EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DISCOVER FINANCIAL SERVICES, INC.,

Plaintiff,

v.

VISA U.S.A., INC., VISA INTERNATIONAL SERVICE ASSOCIATION, MASTERCARD INCORPORATED and MASTERCARD INTERNATIONAL INCORPORATED,,

Defendants.

Case No. 04 CV 7844

ECF Case

DEFENDANTS PROPOSED JURY INSTRUCTIONS

REQUESTED JURY INSTRUCTION NO. __

Definitions

When I use the term "plaintiff," "plaintiffs," or "Discover," I refer to the three Discover-related companies that have brought suit against Visa and MasterCard. When I use the term "Visa," I refer to Visa U.S.A. Inc. When I use the term "MasterCard," I refer to MasterCard Incorporated and MasterCard International Incorporated. When I use the term defendants, I refer to Visa and MasterCard.

When I refer to "By-Law 2.10(e)" or "2.10(e)," I refer to Visa's By-Law 2.10(e) adopted in 1991 concerning its members issuing American Express- or Discover-branded payment cards in the United States. When I refer to the "Competitive Programs Policy" or the CPP, I refer to MasterCard's policy adopted in 1996 concerning its members issuing American Express- or Discover-branded general purpose credit and charge cards in the United States.

When I refer to the "credit markets," I refer to the general purpose credit and charge card market and the general purpose credit and charge card network services market.[1]

---

[1] Visa and MasterCard are evaluating the Court's reconsideration Order of October 1, 2008. Visa and MasterCard reserve the right to modify these proposed instructions in light of the Court's Order. These proposed jury instructions and the proposed verdict form do not include any instructions or verdict form questions regarding Visa International, because it is unclear what issues Discover seeks to have the jury determine with respect to Visa International. Defendants reserve the right to object to any Discover instructions or to propose in response additional instructions, if needed, with respect to Visa International.

REQUESTED JURY INSTRUCTION NO. __

The Complaint and Statute

The plaintiffs claim that the defendants unlawfully restrained trade by adopting Visa 's By-Law 2.10(e) and MasterCard's CPP. More specifically, the plaintiffs contend that By-Law 2.10(e) prevented financial institutions from issuing general purpose credit and charge cards or signature debit cards on the Discover Network and that the CPP prevented financial institutions from issuing credit cards on the Discover Network. The plaintiffs claim that these actions illegally restrained trade and that, as a result, they suffered injury to their business or property. Plaintiffs allege that the defendants' conduct violated section 1 of the Sherman Act. Section 1 of the Sherman Act provides that "[e]very contract, combination . . . or conspiracy in restraint of trade or commerce . . . is illegal."

Although you have heard evidence about various rules, policies, practices, conduct, actions and inaction by the defendants during the trial, the only conduct that plaintiffs are challenging as a violation of Section 1 of the Sherman Act is limited to the issuing provision in Visa's By-Law 2.10(e) and the issuing provision in MasterCard's Competitive Programs Policy.

Although you have heard that the CPP applied to both issuing and acquiring for Discover, plaintiffs are not challenging the CPP's provision that applied to acquiring and the acquiring provision has never been found to be unlawful. In your deliberations, you must therefore treat the acquiring provision of the CPP as lawful conduct under the antitrust laws and assume that the CPP's acquiring provision would have existed even if MasterCard had never adopted the issuing provisions in the CPP. You cannot find any injury or damages to Discover as a result of the CPP's acquiring provisions. In other words, the entirety of the alleged damages stemming from Discover's failure to engage in third-party acquiring (e.g. using an outside

acquirer) must result from the issuance bans in By-Law 2.10(e) and the CPP, not the acquiring ban in the CPP, which has never been found unlawful and is not claimed to be unlawful by Discover in this case.

AUTHORITY: 4 Leonard B. Sand, et al., *Modern Fed. Jury Instructions*, ¶ 79.06, Instructions. 79-1 & 79-55.

REQUESTED JURY INSTRUCTION NO. __

Purpose of the Antitrust Laws

The claims in this case involve allegations under the federal antitrust laws. The basic purpose of the antitrust laws is to protect and encourage competition for the American economy. The premise of these laws is that the action of competitive forces will yield the best and most efficient allocation of all economic resources, the highest quality products, and the greatest material progress.

I want to emphasize that the antitrust laws were not enacted to protect competitors. By this, I mean that the antitrust laws were not enacted to protect individual businesses from having to compete with one another or to protect them from successful competition by others. The antitrust laws do not guarantee that every business will be profitable or that every business will survive. The antitrust laws prohibit only anticompetitive conduct that prevents businesses from competing with each other on the merits of their products, services, or business practices. That is what I mean when I say that the antitrust laws protect competition, not competitors.

Competition is a contest that results in winners and losers. The antitrust laws are indifferent as to who wins the competitive struggle. It is an accepted result that some competitors will succeed and others will fail. Some competitors may even go out of business if they are inefficient or mismanaged or if their products are not of sufficient quality to be accepted in the marketplace. The fact that a competitor or competitors are driven out of a particular business may be a sign of healthy functioning of the free enterprise system. In other words, the antitrust laws do not protect companies from the risks of business failure or the effects of vigorous competition, and the antitrust laws are not meant to penalize a successful competitor.

Nor do the antitrust laws seek to equalize the differences between particular competitors, or to water down the full rigor of the competitive process. A company that becomes large and gains economic power as the result of its competitive vigor in the free enterprise system is not penalized because of its success. Firms with dominant market shares are entitled to compete just as vigorously as smaller firms.

The antitrust laws also guarantee that each competitor has the right to seek and to accept business opportunities that make business sense for it. No person or entity, including an established successful competitor, has a duty to help its competitors by passing up business opportunities that the other competitors may want, or by deliberately leaving room to allow others to remain in or enter the market easily.

AUTHORITY: *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 341 (1990) ("'It is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition.'") (citation omitted); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 116 (1986) (same); *Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302, 315 (4th Cir. 2007); *United States v. Syufy Enter.*, 903 F.2d 659, 662, 668-69 (9th Cir. 1990); *United States Football League v. Nat'l Football League*, No. 84 CIVIL 7484 PKL, 1986 WL 10620, at *3-4 (July 31, 1986), *aff'd*, 842 F.2d 1335 (2d Cir. 1988).

REQUESTED JURY INSTRUCTION NO. __

I will first instruct you as to the elements of Plaintiffs' Section 1 claim with respect to general purpose credit and charge cards. This claim is brought against both Visa and MasterCard.

I will then instruct you about Plaintiffs' Section 1 claim with respect to debit cards. This claim is against only Visa.

GENERAL PURPOSE CREDIT AND CHARGE CARD MARKET AND GENERAL PURPOSE CREDIT AND CHARGE CARD NETWORK SERVICES MARKET

REQUESTED JURY INSTRUCTION NO. __

Elements of the Claim

To prove that Visa and MasterCard unreasonably restrained trade in the credit markets by adopting the issuing provisions in Visa's 2.10(e) and MasterCard's CPP, Discover must prove, by a preponderance of the evidence, the following elements:

First, that general purpose credit and charge cards is a relevant product market for antitrust purposes;

Second, that general purpose credit and charge card network services is a relevant product market for antitrust purposes;

Third, that the United States is the appropriate geographic scope of both these relevant markets;

Fourth, that Visa and MasterCard each had market power within the general purpose credit and charge card market and the general purpose credit and charge card network services market;

Fifth, that Visa's 2.10(e) and MasterCard's CPP were each unlawful restraints of trade; and

Sixth, that Visa's 2.10(e) and MasterCard's CPP harmed competition and consumers in the markets for general purpose credit and charge cards and the general purpose credit and charge card network services;

Seventh, that Discover suffered monetary injury in its business or property as a result of Visa's 2.10(e) and MasterCard's CPP;

Eighth, that Discover proved the amount of any monetary damages that it suffered.

I am instructing you that the following issues have already been determined for this case:

1. General purpose credit and charge cards is a relevant product market for antitrust purposes.

2. General purpose credit and charge card network services is a relevant market for antitrust purposes.
3. The United States is the appropriate geographic scope of both these relevant markets.
4. Visa and MasterCard each had market power within the general purpose credit and charge card market and the general purpose credit and charge card network services market.
5. Visa's 2.10(e) and MasterCard's CPP were each unlawful restraints of trade.
6. Visa's 2.10(e) and MasterCard's CPP harmed competition and consumers in the relevant market by:
    a. limiting output of Discover cards in the United States
    b. restricting Discover's competitive strength by restraining its merchant acceptance levels and its ability to distribute new features through exclusion from the network services market and
    c. depriving consumers of the ability to obtain credit cards that combine the unique features of their preferred issuer and the Discover network brand

Just because I am instructing you that there was harm to competition caused by the issuance provisions in Visa's 2.10(e) and MasterCard's CPP does not mean that you should award Discover even a dollar amount of damages resulting from 2.10(e)'s and the CPP's issuance provisions. While it has been determined that there has been harm to competition, there has been no determination whether or not Discover suffered any amount of monetary damages

(even one dollar of monetary damages) as a result of the harm to competition from the issuing provisions of 2.10(e) and the CPP. You must first determine whether Discover suffered any monetary injury – even a minimum dollar amount of damages – from the 2.10(e) and the CPP as a result of the harm to competition and then whether Discover has proved the amount of any such damages. "Injury" differs from "damages," which are the means of measuring injury in dollars and cents. Discover meets its burden of showing injury if it shows some damage from the unreasonable restraints of trade complained of. Injury beyond this minimum point goes to the amount of damages and not to the question of injury. You may find that Discover suffered a monetary injury, but that it failed to prove an amount of damages or award only a nominal amount of damages, such as one dollar.

