other plaintiffs' antitrust litigation.

I. Legal Background

A. Nature of the Claims

6. Plaintiffs' complaint pleads a deceptively simple case. The core of their complaint is that Visa and MasterCard, which together dominate the credit card industry, require merchants who accept Visa and MasterCard's credit cards to also accept their off-line debit cards. The fees charged the merchants for these debit card transactions, however, were far higher than the fees charged for on-line debit transactions. Merchants, given a choice, would have preferred the lower-priced cards; but they had no choice. Visa and MasterCard forced them to take the higher-priced product they did not want. So pleaded, plaintiffs alleged a straightforward tying arrangement, with credit cards being the tying product and debit cards being the tied product.

7. Plaintiffs further pleaded that Visa and MasterCard's imposition of this tying arrangement, by foreclosing competition in the debit card market (the tied product), created a dangerous probability of Visa and/or Visa/MasterCard successfully monopolizing that market.

8. Damages also appeared to be relatively straightforward. Plaintiffs had paid supra-competitive prices for debit card transactions. Absent the tie, they would have chosen less costly payment systems.

B. Developments in the Law and Economics of Tying

9. Tying has historically been considered to be conduct that is *per se* unlawful. That is, a tying arrangement is unreasonable "without more." A plaintiff need prove only the existence of the tying agreement. The plaintiff should not have to prove that the agreement had an unreasonable anticompetitive effect in any market, nor would any alleged procompetitive justifications be relevant. The *per se* rule thus should simplify the burdens placed on the plaintiff for proving its case.

10. The Supreme Court's most recent decision directly considering the question whether tying is *per se* unlawful is *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984). The Court there reaffirmed the traditional *per se* view (albeit in a 5-4 decision), a position which the Court did not disturb in its subsequent tying decision in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992).

11. Even within the context of a *per se* rule, however, the analysis enunciated in *Jefferson Parish* puts substantial burdens on the plaintiff. *Jefferson Parish* articulates three requirements for a *per se* illegal tie: there must be two products; there must be "appreciable economic power" (or "market power") to force the purchaser to accept the tie; and a "substantial volume" of commerce must be affected in the tied product market. These requirements have often proved difficult to meet, in part because the Court in *Jefferson Parish*, for all its insistence on the *per se* rule, also emphasized that tying could not simply be analyzed formalistically. See, e.g., 466 U.S. at 21 n.34 ("The legality of petitioners' conduct depends on its competitive consequences, not on whether it can be labeled 'tying.'").[1] After all, virtually any product is a bundle of more than one

[1] See also ABA Section of Antitrust Law, Antitrust Law Developments 210 (5th ed. 2002) ("Since the Supreme Court's decision in Jefferson Parish, plaintiffs' victories on rule of reason tying claims have been rare.")

input. Before condemning the seller for bundling "two products" together, courts need assurance of some predictable adverse economic effect in the tied product market. Thus, even in *Jefferson Parish* the Court emphasized the economic reasons for condemning tying agreements, stressing that tying is condemned because "competition on the merits" in the tied market is affected by buyers being forced to purchase a product either that they did not want or "might have preferred to purchase elsewhere on different terms." 466 U.S. at 12.

12. This reaffirmation of the *per se* rule in *Jefferson Parish*, but coupled with the Court's discussion of the importance of considering the economic effect arising from a tying arrangement, has led to a certain amount of confusion in subsequent cases. In *Eastman Kodak*, for example, the majority assumed that Kodak would still be free, at trial, to show that there were procompetitive effects from its bundling of parts and service, even though the plaintiff had asserted a *per se* violation. *See* 504 U.S. at 479. In the Second Circuit, the court of appeals has alternated between articulating a requirement that the plaintiff is required to prove "anti-competitive effects in the tied market," see, e.g., *Hack v. Yale College*, 237 F.3d 81, 86 (2d Cir. 2000), and omitting reference to any such requirement, see, e.g., *United States v. IBM Corp.*, 163 F.3d 737, 741 (2d Cir. 1998) (relying on *Eastman Kodak*), although the Court of Appeals has continued to stress that tying arrangements are subject to a *per se* rule even in cases articulating a "competitive effects" proof requirement, see *Gonzalez v. St. Margaret's House Hous. Dev. Fund Corp.*, 880 F.2d 1514, 1519 (2d Cir. 1989) (court is "virtually certain that the arrangement would survive scrutiny" under rule of reason; nevertheless, the *per se* rule must be applied).

13. Added to the uncertainty of what the *per se* rule means in tying cases has been the general trend in antitrust law to favor a rule of reason approach over *per se* rules. For example, in a 1997 decision the Supreme Court overruled its long-held view that maximum resale price

fixing is subject to a *per se* rule. Speaking for a unanimous Court, Justice O'Connor wrote that "most antitrust claims are analyzed under a 'rule of reason,' according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). Reviewing the case law of vertical restraints, as well as the "considerable body of scholarship" discussing the effects of such restraints, the Court concluded: "[W]e find it difficult to maintain that vertically-imposed maximum prices could harm consumers or competition to the extent necessary to justify their *per se* invalidation. *Id*. at 15.

14. The preference for more extended economic analysis of the effects of allegedly anticompetitive restraints was demonstrated again in *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999), a case decided by the Supreme Court in 1999, after the plaintiffs had filed their complaint. *California Dental* involved the proper standard for reviewing a claim that a dental association's advertising restrictions were anticompetitive. Even though the FTC had evaluated the Association's restrictions on the advertising of discounted dental services under the *per se* rule, the Supreme Court held that a more extended analysis of competitive effect was required. Recognizing theoretical economic arguments that might support restrictions on the advertising of professional services, the Court wrote: "Where, as here, the circumstances of the restriction are somewhat complex, assumption alone [of anticompetitive effects] will not do." 526 U.S. at 775 n.12. Even the dissenting Justices, in an opinion written by Justice Breyer, assumed that the appropriate analysis of the restraints required proof of their "likely anticompetitive effects" and consideration of their procompetitive justifications. See *id*. at 782.

