UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

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

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Note, *Section 5(a) of the Clayton Act and Offensive Collateral Estoppel in Antitrust Damage Actions*, 85 Yale L.J. 541, 548-49 (1976) 22

Discover respectfully submits this reply memorandum of law in support of its motion for (1) partial summary judgment based on collateral estoppel on Claim One of its Second Amended Complaint, and (2) an Order precluding Defendants from relitigating certain issues previously determined in *United States v. Visa/MasterCard*.[1] Discover responds to both Defendants in one brief, as the arguments in favor of its motion for partial summary judgment by collateral estoppel are identical with respect to both Defendants, and Defendants' arguments in opposition are largely the same.

PRELIMINARY STATEMENT

This is a perfect case for the application of collateral estoppel. Discover's Claim One is virtually identical to the DOJ's claim that resulted in the invalidation of the exclusionary rules. All of the elements of Discover's Claim One were plainly necessary to and actually litigated in *Visa/MasterCard*, and there is no dispute that Defendants fiercely litigated the previous case at every turn. As a result, applying collateral estoppel here would be fair and inherently efficient. Indeed, Defendants do not — because they cannot — dispute that all of the elements of the DOJ's Section One claim challenging the exclusionary rules were actually decided against them after a thirty-four day trial in which numerous witnesses testified and hundreds of exhibits were proffered and after a full appeal of these issues was taken to the Second Circuit. Nor do Defendants dispute that the market definition, market power, harm to competition, and lack of procompetitive justification findings that were confirmed by the Second Circuit were necessary to this Court's Final Judgment. Finally, Defendants also do not dispute that, due to the stay of the Final Judgment, the exclusionary rules were not repealed until October 2004, and not one Visa/MasterCard member broke ranks and

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1 *United States v. Visa U.S.A. Inc., et al.*, 163 F. Supp. 2d 322 (S.D.N.Y. 2001), *aff'd*, 344 F.3d 229 (2d Cir. 2003), *cert. denied*, 543 U.S. 811 (2004) (collectively "*Visa/MasterCard*" or the "DOJ Case").

started issuing credit or debit cards over the Discover or American Express networks while the rules remained in effect.

Only by resorting to a litany of distortions do Defendants offer any argument at all to oppose estoppel, which they do as to all of the elements of the DOJ's Section One claim — intra-association conspiracy, market definition, market power, and harm to competition. These distortions include false descriptions of Discover's theories of harm to competition and *Visa/MasterCard*'s findings, as well as an incorrect portrayal of the evidence from the period after the repeal of the exclusionary rules. Once Defendants' various deceptions are exposed, it is clear that Defendants have no legitimate argument to oppose an award of collateral estoppel on each of the core elements of the DOJ's claim.

Defendants, as a result, focus on fact of injury to Discover — which they incorrectly contend was neither litigated nor necessary to the DOJ Case — and on purported efficiency and fairness concerns, which they distort to justify their full frontal assault on this Court's eighty-nine page *Visa/MasterCard* opinion. The hypocrisy of this attack is readily apparent from the fact that, even though MasterCard is currently invoking the Final Judgment to protect its debit business in the face of Visa's Settlement Service Fee ("SSF"), and even though Visa did not challenge the ongoing validity of the Final Judgment in the SSF proceeding, Defendants now seek to relitigate the very foundations of *Visa/MasterCard*, claiming that it is wrong in every respect, and that eight years after the DOJ's trial, the exclusionary rules should be declared lawful after all.

Defendants do not come close to justifying such an unwarranted and inefficient result. A relitigation of the entire DOJ Case would be antithetical to notions of judicial economy and finality — the very goals underpinning collateral estoppel. Such a result also would undermine the deterrent effect of public antitrust enforcement and the efficiency rationale of collateral estoppel by giving

future antitrust defendants increased incentives to draw out antitrust litigation, perpetuate the harms their violations inflict on competitors, and then point to supposed "changed circumstances" and "new evidence" as a reason to reverse previous findings made against them. For these reasons alone, the Court should grant partial summary judgment to Discover based on collateral estoppel. In addition, Defendants' arguments should fail for each of the following five additional reasons.

First, Defendants mischaracterize Discover's case, asserting that it is based on new theories of competitive harm and injury that were not presented in the DOJ Case. This argument is belied by the record. There is complete identity between Discover's theories of injury and competitive harm — which are based entirely on Discover's inability to attract third-party issuers due to the exclusionary rules — and the theory of competitive harm pursued in the DOJ Case. Defendants try to confuse the issue by pointing repeatedly to assumptions in Discover's ***damages analysis***, including the assumption that, in a "but for" world without Defendants' illegal restrictions against third-party issuing, the additional volume generated by third-party issuing would have made it possible for Discover to engage in third-party acquiring. Discover's damages assumptions flow directly from the prohibitions in By-law 2.10(e) and the CPP that precluded third-party issuing on Discover's network. Discover's damages analysis is thus merely an elaboration of the theories underpinning the DOJ Case — not a "new" theory of injury.

Second, Defendants incorrectly contend that Discover's fact-of-injury was not actually litigated or necessarily decided in *Visa/MasterCard* because that issue was not an element of the DOJ's claim. This argument cannot be reconciled with the explicit findings in *Visa/MasterCard*. There, this Court held that competition was harmed because the exclusionary rules foreclosed Defendants' only two network competitors, Discover and American Express, from attracting third-party issuers to their networks. Without such findings of injury to Discover and American Express,

the DOJ's claim of competitive harm necessarily would have failed because there was no other evidence demonstrating how the rules detrimentally affected consumers. Moreover, Defendants' argument is wrong on the law. The Second Circuit does not follow the highly restrictive standard for "necessary" findings upon which Defendants rely for this argument.

Third, Defendants ignore the substantial, additional trial time that would be unnecessarily required by a full-scale relitigation of the legality of the exclusionary rules and, instead, argue incorrectly that no judicial economies would be gained by applying collateral estoppel. Application of collateral estoppel here would be inherently efficient, as it would reduce the total number of fact and expert witnesses, the scope of overall witness testimony, and the number of documents and issues that the jury would otherwise consider.

Granting collateral estoppel also would be consistent with the Congressional intent behind Clayton Act Section 5(a), which Congress amended to recognize the inherent efficiencies of applying collateral estoppel to simplify complex private antitrust cases. Indeed, if the Court were to deny Discover's collateral estoppel motion based on efficiency or fairness grounds, it still would need to grant Section 5(a)'s "prima facie effect" to the *Visa/MasterCard* findings that actually were litigated and necessary to the ruling in that case. *See* 15 U.S.C. § 16(a). That result would be significantly less efficient and more confusing for the jury than would a trial streamlined by a grant of Discover's collateral estoppel motion. Specifically, the jury would be required to decide whether *Visa/MasterCard*'s findings were correct and, in doing so, weigh the defense mounted by Visa and MasterCard as well as Discover's rebuttal evidence.

Moreover, Defendants' efficiencies argument is largely premised on this Court's April 14, 2005 Order denying the application of collateral estoppel ***prior to discovery***. As that decision concerned pre-discovery efficiencies, it has no bearing on the separate question of whether collateral

estoppel should be applied at this time to narrow this case for trial. Defendants' argument also relies heavily on contrived and exaggerated assertions of overlaps between evidence related to claims that are not subject to this motion, and therefore would remain in the case, and evidence that would be rendered unnecessary by a grant of collateral estoppel. When Defendants' distortions are stripped away, it becomes clear that the limited overlaps that do exist would not have a material impact on the efficiencies that would be achieved by collateral estoppel. Nor does the law support denying collateral estoppel simply because some overlaps exist.

Fourth, Defendants also contend that collateral estoppel would be unfair because purportedly overlapping evidence would taint the jury as to the remaining issues in the case. Given the clear distinctions between the issues subject to collateral estoppel and Discover's remaining claims — which concern the debit network services market and inter-association conspiracy — there is simply no reason why a finding of collateral estoppel would have any prejudicial impact on the jury's deliberations with respect to those remaining claims. The same point is true for Discover's damages, as juries routinely separate the issues of liability and damages, thus demonstrating that, when properly instructed, one finding does not necessarily dictate the other.

Defendants' remaining fairness arguments are equally baseless. Visa's claim that Discover's motion unfairly "cherry picks" findings that are unfavorable to Visa runs counter to the basic principles of nonmutual offensive collateral estoppel. Defendants fare no better with their argument that supposed "changed circumstances" and "new evidence" somehow render the application of collateral estoppel unfair. Most of the purported "new evidence" is not new at all. Defendants' argument also should be disregarded because it cannot be squared with MasterCard's successful enforcement of the Final Judgment in the SSF proceedings, a position that MasterCard is currently

defending in the Second Circuit. If the Final Judgment and the findings that underlie it are valid for purposes of the SSF proceeding, they are valid in this case as well.

Defendants further argue that the injury to competition findings in *Visa/MasterCard* were mere speculative "predictions" and that it would therefore be unfair to preclude Defendants from attempting to show that these "predictions" have not come to pass since October 2004. This argument also lacks merit. In truth, this Court's injury to competition findings were based on actual, historic evidence of the exclusionary rules' foreclosure effects on Discover and American Express. Moreover, Discover's and American Express's performances in the marketplace since the demise of the exclusionary rules, even in the face of Defendants' attempts to extend the foreclosure effects of their exclusionary rules after October 2004 via dedication agreements, confirms all of *Visa/MasterCard*'s injury to competition findings. In any event, Defendants can attempt at trial to introduce the post-2004 record to rebut Discover's damages analysis, and thus their unfairness arguments do not withstand scrutiny.

Finally, Defendants claim that summary judgment should be denied to Discover for the period between August 2000 and October 2004 due to material changed circumstances that occurred after the DOJ trial. Defendants, however, do not dispute that all of the facts material to the liability finding in *Visa/MasterCard* remained in place until October 2004 because of the stay of the Final Judgment. Indeed, Defendants themselves petitioned this Court for that stay in order to *preserve* the *status quo*. As a result, until October 2004, the exclusionary rules remained on the books, Visa and MasterCard continued to enforce them, and the member banks continued to abide by them. Not one Visa/MasterCard member bank issued a credit or debit card over either Discover's or American Express's network until the exclusionary rules were repealed in October 2004. As there is no dispute that the conspiracies, market power, injury to competition, and injury to Discover found in

Visa/MasterCard continued unabated until October 2004, Discover should be granted summary judgment for that post-trial period as well.

For the foregoing reasons and those set forth more fully below, Discover's motion for partial summary judgment through October 2004 should be granted.[2]

I. DISCOVER SEEKS COLLATERAL ESTOPPEL ON ISSUES IDENTICAL TO THOSE ACTUALLY LITIGATED AND NECESSARY TO THE JUDGMENT IN THE DOJ CASE.

Defendants argue that Discover is not entitled to collateral estoppel because Discover's injury was not actually litigated in or necessary to the DOJ Case. Defendants also contend that, to the extent such injury was found in the DOJ Case, collateral estoppel cannot apply here because Discover's theories of injury and conspiracy differ from the theories of competitive harm and conspiracy in the DOJ Case. Neither argument can withstand scrutiny.

A. Discover Seeks Collateral Estoppel Only on Issues Identical to Those Raised and Actually Litigated in the DOJ Case.

1. Discover's Injury in Fact Was Actually Litigated in the DOJ Case.

Defendants incorrectly argue that the DOJ Case did not find that Discover was injured because injury to Discover was not an element of the Government's claims. (*See, e.g.*, Visa U.S.A. Inc.'s Mem. of Law in Opp'n to Discover's Mot. for Partial Summ. J. ("Visa Opp'n") at 17, 20; MasterCard Incorporated's and MasterCard International Incorporated's Mem. in Opp'n to

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[2] Defendants' contention that Discover's Rule 56.1 Statement failed to rely on admissible evidence pursuant to Local Rule 56.1 should be disregarded. Defendants' argument ignores that the decisions in *Visa/MasterCard* become evidence once this Court grants collateral estoppel. *See* 2 McCormick on Evid. § 298 (6th ed. 2006) ("Where the doctrines of res judicata, collateral estoppel, or claim or issue preclusion make the determinations in the first case binding in the second, a judgment in the first case is not only admissible in the second, but it is conclusive against the party as a matter of substantive law."); *see also Beeller v. Sales Affiliates, Inc.*, 431 F.2d 651, 655 (7th Cir. 1970) (holding that a prior judgment could be read to the jury and admitted into evidence "since [the plaintiffs] were in fact bound by that judgment in this action"); *compare Torah Soft, Ltd. v. Drosnin*, No. 00 Civ. 0676, 2003 WL 22024074, at *1 (S.D.N.Y. Aug. 28, 2003) ("The plaintiff argues that a judicial finding in one case is inadmissible hearsay when proffered as evidence in another action.... However, the cases cited by [plaintiff] do not address the possibility that judicial findings in the earlier case may have preclusive effects in the latter.") (citations omitted). Consequently, Discover's citation to those opinions was consistent with Local Rule 56.1.

Discover's Mot. for Partial Summ. J. ("MC Opp'n") at 29-30.) In truth, the Court's finding of harm to competition in the network services market was entirely premised on findings of injury to Defendants' only network competitors — Discover and American Express.

