No. 07-773

IN THE

Supreme Court of the United States

BETTY E. VADEN,

Petitioner,

v.

DISCOVER BANK; DISCOVER FINANCIAL SERVICES, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

JOSEPH W. HOVERMILL
MATTHEW T. WAGMAN
JOHN C. CELESTE
MILES & STOCKBRIDGE, P.C.
10 Light Street
Baltimore, MD 21202
(410) 385-3442

ALAN S. KAPLINSKY*
MARTIN C. BRYCE, JR.
BALLARD, SPAHR, ANDREWS & INGERSOLL, LLP
1735 Market St., 51st Fl.
Philadelphia, PA 19103
(215) 665-8500

Counsel for Respondents

* Counsel of Record

February 11, 2008

QUESTION PRESENTED

Whether the court below properly ruled, under the facts presented, that the district court had jurisdiction to compel arbitration based upon its determination that the underlying dispute was (i) subject to an agreement to arbitrate and (ii) completely preempted by federal banking law.

RULE 29.6 DISCLOSURE

DFS Services LLC (f/k/a Discover Financial Services LLC f/ka Discover Financial Services, Inc.) and Discover Bank are wholly owned subsidiaries of the ultimate (publicly held) parent company, Discover Financial Services (f/k/a NOVUS Credit Services Inc.).

No publicly held company owns more than 10% of the stock of Discover Financial Services.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—continued

BRIEF IN OPPOSITION

Respondents Discover Bank and Discover Financial Services, Inc. (together, "Discover Bank") respectfully submit this brief in opposition to the petition for certiorari.

COUNTERSTATEMENT OF THE CASE

The petition for certiorari should be denied because the court below properly applied Section 4 of the Federal Arbitration Act ("FAA") to the peculiar facts at issue and concluded, consistent with this Court's decision in *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1 (1983), that the district court had jurisdiction to compel arbitration of the dispute between Discover Bank and petitioner. That ruling is correct and depends upon a series of highly fact-intensive determinations that are not independently worthy of review but that could prevent this Court from resolving the issue identified by petitioner.

At the outset, petitioner is mistaken in suggesting that there is a broad conflict over whether courts may "look through" to the underlying dispute in assessing whether they have subject matter jurisdiction to compel arbitration under Section 4 of the FAA. Pet. at 19. According to petitioner, a federal court's role should be "limited to determining whether a contractual obligation [to arbitrate] exists and has been violated," and thus "the nature of the underlying dispute (*i.e.*, issues the petitioner does not ask the court to decide . . .) is irrelevant to the suit and is not part of the well-pleaded complaint." *Id.* at 20. No federal court of appeals that has examined this issue has adopted this position.

Indeed, all circuits that have addressed the issue agree that a district court may "look through" a petition to compel arbitration to the underlying dispute to assess whether the amount in controversy requirement for *diversity jurisdiction* has been satisfied. See *infra* at 10-12 (discussing cases). Indeed, Section 4 *requires* district courts to look to the "underlying dispute" because it conditions their authority to compel arbitration on a determination that they "would have jurisdiction under Title 28, in a civil action . . . of the subject matter of a suit arising *out of the controversy between the parties*." 9 U.S.C. § 4 (emphasis added). Petitioner offers no persuasive reason why Congress would have devised a scheme that required courts to "look through" to the underlying dispute for purposes of (i) *federal diversity jurisdiction* but not (ii) for *federal question jurisdiction*. Section 4 draws no such distinction.

To the extent that there is any dispute on the more narrow issue whether courts may "look through" to the underlying dispute to support *federal question jurisdiction*, certiorari is inappropriate at this time because, as petitioner acknowledges, the positions of the various courts of appeals are very much in flux. Indeed, a number of circuits *currently* are examining or re-examining this question. Pet. 17 (arguing that Eleventh Circuit's position "has also become unsettled"); *id.* at 18 (noting intra-circuit conflict within the Fifth Circuit); *id.* at 18 n.6 (noting that Ninth Circuit recently granted interlocutory review of this issue). Given the admitted "currency of the issue" in pending circuit appeals, *id.*, it is premature for this Court to step in while these circuits are analyzing the competing arguments about what Congress intended. Allowing those courts to examine

this legal problem would only sharpen this Court's resolution of the issue, if one ultimately is necessary.

