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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE	)	
	)	**MASTER FILE NO.**
VISA CHECK/MASTERMONEY	)	**CV-96-5238**
ANTITRUST LITIGATION	)	**(Gleeson, J.) (Mann, M.J.)**
	)	

REPLY MEMORANDUM BY THE UNITED STATES OF AMERICA IN SUPPORT OF ITS MOTION TO INTERVENE AND AMEND THE EXISTING PROTECTIVE ORDER

INTRODUCTION

Defendants Visa U.S.A. and MasterCard International (hereafter "Visa" and "MasterCard", respectively) have failed to articulate any actual prejudice that would result from an amendment to the existing protective order to permit plaintiffs' counsel to share with the Government their work product analyses of documents that both the Government and plaintiffs' counsel already have. Defendants ignore not only the circumstances that underlie the Government's motion but also the only policy that justifies a protective order, the protection of business secrets. Defendants' arguments ultimately come down to two points: (1) the "carefully negotiated" stipulated, protective order in this case does not include the Government as a permissible recipient of defendants' confidential information, and (2) the case law in this Circuit

requires the Government to demonstrate "extraordinary circumstances" to justify *any* protective order modification and the Government cannot meet that heavy burden.

But the defendants' arguments entirely ignore the undisputed and dispositive fact that the Government already has received the very confidential documents and deposition testimony which are the subject of this Court's protective order. There is simply no prejudice that could result from the proposed amendment to this Court's protective order because that amendment would *not* expand the group of persons who have access to *defendants'* confidential information -- the only information whose disclosure could be of legitimate concern to them. The Government already has those confidential documents and seeks only plaintiffs' work product analyses of them. No one who does not already have a right of access to the confidential information will obtain access by the proposed amendment. Defendants' objection to that information transfer serves only to make work for the Government and keep the playing field tilted towards defendants, whose employees not only know the content of their own documents, but whose counsel have already had years to analyze that content.

For the same reason, the cases cited by defendants are entirely inapposite. In each case upon which defendants rely the Government was seeking an amendment of a protective order *to obtain the underlying documents themselves*. These different circumstances are critical to the proper result, as the *Grady*[1] decision makes clear. The propriety of the *Grady* Court's reasoning and result is underscored by Congress' explicit endorsement and adoption of both in the 1980

[1] *American Telephone and Telegraph v. Grady*, 594 F.2d 594 (7th Cir. 1978).

amendments to the Antitrust Civil Process Act. There is, in short, no reason -- save delay and waste -- to forbid the transfer of work product analyses from plaintiffs' counsel to the Government.

FACTUAL BACKGROUND

The Government will not repeat here the relevant background facts and negotiations, which were described at length in its opening memorandum. Rather, we will correct here the misstatements and omissions of fact which underlie defendants' mistaken arguments:

(1) The protective order in this case was negotiated and approved long before the Government's case was ever filed and long before the defendants agreed to provide all the document and deposition discovery in this case to the Government.

(2) The parties to the protective order in this action explicitly recognized in Paragraph 12 that such changed circumstances might warrant a change in the terms of the protective order (upon motion to the Court). Thus, defendants have *never* had a basis to assume that the existing protective order was immutable; they agreed otherwise when they negotiated its terms.

(3) As outlined in detail in the Government's opening memorandum, there are numerous substantive issues which the Government and plaintiffs' complaints share, including the propriety of the claim that there is a distinct market for general purpose card network services within the United States and that defendants have market power within that distinct market. Indeed, Judge Jones recognized the extensive overlap of issues (over defendants' initial

objections) when she orally suggested to defendants that they provide the *Wal-Mart* documents to the Government. Defendants subsequently followed the Court's suggestion.

(4) The debit card market, and future competition in that market, is already an explicit subject of the Government's complaint. One of the Government's central claims is that Visa and MasterCard both illegally prohibit their member banks from issuing "competitive" cards -- except Visa and MasterCard cards. These twin rules effectively foreclose other general purpose card networks (i.e. American Express and Discover/Novus) from enlisting the material assistance of member banks in the issuance of cards, thereby foreclosing network competitors from competing effectively. The effect of the rule is particularly potent in the burgeoning debit card market. This is because debit cards can only be effectively issued through defendants' member banks because they have unique access to the demand deposit (checking) accounts from which debit cards draw funds. For this reason, defendants are entirely wrong when they claim that debit has little or no place in the Government's case.

