UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	**98 Civ. 7076 (BSJ)**
v.	)	
	)	**PUBLIC VERSION**
VISA U.S.A. INC., VISA INTERNATIONAL CORP., AND MASTERCARD INTERNATIONAL INCORPORATED,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF THE GOVERNMENT'S MOTION TO STRIKE PORTIONS OF DECLARATIONS SUBMITTED IN SUPPORT OF DEFENDANTS VISA U.S.A. INC'S AND MASTERCARD INTERNATIONAL, INC.'S MOTION TO STAY PENDING APPEAL

Plaintiff, United States of America ("Government") moves to strike portions of the declarations submitted in support of Visa U.S.A.'s Motion To Stay Pending Appeal and MasterCard International Inc's Motion To Stay Pending Appeal. Portions of the declarations of Carl Pascarella, Diana Knox, Phillip Heasley and Robert Selander (collectively, "defendants' declarations") should be stricken because: (1) the testimony is speculative and argumentative and thus improper lay witness opinion testimony under Fed. R. Evid. 701; and/or (2) the declarant lacks personal knowledge under Fed. R. Evid. 602 and thus the testimony is based on hearsay. Moreover, while the Government has no objection to the Court's consideration of

additional evidence for the purpose of determining the public interest or whether a party will suffer irreparable injury, it does object generally to the extent that defendants are attempting to improperly bolster the trial record with evidence on the merits of the case. Such evidence should not be considered in determining defendants' likelihood of success on appeal.[1]

Attached to the accompanying Declaration of Scott Scheele (the "Scheele declaration") are the portions of defendants' declarations to which the Government objects. The objectionable provisions are circled and the basis for the objection is noted in the margin. In addition, a chart containing the provisions the Government seeks to strike, the substance of those provisions, and the basis for the objection is part of each attachment to the Scheele declaration. First, however, we briefly summarize the relevant Second Circuit law.

Rule 701 (Opinion Testimony By Lay Witnesses)

Rule 701, as amended on January 1, 2001, provides that lay witness opinion testimony "is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701 (2001). In order to be admissible, the proponent of a lay opinion must lay a foundation that the opinion is within the bounds of Rule 701. The lay opinions contained in defendants' declarations simply do not meet Rule 701's "rigorous foundational standard" because those opinions are speculative and thus they are not rationally

[1] *See, e.g.,* Declaration of Richard Schmalensee at 3 n.4 and associated text (cites to figures from the 2001 Nilson Report, published after the close of the record in this case); Declaration of Robert Selander at ¶13 (referencing "discussions" which were not part of the trial record); Declaration of Carl Pascarella at ¶¶11, 13 (Visa's rationale for adopting 2.10(e) and its debit card exclusivity rule — both of which occurred prior to Mr. Pascarella arriving at Visa).

based on the witness' perceptions.[2] Moreover, because many of the opinions expressed in defendants' declarations are speculative, they do not meet Rule 701's requirement that the opinion be helpful to the determination of a fact in issue. Similar speculative lay opinion testimony has been stricken in antitrust cases because it was unhelpful to the Judge, as trier of fact, under Rule 701.[3]

Here, defendants' executives' speculation goes well beyond Rule 701's boundaries. Despite their acknowledgment that the future will bring "unexpected" change making it difficult to "predict the details," defendants' executives' endeavor to make such predictions.[4] For example, Carl Pascarella prognosticates what third parties will do more than two years in the future, predicting that after the resolution of appeals some of Visa's "most influential members might have substantial American Express portfolios" and therefore they would "undoubtedly use their influence to prevent Visa from restoring Bylaw 2.10(e)." (Pascarella Decl. ¶ 40) Robert Selander

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[2] *Abdus-Sabur v. Port Authority of New York*, 2001 WL 1111984, *2 (S.D.N.Y. 2001); *see also*, *Giles v. Rhodes*, 2000 WL 1425046, *7 (S.D.N.Y. 2000) (Haight, J.) ("Based on the cited cases, the definition of expert testimony under Rule 702, and the new limitation on Rule 701 lay opinion testimony, it is evident that testimony cannot be characterized as lay if it is based on experience, training or specialized knowledge rather than on the particularized, personal knowledge of the witness.")

[3] *New York v. Saint Francis Hosp.*, 94 F. Supp. 2d 423, 427 (S.D.N.Y. 2000) (paragraph of affidavit struck in antitrust case due to affiant's lack of personal knowledge regarding the alleged impact of the defendants' conduct on competition resulting in the testimony's lack of helpfulness under Rule 701). *See also FTC. v. Heinz*, 116 F. Supp. 2d 190 (D.D.C. 2000), *rev'd on other grnds*, 246 F.3d 708 (D.C. Cir. 2001) (transcript of proceedings at 1054-58) (excluding significant portions of declarations submitted by defendants opposing the Federal Trade Commission's Motion for a Preliminary Injunction to block Heinz from acquiring Beechnut's baby food production assets because the opinions were speculative and therefore "unhelpful" under Rule 701). (*See* Attachment 5 to Scheele declaration)

[4] Pascarella Decl. ¶ 15.

speculates that, if some MasterCard members were to enter agreements with American Express, "the remaining MasterCard members not invited by American Express to enter into such arrangements also may become less devoted to supporting MasterCard." (Selander Dec. ¶ 15).

