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UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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

VISA U.S.A. INC.'S MEMORANDUM OF LAW IN OPPOSITION TO DISCOVER'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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ATTORNEYS FOR DEFENDANT VISA U.S.A. INC

Dated: March 24, 2008

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Defendant Visa U.S.A. Inc. ("Visa") submits this memorandum of law in opposition to the motion for partial summary judgment filed by plaintiffs Discover Financial Services, DFS Services, LLC, and Discover Bank (collectively "Discover").

PRELIMINARY STATEMENT

As the Court stated early in this case, "[t]he principal virtue of collateral estoppel of course is efficiency and judicial efficiency."[1] The record developed during the following three years has confirmed the Court's initial conclusion that "applying collateral estoppel would not promote judicial efficiency."[2] The new matters in this case overwhelm any residual similarity it bears to the Department of Justice's ("DOJ") action against Visa, Visa International Service Association, and MasterCard International Incorporated ("MasterCard"). The markets, the theories of harm, the claims, and the theories of liability are all different from the DOJ case. Indeed, over eighty percent of Discover's alleged damages flow from its new debit and third-party acquiring theories. Moreover, on the few issues that bear some similarity to the DOJ case, there is overlapping evidence that will likely come in at trial regardless of the Court's ruling on collateral estoppel. Because of the lack of efficiency, the differences in the issues, and the overlapping evidence, the Court should deny Discover's request for collateral estoppel.

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[1] *See* Rubin Decl. Ex. 1, Hearing of Apr. 14, 2005 in *Discover v. Visa U.S.A. Inc.*, at 3 [hereinafter "Apr. 14, 2005 Hearing Tr."].

[2] *Id.*

SUMMARY

The overwhelming number of new issues in this case provides ample reason for not applying collateral estoppel:

- The DOJ case covered only the alleged general purpose credit and charge card ("GPCC") and GPCC network services markets;[3] Discover now seeks over $2 billion for debit-related damages in two additional markets: alleged debit cards and debit card network services markets.[4]
- The DOJ case relied on harm flowing from alleged restriction of competition for bank ***issuers***; Discover now seeks over $3 billion in damages arising from its purported inability to engage bank ***acquirers*** to sign merchants for Discover.[5]
- The DOJ case did not allege a conspiracy between Visa and MasterCard,[6] and the duality portion of the judgment found vigorous competition between the two networks;[7] Discover now alleges in its Claims Two and Five that Visa and MasterCard engaged in

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[3] The DOJ trial addressed debit cards only insofar as they impacted the alleged GPCC network services market. *See, e.g.*, *United States v. Visa U.S.A. Inc.*, 163 F. Supp. 2d 322, 329, 392-93, 408 (S.D.N.Y. 2001) [hereinafter "163 F. Supp. 2d at __"]; *United States v. Visa U.S.A. Inc.*, 183 F. Supp. 2d 613, 616 (S.D.N.Y. 2001) [hereinafter "183 F. Supp. 2d at __"].

[4] *See* Rubin Decl. Ex. 2, Second Amended Complaint and Jury Demand in *Discover v. Visa U.S.A. Inc.*, June 4, 2007, ¶¶ 86-89 [hereinafter "Discover's Second Am. Compl."]; Rubin Decl. Ex. 3, Expert Report of Jerry A. Hausman in *Discover v. Visa U.S.A. Inc.*, Sept. 23, 2007, at ¶¶ 60-64 (adding a debit network services market to those alleged in Second Amended Complaint), 257 (claiming $2.19 billion to $2.26 billion in "debit network damages") [hereinafter "Hausman Original Rep."].

[5] *See id.* at ¶ 258; Rubin Decl. Ex. 4, Deposition of Jerry A. Hausman in *Discover v. Visa U.S.A. Inc.*, Jan. 25, 26 & 28, at 52-53 (confirming that both his issuing damages ($2.01 billion) and third-party acquiring savings ($1.11 billion) are dependent on his assumption of third-party acquiring) [hereinafter "Hausman Dep."]. Third-party acquiring refers to Discover's recently adopted strategy of using outside banks to sign up merchants to accept Discover cards, instead of doing all merchant acquiring in-house as Discover always had under its "closed loop" model.

[6] *See generally* Rubin Decl. Ex. 6, Complaint for Equitable Relief for Violations of 15 U.S.C. § 1 in *United States v. Visa U.S.A.*, Oct. 7, 1998 [hereinafter "DOJ Compl."].

[7] *See, e.g.*, 163 F. Supp. 2d at 363-71.

an "inter-association" conspiracy regarding Visa's By-Law 2.10(e) and MasterCard's Competitive Programs Policy ("CPP").

- The DOJ case did not involve any damages claims and therefore did not require disaggregating By-Law 2.10(e)'s effects from the CPP's effects; Discover seeks as much as $7 billion in damages that the jury – if it finds any injury – will have to allocate between By-Law 2.10(e) and the CPP. This allocation is complicated because By-Law 2.10(e) did not apply to acquiring, but the CPP did,[8] and Discover's entire damages model depends on third-party acquiring.[9]
- The DOJ case was brought under Section 1 of the Sherman Act; Discover also asserts claims for monopolization and conspiracy to monopolize under Section 2.[10]
- The DOJ case did not find Visa's partnership agreements or MasterCard's member business agreements illegal; Discover now bases its liability and damages theories in significant part on those agreements.[11]
- The DOJ case found that increasing credit card output benefits consumers; Discover's expert argues that increased card output actually ***harms*** consumers.[12]

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[8] *See* Rubin Decl. Ex. 9, Expert Report of David Teece in *Discover v. Visa U.S.A. Inc.*, Oct. 8, 2007, at § 4.3.1 [hereinafter "Teece Rep."].

[9] *See* Rubin Decl. Ex. 5, Rebuttal Expert Report of Jerry A. Hausman, Dec. 20, 2007, at ¶ 124 (explaining that absent closure of the merchant acceptance gap, bank issuance on the Discover network would only "consist of segmentation strategies" with additional programs not being added until after the achievement of merchant parity in 1998) [hereinafter "Hausman Rebuttal Rep."]; Rubin Decl. Ex. 4, Hausman Dep. at 53 (agreeing that "Discover needs to implement third-party acquiring in order to close the acceptance gap"), 317-18 (confirming that Discover has no model for damages in the absence of third-party acquiring).

[10] *Compare* Rubin Decl. Ex. 6, DOJ Compl. at ¶ 1, *with* Rubin Decl. Ex. 2, Discover's Second Am. Compl., Claims Three, Four and Five.

[11] *Compare* 163 F. Supp. 2d at 408-09, *with* Rubin Decl. Ex. 3, Hausman Original Rep. at § X.

[12] *Compare* 163 F. Supp. 2d at 406, *with* Rubin Decl. Ex. 5, Hausman Rebuttal Rep. at ¶ 19.

- In the DOJ case, Discover said that limited relief banning only By-Law 2.10(e) and the CPP would actually hurt Discover; Discover now purports to seek billions in damages flowing solely from By-Law 2.10(e) and the CPP.[13]
- The DOJ case considered the rules' competitive effects only as they related to the inability of issuing banks to remain in Visa or MasterCard while issuing Discover or American Express cards; Discover's "Project Explorer" damages theory, however, claims injury from the alleged inability of Citibank to form a competing network while remaining a Visa member.[14] This theory conflicts with the Tenth Circuit's *MountainWest* ruling that Visa could deny membership to a competing network owner,[15] a ruling that the DOJ decision did not question.
- The discovery record in the DOJ case closed in 1999 and the trial took place in 2000; Discover's damages claims in this case run through 2012, and its own expert argues and relies upon the fact that substantial changes have taken place in the marketplace since the DOJ decision.[16]

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[13] *Compare* Rubin Decl. Ex. 7, Discover's Amicus Curiae Brief on Remedy in *United States v. Visa U.S.A. Inc.*, Sept. 2000, at 53 (arguing that only repealing By-Law 2.10(e) and the CPP would leave "Discover severely compromised in its ability to build transaction volume and merchant acceptance") [hereinafter "Discover's DOJ Brief on Remedy"], and Rubin Decl. Ex. 8, Prepared Testimony of Phil Purcell to U.S. Senate, May 25, 2000, at 6 (arguing that the limited remedy actually ordered would leave Discover "the only network that will not be able to build volume by attracting substantial third-party issuers") [hereinafter "Purcell Senate Testimony"], *with* Rubin Decl. Ex. 4, Hausman Dep. at 501:17-501:22 ("[I]n the but for world I'm assuming that these Visa restrictions [2.06/10.6.9] remain in place, you know, in other words that they're not going to be allowed to acquire for Visa and MasterCard issuers. So that's a given in my model.").

[14] *See* Rubin Decl. Ex. 3, Hausman Original Rep. at ¶¶ 260-88; *see generally* Visa's Memo. in Support of its Mot. For Part. Summary Judgment (Project Explorer) in *Discover v. Visa U.S.A. Inc.*, Feb. 15, 2008.

[15] *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958 (10th Cir. 1994).

[16] *See* Rubin Decl. Ex. 3, Hausman Original Rep. at ¶¶ 131-147, 149, 165-169, 174, 177, 217; Rubin Decl. Ex. 5, Hausman Rebuttal Rep. at ¶¶ 80-86, 185-211.

Thus, this is a very different case from the DOJ action. Myriad new issues must be tried, and this alone is good reason to reject collateral estoppel. Rather than increasing efficiency leading up to and during the trial, collateral estoppel would create "litigation within litigation"[17] to sort out to what issues and evidence estoppel does and does not apply.

The extensive overlapping evidence relevant to both Discover's new issues and claims and those issues and claims on which Discover seeks estoppel further undermines any efficiency rationale for applying collateral estoppel. When the evidence overlaps, barring Visa from challenging the DOJ case's findings would not promote efficiency, because the jury would still have to consider the same evidence. The list of overlaps is long. A few examples include the evidence on injury-in-fact, which is in essence a subset of Discover's evidence on damages, and the evidence on market definition, most of which is relevant to both the alleged debit and GPCC markets.

While the lack of efficiency alone warrants not applying collateral estoppel, Discover also cannot demonstrate the requisite identity of issues required for invoking collateral estoppel. The stark differences listed above demonstrate the lack of identity between the cases. Equally importantly, even those issues that bear superficial similarity are in fact very different, principally because of the different theories on which Discover is relying in this action. For instance, Discover's intra-association conspiracy claim in the alleged GPCC network services market (Discover's Claim One) is superficially the most similar to the DOJ case. But approximately half of Discover's alleged damages from this claim arise not from By-Law 2.10(e)'s issuing restriction, but instead from Discover's purported inability to have third-party acquirers sign merchants for Discover. The DOJ litigation did not consider – let alone find – any

[17] *See* Rubin Decl. Ex. 1, Apr. 14, 2005 Hearing Tr. at 3.

violation by Visa or MasterCard in connection with merchant acquiring; in fact, the Court expressly carved out from the DOJ Judgment any relief related to banks' acquiring for Discover.[18] Yet, Discover now seeks collateral estoppel in a case in which all of its damages models include billions in losses arising from supposed restrictions on third-party acquiring.[19] Furthermore, on certain issues for which it seeks collateral estoppel, including injury-in-fact, Discover has failed to establish – as required – that the issue was actually litigated and necessary to the DOJ judgment.

