UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION	MDL Docket No. 1720 (JG)(JO)
This Document Relates To: 1:05-CV-3925 1:05-CV-4650 1:05-CV-4677 1:05-CV-4799 1:06-CV-0039 1:06-CV-0078 1:06-CV-2534	

INDIVIDUAL PLAINTIFFS' CONSOLIDATED RESPONSE TO THE MASTERCARD DEFENDANTS' RULE 12(B)(6) MOTION TO DISMISS

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The Individual Merchant Plaintiffs[1] ("Plaintiffs") submit this consolidated Response in opposition to Defendants MasterCard International Incorporated and MasterCard Incorporated's (collectively "MasterCard") motion to dismiss Plaintiffs' Section 2 Sherman Act claims for monopolization and attempted monopolization (the "Motion"). For the reasons explained below, the Court should deny MasterCard's Motion.

PRELIMINARY STATEMENT

Plaintiffs have challenged under Section 2 of the Sherman Act, 15 U.S.C. §2, MasterCard's demonstrated ability to raise interchange fees associated with the use of MasterCard payment cards without causing a loss of business. This demonstrated ability is the true legal and economic definition of monopoly power. Faced with those immutable facts (and Plaintiffs' concomitant allegations to the same effect), MasterCard has chosen to restate Plaintiffs' claims for the purpose of its Motion in the hope of sidestepping the truth.

Plaintiffs' Complaints – not MasterCard's Motion – define Plaintiffs' case against MasterCard. Each Plaintiff has alleged that MasterCard has monopolized and attempted to monopolize the market for selling to merchants: (1) "Network Services for MasterCard Credit Cards" or, alternatively, (2) "Network Services for General Purpose Payment Cards."[2] Compl.[3] ¶29. In

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[1] The Individual Merchant Plaintiffs are Ahold U.S.A., Inc., Albertson's, Inc., BI-LO, LLC, Bruno's Supermarkets, Inc., Delhaize America, Inc., Eckerd Corporation, Hy-Vee, Inc., The Kroger Co., Maxi Drug, Inc., Pathmark Stores, Inc., Publix Super Markets, Inc., Raley's, Rite Aid Corporation, Safeway, Inc., Supervalu Inc., and Walgreen Co. These retail chains accept MasterCard credit cards for billions of dollars of retail sales.

[2] "Network services" are the collection of services provided to retailers by credit card companies including "authorization, clearance and settlement of retail transactions." Compl. ¶23(D).

[3] The citations in this Response are to the Amended Complaint filed in *The Kroger Co. v. MasterCard, Inc.*, No. 06-CV-0039 (E.D.N.Y. filed Feb. 7, 2006). Each Plaintiff has filed a Complaint or Amended Complaint containing virtually identical allegations. For the Court's convenience, a copy of the *Kroger* Amended Complaint is attached as Exhibit 1 to the Blechman

support of their claims, Plaintiffs have clearly alleged that MasterCard has monopoly power or a dangerous probability of obtaining monopoly power in both markets. *Id.* ¶¶1, 32, 95, 100. Plaintiffs have also plainly alleged that MasterCard has monopoly power in its purest form, namely, the power to raise the price that it charges merchants – the "interchange fees" – substantially above the competitive level without losing sales to competitors, *id.* ¶¶31-32, and to "extract supracompetitive, artificially inflated interchange fees" from the retail merchants. *Id.* ¶1; *see also* ¶¶97, 103.[4]

MasterCard, undeterred by clear and controlling Second Circuit precedent, nevertheless has moved to dismiss the Section 2 claims on the purported ground that Plaintiffs have not sufficiently alleged monopoly power. As to Plaintiffs' allegation of a relevant market in network services for MasterCard credit cards, MasterCard incorrectly asserts that there is a "rule" against finding one-brand markets. MC Br.[5] at 12. There is no such rule. *See infra* at 14-19. In determining what products compete in the same relevant market, courts look to the cross-elasticity of demand – *i.e.*, whether purchasers substitute one product for another when the price of the first product rises, thereby constraining the seller's power to raise price to supracompetitive levels. Here, Plaintiffs have alleged that they cannot substitute other credit cards for MasterCard and "have no choice but to continue to accept MasterCard credit cards" even when MasterCard increases its interchange

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Declaration which supports this Response. Further, to assist the Court, we have attached to the Blechman Declaration as Exhibit 2 a Table that cross references paragraphs in the *Kroger* Amended Complaint that are cited in this Response with comparable paragraphs in the other Individual Plaintiffs' pleadings.

[4] Plaintiffs also allege that MasterCard has monopoly power "as demonstrated by ... its ability to price discriminate among different classes of merchants ... and its ability to shift Credit Card usage from standard cards with historically increasing Interchange Fees to Premium Cards with even higher (and faster growing) Interchange Fees." Compl. ¶32.

[5] Memorandum of Law in support of MasterCard's Motion. (Dkt. 376, filed June 9, 2006) ("MC Br.").

fees. Compl. ¶¶43; *see also id.* ¶¶1, 31, 32. Plaintiffs have therefore appropriately pled a market limited to sales of network services for MasterCard credit cards.

As to Plaintiffs' alternative, broader market, MasterCard incorrectly contends that Plaintiffs may not prove monopoly power *directly* through evidence of MasterCard's supracompetitive prices, but *must* do so *indirectly* through evidence of a "monopolistic share of the asserted relevant market." *Id.* at 1, 6-7. But a specific or high market share is not a necessary element that must be pled or proven in a monopolization claim. *See infra* at 20-25. The required element is monopoly power. As the cases, including those cited by MasterCard, make clear, a high market share is merely one of the alternative methods of proving the existence of monopoly power. It may also be proven by direct evidence of Defendant's ability to raise price to supracompetitive levels without losing sales to competitors. Plaintiffs' Complaint contains these allegations. Compl. ¶¶1, 31, 32.

