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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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

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[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."
>
> 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

grounds that included the fact that Discover could seek relief in a private action. (Decl. Ex. 41 (*Visa/MasterCard*, Op. & Order, J. Jones, Aug. 17, 2000) at 2.)

Second, this is not a case where Defendants had no incentive to litigate the prior case vigorously because the remedy was insignificant or future lawsuits were unforeseeable. *See Parklane Hosiery*, 439 U.S. at 330. Defendants not only faced the possibility of business-altering injunctive relief in the DOJ Case, but also follow-on damages suits, as they predicted to the Second Circuit.[20] *Compare Remington Rand Corp. v. Amsterdam-Rotterdam Bank, N.V.*, 68 F.3d 1478, 1486-87 (2d Cir. 1995) (when, at time of prior suit, party had no funds to pay any award entered, and future litigation was unforeseeable, party had no incentive to litigate, and applying collateral estoppel would be unfair).

The interest of Discover (and American Express) in the outcome of the previous case was readily apparent when that case was being litigated. As noted above, at every juncture in that case, from the filing of the Complaint to the denial of Defendants' petitions for *certiorari*, *Visa/MasterCard* principally concerned whether the exclusionary rules harmed competition by harming Discover and American Express. Both Discover and American Express witnesses were subpoenaed by Defendants for depositions and testified at trial, both Discover and American Express submitted amicus briefs, and finally, as discussed above, Discover sought to intervene. Visa and MasterCard argued throughout the case that whether Discover and American Express were harmed by the exclusionary rules was the key question in determining harm to competition. The apparent interest of Discover (and American Express) in the prior case and the focus in that

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[20] Visa International admitted on appeal to the Second Circuit that a finding of liability was likely to attract private lawsuits: "The relief that we are asking this Court for is to vacate the Court's finding of liability. Such a finding of liability, just like the injunction, attracts lawyers who like to bring lawsuits against companies which they perceive, for good reason or not, to be able to respond to their claims. And that's an important issue, a very important issue." (Decl. Ex. 55 (*Visa/MasterCard*, Second Cir. Hr'g Tr., May 8, 2003) at. 28-29.)

case on harm to these competing networks gave Visa and MasterCard every conceivable incentive to vigorously defend themselves against the Government's claims.

Third, this is not a case where the Court's ruling in *Visa/MasterCard* is inconsistent with any prior judgment. *See Parklane Hosiery*, 439 U.S. at 330. Although Visa and MasterCard have previously argued to this Court that the ruling in *SCFC ILC, Inc. v. Visa U.S.A., Inc.*, 36 F.3d 958 (10th Cir. 1994) ("*MountainWest*") was inconsistent with the holding of the DOJ Case, that is false. *MountainWest*, unlike *Visa/MasterCard*, did not touch upon the network services market, and it involved a different rule — Visa's By-law 2.06 — and a different theory of competitive harm, namely, Discover's inability to join Visa to issue Visa cards. Although Visa and MasterCard have continually resorted to specious arguments that *MountainWest* somehow involved the same issues that are raised here, the Court's ruling to the contrary on Defendants' motions to dismiss is the law of the case and controls here. (Decl. Ex. 65 (Hr'g Tr., Apr. 14, 2005) at 6 ("I think [*MountainWest*] just involved different transactions, markets and anticompetitive effects. Therefore, it can have no preclusive effect on this litigation.").)

Finally, this is not a case where the current forum provides additional procedural opportunities unavailable in the original case. *See Parklane Hosiery*, 439 U.S. at 330-31. Rather, this may be the clearest example of two courts providing exactly the same procedural opportunities, as the same court is handling both cases. No procedures will differ between them.

6. Issue Preclusion Will Promote Judicial Economy and Reliance.

Allowing Defendants to relitigate their liability under § 1 for enacting and enforcing the exclusionary rules or any of the facts or issues that were necessary to the Court's ruling on that claim would contravene the vital policies behind collateral estoppel: judicial economy and reliance on the judicial system. *See Parklane Hosiery*, 439 U.S. at 326 (a purpose

of collateral estoppel is to "promot[e] judicial economy by preventing needless litigation"); *Montana v. United States*, 440 U.S. at 153-54 (collateral estoppel "fosters reliance on judicial action by minimizing the possibility of inconsistent decisions"). Those policies cannot be disregarded lightly.

First, as demonstrated above, relitigating Defendants' liability and the issues decided in the DOJ Case would result in the "needless litigation" that the Supreme Court intended offensive collateral estoppel to avoid. *Parklane Hosiery*, 439 U.S. at 326. If collateral estoppel is granted, the jury and this Court will not have to address these already litigated issues, and the time and resources that would otherwise be spent litigating them will be conserved. Moreover, issue preclusion here will significantly streamline Discover's claim concerning the exclusionary rules by limiting the fact and expert testimony on that claim to issues concerning Discover's damages. Applying collateral estoppel therefore "will promote the public interest by preventing needless and repetitious litigation and by conserving the resources of the Court and the parties." *GAF Corp.*, 519 F. Supp. at 1218 (applying collateral estoppel to remove elements of §§ 1 and 2 antitrust claims from dispute after discovery stage).

Second, allowing relitigation here creates the specter of inconsistent judgments or findings, which is another ill that collateral estoppel is meant to avoid. *See Montana v. United States*, 440 U.S. at 153-54 (collateral estoppel "fosters reliance on judicial action by minimizing the possibility of inconsistent decisions"); *S.E.C. v. Blackwell*, 477 F. Supp. 2d 891, 902 (S.D. Ohio 2007) ("Another strong reason to apply collateral estoppel is to prevent inconsistent verdicts..."). The Second Circuit's subsequent reliance on *Visa/MasterCard* reinforces the concerns raised by creating the risk, however remote, of an inconsistent adjudication in this case. Notably, in *Paycom Billing Services, Inc. v. MasterCard International, Inc.*, 467 F.3d 283 (2d

Cir. 2006), the Second Circuit reaffirmed the finding in *Visa/MasterCard* that the exclusionary rules directly harmed Discover: "Competing payment-card network service providers like Discover and American Express were the entities directly harmed by the CPP." *Id.* at 293. In situations such as this one, our judicial system chooses to promote consistency of decisions through collateral estoppel. *See, e.g., Benjamin v. Traffic Exec. Ass'n E. R.R.*, 869 F.2d 107, 110 (2d Cir. 1989) (when arbitration panel already decided issue of whether plaintiff-employees were "rate bureau employees" under first count, not applying collateral estoppel to remaining counts would leave open the possibility of a different result, and "[s]uch a conflict would be confusing and irreconcilable.")

Discover has done its utmost to narrow the issues in dispute in this litigation, including dropping its claims based on Defendants' "no surcharge" policies, violations of the California Unfair Competition Law, and "Honor All Cards" Rules at the outset of the litigation.[21] Granting this motion for collateral estoppel is another way for the Court to streamline this case even further, thus easing the burdens on all involved and moving toward a more timely and fair resolution.

