UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

Plaintiff,

v. 24 Civ. 7214 (JGK)

VISA INC.,

Oral Argument

Defendant.

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New York, N.Y.
May 29, 2025
11:00 a.m.

Before:

HON. JOHN G. KOELTL,

District Judge

APPEARANCES

DEPARTMENT OF JUSTICE - ANTITRUST DIVISION
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(Case called)

MR. CONRATH: Good morning, your Honor.

Craig Conrath for the United States.

THE COURT: Good morning.

MR. MATELSON: Bennett Matelson for the United States.

MR. GOSTIN: Kieran Gostin for Visa.

MS. WILKINSON: Good morning, your Honor.

Beth Wilkinson on behalf of Visa.

MR. STEKLOFF: Good morning, your Honor.

Brian Stekloff on behalf of Visa.

MR. PRIMACK: Jasper Primack for Visa.

THE COURT: Good morning all.

I'm sorry for the delay in starting. I understand there was an issue with respect to setting up the remote.

All right. This is a motion to dismiss by Visa. I'm familiar with the papers. I'll listen to argument.

MR. GOSTIN: Good afternoon, your Honor.

Kieran Gostin. Thank you for having us in today for this oral argument.

The government conducted a five-year investigation before bringing this lawsuit, yet I still think there are significant holes in its complaint that warrant dismissal and should end this case. It's carefully crafted market definition to satisfy two legal theories that are in direct tension, yet it has not applied the legal tests and economic tests that the

Second Circuit has said it required for excluding functionally equivalent products.

It also challenges Visa's price discounts, yet it doesn't allege any below-cost pricing, which the Supreme Court has said is necessary to avoid chilling price cuts which are a core antitrust objective.

And finally, it baldly alleges that Visa has paid off competitors in exchange for express conditions not to compete. But when Visa produced those agreements which it relies on, it was unable to identify any such *quid pro quo* in the agreements.

So, those are the general arguments that we think warrant dismissal. I'm happy to talk about any of them if you have any questions, otherwise I have a few points on each of those arguments that I'd like to make.

THE COURT: By the way, if I agreed with one or all of the arguments, would that dispose of the entire case?

MR. GOSTIN: That's a good question, your Honor.

So, it depends on which argument it is. For market definition, that would dispose of the entire case. *Regeneron* said that you have to define the market even at the motion to dismiss phase.

On the other two theories, if you got rid of the price cost claim, the pricing claim, that would get rid of Count Three definitely. I also think that it would get rid of the monopoly claims because so much of their foreclosure analysis relies on the merchant agreements.

If you dismiss the claims related to the *Fintech* agreements, it would get rid of claim four which is their section one claim. And I think we did need to discuss whether it would also get rid of the monopoly claims, but I think the argument wouldn't be as strong there, if I'm being completely candid.

THE COURT: Okay. Go ahead.

MR. GOSTIN: For the market definition claims, I think there's a couple of points to make here. One, I really want to emphasize the tension that's in their complaint. They're trying to exclude ACH and RTP, which we call interbank payment networks, yet they include in their market all sorts of other networks, including alternative debit network which rely on ACH and RTP. So, there's a direct tension, there's a reason that they're doing that. They need the alternative debit networks to be in the market because they need it for their *Fintech* agreement claim, because those are what they're saying are suffering the harm, these alternative debit works, so they need those in the market. However, they're excluding all other ACH and RTP forms because it would dilute their market power allegation.

THE COURT: So, the problem with the market definition, as far as you're concerned, is the failure to include ACH and RTP in the market.

MR. GOSTIN: Yes, that's correct.

THE COURT: It's hard for me to wrap my mind around the notion that those two networks are sufficiently similar to Visa and the way in which Visa generally works in terms of presenting a Visa card to a merchant and having the customer's bank account then be charged.

Is the ACH network or the RTP network anything like that? Do people come and say to their local merchant, I'm going to use RTP or I'm going to use ACH?

MR. GOSTIN: Yeah. I think the answer --

Oh, sorry. I didn't mean to cut you off.

THE COURT: No. No, that was the question.

MR. GOSTIN: Your Honor, I think largely it's because the market has changed so much. So many transactions now are done online and many online transactions can be conducted through ACH and RTP. When you go online, you don't give your card, you type in the number of your card or you use a different version, you can type in your bank account to make payments at a lot of different merchants.

So, I think that it's a very different market now than it was, say, five or ten years ago because online payments are the majority of transactions that happen in the country these days. So, the market has really changed in that way and I think that's where ACH and RTP are much more used today than they were before.

THE COURT: Much more used today than they used to be, but that really doesn't answer my question about how different the use of ACH and RTP is from the use of a Visa debit card, which also then leads to the next question of the government says that there are about four distinct aspects of the Visa debit card and the other participants in the market that ACH and RTP don't have, at least they don't have three of those characteristics, and in your papers you don't say that they really do have those characteristics. Essentially, you say it doesn't make a difference.

MR. GOSTIN: Yes, your Honor.

Maybe I could just make one more point on your prior question because I don't think I fully answered it for you, and then I'll answer this one.

I do want to point out that they've included things like PayPal and Square where you also don't present your debited card, so that's really an important point here, right? They are included PayPal where you use an app or Square where you use an app, which is very different than producing your debit card. So, I don't think they can say the debit card is the defining point in the market.

THE COURT: Okay. If you use PayPal or so, isn't that an instantaneous charge, if you will, compared to the use of ACH or RTP?

MR. GOSTIN: Well, RTP is instantaneous; ACH can take a couple of days to process, and that goes to the features that you were raising in your second point.

So, I think there's plenty of cases that say just identifying that products have different features alone is not enough. We've cited a series of cases where they said the two products had different features, and that doesn't necessarily mean they're in different markets because consumers can still choose between those features, it doesn't mean that they can't choose between those products. Maybe for some transactions they don't care about having dispute back rights and some they do.

They've also been very unclear in terms of products they have included in the market. For example, they include PIN networks, yet as we say in our brief, they specifically say that PIN networks also don't have sufficient fraud detection, yet they include those in the market. And I think that goes to why the Second Circuit has said it's not enough to just identify features, you have to apply *Brown Shoe* or the hypothetical monopolist test. That's what *Regeneron* says even at the motion to dismiss phase, and that's because trading off between features is something that consumers do all the time.

