UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION	:	**MDL Docket No. 1720**
	:	**MASTER FILE NO. 1:05-md-1720-JG-JO**
This Document Relates To:	:	
ALL CLASS ACTIONS	:	

CLASS PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO EXCLUDE OPINIONS OF DR. GUSTAVO BAMBERGER

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I. PRELIMINARY STATEMENT

Defendants' motion to exclude Dr. Gustavo Bamberger's expert opinion that damages and injury-in-fact can be proven on a class-wide basis is premised on a fundamentally erroneous contention, *i.e.*, that Dr. Bamberger's proposed but-for worlds incorporate the restraint at issue. Defendants argue that the primary but-for world posited by Dr. Bamberger, in which there is no rule requiring the payment of collectively established interchange fees on every payment card transaction, is equivalent to a world in which a rule requires the payment of interchange fees "set" at zero. In Defendants' view, the absence of an agreement to fix prices is the same as an agreement to fix prices.

Dr. Bamberger in fact concludes that, in a competitive market free from Defendants' restraints, the rule requiring the payment of interchange rules on every transaction would have been non-existent, and Visa and MasterCard would not have set *any* interchange fees, thus allowing card issuers to negotiate those fees directly with merchants. In such a world, merchants would have refused to pay interchange fees and thus the *market*, rather than the networks, would have dictated their absence. Defendants' contentions as to that but-for world are baseless for that reason alone.

Dr. Bamberger also describes a potential alternative but-for world, strictly to accommodate Defendants' unproven claim that, despite their anticompetitive effects, collectively set interchange fees are necessary to ensure the viability of the Visa and MasterCard networks, and would have existed in the but-for world.[1] In Defendants' view, if the fact-finder were to determine that some level of collectively set interchange fees is reasonably necessary to

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[1] Dr. Bamberger explains in his initial declaration why those fees are not in fact necessary to ensure the networks' viability. *See* Declaration of Gustavo Bamberger, May 8, 2008 ("Bamberger Decl.") ¶ 78.

the successful operation of the networks, then antitrust law imposes no limits on how high those fees may be set. As Plaintiffs explain below, that is not the applicable law.

Dr. Bamberger's description of such an alternative but-for world is appropriate because a fact-finder may determine that the restraint at issue, Defendants' collective establishment of interchange fees, is necessary to facilitate pro-competitive effects. In such a case, however, Defendants would have been obligated to achieve those effects through the least restrictive means – in this case, interchange fees set at a level no higher than those which would have permitted the networks to operate. Based on his analysis, founded on real world network experience, Dr. Bamberger concludes that foreign benchmarks reflect that Visa and MasterCard would have remained viable with interchange fees set at substantially lower rates than the rates Defendants actually imposed. This alternative but-for world reflects the achievement of network benefits at a lower anticompetitive cost. It serves as the foundation, not for equitable relief, but rather for Plaintiffs' alternative damages estimate, a distinction which Defendants fail to acknowledge.

Their failure to recognize this distinction leads Defendants into their equally erroneous claim that Dr. Bamberger's reliance on these but-for worlds would somehow force the Court to regulate prices. That could be the case *only* if Plaintiffs sought to rely on the alternative but-for worlds as bases for equitable relief. Plaintiffs do no such thing. The alternative benchmarks are used only to establish that impact and damages attributable to Defendants' actions during the relevant period can be calculated on a class-wide basis, even assuming that interchange fees at some level would have existed in the but-for world. For all of these reasons, which are further detailed below, Defendants' motion should be denied.

II. ARGUMENT

Rule 702 of the Federal Rules of Evidence requires that expert testimony be: (1) based upon sufficient facts or data, (2) the product of reliable principles and methods, and (3) applied reliably to the facts of the case. *See also Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993). Defendants baldly assert that Dr. Bamberger's expert opinion should be excluded because it is not reliable or relevant. Dr. Bamberger's opinions that Plaintiffs can establish impact and damages on a class-wide basis are reliable because they are based on his analysis of the economic evidence and clearly relevant to Plaintiffs' class certification motion.

