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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

IN RE PAYMENT CARD INTERCHANGE FEE and MERCHANT-DISCOUNT ANTITRUST LITIGATION	:	MASTER FILE NO. 1:05–md–1720–JG–JO
This Document Relates to:	:	ORAL ARGUMENT REQUESTED
ALL CASES	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO EXCLUDE OPINIONS OF DR. GUSTAVO BAMBERGER

FILED UNDER SEAL

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2 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (2007). 9

Defendants respectfully move to exclude the opinions of class plaintiffs' expert, Dr. Gustavo Bamberger, relating to the alleged potential for common proof of damages (and injury in fact)[1] with respect to the so-called "intra-network" conspiracy claims contained in the Second Consolidated Amended Class Action Complaint ("Complaint" or "Compl." (Docket No. 1170)).[2] For the reasons stated more fully below, Dr. Bamberger's opinions on these matters should be disregarded because they are fundamentally inconsistent with governing legal principles, and therefore may not be considered relevant or reliable under the standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589-95 (1993).[3]

In brief, Dr. Bamberger has not constructed an adequate "but for" world, because his "but for" worlds do not remove the allegedly unlawful "collective" setting of default interchange. Moreover, the "but for" worlds that he has constructed amount to impermissible price regulation and therefore exceed the legitimate scope of the antitrust laws. Dr. Bamberger rendered the opinions at issue through expert reports of May 8, 2008 and January 29, 2009, and depositions of July 30-31, 2008 and May 27, 2009, and his opinions on these issues are now complete.

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1 As Dr. Bamberger has admitted, his reports do not distinguish between damages and injury-in-fact, and provide no alleged methodology for proof of injury-in-fact as to each putative class member that is distinct from his proposed methodology for measuring damages as to each such class member. *See* Bamberger Dep. 181:4-185:9, July 30-31, 2008 ("First Dep.") (a true and correct copy of which is attached to the accompanying Declaration of Cyrus Amir-Mokri as Exhibit A).

2 In the counts of the Complaint that seek damages, class plaintiffs advance two basic theories of antitrust conspiracy. The first category of damages claims – the "intra-network" conspiracy claims – assert that Visa and MasterCard each independently conspired with their respective member banks to fix default interchange rates. The intra-network damages claims are set forth in Counts One, Two, Four, Ten through Twelve, Fourteen, Fifteen, Seventeen and Eighteen of the Complaint. The second – the "inter-network" conspiracy – alleges that Visa and MasterCard colluded to fix their respective interchange rates. The vast majority of Dr. Bamberger's expert declarations focus on attempting to demonstrate commonality of putative class member damages under the first theory, i.e., "intra-network" conspiracy.

3 There are many other aspects of Dr. Bamberger's opinions that are deeply flawed and patently unreliable. Defendants have confined the current motion, however, to a single overarching defect that is purely a legal matter, and which does not require any factual judgments or any assessment of the weight or credibility of Dr. Bamberger's work.

Preliminary Statement

Class plaintiffs' claims of intra-network conspiracy center on the setting of default interchange rates by Visa and MasterCard – i.e., each network's establishment of an amount required to be paid by the acquiring bank to the issuing bank in connection with a payment card transaction, absent other mutually agreed arrangements between the acquiring and issuing bank.[4] Specifically, class plaintiffs claim that each network's establishment of "default" interchange rates is unlawful because it constitutes the "collective" establishment of a "price" – by Visa and its member banks, in one instance, and by MasterCard and its member banks in the other. (*See, e.g.*, Compl. ¶¶ 163-64, 292-305.) According to plaintiffs, this "collective" setting of a default interchange price inhibits competition between the bank members of Visa and of MasterCard over the price at which card transactions will be intermediated between acquirers and issuers, which in turn affects the costs merchants bear in the form of the merchant discount fee. (*Id.* ¶ 246.)

