

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

**In re: Discover Payment Protection Plan
Marketing and Sales Practices Litigation**

Renee Walker, et al.

Plaintiffs,

No. 10-cv-6994

v.

DFS Services LLC, et al.,

Defendants.

PLAINTIFFS' CONSOLIDATED AMENDED CLASS ACTION COMPLAINT

Plaintiffs, Devavani Conroy, Renee Walker, Jason Chan, Robert Ackerman, Michele Kraynak, Shawn Irvine, Anthony DeMarco, Marti Kelmer, Jose Cruz, Robert Hibbs, Jason Hart, Tammy Marsh, Charles Triplett, Kathleen Callahan, Brian Boyce, Ulonda Carter, Diane Alexander, and Karin Sack, (“Plaintiffs”), individually and on behalf of all other persons similarly situated as defined below, bring this action against Defendants, Discover Bank and DFS Services LLC (referred to herein collectively as “Discover” or “Defendants”), and for their Consolidated Amended and Substituted Complaint state and allege as follows:

I. INTRODUCTION

1. Defendants DFS Services LLC and Discover Bank are referred to collectively in this complaint as “Discover” unless otherwise specified.

2. This is a class action lawsuit brought by, and on behalf of, Discover credit card customers throughout the country who were enrolled in the Defendants’ “Payment Protection

Plan,” (formerly known as “Account Guard”) (hereinafter referred to as “Payment Protection” or “DPP”), Identity Theft Protection (formerly known as “Profile Protect”) (hereinafter referred to as “Identity Theft Protection” or “ITP”), Wallet Protection (formerly known as “The Register”) (hereinafter referred to as “Wallet Protection” or “WP”) and Credit Score Tracker (hereinafter referred to as “Credit Score Tracker” or “CST”) products. (collectively referred to herein as the “Products”).

3. The proposed class representatives bring claims against Discover under state deceptive trade practices laws and the federal Truth in Lending Act, 15 U.S.C. § 1601 et seq., for claims for breach of contract and unjust enrichment, and seeking declaratory and injunctive relief. These claims arise from Discover’s deceptive marketing practices and business practices in connection with the marketing, sale, and claims practices associated with the Discover products identified in the preceding paragraph.

4. Discover is one of the nation's largest credit card issuers. Discover earns nearly \$300 million in annual revenue from the sale of several optional fee-based financial products. Discover markets these add-on products as ways for consumers to protect themselves from fraudulent or unauthorized charges or to enhance their financial security against such hazards or hardships like job loss or sickness, identity theft, lost wallets, or low credit scores. Yet Discover often enrolls consumers in these products based on highly deceptive and misleading telemarketing calls, even charging some consumers for the products without the consumer’s consent or understanding that their credit card will be charged for these products. Discover is in a position to do this because, unlike a typical telemarketer, it is the consumer's credit card company and already has their credit card number and detailed confidential information about its customers.

II. PARTIES

5. Defendant DFS Services LLC 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. Because limited liability companies are deemed citizens of the State where they have their 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.

6. Defendant Discover Bank 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.

7. At all times herein mentioned, Defendants, and each of them, were the agents, principals, employees, servants, partners, joint venturers, and representatives of each other. In doing the acts hereinafter alleged, they each were acting within the scope and course of their authority as such agents, principals, employees, servants, partners, joint venturers, and representatives, and were acting with the permission and consent of the other co-Defendants.

8. Plaintiffs are represented by proposed class representatives who purchased one or more of the identified Discover products (Payment Protection Plan, Identity Theft Protection, Wallet Protection and Credit Score Tracker). A statement of facts for each proposed class representative is set out in detail below.

III. JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §1331 because this action arises under the Constitution or laws of the United States and §1332(d)(2) because the matter in controversy exceeds \$5,000,000, exclusive of interest and costs, this is a class action in which at least one member of the Plaintiff class is a citizen of a State different from at least one

Defendant, and the proposed Classes are composed of thousands of members throughout the United States.

10. Venue is proper before this Court pursuant to 28 U.S.C. § 1407, as this Court is the transferee court for all actions consolidated into MDL 2217 by the Judicial Panel on Multidistrict Litigation's order creating this multidistrict litigation on February 27, 2011. Venue is also proper under 28 U.S.C. § 1391 inasmuch Defendants do business in this District, a substantial part of the events or omissions giving rise to the claims occurred within the district in which this Court sits, and a portion of the proposed class resides in it.

11. To the extent there is any contractual or other impediment to pursuit of these claims on a class action basis, Plaintiffs specifically allege, and will prove, if necessary, that any bar to class action proceedings is unconscionable, unfair and against public policy.

IV. STATEMENT OF FACTS

12. Discover markets several purportedly optional fee-based products to its Cardholders. One such product is the "Payment Protection Plan." These products generate substantial revenue for Discover. Discover sells at least four optional financial products for a monthly fee. Discover touts all four optional fee-based plans as ways for consumers to increase their financial security, whether by protecting the customer from fraud or unauthorized charges, or insuring them against a loss of income. These products are currently called the "Payment Protection Plan," "Identity Theft Protection," "Wallet Protection," and "Credit Score Tracker" (the "Plans"). Discover charges \$0.89 for every \$100 of outstanding balance on the cardholder's account each month for Payment Protection; \$12.99 per month for Identity Theft Protection; \$2.99 per month for Wallet Protection; and \$7.99 per month for Credit Score Tracker.

13. Annualized, a consumer with a \$5,000 credit card balance each month would be

charged \$534 for the Payment Protection Plan. Furthermore, Identity Theft Protection costs \$155.88 per year; Wallet Protection costs \$35.88 per year; and Credit Score Tracker costs \$95.88 per year. Cardholders who are enrolled in these plans do not receive a separate invoice for these monthly fees. Instead, Discover charges the fee directly to the consumer's Discover credit card each month.

a. Payment Protection - Deceptive Marketing Claims

14. The Payment Protection Plan purports to temporarily suspend the cardholder's obligation to make regular monthly payments on their Discover card in the event of certain qualifying events. The qualifying events include involuntary unemployment, disability, hospitalization or natural disasters. If a cardholder maintains an outstanding balance on their credit card experiences a qualifying event and otherwise meets the requirements of the plan's terms and conditions, they may qualify for a temporary suspension of their monthly payment obligations.

15. The Payment Protection Plan is similar to credit insurance in the sense that it purports to protect the borrower from defaulting if an unanticipated event disrupts the borrower's source of income. Unlike credit insurance, however, the debt suspension portion of Payment Protection does not actually make monthly payments as they come due each month. Instead, Payment Protection only suspends the borrower's obligation to make monthly payments temporarily.

16. These types of plans have been subject to criticism from consumer advocates on several fronts. For example, it may not be disclosed to consumers that under the terms and conditions of the plan, the cardholder may not be permitted to use their credit card while they have invoked the debt suspension benefits -- even though the qualifying events that trigger the

debt suspension benefit, such as unemployment, may be when the cardholder needs their credit card the most. Under Discover's Payment Protection Plan, a cardholder cannot use the card when monthly payments are suspended due to a hardship.

17. Critics also point out that debt suspension agreements are sometimes marketed to elderly consumers, for whom material benefits of the Plan may be of little or no value. The main benefit of debt suspension plans is that they suspend payment obligations when the borrower's income stream is lost due to unemployment, disability or natural disaster; elderly retired persons rely on savings and fixed income to survive, rather than normal income from employment, so they could rarely benefit from Discover's unemployment or disability benefits.

18. Unlike credit insurance, Payment Protection plans are generally not regulated by state insurance regulators. With credit insurance, state insurance regulators at least set basic minimum terms and conditions, and also are required to regulate premiums to insure that costs are reasonable in relation to the benefits of the product. By contrast, payment protection plans are generally unregulated as to terms, conditions, and fees, making the plans highly profitable for Discover.

19. Discover markets and sells its "Payment Protection" product ("Payment Protection") as a product that will provide benefits to Cardholders if certain events occur, such as unemployment or disability. Discover charges the Cardholders \$.89 per hundred dollars of their monthly account ending balance, and in return tells the cardholder that it will defer minimum payments on account balances for a period of time when the cardholder is unemployed or disabled. These promises are illusory.

20. Discover sells Payment Protection through misleading statements, incomplete statements and misrepresentations. The product is sold through print ads and direct telemarketing

to existing Cardholders who are generally in the “subprime” credit category.

21. Discover manipulates the Payment Protection sales process by either 1) enrolling Cardholders in Payment Protection without advance notice or consent by the cardholder, or 2) misrepresenting to Cardholders that Payment Protection will “Preserve your lifestyle – and protect your Discover Card payment history – when life’s events disrupts your finances” by putting their account on hold during the benefit period.

22. At the time of sale, Discover does not ask the cardholder any qualifying questions to determine if the cardholder is eligible for Payment Protection benefits, or to determine if the cardholder will ever be eligible for Payment Protection benefits. There is a lengthy list of exclusions or grounds for denial of benefits that are not revealed to the cardholder until the customer submits a claim for benefits, when Discover grants itself ultimate and unchallengeable discretionary power to deny benefits if it “determines that [the cardholder] do[es] not qualify for benefits for *any reason*.” (emphasis added). Discover fails to disclose the terms of Payment Protection until after the consumer accepts or is charged for the product.

