IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

LISA NASS-ROMERO,
on behalf of herself and all others similarly situated,

Plaintiff/Appellant,

vs.

Ct. App. No. 30,540

VISA U.S.A., INC., AND MASTERCARD INTERNATIONAL, INC.,

Defendants/Appellees.

APPELLANT'S REPLY BRIEF

Civil Appeal from the First Judicial District
County of Santa Fe
No. D-101-CV-2004-00413

The Honorable Sarah Singleton

Youtz & Valdez, P.C.
Shane C. Youtz
900 Gold Avenue, S
Albuquerque, NM 87110
ph- (505) 244-1200
fax - (505) 244-9700

Cuneo Gilbert & LaDuca, LLP
Jonathan W. Cuneo
Joel Davidow
507 C Street NE
Washington DC, 20002

Cuneo Gilbert & LaDuca, LLP
Daniel Cohen
106-A S Columbus Street
Alexandria, VA 22314

Law Offices of Gordon Ball
Gordon Ball
550 Main Ave., Suite 750
Knoxville, TN 37902

Hagens Berman LLP
George Sampson
1918 Eighth Ave., Suite 3300
Seattle, WA 98101

Attorneys for Plaintiff/Appellant

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INTRODUCTION

Two decisive questions are presented here. First, is Plaintiff unable to sue under the New Mexico Antitrust Act ("the Act"), because she did not purchase, as such, the service that was the subject of the cartel's antitrust violation? In New Mexico the answer to that question is crystal clear: the Act applies to purchase and non-purchase indirect injuries, based on its plain language and uniquely, contains a provision, NMSA 1978, §57-1-3(D), stating that it covers all indirect injuries, involving "business," and "nonbusiness" "purchases," as well as "business" and "nonbusiness" "injuries." This statute's effect cannot be altered by federal law, as has been held by numerous courts interpreting the effect of *Illinois Brick* repealer statutes such as the Act on victims' standing to bring state antitrust claims.

The second question, whether, if this court chose to be guided by federal case law on remoteness, it would have to find that Plaintiff lacks standing to collect damages for her injury, should really not come up in a context such as this, where New Mexico law determines that plaintiff has standing, under a remedial state statute. However, if the court decides to review this question, it must find that federal law does not dictate that Plaintiff be deprived of standing. Federal law of remoteness and standing has prevented antitrust cases by persons such as creditors and landlords, namely persons not in the same chain of distribution as the violator

and its middlemen victims. But here the chain of causation is from suppliers who illegally raised input costs to middlemen who allegedly, and undoubtedly, passed on some or all of such increases to ultimate consumers. No federal standing or remoteness case that has recognized the standing of indirect purchasers has ever held that such a pattern involves "derivative" injury, for which customers of the victims did not have standing to seek redress. To the contrary, recent indirect purchaser classes consisting of persons at the end of a chain of supply, for instance, purchasers of products containing price-fixed additives, SRAMs or LCDs, *see infra*, have been held to have standing to bring state law antitrust or consumer fraud claims.

Having failed to find any relevant federal law in support of their remoteness theory, Defendants resort to the reasoning of *Illinois Brick v. Illinois*,[1] itself, clearly rejected by the Act, as well as decisions from other state courts, in jurisdictions with antitrust acts materially different from New Mexico's unique law. In the end, Defendants' arguments are doomed by their inability to find any relevant authority holding that consumers such as Plaintiff have no right to recovery under a state antitrust law containing language such as New Mexico's, which specifically allows victims of passed-on anticompetitive cost increases to seek redress for any antitrust

[1] 431 U.S. 720 (1977)

injuries they sustained and contains no exception for situations like this where the cost increase is related to a service, rather than a product, input.

The fact of the matter is that the Act and the governing case law all militate in favor of allowing Plaintiff's case to proceed to a stage where she can at least demonstrate her damages, rather than requiring dismissal before she has the opportunity to do so.

I. This Case Comes Fully Within the Text and Intent of the Act

The rationale for allowing this case to proceed is not complex or strained. The New Mexico Act, which purposely negates the effect of federal law, allows persons indirectly injured by antitrust violations to sue for resultant damages. "*Illinois Brick* repealer" statutes like this one were enacted for the basic purpose of preventing the travesty of justice that occurs when a cartel or monopolist, caught in an antitrust violation, pays damages to its distributors that have passed on some or all increased charges to the public, while leaving consumers to bear the brunt of the cost increases caused by such schemes without any opportunity to seek recompense.

