UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

DISCOVER FINANCIAL SERVICES, DFS SERVICES, LLC, and DISCOVER BANK,

Plaintiffs,

v.

VISA U.S.A. INC., VISA INTERNATIONAL SERVICE ASSOCIATION, MASTERCARD INCORPORATED, and MASTERCARD INTERNATIONAL INCORPORATED,

Defendants.

Case No. 04-CV-7844 (BSJ)
ECF Case

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO DISCOVER'S MOTION PURSUANT TO SECTION 5(a) OF THE CLAYTON ACT TO GIVE PRIMA FACIE EFFECT TO CERTAIN FACTS THAT WERE NECESSARY TO THE ULTIMATE RULINGS IN *UNITED STATES V. VISA/MASTERCARD* AND TO CHARGE THE JURY ACCORDINGLY

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INTRODUCTION

Defendants Visa U.S.A. Inc., Visa International Service Association ("Visa"), MasterCard Incorporated, and MasterCard International Incorporated ("MasterCard") (collectively, "Defendants") respectfully submit this memorandum of law in opposition to the motion of Discover Financial Services, DFS Services, LLC and Discover Bank (collectively, "Discover") pursuant to Section 5(a) of the Clayton Act to give prima facie effect to certain statements from the rulings in *United States v. Visa/MasterCard* (the "DOJ Case") and to charge the jury accordingly.

Discover incorrectly claims that applying Section 5(a) is non-discretionary. Section 5(a) specifically incorporates the elements of collateral estoppel, including the fairness requirement. No court has held otherwise. Courts have been denying collateral estoppel where its application would be unfair – even where the so-called "threshold"[1] elements of estoppel were satisfied – since long before *Parklane Hosiery Co., Inc. v. Shore*.[2] As importantly, courts considering application of Section 5(a) do have discretion to weigh the probative value of evidence against its possibility for prejudice and jury confusion. Presenting numerous individual statements from the DOJ opinion "in a vacuum and without context"[3] – while at the same time instructing the jury on estoppel as to other factual determinations – would cause severe prejudice to Defendants and confuse the jury.

For that reason, this Court summarily denied Discover's request to apply collateral estoppel to "81 individual statements"[4] from the opinion in the DOJ Case.[5] Discover,

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1 Pls.' Mot. at 3.

2 439 U.S. 322 (1979).

3 Opinion and Order, Aug. 20, 2008, slip op. at 13.

4 *Id.*

apparently undeterred by this ruling, now seeks to import 38 of those same disembodied statements into this case under Section 5(a).[6] Discover's eleventh hour attempt to gain relief under Section 5(a) in order to circumvent its burden to prove all of the elements of a Section 1 claim in the alleged debit and debit network services markets (Discover's Second Claim for Relief) – neither of which was at issue or necessarily decided in the DOJ case – should not be permitted. Discover seeks to apply, under Section 5(a), the very same offline debit foreclosure finding as to which this Court's October 1 Order declined to apply collateral estoppel. The resulting confusion would be the same as the confusion that motivated this Court, in part, to grant reconsideration and remove the offline debit foreclosure finding from the list of those findings from the DOJ Case to which collateral estoppel would apply. Moreover, the same risk that the finding could improperly infect the jury's consideration of the separate debit claims against Visa in Discover's Second Claim that also motivated the Court to grant reconsideration would apply to recycling that finding under Section 5(a).

Discover's request – submitted for the first time just two weeks before the start of trial – is too late and should also be denied for this reason alone. To seek Section 5(a) relief now severely prejudices the Defendants and underscores Discover's gamesmanship in this litigation. Discover made the tactical decision to seek collateral estoppel alone and not the more limited relief of a "prima facie" showing under Section 5(a) (even as alternative relief), and was content with its decision until the Court's October 1 Order.

Discover also has never shown – and the Court plainly never found – that any of the 38 so-called "5A Findings" satisfy the requirements for application of estoppel. Discover has

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[5] 163 F. Supp. 2d 322 (S.D.N.Y. 2001).

[6] 15 U.S.C. § 16(a).

twisted the Court's Summary Judgment Order in claiming that this Court has already decided collateral estoppel was satisfied as to each statement. It did not. Rather, the Court expressly limited its ruling to only those determinations – which were explicitly noted – that were necessary to the holding in the DOJ case, and denied collateral estoppel on eighty-one individual findings from the case. Discover's request can just as easily be denied for this simple reason as well.

