UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	)	
	)	**98 Civ. 7076 (BSJ)**
Plaintiff,	)	
	)	
v.	)	
	)	
VISA U.S.A. INC., VISA INTERNATIONAL CORP., AND MASTERCARD INTERNATIONAL INCORPORATED,	)	
Defendants.	)	

GOVERNMENT'S MEMORANDUM IN OPPOSITION
TO DEFENDANTS' MOTION TO ALTER OR AMEND THE FINAL JUDGMENT

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I. INTRODUCTION

Plaintiff United States of America (hereinafter, "the Government") opposes Visa U.S.A. Inc.'s and MasterCard International Incorporated's (collectively, "defendants") motion to alter or amend paragraph III(D) of this Court's Final Judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure (and Local Rule 6.3). Paragraph III(D) of the Final Judgment allows a bank that enters into an agreement to issue Discover or American Express cards to rescind its dedication agreement with defendants, beginning on the effective date of the Final Judgment and ending either two years from the effective date, or, if timely appealed, two years from the final order of the highest-level appellate court. Defendants' motion should be denied for three reasons: (1) the motion is untimely because defendants could and should have raised this argument prior to entry of the Final Judgment; (2) rather than penalizing defendants for exercising their right to appeal, the Court's order provides a prompt and effective remedy for defendants' antitrust violations in the least burdensome manner possible; and (3) the relief is rationally related to remedying defendants' unlawful behavior and is well within the bounds proscribed by the Due Process and Equal Protection Clauses.

II. DEFENDANTS COULD AND SHOULD HAVE MADE THIS ARGUMENT BEFORE THE FINAL JUDGMENT WAS ISSUED

The decision whether to grant a Rule 59(e) motion is within the sound discretion of the district court.[1] "Alteration or amendment of a prior decision is warranted only where controlling

[1] *Wells Fargo Fin. Inc. v. Fernandez*, 2001 WL 345226, *1 (S.D.N.Y. Apr. 9, 2001).

law has changed, new evidence is available, and/or clear error must be corrected or manifest injustice prevented."[2] "The standard for granting a Rule 59(e) motion is strict and reconsideration is generally denied as *a Rule 59(e) motion is not a vehicle for reargument or asserting arguments that could and should have been made before judgment issued*."[3]

The argument defendants make in their Rule 59(e) motion — that paragraph III(D) is clear error or manifestly unjust — could and should have been made before the Final Judgment was entered. In determining whether a Rule 59(e) motion simply asserts arguments that could and should have been made before judgment issued, the appropriate question is when defendants were on notice that such an issue existed. In this case, defendants have been aware for over one year that the Government's proposed relief contemplated a rescission period for the dedication agreements, and that this relief envisioned a two-tier approach in the event of an appeal. *See* Government's Reply to Defendants' and Amicus Curiae Memoranda Concerning Remedies filed on October 4, 2000.[4]

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[2] *Katz v. Berisford Int'l PLC,* 2000 WL 1760965, at *5 (S.D.N.Y Nov. 30, 2000) (internal quotation and citation omitted).

[3] *Wells Fargo,* 2001 WL 345226 at *1 (emphasis added, internal quotations and citations omitted).

[4] The Government first proposed a rescission period for defendants' dedication agreements on August 11, 2000. (*Plaintiff's Memorandum in Support of its Proposed Relief* at 7)(rescission period should extend for two years). American Express and Discover sought *to extend* the period of time during which such dedication agreements be voidable. (*Discover's Amicus Curiae Brief on Remedy* at 52-53)(seeking to extend period to three years)(filed September 22, 2000); *(Brief of American Express Company as Amicus Curiae* at 43)(same)(filed September 22, 2000). The Government then submitted a Reply to Defendants' and Amicus Curiae Memoranda Concerning Remedies, on October 4, 2000, in which it proposed language substantially similar to the language contained in paragraph III(D) of the Court's Proposed Final Judgment, issued on October 9, 2001.