Given the Complaint's focus on the alleged impropriety of the "collective" setting of a default price for interchanged transactions between acquirers and issuers, one might have expected that plaintiffs and their class certification expert would posit a "but for" world that removed any obligatory "default" pricing – leaving the matter of acquirer-issuer compensation to be determined without any "collective" network rules, but solely pursuant to bilateral negotiations. And, in fact, the Complaint contains allegations explicitly suggesting that a

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[4] The Visa and MasterCard systems bring together at least four parties to effectuate a payment card transaction: a cardholder, a merchant, an acquirer and an issuer. When the cardholder presents a payment card, the accepting merchant presents the card receivable from that transaction to its acquiring bank, which then reimburses the merchant the full amount of the purchase price minus an agreed "merchant discount fee." The acquiring bank in turn "interchanges" that card receivable with the cardholder's issuing bank, which is obligated to exchange the card receivable for the purchase price minus a "default interchange" fee. The "default interchange" fee is the amount required to be paid by the acquiring bank to the issuing bank in connection with the transaction, absent some other bilateral agreement being reached. Visa and MasterCard each establishes a schedule of default interchange fees that uniformly govern various categories of transactions.

"bilateral" system is a realistic alternative. (*See, e.g.,* Compl. ¶¶ 169-70.) But that is not the "but for" world that Dr. Bamberger advances.

Instead, Dr. Bamberger posits two "but for" worlds with regard to the "intra-network" conspiracy claims, both of which *retain* the alleged collective setting of a "default" price for transactions between issuers and acquirers. The only difference between these "but for" worlds and the actual world is the level of the "default" price that is "collectively" set. Dr. Bamberger opines, for example, that the default interchange rates in one of his alternative "but for" worlds would be 28% of current rates, on average. But the default rates in this "but for" world would not be established any differently, or any less "collectively" than in the actual world, nor would they be any less binding as "default" rates for transactions. All that has changed is the "default" price amount.

Nor is the situation any different with respect to Dr. Bamberger's other "but for" world, in which no default interchange fees are to be paid at all (i.e., the "zero 'but for' world"). The setting of "default" rules for the pricing of acquirer-issuer transactions remains intact in this "but for" world as well, as does the alleged "collective" nature of the agreement. The hypothesized zero "but for" world simply substitutes another collective default agreement governing the "price" of the acquirer-issuer transaction (i.e., *no* payment is required or permitted to be imposed absent mutual consent) for the current alleged collective default agreement governing "price" (i.e., a set, positive default interchange rate is required absent mutual consent). As another court has correctly recognized, when faced with a parallel circumstance, a system of default rules that requires transactions to proceed without interchange fees is every bit as much a matter of fixing a "price" as is a system with positive interchange fee requirements -- because "zero" itself is a

price when dealing with "default" requirements. *See Brennan v. Concord EFS, Inc.*, 369 F. Supp. 2d 1127, 1131-32 (N.D. Cal. 2005).

In short, Dr. Bamberger's "but for" worlds alter only pricing levels, not the underlying conduct that is claimed to give rise to the "intra-network" conspiracy antitrust violations here, i.e., the allegedly "collective" setting of "default" rules governing the pricing of the acquirer-issuer transactions. But in adopting this approach – in an apparent effort to avoid the individualized inquiries that would inevitably arise from a "but for" world without default pricing rules established by each network – Dr. Bamberger has run afoul of governing legal requirements, in two fundamental respects. First, a "but for" world is not supportable under the antitrust laws if it makes no change in the conduct that is alleged to be unlawful. *See Blades v. Monsanto Co.*, 400 F.3d 562, 569 (8th Cir. 2005) (noting that "but for" worlds must be free of the allegedly anti-competitive restraints). Accordingly, if the "but for" world is characterized by the existence of the very conduct alleged to be unlawful, that "but for" world fails as a matter of law. As discussed below, that is the case here.

Second, it is no answer for plaintiffs or Dr. Bamberger to claim that it is the pricing levels themselves which constitute the violation (as opposed to the "collective" setting of a default pricing rule), and therefore it is permissible to hypothesize a "but for" world in which only the pricing level itself is changed. The "restraint of trade" conduct covered by Section 1 of the Sherman Act, 15 U.S.C. § 1, is collective mechanisms and actions employed to establish price, not the pricing level itself. The "but for" worlds utilized by Dr. Bamberger are little more than exercises in attempted price regulation, and therefore cannot, as a matter of law, provide a legitimate basis for his opinions.

Background

A. The Complaint's Allegations of "Intra-Network" Conspiracy

As with any claim of horizontal conspiracy under Section 1, the class plaintiffs' "intra-network" conspiracy claims center on assertions of agreement and collective action. (*See, e.g.*, Compl. ¶ 294 (alleging that the "unlawful contracts, combinations, and conspiracies consisted of continuing agreements, understanding, and concerts of action between and among Visa's issuing and acquiring members including the Bank Defendants and Visa, the substantial terms of which were to illegally fix, raise, maintain, or stabilize the Credit Card Interchange Fees that are imposed on Merchants"), ¶ 301 (similar allegations with respect to MasterCard and its member banks).) Class plaintiffs' theory with respect to the alleged "intra-network" conspiracies focuses on the setting of "default" interchange rates.

