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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 UNITED STATES OF AMERICA,

4 Plaintiff,

5 v.

24 CV 07214

6 VISA, INC.,

7 Defendant.

Conference

8 -----x

New York, N.Y.
November 12, 2024
5:00 p.m.

10 Before:

11 HON. JOHN G. KOELTL,

District Judge

14 APPEARANCES

15 DEPARTMENT OF JUSTICE, ANTITRUST DIVISION

Attorneys for Plaintiff

16 BY: EDWARD WILLIAM DUFFY

BENNETT MATELSON

17 KEVIN KRAUTSCHEID

GREGG MALAWER

18 WILKINSON STEKLOFF, LLP

Attorneys for Defendant

19 BY: BETH A. WILKINSON

20 KIERAN GAVIN GOSTIN

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(Case called)

THE COURT: Who is on the line, please, for the government?

MR. DUFFY: Your Honor, this is Edward Duffy on behalf of the United States.

THE COURT: Who's on the line for Visa?

MS. WILKINSON: Good afternoon, your Honor. Beth Wilkinson and Kieran Gostin, who will be speaking on behalf of Visa.

THE COURT: Thank you. This is Judge Koeltl.

The reason for the call is Visa's letter of November 5, which indicated that the parties had agreed on a schedule for a motion to dismiss and looked forward to exchanging pre-motion letters. The reason for pre-motion letters for a motion to dismiss, as far as I'm concerned, under my practices, is for the moving party to explain the reasons for the motion and to allow me to express any thoughts about the motion -- in some cases, the motion might be withdrawn or not made -- and to give the plaintiff an opportunity to file an amended complaint to attempt to moot the motion.

It seems reasonably clear to me that this is not a case where I could, if I wanted to, discourage a motion to dismiss, and it's unlikely that the government wants to file an amended complaint, so I don't see much purpose for an exchange of pre-motion letters. I'm certainly happy to listen to the

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1 defendant, as a prelude, so that I can better understand the
2 briefs or what the basis for the motion to dismiss will be, and
3 for a brief response by the government if you would like to
4 tell me about that now. If you're not in a position to do
5 that, so be it.

6 Mr. Gostin?

7 MR. GOSTIN: This is Kieran Gostin, your Honor. I
8 would --

9 MS. WILKINSON: Were you calling on us, your Honor?

10 THE COURT: Yes.

11 MS. WILKINSON: Okay. Thank you.

12 MR. GOSTIN: So I'll just give it at a very high
13 level. We're planning on challenging a few bases for the
14 motion, and I'm happy to answer any questions. One of them
15 relates to market definition, and others relate to the two
16 courses of conduct that they challenged. So if the motion was
17 granted, it would dispose of the complaint entirely or
18 significantly limit its scope.

19 For the market definition, the government has defined
20 the market as debit network services, which is defined, and
21 this is a quote from the complaint, as payment products and
22 services that facilitate the debit, i.e., withdrawal, of funds
23 directly out of a consumer's bank account, often using a
24 credential or other account number to identify the consumer.
25 However, the government has excluded from its market definition

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1 one of the primary ways that consumers can pay merchants, by
2 debiting funds directly from their bank accounts.

3 So we plan to rely on their own allegation, their
4 definition of the market, and other allegations that are
5 inconsistent with their reasons for excluding this payment
6 method as a basis for our challenge to their market definition.
7 This is a significant point, because they've alleged our market
8 share is 60 percent. If this payment method were included, it
9 would significantly decrease that I think under any analysis,
10 likely halving it, which would seriously undercut any argument
11 of market power and would certainly end any claim of monopoly
12 power.

13 So, at a high level, that's the market definition
14 argument, which I'm happy to discuss in more detail.

15 THE COURT: Can I just ask you a question on that?

16 MR. GOSTIN: Yes. Of course.

17 THE COURT: Why is that the basis for a motion to
18 dismiss and rely upon the development of the factual record?

19 MR. GOSTIN: Your Honor, it's a great question. Let
20 me try to explain why I think it's appropriate to do at the
21 motion to dismiss stage.

22 So I need to give just a slight bit of background
23 about what the payment method is I'm talking about. It's ACH,
24 which is, instead of using your debit card number, you can
25 also -- and you may have experienced this with paying bills or

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1 other things -- you can also put in your routing number and
2 banking account number and have money directly withdrawn from
3 your account.