23. The Payment Protection claims process is so difficult, onerous and discretionary that, upon information and belief—based on *The Impact of Debt Cancellation Contracts on State Insurance Regulation, A Report to the FIRST* By the Center for Economic Justice dated July 2003—only 3-5% of premiums paid by Cardholders are ever paid out as benefits. Cardholders who are denied benefits do not receive refunds of premiums paid. They have therefore paid Discover for a product that is entirely worthless to them. Cardholders are rarely able to overcome the multiple bureaucratic hurdles and incomprehensible and contradictory preconditions that are confusing and that were not disclosed to the cardholder at the time of sale (or imposition of charges). When Discover’s discretionary process results in the ultimate denial of claims, there is

no objective process for a cardholder to appeal Discover's decision.

24. Payment Protection is a "mass" marketed product, that is, the marketing, management and claims handling processes are applied in a uniform manner so that all members of the proposed class were marketed in a virtually identical manner and members of the class received standardized responses from Discover in response to claims for benefits.

25. Discover's sales materials tell Cardholders that they will give Cardholders "the time [they] need to get back on your feet" because "[t]here are no payments, no periodic finance charges, no late fees, no over limit fees, and no Payment Protection fees" when a triggering event, such as unemployment or disability occurs. Discover, in its marketing material, tells Cardholders that, should the need arise, "One call puts Payment Protection to work...When you need us, simply call... and a thoughtful, knowledgeable Payment Protection specialist will take the time to activate your benefits." Discover's statements are misleading because thousands of Cardholders had a similar experience to the Plaintiffs here, such as Devavani Conroy, a woman who lost her job and asked for benefit payments or coverage under the Program, and who was not given "time to get back on [her] feet", but instead was denied "Payment Protection" coverage despite having paid for it.

26. In order to increase profits, Discover manipulates the claims payment process in its favor by limiting the chances of having to honor or pay Payment Protection claims. Discover relies upon a deceptive practice known as "post claims underwriting" to accomplish this strategy. This is the practice of asking few or no questions of the cardholder at the time of sale to determine if the customer is likely to qualify for benefits should the need arise. When the customer attempts to use the "benefits" of Payment Protection, Discover denies the benefits for reasons that were not disclosed at the time of sale. For example, numerous retired senior citizens are charged for

Payment Protection even though they are excluded from ever receiving unemployment benefits.

27. As a result of Discover's deceptive and unfair marketing schemes and claims practices, Plaintiffs and class members purchase a product that is virtually worthless to them, and are charged excessively for the product even if one assumes that product has some value to the cardholder. The ratio of premiums charged is excessive when compared to the actual value of claims paid.

b. Defendants' False Advertising Relating to Pricing of the Plan

28. The marketing materials and telephonic solicitations offering the Plan mislead consumers to believe that the fee associated with the Plan is assessed as "89¢ per every \$100.00 of your total Discover Card account balance at the end of each monthly billing period in which you're enrolled in Payment Protection." In reality, the fee is not incremental – as suggested by Discover's marketing materials – but a percentage fee of 0.89% of their monthly ending balance.

29. Thus, according to the information presented through the marketing of the plan, if a Card Member's total account balance at the end of a billing period in which he/she is enrolled in the Plan is \$100.00, Discover may contractually charge a fee of 89¢.

30. Such marketing and advertising lead Card Members to believe that if their total Discover Card account balance at the end of a billing period in which he/she is enrolled in the Plan reached the next \$100.00 increment, i.e., \$200.00; Discover may contractually charge a fee of \$1.78.

31. Such marketing and advertising further lead the Card Members to believe that if their total Discover® Card account balance at the end of a billing period in which he/she is enrolled in the Plan is \$110.00 (i.e., more than \$100.00, but less than the next \$100.00 increment of \$200.00), Discover may only contractually charge a fee of 89¢ because the next \$100.00

increment has not yet been reached.

32. In contrast with the misinformation provided through the marketing and advertising of the Plan, Defendants actually charge .0089 of the Card Member's total Discover card account balance at the end of each a billing period in which the Card Member is enrolled in the Plan.

33. Therefore, when a Card Member carries a balance of \$110.00 on the statement closing date while he/she is enrolled in the Plan, Defendants' charges a fee of 97.9¢ (i.e., .0089 x \$110.00), as opposed to the 89¢ as advertised.

34. Additionally, the Plan creates an "endless cycle" whereby the resulting fees are exacerbated and compounded as a result of the interest that accrues when Card Members do not pay their account balances off in full.

35. Furthermore, the fees associated with the Plan cause many Card Members to exceed their credit limits, resulting in additional excessive fees and penalties.

c. Payment Protection - Slamming Claims

36. Discover enrolls far more Cardholders through telemarketing than through the mail or online, the latter two of which require an affirmative act by the consumer to enroll, such as initialing their monthly statement in the designated place, authorizing enrollment, and mailing it back to Discover.

37. Most of Discover's Cardholders are enrolled in the Products through Discover's aggressive and deceptive telemarketing efforts and card activation calls. Some of these calls are made internally by Discover, and others are made by telemarketing firms that Discover hires.

38. In addition to Discover's financial motive to enroll as many of its customers as possible into its highly lucrative fee-based products, individual Discover telemarketers are

incentivized to enroll as many Cardholders as possible, either because their compensation is commission-based or because their performance is otherwise compensated on the number of Cardholders they enroll.

39. Discover's telemarketing scripts attempt to lull the cardholder into believing they are receiving a courtesy call from Discover rather than a sales call. Discover telemarketers are instructed to tell family members who answer the phone that it is just a "courtesy call" rather than disclose that it is in fact a sales call.

40. After reading product descriptions and disclosures, if the telemarketer can elicit some affirmative response from the cardholder, such as "ok" or "yes" after the "disclosure," the telemarketer treats the affirmative response as the cardholder's agreement to enroll in the plan, regardless of whether the consumer understands that they are supposedly agreeing to purchase a product and that their credit card will be charged.

41. Discover's telemarketers employ numerous deceptive tactics to elicit an affirmative response from the cardholder without the cardholder actually understanding that they are supposedly agreeing to purchase an optional product for a monthly fee, thereby tricking some consumers into unknowingly signing up for the plans. One common tactic is for the telemarketer to selectively read, or substantially alter the text of the "disclosure" in an effort to make the "disclosure" sound like incomprehensible legalese and to hide the fact that a sale is taking place. In a traditional telemarketing call, the consumer must read their credit card number to the telemarketer in order to purchase a product. Here the telemarketer is the credit card company. As a result, Discover can post charges on a consumers' account even when there has been no clear and knowing consent given by the consumer.

42. Some of Discover's telemarketers read the script so quickly that Cardholders

cannot understand the text or do not understand they are allegedly being sold a product. The telemarketer then says to the cardholder “Ok, Ms. Smith?” as if the telemarketer is wrapping up the call. Some Cardholders reflexively respond “Ok,” not to indicate their consent to purchase a product but to end the phone call, which they still believe is a courtesy call regarding the benefits of the Discover card. Discover later relies on this “affirmative response” as “proof” that the cardholder knowingly agreed to purchase the plan.

43. In addition to deceptively inducing Cardholders to say “yes” or “ok” during the call, Discover enrolls some Cardholders who did not give an affirmative response.

44. Sometimes the telemarketer's deceptive tactics fail and the cardholder tells the telemarketer he or she is not interested. Undeterred, Discover's telemarketers sometimes assure these Cardholders that Discover is simply going to send the cardholder a "packet of information" about the plan. When these skeptical Cardholders state that it is “ok” for Discover to send them information about the plan to look over, the telemarketer treats this affirmative response as the cardholder's authorization for paid enrollment, even though the consumers do not believe they have agreed to purchase anything.

45. When Cardholders later contact Discover to complain that they have been enrolled without their authorization, Discover purports to review the partial recordings of their conversations with the telemarketers. Discover sometimes concludes that the cardholder gave their authorization, even when the cardholder never actually states that he or she agrees to be enrolled in the paid plan. Discover routinely refuses to reimburse Cardholders the amounts that have been billed to their Discover card for the plan, even when Cardholders are adamant that they only gave approval to have information about the plan sent to them, not for enrollment.

46. Cardholders who receive the packet sometimes disregard it because they may

assume that the packet is just another piece of junk mail from a credit card company. In addition to its deceptive outbound telemarketing practices, Discover enrolls some Cardholders in the plans without their knowledge during the card activation process. When a new Discover cardholder receives their credit card in the mail, the card has not been activated. Instead, the cardholder must call Discover from their home phone number to activate their card. Discover may also issue new cards to existing Cardholders which require the cardholder to call in order to activate.

47. Discover routinely transfers card holders calling to activate their card to a live operator. At some point during these activation calls, the Discover representative turns on a recording device and says to the consumer “I need to record your enrollment.” The representative then reads to the cardholder one of the “disclosures” like those discussed above. Cardholders who are calling to activate a credit card are particularly susceptible to believing that the “disclosure” is some legal text that must be read to the cardholder, rather than an alleged contractual agreement to purchase an optional paid product. Given all the disclosures and fine print that consumers receive when they open a new credit card account, reading the disclosure to Cardholders in the card activation context can mislead Cardholders about the purpose of the disclosure. Accordingly, many Cardholders who receive the disclosure during the card activation process and reply “ok” have no idea that they have supposedly purchased some optional product.

