UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE

PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION

This Document Relates To:

1:05-CV-3800	1:05-CV-5083
1:05-CV-3924	1:05-CV-5153
1:05-CV-4194	1:05-CV-5207
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1:05-CV-5077	1:06-CV-1829
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1:05-CV-5082	1:06-CV-1832

MASTER FILE 05-MD-1720(JG)(JO)

SUPPLEMENTAL MEMORANDUM OF LAW IN FURTHER SUPPORT OF MASTERCARD'S MOTION TO DISMISS CLASS PLAINTIFFS' FIRST SUPPLEMENTAL CLASS ACTION COMPLAINT

Defendants MasterCard International Incorporated and MasterCard Incorporated (collectively, "MasterCard") submit this supplemental memorandum of law in further support of MasterCard's Motion to Dismiss Class Plaintiffs' First Supplemental Class Action Complaint on the ground that MasterCard is not an acquirer of stock or assets under Section 7 of the Clayton Act. Specifically, MasterCard is responding to the Court's Order dated February 2, 2007, which directed MasterCard to "submit supplemental briefing on the issue of when, if ever, stock may be treated as an asset for purposes of Section 7 of the Clayton Act." *See* Order at 1 (Feb. 2, 2007).

The short answer to the Court's inquiry is that our research reveals that stock is never treated as an asset for purposes of Section 7. The plain language of Section 7 distinguishes between acquisitions of "stock and share capital," on the one hand, and acquisitions of "assets," on the other hand. Originally, Section 7 of the Clayton Act only applied to certain acquisitions of stock and it did not apply at all to acquisitions of assets. Congress, thus, intentionally provided different treatment to stock and asset acquisitions. When the Act was amended in 1950 to add the prohibition on certain asset acquisitions, the amendment made it clear that Congress did not intend for a stock acquisition simply to be one type of asset acquisition subject to Section 7. Instead, Congress created two separate categories of transactions that may substantially lessen competition, one that applied to stock acquisitions, and a separate one that applied to asset acquisitions.

Consistent with this legislative history, Class Plaintiffs have identified no case – and we are aware of none – holding that a corporation's redemption of its own stock falls within Section 7 because that stock is deemed to be an asset of another person. For all these reasons and all of the reasons set forth in MasterCard's other briefs on this motion, Class Plaintiffs fail in

their strained attempt to suggest that MasterCard's redemption of its own stock as part of the IPO transaction makes MasterCard an acquirer of assets under Section 7.

The plain language of Section 7 of the Clayton Act distinguishes clearly between acquisitions of "stock and share capital" and acquisitions of "assets." Section 7 has two distinct prohibitions, one directed at certain stock acquisitions and the other at certain asset acquisitions. Section 7 states in pertinent part that "[n]o person . . . shall acquire . . . the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire . . . the assets of another person . . . where . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. On its face, therefore, Section 7 cannot fairly be read as treating "stock" as one example of or a subset of the noun "assets." Indeed, an interpretation that renders superfluous the phrase "stock or other share capital" violates a well-settled canon of statutory interpretation that courts "must, if possible, construe a statute to give every word some operative effect." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 167 (2004); *accord*, *United States v. Peterson*, 394 F.3d 98, 106 (2d Cir. 2005) (rejecting interpretation of statute that "violates the well-known canon of statutory construction that a statute should not be construed to render a word or clause inoperative"); *Connecticut ex rel. Blumenthal v. U.S. Dep't of the Interior*, 228 F.3d 82, 88 (2d Cir. 2000) ("we are required to disfavor interpretations of statutes that render language superfluous") (internal quotation marks omitted); *Yellow Freight Sys., Inc. v. Reich*, 38 F.3d 76, 82-83 (2d Cir. 1994) (stating that it is "axiomatic" for courts to avoid rendering statutory language superfluous).

The enactment of the original Clayton Act Section 7 and its 1950 amendment also demonstrate that Congress intended acquisitions of stock and assets to be treated distinctly. As originally enacted, Section 7 prohibited only certain stock acquisitions, providing in pertinent

part: "no corporation shall acquire . . . the whole or any part of the stock or other share capital of two or more corporations . . . , where the effect of such acquisition may be to substantially lessen competition . . . ." Act of October 15, 1914 (Clayton Antitrust Act), ch. 323, § 7, 38 Stat. 731-32. As the Supreme Court recognized in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), Congress originally considered, but declined to adopt, language that also would have prohibited certain asset acquisitions. *Id.* at 313-14. *See also United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 337 (1963) ("When it was first enacted in 1914, s 7 referred only to corporate acquisitions of stock and share capital; it was silent as to assets acquisitions and as to mergers and consolidations.").

