UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE	:	MDL No. 1409 M 21-95
CURRENCY CONVERSION FEE ANTITRUST LITIGATION	:	
THIS DOCUMENT RELATES TO	:	
ROBERT ROSS, *et al.*,	:	05 Civ. 7116 (WHP)
Plaintiffs,	:	MEMORANDUM & ORDER
-against-	:	
BANK OF AMERICA, N.A. (USA), *et al.*,	:	
Defendants.	:	

WILLIAM H. PAULEY III, District Judge:

Plaintiffs bring this antitrust class action alleging that certain credit card issuers[1] conspired to include mandatory arbitration clauses in cardholder agreements in violation of the Sherman Act, 15 U.S.C. §1. Plaintiffs further allege that Defendants participated in a group

[1] Plaintiffs initially brought 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., Citicorp Diners Club, Inc. (the Citigroup, Citibank, Universal, and Citicorp entities are collectively referred to as "Citigroup"), 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"), Providian Financial Corp., and Providian National Bank (together with Providian Financial Corp., "Providian") (collectively, the "Bank Defendants") and Novus Credit Services, Inc., Discover Financial Services and Discover Bank (collectively, "Discover" and together with the Bank Defendants and the National Arbitration Forum, Inc., the "Defendants"). All of the Defendants except Citigroup and Discover have settled.

boycott by refusing to issue cards to individuals who did not agree to arbitration. The remaining Defendants—Citigroup and Discover—move for summary judgment dismissing Plaintiffs' claims. Plaintiffs move for summary judgment dismissing Citigroup's sixth affirmative defense, which challenges Plaintiffs' ability to use certain evidence in this proceeding. Plaintiffs also move for partial summary judgment against Discover on the ground that Discover has failed to provide any pro-competitive justification for its conduct.

For the following reasons, Plaintiffs' motion for summary judgment as to Citigroup's sixth affirmative defense is granted. Defendants' motions for summary judgment are denied. Finally, Plaintiffs' motion for partial summary judgment as to the absence of pro-competitive justification is denied.[2]

BACKGROUND

Plaintiffs hold credit or charge cards issued by one or more of the Defendants. (Defendants' Joint Statement of Undisputed Material Facts in Support of their Motions for Summary Judgment, dated May 11, 2011 ("Def. Stmt.") ¶¶ 1-2; Plaintiffs' Statement Pursuant to Local Civil Rule 56.1(b), dated July 12, 2011 ("Pl. Stmt.") ¶¶ 1-2.) They claim that Defendants conspired with American Express ("Amex") and Wells Fargo to impose mandatory arbitration clauses in their cardholder agreements to eliminate class action lawsuits and other litigation.

From 1999 through 2003, Defendants, Wells Fargo, and Amex met several times and discussed arbitration. (Def. Stmt. ¶¶ 152, 197; Pl. Stmt. ¶¶ 152e, 197.) On May 25, 1999, First USA, Amex, Citigroup, and Sears Roebuck & Co. co-sponsored a meeting of in-house counsel for credit card companies at the Washington D.C. office of the firm now known as

[2] This Court denies Defendants' application to strike certain portions of Plaintiffs' Statement Pursuant to Local Civil Rule 56.1(b). In resolving these motions, the Court does not consider Defendants' Joint Reply to Plaintiffs' 56.1(b) Response.

Wilmer Cutler Pickering Hale and Dorr LLP ("Wilmer"). (Def. Stmt. ¶ 235; Pl. Stmt. ¶¶ 235a-c.) Representatives of Capital One, Chase, Citigroup, First USA, Household, Providian, and Amex attended. (Def. Stmt. ¶ 235; Pl. Stmt. ¶ 235a.) While the parties dispute whether the attendees actually discussed arbitration, the meeting's agenda suggests that they may have, and this Court construes the evidence in Plaintiffs' favor. (Def. Stmt. ¶ 240; Pl. Stmt. ¶ 235f.) At that time, only First USA and Amex had implemented arbitration clauses in their cardholder agreements or announced their intent to do so. (Pl. Stmt. ¶ 152a; Declaration of Kevin C. Aldridge in Support of Plaintiffs' Memorandum of Law in Opposition to the Motions for Summary Judgment of the Citi and Discover Defendants, dated July 12, 2011 ("Aldridge Decl.") Exs. 149, 195, 215-16.)