To prove harm to competition, the DOJ proffered evidence of injury to Discover caused by the exclusionary rules, thus putting the issue of Discover's injury squarely before Defendants and this Court.[3] Thereafter, in deciding whether the exclusionary rules did, in fact, harm competition in the network services market, this Court examined and relied on that evidence. *See, e.g.*, *Visa/MasterCard*, 163 F. Supp. 2d at 386-87. Indeed, contrary to Defendants' mischaracterization that *Visa/MasterCard* merely held that Discover "might" attract third-party issuers to its network absent the exclusionary rules (MC Opp'n at 20), this Court found that "[b]ecause of the defendants' exclusionary rules ... Discover ***h[as] not been able*** to convince U.S. Banks to issue cards over [its] network[]." *Id.* at 382 (emphasis added). Likewise, this Court held that "the exclusionary rules ***have resulted*** in the failure of Visa and MasterCard member banks to become issuers of ... Discover-branded cards." *Id.* at 383 (emphasis added). Finally, as Defendants concede, this Court specifically found that First USA "would have liked" to issue cards over Discover's network but "would not do so for fear of losing the ability to issue Visa and MasterCard cards." *Id.* at 387. These findings easily satisfy Discover's burden of proving "some damage flowing from the unlawful conspiracy" to

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[3] *See* Decl. of Robert S. Cohen in Supp. of Discover's Mot. for Partial Summ. J. ("Cohen Decl.") Ex. 1 (Pl.'s Post-Trial Proposed Findings of Fact, *Visa/MasterCard*) at ¶ 321 (citing DOJ Trial Tr. 6058 (Schmalensee) (testifying that the exclusionary rules were a "significant cause" of Discover's inability to sell network services to banks)); *id.* at ¶ 331 (citing DOJ Trial Tr. 1279-80 (Hart) (testifying that Advanta "gave consideration" to issuing Discover-branded cards during the 1990s)); *id.* at ¶ 346 (citing DOJ Trial Tr. 2987 (Nelms) (testifying that a potential arrangement where First USA would issue Discover cards was dependent on the by-laws changing)); *id.* at ¶ 344 (citing Citibank Mem. from B. Khanna to R. Quinlan, CC56000289-90, 89 (P-0168) (noting that "full abolition [of 2.10(e)] would allow members freedom to issue both inside and outside the network and could strengthen both American Express['] and Discover[']s ability to attract partners")).

show fact of injury in this case. *Zenith Radio Corp. v. Hazeltine Research Inc.*, 395 U.S. 100, 114 n.9 (1969).[4]

Likewise, contrary to Defendants' assertion (*see, e.g.*, Visa Opp'n at 19-20, 27), the Second Circuit affirmed this Court's findings of actual injury to Discover:

> In the market for network services, where the four networks are sellers and issuing banks and merchants are buyers, the exclusionary rules enforced by Visa U.S.A. and MasterCard ***have absolutely prevented ... Discover from selling [its] products at all.*** Without doubt the exclusionary rules in question harm competitors.

Visa/MasterCard, 344 F.3d at 243 (emphasis added). The Court's language is not conditional or predictive; it is historical and descriptive. Any reasonable interpretation of this record demonstrates that this Court did determine that Discover was, in fact, injured by By-law 2.10(e) and the CPP. *Accord Paycom Billing Servs., Inc. v. MasterCard Int'l, Inc.*, 467 F.3d 283, 293 (2d Cir. 2006) (noting that "[c]ompeting payment-card network service providers like Discover and American Express were the entities directly harmed by the CPP").

In addition, a conclusion that Discover was injured by the exclusionary rules preceded this Court's ultimate finding regarding the detrimental impact of the exclusionary rules on output in the relevant network services market. As Visa itself notes, the Second Circuit expressly acknowledged

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[4] Without citing a single case, Visa argues that, to prove injury in fact, Discover must show that it would have "won" profitable bank deals but for the exclusionary rules. (Visa Opp'n at 19; *see also* MC Opp'n at 20-21.) As an initial matter, Visa's contention that the DOJ Case did not find that Discover would have won deals but for the rules is incorrect. Moreover, there is simply no support for Visa's invented approach, as it is inconsistent with, and plainly more burdensome than, *Zenith*'s "some damage flowing from the unlawful conspiracy" standard. To show fact of injury, Discover only needs to show that it would have been prepared to compete and was denied a meaningful opportunity to do so. This is apparent from the Supreme Court's holding in *Zenith* that conduct that "interfered with and made more difficult the distribution of Zenith products" was sufficient to show fact of injury. *Zenith*, 395 U.S. at 118. Indeed, the cases supporting the futility doctrine, which this Court relied on in the SSF Order, would be completely negated if antitrust plaintiffs facing complete foreclosure were required to show that they would have won deals but-for the restraint at issue. *See id.* at 120 n.15 ("That Zenith failed to make a formal request ... during the damages period can properly be attributed to Zenith's recognition that such a request would have been futile."); *United Indus. v. Eimco Process Equip.*, 61 F.3d 445, 449 (5th Cir. 1995) ("In the refusal to deal context, proof of futility satisfies causation when a demand is lacking."); *Chicago Ridge Theatre Ltd. P'ship v. M&R Amusement Corp.*, 855 F.2d 465, 470 (7th Cir. 1988) ("[D]emands become unnecessary when it is clear they will not be favorably received.").

this Court's statement that the DOJ had to prove that Defendants' exclusionary rules caused "substantial adverse effects on competition, such as increases in price, or decreases in output or quality." (Visa Opp'n at 17 n.39 (quoting *Visa/MasterCard*, 344 F.3d at 238).) This Court could not have found that market-wide output or quality was reduced unless it ***also*** concluded that the exclusionary rules had actual effects in reducing third-party issuance on the Discover and American Express networks.

Defendants rely heavily on *In re Microsoft Corp. Antitrust Litigation*, 232 F. Supp. 2d 534 (D. Md. 2002), and contend that *In re Microsoft* stands for the proposition that, because injury to a private party need not be proved in an equitable case brought by the Government, that issue can never be given preclusive effect in a follow-on damages litigation. (Visa Opp'n at 18-19; MC Opp'n at 30-31.) In fact, there is no such principle. And *In re Microsoft* is inapposite because there, unlike here, the trial court did not find actual injury to the private plaintiff (Netscape) in the market where competition was harmed.

In re Microsoft involved Netscape's follow-on antitrust suit to the Government's case against Microsoft. In that Government case, it was found that Microsoft had maintained a monopoly in the personal computing operating system market by foreclosing potential, "nascent threats" to Microsoft's operating system monopoly, such as Internet browser companies like Netscape. *See United States v. Microsoft*, 253 F.3d 34, 50, 79 (D.C. Cir. 2001). While Netscape competed in the web browser market, and not the operating system market, the Government claimed that, had Netscape maintained its dominant share of the browser market, its web browser could have become an alternative applications platform that could have commoditized the operating system market. *See id.* at 59-60; *United States v. Microsoft*, 87 F. Supp. 2d 30, 38-39 (D.D.C. 2000). To thwart this threat, Microsoft undertook various illegal acts to reduce Netscape's share of the browser market.

See Microsoft, 253 F.3d at 59-60; *Microsoft*, 87 F. Supp. 2d at 38-39. While the Court found that Netscape's share of the browser market was reduced by Microsoft's conduct, it stated that there was insufficient evidence that Netscape's web browser would have succeeded as a competitive platform that would have increased competition in the operating system market. *See United States v. Microsoft Corp.*, 84 F. Supp. 2d 9, 112 (D.D.C. 1999) (Finding of Fact 411); *Microsoft*, 253 F.3d at 78 (referencing Finding of Fact 411). Nonetheless, under the Section 2 standard for monopoly maintenance, Microsoft's foreclosure of Netscape's potential nascent platform threat was sufficient to make Microsoft "reasonably appear capable" of maintaining its monopoly in the operating systems market. *Microsoft*, 253 F.3d at 79.

The facts of this case differ from *In re Microsoft*. Discover is an ***actual*** competitor in the network services market, and this Court predicated its findings of harm to competition in the network services market on the ***actual*** foreclosure caused to Discover (and American Express) in that market.[5] By contrast, in *In re Microsoft*, there was no finding that Microsoft's conduct actually harmed Netscape in the operating system market (the market in which competition was harmed) or that Netscape would have developed a successful platform to increase competition in that market. It was for that reason that the *In re Microsoft* court did not grant collateral estoppel on the issue of Netscape's fact of injury. *See In re Microsoft*, 232 F. Supp. 2d at 538 (denying application of collateral estoppel on issue of fact-of-injury to Netscape because there was no finding that "Navigator ... would have ignited genuine competition in the market for ... operating systems") (quotation omitted). Accordingly, *In re Microsoft* is not applicable here.

Visa also misses the mark when it cites a series of inapposite cases to support the argument that the issue of injury to Discover decided in the DOJ Case is somehow different from the issue of

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[5] Visa argues in its brief that Netscape was a "competitor" of Microsoft and in "a position analogous to Discover's in the current litigation." (Visa Opp'n at 18.) That is wrong.

injury in this case. (Visa Opp'n at 16-17 (citing *Greene v. United States*, 79 F.3d 1348 (2d Cir. 1996); *Faulkner v. Nat'l Geographic Enters., Inc.*, 409 F.3d 26 (2d Cir. 2005); *A.J. Faigin v. Kelly*, 184 F.3d 67 (1st Cir. 1999)).) Unlike the cases Visa cites, here, the governing legal standards have not changed, the issues have not been mooted by subsequent decisions, and the requisite identity of issues is present. *See Faulkner*, 409 F.3d at 30, 37 (denying use of collateral estoppel because intervening Supreme Court precedent altered the governing legal standard); *A.J. Faigin*, 184 F.3d at 77-78 (holding that collateral estoppel should not have been applied because the issue for which plaintiff sought estoppel was technically mooted by an adverse jury finding); *Greene*, 79 F.3d at 1351-53 (denying collateral estoppel because the statutory issue on which the taxpayer was seeking preclusion had not been addressed at all in the prior case). The Court should thus disregard the various precedents cited by Visa.

Finally, MasterCard repeats the argument made in its motion for summary judgment that there was no finding in the DOJ Case that the CPP caused any independent harm to Discover because By-law 2.10(e) was sufficient, by itself, to foreclose Discover (and American Express). (MC Opp'n at 21-22.) For the reasons set forth in Discover's opposition to that motion, including the fact that the issue of the CPP harming Discover was plainly determined in *Visa/MasterCard*, this argument should be rejected. (Mem. of Law in Supp. of Discover's Opp'n to MasterCard's Mot. for Summ. J. ("Discover Opp'n re MasterCard") at 49-62.)

Notably, MasterCard is pressing this same argument in the *American Express* case: that this Court did not find that the CPP harmed American Express. (Cohen Decl. Ex. 2 (*American Express Travel Related Services Co., Inc. v. Visa U.S.A. Inc., et al.*, MasterCard's Mem. of Law in Supp. of its Mot. for Summ. J. Dismissing Damages Claims With Respect to All Counts of the Compl.) at 50.) Yet, if the CPP did not harm either Discover or American Express, MasterCard could and

should have asserted that as a defense to the DOJ's argument that the CPP injured competition. But MasterCard did not make that argument in the DOJ Case. MasterCard thus cannot raise that argument now, in an attempt to shift the responsibility for damages to Visa, because the issue of the CPP causing harm to competition by harming Discover and American Express was already resolved against it. *See Sec. Indus. Ass'n v. Bd. of Governors of the Fed. Reserve Sys.*, 900 F.2d 360, 364 (D.C. Cir. 1990) ("[P]reclusion because of prior adjudication results from the resolution of question in issue, and not from litigation of specific arguments directed to that issue."); *Copyright.Net Music Publ'g LLC v. MP3.Com*, 256 F. Supp. 2d 214, 217 (S.D.N.Y. 2003) ("Development of a novel theory, not earlier raised in defense of a previously litigated issue, is not grounds for avoiding the preclusive effect of collateral estoppel.").

2. <u>Discover's Harm to Competition and Damages Analyses Are Based on the Theory of Competitive Harm Established by the DOJ.</u>

Defendants wrongly contend that, to the extent fact-of-injury to Discover was adjudicated in the DOJ Case, collateral estoppel on that issue cannot be applied here because Discover's damages analysis rests upon a theory of injury different from the theory of competitive harm proved by the DOJ. According to Defendants, Discover's "new" theory of injury is premised on prohibitions against third-party acquiring, whereas the Government's case dealt with injury to competition caused by the inability of Discover (and American Express) to partner with third-party issuers. (MC Opp'n at 18-19; Visa Opp'n at 21-22.) Defendants' argument is without merit.

This Court held that the exclusionary rules prevented Discover (and American Express) from competing at the network level by offering network services to banks for third-party issuing. *See Visa/MasterCard*, 163 F. Supp. 2d at 379. By so doing, this Court concluded, the illegal rules limited "the variety of network services" available to banks and the "card products" available to consumers. *Id.* at 382. This Court also recognized that maintaining Visa's and MasterCard's

acceptance advantage in the relevant market was a principal rationale for the prohibitions against third-party issuance. *See id.* at 400-01. In particular, *Visa/MasterCard* emphasized the significant network effects in the payments industry and held that the exclusionary rules impaired the ability of Discover (and American Express) to improve their merchant acceptance through greater issuing on their networks. *See id.* at 329, 387-88.

That is precisely what Discover contends in its damages case. Discover contends that it suffered damages because the lack of third-party issuing volume (caused by the exclusionary rules) greatly impaired its ability to close the domestic merchant acceptance gap with Visa and MasterCard, through both direct and third-party acquiring. As part of Discover's ***damages*** case, Discover's expert, Prof. Hausman, concludes that increased volumes over Discover's network, which would have resulted from third-party issuing deals, would have enabled Discover to engage in third-party acquiring — as has occurred in the actual world — to close the merchant acceptance gap with Visa and MasterCard. (Cohen Decl. Ex. 3 at Ex. A (Hausman Report) ¶¶ 190-193.)[6] Thus, the record demonstrates that all of Discover's claimed damages on Claim One flow exclusively from the fact that Discover was prevented from contracting with third-party issuers to build volume on its network.[7] (*Id.* ¶¶ 148-49, 190-91.)

Defendants also point to Discover's alternative damages model based on a hypothetical joint venture of Discover and Citibank to create a new network ("Project Explorer") and contend that,

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6 *See* Consolidated Mem. of Law in Supp. of Discover's Opp'n to Visa's Mots. for Summ. J. & Partial Summ. J. ("Discover Opp'n re Visa") at 46-62; Discover Opp'n re MasterCard at 46-47, 66-74.

