

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

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Edward Michael O'Brien,

Plaintiff,

v.

Visa International, Inc.,  
BankAmerica Corp., AT&T Corp.,  
Citigroup, Inc., Bank One Corp.  
Chase Manhattan Corp., MBNA Corp.,  
Wells Fargo & Co., and Capital One  
Financial Corp.,

Defendants.

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COMPLAINT

Case No. CV 02-8047 GHK (Ex)

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## I. OPENING STATEMENT

1. Plaintiff, Edward Michael O'Brien ["PL"], brings this civil action for treble damages against Visa International Inc., BankAmerica Corp., Citigroup Corp., Bank One Corp., AT&T Corp., Chase Manhattan Corp., MBNA Corp., and Wells Fargo & Co. ["Major Banks"] in control of Visa International Inc. ["Visa"], and subsidiary Visa U.S.A. Inc. ["Visa USA"], and Capital One Financial Corp. ["CO"], issuer of Visa USA general purpose credit cards, alleging defendants [collectively "DF"] violated federal and state antitrust and consumer laws via restraints of trade and competition, monopolization, interlocking directorates, exclusive dealing, denial of equal credit opportunity and denial of consumer privacy.

2. BankAmerica Corp., Visa International Inc., and Defendant boardmembers of Visa International Inc. knew of and permitted Visa member, Capital One Financial Corp., to engage in unfair and deceptive business practices denying equal credit opportunity and consumer privacy to consumers throughout the United States. Therefore, owner/directors of Visa are co-liable for CO's violation of federal and state laws causing antitrust and consumer injury to consumers and businesses, including PL, in markets for general purpose credit cards.

3. This private civil action is brought, and Defendants are summoned, to federal district court for recovery of damages, pursuant to Title 15, United States Codes, sec. 1, 2, 15, 19, 1691(a) and 6821(a)(b); and California Business and Professions Codes, sec. 16700 et seq. and 17000 et seq.

4. Since its founding in 1958, BankAmerica Corp. has maintained ownership of Visa. However in 1970 owner permitted national and international co-direction of Visa (board of director membership) by the member banks processing the largest number of credit card transactions and elected small bank(s). Defendants here named, other than CO, are or have recently been issuers/processors of the largest number of credit cards in the United States. Annually, seven (7) of the above named Defendants are "elected" to board membership and one (1) small bank member is elected. "Seven directors are elected nationally, and a separate seat is reserved for a director who represents small banks." [*SCFC ILC, INC. v. VISA USA, INC.*, 36 F.3d 958, 960 (footnote 2.) (10th Cir. 1994) ]

5. Visa and its "competitor" MasterCard are the two largest general purpose credit card networks. Together, they account

for over 75% of all purchases made with credit cards in the United States.

6. Visa is the umbrella organization for approximately 6,000 issuing members (19,000 associate members), "...providing technology to process credit card transactions and regulates and coordinates the individual programs through rules and bylaws proposed by management and adopted by a board of directors (the Board)...Any financial institution which is eligible for federal deposit insurance may become a Visa USA member." [*Ibid.* ]

7. "Within Visa USA's intersystem share, aggregated to include MasterCard issuers as well, the district court noted the evidence showed in 1991 the ten largest issuers of Visa and MasterCard accounted for approximately 48% of the total Visa/MasterCard charge volume. The top-ten issuers were Citicorp, First Chicago, AT&T, Chase Manhattan, MBNA America, Bank of America, Nationsbank, Chemical Bank, Banc One, and Wells Fargo Bank. The largest issuer, Citicorp, accounted for approximately \$42.5 billion in charge volume in 1991 - representing approximately 15.8% of the Visa/MasterCard market and 11.4% of the entire general purpose charge card market.' [*Ibid.*, 967 ]

8. Visa and MasterCard are joint commercial ventures (corporations) and not "banking associations", as they are commonly thought to be. 15 U.S.C., sec. 19 prohibits any person from serving as a director or officer in any two competitive corporations other than banks, banking associations, and trust companies. A statement from (<http://www.aba.com>) illuminates "banking association" for purposes of analysis herein, "The American Bankers Association has been the premier voice of the American banking industry for 125 years, with assets of member banks representing approximately 90 percent of the industry total. ABA's mission is twofold: to provide high-quality banking education and training products and services, and to serve as the voice of the banking industry."

9. In the spirit of congressional legislation, only associations that provide banking education, bank related training or related services and/or values can be considered exempt from 15 U.S.C., sec. 19 prohibitions. Neither Visa nor MasterCard may be legally characterized as a banking association, bank or trust company.

10. Defendants control both the Visa and Mastercard "associations" by simultaneously placing directors (bank employees) on the board of one company and same persons on

important committees of the other company. Although not literally "interlocking directorates" the intent and protective spirit of sec. 19 militates, nevertheless, against interchange of one company's directors/officers at competitor's controlling level(s). Large member banks' control of Visa/Mastercard may be characterized as sophisticated, consistent, effective and patently illegal.

11. Each member bank named as defendant in this case issues both Visa and MasterCard products. Control of two credit card companies by banks that have significant interests in both is

known in the industry as "duality". Duality has substantially lessened competition between Visa and MasterCard because controlling member banks have been, and continue to be, significantly unwilling to fund and implement competitive initiatives that would cause consumers to switch their business from one "association" to the other.

12. In addition, both Visa and MasterCard, on behalf of and in collaboration with the banks that govern them, have adopted rules and policies that restrict the ability of all member banks to do business with American Express, Discover/Novus, or any other credit card company that Visa's owner and directors deem to be undesirably "competitive."

13. Importantly, Visa and MasterCard do not apply restrictive rules to one another. Member banks may do business with the two largest, marginally competitive credit card companies ["networks"] but not with other networks.

14. Defendants exclusionary rules and policies eliminate certain forms of competition among Visa and MasterCard member banks and have effectively precluded American Express and Discover/Novus from competing to enlist banks in the U.S. in their credit card programs.

15. Through common control of both Visa and MasterCard, the largest banks have stifled competition between their two networks and have thwarted competition from Discover/Novus, American Express and smaller competitor networks.

16. Comprehensive reductions in competition among general purpose credit card networks have hindered and delayed the development and implementation of improved network products and services, and have lessened consumer choice.

17. If allowed to continue, anticompetitive structure and practices of Visa and Mastercard will threaten competition in the development and marketing of new general purpose card products including cards that integrate credit, debit, and stored value functions.