MasterCard's heavy reliance on the slip opinion in *Discover Financial Services, Inc. v. Visa U.S.A., Inc.*, No. 04-Civ-7844 (BSJ) (S.D.N.Y. Oct. 24, 2005) is badly misplaced. In *Discover*, unlike the present case, there was no allegation of a narrow market in which MasterCard had a 100% share. Even with regard to Plaintiffs' allegations of a broader market in this case, *Discover* merely provides that the power to control price (*i.e.*, monopoly power) may not be indirectly inferred from a market share of 29%. That is not Plaintiffs' case. The *Discover* opinion does not address the sort of detailed allegations of *direct* evidence of MasterCard's market power that are replete in Plaintiffs' Complaint. If Judge Jones' opinion is read to preclude direct proof of the ability to control prices unless a specific, high market share is alleged, then it would contradict controlling Second Circuit precedent which, as noted earlier, allows Plaintiffs to directly prove monopoly power – *i.e.*, the ability to raise price without losing sales – without reference to market share. The principal

holding in *Discover* is that plaintiff may not cumulate the market share of MasterCard and Visa to reach a 79% share and then infer monopoly power from that jointly held position because a "shared monopolization or oligopoly" is not covered by Section 2 of the Sherman Act. (Slip Op. 3-8). Of course, that is not Plaintiffs' case, either.

STANDARDS APPLICABLE TO A MOTION TO DISMISS

Often claimants who invoke procedural safeguards or argue burdens of proof to defend pleading allegations are afraid of the truth or only barely able to meet their burden. That is not the situation here. For Plaintiffs, the detailed allegations in the Complaints reflect the realities of their daily existence. MasterCard demonstrates its market power every day by imposing enormous, supracompetitive interchange fees on Plaintiffs. Retail merchants' inability to resist these price increases by substituting other payment methods is the origin of this case.

Confident of the legal sufficiency of their Section 2 claims, Plaintiffs nevertheless are constrained to note the procedural requirements of MasterCard's Motion. In determining whether to grant a motion to dismiss, courts are to "construe the complaint in the light most favorable to the plaintiff, accepting the plaintiff's allegations as true." *Todd v. Exxon Corp.*, 275 F.3d 191, 197 (2d Cir. 2001). The Court of Appeals takes a "generous approach to pleading" Sherman Act claims, *Furlong v. Long Island Coll. Hosp.*, 710 F.2d 922, 927 (2d Cir. 1983), and holds that "a short plain statement of a claim for relief which gives notice to the opposing party is all that is necessary in antitrust cases." *Todd*, 275 F.3d at 198. As a result, "an [antitrust] complaint should not be dismissed for failure to state a claim 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Id.*, 275 F.3d at 197-98. In antitrust cases, dismissals before discovery should be granted "very sparingly.'" *Id.* (quoting *George Haug Co. v. Rolls Royce Motor Cars, Inc.*, 148 F.3d 136, 139 (2d Cir. 1998)); *Flash Elecs.,*

Inc. v. Universal Music & Video Distribution Corp., 312 F.Supp.2d 379, 384-85 (E.D.N.Y. 2004). In particular, market definition "is a deeply fact-intensive inquiry, and therefore courts hesitate to grant motions to dismiss for failure to plead a relevant product market." *Todd*, 275 F.2d at 199-200. Accordingly, Plaintiffs' allegation of monopoly power need only be "plausible" in order to survive a motion to dismiss. *Id.* at 203.

ARGUMENT

I. PLAINTIFFS' COMPLAINTS ADEQUATELY PLEAD SUBSTANTIAL MARKET POWER IN THE MARKET FOR MASTERCARD NETWORK SERVICES

Plaintiffs' Complaints allege a relevant market for the sale to merchants of network services for MasterCard credit cards and MasterCard's monopoly power in that market. Compl. ¶¶1, 29, 95, 100. MasterCard's assertion that Plaintiffs have "pled no facts demonstrating that MasterCard possesses monopoly power" (MC Br. at 11) is simply wrong. To explain why, we initially review the legal standard to plead monopoly power (or market power) in a Section 2 claim. MasterCard's Motion is stunningly incomplete on this subject. Next, we recite examples (mainly disregarded in MasterCard's Motion) of specific allegations in Plaintiffs' Complaints of MasterCard's monopoly power in the relevant market. Although not challenged by MasterCard, we then explain why these allegations are plausible. We then demonstrate, contrary to MasterCard's contention, that brand-specific markets are recognized by the courts.

A. Monopoly Power Is Substantial Market Power

In order to state a claim for monopolization, a plaintiff must plead: "(1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power...." *U.S. v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). For an attempt to monopolize

claim, the market power element is reduced to "a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).[6]

Market power is referred to in the case law as "the power to control prices or exclude competition." *See, e.g., Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 97-98 (2d Cir. 1998). In economic terms, market power is the power to raise price profitably above costs. *See K.M.B. Warehouse v. Walker Mfg.*, 61 F.3d 123, 129 (2d Cir. 1995) (market power is the "the ability to raise price significantly above the competitive level without losing all of one's business"); *Graphic Prods. Distribs. v. ITEK Corp.*, 717 F.2d 1560, 1570 (2d Cir. 1983) (same).

The Court of Appeals has sometimes stated that *market* power is *synonymous* with *monopoly* power. *See Tops Mkts.*, 142 F.3d at 97-98; *Int'l Dist. Centers, Inc. v. Walsh Trucking Co., Inc.*, 812 F.2d 786, 791 & n.3 (2d Cir. 1987). On other occasions, the Second Circuit has stated that monopoly power is *substantial* market power, *i.e.*, the ability to raise prices substantially above the competitive level. *See AD/SAT v. Associated Press,* 181 F.3d 216, 226-27 (2d Cir. 1999) (quoting IA Areeda and Hovenkamp, ANTITRUST LAW ¶ 501, at 86); *see also U.S. v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001) ("a firm is a monopolist if it can profitably raise prices substantially above the competitive level").

The law is settled that a plaintiff may plead and prove a defendant's substantial market power by either of two methods: (1) direct evidence of defendant's ability to control price or exclude competition; or (2) indirect evidence consisting of defendant's large share of the relevant market. *See, e.g., Geneva Pharms. Tech. Corp. v. Barr Lab. Inc.*, 386 F.3d 485, 500 (2d Cir. 2004); *U.S. v. Visa, Inc.*, 344 F.3d 229, 239-40 (2d Cir. 2003); *Pepsico v. Coca-Cola Co.*, 315 F.3d

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[6] Because MasterCard's arguments and Plaintiffs' responses apply equally to the monopolization and attempted monopolization claims, this Response refers only to the monopolization claim.

