UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	98 Civ. 7076 (BSJ)
v.	)	
VISA U.S.A. INC., VISA INTERNATIONAL CORP., AND MASTERCARD INTERNATIONAL INCORPORATED,	)	PUBLIC VERSION
Defendants.	)	

GOVERNMENT'S CONSOLIDATED MEMORANDUM OF LAW IN RESPONSE TO DEFENDANTS' MOTIONS FOR STAY PENDING APPEAL

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Plaintiff United States of America ("Government") submits this memorandum in opposition to the motions of Visa U.S.A. and MasterCard International, Inc. (collectively, "defendants"[1]) for stay of the Court's injunctive relief pending appeal.

INTRODUCTION

After a full trial on the merits and extensive briefing, the Court found that defendants' exclusionary rules materially impede competition and thereby constitute an unreasonable restraint of trade pursuant to Sherman Act § 1. The Court's decision is squarely based on the relevant rule of reason case law and well supported by the record evidence. That evidence demonstrates that the rules, restrictions "of, by and for the member banks," restrict competition in both the general purpose card issuing and network markets. The Court's remedy — enjoining such rules and allowing member banks the option for a limited period to rescind dedication agreements entered into during the course of the litigation — properly prohibits the offensive conduct and seeks to restore full competition.

Defendants intend to appeal and now seek to stay enforcement of the remedy pursuant to Federal Rule of Civil Procedure 62(c). Defendants, as movants, face a heavy burden to show why the Court's remedy should not be enforced pending the lengthy appeals process, thereby allowing the established anticompetitive conduct to continue unabated. Defendants fail to meet this burden as to the required elements, namely the potential for success on appeal, the existence of irreparable injury, and the impact of a stay on the public interest.

First, they cannot point to a valid reason why the Court should question the merits of its decision. While defendants provide a litany of issues they intend to raise on appeal, they fail to persuasively

[1] Defendant Visa International has not filed a motion to stay enforcement of the remedy or a notice of appeal.

articulate *why* a substantial possibility or a strong likelihood of reversal exists. Basically, the defendants reiterate their trial arguments which this Court rightly rejected. They will have the opportunity to raise those arguments yet again on appeal, but, for purposes of this motion, they must identify specific errors in the Court's analysis. As full-scale rule of reason analysis is inherently fact-specific, the defendants will have to show that they will be able to overcome the appropriate deference that will be accorded to this Court's factual findings pursuant to Federal Rule of Civil Procedure 52(a).

The defendants' claims of irreparable harm are substantially the same as the rejected procompetitive justifications they offered at trial (*i.e.*, "loyalty" and "cohesion"). Once again, defendants may seek to have the Court of Appeals consider these defenses, but defendants must persuasively explain why the Court should now accept these unsupported justifications as constituting a real and immediate threat of irreparable harm. It is not enough to simply reiterate the arguments. Further, defendants overstate the alleged harm arising from the remedy pending appeal. Visa and MasterCard will not be forced out of business or "unravel" (MC Mem. 6) simply because certain member banks *may* void their member dedication agreements or seek to work with American Express or Discover during the pendency of appeal. Some banks may seek a better deal; American Express or Discover may offer a better deal; and Visa and MasterCard may need to respond to that competition. Such competition, however, is not irreparable harm.

Defendants' failure to meet their burden as to the merits and irreparable harm contrasts significantly with the harm to the public interest that would result from a continued delay in restoring competition to the market. Visa and MasterCard seek to continue to enforce the exclusionary rules for as long as possible. The longer these rules are in effect, the longer consumers are denied the benefits of full competition, including increased output, the higher quality that comes with innovative and varied products and services, the broadest possible competition by four (rather than two) networks for merchant acceptance, and a marketplace responsive to consumer preferences. Visa attempts to downplay the effect of this competition by claiming that the benefits from increased competition would be "utterly insignificant" in the short term. The Government strenuously disagrees. Competition over the next few years will be important in developing innovative products and services, especially in areas such as smart card deployment. Visa's arguments to the contrary should be seen as simply an attempt to forestall competition for as long as possible while Visa continues to control (almost unilaterally) the contours of bank-issued smart card issuance.

Finally, defendants unavailingly argue that a stay is needed to avoid significant consumer disruption that may occur should the judgment be overturned. Banks that enter into agreements with American Express or Discover pending appeal can take steps to minimize any such disruption. If the remedy is overturned, banks can decide whether to sell their American Express or Discover portfolios or take other remedial action. Card portfolios are converted routinely without any significant concerns over disruption. There will be no "loss of consumer confidence" in the credit card industry as defendants improperly suggest.

The Government respectfully requests that the Court deny the motions.

ARGUMENT

I. DEFENDANTS HAVE A "DIFFICULT BURDEN" TO CONVINCE THE COURT TO DELAY ENFORCEMENT OF THE REMEDY

A. Legal Standards

A party seeking a stay of a judgment pending appeal "bears a difficult burden" of explaining why the district court should exercise its equitable powers to allow conduct judged illegal to continue pending appeal. *United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc.*, 44 F.3d 1082, 1084 (2d Cir. 1995). Courts evaluate four factors in deciding whether a party has met this burden:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Rodriguez v. Debuono, 175 F.3d 227, 234 (2d Cir. 1999) (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *Longstreet Assoc. L.P. v. Bevona*, 1998 WL 27134 (S.D.N.Y.) (*Hilton* standards); Charles Alan Wright *et al.*, 11 Federal Practice and Procedure § 2904. A stay will be granted only "if the balance of equities favors this action." Wright, § 2904.

The Government will show that (1) defendants raise no "strong showing" or "substantial possibility" of convincing the Court of Appeals to overturn the Court's Judgment;[2] (2) defendants will not suffer cognizable irreparable harm pending appeal as a result of the Court's injunctive relief; and (3 & 4) the public interest will be unduly harmed if the relief is stayed due to the effect on competition in the market.[3]

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[2] Defendants dispute the formulation of the test's first factor. *Compare Rodriguez*, 175 F.3d at 234 (burden requires a "strong showing that [the movant] is likely to succeed") *with* Visa Mem. 2-3, MC Mem. 3 (citing cases pre-dating *Rodriguez*; burden requires a "substantial possibility, although less than a likelihood" of success). Whether the two standards materially conflict is not a critical issue as the defendants fail to meet their burden under either articulation. As discussed in more detail below, what is important is that regardless of how this standard is characterized, it must be applied with due regard to the deferential review afforded to this Court's fact findings pursuant to Rule 52(a).

[3] Following Visa's lead (Visa Mem. 3), the Government will analyze harm to American Express and Discover as network competitors as part of its discussion of harm to competition and the

B. Defendants' Unavailing Threshold Arguments

Prior to addressing the merits, defendants raise "threshold" arguments. First, they claim that a stay is warranted due simply to the passage of time since the investigation and the filing of the Complaint, and the Government's decision not to seek preliminary relief. (Visa Mem. 2; *see also* MC Mem. 11-13). Such an argument ignores the posture of the proceedings. Preliminary relief is an extraordinary remedy that would have been difficult to justify given the fact-specific nature of Count II. Now, however, after a full trial on the merits which provided the Court the ability to hear evidence, gauge credibility, and assess the facts in making its decision, the equities favor enforcement of the remedy to enjoin the judicially determined anticompetitive conduct. Delay in providing effective relief would serve to countenance an illegal act. *See Malarkey v. Texaco*, 794 F. Supp. 1248, 1251 (S.D.N.Y. 1992) ("To acquiesce in further delays . . . would be to make this Court an instrument for further frustrating instead of promoting the aim of [the law]."). Moreover, the mere passage of time since the Complaint was filed does not provide defendants support to continue their illegal activity. *See Buchanan v. Evans*, 439 U.S. 1360, 1365 (1978) (denying motion for stay where case had been in litigation for over 20 years); *Dandridge v. Jefferson Parish School Bd.*, 404 U.S. 1219, 1220 (1971) (denying motion for stay where case had been in litigation for seven years).

Every day of delay benefits defendants by protecting their market share and insulating them from competitive pressure. *See* 163 F. Supp. 2d at 400-01 (MasterCard's Lockhart explaining need for the exclusionary rules: "We stood a real chance of losing. . . . Every share point was worth real revenue to

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public interest under the fourth (rather than the third) factor of the *Rodriguez* test.

us.”). Defendants are simply trying to make sure that “nothing changes for the duration of the appellate process, which could be two and a half years.” Jennifer A. Kingson, *For Card Industry, Whole New Ball Game*, Am. Banker (Oct. 12, 2001) (statement of Paul Allen, Visa U.S.A. General Counsel). Of course, something has “changed” — their conduct has been found to be illegal.[4]

II. DEFENDANTS FAIL TO MEET THEIR BURDEN AS TO LIKELIHOOD OF SUCCESS ON THE MERITS

As the Court’s opinion found, the Government proved that the exclusionary rules cause significant anticompetitive effects and that these effects outweigh the defendants’ proffered justifications. These findings were made on the basis of the extensive record from a thirty-four day trial and pursuant to a full-scale rule of reason analysis.[5] Defendants bear the burden under Rule 62(c) of showing why this Court’s decision is subject to reversal. *Rodriguez*, 175 F.3d at 234; *Longstreet Assoc. L.P. v. Bevona*, 1998 WL 27134 (S.D.N.Y.) (“Plaintiffs have raised no new argument to convince the Court that its prior ruling was wrong or likely to be reversed on appeal.”). To meet its burden, a party cannot merely repeat “objections and arguments that already have been considered by th[e] Court over the

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[4] Moreover, defendants claim that a stay would not be harmful because innovation already occurs in this market. The question, however, is not whether innovation has occurred as innovation occurs even when a monopolist controls a market. Rather, the question is whether anticompetitive practices lessen the pace and scope of innovation and thus harm consumers. *See generally United States v. Microsoft Corp.*, 253 F.3d 34, 57 (D.C. Cir. 2001).

