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Attridge v. Visa USA, Inc., et al.

(Case No. CGC 04-436920); Objector James Attridge,
individually and on behalf of all others similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

CREDIT/DEBIT CARD TYING CASE

J.C.C.P. No. 4335

CJC-03-004335

**ATTRIDGE'S RESPONSE TO DEFENDANTS'
REPLY IN SUPPORT OF MOTION FOR
FINAL APPROVAL OF "REVISED"
SETTLEMENT**

Date: April 2, 2013

Time: 9:30 a.m.

Dept: 305

Judge: Hon. John E. Munter

1 **ATTRIDGE’S RESPONSE TO DEFENDANTS’ REPLY IN SUPPORT OF**
2 **MOTION FOR FINAL APPROVAL OF “REVISED” SETTLEMENT**
3

4 **I. INTRODUCTION**

5 James Attridge (“Attridge”), the plaintiff in *Attridge v. Visa USA, Inc., et al.*, Case No. CGC-04-
6 436920 (“*Attridge*”) and one of several objectors to the “revised” settlement in this case, hereby files the
7 instant response to Plaintiffs’ Motion for Final Approval of Revised Class Action Settlement to briefly
8 respond to Plaintiffs’ expert declarations. In sum, Plaintiffs’ original expert declaration and second
9 supplemental expert declaration of Dr. Gustavo Bamberger rely upon faulty materials that fail to provide
10 an adequate foundation for an expert opinion. Accordingly, and for the reasons set forth in Attridge’s
11 Opposition to the Motion for Final Approval of “Revised” Settlement, Attridge respectfully requests that
12 the Court deny the Motion for Final Approval in its entirety.
13

14 **II. BAMBERGER’S OPINION LACKS FOUNDATION AS IT WAS LIMITED TO VISA,**
15 **INC. AND MASTERCARD’S “PUBLICLY AVAILABLE INFORMATION” IN WHICH**
16 **EVEN DR. BAMBERGER FOUND ERRORS, AND HE NEVER REVIEWED RELEVANT**
17 ***ATTRIDGE* NON-PUBLIC DISCOVERY FOR VISA U.S.A., INC.**

18 In his original declaration, Dr. Bamberger claims: “However, [*Attridge* expert] Dr. Safir’s
19 estimates imply a substantial percentage drop in those fees after October 2004, and such a drop does not
20 appear to be consistent with the available information on network revenues. To illustrate the potential
21 magnitude of the effect that Dr. Safir claims to have estimated, I reviewed *publicly available information*
22 on network fees.” Original Bamberger Declaration (“Bamberger Dec.”) ¶¶ 29, 30 (emphasis added). In
23 footnote 33 of his declaration, Dr. Bamberger admits that he only looked at the public SEC filings of
24 Visa, Inc., starting with 2007, stating: “Visa, Inc. Form 10-K, fiscal year 2007. **Visa has not publicly**
25 **reported this revenue breakdown for fiscal years prior to 2006.** *If more information on Visa’s*
26 *revenues from earlier years had become available in discovery, I would have incorporated such*
27 *information into my analysis.”* *Id.* at n. 33 (emphasis added).
28

 In attempting to address this failing, Dr. Bamberger filed a Second Supplemental Declaration

1 (“Sec. Supp. Bamberger Dec.”) that omits the critical footnotes 24-26 and thus conceals a second
2 devastating disqualification of his work. Citing MasterCard’s 10-Q and 10-K for worldwide revenue for
3 2002-2009 and Visa, Inc.’s 10-K for fiscal year September 30, 2007 for worldwide revenue for 2003-
4 2007, Dr. Bamberger claims that in his original declaration, “my analysis of available Visa and
5 MasterCard revenue information (summarized in Tables 5 and 6) does not suggest a substantial change in
6 network service fees after October 2004.” But Dr. Bamberger’s original declaration contains the three
7 footnotes (24, 25 and 26), omitted from his Second Supplemental Declaration, which undermine his
8 comparative analysis as follows:

9
10 24. See MasterCard Inc., Form 10-Q and 10-K, 2002-2009. **Worldwide**
11 **revenues** and dollar volume are reported in Table 5. **MasterCard did not separately**
12 **report its U.S. revenues.** If more detailed information on MasterCard network fees had
become available in discovery, I would have incorporated such information into my
analysis.

13 25. See Visa, Inc. 10-K, Fiscal Year September 30, 2007, which reports Visa
14 network revenues. I compare those revenues to Visa’s total credit and debit dollar
15 volume as reported by Nilson.

16 26. Visa’s U.S. revenues reported in subsequent years *do not appear to be*
17 *directly comparable to those reported in its 2007 10-K* (e.g. Visa reports its U. S.
18 revenues for fiscal year 2007 in its 2007 and 2008 10-Ks, *but the reported revenues in*
19 *the two 10-Ks do not match.*). *If more detailed information on Visa network fees had*
become available in discovery, I would have incorporated such information into my
analysis.

20 (Bamberger Dec., n. 24-26 at pp. 14-15 (emphasis supplied).