7 Visa contends that, because Discover's third-party acquiring "claims" raise disaggregation issues, collateral estoppel should be denied. (Visa Opp'n at 22). As discussed more fully in Discover's opposition briefs, there is no disaggregation issue raised by Discover's damages claims as all of Discover's damages flow from the unlawful third-party issuance restrictions. However, even if a disaggregation issue were raised by Discover's damages claims, that is a damages issue, so it would not defeat the identity of liability issues necessary for collateral estoppel. Visa's disaggregation argument, like all of Defendants' arguments that are based on damages issues, is a red herring. (*See also* MC Opp'n at 41 (raising irrelevant and false contention that Discover does not have a theory of individual liability as to Visa and MasterCard).)

because the factual specifics of that model were not litigated in or identical to issues in the DOJ Case, collateral estoppel is inappropriate. (MC Opp'n at 24; Visa Opp'n at 24, 28.) Defendants' argument, however, confuses liability issues with damages issues. Defendants do not contest that Discover uses Project Explorer to model damages. Indeed, they refer to Project Explorer as a "damages theory." (MC Opp'n at 24; Visa Opp'n at 24.) As a damages theory, Project Explorer is not relevant to whether Discover's Claim One is identical to the DOJ Case on liability. *See Zenith*, 395 U.S. at 114 n.9.[8]

Lastly, Visa mischaracterizes Prof. Hausman's opinions and testimony regarding effects on output. Specifically, Visa contends that Discover has a "new theory" under which the exclusionary rules do not harm competition by lowering output and that this "new theory" turns this "Court's analysis from the DOJ Case on its head." (Visa Opp'n at 23-24.) Nothing could be further from the truth. Visa conveniently ignores the section of Prof. Hausman's report entitled "The Exclusionary Rules Have Reduced Market Output," (Cohen Decl. Ex. 3 at Ex. A (Hausman Report) ¶¶ 115-116), and the part of his rebuttal report where he specifically states that the "exclusionary rules did have specific adverse competitive effects on output, lowering market output." (*Id.* at Ex. B (Hausman Rebuttal Report) ¶ 6.) Rather than being a "new theory," Prof. Hausman's opinions, in fact, parallel the Court's findings on this issue. *See Visa/MasterCard*, 163 F. Supp. 2d at 379 (exclusionary rules reduce "overall card output and available card features"); *see also id.* at 382, 406.[9]

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8 MasterCard incorrectly argues that Discover's theory of injury with respect to debit "was not before the Court in the DOJ Action." (MC Opp'n at 20). MasterCard ignores the core of Discover's theory of injury regarding debit — that 2.10(e) and the CPP prevented Discover from attracting third-party debit issuers — and instead focuses on a secondary aspect of Discover's debit damages. Discover's theory is in keeping with *Visa/MasterCard*'s findings and therefore cannot be properly characterized as a new theory of injury. *See Visa/MasterCard*, 163 F. Supp. 2d at 329.

9 Instead of referencing Prof. Hausman's actual opinions on the output effects of the exclusionary rules, Visa attempts to confuse the issue by referencing instances where Prof. Hausman is discussing the relationship between changes in interchange and market-wide output. (*Compare* Visa Opp'n at 23-24 *with* Cohen Decl. Ex. 3 at Ex. B (Hausman Rebuttal Report) ¶¶ 5, 16-22.) MasterCard similarly points to testimony by Prof. Hausman discussing how changes

3. Discover Does Not Allege a Different Conspiracy Than That Proved by the DOJ.

MasterCard incorrectly asserts that the conspiracy that Discover alleges is not identical to the one alleged by the DOJ and supports that assertion by focusing on the DOJ's original allegation of a conspiracy between each Association and its "governing banks." (MC Opp'n at 23.) This, however, is not the proper analysis. To determine whether collateral estoppel applies, courts consider the ***determinations*** made in the prior case, not the initial allegations. *See Comm'r of Internal Revenue v. Sunnen*, 333 U.S. 591, 599-600 (1948) (collateral estoppel applies when issue is identical to that "decided" and "determined" in the prior proceeding). MasterCard's improper focus on the Government's complaint, rather than this Court's findings, is therefore unavailing.

Based on the evidence presented by the DOJ, this Court found a conspiracy between each Association and its member banks, without limitation to the Associations' governing banks. *See Visa/MasterCard*, 163 F. Supp. 2d at 400 ("By-law 2.10(e) and the CPP are restrictions of, by and for the member banks ... To prevent competition on those terms in the United States, the member banks agreed that any bank that obtained such an advantage would be penalized...."). The Second Circuit affirmed these findings. *See Visa/MasterCard*, 344 F.3d at 242 ("These 20,000 banks set the policies of Visa U.S.A. and MasterCard. These competitors have agreed to abide by a restrictive exclusivity provision ... The restrictive provision is a horizontal restraint adopted by 20,000 competitors."). The conspiracy alleged by Discover is identical to and predicated upon those findings. (Decl. of Laura B. Kadetsky in Supp. of Discover's Mot. for Partial Summ. J. ("Kadetsky Decl.") Ex. 7 (Second Am. Compl.) ¶ 94 ("Defendants, on behalf of and in collaboration with their banks, have engaged in a continuing combination and conspiracy...").)

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in interchange might affect consumer welfare to suggest misleadingly that Discover would not have had a valuable network proposition that would have increased output. (MC Opp'n at 47 & n.17.) Prof. Hausman never said this. In fact, in the testimony MasterCard references, Prof. Hausman emphasizes the benefits of Discover's network value proposition. (Cohen Decl. Ex. 4 at 428:6-429:24 (Hausman Dep.).)

4. Claims Asserted by Discover That Are Not Subject to This Motion Are Not a Basis for Denying Collateral Estoppel on Issues Already Litigated and Necessary to the Final Judgment.

Defendants assert that because Discover maintains claims other than Claim One — such as its debit and inter-association conspiracy claims — this Court should deny collateral estoppel because the two cases are no longer identical. (MC Opp'n at 27; Visa Opp'n at 24-26.) This argument ignores the fact that a proper collateral estoppel analysis asks only whether an issue or fact presented in the second action is identical to an issue or fact raised and determined in the prior action. Collateral estoppel does not require that the two cases, and all causes of action raised therein, be identical. *See Allen v. McCurry*, 449 U.S. 90, 94 (1980) (noting that collateral estoppel does not require identity between the causes of action); *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 n.5 (1979) (collateral estoppel applies when "the second action is upon a different cause of action"); *N.L.R.B. v. United Techs. Corp.*, 706 F.2d 1254, 1260 (2d Cir. 1983) (precluding relitigation of particular issues "despite the differences between the two claims" and noting that collateral estoppel can apply "regardless of whether or not the two proceedings are based on the same claim"). Tellingly, Defendants cite no cases demonstrating otherwise. The fact that other causes of action will remain in the case thus has no bearing on the applicability of collateral estoppel to Discover's Claim One.

B. The Findings on Which Discover Seeks Collateral Estoppel Were Necessary to the Judgment in the DOJ Case.

1. Defendants Misstate the Proper Standard for "Necessary" in This Circuit.

Defendants contend that a finding of injury to Discover was not necessary in the DOJ Case, because it was not an element of the DOJ's cause of action. Second Circuit law refutes this.

Defendants erroneously rely upon *In re Microsoft Antitrust Litigation*, 355 F.3d 322 (4th Cir. 2004), to support this argument. (MC Opp'n at 32; Visa Opp'n at 45.) There, the Fourth Circuit

rejected the standard that prevails in the Second Circuit for determining when an issue was "necessary" to a ruling for collateral estoppel purposes. Instead, the Fourth Circuit adopted a much stricter "but for" standard and stated that preclusive effect could not be accorded to the findings that only "support[ed]" the ultimate decision in the prior case. *In re Microsoft*, 355 F.3d at 327. This standard directly conflicts with the law in the Second Circuit, where courts give preclusive effect to findings that were "necessary ***to support***" a judgment — including in the standard the very word the Fourth Circuit rejected. *See Central Hudson Gas & Elec. Corp. v. Empresa Naviera Santa S.A.*, 56 F.3d 359, 368 (2d Cir. 1995) (emphasis added).

In this Circuit, as in at least the First, Ninth, and Federal Circuits, the strict elements of the claim in the prior case do not limit what findings merit preclusive effect in a subsequent litigation. *See Oneida Tribe of Indians of Wis. v. AGB Props., Inc.*, No. 02-CV-233LEKDHR, 2002 WL 31005165, at *3 (N.D.N.Y., Sept. 5, 2002) ("[I]t is well established ... that for purposes of collateral estoppel an issue need not be the only determinative factor in a decision in order for it to be considered 'necessary' to that decision.") (citing *Winters v. Lavine*, 574 F.2d 46, 47 (2d Cir. 1978)).[10] Rather, the Court should look to what was actually raised, litigated, and determined in the prior case to see what was necessary to support the judgment in that prior case. (Mem. of Law in Supp. of Discover's Mot. for Partial Summ. J. ("Discover Br.") at 51-52 (citing *In re Ivan Boesky Sec. Litig.*, 848 F. Supp. 1119, 1124-26 (S.D.N.Y. 1994); *Mishkin v. Ageloff*, 299 F. Supp. 2d 249, 253 (S.D.N.Y. 2004)).) *Cf. Rubio v. County of Suffolk*, No. 01-CV-1806 (TCP), 2007 WL 2993830,

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[10] *See also United States v. Johnson*, 256 F.3d 895, 915 (9th Cir. 2001) (Kozinski, J., concurring); *Hoult v. Hoult*, 157 F.3d 29, 32 (1st Cir. 1998) ("But a finding is necessary if it was central to the route that led the factfinder to the judgment reached even if the result could have been achieved by a different, shorter and more efficient route.") (internal quotation marks and citations omitted); *United States v. Weems*, 49 F.3d 528, 532 (9th Cir. 1995) (finding issue necessarily decided even though it could have been avoided in reaching the ultimate issue); *Mothers Rest., Inc. v. Mama's Pizza, Inc.*, 723 F.2d 1566, 1571 (Fed. Cir. 1983) ("[I]t is important to note that the requirement that a finding be necessary to a judgment does not mean that the finding must be so crucial that, without it, the judgment could not stand.") (internal quotation marks omitted); Restatement (Second) of Judgments § 27 cmt. h (comparing necessary findings to those that "have the characteristics of dicta").

at *3 (E.D.N.Y., Oct. 9, 2007) (invoking collateral estoppel to establish liability for compensatory damages in private action based on specific wording of guilty plea in prior criminal action).[11]

Further, because it adopted a "but for" standard for determining what findings were necessary to a prior ruling for estoppel purposes, the Fourth Circuit also made clear that, when faced with two alternative grounds to support a judgment, district courts in that Circuit should deny collateral estoppel effect to *both* grounds. *See In re Microsoft*, 355 F.3d at 328 ("[I]f a judgment in the prior case is supported by either of two findings, neither finding can be found essential to the judgment. . . ."). That also is not the law in the Second Circuit. *See Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 45 (2d Cir. 1986) (when a judgment relies on alternative grounds, "each is a good estoppel"). Application of the Fourth Circuit's strict "but for" standard thus runs directly contrary to the law in the Second Circuit, and there is absolutely no support for applying that standard here.

Defendants' reliance on *Wickham Contracting Co., Inc. v. Board of Education of the City of New York*, 715 F.2d 21 (2d Cir. 1983), is similarly misplaced. (MC Opp'n at 33; Visa Opp'n at 28-29.) *Wickham* interpreted "necessary" to disallow preclusive effect to certain findings when "a narrower finding would have sufficed." *Wickham*, 715 F.2d at 28. That interpretation was founded on a concern that "parties to litigation have sufficient notice and incentive to litigate matters in earlier proceedings which may bind them in subsequent matters." *Id.* Neither of those concerns are present here. Specifically, Defendants cannot credibly assert that they did not have notice during the

[11] The Second Circuit recognizes that the two rationales underpinning the "necessary" requirement for granting collateral estoppel are whether the issue was sufficiently addressed by the court and the availability of appellate review. *See U.S. v. Hussein*, 178 F.3d 125, 129 (2d Cir. 1999) (explaining that the "rationale for the principle that preclusive effect will be given only to those findings that are necessary to a prior judgment" is to ensure that only findings subject to "close judicial attention" and as to which the parties had an incentive to litigate fully should be given preclusive effect); *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 44 (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 of obtaining appellate review of unnecessary findings.") (internal quotation marks omitted); *see also* 18 Charles Alan Wright, et al., Federal Practice and Procedure § 4421 (2d ed. 2002). In this case, this Court's findings show that it considered and found that Defendants' exclusionary rules harmed competition by foreclosing Discover and American Express from attracting third-party issuers to their networks, and Defendants clearly had the ability to raise that issue on appeal. Thus, the purposes of the "necessary" requirement are satisfied here.

DOJ Case of the potential for follow-on damages suits such as this one and thus an incentive to litigate that case fully. When Discover moved to intervene in the DOJ Case, the Court invited Discover to bring its own separate litigation — a clear indication that the current damages lawsuit was a distinct possibility. (Discover Br. at 39-40.) Further, counsel for Visa International admitted that a finding of liability was likely to attract private lawsuits like Discover's:

> The relief that we are asking this Court for is to vacate the Court's finding of liability. Such a finding of liability, just like the injunction, attracts lawyers who like to bring lawsuits against companies which they perceive, for good reason or not, to be able to respond to their own claims. And that's an important issue, a very important issue.

(Kadetsky Decl. Ex. 55 (*Visa/MasterCard*, Second Cir. Hr'g Tr., May 8, 2003) at 28-29.) That notice to Defendants renders the concerns prompting a limited view of "necessary" in *Wickham* inapplicable here.