[5] Accordingly, defendants have a greater burden than that of a party attempting to obtain a preliminary injunction. *See Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991) (“[A] movant seeking a stay pending review on the merits of a district court's judgment will have greater difficulty [than review of preliminary relief] in demonstrating a likelihood of success on the merits.”).

years of litigation, during trial, and in resolving [post-trial] motion[s]." *Malarkey*, 794 F. Supp. at 1250; *see also id.* ("list of issues" to be raised on appeal does not equate to "strong showing" of likely success on appeal).

In analyzing the accuracy of judgments, courts have looked toward "objective" indicia such as "the extent to which the challenged decision is supported by precedent" and "the standard of review that will govern the appeal." *Cecere v. City of New York*, 1991 WL 136026 at *4 (S.D.N.Y.) (quoting *Hayes v. City Univ. of New York*, 503 F. Supp. 946, 963 (S.D.N.Y.), *aff'd*, 648 F.2d 110 (2d Cir. 1981)). As explained below, the Court's decision is based on established rule of reason precedent using recognized legal and economic principles to assess market power, anticompetitive effects and procompetitive justifications. Furthermore, any analysis that weighs the likelihood of potential appellate court action must recognize the standard under which appellate review will be made. Under Rule 52(a), the appellate court will defer to this Court's detailed factual findings and reverse them only if they constitute clear error. The principal findings in this case — market power, anticompetitive effects and the lack of procompetitive justifications — are inherently fact specific and those facts will be afforded the full benefit of the clearly erroneous standard.[6]

Defendants each raise numerous issues attacking the merits of the Court's opinion. While Visa's issues are not identical to MasterCard's, they together cover the following areas: relevant

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[6] *See, e.g., Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918) (discussing fact-specific nature of rule of reason in general); *Todd v. Exxon Corp.*, — F.3d — 2001 WL 1635496 at *5 (2d Cir. 2001) (market definition is a "deeply fact-intensive inquiry"); *Hayden Publ'g Co. v. Cox Broad. Corp.*, 730 F.2d 64, 70 n.8 (2d Cir. 1984) (citations omitted) ("a pronouncement as to market definition is not one of law, but of fact").

market/market power; anticompetitive effects; procompetitive justifications; and joint venture analysis.[7] We address these issues below, separately analyzing Visa's and MasterCard's respective positions when the two are not substantially similar.

A. Market Definition and Power: No Basis to Show Factual or Legal Error

Defendants make three arguments related to market power and relevant market definition: First, Visa argues that the general purpose card network services market is *irrelevant* to assessing the anticompetitive effects of the exclusionary rules. (Visa Mem. 5-7). Second, MasterCard argues that the Court erred in finding the existence of both the network services market and the general purpose card market. (MC Mem. 16). Finally, MasterCard argues that the Court erred in finding that MasterCard has market power. (MC Mem. 17-18). These arguments are unconvincing.

1. Visa's Efforts to Characterize Network Services as an "Irrelevant" Market Do Not Withstand Scrutiny

On the basis of detailed factual evidence (including Visa's own admissions[8]), the Court found two relevant product markets: (1) general purpose cards and (2) general purpose card network services. 163 F. Supp. 2d at 335-340. The Court further found that the exclusionary rules caused substantial anticompetitive effects in both of these relevant markets by, *inter alia*, diminishing the

[7] MasterCard and Visa also "may" raise the possibility of whether "the relief is properly tailored to remedy the alleged violation." (MC Mem. 18, Visa Mem. 15 n.17). They posit that rescission of the agreements would be "antithetical to the Court's findings that such agreements are procompetitive" and that termination would only benefit American Express and Discover. (MC Mem. 18-19). The Court has already considered these arguments in connection with the extensive remedies briefing. Defendants must offer more analysis to carry the burden of showing how this issue may be subject to reversal.

[8] The Second Circuit recently reiterated that "industry recognition" evidence is significant evidence for market definition purposes. *Todd*, at *9-*10.

competitive vitality of American Express and Discover, which thereby reduces network-level quantity and price competition and restricts the ability of those networks to access the attributes of card-issuing banks. *Id.* at 379. The Court, describing in detail the network-level harm, found that these effects harmed consumer welfare. *Id.* at 381-99.

Notwithstanding these detailed factual findings, Visa asserts that "the importance *vel non* of a 'network services' market will present an important issue which Visa respectfully believes the Court has misconceived." (Visa Mem. 5-7; *see also* (Visa U.S.A. Inc.'s Mem. of Law in Opposition to Government's Motions *In Limine* at 16-19; Defendants' Joint Proposed Concl. of Law "A" at ¶¶ 114-15 (raising same argument)). Visa apparently does not dispute the existence of a network services market; rather, it claims that the network services market is an irrelevant market in which to analyze the effects of the exclusionary rules.

Even assuming this issue warrants plenary review, there can be no serious dispute that the "relevant competition" for analyzing the anticompetitive effects of Bylaw 2.10(e) is competition for network services competitors to provide *network-level* services to card issuers. The purpose of market definition is to aid the process of determining what products compete against each other to determine whether a restriction in such competition harms consumers. *See Todd*, at *10; *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 936-37 (7th Cir. 2000). Here, American Express and Discover seek to offer their *network* services to issuers. Accordingly, we look to the network market to analyze anticompetitive effects. As this Court correctly found, the exclusionary rules have significantly impeded the competitive vitality of American Express and Discover as general purpose card *networks*, resulting in actual and substantial harm to competition at the *network* level. 163 F. Supp. 2d at 379. This network harm impacts consumer welfare as Visa so succinctly stated: "Lest there be any confusion, the ultimate impact of any harm to system level competition is felt by cardholders and merchants who use or accept general purpose charge cards." *Id.* at 339 (quoting Visa *MountainWest* admissions and current trial testimony of Bennett Katz and Dean Schmalensee). Should the rules be eliminated, American Express and Discover would be strengthened as network competitors and Visa and MasterCard would be forced to respond competitively at the network level (as they have outside the United States). *See,* e.g., *id.* at 395-97. Visa continues to claim that *MountainWest* dictates an examination of the issuer-level market. (Visa Mem. 6-7).[9] That case concerned the limited anticompetitive effects arising from Discover seeking to be yet another Visa card *issuer*. 163 F. Supp. 2d at 339 n.10. Network-level competition is the correct market for analysis in this case and Visa offers no factual basis or new legal argument to discredit this conclusion.[10]

2. MasterCard Has Failed to Show Any Error in the Court's Market Definition Findings

MasterCard claims that the Court erred in making its market definition findings. It first argues

[9] Ironically, Visa claims that its *network* will be harmed absent a stay because of the anticipated decline in network volume that would result from the abolition of Bylaw 2.10(e) pending appeal. (*See* Pascarella Dec. ¶ 35).

[10] The only non-*MountainWest* legal authority Visa relies upon, *California Dental Ass'n v. FTC,* 526 U.S. 756, 775 n.12 (1999), is cited for the unremarkable proposition that "proof of actual and substantial harm to competition is a critical issue under the rule of reason." (Visa Mem. 7 n.9). That is the reason this Court undertook a thorough inquiry into the purpose and consequences of the exclusionary rules. The Court was able to analyze the evidence and, based on the proof, find as a matter of fact that the rules cause substantial competitive harm. Moreover, as the cited passage also makes clear, once anticompetitive effects are demonstrated, the burden shifts to the defendant "to show empirical evidence of procompetitive effects." 526 U.S. at 775 n.12. That is something that the defendants failed to do. *See infra* § II.C.

that those findings are suspect because they conflict with two district court opinions from other circuits. (MC Mem. 16; *see also* Defs. Jt. Proposed Concl. of Law "B" at ¶ 9 (raising same argument)). Market definition is a "deeply fact-intensive inquiry." *Todd*, at *5. The Court made its factual findings based on the evidence presented in this case and any attack on those factual findings must be made under the clearly erroneous standard. That another district court made different findings in a different time period based on different evidence is immaterial to the record in this case and does not provide a basis to question this Court's findings. *See Columbia Metal Culvert Co. v. Kaiser Aluminum & Chem. Corp.*, 579 F.2d 20, 28 (3d Cir. 1978) ("Meticulous color matching of precedent to determine how similar a particular product is to others which have or have not constituted markets in other cases is thus not nearly so important as a detailed examination of the record developed in the trial court.").

Moreover, MasterCard's reliance on those cases, *National Bankcard Corp. (NaBanCo) v. Visa*, 596 F. Supp. 1231 (S.D. Fla. 1984), *aff'd*, 779 F.2d 592 (11th Cir. 1986) and *Southtrust Corp. v. Plus System, Inc.*, 913 F. Supp. 1517 (N.D. Ala. 1995), is misplaced. As the Government explained in its Proposed Conclusions of Law (¶¶ 38-39), the *NaBanCo* district court (over fifteen years ago) relied on evidence of *functional* interchangeability rather than *reasonable* interchangeability to find a broad payments market (596 F. Supp. at 1259), a finding which was upheld on review pursuant to the clearly erroneous standard (779 F.2d at 604). The *Southtrust* court cited *NaBanCo* for the "all payments" market without any further analysis. *Southtrust*, 913 F. Supp. at 1524. These cases simply do not provide any factual or legal basis to question this Court's market findings.