ARGUMENT

I. Discover Misstates the Meaning of Section 5(a) and the Law of Collateral Estoppel

Contrary to Discover's claim about the "non-discretionary" nature of Section 5(a), district courts have substantial discretion to determine the prima facie effect of a prior adjudication and how that evidence is presented to a jury. *See Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 571 (1951) ("What issues were decided by the former Government litigation is, of course, a question of law as to which the court must instruct the jury" and the court "must be free to exercise a well established range of judicial discretion" in doing so); *see also Monticello Tobacco Co. v. Am. Tobacco Co.*, 197 F.2d 626, 632 (2d Cir. 1952) (to determine how much the previous judgment proves for the plaintiff, a court is required to examine the pleadings, testimony, jury charge, and court opinions). And courts often invoke fairness principles in declining to give Section 5(a) prima facie effect to prior judgments. *See, e.g.*, *Monticello Tobacco Co.*, 197 F.2d at 633 ("Section 5 does not permit a haphazard use of a [prior] judgment merely for its aura of guilt"); *Int'l Shoe Mach. Corp. v. United Shoe Mach. Corp.*, 315 F.2d 449, at 455-56 (1st Cir. 1963) ("Traditional" collateral estoppel principles which would render a prior judgment inadmissible under Section 5 "include the rule that the passage of time may evoke change of circumstances which preclude the creation of an estoppel."); *Drug Dart Corp. v. Parke, Davis & Co.*, 344 F.2d 173, 184-85 (D.C. Cir. 1965) (holding that there is a

temporal limit in the application of prima facie evidence and declining to give effect to prior adjudication). The Second Circuit has cautioned that such discretion must be "carefully exercised" because of the "potentially high emotive impact on a jury of laymen" from a Section 5(a) prima facie instruction. *Monticello Tobacco Co.*, 197 F.2d at 633; *see also Buckhead Theatre Co. v. Atlanta Enter., Inc.*, 327 F.2d 365, 368 (5th Cir. 1964) (stressing that courts should consider the relevance of proof from the prior judgment against its "great potential to create prejudice").

Moreover, in addition to failing even to try to prove the elements of estoppel, Discover wrongly contends that Section 5(a) is "non-discretionary" whenever the so-called "threshold" elements of collateral estoppel are met because courts supposedly lacked authority to deny application of estoppel as unfair prior to the Supreme Court's decision in *Parklane Hosiery*, 439 U.S. at 331.[7]

First, Section 5(a) provides for relief only where collateral estoppel would apply, so all of the requirements for application of estoppel – including the ***requirement*** of fairness – plainly must be met. *See* 15 U.S.C. § 16(a). The case cited by Discover does not state otherwise. *See S. Pac. Commc'n Co. v. AT&T Co.*, 740 F.2d 1011 (D.C. Cir. 1984). There, the court refused to apply collateral estoppel or Section 5(a) effect to a prior antitrust consent decree. *Id.* at 1020-21. The decree specifically instructed that it should never operate as an estoppel against any party, and the court that entered the decree had expressed doubt that Section 5(a) would have any application. *Id.*[8]

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[7] *See* Pls.' Mot. at § I.

[8] The court also expressed concern that the plaintiff had "deliberate[ly]" made a "strategic decision to present its own evidence on the issues rather than to pursue possible collateral estoppel claims . . . ." *Id.* at 1019. This undermines Discover's argument that "Section 5(a) must provide for something other than the benefits of nonmutual collateral estoppel, or else

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Discover is also incorrect to state that, before 1979, courts did not require that application of collateral estoppel be fair. To the contrary, federal courts, including those in this Circuit, denied preclusive effect to findings from prior litigation as unfair long before *Parklane Hosiery* was decided. For example, in 1976 in *Freeman v. Marine Midland Bank New York*, this Court's sister district found that the defendant had satisfied the elements of res judicata, but that did not end the court's inquiry: "Despite the finding of these elements it is important to consider the equity and public policy principles which temper the doctrine." 419 F. Supp. 440, 447-48 (E.D.N.Y. 1976). The court further explained:

> Although, on the whole, the doctrines of res judicata and collateral estoppel are strictly applied, they have been occasionally rejected or qualified in cases in which an inflexible application would have violated an overriding public policy ***or resulted in manifest injustice to a party***. Courts recognize that the doctrines of res judicata and collateral estoppel express a salutary policy of benefit to society and to the parties of putting an end to litigation, but are not inexorable rules of law. And have, on rather rare occasions, weighed the policy of ending litigation against another policy which would be abrogated by a mechanical application of res judicata or collateral estoppel.

