UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DISCOVER FINANCIAL SERVICES, DFS SERVICES, LLC, and DISCOVER BANK, *Plaintiffs,* v. VISA U.S.A. INC., VISA INTERNATIONAL SERVICE ASSOCIATION, MASTERCARD INCORPORATED and MASTERCARD INTERNATIONAL INCORPORATED, *Defendants.*	:	Case No. 04-cv-7844 (BSJ)(KF) ECF Case

MEMORANDUM OF LAW IN SUPPORT OF DISCOVER'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF CONTENTS (cont'd)

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (cont'd)

Page

TABLE OF AUTHORITIES (cont'd)

Discover respectfully submits this memorandum of law in support of its motion for partial summary judgment based on collateral estoppel on Claim One of its Second Amended Complaint against Visa U.S.A. ("Visa"), Visa International Service Association ("Visa International"), and MasterCard International Incorporated ("MasterCard") (collectively "Defendants"). Discover also submits this memorandum in support of its motion seeking an Order precluding Defendants from relitigating certain issues previously determined in *United States v. Visa U.S.A., Inc., et al.*, 163 F. Supp. 2d 322 (S.D.N.Y. 2001), *aff'd*, 344 F.3d 229 (2d Cir. 2003), *cert. denied*, 543 U.S. 811 (2004) (collectively "*Visa/MasterCard*" or the "DOJ Case").

PRELIMINARY STATEMENT

In *Visa/MasterCard*, after an extensive investigation by the United States, protracted discovery, and a vigorously contested thirty-four-day trial, this Court determined that Defendants violated § 1 of the Sherman Act by maintaining exclusionary rules that harmed competition and consumers by foreclosing Discover and American Express from offering general purpose card network services to banks. The Second Circuit unanimously affirmed that decision, and the Supreme Court declined to review it.

Discover's lawsuit is a follow-on to *Visa/MasterCard* and is a textbook case for the application of nonmutual offensive collateral estoppel. Discover's Claim One is identical to the successful cause of action asserted by the Department of Justice ("DOJ") in *Visa/MasterCard*. It raises issues identical to those already fully litigated in the prior case and affirmed on appeal. Moreover, application of collateral estoppel in this matter is eminently fair. The rules at issue in this case were defended by Visa and MasterCard in the prior case as key pillars of their associations. Fully cognizant (as they admitted to the Second Circuit) of the prospect of follow-on actions such as this one, Defendants relentlessly litigated every aspect of

the prior case until they had exhausted all possible appeals. There are no procedural opportunities available in this case that were unavailable in the first case, nor any other circumstances that would call into question the motivation of Defendants to have raised every possible defense in *Visa/MasterCard*. Finally, applying the doctrine of collateral estoppel here will promote judicial economy and efficiency by limiting the resolution of Discover's claim concerning the exclusionary rules' impact on the general purpose card network services market to a damages trial. By contrast, allowing Defendants to relitigate the same issues that were previously adjudicated will unnecessarily waste the time and resources of this Court and the parties and will present a risk of inconsistent outcomes that could reflect negatively on the judicial system.

If this Court grants collateral estoppel, then there can be no issue of material fact concerning any of the elements of liability for Claim One of Discover's Second Amended Complaint — Discover's claim under § 1 of the Sherman Act regarding Visa By-law 2.10(e) and MasterCard's Competitive Programs Policy ("CPP") (collectively the "exclusionary rules") — through October 2004. This Court has already found that: (i) Visa and MasterCard entered into parallel intra-association conspiracies with their member banks; (ii) general purpose credit and charge cards and general purpose credit and charge card network services are relevant markets; (iii) Visa and MasterCard each had substantial market power in the market for general purpose card network services; (iv) Defendants' exclusionary rules harmed competition and consumers by foreclosing Discover and American Express from the network services market; (v) the exclusionary rules were enacted to foreclose competition from Discover and American Express and, therefore, had no procompetitive justification; and (vi) Visa International encouraged Visa's exclusionary rule. The ruling was appealed, and the Second Circuit unanimously affirmed it.

While fact of injury to Discover was not a separate element of the Government's case against Visa and MasterCard, it is beyond dispute that injury to Discover was actually litigated and necessary to the Court's finding of harm to competition in the prior proceeding. Indeed, because the exclusionary rules uniquely applied to bar competition from Discover and American Express, Visa's and MasterCard's only network competitors in the relevant market, harm to competition and harm to Discover and American Express were inextricably linked. Virtually every finding by this Court on harm to competition related to the debilitating impact the exclusionary rules had on Discover and American Express. With no dispute as to any of the elements of the violation, Defendants' liability is established, leaving only Discover's damages to be resolved at trial. Therefore, Discover respectfully requests that this Court enter summary judgment as to Defendants' liability for Claim One of Discover's Second Amended Complaint through August 2000.

Moreover, because Defendants successfully petitioned this Court to stay the Final Judgment so as not to disturb the "*status quo*," no facts or circumstances that were material to the ultimate findings in *Visa/MasterCard* changed between the close of evidence in the DOJ Case trial and October 2004, when Defendants' exhausted their appeals, and the exclusionary rules were finally rescinded. The undisputed facts in this case demonstrate that, during that time, the exclusionary rules remained on the books and not one member of Visa or MasterCard broke from the respective intra-association conspiracies to issue general purpose cards over the Discover or American Express networks. Accordingly, from 2000 to 2004, the same intra-association conspiracies, the same Visa and MasterCard substantial market power, and the same injury to competition and competitors found by this Court continued unabated. Accordingly, there is no issue of material fact with respect to any element of Defendants' liability under § 1 of

the Sherman Act from August 2000 through October 2004. Discover is therefore entitled to summary judgment on the liability portions of Claim One through October 2004.

Finally, proper application of collateral estoppel in this case dictates that those factual findings actually litigated and necessary to the Court's decision in the prior case, as listed in Attachment A, should not be relitigated here. Discover therefore requests that the Court issue an order establishing as undisputed the elements of Discover's § 1 claim relating to credit network services and those findings set forth in Attachment A.

FACTUAL STATEMENT

A. The Parties

1. Discover

Plaintiff DFS Services, LLC ("DFSLLC") owns a general purpose card network and offers general purpose card network services to banks and merchants. (Discover's Statement of Undisputed Facts ("SOUF") ¶ 1.) Plaintiff DFSLLC is affiliated with Discover Bank, a bank that issues Discover Cards, or Discover-branded proprietary cards, to consumers. (SOUF ¶¶ 2, 3.) DFSLLC and Discover Bank are wholly-owed subsidiaries of Plaintiff Discover Financial Services ("DFS" and, collectively with DFSLLC and Discover Bank, "Discover"). (SOUF ¶ 4.)

Discover's network competes with Visa, MasterCard, and American Express in the general purpose card network services market. (SOUF ¶ 5 (*Visa/MasterCard*, 163 F. Supp. 2d at 327).) Discover has been the only entrant in this market since it began offering network services in 1985. (SOUF ¶ 6 (*Visa/MasterCard*, 163 F. Supp. 2d at 342).) Discover also issues general purpose credit cards.[1] (SOUF ¶ 7 (*Visa/MasterCard*, 163 F. Supp. 2d at 333).)

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[1] American Express, like Discover, not only owned a network in the United States but was also a proprietary card issuer in the relevant time period. *See Visa/MasterCard*, 163 F. Supp. 2d at 333. American Express also had a strategy of attracting third-party banks to issue cards on its network, and banks were interested in that proposition. *See id.* at 386. American Express has brought its own private damages lawsuit in this Court based

After successfully establishing its network and issuing businesses, Discover sought to entice third-party banks to issue cards on its network in order "to drive volume to reach a scale that would increase [its] network['s] competitiveness." (SOUF ¶ 8 (*Visa/MasterCard*, 163 F. Supp. 2d at 389).)

2. Visa and MasterCard

While the exclusionary rules were in effect, Visa and MasterCard operated general purpose card networks that provided network services to member financial institutions. (SOUF ¶ 9 (*Visa/MasterCard*, 163 F. Supp. 2d at 331-32).) During that time, Visa and MasterCard were structured as open joint venture associations, comprised of thousands of member banks that issued payment cards and/or acquired merchants that accept payment cards.[2] (SOUF ¶¶ 10, 11 (*Visa/MasterCard*, 163 F. Supp. 2d at 332; *Visa/MasterCard*, 344 F.3d at 235).) Virtually all of the thousands of banks that were members of Visa were also members of MasterCard, and vice versa. (SOUF ¶ 11 (*Visa/MasterCard*, 344 F. 3d at 235-36).)

Visa International was an international membership association. (SOUF ¶ 12 (*Visa/MasterCard*, 163 F. Supp. 2d at 406).) One of its principal members was Visa U.S.A., the only member of Visa International that operated in the United States. (SOUF ¶ 13 (*Visa/MasterCard*, 344 F.3d at 236).) Visa U.S.A. licensed the right to use the Visa brand name from Visa International, which owned the Visa brand. (SOUF ¶ 14 (*Visa/MasterCard*, 163 F.

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on its foreclosure from the network services market by Defendants. *See American Express Travel Related Servs., Inc. v. Visa U.S.A. Inc., et al.*, No. 04-CV-8967 (BSJ) (S.D.N.Y.).

