No. 15-____

IN THE
Supreme Court of the United States

VISA INC., ET AL.,
Petitioners,

v.

MARY STOUMBOS, 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 in both *Stoumbos v. Visa Inc., et al.*, No. 1:11-cv-01882 (D.D.C.) ("*Stoumbos*") and *National ATM Council, et al. v. Visa Inc., et al.*, No. 1:11-cv-01803 (D.D.C.) ("*National ATM Council*" or "*NAC*") are 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 respondent here and appellant below in *Stoumbos* is Mary Stoumbos. The respondents here and appellants below in *National ATM Council* are The National ATM Council, Inc.; ATMs of the South, Inc.; Business Resource Group, Inc.; Cabe & Cato, Inc.; Just ATMs, Inc.; Wash Water Solutions, Inc.; ATM Bankcard Services, Inc.; Meiners Development Company of Lee's Summit, Missouri, LLC; Mills-Tel, Corp. d/b/a First American ATM; Scot Garner d/b/a SJI; Selman Telecommunications Investment Group, LLC; Turnkey ATM Solutions, LLC; Trinity Holdings Ltd, Inc.; and T&T Communications, Inc. and Randal N. Bro d/b/a T & B Investments.

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.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Visa Inc., Visa U.S.A. Inc., Visa International Service Association, and Plus System, Inc. (collectively, "Visa") and MasterCard Incorporated and MasterCard International Incorporated (collectively, "MasterCard") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 3a–25a) is reported at 797 F.3d 1057. The opinion of the district court denying Plaintiffs' motions for leave to amend their complaint and to alter or amend the court's original judgment (Pet. App. 26a–51a) is reported at 7 F. Supp. 3d 51. The original opinion of the district court (Pet. App. 165a–214a) is reported at 922 F. Supp. 2d 73.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on August 4, 2015. 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.

STATEMENT OF THE CASE

This petition addresses *Stoumbos v. Visa Inc., et al.*, No. 1:11-cv-01882 (D.D.C.) ("*Stoumbos*") and *National ATM Council, et al. v. Visa Inc., et al.*, No. 1:11-cv-01803 (D.D.C.) ("*National ATM Council*" or "*NAC*"), two of three related cases that the Court of Appeals decided together. Petitioners Visa and MasterCard, along with other defendants named only in the third related case, *Mackmin, et al. v. Visa Inc., et al.*, No. 1:11-cv-01831 (D.D.C.) ("*Mackmin*"), have filed a separate petition seeking certiorari in that case, captioned *Visa Inc., et al v. Osborn, et al.* Because the Statement of the Case in *Mackmin* comprehensively sets out the relevant background for the Court, this petition provides a short summary.

All three cases—*Stoumbos*, *National ATM Council*, and *Mackmin*—challenge the same Visa and MasterCard rules prohibiting an ATM owner's imposition of a higher access fee for transactions processed on Visa's or MasterCard's respective ATM network than for transactions processed on another ATM network. And all three cases make identical allegations to support a claim that each rule was the product of a purported conspiracy in violation of Section 1 of the Sherman Act. Visa and MasterCard are

defendants in all three cases. The plaintiff in *Stoumbos* is a consumer who purports to represent a putative class of consumers who paid access fees at ATMs not owned or operated by a bank. Pet. App. 57a ¶ 18, 71a–72a ¶ 56. The plaintiffs in *National ATM Council* are a trade association of non-bank ATM operators and several non-bank ATM operators who purport to represent a putative class of all non-bank operators of ATMs that access Visa- and MasterCard-owned networks. *Id.* at 113a–117a ¶¶ 10–25.

As in *Mackmin*, Plaintiffs in *Stoumbos* and *National ATM Council* allege that Visa, MasterCard, and certain of their member banks reached agreements to "fix" the access fee that a cardholder pays to an ATM operator to use an ATM that is not owned by the cardholder's bank. *Id.* at 83a ¶ 80, 147a ¶ 95. Specifically, Plaintiffs challenge a Visa rule that allegedly bars ATM operators that participate in Visa's network from charging a cardholder a higher access fee for an ATM transaction processed over Visa's network than it charges for a transaction processed over a different ATM network. Plaintiffs challenge an allegedly similar MasterCard rule applicable to ATM operators that participate in the MasterCard network. *Id.* at 83a ¶ 80, 135a ¶ 63. Plaintiffs allege that these rules are the product of anticompetitive agreements among Visa and its bank members and among MasterCard and its bank members. *Id.* at 63a ¶ 40, 148a–149a ¶ 101.

Plaintiffs' claims of actionable antitrust agreements under Section 1 rely solely on allegations that Visa and MasterCard each were formerly organized as associations owned by their bank members, that bank executives sat on the respective Visa and MasterCard boards that approved each association's rules,

and that the bank members agreed to adhere to those rules. *Id.* at 59a–60a ¶¶ 28–29, 63a ¶ 40, 145a ¶¶ 89–90, 148a–149a ¶ 101.[1] In their complaints, Plaintiffs do not allege any facts showing that the bank members orchestrated a conspiracy through Visa and/or MasterCard board members or otherwise communicated with one another about the challenged rules.

On February 13, 2013, the district court dismissed the cases for failure to adequately plead conspiracy and injury-in-fact. *Id.* at 165a–214a. On December 19, 2013, the district court denied Plaintiffs' motions for leave to amend their complaints, holding that Plaintiffs' proposed amendments "provide no additional facts that constitute direct evidence of agreements that would support a claim of a current horizontal conspiracy among the member banks." *Id.* at 48a. The Court of Appeals vacated the district court's judgment on August 4, 2015, concluding that the complaints adequately pleaded injury and conspiracy by alleging that the banks "*used* the bankcard associations to adopt and enforce a supracompetitive pricing regime for ATM access fees." *Id.* at 20a (emphasis in original). The Court of Appeals denied the defendants' petition for panel rehearing or rehearing *en banc* on September 28, 2015. *Id.* at 1a–2a.

Both the district court and the Court of Appeals addressed all three related cases—*Stoumbos, National ATM Council, and Mackmin*—together.

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[1] Plaintiffs acknowledge that MasterCard and Visa became publicly held corporations by holding initial public offerings on May 24, 2006, and March 18, 2008, respectively. Pet. App. 59a ¶ 28, 145a ¶ 89.

Petitioners accordingly incorporate here by reference the petition filed today in the *Mackmin* case.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted to resolve the split between the decision of the Court of Appeals below and decisions of multiple other Courts of Appeals. In the opinion below encompassing *Mackmin*, *Stoumbos*, and *National ATM Council*, the D.C. Circuit held that a plaintiff can plead an actionable conspiracy solely through allegations that banks' employees sat on Visa and MasterCard boards, the boards adopted rules, and banks agreed to adhere to those rules. This decision squarely conflicts with the Ninth Circuit's holding in *Kendall v. Visa U.S.A., Inc.,* 518 F.3d 1042 (9th Cir. 2008), which affirmed dismissal of a complaint that alleged, as here, that banks participated in the board governance of Visa and MasterCard and adhered to Visa and MasterCard rules. The Ninth Circuit held that these allegations were insufficient to establish an unlawful antitrust agreement.

The D.C. Circuit's decision below also conflicts with the Fourth Circuit's holding in *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412 (4th Cir. 2015), that allegations of membership and governance in a trade association do not sufficiently plead an antitrust conspiracy unless they are accompanied by factual allegations as to the "who, what, when and where" of the alleged agreement. *Id.* at 430, 436–38. It likewise conflicts with the Third Circuit's decision in *In re Insurance Brokerage Antitrust Litigation,* 618 F.3d 300 (3d Cir. 2010), which held that allegations

of membership in and adoption of a trade group's rules do not plausibly allege an antitrust conspiracy.

As the petition filed in the *Mackmin* case explains, this split of authority concerns an important, recurring question that affects numerous trade and business organizations across the United States. The question presented in these cases is thus deserving of this Court's review.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the separately filed petition seeking certiorari in the *Mackmin* case, if the Court grants certiorari in the *Mackmin* case, the Court should hold this petition pending a decision on the merits in *Mackmin*.

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

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* Circuit Judge Henderson did not participate in this matter.

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.*

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.

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).

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.

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.

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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,

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,

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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

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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

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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.

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 — SECOND AMENDED CLASS ACTION COMPLAINT, *STOUMBOS V. VISA INC.*, UNITED STATES DISTRICT COURT, DISTRICT OF COLUMBIA, DATED APRIL 15, 2013

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Case No. 1:11-cv-01882-ABJ

MARY STOUMBOS, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, 4208 BARDOZ CT., ANTIOCH, CA 94531

Plaintiff,

v.

VISA INC., VISA U.S.A. INC., VISA INTERNATIONAL SERVICE ASSOCIATION, and PLUS SYSTEM, INC. 595 Market Street San Francisco, CA 94105-2802

and

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

Defendants.

SECOND AMENDED CLASS ACTION COMPLAINT
JURY TRIAL DEMANDED

[TABLE OF CONTENTS INTENTIONALLY OMITTED]

Plaintiff, by her attorneys, brings this civil action on behalf of herself and others similarly situated against the above named Defendants and, demanding a trial by jury, complains and alleges as follows:

JURISDICTION AND VENUE

1. Plaintiff brings this action pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, to recover treble damages, injunctive relief, and the costs of this suit, including reasonable attorneys' fees, for injuries sustained by Plaintiff and the Class as a result of Defendants' violations of Section 1 of the Sherman Act, 15 U.S.C. § 1. In the alternative, Plaintiff also brings this action under California Bus. & Prof. Code §§ 16700 *et seq.* and Cal. Bus. & Prof. Code §§ 17200 *et seq.*, as well as the antitrust, unfair competition and/or consumer protection laws of the "Indirect Purchaser States," as that term is defined below.

2. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. §§ 1331 and 1337, and by the Clayton Act, 15 U.S.C. §§ 15(a) and 27. The Court also has diversity jurisdiction over this class action pursuant to the Class Action Fairness Act of 2005, which *inter alia*, amends 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 five million dollars ($5,000,000.00) exclusive of interests and costs. 28 U.S.C. §§ 1332(d)(2) and (6).

3. The interstate commerce described in this Complaint is carried on, in part, within this District. Venue is proper in this District pursuant to the provisions of 15 U.S.C. § 22 and 28 U.S.C. § 1391. Each of the Defendants resides in, transacts or transacted business in, maintains offices or is found within, and a substantial part of the acts or omissions complained of took place within, this District. This Court has jurisdiction over the state law claims pursuant to 28 U.S.C. §§ 1367 and 1332.

DEFINITIONS

4. "ATM" is an acronym for automated teller machine, which is an electronic banking outlet that allows customers to complete basic transactions with their banks, such as cash withdrawal, without the aid of a branch representative or teller.

5. "Independent ATM" refers to an ATM that is not owned by Visa, MasterCard or any of their member banks.

6. "PIN-debit card" refers to a card with a PIN number that may be used to effectuate transactions at ATMs.

7. "ATM Services" refers to services available to consumers at an ATM, including services such as withdrawing funds, depositing funds, ascertaining balances and other account information.

8. “ATM Access Fee” refers to the fee that is set by the ATM owner and charged at the point of sale to the ATM customer in conjunction with the provision of ATM Services, typically to fund withdrawal transactions. The fee is charged against the ATM customer’s PIN-debit card account and paid to the ATM operator.

9. “ATM Network(s)” refers to an electronic system whereby more than one ATM and more than one depository institution (or the deposit records of such depository institutions) are interconnected by electronic or telecommunications means, to one or more computers, processors or switches for the purpose of providing ATM Services to the retail customers of depository institutions. ATM Network(s) transmit ATM transactions and information between ATMs and the PIN-debit card customers’ banks.

10. “ATM Sponsoring Agreement” refers to the contract that an Independent ATM must enter into with a designated Visa or MasterCard sponsoring bank in order to qualify to use the Visa and MasterCard owned and operated ATM Networks and to accept Visa and MasterCard PIN-debit cards. The ATM sponsoring agreement contains operating terms and conditions that govern and restrict the horizontal pricing conduct of the Independent ATMs, including limitations on the pricing of the ATM Access Fees to customers at the point of sale of ATM Services.

11. “Rival ATM Network(s)” or “Rival Network(s)” refers to ATM Networks not owned or operated by Visa or MasterCard.

12. “Bug” or “Network Bug” refers to a logo on the back of a Pin-debit card that designates which of the competing ATM Networks are enabled for use in conjunction with the card.

13. “ATM Interchange” refers to a per-transaction amount that the ATM Network remits to the ATM operator as compensation for providing the ATM Services that facilitate the ATM customer’s transactions with the customer’s bank.

14. “ATM Network Fee” or “Network Fee” refers to a per-transaction amount that the ATM Network charges the ATM operator for providing the network service. The Network Fee is typically netted by the ATM Network against the ATM Interchange, before remittance of the interchange to the ATM operator. The Network Fee is economically equivalent to a cost per transaction imposed by the ATM Network upon the ATM operator.

15. “Net ATM Interchange” or “Net Interchange” refers to the net amount of interchange remitted to the ATM operator by the ATM Network after deduction of the ATM Network Fee. In the case of Independent ATMs, the Net ATM Interchange is not paid directly to the Independent ATM by the ATM Network but rather is paid through the ATM’s processor, an independent service hired by the ATM and acting as intermediary on its behalf.

16. “Class Period” means October 1, 2007 to the present.

17. “Indirect Purchaser States” refers to states that allow recovery of damages by indirect purchasers pursuant to state antitrust, unfair competition and/or consumer protection laws, as set forth in the second and third claims for relief, *infra*.

PARTIES

18. Plaintiff Mary Stoumbos is a resident of the State of California. Stoumbos has paid several ATM Access Fees in connection with transactions that occurred at Independent ATMs during the Class Period. Plaintiff owns a Visa branded PIN-debit card that she has used at Independent ATMs to conduct transactions, including withdrawals of cash, and for which she has paid ATM Access Fees. Plaintiff’s PIN-debit card enables her ATM transactions to be routed through Rival ATM Networks in addition to the Visa and MasterCard ATM Networks. Bugs on the back of her card evidence these additional, Rival Networks. Her additional Rival Network Bugs are the CU Service Centers, Co-Op Network, and Star network Bugs. The Star network charges lower ATM Network Fees and remits higher Net Interchange to ATM operators than do either the Visa or the MasterCard ATM networks. During the Class Period, Plaintiff paid an ATM Access Fee that was not discounted in connection with a transaction through at least one Independent ATM with access to the Star network, as well as the Visa and MasterCard networks.

19. Defendant VISA INC. is a publicly traded Delaware corporation with its principal place of business in San Francisco, California.

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

21. 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.

22. 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.

23. Defendants VISA INC., VISA U.S.A. INC., VISA INTERNATIONAL SERVICE ASSOCIATION, and PLUS SYSTEM, INC. are collectively referred to herein as "Visa."

