Nos. 15-961 & 15-962

IN THE
Supreme Court of the United States

VISA INC., *et al.*,
Petitioners,
v.
SAM OSBORN, *et al.*,
Respondents.

VISA INC., *et al.*,
Petitioners,
v.
MARY STOUMBOS, *et al.*,
Respondents.

On Writs of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether allegations that members of a business association agreed to adhere to the association's rules and possessed 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.

PARTIES TO THE PROCEEDING

1. In No. 15-961, *Visa* v. *Osborn*, petitioners Bank of America, N.A., NB Holdings Corp., and Bank of America Corp. (collectively, Bank of America); Chase Bank USA, N.A., JPMorgan Chase & Co., and JPMorgan Chase Bank, N.A. (collectively, Chase); Wells Fargo & Company and Wells Fargo Bank, N.A. (together, Wells Fargo); 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 (together, MasterCard) were defendants-appellees below.

Respondents Sam Osborn, John Epseland, Andrew Mackmin, and Barbara Inglis were plaintiffs-appellants below.

2. In No. 15-962, *Visa* v. *Stoumbos*, petitioners Visa and MasterCard were defendants-appellees below in both *Stoumbos* v. *Visa Inc.*, No. 1:11-cv-1882 (D.D.C.) (*Stoumbos*), and *National ATM Council, Inc.* v. *Visa Inc.*, No. 1:11-cv-1803 (D.D.C.) (*NAC*).

Respondent Mary Stoumbos was plaintiff-appellant below in *Stoumbos*. Respondents 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 Co. of Lee's Summit, Missouri, LLC; Mills-Tel, Corp. d/b/a First American ATM; Scot Gardner d/b/a SJI; Selman Telecommunications Investment Group, LLC; Turnkey ATM Solutions, LLC; Trinity Holdings Ltd., Inc.; T&T Communications, Inc.; and Randal N. Bro d/b/a T & B Investments were plaintiffs-appellants below in *NAC*.

RULE 29.6 DISCLOSURE STATEMENT

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

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

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

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

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

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

JPMorgan Chase & Co. is a publicly held corporation. JPMorgan Chase & Co. has no parent company, and no publicly held company owns 10% or more of the stock of JPMorgan Chase & Co.

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

RULE 29.6 DISCLOSURE STATEMENT—Cont.

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

Bank of America Corporation is a publicly held corporation, and no publicly held corporation owns 10% or more of Bank of America Corporation's stock.

Bank of America Corporation is the only publicly held corporation that owns 10% or more of the stock of Bank of America, N.A.

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

Wells Fargo & Company has no parent corporation. Berkshire Hathaway Inc. is a publicly held company that owns 10% or more of Wells Fargo & Company's stock.

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

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 797 F.3d 1057. Osborn Pet. App. 3a-25a. The opinion of the District Court denying respondents' motions to amend their complaints and to alter or amend the court's judgment is reported at 7 F. Supp. 3d 51. Osborn Pet. App. 26a-51a. The opinion of the

District Court dismissing respondents' complaints is reported at 922 F. Supp. 2d 73. Osborn Pet. App. 158a-207a.

JURISDICTION

The Court of Appeals entered judgment on August 4, 2015, and denied timely petitions for rehearing and rehearing en banc on September 28, 2015. On December 22, 2015, the Chief Justice extended the time within which to file petitions for writs of certiorari to and including January 27, 2016, and the petitions were filed on that date. This Court granted the petitions and consolidated the cases on June 28, 2016. The Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides, in pertinent 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

A. Background

1. Although it may be difficult to imagine today, just forty years ago, a bank customer in need of cash typically had two options: She could make a withdrawal from a teller at a branch of her bank during regular business hours, or she could use a bank-issued card at one of the relatively new automated teller machines (ATMs) operated by her bank. The ATMs of other banks—so-called "foreign" ATMs—were not an option. Customers of local or regional

banks traveling out of state, or even out of town, had no convenient means of making cash withdrawals. A sudden, unexpected cash expense could leave a traveler scrambling.

In the late 1970s, banks and other financial institutions realized that they could "increase convenience to their customers" and "spread the costs of the machines" by creating networks of shared ATMs. Osborn Pet. App. 73a (Mackmin Compl. ¶ 70).[1] These early networks were mostly joint ventures composed of regional banks. *Id.* Among them were the business associations that eventually became Visa's Plus and MasterCard's Cirrus networks, as well as some of their competitors, including NYCE, Accel, and CO-OP. *See id.* (Mackmin Compl. ¶ 71); Fed. Reserve Bank of Kan. City, *A Guide to the ATM and Debit Card Industry* 23-25 (2003) (*ATM Guide*).

These networks proliferated in the early 1980s and, after a series of consolidations, began to offer broader access to cash withdrawals. *See ATM Guide*, *supra*, at 12-15; Osborn Pet. App. 73a-74a (Mackmin Compl. ¶¶ 71-72). By the 1990s, a bank customer from Nashua, New Hampshire, could finally count on

[1] Except where noted, the factual allegations recited here are taken from the three proposed second amended complaints considered by the District Court, and are accepted solely for purposes of this brief, which addresses whether respondents have stated a claim for relief. *See* Proposed Second Am. Compl., *Mackmin* v. *Visa Inc.*, No. 1:11-cv-1831 (D.D.C. filed Apr. 18, 2013) (Mackmin Compl.), Osborn Pet. App. 52a-157a; Proposed Second Am. Compl., *Stoumbos* v. *Visa Inc.*, No. 1:11-cv-1882 (D.D.C. filed Apr. 15, 2013) (Stoumbos Compl.), Stoumbos Pet. App. 52a-105a; Proposed Second Am. Compl., *Nat'l ATM Council* v. *Visa Inc.*, No. 1:11-cv-1803 (D.D.C. filed Apr. 15, 2013) (NAC Compl.), Stoumbos Pet. App. 106a-164a.

being able to use an ATM in Seattle, Washington. *See ATM Guide*, *supra*, at 14. Today, Visa's and MasterCard's networks offer access to millions of ATMs worldwide.

Banks can authorize their cards to access more than one network. Banks typically indicate which networks are authorized by printing "network logos, or bugs," on the back of each card. Stoumbos Pet. App. 126a (NAC Compl. ¶ 52). A single ATM may have access to multiple networks as well, and ATMs "routinely display the networks they can access." Osborn Pet. App. 68a-69a (Mackmin Compl. ¶ 58). Thus, consumers today can make withdrawals at any foreign ATM affiliated with a network that their banks have authorized their cards to use.

2. Initially, cash withdrawals from a foreign ATM involved up to four separate fees. Stoumbos Pet. App. 129a-130a (NAC Compl. ¶ 57). The cardholder might pay a "foreign fee" to her bank (called the "issuing bank"). *Id.* at 129a. The issuing bank, in turn, would pay a "switch fee" to the network that processed the transaction, and an "interchange fee" that would ultimately be received by the ATM's operator. *Id.* at 130a; *see ATM Guide*, *supra*, at 38. The network might also deduct an "acquiring fee" from the interchange fee. Osborn Pet. App. 70a (Mackmin Compl. ¶ 63); Stoumbos Pet. App. 130a-131a (NAC Compl. ¶ 58).

