

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	
)	
VISA U.S.A. INC.,)	Civil Action No. 98-7076 (BSJ)
VISA INTERNATIONAL CORP., AND)	
MASTERCARD INTERNATIONAL)	
INCORPORATED,)	
)	
Defendants.)	
)	

DECLARATION OF JOEL I. KLEIN

I, Joel I. Klein, hereby declare the following to be true and correct, based on my personal knowledge, unless otherwise indicated:

1. I am the Assistant Attorney General for the Antitrust Division of the United States Department of Justice. I was nominated for that position by President Clinton and have held that appointment since July 17, 1997, when my nomination was confirmed by the United States Senate. Prior to that time, I was Principal Deputy Assistant Attorney General under Anne K. Bingaman and became Acting Assistant Attorney General in October 1996.
2. As Assistant Attorney General for the Antitrust Division, I oversee and direct the Antitrust Division, which is the division within the Department of Justice responsible for

enforcing the federal antitrust laws. The Antitrust Division enforces these laws through both civil and criminal proceedings.

3. As Assistant Attorney General, I have been delegated the responsibility by the Attorney General to determine whether to bring antitrust actions on behalf of the United States of America, *see* 28 C.F.R. § 0.40. Moreover, I have been specifically delegated authority to assert applicable privileges in antitrust litigation by the Deputy Attorney General, who is authorized pursuant to Department of Justice regulations, *see* 28 C.F.R. §§ 16.21 *et seq.*, to determine whether Department of Justice information will be withheld in response to subpoenas and other demands. The delegation provides that any assertion of privilege be in accordance with the guidelines established in 28 C.F.R. § 16.26.

4. Through the exercise of my official duties, I have become familiar with the Motion to Compel filed by Visa U.S.A., Inc. (“Visa”), whereby Visa seeks to compel the Division to produce documents relating to, *inter alia*, pre-complaint economic analyses prepared for the Antitrust Division concerning defendants’ practices. The Antitrust Division has conducted a search of its files and has located documents that fall within that category (hereinafter “Economic Memoranda”). The Economic Memoranda are described in the Schedule attached to this Declaration.

5. The purpose of this declaration is to invoke the deliberative process privilege with respect to these Economic Memoranda on behalf of the Antitrust Division of the Department of Justice, for the reasons explained below and in the Memorandum in Opposition which will be filed and served with this declaration.

6. I have personally reviewed the Economic Memoranda, the attached Schedule, and the Declarations of M.J. Moltenbrey and George Rozanski, which will be filed and served with my declaration. In my position as Assistant Attorney General, as well in other government positions, I have had occasion to become quite familiar with the legal standards for claims of deliberative process privilege and have successfully asserted such claims on behalf of the Antitrust Division. Based on that knowledge and experience and my review of the Economic Memoranda, I have determined that these documents should be withheld under a claim of deliberative process privilege.

7. The Economic Memoranda were prepared by staff economists and officials of the Economic Analysis Group (“EAG”). One of the primary functions of EAG, a section of the Antitrust Division, is to analyze economic issues relating to conduct that the Antitrust Division has under investigation. I, and other attorneys within the Antitrust Division, rely extensively in virtually every civil investigation and prosecution on the professional expertise and capabilities of EAG economists. As standard practice, Antitrust Division economists work closely with staff attorneys throughout the entire investigation process and provide their opinions, thoughts, analyses, recommendations and conclusions. I personally rely on their input and counsel in my deliberations leading to my decisions as to whether or not to bring an action against particular parties.

8. The Economic Memoranda at issue relate to the deliberative process that resulted in my decision to file the Complaint in this case. The Economic Memoranda contain analyses of and recommendations by the Antitrust Division economists to their superiors (including myself) of the conduct under investigation. These documents reflect not only the analyses and opinions

of EAG economists but also the thoughts and analyses of Antitrust Division attorneys working on this investigation.

9. To the extent there is factual material contained in these documents, the facts were deliberately selected for review by Antitrust Division attorneys and economists in the formulation of their recommendations to me. Moreover, in some instances, the documents were sent to and reviewed directly by me. The facts contained in these documents were selected by staff from a great volume of potentially relevant facts; that selection process itself reflects the thought processes of Antitrust Division staff and officials as to the types of facts relevant to possible prosecutorial decisions and antitrust enforcement policy. Moreover, the facts are inextricably intertwined with the authors' analyses and recommendations.

10. One of the primary responsibilities of the Antitrust Division is to detect and prosecute violations of the federal antitrust laws. Effective discharge of that responsibility depends upon formulation and implementation of sound decisions. In order to ensure effective and sound decision-making, the staff and officials of the Antitrust Division must remain free to engage in a candid exchange of views concerning proposed enforcement actions. Such exchanges would be severely curtailed if their contents were subject to public scrutiny during the deliberative process or thereafter. I have no doubt that candid exchanges regarding the pros and cons of any investigation would be severely chilled by the threat of disclosure of such thoughts to the very entities being investigated.

11. The Economic Memoranda unquestionably reflect the deliberative process of the Antitrust Division which formed part of the analysis leading to my decision to file this action. I have determined that disclosure of the advice, opinion, facts, and recommendations contained in

those documents would inhibit the frank exchange of information and ideas among Antitrust Division officials and staff in the course of their predecisional deliberations concerning enforcement and policy decisions, which is absolutely essential to the performance of my responsibilities and those of the Antitrust Division as a whole. For these reasons, I claim the deliberative process privilege for the Economic Memoranda on behalf of the Antitrust Division of the Department of Justice and I urge the Court to deny Visa's motion and reject the very serious threat it poses to the work of the Division -- and the Government as a whole.

I declare under the penalty of perjury that the foregoing is true and correct. Executed on January 13, 1999, in the District of Columbia.

_____/s/_____
Joel I. Klein
Assistant Attorney General
Antitrust Division
United States Department of Justice