101, 107-08 (2d Cir. 2002); *Todd*, 275 F.3d at 206. The same evidence that tends to show directly that a defendant has monopoly power also tends to show that the market should be defined narrowly and that, accordingly, a defendant has a large market share. That is so because a properly defined antitrust market includes only those substitutes as to which there is significant cross-elasticity of demand.[7] *See, e.g., U.S. v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 394-95 (1956) ("what is called for is an appraisal of the 'cross-elasticity' of demand in the trade"); *Geneva*, 386 F.3d at 496 (relevant market is determined by whether "the ability of consumers to switch to a substitute restrains a firm's ability to raise prices above the competitive level"); *Todd,* 275 F.3d at 201 ("two products or services are reasonably interchangeable where there is sufficient cross-elasticity of demand"). Sufficient cross-elasticity exists when the purchaser would respond to a slight increase in the price of one product by switching to another product. *Id.*, 275 F.3d at 201-202; *AD/SAT,* 181 F.3d at 227. If the purchaser has insufficient ability or incentive to switch to product "B" in response to a price increase in product "A," then products "A" and "B" are not in the same relevant antitrust market. *Id.; see also Times-Picayune Pub. Co. v. U.S.*, 345 U.S. 594, 612 n.31 (1953) ("The [market definition] circle must be drawn narrowly to exclude any other products to which, within reasonable variations in price, only a limited number of buyers will turn"). Evidence that shows directly that defendant has priced its product above the competitive level supports a narrow market definition, *i.e.*, potential substitutes are not in fact constraining defendant's price to the competitive level and therefore should not be included in the relevant market. *See, e.g., Eastman Kodak Co. v. Image Tech. Serv., Inc.*, 504 U.S. 451, 469 n.15 (1992) ("whether considered in the conceptual category of 'market definition' or 'market power,' the

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[7] Cross-elasticity of demand measures the percentage change of the quantity demanded of a good or service in response to a given price change. *See* IIA Areeda, Hovenkamp & Solow, *Antitrust Law* ¶507, at 108 (2d ed. 2002) [hereinafter cited as IIA *Antitrust Law*].

ultimate inquiry is the same"); *Geneva,* 386 F.3d at 500-01 (direct evidence of market power also used to support very narrow market definition).

B. Plaintiffs' Complaints Allege Many Indicia Of Substantial Market Power

Plaintiffs' Complaints allege many economic facts that courts have endorsed as *direct* evidence of substantial market power. These same facts tend to show that other potential substitutes – *i.e.*, other cards such as Visa, American Express and Discover – do not constrain MasterCard's price to a competitive level and therefore the relevant market is properly limited to sales of network services for MasterCard credit cards. MasterCard does not dispute that it has a 100% share of that market.

In particular, the Complaints allege the following legally-recognized indicia of MasterCard's substantial market power:

- Merchants have continued to accept MasterCard credit transactions despite frequent and significant price increases. Compl. ¶¶30, 32, 43; *see Visa*, 344 F.3d at 239 (this evidence supports finding of market power).

- Merchants have continued to accept MasterCard credit transactions despite MasterCard's shifting of card usage from standard cards to premium cards with even higher and faster growing interchange fees. Compl. ¶¶32, 43; *see Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 27 & n.46 (1984) ("as an economic matter, market power exists whenever prices can be raised above the levels that would be charged in a competitive market").

- MasterCard has engaged in sustained price discrimination among different classes of merchants based in part on each class's ability to resist price increases. Compl. ¶¶30, 32, 47; *see Coal Exps. Ass'n v. U.S.*, 745 F.2d 76, 91 (D.C. Cir. 1984) ("the ability of a firm to price discriminate is an indication of significant monopoly power").

- MasterCard has succeeded in forcing merchants nationwide to accept the Merchant Restraints, *see infra* at 11-12, which prohibit merchants from engaging in the normal, procompetitive activity of shifting demand in response to price increases. Compl. ¶¶23(G)-(L), 96, 102. Likewise, MasterCard has succeeded in forcing merchants nationwide to buy Payment Guarantee Services from MasterCard, when many merchants in a competitive market would purchase those services from others. Compl. ¶¶23(F), 48-53. MasterCard's ability to force merchants to accept

conditions that they would not accept in a competitive market is a clear indicator of substantial market power. *See Eastman Kodak*, 504 U.S. at 464 ("Market power is the power to force a purchaser to do something that he would not do in a competitive market"); *du Pont*, 351 U.S. at 393 ("control of price or competition establishes the existence of monopoly power under § 2").

- Interchange fees generate the highest profit margins of all services offered by the co-conspirator banks. Compl. ¶¶23(E), 38(B); *see Microsoft Corp.*, 253 F.3d at 51 (monopoly power established by ability to raise price above competitive level); *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1182 n.60 (1st Cir. 1994) (supracompetitive prices are evidence of monopoly power).

- MasterCard's market power is so substantial that the level of the interchange fees is essentially untethered to the cost of the services that the merchants are purchasing. Compl. ¶40; *see Geneva,* 386 F.3d at 500 ("abnormally high price-cost margin" demonstrates monopoly power).

In light of these detailed factual allegations, MasterCard's argument that Plaintiffs have alleged market power in only conclusory terms is plainly wrong, and the cases MasterCard relies on in this regard are clearly distinguishable because, as explained in the next footnote, the allegations of market power in those cases were thin or non-existent.[8]

Many cases involve allegations that a defendant *could* profitably raise prices above competitive levels, shift usage to higher-priced services, price discriminate or force non-competitive conditions. Plaintiffs here have instead alleged that MasterCard *has in fact done so.* This is the clearest evidence of monopoly power: "Where evidence indicates that a firm has in fact profitably

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[8] MasterCard's distinguishable cases are: *Papasan v. Governor of Mississippi*, 478 U.S. 265, 286 (1986) (allegation that children had been denied an "adequate education" was conclusory because there were no allegations as to level of instruction received); *Flash Electronics*, 312 F.Supp.2d at 385 ("conclusory allegations that merely recite the litany of antitrust ... will not suffice"); *Telectronics Proprietary, Ltd. v. Telectronics, Inc.*, 687 F.Supp. 832, 838 (S.D.N.Y. 1988) (complaint dismissed because plaintiff "has alleged neither monopoly power nor even significant market share on [defendant's] part").

[raised price above competitive level], the existence of monopoly power is clear." *Microsoft*, 253 F.3d at 51.[9]

C. Plaintiffs' Allegations Of MasterCard's Substantial Market Power Are Plausible

Although not explicitly challenged in MasterCard's Motion, Plaintiffs acknowledge that their market power allegations must be "plausible" in light of the marketplace realities. *See Todd*, 275 F.3d at 203. Given the existence of alternate payment forms, how can MasterCard price its network services to merchants substantially above its costs? When MasterCard raises its price to merchants, why do they not resist the increases by using less (or no) MasterCard and more cash, checks or other card networks, *i.e.*, Visa, American Express and Discover? The allegations in Plaintiffs' Complaints and the case law answer these questions and explain how and why MasterCard plausibly has and maintains substantial market power.