4 The basis of the motion is that there are other -- in
5 their complaint, they allege that that payment method is part
6 of the market when it's done by -- done in connection with
7 certain technology companies like Pay Pal, where they exclude
8 it all other times. And the reason they include it for Pay Pal
9 is they need it for one of their allegations of competitive
10 harm. So we think they've been inconsistent there.

11 Now, the reason for excluding it is a single sentence
12 in the complaint that describes three features that they say
13 ACH lacks: Fraud detection, dispute resolution, and charge
14 back rights. However, by their own allegations, they've
15 included other payment methods in their market that do not have
16 those features.

17 For example, they include PIN networks, and I don't
18 want to get too far into the details here, because I don't want
19 to get bogged down, but PIN networks are basically a form of
20 debit that is relying on ATM networks. That's why you have to
21 use a PIN when you use them. And in their complaint, for
22 example, they allege that those PIN networks in many situations
23 lack acceptably robust fraud detection. So we think that their
24 allegations are contradicting each other in a variety of ways.
25 Those are just a couple of examples.

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1 But we would plan for the motion to be based on what
2 they've alleged, other products they've included, while
3 excluding these products for similar reasons, and we think that
4 makes it implausible. There is case law that says complaints
5 should be viewed at motion to dismiss stage, shorn of all their
6 internal contradictions.

7 THE COURT: Okay. Did you say there was a second
8 basis for the motion?

9 MR. GOSTIN: Yes, your Honor. There's two other bases
10 of the motion, which go after each of the courses of conduct
11 that they've alleged.

12 So the first is that they allege that Visa has
13 violated the antitrust laws by offering volume-based discounts.
14 Actually, the way Visa gets paid for debit is they get paid by
15 the merchants. We offer them lower per transaction prices if
16 they offer -- if they provide us with a greater volume of
17 transactions.

18 There's case law that says that lowering prices,
19 cutting prices unsurprisingly is considered pro-competitive
20 under the antitrust laws, not anticompetitive, except in really
21 rare circumstances such as price discrimination, predatory
22 pricing. I mean, they haven't alleged anything that suggests
23 that this is a form of predatory pricing. So we're essentially
24 saying, even if you take their allegations as true, they fail
25 under the law. So that's one of the courses of conduct.

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1 The second course of conduct is about agreements that
2 Visa has entered into with certain technology partners. These
3 are -- an example would be they have an agreement with Apple
4 whereby Visa has provided technology to Apple that allows Apple
5 Pay to work, which is a way you can pay debit and credit with
6 your phone. And as part of those agreements, they allege that
7 we have -- and they're relying entirely on the written
8 agreements here. They allege that we have essentially paid
9 them off not to compete.

10 So we've entered into these agreements with them, and
11 under the agreements, they're not allowed to compete in debit.
12 However, if you actually look at the terms of the agreements
13 which are incorporated by reference into the agreements, they
14 don't do that. What they do is they say that if Apple decides
15 to become a competitor, Visa no longer has to continue to deal
16 with them and no longer has to provide their technology to
17 them.

18 So under the terms of the agreements themselves, we
19 don't think that's anticompetitive product, because there's
20 lots of law that says that there's no duty to deal with
21 competitors.

22 THE COURT: Okay. Mr. Duffy.

23 MR. DUFFY: Yes. If I can just have a few minutes to
24 respond, you know, with our initial thoughts on the substantive
25 bases of the motion, and then I did want to follow up with our

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1 view of the benefits of having the pre-conference letter still
2 submitted.

3 First, with respect to market definition, Mr. Gostin
4 referenced ACH, which you know, as we've put forward in our
5 complaint, it is our position that ACH is not in the same
6 market as debit network services, and there are a few reasons
7 for that. I think one of the more important is that ACH simply
8 does not provide for a near instantaneous form of payment, and
9 for that reason, it is not reasonably interchangeable with
10 debit cards and cannot be used for many of the same types of
11 processes.

12 Mr. Gostin also indicated that there are several
13 criteria that we think are necessary for a product to be within
14 the market. Fraud protections being one. And although we do
15 say that the other smaller debit networks, called the PIN
16 networks, don't have as robust fraud capabilities as Visa does,
17 for a variety of reasons, they still do offer some type of
18 fraud protections that do set them apart from a basic ACH
19 product. And as your Honor mentioned, to the extent there are
20 disputes about this, they are very much factual issues that we
21 don't think would be suitable for a motion to dismiss,
22 irrespective of the substance.

