

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION**

TCF NATIONAL BANK

Plaintiff,

v.

BEN S. BERNANKE, et al

Defendants.

Case No. 4:10-cv-04149-LLP
Hon. Lawrence L. Piersol
Senior District Court Judge

**BRIEF AMICUS CURIAE OF U.S. PIRG
IN SUPPORT OF THE DEFENDANTS**

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
STATEMENT OF AMICUS CURIAE	2
ARGUMENT	3
I. The Current Interchange System is Broken.....	3
II. The Durbin Amendment Provides Substantial Benefits for Consumers.....	6
CONCLUSION.....	9

TABLE OF AUTHORITES

	Page
Cases	
<i>In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation</i> , Case No. 1:05-md-01720 (E.D.N.Y. 2005)	5
<i>U.S. v. Visa U.S.A., Inc.</i> , 163 F. Supp. 2d 322 (S.D.N.Y. 2001), <i>aff'd</i> , 344 F.3d 229 (2d Cir. 2003)	3
Statutes	
Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203; 124 Stat. 1376 (2010) (codified at 15 U.S.C. § 1693o-2).	1
Electronic Fund Transfer Act, 15 U.S.C. § 1693 (b)	1, 6
Other Authorities	
75 Fed. Reg. 81725 (Dec. 28, 2010).	1
75 Fed. Reg. 81740 (Dec. 28, 2010)	5
Aoife White, <i>Visa Europe Settles EU Antitrust Case, Reduces Fees</i> , Bloomberg News (Dec. 8, 2010).	8
<i>Comments on the Notice of Proposed Rule Making on Debit Card Interchange Fees and Routing, Docket No. R-1404</i> (February 22, 2011) (written comments of U.S. PIRG), available at http://www.federalreserve.gov/SECRS/2011/March/20110303/R-1404/R- 1404_022211_67834_571522531216_1.pdf	3
<i>Credit Card Fair Fee Act of 2009: Hearing on H.R. 2695 Before the H. Comm. on the Judiciary</i> , 111th Cong. (Apr. 28, 2010) (testimony of Edmund Mierzwinski, Consumer Program Director, U.S. PIRG).....	2
Dennis w. Carlton, <i>Externalities in Payment Card Networks: Theories and Evidence</i> , <i>Commentary</i> , The Changing Retail Payments Landscape: What Role for Central Banks, proceedings of a conference held at the Federal Reserve Bank of Kansas City (November 9- 10, 2009).	7
Federal Reserve Open Board Meeting, December 16, 2010	7
<i>Hearing on Interchange Fees Before the Sen. Subcomm. on Fin. Services and Gen. Government</i> , 111th Cong. (June 16, 2010) (testimony of Edmund Mierzwinski).	4

Interac Website, *The Chip Transition Time* (2011), available at <http://www.interac.ca/merchants/chip.php>. 7

National Retail Federation, *Credit Card Interchange Fees* (2009), available at http://www.nrf.com/modules.php?name=Pages&sp_id=838. 4

Reserve Bank of Australia, *Payments Systems Board Annual Report* (2005)..... 8

Reform of Australia’s Payments System Preliminary Conclusions of the 2007/08 Review (April 2008). 8

Scott Schuh, Oz Shy, and Joanna Stavins, *Who Gains and Who Loses From Credit Card Payments? Theory and Collaborations*, Federal Reserve Bank of Boston Public Policy Discussion Paper No. 10-3 (August 2010). 5

Senator Richard Durbin, Statement on his Debit Card Interchange Fee Amendment (May 13, 2010), available at <http://durbin.senate.gov/showRelease.cfm?releaseId=324958>..... 1, 6

The Hispanic Institute, *Trickle-Up Wealth Transfer: Cross-Subsidization of Consumers in the Payment Card Market*, November 2009 4, 7

Understanding the Federal Reserve’s Proposed Rule on Interchange Fees: Implication and Consequences of the Durbin Amendment Before the H. Subcomm. on Fin. Institutions and Consumer Credit, 112th Cong. (Feb. 17, 2011) (written testimony of U.S. PIRG, the Hispanic Institute and Public Citizen)..... 3

INTRODUCTION

Regulating debit card interchange fees, as prescribed by the Durbin Amendment to the Dodd-Frank Wall Street Reform and Consumer Financial Protection Act of 2010 (“Durbin Amendment”), will have a tremendous beneficial impact on consumers. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203; 124 Stat. 1376 (2010) (codified at 15 U.S.C. § 1693o-2). As Senator Durbin has said, one of the purposes of the Wall Street Reform Act is to “empower[] consumers to make good financial choices.”¹ Moreover, Section 904 of the Electronic Fund Transfer Act (“EFTA”), portions of which the Durbin Amendment amends, states “[t]he primary objective of this title...is the provision of individual consumer rights.” 15 U.S.C. § 1693 (b). Thus, this Court should grant Defendant’s Motion to Dismiss so that these reforms can protect the interests of consumers in a fair and competitive marketplace.

