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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

SCFC ILC, INC., d/b/a/ MOUNTAINWEST FINANCIAL,

Plaintiff,

v.

VISA U.S.A. INC.,

Defendant.

VISA U.S.A. INC. and VISA INTERNATIONAL SERVICE ASSOCIATION, Delaware corporations,

Counterclaimants,

v.

SEARS, ROEBUCK AND CO., a New York corporation; SEARS CONSUMER FINANCIAL CORPORATION; and SCFC ILC, INC., d/b/a MOUNTAINWEST FINANCIAL,

Counterdefendants.

Civil No. 2:91-CV-0478
Honorable Dee V. Benson

MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT UNDER RULE 50(b) AND FOR NEW TRIAL OR CONDITIONAL NEW TRIAL UNDER RULE 59

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By this motion, defendant VISA U.S.A. Inc. asks this Court (a) to enter judgment in its favor as a matter of law pursuant to Rule 50(b), Fed. R. Civ. P., and (b) to order a new trial under Rule 59, Fed. R. Civ. P., in the alternative if the motion for judgment under Rule 50 is denied or conditionally if the motion is granted. For the reasons which follow, it is our profound conviction that, despite the jury's diligence and good faith, justice in this most important case has not been done.

I.

INTRODUCTION AND SUMMARY.

A. First, the Forest.

Sears contends that VISA has unreasonably restrained trade in the market for general purpose charge cards by refusing to share its property with a Sears affiliate. As a result, Sears claims that it has been prevented from implementing a preferred marketing, or "branding," strategy of issuing a VISA-brand credit card to accompany its own immensely successful proprietary card, Discover, which Sears elected to launch in 1986 after a lengthy internal study determined that to be the preferred "high reward" (and "high risk") strategy.[1] If Sears were allowed to issue that new VISA card it would be one of approximately 6,000 VISA issuers, none of whom is constrained by VISA as to prices charged, areas serviced, number of cards issued or features offered. The number 6,000, itself, is only a "snapshot." VISA (and MasterCard) remain entirely open except as to two direct intersystem competitors, Sears and American Express. As a result, within the past two years not only has VISA's membership continued to increase generally, but several major new credit card programs have been started by such industrial giants as AT&T, GM, GE and GTE Sprint. In addition, Sears has at all times been free to offer Prime Option on precisely the same terms it has "announced," save and except that it would need to replace VISA's trademarks with its own (as it did when it offered its Private Issue card in 1989).

1/ A measure of Sears' success is that it hopes to surpass the total MasterCard association over the next 10-15 years. (Glinski Dep. at 206-07.)

B. Next, the Trees.

What, then, is the evidence upon which Sears predicates its claim that competition in the general purpose charge card market has been substantially restrained as a result of VISA's refusal to let Sears become a member-owner of VISA and use its property? Based upon our review of the trial record and the summary of evidence offered by Sears' counsel in his closing argument, it is the following:

1. VISA says it is a friend of intersystem competition, but it is not. It tried to beat-up on Discover when it started out and considered the possibility of having Discover convert its program to VISA when Discover experienced significant early losses.

2. VISA applies a double standard. It lets Citibank issue Diners Club and Carte Blanche and has not rolled back duality.

3. Three large banks have mentioned that a Sears-sponsored VISA card might become a substantial competitor against their respective VISA/MasterCard programs.

4. For several years in the mid-1980s, many banks earned "high" profits on their credit card programs.

5. A new brand of Discover card wouldn't be as profitable for Sears as a new VISA card since (a) there are potential problems of cannibalization; (b) Discover covers only 80% of retail sales volume -- although it has signed virtually every major merchant, including several that do not take VISA/MasterCard; and (c) some people prefer VISA or MasterCard.

6. If Sears had known that VISA wouldn't let Sears in if it elected to start its own competing card, it never would have done so.

7. Prime Option will be a low-priced VISA card that will be heavily promoted by an organization that is experienced and able to take advantage of scale economies.

In addition, Sears' expert, Dr. James Kearl, offered the following by way of economic opinion testimony:

a. consumers should be free to choose;

b. VISA has market power because its members engage in "collective rule-making," price "discriminate" and earn "high" profits notwithstanding the fact that there has been substantial entry into VISA;

c. proprietary cards cannot effectively eliminate VISA's market power;

d. "big is not necessarily bad;" it all depends on how one gets big;

e. there are no free riding concerns in this case;

f. By-law 2.06 creates a disincentive to new proprietary cards; and

g. there are no possible benefits to competition from By-law 2.06.

C. Some Much Needed Forestry.

This is not a case in which the jury was unable to see the forest for the trees. It is a case in which a small number of sunflowers were offered up as mighty oaks and the assemblage was then solemnly declared by plaintiff's expert to be the Black Forest.

We do not offer that description merely to be flippant, but to underscore our conviction that there has been a fundamental miscarriage of justice in this case. On its face, Sears' claim that the antitrust laws compel a 6,000 member joint venture that does not restrict price or output to share its property on a one-way basis with a direct intersystem competitor is, at best, questionable. If the incentives connected with product creation and risk-taking in a capitalist system are to be honored (as both Sears' expert and VISA's agree they must), the forced sharing of one's creations must be rare, indeed.

The case for such sharing simply has not been made here. Apart from the testimony of its expert, the vast bulk of Sears' case was devoted to establishing such antitrust irrelevancies as that Sears planned a multicard strategy, that VISA did not want to encourage Discover's success and that it applied a discriminatory "double standard," principally in the form of allowing Citicorp to offer Diners Club and Carte Blanche. Despite its questionable relevance, this evidence was well-suited and apparently effective in persuading the jury that vigorous competition (to wit, VISA's anti-Discover campaign) is contrary to -- rather than the stuff of -- antitrust policy, and that "inequality" of treatment somehow demonstrates an

adverse effect on competition. As we say, we do not question the efficacy of Sears' trial strategy. What we challenge is its right to prevail with it.

Beyond that small corpus of (questionably relevant) evidence, Sears' case rested almost entirely upon the opinions of its economist, Professor Kearl. That testimony, we submit, must be disregarded in its entirety: consisting as it did of little more than the carefully scripted ipse dixit of counsel served up in the garb of academic opinion. Prof. Kearl's opinions were based on no econometric analyses or studies, nor were they supported by scholarly literature or other evidence for that matter -- save information imparted to him by Prime Option's officers.[2/] Cf. Brown v. Parker-Hannifin Corp., 919 F.2d 308, 312 (5th Cir. 1990)(court properly refused to admit expert testimony where witness simply "developed two theories consistent with the facts as testified to by the plaintiff"). More important, his testimony was premised upon theories of the market and the role of private property, intersystem competition and (to borrow one of Professor Kearl's favorite terms) "incentives" that lack a foundation in either economics or common sense. That kind of testimony supports nothing. Mid-State Fertilizer Co. v. Exchange Nat'l Bank, 877 F.2d 1333, 1339-40 (7th Cir. 1989); Richardson by Richardson v. Richardson-Merrell, Inc., 857 F.2d 823, 829 (D.C. Cir. 1988); Reazin v. Blue Cross, 663 F. Supp. 1360, 1478-80 (D. Kan. 1987), aff'd 899 F.2d 951, 979-80 (10th Cir. 1990).

2/ Prof. Kearl, in fact, is not an industrial organization economist at all, and has done virtually no writing in the field of his testimony. On cross examination, he admitted that he does not even list himself with the principal economic professional association (American Economic Association) as an industrial organization economist. Instead, he testified, his relevant expertise is in the related field of Applied Microeconomics. (Tr. 1677:13-19.) Applied Microeconomics is, in fact, one of the fields of economics listed by the AEA. It is one of the areas of economic specialty (along with Industrial Organization) listed by VISA's expert, Richard Schmalensee. It is not a specialization claimed by Professor Kearl. See American Economic Association Directory (published in December 1989 American Economic Review) at 250.

D. Into the Woods.

The following are the specific arguments that VISA makes in support of this motion for judgment under Rule 50(b) or, in the alternative, for a new trial or conditional new trial under Rule 59:

1. If at first (and second), you don't succeed, try a new articulation: accepting that a joint venture's rules are subject to evaluation under the rule of reason, not every joint venture is the same, not every joint venture rule is evaluated in the same way and everything need not be submitted to a jury. A rule of a true (i.e. efficiency enhancing) joint venture that does no more than decline to share the venture's property with a non-member is not unreasonable as a matter of law in the absence of proof that it prevents the excluded party from competing successfully.

2. There is no evidence from which a reasonable jury could find that VISA By-law 2.06 has the effect of substantially restraining competition in the market for general purpose charge cards in that:

a. The exclusion of a single competitor from a portion of a market in which there are 6,000 issuers, no restrictions as to price or output, no barriers to entry by any firm that is not already in the market and in which the only "excluded" firms are successful competitors in the market cannot, as a matter of law, substantially restrain competition;

b. There is no evidence from which market power reasonably could be found;

c. There is no evidence that any harm to competition in the general purpose charge card market results from By-law 2.06 or that the elimination of By-law 2.06 would eliminate any concerns with competition in the market;

d. There is no evidence from which a reasonable jury could conclude that By-law 2.06 materially harms competition by

creating a disincentive for the creation of new proprietary systems.

3. As a matter of law, the benefits of By-law 2.06 outweigh any harm resulting from the exclusion of Sears and American Express from VISA.

4. Sears has not shown antitrust injury.

a. Since Sears can offer Prime Option on its own, and thereby capture the benefit of its own efficiencies, the only possible harm it has suffered from being deprived of the right to offer a Prime Option VISA card is the inability to use VISA's property; that is not antitrust injury.

b. Sears has not been prevented from starting a proprietary card and it stands to benefit from "disincentives" to others offering such a card.

5. The Court should in any event order a new trial for each of the reasons set forth above and because the way in which Sears tried the case resulted in a substantial miscarriage of justice through emphasis on evidence that was, at best, only tangentially relevant to the effect of By-law 2.06 on competition but was that substantially prejudicial.

II.

THE COURT SHOULD ENTER JUDGMENT FOR VISA UNDER RULE 50(b).

A. The Standards for Granting Relief under Rule 50(b).

The applicable legal standard is a familiar and uniform one. Under Rule 50(b) a party is entitled to judgment as a matter of law if a reasonable jury, considering the evidence as a whole, could not have rendered a verdict against it. Rajala v. Allied Corp., 919 F.2d 610, 615 (10th Cir. 1990); Lucas v. Dover Corp., Norris Div., 857 F.2d 1397, 1400 (10th Cir. 1988). As with summary judgment, which it parallels,[3/] the prevailing

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3/ Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 2511 (1986).

party at trial is entitled to all reasonable inferences from the evidence. E.E.O.C. v. Sperry Corp., 852 F.2d 503, 506-07 (10th Cir. 1988); Lucas, 857 F.2d at 1400.

As is also true of summary judgment, however, it remains the plaintiff's burden to produce sufficient competent evidence to support every element of its claim. Liberty Lobby, 477 U.S. at 256; City of Chanute v. Williams Natural Gas Co., 955 F.2d 641, 648 (10th Cir. 1992)(judgment as a matter of law appropriate "[i]f even one element [of plaintiff's case] is absent . . . ."). Nor may a verdict be sustained by inferences that are not reasonable[4/] or by isolated pieces of evidence which, "taken as a whole,"[5/] do not create a reasonable basis for the jury's verdict.[6/] Mere speculation will not suffice. Ware v. Unified School Dist. No. 492, 881 F.2d 906, 911 (10th Cir. 1989). A "scintilla" of evidence also is not enough to avoid judgment as a matter of law. Ware, 881 F.2d at 914; City of Vernon v. Southern California Edison Co., 955 F.2d 1361, 1369 (9th Cir. 1992) ("It is not enough for a party to content itself once it has produced a mere scintilla of evidence . . . . Rather, as the Supreme Court held in Matsushita . . . the record must be sufficient to 'lead a rational trier of fact to find for the non-moving party . . . .'" (citation omitted)). Put otherwise, there must be "substantial conflicting evidence." Richardson by Richardson v. Richardson-Merrell, Inc., 857 F.2d 823, 827 (DC Cir. 1988). "In order to benefit from the favorable inferences available under either the directed verdict or j.n.o.v. [standard], a party must present 'substantial evidence' defined as 'evidence a reasonable mind might accept as adequate to support a conclusion.'" Kaplan v. Burroughs Corp., 611 F.2d 286, 290 (9th Cir. 1979).

4/ Lucas 857 F.2d at 1401 ("[T]his court is not required to evaluate every conceivable inference which can be drawn from evidentiary matter, but only reasonable ones")(emphasis in original).

5/ Barr Laboratories, Inc. v. Abbott Laboratories, Inc., ___ F.2d ___, 1992-2 Trade Cas. (CCH) ¶ 70,007 at 68,894 (3d Cir. Oct. 23, 1992).

6/ City of Chanute, 955 F.2d at 647 ("The existence of some disputed facts does not automatically preclude granting summary judgment.").

There is, of course, no separate Rule 50 standard for antitrust cases. However, as with motions for summary judgment in antitrust actions, applications for post-trial relief must take into account that the "range of permissible inferences" in such cases is not unlimited (Matsushita[7/]), particularly where they are based on "ambiguous evidence" (Dreiling v. Peugeot Motors of America, Inc., 850 F.2d 1373, 1379 (10th Cir. 1988)). See also Gibson v. Greater Park City Co., 818 F.2d 722, 723 (10th Cir. 1987). Rather, "'allegations of restraint of trade must be supported by significant probative evidence'" to avoid an adverse judgment as a matter of law. Key Financial Planning Corp. v. ITT Life Ins. Corp., 828 F.2d 635, 638 (10th Cir. 1987). In The Jeanery Inc. v. James Jeans, Inc., 849 F.2d 1148, 1152 (9th Cir. 1988), the Ninth Circuit noted that "in the antitrust context" a court "must closely scrutinize the evidence . . . to avoid the danger of improper antitrust condemnations." Quoting Matsushita, 475 U.S. at 594, the court explained the need for such careful analysis because "mistaken inferences in [such] cases . . . are especially costly," since "they chill the very conduct the antitrust laws are designed to protect." Id. While Matsushita was a predatory pricing case, those comments are equally pertinent here. By-law 2.06, on its face, is designed to protect the incentives for risk-taking and innovation that are a core antitrust value as well as the vigor of intersystem competition. While Sears would have it otherwise, the danger of permitting insupportable inferences to be drawn by the jury is that those values may be materially compromised, at great cost both to the competitive process and to an important industry.

Careful scrutiny is also required where the prevailing party's case is premised largely upon the opinions of an expert. While such evidence may be "indispensable" in certain cases, "that is not to say that the court's hands are inexorably tied, or that it must accept uncritically any sort of opinion espoused by an expert merely because his credentials render him qualified to testify." Richardson, 857 F.2d at 829. Indeed, whether an expert's opinion "has an adequate basis, and whether without it an evidentiary burden has been met,

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7/ Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986).

are matters of law for the court to decide." Id. (j.n.o.v. affirmed). See also City of Chanute, 955 F.2d at 655 (summary judgment granted in antitrust case notwithstanding expert opinion); Mid-State Fertilizer v. Exchange Nat. Bank, 877 F.2d 1333, 1339 (7th Cir. 1989)(summary judgment granted where expert testimony "[made] no sense").

B. VISA Is Entitled to Judgement as a Matter of Law Because a Refusal to Share a "Desirable Facility," Without More, Cannot Be an Unreasonable Restraint of Trade.

Sears' proof necessarily fails because Sears can and does successfully compete in the general purpose charge card market.[9] There is no evidence to support a finding that By-law 2.06 precludes Sears from effectively competing. Indeed, the evidence is uncontested that Discover is an overwhelming competitive success. Sears does not need the VISA mark and systems to compete: it simply wants access to them to compete more advantageously.[9] In a word, Sears claims that VISA owes a duty to deal because its property is a "desirable" facility. We submit that that is a claim that will not hunt.

To date we have failed to persuade the Court as to the accuracy of this analysis under Section 1 of the Sherman Act. We try again now in the hope that our prior results are a function of a failure of advocacy rather than reason.

We commence with a given. Plaintiff's claim must be adjudged under the rule of reason. But does application of that rule require every case to go to the jury under general instructions such as those given here? Indeed, how does a court -- let alone a jury -- determine whether an arrangement promotes or suppresses competition? Recourse to Justice

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8/ VISA also incorporates the arguments which appear in the following: 1) Memorandum of Points and Authorities in Support of VISA's Motion for Summary Judgment, filed June 4, 1992; 2) VISA's Reply Memorandum in Support of its Motion For Summary Judgment, filed July 13, 1992; and 3) Memorandum in Support of VISA's Motion for Judgment under Rule 50, filed October 26, 1992 (hereafter "VISA's Rule 50 Mem."). VISA further asserts as an independent ground for j.n.o.v. the argument made in VISA's Memorandum in Support of Its Motion for Judgment Under Rule 50 and/or Rule 56 Regarding Concerted Action, filed on September 25, 1992.

9/ Mr. Pratt, during final argument, said: "The evidence also shows that Dean Witter can compete most effectively by doing the same thing that Mr. Bailey talked about." (Tr. 2783:19-21).

Brandeis' formulation in Board of Trade of City of Chicago v. United States, 246 U.S. 231, 238 (1918), helps not at all. As Judge Easterbrook observed in his seminal article entitled "The Limits of Antitrust", 63 Texas L. Rev. 1, 12 (1984)(hereafter "Easterbrook"): "When everything is relevant, nothing is dispositive."