[2] In 2006, MasterCard conducted an IPO, and as a result, MasterCard is no longer majority owned by its member banks. (Decl. of Laura B. Kadetsky in Supp. of Discover's Mot. for Partial Summ. J. ("Decl.") Ex. 52 (MasterCard Inc. Form S-1, Sept. 15, 2005) at 5.) MasterCard owns MasterCard International Inc., a named Defendant in this suit. In 2007, Visa underwent a corporate restructuring, pursuant to which Visa U.S.A., Visa Canada, and Visa International were reorganized as subsidiaries of a new global corporation called Visa Inc. (Decl. Ex. 36 ("Visa Inc. Completes Global Restructuring," Oct. 3, 2007).) Visa Inc. announced plans in 2007 to conduct an initial public offering of its stock. That IPO has yet to be completed. (Decl. Ex. 34 ("Visa Inc. Files Registration Statement with SEC for Proposed Initial Public Offering," Nov. 9, 2007).)

Supp. 2d at 406).) Accordingly, all Visa cards issued in the United States were issued by members of Visa U.S.A. (SOUF ¶ 15 (*Visa/MasterCard*, 344 F.3d at 236).)

Even though Visa's and MasterCard's member banks were (and are) competitors, these banks, through their representation on the Boards of Directors of Visa and MasterCard, set the rules and policies of Visa and MasterCard and agreed to abide by those rules and policies as a condition of membership. They also collectively agreed upon the rights of member banks to issue cards over the Visa and MasterCard networks and to acquire Visa and MasterCard transactions from merchants. (SOUF ¶¶ 16-18 (*Visa/MasterCard*, 163 F. Supp. 2d at 332-33 ("Visa members have the right to issue Visa cards and to acquire Visa transactions from merchants that accept Visa cards. In exchange, they must follow Visa's by-laws and operating regulations...The same is true of MasterCard.") (citations omitted); *Visa/MasterCard*, 344 F. 3d at 242 (banks "set the policies of Visa U.S.A. and MasterCard")).)

B. The Exclusionary Rules

Visa and MasterCard thwarted Discover's attempts to build volume on its network and achieve scale by offering network services to banks when they passed rules that barred their member banks from issuing Discover-branded cards, while retaining their membership in Visa or MasterCard. (SOUF ¶ 19 (*Visa/MasterCard*, 163 F. Supp. 2d at 383).) In March 1991, Visa U.S.A. passed By-law 2.10(e), which provided, in relevant part, that "'the *membership of any member shall automatically terminate* in the event it, or its parent, subsidiary or affiliate, issues, directly or indirectly, Discover Cards or American Express Cards, or any other card deemed competitive by the Board of Directors.'" (SOUF ¶¶ 20, 21 (*Visa/MasterCard*, 163 F. Supp. 2d at 379 (emphasis in original)).) Likewise, in June 1996, MasterCard enacted the Competitive Programs Policy ("CPP"), which provided, in relevant part, that, with "'the exception of participation by members in Visa, which is essentially owned by the same member

entities, and [Diners Club and JCB], members of MasterCard may not participate either as issuers or acquirers in competitive general purpose card programs.'" (SOUF ¶¶ 22, 23 (*Visa/MasterCard*, 163 F. Supp. 2d at 381).) Visa International provided affirmative encouragement for Visa U.S.A.'s exclusionary By-law. (SOUF ¶ 78 (*Visa/MasterCard*, 163 F. Supp. 2d at 407).)

Visa's By-law 2.10(e) and MasterCard's CPP prevented Discover and American Express from offering network services to Visa and MasterCard member banks.[3] (SOUF ¶¶ 24, 26 (*Visa/MasterCard*, 163 F. Supp. 2d at 379; *id.* at 329 ("[T]he penalty for issuing American Express or Discover cards is forfeiture of the association member's right to issue Visa or MasterCard cards....")).) Not a single Visa or MasterCard member bank issued a Discover or American Express-branded card while the exclusionary rules were in effect. (SOUF ¶¶ 28, 29 (*Visa/MasterCard*, 163 F. Supp. 2d at 382, 383; *Visa/MasterCard*, 344 F.3d at 237); SOUF ¶ 83.) Accordingly, Discover and American Express were forced to operate as single-issuer networks. (SOUF ¶ 30 (*Visa/MasterCard*, 163 F. Supp. 2d at 379).) The exclusionary rules therefore limited Discover's and American Express's transaction volume, scale, and merchant acceptance, thus stunting their ability to compete and effectively preventing them from offering debit products. (SOUF ¶ 55 (*Visa/MasterCard*, 163 F. Supp. 2d at 329; *Visa/MasterCard*, 344

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[3] The true anticompetitive purpose of Visa By-law 2.10(e) and the CPP was revealed by their overtly discriminatory application against Discover and American Express. (SOUF ¶ 25 (*Visa/MasterCard*, 163 F. Supp. 2d at 327 (under the exclusionary rules, "members of each association [were] able to issue credit or charge cards of the other association, but [were not able] to offer American Express or Discover cards")).) Although Visa's By-law 2.10(e) prohibited the issuing of Discover and American Express-branded cards and "any other card deemed competitive by the Board of Directors," Visa's Board never applied 2.10(e) to prohibit issuing on any other competing network, including MasterCard, JCB, or Citibank's proprietary Diners Club. (SOUF ¶¶ 21, 27 (*Visa/MasterCard*, 163 F. Supp. 2d at 379-80).) Likewise, MasterCard's CPP effectively precluded MasterCard members from issuing Discover or American Express-branded cards while allowing participation by members in the programs of other competitors, including Visa, Diners Club, and JCB. (SOUF ¶ 23 (*Visa/MasterCard*, 163 F. Supp. 2d at 381).)

F.3d at 240).) Consumers were, in turn, harmed by the foreclosure of Discover and American Express. (SOUF ¶ 55 (*Visa/MasterCard*, 163 F. Supp. 2d at 329).)

C. Defendants Thoroughly Litigated Visa/MasterCard.

In October 1998, following an extended investigation, the DOJ filed suit against Defendants, claiming that:

> Each of the defendants, on behalf of and in collaboration with its governing banks, has engaged in a continuing combination and conspiracy to organize and operate its general purpose card networks in a manner that restrains competition among general purpose card networks in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, as amended.

(Decl. of Laura B. Kadetsky in Supp. of Discover's Mot. for Partial Summ. J. ("Decl.") Ex. 6 (*Visa/MasterCard*, Compl. for Equitable Relief for Violations of 15 U.S.C. § 1 ("DOJ Compl.")) ¶ 159).) Claim One of Discover's Second Amended Complaint is virtually identical to this claim. (Decl. Ex. 7 (Second Am. Compl.) ¶¶ 93-99.)

Defendants vigorously contested every juncture of the DOJ Case. First, even prior to the filing of the DOJ's Complaint, Visa and MasterCard responded to the DOJ's Civil Investigative Demands, which included at least fifty-two interrogatories and five depositions. (Decl. ¶ 3; *see, e.g.*, Decl. Exs. 37-39.) Second, leading up to the trial in the DOJ Case, Visa and MasterCard participated in nearly two years of pre-trial fact and expert discovery, in which hundreds of thousands of pages were produced and over 150 depositions of parties and non-parties were taken. (Decl. ¶ 4.) Defendants relied on the expert testimony of seven prominent economists and academics, and those experts addressed, among other things, the DOJ's claim that the exclusionary rules harmed competition by harming Discover and American Express. (Decl. ¶ 8.) The discovery in the DOJ Case also included extensive discovery of Discover. After unsuccessfully seeking to limit Visa's broad subpoena for Discover's documents in the DOJ Case, Discover produced tens of thousands of pages of documents from custodians that included

all of the senior executives in its network and issuing businesses. (Decl. ¶ 6.) Discover also produced nine employees, both current and former, for depositions. (Decl. ¶ 7.) Defendants then submitted summary judgment briefing in which Discover's competitive position was mentioned throughout. (Decl. Ex. 8 (*Visa/MasterCard*, Mem. of Law of Def. MasterCard International Incorporated in Supp. of its Mot. for Summ. J. ("*Visa/MasterCard*, MasterCard Mot. for Summ. J.")); Decl. Ex. 9 (*Visa/MasterCard*, Mem. of Law in Supp. of Def. Visa U.S.A. Inc.'s Mot. for Summ. J. ("*Visa/MasterCard*, Visa Mot. for Summ. J.")).)

Defendants next fought the DOJ's claims in a thirty-four day bench trial from June to August 2000, in which they called live witnesses (including their then-CEOs and many of their other top executives), cross-examined the DOJ's witnesses, submitted hundreds of trial exhibits, made numerous objections, and engaged in significant argument. (Decl. ¶¶ 9-10.) In reaching its decision, the Court also considered evidence from the Visa and MasterCard member banks and other players in the industry, including David Nelms of Discover; expert testimony from all parties; approximately six thousand admitted exhibits; and *amicus curiae* briefs from eighteen third parties, including Discover and American Express. *Visa/MasterCard*, 163 F. Supp. 2d at 330-31. (*See also* Decl. ¶ 11.)

