

Melvin Schwarz (MS8604)
U.S. Department of Justice
Antitrust Division
325 7th Street, N.W., Room 300
Washington, DC 20530
(202)616-5935
Attorney for the United States

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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

In order to protect confidential business and trade secret information consistent with the public's right of access to the Court's records and processes, the parties, by their undersigned counsel, hereby stipulate pursuant to Fed. R. Civ. P. 26(c)(7), subject to approval and entry by the Court, as follows:

Types of Material Which May Be Designated Confidential or Highly Confidential

1. Any documents, answers to interrogatories, responses to requests for admission, deposition testimony, deposition transcripts and exhibits, other responses to requests for

information and/or other written information, whether produced voluntarily or involuntarily, either in the course of any precomplaint investigation by the United States or in response to discovery requests in this litigation by any party (hereafter, collectively, “Discovery Materials”), may be designated by a producing party or non-party as “Confidential” or “Highly Confidential” under this Protective Order.

What Constitutes Confidential And Highly Confidential Information

2. “Confidential Information” shall include any Discovery Material which the producing party or non-party reasonably believes not to be in the public domain and contains any trade secret or other confidential, strategic, research, development, or commercial information.

3. “Highly Confidential Information” shall include any Confidential Information which the producing party or non-party reasonably believes to be so competitively sensitive that it is entitled to extraordinary protections.

Designation of Discovery Materials as Confidential or Highly Confidential

4. Parties and non-parties that produced Discovery Materials to the United States in the course of any precomplaint investigation shall have 14 days after receiving a copy of this Order to designate such Discovery Material as Confidential or Highly Confidential. Such Discovery Materials may be so designated by: (i) providing copies to the United States of the Discovery Materials that are stamped with the legend “CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER” or “HIGHLY CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER,” or (ii) stamping Discovery Materials currently in the possession of the United States

with the legend "CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER" or "HIGHLY CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER."

5. Any documents, material or information produced in discovery in this action, but not covered by paragraph 4 above, that are to be designated "Confidential" or "Highly Confidential" may be so designated by the producing party or non-party by furnishing a separate written notice to the undersigned counsel for the party receiving such documents, material or information at the time of their production or as soon thereafter as practicable (but in no event more than 10 business days after production of such Discovery Material), specifically identifying the documents or materials as "Confidential," or "Highly Confidential" and by providing copies of the documents, material or information so designated that are stamped with the legend "CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER" or "HIGHLY CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER."

6. Inadvertent production of or failure to designate any information as Confidential or Highly Confidential shall not be deemed a waiver of the producing party's or non-party's claim of confidentiality as to such information, and the producing party or non-party may thereafter designate such information as Confidential or Highly Confidential as appropriate.

7. Inadvertent production of any document produced either in the course of any precomplaint investigation by the United States or in response to discovery requests in this action by any party or non-party that a party or non-party later claims should have been withheld on grounds of a privilege, including the work product doctrine (collectively referred to hereafter as an "Inadvertently Produced Privileged Document") will not be deemed to waive any privilege or work product protection. A party or non-party may request the return of any document that it

inadvertently produced by identifying the Inadvertently Produced Privileged Document and stating the basis for withholding such document from production. If a party or non-party requests the return, pursuant to this paragraph, of such an Inadvertently Produced Privileged Document then in the custody of one or more parties, the possessing parties shall within three business days destroy or return to the requesting party or non-party the Inadvertently Produced Privileged Document and all copies thereof and shall expunge from any other document or material information solely derived from the Inadvertently Produced Privileged Document. After a document is destroyed or returned pursuant to this paragraph, a party may move the Court for an order compelling production of the document, but said party may not assert as a ground for entering such an order the fact or circumstances of the inadvertent production.

8. The parties shall serve a copy of this Order simultaneously with any discovery request made to a non-party in this action.

9. Deposition testimony and the transcripts taken during pretrial discovery shall be treated as Highly Confidential for a period of five business days after receipt of such deposition transcript to allow time for the deponent or counsel for that deponent, or any party or counsel to any party, to notify all parties of any Confidential or Highly Confidential Information. Such Confidential and Highly Confidential Information shall be designated by page and line number.

