



U.S. Department of Justice

Antitrust Division

Liberty Place Building
325 7th Street, NW; Suite 300
Washington, DC 20530

August 13, 2001

Via Facsimile

The Honorable Barbara S. Jones
United States District Judge
Southern District of New York
40 Centre Street, Room 2103
New York, NY 10007

Re: United States v. Visa U.S.A., et al.
98 Civ. 7076 (BSJ)

Dear Judge Jones:

Pursuant to the Court's July 28, 2001 Order, and the Amended Stipulated Protective Order, the Government provided notice of the Court's July 28 Order to all third parties that had potential confidentiality claims concerning sealed testimony proffered by the Government, including sealed oral testimony at trial, deposition designations, and citations in the Government's expert witness' written direct testimony. Because the Government does not possess detailed information about each party's current business activities, it is ill-suited to analyze the merits of each third party's confidentiality claims. Consequently, the Government instructed each of the affected third parties to contact the Court directly if the third party had continuing objections to the unsealing of testimony.

The Government maintains the position set forth in its June 7, 2000 letter to Your Honor: that the standard articulated by Judge Edelstein in *United States v. International Business Machines Corp.*, 67 F.R.D. 40 (S.D.N.Y. 1975), should be applied here. Under that standard, the applicant seeking to protect its confidential information bears the burden of demonstrating "a clearly defined and very serious injury" that would result from public disclosure. *See also, Bijan Designer for Men, Inc. v. Katzman*, 1997 WL 51504 (S.D.N.Y. 1997) (Your Honor applies the same standard in a private Sherman Act suit). As the Second Circuit has noted, however, the strong weight to be accorded the public right of access to judicial documents is largely derived from the role those documents play in determining litigants' substantive rights. *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995). Accordingly, information that directly affects a court's adjudication should, absent exceptional circumstances, be subject to public scrutiny. *Joy v. North*, 692 F.2d 880 (2d Cir. 1982), *cert. denied sub nom. Citytrust v. Joy*, 460 U.S. 1051 (1983).

As of this afternoon, the Government is only aware of specific objections made by American Express, Bank of America, Capital One, and Citigroup. Based on a review of the specific testimony identified by those parties, the Government believes that a small portion reveals

The Honorable Barbara S. Jones
August 13, 2001
Page 2

current, competitively sensitive information and should therefore remain under seal. The Government identifies that testimony in the attachment to this letter. Since the defendants have not informed the Government of any testimony they believe should remain under seal, the Government cannot state a position on the need for continued confidential treatment of any such testimony.

Respectfully,

Scott A. Scheele
Trial Attorney
Civil Task Force

Attachment

cc: Eugene Bannigan, Esq. (via Facsimile)
Kenneth Gallo, Esq. (via Facsimile)
M. Laurence Popofsky, Esq. (via Facsimile)

The Honorable Barbara S. Jones
 August 13, 2001
 Page 3

United States v. Visa U.S.A. et al., 98 Civ. 7076 (BSJ)
 Attachment to letter to The Honorable Barbara Jones, dated August 13, 2001.

TESTIMONY THE GOVERNMENT BELIEVES SHOULD REMAIN UNDER SEAL¹

Party Asserting Confidentiality Claim	Testimony That Should Remain Under Seal	Reason Why Testimony Should Remain Under Seal
American Express	Stephen McCurdy Tr. 1093:1-17	American Express' internal target margins for bank issuer deals
	Stephen McCurdy's June 2000 Declaration (PX 1258) paragraph 2 (5th-10th lines) and paragraph 5 (bullet points)	Contains terms of recent and on-going specific negotiations between American Express and various bank issuers
	Peter Wright Deposition Page 64, lines 11-19; Page 185, line 5-Page 187, line 6; Page 191, lines 14-21; and Page 195, line 25-Page 196, line 4	Lists banks with whom American Express is in current on-going (or recent) negotiations and contains specific terms and projections in those negotiations
Citigroup	John Reed deposition Page 85, lines 10-19; Page 88, line 7 - Page 89, line 1	Reflects terms of a current agreement between MasterCard and a member bank
Bank of America	Henry Fulton deposition Page 12, lines 15-19	Recent card acquisition strategy
	Henry Fulton Deposition Page 55, line 25-Page 56, lines 1-3	Recent marketing strategy
	George Phillips Deposition Page 124, lines 18-21	Recent strategic information

¹ Based solely on a review of confidentiality claims asserted by: American Express, Bank of America, Capital One, and CitiGroup.