Moreover, it is absolutely clear that defendants were made aware of the *precise issue* raised by their motion when the Government filed its Reply to Defendant's Comments Concerning the Proposed Final Judgment ("Reply") on October 29, 2001, almost a month before the Court issued its Final Judgment. In its Reply, the Government explicitly advocated that the rescission period commence upon entry of the Final Judgment and extend for two years after the finality of any appeals.[5] In fact, in paragraph III(D) of the Final Judgment, the Court uses almost the exact same language the Government suggested to the Court in its Reply. Thus, there can be no dispute that, at least as of October 29, 2001, defendants were on notice that the rescission period could extend for two years after the uncertainty arising from an appeal had been lifted.

On November 1, 2001, three days after the Government provided its Reply to the Court and the defendants, Visa made a final submission concerning the Proposed Final Judgment to the Court.[6] The express purpose of this filing was to comment on the reply submissions filed by the Government and third parties. Nothing in Visa's submission addressed the rescission period, although Visa had the opportunity to do so. Now that the Final Judgment has been issued, defendants belatedly seek to raise the issue for the first time. Courts routinely deny Rule 59(e) motions made under similar circumstances.[7]

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[5] Government's Reply To Defendants' Comments Concerning the Proposed Final Judgment at 7 (filed October 29, 2001).

[6] Letter to the Honorable Barbara S. Jones from M. Laurence Popofsky, dated November 1, 2001.

[7] *See In re Aquaculture Found.*, 183 F.R.D. 64, 66 (D. Conn. 1998) (denying plaintiff's Rule 59(e) motion to resurrect complaint by asserting supplemental jurisdiction, in part, because rule is not "a basis for asserting arguments that could and should have been made before judgment issued"); *F.D.I.C. v. World University Inc.*, 978 F.2d 10, 16 (1st Cir. 1992) (affirming district court's denial of defendant's Rule 59(e) motion when movant raised the "argument for the first

III. PARAGRAPH III(D) OF THE FINAL JUDGMENT PROVIDES PROMPT AND EFFECTIVE RELIEF IN THE LEAST BURDENSOME WAY

Having found antitrust liability, a court is empowered to issue "such orders and decrees as are necessary or appropriate" to achieve the objectives of the antitrust laws.[8] The goal of equitable relief is not only to stop illegal practices, but to "effectively pry open to competition a market that has been closed by defendants' illegal restraints."[9] Relief may go beyond the proven conduct to practices connected with acts found to be illegal.[10] While "relief must not be punitive," courts are "authorized, indeed required, to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests."[11] Thus, the Court has large discretion to tailor its relief to fit the circumstances of a particular case.[12]

Paragraph III(D), coupled with the other provisions of the Final Judgment, provides prompt and effective relief, designed to give consumers the benefits of open network-level competition. Rather than penalizing defendants, the Court's relief is less burdensome than the most viable alternative — a prolonged rescission period that would take effect immediately yet

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time" in its 59(e) motion, and could have made its argument before the district court entered its judgment, but did not); *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998)(affirming district court's denial of plaintiff's Rule 59(e) motion when movant "argue[d] that they did not raise the issue because they never thought the district court would determine otherwise").

[8] *Northern Securities Co. v. United States,* 193 U.S. 197, 344 (1904).

[9] *International Salt Co. v. United States*, 332 U.S. 392, 401 (1947).

[10] *United States v. United States Gypsum Co.,* 340 U.S. 76, 88-89 (1950).

[11] *United States v. E.I. Du Pont de Nemours & Co.,* 366 U.S. 316, 326 (1961).

[12] *International Salt,* 332 U.S. at 400.

provide enough time for banks to negotiate with American Express and Discover after the finality of an appeal.

