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John R. Read
Chief, Litigation III Section
Antitrust Division
United States Department of Justice
450 Fifth Street, NW,
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By Email

Re: *United States v. American Express Co., MasterCard Int., and Visa Inc.* (Civil Action No. CV-10-4496)—Submission of Class Plaintiffs in MDL 1720 pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. §16 (b)–(h)

Dear Mr. Read:

We are the court-appointed co-lead counsel for the proposed class of merchants in *In re: Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, MDL 1720. The named class representatives (collectively "Class Plaintiffs") represent a broad cross-section of merchants, including the National Grocers Association, the National Association of Convenience Stores, the National Restaurant Association, the National Community Pharmacists Association, The National Cooperative Grocers Association, NATSO, Inc. (formerly National Association of Truck Stop Owners), Affiliated Foods Midwest Cooperative, Payless ShoeSource, Inc., CHS, Inc., Jetro Cash & Carry Enterprises, LLC, Coborn's Incorporated, D'Agostino Supermarkets, Traditions, Ltd., Photos Etc. Corporation, Capital Audio Electronics, Inc., Crystal Rock LLC, Discount Optics, Inc., Leon's

Transmission Service, Inc., and Parkway Corp. A motion for certification of the class is pending. We submit these comments on behalf of the proposed class pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16.

Introduction

Merchants in the United States pay over $50 billion each year in interchange fees to the member banks of Visa and MasterCard. These fees—which are significantly higher than anywhere else in the world—drain consumers and the competitive marketplace in this country. The problem of supracompetitive interchange fees has attracted the attention of dozens of antitrust-enforcement agencies and central banks around the world, which uniformly found interchange fees to be unlawful exercises of market power, and which uniformly capped the networks' interchange fees or eliminated their restrictions on merchant steering.[1] The question at issue is whether the Department of Justice's Proposed Final Judgment—which neither reduces interchange fees nor leaves intact the networks' restrictions on steering—helps to mitigate these substantial anticompetitive effects and, therefore, is in the public interest.[2]

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[1] In recent years, a substantial amount of legal and economic scholarship has been devoted to the issues surrounding payment-card interchange fees and merchant restraints. *See* Symposium: Antitrust Issues in Payment Card Systems, 73 ANTITRUST L.J. Issue 3 (2006).

[2] The Tunney Act demands that a court evaluate whether a proposed consent decree "is in the public interest." 15 U.S.C. § 16(e)[2] The court's public-interest determination shall take account of several factors including, "termination of alleged violations," the anticipated effects of other remedies, and the ambiguity of the decree's terms." 15 U.S.C. § 16(e)(1)(A). A court considering a proposed consent decree must also consider the impact of the decree on (i) "competition in the relevant market," and (ii) "the public generally and individuals alleging specific injury." 15 U.S.C. § 16(e)(1)(B).

We believe that the Proposed Final Judgment is procompetitive and furthers the public interest as required by the Tunney Act. But for reasons described below, we are concerned that the relief may prove to be insufficient to remedy the harm to competition and market power that has resulted from the conduct of Visa, MasterCard, and their member banks over at least the last 30 years. In our view, an evaluation of the Proposed Final Judgment requires assessments of the future under a competitive regime that will be influenced not only by the Proposed Final Judgment but also by recently-enacted (but not yet implemented) legislation, the outcome of MDL 1720, the outcome of merchant litigation against American Express and future technological changes that may affect the relevant markets. Ultimately, it may be necessary for the government to invoke its "ability to investigate and bring an antitrust-enforcement action in the future concerning any rule of either Visa or MasterCard," and seek further relief if the measures contained in the Proposed Final Judgment prove to be inadequate to protect the public interest. (Prop. Final J. § VIII; Comp. Imp. Stmt. at 13.).

I. The Class Plaintiffs challenge a combination of card-network rules that harm merchants and inflate prices to consumers.

The Class Plaintiffs seek to represent a nationwide class, consisting of millions of merchants that accept Visa or MasterCard-branded payment cards, and which collectively pays over $50 billion per year in interchange fees. The Class Plaintiffs challenge the historic, concerted conduct of Visa, MasterCard and their member banks, the restructurings of those two networks into publicly-traded companies, and the continuation of the networks' and banks' historical anticompetitive conduct after the restructurings.