Fairness also weighs heavily against applying collateral estoppel in this case. The law is clear that estoppel should not be applied when it would lead to unfair results, even if it would promote efficiency and otherwise meet the required elements (which it does not). Both the payments industry and the economic scholarship about that industry have changed greatly since the DOJ trial. Consumers use debit cards much more widely and for more purposes than they did in the 1990s, in competition with other payment forms. The DOJ's predictions as to how the market might evolve, as reflected in the Court's opinion, have largely not come to pass. Few banks have issued cards on the Discover network, and the few deals that do exist do not evidence widespread consumer demand for such cards. Features of the few cards that exist are anything but innovative. This real-world evidence about competition without the rules obviously was not available during the DOJ trial. Economic scholarship has changed as well. Emblematic of that change is the government's expert from the DOJ case (Prof. Michael Katz), who in a more recent case explained that in a "two-sided market" such a payments network, traditional economic

[18] 183 F. Supp. 2d at 619.

[19] *See* Rubin Decl. Ex. 4, Hausman Dep. at 317-18 (confirming that Discover has no model for damages in the absence of his assumption of third-party acquiring).

analysis (which he had applied at the DOJ trial to issues such as the significance of increasing interchange) cannot properly be used to analyze market definition or power. Discover's expert (Prof. Jerry Hausman) agrees with Prof. Katz's current approach to two-sided markets.

For all these reasons, as explained more fully below, the Court should deny Discover's motion.

ARGUMENT

Because offensive collateral estoppel "is capable of producing extraordinarily harsh and unfair results" and "may have a devastating impact on a civil litigant's constitutional right to a jury trial," courts have tightly circumscribed its application. *See Remington Rand Corp. v. Amsterdam-Rotterdam Bank, N.V.*, 68 F.3d 1478, 1486 (2d Cir. 1995); *Securities & Exchange Comm'n v. Monarch Funding Corp.*, 192 F.3d 295, 304 (2d Cir. 1999). In the present case, there are myriad mandatory and discretionary reasons to deny Discover's collateral estoppel request.

The Court need not parse through each reason in order to deny Discover's motion. As the Court found at the outset of this case in 2005, collateral estoppel would not foster judicial efficiency and instead lead to unnecessary "litigation within litigation."[20] As explained in Section I below, the intervening fact and expert discovery has confirmed the Court's initial conclusion, and the Court may deny Discover's motion for that reason alone. Section II shows why Discover has not met the specific elements required for invoking collateral estoppel. Section III addresses other mandatory and discretionary reasons that strongly disfavor applying collateral estoppel in this case. Finally, Section IV discusses why this Court should not grant Discover's request to import eighty-one disembodied quotations from the DOJ opinion into this case as essentially stipulated facts.

[20] *See* Rubin Decl. Ex. 1, Apr. 14, 2005 Hearing Tr. at 3.

I. APPLYING COLLATERAL ESTOPPEL WOULD NOT PROMOTE JUDICIAL EFFICIENCY BECAUSE THE EVIDENCE ON CLAIMS AND ISSUES FOR WHICH DISCOVER SEEKS ESTOPPEL OVERLAPS WITH THE EVIDENCE ON CLAIMS AND ISSUES FOR WHICH IT DOES NOT SEEK ESTOPPEL

As the Court has stated, when applied offensively, the "principal virtue of collateral estoppel of course is efficiency and judicial efficiency."[21] *See also Monarch Funding Corp.*, 192 F.3d at 303 (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979)); *United States v. U.S. Currency in Amount of $119,984.00, More or Less*, 304 F.3d 165, 172 (2d Cir. 2002). "When the efficiency rationale for collateral estoppel fails, []courts have understandably declined to apply the doctrine." *Monarch Funding Corp.*, 192 F.3d at 304; *see also U.S. Currency*, 304 F.3d at 172; *Davis v. West Community Hosp.*, 786 F.2d 677, 682 (5th Cir. 1986); *Swineford v. Snyder Co.*, 15 F.3d 1258, 1269 (3d Cir. 1994). Indeed, in appropriate cases, the Second Circuit has viewed the efficiency effects of issue preclusion as a "threshold assessment, and if a court finds that the application of estoppel will not promote efficiency, it should feel free to deny preclusion ***for that reason alone.***" *U.S. Currency*, 304 F.3d at 173 (emphasis added) (citations and internal quotation marks omitted).[22]

When the evidence relevant to non-estopped issues substantially overlaps with evidence relevant to the elements on which estoppel is sought, judicial efficiency will not be served and collateral estoppel should be denied. *See, e.g.*, *Acevedo-Garcia* v. *Monroig*, 351 F.3d 547, 576-77 (1st Cir. 2003) ("Where even one issue of liability must be made available to defendants in the second trial, granting preclusive effect to the other issues may not result in efficiency gains

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[21] *Id.*

[22] Collateral estoppel also ensures the "finality" of a Court's judgment. *In re Microsoft Corp. Antitrust Litig.*, 355 F. 3d 322, 325 (4th Cir. 2004); *see also Pac. R.R. Co. v. United States*, 168 U.S. 1, 48-49 (1897). Visa is not seeking to relitigate the Court's prior injunctive relief. Regardless of the outcome of the current litigation, the DOJ Final Judgment will remain final and binding on Visa. Therefore, there is no risk that failure to apply collateral estoppel would undermine the finality of the Court's injunctive relief from the DOJ litigation.

because litigation of the 'live' issue may require introduction of some of the same evidence pertinent to the estopped issues."); *Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992, 1079 (E.D.N.Y. 2006) (denying collateral estoppel because "little efficiency would be gained: plaintiffs' proof of reliance and damages would almost certainly – as a matter of legal burden and persuasive strategy – require presentation of all evidence available to them of defendants' alleged scheme"); *Setter v. A.H. Robins Co.*, 748 F.2d 1328, 1331 (8th Cir. 1984) ("Even if collateral estoppel were invoked here, little court time would be saved, because . . . the same facts, or most of them, that would have been relevant on the issue of liability would still have to come in and be considered by the court or jury on the issue of exemplary damages."); *Coburn v. Smithkline Beecham Corp.*, 174 F. Supp. 2d 1235, 1239 (D. Utah 2001) (finding that collateral estoppel "would not promote . . . judicial efficiency" because "even if the court grants Plaintiffs' motion on general causation, . . . [defendant] will still elicit general causation testimony from its experts, and this court could not prevent [defendant] from doing so, as this is its primary defense regarding [causation]").[23]

Consistent with these settled principles, this Court was correct three years ago when it concluded that

> there are a number of additional claims and legal theories in this case that were not before me in the DOJ action. Including the plaintiffs' claims relating to monopolies and the debit card market. The collateral estoppel doctrine, in my opinion, would do nothing to promote judicial efficiency vis-a-vis those claims.[24]

The ensuing fact and expert discovery have confirmed the Court's view. The examples below

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[23] *See also* 18A Charles Alan Moore and Arthur R. Miller, Federal Practice and Procedure § 4465, at 738 (2d ed. 1987) ("Whatever values may be gained by nonmutual preclusion are substantially diminished when the need to try related issues requires consideration of much the same evidence as bears on the issue tendered for preclusion.").

[24] Rubin Decl. Ex. 1, Apr. 14, 2005 Hearing Tr. at 3.

show the evidence overlaps between claims on which Discover seeks estoppel and those on which it does not. Because of this overlap of evidence, collateral estoppel would not make the trial more efficient.

A. Evidence Relevant to Injury-In-Fact Overlaps With Evidence Relevant to Damages

Discover asks the Court to bar Visa from challenging Discover's contention that it suffered injury-in-fact caused by By-Law 2.10(e). Discover, however, does not and cannot dispute that Visa is entitled to present a full and complete evidentiary record as to the amount of any such damages. Injury-in-fact is a question of causation – whether By-Law 2.10(e), as opposed to other factors, caused Discover's business failings. *Blue Tree Hotels Inv. (Canada) Ltd. v. Starwood Hotels & Resorts Worldwide, Inc.*, 369 F.3d 212, 220 (2d Cir. 2004) (antitrust plaintiff must show, *inter alia*, "(1) an injury-in-fact; (2) that has been caused by the violation").[25] The same evidence that is relevant to the causes of Discover's alleged injury is also relevant to the amount, if any, of damages that Discover suffered. The following are three non-exhaustive examples of the evidentiary overlap between injury-in-fact and amount of damages:

- ***Evidence that Discover purposely chose to pursue a business strategy that did not emphasize, and even conflicted with, third-party issuance.*** Examples of this include Discover's numerous statements emphasizing the benefit of a direct, closed-loop model and evidence about its numerous efforts to join Visa rather than trying to have Visa members join its network.[26] This evidence pertains to both injury-in-fact and damages because it tends to show that third-party issuing did not fit with Discover's overall business strategy, and thus, By-Law 2.10(e) did not cause its business failings.

[25] Because injury in fact is a causation question, and the standards for causation differ as between a DOJ action and a private antitrust case, Discover's injury in fact is not a question appropriate for collateral estoppel for reasons apart from lack of judicial efficiency. *See infra* Section II.A.1 and II.B.1.

[26] *See* Visa's Memo. in Support of Its Motion for Partial Summary Judgment (Third-Party Acquiring Damages Claims) in *Discover v. Visa U.S.A. Inc.*, Feb. 15, 2008, at 4-6, 8-9 [hereinafter "Visa's TPA Memo."].

- ***Evidence that Discover*** REDACTED MATERIAL REDACTED MATERIAL This evidence pertains to both injury-in-fact and damages because it tends to disprove Discover's assertions about what banks may have found appealing from Discover, and whether By-Law 2.10(e) was the reason banks did not find issuance with Discover attractive.

- ***Evidence about Discover's poor domestic and international acceptance.***[28] Similar to REDACTED MATERIAL showing that Discover had weak acceptance for a variety of reasons unrelated to Defendants' rules – tends to disprove Discover's assertions about why banks would have found Discover issuance appealing. Moreover, it further tends to disprove Discover's assertions about the amount of damages it suffered (because lower acceptance leads to lower damages), even if banks had issued Discover cards.

Because each kind of evidence listed above tends to show that reasons other than By-Law 2.10(e) caused Discover's business failings, it is relevant to both the amount of any damages and whether injury-in-fact was caused by By-Law 2.10(e). These are just three examples of the broad evidentiary overlap on injury and damages. In reality, it is difficult to imagine evidence regarding injury-in-fact that would not also tend to prove or disprove Discover's claims as to the amount of damages allegedly caused by By-Law 2.10(e).

B. Evidence Of Alleged Harm to Competition Overlaps With Evidence Relevant to Injury-In-Fact And Damages

The same overlap analysis applies not just to injury-in-fact, but also to the question of harm to competition from By-Law 2.10(e). Discover is asking this Court to bar Visa from challenging Discover's allegation that, under a rule of reason analysis, By-Law 2.10(e)'s competitive harm outweighed any pro-competitive benefit. *See Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977) (rule of reason analysis must consider the competitive effects – positive and negative – that flow from the challenged restraint). But granting

[27] *See, e.g.*, Rubin Decl. Ex. 9, Teece Rep. at § 4.2.1.4.