Starting in 1996, States encouraged a new wave of investment in ATMs by abolishing restrictions on what other fees an ATM operator could collect. Now, in addition to collecting the net interchange fee—*i.e.*, the interchange fee, less any acquiring fee—operators were permitted to charge cardholders an

"access fee" directly. Stoumbos Pet. App. 121a (NAC Compl. ¶ 43); *see* Osborn Pet. App. 71a (Mackmin Compl. ¶ 66). These changes "creat[ed] an opportunity for *nonbanks* to enter the market to operate ATMs." Stoumbos Pet. App. 121a (emphasis added) (NAC Compl. ¶ 43). Today, some 350 nonbank ATM operator organizations (called "independent service organizations" or "ISOs") offer access to various ATM networks, including those of Visa and MasterCard. *Id.* at 154a (NAC Compl. ¶ 113).

3. In the wake of these developments, Visa and MasterCard each separately adopted an Access Fee Rule to prohibit discrimination against consumers who carry ATM cards that work over their networks. The rule adopted by each network bars ATM operators from charging higher access fees for transactions routed over that network than they charge for transactions routed over other networks. *See* Osborn Pet. App. 75a-76a (Mackmin Compl. ¶¶ 77-78).

Visa's Access Fee Rule provides that participating ATM operators may impose an access fee on cardholders using Visa's network only if they also "impose[] an Access Fee on all other Financial Transactions through other shared networks at the same ATM" and "[t]he Access Fee is not greater than the Access Fee amount on all other Interchange Transactions through other shared networks at the same ATM." *Id.* at 76a (Mackmin Compl. ¶ 77); Stoumbos Pet. App. 137a (NAC Compl. ¶ 68).

Similarly, MasterCard's Access Fee Rule, entitled "Non-Discrimination Regarding ATM Access Fees," provides: "An [ATM operator] 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 [ATM operator] in connection with the transactions of any other network accepted at that terminal." Stoumbos Pet. App. 135a (NAC Compl. ¶ 64); *see* Osborn Pet. App. 76a (Mackmin Compl. ¶ 78).

These rules do not set any maximum or minimum on what ATM operators may charge in access fees; an ATM operator remains free to charge $1.00, $3.00, or no access fee at all. What ATM operators may not do is penalize cardholders whose transactions are routed over the Visa or MasterCard networks by charging them more than they charge other cardholders.

B. Procedural History

1. Respondents comprise three separate groups of plaintiffs. The *Mackmin* respondents are individuals who purport to represent a putative class of consumers who paid access fees when they conducted foreign ATM transactions at bank-operated ATMs. Osborn Pet. App. 56a (Mackmin Compl. ¶ 8). The *Stoumbos* respondent is an individual who purports to represent a putative class of consumers who paid access fees at ATMs not owned or operated by a bank. Stoumbos Pet. App. 57a, 71a-72a (Stoumbos Compl. ¶¶ 18, 56). And the *NAC* respondents are a trade association of ISOs and several individual ISOs, which purport to represent a putative class of all nonbank operators of ATMs that access the Visa and MasterCard networks. *Id.* at 113a-117a (NAC Compl. ¶¶ 10-25). Visa and MasterCard are defendants in all three suits, while Bank of America, Chase, and Wells Fargo are defendants in *Mackmin* only.

Each set of respondents filed suit in October 2011, challenging the Access Fee Rules under Section 1 of

the Sherman Act. The District Court dismissed respondents' cases on the grounds that they failed to plead an injury in fact and failed to plausibly allege a Section 1 conspiracy. Osborn Pet. App. 161a. In an effort to toll the statute of limitations, respondents moved to modify the judgment so that it would dismiss only their *complaints*. *Id.* at 9a, 27a. While those motions were pending, respondents filed motions to amend, attaching proposed second amended complaints. *Id.* at 27a-28a.

Like their original complaints, respondents' proposed second amended complaints allege that each Access Fee Rule was the product of an unlawful horizontal conspiracy among "every bank" that participates in, and is thus a "member" of, "the Visa and/or MasterCard networks." *Id.* at 66a (Mackmin Compl. ¶ 48); *see also id.* at 77a, 90a (Mackmin Compl. ¶¶ 81, 120); Stoumbos Pet. App. 64a (Stoumbos Compl. ¶ 42); *id.* at 147a (NAC Compl. ¶ 95). Respondents' allegations rest on the networks' former structures as membership associations comprising thousands of banks. Respondents claim that Visa and MasterCard adopted their respective Access Fee Rules at a time when each operated as a not-for-profit business association owned and operated by its member banks, including Bank of America, Chase, and Wells Fargo. Osborn Pet. App. 76a-77a, 86a (Mackmin Compl. ¶¶ 79-80, 108); Stoumbos Pet. App. 59a (Stoumbos Compl. ¶ 28). Among other things, respondents allege that the banks selected individuals to serve on each association's board of directors, and that each board of directors "in turn established, approved, and agreed to adhere to" the association's Access Fee Rule. Osborn Pet. App. 65a, 86a-87a (Mackmin Compl. ¶¶ 45-46, 109).

Respondents' proposed second amended complaints acknowledge that Visa and MasterCard each reorganized as public companies after initial public offerings (IPOs) in 2008 and 2006, respectively, and that their bank members—including the three named as defendants here—ceded any "ownership and control rights" in the process. *Id.* at 89a-90a (Mackmin Compl. ¶¶ 116-118); *see also* Stoumbos Pet. App. 60a (Stoumbos Compl. ¶ 29) ("until their IPOs," banks elected directors of each network's board); *id.* at 145a (NAC Compl. ¶ 90) (same). But respondents allege that each network "continue[s] to refer to their bank customers as 'members' of Visa and MasterCard," Stoumbos Pet. App. 63a (Stoumbos Compl. ¶ 40), and that "the member banks retain a significant financial and equity interest" in their former associations, Osborn Pet. App. 89a (Mackmin Compl. ¶¶ 116, 117).

2. The District Court denied respondents' motions to amend as futile, holding that their proposed complaints still failed to plead either a Section 1 conspiracy or injury in fact. *Id.* at 29a. The court denied as moot respondents' motions to modify the judgment. *Id*. As relevant here, the District Court determined that respondents "provide[d] 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 & n.9. On the contrary, the court noted that "after the IPOs, member banks do not control Visa and MasterCard." *Id.* at 48a n.10. And it observed that the allegations as a whole "indicate that banks have reasons to join or stay in the Visa and MasterCard networks based on their individual interests," including the networks' size and the "favorable

network fees" respondents alleged the networks paid to issuers "to enter into exclusive deals to market their cards only." *Id.* at 50a. "In the absence of any other allegations that support a finding of an agreement," the District Court concluded "the conspiracy claims lack the one thing they need: a conspiracy." *Id.*

3. The D.C. Circuit vacated and remanded. *Id.* at 25a. With respect to respondents' allegations of conspiracy, the court concluded that respondents had "alleged a horizontal agreement to restrain trade that suffices at the pleadings stage." *Id.* at 18a. The Court of Appeals recognized that the Access Fee Rules were adopted by each network, rather than by their individual member banks. *Id.* at 19a. And it agreed with petitioners that "mere membership in associations is not enough to establish participation in a conspiracy with other members of those associations." *Id.* at 20a (brackets omitted) (quoting *Fed. Prescription Serv., Inc.* v. *Am. Pharm. Ass'n*, 663 F.2d 253, 265 (D.C. Cir. 1981)). But the court concluded that respondents' pleadings were sufficient because they alleged that the rules "originated in the rules of the former bankcard associations *agreed to by the banks themselves*" and 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." *Id.* at 20a-21a (emphasis in original) (quoting Mackmin Compl. ¶ 81; NAC Compl. ¶¶ 89-90). In the court's view, these allegations plausibly suggested that "the member banks *used* the bankcard associations to

adopt and enforce a supracompetitive pricing regime for ATM access fees." *Id.* at 20a.[2]

The Court of Appeals denied rehearing en banc, *id.* at 1a-2a, and this Court granted certiorari.

