No. 15-____

IN THE
Supreme Court of the United States

VISA INC., ET AL.,
Petitioners,

v.

SAM OSBORN, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether allegations that members of a business association agreed to adhere to the association's rules and possess governance rights in the association, without more, are sufficient to plead the element of conspiracy in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, as the Court of Appeals held below, or are insufficient, as the Third, Fourth, and Ninth Circuits have held.

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the D.C. Circuit.

The Petitioners here and appellees below are Bank of America, National Association, NB Holdings Corp., Bank of America Corp., Chase Bank USA, N.A., JPMorgan Chase & Co., JPMorgan Chase Bank, N.A., Wells Fargo & Co., Wells Fargo Bank, N.A., Visa Inc., Visa U.S.A. Inc., Visa International Service Association, Plus System, Inc., MasterCard Incorporated and MasterCard International Incorporated d/b/a MasterCard Worldwide.

The respondents here and appellants below are Sam Osborn, Andrew Mackmin, and Barbara Inglis.

CORPORATION DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioners state as follows:

Visa Inc. is a publicly-held corporation. Visa Inc. has no parent company, and no publicly-held company owns 10% or more of the stock of Visa Inc.

Visa U.S.A. Inc. is a non-stock corporation. Visa Inc., a publicly-held company, is a parent company of Visa U.S.A. Inc. and has a 10% or greater ownership interest in Visa U.S.A. Inc.

Visa International Service Association is a non-stock corporation. Visa Inc., a publicly-held company, is a parent company of Visa International Service Association and has a 10% or greater ownership interest in Visa International Service Association.

Plus System, Inc. is a non-stock corporation. Visa U.S.A. Inc., discussed above, is a parent company of Plus System, Inc. and has a 10% or greater ownership interest in Plus System, Inc.

MasterCard Incorporated is a publicly-held corporation. MasterCard Incorporated has no parent company, and no publicly-held company owns 10% or more of the stock of MasterCard Incorporated.

MasterCard International Incorporated is a Delaware membership corporation that does not issue capital stock, and is a wholly owned subsidiary of MasterCard Incorporated.

JPMorgan Chase & Co. is a publicly-held corporation. JPMorgan Chase & Co. has no parent company, and

no publicly-held company owns 10% or more of the stock of JPMorgan Chase & Co.

JPMorgan Chase Bank, N.A. is a wholly owned subsidiary of JPMorgan Chase & Co. No publicly-held company other than JPMorgan Chase & Co. owns 10% or more of the stock of JPMorgan Chase Bank, N.A.

Chase Bank USA, N.A. is an indirect wholly owned subsidiary of JPMorgan Chase & Co. No publicly-held company other than JPMorgan Chase & Co. owns 10% or more of the stock of Chase Bank USA, N.A.

Bank of America Corporation is a publicly-held corporation, and no publicly held corporation owns 10% or more of Bank of America Corporation's stock. Bank of America Corporation is the only publicly-held corporation that owns 10% or more of the stock of Bank of America, N.A.

Bank of America Corporation is the only publicly-held corporation that owns 10% or more of the stock of NB Holdings Corporation.

Wells Fargo & Company is a publicly-held corporation, and no publicly held corporation owns 10% or more of Wells Fargo & Company's stock.

Wells Fargo & Company is the only publicly-held corporation that owns 10% or more of the stock of Wells Fargo Bank, N.A.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Bank of America, Chase, Wells Fargo (collectively, the "Bank Defendants"), Visa and MasterCard (collectively, the "Network Defendants") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.[1]

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 3a-25a) is reported at 797 F.3d 1057.[2] The opinion of the district court (Pet. App. 26a-51a) denying plaintiffs' motions for leave to amend their complaint and to

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[1] To designate defendants, this petition will adopt the conventions used in Plaintiffs' Proposed Second Amended Complaint (hereafter the "Complaint") filed in *Mackmin v. Visa Inc.*, No. 1:11-cv-01831 (D.D.C. filed May 18, 2013). The Complaint names: Bank of America, National Association, NB Holdings Corp., Bank of America Corp., and collectively refers to them as "Bank of America"; Chase Bank USA, N.A., JPMorgan Chase & Co., JPMorgan Chase Bank, N.A., and collectively refers to them as "Chase"; Wells Fargo & Co., Wells Fargo Bank, N.A., and collectively refers to them as "Wells Fargo"; Visa Inc., Visa U.S.A. Inc., Visa International Service Association, Plus System, Inc., and collectively refers to them as "Visa"; MasterCard Incorporated, MasterCard International Incorporated d/b/a MasterCard Worldwide, and collectively refers to them as "MasterCard." Pet. App. 60a-65a.

[2] The Court of Appeals' decision also addressed two related cases, *Stoumbos v. Visa Inc.*, No. 1:11-cv-01882 (D.D.C. filed Oct. 24, 2011), and *National ATM Council v. Visa Inc., et al.,* No. 1:11-cv-01803 (D.D.C. filed Oct. 12, 2011). This petition addresses only *Mackmin v. Visa Inc.*, No. 1:11-cv-01831 (D.D.C. filed Oct. 17, 2011).

alter or amend the court's original judgment is reported at 7 F. Supp. 3d 51. The original opinion of the district court (Pet. App. 158a-207a) is reported at 922 F. Supp. 2d 73.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on August 4, 2015. Pet. App. 3a. A timely petition for rehearing was denied on September 28, 2015. Pet. App. 1a-2a. Petitioners' request to extend the time to file a petition for a writ of certiorari to January 27, 2016, was granted by the Honorable John G. Roberts, Jr., on December 22, 2015. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1 provides, in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

PRELIMINARY STATEMENT

The Court of Appeals' decision creates an intolerable circuit conflict on an issue of exceptional importance to our nation's economy. Many firms participate in business associations that enable them collectively to provide products and services that no individual business could provide on its own. This case, for example, concerns banks that participate in automated teller machine ("ATM") networks, which

enable bank customers to engage in transactions at ATMs across the globe that are not owned and operated by their banks. For business associations like these to function effectively, they must have governance structures and membership rules.

Yet in direct conflict with the Ninth Circuit in a substantially identical case involving many of the same defendants, the Court of Appeals held that plaintiffs properly pleaded a horizontal agreement under Section 1 of the Sherman Act by alleging that banks participated in the governance of such a network and agreed to its rules. If firms that participate in business associations must incur the burden of defending costly antitrust litigation and discovery on mere allegations like these, the antitrust laws will become a substantial deterrent to the use of this procompetitive form of business organization.

This case concerns allegations of an agreement among ATM networks and certain of their member banks to "fix" access fees a cardholder pays to a bank ATM operator. In particular, plaintiffs alleged that Visa and MasterCard each has rules that do not allow ATM operators to charge higher access fees to cardholders for transactions routed over Visa and MasterCard, respectively, than for those routed over another network. Plaintiffs claim that these rules violate federal antitrust law—namely, Section 1 of the Sherman Act—because they reflect conspiracies among Visa and its member banks and among MasterCard and its member banks, respectively.

The Court of Appeals for the District of Columbia Circuit ruled that plaintiffs properly pleaded a horizontal agreement under Section 1 by alleging that certain banks participated in the bankcard associa-

tions, possessed governance rights therein, and agreed to adhere to association rules. This holding squarely conflicts with a decision of the Ninth Circuit involving nearly the same defendants and materially indistinguishable facts. The Third and Fourth Circuits have aligned with the Ninth Circuit, holding analogous allegations insufficient to plead a conspiracy under Section 1.

The Court of Appeals' decision and the circuit conflict it has created are exceedingly important. This Court has recognized the central role federal courts must play in ensuring the adequacy of allegations of an antitrust conspiracy. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). Adhering to the appropriate pleading standards is particularly critical in the antitrust context, where the enormous costs of discovery and defense could chill lawful conduct that promotes economic innovation and growth. *See id.* at 558-59. Erroneous application of Section 1's rigorous pleading standards would be especially detrimental in the context of business associations, as hundreds of thousands of businesses lawfully participate in membership associations, joint ventures and standard-setting bodies every year.

Review is warranted to address this fundamental and recurring issue. This Court should therefore grant this petition and reverse the judgment of the Court of Appeals.

STATEMENT OF THE CASE

The Parties

Plaintiffs in this action purport to represent a putative class of consumers who paid access fees to

banks for foreign ATM transactions. Pet. App. 56a ¶ 8.

Defendants Visa and MasterCard have been publicly held corporations since their respective initial public offerings ("IPOs") in 2008 and 2006. Pet. App. 65a ¶ 46. Prior to their IPOs, Visa and MasterCard allegedly were associations comprised of, and owned by, their respective U.S. bank members. Pet. App. 76a-77a ¶¶ 79-80. Among those member banks are the three Bank Defendants in this litigation. *Id.*

ATM Cards and Access Fees

Using ATM cards issued by their banks, consumers with bank deposit accounts can access ATMs to withdraw cash, deposit checks, and conduct various other financial transactions. Pet. App. 68a ¶ 56. Although banks deploy their own ATMs for their depositors to use, they generally also participate in ATM networks, giving their depositors access to a greater number of ATMs than any one bank alone could provide. Pet. App. 72a ¶ 68. Visa and MasterCard operate such ATM networks. *Id.*

When an ATM cardholder uses a "foreign ATM"—that is, an ATM that is not operated by the bank hosting the cardholder's deposit account—the operator of that "foreign ATM" must connect to the cardholder's bank through one of several competing networks to complete the transaction. Pet. App. 68a-70a ¶¶ 57-63. ATM operators may utilize multiple competing networks. Pet. App. 68a-69a ¶¶ 58-59. Similarly, banks may issue ATM cards that allow transactions to be processed over one or more such networks, with the allowed networks often designated by logos—called "bugs"—on the back of the card. Pet. App. 68a-69a ¶¶ 55-59. In a foreign transaction,

the ATM operator allegedly receives two fees: (i) an access fee set by the ATM operator and paid by the cardholder and (ii) an interchange fee set by the network and paid by the cardholder's bank. Pet. App. 70a ¶¶ 63-64. Allegedly, ATM operators' systems route foreign ATM transactions over whichever of the available networks pays them the highest interchange fee. Pet. App. 69a ¶ 59.

Visa's Plus ATM network and MasterCard's Cirrus ATM network each has adopted rules that apply to ATM operators that choose to process ATM transactions over its network. Pet. App. 75a-76a ¶¶ 77-78. Visa's and MasterCard's rules allegedly include provisions (hereafter referred to as the "Access Fee Rules") that bar participating ATM operators from charging a cardholder a higher access fee for processing the cardholder's ATM transaction over its network than over a different ATM network. *Id.* For example, if an ATM operator processes a cardholder's transaction on the Visa Plus network, it may not charge that cardholder a higher access fee than the operator would charge if it processed that transaction on a different ATM network, such as the STAR network. *Id.*

Respondents' Conspiracy Allegations

Plaintiffs allege that the Access Fee Rules were the product of "horizontal" agreements among bank members of Visa's Plus ATM network and Visa, and among bank members of MasterCard's Cirrus ATM network and MasterCard, respectively, to "fix" ATM access fees by reducing "competition at the network level." Pet. App. 75a-77a, 90a ¶¶ 76-81, 118-19. Plaintiffs do not allege any agreements between Visa and MasterCard.

Plaintiffs' allegation that a "horizontal agreement" existed among the Network Defendants and the Bank Defendants relies solely on the former structure of Visa and MasterCard as membership associations. Pet. App. 65a-67a, 76a-78a, 90a ¶¶ 45-47, 79-82, 118-19. First, the Complaint alleges that each Bank Defendant is a member of the Visa and MasterCard networks, and that Visa and MasterCard "were associations comprising, and owned by, their respective bank members." Pet. App. 62a-65a ¶¶ 33, 38, 43, 45, 46. Plaintiffs allege that Bank Defendants employed individuals who served on the former associations' boards, which allegedly approved association rules. Pet. App. 65a, 86a-87a ¶¶ 45-46, 109.

Banks that were members of the associations allegedly agreed "to adhere to rules and operating regulations," including the Access Fee Rules. Pet. App. 65a-66a, 77a ¶¶ 47, 81. Plaintiffs acknowledge that MasterCard and Visa became publicly held corporations through their IPOs, on May 24, 2006 and March 18, 2008, respectively. Pet. App. 65a ¶ 46. After the IPOs, banks allegedly continue to hold unspecified equity interests in Visa or MasterCard. *Id.*

As to the acts in furtherance of the alleged conspiracy among the Bank Defendants and each of the Network Defendants, plaintiffs allege generally that the bankcard associations established the Access Fee Rules, which were approved by the associations' boards and "agreed to by the banks themselves." Pet. App. 65a-66a ¶ 47; *see also id*. at 77a ¶ 81.

The Complaint does not allege any facts to suggest that any Bank Defendant has communicated in any way with any other Bank Defendant about the challenged rules or the level of its ATM access fees.

Nor does the Complaint allege what position, if any, any of the Bank Defendants (let alone all of them) took with respect to the Access Fee Rules as a member of Visa or MasterCard, or why it did so. Likewise, the Complaint does not allege any facts to support a theory that the alleged conspiracy was carried out through the board members employed by the Bank Defendants. Indeed, the Complaint is devoid of any allegations as to any positions or votes taken by any of the associations' board members. Nor does the Complaint contain any factual allegations about a specific level of access fees that any Bank Defendant or any other ATM operator has ever charged to any customer (including any of the plaintiffs) at any ATM at any time. And nowhere in the Complaint are there allegations that the Network Defendants' ATM Access Fee Rules prohibit any Bank Defendant from independently deciding whether to charge an access fee at any ATM it operates, or from unilaterally deciding what access fee to charge.

The Decisions Below

The district court dismissed the cases without prejudice holding that plaintiffs had inadequately pleaded both injury-in-fact and conspiracy. Pet. App. 207a. The district court relied upon the Ninth Circuit's decision in *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042 (9th Cir. 2008) in ruling, as a matter of law, that plaintiffs failed to state a conspiracy under Section 1. Pet. App. 199a-200a. In *Kendall*, the Ninth Circuit held that allegations that the defendant banks were owners of Visa and MasterCard, served on their respective boards, and followed their network rules were insufficient to state a conspiracy under Section 1. *See Kendall*, 518 F.3d at 1048. The district court here noted that plaintiffs "argue[d] that

they have alleged much more than what was asserted in *Kendall*," but determined that "they have not." Pet. App. 200a. "Indeed, they allege less." *Id.*

The district court subsequently denied as futile plaintiffs' motion for leave to amend their first amended complaint, holding that plaintiffs' Complaint "provide[s] no additional facts that constitute direct evidence of agreements that would support a claim of a current horizontal conspiracy among the member banks." Pet. App. 48a. The district court therefore denied as moot plaintiffs' separate motions to alter or amend the judgment.

The Court of Appeals vacated the district court's judgment, concluding that the Complaint adequately pleaded injury and conspiracy. Pet. App. 25a. The D.C. Circuit reasoned that association membership alone was insufficient to plead a conspiracy with other members, but that plaintiffs sufficiently alleged a conspiracy because they alleged that the banks "*used* the bankcard associations to adopt and enforce a supracompetitive pricing regime for ATM access fees." Pet. App. 20a. (emphasis in original). The allegation to which the Court of Appeals referred was the Complaint's allegation that the Access Fee Rules "'originated in the rules of the former bankcard associations *agreed to by the banks themselves*.'" *Id.* (quoting Compl. ¶ 81) (emphasis in original).[3] On that basis, the Court of Appeals concluded that plain-

[3] Paragraph 81 of the Complaint alleged an agreement by bank members of Visa and MasterCard "to adhere to rules and operating regulations" of those networks, including the Access Fee Rules. Pet. App. 77a ¶ 81; *see also id.* at 65a-66a ¶ 47.

tiffs' allegations were "enough to satisfy the plausibility standard." Pet. App. 21a.

The Court of Appeals denied defendants' petition for panel rehearing or rehearing *en banc* on September 28, 2015. Pet. App. 1a-2a.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Decision Creates a Circuit Split on the Important Question of Whether Allegations of Membership and Participation in a Business Association Are Sufficient to Plead an Antitrust Conspiracy

The decision of the Court of Appeals below conflicts with those of multiple other Courts of Appeals on the sufficiency of antitrust conspiracy allegations in the context of business associations. To state a claim under Section 1, plaintiffs must allege that "the challenged anticompetitive conduct stems from . . . an agreement, tacit or express." *Twombly*, 550 U.S. at 553 (citation omitted). Alleged conspirators must make "a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984). Plaintiffs' factual allegations of such a conspiracy must be "enough . . . to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570.

In *Twombly*, this Court clarified what constitutes a "plausible" pleading of an alleged antitrust conspiracy. *Id.*; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009) ("*Twombly* determined the sufficiency of a complaint sounding in antitrust . . . ."). A Section 1 plaintiff must allege, at a minimum: (1) the general

contours of when an agreement was made and (2) must support those allegations with a context that tends to make said agreement plausible. *See Twombly*, 550 U.S. at 556-57; *see also id.* at 557 ("The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'" (citation omitted)).

In this case, the D.C. Circuit held that a conspiracy can be pleaded in the context of a membership association solely through the allegation that defendants held governance rights as association members and "used" the association by agreeing to adhere to the association's rules. That holding conflicts with a recent decision of the Ninth Circuit involving largely the same defendants and virtually identical conspiracy allegations. *See Kendall*, 518 F.3d at 1048. Recent decisions of the Fourth and Third Circuits have aligned with the Ninth Circuit, holding substantively similar allegations insufficient to plead a horizontal agreement under Section 1. *See SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412 (4th Cir. 2015) ("*SawStop*"); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300 (3d Cir. 2010).

A. The Decision of the Court of Appeals Conflicts with a Decision of the Ninth Circuit Involving Virtually Identical Allegations of Conspiracy

The Court of Appeals below and the Ninth Circuit have reached different results in a similar context. In *Kendall v. Visa U.S.A., Inc.*, a putative class of merchants that accepted credit cards for payment

sued Visa, MasterCard, and several banks, alleging they had conspired through the networks' rules to fix merchant discount fees and credit card interchange fees in violation of Section 1.[4] 518 F.3d at 1045-46. Much like the plaintiffs in this case, the merchants in *Kendall* alleged that (1) the Visa and MasterCard member banks "actively" and "knowingly" participated in the management of Visa and MasterCard; (2) "each Bank defendant 'participates in the management of and has a proprietary interest in' the Consortiums"; and (3) "the Banks adopt the interchange fees set by the Consortiums." *Id*. at 1048; *see also* First Amended Class Action Antitrust Complaint ¶¶ 8-10, 11, 13(a), *Kendall v. Visa U.S.A. Inc.*, No. C 04-04276 JSW (N.D. Cal. filed Apr. 25, 2005) (hereinafter "Kendall Complaint") (alleging that the member banks gave "consent to" certain rules of Visa and MasterCard, which allegedly worked to the banks' benefit and the banks adhered to those rules).

But unlike the Court of Appeals in this case, the Ninth Circuit in *Kendall* affirmed the dismissal of the complaint because its allegations about the banks' participation in the governance and operation of the bankcard associations were insufficient to plead an unlawful agreement among the banks and networks. *Kendall*, 518 F.3d at 1048.

Here, not only are the defendants largely the same as in *Kendall*, but the conspiracy allegations are materially indistinguishable from the allegations

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[4] Along with some of the Bank Defendants in this case, the plaintiffs in *Kendall* also named certain other large financial institutions as defendants.

made by the *Kendall* plaintiffs.[5] The D.C. Circuit cited *Kendall*—without acknowledging the case's contrary holding—but reasoned that plaintiffs had adequately alleged a conspiracy here because the banks "*used* the bankcard associations to adopt and enforce a supracompetitive pricing regime for ATM access fees" and that the alleged offending conduct "'originated in the rules of the former bankcard associations agreed to by the banks *themselves*.'" (Pet. App. 20a (quoting Complaint ¶ 81) (emphasis in opinion)).

But the *Kendall* court considered virtually identical allegations about an agreement on association rules and participation in a bankcard association, and found them insufficient. *See* 518 F.3d at 1048. The Ninth Circuit held that the complaint's allegation that "each Bank defendant 'participates in the management of and has a proprietary interest in'" the associations, even when coupled with an allegation that each bank "'knowingly, intentionally and actively participated in an individual capacity in the alleged scheme' to fix" the credit card networks' rules were "insufficient as a matter of law to constitute a violation of Section 1 of the Sherman Act." *Id.* (citations omitted). "[M]embership in an association does not render an association's members automatically liable for antitrust violations committed by the association. Even participation on the association's board of directors is not enough by itself." *Id.* (citation

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[5] If anything, the allegations in this litigation are less plausible. For example, the *Kendall* Complaint alleged a specific communication among the defendants as evidence of the purported conspiracy. Kendall Complaint ¶ 15. No similar factual allegations were made here.

omitted). The D.C. Circuit's holding below thus squarely conflicts with the Ninth Circuit's holding in *Kendall*.

B. The Decision of the Court of Appeals Conflicts with a Decision of the Fourth Circuit

The decision of the Court of Appeals below is irreconcilable with the Fourth Circuit's recent decision in *SawStop*, which held that naked allegations of membership and a governance role in a business association do not sufficiently plead an antitrust conspiracy. *See* 801 F.3d at 423-26. The plaintiff in *SawStop* alleged three separate conspiracies among table saw manufacturers to boycott the plaintiffs' safety technology, each of which arose from a trade association or standard-setting entity. *Id.* at 418-21.

As to two of the conspiracies alleged, the Fourth Circuit held that allegations of an association's membership and its governance did not sufficiently plead an antitrust conspiracy. The *SawStop* plaintiff alleged that the defendants used their market power to (1) influence one standard-setting entity to decline to adopt the plaintiff's technology into its safety standards and (2) influence another standard-setting entity to adopt standards that imposed "needless costs" on the plaintiff. *SawStop*, 801 F.3d at 420, 435.

The Fourth Circuit unanimously affirmed the district court's dismissal of these two conspiracy claims, rejecting the plaintiff's invitation "to infer malfeasance because some of the defendants' representative[s] served on the relevant standard-setting panel" of the association, which then adopted a safety rule that disfavored plaintiff. *Id.* at 436-38. The court ruled that the plaintiff failed to plead a

conspiracy when they alleged only that the defendant manufacturers belonged to a standard-setting organization, actively participated therein, and subsequently adhered to rules adopted by the organization. *Id.*

The Fourth Circuit was divided as to the sufficiency of the plaintiff's allegations of a third conspiracy. The plaintiff alleged that a conspiracy existed to boycott its safety feature product because the defendant manufacturers were members of a power tools trade organization (the "Power Tool Institute") and participated in a particular meeting within that organization where they allegedly voted not to adopt the plaintiff's product. *Id.* at 419-20. The plaintiff identified in its allegations specific representatives who had attended the Power Tool Institute's meeting where the agreement was allegedly hatched. *Id.* at 430.[6]

A divided panel of the Fourth Circuit held that, as to the manufacturers' participation in the Power Tool Institute conspiracy, the plaintiff's allegations contained sufficiently detailed facts about the "'who, what, when[,] where [and why]'" of an agreement to boycott plaintiffs' product. *Id.* at 430. Instead of al-

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[6] The plaintiff further alleged that, prior to the meeting that allegedly launched the conspiracy, specific members of the Power Tool Institute had been separately negotiating licensing agreements with the plaintiff to adopt the safety feature. *SawStop* 801 F.3d at 419-20. After the meeting, however, each defendant manufacturer allegedly broke off these licensing negotiations. *Id.* at 420. The plaintiff also offered a motive for the defendants' parallel conduct following the meeting: the manufacturers did not want to increase their exposure to tort liability by a piecemeal adoption of the plaintiff's safety technology. *Id.*

leging that the defendants had merely participated in the trade association and subsequently adhered to its rules, the plaintiff alleged specific communications between individuals and a specific meeting and vote, all of which "move[d] [plaintiff's] allegations of parallel conduct into the realm of plausibility." *Id.* at 429-30.

Judge Wilkinson dissented from the majority's holding relating to the Power Tool Institute conspiracy, describing the majority's approach as a "refusal to follow" this Court's guidance in *Twombly*. *SawStop*, 801 F.3d at 443 (Wilkinson, J., dissenting). The dissent rejected the plaintiff's specific factual allegations as not "plausible" support for conspiracy claims, reasoning that they reflected "rational business choices" and lawful participation in a trade association. *Id.* at 445, 452 (Wilkinson, J., dissenting). Judge Wilkinson offered the following warning as to the effect of the majority's opinion: "casual presumptions of antitrust infractions can only chill communications among companies, which in turn may hinder . . . innovative joint ventures, and useful trade association conclaves" or lead to businesses posting signs outside of associational meetings such as: "WARNING: HOLDING OR ATTENDING THIS TRADE ASSOCIATION MEETING WILL INCREASE YOUR EXPOSURE TO ANTITRUST SUITS." *Id.* at 443 (Wilkinson, J., dissenting) (emphasis in original).

Here, *unlike* the allegations regarding the Power Tool Institute conspiracy in *SawStop*, plaintiffs have not alleged any specifics as to the "who, what, when, where and why" of the supposed conspiracies between Visa and its bank members or between MasterCard and its bank members. The plaintiffs' Complaint alleged no facts about when the Bank De-

fendants reached any agreement with either of the Network Defendants (let alone any agreement amongst the Bank Defendants themselves), any meeting or communication that led to an agreement to "fix" access fees by reducing competition among ATM networks, or who among the banks or their employees participated in any communication reflecting this supposedly shared commitment. Furthermore, the Complaint lacks any allegations whatsoever suggesting that the bank executives sitting on the associations' boards participated in any such meetings or otherwise acted without regard to fiduciary duties owed to Visa or MasterCard.

Instead, the Court of Appeals below accepted as sufficient the general allegations that the Fourth Circuit unanimously found insufficient: that defendants participated in associations, sat on the associations' decision-making bodies, and adhered to rules passed by the association. Consequently, the D.C. Circuit's opinion squarely conflicts with the unanimous portions of the Fourth Circuit's opinion in *SawStop*. And the division of the *SawStop* panel further underscores the need for guidance from this Court in this important area.

C. The Decision of the Court of Appeals Conflicts with a Decision of the Third Circuit

The decision below likewise conflicts with the Third Circuit's decision in *In re Insurance Brokerage Antitrust Litigation*. In that case, the plaintiffs alleged that a "global conspiracy" existed among insurance brokers to fix the commission charged to insurance companies for brokers' referral of insurance consumers. *In re Ins. Brokerage Antitrust Litig.*,

618 F.3d at 313, 348. In an attempt to plead a Section 1 conspiracy, the plaintiffs alleged that: (1) the brokers participated in the Council of Insurance Agents & Brokers (CIAB), a trade organization; (2) the brokers "controlled" the affairs of the CIAB; (3) the CIAB "adopt[ed] collective policies towards non-disclosure of rival brokers' contingent commissions"; and (4) the brokers adhered to the CIAB's rules by including a confidentiality clause in their agreements with consumers prohibiting them from disclosing the terms of the brokers' commission fee. *Id*. at 313, 328-29.

The Third Circuit affirmed the dismissal of the complaint as to the allegations of a "global conspiracy," holding, as a matter of law, that these allegations were insufficient to plead an unlawful agreement among the brokers. *See In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 349 ("Neither defendants' membership in the CIAB, nor their common adoption of the trade group's suggestions, plausibly suggest conspiracy."). The court ruled that the defendants' alleged control of the CIAB was "insufficient to show a horizontal agreement not to disclose one another's contingent commissions." *Id*.

The D.C. Circuit's decision below squarely conflicts with *In re Insurance Brokerage Antitrust*. The allegations of conspiracy in both cases are materially indistinguishable, as each rests upon the assertion that the respective defendants belonged to a business association, possessed governance rights therein, and adhered to the association's rules. Yet, the D.C. Circuit in this litigation held that these allegations sufficiently pleaded a conspiracy and the Third Circuit found such allegations insufficient.

* * *

In short, the D.C. Circuit's decision below conflicts with those of the three other Courts of Appeals on the issue of whether alleging participation in a business association, exercise of governance rights in that association, and agreement to adhere to its rules is sufficient to plead a conspiracy under Section 1. The conflict is clear and ripe. And because many business associations (like the ones at issue here) are nationwide, the split presents the real risk of forum shopping by antitrust plaintiffs. This Court's review is warranted.

II. The Court of Appeals' Decision is Incorrect

The Court of Appeals' decision erroneously concludes that plaintiffs alleged facts sufficient to plead a conspiracy in violation of Section 1. Plaintiffs rely only on the Bank Defendants' former membership in the Visa and MasterCard associations, the banks' equity interests in and bank executives' former seats on the boards of Visa and MasterCard, and the banks' alleged adherence to the network ATM access fee rules. But none of these alleged facts, alone or collectively, gives rise to the plausible inference of "conscious commitment to a common scheme designed to achieve an unlawful objective" required for any Section 1 conspiracy. *Monsanto*, 465 U.S. at 768. This is in part because "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

Here, plaintiffs make no factual allegations suggesting that any Bank Defendant has communicated

in any way, let alone agreed, with any other Bank Defendant or other ATM operator about the challenged rules. Nor do plaintiffs make any factual allegations about the level of access fees that any Bank Defendant or any other ATM operator has ever charged to any customer at any ATM at any time.

Instead, plaintiffs seek to infer misfeasance from the banks' active participation in a business association—conduct that is not only perfectly lawful, but economically beneficial. By finding those allegations sufficient to plead a conspiracy, the Court of Appeals, in essence, viewed the Visa and MasterCard associations as "walking conspiracies." But courts routinely reject invitations to view business associations this way. *See, e.g.*, *Viazis v. Am. Ass'n of Orthodontist*s, 314 F.3d 758, 764 (5th Cir. 2002) (stating an association "is not by its nature a 'walking conspiracy,' its every denial of some benefit amounting to an unreasonable restraint of trade" (citations omitted)); *AD/SAT, A Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 234 (2d Cir. 1999) (noting "every action by a trade association is not concerted action by the association's members"). The courts do so because permitting cases to proceed based on such allegations would subject business associations to repeated and debilitating antitrust claims for conduct that enhances competition and consumer welfare. *See, e.g.*, *SawStop*, 801 F.3d at 437 (noting that in the context of business associations, "'fear of treble damages and judicial second-guessing would discourage the establishment of useful industry standards.'" (quoting *Consol. Metal Prods., Inc. v. Am. Petroleum Inst.*, 846 F.2d 284, 297 (5th Cir. 1988)).

The Court of Appeals' decision poses a grave threat to the procompetitive benefits of business as-

sociations, as it holds that plaintiffs may proceed with antitrust actions upon allegations that a defendant did nothing more than agree to follow a business association's rules and participate in its governance. This Court should correct the Court of Appeals' erroneous judgment.

III. This Court Should Resolve the Conflict Because it Involves a Recurring and Important Federal Question

The split of authority among the Courts of Appeals—and the decision's inconsistency with this Court's own antitrust jurisprudence—concern an important, recurring question affecting organizations across significant sectors of the United States economy. If allegations of association membership, participation in association governance, and agreement to adhere to association rules are sufficient to plead an antitrust conspiracy, then thousands of associations—and the hundreds of thousands of businesses that belong to them—face enhanced risks of antitrust litigation and attendant discovery costs. "In antitrust law, the flashpoint is often over motions to dismiss versus summary judgment" because, as "the Supreme Court has clearly recognized . . . it is the threat of steep litigation costs that produces deleterious consequences in and of itself, no matter who the victor in the antitrust marathon may ultimately prove to be." *SawStop,* 801 F.3d at 444-45 (Wilkinson, J., dissenting); *see also Twombly*, 550 U.S. at 558 ("It is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive." (citation omitted)).

Business associations have long played an important role in the American economy. *See* Alexis de Tocqueville, *Democracy in America*, 106 (Everyman's Library 1994) (1835) ("Americans of all ages, all conditions, and all dispositions constantly form associations . . . . [w]herever at the head of some new undertaking you see the government in France, or a man of rank in England, in the United States you will be sure to find an association"); *see also* Kimberly A. Zeuli & Robert Cropp, *Cooperatives: Principles and Practices in the 21st Century* 15 (4th ed. 2004) ("The idea of the [association] was both imported by the colonists from Europe and also independently developed by settlers of European origin under North American conditions. The first recognized cooperative business in the United States (a mutual insurance company) was founded in 1752, almost a quarter-century before the birth of the country . . . .").

Today, an estimated 68,000 business associations operate in the United States at the national and state levels.[7] Businesses also collaborate through other profit-making entities, such as joint ventures, over 2,000 of which are formed each year.[8] Hundreds of thousands of businesses belong to one or more of these associations or joint ventures in order to gain such economic benefits as new product offerings and cost reductions.[9]

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[7] Internal Revenue Serv., Data Book 2 (2015), *available at* http://www.irs.gov/pub/irs-soi/14databk.pdf.

[8] Water St. Partners LLC, *Joint Venture Trends and Innovations* 4 (Oct. 16, 2014).

[9] Nigel Smith et al., *Navigating Joint Ventures and Business Alliances* 7 (Nov. 2012).

This Court, the Department of Justice, and the Federal Trade Commission have each recognized the procompetitive benefits of business associations. *See, e.g.*, *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988) (collective efforts to set industry standards can have "significant procompetitive advantages").[10] This Court, too, has cautioned against enforcing antitrust laws in ways that force businesses to employ suboptimal business structures in order to minimize the risk of antitrust scrutiny. *See, e.g., Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 895 (2007) (cautioning against adopting antitrust rules that "increase the total cost of the antitrust system by prohibiting procompetitive conduct the antitrust laws should encourage" or that "increase litigation costs by promoting frivolous suits against legitimate practices"); *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 775 (1984) (refusing to find a Section 1 conspiracy where doing so based simply on business structure "would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote").

The Court of Appeals' decision in this case does just that: it increases the likelihood of frivolous suits and deters procompetitive behavior. It prevents dis-

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[10] Dep't of Justice, *Antitrust and Trade Assocs.*, 5 (1995) (stating that the Department of Justice's Antitrust Division "regards most trade association activity as procompetitive or at least competitively neutral"); Fed. Trade Comm'n, *Antitrust by Trade Association(s)* (2014) (stating that "trade associations typically serve many legitimate purposes, and from an antitrust perspective, most trade association activities are procompetitive or benign"), *available at* https://www.ftc.gov/news-events/blogs/competition-matters/2014/05/antitrust-associations.

trict courts from dismissing—as the district court did in this case—implausible conspiracy allegations against association members. And "[w]hen a district court by misapplying the *Twombly* standard allows a complex case of extremely dubious merit to proceed, it bids fair to immerse the parties in the discovery swamp—'that Serbonian bog . . . where armies whole have sunk'—and by doing so create irrevocable as well as unjustifiable harm to the defendant . . . ." *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 625-26 (7th Cir. 2010) (Posner, J.) (alteration in original) (citations omitted).

The Court of Appeals' decision below also magnifies uncertainty in an oft-litigated area long overdue for guidance from this Court. *Compare, e.g.*, *Advanced Tech. Corp. v. Instron, Inc.*, 925 F. Supp. 2d 170, 177-79 (D. Mass. 2013) (dismissing complaint because it failed to allege facts other than participation in an association and adherence to its rules); *Plant Oil Powered Diesel Fuel Sys., Inc. v. ExxonMobil Corp.*, 801 F. Supp. 2d 1163, 1191-92 (D.N.M. 2011) (holding that allegations of association membership, adherence to its rules, and possession of governance power insufficiently pleaded an antitrust conspiracy); *and LaFlamme v. Société Air France*, 702 F. Supp. 2d 136, 148 (E.D.N.Y. 2010) ("[M]embership and participation in a trade association alone does not give rise to a plausible inference of illegal agreement.") *with Home Quarters Real Estate Grp., LLC v. Mich. Data Exch., Inc.*, No. 07-12090, 2009 WL 276796, at *1 (E.D. Mich. Feb. 5, 2009) (holding that allegations of active association participation, along with adherence to its rules, sufficiently pleaded an antitrust conspiracy).