New Mexico's repealer statute is not exactly like the law of any other state. In its efforts to make the consumer whole, it permits recovery for indirectly injured victims regardless of whether they were injured by a purchase of the violator's

product, or otherwise injured by the violator's conduct. It also clearly contemplates consumers' suing under it and includes a "pass on" defense, allowing a violator to argue that the plaintiff, usually a middleman, "passed on all or any part of such overcharge . . . . ," NMSA 1978, §57-1-3(C), thus recognizing that certain cases will arise under it where the likely injured parties were consumers, who were subjected to such pass-ons, but could not themselves pass on the overcharge.

Whether or not a law confers standing upon a given party depends on the intent of statute, *Key v. Chrysler Motors Corp.*, 121 N.M. 764, 768, 918 P.2d 350, 1996 NMSC-038, and here the intent is clear. When New Mexico legislated to create a cause of action for persons such as consumers suffering indirect injury from antitrust violations, it obviously bestowed standing on such persons. In this regard, Defendants curiously highlight some rulings from other states that actually support Plaintiff's argument here. For instance, they quote the New York Supreme Court as refusing to allow recovery for "derivative" injuries "*in the absence of a clear indication of such intent from the Legislature.*" Defendants' Answer Brief ("Ans. Br."), 36 (quoting *Blue Cross & Blue Shield of New Jersey v. Philip Morris USA, Inc.*, 818 N.E.2d 1140, 1144 (N.Y. 2004)) (emphasis added).

New Mexico case law also creates a generous rule for standing, set out in *Key*, 121 N.M. at 764, and *Pittard v. Four Seasons Motor Inn Inc.*, 101 N.M. 723, 730 (Ct. App. 1984), which state that standing exists for all plaintiffs who suffered foreseeable injuries and are located within the zone of interests protected by the statute.

Given these liberal standards, there is no doubt that Plaintiff has standing to bring her antitrust claims. In her pleadings, which must be accepted as true on a motion to dismiss,[2] Plaintiff alleges that Visa and MasterCard engaged in antitrust violations raising costs to merchants in New Mexico and that such increased costs resulted in higher prices to customers of stores that accept Visa and MasterCard. Compl. ¶¶ 3-5 (R.P. 3). Thus, when the cause of action for indirect "injuries" granted by the Act is applied to these facts, the 12(b)(6) standard is satisfied.

As this case is viable under New Mexico law, no analysis of any other jurisdiction's law need occur. New Mexico chose not to follow federal law and not to mimic other states' repealer statutes, which contain text limiting the classes of victims who could obtain antitrust recovery. Instead, it chose to create causes of action for those suffering indirect injury from purchase-related or non-purchase-related antitrust violations. The most obvious example of the indirect injury

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[2] *Padwa v. Hadley*, 127 N.M. 416, 419, 918 P.2d 1334, 199- NMCA-106

contemplated by the Act is a situation like this, where the violators repeatedly raised costs to stores and Plaintiff has offered to show at trial that she, the customer of such stores, had to pay higher prices as a predictable, consequential result.

II. Courts Evaluating Claims Brought Under *Illinois Brick* Repealer Statues Have Held that Federal Law Cannot Deprive Plaintiffs of Standing Conferred on Them by Such Statutes

Defendants claim that it is appropriate to apply federal rules of antitrust standing to determine whether Plaintiff has standing to bring a claim under the Act. Ans. Br., 17. However, that assertion is belied by relevant case law. In *TFT-LCD Antitrust Litig.*, 586 F.Supp.2d 1109, 1124 (N.D. Cal. 2008), the court's response to defendants' arguments that *Associated General Contractors* ("*AGC*")[3] prevented the plaintiffs from having standing to sue under state repealer statutes including New Mexico's Act was that:

> . . . . it is inappropriate to broadly apply the *AGC* test to plaintiffs' claims under the repealer states' laws in the absence of a clear directive from those states' legislatures or highest courts.

TFT-LCD Antitrust Litig., 586 F.Supp.2d at 1123.