1. The Credit Card Market Is A Separate Product Market

The starting point for explaining why Plaintiffs' allegations of MasterCard's substantial market power are plausible (and much more) is the allegations in Plaintiffs' Complaints, and controlling Second Circuit precedent, stating that cash, checks and debit cards are not in the same market as MasterCard credit cards. *See* Compl. ¶31; *Visa,* 344 F.3d at 239 ("After hearing substantial expert testimony, the district court [properly] found as a matter of fact that other forms of payment – such as cash, checks, debit cards, and proprietary cards (*e.g.*, the Sears or Macy's cards) – are not considered by most consumers to be reasonable substitutes for general purpose

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[9] Moreover, MasterCard's monopoly power is protected by substantial entry barriers, including a "chicken-and-egg" network problem. Compl. ¶33. Indeed, no new credit card network has been created since 1985. *Id.* And even if a new network was created, the Merchant Restraints would still insulate MasterCard from any price competition from that new competitor with respect to interchange fees. *See* Compl. ¶¶23(G)-(L).

credit or charge cards."); *see also* IIA ANTITRUST LAW ¶ 564A at 321-22 (explaining why credit cards are not in same market as checks, cash and other cash equivalents).

Because credit cards constitute a separate product market, the plausibility of MasterCard's substantial market power in that market can be (and is) demonstrated by Plaintiffs' allegations that the cross-elasticity of demand among the networks' credit cards, *i.e.*, price competition from other network credit cards, is not sufficient to restrain MasterCard from raising its interchange fees to merchants above a competitive level. Plaintiffs' Complaints allege specific reasons why MasterCard's conduct blunts or eliminates this cross-elasticity of demand with other credit cards thus protecting or enhancing MasterCard's market power.

2. Plaintiffs' Complaints Allege The Reasons For MasterCard's Substantial Market Power

Plaintiffs' Complaints allege that through a series of rules and conditions imposed on merchants called "Merchant Restraints," MasterCard prevents merchants from buying fewer MasterCard services in response to price competition from other network credit cards and, as a result, MasterCard is able to increase interchange rates. Most prominent among these Merchant Restraints is the "No Surcharge Rule," which expressly prohibits merchants from charging consumers more to use a MasterCard card rather than a less costly credit or charge card. *See* Compl. ¶23(G). This rule prohibits merchants from using the most fundamental economic tool – a price signal to cardholders – to incentivize cardholders to use a less costly payment card. The Complaints allege that the No Surcharge Rule thereby mutes, or entirely negates, the cross-elasticity of demand among credit cards.[10]

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[10] Compl. ¶23(G) ("This rule eliminates any incentive by competing networks to charge a lower interchange fee than MasterCard (and vice versa), since those lower interchange fees will not be visible to consumers and will not lead to increased usage."); *see also id.* ¶40 ("the Merchant Restraints have the effect of severing the connection that exists in a properly functioning market

Plaintiffs' Complaints allege that the No Surcharge Rule is reinforced by other restraints that prevent merchants from fostering competition among credit card issuers to lower the interchange fees. These include the Honor-All-Cards Rule, which requires merchants that accept a MasterCard card issued by *any* member bank to accept MasterCard cards issued by *all* member banks, *see* Compl. ¶23(H); the All-Outlets Rule, which requires a merchant with multiple outlets to accept MasterCard in all of its outlets, *id.* ¶23(I); the No-Bypass Rule, which prohibits merchants from by-passing the MasterCard system to clear transactions even if the issuing and acquiring bank are the same, *id.* ¶23(J); and the No-Multi-Issuer Rule, which prohibits a bank card that processes any other card association transaction from also processing MasterCard transactions. *Id.* ¶23(K).

As a result of these Merchant Restraints, price competition among banks and card associations with respect to the interchange fee is severely muted or altogether eliminated. Compl. ¶39. Merchants are prohibited from shifting credit card usage among the various card issuers or card networks in response to higher or lower interchange fees. Instead, "the merchants' only option in the face of an increase in interchange fees is to decline MasterCard products entirely, an option that merchants are not in an economic position to exercise." *Id.* The absence of interchange fee competition on credit cards at the merchant level as a result of the Merchant Restraints has protected and enhanced MasterCard's substantial market power.

3. The Second Circuit Has Already Affirmed A Finding That MasterCard Has Market Power

Another reason why Plaintiffs' allegations of MasterCard's substantial market power are plausible is because the Second Circuit already has affirmed a factual finding that MasterCard

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between higher prices (*i.e.,* Interchange Fees) and lower consumer demand (*i.e.,* MasterCard credit card usage)").

alone has market power. *Visa*, 344 F.3d at 239 ("we agree with the district court's finding that Visa USA and *MasterCard*, jointly and *separately*, have power within the market for network services") (italics added). As noted above, monopoly power is simply "substantial" market power.[11] With the Court of Appeals having already concluded that MasterCard has market power sufficient to sustain liability under Section 1, it is clearly plausible for Plaintiffs to allege that such power is substantial rather than insubstantial in their Section 2 claims.[12] MasterCard offers no basis for this Court to conclude that Plaintiffs are precluded, as a matter of law, from attempting to show that the conceded market power is substantial.

As a fallback position, MasterCard contends that the Second Circuit's holding in *Visa* that MasterCard does, in fact, enjoy market power is trumped by District Judge Barbara Jones' subsequent opinion in *Discover Financial Services, Inc. v. Visa U.S.A., Inc.*, No. 04-Civ-7844 (S.D.N.Y. Oct. 25, 2005). According to MasterCard, *Discover* compels the conclusion that MasterCard does not have sufficient market power in the market for network services for MasterCard credit cards to sustain a monopolization claim. In *Discover*, however, there was no allegation of the narrow network services market for MasterCard credit cards alleged here by Plaintiffs. Judge Jones was not asked to determine whether MasterCard had market power in that market and she made no such ruling. Further, Judge Jones' conclusion that a 29% market share does not by itself warrant an inference of substantial market power, *i.e.*, monopoly power, is

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[11] If, as the Court of Appeals has sometimes indicated, market power is *synonymous* with monopoly power, *supra* at 6, then the *Visa* Court's finding of market power resolves the monopoly power inquiry in Plaintiffs' favor. If monopoly power means substantial market power, then Plaintiffs have pled whatever additional degree of power is required.