In any event, this case is a poor vehicle to resolve any such dispute because it involves inter-related, fact-intensive determinations of whether (i) petitioner agreed to arbitrate at all, (ii) Discover Bank was the real party in interest, and (iii) petitioner's state-law claims are completely preempted by federal banking law. Pet. 8-9. On those issues, Discover Bank prevailed in the lower courts and firmly believes that those rulings were appropriate. Nevertheless, these fact-intensive determinations were essential to the lower courts' jurisdictional holdings, and likewise would inject substantial factual complexity into this Court's review. Indeed, the presence of these threshold issues, which are not independently worthy of this Court's review, could very well prevent resolution of the jurisdictional question if certiorari were granted.[1]

Finally, the fact that the claims of petitioner in this case, *i.e.*, the underlying dispute among the parties, arose in the procedural context of counterclaims first asserted in a state court action, adds yet an additional level of procedural complexity that cautions against further review. Petitioner's suggestion that this idiosyncratic procedural quirk itself creates a conflict with a prior decision of this Court is wrong. Indeed, the facts presented here do not remotely resemble the circumstances in *Holmes Group, Inc.* v. *Vornado Air Circulation Systems, Inc.*,

[1] Along these lines, although the court of appeals noted that "diversity jurisdiction is not present" in this case, Pet. App. 8a n.2, that is so only because the district court had no occasion to rule on Discover Bank's pending motion to amend in which it showed that there is diversity jurisdiction separate and apart from the federal question jurisdiction addressed below.

535 U.S. 826 (2002), which addressed appellate jurisdiction in a suit involving patent issues.

Discover Bank respectfully requests that the petition for certiorari be denied.

FACTUAL AND PROCEDURAL BACKGROUND

In 1990, Respondent Discover Bank, a federally insured bank, issued a Discover credit card to Petitioner Betty Vaden. Pet. App. 4a. In June 1999, petitioner's credit account attained Platinum status, *id.*, and, in July 1999, she was sent an amendment to her Cardmember Agreement that included a broad arbitration clause allowing either party to elect binding arbitration as the means to settle "any past, present or future claim or dispute . . . arising from or relating to" her account, her past accounts, or the enforceability of the arbitration clause, the Cardmember Agreement, or any prior agreement. *Id.* at 49a; see also *id.* at 4a-5a, 77a.

In July 2003, because petitioner failed to pay her credit card balance of over $10,000, Discover Bank's servicing affiliate, Discover Financial Services, Inc. ("DFS"), sued her for nonpayment in Maryland state court on behalf of Discover Bank. Pet. App. 5a. In response, petitioner filed class-action counterclaims against DFS based on Maryland contract law and various state anti-usury statutes. *Id.*

Invoking Section 4 of the FAA, Discover Bank and DFS filed a petition to compel arbitration in the United States District Court for the District of Maryland. Pet. App. 59a. Petitioner sought to avoid arbitration by arguing that the arbitration amendment only applied to Platinum cardholders and that she had not been a Platinum cardholder at the time the amendment was issued. *Id.* at 51a-52a.

Petitioner also disputed Discover Bank's standing to compel arbitration because she had filed her counterclaims against DFS, not Discover Bank. *Id.* at 60a-61a.

In the district court, neither party questioned whether there was subject matter jurisdiction, and the district court assumed its jurisdiction without discussion. Pet. App. 61a. The district court held that the parties had entered into a valid and enforceable arbitration agreement, *id.* at 83a-86a, and therefore granted Discover Bank's motion to compel arbitration, *id.* at 89a.

