

# 07-2824-cv

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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

VISA INTERNATIONAL CORP.,  
*Defendant,*

v.

MASTERCARD INTERNATIONAL INCORPORATED,  
*Defendant-Appellee,*

UNITED STATES OF AMERICA,  
*Plaintiff-Appellee.*

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

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**SUPPLEMENTAL BRIEF OF THE UNITED STATES  
IN RESPONSE TO AMICUS DISCOVER**

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**TABLE OF CONTENTS**

BACKGROUND ..... 1

ARGUMENT ..... 3

    A. Termination Rights ..... 4

    B. Other Provisions In Issuing Agreements ..... 7

CONCLUSION ..... 9

## TABLE OF AUTHORITIES

Cases:	Page
<i>Bano v. Union Carbide Corp.</i> , 273 F.3d 120 (2d Cir. 2001) .....	5
<i>Bogle-Assegai v. Connecticut</i> , 470 F.3d 498 (2d Cir. 2006) .....	7
<i>Discover Financial Services, Inc. v. Visa U.S.A., Inc.</i> , No. 04-cv-07844-BSJ (S.D.N.Y. Oct. 24, 2005) .....	1
<i>Greene v. United States</i> , 13 F.3d 577 (2d Cir. 1994) .....	7
<i>Olmstead v. Pruco Life Insurance Co. of N.J.</i> , 283 F.3d 429 (2d Cir. 2002) .....	5
<i>Preservation Coalition, Inc. v. Pierce</i> , 667 F.2d 851 (9th Cir. 1982) .....	6
<i>Resident Council of Allen Parkway Village v. U.S. Department of HUD</i> , 980 F.2d 1043 (5th Cir. 1993) .....	5
<i>Riverkeeper, Inc. v. Collins</i> , 359 F.3d 156 (2d Cir. 2004) .....	5
<i>United States v. ASCAP</i> , 341 F.2d 1003 (2d Cir. 1965) .....	8
<i>Universal City Studios, Inc. v. Corley</i> , 273 F.3d 429 (2d Cir. 2001) .....	5

## MISCELLANEOUS

16A Charles Alan Wright et al., <i>Federal Practice &amp; Procedure</i> § 3975.1 (3d ed. 1999) .....	5
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This Supplemental Brief is filed pursuant to the Court's Order of May 28, 2008, which authorized Discover Financial Services and DFS Services, LLC (collectively, "Discover") to file an amicus brief and invited the parties to file supplemental briefs in response.

## BACKGROUND

The Final Judgment resolved the government's civil antitrust enforcement action against Visa and MasterCard. Discover was not a party to that action, and the district court, per Judge Barbara Jones, rebuffed Discover's attempt to intervene in 2000. Order of Oct. 12, 2007, at 4 (entered Nov. 16, 2007) ("October 12 Order") (attached as an addendum to Visa's Supplemental Brief). Discover brought its own antitrust suit against Visa and MasterCard seeking damages on the basis of facts including those that led to both the Final Judgment and the SSF Order, and that suit also is pending before Judge Jones. See *Discover Fin. Servs., Inc. v. Visa U.S.A., Inc.*, No. 04-cv-7844-BSJ (S.D.N.Y. Oct. 24, 2005).

On January 10, 2005, MasterCard filed a motion to enforce the Final Judgment against Visa, pursuant to Section V.C, which expressly permits parties to the decree to seek orders for "enforcement or

compliance.” Final Judgment § V.C (A167). A Special Master issued a report on July 7, 2006, concluding that Visa’s Bylaw 3.14 violated the Final Judgment. After informing the parties in March 2007 of its decision to adopt the Special Master’s Report, the district court held oral argument on the proper remedy on April 23, 2007. SPA 6-7. On June 15, 2007, the district court issued the SSF Order, which granted early termination rights only if a bank converts its debit card portfolio to MasterCard, not to Discover.

At no time during the district court’s consideration of MasterCard’s motion did Discover seek to file a brief as amicus curiae to discuss the alleged violation, the proper remedy, or any other issue. And despite the adverse effects Discover claims the SSF Order will cause, Discover Br. 10, Discover did not timely renew its motion to intervene for purposes of seeking reconsideration of the SSF Order or the opportunity to appeal from it. Instead, it waited two months, until August 17, 2007, to move to intervene—well after Visa filed its notice of appeal on June 29, 2007—and even then, it asked the district court to re-open the proceeding rather than to permit it to intervene for purposes of appealing from the SSF Order. October 12 Order at 2. By

then, the district court had no choice but to deny Discover's motion to intervene for lack of jurisdiction. *Id.* at 3-4.

Discover then sought to intervene in this appeal and ask this Court to remand the case back to the district court so that the district court might consider the merits of Discover's motion to intervene and request for additional relief. On May 28, 2008, this Court denied Discover's motion to intervene but authorized Discover to file an amicus brief on appeal.

### **ARGUMENT**

Discover's brief is entirely beyond the proper role of an amicus curiae. It addresses none of the issues raised by the parties on appeal and instead argues three distinct issues of its own. Two of those issues are completely outside the scope of the proceeding below. This Court should not expand the scope of this appeal to encompass the issues Discover seeks to raise.