23 Going to the two types of conduct that Mr. Gostin was
24 talking about. The volume based discounts, first, I think it's
25 important for us to point out we're not alleging a predatory

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1 pricing theory of harm under that theory. What the United
2 States is alleging is that Visa has created incentive
3 structures with their contracts with merchants and with banks
4 that are tantamount to exclusive dealing because of the nature
5 of the terms that are set forth.

6 So what Visa does is that there are certain
7 transactions that a merchant is going to have no choice but to
8 use Visa for routing that transaction. Visa is able to
9 leverage those non-contestable transactions and create pricing
10 structures that make it entirely uneconomical for merchants and
11 their banks to consider alternative networks for those
12 transactions that the networks could compete for. And, you
13 know, we think the law is quite clear that that type of de
14 facto exclusive dealing is a cognizable violation of the
15 Sherman Act, both as monopolization and an unreasonable
16 restraint on trade.

17 And then, finally, with respect to the tech partner
18 contracts that Mr. Gostin was discussing, the key
19 anticompetitive element of those agreements is not Visa
20 refusing to deal. It is, instead, the nature of the threat of
21 basically telling potential competitors if you do not compete
22 with me, I will provide you with lucrative incentives, and if
23 you do choose to compete with me, I am going to impose
24 penalties upon you. So it is not a duty to deal situation as
25 much as it is an incentive being offered to not compete with

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1 Visa.

2 And then if I can briefly just address kind of the
3 process issue of the three-page pre-motion letter. When
4 agreeing to the briefing schedule, the United States was very
5 interested in ensuring that we would have Visa's letter
6 outlining the bases of its motion to help us, you know, kind of
7 get a head start on the response to a motion to dismiss given
8 the holiday schedule and so forth. It was kind of important
9 for us to be able to get a better sense as to what their
10 arguments would be. So we think we would benefit very much
11 from having that letter on November 20 as Visa committed when
12 proposing that schedule.

13 We also think, and the parties have submitted some
14 letters dealing with the issue of discovery, and we think that
15 the Court will eventually need to decide whether discovery can
16 commence while a motion to dismiss is pending. And we do think
17 that the three-page letter would help the Court in that
18 determination when the issues is properly before the Court.

19 THE COURT: I must say I'm unpersuaded that the
20 letters would do anything. You've heard from Visa the
21 arguments that it intends to make. I'm sure you all can talk
22 among yourselves. But as far as I'm concerned, it appears to
23 be unnecessary paper.

24 I also don't think that that exchange of letters is
25 going to sufficiently inform me of the merits or lack of merits

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1 of the motion to stay discovery that I could base a decision on
2 the simple exchange of letters.

3 By the way, I thought the exchange of letters with
4 respect to -- brief letters with respect to the issue of
5 staying discovery or not staying discovery was helpful to me,
6 but we can get back to that in a moment.

7 Does Visa have any views with respect to further
8 letters in preparation for the motion to dismiss?

9 MR. GOSTIN: Your Honor, we don't think a letter is
10 necessary for all the reasons that you stated.

11 THE COURT: Okay. So I agree with that, and the
12 schedule that was laid out in Visa's letter is fine. I'll do
13 an order establishing the schedule for the motion to dismiss in
14 accordance with the parties' agreement reflected in the
15 November 5th letter.

16 A couple of other things. I should have pointed out
17 at the outset that I'm confident that I have at least one Visa
18 card. I may have more. Visa may be on the front or back of
19 other cards that I have, but nothing about that affects
20 anything that I do in the case. But I bring it to your
21 attention at the outset.

22 So the parties have noted that I have a conference
23 scheduled for January 6. That would have been scheduled as a
24 matter of course when the case was filed. The assumption is
25 that the parties would have gotten together for their 26(f)

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1 conference before that and produced for me a 26(f) report by
2 January the 6th. I could talk to you about it on January 6, or
3 approve your schedule.

4 I know that there is a dispute about whether I should
5 stay discovery pending a decision on the motion to dismiss.
6 That really would require briefing. I thought both of your
7 letters were very good, and good in part for their brevity. I
8 commend all of you. Articles that I've previously written on
9 brevity and civility, so far everything that you've given me
10 reflects a commendable cooperation and attention to both
11 civility and brevity, so for all of that, I thank you.