SUMMARY OF ARGUMENT

1. In every case brought under Section 1, the "crucial question" is whether the "challenged anticompetitive conduct" stems from "an *agreement*, tacit or express." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 553 (2007) (emphasis added). Of course, "[n]ot every instance of cooperation between two people" constitutes concerted action within the scope of Section 1. *Am. Needle, Inc.* v. *Nat'l Football League*, 560 U.S. 183, 189-190 (2010). Rather, courts must undertake a "functional" analysis of "how the parties involved in the alleged anticompetitive conduct actually operate." *Id.* at 191.

Where "separate economic actors pursuing separate economic interests" agree to limit competition among themselves, their conduct is "concerted" and subject to Section 1. *Id.* at 195 (quoting *Copperweld Corp.* v. *Indep. Tube Corp.*, 467 U.S. 752, 769 (1984)). But where the parties to a joint venture cooperate within the context of that venture to pursue the interests of the *venture* as a "whole," *id.* at 196, 197 (quoting *Copperweld*, 467 U.S. at 770), their conduct counts as "unilateral" rather than "concerted" for purposes of

[2] The D.C. Circuit declined to reach respondents' alternative theories of unlawful "vertical" and "hub-and-spoke" conspiracies. Osborn Pet. App. 23a n.3. The only claim the D.C. Circuit addressed—and the only claim before this Court—is respondents' claim of a *horizontal* conspiracy among each network's member banks.

Section 1 and cannot form the basis of a claim. *Copperweld*, 467 U.S. at 769.

This Court has held that, to survive a motion to dismiss, a Section 1 complaint must contain "allegations plausibly suggesting (not merely consistent with)" concerted action. *Twombly*, 550 U.S. at 557. Allegations that, "when viewed in light of common economic experience," are as consistent with "natural, unilateral" conduct as with concerted action will not do. *Id.* at 565-566.

2. Respondents' allegations fail that test. Respondents claim that each network's adoption of its Access Fee Rule was the product of an unlawful horizontal agreement among its member banks. Respondents allege no direct evidence that either network's member banks sought to advance their separate interests through the rules; there is no smoking gun here. Instead, respondents lean on circumstantial allegations of the banks' role in the networks' governance and the rules' nature and effects.

a. The D.C. Circuit thought respondents' circumstantial allegations regarding the banks' role in each network's governance were enough. But every joint venture involves cooperation between legally distinct entities, often with respect to how the venture will be run. And nothing in the complaints suggests the rules were the product of each network's member banks' "act[ing] on interests separate from those of" their network. *Am. Needle*, 560 U.S. at 200.

Respondents make much of the allegation that the banks selected members of each network's board. But assuming that is true, those directors would have a fiduciary duty to promote the interests of the

network, so that fact alone is insufficient to suggest that the boards pursued the "separate economic interests" of the banks, rather than the interests of each network as a "whole." *Id.* at 197. Indeed, just as in *Twombly*, the complaints themselves show why each network would have seen its Access Fee Rule as furthering its independent interests. Respondents allege the rules affected the market for network services by enabling Visa and MasterCard to better compete against their rival networks. And the rules aim on their face to prevent discriminatory conduct by ATM operators—consistent with the "natural, unilateral reaction of each" network to the threat of discriminatory access fees. *Twombly*, 550 U.S. at 566. That kind of "routine market conduct," *id.*, offers no basis to infer that bank-appointed members of each network's board "act[ed] on interests separate from those of" their networks, *Am. Needle*, 560 U.S. at 200.

b. Respondents' allegations of the rules' effect on competition among banks do not suggest concerted action either. For one thing, the complaints themselves acknowledge that the networks did not change their rules after their IPOs, belying the suggestion that the rules were orchestrated by and for the banks alone. And while a rule that affected *only* competition among banks might permit an inference that the banks were acting in their own interests, respondents' allegations here suggest the opposite is true by going on at length about the rules' effects on competition among *networks* in a distinct market where their member banks do not compete. That sets this case apart from prior cases where this Court has found concerted action by the members of joint ventures.

c. Finally, respondents' allegations show why a network would and could successfully impose the rules without concerted action among participating banks. The fact that the NAC respondents, who allege a conspiracy in this case, chose to participate in the networks shows that the benefits of network membership outweigh whatever costs the rules entail. Indeed, respondents' allegations list many of the reasons ATM operators would see it in their independent interest to offer access to Visa's and MasterCard's networks.

At stake in this case is a fundamental principle that flows directly from this Court's precedents: The Sherman Act's "basic distinction" between unilateral and concerted action, *Copperweld*, 467 U.S. at 767, requires dismissal of complaints "merely consistent with" the latter. *Twombly*, 550 U.S. at 557. Every joint venture requires some degree of cooperation among legally distinct entities, often through the venture's governance. *See Am. Needle*, 560 U.S. at 199. If allegations that competitors participated in a venture's governance sufficed to plausibly allege concerted action under Section 1, the threat of suit would chill legitimate and procompetitive cooperation to the detriment of consumers and the purposes of the Act.

ARGUMENT

I. A SECTION 1 COMPLAINT CHALLENGING THE CONDUCT OF A JOINT VENTURE MUST PLAUSIBLY SUGGEST CONCERTED ACTION AMONG THE VENTURE'S MEMBERS

"To 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.'" *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). Whether a complaint meets this requirement depends on both the relevant substantive law and the applicable pleading standards. *See Twombly*, 550 U.S. at 553-556. The relevant substantive law determines *what* the complaint must plead—the elements of the claim. *See Iqbal*, 556 U.S. at 675; *Twombly*, 550 U.S. at 553-554. And the applicable pleading standards govern *how* the complaint must plead them—by making "allegations plausibly suggesting (not merely consistent with)" liability. *Twombly*, 550 U.S. at 557.

A. Section 1 Reaches Only Those Decisions Of Joint Ventures That Flow From Their Members' Pursuit Of Separate Economic Interests

1. In this case, the relevant substantive law is the law of antitrust. Section 1 of the Sherman Act provides: "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." 15 U.S.C. § 1. By its terms, Section 1 "does not prohibit all unreasonable restraints of trade * * * but only restraints effected by a *contract, combination, or*

conspiracy." *Twombly*, 550 U.S. at 553 (emphasis added) (internal quotation marks and brackets omitted). Thus, in every Section 1 case, a "crucial question" is whether the "challenged anticompetitive conduct" stemmed from "an *agreement*, tacit or express." *Id.* (emphasis added) (internal quotation marks omitted).

