

IN RE:)
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VISA CHECK MASTERMONEY)
ANTITRUST LITIGATION)
)
96-CV-5238)
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_____)

Declaration of Professor Eric D. Green

I, ERIC D. GREEN, declare and state as follows:

1. I am a duly licensed attorney engaged by the parties in this action to serve as an impartial mediator. I submit this declaration supporting final approval of the settlement reached in mediation.

I. Preliminary Statement

2. I am a principal of Resolutions, LLC, a Boston, Massachusetts-based mediation services firm with expertise in a variety of complex litigation matters including, but not limited to, class action and anti-trust cases. At Resolutions, LLC, we pursue the mediation of all cases on a neutral, principled basis, mindful that it is our obligation to mediate disputes fairly and impartially. Over the course of more than twenty years as a professional mediator, I have mediated many class action anti-trust and securities matters in a variety of jurisdictions. I am also a Professor of Law at Boston University School of Law, where I teach courses in Evidence and Disputes Resolution. My curriculum vitae is attached.

3. After being asked by counsel for the parties in this case in late 2002 to serve as mediator, I determined that there was no conflict in my serving as a mediator with regard to these parties and agreed to serve as a mediator with the understanding that there would be an adequate exchange of pertinent written information, an opportunity for both plenary and ex parte sessions with

the parties, and sufficient time to have the multiple mediation sessions that a case of this complexity and magnitude required. We then in fact scheduled multiple days of intensive mediation sessions spread throughout the period leading up to the April 2003 trial date. The parties' acceptance of these conditions demonstrated to my satisfaction that they were committed to working towards a settlement of this action, if possible, and their subsequent actions verified this conclusion.

4. Prior to the initial mediation meetings, plaintiffs and defendants provided me with detailed mediation memoranda and supporting documents so that I could acquaint myself with the facts, liability and damage issues, and the respective positions of each party. During the course of the mediation, the parties supplemented these materials with key evidentiary materials, documents, deposition transcripts, expert reports, decisional law, motion papers, court orders, and even video tapes of their own mock jury and focus group research. Nothing that I requested was denied.

5. From the inception of this mediation, it was apparent that this case was a complex anti-trust class action involving numerous difficult legal and factual issues and extremely high stakes for both sides. Based on my review of the mediation briefings and supporting documentation supplied to me by the parties, the detailed oral presentations by plaintiffs' and defendants' counsel, and the discussions over many days of mediation sessions, it ultimately became clear to everyone that continued litigation posed risks for both sides which convinced each side to weigh carefully the advantages of a mediated settlement that would be in their respective best interests compared to the risks of continuing costly, lengthy, and uncertain litigation.

II. The Mediation

6. I conducted sessions with the parties on December 2, 2002, January 21-22, February

10, 25-26, March 28, 31, April 8-9, 12, 14-15, 17-18, 22, 25-27, May 28, 30. During the mediation sessions, the class was represented by Lloyd Constantine, Mitch Shapiro, and Robert Begleiter of Constantine & Partners, George Sampson of Hagens Berman, and others. The MasterCard defendants were represented by Kevin Arquit of Simpson Thacher, Ken Gallo and Keila Ravelo of Clifford Chance, Noah Hanft of Mastercard, and others. The Visa Defendants were represented by Steve Bomse and Larry Popofsky of Heller Ehrman White, Paul Allen and Stephen Theoharis of Visa, and others. During the course of these and subsequent mediation sessions the parties' experts and principals attended and were fully involved. Specifically, principals from the lead plaintiff retailers attended for the merchants' side; the General Counsel, Presidents, CFO's, other executives, and Board members attended for Mastercard and Visa.