MasterCard next argues that the Court did not properly take into account the level of interchangeability among various forms of payment. The Court considered switching among different payment forms and concluded, based, *inter alia*, on "the defendants' own admissions and evidence of consumer preferences," that "because consumers have very little sensitivity to price increases in the card market and because neither consumers nor the defendants view debit, cash and checks as reasonably interchangeable with credit cards, general purpose cards constitute a product market." 163 F. Supp. 2d at 335-38. MasterCard states that the Court erred by failing "to assess the only empirical evidence in the record regarding the level of interchangeability among these various forms of payment;" yet MasterCard does not provide any citation to this alleged piece of evidence. (*See* MC Mem. 16). The Government assumes that MasterCard is referring to Professor Pindyck's survey. (*See* Direct Testimony of Prof. Robert Pindyck at ¶¶ 24, 27). The Court, however, specifically found — based on testimony from Professor Katz *and* Dean Schmalensee — that "it is essentially impossible to make a definitive calculation of consumer price sensitivity or elasticity of demand via survey." 163 F. Supp. 2d at 336; *see also* Plaintiff's Proposed Findings of Fact ¶¶ 41-45 (explaining that to the extent one can take anything from Professor Pindyck's survey, it supports the existence of a general purpose card market). MasterCard offers no reason to dispute the Court's analysis.

Finally, MasterCard argues that the Court failed to consider the existence of competitive alternatives for network products and services. (MC Mem. 16-17). The Court defined the type of core services that networks provide, and, based on defendants' admissions, found that these services "cannot reasonably be replaced by other sources" and that the core functions are "indispensably done at the network level." 163 F. Supp. 2d at 333, 338. Once again, MasterCard fails to cite to the purported evidence that it believes justifies a clear error challenge.

3. MasterCard Has Market Power

MasterCard claims that its 26 percent share of general purpose card volume "precludes" a finding of market power. (MC Mem. 17). Market power is the "power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). It can be shown by (1) direct evidence of specific conduct indicating a defendant's power to control prices or exclude competition *or* (2) through inference based on market share. *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 98 (2d Cir. 1998). As the Second Circuit recently reaffirmed, "If a plaintiff can show that a defendant's conduct exerted an actual adverse effect on competition, then this is a strong indicator of market power." *Todd*, at *10; *see also Toys "R" Us*, 221 F.3d at 937. Direct evidence can be more persuasive than "elusive" market share calculations. *Todd*, at *10. Here, the Court found direct evidence of market power for each defendant. It relied on evidence showing each association's ability to raise price without loss of merchant acceptance and ability to price discriminate. Moreover, the exclusionary rules adopted by each defendant caused anticompetitive effects by reducing output and consumer choice. 163 F. Supp. 2d at 340-41. This direct evidence is proof of MasterCard's power.

MasterCard's assertion that a low market share "precludes" liability under Section 1 is incorrect as a matter of law. "In this Circuit, a threshold showing of market share is not a prerequisite for bringing a § 1 claim. . . . If a plaintiff can show an actual adverse effect on competition, such as reduced output . . . we do not require a further showing of market power." *Todd*, at *11 (quoting *K.M.B. Warehouse Distributions, Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 129 (2d Cir. 1995)); *see also FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986). Contrary to MasterCard's assertion, there is no bright-line Second Circuit rule holding that "market shares of less than 30 percent do not confer market power in Section 1 rule of reason cases." (MC Mem. 17). In the cases MasterCard cites for its "bright-line" Second Circuit rule, the respective district courts found no market power after examining each defendant's "presumptively" low market share in context with other evidence demonstrating a lack of market power. *See Union Carbide Corp. v. Montell N.V.*, 27 F. Supp. 2d 414, 417-18 (S.D.N.Y. 1998) (no evidence showing ability to raise price or exclude competition); *Anti-Monopoly, Inc. v. Hasbro, Inc.*, 958 F. Supp. 895, 904 (S.D.N.Y. 1997) (only "nonspecific and largely speculative" evidence relating to barriers of entry countered against actual evidence of recent successful entry). A share of less than 30 percent does not preclude market power as a matter of law, and, here, market power was found as a matter of fact.

B. Anticompetitive Effects: Defendants' Misplaced Reliance on Exclusive Dealing Cases and Foreclosure

The Court found that the exclusionary rules cause significant anticompetitive effects in (1) the issuing market by preventing defendants' member banks from issuing cards on other networks, thereby reducing overall card output and available card features, and (2) the network market by, *inter alia*, forcing American Express and Discover to operate as single-issuer networks, which limits output, stunts competitive vitality, restricts product offerings, impedes scale, relevance and merchant acceptance, and allows Visa and MasterCard to reduce their competitive vigor. *See* 163 F. Supp. 2d at 379-99. These effects exist regardless of the fact that "American Express and Discover have the same opportunities to market cards to consumers through the mail and over the Internet." *Id.* at 379, 382-83.

Against these detailed factual findings, defendants allege that this Court erred in finding anticompetitive effects because American Express and Discover can use existing distribution channels (*i.e.*, direct mail, phone marketing) to reach every consumer with card offerings.[11] (Visa Mem. 8-10; MC Mem. 12, 15-16; *see also* Defs. Jt. Proposed Concl. of Law "A" at ¶¶ 107-10 (raising same argument)). Based on their characterization of the exclusionary rules as "vertical" exclusive distribution restraints, they claim that American Express and Discover are not foreclosed and therefore, as a matter of law, there are no anticompetitive effects. The rule of reason, however, calls for an examination of all the circumstances of a case — whether or not a restraint may be characterized as "horizontal" or "vertical" — to assess the restraint's anticompetitive effects. *See* 163 F. Supp. 2d at 343-44 (citing cases). That full analysis shows that the exclusionary rules unreasonably restrain trade *regardless* of American Express' or Discover's ability as issuers to send mail to every consumer. *See id.* at 379, 382-83.

Moreover, the Court found that the exclusionary rules were enacted and maintained by the member banks as horizontal rivals ("restrictions of, by and for the member banks") and that the rules "limit competition among the member banks by preventing them from competing against each other by offering their customers Amex and Discover brands and network features." 163 F. Supp. 2d at 379-82, 400-01. Such horizontal restraints among competitors raise serious and substantial antitrust concerns.

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[11] Defendants also claim that American Express and Discover do not "need" bank partners because they are "enormously successful" companies with deep financial resources. As the Government has previously explained, their success as single *issuers* is irrelevant to the anticompetitive effects arising at the *network* level from the exclusionary rules. *See* Government's Response to Defs.' Proposed Findings of Fact and Concl. of Law at 46-47. Moreover, Visa also asserts that because the Government did not allege a relevant market for debit, no debit-related facts can "change the analysis." (Visa Mem. 10). The Government showed anticompetitive effects in the network market. Certain of those effects relate to products with debit functionality. The harm, nevertheless, occurs in the network market. 163 F. Supp. 2d at 392-93, 408.

See, e.g., *United States v. General Motors Corp.*, 384 U.S. 127, 143-48 (1966) (providing for *per se* condemnation of a manufacturer-imposed restraint on its distributors in response to an agreement *among* the distributors). The law does not support defendants' suggestion that "exclusive dealing" authority trumps evidence of actual horizontal effects.[12]

Finally, even if the exclusionary rules were analyzed in a manner similar to exclusive dealing arrangements, the cases defendants continue to rely upon (*see* Visa Mem. 8, 9; MC Mem. 16) do not apply given the combination of the defendants' market share, the rates of foreclosure, and the demonstrated anticompetitive effects. *See* Plaintiff's Proposed Concl. of Law at ¶ 94 & n.19 (distinguishing "exclusive dealing" cases defendants rely upon). Here, defendants use their market power to prevent American Express and Discover from being able to compete for the business of banks that issue Visa and MasterCard cards. These banks are responsible for issuing over 85% of general purpose cards and controlling approximately 75% of such transaction volume. 163 F. Supp. 2d at 382. Moreover, the banks are not mere distributors; rather, they "are a unique distribution source" based on their individual experience and expertise as well as their access to demand deposit accounts, which is crucial for offering network products with debit functionality. *Id.* at 383.

C. There Is No Error in the Court's Rejection of the Purported Justifications

Defendants claim that this Court erred in analyzing the purported justifications for the

[12] *See, e.g.*, *Toys "R" Us*, 221 F.3d at 932 (rejecting vertical analysis proffered by store against charges that store orchestrated a "horizontal agreement" among its key suppliers to boycott store's competitors; agreement caused substantial anticompetitive effects); *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 594-95 (1st Cir. 1993) (utilizing "exclusive dealing" vertical analysis only after finding no evidence of horizontal agreement) (case relied upon by both defendants for their "foreclosure" theory).

exclusionary rules. They argue that the remedy will result in "opportunistic" competition and increased interchange. These issues have been raised repeatedly and addressed by the Court and there is no basis to believe that any error occurred.

