

DALE A. KIMBALL (1809)
CLARK WADDOUPS (3975)
HEIDI E. C. LEITHEAD (5102)
SCOTT R. RYTHOR (5540)
KIMBALL, PARR, WADDOUPS, BROWN & GEE
185 South State, Suite 1300
Salt Lake City, Utah 84111
Telephone (801) 532-7840

M. LAURENCE POPOFSKY
STEPHEN V. BOMSE
MARIE L. FIALA
JUDITH Z. GOLD
RENATA M. SOS
MARK A. OLSON
ROBERT G. MERRITT
SUSAN RICE
333 Bush Street
San Francisco, CA 94104-2878
Telephone (415) 772-6000

Attorneys for Defendant/Counterclaimant
VISA U.S.A. INC. and Counterclaimant
VISA INTERNATIONAL SERVICE ASSOCIATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

SCFC ILC INC. d/b/a	)	Case No. 2:91-CV-047 B
MOUNTAINWEST FINANCIAL,)	
	)	ANSWER TO FIRST AMENDED
	)	COMPLAINT AND COUNTERCLAIM
Plaintiff,)	
	)	(1) Federal Trademark
v.	)	Infringement
)	
VISA U.S.A. INC.,	)	(2) Antitrust (Acquisition
	)	Which May Substantially
Defendant.	)	Lessen Competition)
)	
	)	(3) Fraud
)	
VISA U.S.A. INC., a Delaware	)	(4) Unfair Trade Practices
corporation, and VISA INTERNATIONAL	)	(California Law)
SERVICE ASSOCIATION, a Delaware)	
corporation,)	

VISA'S ANSWER TO SCFC MOUNTAINWEST'S FIRST
AMENDED COMPLAINT AND COUNTERCLAIM

P-1235

Counterclaimants,	)	(5) In the Alternative:
	)	Breach of Contract and
v.	)	Implied Covenant of
	)	Good Faith and Fair
	)	Dealing
SEARS ROEBUCK & CO., an Illinois)	
corporation, SEARS CONSUMER	)	(6) Declaratory Judgment
FINANCIAL CORPORATION, an Illinois)	
corporation, and SCFC ILC INC.)	
d/b/a MOUNTAINWEST FINANCIAL,	)	DEMAND FOR JURY TRIAL
)	
Counterdefendant.)	
)	

Defendant VISA U.S.A. Inc. ("VISA") answers as follows the First Amended Complaint of SCFC ILC Inc. d/b/a MountainWest Financial ("SCFC MountainWest") dated December 27, 1991:

VISA admits, denies, and alleges as to each numbered paragraph of SCFC MountainWest's Complaint as follows:

1. Denies.
2. Denies each allegation, except admits that venue is proper under 28 U.S.C. § 1391(b) and (c) and 15 U.S.C. §§ 15(a), 22.
3. Admits.
4. Admits.
5. Denies each allegation, except admits that this case concerns **payment** cards that are used to purchase a wide variety of goods and **services** and that VISA, MasterCard and Discover cards compete with each other and with numerous other payment devices.

6. Denies each allegation referring to VISA, except admits that some members of VISA also issue MasterCard cards, and that VISA has adopted By-laws that exclude from VISA membership Sears Roebuck & Co. and its subsidiaries or affiliates (hereinafter collectively referred to as "Sears"); as to all other allegations VISA is without knowledge or information sufficient to form a belief as to their truth and on that basis denies. (Hereinafter, denials on this basis shall be shortened to "Denies for lack of information.")

7. Denies each allegation, except admits and affirmatively alleges that Diners Club and Carte Blanche cards compete against the issuers of the VISA card and against numerous other types of payment devices and that the issuers of Carte Blanche and Diners Club cards, or their affiliates, also issue VISA cards.

8. Denies each allegation, except admits and affirmatively alleges that VISA, MasterCard, Diners Club and Carte Blanche cards, as well as Discover cards, all compete in the market with all other payment devices, that approximately 6,000 VISA members offer cards which have different characteristics, different payment terms, different services and other features, and that total VISA cards issued in the United States by all VISA members combined is in excess of 136 million cards.

9. Denies.

10. Denies each allegation, but affirmatively alleges that Discover, American Express, and Optima cards compete with other payment devices, including, but not limited to, VISA cards; that the standard American Express card does not offer credit terms and is used for travel and related expenses, as well as merchandise and other purchases; that Discover card was introduced by Sears through the Greenwood Trust Company in 1986 and that Sears has reported profits from the Discover card in 1989 in excess of \$80 million and in 1990 in excess of \$100 million; that Discover does not charge an annual fee in some states and offers rebates based on the amount of purchases made with the Discover card; and that VISA has a larger merchant base than any other bank card and that Sears is seeking access to the VISA merchant base without having helped to create it.

11. Denies.

12. Denies.

13. Denies each allegation and specifically denies that SCFC MountainWest is or has been an approved member of VISA in good standing, although it has purchased certain assets from the Resolution Trust Corporation ("RTC"), which it claims include VISA membership rights, and has applied for membership in VISA, which VISA has not and cannot approve under VISA By-laws and Operating

Regulations. VISA further admits that MountainWest Savings & Loan Association was a past member of VISA and that MountainWest Savings & Loan Association suffered serious financial problems and was placed into federal government receivership.

14. Denies for lack of information, except admits that FIRREA and its legislative history speak for themselves and that MountainWest Savings & Loan Association was placed in receivership by the RTC.

15. Denies for lack of information.

16. Denies for lack of information, except admits that the Purchase and Assumption Agreement dated May 25, 1990 speaks for itself.

17. Denies each allegation, except admits that the Purchase and Assumption Agreement dated May 25, 1990 speaks for itself and alleges that SCFC MountainWest gave no notice to the RTC that SCFC MountainWest was not a qualified purchaser of the VISA membership under VISA rules.

18. Denies each allegation, except admits that VISA's By-laws speak for themselves.

19. Denies each allegation, except admits that SCFC MountainWest tendered to VISA certain payments.

20. Admits, but alleges that VISA's authorization to print the new "MountainWest Financial" VISA cards was given only because SCFC MountainWest concealed its relationship to Sears.

21. Denies each allegation, except admits that SCFC MountainWest provided some information to VISA on the dates listed and those documents speak for themselves, and alleges that SCFC MountainWest never disclosed its affiliation with Sears, including Sears Consumer Financial Corporation, that SCFC MountainWest and Sears were aware of VISA's policies excluding Sears Roebuck & Co. or any of its affiliates or subsidiaries from VISA membership, and that SCFC MountainWest nevertheless signed an agreement affirmatively stating that it would be bound by all requirements of membership as stated in the By-laws and Operating Regulations of VISA.

22. Denies for lack of information.

23. Denies for lack of information.

24. Denies for lack of information.

25. Denies for lack of information, but affirmatively alleges that Sears began to study the viability of offering a VISA card at least as early as January 1990 and expended \$1 million studying the proposed VISA card program.

26. Denies for lack of information, except admits that Sears has claimed its Prime Option card will have no annual fee,

that Exhibit 33 to SCFC MountainWest's Motion for a Preliminary Injunction was submitted to the Court in camera, and that Exhibit 33 included limited information about the purported features of the Prime Option card.