"Taken literally," Section 1 "could be understood to cover every conceivable agreement, whether it be a group of competing firms fixing prices or a single firm's chief executive telling her subordinate how to price their company's product." *Am. Needle*, 560 U.S. at 189. But as this Court explained in *American Needle*, "that is not what the statute means." *Id.* To take an obvious example, "while the president and a vice president of a firm could (and regularly do) act in combination, their joint action generally is not the sort of 'combination' that § 1 is intended to cover." *Id.* at 195. Similarly, when two companies pool their capital to form a joint venture to sell a product, the venture's "pricing policy may be price fixing in a literal sense," but "it is not price fixing in the antitrust sense." *Texaco Inc.* v. *Dagher*, 547 U.S. 1, 6 (2006). That is because such conduct is "really *unilateral* behavior flowing from decisions of a single enterprise." *Am. Needle*, 560 U.S. at 195 (emphasis added) (internal quotation marks omitted). And Section 1 "does not reach conduct that is wholly unilateral." *Copperweld*, 467 U.S. at 768 (internal quotation marks omitted).

Accordingly, "[n]ot every instance of cooperation between two people" falls within the scope of Section 1. *Am. Needle*, 560 U.S. at 189-190. The existence of a Section 1 agreement "does not turn simply on whether parties involved are legally distinct

entities." *Id.* at 191. Rather, the test is a "functional" one, which turns on "how the parties involved in the alleged anticompetitive conduct actually operate." *Id.* Did the parties undertake the challenged conduct as "separate economic actors pursuing separate economic interests," such that their cooperation "deprive[d] the marketplace of independent centers of decisionmaking"? *Id.* at 195 (quoting *Copperweld*, 467 U.S. at 769). If so, then their cooperation is "concerted" action under Section 1. *Copperweld*, 467 U.S. at 769. And if the alleged agreement is among competitors, it is considered "horizontal." *Dagher*, 547 U.S. at 5. But if instead the parties acted in the context of a joint venture—whether a business association, trade group, or other organization—and pursued the interests of *that venture* as a "whole," *Am. Needle*, 560 U.S. at 196, then their conduct counts as "unilateral," and cannot be the basis of a Section 1 claim. *Copperweld*, 467 U.S. at 769; *see also Dagher*, 547 U.S. at 6 (holding that a joint venture's "pricing policy" "amount[ed] to little more than price setting by a single entity—albeit within the context of a joint venture").

Some of a joint venture's decisions may be subject to Section 1, while others may not. *See Am. Needle*, 560 U.S. at 200 (explaining that although "agreements within a single firm" "generally" count as "independent action," there are "rare cases" in which "[a]greements made within a firm can constitute concerted action"). "The key is whether the alleged contract, combination, or conspiracy is concerted action." *Id.* at 195 (internal quotation marks and ellipses omitted). And that depends on whose *interests* the parties were pursuing when they made the decision. Thus, courts must apply the functional

analysis above to the specific conduct at issue, evaluating each decision on its own terms in order to determine whether it flows from the members' pursuit of their own separate interests, or whether it is really unilateral action in service of the interests of the venture as a whole. And as in every Section 1 case, the burden will fall on the *plaintiff* to show the action was concerted. *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 763, 764 n.8 (1984).

2. To meet that burden and prevail on a Section 1 claim, a plaintiff will ultimately have to present either direct or circumstantial evidence. Direct evidence is evidence that shows that the parties were pursuing separate interests, without relying on an inferential step. If, for example, at a meeting of the joint venture, the parties stated that the purpose of some decision was to advance their interests separate from the venture, that would suggest directly that, at least with respect to that decision, the venture was a mere vehicle for concerted action. *See Am. Needle*, 560 U.S. at 201.

In other cases, however, a plaintiff will have to rely on inferences drawn from circumstantial evidence to establish that the alleged conduct was concerted. This Court has long warned that courts should be careful about inferring concerted action from evidence that is merely circumstantial. *See Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) ("[A]ntitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case."). That is because inferring concerted action from "ambiguous evidence," *id.*, risks "creat[ing] an irrational dislocation in the market." *Monsanto*, 465 U.S. at 764.

That risk is particularly acute in the context of joint ventures like business associations and trade groups, where cooperation can achieve a host of "decidedly procompetitive effects," *SD3, LLC* v. *Black & Decker (U.S.), Inc.*, 801 F.3d 412, 435 (4th Cir. 2015), *cert. denied,* 136 S. Ct. 2485 (2016), which are "beneficial to the industry and to consumers," *Maple Flooring Mfrs. Ass'n* v. *United States*, 268 U.S. 563, 566 (1925). Those benefits include many that "the market would not otherwise provide," *Princo Corp.* v. *ITC*, 616 F.3d 1318, 1335 (Fed. Cir. 2010) (internal quotation marks omitted)—such as "allowing a number of different firms to produce and market competing products compatible with a single standard," *id.* (internal quotation marks omitted); permitting members to "share risks that no individual member would be willing to undertake alone," *id.*; and "enabl[ing] a product to be marketed which might otherwise be unavailable." *NCAA* v. *Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 102 (1984); *see also Broad. Music, Inc.* v. *CBS*, 441 U.S. 1, 23 (1979); *Nw. Wholesale Stationers, Inc.* v. *Pac. Stationery & Printing Co.*, 472 U.S. 284, 295 (1985) (noting procompetitive effects of purchasing cooperatives).

It is therefore especially important to ensure that circumstantial evidence in cases challenging the conduct of joint ventures is held to the same standard applicable to every Section 1 case: Such evidence must "tend[] to exclude the possibility" that the parties to the venture were acting unilaterally. *Monsanto*, 465 U.S. at 764. A plaintiff might show, for example, that the only market affected by the challenged conduct is one in which the venture's members compete, suggesting that the venture is, at

least in that instance, a mere vehicle for the members' pursuit of their own separate interests. *See United States* v. *Sealy, Inc.*, 388 U.S. 350, 354 (1967); *United States* v. *Topco Assocs., Inc.*, 405 U.S. 596, 608-609 (1972). But when the plaintiffs' circumstantial evidence is just "as consistent with" unilateral action as with concerted action, it "does not, standing alone, support an inference of antitrust conspiracy." *Matsushita*, 475 U.S. at 588.

B. A Section 1 Complaint Challenging The Conduct Of A Joint Venture Must Plausibly Suggest That The Venture's Members Were Pursuing Separate Economic Interests

1. At the pleading stage, a plaintiff need not *prove* that the challenged conduct of a joint venture resulted from its members' pursuit of their own separate interests. A plaintiff must, however, plead "enough factual matter * * * to raise a reasonable expectation that discovery will *reveal* [such] evidence." *Twombly*, 550 U.S. at 556 (emphasis added). Under this Court's pathmarking decision in *Twombly*, that means the complaint must contain factual "allegations plausibly suggesting (*not merely consistent with*)" concerted action. *Id.* at 557 (emphasis added).

In applying this standard, a court "begin[s] by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 679. For instance, the "assertion of an unlawful agreement" is a "legal conclusion and, as such, [i]s not entitled to the assumption of truth." *Id.* at 680 (internal quotation marks omitted). "[W]ithout some further factual enhancement," "a naked assertion of conspiracy * * *

stops short of the line between possibility and plausibility of entitlement to relief." *Twombly*, 550 U.S. at 557 (internal quotation marks and brackets omitted).