18. Defendants participation in alleged anticompetitive corporate ownership, management and business practices caused antitrust injury to many persons in credit card markets. PL experienced quantifiable and provable consumer and business injury from Defendants' anticompetitive behavior and brings this action complaining and alleging as follows:

## II. CAUSE OF ACTION

1. In furtherance of alleged combination and conspiracy, each of the defendants attempted to, and did, increase monopoly in general purpose credit card markets; restrained trade in same markets via unfair and/or fraudulent business practices, and directly and intentionally injured certain consumers, including PL, via fraudulent credit card solicitations mailed and/or emailed.

2. Solicitations injured consumers interstate and PL in California by (1) delaying acquisition of credit cards from Defendants' competitors pending defendants promised credit card issue. Delay precluded consumers' acquisition of essential services and/or products in the interim and made eventual acquisition of credit cards from Defendants' competitors more expensive, (2) causing loss of business revenues and/or increasing business expenses due to plaintiff's unkept contracts/guarantees made to certain persons, including government agencies, customers, vendors, service providers, etc. Contracts/guarantees were predicated on Defendants' guarantee of credit and the business leverage inherent in possession of viable VISA/MASTERCARD credit card(s), (3) causing mental distress, or exacerbating related disability, for PL and many other lower-income consumers denied critical, basic services/products (e.g., rental cars, hotel rooms, internet discount purchases, etc.) that require a credit card, (4) demanding; taking and misusing personal information from solicited consumers based on false guarantee(s) of credit, (5) selling or otherwise distributing personal information gathered via questionable methods without permission granted by consumers, and (6) distribution of PL's personal information in a manner that caused plethora of time-consuming, unwanted and disturbing

(often obscene) solicitations to PL and multitudes of Defendants' victims via regular mail and/or email.

3. Defendants restrained interstate trade, unlawfully increased monopoly and dealt exclusively in credit card markets when they caused many would-be credit card purchasers, including PL, to defer application for (eventual purchase of) their competitors credit card(s) following Defendants' written notice that consumers were definitely approved for credit card purchase. (PL was named and provided a meaningless account number on CO approval notices.) (Exhibit A)

4. Only business question on CO's noticed "approval" was the amount of credit-limit ("up to \$5,000.") to be extended to each solicited consumer on his/her "pre-approved" credit card. Limit question was supposed to be answered following analysis of consumer's most recent personal data gathered via consumer's tender of that information via completion of spaces on notice form and placement of same in return mail to CO. Return mail containing consumer's most recent information constituted formal acceptance of CO offer of a Visa credit card having "at least \$500." in consumer credit extended.

5. Unless consumers' most recent data differed substantially from data presumably obtained by CO (source not specified in notice of approval) and used to approve consumer's credit initially, approval and offer of credit card was certified and contractually binding. Only proof of consumer's most recent personal data in substantial deviation from his/her previous condition(s) can legally negate CO's contractual obligation to issue credit card and process consumer's transactions.

6. Denial of credit card issue by Defendant following PL's formal acceptance and tender of personal data [including grant of access to PL's credit report(s)] was not only Defendants second form of restraint of trade via monopolization and exclusive dealing, it was also breach of consumer law.

### III. DAMAGES SPECIFIED

#### 1. Antitrust Injuries Sustained by PL:

a. CO's deceptive solicitation(s) in form of notice of approval deceptively put consumer's credit report(s) and

valuable (sensitive) personal data in commercially powerful hands creating financial and social insecurity, injury and potential for on-going injury to PL's reputation, business, family, etc.

b. CO sold, or otherwise traded for value, PL's most recent personal data to third persons without permission requested, granted or implied in PL's acceptance of credit card offer(s) and request(s) for issue with maximum allowable credit limit.

c. Denial of ability to rent cars when needed for business and/or personal matters via denial of monopolized credit card issue, following certification of approval, was antitrust injury via exclusive dealing, discrimination and denial of essential facility(s). At one point, during time period PL was expecting to receive a CO credit card, PL had critical need for a rental car but was unable to rent car without a major credit card. Had CO not solicited PL deceptively and fraudulently, PL would have obtained a Visa/MasterCard credit card via a *secured* credit card program. [Exhibit C ] Result: loss of business, increased expenses and mental distress.

d. Denial of credit card issue, following notice of approval, caused business injury in excess of \$75,000. to PL and many other consumers when they made commitments to customers, property manager, vendors, printers, service providers, etc. based on CO promise of increased financial "clout" guaranteed in notice of credit card approval.

e. Because PL had experienced several years of VISA/MASTERCARD denials of unsecured card applications by other banks, denial of Capital One's unsecured VISA credit card, following notice of approval (finally!), caused PL to experience mental distress and exacerbation of mental/physical disability. PL was already adjudged disabled by Veterans Administration doctors (1997) due, in part, to extreme, long-term financial hardship, homelessness, and want of basic and essential facilities.

#### IV. JURISDICTION AND VENUE

1. Plaintiff O'Brien files this Complaint as a private citizen and businessman under section 15 of Title 15, United States Codes to prevent and restrain BankAmerica Corp., Visa, board(s) of directors members and Capitol One Financial Corp. from violating section 1 and 2 of the

Sherman Act, 15 U.S.C. sec. 1, 2, 15, 19, 1691(a) and 6821(a)(b); and California Business and Professions Codes, sec. 16700 et seq. and 17000 et seq. as amended.

2. BankAmerica Corp., Visa and/or CO maintain offices, transact business, and are found within the Central District of California, within the meaning of 15 U.S.C. sec. 22.

3. This Court has personal jurisdiction over each defendant, and venue is proper under 15 U.S.C. sec. 22 and 28 U.S.C., sec. 1391(b).

## V. DEFENDANTS AND CO-CONSPIRATORS

### A. Background:

1. In 1970, Bank of America made the decision to transfer control of its BankAmericard program. By virtue of this move, all BankAmericard issuers established a joint operation named National BankAmericard Inc. (NBI), an independent non-stock company founded by Member banks. NBI's functions were to manage, promote and develop the BankAmericard system in the United States.

2. Bank of America continued its operations outside the United States through franchises, expanding its issuer base to banks in 15 countries by 1972. Finally, in 1974 - with the creation of a new entity called IBANCO, BankAmericard Members joined under a multinational umbrella company which managed the International card program. Similar to its predecessor, NBI, IBANCO was a non-stock company and its owners were participating Member banks.

3. Outside of the United States, banks in certain countries resisted the idea of issuing cards related to Bank of America, even though such association was restricted to printing the bank's name on the plastic. To overcome this obstacle, it was necessary to find a universal name - unrelated to any particular financial institution. Finally, in 1977, BankAmericard adopted a new image under the VISA brand name, while retaining its distinctive Blue, White and Gold colors. NBI became Visa U.S.A. and IBANCO became VISA INTERNATIONAL SERVICE ASSOCIATION.