On July 28, 1999, Defendants' representatives attended another meeting at Wilmer, which Plaintiffs characterize as the first meeting of the "Arbitration Coalition." (Def. Stmt. ¶ 170; Pl. Stmt. ¶¶ 170-171.) Defendants do not dispute that the attendees discussed the subject of arbitration. (Def. Stmt. ¶ 186.) A meeting organizer requested that attendees "send me the arbitration clauses used by your company . . . and any answers to FAQs or other explanations of the clause." (Pl. Stmt. ¶ 152i; Aldridge Decl. Ex. 254.) At the meeting, Joan Warrington ("Warrington"), an attorney at Citigroup, met Wendy Hufford ("Hufford"), an attorney at General Electric Capital Corporation. (Def. Stmt. ¶ 186; Pl. Stmt. 186.) Two days later, Warrington e-mailed Julie Nelson ("Nelson"), another attorney at Citigroup, and recommended that she "compare notes" with Hufford. (Def. Stmt. ¶ 186; Pl. Stmt. ¶ 186.)[3]

[3] In the interest of brevity, this Court does not summarize every piece of evidence offered by Plaintiffs. This Court has considered all of Plaintiffs' submissions.

Representatives of the "Arbitration Coalition" met again on September 29, 1999. (Def. Stmt. ¶ 184; Pl. Stmt. ¶ 184.) In a draft agenda, First USA consultant Duncan MacDonald recommended that the attendees discuss such topics as "how to set up an arbitration program," "plain language vs. fine print & overkill," "recent litigation," and "challenges . . . to adoption of arbitration clauses." (Pl. Stmt. ¶ 152j; Aldridge Decl. Ex. 174.) At the meeting, Citigroup's Warrington informed Gail Siegel ("Siegel"), an attorney at Chase, that Citigroup was taking a "wait and see" approach towards adopting an arbitration clause. (Def. Stmt. ¶ 190; Pl. Stmt. ¶ 190a.) Thereafter, Defendants' employees attended many more Wilmer-sponsored meetings at which they discussed arbitration. (Def. Stmt. ¶¶ 171, 174, 197, 201; Pl. Stmt. ¶¶ 171a, 174, 197, 201.)

On February 14, 2001, Citigroup's Nelson attended a Washington, D.C. meeting of the so-called "Class Action Working Group," where representatives of a diverse group of businesses discussed strategies to reduce "class action abuse." (Def. Stmt. ¶¶ 215, 218; Pl. Stmt. ¶¶ 215, 218.) Also in 2001, a Capital One attorney organized periodic telephone conferences with other in-house attorneys. (Def. Stmt. ¶¶ 226, 227, 231; Pl. Stmt. ¶¶ 226, 227, 231.) Discover did not participate in these calls. (Def. Stmt. ¶ 234; Pl. Stmt. ¶ 234.)

The parties dispute precisely how many meetings Citigroup representatives attended. (Def. Stmt. ¶¶ 197, 201; Pl. Stmt. ¶¶ 197, 201.) But it is undisputed that Citigroup employees attended at least three of the "Arbitration Coalition" meetings before Citigroup adopted an arbitration clause. (Def. Stmt. ¶¶ 118, 183, 235; Pl. Stmt. ¶¶ 118a, 183, 235a.) Discover employees attended at least five such meetings. (Def. Stmt. ¶¶ 171, 174; Pl. Stmt. ¶¶ 171a, 174.) The parties dispute whether a Discover representative attended any of the meetings

prior to Discover's adoption of an arbitration clause. (Def. Stmt. ¶¶ 39, 238; Pl. Stmt. ¶¶ 39, 238.)

