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It is a pleasure to address this conference again. The last time was in 1988 when I spoke about a new debit card network in the U.S. called Entree - which was a joint venture of *Visa and MasterCard* designed to slow the development of debit cards in the U.S. and eventually dominate that new U.S. payment system market.

In 1989 15 of the United States sued Entree, which was quickly abandoned by its parents Visa and MasterCard.

In the aftermath of that lawsuit numerous new and competitive debit networks began to grow and flourish in the United States. These networks with names like *NYCE, MAC, MOST, HONOR, STAR, and PULSE* gave merchants and debit cardholders a very fast, and very secure method of payment at the point of sale, with the most typical charge to the merchant being zero, that is nothing. Why? Because the banks which issued these on-line debit cards had a clear economic incentive to replace cash and check transactions with less costly on-line debit.

In addition to stimulating the rapid deployment of on-line debit, the Entree suit began to focus the attention of government antitrust agencies and the retailers of the U.S. on many other abusive practices of *Visa and MasterCard*, which is now widely recognized as the most successful and longstanding cartel in the United States.

I use the singular "cartel" because it is also now widely recognized that *Visa and MasterCard* are two names which 6000 American banks and a growing number in Europe, Asia and Latin America give to the same cartel. A cartel which fixes interchange and other prices, jointly monopolizes and engages in tying arrangements and a host of other predatory and exclusionary practices, all to the detriment of merchants and consumers alike.

The most tangible expression by U.S. retailers and the U.S. Government of their resolve to break up this cartel are the two lawsuits which I am here to speak about.

The first case is called *Wal-Mart, The Limited, Sears Roebuck, Safeway, Circuit City, NRF, IMRA, and FMI v. Visa and MasterCard.* It is also referred to as *In Re Visa Check / Master Money Antitrust Litigation* - The five retailers who have brought suit are each the leader in their U.S. market segment, with collective annual sales in excess of $220 Billion. They also seek to represent a class of virtually all the retailers in the U.S.. NRF, IMRA and FMI are three retail trade associations whose members have annual sales in excess of $3 trillion. I am the lead counsel for the plaintiffs in this case but cannot convey how rare, indeed how unprecedented it is, to find such a diverse group of entities joining together in such a case.

The second litigation filed in October 1998, roughly 2 years after the retailers suit is called the *U.S.A. v. Visa and MasterCard*. The two lawsuits share broad common ground. They do not disagree on any essential point and if successful will destroy the basic objectives of the Visa/MasterCard cartel and restore competition to the American payment systems markets. Please allow me to sketch a more detailed picture of each lawsuit.

The merchants suit attacks identical tying arrangements used by *Visa and MasterCard* whereby U.S. retailers who accept *Visa and MasterCard* credit cards are forced to accept *Visa and MasterCard* off-line debit cards sometimes called *"Visa Check" & MasterMoney* - pursuant to *Visa and MasterCard's* so-called "*Honor All Cards*" rules. Last year retailers in the U.S. were forced to accept these debit cards in transactions totaling roughly $115 billion, a volume which has increased 400% in the last 3 years - and which has been projected to increase to $586 billion in the year 2005. For these transactions retailers are forced to pay credit card style price fixed interchange fees which in April 1999 will be 1.35% for Visa and 1.46 % for MasterCard on a $100 retail transaction. In addition, retailers also must pay other fees to Visa/MasterCard and their members when they are forced to accept these payments.

The retailers claim that these tying arrangements force them to pay billions of dollars yearly in excess fees which are reflected in the price of everything they sell. If the retailers were free to reject these unwanted off-line debit cards, they would instead receive payment with cash, checks and faster and more secure on- line debit cards, each at a tiny fraction of the cost of being forced to accept Visa Check & MasterMoney.

The retailers allege what is obvious, i.e. that Visa/MasterCard operate as interlocking cartels. Virtually every U.S. bank member of Visa is also a member of MasterCard. Virtually every member bank issues both *Visa and MasterCard* credit cards. Virtually all of the big bank owners of Visa also own MasterCard, the big banks who govern Visa also govern MasterCard. To win this case the retailers must prove that Visa/MasterCard and their dual members are dominant in the U.S. credit card market. With market share above 75% if T&E cards are included and market share above 90% if T&E cards are excluded, Visa/MasterCard dominance cannot seriously be disputed.

Under U.S. antitrust law the retailers must also prove what is obvious, that credit cards and debit card are separate products. The character of the demand for these products by consumers, merchants and banks makes this an obvious point.

Some consumers use credit cards but not debit cards and vice versa. Some consumers can get credit cards but not debit cards and vice versa. Some institutions issue credit cards but not debit cards and vice versa. Many consumers carry a credit card from one issuer and a debit card issued by another - and so on. The cards are intended to and have very different functions for cardholders, for merchants and for banks.