2. <u>The Second Circuit Did Not "Pass Over" Any Findings as to Which Discover Seeks Collateral Estoppel.</u>

Defendants argue that the Second Circuit "passed over" this Court's findings of injury to Discover and thus that those findings do not merit preclusive effect. (Visa Opp'n at 29; MC Opp'n at 28-29 (citing *Gelb*, 798 F.2d at 45; *Dow Chem. v. U.S. Env. Prot. Agency*, 832, 319, 323 (5th Cir. 1987).) That argument is a red herring.

Specifically, Defendants argue that Discover is not entitled to collateral estoppel on the issue of injury to Discover because, Defendants contend, the Second Circuit did not explicitly refer to such a finding in its opinion. The "passed over" cases, however, refer to grounds raised on appeal that were not reviewed by the appellate court at all. *See Gelb*, 798 F.2d at 45 ("[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."); *see also Dow Chem.*, 832 F.2d at 323 ("'The federal 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.'") (quoting 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4421 (1981)). Here, the Second Circuit left nothing unreviewed as to Defendants' violations, including the explicit findings of harm to Discover in this Court's opinion. (*Compare* Kadetsky Decl. Ex. 16 (*Visa/MasterCard*, Proof Br. of Def.-Appellant MasterCard International Incorporated) & Cohen Decl. Ex. 120 (*Visa/MasterCard*, Opening Br. of Def.-Appellant Visa U.S.A. Inc.) *with Visa/MasterCard*, 344 F.3d 229.) The "passed over" cases are thus inapplicable.

This conclusion is reinforced by the fact that the purpose of this Court's detailed findings of fact and conclusions of law in *Visa/MasterCard*, made pursuant to Federal Rule of Civil Procedure 52(a), was

> (1) to aid the appellate court by affording it a clear understanding of the ground or the basis of the decision of the trial court; [and] (2) to make definite just what is decided by the case to enable the application of res judicata and estoppel principles to subsequent decisions....

Leighton v. One William St. Fund, Inc., 343 F.2d 565, 567 (2d Cir. 1965); *see also Rosen v. Siegel*, 106 F.3d 28, 32 (2d Cir. 1997) (same). This Court should thus look to its Rule 52(a) findings and conclusions in order to determine the scope of collateral estoppel here. That the Second Circuit did not explicitly reference every finding of fact made by this Court is of no consequence. Rather, this Court's findings informed the appellate court of the basis for this Court's opinion and therefore must have been considered by the Second Circuit. For example, because the issue of harm to Discover (and American Express) was inextricably intertwined with the question of harm to competition, the Second Circuit necessarily addressed that issue when it affirmed this Court's finding of harm to competition. This is evident from the appellate court's explicit recognition that Defendants' exclusionary rules "[w]ithout doubt ... harm competitors." *Visa/MasterCard*, 344 F.3d at 243. The

Second Circuit's decision thus in no way defeats application of collateral estoppel to the finding of harm to Discover.

II. CONGRESS INTENDED THAT COLLATERAL ESTOPPEL SHOULD BE APPLIED TO RENDER COMPLEX ANTITRUST CASES, SUCH AS THIS ONE, MORE EFFICIENT.

Defendants argue that "Discover should not be permitted to transform the equitable tool of collateral estoppel ... into a weapon to bar MasterCard and Visa from presenting evidence that directly contradicts Discover's [] theor[y] of liabilit[y]...." (MC Opp'n at 4; *see also* Visa Opp'n at 5-6.) Because Discover's Claim One is virtually identical to the DOJ's claim, this contention flies in the face of the Congressional intent behind the amendment of Clayton Act § 5(a). That provision states that:

> A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to the matters respecting which said judgment or decree would be an estoppel as between the parties thereto: ... ***Nothing contained in this section shall be construed to impose any limitation on the application of collateral estoppel*** ...

15 U.S.C. §16(a) (emphasis added).[12]

Congress amended Section 5(a) in 1980 by adding the current final sentence in order to make clear that, consistent with its longstanding preference for streamlining complex antitrust cases, the doctrine of nonmutual offensive collateral estoppel fully applies in private plaintiff antitrust cases

[12] The legislative history of Section 5(a) demonstrates that, when Congress enacted the provision in 1914, it recognized the substantial benefits of precluding antitrust defendants from relitigating findings in previous Government cases and therefore "intended to confer" on plaintiffs who followed onto successful Government antitrust suits "as large an advantage" as could be afforded under the law. *See Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 568 (1951); *see also Fradette v. Am. Serv. Corp.*, No. 76-6373-Civ-CA, 1979 WL 1756, at *3 (S.D. Fla., Aug. 29, 1979) ("It seems clear from the legislative history of the original act passed in 1914 that Congress intended to provide civil litigants with as broad as possible benefits from governmental prosecutions, but failed to enact a conclusive evidence statute due to fears that it would be unconstitutional.") (citing H.R. Rep. No. 627, 63d Cong. 2d Sess. 14-15 (1914); 51 Cong. Rec. 13856 (1914); S. Rep. No. 628, 63rd Cong., 2d Sess. 45 (1914)); *see also* Note, *Section 5(a) of the Clayton Act and Offensive Collateral Estoppel in Antitrust Damage Actions*, 85 Yale L.J. 541, 548-49 (1976).

because its application is inherently efficient.[13] As stated in a case applying offensive collateral estoppel effect to an earlier antitrust judgment:

> Antitrust litigation and trials are frequently ... too costly, time-consuming and complex ... Congress has evidenced its intention and concern about the matter by giving full preclusive effect to prior government antitrust suits in order to "eliminate wasteful retrying of issues and reduce the cost of complex litigation to the courts and the parties."

GAF Corp. v. Eastman Kodak Co., 519 F. Supp. 1203, 1217 (S.D.N.Y. 1981) (citation omitted); *see also* Wright & Miller, Federal Practice & Procedure, § 4416 (in light of Congressional intent relevant to Section 5(a), "[i]t seems likely that in most circumstances collateral estoppel will replace the alternative evidentiary effect provision" of Section 5(a)).

Indeed, failing to provide collateral estoppel here would be far less efficient than the alternative: treating the *Visa/MasterCard* findings as prima facie evidence pursuant to Section 5(a). If the findings of *Visa/MasterCard* were admitted at trial only as prima facie evidence — a result that Section 5(a) mandates if the Court denies collateral estoppel due to efficiency or fairness concerns[14] — the jury would be told of these previous findings and then would be invited by Defendants to second-guess them based on a rehashing of all the arguments that this Court previously heard and rejected. That approach would be a prescription for massive jury confusion,

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[13] The 1980 amendment clarifying the doctrine's applicability was crafted in response to a Report from a Presidential Commission, which acknowledged that applying collateral estoppel is inherently efficient. *See* Nat'l Comm'n for the Review of Antitrust Laws and Procedures, *Report to the Attorney General*, Antitrust & Trade Reg. Rep. (BNA) No. 897, at 29-31 (Jan. 18, 1979) (hereinafter, "*Comm'n Report*") (emphasis added); *see also* H.R. Rep. No. 874, 96th Cong., 2d Sess. 2-6, *reprinted in* 1980 U.S. Code Cong. & Ad.News 2716, 2752, 2752-56.

[14] If the Court determines that the issues on which Discover seeks collateral estoppel are identical to those actually litigated in and necessary to the Final Judgment — as they are — but that collateral estoppel is unwarranted because of fairness or efficiency concerns, the Final Judgment is still prima facie evidence here under Section 5(a). The plain language of that statute dictates that the prior judgment "shall be prima facie evidence ... as to the matters respecting which said judgment or decree would be an estoppel as between the parties thereto," 15 U.S.C. § 16(a) — in other words, prima facie effect is mandatory if the four basic requirements for collateral estoppel are met. Any other reading would render this language null and void, a result that black letter principles of statutory construction require courts to avoid whenever possible. *See Mobil Oil Corp. v. Karbowski*, 879 F.2d 1052, 1054-55 (2d Cir. 1989) ("[S]ettled principles of statutory construction dictate that, where possible, a statute be construed so that all of its parts are given effect.") (citations omitted).

which would risk undermining the jury's confidence in this Court's rulings.[15] Consequently, a grant of collateral estoppel here is inherently more efficient than this alternative.

Notwithstanding Congress's belief that the application of collateral estoppel automatically produces efficiencies in complex antitrust litigation, Defendants argue that "no judicial economies would be served by applying collateral estoppel" at this time. (MC Opp'n at 4.) For support, Defendants refer to this Court's April 14, 2005 Order. As discussed below, Defendants' contention is wrong as a matter of both fact and law.

A. The Court's April 14, 2005 Order Concerned Whether It Would Be Efficient to Apply Collateral Estoppel Prior to Discovery, Not Whether It Would Be Efficient to Apply Collateral Estoppel at All.

Defendants' reliance on this Court's April 14, 2005 Order denying Plaintiffs' request for collateral estoppel prior to fact discovery is misplaced. (*See, e.g.*, MC Opp'n at 36; Visa Opp'n at 1; Cohen Decl Ex. 10 (*Visa/MasterCard*, Hr'g Tr., Apr. 14, 2005) at 3 ("At this stage in the litigation, I find that applying collateral estoppel would not promote efficiency...").) The Court's ruling did not consider whether it would be efficient to apply collateral estoppel ***at the summary judgment stage***; it merely held that a grant of collateral estoppel ***prior to discovery*** would engender additional litigation over whether Defendants should be precluded from seeking discovery regarding certain claims in

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[15] The procedure for introducing evidence under Section 5(a) is discussed in *Emich Motors*, 340 U.S. at 571-72. According to *Emich*, when such evidence is introduced, a trial court "is not precluded from resorting to such portions of the record, including the pleadings and judgment, in the antecedent case as [it] may find necessary or appropriate to use in presenting to the jury a clear picture of the issues decided there and relevant to the case on trial." *Id.; see also Michigan v. Morton Salt*, 259 F. Supp 35, 65-67 (D. Minn. 1966). As a result, if collateral estoppel were not applied because of efficiency or fairness concerns, the jury would be made aware (pursuant to Section 5(a)) of the existence of the United States' successful prosecution in *Visa/MasterCard* as well as this Court's findings that (1) relevant markets exist that are identical to those alleged, (2) Defendants wielded substantial market power during the relevant time frame, (3) the exclusionary rules harmed competition and Discover, and (4) there is no legitimate business justification for those rules. And, despite being made aware of the judicial findings, the jury would be instructed to consider evidence that is contrary to them. The jury would thus be put in the position of essentially determining whether this Court's *Visa/MasterCard* findings were correct.

order to craft their defenses. Such disputes may have been difficult for the Court to resolve at that time given the liberal standards governing the scope of discovery under Rule 26.[16]

Indeed, in the April 14, 2005 Order, the Court specifically invited Discover to move again for collateral estoppel later in the case, noting that collateral estoppel may be appropriate after discovery concluded and after a further narrowing of the issues. (Cohen Decl. Ex. 10 (*Visa/MasterCard*, Hr'g Tr., Apr. 14, 2005) at 4.) Since that time, the case has narrowed, eliminating many of the overlaps that could have affected the efficiency question. Discover has dropped its claims concerning Defendants' Honor All Cards rules. Moreover, Discover's previously-asserted monopolization and attempted monopolization claims against MasterCard were dismissed and thereafter dropped from Discover's complaint. Further, Discover's monopolization and attempted monopolization claims against Visa in the general purpose credit and charge card market will become redundant if Defendants are precluded from relitigating the conspiracy findings of this Court's prior ruling in the DOJ Case. A full grant of collateral estoppel (including already litigated and necessary findings that the exclusionary rules harmed competition by affecting Discover's ability to attract debit issuers) also would render unnecessary Discover's Section 1 claim in the debit network services market. As such, the only liability claims that would remain in the case are Discover's (i) inter-association conspiracy claim, and (ii) Discover's Section 2 claims against Visa in the debit network services market for monopolization and attempt to monopolize that market following *Visa/MasterCard*. As detailed more fully below, there is little overlap between the evidence relevant to these claims and the evidence that will be rendered unnecessary by collateral estoppel. *See* Section II(B), *infra*.

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[16] *See* Fed. R. Civ. P. 26(b) ("Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense ... Relevant information need not be admissible at the time of trial if discovery appears reasonably likely to lead to the discovery of admissible evidence.").

B. Collateral Estoppel Will Save Jury and Court Resources.

Defendants argue that granting issue preclusion is inappropriate because doing so will not be efficient. Specifically, they argue that collateral estoppel will not dispose of Discover's debit and inter-association conspiracy claims and damages issues. Further, in their view, there is substantial overlap between evidence relevant to Claim One, which collateral estoppel will render unnecessary, and evidence related to claims or issues that will remain in the case. (*See* Visa Opp'n at 8-16; MC Opp'n at 36-44.) These arguments are wrong for several reasons.

First, Defendants ignore that the total amount of evidence needed to be presented and considered by the jury will be substantially reduced if this Court grants collateral estoppel. The number of witnesses called, the scope of testimony elicited from witnesses, and the documents and materials proffered for admission will decrease substantially with a grant of collateral estoppel. For example, collateral estoppel will render unnecessary and irrelevant:

- the opinions of Prof. Christopher James, MasterCard's expert on market definition and the purported pro-competitive effect of the exclusionary rules, which are contained in his 53 page report;
- the opinions of Dr. Glenn Hubbard, MasterCard's expert on market power and the issue of harm to competition in the general purpose card network services market, which are contained in his 51 page report;
- the opinions of Dr. Sumanth Addanki, Visa's liability expert, on all subjects unrelated to debit — opinions that account for 43 pages of Dr. Addanki's 94 page report;
- the opinions of Prof. Hausman, Discover's expert, concerning liability issues in the general purpose credit and charge card network services market; and
- scores of documents and substantial testimony relevant to liability issues concerning the general purpose credit and charge card market.

Second, Defendants contend that collateral estoppel cannot be applied here because of purported evidentiary overlaps that exist between issues litigated in the DOJ Case and issues in this case. But that argument is wrong on the law. It is clear that courts can apply collateral estoppel no

matter the total amount of judicial efficiencies actually achieved. *See Boesky*, 848 F. Supp. at 1124 (stating that "the Court never suggested that the 'quantity' of judicial resources to be saved should influence, let alone determine, whether to apply collateral estoppel").