After this hotly contested trial, on October 9, 2001, this Court concluded that Defendants' exclusionary rules violated § 1 of the Sherman Act. (SOUF ¶ 76 (*Visa/MasterCard*, 163 F. Supp. 2d at 406).) Defendants then appealed, a process that consumed another three years. During that time, Defendants moved for a stay of this Court's Final Judgment so as to preserve the *status quo*, arguing that implementation of the Final Judgment, and in particular a repeal of the exclusionary rules, would drastically alter the industry and competition within it. (Decl. Ex. 56 (*Visa/MasterCard*, Mem. of Law in Supp. of Visa U.S.A. Inc.'s Mot. to Stay

Pending App.) at 1 ("Visa agrees that the mandated industry restructuring ordered by the Court *is* likely to have a material impact upon competition." (emphasis in original)); Decl. Ex. 57 (*Visa/MasterCard*, Mem. in Supp. of MasterCard International Incorporated's Mot. to Stay the Final J. Pending App.) at 1 (granting stay would preserve the "*status quo*").) This Court agreed and granted the stay. (Decl. Ex. 3 (*United States v. Visa U.S.A., Inc., et al.*, No. 98 Civ. 7076 (BSJ), 2002 WL 638537, at *2 (S.D.N.Y., Feb. 7, 2002)).) Thus, the exclusionary rules remained in effect, Defendants were free to enforce them, and the *status quo* was preserved. Indeed, in a later Order interpreting the effect of the stay, the Court specifically stated that "the status quo at this time is a world in which Visa and MasterCard are free to enforce the practices that this Court held to be anti-competitive and enjoined in its Final Judgment." (Decl. Ex. 64 (*Visa/MasterCard*, Order, Dec. 8, 2003) at 3.)

After briefing and oral argument, the Second Circuit, on September 17, 2003, unanimously affirmed this Court's decision and upheld the Court's findings on intra-association conspiracies, market definition, market power, and harm to competition (and its inextricable linkage to harm to Visa's and MasterCard's only two competitors), and lack of any procompetitive justification for the exclusionary rules. *Visa/MasterCard*, 344 F.3d at 234, 238, 239, 240, 243. In doing so, it characterized the District Court's opinion as "commendably comprehensive and careful." *Id.* at 234.

Defendants then petitioned the Second Circuit for rehearing or rehearing *en banc*, but the Second Circuit denied their request. (Decl. Ex. 10 (*Visa/MasterCard*, Order [MasterCard], Jan. 9, 2004); Decl. Ex. 11 (Order [Visa], Jan. 9, 2004.) Thereafter, Defendants petitioned the Second Circuit for yet another stay of its mandate, which was granted. (Decl. Ex. 58 (*Visa/MasterCard*, Mot. for Stay of Mandate); Decl. Ex. 59 (*Visa/MasterCard*, Def.-

Appellant MasterCard International Incorporated's Mot. for a Stay of the Mandate Pending Application for a Writ of Certiorari); Decl. Ex. 63 (*Visa/MasterCard*, Order, United States Ct. of App. for the Second Circuit, Feb. 5, 2004).) With the stay still in place, Defendants then continued to litigate their liability up to the United States Supreme Court, which finally denied their petitions for *certiorari* on October 4, 2004. *Visa/MasterCard*, 543 U.S. 811. Not until Defendants exhausted their appeals before the Supreme Court was the stay lifted, finally giving effect to the Final Judgment. (Decl. Ex. 13 (*Visa/MasterCard*, Endorsed Letter, J. Jones, Oct. 28, 2004).)

D. Discover Entered the Third-Party Issuing Business Immediately After the Exclusionary Rules Were Repealed.

The exclusionary rules were repealed, in accordance with the Final Judgment, effective on October 15, 2004. (Decl. Ex. 13 (*Visa/MasterCard*, Endorsed Letter, J. Jones, Oct. 28, 2004).) Since then, third-party banks have begun issuing general purpose credit and debit cards on Discover's network, which the exclusionary rules previously barred them from doing. Specifically, beginning in 2005, Discover entered into deals with Visa and MasterCard member banks, including GE Capital Financial Inc. (February 7, 2005), GE Money Bank (February 7, 2005), and HSBC/Metris (September 14, 2005). (SOUF ¶ 32.) Negotiations on the GE deals began before October 2004 but were explicitly conditioned on the effectiveness of this Court's Final Judgment. (SOUF ¶¶ 86-90.) Thus, not one Visa or MasterCard member bank issued over the Discover Network before Defendants repealed the exclusionary rules. (SOUF ¶¶ 28, 29, 83.)

E. Specific Findings on Liability Issues in Visa/MasterCard

In *Visa/MasterCard*, this Court held that (i) the exclusionary rules were the product of identical intra-association conspiracies between Visa and MasterCard and their respective member banks; (ii) general purpose credit and charge cards and general purpose credit

and charge card network services were relevant markets in the United States; (iii) Visa and MasterCard each possessed market power in the general purpose card network services market; (iv) the exclusionary rules harmed competition and consumers by foreclosing Discover and American Express; (v) there was no procompetitive justification for the exclusionary rules as they were designed to harm Discover and American Express; and (vi) Visa International was a necessary defendant. *Visa/MasterCard*, 163 F. Supp. 2d at 329, 332-333, 338, 339-40, 341, 379, 406. In determining that the exclusionary rules harmed competition, the Court gave thorough and extensive consideration to the impact of those rules on Discover and American Express. The Court expressly held that the exclusionary rules harmed competition by foreclosing Discover from the network services market. (SOUF ¶¶ 55, 62 (*Visa/MasterCard*, 163 F. Supp. 2d at 329, 341).)

1. Two Intra-Association Conspiracies Have Already Been Found to Exist.

This Court held that Visa and MasterCard were both composed of competing banks that conspired to restrain competition in the network services and issuing markets via the exclusionary rules. (SOUF ¶ 33 (*Visa/MasterCard*, 163 F. Supp. 2d at 329-30).) In this regard, the Court found that "By-law 2.10(e) and the CPP are restrictions of, by and for the member banks." (SOUF ¶ 34 (*Visa/MasterCard*, 163 F. Supp. 2d at 400).) The Second Circuit affirmed:

> Visa U.S.A. and MasterCard...are not single entities; they are consortiums of competitors...These 20,000 banks set the policies of Visa U.S.A. and MasterCard. These competitors have agreed to abide by a restrictive exclusivity provision to the effect that in order to share the benefits of their association by having the right to issue Visa or MasterCard cards, they must agree not to compete by issuing cards of Amex or Discover. The restrictive provision is a horizontal restraint adopted by 20,000 competitors.

(SOUF ¶ 33 (*Visa/MasterCard*, 344 F.3d at 242).)

2. The Relevant Antitrust Markets

This Court found and the Second Circuit affirmed two relevant product markets: (1) the market for issuing of general purpose credit and charge cards and (2) the market for the network services that support the use of general purpose credit and charge cards. (SOUF ¶ 35 (*Visa/MasterCard*, 163 F. Supp. 2d at 331; *Visa/MasterCard*, 344 F.3d 238-39).)

a. General Purpose Credit and Charge Cards

This Court found and the Second Circuit affirmed that there is a relevant product market for general purpose credit and charge cards. (SOUF ¶¶ 35, 36 (*Visa/MasterCard*, 163 F. Supp. 2d at 331, 338; *Visa/MasterCard*, 344 F.3d at 238-39).) Although Defendants argued that the evidence in the prior case "strongly supports a broad payments market, including credit cards, charge cards, cash, check and debit cards," this Court and the Second Circuit disagreed. (Decl. Ex. 15 (*Visa/MasterCard*, Joint Proposed Findings of Fact & Conclusions of Law of Defs. Visa U.S.A. Inc., Visa International Service Association and MasterCard International Incorporated ("*Visa/MasterCard*, Joint FOF/COL") at II-1; *see also id.* at II-6.)

First, the Court found that general purpose credit and charge cards cannot be in the same market as general purpose debit cards because they are highly differentiated, they have varying merchant acceptance, and neither consumers, merchants, nor Defendants view them as reasonable substitutes.[4] (SOUF ¶¶ 35, 36, 40, 41, 43 (*Visa/MasterCard*, 163 F. Supp. 2d at 331, 336-37, 338, 408).) Second, the Court found that general purpose credit and charge cards cannot be in the same market as cash or checks, because neither consumers, issuers, nor

[4] "A credit card permits cardholders to pay only a portion of the balance due on the account after receipt of a billing statement," and "[a] charge card requires the cardholder to pay his or her full balance upon receipt of a billing statement from the issuer of the card." (SOUF ¶¶ 37, 38 (*Visa/MasterCard*, 163 F. Supp. 2d at 331).) In contrast, debit cards "promptly access money directly from a cardholder's checking or deposit account," therefore removing the opportunity for revolving credit and "strongly differentiat[ing]" them from credit cards. (SOUF ¶ 39 (*Visa/MasterCard*, 163 F. Supp. 2d at 331).)

Defendants view them as substitutes. (SOUF ¶¶ 36, 42 (*Visa/MasterCard*, 163 F. Supp. 2d at 336, 338).) Third, the Court found that Defendants assess the costs to merchants of accepting credit cards, but not of accepting cash, checks, debit, or proprietary cards when they set their pricing to merchants. (SOUF ¶ 44 (*Visa/MasterCard*, 163 F. Supp. 2d at 337).) Fourth, the Court found that Defendants track the four major credit network competitors against each other, not against other payments methods. (SOUF ¶ 44 (*Visa/MasterCard*, 163 F. Supp. 2d at 337).)

b. General Purpose Card Network Services

This Court found and the Second Circuit affirmed that there is a relevant product market for general purpose card network services. (SOUF ¶¶ 35, 45 (*Visa/MasterCard*, 163 F. Supp. 2d at 331, 338; *Visa/MasterCard* 344 F.3d at 238-39).) Although Defendants argued that the DOJ "failed to put forward evidence to show why certain 'core services' can only be performed by MasterCard and Visa and not by issuers or other third parties" and that a network services market was "unduly narrow," this Court and the Second Circuit disagreed. (Decl. Ex. 15 (*Visa/MasterCard*, Joint FOF/COL) at II-1-II-2; *see also id.* at II-21-II-22.)

