UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *et al.*	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CASE NUMBER 1:03cv02169 (RMC)
	)	
FIRST DATA CORPORATION,	)	
	)	
and	)	
	)	
CONCORD EFS, INC.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OF LAW IN SUPPORT OF THE UNITED STATES' MOTION TO EXCLUDE TESTIMONY OF EDWARD J. HOGAN

PUBLIC VERSION

Pursuant to Rule 702 of the Federal Rules of Evidence, this Court should preclude Edward J. Hogan from testifying on certain subjects as an expert witness for defendant First Data Corporation ("First Data"). Hogan's Rule 26 disclosure reveals that he is not qualified to offer expert opinions about the relevant market or competitive effects in that market, his opinions are not based upon the application of expertise to the facts in any reliable way, and his testimony will not assist the Court in resolving the issues presented in this case.

BACKGROUND

On November 19, 2003, Hogan submitted a five-page "expert report" in which he purports to offer opinions about whether PIN debit and signature debit are in the same market (*see* Expert Report of Edward J. Hogan ("Hogan Rep.") ¶¶ 8-11), whether PIN debit and

signature debit rates will converge in the future (*id.* ¶ 18), and whether Maestro and others are significant PIN debit competitors (*id.* ¶¶ 19-21).[1] Hogan offers these opinions even though he is not an economist and has no apparent experience in antitrust matters (*id.* ¶¶ 1-4). Instead, Hogan claims to base his opinions on his experience from "30 years in the payment industry" (*id.* ¶ 6), all of which was spent as a MasterCard executive, a position from which he retired almost two years ago.[2]

The Federal Rules of Civil Procedure require Hogan's report to contain "a complete statement of all opinions to be expressed and the basis and reasons therefor...." Fed. R. Civ. P. 26(a)(2)(B). With respect to his opinion that "PIN and signature debit are in the same market," Hogan's report contains only two short paragraphs, which are quoted here in their entirety:

> 8. PIN debit and signature debit typically co-exist on a single piece of plastic issued by a single issuer that relates to a single demand deposit account (DDA). They function in the same marketplace and, at least as to MasterCard, often clear and settle over the same network (with slightly different processes), with the same result.
>
> 9. In my experience, both MasterCard and the payments industry at large have always considered PIN and signature debit to be fundamentally equivalent mechanisms to access demand deposit accounts. Both MasterCard and the payments industry have always considered PIN and signature debit to be competing products. Both MasterCard and the payments industry have always considered PIN and signature debit to be part of the same market.

Hogan Rep. ¶¶ 8-9. Hogan's report does not explain how his purported expertise is being applied to reach the conclusion that PIN debit and signature debit are in the same product

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[1] A copy of the Hogan Report is attached hereto as Attachment A.

[2] Although Hogan also reviewed the report of First Data's economic expert witness and unspecified information generated in discovery (Hogan Rep. ¶ 6), he does not cite any of those materials in his report and apparently did not rely upon them in forming his opinions.

market, nor does it explain why his observations about the functional equivalence of those products or the payments industry's views about them would support that conclusion.[3]

Hogan's report provides even less explanation for his bold prediction that "PIN and signature debit rates will converge" (*id.* ¶ 18). In one short paragraph (quoted here in its entirety) he states as follows:

> 18. The recent settlement in the Wal-Mart litigation changes the dynamic between PIN and signature rates. Because Visa and MasterCard may no longer link the acceptance of credit to the acceptance of debit, they will be required to offer signature debit rates that are more acceptable to the merchant community. Because Visa and MasterCard both want and need to compete in debit, they have lowered and will continue to lower their signature debit rates, and the PIN and signature debit rates will converge.

Hogan Rep. ¶ 18. Hogan does not explain what basis he has to predict that the rates for PIN and signature debit will converge in the future, the magnitude of the projected decrease in signature debit rates, or the time period over which it will occur.

