

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

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DISCOVER FINANCIAL SERVICES, DFS :
SERVICES, LLC, and DISCOVER BANK, :
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Plaintiffs, : Case No. 04-CV-7844 (BSJ)
 : ECF Case
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v. :
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VISA U.S.A. INC., VISA INTERNATIONAL :
SERVICE ASSOCIATION, MASTERCARD :
INCORPORATED, and MASTERCARD :
INTERNATIONAL INCORPORATED, :
 :
 :
Defendants. :
----- X

**VISA INTERNATIONAL SERVICE ASSOCIATION'S
MEMORANDUM OF LAW IN OPPOSITION TO
DISCOVER'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

I. INTRODUCTION

Discover Financial Services, DFS Services, LLC, and Discover Bank (collectively, “Discover”) do not argue that Visa International Service Association (“Visa International”) enacted or maintained either of the two rules invalidated in *United States v. Visa U.S.A. Inc., et al.*, 163 F. Supp. 2d 322 (S.D.N.Y. 2001) (“*DOJ I*”); 183 F. Supp. 2d 613 (S.D.N.Y. 2001) (“*DOJ II*”) (collectively, the “DOJ Judgment”). And, in its Memorandum of Law in Support of Discover’s Motion for Partial Summary Judgment (“Discover Motion”), Discover fails to identify any finding in the DOJ Judgment that Visa International conspired with Visa U.S.A. or MasterCard regarding either Visa U.S.A.’s By-Law 2.10(e) or MasterCard’s Competitive Programs Policy (“CPP”). Nonetheless, Discover asks this Court to estop Visa International from challenging liability on Discover’s approximately \$7 billion claim arising from the injury that Discover allegedly suffered as a result of By-Law 2.10(e) and the CPP. In addition to the reasons for not applying collateral estoppel set forth in Visa U.S.A. Inc.’s Memorandum of Law

in Opposition to Discover's Motion for Partial Summary Judgment, in which Visa International joins, and in Defendants Visa U.S.A. Inc. and Visa International Service Association's Joint Response to Discover's Statement of Undisputed Facts, two independent grounds specific to Visa International establish that collateral estoppel does not apply here.

First, offensive collateral estoppel requires that the prior judgment have addressed each element of the cause of action on which the plaintiff seeks to estop the defendant from challenging liability. Here, Discover seeks to estop Visa International from challenging liability on Count I of Discover's Second Amended Complaint, which pleads various conspiracies involving By-Law 2.10(e) and the CPP. Yet, the DOJ Judgment did not make any finding that Visa International conspired with Visa U.S.A. or MasterCard. Additionally, Discover's Count I relies on the DOJ Judgment's market power findings, but those findings did not apply to Visa International. The elements of Count I as alleged do not reflect the DOJ Judgment's findings regarding Visa International. Therefore, Discover's estoppel argument fails as a matter of law.

Second, collateral estoppel requires that the findings on which a party seeks estoppel were necessary to the prior judgment. The DOJ Judgment included Visa International only to ensure that the relief obtained against Visa U.S.A. and its By-Law 2.10(e) would be effective. In fact, in the DOJ Judgment the Court expressly stated that enjoining Visa International did not require any liability finding. Accordingly, Discover's effort to apply collateral estoppel against Visa International further fails because none of the findings that Discover seeks to apply was necessary to the DOJ Judgment.