First, the Court found that "networks provide core services that cannot reasonably be replaced by other sources." (SOUF ¶ 45 (*Visa/MasterCard*, 163 F. Supp. 2d at 338).) Second, it found that merchant consumers of network services exhibit little price sensitivity. (SOUF ¶ 45 (*Visa/MasterCard*, 163 F. Supp. 2d at 338 (noting that "merchant consumers exhibit little price sensitivity" and "merchant acceptance of a card brand is also defined and controlled at the system level and the merchant discount rate is established, directly or indirectly, by the networks") 239).)[5]

[5] The Court's holding is supported by its finding that the network services market includes only four competitors in the United States — Visa, MasterCard, Discover, and American Express. (SOUF ¶ 49 (*Visa/MasterCard*, 163 F. Supp. 2d at 339).)

c. The United States Has Already Been Found to Be the Relevant Geographic Market.

This Court found and the Second Circuit affirmed that the United States is the geographic scope of both the general purpose credit card market and the general purpose card network services market. (SOUF ¶ 48 (*Visa/MasterCard*, 163 F. Supp. 2d at 339-40; *Visa/MasterCard*, 344 F.3d at 238-39).)[6]

3. Visa and MasterCard Have Already Been Found to Have Substantial Market Power in the General Purpose Card Network Services Market.

This Court found and the Second Circuit affirmed that Visa and MasterCard each had substantial market power in the market for general purpose card network services for several reasons. (SOUF ¶ 50 (*Visa/MasterCard*, 163 F. Supp. 2d at 341; *id.* at 340-42 (defining "market power" as the "power to control prices or exclude competition"); *Visa/MasterCard*, 340 F. 3d at 239).) Although Defendants argued, among other things, that they did not have market power because Discover and American Express "constrain the ability of MasterCard and Visa to restrain output or innovation," this Court and the Second Circuit disagreed. (Decl. Ex. 15 (*Visa/MasterCard*, Joint FOF/COL) at II-2.)

First, the Court found that, via the exclusionary rules, Visa and MasterCard were able to exclude Discover and American Express from offering network services to banks. (SOUF ¶ 24 (*Visa/MasterCard*, 163 F. Supp. 2d at 379).) Second, the Court found that Visa and MasterCard had consistently and repeatedly raised prices to merchants without losing merchant customers, evidencing their ability to control prices. (SOUF ¶¶ 51, 52 (*Visa/MasterCard*, 163 F. Supp. 2d at 340, 342 (noting that merchants "cannot refuse to accept Visa and MasterCard even

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[6] The exclusionary rules at issue in both this and the DOJ Case covered bank members' activities in only the United States. (SOUF ¶ 49 (*Visa/MasterCard*, 163 F. Supp. 2d at 340 ("The exclusionary rules at issue [were] specific to the United States.")).)

in the face of significant price increases because the cards are such preferred payment methods that customers would choose not to shop at merchants who do not accept them"); *Visa/MasterCard*, 344 F.2d at 240).) Third, the Court found that Visa and MasterCard have the ability to price discriminate and thereby exercise market power. (SOUF ¶ 53 (*Visa/MasterCard*, 163 F. Supp. 2d at 340).) Fourth, the Court found that Visa and MasterCard possess high market shares in a "highly concentrated market with significant barriers to entry."[7] (SOUF ¶ 54 (*Visa/MasterCard*, 163 F. Supp. 2d at 342 ("Because Visa and MasterCard have large shares in a highly concentrated market with significant barriers to entry, both defendants have market power in the general purpose card network services market, whether measured jointly or separately...");

Visa/MasterCard, 344 F.3d at 239).)

4. The Exclusionary Rules Have Already Been Found to Have Harmed Competition and Discover.

a. Harm to Competition

This Court held that Visa U.S.A.'s By-Law 2.10(e) and MasterCard's Competitive Programs Policy ("CPP")

> weaken competition and harm consumers by (1) limiting the output of American Express and Discover cards in the United States; (2) restricting the competitive strength of American Express and Discover by restraining their merchant acceptance levels...; (3) effectively foreclosing American Express or Discover from competing to issue off-line debit cards..., and (4) depriving consumers of the ability to obtain credit cards that combine the unique features of their preferred bank with any of four network brands, each of which has different qualities, characteristics, features, and reputations.

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[7] A major reason why the network services market is shielded by high barriers to entry is the fact that entrants face the "chicken and egg" problem of developing a merchant acceptance network without an initial network of cardholders, who are needed to induce merchants to accept the system's cards in the first place. (SOUF ¶ 54 (*Visa/MasterCard*, 163 F. Supp. 2d at 342).) Further, that no entity has entered the market since Discover did so in 1985 illustrates the significant barriers to entry in the market. (SOUF ¶ 6 (*Visa/MasterCard*, 163 F. Supp. 2d at 342 ("The difficulties associated with entering the network market are exemplified by the fact that no company has entered since Discover did so in 1985.")).)

(SOUF ¶ 55 (*Visa/MasterCard*, 163 F. Supp. 2d at 329; *Visa/MasterCard*, 344 F.3d at 240).) Further, the exclusionary rules "significantly reduced product output and consumer choice in the issuing market" and "reduced price competition in the network services market." (SOUF ¶ 56 (*Visa/MasterCard*, 163 F. Supp. 2d at 330).)[8] Although Defendants argued that the exclusionary rules did not harm competition, but rather that elimination of the exclusionary rules would increase prices charged to consumers, this Court and the Second Circuit disagreed. (Decl. Ex. 15 (*Visa/MasterCard*, Joint FOF/COL) at VII-60-VII-65.)

This Court found that, but for the exclusionary rules, Visa and MasterCard member banks would have issued cards over the Discover and American Express networks and that this increased competition would have benefited consumers by increasing product output and choice. (SOUF ¶¶ 61, 62 (*Visa/MasterCard*, 163 F. Supp. 2d at 341, 395).) This Court also found that the exclusionary rules limited output and choice by preventing combinations of the Discover or American Express brands with banks. (SOUF ¶ 329 (*Visa/MasterCard*, 163 F. Supp. 2d at 329 (noting that the exclusionary rules effectively deprived consumers of the ability to obtain credit cards that combined any of the four network brands with the unique characteristics of their bank of choice)).)

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[8] In concluding that the exclusionary rules harmed competition, the Court found that issuing of a network's brand by multiple banks is "important for a general purpose card network to effectively offer network-level services." (SOUF ¶ 58 (*Visa/MasterCard*, 163 F. Supp. 2d at 387).) "Multiple bank issuance of general purpose cards strengthens general purpose credit and charge card networks in three fundamental areas: increased card issuance, increased merchant acceptance, and increased scale." (SOUF ¶ 59 (*Visa/MasterCard*, 163 F. Supp. 2d at 387).) Moreover, increased merchant acceptance, as well as increased consumer perception of merchant acceptance, are "vital" to a network and can lead to an increase in card issuance and transaction volume:

> Merchant acceptance, and the consumer perception of merchant acceptance, is vital to a network for obvious reasons. Card features are irrelevant if consumers cannot use the card. As a result, increased merchant acceptance--and increased perception of merchant acceptance--can lead to an increase in card issuance and transaction volume.

(SOUF ¶ 60 (*Visa/MasterCard*, 163 F. Supp. 2d at 387-88 (citations omitted)).)

b. Harm to Discover

Given that the issue of injury to competition was necessarily linked to the exclusionary rules' impact on Visa's and MasterCard's only two network competitors in the relevant market, Discover and American Express, the issue of whether the exclusionary rules harmed Discover was litigated extensively during the DOJ Case. From the beginning of the litigation, the DOJ highlighted the harm to competition caused by Defendants' foreclosure of Discover from the market: "These combinations and conspiracies have had anticompetitive effects, including...card networks not owned by banks have been foreclosed from access to an important channel of distribution...." (Decl. Ex. 6 (DOJ Compl.) ¶ 161).)

The parties then brought Discover into the litigation by serving subpoenas for documents and testimony on it. (Decl. ¶ 5.) Discover produced tens of thousands of pages in the DOJ Case, and nine Discover witnesses gave deposition testimony. (Decl. ¶¶ 6, 7.) David Nelms, then the Chief Operating Officer of Discover, gave testimony at the DOJ trial. (Decl. ¶ 11.)

Defendants' briefing and argument in *Visa/MasterCard* reflected their recognition that the central question in that case was whether the exclusionary rules harmed competition by foreclosing Discover and American Express:

- In its summary judgment brief, Visa's main argument regarding By-law 2.10(e) was that: "In the Absence of Proof of Substantial Foreclosure of Competition, a Rule Which Prevents Amex or Discover from Partnering with Visa Members Is Not Unreasonable as a Matter of Law." (Decl. Ex. 9 (*Visa/MasterCard*, Visa Mot. for Summ. J.) at 27.) Visa went on to argue that, because there was no evidence that Discover was substantially foreclosed from the market, By-law 2.10(e) could not have been unlawful. (Decl. Ex. 9 (*Visa/MasterCard*, Visa Mot. for Summ. J.) at 27-43.)

- MasterCard's summary judgment brief made the same assertion: "Every alleged anticompetitive effect flowing from MasterCard's CPP is inextricably tied to whether plaintiff can demonstrate the unlawful foreclosure of

American Express and Discover/Novus by MasterCard's CPP." (Decl. Ex. 8 (*Visa/MasterCard*, MasterCard Mot. for Summ. J.) at 18.)