27. Denies for lack of information, except admits that SCFC MountainWest originally claimed it would solicit 6.5 million potential card holders and now claims it will solicit 10.9 million potential card holders.

28. Denies for lack of information, except admits that Sears has substantial experience in the credit card business and is fully capable of issuing a Prime Option card that does not free ride upon VISA or use the VISA trademark, goodwill, trade secrets and expertise, and other proprietary information or merchant base.

29. Denies for lack of information.

30. Denies.

31. Denies.

32. Denies each allegation, except admits that VISA adopted By-law 2.06 in June 1989, that the language of By-law 2.06 speaks for itself, that in June 1989 VISA rejected the application of a wholly-owned subsidiary of Sears known as Greenwood Trust, and denies for lack of information that MasterCard declined to admit a Sears-affiliated bank as a member of MasterCard.

33. Denies each allegation, except admits that some members of VISA also issue MasterCard, Diners Club and Carte Blanche cards.

34. Denies each allegation, except admits that Universal Bank issues AT&T Affinity VISA cards on terms defined by AT&T, and that the change made to VISA By-laws and Operating Regulations on or about October 8, 1990 and announced October 10, 1990 speak for themselves.

35. Admits.

36. Denies each allegation, except admits that on November 30, 1990, VISA announced certain policies which speak for themselves.

37. Denies each allegation, except admits that on December 4, 1991, VISA announced certain policies which speak for themselves.

38. Denies each allegation, except admits that in January 1991 VISA received a request from Discover Card Services to authorize DataCard to fill an order from Discover Card Services to print Prime Option cards with the VISA trademark and trade dress on the cards and VISA refused to authorize the use of its trademark and trade dress pursuant to its By-laws and Operating Regulations.

39. Denies each allegation, except admits that Roy Worley told Phil Ware on or about January 11, 1991 that VISA needed

more information about the relationship between SCFC MountainWest and Sears and that the request implicated VISA By-law 2.06 which prohibits membership in VISA by Sears.

40. Denies.

41. Denies.

42. Denies.

43. Denies.

44. Denies each allegation, except admits that Ford Motor, General Electric Corporation, and J.C. Penney Company currently own institutions that issue VISA cards.

COUNT I

CONCERTED REFUSAL TO DEAL (FEDERAL)

45. VISA incorporates by reference its responses to paragraphs 1 through 44 and realleges them as if set forth fully herein.

46. Denies each allegation, except admits that VISA members and SCFC MountainWest all compete in the market for all payment devices.

47. Denies.

48. Denies.

49. Denies.

50. Denies.

51. Denies.

52. Denies.

COUNT II

UNREASONABLE RESTRAINT OF TRADE (FEDERAL)

53. VISA incorporates by reference its responses to paragraphs 1 through 52 and realleges them as if set forth fully herein and denies all other allegations in this paragraph 53.

54. Denies.

55. Denies.

56. Denies.

COUNT III

CONCERTED REFUSAL TO DEAL (STATE)

57. VISA incorporates by reference its responses to paragraphs 1 through 56 and realleges them as if set forth fully herein.

58. Denies.

59. Denies.

60. Denies.

COUNT IV

UNREASONABLE RESTRAINT OF TRADE (STATE)

61. VISA incorporates by reference its responses to paragraphs 1 through 60 and realleges them as if set forth fully herein.

62. Denies.

63. Denies.

64. Denies.

COUNT V

UNFAIR PRACTICE

65. VISA incorporates by reference its responses to paragraphs 1 through 64 and realleges them as if set forth fully herein.

66. Denies.

67. Denies.

COUNT VI

VIOLATION OF THE HOMEOWNER'S LOAN ACT

68. VISA incorporates by reference its response to paragraphs 1 through 67 and realleges them as if set forth fully herein. VISA affirmatively alleges that this Count VI was the subject of a Memorandum Decision and Order of the United States District Court for the District of Utah ("the Court") entered in

this case on February 15, 1992, after a hearing on SCFC MountainWest's self-styled Motion for an Order Enforcing Its Rights Under Federal Banking Law and VISA's Motion to Dismiss.

69. Admits.

70. Denies each allegation, but affirmatively alleges that the Court found that by enacting Section 471 Congress did not create a private cause of action in RTC transferees, including SCFC MountainWest.

71. Denies, but affirmatively alleges that the Court found that Section 471 is not a special relief bill to help RTC transferees, including SCFC MountainWest.

72. Denies, but affirmatively alleges that the Court found that in enacting Section 471 Congress intended to preserve the terms of the original contract with the failed institution, that Section 471 gives the RTC transferee the same rights subject to the same obligations and other terms and conditions as the failed institution had, that By-law 2.06 is "a material term or condition" of SCFC MountainWest's "original obligation" within the meaning of Section 471, and that MountainWest failed to comply with that material term or condition.

73. Denies each allegation, but realleges the response to paragraph 72 and affirmatively alleges that the Court found that because of MountainWest Financial's failure to comply with a

material term and condition of its original obligation to VISA, VISA's refusal to provide services to SCFC MountainWest is within the exception to Section 471.

74. Denies, but realleges the responses to paragraphs 72 and 73 and affirmatively alleges that SCFC MountainWest has failed to comply with By-laws 2.01, 2.02, 2.03, 2.08 and 2.10(b) and (e) and Operating Regulation 10.4B.

75. Denies, but affirmatively alleges that the Court dismissed this Count VI for having failed to state a claim on which relief may be granted.

76. Denies.

COUNT VII

BREACH OF CONTRACT

77. VISA incorporates by reference its responses to paragraphs 1 through 76 and realleges them as if set forth fully herein. VISA affirmatively alleges that this Count VII was the subject of a Memorandum Decision and Order of the Court entered in this case on February 15, 1992, after a hearing on SCFC MountainWest's self-styled Motion for an Order Enforcing Its Rights Under Federal Banking Law and VISA's Motion to Dismiss.

78. Denies, but affirmatively alleges that the Purchase and Assumption Agreement dated May 25, 1990, speaks for itself, and that the Court held any contractual rights transferred to SCFC

MountainWest were transferred subject to all terms and conditions of VISA's original contract with MountainWest Savings.

79. Denies each allegation, but affirmatively alleges that FIRREA speaks for itself, and that the Court held that Section 471 gives an RTC transferee the same rights subject to the same obligations, terms or conditions of the original contract with the failed institution.

80. Denies each allegation, but realleges the response to paragraph 79 and affirmatively alleges that the Court held that By-law 2.06 is a material condition or term of the original contract, that under By-law 2.06 SCFC MountainWest was and is ineligible for membership, as SCFC MountainWest was aware, that SCFC MountainWest breached By-law 2.06, and that under the terms of the original contract VISA may exclude SCFC from membership in the VISA system. VISA further alleges that SCFC MountainWest gave no notice to the RTC that SCFC MountainWest was not a qualified purchaser of a VISA membership, that, because of its ineligibility, SCFC MountainWest is not a VISA member, and that SCFC MountainWest has breached By-laws 2.01, 2.02, 2.03, 2.08 and 2.10(b) and (e) and Operating Regulation 10.4B.