THE COURT: *Regeneron*, if my recollection is right, denied the motion to dismiss on the grounds of market definition at the motion to dismiss stage; right?

MR. GOSTIN: That's correct. Under very different factual allegations.

THE COURT: Right. But on the grounds that there are factual disputes that can't be resolved on a motion to dismiss. And I remember going over this with you at the premotion stage when we had the conversation about this motion. So, the motion is now fully briefed, and the question remains whether or not the issue of market definition and what companies should be included in the market definition is in fact a question of fact that can't be resolved on a motion to dismiss. And the question in my mind is, what specific most similar cases stand for the proposition that I could dismiss the complaint on the grounds that the government hasn't included a couple of additional companies that should be included in the definition of the market? What other cases on a motion to dismiss that I could decide that issue and dismiss the case?

You spend a lot of time explaining what a careful decision *Regeneron* is and then you get to the bottom line and the motion to dismiss was denied, and so you rely on some other cases where there were insufficient allegations of the market definition, but there are certainly lots of specific allegations of what the market definition is in this case and why the government is excluding other companies from the market. So, the question is, in my mind, just what are the specific cases, hopefully Court of Appeals cases -- *Regeneron* was not -- that stand for the proposition that in similar cases, the market definition can be decided on a motion to dismiss and the case dismissed because the plaintiff has failed to allege a sufficient market? What are the most persuasive cases which I will then read with great care? Not just cases where the Court said, you haven't sufficiently defined the market. What are the cases on which you rely?

MR. GOSTIN: I think the most important case for your Honor to pay attention to that is sited in our briefs is *Hicks v. PGA Tour*, it's 897 F.3d 1109, and that's from the Ninth Circuit in 2018. And there, they tried to allege a market that was advertising during live golfing events and distinguishing that from other advertising that occurred during those events, so the market was defined as including advertisements that were actually on the golf course and not advertisements that were on commercials in-between the play. And the Court said, no, that's not enough. There were different features that they pointed to in terms of how they were displayed, whether you could fast-forward through the advertisements or not, how impactful they were likely to be, but they said that wasn't enough, that just saying those features was not sufficient. And I think that is the closest case that we have.

Going back to *Regeneron*, I would just like to point out the factual allegations that were in that case. There, they alleged the SSNIP test was satisfied, which is the hypothetical monopolist test, they alleged facts supporting that the SSNIP test was satisfied, and they alleged allegations going to four of the seven *Brown Shoe* factors. Here, at most, we have one of the seven *Brown Shoe* factors, which is different product features.

So, we're not trying to dispute the factual allegations here, we're accepting them for what they are, but we're just saying they don't meet the legal test of *Brown Shoe* and the hypothetical monopolist test even if you accept their allegations as true, which I know you have to, your Honor, of course.

THE COURT: By the way, how different would the market be if it included ACH and RTP?

MR. GOSTIN: In terms of their market power?

THE COURT: Yeah.

MR. GOSTIN: It would significantly diminish. I don't have the numbers available, but I think it would significantly diminish and undermine any claim of market power.

THE COURT: Isn't the definition of "market" usually dependent on expert testimony?

MR. GOSTIN: Yes, your Honor. But as we said, it doesn't mean that they always get to go past the motion to dismiss. I mean, yes, if you ultimately get to that, but they haven't even alleged the economist that an economist would apply. They haven't alleged that they could satisfy the hypothetical monopolist test.

And I'll point out, they have been investigating this industry for five years. If they could have alleged that it would be excluded under the hypothetical monopolist test, they should have been able to at this point.

THE COURT: Okay.

Go ahead.

MR. GOSTIN: So, I think --

THE COURT: By the way --

MR. GOSTIN: Yes.

THE COURT: -- you don't dispute that the geographic area of the market is the United States; right?

MR. GOSTIN: Not for purposes of the motion to dismiss.

THE COURT: And you don't dispute that credit cards don't belong in the market that we're talking about?

MR. GOSTIN: Again, not for purposes of the motion to dismiss.

THE COURT: Okay.

Go ahead.

MR. GOSTIN: So, I think that we can move on. I think that covers most of the points in the market definition, and I thank you for letting me talk about the issues there.

THE COURT: By the way --

MR. GOSTIN: Yes.

THE COURT: -- you haven't made any specific arguments about the CNP submarket.

MR. GOSTIN: Not on the motion to dismiss, your Honor, no.

THE COURT: Wouldn't that remain then?

MR. GOSTIN: The CNP is a submarket of the larger full market, so if the entire market goes away, the submarket goes away as well because ACH and RTP would necessarily be included in the submarket.

THE COURT: Okay.

Go ahead.

MR. GOSTIN: So, to be clear, the argument goes to CNP and the entire market, but we're not making any specific arguments just about CNP.

THE COURT: Okay.

Go ahead.

MR. GOSTIN: In terms of the volume discounts, again, we're not asking the Court to resolve any factual disputes about what they've alleged about the volume discounts, we're asking your Honor to determine the appropriate legal test that should be applied to evaluating those. The Supreme Court has said that price discounts --

THE COURT: Can I stop you at the outset?

You phrase the argument now about volume discounts. I had thought that the original motion was drafted in terms of the government hasn't alleged a sufficient anticompetitive scheme because they haven't alleged that the price that was being charged was below cost. The government then responds, well, yes, we're not arguing that this is a predatory pricing case, we're arguing about numerous other aspects of the contracts.

Isn't that right?

Go ahead.

MR. GOSTIN: So, your Honor, you don't have to allege predatory pricing in order for the price cost test to apply.

THE COURT: I know.

MR. GOSTIN: Yeah.

THE COURT: I know, but I thought that your original motion was based on the concept that the fallacy in the government's contention was that they haven't alleged that the price was in fact less than Visa's cost, and Visa responds, that's right, we're not arguing for a predatory pricing case, we're arguing that there are other aspects of the contracts that make them anticompetitive.

MR. GOSTIN: Yes, your Honor.

And the question, I think, is whether those other aspects go to price or not, because if they go to price, then they have to meet the price costs or the discount attribution test. So, it's a question of whether those other factors are actually doing the work here. So, if you look at their complaint, they allege that we're bundling contestable and noncontestable transactions, and that we're putting those into a single discount and that the PIN networks can't compete with that discount. That's a pricing claim. That's about our pricing model and how it works. And the discount attribution test is designed exactly, and the discount attribution test is just a form of the price cost test that applied to bundling where you have to have below-cost pricing. The discount attribution test is the precise test that courts have developed to determine whether that sort of pricing scheme has an anticompetitive effect.

