UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION This Document Relates To: 1:05-CV-3925 1:05-CV-4650 1:05-CV-4677 1:05-CV-4799 1:06-CV-0039 1:06-CV-0078	MASTER FILE 05-MD-1720(JG)(JO)

MEMORANDUM OF LAW OF DEFENDANTS MASTERCARD INTERNATIONAL INCORPORATED AND MASTERCARD INCORPORATED IN SUPPORT OF THEIR MOTION TO DISMISS INDIVIDUAL MERCHANT PLAINTIFFS' CLAIMS UNDER SHERMAN ACT SECTION 2

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STATUTES

Defendants MasterCard International Incorporated and MasterCard Incorporated (collectively, "MasterCard") respectfully submit this memorandum of law in support of their motion, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss all claims asserted against MasterCard under Section 2 of the Sherman Act by plaintiffs Ahold U.S.A., Inc., Albertson's, Inc., Delhaize America, Inc., Eckerd Corporation, Hy-Vee, Inc., The Kroger Co., Maxi Drug, Inc., Pathmark Stores, Inc., Publix Super Markets Inc., Raley's, Rite Aid Corporation, Safeway, Inc., Supervalu, Inc., and Walgreen Co. (collectively, "Individual Merchant Plaintiffs").

PRELIMINARY STATEMENT

Individual Merchant Plaintiffs allege in their respective complaints that MasterCard has engaged in anticompetitive conduct that purportedly has caused merchants to pay excessive fees for the acceptance of MasterCard-branded credit cards. Included within these complaints are Individual Merchant Plaintiffs' claims under Section 2 of the Sherman Act, 15 U.S.C. § 2, that MasterCard has monopolized and/or attempted to monopolize purported relevant markets for general purpose card network services and MasterCard credit card network services. Because Individual Merchant Plaintiffs cannot allege any factual basis for establishing that MasterCard either has or is likely to obtain monopoly power in the asserted network services market, those claims must be dismissed. Nor may Individual Merchant Plaintiffs properly salvage such claims by limiting the purported market to MasterCard's own network credit services.

The Individual Merchant Plaintiffs fail to make the fundamental allegation of a valid Section 2 claim—that MasterCard already has a monopolistic share of the asserted relevant market or sufficient market share to make it dangerously probable that MasterCard can achieve a monopoly. The complaints, tellingly, are silent as to the size

of MasterCard's market share. While Individual Merchant Plaintiffs cite to "market power" findings in the prior Justice Department case against MasterCard, neither District Judge Barbara Jones nor the Second Circuit in that case addressed whether the market share identified in those findings supported a claim under Section 2, which requires "monopoly power." Recently, however, Judge Jones did address alleged Section 2 claims against MasterCard under this purported market definition and summarily dismissed those claims under Rule 12(b)(6) on the grounds that plaintiffs failed adequately to plead monopoly power—MasterCard's alleged 29% market share was a legally insufficient basis upon which to predicate Section 2 liability. Individual Merchant Plaintiffs have alleged no rationale for disturbing that ruling.

Perhaps recognizing this hurdle, Individual Merchant Plaintiffs resort to asserting a second, alternative sub-market in which MasterCard would hold a complete monopoly: the purported market for "Network Services of MasterCard Credit Cards." But since any company can be claimed to be a monopolist of its own branded products and services, the case law is clear that a brand-specific market definition such as this is improper.

Individual Merchant Plaintiffs can neither allege that MasterCard has monopoly power nor a dangerous probability of attaining monopoly power in a properly-defined market. Their claims under Section 2 of the Sherman Act should be dismissed with prejudice.