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[21] The fact that Discover asserts certain claims based on the exclusionary rules for which Discover is not moving for summary judgment by collateral estoppel should not affect the conclusion that granting this motion will streamline this case and yield considerable efficiency benefits. In this regard, certain of these claims — Claims Three and Four of the Second Amended Complaint asserting monopolization and attempted monopolization against Visa in the credit card network services — do not lead to additional damages if the exclusionary rules are found illegal under Claim One. Discover, therefore, would be in a position to dismiss such potentially duplicative claims if collateral estoppel is granted on Claim One. Indeed, the ability to simplify the case and eliminate duplicative legal theories (for example, Discover would not need to challenge the exclusionary rules under § 2 to cover the contingency of not proving a conspiracy under § 1) actually illustrates how granting collateral estoppel can improve the efficiency of this case.

C. Application of Collateral Estoppel Demonstrates That No Issue of Material Fact Remains as to Defendants' Liability on Discover's Claim One.

Collateral estoppel is warranted on all elements of Claim One — Discover's § 1 claim based on the exclusionary rules. There is thus no dispute as to Defendants' liability under § 1 of the Sherman Act, and Discover is entitled to summary judgment on this claim.[22]

1. The Exclusionary Rules Were Enacted via Parallel Intra-association Conspiracies.

Discover is entitled to collateral estoppel on *Visa/MasterCard*'s finding that Visa and MasterCard each entered into an intra-association conspiracy with its member banks to maintain and enforce the exclusionary rules and on all facts necessary to that finding. (*See* Attach. A.) Therefore, Defendants cannot dispute the existence of the conspiracies. Specifically, this Court found that "the direct purchasers of network services (the issuers) restrict competition among themselves by ensuring that so long as all of them cannot issue American Express or Discover cards, none of them will gain the competitive advantage of doing so." (SOUF ¶ 33 (*Visa/MasterCard*, 163 F. Supp. 2d at 329-30).) These findings regarding Visa's and MasterCard's intra-association conspiracies were necessary to the judgment in *Visa/MasterCard*, were fully and fairly litigated, and are the precise conspiracies at issue in Discover's § 1 claims. Defendants should therefore be precluded from relitigating these findings. Once collateral estoppel is properly applied, there can be no material issue of fact concerning the intra-association conspiracy that each association entered with its respective member banks.

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[22] Courts will grant summary judgment on the basis of collateral estoppel when all material issues of fact were resolved in a prior proceeding. *See Mishkin v. Ageloff*, 299 F. Supp. 2d 249, 252 (S.D.N.Y. 2004) ("Summary judgment is appropriate under the doctrine of collateral estoppel (issue preclusion) when all the material issues of fact in a pending action have been actually and necessarily resolved in a prior proceeding."); *Boesky*, 848 F. Supp. at 1122 (granting summary judgment as to defendant's liability under Rule 10b-5 when collateral estoppel applies and "all findings required to establish liability" on plaintiff's claims were established in prior case).

2. There Are Markets for General Purpose Credit and Charge Cards and General Purpose Credit and Charge Card Network Services in the United States.

Discover is entitled to collateral estoppel on the relevant markets found in *Visa/MasterCard* and on all facts essential to those rulings. (*See* Attach. A.) Defendants, therefore, cannot dispute that general purpose credit and charge cards and general purpose credit and charge card network services constitute relevant product markets in the United States.

This Court found a relevant market for general purpose credit and charge cards, based, *inter alia*, on the fact that neither merchants, consumers, issuers, nor Defendants viewed debit cards, cash, or checks as substitutes for credit cards. (SOUF ¶¶ 36-44 (*Visa/MasterCard*, 163 F. Supp. 2d at 335-338).) Likewise, this Court found a relevant market for general purpose credit and charge card network services, based, *inter alia*, on its findings that there was no good substitute for network services, and that merchants do not exhibit price sensitivity at the network level. (SOUF ¶¶ 45-47 (*Visa/MasterCard*, 163 F. Supp. 2d at 338-39).) This Court further concluded that the geographic dimension of these markets was the United States, based, *inter alia*, on the finding that the exclusionary rules applied to conduct and entities within the United States. (SOUF ¶¶ 48-49 (*Visa/MasterCard*, 163 F. Supp. 2d at 339-40).) The Second Circuit affirmed all of these findings. (SOUF ¶¶ 36, 45 (*Visa/MasterCard*, 344 F.3d at 238-39).).

Defendants had a full and fair opportunity to present arguments, evidence, and expert testimony on market definition in the prior case, and thus they cannot credibly contend that these issues were not fully vetted. *Visa/MasterCard*, 163 F. Supp. 2d at 335-40 (rejecting Defendants' arguments on market definition). Also, because this Court "first determine[d] the relevant product market" before analyzing the anticompetitive conduct at issue, *Visa/MasterCard*, 163 F. Supp. 2d at 334-35, the findings regarding market definition were

necessary to the ultimate ruling.[23] Defendants therefore should be precluded from relitigating the Court's findings on market definition throughout the entire relevant time period. Consequently, the market definitions found by this Court in *Visa/MasterCard* apply here. *See GAF Corp.*, 519 F. Supp. at 1216 (where defendant had full and fair opportunity to litigate market definition in prior case, collateral estoppel precludes relitigation, and partial summary judgment on that issue is proper).

3. Visa and MasterCard Had Substantial Market Power in the Market for General Purpose Credit and Charge Card Network Services.

Discover is entitled to collateral estoppel on the existence of Visa's and MasterCard's market power in the network services market and on all facts essential to that ruling. (*See* Attach. A.) Defendants therefore cannot dispute that Visa and MasterCard each had market power in the market for general purpose credit and charge card network services.

Market power is "the 'power to control prices or exclude competition.'" *Visa/MasterCard*, 163 F. Supp. 2d at 340. Several findings were plainly necessary to the conclusion that Visa and MasterCard both possessed market power. These include direct evidence of Visa's and MasterCard's ability to exclude competition from their only competitors in the relevant network market, Discover and American Express. (SOUF ¶ 62

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[23] Discover need not prove market definition or Visa's and MasterCard's market power in the general purpose card network services market to demonstrate their violation of § 1 of the Sherman Act. *See Federal Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986) ("Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as a reduction of output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'") (quoting 7 Phillip Areeda, Antitrust Law ¶ 1511 at 429 (1986)); *Todd v. Exxon Corp.*, 275 F.3d 191, 206-07 (2d Cir. 2001) ("'If a plaintiff can show an actual adverse effect on competition, such as reduced output...we do not require a further showing of market power.'") (quoting *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 129 (2d Cir. 1995)). There is no question that Defendants' exclusionary rules caused "actual detrimental effects on competition," as that was clearly established in *Visa/MasterCard*, (*see* Part C(4) *infra*), so Discover need not prove market definition or Visa's and MasterCard's substantial market power to establish liability. Yet, because this Court's Final Judgment "entailed a finding" of market definition and market power, those findings were "necessary" for collateral estoppel purposes. *Central Hudson*, 56 F.3d at 369-70.