4. Visa divides its membership into six Regions: Asia-Pacific; Canada, Europe (European Union or EU); Central Europe, Middle East, Africa (CEMEA); Latin America & Caribbean; and the United States. Each of the six Regions

operates with the same rights and obligations, and each Region is responsible for adapting programs and activities to its local markets. Visa operates like a unified holding company. Each Region has its own board of directors responsible for regional and local operations. Elected Members of those boards ["Small Banks"] sit on the Visa International Board of Directors

5. While the six Regions operate independently, they do not operate in a vacuum. Visa headquarters, located in the San Francisco Bay Area, provides the cohesion that guarantees consistency across all Regions. The Visa staff is responsible for long-range planning and inter-regional activities, including the establishment of international policy and operating guidelines, product development enhancement, advanced payment systems strategies, and the operation and upgrading of VisaNet, the largest and most sophisticated consumer financial transaction processing system in the world.

B. Principals:

1. BankAmerica Corp. owns Visa International and permits its approximately 25,000 member banks to exercise controlling interest (direction) via non-stock "ownership" and regional board of directors. Should Visa become insolvent all members would share substantially in asset distribution. Member banks are represented by eight (8) members on Visa's board of directors, composed of seven (7) persons from major banks processing the most credit card transactions annually and one (1) member elected by the general assembly of bank members.

2. Chase Manhattan Bank conducts domestic and international financial services business with operations in more than 50 countries and clients throughout the world. Corporate headquarters: 270 Park Avenue, New York, NY 10017.

3. Citigroup Inc. operates the largest financial services company in the USA with over 100 million customers and \$700.billion in assets. Corporate headquarters: 388 Greenwich Street, New York, NY 10013.

4. Wells Fargo & Company has over \$250.billion in assets and more than 100,000 employees serving in 5,777 service locations in all 50 states and in Canada, the Caribbean, Latin America and other international locations. Corporate headquarters: 420 Montgomery Street, San Francisco, CA 94163.

5. Bank One Corp. is the 5th largest bank holding company in the U.S. with assets of more than \$300 billion. Bank One operates in all domestic and in select international markets in 11 countries, and is the world's largest Visa card issuer and the second largest credit card company in the USA. Corporate headquarters: 100 East Broad Street, Columbus, OH 43271.

6. BankAmerica Corp. conducts general banking business through nearly 1,800 offices primarily in the West and Midwest; and provides other financial services throughout the U.S. and internationally. BankAmerica Corp. is the second largest bank holding company in the U.S. Corporate headquarters: Bank of America Center, San Francisco, CA 94104.

7. AT&T Corp. provides voice data and video telecommunications services; regional, domestic, international and local communication transmission services; cellular telephone and other wireless services; billing, directory and calling card services; and credit card services. Corporate headquarters: 32 Avenue of the Americas, New York, NY 10013-2412.

8. Capital One Financial Corp. is an independent bank corporation and member of the Visa network. CO is organized under the laws of the State of Virginia, with principal place of business in Richmond, Virginia. Started as an independent company in 1995, Capital One has quickly risen to the top of the credit card industry in the U.S. with a global customer base already at 48.6 million and managed loans totaling \$53.2 billion. CO is in a prime position to lead the financial services marketplace through this century. Therefore, CO's right standing in law is critical at this time to the future of global economies.

## VI. MARKET POWER

1. Defendants combination has monopoly power in market(s) for consumer credit cards.

a. Antitrust injury and anticompetitive effects alleged in this Complaint occurred primarily in the market for general purpose credit cards.

b. In 1997, Visa accounted for approximately 50% of the dollar volume of transactions using consumer credit cards in

the United States and approximately 53% of the number of consumer credit cards issued.

c. In 1997, MasterCard accounted for approximately 25% of the dollar volume and approximately 33% of the number of cards issued.

d. Together, Visa and MasterCard account for approximately 75% of consumer credit card dollar volume and approximately 86% of the number of credit cards issued.

e. In the United States, approximately 3.4 million merchant outlets accept both Visa and MasterCard. Practically every merchant that accepts Visa also accepts MasterCard and vice versa. This common merchant base is significantly larger than the base of any other competitor.

f. In 1997, American Express accounted for approximately 18% of dollar volume and 5% of consumer credit cards issued in the United States. Cards on the American Express network were accepted at approximately 2.5 million merchant outlets in the United States.

g. In 1997, Discover/Novus accounted for approximately 6% of dollar volume and 8.5% of cards issued in the United States. Cards on the Novus network were accepted at approximately 3.1 million merchant outlets in the United States.

h. There are two other consumer credit card networks that compete in the United States: Diners Club/Carte Blanche, which is owned by Citigroup Inc., the bank that has issued the largest number of Visa and MasterCard cards, and JCB, a network based in Japan that issues credit cards in the United States primarily to Japanese expatriates.

i. Networks competitive with VISA/MASTERCARD have competitively insignificant market shares and limited merchant acceptance in the United States.

2. Competition among Visa and Mastercard issuers is not a substitute for network competition.

a. Card issuers compete on interest rates, fees, enhancements, and customer service. This competition, however, cannot cure the harm to consumers arising from a lack of competition among card networks, nor does it prevent the Visa and MasterCard member banks from collectively exercising power in credit card issuer/processor market(s) to the detriment of consumers.

b. In furtherance of the combination and conspiracy alleged herein, Defendants have adopted rules and policies that disadvantage or exclude rival credit card networks, such as American Express and Discover/Novus, including rules or policies prohibiting member banks from issuing cards on the American Express or Discover/Novus networks.

c. Combination and conspiracy has had anticompetitive effects, including:

(1) Consumers have had fewer choices in the characteristics and variety of card products made available to them;

(2) Visa and MasterCard member banks have been prevented from competing with one another with respect to the variety of card brands that they may offer to consumers;

(3) Card networks not owned by banks have been foreclosed from access to an important channel of distribution; and

(4) Consumers have been denied the benefits of free and open competition among general purpose card networks in the promotion, development, and implementation of new general purpose card products and services.

3. Unless enjoined by this Court, these anticompetitive effects are likely to continue and are not reasonably necessary to accomplish any pro-competitive objective.

## VII. TRADE AND COMMERCE

1. Throughout the period covered by this Complaint, Visa and MasterCard have operated credit card networks throughout the United States. They provide card network products and services in, and those products and services affect, a substantial amount of interstate commerce. In 1997, transaction volume on the Visa and MasterCard networks exceeded \$600 billion.

