

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION**

<p><b>KARIN SACK, Individually and on behalf of all others similarly situated</b></p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p><b>DFS SERVICES LLC,</b></p> <p><b>DISCOVER FINANCIAL SERVICES (INC.),</b></p> <p style="text-align: center;">and</p> <p><b>DISCOVER BANK,</b></p> <p style="text-align: right;">Defendants.</p>	<p><b>Case No. _____</b></p> <p><b>CLASS ACTION</b></p> <p><b><u>JURY TRIAL DEMANDED</u></b></p>
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**PLAINTIFF’S CLASS ACTION COMPLAINT**

COMES NOW Plaintiff, individually and on behalf of all others similarly situated, and alleges, by and through counsel of record, the following:

1. Plaintiff brings this Class action pursuant to Fed. R. Civ. P. 23 on behalf of herself and all other similarly situated customers of DFS Services LLC, Discover Financial Services (Inc.), and Discover Bank (hereinafter, “Defendants”) who were enrolled in “Discover® Payment Protection Plan” without their knowledge and/or consent.

**INTRODUCTION**

2. This is a class action lawsuit brought by, and on behalf of, individuals throughout Tennessee, who were enrolled in the Defendants’ “Payment Protection Plan” (the “Plan”).

3. Defendants are a leading credit card issuer with one of the most recognized brands in U.S. financial services.

4. Defendants operate the Discover® Card, with more than 50 million card members.

5. This matter arises from the deceptive business practices implemented by Defendants, their agents, employees, representatives, and affiliates, through which they employ confusing and misleading sales tactics to surreptitiously enroll unwitting individuals into the costly Plan.

6. Defendants' deceptive scheme is further perpetrated by their improper calculation of fees relating to the Plan, and their refusal to refund the unlawful fees.

7. The Plan is purported to "help safeguard your account payment history by putting your account on hold during the benefit period (durations vary by product) if you experience a covered hardship such as disability, hospitalization or one of the other covered events<sup>1</sup>."

8. The Plan purportedly provides both debt suspension and debt cancellation benefits for a certain fee.

9. If an individual is enrolled in the Plan and experiences a covered hardship, certain benefits are purportedly available, including: (i) a hold on monthly payments during the benefit period; (ii) an abatement of periodic finance charges or late fees during the benefit period; and (iii) a complete cancellation of outstanding balances, up to Twenty-Five Thousand Dollars (\$25,000.00) in the event of card member death.<sup>2</sup>

10. Upon information and belief, the Plan is aggressively promoted to individuals by Defendants' sales agents via scripted telephonic sales pitches, which occur during the enrollment process, subsequent solicitations, or even during client initiated inquiries.

11. In reality, however, Defendants' agents use misleading, sleight-of-hand sales

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<sup>1</sup> <http://www.discovercard.com/protection-solutions/payment-protection.html> (as of July 7, 2010).

<sup>2</sup> *Id.*

tactics to willfully and knowingly dupe unsuspecting individuals into unknowingly enrolling in the Plan.

12. For example, Defendants' agents often misrepresent their intentions during such solicitations, stating that they are merely seeking authorization to send promotional materials relating to the Plan.

13. In actuality, when the unsuspecting individuals authorize the Defendants' agents to mail said promotional materials, the agents unilaterally extend the scope of that authority and enroll the individuals in the Plan without consent.

14. Defendants' knowingly and willfully charge individuals a fee without receiving the individuals' consent or authorization, and then require the individuals to take onerous affirmative steps to cancel the Plan.

15. As a result, individuals, like the Plaintiff herein, are deluded into enrollment, and caused to pay the attendant monthly fee.

16. Upon the individual's request for proof of such enrollment, Defendants refuse to provide any such evidence.

#### **PARTIES, JURISDICTION, AND VENUE**

17. This Court has original jurisdiction over this matter, under 28 U.S.C. § 1332(d)(2), as the matter in controversy exceeds Five Million Dollars (\$5,000,000.00) exclusive of costs and interest, and is a class action where at least one member of the class of Plaintiffs is a citizen of a State different from any Defendants.