- In argument before this Court, Visa's lawyer claimed that "[t]here is no meaningful showing and ***this is the decisive fact in the entire government's case***, no meaningful showing at all that Discover or American Express cannot get their product to the hands of the consumer. Absent a showing of that kind, there simply can be no harm to competition." (Decl. Ex. 14 (*Visa/MasterCard*, Hr'g Tr., Jun. 8, 2000) at 57 (emphasis added)).)[9]

- In their Joint Proposed Findings of Fact, Defendants further argued that the DOJ "failed to carry its burden of demonstrating that Bylaw 2.10(e) and the CPP substantially harm competition. Under governing case law, that harm can only be established if American Express and Discover were precluded from otherwise reaching the American consumer with their products." (Decl. Ex. 15 (*Visa/MasterCard*, Joint FOF/COL) at vi).) Defendants then focused on a purported lack of evidence that the exclusionary rules harmed Discover to argue that the rules were lawful. (*See, e.g.*, Decl. Ex. 15 (*Visa/MasterCard*, Joint FOF/COL) at VII-1-VII-2, VII-43-VII-46.) Indeed, Defendants there also raised their argument — repeated to no avail in this litigation — that Discover executives somehow "admitted" that the exclusionary rules caused no harm to Discover.[10] (*See, e.g.*, Decl. Ex. 15 (*Visa/MasterCard*, Joint FOF/COL) at VII-46-VII-47, X-11.)

- In its brief to the Second Circuit, MasterCard again asserted that this Court had to decide whether Discover and American Express were foreclosed and whether that foreclosure harmed competition: "The Government had the burden of demonstrating that by virtue of the CPP, Amex and Discover were somehow foreclosed from consumers and that output as a whole in the marketplace was therefore constrained." (Decl. Ex. 16 (*Visa/MasterCard*, Proof Br. of Def.-Appellant MasterCard International Incorporated) at 26; *see also* Decl. Ex. 17 (*Visa/MasterCard*, Reply Br. of Def.-Appellant MasterCard International Incorporated) at 30 ("In order to demonstrate an actual adverse effect on competition, the Government had the initial burden to show that the CPP foreclosed Amex and Discover from reaching 'the ultimate consumers of the product by employing existing or potential alternative channels of distribution.'").)

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[9] Even the DOJ's lawyer conceded that "the primary question is: Is there an effect on the network level competition by American Express and Discover...And the answer to that is clearly, yes." (Decl. Ex. 14 (*Visa/MasterCard*, Hr'g Tr., Jun. 8, 2000) at 81.)

[10] This Court rejected that argument in this case in denying Defendants' motions to dismiss Discover's claims on that basis because such an argument "ignores the distinction between remedy and injury." (Decl. Ex. 65 (Hr'g Tr., Apr. 14, 2005) at 6-7.)

Faced with this argument and evidence, the Court relied heavily, if not exclusively, on findings of harm to the only two competitors in the relevant network market — Discover and American Express — to find harm to competition. Throughout the Court's opinion, the negative impact of the exclusionary rules on Discover (and American Express) provided the basis for its conclusion that competition was harmed:

- By-law 2.10(e) and the CPP "do weaken competition and harm consumers by (1) limiting output of...Discover cards in the United States; (2) restricting the competitive strength of...Discover by restraining [its] merchant acceptance levels and [its] ability to develop and distribute new features such as smart cards; [and] (3) effectively foreclosing...Discover from competing to issue off-line debit cards..." (SOUF ¶ 55 (*Visa/MasterCard*, 163 F. Supp. 2d at 329).)

- "[T]he exclusionary rules adopted by the associations reduce output and consumer choice by denying...Discover the opportunity to issue cards through bank issuers who issue Visa and MasterCard." (SOUF ¶ 62 (*Visa/MasterCard*, 163 F. Supp. 2d at 341).)

- "[T]he rules restrain competition in the network market because they prevent...Discover from offering network services to the consumers of those services, the members of the Visa and MasterCard associations. As a result...Discover [is] forced to operate as [a] single-issuer network[], limiting [its] transaction and issuance volume and stunting [its] competitive vitality." (SOUF ¶ 63 (*Visa/MasterCard*, 163 F. Supp. 2d at 379).)

- "Because of the defendants' exclusionary rules...Discover ha[s] not been able to convince U.S. banks to issue cards over [its] network[]. This prevents [it] from competing in the network services market for the business of bank issuers." (SOUF ¶ 64 (*Visa/MasterCard*, 163 F. Supp. 2d at 382).)

- "The exclusionary rules con[str]ain...Discover's ability to grow market share while effectively maintaining the defendants' market share and power." (SOUF ¶ 65 (*Visa/MasterCard*, 163 F. Supp. 2d at 382).)

The Second Circuit affirmed that the exclusionary rules caused Discover harm and therefore harmed competition:

- "The most persuasive evidence of harm to competition is the total exclusion of ...Discover from a segment of the market for network services." (SOUF ¶ 55 (*Visa/MasterCard*, 344 F.3d at 240).)

- "In the market for *network services*, where the four networks are sellers and issuing banks and merchants are buyers, the exclusionary rules enforced by Visa U.S.A. and MasterCard have absolutely prevented...Discover from selling [its] products at all." (SOUF ¶ 64 (*Visa/MasterCard*, 344 F.3d at 243 (emphasis in original)).)

- ***"Without doubt the exclusionary rules in question harm competitors."*** (SOUF ¶ 65 (*Visa/MasterCard*, 344 F.3d at 243 (emphasis added)).)

The Court's findings that Discover was harmed by Defendants' exclusionary rules focused on three types of harm. First, the exclusionary rules harmed Discover by precluding Discover from offering network services to issuing members of Visa and MasterCard and thus from competing in the network services market for the business of bank issuers.[11] (SOUF ¶ 64 (*Visa/MasterCard*, 163 F. Supp. 2d at 382).) Second, by precluding Discover from partnering with third-party issuers, Defendants' exclusionary rules kept Discover from increasing its merchant acceptance and therefore being a stronger competitor in the relevant market. (SOUF ¶ 55 (*Visa/MasterCard*, 163 F. Supp. 2d at 329).) Finally, the Court concluded that the exclusionary rules harmed Discover by precluding it from accessing the demand deposit accounts ("DDAs") held by debit issuing members of Visa and MasterCard, which prevented Discover from offering a viable debit network service to banks. (SOUF ¶ 55, 70 (*Visa/MasterCard*, 163 F. Supp. 2d at 329, 391).) As a result, Discover was barred from entering the debit market. (SOUF ¶ 55, 70 (*Visa/MasterCard*, 163 F. Supp. 2d at 329, 391).)

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[11] Because "additional issuers leads to increased card issuance," Defendants' restriction of Discover to a single-issuer network kept the network from increasing its card issuance and, therefore, its volume. (SOUF ¶ 67 (*Visa/MasterCard*, 163 F. Supp. 2d at 387).) The rules also prevented Discover from accessing the unique skills and assets of the member banks. (SOUF ¶ 68 (*Visa/MasterCard*, 163 F. Supp. 2d at 387 ("[M]ultiple issuers allow a network to take advantage of 'better skills' and 'new techniques' of various issuers, including coming up with new ways to get credit cards to consumers.")).) Absent the exclusionary rules, Visa and MasterCard member banks would have been attracted to Discover's offering; for example, a potential issuing relationship between First USA, an association member bank, and Discover did not materialize because of the exclusionary rules, although First USA would have liked to issue Discover-branded cards. (SOUF ¶ 69 (*Visa/MasterCard*, 163 F. Supp. 2d at 387 ("Although First USA would have liked to issue Discover cards itself, it would not do so for fear of losing the ability to issue Visa and MasterCard cards.")).)

5. The Court Has Already Found That There Was No Legitimate Business Justification for the Exclusionary Rules.

This Court concluded and the Second Circuit affirmed that no legitimate business justification existed for the exclusionary rules. (SOUF ¶ 71 (*Visa/MasterCard*, 163 F. Supp. 2d at 406; *Visa/MasterCard*, 344 F.3d at 243).) Although Defendants argued that the exclusionary rules were "ancillary loyalty restrictions that are important to preserve the cohesiveness of the associations and that they make the relevant market more, rather than less, competitive," this Court and the Second Circuit disagreed. (Decl. Ex. 15 (*Visa/MasterCard*, Joint FOF/COL) at VIII-1.) Rather, the Court noted Defendants' selective application of the exclusionary rules against only American Express and Discover, (SOUF ¶¶ 21, 23, 25, 27 (*Visa/MasterCard*, 163 F. Supp. 2d at 327, 379-81)), and concluded that Defendants' real motives were to "restrict competition at the network and issuer levels to enhance member bank profitability" through a boycott of Discover and American Express. (SOUF ¶ 72 (*Visa/MasterCard*, 163 F. Supp. 2d at 401).) The Court rejected Defendants' proffered justifications that the exclusionary rules were necessary to ensure "loyalty" (SOUF ¶ 74 (*Visa/MasterCard*, 163 F. Supp. 2d at 402-03)) or prevent "free-riding" (SOUF ¶ 75 (*Visa/MasterCard*, 163 F. Supp. 2d at 404 ("There is even less support in the record for defendants' contention that the exclusionary rules are necessary to prevent member free-riding. Any free-riding claims are unavailing given Visa and MasterCard's lack of 'rules' concerning member bank use of their card-issuing relationships, data and information."))).

6. Visa International Has Already Been Found to Have Acquiesced in Visa U.S.A.'s Implementation and Enforcement of 2.10(e).

The Court found and the Second Circuit affirmed that Visa International was an appropriate and necessary defendant to the DOJ's § 1 claim concerning By-law 2.10(e). (SOUF ¶ 77 (*Visa/MasterCard*, 163 F. Supp. 2d at 406-07; *Visa/MasterCard*, 344 F.3d at 244).) The

Court found that Visa International provided "affirmative encouragement" for the adoption of 2.10(e) and had the authority to adopt exclusionary by-laws in the United States. (SOUF ¶ 78 (*Visa/MasterCard*, 163 F. Supp. 2d at 406-07).) Accordingly, Visa International was a proper defendant in the DOJ Case.

