UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

VISA U.S.A. INC., Defendant-Appellant v. SCFC ILC, INC. d/b/a Mountainwest Financial, Inc. Plaintiff-Appellee.	Case No. 93-4105 Civil No. 2:91-CV-047B Honorable Dee V. Benson Utah, Central Division

REPLY BRIEF OF APPELLANT VISA U.S.A. INC.

On Appeal from the
District Court of the United States
District of Utah, Central Division

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INTRODUCTION

Sears has demonstrated, beyond doubt, that it can compete successfully on its own in the general purpose charge card market. Having done so, it nonetheless claims the right to become part of the competing VISA joint venture as well. However, that extraordinary claim confounds core antitrust values. As the Supreme Court has frequently observed, "one of the fundamental purposes of the Sherman Act is to protect, not to destroy, rights of property." United States v. Terminal R.R. Ass'n, 224 U.S. 383, 409 (1912) ("St. Louis Terminal"). Doing so encourages others to compete and innovate. Similarly, courts have noted that the primary focus of antitrust policy is protecting interbrand competition. See, e.g., Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 726 (1988). That being so, both VISA and its amici have emphasized that permitting Sears to demand access to the property of the VISA joint venture subverts, rather than furthers, sound antitrust policy and the welfare of consumers by threatening intersystem competition and diminishing incentives for innovation.[1] Moreover, if, as Sears argues, there is a problem with competition in the general purpose charge card market because VISA possesses too much power, the solution to that problem cannot be to increase it.

Professor Areeda further points out that the compelled admission of a successful brand competitor, pursuant to unstructured rule-of-reason standards, will chill the formation of productive joint ventures because of uncertainty about the venture's right to limit its membership and otherwise capture the benefits of its members' risk-taking and innovation. AAMA Br. 20. If a joint venture can know no more than that its membership rules are subject to after-the-fact challenge under generalized rule-of-reason standards, with treble damages as the price of failing to correctly predict a jury's views, the incentive not to say "no" is very strong.

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[1] See VISA's Opening Brief ("VOB"), at 27-30; Brief of the American Automobile Manufacturers Association, et al., amicus curiae, ("AAMA Br."), at 17-20; Brief of American Bankers Association, et al., amicus curiae, ("ABA Br."), at 6-7.

It simply is no answer for Sears to argue that VISA must share its property because Sears would be benefitted by having it. As the Supreme Court repeatedly reminds us, "the antitrust laws . . . were enacted for the protection of competition, not competitors." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977). This lawsuit contradicts that proposition in the most fundamental way.

This case has attracted substantial interest not only within the financial services community, but among industrial firms generally, because it is likely to set the standard for compulsory access and other joint venture rule making. Given the economic significance of joint ventures and similar strategic alliances, it is critically important that clear legal standards be established and that those standards be consistent with productive antitrust policy goals. Requiring a plaintiff to demonstrate a substantial need for compulsory access not only provides that guidance but is consistent with the fundamental purposes of the antitrust laws to reward risk-taking and encourage competition.

SUMMARY OF ARGUMENT

1. The assertion that "we want to share your property because it will benefit us to have it" simply begs the question to be answered: under what circumstances, and upon what showing, is there a right to demand that property be shared involuntarily? It is a fundamental purpose of the antitrust laws to protect property rights. St. Louis Terminal, 224 U.S. 383, 409 (1912). Indeed, the very concept of private property carries with it a presumptive right to exclude others in order to enjoy the fruits of one's investment and risk-taking.

2. That presumption is not overcome merely because the property in question belongs to a joint venture, rather than a single entity. Sears does not explain why a joint venture's decision not to share its creations should be treated any differently than an analogous decision by a single firm. VISA submits that it should not.

3. Nor does it matter that VISA is an "open" joint venture that has "singled out" Sears (and American Express) for exclusion. The Sherman Act is not an anti-discrimination

statute. Moreover, it is a familiar proposition that "the antitrust laws . . . were enacted for the benefit of competition, not competitors." Brunswick, 429 U.S. at 488; Bright v. Moss Ambulance Serv., Inc., 824 F.2d 819, 824 (10th Cir. 1987).

4. A firm does not make out even the beginnings of a claim to share someone else's property merely by asserting that it will be benefitted, or that it can put the property to particularly effective use. To the contrary, it first must demonstrate that there is a lack of effective competition in the market, and that the alleged competitive failure is attributable to the refusal to share. Here, however, the nearly "atomistic" structure of the general purpose charge card market conclusively precludes such a showing.

5. Sears also is incorrect in asserting that VISA seeks an antitrust "exemption" and that VISA's "essentiality" standard is unsupported by the law. VISA has never argued that Section 1 is inapplicable to joint ventures in general, or to VISA. See VOB at 26, 29. However, it has urged that how Section 1 and the rule of reason apply to any particular conduct by a joint venture depends upon the specific circumstances presented. Numerous rule-of-reason antitrust cases are disposed of as a matter of law because the plaintiff cannot make the requisite showing. Similarly, the "essentiality" test VISA posits is a recognized antitrust principle, originally established and applied by the United States Supreme Court in the St. Louis Terminal case. 224 U.S. 383 (1912). "Essentiality" takes account of the important consumer interests in protecting incentives for investment and innovation while permitting property to be shared in those limited instances where such sharing is necessary to maintain effective competition.

6. Sears' discussion of "purpose" is also unpersuasive. If VISA is entitled to exclude Sears because its members wish to retain the fruits of their earlier risk-taking for themselves and do not choose to bestow them on a major competitor, the fact that it has acted for such unquestionably self-interested reasons proves nothing.

7. Sears' arguments about competition are not only unpersuasive but backwards. The antitrust laws favor competition over cooperation. Thus, if a firm is capable of

competing on its own -- as Sears has conclusively demonstrated here -- competition policy is furthered when it is obliged to compete on its own, rather than joining with its competitors.

8. Which brings us, again, to the "eat more ice cream" problem. Sears' case for admission to VISA rests on the premise that VISA is too powerful (i.e., has too much "market power"). But if that were true, it can hardly be sensible to compel VISA to increase that power by adding a Sears-issued card. Even more plainly, it cannot be sensible to permit the addition of an existing interbrand competitor when there unquestionably are so few of them. In fact, Sears implicitly concedes that very point by arguing that the cross-ownership of VISA and MasterCard that resulted from the Justice Department's inaction in the 1970s has led to such a diminution in intersystem competition between the two ventures that their members' respective shares should actually be added together in calculating VISA's market power. See S. Br. 38.

ARGUMENT

I. SEARS HAS FAILED TO DEMONSTRATE THAT VISA HAS A DUTY TO SHARE ITS PROPERTY WITH SUCCESSFUL COMPETITORS.

A. There Is No General Duty of Compulsory Access under the Antitrust Laws.

The question posed by this case is: "Under what circumstances do the antitrust laws compel a joint venture to share its property with a competitor?" For reasons discussed in its opening brief, VISA submits that there is no duty to deal as a matter of law absent proof that the excluded party cannot compete effectively in the relevant market without access to the venture's property. See VOB 31-37. There are two principal reasons for that rule: (a) the need to encourage entrepreneurial risk-taking and investment in productive innovation, and (b) the preference for competition over coordination where it is economically feasible.

It is also a rule that accords with common sense: Firms do not typically go out of their way to aid their rivals. That is particularly true where the rival rejected an invitation to contribute its resources and acumen to the joint venture's success; elected, instead, to go into very successful competition against it; and then demands to share its creations -- on a one-way basis, no less. As VISA further noted in its opening brief, there is no precedent in American commerce for such forced one-way sharing with a successful system-level competitor. VOB 56.

Sears' brief proceeds from a very different premise. Pervading every portion of its argument is the claim that the antitrust laws presumptively require a successful joint venture to admit everyone, including major competitors, unless the joint venture can demonstrate that it is infeasible to do so or that the exclusion is justified by some other efficiency purpose. Thus, Sears argues that VISA is required to share its property simply because it will be helpful to Sears -- and, assertedly, to consumers -- if Sears can pursue its chosen "multi-card" strategy of offering a new brand of VISA card along with its own proprietary Discover card.[2] But there is a vast difference between those who require access to be able to compete effectively in the market and those who already compete successfully in that market.

Not only is there no legal support for Sears' position (<u>see</u> pp. 7-9 & note 10, <u>infra</u>), but Sears fails to explain why is it <u>entitled</u> to command access to the fruits of someone else's risk-taking and innovation (and reduce intersystem competition) simply because <u>it</u> may be economically benefitted thereby. Certainly that is not the paradigm of our free-market economic system. Absent extraordinary circumstances, the law does not impose a duty to deal, let alone a duty to share property on a one-way basis, with competitors. General Motors hardly can demand to start making or selling Hondas along with its Chevrolets. Burger King cannot insist on the right to offer Kentucky Fried Chicken simply

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2 Nothing prevents Sears from pursuing its own multi-card strategy -- including a new card with the purportedly low interest rate and all of the other attractive features of its proposed Prime Option card. American Express has done precisely that with its Optima card which, unlike the traditional American Express "green" card, features a revolving credit option. Sears has done more or less the same thing with its up-scale version of Discover, known as Private Issue. <u>See</u> VOB 18 n.19. In fact, multi-brand strategies are extremely common (<u>e.g.</u> GM's Chevrolet, Pontiac, Buick lines). Such strategies do not, however, involve access to others' trademarks, technology and the like. The real reason Sears would like to issue its Prime Option card as a brand of VISA card, of course, is that it wishes to free-ride on the value of the VISA brand and other VISA property and that it would prefer to avoid the risk of cannibalizing its own proprietary brand. <u>See</u> note 45, <u>infra</u>.

because it believes that such a multi-product strategy will appeal to certain consumers. Nor is that result affected by GM's claim that it can make cheaper or better "Hondas" or Burger King's assertion that it can make tastier fried chicken (and that consumers of both Hondas and Kentucky Fried Chicken, therefore, would be better off).[3]

The difference, says Sears, is that VISA is a joint venture. But why does the distinction between a single firm and a joint venture make any difference <u>for this purpose</u>?[4] Unless formalistic distinctions are to control without regard to policy or purpose, it is necessary to determine whether there is any reason to treat VISA's election not to share its creations with competitors any differently than we would treat a comparable decision by Honda, Kentucky Fried Chicken -- or Discover.