81. Denies each allegation, but realleges the response to paragraphs 79 and 80 and affirmatively alleges that, assuming SCFC MountainWest is a VISA member, VISA may refuse to provide

services to MountainWest under the terms of the original contract, because SCFC MountainWest failed to comply with material terms and conditions of that contract.

82. Denies, but affirmatively alleges that the Court held that the sole unresolved issue of material fact, which precluded its dismissal of this Count VII for failure to state a claim, is the legality and enforceability under state and federal antitrust laws of the contract terms prohibiting Sears' membership in the VISA system.

83. Denies, but realleges the response to paragraphs 79, 80 and 81.

84. Denies each allegation.

VISA further pleads as follows:

FIRST AFFIRMATIVE DEFENSE: FAILURE TO STATE CLAIM

85. The Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE: STANDING

86. SCFC MountainWest lacks standing to assert the claims set forth in its Complaint.

THIRD AFFIRMATIVE DEFENSE: JURISDICTION

87. This Court is without jurisdiction over the subject matter alleged in the Complaint.

FOURTH AFFIRMATIVE DEFENSE: LACHES

88. SCFC MountainWest's claims for injunctive relief and each of them are barred by the laches of SCFC MountainWest and Sears by reason of their failure to commence this action in a timely manner.

FIFTH AFFIRMATIVE DEFENSE: UNCLEAN HANDS

89. SCFC MountainWest's claims for injunctive relief and each of them are barred by the failure of SCFC MountainWest and Sears to act equitably by failing to disclose to the RTC that SCFC MountainWest was not a qualified purchaser of the VISA membership under VISA rules; by failing to disclose SCFC MountainWest's ownership by Sears; by the efforts of Sears and SCFC MountainWest to proceed with the Prime Option program without disclosing to VISA that their conduct would be in violation of VISA policy and Operating Regulations; and by the efforts of SCFC MountainWest and Sears to avoid any disclosure to VISA of the Prime Option program until the eve of its introduction to the market place.

SIXTH AFFIRMATIVE DEFENSE:

FAILURE OF CONDITIONS PRECEDENT AND SUBSEQUENT

90. SCFC MountainWest, as a rechartered institution and new legal entity, was an applicant subject to all VISA By-laws and Operating Regulations. VISA's Operating Regulations required SCFC

MountainWest to execute a new membership agreement, which SCFC did. By executing the agreement SCFC MountainWest agreed "to be bound by and perform all requirements of membership as stated in the present By-laws and Operating Regulations of VISA U.S.A. and future amendments," and certified that "it met all requirements for membership."

91. VISA By-Law 2.06 provides that VISA "shall not accept for membership any applicant which is issuing, directly or indirectly, Discover cards . . .; an applicant shall be deemed to be issuing such cards if its parent, subsidiary or affiliate issues such cards."

92. VISA By-law 2.08 provides, "Membership in the corporation shall not be transferable or assignable, whether by sale, consolidation, merger or otherwise, except as expressly provided in these By-Laws."

93. Under By-laws 2.06 and 2.08 SCFC MountainWest was and is ineligible for membership and not a qualified purchaser from the RTC of MountainWest Saving's VISA portfolio, because SCFC MountainWest's affiliate, Greenwood Trust Company, is the issuer of the Discover card.

94. By acquiring MountainWest Saving's VISA portfolio, SCFC MountainWest breached a condition precedent to the existence of a contract with VISA and SCFC MountainWest's membership in the

VISA system. SCFC MountainWest is not a member of the VISA system and possesses none of the rights of membership in the VISA system.

95. Operating Regulation 10.4B provides, "No member may use the Marks of the American Express Company, MasterCard International, Sears Roebuck and Company, or the subsidiaries or affiliates of these entities on Visa Cards. . . ."

96. By issuing VISA cards bearing the Mark "MountainWest Financial," SCFC MountainWest, assuming it is a VISA member, breached, among other things, Operating Regulation 10.4B, which is a condition subsequent of SCFC MountainWest's contract with VISA.

SEVENTH AFFIRMATIVE DEFENSE:

FRAUD IN THE INDUCEMENT

97. SCFC MountainWest, as a rechartered institution and new legal entity, was an applicant subject to all VISA By-laws and Operating Regulations. VISA's Operating Regulations required SCFC MountainWest to execute a new membership agreement, which SCFC did. By executing the agreement SCFC MountainWest agreed "to be bound by and perform all requirements of membership as stated in the present By-laws and Operating Regulations of VISA U.S.A. and future amendments," and certified that "it met all requirements for membership."

98. VISA By-Law 2.06 provides that VISA "shall not accept for membership any applicant which is issuing, directly or

indirectly, Discover cards . . .; an applicant shall be deemed to be issuing such cards if its parent, subsidiary or affiliate issues such cards."

99. VISA By-law 2.08 provides, "Membership in the corporation shall not be transferable or assignable, whether by sale, consolidation, merger or otherwise, except as expressly provided in these By-Laws."

100. Under By-laws 2.06 and 2.08 SCFC MountainWest was and is ineligible for membership and not a qualified purchaser from the RTC of MountainWest Saving's VISA portfolio, because SCFC MountainWest's affiliate, Greenwood Trust Company, is the issuer of the Discover card.

101. On or about December 19, 1988, Greenwood Trust Company, the wholly-owned Sears subsidiary that issues the Discover card, applied to become a proprietary member of VISA. On or about June 5 and 6, 1989 VISA's Board of Directors rejected Greenwood's application and amended its By-law 2.06 in part to read as set forth in paragraph 98. By letter dated June 26, 1989, VISA's General Counsel, Mr. Bennett R. Katz, notified Sears of the VISA Board's rejection of Greenwood's application and of its amendment of By-law 2.06. By letter dated June 28, 1989, MountainWest Savings was also notified of amended By-law 2.06 and of VISA's

prohibition against admitting competitors into the VISA joint venture.

102. Sears subsequently formed SCFC MountainWest as a newly chartered industrial loan corporation under Utah law. SCFC MountainWest thereafter purchased from the RTC the assets of MountainWest Savings, purportedly including its VISA membership and portfolio. In June 1990 VISA, acting in accordance with its standard practice for rechartering members who had been taken over by the FDIC or RTC, requested SCFC MountainWest to submit an application for VISA membership. In July 1990 MountainWest inaccurately advised VISA by telephone that the institution would not be rechartered and failed to disclose its relationship to Sears. On September 27, 1990, SCFC MountainWest filed the executed application form containing the agreement and certification alleged in paragraph 97. At the top of the form, SCFC MountainWest had typed the legend: "Note: Updating existing membership information. Not a new application."

103. On several occasions in 1990, SCFC MountainWest requested and VISA gave its permission for SCFC MountainWest to print cards bearing the SCFC MountainWest mark, and from time to time sent SCFC MountainWest confidential or secret proprietary information. In addition, SCFC MountainWest tendered to VISA certain payments.

104. Assuming without admitting that the conduct alleged in paragraph 103 constituted an acceptance by VISA of SCFC MountainWest's application, that acceptance was made by VISA acting in good faith and in reasonable reliance upon representations and omissions by SCFC MountainWest which SCFC MountainWest knew were false, and which SCFC MountainWest made with the intent that VISA rely upon them.