A. Competitive Market Forces Would Have Eliminated Interchange Fees in Dr. Bamberger's Primary But-For World.

Dr. Bamberger "evaluate[d] a but-for world in which Visa and MasterCard do not require the payment of interchange fees, but issuers are allowed to negotiate any level of interchange fees with individual merchants." Bamberger Decl. ¶73. *See also* Reply Declaration of Gustavo Bamberger, dated January 29, 2009 ("Bamberger Reply Decl.") ¶ 14 (initial declaration addressed a "but-for world without Visa and MasterCard rules requiring the payment of interchange fees"). Contrary to Defendants' assertion, Dr. Bamberger's analysis does not include any collectively-established default pricing rule, much less one that sets the rate at the non-price "zero." Defendants' argument is premised on their own contrivance, rather than Dr. Bamberger's actual analysis.

In Dr. Bamberger's primary but-for world, network members would have been required to accept, process and settle transactions, and merchants would have paid a fee to acquiring banks for access to payment card network services, just as they have in the real world.[2] *See*

[2] Defendants' attempt to paint Dr. Bamberger's but-for world as one in which issuers are forced to give merchants something for nothing is disingenuous. *See* Defs.' Mem. at 6-7. Dr.

Bamberger Dep. Tr., July 30, 2008, at 86:2-5; Bamberger Reply Decl. ¶ 15. Dr. Bamberger then removed the illegal restraint – Visa's and MasterCard's rules requiring the payment of interchange fees to issuing banks on every transaction. *See* Bamberger Decl. ¶¶ 73-78; Bamberger Reply Decl. ¶¶ 14-15, 18. Absent those rules, interchange fees would not have been collectively set at any price. However, individual issuers would have been permitted to negotiate interchange fees with individual merchants (via bilateral negotiations). Bamberger Decl. ¶¶ 83-84; Bamberger Reply Decl. ¶ 15. Dr. Bamberger explains that in that competitive market, merchants would have refused to pay interchange fees, as there is no additional value to merchants associated with them. Bamberger Decl. ¶¶ 74, 83-84; Bamberger Reply Decl. ¶ 15, 18. Accordingly, Dr. Bamberger concludes that competitive market forces would have resulted in merchants paying no interchange fees. *See* Bamberger Decl. ¶¶ 83-84; Bamberger Reply Decl. ¶ 15.

Bamberger effectively rebutted that contention: "I nowhere claim that merchants would have received card acceptance services for free in the but-for world. Instead, I explained that in a but-for world in which: (1) interchange fees were not required; and (2) bilateral negotiations on interchange fees between merchants and issuers were allowed, but not required, the evidence shows that merchants likely would not voluntarily agree to pay interchange fees. In this but-for world – as in the actual world – merchants would pay competitively determined fees for card-acceptance services to acquiring banks (i.e., the "acquirer margin") for the services those banks provide. The total amount paid by merchants (i.e., the acquirer margin plus the interchange fee in the actual world), however, would not be increased by Visa and MasterCard rules requiring the payment of interchange fees." Bamberger Reply Decl. ¶ 15. Dr. Bamberger also explained that, as Dr. Snyder recognized, "accept[ing] all payment card transactions" is a "foundational feature" of the networks and thus, the networks would not have eliminated such rules as they have not done so in the real world in countries where interchange fees are substantially lower than in the United States. *Id.* ¶¶ 23-27. Dr. Bamberger also explained in the deposition testimony Defendants cite that his but-for world is based on his conclusion that "belonging to the network means accepting the transactions … [interchange fees are] not the only source of payment in the network." Bamberger Dep. Tr., dated July 30, 2008, at 86:2-5. Even Defendants' expert Dr. Snyder admitted that credit card issuers generate approximately 80 percent of their total revenue from interest income and fees other than interchange. *See* Reply Mem. of Law in Supp. of Class Pls.' Mot. for Class Certification (docket entry 1167), at 63 & n.170.

