07-2824-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

VISA U.S.A. INC.
Defendant-Appellant,

FINAL VERSION

VISA INTERNATIONAL CORP.,
Defendant,

v.

MASTERCARD INTERNATIONAL INCORPORATED,
Defendant-Appellee,

UNITED STATES OF AMERICA,
Plaintiff-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

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STATEMENT OF ISSUES

The United States will address the following three issues:

1. Whether the district court had authority to construe and enforce its Final Judgment, and to remedy a violation of the Final Judgment, without undertaking a contempt proceeding.

2. Whether the district court abused its discretion in construing a key term in the Final Judgment—a decree it entered after a judgment of liability.

3. Whether the district court abused its discretion by ordering a transition period during which member banks entering into debit card issuing agreements with MasterCard may terminate issuing agreements with Visa that were entered into subject to the Visa Bylaw that was found to violate the Final Judgment.

COURSE OF PROCEEDINGS

1. In 1998, the United States brought a civil antitrust suit against Visa U.S.A. Inc. (Visa) and MasterCard International Inc. (MasterCard), challenging rules precluding member banks from issuing general purpose cards on the American Express or Discover networks. After a trial on the merits, the United States District Court for the

Southern District of New York (Barbara Jones, J.) found that the rules violated Section 1 of the Sherman Act, 15 U.S.C. 1. The court proposed a Final Judgment enjoining Visa and MasterCard "from enacting, maintaining, or enforcing any by-law, rule, policy or practice that prohibits its issuers from issuing general purpose or debit cards in the United States on any other general purpose card network." Proposed Final Judgment § III.C, available at *United States v. Visa U.S.A. Inc.*, 163 F. Supp. 2d 322, 410 (S.D.N.Y. 2001) (*Visa I*); see also *id.* at 407-11. The court considered proposed amendments, *United States v. Visa U.S.A. Inc.*, 183 F. Supp. 2d 613 (S.D.N.Y. 2001) (*Visa II*), and entered the Final Judgment on February 19, 2002 (SPA2; A30, 164). The district court stayed the judgment pending defendants' appeals. This Court affirmed, and the Supreme Court denied review. *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003) (*Visa III*), *cert. denied*, 543 U.S. 811 (2004); *Amended Opinion & Order*, Slip Op. 2-4, No. 98-Civ.-7076 (BSJ) (June 15, 2007, entered June 18, 2007) (SPA2-4). The Final Judgment became effective on October 15, 2004. SPA4-5.

2. While their appeals in the government's case were pending, Visa and MasterCard settled an antitrust class action, filed by Wal-Mart and other merchants to challenge the networks' practice of tying offline debit card acceptance to credit card acceptance. Visa and MasterCard agreed to pay the class damages of approximately $2 billion and $1 billion, respectively, over ten years. See *In re Visa Check/MasterMoney Antitrust Litig.*, 297 F. Supp. 2d 503, 508 (E.D.N.Y. 2003), *aff'd sub nom. Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96 (2d Cir. 2005).

On June 20, 2003, Visa enacted Bylaw 3.14, the focus of the current litigation. Originally, Bylaw 3.14 required any of Visa's 100 largest offline debit card issuers that converted its debit card portfolio from Visa to another network to pay a Settlement Service Fee (SSF)—a lump sum "represent[ing] that issuer's proportionate share of Visa's remaining settlement obligation arising from" the Wal-Mart settlement. SPA3. In response to concerns expressed by the United States, Visa amended Bylaw 3.14 so that the SSF obligation did not

apply to a Visa issuer converting its debit card portfolio to American Express or Discover. *Id.* at SPA3 n.3.

MasterCard filed a motion under Federal Rule of Civil Procedure 62(c), seeking an order enjoining Visa from enforcing Bylaw 3.14 with respect to issuers seeking to convert their Visa debit card portfolios to MasterCard's network. The district court held that it lacked jurisdiction to consider the motion because Visa's and MasterCard's appeals from the Final Judgment were pending, but the court noted that MasterCard could renew its motion if the Final Judgment was affirmed. Order of Dec. 8, 2003 at 4-5 (December 8 Order) (A190-91).

On January 10, 2005, after the defendants' appeals were exhausted and the decree became effective, MasterCard renewed its challenge to Bylaw 3.14 and the SSF as a violation of Section III.C of the Final Judgment. It filed a Motion to Enforce the Final Judgment, SPA5, pursuant to Section V.C, which provides that the district court retains jurisdiction "for the purpose of enabling any of the parties . . . to apply to this court at any time" for orders "appropriate for the

construction or carrying out of this Final Judgment" or "for its enforcement or compliance." Final Judgment (FJ) § V.C (A167).

Visa responded that Bylaw 3.14 did not "prohibit" any bank from issuing debit cards on another network within the meaning of Section III.C of the Final Judgment and did not mandate a loss of membership rights in Visa upon conversion. Order of August 12, 2005, at 2 (August 12 Order) (A339). The district court rejected Visa's "excessively narrow" reading, construing Section III.C to

> prohibit[] any by-law, rule, policy or practice that imposes "loss of membership" as a penalty for issuing competing cards; that "effectively prevents" member banks from issuing cards on competing networks; or that is a "significant cause" of member banks' inability to do so profitably.

Id. at 3-4 (A340-41).

The court appointed a Special Master to determine whether Bylaw 3.14 in fact violated the Final Judgment, as construed. Order of Aug. 18, 2005 (August 18 Order) (A346). The Special Master oversaw discovery and held a five-day evidentiary hearing. SPA5-6. On July 7, 2006, he issued his Report, concluding that Bylaw 3.14 violated

Section III.C of the Final Judgment. Report Of Special Master 33-36 (July 7, 2006) (public version) (Report) (A1279-82).

3. On June 17, 2007, after briefing and oral argument, the district court issued an opinion adopting the Special Master's Report in full. SPA7. The court held that the Motion to Enforce the Final Judgment was proper and that MasterCard was not required to proceed by moving for contempt sanctions; rejected Visa's evidentiary objections; and held that Bylaw 3.14 violated Section III.C of the Final Judgment. *Id.* at SPA7-11, 18-32, 11-18.