Plaintiffs offer evidence that, viewed in their favor, indicates Citigroup and Discover accelerated their decision-making process regarding arbitration in tandem with their attendance at the meetings. (Pl. Stmt. ¶¶ 32, 69, 113.) While the parties contest the details of Citigroup's decision-making process, it is undisputed that Steve Freiberg ("Freiberg"), the Chief Executive Officer of Citi Cards, made the final decision to adopt arbitration clauses in cardmember agreements in September or October of 2000. (Def. Stmt. ¶¶ 118-119; Pl. Stmt. ¶¶ 118-119.) Freiberg testified that, when he made his decision, he had no knowledge of the "Coalition" meetings, or whether Citigroup's competitors had adopted arbitration clauses. (Def. Stmt. ¶ 126; Pl. Stmt. ¶ 126.) Citigroup mailed its first arbitration change-in-terms notice in May or June 2001 and then completed a larger mailing later that year. (Def Stmt. ¶ 150; Pl. Stmt. ¶ 150.) Arbitration change-in-terms notices were mailed to Diners Club cardholders shortly thereafter. (Def. Stmt. ¶ 151; Pl. Stmt. ¶ 151.)

The parties also dispute the chronology of Discover's implementation of an arbitration clause. While Discover claims it decided to adopt a clause no later than April 1, 1999, Plaintiffs contend that the date was after June of that year. (Def. Stmt. ¶ 39; Pl. Stmt. ¶ 32k.) Drawing all reasonable inferences in Plaintiffs' favor, the later date is credited for the purpose of these motions. Nevertheless, Joe Yob ("Yob"), Discover's Executive Vice President of Cardholder Operations, testified that he made the final decision to add an arbitration provision to Discover's cardholder agreement. (Def. Stmt. ¶¶ 36, 27; Pl. Stmt. ¶ 32n.) Like his counterpart at Citigroup, Yob had no knowledge of the Wilmer meetings when he made his decision. (Def. Stmt. ¶ 42; Pl. Stmt. ¶ 42.) In late 2002, Discover decided to amend its

arbitration clause to permit customers to "opt out" of arbitration without sacrificing any contractual rights. (Def. Stmt. ¶¶ 49-52; Pl. Stmt. ¶¶ 49, 52a.)

DISCUSSION

I. Legal Standard

A. Summary Judgment Standard

Summary judgment should be rendered if the record shows that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). The burden of demonstrating the absence of any genuine dispute as to a material fact rests with the moving party. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). Once the moving party has made an initial showing that there is no genuine dispute of material fact, the non-moving party cannot rely on the "mere existence of a scintilla of evidence" to defeat summary judgment but must set forth "specific facts showing that there is a genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (emphasis in original); see also Niagara Mohawk Power Corp. v. Jones Chem., Inc., 315 F.3d 171, 175 (2d Cir. 2003) (citation omitted). "A dispute about a 'genuine issue' exists for summary judgment purposes where the evidence is such that a reasonable [trier of fact] could decide in the non-movant's favor." Beyer v. Cnty. of Nassau, 524 F.3d 160, 163 (2d Cir. 2008) (quoting Guilbert v. Gardner, 480 F.3d 140, 145 (2d Cir. 2007)). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Scott v. Harris, 550 U.S. 372, 380 (2007) (citing Matsushita, 475 U.S. at 586-87). The Court resolves all factual ambiguities and draws all inferences in favor of the non-moving party. See

Liberty Lobby, 477 U.S. at 255; see also Jeffreys v. City of New York, 426 F.3d 549, 553 (2d Cir. 2005).