(*Visa/MasterCard*, 163 F. Supp. 2d at 341; *Visa/MasterCard*, 344 F.3d at 240 ("Visa U.S.A. and MasterCard have demonstrated their power in the network services market by effectively precluding their largest competitor from successfully soliciting any bank as a customer for its network services brand.")).) Further, this Court concluded that Visa and MasterCard had market power because they could (i) raise prices to merchants without losing merchant customers, (ii) price discriminate, and (iii) maintain large shares in a highly concentrated market with significant barriers to entry. (SOUF ¶¶ 51-54 (*Visa/MasterCard*, 163 F. Supp. 2d at 340-42).) The Court thus held that Visa and MasterCard each had market power in the general purpose credit and charge card network services market. (SOUF ¶ 50 (*Visa/MasterCard*, 163 F. Supp. 2d at 340-42 ("[E]ven a cursory examination of the relevant characteristics of the network market reveals that whether considered jointly or separately, the defendants have market power.")).) The Second Circuit affirmed those findings. (SOUF ¶ 50 (*Visa/MasterCard*, 344 F.3d at 239-40).)

Discover's Claim One raises the identical question of Visa's and MasterCard's market power that was decided in *Visa/MasterCard*. This issue was plainly necessary to the ruling in *Visa/MasterCard*, and Visa and MasterCard fully litigated it in the prior case and lost. *Visa/MasterCard*, 163 F. Supp. 2d at 340-42 (discussing and rejecting Defendants' arguments concerning market power). Defendants therefore should be precluded from relitigating these findings. Consequently, it cannot be disputed that Visa and MasterCard had substantial market power in the network services market. *See GAF Corp.*, 519 F. Supp. at 1216 (where defendant had full and fair opportunity to litigate issue of monopoly power in prior litigation, collateral estoppel precludes defendant from relitigating that issue, and summary judgment is proper).

4. The Exclusionary Rules Harmed Competition by Harming Discover.

Discover is entitled to collateral estoppel on this Court's prior ruling that the exclusionary rules harmed competition by, among other things, foreclosing Discover from offering network services to banks and on all facts essential to that ruling. (*See* Attach. A.) Where, as here, the market is highly concentrated, with few players and high barriers to entry, courts often conclude that harm to competitors is tantamount to harm to competition. *See Les Shockley Racing, Inc. v. National Hot Rod Ass'n*, 884 F.2d 504, 508-09 (9th Cir. 1989) (noting that "convergence of injury to a market competitor and injury to competition is possible when the relevant market is both narrow and discrete and the market participants are few" and market conditions are unreasonably disrupted); *see also MCI Commc'ns. Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir. 1983) (upholding jury verdicts of violations of § 2 of Sherman Act based on refusal to deal with competitor in highly concentrated market). Here, this Court found both that competition was harmed and that this injury to consumer welfare flowed from harm to the only competitors to Visa and MasterCard in the relevant market — Discover and American Express.

a. Harm to Competition

The centerpiece of this Court's holding in the DOJ Case was that the exclusionary rules harmed competition and consumers by reducing output over the Discover and American Express networks, thereby denying consumers the ability to choose a bank-issued Discover or American Express-branded card.[24] (SOUF ¶¶ 55, 63 (*Visa/MasterCard*, 163 F. Supp. 2d at 329,

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[24] To demonstrate a violation of § 1, a plaintiff must show that the conduct at issue harmed competition. *See Visa/MasterCard*, 163 F. Supp. 2d at 343; *Eskofot A/S v. E.I. Du Pont De Nemours & Co.*, 872 F. Supp. 81, 90-91 (S.D.N.Y. 1995); *Clorox Co. v. Winthrop*, 836 F. Supp. 983, 988 (E.D.N.Y. 1993). "Any agreement is unlawful (under the rule of reason) if its restrictive effect on competition is not reasonably necessary to achieve a 'legitimate procompetitive objective, *i.e.*, an interest in serving consumers through lowering costs, improving products, etc.'" *Visa/MasterCard*, 163 F. Supp. 2d at 343 (quoting *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 691 (1978)).

379 (describing harm to competition, consumers, and Discover)).) The Second Circuit affirmed these findings. (SOUF ¶ 55 (*Visa/MasterCard*, 344 F.3d at 240).)

The identical issues of harm to competition arise in this case, and these findings were vigorously litigated in the DOJ Case. *See Visa/MasterCard*, 163 F. Supp. 2d at 379 (rejecting Defendants' argument that "American Express and Discover have the same opportunities to market cards to consumers through the mail and over the Internet," and stating that "the record demonstrates that the exclusionary rules have had an adverse effect on both the issuing and the network market"). By definition, they were a necessary part of the decision reached: without harm to competition, there could be no violation of § 1. Defendants should therefore be precluded from relitigating the issue of harm to competition and the key findings underlying that conclusion, so there can be no dispute on this issue here.

b. Harm to Discover

Each of the reasons enunciated by this Court for why the exclusionary rules harmed competition depended on a finding that the rules foreclosed Discover and American Express. Indeed, the Court's finding of harm to competition was inextricably linked to a litany of facts demonstrating the ways in which Discover was specifically injured by Defendants' exclusionary rules.[25] As described above, evidence and argument concerning the harm the exclusionary rules inflicted on Discover were consistently advanced throughout the prior

[25] Discover does not contend that the amount of damages it suffered as a result of the exclusionary rules was established in the DOJ Case. That is left to be decided by the jury. Because fact of injury is distinct from the amount of damages, it is entirely appropriate for the Court to grant summary judgment on liability here, without determining the amount of damages. *See Zenith Radio Corp. v. Hazeltine Res. Inc.*, 395 U.S. 100, 114 n.9 (1969) ("[Petitioner's] burden of proving the fact of damage under s 4 of the Clayton Act is satisfied by its proof of some damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage."); *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931) ("[T]here is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount."); *see also* Fed. R. Civ. P. 56(d)(2).

litigation. (*See, e.g.*, Decl. Ex. 6 (DOJ Compl.) ¶ 161 ("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...").) *Visa/MasterCard*, 163 F. Supp. 2d at 379 ("[P]laintiff contends that Visa By-Law 2.10(e) and MasterCard's Competitive Programs Policy ('CPP') have had an adverse effect on the market by excluding American Express and Discover from offering network services to bank issuers, resulting in decreased network-level competition and fewer and less varied credit card products to the consumer.").

Defendants themselves conceded that the central question in the DOJ Case was whether the exclusionary rules harmed competition by foreclosing Discover and American Express. They advanced that position throughout their summary judgment briefs and argument, proposed findings of fact and conclusions of law, and appellate briefs. (*See, e.g.*, Decl. Ex. 14 (*Visa/MasterCard*, Hr'g Tr., Jun. 8, 2000) at 57 (Visa U.S.A.'s lawyer claimed that "***the decisive fact in the entire government's case***" was whether they could show that Discover and American Express were able to compete) (emphasis added).)

Faced with these arguments, this Court relied almost exclusively on the total exclusion of Visa's and MasterCard's only two competitors — Discover and American Express — from the network services market to find that the exclusionary rules harmed competition. As the Court stated, By-law 2.10(e) and the CPP "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] (3) effectively foreclosing...Discover from competing to issue off-line debit cards...." (SOUF ¶ 55 (*Visa/MasterCard*, 163 F. Supp. 2d at 329); SOUF ¶ 64 (*Visa/MasterCard*, 163 F. Supp. 2d at 382 ("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.")).)