So, the question is, have they alleged anything that goes beyond price to allege their *de facto* exclusive deals, and they have the price discounts, which are applied on volume, they have the bundling of contestable and noncontestable transactions, they also cite early termination fees, but again, that goes to price, and they don't cite any case where early termination fees were enough to show a *de facto* exclusive deal.

I think it's helpful if you took out the bundling of contestable and noncontestable transactions.

THE COURT: Could --

MR. GOSTIN: Yes, your Honor. Go ahead.

THE COURT: They allege various factors which they say are anticompetitive, and they say, we're not alleging a predatory pricing case but we are alleging all of these other factors. It's not clear to me how, on a motion to dismiss, I can say, okay, they've alleged at least five other factors which they say are part of the contracts and the scope of dealing that Visa had with the market participants, and I can say, well, all of these simply reduce to an issue of price, and decide that on a motion to dismiss.

So, again, my question is what case or cases similar have been dismissed on a motion to dismiss with a similar argument? Namely, all of these other factors reduce to an argument of price, and that's not enough to allege anticompetitive conduct. And what are the cases that are particularly persuasive on a motion to dismiss?

MR. GOSTIN: Yes, your Honor.

I do have one case, and I apologize this was not cited in our briefs, but I would like to provide you with the cite.

THE COURT: Sure.

MR. GOSTIN: I think it is a helpful case.

THE COURT: You can tell me, I'll write it down. I'm sure the government can respond.

MR. GOSTIN: And I have a copy. I'll actually hand a copy to the government so they have it during this. And I'm happy to hand you up a copy, too, if you'd like.

THE COURT: Not necessary, just give me the cite.

MR. GOSTIN: It's Nicsand v. 3M, and it's 507 F.3d 442, and it's from the Sixth Circuit.

THE COURT: Okay.

MR. GOSTIN: And that was decided on a motion --

THE COURT: And the year? Sounds recent.

MR. GOSTIN: Jasper, can you grab the year for me? I don't have it up here.

MR. PRIMACK: Yes.

MR. GOSTIN: Thank you.

My colleague is just going to grab the year. I don't have it in front of me right now.

THE COURT: That's okay.

MR. CONRATH: '07.

MR. GOSTIN: '07.

THE COURT: Okay.

MR. GOSTIN: And that case was a motion to dismiss as well, and it has a few similar points. They alleged that they were not alleging a predatory pricing scheme but they were using the price as something they were challenging. They also alleged that it was exclusive dealing, just like they were doing here. And what the Court said is, you take a look at each of the factors separately. First, let's look at the prices; or here, you have prices plus the contestable transactions. Have they alleged anything to show that those were exclusionary? That those were exclusive dealings? There, there was no below-cost pricing, so they got rid of those allegations. And then they looked at what else was alleged beyond that in terms of exclusive dealing, and they went through those and they said, that doesn't amount to exclusive dealing.

And I think that's the same thing you have here: You have the pricing and the bundling, and once you get past that, you really don't have much. They talk about market power and entry barriers, but that's in any monopoly case that's always alleged, so that can't be related to the conduct.

And it said, no, that doesn't count to exclusivity, and I think the same thing is true here. If you take away the pricing and the bundling of contestable and noncontestable demand, you don't have much else left.

I also want to add one point. In their complaint, they specifically say what is driving exclusivity in this case. And let me get the cites for you, your Honor, so you can take a look at it if you're interested. I think paragraphs 79 and 102 of their complaint both say very specifically that we are using the bundling of contestable and noncontestable transactions to create *de facto* exclusivity. They say that directly in those paragraphs.

So, that's their allegation, that that's causing it. They've now come back and said, hey, yes, there are some other things throughout our complaint that we can sort of try to cobble together to make a different exclusive dealing argument, but that's what they said in their complaint, and I think they should be bound by what they said there.

THE COURT: They also allege that on occasion, Visa entered into contracts with an agreement that the other side would not, in fact, deal with a competitor.

MR. GOSTIN: Yeah. That's a separate claim. That's their fourth claim, which I'm happy to talk about as well with the *Fintech* agreements. But they don't claim that those *Fintech* agreements are exclusive deals; importantly, nor could they.

THE COURT: Why would that not go into the issue of anticompetitive conduct?

MR. GOSTIN: Well, the first claim, your Honor, is about merchant deals and the allegation is that we're locking up the available transactions throughout. These are not about locking up transactions; these Fintech agreements, their allegation is that we paid them not to develop ACH-based systems. So, it's a separate claim that doesn't have to do with the merchant routing, it has to do with whether we are paying them not to create different sorts of competitors. Things like PayPal ACH or Square ACH or Amazon or Apple creating an ACH-based network.

THE COURT: Okay.

Go ahead.

MR. GOSTIN: So, I think the final point I want to make is just the Supreme Court has been very clear that they're supposed to be safe harbors for price discounts, and I know they're not alleging a predatory pricing scheme, but they are challenging the price discounts we offer. And the Supreme Court has said there should be a Safe Harbor there because we don't want to risk chilling price discounts. That's why I think it's appropriate at a motion to dismiss level for you to rule on what the appropriate tests should be to evaluate these. And if you do determine that the price cost and discount attribution test are applicable here, there's no factual dispute that you have to resolve. They have not alleged below-cost pricing, they don't claim to, I don't believe, although maybe they'll come up here and say something different, but under either of those, the case should be dismissed.

THE COURT: Okay.

Go ahead.

MR. GOSTIN: So, moving to the third one, the *Fintech* agreements, these were all filed under seal. I have copies of the agreements but I don't want to read them into open court at all. If you need a copy, I'm happy to pass up a binder for you. But I think the point here is simple: They say in their complaint -- and this is at paragraph ten -- that we pay competitors as an express condition for them not to create ACH-based competitors. Yet, when we produced the agreements, they were not able to identify any payments. Moreover, even in their allegations, they agree that two of the three companies that they've identified -- there's Apple, PayPal, and Square -- PayPal and Square have ACH-based networks, so the idea that we've paid them on a basis of an express condition not to produce an ACH-based network seems impossible.