Class Plaintiffs' consolidated amended complaint challenges each network's setting of default interchange fees and enforcement of merchant restraints.[3] (Exh. 1) The complaint describes the networks' traditional governance model, in which each network's major strategic decisions were made by its respective board of directors—a board that was elected by the network's competing member banks and consisted of representatives of those banks. (*Id*. ¶ 104.) The decisions that were made by the competing banks included the adoption of uniform schedules of default interchange fees and the merchant restraints, some of which are the subject of the Proposed Final Judgment. (*See id*.) Class Plaintiffs allege that the networks and their member banks have market power based on the fact that, even in the face

[3] The Second Consolidated Amended Class Action Complaint refers to the merchant restraints as the "Anti-Steering Restraints." The complaint defines Anti-Steering Restraints as "the rules of the Visa and MasterCard Networks that forbid Merchants from incenting consumers to use less expensive payment forms, including: the No-Surcharge Rule; the No-Minimum-Purchase Rule; and the Networks' so-called "antidiscrimination rules," which prohibit Merchants from treating any other Payment Card or medium more advantageously than the Defendants' cards. (Exh. 1 ¶ 8(d).)

of significant increases in interchange fees over the past decade, no major merchant has stopped accepting Visa or MasterCard payment cards. (*Id.* ¶ 279.) As the Antitrust Division notes in its Competitive Impact Statement, the networks' rules and interchange fees harm competition by inflating the price that merchants pay to accept payment cards. (Comp. Imp. Stmt. at 9.) Because the networks' interchange fees were collectively adopted by competitors that have market power, Class Plaintiffs allege that they violate Section 1 of the Sherman Act. (Exh. 1 ¶¶ 292-305.) The merchant restraints are alleged to violate Section 2 of the Sherman Act by insulating the networks' supracompetitive fees from price competition and thereby preserving their monopolies. (*Id.* ¶¶ 342-57.) The consolidated amended complaint also alleges that the networks continued to violate Section 1 even after their reorganizations into for-profit corporations. Exh. 1, Part V.)

Class Plaintiffs also challenge the restructurings that each network engineered in hopes of escaping liability in MDL 1720. (*See* Exhs. 2 & 3.) The banks that governed the MasterCard and Visa networks feared that, in light of the Second Circuit's decision in *United States v. Visa*, and other challenges to their fee-setting practices, their collective establishment of interchange fees and merchant restraints violated Section 1 of the Sherman Act. (Exh. 2 ¶¶ 63-77; Exh. 3 ¶¶ 57-73.) Both networks predicted that a class-action lawsuit such as MDL 1720 could lead to ruinous liability for the networks and banks. (Exh. 2 ¶ 5; Exh. 3 ¶ 79.) In fact, a MasterCard consultant predicted that the networks' and banks' liability could be as high as $200 billion. (Exh. 2 ¶ 5.) But instead of changing their conduct, the banks

that controlled both networks attempted to insulate that conduct from Section 1 by partially divesting the banks' ownership and governance rights and selling shares to the public. (*Id*.) Because the banks and networks engineered these transactions to convert their fee setting and rulemaking from "agreements among competitors" to "unilateral" conduct, Class Plaintiffs challenge each network's restructuring transaction as an unlawful merger under Section 7 of the Clayton Act and Section 1 of the Sherman Act.

In the five-plus years that MDL 1720 has been pending, class counsel has acquired significant expertise in the business, economic, and legal issues surrounding the payment-card industry. The Class Plaintiffs obtained in discovery and analyzed some 60 million pages of documents from parties and nonparties, took or defended over 200 depositions, reviewed and analyzed all or portions of government proceedings against Visa and MasterCard in over 20 foreign countries, and engaged leading experts to testify and otherwise assist in its efforts. The experience of MDL 1720 uniquely enables Class Plaintiffs and their counsel to evaluate the effect of the Proposed Final Judgment on merchant prices, competition in the relevant market, and the public interest generally.

II. Three separate sets of rules—the honor-all-cards rules, the default-interchange rules, and the merchant restraints—combine to create supracompetitive card-acceptance costs for merchants.