Historically, courts have attempted to address this problem by adopting shorthand rules or presumptions. Most prominent is the per se rule under which categories of practices are condemned outright because they are thought to be so rarely beneficial that the costs of litigation outweigh any marginal benefits which might exist. Northern Pacific Ry. Co. v. United States, 356 U.S. 1 (1958). However, recent judicial and economic learning has demonstrated that competitive benefits may accrue from a host of practices formerly thought pernicious. Consequently, per se analysis has given way to a "quick look" application of the rule of reason under which certain practices, are deemed presumptively unlawful and may be found lawful if -- but only if – the defendant carries the burden of proving competitive justification. Compare FTC v. Indiana Federation of Dentists, 476 U.S. 447, 459 (1986) (holding that there are some agreements so inherently suspect that even under the rule of reason "no elaborate industry analysis is required to demonstrate [their] anticompetitive character") with Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 23 (1979) ("BMI") (price-fixing agreement by joint venture lawful under rule of reason because it was necessary for the products to exist at all). As the Supreme Court noted in NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85, 109 n.39 (1984): "The rule of reason can sometimes be applied in the twinkling of an eye." That is true. But it is an observation that we believe is apt in both directions.

At the "facially pernicious" end of the spectrum, courts perform an important judicial function in screening antitrust cases by allocating the burden of proof of justification and by "filtering" those justifications which may be competitively validated. See, e.g., NCAA, 468 U.S. at 113 (when an agreement is plainly anticompetitive on its face the rule of reason places on defendant "a heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operation of a free market").

The controversy at bar, by contrast, presents issues at the opposite end of the rule of reason spectrum. VISA is what we have referred to as a true productive integration. That is, its members have come together to create a new product, through risk and innovation, that none of its members could have created individually. In terms of the reason for protecting property rights it is directly akin to a single entity. See also note 12, infra. Facially, By-law 2.06 does nothing more than exclude two highly successful system competitors from eligibility for membership in such a venture while leaving it otherwise "open." Neither price nor output is addressed by the By-law. Accordingly, Sears' claim rests on the supposed substantial harm to competition effected by the "restraint." But that is not a "jury issue" without more. Here, as at the opposite end of the spectrum, it is appropriate for the Court to make a preliminary legal evaluation to determine whether the challenged practice presents a "plausible" threat to competitive concerns given society's need to nurture investment and innovation. Matsushita, 475 U.S. at 587-88.[10] See also Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 775 (1984). Such a judicial function is recognized, for example, in antitrust cases involving tie-ins where the Supreme Court has endorsed a market power "screen" to dispose of claims deemed inconsequential as a matter of law.[11] In such cases the judicial function derives from an economic "truth":

10/ Matsushita's holding was recently explained in Eastman Kodak Co. v. Image Technical Services, Inc., 112 S. Ct. 2072, 2083 (1992):

> The Court's requirement in Matsushita that the plaintiffs' claims make economic sense did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases. The Court did not hold that if the moving party enunciates any economic theory supporting its behavior, regardless of the accuracy in reflecting the actual market, it is entitled to summary judgment. Matsushita demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision. If the plaintiff's theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted.

11/ Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 26 (1984); Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co., 614 F.2d 832, 841 (2d Cir. 1980); Ball

(continued...)

When firms lack market power they cannot successfully persist in harmful practices: rivals will offer better deals to consumers which will stamp out bad practices faster than the judicial process. As Judge Easterbrook put it "[w]hen there is no market power, the market is better than the judicial process in discriminating the beneficial from the detrimental." (Easterbrook at 21.)

We come, then, to the critical question here: is there a "screen" based on economic learning which justifies a legal rule limiting the circumstances in which a duty to deal will be imposed by the antitrust laws? We think the answer is yes -- an answer derived, inter alia, from United States v. Terminal R.R. Ass'n., 224 U.S. 338 (1912), Associated Press v. U.S., 326 U.S. 1 (1945), and the host of subsequent cases referenced and analyzed in Professor Areeda's seminal article. Essential Facilities: An Epithet in Need of Limiting Principles, 58 Antitrust L. J. 841 (1990) ("Areeda"). That "screen" is the requirement that in the case of what we have called true (i.e. product creating) joint ventures,[12/] the plaintiff must adduce evidence sufficient to show that, as the excluded party, it is disabled from competing successfully in the relevant market. Absent such a preliminary showing, there is no case to go to the jury. See Marrese v. American Academy of Orthopaedic Surgeons, 1991-1 Trade Cas. (CCH) ¶ 69,398 at 65,606 (N.D. Ill. 1991) (plaintiff claimed that denial of membership in an important professional society adversely affected competition by

11/(...continued)
Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc., 784 F.2d 1325, 1334-37 (7th Cir. 1986).

12/ As we have noted above and in the past, the analysis we propose does not apply to every form of competitive aggregation that might, under some definition, be referred to as a joint venture, but only to those forms of efficiency-creating aggregations (a BMI, NCAA or VISA), in which the whole is "truly greater than the sum of its parts" through the creation of new products through risk and innovation. BMI, 441 U.S. at 21-22. A simple aggregation of individual buying power (Northwest Stationers) or pooling of individual inputs (Realty Multi-List) does not necessarily implicate the kind of "incentive" and "Property rights" concerns that are at issue in a case, such as this, in which the venture creates what is a competitively new product as the result of risk-taking and innovation. That situation is, in economic terms, far more akin to the creation and operation of a new single firm -- and should, we submit, be so regarded, for antitrust purposes.

depriving consumers of the benefit of his unique willingness to "undertake high-risk surgery." Summary judgment for defendant was granted, however, because plaintiff could still pursue his profession and, in fact, had done so successfully); Schachar v. American Academy of Ophthalmology, Inc., 870 F.2d 397, 399 (7th Cir. 1989) ("Unless one group of suppliers diminishes another's ability to peddle its wares . . . there is not been the beginning of an antitrust case, no reason to investigate further to determine whether the restraint is 'reasonable.'"); cf. McKenzie v. Mercy Hosp., 854 F.2d 365, 370-71 (10th Cir. 1988) (essential facilities claim failed, as a matter of law on summary judgment, where evidence showed that hospital's denial of staff privileges did not prevent plaintiff from competing successfully on his own against defendant).[13/]

The same point can be stated in another way. Once a joint venture has been created and has succeeded, it is possible for others to ask to share its creations. It may even be that the prospective new entrant is -- as Sears claims is the case here -- likely to offer a low priced product (particularly if it can free ride on the venture's prior efforts). But if a venture's property is subject to compulsory sharing on that kind of showing alone, the incentive to create such enterprises in the first instance will be materially impaired, if not destroyed. See Schmalensee, Tr. 2271:13-2272:14; 2277:15-2278:1. Thus, in evaluating the pertinent legal rules regarding such sharing, the law must take into account long term

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13/ We further commend to the Court's attention the Seventh Circuit's decision in a frequently-cited Section 2 case, Olympia Equipment Leasing Co. v. Western Union Telegraph Co., 797 F.2d 370 (7th Cir. 1986), in which the court discussed the circumstances under which the law should impose a duty to aid competitors. In its opinion, the court drew what we have argued is an important distinction between the "negative" duty under the antitrust laws not to restrain competition (as, for example, by agreements that restrict price competition or limit output) as opposed to any "affirmative" duty to aid a competitor's business success. See 797 F.2d at 376. The court's opinion further explained the adverse effect which imposing such a duty would have on incentives to engage in output enhancing conduct (id. at 375) and points out -- as we argue in text -- that "the monopolistic-refusal-to-deal cases qualify rather than refute the no-duty-to-help-competitors cases." Id. at 376. Accepting that these observations were made, there, under Section 2, we commend their logic to this case as well. Compare also TV Communications Network, Inc. v. TNT, Inc., 964 F.2d 1022, 1027-28 (10th Cir. 1992) ("Section one only prohibits refusals to deal where a manufacturer has monopoly power in the market").

consumer welfare interests and not simply those of the instant litigants. See Tr. 2275:14-2276:2.[14/]

The facts in this case now make it clear that Sears' claim would do otherwise: it would negate incentives in our capitalist society. If a venture's property is subject to compulsory sharing after the fact, our entire system of risk taking and private property will be jeopardized. Olympia, 797 F.2d at 375. Professor Areeda captures the point well. Explaining why compulsory sharing is legally inconsistent with competition policy as enshrined in the Sherman Act, he wrote:

> [A]ny essential facilities doctrine must recognize macro level or class justifications. These legitimate business purposes are not personal to any particular defendant, but are propositions of general policy. For example, the justification for refusing to share a research laboratory does not focus on the practical infeasibility of letting another use the laboratory, but on the general concern that the defendant never would have built a laboratory of that size and character in the first place if he had known that he would be required to share it. Required sharing discourages building facilities such as this, even though they benefit consumers. (Areeda at 851.)

Indeed, plaintiff's expert, Dr. Kearl, acknowledged the relationship between By-law 2.06 and the central role of protecting incentives in our competitive system. Testifying on direct examination, he noted as follows:

> Several years ago a firm developed a new artificial sweetener. That artificial sweetener most people now call NutraSweet. And the development of that artificial sweetener was protected by a patent. A patent is essentially a rule, a government rule that says that the firm that developed the product is the only firm for a period of time that is allowed to sell the product in the market.
>
> Now, if you didn't have the patent, and suppose by happenstance the invention came along, the price might be lower, but it is possible and in fact likely that the firm that

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14/ Yet another way of articulating this point is in terms of what quantum of market power must be shown in a case challenging a refusal to share property. As we have argued previously (see VISA's Rule 50 Mem. at 12-13), the Supreme Court's articulation of a market power test in Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 296 (1985), makes no sense unless the quantum of power that plaintiff must prove is the power to exclude rivals from the market generally. Otherwise, not only is the Court's standard incomprehensible as a linguistic matter, but the property of any successful joint venture is at risk under the very generalized rule of reason balancing test.

developed NutraSweet wouldn't have gone about the business of developing it had it known that it wouldn't have had the patent protection. And consumers in that case would have been worse off because products that would have been available to them had they been in the market would not have been in the market because there was not sufficient incentive for firms to bring them into the market. That is what I mean by the free-riding problem.

Let me restate it. The free riding problem is when consumers value or would value a commodity but the commodity or the product or the good does not come to the market because firms don't have incentive to bring it to the market. (Tr. 1588-89.)[15/]

But having, thus, reached the right church, Dr. Kearl ended up in the wrong pew:

Q Thank you. Let's move that back. Now, when you were considering the output impact of VISA's bylaw 2.06, did you consider the possibility of and free-riding problem in the context of the rule?

A Yes, I did. Let me refer again to my Friday testimony. A free-riding problem occurs when consumers don't get what they would want to buy because there is insufficient incentive, not enough incentive for a firm to bring the product to the market.

Q Was that the example you used on the patent on NutraSweet?

A Yes, the example I used was NutraSweet. And so I looked for a free-riding problem in this case. It is clear from the NutraSweet example that protection from competition in some very special circumstances is necessary in order to increase the amount available in the market. But I see that that is not needed in this particular case. VISA is an open association. It was completely open until the passage of the amendment to bylaw 2.06. It remains open except for those firms that are targeted in that bylaw. Firms come into this association all the time. The firms in the association remain profitable and the firms enter indeed because they believe they can be profitable and output has increased in

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15/ While the example given by Dr. Kearl involved a patent, private property is not protected only by affirmative government grants. For example, trade secrets are considered protectible property interests without any affirmative government authority. Indeed, the laws against theft, generally, reflect the presumption in favor of protecting private property.

this market as firms have entered under this open rule. And for all of those reasons I conclude that output has increased. it has not gone down. and there is not a free-riding problem in this market with entry. (Tr. 1668-69.)

In reality, Dr. Kearl's NutraSweet analysis gives much. if not all. of the game away. But that only became apparent on cross-examination when the basis for his confident "no free rider" and "no benefit to competition" opinions concerning By-law 2.06 were explored. We impose on the Court to quote the testimony at length:

Q Okay. That's a better way of saying it. The short and long of it is that we, in fact, protect NutraSweet from competition even at the potential that there be a higher price to consumers in order to incent [sic!] the creation of the property?

A We want to provide an incentive for terms of [bringing] commodities to the market that consumers value, yes.

Q In fact, you would agree, would you not, that individual ownership of resources is one way to create appropriate expectations about future productive uses of resources?

A I agree with that, yes.

. . . .

Q You wouldn't expect Honda to arrive in San Francisco, say, in the early 1980s with its brand-new car and not able to penetrate the market, not getting as many dealers as it wanted and maybe not as many customers to turn to General Motors and say "I'd like to create a Honda Chevrolet." You wouldn't expect that at all, would you?

A No.

Q In fact, that would be harmful to consumers, and that's my point. That would harm incentives in terms of the creation of private property and the protection of property rights; wouldn't it?

A It may, yes.

Q Okay. Now, I take it, therefore, if we start with that, that the difference if you focus on is that VISA is not a single entity, but it is an association of 6,000, that all have united to issue in property right [terms] a trademark[ed] product called VISA card?

A That's not quite what I consider, no.

Q Let me see if I can explain this. If VISA consisted of, say, not of 6,000, but if VISA had started out, say, with an issuer in every state, 50 states, one issuer in each state and they all shook hands and say "Look. 50 of us. We're going to issue a VISA card, each one of the 50, and we're not going to take in any new members at all, any new members at all." It would be functioning very much like a single entity, wouldn't it? It would be closed?

A We would have to look at it again. That's not the fact situation here, so I'd have to look at it, set of rules and other things in that particular hypothetical.

Q But the fact that these folks got together, formed a joint venture, created a property right, had the incentives to do so under our system would not lead you to think somebody else could come along and say "Hey, I want a piece of your action"; right? If it's a closed joint venture.

A If it were closed.

Q Okay. So now let's see if we understand where we are. A single firm can protect its copyrights because to do so is to promote incentives, to create property and wealth in there?

A That's right.

Q And that benefits consumers?

A It does.

Q And it doesn't make any difference how much a single firm makes in terms of profits. It doesn't make much difference it gets in the 40 or 50 percent range as long as it doesn't get to a monopoly?

A It matters how far it conducts its business. It has to be within the constraints of antitrust law, short of a monopoly, as well.

Q But short of a monopoly, you would say that the single firm can do what it wants to do with its properties?

A I didn't say that. My testimony was it has to conduct --

Q Itself in accordance with the law?

A In accordance with the law.

Q I agree. But assuming it conducts itself in accordance with the law all else equal, please, Doctor, you would not expect someone else to come along and say to that

single entity at 40 or 50 percent of the market "I demand the right to issue your property," because if such a thing were to occur in our system that would be destructive in incentives?

A Yes, it would change the incentives.

Q And you just agreed with me it is equally true for a joint venture. So long as the joint venture now in my 50 example is closed; right?

A The property of single firms and the property of joint ventures should be protected, yes.

Q Okay. So what you have focused on, therefore, is not the fact that VISA is a joint venture as such, but that VISA is a particular joint venture which has chosen to be open for a long time; right?

A Yes. I focused on what I call it and what others call positive externalities in which the VISA members benefit and VISA cardholders benefit by new firms coming in.

. . . .

Q (By Mr. Popofsky) Are you suggesting, therefore, that you would not permit in your view of economics[,] of this efficiency[,] [it] would not be enhanced by permitting the close of joint venture to close down membership if there was some potential for new externalities out there?

A All I suggested was that if you had an open association -- Presumably when it started as an open association, it did so because there were positive network externalities. That is, that the value of the cards became greater for each issuer and each cardholder and for the merchants that took it. And if you got a very large market share and suddenly closed down, okay, my guess is that you would want to look -- the antitrust laws would want to look at the reason for that closure. That's all my testimony is. (Tr. 1741-51; emphasis added.)

With respect, Dr. Kearl's analysis fails to offer anything substantive about why one should distinguish between single entities and joint ventures, or between different types of joint ventures (open vs. closed or vs. partially closed), let alone why the distinction

matters in terms of long term incentives.[16] Expert opinions, including particularly those of a generalized sort which purport to address the ultimate issue, are no more substantive than the reasons and evidence which underlie them. Richardson, 857 F.2d at 829; Mid-State, 877 F.2d at 1333; Reazin, 663 F. Supp. at 1479. When those reasons reduce to nothing more than a thoughtful muse to the effect that the issue involves something that might be looked into or thought about more, the opinion must be disregarded as a matter of law. That is precisely what occurred in Matsushita, where the expert opinion which had been relied upon by the Third Circuit in holding the asserted claim sufficient to go to the jury was nevertheless disregarded as a matter of law by the Supreme Court while holding the claim economically "implausible." See 475 U.S. at 594 n. 19.

It comes to this: Dr. Kearl's testimony substantiates the centrality of incentives for the development and protection of property rights (and the incentives related thereto) in analyzing the legal issue before the Court. But his attempt to override that concern and find a narrow exception to these general concerns -- conveniently tailored to the facts of this case -- must be viewed with suspicion. Indeed, we suggest that, fairly read, his testimony simply is not plausible (Matsushita) or reasonable (Kodak).[17]

16/ The result also makes no sense. A single entity with very substantial market power is entitled to maintain that power by refusing to share its property with others, even if the economic impact of the refusal is substantial. By contrast, under Sears' approach, the property of a joint venture is in play under the rule of reason even where the market is structurally competitive and the restraint imposed by the venture is modest in scope. (Indeed, as Sears tried this case, the de minimis scope of the 2.06 exclusion became its principal vice because it was "discriminatory." See pp. 60-62, infra.)