As a result of the Court of Appeals' decision, businesses seeking to avoid litigation costs may decide to withdraw from standard-setting organizations and other business associations—or to shun the rules and standards promulgated by them. *See, e.g.*, *Golden Bridge Tech., Inc. v. Motorola, Inc.*, 547 F.3d 266, 273 (5th Cir. 2008) (recognizing active participation in standard-setting organizations is "axiomatic" to its success since "[t]o hold otherwise would stifle the beneficial functions of such organizations, as fear of treble damages and judicial second-guessing would discourage the establishment of useful industry standards" (citations omitted)); *Princo Corp. v. Int'l Trade Comm'n*, 616 F.3d 1318, 1335 (Fed. Cir. 2010) (noting that "cooperation by competitors in standard-setting can provide procompetitive benefits the market would not otherwise provide, by allowing a number of different firms to produce and market competing products compatible with a single standard" (citation omitted)).

The question presented is an important one because businesses "should be free to structure [themselves] in ways that serve efficiency of control, economy of operations, and other factors dictated by business judgment without increasing [their] exposure to antitrust liability." *Copperweld*, 467 U.S. at 772-73. The conflict created by the Court of Appeals' decision presents a serious threat to this important principle that merits this Court's review.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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January 27, 2016

APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED SEPTEMBER 28, 2015

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-7004

September Term, 2015

1:11-cv-01831-ABJ

SAM OSBORN, *et al.*,

Appellants,

v.

VISA INC., *et al.*,

Appellees.

Filed On: September 28, 2015

Consolidated with 14-7005, 14-7006

BEFORE: Garland, Chief Judge, and Henderson,* Rogers, Tatel, Brown, Griffith, Kavanaugh, Srinivasan, Millett, Pillard, and Wilkins, Circuit Judges

ORDER

* Circuit Judge Henderson did not participate in this matter.

Appendix A

Upon consideration of petitions of appellees Visa and Mastercard and the Bank Defendants for rehearing *en banc*, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petitions be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, DECIDED AUGUST 4, 2015

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

February 20, 2015, Argued August 4, 2015, Decided

No. 14-7004

SAM OSBORN, *et al.*,

APPELLANTS,

v.

VISA INC., *et al.*,

APPELLEES.

Consolidated with 14-7005, 14-7006

Appeals from the United States District Court
for the District of Columbia
(No. 1:11-cv-01831)
(No. 1:11-cv-01882)
(No. 1:11-cv-01803)

Before: TATEL, SRINIVASAN and WILKINS, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* WILKINS.

Appendix B

WILKINS, *Circuit Judge*: Users and operators of independent (non-bank) automated teller machines (ATMs) brought these related actions against Visa, MasterCard, and certain affiliated banks, alleging anticompetitive schemes for pricing ATM access fees. The crux of the Plaintiffs' complaints is that when someone uses a non-bank ATM, the cardholder pays a greater fee and the ATM operator earns a lower return on each transaction because of certain Visa and MasterCard network rules. These rules prohibit differential pricing based on the cost of the network that links the ATM to the cardholder's bank. In other words, the Plaintiffs allege anticompetitive harm because Visa and MasterCard prevent an independent operator from charging less, and potentially earning more, when an ATM transaction is processed through a network unaffiliated with Visa and MasterCard.

The District Court concluded that the Plaintiffs had failed to allege essential components of standing, and also that they had failed to allege an agreement in restraint of trade cognizable under the Sherman Antitrust Act. *See* 15 U.S.C. § 1. We disagree, and so we vacate and remand these cases for further proceedings based on the proposed amended complaints.

I.

ATMs "have been a part of the American landscape since the 1970s – beacons of self-service and convenience, they revolutionized banking in ways we take for granted today." Linda Rodriguez McRobbie, *The ATM is Dead. Long Live the ATM!*, SMITHSONIAN.COM (Jan. 8, 2015),

http://www.smithsonianmag.com/history/atm-dead-long-live-atm-180953838/ . One view is that "[t]hey live to serve; we only really notice them when we can't seem to locate one." *Id.* But Plaintiffs tell us they *do* take notice of ATMs – specifically, of the fee structure that attaches to their use and what they gain or lose from it. We credit for purposes of this appeal all facts alleged in the proposed amended complaints.

Some background history: Until the mid-1990s, consumers who wished to withdraw cash from their bank accounts generally could do so only by visiting a bank branch or a bank-operated ATM. But states began to abolish various laws that had prohibited ATM operators from charging access fees directly to cardholders. This created a financial incentive for nonbanks to enter the ATM market, and independent ATMs took root accordingly. *See* National ATM Council Proposed Second Amended Complaint ("NAC Prop. Compl.") ¶ 43; Osborn Proposed Second Amended Complaint ("Osborn Prop. Compl.") ¶ 66. These independent ATMs connect to a cardholder's bank through an ATM network. The most popular networks are operated by Visa (the Plus, Interlink, and VisaNet networks) and MasterCard (the Cirrus and Maestro networks). Rival networks include Star, NYCE, and Credit Union 24. NAC Prop. Compl. ¶ 40.

Today, a cardholder can use any independent ATM to access her bank account, so long as her bank card and the ATM are linked by at least one common network. Most bank cards indicate the networks to which they are linked with logos printed on the back of the card, referred to colloquially as "bugs." *Id.*

Appendix B

Independent ATM operators rely on two streams of revenue to sustain their businesses. The first is the "net interchange" fee: the gross interchange fee paid by the cardholder's bank to the ATM operator, which runs between $0.00 and $0.60 per transaction, less any network services fee charged by the ATM network. MasterCard and Visa generally charge high network services fees, which means that ATM operators receive low net interchange fees – running between $0.06 and $0.29 for domestic transactions, and even less for international transactions – for transactions on these networks. Several competing networks charge comparatively low network services fees, thus enabling an ATM operator to collect a higher net interchange fee (up to $0.50 per transaction) when using the lower-fee networks. *Id.* ¶ 59.

The second source of revenue comes from the ATM access fees paid by the cardholder. The average access fee in 2012 was $2.10. *See* Osborn Prop. Compl. ¶ 99 (citing Gov't Accountability Office, GAO-13-266, Automated Teller Machines: Some Consumer Fees Have Increased 14 (2013)).

Visa and MasterCard each impose, as a condition for ATM operators to access their networks, a sort of non-discrimination or most favored customer clause called the "Access Fee Rules." These rules provide that no ATM operator may charge customers whose transactions are processed on Visa or MasterCard networks a greater access fee than that charged to any customer whose

transaction is processed on an alternative ATM network.[1] Thus, under the Access Fee Rules, operators cannot say to cardholders: "We will charge you $2.00 for a MasterCard or Visa transaction, but if your card has a Star or Credit Union 24 bug on it, we will charge you only $1.75."

Both Visa and MasterCard were owned and operated as joint ventures by a large group of retail banks at the time that the Access Fee Rules were adopted. NAC Prop. Compl. ¶ 89. Although these member banks later relinquished direct control over the bankcard associations through public offerings, the IPOs did not alter the substance of the Access Fee Rules, which remain intact to this day.

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1. The challenged Visa rule provides:

> An ATM Acquirer may impose an Access Fee if: It imposes an Access Fee on all other Financial Transactions through other shared networks at the same ATM; The Access Fee is not greater than the Access Fee amount on all other Interchange Transactions through other shared networks at the same ATM . . . .

NAC Prop. Compl. ¶ 68 (citing Visa Int'l Operating Regulations ¶ 4.10A (Oct. 15, 2012)). The challenged MasterCard rule provides:

> An Acquirer must not charge an ATM Access Fee in connection with a Transaction that is greater than the amount of any ATM Access Fee charged by that Acquirer in connection with the transactions of any other network accepted at that terminal.

Id. ¶ 64 (citing MasterCard's Cirrus Worldwide Operating Rule ¶ 7.14.1.2 (Dec. 21, 2012)).

Plaintiffs assert that these rules illegally restrain the efficient pricing of ATM services. They characterize the Access Fee Rules as constituting an "anti-steering" regime that prevents independent ATM operators from incentivizing cardholders to choose and use cards "that are more efficient and less costly than either Visa or MasterCard's." NAC Prop. Compl. ¶ 1.

This consolidated appeal arises from decisions in three separate but related civil actions. The first action, *Stoumbos v. Visa*, was filed by a debit cardholder, Mary Stoumbos, who paid access fees in connection with ATM transactions at various independent ATMs. The second action, *Mackmin v. Visa* (referred to here as the *Osborn* case), was filed by four consumers of independent and bank-run ATM services. The third action, *National ATM Council v. Visa*, was brought by a leading association of independent ATM operators and several individual ATM operators. The Plaintiffs allege violations of Section 1 of the Sherman Act as well as various state laws, and they name Visa and MasterCard entities as defendants. In addition, the *Osborn* plaintiffs name certain member banks as co-defendants.

On February 12, 2013, the District Court concluded that the Plaintiffs' respective complaints had failed to allege facts sufficient to establish standing and, in the alternative, lacked adequate facts to establish concerted activity under Section 1 of the Sherman Act. *Nat'l ATM Council, Inc. v. Visa Inc.*, 922 F. Supp. 2d 73 (D.D.C. 2013) ("*NAC I*"). It dismissed not just the complaints, but the *cases* without prejudice.

Appendix B

In an attempt to toll the statute of limitations, Plaintiffs timely moved the District Court to modify its judgment from dismissal of the *cases* without prejudice to dismissal of the *complaints* with leave to replead. Plaintiffs simultaneously submitted proposed amended complaints. On December 19, 2013, the District Court denied Plaintiffs' motions after concluding that their proposed amended complaints still lacked sufficient facts to establish standing or a conspiracy. *Nat'l ATM Council, Inc. v. Visa Inc.*, 7 F. Supp. 3d 51 (D.D.C. 2013) ("*NAC II*"). The Plaintiffs appeal.

II.

Procedural quirks notwithstanding, we review *de novo* the District Court's determination that the filing of the amended complaints would be futile due to the perceived deficiencies of those complaints under Rules 12(b)(1) and 12(b)(6). *See Kim v. United States*, 632 F.3d 713, 715, 394 U.S. App. D.C. 149 (D.C. Cir. 2011) (stating standard of review for FED. R. CIV. P. 12(b)(1) & 12(b)(6)). To reach that bottom line, we must do some procedural untangling.

The District Court's February 12 order dismissed the cases without prejudice. The principle guiding a dismissal without prejudice is that absent futility or special circumstances (such as undue delay, bad faith, or dilatory motive), a plaintiff should have the opportunity to replead so that claims will be decided on merits rather than technicalities. *Foman v. Davis*, 371 U.S. 178, 181-82, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962); *see also English-*

Speaking Union v. Johnson, 353 F.3d 1013, 1021, 359 U.S. App. D.C. 288 (D.C. Cir. 2004). Where, as it appears was the case here, a plaintiff has not notified the district court that a statute of limitations issue might bar the plaintiff "from correcting the complaint's defects and filing a new lawsuit," a dismissal of the case without prejudice is not an abuse of discretion. *See Ciralsky v. CIA*, 355 F.3d 661, 671, 359 U.S. App. D.C. 366 (D.C. Cir. 2004).

Plaintiffs followed an appropriate course against this background, asking the District Court to modify its judgment pursuant to Rule 59 – so that merely the complaint, and not the case, would have been dismissed – and simultaneously filing a proposed amended complaint. *See Firestone v. Firestone*, 76 F.3d 1205, 1208, 316 U.S. App. D.C. 152 (D.C. Cir. 1996) (describing this as proper procedure). In its December 19 opinion on those motions, the District Court asked and answered the essential question – whether leave to amend was futile – but the accompanying order purported to deny on the merits Plaintiffs' motion for leave to amend their complaints, and to deny as moot their motion to modify the February 12 judgment. As a technical matter, the District Court lacked authority to rule on the merits of the Rule 15(a) motion because it did not modify its final judgment dismissing those cases. *See Ciralsky*, 355 F.3d at 673; *Firestone*, 76 F.3d at 1208.

Because the District Court's denial of the Plaintiffs' Rule 59(e) motion as moot was based on its conclusion that amendment of the complaints would be futile, *see NAC II*, 7 F. Supp. 3d at 54, we review the decision below as a denial

on the merits of the motion to modify the judgment. On this question, we look for abuse of discretion. *Firestone*, 76 F.3d at 1208 (citing *Browder v. Dir., Ill. Dep't of Corrections*, 434 U.S. 257, 263 n.7, 98 S. Ct. 556, 54 L. Ed. 2d 521 (1978)). An abuse of discretion necessarily occurs when a district court misapprehends the underlying substantive law, and we examine the underlying substantive law *de novo*. *Conservation Force v. Salazar*, 699 F.3d 538, 542, 403 U.S. App. D.C. 69 (D.C. Cir. 2012); *see also Dyson v. District of Columbia*, 710 F.3d 415, 420, 404 U.S. App. D.C. 228 (D.C. Cir. 2013) (reviewing *de novo* questions of law underlying district court's denial of plaintiff's Rule 59(e) motion). In other words, the District Court's futility conclusion turned on a legal determination – here, the sufficiency of the proposed amended complaints under Rule 12(b)(1) or Rule 12(b)(6) – and we review those legal determinations independently of the District Court.[2]

That brings us to the substantive questions we must decide. We look first, as always, at the question of whether the Plaintiffs have standing and second, whether the Plaintiffs' proposed amended complaints adequately stated a claim.

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2. The parties have focused on the sufficiency of the proposed amended complaints, rather than the complaints originally dismissed by the District Court, and the Plaintiffs have not argued that the initial complaints should not have been dismissed. *See* Appellants' Br. 8 n.4 (explaining that the complaints dismissed on February 12 are of "questionable" relevance here, as this appeal is confined to the District Court's rulings on the proposed amended complaints).

Appendix B

A.

The District Court determined that the Plaintiffs lacked Article III standing because their allegations showed neither injury nor redressability. *NAC II*, 7 F. Supp. 3d at 60-61. To establish standing, a plaintiff must show that (i) it has "suffered a concrete and particularized injury in fact, (ii) that was caused by or is fairly traceable to the actions of the defendant, and (iii) is capable of resolution and likely to be redressed by judicial decision." *Sierra Club v. EPA*, 755 F.3d 968, 973, 410 U.S. App. D.C. 326 (D.C. Cir. 2014) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

Plaintiffs contend that "in the absence of the access fee rules, ATM operators would offer consumers differentiated access fees at the point of transaction, consumers would then demand multi-bug PIN cards from their banks, their banks would provide these cards, and the market for network services would become more competitive, all resulting in more choice of networks and lower access fees for consumers." *NAC II*, 7 F. Supp. 3d at 60. The District Court held that this was an "attenuated, speculative chain of events[] that relies on numerous independent actors, including the PIN card issuing banks." *Id.* We disagree, and we think the District Court was demanding proof of an economic theory that was not required in a complaint.

A plaintiff's burden to demonstrate standing grows heavier at each stage of the litigation. *See Lujan*, 504 U.S. at 561. Thus, "[a]t the pleading stage, general factual

allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Id.* (internal quotation marks omitted); *see also Am. Nat. Ins. Co. v. FDIC*, 642 F.3d 1137, 1139, 395 U.S. App. D.C. 316 (D.C. Cir. 2011) (observing that on a Rule 12(b)(1) motion, we "grant[] plaintiff the benefit of all inferences that can be derived from the facts alleged").

Two distinct theories of injury are relevant in this appeal. First is the ATM operators' theory of harm. The operators allege that MasterCard and Visa, working in concert with the member banks, have maximized their own returns on each transaction, thereby minimizing the independent ATM operators' cut. *See* NAC Prop. Compl. ¶¶ 77-88. According to the operators, in a competitive market, the imbalance between low- and high-cost networks "would be corrected by a price differential for the final service, and consumers would respond to lower prices for a fungible service by switching." *Id.* ¶ 79. But while ATM operators can respond by routing transactions on multi-bugged cards over the lowest priced networks, they are prevented from using differential pricing to incentivize customers to use such cards. As the operator plaintiffs put it, "ATM operators are prohibited from setting the price differential needed to encourage consumers to switch." *Id.* Visa and MasterCard are thereby insulated from competition with other networks and can charge supra-competitive network services fees with impunity.

The consumers' theory of harm complements that of the operators. The consumers allege that they pay inflated access fees when they visit ATMs. They believe that the Access Fee Rules inhibit competition in both the network services market and the market for ATM access fees. But for the Rules, some ATM operators would offer discounted access fees for cards linked to lower-cost ATM networks, and this discounting would create downward pressure on access fees generally. Osborn Prop. Compl. ¶ 94-107; Stoumbos Proposed Second Amended Complaint ("Stoumbos Prop. Compl.") ¶¶ 81-100.

Economic harm, such as that alleged here, "is a classic form of injury-in-fact." *Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 293 (3d Cir. 2005). But the Defendants painted Plaintiffs' allegations as speculative and conclusory, and the District Court agreed. *NAC II*, 7 F. Supp. 3d at 60. The District Court reasoned that the "protracted chain of causation" alleged by Plaintiffs "fails both because of the uncertainty of several individual links and because of the number of speculative links that must hold for the chain to connect the challenged acts to the asserted particularized injury." *Id.* (quoting *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 670, 320 U.S. App. D.C. 324 (D.C. Cir. 1996) (en banc)) (internal quotation marks omitted). This was error.

At the pleadings stage, a court "must accept as true all material allegations of the complaint," *Warth v. Seldin*, 422 U.S. 490, 501, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975), an obligation that we have recognized "might appear to be in tension with the Court's further admonition that

an allegation of injury or of redressability that is too speculative will not suffice to invoke the federal judicial power," *United Transp. Union v. ICC*, 891 F.2d 908, 911, 282 U.S. App. D.C. 38 (D.C. Cir. 1989) (internal quotation marks omitted). But "this ostensible tension is reconciled by distinguishing allegations of *facts, either historical or otherwise demonstrable*, from allegations that are really predictions." *Id.* at 912 (emphasis added). Thus, "[w]hen considering any chain of allegations for standing purposes, we may reject as overly speculative . . . those types of allegations that are not normally susceptible of labelling as 'true' or 'false.'" *Id.*

Plaintiffs' theories here *are* susceptible to proof at trial. The Plaintiffs allege a system in which Visa and MasterCard insulate their networks from price competition from other networks. This insulation yields higher profits for Visa and MasterCard (and higher returns for their shareholders), at the cost of consumers and independent ATM operators. The economic injury alleged is present and ongoing.

Moreover, the complaints contain factual details, including details about the Plaintiffs' own conduct, that support the alleged causal link between the Access Fee Rules and the economic harm. According to the Plaintiffs, Visa and MasterCard currently capture over half of all ATM transactions, despite charging higher fees than rival networks. *See* Osborn Prop. Compl. ¶¶ 91, 101. Plaintiffs further allege that independent ATM operators (such as the operator plaintiffs) have the desire and technical capacity to offer discounts on cards linked to low-cost

networks. *See* NAC Prop. Compl. ¶¶ 79, 82; Stoumbos Prop. Compl. ¶ 85. They contend that consumers, such as Stoumbos and the Osborn plaintiffs, are "sensitive to differences in ATM Access Fees and where possible will seek out ATMs with the lowest Access Fees." Stoumbos Prop. Compl. ¶ 86; *accord* Osborn Prop. Compl. ¶ 105.

To be certain, Plaintiffs also rely on certain economic assumptions about supply and demand: that other consumers besides the Plaintiffs are price conscious; that bank operators will respond to consumer demand for cards tied to low-cost networks; and that in the face of competitive pressure, ATM networks will reduce their network fees. But these sorts of assumptions are provable at trial. *See United Transp. Union*, 891 F.2d at 912 n.7 (allegations "founded on economic principles," while "perhaps not as reliable as allegations based on the laws of physics, are at least more akin to demonstrable facts than are predictions based only on speculation."); *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 758, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977) (recognizing, in the context of damages, that antitrust cases often involve "tracing a cost increase through several levels of a chain of distribution"). Indeed, allegations of economic harm "based on standard principles of 'supply and demand'" are "routinely credited by courts in a variety of contexts." *Adams v. Watson*, 10 F.3d 915, 923 (1st Cir. 1993).

In deciding that the Plaintiffs had failed to establish injury and redressability, the District Court relied on cases that had been decided at summary judgment. *See NAC II*, 7 F. Supp. 3d at 60 (citing *Lujan*, 504 U.S. at

560-61; *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 496 n.10, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982); *Fla. Audubon Soc'y*, 94 F.3d at 670); *see also NAC I*, 922 F. Supp. 2d at 81 (citing *Dominguez v. UAL Corp.*, 666 F.3d 1359, 1362, 399 U.S. App. D.C. 92 (D.C. Cir. 2012); *Gerlinger v. Amazon.com Inc.; Borders Group, Inc.*, 526 F.3d 1253, 1255-56 (9th Cir. 2008)). On a motion for summary judgment by a defendant, the question is not whether the plaintiff has asserted a plausible theory of harm, but rather whether the plaintiff has offered sufficient evidence for a reasonable jury to conclude that its theory is correct. *See Fla. Audubon Soc'y*, 94 F.3d at 672 (at summary judgment, the court "need not accept appellants' alleged chain of events if they are unable to demonstrate competent evidence to support each link"); *Dominguez*, 666 F.3d at 1362-64 (evaluating plaintiff's theory of supra-competitive pricing and concluding that no record evidence supported its theory of harm). A Rule 12(b)(1) motion, however, is not the occasion for evaluating the empirical accuracy of an economic theory. Because the economic facts alleged by the Plaintiffs are specific, plausible, and susceptible to proof at trial, they pass muster for standing purposes at the pleadings stage.

B.

We next turn to the District Court's alternative holding that the Plaintiffs failed to plead adequate facts to establish the existence of concerted activity. Under the familiar *Twombly-Iqbal* standard, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual

matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Jones v. Horne*, 634 F.3d 588, 595, 394 U.S. App. D.C. 261 (D.C. Cir. 2011) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)).

Section 1 of the Sherman Act prohibits any "contract, combination . . . or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. Thus, to make out a claim under this section, the Plaintiffs must allege that "the challenged anticompetitive conduct stems from . . . an agreement, tacit or express." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (internal quotation marks and brackets omitted). If such an agreement is among competitors, we refer to it as a horizontal restraint. *See Bus. Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 730, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988) (contrasting horizontal agreements from vertical restraints imposed by firms at different levels of distribution). The complaints are sufficient if they contain "enough factual matter (taken as true) to suggest that an agreement was made." *Id.* at 556. We conclude that the Plaintiffs have alleged a horizontal agreement to restrain trade that suffices at the pleadings stage.

According to the Plaintiffs, the member banks developed and adopted the Access Fee Rules when the banks controlled Visa and MasterCard. The rules served several purposes. First and foremost, the rules protected Visa and MasterCard from competition with lower-cost ATM networks, thereby permitting Visa and MasterCard to charge supra-competitive fees. Osborn Prop. Compl.

¶ 80. The rules also benefited the banks, who were equity shareholders of the associations (and therefore financial beneficiaries of the deal). *Id.* ¶¶ 116-117. And the rules protected banks from competition with each other over the types of bugs offered on bank cards. *See id.* ¶ 80 (alleging that "banks were assured that their MasterCard customers would not have to pay more in fees than their Visa cardholders, and they would not face competition at the network level").

That the rules were adopted by Visa and MasterCard as single entities does not preclude a finding of concerted action. The Supreme Court has "long held that concerted action under [Section] 1 does not turn simply on whether the parties involved are legally distinct entities," but rather depends upon "a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate." *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 191, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010). Thus, "a legally single entity violate[s] [Section] 1 when the entity [i]s controlled by a group of competitors and serve[s], in essence, as a vehicle for ongoing concerted activity." *Id.*

The allegations here – that a group of retail banks fixed an element of access fee pricing through bankcard association rules – describe the sort of concerted action necessary to make out a Section 1 claim. *See, e.g., Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978) (upholding antitrust action against association that imposed ethical rule prohibiting competitive bidding by members); *Robertson*

v. Sea Pines Real Estate Cos., 679 F.3d 278, 288-89 (4th Cir. 2012) (finding adequate allegations that real estate brokerages agreed to restrain market competition through anticompetitive service rules in their joint venture). Indeed, in 2003 the Second Circuit upheld a trial court's finding that rules adopted by Visa and MasterCard that prohibited member banks from issuing American Express or Discover cards violated Section 1 of the Act. *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003) (affirming *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322 (S.D.N.Y. 2001)).

The Defendants correctly observe that "[m]ere membership in associations is not enough to establish participation in a conspiracy with other members of those associations." *Fed. Prescription Serv., Inc. v. Am. Pharm. Ass'n*, 663 F.2d 253, 265, 214 U.S. App. D.C. 76 (D.C. Cir. 1981); *see also Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008) ("[M]embership in an association does not render an association's members automatically liable for antitrust violations committed by the association."). But the Plaintiffs here have done much more than allege "mere membership." They have alleged that the member banks *used* the bankcard associations to adopt and enforce a supracompetitive pricing regime for ATM access fees. *See, e.g.*, Osborn Prop. Compl. ¶ 81 ("The unreasonable restraints . . . originated in the rules of the former bankcard associations *agreed to by the banks themselves*.") (emphasis added); NAC Prop. Comp. ¶¶ 89-90 (alleging that member banks appointed representatives to the bankcard associations' Boards of Directors, which in turn established the anticompetitive access fee rules,

with the cooperation and assent of the member banks). That is enough to satisfy the plausibility standard.

Defendants next seek refuge in the fact that the banks reorganized MasterCard and Visa as publicly held corporations in 2006 and 2008, respectively. The Defendants contend that even if there had been agreements or conspiracies, the public offerings terminated them. *See* Appellees' Br. 40-41. In their view, the offering constituted a withdrawal by the member banks – and with that withdrawal, the cessation of any concerted action. The Rules that remained intact no longer represented an agreement by the member banks, but rather unilateral impositions by the bankcard associations themselves, over which the banks no longer had control.

To establish withdrawal, a defendant may show that it has taken "[a]ffirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators." *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 464, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978); *accord Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc.*, 648 F.3d 452, 460 (6th Cir. 2011); *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 616 (7th Cir. 1997). Even where a member of the conspiracy appears to sever ties with other co-conspirators, there is no withdrawal if that member continues to support or benefit from the agreement. *See United States v. Eisen*, 974 F.2d 246, 269 (2d Cir. 1992) (finding no withdrawal from conspiracy where defendant resigned from corrupt firm but continued to receive a portion of profits); *United States v. Antar*, 53 F.3d 568, 583

(3d Cir. 1995) (holding that resignation from conspiracy is insufficient if the defendant "continues to do acts in furtherance of the conspiracy and continues to receive benefits from the conspiracy's operations"), *overruled on other grounds, Smith v. Berg*, 247 F.3d 532, 534 (3d Cir. 2001). Whether there was an effective withdrawal is typically a question of fact for the jury. *See United States v. Bafia*, 949 F.2d 1465, 1480 (7th Cir. 1991); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. C-07-5944, 2014 U.S. Dist. LEXIS 35391, 2014 WL 1091589, at *9 (N.D. Cal. Mar. 13, 2014) (noting that withdrawal generally "is a fact-sensitive affirmative defense").

According to the complaints, each member bank "knew and understood that it and each and every other member of the applicable network would agree or continue to agree to be bound" by the rules both before and after the public offerings. NAC Prop. Compl. ¶ 102. To support that allegation, the plaintiffs point out that the banks have continued to issue Visa- and MasterCard-branded cards and to comply with the Access Fee Rules at their own ATMs. *Id.* ¶¶ 101, 103. Furthermore, even though the banks no longer directly control Visa and MasterCard, the plaintiffs observe, the banks work with those associations to route more transactions over their networks. For example, at least some member banks offer single-bug cards so that independent ATM operators have no choice but to run those transactions over a high-cost network run by Visa or MasterCard. *See* Osborn Prop. Compl. ¶¶ 83-85 (alleging that Bank of America, Wells Fargo, and Chase struck deals with Visa to drop alternative networks); *id.* ¶ 87 (alleging that Capital One and Fifth Third banks

offer MasterCard debit cards with no rival bugs on the back). Based on these allegations, a jury could no doubt conclude that, in so doing, the banks continue to protect Visa and MasterCard from price competition.

Plaintiffs also allege that several member banks continue to benefit indirectly from the Access Fee Rules. Because the major banks still own shares in Visa and MasterCard, *see* NAC Prop. Compl ¶¶ 99-100; Osborn Prop. Compl. ¶¶ 116-117, it can be inferred that the banks reap some ongoing financial benefit from increased profits at Visa and MasterCard. And by removing any incentive for customers to demand multi-bugged debit cards, the banks are able to avoid competition with each other on network offerings attached to their cards. *See* NAC Prop. Compl. ¶ 105 (referring to "collusive agreement not to compete on the basis of the efficiency of each bank's ATM services").

We therefore reject the Defendants' assertion that the public offerings dispelled any hint of conspiracy. The Plaintiffs have adequately alleged an agreement that originated when the member banks owned and operated Visa and MasterCard and which continued even after the public offerings of those associations.[3]

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3. The Plaintiffs plead in the alternative that the Access Fee Rules constitute unlawful vertical conspiracies to restrain trade. *See* Osborn Prop. Compl. ¶¶ 155-170; NAC Prop. Compl. ¶¶ 125-134. Stoumbos puts forward an alternative theory that the rules stem from unlawful "hub-and-spoke" conspiracies. *See* Stoumbos Prop. Compl. ¶ 53. Because we conclude that the proposed amended complaints allege a horizontal conspiracy, we do not reach the question of whether Plaintiffs' alternative theories are tenable.

Appendix B

In a final attempt to defeat the proposed complaints, the Defendants contend that even if the Plaintiffs have adequately pleaded standing and agreement, they have failed to state a claim because their allegations do not establish antitrust injury. Appellees' Br. 21-22; *see Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977) (defining antitrust injury as "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."). The Defendants do not provide a meaningful argument as to why antitrust standing is not present here, where the Plaintiffs have alleged that the Access Fee Rules chill competition among network service providers, leading to artificially high access fees for consumers and artificially low margins for the Defendants. *See, e.g.*, NAC Prop. Compl. ¶ 108 (arguing that Defendants' anticompetitive conduct has forced the independent operators to pay supra-competitive network fees). We therefore decline Defendants' invitation to affirm on that basis.

III.

For the foregoing reasons, we hold that the District Court erred in concluding that the Plaintiffs had failed to plead adequate facts to establish standing or the existence of a horizontal conspiracy to restrain trade. We therefore vacate the District Court's December 19 order denying the Plaintiffs' motion to amend the judgment, and we remand for further proceedings consistent with this opinion.[4]

So ordered.

4. As futility was the sole ground articulated by the District Court for denying the Plaintiffs' motions to amend the judgment and to file amended complaints, we see no reason that the motions should not be granted on remand. *See Foman*, 371 U.S. at 181-82 (explaining that if "the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits"); *Ciralsky*, 355 F.3d at 672-73 (recognizing that it may be appropriate to convert a judgment that dismisses a case into an order dismissing a complaint for statute of limitations purpose). But we leave this discretionary decision to the district judge, *see Firestone*, 76 F.3d at 1208, whose view of the case is more nuanced than our own.

APPENDIX C — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, DECIDED DECEMBER 19, 2013

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CA No. 1:11-cv-01803 (ABJ),CA No. 1:11-cv-01831 (ABJ),CA No. 1:11-cv-01882 (ABJ)

NATIONAL ATM COUNCIL, INC., *et al.*,

Plaintiffs,

v.

VISA INC., *et al.*,

Defendants.

ANDREW MACKMIN, *et al.*,

Plaintiffs,

v.

VISA INC., *et al.*,

Defendants.

MARY STOUMBOS,

Plaintiff,

Appendix C

v.

VISA INC., *et al.*,

Defendants.

December 19, 2013, Decided

MEMORANDUM OPINION

Before the Court are motions to amend the complaints in three separate antitrust lawsuits. Plaintiffs in all three cases allege that certain pricing requirements that defendants Visa and MasterCard impose on operators of automatic teller machines ("ATMs") violate section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 *et seq.* (2012). On February 13, 2013, the Court dismissed the lawsuits without prejudice for failing to plead sufficient facts to allege either injury in fact or the existence of an agreement or conspiracy. *Nat'l ATM Council, Inc. v. Visa Inc.*, 922 F. Supp. 2d 73 (D.D.C. 2013). Shortly after, plaintiffs filed motions to alter or amend the Court's judgment under Federal Rule of Civil Procedure 59(e), asking the Court to amend the judgment to dismiss the complaints, but not the cases, so plaintiffs could then move to amend their complaints.[1] While these motions were pending, plaintiffs

1. *See* Pls.' Mot. to Alter or Amend the Ct.'s Feb. 13 Order Pursuant to Fed. R. Civ. P. 59(e), *NAC* [Dkt. # 36], *Mackimin* [Dkt. # 59], *Stoumbos* [Dkt. # 29]. Visa, MasterCard, and the bank defendants filed a single joint memorandum in opposition to plaintiffs' motions to alter or amend. *See* Mem. P. & A. in Opp. to Pls.' Mot. to Alter or Amend this Ct.'s Feb. 13 Order Pursuant

filed motions for leave to amend their complaints under Federal Rule of Civil Procedure 15(a).[2]

Plaintiffs attempt to remedy the pleading deficiencies in their first amended complaints by setting forth new factual allegations in their proposed second amended complaints. The allegations of injury in the new complaints are still highly conclusory, and since they depend upon a series of intervening actions by parties not before the

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to Fed. R. Civ. P. 59(e), *NAC* [Dkt. # 37], *Mackmin* [Dkt. # 60], *Stoumbos* [Dkt. # 30].

2. *See* Mot. of Pls. National ATM Council Inc. for Leave to File 2d Am. Class Action Compl. [Dkt. # 39] ("NAC Mot. to Amend"); Mot. of Mackmin Pls. for Leave to File 2d Am. Class Action Compl. [Dkt. # 65] ("Mackmin Mot. to Amend"); and Pl.'s Mot. for Leave to File 2d Am. Compl. [Dkt. # 32] ("Stoumbos Mot. to Amend").

Visa and MasterCard filed a single joint opposition to the motions to amend. *See* Visa and MasterCard Defs.' Mem. P. & A. in Opp. to Pls.' Mot.s for Leave to Amend, *NAC* [Dkt. # 42], *Mackimin* [Dkt. # 69], *Stoumbos* [Dkt. # 34] (collectively, "Visa/MC Opp.") The bank defendants filed a joint memorandum in opposition for leave to amend in *Mackimin. See* Bank Defs.' Mem. in Opp. to Pls.' Mot. for Leave to File 2d Am. Class Action Compl. [Dkt. # 68] ("Banks' Opp.").

Each set of plaintiffs filed separate reply briefs. *See* Reply Mem. of P. & A. of Pl. ATM Operators to Bankcard Ass'n Defs.' Opp. to Pls.' Mot. for Leave to Amend [Dkt. # 44] ("NAC Reply"); Pls.' Reply Mem. in Further Supp. of Their Mot. for Leave to File an Am. Compl. [Dkt. # 70] ("Mackmin Reply"); Pls.' Reply in Further Supp. of Mot. for Leave to Amend [Dkt. # 35] ("Stoumbos Reply").