Finally, Hogan's report provides no support for his opinion about the future competitive significance of five different electronic payment firms, MasterCard/Maestro, PULSE, Fiserv, American Express, and Discover. *Id.* ¶¶ 19-21. Hogan does not acknowledge that neither American Express nor Discover offer signature or PIN debit, and fails to mention that Fiserv and MasterCard/Maestro currently do not have a significant market share in PIN debit.

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[3] In two subsequent paragraphs, Hogan asserts that checks and cash "compete with PIN and signature debit" in some unspecified sense (Hogan Rep. ¶ 10) and speculates that the use of electronic checking cards "can be expected to grow" by some unknown amount (*id.* ¶ 11). Neither of these observations, however, support Hogan's conclusion that PIN debit and signature debit are in the same product market, and he makes no effort to explain their relevance.

In essence, First Data seeks to present Hogan's paid testimony (*id.* ¶ 7) on topics that, if there were support for his views, could be addressed first-hand and unpaid from current MasterCard executives or the other industry participants for whom Hogan purports to speak.

ARGUMENT

Hogan's testimony fails to meet the threshold requirements for expert testimony. Rule 702 requires the proponent of expert testimony to establish by a preponderance of the evidence that the witness is qualified, that the testimony is reliable, and that the opinions will assist the trier of fact. *See* Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579, 592-93 & n.10 (1993). These requirements apply to all types of expert testimony, including non-scientific opinions like Hogan's. *See Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 147-48 (1999); Fed. R. Evid. 702 2000 advisory committee notes.

Under *Daubert* and *Kumho Tire,* trial courts must perform a "rigorous gatekeeping function" with respect to expert testimony. *Elcock v. K-mart Corp.,* 233 F.3d 734, 744 (3d Cir. 2000). Accordingly, this Court must carefully assess Hogan's proffered testimony to ensure that it meets the standards of Rule 702. "The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted. The expert's testimony must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded." Fed. R. Evid. 702 2000 advisory committee notes.

I. Hogan's Testimony Fails To Meet the Standards of Rule 702 Because He Does Not Apply Any Expertise In Drawing His Conclusions

Hogan's report states that, in forming his opinions, he relied on his "experience and learning from 30 years in the payments industry." Hogan Rep. ¶ 6. But even if one assumes, for

the sake of argument only, that Hogan's experience gives him some expertise in that subject area, he provides no method that explains how the conclusions he draws about antitrust markets and competitive effects follow from his experience. In the complete absence of any link between Hogan's purported expertise and the opinions he seeks to offer, his testimony fails to comply with the requirements of Rule 702.

It is well established that an expert witness must have a grounding in the methods and procedures of a particular field, and that expertise must be applied in a way that enables the witness to draw conclusions about the particular issues in the case. *See Daubert,* 509 U.S. at 590-91. These requirements are not abandoned when a witness attempts to rely solely or primarily on experience as a basis for non-scientific opinions. Under those circumstances, "[t]he trial court's gatekeeping function requires more than simply 'taking the expert's word for it.'" Fed. R. Evid. 702 2000 advisory committee notes. Instead, the court must require the witness to explain "how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." *Id. See, e.g., United States v. Jones*, 107 F.3d 1147 (6th Cir. 1997) (Handwriting examiner, who had years of practical experience and extensive training, explained his methodology in detail.) Indeed, the advisory committee notes to Rule 702 quote with approval the Fifth Circuit's admonition that "[i]t seems exactly backwards that experts who purport to rely on general engineering principles and practical experience might escape screening by the district court simply by stating that their conclusions were not reached by any particular method or technique." *Watkins v. Telsmith, Inc.*, 121 F.3d 984, 991 (5th Cir. 1997).

Hogan's proposed testimony fails to meet these standards. His perfunctory report does not even attempt to explain how his experience in the "payments industry" leads to any of the conclusions he reaches, why that experience is a sufficient basis for his opinions, or how his experience has been reliably applied to the facts of this case. "[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *General Elec. Co. v. Joiner,* 522 U.S. 136, 146 (1997). Because there is no methodological link between Hogan's industry experience and his opinions, his testimony fails to meet the standards of Rule 702.