18. This Court also has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because this action, in part, arises under the Constitution or laws of the United States.

19. This Court has personal jurisdiction over Defendants named herein because Defendants are registered to do business in Tennessee and are registered with the Tennessee Secretary of State, or transact sufficient business in Tennessee, have sufficient minimum contacts with Tennessee, or otherwise intentionally avail themselves of the markets within Tennessee through the issuance of credit cards, monthly statements, and other products and services such as the Plan, to Tennessee residents rendering the exercise of jurisdiction by the Tennessee courts permissible under traditional notions of fair play and substantial justice.

20. This action satisfies the requirements of 28 U.S.C. § 1391(b) because at least one of the Defendants resides in this District and all defendants reside in this State (a) a substantial amount of the events and occurrences giving rise to the claim occurred in this District or (b) a substantial part of the property that is the subject of this action is situated in this district.

21. Plaintiff Karin Sack is an individual and a citizen of the State of Tennessee, residing in the city of Nashville.

22. Plaintiff brings this action in their own right and on behalf of all others similarly situated.

23. Defendant DFS Services LLC, formerly known as Discover Financial Services LLC, (hereinafter, "Defendants"), is a limited liability company duly organized and existing under the laws of the State of Delaware, having a principal place of business in the State of Illinois. The sole member of the limited liability company DFS Services LLC is Defendant Discover Financial Services (Inc.). As the sole member of the limited liability company DFS Services, LLC, Defendant Discover Financial Services (Inc.) is responsible for the actions and wrongdoings of the limited liability company DFS Services, LLC. Defendant Discover Financial Services (Inc.) is a corporation duly organized and existing under the laws of the State of

Delaware, having a principal place of business in the State of Illinois. Because limited liability companies are deemed citizens of the State where it has its principal place of business (Illinois), the State under whose laws it is organized (Delaware), and every state of which a member is a citizen (Delaware and Illinois), Defendant DFS Services LLC is a citizen of the States of Delaware and Illinois.

24. Defendant Discover Financial Services (Inc.) is a corporation duly organized and existing under the laws of the State of Delaware, having a principal place of business in the State of Illinois. Defendant Discover Financial Services (Inc.), as the parent corporation of Defendant Discover Bank, is responsible for the actions and wrongdoings of Defendant Discover Bank. As the sole member of the limited liability company DFS Services, LLC, Defendant Discover Financial Services (Inc.) is responsible for the actions and wrongdoings of the limited liability company DFS Services, LLC.

25. Defendant Discover Bank, (hereinafter, "Defendants"), is a corporation duly organized and existing under the laws of the State of Delaware, having a principal place of business in the State of Delaware. Defendant Discover Bank is a wholly owned subsidiary of Defendant Discover Financial Services (Inc.). Defendant Discover Financial Services (Inc.), as the parent corporation of Defendant Discover Bank, is responsible for the actions and wrongdoings of Defendant Discover Bank.

#### **CLASS ACTION ALLEGATIONS**

26. Plaintiff brings this action individually and on behalf of all others similarly situated, as Members of a Class that Plaintiff proposes be defined as follows:

All Tennessee citizens (including persons and business entities) that were enrolled in the Plan without their consent during the longest period permitted by the applicable statutes of limitations.

27. Excluded from the proposed Class are:

- (a.) Defendants;
- (b.) Any entities in which Defendants have or had a controlling interest;
- (c.) Any officers or directors of Defendants;
- (d.) The legal representatives, heirs, successors, and assigns of Defendants;
- (e.) Any Judge assigned to this action and his or her immediate family, and
- (f.) Anyone who timely requests exclusion from the Class.

28. This action may be maintained on behalf of the Class proposed above under the criteria of Rule 23 of the Federal Rules of Civil Procedure.

29. **Numerosity:** Members of the Class are so numerous that their individual joinder is impractical. The precise identities, number, and addresses of members of the Class are unknown to the Plaintiff, but may and should be known with proper and full discovery of Defendants, third-parties, and their respective records. All Class members pray for money damages, temporary and permanent injunctive relief, and declaratory relief because the parties opposing the Class have acted on grounds generally applicable to the Class, thereby making appropriate injunctive relief to the class as a whole.