In the Fourth Circuit, petitioner argued for the first time that the district court lacked subject matter jurisdiction over Discover Bank's petition to compel arbitration. *Id.* at 61a. The Fourth Circuit rejected this argument. It looked to this Court's opinion in *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1 (1983), which states that "Section 4 provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit on the underlying dispute." 460 U.S. at 25 n.32. See Pet. App. 62a. Following *Moses H. Cone*, the court below held that "[a] federal court may therefore hear a Section 4 petition to compel arbitration if, but for the arbitration agreement, subject matter jurisdiction over the case would otherwise exist by virtue of a properly invoked federal question in the underlying dispute." *Id.* at 72a.

The court of appeals remanded the case to allow the district court to determine "several legally complex and partially fact-bound inquiries which must be answered *prior* to resolving the subject matter jurisdiction question." Pet. App. 73a (emphasis added). First, the district court was ordered to

"decide whether Ms. Vaden's state law counterclaims are completely preempted by the Federal Deposit Insurance Act," a decision that "may be affected by the court's determination as to whether Discover Bank – as opposed to merely Discover Financial Services – is a party of interest in the state law suit." *Id.* at 73a n.3 (citing Federal Deposit Insurance Act ("FDIA"), 12 U.S.C. § 1831d(a)). Next, if the district court were to find that no federal question had been stated, it was ordered "to consider the pending motion to amend and, if granting it, ascertain whether the parties are diverse and whether the other requirements of § 1332 are properly met." *Id.* Finally, the district court was directed to "reexamine whether there was a question of material fact about the existence of an arbitration agreement between these particular parties." *Id.* at 73a n.4.

Following the Fourth Circuit's original decision, petitioner did not seek review by this Court. On remand, the district court reaffirmed its previous order, ruling that the underlying dispute presented a federal question and that the court therefore had subject matter jurisdiction to compel arbitration of that dispute. Pet. App. 48a. The district court also held that the parties had entered into a valid arbitration agreement. *Id.* at 53a. Because the court ruled that it had jurisdiction based on the underlying federal question, it did not address Discover Bank's motion to amend its petition to include allegations supporting federal diversity jurisdiction.

Petitioner again appealed, and the Fourth Circuit addressed a variety of questions relating to the district court's subject matter jurisdiction. Specifically, to determine whether the underlying dispute raised a federal question, the court below first examined whether petitioner's counterclaims

had in fact been completely preempted by the FDIA. Pet. App. 11a. To answer that question, the court analyzed whether the real party in interest with respect to petitioner's claims was Discover Bank or DFS – because the FDIA applies only when the real party in interest is a bank, and DFS is not a bank under the FDIA. *Id.* at 12a-13a.

In sorting through these factual and legal issues, the court of appeals requested an amicus brief from the Federal Deposit Insurance Corporation ("FDIC") on, among other things, "whether Discover Bank was the real party in interest on these facts." Pet. App. 13a n.7. The FDIC's brief explained that (i) Discover Bank was the real party in interest under the facts presented, *id.* at 14a, and (ii) that Section 1831d "'completely preempts' state law usury claims," *id.* at 24a. In assessing the FDIC's conclusions, the court of appeals "emphasize[d] the heavily fact-dependent nature of [its] analysis," *id.* at 18a n.9, and stated that "a state-chartered, federally insured bank will not always be the real party in interest for purposes of invoking the FDIA," *id.* Under the facts presented here, however, the court of appeals concluded that Discover Bank is, in fact, the real party in interest, *id.* at 13a-18a, and that petitioner's claims were "completely preempted," *id.* at 18a-25a.

Finally, the court of appeals rejected petitioner's argument that the parties had not entered into the arbitration agreement. Pet. App. 25a-28a. Affirming the findings of the district court, the Fourth Circuit granted Discover Bank's motion to compel arbitration. *Id.* at 28a. One judge dissented. *Id.*

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS PROPERLY APPLIED SECTION 4 OF THE FAA TO THE FACTS OF THIS CASE TO HOLD THAT THE DISTRICT COURT HAD JURISDICTION TO COMPEL ARBITRATION.