While Dr. Bamberger acknowledges that in the but-for world card issuing banks' revenue would have been reduced, he concludes that such reductions would have been insufficient to induce those banks to leave the network, as issuing banks' payment card businesses would still have been profitable. Bamberger Decl. ¶¶ 74, 85-88; Bamberger Reply Decl. ¶¶ 14, 18-19. As Dr. Bamberger explains, card issuing banks would have minimized revenue reductions through various means, such as by collecting higher fees from cardholders and limiting rewards programs. Bamberger Decl. ¶ 88; Bamberger Reply Decl. ¶¶ 18-19.

Dr. Bamberger concludes that, under those circumstances, competitive market forces would have eliminated interchange fees and that, as a result: (1) all, or nearly all, merchants have been harmed in the real world by paying interchange fees; and (2) damages can be estimated formulaically on a class-wide basis, based on the difference between the amount of interchange fees each merchant actually paid during the class period, and the amount it would have paid in the primary but-for world. Bamberger Decl. ¶¶ 83-84, 90, 94, 109. Defendants' claim that Dr. Bamberger does not construct a but-for world free of their collusion is patently false.

B. Dr. Bamberger's Alternative But-For World Uses Real World Benchmarks to Establish the Availability of a Less Restrictive Alternative.

As an alternative, Dr. Bamberger also concludes that interchange fees might have been set substantially lower had Visa's and MasterCard's only concern in setting those fees been the ability of the networks to operate successfully. *See* Bamberger Decl. ¶ 79. Dr. Bamberger's alternative but-for world uses benchmarks to estimate a less restrictive alternative only to account for the possibility that the fact-finder may determine that Defendants' collusion as to interchange fees was warranted in part. *Id.* This aspect of Dr. Bamberger's opinion is based on an assumption that Defendants are able to prove that some level of fixed interchange fees would have been necessary for the Visa and MasterCard networks to do business, because of the

purported network effect problem, sometimes referred to as the "chicken-and-egg" problem. *Id.* ¶¶ 78-79. As Dr. Bamberger notes in his declaration, such an assumption runs counter to economic studies supporting the elimination of network-set interchange fees because the Visa and MasterCard networks are now mature. *Id.* ¶ 78. In such a case, however, the restraint at issue (here, the collective setting of interchange fees) would have been no greater than necessary to achieve the pro-competitive benefit of a viable network.

To conduct the alternative but-for world analysis, Dr. Bamberger used as benchmarks interchange fees paid in other four-party network systems, including those in other countries. Bamberger Decl. ¶¶ 79-81. Dr. Bamberger did not randomly choose his benchmarks, but chose benchmarks from countries that included specific characteristics, including: (1) the existence of a four-party network; (2) widespread use of Visa and MasterCard credit cards; and (3) a mature network. Bamberger Reply Decl. ¶ 37. As Dr. Bamberger explained, "benchmarks that share these characteristics provide valuable and reliable information that allows an economist to evaluate whether the Visa and MasterCard networks at issue in this case could have operated successfully in a but-for world in which interchange fees were lower or absent." Bamberger Reply Decl. ¶ 38. Dr. Bamberger explained that the purpose of these benchmarks was to determine if "the reduction, elimination or absence of interchange fees affected the ability of those networks to operate successfully." Bamberger Reply Decl. ¶ 42. Thus, even interchange fees charged in countries where those fees were set by regulators are useful benchmarks for Dr. Bamberger's viability determination. *Id.*

For purposes of the alternative but-for world analysis, Dr. Bamberger identified the interchange fees paid in Australia as a potential benchmark.[3] Bamberger Decl. ¶¶ 80-81, 91, 93; Bamberger Reply Decl. ¶¶ 44-46. Dr. Bamberger found that although the networks' average interchange fees are 72 percent lower in Australia than in the United States, both networks operate successfully in Australia. Bamberger Decl. ¶¶ 80-82, 91-93. Dr. Bamberger concludes based on his analysis of the economic evidence that Visa and MasterCard would have operated successfully in the United States if they would have set interchange fees 72 percent lower than they were during the class period. Bamberger Decl. ¶¶ 91-93. Dr. Bamberger also concludes that, compared to the alternative but-for world, all, or nearly all, merchants were harmed in the real world, because they would have paid substantially lower interchange fees in the alternative but-for world. He further concludes that damages can be estimated on a formulaic, class-wide