In addition to proving Visa/MasterCard dominance in credit cards and the distinct character of the demand for credit cards and debit cards in the U.S. all that the retailers must prove to win this case is that Visa/MasterCard require merchants to accept Visa Check & MasterMoney debit cards as a condition of being able to continue to accept *Visa and MasterCard* credit cards - and this fact of the tying arrangement has already been readily admitted by Visa/MasterCard. Visa has stated that it is central to the way it does business - indeed it is - and more of that later.

Now that is all the retailers must prove to win this case. But they will also show other things in this case. They will show that *Visa and MasterCard* maintain their dominance in the U.S. credit card market through numerous acts of predation & exclusion - such as the notorious and partially successful efforts to destroy and minimize the revolving credit card programs of Amex & Discover / Novus.

The retailers will show how duality has virtually eliminated competition between *Visa and MasterCard*. The retailers will show how Visa and MasterCard insinuated their off-line debit cards into the American retail sector through a campaign of deception, physically and electronically designing the cards to deceive retailers.

Visa and MasterCard intentionally preyed upon the confusion of both merchants and cardholders about the true nature / costs / and dangers of these off- line debit cards. The retailers will show that, despite the defendants acts of deception, when they can distinguish a Visa or MasterCard debit card from a Visa or MasterCard credit card that other parts of the defendants Honor All Cards and Anti-Discrimination rules have prevented merchants from surcharging or effectively utilizing other incentives to urge consumers to use faster/safer and much less costly methods of payment. The retailers will show how Visa and MasterCard's off-line debit cards have foreclosed and seriously diminished the market share of faster, safer and much less costly on-line debit cards. Recall those *NYCE, MAC, MOST, PULSE, STAR,* etc. on-line debit cards which flourished after Entree was terminated. These cards accounted for the vast majority of the U.S. debit card market in the early 1990's Now they account for less than 1/3 of the market . This despite the fact that they are faster and more secure pin encrypted transactions and the average interchange fee for one of these on-line cards in a $100 retail transaction in April 1999 will be 10 cents vs. $1.35 for Visa Check and $1.46 for MasterMoney. The fact that the average on-line debit interchange is a flat 10 cents per transaction today rather than the 0 cents it was in the early 1990's is also assignable to the predatory tactics of Visa and MasterCard. Those of you who are familiar with U.S. POS debit cards know that today most of the cards which bear a Visa or MasterCard logo (or bug) also bear the bug of one of the superior and cheaper on-line debit networks. But in its most recent predatory gambit Visa has given banks a powerful financial incentive to remove these competing on-line bugs from their debit cards - a further act of exclusion and foreclosure - which no doubt will be developed at the trial of both the retailers and the U.S. cases. The relief sought by the retailers is simple but profound. They seek several billion dollars in excess charges they were forced to pay when they were forced to accept Visa Check and MasterMoney. If they win they will receive this money back multiplied by 3 because under U.S. antitrust law damage

verdicts are automatically tripled. The retailers also seek an injunction against the tying arrangements so they can refuse in the future to accept these less secure, slower and fantastically overpriced debit cards. In addition to the amount of money at stake, the death of the tying arrangements means the death of the defendants Honor All Cards rules - and the end to their overarching business plan to leverage their dominance in credit cards into dominance in other payment systems. First debit cards, then stored value cash cards and eventually electronic payments which will replace the forms of payments currently made to utilities, mortgage holders, tax authorities, universities etc. The retailers success will be the beginning of the end of *Visa/MasterCards* intention to dominate all forms of payment not only in the U.S. but throughout the world. The U.S. government case which is extraordinarily important, if for no other reason than the salutary effect it has on the previously filed retailers case, has more modest but still very important objectives.

The U.S. lawsuit currently has two stated objectives. First to stop the defendants from enforcing rules which prevent member banks from issuing Amex and Discover Cards! Second to erode if not eliminate *Visa/MasterCard* duality.

In complete agreement with the retailers, the U.S. alleges that credit cards are a distinct payment market in the U.S. and that debit cards are separate products and are in a separate market. Also in accord with the retailers, the U.S. alleges that the defendants dominate the U.S. credit card market and through duality jointly dominate it.

Also in accord with the retailers the U.S. alleges that *Visa and MasterCard* have maintained their dominance through predatory and exclusionary tactics - most specifically Visa U.S.A. By-law section 2.10(e) and MasterCard's "Competitive Programs Policy".

In the duality portions of the U.S. complaint the government details numerous ways in which duality has effectively reduced or eliminated any competitive dynamic between *Visa and MasterCard*. Examples in the complaint are (1) the way duality effectively prevented *Visa and MasterCard* from competing on commercial credit cards (cards designed for purchases by businesses) (2) how duality effectively prevented *Visa and MasterCard* from competing on systems for secure credit card transactions on the Internet (3) how duality effectively prevented *Visa and MasterCard* from competing on Smart Cards, and (4) how duality effectively precluded *Visa and MasterCard* from targeting each other in comparative advertising campaigns such as Visa's longstanding campaign in the U.S. to tell consumers "Don't bother to bring your American Express card because they do take Visa but don't take American Express."

