UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	
Plaintiff,	
v.	Case No. 98 Civ. 7076 (BSJ)
VISA U.S.A., INC., VISA INTERNATIONAL CORP., and MASTERCARD INTERNATIONAL INCORPORATED,	
Defendants.	

UNITED STATES'S MEMORANDUM OF LAW IN OPPOSITION TO DISCOVER'S MOTION TO INTERVENE

UNITED STATES DEPARTMENT OF JUSTICE
ANTITRUST DIVISION

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The United States respectfully submits this memorandum in opposition to Discover Financial Services and DFS Services, LLC's (collectively "Discover") Motion to Intervene to modify this Court's Order regarding Visa U.S.A. Inc's ("Visa") Settlement Service Fee ("SSF").[1] The reason for the United States's opposition is simple. This Court no longer has jurisdiction over that Order. Whatever the merits of Discover's underlying concern that the SSF Order inadvertently harms Discover, the Second Circuit, not this Court, now has jurisdiction over that Order.

The United States also opposes intervention to the extent that Discover may be seeking not just to modify the SSF Order, but additionally to initiate a separate enforcement action against Visa and/or MasterCard International Incorporated ("MasterCard") based on actions not addressed by the Order that Discover alleges violate the Final Judgment.[2] Discover should not be permitted to intervene in this proceeding for such purposes under Federal Rule of Civil Procedure 24(b) ("Fed. R. Civ. P. 24(b)"). This Court previously denied Discover's motion to intervene in 2000, and the same considerations that led the Court to deny intervention then are present now. Moreover, the Final Judgment does not create a private right of action for non-parties, like Discover, to pursue their own pecuniary interests. As a party to the Judgment, the United States is charged with enforcing it to serve the public interest, and the United States is

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[1] *United States v. Visa U.S.A. Inc.*, No. 98 Civ. 7076 (BSJ), 2007 WL 1741885 (S.D.N.Y. June 15, 2007) ("the SSF Order").

[2] Final Judgment herein means the final judgment issued by this Court on October 9, 2001, *United States v. Visa U.S.A. Inc. ("Visa I")*, 163 F. Supp. 2d 322 (S.D.N.Y. 2001), *as modified by United States v. Visa U.S.A. Inc. ("Visa II")*, 183 F. Supp. 2d 613 (S.D.N.Y. 2001).

discharging that responsibility by actively investigating the specific allegations raised by Discover in its filing.

I. PROCEDURAL BACKGROUND

Because this Court is already familiar with the procedural background of this case, the United States will briefly recount only the events subsequent to this Court's June 15, 2007 SSF Order.

Following this Court's entry of the SSF Order on June 15, 2007, Visa filed a timely notice of appeal on June 29, 2007.[3] Subsequently, on July 2, 2007, Visa moved the Court to stay, pending appeal, that part of the Order allowing issuing banks to rescind their contracts with Visa in favor of MasterCard.[4] On August 7, 2007, the Court denied Visa's motion for a stay.[5]

On August 17, 2007, Discover filed its motion to intervene in this proceeding and to modify the SSF Order.[6] In its motion, Discover asked the Court to modify the SSF Order to: (1) "allow Visa's signature debit issuers to terminate, without penalty, their dedication agreements if they decide within the next two years to issue Discover-branded debit cards," as opposed to just MasterCard debit cards; (2) declare "void the onerous penalty clauses in Visa's dedication agreements that effectively prevent debit issuers from terminating their Visa agreements to issue

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[3]Visa U.S.A. Inc. Notice of Appeal (June 29, 2007) [Docket Number 415].

[4]Memorandum of Law in Support of Visa's Motion to Stay Pending Appeal (July 2, 2007) [Docket Number 417].

[5]*United States v. Visa U.S.A. Inc.*, No. 98 Civ. 7076 (BSJ), 2007 WL 2274866 at *1 (S.D.N.Y. Aug. 7, 2007) ("August 7, 2007 Order ").

[6]Memorandum of Law in Support of Discover's Motion to Intervene (Aug. 17, 2007) [Docket Number 425] ("Discover's Mem.").

debit cards over alternative networks"; and (3) declare "void any agreement that Visa has entered into with a debit issuer that requires the issuer to waive prospectively any rights it may gain from the Settlement Service Fee proceedings."[7]

On September 4, 2007, Visa filed an opposition to Discover's Motion to Intervene arguing, among other things, that this Court lacked jurisdiction because of Visa's appeal.[8] A week later, on September 11, 2007, Discover filed a motion with the Second Circuit requesting that it "remand [] this case to the District Court."[9] Discover stated that such a remand would "clarify that the District Court has jurisdiction to rule on the merits of Discover's" intervention motion.[10] Later, on September 26, 2007, pursuant to the Second Circuit's briefing schedule, Visa filed its merits brief arguing for reversal of this Court's SSF Order.[11] MasterCard's and the United States' responses to Visa's appellate brief are scheduled to be filed by November 2, 2007.