24. Defendant MASTERCARD INCORPORATED is a publicly traded Delaware corporation with its principal place of business in Purchase, New York.

25. Defendant MASTERCARD INTERNATIONAL INCORPORATED 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 Incorporated consists of more than 23,000 member banks worldwide and is the principal operating subsidiary of MasterCard Incorporated. MasterCard International Incorporated operates the MasterCard, Maestro and Cirrus ATM networks.

26. MASTERCARD INCORPORATED and MASTERCARD INTERNATIONAL INCORPORATED are collectively referred to herein as "MasterCard."

NATURE OF THE ANTI-COMPETITIVE HORIZONTAL PRICING RESTRAINT

27. The unreasonable restraints of trade in this case, the ATM Access Fee Restraints, are written Visa and MasterCard rules and corresponding provisions in bank-ATM sponsoring contracts directly aimed at restraining horizontal price competition in two relevant markets: (1) the ATM Services market and (2) the ATM Network market. ATM operators are horizontal competitors with each other in the market for the provision of ATM Services to consumers. Visa and MasterCard are horizontal competitors with other ATM Networks in the market for provision of ATM Network services to ATMs. The anti-competitive rules and contract provisions were adopted before Visa and MasterCard became public corporations and have continued in force and effect since that time to the present.

28. The Visa and MasterCard 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 an IPO of its stock began trading on the exchange on May 24, 2006.

29. From the beginning of their existence until their IPOs, the 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 adhere to the ATM Access Fee Restraints.

30. Prior to the Defendants' IPOs, each bank that was a member of the Visa or MasterCard networks knew and understood that the ATM Access Fee Restraints would continue after the Network Defendants' respective IPOs.

31. 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 1 of the Sherman Act. After a 34-day trial the court found the exclusionary rules violated the antitrust laws and that decision was affirmed by the United States Court of Appeals for the Second Circuit. *United States* v. *Visa USA*, 163 Supp.2d 322 (S.D.N.Y. 2001), *aff'd*, 344 F.3d 229 (2d Cir. 2003). 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. 163 F. Supp. 2d at 405-406.

32. 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 1 of the Sherman Act." *Id.* at 405-406.

33. In affirming the court's "comprehensive and careful opinion," 344 F.3d at 234, the United States Court of Appeals for the Second Circuit underscored 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.

34. Similar to the exclusionary rules at issue in *United States* v. *Visa, U.S.A.*, the ATM Access Fee Restraints at issue in this case are horizontal restraints agreed to by the banks and the Defendants, and their members.

35. After being adjudicated "structural conspiracies" in the United States, the European Union, the United Kingdom, and several other jurisdictions, the 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.

36. For example, in May 2005, MasterCard's then-CEO Robert Selander noted in a presentation to the European banks that were then represented on MasterCard's Board of Directors that through an IPO, MasterCard wished to terminate the "structural conspiracy previously found to exist by courts in the United States."

37. Similarly, in January 2005, Christopher Rodrigues, the President and CEO of Visa International, acknowledged: "[T]he Regions now understand that: Old Visa's days are numbered. No one can stay as they are."

38. On May 22, 2006, MasterCard completed its IPO, which sold a partial interest in MasterCard to public investors. Through this IPO and related agreements,

the surviving 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.

39. 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.

40. Following the IPOs, the Defendants continue to refer to their bank customers as "members" of Visa and MasterCard. The ATM Access Fee Restraints continued unchanged after the IPOs. By perpetuating the ATM Access Fee Restraints, the banks collectively have ceded power and authority to the Defendants, in whom they have a significant financial interest, to continue to implement and enforce the same horizontal price-fixing restraint that had existed pre-IPOs and in which the banks were and remain knowing participants.

41. Prior to the Defendants' IPOs, each bank that was a member of the Visa or MasterCard Networks knew and understood that it and each and every other member of the network would agree to be bound by the ATM Access Fee Restraints. Following the IPOs, each bank that is a member of the Visa or MasterCard Networks, knew and understood that it and each and every other member of the

applicable network would continue to agree to be bound by the ATM Access Fee Restraints. Indeed, as discussed *infra*, it was and continues to be in the member banks' best interests to agree to be bound by the ATM Access Fee Restraints.

42. In short, the violation in this case is an agreement, among Defendants and every bank that is a member of the Visa and/or MasterCard networks, that constitutes a horizontal restraint on the pricing of ATM Access Fees at the point of sale of ATM Services to customers. Visa and MasterCard impose the same horizontal restraints on ATM Access Fee pricing by Independent ATMs, who are competitors of bank-owned and operated ATMs. The horizontal restraints are imposed on Independent ATMs through the terms of the ATM Sponsoring Agreement with a member bank that is a prerequisite for Independent ATM access the dominant Visa and MasterCard ATM Networks.

43. The horizontal restraints at issue impose anti-competitive pricing restrictions upon ATM Access Fees charged at the point of sale of ATM Services to consumers. In order to conduct ATM transactions for customers who have Visa and MasterCard branded PIN-debit cards, ATMs must either be owned by a Visa or MasterCard member bank or sponsored by one. Both Visa and MasterCard by rule require member banks to adhere to certain horizontal pricing restraints regarding ATM Access Fees at both their bank-owned and their bank-sponsored Independent ATMs. The horizontal restraints prohibit both bank-owned and Independent ATMs from

engaging in an important kind of competitive pricing behavior. The horizontal ATM Access Fee Restraints impose exactly the same kind of pricing restraint on each and every ATM that is authorized to handle Visa and MasterCard ATM debit transactions. Specifically, ATM operators are prohibited from offering ATM customers a competitive, lower, or discounted Access Fee for transactions that are routed by the ATM operator over a competing Rival ATM Network that is not owned by Visa or MasterCard.

44. The ATM Access Fee Restraint substantially impedes horizontal price competition in two markets. First, the restraint impedes horizontal price competition among ATMs at the point of sale of ATM Services to the consumer by preventing ATMs from charging lower Access Fees to those consumers who have or can obtain PIN-debit Cards capable of transacting through ATM Networks that compete with the Visa and MasterCard ATM Networks.

45. Several competing, Rival ATM Networks, as detailed below, charge lower ATM Network Fees and remit higher Net ATM Interchange to ATM operators than do either the Visa or the MasterCard ATM Networks. If permitted to do so, ATM operators would have an economic incentive to pass on to customers the benefit of using the lower cost, higher net revenue Rival Networks in the form of lower, or discounted, Access Fees. Through careful setting of ATM Access Fee discounts, ATM operators will be able to attract more ATM traffic from customers who possess or choose to obtain PIN-debit

cards with competing Rival Network Bugs, and will be able to route more transactions through those competing, rival networks, and thereby maximize the ATM operator's revenue. Removal of the Access Fee restraint would result in greater Access Fee price competition among ATMs and the availability of lower, discount pricing to ATM customers.

46. Consumers have a choice of banks and debit card issuers. With the availability of discounted ATM Access Fees, consumers will seek out and demand debit cards with competing ATM Network capability, identified by Bugs on the back of the card. In response to the higher consumer demand for cards with competing ATM Network Bugs, banks will compete for consumer debit card account business by offering more cards with the rival Bugs. The end result of removal of the ATM Access Fee pricing restraint will be greater competition in ATM Access Fees at the point of sale to the customer, a shift in transaction volume to competing, rival ATM Networks, and generally lower ATM Access Fees.

47. Second, the ATM Access Fee Restraint substantially impedes horizontal competition in the ATM Network market, and inhibits the growth of ATM Networks that compete with Visa and MasterCard. The restraint suppresses competition between Visa and MasterCard and their rival ATM Networks by interfering with the normal give and take of the marketplace at the point of sale where ATMs interact directly with customers. Rival ATM Networks attempt to compete for, and expand their shares of, ATM debit transaction business by providing

benefits to ATM operators in the form of lower fees and higher net interchange revenue to ATMs, than is provided by the Visa and MasterCard networks. The Access Fee Restraint, however, prevents ATMs from passing on those benefits to their customers. ATMs are prohibited from offering customers a discount or benefit for using a PIN-debit card that provides higher net revenue to the ATM operator (is less costly). ATMs cannot provide customers with incentives to encourage them to obtain and use cards embossed with rival network Bugs, even though the rival networks are a higher-revenue, lower-cost alternative for the ATMs, because they cannot reward the customers' card choices with lower Access Fees. In short, ATMs are prohibited from fostering the competition that would otherwise arise between Visa and MasterCard and their rival networks at the point of sale to the customer.

48. The suppression of ATM Network competition results in higher ATM Access Fees to consumers and lower ATM terminal deployment and transaction output. If ATMs were allowed to discount Access Fees for us of rival ATM Networks, in order to compete effectively Visa and MasterCard would be forced to lower their fees and provide higher net interchange to ATMs. ATMs would pass on some or all of the benefit of the lower costs and higher net interchange to their customers in the form of lower ATM Access fees.

49. In effect, the horizontal restraint imposes a pricing floor on ATM Access Fees. ATMs have just two sources of revenue to offset their costs of operation and earn an economic profit. ATMs receive revenue per transaction

from ATM Networks in the form of Net Interchange and from customers in the form of the ATM Access Fees. If transaction revenues from the ATM Networks are lower, ATM Access Fees must be correspondingly higher for ATMs to cover costs and earn the same level of profit. Visa and MasterCard ATM Networks are the dominant Bug networks on Visa and MasterCard cards, most of which are single Bug cards, or only have Bugs for Visa or MasterCard networks.

50. ATMs are already highly competitive with each other for point-of-sale customer business, and their ATM Access Fees reflect competitive pricing pressures. ATMs have already set their Access Fees to maximize revenue within the restrictive regime of the current Access Fee Restraints. ATMs have no current economic incentive to institute lower ATM Access Fees across the board because to do so would not serve to increase the number of customer transactions using PIN-debit cards that have rival network Bugs. ATMs are constrained from reducing ATM Access Fees, given the dominance of the Visa and MasterCard debit cards and the lower net revenues received from them, without adversely affecting their own revenues and their ability to cover costs and earn a profit. The only way that ATMs can adjust their pricing to increase their revenues is to encourage customers to seek out and use debit cards with rival network Bugs and thereby shift transaction volume to the rival networks and away from the Visa and MasterCard networks.

51. Lowering Access Fees across-the-board, however, will not encourage and incentivize a shift of volume to

rival networks, because customers will not perceive any benefit to using or obtaining cards with rival network Bugs—customers will be charged the same Access Fee either way. The only effect of reducing ATM Access Fees across-the-board currently will be to make ATM operators worse off economically. On the other hand, if ATMs were permitted to charge differential Access Fees based on the Bugs on the customers' cards, ATMs would be able to steer customers to card issuers offering the Bugs of rival networks, and by increasing the mix of transaction volume in favor of the rival networks, the ATMs would maximize their own revenue. By allowing ATMs to price according to the costs of their inputs, both ATMs and consumers of ATM services would benefit.

NATURE OF THE HORIZONTAL COMBINATIONS

52. As alleged above, the horizontal pricing restraints at issue result from an agreement and combination among Visa, MasterCard and their member banks to adopt, adhere to, and enforce rules and operating regulations that require ATMs owned by the banks and Independent ATMs sponsored by the banks to set a "floor level" for ATM Access Fees at the level of the ATM Access Fees charged for Visa and MasterCard network transactions. ATM Operators cannot price ATM Access Fees below this floor level. In short, the violation in this case is an agreement and combination among Visa, MasterCard, and some or all of the banks that issue Visa- or MasterCard-branded cards that results in a horizontal restraint on the pricing of ATM Services to customers at all ATMs throughout the country that accept Visa and MasterCard PIN-debit cards.

53. Alternatively, the horizontal pricing restraints at issue result from two hub and wheel agreements and combinations in which Visa and MasterCard are the two hubs and horizontally competing ATM owners are rims around the wheel. The ATM sponsoring banks are, in effect, the intermediaries and agents of Visa and MasterCard in imposing the ATM Access Fee Restraints directly upon the Independent ATMs through the written-contract, ATM Sponsoring Agreements. Independent ATMs are horizontal competitors who are prohibited by the written ATM Sponsoring Agreements from offering differential pricing discounts to their ATM Services customers. It would not be in the best interests of any individual ATM operator to choose to saddle himself or herself with a restrictive ATM Access Fee pricing restraint that required him or her to set a single, uniform fee for all transactions at that ATM, irrespective of the ATM Network used to complete the transaction. In his or her own economic self-interest, in order to maximize revenues, an ATM operator would instead choose to retain the flexibility to set discounted Access Fees for those transactions that can be routed through Rival ATM Networks that charge the ATM operator lower Network Fees and remit higher Net Interchange.

54. The setting of a single, uniform access fee, whether or not discounted in relation to access fees at other ATMs, would not incentivize ATM customers to obtain and use more cards possessing Rival ATM Network Bugs, and thus would not promote the ATM operator's economic self-interest in increasing the usage of Rival ATM Networks at his or her ATM, and thereby increasing the net revenue received from those rival networks.

55. The Independent ATM operators would not voluntarily agree either individually or among themselves to horizontal restraints that restrict the ability of each to freely set his or her own Access Fee price structure. Rather, they are compelled to adhere to the anti-competitive horizontal restraints by business and economic reality. Because Visa and MasterCard branded cards dominate the PIN-debit card market,[1] it would be impossible for an Independent ATM to survive economically without the ability to facilitate Visa and MasterCard PIN-debit transactions. Independent ATM operators perceive that they cannot successfully do business without access to those networks. In order to gain access to the Visa and MasterCard transaction networks, however, Independent ATMs are required to enter into the ATM Sponsoring Agreements. Thus, Visa and MasterCard, at the hubs of the two illegal combinations, abuse their dominant market positions to impose a horizontal pricing restraint upon the Independent ATMs that form the rim of the wheel.

CLASS ACTION ALLEGATIONS

56. Plaintiff brings this action on behalf of herself, and on behalf of all others similarly situated. Plaintiff seeks to represent the following class (the "Class") pursuant to Rules 23(a), (b)(2), and (b)(3) of the Federal Rules of Civil Procedure:

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1. According to The Nilson Report, Visa, for example, held a 60.7 % share of the U.S. debit card market. According to Forbes, in 2012 MasterCard had more than 20% of the PIN debit card transactions in the U.S. The largest Pin debit network as of 2008, according to the Federal Reserve Bank of Kansas City is Interlink, operated by Visa, with a 40% market share.

> All persons in the United States who were charged an ATM Access Fee at an Independent ATM during the relevant Class Period.

57. Subject to additional information obtained through further investigation and discovery, the foregoing Class definition may be expanded or narrowed by amendment or amended complaint.