Review should be denied because the decision below properly and faithfully applied the governing statute and decisional law of this Court.

1. Section 4 of the FAA permits a party to file a petition to compel arbitration in any federal district court that "save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties." 9 U.S.C. § 4. The plain meaning of the language chosen by Congress is that a court's jurisdiction to compel arbitration under Section 4 of the FAA depends on whether the Court would have subject matter jurisdiction over a suit arising out of the underlying controversy between the parties. See *Moses H. Cone*, 460 U.S. at 25 n.32 ("Section 4 provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit on the underlying dispute").

The procedural posture in this case mirrors the circumstances in *Moses H. Cone,* where this Court held that it had jurisdiction to consider an appeal from an order in a Section 4 suit to compel arbitration of an underlying state-law contract dispute. See 460 U.S. at 7, 13.[2] There, one party had advanced state law claims in state court, and the

---

[2] The jurisdictional issue addressed by this Court was the appealability of the district court's order under 28 U.S.C. § 1291.

opposing party brought an action in federal district court to compel arbitration of the state law dispute. *Id.* at 7. The district court exercised jurisdiction over the Section 4 suit based on diversity of citizenship, *id.*, and this Court acknowledged that the district court's jurisdiction to compel arbitration required it to determine whether it would have jurisdiction over the suit on the underlying dispute, based on "diversity of citizenship or some other independent basis for federal jurisdiction." *Id.* at 25 n.32.

Following that same approach, the court below applied its prior ruling in this case and looked to see if the underlying dispute "presents a federal question." Pet. App. 3a. It conducted a "highly fact-dependent . . . analysis," concluded that "Discover Bank is the real party in interest," *id.* at 18a & n.9, and ruled the "FDIA 'completely preempts' state usury claims against a state-chartered, federally insured bank that is the real party in interest of a state court dispute," *id.* at 18a; see also *id.* at 25a. Those determinations warrant no further review.

Indeed, a reading of Section 4 of the FAA that prohibited courts from "looking through" to the underlying dispute for which arbitration was sought would render Section 4 virtually meaningless as a method for compelling arbitration through an independent action in federal court. According to petitioner, the role of a court reviewing an independent proceeding to compel under Section 4 "is limited to determining whether a contractual obligation [to arbitrate] exists and has been violated" and therefore "the nature of the underlying dispute (*i.e.*, issues the petitioner does not ask the federal court to decide and, in fact, claims it cannot decide) is irrelevant to the suit and is not part of the well-pleaded complaint." Pet. 20. Under that reading,

however, a court could never even exercise federal diversity jurisdiction over a suit to compel arbitration under Section 4 because it could not "look through" to the underlying dispute to determine whether the amount in controversy were sufficient.

2. No circuit has adopted petitioner's crabbed reading of Section 4. Although petitioner suggests that the circuits disagree about whether to take a "look-through approach," see Pet. 19-20, every circuit to examine the issue agrees that a district court may, at least in some cases, "look through" a Section 4 petition to the parties' underlying dispute.

In particular, along with the Fourth Circuit in this case, the First, Fifth, and Eleventh Circuits all have "looked through" to the underlying dispute in suits under Section 4 to determine whether there was federal question jurisdiction. The Eleventh Circuit has explicitly held, based on the text of Section 4, that "it is appropriate for us to 'look through' [the] arbitration request at the underlying licensing dispute in order to determine whether [the] complaint states a federal question" to support subject matter jurisdiction. *Tamiami Partners, Ltd.* v. *Miccosukee Tribe of Indians*, 177 F.3d 1212, 1223 n.11 (11th Cir. 1999). Similarly, as petitioner acknowledges, see Pet. 13 n.4, 16, both the First Circuit and Fifth Circuit have "looked through" a Section 4 petition to determine whether the underlying dispute raised a federal question that would provide subject matter jurisdiction. See *PCS 2000 LP* v. *Romulus Telecomms., Inc.*, 148 F.3d 32, 34-35 (1st Cir. 1998); *Rio Grande Underwriters, Inc.* v. *Pitts Farms, Inc.*, 276 F.3d 683, 685 (5th Cir. 2001). Indeed, the Fifth Circuit, in *Rio Grande Underwriters*, a case remarkably similar to the instant case, reviewed a district court's subject