[12] We explain below why, contrary to MasterCard's assertion, this pleading practice does not change whether Plaintiffs' claim is based on Section 1 or 2. *Infra* at 21-22 & 22 n.19.

irrelevant here because MasterCard has 100% of the market alleged by Plaintiffs.[13] Tellingly, MasterCard never reconciles its tortured reading of *Discover* with the Court of Appeals' explicit conclusion that Judge Jones was correct in deciding in *Visa* that MasterCard *separately* had market power.

D. There Is No Rule Against Brand-Specific Markets

Plaintiffs' allegation in the alternative that the relevant market is limited to network services for MasterCard credit cards is supported by the detailed allegations of the Complaint, a cogent rationale, and the conclusion of the Court of Appeals. MasterCard therefore resorts to urging this Court to adopt a "rule" against recognizing a brand-specific market. MasterCard's request is precluded by controlling Supreme Court and Second Circuit precedent.

Citing *du Pont,* 351 U.S. at 393, MasterCard asserts that there is a "rule against brand-specific market definitions." MC Br. at 12. However, MasterCard's contention is squarely precluded by the Supreme Court's decision in *Eastman Kodak*, 504 U.S. 451, which states: 'Kodak erroneously contends that this Court in *du Pont* rejected the notion that a relevant market could be limited to one brand.... The Court simply held in *du Pont* that one brand does not *necessarily* constitute a relevant market if substitutes are available." *Id.* at 482 n.30 (italics in original). Instead of adopting the "rule" asserted by MasterCard, the Supreme Court expressly rejected it: "Kodak ... contends that, as a matter of law, a single brand of a product or service can never be a relevant market under the Sherman Act. We disagree." *Id.* at 481. In numerous cases, the Supreme Court had "examined closely the economic reality of the market at issue" and concluded that a single brand constituted the relevant market. *Id.* at 467, 482.

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[13] We show below, *infra* at 24-25, that MasterCard also erroneously reads Judge Jones' decision in *Discover* to prohibit Plaintiffs from proving monopoly power through direct, as opposed to indirect, evidence.

Indeed, courts have routinely found, on the facts of particular cases, that a single brand of a product or service constitutes a relevant market. *See, e.g., Eastman Kodak*, 504 U.S. at 482 & n.31 (citing numerous cases); *U.S. Anchor Mfg. Co. v. Rule Indus.*, 7 F.3d 986, 997-98 (11th Cir. 1993) (limiting market to "Danforth" anchor because record provided "no support for finding significant cross-elasticity of demand or supply between Danforths and generic anchors"); *Woods Exploration & Producing Co. v. Aluminum Co. of Am.*, 438 F.2d 1286, 1307 (5th Cir. 1971) (limiting market to single natural gas field). Courts reaching that conclusion include the Second Circuit, *e.g., Geneva,* 386 F.3d at 499-500 (discussed below); *National Ass'n of Pharm. Mfgrs., Inc. v. Ayerst Lab.*, 850 F.2d 904, 915 (2d Cir. 1988) (limiting market to single chemical entity), as well as district courts within the Circuit. *E.g., Vitale v. Marlborough Gallery*, No. 93 Civ. (PKL) 6276, 1994 WL 654494, at *3-*4 (S.D.N.Y. July 5, 1994) (limiting market to Jackson Pollack paintings); *Intellective, Inc. v. Massachusetts Mut. Life Ins. Co.*, 190 F.Supp.2d 600, 612 (S.D.N.Y. 2002) (limiting market to particular category of investment analysis). In the next footnote, we cite still other cases supporting a single brand product market definition.[14]

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[14] *See also Am. Standard, Inc. v. Bendix Corp.*, 487 F.Supp. 265, 270 (W.D. Mo. 1980) (market limited to "the United States government market for APX-72 transponders"); *Cutters Exchange, Inc. v. Durkoppwerke, GmbH*, No. 3-85-1005, 1986 WL 942 at *7 (M.D. Tenn. Jan. 22, 1986) (market limited to Durkopp products); *Brownlee v. Applied Biosystems, Inc.*, No. C 88 20672 RPA, 1989 WL 53864, at *2 (N.D. Cal. Jan. 9, 1989) (market limited to separation systems of which plaintiff was only manufacturer); *Picker Int'l, Inc. v. Leavitt*, 865 F.Supp. 951, 958 (D. Mass. 1994) (market limited to service of single manufacturer's computed tomography scanners); *Hewlett-Packard Co. v. Arch Assocs. Corp.*, 908 F. Supp. 265, 270 (E.D. Pa. 1995) (market limited to Hewlett-Packard printers); *Mutual Pharm. Co., Inc. v. Hoechst Marion Roussel, Inc.,* No. Civ.A. 96-1409, 1997 WL 805261, at *3 (E.D. Pa. Dec. 17, 1997); (market limited to terfenadine); *In re Cardizem CD Antitrust Litig.*, 105 F. Supp. 2d 618, 680 (E.D. Mich. 2000) ("[A] single brand product can constitute a relevant market for antitrust purposes"); *In re NCAA I-A Walk-On Football Players Litig.*, 398 F.Supp.2d 1144, 1150 (W.D. Wash. 2005) ("The fact that it is a single product market is not fatal to Plaintiffs' claim").

MasterCard's Motion, MC Br. at 11-13, cites several cases (identified in the next footnote) in which courts dismissed Section 2 claims because the plaintiff failed to offer a plausible reason for defining the market narrowly. However, the bare bones allegations deemed legally insufficient in those cases come nowhere close to matching the detailed allegations in Plaintiffs' Complaint, backed by law, explaining the rationale for Plaintiffs' alternate single brand market definition.[15] *E.g.* Compl. ¶¶1, 23 (G) - (L), 29 (B), 31, 32, 33, 40, 47-54.