THE COURT: My recollection of the briefs is that the government contests that your description of the contracts is, in fact, complete and accurate, that there are things left out of your description of the contracts. You say no, that's not right. Again, how exactly could I decide that dispute on a motion to dismiss?

MR. GOSTIN: As an initial point, we have provided the two Apple contracts and the PayPal and the Square contracts, the overarching contracts. There are many regional, like, addendums to those. We didn't want to burden your Honor with thousands and thousands of pages of contracts.

But here's the point: They could have come back and said, hey, look at this specific agreement, or look at this specific provision, and this is where those payments are, but they never did. And what we identified is provisions in there that did not contain any payments and specifically say Visa does not provide payments in exchange for any of this, and allows them to create these ACH-based networks. In every contract there is something ACH-based network. So, I think the contracts both positively say that you can create these, and they haven't identified anything in those contracts saying that we paid them. And again, I do want to stress: They've had these contracts for a long time. These were all produced during the investigative phase. It's not like a case where they don't have these contracts; they have them. And if they thought that there was something in there they could point you to, your Honor, I think they would have.

THE COURT: Okay. Thank you.

MR. GOSTIN: And that's all my points for now, your Honor.

THE COURT: Okay. Thank you.

Government. Mr. Conrath.

MR. CONRATH: Yes. Good afternoon, your Honor.

Craig Conrath for the United States. May it please the Court.

I will track through these in the same order that we just went through them.

I want to say, first, the definition of the market essentially is normally an intensely fact-specific inquiry. It's been said in a lot of case but *Todd v. Exxon* is one that comes to mind, *Regeneron* as well. And the reason for that is that markets are defined by what consumers demand, and what consumers demand is inherently a fact question which is surely in dispute in this case.

So, we have alleged the two varieties of markets that involve getting money from point A to point B, but they involve more than that because that's what consumers demand. They demand three additional things beyond simply moving money from A to B, and they are: An immediate guarantee of payment, because an electronic store isn't going to let an expensive piece of equipment walk out the door without being confident that it's going to be paid.

It is a system of dispute resolution and charge back, which both merchants and customers want to give them the confidence to go ahead with the transaction against the possibility that something might go wrong with it. Both sides knowing there's a way to resolve disputes makes the product more usable by consumers.

And thirdly, fraud protection, which is important to the merchant in particular to be sure that they have a system to prevent fraud to make their transactions profitable.

So, those are the products that we've defined in the market. What defendants want to do is throw in simple ACH, simple RTPs, simple FedNow. I'm going to just refer to ACH to make it simpler. Those are services that just move money from bank account A to bank account B. They are an important input. They are an important input because, as counsel pointed out, we do mention that those products are used. They are an input into a full-fledged competitor debit service, but they're, by themselves, not enough to provide what customers want, and that of course is the ultimate question, a fact question appropriate for later in the trial but not at the motion to dismiss stage.

THE COURT: Or at the summary judgment stage.

MR. CONRATH: Well, yes. We could be there someday, your Honor, but it's certainly not appropriate at the motion to dismiss.

So, basically, let me analogize to the *Regeneron* case because it's a pretty good example. The question was whether the exact same medicine delivered in a vile was in the same product market as the medicine already preloaded in a syringe, and the customers -- here, physicians -- preferred the preloaded medicine because it was safer, because there was less risk of infection, and it was more convenient. And the Court of Appeals ultimately said that that's enough differentiation that it's appropriate to define a separate product market for it, even though the product itself, functionally similar, was in a vile was something that was available but it wasn't what customers demanded, and for that reason, it was outside the market.

Same thing is true here: A simple ACH movement of money from one place to another is risky and inconvenient. You may have to type in a long string of your bank account numbers. If the money is gone, it's gone because it's been transferred to the other money account because there's no dispute resolution, no charge back. And so as the evidence will show at trial, the fact dispute that's there, the market definition that we've alleged will be supported by the evidence of customer preferences, and that will not include simple unadorned ACH transactions.

Visa has said that we did not allege a couple of factors that go into market definition ordinarily. The hypothetical monopolist test, which uses the SSNIP test, we did make that allegation, it's in paragraphs 155 and 163. So, we did not use the words "hypothetical monopolist test," we said rather a single company that was the only seller of a good in the market, which of course is a way of saying "hypothetical monopolist" without using so many 50-cent words. So, that allegation we did make and expect to prove it at trial.

Another method that courts use in defining markets is the *Brown Shoe* factors. It comes from the Supreme Court case *Brown Shoe*. There's a list of factors which often define a market. We surely did mention the one; this whole thing is about the attributes of the market, the characteristics of the market, which are those three qualities that are essential for consumers to provide a network that's a competitor to Visa as a debit card, but we also made allegations on some of the others. Price sensitivity is one of the *Brown Shoe* factors, and of course the hypothetical monopolist test is specifically that.

Distinct prices. Simple ACH as a price very different from the price for debit services. That is another allegation that we made.

So, we did, in fact, make an allegation about the hypothetical monopolist test and we did, in fact, make allegations about the *Brown Shoe* factors.

Unless there's anything else that I've failed to address on market definition, I'll move on, your Honor.

THE COURT: Go ahead.

MR. CONRATH: So, the second topic is the allegations about exclusive dealing arrangements. This is also a fact question extensively. We have alleged nothing to suggest that we're making a predatory pricing claim; we are making a claim that the provisions of their contract that require exclusive dealing are in fact unlawful under Section 2, unlawful under Section One.

And those are contracts. I want to be clear, they're not exactly volume discounts. It's not as if you buy 100, you get this price. For the most part, as we allege in the complaint, their requirements are that the customer deliver all or nearly all of its eligible transactions to Visa. So, these are 100 percent requirements -- in some cases somewhat smaller, 97, 90 -- but all of them are *de facto* exclusive dealing arrangements because they effectively say, you will deliver all of your eligible transactions to Visa, and therefore, they implicitly say, picking up on a question that the Court asked, that they are in agreement not to deal with a competitor. If I have an agreement that says I will give 100 percent of my eligible transactions to Visa, I am of course implicitly saying I will give zero percent to the competitor. So, they are, in fact, agreements not to deal with a competitor.

THE COURT: Visa argues, essentially, that all of the aspects of the contracts that you're complaining about resolve into issues of price discounts, and the Supreme Court has made it clear that the antitrust laws shouldn't be construed in such a way as to discourage price discounts.