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[3] Sears brief underscores this point in compelling -- though doubtless unintended -- fashion. At page 60 (note 66), it asserts that the "proper" way to analyze the relationship between VISA and its members is "vertical," "rather than the horizontal consolidation VISA claims it to be." If correct, that observation puts Sears out of court. Sears' point is that VISA's members are viewed as "licensees" of the right to use the VISA name, symbols and systems in offering general purpose charge cards to consumers and merchants, much as franchisees are authorized to operate by their respective franchisors. <u>See</u> <u>Continental T.V., Inc. v. GTE Sylvania, Inc.</u>, 433 U.S. 36, 52-53 (1977). But no one would suggest that there is a duty to deal with (or license) all applicants in such a situation, particularly when there are no restraints on competition between existing franchisees (or licensees). That is the very point of <u>United States v. Colgate & Co.</u>, 250 U.S. 300, 307 (1919), and its countless progeny. <u>See, e.g.</u>, <u>Westman Comm'n Co. v. Hobart Int'l, Inc.</u>, 796 F.2d 1216, 1227 (10th Cir. 1986) ("we are convinced that, when a manufacturer is left free to determine the profile of its distributorships, procompetitive incentives will lead it to make distribution decisions that ultimately benefit consumers"), <u>cert</u>. <u>denied</u>, 486 U.S. 1005 (1988).

[4] VISA pointed out in its opening brief that although the Sherman Act may apply generally to joint ventures, the decision of a joint venture not to share its creations with third parties is a structural question directly akin to the decision of a single entity and properly so analyzed. VOB 29-31. That same point is explained at length in the Bank Associations' <u>amicus</u> brief. ABA Br. 12-17. Rather than answering the argument, Sears simply asserts that it was "waived" by VISA. S. Br. 30 n.29. But that is plainly incorrect. Neither VISA nor the Bank Associations contend that Section 1 is "inapplicable" to VISA's activities or that VISA is immune from Section 1 scrutiny. To the contrary, both VISA and the Bank Associations argue that whether the conduct of a joint venture should be deemed to be single-firm or multiple-firm conduct depends upon the particular "context" and requires a "particular focus on the kind of conduct at issue." VOB 30 n.33.

The Bank Associations' argument that VISA's refusal to deal with Sears should have been treated as single-firm conduct is entirely consistent with VISA's position. In substance, it is the position of both briefs that the competitive effect of VISA's refusal to deal with Sears would be the same if VISA were an ordinary corporation, like Sears itself, and that the refusal to deal therefore should be judged by the same standards as those applicable to a similar decision by an ordinary corporation.

Every argument that Sears makes about the benefits of a multi-product strategy, about being able to do what its competitors do better or cheaper, about adding more intrabrand competition to the market, could be made as a justification for compulsory access to the property rights of a single firm.[5] But the law rejects those arguments for reasons that are fully applicable here. Antitrust policy encourages firms to make investments and take risks ("build a better mousetrap") in order to create and market new or better products. App. 940-50, 1496-500. That kind of competition benefits consumers in important ways.[6] However, unless those productive enterprises are permitted to retain the rewards of their successful efforts (just as they must bear the costs of those that fail), the incentives for risk taking and innovation will be reduced or eliminated. Thus, unless a firm misuses a position of market dominance (monopolization) or enjoys some natural monopoly that precludes others from coming into the market to compete meaningfully against it ("essential facility"), a simple refusal to deal does not violate the Sherman Act. As the Supreme Court has noted repeatedly, "one of the fundamental purposes of the [Sherman Act] is to protect, not to destroy, rights of property." Standard Oil Co. v. United States, 221 U.S. 1, 78 (1911); St.

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5 For example, everything that Sears says about multi-card strategies and competitive benefits could be asserted, e.g., by Colorado National Bank in seeking the right to offer a Colorado National Bank brand of "Discover" card. The Colorado bank might argue, for example, that it intended to offer "its" Discover card at much less than Sears' uniform 19.8% APR, or that it proposed to offer a real 1% (or 2%, or 5%) rebate (App. 887-903), or that it would not compute finance charges using Sears' "rip-off" (according to amicus Bankcard Holders of America, App. 1406) "two-cycle" average daily balance method. Or maybe it would just assert that it wants the right to use Discover's name, trademarks and merchant base to implement its own "multi-product" strategy, thereby appealing to those consumers for whom Discover has a special attraction.

6 Sears attempts to wrap its argument in the flag of consumer welfare. Specifically, it argues that consumers would be benefitted by the availability of Sears' allegedly "low-priced" Prime Option VISA card. But both the premise and the conclusion of the argument are flawed. As VISA explained in its opening brief (VOB 43-47; see also infra at 18-23), there is no basis for assuming an absence of effective competition in the relevant market now. (In fact, that competition forced Sears to lower the originally planned terms of Prime Option before it was even announced. App. 596-97.) Equally important, Sears' definition of "consumer interest" is far too narrow. As Professor Schmalensee explained at trial, consumers have a broader -- and far more substantial -- interest in making sure that incentives for innovation, risk-taking, and creativity are preserved (App. 947-48), as well as an interest in maintaining effective intersystem competition.

Louis Terminal, 224 U.S. at 409; United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 361 (1961).

The same reasons that mandate such an approach in single firm cases apply to a joint venture's decision whether, and with whom, it wishes to share its creations.[7] While Sears repeatedly asserts that the fact that VISA is a joint venture "changes everything," it never explains why. It simply is no answer to say, as Sears does, that for some purposes the antitrust laws appropriately distinguish between single firms and joint ventures.[8] As Sears repeatedly reminds the Court, the "particular facts" matter (Eastman Kodak Co. v. Image Tech. Servs., Inc., 112 S. Ct. 2072, 2082 (1992); S. Br. 2, 26), and one cannot properly resolve antitrust issues by invoking simple-minded "mantras." Kodak, 112 S. Ct. at 2084 n.18; S. Br. 49.[9] Yet that, effectively, is what Sears' argument amounts to.

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7 Professor Areeda's treatise notes that it is possible to distinguish joint venture and single firm access issues in cases involving essential facilities claims. P. Areeda, Antitrust Law ¶ 736.1 (Supp. 1993) ("Treatise"); cf. Brief of the Bankcard Holders of America, amicus curiae, at 12-16 & n.4. However, his observation that it is easier to impose a duty to deal on joint ventures than on single firms says nothing about whether (and when) it is appropriate to do so. Moreover, the premise which underlies his discussion, and which is explicit in his amicus curiae brief (AAMA Br. 10-13), is that a "natural monopoly" or "essential facility" in fact exists. Nothing in Professor Areeda's discussion suggests that a duty to deal should be imposed on either a single firm or a joint venture without such a showing -- precisely as VISA argues here. See Treatise ¶ 736.1, at 840, 843-44, 845 ("If the excluded firm cannot accomplish the same result by itself or find similar partners in the industry" a duty to deal may be appropriate (emphasis added).); AAMA Br. 10-13. Even when such a showing is made, Professor Areeda notes that joint venture access is significantly more feasible at the time a venture is formed -- when no investments have been made and no risks taken -- as opposed to later, when the venture has succeeded and free riding and intersystem competition present far more serious concerns. Treatise ¶ 736.1, at 845.

8 Thus, for example, if VISA's members agreed to charge 18% interest it would be appropriate to hold that agreement unlawful because such coordination is beyond any reasonable definition of the joint venture's integration. It is no defense that single firms "fix" their prices and determine what features to offer. In that situation there is an important economic difference between single firms and joint ventures. That fact, however, tells us nothing about whether a joint venture's refusal to share its property with a competitor -- a practice that is economically identical to the same decision by a single firm (see App. 947-50) -- nonetheless should be treated differently.

9 In a famous article in the Harvard Law Review, Justice Cardozo warned against the "tyranny of tags and tickets," that is, law through the mindless application or manipulation of jargon. Cardozo, Mr. Justice Holmes, 44 Harv. L. Rev. 682, 688 (1931). That warning has been noted, as well, in several antitrust cases. See, e.g., Joseph E. Seagram & Sons,

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Perhaps perceiving that failing, Sears asserts that VISA is not just a joint venture, but an "open joint venture." S. Br. 6, 51. But that fact is harmful, not helpful, to Sears' position, for several reasons:

First, there is no principle of equal access or non-discrimination under the antitrust laws. Brook Group Ltd. v. Brown & Williamson Tobacco Corp., 113 S. Ct. 2578, 2589 (1993); Colorado Interstate Gas Co. v. Natural Gas Pipeline Co., 885 F.2d 683, 697 (10th Cir. 1989). To the contrary, the right to use property as one sees fit and to one's own advantage -- to say "yes" to *A*, but "no" to *B*; or "yes" today and "no" tomorrow -- is a fundamental free market premise that is supported, not condemned, by the antitrust laws. Indeed, as noted previously, antitrust courts repeatedly emphasize a point that ought to be dispositive of this case: "The antitrust laws . . . were enacted for the benefit of competition, not competitors." Brunswick, 429 U.S. at 488; Bright, 824 F.2d at 824; see also Spectrum Sports, Inc. v. McQuillan, 113 S. Ct. 884, 892 (1993) (the Sherman Act "directs itself not against conduct which is competitive, even severely so, but against conduct which tends to destroy competition itself").[10]

[9](...continued)
Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 79 (9th Cir. 1969), cert. denied, 396 U.S. 1062 (1970). The Supreme Court's "new-age" rendering of the same point ("mantra") in Kodak is equally apt -- both generally and in this case.