Discover has the burden of proving the amount of damages, if any, resulting from the Defendants' actions according to the instructions I will provide.

AUTHORITY: Opinion and Order, August 20, 2008, slip op. at 12-14; *United States Football League v. Nat'l Football League*, 842 F.2d 1335, 1376-77 (2d Cir. 1988) (affirming jury instruction which provided that "[j]ust because you have found the fact of some damage resulting from a given unlawful act, that does not mean that you are required to award a dollar amount of damages resulting from that act"); 4 Leonard B. Sand et. al., *Modern Federal Jury Instructions*, ¶ 79.02, Instruction 79-23.

GENERAL PURPOSE CREDIT AND CHARGE CARD MARKET AND GENERAL PURPOSE CREDIT AND CHARGE CARD NETWORK SERVICES MARKET

REQUESTED JURY INSTRUCTION NO. __

Antitrust Injury vs. Damages

Although I have instructed you that there was harm to competition in the general purpose credit and charge card and network services markets caused by the issuing provisions in Visa's 2.10(e) and MasterCard's CPP, you are not to assume that Discover suffered any injury or damages as a result for the harm to competition. Discover must show both that it was injured by the reduction in competition and the amount of its damages by a preponderance of the evidence. "Injury" differs from "damages," which are the means of measuring injury in dollars and cents.

Discover meets its burden of showing injury if it shows some damage from the unreasonable restraints of trade complained of. Injury beyond this minimum point goes to the amount of damages and not to the question of injury. It is your job to measure the extent of Discover's monetary injury, if any, resulting from 2.10(e)'s and the CPP's issuance provisions in dollars and cents.

There has been no determination as to whether or not Discover suffered some, even a small or nominal amount of monetary damages. There has been no determination as to whether Discover would have been able to attract third-party issuers (e.g., bank issuers) in the absence of the issuance provisions in 2.10(e) and the CPP or whether or not third-party issuance would have been profitable for Discover in the absence of the issuance provisions in 2.10(e) and the CPP. Moreover, there has been no determination whether or not Discover would have pursued third-party acquiring in the absence of the issuance provisions in 2.10(e) and the CPP, and if Discover did pursue third-party acquiring, whether or not third-party acquiring would have resulted in any increase in Discover's merchant acceptance in the absence of the issuance

provisions in 2.10(e) and the CPP. There has similarly been no determination if Discover had pursued third-party acquiring in the absence of the issuance provisions in 2.10(e) and the CPP, as to whether or not Discover would have experienced a "spend lift" on Discover's proprietary cards in the absence of the issuance provisions in 2.10(e) and the CPP, and the extent of any such "spend lift," if any. Finally, there has been no determination as to whether or not Discover and Citi would have consummated the proposed Project Explorer transaction in the absence of the issuance provisions in 2.10(e) and the CPP, and if so, whether or not Project Explorer would have been profitable for Discover in the absence of the issuance provisions in 2.10(e) and the CPP.

All of these are factual determinations which must be decided by you alone and you should not make any assumptions based on my instructions about those issues that have already been determined for this case. Moreover, just because I am instructing you that there has been harm to competition caused by the issuance provisions in 2.10(e) and the CPP does not mean that you are required to find that 2.10(e) and the CPP caused monetary injury of even a small or nominal amount to Discover or to award Discover a dollar amount of damages. You may find that Discover failed to prove it suffered a small or nominal amount of monetary damages or any amount of damages. You may also award only a nominal amount of damages, such as one dollar. In addition, just because I am instructing you on the issue of Discover's damages does not mean that I believe that Discover should, or should not, prevail in this case or are entitled to any amount of damages.

AUTHORITY: *United States Football League v. Nat'l Football League*, 842 F.2d 1335, 1376-77 (2d Cir. 1988) (affirming jury instruction which provided that "[j]ust because you have found the fact of some damage resulting from a given unlawful act, that does not mean that you are required to award a dollar amount of damages resulting from that act"); 4 Sand et. al., *Modern Federal Jury Instructions*, ¶ 79.02, Instructions 79-23 & 79-25.

GENERAL PURPOSE CREDIT AND CHARGE CARD MARKET AND GENERAL PURPOSE CREDIT AND CHARGE CARD NETWORK SERVICES MARKET

REQUESTED JURY INSTRUCTION NO. __

Antitrust Damages: Introduction and Purpose

The purpose of awarding damages in an antitrust action is to put an injured plaintiff as near as possible in the position in which it would have been but for the issuance provisions in 2.10(e) and the CPP. You are not permitted to award damages to punish a wrongdoer – what we sometimes refer to as punitive damages – or to deter the defendants from particular conduct in the future, or to provide a windfall to someone who has been the victim of an antitrust violation. You are also not permitted to award the plaintiff an amount for attorneys fees or the costs of maintaining this lawsuit. Antitrust damages are compensatory only. In other words, here they are designed to compensate Discover for the particular injuries it suffered as a result of the issuance provisions in Visa's 2.10(e) and MasterCard's CPP.

AUTHORITY: *United States Football League v. Nat'l Football League*, No. 84 CIVIL 7484 PKL, 1986 WL 10620, at *31 (S.D.N.Y. July 31, 1986), *aff'd*, 842 F.2d 1335 (2d Cir. 1988); American Bar Association, *Model Jury Instructions in Civil Antitrust Cases* (2005) at F-12-13 (hereinafter "ABA 2005").

GENERAL PURPOSE CREDIT AND CHARGE CARD MARKET AND GENERAL PURPOSE CREDIT AND CHARGE CARD NETWORK SERVICES MARKET

REQUESTED JURY INSTRUCTION NO. __

Antitrust Damages: Speculation Not Permitted

Damages may not be based on guesswork or speculation. If you find that Discover's damages calculation cannot be based on evidence and reasonable inferences, and instead can only be reached through guesswork or speculation, then you may not award damages. If the amount of damages attributable to an antitrust violation cannot be separated from the amount of harm caused by lawful acts or any other factors, including Discover's own business decisions, except through guesswork or speculation, then you may not award damages.

It may be difficult for you to determine the precise amount of damage suffered by Discover. You are therefore permitted to make reasonable estimates in calculating damages. If Discover establishes with reasonable probability the existence of an injury proximately caused by the issuance provisions in 2.10(e) and the CPP, you are permitted to make a just and reasonable estimate of the damages. The amount of damages must, however, be based on reasonable, non-speculative assumptions and estimates. Discover must prove the reasonableness of each of the assumptions upon which the damages calculation is based. If you find it has failed to carry its burden of providing a reasonable basis for determining damages, then your verdict must be for Visa and MasterCard and you should not award Discover any amount of damages, even one dollar. On the other hand, if you find that Discover has provided a reasonable basis for determining damages, then you may award damages based on a just and reasonable estimate supported by the evidence.

AUTHORITY: *United States Football League v. Nat'l Football League*, 842 F.2d 1335, 1378-79 (2d Cir. 1988) (affirming instruction that a jury cannot base damages award on "speculation

or guesswork"); *In re High Pressure Laminates Antitrust Litig.*, No. 00 MD 1368 (CLB), Trial Tr. at 2330 (S.D.N.Y. May 23, 2006), *available at http://www.abanet.org/antitrust/at-committees/at-trial/jury-instructions/15.shtml*, (instructing jury that "you may not engage in guesswork or speculation to award damages"); ABA 2005 at F-15-17.

GENERAL PURPOSE CREDIT AND CHARGE CARD MARKET AND GENERAL PURPOSE CREDIT AND CHARGE CARD NETWORK SERVICES MARKET

REQUESTED JURY INSTRUCTION NO. __

Antitrust Damages: Causation and Disaggregation

Discover is entitled to recover for only injury that was the direct and proximate result of the anticompetitive harm caused by the issuance provisions in Visa's 2.10(e) and MasterCard's CPP. It is not entitled to recover for any injury that is not the direct and proximate cause of the issuance provisions in 2.10(e) or the CPP. It therefore bears the burden of showing that its injuries were caused by the issuance provisions in 2.10(e) and the CPP, which I have instructed you were unlawful restraints of trade, as opposed to other factors, such as its own business decisions or from other Visa and MasterCard conduct which has not been found to be unlawful, such as the CPP's acquiring provision, for example. This means that Discover may not recover if it lost profits as a result of poor management or missed opportunities or other conduct that has not been found to be unlawful.