[28] *See, e.g., id.* at § 4.1.1.

Discover's request will not simplify the evidence that must be presented at trial. As with injury-in-fact, the evidence pertaining to competitive harm will involve By-Law 2.10(e)'s effects on the marketplace. Evidence that Visa presents to rebut damages by showing banks' lack of interest in Discover will also tend to show a lack of competitive harm from By-Law 2.10(e). If banks did not issue Discover cards for reasons apart from By-Law 2.10(e), then any consumer harm from the absence of such cards must have been caused by something other than By-Law 2.10(e).

Indeed, both Discover's and Defendants' expert reports confirm this overlap. For example, Discover's expert identifies the same evidence both to support his theory of harm to competition and to explain why he thinks banks would have been interested in issuing Discover-branded cards.[29] Similarly, Visa's competitive effects expert (Dr. Sumanth Addanki) relies on evidence of a lack of bank interest similar to that relied on by Visa's damages expert (Prof. David Teece).[30]

C. The Evidence Relevant to Defining a Debit Market Overlaps With the Evidence Relevant to Defining a GPCC Market

The DOJ Judgment did not define the debit markets that Discover alleges in this case. Thus, even if collateral estoppel were granted, Discover would still have to prove to the jury that these debit markets exist. In resolving that question, the jury will consider evidence of how consumers use and allocate spending among various payment methods. This same evidence would also be relevant to defining the alleged GPCC markets.

For example, Visa's expert, Dr. Addanki, relies on a study of how consumers choose to

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[29] *See* Rubin Decl. Ex. 3, Hausman Original Rep. at ¶¶ 106-110 (identifying harm to competition from reduced credit and debit product variety based on allegedly unique Discover network features), 125-126, 159-170 (identifying the same allegedly unique features as the reason banks would have been attracted to Discover and why the rules harmed Discover).

[30] *Compare* Rubin Decl. Ex. 10, Expert Report of Sumanth Addanki, Ph.D. in *Discover v. Visa U.S.A. Inc.*, Oct. 8, 2007, at § VI [hereinafter "Addanki Rep."], *with* Rubin Decl. Ex. 9, Teece Rep. at § 4.

pay among credit, debit, check, cash, and other payment methods.[31] That study would provide evidence both on whether a credit market exists and on whether a debit market exists. Discover's expert, Professor Hausman, similarly cites evidence about the use of credit and debit cards, along with cash and checks, in trying to establishing separate markets.[32] In both instances, the evidence on which the experts rely would apply to proving or disproving both a credit or debit market and thus will be relevant regardless of collateral estoppel.

D. Evidence Relevant to Market Power under Section 1 of the Sherman Act Overlaps With Evidence Relevant to Monopoly Power under Section 2 of the Sherman Act

The Court previously found that Visa had "market power" in a GPCC network services market, as required to prove a claim under Section 1 of the Sherman Act. The Court did not address whether Visa had "monopoly power" in any market, as required to prove a claim under Section 2. Nor did the Court decide whether Visa had Section 1 market power in an alleged debit network services market.[33] Market power under Section 1 does not establish or imply the existence of monopoly power under Section 2. *See Flash Electronics, Inc. v. Universal Music & Video Corp.*, 312 F. Supp. 2d 379, 395-96 (E.D.N.Y. 2004).[34] Similarly, it is axiomatic that the existence of market power in one market does not imply the existence of market power in a separate market. *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 43 (2006).

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[31] *See* Rubin Decl. Ex. 10, Addanki Rep. at §§ II - III, Appendix I (analyzing identical data and evidence in finding that Discover has not established separate markets for credit, debit, cash and checks). Other evidence from Dr. Addanki's report also covers both credit and debit. *Id.* at §§ II - III.

[32] *See* Rubin Decl. Ex. 3, Hausman Original Rep. at ¶¶ 43, 47, 51, 52 (setting forth overlapping evidence to support finding of separate credit and debit markets in which cash and checks do not compete).

[33] 163 F. Supp. 2d at 340-42.

[34] *Compare id.* at 340-42 (finding that MasterCard had Section 1 market power), *with* Rubin Decl. Ex. 11, Order of Oct. 24, 2005 in *Discover v. Visa U.S.A. Inc.*, at 3 (granting motion to dismiss monopoly claims against MasterCard because it did not have monopoly power as a matter of law).

Accordingly, regardless of whether collateral estoppel is applied on issues of market power in the GPCC sector, the jury will have to address the questions of market power in the alleged debit market and monopoly power in both the alleged debit and GPCC markets. Moreover, Discover's expert relies on substantially overlapping evidence to support his opinions on market power and monopoly power,[35] and on debit market power and GPCC market power.[36]

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As shown by each of these examples, collateral estoppel on any of the elements of Discover's Section 1 GPCC market claim would not materially streamline the evidence that the jury would otherwise have to hear in this case as to non-estopped elements of that claim or as to the elements of Discover's monopolization and debit claims. As such, collateral estoppel would not promote judicial efficiency. *See, e.g.*, *Acevedo-Garcia*, 351 F.3d at 576-77; *Setter*, 748 F.2d at 1331; *Schwab*, 449 F. Supp. 2d at 1079; *Coburn*, 174 F. Supp. 2d at 1239.

E. Discover's Footnoted Proposal to Drop Certain Parts of Its Monopolization Claims Would Not Make Applying Collateral Estoppel Efficient

Apart from a terse assertion buried in a footnote, Discover makes no attempt to address the Court's previous conclusion that collateral estoppel would not promote efficiency in this case. In footnote 21 of its Memorandum, Discover states that, if collateral estoppel were applied to its Claim One, it "would be in a position to dismiss . . . Claims Three and Four of the Second

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[35] *Compare* Rubin Decl. Ex. 3, Hausman Original Rep. at ¶¶ 75 (citing market share as evidence of market power), 80 (citing interchange fee increases as evidence of market power), 82 (citing price discrimination as evidence of market power), *with id.* at ¶¶ 84 (citing Visa's market share as evidence of monopoly power), 87 (citing interchange fee increases as evidence of monopoly power), 88 (citing price discrimination as evidence of monopoly power).

[36] *Compare id.* at ¶¶ 75 (citing market share as evidence of market power), 80 (citing interchange fee increases as evidence of market power), 82 (citing price discrimination as evidence of market power), *with id.* at ¶¶ 84 (citing Visa's market share as evidence of monopoly power), 87 (citing interchange fee increases as evidence of monopoly power), 88 (citing price discrimination as evidence of monopoly power).

Amended Complaint asserting monopolization and attempted monopolization against Visa in the credit card network services [market]."[37]

Discover's footnoted proposal would not materially simplify the trial and does not resolve the efficiency concerns identified by the Court. Discover's quasi-offer is expressly limited to its "***credit*** card network services" claims in counts Three and Four. Even if Discover dropped those claims, all of its various debit monopolization claims in counts Three through Five must still be tried. Discover also conspicuously has ***not*** offered to drop its claims of conspiracy to monopolize against all defendants (Claim Five). As shown above, all of the claims that would remain for trial involve evidence that substantially overlaps with evidence relevant to Discover's Section 1 GPCC network services market allegations. As such, even if Discover followed through on its offer, collateral estoppel would not simplify this case. The lack of judicial efficiency is reason enough not to apply collateral estoppel. *See, e.g.*, *Monarch Funding Corp.*, 192 F.3d at 304.

F. Collateral Estoppel Would Generate "Litigation Within Litigation" Concerning Overlapping Evidence and Jury Instructions

Applying collateral estoppel would complicate, rather than simplify, the trial in this case. The Court recognized three years ago that applying collateral estoppel would require "litigation within litigation about whether or not collateral estoppel applies to various issues that overlap with issues" that must be tried.[38] This presents not only an issue of juror confusion (discussed in Section III.E.1 below), but also will place on the Court the burden of crafting (and resolving

[37] Memorandum of Law in Support of Discover's Motion for Partial Summary Judgment, Feb. 15, 2008, at 42 n.21 [hereinafter "Discover's Memo."]. Discover conspicuously does not say it actually ***would*** dismiss its GPCC network services market monopolization claims if the Court were to grant its collateral estoppel request. Thus, it is not clear what Discover is actually offering.

[38] Rubin Decl. Ex. 1, Apr. 14, 2005 Hearing Tr. at 3.

unavoidable side litigation concerning) jury instructions that distinguish between estopped and non-estopped issues. Moreover, although much of the evidence would overlap between estopped and non-estopped issues, the Court may have to make determinations about whether a particular piece of evidence or argument pertains to estopped, rather than non-estopped, issues and therefore should not be presented to the jury. Thus, if collateral estoppel were granted, this "side litigation" would make the trial less – rather than more – efficient.

II. DISCOVER HAS NOT ESTABLISHED THE REQUIRED ELEMENTS FOR APPLYING COLLATERAL ESTOPPEL AGAINST VISA

To apply collateral estoppel on any issue, Discover must establish that the issue in the prior litigation was identical to the issue in the current case, that the issue was actually litigated and decided in the prior case, and that the finding was necessary to the prior judgment. *Bear, Stearns & Co., Inc. v. 1109580 Ontario, Inc.*, 409 F.3d 87, 91 (2d Cir. 2005) (citations omitted). Discover cannot establish these elements.

A. Collateral Estoppel Cannot Apply Here Because Discover's Case Is Not Identical to the DOJ Case on the Issues Where Discover Seeks to Apply Collateral Estoppel

When a party's legal or factual theory requires a new inquiry from that undertaken in an earlier litigation – even when applied to essentially the same evidence as the original case – collateral estoppel cannot properly be invoked. *See Greene v. United States*, 79 F.3d 1348, 1352 (2d Cir. 1996) (denying collateral estoppel when the new claims are "analytically distinct from the issues in the previous litigation" because of a "new argument involv[ing] application of entirely different rules," even though "the evidence involved in the two cases is essentially the same"); *Levy v. Kosher Overseers Assoc. of America, Inc.*, 104 F.3d 38, 41 (2d Cir. 1997) (rejecting collateral estoppel where earlier "inquiry . . . was not identical to the . . . inquiry required in the plaintiffs' current action"). The "[u]se of collateral estoppel 'must be confined to

situations where the matter raised in the second suit is identical ***in all respects*** with that decided in the first proceeding . . . .'" *Faulkner v. Nat'l Geographic Enterprises Inc.*, 409 F.3d 26, 37 (2d Cir. 2005) (quoting *C.I.R. v. Sunnen*, 333 U.S. 591, 599-600 (1948)) (emphasis added); *see also Faigin v. Kelly*, 184 F.3d 67, 78 (1st Cir. 1999) (collateral estoppel cannot be applied simply because there is a "modicum of factual commonality" between the issues in two cases).

