U.S. Department of Justice

Antitrust Division

Liberty Square Building
450 Fifth Street, N.W.
Washington, DC 20530

July 14, 2011

VIA ECF

Honorable Nicholas G. Garaufis
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: *United States of America, et al. v. American Express Company, et al.*, Case No. 10-CV-04496 (NGG) (RER)

Dear Judge Garaufis:

The United States seeks entry of its proposed Final Judgment with Defendants MasterCard International Incorporated ("MasterCard") and Visa Inc. ("Visa"). Entry of the Final Judgment would be dispositive with respect to those Defendants. Accordingly, Individual Rule III.A.2 directs the United States to request a pre-motion conference; we hereby do so, although we note, as explained below, that a conference may not be necessary. We are of course prepared for such a conference should the Court so desire.

The proposed Final Judgment, which is attached hereto as Exhibit 1, may be entered at this time without further hearing if the Court determines that entry is in the public interest and is consistent with Fed. R. Civ. P. 54(b). The United States, Plaintiff States, and Defendants MasterCard and Visa have stipulated to entry of the proposed Final Judgment without further notice to any party or other proceedings. Non-settling Defendants American Express Company and American Express Travel Related Services Company, Inc. (together, "American Express") have informed the United States that they take no position on this motion. No party or member of the public has requested a hearing. As described below, the settling parties have satisfied all of the applicable requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("Tunney Act"). It is therefore appropriate for the Court to now make the public interest determination required by 15 U.S.C. § 16(e), and to determine whether entry of judgment is proper under Rule 54(b).

Procedural Background

The United States and seven Plaintiff States filed the Complaint in this case on October 4, 2010. Simultaneously, the Plaintiffs filed a proposed Final Judgment as to Defendants MasterCard and Visa and a Stipulation consenting to entry of the proposed Final Judgment after compliance with the Tunney Act (Docket No. 4). On December 21, 2010, the Plaintiffs filed an Amended Complaint adding eleven additional States as Plaintiffs. The settling parties also stipulated to an "Addendum to Final Judgment" that included those States in the proposed Final Judgment (Docket No. 55).[1]

As required by the Tunney Act, the United States filed on October 4, 2010, a Competitive Impact Statement explaining the settlement with MasterCard and Visa; published the proposed Final Judgment and Competitive Impact Statement in the *Federal Register* on October 13, 2010 (75 Fed. Reg. 62858); and published summaries of the terms of the proposed Final Judgment and Competitive Impact Statement, together with directions for the submission of written public comments, in the *Washington Post* and the *New York Post* for seven days beginning on October 11, 2010 and ending on October 17, 2010. During the 60-day period for public comments, which ended on December 16, 2010, the United States received six comments.

The United States filed its Response to Public Comments and the complete set of comments with this Court on June 14, 2011. In an Order issued June 22, 2011, the Court excused the United States from publishing the substance of the public comments in the *Federal Register*, pursuant to 15 U.S.C. § 16(d). On July 1, 2011, the United States published in the *Federal Register* its Response to Public Comments and a notice stating that the United States received six public comments and providing the address where those comments may be found on the Department of Justice's website.[2] 76 Fed. Reg. 38700 (July 1, 2011). On July 14, the United States filed the certification and proof of publication required by the Court's June 22 Order. The United States has attached as Exhibit 2 hereto a Certificate of Compliance demonstrating that all of the procedural requirements of the Tunney Act have now been satisfied.

Grounds for the Motion

A. The Proposed Final Judgment Satisfies the Public Interest Standard of the Tunney Act

Before entering the proposed Final Judgment, the Court must determine that "entry of such judgment is in the public interest." 15 U.S.C. § 16(e)(1). In the Competitive Impact Statement filed on October 4, 2010 and the Response to Public Comments filed on June 14, 2011, the United States explained how the proposed Final Judgment addresses the harm to competition caused by MasterCard's and Visa's

[1] On April 8, 2011, the State of Hawaii withdrew as a Plaintiff and is therefore no longer a party to the settlement with MasterCard and Visa. The Final Judgment submitted herewith has been modified accordingly.

[2] The public comments may be found at: http://www.justice.gov/atr/cases/americanexpress.html.

challenged merchant restraints. The Competitive Impact Statement and the Response to Public Comments also describe the meaning and proper application of the public interest standard under the Tunney Act, and the United States incorporates those documents herein by reference.

The public, including affected competitors and customers, has had the opportunity to comment on the proposed Final Judgment as required by law. As described more fully in the Competitive Impact Statement and the Response to Public Comments, the proposed Final Judgment is within the range of settlements consistent with the public interest, and there has been no assertion that the proposed settlement constitutes an abuse of the United States' discretion. Accordingly, the Court should find that entry of the proposed Final Judgment is appropriate under 15 U.S.C. § 16(e).