Such a rule is not only anomalous, but economically counterproductive. As Prof. Schmalensee explained (Tr. 2277:15-2278:1), the effect of applying different -- and stricter -- standards to joint ventures is to "discourage [their] formation" by making them a less attractive form of business organization. As a result, potentially valuable projects either will not be undertaken at all, will be undertaken less well by single firms or will produce mergers that totally eliminate competition between the combining firms. See Tr. 2276-78; see also pp. 41-47, infra.

17/ We return to the issue of property rights and incentives in our discussion of the "benefits" of By-law 2.06. See pp. 41-47, infra.

Our point is underscored by the testimony of Dr. Schmalensee, who is unquestionably credentialed. After discussing the importance of incentives in product innovation and the NutraSweet example proffered by Dr. Kearl (Tr. 2268-74), Dr. Schmalensee testified as follows:

> Q What about the facts we are dealing with here, the general purpose credit card industry? You have VISA and you have Discover, how does this analysis that you have been giving us apply to that particular question?
>
> A What it means to me is that it makes no more economic sense to require VISA to share its property with Discover, because it is an association of 6,000 people, than it would make to require Discover to share its property with others simply because it has been selfish in some sense and not shared at all. Neither kind of reasoning makes sense.
>
> Q As an economist if the question were whether Discover should be required to share its property with CitiBank or with the banks we have -- Mr. Pratt's [sic] bank or Mr. Doyle's bank, you wouldn't require them to do it?
>
> A No, I certainly wouldn't. (Tr. 2274-75)
>
> . . . .
>
> Q Let me ask you just a couple of more questions on this subject of property rights and how they impact on your conclusions. During his testimony Professor Kearl suggested that VISA's property rights somehow should be treated differently because it is a joint venture. First of all, does the term joint venture have meaning to you?
>
> A Yes, it does.
>
> Q Tell the jury what it means to you as an economist.
>
> A Yes. Thank you. As an economist a joint venture is a way of businesses getting together for some common purpose. It involves cooperation short of a merger. Two adjacent farms might get together for instance and coordinate their water supply for irrigation. That might not be called a joint venture in lawyers terms' but to economists it is the same thing. It is a partial cooperation, a limited cooperation.
>
> Q Now, do joint ventures serve economically valuable functions in our society?

A They certainly do. One of the important functions of joint ventures is to allow firms that can't undertake projects on their own to undertake them together. One of the issues I dealt with in Washington, just by example, was the issue of research joint ventures. I was involved in drafting an administration legislative proposal and have thought about it a little bit. It is very common in our economy and foreign economies for firms in the same business to get together and do research, not all their research, but research on particular products. This happens when none of the participants can themselves work effectively. They don't all have enough technology or the right facilities or whatever. By pooling they can create property from which they can all benefit.

That is an important thing. Similarly it is important that McDonald's be allowed to spread maybe more rapidly without the use of capital by use of franchises and, [in] my sense, it was important in this industry, because banks were generally limited geographically, that they be able to form a nationwide association to get the kind of coverage of merchants and of cardholders that they seem to need.

Q I want to ask you specifically about Dr. Kearl's conclusions. As an economist can you think of any economic reason why you would want to respect the property rights of a joint venture like VISA any less than the property rights of a single firm like Discover?

A No, I can't. If you did that you would discourage the formation of joint ventures that might mean that some firms would merge when they wouldn't otherwise merge, it might mean again sort of an invisible tax that some kinds of projects wouldn't get undertaken because firms didn't want to merge and they couldn't do it any other way. I see no gain and I do see loss. (Tr. 2276-78.)

Put in the language of Professor Areeda, Sears' claim necessarily invokes the "macro" justification available to any entity -- joint venture or no -- whose property is sought to be shared. A duty to share or deal must be imposed only under very limited conditions -- conditions captured in the notions of essentiality or market power of such a degree that it is tantamount to monopoly or deprivation of an input necessary to effective competition. Only then does the macro justification give way to a stronger public interest, as embodied in the Sherman Act.

C. A Jury Could Not Reasonably Find from the Record in This Case That VISA By-Law 2.06 Imposes a Substantially Unreasonable Restraint on Competition in the General Purpose Charge Card Market

1. VISA's Refusal to Allow an Existing Competitor to Share Its Property Is Not Unreasonable Given Undisputed Facts Concerning the Nature of the Restraint and the Nature of the Relevant Market

We begin with the simplest of observations: VISA has 6,000 members, no one of which accounts for as much as 20% of VISA (let alone the market as a whole); the top 10 issuers only account for 50% of VISA; entry into the market is not restricted to anyone; entry into VISA is not restricted except for Sears and American Express; there has been substantial actual entry into VISA and/or MasterCard, both in terms of absolute numbers of new entrants and major new programs; VISA does not control the price, territories, output or other terms on which cards are issued; Sears can compete for any cardholders or merchants and could offer Prime Option on any terms it wants, other than using VISA's property to do so. Thus, the only proven effect of By-law 2.06 is to prevent a single entrant that already is in the market in another way (by its own choice) from also offering another brand of credit card in competition with the numerous existing VISA issuers.[18/]

That is, of course, a restraint. As Justice Cardozo pointed out in Board of Trade of City of Chicago v. United States, every agreement entails a restriction of some type. See 246 U.S. at 238. But that fact tells us nothing. The antitrust laws are concerned only with those agreements that restrain competition in some cognizable and unreasonable fashion. Id.

18/ We leave aside -- but only for the moment -- Sears' "disincentive" argument. See pp. 37-40, infra.

By-law 2.06 is not such a restraint. Even considering only VISA issuers, this is, as Prof. Schmalensee testified (Tr. 2300), an extremely unconcentrated "market."[19] The HHI of those issuers alone is well under the Justice Department's "safe harbor" of 1,000. (Tr. 2300:6-11; 1992 Department of Justice & FTC Horizontal Merger Guidelines, 57 Fed. Reg. 41,552, 41,558 at § 1.51 reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104 (1992) (attached herewith as Appendix A)(hereafter "Merger Guidelines").) And that, of course, is before even considering Sears and American Express or the absence of barriers to entry into the market by any other firms.

This structural evidence not only matters -- it is dispositive. "Market structure offers a way to cut the inquiry off at the pass." AA Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1401 (7th Cir. 1989). In AA Poultry the court of appeals affirmed a j.n.o.v. where the episodic evidence concerning defendant's intentions and practices "impressed the jury" but "objective information" about the market was "'not sufficient to find actual competitive injury.'" 881 F.2d at 1398-99. Among the points noted by the court were not only the relevant market share numbers, but the presence of "persistent entry," and the existence of numerous competing suppliers. Id. at 1403. More recently, the Third Circuit affirmed summary judgment in the face of significant evidence of anticompetitive animus where the market structure demonstrated an absence of competitive harm. Barr Labs, 1992-2 Trade Cas. at 68,893 (continuing entry showed no barriers to entry and no harm to competition despite high market share). See also Ball Memorial Hospital v. Mutual Hosp. Ins., 784 F.2d 1325, 1334-36 (7th Cir. 1986).

In Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 219-20 (DC Cir. 1986), the court of appeals affirmed summary judgment for a joint venture that had imposed restraints on members where the venture lacked market power. At the

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19/ It is not, in fact, a "market" at all -- however much Sears may sub silentio try to turn it into one. The market -- per Professor Kearl and Sears as well as VISA -- is general purpose charge cards. Sears and American Express are -- depending on the criteria used -- the biggest players of all in that market. (Tr. 1682:5-1683:10.) They are by any measure among the top five. Id.

conclusion of his opinion for the court. Judge Bork cogently explained the reason for that approach:

> A joint venture made more efficient by ancillary restraints, is a fusion of the productive capacities of the members of the venture. That, in economic terms, is the same thing as a corporate merger. Merger policy has always proceeded by drawing lines about allowable market shares and these lines are based on rough estimates of effects because that is all the nature of the problem allows. If Atlas bought the stock of all its carrier agents, the merger would not even be challenged under the Department of Justice Merger Guidelines because of inferences drawn from Atlas' market share and the structure of the market. We can think of no good reason not to apply the same inferences to Atlas' ancillary restraints.[20/] 792 F.2d at 230.

But there is even more in this case than compelling evidence of a competitive structure. For example, there are the statements by Sears executives over the past eight years repeatedly confirming the existence of "intense" competition in the market. Among such evidence, see the Butler/Donovan Task Force presentation in 1984 (DX 489 at VII-II: "Competition in the credit card business . . . is extremely intense"), Mr. Butler's statements in a 1991 Rating Agency presentation (DX 335 at slide 41: "increased competition") and Discover Card Services' "APR Position Papers" (DX 39, DX40: "The credit card environment is highly competitive"). See also PX 387 at 1.6 ("extremely intense").

Sears' statements, in turn, are consistent with the conclusions of the relevant economic literature, including studies by economists at the Department of Justice, the Federal Reserve Board, the Brookings Institute and, even, Sears' own economic consultant, Lexecon. See Tr. 2306; DX 523.

In the face of that undisputed evidence, for Sears to make out even "the beginning of an antitrust case" (Schachar, 870 F.2d at 399) it would need to come forward with evidence of price or output collusion (which it has not even alleged) or offer proof that Sears, itself, as a VISA issuer would be so "unique" that one can ignore the avalanche of

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20/ See Tr. 1737:15-1738:3 (complete elimination of one of top 10 VISA issuers by merger into another would not have a material effect on the market structure).

contradictory structural and other evidence. But, again, Sears makes no such claim and offers no such evidence. It says only that it would be an efficient large entrant that would promote its proposed new product aggressively. Over 7 years Sears says that it might acquire a 5 or 6% market share. Even if those things are true, they do nothing to establish a violation of the Sherman Act.[21/]

So what is Sears' response? First, Sears points to three documents in which VISA members passingly mention the possibility of future competition that Prime Option (among others) might offer. See PX 230, PX 117, PX 642.1. These isolated "tidbits" are far too episodic to prove anything about competition in the market generally.[22/] AA Poultry, 881 F.2d at 1402; Ball Memorial, 784 F.2d at 1337; O.S.C. Corp. v. Apple Computer, Inc., 792 F.2d 1464, 1468 (9th Cir. 1988); H.L. Hayden Co. v. Siemens Medical Systems, Inc., 672 F. Supp. 724, 740 (S.D.N.Y. 1987). To say that there is no basis to find By-law 2.06 a substantial restraint upon competition is not to say that Prime Option would do no business or be no factor in the market. In even the most competitive market a new entrant reasonably would be expected to get business, by its sheer presence if nothing else. It would, in short, be another competitor. But that scarcely proves that VISA By-law 2.06 is responsible for substantially restraining competition that otherwise would exist in the general purpose charge card market.[23/]

21/ In opposing VISA's summary judgment motion and in Dr. Kearl's Disclosure Statement, Sears hinted that it might at least attempt to offer some proof of actual market effects by reference to AT&T -- although even that assertion was not based on any econometric study, but on inferences drawn from newspaper articles. See, e.g., Kearl Disclosure Statement at 4. However when, in response, VISA actually did an econometric study regarding AT&T, Sears backed away from that claim entirely. AT&T was not mentioned anywhere in Dr. Kearl's testimony at trial notwithstanding its central role in his Disclosure Statement and in Sears' summary judgment opposition.

22/ Indeed, given the huge amount of discovery that Sears conducted in this case, the paucity of even this evidence says more about the weakness of Sears' case than the opposite.

23/ In this regard, note also Professor Schmalensee's observation that a single entrant into an already highly competitive market could not be expected to have a material impact (continued...)

Moreover, even on their face, the documents prove nothing. In fact, they are not documents about Prime Option at all. They are documents evaluating competition generally in which Prime Option receives passing mention. Take, for example, the Citibank document (PX 230). It is a strategic planning memorandum from 1991 not even prepared by Citibank, but by a third-party consultant. In the course of several pages assessing numerous competitors -- including American Express, Discover, JCB, General Electric Credit Corporation, AT&T, the Regional Bell Operating Companies ("RBOCs"), retail cards and oil company cards -- the consultant mentions Prime Option on a page that is otherwise devoted entirely to Discover. See PX 230 at Bates no. 4286. The only other page in the lengthy document to which Sears referred in argument is one on which the consultant asked: "How can Citibank raise the barriers to entry and deter competitors?" That page, however, makes no mention of either Discover or Prime Option. And the "potential entrants" it does refer to (GE, JCB, RBOC's) have either come into the market or remain free to do so. In fact, when Mr. Bailey of Citibank was asked about the consultant's comment on cross-examination his response was that the only "barriers" he could think of would involve competing more aggressively -- a comment that is consistent with what is happening in the market inasmuch as these, and other, new entrants are all free to come in. See Tr. 1855-56. To read anything at all untoward into this document would not merely be a stretch, it would be a perversion of competition into its opposite. Ball Memorial, 784 F.2d at 1338 ("to deter aggressive conduct is to deter competition"); AA Poultry, 881 F.2d at 1402 ("If courts use vigorous, nasty pursuit of sales as evidence of forbidden 'intent,' they run the risk of penalizing the motive forces of competition.").

Sears' other two documents are no different. The Chase memorandum (PX 117) -- which was, in any event, admitted only for the limited purpose of "show[ing] what

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23/(...continued)
on prices or output in any event because its profit-maximizing strategy would be to charge prices not materially below prevailing levels, thus permitting it to share (rather than dissipate) any economic rents or profits hypothetically assumed to be available. See Tr. 2313:2-2314:18.

was in Mr. Lynch's mind and what was presented to [Chase]" (Tr. 1527) -- again contains no specific discussion of Prime Option. The only mention of Prime Option in the entire 11-page document is its inclusion in a list of four cards (Discover, Optima, AT&T and Prime Option) on a chart headed "Margin Pressure." Although the accompanying text refers to price-cutting strategies "which put pressure on . . . margins," that observation (a) does not single out Prime Option from any of the other "competitors and potential competitors."[24/] (b) suggests no strategy targeted to Prime Option (or any need therefor) and (c) merely reflects the fact that firms coming into an established market and seeking to "gain share" invariably offer low introductory prices (indeed, even sell below cost) and other inducements to get people to try their new product. See, e.g., AA Poultry, 881 F.2d at 1400 ("Often a price below cost reflects only the sacrifice necessary to establish a presence in a competitive market . . . .").[25/]

Finally, the First of Chicago document contains -- if possible -- an even more modest discussion of Prime Option. The only reference to it is found in a very brief "competitive profile" of FCC's "leading competitors" -- a list that included Citibank, Chase, Bank of America, MBNA, American Express, AT&T and Discover. (PX 642.1 at 11-12.) In discussing the last of those, whoever wrote the document noted[26/] that Discover could "become [a] significant threat [to FCC] if allowed to issue VISA branded cards." (Id. at 12.) Again, not only is the mention no more than in passing, but it does not purport to distinguish Prime Option from the other "leading competitors" or even imply a plan to do other than compete with it.

24/ This document also was prepared before the GM, GE and GTE programs were announced.

25/ In fact, AT&T initially offered a "no fee for life" card then began to charge a fee after a year (only to be forced back to a no fee position by other issuers). Equally significant, Dr. Kearl testified that, in his opinion, Discover -- another one of the four cards listed by Chase -- had no noticeable impact on prices when it entered the business in 1986. See Tr. 1598:20-22.

26/ Albeit without even having knowledge of Prime Option's terms -- an observation that is true of the Citicorp and Chase documents as well.

In sum, these documents not only fail to carry Sears' burden of demonstrating a substantial effect upon competition, they prove nothing beyond the entirely unhelpful (to Sears) facts: (a) that Prime Option actually attracted virtually no attention (three passing references in all of the documents produced in this case), and (b) that it has not been singled out anywhere from other competitors. As a matter of law that proves nothing. If anything, this kind of evidence suggests the danger of misusing episodic evidence about competition to try to punish, rather than advance, it. AA Poultry, 881 F.2d at 1402 (use of such evidence "run[s] the risk of penalizing the motive forces of competition"); Skokie Gold Standard Liquors, Inc. v. Joseph E. Seagram & Sons, 661 F. Supp. 1311, 1319 (N.D. Ill. 1986) ("To allow [plaintiff] to draw such [adverse] inferences from evidence of permissible business practices 'could deter or penalize perfectly legitimate conduct.'").