In *D.R. Ward Constr. Co. v. Rohm & Haas Co.*, 470 F.Supp.2d 485, 491 (E.D. Pa. 2006), the court also evaluated the effect of *AGC* on an indirect

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[3] *See Associated General Contractors of California Inc. v. California State Council of Carpenters*, 459 U.S. 519, 537 (1983).

purchaser's antitrust standing under a repealer statute. In analyzing the outcome of the potential conflict between federal and state law on standing, the court cited Wright & Miller, which explains that "federal courts have stated that state law of standing should be applied as to state rights . . . . , whether the state question arises in an original diversity action, on removal from state court, or as a matter of ancillary jurisdiction." 13A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* §3531.14, 90-91 (2d ed. 1984). Applying this rationale, the court stated that:

> In summary, the Court finds that it need not use the *AGC* factors as the framework for analyzing whether federal prudential considerations permit standing under the Vermont, Tennessee, and Arizona antitrust statutes, unless relevant state law adopts these factors. Phrased differently, the state rules of antitrust standing determine whether a plaintiff suing under a state antitrust statute enjoys federal prudential standing in a diversity action.

D.R. Ward Constr. Co., 470 F.Supp.2d at 495.

III. Defendants' Claims that Plaintiff's Injury Is too Remote to Allow for Recovery Have no Support in the New Mexico Act or Federal Law

Defendants argue that Plaintiff's case must fail because she did not purchase, or repurchase, the financial services that were the subject of their violation. Ans. Br., 21. But the Act expressly covers indirect injury resulting from purchase or non-purchase situations. Furthermore, Plaintiff undoubtedly did

purchase goods from the merchants whose costs were raised by the Visa MasterCard cartel and there is no legal reason why she should be treated any differently from any other consumer harmed by an antitrust violation further up the supply chain.

The only difference between this case and the more traditional cases envisioned by the supporters of the Act is that the classic *Illinois Brick* situation involves suppliers of *goods* who engaged in antitrust violations to overcharge middlemen, while this case involves an illegal overcharge for a *service* provided to middlemen. But the indirect injury standard of the Act is certainly broad enough to cover either situation. There is no language rejecting the latter. Allowing recovery in this situation follows the same policy rationale as the traditional indirect purchaser scenario–that customers of the middlemen must be permitted to sue after the violation is exposed.

Defendants' arguments to the contrary misconstrue the term and concept of "derivative injury." Ans. Br., 20. Defendants state that a claim is derivative if it asserts an injury resulting from an overcharge to an intermediary that was factored into the overhead and affected the prices of the goods that intermediary sold. That is an incorrect statement of the law, as evidenced by the fact that Defendants are

unable to cite any federal authority for applying the "derivative" classification to consumer injury.

In actuality, federal cases generally classify an antitrust claim as derivative if it is made by "a party in a business relationship with an entity" that suffered an antitrust violation,[4] in a situation where the injuries to that party did not flow from the anticompetitive conduct of the violator. *A.G.S. Electronics, Ltd. v. B.S.R. Ltd.*, 460 F.Supp. 707, 710 (S.D.N.Y. 1978), *aff'd*, 591 F.2d 1329 (2d Cir. 1978). For instance, if antitrust violators destroy a firm, which can no longer pay rent to its landlord, the landlord's claim is "derivative" in that the landlord is not a customer of the direct victim. Truly derivative claims are not permitted under *AGC* and would not be saved by the New Mexico Act. However, Plaintiff's claim, as evidenced by the fact that it does meet the *AGC* standard, is not such a claim.

Contrary to Defendants' arguments, Ans. Br., 16-17, the *AGC* ruling was certainly never intended to deprive consumers of standing. As our initial brief demonstrates, the *AGC* standards, relied on by defendants, are met here in many ways. This is not surprising, given that *AGC* contemplated that consumers, like Plaintiff, would have standing to bring antitrust claims. The *AGC* court's denial of standing to a union seeking to bring antitrust claims, explains that the union was

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[4] *G.K.A. Beverage Corp. v. Honickman*, 55 F.3d 762, 766 (2d Cir. 1995).

"neither a *consumer* nor a competitor." *AGC*, 459 U.S. at 539 (emphasis added). *AGC* thus preserved, rather than rejected, consumer standing.

Further, even if *AGC* did not support Plaintiff's standing argument, the result in *AGC* would not dictate that this case be dismissed. *AGC* involved a situation very different from this one. In that case, the Supreme Court formulated a set of rules to analyze non-standard, e.g. non-vertical, causation situations which did not involve a middleman passing an overcharge down to a consumer. This was because plaintiffs in *AGC* were not direct or indirect customers of the alleged antitrust violator and did not suffer the effects of a price increase.