105. But for SCFC MountainWest's representations and omissions, including without limitation those alleged in paragraphs 97 and 102, VISA would have immediately notified SCFC MountainWest that it had no membership rights in VISA, would have immediately stopped the delivery of confidential or secret VISA information to SCFC MountainWest, would have immediately demanded the return of any and all such information already provided to SCFC MountainWest, would have taken immediate steps to prevent SCFC MountainWest from issuing and/or processing VISA cards and transactions, and would have immediately returned each tendered payment to SCFC MountainWest, subject to an agreement by VISA and SCFC MountainWest permitting SCFC MountainWest to maintain its pre-existing 6,000 card VISA program in exchange for its payment to VISA of such dues as were required to maintain that program.

106. As a direct and proximate result of SCFC MountainWest's fraud, SCFC MountainWest has damaged VISA in an

amount to be proven at trial. In addition, as a direct and proximate result of SCFC MountainWest's fraud, Sears -- a competitor of VISA's -- has come into possession of highly confidential VISA information and secrets to the detriments of VISA.

EIGHTH AFFIRMATIVE DEFENSE:

ILLEGALITY

107. Assuming that a contract has arisen between SCFC MountainWest and VISA, which VISA denies, the contract is void for illegality because it will substantially lessen competition between VISA and Sears' Discover credit card networks (sometimes referred to as "systems" or "brands") and will tend to create a monopoly in the nationwide market for general purpose credit card services in violation of 15 U.S.C. § 18 and parallel Utah state law.

COUNTERCLAIM

Pursuant to Fed. R. Civ. P. 13, 19, and 20, counterclaimants VISA U.S.A. Inc. ("VISA") and VISA International Service Association ("VISA International") complain of counterdefendants SCFC ILC Inc. d/b/a MountainWest Financial ("SCFC MountainWest"), Sears Roebuck & Co. ("Sears Roebuck") and Sears Consumer Financial Corporation ("Sears Financial") (counterdefendants are hereinafter sometimes collectively referred to as "Sears") and allege as follows:

INTRODUCTORY STATEMENT

108. In an effort to illegally capitalize on the VISA name and the goodwill built up in the VISA joint venture, Sears has resorted to subterfuge. Rather than marketing its new "Prime Option" credit card program as a Sears' card (or as a "Discover" card) program, Sears began plans to market Prime Option as a VISA card program -- without informing VISA and without informing the federal Resolution Trust Corporation ("RTC"), the federal receiver from which Sears claims to have purchased VISA membership. But Sears' attempt to acquire the VISA membership of a failed Utah loan corporation through the RTC was fraught with fraud, is undisguised trademark infringement in all events, and violates federal antitrust laws.

109. Specifically, these counterclaims allege trademark infringement and related claims arising out of SCFC MountainWest's unlicensed and unauthorized use of the VISA marks in connection with its credit card business. MountainWest Savings & Loan Association ("MountainWest Savings") had been a small VISA member in good standing prior to financial difficulties and being placed in receivership by the RTC. Thereafter the RTC sold the assets of MountainWest Savings, including (according to Sears) its VISA membership and its small VISA card portfolio, to SCFC MountainWest, a newly chartered Utah industrial loan corporation and a wholly

owned subsidiary of Sears Roebuck, which also owns a competing credit card program, known as Discover. SCFC MountainWest's continued use of the VISA marks after the acquisition, and Sears' desire to offer a new VISA card under the name "Prime Option" violates provisions of VISA's By-laws and Operating Regulations which (1) prohibit the transfer or assignment of membership in the VISA joint venture; (2) prohibit a business which owns or issues competing credit cards (specifically including Discover and American Express cards) from also issuing VISA cards; and (3) prohibit the placement on a VISA credit card of a trademark owned by Sears or any of its subsidiaries or affiliates. SCFC MountainWest's use of the VISA marks constitutes trademark infringement. First, SCFC MountainWest did not, as Sears contends, become a VISA member by virtue of the RTC sale. Notwithstanding the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 103-73, 103 Stat. 183 (1989) ("FIRREA"), VISA's rules expressly prohibit the sale or assignment of membership in the joint venture. Accordingly, non-member SCFC MountainWest's unlicensed use of the VISA marks constitutes infringement. Second, even if SCFC MountainWest became a VISA member by virtue of the RTC sale, the use of Sears' marks on VISA cards contravenes, inter alia, VISA Operating Regulation 10.4B, a rule applicable to members which prohibits the placement of a VISA

mark on a card with a mark owned by a competitor. Because compliance with VISA's rules is an express condition to use of the VISA marks, even if a member, SCFC MountainWest's activities are unlicensed and constitute a breach of contract. Finally, even if SCFC MountainWest could prove that it otherwise is a VISA member in good standing, VISA may exercise its rights under its rules to terminate the membership of a competitor.

110. Sears' unlicensed and unauthorized use of the VISA marks has allowed Sears to appropriate the value of the VISA name and goodwill which has been created by the VISA joint venture at considerable expense to VISA International and VISA and their members and to take advantage of VISA's expertise and other proprietary assets and information. Sears' actions have damaged the value of VISA's marks and, unless restrained from using those marks under the pretense of membership or otherwise, Sears will further impair the value of VISA's marks and the goodwill which VISA and its members have created in these marks through their efforts.

111. These counterclaims also challenge the deceptive and illegal efforts by Sears and its affiliates to become a member of VISA and thereby substantially lessen competition between VISA and its members and Sears' Discover card program. Although the Discover card program has enjoyed considerable success, Sears

prefers to become a VISA member and to issue a new line of Prime Option credit cards bearing the well-known VISA trademark, rather than to continue competing against the VISA joint venture by issuing Prime Option as either a form of "Discover" or "Sears" credit card. Along with membership, Sears seeks the right to vote as a VISA member, to receive dividends from profits generated by the bona fide members of the joint venture, to review VISA's confidential and proprietary information (including strategies to compete against the Discover card), and even eligibility to sit on VISA's Board of Directors. Sears asserts that the addition of a Sears-owned bank to the over 6,000 financial institutions which already compete to issue VISA credit cards to cardholders will be salutary to competition within the VISA system -- competition sometimes referred to as "intrasystem" competition. But the merging of an "intersystem" (or "interbrand") competitor (in this case the owners of the Discover card program) with VISA is far more harmful to the type of competition that the antitrust laws were designed to protect than the exclusion of Sears as an additional VISA card-issuer. Sears' attempt to acquire membership and ownership in VISA threatens to substantially lessen competition in violation of the Clayton Act, 15 U.S.C. § 18.