Importantly, "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." Matsushita, 475 U.S. at 588. Accordingly, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." Matsushita, 475 U.S. at 588. Thus, "[t]o survive a motion for summary judgment . . . a plaintiff [alleging] a violation of § 1 must present evidence that tends to exclude the possibility that the alleged conspirators acted independently." Matsushita, 475 U.S. at 588. Further, "[i]f the plaintiff's theory is economically senseless, no reasonable [trier of fact] could find in its favor, and summary judgment should be granted." Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 468-69 (1992).

B. Sherman Act Claims

Section 1 of the Sherman Act prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce[.]" 15 U.S.C. § 1. To prevail on a § 1 claim, Plaintiff must demonstrate (1) an agreement or concerted action among the defendants in the (2) unreasonable restraint of trade. See Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 542 (2d Cir. 1993). Accordingly, to survive summary judgment, Plaintiffs must proffer "direct or circumstantial evidence that reasonably tends to prove the [defendants] had a conscious commitment to a common scheme designed to achieve an unlawful objective." Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984) (internal quotation omitted). "[A]t a minimum, the circumstances must be such as to warrant a [trier of fact] in finding that the conspirators had a unity of purpose or a common

design and understanding, or a meeting of the minds in an unlawful arrangement." Apex Oil Co. v. DiMauro, 822 F.2d 246, 252 (2d Cir. 1987) (internal quotations and modifications omitted).

"Evidence of parallel conduct is probative of an antitrust conspiracy, but such evidence 'alone cannot suffice.'" In re Currency Conversion Fee Antitrust Litig. ("Amex"), 773 F. Supp. 2d 351, 366 (S.D.N.Y. 2011) (quoting Apex Oil, 822 F.2d at 252). Rather, "a plaintiff relying on parallel conduct as evidence of an antitrust conspiracy must also demonstrate the existence of so-called 'plus factors.'" Amex, 773 F. Supp. 2d at 366 (quoting Apex Oil, 822 F.2d at 252). "These plus factors include: (1) evidence of conduct that is contrary to the defendants' independent self-interest; (2) the presence or absence of a strong motive to enter into the alleged conspiracy; (3) the artificial standardization of products; and (4) a high level of inter-firm communications." Amex, 773 F. Supp. 2d at 366 (quoting In re Med. X-Ray Film Antitrust Litig., 946 F. Supp. 209, 218 (E.D.N.Y. 1996)) (internal modification omitted). "[O]nce a conspiracy is shown, only slight evidence is needed to link another defendant with it." Apex Oil, 822 F.2d at 257. Nevertheless, Plaintiffs must provide evidence "pertaining to each defendant" to demonstrate that the defendant participated in the conspiracy. AD/SAT v. Associated Press, 181 F.3d 216, 234 (2d Cir. 1999).

II. Citigroup's Sixth Affirmative Defense

As a preliminary matter, Plaintiffs are entitled to summary judgment dismissing Citigroup's sixth affirmative defense. According to Citigroup, the release in the settlement of a related matter, In re Currency Conversion Fee Antitrust Litigation ("CCF"), MDL No. 1409, Master File No. M 21-95, limits the evidence on which Plaintiffs may now rely. Specifically, Citigroup maintains that Plaintiffs released not only all claims related to foreign transaction fee ("FX fee") conduct, but also any right to present evidence connected with that conduct.

But Citigroup misreads the CCF settlement agreement. In that agreement, the parties acknowledged that the release "does not release or discharge . . . the claims currently asserted in the [Bank of America] Class Action Complaint filed on August 11, 2005." (Declaration of Kevin C. Aldridge in Support of Plaintiffs' Motion for Summary Judgment on the Citi Defendants' Sixth Defense, dated May 9, 2011 Ex. 1: Stipulation and Agreement of Settlement in In re Currency Conversion Fee Antitrust Litigation, dated July 20, 2006 ("CCF Settlement") at ¶ 2(kk).) Because the settlement agreement expressly preserved Plaintiffs' arbitration-related claims, it makes little sense to read the agreement to preclude Plaintiffs from relying on the evidence needed to prove those claims. Indeed, the settlement agreement expressly requires the preservation of FX fee evidence until this matter is resolved. (CCF Settlement at ¶ 19(a).)