Here, the injury that flowed, from supplier to retailer to customer, is standard, and thus, it can only be defeated by a rule prohibiting recovery for all indirect purchasers. Such a rule was established by *Illinois Brick*, and then overridden by the New Mexico legislature. New Mexico, having opted clearly for the pro-consumer result in *Illinois Brick* situations, need not be strait-jacketed by misuse of *AGC* standards meant for non-standard situations where the alleged victims are not customers of overcharged middlemen.

Other relevant authority further demonstrates that federal law does not dictate that consumers be denied antitrust standing. The ABA's definitive treatise on antitrust, ABA Section of Antitrust Law, *Antitrust Law Developments* (6th ed.

2007), states: "As a general rule, courts have denied standing to *creditors, employees, officers, shareholders and suppliers* of antitrust victims." *Id.*, at 825-826 (citations omitted) (emphasis added). Customers are, of course, *not* on the ABA treatise's list of persons who have been denied standing as merely asserting "derivative" injury.

Federal judges have certainly found that purchaser classes of persons who purchased goods containing inputs subjected to illegal price increases have antitrust standing under state *Illinois Brick* repealer statutes, including New Mexico's Act.

In *TFT-LCD*, the court held that indirect purchasers of price-fixed thin-film transistor liquid crystal displays—individuals who bought products containing the price-fixed input—had standing to sue for antitrust violations, under the New Mexico *Illinois Brick* repealer statute, among others. *TFT-LCD Antitrust Litig.*, 586 F.Supp.2d at 1124. That court stated: " . . . . the Court finds that even if the *AGC* test did apply, indirect plaintiffs in this case have alleged facts showing that they have standing under that test, at least at the pleading stage." *Id.*, at 1123; *see also In re Static Random Access memory (SRAM) Antitrust*, 264 F.R.D. 603, 610 (N.D. Cal. 2009) (Stating that indirect purchasers of static random access memory have standing to bring antitrust claims under state laws).

In *D.R. Ward* the court also held that plaintiffs had standing under the Arizona Antitrust Act, and other state antitrust laws because, "plaintiffs allege that they paid an inflated price for plastics additives due to defendants' price-fixing agreement, thereby implying that the direct harm of the price-fixing conspiracy was passed through the stream of commerce to them, purchasers of products containing plastics additives." *D.R. Ward Constr. Co.*, 470 F.Supp.2d at 491.

None of the above cases are mentioned in defendants' survey of cases denying standing to indirect purchasers, which defendants present as being definitive on the issue. Ans. Br., 7.

In light of the governing law on the application of state antitrust laws, a New Mexico court permitting this case to go forward will not expand the requirements of standing past their current limits, but will simply bring itself into conformity with many other courts that have considered the issue.

IV. Federal Reasoning Developed in an *Illinois Brick* Context Is Not Germane to a Case Filed Under a State Law Intended to Allow Recovery for Indirect Injuries

Defendants muddy the waters here by attempting to invoke federal antitrust principles that are obviated by New Mexico's decision to enact an *Illinois Brick* repealer law. They imply, for instance, that federal law would allow indirect standing only when the direct victims have not sued or been paid. Ans. Br., 20.

But there is not one word in the Act here that states that indirect victims are only allowed to sue when the direct victims did not sue or did not recover.

The same improper reliance on irrelevant or rejected federal precedents can be seen in Defendants' further argument that allowing the action to proceed would "risk duplicative recoveries and would require a complex apportionment of damages." Ans. Br., 23. Those are the arguments that led the U.S. Supreme Court to hold as it did in *Illinois Brick*. *See Illinois Brick*, 431 U.S., at 730. Being fully aware of those arguments against consumer suits, New Mexico passed the Act anyway. Defendants are simply arguing that the Act should not have been passed, a policy contention that is totally inappropriate in this context.

As to Defendants' argument that Plaintiff cannot prove that every single merchant raised price on "every single good" purchased, Ans. Br., 19, it is essentially an argument against class certification, and one that would fail in that context. Class action cases are based on what usually happened, and are sustained if common injury was prevalent, not universal. Even in the paradigmatic indirect purchase case, where defendants pleaded guilty to agreeing to raise, say, wholesale tomato prices, and were sued by a class of retail customers, plaintiffs would be unable to prove that every tomato was overpriced or that every customer paid higher prices. Thus, Defendants' first argument, like most of their arguments, if

accepted, would eviscerate all *Illinois Brick* repealer statutes and the class actions that are typically brought under those laws.