II. Hogan's Testimony that PIN Debit and Signature Debit Are in the Same Market Should Be Excluded

There are several additional reasons why this Court should exclude Hogan's testimony that PIN and signature debit are "in the same market" (Hogan Rep. at 3). Hogan is not qualified to testify as an expert on that subject, his testimony is not reliable, and his opinions will not be helpful to this Court. *See* Fed. R. Evid. 702.

A. Hogan Is Not Qualified To Offer Opinions About Antitrust Product Markets

A court should "exclude proffered expert testimony if the subject of the testimony lies outside the witness's area of expertise." 4 Weinstein's Fed. Evid. § 702.06[1], at 702-52 (2000). Although Hogan has experience in the "payments industry" (Hogan Rep. ¶ 4), he lacks any education or training in economics or industrial organization. Hogan thus does not have the requisite training or experience to determine whether PIN debit and signature debit are in the same product market.

General industry experience does not qualify a witness to conduct the analysis required to define a product market for purposes of an antitrust case, and Hogan is no more qualified to testify about relevant markets than other non-economist witnesses who have been precluded from offering such testimony in similar circumstances.

- In *Berlyn v. Gazette Newspapers,* 214 F. Supp. 2d 530, 536 (D. Md. 2002), for example, the plaintiffs' proposed expert witness had considerable experience in publishing, having held several prominent positions with newspapers throughout his career. *Id.* at 533. Nonetheless, the court determined that the witness was not qualified to opine that the relevant product market was community newspapers and some editions of metropolitan newspapers because the witness's background was "completely devoid of specific education, training or experience in economics or antitrust analysis." *Id.*; *see also id.* at 536 ("[G]eneral business experience unrelated to antitrust economics does not render a witness qualified to offer an opinion on complicated antitrust issues such as defining relevant markets.").
- Similarly, in *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.,* 98 F. Supp.2d 729 (W.D. Va. 2000), the court prevented a geological engineer with some background in economics and substantial mineral industry experience (including experience performing market analyses for clients) from testifying as an expert about the geographic market for vermiculite. *Id.* at 732-734. The court noted that "there are differences between an analysis for business investment and an analysis for antitrust purposes," that "market analyses for antitrust markets generally require some expertise in the field of industrial organization," and that individuals with experience in analyzing the mineral market but

not in antitrust "would not possess the skill and training of a professional economist necessary to define a relevant market for antitrust purposes." *Id.* at 732-33.[4]

Like the witnesses in *Berlyn* and *Virginia Vermiculite*, Hogan does not have the qualifications to offer an expert opinion relating to market definition. Accordingly, Hogan's testimony that PIN debit and signature debit are in the same product market should be excluded.

B. Hogan's Opinion that PIN Debit And Signature Debit Are In The Same Market Is Unreliable

Hogan's two-paragraph analysis of whether PIN debit and signature debit are in the same market reflects his complete lack of qualification to testify on this subject. As an initial matter, Hogan's observation that PIN debit and signature debit have certain physical and functional similarities (Hogan Rep. ¶ 8) and his assertion that they are considered "fundamentally equivalent mechanisms to access demand deposit accounts" (*id.* ¶ 9), even if true, do not mean that the products are in the same product market. While products may compete in some general sense (e.g., PIN debit may compete in some sense with bartering goods), it is well settled that "the mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant product market for antitrust purposes." *FTC v. Staples, Inc.,* 970 F. Supp. 1066, 1075 (D.D.C. 1997).