## VIII. RELEVANT MARKET

1. General purpose credit cards are payment devices that a consumer can use to make purchases from unrelated merchants without accessing or reserving the consumer's funds at the

time of the purchase. There are two principal types of general purpose credit cards:

a) credit cards such as Visa and MasterCard Classic and Gold cards, the American Express Optima card, and the Discover card that usually permit the cardholder to either (i) pay all charges within a set period after a monthly bill is rendered, or (ii) pay only a portion of the charges within that time and pay the remainder in monthly installments, including interest; and

b) charge cards such as the American Express Green Card that require the cardholder to pay all charges within a set period after a monthly bill is rendered.

2. General purpose credit cards do not include cards that can be used at only one merchant (e.g., department store cards) or cards that immediately access funds on deposit in a checking or savings account (e.g., debit cards).

3. General purpose credit cards provide a consumer with a combination of convenience, widespread acceptance, security, and deferred payment options that is not effectively replicated by any other form of payment. For a significant number of consumers and types of transactions, other forms of payment are not a close substitute for general purpose credit cards.

4. Competition to provide general purpose cards occurs at two levels. First, Visa and MasterCard compete with American Express, Discover/Novus, Diners Club, and Japan Credit Bureau in an upstream market, herein referred to as the *network* market.

5. Second, individual Visa and MasterCard member banks, including Capital One Financial Corp., compete with each other and with American Express, Discover/Novus, Diners Club, and JCB member banks in two downstream markets, herein referred to as the *issuer* markets.

a) the market for issuing general purpose credit cards to consumers ("card-issuing market"); and

b) the market for providing the services that enable merchants to accept general purpose credit cards for the purchase of goods or services ("card-acceptance market").

6. Visa and MasterCard associations compete only in the upstream network market. Their member banks, with the exception of Citibank, which owns Diners Club, and

BankAmerica Corp., which owns Visa, compete only in the downstream market.

#### IX. PRODUCT MARKET

1. Certain functions essential to the acceptance and use of general purpose credit cards are most efficiently performed by general purpose credit card networks, often because the functions require broad coordination across international regions and subnetworks.

2. For example, among these functions, all general purpose credit card networks: a) invent, develop, and implement systems and technologies, including systems to authorize and settle card transactions and reduce fraud;

b) develop, market, advertise, and promote their brand names among consumers and merchants;

c) invent, develop, implement, standardize, market, and advertise types of card products;

d) develop and implement rules and standards to govern their networks;

e) set fees and assessments for use of the network's products and services, including the interchange fee that accounts for the largest part of the price that merchants pay for the right to accept general purpose credit cards;

f) and extend credit card acceptance to merchant segments that have not accepted cards in the past.

3. The products and services provided by general purpose credit card networks form a relevant product market ("the network market"). Banks and other entities that issue credit cards and provide credit card acceptance services to merchants rely on general purpose credit card networks to provide a core set of these products and services for which there is no cost-effective alternative.

4. Card issuers and banks that provide credit card acceptance services to merchants thus cannot substitute other products and services for the products and services provided by general purpose credit card networks in an amount sufficient to deter Defendants' exercise of market power in the network market.

5. In addition, consumers do not substitute other forms of payment, and merchants do not stop accepting general purpose credit cards, in amounts sufficient to deter Defendants' exercise of market power in the network market.

6. The products and services provided by general purpose credit card networks are critical inputs to the entities that issue cards to consumers and provide credit card acceptance services to merchants.

7. Card issuers compete for cardholders with respect to interest rates, annual cardholder fees, payment terms and conditions, card enhancements, and customer service.

8. Entities that provide credit card acceptance services to merchants compete with respect to their fees and the quality of service they provide. This competition among Visa and MasterCard member banks in the card-issuing market and the card-acceptance market is not a substitute for, and does not replace, competition at the *network* level.

9. Competition at downstream levels thus cannot protect consumers from the anticompetitive effects of the exercise of market power by general purpose credit card networks. Competition among card *issuers* does, however, ensure that if network competition is vigorous, the benefits of that competition will be passed on to consumers.

## X. GEOGRAPHIC MARKET

1. The United States is the relevant geographic market for each relevant product market alleged herein.

2. Almost all of the general purpose credit cards issued by banks based in the United States are issued to domestic cardholders, and these consumers use their credit cards predominantly at merchant locations in the United States.

3. Most general purpose credit card transactions with merchants located in the United States are made using cards issued in the United States, and most merchants would not consider networks operating outside the United States to be a substitute for networks operating in the United States.

4. The Defendants consider the United States to be a separate geographic market, as demonstrated in part by their establishment of separate Boards of Directors for, and separate rules governing the operation of, credit card networks in the United States. For example, the Visa rules permitting member banks to issue Visa and MasterCard, but no other network's cards, apply only in the United States.

#### XI. BARRIERS TO MARKET ENTRY

1. The prospect of entry by new credit card networks does not prevent Visa and MasterCard from exercising market power in the network market.

2. Entry is extremely difficult because establishing a new general purpose credit card network requires large investments to develop both cardholder and merchant bases. Coordinated development of both cardholder and merchant bases is critical because the utility of a particular card product to cardholders and merchants depends not only on the cost and features of the card, but also on the ubiquity of its acceptance and use.

3. Since Visa and MasterCard were established in the mid-1960s, only one network has successfully entered the relevant market. In 1985, Sears created a new network, then called Discover and now known as Novus, by building on the infrastructure and the cardholder and merchant bases of the Sears single-retailer card system. At the time, Sears was one of the largest retailers and card issuers in the United States.

4. In the early 1980s, Citicorp, the largest issuer of Visa and MasterCard cards, and at the time a large provider of credit card acceptance services to merchants, unsuccessfully attempted to enter the network market.

5. Other companies that considered entering the network market concluded that the high cost of building a merchant and cardholder base made entry too difficult. For example, in the late 1980s, AT&T considered forming a new general purpose credit card network. After analyzing the Discover and Citicorp experiences, however, it decided not to enter the network market. AT&T instead entered only at the card-issuing level by becoming a member of Visa and MasterCard.

6. Visa and MasterCard have adopted and maintained anticompetitive rules and policies described above that

further increase an entrant's cost of developing cardholder and merchant bases.

7. By virtue of their dominant market shares and the difficulty of entry into the highly-concentrated network market, Visa and MasterCard together have the power to injure competition in that market. As described below, they have exercised that power to the detriment of consumers by reducing competitive investments in the innovation, development, and marketing of improved network products and services, and by restraining the competitiveness of smaller networks via unfair business practices.