In fact, proof that VISA members were interested in (even concerned about) their competitors and potential competitors says absolutely nothing about the effect of By-law 2.06. Intent evidence generally has been increasingly discounted by the courts, even in cases where such intent is literally a part of the offense, as in attempt to monopolize and predatory pricing cases. See, e.g., AA Poultry, 881 F.2d at 1401-02; Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 230-32 (1st Cir. 1983) (Breyer, J.). Without adequate proof of a substantial effect on competition there is no liability under the Sherman Act. Schachar, 870 F.2d at 400 ("Animosity, even if rephrased as 'anticompetitive intent' is not illegal without anticompetitive effects."); AA Poultry, 881 F.2d at 1402 ("Although reference to intent in principle could help disambiguate bits of economic evidence in rare cases . . . the cost . . . of searching for these rare cases is too high -- in large measure because the evidence offered to prove intent will be even more ambiguous than the economic data it seeks to illuminate."); Barry Wright, 724 F.2d at 232 ("'Intent to harm' [rivals] without more offers too vague a standard in a world where executives may think no further than 'Let's get more business,' and long-term effects on consumers depend in large measure on competitors' responses"); Barr Labs, 1992-2 Trade Cas. at 68,888 (summary judgment affirmed despite evidence "unequivocally" demonstrating defendant's intent "to force its

competitors out of the market and enable it to raise prices" where there was no "market data indicating actual competitive injury"); Morgan v. Ponder, 892 F.2d 1355, 1359 (8th Cir. 1989). In Rural Telephone Serv. Co. v. Feist Publications Inc., 957 F.2d 765, 766, 769 (10th Cir. 1992), the Tenth Circuit recently affirmed summary judgment where plaintiff offered intent evidence rather than proof that "competition in the [relevant] market was reduced," noting that "intent alone is insufficient to establish a violation of §2."

Sears' other arguments come from Professor Kearl. He asserts, first, that despite an overwhelmingly competitive market structure, there nonetheless appears to be some form of market imperfection. Second, he argues that market structure is irrelevant because of VISA's "collective rule-making" power. Finally, he contends that there must be entry into VISA because proprietary cards cannot prevent the "significant" exercise of this market power. (Tr. 1594:7-11, 1598-99.) While these conclusions, like all of Dr. Kearl's opinions, are offered up with great confidence, their force, and their ability to support a judgment, is no greater than their reasonableness and the evidentiary foundation upon which they rest. Mid-State Fertilizer, 877 F.2d at 1339-40; Olympia, 797 F.2d at 382.

Those are hurdles which plaintiff's testimony cannot overcome. Its thesis is, in fact, "economically senseless," with all that implies for Rule 56 or Rule 50 analysis. Eastman Kodak, 112 S. Ct. at 2083 (explaining the Court's earlier summary disposition in Matsushita: "If the plaintiff's theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted").

The problem with Dr. Kearl's initial argument (that there is a failure of competition in the market, structure notwithstanding) is that it is a pure conclusion -- an a priori premise unsupported by (or actually inconsistent with) the record and based upon no systematic study. See, e.g., Newman v. Hy-Way Heat Sys., Inc. 789 F.2d 269, 270 (4th Cir. 1986); AA Poultry, 881 F.2d at 1408 (no study by expert); Merit Motors, Inc. v. Chrysler Corp., 569 F.2d 666, 672 (D.C. Cir. 1977). Thus, for example, Dr. Kearl testified that he has observed "price discrimination" in the market. (Tr. 1658-59.) That is hardly surprising since, as he points out in his textbook, "price discrimination is pervasive."

(Kearl, Contemporary Economics at 336 ("Kearl Text").) It also is no more than "evidence of some market power" (id. at 337; emphasis in original). Yet Dr. Kearl made no attempt in this case to determine whether the so-called "price discrimination" he observed has any actual significance or, indeed, whether what he observed is properly described as price discrimination at all. Price discrimination is not merely a question of selling the "same" (not "similar" as Kearl testified, Tr. 1658:17) commodity at different prices, but doing so where the difference is not "explicable by cost differences." (Schmalensee, Tr. 2436.) See also Tr. 1658:20-24. In fact, as Judge Easterbrook has pointed out, there are many situations in which charging the same price to different customers may represent price discrimination in an economic sense. AA Poultry, 881 F.2d at 1406. Absent evidence that Prof. Kearl made any investigation about price "discrimination" that would permit him to actually identify it as such, and determine its extent and significance, the testimony utterly lacks any substantive content. Id. at 1407-08; Merit Motors, 569 F.2d at 672.[27/]

Similarly, Dr. Kearl testified that he observed high profits (which is not an economic term of art to begin with) that persisted for some time despite the existence of substantial entry. (Tr. 1604-05.) From this apparent non-sequitur,[28/] Dr. Kearl opined that there must, therefore, be a failure of competition in the market. (Tr. 1607.) But, again, not only is the point theoretically upside down, it is premised upon no study of actual market conditions to determine whether his observations about the mid-1980s (as opposed to other periods when low returns or actual losses were being incurred) say anything at all about a failure of competition. To the contrary, he acknowledged on cross-examination that the facts he observed were readily explicable as the response to a surge in demand for credit (or the

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27/ Perhaps Prof. Kearl's failure to conduct a further analysis of the matter is explained, at least in part, by the observation in his text that price discrimination leads to an increase, not a reduction, in output and encourages "a more efficient use of . . . resources." Kearl Text at 336-37 (emphasis added).

28/ See Schmalensee, Tr. 2302-2305:3, explaining why entry is not part of any problem with competition.

expansion of its availability) following the so-called Carter credit squeeze in the preceding few years. See Tr. 1712:11-14.

Moreover, if there were a problem and if the significant entry that had occurred was not a remedy to it, why would Prof. Kearl reasonably conclude that Sears' entry would be? In that regard, Dr. Kearl made no effort to consider, let alone dismiss, the hypothesis of Professor Ausubel's article that price "stickiness" in the credit card market is a function of consumer irrationality. Yet if there were a problem with competition that entry failed to solve, the Ausubel thesis would be the first thing one would look at. The problem, of course, is that if Ausubel were right, Sears' exclusion would have nothing to do with the existence of the problem and its entry into VISA would have no bearing on its solution.[29/]

Professor Kearl finally testified that there was not much price competition in the business. (Tr. 1603:15-23.) However, on cross-examination he conceded that he does not track the industry, is not an expert in it (Tr. 1723-24.) and conducted no pricing study of his own. (Id.) More important, Kearl's assertion cannot be squared with Mr. McKinley's informed opinions or the abundant evidence of price diversity offered on credit cards nationally and regionally by a great variety of VISA issuers, or the consistent statements of Sears, itself, concerning the intensely competitive character of the business.[30/]

In sum, what Prof. Kearl offered the jury was a conclusion, pure and simple. But it was a conclusion thrown into the face of a gale of contradictory structural and other

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29/ For the reasons explained at some length by Prof. Schmalensee, Ausubel's theory has been largely disproven in later work that has identified both theoretical and empirical errors. See Schmalensee, Tr. 2438:11-2443:14. Prof. Kearl agrees that Ausubel did not get it "quite right." (Kearl Dep. at 41.) Cf. Stamatakis Indus., Inc. v. King, 965 F.2d 469, 471-72 (7th Cir. 1992) ("A theory of liability attributing irrationality to consumers does not get very far.").

30/ The fact that not all customers choose to take advantage of, or are not eligible for, low rates does not negate the existence of vigorous competition. After all, because of its strict credit criteria not everyone will be eligible for Prime Option either. (Tr. 218-222; DX 477.) Similarly, many people may choose to pay higher fees or rates because of greater service, other added features (such as frequent flier miles, merchandise certificates, etc.) other banking relationships or problems with their credit histories.

evidence without any supporting facts to protect or sustain it, or a jury verdict based upon it. Merit Motors, 569 F.2d at 672 ("speculations and hypotheses . . . unsubstantiated by any evidence in the record"); American Bearing Co. Inc. v. Litton Industries, Inc., 729 F.2d 943, 950 and n. 14 (3d Cir. 1984)("speculation and unfounded assumptions" likely to "confuse and mislead the jury").

Dr. Kearl's second point is that VISA possesses market power because its members in the aggregate have the ability to restrain competition through their collective power to pass rules binding upon the joint venture. The argument, in some senses, bears more of the trappings of a debate in metaphysics than an issue of either economics or law. However it is, in the end, simply a diversion.[31/] Whether or not VISA (or, more precisely, VISA's members) in some sense possess "market power" because they have the "ability" or "potential" to collectively restrict competition through rule-making, does not permit Sears to avoid demonstrating that the particular exercise of that collective power -- to wit, By-law 2.06 -- has a substantial adverse effect on competition. That is why we have moved this point away from our discussion of market power lest Sears continue to obscure its failure to offer proof of any such effect.

Put otherwise, VISA's capacity to make rules that restrict competition says nothing at all about the effect of By-law 2.06. That effect (or, rather, the absence thereof) is determined by the fact that VISA imposes no limit on its members' prices or output within a market structure that is virtually atomistic. (DX 523 at p. 222.) Moreover, there is no causal relationship at all between the challenged rule and any exercise of market power. See pp. 34-37, infra. If VISA has market power because of its collective rule-making ability, permitting Sears (and/or American Express) to come into VISA would do nothing to ameliorate it; indeed, it would exacerbate it. See Tr. 2329-31. See also pp. 47-48, infra.

31/ Which is not to say that the question ("To aggregate or not to aggregate?") has no answer. Indeed, we submit that it was correctly answered (and the answer explained) by Prof. Schmalensee's testimony. See Tr. 2285-86. See also pp. 36-37, infra.

Prof. Kearl's third argument involves an equally fruitless attempt at obfuscation. Prof. Kearl asserted that the market power achieved by VISA's collective rule-making power could not be dissipated by the presence in the market of proprietary cards. (Tr. 1598:20-1599:3.) At one level, of course, the argument is not only correct, but tautological: If the "power" that VISA possesses is the power to make collective rules for the VISA system, it must be true (although, as we shall see, utterly irrelevant) that no amount of competition outside of VISA can have any impact on it. Indeed, viewed from that perspective, it matters not a whit whether Sears is in or out of VISA -- a point Dr. Kearl himself acknowledged. (Tr. 1600:7-10.)

Except as a tautology, however, the point proves nothing. In fact, it is a pure red-herring. Prof. Kearl contends that, for a variety of purported reasons, a proprietary card cannot be a fully effective competitor against a VISA card. Therefore, he argues, the market needs to have another VISA card. But the argument simply avoids the real issue. The reason why there is no competitive need for another VISA card is not because proprietary cards are a complete substitute (which is the question Dr. Kearl chose to pose for himself) but because the 6,000 VISA and MasterCard issuers already in the market mean there is no competitive harm to begin with. That is the point of our prior discussion (see pp. 22-25). Yet before Sears is permitted to demand access to VISA's property to solve a problem with competition it needs to show that there is such a problem. By attempting to focus attention on the wrong issue ("Do proprietary cards adequately substitute for VISA or Mastercard?"), his testimony invites us to ignore the real and dispositive issue ("With 6,000 VISA and MasterCard issuers, almost entirely open entry, and no restrictions on output or price competition, who cares?"). See AA Poultry, 881 F.2d at 1408.

2. There Is No Evidence of a Causal Relationship between By-Law 2.06 and Any Restraint on Competition in the General Purpose Charge Card Market.

Sears must not only show that there is a problem with competition in the general purpose credit card market, it must prove that the problem is a function of the challenged by-law. See Rural Telephone, 957 F.2d at 769 (no evidence of any reduction of competition "as a result of [defendant's] actions"). One way of testing that proposition is whether eliminating the By-law would solve the problem.

That is a particularly useful focus here since VISA was open prior to 1989 and since neither of the parties affected by the restraint are actually excluded from the market, as opposed to being excluded from a brand in the market. Sears and American Express also are not excluded from access to any customers or suppliers, although that generally would be considered the relevant focus in any inquiry concerning effects upon competition.[32/]

32/ The importance of the point is captured in the following exchange between Mr. Pratt and Prof. Schmalensee. On cross-examination, Mr. Pratt asked Prof. Schmalensee to consider a situation in which "a group of firms" somehow "excludes a competitor from 70 percent of the market." (Tr. 2409):

> A. What does it mean to exclude from 70 percent of the market? 70 percent of the customers?
>
> Q. 70 percent of the market defined in terms of output, in the case of credit card industry, dollar volume.
>
> A. Well, wait. I don't understand. I understand what it would mean to exclude from customers or from regions or from product lines, but do you have in mind something like suppose IBM has a 70-percent share of the computer market and IBM excludes people from the use of the IBM trade name? Is that what we are talking about?
>
> Q. What I am talking about is something like Dean Witter and Sears being excluded from Visa and MasterCard.
>
> A. But excluded from 70 percent of the market to an economist would normally mean foreclosed from the ability to sell to 70 percent of the potential customers. That is not what you mean here. You mean excluded from the use of the trademark used by firms that sell to 70 percent -- that account for 70 percent of the volume; is that right?

(Tr. 2410:1-18.)

Plaintiff's thesis fails as a matter of both theory and proof. Beginning with the latter, there is absolutely no evidence in the record suggesting that the general purpose credit card market has become less competitive since By-law 2.06 was enacted. To the contrary, the evidence strongly suggests that there has been a great deal of price-cutting as well as large scale entry since 1989. (Tr. 1938:7-1939:20, 2302:4-2304:5.) Both Discover and Sears' hypothetical Prime Option card have been forced to reduce their "prices" because of this competition.[33/]

The absence of such evidence is hardly surprising since there is no cause and effect relationship between By-law 2.06 and defendant's purported market power, nor would admitting Sears (and American Express) to VISA have any possible effect, other than to increase that power. See p. 52, infra. By contrast, if the restraint upon competition in this case involved a "collective rule" mandating a $20 annual fee for all VISA cards, elimination of that rule would eliminate the exercise of market power (i.e., the power to raise prices).

3. There Is No Evidence from Which a Jury Could Reasonably Find That VISA or Its Members Possess Market Power Sufficient to Restrain Competition in the Relevant Market.

Market power, of course, remains an essential element of plaintiff's rule of reason case. Westman Comm'n Co. v. Hobart Int'l, Inc., 796 F.2d 1216, 1225 (10th Cir. 1986). However, much of what we have to say about it has been said above, since the relationship between market power and effects upon competition is -- by definition -- close. Indeed, the antitrust laws generally use market power as a short-cut measurement to identify

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33/ We are not arguing, of course, that By-law 2.06 is responsible for this recent competition. In fact, it almost surely results from other market factors, in the same way that the large losses in the early 1980s and the healthy profits that followed similarly were a function of economic conditions -- a point confirmed by both Dr. Schmalensee (Tr. 2441-2442) and Dr. Kearl (Tr. 1712). The only point for present purposes is that Sears has offered no evidence so much as hinting at a relationship between the passage of By-Law 2.06 and a decline in competition in the relevant market. Cf. Eastman Kodak, 112 S. Ct. at 2081, in which the Court relied upon the presence of evidence showing a change in competitive conditions resulting from Kodak's new service policy as a basis for reversing summary judgment.

cases in which -- as we believe is true here -- the structure of the market obviates the need for further inquiry into effects. See, e.g., AA Poultry, 881 F.2d at 1401; Barr Labs, 1992-2 Trade cas. at 68,893.

In fact, this is a case in which the absence of market power ought to be self-evident, but for the assertion by Prof. Kearl that VISA's "collective rule-making" power makes it appropriate to aggregate not only the shares of VISA members but the shares of MasterCard members as well. See Kearl, Tr. 1593-94; see also PX 757 (pie chart).[34/] We respectfully submit that Dr. Kearl simply has it wrong. The ability to pass rules generally says nothing about whether VISA members have the ability to raise prices or exclude competition from the market. Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1414 (7th Cir. 1989) ("[m]arket shares indicates market power only when sales reflect control of the productive assets in the business . . . [and thus] ability to curtail total market output"); Barr Labs, 1992-2 Trade Cas. at 68,892. See also Ball Memorial, 784 F.2d at 1336 (no market power where new entry readily possible). Yet, unless VISA members pass rules limiting price or output among themselves, their ability to exercise market power remains a function of their individual market shares -- a structure concededly bordering on the atomistic -- because that is the level at which they compete with each other (and with any new VISA, MasterCard or proprietary issuer) to offer credit cards to consumers -- a point explained in Prof. Schmalensee's testimony. (Tr. 2280:17-2281:19, 2285:6-2286:17.) See also AA Poultry, 881 F.2d at 1403 ("Concentration . . . should be measured from customers' perspectives . . . .").

The point might be illustrated as follows: Could the Utah Bar Association affect price by refusing to let Dale Kimball practice law? Obviously not (although the quality of grammar -- and Mr. Kimball's own income -- might drop precipitously). On the

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34/ Whether to aggregate is, in our view, an issue of law for the Court. See Arthur S. Langendorfer, Inc. v. S.E. Johnson Co., 917 F.2d 1413, 1432-34 (6th Cir. 1990); Merit Motors, 569 F.2d at 673; American Bearing Co. v. Litton Indus., 729 F.2d at 950; cf. Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 479 (3d Cir. 1992) (en banc).

other hand, what if the bar passed a rule limiting practice to those who attended BYU? The predicted effect on price would be significant. The point is that the result does not depend on whether the Utah Bar Association has a 100% or a 30% share of the market, it depends instead upon what is being excluded.[35/]

4. A Jury Could Not Reasonably Find a Substantial Restraint on Competition Based upon Dr. Kearl's Testimony Concerning "Disincentives."

In addition to arguing that VISA By-law 2.06 prevents consumers from obtaining the benefits of a low cost Prime Option VISA card, Sears argued that VISA's By-law harms competition by creating a disincentive for other firms to start new proprietary card systems. Since Sears, itself, plainly was not deterred from starting such a system, and since its witnesses hardly could argue that Sears' corporate objective is to encourage the creation

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35/ In this regard, consider further the Court's question (Tr. 2488) about the improvidently ticketed car: When the police stop someone whom, they believe, has driven past the speed limit of 65 mph they certainly could look at the car's speedometer. And the fact that the speedometer goes up to 140 mph could be introduced as evidence if the individual decided to challenge the speeding ticket. However, the police do not, in fact, record the highest speed on the car's speedometer when they ticket someone. We would all agree, in fact, that doing so would be a silly idea. That is because just about everyone has a car with a speedometer that goes well past the speed limit -- therefore the speedometer is not a useful screening device -- and because we have better methods of detecting speeding than looking at car speedometers: radar, for example.