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[3] Comparison of relevant benchmarks is common in calculating damages in price-fixing cases. "Where … there is a dearth of market information unaffected by the collusive action of the defendants, the plaintiff's burden of proving damages is, to an extent, lightened … the jury … is entitled to make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly." *Hendrickson Bros., Inc*., 840 F.2d 1065, 1077 (2d Cir. 1988) (citation omitted). Here, Dr. Bamberger uses interchange fees paid in other countries as a benchmark. This type of benchmark comparison is commonly accepted by courts. *See, e.g.*, *In re Linerboard Antitrust Litig*., 305 F.3d 145, 154 (3d Cir. 2002) (plaintiff's expert testified she could calculate damages through "'benchmarking,' which uses 'competitive prices for other comparable products to estimate the pattern of prices but-for the alleged misconduct'"); *In re Live Concert Antitrust Litig*., 247 F.R.D. 98, 145 (C.D. Cal. 2007) (where plaintiffs challenged defendant concert promoter's supra-competitive prices, plaintiffs' expert testified he could calculate damages by using "the yardstick approach in which the ticket prices for other promoters act as a benchmark. This approach is also widely upheld by courts.") (citation omitted); *Bradburn Parent/Teacher Stores, Inc. v. 3M*, 2004 WL 1842987, at *3 (E.D. Pa. Aug. 14, 2004) (comparison of the price of a similar product is a "standard method[] for proving damages in an antitrust case") (citation omitted); *In re Visa Check/MasterMoney Antitrust Litig*., 192 F.R.D. 68, 76 (E.D.N.Y. 2000) (denying defendants' *Daubert* motion where plaintiffs' expert cited two "empirical 'benchmarks'" based on current information from Canada and historical data from the United States); *In re NASDAQ Market-Makers Antitrust Litig*., 169 F.R.D. 493, 522 (S.D.N.Y. 1996) ("'The "yardstick" approach'….[has] been cited with approval by numerous courts in granting class certification") (quoting ABA Antitrust Section, *Antitrust Law Developments* (3d ed. 1992) at 669-73).

basis as the difference between the interchange fees merchants paid during the class period and the lower fees that they would have paid based on a benchmark such as Australia. Bamberger Decl. ¶¶ 93, 94, 110.

Defendants challenge Dr. Bamberger's alternative but-for world analysis because it includes the collective establishment of interchange fees. Defs' Mem. at 9-10. But in rule of reason cases, plaintiffs may in fact establish that a less restrictive means was available to achieve any pro-competitive justifications for defendants' price-fixing (in this case, the continued maintenance of the networks). *See Clorox Co. v. Sterling-Winthrop, Inc.*, 117 F.3d 50, 56 (2d Cir. 1997); *Geneva Pharm. Tech. Corp. v. Barr Labs.*, 386 F.3d 485, 506-07 (2d Cir. 2004). As the Second Circuit has explained, this is necessary to ensure that that the restraint does not exceed the limits "reasonably necessary to meet the competitive problems." *Berkey Photo, Inc. v. Eastman Kodak*, 603 F.2d 263, 303 (2d Cir. 1979).

The networks have repeatedly argued in other proceedings and contexts that interchange fees are necessary to their existence.[4] In the event such an argument is accepted, a lower fee which allows the networks to operate successfully is a less restrictive alternative. Such a standard is necessary to ensure that the networks' participants do not collectively exercise market power to set the fee at supra-competitive levels. *See* Federal Trade Commission and the U.S. Department of Justice, Antitrust Guidelines for Collaborations Among Competitors (April 2000) (the "FTC/DOJ Guidelines") §3.36(b) ("if participants could have achieved or could achieve