F. No Material Facts Changed Between Trial in the DOJ Case in 2000 and Repeal of the Exclusionary Rules in 2004.

Between the close of evidence in the DOJ Case trial and the Final Judgment becoming effective in October 2004, no fact material to the Court's finding of liability changed. Visa and MasterCard maintained and enforced their exclusionary rules under a judicial stay, even after the trial and decision in the DOJ Case. (SOUF ¶ 79.) Defendants used that stay to maintain the exclusionary rules until they exhausted their appeals in October 2004. Visa's and MasterCard's member banks therefore remained subject to the exclusionary rules — including potential expulsion from the associations for non-compliance — until late 2004. (SOUF ¶¶ 80, 81.) In that time, Defendants made no changes to the exclusionary rules and granted no exceptions. (SOUF ¶ 82.) Quite the contrary, Defendants continued to enforce the rules, by then already judged unlawful, to prevent their member banks from issuing cards over the Discover and American Express networks. (SOUF ¶¶ 81, 82.) As a result, the banks that signed up to

REDACTED

REDACTED [12] (SOUF ¶¶ 90, 92.) Not one of those REDACTED

exclusionary rules were repealed. (SOUF ¶¶ 28, 29, 83.)

12 REDACTED

Indeed, Visa and MasterCard predicted that elimination of the exclusionary rules under the Final Judgment would drastically alter the marketplace, and each petitioned this Court for a stay precisely so they could preserve the "*status quo*." (Decl. Ex. 56 (*Visa/MasterCard*, Mem. of Law in Supp. of Visa U.S.A. Inc.'s Mot. to Stay Pending App.) at 1); Decl. Ex. 57 (*Visa/MasterCard*, Mem. in Supp. of MasterCard International Incorporated's Mot. to Stay the Final J. Pending App.) at 1 (granting stay would preserve the "*status quo*").) The CEOs of both Defendants submitted sworn declarations to this Court stating that maintaining the exclusionary rules, via a stay of the Final Judgment, was necessary to avoid irreversible changes in the marketplace. (Decl. Ex. 60 (*Visa/MasterCard*, Decl. of Robert W. Selander in Supp. of Def. MasterCard International's Mot. to Stay Final J.) ¶ 2 ("This Court's imposition of its Final Judgment may well transform the structure of the United States payment card industry in a fundamental way."); Decl. Ex. 61 (*Visa/MasterCard*, Decl. of Carl Pascarella in Supp. of Visa U.S.A. Inc.'s Mot. to Stay Pending App.) ¶ 3 ("In my view, the Judgment also is likely to cause significant, irreversible changes to competition in the payment card industry that no one can reliably predict.").) The stay did exactly what Defendants hoped it would do — it maintained the *status quo* and prevented any material change in network competition from Discover or American Express for bank issuers while the exclusionary rules remained in effect.

In short, between August 2000 and October 2004, Visa and MasterCard continued to (i) maintain their exclusionary rules via intra-association conspiracies with their member banks, (ii) wield sufficient market power to exclude completely Discover and American Express from offering network services to Defendants' member banks, and (iii) injure competition and consumer welfare by foreclosing Discover and American Express from the market for general purpose card network services. Even though some banks were interested in issuing Discover or

American Express-branded cards, not one Visa or MasterCard member bank issued a card over either Discover's or American Express's network until after the exclusionary rules were rescinded in October 2004. (SOUF ¶¶ 28, 29, 83.)

DISCOVER'S DAMAGES LAWSUIT

Discover's case is a direct follow-on to the DOJ Case. To that end, Discover filed its Complaint against Visa U.S.A., Visa International, and MasterCard on October 4, 2004, the same day that the Supreme Court denied Defendants' petitions for *certiorari*.[13] (Decl. Ex. 19 (Compl.).) Discover's Claim One, which alleges violations of § 1 of the Sherman Act based on Defendants' exclusionary rules, directly tracks the language of the DOJ's complaint. For example, the DOJ alleged that

> [e]ach of the defendants, on behalf of and in collaboration with its governing banks, has engaged in a continuing combination and conspiracy to organize and operate its general purpose card network in a manner that restrains competition among general purpose card networks in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, as amended.

(Decl. Ex. 6 (DOJ Compl.) ¶ 159.) Discover alleged, in almost identical language, that

> [d]efendants, on behalf of and in collaboration with their banks, have engaged in a continuing combination and conspiracy to organize and operate their general purpose card networks in a manner that restrains competition among general purpose card networks in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, as amended.

(Decl. Ex. 7 (Second Am. Compl.) ¶ 94.) Further, the DOJ alleged that

> [i]n furtherance of this combination and conspiracy, each of the defendants and its governing banks has adopted rules and policies that disadvantage or exclude rival general purpose card networks, such as American Express and Discover/Novus, including rules or policies prohibiting member banks from issuing cards on the American Express or Discover/Novus networks.

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[13] Discover filed the operative Second Amended Complaint on June 4, 2007.

(Decl. Ex. 6 (DOJ Compl.) ¶ 160.) And Discover alleged, again in almost identical language, that

> [i]n furtherance of this combination and conspiracy, defendants and certain of their banks have adopted and enforced 2.10(e) and the CPP in order to disadvantage or exclude rival general purpose card networks, such as Discover's network, from the general purpose card network services market.

(Decl. Ex. 7 (Second Am. Compl.) ¶ 95.) Discover's Complaint cites the *Visa/MasterCard* rulings on at least forty-seven occasions. (Decl. Ex. 7 (Second Am. Compl.).) Discover alleges the same intra-association conspiracies, the same relevant markets, the same theories of Visa's and MasterCard's substantial market power, and the same injury to competition through the foreclosure of Discover and American Express as did the DOJ. The similarity of these allegations was in no way accidental. Discover's claim was meant to encompass exactly what the DOJ already proved — that Defendants' unlawful exclusionary rules harmed competition by foreclosing competitors, such as Discover, from the market, thereby violating § 1.[14]

Discover's identical claim is, for the most part, based on the same evidence already reviewed in the DOJ Case. The parties had access to all deposition transcripts, trial transcripts, expert testimony, briefs, and motion papers from both the DOJ Case and the preceding investigation. (*See, e.g.*, Decl. Exs. 12, 54.) The same witnesses often were called for depositions in both cases. (Decl. ¶ 12.) The parties on several occasions stipulated to submitting testimony from the DOJ Case as testimony in this case. (Decl. Ex. 53 (Stip. & Order Regarding Deps. of Ronald Zebeck, Richard Greenawalt, and Gayle Rigione).) Finally, the parties all

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[14] Discover now maintains five claims against Defendants: combination and conspiracy to restrain trade in the general purpose card network services market (Claim One) and conspiracy to restrain trade in the relevant markets (Claim Two) in violation of § 1 of the Sherman Act against all Defendants; monopoly maintenance (Claim Three) and attempt to monopolize (Claim Four) in the general purpose credit and debit network services markets in violation of § 2 of the Sherman Act against Defendant Visa U.S.A.; and conspiracy to monopolize the general purpose credit and debit network services markets in violation of § 2 of the Sherman Act against all Defendants (Claim Five).

questioned witnesses extensively on documents produced and testimony given in both the DOJ Case and the CID. (*See, e.g.*, Decl. Exs. 45, 49.)

ARGUMENT

I. DISCOVER IS ENTITLED TO SUMMARY JUDGMENT UNDER SECTION ONE OF THE SHERMAN ACT (CLAIM ONE).

Discover is entitled to summary judgment under § 1 of the Sherman Act for Claim One in its Second Amended Complaint — the direct follow-on to *Visa/MasterCard*. Properly applied, the doctrine of collateral estoppel eliminates any issue of material fact regarding Defendants' liability for Discover's Claim One through October 2004 when the exclusionary rules were effectively eliminated. Defendants should not be allowed to relitigate what this Court already decided against them and what the Second Circuit affirmed, namely, that Visa's By-law 2.10(e) and MasterCard's CPP violated § 1 of the Sherman Act and injured Discover. Although the evidence in the DOJ Case closed in 2000, there can be no reasonable dispute over the fact that Discover (and American Express) were entirely barred from providing network services to Visa and MasterCard members prior to that date. To the contrary, all material facts necessary to the ultimate findings in *Visa/MasterCard* continued unchanged until the Supreme Court denied Defendants' petitions for *certiorari*, forcing them to abandon their conspiracies. Accordingly, summary judgment against all Defendants can and should be granted on Discover's Claim One through October 15, 2004.

A. Legal Standard

Summary judgment should be rendered if "there is no genuine issue as to any material fact and...the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 104 (2d Cir. 2002) (summary judgment is appropriate where, "examining the evidence in the light most favorable to the nonmoving

party, the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law"). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *see also R.B. Ventures, Ltd. v. Shane*, 112 F.3d 54, 57 (2d Cir. 1997). Summary judgment may be rendered "on liability alone, even if there is a genuine issue on the amount of damages." Fed. R. Civ. P. 56(d)(2). "The Second Circuit has counseled district courts that 'summary judgment serves a vital function in the area of antitrust law' '[b]y avoiding wasteful trials and preventing lengthy litigation that may have a chilling effect on pro-competitive market forces.'" *In re Visa Check/MasterMoney Antitrust Litig.*, No. 96-CV-5238 (JG) 2003 WL 1712568, at *1 (E.D.N.Y. Apr. 1, 2003) (granting partial summary judgment for plaintiffs on issues of market definition and Visa's market power in the general purpose credit and charge card network services market) (quoting *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 95 (2d Cir. 1998)); *see also In re Ivan Boesky Sec. Litig.*, 848 F. Supp. 1119, 1126 (S.D.N.Y. 1994) (granting summary judgment for plaintiff based on offensive collateral estoppel effect of prior government action against defendant). Here, there is no disputed issue of material fact as to Defendants' liability.