MR. CONRATH: Right. So, they would like to characterize our allegations as predatory pricing claims.

THE COURT: No, no. I mean, it doesn't necessarily follow that a price discount is predatory. It's that it's below cost.

MR. CONRATH: Yes. I guess I meant to say, your Honor, that their description of our exclusive dealing allegations as all about price is actually not accurate. The allegations are we don't say that their prices are too low, we say what's wrong with their contracts is that you have the exclusive dealing arrangement, the you will deal 100 percent with me and zero percent with my competitors.

So, the Court asked for examples of cases addressing this question on a motion to dismiss. I think neither party cited cases where, on a motion to dismiss, there was a finding that a price cost test had to be applied to an exclusive dealing claim. On the contrast, there have been a substantial number of cases that, with well reasoned logic, courts have decided that the appropriate standard of looking at an exclusive dealing case is the ordinary rule of reason standard under the antitrust law. So, let me just mention a couple of them.

In a way, the leading case is *ZF Meritor*, which is a case where the Third Circuit interpreted the Supreme Court's decision in Tampa Electric, which is the origin of exclusive dealing doctrine. I note, if my memory is correct, the *ZF Meritor* case is after the *Nicsand* case that was just handed out. And some other cases have followed that logic and said, if price is not the predominant motive exclusion, the appropriate standard is the ordinary rule of reason and there's no need to use the price cost test, and that's the situation that we're in here, your Honor.

But there are *Sure Strips* cases that we cited in our brief; are two of them, one of an FTC enforcement action and one a private action. Both, this argument was denied on a motion to dismiss. The *FTC v. Syngenta* case, the motion to dismiss was denied. *Remicade*, the *Dial Corporation*, *American President Lines*, all cases that we cited where courts have declined to apply a price cost test to an exclusive dealing allegation.

I should note, so we did not address the *Nicsand* case in our papers because it's not cited in defendant's papers. If we have a moment to respond, if the Court would like a follow-up letter to address the *Nicsand* case that counsel passed out, I'd be glad to do that.

THE COURT: Sure. Give me a letter by Monday.

MR. CONRATH: Okay. Will do.

So, a way to think about this is to turn to the basis for the price cost test, because that kind of helps us understand the logic behind this. We're recommending to the Court use the *ZF Meritor* standard which says if price clearly predominates as the mechanism of exclusion, only then does it make sense to apply the price cost test.

So, in a predatory pricing case, the allegation is that their prices are too low in period one, they're so low that they're below cost, and then eventually they drive out the competitors, and in period two, there is a recoupment where the company charges high prices. We allege nothing like that in complaint; rather, this fits the mode of exclusive dealing, which critically can be profitable while it's going on. There's no period of loss. And the reasons why the Court decided a price cost test was needed in predatory pricing cases is helpful. The Court said, first, the allegation that you can get a monopoly by predatory pricing is implausible because it requires certain losses in period one and uncertain recoupment in period two. That's one.

Number two is the Court said, we don't want courts to be making fine judgments about prices because it might discourage aggressive price competition, which, of course, is the fundamental part of competition the antitrust laws protect.

So, those are the reasons why the Court said, we needed the special price cost test. Neither of those factors is present in the allegations we have made in this case. There's no allegation, there's no implausibility, there's no two-period process. As the Court in *ZF Meritor* notes, competitors can be excluded without below-cost pricing under an exclusive dealings scheme, and there's nothing in what we've alleged that is going to call upon the Court to make a decision about the level of Visa's prices. We make no allegations about the level of their prices. What we say, in fact, is that generally their prices are supracompetitive. Too high. We're not saying the prices are too low, we're saying they're too high, and that is because they're protected by the exclusive dealing arrangement.

THE COURT: One question is whether, on a motion to dismiss, it's necessary for the Court to say, under the facts alleged in this case, we don't apply the price cost test, we apply the *ZF Meritor* test, we apply a rule of reason. That in and of itself is a significant decision to reach on a motion to dismiss whether the facts, plainly, are disputed.

MR. CONRATH: You're reminding me, your Honor, of something I should have said.

So, whether price predominates should be a fact question, appropriate for later in the process. If we look at the origin of the clearly predominates test, the *ZF Meritor*, which was itself resolved on post-trial motions, and the specific question of whether this is a fact dispute was addressed by the *Syngenta* Court and said that it is a fact dispute.

And actually, if you just describe what the question is, it kind of tells you that it's a fact dispute. Does price clearly predominate? Is A better bigger than B? Does A predominate over B? Does A clearly predominate over B? That just sounds of and appropriately is a fact question.

So, perhaps underscoring the way your Honor phrased there question, that does not have to be resolved at this stage. And we have made sufficient allegations to put that fact question into later in the process.

THE COURT: Okay.

MR. CONRATH: And finally, let me talk about the *Fintech* agreement.

So, a little market context might be helpful here. All this Visa conduct with the *Fintech* agreements arises out of Visa's steep concern --

THE COURT: I'm sorry. We're talking about the third issue?

MR. CONRATH: The third issue. I'm sorry.

THE COURT: The specific contracts.

MR. CONRATH: Yes.

Turns out we're not talking exactly about the specific contracts in the way that Visa has argued it, so let me get to that.

Visa is deeply worried that some of these *Fintech* companies could start to create other ways of moving money that meet consumers' needs and that will displace or partly displace Visa's role as a middle man in transactions. They call this disintermediation, and they're clearly concerned about it. Their fear about that kind of disintermediation led them to enter into agreements, into understandings with various potential competitors. And the essence of these agreements was that Visa gives concessions, discounts, rebates, and what Visa gets is protection from disintermediation. Basically, Visa entered into deals to co-opt potential disrupters before they could ever become disrupters, before they become the next generation of competition for Visa. In the words of one Visa executive that we quoted in the complaint: Everybody is a partner, nobody is a competitor.

So, the complaint alleges that these arrangements with Fintech competitors are part of a Section One violation of the agreements and also part of the broader monopoly allegations and attempted monopolization allegations. So, Visa's claim is that the express agreement not to compete is not exactly written down in the contracts, at least the ones they supplied to the Court. So, this argument can be rejected for several reasons:

First of all, what our complaint alleges is an overall agreement, an understanding, between Visa and each of the potential competitors. The substance of which was a *quid pro quo* as just described in the complaint where the *quid* is the competitor gets rebates, discounts, money basically, and the *quo* is Visa gets protection against disintermediation.