II. BACKGROUND

A. The DOJ Judgment Entered Only “Minor and Ancillary” Relief Against Visa International

Visa International did not adopt or apply either By-law 2.10(e) or the CPP; rather, it expressly declined to adopt, at the international level, a by-law similar to Visa U.S.A.’s By-law 2.10(e). *See* Minutes of Visa International Meeting of the Board of Directors, 5 June 1996, at 5-6, Plaintiffs’ Exhibit 34 to the Deposition of Edmund P. Jensen, Ex. 1 to Declaration of A. Kelly Turner in Support of Visa International Service Association’s Opposition to Discover’s Motion for Partial Summary Judgment (“Turner Decl.”). This Court included Visa International in the DOJ Judgment only to ensure “effective relief by preventing Visa International from adopting at an international level a by-law that Visa U.S.A. would be prohibited from adopting itself.” *DOJ II*, 183 F. Supp. 2d at 617. The Court specifically described the relief entered against Visa International as “minor and ancillary.” *Id.* Indeed, the government asserted that Visa International should be included in the DOJ Judgment for this very reason. Government’s Reply to Defendants’ Comments Concerning the Proposed Final Judgment at 5, *United States v. Visa U.S.A. Inc.* (Oct. 29, 2001), Ex. 2 to Turner Decl.

B. The “Minor and Ancillary” Relief Against Visa International Did Not Require a Liability Finding

This Court held that a liability finding was not a necessary prerequisite to the relief it entered against Visa International in the DOJ Judgment: “[R]egardless of whether Visa International is found to be liable, the injunctive relief provisions to which it is subject are ‘minor and ancillary’ and therefore appropriate.” *DOJ II*, 183 F. Supp. 2d at 617 (citation omitted). The government sought to include Visa International in the DOJ Judgment because the government believed Visa International “could render relief [against By-law 2.10(e)] completely ineffective by adopting, at the international level, a by-law that Visa U.S.A. would be prohibited

from adopting itself.” Government’s Reply at 5. The DOJ Judgment cited this concern as the reason for entering relief against Visa International, rather than any specific liability finding. *DOJI*, 163 F. Supp. 2d at 407; *DOJ II*, 183 F. Supp. 2d at 617.

In *DOJ II*, issued after the parties commented on the proposed judgment, the Court did find Visa International “liable” under Section 1 of the Sherman Act. The Court, however, did not identify the conspiracy in which Visa International had participated, and the Court’s findings against Visa International in the DOJ Judgment did not clearly point to a conspiracy. The DOJ Judgment made three findings specific to Visa International: (1) Visa International “provided affirmative encouragement for By-law 2.10(e)”; (2) Visa International would have adopted an international rule similar to By-law 2.10(e), but did not due to foreign regulatory concerns; and (3) Visa International had the power to override By-law 2.10(e). *DOJI*, 163 F. Supp. 2d at 406-07; *DOJ II*, 183 F. Supp. 2d at 617. But Visa International’s affirmative encouragement of By-law 2.10(e) could have involved a conspiracy with Visa U.S.A., a conspiracy with Visa International’s own bank members, or no conspiracy whatsoever. And the same is true with respect to both Visa International’s consideration of a global version of By-law 2.10(e) and its not prohibiting Visa U.S.A. from adopting or maintaining By-law 2.10(e).

C. Discover’s Collateral Estoppel Motion

Discover apparently seeks to preclude Visa International from challenging liability as to much of Discover’s \$7 billion damages request, although Discover’s summary judgment argument regarding Visa International is less than clear. Based on the DOJ Judgment, Discover asks the Court to find Visa International “liable” on Count I of Discover’s Second Amended Complaint. Discover Mem. at 53. Yet, Discover does not point to any portion of the DOJ Judgment where the Court found that Visa International participated in the conspiracy that Discover alleges in Count I.

Discover's Motion also apparently requests that Visa International be held jointly and severally liable with Visa U.S.A. and/or MasterCard. Discover Mem. at 27 (seeking collateral estoppel on Count I against all Defendants, including Visa International). While Discover's Motion does not say specifically that Visa International should be found jointly and severally liable, Discover's Count I seeks damages arising from Visa U.S.A.'s By-law 2.10(e) and MasterCard's CPP. It follows that any liability attributed to Visa International for Count I must relate to one of those two rules and, thus, presumably would be shared with either Visa U.S.A. or MasterCard. Importantly, however, Discover does not point to any finding in the DOJ Judgment that Visa International conspired with Visa U.S.A. or MasterCard.