1. Harm to Competition, Which Was at Issue in the DOJ Case, Is Not the Same as Harm to Discover, Which Is at Issue in this Case

In the DOJ litigation, the government had to prove only an injury to *competition*. *United States v. Visa*, 344 F.3d 229, 238 (2d Cir. 2003) [hereinafter "344 F.3d at __"].[39] As the Second Circuit explained in *Kruman v. Christie's Int'l PLC*, the government may seek an injunction against conduct that violates the Sherman Act "even when no plaintiff has suffered an injury," because "[t]he existence of a Sherman Act violation does not depend on whether anyone has actually suffered an injury." 284 F.3d 394, 397-98 (2d Cir. 2002). By contrast, Discover, which seeks to recover damages in a private antitrust action under Section 4 of the Clayton Act, "must make some showing of actual injury" to itself. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981). Actual injury requires proof of actual monetary harm to Discover. *See Maddaloni Jewelers, Inc. v. Rolex Watch U.S.A., Inc.*, 354 F. Supp. 2d 293, 306-07 (S.D.N.Y. 2004); *Atlantic City Elec. Co. v. General Electric Co.*, 226 F. Supp. 59, 61 (S.D.N.Y. 1964).[40]

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[39] The Second Circuit noted that the "the district court concluded, and the parties do not argue otherwise, that the following must be shown: . . . . the defendants' actions have had substantial adverse ***effects on competition***, such as increases in price, or decreases in output or quality." 344 F.3d at 238 (emphasis added).

[40] Absent a finding of injury-in-fact to Discover, Discover is not entitled to partial summary judgment as to liability on its Claim One. *See, e.g., Carswell Trucks, Inc. v. Int'l Harvester Co.*, 334 F. Supp. 1238, 1239 (S.D.N.Y. 1971); *Oberweis Dairy, Inc. v. Associated Milk Producers, Inc.*, 553 F. Supp. 962, 965-66 (N.D. Ill. 1982).

The decision in *In re Microsoft Corp. Antitrust Litigation*[41] illustrates the distinction between an injury to competition and injury to a competitor. *Microsoft*, like this case, involved private antitrust litigation that followed a successful government antitrust suit. The *Microsoft* court denied a motion to apply collateral estoppel on the issues of "injury-in-fact, antitrust injury, and causation," based on the differences between the government's burden and the burden faced by a private litigant. *Id.* at 539.[42] The court explained:

> The issue presented by these motions is whether the government proved in its case all of the elements that the private plaintiffs must prove in their actions for damages. It did not.
>
> A plaintiff in a private antitrust action must prove that it suffered injury-in-fact caused by the asserted antitrust violation and that this injury constituted "antitrust injury." Nothing in the government case against Microsoft demonstrates that the consumer plaintiffs . . . suffered any such injuries, and their motions for partial summary judgment therefore clearly fail.

Id. at 538 (citations omitted).

The court reached this conclusion with respect to plaintiff Netscape – a competitor of Microsoft and thus in a position analogous to Discover's in the current litigation – even though the earlier findings of harm to competition were based on the "exclusion of Netscape Navigator" from the relevant market:

> It seems self-evident that this exclusion caused injury to Netscape. However, both the government's and the court's focus was on the harm to the structure of the market, ***that is to competition, not to particular competitors***.

Id. (emphasis added). Therefore, the prior finding that competition had been harmed because Netscape had been foreclosed did not satisfy Netscape's burden of proving "injury-in-fact,

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[41] 232 F. Supp. 2d 534 (D. Md. 2002) ("*Microsoft*"), *rev'd and remanded in part on other grounds*, 355 F.3d 322, 327 (4th Cir. 2004).

[42] As discussed in Section IV, the Fourth Circuit reversed as overly broad the district court's application of collateral estoppel to 350 other findings. *See* 355 F.3d at 327.

antitrust injury, and causation." *Id.* at 539.

In denying collateral estoppel to Netscape, the *Microsoft* court rejected an argument that is indistinguishable from Discover's position here. Discover argues that because the Court found that the "total exclusion of American Express and Discover from a segment of the market for network services" harmed competition,[43] Discover need not show that the exclusion actually caused harm to Discover. But Discover must prove more than that it was denied an opportunity to ***compete*** for bank business (which the government proved to show harm to competition). Discover must also prove that it would have competed and that it would have ***won*** business but for By-Law 2.10(e), and that Discover would have received pecuniary benefit from that business. The DOJ Judgment does not include a single finding that Discover would have won business from a specific bank absent By-Law 2.10(e) or that such business would have been financially advantageous to Discover.

Indeed, during the DOJ trial, Discover asserted that By-Law 2.10(e) alone was not the impediment to Discover's obtaining third-party issuing business. Discover predicted that if only By-Law 2.10(e) and the CPP were repealed (but other rules concerning Discover were left in place), "Discover [would have been] severely compromised in its ability to build transaction volume and merchant acceptance,"[44] because it would be "the only network that will not be able to build volume by attracting substantial third-party issuers."[45] But the DOJ decision did not address Discover's broader concerns and only addressed the competitive harm flowing from By-Law 2.10(e) and the CPP. Indeed, as discussed in Section II.B.1 below, in the appeal of the DOJ

[43] Discover's Memo. at 49-50.

[44] *See* Rubin Decl. Ex. 7, Discover's DOJ Brief on Remedy, at 53.

[45] *See* Rubin Decl. Ex. 8, Purcell Senate Testimony, at 6.

judgment, the Second Circuit found harm to competition solely based upon evidence about the foreclosure of American Express without citing any evidence of the foreclosure of Discover. Thus, the question of harm to Discover before the Court in this case is far from identical to the issue of harm to competition that was before the Court eight years ago.

The difference between harm to competition and harm to Discover is further illustrated by the Court's discussion of First U.S.A.'s approaching Discover "to discuss a possible issuing arrangement."[46] The Court found that competition was harmed because the rules caused Discover and First U.S.A. to discuss an alternative marketing arrangement instead of an issuance agreement.[47] That, however, is far different than a conclusion that Discover was harmed, which would have required a finding that the complex negotiations between First U.S.A. and Discover – which were also fierce competitors for cardholders – would have culminated in a signed agreement and that Discover would have benefited financially from that agreement. *See Maddaloni Jewelers, Inc.*, 354 F. Supp. 2d at 306-07. The Court did not make such a finding. Rather, the evidence shows that the First U.S.A.-Discover negotiations for a co-marketing arrangement fell apart when First U.S.A. merged with Banc One and became too busy for Discover.[48]

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[46] 163 F. Supp. 2d at 386-87.

[47] *Id.*

[48] *See* Rubin Decl. Ex. 13, Trial Testimony of David Nelms in *United States v. Visa U.S.A. Inc.* (7/7/00 Transcript) at 2988-89, 3051-52 [hereinafter "Nelms DOJ Trial Testimony"]. The

REDACTED MATERIAL

These legal and factual differences between harm to competition and harm to Discover preclude collateral estoppel as to the latter based on the Court's findings as to the former.[49]

2. Discover's Alleged Injury on Claim One, for Which Discover Seeks Collateral Estoppel, Depends on the Effects of Third-Party Acquiring, Which Were Not Addressed in the DOJ Litigation

Discover claims an inability to recruit Visa and MasterCard members to issue Discover cards as the first of its two alternative theories of injury in the present case. But Discover concedes that success under this model depended not simply on repealing By-Law 2.10(e), but also on fixing its merchant acceptance gap to make its network attractive to bank issuers. Discover further concedes that its acceptance gap could only be corrected through use of third-party acquiring.[50] The question of Visa and MasterCard members acquiring for Discover, however, was not raised in the DOJ litigation.[51] Thus, the injury that Discover claims in this case is dependent on a theory – third-party acquiring – that materially differs from the prior litigation. Indeed, Discover does not offer any damages model limited solely to the harm underlying the DOJ case, *i.e.*, foreclosed third-party issuing by banks.[52] This difference

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[49] To the extent Discover advances its Project Explorer theory at trial, there certainly were no findings of harm to Discover in the context of the creation of a new network by Citibank and Discover. As such, harm to Discover in the context of Project Explorer must be litigated.

[50] *See* Rubin Decl. Ex. 5, Hausman Rebuttal Rep. at ¶ 124 (explaining that absent closure of the merchant acceptance gap, bank issuance on the Discover network would "consist of segmentation strategies" with additional programs not being added until after the achievement of merchant parity in 1998); Rubin Decl. Ex. 4, Hausman Dep. at 53 (agreeing that "Discover needs to implement third-party acquiring in order to close the acceptance gap"), 317-318 (acknowledging no but-for world model in the absence of third-party acquiring).

[51] 183 F. Supp. 2d at 619 ("Because the Government never attempted to prove that Defendants' merchant acquiring rules were anticompetitive, and because there is no evidence in the record to support the repeal of MasterCard's CPP insofar as it applies to acquirers. . . ."); *see generally* Visa's TPA Memo. at 7 n.25.

[52] *Compare* Rubin Decl. Ex. 4, Hausman Dep. at 317-18 (admitting that he offers no damages model based simply on banks' issuing Discover-branded credit cards without third-party acquiring), *with* 163 F. Supp. 2d at 395 (explaining that the government's model contemplated that American Express and Discover would remain closed-loop networks "that deal directly with merchants").

precludes collateral estoppel. *See, e.g.*, *Greene*, 79 F.3d at 1352 (new theories that are "analytically distinct from the issues in the previous litigation" preclude collateral estoppel); *Levy*, 104 F.3d at 43 (collateral estoppel denied where new "inquiry [that] . . . was not identical to the . . . inquiry required in the plaintiffs' current action").

3. Discover's Third-Party Acquiring Claims Will Require the Jury to Disaggregate between Visa and MasterCard the Cause of Any Harm to Competition or Harm to Discover

The DOJ litigation involved only the issuing restrictions in By-Law 2.10(e) and the CPP. The fact that the CPP also applied to acquiring was not considered, except to the extent necessary to permit MasterCard to retain, if it wanted, its acquiring restrictions.[53] In contrast, Discover now contends that the harm to competition and to Discover that flowed from the rules was dependent on the rules' supposed impact on banks' acquiring merchants for Discover.[54] But By-Law 2.10(e) never restricted acquiring.[55] Discover's third-party acquiring claims will therefore require the jury to disaggregate from the effects of By-Law 2.10(e) the harm (if any) that allegedly flowed from the CPP's acquiring restriction. *See, e.g.*, *Intimate Bookshop, Inc. v. Barnes & Noble, Inc.*, No. 98 Civ. 5564 (WHP), 2003 WL 22251312, at *8 n.5 (S.D.N.Y. Sept. 30, 2003) (granting summary judgment where plaintiff did "not even try to disaggregate the effect and contribution of each defendant's unlawful conduct"); *Universal Amusements Co., Inc. v. Gen. Cinema Corp. of Texas, Inc.*, 635 F. Supp. 1505, 1526 (S.D. Tex. 1985) (plaintiff's failure to disaggregate effects among defendants "left the jury no reasonable or principled way to adjust the damage amount if it so found any defendants innocent"). This new requirement

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[53] 183 F. Supp. 2d at 619.

[54] *See* Rubin Decl. Ex. 4, Hausman Dep. at 317-18 (admitting that he offers no damages model without third-party acquiring).

