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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

UNITED STATES OF AMERICA,

Plaintiff
v.

VISA INC. and PLAID INC.,

Defendants.

Case No.: 4:20-cv-07810-JSW

PLAINTIFF UNITED STATES'
STATEMENT IN SUPPORT OF
ADMINISTRATIVE RELIEF FOR
AN EXPEDITED CASE
MANAGEMENT CONFERENCE

Judge: Hon. Jeffrey S. White

1 The United States does not object to an expedited case management conference in this
2 matter as the Court finds appropriate. Defendants, however, have refused to meaningfully engage
3 on a case schedule and failed to properly seek a joint stipulation in support of its administrative
4 motion under Civil Local Rule 7-11(a). Accordingly, the United States requests the Court order
5 all parties to confer and file a Joint Case Management Statement pursuant to Local Rule 16-9 and
6 this Court's standing order in advance of any expedited Case Management Conference.

7 Defendants propose an infeasible fifteen-week pre-trial period that is out of step with this
8 district's practice. Defendants' schedule is significantly faster than schedules adopted in the vast
9 majority of merger cases – cases that involved fewer legal claims in less complex industries and
10 did not occur during a global pandemic that will present its own unique challenges, particularly in
11 obtaining discovery from third parties. Defendants' proposal for a highly truncated discovery
12 period reneges on the parties' written agreement that the United States would significantly curtail
13 its pre-complaint investigation in exchange for reasonable discovery in litigation. Defendants have
14 either ignored or rejected each of the United States' invitations to narrow the issues at stake or to
15 streamline discovery to accommodate a reasonable shorter time to trial. For example, Defendants
16 both rejected limits on the total number of experts and simultaneously proposed a schedule giving
17 the parties only two days to respond to rebuttal expert reports. Moreover, Defendants are
18 demanding prematurely that the United States produce its investigative file without the benefit of
19 a protective order or discovery request despite impermissibly withholding critical relevant
20 documents from that file for months based on unsubstantiated privilege claims.

21 Rushing to trial and depriving the United States of adequate discovery will harm the
22 American public by impeding the government's case against a monopolist. Accordingly, the
23 United States proposes a trial start date of September 7, 2021. This date is appropriately fast – a
24 mere ten months after the complaint was filed – while allowing the United States adequate time to
25 discover and properly present relevant evidence to this Court.

26 BACKGROUND

27 The United States filed its complaint in this matter on November 5, 2020, challenging
28 Visa's acquisition of Plaid under both Section 2 of the Sherman Act, 15 U.S.C. § 2 ("Section 2"),

1 and Section 7 of the Clayton Act, 15 U.S.C. § 18 (“Section 7”). Five days after filing, on November
2 10, the parties met telephonically to discuss various case management issues. Declaration of
3 Meagan K. Bellshaw (“Bellshaw Decl.”) ¶ 1. During that conference, Defendants proposed a trial
4 start date of late February or early March. *Id.* The next day, November 11, counsel sent a letter
5 purporting to memorialize the parties’ conversation and proposing a trial start date of February 23,
6 2021. Dkt. 42-1 (Decl. of Steven C. Sunshine in Supp. of Defs.’ Admin. Mot. for Expedited Case
7 Mgmt. Conf. Ex. B) (“Sunshine Decl.”) Ex. B. Defendants did not provide any interim deadlines
8 to detail how a fifteen-week pre-trial schedule would work, and did not respond to the United
9 States’ invitation to narrow the issues to accommodate a faster trial schedule.

10 On Friday, November 13, following reassignment from Magistrate Judge Westmore to
11 Judge Freeman (Dkt. 32), counsel for the United States promptly sent Defendants a draft joint case
12 management statement proposing a trial start date of September 7, 2021, and setting forth a
13 complete list of interim deadlines, proposed limitations on discovery, and streamlined pre-trial
14 procedures, among other provisions. Sunshine Decl. Ex. C.