(5) The Government has not disclosed, and has no intention of disclosing, its work product or any other confidential information to plaintiffs' counsel. Nor does the Government intend to coordinate its strategy in the credit card litigation with plaintiffs' counsel. Indeed, the Government has not sought, and has no intention of seeking, a modification of the protective order in its case to permit Government disclosures of confidential information to plaintiffs'

counsel. There is simply no basis for defendants to conjure up any concerns about Government lawyers funneling information to plaintiffs' counsel.[2]

ARGUMENT

I. The Government's Motion to Intervene Meets the Requirements of Rule 24(b) and Should be Granted

The Court of Appeals for the Second Circuit has repeatedly held that a motion for permissive intervention under Fed.R.Civ.P. 24 (b) is the proper procedure for the Government to place this dispute before the Court for resolution. Contrary to defendants' contentions, the Court of Appeals does *not* require that the proposed intervenor in these circumstances assist in resolution of the issues involved in the underlying litigation.[3] Rather, the Court requires only that the applicant for intervention has "a claim or defense that presents a common question of law or facts at issue in the action in which intervention is sought."[4] As the Government has demonstrated, its case and this case, brought against the same defendants, share numerous legal and factual questions and so readily satisfies the commonality requirements for the very limited

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[2] In this regard, the Government notes that any statements by the plaintiffs in this case about the way the Government's case or investigation may evolve with respect to debit are based entirely on the plaintiffs' speculation. The Government has not discussed its strategy or analyses with the plaintiffs in this case, nor does it intend to have such discussions in the future.

[3] *See Martindell v. International Telephone and Telegraph Corp.*, 594 F.2d 291 (2d Cir. 1978) (Government permitted to intervene for sole purpose of seeking protective order modification), *In re Akron Beacon Journal*, 1995 WL 234710 (S.D.N.Y. 1995) (permissive intervention granted when intervenor's only interest in litigation was to modify protective order), *Kamyr Ab v. Kamyr, Inc*., 1992 WL 317259 (N.D.N.Y. 1992) (stating that Second Circuit case law has "expressly provided that a party may intervene in an action for the limited purpose of modifying a protective order.")

[4] *Maryland Casualty Co. v. W.R. Grace & Co.*, 1994 WL 419787 (S.D.N.Y. 1994) *citing Martindell*, 594 F.2d at 294.

purposes for which intervention sought here. Like the numerous cases cited by all parties, the motion before the Court is the proper method for amending the protective order.

In any event, the point is moot. Defendants could not, and do not, contest plaintiffs' right to move to amend. Plaintiffs have done so, as permitted by Paragraph 12 of the protective order, and the matter is now properly raised for resolution on the merits by this Court.

II. The Government is Not Required to Demonstrate "Extraordinary Circumstances" Justifying Modification of the Protective Order in the Circumstances At Issue

The facts presented here are on all fours with the Seventh Circuit's *Grady* decision. As in *Grady*, the Government already possesses the documents defendants produced to the plaintiffs, and so the only result of the modification requested will be a significant savings of time and money for the Government.

The case law relied upon by defendants is entirely irrelevant given the distinguishing fact that the Government already has the documents that are "protected" by the protective order entered in this case. Each of the cases cited by defendants involved a request by the Government to obtain the underlying confidential documents. In those circumstances, the Court of Appeals has emphasized the importance of a party's reliance upon the protective orders' limitations on disclosure when agreeing to produce that confidential information.[5]

[5] As discussed in the Government's opening memorandum, that reliance factor was found by Congress to be insufficient to prevent access, in the context of an antitrust investigation, by the Government to information protected by an existing confidentiality order, regardless of whether the Government had the underlying confidential documents from other sources.

In this case, the defendants themselves have already provided the Government with both the confidential documents and deposition transcripts. Therefore, the proposed amendment to the existing protective order will not give access to defendants' confidential business secrets to anyone not previously, and explicitly, authorized by defendants. The proposed amendment will not impinge on any legitimate confidentiality or reliance interest defendants have, or could have, claimed.