Court, they fail to state a redressable injury in fact. And even if the consumer plaintiffs have overcome the standing hurdle, they have yet to allege facts to support the conspiracy allegations. Accordingly, the Court will deny the motions to amend because the amendments in all three cases would be futile. The Court will also deny the motions to alter the judgment as moot.

BACKGROUND

All three proposed second amended complaints set forth additional allegations about ATM transactions, including additional facts about the role of the entities involved in these transactions and the fees they pay, and they add detail to support plaintiffs' theory of injury.

As the new complaints recount, consumers use personal identification number ("PIN") cards issued by their banks to access ATMs at locations other than a bank branch. When a consumer uses an ATM, the transaction request is transmitted electronically from the ATM to the bank that acquires the transaction, called the "acquiring bank." 2d Am. Class Action Compl., Ex. A to NAC Mot. to Amend [Dkt. # 39-2] ("NAC Proposed Compl.") ¶¶ 40, 45; 2d Am. Class Action Compl., Ex. A to Mackmin Mot. to Amend ("Mackmin Proposed Compl.") [Dkt. # 65-2] ¶ 58. The acquiring bank then sends the request electronically to the "issuing bank," which is the bank that issued the ATM card to the consumer and maintains the account from which the consumer seeks to withdraw money. NAC Proposed Compl. ¶ 45; *see* Mackmin Proposed Compl. ¶ 61. If the issuing bank confirms that

the consumer has sufficient funds for the withdrawal, it sends an authorization back to the ATM operator, and the ATM dispenses the cash to the consumer. NAC Proposed Compl. ¶ 54.

ATM networks, such as Visa, MasterCard, Star, NYCE, Star, Pulse, or others, provide the infrastructure through which the data in an ATM transaction is transmitted electronically from the ATM to the acquiring bank, to the issuing bank, and back.[3] Some ATMs are bank-owned, while others are owned and operated by independent entities. *Id.* ¶ 54; Mackmin Proposed Compl. ¶ 69; 2d Am. Class Action Compl., Attach. A to Stoumbos Mot. to Amend [Dkt. # 32-3] ("Stoumbos Proposed Compl.") ¶ 5. In order to transmit a transaction through an ATM network, the ATM operator must have a contract with that network. Banks that issue Visa-or MasterCard-branded PIN cards are automatically granted access to the Visa or MasterCard networks. Non-bank, independent operators obtain access to Visa, MasterCard, and other ATM networks by affiliating with a sponsoring financial institution, which acts as the acquiring bank for the independent operator. NAC Proposed Compl. ¶ 48; Mackmin Proposed Compl. ¶ 69; Stoumbos Proposed

3. It is not clear from the complaints whether a network, such as Visa, MasterCard, or NYCE, is used to transmit a transaction between an ATM and an acquiring bank when the acquiring bank owns the ATM. *See* NAC Proposed Compl. ¶ 46. For example, if a consumer uses a Bank of America PIN card at an ATM owned and operated by Wells Fargo, it is not clear if the transmission between Wells Fargo's ATM and Wells Fargo as the acquiring bank occurs through a network or through an internal Wells Fargo system.

Compl. ¶¶ 55, 76. Sponsoring financial institutions ensure that the independent operator is properly registered with a network provider and follows the network's agreements. NAC Proposed Compl. ¶ 48; Mackmin Proposed Compl. ¶ 69; Stoumbos Proposed Compl. ¶¶ 76-77.

The designation of which network is used to process an ATM transaction depends not only on the networks the ATM can access, but also on the network or networks the consumer's PIN card is authorized to use, which are ordinarily identified by network logos, or "bugs," on the reverse side of the card. NAC Proposed Compl. ¶ 52; Mackmin Proposed Compl. ¶¶ 58-59; *see* Stoumbos Proposed Compl. ¶ 69. So, for example, if a consumer's PIN card carries only the Visa bug, an ATM transaction can only be sent through the Visa network, but if it carries multiple bugs, such as Visa, STAR, NYCE, and Pulse, the transaction can be sent through any of those networks that the ATM can access.

When a customer uses an ATM that is not owned by his bank -- whether it is owned by another bank or by an independent operator -- the transaction is called a "foreign ATM transaction."[4] NAC Proposed Compl. ¶ 46; Mackmin Proposed Compl. ¶ 60; *see* Stoumbos Proposed Compl. at 20 n.2. The consumer in this type of transaction may be subject to two fees: (1) foreign ATM fees and (2) surcharge or access fees. NAC Proposed Compl. ¶¶ 53,

4. When a customer uses an ATM operated by his own bank, the acquiring bank and issuing bank are the same. These transactions are called "on us" transactions, NAC Proposed Compl. ¶ 46, and are not at issue in these cases.

55, 57, 60; Mackmin Proposed Compl. ¶ 63; Stoumbos Proposed Compl. ¶¶ 61, 72. The foreign ATM fee is a fee the consumer's own bank may charge its customer for using another entity's ATM. NAC Proposed Compl. ¶ 55; Mackmin Proposed Compl. ¶ 63; Stoumbos Proposed Compl. at 20 n.2. These fees are not at issue in these cases.

The access fee is the fee a consumer pays to the ATM operator for using its ATM. NAC Proposed Compl. ¶ 53; Mackmin Proposed Compl. ¶ 63; Stoumbos Proposed Compl. ¶ 61. The consumer has the option of accepting or declining the fee at the point of the transaction: if the consumer accepts the fee, the transaction proceeds, and if not, the consumer's card is returned and the transaction ends. NAC Proposed Compl. ¶ 53. These are the fees at issue in these cases -- or, more specifically, rules imposed by Visa and MasterCard on ATM operators governing these fees are at issue in these cases.

Visa and MasterCard each require ATM operators to agree that they will not charge consumers higher access fees for transactions processed over the Visa and MasterCard networks than for transactions processed over other networks. NAC Proposed Compl. ¶¶ 63-71; Mackmin Proposed Compl. ¶¶ 77-78; Stoumbos Proposed Compl. ¶¶ 78-79. These access fee rules prevent ATM operators from offering consumers differentiated access fees based on the networks used for the transactions.

To understand plaintiffs' claims that the rules harm competition, it is necessary to delve more deeply into the financial relationships underlying an ATM transaction. In

the complaints that were dismissed, plaintiffs' allegations centered around the claim that consumers were harmed by the rules because they prevented ATM operators from passing to consumers the savings obtained through the use of "low cost" networks. But as the Court's opinion explains, plaintiffs failed to allege facts to support this conclusion since they did not allege that other networks cost less to use than the Visa and MasterCard networks. *See Nat'l ATM Council*, 922 F. Supp. 2d 73. Indeed, at oral argument, it was revealed that it is the networks that pay the ATM operators, and not the other way around. So the new complaints advance a more nuanced theory based upon these financial realities, and they explain that what plaintiffs previously meant by "low cost" networks are the alternative networks that enable the ATM operators to realize higher returns.

Independent operators can earn revenue on an ATM transaction from two sources: through the consumer-paid access fees described above, and through "interchange" fees paid to the networks by the banks and then shared with the operators by the networks. NAC Proposed Compl. ¶ 60; Mackmin Proposed Compl. ¶¶ 63, 66, 91; Stoumbos Proposed Compl. ¶¶ 71-72.

Networks charge interchange to the consumer's issuing bank. NAC Proposed Compl. ¶¶ 58, 60. As the association of ATM operators explains:

> The interchange fee originally served to compensate foreign banks for granting an issuing bank's customer access to the foreign

> bank's ATM services. After the advent of nonbank ATM operators, however, interchange became an important source of income for ISOs [Independent Sales Organizations] and allows ISOs [to] keep access fees low while still making a profit. Each ATM network sets its own ATM interchange rate to issuing banks, ranging from zero to as much as $0.60 per transaction.

Id. ¶ 56. According to the ATM operator plaintiffs, ATM operators are not paid interchange directly. *Id.* ¶ 55. Rather, networks determine the amount of interchange they will charge to the issuing bank, and then the networks pass some portion of the interchange from the issuing bank to the ATM operator.[5] *Id.* ¶ 58.

The amount of the interchange received by the ATM operator can be affected by another fee: the network service fee, which is called the "acquiring fee" when the ATM operator pays it to the network, and referred to as the "switch fee" when the issuing bank pays it to the network. *See id.* ¶¶ 57-58; Mackmin Proposed Compl. ¶¶ 63-64. Some networks, including Visa and MasterCard, deduct a portion of the interchange fee paid by the issuing bank before it is passed to the ATM operator, and the share they keep is called the network service fee. *See* NAC Proposed Compl. ¶ 58; Stoumbos Proposed Compl. ¶ 14; *see also* Mackmin Proposed Compl. ¶¶ 91, 93. Other

5. It is unclear from the complaints why the networks determine the level of interchange the issuing bank must pay if the purpose of interchange is to compensate ATM operators for granting an issuing bank's customer access to their ATMs.

networks do not deduct anything from the interchange fee, so the full amount of interchange goes to the ATM operator.

The amount of interchange the ATM operator receives from the issuing bank after any deduction for the network service fee is called "net interchange." NAC Proposed Compl. ¶ 58; Stoumbos Proposed Compl. ¶ 71. The net interchange received from the banks and the access fee paid by the consumer are the two components of an ATM operator's revenue on an ATM transaction.

Visa and MasterCard charge the highest network service fees of all the networks. So the amount of net interchange, and thus the overall revenue that ATM operators receive for transactions processed on the Visa and MasterCard networks, is lower than what they receive for transactions processed on other networks. NAC Proposed Compl. ¶ 59; Mackmin Proposed Compl. ¶ 93; *see also* Stoumbos Proposed Compl. ¶ 45. In other words, it is more profitable for ATM operators to use the alternative networks, which plaintiffs refer to as "less costly" in their complaints. International transactions through the Visa and MasterCard networks can bear a negative interchange, leaving ATM operators to subsidize these transactions with interchange from other transactions. NAC Proposed Compl. ¶ 59; Mackmin Proposed Compl. ¶ 92.

Under the terms of the challenged rules, ATM operators may not charge consumers access fees for Visa or MasterCard transactions that are higher than the

access fees charged for transactions using other networks. Plaintiffs allege that this means the operators cannot "steer" consumers to use the "less costly" networks that take a smaller bite out of the interchange and leave the operator with higher revenue. Plaintiffs contend that the access fee rules result in inflated access fees for consumers because ATM operators must set the fees to cover the costs -- or reduced revenue -- of transactions on the Visa and MasterCard networks. They also complain that the rules prevent ATM operators from offering lower fees to consumers who use networks with lower network fees and higher net interchange. They claim that the rules reduce competition in the network services market because the rules prevent consumers from being able to discern a price difference among network providers and demand a lower price for ATM services.

STANDARD OF REVIEW

According to Federal Rule of Civil Procedure 15(a)(2), the Court should "freely give leave [to amend] when justice so requires." But the decision to grant leave to file an amended complaint is not automatic. The Court may assess the proposed new pleading to determine whether the amendment would be futile. *Foman v. Davis*, 371 U.S. 178, 181-82, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962). And a court does not abuse its discretion if it denies leave to amend or supplement based on futility. *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1099, 317 U.S. App. D.C. 281 (D.C. Cir. 1996) (agreeing with the district court that an amendment was futile when the facts alleged in the complaint "establish[ed] beyond doubt that the

Government did not violate [plaintiff's] due process rights"); *Ruffolo v. Oppenheimer & Co.*, 987 F.2d 129, 132 (2d Cir. 1993) (holding that leave to amend was properly denied on futility grounds since new pleading failed to allege any additional significant facts); *Ross v. DynCorp*, 362 F. Supp. 2d 344, 364 n.11 (D.D.C. 2005) ("While a court is instructed by the Federal Rules of Civil Procedure to grant leave to amend a complaint 'freely,' it need not do so where the only result would be to waste time and judicial resources. Such is the case where the Court determines, in advance, that the claim that a plaintiff plans to add to his or her complaint must fail, as a matter of law . . . ."); *M.K. v. Tenet*, 216 F.R.D. 133, 137 (D.D.C. 2002) ("A court may deny a motion to amend the complaint as futile when the proposed complaint would not survive a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss."); *see also* 3 Moore's Federal Practice § 15.15[3] (Matthew Bender 3d ed.) ("An amendment is futile if it merely restates the same facts as the original complaint in different terms, reasserts a claim on which the court previously ruled, fails to state a legal theory, or could not withstand a motion to dismiss.").

ANALYSIS

I. THE PROPOSED AMENDED COMPLAINTS DO NOT ALLEGE AN INJURY IN FACT OR INJURY THAT IS REDRESSABLE BY THE COURTS

As the Court previously held, every plaintiff in federal court bears the burden of establishing the three elements that make up Article III standing: injury in

fact, causation, and redressability. *Nat'l ATM Council*, 922 F. Supp. 2d at 80 n.9, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). The Court dismissed plaintiffs' first amended complaints, in part, for failing to allege injury in fact, because they did not allege facts to support a claim of injury that was concrete and particularized and actual or imminent, rather than speculative or generalized. *Id.* Plaintiffs attempt to remedy this deficiency by providing additional facts about how the access fee rules affect their businesses and pocketbooks. Although the new complaints do more clearly elucidate both the financial relationships at issue and plaintiffs' theory of the case, the claims are still too conclusory and too dependent on a number of intervening actions by a series of third parties to state an injury in fact. The Court also finds that the details set out in the new complaints indicate that plaintiffs' alleged harms would not be redressable, even if the Court were to provide them the relief they seek.

A. The NAC Proposed Amended Complaint

Plaintiffs in the *NAC* case are an association of independent ATM operators and thirteen individual independent ATM operators. NAC Proposed Compl. ¶ 6. The Court held that the NAC first amended complaint failed to allege the necessary injury in fact because it did not set forth "facts that could support an inference that the access fee requirements injure the *plaintiffs* -- the ATM operators." *Nat'l ATM Council, Inc.*, 922 F. Supp. 2d at 88. In their revised complaint, NAC plaintiffs have now made it clear that their real concerns are based upon the

network service fees that Visa and MasterCard deduct from the interchange -- not the access fees or the access fee rules. This is one reason why their challenge to the access fee rules under the antitrust laws ultimately fails.

ATM operators have no control over the interchange that networks charge to issuing banks or the amount of service fees the networks deduct from the interchange as a charge to the ATM operators. NAC Proposed Compl. ¶ 58. Rather, they must take what they get as net interchange. Visa and MasterCard take a higher deduction, and in the case of international transactions over Visa and MasterCard networks, the net interchange can be a negative amount. *Id.* ¶ 59. The Visa and MasterCard access rules at issue here prohibit the ATM operators from charging more to customers who use those networks, so ATM operators must set one access fee for each ATM terminal, "which serves as its retail price for all ATM transactions at that terminal." *Id.* ¶ 79. The upshot of this arrangement, then, is that independent ATM operators reap lower profits on Visa and MasterCard transactions, and they must partially subsidize Visa and MasterCard international transactions with interchange revenue from other networks. *Id.* But for the access rules, NAC plaintiffs assert, ATM operators would be able to make up for the revenue shortfall by charging higher access fees for transactions using the Visa and MasterCard networks, charging less for transactions over other networks, and steering consumers to use other networks that generate more revenue for them. *Id.* ¶ 82. This, they assert, would lead to more competition in the network services market. *Id.* ¶ 83.

Assuming that all of these facts are true, the NAC second amended complaint still does not show that the ATM access rules injure the ATM operators. First of all, ATM operators already route transactions through whatever network is available that pays them the highest net interchange. As the operators themselves state: "When an ATM has access to multiple networks that match the bug(s) on the customer's card, the ATM operator's processor can choose which network over which to route the transaction and customarily routes the transaction through the 'least costly' network, that is, the network that deducts the lowest network services fee and remits the greatest net interchange." *Id.* ¶ 41. So even if consumers lack a choice at the point of the transaction, the operators have the means already in place to maximize their profits.

Second, the second amended complaint makes plain that what really bothers the ATM operators is the service fee -- the fact that Visa and MasterCard deduct a higher portion of the interchange than other networks do, leaving the operators to make less money on Visa and MasterCard transactions. As paragraph 82 of their complaint indicates, what it appears that they would like to do, then, is *raise* the access fee they charge to Visa and MasterCard customers, not lower the fees charged for other networks: "But for the ATM Restraints, ATM ISOs would charge different access fees depending on the level of network services fees deducted by the different networks and the cost of carrying those networks international transactions." *Id.* ¶82. So this does not suggest that the operators are the victims of an antitrust conspiracy.

Third, the challenged rules do not prevent operators from increasing access fees across the board to cover any revenue shortfall associated with the use of the Visa and MasterCard networks. Plaintiffs contend that Visa and MasterCard are the primary global brands, and ATM operators must accept their branded cards to remain viable, but if the operators can pass the economic impact of higher network fees on to customers, it is difficult for the Court to discern how the access fee rules cause them any harm.

NAC plaintiffs contend they are nonetheless harmed because they "prefer networks that pay a higher net interchange, as this gives them the best price for their ATM services and allows them to charge a lower access fee to maximize the quantity of ATM services demanded." *Id.* ¶ 61. They attempt to liken the access fee rules to "anti-steering" rules, such as merchant restraints that have been condemned by the Department of Justice. According to plaintiffs, at one time, Visa and MasterCard imposed rules on merchants, which are now the subject of a consent decree, that prevented merchants from providing "discounts or non-price benefits, to encourage customers to use the brands of General Purpose Cards that impose lower costs on the merchants." *Id.* ¶ 85; *see also id.* ¶¶ 86-88.[6] But the objectionable merchant rules differ from the access rules challenged here because consumers are able to choose among the credit cards in their wallets when offered a discount or other incentive to use a particular

6. The NAC proposed complaint does not identify the case or the source of the quoted statement. *See id.* ¶¶ 85-88.

credit card at the point of a transaction. In other words, those consumers can actually be "steered." But in an ATM transaction, consumers do not have any opportunity to choose which network will be used to process their transactions. The network is determined by which bugs appear on the PIN cards issued by the customers' banks and which networks are available at -- and then selected by -- any given ATM.

Given these facts, the NAC plaintiffs articulate their anti-steering theory of injury as follows: in the absence of the access fee rules, ATM operators would offer consumers differentiated access fees at the point of transaction, consumers would then demand multi-bug PIN cards from their banks, their banks would provide these cards, and the market for network services would become more competitive, all resulting in more choice of networks and lower access fees for consumers.

Again, this scenario is focused on relieving an alleged burden on consumers and not the ATM operators. But in any event, if this is plaintiffs' theory of harm, it is too speculative. As the Court noted previously, injury in fact requires a plaintiff to allege an injury that is both concrete and particularized and actual or imminent, rather than speculative or generalized. *Nat'l ATM Council*, 922 F. Supp. 2d at 80 n.9, citing *Lujan*, 504 U.S. at 560.

The Court agrees with defendants that this alleged injury is based on an attenuated, speculative chain of events, that relies on numerous independent actors, including the PIN card issuing banks. Visa/MC Opp. at

10; *see also* Bank's Opp. at 4. "Such a protracted chain of causation fails both because of the uncertainty of several individual links and because of the number of speculative links that must hold for the chain to connect the challenged acts to the asserted particularized injury." *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 670, 320 U.S. App. D.C. 324 (D.C. Cir. 1996). There is no guarantee that independent ATM operators would reduce access fees for alternative networks rather than raising access fees for Visa and MasterCard networks. It is not clear that consumers troubled by access fees would rise up and demand multi-branded cards from their banks when they can already avoid access fees all together by using their own bank ATMs in the first place. And it is not clear whether the banks would have any incentive to offer PIN cards that are different than those they are issuing now. Accordingly, the Court holds that the new NAC complaint does not present a particularized, but rather a speculative and generalized, claim of injury, and the operator plaintiffs lack standing.

For similar reasons, the ATM operators' claims pose issues of redressability. The more independent factors in a chain of causation, the more unlikely it will be that the Court can address the alleged harm even if it were to grant plaintiffs the relief they request. *See Lujan*, 540 U.S. at 560-61 (holding that plaintiff's injury must be fairly traceable to the challenged action of the defendant and not the result of some third party not before the court); *see also Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 496 n.10, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982) (Brennan, J., dissenting) (explaining that, in cases in which standing

was denied, "the difficulty was that an intermediate link in the causal chain -- a third party beyond the control of the court -- might serve to bar effective relief. Even if the court acceded to plaintiffs' view of the law, the court's decree might prove ineffectual to relieve plaintiffs' injury because of the independent action of some third party"). Here, plaintiffs ask the Court to eliminate Visa's and MasterCard's access fee rules. But for the operator plaintiffs to obtain what they seek -- an increased volume of consumer transactions on alternative networks at their terminals, resulting in either added pressure on Visa and MasterCard to reduce their network fees or sufficient additional profits to enable the operators to more easily absorb those fees -- multiple independent actors must take multiple independent steps. Given that effective relief for operators depends, in part, on the actions of these independent actors, the Court finds that their claim is not redressable and, accordingly, they lack standing for that reason as well.

B. The Two Consumer Complaints

In dismissing the Mackmin first amended complaint, the Court held that the plaintiffs did not allege an injury in fact because they did not "articulate how these restrictions affected them in particular." *Nat'l ATM Council*, 922 F. Supp. 2d at 85. They did not allege that the named plaintiffs conducted transactions at an ATM where an alternative network was available, that they had PIN cards that could be used on alternative networks, or that the ATMs they used could access these alternative networks. *Id.* at 85-86. In dismissing the Stoumbos first

amended complaint, the Court held that it failed to allege that named plaintiff Mary Stoumbos had a PIN card that allowed transactions to be processed over alternative networks or that she used it on an ATM connected to any alternative networks. *See id.* at 86.

The consumers' proposed second amended complaints plead additional facts with respect to these issues,[7] but like the NAC plaintiffs, they do not allege that consumers have the ability to choose which network will be used to transmit their transactions at the point of the transaction. *See* Mackmin Proposed Compl. ¶ 59 (alleging that the ATM operator, not the consumer, chooses the network to use for each transaction); Stoumbos Proposed Compl. ¶ 85 (alleging only that current technology would allow for ATMs to be reprogrammed in the future to allow this). Thus, they could not have suffered an actual, current injury because, even if the alternative networks had lower

7. The Mackmin proposed amended complaint states that plaintiff Andrew Mackmin has a Visa-branded card "with no bugs on the back" and plaintiff Sam Osborn has a MasterCard--branded card which "shows no other network 'bugs' on the card." Mackmin Proposed Compl. ¶¶ 15, 17. Plaintiff Barbara Inglis has a multiple-bug card and "has incurred access fees in connection with cash withdrawals from Defendant Banks." *Id.* ¶ 16.

The Stoumbos proposed amended complaint alleges that plaintiff Mary Stoumbos has a PIN card that bears the Visa, MasterCard, CU Services Centers, Co-Op Network, and Star network bugs and that she used an ATM connected to the Visa, MasterCard, and Star networks. Stoumbos Proposed Compl. ¶ 18. She also alleges that the Star network pays a higher net interchange to ATM operators than either Visa or MasterCard. *Id.*

access fees, they could not have selected one of those networks to handle their transaction.[8]

More importantly, their theory of antitrust injury is the same as the NAC plaintiffs': that the access fee rules prevent competition in the ATM network market and that their elimination would ultimately result in lower access fees for consumers. *See, e.g.*, Mackmin Reply at 5 ("[Osborn's] access fees were higher than they would be in a competitive market, because absent the Restraints, Defendant banks, ATM operators, and networks would be competing for the transaction, both through providing access to alternative networks, and lowering their fees to compete with other ATM operators, networks, and each other."); Stoumbos Reply at 10 ("The anticompetitive impacts in each market lead directly to higher network costs (lower interchange revenues) to ATM operators and higher ATM Access fees to consumers."). These assertions are highly conclusory, and they depend on a series of actions by multiple, independent actors who are not before the Court.

While the Court appreciates that these plaintiffs, unlike the ATM operators, are consumers, and that the purpose of section 4 the Clayton Act was to create a remedy for consumers "who were forced to pay excessive prices by the giant trusts and combinations that dominated certain interstate markets," *Assoc. Gen. Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519, 530, 103 S. Ct. 897, 74

8. Furthermore, the claim that eliminating the rules would reduce the access fees is highly speculative. It is equally likely that the ATM operators would raise the fees for Visa and MasterCard transactions if freed from the restrictions.

L. Ed. 2d 723 (1983), consumer plaintiffs must nonetheless have standing to sue. The complaints still founder on the injury in fact and redressability elements, and plaintiffs do not have standing. Even if the Court is incorrect about that matter, and the consumer plaintiffs have alleged a sufficiently actual and imminent injury to confer standing, they have not yet cured the other deficiency that led to the dismissal of the complaints: the lack of a conspiracy.

II. THE PROPOSED AMENDED COMPLAINTS DO NOT ALLEGE AN AGREEMENT

A violation of Section 1 of the Sherman Antitrust Act requires a showing of an agreement and a restraint of trade. 15 U.S.C. § 1 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."). The Court ruled that the first amended complaints failed to plead sufficient facts to allege the existence of an agreement. They failed to allege that the member banks of Visa or MasterCard agreed among themselves to do anything. Allegations that the member banks made a prior agreement when they were members of the bankcard associations do not suffice to allege a current agreement. *Nat'l ATM Council*, 922 F. Supp. 2d at 92. Further, they did not allege facts that the banks could or did exercise any control over Visa or MasterCard making the networks a vehicle through which they could carry out the alleged conspiracy. *Id.* at 93. And, plaintiffs did not allege facts to allow the Court to infer an unlawful agreement, such as facts showing that the actions of the participants represented a radical shift from the industry's prior business practices or that they were against the participants' own interests. *Id.* at 94-95.

The proposed complaints seek to remedy these issues by providing additional factual allegations.

Plaintiffs reassert many of the same facts as originally pled.[9] They allege that Visa's and MasterCard's member banks are participants in an agreement because they know that they are all bound by the access fee rules that existed prior to the IPOs. NAC Proposed Compl. ¶ 103; Mackmin Proposed Compl. ¶ 119; Stoumbos Proposed Compl. ¶ 41. But as the Court previously held, "membership in an association -- much less membership in a defunct association -- is not enough to establish agreement or conspiracy." *Nat'l ATM Council*, 922 F. Supp. 2d at 93. Thus, plaintiffs provide no additional facts that constitute direct evidence of agreements that would support a claim of a current horizontal conspiracy among the member banks.[10]

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9. They reassert that Visa and MasterCard were formerly bankcard associations owned and operated by their competing member banks. NAC Proposed Compl. ¶ 89; Mackmin Proposed Compl. ¶ 108; Stoumbos Proposed Compl. ¶¶ 28-29. Member banks elected the associations' Board of Directors, and these Boards created rules and operating regulations, including the ATM Restraints. NAC Proposed Compl. ¶ 90; Mackmin Proposed Compl. ¶ 109; Stoumbos Proposed Compl. ¶ 29. In 2006 and 2008 respectively, MasterCard and Visa each completed IPOs and became independent corporations. NAC Proposed Compl. ¶ 89; Mackmin Proposed Compl. ¶¶ 116-17; Stoumbos Proposed Compl. ¶ 38-39. The member banks "retain a significant financial and equity interest" in the resulting entities. NAC Proposed Compl. ¶¶ 99-100; Mackmin Proposed Compl. ¶¶ 116-17; Stoumbos Proposed Compl. ¶¶ 38-39.

10. Also, the new complaints acknowledge that, after the IPOs, member banks do not control Visa and MasterCard, so

As for facts that would allow the Court to infer the existence an unlawful agreement, the proposed consumer complaints allege that the access fee rules are not in the individual interests of the member banks, and that they would only make sense if all member banks agreed to them. Mackmin alleges that the rules are contrary to any one bank's self-interest because "[a] bank that was not bound by the Restraints could charge lower prices for transactions conducted over networks that pay a higher net interchange fee, and attract customers away from banks that complied with the Restraints." Mackmin Proposed Compl. ¶ 98. Stoumbos alleges that the rules are against the interests of ATM operators, who would rather maximize revenues by retaining the flexibility to set discounted access fees for transactions that can be routed to other networks that pay higher net interchange. Stoumbos Proposed Compl. ¶ 53. But Stoumbos does not explain how this applies to banks. The NAC plaintiffs do not expressly state that the rules conflict with an individual bank's interest, but they do allege that the rules aid the banks if all banks agree to them because the rules "shield[] banks (as issuers of cards) from facing interbrand competition (from other banks using more efficient ATM networks) on the basis of the kind of debit card each bank" issues and that it is "in their interests as banks to abide by the ATM Restraints to avoid competitive ATM access fees." NAC Proposed Compl. ¶¶ 103, 105.

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there is no basis to conclude the corporations are simply a shell through which the banks continue a horizontal agreement. NAC Proposed Compl. ¶¶ 99-100; Mackmin Proposed Compl. ¶¶ 116-17; Stoumbos Proposed Compl. ¶¶ 38-39.

Assuming the truth of these allegations, the question for the Court is whether they are sufficient for the Court to infer an unlawful agreement. The Court concludes they are not, because other alleged facts indicate that banks have reasons to join or stay in the Visa and MasterCard networks based on their individual interests. The fact that Visa and MasterCard process the majority of ATM transactions, NAC Proposed Compl. ¶ 39, Mackmin Proposed Compl. ¶ 57, Stoumbos Proposed Compl. ¶ 63, suggests it is in each bank's individual interests to join these networks. The Mackmin plaintiffs further allege that Visa and MasterCard offer member banks favorable network fees to enter into exclusive deals to market their cards only. Mackmin Proposed Compl. ¶¶ 83-87. These facts support a conclusion that entering into agreements with these networks is in the banks' individual interests, which weighs against an inference of an agreement.

In the absence of any other allegations that support a finding of an agreement, the conspiracy claims lack the one thing they need: a conspiracy.

Appendix C

CONCLUSION

For the reasons set forth above, the Court will deny plaintiffs' motions for leave to file amended complaints with prejudice and deny as moot their motions to amend the judgment.

/s/ Amy Berman Jackson
AMY BERMAN JACKSON
United States District Judge

DATE: December 19, 2013

APPENDIX D — JURY TRIAL DEMANDED OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED APRIL 18, 2013

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

C.A.No.: 11-cv-1831
Assigned to: Amy Berman Jackson
Assign Date: 10/12/2011
Description: Antitrust

ANDREW MACKMIN
500 Central Ave., Apt. 612
Union City, NJ 07087,

BARBARA INGLIS
139 Woodhull Road
Huntington, NY 11743,

and

SAM OSBORN
1713 U StreetNW, Apt. 1D
Washington, DC 20009,

Plaintiffs,

v.

VISA INC., VISA U.S.A. INC., VISA INTERNATIONAL SERVICE ASSOCIATION, and PLUS SYSTEM, INC.

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595 Market Street
San Francisco, CA 94105-2802,

MASTERCARD INCORPORATED and
MASTERCARD INTERNATIONAL
INCORPORATED d/b/a Mastercard Worldwide
2000 Purchase Street
Purchase, NY 10577,

BANK OF AMERICA, NATIONAL ASSOCIATION
Bank of America Corporate Center
Charlotte, NC 28255,

NB HOLDINGS CORPORATION
401 North Tryon Street
Charlotte, NC 28202,

BANK OF AMERICA CORPORATION Bank of
America Corporate Center 100 North Tryon Street
Charlotte, NC 28255,

CHASE BANK USA, N.A. and JPMORGAN
CHASE & CO.
270 Park Avenue
New York, NY 10017,

JPMORGAN CHASE BANK, N.A.
1 Chase Manhattan Plaza
New York, NY 10081,

and

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WELLS FARGO & COMPANY
and WELLS FARGO BANK, N.A.
420 Montgomery Street
San Francisco, CA 94163,

Defendants.

SECOND AMENDED CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

[TABLE OF CONTENTS INTENTIONALLY OMITTED].

Plaintiffs Andrew Mackmin, Barbara Inglis, and Sam Osborn ("Plaintiffs"), on behalf of themselves and all others similarly situated (the "Class" as defined herein), upon personal knowledge as to the facts pertaining to themselves and upon information and belief as to all other matters, based on the investigation of counsel, bring this class action for damages, injunctive relief and other relief pursuant to the federal and state antitrust Jaws, demand a trial by jury, and allege as follows:

I. INTRODUCTION

1. This lawsuit is brought as a proposed class action against Defendants for orchestrating, implementing, and facilitating a conspiracy to fix the fees ATMs charge to customers at the time they withdraw cash, called "ATM access fees."

2. Central to this scheme are contractual restraints originated by banks, and maintained by Visa and MasterCard, which disallow ATMs from offering discounts for withdrawals processed over their competitors' networks (the "Restraints"), to reflect the lower net cost of processing the transaction. This is particularly significant, because as shown below, Visa and MasterCard consistently compensate ATM operators at lower levels than any of their network competitors.

3. In addition, Defendants have pursued a program of issuing "single-bug" debit cards, which can only access Visa and MasterCard's networks, and not those of their competitors. This exclusionary practice furthers Defendants' scheme by retarding the growth of competing networks.

4. The result of Defendants' illegal activities is that ATM access fees rose to their highest level ever in 2012, according to an April 2013 report by the General Accounting Office.

5. It is sometimes the case that a business will attempt to restrict what resellers can charge for its own product or service. But it is highly unusual and anticompetitive for a business to restrict what others can charge for its *competitor's* product or service. That is exactly what the Restraints are. There is no economic or pro-competitive justification for the Restraints, and the markets would function far more fairly and efficiently if they were abolished. That is the relief Plaintiffs seek in this case.

6. Defendants' unlawful agreements effectively set a price floor for all ATM access fees throughout the country, and deprive consumers of the benefits of natural price competition. Defendants have succeeded in restricting interbrand competition, restraining output, and charging artificially inflated fees to the class for use of ATMs. Their anticompetitive activity constitutes a per se violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. It also constitutes an unreasonable restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and state antitrust laws.

7. In the absence of the ATM Restraints, Plaintiffs would have paid lower foreign transaction fees at Bank ATMs. Price competition between ATM Networks, and between ATM Operators, would result in lower ATM Access Fees across the board, including consumers with "single bug" ATM cards.

8. Plaintiffs bring this action on behalf of themselves and others who have paid artificially inflated, supra-competitive ATM Access Fees to the Bank Defendants. Plaintiffs seek damages for themselves and the classes resulting from Defendants' unlawful antitrust violations. They also seek an injunction that would terminate Defendants' unlawful agreements. If Plaintiffs prevail, Defendants will have to compete with each other and other providers, resulting in lower prices, increased volume of transactions, and greater convenience to consumers. These are precisely the purposes the antitrust laws were designed to serve.

Appendix D

II. JURISDICTION AND VENUE

9. Plaintiffs bring this action under Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26) to recover treble damages and the costs of this suit, including reasonable attorneys' fees, for the injuries sustained by Plaintiffs and the members of the Nationwide Direct Purchaser Class (defined below) by reason of Defendants' violation of Section I of the Sherman Act, 15 U.S.C. § 1, and to obtain injunctive relief from Defendants' ongoing and continuing violations of Section 1.

10. In the alternative, Plaintiffs also bring this action pursuant to state antitrust, unfair competition and consumer protection laws to recover damages, restitution, disgorgement, costs of suit, including reasonable attorneys' fees, for the injuries sustained by Plaintiffs and the members of Indirect Purchaser Classes (defined below) by reason of Defendants' violations of those laws.

11. This court has subject-matter jurisdiction over this action under Section 4 of the Clayton Act, 15 U.S.C. § 4, and 28 U.S.C. §§ 1331 and 1337.