58. This action has been brought and may properly be maintained as a class action, pursuant to the provisions of the Rule 23(a), (b)(2), and (b)(3) of the Federal Rules of Civil Procedure on behalf of all members of the Class:

a. <u>Numerosity</u>: Members of the Class are so numerous that their individual joinder is impracticable. Plaintiff is informed and believes, and on that basis alleges, that the proposed Class contains tens of thousands and perhaps millions of members. The precise number of Class members is unknown to Plaintiff. Throughout the period covered by this Complaint, Defendants and their co-conspirators participated in the ATM Services industry throughout the United States.

b. <u>Existence and Predominance of Common Questions of Fact and Law</u>: Common questions of fact and law exist as to all members of the Class. These questions predominate over the questions affecting individual Class members. These common factual and legal questions include:

i. whether Defendants formed and operated an illegal combination to fix, raise, maintain or

stabilize the prices of, or allocate the market for, ATM Access Fees;

ii. whether the combination caused ATM Access Fees to be higher than they would have been in the absence of Defendants' conduct;

iii. the operative time period of Defendants' combination;

iv. whether Defendants' conduct caused antitrust injury to Plaintiff and the members of the Class;

v. the appropriate measure of the amount of damages suffered by the Class;

vi. whether Defendants' conduct violates Section 1 of the Sherman Act;

vii. whether Defendants' conduct violates the antitrust, unfair competition, and consumer protection laws of the states as alleged below; and

viii. the appropriate nature of class-wide equitable relief.

c. Typicality: Plaintiff's claims are typical of the claims of the Class because Plaintiff directly incurred a supra-competitive ATM Access Fee from Independent ATMs during the Class Period, as did each member of the Class. Furthermore, Plaintiff and all members of the Class sustained monetary injury arising out of Defendants' wrongful conduct.

d. Adequacy: Plaintiff is an adequate representative of the Class because her interests do not conflict with the interests of the Class that she seeks to represent; she has retained counsel competent and highly experienced in complex class action litigation; and intends to prosecute this action vigorously. Plaintiff and her counsel will fairly and adequately represent the interests of the Class.

e. Superiority: A class action is superior to other available means of fair and efficient adjudication of the claims of Plaintiff and members of the Class. The injury suffered by each individual Class member is relatively small in comparison to the burden and expense of individual prosecution of the complex and extensive litigation necessitated by Defendants' conduct. It would be virtually impossible for individual members of the Class to effectively redress the wrongs done to them. Even if the members of the Class could afford such individual litigation, the court system could not. Individualized litigation presents a potential for inconsistent or contradictory judgments. Individualized litigation increases the delay and expense to all parties, and to the court system, presented by the complex legal and factual issues of the case. By contrast, the class action device presents far fewer management difficulties, and provides the benefits of single adjudication, economies of scale, and comprehensive supervision by a single court.

TRADE AND INTERSTATE COMMERCE

59. Defendants' branded PIN debit payment cards, issued by the nation's banks and other depository institutions, are utilized in an enormous volume of ATM transactions involving a substantial dollar amount of commerce and are marketed, sold and used in the flow of interstate commerce. Visa provides ATM network 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. As of September 30, 2010, there were 397 million Visa debit cards in circulation.

60. MasterCard provides ATM network 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. As of September 30, 2010, there were 123 million MasterCard debit cards in circulation.

THE ATM INDUSTRY

ATM Pin-debit Transactions and Access Fees

61. ATM transactions are initiated by use of a PIN-debit card. Holders of PIN-debit cards are able to use ATMs owned by banks as well as Independent ATMs. When a consumer uses a PIN-debit card at an ATM, the consumer is charged an ATM Access Fee for certain ATM

Services, such as withdrawing cash from that ATM. The ATM Access Fee is set by the owner of the ATM and the fee is added to the amount withdrawn by the customer and is charged directly to the customer's PIN-debit card bank account.[2]

62. The ATM Access Fee is a single, uniform amount for any given ATM. All ATMs are prohibited by the Visa and MasterCard Rules from charging a differential, lower Access for transactions routed over non- Visa or MasterCard, rival ATM Networks.

63. The vast majority of PIN-debit cards used for ATM transactions are Visa or MasterCard branded bank 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 the primary global brands."

Independent ATMs

64. Independent ATMs are ATMs not owned or operated by Visa, MasterCard or their member banks. Because Independent ATMs are not located at bank premises, they necessarily require access to one or more shared ATM Networks in order to complete ATM customer transactions.

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2. An additional fee (a "foreign ATM fee") may also be assessed by the financial institution that issued the card, but this fee is not relevant to the allegations in this Complaint.

65. In order to accept Visa and MasterCard PIN-debit cards and gain access to the Visa and MasterCard shared ATM Networks, Independent ATMs are required to enter into an ATM Sponsoring Agreement with a Visa or MasterCard designated sponsoring bank. The ATM Sponsoring Agreements contain the anti-competitive pricing restraints on ATM Access Fees at issue in this complaint.

66. Because of the market dominance of Visa and MasterCard PIN-debit cards and the Visa and MasterCard operated PIN-debit ATM Networks, no Independent ATM could survive economically without entering into an ATM Sponsoring Agreement with a Visa or MasterCard sponsoring bank.

ATM Networks

67. ATM transactions are completed over ATM Networks, which are electronic networks that provide the communications link between the ATM and the customer's bank for the purpose of verifying account balances and authorizing withdrawals. Both Visa and MasterCard operate ATM Networks. All ATMs that accept Visa and MasterCard branded PIN-debit cards are required by Visa, MasterCard and their member banks to have access to the Visa and MasterCard ATM Networks.

68. There are also rival ATM Networks not owned or operated by Visa or MasterCard, which include Pulse Network, NYCE Network, Star Network, Exchange Network, Armed Forces Network and Credit Union 24

Network, and others. ATMs may also contract with these networks for shared ATM network services in addition to the required Visa and MasterCard networks and may route transactions over the rival networks when the customer's PIN-debit card is properly coded to permit use of a rival network.

69. A PIN-debit card must be specifically coded for each ATM Network that is authorized for use with that card. Authorized networks coded on the cards are reflected by logos on the backs of the cards, called network Bugs. An ATM cannot route a card transaction over a network that is not coded for that card. Most Visa and MasterCard member banks issue PIN-debit cards coded only for use with the Visa and MasterCard ATM Networks. Some banks and other financial depository institutions, however, issue cards coded for additional, rival networks, and evidenced by additional Bugs for the rival networks on the backs of the cards.

70. ATM transactions using Visa- and MasterCard-branded PIN-debit cards may be completed over alternative networks where the card bears the Bug 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. Visa and MasterCard member banks, however, issue the bulk of Visa and MasterCard PIN-debit cards and most of these are coded only for the Visa and MasterCard ATM Networks. For that reason ATMs have no choice but to route the bulk of ATM transactions over the Visa and MasterCard networks.

Appendix D

ATM Network Fees, Interchange and Net Interchange

71. ATM Networks, on a per transaction basis, remit an ATM Interchange amount to the ATM. ATM Networks also charge the ATM a Network Fee per transaction. The Network Fee is normally deducted by the ATM Network from the ATM Interchange amount before remittance to the ATM. The resultant net revenue per transaction received by the ATM (Interchange minus Network Fee) is the Net Interchange.

72. Net Interchange is one of only two sources of revenue for ATMs from which the ATMs must cover all of their expenses of operation and earn a profit. The other source of ATM revenue is the ATM Access Fee charged by the ATM to the customer at the point of sale of an ATM transaction. The costs of ATM operation include equipment rental, lease or purchase expense, location rental or lease expense, maintenance and service of machines, wages and salaries and other normal business operating expenses.

73. If the ATM cannot cover its costs of operation and earn an economic profit from the Net Interchange alone, its only other revenue option is to charge customers an ATM Access Fee sufficient to make up the difference, or soon cease doing business. From the economic viewpoint of the ATM operator, an ATM Network that pays lower Net Interchange to the ATM is the economic equivalent of a higher-cost ATM Network, since a reduction in Net Revenue is the economic equivalent of an increase in

costs. Conversely, an ATM Network that pays higher Net Revenue is a lower cost ATM Network from the economic point of view of the ATM.

74. The amounts of the ATM Network Fee and ATM Net Interchange vary among the ATM Networks. The Visa and MasterCard ATM Networks, however, consistently charge ATMs the highest Network Fees in proportion to Interchange Fees and remit to ATMs the lowest Net Interchange. Data as to ATM Network Fees and ATM Net Interchange across the various ATM Networks is not publicly available. However, according to industry sources and based on transaction sampling, upon information and belief, the following is a reasonable approximation as of February 2013: Visa networks on average charged ATMs a Network Fee per transaction of $0.33 and paid Net Interchange to ATMs of $0.17, with the Network Fee constituting 66% of total Interchange; and MasterCard networks on average charged a Network Fee of $0.41 and paid Net Interchange of $0.05, with the Network Fee constituting 89% of total Interchange.

75. In contrast, rival networks charge ATMs either no Network Fee at all, or much lower Network Fees than Visa or MasterCard, and accordingly pay much higher Net Interchange. For example, upon information and belief, according to the same industry sources the following is a reasonable approximation as of February 2013: Pulse Network charged zero Network Fees and paid $0.28 Net Interchange; NYCE Network charged zero Network Fees and paid $0.38 Net Interchange; Star Network charged $0.07 Network Fees and paid $0.38 Net Interchange.

Additional examples include Exchange Network, Armed Forces Network and Credit Union 24 Network—each charged zero Network Fees and paid net interchange of $0.42, $0.44, and $0.54, respectively. Although the exact amounts of Network Fees and Net Interchange have varied over time, similar differences between Visa and MasterCard and their rival networks have prevailed in the past, with the rival networks consistently charging lower Network Fees and remitting higher Net Interchange per transaction than the Visa and MasterCard networks.

THE ANTI-COMPETITIVE ACCESS FEE PRICING RESTRAINT

76. As alleged above, all ATMs that accept Visa- or MasterCard-branded PIN-debit cards are required to have access to the Visa and MasterCard networks. Card-issuing U.S. banks have access to those networks by virtue of their membership with Visa and/or MasterCard. Independent ATM owners, however, must be sponsored by a "sponsoring financial institution," or must affiliate with a sponsored entity; *i.e.*, Visa and/or MasterCard member banks that specialize in providing Independent ATM owners access to the Visa and MasterCard PIN-based networks.

77. Visa and MasterCard abuse their market dominance by forcing ATM operators, by rule in the case of member banks, and by terms that Visa and MasterCard require member banks to include in their sponsoring agreements for Independent ATMs, to charge an ATM Access Fee for each and every ATM transaction that is

no less than the amount charged at that ATM for a Visa or MasterCard network transaction, irrespective of the ATM Network over which the transaction is routed. The Access Fee is a horizontal pricing restraint imposed at the point of sale of ATM Services to the public that, in effect, operates to set and maintain an anti-competitive floor price below which ATM operators cannot economically price and to prohibit ATM operators from providing differentially lower prices, or discounts, to customers who present PIN-debit cards enabled with rival ATM Network Bugs.

78. The Visa Plus System, Inc. Operating Regulations set forth the following restraint on the exercise of discretion by ATM operators to charge whatever ATM Access Fee they deem commercially and competitively appropriate:

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

....

79. Similarly, MasterCard's Cirrus Worldwide Operating Rules (September 15, 2010) applicable to the United States Region (Chapter 20) set forth the same restraint on the exercise of discretion by ATM operators to set access fees as they deem commercially appropriate:

> **7.13.1.2 Non-Discrimination Regarding ATM Access Fees**
>
> 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.

80. Visa, MasterCard and their co-conspirator banks have misused their market dominance to impose rules and sponsoring ATM contract terms that operate to fix the ATM Access Fee for any transaction at a given ATM or terminal to be no less than the amount charged at that ATM or terminal for a Visa or MasterCard transaction, irrespective of whether the transaction is actually completed over Visa or MasterCard's PIN-debit network and without regard to any actual or potential cost saving, or revenue benefit, to the ATM operator from using one of the rival, alternative ATM Networks. Plaintiff and the Class are harmed by this practice, as they are forced to pay supra-competitive ATM Access Fees regardless of whether they are using a Visa, MasterCard, or other ATM Network to complete the transaction.

HARM TO COMPETITION AND ANTITRUST INJURY

81. The foregoing provisions (hereinafter, the "ATM Access Fee restraints") harm competition in numerous ways that cause anti-competitive impact and injury to Independent ATM operators, rival ATM Networks (ATM Networks not operated by Visa or MasterCard), and ultimately the consumer of ATM Services.

Anti-competitive Harm in the ATM Services Market

82. ATMs are horizontal competitors with each other in the provision of ATM Services to consumers. The ATM Access Fee restraints are imposed on all ATMs and accomplish a horizontal price fixing scheme across all ATMs that is unlawful *per se*.

83. The ATM Access Fee restraints prohibit ATMs from offering reduced, or discounted, ATM Access Fees for use of PIN-debit cards that are enabled with rival ATM network Bugs. In essence, the restraints set a floor price for the ATM Access Fee for All ATM transactions equal to the minimum price an ATM must charge in order to make transactions routed on the Visa and MasterCard ATM Networks economically viable, in light of the higher Network Fees and lower Net Interchange generated by transactions on those networks.

84. Because rival ATM Networks charge lower Network Fees and remit higher Net Interchange to ATMs, ATMs have an economic incentive to encourage

and steer more ATM transactions to the rival ATM Networks. ATMs can maximize their revenues and profits by carefully setting discounted Access Fees to customers for using cards with rival network Bugs, where the resulting increased transaction volume shifted from Visa and MasterCard to rival ATM Networks produces incremental Net Interchange sufficient to more than offset any lost revenue from the customer Access Fee discounts. When allowed to price free of the Access Fee restraints, ATMs that offer discounted Access Fees to consumers will be able to attract more overall transaction traffic to their ATMs and shift the composition of that traffic toward the higher Net Interchange rival ATM Networks. Both ATMs and customers of ATM Services will benefit from the lower, discounted Access Fees.

85. Current ATM technology and software is capable of identifying the PIN-debit card network Bugs and routing transactions through the lowest cost, highest net revenue ATM Network that is available for each card. The ATM software can also be programmed to show on the screen what discounted Access Fee the customer will receive for the rival network Bugs on his or her card, or can inform the customer that he or she will not receive an available discount because his or her card does not have a rival network Bug.

86. Consumers are sensitive to differences in ATM Access Fees and where possible will seek out ATMs with the lowest Access Fees. ATMs will have an incentive to prominently post and advertise the availability of discounted fees for cards with rival network Bugs. As

consumers become knowledgeable and aware that ATMs offer discount Access Fees for cards with rival network Bugs, consumers will exercise their choice to seek out and use cards embossed with rival Bugs, and will no longer be indifferent and content to hold cards with only the Visa or MasterCard network Bug. Some card issuers already provide cards with rival Bugs, and Plaintiff possesses one of those cards. Once ATM discounts are available for rival Bug cards, other issuers will begin to offer such cards as a way to attract more PIN-debit banking customers. Consumers who do not yet have the rival Bugs will demand that their banks provide new cards with those Bugs or they will open accounts at other banks that do provide them. Card-issuing Banks, in turn, will compete for customer account business by offering and advertise new cards with the additional rival Bugs.