Citigroup's effort to stretch the meaning of the term "claims" to encompass use of FX fee evidence in this action is unpersuasive. The settlement agreement defines "claims" to include "contentions, allegations, and assertions of wrongdoing" relating to an alleged FX fee conspiracy. (CCF Settlement at ¶¶ 2(i), 2(kk).) But the agreement, read as a whole, plainly releases Defendants from liability arising from FX fee conduct, rather than prohibiting the use of FX fee evidence in this proceeding. See Law Debenture Trust Co. of N.Y. v. Maverick Tube Corp., 595 F.3d 458, 468 (2d Cir. 2010) ("The court should read the integrated contract as a whole to ensure that undue emphasis is not placed upon particular words and phrases[.]") (internal citations omitted). Accordingly, Plaintiffs may rely on FX fee evidence, and their motion for summary judgment dismissing Citigroup's sixth affirmative defense is granted.

III. Sherman Act Claims

A. Parallel Conduct

The parties dispute the extent to which Defendants' adoption of arbitration clauses was "parallel." For example, while First USA and Discover implemented their arbitration clauses in 1998 and 1999, respectively, Providian and Citigroup did not promulgate their clauses until 2001. (Def. Stmt. ¶ 150; Pl. Stmt. ¶ 150; Aldridge Decl. Exs. 215, 216, 295, 296.) And Discover decided to adopt an "opt-out" provision in 2002. (Def. Stmt. ¶¶ 49-52; Pl. Stmt. ¶¶ 49, 52a.) Nevertheless, it is undisputed that Defendants' adoption of arbitration clauses roughly coincided with their attendance at the "Arbitration Coalition" meetings. Given the temporal proximity between the meetings and the adoption of arbitration clauses, this parallel conduct is probative of an antitrust conspiracy.

"Without more, parallel conduct does not suggest conspiracy[.]" Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556-57 (2007). And Plaintiffs identify no direct evidence that Defendants participated in a conspiracy. Cf. In re Text Messaging Antitrust Litig., 630 F.3d 622, 628 (7th Cir. 2010) (Posner, J.) ("What is missing, as the defendants point out, is the smoking gun in a price-fixing case: direct evidence, which would usually take the form of an admission by an employee of one of the conspirators, that officials of the defendants had met and agreed explicitly on the terms of a conspiracy to raise price."). Accordingly, this Court evaluates the so-called "plus factors." Apex Oil, 822 F.2d at 252.

B. Plus Factors

1. Conduct Contrary to Defendants' Self-Interest

While each Defendant had a compelling independent justification for its decision to adopt arbitration, the record—viewed in Plaintiffs' favor—reveals conduct against Defendants' self-interest.

To be sure, the undisputed record indicates that Defendants believed resolving disputes through arbitration—and barring class arbitration—would reduce defense and settlement costs, and would help minimize exposure to class action litigation. (Def. Stmt. ¶¶ 36-38, 114-115; Pl. Stmt. ¶¶ 114, 115d, 123a, 129b, 178a.) Nevertheless, the record also reveals conduct that a reasonable trier of fact could view as contrary to each Defendants' unilateral interest. Defendants arguably acted against their unilateral interests by attending numerous meetings with their competitors and—at least in the case of Citigroup—providing competitors with certain sensitive business information. Of course, competitors have the right to organize and engage in joint lobbying and legal efforts. See E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 135 (1961); see also Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510-11 (1972). But there are genuine factual disputes regarding the extent to which Defendants shared strategic information. Viewed in the light most favorable to Plaintiffs, the evidence supports an inference that Defendants used the meetings to coordinate their decision-making on arbitration. Such coordination would be contrary to each Defendant's unilateral interest, and a trial is required to determine what actually happened at the meetings.