STATEMENT OF INDIVIDUAL MERCHANT PLAINTIFFS' ALLEGATIONS[1]

Individual Merchant Plaintiffs each filed non-class-action complaints against MasterCard that were consolidated into the above captioned multi-district litigation. In each of these complaints, Individual Merchant Plaintiffs bring causes of action for monopolization and attempted monopolization, alleging that MasterCard "has monopoly power" or "a dangerous probability of achieving monopoly power" in violation of Section 2 of the Sherman Act.[2] Individual Merchant Plaintiffs claim that MasterCard has monopolized or threatens to monopolize two alternative "Relevant Markets": (1) the U.S. market for "Network Services for General Purpose Payment Cards" and (2) the U.S. market for "Network Services of MasterCard Credit Cards."[3]

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[1] The pertinent allegations are drawn from: the amended complaint in *Hy-Vee, Inc. v. Visa U.S.A. Inc.*, Case No. 05-cv-3925 (E.D.N.Y.) ("Hy-Vee Am. Compl."); the complaint in *Rite Aid Corp. v. MasterCard Inc.*, Case No. 06-cv-0078 (E.D.N.Y.) ("RiteAid Compl."); the complaint in *Raley's v. Visa U.S.A. Inc.*, Case No. 05-cv-4799 (E.D.N.Y.) ("Raley's Compl."); the complaint in *Publix Super Markets, Inc. v. Visa U.S.A., Inc.*, Case no. 05-cv-4677 (E.D.N.Y.) ("Publix Compl."); the complaint in *Supervalu, Inc. v. Visa U.S.A. Inc.*, Case No. 05-cv-4650 (E.D.N.Y.) ("Supervalu Compl."); and the amended complaint in *The Kroger Co. v. MasterCard Inc.*, Case No. 06-cv-0039 (E.D.N.Y.) ("Kroger Am. Compl."). For purposes of this motion, MasterCard refers to these complaints collectively as the "individual complaints." This motion to dismiss is directed only at the individual complaints because the Consolidated Amended Class Complaint, dated April 24, 2006, asserts a Section 2 claim only against Visa U.S.A. but not against MasterCard.

[2] Hy-Vee Am. Compl. ¶¶ 153, 164, Counts XII and XIV; Rite Aid Compl. ¶¶ 83, 88, Counts VI and VII; Kroger Am. Compl. ¶¶ 95, 100, Counts VI and VII; Raley's Compl. ¶¶ 130, 141, Counts XII and XIV; Publix Compl. ¶¶ 130, 141, Counts XII and XIV; Supervalu Compl. ¶¶ 130, 141, Counts XII and XIV.

[3] Hy-Vee Am. Compl. ¶ 32(A), (C)-(D); Rite Aid Compl. ¶ 17(A)-(C); Kroger Am. Compl. ¶ 29 (A)-(C); Raley's Compl. ¶ 18(A), (C)-(D); Publix Compl. ¶ 18(A), (C)-(D); Supervalu Compl. ¶ 18(A), (C)-(D). Individual Merchant Plaintiffs each define Network Services to be: "the collection of services that Visa, MasterCard and other card associations provide retail merchants that accept cards. These Network Services include authorization, clearance and settlement of retail transactions . . . ." (Kroger

In support of their claims, Individual Merchant Plaintiffs allege that MasterCard has "irrefutably established market power as a matter of adjudicated fact and appellate affirmation," citing *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 239 (2d Cir. 2003).[4] Individual Merchant Plaintiffs also contend that MasterCard's "market power" is demonstrated by MasterCard's alleged ability to:

- Raise interchange rates without losing the business of merchants, or losing business to other sellers or payment methods;[5]
- Price discriminate among different classes of merchants based, in part, on each class's ability to resist higher interchange fees;[6] and
- Shift credit card usage from standard cards with historically increasing Interchange Fees to Premium Cards with even higher and faster growing Interchange Fees.[7]

Individual Merchant Plaintiffs also allege that because there are "significant barriers to entry in the relevant market," no company has entered the relevant markets since 1985, and the cost of entry is estimated at $1 billion.[8]

Am. Compl. ¶ 23(D); Hy-Vee Am. Compl. ¶ 26(D); Rite Aid Compl. ¶ 11(D); Raley's Compl. ¶ 12(D); Publix Compl. ¶ 12(D); Supervalu Compl. ¶ 12(D).)

[4] Hy-Vee Am. Compl. ¶ 50; Rite Aid Compl. ¶ 31; Kroger Am. Compl. ¶ 43; Raley's Compl. ¶ 34; Publix Compl. ¶ 34; Supervalu Compl. ¶ 34.