Discover also asks this Court to bar Visa International from challenging two factual findings regarding Visa International from the DOJ Judgment. Attachment A to Discover Mem., pp. 16-17. Again, though, Discover's request is vague. Discover cites 81 different findings from the DOJ Judgment in Attachment A to its Memorandum, purporting to seek collateral estoppel as to all of the findings. Only two of these 81 findings are specific to Visa International. Attachment A to Discover Mem., pp. 16-17, ¶¶ 72-73. Yet, Discover does not state whether it also seeks to apply the other 79 findings against Visa International. This Opposition does not address the findings that do not pertain to Visa International, as Visa International assumes that Discover seeks to apply to Visa International only the two findings specifically pertaining to it.¹

III. ARGUMENT

A. Discover's Claim Against Visa International is Not Identical to the DOJ Case

For Discover to apply collateral estoppel against Visa International on Count I, Discover must establish that the Court considered and decided the same issue against Visa International in

¹ As stated *supra*, Part I, Visa International joins in Visa U.S.A.'s Opposition, including Visa U.S.A.'s arguments for why collateral estoppel should not apply to the 79 other findings.

the DOJ Judgment. *United States v. Hussein*, 178 F.3d 125, 129 (2d Cir. 1999). The determination in the prior action must have established each element of the claim on which the plaintiff seeks to apply collateral estoppel. *SEC v. Monarch Funding Corp.*, 192 F.3d 295, 308 (2d Cir. 1999). In *Monarch*, the Second Circuit held that collateral estoppel would not bar a defendant from challenging liability on a securities fraud claim where the prior proceeding did not establish all the elements of securities fraud. *Id.*

Discover's effort to apply collateral estoppel against Visa International here fails under the Second Circuit's reasoning in *Monarch*. In Count I, Discover alleges, among other matters:

- “Defendants, on behalf of and in collaboration with their banks, have engaged in a continuing combination and conspiracy to organize and operate their general purpose card networks in a manner that restrains competition among general purpose card networks in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, as amended.” Second Amended Complaint ¶ 94.
- “[D]efendants and certain of their banks have adopted and enforced 2.10(e) and the CPP” *Id.* ¶ 95.
- “Defendants have been able to implement and enforce 2.10(e) and the CPP because they possess economic power, both in their individual capacity and jointly, in the general purpose card network services market. . . .” *Id.* ¶ 96.

The DOJ Judgment, however, did not include findings regarding Visa International that correspond to these allegations from Discover's Count I. For example, the DOJ Judgment did not include any finding that Visa International conspired with any banks, or any other party, or that Visa International operated a general purpose credit card network. *See DOJ I*, 163 F. Supp. 2d at 406-07; *DOJ II*, 183 F. Supp. 2d at 417. Similarly, while the Court found that Visa International affirmatively encouraged By-law 2.10(e), the DOJ Judgment did not find that Visa International adopted or enforced either Visa U.S.A.'s By-law 2.10(e) or MasterCard's CPP. *Id.* Finally, as Discover's own complaint acknowledges, the DOJ Judgment's market power findings

pertained only to Visa U.S.A. and MasterCard, not to Visa International. Second Amended Complaint ¶ 96 (quoting market power findings only as to Visa U.S.A. and MasterCard).

Accordingly, although the Court found Visa International liable in the DOJ Judgment, it did not find the violations that Discover has alleged in Count I. As in *Monarch*, the prior judgment did not “establish the elements” of Discover’s cause of action as against Visa International. *Monarch*, 192 F.3d at 308. Collateral estoppel, therefore, cannot apply.