[10] The amicus curiae brief filed by the American Financial Services Association ("AFSA Br.") repeatedly observes that VISA purportedly "discriminates" between Sears (and American Express), on the one hand, and Citibank's Diner's Club card, on the other. AFSA Br. 1-2, 6, 11, 13-14, 17-18. That assertion proves nothing for reasons explained in text above. See also VOB 51-52; 56-57 & n.72. It is also mistaken at the specific as well as the general level. To begin, Diner's Club is not a "credit" card at all -- i.e., it has no revolving balance feature. Rather, it is a "corporate" or "T&E" expense account card that competes mostly with the American Express corporate card program. See App. 544, 856-57. A sizable portion of its entire volume has been attributable to a single contract with the United States government (Tr. 1778-79) -- a contract that it recently lost to American Express. Lipin, American Express's Federal Contract Confirms Its Hold on Corporate Travel, Wall St. J., Oct. 4, 1993, at B4A. Thus, the VISA Board has not deemed it a significant competitor under the organization's by-laws.

To be sure, Sears offered evidence suggesting that the Board erred in that judgment. Whether that supposed "error" was a function of a differing assessment of the facts by the Board, "grandfathering" (a common practice which occurred, for example, in Northwest
(continued...)

Absent proof that competition has thereby been harmed, the exclusion of a firm or firms from a market gives rise to no antitrust claim. Given the structure of the relevant market in this case (see pp. 17-19, infra; VOB 27-31), even if Sears were completely excluded from the general purpose charge card market, it would have no antitrust case because of a lack of effect upon competition (as opposed to the alleged effect on Sears, itself, as a "competitor"). But Sears cannot make even that showing. Neither it nor anybody else has been excluded from the market.[11] In fact, VISA's by-law is precisely written so that the only firms excluded from even the VISA brand are firms that have chosen for themselves (for reasons they presumably deem to be in their self interest) to compete against VISA by offering a proprietary card product. In sum, the fact that VISA has elected to be "open" generally but is closed to those firms who elect to compete against it may be a "discrimination" (albeit a common-sense one), but such epithets do not an antitrust violation make.

Second, the existence of so-called "network externalities" does not alter the fact that some potential entrants impose costs on the system that are greater than any potential

[10](...continued)
Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 287 (1985)), or both, the one thing that the episode does not prove is AFSA's point. AFSA says that the differential treatment of Discover and Diner's Club proves that VISA is acting for the self-interested purpose of excluding Sears because it is believed to be an effective competitor. But if that were true, and if Diner's Club really is "similarly situated" (as Sears argues), then why would the "5,999" other VISA issuers (and 27, out of 28, other VISA directors) who are competitors of Citibank decline to exclude it? In short, whatever force the Diner's Club "discrimination" point may have had forensically before the jury, it has no relevance to Sears' antitrust claim. (In fact, as VISA has asserted previously, permitting such evidence to be considered by the jury as proof of an adverse effect on competition was error and, of itself, requires a new trial. VOB 56 n.72. Sears' brief offers no response to this point.)

[11] To the contrary, Discover has a massive presence in the market. It is the second largest credit card issuer in the entire market, with over 20 million card accounts. App. 533-35, 885-86, 888-90. Its merchant base of over 1.5 million merchants at the time of trial (App. 379-82, 533-35, 791) continues to grow, reportedly reaching 1.8 million in the third quarter of 1993. See Quint, Quarterly Earnings at Dean Witter Are Sharply Higher, N.Y. Times, Oct. 21, 1993, at C6. As a stand-alone business, Discover's value has been estimated at $2 billion (App. 403-04). Its 1991 profits of $170 million (Opn. 963 n.5) would rank it 93rd in the 1992 Fortune 500, ahead of such companies as Shell Oil and Goodyear Tire & Rubber.

benefits. Absent monopolization or essentiality, it remains the prerogative of those who created the property to determine whether, when (and with whom) to share it, based on their own cost/benefit calculations. For example, McDonald's franchisees (as well as McDonald's itself) are benefitted by adding new franchises that display the system's logo, contribute to system promotion, create good will for the benefit of all franchisees and lower system costs (through economies of scale). Yet those facts surely do not prevent McDonald's from deciding at some point that the network "benefits" from having an additional store are outweighed by the "costs."[12] No one would seriously suggest that because McDonald's has been "open" to new franchisees in the past, it may never close. Or that it must accept all applicants. Assume that Wendy's were a sole proprietorship that owned all of its restaurants. It surely would not raise antitrust concerns if McDonald's were to refuse to let Wendy's restaurants sell "Big Macs," or let it open 100 McDonald's franchises.[13]

Third, under what logic is VISA worse off under the antitrust laws because it elected not to close down entirely? Is Sears really suggesting that competition (as opposed to Sears, itself) would be better served if VISA (and Mastercard) had been "closed" from the outset? Or, if they had been forced in the late 1980s to choose between closing down entirely or letting everyone in? Simply put, it is hard to see how a lesser limitation on

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12 Even where there are positive network externalities, there are costs as well as benefits associated with expansion. It is simply a matter of degree. Thus, opening a new store benefits existing franchisees in the ways outlined above. However, it also takes business away from those pre-existing stores.

13 Having eschewed any claim of essentiality (see Opn. at 980), Sears attempts nonetheless to argue that it is at a disadvantage competing on a proprietary basis against VISA. However, the evidence introduced from Sears' own records and witnesses shows that the reason Sears chose to offer Discover in the first place was because it concluded that the advantages of offering a proprietary card vastly outweighed any such disadvantages. Thus, the Sears "task force" that recommended launching a proprietary card noted that among the many important advantages were: "control your own destiny," "define your own product," "better fraud and credit control," and "complete control of image." App. 1329; see also App. 536-50, 1325-28. Similarly, in several presentations to industry and market analysts, Tom Butler, the President of Discover, has attributed Discover's success to the advantages of owning a proprietary system, rather than being a member of a joint venture. He emphasized, for example, that Sears "could have issued our card through the VISA or MasterCard associations" but that it "chose to compete" (App. S0012) because of the anticipated advantages to Sears from doing so.

intrabrand competition can be the basis of a duty to deal when closing down entirely would not be.[14]

These and other pertinent issues are explored in a forthcoming article on the subject of network joint ventures by Donald Baker, former head of the Antitrust Division of the Department of Justice.[15] See Baker, Compulsory Access to Network Joint Ventures Under the Sherman Act: Rules or Roulette?, 1993 Utah L. Rev. ___ (forthcoming Dec. 1993) (hereafter "Compulsory Access").[16] Among Mr. Baker's conclusions -- consistent with the views of Professor Areeda,[17] the DOJ Guidelines,[18] and others[19] -- is that

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[14] Sears "open" joint venture argument rests on the apparent premise that because VISA has elected to be "open" in order to capture network externalities, it cannot need to be closed, in whole or in part, for efficiency reasons. But that argument is wrong for at least two important reasons. First, it ignores the critical fact, explained in text, that different firms impose different costs. See pp. 10-11, supra. A firm that has gone into active interbrand competition and that proposes to "share" on a one-way basis obviously imposes unique costs and concerns that both common sense and the law suggest may be taken into account.

Second, considering a joint venture's refusal to deal after the fact (in economic terminology: ex post) is the wrong focus. The question is whether at the time of their original investment in innovation, firms would be adversely affected by a rule requiring the venture to accept "all comers" if their venture succeeds. Sears' expert, Dr. Kearl, acknowledged the relevance of this ex post concern in his NutraSweet example involving patents. App. 678-81, 828-37. However, he failed to explain how that concern evaporates in the joint venture context. Sears (not to mention Judge Bork) simply ignores the subject.

[15] Mr. Baker was also a former professor of antitrust law at Cornell and has written widely in the field of financial service joint ventures. His book, The Law of Electronic Funds Transfer Systems (2d ed. 1988), also deals with many of the issues in this case and has been cited by both parties in the district court and in their briefs on this appeal.

[16] A manuscript copy of the article is included in VISA's Supplemental Appendix ("VSA") at 1899. Page references are to the manuscript copy.

[17] In his treatise and various published articles, not just in his amicus brief. See, e.g., 7 Treatise ¶¶ 1476-78; Areeda, Essential Facilities: An Epithet in Need of Limiting Principles, 58 Antitrust L.J. 841, 851 (1990) ("Areeda") (App. 1593).

[18] Dep't of Justice, Antitrust Enforcement Guidelines for International Operations § 3.42, reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,109 (1988).

[19] See, e.g., Balto, Antitrust and Credit Card Joint Ventures, 47 Consumer Fin. L.Q. Rep. 266, 272 (1993) (App. 1606); Blumenthal, Three Vexing Issues Under the Essential Facilities Doctrine: ATM Networks as an Illustration, 58 Antitrust L.J. 855, 860 (1990); Kattan, Antitrust Analysis of Technology Joint Ventures: Allocative Efficiency and the Rewards of Innovation, 61 Antitrust L.J. 937, 963 (1993) (App. 1709); Pitofsky, A Framework for Antitrust Analysis of Joint Ventures, 54 Antitrust L.J. 893, 906 (1985).

essential facilities principles ought to establish the outer limits of joint venture compulsory access because of society's interest in promoting innovation and concerns about over-inclusiveness. See Compulsory Access at, e.g., 106-07, 111, 114, 123. Specifically, the article concludes that "judicial restructuring of a joint venture to include unwanted partners is a conceptually flawed idea, and should not be used by an antitrust court except in the extreme case of a monopoly network with no other present or likely competitors in performing an important 'network' function." Id. at 3-4; see also id. at 111 ("[C]ompulsory access to a network ought to be regarded [as] a risky policy to be invoked only . . . when no competitive alternative is available at the 'network' level").[20]

Mr. Baker's article offers a further reason why, in this case, Sears can have no claim. Sears does not contend that it has been deprived of some network switching or other physical facility that cannot practicably, or efficiently, be duplicated.[21] Those it has -- and better, too, if its evidence is to be believed. App. 383-86. What it wants, instead, is access to the good will associated with the VISA name and brand -- a good will that has been created by the past investment and efforts of VISA and its members. In effect, it seeks a compulsory trademark (or, more precisely, service mark) license.