With conclusory assertions out of the way, a court can focus on what facts are actually alleged and what inferences those facts permit. On the assumption that those facts are true, the allegations "must be enough to raise" the existence of concerted action "above the speculative level." *Id.* at 555; *see Am. Needle*, 560 U.S. at 195. If, "when viewed in light of common economic experience," the allegations are just as consistent with "natural, unilateral" conduct as with concerted action, the plaintiff has failed to state a Section 1 claim. *Twombly*, 550 U.S. at 565-566.

2. There is, of course, no special pleading standard for cases under Section 1. But this Court has emphasized the practical significance of the plausibility standard in the antitrust context. In *Twombly*, the Court admonished that "antitrust discovery can be expensive," making it all the more important that a court "insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Id.* at 558 (internal quotation marks omitted). Moreover, the Court stressed, it is unrealistic to expect that "groundless" claims can simply be "weeded out early in the discovery process," given that the mere "threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings." *Id.* at 559; *see also Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 347 (2005) (reasoning that a plaintiff with "a largely groundless claim" should not be permitted to "take up the time of a number of other people, with the

right to do so representing an *in terrorem* increment of the settlement value" (internal quotation marks omitted)). Thus, the Court concluded, "it is only by taking care to require allegations that reach the level suggesting conspiracy that [the Court] can hope to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the discovery process will reveal relevant evidence to support a § 1 claim." *Twombly*, 550 U.S. at 559 (internal quotation marks and brackets omitted).

That is no small matter in cases involving joint ventures, which by their nature involve cooperation that may fall beyond the scope of Section 1. This Court has cautioned time and again against applying antitrust rules in ways that threaten to "chill the very conduct the antitrust laws are designed to protect." *Matsushita*, 475 U.S. at 594; *cf. Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 895 (2007) (cautioning against adopting antitrust rules that "increase the total cost of the antitrust system by prohibiting procompetitive conduct the antitrust laws should encourage" or that "increase litigation costs by promoting frivolous suits against legitimate practices"). And as noted above, this Court has recognized the important procompetitive potential of joint ventures, especially when they "enable[] a product to be marketed which might otherwise be unavailable." *NCAA*, 468 U.S. at 102. Indeed, the Department of Justice and the Federal Trade Commission have established enforcement guidelines so that "consumers may benefit from competitor collaborations in a variety of ways," including through the efficiencies made possible by "joint ventures, trade or professional associations, licensing arrangements, or strategic alliances." FTC

& DOJ, *Antitrust Guidelines for Collaborations Among Competitors* 6 (Apr. 2000).

* * *

Under *Twombly*, Section 1 plaintiffs must make "allegations plausibly suggesting (not merely consistent with)" concerted action. 550 U.S. at 557. And under *American Needle* and *Copperweld*, a joint venture's conduct is concerted only where it flows from the members' "pursuing separate economic interests" as "separate economic actors." *Am. Needle*, 560 U.S. at 195 (quoting *Copperweld*, 467 U.S. at 769). Putting these two lines of precedent together, then, a complaint seeking treble damages on the theory that the members of a joint venture horizontally conspired must offer factual allegations plausibly suggesting (not merely consistent with the possibility) that the members "act[ed] on interests separate from those of" the venture. *Id.* at 200. Otherwise, the suit must be dismissed.

II. THE COMPLAINTS IN THESE CASES DO NOT PLAUSIBLY SUGGEST CONCERTED ACTION AMONG EACH NETWORK'S MEMBER BANKS

Respondents claim that each network's Access Fee Rule was the product of a horizontal agreement among that network's member banks. But their complaints contain no factual allegations plausibly suggesting that the adoption of the challenged rules flowed from the banks' "pursui[t] [of] separate economic interests" as "separate economic actors." *Am. Needle*, 560 U.S. at 195.

To begin with, respondents do not allege any *direct* evidence of concerted action. There is no allegation, for example, that a board member selected by a bank

lobbied her colleagues to adopt the rules for the purpose of advancing the interests of individual banks separate from those of the network. Nor is there any allegation that the banks hijacked the boards' decisionmaking processes to further their own separate ends. *Cf., e.g.*, *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. 492, 497-498 (1988) (describing agreement by steel conduit producers to recruit new members of a standards-setting body for the sole purpose of instructing them to oppose the body's acceptance of competing conduits).

In the absence of a smoking gun, respondents must rely on circumstantial allegations. That is, they must rely on allegations about the rules' nature or effects in order to *infer* that the members of each network "act[ed] on interests separate from those of" the network. *Am. Needle*, 560 U.S. at 200.

The D.C. Circuit agreed with petitioners that allegations of "mere membership" in the networks could not suffice to plead a horizontal agreement. Osborn Pet. App. 20a (brackets omitted) (quoting *Fed. Prescription Serv.*, 663 F.2d at 265).[3] For good reason.

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[3] *See also, e.g.*, *Kendall* v. *Visa U.S.A., Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008) ("[A]dopting or following the fees set by [Visa or MasterCard] is insufficient as a matter of law to constitute a violation of Section 1 of the Sherman Act . * * * Even participation on the association's board of directors is not enough by itself."); *SD3*, 801 F.3d at 435-436 (noting that standards-setting bodies will ordinarily be immune from antitrust scrutiny "when they use ordinary processes to adopt unexceptional standards"); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 349 (3d Cir. 2010) ("[N]either defendants' membership in [a trade group], nor their common adoption of the trade group's suggestions, plausibly suggest conspiracy," and even allegations that defendants "control[led]" the trade group are "insufficient

A business's membership in a venture or association alone says nothing about whether the adoption of a particular association rule was the product of "interests separate from those of" the association, *Am. Needle*, 560 U.S. at 200, or whether it was "really unilateral behavior flowing from decisions of a single enterprise," *id.* at 195.

The court went on, however, to conclude that respondents had "satisf[ied] the plausibility standard" by purportedly alleging that the member banks "*used* the bankcard associations to adopt and enforce a supracompetitive pricing regime." Osborn Pet. App. 20a. The court based that ruling on allegations that banks "agreed to" the rules as members of the networks and that they participated in each network's governance—in particular, that 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." *Id.* at 20a-21a (emphasis omitted) (quoting Mackmin Compl. ¶ 81; NAC Compl. ¶¶ 89-90). That was error.

Respondents' allegations that the banks participated in each network's governance are no

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to show a horizontal agreement"); *Viazis* v. *Am. Ass'n of Orthodontists*, 314 F.3d 758, 764 (5th Cir. 2002) ("[A] trade association by its nature involves collective action by competitors, it is not by its nature a 'walking conspiracy.'" (brackets and ellipsis omitted)); *AD/SAT, Div. of Skylight, Inc.* v. *Associated Press*, 181 F.3d 216, 234 (2d Cir. 1999) (per curiam) ("[A] finding of concerted action based on the defendants' status as members of the [defendant trade association] would seriously undermine the standards articulated by the Supreme Court in *Matsushita* and *Monsanto*.").

more suggestive of concerted action than mere membership alone. The allegation that banks appointed members of each network's board does not suggest the boards pursued the separate interests of those banks. *See infra* pp. 25-29. The same goes for respondents' allegations that the rules purportedly diminished competition among banks, or necessitated concerted action by their very nature. *See infra* pp. 29-39. As for the allegation that the rules were "agreed to by the banks themselves," Osborn Pet. App. 20a (emphasis omitted) (quoting Mackmin Compl. ¶ 81), that is nothing more than a naked "assertion of an unlawful agreement"—precisely the kind of "'legal conclusion'" this Court has held "[i]s not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 680 (quoting *Twombly*, 550 U.S. at 555). Because respondents offer no more than allegations "merely consistent with" concerted action, they fail to state a Section 1 claim. *Twombly*, 550 U.S. at 557.