B. The Court’s Findings Regarding Visa International Were Not Necessary to the DOJ Judgment

Collateral estoppel can apply only for findings that were “necessary to the judgment” in the prior proceeding. *Jim Beam Brands Co. v. Beamish & Crawford Ltd.*, 937 F.2d 729, 734 (2d Cir. 1991); *see also In re Relafen Antitrust Litig.*, 286 F. Supp. 2d 56, 66-67 (D. Mass. 2003). Here, the Court’s DOJ Judgment stated expressly that the Court could order relief against Visa International without any liability finding at all: “[R]egardless of whether Visa International is found to be liable, the injunctive relief provisions to which it is subject are ‘minor and ancillary’ and therefore appropriate.” *DOJ II*, 183 F. Supp. 2d at 617 (citing *EEOC v. Local 638*, 81 F.3d 1162, 1180 (2d Cir. 1996)). Under *EEOC*, the Court could have enjoined Visa International as it did without any additional findings because the injunction as to Visa International did not impose a “considerable burden” and was intended to “ensure effective relief.” *DOJ II*, 183 F. Supp. 2d at 617 (citing *EEOC*, 81 F.3d at 1180).

The DOJ Judgment’s liability finding regarding Visa International is similar to the misrepresentation findings as to which the district court found collateral estoppel inapplicable in *In re Relafen*. There, the antitrust plaintiff sought to estop the defendants from challenging certain findings from a prior action regarding the defendants’ misrepresentation to the patent office. 286 F. Supp. 2d at 64-65. The prior case had involved only a patent validity

determination, however, and the findings of misrepresentation were not necessary to invalidate the patent. *Id.* at 68, 70. The *In re Relafen* court therefore held that collateral estoppel did not apply to those findings. *Id.* Similarly, because the specific findings made in the DOJ Judgment regarding Visa International, including the finding regarding liability, were not necessary to the DOJ Judgment, collateral estoppel cannot apply to those DOJ Judgment findings here.

IV. CONCLUSION

For all the foregoing reasons, Visa International requests that the Court deny Discover's Motion for Partial Summary Judgment regarding collateral estoppel.

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LOCKE LORD BISSELL & LIDDELL LLP

By: 
A. Kelly Turner

111 South Wacker Drive
Chicago, IL 60606-4410
Telephone: (312) 443-0356
kturner@lockelord.com

Jackie Redin Klein
LOCKE LORD BISSELL & LIDDELL LLP
300 S. Grand, Suite 800
Los Angeles, CA 90071
Telephone: (213) 485-1500

*Attorneys for Defendant Visa International Service
Association*

CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2008, I caused true and correct copies of DECLARATION OF A. KELLY TURNER IN SUPPORT OF VISA INTERNATIONAL SERVICE ASSOCIATION'S OPPOSITION TO DISCOVER'S MOTION FOR PARTIAL SUMMARY JUDGMENT to be served by electronic mail on all parties listed on the below service list, with courtesy copies sent by Federal Express to those so indicated.

By: 
A. Kelly Turner

Asim Bhansali: ABhansali@kvn.com (**Email and Federal Express**)
KEKER & VAN NEST, LLP
710 Sansome Street
San Francisco, CA 94111-1704
Telephone: (415) 391-5400
Facsimile: (415) 397-7188

Jennifer M.H. Selendy: jselendy@kirkland.com (**Email**)
Laura B. Kadetsky: lkadetsky@kirkland.com (**Email and Federal Express**)
KIRKLAND & ELLIS LLP
Citigroup Center
153 East 53rd Street
New York, NY 10022
Telephone: (212) 446-4800
Facsimile: (212) 446-4900

--- AND ---

Michael A. Rubin:
Michael.Rubin@aporter.com (**Email and Federal Express**)
ARNOLD & PORTER LLP
555 12th Street, NW
Washington, DC 20004-1206
Telephone: (202) 942-5000
Facsimile: (202) 942-5999

Counsel for Discover Financial Services LLC

Counsel for Defendant Visa U.S.A. Inc.

Scott W. Bulcao: sbulcao@stblaw.com (**Email and Federal Express**)
SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, NY 10017
Telephone: (212) 455-2000
Facsimile: (212) 455-2502

Arman Y. Oruc: aoruc@stblaw.com (**Email**)
SIMPSON THACHER & BARTLETT LLP
555 11th Street, N.W., 7th Floor
Washington, D.C. 20004
Telephone: (202) 220-7700
Facsimile: (202) 220-7702

Counsel for Defendants MasterCard Incorporated and MasterCard International Incorporated