According to the Complaint, the member banks of Visa and MasterCard are horizontal competitors. (*Id.* ¶ 159.) The central thrust of class plaintiffs' allegations is that these member banks, acting within each network, collectively set default interchange fees for payment card transactions on Visa- and MasterCard-branded cards. (*See, e.g.*, *Id.* ¶¶ 163-64.) Because the collective setting of price by horizontal competitors is the focus of an inquiry under Section 1 of the Sherman Act, class plaintiffs assert that it is the "*collectively fixed* Interchange Fees [that] are illegal." (*Id.* ¶¶ 298, 305 (emphasis added).)

Thus, the Complaint's essential focus with regard to the asserted intra-network conspiracies is that the alleged collective setting of default interchange rates is unnecessary and unlawful.[5]

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[5] The Complaint also states, without elaboration, that "[e]ven if some horizontal agreement were necessary to promote the efficiencies of the [ ] Network, the collectively-set Interchange Fee is significantly more restrictive than necessary to bring about those efficiencies." (*See, e.g.*, Compl. ¶¶ 298, 305.) As discussed below, Dr.

(cont'd)

B. Dr. Bamberger's Intra-Network Conspiracy "But For" Worlds

In support of plaintiffs' motion for class certification on the intra-network conspiracy claims, Dr. Bamberger submits his opinions that class members will be able to use common proof to demonstrate that each of them was damaged because "but for" the illegal collective setting of default interchange fees, no interchange fees (or alternatively, a lower level of interchange fees) would have been assessed. In this regard, Dr. Bamberger posits two "but for" worlds with respect to the alleged "intra-network" damage claims.

In Dr. Bamberger's first "but for" world, there would be no positive level of default interchange rates for transactions on Visa- and MasterCard-branded payment cards (the "zero interchange 'but for'" world). Instead, Dr. Bamberger purports to remove the Visa and MasterCard rules that establish a positive default interchange fee. (*See* Declaration of Gustavo Bamberger (May 8, 2008) ("Decl.") ¶ 73 (a true and correct copy of which is attached to the accompanying Declaration of Cyrus Amir-Mokri as Exhibit B); Reply Declaration of Gustavo Bamberger (January 29, 2009) ("Reply Decl.") ¶ 15 (a true and correct copy of which is attached to the accompanying Declaration of Cyrus Amir-Mokri as Exhibit C.)) However, while Dr. Bamberger purports to remove the requirement to pay interchange, he does not remove the participants' "collective" agreement to set "default" terms governing the payment card transaction between the acquiring bank and the issuing bank. Rather, Dr. Bamberger relies on two further fundamental assumptions: (i) that the network rules would *require* issuing banks to accept all receivables presented by acquiring banks *without receiving any payment* (in the absence of superseding individual agreements) (*see* First Dep. at 85:18-86:5, 200:24-201:6) and

(cont'd from previous page)
Bamberger has interpreted this allegation, at the direction of class counsel, as one that the default fees are too high to the extent that they exceed the minimum level necessary for network "viability."

(ii) that the issuing banks would be *required* to continue to provide all the services they currently provide to acquirers and merchants (including Payment Guarantee and Network Processing Services). (*See* Decl. ¶¶ 79-81, 91; First Dep. at 92-94, 532-33, 542-44.)

With these assumptions in place, Dr. Bamberger addresses the question of what fee (if any) would supposedly be paid in his "but for" world, that is, what interchange fee would prevail in a market where all services by issuing banks are *required* (as a "default" matter) to be provided, without any charge permitted, upon a merchant's presentment of a transaction through its acquiring bank. (Decl. ¶¶ 83-84.) According to Dr. Bamberger, under these circumstances, no rational actor (merchant or acquirer) would volunteer to pay anything to the issuing bank – because the network's default rules would require the issuing bank to provide its services *without* any interchange payment, i.e., at par or "zero" interchange. This conclusion is hardly surprising, given Dr. Bamberger's hypothesized premises as to the set of network requirements in his "but for" world.