[4] *See*, *e.g.*, MasterCard International, Inc., "Submission to the Reserve Bank of Australia," (June 8, 2001 as revised July 20, 2001), at 11; Visa International Service Association (Prepared by: Network Economics Consulting Group Pty Limited), "Response to the Reserve Bank of Australia's Consultation Document and Report of Professor Michael Katz," (March 2002), pp. 10-11; Visa's Notification for Decision Pursuant to Section 44 of the Competition Act, Competition Commission of Singapore, June 2, 2006, VI-IC-02597034 – 146, at 037-038; MasterCard International, "Position Paper Submitted to Banco de Mexico," January 7, 2005, MCI_MDL02_01489662-686, at 13.

similar efficiencies by practical, significantly less restrictive means, the Agencies conclude that the relevant agreement is not reasonably necessary to their achievement").[5]

Dr. Bamberger concludes based on his review of the economic evidence that in his alternative but-for world, the networks would have been viable if interchange fees had been set at levels substantially lower than those that prevailed in the United States during the class period.[6] Bamberger Decl. ¶¶ 79-82, 91-93, 110. Dr. Bamberger's opinion is therefore reliable and relevant to demonstrate the reasonable availability of a less restrictive alternative if the fact-finder determines that collectively set interchange fees have some pro-competitive effect, as well as to estimate damages.

C. Dr. Bamberger's But-For Analyses are Relevant to Plaintiffs' Damages Calculations.

The purpose of a but-for analysis is to estimate the damages suffered by plaintiffs as a result of a price-fixing conspiracy. Where "the defendant has illegally imposed noncompetitive prices through some sort of collusive scheme … the usual measure of damage is the difference between the illegal price that was actually charged and the price that would have been charged 'but for' the violation, multiplied by the number of units purchased." 2A Areeda, Antitrust Law ¶ 391a (3d ed. 2007) ("Areeda"). *See also In re Currency Conversion Fee Antitrust Litig.*, 224 F.R.D. 555, 565-66 (S.D.N.Y. 2004) (certifying class where plaintiffs proposed to calculate damages by comparing real world prices to those in a but-for world); *In re Cardizem CD*

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[5] Defendants' expert Professor Snyder agreed that it is important in an antitrust case for an expert economist to have an understanding of the applicable legal standard. Snyder Dep. Tr. At 35-36. As noted above in the text, in considering whether there are less restrictive alternatives available to the Defendants, Dr. Bamberger was plainly applying the proper legal standard as reflected in the case law and the FTC/DOJ Guidelines. Professor Snyder, on the other hand, did not even know what the applicable legal standard is. Snyder Dep. Tr. at 58-59.

[6] Dr. Bamberger assumed that anti-steering restraints would be unlawful (for being collusive) and non-existent in that but-for world, and found that merchants would have been able to exert downward pressure on interchange fees as a result. Bamberger Decl. ¶¶ 99-102.

Antitrust Litig., 200 F.R.D. 297, 309-10 (E.D. Mich. 2001). "The normal frame of reference for what would have been paid is the market value of the goods or services in the absence of the collusive action." *State of N.Y. v. Hendrickson Bros., Inc*., 840 F.2d 1065, 1077 (2d Cir. 1988) (citation and quotations omitted).

Defendants' claim that Dr. Bamberger's proposed but-for worlds "constitute[] no more than proposing a method of price regulation" is simply false. *See* Defs.' Mem. at 12. But-for worlds are not meant to serve as a proposal or a prediction for the future; they are only used to calculate damages based on what would have happened in the past but for defendants' illegal conduct. *See Florida Mun. Power Agency v. Florida Power & Light Co*., 64 F.3d 614, 617 (11th Cir. 1995) ("[O]n remand the district court . . . may, for the limited purpose of calculating damages, estimate the rate that would have been in effect but for the violation . . . . Estimates are permissible and unavoidable in antitrust damage computations.") (citations omitted); *DeLong Equipment Co. v. Washington Mills Electro Minerals Corp*., 990 F.2d 1186, 1205 (11th Cir. 1993) ("We are basically dealing with a hypothetical question, in any event: what would have occurred if the defendants had not violated the antitrust laws . . .?").[7]

Defendants effectively ask the Court to treat Dr. Bamberger's reports as requests for equitable relief. But Plaintiffs have never asked the Court to do that. To the contrary, Dr.