## XII. CONTROL OF BOTH VISA AND MASTERCARD

1. Both Visa and MasterCard are organized as membership corporations that ostensibly operate on a not-for-profit basis. Their activities are financed through fees and assessments levied on their members. Both card networks permit a variety of financial institutions to become members, including commercial banks, thrifts, credit unions, and entities that are engaged primarily in the credit card business, commonly known as "non-bank banks" or "monoline banks."

2. Under Visa's and MasterCard's corporate structures and policy, a financial institution holding membership in either organization has the right to issue cards bearing the organization's trademark and to offer card acceptance services for the organization's cards. Most member banks, including Capital One Financial Corp. and all of the larger bank members, also become owners of the network and receive a bundle of rights similar to those of a shareholder in a corporation. This fact makes unreasonable Defendants' claim for Visa's non-profit status and exemption(s) from statute prohibitions.

3. Network ownership rights include the right to vote for a board of directors, participate in the governance of the association, and share in the association's assets upon dissolution. Voting and dissolution rights are apportioned according to the dollar volume of transactions that the bank has transmitted through the network. Member banks also agree to abide by the network's bylaws, rules, regulations, and policies.

A. Visa and MasterCard Began As Entirely Separate Systems

(1) Prior to 1970, Visa and MasterCard were controlled by different groups of banks.

(2) In 1970, one of Visa's member banks, Worthen Bank of Arkansas, sought to become a card-issuing member of both networks. MasterCard did not object, but Visa responded by adopting Bylaw 2.16, a bylaw that prohibited member banks from issuing any other network's cards.

(3) Worthen then sued Visa, alleging that Bylaw 2.16 violated sec. 1 of the Sherman Act. The district court determined that the bylaw was a per se violation of sec. 1 and granted summary judgment for Worthen. The Eighth Circuit, however, reversed and remanded for trial under the rule of reason.

(4) While the case was awaiting trial, Visa asked the Department of Justice to express its views, pursuant to a Department procedure called a "Business Review", on the legality of a more restrictive bylaw that would have prohibited Visa members from both issuing cards and providing card acceptance services for "any other [credit card] program presently existing or which may develop."

(5) The Department responded that it would not object to a bylaw that restricted Visa members to issuing Visa cards exclusively "to the extent it is necessary to insure continued intersystem competition." But the Department expressed concern that Visa's proposed prohibition on banks providing card acceptance services to merchants for both networks "might well handicap efforts to create new bank credit card systems and may also diminish competition among the banks in various markets."

### XIII. COMPETITION ISSUE

1. Anticompetitive effects caused by restraints on fair and open competition is at the heart of the issue in this complaint. Here we have a case of four organizations -- BankAmerica Corp./Visa, Major Banks/Directors, Small Banks/Director and Capital One Financial Corp. --working together to restrict competition, increase monopoly and exploit consumers in order to maximize revenues for all from relevant markets. Both anticompetitive organizations have devised (promulgated) rules that lock member banks in; lock competition out, and lock consumers up -- driven mad by

excessive interest rates, multiple fees and other inequities including fraudulent solicitations and privacy abuse.

2. Consumers should be able to benefit from innovative new products that financial institutions and new networks seek to develop.

3. U.S. financial institutions should be free to choose with whom they do business and be free of compulsion by dominant credit card "associations".

4. Both financial institutions and consumers should have access to the best products the marketplace can offer.

5. Together, BankAmerica Corp./Visa, Major Banks/ Directors, Small Banks/Director and Capital One Financial Corp. have limited choice, innovation and access for American consumers and financial institutions. Their anticompetitive practices have and will continue to injure consumers by constraining development of the next generation of payment products, whether they be credit cards, debit cards, smart cards or new innovations.

6. How exactly does BankAmerica Corp./Visa - Major Banks/Directors - Small Banks/Director - Capital One Financial Corp. lock out competition?

a. Virtually every financial institution in the United States is a member of Visa, MasterCard, or both. It is significant, therefore, that both organizations have similar prohibitions that bar member banks from issuing American Express Cards. Visa bylaw 2.10(e) explicitly prohibits U.S. member banks from issuing American Express or Discover cards, which Visa views as competitive threats. A violation of this bylaw results in an expulsion from the Visa network. MasterCard, through a similar policy, imposes the same penalty on a bank that issues American Express Cards.

b. As a result of Visa and MasterCard concerted action, all U.S. financial institutions that are members of either network cannot offer their customers a bank-issued American Express credit card unless the bank is willing to abandon existing Visa and MasterCard credit card businesses. A U.S. bank that does business with American Express would also be forced to abandon future participation in Visa or MasterCard programs such as debit cards, smart cards and subsequent innovations.

c. Defendants market (monopoly) power can, and in this case did, empower a rapidly growing member bank's solicitation(s)

of credit card issue/processing on a deceptive and fraudulent basis. Solicitation(s) injured numerous consumers, including the Plaintiff.

#### XIV. PROOF OF DECEPTION AND DISCRIMINATION

1. Although Defendants records will reveal fact Plaintiff responded to Defendants misleading solicitations and applied in vain to Capital One Financial Corp. for a credit card on numerous occasions over the past two years, only recently did PL document his responses to CO's solicitations such that evidence for their malfeasance and breach of antitrust laws is now tangible, accessible and material beyond reasonable doubt.

2. On September 12, 2002 PL received another solicitation from Capital One Financial Corp. following similar solicitation the previous month resulting, eventually, in rejection of PL's acceptance on credit-rating grounds.

3. This time PL photocopied all documents received and sent. From the evidence, Capital One Financial Corp.'s "Approval Verification" is clearly a genuine notice of approval and guarantee of credit card issue (sale).

4. "The credit line will be determined after Capital One receives your acceptance of this offer, and will be at least \$500." [ Capital One Bank's "Approval Verification" mailed to Edward Michael O'Brien, P.O. Box 91003, Santa Barbara, CA 93190-1003 on or about (09-01-02), under "Important Disclosures", third sentence from bottom of page:][Exhibit B]

5. On September 25, 2002 PL received Defendants' reply to PL's formal acceptance of CO's offer (guarantee) of a credit card.

6. "Thank you for your recent request for a credit card issued by Capital One. After careful consideration of your application and/or information obtained from consumer credit report(s), we have determined that we are unable to grant your request for credit at this time." [Capital One's letter sent September 20, 2002: Exhibit B ]

7. Beginning October 1, 2002 PL received numerous solicitations from Visa that were not a part of the conspiracy alleged herein. Although solicitations are not

material they may be used to corroborate material evidence at a later date.

#### XV. FTC ACTIONS DEMONSTRATE DEFENDANTS' LIABILITY

1. "The Federal Trade Commission's legal authority in this area is found in Section 5 of the Federal Trade Commission Act ("FTC Act"), which prohibits 'unfair or deceptive acts or practices' in or affecting commerce.