The key issue in single-brand cases is the same as in other market definition cases – whether plaintiff has plausibly alleged the absence of significant cross-elasticity of demand between defendant's product and other potential substitutes. For example, in *Geneva*, the Court of Appeals held that the market was more narrow than even the single brand – the *relevant market consisted of only generic copies of a single brand*. *Geneva,* 386 F.3d at 500. Geneva's monopolization claim asserted that Barr had entered into an exclusive dealing contract that prevented Geneva from getting access to an input required to produce a generic version of branded warfarin sodium. The district court granted partial summary judgment in favor of defendant Barr on the ground that the relevant market included both branded warfarin sodium and its generic versions, and that Barr had only 8% of that market. *See id.* at 496-97. The district court held that there was "*functional* interchangeability" between generic and branded warfarin sodium because the FDA certifies that

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[15] The parentheticals in the following cases cited by MasterCard reflect pleading deficiencies clearly not present in Plaintiffs' Complaints: *Carell v. Schubert Org., Inc.*, 104 F. Supp. 2d 236, 264 (S.D.N.Y. 2000) ("Nothing in the Complaint explains why products associated with other Broadway shows or other forms of entertainment are not reasonably interchangeable with products associated with *Cats*"); *Mathias v. Daily News, L.P.*, 152 F.Supp. 2d 465, 482 (S.D.N.Y. 2001) (rejecting plaintiffs' "weak attempt to justify their artificially constricted market definition" of the relevant market as the *New York Daily News* with three "meaningless" facts); *Global Disc. Travel Servs., LLD v. Trans World Airlines, Inc.*, 960 F.Supp. 701, 705-06 (S.D.N.Y. 1997) ("Plaintiff has made no reasonable showing why TWA airline tickets for travel between certain cities should be considered a market unto itself, as distinguished from the market consisting of all airline tickets for travel between the paired cities").

generic versions of branded drugs are therapeutically equivalent. *Id.* at 496. The Court of Appeals reversed, holding that the district court erred in focusing on *functional* interchangeability rather than on *economic* interchangeability.[16]

The Second Circuit emphasized that products are in the same market only when the ability of purchasers to switch to a substitute "restrains a firm's ability to raise prices above the competitive level." *Geneva*, 386 F.3d at 496. The Court noted that after the generic warfarin sodium entered the market, consumers of warfarin sodium became segmented into two distinct groups – elastic demanders who purchased the generic version and inelastic demanders who continued to buy branded warfarin sodium at a 40% price premium. *Id.* at 497. Branded warfarin sodium (already priced at a 40% price premium) therefore would not provide a constraint on a slight increase in the price of generic warfarin sodium, and, conversely, generic warfarin sodium (already priced at a 40% discount) provided no substantial price constraint on the price charged for branded warfarin sodium to the inelastic demanders. By establishing the absence of substantial cross-elasticity of demand between generic and branded warfarin sodium, plaintiffs had shown a "plausible justification" for limiting the market to generic versions of warfarin sodium. *Id.* at 498. Although Barr had only 8% of the broader market of all (brand and generic) warfarin sodium, it had 100% of the market for generic warfarin sodium and was clearly a monopolist. *Id.* at 501.

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[16] *See also Telecor Commc'ns, Inc. v. S.W. Bell Tel. Co.*, 305 F.3d 1124, 1132 (10th Cir. 2002) ("Reasonable interchangeability does not depend on product similarity"); *Microsoft*, 253 F.3d at 53-54 ("The test of reasonable interchangeability, however, required the District Court to consider only substitutes that constrain pricing in the reasonably foreseeable future ...."); *U.S. Anchor*, 7 F.3d at 995-99 (despite functional interchangeability, absence of price-related demand and supply elasticities limits market); *U.S. v. Archer-Daniels-Midland Co.*, 866 F.2d 242, 248 & n.1 (8th Cir. 1989) (sugar and high fructose corn syrup, though functionally inter-changeable, are not in the same market because "a small change in the price of HFCS would have little or no effect on the demand for sugar"); *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1074, 1080 (D.D.C. 1997) (absence of cross-elasticity of demand limits market despite functional interchangeability of products).

Similarly, in *Eastman Kodak,* Kodak asserted that it did not have market power in the aftermarket for parts and services for Kodak photocopiers because competition from other equipment manufacturers constrained Kodak's pricing of parts and services to the competitive level. *Eastman Kodak*, 504 U.S. at 465-66. According to Kodak, an increase in Kodak's parts and service prices would be offset by a corresponding loss in profits from initial equipment sales as consumers began purchasing competitive equipment with lower service costs. *Id.* Like the Court of Appeals in *Geneva v. Barr*, the Supreme Court in *Eastman Kodak* began by emphasizing that courts must determine market power issues "on a case-by-case basis" by "examin[ing] closely the economic reality of the market at issue." *Id.* at 467. Whether cast in terms of "market definition" or "market power," the issue is the same: the "extent to which consumers will change their consumption of one product in response to a price change in another, *i.e.,* the 'cross-elasticity of demand.'" *Id.* at 470 & n.15.

The close factual examination in *Eastman Kodak* revealed that several market imperfections – significant information costs and switching costs – could mute the hypothesized price connection between parts/service and original equipment. *Id.* at 473. Moreover, Kodak's assertion of such a price connection between the parts/service market and the original equipment market was not supported by the facts: "Service prices have risen for Kodak customers, but there is no evidence or assertion that Kodak equipment sales have dropped." *Id.* at 472. Accordingly, Kodak failed to negate the inference of market power in the service/parts market and was not entitled to summary judgment. *Id.* at 477.[17]

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[17] As noted above, the Court rejected outright Kodak's assertion that a single brand of a product or service can never be a relevant market under the Sherman Act. *Id.* at 481-82.

Like the plaintiffs in *Geneva v. Barr* and *Eastman Kodak v. Image Technical Services*, Plaintiffs here have clearly alleged a plausible basis for concluding that a single branded service is a relevant market. Plaintiffs' Complaint alleges that MasterCard and its co-conspirators have, through the Merchant Restraints, foreclosed merchants' incentive and ability to steer credit card usage in response to the price level of interchange fees. *E.g.* Compl. ¶¶23 (G) - (L), 26, 40. Thus, MasterCard is plainly wrong in asserting that Plaintiffs have alleged "nothing unique" to support a brand-specific market. MC Br. at 13.[18] Plaintiffs' assertion of a narrow market limited to MasterCard transactions is therefore not only plausible, but compelling. *See du Pont*, 351 U.S. at 395 ("illegal monopolies under § 2 may well exist over limited products and narrow fields where competition is eliminated").

II. THE COMPLAINTS APPROPRIATELY RELY ON DIRECT EVIDENCE OF MASTERCARD'S MARKET POWER IN THE ALTERNATIVE, BROADER MARKET

Plaintiffs' Complaints clearly allege direct evidence of MasterCard's substantial market power, and allege that MasterCard and its co-conspirators have insulated interchange fees from price competition by eliminating merchants' ability to shift demand in response to price. The resulting absence of substantial cross-elasticity of demand supports a separate market or sub-market for the sale of network services for MasterCard credit cards. Plaintiffs have also alleged in the alternative, however, that this same evidence supports the conclusion that MasterCard has monopoly power in the broader market for the sale of network services for general purpose payment cards. Compl. ¶¶29(A), 95, 100. Experts and the factfinder may conclude that, despite the presence of other competitors in this broader market, the MasterCard-imposed Merchant

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[18] MasterCard is willfully blind to Plaintiffs' allegations that the Merchant Restraints result in monopoly power, erroneously asserting that Plaintiffs rely instead on mere "customer preference" for MasterCard's "popular services." *See* MC Br. at 13.