15. The general trend toward a rule of reason analysis rather than a *per se* approach has seen specific application in at least one important tying case, *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir.), cert. denied, 534 U.S. 952 (2001), decided by the District of Columbia Circuit Court of Appeals two years after the plaintiffs filed their complaint. In *Microsoft* the court held that the plaintiffs' Section 1 tying claim should be evaluated under a rule of reason rather than under the *per se* rule. Although acknowledging *Jefferson Parish*'s statement that "certain tying arrangements" are *per se* unlawful, the court did not believe that Microsoft's integration of its browser and operating system was one of those arrangements. See *id*. at 89. Pointing out that the claimed tie was "unlike any the Supreme Court has considered," the court noted that Microsoft claimed that the integrated product provided substantial benefits to consumers. *Id*. at 90. Whether that was true or not, the court felt that a "wooden application" of the *per se* rule "may cast a cloud over platform innovation in the market for PCs, network computers and information appliances." *Id*. at 95. Although the court explicitly disclaimed an intent to switch to a rule of reason "every time a court identifies an efficiency justification for a tying arrangement," *id*., nevertheless, the effect of this disclaimer is uncertain. In the least, *Microsoft* illustrates the willingness of courts to make a deeper inquiry into tying arrangements in new settings where their competitive effects are not obvious.

16. Likewise, the economics scholarship has long been skeptical of the assumption that tying arrangements inevitably have anticompetitive effects. Chicago School theorists have written critically about tying, arguing that ties are not an effective way to raise price and that ties are often imposed for efficiency reasons. Even post-Chicago School theorists have not supported a general case against tying; rather, their scholarship has attempted to find examples where tying could be anticompetitive, to counter Chicago School arguments that ties can never harm

consumers. See, e.g., Keith N. Hylton and Michael Salinger, Tying Law and Policy: A Decision Theoretic Approach, 69 Antitrust L.J. 469, 525 (2001) ("nothing in the literature justifies the current *per se* illegality of tying"; post-Chicago writing only shows that "there are some conditions under which tying could theoretically be harmful to consumers") (reviewing literature).

17. The net effect of these developments in the law and economics of tying is that plaintiffs in tying cases cannot safely rely on *per se* presumptions to carry their case. In one way or another, a plaintiff in a tying case will be required to convince the factfinder that the tying arrangement will likely produce adverse economic effects and will need to meet the defendant's efficiency justifications for the tying arrangement. This means that the plaintiffs' apparently simple case would not be so simple.

II. Plaintiffs' Tying Claims

A. Introduction

18. Two of the four well-accepted requirements for proving an illegal tying arrangement were not subject to dispute in the litigation. The defendants admitted in their answers that under their rules merchants who accept Visa or MasterCard are required to "honor all cards" marked with the Visa or MasterCard trademark and were, therefore, required to accept these off-line debit cards. Accordingly, the plaintiffs did not need to prove the existence of a contractually imposed tie. Nor was there argument over whether a "substantial" amount of commerce was affected, given the volume of commerce made with defendants' debit cards.

19. The other two requirements for a tying analysis (two products and market power to compel the tie) were highly contested. In addition plaintiffs and defendants made strong

arguments with regard to the economic effect of the alleged tie, specifically, whether competition was harmed and whether the tie was justified on efficiency grounds.

B. Two Products

20. Critical to the case is the proper definition of the market or markets involved. This factor is important not only for doctrinal reasons (there must be two products) but also for understanding the economic effect of the defendants' rules.

21. The credit and debit cards "manufactured" by defendants are used by consumers at the point of sale to make payment for the goods and services they purchase. These cards are also used by merchants as a way to accept payment for the goods and services they sell. Although the two-sided quality of these cards might lead to analytical confusion, plaintiffs made clear that their focus was on payment services to merchants.[2] In this sense, credit and debit card payment services are inputs into the end-products sold by merchants.

22. The Supreme Court in *Jefferson Parish* set out the test for determining whether there are two products for tying purposes: "Our cases indicate . . . that the answer to the question whether one or two products are involved turns not on the functional relationship between them, but rather on the character of the demand for the two items." 466 U.S. at 19. Thus, the "separate products" test looks at whether there is "consumer demand for the tied product separate from the tying product." *Microsoft*, 253 F.3d at 86.

23. Plaintiffs sought to show how distinct credit and debit cards are as payment systems for merchants, marshaling a wealth of evidence as to how differently the two are perceived and promoted by the defendants themselves (debit cards are "positioned" to compete against cash and

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[2]See, e.g., Fisher Decl ¶ 69 (April 4, 2000).

checks).[3] Critical to these arguments was the effort to show that credit cards are more valuable to merchants than debit cards because they lead to incremental sales by consumers.[4] That is, consumers tend to buy more using credit cards precisely because of the credit feature of these cards (as well as the interest-free "float" period that the cards provide). Thus merchants would not be inclined to eliminate credit cards as a payment method, but they would be more inclined to do without debit cards if they could, particularly given the consumer's ready substitution of cash or check for debit card by consumers.

24. Defendants, on the other hand, sought to blur the difference between the two types of cards (some debit cards have credit features attached, for example),[5] but, more importantly, argued that credit cards and off-line debit cards make up a package rather than two separate products. In the defendants' view, Visa and MasterCard have integrated the two cards to provide a single branded product payment service, one which is readily understood by consumers and accepted universally by merchants. To dis-integrate this package would require Visa and MasterCard either to invest money in creating a new brand of debit card or would lead them to not issue the card at all. Neither approach, defendants argued, would advance consumer welfare.

25. In the end, proof of the "character of demand" for debit card services apart from credit card services depended on a full understanding of a very complex network industry, complex in terms of the product produced, and the needs and demands of merchants, banks, and consumers.

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[3]See, e.g., Fisher Decl ¶ 81 and n.116 (referencing defendants' own documents).

[4]See, e.g., Fisher Decl ¶ 73.

[5]See, e.g., Klein Decl ¶¶ 60 (line between credit and debit "not always distinct"), 74 n.90 ("a continuum of product variants rather than distinct, separate products").