(1) A deceptive practice is defined as a representation, omission or practice that is likely to mislead reasonable consumers in a material fashion. A practice is unfair if it causes, or is likely to cause, substantial injury to consumers which is not reasonably avoidable and is not outweighed by countervailing benefits to consumers or competition.

(2) Certain information collection practices are likely to violate the FTC Act. For example, if a web site falsely claims to comply with a stated privacy policy or a set of self-regulatory guidelines, Section 5 of the FTC Act provides a legal basis for challenging such a misrepresentation as deceptive. Indeed, we have successfully enforced the law to establish this principle.

(3) In addition, the Commission has taken the position it may challenge particularly egregious privacy practices as unfair under Section 5 if such practices involve children, or the use of highly sensitive information, such as financial records and medical records.

(4) The Federal Trade Commission has and will continue to pursue such law enforcement actions through our active monitoring and investigative efforts, and through referrals we receive from self-regulatory organizations and others, including European Union member states."

2. Although PL has not chosen to make Defendants' online solicitations central to cause-of-action, he can supply evidence of Visa's/CO's on-line solicitations at discovery or upon court's request. Synopses following offered as evidence of contemporary privacy concerns having direct relevance to issues in complaint.

3. "GeoCities: The FTC's First Online Privacy Case

(1) The Federal Trade Commission's first Internet privacy case, *GeoCities*, was based on the Commission's authority under Section 5.

(2) In that case, the FTC alleged that GeoCities misrepresented, both to adults and children, how their personal information would be used. The Federal Trade Commission's complaint alleged that GeoCities represented that certain personal identifying information it collected on its web site was to be used only for internal purposes or to provide consumers with the specific advertising offers and products or services they requested, and that certain additional "optional" information would not be released to anyone without the consumer's permission. In fact, this information was disclosed to third parties who used it to target members for solicitations beyond those agreed to by the member. The complaint also charged that GeoCities engaged in deceptive practices relating to its collection of information from children. According to the FTC's complaint, GeoCities represented that it operated a children's area on its web site and that the information collected there was maintained by GeoCities. In fact, those areas on the web site were run by third-parties who collected and maintained the information.

(3) The settlement prohibits GeoCities from misrepresenting the purpose for which it collects or uses personal identifying information from or about consumers, including children. The order requires the company to post on its web site a clear and prominent Privacy Notice, telling consumers what information is being collected and for what purpose, to whom it will be disclosed, and how consumers can access and remove the information. To ensure parental control, the settlement also requires GeoCities to obtain parental consent before collecting personal identifying information from children 12 and under. Under the order, GeoCities is required to notify its members and provide them with an opportunity to have their information deleted from GeoCities' and any third parties' databases. The settlement specifically requires GeoCities to notify the parents of children 12 and under and to delete their information, unless a parent affirmatively consents to its retention and use. Finally, GeoCities also is required to contact third parties to whom it previously disclosed the information and request that those parties delete that information as well.

(4) ReverseAuction.com

In January 2000, the Commission approved a complaint against, and consent agreement with, ReverseAuction.com, an online auction site that allegedly obtained consumers' personally identifying information from a competitor site (eBay.com) and then sent deceptive, unsolicited e-mail messages to those consumers seeking their business.

(5) Our complaint alleged that ReverseAuction violated Section 5 of the FTC Act in obtaining the personally identifiable information, which included eBay users' e-mail addresses and personalized user identification names ("user IDs"), and in sending out the deceptive e-mail messages.

(6) As described in the complaint, before obtaining the information, ReverseAuction registered as an eBay user and agreed to comply with eBay's User Agreement and Privacy Policy. The agreement and policy protect consumers' privacy by prohibiting eBay users from gathering and using personal identifying information for unauthorized purposes, such as sending unsolicited commercial e-mail messages. Thus, our complaint first alleged that ReverseAuction misrepresented that it would comply with eBay's User Agreement and Privacy Policy, a deceptive practice under Section 5. In the alternative, the complaint alleged that ReverseAuction's use of the information to send the unsolicited commercial e-mail, in violation of the User Agreement and Privacy Policy, was an unfair trade practice under Section 5.

(7) Second, the complaint alleged that the e-mail messages to consumers contained a deceptive subject line informing each of them that his or her eBay user ID 'will expire soon.' Finally, the complaint alleged that the e-mail messages falsely represented that eBay directly or indirectly provided ReverseAuction with eBay users' personally identifiable information, or otherwise participated in dissemination of the unsolicited e-mail.

(8) The settlement obtained by the FTC bars ReverseAuction from committing these violations in the future. It also requires ReverseAuction to provide notice to consumers who, as a result of receiving ReverseAuction's e-mail, registered or will register with ReverseAuction. The notice informs these consumers that their eBay users IDs were not about to expire on eBay, and that eBay did not know of, or authorize, ReverseAuction's dissemination of the unsolicited e-mail. The notice also provides these consumers with the opportunity to cancel registration with ReverseAuction and have their personal identifying information deleted from ReverseAuction's database. In addition, the order requires ReverseAuction to delete, and refrain from using or

disclosing, the personal identifying information of eBay members who received ReverseAuction's e-mail but who have not registered with ReverseAuction. Finally, consistent with prior privacy orders obtained by this agency, the settlement requires ReverseAuction to disclose its own privacy policy on its Internet site, and contains comprehensive record keeping provisions to allow the FTC to monitor compliance.

(9) The ReverseAuction case demonstrates that the FTC is committed to using enforcement to buttress industry self-regulatory efforts in the area of online consumer privacy. Indeed, this case directly challenged conduct that undermined a Privacy Policy and User Agreement protecting consumers' privacy, and that could erode consumer confidence in privacy measures undertaken by online companies. Because this case involved the misappropriation by one company of consumer information protected by another company's privacy policy, it also may have particular relevance to the privacy concerns raised by the transfer of data between companies in different countries.