21 In these footnotes, omitted from his Second Supplemental Declaration, Dr. Bamberger himself
22 found errors in the Visa, Inc. public documents he reviewed, stating: “Visa’s revenues reported in
23 subsequent years *do not appear to be directly comparable to those reported in its 2007 10-K* (e.g., Visa
24 reports its U.S. revenues for fiscal year 2007 in its 2007 and 2008 10-Ks, **but the reported revenues in**
25 **the two 10-Ks do not match.**)” (Bamberger Dec., n. 26, pp. 14-15) (emphasis added), which
26 demonstrates that no reliable ‘but for’ comparisons can be made based on Visa, Inc.’s 10-Ks, which is
27 undoubtedly why Dr. Bamberger made a plea for “more detailed information on Visa network
28 fees...available in discovery.” *Id.*

1 In fact, Dr. Bamberger was not only reviewing the wrong documents, he was also examining the
2 wrong entity. Visa did business in the United States through the non-public entity Visa, U.S.A, Inc.
3 before fiscal year 2007, which was the entity that adopted the anti-competitive exclusionary rule (Visa
4 By-law 2.10(e)), and not Visa, Inc., whose public documents Dr. Bamberger reviewed. Since Visa, Inc.
5 was not even incorporated as a Delaware corporation until May 2007 (LippSmith Dec. Ex. 2., Visa, Inc.
6 10-K at p. 6), it was not a public entity until after that time. Accordingly, no valid comparison of United
7 States revenues based on Visa, Inc.'s public documents before 2004 and after 2004 is even possible since
8 neither Visa, Inc. nor any public documents existed prior to fiscal year 2007.

9 Since the claims in the *Attridge* case are based on violations of Section 1 of the Sherman Act
10 found in the final judgment in *United States v. Visa U.S.A., Inc. and MasterCard International, Inc.*, 163
11 F.Supp.2d 322; aff'd 344 F.3d 229 (2d Cir. 2003); cert denied 160 L.Ed.2d 14, it is only injury in the
12 United States, and not worldwide, that is to be examined. *Visa*, 163 F. Supp. 2d at 339-40. As a result,
13 Dr. Bamberger's analysis based on MasterCard's worldwide revenues as described in footnote 24 above
14 is faulty since no legitimate comparison can be made as to overcharges pre-2004 and post-2004 for injury
15 in the United States based on MasterCard's worldwide revenues.

16 By contrast, Dr. Safir was able to make the comparison between lower fees charged by
17 Defendants after the October 2004 elimination of the anticompetitive exclusionary rules to the higher
18 overcharged fees actually in place before 2004. *Attridge* counsel had obtained Visa U.S.A., Inc.'s and
19 MasterCard's non-public financial data in discovery and provided it to Dr. Safir for his analysis. *See*
20 Declarations of Lingel H. Winters and Graham B. LippSmith filed in support of *Attridge's* Opposition to
21 Motion for Final Approval of "Revised" Settlement. Thus, because Visa, Inc.'s public information is
22 faulty and Dr. Bamberger did not examine the non-public United States financial data for the relevant
23 entities, Visa U.S.A., Inc. and MasterCard, Inc., for both the pre-2004 and post-2004 periods, which was
24 obtained in discovery by *Attridge* counsel, Dr. Bamberger lacks an adequate evidentiary foundation and
25 cannot meet the burden of demonstrating that the proposed settlement is within the "ballpark" for
26 releasing the *Attridge* claims.

27 By failing to obtain and investigate Visa U.S.A., Inc.'s or MasterCard's non-public financial
28 documents and data for both the pre-2004 and post-2004 periods, the settling parties fail to meet their

1 burden to investigate and assess the value of the *Attridge* claims and cannot meet the “ballpark”
2 requirement that they demonstrate “the nature and magnitude of the [*Attridge*] claims” and have failed to
3 demonstrate that the proposed settlement represents a fair resolution of those claims. *Kullar*, 168
4 Cal.App.4th at 116.

6 III. CONCLUSION

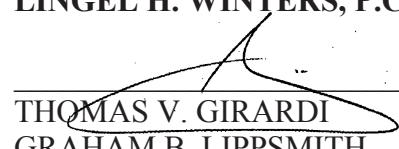
7 Because Dr. Bamberger confined his analysis to public documents that had the limitations
8 described in his footnotes, he was unable to make a valid comparison of Defendants’ pre-2004 network
9 services revenue with their post-2004 revenue. In contrast, *Attridge*’s expert Dr. Safir was able compare
10 Defendants’ pre and post-2004 revenues because he had access to Defendants’ non-public financial
11 documents contained in the *Attridge* discovery.

12 For all the aforementioned reasons, *Attridge* respectfully requests that the Court deny the
13 *Credit/Debit* parties’ Motion for Final Approval of Revised Class Action Settlement in its entirety, or in
14 the alternative, certify an *Attridge* Revolver Credit Card Holder Subclass.

15
16 Dated: March 19, 2013

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17
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1126 Wilshire Boulevard, Los Angeles, California 90017-1904.

On March 19, 2013, I served the foregoing document described as **ATTRIDGE'S RESPONSE TO DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR FINAL APPROVAL OF "REVISED" SETTLEMENT** on all interested parties in this action as set forth on the attached service list in the following manner:

SEE ATTACHED SERVICE LIST

- ☒ **BY MAIL:** I am familiar with this firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
- ☒ **BY LEXISNEXIS FILE & SERVE:** I served the documents via LexisNexis File & Serve on the recipients designated on the Transaction Receipt located on the LexisNexis File & Serve website.
- ☒ **STATE** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.
- ☐ **FEDERAL** I declare that I am employed in the office of the member of the bar of this court at whose direction the service was made.

Executed on March 19, 2013, at Los Angeles, California.



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