And the basic idea that it can be unlawful to enter into agreements with your potential competitors that they won't compete with you, comes out of *FTC v. Actavis*, *Palmer v. BRG* --

THE COURT: But Visa says there's nothing in the agreements that provide precisely that, and the government has had those agreements for some time and can't point to anything in the agreements that stands for that proposition. And as I read your papers, you say, well, Visa's submission of those contracts is incomplete, and is Visa says, no, not right. We've given the contracts. And as the government has other provisions of the contracts that they'd like to offer, they're welcome to do that.

MR. CONRATH: Yes. And the reason that argument is not sufficient is, I think, threefold:

First, our allegation is not limited to the words of the contract. Obviously, the antitrust laws don't expect or don't require that companies are going to write down the most anticompetitive parts of their agreement and include them in a written agreement. So, our allegation in the first instance, which is this sets Visa's strategy and the reasons for it are set forth in our complaint at paragraphs 108 to 117. So, there is an understanding between Visa and each of those companies, the allegation is that there's a *quid pro quo*, effectively, a market division: We'll give you money, you won't compete against us.

But secondly, they attach the current contracts and say they don't have anything. They don't address the fact that we make substantial allegations about prior contracts, so prior contracts where Visa had agreements with the companies to avoid competition.

So, just to take one of the examples: With PayPal, Visa had an agreement in about 2015. PayPal introduced a staged digital wallet, which is a particular type of wallet that Visa perceived as exactly the kind of thing that might lead, in the future, to disintermediation. And Visa threatened some very high punitive fees on PayPal if they did that, and they reached an agreement which eliminated or significantly restricted the competition that PayPal could provide in this way. So, this digital wallet basically requires, at a minimum, two functions: Money coming in, money going out. So, the money going out is the merchant acceptance part of the deal; the money coming in is how the transaction is funded. So, PayPal was getting some merchant acceptance because it had context. Nothing like Visa, but it was perceived by Visa as a threat.

One of the ways to get money into the stage wallet was from your Visa debit card. PayPal added another way to get money into the card through an ACH transaction. And of course, just to take us back to market definition, when PayPal does it, it has some of the other characteristics, so it's not a naked ACH. So, ACH is potentially going to displace some Visa transactions as a way for money to get into the PayPal staged wallet.

Visa didn't like that, they say, we're going to impose a staged digital wallet fee. Internally, Visa described this as a behavioral fee; that is the incentive or the meaning is quite clear: We want to influence the behavior of PayPal, our potential competitor. And the terms of the standard that Visa imposed in the contract were if a customer has Visa as one way to get money into the wallet, you cannot use ACH as an alternative way. What does that mean? Well, it's a very direct interference with the competitive process, which is one of the clearest standards for what makes an anticompetitive effect. If I'm in the wallet, you cannot use a competing method to get money into the wallet. That suppressed what could have become a more competitive alternative to the Visa debit network.

Now, after this investigation started, Visa changed that most blatantly anticompetitive term, and today, instead of flatly forbidding the use of ACH as funding for a point-of-sale transaction, instead it makes it kind of clunky and inconvenient. You have to use a QR code and it's not very convenient. So, of course under the antitrust laws, it's not only illegal if you totally block your competitors' activities, it can be illegal if you just make them inconvenient and hard, if you handicap them, basically.

So, part of our allegation is that, under that earlier contract, that helped Visa to block potential competition that could have erupted, entrenched Visa and protected Visa's existing monopoly, and that has continuing effects to today. And so looking only at the current contracts that Visa appended does not, by any means, address all the issues in the complaint.

THE COURT: You say it continues today.

MR. CONRATH: Effects.

THE COURT: I'm sorry?

MR. CONRATH: That the effects continue today.

THE COURT: Is that allegation in the complaint or just in your response to Visa's allegation that there's nothing in the contract that specifically provides the anticompetitive conduct that you're talking about?

MR. CONRATH: So, the allegations about the conduct are set forth extensively, and there's a portion of the complaint that talks about effects, and I believe it's in that portion that it talks about effects continuing forward. I don't know that it names specifically the one transaction that I talked about, but it makes the allegation generally that effects continue.

THE COURT: Go ahead.

MR. CONRATH: All right.

THE COURT: You had a third point.

MR. CONRATH: Yes.

So, the first point is there's an allegation of an overall agreement. The second point is there are prior agreements that are not mentioned in the motion that may have continuing effects. The third fact is -- and I guess implicit in these is that the written agreements are, themselves, an implementation of the overall *quid pro quo* and not necessarily themselves freestanding *quid pro quo* agreements. But if we look at the Apple agreement that's described, actually it is. So, there was a written agreement -- it's Exhibit 3 to their motion -- it implemented the *quid pro quo*. It provided that Visa would give Apple various payments and incentives. The payments and incentives are set forth in addendum two for the U.S., which they didn't supply to the Court, but basically they consist of we, Visa, will give money and things of value to Apple. In order for Apple to receive this money, they must remain eligible under Section 10 of that contract.

Elsewhere in the contract, it provides that Apple is not eligible if it -- and I'm not going to use the exact words because they make a claim of confidentiality over the exact words -- but they say you're not eligible if you're doing something that Visa regards as disintermediating; in other words, that Visa regards as competing with Visa.

So, that's pretty direct. It says: I will give you money but only if you do not compete with me. And so there's maybe a three-step agreement not to compete because it's got the eligibility term in-between, but it's pretty clearly a *quid pro quo*: You only get the money if you continue not competing with me.

This conduct very closely parallels conduct that was found to be part of a monopolization scheme in the *U.S. v. Google*, Google search case. There, Apple was one of the few companies that might have been able to create its own search engine to enter and compete against Google, but instead, Google paid substantial amounts of money to Google for the use of it, and the Court said that clearly disincentivized Apple from entering and competing, and therefore could be part of a monopolization claim.

Similarly here, the parallel is that Apple is a company that could enter the debit network markets, but these large payments from Visa disincentivized them from entering, and in that sense, they can be part of a monopolization claim.

And unless the Court has additional questions, I think that's what I have to say.

THE COURT: No.

MR. CONRATH: Thank you.

THE COURT: Thank you, Mr. Conrath.