12. This Court also has subject-matter jurisdiction over the state-Jaw claims pursuant to the Class Action Fairness Act of2005, which amended 28 U.S.C. § 1332 to add a new subsection (d) conferring federal jurisdiction over class actions where, as here, "any member of a class of Plaintiffs is a citizen of a state different from any Defendant and the aggregated amount in controversy exceeds $5,000,000, exclusive of interest

and costs." This Court also has jurisdiction under 28 U.S.C. § 1332(d) because "one or more members of the class is a citizen of a state within the United States and one or more of the Defendants is a citizen or subject of a foreign state."

13. Venue in the District of Columbia is proper under 28 U.S.C. § 1391 because each Defendant transacts business and/or is found within this District. A substantial part of the interstate trade and commerce involved in and affected by the violations of the antitrust laws alleged herein was and is carried out within this District. The acts complained of have had, and will have, substantial anticompetitive effects in this District.

14. Jurisdiction over Defendants comports with the United States Constitution and with 15 U.S.C. §§ 15, 22, and 26.

III. THE PARTIES

A. Plaintiffs

15. Plaintiff Andrew Mackmin is a resident of Union City, New Jersey and has paid at least one ATM Access Fee during the relevant time period. Plaintiff Mackmin has a Visa branded Bank of America debit card, with no bugs on the back. He has incurred several access fees for withdrawals during the relevant period, including at Wells Fargo, Chase, and Citibank.

16. Plaintiff Barbara Inglis is a resident of Huntington, New York and has paid at least one ATM Access Fee during the relevant time period. Plaintiff Inglis has a Teachers' Federal Credit Union pin debit card, with several bugs on the back: NYCE, Plus, and Visa. She has incurred access fees in connection with cash withdrawals from Defendant Banks.

17. Plaintiff Sam Osborn is a resident of Washington, DC and has paid at least one ATM Access Fee during the relevant time period. Plaintiff Osborn has a Capital One MasterCard debit card. It shows no other network "bugs" on the card. For example, on May 5, 2011, he withdrew $60 from a Wells Fargo ATM near Dupont Circle in Washington, DC, and was charged a $3 access fee by Wells Fargo, which amount was automatically withdrawn from his account. In November 2011 he withdrew $60 from another Wells Fargo ATM near Dupont Circle, and was assessed a $3 access fee by Wells Fargo.

B. Defendants

The anticompetitive behavior by the Network Defendants (defined below), the Bank Defendants (defined below), and the Bank Co-Conspirators (defined below) has caused antitrust injury common to the Plaintiffs and the members of the Classes.

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IV. THE NETWORK DEFENDANTS

A. Visa

18. Defendant, VISA INC. ("Visa Inc.") is a publicly traded Delaware corporation with its principal place of business in San Francisco, California.

19. Defendant VISA U.S.A. INC. is a Delaware corporation with its principal place of business in San Francisco, CA and is owned and controlled by Visa Inc.

20. Defendant VISA INTERNATIONAL SERVICE ASSOCIATION is a Delaware corporation with its principal place of business in San Francisco, California and is owned and controlled by Visa Inc.

21. Defendant PLUS SYSTEM, INC. is a Delaware corporation with its principal place of business in San Francisco, California and is owned and controlled by Visa Inc.

22. Defendants Visa Inc., Visa U.S.A. Inc., Visa International Service Association, and Plus System, Inc. are collectively referred to herein as "Visa." During the relevant time period and until the Visa corporate restructuring, Visa was governed by a board of directors comprised of bank executives selected from its member banks, including certain Bank Defendants and Bank Co-Conspirators.

23. Visa engages in interstate commerce and transacts business in this judicial district.

B. MasterCard

24. Defendant MASTERCARD INCORPORATED ("MasterCard Incorporated") is a Delaware corporation with its principal place of business in Purchase, New York.

25. Defendant MASTERCARD INTERNATIONAL INCORPORATED ("MasterCard International") is a Delaware non-stock (membership) corporation with its principal place of business in Purchase, New York and is owned and controlled by MasterCard Incorporated. MasterCard International consists of more than 23,000 member banks worldwide and is the principal operating subsidiary of MasterCard Incorporated.

26. MasterCard Incorporated and MasterCard International are collectively referred to herein as "MasterCard."

27. MasterCard engages in interstate commerce and transacts business in this judicial district.

28. Defendants Visa and MasterCard are herein collectively referred to as the "Network Defendants."

Appendix D

V. THE BANK DEFENDANTS

A. Bank of America

29. Defendant BANK OF AMERICA, NATIONAL ASSOCIATION is a national banking association with its principal place of business in Charlotte, North Carolina. Bank of America, National Association is a wholly owned subsidiary of Defendant NB Holdings Corporation, and provides banking products and services through its branches.

30. Defendant NB HOLDINGS CORPORATION is a Delaware corporation with its principal place of business in Charlotte, NC and is wholly owned by Defendant Bank of America Corporation.

31. Defendant BANK OF AMERICA CORPORATION is a Delaware corporation with its principal place of business in Charlotte, North Carolina.

32. Defendants Bank of America, National Association, NB Holdings Corporation, and Bank of America Corporation are herein collectively referred to as "Bank of America."

33. Bank of America is a member of both the Visa and MasterCard networks. It engages in interstate commerce and transacts business in this judicial district. Between 2000 and 2005, it was represented on the Visa U.S.A. Board of Directors. It is currently and/or has been represented on the Visa Board of Directors.

B. Chase

34. Defendant CHASE BANK USA, N.A. is a New York bank with its principal place of business in New York, New York. It is the successor to Chase Manhattan Bank USA, N.A., and a wholly owned subsidiary of Defendant JPMorgan Chase & Co.

35. Defendant JPMORGAN CHASE & CO. is a Delaware corporation with its principal place of business in New York, New York.

36. Defendant JPMORGAN CHASE BANK, N.A. is a wholly owned subsidiary of JPMorgan Chase & Co, and is the private banking and wealth management division thereof. JPMorgan Chase Bank, N.A. is organized under the banking laws of the United States with its principal place of business in New York, New York. JPMorgan Chase Bank, N.A., acquired the credit-card operations and receivables of Washington Mutual Bank from the FDIC on September 25, 2008. By acquiring these assets, JPMorgan Chase Bank, N.A. became the successor-in- interest to the liabilities that are associated with this litigation.

37. Defendants Chase Bank USA, N.A., JP Morgan Chase & Co., and JPMorgan Chase Bank, N.A. are collectively referred to herein as "Chase."

38. Chase is a member of both the Visa and MasterCard networks. It engages in interstate commerce and transacts business in this judicial district. Between 2000 and 2003,

Chase was represented on the MasterCard Board of Directors for the United States. Between 2003 and 2006, it was represented on the Visa U.S.A. Board of Directors.

39. In July 2004, Chase completed its acquisition of Bank One Corporation and Bank One Delaware, N.A. From at least 2000 until its acquisition by Chase, Bank One was represented on the Visa U.S.A. Board of Directors.

C. Wells Fargo

40. Defendant WELLS FARGO & COMPANY is a Delaware corporation with its principal place of business in San Francisco, California.

41. Defendant WELLS FARGO BANK, N.A. is a federally chartered bank with its principal place of business in San Francisco, California.

42. Defendants Wells Fargo & Company and Wells Fargo Bank, N.A. are collectively herein referred to as "Wells Fargo."

43. Wells Fargo is a member of both the Visa and MasterCard networks. It engages in interstate commerce and transacts business in this judicial district. During parts of the relevant time period, it was represented on the Visa U.S.A. Board of Directors.

44. Wells Fargo ATMs display the bugs of several networks to the left of the screen, including Star, Pulse, MasterCard, Maestro, Cirrus, Plus, and Visa.

45. Defendants Bank of America, N.A., NB Holdings Corporation, Bank of America Corporation, Chase Bank USA, N.A., JPMorgan Chase & Co., JPMorgan Chase Bank, N.A., Wells Fargo & Company, and Wells Fargo Bank, N.A. (collectively, "Bank Defendants") are members of the Visa and MasterCard networks. All of the Bank Defendants are actual or potential competitors for the provision of ATM services. All of the Bank Defendants belong to both networks, have periodically served on the board of directors of each Network Defendant, and have conspired with each other and with the Network Defendants to fix ATM Access Fees.

VI. NON-PARTY BANK CO-CONSPIRATORS

46. The Network Defendants are descendants of bankcard associations formerly jointly owned and operated by a majority of the retail banks in the United States. Visa, Inc. became a publicly held corporation after an initial public offering of its stock began trading on the New York Stock Exchange on March 18, 2008. MasterCard, Inc. became a publicly held corporation after an initial public offering of its stock began trading on the exchange on May 24, 2006. Nonetheless, banks continue to hold non-equity membership interests in the Network Defendants' subsidiaries and the largest among them also hold equity interests and seats on the Network Defendants' boards of directors.

47. The Network Defendants continue to refer to their bank customers as "members" of Visa and MasterCard and continue to operate principally for the benefit of their member banks. The unreasonable

restraints of trade in this case are horizontal agreements among the Bank Defendants and the Network Defendants, and their members, to adhere to rules and operating regulations that require ATM Access Fees to be fixed at a certain level. These restraints originated in the rules of the former bankcard associations agreed to by the banks themselves. By perpetuating this arrangement, the banks collectively have ceded power and authority to the Network Defendants to design, implement, and enforce a horizontal price-fixing restraint in which they are knowing participants.

48. In short, the violation in this case is a horizontal agreement among every bank that is a member of the Visa and/or MasterCard networks that charges ATM Access Fees on Foreign ATM Transactions. These co-conspirators are collectively referred to herein as the "Bank Co-Conspirators."

VII. OTHER NON-PARTY CO-CONSPIRATORS

49. Various persons, partnerships, firms, and corporations not named as Defendants in this lawsuit, and individuals, the identities of which are presently unknown, have participated as co-conspirators with Defendants in the offense alleged in this Complaint, and have performed acts and made statements in furtherance of the illegal combination and conspiracy.

Appendix D

VIII. TRADE AND INTERSTATE COMMERCE

50. "PIN debit payment cards" are issued by banks and depository institutions, including the Bank Defendants and Bank Co-Conspirators, and are utilized in an enormous volume of ATM transactions involving a substantial dollar amount of commerce. These cards are marketed, sold and used in the flow of interstate commerce. A PIN debit payment card is any card that requires entry of a "personal identification number," a cardholder's unique 4-digit code, to authenticate a debit transaction at the point of the transaction.

51. During the relevant period, the Bank Defendants and the Bank Co-Conspirators issued Visa and MasterCard PIN debit payment cards.

52. Visa provides ATM services for cards branded with the Visa, Visa Electron, Interlink, and PLUS service marks at ATMs and terminals connected to the Visa, PLUS, and Interlink networks. In 2007, U.S. cardholders used Visa's PIN-based platform to access $395 billion in cash.

53. MasterCard provides ATM services for cards branded with the MasterCard, Maestro or Cirrus service marks at ATMs and terminals participating in the MasterCard Worldwide Network. Excluding Cirrus- and Maestro-branded cards, cardholders used MasterCard-branded cards to access $202 billion in cash in the U.S. in 2007.

Appendix D

IX. FACTUAL BACKGROUND

A. PIN Debit Cards and ATM Transactions

54. ATM transactions are initiated by use of a PIN debit card. PIN debit cards include "pay now," "pay later," and "pay before" cards. "Pay now" cards allow a cardholder to effect an automatic debit from a checking, demand deposit, or other financial account. A "pay later" card requires payment within an agreed-upon period of time. Finally, "pay before" cards are pre-funded up to a certain monetary value.

55. All ATM transactions are PIN debit transactions, and only cards with PIN debit capability may be used in an ATM. For purposes of this Complaint, any payment card that can be used in an ATM is referred to as a "Debit Card."

56. A debit cardholder can obtain cash, monitor account balances, or transfer balances at an ATM. Some ATMs also accept deposits or dispense items of value other than cash, such as stamps or travelers checks.

57. An overwhelming majority of Debit Cards issued by the Bank Defendants and the Bank Co-Conspirators, and used for ATM transactions, are Visa- or MasterCard-branded bank account-linked PIN Debit Cards.

58. Some but not all Visa- and MasterCard-branded PIN debit cards are capable of effecting cash

withdrawals over non-Visa and non-MasterCard EFT networks, including Star (owned by First Data), Pulse (Discover Card), NYC Payment Network LLC, ACCEL/ Exchange Network, Credit Union 24, Co-op Financial Services, Shazam Inc., Jeanie, and TransFund. When Visa- and MasterCard-branded cards offer access to one or more of these alternative PIN- debit networks, the reverse side of the card bears a service mark, or "bug," belonging to the alternative network. In addition, ATMs routinely display the networks they can access. As explained further below, Visa and MasterCard have sought to limit or eliminate the "bugs" on the back of branded PIN debit cards, in order to steer more traffic to their networks.

59. When an ATM has access to multiple networks that match the bugs on the customer's card, the ATM operator's processor can and will choose the Network over which to route the transaction. The ATM operator can and will automatically choose the network that it expects will pay the ATM the highest net interchange fee.

B. Foreign ATM Transactions

60. Foreign ATM Transactions involve a customer of one bank withdrawing money from his or her account by using an ATM owned and/or operated by another bank.

61. Such Foreign ATM Transactions involve four parties: (1) the "cardholder," *i.e.,* the customer who retrieves money from the ATM machine; (2) the "card-issuer bank," *i.e.,* the bank at which the customer holds an account and from which the customer has received an ATM card; (3) the ATM Operator, *i.e.,* the bank that owns or operates the ATM machine from which the customer withdraws money from his account; and (4) the "ATM network," *i.e.,* an entity that owns a network that connects ATM Operators with the card-issuing banks.

62. The ATM network administers agreements between various card-issuer banks and ATM Operators and thereby ensures that customers can withdraw money from one network member's ATM as readily as from another.

63. A single Foreign ATM Transaction may generate up to five fees. Generally, a customer will pay two fees, which are automatically withdrawn from the customer's account- one to the ATM Operator for use of that entity's ATM machine, *i.e.,* the Surcharge or ATM Access Fee, and one to the bank at which he has an account, *i.e.,* the Foreign ATM Fee. The card-issuer bank also pays two fees. It pays a "Switch Fee" to the ATM network that routed the transaction. It also pays an "Interchange Fee" to the owner of the foreign ATM. The acquiring bank may also pay an "acquiring fee" to the network.

64. The following table, from a study by the GAO titled "Automated Teller Machines," Report No. 13-266,

describes the fees involved in an ATM transaction, who pays them, and who receives them:

Table: Fees Paid by Consumers, Financial Institutions, and ATM Owners to Process ATM Transactions

Fee	Who pays	Who receives	Description
Surcharge fee	Consumer	ATM owner	Paid to the ATM owner by the consumer when using an ATM not owned by his or her financial institution.
Foreign fee	Consumer	Consumer's financial institution	Paid to the consumer's financial institution by the consumer when using an ATM not owned by the card-issuing financial institution.
Interchange fee	Consumer's financial institution	ATM owner	Paid to the ATM owner for the costs of operating and maintaining the ATM.
Switch fee	Consumer's financial institution	EFT networks	Paid to the EFT networks for routing transaction information over the network.
Acquiring fee	ATM owner	EFT networks	Paid to the EFT networks for the use of the network by the ATM owner.

65. In the past, ATM fees were limited to Interchange Fees and Foreign ATM Fees. ATM Operators were prohibited from charging cardholders for the ATM service they were providing. They received only the fixed Interchange Fees that the ATM networks set and the card-issuer banks paid.

66. Beginning in 1996, state laws and network rules (including those of Visa and MasterCard) prohibiting ATM operators from charging access fees were abolished. Access fees allowed these ATMs to recover the cost of providing ATM services. ATM screens would disclose the amount of the Surcharge and, with the cardholder's approval, the ATM Operator would add the surcharge to the amount of cash withdrawn, which would be debited against the cardholder's account at his bank.

67. All the Bank Defendants and the Bank Co-Conspirators impose Surcharges, or ATM Access Fees, at their ATM terminals for Foreign ATM Transactions.

C. ATM Networks

68. Generally, banks participate in ATM networks, such as the Visa or MasterCard PIN-based networks. While a bank can deploy its own ATMs, the advantage in participating in an ATM network is that a bank's depositors are thereby able to use ATMs at many more locations than one bank alone could support. A bank must offer access to other banks' ATMs to provide its customers with convenient access to their accounts. Visa and MasterCard provide the only networks with nationwide reach.

69. To accept a Visa- or MasterCard-branded PIN Debit Card, the ATM Operator must have access to the Visa or MasterCard PIN-based networks. As members of Visa or MasterCard, the Bank Defendants and the Bank Co-Conspirators have access to their PIN-based networks for bank-operated ATMs. By contrast, "non-banks," such as independent ATM operators and firms that provide the equipment and physical infrastructure for the authentication, clearing, or settlement of transactions ("processors") ("ISOs"), are not Visa or MasterCard members. Before being granted access to the networks, therefore, a non-bank first must be sponsored by a "sponsoring financial institution," or must affiliate itself with a sponsored entity. Sponsoring institutions are Visa or MasterCard member banks that specialize in providing

Independent ATM Operators with access to the Visa and MasterCard PIN-based networks.

70. ATM networks began in the 1970s as proprietary networks of single banks, which only one bank's customers could access. Banks soon realized that by sharing ATMs, they could spread the costs of the machines over more customers and transactions, and increase convenience to their customers. The first shared ATM networks were mostly joint ventures of banks in various regions of the country. The number of ATM networks increased rapidly, peaking in 1986 at close to 200.

71. Larger networks began to appear in the 1980s, and offered the promise of economies of scale, beginning a trend of consolidation that has continued to this day. The largest networks were the Plus and Cirrus networks, which Visa and MasterCard acquired in the mid-1980s in order to control the PIN debit market. They wanted to fend off competition from growing ATM networks that promoted PIN debit as a safer, faster and cheaper method of retain payment, threatening Visa and MasterCard's revenue from their high-interchange credit cards. Visa and MasterCard wished to displace PIN debit with "signature debit," an offline form of payment more akin to credit cards, which would pay high interchange fees to Visa and MasterCard, instead of paying (lower) interchange fees to merchants.

72. In 1990, the Plus and Cirrus networks entered an agreement of "duality," by which an ATM

owner could belong to just one of the networks and process withdrawals for cardholders of the other without having to pay additional fees. This agreement encouraged ATMs to end their relationships with regional networks, resulting in further consolidation.

73. Visa and MasterCard have a long history of anticompetitive practices intended to generate higher fees for them. They imposed an "Honor All Cards" rule on retailers, forcing them to accept their high-priced signature debit cards, if they also wanted to process Visa and MasterCard credit cards. In 2003, retailers obtained a $3 billion settlement against Visa and MasterCard, requiring them to drop their Honor All Cards rule, and lower interchange fees for signature debit transactions. MasterCard acknowledged in a 2010 SEC filing, "our business and revenues could be impacted adversely by the tendency among U.S. consumers and merchants to migrate from offline, signature-based debit transactions to online, PIN-based debit transactions because we generally earn less revenue from the latter types of transactions."

74. An overwhelming majority of cards used for ATM transactions are Visa- or MasterCard-branded account-linked PIN-debit cards. As VISA states on page 17 of its Form 10- K, filed with the U.S. Securities and Exchange Commission for the fiscal year ended September 30, 2010, "[i]n the debit card market segment, Visa and MasterCard are primary global brands." By 2002, Visa and MasterCard networks extended to almost every ATM in the country. ATM operators essentially have no choice but to maintain access to Visa and MasterCard networks,

or they will have to turn away an increasing percentage of customers, whose cards cannot access any other network, or can only access networks that the ATM cannot.

75. Some ATM transactions using Visa- and MasterCard-branded PIN Debit Cards may be completed over alternative networks originally designed for electronic fund transfers ("ETFs"). Visa- and MasterCard-branded cards that offer access to an alternative PIN Debit network indicate as much on the reverse side of the card, in the form of a service mark belonging to the alternative network, such as STAR, NYCE Payment Network LLC, ACCEL/Exchange Network, Credit Union 24, CO-OP Financial Services, Shazam Inc., Jeanie, or TransFund.

D. Defendants' Horizontal Conspiracy

76. The Bank Defendants and the Bank Co-Conspirators, members of the Visa and MasterCard networks, have colluded with Visa and MasterCard to increase the ATM access fees charged to consumers. They have effectuated this scheme through two primary actions: routing more transactions over Visa and MasterCard's networks, and restricting any ATM from offering discounts for transactions completed using competing networks.

77. The Visa Plus System, Inc. Operating Regulations sets forth the following restraint on the exercise of discretion by A TM Operators to charge an ATM Access Fee they deem commercially appropriate:

Appendix D

4.10A Imposition of Access Fee

An ATM Acquirer may impose an Access Fee if:

It imposes an Access Fee on all other Financial Transactions through other shared networks at the same ATM;

The Access Fee is not greater than the Access Fee amount on all other Interchange Transactions through other shared networks at the same ATM ....

78. Similarly, MasterCard's Cirrus Worldwide Operating Rules (current edition December 21, 2012) applicable to the United States Region (Chapter 20) sets forth the same restraint on the exercise of discretion by ATM Operators to set ATM Access Fees as they deem commercially appropriate:

7.14.1.2 Non-Discrimination Regarding ATM Access Fees

An Acquirer must not charge a ATM Access Fee in connection with a Transaction that is greater than the amount of any ATM Access Fee charged by that Acquirer in connection with the transactions of any other network accepted at that terminal.

79. Defendants' horizontal conspiracy is rooted in the historical context in which the Network Defendants emerged as described more fully below. In sum, Visa and

MasterCard are descendants of bankcard associations formerly jointly owned and operated by a majority of the retail banks in the United States, including the Bank Defendants and the Bank Co-Conspirators. The Network Defendants continue to operate principally for the benefit of these member banks.

80. Visa and MasterCard adopted the Restraints when they were still associations of member banks, and those banks owned virtually all ATMs. The purpose behind the Restraints was to relieve banks of the rigors of competition, and to thwart price competition from independent ATMs, after ATM access fees were first permitted in 1996. In this way, banks were assured that their MasterCard customers would not have to pay more in fees than their Visa cardholders, and they would not face competition at the network level. Visa and MasterCard exploited their position as nationwide networks to collect more fees, pay ATMs less in net interchange to process transactions, and contain the growth of rival ATM networks.

81. The unreasonable restraints of trade in this case are horizontal agreements among the Bank Defendants and the Bank Co-Conspirators to adhere to rules and operating regulations that require ATM Access Fees to be fixed at a certain level. As discussed above, these restraints originated in the rules of the former bankcard associations agreed to by the banks themselves.

82. The Bank Defendants and the Bank Co-Conspirators have perpetuated this arrangement, in

agreement with the Network Defendants, to enforce a horizontal price-fixing arrangement for their mutual benefit.

83. In conjunction with the Restraints, Visa and MasterCard have consistently encouraged issuers to maintain "single-bug" cards, and reduce or eliminate their customers' access to alternative networks. In 1996, in consultation with Arthur Andersen, Visa devised the "Deposit Access 2001 Mainstreaming Debit Strategy," which called for Visa to meet with the top five or six banks issuing debit cards and convince them to drop all Regional Network PIN debit marks from their debit cards. In 1998, Visa and Bank of America agreed that Bank of America would promote only Visa-branded debit cards, and exclude regional networks, in exchange for an undisclosed sum from Visa. A year later, Bank of America dropped the Regional Network marks from the debit cards it issued in certain regions, and in 2001, dropped STAR from all of its approximately 18 million debit cards.

84. On its website, Visa openly encourages banks to use only Visa, stating, it is "The Only Network You Need." It further states, "When you consolidate your ATM activity under the Visa®/Plus® brand mark, you're not just reducing costs and simplifying operations, you're meeting your cardholders' highest service expectations." Visa makes clear that banks will provide ATM access "through a single network," and that the bank "[e] liminates redundant costs and procedures associated with participation in multiple ATM networks by consolidating ATM access under the Visa/Plus brand with the Visa/Plus

network and a single brand strategy." In exchange, the bank will obtain "Issuer benefits from favorable switch fees and interchange rates." In essence, Visa will shift the costs from the bank to the consumer.

85. Defendants Wells Fargo and Chase have entered similar exclusive deals with Visa. Wells Fargo states on its website that its debit cards allow consumers to obtain "cash at more than 12,000 Wells Fargo ATMs nationwide and over 1.5 million Visa® and Plus® network ATMs worldwide." Chase promotes Visa ATM/debit cards on its website and in marketing materials. As part of their deals with Visa and MasterCard, banks replaced ATM cards with Visa- and MasterCard-branded check cards.

86. Similarly, MasterCard promotes its branded debit cards to banks, devoid of any rival networks' insignia. It explains on its website that such cards may be used only at an ATM that displays the MasterCard, Maestro or Cirrus emblem, and provides an ATM locator to help customers find such ATMs.

87. MasterCard has entered similar deals. For example, Capital One and Fifth Third banks offer MasterCard debit cards, with no competing bugs on the back.

88. Visa and MasterCard pay ATM operators the lowest net interchange fees of any major network. Visa and MasterCard promise issuing banks lower interchange rates if they agree to direct more or all of their customers' withdrawals through Visa and MasterCards' networks.

ATM Operators have no choice but to accept Visa and MasterCard's low net interchange rates. The only way they can make up the difference is by raising access fees.

89. MasterCard announced a dramatic reduction in net interchange fees in 2010. Cardtronics, the largest non-bank owner of ATMs, and a major provider of ATMs for retail businesses, reported in a May 7, 2010 SEC filing that MasterCard's new "tiered" interchange rate reductions would reduce its gross profit by nearly $2 million during the remainder of the year. By paying ATMs less, Visa forced these ATMs to charge customers more in ATM access fees, for all transactions.

90. Visa followed MasterCard with a significant reduction in its interchange rate in the fall of 2011. One study by Tremont Capital Group found that these changes could result in a reduction of the net interchange of up to 43 percent, or a loss of between $7.8 million and $11.9 million in domestic interchange income. The CEO of the ATM Industry Association commented that this report "show[ed] graphically the scale of economic devastation caused by continuous and significant interchange reduction in the huge U.S. ATM market. The fact that this is happening in times of a national economic crisis is simply an embarrassing and sad reflection on how the industry is currently being unfairly dominated."

91. Data demonstrating the relative costs of ATM transactions over the various networks is not made public by the networks, or by banks. However, Plaintiffs have a good-faith basis to believe that the following table,

which summarizes three disparate sets of data from ATM operators covering the year 2012, one for the month of October 2012, and one for the month of February 2013, provides a reasonable approximation of the variation in net-per-transaction interchange revenue received by a typical ATM ISO after deduction for network services fees, and may also approximate the relative interchange paid to acquiring banks.

	Data Set #1 - 2012			Data Set #2 – October 2012			Data Set #3 - February 2013		
	tl # txns	network fee $	net intchg $	tl # txns	network fee $	net intchg $	tl # txns	network fee $	net intchg $
MC*	28.0%	0.34	0.06	15.7%	0.18	0.29	27.0%	0.41	0.05
VISA**	31.5%	0.22	0.21	25.4%	0.18	0.29	27.0%	0.33	0.17
PULSE	9.2%	0.00	0.28	2.4%	0.04	0.46	11.2%	0.00	0.28
NYCE	6.6%	0.00	0.36	3.3%	0.03	0.48	8.4%	0.00	0.38
STAR	12.1%	0.05	0.39	30.9%	0.04	0.51	15.1%	0.07	0.38
EXCHANGE Network	4.4%	0.00	0.41	20.1%	0.00	0.52	6.8%	0.00	0.42
Armed Forces Fin Network	6.6%	0.00	0.44	2.1%	0.02	0.52	3.2%	0.00	0.44
Credit Union 24	1.7%	0.00	0.54	0.04%	0.00	0.67	1.3%	0.00	0.54

92. In the table, "MC" reflects the average of ATM data for all MasterCard networks, including Maestro International, MasterCard International, Cirrus International, Cirrus, Maestro and Cirrus MasterCard. "Visa" reflects the average of all ATM data for all Visa networks, including Plus, Plus International, Plus International (Canada), VisaNet, Visa International, Visa International (Canada). The figures are averages. Important to note is that transactions over Visa and MasterCard's international networks can bear a *negative* interchange, resulting in a net additional cost of ATM ISOs. Visa and MasterCard's rules prohibit registered ISOs from refusing international transactions, so they are included in the average interchange.

93. High network fees by Visa and MasterCard (charged to the acquiring bank) result in significantly lower net interchange from the networks to the ATM. Visa and MasterCard remit the lowest net interchange of any of the networks.

X. ANTICOMPETITIVE EFFECTS AND ANTITRUST INJURY RESULTING FROM THE RESTRAINTS

94. The Restraints harm competition in many ways. By restricting the networks' ability to price their services as they see fit, Defendants protect themselves from competition at the expense of independent ATMs and ATM customers.

95. Because of the Restraints, ATM Operators cannot offer discounts or any other benefit or inducement to persuade consumers to complete their transactions over competing, lower cost PIN-based networks, nor do ATM Operators offer any kind of rebate or benefit that might circumvent the fixed ATM Access Fees imposed by the networks' rules.

96. Because the ATM restraints break the essential economic link that would exist in a reasonably competitive market between the price a consumer is charged for a service and the cost to the seller of providing it, they extinguish the incentive of cardholders to demand, and providers of ATM services to provide, lower-cost, more efficient services.

97. In a competitive market, ATMs would be able to make up the cost of low interchange rates differentially. ATMs already route the transaction over the network that best offsets their costs. But they have to charge the same amount for a withdrawal processed over the Credit Union 24 network, which may pay 67 cents in net interchange, as they charge for MasterCard, which may pay only 5 cents. The ATM has to raise its charge for the Credit Union 24 withdrawal to a level that will allow it to balance out the close-to-zero compensation it is receiving from MasterCard. Because the ATM has to charge more for competitor networks' transactions than it otherwise would, their service is less attractive to consumers, volumes drop, increasing the ATM cost per transaction, which also causes a rise in access fees. Competitor networks obtain less competitive benefit for pricing competitively, and they lose volume to Visa and MasterCard, who have roped off a larger share of the market with their single-bug cards. Customers have no reason to desire a card that works over multiple networks and results in lower access fees, because they see no difference in price, so they accept the single-bug debit card that they are issued.

98. This horizontal conspiracy is only effective because the Bank Defendants and Bank Co-Conspirators know that their competitors are also complying. It would be contrary to any one bank's self-interest independently to agree to the Restraints, unless it knew that its competitors were also agreeing to it. A bank that was not bound by the Restraints could charge lower prices for transactions conducted over networks that pay a higher net interchange

fee, and attract customers away from banks that complied with the Restraints. In any event, it appears that even if any bank were inclined to violate the Restraints, Visa and MasterCard could easily and readily detect it, and would terminate or take other action against such a violator.

99. Indeed, in 2012, ATM access fees broke all prior records. An April 2013 Government Accountability Office report, titled "AUTOMATED TELLER MACHINES: Some Consumer Fees Have Increased," found a dramatic increase in ATM access fees over the last five years, from $1.75 in 2007 to $2.10 in 2012, a 20 percent increase. The report found that large banks were more likely to charge higher access fees than community banks or credit unions. "This report makes clear that consumers are facing ever increasing fees to access their own money. A consumer could pay as much as $5.00 to $10.00 dollars each time they use an ATM, and these fees could be particularly difficult to avoid in rural and underserved areas. These fees are outrageous, are anti-consumer, and they need to be reined in," said Senator Tom Harkin, commenting on the study.

100. The financial research firm Bankrate.com recently confirmed that ATM access fees rose for the eighth straight year, up 4% to an all-time record high of $2.50.

101. As a result of Defendants' exclusionary practices, Visa and MasterCard's share of the ATM services market has grown. According to the EFT Data Book, 2006 edition, the Visa/Plus network had a 14.9%

share of transactions in March 2005, growing to 18.2% in March 2006. By 2012, Visa's market share had roughly doubled from its 2005 level, according to data obtained from ATM operators. MasterCard nearly equaled Visa's market share, in data collected in February 2013.

102. If the Restraints were eliminated, as Plaintiffs demand in this suit, competition would return to the market for ATM access fees, and for network services.

103. First, the ATM could charge differentially based on the network that best offsets its costs, bringing its access fee closer to its cost for each transaction. Because ATM operators' costs are largely fixed they incur little cost per additional transaction their profitability is highly dependent on volume of customers. ATM Operators would advertise their lower access fees to attract customers. The ATMs would attract more customers, and their cost per transaction would decrease, allowing them to charge even less. Thus, they would have every incentive to price as low as they could to compete for business with nearby ATMs and banks.

104. Second, ATM networks would compete for transactions by offering ATMs higher net interchange. ATM networks could advertise to customers to demand that banks add their "bug" to their debit cards in order to pay lower transaction fees. Single-bug cards would become multiple-bug cards.

105. It is clear that customers are highly attuned to bank fees, even more since the federal government

bailed out the banks in 2008. A 2012 J.D. Power and Associates report found that fees were the number one reason customers shopped for a new primary bank, and one-third of customers of big and large regional banks cited fees as the main reason. "It is apparent that new or increased fees are the proverbial straws that break the camel's back," stated Michael Beird, director of the banking services practice at J.D. Power and Associates.

106. Third, Visa and MasterCard would have to compete with the other networks for ATM volume, and would lower their prices. Even the *threat* of price competition would result in lower ATM access fees.

107. Fourth, the higher volume of lower-priced services reflects more convenience for consumers, and more economic activity, both central goals of the antitrust laws.

XI. THE ELEMENT OF AGREEMENT

108. The Network Defendants are descendants of bankcard associations formerly jointly owned and operated by a majority of the retail banks in the United States. Visa, Inc. became a publicly held corporation after an initial public offering ("IPO") of its stock began trading on the New York Stock Exchange on March 18, 2008. MasterCard, Inc. became a publicly held corporation after its IPO on May 24, 2006.

109. From the beginning of their existence until their IPOs, the Network Defendants and their

predecessor entities' member banks elected a Board of Directors, composed exclusively or almost exclusively of competing member banks. That Board of Directors in turn established, approved, and agreed to adhere to rules and operating regulations that required all member banks to fix ATM Access Fees at a certain level ("ATM Access Fee Restraints").

110. Prior to the Network Defendants' IPOs, each bank member of the Visa and MasterCard networks was a member of a horizontal agreement in the form of the Restraints, and they knew that the Restraints would continue after the Network Defendants' respective IPOs.

111. In 1998, the Antitrust Division of the Department of Justice sued Visa and MasterCard alleging that the joint governance of the two networks and certain rules that prevented banks from issuing cards on competitive networks (the "exclusionary rules") violated Section I of the Sherman Act. After a 34-day trial, the court found that the Visa and MasterCard networks, together with their member banks, implemented and enforced illegal exclusionary agreements requiring any U.S. bank that issued Visa or MasterCard general purpose cards to refuse to issue American Express and Discover cards. *United States v. Visa USA,* 163 F. Supp. 2d 322, 405-06 (S.D.N.Y. 2001), *affd,* 344 F.3d 229 (2d Cir. 2003).

112. The court concluded that the "exclusionary rules undeniably reduce output and harm consumer welfare," that Visa and MasterCard had "offered no persuasive procompetitive justification for them," and that

"the Member Banks agreed not to compete by means of offering American Express and Discover branded cards," that "[s]uch an agreement constitutes an unreasonable horizontal restraint [that] cannot be permitted," and that "these rules constitute agreements that unreasonably restrain interstate commerce in violation of Section I of the Sherman Act." *id.*

113. In affirming the court's "comprehensive and careful opinion," 344 F.3d at 234, the Second Circuit Court of Appeals explained the crucial role played by the member banks in agreeing to, and abiding by, the Visa and MasterCard versions of the exclusionary rules:

> Visa U.S.A. and MasterCard, however, are not single entities; they are consortiums of competitors. They are owned and effectively operated by some 20,000 banks, which cooperate with one another in the issuance of Payment Cards and the acquiring of Merchant's transactions. These 20,000 banks set the policies of Visa U.S.A. and MasterCard. These competitors have agreed to abide by a restrictive exclusivity provision to the effect that in order to share the benefits of their association by having the right to issue Visa or MasterCard cards, they must agree not to compete by issuing cards of American Express or Discover. The restrictive provision is a horizontal restraint adopted by 20,000 competitors.