The Second Circuit emphatically affirmed the linkage between injury to competition and injury to Discover when it stated that: "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).) Even more precisely, it stated, "***[w]ithout doubt the exclusionary rules in question harm competitors.***" (SOUF ¶ 65 (*Visa/MasterCard*, 344 F.3d at 243 (emphasis added)).)[26]

Defendants therefore actually raised and litigated the fact of injury to Discover from the exclusionary rules (as distinct from damages), and the decision in *Visa/MasterCard* show that finding harm to Discover was necessary and essential to the judgment that the exclusionary rules harmed competition. As antitrust injury to Discover is an element of Discover's § 1 claim, the identical issue is presented here. The issue has already been fully

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[26] As noted above, the Second Circuit has re-confirmed its holding that MasterCard's CPP harmed Discover. In *Paycom Billing Services, Inc. v. MasterCard International, Inc.*, 467 F.3d 283 (2d Cir. 2006), Paycom, a merchant selling access to password-protected websites, alleged that the CPP caused it antitrust injury. Although the Second Circuit disagreed that the CPP harmed Paycom, it explicitly re-confirmed that the CPP harmed Discover:

> Competing payment-card network service providers like Discover and American Express were the entities directly harmed by the CPP. They were prevented from using MasterCard member banks to issue their payment-cards, thereby losing the substantial business that would have been enjoyed with a larger issuance and transaction volume. Any injuries suffered by Paycom from the CPP were derived from the reduced issuance/transaction volumes of Discover and American Express payment-cards. The CPP did not prevent Paycom from accepting Discover or American Express cards as payment options, and elimination of the CPP would have benefited [*sic*] Paycom only through the increased use of Discover and American Express cards. Consequently, any injury suffered by Paycom was indirect and flowed from the injuries suffered by Discover and American Express.

Id. at 293.

litigated, so Defendants should not be permitted to relitigate it, and antitrust injury related to all of Discover's claimed damages under Claim One is thus established.[27]

Settled case law in this District holds that facts or issues that were integral and necessary to the ultimate ruling in the previous case can be given collateral estoppel effect in a subsequent action, even when those issues were not technically an element of the claim under consideration in the first case. In *In re Ivan Boesky Securities Litigation*, private shareholders brought an action for violations of § 10(b) of the Securities Exchange Act of 1934 and other claims. On a motion for summary judgment, the plaintiff claimed that offensive collateral estoppel applied to preclude relitigation of the defendant's liability based on a prior civil suit by the U.S. Securities and Exchange Commission ("SEC") against the defendant, in which the court held and the Second Circuit affirmed that the defendant violated the federal securities laws. *See Boesky*, 848 F. Supp. at 1121-22.

The court granted summary judgment on liability on the § 10(b) claim. *See id.* at 1126. The court did so even though, in the private action, the plaintiff had to prove two elements of its claim — reliance and loss causation — in addition to the three required elements of the SEC's claim. *See id.* at 1124. To determine that the two additional elements were already established, the court looked to the record in the prior case and concluded that the findings relating to reliance and loss causation were necessary and essential to the judgment in the SEC's favor, such that collateral estoppel established these elements in the private case. *See id.* at 1124-25. In particular, the findings regarding reliance and loss causation were "essential to the

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[27] Discover is seeking three categories of damages: (1) damages to the business from lost profits on third-party credit card issuing volumes; (2) damages to the business from lost profits on third-party signature debit card issuing volumes, and (3) damages to the proprietary issuing business due to inferior merchant acceptance. Even with antitrust injury for these damages established, the quantification of these damages, of course, remains an issue for trial.

coherence of the SEC's argument" and "integral to the Court's analysis" in the prior case, such that summary judgment was due to the plaintiff. *See id.* at 1125-26; *see also Mishkin*, 299 F. Supp. 2d at 253 (collateral estoppel establishes all elements of trustee's suit under § 10(b), including element of loss causation, based on prior criminal convictions of and guilty pleas by defendants).

Discover's case is on the same footing. While Discover's antitrust injury was technically not part of the DOJ's case, analysis of the evidence, arguments, and findings in the prior case shows that the DOJ ***did prove*** and the Court ***did find*** that Discover was harmed. The Court's opinion shows that the findings on harm to Discover were "essential to the coherence" of and "integral to the Court's analysis" as to whether competition was harmed and merit preclusive effect here. *Boesky*, 848 F. Supp. at 1125.

5. There Was No Legitimate Business Justification for the Exclusionary Rules.

Discover is entitled to collateral estoppel on the absence of any procompetitive justification for Defendants' exclusionary rules and on all facts essential to that ruling. (*See* Attach. A.) Defendants therefore cannot dispute that there was no legitimate business justification for the exclusionary rules. In *Visa/MasterCard*, this Court rejected Defendants' proffered justifications of ensuring loyalty and preventing "free-riding." *See Visa/MasterCard*, 163 F. Supp. 2d at 399-406. Instead, the Court found that the "contemporaneous evidence" showed that defendants' motives were to restrict competition from American Express and Discover. (SOUF ¶ 73 (*Visa/MasterCard*, 163 F. Supp. 2d at 400).) The Second Circuit explicitly affirmed these findings. (SOUF ¶ 71 (*Visa/MasterCard*, 344 F.3d at 243).) The identical issue of whether a pro-competitive justification exists is raised here. This issue was actually litigated in the prior case and was a necessary and essential part of the Court's judgment.

As Defendants should be precluded from relitigating this issue and the key findings underlying it, it is undisputed that Defendants had no legitimate business justification for the exclusionary rules.

6. Visa International Is Also Liable.

Discover is entitled to collateral estoppel on Visa International's liability and on all facts essential to that ruling. (*See* Attach. A.) Defendants therefore cannot dispute that Visa International is liable on Discover's Claim One. The Court already found that Visa International was "a necessary defendant as to Count Two of the [Department of Justice] Complaint." (SOUF ¶ 77 (*Visa/MasterCard*, 163 F. Supp. 2d at 406).) The Second Circuit affirmed Visa International's liability. (SOUF ¶ 77 (*Visa/MasterCard*, 344 F.3d at 244).) Visa International vigorously litigated its liability and the findings on which its liability was based, but the Court necessarily ruled against it in order to hold it liable. (SOUF ¶ 77 (*Visa/MasterCard*, 163 F. Supp. 2d at 406 (rejecting Visa International's argument that it was not an appropriate defendant)).) It is therefore undisputed that Visa International should be held liable here as well.