[55] *See* Rubin Decl. Ex. 9, Teece Rep. at § 4.3.1.

renders the inquiry to be conducted in the current case fundamentally different from the analysis undertaken by the Court eight years ago.[56]

4. Discover's Theory of Competitive Harm Differs From The Government's Theory

The Court's prior competitive effects analysis assumed that increased output of credit cards would ***benefit*** consumer welfare – a proposition with which the government and Visa agreed,[57] and which is consistent with the basic antitrust principle that increased output enhances consumer welfare.[58] In the current litigation, Discover's expert abandons this argument and contends that more favorable pricing to issuers – and the better card features that result – causes consumers to "make 'excessive use' of their credit cards."[59] According to Discover's expert, the problem "is not necessarily too little output . . . but too much credit card output . . . compared to a social optimum," and "[o]verall consumer welfare decreases because competitive retail outlets increase prices to pay for the increases in interchange."[60] Visa disagrees with this proposition, and will vigorously dispute it at trial. Regardless, Discover's new theory turns the Court's analysis from the DOJ case on its head, and therefore the question of competitive effects will not

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[56] We anticipate Discover may argue that an inter-association conspiracy finding may obviate the need for allocation. Of course, inter-association conspiracy itself is a new issue not decided in the DOJ case, and therefore the possibility of an inter-association conspiracy finding does not address the allocation problem presented by applying collateral estoppel on intra-association conspiracy. Moreover, because of various differences between the CPP and By-Law 2.10(e), allocation issues would likely remain even if an inter-association conspiracy were found with respect to the third-party issuing provisions of the CPP and By-Law 2.10(e).

[57] 163 F. Supp. 2d at 379 ("[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. As a result, consumer welfare and consumer choice are decreased.").

[58] *See, e.g.*, *Weyerhaeuser v. Ross-Simmons Hardwood Lumber Co., Inc.*, 127 U.S. 1069, 1077 (2007) (noting that "increases in output generally result in lower prices to consumers") (citations omitted).

[59] *See* Rubin Decl. Ex. 5, Hausman Rebuttal Rep. at ¶ 19.

[60] *See id.*

be identical in the two cases. *See Greene*, 79 F.3d at 1352 (collateral estoppel will not apply where second case involves different theory, even when applied to essentially the same evidence as the original case).

Discover's Project Explorer damages theory also involves a different competitive effects analysis than the theory presented to the Court in the DOJ case. In the earlier litigation, the Court analyzed the competitive effects based on the government's argument that banks might issue Discover cards in the absence of By-Law 2.10(e) and the CPP. That analysis is irrelevant to Discover's "Project Explorer" model in which Citibank and Discover allegedly would have joined together to create a new network if only Citibank could also have remained a member of Visa and MasterCard. None of the Court's prior analyses of the competitive effects of By-Law 2.10(e) and the CPP addressed this alleged but-for world. Discover cannot rely on collateral estoppel to relieve it of the burden of presenting a competitive effects analysis in the context of its Project Explorer but-for world. *See, e.g.*, *Greene*, 79 F.3d at 1352; *Levy*, 104 F.3d at 43.

5. The DOJ Case Was Limited to Credit But Discover Has Pled Debit as a Relevant Market and Sought Damages in that Market

Debit was a collateral issue in the DOJ litigation – relevant only for its purported effect on competition for ***credit*** network services.[61] The Court analyzed debit cards and included them "in its prohibition" because the Court concluded that the "evidence demonstrated that the future of credit card products will be built on, and dependent upon, debit functionality . . . . Credit

[61] 163 F. Supp. 2d at 394 ("The inability to provide debit functionality on a cost-effective basis further limits the effectiveness of American Express and Discover as suppliers of credit and charge card network services.").

cards that do not also have debit functionality will fall by the wayside."[62]

Here, by contrast, Discover asserts both Section 1 and Section 2 claims for alleged harm to competition in a market for debit network services.[63] Discover also raises new allegations about Visa's debit issuance agreements with member financial institutions as part of its Section 2 claims.[64] Discover seeks almost twice as much for debit network damages as it does for credit network damages.[65] At the same time, Discover has abandoned the government's debit theories related to potential multi-function cards.[66]

Discover cannot take statements about debit's impact on a GPCC market and give them preclusive effect to support theories of harm in a different alleged market. *See, e.g.*, *Pool Water Products v. Olin Corp.*, 258 F.2d 1024, 1032 (9th Cir. 2001) (denying collateral estoppel because four markets were alleged in the current case, as compared to only two in the prior case, with only one overlapping market between the cases). The Court should therefore deny Discover's request to apply collateral estoppel to the question of "damages to [Discover] from lost profits on

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[62] *Id.* at 408; *see also id.* at 392-93 (describing Visa and MasterCard's "relationship card strategies); 183 F. Supp. at 616. Discover seeks to gloss over this rationale by the strategic use of ellipses to expand the scope of the Court's debit findings. For example, on page 16 of its Memorandum, Discover asserts that the Court found that the rules "(3) effectively foreclos[ed] American Express or Discover from competing to issue off-line debit cards . . .". The omitted words, however, provide critical context: ". . . which soon will be linked to credit card functions on a single smart card." 163 F. Supp. 2d at 329.

[63] *See* Rubin Decl. Ex. 2, Discover's Second Am. Compl., Claims One through Five.

[64] *See generally* Visa's Memo. of Law in Support of Its Mot. For Partial Sum. Judgment (Monopolization Claims Based On Debit Issuance Agreements) in *Discover v. Visa U.S.A. Inc.*, Feb. 15, 2008.

[65] *See* Rubin Decl. Ex. 3, Hausman Original Rep. at ¶ 257.

[66] In fact, since the DOJ trial, there has been no appreciable interest in multi-function cards in the United States. *See* Rubin Decl. Ex. 16, The Nilson Report, Issue No. 889, Oct. 2007, at 1, 12 (discussing how "combo" cards have only gained traction in a few locations overseas).

third-party signature debit card issuing volumes,"[67] as well as the eight "Debit-Related Conclusions" set forth in Discover's Attachment A.[68]

B. Several Issues on Which Discover Seeks Collateral Estoppel Were Not Actually Litigated and Decided in the DOJ Case

1. The DOJ Case Did Not Actually Litigate or Decide Whether By-Law 2.10(e) Caused Harm to Discover

Under the Sherman Act, the government can seek equitable relief for an antitrust violation "even when no plaintiff has suffered an injury." *Kruman*, 284 F.3d at 397-98. Nevertheless, Discover contends that the issue of injury-in-fact to Discover was actually litigated and decided in the DOJ litigation.[69] By including injury-in-fact in its request for collateral estoppel, Discover is able to ask for partial summary judgment as to liability on its Claim One.[70]

Discover relies on the Court's statement that the rules "prevent[] them [*i.e.*, American Express and Discover] from ***competing*** in the network services market for the business of bank issuers."[71] The Court, however, did not find that absent the rules, Discover would have ***won*** that bank business or that any such business would have accrued monetary benefits to Discover. The Court also did not express any opinion on whether factors other than By-Law 2.10(e), such as Discover's own business strategy or the CPP's acquiring restriction, might have influenced Discover's ability to win bank deals. Likewise, while the Second Circuit observed that "[t]he

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[67] Discover's Memo. at 51 n.27.

[68] Discover's Memo., Attachment A, at ¶¶ 74-81.

[69] Discover's Memo. at 18-21, 48-52.

[70] If injury-in-fact were left for the jury to decide, Discover would not have been able to request partial summary judgment as to liability. *See, e.g.*, *Oberweis Dairy,* 553 F. Supp. at 965-66 (denying motion for partial summary judgment as to antitrust liability where findings in prior action did not establish that defendant's antitrust violations proximately caused injury to plaintiff).

[71] 163 F. Supp. 2d at 382 (emphasis added); *see also id.* at 341 (explaining that absent the rules, Discover would have had "the opportunity" to compete for bank business).

district court cited evidence that three major U.S. issuer banks – Banco Popular, Advanta, and Bank One – would have contracted with ***American Express*** to issue Amex cards in the United States but for the exclusionary rules,"[72] it made no similar observation about Discover.

Discover also argues that one sentence in the Second Circuit's opinion – "[w]ithout doubt the exclusionary rules in question harm competitors" – constitutes a definitive linkage between harm to competition and harm to Discover.[73] But Discover cannot establish injury-in-fact to itself based on a single sentence in which Discover is not even mentioned. *See Postlewaite v. McGraw-Hill*, 333 F.3d 42, 49 (2d Cir. 2003) (requiring that each element of collateral estoppel be established "with clarity and certainty"). Indeed, the quoted sentence is from a section of the opinion in which the Second Circuit responded to Visa's argument that "the sole beneficiary [of repealing the rules] will be AmEx" – ***not*** Discover.[74] The Second Circuit rejected Visa's argument precisely because, regardless of the impact of the rules on competitors, it found no fault with the finding that the rules "harmed competition."[75]

Similarly, although this Court stated that "Discover . . . needs more card issuance and transaction volume, which can only realistically be obtained via third-party issuers, to become a

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[72] 344 F.3d at 240 (emphasis added); *see also id.* ("In addition, Amex, despite repeated recent attempts, has been unable to persuade any issuing banks in the continental United States to utilize its network services," but making no similar finding as to Discover.).

[73] Discover's Memo. at 21, 50 (quoting 344 F.3d at 243).

[74] 344 F.3d at 241.

[75] *Id.* at 243. Discover is likewise wrong in suggesting that the Second Circuit somehow concluded in *Paycom Billing Services, Inc. v. MasterCard International, Inc.*, 467 F.3d 283 (2d Cir. 2006), that the DOJ case involved harm to Discover. That case was before the court on a Rule 12(b)(6) motion to dismiss, which required that the court "accept[] all factual allegations in the complaint as true . . . ." *Id.* at 289. The language on which Discover relies is nothing more than Paycom's complaint allegations that American Express's and Discover's use of banks would "expand[] the scope of their network services by increasing transaction/issuance volume." *Id.* at 293. A recitation of Paycom's allegations cannot relieve Discover of its burden of proving injury-in-fact.

more relevant network," 163 F. Supp. 2d at 388, the Court notably did ***not*** make any finding that but-for the rules, Discover would succeed in winning the volume it needed. The Court also made certain findings that Discover had considered whether to offer a debit product in the 1990s and concluded that it could not do so without access to banks. 163 F. Supp. 2d at 393-94. Yet this finding is not the same as finding that Discover ***would*** have elected to enter the debit segment absent the rules and would have done so successfully.[76]

2. The DOJ Case Did Not Actually Litigate or Decide Any Issues Concerning Project Explorer

Although Discover does not expressly discuss the effect of collateral estoppel on its Project Explorer model, its summary judgment request on Claim One would effectively bar Visa from challenging liability as to the Project Explorer theory. The DOJ case, however, did not involve any litigation regarding By-Law 2.10(e)'s effect on Project Explorer or the pro- or anti-competitive effects that By-Law 2.10(e) might have with respect to Project Explorer.