48. Discover experiences high cancellation rates for these products, from which it may be inferred that the customers did not agree to buy the products at the time of sale.

49. Many Cardholders have no idea they are enrolled in a plan and do not notice or appreciate the meaning of the line-item charge for the plan that Discover bills to their Discover account each month. Some Cardholders pay this inconspicuous charge month after month for many months before they become aware of the purpose of the charge.

d. Identity Theft Protection, Credit Score Tracker and Wallet Protection - Deceptive Marketing Claims

50. Discover also deceptively enrolls its customers in the Credit Score Tracker, Identity Theft Protection, and Wallet Protection products. With Discover's Credit Score Tracker, the cardholder is given a copy of their Experian credit report. (Experian is one of the three major credit reporting agencies.) In addition, enrollees are given access to tools that allow them to track their credit score on a daily basis and to receive e-mail alerts if there are changes to their credit score. A main selling point Discover uses to market this plan is the Experian credit report consumers receive. Discover charges enrollees an additional \$19.99 (in addition to the monthly fee) if they want credit reports from the other major credit reporting agencies. Experian and the two other major credit reporting agencies, however, are required by federal law to provide consumers one free credit report each year. Discover charges the Cardholders' accounts \$7.99 per month for this product.

51. Discover's Identity Theft Protection plan purports to monitor the enrollee's credit score for indicia of identity theft and will alert the enrollee if something suspicious happens to their credit score. Discover enrolls its customers into this plan without their knowledge or consent and fails to withdraw customers from the plan upon request in order to continue billing them for the product. Discover charges the Cardholders' accounts \$12.99 per month for this product. This product was previously called "Profile Protect."

52. Under Discover's Wallet Protection plan, if the enrollee's wallet is lost or stolen, Discover will contact the issuers of the enrollee's credit cards to cancel the card. In addition, Discover represents that it will monitor a customer's credit for 90 days after their wallet is lost or stolen and wire the customer up to \$1,000 in emergency cash. Discover enrolls Cardholders in this plan without their meaningful, knowing authorization and charges the Cardholders' credit

cards \$2.99 per month. This product was previously called “The Register.”

53. Discover employs aggressive and deceptive telemarketing, as alleged in the preceding paragraphs of this complaint, with respect to each of these Products, and enrolls customers in these Products without their affirmative consent.

V. STATEMENT OF FACTS SPECIFIC TO PROPOSED CLASS REPRESENTATIVES

a. Plaintiff Devavani Conroy

54. Plaintiff Devavani Conroy (“Plaintiff Conroy”) “enrolled” in Discover’s Payment Protection beginning on November 4, 2009. Discover solicited Plaintiff by phone, and several weeks after “enrollment” sent her a Post-Enrollment Letter and several prolix and confusing documents that set out various additional terms of the Program that were not disclosed at the time of sale.

55. Plaintiff Conroy was enrolled in the Identity Theft Protection Plan on February 21, 2006. She cancelled the plan on May 9, 2010.

56. Plaintiff Conroy was laid off from her job and attempted to take advantage of the “benefits” provided by Payment Protection. When Plaintiff Conroy called Discover in April 2010, she was “denied” any of the benefits of the Payment Protection plan for which she had been paying over \$45 per month.

b. Plaintiff Renee Walker

57. Plaintiff Renee Walker (“Plaintiff Walker”) has been a Discover® Card Member since December 2008. Defendants deceptively enrolled Plaintiff Walker in the Plan without her authorization or consent. Plaintiff Walker first learned she was being billed for fees related to the Plan in or about January 2010. On or about January 15, 2010, Walker called Defendants to challenge the subject fees. Defendants’ Customer Service representative advised Plaintiff Walker

that she had been enrolled in the Plan as of May 14, 2009. A temporary credit in the amount of \$551.98 was issued on February 1, 2010. The temporary credit was reversed on February 22, 2010.

58. Defendants' Customer Service representative agent advised Plaintiff Walker that her consent for enrollment in the Plan was "on file", but could not provide any further information on the matter. Plaintiff Walker cancelled the Plan on the same day.

59. Plaintiff Walker was charged, at a minimum, \$551.98 in unauthorized fees related to the Plan. Pursuant to Cal. Civ. Code § 1782, Plaintiff Walker notified Defendants in writing, by certified mail sent on July 9, 2010, of the particular violations of Cal. Civ. Code §1770 and demanded that Defendants rectify the problems associated with the actions detailed above (the "Walker Letter"). Defendants did not respond to the Walker Letter. Defendants did not resolve or offer to resolve the issues raised in the Walker Letter.

c. Plaintiff Jason Chan

60. Plaintiff Jason Chan ("Plaintiff Chan") has been a Discover Card Member since 2006. Defendants deceptively enrolled Plaintiff Chan in the Plan without his authorization or consent. Plaintiff Chan first learned he was being billed for fees related to the Plan in or about March 2010. On or about March 21, 2010, Plaintiff Chan called Defendants to challenge the subject fee. A Discover Customer Service representative advised Chan that he had been enrolled in the Plan for more than two years. Plaintiff Chan was enrolled in the plan on January 23, 2008.

61. Defendants' Customer Service representative agent advised Plaintiff Chan that his consent for enrollment in the Plan was "on file", but could not provide any further information on the matter. Plaintiff Chan cancelled the Plan on the same day.

62. Plaintiff Chan was charged, at a minimum, \$1,657.24 in unauthorized fees related

to the Plan. Pursuant to Cal. Civ. Code § 1782, Plaintiff Chan notified Defendants in writing, by certified mail sent on July 8, 2010, of the particular violations of Cal. Civ. Code §1770 and demanded that Defendants rectify the problems associated with the actions detailed above (the “Chan Letter”). Defendants did not respond to the Chan Letter. Defendants did not resolve or offer to resolve the issues raised in the Chan Letter.

d. Plaintiff Robert Ackerman

63. Plaintiff Robert Ackerman (“Plaintiff Ackerman”) has been a Card Member since 2001. Defendants deceptively enrolled Plaintiff Ackerman in the Plan without his authorization or consent. Plaintiff Ackerman first learned he was being billed for fees related to the Plan in or about November 2009.

64. In or about November 2009, Plaintiff Ackerman called Defendants to challenge the subject fees. Defendants’ Customer Service representative advised Plaintiff Ackerman that he had been enrolled in the Plan since July 16, 2008.

65. Defendants’ Customer Service representative advised Plaintiff Ackerman that his consent for enrollment in the Plan was “on file”, but could not provide any further information on the matter. Plaintiff Ackerman cancelled the Plan on the same day.

66. Plaintiff Ackerman was charged, at a minimum, \$300.00 in unauthorized fees related to the Plan.

e. Plaintiff Michelle Kraynak

67. Michelle Kraynak (“Plaintiff Kraynak”) has been a Discover® Card Member since 2001. Defendants deceptively enrolled Plaintiff Kraynak in the Plan without her authorization or consent. Plaintiff Kraynak first learned she was being billed for fees related to the Plan on or about June 15, 2010.

68. On or about June 15, 2010, Plaintiff Kraynak called Defendants to challenge the subject fee. Defendants' Customer Service representative advised Plaintiff Kraynak that she had been enrolled in the Plan since June 27, 2001, and directed further inquiries to the Payment Protection Plan department.

69. On or about June 16, 2010, Plaintiff Kraynak called the Payment Protection Plan department. The Payment Protection Plan department agent advised Plaintiff Kraynak that her consent for enrollment in the Plan was "on file", but could not provide any further information on the matter. Plaintiff Kraynak cancelled the Plan on the same day.

70. Plaintiff Kraynak was charged, at a minimum, approximately \$5,000.00 in unauthorized fees related to the Plan.

f. Plaintiff Shawn Irvine

71. Plaintiff Shawn Irvine ("Plaintiff Irvine") enrolled as a Card Member in or about 2005. Defendants deceptively enrolled Irvine in the Plan without his authorization or consent. Irvine first learned he was being billed for fees related to the Plan on or about June 9, 2009.

72. On that same day, Plaintiff Irvine and his wife (the "Irvines") contacted Defendants to dispute the subject fees. During that call Defendants' Customer Service Representative advised the Irvines that the matter would be investigated. During that call, the Irvines cancelled their enrollment in the Plan.

73. On or about June 19, 2009, Irvine received a letter from Defendants' "Cardmember Services" department stating that an internal investigation had established proof of his enrollment in the Plan on August 2, 2008, but could not provide any further information on the matter.

74. The Irvines were charged in excess of \$1,000.00 in unauthorized fees related to the

Plan.

g. Plaintiff Anthony DeMarco

75. Anthony DeMarco (“Plaintiff DeMarco”) is a Discover® Card Member. Defendants deceptively enrolled DeMarco in the Plan without his authorization or consent. Plaintiff DeMarco first learned he was being billed for fees related to the Plan in or about March 2010.

76. In or about March 2010, Plaintiff DeMarco called Defendants to challenge the subject fee. Defendants’ Customer Service representative advised Plaintiff DeMarco that he had been enrolled in the Plan since April 1, 2008. Defendants’ Customer Service representative agent advised Plaintiff DeMarco that a recording of his consent for enrollment in the Plan was “on file”, but could not provide any further information on the matter. Plaintiff DeMarco cancelled the Plan on the same day.

