



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE :

MDL No. 1409
M 21-95

CURRENCY CONVERSION FEE :
ANTITRUST LITIGATION

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THIS DOCUMENT RELATES TO:

ROBERT ROSS et al., :

Plaintiffs, :

05 Civ. 7116 (WHP)

-against- :

MEMORANDUM & ORDER

BANK OF AMERICA, N.A. (USA) et al., :

Defendants. :

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WILLIAM H. PAULEY III, District Judge:

Plaintiffs bring this putative antitrust class action alleging that certain general purpose credit card issuers¹ conspired to include mandatory arbitration clauses in cardholder agreements in violation of the Sherman Act, 15 U.S.C. §1 et seq. Discover renews its motion to dismiss the Class Action Complaint pursuant to Rule 12(b)(1) for lack of Article III standing and

¹ Plaintiffs bring their claims against Bank of America, N.A. (USA) (“Bank of America”), Capital One Bank, Capital One, F.S.B. (together with Capital One Bank, “Capital One”), J.P. Morgan Chase (prior to its merger with Bank One Corporation, which previously acquired First USA, Inc., “Chase”), Chase Bank USA, N.A., Citigroup, Inc., Citibank (South Dakota) N.A., Citibank USA, N.A., Universal Bank, N.A., Universal Financial Corp. (the Citigroup, Citibank and Universal entities are collectively referred to as “Citibank”), Citicorp Diners Club, Inc., HSBC Finance Corp., HSBC Bank, Nevada, N.A. (together with HSBC Finance Corp. and its predecessor Household International Inc., “Household”), MBNA America Bank, N.A., MBNA America (Delaware), N.A. (together with MBNA America Bank, N.A., “MBNA”) (collectively, the “Bank Defendants”), and Novus Credit Services, Inc., Discover Financial Services, Inc. (Discover Financial Services, Inc. is now Discover Financial Services LLC) and Discover Bank (collectively, “Discover” and together with the Bank Defendants, the “Defendants”).

Rule 12(b)(6) for lack of antitrust standing. All Defendants also move to strike Plaintiffs' demand for a jury trial. For the following reasons, Discover's motions to dismiss for lack of Article III standing and lack of antitrust standing are denied. Defendants' motions to strike Plaintiffs' demand for a jury trial are granted.

BACKGROUND

Plaintiffs hold general purpose credit cards issued by one or more of the Defendants.² Their class action complaint alleges that the Banks, together with other co-conspirators, including American Express and Wells Fargo, colluded to force cardholders to accept mandatory arbitration clauses in their cardholder agreements. (Class Action Complaint dated Aug. 11, 2005 ("Complaint" or "Compl.") ¶¶ 97-101.) The Complaint asserts that Defendants formed "an organization uniquely devoted to collectively promoting and implementing mandatory arbitration clauses" in their cardholder agreements known among participants as the "Arbitration Coalition," which convened on at least nineteen occasions. (Compl. ¶¶ 101, 111-12.)

Plaintiffs contend that these activities furthered a conspiracy to suppress competition and impede access to the court system. (Compl. ¶¶ 124, 152-54.) Plaintiffs allege that Defendants' conduct "deprive[d] cardholders of meaningful choice regarding arbitration,"

² Familiarity with this Court's prior Memoranda and Orders in this action as well as Ross v. American Express Co., No. 04 Civ. 5723 and In re Currency Conversion Fee Antitrust Litigation, MDL No. 1409, and the Second Circuit's opinions in this action and Ross v. American Express Co. is presumed. See Ross v. Am. Express Co., 547 F.3d 137 (2d Cir. 2008) ("Ross V"); Ross v. Bank of Am. N.A. (U.S.A.), 524 F.3d 217 (2d Cir. 2008) ("Ross IV"); Ross v. Am. Express Co., 478 F.3d 96 (2d Cir. 2007) ("Ross III"); Ross v. Bank of Am. N.A. (U.S.A.), No. 05 Civ. 7116, 2006 WL 2685062 (S.D.N.Y. Sept. 20, 2006) ("Ross II"); Ross v. Am. Express Co., No. 04 Civ. 5723, 2005 WL 2364969 (S.D.N.Y. Sept. 27, 2005) ("Ross I").

and that the arbitration clauses “effectively negate meaningful recourse for unlawful conduct.” (Compl. ¶ 6.) Plaintiffs seek declaratory and injunctive relief. (Compl. ¶¶ 150-63.)

Discover’s cardholder agreements contain a clause that purportedly allows new cardholders to “opt out” of mandatory arbitration if they give notice within thirty days of receiving a card. (Affidavit of Julie Loeger dated Nov. 10, 2005 (“Loeger Aff.”) ¶ 6, Ex. C: Discover Cardholder Agreement dated April 2003, at 2.) When Discover implemented this opt-out provision in 2003, it offered a similar opportunity to existing cardholders. (Loeger Aff. ¶ 5, Ex. B: Arbitration Rejection Notice dated January 2003.)