A. Respondents' Own Allegations Suggest That Each Network's Board Pursued The Interests Of The Network

Respondents urge an inference of concerted action from their allegations that the members of each network's board were chosen by the banks. Osborn Pet. App. 65a, 86a-87a (Mackmin Compl. ¶¶ 45, 109); Stoumbos Pet. App. 60a (Stoumbos Compl. ¶ 29). But every joint venture involves cooperation among legally distinct entities, often with respect to how the venture will be run. *See Am. Needle*, 560 U.S. at 199; *Dagher*, 547 U.S. at 6. That does not mean that every decision of a venture's board flows from its members' separate economic interests. On the

contrary, "directors * * * have a fiduciary duty to promote the interests of the *corporation*." *United States* v. *Byrum*, 408 U.S. 125, 138 (1972) (emphasis added); *see also Commodity Futures Trading Comm'n* v. *Weintraub*, 471 U.S. 343, 348-349 (1985) (similar). The fact that some of the members of each network's board allegedly were chosen by the banks is therefore insufficient to suggest that those board members "act[ed] on interests separate from those of" each network when they participated in the adoption of the challenged rules. *Am. Needle*, 560 U.S. at 200.

Indeed, in this case, just as in *Twombly*, the "complaint[s] [themselves] give[] reasons to believe" that the rules were in each *network*'s "best interests." 550 U.S. at 568. The complaints go on at length about the benefit the rules supposedly conferred on each *network* by enhancing its competitive position vis-à-vis rival *networks* in the market for *network* services. *See, e.g.*, Osborn Pet. App. 86a (Mackmin Compl. ¶ 106) (without the rules, "Visa and MasterCard would have to compete with the other networks for ATM volume, and would lower their prices"); Stoumbos Pet. App. 66a (Stoumbos Compl. ¶ 47); *id.* at 142a (NAC Compl. ¶ 81).[4] There is no allegation whatsoever that any bank competed in that market.

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[4] As noted, petitioners rely on these allegations only because of the procedural posture of this case. *See supra* n.1. They do not concede the truth of any allegation or agree that respondents have described any unlawful conduct. The only issue now before the Court is whether the Access Fee Rules were the product of a horizontal conspiracy among each network's member banks. *See supra* n.2. Respondents have not alleged that the networks (or the banks) communicated among them-

Nor do the complaints suggest that the rules were "anything more than the natural, unilateral reaction of each" network to the threat of discriminatory ATM access fees in the mid-1990s. *Twombly*, 550 U.S. at 566; *see supra* pp. 4-5. For a network services provider actively competing with a host of rival networks, barring operators from charging higher fees for transactions processed on its network simply makes good business sense. The complaints themselves allege that "[c]onsumers are sensitive to differences in ATM Access Fees." Stoumbos Pet. App. 85a (Stoumbos Compl. ¶ 86). Non-discrimination rules help ensure that a network's users are not charged more than its competitors'—which in turn helps maintain the value of the network's brand. The rules also help ensure that cardholders have a positive experience when using ATMs that participate in the network; for instance, they prevent ATM operators from using network branding to lure in consumers only to reveal in the course of the transaction that a higher fee applies. And they neutralize the advantage rival networks would otherwise gain from adopting similar rules themselves. *See, e.g.*, *EFT Rules Bend Under Surcharge Weight*, Bank Network News, Aug. 28, 1997, at 4 (noting the adoption of non-discrimination clauses similar to those alleged here by ATM networks Honor, Magic Line, Cash Station, TransAlliance, MAC, NYCE, and Star). When "viewed in light of common economic experience," *Twombly*, 550 U.S. at 565, the "natural explanation" for the rules is that each network acted to safeguard its brand—and the

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selves regarding any aspect of the rules or access fees, or that the rules threaten monopolization in any market.

cardholders whose foreign ATM transactions are routed over its network—from discriminatory pricing. *Id.* at 568.

It would be a stretch, to say the least, to claim that the allegations above plausibly suggest that bank-appointed members of each network's board "act[ed] on interests separate from those of" their networks in adopting Access Fee Rules. *Am. Needle*, 560 U.S. at 200. On the contrary, the complaints themselves show that adopting such rules was "routine market conduct"—each network "do[ing] what was only natural anyway." *Twombly*, 550 U.S. at 566.

This Court has warned that permitting inferences of concerted action from decisions that "arise in the normal course of business" would "inhibit management's exercise of independent business judgment and emasculate the terms of the statute." *Monsanto*, 465 U.S. at 763-764. That concern is just as vital in the context of joint ventures. Where business associations sell products or services as market participants, they act no differently than the ordinary corporations they compete with. Section 1 was not intended to "chill[] vigorous competition through ordinary business operations" or invite "judicial scrutiny of routine, internal business decisions." *Am. Needle*, 560 U.S. at 190. Nor was it meant to steer businesses away from whatever corporate or organizational structure "serve[s] efficiency of control, economy of operations, and other factors dictated by business judgment." *Copperweld*, 467 U.S. at 773. It would therefore make little sense—and would not serve the purposes of the Act—to treat the routine conduct of joint ventures as an ongoing conspiracy. *See* Gregory J. Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 Antitrust L.J. 701, 704-

705 (1998) ("When a joint venture itself participates in the marketplace, its ordinary actions as a market participant are those of a single entity.").

In short, respondents' own allegations establish that the Access Fee Rules advanced each network's own, independent interests as a participant in a market for *network* services. And those allegations actually *support* the inference that the members of each network's board adopted the challenged rules in pursuit of the interests of each network as a whole.

B. Respondents' Allegations Of The Rules' Supposed Effects On Competition Among Banks Do Not Plausibly Suggest Concerted Action

The foregoing suffices to answer the question presented. Allegations that members of a business association possessed governance rights in the association say nothing about whose interests the members were pursuing when they exercised those rights. Indeed, such allegations are entirely consistent with the members' lawful participation in a joint venture. Thus, like allegations of mere membership, allegations that members possessed governance rights are not enough to plead a horizontal conspiracy under Section 1, and the D.C. Circuit erred in holding otherwise. Osborn Pet. App. 20a. To state a Section 1 claim, a complaint must plead something more—something that plausibly suggests the members were "act[ing] on interests separate from those of" each network. *Am. Needle*, 560 U.S. at 200.

At the certiorari stage, respondents appeared to contend that there *is* something more in their complaints, pointing to allegations that the rules had effects beyond the market for network services.