77. Plaintiff DeMarco was charged, at a minimum, \$200.00 in unauthorized fees related to the Plan.

h. Plaintiff Marti Kelmer

78. Marti Kelmer (“Plaintiff Kelmer”) has been a Discover® Card Member since in or about October 2006. Defendants deceptively enrolled Kelmer in the Plan without her authorization or consent. Plaintiff Kelmer first learned she was being billed for fees related to the Plan in or about September of 2009.

79. On or about September 21, 2009, Plaintiff Kelmer called Defendants to challenge the subject fees. Defendants’ Customer Service representative advised Plaintiff Kelmer that she had been enrolled in the Plan since October 30, 2006. Defendants’ Customer Service representative agent advised Plaintiff Kelmer that her consent for enrollment in the Plan was “on

file”, but could not provide any further information on the matter. Plaintiff Kelmer cancelled the Plan on the same day.

80. Plaintiff Kelmer was charged, at a minimum, \$781.19 in unauthorized fees related to the Plan.

i. Plaintiff Jose Cruz

81. Plaintiff Jose Cruz (“Plaintiff Cruz”) has been a Discover® Card Member since in or about 2009. Defendants deceptively enrolled Plaintiff Cruz in the Plan without his authorization or consent. Plaintiff Cruz first learned he was being billed for fees related to the Plan on or about June 16, 2010.

82. On or about June 16, 2010, Plaintiff Cruz and his wife called Defendants to challenge the subject fees. Defendants’ Customer Service representative advised Plaintiff Cruz and his wife that his account had been enrolled in the Plan since April 17, 2009. Defendants’ Customer Service representative agent advised Plaintiff Cruz that his wife’s consent for enrollment in the Plan was “on file”, but could not provide any further information on the matter. After further dispute, Defendants agreed to provide Plaintiff Cruz a credit refund on account for the Plan fees, pending their investigation. Plaintiff Cruz cancelled the Plan the same day. Approximately one month later, Defendants contacted Plaintiff Cruz to advise that they had confirmed his enrollment in the plan and re-instated all of the fees that they had previously refunded.

83. Plaintiff Cruz was charged, at a minimum, \$700.00 in unauthorized fees related to the Plan.

84. Plaintiff Cruz was also enrolled in the Wallet Protection Plan on April 21, 2009 and is still currently enrolled.

j. Plaintiff Robert Hibbs

85. Robert Hibbs (“Plaintiff Hibbs”) has been a Discover® Card Member since 2000.

86. Defendants deceptively enrolled Plaintiff Hibbs in the Plan without his authorization or consent. Plaintiff Hibbs first learned he was being billed for fees related to the Plan in or about the last week of July 2010.

87. Upon learning that he was being billed for fees related to the Plan, Plaintiff Hibbs reviewed his historical statements and learned he had been enrolled in the Plan since February 16, 2009. Plaintiff Hibbs immediately called Defendants to challenge the subject fees. Defendants’ Customer Service representative advised Plaintiff Hibbs that they would conduct an investigation to determine whether or not they had proof of his enrollment. Plaintiff Hibbs cancelled the plan on the same day and has not heard back from Defendants regarding their investigation.

88. Plaintiff Hibbs was charged, at a minimum, \$1,000.00 in unauthorized fees related to the Plan.

k. Plaintiff Jason Hart

89. Jason Hart (“Plaintiff Hart”) has been a Discover® Card Member since November 2009. Defendants deceptively enrolled Plaintiff Hart in the Plan without his authorization or consent. Plaintiff Hart first learned he was being billed for fees related to the Plan on or about August 8, 2010.

90. On or about August 8, 2010, Plaintiff Hart called Defendants to challenge the subject fees. Defendants’ Customer Service representative advised Plaintiff Hart that he had been enrolled in the Plan since May 25, 2010. Defendants’ Customer Service representative agent advised Plaintiff Hart that his consent for enrollment in the Plan was “on file”, but could not provide any further information on the matter. Plaintiff Hart cancelled the Plan on the same day.

91. Marsh was charged, at a minimum, \$45.85 in unauthorized fees related to the Plan.

l. Plaintiff Tammy Marsh

92. Tammy Marsh (“Plaintiff Marsh”) has been a Discover® Card Member since June 2008. Defendants deceptively enrolled Plaintiff Marsh in the Plan without her authorization or consent. Plaintiff Marsh first learned she was being billed for fees related to the Plan on or about January 29, 2010.

93. On or about January 29, 2010, Plaintiff Marsh called Defendants to challenge the subject fees. Defendants’ Customer Service representative advised Plaintiff Marsh that she had been enrolled in the Plan since April 20, 2009. Defendants’ Customer Service representative agent advised Plaintiff Marsh that her consent for enrollment in the Plan was “on file”, but could not provide any further information on the matter. Plaintiff Marsh cancelled the Plan on the same day.

94. Plaintiff Marsh was charged, at a minimum, \$1,293.24 in unauthorized fees related to the Plan.

m. Charles Triplett

95. Plaintiff Charles Triplett (“Plaintiff Triplett”) is a 66 year old Florida resident who has resided in Florida during all relevant time periods.

96. Plaintiff Triplett is retired and is on a fixed income, receiving a pension from the U.S. Postal Service, where he was employed for 34 years. At the time he was enrolled in the plan, Plaintiff Triplett was retired and on a fixed income. In or around 1992, Plaintiff Triplett became a Discover credit card holder. In or around 2005, Payment Protection features were added to Plaintiff Triplett’s account. Plaintiff Triplett was enrolled in Payment Protection without his knowledge.

97. Following his enrollment, Plaintiff Triplett's account was billed on a monthly basis for Payment Protection and he made payments towards his account. These charges and Plaintiff Triplett's payments can be readily compiled and calculated by Discover. Discover charged Plaintiff Triplett for Payment Protection every month even though Plaintiff Triplett paid his balance in full.

98. In January 2011, Plaintiff Triplett cancelled his Payment Protection. Despite telling Discover's representative that he was retired, and did not therefore think he was eligible for the plan, the representative tried to sell Plaintiff Triplett on accepting a lower rate for Payment Protection.

99. Plaintiff Triplett was also enrolled in the Identity Theft Protection Plan on June 25, 1999 and is still currently enrolled.

100. Plaintiff Triplett was also enrolled in the Wallet Protection Plan on September 11, 2009 and is still currently enrolled.

101. Plaintiff Triplett was also enrolled in the Credit Score Tracker on November 9, 2009 and is still currently enrolled.

n. Plaintiff Kathleen Callahan

102. Plaintiff Kathleen Callahan ("Plaintiff Callahan") has been a Discover Card account holder since 2000. On November 28, 2005, Discover enrolled Plaintiff Callahan in its Payment Protection Plan and proceeded to assess monthly Plan fees on Plaintiff Callahan's Discover credit card account.

103. Plaintiff Callahan did not authorize Discover to enroll her in the Plan, nor to charge her account for Plan fees.

104. From 2005 through October, 2010, Discover assessed Payment Protection fees on

Plaintiff Callahan's credit card account for each month the account carried an outstanding balance.

105. As a result, each month Plaintiff Callahan paid Discover for her credit card account, she paid at least a portion of the unauthorized fees that Discover levied against her account. In total, Discover charged Plaintiff Callahan's credit card account more than \$1,000.00 in unauthorized Payment Protection Plan fees.

106. In or about September 2010, Plaintiff Callahan discovered the unauthorized Payment Protection charges on her account and contacted Discover to request that the charges be canceled. Discover assured Plaintiff Callahan that the Plan would be canceled. It was not. Plaintiff Callahan contacted Discover several more times to request cancellation of the Plan. Each time, Discover assured her that it would be canceled. Nevertheless, her credit card account remained enrolled in the Plan.

107. Shortly thereafter, Plaintiff Callahan became ill and unable to meet her financial obligations. Accordingly, because Discover failed to cancel the Payment Protection Plan on her account, on or about September 25, 2010, Plaintiff Callahan contacted Discover and attempted to make a claim to use the benefits of the Plan she had paid for.

108. On or about October 4, 2010, Plaintiff Callahan received a letter from Discover informing her that the Payment Protection Plan had been cancelled.

109. On or about October 11, 2010, Plaintiff Callahan received a phone call from Discover regarding a negotiation and they agreed upon a final payment schedule on her three outstanding Discover accounts, including the Discover credit card account that was enrolled in the Payment Protection Plan.

110. The Discover representative who contacted Plaintiff Callahan confirmed that the

account had been charged for the Plan.

111. Plaintiff Callahan settled two of her outstanding Discover accounts, but informed the Discover representative that she would not pay the remaining account in full because she had never authorized Discover to enroll or charge her for its Payment Protection Plan.

112. Discover has yet to provide Plaintiff Callahan a full refund of the unauthorized fees it collected from her.

o. Plaintiff Brian Boyce

113. On or about April 22, 2009, Plaintiff Brian Boyce (“Plaintiff Boyce”) requested and received a Discover Card credit card (the “Card”), which he began using to make purchases from various merchants and service providers. Unbeknownst to Plaintiff Boyce, at or around the time the Card was issued to Plaintiff Boyce, Defendants had enrolled Plaintiff in the Plan without his knowledge or consent.

114. From April of 2009 through September of 2009, Defendants placed charges on Plaintiff Boyce’s card totaling \$676.57, exclusive of interest and finance charges.