JURISDICTION

112. The Court has jurisdiction over these claims and the parties hereto under Rules 13, 19, and 20 of the Federal Rules of Civil Procedure. The claims arise out of the same transactions and occurrences which are the subject matter of the Complaint, and Sears and each of them have similar interests in their resolution. These claims present a federal question under 28 U.S.C. §§ 1331, 1338(a) and 15 U.S.C. § 4, in that they arise under the laws of the United States, including its trademark laws, 15 U.S.C. §§ 1051 et seq.; and antitrust laws, 15 U.S.C. § 18. The Court also has jurisdiction under 28 U.S.C. § 1332 in that there is complete diversity between the parties and the amount in controversy exceeds \$50,000. The Court has supplemental jurisdiction over the state law claims under 28 U.S.C. § 1337 and under 28 U.S.C. § 1338(b) in that those claims are joined with substantial and related claims under federal law and under the principles of pendent jurisdiction.

PARTIES

113. VISA International is an international membership organization incorporated under the laws of the State of Delaware, with its principal place of business in the City and County of San Mateo, California. VISA International is the owner of the entire right, title and interest in the "VISA" and the "BANDS DESIGN" trademarks and service marks, and the valid, subsisting and

uncancelled federal service mark registrations therefor numbered 839,744; 913,548; 980,571; 1,065,272; 1,071,114; 1,152,655; 1,180,479; and 1,218,611, the California trademark registrations numbered 75636 and 76269, and the California servicemarks numbered 36 and 5971. True and correct copies of registered federal marks numbered 1,065,272; 1,071,114; and 1,152,655 and of registered California marks numbered 75636 and 5971 are attached hereto as Exhibits A through E.

114. VISA is a corporation incorporated under the laws of the State of Delaware, with its principal place of business in the City and County of San Mateo, California. VISA is a joint venture among approximately 19,000 United States financial institutions, including commercial banks, savings banks, savings and loan associations and credit unions (hereafter referred to as "banks"). VISA is a group member of VISA International and directly administers and supports the United States VISA credit card and travelers cheque programs. VISA's members have devoted substantial time, effort and money to developing the VISA joint venture and promoting the VISA name and marks. As a result of these efforts over a number of years, the VISA name and associated marks have become well-known and highly respected and the VISA name and marks have acquired enormous goodwill. The VISA card is now accepted by over 2.5 million merchants throughout the United States

whose display of the VISA name and logo signifies their willingness to accept cards issued by VISA members as payment for goods and services in lieu of cash, checks, travelers checks and other competing payment cards.

115. On information and belief, VISA and VISA International allege that Sears Roebuck is an Illinois corporation with its principal place of business in Riverwoods, Illinois. Sears Roebuck owns and operates retail stores throughout the United States and, through numerous corporate subsidiaries and affiliates, is engaged in a variety of other businesses.

116. On information and belief, VISA and VISA International allege that Sears Financial is an Illinois corporation with its principal place of business in Riverwoods, Illinois. Sears Financial is a wholly-owned subsidiary of Sears Roebuck and is responsible for, among other things, Sears' credit card business. Greenwood Trust Co. is a wholly-owned subsidiary of Sears Financial and issues the Discover card to millions of credit card customers.

117. On information and belief, VISA and VISA International allege that SCFC MountainWest is a Utah industrial loan corporation with its principal place of business in Sandy, Utah. SCFC MountainWest is a wholly-owned subsidiary of Sears Financial. SCFC MountainWest purportedly purchased the assets of

MountainWest Savings, a federally insured savings and loan corporation, from the RTC on or about May 25, 1990, without notice to VISA and without disclosing to the RTC that SCFC MountainWest was not a qualified purchaser of the VISA membership under VISA rules.

118. Sears Roebuck and its affiliates and subsidiaries act in concert under the direction and control of Sears Roebuck, the parent company, and in practice function as a single entity.

119. Sears operates a successful credit card program, the Discover card, which competes with members of the VISA joint venture. Since its inception in 1985, the Discover card program has become a profitable enterprise. At present, Sears enjoys over \$8.5 billion in Discover card receivables. With approximately 37 million cardholders and 1.25 million participating merchants, the Discover card program has become one of the largest payment card programs in the United States.

THE VISA CREDIT CARD SYSTEM

120. VISA is a joint venture among licensed member financial institutions which enter into contractual relationships with cardholders and with merchants who accept the VISA card as payment for goods and services. VISA's Board of Directors are elected by VISA member banks and establish common rules which enable the VISA system to function. Those rules provide that cards

bearing VISA's marks may be issued only by licensed member financial institutions. Similarly, VISA charge drafts may be accepted for processing and payment only by licensed member financial institutions that contract with merchants for such processing and payment. Only duly organized and regulated financial institutions which have agreed to abide by VISA's rules may become members of VISA and thereby become licensed to use VISA's marks.

121. VISA enjoys a highly favorable reputation among merchants who have agreed to accept cards bearing its marks and with the general public to whom VISA cards are issued. The "VISA" and "BAND DESIGN" marks have been extensively used, advertised and promoted throughout the United States for many years in association with the financial services offered by VISA members. VISA and its members have built up extensive goodwill in connection with the services offered to the public throughout the United States under the "VISA" and "BAND DESIGN" marks. By reason of VISA use, advertising and promotion of the "VISA" marks, the marks have become well and favorably known to the public and the marks have come to be recognized as identifying VISA and the services offered its members. VISA is charged with the responsibility of protecting the marks and the integrity and reputation of the system for the benefit of its members.

122. Pursuant to VISA's By-laws and Operating Regulations, a licensed member may act in the capacity of an "issuing bank" by issuing credit cards bearing the VISA name and marks to consumers. Each credit card bears an identification number that identifies the member issuing bank. A licensed member additionally may act in the capacity of a "merchant bank" (sometimes referred to as an "acquirer") by entering into agreements with merchants wishing to accept credit cards bearing the VISA trademarks. Many VISA members act as both card-issuers and merchant banks and compete with each other to provide credit card services to VISA cardholders and merchants. Over 6,000 autonomous financial institutions compete with one another to provide VISA credit card services to the cardholder and/or the merchant. VISA card-issuers compete against one another through low-fee or no-fee credit cards, cash back or credit rebates on purchases, interest rates, service, offering frequent flyer miles or discount hotel and motel room rates, and a myriad other options designed to attract customers. Similarly, VISA acquirers compete with each other by offering low fees to merchants (known as "merchant discount fees") for credit card processing and handling services.

123. In addition to this "intrasystem" competition, VISA's member banks also compete with other payment mechanism

providers, including with other card programs such as American Express and the Discover card. This "intersystem" competition enables consumers to choose from a variety of check, credit card and other devices -- in lieu of cash -- to pay for goods and services. Consumers may choose among the package of VISA services offered by competing VISA banks and/or the competing services offered by proprietary credit card businesses, automated teller machine ("ATM") networks, debit card and travelers check programs and so forth. Often, consumers choose to carry several different forms of payment devices: perhaps several credit cards, an ATM card and a checkbook. Interbrand competition means that many businesses, including the VISA joint venture and Sears' Discover card, compete to be among the consumer's choices.

FACTS GIVING RISE TO THIS DISPUTE

124. Unlike VISA, the Discover card program is administered by a single corporate group: Sears Roebuck and its corporate subsidiaries. The Discover card program is not comprised of various independent member banks; rather, all Discover cards are issued by the Greenwood Trust Company of New Castle, Delaware ("Greenwood"), a wholly-owned Sears subsidiary.

