

EXHIBIT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DISCOVER FINANCIAL SERVICES, INC.,

Plaintiff,

v.

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

Defendants.

Case No. 04 CV 7844

ECF Case

**DEFENDANTS' PROFFER OF JURY INSTRUCTIONS AND VERDICT FORM
FOR CREDIT MARKET LIABILITY ISSUES**

**GENERAL PURPOSE CREDIT AND CHARGE CARD MARKET AND GENERAL
PURPOSE CREDIT AND CHARGE CARD NETWORK SERVICES MARKET¹**

REQUESTED JURY INSTRUCTION NO. __

Relevant Market – Definition²

Discover contends that Visa's By-Law 2.10(e) and MasterCard's CPP prevented financial institutions from issuing general purpose credit and charge cards on the Discover Network. In order for you to determine whether some amount of competition has been foreclosed by By-Law 2.10(e) and the CPP, it is necessary for you to first define the markets in which Visa's and Mastercard's charge and credit cards and network services compete. You will then be able to determine if competition within these market has been harmed in some meaningful way by By-Law 2.10(e).

A market has two dimensions. The first concerns which products or services are in competition, and is called the relevant product or services market. The second concerns the geographic area where the competition takes place. This is called the relevant geographic market.

¹ Defendants submit these instructions and Verdict form relating to the general purpose credit and charge card markets for the purpose of preserving their arguments pursuant to Rule 51(d) to appeal the full scope of the court's August 20, 2008 order (dkt 348) on the application of collateral estoppel to Discover's claim relating to credit markets. See Visa's and MasterCard's oppositions to motions for summary judgment (dkt nos. 303, 330) and Trial Brief to be submitted. The Trial Brief will address whether, and to what extent, the Court's collateral estoppel ruling deprives Defendants of their 7th Amendment right to a jury trial. Visa and MasterCard believe that Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979), may not be applicable here, in whole or part.

² AUTHORITY: 4 Leonard B. Sand, et al., *Modern Fed. Jury Instructions – Civil* ¶ 79.02, Ins. No. 79-51 (2008).

In this case, the parties agree that the relevant geographic market is the United States. Thus, you must only determine which products and services are in competition with general purpose credit and charge cards and charge card network services.

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Relevant Market – Product Market³

Plaintiffs contend that the relevant markets are (1) general purpose credit and charge cards and (2) general purpose credit and charge card network services. Defendants contend that plaintiffs have not presented adequate evidence to define these markets and that a proper market must account for debit cards, cash and checks, as alternative competitive payment methods.

The basic idea of a product market is that the products within it are reasonable substitutes from a buyer's point of view. This does not mean that products must be identical to be in the same relevant market. It means that, as a matter of practical fact and the actual behavior of buyers, the products must be reasonable substitutes for the buyer's needs.

One way you may be able to tell whether products are reasonable substitutes for each other is by considering whether changes in the price of one product have fairly direct and substantial effects upon the prices or sales of the other products. If so, the products are in the same market.

You may also consider how people in the industry and the public at large view the products; whether the products have the same or similar characteristics or uses; whether the products have similar prices; whether the products are sold to similar customers; and whether they are distributed and sold by the same kinds of distributors or dealers.

In sum, to determine the relevant product market, you must decide which products compete with each other. This is a practical determination. Products do not have to be identical

³ 4 Leonard B. Sand, et al., *Modern Fed. Jury Instructions – Civil* ¶ 79.02, Ins. No. 79-51 (2008).

to be in the same relevant market, but they must be sufficiently similar in the respects I have mentioned to compete meaningfully with each other.

If you find that plaintiffs have proven a relevant product market comprised of products that are reasonably interchangeable, then you should continue to evaluate the remainder of plaintiffs' claim. However, if you find that plaintiffs have failed to prove such a market, then you must find in the defendants' favor on this claim.

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Elements of the Claim⁴

In order to prove their claim that Defendants unreasonably restrained trade in the general purpose credit and charge card market and in the general purpose credit and charge card network services market by adopting By-Law 2.10(e), the plaintiffs must prove, by a preponderance or greater weight of the evidence, each of the following elements:

First, that By-Law 2.10(e) was an unreasonable restraint of trade in each the general purpose credit and charge card market and in the general purpose credit and charge card network services market;

Second, that the plaintiffs were injured in their business or property as a result of Defendants' actions.

You must therefore decide whether Discover has proven, by a preponderance of the evidence that By-Law 2.10(e) and the CPP were each unreasonable restraints of trade with respect to the general purpose credit and charge card market and the general purpose credit and charge card network services market and whether as result of the harm to competition from the By-Law 2.10(e) and the CPP, Discover was injured in its business or property.

I will now instruct you on the elements listed above that you must decide.

⁴ 4 Leonard B. Sand, et al., *Modern Fed. Jury Instructions – Civil* ¶ 79.02, Ins. No. 79-51 (2008).

**GENERAL PURPOSE CREDIT AND CHARGE CARD MARKET AND GENERAL
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REQUESTED JURY INSTRUCTION NO. ____

Rule of Reason - Proof of Competitive Harm (By-Law 2.10(e))⁵

You must examine all of the facts and circumstances of the case in order to determine whether By-Law 2.10(e) was an unreasonable restraints of trade. Bear in mind that in making this determination, you should focus on the effect of By-Law 2.10(e) on overall competition in the relevant markets – not the effect on the plaintiffs alone.