30. **Existence of Common Questions of Fact and Law:** There is a well-defined commonality and community of interest in the questions of fact and law affecting the members of the Class. The common questions of fact and law include, among other things:

- a. Whether Defendants engaged in a common policy, plan or scheme to unilaterally enroll people in the Plan;
- b. Whether Defendants engaged in a common policy, plan or scheme to implement a scripted sales pitch to confuse people into enrolling into the plan;
- c. Whether and to what extent each Defendant's deceptive business practices

and misconduct, as complained of herein, violate Tennessee law;

- d. Whether and to what extent each Defendant's deceptive business practices and misconduct, as complained of herein, constitute fraud under Tennessee law;
- e. Whether and to what extent each Defendant's deceptive business practices and misconduct, as complained of herein, are in violation of Tennessee Code Annotated 47-18-101, et seq.;
- f. Whether and to what extent each Defendant has been unjustly enriched as a result of the deceptive and unfair business practices, as complained of herein;
- g. Whether the terms of the Discover® Card Member Agreement "Terms & Conditions" are applicable to disputes involving the Plan;
- h. If the terms of the Discover® Card Member Agreement "Terms & Conditions" are applicable to disputes involving the Plan, whether the arbitration provision in the Discover® Card Member Agreement is unconscionable and unenforceable;
- i. If the terms of the Discover® Card Member Agreement "Terms & Conditions" are applicable to disputes involving the Plan, whether the class-action prohibition provision in the Discover® Card Member Agreement is unconscionable and unenforceable; and
- j. Whether Plaintiff and the proposed Class are entitled to recover compensatory, exemplary, treble, statutory or punitive damages based on the Defendants' fraudulent and illegal conduct or practices in connection with the Plan.

31. **Typicality:** Plaintiff is a member of the proposed Class. The Plaintiff's claims and the claims of the proposed Class have a common origin and share common bases. Their claims originate from the same deceptive and fraudulent practices of the Defendants, and the Defendants act and have acted in the same way toward the Plaintiff and the proposed Class members. If brought and prosecuted individually, the claims of each proposed Class member would necessarily require proof of the same material and substantive facts, rely upon the same remedial theories, and seek the same relief.



32. **Adequacy**: Plaintiff is adequate representative of the proposed Class because their interests do not conflict with the interests of the members of the proposed Class they seek to represent. Plaintiff has retained competent counsel, and intends to prosecute this action vigorously. Plaintiff's counsel will fairly and adequately protect the interests of the members of the proposed Class.

33. **Superiority**: A Class action is superior to all other available methods for the fair and efficient adjudication of this controversy because joinder of all Members is impracticable. Furthermore, as the damages suffered by individual Class Members might be relatively small, the expense and burden of individual litigation makes it impossible for Members of the Class to individually redress the wrongs done to them. There will be no difficulty in the management of this case as a Class action.

34. In the alternative, the Class may be certified because:

- a. the prosecution of separate actions by the individual Members of the Class would create a risk of inconsistent or varying adjudication with respect to individual Class Members that would establish incompatible standards of conduct for Defendants;
- b. the prosecution of separate actions by individual Class Members would create a risk of adjudications with respect to them that would, as a practical matter, be dispositive of the interests of other Class Members not party to the adjudications, or they would substantially impair or impede their ability to protect their interests; and
- c. Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final and injunctive relief with respect to the Members of the Class as a whole.

35. This lawsuit may be maintained as a class action pursuant to Federal Rule of Civil Procedure 23(b)(2) because Plaintiff and the proposed Class seek declaratory and injunctive relief, and all of the above factors of numerosity, common questions of fact and law, typicality and adequacy are present. Moreover, Defendants have acted on grounds generally applicable to



Plaintiff and the proposed Class as a whole, thereby making declaratory and/or injunctive relief proper and suitable remedies.