125. VISA's rules contain a long-standing prohibition against the placement of an interbrand competitor's trademarks on the VISA credit card. Since 1986, VISA has prohibited the

placement of marks owned by MasterCard International, American Express and Sears Roebuck, or their subsidiaries or affiliates, on the VISA card. Operating Regulation 10.4B provides in relevant part:

No member may use the Marks of the American Express Company, MasterCard International, Sears, Roebuck and Company, or the subsidiaries or affiliates of these entities on Visa Cards.

126. On or about December 19, 1988, Greenwood applied to become a proprietary member of VISA. As such, Greenwood would have had the right to issue VISA cards, act as a merchant bank, receive dividends generated from the profits of VISA members (who are direct competitors of the Discover card issued by Sears through Greenwood), vote on Board membership and the sale or dissolution of the joint venture, sit on VISA's Board of Directors, and have access to many of VISA's operating, strategic and marketing plans (including competitive strategies against the Discover card) and to VISA's expertise and proprietary and confidential information. Greenwood sought to participate in the VISA credit card joint venture, while at the same time it wished to compete directly against the members of the VISA joint venture through its proprietary Discover card program.

127. On or about June 5 and 6, 1989, VISA's Board of Directors rejected Greenwood's application and passed the following resolution amending its By-law 2.06:

"ELIGIBILITY OF COMPETITORS"

Greenwood Trust Company has made application for Principal membership in the corporation. Greenwood Trust Company is the issuer of Discover cards and has no intention of converting that program; rather, they intend to issue both Discover cards and Visa Cards. In order to preserve and enhance interbrand competition, and upon motion duly made, seconded and unanimously carried, it was RESOLVED, that. . .

if permitted by applicable law, the corporation shall not accept for membership any applicant which is issuing, directly or indirectly, Discover cards or American Express cards, or any other cards deemed competitive by the Board of Directors; an applicant shall be deemed to be issuing such cards if its parent, subsidiary or affiliate issues such cards.

128. By letter dated June 26, 1989, VISA's General Counsel, Mr. Bennett R. Katz, notified Sears Roebuck of the VISA Board's resolution and amended By-law 2.06. By letter dated June 28, 1989, MountainWest Savings was also notified of amended By-law 2.06 and of VISA's prohibition against admitting competitors into the VISA joint venture.

129. After the Greenwood application was denied and By-law 2.06 amended, Sears once again sought access to and ownership in the VISA system. Sears formed SCFC MountainWest as a newly chartered industrial loan corporation under Utah law. SCFC MountainWest thereafter purchased from the RTC the assets of

MountainWest Savings, purportedly including its VISA membership and a small portfolio of approximately 3,000 VISA credit cards issued to Utah residents.

130. In accordance with standard practice for rechartering members who had been taken over by the FDIC or RTC, in June 1990 VISA requested SCFC MountainWest to submit an application for VISA membership.

131. In an effort to follow up on requests for additional information from all institutions that had been taken over by the RTC and to determine if new applications were necessary, VISA called SCFC MountainWest in July 1990 and was inaccurately advised that the institution would not be rechartered. Sears was not mentioned. VISA did not press for immediate response to the June letter because of SCFC MountainWest's misleading report.

132. On September 27, 1990, SCFC MountainWest returned the signed membership application form. At the top, SCFC MountainWest had typed the legend: "Note: Updating existing membership information. Not a new application." In the same document, SCFC MountainWest affirmatively represented to VISA: "We desire to participate in the [VISA] programs . . . and hereby make application to Visa U.S.A. for such authority."

the proposed card design and a cover letter which identified the issuing bank as "Discover Card Services - Prime Option VCI Customer," with an Illinois phone number. The letter did not mention SCFC MountainWest, nor did it include a Utah address or phone number; however, it did include an identification number assigned to Valley Bank in Idaho. The card "proof" submitted along with the application was equally confusing. The front side did not include any issuer's name. The back of the card merely referenced "MountainWest Financial" with an address in Sandy, Utah. It also included an 800-telephone number with too many digits. If one digit was omitted, the number was for the Chicago Board Options Exchange "options hotline."

136. VISA immediately contacted DataCard to determine if there had been an error. DataCard responded that the order for VISA cards had been placed by Discover Card Services in Riverwoods, Illinois. Darryl Johnson of DataCard called Discover Card Services and was advised that SCFC MountainWest had used the marketing staff from Discover to design the "Prime Option" card but that there was no other relationship.

137. On January 10, 1991, VISA's Member Support department, which had received the proof for the "Prime Option" card, contacted the Member Records department to attempt to clear up the confusion. VISA staff in Member Records told the support

staff that MountainWest Financial was the new name for MountainWest Savings & Loan and that an entity called "SCFC ILC, d/b/a MountainWest Financial" had applied for VISA membership but had not yet come before the membership committee. Member Records also explained that the Valley Bank identification number, which was similar to one of SCFC MountainWest's numbers, was an error. Thereafter, a VISA employee in Member Records obtained a printout from the RTC which identified the owner of SCFC MountainWest as "Sears Consumer Financial Services."

138. The RTC printout, together with the January 1991 card order submitted on behalf of Discover Card Services, revealed to VISA for the first time that SCFC MountainWest was an affiliate or subsidiary of Sears, and, therefore, was ineligible for membership by virtue of amended By-law 2.06. On January 11, 1991, a VISA employee telephoned Philip Ware, the Operations Manager of SCFC MountainWest in Utah, to clarify the ownership question. He stated that VISA could not approve applications for VISA membership from subsidiaries or affiliates of Sears. Mr. Ware stated that SCFC MountainWest's connection to Sears was "remote."

139. A few days later, on January 16, 1991, VISA received a revised cover letter from DataCard for the "Prime Option" card. This letter changed the issuing bank from "Discover Card Services" to "SCFC ILC INC. d/b/a MountainWest Financial,"

changed the contact name from a Discover employee to Philip Ware, in Sandy, Utah, and changed the Illinois telephone number to one in Utah. By this time, however, the connection between SCFC MountainWest and Sears had become clear and VISA refused to comply with the request to print the 1.5 million Sears' Prime Option VISA cards or to proceed with SCFC MountainWest's membership application. On January 16, SCFC MountainWest filed the Complaint in this action seeking, inter alia, a mandatory injunction requiring VISA to allow it to introduce the Sears Prime Option program, "including a specific directive that VISA approve printing of the Prime Option card blanks."

140. On or about March 14, 1991, pursuant to VISA By-law 2.10(b), VISA's Board of Directors unanimously adopted a resolution automatically expelling SCFC MountainWest as a member of VISA assuming it had acquired membership rights from the RTC, which VISA denies.

141. At the same time, VISA's Board of Directors by unanimous vote amended Section 2.10 of the VISA By-laws by adding the following subsection (e):

The membership of any Member shall automatically terminate in the event it, or its parent, subsidiary or affiliate, issues, directly or indirectly, Discover cards or American Express Cards, or any other card deemed competitive by the Board of Directors; in the event the Member has issued such competitive card prior to the Board declaring such card competitive, the membership of such Member shall not terminate if it discontinues

issuing such competitive card within 60 days of notification by VISA. Outstanding competitive cards need not be cancelled prior to expiration.