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[7] *See also Fishman v. Estate of Wirtz*, 807 F.2d 520, 550 (7th Cir. 1986) (noting that "an antitrust plaintiff is given an exceedingly difficult task: quantifying the difference between what actually happened and what would have happened in a hypothetical free market"); *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig*., 256 F.R.D. 82, 88 (D. Conn. 2009) ("generally speaking, antitrust injury-in-fact and damages are often determined by comparing the 'but-for' price – the price a customer would have paid in the absence of the conspiracy – and the actual price paid") (citation omitted); 2A Areeda ¶ 391a (stating that "[b]ecause antitrust damage calculations necessarily require a determination of *what would have been* in a 'but for' world, there is an inescapable element of uncertainty in those calculations") (emphasis added).

Bamberger follows the established doctrine of measuring damages by estimating prices in the but-for world.

D. In the Second Circuit, Plaintiffs Are Not Required to Construct Any But-For World to Establish Impact.

Citing *Blades v. Monsanto Co.*, 400 F.3d 562, 569 (8th Cir. 2005), Defendants contend that "[t]o establish *antitrust impact*, an expert is required to construct a hypothetical market, a but-for market, free of the restraints and conduct alleged to be anticompetitive."[8] Defs.' Mem. at 9 (emphasis added). Tellingly, no court outside of the Eight Circuit has ever imposed such a requirement to establish antitrust impact. In fact, that is not the standard in the Second Circuit. In this circuit, it is well established that a conspiracy to fix list prices on a nationwide basis presumptively injures all those who purchased the affected product/service. *See, e.g.*, *In re Master Key Antitrust Litig.*, 528 F.2d 5, 12 n.11 ("if the appellees establish ... that the defendants engaged in an unlawful national conspiracy which had the effect of stabilizing prices above competitive levels, and further establish that the appellees were consumers of that product, we would think that the jury could reasonably conclude that appellants' conduct caused injury to each appellee").[9]

For example, in *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 256 F.R.D. 82, 88 (D. Conn. 2009), the court recognized "where other methods of common proof exist to show class-wide impact such as lock-step increases of national price lists in an

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[8] The language Defendants quote is from the Eighth Circuit's reproduction of the district court's opinion, and is not the Eight Circuit's own. *Blades*, 400 F.3d at 569. Moreover, the district court in *Blades* denied defendants' motion to exclude plaintiffs' expert testimony, on the basis that it wanted to consider all evidence at the class certification stage. The Eight Circuit did not disagree. *Blades*, 400 F.3d at 569, 571-75.

[9] *See also In re Alcoholic Beverages Litig.*, 95 F.R.D. 321, 327 (E.D.N.Y.1982) ("as a general rule, an illegal price-fixing scheme presumptively impacts upon all purchasers of a price-fixed product in a conspiratorially affected market"); *In re Auction Houses Antitrust Litig.*, 193 F.R.D. 162, 166 (S.D.N.Y. 2000).

oligopolistic market, comparing 'but-for' prices with actual transaction prices is not the only way for plaintiffs to succeed in a motion for class certification." The court in *In re Universal Service Fund Telephone Billing Practices Litig.*, 219 F.R.D. 661, 674 (D. Kan. 2004), explicitly noted that the Eight Circuit was an exception to the general rule (including the rule in the Second Circuit) that class-wide antitrust impact can be presumed in a horizontal price-fixing case.[10] *See also* Reply Mem. of Law in Supp. of Class Pls.' Mot. for Class Certification (D.E. 1167), at 38 & n.80 (presumption of impact established in *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 455 (3d Cir. 1977), prevails in Second Circuit); *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 138-39 (2d Cir. 2001) (citing *Bogosian*).[11] *See also Kohen v. Pacific Investment Mgmt. Co., LLC*, --- F.3d ----, 2009 WL 1919013, at *3 (7th Cir. July 7, 2009) (Posner, J.) (impact may be presumed at class certification stage where even a single named plaintiff has a plausible claim to have suffered damages).