Br. in Opp. 4, 16-17. According to respondents, the rules affect two *other* markets, in which the banks supposedly *do* compete. First, respondents claim that the rules affect the "market for ATM cash withdrawal services." Osborn Pet. App. 91a (Mackmin Compl. ¶ 122); *see also* Stoumbos Pet. App. 65a-66a (Stoumbos Compl. ¶¶ 44-46); *id.* at 140a (NAC Compl. ¶ 78). They theorize that the rules inhibit competition in that market by preventing ATM operators from attracting users of lower-cost networks by charging them lower access fees than what they charge users of Visa's or MasterCard's networks. *See* Osborn Pet. App. 85a (Mackmin Compl. ¶ 103). Second, respondents claim that the rules inhibit competition among card-issuing banks by insulating them from customer demands for cards that can access more than one network—so-called "multiple-bug" cards. *Id.* at 83a, 85a (Mackmin Compl. ¶¶ 97, 104); Stoumbos Pet. App. 157a-158a (NAC Compl. ¶ 120).[5]

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[5] Respondents separately allege that some banks individually negotiated with one or the other network to issue single-bug cards. *See, e.g.*, Osborn Pet. App. 78a-79a (Mackmin Compl. ¶¶ 83-85) (alleging that Bank of America, Wells Fargo, and Chase each agreed with Visa to issue single-bug cards). But these allegations of *vertical* exclusive dealing arrangements do not suggest that the networks' conduct represents *horizontal* concerted action among their member banks. *See, e.g.*, *Chuck's Feed & Seed Co.* v. *Ralston Purina Co.*, 810 F.2d 1289, 1294 n.2 (4th Cir. 1987) ("Any arrangement between a manufacturer and a dealer whereby a dealer agrees not to buy from certain third parties, not to sell to certain third parties, or not to sell in certain locations is a 'vertical' restriction."); *Constr. Aggregate Transp., Inc.* v. *Fla. Rock Indus., Inc.*, 710 F.2d 752, 776 (11th Cir. 1983).

1. These allegations regarding the rules' effects do not "nudge[]" respondents' "claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. To see why, imagine a hypothetical network services provider that is not a joint venture, but a company independent of any bank control. Now ask this simple question: Would this hypothetical entity have adopted the challenged rule? If a network indisputably independent of any bank control would rationally adopt the same rule, then respondents' circumstantial allegations of the rule's effects are entirely consistent with unilateral action. That is, those allegations would not plausibly suggest the rules were the product of each network's member banks "act[ing] on interests separate from those of" their networks. *Am. Needle*, 560 U.S. at 200.

The complaints' description of the networks' IPOs brings this hypothetical to life. By respondents' own account, when the networks became public companies, each became a single enterprise, whose internal decisionmaking is unilateral. Indeed, respondents acknowledge that the banks ceded their "ownership and control rights" in the networks through the IPOs. Osborn Pet. App. 89a (Mackmin Compl. ¶¶ 116, 117); *see also* Stoumbos Pet. App. 60a (Stoumbos Compl. ¶ 29) ("until their IPOs," banks elected directors of each network's board); *id.* at 145a (NAC Compl. ¶ 90) (same). And yet respondents acknowledge that the networks kept in place their Access Fee Rules, which had the very same effects as they did before the IPOs. That simple fact demonstrates that, whatever effects the rules might have on inter-bank competition, those effects are perfectly consistent with unilateral conduct by each network. If the rule had been contrary to each network's

independent interest, each network's board would have owed the network a duty to repeal the rule post-IPO. *See, e.g.*, *Byrum*, 408 U.S. at 138 ("[D]irectors * * * have a fiduciary duty to promote the interests of the corporation.").

The natural explanation for why the networks kept the rules after they ceased to be joint ventures is that all along the rules advanced the competitive interests of each network, regardless of their supposed effect on inter-bank competition. Respondents' allegations thus remain consistent with each network and its board pursuing the interests of each network as a "whole" vis-à-vis the *network's* competitors. *Am. Needle*, 560 U.S. at 196.

2. Even if respondents' own allegations regarding the networks' IPOs did not conclusively rebut their claims, the rules' alleged effect on inter-bank competition would remain consistent with each network's unilateral pursuit of its own interests.

a. Respondents' circumstantial allegations with respect to the market for ATM cash withdrawal services do not make a horizontal conspiracy plausible. That is because, according to respondents' own allegations, the Access Fee Rules also affected a *separate* market for network services—a market in which banks, which do not offer network services, do *not* compete. *See supra* p. 26. And it is just as possible, indeed far more so, that each network's board members were pursuing the *network's* interest in *that* market when they adopted each rule. That is fatal to respondents' claims. For as long as the complaints themselves allege facts under which concerted action is merely "possible," they remain in "neutral territory," incapable of stating a horizontal

conspiracy under Section 1. *Twombly*, 550 U.S. at 557.

That distinguishes this case from three previous decisions of this Court finding concerted action among the members of joint ventures. In each of those cases, the challenged conduct affected only a *single* market in which the venture's members competed.

Take *Sealy*, which involved manufacturers that competed in the market for making and selling mattresses. 388 U.S. at 351. The manufacturers "operated and controlled Sealy, Inc., a company that licensed the Sealy trademark to the manufacturers, and dictated that each operate within a specific geographic area." *Am. Needle*, 560 U.S. at 191 (citing *Sealy*, 388 U.S. at 352-353). Those territorial restraints, which divided up the market for making and selling mattresses, were "supposed to promote" the "interests" of the licensees. *Sealy*, 388 U.S. at 354. And indeed, there was no suggestion that the restraints affected any other market, besides the market in which the licensees competed. The Court thus held that Sealy was a mere "instrumentality of the licensees for purposes of the horizontal territorial allocation," *id.*—a conclusion reinforced by the fact that Sealy had also been a mere "instrumentality" for purposes of "flagrant and pervasive price-fixing," *id.* at 355-356.

The Court considered similar restraints in *Topco*. That case involved grocery store chains, not mattress manufacturers. But the basic facts were the same: The grocery store chains formed a cooperative that licensed each chain to "sell Topco-controlled brands only within the marketing territory allocated to it."

Topco, 405 U.S. at 598, 601-602. As in *Sealy*, those territorial restraints served the interests of the licensees by "insulat[ing] members from competition." *Id.* at 602. And there was no suggestion that the restraints affected any other market, besides the market for goods in which the licensees competed. The Court therefore held that the restraints were the product of a "horizontal" conspiracy among the licensees. *Id.* at 608.

Finally, *American Needle* involved professional football teams that "compete in the market for intellectual property." 560 U.S. at 197. The teams formed a corporate entity known as the NFLP to "develop, license, and market their intellectual property." *Id.* at 187. The Court concluded that "decisions by the NFLP regarding the teams' separately owned intellectual property constitute concerted action," *id.* at 201, because they advance the "separate economic interests" of each team, as opposed to the interests of the league as a "whole." *Id.* at 197 (quoting *Copperweld*, 467 U.S. at 769, 770). Once again, there was no suggestion that those decisions affected any other market, besides the market for intellectual property in which the teams competed. Thus, the Court held that the NFLP's actions were subject to Section 1, "at least with regards to its marketing of property owned by the separate teams." *Id.* at 200; *see also id.* at 201 ("In making the relevant licensing decisions, NFLP is therefore 'an instrumentality' of the teams." (quoting *Sealy*, 388 U.S. at 354)).