1. The Facts Do Not Support Visa's Concern About "Opportunistic Competition"

Visa raises again its concern that, with the repeal of the exclusionary rules, American Express will "opportunistically" engage in "selective issuing partnerships with large, important Visa members." (Visa Mem. 17). As a result, Visa claims, its important members will have "mixed incentives" to support both brands and will be "less likely" to support aggressive competition between the networks in areas such as corporate card program development. (Visa Mem. 17-19). It attempts to justify the rules under the (oft-repeated) "cohesion" and "loyalty" theories.[13]

The Court, however, thoroughly reviewed the offered justifications and found that they do not withstand scrutiny for several reasons: (1) contemporaneous evidence showed that the real purpose of the rules was to stop competition and enhance profitability, (2) defendants failed to offer sufficient facts to support their conclusions, and (3) the record evidence contradicted the defendants' claims. 163 F. Supp. 2d at 402-05. Visa's only evidentiary basis for contesting these findings is the Court's alleged failure to consider Harvey Golub's 1996 speech to the banking industry. (Visa Mem. 10-11). The Golub speech, however, was thoroughly discussed during trial in the context of the "opportunistic" competition and "cherry-picking" arguments. The Court specifically considered the substantive issues

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[13] Visa raises this issue as part of its "merits" discussion and as a substantial aspect of its irreparable harm analysis. (Visa Mem. 10-11, 16-26). MasterCard states that it "may" raise the same issues. (MC Mem. 18).

defendants raised and rejected them on the merits. *See* 163 F. Supp. 2d at 403-04 ("there is no evidence as to why it would be any more opportunistic for American Express to offer a deal to a large issuing bank than it is for MasterCard to offer a special deal to a Visa bank" and that "cherry-picking" concerns were inappropriate reasons to limit competition). There is no basis to find that the Court's rejection of defendants' proffered justifications is contrary to established precedent[14] or clearly erroneous, especially in light of the undisputed fact "that there is no evidence of 'disruption' or 'lack of cohesion' outside of the continental United States — where many member banks issue American Express cards." *Id.* at 404. A lack of citation to the Golub speech in one portion of the Court's opinion does not change that conclusion, *cf. id.* at 374 (discussing Golub speech in relation to enactment of CPP), and defendants fail to cite any authority to the contrary.

Visa attempts to address the "MasterCard distinction" in Rule 2.10(e) by claiming that Visa faces much greater risks if its banks enter into partnerships with American Express because "historically, [opportunistic benefits] were not available when dual issuance involved MasterCard, another open joint venture." (Visa Mem. 19). The Court has already heard and rejected this argument, holding correctly that this "self-enforcing mechanism" theory presented by Visa's expert Ronald Gilson is "belied by the uncontradicted record evidence," including the existence of dedication agreements. 163 F. Supp. 2d at

[14] Visa does not even attempt to distinguish the cases on which the Court relied. *See* 163 F. Supp. 2d at 405 (citing cases). Moreover, the courts have soundly rejected the proposition that Visa should be protected from "unreasonable" competition. *See National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 696 (1978) ("[T]he rule of reason does not support a defense based on the assumption that competition itself is unreasonable. Such a view of the Rule would create 'the sea of doubt' on which Judge Taft refused to embark in *Addyston Pipe*, 85 F. at 284, and which this Court has firmly avoided ever since.").

402-03. In short, Visa has failed to provide any new support (other than "history") for this theory or explain how the Court erred in rejecting it.

Visa's theory of "opportunistic" competition is a cover to mask its fear of competition on the merits. Visa claims that the remedy will lead to the resumption of battles for issuers similar to the "mail-share wars" between Visa and MasterCard and would, according to Visa, result in "bidding contests" to keep members that want to obtain advantages. (Pascarella Dec. ¶ 32). This argument was made before: except then, such competition between systems was seen as *pro*-competitive. *See* Defendants' Joint Proposed Concl. of Law "A" at ¶ 43 (duality allows members to "play-off" one association against the other). As defendants asserted, management may not favor such rivalry, but it is, in general, "good for competition." *Id.*; *see also* 163 F. Supp. 2d at 367-68 (competition for co-branding incentives which Visa claimed offered "value" to cardholders or the networks).

While Visa claims that American Express will engage in "strategic, not quality" competition, the repeal of the exclusionary rules makes possible competition to create better products and services. This is demonstrated by the quality competition that developed outside the United States where, in the absence of the exclusionary rules, American Express began to work with banks. *See, e.g.*, 163 F. Supp. 2d at 399 (Visa's European Region management responded with significant initiatives to dissuade member banks from partnering with American Express). If the exclusionary rules were lifted, the networks would be free to engage in such competition here, which benefits consumer welfare. *Id.* at 395-97; *see also id.* at 398 (associations would likely respond with their own accelerated programs in response to American Express working with banks on smart card offerings); Direct Testimony of Prof. Michael Katz at ¶¶ 384-85 ("The fact that competition from American Express and Discover drives association behavior, together with the fact that the associations' competitive cards policies limit the abilities of American Express and Discover/NOVUS to compete, imply that elimination of the competitive cards policies would spur the associations themselves to compete more vigorously.").

2. The "Higher Interchange" Theory Is Inapplicable

Visa asserts that the Court's remedy will result in higher interchange to issuers due to this increased competition among the four networks. (Visa Mem. 11-12). Visa's concerns over the "right" level of interchange are simply not relevant. Visa speculates that removing the exclusionary rules would disrupt interchange and therefore merchant discount rates now charged in the marketplace. But Visa wrongly equates the status quo with the preferred pricing mechanism for merchants and, ultimately, consumers. Visa suggests that the Government's position is nothing more than "who cares." (Visa Mem. 12). But, as the Government argued and as the Court found, regardless of short-term movements of interchange rates (which cannot be predicted with certainty by the defendants[15]), increased network-level competition will ultimately manifest itself in myriad beneficial ways, including a competitive interchange rate: "[W]hile . . . 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." 163 F. Supp. 2d at 396 (citing Schmalensee, Tr. 5983); *see also Sullivan v. National Football League*, 34 F.3d 1091,

[15] While defendants and their expert focus narrowly on the fact that American Express' merchant discount rate is currently higher than Visa's and MasterCard's rates, and assume that this must mean higher interchange if the exclusionary rules are revoked, they ignore the competitive forces that would be unleashed by the removal of the rules which drive networks "to offer more attractive packages of services and pricing to merchants." *See* Direct Testimony of Prof. Michael Katz at ¶¶ 318, 351.

1101 (1st Cir. 1994) ("The Supreme Court has emphasized, however, that overall consumer preferences in setting output and prices is more important than higher prices and lower output, *per se*, in determining whether there has been an injury to competition.") (citing *National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 107 (1984)).

D. The Court Properly Took Into Account Visa's Status as a Joint Venture

Visa claims that the Court's opinion is subject to reversal because it "does not take adequate account of Visa's joint venture structure in assessing By-law 2.10(e)." (Visa Mem. 12-13; *see also* Defs. Jt. Proposed Concl. of Law "A" at ¶¶ 71-78 (raising same argument)). The Court's analysis, however, was entirely proper. Visa's argument about the legitimacy of joint venture activity rests on the assumption that the exclusionary rules are in fact ancillary to procompetitive conduct. The Court's findings, however, reject the factual basis for that assumption and necessarily lead to the conclusion that the exclusionary rules are *not* ancillary.[16] 163 F. Supp. 2d at 399-407. Thus, Visa's legal analysis is inapplicable to the facts of this case.

Visa also mischaracterizes the Court as "implicitly reject[ing] the entire concept" of its procompetitive justification. (Visa Mem. 14, citing 163 F. Supp. 2d at 400-06). No one has claimed that all loyalty or cohesion rules are anticompetitive; rather, only that the facts of this case do not support defendants' claims. The Court examined the exclusionary rules under the rule of reason and found that their anticompetitive effects far outweighed defendants' unsupported justifications. 163 F. Supp. 2d at

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[16] The record must support a finding that the restraint in fact is reasonably necessary to enhance competition and "does indeed have a pro-competitive effect." *Graphic Products Distributors, Inc. v. Itek Corp.*, 717 F.2d 1560, 1573 n.22, 1576 (11th Cir. 1983). Specific facts must be shown. *See Blackburn v. Sweeney*, 53 F.3d 825, 828 (7th Cir. 1995).

399-407.

The rule of reason required defendants to come forward with a theoretically sound *and* factually supported justification to counter the exclusionary rules' anticompetitive effects. This they failed to do. Visa is not liable because it is a joint venture; rather, because its conduct has had serious anticompetitive effects and the facts do not support its asserted defense.

III. DEFENDANTS' SPECULATIVE AND INSUBSTANTIAL CLAIMS OF IRREPARABLE HARM DO NOT JUSTIFY DELAYING PROMPT IMPOSITION OF THE REMEDY

Defendants bear the burden of explaining why they would be irreparably harmed by enforcement of the remedy pending appeal. To be able to meet this burden, they must first show an injury "that is not remote or speculative but actual and imminent." *Tom Doherty Assoc. Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 37 (2d Cir. 1995); *Jayaraj v. Scappini*, 66 F.3d 36, 39 (2d Cir. 1995) ("The harm must be imminent or certain, not merely speculative."); *Borey v. National Union Fire Ins. Co.*, 934 F.2d 30, 34 (2d Cir. 1991) (irreparable harm cannot be "a mere possibility"); *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (defendants must show an injury that is "certain and great" and likely to occur in the near future).

Second, the threatened harm to the defendants must be of such a nature that it "would impair the court's ability to grant an effective remedy" after full review. *Rodriguez*, 175 F.3d at 234 (quoting Charles Alan Wright *et al.*, Federal Practice and Procedure § 2948.1, at 144-49 (2d ed. 1995)). In other words, there must be a "substantial" chance that the court would not be able to return the movant to the position it previously occupied.[17] *Brenntag Int'l Chemicals, Inc. v. Bank of India*, 175 F.3d 245, 249 (2d Cir. 1999) (emphasis added) (irreparable harm may be found when dealing with obligations owed by insolvents). Any lesser threshold for irreparable harm would eviscerate the Court's discretion under Rule 62(c) to either grant or deny a stay pending appeal.