In essentially the same way, VISA says that use of the aggregate market share of a joint venture is equally uninformative and for essentially the same reasons. First, almost every industry has a trade association that adopts rules (like VISA) and that includes most of the firms in the industry (like VISA). By Prof. Kearl's definition, each of these associations has market power. (Schmalensee, Tr. 2355.) Therefore, like the speedometer, collective market share is not a useful screen because it, in fact, does not screen anyone out. Second, there are far better methods of detecting whether collective rule making is likely to have an effect on market price. The best method of detection depends upon the kind of rule that is being enacted. Since, as an economic matter, the effect on price of a rule that excludes entry depends on the amount of entry that is excluded and not on the share of the association, a much better measure of market power is the expected share of the excluded entry. (On the other hand, if the rule was that all members of the association must charge the same price, the market share of those members would be the right measure of the market power. That is because, as an economic matter, the effect on price of a price-fixing rule depends on the share of the firms that have agreed upon the common price.)

of new competitive proprietary cards.[36] This assertion is found virtually exclusively in the testimony of Sears' economist. And, despite his inability to point to any evidence suggesting that anyone had actually been deterred from offering a new general purpose credit card by VISA By-law 2.06,[37] Prof. Kearl nonetheless confidently opined that By-law 2.06 significantly restrains competition in the relevant market by creating a powerful disincentive to would-be credit card offerors. See Tr. 1592:17-20, 1600-02, 1657:14-16, 1668:6-9, 1715:5-9, 1718:5-8.

Yet, surely, something more is required to sustain a verdict than that kind of speculation. Compare Rural Telephone, 957 F.2d at 769 (plaintiff "unable to identify anyone" who was dissuaded from dealing with plaintiff); Barr Labs, 1992-2 Trade Cas. at 68,894 (summary judgment affirmed where no evidence that any competitor was forced out by defendant's conduct); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1313, 1356-62 (E.D. Pa.), rev'd 723 F.2d 238, 277 (3d Cir. 1980), rev'd 475 U.S. 574, 594 n. 19 (1986)(expert used assumptions rather than evidence of costs). To begin, there is no evidence that either Sears or Dr. Kearl even made any effort, through research or discovery, to see if there were any actual support for his assertion. But it is not unreasonable, we submit, to expect an economist to take reasonable steps to validate an hypothesis to which he attributes such over-arching significance, particularly given the fact that he had the unusual research advantage of having the subpoena power of the United States government at his disposal to do so. AA Poultry, 881 F.2d at 1407-08 (expert's testimony rejected where no study done).[38]

36/ In this regard, see also discussion of antitrust injury, infra at 54-55.

37/ MasterCard has no analogous rule. Its decision refusing to permit Sears to join, evidently, was based upon a catch-all residuary power on the part of its directors to act for the good of the organization.

38/ One might also wonder why, again, no other economist or anyone else working in this industry, for that matter, has so much as mentioned this issue in any scholarly, or other, writing.

Nor is this a case in which the plaintiff is being asked to prove that "the dog didn't bark." Given the economic dimensions of this business, if anyone was even remotely interested in starting a new credit card system and was worried about the potential application of the VISA By-law, we would expect to find a letter of inquiry or protest (a threat of litigation, perhaps) raising the matter. Indeed, since the rule is not self-executing (or, in MasterCard's case, is not even a rule at all) one surely would anticipate the existence of some query about whether the rule would even be deemed applicable to a particular proposed program. Nothing of the sort, of course, appears anywhere in the record.

What does appear in the record, is that, in the 15 years prior to 1989, no new proprietary general purpose credit card program was successfully begun with the exception of Discover and American Express' Optima. That fact would seem to be far more telling than the fact that since mid-1989 (during a major recession) no new proprietary programs have been created.

That evidence aside, we also know beyond dispute that By-law 2.06 does not keep anyone out of the credit card market. See Marrese v. American Acad. of Orth. Surgeons, 1991-1 Trade Cas. at 65,606; cf. NCAA, 104 S. Ct. at 2961 ("a restraint in a limited aspect of a market may actually enhance marketwide competition"). Indeed, it does not keep anyone from coming into the market in whatever mode (proprietary or association-member) they deem competitively preferable for themselves. Not surprisingly, virtually all new entrants have chosen the same route since mid-1989 as they chose before it. Indeed, Prof. Kearl is surely right when he notes that for someone not in the business already, it is a major undertaking to create a new system from scratch. On the other hand, it can be done -- and the rewards of doing so can be substantial, particularly when one factors in the kind of cross-selling and other marketing opportunities Sears anticipated with Discover. And, if another entrant (such as JCB) sees analogous opportunities, 2.06 is no bar to its efforts. (Schmalensee, Tr. 2326-2329:10.)

Prof. Kearl's thesis must also be rejected as fatally inconsistent with other parts of his testimony. American Bearing, 729 F.2d at 950 (expert testimony "self-

contradictory"). Prof. Kearl testified that proprietary cards inherently are at a disadvantage to association-branded cards. (Tr. 1597:21-1599:3.) Indeed, even Sears' Philip Purcell speculated that if he had been forced to choose he never would have offered Discover. (Tr. 157:3-9.) But if that is true it necessarily follows that there is no adverse impact on competition since everyone is eligible to join VISA (or MasterCard) -- except Sears and American Express. Moreover, since Prof. Kearl sees no harm in having VISA be totally open (even against its will), there surely can be no competitive need to have more competing systems that offer competitively less attractive products. On the other hand, if there is a competitive need to assure the creation (and, one would assume, the success) of system competitors, the only pro-competitive rule would be one that requires resources to be devoted to those new systems, i.e., a rule requiring VISA to close either in part or, better yet, entirely. Otherwise, self-interested competitive behavior ("incentives") will cause resources to be devoted disproportionately to VISA and MasterCard -- as the most casual observation confirms is actually the case. Compare Schmalensee, Tr. 2320.

The short point, of course, is that this entire argument is an economist's construct having no pertinence to the real world (as suggested by the absence of any evidence supporting it, any scholarly or trade press writing about it and the failure of Sears even to mention the point prior to the filing of Dr. Kearl's Disclosure Statement, in which it received 8 lines near the end). It bears even less pertinence to the reasons why Sears is challenging By-law 2.06 in this lawsuit. If someone (say, a state Attorney General or the Department of Justice) really believed in this theory, they could assert it. However, to permit Sears to support a jury verdict on this basis would elevate an expert's speculation to unacceptable heights.

D. As a Matter of Law, the Benefits of By-Law 2.06 Outweigh Any Restraint Upon Competition.

For the jury to return a verdict in favor of Sears in this case, it also needed to find that the anti-competitive effects of By-law 2.06 outweigh the rule's beneficial effects.

Again, the evidence does not permit a reasonable jury to make such a finding. A number of reasons mandate that conclusion.

1. Property Rights.

One need look no further than the importance of protecting property rights in order to encourage innovation and risk taking. This is a principle that stands at the heart of our free market system. See Kearl Text at 65. See also pp. 13-14, supra. It is fundamental to antitrust jurisprudence, as well. See, e.g., Copperweld, 467 U.S. at 775; Olympia, 797 F.2d at 375; Rothery, 792 F.2d at 221. The reasons for its importance were explained at some length in Prof. Schmalensee's testimony. (Tr. 2267-2272.) Dr. Kearl similarly acknowledged the importance of encouraging innovation by protecting property rights. (Tr. 1589:6-16; 1740:3-7.) In brief, the point of their testimony is that it is important to protect private property and the expectations associated therewith[39/] in order to provide appropriate incentives for entrepreneurial investment and innovation. Consumers benefit because new products are created and overall economic competition is thereby enhanced. See Kearl, supra, at 14-18; compare Schmalensee, Tr. 2275:14-2276:2. In Rothery, Judge Bork noted that, in addition to lacking market power, the joint venture's refusal to allow competition by members was justified by the need to maintain the venture's incentives: "The problem is that the van line's incentive to spend for reputation, equipment, facilities and services declines as

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39/ Doctor Kearl makes the point about expectations in his text. At the end of Chapter 4, he poses the following "Discussion and Thought Question" to his students: "What expectations are important if an economy is to use its resources in appropriate ways?" (Kearl Text at 71.)

At the back of the book, he provides the answer:

> If an economy is to use its resources in appropriate ways, individuals must expect that they can use resources with few restrictions (and these restrictions must be known or anticipated), they must expect that they can exclude others from using the same resources, and they must expect that they can transfer the resources to others if they desire.

(Kearl Text at S-4.)

it receives less of the benefit from them. That produces a deterioration of the system's efficiency . . . ." 792 F.2d at 221; see also id. at 212-13.

VISA submits that the foregoing observations ought to be dispositive of this case. There is no disagreement between the parties that if VISA were a single entity, its refusal to share property with Sears would raise no cognizable antitrust issue. Copperweld, 467 U.S. at 767-68, 775. Nor, as a matter of sound economics, should it. (Kearl, Tr. 1744:18-1745:20; Schmalensee, Tr. 2275:9-2276:2.) Acknowledging, as we do (see pp. 11-12, supra), that VISA's status as a joint venture makes it appropriate to evaluate the legitimacy of VISA's refusal to share its property with Sears, if there is no sound economic reason to distinguish the decision of a joint venture such as VISA from that of a single entity, the result under the antitrust laws necessarily should be the same. That is, in fact, the thrust of Prof. Schmalensee's testimony quoted above. See pp. 20-21, supra.

Prof. Kearl, similarly (if grudgingly), accepts much of VISA's argument on this point.[40/] For example, when asked on cross-examination about his views of property rights, he not only acknowledged their importance generally, but said, without qualification, that "the property of single firms and the property of joint ventures should be protected, yes." (Tr. at 1745:24-25.) Even more important, in the immediately preceding answer, he noted -- albeit in the context of a question about a single firm -- that forcing a firm to share its property would "change the incentives" for investment and innovation -- a concession that

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40/ By contrast, Prof. Kearl's collaborator, Dennis Carlton, was more explicitly generous to the point in his affidavit opposing summary judgment. See Carlton Aff. ¶ 8. For example:

> It would be a clear mistake to force every successful firm to share the secrets of its success with its rivals. If firms cannot enjoy the fruits of their hard work and risk taking, there will be a reduced incentive for a firm to innovate and succeed. The protection of the single firm's property rights in its success is the surest way to preserve the firm's incentive to innovate and to guarantee consumers a flow of new products. Forcing a firm to help its rivals will, of course, produce a temporary increase in the number of competitors, but will diminish or remove incentives to innovate, and thereby eventually reduce competition and harm consumers.

he then acknowledged would generally be as applicable to a joint venture as to any other form of private business enterprise. Id.

Obviously, if Prof. Kearl agrees entirely with Dr. Schmalensee's opinions on this issue, this case is at an end. Thus, Dr. Kearl struggled to fight shy of such a concession. Rather, he argued that -- in this case -- concern for the protection of property rights are overcome by the fact that there are no apparent free-riding problems as evidenced by the fact that VISA has been (and remains, except as to By-law 2.06) an open membership joint venture. See Kearl, Tr. 1668:12-1669:13.

The core of Dr. Kearl's discussion of this issue appears at two places in his testimony, pages 1588-1591, and again at 1668-71. In his initial responses, Prof. Kearl introduced his NutraSweet example and described the nature of the free-riding problem that would exist if the inventor of NutraSweet could not get a patent to protect his invention:

> [C]onsumers in that case would have been worse off because products that would have been available to them had they been in the market would not have been in the market because there was not sufficient incentive for firms to bring them into the market. That is what I mean by the free-riding problem.

(Tr. 1589.)

So far so good, more or less.[41/] Then, at page 1590, Mr. Pratt asks what ought to be the critical question:

> Q. Now, based on the work you have done, does entry into the market we are considering here create a free-riding problem?

Kearl's answer begins forthrightly enough: "I do not believe it does, Mr. Pratt." Having said that, however, the balance of his answer is a complete non-sequitur. It says nothing at

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41/ The "more or less" is the following: Professor Kearl defines free-riding as limited to situations "when consumers value or would value a commodity but the commodity . . . does not come to the market because firms don't have incentive to bring it to the market." (Tr. 1589:17-20.) It is difficult to tell from Professor Kearl's testimony whether that definition is simply meant as an oversimplification for pedagogical purposes or whether he is actually attempting to limit free riding to situations in which products do not come "to the market" at all. If it is the latter, his testimony is flatly wrong and critically so. Olympia, 797 F.2d at 375.

all about incentives or the protection of property. Instead, Kearl launches into a speech about how a "new firm" is "offering something that consumers want," and that although existing firms in the market will not like it, "output will go up and in general we would expect prices to go down." (Tr. 1590-1591.) He then offers the following peroration:

> But the important thing I want to emphasize is it is important in this kind of entry that consumers be able to choose. They get to decide who succeeds and who does not succeed and what kind of products win, what kind of products lose in the marketplace.

(Tr. 1591.)

That is, with all respect, a surprising answer, to say the least. Not only is it non-responsive, but it entirely avoids the basic problem with his analysis while proffering an emotional appeal to the lay jury's self-interested prejudice ("be able to choose"). As Dr. Schmalensee later explained in his testimony, one cannot simply evaluate competitive incentive issues by taking a snapshot in time. Nor is it appropriate to ignore the impact of property sharing upon incentives generally and, thus, say that there is no problem with requiring VISA to share its property with all comers. See Tr. 2268:13-25; 2270:7-17. Dr. Kearl plainly knows that as well. (Kearl Text at 67-68.) See also n.40, supra; Tr. 1589, quoted, supra at 43. Yet his testimony critically ignores the fact that incentives for investment and innovation are jeopardized as much by a rule which permits property to be taken after the fact as before. Olympia 797 F.2d at 375 (If defendant "had known that by taking steps to promote competition" by encouraging other competitors it would "lay[ ] itself open to an antitrust suit . . . it probably would not have taken them."). Furthermore, in evaluating consumer welfare, one must have in mind -- as Prof. Schmalensee pointed out -- that consumers are not merely consumers of credit cards. They are consumers of artificial sweeteners, fast-food hamburgers, automobiles and numerous other products for which investment incentives remain critical. As Prof. Schmalensee noted in his testimony, depriving property of its protection is akin to imposing a form of "invisible tax" on consumer welfare generally. In evaluating the economic consequences of By-law 2.06, these effects must be considered. (Tr. 2271:13-2272:14.)

As noted, Prof. Kearl returned to the subject of "free riding" near the end of his testimony. See Tr. 1668-1670. Although his testimony there does nothing to mitigate the misleading nature of his earlier responses, he did, finally, at least attempt to explain why it is his view that general concerns about protecting property expectations should give way in this case. Specifically, at page 1669, he notes (without using the term) that "incentives" are "not needed in this particular case" because "VISA is an open association." Id. Since firms have continued to enter VISA, Prof. Kearl asserts, there must not be any free-riding problem associated with open membership.

This is, in effect, the argument initially offered by Prof. Kearl in his Disclosure Statement (and by Dennis Carlton in his Affidavit Opposing Summary Judgment). In brief, the argument is that while it generally is very important to protect private property and the incentives associated therewith -- whether of single firms or joint ventures -- and while we should even protect the prerogatives of joint ventures to close their membership entirely, we should not permit selective closure because the fact of successful "openness" demonstrates the absence of a legitimate free-riding concern on the part of the venture.

While the assertion at least has the virtue of being responsive, that does not make it persuasive. The argument assumes, as its necessary predicate, that there is no difference in the costs ("free ride") imposed on a venture by one potential new member as opposed to another. But that is an untenable hypothesis, both generally and as applied to the facts of this case.

Different applicants impose different costs on a system, and there simply is no reason why a venture should be required to ignore those differences. Yet that is the thrust of Dr. Kearl's proposed exception to the general principle that supports a refusal to share property, whether by a single entity or a joint venture.[42/]

42/ In fact, closure based on status (here, being a competitor), is no different than closure based on time. The logic of the Kearl/Carlton thesis should lead them to argue that a joint venture that once has been open (and has prospered with that policy) should not later be permitted to close because it has shown that it can operate successfully (continued...)

The point is not only theoretically unpersuasive but demonstrably so as a matter of the evidence in this case. There are, after all, a variety of identifiable considerations which distinguish direct competitors from others. Among these are concerns over potential access to confidential information (Tr. 549:1-550:14, 1429:1-1430:24), the ability of Sears to cross-market with Discover on both the cardholder and merchant sides of the business (Tr. 553:1-555:11, 1424:7-25), the risk of regulation (Tr. 537:14-539:1, 558:8-559:12), Sears' potential ability to harm VISA members by converting its Prime Option program to Discover at a later date, the fact that Sears provides an advantage to its Discover card by taking it but not VISA (Tr. 230:2-5, 555:12-22), and the fact that the proposed sharing operates only in one direction (Tr. 548:10-25, 1425:12-1426:8, 2321:13-25). The competitive (and common sense) importance of the latter point should be underscored because it is a particularly significant form of free riding. There was substantial testimony at trial to the effect that Prime Option was developed in order to cannibalize other VISA and MasterCard programs, rather than cannibalizing Discover. (Tr. 713:2-714:24.) VISA and

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42/(...continued)

without being closed. But that is self-evidently an absurd proposition and Sears' experts therefore understandably eschew it. See Kearl, Tr. 1746:1-1754:8; cf. Carlton Aff. ¶¶ 12-14.