C. Any Suggestions of Harm to Discover Were Not "Necessary" to the Prior Judgment

Only those findings that are "***necessary, material, and essential*** to the prior outcome" can have preclusive effect in future cases. *GAF Corp. v. Eastman Kodak Co.*, 519 F. Supp. 1203, 1211 (S.D.N.Y. 1981) (emphasis added); *see United States v. Hussein*, 178 F.3d 125, 129 (2d Cir. 1999); Restatement (Second) of Judgments § 27 cmt. *h* (1982). In *Wickham Contracting Co., Inc. v. Brd. of Educ. Of City of New York*, 715 F.2d 21, 28 (2d Cir. 1983), the Second Circuit explained that it is reversible error to apply collateral estoppel to a broad finding in a

[76] Indeed, myriad evidence suggests that Discover would not have entered the debit business, regardless of whether By-Law 2.10(e) were in place. *See, e.g.*, Rubin Decl. Ex. 10, Addanki Rep. at § VI.B (challenging ability of Discover to compete successfully for debit business from banks); Rubin Decl. Ex. 9, Teece Rep. at §§ 4.2 & 4.5 (same).

prior case if a narrower finding "would have sufficed" to establish the elements of the earlier cause of action:

> [W]hether Local 3's actions were directed at all such firms or just at Wickham-Perone was irrelevant in the proceedings before the ALJs since secondary boycotts and coercion as to recognition of a bargaining representative are illegal whether directed at one or many employers. While the ALJ did find that Local 3 sought to exclude all subcontractors who did not hire members of Local 3, a narrower finding would have sufficed. . . . [T]he ALJs factual determinations that Local 3 sought to exclude all non-Local 3 subcontractors . . . while critical to the antitrust claim, was neither necessary nor essential to the unfair labor practice findings.

As explained in Sections II.A.1 and II.B.1 above, injury to Discover was not an element of the government's case. For this reason alone, harm to Discover cannot have been "necessary, material and essential" to the prior judgment.

Moreover, in determining whether a specific finding is necessary to a prior judgment, the Second Circuit has recognized that "[a]ppellate review plays a central role in assuring the accuracy of decisions." *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 45 (2d Cir. 1986). "The limitation that a preclusive finding must be necessary to support a judgment is explained at least in part by the difficulty in obtaining appellate review of 'unnecessary' findings." *Id.* Thus, the rule in the Second Circuit and other federal courts is that "[i]f an appeal is taken and the appellate court affirms on one ground and disregards the other, there is no collateral estoppel as to the unreviewed ground." *Id.*; *see also Dow Chem. v. U.S. EPA*, 832 F.2d 319, 323 (5th Cir. 1987) ("[F]ederal decisions agree that once an appellate court has affirmed on one ground and passed over another, preclusion does not attach to the ground omitted from its decision.").

In the current case, the Second Circuit "passed over" all of the statements that Discover now contends constituted a finding of harm to Discover. As noted above in Section II.B.1, the Second Circuit specifically affirmed this Court's finding of harm to competition on the ground that American Express would have contracted with bank issuers, but made no similar statement

with respect to Discover.[77] The Second Circuit also noted that "[s]ince at least 1995, American Express has sought to change its structure by soliciting banks to issue American Express cards,"[78] but was silent as to Discover. Moreover, the Second Circuit also did not discuss any of this Court's findings that third-party issuance might have improved the competitive position of Discover and American Express, including with respect to their merchant acceptance.[79]

Finally, as this Court is aware, Visa argued repeatedly during the DOJ trial that because Discover asserted it would be harmed if only the rules were repealed, the rules should be retained.[80] The fact that the Court did not consider it necessary to address this argument in its final opinion underscores that the question of harm to Discover was unnecessary to its decision. Indeed, the government responded to Visa's arguments by pointing out that whether Discover would be harmed or not by repealing only By-Law 2.10(e) and the CPP was largely irrelevant because Discover's "interests [were] in profit-maximization, not consumer welfare."[81]

For each of these reasons, it is clear that "harm to Discover" was not necessary to the DOJ judgment in the way that the issues of "reliance and causation" were "integral aspects of [the] scheme, essential to the coherence of the SEC's argument . . . and to the Court's judgment" in *In re Ivan F. Boesky Securities Litig.*, 848 F. Supp. 1119, 1125 (S.D.N.Y. 1994). Instead, this case is no different from *In re Microsoft Corp. Antitrust Litigation*, 232 F. Supp. 2d at 538-39, in

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[77] 344 F. 3d at 240.

[78] *Id.* at 236.

[79] *Compare* 163 F. Supp. 2d at 387-89, *with* 344 F.3d at 240-41.

[80] *See* Rubin Decl. Ex. 17, Joint Proposed Findings of Fact and Conclusions of Law of Defs. Visa U.S.A. Inc., Visa International Services Assoc. and MasterCard International Inc. in *United States v. Visa U.S.A. Inc.*, Sept. 22, 2000, at vi ("The President of Discover testified that the elimination of 2.10(e) . . . would not assist Discover at all. To the contrary, he testified it would harm Discover, merchants and consumers.").

[81] *See* Rubin Decl. Ex. 18, Government's Response to Defendants' Proposed Findings of Fact and Conclusions of Law in *United States v. Visa U.S.A. Inc.*, Oct. 4, 2000, at 45 n.45.

which the court refused to apply collateral estoppel on the issue of injury-in-fact to Netscape even though the court in the government's prior action against Microsoft had relied on the "exclusion of Netscape Navigator" in finding harm to competition. *Id.*

III. OTHER MANDATORY AND DISCRETIONARY FACTORS WEIGH HEAVILY AGAINST APPLYING COLLATERAL ESTOPPEL

In addition to the deficiencies discussed in Sections I and II – each of which separately is enough reason to deny Discover's motion – multiple other factors disfavor Discover's request for collateral estoppel in this case.

A. The Substantial Time that Has Passed Since the DOJ Trial Precludes Applying Collateral Estoppel

Discover acknowledges that to apply collateral estoppel, the Court must find that "no new material facts or circumstances arose after the record closed in the case upon which collateral estoppel is sought."[82] Nevertheless, without making any effort to demonstrate that nothing has changed, Discover seeks to apply collateral estoppel beyond the 2000 close of evidence in the DOJ trial through at least October 2004,[83] and in reality all the way through the end of its damages period in 2012.

Contrary to Discover's contention, collateral estoppel in complex antitrust actions may not apply to a time period that extends well beyond that considered in the prior action. *See, e.g.*, *Pool Water Products*, 258 F.2d at 1032 (denying collateral estoppel for want of identity of issues because "the time period at issue here is different"); *Int'l Shoe Mach. Corp. v. United States Mach. Corp.*, 315 F.2d 449, 457 (1st Cir. 1963) ("[T]he ultimate judgment relates only to the period embraced by the evidence adduced at trial."); *Oberweis Dairy*, 553 F. Supp. at 966

[82] Discover's Memo. at 31; *see also Dracos v. Hellenic Lines, Ltd.*, 762 F.2d 348 (4th Cir. 1985); *In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 11 F.3d 1460, 1463 (9th Cir. 1993); *Harkins Amusement Enters v. Harry Nace Co.*, 890 F.2d 181, 183 (9th Cir. 1989).

[83] Discover's Memo. at 33.

("Because *Alexander's* findings relevant here are focused on the 1970-71 period, any collateral estoppel must be so limited."); *Washington Alder v. Weyehaeuser*, No. Cv 03-753-PA, 2004 WL 1119822, at *4 (D. Or. May 19, 2004). This rule recognizes that prior findings "[can]not reflect a competitive situation subsequent [to the trial], else they would be grounded on speculation, not evidence." *Int'l Shoe Mach. Corp.*, 315 F.2d at 456.

Nevertheless, Discover argues that as long as it alleges nothing more than a continuation of the same conduct at issue in the earlier case, collateral estoppel may extend substantially beyond the time period covered by the earlier case.[84] Discover relies primarily on *Ramallo Bros. Printing, Inc. v. El Dia, Inc.*, 490 F.3d 86 (1st Cir. 2007), and *In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 11 F.3d at 1460. Those cases, however, involved ***defensive*** collateral estoppel against plaintiffs that had previously sued the same defendants, lost in the initial lawsuits, and filed second lawsuits based on nothing more than continuation of the same conduct already found lawful. The Supreme Court has recognized that defensive use of collateral estoppel between the same parties raises different concerns of fairness and efficiency than the use of offensive, non-mutual collateral estoppel. *See Parklane Hosiery*, 439 U.S. at 329-31. Discover also claims that *GAF Corp. v. Eastman Kodak Co.*, 519 F. Supp. at 1209, is "directly on point."[85] The time periods at issue there, however, consisted of "pre-1977 occurrences and documents" in the first case, as compared to damages claims "through mid-

[84] *Id.*. Of course, as discussed above, Discover does far more than allege a continuation of the same conduct at issue in the DOJ litigation, adding debit claims, third-party acquiring allegations and monopolization claims.

[85] *Id.* at 32.

1977" in the second case. *Id.* at 1214. That short time period differs dramatically from this case.[86]

Although Discover baldly asserts in its motion that "nothing material" changed after the DOJ trial to justify ***not*** applying collateral estoppel,[87] Discover's expert argued at length in his reports that market conditions beginning in 2004 were "not a proper basis on which to estimate Discover's but-for [market] share" because the industry has undergone substantial changes from when the rules were adopted and in effect.[88] In 2005, Discover itself underwent an abrupt change when it abandoned its historical single-acquirer business model in favor of third-party acquiring, which has materially changed the competitive landscape in the industry.[89]

Discover's arguments about the effect of the Court's stay of the DOJ Judgment are without merit.[90] The Court's stay provided only that the rules would remain in effect and dedication agreements with banks would not be terminable during an appeal. It did not magically stop the payment card industry from continuing its rapid evolution. As such, the temporal differences between the current litigation and the DOJ action, along with the material

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[86] It is ***Discover's*** burden to prove that the conditions that existed at the time of the DOJ trial "continued to exist" in order to extend the DOJ judgment beyond its temporal foundation. *See Kulak v. City of New York*, 88 F.3d 63, 71 (2d Cir. 1996); *Dracos*, 762 F.2d at 353. The single case cited by Discover to shift that burden to Visa is readily distinguishable. In *Harrington Haley LLP v. Nutmeg Insurance Co.*, 39 F. Supp. 2d 403, 407 (S.D.N.Y. 1999), the time period involved in the prior judgment were from just "slightly earlier" than the time period in the pending case and involved a question of the reasonableness of legal fees. Similarly, the Restatement (Second) of Judgments shifts the burden to the party opposing collateral estoppel only when the time period is short and the condition that is to be estopped is fairly immutable (*e.g.*, mental competence to convey property a week apart). *See* Restatement (Second) of Judgments § 27 cmt. *c*.

[87] Discover's Memo. at 33.

[88] *See* Rubin Decl. Ex. 5, Hausman Rebuttal Rep. at ¶ 185; *see also id.* at ¶¶ 80-86, 186-211; Rubin Decl. Ex. 3, Hausman Original Rep. at ¶¶ 131-147, 149, 165-169, 174, 177, 217.

[89] *See* Section II.A.2, *supra*.

[90] *See* Discover's Memo. at 23-24, 34.

changes in the marketplace discussed in the next section, preclude application of collateral estoppel.

B. Nearly Four Years of Real-World Evidence on the Issue of Injury to Competition Weigh Against Applying Collateral Estoppel Based on the Predictions Made in the DOJ Case

The differences between the cases is more than just temporal. The current case will be tried almost a decade after discovery closed in the DOJ litigation and eight years after the trial ended. By the time of trial in this case, Discover will have had almost four years following the repeal of the rules to win bank business and offer consumers new benefits through bank partnerships. The availability of this new real-world evidence concerning Discover's success or failure in winning bank business and providing consumers benefits undermines Discover's argument that collateral estoppel should be applied to the Court's earlier predictions about the competitive effects of the rules.