Finally, as opposed to cases involving preliminary relief, the requirement of irreparable harm is "applied more stringently after trial, on motions for stay pending appeal . . . . After judgment is entered, the propriety of the injury . . . has been judicially determined, and its imposition without further delay is surely more acceptable than prior to judgment." *Malarkey v. Texaco*, 794 F. Supp. 1248, 1250 (S.D.N.Y. 1992) (quoting *Hayes v. City Univ. of New York*, 503 F. Supp. 946, 964 (S.D.N.Y. 1980), *aff'd*, 648 F.2d 110 (2d Cir. 1981)). Here, we have had a full trial on the merits and, as discussed above, defendants have failed to raise any substantial question about the Court's judgment. Accordingly, defendants face a significant burden in proving such non-speculative and substantial irreparable harm as would justify staying the remedy. *See Longstreet Assoc. L.P. v. Bevona*, 1998 WL 27134 (S.D.N.Y.) ("[H]aving already permitted plaintiffs to litigate their underlying claim, and having found that that claim is unlikely to succeed, the Court concludes that the risk of irreparable injury to plaintiffs is weakened greatly.").

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[17] That is not to say that the parties must be returned to their *exact* pre-litigation positions as that would require a finding of irreparable harm associated with nearly every grant of injunctive relief, because parties necessarily alter their positions and expend resources that may not be recovered regardless of how a court may decide an issue. *Cf. Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974) ("substantial and unrecoupable" litigation expense does not constitute irreparable injury); *Cecere v. City of New York*, 1991 WL 136026 (S.D.N.Y.) (no right of stay for appellate court to determine immunity issue even though moving forward with trial would result in unrecoverable expense).

Defendants' core irreparable harm argument is that American Express will "opportunistically" target large, influential Visa issuers that "are central to important ongoing Visa initiatives" and that actions by these influential members (with alleged "mixed incentives") "could" result in a "risk" of harm in, for example, corporate card development. They assert that "selective partnering by American Express could effectively hobble or even eliminate" Visa as a corporate card competitor. Visa, however, candidly admits that any such harm "cannot be predicted with certainty." (Visa Mem. 17-18, Pascarella Dec. ¶¶ 21-23). From this chain of speculation, Visa concludes that repeal of Bylaw 2.10(e) pending appeal *will cause* irreparable and irreversible harm to Visa. (Visa Mem. 20). MasterCard raises substantially similar arguments. (MC Mem. 9-10, Selander Dec. ¶¶ 12-16 (discussing possibility of American Express reaching deals with member banks; possibility of conflicted members refusing to support MasterCard programs)).

This argument fails because (1) it relies on speculation; (2) the Court has already rejected on the merits the basis of the argument (a restatement of their claimed justifications); (3) the record belies their "irreversibility" claims; and (4) at its core, the "harm" they fear is merely that associated with competition, which does not constitute irreparable injury.

A. Speculation Cannot Justify a Stay

Defendants must present evidence showing that the threatened harm is not merely speculative. *Doherty*, 60 F.3d at 37; *see also Baker's Aid v. Hussman Foodservice Co.*, 830 F.2d 13, 16 (2d Cir. 1987) ("conclusory statement" of company president failed to establish irreparable harm). This they have not done. Their claims amount to nothing more than unsupported predictions about what may or may not occur in the future and how such an occurrence (or lack of occurrence) might cause harm.[18] In this way, the claims are similar to those made in *Los Angeles Memorial Coliseum Comm'n v. NFL*, 634 F.2d 1197, 1198, 1201 (9th Cir. 1980), a case in which the court of appeals reversed as clearly erroneous a finding of irreparable injury because the supporting evidence — declarations from the businesspeople involved — failed to show threat of "real and concrete injury." The declarations described how the aggrieved party would be harmed because several NFL club owners *might* block another owner from moving a team to a different city. The court found that this evidence which described what *might* happen in marketplace and what competitors' reactions *might* entail failed to satisfy burden of showing immediate threatened injury. The same is true here: defendants' showing is mere speculation (and, as discussed below, contrary to the Court's findings and the established record evidence). In contrast to Visa's and MasterCard's speculative assertions of irreparable harm, prompt imposition of the Court's remedy will increase competition by American Express and Discover and, thus, will benefit consumers.

B. The Court Has Already Rejected Defendants' Claims on the Merits

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[18] For example, Visa's Pascarella assumes that, if the judgment is reversed, Visa members who had worked with American Express pending appeal would "undoubtedly" use their influence to prevent Visa from restoring Bylaw 2.10(e). (Pascarella Dec. ¶ 40; *see also* Selander Dec. ¶ 15 (MasterCard members who do not work with American Express may "become less devoted to supporting MasterCard")). There is no factual basis to support such an assumption as to members' behavior, especially when the evidence outside the United States shows that there have been no cohesion or loyalty problems from defendants' banks working with American Express. 163 F. Supp. 2d at 404. Moreover, Selander — while opining in his declaration about the market effects of the remedy on the MasterCard joint venture (*e.g.* ¶¶ 3, 15) — fails to even mention MasterCard's announced conversion from a joint venture to a for-profit stock company in which it will offer equity, or analyze how that conversion impacts his irreparable harm prediction.

Defendants base their irreparable harm claims on the same proclaimed justifications that the Court has already rejected. Their unsupported theories are legally insufficient to support their claim that actual and imminent irreparable harm will result from (1) repeal of the exclusionary rules and (2) voidability of the dedication agreements.

1. Repeal of the Exclusionary Rules

The repeal of the exclusionary rules pending appeal will not result in irreparable harm (*see* Visa Mem. 16-26); rather, it will simply result in competition from American Express and Discover. First, while Visa claims that American Express will engage in "opportunism," the evidence, and the Court's findings, show that American Express seeks to engage in quality competition that will benefit consumers. As the Court found, "Bank issuance across all networks would increase product variety and consumer choice." 163 F. Supp. 2d at 395-97. Second, there is no evidence to support the claim that any "loyalty" or "cohesion" problems will "hobble" the associations' vitality or cause them to "eliminate" their corporate card or any other programs. (*See* Pascarella Dec. ¶ 23). On the contrary, the evidence shows that banks have historically dealt with American Express in areas such as gold cards and traveler's checks without causing a disintegration of the associations or an inability to produce competitive initiatives and that no disruption problems occurred outside the United States as a result of American Express alliances with defendants' member banks. 163 F. Supp. 2d at 404-05 & n.27. With respect to corporate cards in particular, as Dean Schmalensee testified, entry barriers for issuers in the corporate card segment are low. (Schmalensee, Tr. 6077-80). Accordingly, American Express could not "eliminate" Visa as a competitor simply by partnering with one or a handful of banks. *See*

Final Judgment Opinion at 5. Moreover, MasterCard enticed one of Visa's significant corporate card issuers to switch networks; yet there has never been a claim of "irreparable harm" arising from such competitive maneuvering. (*See* Heasley, Tr. 5331-32). Finally, this argument is, of course, simply a restatement of the defendants' "loyalty" and "cohesion" justifications, which the Court has already rejected. 163 F. Supp. 2d at 399-405. Visa reiterates its argument that the Judgment will result in harm based on issuers having loyalties divided among three or four networks. The Court, however, specifically found that repeal of the exclusionary rules would not disrupt the associations' governance, that "triality" or "quadrality" concerns were unwarranted, that the owners of the associations would be free to monitor their governors' competitive incentives, and that the associations could establish appropriate percentage dedication volume levels for governors. *See* 163 F. Supp. 2d at 330, 407-08.

Visa responds by stating, "For present purposes, the question is not who is correct about that prediction. The relevant point is that *if* it turns out that Visa is correct, material harm to the structure of the industry will have been done by the Judgment." (Visa Mem. 20). This begs the question. Visa has offered no persuasive proof to explain why increased competition would "materially harm" the industry (rather than, as the Court found, increase consumer welfare); yet, it now wants to base its showing of irreparable harm on the faulty premise that it *may* be right about such an outcome. Moreover, as the Court found, although Visa now claims that repeal of the exclusionary rules would cause "irreparable" or "fatal" harm, "such was not always its view." 163 F. Supp. 2d at 401 (Visa was "flexible" about tailoring Bylaw 2.10(e) to accommodate one of its largest issuers). To obtain a stay, Visa needs to show actual and imminent harm pending appeal; that it has not done.[19]

2. Invalidation of the Dedication Agreements

Defendants assert that they will be irreparably harmed by the provisions of the Judgment providing banks the ability to void their member dedication agreements should they reach issuing arrangements with American Express or Discover. (Visa Mem. 21-22; MC Mem. 4-9). First, Visa argues that the Judgment "seriously threatens" its ability to continue its Partnership Program because rescission would undermine the four alleged "basic purposes" of the agreements: relative equality of terms, commonality of commitment, predictability, and long-term stability. (Visa Mem. 21). The importance (and relevance) of these four "purposes" is vastly overstated:

(1) *Equality of Terms*: This concern is contradicted by evidence that Visa offered substantial incentive packages on non-uniform terms to obtain agreements from its largest issuers (the same issuers that Visa claims American Express will "opportunistically" target). The Court found "overwhelming" evidence that such secret and non-uniform payments made in connection with securing dedication agreements dispelled the notion that Visa maintains equality of terms among its members. 163 F. Supp. 2d at 403; *see, e.g.,* **[REDACTED]**

[REDACTED] Therefore, there is nothing about "equality of terms" which constitutes a valid threat of irreparable harm to the Visa organization.

(2) *Commonality of Commitment*: This is also an invalid consideration as "commonality" has

[19] Moreover, the Court has already addressed Visa's concerns (Visa Mem. 23) about the loss of off-line debit exclusivity. *See* Final Judgment Opinion at 3.

never been essential to Visa or the Partnership Program. Visa does *not* mandate that all its members enter into Partnership Agreements. In fact, Visa has taken no steps to remove those member banks that have not signed such agreements or those banks that *have* signed Member Business Agreements with MasterCard. (Beindorff, Tr. 4406-07; Heasley, Tr. 5329). Non-partners receive the same level of attention as partners. (Pascarella, Tr. 5252-53). A bank exercising its voidability rights would be in the exact same position as a member that never signed an agreement. There is no showing that such a situation would cause irreparable harm to Visa.