114. Similar to the exclusionary rules at issue in *United States v. Visa, US.A.*, the ATM Access Fee Restraints at issue in this case are horizontal agreements among the Bank Defendants, and later the Network Defendants, to adhere to rules and operating regulations that require ATM Access Fees to be fixed at a certain level.

115. After being adjudicated "structural conspiracies" in the United States, the European Union, the United Kingdom, and several other jurisdictions, the Network Defendants took steps to restructure themselves in an attempt to remove their conspiratorial conduct from Section 1 of the Sherman Act and equivalent laws in foreign jurisdictions that prohibit agreements among competitors.

116. On May 22, 2006, MasterCard completed its IPO. The resulting entity acquired certain of its member banks' ownership and control rights in MasterCard through the redemption and reclassification of stock that was previously held by the member banks. To date, the member banks retain a significant financial and equity interest in MasterCard.

117. Similarly, on March 19, 2008, Visa completed its own IPO. Under a series of transactions, Visa redeemed and reclassified approximately 270 million shares of Visa stock previously held by the member banks. To date, the member banks retain a significant financial and equity interest in Visa.

118. Following the IPOs, the Network Defendants continue to refer to their bank customers as "members" of Visa and MasterCard. By perpetuating the ATM Access Fee Restraints, the banks collectively have accorded the Network Defendants, in whom they have a significant financial interest, the authority to design, implement, and enforce a horizontal price- fixing restraint in which they are knowing participants.

119. Both prior to, and after the Network Defendants' IPOs, each bank which was a member of the Visa or MasterCard Networks, knew and understood that it and each and every other member of the applicable network would agree or continue to agree to be bound by the ATM Access Fee Restraints. Indeed, as discussed *infra,* it was and is in the member banks' best interest to agree or continue to agree to be bound by the ATM Access Fee Restraints.

120. In short, the violation in this case is a horizontal agreement among every bank that is a member of the Visa and/or MasterCard networks that charges ATM Access Fees on Foreign ATM Transactions. These co-conspirators are collectively referred to herein as the "Bank Co-Conspirators."

XII. THE RELEVANT MARKET

121. Plaintiffs allege a *per se* violation of the antitrust laws. For this reason, there is no need to plead a relevant product or geographic market.

122. To the extent it is required, Plaintiffs allege that the relevant product market is the market for ATM cash withdrawal services. No cost-effective alternative to ATM cash withdrawal services exists, and there are few substitutes. The market for ATM services is a separate and distinct relevant product market for the purposes of 15 U.S.C. § 1.

123. The relevant geographic market is comprised of the United States and its territories and possessions.

XIII. DEFENDANTS' MARKET POWER

124. Plaintiffs allege a *per se* violation of the antitrust laws. For this reason, there is no need to plead market power. To the extent it is required, Plaintiffs allege as follows.

125. The Bank Defendants represent the largest of the nation's consumer banking entities and are the leading providers of ATM services.

126. The Network Defendants represent the largest providers of ATM network processing services in the United States, and the leading brands of PIN debit payment cards.

127. Through their contracts and agreements, Defendants and their co-conspirators, including the Bank Co-Conspirators, wield considerable market power and control pricing in the relevant market. Visa and MasterCard implement and enforce the ATM restraints

challenged herein and require compliance with them in their contracts, agreements, rules and undertakings with the Bank Defendants and the Bank Co-Conspirators, who, in turn, secure compliance by their customers and suppliers. Together, Defendants and their co-conspirators, including the Bank Co-Conspirators, directly exercise their market power through these arrangements to suppress competition in the relevant market.

128. Defendants' direct exercise of market power constrains all consumers of ATM services and results in supra-competitive ATM Access Fees. Defendants actively monitor and vigorously enforce the ATM restraints. Consumers of ATM services must accept and agree to pay inflated and supra-competitive ATM Access Fees as a condition of withdrawing money in Foreign ATM Transactions.

129. Defendants and the Bank Co-Conspirators maintain their market power in light of the insurmountable barriers to entry faced by potential competitors.

XIV. NATIONWIDE DIRECT PURCHASER CLASS ALLEGATIONS

130. Plaintiffs bring this action under Fed. R. Civ. P. 23(a), (b)(2) and (3), on behalf of themselves and the following class (hereinafter, "Nationwide Direct Purchaser Class"):

> All individuals and entities that paid an ATM Access Fee for a Foreign ATM Transaction

directly to any Bank Defendant or Bank Co-Conspirator at any time on or after October 1, 2007 until such time as Defendants' unlawful conduct ceases.

131. Excluded from the Indirect Purchaser Class are Defendants; the officers, directors, or employees of any Defendant; any entity in which any Defendant has a controlling interest; and any affiliate, legal representative, heir or assign of any Defendant. Also excluded are any federal, state, or local governmental entities, any judicial presiding over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action.

132. The members of the Nationwide Direct Purchaser Class are so numerous that joinder of all members is impracticable. Plaintiffs estimate that the number of ATM cardholders forced to pay inflated ATM Access Fees in connection with a Foreign ATM Transaction are at least in the many thousands. Although the precise number of members of the Nationwide Direct Purchaser Class is currently unknown to Plaintiffs, this information is certainly within the control of the Defendants. Accordingly, the identity of these Class members can readily be determined from records maintained by Defendants.

133. Defendants' anticompetitive conduct is substantially uniform and the antitrust violations alleged herein affect Plaintiffs and the proposed Nationwide Direct Purchaser Class in substantially the same manner.

Consequently, common questions of law and fact will predominate over any individual questions of law and fact. Among the questions of law and fact common to the Nationwide Direct Purchaser Class are:

a. Whether Defendants have entered into an agreement to artificially fix the prices of all ATM Access Fees charged to Plaintiffs and the Nationwide Direct Purchaser Class;

b. Whether Defendants possess and exercise market power in the relevant market alleged in this complaint;

c. Whether the ATM restraints alleged herein cause Plaintiffs and the Nationwide Direct Purchaser Class to pay artificially high ATM Access Fees for Foreign ATM Transactions;

d. Whether Defendants' ATM restraints are unlawful under Section 1 of the Sherman Act;

e. The proper measure of damages and the amount thereof sustained by Plaintiffs and the Nationwide Direct Purchaser Class as a result of the violations alleged herein;

f. Whether Plaintiffs and the Nationwide Direct Purchaser Class are entitled to injunctive relief.

134. Plaintiffs have claims that are typical of the claims of the Nationwide Direct Purchaser Class and have no interests adverse to or in conflict with the Nationwide Direct Purchaser Class. Plaintiffs are represented by counsel competent and experienced in the prosecution of class action and antitrust litigation, and will fairly and adequately protect the interests of the Nationwide Direct Purchaser Class.

135. There is no foreseeable difficulty managing this action as a class action. Common questions of law and fact exist with respect to all members of the Nationwide Direct Purchaser Class and predominate over any questions solely affecting individual members. A class action is superior to other available methods for the fair and efficient adjudication of the controversy. Such treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without the duplication of effort and expense that numerous individual actions would engender. Class treatment will also permit the adjudication of relatively small claims by many class members who could not afford to individually litigate an antitrust claim against large corporate Defendants. There are no difficulties likely to be encountered in the management of this class action that would preclude its maintenance as a class action, and no superior alternative exists for the fair and efficient adjudication of the controversy.

136. The anticompetitive conduct of Defendants alleged herein has imposed a common antitrust injury on the members of the Nationwide Direct Purchaser Class.

137. Defendants have acted, continue to act, refused to act, and continue to refuse to act on grounds generally applicable to the Class, thereby making appropriate final injunctive relief with respect to the Class as a whole.

XV. INDIRECT PURCHASER CLASS ALLEGATIONS

138. In the event that Plaintiffs are held not to be direct purchasers under federal antitrust law, Plaintiffs, in the alternative, allege as follows:

139. Plaintiffs bring this action against Network Defendants only under Fed. R. Civ. P. 23(a), b(2) and (b)(3) on behalf of themselves and the following class (hereinafter, "Indirect Purchaser Class"):

> All individuals and entities that paid an ATM Access Fee for a Foreign ATM Transaction to any Visa and MasterCard Member Bank at any time on or after October I, 2007 until such time as the Network Defendants' unlawful conduct ceases.

140. Excluded from the Indirect Purchaser Class are Defendants; the officers, directors, or employees of any Defendant; any entity in which any Defendant has a

controlling interest; and any affiliate, legal representative, heir or assign of any Defendant. Also excluded are any federal, state, or local governmental entities, any judicial presiding over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action.

141. Plaintiffs will seek certification of the following subclasses (collectively, the "Indirect Purchaser State Classes") for damages for claims under the antitrust statutes and/or consumer protection statutes of each of the following jurisdictions:

a. Arizona Indirect Purchaser Class: All persons and entities who, as residents of Arizona, paid an ATM Access Fee to any Member Bank on or after October 1, 2007.

b. California Indirect Purchaser Class: All persons and entities who, as residents of California, paid an ATM Access Fee to any Member Bank on or after October 1, 2007.

c. District of Columbia Indirect Purchaser Class: All persons and entities who, as residents of the District of Columbia, paid an ATM Access Fee to any Member Bank on or after October I , 2007.

d. Florida Indirect Purchaser Class: All persons and entities who, as residents of Florida, paid an ATM Access Fee to any Member Bank on or after October 1, 2007.

e. Hawaii Indirect Purchaser Class: All persons and entities who, as residents of Hawaii, paid an ATM Access Fee to any Member Bank on or after October 1, 2007.

f. Illinois Indirect Purchaser Class: All persons and entities who, as residents of Illinois, paid an ATM Access Fee to any Member Bank on or after October 1, 2007.

g. Iowa Indirect Purchaser Class: All persons and entities who, as residents of Iowa, paid an ATM Access Fee to any Member Bank on or after October 1, 2007.

h. Kansas Indirect Purchaser Class: All persons and entities who, as residents of Kansas, paid an ATM Access Fee to any Member Bank on or after October 1, 2007.

i. Maine Indirect Purchaser Class: All persons and entities who, as residents of Maine, paid an ATM Access Fee to any Member Bank on or after October 1, 2007.

j. Massachusetts Indirect Purchaser Class: All persons and entities who, as residents of

Massachusetts, paid an ATM Access Fee to any Member Bank on or after October 1, 2007.

k. Michigan Indirect Purchaser Class: All persons and entities who, as residents of Michigan, paid an ATM Access Fee to any Member Bank on or after October 1, 2007.

I. Minnesota Indirect Purchaser Class: All persons and entities who, as residents of Minnesota, paid an ATM Access Fee to any Member Bank on or after October 1, 2007.

m. Missouri Indirect Purchaser Class: All persons and entities who, as residents of Missouri, paid an ATM Access Fee to any Member Bank on or after October 1, 2007.

n. Mississippi Indirect Purchaser Class: All persons and entities who, as residents of Mississippi, paid an ATM Access Fee to any Member Bank on or after October 1, 2007.

o. Montana Indirect Purchaser Class: All persons and entities who, as residents of Montana, paid an ATM Access Fee to any Member Bank on or after October 1, 2007.

p. Nebraska Indirect Purchaser Class: All persons and entities who, as residents of Nebraska, paid an ATM Access Fee to any Member Bank on or after October 1, 2007.

q. Nevada Indirect .Purchaser Class: All persons and entities who, as residents of Nevada, paid an ATM Access Fee to any Member Bank on or after October I, 2007.

r. New Hampshire Indirect Purchaser Class: All persons and entities who, as residents of New Hampshire, paid an ATM Access Fee to any Member Bank on or after October I, 2007.

s. New Mexico Indirect Purchaser Class: All persons and entities who, as residents of New Mexico, paid an ATM Access Fee to any Member Bank on or after October I, 2007.

t. New York Indirect Purchaser Class: All persons and entities who, as residents of New York, paid an ATM Access Fee to any Member Bank on or after October 1, 2007.

u. North Carolina Indirect Purchaser Class: All persons and entities who, as residents of North Carolina, paid an ATM Access Fee to any Member Bank on or after October 1 , 2007.

v. North Dakota Indirect Purchaser Class: All persons and entities who, as residents of North Dakota, paid an ATM Access Fee to any Member Bank on or after October 1, 2007.

w. Oregon Indirect Purchaser Class: All persons and entities who, as residents of Oregon,

paid an ATM Access Fee to any Member Bank on or after October 1, 2007.

x. South Carolina Indirect Purchaser Class: All persons and entities who, as residents of South Carolina, paid an ATM Access Fee to any Member Bank on or after October I, 2007.

y. South Dakota Indirect Purchaser Class: All persons and entities who, as residents of South Dakota, paid an ATM Access Fee to any Member Bank on or after October 1, 2007.

z. Tennessee Indirect Purchaser Class: All persons and entities who, as residents of Tennessee, paid an ATM Access Fee to any Member Bank on or after October 1, 2007.

aa. Utah Indirect Purchaser Class: All persons and entities who, as residents of Utah, paid an ATM Access Fee to any Member Bank on or after October 1, 2007.

bb. Vermont Indirect Purchaser Class: All persons and entities who, as residents of Vermont, paid an ATM Access Fee to any Member Bank on or after October 1, 2007.

cc. West Virginia Indirect Purchaser Class: All persons and entities who, as residents of West Virginia, paid an ATM Access Fee to any Member Bank on or after October 1, 2007.

dd. Wisconsin Indirect Purchaser Class: All persons and entities who, as residents of Wisconsin, paid an ATM Access Fee to any Member Bank on or after October 1, 2007.

142. The members of the Indirect Purchaser State Classes are so numerous that individual joinder of all members is impracticable under the circumstances of this case. Although the precise number of such persons is unknown, the exact size of each of the Indirect Purchaser State Classes is easily ascertainable, as each class member can by identified by using Defendants' records. Plaintiffs are informed and believe that there are many thousands of Indirect Purchaser State Class members.

143. Indirect Purchaser Plaintiffs' claims are typical of the claims of the members of the Indirect Purchaser State Classes in that Indirect Purchaser Plaintiffs are indirect purchasers of ATM services from Member Banks and paid ATM Access Fees, all Indirect Purchaser State Class members were damaged by the same wrongful conduct of Defendants and their co-conspirators as alleged herein, and the relief sought is common to the Indirect Purchaser State Classes.

144. Defendants' relationships with the members of the Indirect Purchaser State Classes and Defendants' anticompetitive conduct are substantially uniform and the antitrust violation alleged herein affects Plaintiffs in substantially the same manner. Consequently, common questions of law and fact will predominate over any individual questions of law and fact. Among the questions

of law and fact common to the Indirect Purchaser State Classes are:

a. Whether Defendants have entered into an agreement to artificially fix the prices of all ATM Access Fees charged to Plaintiffs and the Indirect Purchaser State Classes;

b. Whether Defendants possess and exercise market power in the relevant market alleged in this complaint;

c. Whether the ATM restraints alleged herein cause Plaintiffs and the Indirect Purchaser State Classes to pay artificially high ATM Access Fees for Foreign ATM Transactions;

d. Whether Defendants' ATM restraints are unlawful under the state antitrust and consumer protection statutes alleged herein;

e. The proper measure of damages and the amount thereof sustained by Plaintiffs and the Indirect Purchaser State Classes as a result of the violations alleged herein;

f. Whether Plaintiffs and the Indirect Purchaser State Classes are entitled to injunctive relief.

145. Plaintiffs have claims that are typical of the claims of the class and have no interests adverse to or in conflict with the class. Plaintiffs are represented by counsel competent and experienced in the payment industry and in prosecution of class action and antitrust litigation and will fairly and adequately protect the interests of the Indirect Purchaser State Classes.

146. There is no foreseeable difficulty managing this action as a class action. Common questions of law and fact exist with respect to all members of the Indirect Purchaser State Classes and predominate over any questions solely affecting individual members. A class action is superior to any other method for the fair and efficient adjudication of this legal dispute because joinder of all members is impracticable, if not impossible. The damages suffered by most of the members of the Indirect Purchaser State Classes are small in relation to the expense and burden of individual litigation and therefore impractical for such members of the class to individually attempt to redress the antitrust violation alleged herein.

147. The anticompetitive conduct of Defendants alleged herein has imposed a common antitrust injury on the members of the class.

148. Defendants have acted, continue to act, refused to act, and continue to refuse to act on grounds generally applicable to the Indirect Purchaser State Classes, thereby making appropriate final injunctive relief with respect to the Class as a whole.

Appendix D

FIRST CLAIM FOR RELIEF AGAINST ALL DEFENDANTS: SHERMAN ACT, SECTION 1, 15 U.S.C. § 1 (*PER SE* AGREEMENT TO FIX PRICES OR UNREASONABLE RESTRAINT OF TRADE)

149. Through the ATM restraints challenged herein, Defendants and the Bank Co- Conspirators have implemented and managed a horizontal agreement to fix prices for ATM Access Fees and to protect and shield themselves from competition from lower-priced ATM services. Defendants' ATM restraints independently restrain competition and constitute a *per se* violation of Section 1 of the Sherman Act.

150. Defendants' ATM restraints constitute an agreement that unreasonably restrains competition in the market for ATM services in the United States in violation of Section 1 of the Sherman Act, 15 U.S.C. § I. The agreements have and will continue to restrain trade in interstate commerce by fixing the price of ATM Access Fees in a manner that prevents ATM customers from using lower-cost ATM network services and protecting Defendants from competition in providing ATM services. By unlawfully insulating the Visa and MasterCard networks from competition in providing ATM services, the agreements unlawfully increase ATM Access Fees above reasonably competitive levels, reduce output and the number of ATM terminals deployed, harm the competitive process, raise barriers to entry and expansion, and impede innovation and investment.

151. The ATM restraints are not reasonably necessary to accomplish any pro- competitive goal. Any efficiency benefit is outweighed by anticompetitive harm and less restrictive alternatives exist by which Defendants could reasonably achieve the same or greater efficiency.

152. As a result of these violations of Section 1 of the Sherman Act, Plaintiffs and the putative Class have been monetarily injured. Among other effects, the ATM restraints prevent Plaintiffs and the proposed Class from paying the lower ATM Access Fees that would result from a competitive market.

153. These violations of the Sherman Act and the effects thereof are continuing and will continue unless the injunctive relief requested herein is granted.

154. Plaintiffs and members of the Nationwide Direct Purchaser Class have been and are injured in their business or property by being forced to pay inflated and supra-competitive ATM Access Fees, resulting from Defendants' unlawful imposition of the ATM restraints alleged herein.

Appendix D

SECOND CLAIM FOR RELIEF AGAINST ALL DEFENDANTS: SHERMAN ACT, SECTION 1, 15 U.S.C. § 1 (VERTICAL AGREEMENT AMONG VISA, BANK DEFENDANTS, AND BANK CO-CONSPIRATORS TO FIX PRICES OR UNREASONABLE RESTRAINT OF TRADE)

155. In the event Defendants' ATM restraints are held not to constitute a horizontal conspiracy in restraint of trade, Plaintiffs, in the alternative, allege as follows.

156. The Bank Defendants, along with the Bank Co-Conspirators, entered into separate, but identical express written agreements ("ATM Restraint Agreements") with Visa (pursuant to Section 4.1OA of the Visa Operating Agreement) whereby Visa, Bank Defendants and Bank Co-Conspirators explicitly agreed to fix the ATM Access Fee charged for any transaction at a given ATM to be no less than the amount charged at the same ATM for a Visa or MasterCard transaction.

157. As set forth in Paragraphs 1 through 148, Defendants' ATM Restraint Agreements restrain competition in the ATM services market and constitute a violation of Section I of the Sherman Act.

158. Defendants' ATM Restraint Agreements unreasonably restrain interbrand competition in the ATM services market in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The ATM Restraint Agreements have restrained and will continue to restrain trade in interstate

commerce by fixing and inflating the price of ATM Access Fees in a manner that: (1) prevents ATM operators from varying the ATM Access Fees they charge to reflect differences in the ATM Operators' costs imposed by competing ATM networks; (2) eliminates any incentive for consumers to conduct transactions at ATMs with Pin debit cards that contain service marks of competing lower-cost ATM networks; and (3) protects Visa from competition with other ATM networks in providing ATM network services. By unlawfully insulating Visa from competition in the ATM network market, the ATM Restraint Agreements unlawfully result in increased ATM Access Fees above reasonably competitive levels, reduce output and the number of ATM terminals deployed, harm the competitive process, raise barriers to entry in the ATM network market, and impede innovation and investment in both the ATM network and ATM services market.

159. The ATM Restraint Agreements are not reasonably necessary to accomplish any pro-competitive goal and no pro-competitive benefits result from them. Any efficiency benefit is outweighed by anticompetitive harm and Jess restrictive alternatives exist by which Visa, Bank Defendants and Bank Co-Conspirators could reasonably achieve the same or greater efficiency.

160. As a result of these violations of Section I of the Sherman Act, Plaintiffs and the Nationwide Direct Purchaser Class have been monetarily injured. Among other effects, the ATM Restraint Agreements prevent Plaintiffs and the Nationwide Direct Purchaser Class from paying the lower ATM Access Fees that would result from a competitive ATM services market.

161. These violations of the Sherman Act and the effects thereof are continuing and will continue unless the injunctive relief requested herein is granted.

162. Plaintiffs and members of the Nationwide Direct Purchaser Class have been and are injured in their business or property by being forced to pay inflated and supra-competitive ATM Access Fees, resulting from the anticompetitive effects of the ATM Restraint Agreements alleged herein.

THIRD CLAIM FOR RELIEF AGAINST ALL DEFENDANTS: SHERMAN ACT, SECTION 1, 15 U.S.C. § 1 (VERTICAL AGREEMENT AMONG MASTERCARD, BANK DEFENDANTS, AND BANK CO-CONSPIRATORS TO FIX PRICES OR UNREASONABLE RESTRAINT OF TRADE)

163. In the event Defendants' ATM restraints are held not to constitute a horizontal conspiracy in restraint of trade, Plaintiffs, in the alternative, allege as follows:

164. The Bank Defendants, along with the Bank Co-Conspirators, entered into separate, but identical express written agreements ("ATM Restraint Agreements") with MasterCard (pursuant to Section 7.13.1.2 of MasterCard's Cirrus Worldwide Operating Rules) whereby MasterCard, Bank Defendants and Bank Co-Conspirators explicitly agreed to fix the ATM Access Fee charged for any transaction at a given ATM to be no Jess than the amount charged at the same ATM for a Visa or MasterCard transaction.

165. As set forth in Paragraphs I through 148, Defendants' ATM Restraint Agreements restrain competition in the ATM services market and constitute a violation of Section I of the Sherman Act.

166. Defendants' ATM Restraint Agreements unreasonably restrain interbrand competition in the ATM services market in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The ATM Restraint Agreements have restrained and will continue to restrain trade in interstate commerce by fixing and inflating the price of ATM Access Fees in a manner that: (1) prevents ATM operators from varying the ATM Access Fees they charge to reflect differences in the ATM Operators' costs imposed by competing ATM networks; (2) eliminates any incentive for consumers to conduct transactions at ATMs with Pin debit cards that contain service marks of competing lower-cost ATM networks; and (3) protects MasterCard from competition with other ATM networks in providing ATM network services. By unlawfully insulating MasterCard from competition in the ATM network market, the ATM Restraint Agreements unlawfully result in increased ATM Access Fees above reasonably competitive levels, reduce output and the number of ATM terminals deployed, harm the competitive process, raise barriers to entry in the ATM network market, and impede innovation and investment in both the ATM network and ATM services market.

167. The ATM Restraint Agreements are not reasonably necessary to accomplish any pro-competitive goal and no pro-competitive benefits result from them.

Any efficiency benefit is outweighed by anticompetitive harm and Jess restrictive alternatives exist by which MasterCard, Bank Defendants, and Bank Co-Conspirators could reasonably achieve the same or greater efficiency.

168. As a result of these violations of Section 1 of the Sherman Act, Plaintiffs and the Nationwide Direct Purchaser Class have been monetarily injured. Among other effects, the ATM Restraint Agreements prevent Plaintiffs and the Nationwide Direct Purchaser Class from paying the lower ATM Access Fees that would result from a competitive ATM services market.

169. These violations of the Sherman Act and the effects thereof are continuing and will continue unless the injunctive relief requested herein is granted.

170. Plaintiffs and members of the Nationwide Direct Purchaser Class have been and are injured in their business or property by being forced to pay inflated and supra-competitive ATM Access Fees, resulting from the anticompetitive effects ofthe ATM Restraint Agreements alleged herein.

FOURTH CLAIM FOR RELIEF AGAINST NETWORK DEFENDANTS: VIOLATIONS OF STATE ANTITRUST AND RESTRAINT OF TRADE LAWS

171. Plaintiffs incorporate by reference the allegations in the above paragraphs as if fully set forth herein.

172. Plaintiffs allege the following violations of state antitrust and restraint of trade laws.

173. Arizona: By reason of the foregoing, Network Defendants have violated Arizona Revised Statutes, § 44-1401 *et seq.* The Arizona Indirect Purchaser Class alleges as follows:

a. Network Defendants' combinations or conspiracies had the following effects: (1) price competition for ATM Transactions was restrained, suppressed, and eliminated throughout Arizona; (2) prices for ATM Transactions were raised, fixed, maintained and stabilized at artificially high levels throughout Arizona; (3) members of the Arizona Indirect Purchaser Class were deprived of free and open competition; and (4) members of the Arizona Indirect Purchaser Class paid supra-competitive, artificially inflated prices for ATM Transactions;

b. During the Class Period, Network Defendants' illegal conduct substantially affected Arizona commerce.

c. As a direct and proximate result of Network Defendants' unlawful conduct, members of the Arizona Indirect Purchaser Class have been injured in their business and property and are threatened with further injury.

d. By reason of the foregoing, Network Defendants entered into agreements in restraint of trade in violation of Arizona Revised Statutes § 44-1401 *et seq.* Accordingly, the members of the Arizona Indirect Purchaser Class

seek all forms of relief available under Arizona Revised Statutes § 44-1401 *et seq.*

174. California: By reason of the foregoing, Network Defendants have violated California Business and Professions Code, § 16700 *et seq.* The California Indirect Purchaser Class alleges as follows:

a. Network Defendants' contract, combination, trust or conspiracy was entered in, carried out, effectuated and perfected within the State of California, and Network Defendants' conduct within California injured all members of the Class throughout the United States. Therefore, this claim for relief under California law is brought on behalf of the California Indirect Purchaser Class.

b. Beginning at a time currently unknown to the California Indirect Purchaser Class, but at least as early as October 1, 2007, and continuing thereafter at least up to the filing of this complaint, Network Defendants and their co-conspirators entered into and engaged in a continuing unlawful trust in restraint of the trade and commerce described above in violation of section 16720, California Business and Professions Code. Network Defendants, and each of them, have acted in violation of section 16720 to fix, raise, stabilize, and maintain prices of, and allocate markets for ATM Transactions at supra-competitive levels.

c. The aforesaid violations of section 16720, California Business and Professions Code, consisted, without limitation, of a continuing unlawful trust and concert

of action among the Network Defendants and their co-conspirators, the substantial terms of which were to fix, raise, maintain, and stabilize the prices of, and to allocate markets for ATM Transactions.

d. For the purpose of forming and effectuating the unlawful trust, the Network Defendants and their co-conspirators have done those things which they combined and conspired to do, including but not in any way limited to, the acts, practices and course of conduct set forth above, fixing, raising, stabilizing, and pegging the price of ATM Transactions.

e. The combination and conspiracy alleged herein has had, inter alia, the following effects: (1) price competition in the sale of ATM Transactions has been restrained, suppressed, and/or eliminated in the State of California; (2) prices for ATM Transactions have been fixed, raised, stabilized, and pegged at artificially high, noncompetitive levels in the State of California; and (3) those who purchased ATM Transactions directly or indirectly from Defendants and their co-conspirators have been deprived of the benefit of free and open competition.

f. As a direct and proximate result of Network Defendants' unlawful conduct, the members of the California Indirect Purchaser Class have been injured in their business and property in that they paid more for ATM Transactions than they otherwise would have paid in the absence of Defendants' unlawful conduct. As a result of Network Defendants' violation of Section 16720 of the California Business and Professions Code, the California Indirect Purchaser Class seek treble damages

and their cost of suit, including a reasonable attorney's fee, pursuant to section 16750(a) of the California Business and Professions Code.

175. District of Columbia: By reason of the foregoing, Network Defendants have violated District of Columbia Code Annotated § 28-4501 *et seq.* District of Columbia Plaintiffs on behalf of the District of Columbia Indirect Purchaser Class alleges as follows:

a. Network Defendants' combinations or conspiracies had the following effects: (1) price competition for ATM Transactions was restrained, suppressed, and eliminated throughout the District of Columbia; (2) prices for ATM Transactions were raised, fixed, maintained and stabilized at artificially high levels throughout the District of Columbia; (3) members of the District of Columbia Indirect Purchaser Class were deprived of free and open competition; and (4) members of the District of Columbia Indirect Purchaser Class paid supra-competitive, artificially inflated prices for ATM Transactions.

b. During the Class Period, Network Defendants' illegal conduct substantially affected District of Columbia commerce.

c. As a direct and proximate result of Network Defendants' unlawful conduct, members of the District of Columbia Indirect Purchaser Class have been injured in their business and property and are threatened with further injury.

d. By reason of the foregoing, Network Defendants have entered into agreements in restraint of trade in violation of District of Columbia Code Annotated§ 28-4502 *et seq.* Accordingly, the District of Columbia Indirect Purchaser Class seek all forms of relief available under District of Columbia Code Annotated § 28-4503 *et seq.*

176. Hawaii: By reason of the foregoing, Network Defendants have violated Hawaii Revised Statutes, § 480-1 *et seq.* The Hawaii Indirect Purchaser Class alleges as follows:

a. Network Defendants' combinations or conspiracies had the following effects: (1) price competition for ATM Transactions was restrained, suppressed, and eliminated throughout Hawaii; (2) prices for ATM Transactions were raised, fixed, maintained and stabilized at artificially high levels throughout Hawaii; (3) members of the Hawaii Indirect Purchaser Class were deprived of free and open competition; and (4) members of the Hawaii Indirect Purchaser Class paid supra-competitive, artificially inflated prices for ATM Transactions.

b. During the Class Period, Network Defendants' illegal conduct substantially affected Hawaii commerce.

c. As a direct and proximate result of Network Defendants' unlawful conduct, members of the Hawaii Indirect Purchaser Class have been injured in their business and property and are threatened with further injury.

d. By reason of the foregoing, Network Defendants entered into agreements in restraint of trade in violation of Hawaii Revised Statutes§ 480-1 *et seq.* Accordingly, the members of the Hawaii Indirect Purchaser Class seek all forms of relief available under Hawaii Revised Statutes § 480-1 *et seq.*

177. Illinois: By reason of the foregoing, Network Defendants have violated the Illinois Antitrust Act, Illinois Compiled Statutes, § 740 I11. Comp. Stat. 10/1 *et seq.* The Illinois Indirect Purchaser Class alleges as follows:

a. Network Defendants' combinations or conspiracies had the following effects: (1) price competition for ATM Transactions was restrained, suppressed, and eliminated throughout Illinois; (2) prices for ATM Transactions were raised, fixed, maintained and stabilized at artificially high levels throughout Illinois; (3) members of the Illinois Indirect Purchaser Class were deprived of free and open competition; and (4) members of *the* Illinois Indirect Purchaser Class paid supra-competitive, artificially inflated prices for ATM Transactions.

b. During the Class Period, Network Defendants' illegal conduct substantially affected Illinois commerce.

c. As a direct and proximate result of Network Defendants' unlawful conduct, the Illinois Indirect Purchaser Class have been injured in their business and property and are threatened with further injury.

d. By reason of the foregoing, Network Defendants *entered* into agreement in restraint of trade in violation of Illinois Compiled Statutes,§ 740 Ill. Comp. Stat. 10/1 *et seq.* Accordingly, *members* of *the* Illinois Indirect Purchaser Class *seek* all forms of relief available under Illinois Compiled Statutes, § 740 Ill. Comp. Stat. 10/1 *et seq.*

178. Iowa: By reason of the foregoing, Network Defendants have violated Iowa Code § 553.1 *et seq.* The Iowa Indirect Purchaser Class alleges as follows:

a. Network Defendants' combinations or conspiracies had the following effects: (1) price competition for ATM Transactions was restrained, suppressed, and eliminated throughout Iowa; (2) prices for ATM Transactions were raised, fixed, maintained and stabilized at artificially high levels throughout Iowa; (3) the Iowa Indirect Purchaser Class were deprived of free and open competition; and (4) the Iowa Indirect Purchaser Class paid supra-competitive, artificially inflated prices for ATM Transactions.

b. During the Class Period, Network Defendants' illegal conduct substantially affected Iowa commerce.

c. As a direct and proximate result of Network Defendants' unlawful conduct, members of the Iowa Indirect Purchaser Class have been injured in their business and property and are threatened with further injury.

d. By reason of the foregoing, Network Defendants have entered into agreements in restraint of trade in violation of Iowa Code§ 553.1 *et seq.* Accordingly, members of the Iowa Indirect Purchaser Class seek all forms of relief available under Iowa Code § 553.1 *et seq.*

179. Kansas: By reason of the foregoing, Network Defendants have violated Kansas Statutes, § 50-101 *et seq.* The Kansas Indirect Purchaser Class alleges as follows:

a. Network Defendants' combinations or conspiracies had the following effects: (1) price competition for ATM Transactions was restrained, suppressed, and eliminated throughout Kansas; (2) prices for ATM Transactions were raised, fixed, maintained and stabilized at artificially high levels throughout Kansas; (3) the Kansas Indirect Purchaser Class were deprived of free and open competition; and (4) the Kansas Indirect Purchaser Class paid supra- competitive, artificially inflated prices for ATM Transactions.

b. During the Class Period, Network Defendants' illegal conduct substantially affected Kansas commerce.

c. As a direct and proximate result of Network Defendants' unlawful conduct, members of the Kansas Indirect Purchaser Class have been injured in their business and property and are threatened with further injury.

d. By reason of the foregoing, Network Defendants have entered into agreements in restraint of trade in

violation of Kansas Statutes§ 50-101 *et seq.* Accordingly, members of the Kansas Indirect Purchaser Class seek all forms of relief available under Kansas Statutes § 50-101 *et seq.*

180. Maine: By reason of the foregoing, Network Defendants have violated the Maine Revised Statutes, 10 M.R.S. § 1101 *et seq.* The Maine Indirect Purchaser Class alleges as follows:

a. Network Defendants' combinations or conspiracies had the following effects: (1) price competition for ATM Transactions was restrained, suppressed, and eliminated throughout Maine; (2) prices for ATM Transactions were raised, fixed, maintained and stabilized at artificially high levels throughout Maine; (3) members of the Maine Indirect Purchaser Class were deprived of free and open competition; and (4) members of the Maine Indirect Purchaser Class paid supra-competitive, artificially inflated prices for ATM Transactions.

b. During the Class Period, Network Defendants' illegal conduct substantially affected Maine commerce.

c. As a direct and proximate result of Network Defendants' unlawful conduct, members of the Maine Indirect Purchaser Class have been injured in their business and property and are threatened with further injury.