On September 20, 2006, this Court dismissed the Complaint for lack of Article III standing, finding that Plaintiffs’ allegations of injury flowing from the mandatory arbitration clauses were too speculative. Ross II, 2006 WL 2685082, at *3-5 (the “September 20th Order”). On April 25, 2008, the Court of Appeals vacated the September 20th Order, holding that the Complaint’s allegations “[of] reduced choice and diminished quality result directly from the banks’ illegal collusion to constrict the options available to cardholders . . . [and] [t]hese harms are sufficiently ‘actual or imminent’ as well as ‘distinct and palpable,’ to constitute Article III injury in fact.” Ross IV, 524 F.3d at 223. While Discover urged dismissal on the grounds that its opt-out provision deprived Plaintiffs of standing, neither this Court nor the Court of Appeals reached that argument. Ross IV, 524 F.3d at 226. The Court of Appeals remanded the cardholders’ claims against Discover “to afford the district court, in the first instance, to examine the opt-out provisions and to determine whether [Discover] should be treated differently from the other banks.” Ross IV, 524 F.3d at 226. On remand, this Court now considers Discover’s argument.

DISCUSSION

I. Article III Standing

Article III standing is “the threshold question in every federal case, determining the power of the court to entertain suit.” Ross IV, 524 F.3d at 222 (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)) (internal quotation marks and citation omitted). “A court presented with a motion to dismiss under both Rule 12(b)(1) and 12(b)(6) must decide the jurisdictional question first because a disposition of a Rule 12(b)(6) motion is a decision on the merits, and therefore, an exercise of jurisdiction.” Adamu v. Pfizer, Inc., 399 F. Supp. 2d 495, 500 (S.D.N.Y. 2005) (quoting Magee v. Nassau County Med. Ctr., 27 F. Supp. 2d 154, 158 (E.D.N.Y. 1998)).

In considering a Rule 12(b)(1) motion, all facts alleged in the complaint are taken as true and all reasonable inferences drawn in Plaintiffs’ favor. See Bldg. & Const. Trades Council of Buffalo, N.Y. & Vicinity v. Downtown Dev., Inc., 448 F.3d 138, 144 (2d Cir. 2006). “Dismissal is inappropriate unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him or her to relief.” Raila v. United States, 355 F.3d 118, 119 (2d Cir. 2004).

To establish standing under Article III, Plaintiffs must demonstrate: (1) an injury in fact that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) causation; and (3) that it is likely, not speculative, that the injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). “Injury in fact is a low threshold which . . . ‘need not be capable of sustaining a valid cause of action,’ but ‘may simply be the fear or anxiety of future harm.’” Ross IV, 524 F.3d at 222 (quoting Denney v. Deutsche Bank AG, 443 F.3d 253, 263 (2d Cir. 2006)). “Moreover, the fact that an injury may be outweighed by other benefits, while often sufficient to defeat a claim for

damages, does not negate standing.” Ross IV, 524 F.3d at 222 (quoting Denney, 443 F.3d at 265). As for causation, “[a] plaintiff may satisfy the causation requirement if the complaint avers the existence of an immediate link between [the defendant’s conduct] and the injury.” Pac. Capital Bank, N.A. v. Connecticut, 542 F.3d 341, 350 (2d Cir. 2008) (citations and quotation marks omitted). To obtain redress, a “non-speculative likelihood that the injury can be remedied by the requested relief” must exist. W.R. Huff Asset Mgmt. Co. v. Deloitte & Touche LLP, 549 F.3d 100, 106-07 (2d Cir. 2008).

Plaintiffs allege that Discover and its co-conspirators included arbitration clauses that deprive card holders of “meaningful choice” in dispute resolution, and that three types of injury result: (1) reduced choice and diminished quality of credit card services; (2) increased costs of credit card services attributable to dispute resolution expenses; and (3) increased costs of credit card services attributable to violations of consumer protection and antitrust statutes. This allegation is sufficient to pass the “low threshold” of Article III injury in fact. See Ross IV, 524 F.3d at 224-25 (“The reduction in choice and diminished quality of credit services to which the cardholders claim they have been subjected are present anti-competitive effects that constitute Article III injury in fact.”). The Court of Appeals offered as an example of the harm—“the reduction of choice for consumers, many of whom might well prefer a credit card that allowed for more methods of dispute resolution. . . .” Ross IV, 524 F.3d at 224. Among those methods of dispute resolution, the Court of Appeals focused on access to class actions lawyers, noting that “because the banks conspired not to offer cards permitting class actions, the cardholders will be forced to expend time and legal fees to monitor the legality of the banks’ behavior, whereas if the cardholders had access to a card that permitted class actions, they would have the option of relying on motivated class action attorneys to perform this function.” Ross IV, 524 F.3d at 224.