Additionally, on September 10, 2007, after Discover filed its intervention motion, American Express Travel Related Services Company, Inc. ("American Express") also moved this

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[7] Discover's Mem. at 1-3.

[8] Visa's Opposition to Discover's Motion To Intervene (Sept. 4, 2007) ("Visa's Opp."). On the same day, MasterCard also filed an opposition, but based it on different grounds than a lack of jurisdiction. MasterCard's Memorandum of Law in Opposition to Discover's Motion To Intervene (Sept. 4, 2007) ("MasterCard's Mem.").

[9] Brief of Proposed Intervenors Discover Financial Services and DFS Services, LLC (Sept. 11, 2007) at 1 ("Discover's App. Br.").

[10] *Id.* at 17.

[11] Proof Brief of Defendant-Appellant Visa U.S.A. Inc. (Sept. 26, 2007).

Court to intervene in the SSF proceeding.[12] However, American Express's intervention motion is expressly contingent on this Court's grant of Discover's Motion to Intervene.[13]

II. ARGUMENT

A. The District Court Lacks Jurisdiction To Consider Discover's Motion To Intervene To Modify the SSF Order

Upon the filing of Visa's notice of appeal from the SSF Order, jurisdiction over that Order passed from the district court to the court of appeals. The Supreme Court has instructed that "[t]he filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982).

Courts in the Second Circuit and this District routinely follow this black letter rule. *See, e.g., Leonhard v. United States*, 633 F.2d 599, 609 (2d Cir. 1980) (holding that "the filing of a timely and sufficient notice of appeal immediately transfers jurisdiction, as to any matters involved in the appeal, from the district court to the court of appeals"); *Wolf v. Nazareth Enterprises, Inc.*, 303 F.2d 152, 155 (2d Cir. 1962) (holding that "[i]t is axiomatic that as a

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[12]Motion and Memorandum of Law of American Express To Intervene in Any Proceeding To Modify the SSF Order (September 10, 2007) [Docket Number 429] ("American Express's Motion To Intervene").

[13]American Express's Motion To Intervene at 1, n.1 ("American Express seeks. . . intervention in the event, *and only in the event,* that the Court grants the August 17, 2007 intervention motion of Discover") (emphasis in original). The United States also opposes the intervention of American Express. Because American Express's Motion to Intervene is contingent on Discover's Motion and because the grounds for the United States's opposition to both motions are the same, the government will directly address only Discover's Motion to Intervene herein.

general rule a court has no power to reopen a final judgment once an appeal is taken as jurisdiction passes to the higher court"); *Katz v. Berisford Int'l PLC*, No. 96 Civ. 8695 (JGK), 2000 WL 1760965, at *2 (S.D.N.Y. Nov. 30, 2000) (holding that the district court lacked jurisdiction to decide a motion to intervene because "[i]t is well-established that the filing of a notice of appeal divests the district court of jurisdiction and transfers it to the Court of Appeals"); *Thwaites Place Assocs. v. Sec'y of United States Dep't of Housing and Urban Dev.*, 112 F.R.D. 189, 190 (S.D.N.Y. 1986) (holding that "this court is without jurisdiction to entertain" a motion to intervene because "the filing of a notice of appeal transfers jurisdiction of all matters pertaining to the appeal to the Court of Appeals"). Indeed, a recent Second Circuit decision, cited by Discover in its September 11, 2007 appellate brief seeking a remand, also held that once a timely notice of appeal is filed, the district court no longer has jurisdiction to consider a motion to intervene. *See Drywall Tapers & Pointers of Greater N.Y. v. Nastasi & Assoc. Inc.*, 488 F.3d 88, 94 (2d Cir. 2007) (upholding district court's denial of motion to intervene because "notice of appeal. . . divested the [District] Court of jurisdiction. . . ").[14]

This Court has previously recognized in this matter that an appeal of one of its orders divests it of jurisdiction over that order. When the Final Judgment in this case was on appeal to the Second Circuit, MasterCard filed its first motion challenging Visa's SSF as a violation of the Final Judgment. This Court denied MasterCard's motion, holding that it did not have jurisdiction while the Final Judgment was still on appeal. *United States v. Visa U.S.A. Inc.*, No. 98 Civ. 7076 (BSJ) (S.D.N.Y. December 8, 2003) ("December 8, 2003 Order") ("[I]f the Final

[14]Moreover, Discover's recent request that the Second Circuit remand the case back to this Court implicitly concedes that the Second Circuit now has jurisdiction over the SSF Order. Discover's App. Br. at 17.