The district court ordered Visa to repeal Bylaw 3.14. It further ordered Visa to permit any debit issuer formerly subject to the SSF to terminate within two years, without penalty, its existing issuing agreements with Visa if the issuing bank (1) enters into a offline debit issuing agreement with MasterCard and (2) repays to Visa any unearned incentive payments the bank may have received at the outset of its current issuing agreement. SPA39-41 (SSF Order) at §§ II.B and C. Visa appealed. A1397. On August 8, 2007, the district court

entered its order denying Visa's motion to stay the remedy pending appeal. Order (Aug. 8, 2007) (A1441).

STATEMENT OF FACTS

Visa and MasterCard control the two largest of the four major network brands of payment cards. Visa and MasterCard issue no cards of their own, but run the networks over which payment card transactions take place. At the time of the government's trial, Visa and MasterCard were "organized as open joint ventures, owned by the numerous banking institutions that are members of the networks." *Visa III*, 344 F.3d at 235. Many of Visa's 14,000 members are also members of the MasterCard network. *Id.* There are four basic types of payment cards: charge cards and credit cards (known collectively as "general purpose cards"[1]), and debit cards, which may be online or offline.[2] Although banks may issue both networks' general purpose

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[1] *Visa I*, 163 F. Supp. 2d at 331.

[2] "A *charge card* requires that the balance be paid in full at the end of every billing cycle. A *credit card* allows customers to pay only a portion of the monthly balance, charging interest on the unpaid balance." *Visa III*, 344 F.3d at 234 n.2. *Debit cards*, although "similar to credit and charge cards in that they may be used at unrelated merchants, . . . promptly access money directly from a cardholder's

cards, each bank has issued only one brand of offline debit card, *United States v. Visa U.S.A. Inc.*, 183 F. Supp. 2d 613, 615 (S.D.N.Y. 2001) (*Visa II*); Report 7 n.12 (A1253 n.12).

A. The Government's Suit And The Final Judgment

In 1998, the United States sued Visa and MasterCard, alleging that Visa's Bylaw 2.10(e) and MasterCard's Competitive Programs Policy (CPP), which prohibited member banks from also issuing American Express or Discover general purpose cards, violated Section 1 of the Sherman Act. See *Visa III*, 344 F.3d at 236 & n.3. Following a 34-day bench trial, the district court held that these "exclusionary rules" had "weaken[ed] competition and harm[ed] consumers" and lacked any procompetitive justification. *Id.* at 234, 237, 240; *Visa I*, 163 F. Supp. 2d at 329-30, 399-400. "The result, as intended, [had] been that no bank [had] broken rank; rather than lose access to the Visa and MasterCard networks (as well as their ATM networks . . .), no bank in

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checking or deposit account[, which] strongly differentiates them from credit and charge cards." *Visa I*, 163 F. Supp. 2d at 331. "Online" debit cards require the cardholder to enter a PIN. "Offline" debit cards require the cardholder to sign a transaction receipt. *Id.* at 393.

the continental United States [had] agreed to issue American Express" or Discover cards. *Visa I*, 163 F. Supp. 2d at 400. The district court further found that "[n]etwork services output is necessarily decreased and network price competition restrained by the exclusionary rules." *Id.* at 379.

The district court crafted the Final Judgment to enjoin continuation of the anticompetitive conduct and to restore competition. Section III.C of the Final Judgment enjoins Visa and MasterCard "from enacting, maintaining, or enforcing any by-law, rule, policy or practice that prohibits its issuers from issuing general purpose or debit cards in the United States on any other general purpose card network." FJ § III.C (A165-66). The district court included debit cards in Section III.C's proscription, over defendants' objections, based on its finding that "the future of credit card products will be built on, and dependent upon, debit functionality." *Visa I*, 163 F. Supp. 2d at 408. Thus, the district court reasoned, "if the court were to permit defendants to exclude issuer banks from issuing debit cards of network rivals, defendants could accomplish the same anticompetitive goals of By-

law 2.10(e) and the CPP through the backdoor of debit." *Id.* The district court later elaborated:

> Since debit functionality is important to the growth of the proprietary networks and will likely be a key component of future general purpose credit card products, allowing exclusionary rules for debit cards would thwart the Court's remedy and, as such, cannot be permitted.

Visa II, 183 F. Supp. 2d at 616.

Section III.D of the Final Judgment was designed to undo the effects of the violation and restore competition. It granted banks that entered into issuing agreements with American Express or Discover a limited right to terminate any existing "dedication" issuing agreements with Visa or MasterCard. FJ § III.D (A166).[3] The court explained that, although the dedication agreements were "not inherently anticompetitive," they perpetuated defendants' "greatly and

[3]Some member banks had signed agreements with Visa or MasterCard committing them to maintain a certain percentage of their general purpose card volume, new card issuance, or total number of cards in force in the United States on that association's network. In return for such "dedication," the member banks received discounts on network fees and, often, large cash payments from the association. *Visa I*, 163 F. Supp. 2d at 368-69.

impermissibly altered . . . competitive landscape," and would continue to foreclose competition. *Visa I*, 163 F. Supp. 2d at 408-09.

This Court affirmed the Final Judgment in a unanimous opinion. The Court agreed that "at the network level . . . competition has been seriously damaged by the defendants' exclusionary rules," and affirmed the remedy. *Visa III*, 344 F.3d at 240, 244.

B. The Wal-Mart Litigation And The Settlement Service Fee

In an unrelated private antitrust case, a class of merchants, led by Wal-Mart, alleged that Visa and MasterCard "tied merchant use of defendants' debit products to use of defendants' credit cards" by using "their power in the credit card market to force merchants to accept an artificially-inflated transaction fee when accepting payment from consumers using debit cards operated by Visa or MasterCard." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 100-01 (2d Cir. 2005). In April 2003, Visa and MasterCard settled with the class, agreeing to pay damages of $2 billion and $1 billion, respectively, in equal annual installments over ten years. *Id.* at 101, 102; *In re Visa*

Check/MasterMoney Antitrust Litig., 297 F. Supp. 2d 503, 508 (E.D.N.Y. 2003).

In June 2003—while the Final Judgment in the government's case was stayed pending defendants' appeals—Visa enacted Bylaw 3.14. Bylaw 3.14 originally imposed a Settlement Service Fee (SSF) on any of Visa's 100 largest debit issuers that converted its offline debit card portfolio from Visa to any other network—with the fee calculated to be that issuer's proportionate share of Visa's remaining settlement obligation.[4] The SSF was payable as a lump sum, even though Visa paid its settlement obligation to the class over ten years. SPA3-4, 14; Report 5 n.7 (A1251 n.7).