D. Defendants Cannot Dispute That Their Violation of Section One Continued Until the Exclusionary Rules Were Repealed.

As demonstrated above, there is ample reason to preclude Defendants from relitigating their liability in the current case under the doctrine of collateral estoppel. Even if the Court refuses to give preclusive effect to the rulings in the DOJ Case during the period after the record closed in *Visa/MasterCard*, however, there is no genuine issue of material fact as to Defendants' ongoing violation of § 1 until they repealed the exclusionary rules. Quite the contrary, because they successfully maintained the "*status quo*" via a stay of the Final Judgment, Visa and MasterCard cannot credibly dispute that no fact material to the Court's liability holding in *Visa/MasterCard* changed between 2000 and October 2004. During that time, Visa and

MasterCard continued to (i) maintain their parallel intra-association conspiracies, (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, because this Court's Final Judgment was stayed, 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. Call it collateral estoppel or summary judgment, the result is the same: Discover is entitled to summary judgment on its First Claim for Relief for the entire period up to October 2004.

II. APPLICATION OF COLLATERAL ESTOPPEL TO ELIMINATE FACTS FROM DISPUTE IS WARRANTED.

The Court's holding in *Visa/MasterCard* establishes Defendants' liability for Discover's Claim One in the current case. Whether or not the Court determines Defendants' liability now, however, Discover respectfully requests an order precluding Defendants from relitigating the necessary findings already determined in the DOJ Case and establishing those findings in this action. Application of collateral estoppel demonstrates that there is no dispute as to any of the elements of Discover's § 1 claim based on the exclusionary rules or any of the findings set forth on Attachment A to this memorandum.

This Court has the power to enter such an order pursuant to the policies embodied in the Federal Rules of Civil Procedure. First, under Rule 16(c), the Court has the power to narrow the issues remaining for trial, as will happen if certain findings are established now. *See* Fed. R. Civ. P. 16(c)(2) (allowing the court to consider and take action on "formulating and simplifying the issues" and "avoiding unnecessary proof and cumulative evidence"). Second,

under Rule 56(d), the Court "should, to the extent practicable, determine what material facts are not genuinely at issue" and "issue an order specifying what facts — including items of damages or other relief — are not genuinely at issue." Fed. R. Civ. P. 56(d)(1). This type of relief is just what Discover requests. Finally, Rule 1's policy of securing the "just, speedy, and inexpensive determination of every action" will be effected by removing these issues from dispute here. Fed. R. Civ. P. 1. No matter what procedural mechanism is referenced, the result is the same: collateral estoppel precludes Defendants from relitigating those findings already determined in *Visa/MasterCard*, and establishing them here will promote efficiency, conserve this Court's and the parties' resources, and maintain the consistency of judicial determinations.[28]

As demonstrated above, this is a prime case for collateral estoppel. Discover now brings a claim based on the same anticompetitive conduct, against the same Defendants, and pursuant to the same rule of law under which the DOJ sued in *Visa/MasterCard*. The issues are identical, were actually litigated and decided in the prior case, and were necessary to this Court's judgment of liability against Defendants. Further, Defendants had a full and fair opportunity to litigate all issues in the prior case, no fairness concerns weigh against application of collateral estoppel, and policies of efficiency and judicial reliance support issue preclusion. This is true for every single element that Discover must prove in order to demonstrate Defendants' violation of § 1 in this private litigation, and the Court should therefore enter an order establishing those elements in this matter. *See GAF*, 519 F. Supp. at 1217-18 (applying offensive collateral estoppel to preclude relitigation of elements of §§ 1 and 2 claims).

The Court should also enter an order establishing in this case those key findings from the DOJ Case listed on Attachment A to this Memorandum. These issues were all

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[28] The Court's request to receive dispositive motions, "including with respect to collateral estoppel," provides further procedural support for Discover's request. (Decl. Ex. 62 (Order, Apr. 30, 2007).)

exhaustively litigated in the prior case, and, as the support for this Court's conclusions on the elements of the antitrust violation, they were necessary to its judgment. Each and every one, as alternative grounds for its decisions, is a "good estoppel." *Gelb*, 798 F.2d at 45. As to each finding, therefore, collateral estoppel directs that that issue is undisputed in the current case. Such an Order is also particularly warranted here because of the economy and efficiency it will impose on the remainder of this litigation. Applying collateral estoppel allows the Court to simplify the case by establishing key findings, thereby reducing the burdens on all involved of litigating the issues yet again. *See* Fed. R. Civ. P. 1 & 16(c); *see also In re Bulk Oil (USA), Inc.*, No. 89-B-13380, 93 Civ. 4492(PKL), 93 Civ. 4494(PKL), 2007 WL 1121739, at *11 n.10 (S.D.N.Y., Apr. 11, 2007) (noting advisory committee statement that "'[t]he partial summary judgment is merely a pretrial adjudication that certain issues shall be deemed established for the trial of the case. This adjudication...serves the purpose of speeding up litigation by eliminating before trial matters wherein there is no genuine issue of fact'").

CONCLUSION

For the reasons stated above, Discover respectfully requests that this Court 1) grant summary judgment as to Defendants' liability on Discover's Claim One and 2) issue an order precluding Defendants from relitigating and establishing in this case the elements of Discover's Claim One and every key finding set forth on Attachment A.

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ATTACHMENT A

FINDINGS AND CONCLUSIONS IN *UNITED STATES V. VISA/MASTERCARD* AS TO WHICH DISCOVER IS SEEKING COLLATERAL ESTOPPEL

I. Visa and MasterCard Engaged In A Combination and Conspiracy.

1. Visa U.S.A.'s By-law 2.10(e) and MasterCard's Competitive Programs Policy ("CPP") have enabled "the direct purchasers of network services (the issuers) [to] restrict competition among themselves by ensuring that so long as all of them cannot issue American Express or Discover cards, none of them will gain the competitive advantage of doing so." *United States v. Visa U.S.A. Inc., et al.*, 163 F. Supp. 2d 322, 329-30 (S.D.N.Y. 2001), *aff'd*, 344 F. 3d 229, 242 (2d Cir. 2003) ("Visa U.S.A. and MasterCard, however, are not single entities; they are consortiums of competitors. They are owned and effectively operated by some 20,000 banks, which compete with one another in the issuance of payments cards and the acquiring of merchants' transactions. 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."), *cert. denied*, 543 U.S. 811 (2004); *see also* 163 F. Supp. 2d at 400.

II. General Purpose Credit and Charge Cards and General Purpose Credit and Charge Card Network Services in the United States Are Markets.

2. "[T]he two relevant product markets are (1) the market for credit and charge cards issued under these brand names, and (2) the market for the network services that support the use of credit and charge cards." 163 F. Supp. 2d at 331; *see also id.* at 333, 335, 338; *aff'd*, 344 F.3d at 238-39 ("[T]his case involves two interrelated, but separate, product markets: (1)

what the court called the general purpose card market, consisting of the market for charge cards and credit cards, and (2) the network services market for general purpose cards.").

A. General Purpose Cards Is A Relevant Market.

3. "[B]ecause card consumers have very little sensitivity to price increases in the card market and because neither consumers nor the defendants view debit, cash and checks as reasonably interchangeable with credit cards, general purpose cards constitute a product market." 163 F. Supp. 2d at 338; *aff'd,* 344 F.3d at 239 ("After hearing substantial expert testimony, the district court found as a matter of fact that other forms of payment-such as cash, checks, debit cards, and proprietary cards (e.g. the Sears or Macy's cards)-are not considered by most consumers to be reasonable substitutes for general purpose credit or charge cards. As the government's expert witness explained, based on empirical analysis of consumer preferences, if prices for general purpose payment cards were to rise significantly, cardholders would likely pay the increased fees, rather than abandon their cards in favor of other forms of payment. Thus, general purpose payment cards constitute a distinct market, separate from the market for such other payment alternatives. We find no reason to doubt the court's conclusion.") (citations omitted).