Those who are knowledgeable in the economics of payment-card markets do not seriously dispute that three sets of network rules—the honor-all-cards rule, the default-interchange rule, and the merchant restraints—create the market power that

allows the networks to set merchant fees at supracompetitive levels. The networks' honor-all-cards rules[4] require a merchant to accept any Visa or MasterCard payment card presented to it—regardless of the bank that issued it or the level of interchange fees associated with that card. Once a merchant accepts a card, the networks' default-interchange rules[5] require the payment of an interchange fee at the networks' default levels on every transaction in which the issuing and acquiring banks have not executed a bilateral interchange-fee agreement. The networks' merchant restraints prevent merchants from mitigating the effects of the default-interchange rules by steering customers to forms of payment whose acceptance costs are lower than the networks' fees. These three rules create a situation in which the issuing bank whose card is presented to a merchant has absolute monopoly power over that transaction and can demand or "hold up" the merchant to pay any level of fee. The networks do not deny that this "hold up" problem exists and in fact their paid consultants have used its existence to justify the imposition of interchange fees at default levels in order to "protect" the merchant from the market power that their rules create.[6]

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[4] Visa International Operating Regulation Core Principle 6.2 & MasterCard Rule 5.8.1. The Visa and MasterCard rules are publicly available at respectively http://usa.visa.com/download/merchants/visa-international-operating-regulations-main.pdf and http://www.mastercard.com/us/merchant/pdf/BM-Entire_Manual_public.pdf.

[5] Visa International Operating Regulation 9.5 & MasterCard Rule 9.4.

[6] *See, e.g.*, "The Law and Economics of Interchange Fees" at 8, Testimony of Timothy Muris on Behalf of the Electronics Payments Coalition, Before the Subcommittee on Commerce, Trade, and Consumer Protection of the Committee on Energy and Commerce, House of Representatives (Feb. 15, 2006).

The networks' market power manifests itself in the form of supracompetitive interchange fees and extensive price discrimination in those fees among categories of merchants. The Competitive Impact Statement acknowledges that interchange fees and merchant-discount fees are higher than they would be but for the networks' rules because the rules "allow [the networks] to maintain high prices for network services with confidence that no competitor will take away significant transaction volume." (Comp. Imp. Stmt. at 9). Price discrimination is also noted as an effect of the networks' and banks' market power. (*Id*. at 7.) The Competitive Impact Statement states that the networks' rules also have the effect of reducing output for lower-cost payment methods, stifling innovation, and compounding the already-high barriers to entry in the payment-card market. (*Id*. at 10.) We agree.

The acknowledgement of the connection between the networks' rules and supracompetitive interchange fees in the Division's Competitive Impact Statement is consistent with the conclusions reached by foreign regulatory and judicial bodies that evaluated the networks' interchange fees and merchant rules under their national antitrust laws. According to public sources, the payment-card industry has been investigated or is currently being investigated by central banks and antitrust-enforcement agencies in at least 26 foreign jurisdictions.[7] In at least 12 of those jurisdictions, the investigations resulted in mandatory reductions in the networks'

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[7] MasterCard, 2006 Annual Report (Form 10-K) at. 24-25, 117; MasterCard, 2008 Annual Report (Form 10-K) at 28; Visa Inc., Amendment Number 5 to SEC Form S-4 Registration Statement, Sept. 13, 2007, at 10, 161; Visa Inc., 2008 Annual Report (Form 10-K) at 16.

interchange fees.[8] Several proceedings also resulted in a repeal of the networks' No-Surcharge Rules. *Id*.

Among all of these proceedings, those conducted in the European Union and Australia provide some of the most detailed findings on the combined anticompetitive effects of the networks' rules. In Australia, a decision of that nation's antitrust authority gave the Reserve Bank of Australia the authority to investigate the merchant restraints and interchange fees of Visa and MasterCard. The Reserve Bank concluded that the no-surcharge rule in particular "masked price signals to cardholders" and thereby "limited the ability of merchants to put downward pressure on interchange fees."[9] The Reserve Bank concluded that a repeal of the merchant restraints would not be sufficient standing alone to remedy the competitive problem, and therefore capped interchange fees in addition to forcing the repeal of Visa and MasterCard's No-Surcharge Rules. *Id*. at 6. American Express and Diners Club voluntarily dropped their equivalent rules. *Id*. at 5.

European investigations similarly led to interchange-fee reductions for Visa and MasterCard. After the European Commission issued Statements of Objections against MasterCard and Visa's default interchange fees, Visa settled with the Commission by reducing its cross-border credit-card interchange fees from

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[8] F. Hayashi, Public Authority Involvement in Credit and Debit Card Markets: Various Countries, Fed. Reserve Bank – Kansas City (April 2010). (attached as Exhibit 4.) Class Plaintiffs note that Ms. Hayashi's statement that the Canadian Interac network eliminated its interchange fee after a regulatory investigation is incorrect. And just yesterday, the Canadian Competition Bureau initiated a new challenge to Visa and MasterCard's merchant restraints that included a challenge to the No-Surcharge Rule.