In this regard, Defendants wrongly contend that collateral estoppel should not be applied on the issue of Discover's fact-of-injury because there is an overlap between evidence pertaining to that issue and evidence pertaining to Discover's damages. In any damages case, however, there will be some overlap between evidence of injury and damages. Yet courts have held that such overlaps should not defeat application of collateral estoppel. *See, e.g., Boesky*, 848 F. Supp. at 1125 (applying collateral estoppel on issue of plaintiff's injury in securities fraud case even though much of the same evidence went to questions of injury and damages). Indeed, any contention otherwise is at odds with the Congressional intent behind the amendment of Section 5(a), which was designed to ensure that courts could apply collateral estoppel in private damages actions to findings made in prior, successful antitrust prosecutions.

Moreover, several complex antitrust cases have permitted litigation of injury and damages issues in separate proceedings, notwithstanding the evidentiary overlap between fact-of-injury and damages determinations. *See, e.g., In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94 C 897, 1998 WL 326721, at *5 (N.D. Ill. June 12, 1998) (bifurcating liability and damages proceedings despite fact that "there may be some areas of overlap in which certain evidence may be relevant in both phases of trial.").[17] This willingness to bifurcate demonstrates that the predictable but limited

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[17] *See also Cosgrove v. Tops Mkts., Inc.*, 39 Fed. Appx. 661, 663 (2d. Cir. 2002) (noting district court's bifurcation of liability/injury and damages in antitrust case); *Buffalo Broad Co. Inc. v. ASCAP*, 546 F. Supp. 274, 285 n.29 (S.D.N.Y. 1982), *rev'd on other grounds*, 744 F.2d 917 (2d. Cir. 1984) (same); *SCFC ILC, Inc. v. Visa U.S.A., Inc.*, 801 F. Supp. 517, 528 (D. Utah 1992). MasterCard points to caselaw where courts refused to bifurcate proceedings into liability and damages phases. (MC Opp'n at 37 n.12.) This argument ignores these complex antitrust cases.

evidentiary overlap between injury and damages questions should not bar application of collateral estoppel in an antitrust damages case like this one.

Defendants' argument also is wrong on the facts, as they exaggerate the overlap between fact-of-injury and damages. Discover can satisfy its fact-of-injury burden of showing "some damage" from the exclusionary rules through *Visa/MasterCard*'s findings or through the undisputed

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REDACTED. *See Zenith*, 395 U.S. at 114 n.9. In fact, even Defendants' experts admit that Discover would have attracted third-party issuers in the but-for world. (Cohen Decl. Ex. 5 at 518:8-519:11 (Oster Dep.).) Given these findings and undisputed evidence, all of the supposed overlaps cited by Defendants — including the impact of Discover's acceptance or purported unwillingness to share certain assets — relate to the strength of Discover's business proposition to various types of issuers and, thus, solely to the scope of its damages. (Visa Opp'n at 10-11.)

Defendants' remaining "evidentiary overlap" arguments also cannot withstand serious factual scrutiny. For instance, Defendants argue that there is substantial evidentiary overlap between *Visa/MasterCard*'s finding of market power in the general purpose card network services market, which is subject to Discover's collateral estoppel request, and the issue of monopoly power in the general purpose debit network services market, which will remain in Discover's Section 2 case against Visa. (Visa Opp'n at 13-14; MC Opp'n at 42.) That is not correct. The market power finding made in the DOJ Case was based on evidence that would not be relevant to the monopoly power inquiry in the debit network services market. For example, the evidence showing Visa's dominant credit and charge card share has no relationship to the issue of its monopoly power in the wholly separate general purpose debit network services market. Similarly, evidence of Visa's ability

to raise credit card interchange rates without losing merchant acceptance would not be relevant to showing monopoly power in the debit network services market, which will concern, among other things, merchants' ability to resist different interchange increases involving signature and PIN debit rates. As such, the fact that Visa's monopoly power in the debit network services market necessarily will remain in the case will not result in the introduction of evidence that would otherwise be eliminated by collateral estoppel.

Defendants also exaggerate the overlap between the evidence supporting the market definition found in *Visa/MasterCard*, which is subject to Discover's collateral estoppel request, and the debit network services market definition exercise, which will remain in the case. The evidence in the DOJ Case relevant to the existence of the general purpose card network services market concerned whether a hypothetical general purpose card network monopolist could profitably impose a price increase. *See Visa/MasterCard,* 163 F. Supp. 2d at 339 (referencing evidence presented by DOJ's expert that banks would continue to issue general purpose cards notwithstanding a ten percent price increase). That evidence is not relevant to the question of whether a hypothetical debit network monopolist could profitably increase prices in a different market.

Moreover, Defendants incorrectly argue that defining a debit network services market will necessarily involve the consumer evidence considered in the DOJ Case because "the jury will consider evidence of how consumers use and allocate spending among various payment methods," and the "same evidence" is relevant to defining both credit and debit network services markets. (Visa Opp'n at 12.) This argument ignores the fact that the consumer evidence that was germane to the relevant markets defined in the DOJ Case would not be similarly germane to the issue of whether debit network services is a relevant market. In its examination of consumer behavior, *Visa/MasterCard* relied on evidence showing that "it is highly unlikely that there would be enough

cardholder switching away from credit and charge cards [to other forms of payment] to make any [] price increase unprofitable for a hypothetical monopolist of general purpose card products." *See Visa/MasterCard*, 163 F. Supp. 2d at 336 (referencing DOJ's expert evidence). To the extent consumer payment patterns bear upon the debit network services market definition question, the jury will examine a different question: whether consumers would switch away from debit cards if they were faced with a significant, non-transitory price increase by a hypothetical supplier of debit cards. Accordingly, the evidence referenced in the DOJ Case need not be presented in this case should this Court apply collateral estoppel. As such, the fact that Discover will be proving a debit network services market at trial will not result in the introduction of evidence that collateral estoppel would otherwise eliminate.[18]

MasterCard's argument that Discover's inter-association conspiracy claim will necessarily involve the introduction of evidence that would otherwise be eliminated by collateral estoppel is similarly baseless. (MC Opp'n at 41-42). Discover's claim solely concerns whether the passage of the CPP was a conspiratorial act between Visa and MasterCard. There is little or no overlap between that issue and any of the issues (*i.e.*, market definition, market power, harm to competition, and harm to Discover) that would be eliminated by collateral estoppel.[19] The substantial evidence of conspiracy between the two associations, which MasterCard notes (MC Opp'n at 42 n.15), does not

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[18] Visa claims that granting collateral estoppel risks inconsistent rulings on market definition. (Visa Opp'n at 37 n.100.) Specifically, Visa argues that, in the context of rebutting Discover's assertions about the existence of a debit network services market, it will be permitted to show that debit and credit substantially compete as payment forms, even if this Court applies collateral estoppel to the finding in *Visa/MasterCard* that general purpose credit and charge card network services is a relevant market. This argument is meritless. If the Court applies collateral estoppel to this holding, then Visa should not be able to challenge it through the backdoor of the debit network services market definition exercise. This is particularly true since Discover's Section 2 claims in the debit network services market principally relate to the post-October 2004 period. Post-October 2004 facts should not be the basis for upending market definition findings predicated on facts from the pre-2000 time period.

[19] The closest possible overlap is between evidence of conspiracy and procompetitive justifications. Even there, though, the overlap is limited, as the question of whether the passage of the CPP was in MasterCard's independent self-interest is distinct from whether it was pro-competitive to protect against free-riding.

even begin to show an overlap that would offset the substantial efficiencies to be gained by granting collateral estoppel in this case.

Finally, Defendants' authorities supporting their argument that collateral estoppel should be denied if substantial efficiencies cannot be shown are plainly distinguishable. (Visa Opp'n at 8-9; MC Opp'n at 36.) None of the cases to which Defendants point are antitrust cases.[20] Thus, none of them consider Congress's stated preference for the application of collateral estoppel in antitrust cases, and none was informed by the Congressional determination that an application of collateral estoppel in such cases is inherently efficient. Moreover, Defendants' cases concern scenarios of manifest unfairness to a defendant, where a grant of collateral estoppel would actually cause much greater inefficiencies by creating a perverse incentive for parties to litigate tangential issues in predicate cases. *See, e.g., Monarch*, 192 F.3d at 305 (denying request to apply collateral estoppel effect to findings made in sentencing proceeding because "allowing sentencing findings to earn collateral estoppel respect may greatly increase the stakes at sentencing, producing more exhaustive litigation over matters of only tangential importance to the criminal case"); *U.S. Currency*, 304 F.3d at 172-73 (same). Defendants also cite distinguishable authority where the issues on which collateral estoppel was sought were not actually litigated in the prior suit. *See Acevedo-Garcia*, 351 F.3d at 576. That is not true here.

C. Collateral Estoppel Will Simplify the Case for the Jury.

One virtue of granting collateral estoppel in an antitrust case is that it will streamline the number of complex, economic issues with which the jury will need to grapple. *See* Comm'n Report at 29 ("complex antitrust cases can be litigated and adjudicated more efficiently" upon a grant of

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[20] *See SEC v. Monarch Funding Corp.*, 192 F.3d 295 (2d Cir. 1999) (civil suit for securities violations); *United States v. U.S. Currency in the Amount of $119,984.00*, 304 F.3d 165 (2d Cir. 2002) (civil forfeiture case); *Schwab v. Phillip Morris*, 449 F. Supp. 2d 992 (E.D.N.Y. 2006) (RICO claim predicated on mail and wire fraud); *Acevedo-Garcia v. Monroig*, 351 F.3d 547 (1st Cir. 2003) (political discrimination case); *Coburn v. SmithKline Beecham Corp.*, 174 F. Supp. 2d 1235 (D. Utah 2001) (products liability action).

collateral estoppel). Further, if collateral estoppel is not applied based on fairness and efficiency concerns, there will be substantial potential for jury confusion resulting from the application of Section 5(a)'s "prima facie" effect standard to findings made in *Visa/MasterCard*. *See* Section III(A), *infra*.

D. Collateral Estoppel Will Eliminate the Possibility of Inconsistent Rulings.

Defendants brazenly invite this Court to relitigate the entire decision in *Visa/MasterCard* based on "evidence" that they did not proffer (or that they claim was unavailable) in the DOJ Case. This is readily apparent from their 56.1 Responses, which include the following statements:

- "Visa disputes that By-Law 2.10(e) restrained competition." (Defs.' Visa U.S.A. Inc. & Visa International Service Association's Joint Resp. to Discover's Statement of Undisputed Facts ("Visa Resp.") No. 24 at 18; *see also* MasterCard Incorporated's and MasterCard International Incorporated's Local Rule 56.1(b) Statement in Resp. to Discover's Local Rule 56.1(a) Statement ("MasterCard Resp.") No. 55 at 64 ("MasterCard disputes that while the CPP was in effect, it weakened competition and harmed consumers.").)

- "Visa disputes that it has — or has ever had — market power in any relevant market." (Visa Resp. No. 50 at 38; *see also* MasterCard Resp. No. 50 at 55 ("MasterCard disputes that it has had market power at any time in any alleged relevant market, when considered independently or jointly with Visa.").)

- "MasterCard disputed the issue of market definition in the DOJ case and continues to dispute the issue of market definition in the current litigation. MasterCard disputes debit, cash and checks are not reasonably interchangeable with credit and charge cards." (MasterCard Resp. No. 36 at 39 (citations omitted); *see also* Visa Resp. No. 36 at 26 ("Visa disputes the issue of market definition, including Discover's allegation that debit cards, cash and checks are not individually or collectively reasonable substitutes for credit and charge cards.").)[21]

- "MasterCard disputes that prior to the repeal of the CPP, MasterCard members were not able to issue American Express and Discover credit or charge cards." (MasterCard Resp. No. 25 at 28; *see also* Visa Resp. No. 19 at 15 ("Visa disputes that By-Law 2.10(e) was ever the but-for or proximate cause of banks' failure to issue Discover cards.").)

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[21] Visa's assertion that there is "nothing inconsistent about the Court finding one market definition in 2000 and a jury in 2008 finding a different market definition" is disingenuous. (Visa Opp'n at 37 n.100.) Visa seeks a finding that the relevant market that existed prior to 2000 included all forms of payment. Such a result would plainly conflict with the DOJ Case, which addressed that pre-2000 time period.

As discussed more fully below, these arguments are based on a false description of the findings in *Visa/MasterCard* and a false portrayal of the post-2004 record, and thus they should be disregarded.

Defendants' wholesale attack on the DOJ Case also should be rejected because relitigating the entire case raises the possibility, however remote, of inconsistent rulings going to the heart of *Visa/MasterCard* — the very result that collateral estoppel was designed to avoid. *See, e.g.*, *Montana v. United States*, 440 U.S. 147, 153-54 (1979) (collateral estoppel "fosters reliance on judicial action by minimizing the possibility of inconsistent decisions"); *Grieve v. Tamerin*, 269 F.3d 149, 154 (2d Cir. 2001) ("[P]rinciples of preclusion ... serve important interests of the public and the courts in avoiding repetitive litigation and potentially inconsistent decisions."). (*See also* Discover Br. at 41-42.) Such a result would reflect poorly on the justice system, as it would be inconsistent with *Visa/MasterCard*, and, eight years after the DOJ Case trial and four years after the Final Judgment went into effect, would create uncertainty in the industry. Defendants offered no reason why this Court should entertain a result that opens the door, however slightly, to such a result.