The Court found that the large number of dedication agreements defendants have already entered into with their members have altered the competitive landscape by foreclosing American Express and Discover from a large portion of the card issuing banks.[13] Thus, to allow American Express and Discover to compete with Visa and MasterCard on an equal footing, the Court's relief permits banks entering an agreement with Discover and/or American Express, for a limited time, to rescind their dedication agreements without penalty.

Due to the nature of competition, not all banks are likely to respond to the Final Judgment in the same way. Some banks may refrain from entering an agreement with American Express and/or Discover while an appeal is pending due to the uncertainty created by an appeal, including the possibility that the Second Circuit would modify the Final Judgment to the banks' benefit. Other banks may believe the first-mover competitive advantage outweighs the risks of an uncertain outcome on appeal. Thus, adequate relief requires that banks be able to rescind their dedication agreements as soon as possible, *and* for a reasonable time period after any uncertainty arising from an appeal was resolved. The Court's remedy balances these interests in the least burdensome manner possible.

The only other way in which the Court could accommodate both of these interests would be to adopt a significantly longer term for paragraph III(D) that would begin upon the effective date of the Final Judgment and end at a time when the Court could be certain banks would have had adequate opportunity to enter agreements free of the uncertainty of appeal. Given the

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[13] *United States v. Visa U.S.A. et al*., 163 F.Supp.2d 322, 408-09 (S.D.N.Y. 2001)

uncertainty as to how long the appeals process might take (including the possibility of an eventual petition for certiorari)[14] a term of five years likely would be necessary.[15] Thus, rather than exacting a penalty on defendants, the Court's decision to tailor paragraph III(D) more precisely to the public interest limits the window of time when defendants' members can rescind their dedication agreements to two years after this case ends, rather than the five years that would otherwise be necessary.

IV. PARAGRAPH III(D) IS RATIONALLY RELATED TO NECESSARY RELIEF AND THEREFORE IT IS WELL WITHIN THE BOUNDS PROSCRIBED BY THE CONSTITUTION

Defendants appear to assert that any burden imposed on their ability to appeal — however slight — is constitutionally impermissible.[16] Defendants' argument is without merit. Any minimal

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[14] By filing the instant motion, for example, defendants have prolonged the appeals period by re-setting the appeals clock until the Court rules on the motion. Fed.R. App. P. 4(a)(4)(A)(iv).

[15] An unconditional five-year rescission period is clearly within the Court's authority. Such a term is consistent with the belief that defendants' members should have two years after all appeals are resolved to rescind the dedication agreements. Consumer welfare, however, mandates implementation of the Court's initial "intention that the recission period begin on the effective date of the Final Judgment *regardless of whether the parties appeal.*" Opinion at 8 (emphasis in original).

[16] Defendants repeatedly cite *Worcester et al. v. Commissioner of Internal Revenue*, 370 F.2d 713 (1st Cir. 1966) for the proposition that a court cannot "put a price on an appeal" and that any burden is unacceptable if it places the defendants in "the dilemma of making an unfree choice." Mem. at 8 & 9 (citing *Worcester*, 370 F.2d at 718). First, *Worcester* involved the possible denial of a fundamental right (defendant in a previous criminal case faced possible jail time, rather than probation if he appealed). Yet, as discussed below, the Due Process and Equal Protection clauses do not *per se* condemn *any* burden on appeal; rather, they mandate a balancing of interests under the appropriate legal framework. This point is made clear in *Adsani v. Miller*, 139 F.3d 67, 76-77 & n.10 (2d Cir. 1998) — a controlling case defendants fail to cite — in which the Second Circuit refused to read *Worcester* as referring to an "absolute inability of the courts to set costs on appeal." Instead, a condition is condemned only if it is found to be "*unacceptably* burdensome" as analyzed under the Due Process and Equal Protection tests. *Id.* Defendants do not even attempt to articulate the contours of these tests, much less demonstrate how the Final

burden caused by paragraph III(D) on defendants' appeal-related decision-making process is well within the bounds prescribed by the Equal Protection and Due Process clauses. The Supreme Court has repeatedly permitted limitations and restrictions on a civil litigant's right to appeal so long as the restraint: (1) is rationally related to a legitimate interest, and (2) does not impact a fundamental liberty or a protected class of litigants.[17] In examining whether a restraint on a civil litigant's right to appeal violates the Constitution, the Second Circuit has analyzed whether the restraint creates a "substantial barrier" that is "unacceptably burdensome," making an appeal a "meaningless ritual."[18] Defendants have not even attempted to argue that paragraph III(D) imposes such a burden.