Defendants rely entirely on *Blades* for the legal underpinning for their pending motion. *See* Defs.' Mem. at 4, 9. But *Blades* has no bearing in this Court, or any other court outside the Eighth Circuit. Defendants effectively seek to hold Plaintiffs accountable for relying on an improper but-for world, when Plaintiffs in fact need not necessarily rely on any but-for world at all to establish impact.

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[10] In any event, both of Dr. Bamberger's but-for worlds establish class-wide fact of injury in that interchange fees would have been lower than those Defendants set in the real world.

[11] *See also In re Playmobil Antitrust Litigation*, 35 F. Supp. 2d 231, 246 (E.D.N.Y. 1998) (recognizing that impact is presumed and "proof of impact and injury will be common to the class" where "retailers were mandated to sell at or above list-price"). Defendants do not argue otherwise in their Sur-reply in Opposition to Class Plaintiffs' Motion for Class Certification (D.E. 1251).

E. Abolishing an Illegal Rule Requiring the Payment of a Fee is not "Setting" the Fee at Zero.

Defendants rely on *Brennan v. Concord EFS, Inc.*, 369 F. Supp. 2d 1127 (N.D. Cal. 2005), for the novel and unique proposition that abolishing an illegal rule requiring the payment of a fee is the same, for purposes of antitrust law, as setting the fee at zero. Defs.' Mem. at 11-12. Defendants' reliance is misplaced. The *Brennan* decision addressed only the question of whether collective establishment of ATM interchange fees is a *per se* violation of Section 1 of the Sherman Act. The *Brennan* court noted in dictum that, if plaintiffs were requesting that fees be set at some level other than that set by defendants, that request would be fatal to a *per se* claim. *Brennan*, 369 F. Supp. 2d at 1131-32. The *Brennan* court did not consider whether a rule of reason analysis generally, or a less restrictive means analysis in particular, could entail a but-for world involving lower fees. *Id.* Moreover, the *Brennan* court did not cite any authority for its premise that abolishing an illegal rule requiring the payment of a fee is the same thing, for the purposes of antitrust law, as fixing the price at zero.

Contrary to Defendants' argument, the absence of an agreement to fix prices is not the same as an agreement to fix prices. Zero is not a price, and the complete absence of a price (*i.e.*, a particular fee) is not equivalent to "setting" the price at zero. If courts were to adopt such logic, antitrust liability would run rampant. For example, if a manufacturer required its distributors to charge a surcharge of "x," and that rule was deemed collusive and was abolished, there would be no surcharge. But Defendants would argue that the surcharge was "set" at zero. Or in an industry in which sellers do not give discounts, the *absence* of an agreement to provide rebates would not be the same as an agreement to not give discounts. Moreover, even if zero were a "price", fixing such a price could not result in private antitrust liability because those paying it could not have been injured or suffered damages. *See Zenith Radio Corp. v. Hazeltine*

Research, Inc., 395 U.S. 100, 114 (1969) (antitrust plaintiff must prove it "had in fact been injured to some extent"); *Daniel v. American Bd. of Emergency Medicine*, 428 F.3d 408, 437 (2d Cir. 2005) (identifying factors relevant to antitrust standing) (internal citations omitted).

No other court has relied on the *Brennan* court's unique theory, and Plaintiffs respectfully suggest that this Court should not be the first.

F. Defendants Cite No Authority for the Proposition that an Expert's Damages Report Constitutes a Request for Price Regulation.

Defendants attack Dr. Bamberger's but-for worlds by relying on Section 2 monopolization cases that stand for the unremarkable premise that courts generally should not calculate reasonable prices or dictate the prices monopolists charge.[12] Those cases are uniformly inapposite to this one. *See Coalition for ICANN Transparency v. Verisign, Inc.*, 567 F.3d 1084, 1091-92 (9th Cir. 2009) (district court erred in relying Section 2 monopolization precedent in analyzing Section 1 restraint of trade claim). While high prices imposed by a monopolist may not be anticompetitive, "[h]arm to consumers in the form of higher prices resulting from competitive restraints has long been held to constitute an actual injury to competition in the Section 1 context." *Id.*