[5] Hy-Vee Am. Compl. ¶ 35; Rite Aid Compl. ¶ 20; Kroger Am. Compl. ¶ 32; Raley's Compl. ¶ 21; Publix Compl. ¶ 21; Supervalu Compl. ¶ 21.

[6] Hy-Vee Am. Compl. ¶ 35; Rite Aid Compl. ¶ 20; Kroger Am. Compl. ¶ 32; Raley's Compl. ¶ 21; Publix Compl. ¶ 21; Supervalu Compl. ¶ 21.

[7] Hy-Vee Am. Compl. ¶ 35; Rite Aid Compl. ¶ 20; Kroger Am. Compl. ¶ 32; Raley's Compl. ¶ 21; Publix Compl. ¶ 21; Supervalu Compl. ¶ 21.

[8] Kroger Am. Compl. ¶ 33; Hy-Vee Am. Compl. ¶ 36; Rite Aid Compl. ¶ 21; Raley's Compl. ¶ 22; Publix Compl. ¶ 22; Supervalu Compl. ¶ 22.

Absent from all of the individual complaints, however, is any allegation identifying MasterCard's market share in the putative relevant markets. Individual Merchant Plaintiffs do not draw upon easily obtainable information from the Nilson Reports, a generally accepted industry publication, but instead seek to support their monopoly power allegations merely by citing to the findings in the Department of Justice litigation. In that litigation, the Second Circuit accepted Judge Jones's finding that MasterCard's share of the alleged general purpose card network services market was 26% in 1999. *United States v. Visa*, 344 F.3d at 240.

ARGUMENT

INDIVIDUAL MERCHANT PLAINTIFFS' SECTION 2 CLAIMS AGAINST MASTERCARD SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM

On a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court must take the allegations in the individual complaints as true and draw all reasonable inferences in favor of the plaintiffs. *Flash Elecs., Inc. v. Universal Music & Video Distrib. Corp.*, 312 F. Supp. 2d 379, 384 (E.D.N.Y. 2004) (Dearie, J.) (*citing Todd v. Exxon Corp.*, 275 F.3d 191, 197 (2d Cir. 2001)). Yet, a plaintiff may not avoid dismissal by substituting conclusory statements for factual allegations. *Id.*; *see also Papasan v. Allain,* 478 U.S. 265, 286 (1986) (holding that court is not "bound to accept as true a legal conclusion couched as a factual allegation"). In reviewing a Rule 12(b)(6) motion, a court may consider documents incorporated in the complaint by reference, relied upon by plaintiffs in drafting the complaint, and found in the public record, such as court filings in other actions. *Blue Tree Hotels Inv. (Canada), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc.*, 369 F. 3d 212, 217 (2d Cir. 2004).

Section 2 of the Sherman Act states in pertinent part that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations" is in violation of the Act. 15 U.S.C. § 2. Section 2 thus prohibits three separate offenses: monopolization, attempted monopolization, and conspiracy to monopolize. *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 454 (1993). Individual Merchant Plaintiffs here assert that MasterCard has committed two of the three Section 2 offenses: monopolization and attempted monopolization.

To state a valid monopolization claim under Section 2 of the Sherman Act, a plaintiff must allege "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570 (1966). For a claim of attempted monopolization under Section 2, a plaintiff must allege "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports,* 506 U.S. at 456.

Here, Individual Merchant Plaintiffs' monopolization and attempted monopolization claims suffer from two fatal deficiencies. First, Individual Merchant Plaintiffs fail to allege that MasterCard possesses the necessary share of the putative market for "Network Services for General Purpose Payment Cards" to make the required

showing of monopoly power or a dangerous probability of attaining monopoly power.[9] Second, Individual Merchant Plaintiffs cannot rely upon their alternative alleged relevant market—the U.S. market for "Network Services for MasterCard Credit Cards"—because well-settled law within the Second Circuit uniformly rejects such brand-specific market definitions as a framework for Section 2 liability.