Due to the stay of this Court's injunction, VISA has notified Sears that it will not enforce the March 14 resolution nor will it apply amended By-law 2.10 against SCFC MountainWest at this time.

142. VISA's Board of Directors further resolved that, "notwithstanding the termination of membership of [SCFC MountainWest], during the pendency of its suit against VISA U.S.A. Inc. [SCFC MountainWest] may continue to service those VISA cardholder accounts it owns as of March 17, 1991, including the re-issue of VISA cards to such cardholders."

FIRST CAUSE OF ACTION
FEDERAL TRADEMARK INFRINGEMENT
[against all counterdefendants]

143. VISA International alleges infringement of the federally registered VISA marks under the provisions of the Lanham Act, 15 U.S.C. § 1114. The allegations of paragraphs 108 through 142 are incorporated by reference herein.

144. Counterdefendants have infringed VISA International's marks within the meaning of 15 U.S.C. § 1114 in that VISA never licensed Sears to issue -- in fact, it expressly prohibited it from issuing -- VISA cards. Accordingly, Sears has been operating a credit card program and has issued VISA cards

bearing the VISA trademark without a license. Compliance with VISA's rules is a condition to use of the VISA marks. VISA By-laws prohibit the sale, transfer or assignment of VISA membership. Accordingly, Sears could not acquire VISA membership from the RTC, and SCFC MountainWest's use of the VISA marks infringes those marks. Even if SCFC MountainWest could acquire the VISA membership, which VISA denies, it cannot, under VISA By-law 2.06 or Operating Regulation 10.4B, issue VISA cards and Sears' actions in contravention of these rules constitutes infringement. Sears' actions have caused cardholders, merchants and the public to believe that the Sears VISA card program is currently approved or sponsored by VISA when, in fact, Sears has conducted its program in violation of applicable VISA rules.

145. As a direct consequence of their trademark infringement, counterdefendants have damaged VISA International in an amount to be proven at trial. In addition, Sears' actions have damaged the goodwill associated with VISA's marks, and have allowed Sears to free ride on the VISA joint venture and on the value of the VISA name and associated marks and have misappropriated the value of such marks. Unless enjoined, Sears will further impair the value of VISA's marks and the goodwill which VISA and its members have created in these marks through their efforts.

SECOND CAUSE OF ACTION
ACQUISITION WHICH MAY SUBSTANTIALLY LESSEN COMPETITION
[against all counterdefendants]

146. VISA alleges violation of 15 U.S.C. § 18 and seeks injunctive relief pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26, and declaratory relief under 28 U.S.C. § 2201. The allegations of paragraphs 108 through 142 are incorporated by reference.

147. The relevant product market for the purpose of analyzing Sears' continuing effort to become a VISA member is the market for general purpose credit card services. The relevant geographic market is nationwide. While VISA's member banks and other financial institutions compete to provide services to consumers and merchants in a much broader market -- a national market for payment mechanisms which includes cash, credit and debit cards, checks, ATM cards, wire transfer services and other cash substitutes -- there are very few credit card networks (sometimes referred to as credit card "systems" or "brands") which compete against each other in this national market. This "intersystem" competition among networks such as VISA, Sears' Discover, American Express and MasterCard is different in kind from the "intrasystem" competition among VISA's member banks and defines a separate market for antitrust purposes. Participation by Sears in VISA would substantially lessen competition in this interbrand market.

148. The effect of (a) Sears' alleged acquisition of the VISA membership and VISA credit card portfolio of the former MountainWest Savings, (b) the continued operation of MountainWest Savings' VISA card program under the Sears masthead and (c) the threatened roll out of millions of Sears' "Prime Option" credit cards bearing the VISA trademark may be substantially to lessen competition and tend to create a monopoly in the national general purpose credit card services market.

149. As a direct result of Sears' acquisition of the assets of MountainWest Savings and its attempt to launch Prime Option through SCFC MountainWest, VISA and its members have suffered and/or are threatened with injury and damage to their business and property. Unless counterdefendants are restrained from their unlawful conduct, VISA and its members will suffer irreparable injury for which there is no adequate remedy at law.

THIRD CAUSE OF ACTION
FRAUD
[against all counterdefendants]

150. VISA alleges fraud. The allegations of paragraphs 108 through 142 are incorporated by reference herein.

151. Sears gained access to the VISA credit card system through knowing and intentional deception. Sears failed to inform VISA that a Sears subsidiary had acquired the assets of

MountainWest Savings, purportedly including its VISA membership and small VISA card portfolio, and would offer VISA cards in direct contravention of VISA's By-laws and Operating Regulations. The application and card-ordering materials submitted by Sears or on its behalf failed to identify Sears' ownership interest in the card-issuer, and representations of Sears implied that Sears' connection to SCFC MountainWest was "remote" when, in fact, SCFC MountainWest is a wholly-owned Sears subsidiary. Sears also represented that SCFC MountainWest was "eligible" for VISA membership and would comply with VISA's rules, when in fact this was not the case. These omissions and misrepresentations were intentional and material in that, but for said omissions and misrepresentations, VISA would have immediately notified SCFC MountainWest that it had no membership rights in VISA and would have taken immediate steps to prevent SCFC MountainWest from issuing and/or processing VISA cards and transactions.

152. Sears intended that VISA rely on their intentional omissions and misrepresentations so that VISA would not interfere with Sears' illegal effort to participate in the VISA system as an illicit VISA member. VISA reasonably relied on said omissions and misrepresentations when it did not immediately act to prevent Sears' infringement of VISA's marks and, in the alternative, to terminate all of Sears' alleged membership rights and privileges

after Sears acquired the assets of MountainWest Savings, purportedly including MountainWest Savings' VISA membership and accompanying VISA card portfolio. Had VISA been aware of the omitted fact -- that Sears had acquired a former VISA member -- it would have so acted.

153. As a direct and proximate result of Sears' fraud, counterdefendants have damaged VISA in an amount to be proven at trial.

154. VISA seeks punitive damages from counterdefendants for their fraud to punish them for outrageous conduct and to deter them and others like them from similar conduct in the future.

FOURTH CAUSE OF ACTION
UNFAIR TRADE PRACTICES
(California law)
[against all counterdefendants]

155. VISA alleges unfair trade practices under California law, Cal. Bus. and Prof. Code §§ 17200, 17202-203, 17500 and 17535. The allegations of paragraphs 108 through 142 are incorporated by reference herein.

156. Sears' unauthorized use of the VISA marks constitutes unfair competition under California law in that it permits Sears to solicit business within the VISA system, while at the same time promoting and developing Sears' own proprietary credit card business in direct contravention of VISA By-laws. In

addition, Sears may use economies of scale and source to offer VISA card programs in conjunction with other Sears credit card programs without reciprocal cross-selling rights being afforded to other bona fide VISA member banks. Sears may also use trade secrets and confidential information available only to VISA proprietary members in its own Discover card business. Further, Sears' acts have confused and will continue to confuse, mislead and deceive the public as to the source, origin or sponsorship of Sears' "Visa card" business.