[9] Reserve Bank of Australia, Reform of Australia's Payments System: Preliminary Conclusions of the 2007/08 Review at 4 (Apr. 2008).

approximately 1.0% to 70 basis points and by halving its debit-card interchange fees to 28 Euro cents per transaction. Commission Decision relating to a proceeding under Art. 81 of the EC Treaty and Article 53 of the EEA Agreement.[10] MasterCard contested the Commission's charges, however, and received a 245-page opinion concluding that its interchange fees violated Article 81 of the EU treaty—the EU's analog to Section 1 of the Sherman Act. The Commission found that MasterCard's default interchange fees "fix the level of the interchange fee rate for all acquiring banks alike," and thus "inflate[e] the base on which acquiring banks set charges to merchants." Commission Decision Relating to a Proceeding Under Art. 81 of the EC Treaty and Article 53 of the EEA Agreement.[11] The EC also considered and rejected MasterCard's argument that merchants' ability to surcharge MasterCard cards in Europe—where MasterCard's no-surcharge rule was repealed since 2005—made interchange-fee reductions unnecessary. *Id.* ¶¶ 510-21. Thus, after extensive investigations, authorities in both Australia and Europe concluded that a direct cap in interchange rates was the most effective remedy to redress the anticompetitive effects of the networks' and banks' practices.

III. Foreign regulators have constructed comprehensive remedies to address the three sets of rules that combine to inflate prices to merchants.

Because the networks have market power, they have been able to continue increasing fees in the United States after antitrust-enforcement actions forced them

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[10] COMP/29.373 – Visa Int'l – Multilateral Interchange Fee, 2002 O.J. (L 318) 20 & n.14 (EC).

[11] Comp/34.579 MasterCard; Comp/36.518 EuroCommerce; Comp/38.580 Commercial Cards ¶ 408 (Dec. 17, 2007).

to modify selected rules. In *Visa Check*, for example, Visa and MasterCard agreed to repeal the portion of their Honor-All-Cards rules that required merchants that accepted credit cards to also accept offline-debit cards and to temporarily reduce debit-card interchange fees. (*See* Exh. 5 ¶ 8(a).) But because the *Visa Check* settlement did not address the networks' market power in the credit-card market and did not restrict the their ability to increase credit-card interchange fees, the networks increased credit-card interchange fees on the same day that the debit-card interchange reductions went into effect. Visa Tinkers with Credit Interchange, Am. Banker (Aug. 1, 2003) (Exh. 6.). These increases are widely believed to have offset the reduction in debit-card fees. Similarly, the Division's previous case against Visa and MasterCard led to the repeal of the networks' rules that prevented member banks from issuing American Express or Discover-branded cards.[12] But the limited relief sought by the Antitrust Division in those cases has plainly been inadequate to decrease interchange fees or reduce the price discrimination that is rampant in Visa and MasterCard's networks.

Foreign courts and regulators achieved more direct and tangible results for merchants by pursuing more comprehensive remedies for the networks' market power. The Reserve Bank of Australia, for example, imposed caps on credit-card interchange fees and required the networks to repeal their No-Surcharge Rules.[13] In 2003, the Reserve Bank mandated that the card networks decrease their average

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[12] *United States v. Visa U.S A., Inc.*, 163 F. Supp. 2d 322, 407-09 (S.D.N.Y. 2001).

[13] Payment System Board, Reserve Bank of Australia, Annual Report at 19 (2007).

interchange fees from 0.95 percent to 0.55 and in 2006 mandated further reductions to 0.50 percent. *Id*. The Australian rates stand in stark contrast to the United States where average, effective credit-card interchange fees are approximately 1.63%. Seven years of experience since the reforms demonstrates that the Reserve Bank's actions led to decreases in merchants' costs of accepting payment cards, an expansion in the number of merchant outlets that accepted cards, and increases in the number of outstanding card accounts.[14] Moreover, the bulk of the decrease in merchant fees was passed on to consumers.[15] And even at these decreased interchange-fee levels, banks still found it in their interests to issue cards and provide acceptance services to merchants.

