UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

VISA USA, INC., VISA INTERNATIONAL CORP., AND MASTERCARD INTERNATIONAL, INC.,

Defendants.

98 Civ. 7076 (BSJ)

MEMORANDUM OPINION & ORDER

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Plaintiff, the United States Government, brings this action alleging that defendants are engaged in continuing combination and conspiracy to restrain trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, as amended.

Pending are various discovery disputes, including defendants request that the Court adjourn the scheduled trial date. The Court held a conference with the parties, and certain non-party witnesses, on June 25, 1999, to resolve the outstanding discovery disputes. The Court ruled on several of those disputes on the record, and makes only brief reference to those rulings here. As to other matters, the Court reserved judgment and now rules.

Before addressing the pending disputes, the Court notes that it informed the parties, at the start of the June 25 conference, that this action would be referred to Magistrate Judge Katz, the Magistrate Judge designated for this case, all further pre-trial

supervision. By separate order of today's date, the Court makes this referral.

I. Visa USA's Subpoena to Morgan Stanley-Dean Witter ("Discover")

Prior to bringing this action, plaintiff issued a series of Civil Investigative Demands ("CIDs") to defendants and others, including Discover. Defendant Visa USA has now issued a subpoena containing document demands to Discover. Visa USA has requested that Discover search the files of 36 Discover employees for documents responsive to each of its document requests.

Discover has raised certain objections to the document requests. The principal disputes concern: (1) the appropriate level of employees within the Discover organization for whom files must be searched; (2) whether Discover may limit its searches to update previous CID productions to the plaintiff which have subsequently been produced to the defendants; and (3) once the employees whose files are to be searched are identified, whether Discover must search the files of all employees for documents responsive to all requests, or may tailor its list of employee files to be searched according to document request.

Discover has identified 22 employees whose files it proposes to search. All but one of those employees are on the list supplied by Visa USA. The Court, therefore, ordered at the June 25, 1999 conference that Discover begin immediately a rolling production of documents from the files of those 21 employees.

The Court reserved decision as to the additional 15 employees whose files Visa USA wants searched, and also as to the scope of the document requests and the relationship between the current subpoena and the prior CID productions.

The Court has considered: the relevant law; the submissions from Visa USA, MasterCard, and from Discover; and the arguments presented at the conference. The Court now decides that Discover must search the files of the additional 15 employees identified by Visa USA in its May 27 and June 15 letters (or, in the case of individuals no longer employed by Discover, the individuals replacing the named individuals), unless Visa USA and Discover agree to a more limited search by July 12, 1999.

Discover also objects to the subpoena to the extent that it requires Discover to duplicate searches conducted pursuant to prior CIDs issued by plaintiff. Discover need not, of course, duplicate production of previously produced documents. However, this litigation and the subpoena are broader in scope than the CID requests. Moreover, the subpoena seeks documents from more employee files than did certain of the CID requests. Accordingly, the Court will not sustain Discover's objection to the extent that it seeks to limit its searches to updating prior CID productions. To the extent that the subpoena calls for searching the same files for the same information as did the CIDs, Discover need only update its prior productions.

The Court expects that Discover and Visa USA will work together to identify which, if any, of the document requests require searching only a subset of employee files and which requests require only updating prior productions. Failing agreement by July 12, 1999, Discover must search the files of all of the employees identified for documents responsive to any of the document requests.

Finally, Discover objects to the timetable for it to complete production. While the subpoena issued to Discover requires production by July 31, 1999, Discover contends that it cannot complete production until the end of August 1999. Given the amount of documents produced in this litigation, the parties' need to obtain witness discovery in a timely fashion, and the need for an expeditious conclusion to discovery, the Court denies Discover's request for an additional month before completing its production. The Court will, however, allow Discover an additional two weeks to complete its production. Discover must produce to Visa USA the responsive documents no later than August 14, 1999.

II. Production of Archived E-Mail by Visa USA and Visa International

The plaintiff seeks archived email from Visa USA and Visa International. Because both Visa entities have changed email systems, some considerable expense is involved in developing programs to retrieve and recreate the email from archive tapes.

The plaintiff and these two defendants have agreed to narrow the scope of archived email search, both in terms of the number of employees whose email is to be produced and the number of days per month for which that email is to be produced. Visa International estimates that it will cost approximately $130,000.00 to retrieve the archived email for both defendants. The parties dispute who should bear this cost. At the June 25, 1999 conference, the Court ordered that the defendants produce the email at their initial expense. The Court has reserved decision about which party will ultimately bear the cost of producing email.

III. Visa International Production of CD-Roms

Following a series of letters between the plaintiff and Visa International, the Court denied the plaintiff's request for an Order directing Visa International make its production available to the Government on CD-Rom.

IV. Contention Interrogatories

Visa International has sought leave to serve contention interrogatories prior to the close of discovery. Local Rule 33.3 limits the interrogatories that may be served at the commencement of discovery to: "those seeking names of witnesses with knowledge of information relevant to the subject matter of the action, the computation of each category of damage alleged, and the existence, custodian, location and general description of

relevant documents . . . ." (Local R. Civ. P. 33.2(a).) "During discovery, interrogatories other than those [described above] may only be served (1) if they are a more practical method of obtaining the information sought than a request for production or a deposition, or (2) if ordered by the court." (Local R. Civ. P. 33.2(b).)