In his second "but for" world, Dr. Bamberger posits that a positive default interchange fee would still be set, as before, but that the level of such fee would be restricted to the minimum amount deemed necessary to preserve the network's "viability." (Decl. ¶¶ 79-80.) As Dr. Bamberger has admitted, he constructed the conditions for this second "but for" world based on instructions he received from class counsel that he should assume for this alternative world that collective "setting of interchange fees is allowed, but only to the extent required for the viability of the Visa and MasterCard systems." (*See id.* ¶ 79.) Dr. Bamberger stated at his deposition:

> My understanding is that Plaintiffs, at least in their complaint, have put forth an alternative to a claim that any collectively-set interchange is illegal. That it may be the case, even if interchange is legal at some level, it has not been set in the least restrictive way.

(First Dep. at 26:11-17.)

Dr. Bamberger then utilizes Australia as a potential benchmark for how low default interchange rates can be set while "viability" is maintained. He concludes that a reasonable number for the "alternative but-for world interchange fee (assuming the viability of the networks requires such a fee) is the actual-world average interchange rate maintained by Visa and MasterCard in another country, such as Australia." (Decl. ¶ 80.) Dr. Bamberger estimates that the level of interchange established by regulatory authorities in Australia would be about 28% of current average interchange fee levels for payment cards issued on the Visa and MasterCard networks in the United States. The only difference between his alternative and original "but for" worlds is that the former assumes that a lower "default" interchange is established by each network.

Argument

Whether it is offered in the context of trial or a class certification proceeding, an expert's testimony must be both relevant and reliable. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589-92 (1993) (discussing FRE 702); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 323-25 (3d Cir. 2008); *In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. 68, 76-77 (E.D.N.Y. 2000). To be relevant, the evidence must assist the understanding or determination of a fact at issue, and must logically advance a material aspect of the party's case. *See Daubert*, 509 U.S. at 591-92; *Cooper v. Brown*, 510 F.3d 870, 942 (9th Cir. 2007). To be reliable, the expert's opinion must be based on acceptable data and methodology. *See Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 266 (2d Cir. 2002); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1055-57 (8th Cir. 2000). As a matter of law, Dr. Bamberger's opinions with respect to "but for" worlds prevailing in the absence of the alleged intra-network conspiracies are neither relevant nor reliable.

A. Dr. Bamberger's opinions should be excluded because they do not describe a "but for" world that removes the alleged unlawful "collective" conduct in establishing a uniform default price for acquirer-issuer transactions.

In evaluating antitrust injury and damages, experts in antitrust cases posit "but for" worlds. *See* 2 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 397 (2007). A "but for" world should present a picture of what the market would have looked like "but for" the alleged antitrust violation. *Id.* ¶ 394. Thus, "[t]o establish antitrust impact, an expert is required to construct a hypothetical market, a but-for market, *free of the restraints and conduct alleged to be anticompetitive*." *Blades*, 400 F.3d at 569 (internal quotation marks omitted) (emphasis added). If, in constructing a "but for" world, an expert maintains as constant the purported action that is alleged to constitute the restraint, the expert fails to present an appropriate "but for" world.

Here, Dr. Bamberger's "but for" worlds fail to eliminate the assertedly anti-competitive conduct. To the contrary, the core matter complained of by plaintiffs – the alleged "collective" action in setting a "default" price for issuer-acquirer transactions – is precisely what remains in each of Dr. Bamberger's "but for" worlds. And, what he has changed – only price – is precisely what is beyond the purview of Section 1. Accordingly, his opinions concerning whether injury and damages may be litigated on a classwide basis should be excluded.

The Alternative "But For" World. The fatal shortcomings of Dr. Bamberger's "but for" worlds are most readily evident from the alternative, "28% 'but for' world" scenario that he describes. In this scenario, Dr. Bamberger opines that a default interchange rate with positive value would be *collectively* set by each of Visa and MasterCard – just as in the actual world. (*See* Decl. at ¶ 79.) Thus, in Dr. Bamberger's view, the mechanics of establishing each network's interchange rates would remain precisely the same in the 28% "but for" world as they allegedly are in the actual world, even though it is this very collective rate-setting that allegedly

gives rise to an antitrust violation. To construct the 28% "but for" world, Dr. Bamberger *did not* remove the alleged collective action, or the obligatory nature of the "default" rule. Instead, the only manner in which this alternative "but for" world is different from the actual world is in the level of interchange rates, not in the alleged collective action that would be the focus of a Section 1 inquiry.