In the Second Circuit, collateral estoppel should not be invoked when the factual foundations for a prior judgment have changed since the close of the evidence in the first trial. *See, e.g.*, *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 719 (2d Cir. 1993) ("[A] court should decline to give effect to a prior judgment if there have been changes either in the applicable law or the factual predicates essential to that prior judgment."); *Ezagui v. Dow Chem. Corp.*, 598 F.2d 727, 731 (2d Cir. 1979) (affirming denial of collateral estoppel "on the ground that new scientific evidence cast doubt on" prior findings); *Montana v. United States*, 440 U.S. 147, 158-60 (1979) (explaining that "changes in facts essential to a judgment will render collateral estoppel inapplicable"). Analogous to the current litigation, in *Pool Water Products*, 258 F.2d at 1032, the court refused to apply collateral estoppel when the prior proceeding involved "attempt[s] to predict the [competitive] effects," and the subsequent proceeding turned on whether "the acquisition actually resulted in lessened competition."

The real-world evidence of Discover's bank deals undermines its competitive effects theories. For example, the elimination of the rules has not "enable[d] American Express and Discover to combine their services and features with the different product features and issuing skills of" issuing banks.[91] REDACTED MATERIAL

REDACTED MATERIAL

[91] 163 F. Supp. 2d at 382.

[92] *See* Rubin Decl. Ex. 9, Teece Rep. at § 4.2.1.4. REDACTED MATERIAL

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In sum, the jury should be permitted to consider this real-world evidence instead of being forced to rely on the competitive effects predictions made by the litigants eight years ago.

C. New Developments and Evidence Weigh Against Applying Collateral Estoppel to the Issue of Market Definition

One of the key issues litigated in the DOJ case was whether debit, as well as cash and checks, were in the same market as general purpose credit and charge cards.[95] The Court determined that debit was not in the GPCC markets it found.[96] The Court based that decision on its conclusion that "[c]onsumers . . . do not consider debit cards to be substitutes for general purpose cards."[97] During the past decade, however, consumers' use of debit cards has continued to evolve, and there is now substantial new evidence that, as debit has matured as a product, consumers have come to view debit cards as reasonable substitutes for credit cards even if they did not in the mid-1990s.

For example, in the DOJ litigation, the Court cited the opinion of Discover's then-Chief Operating Officer (now CEO), David Nelms, that credit and debit were not substitutes.[98] By 2007, Mr. Nelms had abandoned that point of view. He testified in this case that credit is "not necessarily" a separate category from debit:

> [S]ignature debit that run on the exact same networks and have the same acceptance, has a lot of similarities to a credit card . . . in all other aspects, material aspects, it's the same. . . . I think on the

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[95] Discover contends that it need not prove market definition or market power at trial because it can simply rely upon the Court's prior finding of anti-competitive effects and thus avoid the usual threshold analysis. *See* Discover's Memo. at 45 n.23. In the absence of collateral estoppel as to competitive effects, this argument fails. Regardless, the Court's prior competitive effects analysis was dependent upon the Court's market definition and market power conclusions; the competitive effects analysis cannot stand on its own. If the Court permits a fresh look at either market definition or power, it logically follows that competitive effects must be examined anew as well.

[96] 163 F. Supp. 2d at 336-37.

[97] *Id.*; 344 F.3d at 239.

[98] 163 F. Supp. 2d at 336-37.

> issuing side, again a customer can choose to use their debit card versus a credit card sometimes.[99]

The jury in this case should answer questions about market definition based on all of the evidence, including the evolving use of different payment mechanisms during the past eight years, especially when Discover alleges competitive harm and seeks damages through 2012. As the *Coburn* court explained, "it would be unjust to freeze in time the answers to these . . . questions when the resolution of these questions . . . will be decided upon the basis of . . . knowledge as it exists at the time of trial." *Coburn*, 174 F. Supp. 2d at 1240.[100]

D. New Developments And Evidence Weigh Against Applying Collateral Estoppel to the Issue of Market Power

In finding market power in the DOJ litigation, the Court and the Second Circuit relied heavily on the observation that "both Visa and MasterCard have recently raised interchange rates charged to merchants a number of times, without losing a single merchant customer as a result."[101] But in the words of Discover's own expert, there is now substantial "emerging

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[99] *See* Rubin Decl. Ex. 23, Deposition of David Nelms in *Discover v. Visa U.S.A. Inc.*, May 15-16, 2007, at 52-54. Other evidence since the DOJ trial points to the same conclusion. *See* Visa's Response No. 36 to Discover's Rule 56.1 Statement. In addition, the government's expert from the DOJ litigation (Prof. Katz) more recently testified that cash and checks do restrain the pricing power of debit network providers because they serve as substitutes for debit. *See* Rubin Decl. Ex. 24, Hearing Testimony, Dec. 5, 2003, *United States v. First Data*, at 112-115 (it would be a "mistake as a matter of economics" to "exclud[e] checks form the analysis" of debit card network services). Thus, if credit and debit network services are now found to be in the same market, the competitive restraints of cash and checks on those services must also be considered. *See* Rubin Decl. Ex. 10, Addanki Rep. at ¶¶ 35-38.

[100] Any concern about inconsistent judgments is without merit. There is nothing inconsistent about the Court finding one market definition in 2000 and a jury in 2008 finding a different market definition based upon eight more years of data. Moreover, collateral estoppel on market definition increases the likelihood of an inconsistent judgment in which the jury finds that debit competes with credit, cash and checks but at the same time is ordered to find that credit does not compete with debit, cash and checks. Indeed, such an order as to a credit market is likely to bias the jury's *de novo* consideration of the scope of the market in which debit competes.

[101] 163 F. Supp. 2d at 340; 344 F.3d at 239-40.

literature on two-sided markets"[102] that counsels against such an analysis. Although the general concept of a two-sided market had been introduced in the literature before the DOJ trial, the concept has been far more fully elucidated since that time.[103] According to this new literature, in a competitive two-sided market, higher prices on one side of a market (*e.g.*, the merchant/acquirer side of the network services market) support lower prices on the other side of the market (*e.g.*, the cardholder/issuer side of the network services market), and thus raising prices on one side of the market is consistent with a competitive market in which those higher prices ***expand*** output by lowering prices and stimulating demand on the other side of the market.[104]

Based on this emerging economic scholarship, in 2003, both Professor Katz (DOJ's expert) and Professor Hausman (Discover's expert) testified that increasing interchange rates was not evidence of the exercise of market power by the largest PIN debit network, because those increases reflected the dynamics of increased competition for issuers (and through issuers,

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[102] *See* Rubin Decl. Ex. 25, Jerry Hausman and Julian Wright, *Two Sided Markets with Substitution: Mobile Termination Revisited*, June 2006 (unpublished manuscript), at 1 (citing six articles that were all published after the DOJ trial).

[103] *See* Rubin Decl. Ex. 10, Addanki Rep. at ¶ 26 ("A rich body of economic literature has emerged on the analysis of two-sided markets, most of it coming after the DOJ case. . . .") (citing recent articles applying new two-sided market analysis to payments industry).

[104] *See* Rubin Decl. Ex. 26, Statement of Jerry Hausman, Dec. 17, 2004 (report submitted to the Australian Competition and Consumer Commission), at ¶¶ 16 ("A two-sided market exists where customers' demand and valuation of a product or service depends on the usage by the other side of the market."), 17 ("The two-sided market feature is common in many network industries. . . . [I]n the U.S. most banks allow 'free' transactions for consumers for the use of online debit cards because the banks' goal is to cause more merchants to purchase the necessary equipment to allow them to accept online debit transactions.").

cardholders) in the two-sided payment card market.[105] Visa's experts in the current litigation rely extensively on this new two-sided market evidence in response to Discover's continued argument that increasing interchange rates constitutes evidence of the exercise of market power.[106] The jury should be permitted to use this new analytical framework and real world evidence to assess the issue of market power at trial.[107] *See, e.g.*, *Coburn*, 174 F. Supp. 2d at 1240 ("[I]t would be unjust to freeze in time the answers to these [expert] questions when the resolution of these questions . . . will be decided upon the basis of scientific knowledge as it exists at the time of trial."); *Continental Airlines, Inc. v. Am. Airlines, Inc.*, 824 F. Supp. 689, 712-13 (S.D. Tex. 1993) (denying collateral estoppel as to market findings where the economic framework for understanding competition at hub and individual airport level was not well understood at time of first judgment).

E. Applying Collateral Estoppel Would Be Unfair to Visa

The Supreme Court has instructed trial courts to exercise their discretion and ***not*** apply offensive, non-mutual collateral estoppel when doing so would be unfair to defendants. *See Parkland Hosiery*, 439 U.S. at 651-52. Applying collateral estoppel would be unfair to Visa for several reasons: (1) collateral estoppel would bias the jury's consideration of overlapping

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[105] *See* Rubin Decl. Ex. 24, Hearing Testimony, Dec. 5, 2005, *United States v. First Data*, at 102 (Katz: "[U]ltimately that Interchange fee is driven by competition to attract issuers, to attract merchants, and again . . . the increases in Interchange fees that we have been seeing is a result not of the exercise of market power, but it is the result of competition as PIN networks have tried to keep issuer customers."), 107-108 (Katz: "You can interpret competitive behavior as evidence that you had the, the hypothetical monopolist in action" through raising interchange), 152 (Hausman: "The problem is that what is actually competition which is trying to get issuers by raising the Interchange. If you only look at the other [merchant] side of the market, looks like you are excising market power . . . .").

[106] *See* Rubin Decl. Ex. 10, Addanki Rep. at ¶¶ 26-34, 41-45, 60.

[107] As noted above, two-sided markets and the real world evidence discussed above will all be admissible as to Discover's monopoly claims and debit claims and thus there will be no meaningful efficiency gain by limiting the relevance of that evidence through collateral estoppel.

evidence relevant to non-estopped issues; (2) certain of Discover's current theories are inconsistent with a prior judgment in Visa's favor; and (3) Discover is cherry-picking sentences out of context that are superficially favorable to it, while ignoring those parts of the Court's opinion that put the cited sentences in context and may actually undermine its current theories.

1. Collateral Estoppel Would Risk Juror Confusion and Would Undermine Visa's Right to an Unbiased Jury on Issues to Which Estoppel Cannot Apply

Collateral estoppel cannot apply to – and Visa is entitled to defend fully – all issues in this litigation that were not litigated in the DOJ action, including Discover's monopolization claims, its debit claims, its third-party acquiring claims, and the amount of any damages. The jury's task of deciding these non-estopped issues would be more difficult – and more likely to be infected with confusion or bias – if it were forced to sort out which issues are estopped and which are not.

As the court held in *Coburn*, 174 F. Supp. 2d at 1241, any jury instruction applying collateral estoppel on general causation "would inevitably color the jury's decision regarding specific causation," and as such "the risk of prejudice and confusion significantly outweighs any benefit that might be derived from applying collateral estoppel." *Id.*; *see also Phonetele, Inc. v. American Tele. & Telegraph Co.*, No. CV-74-3566-MML, 1984 WL 2943, at *5 (C.D. Cal. 1984) (concluding that "the application of issue preclusion to the questions designated by Phonetele would make a fair resolution of the remaining questions unacceptably difficult"); *Whelan v. Abell*, 953 F.2d 663, 669 (D.C. Cir. 1992) (affirming denial of collateral estoppel where there was the "prospect of skewing or distorting the jury's judgment in the particular setting before [the court]").