But the law simply does not recognize a refusal to license intellectual property as an antitrust offense;[22] nor is intellectual property an essential facility in the first place. Compulsory Access at 144-51. As Mr. Baker explains, a plaintiff relying on a compulsory access claim to "gain access to a valuable trademark . . . is quite simply circumventing in a serious way the fundamental purpose of the intellectual property laws of allowing the creators

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20 The article also emphasizes the relevance of the conduct/structure distinction discussed in VISA's Opening Brief (at 27-31). See Compulsory Access at 74, 78, 122-26.

21 Cf. Otter Tail Power Co. v. United States, 410 U.S. 366, 377 (1973); St. Louis Terminal, 224 U.S. 383; MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1132-33 (7th Cir.), cert. denied, 464 U.S. 891 (1983).

22 See, e.g., SCM Corp. v. Xerox Corp., 645 F.2d 1195, 1204-06, 1211-12 (2d Cir. 1981), cert. denied, 455 U.S. 1016 (1982); California Computer Prods., Inc. v. IBM Corp., 613 F.2d 727, 744 (9th Cir. 1979).

(. . . including the joint creators)[23] of new innovations to keep the fruits of their success for themselves." Compulsory Access at 145; see also id. at 120-21, 149-50.

B. The Law Supports VISA's Refusal to Deal with Sears.

Sears also argues that, whatever the logic of VISA's position, it is a mere creation of counsel unsupported by the law. S. Br. 26-30. But there is nothing novel or unprecedented about the legal propositions VISA relies on in this case. As applied to single firms there is no question that a showing of essentiality (or monopolization) is required before compulsory access would even be considered. See Opn. 979 n.26; Olympia Equip. Leasing Co. v. Western Union Tel. Co., 797 F.2d 370, 376 (7th Cir. 1986), cert. denied, 480 U.S. 934 (1987). Sears implicitly concedes the point. See S. Br. 30-31. Cases generally have also refused to require joint ventures to share their property absent an equivalent showing (i.e., that membership is necessary for effective competition). See, e.g., Tarabishi v. McAlester Regional Hosp., 951 F.2d 1558, 1568 & n.14 (10th Cir. 1991), cert. denied, 112 S. Ct. 2996 (1992); Schachar v. American Acad. of Ophthalmology, Inc., 870 F.2d 397, 399 (7th Cir. 1989); McKenzie v. Mercy Hosp., 854 F.2d 365, 369-71 (10th Cir. 1988). That is scarcely surprising since the principal source of duty to deal/essential facility principles is the Supreme Court's decision in St. Louis Terminal which, of course, was a joint venture case. See VOB 38-39. Sears' brief, surprisingly, does not even mention St. Louis Terminal.[24]

As discussed in VISA's Opening Brief (at 37-39), St. Louis Terminal endorses the proposition that is central to VISA's position here: that the antitrust laws are intended to

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23 See Compulsory Access at 144 ("A trademark is issued to identify the owner's products and no special distinction is made between a joint owner and a single owner of a trademark.").

24 While Sears does cite United States v. Realty Multi-List, 629 F.2d 1351 (5th Cir. 1980), it fails to acknowledge that the duty to deal in that case was premised on essential facilities authorities and on a finding that membership in the multiple-listing network was necessary for brokers to compete effectively in the downstream real estate sales market. See id. at 1371 & n.38, 1386.

nurture and promote property rights (see 224 U.S. at 409) and that both single firms and joint ventures enjoy a presumptive right to refuse to deal entirely or to deal only with whom and on whatever terms they may determine. VOB 38. That right is limited only where some unavoidable circumstance renders the ordinary processes of the market unavailing.[25] That is the conclusion, as well, of the forthcoming Baker article. See Compulsory Access at, e.g., 129-32; see also id. at 111, 114.

Associated Press does not yield a contrary result. As VISA's Opening Brief explained, Associated Press generally is viewed as an "essential facilities" or "natural monopoly" case, both by commentators[26] and by the Supreme Court in Northwest Stationers, 472 U.S. 284. See VOB 39. That brings its conclusion into line with St. Louis Terminal,[27] an approach that Mr. Baker suggests is the correct one. Compulsory Access at 72. The decision also has been critically analyzed by numerous commentators, including not only Mr. Baker[28] and Professor Areeda,[29] but, most scathingly, by Judge Bork who

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25 Sears mischaracterizes VISA's essential facilities argument as requiring an absolute inability to compete in the market. See S. Br. 32. But that is not, and has never been, VISA's position. See VOB 32 n.37. As VISA's Opening Brief makes clear, a party demanding access to a competitor's property must show that it is not able to compete effectively in the market without access to the property of a competitor (be it a single firm or, as here, a joint venture). City of Chanute v. Williams Natural Gas Co., 955 F.2d 641, 648 (10th Cir.), cert. denied, 113 S. Ct. 96 (1992); City of Anaheim v. Southern Cal. Edison Co., 955 F.2d 1373, 1380-81 (9th Cir. 1992); Pitofsky, A Framework for Joint Ventures, 54 Antitrust L.J. 893, 902 (1985) ("significant competitive advantage does not mean that membership in a joint venture is 'indispensable' but only that lack of opportunity to participate would seriously diminish the company's ability to compete"); VOB 31-39. As Sears, itself, points out (quoting Associated Press v. United States, 326 U.S. 1 (1945)), even monopolies are relative. Id. at 17 & n.17; S. Br. 28. Thus, the fact that there might be another place to cross the Mississippi 200 miles upstream would not affect the "essentiality" of access at St. Louis. If there needs to be access for meaningful competition to take place a potentially viable essential facilities claim might be asserted. However, where the plaintiff demonstrates in the clearest possible fashion that access is not needed by rejecting it in favor of proceeding on its own, and by succeeding dramatically in so doing, no prima facie claim is presented.

26 Areeda at 842-44; H. Hovenkamp, Economics and Federal Antitrust Law § 10.3, at 283 (1985).

27 Which, as Judge Swan pointed out, was the case the government principally relied on in Associated Press, itself, in urging invalidation of AP's by-law. See VOB 39.

28 Compulsory Access at 35-52.

describes it as "clearly mistaken" and explains at length why its approach is antithetical to modern efficiency-based antitrust analysis. See R. Bork, The Antitrust Paradox 339-42 (rev. ed. 1993) ("Paradox").[30]

II. THE DECISION BELOW SHOULD BE REVERSED BECAUSE SEARS HAS FAILED TO DEMONSTRATE HARM TO COMPETITION.

Regardless of whether VISA's analysis of the governing legal standard is correct, the decision below must be reversed as a matter of law because Sears failed to demonstrate harm to competition. Indeed, not only is the proof of harm legally insufficient, but the undisputed facts demonstrate that Sears' admission as a member/owner of VISA would reduce competition between card systems, thereby harming interbrand competition. No reasonable jury, understanding the "particular facts"[31] of this case as well as the "realities of the market"[32] could have concluded otherwise.

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[29](...continued)

[29] Areeda at 842.

[30] Sears also incorrectly asserts that VISA's position is contrary to Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985), and Reazin v. Blue Cross & Blue Shield, 899 F.2d 951 (10th Cir.), cert. denied, 497 U.S. 1005 (1990). Aspen supports VISA, not Sears. Not only was it a Section 2 case, but the Supreme Court recognized a duty to share only because plaintiff had shown that it suffered a severe competitive disadvantage by virtue of the defendant's exclusionary change in marketing practices. That is akin to an essential facility showing of the kind that Sears eschews. (See, in addition, the discussion of Aspen in Olympia, 797 F.2d at 377-78.)

Reazin is similarly beside the point. Indeed, it did not involve joint venture or even single firm access issues at all. What it did involve was termination of a hospital's provider contract by an insurance carrier pursuant to an agreement with favored hospital customers who gave the carrier price concessions in return for an expected increase in volume. The effect of those agreements -- whether viewed horizontally, vertically or both -- was to harm a competing insurance carrier that had acquired the terminated provider hospital. Analogized to the joint venture context, the Reazin claim challenged conduct in the marketplace rather than structural rules governing membership. See VOB 30-31.

[31] Kodak, 112 S. Ct. at 2082.

[32] Brook Group, 113 S. Ct. at 2598.

A. Sears' Claim Fails as a Matter of Law Since VISA's Refusal to Admit Sears and American Express Does Not Give VISA's Members the Ability to Raise Prices or Exclude Competition from the Market.

Sears acknowledges the need to demonstrate market power. However, it continues to argue that its "collective share" evidence met that burden. S. Br. 37-40. VISA's Opening Brief explained why, on the particular facts of this case, Sears' "collective share" thesis is not the appropriate way to assess VISA's purported market power. VOB 43-47. Market power in antitrust cases is a threshold test to determine whether the challenged restraint gives defendants the ability to raise prices or exclude competition from the market. See Westman, 796 F.2d at 1225-26 & n.3); VOB 42-47. If it does not, the inquiry is at an end because the practice can have no materially adverse effect upon competition. Brook Group, 113 S. Ct. at 2589 ("where the market is highly diffuse and competitive, or where new entry is easy . . . summary disposition of the case is appropriate"); AA Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1401 (7th Cir. 1989) ("Market structure offers a way to cut the inquiry off at the pass."), cert. denied, 494 U.S. 1019 (1990); Bacchus Indus., Inc. v. Arvin Indus., Inc., 939 F.2d 887, 894-95 (10th Cir. 1991); Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1334-35 (7th Cir. 1986).