Defendants also argue that pass-on damage to consumers may not have occurred and would be incalculable. Ans. Br., 21-22. In so arguing, they make a summary judgment argument inapplicable in an appeal of a 12(b)(6) dismissal where the issue is whether Plaintiff stated a claim for damages, not whether she can prove damages. Defendants' arguments also go against the conclusion of the leading antitrust analyst of present times. In his book, *Federal Antitrust Policy*, Professor Herbert Hovenkamp teaches that:

> Most real world markets are of the type illustrated in Figure 3. The market demand curve slopes downward, and each firm in the market tends to produce at a level at which its marginal cost equals the market price. When marginal cost is MC, market output is Q and price is P. When the firms must pay a cartel price for a variable cost item, however, their marginal costs rise to MC′, output is reduced to Q′ and price rises to P′. The reduction in output produces lost profits to the firms, while the increase in price represents that part of the overcharge that is passed on to consumers.

Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and its Practice* 626 (West Publishing 1994).

It should be noted that lead counsel in the merchants' case against Visa and MasterCard had no difficulty in perceiving the consumer injury resulting from the illegal scheme. He wrote that the injunctive aspects of his settlement agreement stopping the scheme were very beneficial because if he had litigated further "[i]n

those two to three years, an additional $30 to $40 billion in real tangible damage would have been done to American stores and *American consumers*." Lloyd Constantine, *Priceless* 214 (Kaplan 2009) (emphasis added).

V. Contrary Cases Based on Less Expansive Statutes Need Not be Followed

Defendants seek also to rely on decisions in which other states declined to allow consumer complaints against the Visa/MasterCard debit card cartel. Ans. Br., 6-7. But New Mexico is of course free to go its own way, as did West Virginia. There are clear justifications for doing so.

First, as noted, only the New Mexico Act goes beyond indirect injury language to encompass business or non-business injury, based on purchase-related injury or other forms of injury. §57-1-3(D).

Second, New Mexico's rules concerning plain meaning and expansive reading of remedial statutes create powerful justifications for refusal to scuttle consumer injury cases like this before evidence is taken. *See State v. Bennett*, 134 N.M. 705, 708 62 P.3d 305, 2003 NMCA-019; *Albuquerque Hilton Inn v. Haley*, 90 N.M. 510, 512, 565 P.2d 1027, 1029 (N.M. S.Ct .1977); *State ex rel. Bird v. Apodoca*, 91 N.M. 279, 284, 573 P.2d 213, 218 (N.M. S.Ct. 1977).

Third, the two main cases rejecting standing for indirect purchasers of products containing Visa and Mastercard's tied input were decided in Iowa and

Nebraska, two states where the antitrust laws are unlike those in New Mexico. The Nebraska law applies to persons who "*dealt* directly or indirectly with defendant." Neb. Rev.Stat. §59-821(emphasis added). The New Mexico Act, on the other hand, contains no such requirement that the putative plaintiff have any direct or indirect interaction with the violator. The Iowa law refers to a potential plaintiff as "a person who is injured" "by conduct prohibited under this chapter," with no mention of an allowance for those suffering indirect injuries to sue under the Act. I.C. §553.12(2). Nor does the Iowa act contain a section like NMSA 1978, §57-1-3(D), which covers non-purchase injuries. Thus, the holdings in these cases are not applicable in this state.

On the other hand, the West Virginia state court, where purchasers such as Plaintiff were found to have standing to sue Visa and Mastercard, made a general finding of law, which is certainly applicable here, and should be followed. The West Virginia state court stated:

> After reviewing well over 400 pages of counsels' arguments and cases it is the opinion of the Court that the standing issue in this case and in related cases is answered in almost all of the litigation by one decisive question: Has the state adopted an Illinois Brick repealer statute? If the state has a repealer statue or rule then there is standing. If not, then The Associated General Contractors of Cal., Inc., v. State Council of Carpenters, 459 U.S. 519 (1983) antitrust standing analysis is applicable and determinative of the issue.