Mr. Gostin.

MR. GOSTIN: Thank you, your Honor.

I have a few responsive points that I want to make if you'll allow me.

First, my very good team also told me there's another market case I should cite for you in addition to *Hicks* if I could just highlight that for you. It's also cited in our brief. It's *Jacobs*, it's Eleventh Circuit case from 2018, and it's 626 F.3d 1327, and that involved a mattress case where there were different qualities of mattresses and there were different features between them that were alleged, and the Court said just alleging that the different mattresses, like expensive mattresses and less expensive mattresses, didn't define a market and that they both should be included, and that was at the motion to dismiss phase as well.

THE COURT: But there are a lot more allegations with respect to the definition of the market than simply that. That was sort of what I was referring to asking for the similar cases. I mean, plainly, there are a series of cases which have, at the motion to dismiss stage, said insufficient allegations of a market, but those have tended to be fairly extreme cases. Here, there are lots of allegations as to how the market would be defined to exclude ACH and RTP. I mean, they're not cursory allegations. So, this could be a case that's closer to *Regeneron*.

But go ahead.

MR. GOSTIN: Well, let me address that, your Honor, please.

So, they've tried now to come up here and cite other allegations in their complaint, suggesting that they have satisfied more of the *Brown Shoe* factors. For example, they talk about price differences, and they say that ACH is price low, and that is alleged in the complaint, but two points on that your Honor:

One, that's --

THE COURT: They also allege about three factors of consumer preferences that would exclude ACH and RTP from the market that they are identifying. And I come back, and you can respond to this, to the notion if you're looking at consumer preferences as an important factor in determining the market, how do you conceive of a consumer going into a merchant and saying, okay, here's my Visa card, process the transaction, as opposed to a consumer who goes in and says to the merchant, I want to use ACH or RTP.

In fact, RTP couldn't even be used that way, could it?

MR. GOSTIN: A couple responses there, your Honor.

THE COURT: Go ahead.

MR. GOSTIN: First, on the paragraphs that they cite, paragraph 155, for example --

THE COURT: Go ahead.

MR. GOSTIN: Oh, sorry. I thought you were going to say something.

THE COURT: No, no.

MR. GOSTIN: Paragraph 155. That doesn't mention ACH and RTP, it's just a general allegation. It doesn't say anything about consumer dispreference for ACH or RTP. Those two aren't.

And to make a SSNIP argument, which is what they're saying that allegation is, you have to make an argument specific to a product. You have to say they don't prefer ACH or RTP for X, Y, or Z reason.

THE COURT: Let me just stop you.

I thought that your argument -- and again, you can correct me if I'm wrong -- was that they have insufficiently identified the market because they have failed to include other products, if you will, specifically, ACH and RTP, to which they respond, no, just look at those products. They do not have at least three of the factors that they point to which are important to consumers.

Your turn.

MR. GOSTIN: Your Honor, nowhere do they say that those are the driving consumer factors for that. What they say is that people prefer debit but they never say that, oh, why they prefer debt over ACH in terms of those, they just rely --

Sorry, your Honor.

THE COURT: But --

MR. GOSTIN: I feel like I'm not answering your question, so maybe if you could -- what's your concern? Your concern is that you think that by just alleging these factors, that's enough to say that those differing features are enough to drive consumer demand. And my point is that the courts have said just identifying different features is not enough, you have to say why those features are economically defining for the market, and that's what they haven't done. That's what the allegations don't get to. They don't go beyond just saying these are different features and saying that, yes, maybe some consumers prefer those features in certain situations but they don't say that they're market defining in any way, which is what you would do if you alleged a SSNIP, for example. The SSNIP allegation, to be clear, is alleging that if we raise the price, that they wouldn't go to ACH or RTP. There is no allegation that if Visa raised its prices, people would not go to ACH and RTP. They do not allege that.

THE COURT: Perhaps I'm missing something. My question to you is how plausible is it, particularly at the motion to dismiss stage, to say that in the market which consists of debit transactions in which a consumer uses a debit card to draw on the consumer's bank account and Visa provides that service, that it's a fatal flaw in the complaint and in the definition of market not to include ACH and RTP. Strictly from the description in the complaint of the various products, how reasonable is it, particularly on a motion to dismiss, to say that ACH and RTP is sufficiently like the Visa card to be included in the same market?

MR. GOSTIN: Your Honor, I understand you're focusing on this idea of whether someone can use ACH at a merchant. They have not alleged that ACH cannot be used at merchants. That is not alleged in their complaint, and I understand why you're focusing on it, but that is not something they allege. And there's a reason that they don't allege it: Because you can use ACH at merchants. So, they cannot come back and say you cannot use ACH at Amazon because you can go onto amazon.com and you can use ACH. They haven't alleged that you can't because they cannot allege that. So, I understand that there's a --

THE COURT: Hold on.

MR. GOSTIN: I understand that historic --

THE COURT: Hold on.

MR. GOSTIN: Sorry, your Honor.

THE COURT: Or RTP?

MR. GOSTIN: Or RTP. I'm not sure whether RTP can be used there or not. But they haven't alleged it with ACH or RTP.

So, I understand that's your focus, but that is not something that they've alleged.

THE COURT: Okay. Go ahead.

MR. GOSTIN: So, although they said that they alleged the SSNIP test, I don't think they have alleged that. They say that they've alleged price differences, but they also allege that PIN networks are cheaper than Visa, and PIN networks are included in the market, so just alleging that again drives them towards inconsistency. I think that's why they didn't make that argument in their brief and are just raising it now. So, I still think that they've only alleged one of the seven *Brown Shoe* factors. And that very different than *Regeneron* and it's much more similar, I think, to *Jacobs* and *Hicks*, where all they focused on were these features.

Unless you have more questions about market definition, I'll move on.

THE COURT: No. Go ahead.

MR. GOSTIN: In terms of the volume discounts, I think that they came up here and told you exactly what we told you:

That price is what is driving exclusivity. They said that we demand 100 percent exclusivity. That's not true. First of all, they don't allege 100 percent exclusivity, and I don't think that's accurate, but any level of exclusivity is not what we demand. You can still pay Visa's rack rates. So, you can come and use Visa and you pay our normal rates, that's fine; however, if you want to get our discounts, then you have to agree to route a certain amount of volume to us. That's a volume discount. So, they very clearly said when they came up here that what was driving exclusivity was the pricing.