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[4]Bylaw 3.14 provided that:

> If any Visa check card Issuer among the largest 100 Issuers, measured by sales volume achieved during the year ending September 30, 2002, reduces its Visa-branded check card Issuance such that Its sales volume is ten percent less than in that year, the Member would be required to pay a Settlement Service Fee. The fee would be in the amount of the unpaid settlement payments represented by the proportion of the Issuer's sales volume on check cards during the year ended September 30, 2002, to the total of all sales volume on check cards during that year.

SPA3 n.3.

The United States expressed its concern to Visa that the SSF could penalize issuers seeking to convert their debit portfolios to American Express or Discover, and thereby undercut the Final Judgment, which was designed specifically to undo the effects of rules prohibiting Visa and MasterCard members from issuing cards on the American Express and Discover networks. In response, Visa amended Bylaw 3.14 so that the SSF obligation would not apply to issuers converting their debit portfolios to American Express or Discover. SPA3 n.3. The amended Bylaw 3.14 continued to apply to issuers converting their debit portfolios from the Visa network to co-defendant MasterCard's network.

C. MasterCard's Motion To Enforce

MasterCard filed a motion, pursuant to Federal Rule of Civil Procedure 62(c), seeking to enjoin enforcement of Bylaw 3.14 to "preserve the status quo" pending resolution of defendants' appeals from the Final Judgment. SPA4. The district court held that it lacked jurisdiction to consider MasterCard's motion while the appeals were

pending, but noted that MasterCard could renew its motion if and when jurisdiction returned to it. December 8 Order at 4-5 (A190-91).

The Final Judgment became effective on October 15, 2004. SPA4-5. Section V.C of the Final Judgment provides that the district court retains jurisdiction

> for the purpose of enabling any of the parties to this Final Judgment to apply to this court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of its provisions, for its enforcement or compliance, and for the punishment of any violation of its provisions.

A167. On January 10, 2005, MasterCard filed its Motion To Enforce The Final Judgment, contending that Visa's Bylaw 3.14, as amended, violated Section III.C of the Final Judgment because it penalizes issuers seeking to convert their debit portfolios from the Visa network to MasterCard's network. By then, Visa had signed the great majority of its top 100 banks to long-term contracts to issue Visa's offline debit cards—contracts that were entered into while Bylaw 3.14 and the threat of the SSF were in place.

1. The Meaning Of "Prohibits"

Visa took the position that Bylaw 3.14 did not "prohibit" any bank from issuing debit cards on another network within the meaning of Section III.C of the Final Judgment because it did not "mandate a loss of membership rights when a member issues cards on a competitor's network." August 12 Order at 2 (A339). The district court, however, agreed with the United States and MasterCard by holding that Visa's "excessively narrow" reading was "wrong" and "contrary to the remedial goals of the Final Judgment," to the "broad scope" of Section III.C, and to the district court's "intent" in crafting the Final Judgment. *Id.* at 4, 3 (A341, 340). Illustrating the breadth of Section III.C, the court noted that it had previously held it unnecessary to prohibit defendants expressly from restricting equity ownership in their competitors' networks because such conduct was already subject to challenge under Section III.C, rendering "more specific provisions . . . unnecessary." *Id.* at 3 (A340); *Visa II*, 183 F. Supp. 2d at 615.

Thus, drawing on its original findings that defendants' exclusionary rules "effectively prevent[ed]" member banks from issuing

American Express or Discover cards and were a "significant cause" of those rivals' inability to sell network services to Visa's and MasterCard's member banks, the district court construed Section III.C to

> prohibit[] any by-law, rule, policy or practice that imposes "loss of membership" as a penalty for issuing competing cards; that "effectively prevents" member banks from issuing cards on competing networks; or that is a "significant cause" of member banks' inability to do so profitably.

August 12 Order at 3-4 (A340-41). The district court also clarified that although the Final Judgment left Visa and MasterCard free to negotiate for exclusivity with individual banks, neither network could impose exclusivity through a bylaw. *Id.* at 4 (A341).

2. The Special Master's Report

The district court appointed a Special Master to determine whether Visa's Bylaw 3.14 and the SSF in fact violated Section III.C of the Final Judgment, as construed. The Special Master oversaw further discovery, held a five-day evidentiary hearing, reviewed post-hearing

briefing, and heard oral argument. SPA5-6; Report 3, App. A (A1249, 1283).[5]

The Special Master issued his Report on July 7, 2006. SPA6; Report (A1246). As a threshold matter, the Special Master concluded that contempt standards did not apply because the district court's referral did not mention contempt and because "alleviation rather than sanction is what is at issue." Report 32 (A1278) (citing *Alexander v. Hill*, 707 F.2d 780, 783 (4th Cir. 1983)); see also August 18 Order (appointing the Special Master) (A346). On the merits, the Special Master concluded that, although Visa "adopted the SSF in good faith in response to the Wal-Mart settlement," the SSF, in fact, violated the Final Judgment. Report 7, 32, 35-36 (A1253, 1278, 1281-82). The Special Master explained that the evidence relating to the period before the Final Judgment became effective on October 15, 2004 supported his conclusion that "the continuance of the SSF" after that date "violated

[5]The United States submitted letter briefs and participated in oral argument with respect to legal questions, but did not submit evidence, examine witnesses, or take a position as to the effect of Bylaw 3.14 on the ability of Visa member banks to issue cards on the MasterCard network.

the Final Judgment." *Id.* at 35-36 (A1281-82). The Special Master did not address possible remedies for Visa's violation.

3. The SSF Order

The district court reviewed the Special Master's Report de novo. The court adopted the Report, concluded that the SSF violated the Final Judgment, and ordered prospective relief. SPA7, 39-41.

The district court first rejected Visa's argument that contempt standards applied to the proceedings. *Id.* at SPA7-11. Recognizing that a "motion to enforce is an appropriate vehicle for parties to seek compliance with a court order," the court relied on its "broad equitable authority to fashion an appropriate remedy" to "give present effect to its prior orders," regardless of whether it found Visa in contempt. *Id.* at SPA8, 35. The court acknowledged that contempt standards "may be appropriate where sanctions are sought or imposed," but explained that the purpose of the remedy it was ordering "is to give present effect to the Final Judgment, not to sanction Visa or to compensate MasterCard for harm that it may have suffered." *Id.* at SPA9, 35-36. This forward-looking remedy did not "transform[]" into a contempt sanction "simply

because it may have negative economic consequences for Visa." *Id.* at SPA35.

