COUNSEL FOR DFT(S): VVV
PLTFF PRO SE:
DFT. PRO SE:
DATE: 8/17/02
BY: VSR

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-v.-

VISA U.S.A., INC., VISA INTERNATIONAL CORP., and MASTERCARD INTERNATIONAL INCORPORATED,

Defendants.

98 Civ. 7076 (BSJ)

Opinion and Order

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Discover seeks to intervene in this action because it believes that its interests in this case align closely with the interests of consumers and merchants. It argues that unless it is permitted to intervene, those interests will not be fully and accurately reflected in the evidentiary record before the Court. Discover seek intervention as of right, pursuant to Federal Rule of Civil Procedure 24(a), and, in the alternative, by permission of the Court pursuant to Federal Rule of Civil Procedure 24(b). For the reasons set forth below, the motion to intervene is denied.

I.

To qualify for intervention as of right under Rule 24(a)(2), an applicant must demonstrate that: (1) it has an interest relating to the subject of the action; (2) it is so situated that the disposition of the action may as a practical matter impair or impede its ability to protect its interest; and (3) its interest is not adequately represented by existing parties. See Fed. R. Civ. P. 24(a)(2); Restor-A-Dent Dental Labs, Inc. v. Certified Alloy Prods., Inc., 725 F.2d 871, 874 (2d Cir. 1984); In re Ivan F. Boesky Secs. Litigation, 129 F.R.D. 89, 94 (S.D.N.Y. 1990).

While Discover undoubtedly has an interest relating to the subject of the action, in government antitrust actions, courts have uniformly recognized that the government represents the public interest in competition, unless a private party makes an extraordinary showing to the contrary.

See United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981); United States v. Associated Milk Producers, Inc., 394 F. Supp. 29, aff'd, 534 F.2d 113, 117-18 (8th Cir.), cert. denied sub nom. National Farmers' Organization, Inc. v. United States, 429 U.S. 940 (1976). Intervention as of right has been recognized only where a showing of bad faith or malfeasance on the part of the Government has been made. See Associated Milk Producers, Inc., 534 F.2d at 117; United States v. Blue Chip Stamp Company, 272 F. Supp. 432, 438 (C.D. Cal. 1967), aff'd per curiam sub nom. Thrifty Shoppers Scrip Co. v. United States, 389 U.S. 580 (1968) (applicant for intervention has burden of demonstrating "that the Government has not acted properly in the public interest."). Discover has made no such showing in this proceeding. To the extent that Discover seeks intervention to protect its private interests, Discover's interests as a competitor are not the subject of this case and Discover cannot seek intervention on this ground.

Moreover, Discover's ability to protect these interests will not be impaired or impeded by the denial of intervention under Rule 24(a)(2). Discover seeks primarily to present to the Court its views on issues concerning the relief the United States is requesting in this case, and more specifically, the impact that relief may have on Discover. Any judgment entered on the United States' complaint in this case, however, would not impair Discover's ability to seek relief in a private antitrust action or otherwise to protect any legitimate interest adversely affected by anti-competitive conduct.

II.

This Court may permit intervention under Rule 24(b): (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. Under both prongs of this rule, in exercising our discretion we "must consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Fed. R. Civ. P. 24(b).

In United States v. Stroh Brewery Co., 1982-2 Trade Cas. (CCH) P 64,804 at 71,960 (D.D.C. 1982), the court denied permissive intervention under Rule 24(b) because, "where there is no claim

of bad faith or malfeasance... 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."

I have precisely the foregoing concerns with respect to Discover in the instant action, namely, that to permit them the intervention they seek 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 me.

III.

In sum, I find that intervention pursuant to Rule 24 of the Federal Rules of Civil Procedure, either by right or by permission of the Court, is not appropriate in this proceeding. Accordingly, Discover's motion is denied and its Complaint is dismissed. Discover shall be permitted to make an amicus submission to this Court on the issue of remedies. Any such submission shall be due on or before September 22, 2000.

SO ORDERED:

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

DATED: New York, New York
August 17, 2000