In the exclusionary practices portion of the complaint - the U.S. asserts that the payments markets would be more competitive if *Visa and MasterCard* members such as Chase and Bank of America were free to issue American Express and Discover cards - the relief sought by the U.S. is an injunction against Defendants anti-American Express/ Discover exclusionary rules and a partial end to duality. In the limited nature of the relief requested are implicit weaknesses which the U.S. Government can still address, can

still improve, and if recent developments are properly interpreted, will address and will improve. The potential weakness in the attack on *Visa and MasterCard*'s exclusionary rules are these: First, try as it valiantly has to distance itself from the events and to partially rewrite history - the United States antitrust division had a role in creating duality back in the mid 1970's. Although this ancient mistake in judgment has no legal significance - it does create an argument for *Visa and MasterCard* which may engender some sympathy with the Federal District Court.

Second and more important, the U.S. is not seeking to end duality, but to erode it and erode its most pernicious effects. The relief requested by the U.S. would continue to allow banks to be members of both *Visa and MasterCard*, to issue both *Visa and MasterCard* credit cards and to acquire merchants for both *Visa and MasterCard.* To undercut duality the government demands that a bank be "dedicated" to only one of the two networks. A bank which governs *Visa* by serving on its board of directors or any of the committees which makes important competitive decisions (such as ratifying the collectively fixed interchange rates) would be barred from acting as a governor of *MasterCard* by serving on its board and/or performing any other analogous governing functions. Because dual membership/issuance/and acquisition will still be permitted and because *Visa and MasterCard* rules already preclude banks from serving on both the *Visa and MasterCard* boards, there is less here than meets the eye. But it is still important and the Department of Justice may ultimately be correct that a requirement of bank dedication to only one network whether it is *Visa, MasterCard,* American Express or Discover will neutralize duality and improve competition. Time will tell.

On the exclusionary practices side the perceived weakness in the U.S. Complaint is the perceived failure to demonstrate how consumers will be substantially better off if they can obtain a Chase/Amex card and a Chase/Discover/Novus Card as well as the mirror image Chase *Visa and MasterCard* cards they already can get.

One respectable argument holds that such a world, in which Chase or Bank of America issues all four network cards would actually be a world even less competitive than the present. You can expect *Visa and MasterCard* to strongly assert these arguments. But the debit card market holds the potential rebuttals to these criticisms of the U.S. case and the U.S. belatedly seems to realize this.

The best example of how duality has hurt competition and has hurt merchants and consumers is in the debit card market. Some of you may recall how after Entree was terminated, *Visa and MasterCard* set out in diametrically opposite directions in their debit card programs. Visa chose to emphasize the off- line card and downplay its online product called Interlink. *MasterCard* ridiculed the off-line product, referring to it as obsolete, transitional, niche, etc., and stated that its on-line Maestro product was both the present and future of debit cards in the U.S. But then through the collusive workings of duality, *MasterCard* got turned around one hundred and eighty degrees and today it promotes off-line MasterMoney to the point where its on-line Maestro program has so little volume as to be statistically insignificant! The key to the U.S. case on duality is to present this real world manifestation of the harm inflicted in the U.S. debit card market.

Debit cards are also the key to the government's success in its exclusionary practices case. While one can debate whether consumers will be better off if they can get all four U.S. network cards from Chase, Bank of America or any other *Visa and MasterCard* dual member, there is a powerful and indisputable benefit of ending the anti-American Express/Discover rules- and this benefit is in the debit card market and in the stored value card market.

Under the *Visa and MasterCard* rules American Express, Discover, Novus and any new network entrant is effectively prevented from operating large and successful debit card programs. Since debit cards will eventually meet and exceed credit card volumes in the U.S.- the future lies there and the future of competition as well.

Recently the U.S. Antitrust Division has asked for and obtained all of the Federal Trade Commission investigative files on *Visa and MasterCard* exclusionary practices in the debit card market. These files include information similar to the claims in the retailers lawsuit as well as all of the information on Visa's most recent "Visa Check II" gambit to destroy competing on-line debit networks by prohibiting "dual-bugged" debit cards.

So, the two cases which already shared so much common ground are converging even more closely.

The time frames of the two cases are also converging

The approximate time frame for the trials of both cases is now roughly the same - both trials should occur in the first half of the year 2000 - and *Visa and MasterCard* will no doubt learn as other warriors have learned - that it is disastrous to fight a war simultaneously on two fronts. Make no mistake this is a just war - a legal war in which the promise of competition in the payment systems of the U.S. and ultimately the world hangs in the balance.

Thanks!