115. Although Defendants subsequently credited the sum of \$676.57 to Plaintiff Boyce’s card in November 2009, Defendants have never credited to Plaintiff Boyce any of the interest and finance charges billed to Plaintiff Boyce as a result of the Plan charges and, therefore Plaintiff Boyce has not been provided with a full refund.

p. Plaintiff Ulonda Carter

116. Plaintiff Ulonda Carter (“Plaintiff Carter”) is a 62 year old Pennsylvania resident who has resided in Pennsylvania during all relevant time periods.

117. Plaintiff Carter is a tax examiner technician for the IRS, where she has worked since 2002.

118. In or around November 2010, Plaintiff Carter became a Discover credit card holder when she responded via phone call to an offer mailed to her by Discover. When she called Discover, a representative pitched to her the Payment Protection plan as she signed up for her card. Plaintiff Carter became enrolled in Discover's Payment Protection Plan on November 3, 2010 and was told she would receive a package of material in the mail with the terms and conditions of the plan. Plaintiff Carter never received these written materials, but was nevertheless billed for Payment Protection in her next month's credit card statement.

119. Following her enrollment, Plaintiff Carter's account was billed on a monthly basis for Payment Protection and she made payments towards her account. These charges and Plaintiff Carter's payments can be readily compiled and calculated by Discover.

q. Diane Marie Alexander

120. Plaintiff Diane Marie Alexander ("Plaintiff Alexander") has been a Discover card member since 2008.

121. Defendants deceptively enrolled Plaintiff Alexander in the Plan without her authorization or consent.

122. Plaintiff Alexander first learned she was being billed for fees related to the Plan in or about July 2010. Plaintiff Alexander later learned that Defendants had been billing Plaintiff Alexander for fees related to the Plan since September 23, 2009. Plaintiff Alexander cancelled the Plan in or about July 2010.

123. On or about August 6, 2010, Plaintiff Alexander called Defendants again to discuss the fraudulent charges to her account for fees related to the Plan. On or about August 15, 2010, Defendants refunded Plaintiff Alexander's account \$259.10 for "Payment Protection" charges that were "under investigation."

124. On or about August 26, 2010, Defendants recharged Plaintiff Alexander's account \$259.10. On or about October 1, 2010, Plaintiff Alexander called Defendants again to discuss the fraudulent charges to her account for fees related to the plan.

125. Defendants have refused to refund Plaintiff Alexander the unauthorized fees related to the Plan.

r. Plaintiff Karin Sack

126. Plaintiff Karin Sack ("Plaintiff Sack") is a Discover Card member.

127. Plaintiff Sack was enrolled in the Plan on December 19, 2007 after a telemarketing call misled her into believing that she agreed to receive information concerning the Plan, whereas, in reality, the sales agent enrolled her in the Plan.

128. Plaintiff Sack never consented to enrollment in the Plan.

VI. CLASS ALLEGATIONS

129. Plaintiffs bring this action on their own behalf and on behalf of a class of all other persons similarly situated (the "Class"), pursuant to Rule 23 of the Federal Rules of Civil Procedure.

130. Plaintiffs bring this action as a class representative to recover damages and/or refunds from Discover for breach of contract, unconscionability, consumer fraud, injunctive relief and declaratory judgment, rescission, and restitution for unjust enrichment.

131. This action satisfies the numerosity, commonality, typicality, adequacy, predominance, and superiority requirements of the Federal Rules of Civil Procedure Rule 23(a), (b), and (g).

132. Plaintiffs seek certification of a class comprised of the following citizens and consumers:

All persons in the United States who were enrolled in or billed for Discover Payment Protection, AccountGuard, Identity Theft Protection, Profile Protect, Wallet Protection, The Register and/or Credit Score Tracker between January 21, 2004 and [date of preliminary approval of the settlement] (the “Class Period”).

133. Plaintiffs reserve the right to modify or amend the definition of the proposed class before the Court determines whether certification is appropriate.

134. Excluded from the Class are:

- a. Defendants and any entities in which Defendants have a controlling interest;
- b. Any entities in which Defendants’ officers, directors, or employees are employed and any of the legal representatives, heirs, successors or assigns of Defendants;
- c. The Judge to whom this case is assigned and any member of the Judge’s immediate family and any other judicial officer assigned to this case;
- d. Persons or entities with claims for personal injury, wrongful death and/or emotional distress;
- e. All persons or entities that properly execute and timely file a request for exclusion from the Class;
- f. Any attorneys representing the Plaintiffs or the Class; and
- g. All governmental entities.

135. Numerosity – Fed. R. Civ. P. 23(a)(1). The Class is comprised of over 100 people and possibly hundreds of thousands of individuals who were Discover customers, the joinder of which in one action would be impracticable. The exact number or identification of the Class members is presently unknown. The identity of the Class members is ascertainable. In addition to rolls maintained by the Defendants and its agents, the Class members may be located and informed of the pendency of this action by a combination of electronic bulletins, e-mail, direct mail and public notice, or other means. The disposition of the claims of the proposed class members through this class action will benefit both the parties and the Court.

136. Predominance of Common Questions – Fed. R. Civ. P. 23(a)(2), 23(b)(3). The questions of law and fact common to the Class predominate over questions affecting only individual Class members, and include, but are not limited to, the following:

- a. Whether Discover's sales, billing, and marketing scheme as alleged in this Amended Complaint is fraudulent, deceptive, unlawful, and/or unfair in violation of law;
- b. To the extent applicable, whether Discover's Credit Card Agreement arbitration clause and class action waiver are unconscionable and therefore unenforceable;
- c. Whether Discover's imposition of the Products on individuals who did not sign up for them is unlawful;
- d. Whether Discover's marketing of Payment Protection to individuals ineligible for certain benefits is misleading and/or in bad faith;
- e. Whether Discover's administration of the Payment Protection program has been conducted in bad faith;
- f. Whether Discover's common and uniform sales, billing, and marketing schemes related to the Products as alleged in this Complaint constitutes a deceptive trade practice;
- g. Whether Plaintiffs and the Class members are entitled to restitution of all amounts acquired by Discover through its common and uniform scheme;
- h. Whether Plaintiffs and the Class members are entitled to injunctive relief requiring the disgorgement of all wrongfully collected fees by Discover;
- i. Whether Plaintiffs and the Class members are entitled to prospective injunctive relief enjoining Discover from continuing to engage in the fraudulent, deceitful, unlawful, and unfair common scheme as alleged in this Class Action Complaint;
- j. Whether Plaintiffs and the Class are entitled to rescind their contracts;
- k. Whether Plaintiffs and the Class members are entitled to recover compensatory and punitive damages as a result of Discover's wrongful scheme;
- l. Whether the Products are Worthless;
- m. Whether the Products are excessively priced relative to their value to the consumer; and

- n. Whether Discover's marketing practices concerning the Products are deceptive or misleading with respect to the issue of customer consent to enroll.

137. Typicality – Fed. R. Civ. P. 23(a)(3). Plaintiffs assert claims that are typical of the entire Class, having all been targeted by Discover as consumers who were improperly assessed charges for Payment Protection, Identity Theft Protection, Wallet Protection, and Credit Score Tracker and having paid for these products. Plaintiffs and the Class members have similarly suffered harm arising from Discover's violations of the law as alleged in this Class Action Complaint.

138. Adequacy – Fed. R. Civ. P. 23(a)(4); 23(g)(1). Plaintiffs are adequate representatives of the Class because they fit within the class definition and their interests do not conflict with the interests of the Members of the Class they seek to represent. Plaintiffs are passionate about this litigation personally and will prosecute this action vigorously for the benefit of the entire Class. Plaintiffs are represented by experienced and able attorneys from coordinated law firms that will collectively and jointly serve as class counsel. Class counsel has litigated numerous class actions, and Plaintiffs' counsel intends to prosecute this action vigorously for the benefit of the entire Class. Plaintiffs and class counsel can fairly and adequately protect the interests of all of the Members of the Class.

139. Superiority – Fed. R. Civ. P. 23(b)(3). The class action is the best available method for the efficient adjudication of this litigation because individual litigation of Class Members' claims would be impracticable and individual litigation would be unduly burdensome to the courts. Plaintiffs and members of the Class have suffered irreparable harm as a result of Discover's fraudulent, deceitful, unlawful, and unfair conduct. Because of the size of the individual Class members' claims, no Class members could afford to seek legal redress for the wrongs identified in this Class Action Complaint. Without the class action vehicle, the Class

would have no reasonable remedy and would continue to suffer losses, as Discover continues to engage in the unlawful, unfair, and unconscionable conduct that is the subject of this Class Action Complaint, and Discover would be permitted to retain the proceeds of their violations of law. Further, individual litigation has the potential to result in inconsistent or contradictory judgments. A class action in this case presents fewer management problems and provides the benefits of single adjudication, economies of scale, and comprehensive supervision by a single court.

VII. CAUSES OF ACTION

140. Plaintiffs Conroy, Carter, and Triplett, individually and on behalf of all similarly situated individuals shall hereinafter collectively be referred to as “Efficacy Plaintiffs.”

141. Plaintiffs Walker, Chan, Ackerman, Kraynak, Irvine, DeMarco, Kelmer, Cruz, Hibbs, Hart, Marsh, Callahan, Boyce, Carter, Alexander, and Sack shall hereinafter collectively be referred to as “Slamming Plaintiffs.”