Whether Discover's opt-out provision offers consumers "meaningful choice"—in particular, the ability to file a putative class action—is a question that cannot be answered at the pleading stage. Accepting Plaintiffs' allegations as true, an "opt-out" provision may be illusory. This issue requires discovery.

Plaintiffs also allege that the lack of meaningful choice drives up costs for cardholders to seek redress. Not surprisingly, the Class Action Complaint asserts that class actions provide a more efficient way to resolve disputes that are substantial, yet may harm each individual consumer in a small way. Plaintiffs allege that this diminishes the value of credit cards. See Ross IV, 524 F.3d at 224. Thus, Plaintiffs have tied Discover's conduct to their harm. As for redress, Plaintiffs seek injunctive relief striking the arbitration clauses from the cardholder agreements. Such relief would redress Plaintiffs' alleged harm. Accordingly, Discover's motion to dismiss for lack of Article III standing is denied.

II. Sufficiency of the Pleadings

On a motion to dismiss, the Court must accept the material facts alleged in the complaint as true and construe all reasonable inferences in the plaintiff's favor. Grandon v. Merrill Lynch & Co., 147 F.3d 184, 188 (2d Cir. 1998). Nonetheless, "factual allegations must be enough to raise a right of relief above the speculative level, on the assumption that all of the allegations in the complaint are true." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1965 (2007) (requiring plaintiff to plead "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [his claim]"); see also ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007) (adopting Twombly plausibility standard in all cases). A court may also consider "documents appended to the complaint or incorporated in the

complaint by reference, and to matters of which judicial notice may be taken.” Allen v. WestPoint-Pepperell, Inc., 945 F.2d 40, 44 (2d Cir. 1991).

Plaintiffs allege a number of meetings between the Defendants, American Express, and Discover, including the times and purposes of those meetings, the specific product of the conspiracy, and the anticompetitive effect. These allegations are sufficient to raise Plaintiffs’ claims above the merely speculative level.

III. Antitrust Standing

“Besides demonstrating Article III standing, an antitrust plaintiff must also establish antitrust standing.” Ross IV, 524 F.3d at 222 n.1. To establish antitrust standing, the plaintiff must first show that it suffered an “antitrust injury,” which is “an ‘injury of the type the antitrust laws are intended to prevent and that flows from that which makes defendants’ acts unlawful.’” Paycom Billing Servs., Inc. v. Mastercard Int’l, Inc., 467 F.3d 283, 290, 292-93 (2d Cir. 2006) (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977)). “Thus, [t]he antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect of the defendant’s behavior.” Paycom, 467 F.3d at 290 (quoting Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 344 (1990)).

While the Court of Appeals noted that its opinion “do[es] not address the question of whether the cardholders alleged injuries would survive an antitrust standing analysis,” it previewed its thinking for the district court. Ross IV, 524 F.2d at 225. Specifically, in Section III of its opinion, the Court of Appeals held “[t]he cardholders have adequately alleged antitrust injuries in fact.” Ross IV, 524 F.3d at 223. Drawing from this Court’s September 20th Order, the Court of Appeals noted that “reduced choice and diminished quality of credit card services”

were injuries alleged by the cardholders. Ross IV, 524 F.3d at 223 (citing Ross II, 2006 WL 2685062, at *2). And the Court of Appeals then offered its analysis: “The Supreme Court has opined that one form of antitrust injury is ‘coercive activity that prevents its victims from making free choices between market alternatives.’” Ross IV, 524 F.3d at 223 (quoting Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 528 (1983)); see also Leegin Creative Leather Prods., Inc. v. PSKS, Inc., --- U.S. ---, 127 S. Ct. 2705, 2736 (2007) (Breyer, J., dissenting); FTC v. Ind. Fed’n of Dentists, 476 U.S. 447, 459 (1986). The Court of Appeals concluded that “reduced choice and diminished quality in credit services result directly from the banks illegal collusion to constrict the options available to cardholders.” Subject to the “efficient enforcer” factors, Article III injury in fact as determined by the Court of Appeals appears coextensive with antitrust injury in fact, and Discover’s opt-out provision does not change this analysis at the pleading stage.