Visa International's interrogatories would ask the plaintiff to specify which facts alleged in the Complaint specifically apply to Visa International, as opposed to Visa USA. The plaintiff responds that, unless otherwise specified in the Complaint, the acts attributed to "Visa" in the Complaint are alleged to have been taken by Visa USA, and are attribute to Visa International as the parent corporation that delegated authority to Visa USA to take such actions. Plaintiff insists that contention interrogatories would simply require needless paperwork. Moreover, the plaintiff argues that the Complaint is unusually detailed in its recital of the relevant factual allegations so that contention interrogatories are unwarranted.

The Court agrees that the Complaint provides ample factual information, and that the plaintiff's theory of liability is clear. The Court is thus unpersuaded that failure to allow contention interrogatories at this early stage of discovery will require Visa International to conduct broad and far-ranging discovery into areas it otherwise need not pursue. Furthermore,

Visa International has not explained why the information sought cannot effectively be obtained through use of other discovery tools such as party depositions. Accordingly, Visa International's request to serve contention interrogatories is denied at this time, without prejudice to Visa International's raising the issue with Magistrate Judge Katz.

V. Plaintiff's Requests for Admission from Visa USA

Plaintiff presented Visa USA with three documents -- two letters from Visa USA counsel and a declaration submitted in a prior litigation -- and sought that Visa USA admit that it believed the factual assertions, opinions, and applications of law to fact contained therein were true at the time they were made. Visa USA answered by admitting that the "author" believed the "factual assertions" were true at the time. Visa USA has subsequently amended its response to "admit" the entirety of these three documents subject to qualifying answers to a series of specific questions also posed as alternative requests for admission. The Court advised Visa USA, at the June 25, 1999 conference, that its responses were unacceptable. Visa USA characterizes its dispute with plaintiff as one over "form" rather than "substance." Without reaching the merits of this distinction, the Court ordered Visa USA to respond to the Requests for Admission as written, in the proper form as well as in substance. Toward that end, Visa USA was directed to amend

its answers to the plaintiff's Requests for Admission within two weeks of the June 25, 1999 hearing which is July 9, 1999.

VI. MasterCard Production

MasterCard requested the Court's guidance with respect to several of its outstanding discovery obligations: (1) whether to complete production from the files of employees Timko and Munson; (2) whether to search and produce documents from the files of employees Child, Wankmueller, Rozwadowski and Doyle; (3) whether to produce current email for the aforementioned employees and all others for whom they have made hard-copy production; and (4) whether to produce archived email for 11 employees identified by the plaintiff on the topic of MasterCard's Competitive Programs Policy. MasterCard agreed to produce an index of its videotape library.

At the June 25, 1999 conference, the Court ordered that MasterCard: (1) complete its production from the files of Timko and Munson; (2) make production from the files of Child, Wankmueller, Rozwadowski and Doyle; and (3) produce current email for all of the employees for whom paper production was made. The Court reserved decision on the dispute over archived email.

Following the June 25 conference, the plaintiff and MasterCard agreed that, for each of the additional 11 employees from whom archived email is sought by plaintiff, MasterCard will either search for such archived email or will supply an affidavit

from the particular employee supporting MasterCard's contention that such employee is unlikely to have responsive archived email documents from the relevant time period.

VI. Trial Schedule

Defendants argue that the current trial schedule is overly ambitious, and urge an adjournment of the trial date from February 8, 1999 to October 2, 1999, with corresponding adjustment to the schedule's internal deadlines. The first scheduled trial date, set before this action was transferred to the Court's docket, was October 29, 1999. Upon transfer of the case, the defendants sought an adjournment of the trial date; the Court granted a three-month adjournment and set a trial date of February 8, 2000. Now defendants seek a further adjournment of approximately eight additional months, for a nearly one-year adjournment from the trial date as originally set. The Court is persuaded that some adjustment of the schedule is in order, but declines to grant the eight-month extension sought by defendants.

The Court hereby adjourns the trial date until June 5, 2000. The parties are directed to submit a revised stipulated schedule detailing internal deadlines, except that all pretrial motions and the joint pre-trial order shall be filed no later than May 15, 2000 and expert reports shall be exchanged simultaneously.[1]

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[1] The Court declines to accept defendants' request to stagger the submission of expert reports. The practice of requiring that plaintiff submit its expert reports before defendant reflects the judgment that, in the ordinary case, it makes sense for the plaintiff to identify its theories and bases for the lawsuit before the

Accordingly, the parties are directed to confer and to submit a revised stipulated schedule in conformity with the foregoing. The schedule should be submitted both to the Court and to Magistrate Judge Katz.

SO ORDERED:

/s/
Barbara S. Jones
UNITED STATES DISTRICT JUDGE

New York, New York
July 6, 1999

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defendant is required to refute them. Here, however, the parties have twice agreed to schedules whereby expert reports would be exchanged simultaneously. Moreover, the issues for these experts are well known to the parties from the several CID investigations as well as from prior litigation involving Visa USA. Given the parties' familiarity with the underlying issues and with the issues to be addressed by experts, there is no need to burden the schedule with an extended period of time during which defendants' experts craft reports to rebut plaintiff's experts. The same purposes can be met by the parties' inclusion in the schedule of a brief period for preparation and submission of expert rebuttal reports.