157. As a direct and proximate result of Sears' unfair trade practices, counterdefendants have damaged VISA in an amount to be proven at trial. Sears' actions have allowed Sears to free ride on the VISA joint venture and on the value of the VISA name and associated marks and have misappropriated the value of such assets. Unless Sears is restrained from continuing their unlawful activity, VISA will suffer irreparable injury for which there is no adequate remedy at law.

**FIFTH CAUSE OF ACTION
IN THE ALTERNATIVE: BREACH OF CONTRACT AND
THE IMPLIED COVENANT OF GOOD FAITH
[against SCFC MountainWest]**

158. In the event it is determined that SCFC MountainWest became a member of VISA through the purchase of the

assets of MountainWest Savings, VISA alleges breach of contract, including breach of the implied covenant of good faith and fair dealing. The allegations of paragraphs 108 through 142 are incorporated by reference herein.

159. SCFC MountainWest purchased the assets of MountainWest Savings from the RTC. The Purchase and Assumption Agreement included a description of MountainWest Savings' VISA membership and VISA card portfolio among the assets to be transferred to SCFC MountainWest. Sears contends that through the purchase of the VISA membership, SCFC MountainWest became a member in good standing of VISA. VISA denies this claim, contending that any attempt to transfer a VISA membership requires a new application and approval from VISA. VISA pleads this alternative cause of action in the event it is determined that through purchase of the MountainWest Savings VISA membership, SCFC MountainWest became a member of VISA.

160. SCFC MountainWest's use and threatened use of the Prime Option mark together with the VISA mark violate VISA By-laws and Operating Regulation 10.4B and the VISA Membership Agreement signed by SCFC MountainWest.

161. VISA By-law 2.06 provides that VISA "shall not accept for membership any applicant which is issuing directly or indirectly Discover cards . . .; an applicant shall be deemed to

be issuing such cards if its parent, subsidiary or affiliate issues such cards."

162. By-law 2.06 provides that no member, its parents, subsidiaries, or affiliates, may issue, directly or indirectly, Discover cards or American Express cards or any other card deemed competitive by VISA's Board of Directors.

163. By issuing and threatening to issue Prime Option, SCFC MountainWest is in breach of By-law 2.06.

164. A covenant of good faith and fair dealing is implied in every contract, including the membership agreement which SCFC MountainWest executed as part of its application for membership in VISA. SCFC MountainWest's use and threatened use of Prime Option together with VISA, and its attempt to become a member of VISA without disclosing its affiliation with Sears, violates the covenant of good faith and fair dealing implied in the membership agreement.

165. As a direct result of Sears' breach of contract and breach of the implied covenant of good faith and fair dealing, counterdefendants have damaged VISA in an amount to be proven at trial.

166. VISA seeks specific performance of its contractual right under VISA's By-law 2.10 to terminate any VISA membership purportedly held by Sears.

SIXTH CAUSE OF ACTION
DECLARATORY JUDGMENT
[against all counterdefendants]

167. VISA seeks a declaratory judgment under 28 U.S.C. § 2201. The allegations of paragraphs 108 through 166 are incorporated by reference herein.

168. There is a real and actual controversy between VISA on the one hand and Sears on the other as to whether VISA must allow Sears into the VISA system, whether Sears may be precluded from issuing VISA cards by rule of the joint venture, or whether VISA may terminate Sears' alleged membership in the VISA joint venture because it is an interbrand competitor of VISA. Sears contends that its exclusion from the VISA system constitutes an illegal group boycott of Sears' ability to compete within the VISA system, while VISA contends that interbrand competition is promoted by maintaining separate and distinct competitors and that the merging of two large national credit card systems -- Sears and VISA -- will substantially lessen interbrand competition. VISA seeks a declaration that it lawfully may exclude Sears from the VISA system and that its By-laws 2.06 and 2.08 and Operating Regulation 10.4B are valid and enforceable.

169. VISA further seeks a declaration that, even assuming that SCFC MountainWest became a member of VISA by virtue

of FIRREA or otherwise, and has otherwise remained a member in good standing, which VISA denies, VISA may lawfully terminate SCFC MountainWest on the ground that Sears is an interbrand competitor.

DEMAND FOR JURY

170. VISA International and VISA hereby demand a jury.

PRAYER FOR RELIEF

WHEREFORE, VISA International and VISA pray for the following relief:

1. On SCFC MountainWest's Complaint:
 - a. That judgment be entered against SCFC MountainWest and in favor of VISA on each count;
 - b. That VISA be awarded its costs and expenses, including attorneys' fees, as allowed by the law; and
 - c. For such other and further relief as the Court may deem just and proper.
2. On the counterclaims of VISA International and VISA:
 - a. On all Causes of Action, for an order enjoining counterdefendants from issuing VISA credit cards, from using the VISA mark and all other VISA proprietary assets and information or otherwise participating in the VISA credit card system as a card issuer or merchant bank;

b. On the First, Third, Fourth and Fifth Causes of Action, for damages in the amount proven at trial;

c. On the Second Cause of Action, for such injunctive relief as the Court may find is reasonably necessary to restore and maintain effective competition in the national credit card services market;

d. On the Third Cause of Action, for punitive damages;

e. On the Fifth Cause of Action, for an order specifically enforcing VISA's contractual right to terminate Sears' purported membership in VISA under its amended By-law 2.10;

f. On the Sixth Cause of Action, for an order declaring the rights of VISA to enforce its By-laws 2.06, 2.08 and Operating Regulation 10.4B;

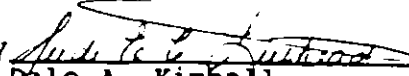
g. On the Sixth Cause of Action, for an order declaring that even assuming that SCFC MountainWest became a member of VISA by virtue of FIRREA or otherwise, and has otherwise remained a member in good standing, which VISA denies, VISA may lawfully terminate SCFC MountainWest on the ground that Sears is an interbrand competitor;

h. On all Causes of Action, for fees, costs and expenses, including attorneys' fees; and

i. For such other and further relief as the Court may deem just and proper.

Dated: April 1, 1992

KIMBALL, PARR, WADDOUPS, BROWN & GEE

By 
Dale A. Kimball
Clark Waddoups
Heidi E. C. Leithead
185 South State Street, Suite 1300
Salt Lake City, UT 84111
Telephone: (801) 532-7840

M. Laurence Popofsky
Stephen V. Bomse
Marie L. Fiala
Judith Z. Gold
Renata M. Sos
Mark A. Olson
Robert S. Merritt
Susan Rice
HELLER, EHRMAN, WHITE & MCAULIFFE
333 Bush Street
San Francisco, CA 94194-2878
Telephone: (415) 772-6000

Attorneys for Defendant
VISA U.S.A. Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing ANSWER TO FIRST AMENDED COMPLAINT AND COUNTERCLAIM was hand-delivered this 1st of April, 1992, to the following counsel of record:

Richard W. Giauque
Gary F. Bendinger
GIAUQUE, CROCKETT & BENDINGER
136 South Main Street
500 Kearns Building
Salt Lake City, UT 84101

and delivered this 1st day of April, 1992, by overnight mail to the following counsel of record:

William H. Pratt
James D. Sonda
Randall A. Hack
Leonard A. Gail
KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, IL 60601