Turning to the “efficient enforcer” factors, “[a] court must also consider . . . : (1) the directness or indirectness of the asserted injury; (2) the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement; (3) the speculativeness of the alleged injury; and (4) the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries.” Ross IV, 524 F.3d at 222 n.1 (citing Volvo N. Am. Corp. v. Men’s Int’l Prof’l Tennis Council, 857 F.2d 55, 66 (2d Cir. 1988)). First, Plaintiffs suffer injury directly because they are allegedly deprived of meaningful choice in dispute resolution. Second, they are members of an identifiable class of persons, namely cardholders, who would normally be motivated to “vindicate the public interest in antitrust enforcement.” Third, the alleged injury—ability to seek redress through class action litigation—is not speculative because the conspiracy

reduced both Plaintiffs' choice and the quality of the credit cards they received. Finally, because Plaintiffs seek only injunctive relief, no apportionment of damages issues will arise. Because Plaintiffs sufficiently allege that they have suffered antitrust injury and are "efficient enforcers," they have antitrust standing.

IV. Plaintiffs' Jury Demand

"[O]nly those claims that can be classified as 'suits at common law' trigger the right to a jury trial." Design Strategy Inc. v. Davis, 469 F.3d 284, 299 (2d Cir. 2006). In determining whether a particular action is a suit at law, the Court must consider: (1) whether the action would have been deemed legal or equitable in 18th century England; and (2) whether the remedy sought is legal or equitable in nature. See Eberhard v. Marcu, 530 F.3d 122, 135 (2d Cir. 2008); see also Design Strategy, 469 F.3d at 299. "[D]eclaratory judgment actions are inherently neither equitable nor legal and . . . the nature of the underlying dispute determines whether a jury trial is available." Petition of Roseman & Colin, 850 F.2d 57, 60 (2d Cir. 1988). But "[i]f the only relief sought is equitable, such as an injunction or specific performance (a type of affirmative injunction), neither the party seeking that relief nor the party opposing it is entitled to a jury trial." Marseilles Hydro Power, LLC v. Marseilles Land & Water Co., 299 F.3d 643, 648 (7th Cir. 2002); see also Camferdam v. Ernst & Young Int'l, Inc., No. 02 Civ. 10100 (BSJ), 2004 WL 1124649, at *3 (S.D.N.Y. May 19, 2004) ("Injunctions have long been classified as equitable relief for which no party is entitled to a jury.") (citing United States v. Louisiana, 339 U.S. 699, 706 (1950)). The mere request for a declaratory judgment cannot transform a suit for equitable relief into a suit at law. See Marseilles Hydro Power, 299 F.3d at 649.

Plaintiffs seek a declaration that Defendants violated the Sherman Act, that “Defendants be enjoined from continuing the illegal course conduct,” that the arbitration clauses be “invalidated, declared null and void, and stricken from Defendants’ cardholder agreements,” and that the Defendants be required to notify all courts which have enforced the “unlawful” arbitration clauses and withdraw all pending motions to compel arbitration. While Plaintiffs frame their action as one for declaratory relief, it is equitable in nature because they seek only injunctive relief. Accordingly, Defendants’ motions to strike Plaintiffs’ jury demand is granted.³

CONCLUSION

For the foregoing reasons, Discover’s motion to dismiss for lack of Article III standing and antitrust standing is denied. Defendants’ motions to strike Plaintiffs’ jury demand are granted.

Dated: January 21, 2009
New York, New York

SO ORDERED:


WILLIAM H. PAULEY III
U.S.D.J.

³ The decision to strike Plaintiffs’ jury demand does not preclude this Court from considering the use of an advisory jury under Rule 39, if warranted at a later time.

Counsel of record:

Merrill G. Davidoff, Esq.
Berger & Montague, P.C.
1622 Locust Street
Philadelphia, PA 19103-6365
Counsel for Plaintiffs

Ronald S. Betman, Esq.
Winston & Strawn, L.L.P.
35 West Wacker Drive
Chicago, IL 60601
Counsel for Defendant Discover

Paul W. Bartel, II, Esq.
Davis, Polk & Wardwell
450 Lexington Avenue
New York, NY 10017
Counsel for Defendant Discover

Mark P. Ladner, Esq.
Morrison & Foerster LLP
1290 Avenue of the Americas
New York, NY 10104
Counsel for Defendant Bank of America

Andrew J. Frackman, Esq.
O'Melveny & Myers LLP
7 Times Square
New York, NY 10036
Counsel for Defendant Capital One

Robert D. Wick, Esq.
Covington & Burling, L.L.P.
1201 Pennsylvania Avenue, NW
Washington, DC 20004
Counsel for Defendant J.P. Morgan Chase

David Graham, Esq.
Sidley Austin, L.L.P.
787 Seventh Avenue
New York, NY 10019
Counsel for Defendant Citibank

Harry T. Robins, Esq.
Morgan, Lewis & Bockius LLP
101 Park Avenue, 37th Floor
New York, NY 10178
Counsel for Defendant HSBC

Christopher Robin Lipsett, Esq.
Wilmer, Cutler, Hale & Dorr, L.L.P.
399 Park Avenue
New York, NY 10022
Counsel for Defendant MBNA