Id. at 448 (quoting 1 B Moore's Federal Practice par. 0.405(11) (2d ed. 1974) at 783-84) (emphasis added); *see also, e.g.*, *Ferrell v. American Express Co.*, No. 73-C-1419, 1974 WL 210, at *3 (E.D.N.Y. July 17, 1974) ("The doctrines of *res judicata* and collateral estoppel have been held inapplicable in cases where their application would thwart a strong public policy."); *Moch v. East Baton Rouge Parish School Bd.*, 548 F.2d 594, 596-97 (5th Cir. 1977) (collecting numerous cases in which courts "rejected strict application of bar and estoppel principles when

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it would be rendered superfluous" by *Parklane Hosiery*. *See* Pls.' Mot. at 3-4. As in *Southern Pacific Commc'n*, a plaintiff might deliberately make a strategic decision to seek relief under Section 5(a) rather than to pursue collateral estoppel claims, just as it might prefer to present its own evidence on issues that were already the subject of earlier litigation.

their use would violate an overriding public policy or result in manifest injustice"); *Tipler v. E.I. duPont de Nemours & Co.*, 443 F.2d 125, 128 (6th Cir. 1971) ("Neither collateral estoppel nor res judicata is rigidly applied. Both rules are qualified or rejected when their application would contravene an overriding public policy or result in manifest injustice.").

II. Discover's Request For Section 5(a) Prima Facie Relief Is Untimely And Prejudicial To Defendants' Trial Preparations

Discover's last minute attempt to seek prima facie effect for thirty-eight findings from the DOJ case – thirteen days before the start of trial – is untimely and prejudicial to the Defendants' trial efforts. Discover made a strategic decision months ago to move for partial summary judgment based on collateral estoppel alone, rather than under Section 5(a) of the Clayton Act, and did not propose alternative relief under Section 5(a) if the Court declined to apply, or only partially applied, collateral estoppel. On August 20, when the Court denied some of what Discover had been seeking – such as declining to give collateral estoppel effect to eighty-one specific determinations presented by Discover[9] - Discover could have moved then for the DOJ judgment to be given prima facie effect, despite not having originally made an alternative request for such relief when it moved for collateral estoppel. Instead, Discover waited until the eve of trial to make its request and only after (and because) the Court declined to give collateral estoppel effect to the debit foreclosure finding.

Indeed, Discover's request that the Court instruct the jury on the 38 findings set forth in its Motion is a *de facto* request for reconsideration of the Court's August 20 Order denying Discover's request to apply collateral estoppel to those findings plus 43 others. The Court specifically declined to present those 81 findings "in a vacuum" because it decided that

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[9] Opinion and Order, Aug. 20, 2008, slip op. at 13.

doing so would be "unfair to Defendants." As explained above, fairness is a requirement for applying the Section 5(a) presumption. By asking to re-litigate the fairness determination for its shortened list of 38 findings, Discover is effectively moving for an untimely reconsideration. Discover's late request is particularly egregious given that the lead finding it seeks relates to alleged foreclosure in debit, the very issue on which Defendants sought timely reconsideration that Discover opposed, without ever mentioning its forthcoming Section 5(a) request.

III. Discover Has Never Shown That Its Thirty-Eight So-Called "5A Findings" Satisfy the Requirements for Application of Collateral Estoppel

Section 5(a), by its terms, applies only to a prior finding that satisfies the requirements for application of collateral estoppel. *See* 15 U.S.C. § 16(a). Discover, in its motion, makes no effort to meet this precondition. Instead, it contends the Court has already found that its 38 so-called 5A Findings "satisfy the threshold requirements of collateral estoppel."[10] This is not a "fair reading"[11] of the Court's August 20 Order by any stretch.

Discover previously sought an order "establishing in this case those [81] key findings from the DOJ Case listed on Attachment A" to its summary judgment motion.[12] As support for this expansive relief, Discover offered only the conclusory assertion that each statement was "exhaustively litigated" and that "as ***support*** for this Court's conclusions on the elements of the antitrust violation, they were necessary to its judgment."[13] As Defendants explained in their opposition briefs, "Discover's proposed standard (which it does not even

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10 Pls.' Mot. at 1-2.

11 *Id.*

12 *See* Mem. of Law in Supp. of Discover's Mot. for Partial Summ. J., Feb. 15, 2008, at 55.