As common sense would tell you, antitrust law does not prohibit every business agreement which affects trade or every agreement which may restrain or influence competition. That law prohibits only *unreasonable* restraints of trade. The goal of the antitrust laws is to prevent restraints of trade which tend, or are intended, to control prices, to restrict production or otherwise affect or control the market so as to deprive purchasers and consumers of the benefits of free and open competition. Thus, for a restraint to be unreasonable it must harm competition and thereby harm consumers.

It is therefore up to you based solely on the evidence presented during this trial to determine if By-Law 2.10(e) was an unreasonable restraint of trade in the general purpose credit and charge card market and the general purpose credit and charge card network services market.

No one factor of control should dictate your determination whether By-Law 2.10(e) was an unreasonable restraint of trade. You should consider all the facts and circumstances relating to By-Law 2.10(e)'s impact on competition.

⁵ 4 Leonard B. Sand, et al., *Modern Fed. Jury Instructions – Civil* ¶¶ 79.04, 79.06, Ins. Nos. 79-43, 79-61 (2008).

You should consider the nature of By-Law 2.10(e), the actual immediate effect and its probable future effect. You should consider the history of By-Law 2.10(e) and the context in which it was adopted. You should also consider the nature of the particular industry in which By-Law 2.10(e) was adopted, and the condition of that industry both before and after it was adopted.

You should consider the purpose of By-Law 2.10(e) and the reason why it was made. The fact that Visa had a good motive or sound business purpose for adopting By-Law 2.10(e) does not prevent you from finding that By-Law 2.10(e) was an unreasonable restraints of trade. But examining the purpose of By-Law 2.10(e) may assist you in determining its effects on competition in the alleged general purpose credit and charge card market and general purpose credit and charge card network services market.

You should also consider the relative size and economic strength of Visa in the market.

If, after considering all these facts and circumstances, you find that By-Law 2.10(e) imposes some unreasonable restraint on competition, you should then determine whether By-Law 2.10(e) had any positive or pro-competitive effects on competition. If you find that it does, then your final determination whether By-Law 2.10(e) was an unreasonable restraint of trade must be made by balancing its restrictive or anti-competitive effects against its pro-competitive effects. If the anti-competitive effects of By-Law 2.10(e) outweigh pro-competitive effects, then you should find that By-Law 2.10(e) was an unreasonable restraint of trade.

**GENERAL PURPOSE CREDIT AND CHARGE CARD MARKET AND GENERAL
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REQUESTED JURY INSTRUCTION NO. ____

Rule of Reason - Proof of Competitive Harm (the CPP)⁶

You must examine all of the facts and circumstances of the case in order to determine whether the CPP was an unreasonable restraints of trade. Bear in mind that in making this determination, you should focus on the effect of the CPP on overall competition in the relevant markets – not the effect on the plaintiffs alone.

As common sense would tell you, antitrust law does not prohibit every business agreement which affects trade or every agreement which may restrain or influence competition. That law prohibits only *unreasonable* restraints of trade. The goal of the antitrust laws is to prevent restraints of trade which tend, or are intended, to control prices, to restrict production or otherwise affect or control the market so as to deprive purchasers and consumers of the benefits of free and open competition.

It is therefore up to you based solely on the evidence presented during this trial to determine if the CPP was an unreasonable restraint of trade in the general purpose credit and charge card market and the general purpose credit and charge card network services market.

No one factor of control should dictate your determination whether the CPP was an unreasonable restraint of trade. You should consider all the facts and circumstances relating to the CPP's impact on competition.

You should consider the nature of the CPP, the actual immediate effect and its probable future effect. You should consider the history of the CPP and the context in which it

⁶ 4 Leonard B. Sand, et al., *Modern Fed. Jury Instructions – Civil* ¶¶ 79.04, 79.06, Ins. Nos. 79-43, 79-61 (2008).

was adopted. You should also consider the nature of the particular industry in which the CPP was adopted, and the condition of that industry both before and after it was adopted.

You should consider the purpose of the CPP and the reason why it was made. The fact that MasterCard had a good motive or sound business purpose for adopting the CPP does not prevent you from finding that the CPP was an unreasonable restraints of trade. But examining the purpose of the CPP may assist you in determining its effects on competition in the alleged general purpose credit and charge card market and general purpose credit and charge card network services market.

You should also consider the relative size and economic strength of MasterCard in the market.

If, after considering all these facts and circumstances, you find that the CPP imposes some unreasonable restraint on competition, you should then determine whether the CPP had any positive or pro-competitive effects on competition. If you find that it does, then your final determination whether the CPP was an unreasonable restraint of trade must be made by balancing its restrictive or anti-competitive effects against its pro-competitive effects. If the anti-competitive effects of the CPP outweigh pro-competitive effects, then you should find that the CPP was an unreasonable restraint of trade.

PROFFER CREDIT MARKET VERDICT FORM
SHERMAN ACT, § 1 (CREDIT)

We, the jury, unanimously find as follows:

1. Have Plaintiffs proven by a preponderance of the evidence that general purpose credit and charge cards are a relevant product market within the United States?

Yes _____

No _____

2. Have Plaintiffs proven by a preponderance of the evidence that general purpose credit and charge card network services are a relevant product market within the United States?

Yes _____

No _____

(If the answer to either Question 1 or Question 2 is "No," please [steps for returning form].)

3. Have Plaintiffs proven by the preponderance of the evidence that By-Law 2.10(e) had a harmful effect on competition in the credit markets in the United States?

Yes _____

No _____

(If "No," please [steps for returning form].)

4. Have Plaintiffs proven by the preponderance of the evidence that By-Law 2.10(e) unreasonably restrained trade in the credit markets in the United States?

Yes _____

No _____

(If "No," please [steps for returning form].)