Further, Warrington may have acted against Citigroup's unilateral interest when she shared information about its arbitration plans with Siegel. (Def. Stmt. ¶ 190; Pl. Stmt. ¶ 190a.) According to Defendants, Warrington contradicted the notion that any conspiracy existed

when she informed Siegel that Citigroup was taking a "wait and see" attitude. (Def Stmt. ¶ 190; Pl. Stmt. ¶ 190a.) But the record also supports a contrary interpretation. Specifically, a reasonable trier of fact could view Warrington's willingness to share sensitive information with a competitor as a tacit invitation to collude. While Plaintiffs' reading of Warrington's statement seems improbable, this factual dispute is inappropriate for resolution on summary judgment.

2. Motive

Defendants contend that the lack of evidence of a rational motive to engage in the purported conspiracy and group boycott undermines Plaintiffs' allegations. See AD/SAT, 181 F.3d at 233 (quoting Matsushita, 475 U.S. at 588) (internal quotation marks omitted) ("[T]he absence of a rational motive to engage in the alleged conspiracy is highly relevant to whether a genuine issue for trial exists[.]"). In a traditional price-fixing conspiracy, the conspirators are motivated by the goal of raising prices without losing their competitive position. See Amex, 773 F. Supp. 2d at 368 ("The evidence demonstrates that Amex wanted to raise its FX Fee but was constrained by . . . its disinclination to be a market-leader on pricing."). Here, by contrast, there is little evidence indicating that adoption of an arbitration clause threatened any Defendant's competitive posture.

Nonetheless, a conspiracy to adopt arbitration clauses would not be entirely irrational. While Plaintiffs surmise that Defendants colluded in order to foreclose a "renegade Bank campaign" in which certain issuers would advertise their lack of an arbitration clause, the Court need not engage in such speculation. The deposition testimony of Wendy Kleinbaum ("Kleinbaum"), an attorney at Citigroup, reveals that Defendants may have been concerned that consumers would cancel their cards if Citigroup unilaterally adopted an arbitration clause. (Pl. Stmt. ¶ 69e.) While Kleinbaum testified that she flagged several potential concerns about

adopting an arbitration clause, she also explained that she did not believe moving to arbitration would have a deleterious effect on Citigroup's business. (Aldridge Decl. Ex. 189: Dep. Tr. of Wendy Kleinbaum, dated March 5, 2010, at 102.) Although Defendants' interpretation of Kleinbaum's testimony may be correct, the significance of the testimony is a contested issue of fact for trial.

In arguing that they had no motive to conspire, Defendants observe that Plaintiffs' own expert, Dr. Oren Bar-Gill, opined that the presence or absence of arbitration clauses does not impact consumer choice. (Def. Stmt. ¶ 136; Pl. Stmt. ¶ 136.) Indeed, Dr. Bar-Gill explained that consumers typically have no idea that arbitration clauses exist, or do not understand them. (Def. Stmt. ¶ 137; Pl. Stmt. ¶ 137.) But Dr. Bar-Gill did not claim that consumers would never care about arbitration. To the contrary, he explained that what consumers view as "salient" may change over time. (Aldridge Decl. Ex. 102, ¶ 6.) Thus, while Defendants identify potentially fruitful grounds for cross-examination of Plaintiffs' expert, they fail to establish that there was no rational motive to conspire.

As further evidence of motive, Plaintiffs postulate that because early adopters of arbitration clauses faced an onslaught of litigation targeting those clauses, Defendants conspired to lighten their proportionate share of the litigation burden. Specifically, Plaintiffs cite a draft e-mail authored by attorney Alan Kaplinsky of the law firm Ballard Spahr Andrews & Ingersoll LLP encouraging attendees of the July 28, 1999 meeting to be "well networked" because "the plaintiffs' bar is engaged in a 'take no prisoners assault' on consumer arbitration programs." (Aldridge Decl. Ex. 251.) While Defendants deny that attendees of the July 28 meeting shared this motive, or even received Kaplinsky's e-mail, the facts are disputed. Similarly, Defendants may be correct that issuers that adopted their clauses relatively late—such as Citigroup—would

have no motive to enter the fray and shoulder part of their competitors' litigation costs. But this Court will not weigh competing inferences in resolving Defendants' summary judgment motions, and must view the facts in Plaintiffs' favor.