Indeed, courts have frequently found products not to be in in the same relevant product market for antitrust purposes even though those products are in some sense functionally interchangeable. In *United States v. VISA U.S.A., Inc.,* 344 F.3d 229, 239 (2d Cir. 2003), for

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[4] Other cases are to the same effect. *See, e.g., Thomas J. Kline, Inc. v. Lorillard, Inc.,* 878 F.2d 791, 799 (4th Cir. 1989) (upholding exclusion of a non-economist financial analyst from testifying about price discrimination).

example, the Second Circuit upheld the district court's finding that cash, checks, debit cards, and proprietary cards are not in the same product market as general purpose credit or charge cards, even though all of those methods of payments can be used in some circumstances to purchase goods. Similarly, in *Staples, Inc.*, 970 F. Supp. at 1076, the court found that office products sold by office superstores were in a separate product market from the same office products sold through other outlets. The court reached this conclusion even though the "products in question are undeniably the same no matter who sells them." *Id.*[5]

Central to defining a product market is the methodology incorporated in the *Horizontal Merger Guidelines*, an approach that has been routinely applied by courts. *See, e.g., United States v. Sungard Data Systems, Inc.,* 172 F. Supp. 2d 172, 181 (D.D.C. 2001); *Swedish Match*, 131 F. Supp.2d at 160; *Staples, Inc.*, 970 F. Supp. at 1076. The *Guidelines* take the smallest possible group of competing products and ask whether a hypothetical monopolist controlling that group of products would profitably impose a small but significant and nontransitory price increase, which is often defined as a five percent price increase. *See* U.S. Dept. of Justice & Federal Trade Comm'n, 1992 *Horizontal Merger Guidelines* § 1.11 (rev. 1997).

If in response to the price increase, enough buyers would turn to other products, making the price increase unprofitable, then additional products should be included in the product market until a hypothetical monopolist controlling the expanded grouping of products would profitably impose the small but significant, nontransitory price increase. *See, e.g., U.S. Anchor Mfg. v.*

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[5] *See also United States v. Archer-Daniels-Midland Co.*, 866 F.2d 242, 246 (8th Cir. 1988) (finding that sugar was not in the same product market as high fructose corn syrup, even though the two were functionally interchangeable in some contexts); *FTC v. Swedish Match*, 131 F. Supp.2d 151, 157-60 (D.D.C. 2000) (finding that moist snuff and loose leaf tobacco, though functionally interchangeable, were not in the same antitrust product market).

Rule Indus., Inc., 7 F.3d 986, 995-96 (11th Cir. 1993). Thus, some switching to another product will not necessarily suffice to demonstrate that the other product should be included in the market. *Swedish Match*, 131 F. Supp.2d at 160. Only switching on a scale sufficient to defeat the profitability of a small but significant, nontransitory price increase should be considered in defining a market. *Id.* As the Supreme Court has said, the market "must be drawn narrowly to exclude any other product to which, within reasonable price variations, only a limited number of buyers will turn." *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 612 n. 31 (1953).

Nothing in Hogan's report suggests that he is competent to conduct such an analysis, much less that he did so. Notwithstanding his sweeping statements about industry perceptions, Hogan fails to address whether merchants—the relevant consumers—view PIN debit and signature debit as interchangeable, he fails to analyze price sensitivities or price differences between the products, and he fails to consider any other issues relevant to determining whether the products are in the same market. Indeed, Hogan offers no methodology for defining a product market beyond his second-hand opinions, expressed on behalf of an entire industry, that the "payments industry" as a whole has "always considered" PIN debit and signature debit to be "fundamentally equivalent mechanisms" (Hogan Rep. ¶ 9). Hogan has thus failed to employ "the same level of intellectual rigor that characterizes an expert in the field of economics and industrial organization." *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1025 (10th Cir. 2002) (affirming district court order that excluded testimony regarding relevant market on that basis); *see also Bailey v. Allgas, Inc.*, 148 F. Supp. 2d 1222, (N.D. Ala. 2000) (relevant market testimony excluded because the "methodology is not professionally sound and valid"), *aff'd*, 284

F.3d 1237 (11th Cir. 2002) (affirming summary judgment without considering issue of exclusion of this testimony).