Defendants rely on criminal cases, such as *Griffin v. Illinois*, to support their motion and then claim, without citation, that "the principle applies in both criminal and civil contexts."[19] Contrary to defendants' arguments, such cases are wholly unhelpful, and even misleading, because the Supreme Court has explicitly held that "this Court has not extended *Griffin* to the broad array of civil cases."[20] Defendants' reliance on deportation cases is similarly misplaced because in each of those cases the alien's decision to appeal would serve to subject the alien to a form of bodily

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Judgment fails their requirements.

[17] *United States v. Kras*, 409 U.S. 434, 444-47 (1973); *Ortwein v. Schwab*, 410 U.S. 656, 659-60 (1973).

[18] *Adsani v. Miller*, 139 F.3d 67, 76 n.10 & 79 (2d Cir. 1998)*; Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1152 (2d Cir. 1986), *rev'd on other grnds*, 481 U.S. 1 (1987).

[19] *Defendants' Motion To Alter or Amend The Final Judgment* at 7.

[20] *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996).

restraint.[21] The Supreme Court has held that "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause . . . "[22] The defendants' interests in appealing an ordinary civil case simply "do not rise to the same constitutional level"[23] as the interests involved in the cases upon which they rely.[24]

In fact, there are numerous instances where the Supreme Court has upheld limitations on a civil litigant's right to appeal. In *Ortwein v. Schwab*, for example, the Supreme Court held that a statute requiring a filing fee to be paid by indigent welfare recipients seeking to appeal an adverse welfare decision did not violate the Equal Protection or Due Process Clauses.[25] The Court also

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[21] In each case, voluntary departure — a process that permits an alien to select his or her destination — was contingent upon a waiver of appeal. *See Contreras-Aragon v. INS*, 852 F.2d 1088, 1090 & 1095 (9th Cir. 1988); *Ballenilla-Gonzalez v. INS*, 546 F.2d 515, 521-522 (2d Cir. 1976). Thus, to appeal, the defendants would have to accept the prospect of being forcibly transported to a country not of their choosing.

[22] *Foucha v. Louisiana*, 504 U.S. 71, at 80 (1992) (citing *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982)). Defendants in deportation cases are not further from the heart of the 14th Amendment because they involve aliens, as courts have held that pre-deportation aliens possess "substantive due process rights." *See, e.g., Doherty v. Thornburgh*, 943 F.2d 204, 209 (2d Cir. 1991). *See also, Danh v. Denmore*, 59 F. Supp.2d 994, 1001 (N.D. Cal. 1999) ("Nonetheless, the fundamental right to be free from bodily restraint is not reserved exclusively for citizens; rather, 'all persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth] amendments.'") (citing *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) and *Harisiades v. Shaughnessy*, 342 U.S. 580, 586 & 587 n. 9 (1952)).

[23] *Kras*, 409 U.S. at 445 (1973) ("Kras' alleged interest in the elimination of his debt burden . . . does not rise to the same constitutional level [as the marital relationship interests restrained in the denial of judicial access in *Boddie*].")

[24] *Nickens v. Melton*, 38 F.3d 183, 185 n.5 (5th Cir. 1994) ("We note that the interest here at stake (the right to appeal a civil damage suit) is not as fundamental as, for example, marriage or liberty (in the sense of freedom from imprisonment)."); *see also, Ortwein v. Schwab*, 410 U.S. 656, 659 (1973) ("we see no fundamental interest that is gained or lost depending on the availability of [an appeal of an adverse welfare decision]") (internal quotation omitted).