The reason why a joint venture chooses to be open, rather than closed, is – as Dr. Kearl indicated -- because of "positive network externalities". (Tr. 1577:23-1578:9.) That is simply an economist's way of saying that the members of the venture are, on balance, better off admitting additional members to their venture. At some point, that balance may shift, i.e., the positive externalities are outweighed by over-supply (at the extreme, by saturation). At that point, the joint venture, still acting in its self-interest, will elect to close. That decision to close should be respected every bit as much as the original decision to be open, and for precisely the same reasons: to protect the property rights and profit-maximizing expectations of the venture. As noted, Kearl and Carlton agree.

But the decision by VISA to enact By-law 2.06 is no different. VISA has determined that admitting direct intersystem competitors imposes particular costs on the system and its members that, on balance, outweigh the benefits of admitting them. That decision is no different than the decision to close at a particular point in time and should be treated no differently as an economic, or legal, matter. Rothery, 792 F.2d at 212-13, 221.

MasterCard members presumably might like to return the favor but they are prevented from doing so because they have no right to command access to the property of Discover.

Apart from these specific considerations lies the broader question of when it is appropriate for the government to interfere in the private ordering of economic affairs. (Schmalensee, Tr. 2296:17-25, 2343:16-21; compare Carlton Aff. at ¶ 14 ("one must be on guard to prevent unnecessary restrictions on competition.").) Government regulation, after all, imposes its own costs on an economic system and should not be undertaken lightly. Cf. Chicago Prof. Sports Ltd. v. NBA, 961 F.2d 667, 676 (7th Cir. 1992) ("Competition does not undermine judicial decisions, so the cost of wrongly condemning a beneficial practice may exceed the costs of wrongly tolerating a harmful one."); see also Easterbrook at 30.

In sum, the protection of incentives for the creation and maintenance of property is reason enough to uphold By-law 2.06. A reasonable jury, on this record, could not conclude otherwise.

2. As a Matter of Law, the Harm to Intersystem Competition in This Case Outweighs Any Benefits to Intrasystem Competition.

Property rights aside, the benefits of VISA By-law 2.06 demonstrably outweigh any cognizable harm to competition. Begin with the structure of the market. Unlike the exceedingly unconcentrated structure of competition at the issuer level (discussed above), system competition is highly concentrated. On the most generous view, there are only five system-level competitors: VISA, MasterCard, Discover, American Express and Diners Club/Carte Blanche. The HHI Index for those systems is extremely high, 3231. That is true without even considering the ownership overlap between VISA and MasterCard resulting from duality. But see p. 52, infra. Given this exceptionally high concentration, traditional antitrust policy would regard any action that increased the concentration as highly suspect, at best. See, e.g., Merger Guidelines § 1.51(c). The reason is scarcely obscure: In a market with few competitors, the exercise of market power is far more likely, as is the possibility of collusion.

History in this industry is consistent with theory. Following duality, competition between the MasterCard and VISA systems diminished materially. At the issuer level, it has all but disappeared. The record shows that most banks' VISA and MasterCard programs have been all but merged at the personnel and "back room" level. (Tr. 466:20-24, 467:21-23). While some competition remains at the system level, that competition is tepid, to say the least. Except in rare circumstances, confidentiality between the systems is a practical impossibility. See n. 45, infra. Similarly, one searches in vain for post-duality advertisements in which VISA or MasterCard take on one another, even obliquely.[43/] Interchange fees are completely merged and are routinely quoted to merchants on a blended basis for the two systems. (Tr. 466:25-467:5.)[44/]

On the other side, of course, uncontradicted evidence (much of it offered by Sears in the form of the anti-Discover campaign) shows the existence of vigorous competition between Discover, American Express and VISA/MasterCard and their members. This competition takes the form of systems improvements, aggressive advertising and merchant discount competition, to cite but a few examples. See Tr. 333:16-22, 443-448, 560:9-561:17.

Sears has two answers: First, its witnesses testified that there is no need for concern because Discover intends to keep competing just as vigorously after Prime Option is

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43/ By contrast, compare the television advertisement (DX 566) played during opening statements in which -- pre-duality -- BankAmericard (VISA's predecessor) advised consumers that if they had a BankAmericard, they did not need a MasterCharge.

44/ Recent developments, testified to at trial, confirm exactly what economic theory would predict. Within the past few years, the balance of power within MasterCard has begun to diverge from the wholly overlapping structure of the post-duality years as large industrial corporations, such as AT&T, GM, GE and GTE, which are now entering the credit card business have elected either to emphasize or operate exclusively within the MasterCard system. (Tr. 1443.) Industrial organization theory would predict that this de facto lessening of duality would result in the re-emergence of competition between the two systems, albeit in a somewhat muted form. That is precisely what is occurring. VISA's Board has encouraged the adoption of a fee structure that will create incentives for a gradual separation of the systems (Tr. 844:24-845:19, 1443:2-25) and the VISA Board recently has approved programs targeted against major MasterCard-member promotions. See Sealed Transcript at 1432:9-1436:6.

launched as it has before. The second answer was provided by Dr. Kearl who simply professes not to understand what the fuss is all about. We take the two points in turn.

Since Prime Option does not actually exist, any discussion about its competitive effects, pro or con, necessarily falls in the realm of prediction, if not speculation. In that sense, one must, as Prof. Kearl urged (in a different context), consider incentives and invoke the predictive force of industrial organization theory. Tested in that crucible, the self-serving testimony of Dean Witter and Prime Option executives can scarcely be credited. Once again, that is true not only as a matter of "incentive" theory (about which, more in a moment) but as a matter of evidence. In contrast to his current assurances from the witness stand, we have B. J. Martin's 1988 memo in which he urged Greenwood Trust to apply to VISA so that Sears could "know everything" going on there. (DX 074.) Similarly, there is Mr. Purcell's candid admission that his reason for seeking VISA membership in 1989 was to modulate the intense competition being waged by VISA against Discover:

> Q. And is your testimony here that by becoming a member of VISA you would have the opportunity to perhaps limit their exercise of these kinds of marketplace activities against Discover?
>
> A. What I believe I said was that by becoming a member of VISA it is much harder to discriminate against us with some of these kinds of activities and that would be preferable.

(Tr. 267:2-8; see also 3/27/92 Purcell Dep. at 174-75.)[45/]

In the same vein, Sears' witnesses acknowledged that there is competition for capital within Dean Witter, that many of Discover's top executives had been taken away by Prime Option and that the supposedly unique Prime Option feature of time-tiered interest had first been thought of by the head of marketing for Discover who nonetheless simply passed it

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45/ Mr. Purcell testified in deposition: "[I]t would be better to be in VISA where we would be, perhaps, better treated, better accepted and, at a minimum, would be aware of any anti-Discover moves made by VISA." (3/27/92 Purcell Dep. at 174); see also id. at 175: "The urgent need was to put the company in a position where the market power of VISA and the use of that market power could perhaps be limited."

on to Discover's supposed "competitor," Prime Option. (Tr. 651:19-653:10, 657:9-658:19, 663:14-20, 1276:8-1277:21.)

All of this is perfectly consistent with what economic theory would predict. As Dr. Kearl observed quite aptly, no one wants competition that they can avoid (Tr. 1708:22) and everyone wants to profit maximize. (DX 323 at S1750326; Tr. 55:2-16.) It is for that reason, of course, that Prime Option was designed to cannibalize VISA and MasterCard programs rather than Sears' own Discover card.[46/]

These observations underscore why Sears should be kept out of VISA.[47/] If Discover were to become a VISA member, it would be far easier to coordinate interbrand strategies. Dr. Kearl's observations about "incentives" suggest that that is precisely what Sears would wish to do. Some of those incentives are self-evident while others depend upon future developments in the marketplace which no one can now predict with any confidence. Among the former, it is reasonable to expect Discover to compete less vigorously on merchant discounts. Until now, Discover has been an aggressive competitor on the merchant side in order to increase its merchant base while simultaneously cutting into the margins of its competitors. (Tr. 966:15-21.) That has meant merchant discount rates noticeably below those offered by VISA and MasterCard issuers. That competition has imposed constraints on the interchange fees charged by VISA and MasterCard -- in much the same way that VISA and MasterCard discounts constrain the higher merchant discount rates of American Express. (Russell, Tr. 1451:17-1453:2; Purcell, Tr. 333:23-334:14.) Obviously, however, Discover's economic interests would be better served if it could successfully raise its merchant discount.

46/ See also Mr. O'Hara's testimony about the Sears "family" of businesses and the duty to maximize shareholder returns. (Tr. 663:18-20.)

47/ In fact, they indicate why Sears' proposed joinder would violate Section 7 of the Clayton Act. See Post-Trial Memorandum of Counterclaimant VISA U.S.A. Inc. Re Clayton Act Section 7, 15 U.S.C. § 18. As explained there (at n. 2), if Sears' acquisition and use of an ownership interest in VISA "may" tend "substantially to lessen competition," then a rule preventing such anticompetitive acts cannot, itself, be anticompetitive. See also Rothery, 792 F.2d at 220 (Clayton Act Section 7 stricter than Section 1 of Sherman Act).

That benefit would double if Sears were also a VISA member since it expects to earn huge amounts of money in the form of interchange fees as a VISA issuer. Lessening competitive pressures on VISA interchange fees by raising Discover's merchant discount rate thus would be of immense benefit to Sears.[48/]

As noted above, it is not possible for anyone now to predict precisely what other strategies Discover might attempt to pursue. For example, depending upon the relative success of its two programs, one can envision substantial resources being diverted from Discover to Prime Option.[49/] At the extreme, it could become advantageous for Sears to convert its Discover program entirely (however much its current intentions may honestly be to the contrary). See 5 Areeda & Turner, Antitrust Law at ¶ 1203, pp. 319-20. Similarly, the intentions of those who currently head up Dean Witter and its credit card operations will not necessarily be the same as those of the men and women who follow them.[50/] Two things remain unavoidably clear, however: Economic actors will seek to act in a self-interested, profit-maximizing way and the opportunity (and incentives) for such actions to materially harm intersystem competition are far greater than any possible benefits from admitting Sears to VISA.

48/ According to Prime Option's financial model, it anticipates receiving VISA interchange fees of $651 million over 7 years. That represents 95% of its total after-tax expected profits from Prime Option. (Huber Dep. at 159 and Dep. Exh. 5 at S1971022.) It is not surprising, therefore, that in the so-called "reorganization" documents produced to VISA on the eve of trial, VISA discovered a handwritten note reflecting a conversation with a top Sears executive who evidently stated that the whole purpose of this lawsuit, and of Sears' desire to issue Prime Option, is "to get interchange fees." (Document no. MSC 000046.) Unfortunately, given the circumstances under which this discovery was obtained, VISA was unable to learn anything more about this extraordinarily provocative comment. However, the numbers cited in this footnote may make the point self-explanatory.

49/ Again, Prime Option's pro forma financial projections indicate that Sears anticipates a greater return on equity ("ROE") on its Prime Option program than from Discover. We have substantial doubt about the accuracy of these projections, created by Sears while this case was pending. However, Sears -- having vouched for their legitimacy under oath -- can scarcely disavow them.

50/ "Now there arose up a new king over Egypt, which knew not Joseph." Exodus 1:8.

Prof. Kearl's testimony on this point is simply mysterious. His overall conclusion, of course, was that he could find "no benefits" to excluding Sears from VISA. (Tr. 1666:20-1668:11.) Further, when queried about intersystem competition, he seems to all but deny its existence: "Discover does not compete with VISA. It competes only with the VISA issuers." (Tr. 1757.)

This testimony, by itself, should be enough to disqualify Prof. Kearl's testimony from serious consideration. While he may well have had something in mind, it is not evident from the record what it was. In any event, the facts reviewed above cannot be so easily discarded nor can his conclusory opinions sustain a verdict not supported by the record. Zenith Radio Corp., 505 F. Supp. at 1356-62; Reazin, 663 F. Supp. at 1480; Merit Motors, 569 F.2d at 672. See also Thomas v. Hoffman-LaRoche, Inc., 949 F.2d 806, 816 (5th Cir. 1992)(discussing Matsushita).

What is more, as Prof. Schmalensee pointed out, the necessary logic of Prof. Kearl's testimony compels the conclusion that By-law 2.06 is pro-, not anti-, competitive. See Tr. 2327:13-2329:10. In advancing the theory that VISA possesses market power through its collective rule-making capacity, Prof. Kearl opined that the market shares of MasterCard and VISA members should be aggregated because of the ownership overlap between the two associations. (Tr. 1594.) As we have explained previously, there is a logical fallacy in that assumption, at least as applied to By-law 2.06. See pp. 36-37, supra. However, at the system level, not only does such aggregation make sense, but the logic of Prof. Kearl's testimony is that admitting Sears to VISA will increase its market power and the antitrust concerns that go with it. In fact, if one assumes that American Express will promptly follow Sears into VISA, the relevant market share under Prof. Kearl's thesis would be 100%. Yet, as Prof. Schmalensee noted, the remedy for being too fat is not to eat more ice cream, and the remedy for too much market power is not to create more. (Tr. 2331:12-16.)

E. As a Matter of Law, Sears Cannot Prove Antitrust Injury.

Sears claims that By-law 2.06 harms competition in two ways: first, it has been prevented from offering its new Prime Option VISA card to consumers and, second, new proprietary cards have been "disincented" from coming into the market. Neither of those claims results in antitrust injury on Sears' part and its claim, accordingly, fails on that ground alone. City of Vernon v. Southern California Edison Co., 955 F.2d 1361, 1366 (9th Cir. 1992); Kaplan v. Burroughs Corp., 611 F.2d 286, 291 (9th Cir. 1980); Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 268-69 (7th Cir. 1981).

1. Any Harm to Sears as a Result of Being Unable to Offer a Prime Option VISA Card Does Not Constitute Antitrust Injury.

Sears' principal claim is that it has been prevented by By-law 2.06 from offering consumers a Prime Option VISA card. That, of course, is true: it is, indeed, the very point of 2.06. It is equally true, however, that Sears has not been prevented from competing in the market generally, or from offering a card with every one of Prime Option's announced features, except for use of VISA's trademarks and other property. The question, then, is whether that deprivation (assuming it is one)[51/] constitutes "antitrust injury," that is, injury flowing from the violation that is of a type that the antitrust laws are designed to prevent. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977).

We submit that it does not. By definition, Sears' ability to offer Prime Option on its own, on any terms it selects, means that it can capture (and consumers can benefit from) any efficiencies attributable to Sears, itself. The only thing that Sears cannot obtain,

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51/ Sears' only proof of any harm is its assertion that a VISA card is more advantageous than a proprietary card. But that is not really proof of anything except the assertion, itself. No study of any kind was offered in support of the claim. See, e.g., McGlinchy v. Shell Chem. Co., 845 F.2d 802, 808 (9th Cir. 1988) (summary judgment granted where no proper damage study offered); AA Poultry, 881 F.2d at 1407-08 (no study). What is more, other evidence suggests the contrary. After all, Sears' 1984 Card Task Force concluded that a proprietary card represented a high reward/high risk strategy at a time when Sears had no merchant base at all. (DX 13.) Now, as Private Issue demonstrates, Sears can launch a new credit card brand and have it accepted overnight by the entire Discover card merchant base. Granted Sears is concerned about potential cannibalization of its existing products if it pursues that strategy, but that would scarcely seem to be antitrust injury.

therefore, is any value attributable to VISA's trademarks, systems and merchant base. But that is a plea to be compensated for a free ride, nothing more.[52/]

Such "harm" (even if real) simply is not antitrust injury. It is the goal of the antitrust laws to prevent, not to compensate, free riding. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 55 (1977); Rothery, 792 F.2d at 222-23. That is true whether or not the conduct that is challenged may be unlawful under the antitrust laws. In Isaksen v. Vermont Castings, Inc., 825 F.2d 1158, 1165 (7th Cir. 1987), Judge Easterbrook noted that "[t]he prevention of free riding is not, as yet anyway, a defense to a charge of resale price maintenance; but neither is being prevented from taking a free ride . . . a form of antitrust injury compensable by a damage award:); see also, Local Beauty Supply, Inc. v. Lamaur Inc., 787 F.2d 1197, 1202 (7th Cir. 1986).

2. **Sears Has Not Suffered Antitrust Injury as a Result of 2.06's Alleged Disincentives for Others to Offer New Proprietary Cards.**

Sears' second claim regarding 2.06 is that it harms competition by discouraging others from offering proprietary cards. Since Sears is in the market with such a card, it is benefitted, not harmed, by that alleged disincentive. It suffers no injury at all as a result -- "antitrust" or otherwise. See Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 110 S. Ct. 1884, 1895 (1990); Brunswick, 429 U.S. at 487. Accordingly, it cannot predicate a claim of injury in fact on this argument.