matter jurisdiction over a Section 4 petition by looking through the petition to determine whether the underlying dispute – a state law dispute in state court – presented a federal question because the area of law was completely preempted by the Federal Crop Insurance Act. *Id.*[3]

Further, the circuit courts identified by petitioner as taking a contrary approach, Pet. 12, also allow district courts to "look through" the Section 4 petition to the underlying dispute in at least some circumstances. For example, the Seventh Circuit, "[i]n the context of actions to compel arbitration, [has] adhered to the rule that, in order to ascertain whether the jurisdictional amount for the diversity statute has been met, the appropriate focus is the stakes of the *underlying arbitration dispute*." *America's MoneyLine, Inc.* v. *Coleman*, 360 F.3d 782, 786 (7th Cir. 2004) (emphasis added). Similarly, the Sixth Circuit has held that a district court has jurisdiction over a complaint filed under Section 4 when the parties have diverse citizenship and the amount in controversy in the *underlying claim* is sufficient. *Smith Barney, Inc.* v. *Sarver*, 108 F.3d 92. 95 & n.3 (6th Cir. 1997). Likewise, the Second Circuit acknowledges that a federal district court may exercise jurisdiction over a Section 4 petition if it finds that the requirements for diversity jurisdiction have been met. *Westmoreland Capital Corp.* v.

---

[3] In an earlier decision, the Fifth Circuit held that "federal question jurisdiction cannot be derived from the underlying dispute to be arbitrated." *Prudential-Bache Secs., Inc.* v. *Fitch*, 966 F.2d 981, 988 (5th Cir. 1992). Of course, resolution of any such intra-circuit conflict is not a matter of concern to this Court and is best left to the Fifth Circuit. *See* Eugene Gressman et al., *Supreme Court Practice* at 253-54 (9th ed. 2007) (citing *Davis* v. *United States*, 417 U.S. 333, 340 (1974)).

Findlay, 100 F.3d 263, 268 (2d Cir. 1996). Put simply, consistent with this Court's statements in *Moses H. Cone*, 460 U.S. at 25 n.32, no circuit categorically prohibits district courts from "looking through" Section 4 petitions to the underlying disputes when assessing their jurisdiction.

Although the Second, Sixth, and Seventh Circuits allow district courts to "look through" to the underlying dispute in assessing the amount in controversy for purposes of diversity jurisdiction, petitioner argues, Pet. 12-15, that these courts take a different approach to federal question jurisdiction under Section 4. See *Westmoreland*, 100 F.3d at 268; *Wisconsin* v. *Ho-Chunk Nation*, 463 F.3d 655, 659 (7th Cir. 2006); *Smith Barney*, 108 F.3d at 95 (dicta).[4] As such, the only claimed dispute among the circuits is whether a district court not only can "look through" to the underlying dispute to support diversity jurisdiction but also can do so to support federal question jurisdiction.[5]

On this narrow issue, review would be premature because the law in this area is rapidly evolving

---

[4] In *Smith Barney*, the Sixth Circuit held that there was jurisdiction based upon diversity because the parties were diverse and the damages claimed in the underlying dispute were greater than the jurisdictional minimum. 108 F.3d at 95. Here too, Discover Bank has argued that there is diversity jurisdiction in this case, Pet. App. 73a n.3, but the district court had no occasion to address that issue because it concluded that there was federal question jurisdiction, *id.* at 48a & n.5 (exercising federal question and supplemental jurisdiction).