This was not an "easy" tying case to describe and analyze, unlike salt machines and salt,[6] or computers and punch cards,[7] or hospital services and anesthesiology,[8] or prefabricated houses and credit,[9] or gasoline and S&H Green Stamps.[10] Faced with these challenges, plaintiffs brought together "[o]verwhelming evidence" (in the District Court's words, when granting summary judgment on this issue), showing distinct, separate demands for credit card and debit card services. Plaintiffs' success in showing that there were two products was fully justified by their production of record evidence of differing product perception, differing functions, and distinct pricing and certainly warranted the Court's grant of summary judgment on this issue; but the need to develop such a strong record was just as certainly a significant factor in making this case a risky one to bring.

C. Market Power in the Tying Product Market

26. Plaintiffs were required to show sufficient market power in the tying product market such that the defendants could force merchants to accept the tied product. The most straight-forward way to show such power is to show the market share of the defendants.

27. Plaintiffs faced two important issues in proving market share. The first is market definition. Are charge cards (like American Express) in the same market as credit cards? Charge cards have the float characteristic of credit cards, but not the credit characteristic. Does that place them in a separate market from the merchant's point of view? Including charge cards

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[6]See Morton Salt Co. v. Suppiger Co., 314 U.S. 488 (1942).

[7]See IBM v. United States, 298 U.S. 131 (1936).

[8]See Jefferson Parish, supra.

[9]See Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969).

[10]See Yentsch v. Texaco, Inc., 630 F. 2d 46 (2d Cir. 1980).

would drop Visa's market share below 50 percent,[11] not enough to constitute monopoly power but enough to be thought of as "market power" (the difference between the two concepts being a matter of some debate). Excluding charge cards would lift Visa's share close to the 60 percent level, near to what the Second Circuit has previously found to constitute monopoly power.[12]

28. Although this issue loomed large from a doctrinal point of view, plaintiffs' development of the case showed it to be less important to the resolution of the case than might have otherwise been assumed at the outset. The case law, often supported by a "simple" economic model that posits direct links between market structure, conduct, and performance, tends to focus initially on market definition and market share, assuming the ability to exercise market power from high market shares. More sophisticated development of these economic models looks more closely at a defendant's actual conduct, however, to examine whether the defendant is exercising market power. Plaintiffs took this more sophisticated approach, showing Visa's high market share and showing that merchants were, in fact, forced to accept Visa's debit card service. Plaintiffs thus made clear that whether charge cards were included "in the market" or not, Visa had and exercised "appreciable economic power."

29. The second issue the plaintiffs faced was more difficult. Did MasterCard have economic power to force the tie? Even with the narrower credit card market definition, MasterCard's share was only about a third, a share that Learned Hand famously characterized as "certainly" not enough to constitute monopoly power.

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[11]See Fisher Decl ¶ 123.

[12]See Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979) (camera market), cert. denied, 444 U.S. 1093 (1980).

30. Plaintiffs approached the MasterCard market power issue from several directions. One was to treat Visa and MasterCard as united in their approach to credit and debit card services. Plaintiffs argued that, particularly in light of "duality" (the virtual identity of bank membership in the two associations), the two associations did not treat each other as competitors and did not compete against each other for merchant acceptance.[13] Thus, whether because of actual collusion or parallel behavior, it would be appropriate to treat in the aggregate Visa and MasterCard's market power to impose the tie, combining the two firms' market shares and market power.

31. Another approach was to look directly at what MasterCard was able to do in the marketplace, that is, its ability to impose the tie. This was not simply a reductionist argument (proving the power to impose a tie by proving there is a tie). Rather, plaintiffs arrayed a factual showing to the effect that MasterCard's debit interchange fee was even higher than Visa's; that merchants were unhappy with MasterCard's fee and complained vociferously (at least once they understood that they were paying the same for debit as credit); and that despite the complaints, merchants either did not drop MasterCard or, if they did, returned quickly. The explanation given for this power in the marketplace was the size of the large installed base of consumers who carry a MasterCard credit card (whether they end up using their MasterCard credit card or their Visa credit card).[14]

32. Both approaches are compelling ones, both legally and factually. The idea that market power can be shown directly through market effect, rather than indirectly through market share, has been made clear by the Supreme Court.[15] The facts developed by the plaintiffs in this case

[13]See Fisher Decl ¶ 110.

[14]See Fisher Decl ¶ 116.

[15]See FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986).

also lead strongly to the conclusion that Visa and MasterCard should be treated in the aggregate when considering whether the two had power to force merchants to take both the Visa and MasterCard off-line debit cards. Indeed, in another context Visa itself had argued that the two firms do not compete.[16] Nevertheless, absent proof of some agreement to impose the tie, aggregating market power would be novel in a tying case. Indeed, I can think of no other case in which a tying allegation has been made against more than one firm; but, then, I can think of no other tying case involving two defendants so inextricably linked.

33. In the end I believe that plaintiffs would have made their case to the jury that MasterCard, as well as Visa, had the power to force merchants to accept the tie. The record is overwhelming both that the two defendants did not compete with regard to this aspect of their business (and many others, as well) and that merchants simply could not do business without offering both.[17]

D. Was Competition Harmed?

34. Proceeding from the conclusion that there are two products, and that the defendants had the market power to force plaintiffs to take the tied product as a condition of taking the tying product, strict application of the *per se* rule would lead to the conclusion that it can be presumed that "competition on the merits" in the tied product market has been foreclosed. That is, competing debit card networks could not compete on the merits for plaintiffs' debit card service

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[16]See Fisher Decl ¶ 16; Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment, p.28 (June 7, 2000).

[17]I note the critical strategic victory achieved by counsel for plaintiffs in defeating MasterCard's motion to sever the case for trial. See In re Visa Check/Master Money Antitrust Litigation, 2003 U.S. Dist. LEXIS 4965, *26 (S.D.N.Y. 2003). Successful prosecution of this case at trial would have been greatly helped by having the jury consider both defendants at one time.

business, even though those who offered on-line debit products provided an arguably superior product at a lower price than the defendants' off-line cards.