Sears does not dispute VISA's analysis but, instead, offers up a collection of cases in which aggregate shares have been relied upon.[33] See S. Br. 37-38. As VISA explained in its opening brief, there are a number of situations in which it would be appropriate (indeed, necessary) to look at aggregate shares to evaluate the potential competitive effect of a challenged practice. VOB 47 n.60. However, in evaluating the effects of the particular

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[33] And which are inapposite. See NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85 (1984) (output limitations and price fixing by an association -- the NCAA -- that controlled the entire relevant market); Monument Builders of Kansas City, Inc. v. American Cemetery Ass'n, 891 F.2d 1473, 1482 (10th Cir. 1989) (in review of denial of a motion to dismiss, allegations of aggregate share had to be taken as true), cert. denied, 495 U.S. 930 (1990); Wilk v. American Medical Ass'n, 895 F.2d 352, 360 (7th Cir.) (court accepted the lower court's analysis of market power, which aggregated shares in part because of evidence of high barriers to entry and of anticompetitive effects -- neither of which is present here), cert. denied, 496 U.S. 927 (1990).

practice that Sears challenges here[34] -- VISA's refusal to allow Sears to issue a VISA card -- one needs to look at the impact of the by-law on the marketplace offerings of the various individual financial institutions that compete with each other (and with Sears and American Express) to issue general purpose charge cards.[35] That is the only way to assess the possible effect on price or output in the relevant market.

Given the existence of innumerable individual issuers competing on price, with no limitation on output and no barriers to the entry of new card issuers into the market, the impact of VISA's by-law necessarily is minimal. See VOB 46-47.[36] Even if Sears were excluded entirely from the general purpose charge card market (which, of course, is not the case), the existence of so many competing issuers, plus the ability of other firms to enter the market, disposes of this case as a matter of law. When intraband competition is as fragmented as it is here, the challenged by-law (however much it may be a "collective" expression of VISA's members) cannot materially affect prices or output. App. 690, 985-86. Thus, a market power analysis that focuses -- as it must -- on those effects requires consideration of individual issuers' market shares. App. 952-58, 972-77.

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34 "One cannot determine the degree of market power that merits concern . . . without reference to the legal context in which the issue arises." 2 Treatise ¶ 518.

35 Sears suggests that VISA's expert, Prof. Schmalensee, testified to the contrary regarding the possible effect of Sears' entry. S. Br. 19. He did not. In fact his testimony is entirely consistent with VISA's position:

> [T]he business plan . . . for Prime Option . . . projects that after two years it would have a share of the general purpose charge card market . . . [of] about 1.4 percent. . . . It is very difficult to imagine that kind of entry having a significant affect [sic] on prices. Even after seven years and assuming no growth in the market, I think the Sears projection for shares is around five percent. Again, given all of the competition, all of the other entry, everything else going on, that is unlikely to have a significant effect on prices. App. 986.

36 Bacchus, 939 F.2d at 894 ("Without significant barriers to entry, it is unlikely that [a firm] could be able to eliminate competition and control prices for any significant period of time."). What is more, as the Ninth Circuit has pointed out within the past two weeks, neither a "strong competitor's ability to deter entry by others" nor even "anticompetitive conduct by one firm against another" constitutes an entry barrier. Los Angeles Land Co. v. Brunswick Corp., ___ F.3d ___, ___, 1993 WL 404920 at *5 (9th Cir. Oct. 13, 1993) (citing United States v. Syufy Enters., 903 F.2d 659, 668 (9th Cir. 1990)).

In any event, the foregoing facts should dispose of this case as a matter of law whether one treats the issue as a question of market power or effects on competition. Stated otherwise, the result here does not depend upon the particular antitrust "pigeonhole" (market power, market structure, competitive effects) one places the facts in. What is important is the undisputed facts themselves.[37]

B. Sears' Evidence.

Faced with this seemingly insuperable failing, Sears needed to produce probative evidence demonstrating that actual market behavior somehow yielded supracompetitive profits or prices and that their existence was caused by VISA's refusal to share its property with Sears and American Express. Brook Group, 113 S. Ct. at 2589, 2592-93.[38] Sears failed to do so. Sears' expert not only made no study of the issue but expressly disclaimed any opinion on the matter at his deposition. See App. 709-13,2 741-43. When he then nonetheless attempted to opine on the subject at trial (still with no study), the Court properly excluded the testimony.[39] While Sears posits the alleged existence of "market imperfections"

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[37] While asserting that Professor Kearl's collective power theory "makes perfect sense" (S. Br. 39 n.39), Sears obviously feels the need to do more: hence, its citation to pretrial affidavits from Professors Steven Salop of Georgetown University and Dennis Carlton of the University of Chicago. But since these affiants were never designated as trial experts, they were not put forward for cross-examination and their affidavits are not part of the trial record. Sears' reliance on them is thus wholly improper, although the perceived need to buttress the testimony of Dr. Kearl in that fashion is surely revealing. In any event, neither Carlton nor Salop purported to have conducted any study (or advanced any opinion) concerning the presence of supracompetitive profits or, for that matter, any market imperfection in the relevant market. Thus, even if relevant, their ipse dixit does nothing to remedy the critical failings of Sears' proof.

[38] Sears' brief all but ignores the Supreme Court's decision last term in Brook Group, although that decision represents the Court's most recent discussion of such pertinent matters as market power, intent, market imperfections and the role of expert testimony and jury verdicts in antitrust cases. See VOB 45, 49-53, 56, 60. The case is no less relevant because Sears chose to ignore it.

[39] Sears attempts to excuse that failure by accusing VISA's expert, Prof. Schmalensee, of having made no empirical study of the facts. See S. Br. 44 n.48. That is entirely disingenuous. During pre-trial proceedings, Dr. Kearl (and Dennis Carlton of Lexecon) suggested, without any empirical data or other systematic market analysis, that the AT&T affinity card had affected credit card prices. In response to that suggestion, Dr. Schmalensee conducted an econometric study of the price effects of that entry which demonstrated that the

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(S. Br. 19 n.19), it fails to suggest their source or explain how they might exist given the market structure discussed above.[40] Instead, it simply asked the jury to infer their existence from facts which are either entirely non-probative or are equally consistent with the acknowledged competitive structure of the market.[41] That was insufficient as a matter of

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[39](...continued)
market in fact had behaved precisely in accordance with the predictions of the structural evidence -- that is, there was no significant effect on prices. When VISA disclosed that study during discovery, Sears simply abandoned its argument. VISA, having nothing to rebut, did not need to introduce its study.

[40] See Brook Group, 113 S. Ct. at 2589; AA Poultry, 881 F.2d at 1403. Judge Bork has also written pertinently on the subject. Commenting on the majority's opinion in Kodak (which Sears cites repeatedly), he notes that:

> The majority's . . . reasoning can be applied to all antitrust questions and it is capable of driving rational economic analysis once more from the law. It is always possible to posit "market imperfections" that may result in markets working contrary to the predictions of economics. . . . The result of reintroducing them into the law is lengthy trials on baseless claims and with unpredictable outcomes.

Paradox at 438. Bork's comment about "unpredictable outcomes" presumably references his earlier observation that "since juries do not usually understand basic price theory, victory often goes to the party whose lawyer and economic expert are more adept at demagoguery. Only a trial judge who understands some economic reasoning can prevent that by granting summary judgment." Id. at 433; see also Hay, Is the Glass Half-Empty or Half-Full? Reflections on the Kodak Case, 62 Antitrust L.J. 177, 184 (1993).

[41] Sears suggests that the jury's verdict can be sustained by evidence that certain member banks wished to exclude Sears for the purpose of avoiding the added VISA-brand competition it would provide. Further, Sears suggests that this "belief" could be relied upon by its expert and by the jury to infer that Prime Options's entry could affect competition, notwithstanding the overwhelming structural and other evidence to the contrary. S. Br 41-42. Neither claim is well taken.

First, even putting to one side the marginal character of Sears' evidence, it is inherently circular. There is no doubt that VISA and its members (like Sears) were pursuing their own self-interest. If VISA had the right to do so, as we believe it did, then the fact that it acted with the purpose of furthering its self-interest adds nothing. As Donald Baker notes, "[t]he fact that the [network joint venture] partners excluded the plaintiff . . . from access because they regarded the plaintiff as a 'nasty competitor' or because they believed they would make more money in the 'primary' market if it were excluded are not relevant inquiries." Compulsory Access at 164; see also Olympia, 797 F.2d at 379 ("[i]f conduct is not objectively anti-competitive, the fact that it was motivated by hostility to competitors . . . is irrelevant"); DeVoto v. Pacific Fidelity Life Ins. Co., 618 F.2d 1340, 1346-47 (9th Cir.) (where result is not unreasonable, the "intent to achieve that result, without more, is not unreasonable"), cert. denied, 449 U.S. 869 (1980).

Sears' second point was expressly rejected by Brook Group. In that case, plaintiff produced significant evidence that defendant not only intended to drive plaintiff from the market, but believed that it could do so. 113 S. Ct. at 2592. The jury apparently agreed.

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law. Brook Group, 113 S. Ct. at 2595; Lie v. St. Joseph Hosp., 964 F.2d 567, 570 (6th Cir. 1992).

Having disclaimed any evidence on that critical threshold issue, Sears attempted to finesse the point by having Dr. Kearl testify to his observation of "high" prices. Its brief cites that same evidence. S. Br. 43-44 & n.48. But "high" prices or profits have no economic meaning. Reserve Supply Corp. v. Owens-Corning Fiberglass Corp., 971 F.2d 37, 52 (7th Cir. 1992) ("high profits" cannot be equated with "supracompetitive" profits absent "evidence, such as studies on the comparative costs of production or on market conditions, to indicate that these profits were above those available in a competitive market"); VOB 47-49; cf. Los Angeles Land Co., ___ F.3d at ___, 1993 WL 404920 at *4 (evidence that "comparable" prices were charged for services of disparate quality was insufficient as a matter of law to establish that the inferior services were supracompetitively priced). Moreover, as Professor Hay has pointed out: Such "[p]rofits can be the result of luck, skill or simply the short-run disequilibrium of an industry." Hay, supra note 40, at 825. Since VISA introduced undisputed evidence that output was consistently expanding even in the face of the assertedly "high prices," the inference of a noncompetitive market is not only implausible but legally impermissible. The Supreme Court expressly so held in Brook Group:

> Where, as here, output is expanding at the same time prices are increasing, rising prices are equally consistent with growing product demand. Under these conditions, a jury may not infer competitive injury from price and output data absent some evidence that tends to prove that output was restricted or prices were above a competitive level.