142. Slamming Plaintiffs and Efficacy Plaintiffs shall hereinafter collectively be referred to as “All Plaintiffs.”

COUNT I

BREACH OF CONTRACT AND FRAUDULENT INDUCEMENT (Only as to Efficacy Plaintiffs)

143. Efficacy Plaintiffs repeat and reallege all preceding paragraphs of this amended complaint as if fully set forth herein.

144. Efficacy Plaintiffs entered into contractual relationships with Discover governing the terms and conditions of Payment Protection, Identity Theft Protection, Credit Score Tracker, and Wallet Protection.

145. The essential elements of a cause of action for breach of contract are: (1) a legal obligation of a defendant to a plaintiff, (2) a violation or breach of that right or duty, and (3) a

consequential injury or damage to the plaintiff.

146. In order to state a cause of action for fraud in the inducement of a contract, a party must allege that the misrepresentations were positive statements of fact, made for the purpose of procuring the contract; that they are untrue; that they are material; and that the party to whom they were made relied upon them, and was induced by them to enter into the contract.

147. Under contract law recognized in all fifty states, one cannot, by fraud and deceit, induce another to enter into a contract to his disadvantage, then escape liability by saying that the party to whom the misrepresentation was made was negligent in failing to learn the truth.

148. The doctrine of caveat emptor affords no protection to a seller who makes false representations of a material fact, constituting an inducement to the contract, on which a buyer had a right to rely. A buyer can show that a contract of sale was induced by the seller's fraud, notwithstanding the fact that the sale was made "as is."

149. Allegations of fraud in the inducement of a contract do not convert a contract action into one based on tort.

150. The statements made to the Plaintiffs regarding Payment Protection were positive statements that Payment Protection would provide certain benefits in the event of specified losses, these statements were made by Discover for the purpose of procuring the Cardholder's Agreement to accept and pay for Payment Protection, the statements constituted misrepresentations of material fact, upon which the Discover Cardholders reasonably relied and which induced the Cardholders to enter into the contractual agreement to pay for Payment Protection.

151. The statements made to Efficacy Plaintiffs regarding Credit Score Tracker, Identity Theft Protection, and Wallet Protection were positive statements that these Products had value,

these statements were made by Discover for the purpose of procuring the Cardholder's Agreement to accept and pay for the Products, the statements constituted misrepresentations of material fact, upon which the Discover Cardholders reasonably relied and which induced the Cardholders to enter into the contractual agreement to pay for the Products.

COUNT II

**BREACH OF CONTRACT: BREACH OF THE
COVENANT OF GOOD FAITH AND FAIR DEALING
(Only as to Efficacy Plaintiffs)**

152. Efficacy Plaintiffs repeat and reallege all preceding paragraphs of this amended complaint as if fully set forth herein.

153. Upon information and belief, Efficacy Plaintiffs and other members of the proposed class purchased Payment Protection coverage from Discover with the justified expectation that they were eligible for the benefits offered by Discover's Payment Protection plan.

154. Efficacy Plaintiffs and Discover contracted for the Payment Protection, Identity Theft Protection, Wallet Protection, and Credit Score Tracker benefits, and these benefits were either illusory in the case of Payment Protection, or without value in the case of the other Products..

155. Efficacy Plaintiffs and other Class members paid monthly premiums for these services, in some cases unknowingly, to obtain the purported benefits of the Payment Protection, Identity Theft Protection, Wallet Protection, and Credit Score Tracker products.

156. Upon information and belief, the terms and conditions of the agreements governing these products are embodied in written materials in the possession of Discover.

157. These terms and conditions were never provided to Efficacy Plaintiffs and other

Class members before they were enrolled in the Payment Protection, Identity Theft Protection, Wallet Protection, and Credit Score Tracker products. Efficacy Plaintiffs and Class members never received these terms and conditions.

158. There are various terms of the contract that Discover was obligated to perform but did not, thus breaching an express provision of the contract.

159. Despite the full performance by Efficacy Plaintiffs and other Class members, Discover did not provide Plaintiffs or other Class members with the benefits for which they had paid for the Payment Protection product; the Identity Theft Protection, Wallet Protection, and Credit Score Tracker products did not provide value commensurate with fees paid by the Efficacy Plaintiffs because these products were, essentially, worthless. Accordingly, to the extent that a contract has been fully formed between Discover and Efficacy Plaintiffs and other Class members, Discover has materially breached the contract, which has resulted in harm to Plaintiffs and other Class members, who did not receive the benefit of their bargain.

160. Each state where Efficacy Plaintiffs reside recognizes an implied covenant of good faith and fair dealing as part of every contract.

161. The implied covenant of good faith and fair dealing applies where one party, such as Discover in this case, has the power to make discretionary decisions to further its own interests due to a lack of defined standards in the contract. It is invoked so that one party cannot exercise the discretion allotted to it so as to thwart the contracting parties' reasonable expectations.

162. Here, Discover is granted wide authority and discretion under the contract. There are various express contractual duties or obligations over which Discover has sole discretion according to Discover's Cardholder Agreement and Agreements governing the terms and conditions of the Payment Protection, Identity Theft Protection, Wallet Protection, and Credit

Score Tracker products.

163. Discover, through the acts described herein and discretion allotted it under the contracts, has enacted uniform policies that act capriciously to contravene the reasonable expectations of Efficacy Plaintiffs and the Class, such as capriciously denying Payment Protection benefits to customers based on pre-existing ineligibility for products after the customer had already paid for Payment Protection for months or years.

164. Actions or inaction taken to hinder or obstruct performance, or knowingly and unreasonably delaying the performance of one's duties under a contract, breaches the implied covenant of good faith and fair dealing. Through its uniform policies and practices, Discover does just this.

165. Subterfuge and evasion violate the obligation of good faith in performance even when an actor believes his conduct to be justified. Bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. Examples of bad faith are evasion of the spirit of the bargain; willful rendering of imperfect performance; abuse of a power to specify terms; and interference with or failure to cooperate in the other party's performance.

166. Under the agreements concerning the Payment Protection, Identity Theft Protection, Wallet Protection, and Credit Score Tracker products and Discover's Cardholder Agreement, Discover impliedly promised to administer these contractual obligations in accordance with principles of good faith and fair dealing. Discover breached this implied promise by, for example, capriciously denying customers with Payment Protection the benefits they were owed under the Payment Protection Agreement.

167. For those Efficacy Plaintiffs and other members of the proposed class who knowingly purchased Payment Protection, they did so with the justifiable expectation that they

were eligible to receive the benefits offered by Discover, that the benefits were the same as those represented to them through marketing and advertising, and that Discover had in place a process through which those benefits could fairly and efficiently be administrated.

168. As set forth herein, Efficacy Plaintiffs and other Class members have not obtained the benefit of their bargain from Discover and the essential purpose of the agreements governing the Payment Protection, Identity Theft Protection, Wallet Protection, and Credit Score Tracker products has been frustrated.

169. Discover has breached the covenant of good faith and fair dealing inherent in the “optional” product agreements and Cardholder Agreement and is liable to Efficacy Plaintiffs and the other members of the proposed class.

170. Efficacy Plaintiffs and the proposed class have performed all, or substantially all, of the obligations imposed on them in the agreements.

171. Efficacy Plaintiffs and members of the proposed class have sustained damages as a result of Discover’s breach of the covenant of good faith and fair dealing.

COUNT III

UNCONSCIONABILITY (As to All Plaintiffs)

172. Plaintiffs repeat and reallege all preceding paragraphs of this amended complaint as if fully set forth herein.

173. The policies and practices associated with Discover’s Payment Protection, Identity Theft Protection, Wallet Protection, and Credit Score Tracker products are substantively and procedurally unconscionable in the following material respects, among others:

- a. Discover unilaterally imposes the Payment Protection, Identity Theft Protection, Wallet Protection, and Credit Score Tracker products upon its customers’ credit card accounts, thereby failing to disclose to customers that the Payment

Protection, Identity Theft Protection, Wallet Protection, and Credit Score Tracker products are optional plans and that they have the option to “opt out” of the Payment Protection, Identity Theft Protection, Wallet Protection, and Credit Score Tracker products.