On the merits, the district court reviewed the evidence and found that "the record easily shows by a preponderance of the evidence that the SSF effectively prevents Visa member banks from switching to MasterCard in violation of Paragraph III.C of the Final Judgment." *Id.* at SPA11-12. Indeed, although it had held that contempt standards did not apply, the court found that the evidence demonstrated Visa's violation by "clear and convincing" evidence. *Id.* at SPA11 n.11. The court rejected Visa's evidentiary objections and further held that "even if the Court were to disregard all the evidence challenged by Visa under the Rules, ample evidence would remain to support the Special Master's ultimate conclusion that the SSF effectively prevents Visa banks from switching to MasterCard in violation of the Final Judgment." *Id.* at SPA31-32, 22-25, 18, 19.

The district court ordered a two-part remedy.[6] First, it ordered Visa to repeal Bylaw 3.14. SSF Order § II.A (SPA40). Second, in order to prevent the violation it found from having a continuing anticompetitive effect, the court ordered Visa to permit banks seeking to convert their debit portfolios from Visa's network to MasterCard's to terminate existing debit issuing agreements with Visa under certain conditions. SSF Order § II.B (SPA40). In order to take advantage of the termination provision, the bank must (1) enter into an issuing agreement with MasterCard within two years and (2) it must repay to Visa any unearned incentives the bank received under its contract with Visa. *Id.* The district court refused the United States' and MasterCard's requests to require Visa to grant the same conditional termination rights to banks seeking to convert their debit portfolios to Discover or American Express. The court concluded that such a requirement would be "overbroad" as a remedy for the effects of the amended Bylaw 3.14, which did not impose an SSF contribution

[6]After notifying the parties of its initial conclusion that the SSF violated the Final Judgment, the district court heard oral argument on the appropriate remedy. SPA6-7.

obligation on banks that left Visa for Discover or American Express. SPA34 n.35, 3 n.3.

The district court acknowledged that, at the time Visa entered into most of its issuing agreements, the Final Judgment was not yet in effect because it had been stayed pending appeal. *Id.* at SPA36. But, the court reasoned, the termination provision was necessary to give "present effect" to the Final Judgment because Visa had locked up with long-term contracts approximately 89% of the volume of its top 100 debit issuers before the Final Judgment became effective. *Id.* at SPA35, 4; see also *id.* at SPA33, 39 (remedy gives "present and prospective effect" to the Final Judgment). According to the court, withholding termination rights would inequitably allow Visa to "continue to reap the benefits of those contracts" despite its violation. *Id.* at SPA36. Moreover, the court held that Visa was "hard-pressed" to argue equities because the court's December 2003 Order put Visa "on notice that the Court would consider granting termination rights to member banks if the Final Judgment were upheld on appeal." *Id.* at SPA37, citing December 8 Order at 5 n.3 (A191 n.3).

SUMMARY OF ARGUMENT

The Final Judgment was entered to restore competition and protect consumers after the United States proved in a lengthy trial on the merits that Visa and MasterCard had violated the federal antitrust laws. The government's case focused on Visa's and MasterCard's rules restricting banks from issuing general purpose cards on rival networks. At the heart of the remedy for the violation the government proved is Section III.C of the Final Judgment, which enjoins both Visa and MasterCard from enforcing any bylaw that "prohibits" banks from issuing cards on other networks. FJ § III.C (A165-66); see SPA38 (the Final Judgment "was crafted to promote competition"). The United States took no position below on the factual question that was the subject of the Special Master's Report—whether defendant Visa's Bylaw 3.14 actually has the effect of prohibiting issuers from issuing offline debit cards on co-defendant MasterCard's network in violation of Section III.C—and we do not address that question here. We urge this Court, however, to reject Visa's arguments that the district court is severely limited in its authority to interpret and enforce its Final

Judgment, or remedy any violation, as necessary to fulfill its purpose of protecting the public interest in competition.

1. A district court has broad inherent authority and flexibility to construe, enforce, and administer its litigated decrees without undertaking a contempt proceeding. This Court has expressly recognized that "[e]nsuring compliance with a prior order is an equitable goal which a court is empowered to pursue even absent a finding of contempt," and may instead rely on its "even more basic authority to compel compliance with its orders." *Berger v. Heckler*, 771 F.2d 1556, 1569 & n.19 (2d Cir. 1985). Moreover, the Final Judgment specifically permits any party to apply "for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of its provisions, for its enforcement or compliance, and for the punishment of any violation of its provisions." FJ § V.C (A167). Thus, neither the case law nor the Final Judgment limits the district court to construing or enforcing its decree through contempt sanctions.

2. The district court's interpretation of Section III.C of the Final Judgment—construing "prohibits" as "effectively prevents"—was reasonable and enforceable, and certainly not an abuse of discretion. Section III.C enjoins Visa and MasterCard from enforcing any bylaw that "*prohibits* its issuers from issuing . . . debit cards . . . on any other general purpose card network." A165-66 (emphasis added). Visa argued to the district court that Bylaw 3.14 did not "prohibit" any bank from converting its debit card portfolio because it did not impose loss of Visa membership as a penalty. August 12 Order at 2 (A339). Visa's interpretation, however, would invite easy circumvention of Section III.C. The district court was well within its discretion to reject Visa's proffered interpretation as "excessively narrow" and "contrary to the remedial goals of the Final Judgment." *Id.* at 4, 3 (A341, 340).

3. Having found that Bylaw 3.14 violated the Final Judgment, the district court did not abuse its discretion in crafting a narrowly tailored remedy to restore the competition affected by the violation. Most of Visa's current offline issuers entered into their issuing agreements subject to the threat of SSF payments if they sought to

convert their portfolios to MasterCard's network. Because Visa locked up the vast majority of its debit issuers with long-term contracts, "the Final Judgment would have no meaningful effect for nearly another year, and only partial effect for years to come" if termination rights were not granted. SPA39. The district court's remedy is prospective, simply restoring the conditions that would have prevailed absent the violation that it found—namely, the right of issuers to switch from the Visa network to the MasterCard network without incurring the SSF penalty. The termination provision does not punish or sanction Visa, and does not compensate MasterCard. Visa's contention that the right of issuers to terminate their contracts constitutes a contempt "sanction" because it "'may have negative economic consequences'" for Visa, Visa Br. 19 (quoting SPA35), proves too much. Virtually all injunctions have a potential negative economic impact on the enjoined party.