13 *Id.* at 55-56 (emphasis added).

apply) is infirm."[14] Defendants also demonstrated that many of the 81 statements on Discover's original Attachment A were neither "identical" to the issues in this litigation nor "necessary" to the judgment in the DOJ Case.[15]

After considering the parties' arguments, the Court summarily denied Discover's request:

> Finally, the Court declines to give collateral estoppel effect to the determinations encapsulated in Discover's Attachment A, concluding that the presentation to the jury of 81 individual statements in a vacuum and without context would be unfair to defendants.[16]

To avoid any doubt, the Court specifically identified those findings that it "necessarily had to determine" in the DOJ Case.[17] The Court also emphasized that its collateral estoppel ruling "is limited in scope, to wit, solely to [those determinations] that the court has found were necessary to support its decision . . . ."[18] In light of this record, Discover cannot seriously maintain that the Court somehow found that 81 ***additional*** statements from the DOJ opinion satisfy the requirements for application of collateral estoppel.

Furthermore, this Court granted Visa's motion to reconsider the Court's ruling that collateral estoppel applied to the finding that "Bylaw 2.10(e) and the CPP harmed competition and consumers in the relevant market by … foreclosing Discover from competing to

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14 MasterCard Incorporated and MasterCard International Incorporated's Mem. in Opp'n to Discover's Mot. for Partial Summ. J., March 24, 2008, at 54-55; *see* Visa U.S.A. Inc.'s Mem. of Law in Opp'n to Discover's Mot. for Partial Summ. J, March 24, 2008, at 44-47 (showing that mere "support" for a judgment is insufficient to establish that a finding was "necessary"). Visa and MasterCard incorporate their summary judgment opposition submissions by reference.

15 *Id.*

16 Opinion and Order, Aug. 20, 2008, slip op. at 13.

17 *Id.* at 8-9.

18 *Id.* at 12-13.

issue off-line debit cards," holding that the initial collateral estoppel ruling "failed to weigh adequately the potential for juror confusion."[19] The Court's holding that it will not apply collateral estoppel to its debit foreclosure finding highlights an absurdity of Discover's current argument – Discover argues that the Court has deemed the collateral estoppel requirements satisfied as to all of its "5A Findings," including the finding regarding debit foreclosure, and yet the Court explicitly denied collateral estoppel effect as to that finding in particular.

Indeed, Discover cannot plausibly claim that this Court's statements regarding debit were *necessary* to the Court's judgment, as affirmed by the Second Circuit. In the DOJ case, the Court's inquiry focused on whether or not By-Law 2.10(e) and the CPP harmed competition and consumers by foreclosing American Express and Discover in alleged credit and charge card and network services markets. Thus, it was not necessary for the Court to find that there was any harm to competition and consumers due to any foreclosure in debit. This point is made crystal clear by the Court's collateral estoppel rulings, which provide preclusive effect to the Court's prior findings of harm to competition and consumers,[20] but which do not include or rely on any findings of foreclosure in debit.[21] Thus, this Court plainly did not make the predicate determination that its statements related to debit were necessary to its judgment when it ruled that it would instruct the jury that 2.10(e) and CPP harmed competition and consumers while expressly *deleting* one of its findings in that regard relating to off-line debit foreclosures. At best, such statements regarding debit were supportive of the Court's judgment in the DOJ case, which is insufficient for collateral estoppel. *See, e.g., In re Microsoft Corp. Antitrust Litig.*, 355 F.3d 322, 325 (4th Cir. 2004) ("[T]he 'supportive of' standard is not the appropriate standard for

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19 Order, Oct. 1, 2008 at 6.

20 *See* Opinion and Order, Aug. 20, 2008, slip op. at 14.

21 *See* Order, Oct. 1, 2008 at 4-6.

applying collateral estoppel"). Accordingly, prima facie effect under Section 5(a) is not warranted for Discover's proposed statements.[22]

IV. Introducing the DOJ Final Judgment as Prima Facie Evidence of 38 Individual Statements Without Context Would Cause Severe Prejudice and Jury Confusion

In addition to Discover's failure to satisfy the elements of estoppel and its flawed legal analysis, there is yet another important reason why Discover's request should be denied. Presentation to the jury of 38 individual statements without context would impose a grave risk of unfair prejudice to Defendants and jury confusion. Accordingly, the DOJ judgment, if offered for this purpose, should be excluded under Fed. R. Evid. 403.[23]

Notably, this Court has already held that "presentation to the jury of 81 individual statements in a vacuum and without context would be unfair to Defendants."[24] In addition, with regard to its specific debit foreclosure finding, the Court held that "the possibility of juror

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22 Furthermore, Discover's proposed finding regarding debit foreclosure misquotes the Court's actual finding by intentionally omitting that portion that explicitly ties foreclosure of competition in issuance of off-line debit cards to the ability to *link credit and debit functionality on a single* ***smart card***. *Compare* "By-law 2.10(e) and MasterCard's Competitive Programs Policy ("CPP") do weaken competition and harm consumers by...effectively foreclosing American Express or Discover from competing to issue off-line debit cards, which soon will be linked to credit card functions on a single smart card." *United States v. Visa U.S.A.*, 163 F.Supp.2d 322, 329 (S.D.N.Y. 2001), *with* "Bylaw 2.10(e) ... did weak[en] competition and harm consumers by ... effectively foreclosing... Discover from competing to issue off-line Debit cards." Discover Br. Att.A. ¶1.