Judgment is upheld on appeal, MasterCard can return to this Court and move to enjoin By-law 3.14. Once jurisdiction reverts to this Court, it has the power to enforce the Final Judgment. . . Having found that this Court does not have jurisdiction to enjoin Visa from enforcing By-law 3.14, we need not reach the issue of whether the SSF is prohibited by the Final Judgment."). Accordingly, unless the Second Circuit remands the SSF Order back to this Court, this Court does not have jurisdiction to grant Discover's Motion to Intervene to modify that Order.

B. Discover Should Not Be Permitted To Intervene To Enforce the Final Judgment

In Discover's motion to intervene, Discover also argues that this Court should declare void: (1) "onerous penalty clauses" in Visa's dedication agreements; and (2) any agreement between Visa and an issuer "that requires the issuer to waive prospectively any rights it may gain from the SSF proceedings."[15] If these additional requests by Discover are related to and made entirely in the context of a modification of the SSF Order, then based on the caselaw discussed previously, this Court has no jurisdiction to grant Discover's additional requests to intervene because the SSF Order is now on appeal. To the extent Discover is instead seeking to begin its own action to enforce the Final Judgment against perceived violations separate from those addressed by the SSF Order, then such intervention is inappropriate for other reasons (even though this Court retains jurisdiction to consider separate violations of its Final Judgment).

[15]Discover's Mem. at 2-3.

1. This Court Has Previously Denied a Motion To Intervene by Discover

In July 2000, Discover filed its first motion to intervene in this proceeding.[16] This Court denied Discover's motion, because there was no showing of "bad faith or malfeasance" by the government and permitting Discover to intervene "would 'unduly delay or prejudice the adjudication of the rights of the original parties,' Fed. R. Civ. P. 24(b), by imposing additional and unnecessary burdens – in the form of new discovery, evidence, and even legal issues – on the resolution of the matter before [the Court]." *United States v. Visa U.S.A. Inc.*, No. 98 Civ. 7076 (BSJ), 2000 WL 1174930, at *1 (S.D.N.Y. Aug. 18, 2000) (quoting *United States v. Stroh Brewery Co.*, Civ. Action No. 82-1059, 1982 WL 1861, at *3 (D.D.C. June 4, 1982)) (denying intervention under Fed. R. Civ. P. 24(b) because, "where there is no claim of bad faith or malfeasance [on behalf of the government]. . . the potential for unwarranted delay and substantial prejudice to the original parties implicit in the proposed intervention clearly outweighs any benefit that may accrue therefrom").

The same considerations are equally applicable here. Discover makes no claim (nor does any other party) that the government is unable to pursue the allegations Discover has presented or will fail to do so through "bad faith or malfeasance." Accordingly, the Court should deny Discover's new Motion to Intervene just as it did in 2000.

2. The Final Judgment Cannot Be Enforced by Discover

A long line of authority suggests that a court should not grant a private right of action for a violation of a judicial order embodying a government decree. *E.g., Blue Chip Stamps v. Manor*

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[16]Discover's Memorandum in Support of Its Motion To Intervene (July 28, 2000) ("Discover's 2000 Motion to Intervene").

Drugs Stores, 421 U.S. 723, 750 (1975); *Buckeye Coal & R. Co. v. Hocking Valley Co.*, 269 U.S. 42, 49 (1925) ("The United States. . . must alone speak for the public interest."); *Dahl, Inc. v. Roy Cooper Co.*, 448 F.2d 17, 20 (9th Cir. 1971); *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 654 F. Supp. 1419, 1438 (D. Del. 1987) (quoting *Control Data Corp. v. IBM Corp.*, 306 F. Supp. 839, 846 (D. Minn. 1969), *aff'd*, 430 F.2d 1277 (8th Cir. 1970) ("To permit enforcement of an antitrust consent decree by third parties in reality makes the decree a statute continuing perhaps in perpetuity, and one withal not enacted by Congress.").

The Second Circuit has held that beneficiaries of an antitrust judgment cannot bring proceedings to enforce the judgment. In *United States v. American Society of Composers, Auth. & Pub.*, 341 F.2d 1003 (2d Cir. 1965), a licensee of the defendant ASCAP sought to enforce the antitrust decree against ASCAP. The Court recognized that the licensee was a beneficiary of the decree, but nevertheless held that the licensee did not have standing to enforce the decree. The Court explained that "the government is the sole proper party to seek enforcement of government antitrust decrees." *Id.* at 1008. The Court elaborated on the public policy rationale for this rule:

> The United States in instituting antitrust litigation seeks to vindicate the public interest and, in so doing, requires continuing control over the suit to determine, for instance, when modification of the decree might be a preferable alternative to attempting to enforce it through one or more contempt proceedings.