Nor, as defendants admit in their opposing memorandum, can defendants claim that they provided all these confidential materials to the Government in reliance on any agreement that the Government would not seek the amendment in dispute. Defendants' production of Wal-Mart deposition transcripts came after they explicitly acknowledged the existence of a dispute concerning whether the Government should be permitted access to plaintiffs' work product analyses.[6]

III. The Proposed Amendment Will Cause No Prejudice to Defendants

Defendants also complain that they will be prejudiced by any amendment to the protective order. But this purported prejudice is, in fact, non-existent. First, modification of the protective order would not increase the scope of defendants' preparation for depositions because defendants have already, independently, agreed that the Government will receive copies of all the *Wal-Mart* products of discovery, including depositions. Thus, defendants now proceed on the assumption that the Government will have, and can use to the full extent permitted by the

[6] Letter from Kenneth Gallo, to Melvin Schwarz, dated January 15, 1999 (Exhibit D of the Government's initial brief).

Federal Rules of Evidence, each and every deposition and document obtained by plaintiffs in this case. It is simply not the case that the proposed amendment would exacerbate the scope of defendants' discovery concerns in this case; such concerns, to the extent they have any relevance here, already exist because defendants have agreed to the Government's access to discovery in this case.

Nor will the proposed modification sanction a two way exchange of confidential information between the Government and the *Wal-Mart* plaintiffs. First, defendants' arguments assume the Government, as well as plaintiffs' counsel, would willfully violate the protective orders in their respective cases that prohibit such communications. Suffice it to say that defendants have no basis for making such outrageous assumptions and they should be summarily rejected by this Court. Defendants' claims also ignore the Government's representations in its opening memorandum that it does not intend to petition Judge Jones for a modification of that Court's protective order. The Government has no intention of providing any protected information to the *Wal-Mart* plaintiffs; rather the Government only seeks information *from* plaintiffs' counsel to level the playing field with defendants' counsel, who have ready access to the authors of the documents and have had years to study the millions of pages they have produced.

IV. The Antitrust Civil Process Act Amendments Are Instructive As to the Proper Result Here, Regardless of Whether the Government Issues a CID

The Antitrust Civil Process Act ("ACPA") is instructive to the current controversy because the 1980 amendments to the Act demonstrate that Congress endorsed the results in the two *MCI/AT&T* appellate decisions upon which the Government relies here. Consequently, the

common law recognition by those Courts of the Government's right of access to, and continued work product protection for, the confidential analyses communicated by plaintiffs' counsel should be accepted by this Court, regardless of whether the Government issues a CID for the materials in the course of its debit card investigation.[7] In the legislative history of this statute (cited in the Government's opening memorandum at pages 13 to 15), Congress expressly discusses the *MCI/AT&T* decisions and adopts their reasoning as the basis to extend the Government's powers in the course of its civil antitrust investigations. That Congressional approval should lead this Court to the same result.[8]

V. The Work Product Privilege Issue is Ripe for Decision and this Court Should Rule that any Work Product Protection Which Otherwise Exists Shall Not be Lost by Disclosure of the Analyses to the Government

As the *MCI/AT&T* and other similar cases previously cited make clear, the commonality of interest doctrine provides continued protection for any work product analyses which plaintiffs' counsel may be permitted to share with the Government. Thus, as defendants concede, and as the case law in this and other Circuits makes clear, work product can be disclosed to

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[7] As defendants apparently concede, the ACPA (1) authorizes the Government to subpoena the *Wal-Mart* plaintiffs' products of discovery, including work product analyses, as part of its investigation into defendants' debit card practices, and (2) plaintiffs' work product will remain protected from disclosure to defendants even though it is obtained by the Government. Moreover, the Government has broad flexibility to use legitimately obtained CID information for any legitimate law enforcement purpose. The information at issue here is obviously relevant to the pending debit card investigation, which concerns the same substantive issues (among others) as those pending before this Court. But the Government has no obligation to issue such a CID in these circumstances; the *Grady* decision and Congress itself have endorsed Government access to plaintiffs' work product in these circumstances. The Government should not be required to rely on its CID powers here.