B. Defendants Should Be Precluded From Relitigating Their Liability for Enacting and Enforcing the Exclusionary Rules Under Principles of Collateral Estoppel.

This Court already determined and the Second Circuit affirmed that Visa and MasterCard violated the antitrust laws. Collateral estoppel should be applied in this proceeding to that determination and to all findings that were necessary to that determination.

Collateral estoppel, or issue preclusion, serves vital purposes of efficiency and reliance in the American judicial system:

> Application of [collateral estoppel] is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions. To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

Montana v. United States, 440 U.S. 147, 153-54 (1979). These are precisely the concerns here — there is no need to tax the judicial system (including the time of potential jurors) and waste this Court's time by letting Defendants relitigate issues identical to those already resolved by this Court and affirmed by the Second Circuit in *Visa/MasterCard*.

Nonmutual offensive collateral estoppel allows a plaintiff to "estop a defendant from relitigating the issues which the defendant previously litigated and lost against another plaintiff." *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 329 (1979) (establishing doctrine of offensive collateral estoppel). To successfully preclude relitigation under this doctrine, the party seeking collateral estoppel must show that: (1) the issues of both proceedings are identical, (2) the relevant issues were actually litigated and decided in the prior proceeding, (3) there was a "full and fair opportunity" to litigate the issues in the prior proceeding, and (4) the issues were necessary to a valid and final judgment on the merits. *Central Hudson Gas & Elec. Corp. v. Empresa Naviera Santa S.A.*, 56 F.3d 359, 368 (2d Cir. 1995); *see also Beck v. Levering*, 947 F.2d 639 (2d Cir. 1991) (imposing nonmutual offensive collateral estoppel to grant plaintiffs' motion for summary judgment); *GAF Corp. v. Eastman Kodak Co.*, 519 F. Supp. 1203, 1211 (S.D.N.Y. 1981) (granting plaintiff's motion for partial summary judgment via nonmutual offensive collateral estoppel). The application of collateral estoppel, however, must not create any unfairness for the estopped party. *See Central Hudson*, 56 F.3d at 370 (confirming absence

of fairness concerns recognized in *Parklane Hosiery*). This suit presents a textbook case for the application of the doctrine.[15]

1. The Issues Before the Court Are Identical to the Issues in *Visa/MasterCard*.

Claim One of Discover's Second Amended Complaint — which alleges that Defendants' exclusionary rules violated § 1 of the Sherman Act — is identical to the DOJ's claim that prevailed in *Visa/MasterCard*. *GAF*, 519 F. Supp. at 1211 (issues in prior litigation must be identical to issues sought to be estopped). To determine whether issues in different litigations are "identical" for collateral estoppel purposes, the Restatement (Second) of Judgments is used. *See, e.g., Shomo v. New York State Dep't of Corr. Servs.*, No. 9:04-CV-0910 (LEK/GHL), 2007 WL 2580509, at *5 (N.D.N.Y., Sep. 4, 2007). According to the Restatement, the Court should ask:

> Is there a substantial overlap between the evidence or argument to be advanced in the second proceeding and that advanced in the first? Does the new evidence or argument involve application of the same rule of law as that involved in the prior proceeding? Could pretrial preparation and discovery relating to the matter presented in the first action reasonably be expected to have embraced the matter sought to be presented in the second? How closely related are the claims involved in the two proceedings?

Restatement (Second) of Judgments § 27, cmt. c. The answers to each of these questions demonstrate that the Court should apply collateral estoppel here.

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[15] The federal antitrust statutes support giving prima facie preclusive effect to prior antitrust judgments. Under Section 5(a) of the Clayton Act, "[a] final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto...Nothing contained in this section shall be construed to impose any limitation on the application of collateral estoppel...." 15 U.S.C. § 16(a). Indeed, the "avowed purpose of [Section 5(a)] was to 'permit application of the (collateral estoppel) doctrine to eliminate wasteful retrying of issues and reduce the costs of complex antitrust litigation to the courts and parties.'" *GAF*, 519 F. Supp. at 1211 (quoting H.R. Rep. No. 96-874, at 3 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2716, 2752, 2753). Precluding Defendants from relitigating the factual findings made in *Visa/MasterCard* furthers Congressional intent by avoiding the "wasteful retrying" of those issues already litigated and reducing costs to the parties and the courts.

First, virtually all of the evidence and arguments relevant to Discover's Claim One will be the same as that already presented and considered in the DOJ Case. Discover's Claim One is premised on the same conduct and facts that were presented in *Visa/MasterCard* and would be governed by the same law and standard of proof applied during the prior case. Discover alleges the same conspiracies, same relevant markets, same substantial market power, same exclusionary conduct, and same injury to competition as did the DOJ. Defendants cannot seriously contest that the issues presented here are identical to those considered in the DOJ Case.

Second, given that significant overlap in evidence and argument, pretrial preparation and discovery relating to the matter in *Visa/MasterCard* not only could be "reasonably expected" to have encompassed the matter in *Discover v. Visa/MasterCard* but actually did encompass the same matter. Indeed, the key question addressed in *Visa/MasterCard* was whether the exclusionary rules harmed competition and consumers by foreclosing Discover and American Express from offering their network services to banks. Discover makes that same claim in this damages lawsuit.

The fact that the time period encompassed by Discover's § 1 claim includes four years in which the exclusionary rules were in effect after proof in the DOJ Case closed does not in any way diminish the case for applying collateral estoppel here.[16] It is well settled that collateral estoppel precludes relitigation of the validity of continuing conduct when no new material facts or circumstances arose after the record closed in the case upon which collateral estoppel is sought. *Ramallo Bros. Printing, Inc. v. El Dia, Inc.*, 490 F.3d 86, 90 (1st Cir. 2007) ("While we acknowledge that changed circumstances may defeat collateral estoppel, collateral

[16] As discussed below, the Court can separately grant summary judgment for this time period even if the doctrine of collateral estoppel is not applied to preclude Defendants from relitigating their liability for enforcing the exclusionary rules from 2000 to 2004 while the stay was in effect.

estoppel remains appropriate where the changed circumstances are not material."); *In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 11 F.3d 1460, 1463-64 (9th Cir. 1993) (when complaint alleges continuing conduct after prior suit, not new conduct, collateral estoppel is appropriate). Even though an additional time period is under the Court's review, collateral estoppel can be applied if the facts necessary to the original findings remain the same. *Ramallo Bros.*, 490 F.3d at 91 (temporal difference is "immaterial" for collateral estoppel purposes when complaint alleges only a continuation of the same conduct adjudicated in the prior case). Indeed, when the Restatement factors demonstrate the identical nature of two proceedings across an extended time period — as they do here — that "different time period does not necessarily preclude application of collateral estoppel." *See B-S Steel Of Kansas, Inc. v. Texas Indus., Inc.*, 439 F.3d 653, 663 (10th Cir. 2006) (using Restatement factors to analyze identical nature of two proceedings).

The Southern District's decision in *GAF Corp. v. Eastman Kodak Co.* is directly on point. In *GAF Corp.*, the plaintiff sought to apply offensive collateral estoppel to preclude relitigation of elements of its §§ 1 and 2 antitrust claims by the defendant, who had litigated and lost those claims in an earlier trial against another competitor. *See GAF Corp.*, 519 F. Supp. at 1210. The defendant contended that the issues in the two cases were temporally distinct and thus not identical, because the damages period in the second case extended beyond that in the first case. *See id.* at 1214. The Court disagreed, concluding that

> the slightly different time period covered by the evidence in this case would not likely cause a jury to find different market definitions or reach different conclusions as to [the defendant's] market power. The slim possibility that the jury could reach a different conclusion is insufficient justification for relitigating issues vigorously and fully contested by [the defendant] over the course of several months in the [first] trial.

Id. The Court, therefore, relied upon the doctrine of offensive collateral estoppel to preclude the defendants from relitigating elements of its liability in slightly different time periods and granted partial summary judgment in favor of the plaintiff on several elements of its antitrust claims. *See id.* at 1218; *see also Exhibitors Poster Exch., Inc. v. National Screen Serv. Corp.*, 517 F.2d 110 (5th Cir. 1975) (in defensive collateral estoppel case, when third suit alleges antitrust violations from conspiracy completed prior to first two suits and unchanged continuing conduct, judgments in first suits "bar relitigation of the applicability of the identical antitrust principles to this identical and inseparable conduct"); Restatement (Second) of Judgments § 27 cmt. c.[17] *Compare Dracos v. Hellenic Lines, Ltd.*, 762 F.2d 348 (4th Cir. 1985) (refusing to apply offensive collateral estoppel to choice of law analysis from cases ten and twelve years earlier when facts affecting choice of law were shown to have changed, and when industry involved generally undergoes significant changes). Defendants vigorously contested this § 1 claim before this Court, and nothing material to that claim changed between 2000 and October 2004. Accordingly, any contention that collateral estoppel effect should not be applied to the entire relevant time frame is meritless.