The district court was not barred from granting the termination rights even though Visa entered into the issuing agreements before the Final Judgment formally took effect. It is well established that a court in equity in an antitrust case may enjoin lawful and otherwise

permissible practices when necessary to correct the anticompetitive effects of unlawful conduct. Moreover, the district court found that those agreements "*presently* violate the Final Judgment because they bind issuing banks to Visa on terms negotiated pursuant to the SSF." SPA36 (emphasis added). In any event, as the district court observed, Visa was on notice after the Final Judgment was entered—but before it went into effect or Visa entered into the bulk of its issuing agreements—that a future order of rescission was a distinct possibility. See SPA37; December 8 Order at 5 n.3 (A191 n.3).

ARGUMENT

I. THE DISTRICT COURT HAD THE POWER TO CONSTRUE AND ENFORCE ITS FINAL JUDGMENT WITHOUT UNDERTAKING A CONTEMPT PROCEEDING

Visa's position on appeal hinges on its contention that the district court was required to employ contempt standards and procedures when considering MasterCard's motion to enforce the decree.[7] But neither

[7]See Visa Br. 20 (district court "erred as a matter of law when it concluded that MasterCard's motion to enforce did not sound in contempt, when it determined that the SSF violated the Final Judgment without applying a contempt standard, and when it imposed

MasterCard's motion, nor the district court's remedy, sounded in contempt, and the court did not adjudge Visa to be in contempt. Rather, the district court invoked its inherent authority to construe the Final Judgment, order a cessation of the violation, and give prospective effect to the decree. Visa's position—that, "as a matter of law" (Visa Br. 20), a district court is powerless to construe and enforce its judgments absent contempt proceedings—finds no basis in the law and would severely undercut the effectiveness of judgments obtained to protect the public. This Court reviews questions of law de novo. *Anobile v. Pelligrino*, 284 F.3d 104, 113 (2d Cir. 2002).

The Final Judgment is the culmination of a litigated public antitrust case brought by the United States against Visa and MasterCard. See *Visa I*, 163 F. Supp. 2d at 407-11. After finding that Visa's and MasterCard's conduct "decreased network-level competition" and violated the antitrust laws, *id.* at 379, 406, the district court had

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a remedy broader than that permitted under a contempt standard"); see also *id.* at 15-21 (contempt procedures should have applied); *id.* at 21 (Final Judgment too ambiguous to be enforced by contempt); *id.* at 32, 47 (party cannot be found guilty of contempt retroactively); *id.* at 45-47 (termination remedy beyond scope of contempt sanction).

"the duty to compel action" that would restore competition, "cure the ill effects of the illegal conduct, and assure the public freedom from its continuance," *United States v. United States Gypsum Co.*, 340 U.S. 76, 88 (1950); accord *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 697 (1978); *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961); *International Salt Co. v. United States*, 332 U.S. 392, 401 (1947). In fulfilling that duty, the district court was "clothed with 'large discretion' to fit the decree to the special needs of the individual case." *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972).

Accordingly, the Final Judgment was purposefully crafted to provide effective relief, restoring and protecting competition. Section III.C of the Final Judgment enjoined Visa and MasterCard "from enacting, maintaining, or enforcing any by-law . . . that *prohibits* its issuers from issuing . . . debit cards . . . on any other general purpose card network." A165-66 (emphasis added). In order to ensure that the decree continued to fulfill its purposes, Section V.C expressly provided that the district court retained jurisdiction "for the purpose of enabling

any of the parties to this Final Judgment to apply to this court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of its provisions, for its enforcement or compliance, and for the punishment of any violation of its provisions." A167.

Thus, by its terms, the Final Judgment opened the district court's door to a variety of means by which the decree's purposes can be carried out in the event of conduct inconsistent with its prohibitions. Moreover, the district court possesses inherent, broad equitable powers to ensure that the Final Judgment fulfills its purpose, including construing the decree terms, directing defendants to cease conduct that violates the decree, and ordering prospective relief to remedy continuing anticompetitive effects of any violation. See *Berger v. Heckler*, 771 F.2d 1556, 1568 (2d Cir. 1985) ("'the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies'") (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971)). This is not

a case in which the district court imposed a coercive sanction, such as a daily fine, or ordered Visa to pay compensation to MasterCard. *Cf. EEOC v. Local 638*, 81 F.3d 1162, 1177 (2d Cir. 1996) (civil contempt "sanctions may be used either to coerce the defendant into complying with the district court's orders or to compensate the victim of the defendant's contemptuous conduct"). Nor did the district court punish Visa. *Cf.* 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 2960, at 371-72 (2d ed. 1995) (WRIGHT & MILLER) (criminal contempt "penalizes yesterday's defiance rather than seeking to coerce tomorrow's compliance").

Visa asserts that—despite the express terms of the Final Judgment—there is no such thing as a "motion to enforce," and that the district court's authority to ensure compliance is narrowly circumscribed, extending *only* to contempt proceedings. Visa Br. 15, 17. Case law, however, confirms that the "usual method for having the court interpret its judgment is to file a motion to enforce the judgment." *SEC v. Hermil, Inc.*, 838 F.2d 1151, 1153 (11th Cir. 1988). As this Court has held, "[e]nsuring compliance with a prior order is an

equitable goal which a court is empowered to pursue even absent a finding of contempt," and may instead rely on its "even more basic authority to compel compliance with its orders." *Berger*, 771 F.2d at 1569 & n.19; accord *Holland v. New Jersey Dep't of Corrections*, 246 F.3d 267, 282 n.14 (3d Cir. 2001) (rejecting proposition "that a court can exercise the compliance enforcement power *only* via its contempt power"). District courts are "invested with broad equitable powers and simply should not be compelled to operate in a punishment or nothing atmosphere. Alleviation rather than sanction was properly the goal on which the district court concentrated its attention." *Alexander v. Hill*, 707 F.2d 780, 783 (4th Cir. 1983).