4. "Due to their relative lack of merchant acceptance, their largely regional scope, and their lack of a credit function, on-line debit cards, which require a pin number, are not adequate substitutes for general purpose cards." 163 F. Supp. 2d at 336-37.

5. "The fact that Visa and MasterCard are suppliers of both debit and general purpose card services over their networks is irrelevant to product market definition." 163 F. Supp. 2d at 408.

6. "[D]efendants' member issuers do not view cash or checks as 'competitive' with general purpose cards." 163 F. Supp. 2d at 336 (citations omitted).

7. "[I]t is highly unlikely that there would be enough cardholder switching away from credit and charge cards to make any [general purpose card] price increase unprofitable for a hypothetical monopolist of general purpose card products." 163 F. Supp. 2d at 336.

8. "Although debit cards are similar to credit and charge cards in that they may be used at unrelated merchants, the fact that upon use they promptly access money directly from a cardholder's checking or deposit account strongly differentiates them from credit and charge cards." 163 F. Supp. 2d at 331 (citations omitted).

9. "In setting interchange rates paid by merchants to issuers (through the merchants' acquiring banks), both Visa and MasterCard consider, and have considered, primarily each other's interchange rates, and secondarily the merchant discount rates charged by Discover and American Express. The costs to merchants of accepting cash, checks, debit, or proprietary cards were not a factor." 163 F. Supp. 2d at 337 (citations omitted).

10. "[G]eneral purpose card networks also track each other's merchant charges. And when tracking 'competitors,' defendants look to the major general purpose card networks, not to other payment methods." 163 F. Supp. 2d at 337 (citations omitted).

B. General Purpose Card Network Services Is A Relevant Market.

11. "[G]eneral purpose card network services also constitute a product market because merchant consumers exhibit little price sensitivity and the networks provide core services that cannot reasonably be replaced by other sources." 163 F. Supp. 2d at 338; *see also id.* at 336, 338,

aff'd, 344 F.3d at 239 ("The district court found, on the basis of expert testimony, that there are no products reasonably interchangeable, in the eyes of issuers or merchants, with the network services provided by the four major brands. This was a reasonable finding: (1) Network-level costs are so high that banks and merchants cannot provide these services for themselves, and (2) issuance and acceptance of credit and charge cards is so profitable (and network service fees so negligible in comparison) that even a large increase in network fees would not provide a rational financial incentive to abandon the business of issuing or accepting payment cards.") (citations omitted).

12. "[T]here would be no loss to network transaction volume in the face of even a 10% increase in price for network services-both because banks cannot provide the core system services themselves and it is implausible that they would exit the profitable credit and charge card market in response to such a small increase in price." 163 F. Supp. 2d at 339.

13. This case "involves the U.S. credit and charge card industry, which has only four significant network services competitors: American Express, a publicly owned corporation; Discover, a corporation owned by Morgan Stanley Dean Witter; and the defendants Visa and MasterCard, which are joint ventures, each owned by associations of thousands of banks." 163 F. Supp. 2d at 327; *see also id.* at 339 ("Moreover, Visa and MasterCard do not dispute that they participate in the general purpose card network services market, or that in that market they compete against American Express and Discover as networks.").

C. The United States Is the Geographic Scope of the Relevant Markets.

14. "The United States is the appropriate geographic scope for the general purpose card product market and the general purpose card core systems services market for several reasons." 163 F. Supp. 2d at 339-40 (citations omitted).

15. "[T]he exclusionary rules at issue are specific to the United States." 163 F. Supp. 2d at 340.

III. Defendants Have Joint and Separate Market Power in the Market for General Purpose Credit and Charge Card Network Services.

16. "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...." 163 F. Supp. 2d at 342, *aff'd*, 344 F.3d at 239-40 ("We agree with the district court's finding that Visa U.S.A. and MasterCard, jointly and separately, have power within the market for network services.... In addition, the court inferred market power from the defendants' large shares of a highly concentrated market: In 1999, Visa U.S.A. members accounted for approximately 47% of the dollar volume of credit and charge card transactions, while MasterCard members accounted for approximately 26%. (American Express accounted for 20%; Discover, for 6%. The evidence relied on by the district court was sufficient to sustain a finding of market power.") (citations omitted).

17. "The difficulties associated with entering the network market are exemplified by the fact that no company has entered since Discover did so in 1985." 163 F. Supp. 2d at 342.

A. Merchants Exhibit Little Price Sensitivity.

18. Merchants "cannot refuse to accept Visa and MasterCard even 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." 163 F. Supp. 2d at 340 (citations

omitted); *see also id.* at 337, *aff'd*, 344 F.3d at 240 ("Indeed, despite recent increases in both networks' interchange fees, no merchant had discontinued acceptance of their cards.") (citations omitted).

19. "Visa and MasterCard have raised prices and restricted output without losing merchant customers." 163 F. Supp. 2d at 342.

B. Defendants Have The Ability To Price Discriminate.

20. "Defendants' ability to price discriminate also illustrates their market power." 163 F. Supp. 2d at 340; *see also id.* at 341.

IV. **The Exclusionary Rules Unreasonably Harmed Competition and Discover.**

21. "Visa U.S.A.'s By-law 2.10(e) and MasterCard's Competitive Programs Policy ("CPP") do weaken competition and harm consumers by: (1) limiting 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 and their ability to develop and distribute new features such as smart cards; (3) effectively foreclosing American Express or Discover from competing to issue off-line debit cards, which soon will be linked to credit card functions on a single smart card, 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." 163 F. Supp. 2d at 329, *aff'd*, 344 F.3d at 240 ("The district court found that Visa U.S.A. and MasterCard's exclusionary rules harm competition by "reducing overall card output and available card features," as well as by decreasing network services output and stunting price competition. We cannot say that these conclusions were erroneous. The

most persuasive evidence of harm to competition is the total exclusion of American Express and Discover from a segment of the market for network services.").

22. Under the exclusionary rules, "members of each association are able to issue credit or charge cards of the other association, but may not offer American Express or Discover cards." 163 F. Supp. 2d at 327; *see also id.* at 329, 379.

23. "[T]he exclusionary rules have had an adverse effect on both the issuing and the network market." 163 F. Supp. 2d at 379, *aff'd*, 344 F.3d at 241 ("[A]t the network level (where four major networks seek to sell their technical, infrastructure, and financial services to issuer banks) competition has been seriously damaged by the defendants' exclusionary rules.").

24. "As a result [of the exclusionary rules], consumer welfare and consumer choice are decreased." 163 F. Supp. 2d at 379.