In the present case, jury confusion and bias would be likely with respect to all overlapping issues. For example, if the Court were to instruct the jury that By-Law 2.10(e) was

unlawful with respect to Discover's Section 1 credit market claims, that instruction would bias the jury's consideration of whether the rule was lawful for purposes of Discover's Section 2 monopolization claims or Discover's Section 1 debit market claims. Similarly, the jury's determination of the scope of the market in which debit competes almost certainly will be influenced if it is told that it must treat credit cards as a separate market in which debit does not compete.[108] The same is true for questions of monopoly power and market power – if the jury is told that it must conclude that Visa has market power, its determination of whether Visa has monopoly power almost certainly will be affected. And if the jury is told that it must find that Discover has been injured, Visa would effectively be precluded from showing that the small amount of bank business Discover would likely have won in the but-for world would not have covered the costs to Discover of operating a network for banks and thus the amount of damages is zero.[109] Thus, the application of collateral estoppel that Discover seeks would substantially prejudice Visa's ability to receive a fair trial on non-estopped issues – and thus would be unfair within the meaning of *Parklane Hosiery* and cause the type of "devastating impact on [Visa's] constitutional right to a jury trial" of which the Second Circuit warned in *Monarch Funding Corp.*, 192 F.3d at 304.

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[108] Application of collateral estoppel to compel a separate credit card market would also risk an inconsistent judgment if the jury concludes that Discover has failed to prove the existence of a separate debit market. Such a finding could mean that debit and cash are substitutes, or it could mean – inconsistent with the Court's collateral estoppel instructions – that debit and credit are substitutes.

[109] Indeed, Visa's experts will opine that the amount of any damages is zero if one uses Discover's real-world performance and considers all of the costs associated with operating a network along-side a proprietary issuing business (including the cost of proprietary cardholders switching volume to a new third-party issuer) *See* Rubin Decl. Ex. 9, Teece Rep. at §§ 4.4 - 4.6 (explaining that real world results are the best measure of but-for world); Rubin Decl. Ex. 12, Report of William E. Wecker in *Discover v. Visa U.S.A. Inc.*, Oct. 8, 2007, at Exhibit D (showing zero damages based upon real world results and an accurate assessment of the costs of operating a network including cannibalization).

2. Collateral Estoppel Would Be Unfair Because Discover Asserts Some Theories That Are Inconsistent With An Earlier Judgment In Visa's Favor

"Allowing offensive collateral estoppel may also be unfair to a defendant if the judgment relied upon as a basis for estoppel is itself inconsistent with one or more previous judgments in favor of the defendant." *Parklane Hosiery*, 439 U.S. at 330; *see also Leblanc-Sternberg v. Fletcher*, 67 F.3d 412, 434 (2d Cir. 1995).

Under Discover's alternative Project Explorer damages theory, By-Law 2.10(e) was unlawful because it allegedly prevented Citibank from launching a new competitive network. Discover contends that By-Law 2.10(e) (along with the CPP) prevented this new competitive network – which Discover contends would have benefited Discover – because Citibank could not remain a member of Visa while it ran this new network. Yet, the Tenth Circuit's decision in *MountainWest* holds that Visa can ***lawfully*** exclude competitor networks from membership in Visa. *See* 36 F.3d at 971-72. Directing a verdict as to the unlawfulness of By-Law 2.10(e) in the context of Discover's Project Explorer theory would be inconsistent with the *MountainWest* decision. The existence of an inconsistent prior decision in the context of Project Explorer creates precisely the type of unfairness disfavored by the Supreme Court and the Second Circuit. *See Parklane Hosiery*, 439 U.S. at 330; *see also Leblanc-Sternberg*, 67 F.3d at 434.

Similarly, Discover seeks to apply collateral estoppel to the Court's finding that "Discover profitably [cannot] compete to buy additional portfolios to increase their size – and therefore merchant 'relevance.'"[110] The Court, however, explained that this limitation was "principally because [Discover] cannot be Visa or MasterCard members."[111] That limitation –

[110] Discover's Memo., Attachment A, at ¶ 43.

[111] 163 F. Supp. 2d at 394.

based on By-Law 2.06 – is precisely what was found to be lawful in the *MountainWest* litigation. *See* 36 F.3d at 971-72.

3. It Is Unfair for Discover to Cherry-Pick Sentences Out of Context from the DOJ Opinion

In the DOJ decision, the Court made a number of factual findings that were favorable to Visa. For example, the Court cited Visa's Partnership Agreements as a pro-competitive tool to ensure loyalty to Visa and thus enhance inter-system competition in the face of duality.[112] The Court also concluded that competition for these agreements has driven down prices to issuers, and that those lower prices have been passed on to consumers.[113] In addition, the Court concluded that the two-year rescission window provided for in the Court's Order would "permit American Express and Discover to compete on equal footing with Visa and MasterCard for issuing agreements with card issuers."[114]

Now, however, Discover argues that Visa's Partnership Agreements are anti-competitive and have harmed Discover,[115] in part based on the Court's statement that "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."[116] Given the Court's other findings about Visa's Partnership Agreements, it would be unfair to Visa if the jury

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[112] *Id.* at 370 ("Plaintiff's focus on dual governance has been rendered largely irrelevant by these agreements. . . .").

[113] *Id.* at 365-370.

[114] *Id.* at 409.

[115] *See* Rubin Decl. Ex. 5, Hausman Rebuttal Rep. at ¶ 190 ("Since the DOJ decision went into effect in late 2004, Discover has been seeking business from numerous banks that have dedication agreements that substantially minimize the prospect for issuing credit or debit cards on Discover's network."); *see also id.* at ¶¶ 191-207.

[116] Discover's Memo., Attachment A, at ¶ 44 (citing 163 F. Supp. 2d at 408-09).

were told that it is conclusively established that these agreements have prevented Discover from competing during the duration of the agreements without also telling the jury (1) that this Court found that the agreements had pro-competitive effects and (2) that the Court also found – in the very next sentence after the sentence that Discover cites – that the two-year rescission window would allow Discover to compete on equal footing.[117]

IV. DISCOVER'S REQUEST FOR COLLATERAL ESTOPPEL IS OVERBROAD WITH RESPECT TO DISCOVER'S ATTACHMENT A

Discover also seeks an order "establishing in this case those key findings from the DOJ Case listed on Attachment A."[118] Discover's support for this broad relief consists of a single sentence in which Discover asserts that all elements of collateral estoppel were met because each of these assertions was "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."[119] This conclusory sentence does not satisfy Discover's burden of establishing with "clarity and certainty" every element of collateral estoppel for each of the 81 individual statements. *Postlewaite*, 333 F.3d at 49; *see also Hailton v. Accu-Tek*, 62 F. Supp. 2d802, 813 (E.D.N.Y. 1999); 18 James Wm. Moore et al., Moore's Federal Practice § 132.05[1], at 132-77 (3d ed. 1999). Because Discover has failed to establish the elements of collateral estoppel on each of these statements, Discover's request should be denied.

Not only does Discover not attempt to meet its burden, it seeks to lower that burden by asserting that collateral estoppel should be invoked as long as the individual statements "support" the Court's prior conclusions. According to the same case law relied upon by

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[117] 163 F. Supp. 2d at 409.

[118] Discover's Memo. at 55.

[119] *Id.* at 55-56 (emphasis added).

Discover, however, before collateral estoppel can be invoked, individual facts must be so "integral" that they are "essential to the coherence of the . . . Court's judgment." *In re Ivan F. Boesky Securities Litig.*, 848 F. Supp. at 1125; *see also GAF Corp.*, 519 F. Supp. at 1211 (necessary requirement means "***necessary, material, and essential*** to the prior outcome"). As discussed above, the Second Circuit recognizes that findings that were passed over by an appellate court in affirming a decision cannot serve as a basis for collateral estoppel. *See Gelb*, 798 F.2d at 45. Consistent with the Second Circuit's rule, the Fourth Circuit in *In re Microsoft Corp. Antitrust Litig*ation, explained at length why the "supportive of" standard advocated by Discover is inappropriate:

> Because a fact that is "supportive of" a judgment may be consistent with it but not necessary or essential to it, the term "supportive of" is a broader term than "critical and necessary." The term "supportive of" sweeps so broadly that it might lead to inclusion of all facts that may have been "relevant" to the prior judgment. Such a broad application of offensive collateral estoppel risks the very unfairness about which the Supreme Court was concerned in *Parklane*, . . . and we conclude therefore that it is inappropriate.

355 F.3d at 327. Therefore, the Fourth Circuit reversed the district court's decision to grant collateral estoppel to 350 individual findings of fact that were not all "critical and necessary to the judgment actually affirmed by the D.C. Circuit." *Id.* at 329.

In the current case, this Court's 80-page opinion includes numerous statements that played no role in the Second Circuit's affirmance of the judgment. For example, the Second Circuit did not address the statements in paragraphs 37, 38, 40, 41, 43 and 45 of Discover's Attachment A that Discover contends establish harm to Discover. The Second Circuit did not address the statements in paragraphs 46-50, 54-59 and 61 that Discover contends establish that "multiple bank issuance is critical." The Second Circuit also did not address the "free-riding" analysis of this Court or the statements in paragraphs 70 and 72 of Attachment A. Furthermore,

this Court's conclusions about debit played no role in the Second Circuit's decision and thus paragraphs 74 through 81 cannot serve as estoppel.

Similarly, as discussed above, many of the individual factual issues addressed in the DOJ litigation are not identical to the facts as they would be presented today. For example, the statements concerning the competitive effects of increased price competition on consumer welfare in paragraphs 21 through 34 are at odds with Discover's new theory that increases in interchange that results from greater network price competition for issuers will result in ***less*** consumer welfare.[120] And the statements under "Multiple Bank Issuance Is Critical" in paragraphs 46 through 61 and 74 through 81 are undermined by Discover's new third-party acquiring theories and its failure to advance any arguments based upon multi-function cards.[121] Moreover, many of the quotations on Attachment A refer collectively to "American Express and Discover" while the current case involves only Discover. *See, e.g.*, Paragraphs 19, 24-26, 28-30, 33, 55, 57, 61-64, 73 of Discover's Attachment A.

Thus, regardless of how the Court rules on the rest of Discover's motion, it should deny Discover's request to take specific statements from the Court's earlier decision and use those statements to conclusively establish individual facts in 2008. If the Court were to deny Discover's broader request for collateral estoppel, it would be even more inappropriate to apply collateral estoppel to any of the individual findings because that would constitute a back-door through which to avoid the usual standards for invoking collateral estoppel. The jury should be permitted to consider all of the available evidence and reach its own factual conclusions on each

[120] *See* Section II.A.4, *supra*.

[121] *See* Section II.A.2, *supra*.

disputed fact at trial. *See, e.g.*, *Coburn*, 174 F. Supp. 2d at 1240; *Continental Airlines*, 824 F. Supp. at 712-13.

CONCLUSION

Discover's only ground for seeking partial summary judgment is the application of collateral estoppel. Because collateral estoppel should not be applied, Discover's motion for partial summary judgment must be denied.

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