A. Individual Merchant Plaintiffs' Section 2 Claims Against MasterCard Should Be Dismissed For Failure To Plead Facts Giving Rise To An Inference Of Actual Or Probable Monopoly Power

As District Judge Barbara Jones recently held in addressing alleged Section 2 claims against MasterCard, MasterCard's market share is insufficient as a matter of law to establish monopoly power. *Discover Fin. Servs., Inc. v. Visa U.S.A., Inc.*, No. 04 Civ 7844 (BSJ), slip op. at 3 (S.D.N.Y. Oct. 24, 2005) (a copy of which is attached to the accompanying Declaration of Adav Noti, dated June 9, 2006 ("Noti Decl.") as Exhibit A) (holding that MasterCard's alleged 29% market share "is clearly insufficient as a matter of law for a claim for either actual or attempted monopolization against MasterCard"). Courts in this Circuit have consistently held that an allegation that a defendant possesses a 30% market share in the relevant market does not come close to satisfying the monopoly power requirement. *United Air Lines, Inc. v. Austin Travel Corp.*, 867 F.2d 737, 742 (2d Cir. 1989) (holding 31% market power insufficient for monopolization claim); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d Cir. 1945) ("certainly thirty-three per cent [market share] is not" monopoly power).

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[9] MasterCard does not accept any of the Individual Merchant Plaintiffs' purported "market definitions" as valid, but only treats those allegations as viable for purposes of this motion.

Indeed, as this Court has stated, it is only when market shares "reach roughly 75% does the percentage approach a level that may give rise to an inference of market power necessary to sustain a Section 2 claim." *Flash Elecs.*, 312 F. Supp. 2d at 396 (it is "useful to suggest that a market share below 50% is rarely evidence of monopoly power, a share between 50% and 70% can occasionally show monopoly power, and a share above 70% is usually strong evidence of monopoly power") (citations omitted).

Nor, as a matter of law, can a plaintiff assert that a defendant with 30% of the alleged market possesses a dangerous probability of gaining monopoly power. *See, e.g.*, *AD/SAT v. Associated Press*, 181 F.3d 216, 229 (2d Cir. 1999) ("[A] 33 percent market share does not approach the level required for a showing of dangerous probability of monopoly power"); *Nifty Foods Corp. v. Great Atl. & Pac. Tea Co.*, 614 F.2d 832, 841 (2d Cir. 1980) (holding market share between 48.3% and 33% insufficient to state attempted monopolization claim under Section 2); *Discover Fin. Servs.*, slip op. at 2-3 (holding that "there is no 'dangerous probability'" that MasterCard would succeed in achieving monopoly power given an alleged market share of 29%); *accord Flash Elecs.*, 312 F. Supp. 2d at 396-97 (dismissing Section 2 claims against two defendants having 25% and 50% market shares, respectively).

In accordance with this settled precedent, New York federal courts have regularly dismissed Section 2 claims pursuant to Rule 12(b)(6) where plaintiffs have pled modest operative market shares. *See Orthopedic Studio, Inc. v. Health Ins. Plan of Greater N.Y., Inc.*, No. CV-95-4338, 1996 WL 84503, *6 (E.D.N.Y. Feb. 6, 1996) (Glasser, J.) (dismissing Section 2 claim where plaintiff alleged defendant had less than

10% of relevant market); *City of New York v. Coastal Oil N.Y., Inc.*, No. 96 Civ 8667, 1998 WL 82927, *5 (S.D.N.Y. Feb. 25, 1998) (dismissing Section 2 claim where plaintiff alleged defendant supplied 29% of municipal market but did not specify commercial and resident market shares); *Pants 'n' Stuff Shed House, Inc. v. Levi Strauss & Co.*, 619 F. Supp. 945 (W.D.N.Y. 1985) (dismissing Section 2 claim where plaintiff alleged defendant had 25% market share). Dismissal is particularly warranted where plaintiff has failed to plead any market share at all. *See Telectronics Proprietary, Ltd. v. Medtronic, Inc.*, 687 F. Supp. 832, 838 (S.D.N.Y. 1988) (dismissing Section 2 claim based on conclusory allegations that quoted statutory language); *Consol. Terminal Sys., Inc. v. ITT World Commc'n, Inc.*, 535 F. Supp. 225, 228 (S.D.N.Y. 1982) ("The critical flaw of the allegations under Section 2 is that the complaint nowhere alleges the market share of any particular defendant").