There is an important related point which should also be noted. For the reasons discussed above, VISA submits that Sears' claims in this case fail entirely as a matter of law. However, should the Court conclude that Sears' disincentive claim supports the jury's verdict, judgment for VISA under Rule 50 would still be required. Sears cannot "mix and match" its claims. That is, it cannot prove a violation based solely upon its disincentive

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52/ In this regard, it is of absolutely no moment whether VISA has elected, for reasons it deems sufficient unto itself, to let others free ride to a greater or lesser extent. The issue here is whether it is the purpose of the antitrust laws to permit Sears to seek to recover the alleged loss of such free-riding benefits.

argument while satisfying its obligation to prove the existence of antitrust injury by reference to its inability to offer Prime Option.[53]

III.

VISA IS ENTITLED TO A NEW TRIAL UNDER RULES 50(b) AND 59.

A. The Standards for Granting a New Trial.

The trial court enjoys wide latitude in deciding a motion for a new trial. Rule 59 permits the court to grant a new trial "upon any grounds which, in the sound judgment of the trial court, [are] in the interest of the proper administration of justice." Tidewater Oil Co. v. Waller, 302 F.2d 638, 642-43 (10th Cir. 1962). The trial court's discretion is limited only by the Seventh Amendment (preserving the common law right of trial by jury in actions at law).[54] A new trial motion presents, in essence, a final opportunity for the trial judge, viewing the record in its entirety, to determine whether the verdict is against the clear weight of the evidence, whether there has been substantial error in the admission or rejection of evidence or instructions to the jury, or whether the essential fairness of the trial has been compromised in some other way. Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 251 (1940). Indeed, a trial judge "has the obligation or duty to ensure that justice is done, and, when justice so requires, he has the authority to set aside the jury's verdict." McHargue v. Stokes Div. of Pennwalt Corp., 912 F.2d 394, 396 (10th Cir. 1990).

VISA's new trial motion rests, in part, on the ground that the jury verdict in Sears' favor is against the weight of the evidence. The standard to be applied in assessing

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53/ In fact, since it is impossible to tell from the jury's verdict whether their respective determinations of illegality and fact of injury were predicated on one claim rather than the other, if this Court concludes that either claim was inadequately supported a new trial is required. MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1161-63 (7th Cir. 1983). See also Ameritnet, Inc. v. Xerox Corp., 972 F.2d 1483, 1497-98 (8th Cir. 1992); Farley Transp. Co. v. Santa Fe Trail Transp. Co., 786 F.2d 1342, 1352 (9th Cir. 1985).

54/ As one oft-cited opinion defining the scope and extent of Rule 59 points out, "[t]he exercise of this power [to grant a new trial] is not in derogation of the right of trial by jury but is one of the historic safeguards of that right." Aetna Cas. & Sur. Co. v. Yeatts, 122 F.2d 350, 353 (4th Cir. 1941).

the evidence here is sharply distinguished from the standard on a motion for judgment n.o.v. (now, judgment as a matter of law, see Rule 50(b)). In deciding whether the verdict is against the weight of the evidence, the trial judge is not required to view the evidence in the light most favorable to the non-moving party. The court is allowed to weigh the evidence and the credibility of witnesses for itself. Nor is the court required to deny the motion even if there appears to be substantial evidence to support the verdict. Leichihman v. Pickwick Int'l, 814 F.2d 1263, 1266-67 (8th Cir. 1987); Holmes v. Wack, 464 F.2d 86, 88-89 (10th Cir. 1972); Seven Provinces Ins. Co. v. Commerce & Indus. Ins. Co., 65 F.R.D. 674, 687-88 (W.D. Mo. 1975). The overriding principle in determining the outcome of a new trial motion on this ground is the prevention of injustice to the movant. Leichihman, 814 F.2d at 1267.

VISA also seeks a new trial on the ground that the trial, viewed in its entirety, was fundamentally unfair and materially prejudicial to VISA. Well-settled authority under Rule 59 permits the court, in considering a new trial motion, to go beyond a mere mechanical weighing of the sufficiency of the evidence. The decision whether to grant or deny the motion "embraces all the reasons which inhere in the integrity of the jury system itself." Tidewater Oil Co., 302 F.2d at 643 (emphasis added). The court is empowered -- indeed, required -- to consider whether, overall, the essential fairness of the trial has been compromised, and to grant such relief as is necessary to safeguard the integrity of the judicial process. Among the many specific factors that the court may evaluate at this stage are whether evidence has been admitted or rejected improperly, or whether a properly requested jury instruction should have been given. Montgomery Ward & Co., 311 U.S. at 251; MidAmerica Fed. Sav. & Loan Ass'n v. Shearson/American Express Inc., 886 F.2d 1249, 1261 (10th Cir. 1989); Logan v. Dayton Hudson Corp., 865 F.2d 789, 790 (6th Cir. 1989). See generally 6A Moore's Federal Practice ¶ 59.08[2].

VISA asserts that "integrity of the trial" issues arose here in the context of evidence, argument and jury instructions. Taken as a whole, the fairness of the trial was undermined by Sears' heavy reliance on issues -- such as the Diners Club "discrimination"

and "double standard" themes, and Sears' asserted "multi-card strategy" -- that are, at most, only peripherally relevant to its Section 1 claim. Sears' undue focus on such collateral issues gave rise to a substantial likelihood that the jury was confused, misled or improperly moved by emotion unconnected to the core antitrust issue that it was asked to decide. This prejudice was exacerbated by the Court's decision not to give the proposed supplemental jury instructions offered by VISA in an effort to mitigate this problem. (Tr. 2584-2597.) Combined, these factors worked a miscarriage of justice, which VISA respectfully asks the Court to remedy by ordering a new trial.

B. The Jury Verdict Is Against the Weight of the Evidence.

In the event the Court finds VISA's j.n.o.v. arguments unpersuasive, VISA submits that a new trial is warranted because the jury verdict is against the weight of the evidence. VISA believes that weighing the evidence and assessing the credibility and force of the witnesses, particularly Professors Kearl and Schmalensee, compels the following conclusions:[55/]

First, the weight of the evidence does not support a finding that By-law 2.06 is unreasonable in the context of a vigorously competitive market and the limited "restraint" it creates.

Second, there is insufficient -- indeed, there is no credible -- evidence establishing that By-law 2.06 has substantially impeded competition in the general purpose charge card market.

Third, there is insufficient evidence to support the conclusion that VISA or its members possess market power. The fact that VISA members have the ability to engage in collective rule-making in no way proves that they have exercised market power to restrain competition.

55/ VISA incorporates herein each of the arguments made in support of our Rule 50(b) motion as a separate basis for the motion under Rule 59.

Fourth, the evidence presented, primarily by Dr. Kearl, does not credibly sustain a finding that By-law 2.06 creates a disincentive to would-be credit card system entrants and thus significantly restrains competition in the relevant market.

Fifth, the evidence weighs strongly against a finding that any anticompetitive effects of By-law 2.06 outweigh the rule's beneficial effects, specifically the protection of private property rights and the preservation of intersystem competition.[56/]

And last, Sears completely failed to prove antitrust injury, in that the evidence does not prove that Sears suffered injury of the type that the antitrust laws are designed to prevent.

The evidence in question has been discussed in substantial detail in our argument in support of the Rule 50(b) motion; we do not intend to re-argue here the reasons why the record is insufficient to support a finding in Sears' favor on any of these issues (thus saving at least three actual trees and miscellaneous smaller shrubbery from a premature demise). We request that the Court grant the motion for a new trial on these grounds, either conditionally or in the alternative depending on the outcome of VISA's motion for judgment under Rule 50(b).

C. The Essential Fairness of the Trial Was Undermined by Sears' Excessive Emphasis of Issues That Are, At Best, Only Marginally Relevant to the Section 1 Antitrust Claim.

The trial record, taken as a whole, is heavily freighted with evidence and argument having very little bearing on the antitrust issues the jury was asked to decide. Indeed, it is strikingly clear from the discussion above (see supra at 24-29) that Sears chose to try only the thinnest and most oblique of antitrust cases.[57/] Rather, Sears focused on

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56/ See also the arguments set forth in VISA's Post-Trial Memorandum re Clayton Act Section 7 at 7-14.

57/ The Court, at one point, expressed a similar reaction:

(continued...)

questions of fairness for the obvious reason that it had concluded that these themes were likely to "play" better with a jury than what Mr. McKinley humorously referred to as "intergalactic externalities."[57] (Tr. 1992:3.) See AA Poultry, 881 F.2d at 1402. Taken cumulatively, these peripheral matters largely overwhelmed the real antitrust case. Sears' strategy deprived VISA of a fair trial.

For purposes of this motion, VISA complains of four specific themes repeatedly hammered at by Sears: (1) VISA's asserted "discrimination" and the supposed application of a "double standard" to Sears, measured against the fact that VISA member banks also issue MasterCards and that one VISA member also issues Diners Club and Carte Blanche; (2) Sears' eleventh-hour assertion of a purported "multi-card strategy," based on the assumption that it would be able to issue a new VISA card after launching its own Discover program; (3) Sears' emphasis on the so-called "anti-Discover" campaign implemented by VISA after Discover entered the market; and (4) Sears' express invitation to the jury to decide that "consumers" should have the "right to choose" whether a Prime Option VISA card should enter the market. Some of this evidence was relevant only for the attenuated purpose of informing VISA's intentions in its historic relationship with Sears which, in turn, might inform the competitive consequences of By-law 2.06. Other evidence was not relevant to the Section 1 issues at all. The Court itself deemed Sears' purported

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57/(...continued)

> [A]fter a great deal of reflection on my part and a considerable study of the record, I personally expected a little different testimony from the plaintiff in this case. I expected a little more comparison between interest rates and comparable markets, and seeing the rates staying high in this one and seeing them go down in others, and more direct evidence of the ability to raise and maintain super competitive prices.

(Tr. at 2522).

58/ Sears' many attempts to appeal to the jurors' emotions rather than intellect at times were patently transparent. We lost track during the trial of the number of times reference was made to the June 1989 VISA Board meeting taking place "in Cannes, France" or "on the French Riviera." Subsequent examination of the transcript disclosed 61 references. This is just one example of the level to which Sears' case had degenerated by the time it went to the jury.

"multi-card strategy" to be no more than "historical trivia." (Tr. at 940.) Yet these marginally relevant themes predominated in Sears' case. See, e.g., Tr. 17, 22-23, 37, 45, 56, 2670, 2679-85, 2691

Sears' trial strategy produced precisely the result the Court sought to avoid three months ago in bifurcating -- at Sears' behest -- VISA's non-antitrust counterclaims for separate trial. (8/11/92 Memorandum Decision and Order at 25-28 ("MDO").) VISA's non-antitrust counterclaims are predicated on the course of dealings between the parties in the year leading up to the filing of this lawsuit. In ordering bifurcation of those claims, the Court expressed its concern that allowing such evidence to come in at trial "could prejudice or confuse the outcome of the antitrust dispute" and "hinder a fair trial of the antitrust issues." (MDO at 27.) Yet having thus excluded VISA's counterclaims on that ground, Sears then proceeded to "try" its non-antitrust "claims" as if they were the heart of its case. It gave those arguments prominence equal to or greater than any antitrust evidence. In fact, much of the same story the Court sought to exclude ended up being told, but only from Sears' point of view. At the same time, the bifurcation order precluded VISA from effectively rebutting Sears' arguments. The likely result is that the jury was misled, confused or moved by these improper appeals to "fairness." In short, Sears has "undermined the focus of the trier-of-fact on the important antitrust issues raised in this action" (MDO at 27) -- to VISA's material prejudice.

1. Sears' "Discrimination" and "Double Standard" Arguments Have No Place in an Antitrust Case.

A large part of the trial was consumed by Sears' thesis that VISA has discriminated against, or applied a double standard to, Sears because most of VISA's members also own and issue MasterCard(s), and because Citicorp also issues Diners Club and Carte Blanche. In Mr. Pratt's own words, the Diners Club issue became "a ping-pong ball in this trial" (Tr. 2670) -- a ball that Sears put into play. (Tr. 19, 37.) At times, the debate over Diners' state of health and vital signs raged so fiercely that it was hard to remember how or why the ball belonged in this "court" to begin with.

As the Court recognized during the trial, the antitrust laws do not have a basis in this kind of fairness. See, e.g., Tr. 940-42. Yet, in Mr. Pratt's opinion, the "discrimination/double standard" theory was "integral" to Sears' case, an argument which he intended "to continue to drive home to the jury" even after VISA's objection. (Tr. 897, 933.) That Mr. Pratt made good on his promise is readily apparent from the fact that the Diners Club issue was mentioned some 193 times during trial, was highlighted by Sears witnesses (Kearl Tr. 1573; Butler, Tr. 950, 954; Purcell, Tr. 212) and consumed approximately 1/3 of Mr. Pratt's closing argument. (Tr. 2667-74, 2684, 2689-93, 2697, 2774, 2780-82.)

The vice of this tactic is twofold. First, it obviously was intended to -- and doubtless did -- improperly appeal to the jury's sense of fair play, what the Tenth Circuit has called "all the decencies of human emotion." Barnes v. Smith, 305 F.2d 226, 229 (10th Cir. 1962).[59/] Sears' rhetoric regarding VISA's "special rule," (40 references), the "rules of the game" (6 references), "discrimination," (4), "double standards," (4), and "singling out Discover" (6) at times seemed more appropriate to a Title VII claim than to an antitrust case. Plainly such equitable arguments strike sympathetic chords with a jury, but they have no bearing on the competitive effects of VISA's conduct in the relevant market.

Second, Sears' counsel literally invited the jury to apply an erroneous legal standard in deciding whether By-law 2.06 violated the Sherman Act. In closing argument, after a lengthy exegesis on the Diners Club evidence, Mr. Pratt summarized for the jury

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59/ The problem is doubly significant because the issue of "fairness" in this context has -- and was given -- the ring of being a "competition" issue. Indeed, there is at common law the tort of "unfair competition." For all the jury knew, sitting there day after day with no legal roadmap to guide them, that was the issue they were being asked to decide. Certainly Mr. Pratt did nothing to dispel that impression. Having been, thus, conditioned for three weeks -- including in final argument -- to believe that this issue was central to the case, it is unrealistic, as a real world matter, to expect them to put that evidence aside in their deliberations -- at least in the absence of a direct and unequivocal instruction directing them to do so. See VISA Proposed Supplemental Instruction 102.

three "important things you have to keep in mind as you decide what the right outcome in this case for competition and consumers is." (Tr. 2673.) His third point was that

> based on the rules that the VISA member banks have decided to set for themselves you're not disqualified from VISA simply because you offer a competing card . . . .
>
> [T]hose are the rules that VISA member banks have chosen to play by. Those are the rules that VISA member banks have set themselves. Those should be the same rules that apply to everybody in the market in particular in this case the same rules that apply to Dean Witter and Mountainwest.

(Tr. 2673-74; emphasis added.) This "important" principle advocated by Sears' counsel happens to be legally erroneous and directly contrary to the issues they were expected under the Court's instructions to decide. (Jury Instruction No. 20.) Thus, the prejudice arising from Sears' continuous harping on the "fairness" chord was compounded by a clear invitation to error in the jury deliberations. Given the course of the trial, any hope that this prejudice could be avoided is, we suggest, wishful thinking. We submit that VISA has more than fair ground to complain about prejudice to its right not to have the jury's determination of "the important antitrust issues" in this case "undermine[d]" by excessive attention to matters which, at most, masqueraded as evidence central to the competitive effects of VISA By-law 2.06.

2. Sears' Evidence of Its Supposed "Multi-Card Strategy" Is Neither Credible Nor Relevant and Hindered a Fair Trial of the Antitrust Issues.

A second prominent theme at trial was Sears' so-called "multi-card strategy" and the assertion that VISA unexpectedly (and -- per implication -- unfairly) changed the rules in the middle of the game, to Sears' detriment. Again, this issue was designed to appeal to notions of fair play; to present the image that "poor Sears, the nation's largest retailer went in the wrong order and that is why they are in a problem here." (Tr. 940.) This evidence was not relevant to the antitrust issues and detracted from the proper focus of the trial. Furthermore, because of the Court's bifurcation order, VISA was precluded from responding to the distorted picture Sears painted of the prior course of dealings between the parties.

To begin with, the testimony on this subject is scarcely credible.[60] As the court observed, not one word about this "strategy" was uttered by Sears before the trial began: the story was heard for the first time in Mr. Pratt's opening statement. (Tr. 325.) Moreover, the purported strategy was based on the flimsiest of evidentiary foundations -- a single document, with every indicia of being no more than an annotated think piece, that was then elevated by Mr. Purcell into a full-blown corporate policy. (PX 633, Tr. 125-29, 147-55.) In fact, Mr. Purcell apparently recalled this central Sears corporate strategy only under the stress of testifying at trial, for he had made no mention of it when questioned about that very document at his deposition. Indeed, he could not even recall having seen the document previously. (Tr. 232-33; 3/27/92 Dep. at 146.) The story then was embellished further by Sears witnesses following Mr. Purcell's lead. (Butler, Tr. 800, 804-808.) Curiously enough, however, neither Ms. Donovan, who co-headed the 1984 Bankcard Task Force, nor Mr. Kennedy, to whom Ms. Donovan and Mr. Butler then reported, knew anything at all about this grand strategy. (Donovan Dep. at 60-61; Kennedy Dep. at 37-39, 55-60, 78-79, 128-30, 135-36, 159-62.) Or for that matter about the singular document purportedly embodying it. (Donvan Dep. at 60-61.) The "strategy" also is mentioned nowhere in the nearly 300 pages that comprise the Bankcard Task Force report. See DX 13, DX 489. VISA submits that, on this record, the only reasonable conclusion is that Sears' asserted strategy was the product of a convenient revisionism, pure and simple.