Interchange fee reform is necessary because of lack of competition and transparency in the market. Over the last decade the debit card interchange fees have skyrocketed, directly costing merchants and consumers over \$16 billion dollars per year.² The escalating interchange fees result in increases in the price of goods to consumers. By lowering interchange on the debit cards issued in the United States consumers will save financially on the cost of goods, and be the beneficiaries of a more transparent marketplace and increased competition among financial institutions.

¹ Senator Richard Durbin, Statement on his Debit Card Interchange Fee Amendment (May 13, 2010), *available at* <http://durbin.senate.gov/showRelease.cfm?releaseId=324958>.

² 75 Fed. Reg. 81725 (Dec. 28, 2010).

STATEMENT OF AMICUS CURIAE

Amicus Curiae U.S. PIRG submits this brief in support of Defendants' Motion to Dismiss Plaintiff's Claims for Failure to State a Claim Upon Which Relief Can Be Granted and For Lack of Subject Matter Jurisdictions and Defendants' Response In Opposition to Plaintiff's Motion For a Preliminary Injunction. Docket No. 64. U.S. PIRG believes that the enactment of the Durbin Amendment and the forthcoming regulations will provide prospective financial relief and significant benefits for consumers in an economically unstable time.

U.S. PIRG, the non-profit, non-partisan federation of state Public Interest Research Groups ("U.S. PIRG"), works through public outreach on behalf of all consumers for a fair and competitive marketplace. U.S. PIRG's mission is to deliver result-oriented public interest activism that protects consumers, encourages a fair, sustainable economy, and fosters responsive, democratic government. U.S. PIRG regularly advocates before state and federal regulators and legislators on both consumer protection and competition policy issues in the payment system marketplace. Additionally, as part of its consumer outreach on these issues, U.S. PIRG has launched a major campaign on over 40 college campuses around the country against unfair payment card marketing practices.

Because of the negative impact interchange fees have on consumers, U.S. PIRG has testified before the United States Congress for legislation to reform the credit card market. U.S. PIRG was an invited witness and testified before the House Judiciary Committee and the Senate Appropriations Subcommittee on Financial Services and General Government in support of interchange fee regulation.³ Most recently U.S. PIRG submitted testimony in support of the

³ See *Credit Card Fair Fee Act of 2009: Hearing on H.R. 2695 Before the H. Comm. on the Judiciary*, 111th Cong. (Apr. 28, 2010) (testimony of Edmund Mierzwinski, Consumer Program

Durbin Amendment and the Federal Reserve Board of Governors' proposed rule before the House Financial Services Subcommittee on Financial Institutions and Consumer Credit.⁴ U.S. PIRG and other consumer groups submitted testimony to the Federal Reserve Board in the underlying regulatory proceeding on the need for interchange fee regulation.⁵ In light of the impact of interchange fees on consumers, *Amicus* has a significant interest in supporting regulation of these interchange fees.

ARGUMENT

I. The Current Interchange System is Broken.

The debit card market is broken and consumers have been harmed by the exercise of market power by Visa and MasterCard. The two firms collectively represent over 80 percent of all U.S. debit card transactions. *See U.S. v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 341 (S.D.N.Y. 2001) (holding that Visa and MasterCard have market power evidenced by their ability to successfully engage in price discrimination), *aff'd*, 344 F.3d 229 (2d Cir. 2003). Because most debit cards issued in the U.S. bear either the Visa or MasterCard logos, merchants have no choice but to accept these cards. Because acceptance of Visa and MasterCard is essential for almost all merchants, Visa and MasterCard have the incentive and ability to increase

Director, U.S. PIRG); *Hearing on Interchange Fees Before the Sen. Subcomm. on Fin. Services and Gen. Government*, 111th Cong. (June 16, 2010) (testimony of Edmund Mierzwinski).

⁴ *See Understanding the Federal Reserve's Proposed Rule on Interchange Fees: Implication and Consequences of the Durbin Amendment Before the H. Subcomm. on Fin. Institutions and Consumer Credit*, 112th Cong. (Feb. 17, 2011) (written testimony of U.S. PIRG, the Hispanic Institute and Public Citizen).

⁵ *See Comments on the Notice of Proposed Rule Making on Debit Card Interchange Fees and Routing*, Docket No. R-1404 (February 22, 2011) (written testimony of U.S. PIRG), available at http://www.federalreserve.gov/SECRS/2011/March/20110303/R-1404/R-1404_022211_67834_571522531216_1.pdf.

interchange fees which have harmed merchants and in turn consumers through higher merchandise prices. Indeed, the rapid increase of debit card interchange fees in the past decade demonstrates a significant market failure.