Permissible Uses of Discovery Material

10. All persons obtaining access to Discovery Material produced in connection with this action shall use such Discovery Material only for preparation and trial of this action, including any appeal and retrial, and shall not use such Discovery Material for any other

purpose, including the furtherance of that person's business interests or in any administrative or judicial proceeding. Any person found to have made an impermissible use of any Discovery Material will be subject, without limitation, to civil and criminal penalties for contempt of court. Nothing in this provision, however, shall restrict the rights, if any, of the plaintiff to make use of any precomplaint Discovery Material outside the context of this action to the extent otherwise permitted under 15 U.S.C. § 1 *et seq.*; 15 U.S.C. § 1311-1314 *et seq.*; 15 U.S.C. § 12 *et seq.*; or any other applicable law. In the event that plaintiff intends to make any such use of any precomplaint Discovery Material, plaintiff will provide the producing party or non-party with 10 days notice of its intent to use such precomplaint Discovery Material. Nothing in this provision shall limit the rights, if any, of any party or non-party to object to the plaintiff's use of such precomplaint Discovery Material. Nothing in this provision shall alter the rights, if any, of the plaintiff to use, or the defendants or non-parties to object to the use of, post-complaint Discovery Materials outside the context of this action. In the event that plaintiff intends to make any such use of post-complaint Discovery Material, plaintiff will provide the producing party or non-party with 10 days notice of its intent to use such post-complaint Discovery Material. Nothing in this Order shall limit or restrict a party's rights, if any, to use its own Discovery Material or any information obtained independent of discovery in this action or any precomplaint investigation.

11. The Department shall treat all Confidential and Highly Confidential Information in accordance with the policy regarding disclosure of designated commercially or financially sensitive information set forth at 28 C.F.R. § 16.8. The Department shall treat all information obtained in discovery in this action that has been designated as Confidential or Highly Confidential Information by a defendant or non-party as "confidential business information"

pursuant to the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and shall honor all statutory obligations to protect the confidentiality of all such information obtained voluntarily or by means of compulsory process. If any request is made to the Department for Confidential or Highly Confidential Information covered by this Order, the Department shall promptly give notice of that request to the producing party or non-party.

12. Subject to paragraph 11, nothing herein shall impose any restrictions on the use or disclosure by a party or witness of documents, material or information obtained by such party or witness independently of the discovery proceedings in this action, whether or not such documents, material or information are also obtained through discovery proceedings in this action.

13. Confidential Information may be disclosed only to the following persons:

- (a) the Court;
- (b) counsel for the United States who are involved in representing the United States in this Action, including any counsel specially employed or retained by the United States for purposes of this Action;
- (c) outside counsel for a defendant, provided that they are not presently, and have no present plans to become, an employee or consultant of any defendant or any other entity which provides network credit or charge card services (as those terms are referred to in the complaint);
- (d) consultants, experts or litigation support services, including outside copying services, retained by a party for the purpose of assisting that party in this action, provided that they are not presently, and have no present

plans to become, an employee or consultant (except herein) of any defendant or any other entity which provides network credit or charge card services (as those terms are referred to in the complaint);

- (e) associated personnel of any person within categories (a) through (d) for whom access to Confidential Information is necessary to assist such persons in the action, including any Court personnel assisting the Court, litigation assistants, paralegals, secretarial or other clerical personnel, stenographers or other persons involved in taking or transcribing testimony in this action, and principals and employees of the firm with which consultants or experts are associated, provided that they are not presently, and have no present plans to become, an employee or consultant of any defendant or any other entity which provides network credit or charge card services (as those terms are referred to in the complaint); and
- (f) No more than two specifically identified in-house counsel for each of the defendants as may be agreed upon by the parties or (in the absence of agreement) ordered by the Court.

14. Highly Confidential Information may be disclosed only to any persons falling within categories (a) through (e) in paragraph 13 above.

15. Notwithstanding the provisions in paragraphs 13 and 14 above, Confidential and Highly Confidential Information may be disclosed to any management employee of the party or non-party producing such information.

16. Neither Confidential nor Highly Confidential Information shall be copied or reproduced except to the extent such copying or reproduction is reasonably necessary to the conduct of this action. All such copies or reproductions shall be subject to the terms of this Order. If the duplicating process by which copies of Confidential or Highly Confidential materials are made does not reproduce the "CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER" or "HIGHLY CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER" stamp appearing on the original, all copies shall be stamped with a "CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER" or "HIGHLY CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER" designation. All copies of Confidential and Highly Confidential Information shall be kept under the control of person(s) described in paragraph 13(a) through (d) above.