(3) *Predictability*: Nothing about the remedy will impact Visa's ability to maintain adequate "predictability." This concern is belied by the standard contracts themselves which allow for termination under several scenarios. For example, the contracts *automatically* terminate (with no penalties) if a bank is merged or acquired by any other entity. (Pascarella Dec. Exh. B at VU2118870). Given the rapid consolidation of card-issuing banks, Visa would not be able to predict its future issuing volume based only on these partnership agreements. Tellingly, Visa never mandated that the agreement terms relating to general purpose card issuance would survive a merger or acquisition, in order to preserve "predictability."[20] Moreover, the standard contracts allow each bank the unilateral option of terminating the contract early, subject to the bank returning the cumulative discount it had received from Visa over the prior two years of the agreement. (*See* Dahir, Tr. 4539-40). Of course, as banks move forward under their partnership agreements, it becomes more costly for them to take advantage of this provision

[20] By contrast, Visa insisted that First Union agree that should First Union be acquired, then "regardless of whether the . . . Partnership Agreement is terminated," First Union was obligated to ensure that First Union's successor maintained Visa-branded *debit* exclusivity only. P-0830 at VU1574096.

(which further intensifies the lock-in of these members). (*See* Heasley, Tr. 5326). Visa would not have agreed to these termination provisions if it believed their exercise would cause irreparable harm.

(4) *Long-Term Stability*: Visa promulgated the program in February 1999 (after the Complaint was filed) and most banks entered into the agreements during that year. (*See* P-0830 (collecting sample agreements)). The five-year agreements will expire in 2004, most likely about the same time as the appeals process for this litigation is completed. Visa has, in effect, used the program (which includes substantial discounts and direct payments of money to issuers) to lock-up its issuers during the course of the litigation. It cannot be the case, however, that rescission of contracts roughly two years old that expire by their own terms around three years from now creates a danger of affecting "long term stability." Visa thrived for many years without any such contracts. "Long term stability" is simply another means of describing the already rejected "loyalty" and "cohesion" justifications.

In sum, nothing about the Judgment undermines the basic premises of the Partnership Program, a program which Visa may continue and promote by offering its members the most competitive products and services.

MasterCard, citing Justice White's stay order in *NCAA*, further argues that, absent a stay, it will be irreparably harmed because a bank exercising its voidability rights would cause MasterCard to lose time and effort associated with negotiating the contracts. This, MasterCard claims, would "squander" and "unravel" relationships with banks that it has cultivated over the years. MasterCard fears that, after several years of appellate review, it would take a "tremendous" effort to resume its relationships. (MC Mem. 6-7).

This harm simply does not suffice. The *NCAA* case is inapposite because in that case the district court's judgment would have voided all television contracts for the upcoming football season, including the television rights of those schools that would have preferred to continue under the existing NCAA arrangement, thereby possibly eliminating all televised broadcasts of NCAA football games that season. *NCAA v. Board of Regents*, 463 U.S. 1311, 1313 (1983) (White, J. Circuit Justice). Under this Court's judgment, however, banks have the *choice* of voiding their own dedication agreements if they reach an agreement with American Express or Discover. The Court's remedy pending appeal would not in any way jeopardize credit card issuing or the provision of network services. Moreover, if MasterCard offers the most competitive value proposition, then banks will side with MasterCard. But, merely because a bank decides not to side with MasterCard does not create irreparable harm.[21] MasterCard's fears about Visa benefitting from the Judgment (MC Mem. 8-9) are not relevant. The Court decreed that the contracts should be voided to level the playing field as between the associations and American Express/Discover. The underlying theory is that increased network competition will result in increased consumer welfare. MasterCard has already been able to show its competitive vitality by securing dedication agreements when it competed only against Visa for bank partners. It will now have to intensify that competitive vitality as opposed to *all* the networks, Visa included.

C. Defendants' Improper Fear of Competition Is Not Irreparable Harm

[21] For example, in *Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n*, 409 F. Supp. 233, 267-69 (W.D. Mo.), *aff'd*, 532 F.2d 615 (8th Cir. 1976), the court found that neither Major League Baseball nor an individual baseball team suffered irreparable harm due to the court's judgment, which rejected the team's contract claim and allowed the team's star player to negotiate with other clubs. In denying MLB's and the team's motion for a stay, the court found that the team did not suffer irreparable harm even though the player might play for another team in the current season because the remedy did not foreclose the current club's ability to keep the aggrieved player.

Visa claims that some of its member banks may convert Visa cards to American Express cards in the time period pending appeal and that such a loss of transaction volume will — due to network effects — diminish the ongoing value of the Visa association. First, the Court has found that repeal of the exclusionary rules will result in *increased* overall card issuing output. 163 F. Supp. 2d at 379. Visa may lose some volume, but that does not equate to irreparable harm. Second, the contention that some members "may" transfer Visa cards to the American Express network is speculative and, as such, cannot constitute irreparable harm. Third, the individual cardholder accounts belong to the individual member bank, *not* the Visa association. 163 F. Supp. 2d at 404-05 (relationship belongs to the bank, not the association). Visa simply has no "right" to these accounts for which it can claim irreparable harm.[22] Moreover, Visa did not initiate any lawsuits, make any claims against MasterCard, or state that it would be "irreparably" harmed when banks transferred Visa cards to MasterCard cards. *Id.* at 405 (nothing "unlawful or improper" in Citibank converting Visa cards to MasterCard, and MasterCard has no obligation to compensate Visa for Citibank's actions).

Finally, it is incongruous for Visa to claim for purposes of this motion that it will be *irreparably* harmed by the *temporary* loss of some issuers to American Express pending appeal[23] when, on the merits, Visa has steadfastly maintained that American Express is not substantially harmed or at a

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[22] It is for this reason that Visa's reliance on *Jacobson & Co., Inc. v. Armstrong Cork Co.*, 548 F.2d 438, 444-45 (2d Cir. 1977) is misplaced. In that case, the court found that the immeasurable loss of goodwill may be irreparable harm. Here, the Visa entity will not suffer any loss to its goodwill if a member bank decides to issue American Express pending appeal.

[23] Irreparable harm must be *substantial*. *See, e.g. Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1205 (2d Cir.1970) (threat to existence of business); *Miss Am. Org. v. Mattel, Inc.*, 1991 WL 79481 (S.D.N.Y.) (financial ruin as a going concern).

competitive disadvantage by not being allowed access to *any* member banks *at all*. Similarly, MasterCard argues that it "needs" the member dedication agreements to be an effective competitor (*i.e.*, MasterCard has to win the loyalty of a declining number of large issuers); yet it also argues that American Express is not harmed by being denied *any* bank issuer. It cannot have it both ways. The remedy will create competition and competition does not constitute irreparable harm. *See Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 n. 3 (D.C. Cir. 1977) ("mere existence of competition is not irreparable harm in the absence of substantiation of severe economic impact").

D. Defendants' "Irreversibility" Claims Do Not Withstand Scrutiny

Defendants argue that effectuation of the remedy pending appeal will be irreversible since, should they win on appeal, they would not be able to re-enact the exclusionary rules or re-institute their member dedication agreements. They premise this claim on the basis of American Express' alleged "opportunistic" competition of reaching agreements with defendants' large members so as to improperly influence the associations. As discussed above, the Court has already rejected such claims. Moreover, if American Express had the ability to "opportunistically" target such "selected influential" members and cause the results Visa claims will occur, then it already should have "paid-off" (much like the defendants are paying their largest issuers to sign dedication agreements) those members to force the associations to repeal the rules. Of course, no such scenario has ever developed because Visa's theory is wrong. *See* Heasley, Tr. 5332-34 (Visa's Board, the members of which operate under a 75% dedication bylaw, would not pay attention to threats from large, non-dedicated members to reduce competitive vigor). If the judgment is reversed on appeal, and if the collective interest is best served by reinstating the exclusionary rules, the associations would be able to vote collectively on such action and re-instate the rules.[24]

Moreover, Visa's arguments are internally inconsistent. On the one hand, Visa claims that the relationship-specific investments made for decades by virtually all banks in their Visa and MasterCard portfolios are so easily overcome that American Express will likely induce a "defection cascade" that will leave Visa a "significantly less effective competitor" should the remedy be enforced pending appeal. (Gilson Dec. ¶ 9). On the other hand, defendants argue that any investments made by banks in American Express during the appeal will yield an "irreversible" dedication of banks to American Express and will permanently "unravel" the defendants' competitiveness. (*See* MC Mem. 6-7). On the face of it, these positions flatly contradict one another.