7. At several of the mediation sessions, the parties made detailed presentations of their versions of the facts and their views on liability and damages. At the mediator's request, the parties also made a presentation of their assessment of the other side's case and outlined, in detail, the proofs and arguments they intended to assert with respect to both liability and damages. Throughout the mediation, plaintiffs vigorously asserted and defendants strenuously denied any liability. The parties held divergent views on almost every issue, including plaintiffs' ability to assert a credible theory of damages that could support class-wide relief. Throughout the mediation, the parties continued to discuss their views on the respective strength of their claims and defenses, and these discussions were the basis on which all settlement discussions proceeded. These discussions were face-to-face, with the mediators and sometimes also in lengthy settlement sessions.

8. In early 2003, the mediation efforts stalled as the parties appeared to reach a temporary impasse. It became clear that further settlement talks were unlikely to break this impasse

until the Court ruled on the parties' cross-motions for summary judgment. The Court issued its ruling on these motions on April 1, 2003. These rulings reignited the mediation. However, since trial was scheduled to start April 28, 2003, less than four weeks remained in which to try to find a settlement. Accordingly, at my suggestion and with the parties' consent, I added Jonathan B. Marks of MarksADR, LLC to the mediation team. Mr. Marks is my former co-founder of Endispute, Inc., my co-mediator in many major cases, including United States v. Microsoft, and one of the most highly regarded mediators in the world for complex, high-stakes, legally intensive multi-party cases.

9. With Mr. Marks on board the mediation team, we engaged in virtual non-stop mediation efforts from about April 12, 2003 until the settlements were reached and announced the week of April 28. During this time, Mr. Marks and I engaged in fifteen days of mediation with the parties' counsel and principals. These sessions often lasted long into the night and over weekends. The discussions continued to focus on the factual and legal issues, damages, evidentiary considerations, trial dynamics, risk analysis, and of course, negotiation positions. During the mediation a total of 38 ¼ days plus 35.33 hours of mediation time was charged to the parties by myself and Mr. Marks, making this one of the most intensely mediated cases of which I am aware.

III. The Settlement Was the Product of Arms-Length Negotiations

10. The mediation sessions in this case were conducted on both sides by highly experienced and capable outside and inside counsel who were fully prepared and had an excellent understanding of the strengths and weaknesses of their claims and defenses. The quality of the advocacy on both sides was extremely high. While counsel were professional and cooperative, each side zealously advanced their respective arguments in the best interests of their clients. Moreover, each side demonstrated an unquestionable willingness to go to trial rather than accept a settlement

that was not in the best interest of their clients. Indeed, the parties took this case right up to jury selection and opening arguments. They were preparing witnesses and ready to go. At the same time, during the mediation, the parties exchanged many offers and counter-offers and engaged in hard-fought and painful negotiations, ultimately modifying their settlement positions, but generally only in response to powerful arguments and in exchange for offered value.

IV. Conclusions

11. Although the parties believed in their respective positions, it was clear that continued litigation carried risks for them. If the case did not settle, the parties faced a complex and lengthy jury trial before a panel of ordinary citizens to whom the card payment system, economic, and anti-trust issues in the case would be unfamiliar and present a formidable challenge. Defendants, while adamant that they were not liable under the anti-trust laws, could not be sure of a favorable jury verdict. Plaintiffs faced challenges both as to liability and damages. Both sides faced the risk that a jury could react unfavorably to the evidence presented. The reasonable range of possible outcomes ran from zero to many billions of dollars.

12. Based on the facts and circumstances presented by this case and my experience in the mediation of anti-trust and class actions, it is my opinion that the settlement was achieved through a fair and reasonable process and is in the best interest of the class. In my opinion, the court system and the mediation process worked exactly as they are supposed to work at their best; a consensual resolution was achieved based on full information and honest negotiation between well-represented and evenly balanced parties.

I declare under penalty of perjury under the laws of the United States that the foregoing is

true and correct. If called as a witness, I could and would competently testify thereto.

Executed this 11th day of September, 2003 at Boston, Massachusetts.

A handwritten signature in black ink, appearing to read 'E. D. Green', written over a horizontal line.

Eric D. Green