35. Defendants, however, told a very different story about the competitive effects of the "honor all cards" rule. Their story was direct and easy to understand. According to their view, the rule did not "foreclose" any competition at all. Merchants were free to accept all forms of payment systems; in this sense the honor all cards rule is not an exclusivity provision that "ties out" competing alternatives. It is consumers who choose to use the Visa and MasterCard debit products. In fact, the requirement that merchants "carry" all of defendants' branded products expands consumer choice by assuring consumers that Visa and MasterCard's products will be "on the shelf" when they want to buy something. If merchants cannot dissuade consumers from that choice (by "steering" consumers to some other form of payment), then the merchants' desire to be free to decline these debit cards ends up thwarting consumer choice.[18] This, the defendants argued, is hardly the result the antitrust laws have in mind.

36. Defendants sought to bolster their argument for lack of foreclosure by arguing that on-line debit has actually grown since 1990. If, as plaintiffs argue, the purpose of the tie was to foreclose competition from on-line debit cards, what explains the growth in this payment system?

37. Plaintiffs had a compelling, if more complex, response. In the plaintiffs' view, the honor all cards rule was the lynchpin in a persistent effort to foreclose competition in the debit card payment services market by suppressing what would otherwise have been the predictable growth of on-line debit cards. Although on-line debit may have grown, its growth was actually less than the defendants (and their consultants) themselves had predicted would have occurred in the absence of the tying arrangement. The high interchange fee for off-line debit, plaintiffs argued,

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[18]See, e.g., Klein Decl ¶¶ 90-93.

distorted banks' incentives to issue and promote on-line debit. Because of network effects, fewer on-line debit cards meant that fewer merchants would invest in the pin-pad technology necessary for accepting these cards, which then meant that such cards were less attractive to consumers. That on-line debit grew despite these impediments is testament to the attractiveness of a product that would have been in greater demand in an unfettered marketplace.

38. As discussed earlier, the *per se* rule would indicate that proof of competitive effects is irrelevant. Indeed, tying cases have never required proof that a "tie-in" was also a "tie-out"; that is, proof that the plaintiff was required to buy the tied product exclusively from the defendant and never from any other seller. Defendants' efforts to focus on competitive effects in the tied product market was thus an effort, at heart, to use a rule of reason approach to this tying arrangement. Whether plaintiffs would have been able to convince the courts to apply a *per se* rule to the tying arrangement alleged in this case, however, is unclear (see ¶¶ 9-17, supra). In the face of this legal uncertainty, plaintiffs chose to make these competitive effects arguments in the context of their Section 2 attempt to monopolize claims.[19] This was a very well-conceived strategic approach which allowed plaintiffs to maintain their *per se* arguments, while still building a record of actual anticompetitive effect. This strategic approach wisely recognizes that complex antitrust cases ultimately rest on a solid record showing harm to competition, not on legal presumptions.

E. Efficiencies

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[19] See, e.g., Supplemental Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment at 10-19 (Dec. 13, 2002).

39. Defendants offered several variants of an efficiency justification for the honor all cards rule. Although under a strict *per se* approach efficiencies are not relevant, courts are also loathe to ignore solid evidence of efficiencies, particularly in a complex and unusual case like this one.

40. One efficiencies justification is the product integration argument (see ¶ 24, supra). That is, a bundle is permissible if there are efficiencies in integration. Defendants argued that the honor all cards rule was necessary to create a network which can provide ready acceptance of Visa and MasterCard branded debit cards. Allowing particular merchants to "pick and choose" the cards it wants to accept would ultimately destroy that network, because merchants acting on an individual basis lack appropriate incentives to preserve the network as a whole.[20] In further support of the efficiencies in integration argument, defendants pointed out that an honor all cards rule had been adopted by all card networks in the industry (although none tied debit card acceptance to credit card acceptance) and had been in effect even before the issuance of debit cards.[21]

41. The other efficiencies justification relates to the impact of a finding of liability on innovation. Arguing that the honor all cards rules were not anticompetitive when adopted, defendants contended that retroactive treble damages would inevitably chill innovation through an ex post re-evaluation of once-legitimate design decisions.[22]

42. Both arguments sound more plausible than the record indicates they are. Plaintiffs showed, for example, that defendants offer on-line debit cards that are branded separately and are

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[20] See Klein Decl ¶¶ 48-56.

[21] Compare United States v. Microsoft Corp., 253 F. 3d at 88 ("bundling by all competitive firms implies strong net efficiencies").

[22] See, e.g., Defendants' Memorandum In Support Of Their Motion For Summary Judgment Or Partial Summary Judgment at 3-4, 29-33 (June 7, 2000).

not subject to the honor all cards rule; that defendants' outside experts had advised them that off-line debit cards should be introduced under a separate brand to increase consumer awareness, but that defendants instead suppressed a separate brand for the card with the result that both consumers and merchants were confused; and that the debit card market had developed much more vibrantly in Canada where the lack of anticompetitive rules enabled on-line debit to flourish.

43. If efficiencies had been relevant at trial, it is difficult for me to believe that defendants' proof would have been sufficient to find that their asserted efficiencies could have outweighed the anticompetitive effects of the tie. If anything, the tie, by suppressing growth of on-line debit, suppressed innovation in these markets. Compare *Berkey Photo, Inc. v. Eastman Kodak Co.*, supra (contrary to defendant's innovation claim, joint development of camera flash product actually slowed innovation and restrained competition in violation of Section 1). Nevertheless, it is also my view that, as with the arguments on proof of anticompetitive effect, in one way or another plaintiffs would have been required to meet these arguments. But again, a review of the arguments raised by plaintiffs challenging the necessity for Visa and MasterCard to offer these products as a bundle indicates that plaintiffs were well-prepared to meet defendants' policy arguments with a developed factual rebuttal.