25. "[D]efendants' exclusionary rules restrict competition between networks and harm consumers by denying them innovative and varied products...." 163 F. Supp. 2d at 408, *aff'd*, 344 F.3d at 243 ("Nor do we fault the district court's determination that certain types of products combining unique features of cards offered by Amex and Discover with the advantages of linkage to cardholders' bank accounts would likely become available.").

A. Harm To Competition In The Issuing And Network Markets

26. The "exclusionary rules have significantly reduced product output and consumer choice in the issuing market and have reduced price competition in the network services market." 163 F. Supp. 2d at 330.

27. "Through the exclusionary rules Visa and MasterCard also limit competition among the member banks by preventing them from competing against each other by offering their customers Amex and Discover brands and network features." 163 F. Supp. 2d at 382; *see also id.* at 408.

28. "Competition among issuers largely determines the prices that consumers pay and the variety of card features they can obtain." 163 F. Supp. 2d at 333.

29. "[T]he exclusionary rules cause an adverse effect on the issuing market by effectively preventing Visa and MasterCard member banks from issuing American Express and Discover cards, reducing overall card output and available card features." 163 F. Supp. 2d at 379.

30. "Some merchants, including large, prominent, national retail chain stores, such as Target and Saks Fifth Avenue, believe that if they were to stop accepting Visa and MasterCard general purpose cards they would lose significant sales." 163 F. Supp. 2d at 337.

31. As a result of the exclusionary rules, "[n]etwork services output is necessarily decreased and network price competition restrained by the exclusionary rules because banks cannot access the American Express and Discover networks." 163 F. Supp. 2d at 379, *aff'd*, 344 F.3d at 243 ("[T]he exclusion of Amex and Discover from the ability to market their cards and programs to banks has harmed competition in the market for network services...."); *see also id.* at 240 ("The most persuasive evidence of harm to competition is the total exclusion of American Express and Discover from a segment of the market for network services.").

32. "[T]he [exclusionary] rules restrain competition in the network market because they prevent American Express and Discover from offering network services to the consumers of those services, the members of the Visa and MasterCard associations." 163 F. Supp. 2d at 379, *aff'd*, 344 F.3d at 243 ("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 Amex and Discover from selling their products at all...We find no fault with the district court's finding that the exclusion of Amex and Discover from the ability to market their cards and programs to banks has harmed competition in the market for network services....").

B. Harm To Consumers

33. "[T]here is also evidence that the exclusionary rules adopted by the associations reduce output and consumer choice by denying American Express and Discover the opportunity to issue cards through bank issuers who issue Visa and MasterCard." 163 F. Supp. 2d at 341, *aff'd*, 344 F.3d at 241 ("[P]roduct innovation and output has been stunted by the challenged policies. By excluding Amex and Discover from the market for outside card issuers, Visa U.S.A. and MasterCard effectively den[ied] consumers access to products that could be offered only by a network in partnership with individual banks.").

34. "[B]ecause of the defendants' exclusionary rules, consumers cannot obtain a card that combines the features of the consumer's bank with the features of the American Express or Discover networks." 163 F. Supp. 2d at 334, n.5.

C. Harm To Discover

35. "Because of the defendants' exclusionary rules American Express and Discover have not been able to convince U.S. banks to issue cards over their networks." 163 F. Supp. 2d at 382; *see also id.* at 386, *aff'd*, 344 F.3d at 237 ("As a result of these exclusionary rules, American Express and Discover have been effectively foreclosed from the business of issuing cards through banks.... No United States bank has been willing to give up its membership in the Visa U.S.A. and MasterCard networks in order to issue Amex or Discover cards.").

36. "[T]he exclusionary rules adopted by the associations reduce output and consumer choice by denying American Express and Discover the opportunity to issue cards through bank issuers who issue Visa and MasterCard." 163 F. Supp. 2d at 341.

37. "As a result [of the exclusionary rules], American Express and Discover are forced to operate as single-issuer networks, limiting their transaction and issuance volume and stunting their competitive vitality." 163 F. Supp. 2d at 379, *aff'd*, 344 F.3d at 243 ("Without doubt the exclusionary rules in question harm competitors.").

38. As a result of the exclusionary rules, "American Express and Discover cannot access the issuing competencies and segmented marketing expertise of the banks, nor their more profitable relationship customers with checking accounts, attributes which cannot be provided by the smaller banks and monoline banks to which American Express and Discover do have access." 163 F. Supp. 2d at 379; *see also id.* at 382.

39. The exclusionary rules prevented Discover "from competing in the network services market for the business of bank issuers." 163 F. Supp. 2d at 382 (citations omitted).

40. "The exclusionary rules con[str]ain American Express and Discover's ability to grow market share while effectively maintaining the defendants' market share and power." 163 F. Supp. 2d at 382.

41. "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." 163 F. Supp. 2d at 387; *see also id.* at 395 ("General purpose card issuers, if permitted, would be attracted to features of the American Express or Discover networks.").

42. "[T]he associations' past foreclosure of American Express and Discover from competing to enter into the agreements has greatly and impermissibly altered the competitive landscape in the network and card markets." 163 F. Supp. 2d at 408.

43. "Nor can ... Discover profitably compete to buy additional portfolios to increase their size–and therefore merchant 'relevance'– principally because they cannot be Visa or MasterCard members. If they buy a portfolio they must flip it to their own network immediately; the high loss rates in doing so make it impossible for either proprietary system to bid profitably for such portfolios in comparison to banks, who need not switch brands at all." 163 F. Supp. 2d at 394.

44. "Because ... agreements between issuers and Visa and MasterCard now predominate the market, American Express and Discover have been effectively foreclosed from a large portion of the card issuing market, and will continue to be so foreclosed for the duration of those agreements." 163 F. Supp. 2d at 408-09.

45. "Discover has already lowered its merchant discount rate to gain acceptance; lowering it further would not close the gap. Discover instead needs more card issuance and transaction volume, which can only realistically be obtained via third-party issuers, to become a more relevant network." 163 F. Supp. 2d at 389 (citations omitted).

D. Multiple Bank Issuance Is Critical.

46. "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." 163 F. Supp. 2d at 387; *see also id.* ("Acquiring additional issuers leads to increased card issuance.").

47. "Multiple bank issuing is important for a general purpose card network to effectively offer network-level services." 163 F. Supp. 2d at 387 (citations omitted).

48. "[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." 163 F. Supp. 2d at 387 (citations omitted).

49. The exclusionary rules limit incentives for banks to issue American Express and Discover cards. 163 F. Supp. 2d at 383.

50. Visa and MasterCard "member banks are a unique distribution source for general purpose card products because of their experience and expertise." 163 F. Supp. 2d at 383.

51. Visa and MasterCard member banks "also control access to the primary financial relationship in America-the checking account." 163 F. Supp. 2d at 383.

52. "No amount of effort by American Express and Discover to issue through non-member banks, retailers or other organizations will provide consumers with the range of choices to which they are entitled." 163 F. Supp. 2d at 383.

53. "Since the bank members of Visa and MasterCard issue over 85% of general purpose cards comprising some 75% of the transaction volume, a huge portion of the market for network services is preserved for Visa and MasterCard" by the exclusionary rules. 163 F. Supp. 2d at 382.