The analysis in *New York v. Saint Francis Hospital* is instructive.[5] In that case the State brought antitrust claims against a number of hospitals. Defendants moved to strike portions of the State's declarations submitted in support of the State's summary judgment motion. The district court struck those portions of the state's declarations that made speculative conclusions that were not based on personal knowledge, such as testimony that the defendants' "refusal to compete on price for all market services has undermined New York's effort to have hospital rates set through competitive market forces." In striking the testimony, the district court held that "[t]here is no basis in the [declaration] to support his personal knowledge, even through experience gained over time, regarding the alleged impact of defendants' refusal to cease their joint negotiations on competition."[6]

In the merger context, where the proceedings require evidence concerning predictions about the future impact of the proposed merger, courts have struck portions of lay witness declarations that are not based on personal knowledge and are speculative, and thus "unhelpful" under Rule 701. In *FTC v. Heinz*, for example, the district court ruled that customer lay witness declarations were useful "to the extent they regard past practices," but "where the declarant is

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[5] 94 F. Supp. 2d 423 (S.D.N.Y. 2000)

[6] *Id*. at 427. In contrast, the court denied defendants' motion to strike portions of another declaration where a witness that had personal knowledge by virtue of conducting negotiations with the defendants opines that, as a result of the defendants' joint negotiations, the State would be forced to pay more for services. *Id.*

saying what he thinks is going to happen if there's a merger, or whether he likes the merger or not, I'm, frankly, not going to consider them. Those opinions might be admissible as lay expertise, but . . . all expert testimony is conditioned on its usefulness to the finder of fact, and I don't find those opinions very helpful."[7]

While defendants' experts are free to speculate regarding the theoretical implications of the Final Judgment with impunity, and they do, defendants' fact witnesses must base their lay opinions on their own perceptions and personal knowledge. Defendants' lay witness declarations repeatedly fail this test.

Rule 602 (Lack of Personal Knowledge)

Federal Rule of Evidence 602 provides, in relevant part, that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Fed. R. Evid. 602. Although conclusions may constitute personal knowledge, those conclusions must be based on a witness's observations over time.[8] This Court ruled at trial, based on Visa's personal knowledge foundation objection, that testimony not based on personal knowledge should be stricken.[9] Despite the Court's prior ruling that such testimony is inadmissible in this case, Visa U.S.A. now seeks to have Carl Pascarella and Diana Knox testify

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[7] *FTC v. Heinz,* Preliminary Injunction Hearing Transcript at 1055. Attachment 5 to Scheele Declaration.

[8] *SEC v. Singer,* 786 F. Supp. 1158, 1167 (S.D.N.Y. 1992). *Accord, Gittes v. GMIS Inc.,* No. 95 Civ. 2296 (BSJ) 1999 WL 500144 *7 ("To remedy this defect, the Court, while deciding these motions, did not mistake such legal advocacy for assertions of fact within the affiants' personal knowledge.")

[9] *See, e.g.*, Tr. 3073-74 (David Nelms' testimony concerning matters at Discover before he was employed at Discover struck from the record based on Visa U.S.A. personal knowledge foundation objection).

about Visa U.S.A. matters that occurred prior to their having joined Visa U.S.A.

Perhaps the most important reason for striking the testimony, however, is that the defendants should not be permitted to recast the trial record with argumentative, speculative, self-serving testimony that is not based on personal knowledge. Although defendants are entitled to submit declarations to support their argument of irreparable injury if a stay is denied, much of their declarations are nothing more than an improper attempt to bolster the record on the merits of their appeal. Indeed, all but one of the declarants testified at trial and were cross-examined by plaintiff. To the extent these declarations repeat evidence presented at trial, they are unnecessary and cumulative; to the extent they recast or offer new evidence related to the merits of defendants' appeal (as distinguished from evidence relating to what will happen in the limited time period pending appeal), they are improper and should be stricken. The trial record has already closed.

CONCLUSION

For the foregoing reasons, the Government respectfully requests the Court to strike portions of the declarations of Carl Pascarella, Phillip Heasley, Robert Selander, and Diana Knox.

Respectfully submitted,

_____/S/_____
Scott Scheele (SS0496)
Jeffrey I. Steger (JS7416)
William H. Stallings (WS 8895)
Trial Attorneys
U.S. Department of Justice, Antitrust Division
325 7th Street, NW
Suite 300
Washington, D.C. 20530
202-616-5924

Counsel for Plaintiff
UNITED STATES OF AMERICA

Dated: January 18, 2002
Washington, D.C.

CERTIFICATE OF SERVICE

I certify that on January 18, 2002, a true and correct copy of the following were served upon the counsel listed below via Federal Express, overnight delivery: (1) Memorandum In Support Of Government's Motion To Strike (Public Version); (2) Declaration of Scott Scheele In Support Of Government's Motion To Strike (Public Version); (3) Government's Consolidated Memorandum In Response To Defendants' Motion For Stay Pending Appeal (Public Version); and (4) Declaration of William H. Stallings In Support Of The Government's Memorandum In Response To Defendants' Motion For Stay Pending Appeal (Public Version).

M. Laurence Popofsky, Esq.
Heller, Ehrman, White & McAuliffe, LLP
333 Bush Street
San Francisco, CA 94104-2878

Gary Carney, Esq.
Clifford, Chance, Rogers & Wells
200 Park Avenue
New York, New York 10166

Eugene F. Bannigan, Esq.
Morgan, Lewis & Bockius, LLP
101 Park Avenue
New York, NY 10178-0060

_____/S/_____
Scott A. Scheele