87. The ATM Access Fee restraints prevent ATM operators from maximizing revenue by prohibiting them from implementing a revenue-maximizing Access Fee pricing structure that properly reflects the variability of ATM costs and revenues depending on which of the various competing ATM Networks is used for the transaction. By impeding the ability of ATMs to maximize revenue by selectively reducing ATM Access Fees to consumers possessing cards with rival Bugs, the Access Fee restraints decrease economic output, and limit growth, both in the deployment of additional ATM locations and in the number of ATM transactions initiated by consumers. As ATM Access Fee discounts begin to accomplish the goal of increasing transaction volume and shifting its composition to the higher net revenue ATM Networks,

the higher revenues will enable ATMs to further reduce, or even eliminate, customer Access Fees, increase the output of customer ATM transactions and increase the deployment of additional ATM locations.

88. Ultimately, the ATM Access Fee Pricing restraints cause anti-competitive harm and injury to consumers, plaintiff and the Class, by raising the cost of transactions at ATMs. Initially, removal of the pricing restraint would result in the availability of discounted Access Fees for cardholders who, like the Plaintiff, already have cards embossed with rival network Bugs. Shortly thereafter, consumers who do not currently possess rival Bug cards would be able to take advantage of the discounts as they seek out, obtain, and use cards from issuers that currently offer cards with the rival network Bugs, or from additional card issuers that soon will add such cards to their repertoires in response to the customer demand.

Anti-competitive Harm in the ATM Network Market

89. The ATM Access Fee restraints are imposed by Visa and MasterCard to insulate and protect themselves from competition in the ATM Network market, and to shield their disproportionately high Network Fees and low Net Interchange remittances from the competitive pressures of the much lower Network Fees and higher Net Interchange remittances of the rival ATM Networks.

90. The anti-competitive effects of the ATM Access Fee pricing restraints in the ATM Network market include suppression of competition among PIN-based

ATM Networks that compete with Visa and MasterCard networks, hindrance of the growth of rival, more efficient ATM Networks, maintenance of Visa and MasterCard dominance together with their inefficient, non-competitive high Network Fees and low Net Interchange, and maintenance of overall higher Access Fee levels for customers of ATM Services. The relatively high Network Fees and low Net Interchange received by ATMs as a result of the continuing Visa and MasterCard dominance of the ATM Network Market, inhibits the profitability and growth of the ATM industry, and results in a restriction of output in the form of fewer ATMs and fewer ATM locations.

91. If ATMs were free of the Access Fee restraints and allowed to price competitively, Visa and MasterCard would lose market share to ATM Network rivals as a result of the Access Fee discounting for rival Bug cards, unless Visa and MasterCard reduced their Network Fees and increased their Net Interchange to ATMs to meet the competition of the rival networks. More competitive pricing by the Visa and MasterCard ATM Networks would in turn lower the costs and increase the net revenues to ATMs, enable more growth in the deployment of ATM locations, and result in generally lower ATM Access Fees to consumers.

Antitrust Injury to Plaintiff and the Class

92. Plaintiff and the Class are direct purchasers under the federal antitrust laws, because the ATM Access Fees are assessed directly to the consumer at the level at which

the prices are fixed, and because the ATM Sponsoring Agreements impose the horizontal pricing restraints directly upon the Independent ATM owners from whom Plaintiff and the Class directly purchased ATM Services. In the alternative, Plaintiff and the Class are indirect purchasers and have standing to pursue injunctive relief under the federal antitrust laws, and damages claims under the state antitrust laws alleged in this Complaint.

93. Plaintiff and the Class are, and have been, injured by the ATM Access Fee restraints by being forced to pay higher ATM Access Fees for ATM Services at Independent ATMs than they otherwise would have paid if the ATMs were free to price competitively, including the use of discount pricing for cards with rival Network Bugs.

94. Plaintiff, and other members of the Class who currently possess PIN-debit cards with rival network Bugs, have used, and continue to use, such cards to withdraw cash at Independent ATMs. They have been charged the full, uniform Access Fees applicable to all transactions at those ATMs denied the discounted Access Fees that would have been available for rival Bug cards in the absence of the Access Fee restraints.

95. Members of the class who currently possess PIN-debit cards without rival network Bugs have used, and continue to use, such cards to withdraw cash at Independent ATMs. They also have been charged the full, uniform Access Fees applicable to all transactions at those ATMs and denied the discounted fees that would have

been available for rival Bug cards in the absence of the Access Fee restraints. They could have taken advantage of the discounted Access Fees by replacing their PIN-debit cards with ones containing the rival Bugs.

96. Plaintiff and the entire Class also are, and have been, injured by being forced to pay ATM Access Fees at Independent ATMs that are generally higher for all PIN-debit card transactions, with our without rival Network Bugs, and whether or not routed through a rival network, as a result of the anti-competitive Access Fee pricing restraints.

97. The ATM restraints result in supra-competitive ATM Access Fees and artificially constrain growth in ATM deployment. But for the ATM restraints, retail prices for ATM Services would be lower, the quantity of ATM Services demanded would be greater, and economic output would increase.

98. In a competitive market free of pricing restraints, ATM operators would set ATM Access Fees at levels in reflecting the costs of obtaining the ATM Network services. ATM operators would set ATM Access Fees lower for transactions routed through lower-cost ATM networks relative to transactions routed through higher-cost networks. Competition between ATM operators would pass these lower costs on to Plaintiffs. However, the ATM restraints fix and maintain ATM Access Fees at the same level regardless of which network completes the transaction or the actual economic costs and benefits of those services to the ATM operator.

99. By preventing ATM operators from charging an ATM Access Fee that reflects the lower Network Fee cost and higher Net Interchange of the Rival ATM Networks, the ATM Access Fee Pricing restraints shelter the Defendants from natural and beneficial price competition that otherwise would be exerted by the other participants in the market. By preventing ATM operators from passing on cost savings to consumers in the form of lower prices, signaling the availability of more efficient, higher quality, or lower priced services, Visa and MasterCard escape the competitive discipline that would otherwise be brought to bear on them by the rival, competing PIN-based networks.

100. Because the ATM restraints break the essential economic link that would exist in a competitive market between the price a consumer is charged for a service and the cost to the retailer of providing it, they extinguish the incentive of cardholders to demand, and ATMs to provide, lower-cost, more efficient ATM Services. By disrupting the ordinary give and take of the marketplace, the ATM Access Fee pricing restraints suppress competition among ATM Networks at the point of sale, where ATM operators and ATM pricing interact directly with consumers. As alleged above, rival PIN-debit ATM networks cost ATMs less and remit higher net revenue. The ATM Access Fee pricing restraints prevent ATMs from passing on to customers the lower costs and higher benefits as an inducement to drive more consumers and more transaction volume toward cards with the rival network Bugs. Consumers are prevented from realizing the savings that would come from shifting transaction volume to the lower cost, higher net revenue, and more

efficient rival ATM Networks. The ability of the lower-cost, higher-net-revenue, rival ATM Networks to compete and grow is hindered, and the potential economic savings to consumers is denied, causing antitrust injury.

RELEVANT MARKETS

101. Because this Complaint alleges *per se* violations of the antitrust laws in the form of horizontal pricing restraints, no relevant market definitions are necessary. In the alternative, the relevant market definitions are as follows:

Relevant Product Markets

102. One relevant product market is the market for ATM Services. No cost-effective alternative to ATM Services exists and there are few substitutes. Accordingly, a sufficient number of PIN-debit cardholders would not switch away from ATMs to make a small but significant price increase in those services unprofitable. The market for ATM Services is a separate and distinct relevant product market for the purposes of 15 U.S.C. § 1.

103. A second relevant product market is the market for ATM Networks. There is no cost-effective alternative to shared ATM Networks for purposes of facilitating ATM Services transactions between customers and their banks, and there are no substitutes. The market for ATM Networks is a separate and distinct relevant product market for the purposes of 15 U.S.C.

Relevant Geographic Market

104. The relevant geographic market is the United States and all its territories.

DEFENDANTS' MARKET POWER

105. Visa and MasterCard directly wield market power in the relevant markets because Visa and MasterCard PIN-debit cards account for the overwhelming majority of PIN-debit cards issued in the United States. Visa and MasterCard implement and enforce the horizontal ATM Access Fee pricing restraints upon all horizontal participants in the ATM Services market. The Defendants require compliance with ATM Access Fee pricing restraints their rules applicable to member bank ATMs, and by requiring the member banks to include those same pricing restraints in the ATM Sponsoring Agreements with Independent ATMs. Visa and MasterCard directly exercise their market power through these arrangements to suppress inter-brand competition from rival ATM Networks in the relevant ATM Network market.

106. Defendants' direct exercise of market power constrains all of the participants in the ATM industry, from member banks that own ATMs to Independent ATM owners, to processors and technology providers (including the administrators of ATM Access Fees), to sponsoring financial institutions and sponsored entities. Defendants actively monitor and vigorously enforce the ATM restraints, and participants in the ATM Services market,

including Independent ATMs, must accept and agree to the pricing restraints as a condition of transacting Visa and MasterCard Pin-debit business. Parties that do not adhere to the ATM Access Fee pricing restraints are denied access to the dominant Visa and MasterCard ATM Networks.

107. 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, rival ATM Networks from competing to carry a larger share of ATM transactions.

VIOLATIONS ALLEGED

FIRST CLAIM FOR RELIEF

(Violation of Section 1 of the Sherman Act, 15 U.S.C. § 1)

108. Plaintiff incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

109. The defendants have combined, conspired and/or contracted to restrain interstate trade in violation of Section 1 of the Sherman Act, 15 U.S.C. §1, and Section 4 of the Clayton Act, 15 U.S.C. § 15, by engaging in contracts, combinations, and agreements that constitute horizontal restraints upon the competitive pricing of ATM Services.

110. In furtherance of the illegal combination, contracts and conspiracy, each of the defendants has committed overt acts, including, *inter alia*, implementing and enforcing contracts and rules that result in the horizontal fixing, maintaining and/or stabilizing of prices, namely ATM Access Fees, at ATMs in the United States.

111. Plaintiff and the members of the Class have been injured and financially damaged in their respective businesses and property in an amount to be determined according to proof and are entitled to recover threefold the damages sustained pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15, and are entitled to an injunction preventing and restraining the violations alleged herein.

112. The conduct of the defendants constitutes a horizontal restraint of trade and a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

113. Alternatively, the conduct of the defendants constitutes a series of vertical restraints of trade and a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 under the Rule of Reason in that the restraints 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 less restrictive alternatives exist by which the defendants could reasonably achieve the same or greater efficiency.

SECOND CLAIM FOR RELIEF

(Violation of State Antitrust and Unfair Competition Laws)

114. Plaintiff incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

115. By reason of the foregoing, defendants have entered into agreements in restraint of trade in violation of Alabama Code §§ 8-10-1 *et seq.*

116. By reason of the foregoing, defendants have entered into agreements in restraint of trade in violation of Arizona Revised Stat. §§ 44-1401 *et seq.*

117. By reason of the foregoing, defendants have entered into agreements in restraint of trade in violation of California Bus. & Prof. Code §§ 16700 *et seq.* and Cal. Bus. & Prof. Code §§ 17200 *et seq.*

118. By reason of the foregoing, defendants have entered into agreements in restraint of trade in violation of District of Columbia Code Ann. §§ 28-4502 *et seq.*

119. By reason of the foregoing, defendants have entered into agreements in restraint of trade in violation of Iowa Code §§ 553.1 *et seq.*

120. By reason of the foregoing, defendants have entered into agreements in restraint of trade in violation of Kansas Stat. Ann. §§ 50-101 *et seq.*

121. By reason of the foregoing, defendants have entered into agreements in restraint of trade in violation of Maine Rev. Stat. Ann. 10 §§ 1101 *et seq.*

122. By reason of the foregoing, defendants have entered into agreements in restraint of trade in violation of Michigan Comp. Laws. Ann. §§ 445.772 *et seq.*

123. By reason of the foregoing, defendants have entered into agreements in restraint of trade in violation of Minnesota Stat. §§ 325D.5 1 *et seq.*

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

125. By reason of the foregoing, defendants have entered into agreements in restraint of trade in violation of Nebraska Rev. Stat. §§ 59-801 *et seq.*

126. By reason of the foregoing, defendants have entered into agreements in restraint of trade in violation of Nevada Rev. Stat. Ann. §§ 598A *et seq.*

127. By reason of the foregoing, defendants have entered into agreements in restraint of trade in violation of New Mexico Stat. Ann. §§ 57-1-1 *et seq.*

128. By reason of the foregoing, defendants have entered into agreements in restraint of trade in violation of North Carolina Gen. Stat. §§ 75-1 *et seq.*

129. By reason of the foregoing, defendants have entered into agreements in restraint of trade in violation of North Dakota Cent. Code §§ 51-08.1-01 *et seq.*

130. By reason of the foregoing, defendants have entered into agreements in restraint of trade in violation of Oregon Rev. Stat. §§ 646.705 *et seq.*

131. By reason of the foregoing, defendants have entered into agreements in restraint of trade in violation of the Pennsylvania common law.

132. By reason of the foregoing, defendants have entered into agreements in restraint of trade in violation of South Dakota Codified Laws Ann. §§ 37-1-3.1 *et seq.*

133. By reason of the foregoing, defendants have entered into agreements in restraint of trade in violation of Tennessee Code Ann. §§ 47-25-101 *et seq.*

134. By reason of the foregoing, defendants have entered into agreements in of trade in violation of Vermont Stat. Ann. 9 §§ 2453 *et seq.*

135. By reason of the foregoing, defendants have entered into agreements in restraint of trade in violation of West Virginia §§ 47-18-1 *et seq.*

136. By reason of the foregoing, defendants have entered into agreements in restraint of trade in violation of Wisconsin Stat. §§ 133.01 *et seq.*

137. As a direct and proximate result of Defendants' unlawful conduct, Class Members in each of the states listed above paid supra-competitive, inflated ATM Access Fees. Such members of the Class have been injured in their business and property in that they paid more ATM Access Fees than they otherwise would have paid in the absence of Defendants' unlawful conduct.

THIRD CLAIM FOR RELIEF

(Violation of State Consumer Protection and Unfair Competition Laws)

138. Plaintiff incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

139. 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.

140. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Alaska Stat. §§ 45.50.471 *et seq.*

141. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Arkansas Code §§ 4-88-101 *et seq.*

142. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of California Bus. & Prof. Code §§ 17200 *et seq.*

143. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of District of Columbia Code §§ 28-3901 *et seq.*

144. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Florida Stat. §§ 501.201 *et seq.*

145. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Hawaii Rev. Stat. §§ 480-1 *et seq.*

146. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Idaho Code §§ 48-601 *et seq.*

147. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Kansas Stat. §§ 50-623 *et seq.*

148. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of 5 Maine Rev. Stat. §§ 207 *et seq.*

149. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Mass. Gen. Laws Ann. ch. 93A, §§ 1 *et seq.*

150. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Montana Code §§ 30-14-101 *et seq.*

151. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Nebraska Rev. Stat. §§ 59-1601 *et seq.*

152. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of New Hampshire Stat. §§ 358-A:1 *et seq.*

153. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of New Mexico Stat. §§ 57-12-1 *et seq.*

154. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of New York Gen. Bus. Law §§ 349 *et seq.*

155. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of North Carolina Gen. Stat. §§ 75-1.1 *et seq.*

156. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Oregon Rev. Stat. §§ 646.605 *et seq.*

157. Defendants have engaged in unfair competition or unfair or deceptive acts or violation of Rhode Island Gen. Laws. §§ 6-13.1-1 *et seq.*

158. Defendants have engaged in unfair competition or unfair or deceptive acts or violation of South Carolina Code Laws §§ 39-5-10 *et seq.*

159. Defendants have engaged in unfair competition or unfair or deceptive acts or violation of Utah Code §§ 13-11-1 *et seq.*

160. Defendants have engaged in unfair competition or unfair or deceptive acts or violation of 9 Vermont §§ 2451 *et seq.*

161. Defendants have engaged in unfair competition or unfair or deceptive acts or violation of West Virginia Code §§ 46A-6-101 *et seq.*

162. Defendants have engaged in unfair competition or unfair or deceptive acts or violation of Wyoming Stat. § 40-12-105.

163. As a direct and proximate result of Defendants' unlawful conduct, Class Members in the states listed above paid supra-competitive, artificially high ATM Access Fees. Plaintiff and the members of the Class have been injured in their business and property in that they paid more ATM Access Fees than they otherwise would have paid in the absence of Defendants' unlawful conduct.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays:

1. That the Court determine that the Sherman Act, state antitrust law, and state consumer protection and/or unfair competition law claims alleged herein may be

maintained as a class action under Rule 23(a), (b)(2), and (b)(3) of the Federal Rules of Civil Procedure;

2. That the unlawful conduct, contract, conspiracy or combination alleged herein be adjudged and decreed to be:

i. A restraint of trade or commerce in violation of Section 1 of the Sherman Act, as alleged in the First Claim for Relief;

ii. An unlawful combination, trust, agreement, understanding, and/or concert of action in violation of the state antitrust laws identified herein; and

iii. Violations of the state consumer protection and unfair competition laws identified herein.

3. That Plaintiff and the Class recover damages, as provided by federal and state antitrust laws, and that a joint and several judgment in favor of Plaintiff and the Class be entered against the Defendants in an amount to be trebled in accordance with such laws;

4. That Defendants, their affiliates, successors, transferees, assignees, and the officers, directors, partners, agents, and employees thereof, and all other persons acting or claiming to act on their behalf, be permanently enjoined and restrained from in any manner continuing, maintaining, or renewing the conduct, contract, conspiracy or combination alleged herein, or from entering into any other conspiracy alleged herein, or from entering into any other contract, conspiracy or combination having a similar purpose or effect, and from

adopting or following any practice, plan, program, or device having a similar purpose effect.

5. That Plaintiff and members of the Class be awarded pre- and post-judgment interest, and that that interest be awarded at the highest legal rate from and after the date of service of the initial Complaint in this action;

6. That Plaintiff and members of the Class recover their costs of this suit, including reasonable attorneys' fees as provided by law; and

7. That Plaintiff and members of the Class have such other, further, and different relief as the case may require and the Court may deem just and proper under the circumstances.

DEMAND FOR JURY TRIAL

Plaintiff, on behalf of herself and the members of the Class, hereby demands trial by jury on all issues so triable.

DATED: April 15, 2013

Respectfully submitted,

By: */s/ Michael G. McLellan*

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Counsel for Plaintiff and the Class

APPENDIX E — SECOND AMENDED CLASS ACTION COMPLAINT, *THE NATIONAL ATM COUNCIL, INC. V. VISA INC.*, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, DATED APRIL 15, 2013

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 1:11-cv-01803

THE NATIONAL ATM COUNCIL, INC.
9802-12 Baymeadows Road, No. 196
Jacksonville, FL 32256,

ON BEHALF OF ITSELF AND ITS
MEMBERSHIP, AND,

ATMs OF THE SOUTH, INC.
3613 North Arnoult Rd.
Metairie, LA 70002,

BUSINESS RESOURCE GROUP, INC.
14825 Spring Hill Drive
Frenchtown, MT 59834,

CABE & CATO, INC.
8601 Dunwoody Place, Ste. 106
Atlanta, GA 30350,

JUST ATMS, INC.
125 Ryan Industrial Ct., Ste. 101
San Ramon, CA 94583,

Appendix E

WASH WATER SOLUTIONS, INC.
231 Fairfield Drive
Brewster, NY 10509,

ATM BANKCARD SERVICES, INC.
31 Elmwood Loop
Madisonville, LA 70447,

MEINERS DEVELOPMENT COMPANY OF LEE'S
SUMMIT, MISSOURI, LLC
520 West 123rd Street
Kansas City, MO 64145,

MILLS-TEL, CORP. d/b/a First American ATM
1800 West Broward Blvd. Ft.
Lauderdale, FL 33312,

SELMAN TELECOMMUNICATIONS
INVESTMENT GROUP, LLC
5717 Clarendon Drive
Piano, TX 75093,

SCOT GARDNER d/b/a SJI
2497 Horsham Drive
Germantown, TN 38139,

TURNKEY ATM SOLUTIONS, LLC
8601 Dunwoody Place, Ste. 106
Atlanta, GA 30350,

TRINITY HOLDINGS LTD, INC.
17369 Shirley Avenue Port
Charlotte, FL 33948,

T & T COMMUNICATIONS, INC. and RANDAL N.
BRO d/b/a T & B Investments
405 Witt Road
Center Point, TX 78010,

Plaintiffs,

v.

VISA INC., VISA U.S.A. INC., VISA
INTERNATIONAL SERVICE ASSOCIATION, and
PLUS SYSTEM, INC.,
595 Market Street
San Francisco, CA 94105-2802,

and

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

Defendants.

SECOND AMENDED CLASS ACTION COMPLAINT

I. INTRODUCTION AND SUMMARY

1. This case challenges certain so-called "non-discrimination" rules (the "ATM Restraints") adopted

by defendants, Visa and MasterCard, which reduce interbrand competition, restrain output, and maintain high ATM access fees to consumers and high network services fees to ATM operators. The rules prohibit ATM operators, both banks and non-banks, from offering a discount or other incentive to consumers depending on whether they use debit cards programmed to transact over Visa, MasterCard, or any competing non-Visa or non-MasterCard Electronic Funds Transfer ("EFT") network (collectively, the "ATM networks"). The rules expressly prohibit an ATM operator, both bank and non-bank, from charging consumers a different access fee at a particular ATM terminal for transactions carried over different networks, even where the cost of using those different networks may vary markedly. As such, the rule is an "anti-steering" rule that prevents ATM operators from steering consumers by way of lower access fees toward using ATM cards attached to one network or another or to unaffiliated networks that are more efficient and less costly than either Visa or MasterCard's.

2. The ATM Restraints were adopted initially by the nation's banks when the banks owned and controlled Visa and MasterCard and owned and controlled virtually all ATMs. By eliminating the discretion of bank and non-bank ATM operators to set access fees according to the ATM network(s) associated with the card presented to the terminal, the ATM Restraints ensured that the advent of ATM surcharging in the mid-1990s and the entry into the market of new, independent, non-bank ATM operators would not result in ATM access fee price competition at the terminal between banks on the basis of

the cards they issue or the costs or efficiency of the ATM networks they had chosen to associate with those cards. Instead, the members banks agreed to restrain price competition in ATM access fees at the terminal between cards bearing different ATM network associations. In this way MasterCard-issuing banks that may have had to pay more to their network for each ATM transaction would not be exposing their customers to the threat of having to pay a higher access fee than customers of a Visa-issuing bank that may have had to pay less to their network for each ATM transactions. Fixing the price at the same level for all transaction at a given terminal regardless of the network used, as the ATM Restraints do, insulates banks against the competitive market consequences of choosing to issue cards associated with inefficient, more costly ATM networks and insulates the networks themselves from the competitive market consequences of being inefficient and more costly.

3. The ATM Restraints, implemented well before the banks "spun-off" Visa and MasterCard into legally distinct entities, have been perpetuated to the present day because the member banks as well as Visa and MasterCard themselves all have strong incentives to continue them and because Visa and MasterCard have the market power to prevent their member banks from repudiating them, even if, *arguendo*, the banks were willing to operate their ATMs free of the ATM Restraints. The interbrand anticompetitive effects of the ATM Restraints continue unabated: the rules continue to insulate banks from competition on the basis of the ATM access fee generated by their customers' cards, they continue to insulate Visa

and MasterCard's ATM networks from competition from one another and from unaffiliated ATM networks on the basis of cost or efficiency, they continue to empower defendants to charge supracompetitive fees to ATM operators, and they continue to extinguish the discretion of ATM operators to price their services according to the cost of providing them over the various different ETF networks available on customers' cards.

4. The ATM Restraints have resulted in anticompetitive effects that include i) systematic supracompetitive overcharging of ATM operators by Visa and MasterCard for ATM network services, ii) an artificial constraint on the ability of unaffiliated EFT networks to attract ATM transactions, iii) the suppression of economic output in the form of fewer ATMs deployed and fewer transactions than would be the case in the absence of the ATM Restraints, and iv) supracompetitive access fees for consumers of ATM services. This action seeks damages for injury that flows directly from the first anticompetitive effect, *to-wit*: class-wide compensatory damages for supracompetitive overcharging of independent ATM operators by Visa and MasterCard for ATM network services, plus compensatory damages for costs incurred in completing Visa and MasterCard international transactions that generate negative revenue for independent ATM operators and for which higher access fees may not be charged as a consequence of the ATM Restraints.

5. Visa and MasterCard are the largest providers of debit payment cards and to be commercially viable

independent ATM operators (*i.e.*, non-bank entities that own and operate ATM machines) must have access to the Visa and MasterCard networks which will allow them to accept Visa and MasterCard debit payment cards. Visa and MasterCard deliberately have suppressed competition by only permitting access to their card networks to independent ATM operators who agree to abide by the ATM Restraints.

6. This case is brought by (i) a leading association of independent ATM operators, the NATIONAL ATM COUNCIL, INC. (hereafter "NAC" or the "Association Plaintiff"), on behalf of itself and its membership, and (ii) the plaintiff independent ATM operators (hereafter the "ATM Operator Plaintiffs"), who bring this action on their own behalf and as representatives for a putative class of independent ATM operators. The defendants in this action are: VISA INC., VISA U.S.A. INC., VISA INTERNATIONAL SERVICE ASSOCIATION, and PLUS SYSTEM, INC. (collectively, "Visa") and MASTERCARD INCORPORATED and MASTERCARD INTERNATIONAL INCORPORATED d/b/a MasterCard Worldwide (collectively, "MasterCard").

II. JURISDICTION AND VENUE

6. The ATM Operator Plaintiffs bring this action under Sections 4 and 16 of the Clayton Act, 15 U.S.C, §§ 15 and 26, to recover treble damages resulting from overcharges imposed directly on them by reason of defendants' violation of Sections 1 and 2 of the Sherman Act. The ATM Operator Plaintiffs also seek injunctive and declaratory relief to remedy the unlawful conduct

and attorney fees and other costs as permitted by law. The Association Plaintiff seeks injunctive and declaratory relief and attorney fees and costs to the extent permitted by law, but does not seek to recover damages for the Association or on behalf of its members.

7. This Court has subject-matter jurisdiction over this action under Section 4 of the Sherman Act, 15 U.S.C. § 4, and 28 U.S.C. §§ 1331, 1337, 2201, and 2202.

8. Venue in the District of 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 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.

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

III. THE PARTIES

A. The Plaintiffs

10. Plaintiff, THE NATIONAL ATM COUNCIL, INC. (the "NAC"), is a Florida corporation with its principal place of business in Jacksonville, FL operating as a trade association under Section 501(c)(6) of the Internal Revenue Code of 1986. The NAC is the successor by merger of

two former trade associations known as the National Association of ATM ISOs and Operators ("NAAIO") and the Alliance of Specialized Communications Providers ("ASCP"). NAC seeks declaratory and injunctive relief to prevent continuing and future competitive restraints that are being unlawfully imposed upon, and causing injury to, its members through the unlawful practices of the defendants alleged herein. NAC is not seeking damages in this action and does not seek to be appointed as a class representative (damages are separately sought in this action by the ATM Operator Plaintiffs on behalf of the putative class).

11. The interests the NAC seeks to protect in this action are germane to the association's purposes, which include promoting the business interests and improving business conditions of independent ATM operators. These purposes are materially advanced by NAC's efforts in this litigation to seek to stop unlawful conduct that restrains the ability of independent ATM operators to make independent business decisions and to offer better terms, services and choices to their customers and allows the defendants to impose supracompetitive network fees on NAC's members. NAC has standing to bring these claims. Many of its members are independent ATM operators who would have standing to sue in their own right because their ability to provide better terms, services and choices to their customers has been restrained by defendants' illegal conduct and they will continue to incur economic injury as a result of defendants' overcharges and/or undercharges if the illegal conduct is not enjoined. Neither the claims asserted nor the declaratory and injunctive

relief requested requires the participation of individual members of the NAC in this lawsuit.

12. Plaintiff, ATMs OF THE SOUTH, INC., is a Louisiana corporation with its principal place of business in Metairie, LA. The company operates ATMs as a registered "Independent Sales Organization" ("registered ISO").

13. Plaintiff, BUSINESS RESOURCE GROUP, INC., is a Montana corporation with its principal place of business in Frenchtown, MT. The company operates ATMs as a registered ISO.

14. Plaintiff, CABE & CATO, INC., is a Georgia corporation with its principal place of business in Atlanta, GA. The company operates ATMs as a registered ISO.

15. Plaintiff, JUST ATMS, INC., is a California corporation with its principal place of business in San Ramon, CA. The company operates ATMs as a registered ISO.

16. Plaintiff, WASH WATER SOLUTIONS, INC., is a New York corporation with its principal place of business in Brewster, NY. The company operates ATMs as a registered ISO.

17. Plaintiff, ATM BANKCARD SERVICES, INC., is a Louisiana corporation with its principal place of business in Madisonville, LA. The company operates ATMs as an affiliate of a registered ISO.

18. Plaintiff, MEINERS DEVELOPMENT COMPANY OF LEE'S SUMMIT, MISSOURI, LLC, is a Missouri limited liability company with its principal place of business in Kansas City, MO. The company operates ATMs as an affiliate of a registered ISO.

19. Plaintiff, MILLS-TEL, CORP. d/b/a FIRST AMERICAN ATM, is a Florida corporation with its principal place of business in Ft. Lauderdale, FL. The company operates ATMs as an affiliate of a registered ISO.