As Individual Merchant Plaintiffs fail to plead any facts demonstrating MasterCard's market share in the alleged market for general purpose payment card network services, their Section 2 claims should be dismissed on this basis alone. At most, Individual Merchant Plaintiffs cite the "market power" findings made by Judge Jones in *United States v. Visa*, findings that were affirmed by the Second Circuit.[10] But that case involved only a claim for restraint of trade under Section 1 of the Sherman Act; there were no Section 2 monopolization or attempted monopolization claims at issue. Furthermore, Judge Jones found only that MasterCard held a 26% network market share of the "dollar volume of credit and charge card transactions." *See United States v. Visa*,

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[10] Hy-Vee Am. Compl. ¶ 50; Rite Aid Compl. ¶ 31; Kroger Am. Compl. ¶ 43; Raley's Compl. ¶ 34; Publix Compl. ¶ 34; Supervalu Compl. ¶ 34.

344 F.3d at 240. Regardless of whether this market share adequately supports a finding of "market power" under Section 1, it does not constitute a basis for a Section 2 finding of actual or likely "monopoly power." *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 481 (1992) ("Monopoly power under § 2 requires, of course, something greater than market power under § 1"); *see also Coastal Oil*, 1998 WL 82927, at *5 (dismissing under Rule 12(b)(6) attempted monopolization claim where plaintiffs alleged 29% market share and mistakenly relied on Section 1 caselaw).

Judge Jones confirmed this in granting a Rule 12(b)(6) motion and dismissing Section 2 claims against MasterCard brought by Discover Financial Services in a follow-on action to the Department of Justice litigation. *See Discover Fin. Servs.*, slip op. at 3. Challenging MasterCard's conduct in the *same* purported general purpose card network services market as alleged here, plaintiff Discover alleged in that case that MasterCard had a 29% share in that alleged market. *Id.* Citing much of the relevant Second Circuit case law on Section 2 noted above, Judge Jones squarely held "[t]hat allegation is clearly insufficient as a matter of law for a claim for either actual or attempted monopolization against MasterCard." *Id.*

Judge Jones's ruling in *Discover* compels an identical result here. By drawing the proper distinction between the requisite "market power" necessary to support a Section 1 claim and the "monopoly power" necessary to support a Section 2 claim, Judge Jones confirmed that Individual Merchant Plaintiffs' reliance on the *United States v. Visa* Section 1 market power findings are misplaced in a Section 2 context. *See PSW, Inc. v. VISA U.S.A., Inc.*, No. CA-04-347T, 2006 WL 519670, *12 n.3 (D.R.I. Feb. 28, 2006) (holding that *United States v. Visa* addresses only market power under

Section 1 and does not support a Section 2 monopoly claim). Moreover, Judge Jones dismissed Discover's claims in the face of its allegations of the same type of pricing power and high barriers to entry that Individual Merchant Plaintiffs make here in support of their monopoly power allegations. (*Compare* First Am. Compl. and Jury Demand, *Discover Fin. Servs. v. Visa U.S.A., Inc.*, No. 04 Civ. 7844, ¶¶ 25-28 (Noti Decl., Ex. B), *with, e.g.*, Hy-Vee Am. Compl. ¶¶ 34-36.)

In short, Individual Merchant Plaintiffs have pled no facts demonstrating that MasterCard possesses monopoly power in any network services market for general purpose payment cards, or that there is a dangerous probability that it will obtain such power. Accordingly, all Section 2 monopolization and attempted monopolization claims based on the alleged "Network Services for General Purpose Cards" market should be dismissed in their entirety.

B. Individual Merchant Plaintiffs' Section 2 Claims Based On An Alleged Market For "Network Services For MasterCard Credit Cards" Should Be Dismissed For Failure To Plead A Legally Cognizable Market Definition

"As a prerequisite to any antitrust claim, plaintiff must allege a relevant product market in which the anti-competitive effects of the challenged activity can be assessed." *Carell v. Shubert Org., Inc.*, 104 F. Supp. 2d 236, 264 (S.D.N.Y. 2000) (citations omitted). Individual Merchant Plaintiffs here allege an alternative proposed market definition supporting their Section 2 claims that is limited to "Network Services for MasterCard Credit Cards."[11] But long-standing federal precedent generally prohibits

[11] Kroger Am. Compl. ¶ 29(B); Rite Aid Compl. ¶ 17(B); Raley's Compl. ¶ 18(C); Publix Compl. ¶ 18(C); Supervalu Compl. ¶ 18(C). *Cf.* Hy-Vee Am. Compl. ¶ 32(C) ("Network Services of MasterCard Credit Cards").

such a brand-specific market definition as not legally cognizable. This failure to identify a valid relevant market compels dismissal of Individual Merchant Plaintiffs' alternative Section 2 allegations.