West Virginia v. Visa U.S.A. Inc., Civil Action no. 03-C-551, at 4 (W. Va. Cir. Ct. October 15, 2005).

VI. Plaintiff Meets the Standing Requirements Under the New Mexico Unfair Practices Act

Like its antitrust law, New Mexico's Unfair Practices Act ("UPA"), NMSA 1978, §57-12-2(D), declines to limit recovery to purchasers, stating instead that recovery is available to "[a]ny person who suffers any loss of money or property . . . as a result of any employment by another person of a method, act or practice declared unlawful by the Unfair Practices Act." NMSA §57-12-10(B). Further, contrary to Defendants' assertion, at Ans. Br., 36, it is inappropriate to apply principles of antitrust standing to UPA causes of action.

In *D.R. Ward*, *supra*, the court held that the plaintiffs had standing to proceed under the Vermont Consumer Fraud Act, which contains a similar standard to the UPA, allowing recovery for "any consumer who . . . sustains damages or injury as a result of any false or fraudulent representations or practices prohibited." *D.R. Ward*, 470 F.Supp.2d at 500 (quoting 9 V.S.A. § 2453). The court refused to utilize principles of federal antitrust law to determine whether the plaintiffs had standing under a state consumer protection law, stating "[t]his Court cannot conclude as a matter of law that the Vermont Supreme Court would adopt the *AGC* factors for determining standing under the VCFA." *Id.*, at 501.

In light of New Mexico case law calling for the liberal construction of this remedial statute, *Salmeron v. Highlands Ford Sales Inc.*, 271 F.Supp.2d 1314, 1318 (D.N.M. 2003), this court should follow *D.R. Ward* and allow Plaintiff to proceed with her UPA claim. There is no reason to use antitrust principles to dismiss such a claim, where issues regarding causation require the examination of evidence and can only be decided if the claim is able to proceed past the 12(b)(6) stage.

CONCLUSION

For all the reasons stated above, this court should reverse the order of the district court dismissing Plaintiff's claims under the Act and the UPA, and allow those claims to proceed.

STATEMENT OF COMPLIANCE

The body of the foregoing brief exceeds the 15-page limit set forth in Rule 12-213(F)(2) NMRA. As required by Rule 12-213(G) NMRA, I certify that this brief complies with Rule 12-213(F)(3) NMRA, that the brief is proportionally spaced, and that the body of the brief contains 4,080 words. The brief was prepared and the word count was determined using Microsoft Office Word 2007.

Dated: April 5, 2011

Respectfully submitted,

YOUTZ & VALDEZ, P.C.

Maxine Bowers for

Shane C. Youtz
900 Gold Avenue, SW
Albuquerque, NM 87102
(505) 244-1200 – Telephone

CUNEO GILBERT & LADUCA, LLP
Jonathan W. Cuneo
507 C Street NE
Washington DC, 20002

CUNEO GILBERT & LADUCA, LLP
Daniel Cohen
106-A S. Columbus Street
Alexandria, VA 22314

LAW OFFICES OF GORDON BALL
Gordon Ball
550 Main Ave., Suite 750
Knoxville, TN 37902

HAGENS BERMAN LLP
George Samson
Seattle, WA 98101
Attorneys for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was mailed this 5th day of April, 2011, to:

Leslie McCarthy Apodaca
Rodey, Dickason, Sloan, Akin & Robb, PA
P.O. Box 1888
Albuquerque, NM 87103
Attorney for Defendant Visa USA, Inc.

Robert C. Mason
Arnold & Porter
399 Park Avenue
New York, NY 1002-4690
Attorney for Defendant Visa USA, Inc.

Jerry Todd Wertheim
Jones, Snead, Wertheim & Wentworth, PA
P.O. Box 2228
Santa Fe, NM 87504-2228
Attorney for Defendant MasterCard International

Gary Carney
Paul, Weiss, Rifkind, Wharton & Garrison
1285 Avenue of the Americas
New York, NY 10019-6064
Attorneys for Defendant MasterCard International

Kenneth A. Gallo
Paul, Weiss, Rifkind, Wharton & Garrison
2001 K Street NW
Washington, D.C. 20006-1047
Attorney for Defendant MasterCard International

Stephen Pacheco, Clerk of the Court
First Judicial District Court
P.O. Box 2268
Santa Fe, NM 87504-2268

Maryanne Bowers for
Shane Youtz