[5] Of course, it makes little sense to think that Congress intended courts to "look through" petitions to the underlying dispute if they support federal diversity jurisdiction but to prevent such an analysis where, as here, the basis for jurisdiction is federal question.

within the federal circuits. Although the Fifth Circuit once ruled that a federal question in the underlying dispute was an insufficient ground on which to base jurisdiction, *Prudential-Bache Securities* v. *Fitch*, 966 F.2d 981, 988 (5th Cir. 1992), a more recent panel takes the same approach as the Fourth Circuit in this case. See *Rio Grande Underwriters*, 276 F.3d at 685. As petitioner recognizes, see Pet. 11 n.2, the Ninth Circuit has an appeal pending in which it will likely address jurisdiction under Section 4 of the FAA. See *In re Cintas Corp. Overtime Pay Arbitration Litig.*, No. M:06-cv-01781-SBA, 2007 WL 1302496 (N.D. Cal. May 2, 2007), *interlocutory appeal granted*, No. 07-80046 (9th Cir. July 24, 2007). Likewise, the Eleventh Circuit will be reviewing *en banc* its prior position on this jurisdictional question. See *Community State Bank* v. *Strong*, 485 F.3d 597 (11th Cir.), *reh'g en banc granted*, 508 F.3d 576 (11th Cir. Sept. 10, 2007).

With all the attention that this question is receiving in the federal circuits, the opportunity for consensus is real and should be allowed to develop. At a minimum, this Court would benefit from the product of the ongoing debate among the circuits on this issue, if the question ultimately warrants resolution by this Court.

3. In all events, on the narrow issue presented, this case is an inappropriate vehicle because the determination of subject matter jurisdiction is itself based on fact-intensive analyses of whether (i) there is an agreement to arbitrate and (ii) the underlying dispute is completely preempted based upon the peculiar facts as applied to relevant federal banking statutes. As such, review is not warranted because this case involves issues that likely would require the

Court to delve into complex factual questions that may prevent the Court from actually addressing the scope of Section 4 altogether. See Eugene Gressman et al., *Supreme Court Practice* 248 (9th ed. 2007) ("If it appears that upon a grant of certiorari the Supreme Court might be able to decide the case on another ground and thus not reach the point upon which there is conflict, the conflict itself may not be sufficient reason for granting review.") (citing *Sanson Hosiery Mills* v. *NLRB*, 344 U.S. 863 (1952); *Arlington Inc.* v. *Mayer*, 339 U.S. 965 (1950)).

Moreover, petitioner does not and cannot suggest that these threshold issues are independently worthy of the Court's review. Specifically, the jurisdictional holding below depends upon the conclusion that an agreement to arbitrate applies to petitioner's counter-claims filed in state court because (i) Discover Bank is the real party in interest, Pet. App. 13a-18a, (ii) these state law claims against this real party in interest are completely preempted by federal banking law under these specific circumstances, *id.* at 18a-25a, and (iii) there is a binding agreement to arbitrate these claims, *id.* at 25a-27a.

In particular, as the court below acknowledged, the question whether Discover Bank is the real party in interest is "heavily fact-dependent." Pet. App. 18a n.9. And even though petitioner below conceded that if Discover Bank were the real party in interest then the FDIA "completely preempted her state-law claims," this Court would need to address these legal and factual issues because "a party may not create jurisdiction by concession." *Id.* at 18a n.10. Likewise, both the district court, *id.* at 48a-53a, and court of appeals, *id.* at 25a-27a, devoted significant effort to resolving petitioner's factual claim that she had not entered into an agreement to arbitrate at all.

The questions about whether an agreement to arbitrate exists, whether Discover Bank is the real party in interest, and whether petitioner's claims are completely preempted stand as serious obstacles to this Court's review of the principal issue presented by petitioner. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings."). Resolution of any conflict on the interpretation of Section 4 can and should await an appropriate vehicle—one in which there is no danger that a variety of other issues, not worthy of review, would render the grant of certiorari improvident.