12 Where do we go from here? My inclination, and I'm
13 perfectly happy to listen to the parties, is that we want to
14 follow the usual course, which was sort of implied in some of
15 the correspondence, which means that you ought to, as you
16 apparently have, talk about the case among yourselves, talk
17 about a potential schedule for the case. It's certainly
18 possible for you all to talk about the future of the case, the
19 schedule for discovery, what your potential deadlines are,
20 taking into account that the parties may differ as to or do
21 differ as to whether the discovery should actually go forward
22 pending a decision on the motion to dismiss.

23 So you could meet and come up with schedules which are
24 dependent on whether the motion to stay discovery is granted or
25 not, what happens on the motion to dismiss, and give me a Rule

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1 26(f) report based on that. I do have a concern that the
2 motion to dismiss schedule that you've given me takes two and a
3 half months. That's a generous schedule, but it means that if
4 I stayed discovery until a decision on the motion to dismiss,
5 we would be two and a half months, plus however many months it
6 may take me to decide the motion. That's a long pause. So you
7 can take that into account. I'm certainly not going to decide
8 the motion to stay discovery now based on the letters that
9 you've just given me, but you can take that into account.

10 Is this a case where the case is likely to be
11 dismissed in its entirety? Is it a case that some haircuts may
12 be made at the outset? I can't decide those things based upon
13 what the parties have given me so far.

14 So, where are we? I always prefer for the parties to
15 talk out what you think is the best timing for a motion to stay
16 discovery, as well as the alternatives that you want to propose
17 to me for the progress of the case if the case is going
18 forward, and you can give me a 26(f) report after you've had
19 your meetings with respect to that.

20 If you all can't agree with respect to what the
21 correct timing is for a motion to stay discovery, of course
22 I'll give you a date. I do think that, as Visa pointed out,
23 that the merits of a motion to dismiss are one of the factors
24 to be taken into account on whether to stay discovery. I also
25 found somewhat persuasive the amount of time that the parties

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1 have been engaged in pre-litigation discovery, including
2 depositions. On the other hand, as I've said, the ample time
3 that you've afforded each other to brief the motion to dismiss
4 is a matter of concern to me. I have no great desire to stall
5 the case for months and months at the outset.

6 So those are considerations that you can take into
7 account. I'll leave at the moment the January 6 date for
8 another telephone conference with you, though I think one
9 reason for doing this by telephone conference is I didn't want
10 to drag all of you up from Washington when this conference is
11 really a ministerial conference to set the deadlines for the
12 motion to dismiss. But to the extent that we have substantive
13 conferences, I may call you up from Washington for a personal
14 appearance, unless that's too onerous for you.

15 So that's where we are. I'm perfectly happy to listen
16 to all of you. I expect that all of you will have your
17 appropriate meetings and provide me with a 26(f) report, and I
18 would hope that you could all do it within a month, by
19 December 13.

20 So you'll give me all of the alternatives in the 26(f)
21 report, and you will have talked about a schedule for the
22 motion to stay discovery. It's a motion, but I know what the
23 factors are and you don't have to write an extensively long
24 motion or response or reply. I hope that you all can agree
25 upon that.

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1 So does that give all of you sufficient guidance? I'm
2 perfectly happy to listen to you all now.

3 Plaintiff, Mr. Duffy?

4 MR. DUFFY: Yes, your Honor. I think that guidance is
5 clear to us on both the motion to stay schedule and the 26(f)
6 report.

7 THE COURT: Okay. Mr. Gostin? Ms. Wilkinson?

8 MS. WILKINSON: Yes, your Honor. Ms. Wilkinson.

9 Yes, we will be happy to work with Mr. Duffy and his
10 team and come up with all the deadlines to file the motion and
11 complete the 26(f). I don't think we'll have any difficulty.
12 We've had constructive discussions with them before, and we
13 will always continue to do so in this case.

14 THE COURT: All right. That's great.

15 Anything else I can do for you today?

16 MS. WILKINSON: Nothing on behalf of Visa, your Honor.

17 MR. DUFFY: Nothing on behalf of the United States,
18 your Honor.

19 THE COURT: Great. Good to talk with you. I look
20 forward to working with you.

21 Bye now.

22 (Adjourned)