15 Two days later, in a Sunday afternoon letter, without responding to the United States’
16 proposed case management statement, Defendants declared the parties at an impasse regarding the
17 trial date and demanded that the United States agree to join an administrative motion for an
18 expedited case management conference within twenty-four hours. Sunshine Decl. Ex. D. The
19 United States informed Defendants that the motion was premature given that Defendants had not
20 responded to the United States’ proposed schedule; that the parties were still negotiating and
21 should continue to negotiate the proposed scheduling order, including the many elements that
22 would determine the feasibility of a particular trial date; and that the United States was unclear as
23 to the scope of Defendants’ proposed motion. *Id.* Ex. E. The United States requested a meet and
24 confer to better understand the relief Defendants were seeking. *Id.* In response, Defendants
25 provided edits to the United States’ draft scheduling order and reasserted that the parties were at
26 an impasse regarding the trial start. *Id.* The next day, following reassignment of the matter from
27 Judge Freeman to this Court, Defendants filed the instant motion.

ARGUMENT

Visa is a monopolist seeking to maintain its market dominance by buying Plaid before Plaid has the chance to successfully compete against Visa’s online debit business. The United States’ allegations – that the merger violates both Section 2 and Section 7 – are squarely in line with traditional antitrust jurisprudence, such as the seminal *Microsoft* decision, recognizing that dominant firms should not be permitted to squash nascent competition before it has a chance to take root. *See, e.g., United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001) (en banc) (per curiam) (“[I]t would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will...”); Areeda & Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 912b (5th ed. 2020) (“But when the dominant firm in the market has a market share satisfying the Sherman Act § 2 standards for monopoly or attempt, a ‘lessening’ of competition is not essential to illegality. Such a merger tends to maintain a monopoly by cutting off an avenue of future competition before it has had a chance to develop. As a result, condemnation under § 2 is appropriate.”)

By their nature, antitrust cases involve complex legal, factual, and economic questions. Numerous issues likely will be before the Court, including Visa’s monopoly power and its durability, the definition of the relevant product market, the likelihood that Plaid would enter the market, and the competitive harm in that market if Visa were to prevent Plaid from doing so. The government substantially curtailed the scope of its pre-complaint investigation at Defendants’ request – in exchange, Defendants agreed not to make the exact arguments they are making before this Court, namely that the government’s pre-litigation investigation should prevent reasonable post-complaint discovery or that any investigation was sufficient to ready the United States for trial. Bellshaw Decl. Ex. A at §IV(B). The United States now needs time to conduct appropriate discovery and to develop admissible evidence on each of these issues.

Defendants are correct that antitrust trials involving acquisitions typically proceed at an accelerated pace, and the United States’ proposed trial schedule is structured accordingly. A September 7, 2021, start date is consistent with the scheduling order in the Department of Justice’s most recent case challenging an acquisition under Section 2, *United States v. United Continental*

1 *Holdings*, No. 15-cv-07992-WHW-CLW (D.N.J. 2015, Dkt. 24) (224 days between filing the
 2 complaint and trial), and the last merger trial it litigated in the Northern District of California,
 3 *United States v. Bazaarvoice*, No. 13-cv-00133-EMC (N.D. Cal. 2013, Dkt. 29) (243 days), and is
 4 far faster than the median time to trial for civil cases in this district (approximately 890 days),
 5 *Federal Court Management Statistics, Northern District of California* (June 30, 2020), available
 6 at <https://www.uscourts.gov/statistics-reports/federal-court-management-statistics-june-2020>. In
 7 contrast, Defendants' proposed schedule, 110 days from complaint to trial, is significantly faster
 8 than the case schedules adopted in most recent merger cases, even though those cases involved
 9 only a Section 7 challenge in less complex industries than here. *See, e.g., United States v. Sabre*
 10 *Corp.*, No. 19-cv-01548-LPS (D. Del. 2019, Dkt. 31) (160 days); *United States v. Quad/Graphics,*
 11 *Inc.*, No. 19-cv-04153 (N.D. Ill. 2019, Dkt. 46) (147 days), *United States v. Energy Solutions, Inc.*,
 12 No. 16-cv-01056-SLR (D. Del. 2017, Dkt. 103) (159 days); *United States v. Deere & Co.*, No. 16-
 13 cv-08515 (N.D. Ill. 2016, Dkt. 171) (initially set for 180 days, later extended to 278 days).