23 Section 5(a) of the Clayton Act does not allow – let alone require – the Court to forego application of the Federal Rules of Evidence to determine whether the DOJ final judgment is ***admissible*** at trial. If Congress had intended to allow for admission of prior judgments under Section 5(a) notwithstanding those Rules, it would have so provided. *Compare* 15 U.S.C. § 16(a) *with* 31 U.S.C. § 3731(d) ("Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, ***or the Federal Rules of Evidence***, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements . . . shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding . . . .") (emphasis added).

24 Opinion and Order, Aug. 20, 2008, slip op. at 13.

confusion outweighs any interest one could gain from the collateral estoppel ruling."[25] Presentation of 38 of those same statements, including the statement regarding debit foreclosure is no more fair.

Discover attempts to argue that there would be no unfairness or prejudice to the Defendants by giving prima facie effect to its "5A Findings" because Defendants will have an opportunity to litigate those facts to the jury.[26] But this argument ignores the fact that requiring Defendants to rebut 38 ancillary findings – some of which are on their face inconsistent with the Court's summary judgment order, such as the fact that this Court already determined that the CPP did not apply to debit – would certainly cause prejudice and jury confusion, as well as waste time and resources. Discover makes clear in its Proposed Jury Instructions that it would use the Court's finding that By-Law 2.10(e) and the CPP foreclosed Discover from off-line debit as the basis for collecting all of its debit-related damages in its First Claim and ***never*** prove the requisite elements of its Second Claim for the alleged debit card and debit network services market, despite the undisputed fact that neither debit market was alleged or decided in the DOJ case, nor was By-Law 2.10(e) or the CPP alleged or found to be an unlawful restraint of trade in either of the two alleged debit markets.

The outcome that Discover ultimately seeks is dumbfounding. Defendants are aware of no case – and Discover cites none – where a court has both applied collateral estoppel to preclude re-litigation of some prior findings ***and*** admitted the judgment from the prior litigation as prima facie evidence of numerous additional matters under Section 5(a). In addition, the statutory language added by the 1980 amendment makes clear that, if the court applies

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[25] Order, Oct. 1, 2008 at 6.

[26] Pls.' Mot. at 2.

collateral estoppel, it need not apply Section 5(a). *See* 15 U.S.C. § 16(a) ("Nothing contained in this section shall be construed to impose any limitation of the application of collateral estoppel . . . ."). Indeed, the ABA's model jury instructions suggest that collateral estoppel and the prima facie presumption under Section 5A should operate in the alternative. Under the model instruction, a jury is told that it remains the sole judge of whether plaintiff has satisfied all elements of its claim. *See* ABA Model Jury Instructions in Civ. Antitrust Cases G-26 ("You must determine . . . whether plaintiff has proved *all* of the required elements of its claim.") This requirement is plainly inconsistent with the collateral estoppel order relieving Discover of having to prove certain elements of its claim.

The risk of prejudice and jury confusion in this scenario is undeniable, as the jury will be left to parse the handful of fully estopped issues from more than three dozen other rebuttable presumptions based on the DOJ Case. Even if the jury could keep track of this distinction, it certainly would be left confused as to why some findings were established conclusively while others remained subject to contradiction by Defendants.

If Discover intends for Section 5(a) to have application here, collateral estoppel should not also apply. The procedure under Section 5(a) for introducing the DOJ judgment and instructing the jury as to its significance as establishing rebuttable presumptions is complex. It would make no sense to go through all of this and ***also*** instruct the jury that, in addition to the more than three dozen rebuttable presumptions based on the DOJ Case, there are several precluded issues. Indeed, if Section 5(a) were to apply, it would provide another reason to deny application of collateral estoppel as fundamentally unfair to Defendants.

Even if the Court were otherwise inclined to apply Section 5(a) – which is wholly unwarranted for all the reasons discussed above – the 38 individual statements listed on Discover's new Attachment A should be excluded as overly prejudicial and confusing.

CONCLUSION

For the foregoing reasons, Discover's request to introduce the DOJ judgment as prima facie evidence of 38 individual statements from the DOJ Case under Section 5(a) of the Clayton Act should be denied in its entirety.

Dated: October 10, 2008

Respectfully Submitted,

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