Consumers have significant concerns about the problem of escalating debit card interchange fees. In 2009, interchange fees alone cost merchants and consumers an estimated \$48 billion. *Hearing on Interchange Fees Before the Sen. Subcomm. on Fin. Services and Gen. Government*, 111th Cong. (June 16, 2010) (testimony of Edmund Mierzwinski). Those fees have increased three-fold from \$16 billion in 2001.⁶ These fees have a disproportionately harmful effect on the 25 percent of the population that is unbanked and other consumers that pay by cash and checks, since those consumers never receive the benefits of any card rewards programs that are funded by interchange fees. Yet while the under and unbanked Americans receive no benefit from these programs, they pay in excess of \$1 billion annually to subsidize those regressive rewards. *Hearing on Interchange Fees Before the Sen. Subcomm. on Fin. Services and Gen. Government*, 111th Cong. (June 16, 2010). The Hispanic Institute has reported that the bottom 50 percent of income earners pay at least \$669 million more in higher prices to subsidize at least \$354 million in payment card rewards.⁷ A recent study by the Federal Reserve Bank of Boston demonstrates that interchange fees are a regressive penalty on the unbanked with each credit card using household receiving \$1,133 from cash users every year.⁸

⁶ See National Retail Federation, *Credit Card Interchange Fees* (2009), available at http://www.nrf.com/modules.php?name=Pages&sp_id=838.

⁷ The Hispanic Institute, *Trickle-Up Wealth Transfer: Cross-Subsidization of Consumers in the Payment Card Market*, November 2009.

⁸ Scott Schuh, Oz Shy, and Joanna Stavins, *Who Gains and Who Loses From Credit Card Payments? Theory and Collaborations*, Federal Reserve Bank of Boston Public Policy

Interchange fees were established to compensate the card-issuers for costs such as insurance, fraud, risk of loss, float and processing. Yet, while all these costs have decreased in the past 15 years, interchange fees have continued to increase (over 20 percent in the past few years, even though all the costs of card processing and issuance have fallen). Debit card fees on Interlink, Visa's debit network, increased over 30 percent in 2009 alone. The divergence between lower costs and higher fees has grown to the point where card networks no longer even attempt to justify interchange as a method for recovery of the cost of processing transactions.

As problematic, the current debit card interchange fee system provides much greater incentives for financial institutions to issue and promote signature-based debit cards. Signature-based cards are far less safe from fraud since they do not require the use of a personal identification number ("PIN") and the debit from the account is not instantaneous. Signature-based cards have seven and a half times the rate of fraud as PIN-based cards. 75 Fed. Reg. 81740-41. Yet because the networks and issuers of signature based-debit cards are able to exercise their market power, they have levied higher interchange fees. *See In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, Case No. 1:05-md-01720 (E.D.N.Y. 2005) (A class of merchants have alleged in an antitrust suit against Visa, MasterCard and numerous major card issuing banks, that the setting of current debit card interchange fees violate the antitrust laws.). In addition, issuers attempt to force consumers to use these cards either by providing rewards or assessing surcharges on PIN debit transactions. A system that promotes the less secure and more costly product for consumers makes no economic sense and is a sign of a broken market.

Discussion Paper No. 10-3 (August 2010) (while this study is demonstrative of credit cards, a similar dynamic exists for debit cards).

Moreover, these fees continue to remain hidden from consumers. The rules of Visa and MasterCard prevent merchants from accurately informing consumers of the costs of credit and debit card acceptance or attempting to direct them to more efficient and lower priced payment mechanisms. For consumers, the system lacks adequate information concerning the practices of many card-issuers. Where consumers have choice and market transparency, there will be active competition to provide better services and lower costs.

II. The Durbin Amendment Provides Substantial Benefits for Consumers.

The Durbin Amendment amends section 904 of the EFTA which states “[t]he primary objective of this title...is the provision of individual consumer rights.” 15 U.S.C. § 1693 (b). The Durbin Amendment sought to protect consumers and competition by providing transparency of costs for debit interchange, which will lead to better services and lower costs passed through to consumers. The Durbin Amendment further seeks to “clean[] up Visa’s and MasterCard’s worst abuses, [so] small business and their customers will be able to keep more of their own money.”⁹ Simply put, lower interchange fees will lead to lower prices of goods for consumers. A 2009 study conducted by the Hispanic Institute in partnership with the University of Pennsylvania found that “in competitive industries, interchange fees are passed through to the consumer resulting in higher nominal prices, *so when interchange fees are lower, prices are lower.*”¹⁰ Moreover, the staff of the Federal Reserve Board stated in their presentation of the proposed regulations that “given reductions in interchange fees and in overall debit card

⁹ Senator Richard Durbin, Statement on his Debit Card Interchange Fee Amendment (May 13, 2010), *available at* <http://durbin.senate.gov/showRelease.cfm?releaseId=324958>.