F. Conclusion

44. Each of the elements of the tying analysis raises complex and novel issues. Despite the existence of the *per se* rule in tying cases, plaintiffs faced vigorous challenges in the critical parts of their tying argument, specifically, whether there are two products and whether Visa and MasterCard both had the power to compel the acceptance of a tying arrangement. Coupled with the strong potential that a court would insist on applying the rule of reason here, requiring

thorough proof of anticompetitive effect and effective rebuttal of any alleged procompetitive efficiencies, plaintiffs were necessarily required to prepare a record that could support factual findings that went beyond the presumptions of the *per se* rule. This was by no means an easy case to litigate successfully, but plaintiffs more than met the challenges they faced, building such a strong record that they were able to obtain summary judgment on many of these issues and were able to defeat defendants' summary judgment motions on all.

III. Attempt to Monopolize

45. The law on attempted monopolization is relatively straightforward. Plaintiff must prove a) anticompetitive or predatory conduct; b) done with a specific intent to monopolize; and c) a dangerous probability of successfully monopolizing a market. See *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

46. In some sense the attempt to monopolize claim might be viewed as surplusage. The core anticompetitive conduct in the case is the tying arrangement. If the arrangement turns out to be lawful under Section 1, then it could not be viewed as anticompetitive or predatory under Section 2. If the tying is unlawful, then liability and damages can be based solely on it.

47. On the other hand, plaintiffs did not rest with the claim that tying was the only anticompetitive act in which Visa and MasterCard engaged in their attempt to monopolize. Rather, plaintiffs used the broader Section 2 theory to describe a long-pursued course of conduct whose ultimate goal, at least according to plaintiffs, was to exclude on-line debit cards from the debit card market. As I noted above (see ¶ 38, supra), the factual record assembled by the plaintiffs fleshes out the anticompetitive effect that the honor all cards rule was intended to have, supporting both the Section 1 and Section 2 theories.

48. The pivotal factual/doctrinal issues for the attempt to monopolize case were not that much different than the ones faced in the Section 1 claim (product market definition; the extent of the defendants' power in the debit services market). Whatever the outcome, however, in my judgment the Section 2 claim made a key contribution to plaintiffs' success in litigating this case. Plaintiffs chose a strategy that enabled them to make their proof on competitive effects without simultaneously undermining their effort to convince the court that the *per se* rule is the appropriate one for judging the tie. In this way they ultimately presented a far more convincing case than would have been presented had they not included the Section 2 claim.

IV. Damages

A. Introduction

49. Plaintiffs in antitrust cases have some degree of freedom in proving the extent of their damages. See, e.g., *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969) (proof in antitrust cases is "rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts"); *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946) (factfinder can "'act upon probable and inferential . . . proof'; otherwise "the wrongdoer [would be allowed] to profit by his wrongdoing at the expense of his victim"). What is necessary is a theory of damages that connects the violation to its economic effects in the marketplace.

50. Courts have taken two apparently different views of the proper way to compute damages in tying cases. Some courts have required that plaintiffs prove that the price of the entire package (tying and tied product) be increased, see, e.g., *Kypta v. McDonald's Corp.*, 671 F.2d 1282 (11th Cir. 1982) (tie of franchise and restaurant lease); *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971) (tie of franchise and supplies); other courts have permitted recovery only on proof that the tied product's price was increased, see, e.g., *Bell v. Cherokee Aviation Corp.*, 660 F.2d 1123

(6th Cir. 1981) (tie of sublease of fixed base airport operation to jet fuel, parts, and maintenance). These differences, however, are more related to the many different ways in which ties occur in markets (some of which may cause the plaintiff little economic harm), rather than to there being some absolutely "right" way to determine damages in all tying cases. For example, although the franchisee in *Siegel* tied the franchise and supplies, the franchisee charged no fee for the franchise itself. In that circumstance it was very clear from the economics of the transaction that the plaintiff's damages could not be computed simply from determining how much above market prices he had paid for his supplies; the franchise could not be "free," so the competitive price for the whole package had to be considered.

51. The task thus facing plaintiffs in this case was to trace the economic effects of the tying arrangement to determine the extent to which they had been overcharged by the tie. As with all the other elements of their case, this would require proof of how the complex markets in this case were affected by tying together credit card and debit card services.

B. Plaintiffs' Damages Theory

52. Plaintiffs' damages theory had three components.[23] First, by tying debit card services to their credit card services, defendants were able to extract a higher than competitive price for debit card services. Second, the high prices that defendants were able to extract from merchants for debit services led to perverse competition in that market, with competing on-line debit networks being forced to charge higher fees to merchants so as to convince issuing banks to remain in their networks. Third, a critical aspect of defendants' conduct (primarily the honor all cards rule, but also other exclusionary conduct) was to suppress the development of a mature regional on-line

[23] See, e.g., Fisher Decl ¶ 277.

PIN debit network system, which would then have been poised to enter the credit card market, thereby putting pressure on the defendants to lower their interchange fees on credit card services.

53. To prove these damages plaintiffs needed to show what would have occurred in a world without the tying arrangement. Defendants' conduct, of course, prevented such a world from developing, so the plaintiffs needed to present only "probable and inferential proof" of what such a "but-for" world would have looked like.

54. Plaintiffs essentially argued that competitive forces in the but-for world would have produced what I would term a "drop and lower" effect.[24] That is, merchants in the but-for world, free to choose between the defendants' high-priced off-line debit card services and far lower-priced competing on-line debit card services, would have dropped the defendants' products in favor of the less expensive alternatives. This, in turn, would have forced the defendants to compete by lowering their off-line fees to a level where merchants would find the defendants' off-line debit service as attractive as the on-line debit service. These lower rates would have had the further effect of ending the perverse competition that did occur for on-line networks to raise their interchange fees and would have brought about the feared pressure to lower credit card interchange rates as well.