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[41](...continued)
However, the Supreme Court reversed as a matter of law on the ground that, in the absence of "objective evidence" demonstrating the reasonableness of defendant's purpose and belief, no issue for the jury was presented. Id. at 2592, 2597-98. The further fact that plaintiff's thesis was endorsed by its expert (relying on the same intent evidence) made no difference. Id. at 2597-98.

113 S. Ct. at 2595.[42]

The only other evidence Sears points to is Dr. Kearl's testimony about the supposed persistence of high interest rates and the presence of new entry. S. Br. 44 n.48. VISA dealt with that issue in its opening brief. See VOB 43-48, 53-54. The presence of supposedly "sluggish" or "sticky" interest rates is not only non-probative, itself,[43] but the existence of entry reflects a "cure," not a "disease." App. 973-77.[44] The explanation for the supposed "stickiness" of interest rates is in part the expanding demand for credit following the early 1980s "credit crunch" and the fact that because of the so-called "adverse selection" problem, competition is likely to take other forms (e.g., liberal credit availability, "bonus" features or greater service). That explanation, which is entirely consistent with the undisputed market structure evidence, apparently was not even considered by Dr. Kearl.

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42 Sears also proved nothing by Dr. Kearl's observations about so-called price discrimination. As Prof. Kearl's own text points out, such "discrimination" is "pervasive" in our economy. J. Kearl, Contemporary Economics 336-37 (1989). Without more, isolated observations of price discrimination are of no moment. Id. at 337. Here, however, there was not even a sufficient evidentiary predicate of the existence of actual price discrimination, as opposed to simple price differences, which -- economically speaking -- are two very different matters. See AA Poultry, 881 F.2d at 1406. Charging different prices to different customers based upon, e.g., their credit ratings or other relevant behavioral criteria is not price discrimination in the sense that term is used by economists. In fact, a recent report of the Federal Reserve Board cites the existence of such differences as evidence of continuing "intense" competition in the market. Fed. Reserve Bd., The Profitability of Credit Card Operations of Depository Institutions 7-8 (Sept. 1993) (VSA 1890). Yet so far as appears in this record, that kind of price difference was all Dr. Kearl observed. See VOB 54 n.69. In short, absent evidence that Prof. Kearl made any investigation about price "discrimination" that would permit him to actually identify it as such, let alone determine its extent and significance, the testimony lacks any substantive content. Id. at 1407-08; Merit Motors, Inc. v. Chrysler Corp., 569 F.2d 666, 672 (D.C. Cir. 1977).

43 Raskovich & Froeb, Has Competition Failed in the Credit Card Market? (Dep't of Justice EAG 92-7, Jun. 12, 1992) (App. 1796); see also Reserve Supply, 971 F.2d at 51; VOB 43-47, 53-54. Sears, again, offers no response on this point. That is scarcely surprising since, at the time of trial, its Discover card was the only one of the "top ten" charge card issuers charging 19.8% interest to all of its cardholders. That "sluggishness" was scarcely a result of Sears' lack of membership in VISA. It does, however, suggest why Judge Benson dismissed Sears' evidence about offering a "low-priced" card to consumers. Opn. at 983 & n.30.

44 Barr Labs., Inc. v. Abbott Labs., Inc., 978 F.2d 98, 113-14 (3d Cir. 1992); Bacchus, 939 F.2d at 894; see also Fed. Reserve Bd., supra note 42, at 7 ("competition in the credit card market remains intense, with many thousands of firms offering bank cards to consumers").

Yet, as the Supreme Court recently held in reversing a jury verdict as a matter of law in Brook Group, it is "unreasonable to draw conclusions about the existence of . . . supracompetitive pricing" from price data alone where "competition is most likely to take place through less observable and less regulable means . . . ." 113 S. Ct. at 2594.

Sears also failed to demonstrate any relationship between the supposed market failure and its exclusion. But if there were a problem with competition in the general purpose charge card market, Sears could have exploited any of its (as opposed to VISA's) efficiencies and attempted to expand its market share by lowering the 19.8% interest rate on its Discover card. Similarly, it could have introduced the allegedly attractive features of its proposed Prime Option card by offering it as a new type of Discover card -- as it did when it offered its so-called "Private Issue" Discover card in 1989. App. 563-64. Moreover, since there are no output or other limits on existing card issuers and no barriers to entry into the card issuing business by new firms, Sears offers no explanation for why any competitive void -- if one truly existed -- would not promptly be filled by others.

The actual explanation, of course, is that there was no failure of competition in this indisputably diffuse market. Sears simply wanted to avoid "cannibalizing" (Sears' word, App. 498-99) its own Discover brand and hoped to profit by free riding on the prior investment and efforts of VISA's members. But, that is scarcely the basis of a viable antitrust claim.[45]

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[45] Sears vigorously protests that "free riding" forms no part of its intentions. But it is hard to see what Sears planned to do other than free ride. Since Sears has established all of the systems and other infrastructure necessary to operate its own national credit card network, the only things it possibly could hope to get from VISA are the good will attached to the VISA brand and access to the VISA merchant base -- neither of which Sears did anything to create. That is free-riding and nothing but. Nor does the possibility of "payment" solve the problem. That simply confuses the problem with its solution, as Judge Easterbrook explained in the WGN case. Chicago Prof'l Sports Ltd. v. NBA, 961 F.2d 667, 674-75 (7th Cir.), cert. denied, 113 S. Ct. 409 (1992).

C. Allowing Sears (and American Express) to Join VISA Would Harm Intersystem Competition.

The primary concern of antitrust law is promoting interbrand competition (see e.g., Business Elecs., 485 U.S. at 726), and the primary concern about joint venture membership rules is the danger that they may lead to overinclusiveness, thereby reducing beneficial system-level rivalry. VOB 28-31; see also Blumenthal, supra note 19, at 868 ("[compulsory access] undermines the development of multiple competing joint ventures. Competitors have the incentive to invoke the compulsory access doctrine in order to free ride on an existing successful venture.").[46]

This case illustrates why that concern exists and why Sears' compulsory access argument leads in precisely the wrong direction. Despite Sears' considerable effort to obscure the different types of competition that exist in this business and the relationship between them,[47] the point is quite simple: Competition in the general purpose charge card

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[46] Sears contends that while VISA's concern about overinclusiveness may be well taken in general, it has no application here because of positive network externalities and the fact that VISA is an "open" joint venture. S. Br. 52. In effect, says Sears, "the more (or the bigger) the merrier." Id. (citing Realty Multi-List). But the fact that there often are economies of scale associated with economic activity does not mean that 100% market share mergers ("mergers to monopoly") routinely should be approved in the name of such economies. In fact, the essential facilities doctrine only applies where it is infeasible to have effective competition at the network level. Thus, for example, if it were feasible to have multiple routes across the Mississippi River at St Louis, it would have been preferable to have competing ferry lines or bridges, rather than permitting a "bottleneck monopoly" to exist, thereby necessitating a "utility" solution with continual regulation that is always a second best result. D. Carlton & J. Perloff, Modern Industrial Organization 788 (1990). It is employed only where competition is truly infeasible or where there is no perceived benefit from having multiple sources at the network level. Plainly that is not the case in the general purpose charge card market for reasons explained in text. See also VOB 43-44. In fact, the court below found that it is important to preserve intersystem competition in this market. Opn. at 996-97.

[47] For example, Sears disingenuously asserts that there is no such thing as network (or system) competition between itself and VISA, since "[t]he Discover card and other proprietary cards neither supply nor consume association services." S. Br. 55. But that is pure semantic sleight-of-hand. Sears and American Express perform precisely the same "system" functions as VISA and MasterCard, they just happen to do them themselves. That hardly means that there is no competition at that level. See VOB 61-62; pp. 32-33, infra.

Similarly, Sears contends that VISA's by-law harms intersystem competition by depriving Sears of the ability to pursue its preferred multi-card strategy. S. Br. 54. But, as we have discussed above, that argument simply begs the question to be decided. It is, also, (continued...)

market occurs at both the system and the member level. The individual members of VISA and MasterCard compete against each other and against the proprietary cards to have their particular cards accepted and used by consumers. That is intrasystem competition. In addition, the card systems compete by, e.g., creating better (faster, cheaper) backroom technology, improving the common features of their card products (e.g., chargeback rules, fraud control, transaction approval), and promoting the acceptance and use of their respective card brands by consumers and merchants. At this level there are, at best, only five competitors. There is, thus, a far greater benefit from preserving existing competition at the highly concentrated system level (HHI: 3231)[48] than from the speculative benefits of adding one or two more card issuers, where competition already borders on the "atomistic" (HHI: less than 500). See Dep't of Justice & FTC, Horizontal Merger Guidelines § 1.51(c), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104, at 20,573-6 (1992).

As VISA explained in its opening brief (at 61-65), Sears' incentives to coordinate its competitive strategies and to minimize various types of system-level competition if it became a VISA member are significant and are hardly difficult to perceive.[49] (The same would be true of American Express since the logic of Sears' position compels its entry, too.) The point, in fact, is no more obscure than the proposition that economic actors seek to

[47](...continued)
no different than a suggestion that General Motors should be permitted to "benefit" intersystem competition in the automobile market by demanding to use Honda's technology and trademarks to produce and market both Hondas and Chevrolets.

[48] See Opn. 993 & n.43.

[49] See also Compulsory Access at 113: "Where the 'outsider' competes with the joint venture in the 'network' function, it may have a special incentive to use its voice and vote to retard the joint venture's efforts and innovations in the 'network' market." Cf. Balto, supra note 19, at 271-72.

maximize their self interest or, as Sears' expert, Dr. Kearl, put it: "No one welcomes competition if they can avoid it." App. 796.[50]

But, says Sears, all of this was a matter for the jury which saw fit to reject it. Our reply is equally straightforward: given facts which no one disputes (e.g., the structure of the market at the issuer and system levels, respectively, and the importance of maintaining intersystem competition) plus the universal incentive for firms to engage in welfare-maximizing behavior, a reasonable jury could not have reached that conclusion.[51] See Brook Group, 113 S. Ct. at 2593-94; AA Poultry, 881 F.2d at 1403-04; cf. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 596-97 (1986).[52]

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[50] On the theory that history is instructive, VISA's Opening Brief reviewed the evolution of VISA/MasterCard duality, and cited several other instances referred to by David Balto in which compulsory access resulted in apparent harm to intersystem competition. See VOB 11-12; App. 1606. In his forthcoming article, Donald Baker adds an emphatic footnote to that discussion by comparing the credit card markets in Canada, where duality does not exist, with the situation in this country, where it does. Compulsory Access at 91-97.