3. Standardization

The parties dispute whether Defendants' respective arbitration clauses reflect "artificial standardization." See Amex, 773 F. Supp. 2d at 366. Unlike setting prices or FX fees, the decision to adopt an arbitration clause is binary—a business either implements one, or it does not. A comparison with Defendants' FX fee conduct in Amex, 773 F. Supp. 2d at 371-72, illustrates the point. In that case, most Defendants fixed their respective FX fees at precisely the same level. See Amex, 773 F. Supp. 2d at 371-72. Here, by contrast, Defendants merely decided to adopt arbitration clauses. The degree of uniformity that this Court found probative in Amex is absent, notwithstanding Plaintiffs' allegation that the two purported conspiracies are "integrally intertwined." Amex, 773 F. Supp. 2d at 364.

Nevertheless, the presence of class action waivers in Defendants' arbitration clauses could support an inference of collusion. To be sure, the Supreme Court has recognized that "[a]rbitration is poorly suited to the higher stakes of class litigation." AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1752 (2011). And Discover's decision in 2002 to add an "opt-out" provision to its arbitration clause when others did not undercuts any claimed "standardization." But each Defendant's decision to adopt an arbitration clause that roughly mirrored those used by its competitors is probative, particularly when the evidence is considered in Plaintiffs' favor.

4. Inter-Firm Communications

Plaintiffs place great weight on the fact that Defendants' representatives attended many meetings where arbitration was discussed. Specifically, Plaintiffs argue that these frequent meetings suggest a conspiracy because Defendants used them to coordinate the adoption of arbitration clauses. It is well settled that "a high level of inter[-]firm communications" is probative of a conspiracy in instances of parallel conduct among competitors. Apex Oil, 822 F.2d at 254. But a showing of frequent meetings among competitors is insufficient to defeat summary judgment. See H.L. Moore Drug Exch. v. Eli Lilly and Co., 662 F.2d 935, 941 (2d Cir. 1981) ("[A] mere showing of close relations or frequent meetings between the alleged conspirators . . . will not sustain a plaintiff's burden absent evidence which would permit the inference that these close ties led to an illegal agreement."). Rather, Plaintiffs must provide either direct or circumstantial evidence that "tends to exclude the possibility that the alleged conspirators acted independently." Matsushita, 475 U.S. at 588.

Defendants' frequent attendance at the meetings is certainly noteworthy, and the voluminous record in this case—viewed in the light most favorable to Plaintiffs—could suggest that Defendants used the meetings to concoct a conspiracy to adopt arbitration clauses and boycott customers who rejected them. The Court recognizes that the ultimate decision-makers at Citigroup and Discover—Freiberg and Yob—had no knowledge of the meetings. (Def. Stmt. ¶¶ 42, 126; Pl. Stmt. ¶¶ 42, 126.) But the in-house counsel who attended the "Coalition" meetings were not "low level employees" engaged in mere "shop talk." Amex, 773 F. Supp. 2d at 370 (quoting In re Baby Food Antitrust Litig., 166 F.3d 112, 125 (3d Cir. 1999)) (internal quotation marks omitted). And disputed issues of fact remain regarding whether "the exchanges of information had an impact on [arbitration] decisions." Amex, 773 F. Supp.2d at 370 (quoting In

re Flat Glass Antitrust Litig., 385 F.3d 350, 369 (3d Cir. 2004)) (internal quotation marks omitted). Accordingly, summary judgment is unwarranted.