55. To prove that this scenario was probable plaintiffs relied on the testimony of economics experts. That testimony was based on the application of economic theory to the workings of the debit and credit card markets, drawing greatly on an extensive array of defendants' own documents relating to their business decisions and studies of these markets that defendants commissioned from outside experts. Plaintiffs also drew on a "natural experiment" occurring in the real world, the experience in Canada where there was no honor all cards rule for debit cards,

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[24]See, e.g., Fisher Decl ¶¶ 142 and n.175, 289.

where virtually all debit cards are on-line, where pricing of debit card services is at-par, and where debit card usage has grown substantially faster than in the United States.[25]

56. Defendants argued that plaintiffs' but-for world was improbable. Defendants might not have offered off-line debit cards at all without the honor all cards rule; if they had continued to offer these cards, some (many) merchants might not have dropped the Visa and MasterCard offerings even at the current pricing; even if some would have decided to drop defendants' off-line offerings, defendants might have responded by just lowering interchange fees to those merchants but not necessarily to all the merchants in the class; even if defendants had lowered fees on debit services to all merchants, they might then have raised fees on credit card services so that the price of the package would end up being no different than it is now; and even if defendants had lowered fees for debit card services and did not increase (or even decreased) fees for credit card services, they might have raised fees imposed on consumer cardholders.

57. Plaintiffs mustered a truly impressive array of documents and studies to counter defendants' arguments about what the but-for world would have looked like, arguments which were generally a combination of economic theory and factual support.[26] For example, plaintiffs pointed out that the package theory of damages on which defendants had placed great stress evolved out of a limited economic model in which the tying and tied products were combined in fixed proportions (which is not the case here where there is separate demand for the two products); other economic models, with different assumptions, show that there are cases where

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[25] See, e.g., Fisher Decl ¶ 204.

[26] See, e.g., Memorandum of Law in Opposition to Defendants' Motions for Summary Judgment and Partial Summary Judgment at pp. 33-50 (July 5, 2000); Supplemental Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment at pp. 25-35.

ending the tie can result in lowering the price of both products.[27] More importantly, however, plaintiffs used the facts of the case to show how remarkably inapposite the package price theory really is in this case. Credit card issuing banks are not necessarily the same as debit card issuing banks, so raising the debit card interchange fee at the expense of the credit card interchange fee would mean that banks that did not issue debit cards (such as Citibank) would have been subsidizing those that did (such as Chase). This is an unlikely outcome, to say the least.[28] Indeed, the documents put together by plaintiffs show that maintaining the tie was an essential part of the defendants' business strategy to suppress the growth of a competitive debit market which might have forced credit interchange fees down. Defendants feared that untying the package would lead to lower credit interchange fees, not higher ones.

C. Steering

58. A persistent issue in this litigation was the question of "steering." Could merchants have avoided the high off-line debit interchange fee by steering consumers to different forms of payment?

59. This issue could have been relevant to the litigation in a number of different ways. It could have been viewed as a causation issue (merchants are hurt by their own sloth in not steering, rather than by the tying agreement). It could have been viewed as relevant to the question whether the tying was anticompetitive (the availability of steering means that the honor all cards rule does not really foreclose competition). Or, it could have been viewed as a damages issue (merchants were required to mitigate their damages by steering when they could).

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[27] See Fisher Decl ¶¶ 177-79. See also George J. Stigler, United States v. Loew's Inc.: A Note on Block-Booking, 1963 Sup. Ct. Rev. 152, 153 ("block-booking is a method of selling calculated to extract larger sums [from purchasers] than otherwise would be possible").

[28] See Fisher Decl ¶ 173; Brief of Plaintiffs-Appellees on Appeal from the United States District Court for the Eastern District of New York at 43-44 (Sept. 18, 2000).

60. Defendants argued all three points. As the litigation developed, their arguments on causation were rejected by the District Court at the class certification stage, but were then "repackaged," at the Court's suggestion, as a mitigation defense.

61. As with so many of the important issues in this litigation, the question of steering ultimately rests on the facts. At first blush it might seem that steering could be a strategy for merchants concerned about high interchange fees. But the plaintiffs' development of the record makes it clear that steering was an unlikely business strategy. For one, defendants' rules, on their face, prohibited steering (although Visa changed its rules in June 1998). For another, the merchant would have to know that there was an off-line debit transaction to be steered; defendants, however, have branded their credit and debit cards in a way that make it difficult or impossible to tell whether they are credit or debit cards. A third impediment to steering was that the most likely steering would be to on-line debit, which requires installation of pin-pad technology, an investment that many merchants have not made in part because of the lack of growth of on-line debit, growth the defendants have been able to suppress. A fourth impediment was that the banks themselves, unimpeded by anti-steering rules, invested heavily in promotions to steer cardholders to off-line debit. Finally (and related to the fourth impediment), some (unknown) percentage of consumers do not want to be steered, at which point the honor all cards rule would require merchants to offer and use defendants' off-line debit card services. Indeed, the very fact that some customers would refuse to be steered makes a merchant's attempt to steer any customer a risky proposition, for the customer at the register may well be the very customer who will resent the effort; but it will be impossible for the merchant to know this in advance.

E. Conclusion

62. To say the obvious, proof of damages was an extremely critical component of plaintiffs' case. To be successful they not only were required to deal with the issue of whether they needed to show an increase in the package of the tying and tied product, or just the tied product, but, more importantly, they had to be able to construct a probable but-for world of these two markets without a contractually imposed tie between them. As with each area of this litigation, this required the assembly and mastery of documents, studies, and expert economic opinion to understand a complex market and show how it should have worked if competition had been able to flourish. Perhaps most importantly, by showing how defendants' conduct affected all members of the class, they set the stage for a settlement that benefits all merchants, large ones like Wal-Mart and those merchants too small to make recovery of individual damages worth pursuing. This really is the public interest that the class action vehicle is intended to serve.

V. An Assessment: Complexity, Risk, and Result

63. A judgment of the value of the representation in this litigation involves an assessment of the complexity of the litigation, the risk in pursuing the litigation, and the result achieved.

64. As I have already indicated, the antitrust case plaintiffs filed against Visa and MasterCard was a very complicated one, presenting, on virtually every legal point, unique issues with uncertain outcomes. Within the four corners of this case alone it is apparent to me that a successful result was far from assured at the time plaintiffs filed their suit.

65. Another way of gauging the task facing the plaintiffs is to compare this case with other recent successful antitrust cases. Three cases (or, more precisely, three sets of cases) are instructive.