(FEDERAL TRADE COMMISSION LETTER TO EU COMMISSION ON ITS JURISDICTION OVER CONSUMER PRIVACY ISSUES: Date : July 14, 2000: John Mogg, Director, DG XV, European Commission, Office C 107-6/72, Rue de la Roi, 200 1049 Brussels, BELGIUM)

(UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION: In the Matter of GEOCITIES, a corporation, FILE NO. 9823015, AGREEMENT CONTAINING CONSENT ORDER)

(10) "The 1st and 4th Amendments of the US Constitution, as well as the existing Torts and Consumer Protection laws grant limited privacy rights. There are about 90 data privacy bills in the US Congress, mainly intended to protect children and medical records. Examples of such past measures include the Privacy Act 1974 (establishing standards for when it is reasonable, ethical and justifiable for government agencies to compare data in different databases) and the Electronic Communications Privacy Act (restricting the interception of electronic communications and prohibits the access to stored data without the consent of the user or the communication service)." [ *Ibid.* ]

(11) "In this sense, the FTC lawsuit against Geocities for going against its own policy (by disclosing the information about its own members to third parties after having claimed not to do so without express authorization) is a clear indicator that there is still room for public enforcement." [ *Ibid.* ]

(12) PL alleges Defendants have committed, via on-line and off-line methods, same or similar crimes as those noted above. Misuse of PL's personal information, deceptively and unfairly solicited, caused personal and business injury of the type governments seek to eradicate.

(13) (Gramm-Leach-Bliley Act; 15 USC, Subchapter II, Sec. 6821-6827 Fraudulent Access to Financial Information):

"Sec. 6821. Privacy protection for customer information of financial institutions. (a) Prohibition on obtaining customer information by false pretenses. (b) Prohibition on solicitation of a person to obtain customer information from financial institution under false pretenses" [ *Ibid.*]

#### XVI. DEFENDANTS DENIED EQUAL CREDIT OPPORTUNITY

1. The Equal Credit Opportunity Act [ECOA], 15 U.S.C., sec. 1691 et seq. prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age, or because an applicant receives income from a public assistance program.

2. The Department of Justice may file a lawsuit under ECOA where there is a pattern or practice of discrimination. In cases involving discrimination in home mortgage loans or home improvement loans, the Department may file suit under both the Fair Housing Act and ECOA. Individuals who believe that they have been the victims of any unfair credit transaction involving residential property may file a complaint with the Department of Housing and Urban Development [HUD] or may file their own lawsuit.

3. PL has chosen inter two-horned antitrust law/consumer law cause-of-action to exercise right to file personal ECOA lawsuit. "Jury trial is required in action brought under Equal Opportunity Act, 15 USCS, sec. 1691. *Vander Missen v Kellogg-Citizens Nat. Bank* (1979, ED Wis) 83 FRD 206, 28 FR Serv 2d 563." [15 USCS, sec. 1691, n1 ]

4. PL was not only injured via Defendants deceptive sales practice, carrying monopolization and restraint of trade in its batwings, he was also injured via Defendants discrimination. Defendants denial of a credit card, following assurance of entitlement to same, breached the Equal Credit Opportunity Act. Defendants not only used inaccurate credit report(s) gotten from questionable sources (TRW, Equifax, et al.) sources, they also used (not

expressly) PL's age (56) in relation to his status as recipient of public assistance in form of the VA disability pension to discriminate and rationalize denial of credit.

5."Creditor's denial of credit for reason that 'credit references are insufficient' is insufficiently specific in absence of explanation by creditor of manner in which credit reference or file was insufficient; reason articulated was misleading or excessively vague in view of fact that combination of factors were actually used." (*Fischl v. General Motors Acceptance Corp.* (1983, CA5 La), 708 F2d 143.

6. A combination of factors were actually used. Defendants made only general reference to PL's negative credit reports to rationalize denial. They did not specify how PL's credit report(s) indicated negative creditworthiness nor did they cite any other reason for denial. Their records will prove they used PL's age, disabled status (unable to work conventional job) and dependency on VA pension combined with PL's credit report(s) for denial rationale. CO's initial approval of PL's credit clearly implies prior access to PL's credit report(s). How else could Capital One Financial Corp. responsibly tender its initial approval of consumer's credit?

7. Information supplied by PL to CO in exchange for promised credit card did not contradict or modify PL's credit report(s) in CO's hands. Therefore, only rationale for denial must be "combination of factors" which included new information concerning PL's income source.

8. Attorneys, nationwide, have been for a long time diligent, clever and successful in proving forms of discrimination and denial of consumer privacy such that Plaintiff is confident, with specialized help, he can prove Defendants' violation of Title 15, sec. 1691(a)(1)(2) and 6821(a)(b).

#### XVII. RELATED STATE LAW VIOLATIONS

1. "A[n] [illegal] trust is a combination of capital, skill or acts by two or more persons for any of the following purposes:

(a) To create or carry out restrictions in trade or commerce.

(b) To limit or reduce the production, or increase the price of merchandise or of any commodity.

(c) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity.

(d) To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this State.

(e) To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they do all or any or any combination of the following:

(1) Bind themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure, or fixed value.

(2) Agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure.

(3) Establish or settle the price of any article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity.

(4) Agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected." [ Cal. Bus. and Prof. Codes, sec. 16720. ]

2. "It shall be unlawful for any person to lease or make a sale or contract for the sale of goods, merchandise, machinery, supplies, commodities for use within the State, or to fix a price charged therefore, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, merchandise, machinery, supplies, commodities, or services of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or

tend to create a monopoly in any line of trade or commerce in any section of the State." [ Cal. Bus. and Prof. Codes, sec. 16727. ]

3. "BUSINESS AND PROFESSIONS CODE SECTION 17000-17002

17000. This chapter may be cited as the Unfair Practices Act.

17001. The Legislature declares that the purpose of this chapter is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented."

2. Pl alleges Defendants engaged in conduct (credit card solicitations) that were "unfair, dishonest, deceptive, destructive, fraudulent and discriminatory" and that conduct restrained, if not destroyed, interstate competition in relevant markets while causing antitrust injury to the Plaintiff.

3. "Sec. 2. - Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

4. PL alleges Defendants combined to increase VISA's monopoly in credit card markets while maximizing revenues for Capital One Financial Corp. via restraint of trade and/or exclusive dealing. Thus, Defendants' conspiracy breached both sec. 1 and 2 of Title 15, United States Codes.

5. "The Department also charges that the Visa and MasterCard networks both adopted exclusionary rules that prohibit member banks from doing business with other networks, such as American Express and Discover. Although Visa and MasterCard allow member banks to issue each other's card, if a bank were to issue an American Express or Discover card that bank would lose its right to issue Visa and MasterCard products.

6. PL alleges fact exclusive dealing by VISA caused Capital One to restrict credit card issue to VISA/MASTERCARD products, and exclusive reliance on VISA criteria for unsecured credit card issue caused PL to experience injurious discrimination and denial of credit.

7. "Banks that want to offer their customers card choices beyond Visa and MasterCard have been prevented from doing so," Klein said. "Consumers have had fewer choices in the types of card products available to them, and networks like American Express and Discover have been effectively precluded from competing to enlist banks to issue their cards."