Discover must show, for example, that the damages it attributes to its failure to engage in third-party acquiring were caused by 2.10(e) and the CPP's provisions on third-party issuance, and not to any alleged provision on third-party acquiring in the CPP, which has never been found unlawful. This means that the entirety of damages stemming from Discover's failure to engage in third-party acquiring must flow from the issuance provisions, not from the CPP's acquiring provisions. As a result, if you do not find that 2.10(e) and CPP's third-party issuance provisions eliminated any incentives for third-party acquirers to work with Discover, then Discover is not entitled to damages stemming from its failure to engage in third-party acquiring.

Similarly, Discover must show that the damages it attributes to its failure to pursue Project Explorer were caused by the issuance provisions in 2.10(e) and the CPP, and not to business decisions made by Discover or its proposed partner, Citibank.

In addition, Discover bears the burden of proving damages with reasonable certainty, including apportioning damages between lawful and unlawful causes. If you find that there is no reasonable basis to apportion Discover's damages between lawful and unlawful causes, or that apportionment can be accomplished only through speculation or guesswork, then you may not award any damages at all. If you find that Discover has proven with reasonable certainty the amount of damage caused by the issuance provisions in 2.10(e) and the CPP, then you may award damages to Discover.

AUTHORITY: ABA 2005 at F-18-21; *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1056-57 (8th Cir. 2000) (excluding damage expert's testimony where the expert's model "did not incorporate all aspects of the economic reality of the . . . market and because it did not separate lawful from unlawful conduct"); *MCI Communs. Corp. v. AT&T*, 708 F.2d 1081, 1161 (7th Cir. 1983) ("It is essential, however, that damages reflect only the losses directly attributable to unlawful competition . . . the courts have been consistent in requiring plaintiffs to prove in a reasonable manner the link between the injury suffered and the illegal practices of the defendant"); *Intimate Bookshop v. Barnes & Noble, Inc.*, No. 98 Civ. 5564 (WHP), 2003 WL 22251312, at *8 (S.D.N.Y. Sept. 30, 2003) ("As noted, [plaintiff]'s unsupported assumption of causation and supposition that all of its losses were caused by defendants' allegedly unlawful conduct and intervening market factors are fatal to its claim."); *United States Football League v. Nat'l Football League*, No. 84 CIVIL 7484 PKL, 1986 WL 10620, at *33 (S.D.N.Y. July 31, 1986), *aff'd*, 842 F.2d 1335 (2d Cir. 1988) ("In awarding damages in this case, you may only award those damages caused by unlawful acts of the [defendant]. To the extent that you find that the [plaintiff] suffered monetary losses as a result of its own business decisions, you may not award any damages so caused to the [plaintiff] in this case.").

GENERAL PURPOSE CREDIT AND CHARGE CARD MARKET AND GENERAL PURPOSE CREDIT AND CHARGE CARD NETWORK SERVICES MARKET

REQUESTED JURY INSTRUCTION NO. __

Timing of Injury

In deciding when a plaintiff was injured by an unlawful restraint of trade, you must determine when the restraint first injured the plaintiff in its business or property. Here, you must determine when the issuance provision in By-Law 2.10(e) first caused injury to Discover in its business or property.

AUTHORITY: *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971); *Argus v. Eastman Kodak Co.*, 552 F. Supp. 589, 594 (S.D.N.Y. 1982), *aff'd*, 801 F.2d 38 (2d Cir. 1986).

GENERAL PURPOSE CREDIT AND CHARGE CARD MARKET AND GENERAL PURPOSE CREDIT AND CHARGE CARD NETWORK SERVICES MARKET

REQUESTED JURY INSTRUCTION NO. __

New and Accumulating Injury

In deciding whether an action after a particular date caused further injury to a plaintiff, you must decide whether any action after the date in question resulted in a new and accumulating injury beyond the injury that would have flowed as the consequence of actions that took place before the date in question. In this case, you must decide whether certain actions by Visa or other members of the By-Law 2.10(e) conspiracy after October 7, 1994 caused new and accumulating over and above the injuries that already existed as of those dates.

Similarly with respect to any harm allegedly caused by the CPP, it is undisputed that Visa enacted By-law 2.10(e) over five years before MasterCard enacted its CPP. Thus, if you find that 2.10(e) caused Discover to suffer any monetary damages, you must then determine whether the CPP caused Discover monetary damages over and above the damages that it would have already suffered as a result of the harm Discover claims it would have suffered from By-Law 2.10(e).

AUTHORITY: *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189-90 (1997); *In re: Ciprofloxacin Hydrochloride Antitrust Litig.*, 261 F. Supp. 2d 188, 228 (E.D.N.Y. 2003); *Vitale v. Marlborough Gallery*, No. 93 CIV (PKL) 6276, 1994 WL 654494, at *5 (S.D.N.Y. July 5, 1994).

GENERAL PURPOSE CREDIT AND CHARGE CARD MARKET AND GENERAL PURPOSE CREDIT AND CHARGE CARD NETWORK SERVICES MARKET

REQUESTED JURY INSTRUCTION NO. __

Antitrust Damages: Apportionment

Discover contends that the harm it suffered due to the issuance provisions in 2.10(e) and the CPP is a single, indivisible harm. In other words, it claims that the issuance provisions in 2.10(e) and the CPP caused it a concurrent harm which is incapable of logical division between 2.10(e) and the CPP. Defendants, on the other hand, contend that there is a reasonable basis by which to divide any monetary damages caused by the issuance provisions contained in 2.10(e) and the CPP, if any such monetary damages were suffered by Discover – a fact which Defendants deny. If you find that any harm alleged to be caused by the issuance provisions in 2.10(e) and the CPP is not a single, indivisible harm (in other words, you find that there is a reasonable basis by which to divide any harm alleged between the two defendants), Discover has the burden of apportioning between Visa and MasterCard any harm it claims to have suffered from the issuance provisions in 2.10(e) and the CPP. If you find that Discover has not met its burden of apportioning any claimed harm between Visa and MasterCard, then you may not award Discover any damages. On the other hand, if you find that any harm alleged to be caused by the issuance provisions in 2.10(e) and the CPP is indivisible and therefore incapable of logical division, Visa and MasterCard bear the burden of showing that any claimed harm can be logically apportioned between them.

AUTHORITY: *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 722 (2d Cir. 1993); *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 447 F. Supp. 2d 289, 297-98 (S.D.N.Y. 2006) (joint and several liability attaches only once plaintiff shows it "suffers a single indivisible injury caused by more than one tortfeasor, each of whom has actually caused the harm that injured the plaintiff."); *S. Pac. Commc'ns v. Am. Tel. & Tel. Co.*, 556 F. Supp 825, 1090 (D.D.C. 1982) (rejecting plaintiff's "aggregate damage claim" because "unless the Court

were to find both that defendants were liable for every one of the actions challenged by [plaintiff] and that no other factors materially contributed to the [damages], the Court could not calculate the amount of damages . . . without engaging in speculation or guesswork"); Restatement (Second) of Torts, §§ 433A cmt. i & 433B(2).

GENERAL PURPOSE CREDIT AND CHARGE CARD MARKET AND GENERAL PURPOSE CREDIT AND CHARGE CARD NETWORK SERVICES MARKET

REQUESTED JURY INSTRUCTION NO. __

Antitrust Damages: Lost Profits[2]

Discover claims that it was harmed because it lost profits as a result of the issuance provisions in Visa's 2.10(e) and MasterCard's CPP. If you find that Discover suffered injury as a direct and proximate cause of the issuance provisions in 2.10(e) and the CPP, and not as a result of its own business decisions or lawful Visa and MasterCard conduct, and if you find that there is a reasonable basis by which to apportion its damages between lawful and unlawful causes, as previously instructed, you may calculate Discover's lost profits, if any. To calculate lost profits, you must calculate net profit: the amount by which Discover's gross revenues would have exceeded all of the costs and expenses that would have been necessary to produce those revenues.

Discover offers two alternative damages methodologies: A yardstick approach using MasterCard's performance and an approach based on Project Explorer. Thus, if you award damages based upon the MasterCard yardstick theory, you cannot award damages based on the Explorer theory, and if you award damages based on the Explorer theory you cannot award damages based on the MasterCard yardstick theory.

Using MasterCard as a yardstick, Plaintiffs have proposed to calculate the net profits they would have earned in the absence of the issuance provisions in By-Law 2.10(e) and the CPP by showing evidence of the market share Discover would have had in the absence of the issuance provisions in By-Law 2.10(e) and the CPP. If you find that plaintiffs have shown

---

[2] Visa and MasterCard propose that this instruction be provided only if their motion to exclude Prof. Hausman's testimony pursuant to Rule 702 and/or Daubert is not granted.

reliable evidence of what their market share would have been in the absence of the issuance provisions in By-Law 2.10(e) and the CPP, then you may calculate plaintiffs' lost profits by considering market share, evidence of the size of the market, and evidence relating to the profit margin plaintiffs would have secured on such sales.