And I just want to read something from the complaint which says it quite explicitly. This is paragraph 102 which I mentioned to you before. It says: Visa uses its power to ensure control over noncontestable transactions and then leverages its control over those transactions to demand and enforce exclusivity. Again, that's the bundling of contestable and noncontestable transactions, a pricing mechanism that they are saying is driving exclusivity. And they say it specifically and directly. So, they mention *Meritor* and said, isn't this a fact question? And price predominant certainly sometimes is a fact question, but not when they've specifically alleged what is driving exclusivity. That's what's different here. They specifically allege it.

And the facts in *Meritor* and those other cases were very different. *Meritor* involved where the defendant was threatening supply shortages. *Remicade* was where there was a fail-first provision, it was two medications, and you couldn't prescribe another medication unless they failed on your medication first. So, there were lots of clearly nonprice mechanisms that were driving it. There's no claim here that Visa is threatening a supply shortage. Any merchant that accepts Visa can do it and just get their rack rates. The question about exclusivity is, if you want our lower prices then you have to agree to route a certain number of transactions to us or put us in a certain level on your routing table, and that's about price, and that's why I think the price cost or discount attribution test should apply here.

Before I move on, let me see if there's just anything else I wanted to mention on that. If you'll give me one second.

No, I think those are the main arguments on predatory pricing that I wanted to address.

Moving to the *Fintech* agreements, I think they made three points, and I want to respond to each of them just briefly. The first is that they say, oh, we're not relying on the actual agreements, we're relying on allegation of agreements that happened outside of the written agreements. But if you look at those allegations that they cited, there's nothing in there that says there's a *de facto quid pro quo*, and they haven't alleged when such agreement was supposed to take place, how it took place. They've seen all the emails between the companies, they haven't identified an email where that agreement took place. Normally, to allege a plausible agreement, you have to do more than just blatantly say there was an agreement, you have to allege facts supporting that there was some agreement beyond the written agreements, and I don't think they've alleged anything that comes close to that.

Moreover, most of those allegations in there don't involve a *quid pro quo* where we paid them allegedly not to institute an ACH-based payment mechanism. They involve situations where we allegedly said you have to pay additional fees in certain situations or you have to put Visa products more or equally accessible on your PayPal app. We're allowed to do that, your Honor. That's not what they're alleging is against the law, nor could they. If PayPal or Apple decides to become our competitor, or if PayPal competes with us, if they develop their own network, we don't have to deal with them. We can walk away from the deal. And for the same reason, if they do become a competitor, we can charge them additional fees for our transactions. There's nothing that prevents us from doing that, and that's not what they say in their complaint.

If you go to their -- and again, I'm sorry I keep reading stuff from the complaint, but I think it's important what they actually alleged here. I think they should be held to it.

If you go to paragraph 196, I believe it is. This is in their third claim, which is their *Fintech* claim. This is the basis for the claim: Visa's agreements -- and they say "agreements," which I assumed meant written agreements -- pay competitors not to compete in each relevant market and pay potential competitors not to develop alternatives to debit card networks or adopt new technologies that may disintermediate traditional debit card networks.

Nowhere have they cited still any sort of payment that way make. The closest they've come to, and this was their third point, was when talking about Apple. But what they were citing, and it's important to understand there's two courses of dealings going on between Visa and Apple: One is Visa has a deal with Apple related to Apple Pay, which is where an ACH mechanism might be induced. That's called the Apple Technology Agreement. And Visa provides Apple certain technology, and in exchange, Visa is included on Apple Pay and Visa can be used. Nothing in that agreement involves any payment from Visa to Apple. They haven't cited anything. They mention something about payments from issuers, but if you go and look at that specific provision, and we've cited it, it specifically says: This is not a payment from Visa to Apple, it's just Visa collecting fees and passing them on to Apple. It's just a service they're providing.

Then you get to the merchant agreement. This is the second course of dealing. So, Apple is also a merchant; they have Apple Stores, Apple locations, they sell products. And just like any other merchant, they get a volume discount. So, we didn't include and addendum to, and if it's important, we are happy to provide that to the Court, but there is no dispute that what that addendum does is provide volume discounts just like we do with every other merchant. That's not a payment for them not to create an ACH-based mechanism.

And there's actually even a provision in that contract that says this has nothing to do with Apple Pay. And I won't read it into the record because it's a sealed agreement, but just to cite it for the Court so you can look at it, it's Schedule B, this is of the merchant agreement which is Exhibit 3. Schedule B, Section One, at page five. And it specifically says: This merchant agreement doesn't control anything that happens in Apple Pay, which is where an ACH-based mechanism would occur.

So, yes, we have a deal with Apple as a merchant, but they haven't identified anything suggesting that that's a payment for them not to create ACH-based mechanisms. It's just a payment that we have with any merchant.

Finally, on PayPal, I think the same points here. They're talking about this digital wallet fee that we used to impose on PayPal for using a QR code in person; we've now waived this fee in our most recent agreement. But it's important to understand what that fee is. The digital wallet fee is not a fee on ACH-based transactions, it's a fee on Visa transactions. And even the old contract, which they haven't provided, but if they did, all they allege is that we impose that fee on Visa transactions if you're going to use something other than a QR code -- the current agreement just says: If you're going to use something other than a QR code, you're going to get charged this extra fee on Visa transactions.

We're allowed to do that. If they want to become our competitor, we can charge them more money for our product. They haven't cited any case that said that that was not allowed.

So, again, I want to be very specific. What they allege they can show, what they say in their papers, both their complaint and their opposition, is they can show that Visa paid these competitors or potential competitors not to launch ACH-based systems. First of all, PayPal and Square have ACH systems and there's no payments in there preventing them from doing that.

And for Apple, they haven't alleged any payment that was given to them not to do it. All it says is that, look, Apple, if you become your competitor, if you launch your own ACH-based network, we can terminate our deal. We can stop dealing with you. And there's nothing in the law that requires Visa to deal with Apple. And Apple is not a small competitor.

They're perfectly capable of handing themselves. The idea that Visa is bullying Apple around I don't think passed the smell test.

So, unless your Honor has any questions, those were the points that I wanted to make.

THE COURT: No. Thank you.

All right. Thank you. I'll take am motion under advisement.

Thank you all.

(Adjourned)