Not only is the credibility of this evidence suspect, but it had no legitimate role to play in an antitrust case. While denying VISA's motion for a mistrial based, in part, on this evidence, the Court acknowledged that:

> I don't see a lot of relevance to what Sears wanted to do. I never have. They decided to go first with the proprietary card and then for all the world thought that next they would go to a bank card. Even if that is true, and there certainly is dispute about whether that was truly their intent, so what? And the notion that was made in opening statement that if they had known this was going to happen they wouldn't have done it in that order, again, I say to

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60/ As noted above, the Court is entitled on a new trial motion to assess for itself the credibility of witnesses and to weigh the evidence. See discussion at 55-57.

> myself silently, so what? How does that get us to an antitrust determination? So, Mr. Popofsky, I don't disagree with you. I do feel that that has very little utility in answering the antitrust question here and I always have.

(Tr. 939.) VISA concurs wholeheartedly. But unless the Court now grants a remedy, potential injustice occurred as a result of Sears' arguments on this point. The quasi-equitable claim Sears erected based on VISA supposedly "changing the rules of the game" after the multi-card strategy was "adopted" might conceivably sustain a different kind of lawsuit, but not this one. Judge Posner observed with respect to a similar "changing the rules" argument by the plaintiff in Olympia, 797 F.2d at 376, that

> [i]f [the defendant] does extend a helping hand, though not required to do so, and later withdraws it as happened in this case, does he incur antitrust liability? We think not. Conceivably he may be liable in tort or contract law, under theories of equitable or promissory estoppel or implied contract . . . . But the controlling consideration in an antitrust case is antitrust policy rather than common law analogies.

Similarly here, the evidence was not relevant to establishing any predicate of Sears' claim.

It would have been prejudicial enough that Sears loaded up the record with irrelevant appeals to fairness based on evidence whose bona fides are, charitably put, suspect. Unfortunately, as an unintended consequence of the bifurcation order, VISA was precluded even from telling its side of the "history". Sears successfully portrayed itself as the innocent -- and injured -- party, that had mapped out a careful business strategy only to have the rug pulled out from under it by VISA's arbitrary passage of By-law 2.06. Even then, Mr. Purcell testified, he persisted in trying to resolve the problem amicably, but the big banks refused to be reasonable. (Tr. 175:4-179:24, 270:2-282:2.) What was missing from the trial was evidence showing that Sears was hardly the victim it pretended to be -- "Greta Garbo sitting by the train left by the wayside as the train leaves the station." (Tr. 936.) Evidence such as, for example, Sears' real written strategy of "sneaky--going in the back door." See Doc. S1772528-31. For reasons that could not have been predicted at the time, the bifurcation order left VISA with one hand tied behind its back in its effort to counter the "fairness" theme that Sears interjected into this trial.

As noted above, the Court's stated purpose in ordering bifurcation was to "insure a fair, unprejudiced decision on the merits of the antitrust dispute." (MDO at 27-28.) Yet antitrust law is not the stuff of lay people's day-to-day existence. It is hard enough for lawyers and economists to deal with its nuances. That is why Sears kept putting extraneous kinds of evidence in, and why proper application of the antitrust laws requires that it be kept out. With all respect, VISA submits that once bifurcation was ordered, the Court had a responsibility to keep the trial sharply focused on the central antitrust issues, and to stringently limit the kind of evidence introduced. That, simply, did not obtain and Sears enjoyed a substantial unfair advantage as a result.

3. Evidence of VISA's "Anti-Discover" Campaign Did Not Advance Resolution of Sears' Antitrust Claims and Served Only to Inflame the Jury.

A third leitmotif of Sears' case having nothing to do with the antitrust laws was what Sears called VISA's "anti-Discover campaign." In reality, the "campaign" consisted of nothing more pernicious than speeches and brochures by VISA marketing personnel exhorting VISA's members not to cooperate with Discover and suggesting strategies for slowing Discover's growth. (Tr. 431:9-432:8, 471:2-478:15, 831:11-834:1.) Despite its negligible relevance (or worse)[61/] Sears milked this evidence for all it was worth in order to bolster the portrayal of VISA as villain and Sears as hapless victim. Much ado about these events was made in the testimony of Sears' witnesses, and Sears highlighted the evidence by presenting Ms. Schall's speech on the subject in the particularly attention-getting form of a videotape. (Tr. 171-72, 971:20-25, PX 765.) The subject featured prominently in Sears' closing argument (Tr. 2679-85), and Mr. Pratt even went so far as to imply that perhaps VISA's campaign might be unlawful in and of itself: "Now, nobody sued VISA

61/ As we note in text, infra, the evidence actually shows competition, not its opposite. But the "atmospherics" created by Sears' use of this evidence were precisely to the contrary. And, for good reason. As numerous cases have recognized, it is easy to confuse the appropriate (award them a "medal") intent to compete aggressively with the ("send 'em to jail") intent to restrain competition. See, e.g., cases cited supra in text at 26, 28. See also pp. 24-29, supra.

back in the 1980's over the campaign. And we can leave for another time the question of whether or not the kind of competition that VISA engaged in is the kind of competition that we ought to be encouraging in this country." (Tr. 2679-80.) See note 39, supra.

VISA consistently has argued that the relevance of this evidence is extremely attenuated and is, in all events, by its prejudicial appeal to juror sympathies. See VISA's Motion in Limine to Exclude Any Testimony Regarding VISA's "Anti-Discover" Card Marketing Campaign at 1105-1119. Sears claimed relevance because the marketing campaign supposedly was the first stage of VISA's overall anti-Sears strategy that, when it failed, was followed by By-law 2.06. In Mr. Pratt's words:

> [W]hat VISA wants to do is they tried to stop Discover Card from coming in and starting a competing proprietary card. They tried in several ways. When they were unsuccessful doing it, they passed 2.06 both to penalize us and to send a message to anybody else [that] the price of doing what Dean Witter or Discover did is you can't ever play in the VISA and MasterCard part of the market.

(Tr. 1110.) In fact, Mr. Pratt opposed VISA's effort to exclude the evidence with the now-familiar refrain that the anti-Discover campaign "go[es] to the very heart of the theory that we're presenting here" and was "the heart of our case." (Tr. 1110, 1116.)[62/]

Sears' argument is wrong on both the law and the facts. The antitrust laws impose no obligation to treat rivals well, and evidence that VISA wished a significant competitor to fail proves nothing. To the contrary, such intent evidence plays no useful role in this kind of litigation. It proves no more than that competition is functioning as it should in a free market economy. Judge Easterbrook put it this way in AA Poultry, 881 F.2d at 1402:

> If courts use the vigorous, nasty pursuit of sales as evidence of a forbidden "intent", they run the risk of penalizing the motive forces of competition. [citations omitted]
>
> Almost all evidence bearing on "intent" tends to show both greed-driven desire to succeed and glee at a rival's predicament. . . . Firms need not like their

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62/ To which the Court responded, "Well, if that's the heart of your case, you may be in trouble." (Tr. 1116.)

> competitors: they need not cheer them on to success: a desire to extinguish one's rivals is entirely consistent with, often is the motive behind, competition.

And as the Seventh Circuit said in an opinion written earlier this year:

> "Competition is ruthless, unprincipled, uncharitable, unforgiving -- and a boon to society, Adam Smith reminds us, precisely because of these qualities that make it a bane to other producers." [citation omitted] . . . . Entertaining claims of excessive competition would undermine the functions of the antitrust laws, a point forcefully made by a former head of the Antitrust Division. Edward A. Snyder & Thomas E. Kauper, Misuse of the Antitrust Laws: The Competitor Plaintiff, 90 Mich L. Rev. 551 (1991).[63/]

Stamatakis Indus., Inc. v. King, 965 F.2d 469, 471 (7th Cir. 1992).

Furthermore, just as we believe happened here, intent evidence is easily susceptible to being misunderstood by lay jurors, and the potential for prejudice arising from its admission outweighs any asserted relevance. Judge Easterbrook aptly described VISA's position:

> [S]tatements of this sort ["We are going to run you out of the egg business. Your days are numbered."] readily may be misunderstood by lawyers and jurors, whose expertise lies in fields other than economics.
>
> Intent . . . invites juries to penalize hard competition. It also complicates litigation. Lawyers rummage through business records seeking to discover tidbits that will sound impressive (or aggressive) when read to a jury. Traipsing through the warehouses of business in search of misleading evidence both increases the costs of litigation and reduces the accuracy of decisions. Stripping intent away brings the real economic questions to the fore at the same time as it streamlines antitrust litigation.

AA Poultry, 881 F.2d at 1402 (emphasis added).[64/] However "ruthless," "unprincipled," "nasty" or "greed-driven" the anti-Discover campaign might have been, it did not move Sears one iota closer to proving a Section 1 violation.

Sears' argument also is factually bankrupt. The anti-Discover campaign happened three years before 2.06 was passed. The personnel involved -- particularly Fran Schall -- were certainly not in a position to influence VISA policy at the Board level. Sears

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63/ Interestingly, Mr. Kauper, whose work is cited with approval by the Court of Appeal, was designated as an expert witness by Sears in this case but was never called to testify. It might have been illuminating to hear whether Mr. Kauper agrees with the use Sears made of the anti-Discover evidence.

64/ See also discussion and authorities at 24-29, supra.

proved no connection between the campaign and the Board's consideration and enactment of By-law 2.06. Mr. Pratt's suggestion that the two events formed part of a unified and long-term anti-Sears strategy was entirely fanciful, particularly given that, at the time of the anti-Discover campaign, Sears still owned a VISA membership through Sears Savings Bank.

What one is left with is yet another part of Sears' case devoted to proving that VISA "done 'em wrong," without regard to the legal and factual irrelevance of this evidence. VISA believes that the evidence should not have been admitted[65/] and that it caused VISA substantial injury.

4. Counsel for Sears Argued Improperly That Consumers Should Be the Ones to Choose Whether Sears May Issue the Prime Option Card.

At four separate points during final argument, Mr. Pratt argued that, under the Sherman Act, consumers should decide whether Prime Option may enter the marketplace. (Tr. 2660-61, 2664, 2716, 2718.) For example, Mr. Pratt directly linked the antitrust law and consumer choice in the following passage:

> Let me talk about how VISA's bylaw 2.06 distorts the marketplace and is contrary to the free and open competition that the Sherman Act talks about. You need to ask yourself, ladies and gentlemen, who it is that ought to be deciding whether the Prime Option VISA Card should be available to consumers. Who it is that ought to be influencing whether other companies in this country come out with proprietary cards and make them available to people in this country. Should it be the VISA member banks that already control the lion's share of this industry and makes [sic] these huge profits that you heard about or should it be consumers?

(Tr. 2660; emphasis added.)

This argument was not only legally irrelevant, it plainly was calculated to mislead the jury. The issue is not whether consumers are entitled to "decide" that Prime Option should enter the market, but whether VISA's exclusion of Sears harms competition in the manner defined by antitrust law. It is no answer to the antitrust inquiry that consumers would or might "choose" Prime Option. Yet Mr. Pratt concluded his case with one last bid

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65/ VISA also incorporates by reference the remaining arguments made in its Motion in Limine to Exclude Evidence of VISA's "Anti-Discover" Marketing Campaign in particular the Constitutional objection, but will not repeat that discussion here.

to win the jurors' sympathies by proposing that "consumer choice" was the correct solution to the Section 1 conundrum.[66]

VISA submits that Sears' counsel invited the jury to use an inaccurate, and prejudicial, standard in deciding Sears' Section 1 claim. By posing the question in terms of consumer "choice," counsel materially misstated the applicable law set out in the jury instructions. See Jury Instruction Nos. 20, 21, 22, 23, 24

5. The Cumulative Weight of Sears' Improper Evidence and Argument Deprived VISA of a Fair Antitrust Trial.

Even if none of the improprieties enumerated above would warrant a new trial taken individually, the Court should consider their impact on the trial in the aggregate. Judged against that standard, the irrelevant and prejudicial issues overwhelmed Sears' legitimate antitrust case; a new trial is the only appropriate remedy.

VISA's position finds strong support in recent authority from the Eleventh Circuit. MacPherson v. University of Montevallo, 922 F.2d 766 (11th Cir. 1991), is, ironically enough, a discrimination case. The trial court granted defendant a new trial because the overall manner in which plaintiffs had tried their case caused the jury to be confused about the law and misled by sympathy. 922 F.2d at 776. As summarized by the Court of Appeals, the District Court based its grant of new trial on several reasons:

> [I]ts grant of a new trial was based on additional concerns about the relevance of evidence (admitted under the disparate impact theory) to the disparate treatment theory [which was the only theory relevant to plaintiffs' claims]; the likelihood that the jury was confused by the plaintiffs' arguments and evidence admitted on the disparate impact theory which was no longer relevant to [sic] case; and the court's perception that [plaintiffs' expert's] testimony, which mainly focused on the disparate impact theory, dealt a great deal with the fairness of the [defendant's] treatment of plaintiffs, as opposed to whether the [defendant] committed age discrimination.

66/ As did his expert, see Tr. 1589:25-1591:23, quoted at p. 43, supra.

922 F.2d at 777. The Court of Appeal affirmed, finding the lower court's ruling to be well within its discretion and giving great deference to the trial court's "first-hand experience of the evidence, the witnesses, and the jury in the context of trial . . . ." Id.[67]

Sears' tactics had a similar cumulative impact on the integrity of the verdict in this case. VISA asks the court to enter a new trial order on this ground.

D. The Court's Refusal to Give the Limiting Instructions Requested by VISA Compounded the Injustice Arising from Sears' Trial Strategy.

Having been unsuccessful at excluding this evidence entirely during trial, VISA proposed a number of supplemental jury instructions designed to at least mitigate the harm caused by Sears' non-antitrust strategy. (VISA's Proposed Supplemental Jury Instructions 101, 102(A) and (B), 103.) VISA believes that these instructions were the minimum necessary to have any hope of avoiding all-but-certain prejudice from the misleading arguments with which Sears had peppered the record. Such evidence has a demonstrable potential to confuse and mislead. Indeed, there is little doubt that this was the principal purpose for its introduction. For that reason, it was imperative that the Court clarify for the jury the limited role that such classes of evidence might play in their deliberations.

To that end, Proposed Supplemental Instruction 101 advised the jury that there was no allegation relating to the "anti-Discover" campaign and that such evidence was, in any event, evidence of conduct that could not be unlawful. Proposed Supplemental Instruction 102 (Version A) directed the jury that no finding of anti-competitive effect could be based on Sears' "discrimination" and "double standard" evidence. Proposed Instruction 103 advised that no finding that VISA had violated the antitrust laws could be based on Sears' alleged multi-card strategy.

67/ Cf. United States v. Thornbrugh, 962 F.2d 1438, 1446 (10th Cir. 1992) (In a criminal case, even if no individual error warrants reversal, the cumulative effect of the errors at trial do.); United States v. Rivera, 900 F.2d 1462, 1469 (10th Cir. 1990) (In a criminal case, the cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error.)

The Court declined to give each of these proposed instructions. (Tr. 2584-87.) VISA now respectfully submits that the cumulative weight of the challenged evidence, together with the Court's decision not to give the requested instructions, resulted in material prejudice to VISA.

E. The Trial Record, as a Whole, Shows That Sears Elected Not to Try a Proper Antitrust Case.

When all is said and done, we submit that the record, taken as a whole, shows that Sears elected not to try a serious antitrust case at all. Given the jury's verdict, it is hard to quarrel with their strategy. We can, and do, however, ask that the Court not permit the verdict based on this record to stand.

This is, as the Court has observed, an extremely important antitrust case, whether judged in terms of the legal principles at stake, or the practical economic consequences of its outcome. Yet Sears chose to turn the trial into a morality play, with a central focus on "fairness" and similar emotional appeals, rather than the drier (but more pertinent) stuff of regression analyses, profitability studies (not musings) and the testimony of the most highly credentialed and experienced experts available to talk about them. What we were promised by Mr. Pratt and by Sears when they opposed summary judgment (and when Sears sought bifurcation, so that it would not be prejudiced by the interjection of "extraneous" evidence into this antitrust suit) was something very different from what Sears delivered at trial. In fact, as noted above, even the Court remarked on that fact. (Tr. 2522.)

It is, of course, the prerogative of parties and their trial counsel to determine how most effectively to try their lawsuits. But they do so against a backdrop of what the case is about and what the limits of orderly process and the search for a reasoned outcome will allow. We believe that, in fairness, Sears went beyond those limits in this case, thereby creating a result which may reflect less the strength of its antitrust case, than the effects of its extraneous evidence and argument. At a minimum, a new trial should be ordered to remedy the potential miscarriage of justice that was the likely result of those efforts.

IV.

CONCLUSION.

For the foregoing reasons, VISA's motion for judgment under Rule 50(b) should be granted. The Court should also grant VISA's motion for a new trial, conditionally if the motion for judgment under Rule 50(b) is granted, or in the alternative if it is not.

Dated: November 24, 1992

Respectfully submitted,

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