In 1950, Congress expanded Section 7 to cover pure asset acquisitions by adding the language: "and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets." Act of December 29, 1950 (Celler-Kefauver Antimerger Act), ch. 1184, 64 Stat. 1125-26. The purpose of the 1950 amendment was:

> [t]o prevent corporations from acquiring another corporation by means of the acquisition of its assets, whereunder (sic) the present law it is prohibited from acquiring the stock of said corporation. Since the acquisition of stock is significant chiefly because it is likely to result in control of the underlying assets, failure to prohibit direct purchase of the same assets has been inconsistent and paradoxical as to the over-all effect of existing law.

Brown Shoe Co., 370 U.S. at 316 n.29 (quoting S. Rep. No. 81-1775 (1950), *as reprinted in* 1950 U.S.C.C.A.N. 4293, 4294). *See also Philadelphia Nat'l Bank*, 374 U.S. at 345-46 (distinguishing between stock acquisition provision of Section 7, which would also apply to merger acquisitions "which entail a transfer of stock of the parties," and "the assets-acquisition provision [which] clearly reaches corporate acquisitions involving no such transfer").[1]

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[1] The Senate Report on the 1950 Amendment further provides that:

In short, Congress expanded the scope of Section 7 to include asset acquisitions in order to prevent a substantial lessening of competition caused by an asset purchase rather than a stock acquisition. There is no indication whatsoever that by virtue of this amendment, Congress intended to subsume stock within the category of assets governed by the amended Section 7. Indeed, had Congress intended an acquisition of assets to encompass an acquisition of stock or other share capital, it could have made it clear that stock should be treated as a subset of assets. Instead, Congress amended the statute to provide an additional and distinct basis for liability. Accordingly, Congress has always treated a stock acquisition as distinct from an asset acquisition under the Clayton Act, both as originally passed, and as amended in 1950.

Section 7A of the Clayton Act and its implementing regulations also treat stock and asset acquisitions distinctly. Section 7A reflects the Federal Trade Commission's "Hart-Scott-Rodino" pre-merger notification process by which certain transactions are brought to the attention of the Commission for potential review before they are consummated. That statute treats stock acquisitions distinctly from asset acquisitions by providing, in pertinent part, that "no person shall acquire, directly or indirectly, any voting securities or assets of any other person [in excess of a threshold dollar amount], unless both persons . . . file notification . . . and the waiting

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> The purpose of the proposed bill, H.R. 2734, is to limit future increases in the level of economic concentration resulting from corporate mergers and acquisitions. The bill would accomplish this purpose by enabling the Federal Trade Commission to prevent those acquisitions which substantially lessen competition or tend to create a monopoly. Since 1914 the Commission has had the power to prevent such acquisitions when they are effected through the purchase of stock. The objective of Congress in passing section 7 of the Clayton Act has been circumvented by the acquisition of assets rather than, or in addition to, the purchase of stock. The proposed bill would eliminate this practice by extending the application of the Clayton Act to acquisitions of assets.

S. Rep. No. 81-1775 (1950), *as reprinted in* 1950 U.S.C.C.A.N. 4293, 4295.

period described in subsection (b)(1) has expired . . ." 15 U.S.C. § 18a. The federal regulations that implement Section 7A provide expressly that in determining whether an asset acquisition meets the monetary threshold for pre-merger notification, "[n]either voting or nonvoting securities nor obligations . . . shall be considered assets of another person from which they are acquired." 16 C.F.R. § 801.21(b).

Against this legislative backdrop, it is not surprising that we have found no case – and Class Plaintiffs cite none – holding that a stock acquisition constitutes an asset acquisition with respect to Section 7. Even more importantly for present purposes, we are aware of no case holding that a corporation's redemption of its own stock constitutes the acquisition of an asset of another person.[2] Thus, MasterCard's redemption of its own stock does not constitute an asset acquisition for purposes of Section 7.

CONCLUSION

For the foregoing reasons, MasterCard respectfully requests that this Court enter an order dismissing with prejudice the First Supplemental Class Action Complaint.

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[2] The 1950 amendment makes it clear that Class Plaintiffs' Section 7 theory fails for a different, but related reason. In stating that the purpose of the 1950 amendment was to "prevent corporations from *acquiring another corporation* by means of the acquisition of *its* assets," *id.* at 4294 (emphasis added), the Senate Report makes clear that Congress intended for Section 7 to apply to a corporation's acquisition of the assets of a second corporation as a means of acquiring control over that second corporation. There is no indication that Congress had a legislative concern with the redemption by the first corporation of its own stock that happened to be held by the second corporation. As MasterCard did not repurchase its shares from its member banks as a means of acquiring control over the member banks, Section 7 should not apply to this transaction.

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