Moreover, in arguing that a grant of collateral estoppel would not be efficient, Defendants ignore the efficiencies that would be gained outside of this litigation by ensuring that a jury verdict in this matter is not inconsistent with the DOJ Case. Permitting the relitigation of *Visa/MasterCard* based on supposed "new evidence" and "changed circumstances" would provide an incentive for antitrust violators in the future to perpetuate the harm they inflict on competitors, as Defendants did here through their dedication agreements, and then use that conduct to assert that "changed circumstances" have now undermined the previous findings made against them. (*See, e.g.*, Cohen Decl. Ex. 121 at VUSA112858970 ("Consider proactively renewing existing partnerships with key issuers to include consumer, commercial, and Visa-systems volume and to prevent banks from issuing Amex and Discover cards.").) Such a result would negate both the efficiencies gained

through collateral estoppel and the deterrent effects of antitrust enforcement. *See Oberweis Dairy, Inc. v. Assoc. Milk Producers, Inc.*, 553 F. Supp. 962, 968 (N.D. Ill. 1982) (stating that the "deterrent effect of the antitrust laws will be enhanced" through application of collateral estoppel) (quotation omitted).

III. APPLICATION OF COLLATERAL ESTOPPEL WOULD NOT BE UNFAIR.

Contrary to Defendants' contentions, none of the fairness concerns articulated in *Parklane Hosiery*, 439 U.S. at 330-31, are applicable here. (Discover Br. at 38-40.)[22]

A. Collateral Estoppel Would Not Result in Jury Confusion.

Defendants contend that granting collateral estoppel would be unfair as it "would inevitably cause juror confusion and substantially distort the record in Discover's favor" regarding issues that are not subject to this motion. (MC Opp'n at 52-53; *see also* Visa Opp'n at 40-41). This argument is based on the contrived assertion that there are substantial overlaps between collateral estoppel issues and claims that will necessarily remain in the case. Moreover, this argument ignores the fact that properly crafted jury instructions can substantially mitigate, if not eliminate, the possibility of jury confusion.

The superficiality of this argument is apparent from Defendants' briefs. Visa, for example, argues that "if the jury is told that it must conclude that Visa has market power [in the general purpose credit and charge card market], its determination of whether Visa has monopoly power [in the debit network services market] almost certainly will be affected." (Visa Opp'n at 41.) Visa never explains why the jury cannot be instructed that the issue of its monopoly power in the wholly separate debit network services market is different from the market power finding in the credit

[22] In arguing that the application of collateral estoppel would be unfair, Visa now apparently joins MasterCard's contention that Discover's damages model based on Project Explorer somehow contradicts the Tenth Circuit's holding in *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958 (10th Cir. 1994). (Visa Opp'n at 42-43.) For reasons stated previously, this contention is wrong. (*See* Mem. of Law in Support of Discover's Opp'n to MasterCard's and Visa's Mots. for Partial Summ. J. Regarding Project Explorer ("Discover Opp'n re Explorer") at 25-27.)

network services market found in the DOJ Case. Jury instructions on the differences between the debit network services market definition exercise and the relevant credit and charge card network services market defined in the DOJ Case should mitigate any potential for jury confusion on that issue as well. MasterCard similarly offers no basis for its conclusory statement that collateral estoppel would "cause distortion of the jurors' views" of the evidence relating to the new claims, including inter-association conspiracy, debit, and Section 2 claims. (MC Opp'n at 53.) As for Defendants' claim that collateral estoppel would inevitably taint the jury's deliberations on damages, that is rebutted by the cases where juries have awarded nominal damages following a liability finding. *See, e.g., U.S. Football League v. Nat'l Football League*, 842 F.2d 1335 (2d Cir. 1988). Such cases show that juries can distinguish between the liability and damages inquiries.[23]

B. Visa's "Cherry-picking" Argument Fundamentally Misstates the Law of Collateral Estoppel.

Visa contends that, by not according preclusive effect to certain findings of this Court that were purportedly favorable to Visa, application of collateral estoppel would be unfair. (Visa Opp'n at 43-44.) By this logic, however, nonmutual offensive collateral estoppel would almost always be "unfair."

Collateral estoppel applies to bar relitigation of issues by a party that litigated and lost the prior case. *See Parklane Hosiery*, 439 U.S. at 329. Thus, Discover can now bind Defendants, which lost the DOJ Case, to the adverse findings made there that they fully litigated. It is axiomatic,

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[23] None of the cases Defendants cite on the issue of jury confusion are apposite. *See Coburn v. SmithKline Beecham Corp.*, 174 F. Supp. 2d 1235, 1241 (D. Utah 2001) (jury instruction could cause confusion when it was overly general and facts differed between the two cases); *Whelan v. Abell*, 953 F.2d 663, 668 (D.C. Cir. 1992) (collateral estoppel denied when cases did not involve same burdens of proof, among other differences). In neither of the other two cases that Defendants cite in their section on purported jury confusion did the court actually indicate that a jury would be confused. *See Monarch*, 192 F.3d at 304, 307 (discussing collateral estoppel's effect on right to jury trial and denying collateral estoppel mainly because prior finding of fact was not necessary to the judgment in the first case); *Phonetele, Inc. v. AT & T*, No. CV-74-3566-MML, 1984 WL 2943, **3-5 (C.D. Cal. 1984) (denying collateral estoppel in case not necessarily involving the same products in the same market, among other differences).

however, that a non-party to the previous case, such as Discover, cannot be bound by it. *See Burt v. Gates*, 502 F.3d 183, 188 n.5 (2d Cir. 2007) (collateral estoppel is not applicable when plaintiffs were not parties to prior case or their privies); *Stichting Ter Behartiging van de Belangen van Oudaandeelhouders in Het Kapitaal van Saybolt International B.V. v. Schreiber*, 327 F.3d 173, 184 (2d Cir. 2003) ("Collateral estoppel applies only against a party to a previous adjudication and that party's 'privies.'"). Indeed, binding non-parties would violate fundamental notions of due process. *See Parklane Hosiery*, 439 U.S. at 327 n.7 ("It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard."). Courts routinely apply collateral estoppel in what Visa terms a "cherry-picking" manner — against a party to a prior case but not against one that never had a chance to litigate the issue — and reject the "fairness" argument Visa now makes. *See, e.g.*, *Meredith v. Beech Aircraft Corp.*, 18 F.3d 890, 895 (10th Cir. 1994); *Compton v. Chinn Enters., Inc.*, 957 F. Supp. 139, 141 (N.D. Ill. 1997).

C. MasterCard Should Be Precluded From Relitigating *Visa/MasterCard.*

While equity favors the application of collateral estoppel to preclude all Defendants from relitigating *Visa/MasterCard*'s necessary findings, it weighs particularly against MasterCard. MasterCard successfully enforced the Final Judgment to further its private interests in the debit network services market in the SSF proceeding, and it is currently defending the Court's SSF Order in the Second Circuit. Thus, while here MasterCard is telling this Court that changed circumstances have gutted the foundations of the DOJ Case, requiring its complete relitigation, MasterCard is simultaneously seeking to enforce the Final Judgment in the Second Circuit. After its successful exploitation of the Final Judgment, MasterCard should be estopped from pressing this patently inconsistent position. *See Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 148 (2d Cir. 2005) (judicial estoppel should apply "where a party both takes a position that is inconsistent with one

taken in a prior proceeding, and has had that earlier position adopted by the tribunal to which it was advanced").

D. Discover's Positions on Remedies in the DOJ Case Are Irrelevant.

As they did in their motions to dismiss, Defendants attempt to exploit testimony of Discover's executives on remedies in the DOJ Case to defeat Discover's collateral estoppel motion. This time, Defendants contend that this testimony somehow renders the application of collateral estoppel unfair because of a purported conflict with Discover's liability case (MasterCard Opp'n at 53-54) or because it supposedly shows that this Court's determination of harm to Discover was not identical to issues raised in the DOJ Case or necessary to its prior judgment. (Visa Opp'n at 19, 30.) Neither argument can withstand scrutiny.

A fundamental premise of both arguments is that Discover's testimony on remedies in the DOJ Case is relevant to Discover's antitrust injury. (MC Opp'n at 53 (referring to "collateral estoppel on the issue of injury to Discover..."); Visa Opp'n at 30 (asserting that "question of harm to Discover was unnecessary" because of remedies testimony).) Yet it is not, as the testimony does not concern Discover's past injuries, but only prospective remedies from the DOJ Case. Indeed, this Court made that very distinction and already rejected the argument that this testimony is relevant to Discover's antitrust injury. (Kadetsky Decl. Ex. 65 (*Visa/MasterCard*, Hr'g Tr., Apr. 14, 2005) at 6-7.) That holding is law of the case, rendering Defendants' arguments baseless.

IV. GRANTING COLLATERAL ESTOPPEL OR SUMMARY JUDGMENT THROUGH OCTOBER 2004 IS WARRANTED.

A. Defendants Do Not Dispute That the Facts Material to the Findings in *Visa/MasterCard* Did Not Change Between 2000 and 2004.

Nothing material to the findings in the DOJ Case changed between 2000 and 2004. After this Court ruled against them, Defendants requested a stay of the Final Judgment specifically to maintain the *status quo*. (Discover Br. at 24.) Defendants got their request. Until October 2004, the

exclusionary rules remained on the books, and Defendants enforced them without exception. All of Defendants' members abided by these rules during this time: not one of them issued a single credit or debit card over the Discover or American Express networks until the exclusionary rules were repealed. In fact, the third-party issuance deals that were negotiated during the relevant 2000-04 time frame—REDACTED

REDACTED (Discover Br. at 11, 23 n.12.)

In short, between 2000 and 2004, Visa and MasterCard maintained the same intra-association conspiracies and the same power to exclude competition. Moreover, the same injury to competition found in *Visa/MasterCard* continued unabated until the Final Judgment went into effect in October 2004. And that injury to competition continued to stem from the complete foreclosure of Discover and American Express from providing network services to member banks.

Defendants, tellingly, do not dispute any of these core facts in their opposition briefs. As a result, the Court should grant summary judgment to Discover for the 2000-04 period, either because there is no dispute over the material facts or because collateral estoppel is warranted.[24]

B. Defendants' Actions Show That There Have Been No Material Changed Circumstances Since the DOJ Case Trial.

Pursuant to Fed. R. Civ. P. 60(b)(5), a party can petition for relief from a final judgment when "it is no longer equitable that the judgment should have prospective application," because there has been "a significant change either in factual conditions or in law." *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992).[25] Such requests are not uncommon with antitrust judgments,

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[24] REDACTED

REDACTED is sufficient alone to warrant granting Discover summary judgment on fact of injury. *See Zenith*, 395 U.S. at 114 n.9 (party needs to show "some damage flowing from the unlawful conspiracy… [and] that the illegality is shown to be a material cause of the injury").

[25] *See also Davis v. New York City Housing Auth.*, 278 F.3d 64, 88 (2d Cir. 2002) ("It is, of course, well established that a district court has the power, in the exercise of its discretion, to modify its past injunctive decrees in order to accommodate changed circumstances."); *United States v. Eastman Kodak Co.*, 63 F.3d 95, 101-02 (2d Cir. 1995)

where changes in market conditions may obviate the need for the decree or require its modification. *See Eastman Kodak*, 63 F.3d at 97-98; *New York v. Microsoft Corp.*, 531 F. Supp. 2d 141, 171-72 (D.D.C. 2008). As such, if the underpinnings of the Final Judgment were truly mooted by changed circumstances, Visa or MasterCard could have made a Rule 60(b)(5) motion to request the decree's repeal or modification. Yet they never did.

As mentioned earlier, not only did MasterCard not move to repeal or modify the Final Judgment, it instead successfully moved to ***enforce*** the Final Judgment to strike down Visa's SSF, and it is now defending this Court's SSF Order in the Second Circuit. MasterCard's repeated reliance on the Final Judgment is a stark admission that nothing material to the Final Judgment's underpinnings has changed since 2000.

Visa's "changed circumstances" argument is equally disingenuous. In the nearly five-year-long SSF proceeding, including the current briefing before the Second Circuit, Visa never contended that MasterCard's application should be denied because changed circumstances mooted the need for the Final Judgment. That is particularly striking as Visa now contends that developments in the use of debit cards suggest that they compete with credit cards and that the relevant market should include all forms of payment. (Visa Opp'n at 36-37 & n.100.) If that were true, Visa could have cited those changes as a reason to deny MasterCard relief in the SSF proceedings.[26] But it never did that. Visa's hypocrisy is further revealed by its position that "[r]egardless of the outcome of the current

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(modification or termination of an antitrust decree may be made where the movant can "demonstrate that the basic purposes of the ... decree[] – the elimination of monopoly and unduly restrictive practices – have been achieved" or show "significant changes in the factual or legal climate").

[26] MasterCard also asserts that the relevant market cannot be limited to debit, citing purportedly new evidence of substitution between credit and debit. (MC Opp'n at 50-51.) MasterCard, of course, did not advocate that expansive view of the market in the SSF proceeding, presumably because its arguments concerning the anticompetitive effects of the SSF would have been far weaker against the backdrop of a broader market. Whatever the case, as discussed in Section IV(C)(4), *infra*, MasterCard's (and Visa's) contention that new developments mandate a reexamination of the relevant market is groundless.

litigation, the DOJ Final Judgment will remain final and binding on Visa." (Visa Opp'n at 8 n.22.) Visa cannot reconcile that disclaimer with its assertion that changed circumstances pertinent to this Court's findings counsel against applying collateral estoppel to the 2000–04 time period.

C. Defendants Have Failed to Discharge Their Burden of Showing a Material Change in Circumstances.

The party opposing collateral estoppel bears the burden of showing that changed circumstances warrant denying collateral estoppel for the time period following the initial ruling.[27] That burden shift is particularly justified where, as here, the party requesting collateral estoppel has made an undisputed showing that the "controlling" or "essential" facts underpinning the decision in the first case did not change during the subsequent period.[28] *See Sunnen*, 333 U.S. at 600 (collateral estoppel should be granted "where the controlling facts and applicable legal rules remain unchanged" between the two cases); *S. Boston Allied War Veterans Council v. City of Boston*, 875 F.