At oral argument, Plaintiffs acknowledged that there is an "extreme paucity of documents" supporting their theory of the case. (Hr'g Tr. dated Nov. 7, 2011, at 61.) And while Plaintiffs attribute this evidentiary deficiency to Defendants' redactions for privilege, this Court does not draw an adverse inference from Defendants' privilege determinations. See Nabisco, Inc. v. PF Brands, Inc., 191 F.3d 208, 226 (2d Cir. 1999) ("If refusal to produce [a document] based on claim of the [attorney-client] privilege supported an adverse inference, persons would be discouraged from seeking opinions, or lawyers would be discouraged from giving honest opinions."), abrogated on other grounds, Moseley v. V Secret Catalogue, Inc., 537 U.S. 418 (2003). However, the high degree of inter-firm communications in this case—considered with the record as a whole—precludes an award of summary judgment. See H.L. Hayden Co. of N.Y. v. Siemens Med. Sys., Inc., 879 F.2d 1005, 1012 (2d Cir. 1989) ("[A court] must accord plaintiffs 'the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each.'") (quoting Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699 (1962)).

C. "Economic Sense"

Viewed in Plaintiffs' favor, the record in this case shows that Plaintiffs' conspiracy allegations may make "economic sense." Matsushita, 475 U.S. at 587. While Dr. Bar-Gill opined that consumers do not consider the presence of arbitration clauses when choosing among credit cards, consumer preferences are not static. As such, Defendants could have colluded to foreclose the possibility that arbitration would ever become important to cardholders. Of course, the unilateral benefits of arbitration to each Defendant are great. See

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1775 (2010) (describing the benefits of arbitration as "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes"). Yet, Defendants arguably acted against their respective self-interest by attending numerous meetings with direct competitors where at least some sensitive business information was shared. A careful weighing of the evidence could refute Plaintiffs' insinuations of conspiratorial conduct. But the factual disputes in this case must be resolved at trial.

IV. Remaining Issues

A. Antitrust Standing and Irreparable Harm

This Court has already considered and rejected an antitrust standing argument indistinguishable from the one Discover now advances. See Amex, 773 F. Supp. 2d at 373 (rejecting the argument as "absurd"). Discover's standing argument fails for the same reasons. The impact, if any, of Discover's "opt-out" provision may be addressed at trial.

Discover's contention that Plaintiffs cannot demonstrate irreparable harm is similarly meritless. The fact that some of the alleged co-conspirators have settled and agreed to remove their arbitration clauses for thee and a half years does not prevent Plaintiffs from demonstrating injury as a result of reduced choice and "a diminution in the overall quality of credit services offered to consumers." Ross v. Bank of Am., N.A. (USA), 524 F.3d 217, 221 (2d Cir. 2008).

B. Pro-Competitive Justifications

Finally, Plaintiffs' motion for partial summary judgment against Discover regarding the absence of pro-competitive justifications is premature. In a Sherman Act "rule of reason" case, Defendants bear the burden of justifying their conduct only if Plaintiffs first prove

the existence of an anticompetitive conspiracy. In re Tamoxifen Citrate Antitrust Litig., 466 F.3d 187, 201 n.13 (2d Cir. 2006). Here, the parties dispute whether the "rule of reason" standard applies, as Plaintiffs contend that a horizontal agreement to adopt arbitration is per se unlawful. And while Plaintiffs have demonstrated genuine issues for trial, they have not proven their case by a preponderance of the evidence, and may not be able to do so. Accordingly, this Court denies Plaintiffs' motion for partial summary judgment against Discover.

CONCLUSION

For the foregoing reasons, Defendants' motions for summary judgment are denied. Plaintiffs' motion for summary judgment dismissing Citigroup's sixth affirmative defense is granted, and Plaintiffs' motion for partial summary judgment against Discover regarding the absence of pro-competitive justification is denied.

The Clerk of Court is directed to terminate the motions pending at ECF Nos. 301, 307, 311, and 312.

Dated: February 8, 2012
New York, New York

SO ORDERED:

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

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