In short, should the judgment be reversed, nothing would prohibit the associations from re-instating the exclusionary rules and renegotiating their dedication agreements with their member banks. Should a bank no longer be able to offer an American Express card, any consumer disruption from switching card brands would be minimal (as discussed below). In any event, the continued harm to

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[24] The associations as collectives can coordinate their action. It is for this reason that Professor Gilson's "prisoner's dilemma" model (Gilson Dec. ¶¶ 15-16) is inapplicable. Under that model, individuals in a collective setting may each make decisions that result in a "sub-optimal" result for the collective when the individuals are unable to coordinate their conduct. For example, if two criminal suspects could make sure that neither would cooperate with prosecutors and thereby ensure that both go free, then their "collective" decision would be to remain silent. However, if neither is sure of what the other will do, then it may be in the best interest of one to cooperate with prosecutors. He would receive a benefit while the other would serve a significant sentence. *See generally* Drew Fudenberg & Jean Tirole, Game Theory, at 9-10 (MIT Press, 1991). Here, the Visa board members will coordinate their decision-making in the context of a Board meeting and discussion of a motion to re-instate the exclusionary rules. As the Court found, by taking collective action, they can ensure that no individual bank obtains a competitive advantage. 163 F. Supp. 2d at 400.

consumers and competition from enforcement of the exclusionary rules far outweighs any possible harm to the defendants from minimal differences between the current environment and a speculative and unlikely post-reversal environment.[25]

IV. THE PUBLIC INTEREST CALLS FOR FULL, EFFECTIVE, AND *TIMELY* COMPETITION

The public interest is best served by promoting competition without further delay. The exclusionary rules violate the Sherman Act, which is founded on the fundamental premise that competition serves the public interest by yielding "the best allocation of our economic resources, the lowest prices, and highest quality, and the greatest material progress." *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 4 (1958). Delaying implementation of the remedy would effectively deprive the public of the benefits of full competition. "[I]t is often against the public interest to impede the termination of the offensive conduct or delay the amelioration of its effects." *United States v. Paccione*, 914 F. Supp. 1037, 1039 (S.D.N.Y. 1996) (citing *United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk*, 44 F.3d 1082, 1084 (2d Cir. 1995)); *see also California v. American Stores Co.*, 492 U.S. 1301, 1304-05 (1989) (O'Connor, J., Circuit Justice) ("lessening of competition is precisely the kind of irreparable injury that injunctive relief under [the antitrust laws] was intended to prevent") (internal quotes omitted).

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[25] This is not a case where denying a stay would effectively moot an appeal. Defendants' appellate issues will be preserved regardless of the stay. Accordingly, defendants' reliance on *Providence Journal* (Visa Mem. 25, MC Mem. 5) is misplaced. *See Providence Journal Co. v. FBI*, 595 F.2d 889 (1st Cir. 1979) (publication of information would destroy appellants right of meaningful review of denial of injunction against publication).

As discussed below, increased competition during the pendency of appeal would provide material benefit to consumer welfare, including the likely introduction of new products and services. Delaying effectuation of the remedy would impede competitive smart card deployment and likely restrict product offerings. Moreover, should the judgment be reversed, any resulting disruption would be minimal. Overall, the balance of the equities overwhelmingly favors denying the stay.

A. Increased Competition Would Provide Material Consumer Benefit

A strengthened American Express and Discover would result in increased competition from *all* network competitors, as Visa and MasterCard would be forced to respond to the new competitive environment, just as they responded to American Express' international partnerships with banks. 163 F. Supp. 2d at 398-99. This process would enhance the potential for better network-level products and services, all of which would benefit the card-issuing banks. Moreover, increasing the number of strong card networks would benefit merchants by creating more alternatives, thereby encouraging a responsive competitive process.

Most important, the increased competition from removing these exclusionary rules would benefit consumers. More competitive networks lead to better network-level products and services, which result in better products and services for consumers. For example, heightened network-level competition would provide greater incentives for networks to work with issuers to promote products, such as multi-application smart cards that would provide consumers more "robust" features as well as multi-function cards with credit and debit functionality. Visa asserts that such competition is an "utterly insubstantial" concern in the short term and that consumers would, in fact, be "harmed" by implementing the relief pending appeal. (Visa Mem. 26, 28). Such a position lacks merit. Defendants point to two products — smart cards and credit/debit cards — as examples of what they believe constitute insignificant competitive importance. However, consideration of the evidence as to each of those products shows why the remedy should not be delayed.

1. Smart Cards

The Court found that a primary example of consumer harm from the exclusionary rules relates to American Express and Discover being unable to partner with banks to develop smart card applications. 163 F. Supp. 2d at 397-99. Using Blue from American Express as an example, the Court found that bank issuance "would greatly enhance the functionality and scale of the Blue card" and "mass deployment of bank issuing resources would improve the scale economies of smart card issuance." *Id.* As a result, consumers would benefit from increased functionality and competition would be enhanced "because the defendants would surely respond with their own accelerated programs for development of competitive card programs." *Id.*

Visa, however, states that a stay would not cause any competitive harm regarding smart card deployment because any such harm is "an utterly insubstantial concern in the near term." (Visa Mem. 28). According to Visa, no business opportunity exists for smart cards, so, therefore, American Express and Discover are not harmed by being denied access to banks to further their smart card development.[26]

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[26] Visa cites the Court's opinion (163 F. Supp. 2d at 350-51) for the proposition that American Express and Discover are unaware of any viable business case for smart card deployment today. (Visa Mem. 28). The cited reference, however, discusses a business case for *wide-scale* implementation of smart cards which would require, *inter alia*, wide-scale point-of-sale merchant reterminalization. Visa is disingenuous in conflating that type of smart card program with today's smart card programs. The Blue card and the "Smart Visa Card" programs are not efforts at replacing the magnetic stripe or reterminalizing all point-of-sale merchants. Rather, as the Court's discussion recognized in the paragraph immediately following what Visa cited, today's smart card programs relate

(*Id.*). This is meritless. As trial testimony demonstrated (and as Visa's post-trial marketing campaign confirmed), Visa is expending significant resources to develop its smart card program. It has a platform in place and its traditional bank issuers have issued a substantial number of Visa-branded smart cards to date. (Knox Dec. ¶8). Visa's *actions* show that it believes business opportunities exist. (*See* Knox, Tr. 4809 (migration to chip not a question of "if" but "when")). The competitive analysis, however, does not change even accepting Visa's premise that it believes no smart card business case exists. American Express has made the competitive judgment that it wants to work with banks to further deploy smart card functionality and the evidence shows that banks want to work with American Express to issue smart cards. 163 F. Supp. 2d at 397 ("Capital One and others are interested in working with American Express to issue the card and provide innovative features."). The unrestrained market should determine whose business judgment is correct, as the antitrust laws seek to promote such vigorous competition. Visa should not be able to substitute its views for that of the "public interest" by further restricting competition pending appeal.

Moreover, while Visa considers its smart card issuing efforts to be "very limited" and not competitively significant, Visa's traditional bank issuers have already issued **[REDACTED]** the number of Visa-branded smart cards as American Express has issued "Blue" smart cards. *Compare* Knox Dec. ¶ 8 (traditional Visa banks have issued **[REDACTED]** Visa-branded smart cards) *with* Chenault, Tr. 2437 (American Express issued approximately 1,500,000 "Blue" cards which it considered

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to internet use (163 F. Supp. 2d at 351) and the ability to offer consumers increased functionality and innovative features (especially by combining each network's resources with the expertise and skills of the banks). *Id.* at 397-98.

enormously successful). As witnesses testified, and the Court found, increasing the number of cards issued improves the scale economics of offering smart cards. 163 F. Supp. 2d at 397-98. Given the numerous Visa and MasterCard member banks that have yet to take advantage of smart card issuance, tremendous opportunities exist for all four of the networks to work with banks to increase the smart card choices for consumers, thereby greatly enhancing the competitive vitality of the program. *See id.* at 398.

Finally, Visa has as its fall-back position the following: Assuming business opportunities do in fact exist, there still would be no harm to competition from a stay because (1) Visa does not expect significant smart card growth, (2) smart card projects require a substantial lead-time to effectuate; and (3) smart card applications will not be developed for internet transactions because “only a very small percentage of cards outstanding have chips in them.” (Visa Mem. 28-29). Visa claims that American Express will actually *benefit* by the stay because Visa will take the lead in facilitating the installation of merchant acceptance and promoting smart card applications. Once the stay is lifted, the argument goes, American Express will be able to utilize the infrastructure and “open” applications that Visa puts in place and benefit from Visa’s smart card promotion efforts. (Knox Dec. ¶¶ 8-12).

Visa is basically asking this Court to sanction its development of one of the most important new payment methods free of vigorous competition from American Express or Discover. Visa posits that no competitive harm will occur during the stay period because Visa itself will be responsible for how the product develops and what types of applications, features, and services consumers will receive. Visa, however, is not entitled to define the contours of competition. *FTC v. Indiana Fed’n of Dentists*, 476 U.S. 447, 462 (1986) (“The Federation is not entitled to pre-empt the working of the market by deciding for itself that its customers do not need that which they demand.”); *National Soc'y of Prof'l*

Eng'rs v. *United States*, 435 U.S. 679, 695 (1978) ("All elements of a bargain . . . are favorably affected by the free opportunity to select among alternative offers.").

The competitive process is vital in developing nascent products, especially those characterized by having network effects. First-mover advantage can be critical in formulating a competitive presence. (*See* Michael Katz & Carl Shapiro, "Systems Competition and Network Effects," 8 *Journal of Economic Perspectives*, at 93-115 (Spring, 1994)). Visa itself recognized this in the context of smart card deployment. In a December 1999 memorandum to its Board of Directors, the Visa team responsible for responding to Blue stressed that if American Express were the first network to effectively establish an infrastructure and applications, it would have a distinct and "sustainable" competitive advantage. This team emphasized that Visa had to respond *quickly* to this threat in order to ensure that it would triumph:

> Amex has the opportunity to create a *sustainable competitive advantage* if they develop a production-ready infrastructure for issuing and managing cards and no concerted effort is made by the Banks and Visa to be ready to respond with comparable infrastructure and products. Building the Visa issuing infrastructure requires significant investment in time and money and should not be delayed but rather accelerated.

P-0840 at VU1603610 (emphasis added). As one would expect, there is no discussion of how Visa could "benefit" by waiting for American Express to develop a smart card program and then entering at a later date. Rather, Visa sought to enter the market as soon as possible and use its bank relationships to "deliver a more competitive product through unique, customized enhancements." *Id.*; *see also* 163 F. Supp. 2d at 398 ("Visa itself has recently acknowledged that its network of multiple issuers provides it a 'strength to leverage' a powerful response to American Express' Blue card.") (quoting P-0836). Moreover, Visa's assertion that American Express can "down the road" use standards such as EMV that Visa institutes does not change the competition issue as the competitive process is important in developing standards. The experiences with the EMV payment standard shows the risks that can occur when the competitive process does not function freely.[27] Visa cannot be left free to dictate the pace of competition.