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[27] Defendants erroneously rely on *Pool Water Products v. Olin Corp.*, 258 F.3d 1024 (9th Cir. 2001), for their proposition that collateral estoppel cannot be applied to time periods that extend beyond the initial decision in complex antitrust cases. In *Pool Water Products*, collateral estoppel was denied in large part because the Government case involved a *prospective* examination of a merger's impact on competition under Section 7 of the Clayton Act. The ensuing private action, however, was based on the merger's *actual* impact on competition. Because the Court was loath to give collateral estoppel effect to the previous case's ex ante predictive view of harm to competition, it denied collateral estoppel. That concern is plainly not at issue here. Defendants fare no better with *International Shoe Machine Corp. v. United Shoe Machinery Corp.*, 315 F.2d 449, 456-57 (1st Cir. 1963), as that case hinged on the fact that the evidence in the prior Government case "plainly could not reflect the competitive situation subsequent to that date," whereas in this case, because of the stay, the exclusionary rules remained on the books until October 2004.

[28] MasterCard's reliance on *Dracos v. Hellenic Lines, Ltd.*, 762 F.2d 348, 353 (4th Cir. 1985), to shift the burden of showing (or disproving) "changed circumstances" is misplaced. (MC Opp'n at 25.) *Dracos* was a conflict of laws case with a twelve-year interval between the two decisions. Moreover, the *Dracos* court stated that offensive collateral estoppel should be denied "[u]nless it is shown that the condition found at a first trial is so permanent as to be unlikely to be disturbed." *Id.* at 353. If anything, this language suggests that in cases such as this one, where there is evidence that the essential facts remained the same during the interval between the two cases, offensive collateral estoppel should be granted unless the party opposing collateral estoppel can show material changed circumstances. This Court also should disregard MasterCard's citation to *South Boston Allied War Veterans Council v. City of Boston*, 875 F. Supp. 891 (D. Mass. 1995), as the two year interval in that case was hardly "de minimus." (MC Opp'n at 25-26.) Finally, *Kulak v. City of New York*, 88 F.3d 63, 72 (2d Cir. 1996), cited by Visa (Visa Opp'n at 33), is not at all on point. That case was decided under New York law, not federal law, and it does not speak to which party has the burden of disproving changed circumstances. Rather, it merely restates basic law to the effect that the party seeking to apply collateral estoppel has the burden of showing that the issues in the two cases are identical and were necessarily decided in the prior case.

Supp. 891, 909 (D. Mass. 1995) ("minor factual variations" are insufficient to defeat preclusion as "the new facts [must be] relevant under the legal rules that control the outcome") (citation omitted). As Defendants cannot dispute that the facts supporting *Visa/MasterCard*'s core findings did not change between 2000 and 2004, they bear the burden of showing that other changes in the relevant landscape mandate the denial of Discover's collateral estoppel motion. Defendants have not come close to satisfying that burden.

1. Defendants' "New Evidence" Is Irrelevant to Whether Summary Judgment Should Be Granted For the 2000-04 Period.

To support their "changed circumstances" argument, Defendants refer to purported changes in the payments industry that occurred ***after*** the exclusionary rules were repealed. (*See, e.g.*, MC Opp'n at 46-48; Visa Opp'n at 35-36.) None of this "evidence" has even a remote connection to the relevant issue — whether the exclusionary rules continued to harm competition by foreclosing Discover and American Express during the 2000-04 time frame.[29]

Defendants fare no better with their claim that Prof. Hausman supports their changed circumstances argument when he contends that the post-exclusionary rules world is the wrong proxy for assessing Discover's damages. (Visa Opp'n at 33; MC Opp'n at 26-27.) Prof. Hausman opined that, because of the proliferation of dedication agreements — which did not exist in the mid-1990s and which are, in his view, a backdoor means of maintaining the exclusionary rules — and the overhang of this litigation, the current market is much less conducive to Discover's third-party

[29] Visa claims that Discover is seeking to "apply" collateral estoppel through 2012. (Visa Opp'n at 31.) That patently false assertion is belied by even a cursory reading of Discover's moving papers. Discover only seeks partial summary judgment by collateral estoppel on Claim One for the pre-October 2004 period when the exclusionary rules were in effect, and all damages arise from pre-October 2004 conduct. By contrast, Discover's expert, Prof. Hausman, calculates damages through 2012 only for the Section 2 debit claim against Visa and does so based on illegal Visa conduct after October 2004. (*See* Cohen Decl. Ex. 3 at Ex. A (Hausman Report) ¶ 217 (explaining calculation of Section 2 debit damages through 2012).) Beyond that falsehood, Visa's baseless assertion also once again deliberately confuses the clear distinction between damages issues (which are not germane to collateral estoppel) and liability issues (which are relevant to this motion).

issuance strategy than the environment that would have prevailed in the mid-1990s absent the exclusionary rules. (Cohen Decl. Ex. 3 at Ex. A (Hausman Report) ¶ 174.) These conclusions have nothing to do with whether the exclusionary rules continued to harm competition or Discover between 2000 and 2004. If anything, Prof. Hausman's opinions demonstrate that the foreclosure caused by the exclusionary rules was reinforced and exacerbated during the 2000-04 period by Defendants' dedication agreements with their members.

As Defendants' "new evidence" is immaterial to the changed circumstances question, it cannot justify denying Discover collateral estoppel or summary judgment for the 2000-04 period. *See S. Boston Allied War Veterans Council*, 875 F. Supp. at 909 (to defeat preclusion, "new facts [must be] relevant under the legal rules that control the outcome") (citation omitted).

2. <u>Defendants' "New Evidence" Does Not Undermine the *Visa/MasterCard* Injury-to-Competition Finding.</u>

Defendants also contend that post-2004 evidence is relevant to collateral estoppel because it purportedly belies the "predictions" made in *Visa/MasterCard* regarding competition in a world without the exclusionary rules. (Visa Opp'n at 34; MC Opp'n at 46.) In characterizing these injury-to-competition findings as mere "predictions," Defendants imply that they should be given less weight for purposes of collateral estoppel. This argument fails for three reasons.

First, it grossly mischaracterizes the holding in *Visa/MasterCard*. This Court did not base its ruling on predictions of what a future world without the rules would look like. To the contrary, this Court examined the exclusionary rules' historic and actual impact on competition up to that time and made findings on the actual effects of the rules. *See* Section I(A)(1), *supra*.

Second, Defendants' argument is belied by the facts. In the few years since the repeal of the exclusionary rules, REDACTED

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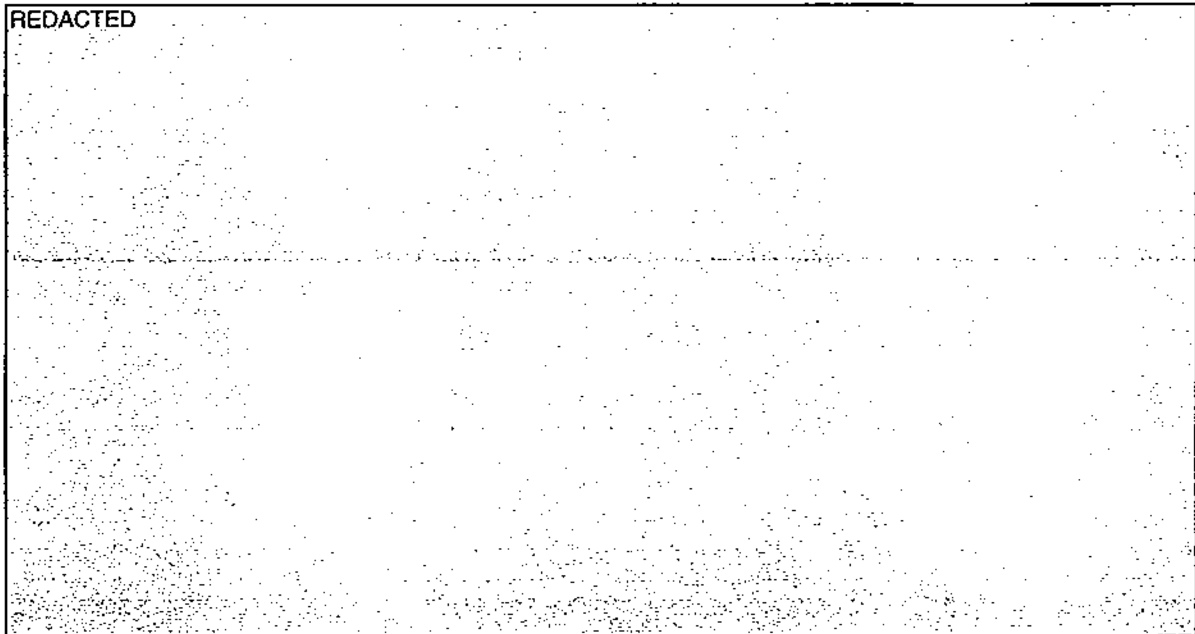

Against this backdrop of significant achievements, Defendants' characterization of the post-2004 world is grossly inaccurate. Even though Defendants' dedication agreements have substantially hindered Discover's and American Express's performances post-October 2004, the record from this period confirms every aspect of this Court's findings on injury to competition, including the exclusionary rules' harmful impact on output, consumer choice, Discover's merchant acceptance, and Discover's ability to compete in debit.

[30] American Express, similarly, has entered into deals with bank partners. (Cohen Decl. Ex. 12 (*American Express Travel Related Services Co., Inc. v. Visa U.S.A. Inc., et al.*, Pl. American Express Travel Related Services Co., Inc.'s Statement of Additional Material Facts in Resp. to MasterCard's Mot. for Summ. J. (Vol. III)) ¶¶ 770-812.) Accordingly, Visa's claim that "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" is incorrect. (Visa Opp'n at 35.) Defendants' assertions that Discover restricts its bank partners from offering cash reward programs is similarly incorrect. (MC Opp'n at 47; Visa Opp'n at 35.) REDACTED REDACTED REDACTED. (Cohen Decl. Ex. 119.) Defendants cannot discharge their burdens of showing changed circumstances with such factual distortions.

[31] A Visa executive described Discover's signature debit network as "good from a competitive standpoint" in part because it will "expand[] the marketplace." (Cohen Decl. Ex. 117 at 223:19-24 (Gardner Dep.).) Moreover, Visa documents described "Discover's signature [debit] product" as "attractive," noting that the "[c]ost of doing nothing" to blunt the Discover threat is "dangerous." (Cohen Decl. Ex. 13 at VUSA-200153705.)

Significantly, Defendants' argument is refuted by their own experts, many of whom admitted that this Court's injury-to-competition finding was correct.[32] For example, MasterCard's damages expert, Prof. Hall, testified that he agreed with this Court's finding that the exclusionary rules limited output because a consumer study by Synovate of the impact of introducing bank-issued Discover-branded cards — on which both he and Visa's damages expert relied — demonstrates that the exclusionary rules limited output. (Cohen Decl. Ex. 6 at 406:15-22 (Hall Dep.).)

Third, Defendants' argument blurs the distinction between liability and damages. MasterCard argues that post-2004 evidence shows that Discover's "value proposition" is insufficient "to attract large numbers of bank partners." (MC Opp'n at 47.) But the number of bank partners that Discover would have attracted in a but-for world is relevant to damages, not injury to competition. Moreover, as Defendants can attempt to introduce evidence of Discover's purportedly weak value proposition to rebut Discover's damages claim at trial, their contention that granting collateral estoppel would necessarily prevent them from "presenting this newly-available evidence to the jury" cannot withstand scrutiny. (MC Opp'n at 49; *see also* Visa Opp'n at 34-35.) In sum, notwithstanding that post-October 2004 evidence is irrelevant to the collateral estoppel analysis, the post-2004 record confirms this Court's findings of injury to competition.

3. Defendants' "New Evidence" Does Not Undermine *Visa/MasterCard*'s Market Power Finding.

Defendants claim that this Court should revisit its market power finding because "new" (MC Opp'n at 49) and/or "emerging" (Visa Opp'n at 38) scholarship on two-sided markets has evolved since the DOJ trial, which they claim shows that rising interchange can be consistent with a competitive market "in which those higher prices ***expand*** output by lowering prices and stimulating

[32] (Cohen Decl. Ex. 7 at 359:16-360:6 (Teece Dep.); Cohen Decl. Ex. 5 at 715:4-17, 717:18-718:3 (Oster Dep.); Cohen Decl. Ex. 8 at 7:4-11:11 (Wecker Dep.).)

demand on the other side of the market." (Visa Opp'n at 38 (emphasis in original); *see also* MC Opp'n at 49.) But this "scholarship" is neither new nor emerging. As demonstrated by the following, Defendants repeatedly made this very argument, to no avail, during the DOJ trial:

- "One cannot presume that an increase in interchange fees would raise the average 'price' of a Visa transaction ... [because] "the average 'price' to cardholders — interest rates, annual card fees and the like — would fall...." (Cohen Decl. Ex. 15 (Expert Report of Visa Expert Economist Richard L. Schmalensee) at 99);

- "The merchant discount goes up [from higher interchange], but the price to consumers goes down, and it just simply shifts costs, penny for penny, through the system." (Cohen Decl. Ex. 118 (DOJ Trial. Test.) at 5983:1-3 (Schmalensee));

- "If interchange fees are increased ... [c]ardholders will likely gain in the longer run as the higher merchant payments are passed back to issuers in the form of lower card fees...." (Cohen Decl. Ex. 16 (Decl. of Richard L. Schmalensee in Supp. of Visa U.S.A.'s Mot. to Stay Pending Appeal) at ¶ 6.)[33]

- MasterCard economist Robert S. Pindyck attempted to rebut the DOJ's assertion that interchange increases without merchant defections from MasterCard evidence market power by stating that "consumers are getting more (in terms of improved card services) from every dollar of interchange." (Cohen Decl. Ex. 17 (Rebuttal Report of Robert S. Pindyck) at ¶ 12.1.2.)