36. This lawsuit may be maintained as a class action under Federal Rule of Civil Procedure 23(b)(3) because questions of fact and law common to the Class predominate over the questions affecting only individual members of the Class, and a class action is superior to other available means for the fair and efficient adjudication of this dispute. The damages suffered by each individual class member may be disproportionate to the burden and expense of individual prosecution of complex and extensive litigation to proscribe Defendants' conduct and practices. Additionally, effective redress for each and every class member against Defendants may be limited or even impossible where serial, duplicate, or concurrent litigation occurs arising from these disputes. Even if individual class members could afford or justify the prosecution of their separate claims, such an approach would compound judicial inefficiencies, and could lead to incongruous and conflicting judgments against Defendants.

### **COUNT I**

#### **VIOLATION OF THE TENNESSEE CONSUMER PROTECTION ACT**

##### **TENN. CODE ANN. § 47-18-101, et seq.**

COMES NOW Plaintiff, individually on behalf of all others similarly situated and, for this Count of Plaintiff's Class Action Complaint against Defendants, alleges:

37. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth herein.

38. This Count is a class action claim brought pursuant to Tennessee Code Annotated § 47-18-104, *et seq.*, known as the Tennessee Consumer Protection Act (hereinafter, "the Act").

39. Defendants' actions constitute unlawful, unfair, deceptive and fraudulent business

acts and practices in violation of Tenn. Code Ann. § 47-18-101, *et seq.*

40. The conduct of Defendants constitutes and was intended to constitute unlawful, unfair, deceptive and fraudulent business acts and practices within the meaning of Tenn. Code Ann. § 47-18-101, *et seq.*

41. The acts and business practices, as alleged herein, constituted and constitute a common, continuous, and continuing course of conduct of unfair, unlawful, deceptive and/or fraudulent business acts or practices within the meaning of Tenn. Code Ann. § 47-18-101, *et seq.*

42. Defendants' acts and business practices as described above are otherwise unfair, unconscionable, unlawful, deceptive and fraudulent.

43. Accordingly, Plaintiff, on behalf of herself and all other similarly situated Class members, requests Class-wide relief and damages as allowed by law.

44. At all times relevant, Defendants engaged in the aforementioned acts or practices which are deceptive to the consumer or to any other person.

45. At all times relevant, Defendants transacted business in Memphis, Tennessee and the Western District of Tennessee, Western Division.

46. Federal Trade Commission (FTC) prohibits negative option marketing, which occurs when a business enrolls customers into a program for a fee without their knowledge or consent. As alleged *supra*, Defendants have engaged in negative option marketing (as well as other deceptive trade practices described herein) with Plaintiff and the proposed Class.

47. Defendants' business practices were unscrupulous, unethical and substantially injurious to consumers.

48. There is no legitimate business reason for Defendants' business practices such that the utility of their business practices outweigh the harm to consumers. Furthermore,

Defendants' business practices undermine this state's and the applicable state's fundamental policy against unfair and deceptive business practices that are likely to deceive or mislead consumers and that undercut trust and fair competition in the consumer marketplace.

49. The Plan as described herein was provided by Defendants to Plaintiff and the proposed Class primarily for personal, family or household purposes.

50. Defendants, through their employees, agents, and representatives, have engaged in otherwise unfair, unconscionable, unlawful, deceptive and fraudulent acts by enrolling people in a Discover® Payment Protection Plan without their knowledge and/or consent.

51. As a direct and proximate result of Defendants' unfair, unconscionable, unlawful, deceptive and fraudulent acts, Plaintiff and the Class Members were damaged.

52. Defendant at all times acted intentionally, maliciously, willfully, outrageously, and knowingly enrolling its customers in the Discover® Payment Protection Plan without their knowledge and/or consent.

53. The conduct reflects a deliberate indifference to Plaintiff and the proposed Class Members' rights, entitling Plaintiff and the proposed Class to an award of punitive damages.

54. Pursuant to the Act, this Court may award attorney's fees to Plaintiff and the proposed Class Members.

55. Plaintiff and the proposed Class Members have sustained an ascertainable loss and were damaged by the unlawful acts, methods and/or practices of Defendants plus interest thereon.

56. Plaintiff, individually and as a member of the Class, have no adequate remedy at law for the future unlawful acts, methods or practices as set forth above.