Visa's reliance (Visa Br. 17) on *EEOC v. New York Times Co.*, 196 F.3d 72 (2d Cir. 1999), for the proposition that court orders can be enforced only through contempt, is misplaced. Indeed, the decision indicates the contrary. In *New York Times*, the EEOC had entered into a 1995 consent decree with a newspaper and its union for the purpose of increasing minority and female representation in desirable jobs. The newspaper and union later agreed to transfer fifteen senior workers

from other newspapers to the Times, thereby moving them ahead of minority and female workers already at the Times. *Id.* at 75-76. On May 8, 1997, the district court found that the transfer violated the consent decree and ordered the newspaper and union to "rescind" the transfer. *Id.* at 76. It further invited the EEOC to request any "'additional remedies to correct any inconsistency with the purpose of the Consent Decree that resulted from the transfer.'" *Id.* In so doing, the court did not employ contempt procedures. On appeal, this Court found that the district court had not given adequate reasons for its decision, and so it remanded—not to employ contempt procedures, but simply to "'make findings and conclusions regarding the validity of the transfer.'" *Id.* (internal citation omitted).

While the appeal from the May 8 order in *New York Times* was pending, the newspaper removed the transferees from their positions at the Times as directed, but allowed them to "pre-book" jobs at the Times through the union's reservation system rather than returning them to the priority lists of their former newspapers. *Id.* On August 13, 1998, the district court found that the pre-booking violated both the consent

decree and its May 8 enforcement order, and it ordered additional relief, including discovery into the damages suffered by individual employees as a result of the violations. *Id.* at 77. In a second appeal, this Court considered both the May 8 and August 13 orders. As to the May 8 order, it affirmed the district court's conclusion that the transfer violated the decree. *Id.* at 79-80. It further emphasized that the district court had *discretion to require* in the May 8 order that the employees be returned to the priority lists of their former newspapers, but it held that the district court's actual order requiring the newspaper to "rescind the transfer" was not sufficiently precise to require such action or to bar pre-booking. *Id.* at 81. Thus, the district court could not award damages for violation of the May 8 order because the May 8 order was not clear enough.

Visa ignores the Court's confirmation in *New York Times* of the district court's inherent authority to determine that the transfer violated the consent decree and to order corrective action without invoking contempt procedures. Instead, Visa emphasizes the Court's conclusion that the newspaper was not liable for a violation of the

May 8 enforcement order. The Court treated the district court's August 13 order imposing additional relief—including the possibility of damages— "in the same manner as if the court had held [the Times] in contempt" for violating the May 8 order, holding the May 8 enforcement order too ambiguous to be enforced via contempt. *Id.* at 80-81. But, as the district court in this case correctly explained, *New York Times* "does not weigh in favor of applying contempt standards here" because the issue in this case is not whether Visa violated "a subsequent enforcement order." SPA10-11. The *New York Times* Court's decision to treat the August 13 order under contempt standards flowed from the nature of the sanction involved and did not reflect a restriction on the district court's inherent authority to construe the underlying decree and order prospective relief—authority that this Court had expressly confirmed with respect to the May 8 order. *New York Times*, 196 F.3d at 80-81. The SSF Order here grants relief analogous to the relief this Court held was within the scope of the district court's discretion in connection with the May 8 order in *New York Times*.

Visa's reliance on *Martens v. Thomann*, 273 F.3d 159 (2d Cir. 2001), is similarly unavailing. Visa Br. 12, 15-16. There, faced with a poorly drafted "motion to enforce" a class action settlement by attorneys whom the court was about to sanction, the district court denied the motion without explaining the basis for its decision. This Court noted that there are "many ways in which the performance of a class action settlement might be called into question before the district court," and provided a few examples, not an exhaustive list. *Martens*, 273 F.3d at 172. The court explained that "[e]ach one of these (*or other*) possibilities, however, carries its own procedures, its own standards for granting relief by the district court, and its own standards for review . . . , thus making identification of the precise nature of the motion . . . essential." *Id.* (emphasis added).

Tellingly, the court did not affirm the district court's dismissal of the motion to enforce. Rather, concerned that some of the motion's claims "raise serious questions," the Court remanded "to seek clarification from the district court before venturing to say whether the court abused its discretion in denying the motion." *Id.* at 172, 173.

Thus, *Martens* is hardly "controlling" authority in Visa's favor on the contempt question. Visa Br. 2, 16. Rather, *Martens* simply stands for the proposition that different motions carry with them different standards and procedures, requiring movants and courts to be clear as to the basis for relief.

Moreover, although the *Martens* court observed that "there is nothing in the Federal Rules of Civil Procedure styled a 'motion to enforce,'" it acknowledged that Circuit precedent approved of such motions "in situations inapposite to the case before us." 273 F.3d at 172; *cf.* Visa Br. 15. The court emphasized that, although there were "many ways" the issue could have been raised, "neither the parties nor the court below clarified precisely what relief was being requested and under what rule the motion was noticed." *Id.* The court did not suggest that the Federal Rules of Civil Procedure specify in detail every possible motion that may be filed.

To be sure, the district court could not hold Visa in contempt without affording Visa the procedural safeguards that attend contempt proceedings. See *In re Rosahn*, 671 F.2d 690, 697 (2d Cir. 1982)

(contempt order vacated for failure to follow proper procedures). But Visa's conclusion—that it is entitled to the procedural safeguards of contempt proceedings regardless of the remedy—simply does not follow. The procedural safeguards turn on the nature of the proceeding, the relief requested, and the remedy imposed. For example, criminal and civil contempt proceedings have very different standards and procedures, *In re Weiss*, 703 F.2d 653, 661-62 (2d Cir. 1983), but sometimes it is only in hindsight that a reviewing court can tell which should have applied. See *id.* at 661 (difference between criminal and civil contempt turns on "the character of the court's sanction"); *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 441 (1911) (look at the sanction's "character and purpose" to "distinguish" between the two types of contempt).

Here, the character and purpose of neither MasterCard's claim nor the district court's remedy sounded in contempt, and so contempt procedures were unnecessary. MasterCard moved to enforce the decree, as Section V.C of the Final Judgment expressly permits. FJ § V.C (A167). It did not seek compensation or a coercive sanction, and

the district court did not award any such relief. See *Heartland Reg'l Med. Ctr. v. Leavitt*, 415 F.3d 24, 29 (D.C. Cir. 2005) ("[s]uccess on a motion to enforce a judgment gets a [movant] only 'the relief to which [the movant] is entitled under [the] original action and the judgment entered therein'") (internal citation omitted). Thus, Visa was never threatened with relief designed "(i) to coerce compliance with the order; or (ii) to compensate the moving party for actual losses sustained," Visa Br. 45 (citing *United States v. United Mine Workers*, 330 U.S. 258, 303-04 (1947)), and the district court was not required to undertake a contempt proceeding.[8]