You must first determine if MasterCard was affected positively or negatively by the issuance provisions in By-Law 2.10(e) and the CPP. If you find that MasterCard was not affected positively or negatively by By-Law 2.10(e) or the CPP, you must decide whether the performance of MasterCard as compared to plaintiffs' business is a reliable guide to estimate what plaintiffs' actual net profits would have been in the absence of the issuance provisions in By-Law 2.10(e) and the CPP. You may find, however, that the performance of MasterCard is not representative of plaintiffs' performance in the absence of the issuance provisions in By-Law 2.10(e) and the CPP, such as if plaintiffs' performance would have been impacted by different economic conditions, mismanagement, different levels of competition, different business models, or other factors.

The two businesses do not have to be identical; they need only be sufficiently similar that conclusions may be drawn within the bounds of reasonableness. However, if you find that the businesses proposed by plaintiffs as a yardstick for their performance are not representative of what plaintiffs' performance would have been, and that plaintiffs' performance may only be calculated using speculation or guesswork, you may not award damages for lost profits based on this yardstick measure.

You may find, however, that plaintiffs have not shown reasonable evidence of what its market share would have been in the absence of the issuance provisions in By-Law 2.10(e) and the CPP, such as if plaintiffs' market share were impacted by changed economic

conditions, mismanagement, increased competition, changing technology, different business models, or other factors. You may also find that plaintiffs have not shown reasonable evidence of the profit margin it would have incurred in the absence of the issuance provisions in By-Law 2.10(e) and the CPP. If you find that the evidence of plaintiffs' market share and/or profit margins is not reasonable, and that lost profits may only be calculated using speculation or guesswork, you may not award damages for lost profits based on market share or profit margins.

AUTHORITY: *Eleven Line, Inc. v. N. Tex. State Soccer Ass'n*, 213 F.3d 198, 208 (5th Cir. 2000) ("An antitrust plaintiff who uses a yardstick method of determining lost profits bears the burden of demonstrating the reasonable similarity of the business whose earnings experience he would borrow."); *United States Football League v. Nat'l Football League*, No. 84 CIVIL 7484 PKL, 1986 WL 10620, at *32-33 (S.D.N.Y. July 31, 1986), *aff'd*, 842 F.2d 1335 (2d Cir. 1988); ABA 2005 at F-27 – F-32; 4 Sand et. al., *Modern Federal Jury Instructions*, ¶ 79.02, Instruction 79-27.

GENERAL PURPOSE CREDIT AND CHARGE CARD MARKET AND GENERAL PURPOSE CREDIT AND CHARGE CARD NETWORK SERVICES MARKET

REQUESTED JURY INSTRUCTION NO. __

Antitrust Damages: Future Lost Profits[3]

In this case, Discover is seeking not only to recover those damages they allege they have already suffered, but also to recover damages they claim they will suffer through the year 2010 as a result of the issuance provisions in Visa's 2.10(e) and MasterCard's CPP. If you find that Discover suffered injury as a direct and proximate cause of the issuance provisions in 2.10(e) and the CPP, and not as a result of its own business decisions or lawful Visa and MasterCard conduct, and if you find that there is a reasonable basis by which to apportion its damages between lawful and unlawful causes, as previously instructed, you may calculate its future lost profits, if any. To calculate lost future profits, you must make a reasonable estimate of (1) the amount of profits, if any, that Discover would have earned in future years, and (2) the length of time for which it would have earned those profits. You must not engage in guesswork or speculation. In making the determination whether Discover is entitled to any future lost profits, you must consider the various uncertainties that could affect the success of Discover's business, such as different economic conditions, mismanagement, different levels of competition, different business models, or other factors.

To calculate lost profits, you must calculate net profit: the amount by which plaintiff's gross revenues would have exceeded all of the costs and expenses that would have been necessary to produce those revenues. If you find that the fact of future losses is speculative or their amount is unproven, then you may not award damages for lost future profits.

---

[3] Visa and MasterCard propose that this instruction be provided only if their motion to exclude Prof. Hausman's testimony pursuant to Rule 702 and/or Daubert is not granted.

If you do award damages for future lost profits, you must discount the amount to its present value, using a discount rate of interest that you find reasonable. This is because the right to receive a certain sum of money at a future date is worth less than the same amount of money in hand today – this is known as the time value of money. For example, it you had a choice to receive $1000 today or a year from now, you would be better off receiving the money today and earning interest on it for a year – you would then have something more than $1000 in a year from now. Similarly, if you had a right to $1000 a year from now and you asked for the money today, the person owing you the money a year from now could properly give you a lower amount, reflecting the value that could be earned on that money over the next year.

AUTHORITY: ABA 2005 at F-33-38.

GENERAL PURPOSE CREDIT AND CHARGE CARD MARKET AND GENERAL PURPOSE CREDIT AND CHARGE CARD NETWORK SERVICES MARKET

REQUESTED JURY INSTRUCTION NO. __

Antitrust Damages: Project Explorer

Discover is entitled to recover only for injury that was the direct and proximate result of the issuance provisions in Visa's 2.10(e) and MasterCard's CPP. It is not entitled to recover for any injury that is not the direct and proximate cause of the issuance provisions in 2.10(e) or the CPP. It therefore bears the burden of showing that its injuries were caused by the issuance provisions in 2.10(e) or the CPP, which I have instructed you were unlawful restraints of trade, as opposed to other factors, such as its own business decisions or from other Visa and MasterCard conduct which has not been found to be unlawful. This means that Discover may not recover if it lost profits as a result of poor management, missed opportunities, or conduct not found to be unlawful.

Discover must therefore show that the damages it attributes to its failure to pursue Project Explorer were caused by the issuance provisions in 2.10(e) and the CPP, and not to business decisions made by Discover or its proposed partner, Citibank. Furthermore, Discover has offered its Explorer damages theory only as an alternative to its MasterCard yardstick theory. Thus, if you award damages based upon the MasterCard yardstick theory, you cannot award damages based on the Explorer theory, and if you award damages based on the Explorer theory, you cannot award damages based on the MasterCard yardstick theory.

In addition, as I have instructed you previously, if Discover meets its burden of showing that its failure to pursue Project Explorer was caused by the issuance provisions in 2.10(e) and the CPP, then Discover bears the burden of proving any damages allegedly resulting from Project Explorer with reasonable certainty, including apportioning damages between lawful

and unlawful causes. The amount of damages resulting from Project Explorer must be based on reasonable, non-speculative assumptions and estimates, and Discover must prove the reasonableness of each of the assumptions upon which the damages calculation is based. If you find that Discover has failed to carry its burden of providing a reasonable basis for determining damages, or that there is no reasonable basis to apportion Discover's damages between lawful and unlawful causes, or that apportionment can only be accomplished through speculation or guesswork, then you may not award any damages at all. If you find that Discover has proven with reasonable certainty the amount of damage resulting from Project Explorer that were caused by the issuance provisions in 2.10(e) and the CPP, then you may award damages, based on a just and reasonable estimate supported by the evidence, to Discover for Project Explorer's failure.

AUTHORITY: ABA 2005 at F-15-21; *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1056-57 (8th Cir. 2000) (excluding damage expert's testimony where the expert's model "did not incorporate all aspects of the economic reality of the . . . market and because it did not separate lawful from unlawful conduct"); *MCI Communs. Corp. v. AT&T*, 708 F.2d 1081, 1161 (7th Cir. 1983) ("It is essential, however, that damages reflect only the losses directly attributable to unlawful competition . . . the courts have been consistent in requiring plaintiffs to prove in a reasonable manner the link between the injury suffered and the illegal practices of the defendant"); *United States Football League v. Nat'l Football League*, 842 F.2d 1335, 1378-79 (2d Cir. 1988) (affirming instruction that a jury cannot base damages award on "speculation or guesswork"); *In re High Pressure Laminates Antitrust Litig.*, No. 00 MD 1368 (CLB), Trial Tr. at 2330 (S.D.N.Y. May 23, 2006), *available at http://www.abanet.org/antitrust/at-committees/at-trial/jury-instructions/15.shtml*, (instructing jury that "you may not engage in guesswork or speculation to award damages"); *Intimate Bookshop v. Barnes & Noble, Inc.*, No. 98 Civ. 5564 (WHP), 2003 WL 22251312, at *8 (S.D.N.Y. Sept. 30, 2003) ("As noted, [plaintiff]'s unsupported assumption of causation and supposition that all of its losses were caused by defendants' allegedly unlawful conduct and intervening market factors are fatal to its claim."); *United States Football League v. Nat'l Football League*, No. 84 CIVIL 7484 PKL, 1986 WL 10620, at *33 (S.D.N.Y. July 31, 1986), *aff'd*, 842 F.2d 1335 (2d Cir. 1988) ("In awarding damages in this case, you may only award those damages caused by unlawful acts of the [defendant]. To the extent that you find that the [plaintiff] suffered monetary losses as a result of its own business decisions, you may not award any damages so caused to the [plaintiff] in this case.").

GENERAL PURPOSE CREDIT AND CHARGE CARD MARKET AND GENERAL PURPOSE CREDIT AND CHARGE CARD NETWORK SERVICES MARKET

REQUESTED JURY INSTRUCTION NO. __

Preparedness to Enter Business

Discover claims that it was harmed because the issuance provisions in 2.10(e) and the CPP prevented them from entering a new line of business, specifically third-party credit issuance and third-party acquiring. To recover damages, it is not necessary that Discover actually has entered into this business if you find that the issuance provisions in 2.10(e) or the CPP prevented it from entering into third-party credit issuing and/or third-party acquiring deals when Discover says it would have first done so. Discover must prove, however, that it had an intention to enter into this line of business and that it had taken concrete steps to prepare to do so.