Id.

The Court further explained:

> Leaving the choice and power to enforce or modify in the government's hands achieves a desirable result. It forecloses the possibility that a multitude of parties with conflicting interests will become entangled in subsequent proceedings in the

action, and at the same time affords those parties affected by the decree sufficient protection of their rights.

Id.

The Second Circuit's instruction governs here. First, situations may well arise that lead the United States to determine that the public's interest would be served by "modification of the [Final Judgment as opposed] to attempting to enforce it." *Id.* Indeed, the United States has already addressed issues relating to the Final Judgment in ways that served the public interest but did not entail an enforcement action. Specifically, the government (1) persuaded Visa to make its SSF inapplicable to Discover and American Express in 2003;[17] and (2) successfully argued the proper interpretation of Paragraph III.C of the Final Judgment in 2005.[18]

Second, if intervention is allowed in this high-profile case for one non-party whose private interests might benefit from enforcement of the Final Judgment, this Court might well see numerous other non-parties with "conflicting interests" seeking to litigate their own grievances under the terms of the Final Judgment.[19] Indeed, American Express has already followed

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[17]In its original inception, the SSF applied to banks' debit card brand conversions to MasterCard, and to American Express and Discover. However, after the United States voiced concerns that the SSF may violate the Final Judgment; Visa agreed, in November 2003, to limit the scope of the SSF to only banks' debit card conversions to MasterCard.

[18]In the Response of United States to MasterCard's Motion To Enforce the Final Judgment (May 16, 2005), the United States argued that Paragraph III.C of the Final Judgment should be interpreted broadly and "should cover not only rules encompassing 'loss of membership' for issuing competing cards but also any exclusionary by-law, rule, policy, or practice that 'effectively prevents' member banks from issuing cards on competing networks or is a 'significant cause' of their inability to do so profitably." *Id.* at 5-7, 9.

[19]Discover's argument that it should be allowed to intervene because the Final Judgment was designed to help restore competition does not support intervention here. Every judgment in a government antitrust case has as its aim to preserve or restore competition. If that purpose supported intervention by third-parties, then any non-party could intervene in any antitrust case

Discover's lead, even though its intervention motion suggests that its interests conflict with Discover because it would prefer to litigate these matters in front of a jury based on a different record it claims to have developed.

Third, there is no claim that the government cannot adequately enforce the Final Judgment. The United States has met with Discover regarding the concerns presented in its Motion, and the United States is currently investigating those concerns. Once the United States gathers relevant evidence, it will determine whether to pursue further relief against defendants Visa and MasterCard for violating the Final Judgment.

Finally, refusing to allow Discover to intervene to enforce the Final Judgment will not leave Discover without remedies for any harms it may have suffered from anticompetitive conduct on the part of Visa or MasterCard. Discover is free to pursue its claims in its private antitrust action, and apparently is doing so.[20] Allowing Discover to intervene here to air the same grievances at issue in Discover's pending private litigation would lead to wasteful and unnecessary duplicative proceedings. Intervention was not designed to achieve such an inefficient result. *See In re Bank of New York Derivative Litig.*, 320 F.3d 291, 300-01 (2d Cir. 2003) (upholding district court's denial of intervention and finding that intervenors' interests were protected in parallel court proceedings, even though plaintiffs in parallel action chose a "slightly different strategy and. . . raised slightly different claims").

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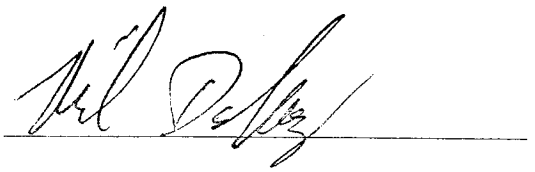
where a judgment is secured. Such a result would be contrary to precedent and sound policy disfavoring such intervention.

[20] *See* MasterCard's Mem. at 21-22.

III. CONCLUSION

For the reasons stated above, the United States respectfully requests that this Court deny Discover's Motion to Intervene.

Respectfully submitted,



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Dated: October 3, 2007

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of October, 2007, a true and correct copy of the United States's Memorandum of Law in Opposition to Discover's Motion to Intervene was served upon the counsel listed below via Federal Express overnight delivery and electronic mail.

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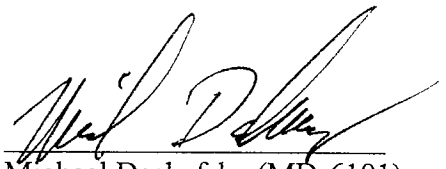

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