In sum, Hogan's conclusion that PIN debit and signature debit are in the same market is an unsupported "bottom-line" that must be excluded. *See Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 319 (7th Cir. 1996) ("[A]n expert who supplies nothing but a bottom line supplies nothing of value to the judicial process.") (quoting *Mid-State Fertilizer Co. v. Exchange Nat'l Bank*, 877 F.2d 1333, 1339 (7th Cir. 1989)).

C. Hogan's Opinion that PIN Debit And Signature Debit Are In The Same Market Is Unhelpful

It is well-settled that to be admissible, expert testimony must be not only reliable, but helpful to resolve an issue in the case. *See, e.g., In re Brand Name Prescription Drugs Antitrust Litig.,* 186 F.3d 781, 786 (7th Cir. 1999). Because Hogan's cursory and unclear analysis does not properly address whether PIN debit and signature debit are in the same relevant market for antitrust purposes, his analysis is not helpful in resolving market definition issues. *See Bailey v. Allgas, Inc.,* 284 F.3d 1237, 1246 (11th Cir. 2002) (Expert's "cursory and unclear" assessment of the relevant product market did not "provide a sufficient basis upon which a reasonable jury could find Allgas possessed monopoly power.").[6]

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[6]Moreover, where an expert offers testimony that—even if true or obvious—is not relevant to the matters in issue, that testimony should be excluded as unhelpful. *See, e.g.*, *In re Brand Name Prescription Drugs Antitrust Litig.*, 186 F.3d at 786 (upholding trial court's exclusion of testimony of a prominent economic expert because it "concerned a matter not in issue" in the case). Hogan makes a series of statements about similarities between PIN debit and signature debit, *see* Hogan Rep. ¶ 8 (they "typically co-exist on a single piece of plastic issued by a single issuer"), as well as checks and cash, *see id.* ¶¶ 10-11, that may or may not be true (they are all based on Hogan's say-so), but none of them permit a conclusion that PIN debit and signature debit are in the same antitrust product market.

III. Hogan's Testimony About Future PIN Debit and Signature Debit Rates Should Be Excluded

Hogan's cursory analysis does not end with his product market observations, but continues with his speculation about likely price effects of VISA's settlement with Wal-Mart (Hogan Rep. ¶ 18). He believes that "PIN and signature rates will converge" because VISA agreed in the settlement not to require merchants to accept its signature debit card if they accept its credit card, from which Hogan infers that VISA will have to offer more attractive signature debit rates to compete in debit.

Hogan is not qualified to analyze what effect VISA's former "honor all cards" policy had on signature debit prices and he has not undertaken the analysis that would be necessary to reach such a conclusion. His breezy three-sentence treatment of future VISA debit pricing is unreliable because it does not consider the many economic factors that would be relevant to such an analysis. *See Concord Boat Corp. v. Brunswick Corp.,* 207 F.3d 1039, 1056-57 (8th Cir. 2000) (expert's opinion "should not have been admitted because it did not incorporate all aspects of the economic reality"). Hogan does not state (nor could he) how much VISA signature debit prices might fall or how long that might take, or provide any other information sufficient to make his conclusion relevant to whether signature debit will at some point in the future be priced closer to PIN debit. In short, Hogan offers nothing more than an unhelpful "bottom line" conclusion based on no particular expertise or other specialized knowledge that would distinguish him from any other executive from an electronic payment firm. *See Rosen,* 78 F.3d at 319. Accordingly, his testimony regarding future PIN and signature debit rates should be excluded.