66. The first is the litigation against market-makers trading on the Nasdaq National Market.[29] The private litigation was spurred by an article written by two finance professors who discovered an odd bidding pattern in Nasdaq securities (the absence of "odd-eighth" quotations), from which they inferred that the traders had engaged in tacit collusion. Plaintiffs filed suit shortly after the article was published and several months before either the Justice Department or the Securities and Exchange Commission opened an investigation. Over the next four years plaintiffs' counsel engaged in a massive discovery effort, eventually developing a case of explicit collusion. During this period counsel worked cooperatively with attorneys at the Justice Department, encouraging the investigation and subsequently drawing on the evidence obtained by the Government. In 1996 the Justice Department filed a civil suit with an accompanying consent decree prohibiting the avoidance of odd-eighth bids. Plaintiffs began securing settlements of the class action in 1997. The total settlements eventually amounted to $1.027 billion, at that time the largest private settlement of an antitrust case in history.

67. The second is the Vitamins litigation.[30] These private cases involved an international cartel of vitamins producers that had been engaged in fixing the prices of vitamins for nearly a decade. The investigation of the cartel was begun in 1997 by private counsel before there was any public indication of interest from the Department of Justice. Suits were filed on behalf of both direct and indirect purchasers (in federal and state courts) prior to any official Justice Department action. In 1999 the two major participants in the cartel agreed to plead guilty to

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[29]For information on the case and its settlement, see In re NASDAQ Market-Makers Antitrust Litigation, 187 F.R.D. 465 (S.D.N.Y. 1998); Arthur M. Kaplan, Antitrust as a Public-Private Partnership: A Case Study of the *NASDAQ* Litigation, 52 Case West. L. Rev. 111 (2001) (author was one of the plaintiffs' co-lead counsel in the litigation).

[30]For information on the case and its settlement, see In re Vitamins Antitrust Litigation, 2001 U.S. Dist. LEXIS 25067 (D.D.C. 2001); Harry First, The Vitamins Case: Cartel Prosecutions and the Coming of International Law, 68 Antitrust L.J. 711 (2001).

price-fixing charges and to pay the largest fines ever imposed in an antitrust case. Six months later six corporations agreed to settle the direct-purchaser litigation for $1.05 billion, which then became the largest antitrust settlement in history (although opt-outs later reduced the settlement to $242 million). This was followed by a $335 million settlement of the indirect-purchaser and state claims.

68. The third is litigation involving "reverse payment" patent settlements under the Hatch-Waxman Act.[31] Although a number of these cases have been filed, two have been brought to successful settlement (involving the drugs BuSpar and Cardizem) and one of these settlements has been approved by the District Court (BuSpar). The basic claim in these cases is that the pharmaceutical manufacturer patent holder entered into a collusive settlement with a generic drug patent challenger in which the patent holder paid the challenger to stay out of the market. The issue drew enforcement attention from the Federal Trade Commission, which filed suit against both drug manufacturers and eventually settled both cases. The damages cases involved class action suits by direct and indirect purchasers, as well as claims for damages brought by the states. The BuSpar litigation was settled for $220 million for the direct purchaser classes and $100 million in the state litigation; the Cardizem litigation was settled for $190 million.

69. Outstanding results were achieved in each of these cases, as was recognized the Judges who approved the settlements and awarded attorneys' fees. None of these cases was easy to win; each presented particular challenges. In comparison to the difficulties faced by plaintiffs in the Visa/MasterCard litigation, however, none of the other cases really come close.

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[31]See In re Cardizem CD Antitrust Litigation, 332 F.3d 896 (6th Cir. 2003) (reverse payment patent settlement agreement *per se* unlawful); In re Buspirone Antitrust Litigation, 185 F. Supp. 2d 363 (S.D.N.Y. 2002) (denying motion to dismiss). For further information, see James Langenfeld & Wenqing Li, Intellectual Property and Agreements to Settle Patent Disputes: The Case of Settlement Agreements with Payments from Branded to Generic Drug Manufacturers, 70 Antitrust L.J. 777 (2003)

70. Both the Nasdaq and Vitamins litigation involved a substantive antitrust violation about which there is no legal dispute. The *per se* rule for horizontal price fixing is clear and beyond challenge. The problem in Nasdaq was proving that there was collusion. This is not an insignificant problem, but it is amenable to discovery and proof. Counsel did a thorough job in getting that proof, in the face of skeptical economists who argued that actual collusion would be highly unlikely in a market like the one in which the Nasdaq market-makers operated. But counsel also had the assistance of the Justice Department in gathering that proof, as well as the tactical assistance that came from the filing of a civil settlement against the largest of the market-makers. Similarly in the Vitamins litigation the plaintiffs had the benefit of guilty pleas by the defendants. with an accompanying memorandum laying out the story of "an extremely well organized operation." Guilty pleas are an even stronger lever for settlement than a civil consent judgment.

71. Both the Nasdaq and Vitamins litigation had hard fought disputes over damages. It was unclear, for example, whether the net result of no odd-eighths bidding led some to pay more (rounding up) but some to pay less (rounding down). It was unclear in Vitamins how high the overcharge was and, in the indirect case, how much was passed down the chain of distribution. Nevertheless, the core theory for damages in both cases is well-accepted. Price fixing enables sellers to exercise market power to raise price. Absent collusion, the market power does not exist and prices should be at competitive levels. In the end the damages question was simply "how much?"

72. The reverse payment generic drug cases had some similarity to Nasdaq and Vitamins in that there was a degree of government cooperation and some "boost" from the FTC's prosecutorial concern with the license agreements involved in the two cases. On the other hand, these

cases had doctrinal complexity that was more like the problems faced by the plaintiffs in Visa/-MasterCard. Plaintiffs in Cardizem argued that the reverse payment licenses amounted to *per se* illegal market divisions (competitors agreeing, for a fee, not to enter the market). This was certainly a solid argument on the facts and the legal argument for *per se* treatment of market division among competitors is still well-accepted. Nevertheless, there was substantial uncertainty about whether settlement agreements in the context of a patent dispute should be treated differently, particularly in the complex setting of pharmaceutical regulation. The district court and court of appeals ultimately upheld the *per se* treatment of this agreement, but other courts, reviewing slightly different agreements, have held that a rule of reason should apply.[32] Further, the issue of damages was a difficult one in these cases, involving predictions of how far brand-name prescription drug prices would have fallen had generic entry not been delayed. Unlike price-fixing, but more like tying, there is no core methodology for making this determination on which all could agree.