17. Persons described in paragraph 13 (b) and (c) (and their associated personnel) shall be deemed bound by the terms of this Order upon its entry by the Court. A party disclosing Confidential Information to a person described in paragraph 13 (d) through (f) or Highly Confidential Information to a person described in paragraph 13 (d) through (e) must first (i) advise the recipient that the information is Confidential or Highly Confidential and may only be used in connection with this action; (ii) provide the recipient with a copy of this Order; and (iii) have that person execute a confidentiality agreement stating the following:

"I hereby acknowledge that [name, position of employment], am about to receive confidential information. I certify my understanding that such information is to be provided to me pursuant to the terms and restrictions of the court order of [date entered] in *United States v. Visa U.S.A. Inc. et al.*, 98 Civ. 7076 (S.D.N.Y.). I have been given a copy of and have read this Order and agree to be bound by its terms."

Persons described in paragraphs 13 (b) and (c) should advise their associated personnel of this Order and the terms of the above stated agreement prior to providing their associated personnel access to Confidential or Highly Confidential Information.

18. Counsel for a party may disclose Confidential or Highly Confidential Information to any actual or potential witness provided counsel has obtained consent of counsel for the party or non-party who produced such information, except that such consent need not be obtained if (i) the person is an author or recipient of the Confidential or Highly Confidential Information, or (ii) the person is a former employee of the producing party or non-party and is known with certainty to have prior knowledge of the specific Confidential or Highly Confidential Information to be disclosed.

19. Within 10 business days after the entry of this Order the United States will cause all persons described in paragraph 13(d) who have already been given access to Confidential or Highly Confidential Information to execute a confidentiality agreement.

Challenges to Confidential or Highly Confidential Designations

20. If the receiving party disagrees with the designation by the producing party or non-party of any Discovery Material as Confidential or Highly Confidential Information, then the parties to the dispute will attempt first to resolve the dispute on an informal basis before presenting the dispute to the Court. All items objected to shall continue to be treated as Confidential or Highly Confidential pending resolution of the parties' dispute. If the dispute cannot be resolved informally, the producing party or non-party bears the burden of persuading

the Court that the information is in fact Confidential or Highly Confidential within the definition(s) of those term(s) set forth above.

21. Entering into, agreeing to, and/or complying with the terms of this Stipulation and Order shall not: (a) operate as an admission by any party that any particular documents, material or information contain or reflect currently valuable trade secrets or proprietary or commercial information; or (b) prejudice in any way the right of a party at any time: (i) to seek a determination by the Court of whether any particular document, item of material or piece of information should be subject to the terms of this Stipulation and Order; (ii) to seek relief on appropriate notice from any provision(s) of this Stipulation and Order, either generally or as to any particular document, item of material or piece of information; (iii) to object to any discovery request, including the right to assert that no discovery should be had of certain documents or information; or (iv) to seek documents or other information from any source.

Deposition Procedures

22. At any deposition session, when counsel for a party or the deponent deems that the answer to a question will result in the disclosure of Confidential or Highly Confidential Information, counsel shall have the option, in lieu of taking other steps available under the Federal Rules of Civil Procedure, to request that all persons other than the reporter, counsel and individuals specified in paragraphs 13 and 14 hereof who have access to the appropriate category of information leave the deposition room during the Confidential or Highly Confidential portion of the deposition. When Highly Confidential Information is the subject of examination, defendants' in-house counsel may also be excluded by a party or the deponent. The failure of

such other persons to comply with such requests shall constitute substantial justification for counsel to advise the witness that he or she need not answer the question pending.

23. Any deposition testimony concerning a Confidential or Highly Confidential document produced by a non-party shall be marked by the court reporter as Confidential or Highly Confidential on the deposition transcript.

Efforts by Non-Parties to Obtain Confidential Information

24. If any party has obtained Confidential or Highly Confidential Information under the terms of this Order and receives a subpoena or other compulsory process commanding the production of such Confidential or Highly Confidential Information, such party shall promptly notify the producing party or non-party. The subpoenaed party shall not produce any Confidential or Highly Confidential Information in response to the subpoena without the prior written consent of the producing party or non-party unless in response to an order of a court of competent jurisdiction.

25. The parties will not object to the producing party or non-party having a reasonable opportunity to appear in the litigation or process commanding disclosure of such Confidential or Highly Confidential Information for the sole purpose of seeking to prevent or restrict disclosure thereof.

Filing Under Seal

26. All Confidential or Highly Confidential Information filed with the Court shall be filed under seal. Where possible, only confidential portions of filings with the Court shall be

filed under seal. Information filed under seal shall be placed in sealed envelopes on which shall be endorsed the title to the action, the words "FILED UNDER SEAL," and a statement substantially in the following form:

"This envelope is sealed pursuant to order of the Court and contains Confidential Information [and/or Highly Confidential Information] filed in this case by [name of Party] and is not to be opened or the contents thereof to be displayed or revealed except by order of the Court."