The rule against brand-specific market definitions was first expressed by the Supreme Court in *United States v. E.I. du Pont De Nemours & Co.*, 351 U.S. 377, 393 (1956), where it rejected the propriety of defining markets by reference only to one manufacturer's products, stating that "[the] power that . . . manufacturers have over their trademarked products is not the power that makes an illegal monopoly." Rather, the Court held that a proper market definition is made up of "commodities reasonably interchangeable by consumers for the same purposes." *Id.* at 395.

"A plaintiff's failure to define its market by reference to the rule of reasonable interchangeability is, standing alone, valid grounds for dismissal." *Carell*, 104 F. Supp. 2d at 264 (*quoting Global Disc. Travel Servs. LLC v. Trans World Airlines, Inc.*, 960 F. Supp. 701, 705 (S.D.N.Y. 1997)). Accordingly, courts within the Second Circuit regularly dismiss claims based on alleged relevant markets defined in terms of single products or entities without reference to the *du Pont* Rule of interchangeability. *See, e.g.*, *Todd*, 275 F.3d at 200 ("Cases in which dismissal on the pleadings is appropriate frequently involve . . . failed attempts to limit a product market to a single brand, franchise, institution, or comparable entity that competes with potential substitutes . . . ."); *Carell*, 104 F. Supp. 2d at 264 (dismissing Section 2 claims based on market definition limited to Broadway musical *Cats*-related intellectual property); *Mathias v. Daily News, L.P.*, 152 F. Supp. 2d 465, 483 (S.D.N.Y. 2001) (dismissing Section 2 claims based on home delivery subscriptions of the Daily News); *Global Disc.*,

960 F. Supp. at 705-706 (dismissing Section 2 claims based on market defined as travel between cities on TWA).

Individual Merchant Plaintiffs imply in their pleadings that a "MasterCard network services" market is appropriate because their customers' strong preference for MasterCard makes it economically irrational to decline the acceptance of MasterCard in the face of MasterCard interchange increases. (*See, e.g.*, Hy-Vee Complaint ¶ 45.) But New York federal courts "have rejected the proposition that allegedly unique products, by virtue of customer preference for that product, are 'markets unto themselves.'" *Carell*, 104 F. Supp. 2d at 265 ("A consumer might prefer . . . Pepsi because she prefers the taste, or NBC because she prefers 'Friends,' 'Seinfeld,' and 'E.R.' . . . but at base, Pepsi is one of many sodas, and NBC is just another television network.") (*quoting Global Disc.*, 960 F. Supp. at 705).

Consequently, an allegation that MasterCard provides popular services does not excuse Individual Merchant Plaintiffs from pleading a market that accounts for reasonable substitutes. They allege nothing unique about "Network Services of MasterCard Credit Cards" that can render it a market divorced from potentially substitutable services such as Visa or American Express payment card network services. As this Court has recognized, "[o]bviously, every manufacturer has a natural monopoly over the distribution of its products. That monopoly, however, does not contravene the antitrust laws." *Flash Elec.*, 312 F. Supp. 2d at 396 n.9 (*quoting Sports Ctr., Inc. v. Riddell, Inc.*, 673 F.2d 786, 791 (5th Cir. 1982)). MasterCard respectfully requests that this Court dismiss all monopolization and attempted monopolization claims against MasterCard based upon that insufficient market definition.

CONCLUSION

For the foregoing reasons, MasterCard respectfully requests that this Court enter an order dismissing all of the claims under Section 2 of the Sherman Act in of each of the above-captioned actions with prejudice.

Dated: June 9, 2006

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