B. Entry of the Proposed Final Judgment is Consistent With Rule 54(b)

Because the proposed Final Judgment applies to "fewer than all" of the parties in this action, and American Express remains an active litigant, entry of the proposed Final Judgment must satisfy Rule 54(b) of the Federal Rules of Civil Procedure. Under Rule 54(b), the Court may direct entry of the proposed Final Judgment "only if the court expressly determines that there is no just reason for delay." Fed. R. Civ. P. 54(b). Whether to enter a judgment under Rule 54(b) is "left to the sound judicial discretion of the district court." *Curtiss-Wright Corp. v. Gen'l.. Elec. Co.*, 446 U.S. 1, 8 (1980). In making its determination, the court "must take into account judicial administrative interests as well as the equities involved." *Id.* "Consideration of the former is necessary to assure that application of the Rule effectively preserves the historic federal policy against piecemeal appeals." *Id.* (quotation omitted). *Accord O'bert v. Vargo*, 331 F.3d 29, 40-41 (2d Cir. 2003) ("The matter of whether to direct the entry of a partial final judgment in advance of the final adjudication of all of the claims in the suit must be considered in light of the goal of judicial economy as served by the 'historic federal policy against piecemeal appeals.'") (quoting *Curtiss-Wright*). Here, these factors weigh decisively in favor of entering the proposed Final Judgment.

First, this case does not present a risk of piecemeal appeals. The proposed Final Judgment resolves all pending claims against MasterCard and Visa and there is nothing further for the Court to adjudicate with respect to these Defendants. Moreover, neither settling Defendant has preserved the right to appeal from the Final Judgment. As the Second Circuit has held, "[a]ppeal from a consent judgment is generally unavailable on the ground that the parties are deemed to have waived any objections to matters within the scope of the judgment." *New York ex rel. Vacco v. Operation Rescue Nat'l*, 80 F.3d 64, 69 (2d Cir. 1996). "[F]or a party to consent to a judgment and still preserve his right to appeal, he must reserve that right unequivocally, as it will not be presumed." *LaForest v. Honeywell Int'l, Inc.*, 569 F.3d 69, 73 (2d Cir. 2009) (citation omitted). Because neither MasterCard nor Visa has sought to preserve a right to appeal here, there is no risk of piecemeal appeals by multiple defendants.

Second, entry of the proposed Final Judgment as a Rule 54(b) judgment would promote judicial administration and efficiency. Entry would permit the full implementation of the terms of relief. Pursuant to the October 4, 2010 Stipulation, MasterCard and Visa have agreed to abide by the terms of the proposed Final Judgment pending its entry by the Court. However, several important provisions of the proposed Final Judgment, such as the promulgation of the new merchant rules pursuant to Section V, are contingent on entry of the Final Judgment by the Court. Therefore, the relief obtained by the proposed Final Judgment cannot be fully implemented until it is entered. Entry of the Final Judgment would also promote settlement and provide certainty and finality to the settling parties. In similar government antitrust actions, district courts (including in this district) have directed entry under Rule 54(b) of consent decrees involving fewer than all parties. *See, e.g.*, *New York v. Microsoft Corp.*, 231 F. Supp. 2d 203, 204-05 & n.1 (D.D.C. 2002); *Alaska v. Hoffman LaRoche, Inc.*, No. CIV A 01 1583, 2001 WL 1230932, at *2 (D.D.C. Aug. 3, 2001); *New York v. Am. Med. Ass'n*., No. 79 C 1732, 1980 WL 1869 (E.D.N.Y. June 9, 1980); *United States v. Bristol-Myers Co.*, 82 F.R.D. 655, 660-64 (D.D.C. 1979).[3]

For the foregoing reasons, the Court should find that there is no just reason for delay and direct entry of the Final Judgment pursuant to Rule 54(b).

Conclusion

For the reasons set forth in this letter, the Competitive Impact Statement, and the Response to Public Comments, the Court should find that the proposed Final Judgment is in the public interest and that there is no just reason to delay entry of the proposed Final Judgment under Rule 54(b). The United States respectfully requests that the Court direct entry of the proposed Final Judgment as soon as possible without further hearing.

Respectfully Submitted,

/s/Craig W. Conrath
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cc: via ECF to all counsel

[3] Rule 54(b) consent judgments involving fewer than all parties have also been entered in other types of government enforcement actions. *See, e.g., SEC v. Simone*, Civ. No. 07-3928, 2008 WL 3929461 (E.D.N.Y. July 30, 2008) (securities action); *United States v. Cannons Eng'g Corp.*, 720 F. Supp. 1027, 1052-53 (D. Mass. 1989) (CERCLA action).