[51] While Sears dismisses VISA's concerns about Sears' future behavior as mere speculative paranoia, its brief is notably silent about the Purcell and Martin testimony referenced in VISA's Opening Brief (at 63-65). But it is hard so facilely to dismiss concerns about confidentiality and attempts to limit interbrand competition as mere theory when a top Discover official has written a memo urging Sears to apply to VISA so that Discover could know everything going on there and when the Chief Executive of Dean, Witter testified that his reason for wanting to join VISA in 1989 was not to issue VISA cards but to limit the vigor of VISA's competition against Discover. See VOB 64 & n.82.

Sears also inexplicably attempts to wish away VISA's discussion of "merchant side" competition on the ground that there was no evidence introduced about it and that it relates to some other market. However, VISA's discussion of the merchant portion of the business was fully documented in the record (see, e.g., VOB 14-15, 61-62 & nn.78, 80, 64-65). Further, it is difficult to credit the suggestion that the merchant business is not a part of the general purpose charge card market. The two sides are inherently interdependent. See National Bancard Corp. (NaBanco) v. VISA U.S.A., Inc., 596 F. Supp. 1231, 1253-54 (S.D. Fla. 1984), aff'd, 779 F.2d 592 (11th Cir.), cert. denied, 479 U.S. 923 (1986); Baxter, Bank Interchange of Transactional Paper: Legal and Economic Perspectives, 26 J.L. & Econ. 541, 574-78 (1983). Moreover, David Balto has pointed out how and why Sears' admission to VISA threatens that important form of competition. VOB 65 nn. 84 & 85.

[52] The AFSA's amicus brief accuses VISA of being disingenuous in claiming that it enacted By-law 2.06 out of an altruistic concern for the health of intersystem competition. Indeed, much of AFSA's brief is predicated on the proposition that such a concern is a mere pretext or "sham." ASFA Br. at 7-11. But VISA is no more altruistic than Sears and has not suggested otherwise. To the contrary, VISA's Opening Brief quite explicitly noted that:

(continued...)

III. SEARS CANNOT RELY ON THE SUPPOSED DISINCENTIVE EFFECT OF VISA'S BY-LAW.

Sears brief also relies extensively on its so-called "disincentive" theory: that VISA's rule not only limits intrasystem competition by excluding Sears (and American Express) but harms intersystem competition by inhibiting the development of other proprietary cards. However, there is no such "disincentive" effect -- not merely as a matter of evidence but as a matter of law -- and Sears could not complain about it if there were.

A. There Is No "Disincentive."

The initial problem with Sears' theory is that there is no "disincentive" to begin with. That is true in the sense that Sears introduced no evidence that anyone was actually dissuaded from taking any action as a result of VISA's by-law. See VOB 60.[53] It is also true in a more basic sense: VISA's by-law does not keep anyone (including Sears and American Express) out of the general purpose charge card market. In fact, it does not prevent, or inhibit, anyone from being in that market in whichever fashion (proprietary or system-member) they consider best for themselves. The by-law creates a "disincentive" only

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[52](...continued)

> VISA does not assert that its motive for excluding Sears was some public-spirited interest in preserving intersystem competition. Rather, VISA excluded Sears to avoid free-riding, an unlevel playing field, and the added costs that Sears would impose on VISA members by taking advantage of a brand and operating systems that it not only had done nothing to create but had chosen to compete against . . . . (VOB 63, emphasis added.)

Sears advances a similar argument with regard to the preamble to the Board resolution that adopted By-law 2.06. S. Br. 16. The point is equally wide of the mark. The concern for intersystem competition reflected there is not about preserving Sears' competitive vigor, but with the fact that permitting Sears to have the one-way benefits of a proprietary card (with its various advantages) as well as a VISA membership would give Sears an unfair competitive advantage that would harm intersystem competition to VISA's detriment.

[53] Sears attempts to fill that evidentiary void by referring to a list drawn up by a VISA employee of firms that might be capable of competing on their own. App. 1503. There is no evidence that any of those firms so much as considered starting a proprietary card (or that the list was ever seen by the VISA Board for that matter). Nor did Sears even take discovery from any of the listed firms to find out. It is also noteworthy that no other economist nor anyone else working in the field has even mentioned the supposed "disincentive" theory in any scholarly or other writing about the credit card industry. See App. 980-85.

in the sense that VISA has determined that it will not license its trademarks or share its other property with firms that have elected to go into system-level competition with it. The fact that choosing to become a McDonald's franchisee may disqualify you from also owning a Burger King franchise is not typically spoken of as a "disincentive." It is hard to be overly sympathetic to the "cruel" choice faced by prospective entrants into the general purpose charge card market: Enter with a new brand or use the trademark, facilities and merchant base of the leading brand. Firms in other markets rarely face such a "dilemma."

B. Sears May Not Assert the Disincentive Theory Since It Was Not Adversely Affected by It.

Sears' disincentive theory is premised on the supposedly adverse effect of VISA's by-law on intersystem competition. Sears' own claim, by contrast, is based on supposed harm to intrasystem competition. Thus, VISA's Opening Brief observed that Sears may not rely upon the supposedly adverse intersystem effects resulting from VISA's purported "disincentive" as a basis for its lawsuit demanding entry. See VOB 57-59.

Sears responds that the issue is not a matter of "standing," but "evidence": "Once a plaintiff has antitrust standing to challenge a particular restraint . . . it can . . . introduce evidence of any anticompetitive effects caused by the challenged restraint." S. Br. 46. As support for that proposition Sears cites Summit Health Ltd. v. Pinhas, 111 S. Ct. 1842 (1991), and this Court's decision in Reazin, 899 F.2d 951. S. Br. 47.

But Sears argument is theoretically wrong and the cases it relies on do not support its position. The controlling rule of law is that a party may only pursue an antitrust claim -- whether for damages or an injunction -- where "the harm claimed . . . corresponds to the rationale for finding a violation of the antitrust laws in the first place." Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 342 (1990) ("ARCO"); see also id. at 337-38; VOB 58-59. To the extent that the rationale Sears proffers against VISA's by-law is that it allegedly harms intersystem competition by creating a disincentive effect, Sears has no basis to pursue that claim, nor that rationale, because it has not been harmed by it. Put slightly differently, the "rule" that keeps Sears from offering another brand of VISA card is analytically separable from the rule that ostensibly prevents other firms from offering additional intersystem competition. (Indeed, it would be a perverse outcome if the need for more system-level competition became the engine for reducing it by admitting Sears to VISA. See pp. 24-26, supra.)

The problem, in short, is more than a question of "evidence," as the following example may demonstrate: Assume that Sears filed a suit in which the charging allegations were limited to the claim that VISA's by-laws created a disincentive for the creation of new proprietary cards. Sears plainly could not obtain an order admitting it to VISA based on that claim. In fact, its complaint would be dismissed immediately for lack of standing. ARCO, 495 U.S. at 342. Now assume that Sears filed a complaint alleging that VISA's by-laws harm both intrasystem competition (by excluding Sears) and intersystem competition (through its disincentive effect). Suppose, further, that at the summary judgment stage Sears was forced to concede that it had no evidence to support its "intrasystem" allegations. Could it nonetheless insist on going to trial on its "intersystem" (disincentive) evidence alone? Surely, it could not.[54]

Nor do the cases Sears relies on support its position. In both Reazin and Summit Health, the plaintiffs' point was that other parties, in addition to the plaintiffs, were affected by the challenged practice in the same way as the plaintiffs. Hence the effect of the rule on all of those parties was relevant in assessing the nature of the restraint. That is unquestionably correct, but beside the point. Thus, it would be perfectly appropriate for Sears to ask the jury to take into account the exclusion of American Express as well as itself

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[54] Since it would not be entitled to either damages or an injunction based on the disincentive effect on others, what would its claim be for? See ARCO, 495 U.S. at 342; VOB 58.

from VISA.[55] What Sears cannot do, however, is rely upon supposed competitive injury of a different type that is suffered only by others. ARCO, 495 U.S. at 339-40; Anago Inc. v. Tecnol Medical Prods., Inc., 792 F. Supp. 514, 519 (N.D. Tex.), aff'd, 976 F.2d 248 (5th Cir. 1992).[56]

IV. THE CLAIM BY AMICUS CURIAE AFSA THAT VISA'S BY-LAW IS A "NAKED" RESTRAINT IS UNTENABLE.

There remains the argument by amicus curiae American Financial Services Association that VISA's by-law is a naked restraint on competition. AFSA Br. 7, 17.[57] Both the substance of the argument and its source[58] could not be more improbable.

AFSA suggests that membership restrictions by an "open" joint venture can serve no legitimate ancillary or efficiency function. That is mystifying coming, as it does, after the Supreme Court's unanimous opinion in Northwest Stationers. More important, the argument overlooks entirely the fact that joint ventures would not be formed in the first place

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55 Similarly, if Sears could prove that intrasystem competition was affected by the prospective exclusion of other firms from VISA, it could offer that evidence, too, since it involves the same type of purported harm (and the same competitive rationale) as Sears' own claim.

56 In fact, Sears' own brief demonstrates that it "lacks standing" to assert its disincentive argument. In discussing VISA's Section 7 claim, Sears asserts that a party who would be a "beneficiary" of a particular practice "lacks standing" to complain about it. See S. Br. 61. That observation applies to Sears' disincentive argument since Sears scarcely would wish to encourage the creation of greater intersystem competition against itself in the general purpose charge card market.