## A. Termination Rights

According to Discover, the “fundamental problem,” Discover Br. 2, with the SSF Order is that it allows a bank to terminate, without penalty, its current debit card issuing agreement with Visa if the bank enters into a new debit card issuing agreement with MasterCard but not if the bank enters into such an agreement with Discover. See SSF Order § II.B (SPA 40); Discover Br. 9-13. MasterCard in fact requested a remedy that included the broader termination rights Discover seeks, and the United States concurred. See 4/23/07 Hr’g Tr. 46. The district court, however, expressly rejected that aspect of MasterCard’s proposed remedy. SPA 34 n.35. Neither MasterCard nor the United States cross-appealed from the SSF Order. Thus, the issue of whether the SSF Order’s termination rights are too narrow is not before the Court in this appeal.<sup>1</sup>

Discover should not be permitted to expand the scope of the appeal. “Although an *amicus* brief can be helpful in elaborating issues properly presented by the parties, it is normally not a method for

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<sup>1</sup>Visa, of course, has challenged the termination rights as too broad and beyond the district court’s authority to order. Visa Br. 43-51.

injecting new issues into an appeal, at least in cases where the parties are competently represented by counsel.” *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 445 (2d Cir. 2001). See also *Olmstead v. Pruco Life Ins. Co. of N.J.*, 283 F.3d 429, 436 n.5 (2d Cir. 2002) (declining to consider an issue raised by amicus SEC “because an issue raised only by an *amicus curiae* is normally not considered on appeal”); *Bano v. Union Carbide Corp.*, 273 F.3d 120, 127 n.5 (2d Cir. 2001) (“an *amicus curiae* generally cannot expand the scope of an appeal to implicate issues that have not been presented by the parties to the appeal” (quoting *Resident Council of Allen Parkway Vill. v. U.S. Dep’t of HUD*, 980 F.2d 1043, 1049 (5th Cir. 1993)); 16A Charles Alan Wright et al., *Federal Practice & Procedure* § 3975.1, at 542 (3d ed. 1999).

The circumstances here are quite similar to those in *Riverkeeper, Inc. v. Collins*, 359 F.3d 156 (2d Cir. 2004), in which this Court declined to allow amicus Attorney General of Connecticut to raise arguments similar to arguments petitioner had made below but not pursued on appeal. *Id.* at 163 n.8. There is no reason to give Discover more latitude, especially when Discover was aware of the proceedings before

the district court, had every incentive to make known its view of the proposed remedy, but failed to act in a timely manner.

Discover chose not to seek leave to file an amicus brief when the district court was considering the scope of the remedy, and it inexplicably waited two months after the district court issued the SSF Order before moving to intervene, well after Visa had noticed its appeal. See p. 2, above. At that point, it belatedly moved not to intervene for purposes of appeal, but to re-open the SSF proceeding in the district court. October 12 Order at 2. Under the circumstances, allowing an amicus to expand the scope of the appeal would be particularly inappropriate. See *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 862 (9th Cir. 1982) (“The issue [amicus] seeks to raise was raised by the parties below and disposed of by the district court’s judgment. Had [appellant] wished to preserve this issue on appeal, it could easily have done so. It did not. . . . Had [amicus] wished to raise the issue properly in this case, it could have intervened instead of appearing as amicus. It did not. Therefore, the issue is not properly before us.”).

## B. Other Provisions In Issuing Agreements

Discover also asks this Court to declare void two provisions allegedly contained in some number of Visa debit card issuing agreements. Discover Br. 13-14. Neither the parties nor Discover raised any such issue below, and neither the Special Master nor the district court had any occasion to receive evidence regarding such agreements or to consider whether they violated the Final Judgment. Discover thus seeks to have this Court make fact findings based on evidence from its private case, never presented in this proceeding below. Not even the parties could properly raise such arguments on appeal here. See *Bogle-Assegai v. Connecticut*, 470 F.3d 498, 504 (2d Cir. 2006) (“it is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal” (quoting *Greene v. United States*, 13 F.3d 577, 586 (2d Cir. 1994))).

Moreover, the Court should reject Discover’s invitation to remand the case so that the district court may consider Discover’s claims in the first instance. Discover Br. 3. The Final Judgment is the result of a government antitrust enforcement action, and the United States is charged with enforcing it to ensure that it serves the public interest.

Nonparties, including private parties affected by the antitrust violation that the Final Judgment remedies, may pursue their private litigation, but they have no private cause of action to enforce the terms of the public antitrust decree. See *United States v. ASCAP*, 341 F.2d 1003, 1008 (2d Cir. 1965) (consent decree) (“the fact that the court retains jurisdiction in an antitrust action does not mean, unless the decree should expressly provide otherwise, that persons affected by the judgment, but not parties to it, can invoke the court’s jurisdiction to alter or enforce the terms of the decree”).

In denying Discover’s untimely motion to intervene, the district court recognized these principles and noted that the United States was actively investigating Discover’s concerns and that “[o]nce the United States gathers relevant evidence, it will determine whether to pursue further relief against defendants Visa and MasterCard for violating the Final Judgment.” October 12 Order at 6. The United States’ investigation continues today.

## CONCLUSION

This Court should not expand the scope of issues on appeal to include those in Discover's amicus brief.

Respectfully submitted.

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JULY 14, 2008

## CERTIFICATE COMPLIANCE WITH RULE 32(a)(7)

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 1,554 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect 10 in Century 14-point font.

Dated: July 14, 2008

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## ANTI-VIRUS CERTIFICATION

Case Name: United States v. Visa U.S.A. Inc.

Docket No: 07-2824-cv

Pursuant to Local Rule 32(a)(1)(E), I hereby certify that the Supplemental Brief Of The United States In Response to Amicus Discover submitted in PDF form as an e-mail attachment to [agencycases@ca2.uscourts.gov](mailto:agencycases@ca2.uscourts.gov) in the above-referenced case, was scanned using Symantec AntiVirus Full Version 9.0.2.1000 (with updated virus definition file as of June 29, 2008), and found to be VIRUS FREE.

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## CERTIFICATE OF SERVICE

I certify that on July 14, 2008, two true and correct copies of the Supplemental Brief Of The United States In Response To Amicus Discover were served by Federal Express, overnight delivery, and by electronic mail on:

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