20. Plaintiff, SCOT GARDNER d/b/a SJI, is a sole-proprietor residing in Germantown, TN. The business operates ATMs as an affiliate of a registered ISO.

21. Plaintiff, SELMAN TELECOMMUNICATIONS INVESTMENT GROUP, LLC, is a Texas limited liability company with its principal place of business in Plano, TX. The company operates ATMs as an affiliate of a registered ISO.

22. Plaintiff, TURNKEY ATM SOLUTIONS, LLC, is a Georgia limited liability company with its principal place of business in Atlanta, GA. The company operates ATMs as an affiliate of a registered ISO.

23. Plaintiff, TRINITY HOLDINGS LTD., INC., is a Florida corporation with its principal place of business in Port Charlotte, FL. The company operates ATMs as an affiliate of a registered ISO.

24. Plaintiff, T & T COMMUNICATIONS, INC. and RANDAL N. BRO d/b/a T & B Investments, is a general partnership of an individual ("Bro") who resides in Bellville, TX and a Texas corporation ("T & K") with its principal place of business in Center Point, TX. The partnership operates ATMs as an affiliate of a registered ISO.

25. The putative plaintiff class in this lawsuit includes approximately 350 non-bank ISOs that are sponsored by one or more sponsoring financial institutions and are registered with Visa and MasterCard as registered ATM ISOs, together with a larger but unknown number of the ISOs' ATM-operating contractual affiliates (the putative plaintiff class, consisting of ISOs and their affiliates, are referred to herein as the "Independent ATM Operators" or "ISOs"). These independent ATM operators deploy slightly more than half of the ATMs presently in service in the United States, or approximately 200,000 terminals.

B. The Defendants

26. Defendant, VISA INC., is a Delaware corporation with its principal place of business in San Francisco, California. VISA INC. has offices, transacts business, or is found in the District of Columbia.

27. VISA INC. is the successor to a membership association that was owned and operated by retail banks. 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.

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

29. Defendant, VISA INTERNATIONAL SERVICE ASSOCIATION, is a Delaware corporation with its principal place of business in San Francisco, CA, owned and controlled by VISA INC.

30. Defendant, PLUS SYSTEM, INC., is a Delaware corporation with its principal place of business in San Francisco, CA, owned and controlled by VISA INC.

31. Defendant, MASTERCARD INCORPORATED, is a Delaware corporation with its principal place of business in Purchase, New York. MASTERCARD INCORPORATED has offices, transacts business, or is found in the District of Columbia.

32. MASTERCARD INCORPORATED is the successor to a membership association that was owned and operated by retail banks. MASTERCARD INCORPORATED became a publicly held corporation after an initial public offering of its stock began trading on the New York Stock Exchange on May 24, 2006.

33. Defendant, MASTERCARD INTERNATIONAL INCORPORATED, is a Delaware non-stock (membership) corporation with its principal place of business in Purchase, New York, owned and controlled by MASTERCARD INCORPORATED.

34. The acts charged in this complaint as having been done by defendants and their co-conspirators were authorized, ordered, or done by their officers, agents, employees, or representatives while actively engaged in the management of defendants' business or affairs and the acts charged in this complaint continue to the present day.

C. Non-Party Co-Conspirators

35. Unnamed as parties, but equally culpable, co-conspirators with defendants include all U.S. banking and depository institutions that act as issuers or acquirers of Visa- and MasterCard-branded PIN-debit cards.

36. The acts charged in this complaint as having been done by these non-party co-conspirators and the defendants were authorized, ordered, or done by their officers, agents, employees, or representatives while actively engaged in the management of the non-party co-conspirators' business or affairs and the acts charged in this complaint continue to the present day.

IV. FACTUAL BACKGROUND

A. PIN-Debit Cards and ATM Services

37. ATM transactions are initiated by use of a PIN-debit card. 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. PIN-debit

cards include “pay now” cards, which allow a cardholder to effect a remote electronic debit from a checking, demand deposit, or other financial account. PIN-debit cards also include “pay later” cards, such as credit, deferred debit, or charge cards, which require payment within an agreed upon period of time. Finally, PIN-debit cards may be “pay before” cards, which are pre-funded up to a certain monetary value. So defined, a PIN-debit card also may be capable of signature-debit or credit non-ATM transactions. Nonetheless, 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 “PIN-debit card.”

38. A PIN-debit cardholder can obtain cash, monitor account balances, or transfer balances at both bank and nonbank ATMs. Some ATMs also accept deposits or dispense items of value other than cash, such as stamps or travelers checks. Collectively, these services are referred to as “ATM Services.”

39. An overwhelming majority of cards used for ATM transactions are Visa- or MasterCard-branded PIN-debit cards linked to bank accounts.

40. Some ATM transactions using Visa- and MasterCard-branded PIN-debit cards may be completed over non-Visa and non-MasterCard EFT networks, such as the networks operated by STAR (First Data), Pulse (Discover Card), NYCE Payment Network LLC (FIS), 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 usually bears a service mark belonging to the alternative network. These service marks are referred to as "bugs."

41. ATM transactions using non-Visa or -MasterCard Networks, such as those named above, can be conducted with Visa- or MasterCard-branded cards that bear the bug of unaffiliated network. 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.

B. ATM ISOs

42. ATM independent sales organizations ("ISOs") are nonbank entities that provide ATM Services to consumers.

43. Beginning in about 1996, state laws and network rules prohibiting ATM operators from charging a fee directly to cardholder for use of the ATM (an "access fee," also referred to as a "surcharge" or "surcharge fee") were abolished, creating an opportunity for nonbanks to enter the market to operate ATMs. Prior to 1996, ATM ISOs did not exist and all ATMs were operated by banks.

44. ATM ISOs fill consumer demand for conveniently located ATMs, for example, at nonbank locations where cash is handled, remote locations, or locations that are more expensive than typical bank ATM locations or may be unattractive to a bank for other reasons.

C. Issuing, Acquiring and Sponsoring Banks

45. Retail banks are publicly chartered companies that provide and sell banking services to consumers and may be "issuing banks" or "acquiring banks" for any given ATM transaction. Issuing banks provide PIN-debit cards to their own customers to access their accounts via PIN-debit networks, including via ATMs. Acquiring banks operate their own ATMs at bank branches and at offsite locations. These ATMs can be used by the bank's customers and by customers of other financial institutions to conduct transactions using PIN-debit cards. As used herein, "issuing bank" and "acquiring bank" include credit unions.

46. Where a cardholder uses a PIN-debit card at an ATM operated by his own bank, the bank acts as both the issuing bank (because it issued the card) and the acquiring bank (because it has acquired the ATM transaction). Such a transaction is referred to as "on us," in contrast to a "foreign ATM transaction," which occurs anytime the acquiring bank and the issuing bank are different. All transactions conducted by ATM ISOs are by definition foreign ATM transactions.

47. All U.S. banks that issue Visa- or MasterCard-branded PIN-debit cards are members of Visa and/or MasterCard and enjoy direct access to defendants' PIN-

based networks for the ATMs that they operate. Only Visa or MasterCard member banks may transact over Visa or MasterCard's networks and only banks may be members of Visa or MasterCard.

48. ATM ISOs and "processors," firms that provide communications infrastructure and other services for ATM transactions, such as authentication, clearing, and settlement of transactions, are nonbanks and may not be members of Visa or MasterCard. To gain access to Visa or MasterCard's networks, therefore, an ATM ISO must be sponsored by a member bank acting as a "sponsoring financial institution," or must affiliate itself with such a sponsored ISO. Sponsoring financial institutions act as the acquiring bank for their ISOs' ATM transactions and specialize in providing ISOs with access to all PIN-based ATM networks, those that are owned and operated by Visa (principally, Plus, Interlink, and VisaNet) and MasterCard (Maestro and Cirrus) as well as those that are unaffiliated with defendants, such as Pulse (Discover), NYCE, Star, Armed Forces Financial Network, Exchange, Credit Union 24, and others, as more fully alleged in the following section. The sponsoring bank ensures that the ISO is registered with the network and that it has executed and is fulfilling an agreement with the sponsoring bank that obligates the ISO to abide by all of the network's rules and operating regulations as well as the sponsor's obligations to the networks. Only a handful of member banks nationwide serve as sponsoring financial institutions and acquiring banks for ATM ISOs, for example, Meta Bank, American State Bank, and First Scottsdale Bank.

D. ATM Networks and ATM Network Services

The debit card industry is shrouded in secrecy and obtaining even ordinarily public market information about ATM networks that provide transaction services to ATMs ("ATM network services market") is difficult. The latest available public data for the number of ATMs online at the various ATM networks was published in 2008, which showed the following:

Network	Number ATMs Online - 2008
Maestro/Cirrus (MasterCard)	*
Interlink (Visa)	409,044
Star	325,500
NYCE	280,000
Pulse	265,000
Exchange	200,000
Credit Union 24	105,200
Allpoint Network	34,509
Co-Op Financial Services	26,528
MoneyMaker	20,957
MoneyPass	13,540
Shazam	11,958
Fastbank	10,215
Instant Cash	8,480
Jeanie	7,680
InterCept EFT Network	3,025

Source: ATM&Debit News estimates, ATM&Debit News and Prepaid Trends, October 23, 2008. *No published data reported; estimated 300,000-400,000.

50. The 2008 estimate for MasterCard's Maestro network was 1,000,000 ATMs online worldwide, but no estimate of U.S.-installed ATMs on either Maestro or Cirrus was published. It is reasonable to estimate, however, that the number of ATMs that were on MasterCard's networks in 2008 was at least as many as Star, the largest unaffiliated network, and comparable to the estimate given for the number of ATMs online on Visa/Interlink or more, perhaps in the range of 300,000-400,000. The 2008 estimate for Visa/Interlink worldwide was 1,249,181 ATMs online.

51. The 2008 data fails to reflect an industry consolidation that occurred over the past five years. A more current picture of the participants in the ATM network services market is given by the list of networks carrying transactions for a representative ATM ISO, a member of the putative class, in January 2013:

Armed Forces Financial Network	Maestro (MasterCard)
Cirrus (MasterCard)	NYCE Network
Cirrus International (MasterCard)	Plus International (Canada) (Visa)
China Union Pay	Plus International (Visa)
CU 24	Plus (Visa)

Discover	Pulse
Exchange	Star North East
Fiserv	Star
Maestro USA (Master-Card)	Visa International (Canada)
MasterCard	Visa International
MasterCard International	VisaNet

Most states operate electronic benefit transfer ("EBT") networks for distribution of government benefits, which have been excluded from the ISO's list.

E. A Typical ATM Transaction

52. A typical ATM transaction to withdraw cash is described in the diagram below (reproduced from GAO study GAO-08-281, "Consumer Access to Bank Fee Disclosures," Figure 9, at 60), which illustrates a bank-owned ATM transaction. A consumer inserts his PIN-debit card into an ATM terminal. If the terminal has access to a network that matches a network accessible by the consumer's card, the transaction proceeds. ATM ISOs are not connected directly to the acquiring bank as shown in the figure. Rather, ATM ISOs connect to various networks via the ISO's processor. The processor is connected to the ATM ISO's sponsoring bank. The processor determines which network or networks the cardholders issuing bank has authorized ATMs to use, ordinarily corresponding to network logos, or bugs, on the reverse side of the card.

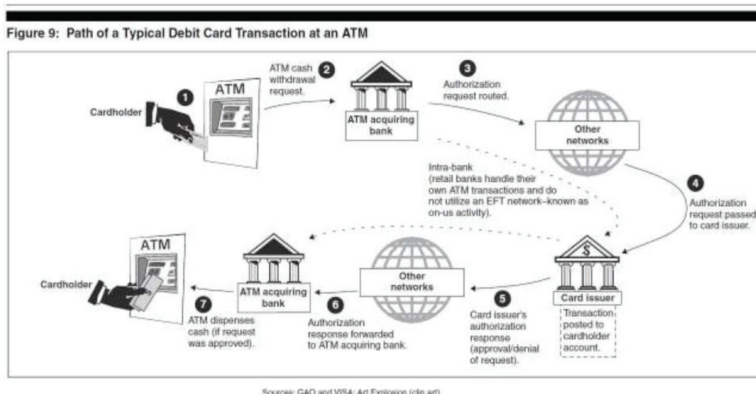

Figure 9: Path of a Typical Debit Card Transaction at an ATM

Sources: GAO and VISA; Art Explosion (clip art).

53. In transactions involving ATM ISOs and other foreign ATM transactions, the consumer is informed that he will be charged an access fee by the ATM operator and the amount of the fee. If the consumer consents to the fee, the transaction proceeds. Otherwise, the consumer's card is returned and the transaction ended. In some cases, the issuing bank may reimburse the consumer for the access fee. In other cases the issuing bank and the ISO may have entered into an arrangement to provide noaccess fee, or surcharge-free ATM services to certain cardholders.

54. The ATM acquiring bank or processor then sends a request, via an ATM network, to the consumer's issuing bank, which confirms that the consumer has sufficient funds in his account to cover the withdrawal plus the access fee, and sends an authorization back to the ATM operator via the ATM network. Once the ATM operator receives approval, it dispenses the withdrawal to the consumer and returns his card. If the consumer does not have sufficient funds, the transaction is denied and the consumer's card is returned.

55. The issuing bank debits the customer's account by the amount of the withdrawal plus the ATM operator's access fee. Unless the ATM is operated by the issuing bank (an "on us" transaction), the issuing bank may also assess a "foreign ATM fee" on the customer's monthly account statement, which the issuing bank retains.

56. In connection with a foreign transaction, the issuing bank may also be required to pay a fee set by the ATM network known as "interchange." 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 and allows ISOs 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.

57. The following table (reproduced from GAO study GAO-13-266, "Automated Teller Machines," Figure 1, at 8), summarizes some of the fees generated by an ATM transaction:

Appendix E

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.

Fee	Who pays	Who receives	Description
Inter-change 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.

58. Contrary to the possible suggestion in the table, ATM owners are not paid interchange directly. Instead, interchange is paid to the ATM network, and most ATM ISOs are unsure of the interchange charged by a particular network or the precise amount of the network fee. ATM ISOs have no control over the level of interchange the networks charge issuing banks or the amount of fees the networks charge ATM operators.

Some networks, most egregiously those operated by Visa and MasterCard, and a few others, retain a portion of the interchange as a fee for its own services (the "network services fee" referred to as the "acquiring fee" in the table above), and send the remainder to the ATM operator. As a consequence of the high network services fees charged by Visa and MasterCard, ATM transactions processed over Visa and MasterCard's networks are more costly for ATM operators than transactions processed over rival networks.