¹⁰ The Hispanic Institute, *Trickle-Up Wealth Transfer: Cross-Subsidization of Consumers in the Payment Card Market*, November 2009 at 25 (emphasis added).

acceptance cost, merchants could choose to pass the savings through which could benefit both the consumers that primarily pay with cash or checks, as well as debit card users. We expect this would be most likely to happen, that is, lower costs would be most likely passed on to consumers, in those markets with lower margins and intense price competition.”¹¹

The experience of other countries demonstrates that regulation of interchange similar to the Durbin Amendment is beneficial to consumers. In fact, Canada, a country with one of the highest debit card usage rates in the world has zero debit interchange.¹² In many respects PIN debit in Canada is far superior to debit in the U.S. Fraud rates are far lower. There is a lower rate of unbanked consumers. The at-par interchange fee system has fostered much innovation in Canada and this innovation surpasses the degree of innovation in the U.S.¹³

Further, upon Australia’s enactment of credit card interchange fee reforms, the Reserve Bank observed that “the most notable impact of the reforms [on credit card interchange fees] has been a marked reduction in merchants’ costs of accepting credit cards, which in turn, is flowing through into lower prices of goods and services for all consumers.”¹⁴ Moreover, in 2008, the Reserve Bank reported that reduced interchange fees resulted in lower prices and the fact that

¹¹ Federal Reserve Open Board Meeting, December 16, 2010.

¹² Dennis w. Carlton, *Externalities in Payment Card Networks: Theories and Evidence, Commentary*, The Changing Retail Payments Landscape: What Role for Central Banks, proceedings of a conference held at the Federal Reserve Bank of Kansas City, November 9-10, 2009, at 129-130.

¹³ For example, the Interac network offers an Internet payment service enabling over 500 merchants to offer their customers a secure internet payment option using PIN debit cards. Moreover, the system incentivizes issuers to create stronger fraud controls through Chip & PIN systems, which will be complete by 2015. See Interac Website, *The Chip Transition Time* (2011), available at <http://www.interac.ca/merchants/chip.php>.

¹⁴ Reserve Bank of Australia, *Payments Systems Board Annual Report* (2005) at 10.

merchants passed savings from lower interchange fees on to the consumer “is consistent with standard economic analysis which suggests that, ultimately, changes in business costs are reflected in the prices that businesses charge.”¹⁵ And in its 2007/2008 review, the Reserve Bank found consumer savings of \$1.1 billion Australian in one year.¹⁶

Recently, the European Union has carefully considered the issues surrounding debit card competition in an enforcement action against Visa. The EU Competition Commission reduced Visa Europe’s debit interchange fees by 60% to 0.2% of a transaction. Joaquin Almunia, the EU’s competition commissioner said, “Lower inter-bank fees will trigger real benefits for merchants and consumers whilst more transparent rules will also improve competition in the cards market.”¹⁷

Debit is utilized as a convenient form of access to the consumer’s demand deposit account. With the Durbin Amendment in place, the affected issuing banks will still maintain the incentives to continue providing debit cards and promoting the use of debit cards for consumers; not because they must, but because the incremental transactional costs for debit transactions are lower than the banks’ cost for cash and checks. Banks reduce their overall transactional costs by issuing debit cards and by having their customers use debit instead of the cash and check alternatives. Moreover, by issuing debit cards, banks attract more customers and those customers may carry higher average balances.

¹⁵ Reform of Australia’s Payments System Preliminary Conclusions of the 2007/08 Review (April 2008).

¹⁶ *Id.* It should be noted that proponents of interchange fees often site a MasterCard funded study, which found no benefit to consumers from the reduction of interchange fees in Australia. However, the Reserve Bank of Australia vigorously disputes this study’s findings.

¹⁷ Aoife White, *Visa Europe Settles EU Antitrust Case, Reduces Fees*, Bloomberg News (Dec. 8, 2010).

CONCLUSION

The Durbin Amendment acts to help correct a broken and anticompetitive market dominated by card networks that have substantially increased interchange fees over the last decade. The Durbin Amendment provides needed relief to consumers. The savings that merchants will acquire will be passed on to consumers in the form of lower priced goods. Because of the substantial benefits resulting from the Durbin Amendment, we urge the court to dismiss Plaintiff's claims consistent with the Defendants' Motion to Dismiss.

Respectfully submitted,

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Dated: March 11, 2011

**CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1.B.1
TYPE-VOLUME LIMITATION**

This brief complies with the type-volume limitation of Local Rule of Practice 7.1.B.1 because the amicus curiae brief contains 2,463 words. In making this certification, I have relied on the word count feature of the word-processing program used to prepare the brief.

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