- b. Discover did not obtain affirmative consent from subscribers prior to enrolling them in the Payment Protection, Identity Theft Protection, Wallet Protection, and Credit Score Tracker products;
- c. Discover does not provide the terms and conditions of the Payment Protection, Identity Theft Protection, Wallet Protection, and Credit Score Tracker products to subscribers until after they have enrolled in the Payment Protection, Identity Theft Protection, Wallet Protection, and Credit Score Tracker products;
- d. The written documents that Discover does eventually provide to subscribers, if any, do not provide subscribers with sufficient information to understand the terms and conditions of the Payment Protection, Identity Theft Protection, Wallet Protection, and Credit Score Tracker products;
- e. The written documents eventually provided, if any, along with other written materials in the possession of Discover, are contracts of adhesion in that they are standardized forms, imposed and drafted by Discover, which is a party of vastly superior bargaining strength, and only relegates to the subscriber the opportunity to adhere to them or reject the agreement in its entirety;
- f. These documents provided to customers are ineffective, ambiguous, deceptive, unfair, and misleading in that they do not require affirmative customer consent (like a signature) and do not unambiguously state that certain customers are per se ineligible to receive benefits, even though Discover had the information and means of determining eligibility prior to enrolling these customers in Payment Protection;
- g. Discover does not alert customers that certain individuals are per se ineligible for Payment Protection benefits;
- h. The amount charged in fees for the Payment Protection, Identity Theft Protection, Wallet Protection, and Credit Score Tracker products is not rationally related to the amount of value the Payment Protection, Identity Theft Protection, Wallet Protection, and Credit Score Tracker products provide to subscribers, nor is the value of the Payment Protection, Identity Theft Protection, Wallet Protection, and Credit Score Tracker products computable or discernable by subscribers;
- i. Discover charges exorbitant fees for Payment Protection, much more than the value of the benefits offered or paid out to subscribers, and is able to do so because Discover does not identify Payment Protection as an insurance product, which would require it to provide fees and claims-paid data to state authorities for review and regulation;

- j. The formula Discover uses to compute Payment Protection fees is misleading such that subscribers are unable to budget for this product or understand its overall cost in order to determine its value to subscribers; and
- k. Discover operates its customer service centers in such a way as to make it difficult for subscribers to cancel enrollment, obtain information about the terms and conditions of the Payment Protection, Identity Theft Protection, Wallet Protection, and Credit Score Tracker products, and file claims, in order for Discover to maximize the number of Payment Protection, Identity Theft Protection, Wallet Protection, and Credit Score Tracker subscribers and minimize the amount of benefit subscribers obtain through the Payment Protection, Identity Theft Protection, Wallet Protection, and Credit Score Tracker products.

174. Considering the great business acumen and experience of Discover in relation to Plaintiffs and the proposed class, the great disparity in the parties' relative bargaining power, the inconspicuousness and incomprehensibility of the contract language at issue, the oppressiveness of the terms, the commercial unreasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and similar public policy concerns, these provisions are unconscionable and, therefore, unenforceable as a matter of law.

175. The imposition of Payment Protection fees which excessively exceed the amount of claims-paid by a rate higher than any insurance product would be permitted to charge for premiums is itself unconscionable. Such fees are not reasonably related to Discover's costs of administering the Plan and providing the benefits offered.

176. Plaintiffs and members of the proposed class have sustained damages as a result of Discover's unconscionable policies and practices as alleged herein, including but not limited to all fees paid for the Payment Protection, Identity Theft Protection, Wallet Protection, and Credit Score Tracker products.

COUNT IV

VIOLATIONS OF THE TRUTH IN LENDING ACT - 15 U.S.C. §1601 ET SEQ.

(As to All Plaintiffs)

177. Plaintiffs repeat and reallege all preceding paragraphs of this amended complaint as if fully set forth herein.

178. During the relevant time period, Discover sold the credit services at issue in this lawsuit to the members of the proposed class, engaging in significant interstate commerce.

179. The purpose of the Truth in Lending Act of 1968, as amended, 15 U.S.C. §1601, 1666j and Regulation Z, 12 CFR part 226 (“TILA” and “Regulation Z”) is “to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices. 15 U.S.C. §1601(a); 12 C.F.R. 226.1(b).

180. TILA requires all solicitations for the extension of credit to clearly, conspicuously and in readily understood language disclose the terms of the commitment that the offeror is extending to the consumer.

181. Congress delegated authority for the implementation of the Truth-in-Lending Act to the Federal Reserve Board (“Board”). 15 U.S.C. §1604. The Board promulgated Regulation Z, which is the Truth In Lending Act’s implementing regulation. 12 C.F.R. §§226 et seq.

182. Discover’s failure to disclose in its applications, solicitations, billing statement or otherwise that the premium charged for Payment Protection is a finance charge, that the minimum payment does not include all fees imposed, and that the interest is charged on penalty fees and costs in connection with Payment Protection, which violates sections 1605 and 1637(a)(3), (a)(4) and (b)(4) of the Truth in Lending Act.

183. As a result of Discover's violations of the Truth in Lending Act and Regulation Z, Discover is liable to Plaintiffs and members of the proposed class, who seek damages, pursuant to 15 U.S.C. §1640, including actual damages resulting from Discover's improper and illegal practices, the lesser of \$500,000 or 1% of the net worth of Discover, and costs and reasonable attorney fees.

184. Plaintiffs repeat and reallege all preceding paragraphs of this amended complaint as if fully set forth herein.

COUNT V

VIOLATIONS OF STATE STATUTES PROHIBITING UNFAIR AND DECEPTIVE ACTS AND PRACTICES (As to All Plaintiffs)

185. Plaintiffs repeat and reallege all preceding paragraphs of this amended complaint as if fully set forth herein.

186. The state deceptive trade practices acts were enacted by the various states following the passage of the Federal Trade Commission Act ("FTC Act"), which prohibits deceptive acts and practices in the sale of products to consumers. The state laws in this area are modeled on the FTC Act and are therefore highly similar in content.

187. Defendants' actions violate the Deceptive Trade Practices Acts of the various states, as set out above. With respect to the Payment Protection, Identity Theft Protection, Wallet Protection, and Credit Score Tracker products, Defendants have engaged in deceptive practices by representing that services have characteristics and benefits that they do not have; representing that services are of a particular standard, quality, or grade when they are of another; advertising services with intent not to sell them as advertised; making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions; and engaging in other

conduct which similarly creates a likelihood of confusion or of misunderstanding.

188. The conduct described in the statement of facts constitutes unfair or deceptive trade practices predominantly and substantially affecting the conduct of trade or commerce throughout the United States in violation of the state deceptive trade practices acts and other similar state statutes prohibiting unfair and deceptive acts and practices. The deceptive trade practices acts violated by Discover are set forth in Paragraph 180, below.

189. The violations of the various state consumer protection acts (Alabama: the Alabama Deceptive Trade Practices Act (Ala. Code §8-19-1 et seq.); Alaska: Alaska Unfair Trade Practices and Consumer Protection Act (Alaska Stat. §45.50.471 et seq.); Arizona: the Arizona Consumer Fraud Statute (Ariz. Rev. Stat. Ann. §44-1521 et seq.); Arkansas: the Arkansas Deceptive Trade Practices Act (Ark. Code Ann. §4-88-101 et seq.); California: the California Consumers Legal Remedies Act (Cal. Civ. Code § 1750, et seq.), the California Unfair Business Practices Act (California Business & Professions Code §17200, et seq), and the California False Advertising Law (Cal. Bus. & Prof. Code § 17500, et seq.); Colorado: the Colorado Consumer Protection Act (Colo. Rev. Stat. §6-1-101 et seq.); Connecticut: the Connecticut Unfair Trade Practices Act (Conn. Gen. Stat. §42-110a et seq.); Washington, D.C. the Consumer Protection Procedures Act (D.C. Code Ann. §28-3901 et seq.); Florida: the Florida Deceptive and Unfair Trade Practices Act (Fla. Stat. Ann. §501.201 et seq. (West)) and the Florida False Advertising Statutes (Fla. Stat. Ann. §817.40 et seq. (West)); Georgia: Uniform Deceptive Trade Practices Act (Ga. Code Ann. §10-1-370 et seq.); the Fair Business Practices Act (Ga. Code Ann. §10-1-390 et seq.); and the False Advertising Statute (Ga. Code Ann. §10-1-420 et seq.); Hawaii: The Hawaii Federal Trade Commission Act (Hawaii Rev. Stat. §480 et seq.) and the Uniform Deceptive Trade Practice Act (Hawaii Rev. Stat. §481A et seq.); Idaho: the Idaho Consumer Protection Act (Idaho

Code §48-601 et seq.); Illinois: the Illinois Consumer Fraud and Deceptive Business Practices Act (815 Ill. Comp. Stat. Ann. §505/1 et seq. (Smith Hurd)) and the Uniform Deceptive Trade Practices Act (815 Ill. Comp. Stat. Ann. 510/1 et seq. (Smith Hurd)); Indiana: the Deceptive Consumer Sales Act (Ind. Code Ann. §24-5-0.5-1 et seq. (Burns)); Iowa: the Iowa Consumer Fraud Act (Iowa Code Ann. §714.16 (West)); Kansas: the Kansas Consumer Protection Act (Kan. Stat. Ann. §50-623 et seq.); Kentucky: the Consumer Protection Act (Ky. Rev. Stat. §367.110 et seq.); Louisiana: the Unfair Trade Practices and Consumer Protection Law (La. Rev. Stat. Ann. §51:1401 (West)); Maine: the Maine Unfair Trade Practices Act (Me. Rev. Stat. Ann. Tit. 5 §206 et seq.) and the Uniform Deceptive Trade Practices Act (Me. Rev. Stat. Ann. Tit. 10 §1211 et seq.); Maryland: the Maryland Consumer Protection Act (Md. Com. Law Code Ann. §§13-101 et seq., 14-101 et seq.); Massachusetts: the Consumer Protection Act (Mass. Gen. Laws Ann. Ch. 93A); Michigan: the Michigan Consumer Protection Act (Mich. Comp. Laws Ann. §445.901 et seq.) and the Michigan Pricing and Advertising Act (Mich. Comp. Laws Ann. §445.351 et seq.); Minnesota: the Consumer Fraud Act (Minn. Stat. Ann. §325 F. 69); the False Statement in Advertisement Statute (Minn. Stat. Ann. §325 F. 67); the Uniform Deceptive Trade Practices Act (Minn. Stat. Ann. §325D.44); and the Unlawful Trade Practices Act (Minn. Stat. Ann. §325D.13); Mississippi: the Consumer Protection Act (Miss. Code Ann. §75-24-1 et seq.) and the False Advertising Statutes (Miss. Code Ann. §97-23-3); Missouri: the Missouri Merchandising Practices Act (Mo. Rev. Stat. §407.010 et seq.); Montana: the Montana Unfair Trade Practices and Consumer Protection Act (Mont. Code Ann. §30-14-101 et seq.); and the Statutory Deceit Statute (Mont. Code Ann. §27-1-712); Nebraska: the Nebraska Consumer Protection Act (Neb. Rev. Stat. §59-1601 et seq.) and the Nebraska Uniform Deceptive Trade Practices Act (Neb. Rev. Stat. §87-301 et seq.); Nevada: the Deceptive Trade Statutes (Nev. Rev.