8. The federal complaint also states that the exclusionary rules impair the ability of other networks to compete with Visa and MasterCard, particularly with respect to debit and smart cards that are dependent upon a cardholder's bank relationship. Increased competition from other network competitors would spur development of new and higher quality products.

9. A copy of the federal complaint will be available at the following address as of mid-afternoon on October 7, 2002: <http://www.usdoj.gov/atr/index.html> " # # #

[ <http://www.usdoj.gov/opa/pr/1998/October/464at.htm> ]

## XVIII. DISCUSSION ON REMEDIES

### A. Federal Specifications

1. Federal antitrust statutes specify penalties and/or remedies for proven breach(s) of Title 15, United States Codes, sections 1, 2, 15 and 19. Many state antitrust statutes specify compensatory, exemplary and other forms of remedy for personal (personal business) injuries sustained via breach of Title 15, U.S.C., sec. 1, et seq., and/or State Codes (antitrust). California specifies penalties and/or remedies which are appropriate for this action.

### 2. Federal Penalties/Remedies:

a) Sec. 1: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy

hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court." [15 U.S.C., sec. 1]

b) Sec. 2: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court." [15 U.S.C., sec. 2]

c) Sec. 13a: "Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than \$5,000 or imprisoned not more than one year, or both." [15 U.S.C., sec. 13]

d) Sec. 14: Statute is silent on remedy, but that does not imply that none exists in similar case precedent or in the mind and discretion of the Court.

e) Sec. 15: "...and person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." [15 U.S.C., sec. 15]

#### B. Declaration of Penalties/Remedies:

1. On its face it appears, in this private antitrust case, that the appropriate penalty/remedy for proven breach of sec.1, 2, 15 and 19 is:

a) For convictions on Sections 1 and 2: defendants must pay one-million dollars (trebled) to Plaintiff.

b) For convictions on Sections 19: Defendants must pay an amount deemed appropriate.

#### C. State Specifications Re California Law

1. Section 16750: "Any person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by this chapter, may sue therefore in any court having jurisdiction in the county where the defendant resides or is found, or any agent resides or is found, or where service may be obtained, without respect to the amount in controversy, and to recover three times the damages sustained by him or her actual damages pursuant to Section 16761, and preliminary or permanent injunctive relief when and under the same conditions and principles as injunctive relief is granted by courts generally under the laws of this state and the rules governing these proceedings, and shall be awarded a reasonable attorneys' fee together with the costs of the suit.

2. "a) This action may be brought by any person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by this chapter, regardless of whether such injured person dealt directly or indirectly with the defendant." (emphasis added) [Cal. Codes: Business and Professions: Sec. 16750 (a)]

3. "b) Section 16755: Any violation of this chapter is a conspiracy against trade, and any person who engages in any such conspiracy or takes part therein, or aids or advises in its commission, or who as principal, manager, director, agent, servant or employee, or in any other capacity, knowingly carries out any of the stipulations, purposes, prices, rates, or furnishes any information to assist in carrying out such purposes, or orders there under or in pursuance thereof, is punishable, as follows:"

4. "(1) If the violator is a corporation, by a fine of not more than one million dollars (\$1,000,000) or the applicable amount under paragraph (3), whichever is greater."

5. "(2) If the violator is an individual, by imprisonment in a state prison for one, two, or three years, by imprisonment for not more than one year in a county jail, by a fine of not more than the greater of two hundred fifty thousand dollars (\$250,000), a fine or the applicable amount under paragraph (3), or by both a fine and imprisonment."

6. "(3) If any person derives pecuniary gain from a violation of this chapter, or the violation results in pecuniary loss to a person other than the violator, the violator may be fined not more than an amount equal to the amount of the gross gain multiplied by two or an amount equal to the amount of the gross loss multiplied by two, whichever is applicable."

7. Discussion: On its face it appears in this case that the appropriate state penalty/remedy for proven breach(s) of Sections 16000 et seq. and Section 17000, are:

a) For convictions on Section 16000, et seq. and Section 17000 et seq.: Defendants must pay one-million dollars (trebled) each, or the gain (pecuniary) that defendants derived from breaches of antitrust laws, if the gain is proven greater than \$3.0 million.

b) For convictions on Sections 16000, et seq. and Section 17000 et seq.: Defendants, individually and/or collectively, must pay one-million dollars (trebled) each, or the gain (pecuniary) that defendants derived from breaches of antitrust laws, if the gain is proven greater than \$3.0 million.

D. Equitable Remedies:

1. Power to remedy business inequities is usually found in the nature of business...money. Presently, and in future, Defendants must be fined X% of income (pecuniary gain) for proven antitrust illegal conduct alleged by federal/state/private prosecutors.

## XIX. CONCLUSION

1. Had Defendants not monopolistically restrained trade and competition via exclusive dealing and unfair business practices PL would have obtained a secured, major credit card without expensive delays and compromise of privacy resulting from dealings with a Visa member bank using deceptive sales practices.

2. When Geocities solicited and misused PL's personal data in 1998, PL decided not to prosecute the company because its services were excellent and very cost-effective. Well worth the trauma of unauthorized email solicitations that resulted from Geocities sins:

3. When Capital One Financial Corp. solicited and misused PL's personal data and then refused to render services promised, PL decided the time had come to lower the boom on unauthorized commercial use of his personal data (property) especially when unauthorized user caused antitrust injury.

4. Defendants individually and in combination used monopoly power to restrain trade and competition while monopolizing

markets and controlling competitor through interlocking directorates; dealing with consumers and businesses exclusively; and denying equal credit opportunity and consumer privacy. Injury to PL and fellow consumers was direct and intentional and, therefore, grounds for action under Title 15, sec. 1, et seq.

5. Unless enjoined by this Court, anticompetitive effects from Defendants actions condemned herein are likely to continue.

6. Defendants combinations and conspiracies breaching federal, state and international law are not reasonably necessary to accomplish any pro-competitive or pro-consumer benefit and are, therefore, per se violations of antitrust laws.

#### XX. PRAYER

1. Plaintiff O'Brien claims and prays for compensatory damages (business and personal) in the amount of \$75,000. trebled.

2. Plaintiff O'Brien claims and prays for an award of punitive (exemplary) damages in the amount of \$X., approximately equal to twice the *pecuniary gain* defendants derived from *per se* illegal, antitrust actions over the time period encompassed by cause(s) of action in this case.

3. For award to plaintiff of its attorneys' fees and other costs of suit.

4. For such other and further damage award and/or relief as the Court deems just and equitable.

Executed this day, October 16, 2002

by \_\_\_\_\_

Edward Michael O'Brien

*pro se*

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