59. Data demonstrating the relative costs of ATM transactions over the various networks is not disclosed by the networks, so authoritative and consistent data can only be obtained from the defendants themselves. However, plaintiffs have a good faith basis to believe that the following table, which summarizes three disparate sets of data, covering the year 2012, the month October, 2012 and the month February, 2013, respectively, and based on an aggregate number of 19,430,413 transactions for those periods, provide a reasonably representative sample of the variation in revenue received by a typical ATM ISO after deduction for network services fees:

Appendix E

Data Set #1 – 2012

	tl # txns	network fee $	net intchg $
MC*	28.0%	0.34	0.06
VISA**	31.5%	0.22	0.21
PULSE	9.2%	0.00	0.28
NYCE	6.6%	0.00	0.36
STAR	12.1%	0.05	0.39
EXCHANGE Network	4.4%	0.00	0.41
Armed Forces Fin Network	6.6%	0.00	0.44
Credit Union 24	1.7%	0.00	0.54

Data Set #2 – October 2012

	tl # txns	network fee $	net intchg $
MC*	15.7%	0.18	0.29
VISA**	25.4%	0.18	0.29
PULSE	2.4%	0.04	0.46
NYCE	3.3%	0.03	0.48
STAR	30.9%	0.04	0.51
EXCHANGE Network	20.1%	0.00	0.52
Armed Forces Fin Network	2.1%	0.02	0.52
Credit Union 24	0.04%	0.00	0.67

Appendix E

Data Set #3 – February 2013			
	tl # txns	network fee $	net intchg $
MC*	27.0%	0.41	0.05
VISA**	27.0%	0.33	0.17
PULSE	11.2%	0.00	0.28
NYCE	8.4%	0.00	0.38
STAR	15.1%	0.07	0.38
EXCHANGE Network	6.8%	0.00	0.42
Armed Forces Fin Network	3.2%	0.00	0.44
Credit Union 24	1.3%	0.00	0.54

In the table, "MC" reflects the average of ATM data for the principal MasterCard networks, including: Maestro International, MasterCard International, Cirrus International, Cirrus, Maestro, and Cirrus MasterCard. "Visa" reflects the average of ATM data for the principal Visa networks, including: Plus, Plus International, Plus International (Canada), VisaNet, Visa International, Visa International (Canada). The figures are averages. Transactions over Visa and MasterCard's international networks can bear a negative net interchange, resulting in an additional net cost to ATM ISOs. Visa and MasterCard's rules, prohibit registered ISO from refusing international transactions, so they are included in the averages. High network fees by Visa and MasterCard result in significantly lower revenue from those networks. ATM ISO have no bargaining power with respect to

network services fees, which have been growing steadily for the past decade.

60. In summary, ATM ISOs may be paid for providing ATM services in two ways. First, ATM ISOs receive the per-transaction fee at the ATM, the access fee (or surcharge fee). Second, a network may collect interchange from an issuing bank, which is passed on by the Network to the ATM ISO after deduction for network services fees, resulting in the net interchange. The total amount of revenue an ATM ISOs receives for its services with respect to each transaction is the sum of the net interchange it receives from the network and the access fee that it charges consumers.

61. Visa and MasterCard remit the lowest net interchange of any of the networks. All other things being equal, ATM ISOs 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.

62. Two other per-transaction fees are paid by ATM ISO's in addition to the fees noted above. Each transaction bears a fee payable to the sponsoring bank and to the ISO's processor. Sponsoring bank fees are about a penny per transaction and processor fees are around $0.10 per transaction. These fees are customarily paid by the ISO to its processor and to the sponsoring bank directly and periodically.

F. The Anticompetitive Restraints

63. The Visa and MasterCard Network Agreements and Operating Rules include a provision referred to by the networks as the "Non-Discrimination Rule" and herein as the ATM Restraints. The ATM Restraints prohibit ATM Operators from charging lower access fees to customers whose transactions are completed over other networks than they charge to customers whose transactions are completed over Visa and MasterCard's networks.

64. MasterCard's Cirrus Worldwide Operating Rules (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 access fees as they deem commercially appropriate:

> **7.14.1.2 Non-Discrimination Regarding ATM surcharge fees 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.**

65. The Visa International Operating Regulations (October 15, 2012) set forth the following restraint on the exercise of discretion by ATM operators to charge a access fee they deem commercially appropriate:

> **An ATM Acquirer may impose an Access Fee on an international ATM Cash Disbursement if:**
>
> **It imposes an Access Fee on all other international ATM Cash Disbursements through any other networks at the same ATM; The Access Fee is not greater than the Access Fee amount on all other international transactions; and The Access Fee is a fixed and flat fee.**

66. Another provision of those same rules applies this same restraint to domestic transactions:

> **An ATM Acquirer in a country where an Access Fee for domestic ATM Cash Disbursements is permitted by Visa must comply with the requirements specified for International ATM Cash Disbursement surcharge fees.**

67. A third provision provides that access fees may be charged on domestic transactions in the United States.

68. The Visa Plus System, Inc. Operating Regulations set forth the following restraint on the exercise of discretion by ATM operators to charge an access fee they deem commercially appropriate:

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 ....

69. Defendants' rules and practices described above constitute the anticompetitive restraint challenged in this action. By agreeing with their members to the ATM Restraints, defendants have placed a competitive straightjacket on bank and non-bank ATM operators, restricting decisions by them to offer discounts, benefits, and information to customers that they would otherwise be free to offer, for the purpose of avoiding competition on the basis of the cost or efficiency of the various ATM networks affiliated with various cards issued to consumers.

70. Visa and MasterCard impose these rules in their agreements with sponsoring banks, which in turn are required to obtain agreement from their ATM ISOs in connection with the ISOs' registration with the network to submit to Visa and MasterCard's rules, including the ATM Restraints. Visa and MasterCard require sponsoring banks to penalize ATM ISOs that do not adhere to the Restraints.

71. All ATM operators must accept the ATM Restraints in order to accept defendants' cards. Bank and non-bank ATM operators clearly understand and expressly agree that they must comply with the ATM Restraints. Defendants actively monitor and vigorously enforce their Operating Rules.

V. TRADE AND INTERSTATE COMMERCE

72. The defendants' PIN-debit cards, issued by the nation's banks and other depository institutions, are utilized in an enormous volume of ATM transactions involving a substantial dollar amount of commerce and are marketed, sold and used in the flow of interstate commerce.

73. 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.

74. 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. Under MasterCard's Worldwide Operating Rules ("MasterCard's Rules" or "Operating Rules"), in order to access the MasterCard network, independent ATM

operators must agree to abide by those Operating Rules and to pay or accept various per-transaction fees and prices set by MasterCard and/or its member banks.

VI. THE RELEVANT MARKET

75. The relevant product market affected by the ATM Restraints is the market for ATM network services, in which the above-described ATM networks sell network services to bank and nonbank operators of ATMs. Plaintiffs and the members of the putative class are direct purchasers in this market. No cost-effective alternative to ATM network services exists and there are no substitutes. Accordingly, a sufficient number of ATM operators would not switch away from the ATM network services offered by these networks to make a small but significant price increase in those services unprofitable.

76. The 50 states of the United States and its districts and territories comprise the relevant geographic market.

VII. THE ANTICOMPETITIVE EFFECTS OF THE ATM RESTRAINTS

77. The ATM Restraints have harmed and diminished competition in the relevant ATM network services market. The Restraints have resulted in systematic supracompetitive overcharging of ATM operators by Visa and MasterCard for network services and an artificial constraint on the ability of unaffiliated EFT networks to attract ATM transactions. This has

resulted in the suppression of economic output in the form of fewer ATMs deployed and fewer transactions than would be the case in the absence of the ATM Restraints and in higher access fees for consumers of ATM services, in particular for transactions carried over non-Visa and non-MasterCard networks, which must bear the same access fee despite being less costly for the ATM operator.

78. Since the advent of access fees (or "surcharging") in the mid-1990s, the ATM Restraints have served to insulate the member banks of Visa and MasterCard from competition against one another in the acquisition of access fee-generating foreign ATM customers. This is achieved by expressly fixing the ATM access fee at any given ATM terminal regardless of the issuer's network. Thus, for banks that issue Visa cards, an ATM network to which issuing banks pay one level of interchange to complete an ATM transaction would be at neither a competitive advantage nor a competitive disadvantage with respect to banks that issue MasterCard cards, whose network to which issuing banks may pay a different level of interchange. By prohibiting acquiring banks—as well as the industry's new entrants, the ATM—ISOs from varying the access fee to consumers according to the network associated with the card used, the ATM Restraints eliminated the possibility that Visa-issuing banks and MasterCard-issuing banks would face price competition at the terminal for access fee-generating ATM customers, or that either would face price competition at the terminal from any number of the non-Visa or non-MasterCard networks that were then serving bank ATMs.

79. For ATM operators, the ATM Restraints have the perverse effect of forcing the ATM operator to partially subsidize Visa and MasterCard transactions with interchange revenue from non-Visa and non-MasterCard networks. For each terminal, the ATM operator must choose one and only one access fee, which serves as its retail price for all ATM transactions at that terminal. The operators' per transaction costs will vary widely, however, depending on the network borne on the card, so the chosen access fee will yield a smaller gross profit on networks that pay less net interchange and a larger profit on networks that pay more net interchange. Because an overwhelming volume of an ATM ISO's transactions are carried by the "higher cost" Visa and MasterCard networks and a much smaller volume on all the other networks, the ATM operator cannot raise its access fee high enough to completely recoup on revenue generated by unaffiliated networks its overcharge by Visa and MasterCard for ATM network services. In a competitive market this imbalance would be corrected by a price differential for the final service, and consumers would respond to lower prices for a fungible service by switching. But the ATM Restraints prevent such "steering" of volume from the Visa and MasterCard networks to alternative networks because ATM operators are prohibited from setting the price differential needed to encourage consumers to switch.

80. Because ATM operators have no opportunity to price ATM access fees according to the economic costs of each network, the ATM networks are not subject to competitive pressure when they operate inefficient, more costly operations. A strong indicator of the

anticompetitive nature of the ATM Restraints, moreover, is their requirement for both bank and independent ATM operators to relinquish their independent discretion over their own pricing of ATM services according to the network used to carry the transaction.

81. The ATM Restraints, therefore, restrain horizontal, interbrand competition between networks in the relevant market for ATM network services by restraining price competition at the ATM terminal for access-fee generating ATM customers on the basis of the transacting network presented on the card.

82. By insulating the Visa and MasterCard debit cards issued by banks from price competition in the consumer ATM services market, the ATM Restraints enable Visa and MasterCard to impose artificially high network fees in the relevant ATM network services market without fear that it will result in ATM ISOs charging lower access fees to users of the non-Visa and non-MasterCard networks than they charge to users of the Visa and MasterCard 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.

83. Even the threat of differential pricing would drive competition among networks to charge lower and more competitive network fees. In turn, this would increase the net interchange flowing to ATM operators and allow ATM operators to offer lower access fees to consumers and deploy additional ATM terminals.

84. By preventing competition between networks, the ATM Restraints result in higher access fees at the consumer level, directly harming consumers.

85. Of a closely related restraint applied by Visa and MasterCard on merchants accepting their general purpose credit and charge cards, the United States Department of Justice ("DOJ") asserted that without the restraint, "merchants would be free to use various methods, such as discounts or non-price benefits, to encourage customers to use the brands of General Purpose Cards that impose lower costs on the merchants. In order to retain merchant business, the networks would need to respond to merchant preferences by competing more vigorously on price and service to merchants. The increased competition among networks would lead to lower merchant fees and better service terms." Likewise here, the ATM Restraints imposed on ATM operators by the network defendants prevent them from encouraging customers to use cards affiliated with networks paying higher net interchange. This anti-steering restraint, in turn, prevents the network defendants from having to compete more vigorously on price and service to ATM Operators.

86. DOJ further asserted: "Because the Merchant Restraints result in higher merchant costs, and the merchants pass these costs on to consumers, retail prices are higher generally for consumers. Moreover, a customer who pays with lower-cost methods of payment pays more than he or she would if defendants did not prevent merchants from encouraging network competition at the point of sale." Likewise here, the ATM Restraints prevent

customers from switching to cards that use networks that do not deduct high network fees to be rewarded with lower prices in the form of lower access fees.

87. Finally, DOJ asserted: "Merchant Restraints have had a number of other anticompetitive effects, including reducing output of lower-cost payment methods, stifling innovation in network services and card offerings, and denying information to customers about the relative costs of General Purpose Cards that would cause more customers to choose lower-cost payment methods. Defendants' Merchant Restraints also have heightened the already high barriers to entry and expansion in the network services market. Merchants' inability to encourage their customers to use less-costly General Purpose Card networks makes it more difficult for existing or potential competitors to threaten Defendants' market power." Likewise here, beyond the direct monetary harm to ATM operators and consumers, the ATM Restraints stifle innovation and heighten barriers to entry by reducing the ability of lower-cost networks to attract volume by prohibiting competition on access fee prices at the ATM terminal.

88. The DOJ entered into a consent decree with Visa and MasterCard that prohibited them from imposing this kind of anti-steering restraint or any comparable restraint in the general purpose credit and charge card market.

VIII. THE ELEMENT OF AGREEMENT

89. The 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 an IPO of its stock began trading on the exchange on May 24, 2006.

90. From the beginning of their existence until their IPOs, Visa and MasterCard's member banks elected a Board of Directors composed exclusively or almost exclusively of competing member banks. That Board of Directors, with the cooperation and assent of the member banks, in turn established, approved, and agreed to adhere to rules and operating regulations, including the ATM Restraints that eliminated horizontal, interbrand competition between the member banks as described above.

91. Prior to the defendants' IPOs, each bank that was a member of the Visa or MasterCard networks knew and understood that the ATM Restraints would continue after the IPOs.

92. 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 exclusionary rules that prevented banks from issuing cards on competitive networks violated Section 1 of the Sherman

Act. After a 34-day trial the court found the exclusionary rules violated Section 1, which was affirmed by the United States Court of Appeals for the Second Circuit. *United States v. Visa USA*, 163 Supp.2d 322 (S.D.N.Y. 2001), aff'd, 344 F.3d 229 (2d Cir. 2003). The court condemned Visa and MasterCard networks, together with their member banks, for implementing and enforcing 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. 163 F. Supp. 2d at 405-406.

93. 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 1 of the Sherman Act." Id. at 405-406.

94. In affirming the court's "comprehensive and careful opinion," 344 F.3d at 234, the Second Circuit underscored 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.

95. Similar to the exclusionary rules at issue in *United States v. Visa, U.S.A.*, the ATM Restraints at issue in this case are agreements among horizontal competitors to adhere to rules and operating regulations that require ATM access fees to be fixed at a certain level regardless of the costs of the underlying ATM networks. The restraint is tantamount to the banks having agreed not to compete against one another on the price of the ATM services that can be obtained with their customers' cards.

96. After being adjudicated "structural conspiracies" in the United States, the European Union, the United Kingdom, and several other jurisdictions, 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.

97. For example, in May 2005, MasterCard's then-CEO Robert Selander noted in a presentation to the European banks that were then represented on MasterCard's Board of Directors that through an IPO, MasterCard wished to terminate the "structural conspiracy previously found to exist by courts in the United States."