The European Commission also obtained interchange relief for merchants in the form of direct reductions of fees. In April 2009, it agreed with MasterCard to accept a reduction in cross-border interchange fees to 30 basis points for credit (from previous levels of 0.8% to 1.9%) and 20 basis points for debit (from previous levels of 0.4% to 0.75%), while MasterCard appealed the Commission's December 2007 decision that found it to be in violation of EU competition law.[16] The Commission recently settled its debit-card price-fixing case against Visa on similar terms, requiring an interchange reduction of approximately 60% to 20 basis points

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[14] Reserve Bank of Australia, *Additional Credit Card Statistics*, *available at* http://www.rba.gov.au/PaymentsSystem/PaymentsStatistics/payments_data.html; Robert Stillman, et al., *Regulatory intervention in the payment card industry by the Reserve Bank of Australia, Analysis of the evidence*, CRA International (Apr. 28, 2008) at 26.

[15] Payment Systems Board, Reserve Bank of Australia, *Reform of Australia's Payments System: Preliminary Conclusions of the 2007/08 Review* § 5.2.6 (Apr. 2008).

[16] MasterCard to Trim Fees in Europe Under a Settlement, Am. Banker (Apr. 2, 2009).

for cross-border transactions and domestic transactions in six countries.[17] Because MasterCard repealed its No-Surcharge Rule in Europe, the Commission's settlements create a scenario much like that in Australia, in which merchants benefit both from decreased acceptance fees and the unfettered ability to steer customers to their preferred methods of payment.

Measured against international benchmarks, the Proposed Final Judgment is a modest remedy because it does not directly tackle the supracompetitive interchange fees that are the manifestations of Defendants' practices and does not completely repeal the merchant restraints. The Division can enhance the effectiveness of the proposed relief by interpreting the Proposed Final Judgment in a way that "free[s] merchants to influence the method of payment used by their customers."(Comp. Imp. Stmt. at 11.) For example, if merchants could display separate prices at the point of sale for purchases made on various methods of payment, the merchant could inform the consumer of the relative prices of payment methods without placing a "surcharge" on the transaction amount. And if a consumer had a payment device that could process a transaction over multiple networks, a merchant could obtain a similar result by programming its POS device to offer the consumer the option of paying with the cheapest network first.[18] If the Antitrust Division interpreted the Proposed Final Judgment to allow merchants to

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[17] Press Release, European Commission, Antitrust: Commission makes Visa Europe's commitments to cut interbank fees for debit cards legally binding (Dec. 8, 2010).

[18] As described in Section IV, many merchants engage in a similar practice currently, in which consumers who present a debit card for payment are automatically prompted to enter a PIN and process the transaction as a PIN-debit transaction, which may be cheaper than a offline-debit transaction.

engage in these practices, it will have made significant progress toward effectuating the stated purpose of the Proposed Final Judgment to allow merchants to influence consumers' payment choices.

IV. Whether the Proposed Final Judgment is in the public interest depends on its implementation and future marketplace developments.

Because the networks' market power is reflected in supracompetitive interchange fees and extensive price discrimination, the Proposed Final Judgment will further the public interest only if it eliminates or greatly reduces those fees and price-discrimination practices. As noted above, the Proposed Final Judgment is significantly narrower than remedies issued by foreign competition authorities investigating similar conduct. While the narrowness of the Proposed Final Judgment does not by itself stand in the way of approval,[19] it does highlight the importance of Section VIII of the Proposed Final Judgment, which preserves the right of the Antitrust Division and the plaintiff states to investigate and bring a future enforcement action "to prevent or restrain violations of the antitrust laws concerning any Rule of MasterCard or Visa, including any current Rule and any Rule adopted in the future." (Prop. Final J. § VIII; *see also* Comp. Imp. Stmt. at 13.) The Court's retention of jurisdiction over this matter is also important to guaranteeing that the Proposed Final Judgment serves the public interest.

The Proposed Final Judgment, combined with recent regulatory developments, may help it to bring down interchange fees and curtail price discrimination. The Dodd-Frank Wall Street Reform and Consumer Protection Act requires the Federal Reserve Board to cap debit-card interchange fees at levels that are "reasonable and proportional to the cost incurred by the issuer with respect to

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[19] *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995) (noting that consent-judgment remedy should not be judged against remedy that the government may have achieved after trial).

the transaction."[20] [21] Today, the Federal Reserve staff recommended to the Board of Governors that debit-card interchange for regulated banks be set at the "average variable cost" for authorization, clearance and settlement, up to a cap of 12 cents per transaction. Memorandum, J. Yellen to Bd. of Governors (Dec. 13, 2010).[22] By widening the gap between credit-card and debit-card interchange fees, Dodd-Frank's permanent reduction in debit-card interchange fees increases the incentive for merchants to engage in the differential discounting that the Proposed Final Judgment contemplates.