In determining whether or not Discover has demonstrated the intention and preparedness to enter this new business, you may consider such elements as the following: the background and experience of the principals and employees of Discover; Discover's ability to finance the business and purchase the necessary facilities and equipment; and concrete and discernable steps taken by Discover to enter this new business. Ultimately, to award Discover damages related to its failure to enter this new line of business, you must determine that had it not been for the issuance provisions in 2.10(e) or the CPP, Discover would have entered that business.

AUTHORITY: ABA 2005 at F-42-43.

GENERAL PURPOSE CREDIT AND CHARGE CARD MARKET AND GENERAL PURPOSE CREDIT AND CHARGE CARD NETWORK SERVICES MARKET

REQUESTED JURY INSTRUCTION NO. __

Duty to Mitigate Damages

If a company is faced with the possibility that it may suffer injury as a result of the unlawful business conduct of another, it cannot sit back and do nothing while the damages mount up. A company must protect itself by acting reasonably and responsibly to minimize the amount of its damages. This is called the "mitigation of damages."

Discover claims that they could have done nothing to mitigate any damages they claim to have suffered. On the other hand, Visa and MasterCard claim that Discover could have mitigated its damages, if any, in several ways. Visa and MasterCard contend that Discover could have adopted third-party acquiring earlier, and thereby avoided some or all of the damages alleged caused by Discover's decreased merchant acceptance. Visa and MasterCard also contend that Discover could have substantially increased the number of cards and the amount of volume on the Discover Network while the issuance provisions in 2.10(e) and the CPP were in place, and thereby reduced any damages Discover may have incurred.

Visa and MasterCard have the burden of proving to you, by a preponderance of the evidence, that Discover did not mitigate its damages. If you find that Discover could have avoided some or all of its economic losses by any of the methods proposed or suggested by Visa and MasterCard, and that Discover unreasonably failed to do so, then you cannot award it the damages it could have avoided.

AUTHORITY: *United States Football League v. Nat'l Football League*, No. 84 CIVIL 7484 PKL, 1986 WL 10620, at *34 (S.D.N.Y. July 31, 1986), *aff'd*, 842 F.2d 1335 (2d Cir. 1988); 4 Sand et al., *Modern Federal Jury Instructions*, ¶ 79.02, Instruction 79-29.

GENERAL PURPOSE CREDIT AND CHARGE CARD MARKET AND GENERAL PURPOSE CREDIT AND CHARGE CARD NETWORK SERVICES MARKET

REQUESTED JURY INSTRUCTION NO. __

Conspiracy Defined[4]

The word "conspiracy," which is used in the Sherman Act, means "together with" someone else. A conspiracy is formed when two or more people or corporations join together to accomplish some purpose by acting together. In this case, it has been established that By-Law 2.10(e) was a conspiracy among Visa and one or more members when it was adopted.

You must decide whether banks that joined Visa after By-Law 2.10(e) was adopted joined the By-Law 2.10(e) conspiracy. I instruct you on this issue next.

---

[4] 4 Leonard B. Sand, et al., *Modern Fed. Jury Instructions – Civil* ¶ 79.02, Ins. No. 79-4 (2008).

GENERAL PURPOSE CREDIT AND CHARGE CARD MARKET AND GENERAL PURPOSE CREDIT AND CHARGE CARD NETWORK SERVICES MARKET

REQUESTED JURY INSTRUCTION NO. __

Joining the Conspiracy[5]

In order to determine that a financial institution (*e.g.* bank) joining Visa after By-Law 2.10(e) was adopted joined the By-Law 2.10(e) conspiracy, you must conclude that the financial institution consciously committed itself to By-Law 2.10(e) in order to achieve an unlawful objective in concert with at least one of the existing members of the By-Law 2.10(e) conspiracy.

[5] 4 Leonard B. Sand, et al., *Modern Fed. Jury Instructions – Civil* ¶ 79.02, Ins. No. 79-8 (2008).

DEBIT CARD AND DEBIT NETWORK SERVICES CLAIM

REQUESTED JURY INSTRUCTION NO. __

Relevant Market – Definition[6]

I have now provided you with instructions as to the findings you must make in the general purpose credit and charge card market and the general purpose credit and charge card network services market. I am now going to turn to Discover's claim that it has been injured in the alleged debit network service market.

As a reminder, this claim is only against Visa. Discover contends that Visa's By-Law 2.10(e) prevented financial institutions from issuing signature debit cards on the Discover Network. In order for you to determine whether some amount of competition has been foreclosed by By-Law 2.10(e), it is necessary for you to first define the market in which Visa's debit network services compete. You will then be able to determine if competition within this market has been harmed in some meaningful way by By-Law 2.10(e).

A market has two dimensions. The first concerns which products or services are in competition, and is called the relevant product or services market. The second concerns the geographic area where the competition takes place. This is called the relevant geographic market.

In this case, the parties agree that the relevant geographic market is the United States. Thus, you must only determine which products and services are in competition with debit cards and debit card network services.

---

[6] AUTHORITY: 4 Leonard B. Sand, et al., *Modern Fed. Jury Instructions – Civil* ¶ 79.02, Ins. No. 79-51 (2008).

DEBIT CARD AND DEBIT NETWORK SERVICES CLAIM

REQUESTED JURY INSTRUCTION NO. __

Relevant Market – Product Market[7]

The parties disagree over what constitutes the relevant product and services market or markets. More specifically, plaintiffs contend that the relevant markets are (1) a debit card market involving both PIN and Signature debit cards, and (2) a debit network services market to provide network services for both PIN and Signature debit cards. Visa contends that plaintiffs have not presented adequate evidence to define these markets and that a proper market must account for at least cash and checks as alternative competitive payment methods in addition to PIN and Signature debit cards.

The basic idea of a product market is that the products within it are reasonable substitutes from a buyer's point of view. This does not mean that products must be identical to be in the same relevant market. It means that, as a matter of practical fact and the actual behavior of buyers, the products must be reasonable substitutes for the buyer's needs.

One way you may be able to tell whether products are reasonable substitutes for each other is by considering whether changes in the price of one product have fairly direct and substantial effects upon the prices or sales of the other products. If so, the products are in the same market.

You may also consider how people in the industry and the public at large view the products; whether the products have the same or similar characteristics or uses; whether the products have similar prices; whether the products are sold to similar customers; and whether they are distributed and sold by the same kinds of distributors or dealers.

---

[7] 4 Leonard B. Sand, et al., *Modern Fed. Jury Instructions – Civil* ¶ 79.02, Ins. No. 79-51 (2008).

In sum, to determine the relevant product market, you must decide which products compete with each other. This is a practical determination. Products do not have to be identical to be in the same relevant market, but they must be sufficiently similar in the respects I have mentioned to compete meaningfully with each other.

If you find that plaintiffs have proven a relevant product market comprising products that are reasonably interchangeable, then you should continue to evaluate the remainder of plaintiff's claim. However, if you find that plaintiffs have failed to proved such a market, then you must find in Visa's favor on this claim.

In the remaining instructions and in the Verdict Form, I refer to the "debit markets," a term that would cover both the general purpose debit card market and the general purpose debit card network services market, assuming that you find that both those relevant product markets exist.

DEBIT CARD AND DEBIT NETWORK SERVICES CLAIM

REQUESTED JURY INSTRUCTION NO. __

Elements of the Claim [8]

In order to prove its claim that Visa unreasonably restrained trade in the debit markets by adopting By-Law 2.10(e), the plaintiffs must prove, by a preponderance or greater weight of the evidence, each of the following elements:

> **First**, that By-Law 2.10(e) was an unreasonable restraint of trade in the debit markets;
>
> **Second**, that the plaintiffs were injured in their business or property by By Law 2.10(e) in the debit markets as a result.
>
> I will now instruct you further on the elements listed above.

[8] 4 Leonard B. Sand, et al., *Modern Fed. Jury Instructions – Civil* ¶ 79.02, Ins. No. 79-51 (2008).

DEBIT CARD AND DEBIT NETWORK SERVICES CLAIM

REQUESTED JURY INSTRUCTION NO. ___

Rule of Reason - Proof of Competitive Harm (Debit Network Services)[9]

You must examine all of the facts and circumstances of the case in order to determine whether By-Law 2.10(e) was an unreasonable restraint of trade. Bear in mind that in making this determination, you should focus on the effect of By-Law 2.10(e) on overall competition in the relevant market – not the effect on the plaintiffs alone.

As common sense would tell you, antitrust law does not prohibit every business agreement which affects trade or every agreement which may restrain or influence competition. That law prohibits only ***unreasonable*** restraints of trade. The goal of the antitrust laws is to prevent restraints of trade which tend, or are intended, to control prices, to restrict production or otherwise affect or control the market so as to deprive purchasers and consumers of the benefits of free and open competition. Thus, for a restraint to be unreasonable it must harm competition and thereby harm consumers.