[25] 410 U.S. 656 (1973).

upheld a similar restraint, under a Due Process and Equal Protection challenge, for a filing fee requirement to secure a discharge in bankruptcy.[26] In each case the Court held the parties did not have a "fundamental interest" in a civil appeal. Accordingly, no heightened level of scrutiny was warranted under the Due Process clause.[27] Similarly, in each case, the Court held the applicable equal protection standard merely requires that any resulting discrimination be rationally justified.[28]

Second Circuit precedent indicates that only the most significant barriers to a civil litigant's right to appeal will be constitutionally invalid. In *Texaco Inc. v. Pennzoil Co.*, the court held that the Texas law requiring Texaco to post a $12 billion supersedeas bond, which would produce a major "catastrophe," including bankrupting Texaco,[29] was irrational and would reduce the appeal to a "meaningless ritual" by denying Texaco the means to press its appellate argument.[30] Accordingly, the Second Circuit held that Texaco had established a fair ground for litigation on the issue of whether the bond requirement denied it due process.[31]

In *Adsani v. Miller*, the Second Circuit upheld the constitutionality of a costs-of-appeal bond requirement imposed upon an unsuccessful Copyright Act plaintiff.[32] The plaintiff

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[26] *Kras*, 409 U.S. at 444-47 (1973).

[27] *Ortwein*, 410 U.S. at 659-60; *Kras*, 409 U.S. at 445-47.

[28] *Id*.

[29] *Texaco Inc.*, 784 F.2d at 1152.

[30] *Id.* at 1153-54.

[31] *Id.* at 1153-55.

[32] 139 F.3d 67 (2d Cir. 1998)

maintained that the enormous cost of the appeal bond penalized her for exercising her right to an appeal. In rejecting the plaintiff's position, the Second Circuit held that, absent evidence of an inability to pay the bond, the bond requirement did not impose an impermissible barrier to appeal.[33] The *Adsani* court held that, under the relevant case law, a condition placed on a civil litigant's right to appeal is constitutionally valid so long as it is not "unacceptably burdensome" such that it erects an impermissible "barrier" to appeal.[34]

In this case, there simply is *no* basis for defendants to claim that the additional time period for relief imposes an unacceptably burdensome barrier, reducing an appeal to a "meaningless ritual." Defendant's sole argument is an unsubstantiated statement that the "marketplace disruption Visa and MasterCard will inevitably confront is less if they accept the judgment without challenge."[35] Defendants do not define or characterize this "marketplace disruption" and do not explain how any disruption resulting from an issuer exercising its rights results in a significant burden. No material disruption exists. The Court's order provides for the equitable return of any funds paid to the issuer but not yet earned, and thus defendants will not suffer inequitable damages. Thus, as in *Adsani*, defendants have not put forth *any* evidence that there is an impermissible burden placed on their right to appeal. Accordingly, defendants' motion should be denied.

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[33] *Id.* at 79.

[34] *Id.* at 76 n.10 & 79; *see also*, *Tri-Star Pictures, Inc. v. Unger*, 32 F. Supp.2d 144, 148-49 (S.D.N.Y. 1999), *aff'd*, 198 F.3d 235 (upholding constitutionality of appellate bond requirement).

[35] *Defendants Motion to Alter or Amend The Final Judgment* at 6.

V. CONCLUSION

For the foregoing reasons, the Government respectfully requests the Court to deny defendants' motion.

Respectfully submitted,

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Dated: December 20, 2001
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CERTIFICATE OF SERVICE

I certify that on December 20, 2001, a true and correct copy of the Government's Opposition to Defendant's Motion to Alter or Amend the Final Judgment was served upon the counsel listed below via Federal Express, overnight delivery.

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