The Zero Interchange "But For" World. The analysis is exactly the same with respect to the "zero" interchange "but for" world. Here, once again, Dr. Bamberger posits a default pricing rule that is collectively established and which *governs* the pricing between acquirers and issuers and payment card transactions. The fact that the new pricing rule is "zero" (or "par") is of no moment; the reality is that the issuer and acquirer are each required to abide by the new default price. As Dr. Bamberger testified (when asked whether it would be appropriate to characterize his system as one in which issuers are required to accept paper for free): "I think in the but-for world, there is no requirement to pay interchange and there is, if you belong to the network, *a requirement to accept* those transactions. (First Dep. at 201:3-6 (emphasis added).)

In short, Dr. Bamberger's "but for" world once again contains a collective agreement among the issuers and acquirers as to a default term of exchanging merchant paper. It is not a "but for" world where the price of such transactions is simply a term left ungoverned, with no collectively established, "default" interchange fee rule being operative at all (as would, for example, be the case in a "bilateral negotiations" world where issuers and acquirers were each left entirely free on an individual basis to decide whether to deal with one another, and on what price terms). Instead, under Dr. Bamberger's theory, the members of the Visa and MasterCard networks continue to collectively agree on all terms of accepting, processing, and settling transactions, including, specifically, a default standard that no member would be entitled to any

compensation from another for the bundle of services provided to merchants. (First Dep. at 84-87, 200-03.) Thus, Dr. Bamberger's hypothesized zero "but for" world effectively substitutes one alleged collective default agreement – acceptance at a positive default interchange rate – with another collective default agreement—acceptance without an interchange fee.[6] Once again, the "collective" agreement as to the terms of a payment card transaction has not been removed.[7]

Dr. Bamberger attempts to distinguish between "eliminating the requirement to pay interchange" versus "setting a required interchange at zero" or "par." (*See id.* at 101-03, 107.) But this exalts semantics over substance, and fails to take into account that the two are exactly the same in legal (and economic) effect, given that it is a "default" set of obligatory network rules that is at issue in each instance. Accordingly, the only thing that has changed from the actual world is the price level: whereas the actual world exhibits a positive (or negative) interchange price, Dr. Bamberger simply asserts that in the "but for" world, the members of the network *agree* that they will not charge a positive interchange. This means that transactions effectively would be cleared at par, which is saying that the "price" for services would reduce to zero. This was exactly the conclusion reached in *Brennan v. Concord EFS, Inc.*, where the court observed that "to say that [default] interchange fees should be abolished" is "the same thing as

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[6] Dr. Bamberger contends that his zero "but for" world is more than just a price difference with the actual world. (Rep. Decl. ¶ 17.) But the only differences he identifies are changes that relate to bank profitability and the impact of lesser interchange revenue on the level of rewards conferred upon cardholders. (*Id.* ¶ 18; Decl. ¶ 74; Deposition of Gustavo Bamberger, May 27, 2009 ("Second Dep.") at 299:21-301:20, a true and correct copy of which is attached to the accompanying Declaration of Cyrus Amir-Mokri as Exhibit D.) These purported distinctions in the "but for" world thus have no relevance to the central question in "but for" world analysis, namely, whether they are part of the allegedly unlawful restraint itself. Therefore, a mere change in these factors does not constitute the relevant removal of the allegedly unlawful conduct from the "but for" world. All that these purported distinctions represent are consequences of diminished revenue for issuing banks as a result of eliminating interchange while keeping all other variables constant.

[7] Moreover, the resulting price—zero or "nothing"—does not reliably reflect competitive conditions. If anything, as indicated below, the fact that all the examples of Dr. Bamberger's alleged zero-interchange systems are regulated suggests that a competitive market would not yield zero interchange.

'set at zero.'" *See* 369 F. Supp. 2d at 1131. And, as the court correctly found, "zero" itself is a price. *Id.*

Accordingly, Dr. Bamberger's zero interchange "but for" world suffers from the same fatal defect as his alternative 28% "but for" world: the *collective* agreement by the banks to the default pricing terms of a payment card transaction persists.[8]

B. Dr. Bamberger's "but for" worlds amount to impermissible price regulation, and exceed the legitimate scope of the antitrust laws.