II. THE DISTRICT COURT'S INTERPRETATION OF ITS JUDGMENT WAS REASONABLE AND ENFORCEABLE

Section III.C of the Final Judgment enjoins Visa and MasterCard "from enacting, maintaining, or enforcing any by-law . . . that *prohibits* its issuers from issuing . . . debit cards . . . on any other general purpose card network." FJ § III.C (emphasis added) (A165-66). The district

[8]The district court found that MasterCard proved Visa's violation by clear and convincing evidence, SPA11 n.11, but it did not opine as to whether the other prerequisites to a finding a civil contempt, Visa Br. 15-16, had been met.

court construed "prohibits" to mean "effectively prevents." August 12 Order at 3-4 (A340-41). Visa complains that that interpretation renders the Final Judgment "ambiguous and therefore unenforceable," Visa Br. 12, but the court's interpretation was natural, reasonable, and well within its discretion, in contrast to Visa's proffered interpretation, which would have rendered Section III.C toothless. A district court has broad discretion in construing its own decree, and "[w]hen an issuing judge interprets [her] own orders," this Court "accord[s] substantial deference to the draftsman." *United States v. Spallone*, 399 F.3d 415, 423 (2d Cir. 2005).

Visa argued that Bylaw 3.14 did not "prohibit" banks from issuing cards on another network because a bank that converted its debit portfolio to MasterCard would not lose its membership in the Visa association. August 12 Order at 2 (A339). As the district court held, Visa's "excessively narrow" reading is "wrong" and "contrary to the remedial goals of the Final Judgment," to the "broad scope" of Section III.C, and to the district court's "intent" in crafting the Final Judgment. *Id.* at 4, 3 (A341, 340); see *Spallone*, 399 F.3d at 424 ("Court orders are

construed like other written instruments, except that the determining factor is not the intent of the parties, but that of the issuing court"). Visa's interpretation would render Section III.C—and thus the Final Judgment—completely ineffective because it would allow Visa to impose any penalty, no matter how coercive or extreme, on a bank proposing to transfer its portfolio to a competing network, as long as Visa did not threaten to terminate the bank's membership. A decree that could be so easily evaded would not satisfy the requirement that relief in a public antitrust enforcement proceeding "cure the ill effects of the illegal conduct, and assure the public freedom from its continuance." *United States Gypsum*, 340 U.S. at 88.

Nor did the district court's interpretation render the Final Judgment "ambiguous" or a "moving target." Visa Br. 24, 22. Visa had proposed an unduly narrow construction, and the district court reasonably responded by providing additional guidance, making explicit its original intent and eliminating any basis for future claims of confusion. In construing "prohibits" to mean "effectively prevents" or a "significant cause," the district court drew on its original findings as to

the effect of the exclusionary rules. See August 12 Order at 3 (A340); *Visa I*, 163 F. Supp. 2d at 379, 383; *Armstrong v. De Forest Radio & Tel. & Tel. Co.*, 10 F.2d 727, 728 (2d Cir. 1926) ("a decree, though given in general terms, is to be interpreted and enforced in accord with the findings of fact embodied in the findings directing decree"). The district court's interpretation of Section III.C to bar any bylaw "that imposes 'loss of membership' as a penalty for issuing competing cards; that 'effectively prevents' member banks from issuing cards on competing networks; or that is a 'significant cause' of member banks' ability to do so profitably," August 12 Order at 3-4 (A340-41), is neither ambiguous nor a significant change in the provision.

Nor is Visa correct in suggesting that the district court, in reviewing the Special Master's conclusions, broadened the meaning of "prohibits" beyond the standard articulated in the August 12 Order. Visa Br. 23-24. To the contrary, the district court made clear that it continued to apply the "effectively prevents" standard, and emphasized that the Special Master had "properly focused on evidence establishing

how the SSF, as a practical matter, operates to *eliminate* an issuer's ability to switch networks." SPA33 (emphasis added).

The district court's construction of the term "prohibits" in Section III.C is reasonable, consistent with the purposes of the decree, and well within its discretion.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ORDERING PROSPECTIVE RELIEF TO UNDO THE ANTICOMPETITIVE EFFECTS OF THE VIOLATION

To remedy the decree violation it had found, the district court ordered Visa (1) to repeal the offending Bylaw 3.14 and (2) to permit banks that choose to convert to MasterCard's debit network a limited right to terminate the bank's existing debit card issuing agreement with Visa. SSF Order § II (SPA40). Visa does not contest repeal of the SSF as an appropriate remedy, Visa Br. 44, but challenges the termination provision as beyond the district court's authority, *id.* at 47-51. The district court, however, adopted the termination provision to give the Final Judgment current and prospective effect, and this Court reviews that decision only for abuse of discretion. See *In re Grand Jury Proceedings (Kluger)*, 827 F.2d 868, 873 (2d Cir. 1987). "An injunction

is an ambulatory remedy that marches along according to the nature of the proceeding. It is executory and subject to adaption as events may shape the need . . . ." *Sierra Club v. United States Army Corps of Eng'rs*, 732 F.2d 253, 256 (2d Cir. 1984).

In 2003 and 2004, Visa locked up with long-term contracts approximately 89% of the volume of its top 100 debit issuers. SPA4. Most of those agreements were entered into after Visa had enacted Bylaw 3.14 and after the Final Judgment had been entered, but—due to the stay pending Visa's and MasterCard's original appeals—before the Final Judgment went into effect. *Id.* In fashioning a remedy after determining that Bylaw 3.14 violated the Final Judgment, the district court reasoned that if it "were merely to order Visa to repeal the SSF without granting termination rights, the Final Judgment would have no meaningful effect for nearly another year, and only partial effect for years to come." *Id.* at SPA39. It held that, even though many of the issuing agreements were not unlawful when entered into (because the Final Judgment was stayed at the time), "those contracts presently violate the Final Judgment because they bind issuing banks to Visa on

terms negotiated pursuant to the SSF." *Id.* at SPA36. The district court therefore provided a narrow termination provision that allows banks to terminate their current debit issuing agreements with Visa, if—but only if—the bank (1) enters into a new debit issuing agreement with MasterCard (but not if the agreement is with Discover or American Express), (2) repays to Visa any "benefits or financial incentives" not yet earned under its agreement with Visa, and (3) exercises its termination right within two years of the SSF Order's effective date. SSF Order § II.B (SPA40); SPA34 n.35.