57 AFSA also advances a number of the same arguments as Sears. Those points have been dealt with previously, though not necessarily with specific reference to AFSA. We have dealt specifically with AFSA's argument about VISA's alleged "sham" purpose to promote intersystem competition (see note 52, supra). We have also noted Judge Bork's considerably negative view of the Associated Press decision. See pp. 15-16, supra.

58 We respectfully invite the Court's attention to Judge Bork's discussion of antitrust law, economics and policy, including joint ventures, in The Antitrust Paradox which, we submit, bears little resemblance, either in tenor or in substance, to his argument for AFSA. Indeed, Judge Bork's enthusiasm for the joint venture form of industrial organization as a means of encouraging investment and innovation and his condemnation of Associated Press can scarcely be squared with his implicit argument that network joint ventures must admit any applicant unless to do so would somehow overtax the system. Judge Bork's writings -- both professorial and judicial -- are themselves precedent for rejection of that thesis. See, e.g., Paradox at 28, 52-53, 339-42, 434-39; Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 222-23 (D.C. Cir. 1986), cert. denied, 479 U.S. 1033 (1987).

if the participants did not have an expectation that they could retain the fruits of their risk-taking and innovation if their venture proved successful.[59] A "restraint" that does no more than reap the benefits of the joint venturers' risks and investment cannot be a naked restraint. That is no less true because the venture has elected to be open in its own interest in order to capture available network externalities. The apparent suggestion by amicus that a joint venture has the right to reap the fruits of its creations only so long as it uses them in a way that benefits some competitors' (or court's) version of efficiency is a mind-numbing assertion.

Efficiency, indisputably, plays an important role in joint venture cases. At the time the proposed venture is formed, it is appropriate to determine whether it is likely to yield efficiencies that are sufficient to justify the diminution in rivalry that is inherent in the decision of the venturers to cooperate, rather than compete, with one another within the limits and purposes of the venture. Similar questions may also be asked if the venture threatens to become overinclusive by taking in more members than is competitively reasonable given the possibility of effective single firm competition against the venture, or the potential for the formation of competing joint ventures.[60] However, the decision to let

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[59] Professor Areeda has addressed this precise point:

> [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. So has Judge Bork: "The integration of economic activities, which is indispensable to productive efficiency, always involves the implicit elimination of actual or potential competition. We allow it -- indeed should encourage it -- because the integration creates wealth for the community." Paradox at 28.

[60] And it is always appropriate to evaluate whether a particular limitation on the joint venturers' competition amongst themselves goes further than the integration needs of the venture require. Compare Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979) and NaBanco, 779 F.2d 592 (no, it doesn't) with NCAA, 468 U.S. 85 (yes, it does). See also Compulsory Access at 111-15 for a more elaborate examination of the same point.

the venture be formed necessarily implies the right to let the venturers reap the rewards of their undertaking. In antitrust terminology, such restrictions are inherently ancillary and, thus, lawful.[61] Once again Professor Areeda explains the point: "[A] well-considered decision legalizing the creation of a joint venture necessarily expresses approval of all that is inherent and reasonably ancillary to it." Treatise ¶ 1478 at 350-51.

V. SEARS FAILS TO REBUT VISA'S SHOWING THAT THE TRIAL COURT ERRED IN CONCLUDING THAT SEARS' ACQUISITION OF A PARTIAL OWNERSHIP INTEREST IN VISA DOES NOT VIOLATE SECTION 7 OF THE CLAYTON ACT.

Sears offers no substantive defense of the trial court's Section 7 analysis. Instead, it asserts that the court's ultimate finding "was not clearly erroneous, for the same reasons that the jury could (and did) find that MountainWest's continued membership in VISA is pro-competitive." S. Br. 57. That, of course, is somewhat of a caricature of Judge Benson's actual holding: that while "the probable harms to competition . . . outweigh the probable benefits," they do not do so "substantially" enough to violate Section 7. Opn. at 997.

Left unaddressed by Sears is VISA's argument that a proper market structure analysis yields a presumption of illegality and, therefore, a contrary result. Sears also fails to address VISA's argument that while Sears' proposed issuance of a VISA card does not constitute a "true merger," the changed competitive incentives inherent in its proposed plan require condemnation under the cases governing "incipient threats to competition" in the context of partial mergers. See VOB 70-71.

What is addressed, remarkably enough, is the thrice-repeated assertion that the trial court "got it wrong" even if (on Sears' view) it wound up in the right place. Most striking in this regard is Sears' argument that the Court "erroneously accepted VISA's assertion that MountainWest's membership in VISA should be analyzed as a horizontal relationship." S. Br. 60 n.66. Ignoring the history of system competition in this industry and the record

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[61] Subject, of course, to the same essential facility and monopolization limits that apply to economic actors generally. Olympia, 797 F.2d at 376 ("the monopolistic-refusal-to-deal cases qualify rather than refute the no-duty-to-help-competitors cases").

assembled on that subject (see VOB 4-15), Sears argues that its membership in VISA is "properly analyzed as a vertical relationship" since Discover card is not a horizontal competitor of VISA itself, only a competitor of VISA issuers. But however articulated, Sears' proposed issuance of a VISA card offers the potential for diminishing system competition between Discover and VISA on both the issuer and merchant sides of the business. See pp. 25-26, supra.

In all events, issue is joined on the merits of the Section 7 issues even if by Sears' silence. What remains are Sears' procedural arguments which the trial court rejected.

A. The Jury's Verdict Does Not Bar Judgment in VISA's Favor on Its Section 7 Counterclaim.

Sears argues that because the jury found that Sears' proposed issuance of a VISA Card was "procompetitive" under Section 1, Judge Benson was bound to accept and apply that finding in passing upon VISA's Section 7 counterclaim. That argument is wrong, as the District Court itself suggested (Opn. 998 n.52), for two separate reasons:

First, for collateral estoppel or "issue preclusion" to apply, the Court must be able to determine that the facts impliedly found by the jury are those which also govern the Section 7 analysis. That is impossible here. Sears argued at trial that By-law 2.06 harms competition in two different ways: (1) by depriving consumers of Sears' assertedly low-cost VISA card, and/or (2) by creating a disincentive to other potential issuers starting their own proprietary card systems. The case was permitted to go to the jury on both theories, and, for these purposes, a "general" verdict was rendered. App. 251-52. However, one simply cannot determine from the face of the verdict whether the jury's finding was based upon the first ground (which would be relevant to Section 7 analysis) or the second (which in no way implicates the competitive impact of the by-law upon Sears' own membership in VISA). Given that record, Sears' collateral estoppel argument is not only uncompelling,[62] but irrelevant.[63]

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[62] Glass v. United States Rubber Co., 382 F.2d 378, 384 (10th Cir. 1967); see also C.B. Marchant Co. v. Eastern Foods, Inc., 756 F.2d 317, 319 (4th Cir. 1985); In re Held, 734

(continued...)

Second, while Section 1 and Section 7 address similar competitive concerns, they are, in fact, distinct: Section 7 is an incipiency statute which does not involve the kind of balancing relevant to a Section 1 case. Accordingly, collateral estoppel cannot apply. See United Shoe Mach. Co. v. United States, 258 U.S. 451, 459-61 (1922).[64]

B. VISA's Section 7 Counterclaim Is Not Barred Because of Lack of Standing or FDIC Approval of Sears' Acquisition of MountainWest.

Sears' additional arguments were properly rejected by the District Court whose analysis, once again, is left unaddressed by Sears. First, the trial court held that, far from being "the primary beneficiary of the competitive decline" (S. Br. 61), VISA confronts potential injury in the form of the unfair advantage that would accrue to Sears as a VISA member that also is able to offer Discover, as well as lost security for competitively sensitive information. Those concerns plainly are sufficient to accord VISA standing. See Opn. 991-92 and the cases there cited.

Second, Sears argues that VISA's Section 7 claim is barred by 12 U.S.C. Section 1828(c)(7)(C) since Dean Witter's purchase of the failed MountainWest Savings & Loan from the RTC was subject to regulatory approval. S. Br. 61-62. But, as the District Court held in its August 1992 opinion (801 F. Supp. 517, 523-25), from which Sears has taken no appeal, the Bank Merger Act only grants protection from suits which challenge the merger "alone and of itself." VISA's claim challenges Sears' post-acquisition efforts to utilize MountainWest's trademark license as a means of participating in VISA's credit card program. Accordingly, as the District Court held, relying upon United States v. ITT

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[62](...continued)
F.2d 628, 629 (11th Cir. 1984); Tucker v. Arthur Andersen & Co., 646 F.2d 721, 728 (2d Cir. 1981).

[63] Monsour Med. Ctr. v. Heckler, 806 F.2d 1185, 1195 n.28 (3d Cir. 1986), cert. denied, 482 U.S. 905 (1987); cf. United States v. Sutton, 732 F.2d 1483, 1491-92 (10th Cir. 1984), cert. denied, 469 U.S. 1157 (1985).

[64] See also Commissioner v. Sunnen, 333 U.S. 591, 598-600 (1948); Guild Trust v. Union Pac. Land Resources Corp., 682 F.2d 208, 211-12 (10th Cir. 1982); Peterson v. Clark Leasing Corp., 451 F.2d 1291, 1292 (9th Cir. 1971).

Continental Baking Co., 420 U.S. 223 (1975), the Bank Merger Act does not prohibit the counterclaim. Sears conclusory postulates to the contrary are no substitute for analysis.

CONCLUSION

For the reasons set forth above and in VISA's Opening Brief the decision below should be reversed.

Dated: November 1, 1993

Respectfully submitted,

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PROOF OF SERVICE

I, Janice M. Knabe, declare as follows:

I am employed in the City and County of San Francisco; I am over the age of eighteen years and not a party to this action. My business address is 333 Bush Street, San Francisco, California 94104.

On November 1, 1993, I caused a true copy of **REPLY BRIEF OF APPELLANT VISA U.S.A. INC.** to be transmitted by facsimile electronic equipment and delivered by Federal Express to the following:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed at San Francisco, California this 1st day of November, 1993.

Janice M. Knabe

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