In Dr. Bamberger's "but for" worlds, everything is exactly the same as in the actual world as it pertains to the interchange transaction, except for the level of interchange rates between issuers and acquirers. But making changes only to the price level at which a product or service is offered while keeping all else constant is not a legitimate basis for asserting antitrust injury and damages; it constitutes no more than proposing a method of price regulation, and it is well-established that mere alteration of price does not form the basis of a cognizable antitrust claim. *See, e.g., Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 129 S. Ct. 1109, 1121 (2009) ("Courts are ill suited 'to act as central planners, identifying the proper price, quantity, and other terms of dealing.'" (citing *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004))); *Metronet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1133-34 (9th Cir. 2004); *Town of Concord, Mass. v. Boston Edison Co.*, 915 F.2d 17, 24, 25 (1st Cir. 1990) (Breyer, J.); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 294 (2d Cir. 1979).

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[8] Thus, Dr. Bamberger's "but for" worlds retain the "collective" setting of default terms even though the Complaint alleges that "bilateral agreements" among issuers and acquirers are possible (*see, e.g.,* Compl. ¶¶ 169-70), *without* default requirements being imposed, and even though such bilateral agreements would technically remove the alleged collective action. Class plaintiffs avoid such a "but for" world, however, because it would render class certification impossible: to establish classwide injury and damages, a bilateral agreement "but for" world would require individualized inquiry into the circumstances of each merchant to determine what its bargain would have been as a result of the bilateral agreement.

Nor is it any answer for class plaintiffs to claim that a "high" price level can itself constitute a violation of Section 1 of the Sherman Act if, as a "lesser restrictive alternative," a lower price would somehow suffice for "viability." While the existence (or not) of a "lesser restrictive alternative" can certainly play a legitimate role in Section 1 inquiries, i.e., in determining the competitive legitimacy or necessity of conduct constituting a "restraint," such inquiries never consider "lower" price as a less restrictive alternative; that "is not an antitrust argument at all, for it amounts to a dispute over prices and competition law is not concerned with setting a proper price." *Brennan v. Concord EFS, Inc.*, 369 F. Supp. 2d at 1132; *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 283 (6th Cir. 1898) (Taft, J.) (to inquire into the reasonableness of prices is to "set sail on a sea of doubt").[9] Instead, when courts have used the concept of a lesser restrictive alternative (*e.g.*, in connection with joint venture activity), they inquire whether the challenged activity (*e.g.*, the setting of some price) is necessary or ancillary to legitimate purposes, but the question of appropriate price *level* plays no role at all in the inquiry. *See, e.g., In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 544 F.3d 1323, 1332 (Fed. Cir. 2008) (under rule of reason analysis, plaintiff must show an alternative to the challenged conduct that is less restrictive of competition once defendant has met its burden of showing the procompetitive virtues of the conduct); *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 317 (2d Cir. 2008) (same). Any application of the so-called lesser restrictive alternative doctrine simply to mandate a lower price is tantamount to a legally improper exercise in price regulation.

[9] *See also Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1340 (7th Cir. 1986) (courts should not become "little versions of the Office of Price Administration"); *Yankees Entm't & Sports Network, LLC v. Cablevision Sys. Corp.*, 224 F. Supp. 2d 657, 674-75 (S.D.N.Y. 2002) (asking a court to determine whether a price is "reasonable" amounts to "nothing less than price regulation of the kind undertaken by regulatory agencies…and, which is, in any event, inconsistent with antitrust's fundamental market orientation" (quoting Phillip E. Areeda, Herbert Hovenkamp & Roger Blair, *Antitrust Law* ¶ 771, at 172 (2d ed. 2002)).

This conclusion is simply underscored by Dr. Bamberger's inappropriate focus on *minimal* "viability" as an invented test for determining the *maximum* pricing level for any default interchange fees in his 28% "but for" world. Dr. Bamberger repeatedly explains that the question he has sought to answer is whether the elimination or reduction of interchange would still permit the networks to be "viable." (*See, e.g.*, Decl. ¶¶ 73-74, 79-81, 91; Rep. Decl. ¶¶ 37-38, 42; First Dep. at 26.) And, as made clear in his Reply Declaration and follow-up deposition testimony, the purported foreign "benchmarks" that he has utilized are benchmarks *only* for the purpose of ascertaining the minimum requirements for "viability," not as predictors of what would have occurred in a "but for" world generated under competitive conditions in the United States. (*See, e.g.*, Rep. Decl. ¶36 ("In this matter, I use benchmarks to assess a particular issue – namely, whether Visa and MasterCard credit and debit card systems would have operated successfully in the but-for world."), ¶37, ¶42; Second Dep. at 281:11-282:19.) At its core, the question that inappropriately frames Dr. Bamberger's creation of his "but for" worlds is a regulatory inquiry, not one permitted by the antitrust laws, and what Dr. Bamberger has essentially done in his "but for" worlds is the work of a regulator.[10] The premises underlying this analysis are legally wrong, and the analysis should therefore be excluded.