If a stay is entered, Visa and MasterCard will have the opportunity to not only develop the competitive contours of the smart card product but also to develop and solidify relationships with the bank issuers. As MasterCard's Selander admits, such relationships with member banks are important in forming lasting alliances and effectively marketing products. (Selander Dec. ¶¶ 7-10). These relationships are even more important given the rapid consolidation of card-issuing banks. If a stay is entered, Visa and MasterCard would be able to form more lasting relationships with their issuers, leaving fewer banks in a position to work with American Express and Discover at the end of the appelate process. Defendants also assert that there is a substantial lead time involved in instituting smart card programs; all the more reason to deny the stay. A stay would delay the introduction of bank-issued American Express and Discover products until the expiration of the appeals process plus the substantial necessary lead time.

2. Multi-Function Credit/Debit or Relationship Cards

Visa claims that the Court erred in finding that consumers will demand a multi-function relationship card that incorporates both credit and debit functionality. Moreover, Visa claims that this

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[27] *See* Wittwer Dep. 70-73, 87-88 (American Express' VP & General Manager for Smart Card Development testifying as to Visa not allowing American Express to participate in the development of the EMV standards which restrained the development of interoperability).

finding should be ignored for purposes of analyzing the stay because *Visa* claims that *it* now no longer seeks to offer such a card. (Visa Mem. 29-30). Whether *Visa* now wants to offer such a card is immaterial to deciding whether the public interest will be harmed by granting a stay.[28] The question is whether the marketplace demands such a product and whether competitors want to meet that demand. The Court's findings (findings which Visa has not and cannot seriously challenge as clearly erroneous) show that such a demand exists and that networks such as American Express want to offer the product. 163 F. Supp. 2d at 392-93; *see also* Chenault, Tr. 2564-65; Rothschild, Tr. 2634-38, 2708.

In attempting to challenge this fact, defendants claim that American Express "testified unequivocally that it has no intention of issuing a card combining credit and debit functionality" even if the exclusionary rules were eliminated. (Visa Mem. 32, citing Rothschild, Tr. 2669-70). This is a complete distortion of the record. Defense counsel was asking Rothschild about the "debit on charge" product that American Express was forced to consider using due to the exclusionary rules. Because American Express does not have access to bank issuers, it considered the makeshift debit product that would utilize the ACH network for debit authorization and settlement. (Rothschild, Tr. 2707-08). Using the ACH network is not a viable strategy for offering debit products. 163 F. Supp. 2d at 393. Accordingly, American Express "wouldn't even be considering a product like debit on charge" if the exclusionary rules were lifted because they would then be able to form relationships with banks and offer

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[28] Visa may now claim that it no longer seeks to offer a relationship card, but the record evidence shows that Visa considered such a card to be a central focus of its future product offerings. *See* Plaintiff's Proposed Findings of Fact ¶¶ 393-96; McEwen Dep. 29, 33-34 (Visa U.S.A.'s Executive Vice President for Product Management, and Diana Knox's supervisor, testifying that smart card strategy "still today" includes providing customers a single card that accesses the cardholder's credit *and* debit accounts).

comparable debit products to Visa's and MasterCard's. (Rothschild, 2669-70). Defendants also ignore the fact that American Express already offers cards outside the United States that combine a credit and debit function. (Rothschild, Tr. 2635-36).[29] In short, the market will decide whether American Express' product will be a success or a failure; Visa should not be permitted to pre-empt the market or the competitive process.

B. Reversal of the Judgment Would Not Cause Significant Consumer Disruption

Defendants, without citation to any empirical evidence, claim that enforcing the judgment pending appeal would cause the public to suffer widespread "disruption" and "confusion." (MC Mem. 19-20; Visa Mem. 27). According to their argument, a bank that issues an American Express card pending appeal would be forced to divest that card (or divest the bank's Visa/MasterCard cards) should the Court of Appeals reverse this Court's judgment. We fail to see how that process would result in material disruption or confusion. This argument is premised on the fact that consumers "showered with new bank-issued American Express cards *will not understand* their function, the terms upon which they were offered and/or their rights to retain their old MasterCard or Visa cards." (MC Mem. 19 (emphasis added)). This argument is meritless. American consumers will be able to understand how a bank-issued American Express card functions. Defendants do not know what is "best" for consumers; that is for competition to determine.

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[29] Defendants also claim that even if American Express were to have access to banks, it would not offer a debit product due to fear that the debit product would cannibalize its credit/charge products. (Visa Mem. 32-33). In fact, American Express research concluded that debit transactions would cannibalize only approximately five percent of its general purpose card transactions. (Rothschild, Tr. 2660). In any event, defendants should not be the ones to decide whether American Express and Discover can or will participate in the development of multi-function cards.

In any event, Visa and MasterCard member banks have frequently switched accounts from one brand to another *without* any harm to the public interest. *Cf.* 163 F. Supp. 2d at 404-05 (nothing unlawful or improper in bank converting Visa branded cards to MasterCard branded cards). Defendants offer no persuasive reason why a bank having to convert an American Express account to a Visa or MasterCard account would be any more "disruptive" or against the public interest than a bank switching a Visa account to a MasterCard account. It must be remembered that the *bank* — not the associations — owns the cardholder accounts.[30] *Id.* The banks and American Express will be the ones taking the risks during the appeal. Banks are rational actors. Should the Court decline to stay the remedy, any bank that seeks to enter into a relationship with American Express would be able to minimize its risks contractually should the Judgment be reversed. (*See, e.g.*, P-0091 at pp. 23-25 (Banco Popular/American Express contract providing mechanism for handling sale or conversion of bank-issued American Express portfolio, should the issuing relationship terminate).

Visa misleadingly quotes the *MountainWest* opinion to support its view that a recall of cards could impact "public confidence in the nation's credit card system." (Visa Mem. 27 quoting *SCFC ILC, Inc. v. Visa U.S.A. Inc.*, 936 F.2d 1096, 1101-02 (10th Cir. 1991)). In the quoted passage, the Tenth Circuit was simply *reciting* Visa's arguments in comparison to MountainWest's arguments. 936 F.2d at 1101. The Court's *holding* was that the evidence was insufficient to determine whether, should

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[30] We do not know which "rights" MasterCard refers to when it says that a consumer has a "right to retain their old MasterCard or Visa cards." (MC Mem. 19). The *bank* issues the card to the consumer pursuant to the particular cardholder agreement. If the *bank* decides to switch the brands of its accounts, then the consumer has the *ability* to switch to another bank to retain its previous brand and/or to pursue remedies according to any breach of the cardholder agreement with that particular bank. We, however, are aware of no "right" to a Visa or MasterCard card.

Visa prevail on the merits, it would cancel the Visa-branded cards already in circulation or whether those cards would "simply be sold to an acceptable issuer." *Id.* As a result, Visa's claims of potential public harm were found to be speculative. *Id.* The Court never held that the public's confidence in the nation's credit card system would be shaken based on a bank having to "simply" switch the brands of a particular card portfolio.

C. The Remedy Benefits Discover

Defendants assert that the remedy harms Discover because it will not be able to enter into issuing partnerships with banks. (Visa Mem. 33-34, MC Mem. 11). Defendants completely ignore Discover's view that it "fully supports" the repeal of the exclusionary rules as found in paragraphs III (A), (B) and (C) of the Final Judgment. *See* Discover's *Amicus* Comments on Proposed Final Judgment at 2; Nelms, Tr. 2989 ("[Discover] would generally be interested in anyone who wanted to issue and provide volume on the network."). While Discover wanted additional language in the remedy concerning anti-discrimination provisions, the Court found that the Final Judgment provided sufficient protections to cover Discover's concerns.[31] (Final Judgment Opinion at 2-3).

Discover should have the same opportunity as American Express to take part in the competitive process. Discover believes that, as a low cost competitor, it can offer banks other features, services and qualities that would lead to beneficial relationships, notwithstanding its low interchange rate. (Nelms, Tr. 3010-11). If Discover cannot offer a competitive product, then Visa and MasterCard will not be

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[31] Defendants' argument that eliminating the exclusionary rules would harm Discover (Visa Mem. 34) ignores Nelms' assumption that Visa and MasterCard prohibited issuers from having an equity ownership in Discover. *See* Nelms, Tr. 3073. It was not until the submission of comments concerning the Court's Proposed Final Judgment that Visa clarified there was no such prohibition.

harmed by effectuation of the remedy pending appeal. Given Discover's stated views that it supports the remedy, Visa's and MasterCard's fears about the remedy harming Discover should be discounted. The Court should allow the competitive process and the marketplace to function freely by denying the stay.

D. Weighing Harms

In the end, a motion for stay comes down to the equities and the weighing of risks. Defendants have offered no persuasive reason why the Court's judgment will be subject to reversal. Their claims of irreparable harm are speculation based on their rejected justifications. In short, there is only a slight risk of harm to defendants. The harm to consumers inherent in a stay, however, is real and material. Allowing defendants to continue their anticompetitive conduct permits them to reap the anticompetitive benefits of the exclusionary rules. Those rules were enacted with the purpose of restricting competition and their anticompetitive effects are apparent. The stay should be denied.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court deny the defendants' motions for a stay pending appeal. We do not believe that oral argument is necessary because defendants' motions raise no issues that have not already been thoroughly considered by the Court.

Respectfully submitted,

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