[8] Of course, given the uncontradicted decisions in the *MCI/AT&T* litigation permitting disclosure of confidential work product to the Government in the context of pending federal court litigation, Congress had no need to address that subject matter by statute; it sufficed to endorse the result in the legislative history.

persons with common litigation interests without waiving that privilege. But defendants grossly overstate the unity of interest required to retain the work product privilege in a situation such as this. In this Circuit, the two parties sharing work product material do *not* need to be litigating identical claims in order to share a "common interest."[9] Rather, because the purpose of the work product privilege is served so long as the information is not disclosed to any person(s) with actual or likely *opposing* litigation interests,[10] the existence of a common interest and issues in dispute between the transferor and transferee of the information is sufficient.[11] Identity of claims is not required.

This common sense approach has been adopted in the Eastern District of New York. In *In Re Crazy Eddie Securities Litigation*, the court stated that the common interest doctrine allows counsel to share "work product, including ideas, opinions, and legal theories, with those having *similar interest* in fully preparing litigation against a common adversary."[12] As in *A.T.&T.*, the *Crazy Eddie* court did not require that the transferor and transferee be co-parties or share identical interests. Indeed, the courts have resisted such an approach because it would clearly

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[9] *See In re Steinhardt Partners*, 9 F.3d 230, 236 (2d. Cir. 1993) (stating, while not deciding the issue, that common interest doctrine could apply when the disclosing party and the government share a common interest in developing legal theories.)

[10] *See A.T&T.*, 642 F.2d at 1299, *In Re Crazy Eddie Securities Litigation*, 131 F.R.D. 374, 378 (E.D.N.Y. 1990).

[11] *See A.T&T* 642 F.2d at 1299 (stating that "'common interests' should not be construed as narrowly limited to co-parties," but rather if the transferor and transferee anticipate litigation against a common interest on the same issue or issues, the doctrine should apply); *In Re Crazy Eddie Securities Litigation*, 131 F.R.D. at 378 (stating that counsel may share work product with those "having similar interests" in litigation against a common adversary).

[12] *Id.* at 379. (emphasis added)

render the common interest doctrine of little practical value because different persons very rarely have identical interests.[13]

Lastly, defendants argue that it would be premature for this Court to make a blanket ruling that plaintiffs' analyses of defendants' documents would remain work product protected. That argument completely misstates the nature of the relief sought here. The Government only seeks an order from this Court that disclosure to it does not waive a work product privilege *to the extent it otherwise exists*. The Government is *not* asking this Court to provide work product protection for some document which is not otherwise, in fact, work product. Thus, while it is hard to imagine how defendants could ever dispute that the analyses of plaintiffs' counsel concerning defendants' documents produced in the course of this litigation do not fall in the category of inviolable attorney opinion under Fed. R. Civ. P. 26(b), such an issue would remain open for defendants to raise if this Court grants the relief requested by the Government.

Second, it is apparent from the face of plaintiffs' supporting motion papers that no transmission of counsels' analyses will occur without a Court order guaranteeing continuance of

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[13] Contrary to defendants completely unsupported assertion, any work product the *Wal-Mart* plaintiffs may divulge to the Government will *not* be revealed in an attempt to petition the Government, and therefore such disclosure will not waive the privilege. Defendants reliance on *Information Resources, Inc. v. Dun and Bradstreet* is misplaced because, here, in contrast to *Information Resources,* it is the Government that seeks a one-way communication flow from *Wal-Mart* plaintiffs' counsel in order to assist its prosecution of a case *it has already filed*. In fact, the *Information Resources* court recognized that in circumstances such as those here, courts have *not* found a waiver of the work product privilege. The *Information Resources* court specifically distinguished *MCI v. A.T.&T.* on these grounds, noting there was no waiver because the Government was already embroiled in litigation against the same defendant.

whatever work product protections now exist. Plaintiffs have described in their motion papers here their understandable concern that they make no disclosure of this information without prior assurance that the information will retain all the available protections from discovery by defendants. Consequently, the relief sought by the Government and plaintiffs is now unquestionably ripe.

CONCLUSION

For all of the reasons set forth above, this Court should grant the Government's motion to intervene, declare that plaintiffs' counsel may divulge their analyses of confidential documents and deposition transcripts in the Government's possession without waiver of any applicable privileges, and modify the protective order to effectuate that result.

Respectfully submitted,

_____/s/_____
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