II. THERE IS NO CONFLICT WITH THIS COURT'S DECISION IN *HOLMES GROUP*.

With regard to her second question presented, petitioner does not and can not contend that there is any circuit conflict. Rather, petitioner argues that the decision below conflicts with this Court's opinion in *Holmes Group, Inc.* v. *Vornado Air Circulation Systems, Inc.*, 535 U.S. 826 (2002). The alleged conflict, however, is illusory as *Holmes Group* did not purport to address Section 4 of the FAA.

In *Holmes Group*, this Court considered whether the Federal Circuit has appellate jurisdiction over an appeal from a district court in which a patent-law claim was raised only in the context of the defendant's counterclaim. 535 U.S. at 827. The Court concluded that, because the patent-law claim in that case was not part of the plaintiff's well-pleaded complaint, the action did not arise under federal patent law, and the Federal Circuit was thus without jurisdiction to entertain the appeal. *Id.* at 829-32.

Petitioner argues, by analogy from *Holmes Group* to the facts in this case, suggesting that there is no federal question jurisdiction "arising out of the controversy between the parties," 9 U.S.C. § 4, because it is her state-court *counterclaims* that would invoke federal question jurisdiction through complete preemption. Pet. 27-30. There is, however, no conflict between the decision below and this Court's decision in *Holmes Group*.

As noted, *Holmes Group* addresses the issue of the Federal Circuit's appellate jurisdiction over a patent appeal and thus is silent about jurisdiction under Section 4 of the FAA. 535 U.S. at 829-32. Further, as explained by the Fourth Circuit, *Holmes Group* did not involve "complete preemption" and thus does not speak to the central issue of federal question jurisdiction in this case. Pet. App. 10a n.4. Moreover, to the extent *Holmes Group* is premised on the policy underlying the well-pleaded complaint rule that a "plaintiff is 'the master of the complaint,'" 535 U.S. at 831, that concern is absent here because Discover Bank is both the state-court plaintiff and the party seeking to compel arbitration in federal court. Pet. App. 10a n.4. There is thus no danger in this case of the defendant's counterclaims depriving Discover Bank of its chosen forum. *Id.*

More to the point, the decision in *Holmes Group* is inapplicable here because the authority of a federal court to compel arbitration under Section 4 of the FAA does not depend upon the existence of *any* lawsuit on the underlying dispute. Indeed, by its terms, Section 4 is a vehicle to compel arbitration when an opposing party refuses to do so. As such, "Section 4 does not require a party to actually file suit regarding the underlying controversy." Pet. App. 7a. Thus, the fact that the underlying dispute was set

forth in a counterclaim filed in a state-law action rather than an affirmative claim in a complaint is irrelevant to the question of whether Discover Bank may compel arbitration pursuant to Section 4.

As this Court made clear in *Moses H. Cone*, Sections 3 and 4 of the FAA are "parallel devices for enforcing an arbitration agreement." 460 U.S. at 22. Whereas Section 3 cannot be invoked to stay a pending lawsuit "unless there is such a suit in existence," Section 4 requires only that the "federal district court *would have* jurisdiction over *a suit* on the underlying dispute." *Id.* at 25 n.32 (emphasis added). So long as there would be federal jurisdiction over a lawsuit to resolve the parties' underlying dispute, Section 4 may be invoked to compel arbitration. As such, under Section 4, it does not matter whether the underlying dispute is set forth in a complaint, a counterclaim, or in no suit at all.

There is, accordingly, no conflict between the decision below and *Holmes Group*.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOSEPH W. HOVERMILL
MATTHEW T. WAGMAN
JOHN C. CELESTE
MILES & STOCKBRIDGE, P.C.
10 Light Street
Baltimore, MD 21202
(410) 385-3442

ALAN S. KAPLINSKY*
MARTIN C. BRYCE, JR.
BALLARD, SPAHR, ANDREWS & INGERSOLL, LLP
1735 Market St., 51st Fl.
Philadelphia, PA 19103
(215) 665-8500

Counsel for Respondents

* Counsel of Record

February 11, 2008