14 Defendants have proffered no justification to deviate from this practice and instead rush to
 15 a February 23 trial beyond two generic sentences of generalized harm. The United States has
 16 repeatedly requested additional information regarding the purported harm Defendants face and
 17 what steps they have taken to mitigate it; requests that have thus far been ignored entirely.

18 Defendants' motion remarkably accuses the United States of strategic delay and claims it
 19 is trying to win this case by forcing the parties to abandon. The United States submits, however,
 20 that it is the parties who are attempting to win this case by denying the United States a fair chance
 21 to develop its case and present relevant evidence in such an important and complex merger to this
 22 Court. Defendants' schedule is also unworkable. For example, while rejecting the United States'
 23 proposal to place reasonable limits on the number of experts each side may identify, Defendants
 24 have proposed a schedule that would give the United States only two days to respond to an
 25 unlimited number of expert reports of untold length.

26 Defendants' allegations that the United States is attempting to stymie resolution of this
 27 matter on the merits or that it has conditioned production of documents on Visa's waiver of valid
 28 privilege claims simply are not true. Defendants are demanding that the United States produce its

1 investigative file – which, aside from Defendants’ own productions, consists primarily of third-
2 party materials, including sensitive and highly confidential business information of Defendants’
3 respective customers and competitors – without the benefit of either a protective order or a
4 discovery request. The pre-discovery production of the government’s investigative file is a
5 courtesy extended only where appropriate, such as, for example, when the Defendants have not
6 rendered the file incomplete by improperly withholding relevant material, and after the United
7 States is confident that third party information will be protected adequately. Accordingly, the
8 United States has agreed to pre-discovery production of its investigative file on two conditions: (i)
9 entry of a valid protective order; and (ii) Visa’s agreement that a narrow privilege issue relating to
10 a discrete set of critical documents is ripe for adjudication by the Court. Visa and its third-party
11 business consultant (at Visa’s direction) withheld thousands of documents relating to Visa’s
12 pricing strategy from the United States during its pre-complaint investigation. Despite Visa’s
13 dubious claims that these documents are privileged or attorney work product, Visa’s CEO admitted
14 in deposition that they do not relate to any pending litigation and that Visa funneled the strategy
15 project through outside counsel in order to keep the documents confidential. The parties have met
16 and conferred unsuccessfully on this issue for months. The United States is asking Visa to agree
17 that this issue is ripe for adjudication by the Court and, if the Court determines that some or all of
18 the documents at issue are not privileged, that Visa produces the documents in compliance with
19 the Court’s order. Once Visa completes its production, and a protective order is entered, the United
20 States will agree to pre-discovery production of its investigative file. This offer of reciprocal pre-
21 discovery document production is neither improper nor gamesmanship.

22 Finally, although it has given Visa an opportunity to cast aspersions on the United States’
23 case, an administrative motion is not the proper vehicle for Defendants to air these grievances
24 before the Court. The United States would have been willing to stipulate to reschedule the March
25 23, 2021, Case Management Conference (Dkt. 41) to an earlier date if Defendants simply had
26 explained the exact relief they sought. See Local Rule 7-11(b) (motion for an order concerning a
27 miscellaneous administrative matter must be accompanied “by either a stipulation under Civil L.R.
28 7-12 or by a declaration that explains why a stipulation could not be obtained”).

1 Dated: November 20, 2020

Respectfully submitted,

2
3 /s/ John R. Read

JOHN R. READ

4 Trial Attorney

U.S. Department of Justice

5 Antitrust Division

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7 *Attorney for Plaintiff United States*

ATTORNEY ATTESTATION

I, Meagan K. Bellshaw, am the ECF user whose identification and password are being used to file Plaintiff United States' Statement in Support of Administrative Relief for an Expedited Case Management Conference. In compliance with Local Rule 5-1(i)(3), I hereby attest that all signatories hereto concur in this filing.

/s/ Meagan K. Bellshaw

Meagan K. Bellshaw