The envelope shall not be opened without further order of the Court except by persons authorized to have access to such information pursuant to paragraph 13 or 14, as applicable, which person(s) shall return the information to the Clerk in a sealed envelope. Any envelope containing information filed under seal that is an exhibit to a pleading shall also bear the name of the pleading. Where documents filed under seal are transmitted between the parties, the above message shall be placed on the facsimile cover sheet or on a sheet directly following the facsimile cover sheet.

Use of Confidential or Highly Confidential Information at Trial

27. The parties shall confer and attempt to agree before any trial or other evidentiary hearing on the procedures under which Confidential and Highly Confidential Information may be introduced into evidence or otherwise used at such trial or hearing. Upon reaching agreement, the parties shall give notice of the terms of such agreement to each non-party producing any Confidential or Highly Confidential Information which may be used or introduced at such trial or hearing. Absent agreement, the Court shall be asked to issue an order governing the use of such Confidential and Highly Confidential Information at trial or evidentiary hearing upon reasonable notice to all parties and non-parties who have produced such information. The

parties shall provide non-parties with notice of potential use at trial of any Confidential or Highly Confidential Information produced by them if and when they are listed as potential exhibits in the required filings prior to commencement of trial. The parties shall give notice as soon as practicable after Confidential or Highly Confidential Information which is not listed on the exhibit list is determined to be used by counsel for a party in the course of examination or cross-examination at trial.

Procedures upon Termination of Action

28. Within 10 business days following the running of any applicable time to appeal the final order entered in this litigation, all defendants shall either (i) return to the person who produced such materials all copies of all Confidential or Highly Confidential Information obtained through discovery in this action or (ii) certify to that person that all such materials have been destroyed.

29. After the running of any applicable time to appeal the final order entered in this litigation, any producing party or non-party may request that plaintiff return or destroy any Discovery Material the producing party or non-party has provided. Upon such request, plaintiff shall comply subject to its rights, if any, under any applicable law, regulation or Department of Justice directive to retain such Discovery Material. In the event that plaintiff retains any Discovery Material, plaintiff will provide the producing party or non-party with a list of each document, identified by Bates number, it retains. Nothing in this provision shall limit the rights, if any, of any party or non-party to object to and seek a ruling of the Court concerning the plaintiff's retention of any Discovery Material. Nothing in this Order shall alter the rights, if

any, of the parties or non-parties to demand the return of, or the plaintiff to retain, post-complaint Discovery Materials.

Miscellaneous

30. This Order supersedes the Final Protective Order entered by the Court on November 18, 1998.

31. This Order shall not affect the right of any party or non-party to oppose production of Discovery Material on any ground permitted by the Federal Rules of Civil Procedure, including any applicable privilege. Moreover, this Order shall not affect the scope of discovery by any party that is not otherwise proper under the Federal Rules of Civil Procedure.

32. Nothing in this Order shall prejudice the right of any party or non-party to move the Court to broaden or restrict the rights of access to and use of particular Discovery Material, or to seek modifications of this Order upon due notice to all other parties and affected non-parties.

33. This document may be signed in counterpart, and each such counterpart shall be deemed an original.

SO ORDERED:

/s/
BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Dated: December 11, 1998

STIPULATION OF THE PARTIES

For the plaintiff
United States of America

For defendant
Visa International Corp.

_____/s/_____
M.J. Moltenbrey (MM4814)
Chief, Civil Task Force

_____/s/_____
John H. Shenefield, Esq.
Eugene F. Bannigan, Esq.
Jonathan Rich, Esq.
Gergory Asiolla
Morgan, Lewis & Bockius
1800 M St., N.W.
Washington, D.C. 20036-5689

Melvin Schwarz (MS8604)
Special Counsel for Civil Enforcement

For defendant
Visa U.S.A. Inc.

Steven Semeraro (SS8817)
Scott Scheele (SS0496)
Jeffrey Steger (JS7416)
Trial Attorneys
U.S. Department of Justice
Antitrust Division
325 7th Street, N.W., Room 300
Washington, DC 20530
(202)616-5935

_____/s/_____
M. Laurence Popofsky, Esq.
Stephen Bomse, Esq.
Brent Rushforth, Esq.
Heller, Ehrman, White & McAuliffe
333 Bush Street
San Francisco, CA 94104-2878

For defendant
MasterCard International Incorporated

_____/s/_____
Kevin Arquit, Esq.
James C. Egan, Esq.
Martin Seidel, Esq.
Rogers & Wells
607 14th Street, N.W.
Washington, D.C. 20005-2018