Defendants bear the burden of showing that new facts or circumstances arose after the relevant findings in order to preclude the application of collateral estoppel to the subsequent period. *Harrington Haley LLP v. Nutmeg Ins. Co.*, 39 F. Supp. 2d 403, 407 n.15, 410 (S.D.N.Y. 1999) (placing burden on party opposing collateral estoppel to demonstrate changed

[17] In pertinent part, Comment C instructs:

> Sometimes, there is a lack of total identity between the matters involved in the two proceedings because the events in suit took place at different times. In some such instances, the overlap is so substantial that preclusion is plainly appropriate...And, in the absence of a showing of changed circumstances, a determination that, for example, a person was disabled, or a nonresident of the state, in one year will be conclusive with respect to the next as well. In other instances the burden of showing changed or different circumstances should be placed on the party against whom the prior judgment is asserted."
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> Restatement (Second) of Judgments § 27 cmt. c.

circumstances so as to avoid preclusion, when time period in later case followed time period in prior case); Restatement (Second) of Judgments § 27, cmt. c. Defendants cannot meet that burden here. It is beyond reasonable dispute that the relevant circumstances did not change at all prior to October 2004. Specifically, as described above, Visa and MasterCard used the stay of the Final Judgment to continue to (i) maintain their parallel intra-association conspiracies, (ii) wield the substantial market power necessary to exclude competition from their only competitors in the relevant network market, and (iii) injure competition and consumer welfare by foreclosing those competitors — Discover and American Express — from offering network services to banks. Even though some banks were interested in issuing Discover or American Express-branded cards, not one Visa or MasterCard member bank issued a card over either Discover's or American Express's network until after the exclusionary rules were rescinded in October 2004. The continuing violation is not subject to reasonable dispute.

2. The Issues Before the Court Were Actually Litigated and Decided in *Visa/MasterCard*.

Each of the findings for which Discover seeks issue preclusion was actually litigated and decided in the DOJ Case. *See Central Hudson*, 56 F.3d at 368 (relevant issues must have been actually litigated and decided in the prior proceeding). All of the elements of the DOJ's § 1 claim challenging the exclusionary rules were fully litigated as part of an expansive and rigorous rule of reason inquiry.[18] Under this standard, Defendants exhaustively litigated the question of their liability by contesting whether the DOJ satisfied its burden on the elements of

[18] The expansive nature of the rule of reason inquiry has been described by the Supreme Court: "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts." *Board of Trade of City of Chicago v. United States*, 246 U.S. 231, 238 (1918).

its § 1 claim against the exclusionary rules. (*See, e.g.*, Decl. Ex. 15 (*Visa/MasterCard*, Joint FOF/COL) §§ VII (harm to American Express and Discover), VIII (procompetitive justifications).) In its extensive opinion, this Court applied the rule of reason to every element of the DOJ's claim against the exclusionary rules in holding that these restraints of trade violated the antitrust laws. *Visa/MasterCard*, 163 F. Supp. 2d at 329, 332-333, 338, 339-40, 341, 379, 406. Accordingly, there is no question that Defendants' liability, and all of the elements related to that finding, were actually raised, contested, and determined by this Court already. *See* Restatement (Second) of Judgments § 27, cmt. d ("When an issue is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined, the issue is actually litigated within the meaning of this section.").

Additionally, the Court's opinion cites the evidence supporting its findings of fact and the legal standards supporting its conclusions of law. *See Visa/MasterCard*, 344 F.3d at 234 (describing District Court opinion as "commendably comprehensive and careful"). In contrast to cases where the matter concludes with an unclear statement as to the issues decided, such as a general jury verdict, what was actually litigated and decided here is evident from the face of the opinion. *Compare Tucker v. Arthur Andersen & Co.*, 646 F.2d 721, 729 (2d Cir. 1981) (when jury returns general verdict in favor of defendant, and several issues have been litigated, later court cannot determine what jury actually decided). The Court's opinion shows that each issue or fact on which Discover seeks preclusion was actually litigated in the prior case.

3. Defendants Had a Full and Fair Opportunity to Litigate in *Visa/MasterCard*.

Defendants had a full and fair opportunity to litigate in *Visa/MasterCard*, consistent with due process requirements. *See Central Hudson*, 56 F.3d at 368 (for collateral estoppel to apply, "there must have been 'full and fair opportunity' for the litigation of the issues

in the prior proceeding"). Defendants called live witnesses at trial, including many of their current and former senior executives and some of the leading antitrust economists in the country, cross-examined all of the DOJ's witnesses, submitted hundreds of trial exhibits, made numerous evidentiary objections, and submitted pre-trial and post-trial briefs reciting their positions on the elements of the DOJ's claim challenging the exclusionary rules. Defendants then appealed the judgment to the Second Circuit, where they fully briefed the relevant issues and participated in oral argument. Finally, Defendants petitioned for a writ of *certiorari* to the United States Supreme Court.[19]

4. The Issues Before the Court Were Necessary to Support the Judgment in *Visa/MasterCard*.

The issues on which Discover seeks collateral estoppel were necessary to support the Final Judgment in *Visa/MasterCard*. In the Second Circuit, "necessary" for collateral estoppel purposes means that an issue was "essential" and "material" to the prior judgment. *See Niagara Frontier Tariff Bureau, Inc. v. United States*, 826 F.2d 1186, 1190 (2d Cir. 1987) (concluding that prior resolution of an issue was "necessary and essential" to the judgment in the earlier action and granting collateral estoppel); *GAF Corp.*, 519 F. Supp. at 1211 (stating that "the issues sought to be precluded must have been necessary, material, and essential to the prior outcome").

"It is well established in the Second Circuit that for purposes of collateral estoppel an issue need not be the only determinative factor in a decision in order for it to be considered 'necessary' to that decision." *Oneida Tribe of Indians of Wis. v. AGB Props., Inc.*, No. 02-CV-

[19] The "quality, extensiveness, or fairness" of the procedures in the prior case also cannot be doubted. *Montana v. United States*, 440 U.S. at 164 n.11; *see also* 18 Charles Allen Wright et al., Federal Practice and Procedure, § 4423 (2d ed. 2002) ("[F]ederal courts should adhere to a rule that redetermination of an issue is only justified, if at all, by very special circumstances surrounding the competence of one federal court as compared to another.").

233LEKDRH, 2002 WL 31005165, at *3 (N.D.N.Y. Sept. 5, 2002) (citing *Winters v. Lavine*, 574 F.2d 46, 67 (2d Cir. 1978)); *see also Central Hudson*, 56 F.3d at 369-70 (when prior judgment "entailed a finding" on an issue, that issue was "necessary" to that prior judgment). As the Second Circuit has explained, where the prior court decides the case on multiple grounds, each ground is deemed "necessary" for collateral estoppel. *See Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 45 (2d Cir. 1986) ("The general rule in this Circuit is that 'if a court decides a case on two grounds, each is a good estoppel.'"); *see also* 3 James WM. Moore, Moore's Federal Practice and Procedure § 132.03[4][b][ii] (3d ed. 2007).

All of the liability elements of Discover's Claim One were necessary to the judgment in *Visa/MasterCard*, because the Court reached conclusions on each of them in order to hold that Defendants violated § 1 of the Sherman Act. *See Visa/MasterCard*, 344 F.3d at 238 (listing elements of § 1 claim). These necessary findings include that (i) the exclusionary rules were the product of twin intra-association conspiracies between the associations and their respective member banks; (ii) general purpose credit and charge cards and general purpose credit and charge card network services were relevant markets in the United States; (iii) Visa and MasterCard each possess substantial market power in the general purpose card network services market; (iv) the exclusionary rules harmed competition by stifling Visa's and MasterCard's only two competitors in the relevant network market, Discover and American Express; (v) there was no procompetitive justification for the exclusionary rules, as they were designed to harm Discover and American Express; and (vi) Visa International was a necessary defendant. *Visa/MasterCard*, 163 F. Supp. 2d at 329, 332-33, 338, 339-40, 341, 379, 406; *see Visa/MasterCard*, 344 F.3d at 238. Similarly, as set forth more fully below, the Court's finding of antitrust injury to Discover was necessary to its holding. Thus, because the Court reached

decisions on each of these elements in order to hold Defendants liable, Defendants should be precluded from relitigating them.

Further, the key findings underlying the liability elements of the § 1 violation were necessary to the Final Judgment, as they were all "logically or practically, a necessary component of the decision reached." *Hoult v. Hoult*, 157 F.3d 29, 32 (1st Cir. 1998); *see also Oneida* 2002 WL 31005165, at *7. Discover has limited its motion to those findings that directly supported the Court's decision and that were demonstrably necessary to the Court's liability holding and ultimate conclusions on each of the elements of the § 1 claim. (*See* Attach. A.)

5. There Will Be No Unfairness to Defendants From Application of Collateral Estoppel.

Application of collateral estoppel here is fair to Visa and MasterCard. In *Parklane Hosiery*, the Supreme Court identified four circumstances in which nonmutual offensive issue preclusion could be unfair: (i) the plaintiff could have easily joined in the earlier action; (ii) the defendant had little incentive to defend vigorously the earlier action; (iii) the judgment relied upon as a basis for estoppel is inconsistent with a previous decision in favor of the defendant; or (iv) the second action affords the defendant procedural opportunities not available in the first action. *Parklane Hosiery*, 439 U.S. at 330-31; *see also Central Hudson*, 56 F.3d at 370 (referencing *Parklane Hosiery* fairness concerns). None of those concerns are present here.

First, this is not a case where Discover could have easily joined in the earlier action but instead adopted a "'wait and see' attitude, in the hope that the first action by another plaintiff will result in a favorable judgment." *Parklane Hosiery*, 439 U.S. at 330. Quite the contrary, Discover attempted to intervene in *Visa/MasterCard*, but its motion was denied on