IV. Hogan's Testimony About Future Competition From Various PIN Debit Providers Should Be Excluded

Hogan should not be permitted to testify about the future competitive significance of PIN debit networks such as MasterCard/Maestro, PULSE, Fiserv, American Express, and Discover (Hogan Rep. ¶¶ 19-21). Hogan provides no facts, data, or other information to support his conclusion that these companies "are serious PIN debit competitors" (*id.* at 4). Rather, his conclusion rests on a series of unsupported assertions about how the companies are likely to grow in the future. It is elementary that an expert cannot simply point to his resume and then engage in unfettered speculation. Similarly, a witness with industry experience cannot just offer a "hunch" based on his business sense. *Ullman-Briggs, Inc. v. Salton/Maxim Housewares, Inc.,* 1996 WL 535083, *3-4 (N.D. Ill. 1996). As noted above, "[t]he trial court's gatekeeping function requires more than simply 'taking the expert's word for it.'" Fed. R. Evid. 702 2000 advisory committee notes.

Yet Hogan expects this Court to do just that. For example, he states that MasterCard's relationships with "important issuers" will enable it to "obtain significant market share." Hogan Rep. ¶ 19. Hogan does not discuss how or why these unspecified "relationships" will allow MasterCard to gain "significant" market share (or what that means), consider any impediments MasterCard might face, or indicate how long such growth might take. Moreover, if Hogan actually analyzed the issue, he would have needed to address why, if MasterCard first took steps to grow this business five years ago, MasterCard currently has approximately only a 1% share of the PIN debit market. Hogan's failure to account for this "economic reality" is fatal to his "opinion." *Concord Boat,* 207 F.3d at 1056-57.

Hogan's statements that PULSE "is expected to continue to expand" and that "Fiserv is poised to be a significant player in PIN debit" (Hogan Rep. ¶ 20) are equally unreliable. Hogan offers nothing more than his own say-so. He does not discuss PULSE's or Fiserv's marketing strategies, businesses plans, or any economic facts bearing on how much they can expand or whether they will do so, much less provide any basis for speaking on behalf of these companies.

Hogan's treatment of American Express and Discover is also blatantly speculative (*id.* ¶ 21). He acknowledges that neither company currently markets debit card products, much less PIN debit products. *Id.* Nevertheless, based on the fact that each has a network, existing customers, and relationships with banks (none of which will be disputed in this case), and as result of the United States' successful challenge to VISA's and MasterCard's exclusivity rules, he concludes that "nothing prohibits" them from marketing debit products. *Id.* Hogan offers no basis for testimony about either American Express's or Discover's plans or expectations regarding future debit business. As noted above, nothing requires a district court to admit such unreliable opinion evidence based solely on the *ipse dixit* of the witness. *Joiner*, 522 U.S. at 146.

Finally, Hogan's cursory treatment of each of these competitors, and his failure to provide any concrete information about the future significance of any of them or first-hand knowledge of their business strategies, renders his opinion unhelpful. *See In re Brand Name Prescription Drugs Antitrust Litig.,* 186 F.3d at 786. The possibility that some competitors may grow by some unknown amount has no bearing on whether, post merger, PIN debit prices are likely to rise in a market with two dominant firms. Because Hogan's opinion about the future

competitive significance of these competitors is unreliable and unhelpful, his testimony should be excluded.

CONCLUSION

At the end of the day, much of Hogan's report amounts to an impermissible effort "to plug holes in [First Data's] case, to speculate, and surmise." *In re Aluminum Phosphate Antitrust Litig.,* 843 F. Supp. 1497, 1506 (D. Kan. 1995). First Data should not be permitted to offer Hogan as essentially a "channeler" of second-hand industry information that, if valid, should come first-hand from unpaid fact witnesses. *See Law v. NCAA,* 185 F.R.D. 324, 341 (D. Kan. 1999). Hogan is not qualified to offer many of these opinions, they lack any reasonable foundation, and they are not helpful to resolving the issues in this case.

For the reasons stated above, the United States' motion to exclude portions of Hogan's testimony should be granted. Hogan should not be permitted to offer opinions relating to product market (Hogan Rep. ¶¶ 8-11), the effect of the VISA/Wal-Mart settlement's on PIN or signature debit prices (*id.* ¶ 18), or the future competitive significance of existing or potential debit competitors (*id.* ¶¶ 19-21).

_____/s/_____
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