57. Plaintiff and the proposed Class are entitled to equitable relief, including

restitutionary disgorgement of all profits accruing to Defendants during their unfair business practices and an injunction prohibiting Defendants from engaging in the same or similar unfair business practices in the future. The entry of injunctive relief is of particular importance and is necessary to secure a fair consumer marketplace.

58. In bringing this action, Plaintiff has engaged the services of attorneys and has incurred reasonable legal expenses in an amount to be proved at trial.

**COUNT II**  
**COMMON LAW FRAUD**

COME NOW PLAINTIFF, individually and on behalf of all others similarly situated, and for this Count, alleges the following:

59. Plaintiff repeats, realleges, and incorporates by reference each of the foregoing paragraphs of this Complaint as if fully set forth herein.

60. Defendants have engaged in a common scheme of fraud, through which they unlawfully enroll individuals in the Plan without obtaining the individuals' consent or authorization.

61. Defendants perpetrate the common scheme of fraud complained of herein by omitting, or failing to disclose to individuals, that they are unilaterally enrolling said individuals in the Plan.

62. Defendants knowingly and willfully enroll individuals in the Plan without obtaining the individuals' consent or authorization.

63. Defendants intentionally perpetrate the common scheme of fraud complained of herein as an unlawful means to cause individuals to pay additional fees.

64. Plaintiff and the proposed Class are presumed to have justifiably relied on Defendants' omissions and failures to disclose.

65. As a direct and proximate result of Defendants' common scheme of fraud, Plaintiff and the proposed Class were caused to sustain damages in the form of the unauthorized fees paid in connection with the Plan.

**COUNT III**  
**UNJUST ENRICHMENT**

COME NOW Plaintiff, individually and on behalf of all others similarly situated, and for this Count of Plaintiff's Class Action Complaint against Defendants, alleges:

66. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth herein.

67. To the detriment of Plaintiff and the proposed Class, Defendants have been, and continue to be, unjustly enriched as a result of their wrongful conduct alleged herein.

68. Plaintiff and the proposed Class conferred a benefit on Defendants when Defendants enrolled Plaintiff and the proposed Class without their knowledge and/or consent in Discover® Payment Protection Plan; therefore, wrongfully accepting these benefits, which under the circumstances, would be unjust to allow Defendants to retain.

69. Plaintiff and the proposed Class, therefore, seek disgorgement of all wrongfully obtained profits received by Defendants as a result of their inequitable conduct.

**PRAYER FOR RELIEF**

**WHEREFORE**, as to each of the foregoing Counts, Plaintiff, individually and on behalf of all others similarly situated, seeks the following relief:

- a. An Order certifying the proposed Class herein and appointing Plaintiff and the undersigned counsel of record to represent the Class;
- b. An Order rescinding the Plan enrollment of each and every Plaintiff and member of the Class based on Defendants' deceptive misconduct as complained of herein, or, alternatively, damages for said fraud;

- c. An Order issuing a preliminary injunction enjoining Defendants and all others, known and unknown, from continuing to take illegal action as set forth in this Complaint;
- d. An Order issuing a permanent injunction enjoining Defendants and all others, known and unknown, from continuing to take illegal action as set forth in this Complaint;
- e. A Judgment awarding Plaintiff and the Class compensatory, consequential, and statutory damages, including, without limitation, the loss of monies paid to Defendants as fees derived from enrollment in the Plan, pre-judgment interest, and post-judgment interest;
- f. A Judgment awarding Plaintiff and the Class restitution of all fees paid in connection with the Plan;
- g. A Judgment awarding Plaintiff and the Class exemplary, treble and punitive damages;
- h. A Judgment awarding Plaintiff and the Class reasonable attorneys' fees and costs of this action in accordance with Tenn. Code Ann. § 47-18-101, *et seq.*
- i. Such other and further relief as this Honorable Court finds just and proper under the circumstances.

**JURY DEMAND**

WHEREFORE, as to each of the foregoing matters, Plaintiff demands a trial by jury on all issues so triable as a matter of right.

Respectfully submitted,

**DEAL, COOPER & HOLTON, PLLC**

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