Stat. §§598.0903 et seq., 41.600 et seq.); New Hampshire: the Regulation of Business Practices for Consumer Protection Act (N.H. Rev. Stat. Ann. §358-A:1 et seq.); New Jersey: the New Jersey Consumer Fraud Act (N.J. Stat. Ann. §56:8-1 et seq. (West)); New Mexico: New Mexico Unfair Practices Act (N.M. Stat. Ann. §57-12-1 et seq.); New York: New York Consumer Protection Act (N.Y. Gen. Bus. Law §§349, 350 (Consol.)); North Carolina: North Carolina Unfair and Deceptive Trade Practices Act (N.C. Gen. Stat. §75-1.1 et seq.); North Dakota: Deceptive Act or Practice Statutes (N.D. Gen. Stat. §51-15-01 et seq.); Ohio: Ohio Consumer Sales Practices Act (Ohio Rev. Code Ann. §1345.01 et seq. (Baldwin)); Oklahoma: Oklahoma Consumer Protection Act (Okla. Stat. Ann. Tit. 15, §751 et seq. (West)) and the Oklahoma Deceptive Trade Practices Act (Okla. Stat. Ann. Tit. 78, §51 et seq. (West)); Oregon: the Unlawful Trade Practices Act (Or. Rev. Stat. §646.605 et seq.) and the Oregon Food and Other Commodities Act (Or. Rev. Stat. §616.005 et seq.); Pennsylvania: Unfair Trade Practices Act and Consumer Protection Law (Pa. Stat. Ann. Tit. 73 §201-1 et seq. (Purdon)); Rhode Island: Consumer Protection Act (R.I. Gen. Law §6-13.1-1 et seq.); South Carolina: South Carolina Unfair Trade Practices Act (S.C. Code Ann. §39-5-10 et seq.); South Dakota: South Dakota Deceptive Trade Practices and Consumer Protection Law (S.D. Codified Laws Ann. §37-24-1 et seq.); Tennessee: Tennessee Consumer Protection Act (Tenn. Code Ann. §47-18-101 et seq.); Texas: Texas Deceptive Trade Practices Act (Tex. Bus. & Com. Code Ann. §17.41 et seq. (Vernon)); Utah: Utah Consumer Sales Practices Act (Utah Code Ann. §13-11-1 et seq.) and the Utah Truth in Advertising Act (Utah Code Ann. §13-11a-1 et seq.); Vermont: Vermont Consumer Fraud Statute (Vt. Stat. Ann. Tit. 9, §2451 et seq.); Virginia: Virginia Consumer Protection Act (Va. Code 59.1-196 et seq.); Washington: Washington Consumer Protection Act (Wash. Rev. Code Ann. §19.86 et seq.); West Virginia: West Virginia Consumer Credit and Protection Act

(W. Va. Code §46A-6-101 et seq.); Wisconsin: Wisconsin Fraudulent Representations Act (Wis. Stat. Ann. §100.18 et seq. (West)); Wyoming: Consumer Protection Act (Wyo. Stat. §40-12-101 et seq.)) have directly, foreseeably, and proximately caused damages to Plaintiffs and proposed class in amounts yet to be determined.

190. As a result of Defendants' violations of the Deceptive Trade Practices Acts of the various states prohibiting unfair and deceptive acts and practices, Plaintiffs and members of the proposed class have suffered actual damages for which Defendants are liable.

COUNT VI

COMMON LAW FRAUD (As to All Plaintiffs)

191. Plaintiffs repeat and reallege all preceding paragraphs of this amended complaint as if fully set forth herein.

192. Defendants have engaged in a common scheme of fraud, through which they unlawfully enroll Card Members in the Payment Protection, Identity Theft Protection, Wallet Protection, and Credit Score Tracker products without obtaining the Card Members' consent or authorization.

193. Defendants perpetrate the common scheme of fraud complained of herein by omitting, or failing to disclose to Card Members, that they are unilaterally enrolling said Card Members in the Payment Protection, Identity Theft Protection, Wallet Protection, and Credit Score Tracker products.

194. Defendants knowingly and willfully enroll Card Members in the Payment Protection, Identity Theft Protection, Wallet Protection, and Credit Score Tracker products without obtaining the Card Members' consent or authorization.

195. Defendants intentionally perpetrate the common scheme of fraud complained of

herein as an unlawful means to cause Card Members to pay additional fees.

196. Plaintiffs, and the proposed class, are presumed to have justifiably relied on Defendants' omissions and failures to disclose.

197. As a direct and proximate result of Defendants' common scheme of fraud, Plaintiffs were caused to sustain damages in the form of the unauthorized fees paid in connection with the Payment Protection, Identity Theft Protection, Wallet Protection, and Credit Score Tracker products.

COUNT VII

INJUNCTIVE RELIEF (As to All Plaintiffs)

198. Plaintiffs repeat and reallege all preceding paragraphs of this amended complaint as if fully set forth herein.

199. Plaintiffs ask the Court to grant the remedy of restitution to themselves and to all members of the class who made payments to Discover for Payment Protection. The Plaintiffs ask the Court to grant the following relief:

- a. a refund of all Payment Protection payments made to Discover;
- b. a refund to any consumer who was retired at the time they were sold Payment Protection by Discover;
- c. a refund to any consumer who was a senior citizen at the time they were sold Payment Protection by Discover;
- d. a full refund to any consumer who was otherwise not eligible for Payment Protection due to the restrictions in the coverage at the time the product was sold to the consumer and who paid for the product; and
- e. a full refund to any consumer who did not consent to enrollment in Payment Protection, AccountGuard, Identity Theft Protection, Profile Protect, Wallet Protection, or Credit Score Tracker and who paid for the product(s).

200. Plaintiffs seek injunctive relief enjoining Discover from continuing to engage in

the fraudulent, deceitful, unlawful and unfair common scheme as alleged herein.

COUNT VIII

**DECLARATORY RELIEF
(As to All Plaintiffs)**

201. Plaintiffs repeat and reallege all preceding paragraphs of this amended complaint as if fully set forth herein.

202. Plaintiffs seek a Declaratory Judgment finding that the conduct of Defendants is in violation of the Deceptive and Unfair Trade Practices of the various states as alleged herein, and enjoining Defendant from continuing in such conduct.

COUNT IX

**UNJUST ENRICHMENT
(Only As to Slamming Plaintiffs)**

203. Slamming Plaintiffs repeat and reallege all preceding paragraphs of this amended complaint as if fully set forth herein.

204. In seeking to increase its fee revenue, Discover enrolled Slamming Plaintiffs and members of the proposed class into Payment Protection, Identity Theft Protection, Wallet Protection, and Credit Score Tracker without their consent or authorization.

205. By unknowingly paying unauthorized or otherwise fraudulent charges to Discover for the four above described “optional” products, members of the proposed class conferred a benefit on Discover, which Discover knowingly accepted despite the fact that it was not entitled to such benefit. Such acts were, and are, unconscionable.

206. Defendants were unjustly enriched by charging the Slamming Plaintiffs and Class members for illusory benefits, which Slamming Plaintiffs and Class members never requested or authorized.

207. Defendants were unjustly enriched by charging Plaintiffs and Class members multiple Payment Protection charges if the cardholder had multiple Discover credit cards.

208. Defendants were unjustly enriched by forcibly enrolling and charging Slamming Plaintiffs and Class members who were retired or who were senior citizens for Payment Protection even though they were ineligible to receive benefits by the terms of the Payment Protection documents.

209. As a result of Defendants' actions which constitute unjust enrichment, Slamming Plaintiffs and class members suffered actual damages for which Defendants are liable. Defendants' liability for such damages should be measured by the extent of Defendants' unjust enrichment.

VIII. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray:

- A. That the Court determine that this action may be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure, that Plaintiffs are proper class representatives and appoint their counsel as re Class Counsel;
- B. That judgment be entered against Defendants and in favor of Plaintiffs and the Class for injunctive relief as requested herein, and for actual, compensatory and punitive damages in an amount to be determined at trial;
- C. That judgment be entered imposing interest on damages, litigation costs, and attorneys' fees against the Defendants; and
- D. For all other and further relief as this Court may deem necessary and appropriate.

JURY DEMAND

Plaintiffs demand a trial by jury consisting of twelve persons on all issues so triable.

Dated this 12th day of January 2012.

Respectfully submitted,

/s/Diane E. Sammons

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CERTIFICATE OF SERVICE

I hereby certify that, on January 12, 2012, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send notification of such filing to all attorneys of record.

/s/ Marvin A. Miller _____