Restraints prevent those would-be competitors from significantly constraining MasterCard's interchange fees and MasterCard therefore has monopoly power in that broader market. *E.g.*, Compl. ¶¶1, 23 (G) - (L), 26, 29 (A), 39, 40, 96, 102. Discovery and analysis should go forward on both alternative alleged relevant markets.

MasterCard attempts to forestall discovery and analysis of its monopoly power in the alternative broader market by asserting that it has only a 29% share in that market and that a high market share is a "necessary" and "required" element of a monopolization claim. MC Br. at 1, 6-7. MasterCard is wrong. As the Court of Appeals has specifically held, a high market share is merely one alternative method of proving the existence of monopoly power. The preferred method of proof is to demonstrate directly the defendant's ability to raise price without losing sales – exactly what Plaintiffs have alleged.

A. The Second Circuit Has Expressly Permitted The Use of Direct Evidence to Prove Monopoly Power

The Court of Appeals has expressly and repeatedly rejected the contention that market power may be proven only by high market share; plaintiffs may instead plead and prove direct evidence of market power. The Second Circuit articulated these alternative means of proof most forcefully in *Todd,* 275 F.3d at 206:

> Market power defined as a percentage market share, however, is not the only way to demonstrate defendants' [market power]. *See Toys "R" Us, Inc. v. FTC,* 221 F.3d 928, 937 (7th Cir. 2000) (explaining that "the share a firm has in a properly defined relevant market is only a way of estimating market power, which is the ultimate consideration"). If a plaintiff can show that a defendant's conduct exerted an actual adverse effect on competition, this is a strong indicator of market power. In fact, this arguably is more direct evidence of market power than calculations of elusive market share figures. *See Tops Mkts.,* 142 F.3d at 98 (stating that market power "may be proven *directly* by evidence of the control of prices ... or it may be *inferred* from one firm's large percentage share of the relevant market") (emphasis added); *Toys "R" Us,* 221 F.3d at 937 (stating that market power may be proven "through *direct* evidence of anticompetitive effects" or "by

> proving relevant product and geographic markets and by showing that the defendant's share exceeds whatever threshold is important for the practice in the case").

See also Geneva, 386 F.3d at 500 (monopoly power "can be proven directly through evidence of control over prices or the exclusion of competition, or it may be inferred from a firm's large percentage share of the relevant market"); *K.M.B. Warehouse*, 61 F.3d at 129 ("market power may be shown by 'evidence of specific conduct indicating the defendant's power to control prices or exclude competition.' In addition, market share may be used as a proxy for market power") (citation omitted); *Pepsico,* 315 F.3d at 107-08 (same).

None of this should come as a surprise to MasterCard. En route to concluding that MasterCard wields market power, the Second Circuit in *Visa* held:

> Such power may be proven through evidence of specific conduct undertaken by the defendant that indicates he has the power to affect price or exclude competition. [citation omitted] *Alternatively,* market power may be presumed if the defendant controls a large share of the relevant market.

344 F.3d at 239 (emphasis added). Thus, it is clear that Plaintiffs may prove MasterCard's necessary degree of control over price by introducing direct evidence of its ability to raise prices without losing sales – exactly what Plaintiffs have alleged. Compl. ¶¶31-32. There is no requirement that Plaintiffs prove MasterCard's substantial market power a second time by indirectly inferring such power from proof of a high market share.

MasterCard contends that if an indirect inference of monopoly power does not flow from a high market share, then proof of monopoly power is precluded as a matter of law. MC Br. at 9-11. This proffered rule would prevent proof of monopoly power by direct evidence of defendant's power to substantially raise price without losing sales. It is also contrary to controlling law, which expressly allows for such direct proof of Section 2 monopoly power. *See, e.g., Geneva*, 386 F.3d at 500 (permitting "monopoly power" in Section 2 case to be "proven directly through control over

prices"); *Pepsico*, 315 F.3d at 107-08 (Section 2 case acknowledging that "monopoly power" may be "proven directly through evidence of the control of prices or the exclusion of competition"); *Tops Mkts.*, 142 F.3d at 397-98 (same); *Broadway Delivery Corp. v. UPS*, 651 F.2d 122, 128, 130 (2d Cir. 1981) (Section 2 case adhering to rule "that a particular market share is not invariably necessary for a firm to be able to control prices or exclude competition" and holding that "evidence of market share is [not] invariably a requirement of a monopolization claim"); *see also Todd,* 275 F.3d at 207 (noting in Section 1 case that Court has permitted use of direct evidence to prove "market power in the context of a §2 monopolization claim") (citing *Tops Mkts.,* 142 F.3d at 98-99)).[19]

To the extent that MasterCard implies (it does not expressly argue) that direct evidence of monopoly power is *per se* insufficient when the defendant's market share is below a particular threshold, that implication is also precluded by Second Circuit law. In *Broadway Delivery v. UPS*, the Court of Appeals rejected a jury instruction requiring a particular market share threshold be

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[19] MasterCard argues that *Visa*, as a Section 1 case, is of measured utility on the issue of its market power, and Plaintiffs must allege "something greater" than the facts in *Visa* to present a legally sufficient Section 2 claim. MC Br. at 10-11. Contrary to MasterCard's contention, *Visa* is helpful here because, as noted above, the finding already by the Court of Appeals in that case that MasterCard alone had market power establishes, at a minimum, that MasterCard *does* have market power in the broader market. In essence, what MasterCard really argues here is that Plaintiffs have not alleged sufficient facts to support an inference of MasterCard's market power. Plaintiffs' Complaints, however, are replete with specific allegations of MasterCard conduct above and beyond the activities challenged in *Visa* that show MasterCard's substantial market power. *E.g.*, Compl. ¶32 (MasterCard's power to shift credit card usage from standard cards to premium cards); *id.* ¶47 (MasterCard's differential pricing tiers that merchants cannot resist), *id.* ¶23(G), (I) & (J) (MasterCard's Merchant Restraints including, for example, No Surcharge Rule, All-Outlets Rule and No-Bypass Rule), *id.* ¶¶23(D), 51-54 (MasterCard's bundling of Network Services). These detailed factual allegations easily distinguish this case from *PSW, Inc. v. Visa U.S.A., Inc.*, No. CA-04-347T, 2006 WL 519670 (D.R.I. 2006), MC Br. at 10-11, in which "there [were] absolutely no allegations that [defendants] had sufficient market power ... to monopolize a relevant market," *id.* at *11, other than plaintiffs' allegation of "shared power" with Visa – a concept which, as we note above, the *Discover* court also rejected.