54. "When combined with new products and services that bank issuance provides-such as the practical ability to offer customers a debit product on the network infrastructure (discussed below)-strengthening the networks in these areas benefits consumers both directly (by ensuring availability of new products and services) and indirectly (by lowering network costs that are passed on to consumers)." 163 F. Supp. 2d at 387.

55. "Through the use of account information uniquely available to banks with whom those customers have a demand deposit account relationship, these bank issuers more cheaply, easily and effectively find and market credit cards to those consumers." 163 F. Supp. 2d at 391.

56. "Banks are also important to network competitors because they provide the link to the checking accounts that will provide the platform for the next wave of card products." 163 F. Supp. 2d at 392.

57. "[N]on-bank issuers are not an economically attractive alternative to member banks for issuing general purpose credit and charge cards. Those organizations lack the expertise, experience, personnel, and reach to be effective marketers of cards." 163 F. Supp. 2d at 394.

58. "Small banks not in the Visa and MasterCard system also lack card-issuing infrastructure and the skills, expertise, and relevance that Visa and MasterCard issuing banks provide." 163 F. Supp. 2d at 394; *see also* 163 F. Supp. 2d at 389.

59. "[I]ssuers recognize that the combination of banks' knowledge and features with network features and brand preference yields customer value." 163 F. Supp. 2d at 395.

60. "Cross-selling by banks at and through their branches is a key channel for profitable new account acquisitions across all product lines and has been acknowledged as the second-most significant driver of new card acquisition." 163 F. Supp. 2d at 390.

61. "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." 163 F. Supp. 2d at 387-88 (citations omitted); *see also id.* at 406.

V. <u>There Is No Legitimate Business Justification For The Exclusionary Rules.</u>

62. "Since defendants' exclusionary rules undeniably reduce output and harm consumer welfare, and defendants have offered no persuasive procompetitive justification for them, these rules constitute agreements that unreasonably restrain interstate commerce in violation of Section 1 of the Sherman Act." 163 F. Supp. 2d at 406, *aff'd*, 344 F.3d at 243 ("In sum, the

defendants have failed to show that the anticompetitive effects of their exclusionary rules are outweighed by procompetitive benefits.").

63. "The contemporaneous evidence shows that defendants' motives are to restrict competition at the network and issuer levels to enhance member bank profitability." 163 F. Supp. 2d at 401.

64. Defendants' real justification for the exclusionary rules was to stop competition from American Express and Discover. 163 F. Supp. 2d at 400.

65. "Visa's and MasterCard's exclusionary rules also serve to protect the associations' products from vigorous network competition." 163 F. Supp. 2d at 400.

66. "The Visa board has never 'deemed' MasterCard (or Diners Club or JCB) to be 'competitive' with Visa despite the fact that at the time By-law 2.10(e) was passed, the worldwide volume on the Diners Club and Discover networks were about equal." 163 F. Supp. 2d at 379-80 (citations omitted).

A. Competition Would Not Disrupt Cohesion Of The Associations.

67. The "loyalty" and "cohesion" justifications for the exclusionary rules do not withstand scrutiny. 163 F. Supp. 2d at 402, *aff'd*, 344 F.3d at 243 ("The district court found no evidence to suggest that allowing member banks to issue cards of rival networks would endanger cohesion in a manner adverse to the competitive process. MasterCard members have long been permitted to issue Visa cards, and vice versa, without such consequences.... In sum, the defendants have failed to show that the anticompetitive effects of their exclusionary rules are outweighed by procompetitive benefits.") (citations omitted).

68. "The fact that Citibank is a member of Visa and yet is dedicating itself to MasterCard while continuing to control Diners Club has not caused any divisiveness or lack of cohesion at the Visa board level." 163 F. Supp. 2d at 403.

69. "Perhaps the most concrete evidence dispelling the notion that the associations are 'fragile' (and thus need 'loyalty' rules) comes from the associations' dealings with individual members regarding dedication agreements." 163 F. Supp. 2d at 403.

B. There Is No Credible Concern About Free-Riding.

70. "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." 163 F. Supp. 2d at 404.

71. "Neither does defendants' claim of free-riding withstand scrutiny. Instead, there is substantial evidence that by adopting and enforcing the exclusionary rules, the member banks agreed not to compete by means of offering...Discover branded cards. Such an agreement constitutes an unreasonable horizontal restraint." 163 F. Supp. 2d at 405, *aff'd*, 344 F.3d at 242 ("The restrictive provision is a horizontal restraint adopted by 20,000 competitors.").

VI. Visa International Is Also Liable.

72. "Visa International is a necessary defendant as to Count Two of the [Department of Justice] Complaint because it has the authority to adopt exclusionary by-laws in the United States." 163 F. Supp. 2d at 406.

73. "In the past, Visa International has provided affirmative encouragement for By-law 2.10(e) and would have passed its own international version of that rule absent intervention from foreign competition authorities." 163 F. Supp. 2d at 407; *aff'd*, 344 F.3d at 244 ("Nor do we believe, in the specific circumstances presented, that affirmative encouragement was an insufficient legal basis on which to premise liability."); *see also United States v. Visa U.S.A., Inc., et al.*, 183 F. Supp. 2d 613, 617 (S.D.N.Y. 2001) ("[B]ecause Visa International not only had the power to preempt Visa U.S.A.'s exclusionary rule, but also provided affirmative encouragement for the illegal bylaw, Visa International was in part responsible for the illegal rule and therefore is liable.").

VII. Debit-Related Conclusions.

74. "Through the exclusionary rules, the defendants' members foreclose ... Discover from competing for [debit] cardholders." 163 F. Supp. 2d at 391.

75. "Roughly ninety percent of U.S. families have at least one checking account ('demand deposit account' or 'DDA'). Visa and MasterCard member banks are the custodians of the vast majority of these accounts." 163 F. Supp. 2d at 392.

76. "Discover ha[s] studied issuing off-line debit products over [its] network[] in the United States to compete with Visa and MasterCard's virtual monopoly in this area. [Discover has] found, however, that without access to banks' demand deposit accounts this is not a viable strategy." 163 F. Supp. 2d 393.

77. "Without access to bank accounts, ... [a] Discover off-line debit card would have to be authorized and settled through the Automated Clearinghouse (ACH), an inferior system...." 163 F. Supp. 2d at 393.

78. "Bank issuers on the Visa/MasterCard networks simply attach off-line debit functionality to the ATM cards routinely distributed to most banking customers. In contrast, ... Discover would have to convince bank customers to take a second debit card in addition to the debit card linked to their bank accounts." 163 F. Supp. 2d at 393.

79. "The inability to provide debit functionality on a cost-effective basis further limits the effectiveness of ... Discover as [a] supplier[] of credit and charge card network services." 163 F. Supp. 2d at 394.

80. "Because off-line debit transactions run over the same network as credit and charge transactions, the addition of debit volume improves network economies of scale and increases network relevance." 163 F. Supp. 2d at 394.

81. "In addition, debit functionality makes a network more attractive for consumers and banks desiring a range of products over a single brand or card." 163 F. Supp. 2d at 394.