Conclusion

For the foregoing reasons, Defendants respectfully request that this Court exclude the opinions relating to the so-called "intra-network" conspiracy damage claims that are contained in both the opening and reply declarations of Dr. Gustavo Bamberger.

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[10] It is no accident that virtually all of the foreign "benchmarks" cited by Dr. Bamberger involve instances of regulatory price-setting, not the emergence of pricing generated solely by competitive conditions. In Australia, for example, interchange is capped by a rate that is determined by the Reserve Bank of Australia. Accordingly, the levels of interchange in Australia have been set not by competitive processes, but through regulatory action.

Dated: New York, New York
June 5, 2009

Respectfully submitted,

ARNOLD & PORTER LLP

By: /s/ Robert C. Mason

Robert C. Mason
399 Park Avenue
New York, NY 10022-4690
Tel: (212) 715-1000
Fax: (212) 715-1399
robert.mason@aporter.com

Robert J. Vizas
275 Battery Street, Suite 2700
San Francisco, CA 94111
Tel: (415) 356-3000
Fax: (415) 356-3099

Mark R. Merley
Matthew A. Eisenstein
555 12th Street, N.W.
Washington, DC 20004
Tel: (202) 942-5000
Fax: (202) 942-5999
Attorneys for Defendants Visa Inc., Visa U.S.A. Inc., and Visa International Service Association

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

By: /s/ Kenneth A. Gallo

Kenneth A. Gallo
Joseph J. Simons
2001 K Street, N.W.
Washington, DC 20006-1047
Tel: (202) 223-7300
Fax: (202) 223-7420
KGallo@paulweiss.com
JSimons@paulweiss.com

Bruce Birenboim
Andrew C. Finch
Gary R. Carney

1285 Avenue of the Americas
New York, NY 10019-6064
Tel: (212) 373-3000
Fax: (212) 757-3990
BBarenboim@paulweiss.com
AFinch@paulweiss.com
GCarney@paulweiss.com

HUNTON & WILLIAMS LLP
Keila D. Ravelo
Wesley R. Powell
200 Park Avenue
New York, NY 10166-0005
Tel: (212) 309-1000
Fax: (212) 309-1100
Attorneys for Defendants MasterCard Incorporated and MasterCard International Incorporated

MORRISON & FOERSTER, LLP

By: /s/ Mark P. Ladner
Mark P. Ladner
Michael B. Miller
1290 Avenue of the Americas
New York, NY 10104-0050
Tel: (212) 468-8000
Fax: (212) 468-7900
mladner@mofo.com
Attorneys for Defendants Bank of America, NA., BA Merchant Services LLC (f/k/a Defendant National Processing, Inc.), Bank of America Corporation, and MBNA America Bank, N.A.

SHEARMAN & STERLING LLP

By: /s/ James P. Tallon
James P. Tallon
Wayne D. Collins
Lisl J. Dunlop
599 Lexington Avenue
New York, NY 10022-6069
Tel: (212) 848-4000
Fax: (212) 848-7179
jtallon@shearman.com
Attorneys for Defendants Barclays Financial

Corp., Barclays Bank Delaware, and Barclays Bank plc

O'MELVENY & MYERS LLP

By: /s/ Andrew J. Frackman
Andrew J. Frackman
Edward D. Hassi
Peter C. Herrick
Times Square Tower
7 Times Square
New York, NY 10036
Tel: (212) 326-2000
Fax: (212) 326-2061
afrackman@omm.com
Attorneys for Defendants Capital One Bank (USA), N.A., Capital One, N.A., Capital One Bank, Capital One F.S.B., and Capital One Financial Corp.

SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP

By: /s/ Peter E. Greene
Peter E. Greene
Cyrus Amir-Mokri
Peter S. Julian
Linda W. Cenedella
Four Times Square
New York, NY 10036
Tel: (212) 735-3000
Fax: (212) 735-2000
peter.greene@skadden.com
Attorneys for Defendants JPMorgan Chase & Co., Chase Bank USA, N.A., Chase Paymentech Solutions, LLC, and JPMorgan Chase Bank, N.A. as acquirer of certain assets and liabilities of Washington Mutual Bank

SIDLEY AUSTIN LLP

By: /s/ Benjamin R. Nagin
Benjamin R. Nagin
787 Seventh Ave
New York, NY 10019
Tel: (212) 839-5300

Fax: (212) 839-5599
bnagin@sidley.com

David F. Graham
Eric H. Grush
One South Dearborn Street
Chicago, IL 60603
Tel: (312) 853-7000
Fax: (312) 853-7036
Attorneys for Defendants Citigroup Inc., Citicorp and Citibank, N.A.

KEATING MUETHING & KLEKAMP, PLL

By: /s/ Patrick F. Fischer
Patrick F. Fisher
Richard L. Creighton
Drew M. Hicks
Keating Muething & Klekamp, PLL
One East Fourth Street, Suite 1400
Cincinnati, OH 45202
Tel: (513) 579-6400
Fax: (513) 579-6457
Attorneys for Defendant Fifth Third Bancorp

KUTAK ROCK LLP

By: /s/ John P. Passarelli
John P. Passarelli
James M. Sulentic
The Omaha Building
1650 Farnam Street
Omaha, NE 68102-2186
Tel: (402) 346-6000
Fax: (402) 346-1148
john.passarelli@kutakrock.com
Attorneys for Defendant First National Bank of Omaha

WILMER CUTLER PICKERING HALE AND DORR LLP

By: /s/ Christopher R. Lipsett
Christopher R. Lipsett
David S. Lesser
399 Park Avenue

New York, NY 10022
Tel: (212) 230-8800
Fax: (212) 230-8888
chris.lipsett@wilmerhale.com

A. Douglas Melamed
Ali M. Stoeppelwerth
Perry A. Lange
1875 Pennsylvania Ave., N.W.
Washington, DC 20006
Tel: (202) 663-6000
Fax: (202) 663-6363
Attorneys for HSBC Finance Corporation and HSBC North America Holdings, Inc.

JONES DAY

By: /s/ John M. Majoras
John M. Majoras
Joseph W. Clark
51 Louisiana Avenue, N.W.
Washington, DC 20001
Tel: (202) 879-3939
Fax: (202) 626-1700
jmmajoras@jonesday.com
jwclark@jonesday.com
Attorneys for Defendants National City Corporation, National City Bank of Kentucky

PULLMAN & COMLEY, LLC

By: /s/ Jonathan B. Orleans
Jonathan B. Orleans
850 Main Street
P.O. Box 7006
Bridgeport, CT 06601-7006
Tel: 203-330-2000
Fax: 203-576-8888
jborleans@pullcom.com
Attorney for Defendant Texas Independent Bancshares, Inc.

ALSTON & BIRD LLP

By: /s/ Teresa T. Bonder
Teresa T. Bonder

Valerie C. Williams
1201 W. Peachtree Street, N.W.
Atlanta, GA 30309
Tel: (404) 881-7000
Fax: (404) 881-7777
teresa.bonder@alston.com

Naeemah Clark
90 Park Avenue
New York, NY 10016
Tel: (212) 210-9400
Fax: (212) 210-9444
Attorneys for Defendants Wachovia Bank, NA., Wachovia Corporation, and Suntrust Banks, Inc.

PATTERSON BELKNAP WEBB & TYLER LLP

By: /s/ Robert P. LoBoe
Robert P. LoBoe
Cecilia B. Loving
Norman W. Kee
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, NY 10036
Tel: 212-336-2793
Fax: 212-336-2222
wfcavanaugh@pbwt.com
Attorneys for Defendant Wells Fargo & Company

WASHINGTON MUTUAL, INC. [11]

[11] The defendants understand that, on September 26, 2008, defendant Washington Mutual, Inc. filed a voluntary petition under Chapter 11 of Title 11 of the United States Code in the United States Bankruptcy Court for the District of Delaware, and therefore, that the automatic bankruptcy stay, 11 U.S.C. § 362, applies to plaintiffs' claims against Washington Mutual, Inc. The matter is currently pending in that court as Bankruptcy Case No. 08-12229-MFW.