It is therefore up to you based solely on the evidence presented to you during this trial to determine if By-Law 2.10(e) was an unreasonable restraint of trade in the debit markets that Discover alleges.

No one factor of control should dictate your determination whether By-Law 2.10(e) was an unreasonable restraint of trade. You should consider all the facts and circumstances relating to By-Law 2.10(e)'s impact on competition.

---

[9] 4 Leonard B. Sand, et al., *Modern Fed. Jury Instructions – Civil* ¶¶ 79.04, 79.06, Ins. Nos. 79-43, 79-61 (2008).

You should consider the nature of By-Law 2.10(e), its actual immediate effect, and its probable future effect. You should consider the history of By-Law 2.10(e) and the context in which it was adopted. You should also consider the nature of the particular industry in which By-Law 2.10(e) was adopted, and the condition of that industry both before and after By-Law 2.10(e).

You should consider the purpose of By-Law 2.10(e) and the reasons why it was made. The fact that Visa had a good motive or sound business purpose for adopting By-Law 2.10(e) does not prevent you from finding that By-Law 2.10(e) was an unreasonable restraint of trade. But examining the purpose of By-Law 2.10(e) may assist you in determining the effects of By-Law 2.10(e) on competition in the alleged debit markets.

You should consider the relative size and economic strength of Visa in the market.

If, after considering all these facts and circumstances, you find that By-Law 2.10(e) does impose some unreasonable restraint on competition, you should then determine whether By-Law 2.10(e) had any positive or pro-competitive effects on competition. If you find that it does, then your final determination whether By-Law 2.10(e) was an unreasonable restrain of trade must be made by balancing its restrictive or anti-competitive effects against its pro-competitive effects. If the anti-competitive effects of By-Law 2.10(e) outweigh its pro-competitive effects, then you should find that By-Law 2.10(e) was an unreasonable restraint of trade.

DEBIT CARD AND DEBIT NETWORK SERVICES CLAIM

REQUESTED JURY INSTRUCTION NO. ___

Antitrust Injury v. Damages [10]

If you find that the plaintiffs have met their burden to show the By-Law 2.10(e) was an unreasonable restraint of competition in the alleged debit markets, then you must decide whether the plaintiffs have suffered any injury or damages as aresult of the harm to competition. The plaintiffs must prove, by a preponderance of the evidence, that they were injured in their business or property by the activities plaintiffs claim are unlawful. That is, the plaintiffs must show that they were injured because of the anticompetitive effects of the debit issuance provision in By-Law 2.10(e).

"Injury" differs from "damages," which are the means of measuring the injury in dollars and cents. The plaintiffs meet their burden of showing injury if they show some damage from the unlawful activities complained of. Injury beyond this minimum point goes only to the amount of damage and not to the question of injury. It is your job to measure the extent of Plaintiff's monetary injury, if any, resulting from the debt issuance provision in By-Law 2.10(e).

You may find that Plaintiffs have met their burden of showing "injury" but that does not mean that you are required to award a dollar amount of damages. You may find that the plaintiffs failed to prove an amount of damages or award only a nominal amount of damages, such as one dollar.[11]

---

[10] 4 Leonard B. Sand, et al., *Modern Fed. Jury Instructions – Civil* ¶ 79.02, Ins. No. 79-23 (2008).

[11] *United States Football League v. National Football League*, 842 F.2d 1335, 1376-77 (2d Cir. 1988).

I am going to instruct you again on the issue of causation and damages, as I did with respect to credit markets . The fact that I am giving you instructions concerning the issue of plaintiffs' damages does not mean that I believe the plaintiffs should, or should not, prevail on this claim or are entitled to any amount of damages.

DEBIT CARD AND DEBIT NETWORK SERVICES CLAIM

REQUESTED JURY INSTRUCTION NO. __

Antitrust Damages: Introduction and Purpose

The purpose of awarding damages in an antitrust action is to put an injured plaintiff as near as possible in the position in which it would have been but for the issuance provisions in 2.10(e). You are not permitted to award damages to punish a wrongdoer – what we sometimes refer to as punitive damages – or to deter the defendants from particular conduct in the future, or to provide a windfall to someone who has been the victim of an antitrust violation. You are also not permitted to award the plaintiff an amount for attorneys fees or the costs of maintaining this lawsuit. Antitrust damages are compensatory only. In other words, here they are designed to compensate Discover for any injuries it suffered in the alleged debit markets as a result of Visa's 2.10(e).

AUTHORITY: *United States Football League v. Nat'l Football League*, No. 84 CIVIL 7484 PKL, 1986 WL 10620, at *31 (S.D.N.Y. July 31, 1986), *aff'd*, 842 F.2d 1335 (2d Cir. 1988); American Bar Association, *Model Jury Instructions in Civil Antitrust Cases* (2005) at F-12-13 (hereinafter "ABA 2005").

DEBIT CARD AND DEBIT NETWORK SERVICES CLAIM

REQUESTED JURY INSTRUCTION NO. __

Antitrust Damages: Speculation Not Permitted

Damages may not be based on guesswork or speculation. If you find that Discover's damages calculation cannot be based on evidence and reasonable inferences, and instead can only be reached through guesswork or speculation, then you may not award damages. If the amount of damages attributable to an antitrust violation cannot be separated from the amount of harm caused by lawful acts or any other factors, including Discover's own business decisions, except through guesswork or speculation, then you may not award damages.

It may be difficult for you to determine the precise amount of damage suffered by Discover. You are therefore permitted to make reasonable estimates in calculating damages. If Discover establishes with reasonable probability the existence of an injury in the alleged debit network service market proximately caused by the issuance provisions in 2.10(e), you are permitted to make a just and reasonable estimate of the damages. The amount of damages must, however, be based on reasonable, non-speculative assumptions and estimates. Discover must prove the reasonableness of each of the assumptions upon which the damages calculation is based. If you find it has failed to carry its burden of providing a reasonable basis for determining damages, then your verdict must be for Visa and you should not award Discover any amount of damages, even one dollar. On the other hand, if you find that Discover has provided a reasonable basis for determining damages, then you may award damages based on a just and reasonable estimate supported by the evidence.

AUTHORITY: *United States Football League v. Nat'l Football League*, 842 F.2d 1335, 1378-79 (2d Cir. 1988) (affirming instruction that a jury cannot base damages award on "speculation or guesswork"); *In re High Pressure Laminates Antitrust Litig.*, No. 00 MD 1368 (CLB), Trial

Tr. at 2330 (S.D.N.Y. May 23, 2006), *available at http://www.abanet.org/antitrust/at-committees/at-trial/jury-instructions/15.shtml*, (instructing jury that "you may not engage in guesswork or speculation to award damages"); ABA 2005 at F-15-17.

DEBIT CARD AND DEBIT NETWORK SERVICES CLAIM

REQUESTED JURY INSTRUCTION NO. __

Antitrust Damages: Causation

Discover is entitled to recover only for injury that was the direct and proximate result of the anticompetitive harm caused by the issuance provisions in Visa's 2.10(e). It is not entitled to recover for any injury that is not the direct and proximate cause of the issuance provisions in 2.10(e). It therefore bears the burden of showing that its injuries in the alleged debit card network services market were caused by the issuance provisions in 2.10(e), as opposed to other factors, such as its own business decisions or from other Visa conduct which has not been found to be unlawful, such as the CPP's acquiring provision, for example. This means that Discover may not recover if it lost profits as a result of poor management or missed opportunities or other conduct that has not been found to be unlawful.

Discover must show, for example, that the damages it attributes to its failure to engage in third-party acquiring were caused by 2.10(e)'s provisions on third-party issuance, and not to any provision on third-party acquiring in the CPP, which has never been found unlawful. This means that the entirety of damages stemming from Discover's failure to engage in third-party acquiring must flow from the issuance ban, not from the CPP's acquiring provision. As a result, if you do not find that 2.10(e)'s issuance provisions eliminated any incentives for third-party acquirers to work with Discover, then Discover is not entitled to damages stemming from its failure to engage in third-party acquiring. Discover bears the burden of proving damages with reasonable certainty.

AUTHORITY: ABA 2005 at F-18-21; *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1056-57 (8th Cir. 2000) (excluding damage expert's testimony where the expert's model "did not incorporate all aspects of the economic reality of the . . . market and because it did not separate

lawful from unlawful conduct"); *MCI Communs. Corp. v. AT&T*, 708 F.2d 1081, 1161 (7th Cir. 1983) ("It is essential, however, that damages reflect only the losses directly attributable to unlawful competition . . . the courts have been consistent in requiring plaintiffs to prove in a reasonable manner the link between the injury suffered and the illegal practices of the defendant"); *Intimate Bookshop v. Barnes & Noble, Inc.*, No. 98 Civ. 5564 (WHP), 2003 WL 22251312, at *8 (S.D.N.Y. Sept. 30, 2003) ("As noted, [plaintiff]'s unsupported assumption of causation and supposition that all of its losses were caused by defendants' allegedly unlawful conduct and intervening market factors are fatal to its claim."); *United States Football League v. Nat'l Football League*, No. 84 CIVIL 7484 PKL, 1986 WL 10620, at *33 (S.D.N.Y. July 31, 1986), *aff'd*, 842 F.2d 1335 (2d Cir. 1988) ("In awarding damages in this case, you may only award those damages caused by unlawful acts of the [defendant]. To the extent that you find that the [plaintiff] suffered monetary losses as a result of its own business decisions, you may not award any damages so caused to the [plaintiff] in this case.").