Section III.C of the Final Judgment "guarantees issuers the ability to make meaningful branding decisions free of prohibitions like the SSF." SPA39. The district court's remedy is carefully tailored to restore that ability on a prospective basis. The termination provision does not punish or sanction Visa, does not compensate MasterCard, and is not retroactive. SPA35-36. The remedy does not automatically terminate any agreement, and limits the termination right to issuers that would have been required to pay the SSF under the amended Bylaw 3.14. SSF Order § II (SPA40).

Moreover, the remedy is tailored to avoid penalizing Visa. Visa will continue to receive the "benefit of its bargains" unless and until a bank enters into an issuing agreement with MasterCard and wants to terminate its agreement with Visa prematurely. Even if issuers make that choice, Visa will not be required to disgorge any profits it has earned under the contracts to date, and will be entitled to a refund of "any unearned incentives" by the terminating bank. SPA36. Visa is not required to compensate MasterCard for lost profits on any issuing agreements MasterCard would have entered into with banks but for the SSF, nor is it required to reimburse MasterCard for any amounts MasterCard paid a bank to cover the bank's SSF liability. *Id.* at SPA17.

Visa's contention that the termination provision constitutes a contempt sanction because it "'may have negative economic consequences'" for it, Visa Br. 19 (quoting SPA35), proves too much. Virtually *all* injunctions have a potential negative economic impact on the enjoined party, as do virtually all enforcement orders. Indeed, the Final Judgment itself had significant negative consequences for Visa

and MasterCard—including a parallel provision permitting banks early termination of otherwise legal issuing agreements with Visa or MasterCard[9]—but that negative impact did not prevent this Court from affirming the district court's imposition of the remedy in a civil case without a "clear and convincing" standard of proof. Visa's argument—that a district court can *enter* a decree based on a violation of the law proved by a preponderance of the evidence but may not *enforce* it without requiring a higher standard—would severely undercut the effectiveness of judicial decrees. Nor is it determinative that the remedy may impair "lawfully negotiated contracts." Visa Br. 19. It is well established that a court in equity in an antitrust case may enjoin lawful and otherwise permissible practices when necessary

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[9]Section III.D of the Final Judgment provided banks with a conditional, two-year right to terminate existing general purpose card issuing agreements with Visa or MasterCard if the bank entered into an issuing agreement with American Express or Discover. FJ § III.D (A166). This relief was granted despite the district court's finding that such issuing agreements were "not inherently anticompetitive," because permitting termination was necessary to restore competition. See *Visa I*, 163 F. Supp. 2d at 408-09; *Visa II*, 183 F. Supp. 2d at 618. This Court affirmed the remedy in full, *Visa III*, 344 F.3d at 244, rejecting the argument that the district court was without power to permit such rescission. See MasterCard's Opening Br. On The Merits, No. 02-6074(L), 85-87 (Aug. 30, 2002).

to correct the anticompetitive effects of unlawful conduct. *United States Gypsum*, 340 U.S. at 88-89; *United States v. Glaxo Group Ltd.*, 410 U.S. 52, 60-63 (1973); *Professional Engineers*, 435 U.S. at 698; *United States v. Loew's, Inc.*, 371 U.S. 38, 50-51 (1962).

Visa emphasizes that many of the issuing agreements subject to the termination provision were entered into before the effective date of the Final Judgment, and suggests that it is being penalized for past conduct. Visa Br. 47-49. The district court, however, found that those agreements "*presently* violate the Final Judgment because they bind issuing banks to Visa on terms negotiated pursuant to the SSF." SPA36 (emphasis added). It concluded that Bylaw 3.14 thwarts the effectiveness of the Final Judgment, and the issuing contracts embody the effects of that bylaw. "Visa cannot continue to reap the benefits of those contracts now that the Court has determined that the SSF effectively prevents Visa debit issuers from switching to MasterCard in violation of the Final Judgment." *Id.* Without the conditional termination rights, "the Final Judgment would have no meaningful

effect for nearly another year, and only partial effect for years to come" given the length of the issuing agreements. *Id.* at SPA39.[10]

Moreover, as the district court recognized, rescission is an equitable remedy and the equities are against Visa. SPA35; *In re Blinds to Go Share Purchase Litig.*, 443 F.3d 1, 8 (1st Cir. 2006). But for the lack of jurisdiction due to the pending appeals, the district court could have enjoined Bylaw 3.14 in the fall of 2003, soon after the bylaw's enactment and before Visa and the banks entered into most of the current issuing agreements. The court invited MasterCard to renew its challenge to the SSF if and when jurisdiction returned to the district court, and the court warned that, if it found the bylaw to violate the Final Judgment, it could "fashion an appropriate remedy, *including*

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[10]In any event, even if many of the issuing contracts were entered into before the Final Judgment went into effect, Bylaw 3.14 was in force from June 2003 until Fall 2007 (when Visa repealed it in compliance with the SSF Order), and the bylaw violated the Final Judgment. Thus, Visa's reliance (Visa Br. 33-34) on *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), is misplaced because "the critical question is whether any present *violation* exists." *Id.* at 558. See also *id.* (even past conduct that did not constitute a violation "may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue"). The district court was not required to "countenance a continuing violation of its order." SPA39.

rescission of those contracts" at that time. December 8 Order at 5 n.3 (emphasis added) (A191). In fashioning equitable relief, an "abiding truth[]" is that the district court had "the ability—indeed, the duty—to weigh all the relevant facts and circumstances and to craft appropriate relief on a case-by-case basis." *Blinds to Go*, 443 F.3d at 8. The December 8 Order clearly put Visa on notice that it entered into SSF-tainted issuing agreements at its peril, and Visa now is "hard-pressed" to argue that the equities favor it. SPA37.

The Final Judgment was designed to eliminate artificial restraints on an issuer's ability to switch its cards from one network to another. Having determined that Bylaw 3.14 violated the decree, the district court had the authority not only to order its repeal, but also to ensure that the Final Judgment has current and prospective effect, SPA33, 37, 39, so that the Final Judgment will "cure the ill effects of the illegal conduct, and assure the public freedom from its continuance." *United States Gypsum*, 340 U.S. at 88.

CONCLUSION

The district court correctly determined that contempt standards do not apply to this proceeding, and it did not abuse its discretion in interpreting Section III.C of the Final Judgment. If the Court affirms the district court's judgment that Bylaw 3.14 violates the Final Judgment, it should also affirm the remedy.

Respectfully submitted.

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