d. By reason of the foregoing, Network Defendants have entered into agreements in restraint of trade in

violation of Maine Revised Statutes 10, § 1101 *et seq.* Accordingly, members of the Maine Indirect Purchaser Class seek all relief available under Maine Revised Statutes 10, § 1101 *et seq.*

181. Michigan: By reason of the foregoing, Network Defendants have violated Michigan Compiled Laws§ 445.773 *et seq.* The Michigan Indirect Purchaser Class alleges as follows:

a. Network Defendants' combinations or conspiracies had the following effects: (1) price competition for ATM Transactions was restrained, suppressed, and eliminated throughout Michigan; (2) prices for ATM Transactions were raised, fixed, maintained and stabilized at artificially high levels throughout Michigan; (3) members of the Michigan Indirect Purchaser Class were deprived of free and open competition; and (4) members of the Michigan Indirect Purchaser Class paid supra-competitive, artificially inflated prices for ATM Transactions.

b. During the Class Period, Network Defendants' illegal conduct substantially affected Michigan commerce.

c. As a direct and proximate result of Network Defendants' unlawful conduct, members of the Michigan Indirect Purchaser Class have been injured in their business and property and are threatened with further injury.

d. By reason of the foregoing, Network Defendants have entered into agreements in restraint of trade in

violation of Michigan Compiled Laws § 445.773 *et seq.* Accordingly, members of the Michigan Indirect Purchaser Class seek all relief available under Michigan Compiled Laws§ 445.73 *et seq.*

182. Minnesota: By reason of the foregoing, Network Defendants have violated Minnesota Statutes§ 325D.49 *et seq.* The Minnesota Indirect Purchaser Class alleges as follows:

a. Network Defendants' combinations or conspiracies had the following effects: (I) price competition for ATM Transactions was restrained, suppressed, and eliminated throughout Minnesota; (2) prices for ATM Transactions were raised, fixed, maintained and stabilized at artificially high levels throughout Minnesota; (3) members of the Minnesota Indirect Purchaser Class were deprived of free and open competition; and (4) members of the Minnesota Indirect Purchaser Class paid supra-competitive, artificially inflated prices for ATM Transactions.

b. During the Class Period, Network Defendants' illegal conduct substantially affected Minnesota commerce.

c. As a direct and proximate result of Network Defendants' unlawful conduct, members of the Minnesota Indirect Purchaser Class have been injured in their business and property and are threatened with further injury.

d. By reason of the foregoing, Network Defendants have entered into agreements in restraint of trade

in violation of Minnesota Statutes§ 325D.49 *et seq.* Accordingly, members of the Minnesota Indirect Purchaser Class seek all relief available under Minnesota Statutes § 325D.49 *et seq.*

183. Mississippi: By reason of the foregoing, Network Defendants have violated Mississippi Code § 75-21-1 *et seq.* The Mississippi Indirect Purchaser Class alleges as follows:

a. Network Defendants' combinations or conspiracies had the following effects: (I) price competition for ATM Transactions was restrained, suppressed, and eliminated throughout Mississippi; (2) prices for ATM Transactions were raised, fixed, maintained and stabilized at artificially high levels throughout Mississippi; (3) members of the Mississippi Indirect Purchaser Class were deprived of free and open competition; and (4) members of the Mississippi Indirect Purchaser Class paid supra-competitive, artificially inflated prices for ATM Transactions.

b. During the Class Period, Network Defendants' illegal conduct substantially affected Mississippi commerce.

c. As a direct and proximate result of Network Defendants' unlawful conduct, members of the Mississippi Indirect Purchaser Class have been injured in their business and property and are threatened with further injury.

d. By reason of the foregoing, Network Defendants have entered into agreements in restraint of trade in violation of Mississippi Code § 75-21-1 *et seq.*

e. Accordingly, members of the Mississippi Indirect Purchaser Class seek all relief available under Mississippi Code § 75-21-1 *et seq.*

184. Nebraska: By reason of the foregoing, Network Defendants have violated Nebraska Revised Statutes§ 59-801 *et seq.* The Nebraska Indirect Purchaser Class alleges as follows:

a. Network Defendants' combinations or conspiracies had the following effects: (I) price competition for ATM Transactions was restrained, suppressed, and eliminated throughout Nebraska; (2) prices for ATM Transactions were raised, fixed, maintained and stabilized at artificially high levels throughout Nebraska; (3) members of the Nebraska Indirect Purchaser Class were deprived of free and open competition; and (4) members of the Nebraska Indirect Purchaser Class paid supra-competitive, artificially inflated prices for ATM Transactions.

b. During the Class Period, Network Defendants' illegal conduct substantially affected Nebraska commerce.

c. As a direct and proximate result of Network Defendants' unlawful conduct, members of the Nebraska Indirect Purchaser Class have been injured in their business and property and are threatened with further injury.

d. By reason of the foregoing, Network Defendants have entered into agreements in restraint of trade in violation Nebraska Revised Statutes§ 59-801 *et seq.* Accordingly, members of the Nebraska Indirect Purchaser Class seek all relief available under Nebraska Revised Statutes § 59-801 *et seq.*

185. Nevada: By reason of the foregoing, Network Defendants have violated Nevada Revised Statutes § 598A.O10 *et seq.* The Nevada Indirect Purchaser Class alleges as follows:

a. Network Defendants' combinations or conspiracies had the following effects: (1) price competition for ATM Transactions was restrained, suppressed, and eliminated throughout Nevada; (2) prices for ATM Transactions were raised, fixed, maintained and stabilized at artificially high levels throughout Nevada; (3) members of the Nevada Indirect Purchaser Class were deprived of free and open competition; and (4) members of the Nevada Indirect Purchaser Class paid supra-competitive, artificially inflated prices for ATM Transactions.

b. During the Class Period, Network Defendants' illegal conduct substantially affected Nevada commerce.

c. As a direct and proximate result of Network Defendants' unlawful conduct, members of the Nevada Indirect Purchaser Class have been injured in their business and property and are threatened with further injury.

d. By reason of the foregoing, Network Defendants have entered into agreements in restraint of trade in violation of Nevada Revised Statutes§ 598A.Ol0 *et seq.* Accordingly, members of the Nevada Indirect Purchaser Class seek all relief available under Nevada Revised Statutes § 598A.O10 *et seq.*

186. New Hampshire: By reason of the foregoing, Network Defendants have violated New Hampshire Revised Statutes § 356:1 *et seq.* The New Hampshire Indirect Purchaser Class alleges as follows:

a. Network Defendants' combinations or conspiracies had the following effects: (1) price competition for ATM Transactions was restrained, suppressed, and eliminated throughout New Hampshire; (2) prices for ATM Transactions were raised, fixed, maintained and stabilized at artificially high levels throughout New Hampshire; (3) members of the New Hampshire Indirect Purchaser Class were deprived of free and open competition; and (4) members of the New Hampshire Indirect Purchaser Class paid supra-competitive, artificially inflated prices for ATM Transactions.

b. During the Class Period, Network Defendants' illegal conduct substantially affected New Hampshire commerce.

c. As a direct and proximate result of Network Defendants' unlawful conduct, members of the New Hampshire Indirect Purchaser Class have been injured in their business and property and are threatened with further injury.

d. By reason of the foregoing, Network Defendants have entered into agreements in restraint of trade in violation of New Hampshire Revised Statutes § 356:1 *et seq.* Accordingly, members of the New Hampshire Indirect Purchaser Class seek all relief available under New Hampshire Revised Statutes § 356:1 *et seq.*

187. New Mexico: By reason of the foregoing, Network Defendants have violated New Mexico Statutes § 57-1-1 *et seq.* The New Mexico Indirect Purchaser Class alleges as follows:

a. Network Defendants' combinations or conspiracies had the following effects: (1) price competition for ATM Transactions was restrained, suppressed, and eliminated throughout New Mexico; (2) prices for ATM Transactions were raised, fixed, maintained and stabilized at artificially high levels throughout New Mexico; (3) members of the New Mexico Indirect Purchaser Class were deprived of free and open competition; and (4) members of the New Mexico Indirect Purchaser Class paid supra-competitive, artificially inflated prices for ATM Transactions.

b. During the Class Period, Network Defendants' illegal conduct substantially affected New Mexico commerce.

c. As a direct and proximate result of Network Defendants' unlawful conduct, members of the New Mexico Indirect Purchaser Class have been injured in their business and property and are threatened with further injury.

d. By reason of the foregoing, Network Defendants have entered into agreements in restraint of trade in violation of New Mexico Statutes§ 57-1-1 *et seq.* Accordingly, members of the New Mexico Indirect Purchaser Class seek all relief available under New Mexico Statutes § 57-1-1 *et seq.*

188. New York: By reason of the foregoing, Network Defendants have violated New York General Business Laws § 340 *et seq.* The New York Indirect Purchaser Class alleges as follows:

a. Network Defendants' combinations or conspiracies had the following effects: (1) price competition for ATM Transactions was restrained, suppressed, and eliminated throughout New York; (2) prices for ATM Transactions were raised, fixed, maintained and stabilized at artificially high levels throughout New York; (3) members of the New York Indirect Purchaser Class were deprived of free and open competition; and (4) members of the New York Indirect Purchaser Class paid supra-competitive, artificially inflated prices for ATM Transactions.

b. During the Class Period, Network Defendants' illegal conduct substantially affected New York commerce.

c. As a direct and proximate result of Network Defendants' unlawful conduct, members of the New York Indirect Purchaser Class have been injured in their business and property and are threatened with further injury.

d. By reason of the foregoing, Network Defendants have entered into agreements in restraint of trade in violation of New York General Business Laws§ 340 *et seq.* Accordingly, members of the New York Indirect Purchaser Class seek all relief available under New York General Business Laws § 340 *et seq.*

189. North Carolina: By reason of the foregoing, Network Defendants have violated North Carolina General Statutes § 75-1 *et seq.* The North Carolina Indirect Purchaser Class alleges as follows:

a. Network Defendants' combinations or conspiracies had the following effects: (I) price competition for ATM Transactions was restrained, suppressed, and eliminated throughout North Carolina; (2) prices for ATM Transactions were raised, fixed, maintained and stabilized at artificially high levels throughout North Carolina; (3) members of the North Carolina Indirect Purchaser Class were deprived of free and open competition; and (4) members of the North Carolina Indirect Purchaser Class paid supra-competitive, artificially inflated prices for ATM Transactions.

b. During the Class Period, Network Defendants' illegal conduct substantially affected North Carolina commerce.

c. As a direct and proximate result of Network Defendants' unlawful conduct, members of the North Carolina Indirect Purchaser Class have been injured in their business and property and are threatened with further injury.

d. By reason of the foregoing, Network Defendants have entered into agreements in restraint of trade in violation of North Carolina General Statutes§ 75-1 *et seq.* Accordingly, members of the North Carolina Indirect Purchaser Class seek all relief available under North Carolina General Statutes § 75- I *et seq.*

190. North Dakota: By reason of the foregoing, Network Defendants have violated North Dakota Century Code§ 51-08.1-01 *et seq.* The North Dakota Indirect Purchaser Class alleges as follows:

a. Network Defendants' combinations or conspiracies had the following effects: (1) price competition for ATM Transactions was restrained, suppressed, and eliminated throughout North Dakota; (2) prices for ATM Transactions were raised, fixed, maintained and stabilized at artificially high levels throughout North Dakota; (3) members of the North Dakota Indirect Purchaser Class were deprived of free and open competition; and (4) members of the North Dakota Indirect Purchaser Class paid supra-competitive, artificially inflated prices for ATM Transactions.

b. During the Class Period, Network Defendants' illegal conduct had a substantial effect on North Dakota commerce.

c. As a direct and proximate result of Network Defendants' unlawful conduct, members of the North Dakota Indirect Purchaser Class have been injured in their business and property and are threatened with further injury.

d. By reason of the foregoing, Network Defendants have entered into agreements in restraint of trade in violation of North Dakota Century Code§ 51-08.1-01 *et seq.* Accordingly, members of the North Dakota Indirect Purchaser Class seek all relief available under North Dakota Century Code § 51-08.1-01 *et seq.*

191. Oregon: By reason of the foregoing, Network Defendants have violated Oregon Revised Statutes § 646.705 *et seq.* The Oregon Indirect Purchaser Class allege as follows:

a. Network Defendants' combinations or conspiracies had the following effects: (1) price competition for ATM Transactions was restrained, suppressed, and eliminated throughout Oregon; (2) prices for ATM Transactions were raised, fixed, maintained and stabilized at artificially high levels throughout Oregon; (3) members of the Oregon Indirect Purchaser Class were deprived of free and open competition; and (4) members of the Oregon Indirect Purchaser Class paid supra-competitive, artificially inflated prices for ATM Transactions.

b. During the Class Period, Network Defendants' illegal conduct had a substantial effect on Oregon commerce.

c. As a direct and proximate result of Network Defendants' unlawful conduct, members of the Oregon Indirect Purchaser Class have been injured in their business and property and are threatened with further injury.

d. By reason of the foregoing, Network Defendants have entered into agreements in restraint of trade in violation of Oregon Revised Statutes§ 646.705 *et seq.* Accordingly, members of the Oregon Indirect Purchaser Class seek all relief available under Oregon Revised Statutes § 646.705 *et seq.*

192. South Dakota: By reason of the foregoing, Network Defendants have violated South Dakota Codified Laws § 37-1-3.1 *et seq.* The South Dakota Indirect Purchaser Class alleges as follows:

a. Network Defendants' combinations or conspiracies had the following effects: (1) price competition for ATM Transactions was restrained, suppressed, and eliminated throughout South Dakota; (2) prices for ATM Transactions were raised, fixed, maintained and stabilized at artificially high levels throughout South Dakota; (3) members of the South Dakota Indirect Purchaser Class were deprived of free and open competition; and (4) members of the South Dakota Indirect Purchaser Class paid supra-competitive, artificially inflated prices for ATM Transactions.

b. During the Class Period, Network Defendants' illegal conduct had a substantial effect on South Dakota commerce.

c. As a direct and proximate result of Network Defendants' unlawful conduct, members of the South Dakota Indirect Purchaser Class have been injured in their business and property and are threatened with further injury.

d. By reason of the foregoing, Network Defendants have entered into agreements in restraint of trade in violation of South Dakota Codified Laws§ 37-I-3.I *et seq.* Accordingly, members of the South Dakota Indirect Purchaser Class seek all relief available under South Dakota Codified Laws§ 37-I-3.I *et seq.*

193. Tennessee: By reason of the foregoing, Network Defendants have violated Tennessee Code § 47-25-101 *et seq.* The Tennessee Indirect Purchaser Class alleges as follows:

a. Network Defendants' combinations or conspiracies had the following effects: (1) price competition for ATM Transactions was restrained, suppressed, and eliminated throughout Tennessee; (2) prices for ATM Transactions were raised, fixed, maintained and stabilized at artificially high levels throughout Tennessee; (3) members of the Tennessee Indirect Purchaser Class were deprived of free and open competition; and (4) members of the Tennessee Indirect Purchaser Class paid supra-competitive, artificially inflated prices for ATM Transactions.

b. During the Class Period, Network Defendants' illegal conduct had a substantial effect on Tennessee commerce as products containing ATM Transactions were sold in Tennessee.

c. As a direct and proximate result of Network Defendants' unlawful conduct, members of the Tennessee Indirect Purchaser Class have been injured in their business and property and are threatened with further injury.

d. By reason of the foregoing, Network Defendants have entered into agreements in restraint of trade in violation of Tennessee Code§ 47-25-101 *et seq.* Accordingly, members of the Tennessee Indirect Purchaser Class seek all relief available under Tennessee Code § 47-25- 101 *et seq.*

194. Utah: By reason of the foregoing, Network Defendants have violated Utah Code § 76-1 0-911 *et seq.* The Utah Indirect Purchaser Class alleges as follows:

a. Network Defendants' combinations or conspiracies had the following effects: (1) price competition for ATM Transactions was restrained, suppressed, and eliminated throughout Utah; (2) prices for ATM Transactions were raised, fixed, maintained and stabilized at artificially high levels throughout Utah; (3) members of the Utah Indirect Purchaser Class were deprived of free and open competition; and (4) members of the Utah Indirect Purchaser Class paid supra-competitive, artificially inflated prices for ATM Transactions.

b. During the Class Period, Network Defendants' illegal conduct had a substantial effect on Utah commerce.

c. As a direct and proximate result of Network Defendants' unlawful conduct, members of the Utah Indirect Purchaser Class have been injured in their business and property and are threatened with further injury.

d. By reason of the foregoing, Network Defendants have entered into agreements in restraint of trade in violation of violated Utah Code§ 76-10-911 *et seq.* Accordingly, members of the Utah Indirect Purchaser Class seek all relief available under violated Utah Code § 76-10- 911 *et seq.*

195. Vermont: By reason of the foregoing, Network Defendants have violated Vermont Stat. Ann. 9 § 2453 *et seq.* The Vermont Indirect Purchaser Class alleges as follows:

a. Network Defendants' combinations or conspiracies had the following effects: (1) price competition for ATM Transactions was restrained, suppressed, and eliminated throughout Vermont; (2) prices for ATM Transactions were raised, fixed, maintained and stabilized at artificially high levels throughout Vermont; (3) members of the Vermont Indirect Purchaser Class were deprived of free and open competition; and (4) members of the Vermont Indirect Purchaser Class paid supra-competitive, artificially inflated prices for ATM Transactions.

b. During the Class Period, Network Defendants' illegal conduct had a substantial effect on Vermont commerce.

c. As a direct and proximate result of Network Defendants' unlawful conduct, members of the Vermont Indirect Purchaser Class have been injured in their business and property and are threatened with further injury.

d. By reason of the foregoing, Network Defendants have entered into agreements in restraint of trade in violation of Vermont Stat. Ann. 9 § 2453 *et seq.* Accordingly, members of the Vermont Indirect Purchaser Class seek all relief available under Vermont Stat. Ann. 9 § 2453 *et seq.*

196. West Virginia: By reason of the foregoing, Network Defendants have violated West Virginia Code§ 47-18-1 *et seq.* The West Virginia Indirect Purchaser Class alleges as follows:

a. Network Defendants' combinations or conspiracies had the following effects: (1) price competition for ATM Transactions was restrained, suppressed, and eliminated throughout West Virginia; (2) prices for ATM Transactions were raised, fixed, maintained and stabilized at artificially high levels throughout West Virginia; (3) members of the West Virginia Indirect Purchaser Class were deprived of free and open competition; and (4) members of the West Virginia Indirect Purchaser Class paid supra-competitive, artificially inflated prices for ATM Transactions.

b. During the Class Period, Network Defendants' illegal conduct had a substantial effect on West Virginia commerce.

c. As a direct and proximate result of Network Defendants' unlawful conduct, members of the West Virginia Indirect Purchaser Class has been injured in their business and property and are threatened with further injury.

d. By reason of the foregoing, Network Defendants have entered into agreements in restraint of trade in violation of West Virginia Code§ 47-18-1 *et seq.* Accordingly, members of the West Virginia Indirect Purchaser Class seek all relief available under West Virginia Code § 47-18-1 *et seq.*

197. Wisconsin: By reason of the foregoing, Network Defendants have violated Wisconsin Statutes § 133.01 *et seq.* The Wisconsin Indirect Purchaser Class alleges as follows:

a. Network Defendants' combinations or conspiracies had the following effects: (I) price competition for ATM Transactions was restrained, suppressed, and eliminated throughout Wisconsin; (2) prices for ATM Transactions were raised, fixed, maintained and stabilized at artificially high levels throughout Wisconsin; (3) members of the Wisconsin Indirect Purchaser Class were deprived of free and open competition; and (4) members of the Wisconsin Indirect Purchaser Class paid supra-competitive, artificially inflated prices for ATM Transactions.

b. During the Class Period, Network Defendants' illegal conduct had a substantial effect on Wisconsin commerce.

c. As a direct and proximate result of Network Defendants' unlawful conduct, Wisconsin Plaintiffs and members of the Wisconsin Indirect Purchaser Class have been injured in their business and property and are threatened with further injury.

d. By reason of the foregoing, Network Defendants have entered into agreements in restraint of trade in violation of Wisconsin Statutes§ 133.01 *et seq.* Accordingly, members of the Wisconsin Indirect Purchaser Class seek all relief available under Wisconsin Statutes § 133.01 *et seq.*

FIFTH CLAIM FOR RELIEF AGAINST NETWORK DEFENDANTS: VIOLATIONS OF STATE CONSUMER PROTECTION AND UNFAIR COMPETITION LAWS

198. Indirect Purchaser Plaintiffs incorporate by reference the allegations in the above paragraphs as if fully set forth herein.

199. Indirect Purchaser Plaintiffs allege the following violations of state consumer protection and unfair competition laws in the alternative.

200. Network Defendants engaged in unfair competition or unfair, unconscionable, deceptive or fraudulent acts or practices in violation of the state consumer protection and unfair competition statutes listed below.

201. California: By reason of the foregoing, Network Defendants have violated California's Unfair Competition Law, Cal. Bus. & Prof. Code§ 17200 *et seq.* California Plaintiffs on behalf of the California Indirect Purchaser Class allege as follows:

a. Network Defendants committed acts of unfair competition, as defined by section 17200 *et seq.,* by engaging in a conspiracy to fix and stabilize the price of ATM Transactions as described above.

b. The acts, omissions, misrepresentations, practices and non-disclosures of Network Defendants, as described above, constitute a common and continuing course of conduct of unfair competition by means of unfair, unlawful and/or fraudulent business acts or practices with the meaning of section 17200 *et seq.,* including, but not limited to (I) violation of Section 1 of the Sherman Act; (2) violation of the Cartwright Act.

c. Network Defendants' acts, omissions, misrepresentations, practices and nondisclosures are unfair, unconscionable, unlawful and/or fraudulent independently of whether they constitute a violation of the Sherman Act or the Cartwright Act.

d. Network Defendants' acts or practices are fraudulent or deceptive within the meaning of section 17200 *et seq.*

e. Network Defendants' conduct was carried out, effectuated, and perfected within the state of California. Network Defendants maintained offices in California where their employees engaged in communications, meetings and other activities in furtherance of Defendants' conspiracy.

f. By reason of the foregoing, California Plaintiffs and the California Indirect Purchaser Class are entitled to full restitution and/or disgorgement of all revenues, earnings, profits, compensation, and benefits that may have been obtained by Network Defendants as a result of such business acts and practices described above.

202. Florida: By reason of the foregoing, Network Defendants have violated the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201 *et seq.* The Florida Indirect Purchaser Class alleges as follows:

a. Network Defendants' unlawful conduct had the following effects: (I) price competition for ATM Transactions was restrained, suppressed, and eliminated throughout Florida; (2) prices for ATM Transactions were raised, fixed, maintained, and stabilized at artificially high levels throughout Florida; (3) members of the Florida Indirect Purchaser Class were deprived of free and open competition; and (4) members of the Florida Indirect Purchaser Class paid supra-competitive, artificially inflated prices for ATM Transactions.

b. During the Class Period, Network Defendants' illegal conduct substantially affected Florida commerce and consumers.

c. As a direct and proximate result of Network Defendants' unlawful conduct, members of the Florida Indirect Purchaser Class have been injured and are threatened with further injury.

d. Network Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Fla. Stat. § 501.201 *et seq.,* and, accordingly, members of the Florida Indirect Purchaser Class seek all relief available under that statute.

203. Hawaii: By reason of the foregoing, Network Defendants have violated Hawaii Revised Statutes Annotated § 480-1 *et seq.* The Hawaii Indirect Purchaser Class alleges as follows:

a. Network Defendants' unlawful conduct had the following effects: (1) price competition for ATM Transactions was restrained, suppressed, and eliminated throughout Hawaii; (2) prices for ATM Transactions were raised, fixed, maintained, and stabilized at artificially high levels throughout Hawaii; (3) members of the Hawaii Indirect Purchaser Class were deprived of free and open competition; and (4) members of the Hawaii Indirect Purchaser Class paid supra-competitive, artificially inflated prices for ATM Transactions.

b. During the Class Period, Network Defendants' illegal conduct substantially affected Hawaii commerce and consumers.

c. As a direct and proximate result of Network Defendants' unlawful conduct, members of the Hawaii Indirect Purchaser Class have been injured and are threatened with further injury.

d. Network Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Hawaii Revised Statutes Annotated§ 480-1 *et seq.,* and, accordingly, members of the Hawaii Indirect Purchaser Class seek all relief available under that statute.

204. Massachusetts: By reason of the foregoing, Network Defendants have violated the Massachusetts Consumer and Business Protection Act, M.G.L. c. 93A, § 1 *et seq.* The Massachusetts Indirect Purchaser Class alleges as follows:

a. Network Defendants were engaged in trade or commerce as defined by M.G.L. c. 93A, §I.

b. Network Defendants agreed to, and did in fact, act in restraint of trade or commerce in a market which includes Massachusetts, by affecting, fixing, controlling and/or maintaining at artificial and noncompetitive levels, the prices at which ATM Transactions were sold, distributed, or obtained in Massachusetts and took efforts to conceal their agreements from the Massachusetts Indirect Purchaser Class.

c. Network Defendants' unlawful conduct had the following effects: (1) price competition for ATM Transactions was restrained, suppressed, and eliminated throughout Massachusetts; (2) the prices of ATM Transactions were raised, fixed, maintained, and stabilized at artificially high levels throughout Massachusetts; (3) members of the Massachusetts Indirect Purchaser

Class were deprived of free and open competition; and (4) members of the Massachusetts Indirect Purchaser Class paid supra-competitive, artificially inflated prices for ATM Transactions and ATM Transactions.

d. As a direct and proximate result of Defendants' unlawful conduct, members of the Massachusetts Indirect Purchaser Class were injured and are threatened with further injury.

e. Each of the Network Defendants or their representatives have been served with a demand letter in accordance with M.G.L. c. 93A, § I, or such service of a demand letter was unnecessary due to the defendant not maintaining a place of business within the Commonwealth of Massachusetts or not keeping assets within the Commonwealth. More than thirty days has passed since such demand letters were served, and each Network Defendant served has failed to make a reasonable settlement offer.

f. By reason of the foregoing, Network Defendants engaged in unfair competition and unfair or deceptive acts or practices, in violation of M.G.L. c. 93A, § 2. Network Defendants' and their co-conspirators' violations of Chapter 93A were knowing or willful, entitling the Massachusetts Indirect Purchaser Class to multiple damages.

205. Missouri: By reason of the foregoing, Network Defendants have violated Missouri's Merchandising Practices Act, specifically Mo. Rev. Stat.§ 407.020. The Missouri Indirect Purchaser Class alleges as follows:

a. Members of the Missouri Indirect Purchaser Class purchased ATM Transactions for personal, family, or household purposes.

b. Network Defendants engaged in the conduct described herein in connection with the prices at which ATM Transactions were sold, distributed, or obtained in Missouri,

c. Network Defendants agreed to, and did in fact affect, fix, control, and/or maintain, at artificial and non-competitive levels, the prices at which ATM Transactions were sold, distributed, or obtained in Missouri, which conduct constituted unfair practices in that it was unlawful under federal and state law, violated public policy, was unethical, oppressive and unscrupulous, and caused substantial injury to the members of the Missouri Indirect Purchaser Class.

d. Network Defendants concealed, suppressed, and omitted to disclose material facts to the Missouri Indirect Purchaser Class concerning Network Defendants' unlawful activities and artificially inflated prices for ATM Transactions. The concealed, suppressed, and omitted facts would have been important to the Missouri Indirect Purchaser Class as they related to the cost of ATM Transactions they purchased.

e. Network Defendants misrepresented the real cause of price increases and/or the absence of price reductions in ATM Transactions by making public statements that were not in accord with the facts.

f. Network Defendants' statements and conduct concerning the price of ATM Transactions were deceptive as they had the tendency or capacity to mislead the Missouri Indirect Purchaser Class to believe that they were purchasing ATM Transactions and ATM Transactions at prices established by a free and fair market. Network Defendants' unlawful conduct had the following effects: (1) ATM Transaction price competition was restrained, suppressed, and eliminated throughout Missouri; (2) ATM Transaction prices were raised, fixed, maintained, and stabilized at artificially high levels throughout Missouri; (3) members of the Missouri Indirect Purchaser Class were deprived of free and open competition; and (4) members of the Missouri Indirect Purchaser Class paid supra-competitive, artificially inflated prices for ATM Transactions.

g. The foregoing acts and practices constituted unlawful practices in violation of the Missouri Merchandising Practices Act.

h. As a direct and proximate result of the above-described unlawful practices, members of the Missouri Indirect Purchaser Class suffered ascertainable loss of money or property.

i. Accordingly, members of the Missouri Indirect Purchaser Class seek all relief available under Missouri's Merchandising Practices Act, specifically Mo. Rev. Stat. § 407.020, which prohibits "the act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the

concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce," as further interpreted by the Missouri Code of State Regulations, 15 CSR 60-7.010 *et seq.,* 15 CSR 60-8.010 *et seq.,* and 15 CSR 60-9.010 *et seq.,* and Mo. Rev. Stat.§ 407.025, which provides for the relief sought in this count.

206. Montana: By reason of the foregoing, Network Defendants have violated Montana's Unfair Trade Practices and Consumer Protection Act of 1970, Mont. Code, § 30-14-103 *et seq.* The Montana Indirect Purchaser Class alleges as follows:

a. Defendants' unlawful conduct had the following effects: (I) ATM Transaction price competition was restrained, suppressed, and eliminated throughout Montana; (2) ATM Transaction prices were raised, fixed, maintained, and stabilized at artificially high levels throughout Montana; (3) members of the Montana Indirect Purchaser Class were deprived of free and open competition; and (4) members of the Montana Indirect Purchaser Class paid supra- competitive, artificially inflated prices for ATM Transactions.

b. During the Class Period, Network Defendants' illegal conduct substantially affected Montana commerce and consumers.

c. As a direct and proximate result of Network Defendants' unlawful conduct, members of the Montana Indirect Purchaser Class have been injured and are threatened with further injury.

d. Network Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Montana's Unfair Trade Practices and Consumer Protection Act, Mont. Code § 30-14-1 03 *et seq.* and, accordingly, members of the Montana Indirect Purchaser Class seek all relief available under that statute.

207. Nebraska: By reason of the foregoing, Network Defendants have violated Nebraska's Consumer Protection Act, Neb. Rev. Stat.§ 59-1601 *et seq.* The Nebraska Indirect Purchaser Class alleges as follows:

a. Network Defendants' unlawful conduct had the following effects: (I) ATM Transaction price competition was restrained, suppressed, and eliminated throughout Nebraska; (2) ATM Transactions prices were raised, fixed, maintained, and stabilized at artificially high levels throughout Nebraska; (3) members of the Nebraska Indirect Purchaser Class were deprived of free and open competition; and (4) members of the Nebraska Indirect Purchaser Class paid supra-competitive, artificially inflated prices for ATM Transactions.

b. During the Class Period, Network Defendants' illegal conduct substantially affected Nebraska commerce and consumers.

c. As a direct and proximate result of Network Defendants' unlawful conduct, members of the Nebraska Indirect Purchaser Class have been injured and are threatened with further injury.

d. Network Defendants' actions and conspiracy have had a substantial impact on the public interests of Nebraska and its residents.

e. Network Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Nebraska's Consumer Protection Act, Neb. Rev. Stat.§ 59-1601 *et seq.* and, accordingly, members of the Nebraska Indirect Purchaser Class seek all relief available under that statute.

208. New Hampshire: By reason of the foregoing, Network Defendants have violated New Hampshire's Consumer Protection Act, N.H. Rev. Stat. Ann.§ 358-A:2 *et seq.* The New Hampshire Indirect Purchaser Class alleges as follows:

a. Network Defendants' unlawful conduct had the following effects: (1) ATM Transaction price competition was restrained, suppressed, and eliminated throughout New Hampshire; (2) ATM Transaction prices were raised, fixed, maintained, and stabilized at artificially high levels throughout New Hampshire; (3) members of the New Hampshire Indirect Purchaser Class were deprived of free and open competition; and (4) members of the New Hampshire Indirect Purchaser Class paid supra-competitive, artificially inflated prices for ATM Transactions.

b. During the Class Period, Network Defendants' illegal conduct substantially affected New Hampshire commerce and consumers.

c. As a direct and proximate result of Network Defendants' unlawful conduct, members of the New Hampshire Indirect Purchaser Class have been injured and are threatened with further injury.

d. Network Defendants' actions and conspiracy have had a substantial impact on the public interests of New Hampshire and its residents.

e. Network Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of New Hampshire Consumer Protection Act, N.H. Rev. Stat. Ann. § 358-A:2 *et seq.* and, accordingly, members of the New Hampshire Indirect Purchaser Class seek all relief available under that statute.

209. New York: By reason of the foregoing, Network Defendants have violated New York's General Business Law, N.Y. Gen. Bus. Law§ 349 *et seq.* The New York Indirect Purchaser Class alleges as follows:

a. Network Defendants agreed to, and did in fact, act in restraint of trade or commerce by affecting, fixing, controlling and/or maintaining, at artificial and noncompetitive levels, the prices at which ATM Transactions were sold, distributed or obtained in New York and took efforts to conceal their agreements from the New York Indirect Purchaser Class.

b. The conduct of the Network Defendants described herein constitutes consumer- oriented deceptive acts or practices within the meaning of N.Y. Gen. Bus. Law§ 349,

which resulted in consumer injury and broad adverse impact on the public at large, and harmed the public interest of New York State in an honest marketplace in which economic activity is conducted in a competitive manner.

c. Network Defendants made certain statements about ATM Transactions that they knew would be seen by New York residents and these statements either omitted material information that rendered the statements they made materially misleading or affirmatively misrepresented the real cause of price increases for ATM Transactions.

d. Network Defendants' unlawful conduct had the following effects: (1) ATM Transaction price competition was restrained, suppressed, and eliminated throughout New York; (2) ATM Transactions prices were raised, fixed, maintained, and stabilized at artificially high levels throughout New York; (3) members of the New York Indirect Purchaser Class were deprived of free and open competition; and (4) members of the New York Indirect Purchaser Class paid supra-competitive, artificially inflated prices for ATM Transactions.

e. During the Class Period, Network Defendants' illegal conduct substantially affected New York commerce and consumers.

f. During the Class Period, each of the Network Defendants named herein, directly, or indirectly and through affiliates they dominated and controlled,

manufactured, sold and/or distributed ATM Transactions in New York.

g. Members of the New York Indirect Purchaser Class seek actual damages for their injuries caused by these violations in an amount to be determined at trial and are threatened with further injury. Without prejudice to their contention that Network Defendants' unlawful conduct was willful and knowing, members of the New York Indirect Purchaser Class do not seek in this action to have those damages trebled pursuant to N.Y. Gen. Bus. Law§ 349(h).

210. South Carolina: By reason of the foregoing, Network Defendants have violated South Carolina's Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10 *et seq.* The South Carolina Indirect Purchaser Class alleges as follows:

a. The South Carolina Indirect Purchaser Class Network Defendants' unlawful conduct had the following effects: (1) ATM Transaction price competition was restrained, suppressed, and eliminated throughout South Carolina; (2) ATM Transaction prices were raised, fixed, maintained, and stabilized at artificially high levels throughout South Carolina; (3) members of the South Carolina Indirect Purchaser Class were deprived of free and open competition; and (4) members of the South Carolina Indirect Purchaser Class paid supra- competitive, artificially inflated prices for ATM Transactions.

b. During the Class Period, Network Defendants' illegal conduct substantially affected South Carolina commerce and consumers.

c. As a direct and proximate result of Network Defendants' unlawful conduct, members of the South Carolina Indirect Purchaser Class have been injured and are threatened with further injury.

d. Network Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of South Carolina Revised Statutes Annotated § 480-1 *et seq.*, and, accordingly, members of the South Carolina Indirect Purchaser Class seek all relief available under that statute.