DEBIT CARD AND DEBIT NETWORK SERVICES CLAIM
REQUESTED JURY INSTRUCTION NO. __

Antitrust Damages: Lost Profits[12]

Discover claims that it was harmed because it lost profits in the alleged debit markets as a result of the issuance provisions in Visa's 2.10(e). If you find that Discover suffered injury in the alleged debit markets as a direct and proximate cause of the issuance provisions in 2.10(e), and not as a result of its own business decisions or lawful Visa conduct, and if you find that there is a reasonable basis by which to apportion its damages between lawful and unlawful causes, as previously instructed, you may calculate Discover's lost profits, if any. To calculate lost profits, you must calculate net profit: the amount by which Discover's gross revenues would have exceeded all of the costs and expenses that would have been necessary to produce those revenues. As a reminder, your award of damages must be fairly based on the evidence which has been presented to you. You may not simply speculate as to profits that Discover may have lost.

Discover offers two alternative damages methodologies: A yardstick approach using MasterCard's performance and an approach based on Project Explorer. Thus, if you award damages based upon the MasterCard yardstick theory, you cannot award damages based on the Explorer theory, and if you award damages based on the Explorer theory you cannot award damages based on the MasterCard yardstick theory.

Using MasterCard as a yardstick, Plaintiffs have proposed to calculate the net profits they would have earned in the alleged debit network services market in the absence of the issuance provisions in By-Law 2.10(e) by showing evidence of the market share Discover would

---

[12] Visa and MasterCard propose that this instruction be provided only if their proposed motion to exclude Prof. Hausman's testimony pursuant to Rule 702 and/or Daubert is not granted.

have had in the absence of the issuance provisions in By-Law 2.10(e). If you find that plaintiffs have shown reliable evidence of what their market share would have been in the absence of the issuance provisions in By-Law 2.10(e), then you may calculate plaintiffs' lost profits by considering market share, evidence of the size of the market, and evidence relating to the profit margin plaintiffs would have secured on such sales.

You must first determine if MasterCard was not affected positively or negatively by the issuance provisions in By-Law 2.10(e). If you find that MasterCard was not affected positively or negatively by By-Law 2.10(e), you must decide whether the performance of MasterCard as compared to plaintiffs' business is a reliable guide to estimate what plaintiffs' actual net profits would have been in the absence of the issuance provisions in By-Law 2.10(e). You may find, however, that the performance of MasterCard is not representative of plaintiffs' performance in the absence of the issuance provisions in By-Law 2.10(e) and the CPP, such as if plaintiffs' performance would have been impacted by different economic conditions, mismanagement, different levels of competition, different business models, or other factors.

The two businesses do not have to be identical; they need only be sufficiently similar that conclusions may be drawn within the bounds of reasonableness. However, if you find that the businesses proposed by plaintiffs as a yardstick for their performance are not representative of what plaintiffs' performance would have been, and that plaintiffs' performance may only be calculated using speculation or guesswork, you may not award damages for lost profits based on this yardstick measure.

You may find, however, that plaintiffs have not shown reasonable evidence of what its market share would have been in the absence of the issuance provisions in By-Law 2.10(e) such as if plaintiffs' market share were impacted by changed economic conditions,

mismanagement, increased competition, changing technology, different business models, or other factors. You may also find that plaintiffs have not shown reasonable evidence of the profit margin it would have incurred in the absence of the issuance provisions in By-Law 2.10(e). If you find that the evidence of plaintiffs' market share and/or profit margins is not reasonable, and that lost profits may only be calculated using speculation or guesswork, you may not award damages for lost profits based on market share or profit margins.

AUTHORITY: *Eleven Line, Inc. v. N. Tex. State Soccer Ass'n*, 213 F.3d 198, 208 (5th Cir. 2000) ("An antitrust plaintiff who uses a yardstick method of determining lost profits bears the burden of demonstrating the reasonable similarity of the business whose earnings experience he would borrow."); *United States Football League v. Nat'l Football League*, No. 84 CIVIL 7484 PKL, 1986 WL 10620, at *32-33 (S.D.N.Y. July 31, 1986), *aff'd*, 842 F.2d 1335 (2d Cir. 1988); ABA 2005 at F-27 – F-32; 4 Sand et. al., *Modern Federal Jury Instructions*, ¶ 79.02, Instruction 79-27.

DEBIT CARD AND DEBIT NETWORK SERVICES CLAIM

REQUESTED JURY INSTRUCTION NO. __

Antitrust Damages: Future Lost Profits[13]

In this case, Discover is seeking not only to recover those damages they allege they have already suffered, but also to recover damages they claim they will suffer through the year 2010 as a result of the issuance provisions in Visa's 2.10(e). If you find that Discover suffered injury as a direct and proximate cause of the issuance provisions in 2.10(e), and not as a result of its own business decisions or lawful Visa and MasterCard conduct, and if you find that there is a reasonable basis by which to apportion its damages between lawful and unlawful causes, as previously instructed, you may calculate its future lost profits, if any. To calculate lost future profits, you must make a reasonable estimate of (1) the amount of profits, if any, that Discover would have earned in future years, and (2) the length of time for which it would have earned those profits. You must not engage in guesswork or speculation. In making the determination whether Discover is entitled to any future lost profits, you must consider the various uncertainties that could affect the success of Discover's business, such as general market or economic conditions, or lawful competition Discover will face in the future.

To calculate lost profits, you must calculate net profit: the amount by which plaintiff's gross revenues would have exceeded all of the costs and expenses that would have been necessary to produce those revenues. If you find that the fact of future losses is speculative or their amount is unproven, then you may not award damages for lost future profits.

If you do award damages for future lost profits, you must discount the amount to its present value, using a discount rate of interest that you find reasonable. This is because the

---

[13] Visa and MasterCard propose that this instruction be provided only if their motion to exclude Prof. Hausman's testimony pursuant to Rule 702 and/or Daubert is not granted.

right to receive a certain sum of money at a future date is worth less than the same amount of money in hand today – this is known as the time value of money. For example, it you had a choice to receive $1000 today or a year from now, you would be better off receiving the money today and earning interest on it for a year – you would then have something more than $1000 in a year from now. Similarly, if you had a right to $1000 a year from now and you asked for the money today, the person owing you the money a year from now could properly give you a lower amount, reflecting the value that could be earned on that money over the next year.

AUTHORITY: ABA 2005 at F-33-38.

DEBIT CARD AND DEBIT NETWORK SERVICES CLAIM

REQUESTED JURY INSTRUCTION NO. __

Antitrust Damages: Project Explorer

Discover is entitled to recover only for injury that was the direct and proximate result of the issuance provisions in Visa's 2.10(e). It is not entitled to recover for any injury that is not the direct and proximate cause of the issuance provisions in 2.10(e). It therefore bears the burden of showing that its injuries were caused by the issuance provisions in 2.10(e) as opposed to other factors, such as its own business decisions or from other Visa and MasterCard conduct which has not been found to be unlawful. This means that Discover may not recover if it lost profits as a result of poor management, missed opportunities, or other conduct not found to be unlawful.

Discover must therefore show that the damages it attributes to its failure to pursue Project Explorer were caused by the issuance provisions in 2.10(e), and not to business decisions made by Discover or its proposed partner, Citibank. Furthermore, Discover has offered its Explorer damages theory only as an alternative to its MasterCard yardstick theory. Thus, if you award damages based upon the MasterCard yardstick theory, you cannot award damages based on the Explorer theory, and if you award damages based on the Explorer theory, you cannot award damages based on the MasterCard yardstick theory.

In addition, as I have instructed you previously, if Discover meets its burden of proving that showing that its failure to pursue Project Explorer was caused by the issuance provisions in 2.10(e), then Discover bears the burden of proving any damages allegedly resulting from Project Explorer with reasonable certainty, including apportioning damages between lawful and unlawful causes. The amount of damages resulting from Project Explorer must be based on

reasonable, non-speculative assumptions and estimates, and Discover must prove the reasonableness of each of the assumptions upon which the damages calculation is based. If you find that Discover has failed to carry its burden of providing a reasonable basis for determining damages, or that there is no reasonable basis to apportion Discover's damages between lawful and unlawful causes, or that apportionment can only be accomplished through speculation or guesswork, then you may not award any damages at all. If you find that Discover has proven with reasonable certainty the amount of damage resulting from Project Explorer that were caused by the issuance provisions in 2.10(e), then you may award damages, based on a just and reasonable estimate supported by the evidence, to Discover for Project Explorer's failure.