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[12] *See Pacific Bell Tel. Co. v. LinkLine Comm'ns, Inc.*, 129 S.Ct. 1109, 1121 (2009) (involving price squeeze claim brought under Section 2 dismissed where its resolution would require the court to determine the proper prices a monopolist should have charged at both the wholesale and retail level); *Metronet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1133-34 (9th Cir. 2004) (holding that plaintiffs' claims did not fall into an exception to the "no duty to deal" rule applicable to Section 2 claims); *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990) (reversing district court based on difficulty in determining fair price in a price squeeze claim under Section 2); *Berkey Photo, Inc.*, 603 F.2d 263, 294 (addressing Section 2 claim and holding that a unless a monopolist has bolstered its power through wrongful actions, it will not be required to pay damages because its prices may be found excessive, but noting that "[e]xcessive prices, maintained through exercise of a monopolists control of the market constituted one of the primary evils that the Sherman Act was intended to correct").

Defendants also contend that lower prices can never be a less restrictive alternative where a collectively-established price is necessary to a joint venture's existence, because it amounts to improper rate regulation. As discussed above, a lower fee is a valid less restrictive alternative. *See supra* § II.B.[13] Defendants' cited authority does not suggest otherwise. In particular, Defendants' reliance on *Brennan* in this context is misplaced, as the court did not address rule of reason jurisprudence even in the most general sense. *Id.*, 369 F. Supp. 2d at 1131-32. Defendants' other cases are equally inapposite. Defendants quote a superannuated case for the proposition that an inquiry into the reasonableness of prices is to "set sail on a sea of doubt." But that case addressed restraints that "have no other purpose and no other consideration on either side than the mutual restraint of the parties" (*i.e.*, *per se* violations). *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 283-84 (6th Cir. 1898). Here, the purposes of Dr. Bamberger's alternative but-for analysis are, first, to demonstrate that, in the event the fact-finder determines that some level of collectively established interchange fees is necessary, there exists a less restrictive alternative that ensures the networks' successful operation, and, second, to estimate the but-for price and damages under that circumstance.

Other cases upon which Defendants rely involve facts and legal claims decidedly different from those in this case. For example, the court in *Ball Mem'l Hosp., Inc. v. Mutual Hospital Ins., Inc.*, 784 F.2d 1325, 1340 (7th Cir. 1986), affirmed the denial of a preliminary injunction as to a Section 2 claim, based on the defendant's lack of sufficient market power. *Yankees Entm't & Sports Network, LLC v. Cablevision Sys. Corp.*, 224 F. Supp. 2d 657, 674-75 (S.D.N.Y. 2002), entailed a Section 2 claim, as well as the essential facility doctrine.

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[13] As noted above, if accepted by this Court, Defendants' argument would permit Defendants to collectively set exorbitant interchange fees, unbounded by any limitation imposed by antitrust law.

Defendants' citation to *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 544 F.3d 1323, 1332 (Fed. Cir. 2008), to support their claim that price level plays no role in a rule of reason burden-shifting analysis is inapt.[14] While the *Ciprofloxacin* court cited the rule of reason burden-shifting standard, it affirmed the district court's finding that plaintiffs had not demonstrated that the alleged restraint had any adverse effects on competition. *Id.*, 544 F.3d at 1332. The court did not address what may or may not constitute a less restrictive means for achieving a pro-competitive result.

In short, Defendants' rate regulation argument is devoid of legal support, binding or otherwise.

III. CONCLUSION

Defendants' motion rests entirely on distortion of Dr. Bamberger's report and inapposite precedent that does not and should not bind this Court. For these reasons, Plaintiffs request that the Court deny Defendants' Motion to Exclude Opinions of Dr. Gustavo Bamberger.

[14] Defendants' citation to *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 317 (2d Cir. 2008), is off-base as well. The plaintiff in that case failed to proffer any evidence to support a rule of reason analysis, and argued only that a *per se* analysis was proper. *Id.* at 334. The court did not conduct a rule of reason analysis. The decision has no bearing on the question before this Court, *i.e.*, whether a lower fee charged by a network claiming that such a fee is necessary for its survival can constitute a less restrictive means under the rule of reason burden-shifting analysis.

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Respectfully submitted,

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