211. Vermont: By reason of the foregoing, Network Defendants have violated Vermont's Consumer Fraud Act, 9 Vt. Stat. Ann.§ 2451 *et seq.* The Vermont Indirect Purchaser Class alleges as follows:

a. Network Defendants agreed to, and did in fact, act in restraint of trade or commerce in a market that includes Vermont, by affecting, fixing, controlling, and/or maintaining, at artificial and noncompetitive levels, the prices at which ATM Transactions were sold, distributed, or obtained in Vermont.

b. Network Defendants deliberately failed to disclose material facts to the Vermont Indirect Purchaser Class concerning Network Defendants' unlawful activities and artificially inflated prices for ATM Transactions.

Network Defendants owed a duty to disclose such facts, and considering the relative Jack of sophistication of the average, non-business consumer, Network Defendants breached that duty by their silence. Network Defendants misrepresented to all consumers during the Class Period that Network Defendants' ODD prices were competitive and fair.

c. Network Defendants' unlawful conduct had the following effects: (1) ATM Transaction price competition was restrained, suppressed, and eliminated throughout Vermont;

(2) ATM Transaction prices were raised, fixed, maintained, and stabilized at artificially high levels throughout Vermont; (3) members of the Vermont Indirect Purchaser Class were deprived of free and open competition; and (4) members of the Vermont Indirect Purchaser Class paid supra-competitive, artificially inflated prices for ATM Transactions.

d. As a direct and proximate result of the Network Defendants' violations of law, members of the Vermont Indirect Purchaser Class suffered an ascertainable loss of money or property as a result of Network Defendants' use or employment of unconscionable and deceptive commercial practices as set forth above. That loss was caused by Network Defendants' willful and deceptive conduct, as described herein.

e. Network Defendants' deception, including their affirmative misrepresentations and omissions concerning

the price of ATM Transactions, likely misled all consumers acting reasonably under the circumstances to believe that they were purchasing ATM Transactions at prices born by a free and fair market. Network Defendants' misleading conduct and unconscionable activities constitutes unfair competition or unfair or deceptive acts or practices in violation of9 Vt. Stat. Ann.§ 2451 *et seq.,* and, accordingly, members of the Vermont Indirect Purchaser Class seek all relief available under that statute.

XVI. REQUEST FOR RELIEF

212. Accordingly, Plaintiffs pray that final judgment be entered against each Defendant granting the following relief:

a. A declaration that this action may be maintained as a class action pursuant to Rules 23(b)(2) and 23(b)(3) of the Federal Rules of Civil Procedure and that reasonable notice of this action, as provided by Rule 23(c)(2) of the Federal Rules of Civil Procedure be given to all members of the Class;

b. A finding that the combinations and agreements alleged in the Amended Complaint be adjudged and decreed to be per se violations and/or unreasonable restraints of trade or commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1;

c. An injunctive order and decree requiring each Defendant to eliminate the ATM restraints and be prohibited from otherwise enforcing them;

d. An injunctive order and decree that each Defendant be permanently enjoined from fixing or specifying the ATM Access Fee for ATM services or implementing other rules or policies having a similar purpose or effect in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1;

e. The Plaintiffs and each member of the Classes recover three-fold their damages as provided by the applicable law as determined to have been sustained by each of them (using such damage methodologies as may be appropriate at trial), and for judgment in favor of Plaintiffs and the Classes be entered against Defendants and each of them in that amount plus interest;

f. The Plaintiffs and the Classes recover their costs of this suit, including reasonable attorneys' fees, as provided by law; and

g. The Plaintiffs and the Classes be granted such other relief as may be appropriate and as the court deems just and proper.

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XVII. JURY DEMAND

Plaintiffs demand a trial by jury, pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, for all issues triable of right by a jury.

Dated: April 18, 2013

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APPENDIX E – MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED FEBRUARY 13, 2013

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CA No. 1:11-cv-01803 (ABJ)

NATIONAL ATM COUNCIL, INC., *et al.*,

Plaintiffs,

v.

VISA INC., *et al.*,

Defendants.

CA No. 1:11-cv-01831 (ABJ)

ANDREW MACKMIN, *et al.*,

Plaintiffs,

v.

VISA INC., *et al.*,

Defendants.

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CA No. 1:11-cv-01882 (ABJ)

MARY STOUMBOS,

Plaintiff,

v.

VISA INC., *et al.*,

Defendants.

February 13, 2013, Decided
February 13, 2013, Filed

MEMORANDUM OPINION

Sometimes the bank is just too far away. So customers in need of cash will avail themselves of automatic teller machines ("ATMs") at banks other than their own, or at convenience stores, gas stations, nail salons, and numerous other places. When they do, they will be advised: "This ATM will charge a fee of $2.50 for this transaction. This fee is in addition to any fees which may be charged by your financial institution. If you agree to this fee, press YES. If you wish to cancel this transaction, press NO." And they will be required to accept the fee before the machine will execute the transaction. This case involves those fees.[1]

1. Readers hoping for an opinion outlawing the fees entirely can stop here; this case has nothing to do with the legality of the fees in general, but rather, the manner in which they are calculated.

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Plaintiffs in three separate actions claim that the ATM access fee pricing requirements that Visa and MasterCard have imposed on banks and ATM operators violate Section 1 of the Sherman Antitrust Act. 15 U.S.C. § 1 (2006). Specifically, plaintiffs complain about contract provisions that prohibit ATM operators from charging fees for transactions processed over Visa and MasterCard networks that are higher than the lowest access fees charged for transactions processed over other payment networks. Plaintiffs claim that through these provisions, Visa and MasterCard suppress competition from other ATM networks, force ATM operators to charge consumers supra-competitive access fees, and harm competition in the market for ATM networks. Plaintiffs in *National ATM Council v. Visa* ("*NAC*"), No. 1:11-cv-01803 (ABJ), and *Stoumbos v. Visa*, No. 1:11-cv-01882 (ABJ), claim that Visa and MasterCard conspired with unnamed banks to execute the scheme, while plaintiffs in *Mackmin v. Visa*, No. 1:11-cv-01831 (ABJ), have brought conspiracy claims against Bank of America, Wells Fargo, and J.P. Morgan Chase, as well as Visa and MasterCard.[2]

Defendants in all three cases have moved to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).[3]

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2. Consumer plaintiffs also allege violations of various state antitrust and unfair competition laws and of state consumer protection laws. *Mackmin* Compl. ¶¶ 112-52; *Stoumbos* Compl. ¶¶ 53-102.

3. Visa and MasterCard filed a single joint motion to dismiss all three cases. *See* Visa and MasterCard Defs.' Mot. to Dismiss,

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It is well-established that when considering a 12(b)(6) motion, the Court must accept the facts set out in the complaint as true. But the Court is not bound to assume the truth of a party's conclusions. In this case, the complaints bristle with indignation, but when one strips away the conclusory assertions and the inferences proffered without factual support, there is very little left to consider. The Court will therefore grant the motions to dismiss – without prejudice – on two grounds. First, the complaints allege insufficient facts to support the allegations that plaintiffs suffered any injury, and the law does not support their argument that such allegations are unnecessary in an antitrust case. Second, plaintiffs have not set forth sufficient facts to support their claim that there was a horizontal conspiracy. Notably absent from each of the complaints are facts showing the existence of an agreement, the essential element of any conspiracy. Given the insufficiency of the federal claims, the Court declines to consider the state law claims, and the complaints will be dismissed.

NAC v. Visa [Dkt. # 24], *Mackmin v. Visa* [Dkt. # 40], *Stoumbos v. Visa* [Dkt. # 17] (collectively "Visa/MC Mot."). The bank defendants filed a joint motion to dismiss in *Mackmin. See* Bank Defs.' Mot. to Dismiss, *Mackmin v. Visa* [Dkt. # 39] ("Banks' Mot."). The parties also provided additional briefing on the issue of injury in fact. *See* Defs.' Suppl. Br., *NAC v. Visa* [Dkt. # 29], *Mackmin v. Visa* [Dkt. # 51], *Stoumbos v. Visa* [Dkt. # 23]; Consumer Pls.' Suppl. Br., *Mackmin v. Visa* [Dkt. # 52], *Stoumbos v. Visa* [Dkt. # 24]; NAC's Suppl. Br., *NAC v. Visa* [Dkt. # 30].

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BACKGROUND

All three complaints raise the same general claim: that Visa and MasterCard include provisions in their contracts with banks and ATM operators that require ATM operators using the Visa or MasterCard ATM networks to set consumer access fees for transactions on those networks that are no higher than the lowest access fees charged for transactions processed over other ATM networks. *NAC v. Visa* First Am. Class Action Compl. ("*NAC* Compl.") [Dkt. # 22] ¶¶ 41-43; *Mackmin v. Visa* First Am. Class Action Compl. ("*Mackmin* Compl.") [Dkt. # 24] ¶¶ 69-70; *Stoumbos v. Visa* Corrected Class Action Compl. ("*Stoumbos* Compl.") [Dkt. # 3] ¶¶ 31-32. Put another way, ATMs that accept Visa- or MasterCard-branded cards cannot charge consumers using those cards more for their transactions than they charge consumers whose transactions are processed on other ATM networks. Visa and MasterCard maintain that the provisions in question simply establish a ceiling on ATM access fees, which benefits all consumers. But plaintiffs characterize the provision as setting not a ceiling, but a floor: a level beneath which prices for transactions processed on other networks cannot be discounted. All three complaints assert that these access fee requirements injure competition in violation of Section 1 of the Sherman Antitrust Act.[4]

4. The Court notes at the outset that its dismissal of plaintiffs' antitrust claims should not be interpreted as a ruling accepting the defendants' argument that the access fee requirements are actually procompetitive. The Court did not reach the question of whether the challenged contract provisions are acceptable because they are cast in terms of a ban on charging consumers

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I. ATMs, Networks, and ATM Transactions

To understand the parties' claims and defenses, it is necessary to understand how ATMs operate and how funds flow in an ATM transaction. ATMs enable consumers to conduct banking transactions, such as withdrawing cash and obtaining account balances, without entering the bank. *Stoumbos* Compl. ¶¶ 4, 7. Consumers activate the ATMs with personal identification number ("PIN")-based payment cards, issued by their banks or depository institutions, that link to their accounts.[5] *NAC* Compl. ¶¶ 35-37; *Mackmin* Compl. ¶¶ 48, 52; *Stoumbos* Compl. ¶¶ 6-7, 25.

ATMs can be owned and operated by banks or by independent operators. To process a consumer's ATM transaction, an ATM must access a network that can communicate with the consumer's bank to complete the transaction. Defendants Visa and MasterCard each operate ATM networks that transmit these communications, as do other networks, such as STAR, Pulse, NYCE Payment Network LLC, ACCEL/Exchange Network, Credit Union

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more when they use Visa and MasterCard networks rather than as a restriction on charging them less to use other networks. Nor has the Court expressed an opinion on defendants' argument that the access fee requirements can be aptly compared to "most favored nation" clauses that have been upheld by courts in other cases. The defects in these complaints compel the dismissal of the pending claims even if there are anti-competitive aspects to the arrangements in question.

5. Banks and depository institutions that issue PIN-based payment cards are sometimes referred to as "issuing banks."

24, CO-OP Financial Services, Shazam Inc., Jeanie, and TransFund. *NAC* Compl. ¶ 38; *Mackmin* Compl. ¶¶ 64, 66; *Stoumbos* Compl. ¶¶ 28-29.

The network used to process a particular transaction is determined by two factors: which networks the consumer's PIN card can access and which networks the ATM can access. Some PIN cards transmit transactions over a single payment network only, while others can send transactions over more than one network. *NAC* Compl. ¶ 38; *Mackmin* Compl. ¶ 66; *Stoumbos* Compl. ¶ 28. The reverse side of each card shows the service marks of the payment networks the card can access. *NAC* Compl. ¶ 38; *Mackmin* Compl. ¶ 66; *Stoumbos* Compl. ¶ 28. For example, a PIN card bearing the Visa, STAR, and NYCE service marks can only transmit ATM requests over the Visa, STAR, and NYCE networks, so that card can only be used on ATMs with access to those networks.

Whether an ATM can access a particular network depends on whether the ATM operator has a contract with the network provider. Banks that issue Visa- or MasterCard-branded PIN cards are automatically granted access to the Visa or MasterCard networks. Independent ATM operators who want their ATMs to have access to the Visa or MasterCard networks must be sponsored by a "sponsoring financial institution" – a Visa or MasterCard member bank – or must affiliate with a sponsored entity. *NAC* Compl. ¶ 39, *Mackmin* Compl. ¶ 64; *Stoumbos* Compl. ¶ 29. Both independent and bank-owned ATM operators typically contract with multiple networks so their ATMs can serve as many consumers as possible.

Consumers can access funds and conduct transactions using ATMs at their own bank, at other banks, and at non-bank locations, such as convenience stores, shopping malls, and airports. When a consumer uses an ATM to obtain cash from her account, the ATM sends the transaction request over a network and, if the requested funds are available, the ATM provides the cash to the consumer. Thanks to modern technology, all of this typically happens within a few seconds. When the consumer initiates the transaction on an ATM operated by an entity other than her own bank, that ATM's operator – whether a different bank or an independent operator – usually charges the consumer an ATM access fee for the transaction. *NAC* Compl. ¶ 37; *Mackmin* Compl. ¶¶ 2-3; *Stoumbos* Compl. ¶¶ 8, 27. These are the access fees at issue in the three lawsuits before the Court.[6]

II. The Parties

The three groups of plaintiffs represent different participants in ATM transactions. Plaintiffs in *NAC v. Visa* are the National ATM Council, a trade association that represents owners and operators of independent (*i.e.*, non-bank owned) ATMs, along with thirteen owners and operators of independent ATMs. *NAC* Compl. ¶¶ 7, 9-21. Plaintiffs in *Mackmin v. Visa* are four consumers who have used ATMs, whether independent or bank-owned, and

6. A consumer may also be required to pay a fee charged by the consumer's own bank for using an ATM not operated by the bank, sometimes called a foreign ATM access fee. These foreign ATM access fees are not at issue in these lawsuits. *NAC* Compl. ¶ 37; *Mackmin* Compl. ¶ 3; *Stoumbos* Compl. at 8 n.1.

have paid ATM access fees as a result. *Mackmin* Compl. ¶¶ 12-15. Plaintiff in *Stoumbos v. Visa* is a consumer who has paid several ATM access fees specifically in connection with transactions at independent ATMs. *Stoumbos* Compl. ¶ 11.

Defendants Visa and MasterCard are each independent, publicly-traded corporations that issue PIN cards under their respective brands and process ATM transactions on their networks. Visa operates the Visa, PLUS, and Interlink payment networks and issues PIN cards that carry its Visa, Visa Electron, Interlink, or PLUS service mark. MasterCard operates the MasterCard Worldwide Network and issues PIN cards that carry its MasterCard, Maestro, or Cirrus service mark. Before they became independent, publicly-traded corporations in 2008 and 2006, respectively, Visa and MasterCard were each associations owned and operated by member banks. *NAC* Compl. ¶¶ 30, 33-34; *Mackmin* Compl. ¶¶ 44-45, 50-51; *Stoumbos* Compl. ¶¶ 20, 25-26.

The *Mackmin* plaintiffs have also sued Bank of America, N.A.; NB Holdings Corp.; Bank of America Corp. (collectively, "Bank of America"); Chase Bank USA, N.A.; JPMorgan Chase & Co.; and JPMorgan Chase Bank, N.A. (collectively, "Chase"); and Wells Fargo & Co. and Wells Fargo Bank, N.A. (collectively, "Wells Fargo"). These defendants are national retail banks that belong to the Visa and MasterCard networks. *Mackmin* Compl. ¶ 43.

III. Plaintiffs' Claims

Plaintiffs complain that Visa and MasterCard violate Section 1 of the Sherman Antitrust Act by including provisions in their agreements with banks and ATM operators that prohibit the operators from charging higher access fees for transactions over the Visa or MasterCard networks than they charge for transactions on any other network. *NAC* Compl. ¶¶ 41-42; *Mackmin* Compl. ¶¶ 69-70; *Stoumbos* Compl. ¶¶ 31-32. This means that an ATM operator cannot charge a consumer whose PIN card only operates on the MasterCard network a $2.00 ATM access fee on a particular ATM terminal, while charging a consumer whose PIN card operates on the NYCE network a $1.50 access fee on that same terminal.

According to all three complaints, these agreements harm competition. By preventing ATM operators from charging different ATM access fees to consumers based on the networks their PIN cards can access, plaintiffs say, these agreements effectively prohibit operators from discounting, rebating, or directing consumers to less expensive networks, *NAC* Compl. ¶¶ 44-45; *Mackmin* Compl. ¶¶ 74-75; *Stoumbos* Compl. ¶ 36. Thus, it is alleged that the agreements cause consumers to pay "supra-competitive" fees, that is, fees higher than a competitive market would bear, for ATM transactions, *NAC* Compl. ¶ 46; *Mackmin* Compl. ¶ 76; *Stoumbos* Compl. ¶ 39, and insulate Visa and MasterCard from the rigors of competition from other payment networks. *NAC* Compl. ¶ 43; *Mackmin* Compl. ¶ 80; *Stoumbos* Compl. ¶ 34. Plaintiffs claim that but for these contract clauses,

price competition would ensue in the ATM transaction market, which would result in lower ATM access fees for consumers. *NAC* Compl. ¶ 47; *Mackmin* Compl. ¶ 76; *Stoumbos* Compl. ¶ 39. The *NAC* complaint, filed by independent ATM operators, also claims that the access fee rules enable Visa and MasterCard to "charge artificially high network fees for ATM transactions, to remit inadequate compensation to ATM operators, and to steer excessive and disproportionate compensation for ATM transactions to their member banks." *NAC* Compl. ¶ 46.

On January 30, 2012, Visa and MasterCard and the bank defendants filed motions to dismiss under Federal Rule of Civil Procedure 12(b)(6) on multiple grounds. The network defendants asserted that plaintiffs failed to allege sufficient facts to establish the existence of a conspiracy, an antitrust injury, or a violation of D.C. or state antitrust laws. Visa/MC Mot. at 9-24. The bank defendants asserted that plaintiffs have not pled facts to support the alleged *per se* violation of Section 1 of the Sherman Act, the allegation of a horizontal agreement, or an antitrust injury. Banks' Mot. at 8-22. Subsequently, in response to the Court's request, the parties provided supplemental briefing on the issue of injury in fact. *See* Defs.' Suppl. Br., *NAC v. Visa* [Dkt. # 29], *Mackmin v. Visa* [Dkt. # 51], *Stoumbos v. Visa* [Dkt. # 23]; Consumer Pls.' Suppl. Br., *Mackmin v. Visa* [Dkt. # 52], *Stoumbos v. Visa* [Dkt. # 24]; and NAC's Suppl. Br., *NAC v. Visa* [Dkt. # 30].

Appendix E

STANDARD OF REVIEW

In evaluating a motion to dismiss under Rule 12(b)(6), the Court must "treat the complaint's factual allegations as true . . . and must grant plaintiff 'the benefit of all inferences that can be derived from the facts alleged.'" *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113, 342 U.S. App. D.C. 268 (D.C. Cir. 2000), quoting *Schuler v. United States*, 617 F.2d 605, 608, 199 U.S. App. D.C. 23 (D.C. Cir. 1979) (citations omitted). Nevertheless, the Court need not accept inferences drawn by the plaintiff if those inferences are unsupported by facts alleged in the complaint, nor must the Court accept plaintiff's legal conclusions. *Browning v. Clinton*, 292 F.3d 235, 242, 352 U.S. App. D.C. 4 (D.C. Cir. 2002).

"To survive a [Rule 12(b)(6)] motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (internal quotation marks omitted); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (applying this standard in an antitrust case in which the allegations of conspiracy were found to be insufficient because the plaintiffs had not set forth enough facts to state a plausible claim on its face). A claim is facially plausible when the pleaded factual content "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility

that a defendant has acted unlawfully." *Id.* "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not show[n] – that the pleader is entitled to relief." *Id.* at 679, quoting Fed. R. Civ. P. 8(a)(2) (second alteration in original) (internal quotation marks omitted). A pleading must offer more than "labels and conclusions" or a "formulaic recitation of the elements of a cause of action," *id.* at 678, quoting *Twombly*, 550 U.S. at 555, and "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions," *id.*

ANALYSIS

I. The Sherman Antitrust Act

Plaintiffs allege a violation of Section 1 of the Sherman Antitrust Act. Section 1 declares illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1 (2006). Thus, a violation involves two critical components: the combination or agreement, and the restraint of trade.

The Supreme Court has made clear that a restraint of trade violates Section 1 of the Act if it causes "antitrust injury, which is to say, injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977). The antitrust injury must

"stem[] from a competition-*reducing* aspect or effect of the defendant's behavior." *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990).[7]

The federal government is authorized to enforce the antitrust laws by seeking civil or criminal sanctions. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 652, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985). And under Section 4 of the Clayton Act, private parties who have been injured by Sherman Act violations may also seek relief in court. 15 U.S.C. § 15(a) (stating that a private "person injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.").[8]

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7. Restraints that, for example, result in low prices "benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition" and "cannot give rise to antitrust injury." *Atl. Richfield Co.*, 495 U.S. at 340; *see also Dial A Car v. Transp., Inc.*, 884 F. Supp. 584, 591 (D.D.C. 1995) (dismissing claim for lack of antitrust injury because "[d]efendants' conduct may have resulted in *lower* prices and *more* competition in the market; it has not resulted in *higher* prices and *less* competition"). Thus, for a complaint to survive a motion to dismiss, plaintiffs must allege sufficient facts in their complaints for the Court to conclude that defendants' actions plausibly resulted in some harm to competition. *See Atl. Richfield Co.*, 495 U.S. at 344.

8. The Clayton Act includes the Sherman Act as one of the "antitrust laws." *See* 15 U.S.C. § 12(a). Also, a person "threatened [with] loss or damage by a violation of the antitrust laws" can seek injunctive relief under section 16 of the Clayton Act. 15 U.S.C. § 26.

Appendix E

A. The Complaints Must Allege Both Prongs of Antitrust Standing

Although the language of Clayton Act Section 4 is broadly written, the "potency of the remedy implies the need for some care in its application," and not every party affected by an antitrust violator's "ripples of harm" is allowed to sue. *Andrx Pharms., Inc. v. Biovail Corp. Int'l*, 256 F.3d 799, 806, 347 U.S. App. D.C. 178 (D.C. Cir. 2001), quoting *Blue Shield of Va. v. McCready*, 457 U.S. 465, 476-77, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982) (quotation marks omitted). To have standing to sue on an antitrust claim, a private plaintiff must show two things: (1) that the defendant's alleged wrongdoing has caused him to suffer an injury in fact that affects his business or property; and (2) that the injury is the kind of injury the antitrust laws were intended to prevent.

While allegations that competition has been restrained may satisfy the second prong, that circumstance alone is not enough to confer standing to sue under Section 4 of the Clayton Act. A plaintiff must personally suffer the harm. In that aspect, the injury-in-fact prerequisite in antitrust cases mirrors the Article III constitutional standing requirement that all plaintiffs in federal cases must satisfy.[9] Indeed, the D.C. Circuit recently overturned

9. "[E]very federal court has a 'special obligation to satisfy itself' of its own jurisdiction before addressing the merits of any dispute." *Dominguez v. UAL Corp.*, 666 F.3d 1359, 1362, 399 U.S. App. D.C. 92 (D.C. Cir. 2012), quoting *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541, 106 S. Ct. 1326, 89 L. Ed. 2d 501 (1986). As an Article III court, this Court's judicial power is

a grant of summary judgment in an antitrust matter because the lower court failed to analyze whether the plaintiff had demonstrated an Article III injury in fact. *Dominguez*, 666 F.3d at 1362 (D.C. Cir. 2012) (rejecting the notion that injury in fact can simply be inferred from anticompetitive acts, stating that the fact "[t]hat the merits of a particular claim may be clear is no reason to avoid the constitutionally required inquiry into this limit on our jurisdiction"); *see also Gerlinger v. Amazon.com Inc., Borders Group, Inc.*, 526 F.3d 1253, 1255-56 (9th Cir. 2008) (finding no Article III injury in fact in an antitrust case because the defendant did not show he personally paid a higher price for a book or that he himself experienced any reduced selection of titles, poorer service, or any other potentially conceivable form of injury).

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limited to adjudicating actual "cases" and "controversies." *Allen v. Wright*, 468 U.S. 737, 750, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984). "In an attempt to give meaning to Article III's case-or-controversy requirement, the courts have developed a series of principles termed 'justiciability doctrines,' among which are standing[,] ripeness, mootness, and the political question doctrine." *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1427, 322 U.S. App. D.C. 135 (D.C. Cir. 1996), citing *Allen*, 468 U.S. at 750. Within Article III standing, every plaintiff in federal court bears the burden of establishing the three elements that make up the "irreducible constitutional minimum" of Article III standing: injury in fact, causation, and redressability. *Dominguez*, 666 F.3d at 1362. Injury in fact requires a plaintiff to allege an injury that is both concrete and particularized and actual or imminent, rather than speculative or generalized. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

Similarly, the first prong of the antitrust standing inquiry requires plaintiffs to allege that the defendants' conduct caused or threatened injury to their own business or property. *Andrx*, 256 F.3d at 806 ("As in any civil action for damages, the plaintiff in a private antitrust lawsuit must show that the defendant's illegal conduct caused its injury. The plaintiff's first step is to plead an injury-in-fact . . . to business or property.") (citations omitted).

By contrast, the second requirement of antitrust injury looks at the marketplace in general. It requires plaintiffs to allege an injury that is "the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick*, 429 U.S. at 489, citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 125, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969) (internal quotation marks omitted). "The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be the type of loss that the claimed violations . . . would be likely to cause." *Id.* Although both standing requirements involve questions of injury, they present two separate inquiries. *See Atl. Richfield Co.*, 495 U.S. at 339 n.8 (rejecting a theory that equates injury in fact with antitrust injury: "antitrust injury requirement cannot be met by broad allegations of harm to the 'market' as an abstract entity").

Thus, a private plaintiff's antitrust claim may proceed only if the complaint satisfies both inquiries under the conventional Federal Rule of Civil Procedure 8(a) pleading standards that govern "in all civil actions." *Iqbal*, 556 U.S. at 684, quoting Fed. R. Civ. P. 1 (quotation mark omitted).

B. The Complaints Must Also Allege an Agreement or Conspiracy

The Supreme Court has repeatedly made it clear that the existence of an agreement or conspiracy is an essential element of a Sherman Act violation.

> Because § 1 of the Sherman Act does not prohibit all unreasonable restraints of trade but only restraints effected by a contract, combination, or conspiracy, the crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express. While a showing of parallel business behavior is admissible circumstantial evidence from which the fact finder may infer agreement, it falls short of conclusively establishing agreement or itself constituting a Sherman Act offense. Even conscious parallelism, a common reaction of firms in a concentrated market that recognize their shared economic interests and their interdependence with respect to price and output decisions is not in itself unlawful.

Twombly, 550 U.S. at 553-54 (citations, edits, and internal quotation marks omitted). So, to plead a violation of Section 1 of the Sherman Act, plaintiffs must allege not only the antitrust injury, but also the existence of an agreement or conspiracy, or facts sufficient to support the inference of an agreement or conspiracy.

Appendix E

While the standard articulated in *Twombly* for the sufficiency of a complaint is recited in practically every motion to dismiss filed in every sort of action in this court, it has particular relevance here. In *Twombly*, the Court specifically undertook to address what a plaintiff must plead in order to state a Sherman Act claim, and it asked "whether a §1 complaint can survive a motion to dismiss when it alleges that [the defendants] engaged in certain parallel conduct unfavorable to competition, absent some factual context suggesting agreement, as distinct from identical, independent action." *Id.* at 548-49. The answer to the question was no.

The Court ruled that the Federal Rules of Civil Procedure require a plaintiff to put some meat on the bones from the outset: "plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555 (edits and internal quotation marks omitted). Allegations of parallel conduct "must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Id.* at 557. The complaints must include "further circumstance pointing toward a meeting of the minds." *Id.* The Court concluded that the *Twombly* plaintiffs' allegations of agreement and conspiracy were insufficient because the claims rested "on descriptions of parallel conduct and not on any independent allegation of actual agreement." *Id.* at 564. Therefore, the plaintiffs had not set forth "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570.

Notwithstanding plaintiffs' insistence that there is something special about antitrust litigation that exempts this case from the usual pleading requirements, the Court is bound to follow *Twombly's* unambiguous guidance when it analyzes the three complaints before it.

II. The Complaints Do Not Allege Injury in Fact

Plaintiffs acknowledge in their briefs that they must establish injury in fact as part of antitrust injury. *See* Consumer Pls.' Suppl. Br. at 3; NAC's Suppl. Br. at 1. They take the position, though, that by alleging anticompetitive conduct, they have more than satisfied the requirements for pleading antitrust injury in fact. *See, e.g.*, NAC Suppl. Br. at 8; Tr. of Hr'g on Mot. to Dismiss ("Tr.") [Dkt. # 32] at 81, Sept. 5, 2012 ("[I]f you can establish that competition has been harmed . . . there are certain injuries that flow from that . . . . It is not required in an antitrust complaint to plead the economics textbook that goes in between the allegation of the competition injury and the actual injury . . . ."); Tr. at 100 (*Mackmin* counsel citing *Cardizem CD* for proposition that an allegation of anticompetitive activity establishes injury in fact and antitrust injury "all in one"); *see also* Tr. at 87, 96, 114-16 (arguing that plaintiffs were injured because "[t]hey paid an ATM access fee in a restrained market" that was greater than the price would be otherwise: "What's that other price? . . . It's a price in what's called the but for world.").

But a "'naked assertion' of antitrust injury . . . is not enough; an antitrust claimant must put forth factual 'allegations plausibly suggesting (not merely consistent

with)' antitrust injury." *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 451 (6th Cir. 2007) (*en banc*), quoting *Twombly*, 550 U.S. at 557. Antitrust injury involves a two-step showing, *see Andrx*, 256 F.3d at 806, and none of the cases cited by the plaintiffs supports the proposition that the injury-in-fact step can be merged with the allegations of competitive harm.

In *In re Cardizem CD Antitrust Litigation*, 332 F.3d 896 (6th Cir. 2003), the court stated that a "private antitrust plaintiff, *in addition to having to show injury-in-fact* and proximate cause, must allege, and eventually prove, antitrust injury." *Id.* at 909 (emphasis added) (internal quotation marks omitted). The court specifically found that facts the *Cardizem CD* plaintiffs pled were sufficient to satisfy the injury-in-fact requirement: in that case, purchasers of heart medication alleged that an agreement between the brand drug manufacturer and a generic manufacturer prevented any generic from entering the market and thereby deprived plaintiffs of a less expensive generic alternative. *Id.* at 910. The court ruled that plaintiffs suffered injury in fact because they incurred the out-of-pocket expense of the price difference between the brand drug and a generic version. *Id.* at 904-05.[10]

10. The court also emphasized, "Our conclusion that the Agreement was a *per se* illegal restraint of trade does not obviate the need to decide whether the plaintiffs adequately alleged antitrust injury." *Cardizem CD*, 332 F.3d at 909 n.15. And in that case, the "but for" allegations satisfied the "antitrust injury" prong of the standing test, but they were not the sole foundation for the "injury in fact" prong.

Consumer plaintiffs also cite *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 586 F. Supp. 2d 1109 (N.D. Cal. 2008) ("*LCD*"), for the proposition that to plead antitrust injury, all a claimant must allege is that he paid for a product at a supra-competitive price. *See* Tr. at 102-04 ("[A]ll we need to do as consumers is to say that . . . there's a restraint in the marketplace, the marketplace is broken."). But that is not what the *LCD* case holds. The court simply ruled that it was not necessary at the pleading stage to allege the exact *measure* of damages. *LCD*, 586 F. Supp. 2d at 1124. The court found that the *LCD* plaintiffs sufficiently alleged that overcharges are in fact passed on to consumers "and that such overcharges can be traced through the relatively short distribution chain." *Id.* In other words, the *LCD* plaintiffs provided factual allegations to demonstrate that consumers were being affected, so the complaint satisfied the injury-in-fact requirement.[11]

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11. The *LCD* complaint also included significant detail about the market and the defendants' complex and unusual pricing behavior that could not be attributable to supply and demand. *See id.* at 1115-16 (describing detailed allegations of declining LCD panel prices before the conspiracy, due to advances in technology, improving efficiencies, and new market entrants, and post-conspiracy pricing characterized by unnatural and sustained price stability, periods of substantial price increases, and a compression of price ranges for the products). There is nothing comparable in the complaints before the Court. Plaintiffs also point to *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 27 S. Ct. 65, 51 L. Ed. 241 (1906), to support their argument. Tr. at 115. But the issue in that case was which statute of limitations would apply. *Chattanooga*, 203 U.S. at 397. The case does not analyze what facts plaintiffs must allege to plead injury in fact.

Plaintiffs pointed the court to *Ross v. Bank of America, N.A. (U.S.A.)*, 524 F.3d 217 (2d Cir. 2008), and urged it to conclude that an allegation of competitive harm was sufficient. Consumer Pls.' Suppl. Br. at 6. But *Ross* does not diminish the requirement that plaintiffs plead injury in fact. The harm plaintiffs alleged that they suffered in that case was that they were forced to accept arbitration clauses in credit card agreements with their banks. *Ross*, 524 F.3d at 223 (finding that the cardholders' assertion that they were "deprived of any meaningful choice on a critical term and condition of their general purpose card accounts" satisfied injury-in-fact requirement").

Thus, in *Cardizem CD, LCD*, and *Ross*, there was no factual or logical gap between the complained-of conduct and the alleged harm. In those cases, the complaints provided sufficient facts to support an inference that the defendants' concerted actions caused injury to the plaintiffs' business or property. That is not the case in the three complaints before the Court.

A. The Consumer Complaints

Plaintiffs in the *Mackmin* case represent consumers who have used both independent and bank-owned ATMs, while plaintiff Mary Stoumbos has sued only on behalf of consumers who use independent ATMs. *Mackmin* Compl. ¶¶ 12-15, 89; *Stoumbos* Compl. ¶¶ 11, 22. Both complaints allege that plaintiffs have been forced to pay inflated, "supra-competitive" ATM access fees as a result of the Visa and MasterCard access fee rules, because without the access fee rules, ATM operators could send transactions

to "lower cost networks" and would pass that cost savings on to consumers in the form of lower access fees. *Mackmin* Compl. ¶¶ 4-5; *Stoumbos* Compl. ¶¶ 33, 37-38, 40. But the consumer plaintiffs do not allege facts to support the necessary allegation that they were personally affected by those circumstances, or that the access fees charged by the ATM operators were actually inflated.

1. The *Mackmin* complaint

The *Mackmin* complaint starts out by explaining how ATM transactions work. Paragraph 3 explains that the ATM access fee at the heart of the dispute is paid by the customer. *Mackmin* Compl. ¶ 3. Paragraphs 1, 4, and 5 set out the conclusion that these fees are inflated, and that "[b]y prohibiting [ATM operators] from offering more attractive terms to consumers who use lower cost, competing networks, Visa and MasterCard are able to maintain their market position." *Id.* ¶¶ 1, 4-5. But the complaint never follows up with any factual detail that would indicate that consumers have any ability to "use" competing networks: there is no allegation that any choices can be offered at the ATM, and there is a critical lack of factual support for the notion that other networks cost less.