73. The settlement in the Visa/MasterCard case, of course, exceeds the settlements in all these other cases--combined. Unlike all these other cases, plaintiffs' counsel received no help from government enforcement agencies.[33] Although there was important preliminary litigation in Nasdaq, Vitamins, and BuSpar, and an interlocutory appeal of the *per se* issue in Cardizem,

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[32]See In re Ciprofloxacin Hydrochloride Antitrust Litigation, 261 F. Supp. 2d 188 (E.D.N.Y. 2003).

[33]The Justice Department's suit against Visa and MasterCard focused on the rules prohibiting Visa and MasterCard members from issuing credit cards on other networks. Originally, the suit did not focus on debit cards or on the debit card payment system market, but debit cards became a significant part of the case after plaintiffs' counsel provided assistance to counsel for the Government with regard to the importance of the debit card market. See United States v. Visa U.S.A. Inc., 163 F. Supp. 2d 322, 392-94 (S.D.N.Y. 2001) (competitively important for card issuers to have access to bank networks because only banks can issue the cards that debit a demand deposit account). For further discussion of plaintiffs' counsel's substantial assistance to the Government, see In re Visa Check/MasterMoney Antitrust Litigation, 190 F.R.D. 309 (E.D.N.Y. 2000) (Government first obtained copies of the three million documents that defendants had furnished plaintiffs; in light of this "massive quantity of documents," Government then sought and obtained access to plaintiffs' counsels' analyses of those documents).

plaintiffs in Visa/MasterCard had to litigate the class certification to a successful appeal in the Second Circuit and denial of certiorari in the Supreme Court, had moved for and defended summary judgment motions, had its own motion for summary judgment granted in large part, and was about to try the case when defendants agreed to settle. Although the classes in the three cases were large, none approached the size of this class (approximately 5 million). And even though there was an important *per se* question raised in the reverse payments litigation, none of the three cases had as many difficult legal issues with which to deal.

74. The litigation risk in the plaintiffs' case was also a function of their adversary. Visa and MasterCard are no strangers to antitrust litigation, nor are their counsel. Visa has long been well-represented by a team of lawyers from Heller, Ehrman in San Francisco, headed by Laurence Popofsky, a highly respected antitrust litigator. Popofsky had previously been completely successful in defending Visa in two important antitrust cases[34] and represented Visa in the case brought against it by the Department of Justice (which is now on appeal). Particularly significant was his victory in the Tenth Circuit in a case in which Sears (which then owned the Discover card) challenged Visa's rule which prohibited a bank that issued Discover cards from joining the Visa network. In that case Popofsky was able to convince the court of appeals to reverse a jury verdict in Sears' favor and hold that the restraint was not unreasonable as a matter of law. Similarly, MasterCard was represented by a team of lawyers from Clifford Chance, headed by Kevin Arquit, a highly-experienced and highly-respected antitrust lawyer who is a former General Counsel and Director of the Bureau of Competition of the Federal Trade Commission.

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[34]See National Bancard Corporation (Nabanco) V. Visa U.S.A., Inc., 779 F.2d 592 (11th Cir. 1986) (fixing certain bank credit card interchange rates); SCFC ILC, Inc. V. Visa USA, Inc., 36 F.3d 958 (10th Cir. 1994), cert. denied, 515 U.S. 1152 (1995).

Knowing the track record of both Visa and MasterCard in prior antitrust litigation, as well as the abilities of their lawyers, would make anyone even more cautious about filing this antitrust case.

75. A final aspect to valuing the representation provided the class in this litigation is to look at the result. Of course, simply in terms of the dollar amount that defendants have agreed to pay the class, the recovery is extraordinary. But the settlements against the two defendants go beyond serving the interests of the class of plaintiffs that counsel represents. The settlements also contain key provisions that advance the public interest. The settlements require the untying of debit cards, which will mean that merchant costs of accepting debit will decline, a reduction in input costs valued in the tens of billions of dollars that will ultimately redound to the benefit of consumers.[35] The settlements also prohibit anti-steering rules and require Visa and MasterCard to give their debit cards a consistent visual and electronic identity that will allow consumers and merchants readily to distinguish between the two products. Both provisions will benefit merchants and consumers by increasing the ability of merchants to lower their input costs; the latter provision has the further benefit for consumers of ending the confusion engendered by the defendants' current card design practices. In addition, Visa will not be able to prohibit member banks from issuing the ATM or POS debit cards of a competing network. Finally, there is an immediate reduction of interchange fees which is effective until January 1, 2004. At that point, the combined effect of the injunctive provisions of the settlements will mean that competition in the debit card services market can begin to work, bringing with it better products, future lower rates for merchants, and future lower retail prices for consumers. Everyone is going to benefit from these provisions.

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[35]See Declaration of Franklin Fisher regarding valuation of Visa and MasterCard Settlement Agreements.

76. Visa and MasterCard's decisions to settle this case for such extraordinary relief rests ultimately on a calculus made by defense counsel that plaintiffs' case was a strong one that could be convincingly put to a jury and defended on appeal. That their evaluation led to these settlements tells me quite a bit about the how successful plaintiffs' counsel was in overcoming the substantial legal challenges of this case and putting together a factual record that could show the extent to which Visa and MasterCard suppressed competition and raised prices in the debit card services market.

VI. Conclusion

77. For the foregoing reasons, I conclude that plaintiffs' counsel did an extraordinary job representing the class in this extremely difficult and highly risky case. The settlements they have achieved are historic. It is beyond anything that I might have predicted when this litigation was commenced and it is hard for me now to imagine any better result.

I declare under penalty of perjury that the foregoing is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Harry First

Professor Harry First

August 13, 2003

Date