98. Similarly, in January 2005, Christopher Rodrigues, the President and CEO of Visa International, acknowledged: "[T]he Regions now understand that: Old Visa's days are numbered. No one can stay as they are."

99. On May 22, 2006, MasterCard completed its IPO, which sold a partial interest in MasterCard to public investors. Through this IPO and related agreements, the surviving 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, member banks retain a significant financial and equity interest in MasterCard.

100. 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, member banks retain a significant financial and equity interest in Visa.

101. Following the IPOs, the defendants continue to refer to their bank customers as "members" of Visa

and MasterCard. By perpetuating the ATM Restraints, member banks have relinquished their independent authority over the setting of access fees at their ATM terminals to the network defendants, in whom they have a significant financial interest, authorizing and agreeing with them to design, implement, and enforce a horizontal price-fixing restraint in which the banks are knowing and willing participants and beneficiaries.

102. Both prior to, and after the IPOs, each bank which was a member of Visa, MasterCard or both, and 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 ATM Restraints.

103. The member banks' have agreed to continue to be bound by the ATM Restraints even after the IPOs. Solely as the result of the IPO, therefore, did the agreement embodied in the ATM Restraints between horizontal competitors to refrain from competition on the basis of the ATM network borne by the banks issued debit cards become a mandatory agreement between every member bank and the Visa and MasterCard stand-alone entities. Yet, the IPOs notwithstanding, these agreements have precisely the same horizontal, pre-IPO interbrand effects on competition in the market of i) shielding 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 has chosen to issue, and ii) shielding Visa and MasterCard ATM networks (now that they are parts of free-standing entities) from

competition from each other and from unaffiliated ATM networks in the provision of ATM network services. The only "vertical" element in this arrangement, therefore, is an artifice of the formation of separate entities to manage the Visa and MasterCard bank members' relationships, which creates the appearance of a "vertical" agreement between the banks and the network defendants. But, every effect of the restraint, just as before the IPOs, is "horizontal," that is, it is a direct restraint on interbrand competition both between banks and between providers of ATM network services.

IX. VISA AND MASTERCARD'S MARKET POWER

104. Visa states on page 17 of its Form10-K filed with the U.S. Securities and Exchange Commission for the fiscal year ended September 30, 2010, "In the debit card market segment, Visa and MasterCard are the primary global brands." This is beyond debate. Virtually all U.S. retail banks issue Visa- or MasterCard-branded debit cards, or both, and all ATM ISOs must accept Visa- and MasterCard-branded ATM cards to operate a viable business.

105. As a consequence, even were the member banks of Visa and MasterCard to conclude, counterfactually, that it was no longer in their interest as banks to abide by the ATM Restraints to avoid competitive ATM access fees, Visa and MasterCard would each possess sufficient market power to force their member banks to agree to continue to observe and enforce the ATM Restraints. In fact, however, Visa and MasterCard do not need to exercise their market

power in such a manner, because their member banks willingly perpetuate the ATM Restraints to continue to reap the illicit benefit of the collusive agreement not to compete on the basis of the efficiency of each bank's ATM services. Visa and MasterCard do, however, exercise their market power with respect to ATM ISOs, who are forced unwillingly to accept the ATM Restraints or exit the market.

106. The ubiquity of Visa- and MasterCard-branded debit cards (and particularly since the rise over the past five years in the proportion of "single bug" debit cards authorized to transact over only a MasterCard or Visa network) means that ATM operators must transact over Visa and MasterCard's ATM networks to survive. Only ATM ISOs that are registered with Visa may display a Visa logo on its ATM terminals, and only an ATM ISO registered with MasterCard may display a MasterCard logo.

107. Because of this "must carry" status for ATM ISOs, the defendants continue to impose the ATM Restraints to ensure that plaintiffs are price-takers with respect to the price of ATM network services. Despite technological advances that have lowered the costs of ATM infrastructure and transactions over recent years, Visa and MasterCard have increased the costs they impose on ATM ISOs without losing sufficient market share to make the price increases unprofitable. Notwithstanding these elevated costs, nearly all ATM ISOs continue to accept defendants' high fees for network services. The ATM ISOs inability to resist the elevation of costs imposed by

each defendant, far in excess of the fees charged by other comparable ATM networks, if any, as alleged in Paragraph 59, *infra*, is strong evidence of each defendant's market power.

X. ANTITRUST INJURY

108. In a reasonably competitive market absent the ATM Restraints, ATM operators could set ATM access fees at a level reflecting the cost of providing the network services and other inputs necessary to complete the transaction using the card presented. In the absence of the ATM Restraints, defendants, as the dominant providers of ATM network services, would bear the consequences of charging ATM operators excessive network fees, because ATM operators could charge different access fees for different cards or network use at the same terminal. To retain volume, defendants would respond to threatened or actual increases in access fees for transactions carried over their networks by adjusting their network fees down to a competitive level. In the presence of the ATM Restraints, however, as the dominant ATM networks service providers, defendants feel no such competitive pressure and set the price of network services with impunity, because ATM operators have no way to respond. Although bank-operators of ATMs welcome an industry structure that allows them to escape competitive ATM access fees that could pressure the card issuers' network for high cost or inefficiency, the ATM operators do not, because providing consumers with ATM services is their only business. Unlike banks, plaintiffs and the putative class of ATM operators are not content to trade away

higher output in their ATM operations in exchange for less rigorous competition between the ATM networks chosen by issuers and the issuers that choose them.

109. As a direct, proximate and foreseeable result of the ATM Restraints, as originally agreed by the banks and as perpetuated post-IPO in Visa and MasterCard's agreements with their banks, defendants have been able to levy supracompetitive network fees, membership fees, and other fees on ATM operators, and requiring them to transact costly international transactions that drain revenue, with no competitive consequence or threat of loss of network volume.

110. Plaintiffs have been injured by defendants' systematic deduction for fees for ATM network services by defendant's requirement that ATM ISOs bear negative interchange generated by international cardholders transacting on Visa and MasterCard's ATM networks, and imposing other supracompetitive charges and fees for ATM network services that exceed what those fees would be in a reasonably competitive market without the ATM Restraints.

111. Plaintiffs have suffered antitrust injury because the injury caused by the ATM Restraints is the type of injury that flows directly from the anticompetitive effects of the violation and is the type of injury the antitrust laws were intended to prevent.

XI. CLASS ALLEGATIONS

112. The ATM Operator Plaintiffs bring this action under Fed. R. Civ. P., 23(a), (b)(I)(A), (2) and (3), on behalf of themselves and the following class:.

> All non-bank operators of ATM terminals, including registered ISOs and their affiliates, that operate ATM terminals located in the relevant geographic market with the discretion to determine the price of the ATM access fee for the terminals they operate and that have adhered to the defendants' ATM restraints in transactions they have completed at any time on or after October 1, 2007 ("independent ATM operators").

113. The ATM Operator Plaintiffs estimate that approximately 350 ISOs are registered with Visa and MasterCard, more specific information about which is within the control of Defendants. Moreover, most ISOs transact business with numerous ATM-operating affiliates, the precise number of which is not currently known by Plaintiffs, but specific information about which is within the control of the Sponsoring Financial Institutions. Accordingly, the identity of the class members readily can be determined from records maintained by Defendants, their agents, and the Sponsoring Financial Institutions. The members of the class are so numerous that joinder of all members is impracticable. .

114. Defendants' relationships with the members of the class and Defendants' anticompetitive conduct at issue are substantially uniform and the antitrust violation alleged herein affects the ATM Operator Plaintiffs and the putative 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 class are:

a. Whether defendants have established rules precluding differential access fees (differential surcharging) by plaintiffs and the class;

b. Whether Visa and MasterCard possess and exercise market power in the relevant markets alleged in this complaint;

c. Whether the ATM Restraints prevent the ATM operator plaintiffs and the putative class from exercising independent commercial discretion in setting ATM access fees in a manner that increases revenue and induces cardholders to utilize more efficient or lower cost payment networks other than Visa and MasterCard's, as would be the case in a competitive market;

d. Whether defendants' ATM Restraints are unlawful under Section 1 of the Sherman Act;

e. Whether defendants' actions have adversely impacted the class as a result of network overcharges and related conduct;

f. The proper measure of damages and the amount thereof sustained by the ATM operator plaintiffs and the putative class as a result of the violations alleged herein;

g. Whether the ATM operator plaintiffs and the putative class are entitled to injunctive and declaratory relief.

115. The ATM Operator 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 ATM industry and in prosecution of class action and antitrust litigation and will fairly and adequately protect the interests of the class.

116. 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 class 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 class 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.

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

118. 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.

XII. VIOLATIONS ALLEGED

Claim 1: Sherman Act, Section 1, 15 U.S.C. §1 (Against Visa and MasterCard for Unlawful Agreement Among and Between Competing Banks)

119. The ATM Restraints constitute an agreement between horizontally competing banks unreasonably to restrain trade to fix prices for ATM services, to avoid competition between issued cards at the ATM terminal, and to protect and shield defendants from competition from competing ATM networks. Each defendant's ATM restraint independently restrains interbrand competition among banks and violates Section 1 of the Sherman Act apart from the existence of the other defendant's ATM restraint. The ATM Restraints were collectively and directly agreed by the competing member banks prior to the defendants' IPOs and after the IPOs the defendants have continued to implement, manage and enforce the collusive arrangement for the illicit benefit of their member banks and to shield themselves from competition on the basis of the costs and efficiencies of the ATM networks that they operate.

120. The inter-bank agreements codified in defendants' rules 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 choosing to use lower-cost ATM network services, protecting rival banks from competition on the basis of the kind of ATM cards issued by each bank, and protecting defendants ATM networks from competition from one another and from rivals. By unlawfully insulating defendants' bank members and ATM networks from competition, the agreements increase the costs of card acceptance to ATM operators, increase consumer access fees and foreign ATM fees above reasonably competitive levels, reduce output and the number of ATM terminals deployed, harm the competitive process, and raise barriers to entry and expansion and retard innovation and investment in the ATM industry.

121. The ATM Restraints are not reasonably necessary to accomplish any procompetitive goal and no procompetitive benefits result from them. Any efficiency benefit is outweighed by anticompetitive harm and less restrictive alternatives exist by which defendants could reasonably achieve the same or greater efficiency.

122. By also shielding the networks from competition against one another and from unaffiliated networks, these collusive agreements have enabled defendants to maintain and impose supra-competitive overcharges on ATM operators for ATM network services and to impose other fees and costs injuring plaintiffs and the members of the putative class. Network fee overcharges disproportionately harm independent ATM operators compared to banks, because ATM ISOs have lower volume and no "on us" customer transactions with which to amortize their investment in ATM their operations.

123. As a result of these anticompetitive effects of the ATM Restraints, the ATM operator plaintiffs and the putative class have been injured in their business and property in an amount not presently known. The ATM operator plaintiffs and the putative class have been injured by supracompetitive fees that greatly exceed the fees that would be paid by ATM operators for network services in a competitive market not governed by the ATM Restraints. The ATM operator plaintiffs and the putative class seek to recover for overcharge damages that have been directly imposed upon them by the defendants.

124. As a further result of the ATM Restraints, which are continuing in nature, the putative class, and the members of the association plaintiff face irreparable injury. The violations and the effects thereof are continuing and will continue unless the injunctive relief requested herein is granted. The ATM operator plaintiffs, the putative class, and the association plaintiff have no adequate remedy at law.

Claim 2: Sherman Act, Section 1, , 15 U.S.C. §1 (Against Visa for Unreasonable Vertical Agreements Between Visa and Its Member Banks)

125. After Visa's IPOs, the ATM Restraints, formerly agreed by and among the banks, took on the form of a series of agreements between Visa and its member banks that bind the latter to observe the ATM Restraints. These agreements unreasonably restrain trade by prohibiting and preventing price competition between banks in access fees for ATM services and inhibiting competition between

Visa, MasterCard and other providers of ATM network services in violation of Section 1 of the Sherman Act.

126. Visa has market power in the market for ATM network services. Visa uses its market power to force plaintiffs and the members of the putative class to accept its Operating Rules, including the ATM Restraints, which restraints enable defendants to overcharge ATM ISOs supra-competitive network fees and to compel them to accept international transactions at a per-transaction loss.

127. There is no procompetitive justification for requiring the member banks to abide by the ATM Restraints or for the member banks to agree to them.

128. As a direct and proximate result of the unreasonable agreements between Visa and its member banks, plaintiffs and the members of the putative class have been injured as herein alleged.

129. As a further result of the ATM Restraints, the ATM operator plaintiffs, the putative class, and the members of the association plaintiff face irreparable injury. The violations and the effects thereof are continuing and will continue unless the injunctive relief requested herein is granted. The ATM operator plaintiffs, the putative class, and the association plaintiff have no adequate remedy at law.

Claim 3: Sherman Act, Section 1, ,15 U.S.C. §1 (Against MasterCard for Unreasonable Vertical Agreements Between MasterCard and Its Member Banks)

130. After MasterCard's IPO, the ATM Restraints, formerly agreed by and among the banks, took on the form of a series of agreements between MasterCard and its member banks that bind the latter to observe the ATM Restraints. These agreements unreasonably restrain trade by prohibiting and preventing price competition between banks in access fees for ATM services and inhibiting competition between Visa, MasterCard and other providers of ATM network services in violation of Section 1 of the Sherman Act.

131. MasterCard has market power in the market for ATM network services. MasterCard uses its market power to force plaintiffs and the members of the putative class to accept its Operating Rules, including the ATM Restraints and their concomitant supra-competitive network fees, and to accept international transactions at per-transaction loss.

132. There is no procompetitive justification for requiring the member banks to abide by the ATM Restraints or for the member banks to agree to them.

133. As a direct and proximate result of the unreasonable agreements between MasterCard and its member banks with regard to the ATM Restraints, plaintiffs and the members of the putative class have been injured as herein alleged.

134. As a further result, the ATM operator plaintiffs, the putative class, and the members of the association plaintiff face irreparable injury. The violations and the effects thereof are continuing and will continue unless the injunctive relief requested herein is granted. The ATM operator plaintiffs, the putative class, and the association plaintiff have no adequate remedy at law.

REQUEST FOR RELIEF

WHEREFORE, 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 Rule 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 plaintiff class;

B. Such declaratory and injunctive relief as the Court determines to be appropriate to redress conduct found to be unlawful under the antitrust laws.

C. An award of treble damages to the ATM Operator Plaintiffs and members of the putative class, (but not the Association Plaintiff), based on the unlawful conduct of defendants.

D. An award of post-judgment interest and any other interest permitted by law.

E. An award of the costs of this suit, including reasonable attorneys' fees, as provided by law, and

F. Such other relief as the Court determines just and proper.

JURY DEMAND

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

Dated: April 15, 2013

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APPENDIX F – 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.

Appendix F

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.

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,

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].

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

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 F

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.

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

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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.

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]

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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

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.

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 supracompetatative 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

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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]

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]

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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.

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.

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