Evolving technology may also help merchants take advantage of Dodd-Frank's decreased interchange fees and the Proposed Final Judgment's improved steering options. For example, after the *Visa Check* settlement, merchant processors competed with each other to offer merchants the technological ability to prompt consumers to enter PIN numbers on debit-card transactions in order to take advantage of a settlement provision that required the networks to electronically distinguish debit cards from credit cards. Because PIN-debit interchange fees were lower than offline-debit interchange fees at the time of the settlement, some merchants were able to lower their card-acceptance costs by steering consumers to PIN debit.

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[20] In "issuing the standards and prescribing the regulations" required by Section 1075, Congress requires the FRB (1) to consider the functional similarity between electronic debit transactions and checking transactions that are required by the Federal Reserve bank system to clear at par; (2) to consider "the incremental cost incurred by an issuer for the role of the issuer in the authorization, clearance, and settlement of a particular electronic debit transaction," and (3) *not* to consider "other costs incurred by an issuer which are not specific to a particular electronic debt transaction." In other words, the new limits on electronic debit transaction interchange fees are limited by statute essentially to the "incremental" or "marginal" costs of a single transaction. "This statutory provision is the subject of a pending legal challenge on Equal Protection and Due Process (taking) grounds. *See* Compl., *TCF Nat'l Bank v. Bernanke*, No. 10-4149 (D.S.D. Oct. 12, 2010).

[21] Dodd-Frank Wall Street Reform and Consumer Financial Protection Act, § 1075, Pub. L. 111-203, 124 Stat. 1376, 2068 (Jul. 21, 2010).

[22] *Available at http://www.federalreserve.gov/boarddocs/meetings/2010/20101216/20101216_ InterchangeFeeProposedRuleStaffMemo.pdf.*

Consumer-side technological developments could also increase the prevalence and effectiveness of steering. Many payment-card-industry experts expect emerging payment devices such as cell phones, PDAs, and fobs to replace the magnetic-stripe payment card. One of the many advantages of these new devices is that they allow the consumer to access multiple accounts from a single device. A single device that can access multiple accounts is often referred to as a "digital wallet."[23] If the move to digital wallets became widespread, merchants could encourage consumers to use the cheapest form of payment in their "digital wallet" without asking them to pull an additional card out of their physical wallet. Merchants may be able to accomplish this type of steering by simultaneously showing the consumer the price at the point of sale for completing a transaction on each of the forms of payment that the consumer has in her "digital wallet," or by sequencing the consumer's payment options such that the cheapest form of payment appears first. To the extent that technology makes steering easier for merchants and consumers, one would expect steering—or the threat of steering—to have a greater impact on interchange fees.

Conclusion

Developments in the market over the next year or so will prove, or disprove, whether this Proposed Final Judgment, in fact, meets the Tunney Act standard. If credit-card and debit-card interchange fees decline, and if price discrimination becomes less prevalent, then the Court's approval of the Proposed Final Judgment will have been proven correct without any further action by the Antitrust Division. If, on the other hand, credit and debit interchange fees remain the same, or increase, or if Visa and MasterCard continue their rampant price discrimination, then it will be imperative on the Antitrust Division to exercise its rights under VIII to revive its

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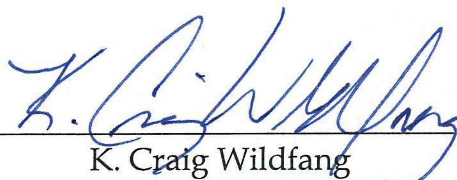
[23] W. Wade, The Future of Payments is Anything but Flat, Am. Banker (Feb. 24, 2009).

investigation and seek further relief in order to fully remedy the harm to competition that has resulted from the anticompetitive Visa and MasterCard rules. If the networks continue to exercise market power, unabated by further government enforcement action or a resolution of the Class Plaintiffs' claims in MDL 1720, then the facts will have proven that approval of the Proposed Final Judgment was ill-advised. Because of the importance to the United States' economy of eliminating and remedying the substantial competitive harm to the payment-card markets—which over the course of the five year term of the Proposed Final Judgment likely will almost completely supplant the use of cash and paper checks—this Court should consider in its retention of jurisdiction requiring periodic reports from the Department of Justice, Visa and MasterCard providing information and data regarding levels of interchange fees and the price discrimination by which Visa, MasterCard and their member banks have exercised their substantial market power.

Sincerely,



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