AUTHORITY: ABA 2005 at F-15-21; *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1056-57 (8th Cir. 2000) (excluding damage expert's testimony where the expert's model "did not incorporate all aspects of the economic reality of the . . . market and because it did not separate lawful from unlawful conduct"); *MCI Communs. Corp. v. AT&T*, 708 F.2d 1081, 1161 (7th Cir. 1983) ("It is essential, however, that damages reflect only the losses directly attributable to unlawful competition . . . the courts have been consistent in requiring plaintiffs to prove in a reasonable manner the link between the injury suffered and the illegal practices of the defendant"); *United States Football League v. Nat'l Football League*, 842 F.2d 1335, 1378-79 (2d Cir. 1988) (affirming instruction that a jury cannot base damages award on "speculation or guesswork"); *In re High Pressure Laminates Antitrust Litig.*, No. 00 MD 1368 (CLB), Trial Tr. at 2330 (S.D.N.Y. May 23, 2006), *available at http://www.abanet.org/antitrust/at-committees/at-trial/jury-instructions/15.shtml*, (instructing jury that "you may not engage in guesswork or speculation to award damages"); *Intimate Bookshop v. Barnes & Noble, Inc.*, No. 98 Civ. 5564 (WHP), 2003 WL 22251312, at *8 (S.D.N.Y. Sept. 30, 2003) ("As noted, [plaintiff]'s unsupported assumption of causation and supposition that all of its losses were caused by defendants' allegedly unlawful conduct and intervening market factors are fatal to its claim."); *United States Football League v. Nat'l Football League*, No. 84 CIVIL 7484 PKL, 1986 WL 10620, at *33 (S.D.N.Y. July 31, 1986), *aff'd*, 842 F.2d 1335 (2d Cir. 1988) ("In awarding damages in this case, you may only award those damages caused by unlawful acts of the [defendant]. To the extent that you find that the [plaintiff] suffered monetary losses as a result of its own business decisions, you may not award any damages so caused to the [plaintiff] in this case.").

DEBIT CARD AND DEBIT NETWORK SERVICES CLAIM

REQUESTED JURY INSTRUCTION NO. __

Preparedness to Enter Business

Discover claims that it was harmed because the issuance provisions in 2.10(e) prevented it from entering a new line of business, specifically third-party debit card issuance and third-party acquiring. To recover damages, it is not necessary that Discover actually has entered into this business if you find that the issuance provisions in 2.10(e) prevented it from pursuing third-party debit card issuance and/or third-party acquiring deals when Discover says it would have first done so. Discover must prove, however, that it had an intention to enter into this line of business and that it had taken concrete steps to prepare to do so.

In determining whether or not Discover has demonstrated the intention and preparedness to enter this new business, you may consider such elements as the following: the background and experience of the principals and employees of Discover; Discover's ability to finance the business and purchase the necessary facilities and equipment; and concrete and discernable steps taken by Discover to enter this new business. Ultimately, to award Discover damages related to its failure to enter this new line of business, you must determine that had it not been for the issuance provisions in 2.10(e), Discover would have entered that business.

AUTHORITY: ABA 2005 at F-42-43.

DEBIT CARD AND DEBIT NETWORK SERVICES CLAIM

REQUESTED JURY INSTRUCTION NO. __

Duty to Mitigate Damages

If a company is faced with the possibility that it may suffer injury as a result of the unlawful business conduct of another, it cannot sit back and do nothing while the damages mount up. A company must protect itself by acting reasonably and responsibly to minimize the amount of its damages. This is called the "mitigation of damages."

Discover claims that they could have done nothing to mitigate any damages they claim to have suffered. On the other hand, Visa claims that Discover could have mitigated its damages, if any, in several ways. Visa contends that Discover could have had financial institutions issue Discover offline debit cards along with MasterCard cards because the CPP's issuance prohibition did not apply to debit. Visa contends that Discover could have had the many banks that joined Visa or MasterCard just to issue offline debit cards issue Discover offline debit cards instead, or Discover could have had banks that issued only Visa or MasterCard offline debit cards move their portfolio to Discover. Visa contends that Discover could have adopted third-party acquiring earlier, and thereby avoided some or all of the damages alleged caused by Discover's decreased merchant acceptance. Visa and MasterCard also contend that Discover could have substantially increased the number of cards and the amount of volume on the Discover Network while the issuance provisions in 2.10(e) were place, and thereby reduced any damages Discover may have incurred.

Visa and MasterCard have the burden of proving to you, by a preponderance of the evidence, that Discover did not mitigate its damages. If you find that Discover could have avoided some or all of its economic losses by any of the methods proposed or suggested by Visa

and MasterCard, and that Discover unreasonably failed to do so, then you cannot award it the damages it could have avoided.

AUTHORITY: *United States Football League v. Nat'l Football League*, No. 84 CIVIL 7484 PKL, 1986 WL 10620, at *34 (S.D.N.Y. July 31, 1986), *aff'd*, 842 F.2d 1335 (2d Cir. 1988); 4 Sand et al., *Modern Federal Jury Instructions*, ¶ 79.02, Instruction 79-29.

DEBIT CARD AND DEBIT NETWORK SERVICES CLAIM

REQUESTED JURY INSTRUCTION NO. ___

Timing of Injury

In deciding when a plaintiff was injured by an unlawful restraint of trade, you must determine when the restraint first injured the plaintiff in its business or property. You must make that determination for the alleged debit markets. If you find that By-Law 2.10(e) caused injury to Plaintiffs in the debit markets, you must determine when that restraint first injured Discover in its business or property.

AUTHORITY: *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971); *Argus v. Eastman Kodak Co.*, 552 F. Supp. 589, 594 (S.D.N.Y. 1982), *aff'd*, 801 F.2d 38 (2d Cir. 1986).

DEBIT CARD AND DEBIT NETWORK SERVICES CLAIM

REQUESTED JURY INSTRUCTION NO. ___

New and Accumulating Injury

In deciding whether an action after a particular date caused further injury to a plaintiff, you must decide whether any action after the date in question resulted in a new and accumulating injury beyond the injury that would have flowed as the consequence of actions that took place before the date in question. In this case, you must decide whether certain actions by Visa or other members of the By-Law 2.10(e) conspiracy after October 4, 2000 led to new and accumulating injury over and above the injuries that already existed as of those dates.

AUTHORITY: *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189-90 (1997); *In re: Ciprofloxacin Hydrochloride Antitrust Litig.*, 261 F. Supp. 2d 188, 228 (E.D.N.Y. 2003); *Vitale v. Marlborough Gallery*, No. 93 CIV (PKL) 6276, 1994 WL 654494, at *5 (S.D.N.Y. July 5, 1994).

DEBIT CARD AND DEBIT NETWORK SERVICES CLAIM

REQUESTED JURY INSTRUCTION NO. ___

Conspiracy Defined[14]

The word "conspiracy," which is used in the Sherman Act, means "together with" someone else. A conspiracy is formed when two or more people or corporations join together to accomplish some purpose by acting together. In this case, it has been established that By-Law 2.10(e) was a conspiracy among Visa and one or more members when it was adopted.

You must decide whether banks that joined Visa after By-Law 2.10(e) was adopted joined the By-Law 2.10(e) conspiracy. I instruct you on this issue next.

---

[14] 4 Leonard B. Sand, et al., *Modern Fed. Jury Instructions – Civil* ¶ 79.02, Ins. No. 79-4 (2008).

DEBIT CARD AND DEBIT NETWORK SERVICES CLAIM

REQUESTED JURY INSTRUCTION NO. ___

Joining the Conspiracy[15]

In order to determine that a financial institution joining Visa after By-Law 2.10(e) was adopted joined the By-Law 2.10(e) conspiracy, you must conclude that the financial institution consciously committed itself to By-Law 2.10(e) in order to achieve an unlawful objective in concert with at least one of the existing members of the By-Law 2.10(e) conspiracy.

[15] 4 Leonard B. Sand, et al., *Modern Fed. Jury Instructions – Civil* ¶ 79.02, Ins. No. 79-8 (2008).

ALL COUNTS

REQUESTED JURY INSTRUCTION NO. __

Expert Testimony

Now that I have instructed you as to the elements of Discover's claims against Visa and MasterCard with respect to the general purpose credit and charge cards and the elements of Discover's claims against Visa with respect to debit cards, I want to provide instructions that you should apply in evaluating all these claims. You have heard testimony from Discover's experts and from Visa's and MasterCard's experts regarding the amount of damages to which Discover claims it is entitled and the proper amount of damages. If you find that any of the pertinent underlying assumptions made by one of these experts in preparing a damage report are not reasonable or are not proven by a preponderance of the evidence, or if you find that one of these expert's conclusions depend on a comparison of things which have not been proven to be comparable, then you should consider this in determining the weight – if any – you will give to these assumptions and the effect they have on plaintiff's damages claim. You should not accept expert testimony merely because the witness was permitted to testify concerning his or her opinion. You should similarly not substitute an expert's opinion for your own reason, judgment, and common sense.

AUTHORITY: ABA 2005 at F-46; 4 Sand et al., *Modern Federal Jury Instructions*, ¶ 76.01, Instruction 76-9.