While paragraph 59 explains that the customer pays the access fee to the ATM operator and a foreign ATM fee to his own bank, and "the card-issuer bank" pays a switch fee to the ATM network and an interchange fee to the owner of the foreign ATM, there is no allegation that anyone pays a fee to the networks. *Id.* ¶ 59. So what is the complaint's often-repeated phrase "lower cost

network" supposed to mean? The complaint charges that the challenged rules require ATM access fees to be the same for any transaction "irrespective of whether the transaction is actually completed over Visa or MasterCard's PIN Debit network, and without regard to any savings incurred by the ATM owner from obtaining services from one of the alternative PIN-based networks." *Id.* ¶ 68. "Any" savings? Are there savings? None are alleged. Nothing in the complaint explains whether or how the network utilized affects the ATM operator's costs.

Similarly, there are no facts from which a reasonable person could draw the conclusion in paragraph 74 that the rules create an arrangement "that prohibits discounting, directing consumers to less expensive competitor networks, and other pricing behavior characteristic of a free and competitive market." *Id.* ¶ 74. What is stopping ATM operators from offering customers who use their machines a discount? The complaint asserts that "[i]n a reasonably competitive market, ATM Operators would set ATM Access Fees at a level reflecting the cost of obtaining the network services and other inputs necessary to complete the transaction," *id.* ¶ 77, and that by requiring that access fees be the same regardless of the network utilized, the "restraints break the essential economic link that would exist in a reasonably competitive market between the price a consumer is charged for a service and the cost to the seller of providing it," *id.* ¶ 79. What is missing is any discussion of what the ATM operator's costs are, and whether they change if the operator uses a Visa or MasterCard network or an alternative network. Those missing facts are fundamental, and without them,

there is no basis for the conclusions in paragraph 87 that the access fees are "inflated" or "supra-competitive."

There are also significant problems with injury in fact here because the *Mackmin* plaintiffs do not articulate how these restrictions affected them in particular.[12] The complaint alleges that each of the named plaintiffs has paid at least one ATM fee at some unspecified time or place. *Id.* ¶¶ 12-15. But it does not state whether the plaintiffs were conducting transactions at an ATM where an alternative network was even available. The *Mackmin* plaintiffs allege that "some" ATM transactions using Visa- or MasterCard-branded cards may be completed over alternate networks – transactions initiated with cards displaying the service marks of other networks on the reverse side. *Id.* ¶ 66. But there are no allegations that any of the named plaintiffs actually carry PIN cards in their wallets that can be used on alternative networks, or

12. According to the information provided in the complaints, the complained-of contract provisions do not necessarily affect all ATM transactions. First of all, the access fees are only imposed when a consumer is somewhere other than at his own bank. *Mackmin* Compl. ¶ 56. Second, the rules only affect transactions made with PIN cards that have multiple service marks and permit the bearer to utilize alternative networks. Otherwise – whether it is the consumer or the ATM operator who selects the network – there is no option available to choose an alternative network and obtain the alleged "cost savings" even if they exist. Third, the consumer complaints allege that the "overwhelming" majority of the cards issued are Visa or MasterCard-brand cards. *Mackmin* Compl. ¶ 55; *Stoumbos* Compl. ¶ 45. And customers obtaining Visa and MasterCard transactions must be afforded the benefit of the lowest access fee an operator is willing to charge.

whether those particular networks, if any, were offered at the ATMs where plaintiffs conducted their transactions and paid their fees.

2. The *Stoumbos* complaint

Plaintiff Stoumbos also begins the factual background section of her complaint with a description of how ATM transactions work and how they are priced. *Stoumbos* Compl. ¶¶ 27-29. In paragraph 28, Stoumbos states that "[s]ome ATM transactions using Visa- and MasterCard-branded PIN-debit cards may be completed over alternate networks" and that the PIN cards that offer this access bear the other service marks on the back of the card. *Id.* ¶ 28. But there is no allegation in the complaint that Stoumbos herself had such a card. She does allege that she used an independent ATM, but there is no indication of whether she used one that was connected to any alternative network, or whether she used an ATM that could have accessed whatever particular alternative network may have been available to her. These omissions mean that there is no link between the alleged harm to competition and the plaintiff's pocketbook.

And what is said about the elusive discounts that supposedly are not being passed on to consumers due to the restraints imposed by the defendants? The *Stoumbos* complaint alleges that Visa and MasterCard force ATM operators to charge an access fee for all transactions that is no less than the fee charged at that ATM for Visa and MasterCard transactions. *Id.* ¶ 30. According to the plaintiff, they do this "irrespective" of whether

the transaction is actually completed over the Visa or MasterCard networks, and "without regard to any actual or potential cost savings to the ATM operator" of using an alternative network. *Id.* ¶ 33.

As was the case with the *Mackmin* complaint, this language is telling. "Potential" cost savings? The complaint does not allege any facts to indicate that alternate networks actually provide the service at a lower cost or that completing an ATM transaction over an alternate network would give rise to *any* savings for the ATM operator. So, the sentence in paragraph 33 stating that plaintiffs are harmed because "they are forced to pay supra-competitive ATM Access Fees" is an unsupported conclusion. So is: "The ATM restraints operate to prohibit discounting by competing ATM operators to reflect the variability of costs of using competing networks." *Id.* ¶ 34. The problem with that statement is that there are no facts alleged that show that there *is* any "variability of costs of using competing networks." These sorts of allegations are repeated throughout the complaint. *See, e.g., id.* ¶ 36 (alleging that the rules "prohibit[] discounting" and "prevent[] Independent ATM operators from setting profit-maximizing prices and . . . other pricing behavior characteristic of a competitive market"); *id.* ¶¶ 38-40 (alleging that consumers "are forced to pay higher ATM Access Fees than they otherwise would if there were competition in the market," the ATM access fees "result in supra-competitive ATM Access Fees and artificially constrain growth in ATM deployment, and that "[c]ompetition between ATM operators would pass these lower costs on to Plaintiffs").

In the midst of these conclusory recitations, Stoumbos does include one sentence that claims, "Alternative PIN-debit networks are less costly." *Id.* ¶ 41. This assertion hardly suffices to support the inferences the Court is being asked to draw in this case. Less costly to whom? Less costly to operate? Less costly to use? Again, nowhere in this complaint does plaintiff allege that the networks – either Visa and MasterCard or the competing networks – charge anyone for using their facilities at all.

Stoumbos also asserts that the contract provisions are unlawful because "[i]ndependent ATM operators may not offer a discount or other benefit to persuade consumers to complete their transactions over competing, lower cost . . . networks." *Id.* ¶ 36; *see also id.* ¶ 37 (alleging that the rules deter ATM operators from "steering" transactions to other networks, which "hinders the growth and development of more efficient, lower cost competing ATM networks"). But how can a customer be "steered?" There are no factual allegations that establish that even a persuaded consumer would have any ability to affect which network the operator is using. Moreover, none of the allegations support the conclusion that ATM operators cannot discount to compete with each other. Plaintiff does not allege that there is anything barring ATM operators from using the so-called lower cost networks and lowering their prices across the board to attract consumers to their machines.

Paragraph 37 contends that "[a]bsent these agreements, independent ATM transacting networks would be able to compete with the Visa and MasterCard

networks by offering lower ATM Access Fees than those charged in the Visa and MasterCard networks." *Id.* ¶ 37. But plaintiff's speculation depends on a huge number of assumptions – most notably, that ATM operators would realize some savings if they used the other networks – but also that there would be some mechanism whereby they could pass that savings onto consumers by incorporating some sort of consumer network choice into the transaction. Moreover, the suggestion that the new competing networks would "offer lower fees" than Visa and MasterCard is inconsistent with the allegation in the complaint that it is the ATM operator, not the network, who charges the consumer the access fee in the first place. *See id.* ¶ 8.[13] These conclusory statements do not provide sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *See Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 570.[14]

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13. This same confusion is evident in paragraph 45. Stoumbos alleges that the contract provisions "secure compliance by [Visa and MasterCard's] customers and suppliers." *Stoumbos* Compl. ¶ 45. Customers *and* suppliers? Which is it? Should it not be apparent by the time one has reached this point in the complaint whether the allegation is that the independent ATM operators are the networks' customers or if they are their suppliers?

14. The complaints are also quite fuzzy about what market the consumer plaintiffs think is being restrained by the access fee rules and where the change will be if those rules are eliminated. At certain points, the complaints seem to indicate that what has been affected is the competition between networks. *See Mackmin* Compl. ¶ 4 (alleging that access fee rules allow Visa and MasterCard to maintain their market position and restrict competition between card networks). They suggest that this competition is supposed to occur at the individual machines. *See Stoumbos.* Compl. ¶ 41

Appendix E

B. The *NAC* Independent ATM Operators' Complaint

The *NAC* plaintiffs represent independent ATM operators. *NAC* Compl. ¶¶ 7, 9-22. As such, they stand between the consumer and the network in a transaction involving an independent ATM. The *NAC* plaintiffs insist that since they have alleged antitrust injury, they have also alleged Article III injury in fact. NAC Suppl. Br. at 8 (stating that the *NAC* complaint "reveals allegations of a compensable antitrust injury that more than satisfy the requirements for pleading antitrust injury and, *a fortiori*, Article III injury in fact"). That might be true if the NAC plaintiffs had properly alleged both prongs of antitrust injury – that is, both harm to competition *and* injury in fact – but the second showing is missing.

("[T]he ATM restraints suppress competition with rival networks at the point of the transaction, where ATM operators interact directly with consumers."). But plaintiffs also express concerns about the market for PIN cards. *See id.* ¶ 47 ("Visa and MasterCard maintain their market power in light of the insurmountable barriers to entry faced by a potential competitor that might seek to achieve comparable consumer acceptance of its PIN-debit card, while at the same time the ATM restraints effectively foreclose competitive ATM networks from competing to carry a larger share of ATM transactions.") And the plaintiffs alternate between complaining that the networks are not competing with each other, *id.* ¶ 37, and that the ATM *operators* are not competing with each other. *Id.* ¶ 34. The schizophrenic nature of plaintiffs' world view comes to a head in the odd allegation in the *Stoumbos* complaint that the ATM operators are "unwilling co-conspirators." *Id.* ¶ 21. If the essence of conspiracy is an agreement, then this is something of an oxymoron, and the plaintiffs seem torn between casting the operators as fellow victims or as participants in the scheme.

Appendix E

In opposition to the motion to dismiss on antitrust standing grounds, the *NAC* plaintiffs point to their allegations that the access fee rules "enable both Visa and MasterCard to charge artificially high network fees for ATM transactions, to remit inadequate compensation to ATM operators, [] to steer excessive and disproportionate compensation for ATM transactions to their member banks . . . and to establish terms that benefit the defendants and their co-conspirator banks and harm ATM operators." *Id.*, quoting *NAC* Compl. ¶ 46 (alteration in original) (quotation marks omitted). They also allege that as a result of the access fee rules, "the ATM Operator Plaintiffs and the putative class have been injured in their business and property in an amount not presently known. . . . by supracompetative fees that greatly exceed the fees that would be paid by ATM operators for network and bank services in a competitive market." *Id.*, quoting *NAC* Compl. ¶ 67 (quotation marks omitted).

But none of this sets forth facts that could support an inference that the access fee requirements injure the *plaintiffs* – the ATM operators. It is the consumers, not the operators, who pay the allegedly inflated ATM access fees. *NAC* Compl. ¶ 37 ("Consumers pay for ATM services from banks of which they are not customers and from non-bank ATM operators by paying a surcharge levied at the point of the transaction (an 'access fee'). . . . The access fee is added to the amount withdrawn from the cardholder's account at the time of the transaction . . . ."). Thus, the allegations that the access fee requirements prevent ATM operators from offering consumers a discount to use lower cost networks does not allege harm to the operators

themselves. *See id.* ¶¶ 45, 49. If ATM operators are required to charge consumers more for ATM transactions than they might absent the access fee rules, the rules tend to benefit operators by increasing their revenue. This does not constitute antitrust injury. *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 583, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (explaining that conspiracy to charge higher-than-competitive prices for televisions and other electronic products could not injure competing manufacturers of such products because they would stand to gain from a conspiracy to raise prices for the products).

The *NAC* plaintiffs also allege that the access fee requirements enable Visa and MasterCard "to charge artificially high network fees," "remit inadequate compensation to ATM operators," and "steer excessive and disproportionate compensation" to their member banks, to the benefit of the card companies and member banks. *NAC* Compl. ¶ 46. But these allegations are highly conclusory and therefore, need not be accepted at face value. The *NAC* complaint provides no facts suggesting how requirements equalizing access fees that consumers pay plausibly resulted in these alleged harms.[15] The

15. Counsel for *NAC* plaintiffs stated in oral argument that the requirements harm operators because the clauses prevent operators from gaining volume by preventing them from offering incentives to consumers to choose lower cost networks for their transactions. Tr. at 66-67. But this is not stated in the complaint. The complaint does not indicate that a consumer has any opportunity to choose which network will carry his transaction, and furthermore, it provides no facts from which one could conclude that there are networks that cost less than others.

complaint draws absolutely no connection between the access fees and funds flowing to the banks. Nor does it provide any detail about whether and how the ATM operators are supposed to be compensated.

Most important, the *NAC* complaint does not allege that Visa and MasterCard charge "network fees" at all, much less make clear how they have been "artificially" inflated. There are no allegations that indicate that Visa and MasterCard ask the ATM operators – or anyone else – to pay anything, what the fees might be, how they are calculated, how and when they are paid, or who pays them. Similarly, the complaint does not include the fact that Visa and MasterCard pay "compensation to ATM operators" at all, much less any facts that would support the inference that it is "inadequate." At oral argument, counsel for *NAC* plaintiffs explained that the consumer's bank pays an "interchange" fee to the network for processing a transaction, which the network then forwards to the ATM operator after deducting a network fee. Tr. at 57-58. But none of this is in the complaint. The fact that operators receive access fees from consumers and separately receive "interchange" from the issuing bank suggests the two fees are not directly related. The complaint provides the Court no facts from which the Court can understand or infer how the access fee relates to the interchange fee relates to the network fee, much less how the Visa and MasterCard requirements affect the amount of interchange operators receive. Accordingly, the *NAC* complaint does not allege injury in fact.

Thus, none of the complaints does anything more than make the "but for" claim. The complaints do not specify what market is being restrained, how it is supposed to work, how it was adversely affected, and how that circumstance injured the plaintiffs. A critical problem is that plaintiffs do not make clear who pays whom in these transactions. They do not explain what the ATM operators' costs might be or how they are tied to the pricing of the fees, and there are no facts in the complaints that support a conclusion that prices would be lower if the restrictions at issue were lifted.

The complaints allege that the contract provisions prohibit ATM operators from passing on the savings that could be realized when using "lower cost networks," and that consumers are therefore paying "supra-competitive" fees. But the notion that there *are* other networks that actually can or do charge the ATM operators less – thereby giving rise to savings that could be passed along to the consumer – is not stated anywhere. Plaintiff Stoumbos comes the closest when she states, "Alternative PIN-debit networks are less costly." *Stoumbos* Compl. ¶ 41. But neither Stoumbos nor any other plaintiff offers facts to flesh out that characterization. And the fact that this is a problem at the heart of the case was exposed during oral argument, when counsel explained that in fact, the operators charge the networks and not the other way around. Tr. at 57-58.

As they stood before the Court, defendants pointed out and plaintiffs did not dispute that ATM operators do not incur "costs" for accessing different networks

at all. Rather, issuing banks pay the ATM operators "interchange fees" via the networks, and networks deduct a portion of these interchange fees before passing them on to the ATM operators. *See* Tr. at 12-13, 54-58. It is unclear to the Court how businesses that do not incur costs can pass "cost savings" along to someone else. More important, the fact that the money flows in this direction is not stated clearly in the consumer complaints. *See NAC* Compl. ¶ 46. (alleging that the "ATM restraints . . . enable both Visa and MasterCard to charge artificially high network fees for ATM transactions, to remit inadequate compensation to ATM operators, and to steer excessive and disproportionate compensation for ATM transactions to their member banks"). And it is altogether absent from the operators' complaint. NAC's counsel justified this omission by explaining that the term "*lower cost networks*" in all three complaints was meant to refer to alternative *networks that pay the operators higher fees* than those paid by Visa and MasterCard. Tr. at 54. But nothing in the complaints would alert the reader to the fact that plaintiffs are relying upon this novel and unsustainable definition of the term "cost."

Moreover, at oral argument, plaintiffs advanced a different theory of competitive harm than the one advanced in the pleadings. The lawsuits assert primarily that the problem is that consumers are being denied the opportunity to choose to use a "lower cost network" at the point of the ATM transaction, that the ATM operators are being denied the opportunity to pass along the savings that would thereby be achieved, and therefore, banks and independent operators get away with charging too much.

So initially, it seemed that this case was about a lack of competition in a market where banks and independent ATM operators compete for individual customers' ATM transactions at individual ATM machines. *See, e.g.*, *Stoumbos* Compl. ¶ 41 ("[T]he ATM restraints suppress competition with rival networks *at the point of the transaction*, where ATM operators interact directly with consumers.") (emphasis added). But the ground shifted at oral argument, when plaintiffs acknowledged that by "lower cost networks," they meant networks that pay the ATM operators more; that it is the ATM operators, and not the consumers, who select which network to utilize for a given transaction, Tr. at 54-58; and that the ATM operators *already automatically* route transactions over the "lower cost" networks. *Id.* So they posited a different theory instead: that ATM operators prefer to use the alternative networks that pay them the higher fees; that they can only select those networks for transactions involving PIN cards branded with the alternative service marks; that if they could, the ATM operators would discount the access fees for customers utilizing those PIN cards to increase the volume of those transactions at their ATMs; and that therefore, if the restrictions at issue here were struck down, consumers would start to demand that their banks issue cards branded with the alternative marks, and there would be more competition among networks at *that* point in the chain. Tr. at 76, 82, 97.

Whether that theory holds water or not, it is not alleged in the complaints. A court can only assess the sufficiency of what is on the face of the complaints and not allegations that have been amplified or supplemented

or brought in to pinch hit at oral argument. In the end, notwithstanding plaintiffs' adamant insistence that consumers are being overcharged, the Court simply could not find facts to support that contention in the complaints.[16]

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16. The case will be dismissed on the grounds that plaintiffs have failed to satisfy the first prong of the antitrust injury: injury in fact. But defendants have also challenged the sufficiency of the second prong: whether the complaint sets out the necessary injury to competition. They point out that the Visa and MasterCard requirements do not fix prices for ATM services since they do not require operators to charge a specific amount in access fees to consumers. Visa/MC Mot. at 18. They also do not bar ATM operators in any way from discounting the ATM access fees they charge to consumers across the board in order to compete with other operators and attract more customers to their terminals. *Id.* Further, defendants assert that the access fees requirements are actually procompetitive, and not anticompetitive. *Id.* at 14-17; Banks' Mot. at 9-13. The bank defendants note that by virtue of these provisions, consumers using the Visa or MasterCard networks get the benefit of the lowest access fee an ATM operator is willing to charge. Banks' Mot. at 19-20. Thus, the banks argue, the access fee requirements benefit the vast majority of consumers, since most PIN cards use the Visa or MasterCard networks. *See Dial A Car*, 884 F. Supp. at 591 (dismissing antitrust claim, in part, because defendants' conduct resulted in lower prices in the market). Defendants also argue that the contract provisions are akin to most favored nation clauses, which are not *per se* anticompetitive. Visa/MC Mot. at 14-19; Banks' Mot. at 9-13. The Court is skeptical about this analogy since those clauses are designed to ensure that buyers pay the lowest price available. *See, e.g., Kartell v. Blue Shield of Mass., Inc.*, 749 F.2d 922, 926 (1st Cir. 1984) (finding Blue Shield to be *like* a buyer because it pays the bill and seeks to set the amount of the charge). Visa and MasterCard are not analogous to buyers in this situation. Defendants also stress that plaintiffs have not alleged that consumers can even

III. The Complaints Do Not Allege an Agreement or Conspiracy

Plaintiffs in all three cases allege a horizontal conspiracy to restrain trade.[17] *NAC* Compl. ¶¶ 31, 43; *Mackmin* Compl. ¶¶ 45-46; *Stoumbos* Compl. ¶¶ 21, 34.[18] Plaintiffs allege that before March 18, 2008, and May 24, 2006, when Visa and MasterCard respectively made initial public offerings to become public companies, they were associations owned and operated by a majority of the retail

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choose at the ATM which payment network will process their transactions. Visa/MC Mot. at 18; Banks' Mot. at 21. Because of this, any benefit ATM owners might theoretically provide to consumers without the access fee rules cannot be passed on to consumers – there is no competition at the point of transaction, so there cannot be injury to competition. *Id.*

Given the failure of the pleadings on injury in fact, which is necessary for Article III purposes as well as under the Clayton Act, *see Dominguez*, 666 F.3d at 1362, and the flaws in the conspiracy allegations, the court need not reach these questions. Thus, the order dismissing the cases should not be viewed as a finding by this court that the restrictions are procompetitive or that they are merely most favored nation provisions.

17. Horizontal agreements are agreements among competitors, and vertical agreements are those among firms at different levels of distribution. *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 730, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988). Horizontal price fixing agreements are *per se* illegal under the Sherman Act. *United States v. Topco Assoc., Inc.*, 405 U.S. 596, 607-08, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972).

18. Because the factual allegations regarding agreement and conspiracy in the three complaints are substantially similar, the Court addresses the complaints together.

banks in the United States. *NAC* Compl. ¶ 30; *Mackmin* Compl. ¶ 44; *Stoumbos* Compl. ¶ 20. Visa and MasterCard are no longer associations, but plaintiffs allege that "banks continue to hold non-equity membership interests" in their subsidiaries and "the largest among them also hold equity interests and seats on [their] boards of directors." *NAC* Compl. ¶ 30; *Mackmin* Compl. ¶ 44; *Stoumbos* Compl. ¶ 21. The *Mackmin* complaint also contains general allegations that the named bank defendants have been involved with Visa and MasterCard's governance: Bank of America "currently and/or has been" represented on the Visa board of directors. *Mackmin* Compl. ¶ 32. Chase used to have representation on the MasterCard and Visa boards of directors before each association's IPOs. *Id.* ¶ 37. Its representation on the MasterCard board ended in 2003, and its representation on the Visa board ended in 2006. *Id.* Wells Fargo was represented on the companies' boards "[d]uring parts of the relevant time period." *Id.* ¶ 42. *Mackmin* plaintiffs conclude that all of the bank defendants belong to both networks and have periodically served on the board of directors of each network. *Id.* ¶ 43. According to all the plaintiffs, the network defendants still refer to their bank customers as "members" and "operate principally for the benefit of their member banks." *NAC* Compl. ¶ 30; *Mackmin* Compl. ¶ 45; *Stoumbos* Compl. ¶ 21.

Plaintiffs allege that the challenged access fee rules originated in the rules and regulations agreed to by the banks before Visa and MasterCard became public corporations and that these rules create a horizontal conspiracy. *Mackmin* Compl. ¶ 45 ("These restraints originated in the rules of the former bankcard associations

agreed to by the banks themselves. By perpetuating this arrangement, the banks collectively have ceded power and authority to the Network Defendants to design, implement, and enforce a horizontal price-fixing restraint . . . ."); *Stoumbos* Compl. ¶ 21 ("The unreasonable restraints of trade in this case are horizontal agreements among Visa, MasterCard and their member banks to adopt, adhere to, and enforce rules . . . that require ATMs to grant most-favored-nation ('MFN') treatment with respect to the ATM Access Fees charged for Visa and MasterCard network transactions."); *NAC* Compl. ¶ 31 ("The unreasonable restraints of trade in this case include horizontal agreements among the issuers of Visa and MasterCard products to adhere to rules and operating regulations that require ATM access fees to be fixed at a certain level."). Plaintiffs' claims of an agreement or conspiracy, thus, rest on the allegation that before Visa and MasterCard became publicly held corporations, their member banks created the associations' rules and regulations containing the access fee rules that remain in place today. None of the complaints allege that the banks agreed among themselves to do anything. Rather, the claim of a horizontal conspiracy arises from the prior existence of the bankcard associations.

Given this, the question before the Court is whether allegations that the access fee rules originated when Visa and MasterCard were managed and operated by their member banks and that today, some banks have or have had in the past some undefined amount of equity and/or number of board seats on the Visa or MasterCard boards of directors is enough to allege a current agreement or

conspiracy to restrain trade under the Sherman Act. In other words, is the allegation that the access fee rules originated with the bankcard associations and that the rules still exist enough to allege a current agreement among banks to restrain trade?

Visa and MasterCard argue that plaintiffs cannot assert a conspiracy simply based on the allegation that banks are members of Visa or MasterCard and follow the networks' rules. Visa/MC Mot. at 9-11. They further argue that the fact that bank employees have, at times, served on the boards of Visa or MasterCard or that banks have held unspecified equity interests in Visa or MasterCard does not establish a conspiracy to restrain trade. *Id.* at 11-12. Finally, they argue plaintiffs allege no basis for conspiracy under *American Needle. Id.* at 12-14. Similarly, the bank defendants assert that plaintiffs have not pled facts to support an inference of a horizontal agreement because they do not allege that the bank defendants agreed among themselves to adhere to the networks' access fee rules. Banks' Mot. at 13.

Plaintiffs' allegations that banks used to belong to the bankcard associations does not provide factual support for the conclusion that banks are engaged in a horizontal conspiracy to restrain trade. *See Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008) (holding that belonging to an association or being on a board of directors of a network does not establish a horizontal agreement).[19]

19. Contrary to argument from NAC counsel that this case was dismissed for a failure of proof, Tr. at 89, the court there granted a motion to dismiss. *Kendall*, 518 F.3d at 1045.

Appendix E

As in the cases before the Court, the complaint in *Kendall* depended upon allegations describing the Visa and MasterCard bankcard associations, or consortiums, as they were called in *Kendall*. *Id.* at 1045. There, plaintiffs alleged that banks participated in the management of and had proprietary interests in the consortiums, that they charged plaintiffs an interchange rate fixed by the consortiums, and that they adopted the fees set by the consortiums. *Id.* at 1048. Based on these allegations, plaintiffs there claimed the banks engaged in a conspiracy to restrain trade. The Ninth Circuit disagreed and ruled that plaintiffs did not allege sufficient facts to support their theory, holding that allegations about the existence of the association alone are not enough to establish an agreement. "[M]embership in an association does not render an association's members automatically liable for antitrust violations committed by the association. Even participation on the association's board of directors is not enough by itself." *Id.* (citation omitted).

Plaintiffs here argue that they have alleged much more than what was asserted in *Kendall*, Tr. at 127, but they have not. Indeed, they allege less. In *Kendall*, the bankcard associations were still in existence and the banks still belonged to the associations. *See Kendall*, 518 F.3d at 1048. Here, plaintiffs can only allege that banks *previously* belonged to the associations, and membership in an association – much less membership in a defunct association – is not enough to establish agreement or conspiracy.

Appendix E

Plaintiffs' allegations that banks today have some equity interest in and hold some seats on the boards of Visa and MasterCard also do not provide factual support for the conclusion that banks are engaged in a horizontal conspiracy to restrain trade. Vague allegations that banks "hold non-equity membership interests" in Visa and MasterCard subsidiaries and "the largest among them also hold equity interests and seats on [their] boards of directors" does not show that banks control Visa and MasterCard. Even the *Mackmin* complaint, which attempts to set forth allegations about the continuing role of the named defendant banks in Visa and MasterCard, can only muster generalized claims. *See Mackmin* Compl. ¶¶ 32, 37, 42 (stating that Bank of America "currently and/or has been" represented on the Visa board of directors, Chase had representation on the MasterCard and Visa boards before their IPOs, and Wells Fargo was represented on the companies' boards "[d]uring parts of the relevant time period"). These general allegations are not enough to support the theory that banks control Visa and MasterCard today such that the card companies are simply a vehicle by which the banks exercise a horizontal agreement. *See, e.g., In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-MD-1720 (JG)(JO), 2008 U.S. Dist. LEXIS 104439, 2008 WL 5082872, at *10 (E.D.N.Y. Nov. 25, 2008) (granting motion to dismiss in part because plaintiffs failed to allege facts demonstrating that banks continued to control MasterCard after its IPO). And the allegation that these publicly held companies are operating for the benefit of the banks instead of their shareholders is if no assistance: that allegation is conclusory, with no facts alleged to support this claim.

Thus, there are no factual allegations that allow the Court to conclude that any control that banks may have once exercised over Visa and MasterCard when they were associations continues today.

Furthermore, the complaints allege no facts to suggest the existence of either an actual or a tacit agreement among banks to restrain trade by individually agreeing to the Visa and MasterCard agreements. At most, plaintiffs allege that ATM operators – both banks and independent operators – make independent business decisions whether to participate in the Visa and MasterCard networks. A statement of parallel conduct alone, without factual allegations to plausibly suggest an illegal agreement, is not enough. *Twombly*, 550 U.S. at 567-70 (dismissing antitrust complaint because allegations of parallel conduct without more did not plausibly suggest an unlawful agreement).

Plaintiffs attempt to compare their cases to *Starr v. Sony BMG Music Entertainment*, 592 F.3d 314 (2d Cir. 2010). *Starr* involved a claim that sellers of digital music had conspired to fix the price of digital music. *Id.* at 317. The court denied a motion to dismiss on the basis that plaintiffs' allegations of parallel conduct were sufficient to state a Section 1 Sherman Act claim. *Id.* The court reached that conclusion, in part, because the *Starr* complaint included *factual* allegations that suggested a preceding agreement among defendants, which could not be explained absent an unlawful agreement. *Id.* at 323. First, plaintiffs alleged that defendants controlled more than 80% of the digital music sales in the U.S. market. *Id*. Second, they alleged facts indicating that

two companies that defendants created to distribute digital music, MusicNet and pressplay, would have been unprofitable absent an unlawful agreement. *Id.* at 324. Third, they pointed to statements by one defendant's CEO that supported the existence of an unlawful agreement. *Id.* (referencing a quote from the CEO of a defendant company, who suggested that "pressplay was formed expressly as an effort to stop the 'continuing devaluation of music'"). The *Starr* court concluded that these facts taken together suggested a preceding agreement and not merely parallel conduct that could just as well have been independent action. *Id.* at 323.

Plaintiffs also cite *Interstate Circuit v. United States*, 306 U.S. 208, 59 S. Ct. 467, 83 L. Ed. 610 (1939), and *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000), for the proposition that the existence of a horizontal conspiracy can be inferred from the series of similar vertical arrangements between Visa or MasterCard and different banks – a so-called "hub and spoke" conspiracy. Tr. at 126. *Interstate Circuit* involved a conspiracy among distributors and exhibitors of movies, and *Toys "R" Us* involved a conspiracy between toy retailer Toys "R" Us and toy manufacturers. In *Interstate Circuit*, the court found evidence of a horizontal conspiracy when movie exhibitor Interstate, which had a monopoly on first run movies in Texas, sent an identical letter to eight movie distributors naming all eight distributors as addressees, asking them to agree to a minimum price for first-run theaters and a policy against double features at night. *Interstate Circuit*, 306 U.S. at 215-217. The trial court drew an inference of agreement from the nature of the

proposals, the manner in which they were made, the substantial unanimity of action taken, and the lack of evidence of a benign motive. *Id.* at 221. The Supreme Court affirmed. *Id.* The Court viewed as important the fact that the new distribution policies represented a radical shift from the industry's prior business practices and rejected arguments that such unanimity of action was explainable by chance. *Id.* at 222.

Toys "R" Us involved a series of vertical agreements between the toy retailer and toy manufacturers to restrict distribution of products to lower priced warehouse club stores. *Toys "R" Us*, 221 F.3d at 931-32. The Seventh Circuit upheld the Federal Trade Commission's finding of a horizontal conspiracy based on the series of vertical agreements in which toy manufacturers boycotted sales to warehouse stores. *Id.* at 935. In doing so, the FTC – which the Seventh Circuit affirmed – emphasized that the boycott was against the manufacturers' own interest and depended on all the manufacturers participating. *Id.* at 932.

It is true that an agreement can be shown by either direct or circumstantial evidence. *Id.* at 934. But when the agreement is purely circumstantial, there must be some evidence that tends to exclude the possibility that the alleged conspirators acted independently. *Id.* What facts are alleged in the complaints before this Court that *exclude* that possibility? Why would it not be in each bank's independent self-interest to adopt the rules proffered by Visa or MasterCard to be able to handle the vast majority of ATM transactions? Even if Visa or

MasterCard were pressuring them to do something that is ultimately anticompetitive and not in the consumers' interest, what alleged facts suggest that any individual bank would only want to do it as long as other banks did it? These complaints do not have the additional facts that were important in both *Interstate* and *Toys "R" Us*: the restraints here are not a sudden break from past practice that would be inexplicable without the agreement, as in *Interstate*, and they are not contrary to the banks' own interests or dependent on all banks participating, like the sales boycott executed by manufacturers in *Toys "R" Us*.

Finally, plaintiffs' allegations that the banks ceded control and authority to the networks does not establish a conspiracy under *American Needle, Inc. v. National Football League*, 130 S. Ct. 2201, 560 U.S. 183, 176 L. Ed. 2d 947 (2010). That case involved the question of whether the defendant, the National Football League Properties ("NFLP"), was a single entity or whether it was a group of individual entities acting in concert. This is important because Section 1 of the Sherman Act requires an allegation of concerted action that restrains trade. 15 U.S.C. § 1. Section 2 of the Sherman Act covers independent action and concerted action, but it requires a showing of monopolization, not just a restraint of trade. 15 U.S.C. § 2.[20] The *American Needle* court had "only a narrow issue to decide: whether the NFL respondents are *capable* of engaging in a 'contract, combination . . . , or conspiracy.'" *American Needle*, 130 S. Ct. at

20. Plaintiffs in all three cases before the Court allege violations of only Section 1 of the Sherman Act.

2208 (emphasis added). In other words, was there an agreement? Was the unincorporated association of football teams just one entity, or was it appropriate for the court to consider them to be more than one entity capable of combining and violating Section 1?

In providing some background for the issue it had to decide, the Supreme Court explained why Section 1 of the Sherman Act has a lower threshold for liability than Section 2. The Court stated that concerted action is more fraught with anticompetitive risk than independent action, and therefore, concerted action is treated more strictly under the Sherman Act than independent action – *because* it deprives the marketplace of the independent centers of decision making that are fundamental to competition. *Id.* at 2209. But the Court did not hold that anytime there is a diminution in independent decision making, that automatically means an antitrust conspiracy exists. And it did not purport to, nor did it, articulate any substitute for the requirement of an agreement or combination. In deciding the question before it, the Supreme Court simply recognized that the legal structure of the venture was not determinative, and that the key issue on the question of whether the defendant was a single or collective entity was whether the organization joined together independent centers of decision making. Thus, *American Needle* did not create a new test for the sufficiency of conspiracy allegations.

Here, there is no question that Visa, MasterCard, and the banks are separate entities. Visa and MasterCard are each public corporations, and the bankcard associations,

which were once controlled by the banks, no longer exist. Further, there is no allegation that the independent banks are currently joined together in a collective entity for decision-making purposes. Thus, *American Needle* is inapposite and of limited assistance in these cases.

In sum, the plaintiffs fail to allege sufficient factual allegations to support a claim that defendants have entered into an agreement or conspiracy to restrain trade.

CONCLUSION

For the reasons explained above, the Court finds that the complaints do not allege injury in fact or the existence of an agreement or conspiracy and therefore, it will grant defendants' motions to dismiss without prejudice. The Court has not concluded that plaintiffs could never make factual allegations to support their claims; it simply rules that plaintiffs have not done so here. Given that the federal claims are insufficient, the Court declines to consider plaintiffs' state law claims.

A separate order will issue.

/s/ Amy B. Jackson
AMY BERMAN JACKSON
United States District Judge

DATE: February 13, 2013