met and, instead, held that it would follow "guidance from the Supreme Court and ... give only weight and not conclusiveness to market share evidence." 651 F.2d at 127. The economic realities of particular markets may permit other evidence of substantial market power to overcome the conclusion otherwise inferable from a relatively low market share. *Id.* at 129-30 ("the jury should not be told that it must find monopoly power lacking below a specified share" and the instruction "should not deflect the jury's attention from indicia of monopoly power other than market share").[20]

MasterCard has cited, and can cite, no contrary Second Circuit law. Instead, MasterCard merely cites distinguishable cases in which the complaint alleged *neither* direct *nor* indirect indicia of monopoly power. *See* MC Br. at 8-9.[21] None of these cases even arguably holds that a complaint that alleges that the defendant has monopoly power, perpetuates restraints that preserve and enhance that power, and is able to raise prices without losing business must also allege a specific, high market share in order to state a claim – and MasterCard should not have cited them for that demonstrably incorrect proposition.[22]

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[20] *See also Hayden Pub. Co. v. Cox Broad. Co.*, 730 F.2d 64, 69 n.7 (2d Cir. 1984) (monopoly power can be proved despite share below 50%); *Energex Lighting Indus. v. NAPLC*, 656 F.Supp. 914 (S.D.N.Y. 1987) (monopoly power may be proved despite less than 25% share).

[21] The distinguishable cases MasterCard cites, MC Br. at 8-10, and their pleading deficiencies, are as follows: *Orthopedics Studio, Inc. v. Health Ins. Plan of Greater N.Y., Inc.*, No. CV-95-4338, 1996 WL 84503, at *6 (E.D.N.Y. Feb. 9, 1996) (complaint alleged no direct evidence and a share of "less than 10% of the market"); *City of New York v. Coastal Oil New York, Inc.*, No. 96 CIV. 8667(RPP), 1998 WL 82927 (S.D.N.Y. Feb. 25, 1998) (complaint failed to allege monopoly power and failed to allege even a low market share); *Pants 'N' Stuff Shed House, Inc. v. Levi Strauss & Co.*, 619 F.Supp. 945, 948-49 (W.D.N.Y. 1985) (complaint did not allege that defendant had or was likely to obtain monopoly power); *Telectronics*, 687 F.Supp. at 838 ("complaint alleged neither monopoly power nor even a significant market share); *Consolidated Terminal System, Inc. v. ITT World Communications, Inc.*, 535 F.Supp. 225 (S.D.N.Y. 1982) (complaint alleged that several defendants collectively held 98% of the market, but did not allege a conspiracy between defendants or that any one of them had monopoly power or any particular market share).

[22] MasterCard also misleadingly cites *United Air Lines, Inc. v. Austin Travel Corp.*, 867 F.2d 737 (2d Cir. 1989), *AD/SAT*; and *Nifty Foods Corp. v. The Great Atlantic & Pacific Tea Co.*, 614 F.2d 832 (2d Cir. 1980), for the proposition that a complaint should be dismissed unless the

Further, as noted earlier, MasterCard misstates the import of the slip opinion in *Discover*. According to MasterCard, that decision proves that it has a 29% market share and "compels" the dismissal here of Plaintiffs' claim of an alternative, broader market. MC Br. at 10. Nothing could be further from the truth. Discover's allegation of MasterCard's market share in that case is hardly binding on Plaintiffs here. More importantly, Judge Jones' ruling that a 29% market share is insufficient to support a claim for monopolization or attempt to monopolize, and that monopoly power requires a showing of at least 30% of the market (Slip Op. 2-3), *speaks only to indirect proof of monopoly power inferred from a high market share.*[23] Critically, Judge Jones' decision makes *no reference whatsoever to any allegations of direct proof of the ability to raise price or exclude competition and does not purport to decide whether a specific market share is required when such direct evidence is present.* The more expansive interpretation of Judge Jones' opinion advanced by MasterCard has no support on the face of the opinion and would require a reading of the decision that is at odds with the controlling authority in this Circuit. *See Geneva, Todd,*

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plaintiff has alleged a market share greater than 31% (*United Air*), 33% (*AD/SAT*), or 48% (*Nifty Foods*). MC Br. at 7-8. None of these cases, however, involve a motion to dismiss. All were decided on summary judgment after discovery, and in each case the plaintiff sought to carry its burden of proof by merely relying on the defendant's market share in order to infer the existence of monopoly power. In each case, the court held that the pertinent market share was not high enough to allow monopoly power to be inferred from that fact alone. None of these cases even arguably addresses the question of what allegations of direct proof of monopoly power or power over price are required to defeat a motion to dismiss. MasterCard also cites *Flash Electronics*. MC Br. at 8. That, at least, is a motion to dismiss case, but it was not decided on the ground suggested by MasterCard. The complaint in *Flash Electronics* was dismissed because "a fair reading" of it indicated that plaintiff was proceeding by cumulating various defendants' market shares and alleging a shared monopoly -- which is a legal theory that the courts do not recognize. 312 F.Supp.2d at 396-97. Here, in contrast, Plaintiffs have alleged that MasterCard individually possesses monopoly power.

[23] As noted earlier, *Discover* holds that the market shares of separate entities cannot be aggregated in order to find sufficient market power to sustain claims of actual and attempted monopolization under Section 2.

Broadway Delivery, *Pepsico*, *Tops*. MasterCard offers no reason why Judge Jones' opinion should be read to disregard controlling authority. *See Shain v. Ellison*, 273 F.3d 56, 66 (2d Cir. 2001) ("[W]e must accept a plausible reading of a case that renders it consistent with other Second Circuit precedent even where an alternative reading exists.").

CONCLUSION

Based on the foregoing analysis, Plaintiffs request that the Court deny MasterCard's Motion to Dismiss.

Dated: July 21, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 21, 2006, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the Court's Electronic Mail Notice List.

By: _____
William J. Blechman

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