Moreover, Defendants have been arguing that interchange is pro-competitive because of its purportedly beneficial effects on the issuing/cardholder side of the market since at least the *NaBanco* litigation in the early 1980s. (*See* Cohen Decl. Ex. 18 (Br. of Appellee Visa U.S.A. Inc., *Nat'l Bancard Corp. v. Visa U.S.A., Inc.*, June 19, 1985) at 62 ("If VISA followed NaBanco's suggestion and lowered [interchange] to near-zero in order to make merchant discount rates sufficiently low to attract supermarkets it would have to make up lost revenues from the cardholder side.").) Defendants, unsurprisingly, resurrected this argument immediately prior to the DOJ trial in the

[33] It is no surprise that Visa's economist in the DOJ Case, Richard Schmalensee, made this very argument in that case, as he wrote extensively during the 1990s about the purportedly procompetitive benefits of high interchange on the cardholder side of the market. *See* Antitrust Law Journal, Economic Aspects of Payment Card Systems, Vol. 63 Spring 1995 Edition at 861, 891 ("The value of the interchange fee affects the prices paid by consumers and merchants and thus the output of the system"); *see also* Cohen Decl. Ex. 14 (Payment Systems and Interchange Fees, R. Schmalensee, June 28, 1999, VUSA105480972-93).

merchant Honor All Cards lawsuit by arguing that reduced interchange rates to merchants would harm economic incentives on the issuance side of the relevant market. *See In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. 68, 74 (E.D.N.Y. 2000) ("First, Schmalensee conclude[d] that a dramatic reduction in off-line debit interchange fees would have resulted in many fewer banks issuing many fewer cards."). As such, Defendants' two-sided market argument is nothing more than old wine in a new bottle.[34]

Additionally, Defendants' argument that two-sided market analysis "counsels against" this Court's market power finding is incorrect. (Visa Opp'n at 38; *see also* MC Opp'n at 49-50.) Defendants deliberately confuse the distinction between evaluating whether an interchange increase is harmful to competition with evaluating whether an interchange increase shows market power. The former, according to two-sided market analysis, requires an examination of prices on the issuing/cardholder side of the market, while the latter requires an examination only of merchants' ability to defeat an interchange increase by switching to other forms of payment. Contrary to Defendants' argument, finding that an interchange increase evidences market power is very different from declaring it harmful to competition.[35] A finding with respect to the former can be based solely on a merchant-side evaluation, while a finding on the latter requires an examination of both the

[34] Notably, a substantial portion of the recent scholarship on "two-sided markets" was financed by Visa before and after the DOJ trial. In fact, much of this recent scholarship stemmed from economic work that was supported by Visa and its longstanding economist, Schmalensee, which was prepared before the DOJ Case. (*See* Cohen Decl. Ex. 9 at 130:9-135:6 (Hubbard Dep.) (testifying that two-sided market scholarship "began" with "Cooperation Among Competitors: The Economics of Payment Card Associations," J. Rochet & J. Tirole, May 16, 2000, and confirming that this work was supported by Visa).) This attempt to manipulate the Court through the sponsored creation of "science" should not be countenanced. In fact, the only thing about this scholarship that is arguably new is the "two-sided market" label that has been applied to Defendants' argument.

[35] There is nothing inconsistent about observing that an interchange increase evidences market power and saying that a particular increase is not itself an anticompetitive exercise of market power. A firm, for example, may only be able to pass-through specific cost increases in its price if it has market power, but that does not mean that passing through such cost increases is itself anticompetitive.

merchant and cardholder sides of the market, as this Court already found.[36] Defendants' "two-sided market" argument is entirely beside the point.[37]

Lastly, Defendants' "two-sided market" argument ignores the direct evidence of market power that was central to the DOJ Case: Visa's and MasterCard's ability to exclude their only two rivals, Discover and American Express, from the relevant network services market. It is axiomatic that the power to exclude competition is direct and powerful evidence of market power. *See Visa/MasterCard*, 163 F. Supp. 2d 340 ("Market power is defined as the 'power to control prices or exclude competition.'") (citations omitted). Defendants, tellingly, ignore *Visa/MasterCard*'s reliance on direct evidence of market power in their collateral attack on its market power finding, presumably because their "two-sided market" arguments have no application whatsoever to this evidence. They also ignore that this Court based its market power finding on the fact that Defendants had high market shares in a market protected by significant barriers to entry. *See id.* at 342. As Defendants' "two-sided" market does not even touch any of this direct and indirect evidence of Defendants' market power, their attempt to reopen *Visa/MasterCard*'s market power finding should be rejected.

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36 *Compare Visa/MasterCard*, 163 F. Supp. 2d at 340 (finding that merchants' inability to resist Visa's and MasterCard's interchange increases evidences their market power) *with id.* at 396 ("While, as Dean Schmalensee explained, it is very difficult to analyze the effects on consumer welfare of increases or decreases in interchange rates, merchants — and ultimately consumers — have an interest in the vigor of competition to ensure that interchange pricing points are established competitively.").

37 Consistent with the contrived and baseless nature of this argument, Defendants misconstrue opinions rendered by the DOJ's expert, Prof. Katz, and Discover's expert, Prof. Hausman, in a 2003 PIN debit merger case. (Visa Opp'n at 38-39; MC Opp'n at 49-50.) In the PIN debit case, Prof. Katz opined that an evaluation of increases in interchange, without more, is insufficient to show that an increase in PIN debit interchange is anticompetitive. (Cohen Decl. Ex. 11 (*United States v. First Data Corp., et al.*, Hr'g Test., Dec. 5, 2003) at 102:12-22, 106:4-108:9.) Because of the clear difference between using interchange increases to conclude that market power exists and opining that an interchange increase is harmful to competition, Prof. Katz's opinions in the PIN debit case are consistent with his analysis of the exclusionary rules. Defendants' exploitation of Prof. Hausman's prior testimony is even more far afield. In the testimony from that case cited by Defendants, Prof. Hausman discusses an entirely separate issue — whether it is economically proper to incorporate interchange fees into the hypothetical monopolist test that economists use to define relevant markets (Prof. Hausman says it is not). (*See id.* at 142:16-20, 151:21-152:22.) Prof. Hausman rendered the same opinion in this case (Cohen Decl. Ex. 3 at Ex. B (Hausman Rebuttal Report) ¶ 8), and, in any event, the testimony is entirely consistent with *Visa/MasterCard*'s market power finding.

4. Defendants' "New Evidence" Does Not Undermine *Visa/MasterCard*'s Market Definition Findings.

Defendants also have failed to discharge their burden of showing that supposed changed circumstances warrant relitigating *Visa/MasterCard*'s market definition findings. Defendants' claim that "there is now substantial new evidence" that consumers view debit and credit cards as reasonably interchangeable is belied by their failure to offer any support for that claim. (Visa Opp'n at 36; *see also* MC Opp'n at 50-51.) As the centerpiece of this "substantial new evidence," Defendants cite Discover CEO David Nelms's testimony that consumers "sometimes" choose to use their debit cards "versus a credit card." (Visa Opp'n at 36-37; MC Opp'n at 51.) This testimony hardly constitutes "substantial new evidence" of anything, as it does not come anywhere close to showing that consumers today systematically view debit cards as reasonable substitutes for credit cards. Moreover, Defendants pushed the same superficial evidence that "some" consumers substitute between credit and debit in the DOJ Case (*see, e.g.*, Kadetsky Decl. Ex. 15 (*Visa/MasterCard*, Joint Proposed Findings of Fact & Conclusions of Law of Defs.' Visa U.S.A. Inc., Visa International Service Association, & MasterCard International Incorporated) at II-11 ("[A]s debit grew, Visa expected to see and did see such cannibalization of credit by debit increase.")), and this Court rejected it.[38] As Defendants' evidence is neither "new" nor "substantial" and has previously been rejected by the Court, it fails to justify a wasteful and unnecessary relitigation of the relevant market issue.[39]

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[38] *See Visa/MasterCard*, 163 F. Supp. 2d at 338. In response to Defendants' attempt "to define the market more broadly" in the DOJ Case, the Court found that "although it is literally true that, in a general sense, cash and checks compete with general purpose cards as an option for payment by consumers and that growth in payments via cards takes share from cash and checks in some instances, cash and checks do not drive many of the means of competition in the general purpose card market." *Visa/MasterCard*, 163 F. Supp. 2d at 337-38.

[39] REDACTED

V. COLLATERAL ESTOPPEL ALSO APPLIES TO VISA INTERNATIONAL.

Visa International erroneously argues that the *Visa/MasterCard* findings concerning it were not necessary to that judgment. It claims that this is demonstrated by this Court's statement that, "regardless of whether Visa International is found to be liable, the injunctive relief provisions to which it is subject are 'minor and ancillary' and therefore appropriate." *Visa/MasterCard*, 183 F. Supp. 2d at 617 (citing *EEOC v. Local 638*, 81 F.3d 1162, 1180 (2d Cir. 1996)). (Visa International Service Association's Mem. of Law in Opp'n to Discover's Mot. for Partial Summ. J. ("Visa Int'l Opp'n") at 7.) This statement, however, is not determinative of the collateral estoppel analysis.

First, Visa International's reliance on it ignores that this Court held that "Visa International was in part responsible for the illegal rule and ***therefore is liable***." *Id.* (emphasis added); *see also Visa/MasterCard*, 344 F.3d at 244. Second, Visa International's argument relies on language discussing whether the liability finding against it was necessary to support an order of injunctive relief. That is not the question here. Rather, the collateral estoppel question is whether the issues addressed by this Court — Visa International's power to preempt Visa U.S.A.'s exclusionary rule and Visa International's affirmative encouragement of By-law 2.10(e) — were necessary to the liability holding against it. They unquestionably were.[40]

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[40] Visa International apparently also contends that, because this Court's entry of injunctive relief against it was "only to ensure" effective relief by preventing Visa International from adopting at the international level a rule that Visa U.S.A. would be prohibited from adopting, collateral estoppel should not apply. (Visa Int'l Opp'n at 3.) This argument, however, shows just how necessary relief against Visa International was to the *Visa/MasterCard* judgment. Essentially, the Court's order states that, without relief against Visa International, any relief against Visa U.S.A. might well be ineffective, because Visa International could undercut the relief ordered. *See Visa/MasterCard*, 183 F. Supp. 2d at 617.

Visa International also argues that the issues relevant to Discover's claims against it differ from the findings made concerning it in *Visa/MasterCard*. (Visa Int'l Opp'n at 5-6.) That is not true. Here, Discover raises the same issues concerning Visa International on which this Court made findings in the DOJ Case: whether Visa International had authority over Visa U.S.A. with respect to By-law 2.10(e) and thus was at least in part responsible for By-law 2.10(e), thereby violating the Sherman Act. *Compare Visa/MasterCard*, 163 F. Supp. 2d at 406-07; *Visa/MasterCard*, 183 F. Supp. 2d at 617; *Visa/MasterCard*, 344 F.3d at 244 (quoting *Visa/MasterCard*, 183 F. Supp. 2d at 617) *with* Kadetsky Decl. Ex. 7 (Second Am. Compl.) ¶¶ 11, 22, 93-99). Indeed, Visa International's own lawyer told the Second Circuit that the liability finding in the DOJ Case would attract private damages suits, which could logically be only about the same issues raised in the prior case. (Kadetsky Decl. Ex. 55 (*Visa/MasterCard*, Second Cir. Hr'g Tr., May 8, 2003) at 28-29.) Visa International's parsing of Discover's Claim One does not defeat the identity of issues, which is the only relevant question for collateral estoppel.

VI. THE FINDINGS IN ATTACHMENT A MERIT PRECLUSIVE EFFECT.

Defendants contend that Discover has not shown that the findings listed on its Attachment A merit collateral estoppel treatment. (MC Opp'n at 54-55; Visa Opp'n at 44-46.) These arguments should be rejected. First, Defendants' reliance on the Fourth Circuit's decision in *In re Microsoft* is unavailing, as the Second Circuit's legal standard controls here. *See* Section I(B)(1), *supra*. Second, the Second Circuit's order demonstrates that collateral estoppel applies to the findings in Attachment A, even though the appellate court did not explicitly refer to each of them, because, as discussed above, it did not "pass over" any issue as to which Discover seeks preclusion here. *See* Section I(B)(2), *supra*. Third, Defendants' contentions regarding "new" evidence and scholarship do not defeat application of collateral estoppel. *See* Section IV(C), *supra*.

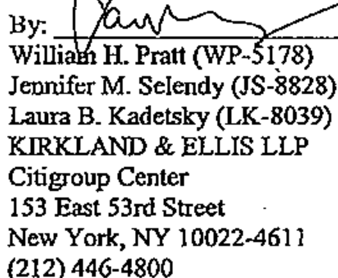
In a footnote in response to Discover's Statement of Undisputed Facts, Visa points to the Ninth Circuit's decision in *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042 (9th Cir. 2008). (Visa Resp. at 36 n.2.) That case is inapposite. In *Kendall*, the court did not apply preclusive effect to findings made in the DOJ Case about interchange or merchant fees. *See id.* at 1051. There, the Ninth Circuit was considering a motion to dismiss antitrust claims brought by various merchants alleging that the Associations and certain member banks conspired to set merchant discount fees and interchange fees. *See id.* at 1046. Those claims were not about Defendants' exclusionary rules and thus were not identical to the claims brought by the Government and determined by this Court in the DOJ Case and brought again by Discover in this case. Collateral estoppel therefore did not apply for the *Kendall* plaintiffs. That holding is irrelevant to the collateral estoppel analysis in Discover's case.

CONCLUSION

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

Dated: New York, New York
April 25, 2008

Respectfully submitted,



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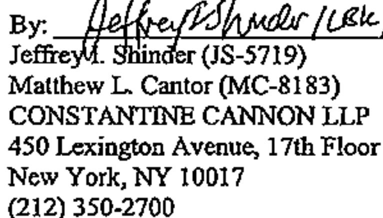

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