The contrast with the allegations here could not be sharper. In *Sealy*, *Topco*, and *American Needle*, the alleged restraints affected only a *single* market—the market in which the ventures' members competed.

That fact supported the conclusion that the ventures were mere vehicles for concerted action among their members. By contrast, according to respondents' own allegations, the rules at issue here affect an *additional* market—the market for network services—which lies beyond any market in which the banks supposedly compete. Respondents' allegations thus come far closer to the facts in *Dagher*, in which the Court held that an agreement among members of a joint venture was not an agreement "in the antitrust sense," because the defendants "did not compete with one another in the relevant market * * * but instead participated in that market jointly" through the venture. 547 U.S. at 5-6. Because the Access Fee Rules advance the interests of each network as a whole, in a market in which the banks do not even compete, respondents fail to plausibly suggest that the networks were mere instrumentalities of the banks in adopting these rules.

b. Respondents' allegations about the rules' supposed effects on the card-issuer market are even less suggestive of concerted action among each network's member banks. Any network services provider would prefer that issuers offer single-bug cards limited to its network; indeed, respondents allege that the networks compete with one another for such exclusivity, each "consistently encourag[ing] issuers to maintain 'single-bug' cards." Osborn Pet. App. 78a (Mackmin Compl. ¶ 83). So the alleged effect on the availability of multiple-bug cards does not make unilateral action by each network less likely. And because a rule with such effects would be in the interest of an independent network services provider absent any agreement among issuers, the allegation

"stays in neutral territory." *Twombly*, 550 U.S. at 557.

C. Respondents' Own Allegations Show That The Networks Could Have Imposed The Rules Without Concerted Action

Finally, respondents attempt to infer concerted action from the nature of the rules themselves. They argue that these are the type of rules that could not have been successfully imposed without concerted action among the parties subject to them. Osborn Pet. App. 83a (Mackmin Compl. ¶ 98). Once again, however, the complaints give reasons to believe that is not so.

For starters, the complaints identify legitimate, independent reasons that a bank would voluntarily abide by the rules in the absence of concerted action. *See id.* at 50a. Abiding by the rules may be a cost of being part of a network. But the complaints show how being part of the Visa or MasterCard network carries many benefits. Among other things, it allows "a bank's depositors * * * to use ATMs at many more locations than one bank alone could support." *Id.* at 72a (Mackmin Compl. ¶ 68). Respondents themselves allege that Visa and MasterCard "provide the only networks with nationwide reach." *Id.* And belonging to a large ATM network permits banks to "spread the costs of [their own ATMs] over more customers and transactions." *Id.* at 73a (Mackmin Compl. ¶ 70). For many ATM operators, these benefits would doubtless outweigh any costs, including whatever drawbacks the Access Fee Rules may entail. Thus, the fact that banks abide by the rules does not suggest the existence of a horizontal agreement among banks; it suggests simply that many

banks, for reasons of their own, find being part of the network a good deal.

Of course, some rules, by their nature, *could* suggest concerted action. Suppose, for example, that a group of competing manufacturers formed a business association for the sole purpose of adopting rules setting a floor on the price of their members' goods. Unlike the rules at issue here, the manufacturers' rules could be successfully imposed only through a horizontal agreement among the members themselves. That is because the rational economic response to such a rule *absent* agreement would be *not* to comply—*i.e.*, to sell below the fixed price and capture a greater share of the market. *See* Richard A. Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 Stan. L. Rev. 1562, 1569-1570 (1969) (noting that supracompetitive prices encourage new entrants willing to charge lower prices, jeopardizing a cartel that cannot bar or co-opt them); *Interstate Circuit* v. *United States*, 306 U.S. 208, 221-223 (1939) (inferring concerted action from defendants' parallel adoption of a policy that would have threatened "substantial loss" of business absent "substantially unanimous action"). Because any attempt to impose such a rule unilaterally would fail, an allegation that a business association had successfully imposed such a rule would plausibly suggest concerted conduct.

That is not the situation here. While the only reason to be part of a price-fixing cartel is the price-fixing agreement itself, participating in the Visa or MasterCard networks offers both bank and nonbank operators of ATMs significant benefits (set forth in the complaints themselves), separate and apart from the right to charge particular access fees. Retaining

these benefits is a reason ATM operators could rationally choose to comply with the Access Fee Rules in the absence of an agreement. Thus, the fact that each network successfully imposed the rule is not suggestive of concerted action.

Indeed, each network succeeded in imposing its Access Fee Rule even after it became an independent public company whose decisionmaking is unilateral. *See* Osborn Pet. App. 90a (Mackmin Compl. ¶ 118). Respondents' only answer is to say that following the networks' IPOs, each 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. Stoumbos Pet. App. 149a (emphasis added) (NAC Compl. ¶ 102). But that conclusory allegation is devoid of any support in the complaints. It is no more than a "naked assertion" of agreement, unaccompanied by "further factual enhancement." *Twombly*, 550 U.S. at 557; *cf. Iqbal*, 556 U.S. at 686-687 (courts are not required to credit conclusory allegations of a defendant's state of mind).

Moreover, the NAC respondents (who are independent ATM operators) themselves agreed to abide by the rules. *See* Stoumbos Pet. App. 123a (NAC Compl. ¶ 48). And they certainly are not suggesting that *they* were party to a horizontal agreement. Their own conduct belies any suggestion that no one would have abided by the rules in the absence of such an agreement. In fact, their explanation for why they accepted the rules only further undermines their claim. According to their complaint, Visa and MasterCard enjoy "'must-carry' status" that led the NAC respondents to conclude that carrying Visa's and MasterCard's networks was in their business interests. *Id.* at 151a-152a (NAC Compl. ¶ 107). If

that were true, then the presence of a horizontal agreement is not the only—or even the more likely—explanation for abiding by the rules, after all. Respondents' attempt to draw an inference of concerted action from the nature of the rules fails.

* * *

There is no doubt that "competitors cannot simply get around antitrust liability by acting through a third-party intermediary or joint venture." *Am. Needle*, 560 U.S. at 202 (internal quotation marks omitted). So when a plaintiff's factual allegations raise a reasonable expectation that discovery will reveal evidence—direct or circumstantial—that competitors are using a joint venture to pursue their separate economic interests, their complaint may state a claim.

The complaints in this case fail, however, because they do not plausibly allege that each network's adoption of its Access Fee Rule flowed from its member banks' pursuing "interests separate from those of" their networks. *Id.* at 200. On the contrary, respondents' allegations are perfectly consistent with each network's members diligently pursuing the interests of each network as a "whole" in the market for network services—a market in which banks do not compete. *Id.* at 196.

That conclusion flows directly from the Sherman Act's "basic distinction" between unilateral and concerted action. *Copperweld*, 467 U.S. at 767. And under *Twombly*, that distinction is just as vital at the pleading stage: Allegations that remain "merely consistent with" concerted action "stop[] short of the line between possibility and plausibility of entitlement to relief." 550 U.S. at 557 (internal quotation

marks and brackets omitted). Faithful application of these principles is especially important in the context of joint ventures like the networks here. Every joint venture is a bundle of agreements, and if allegations that competitors participated in a venture's governance were enough to state a claim, it would deter the kind of pro-consumer efforts—exemplified by the networks themselves—that bring new and innovative products and services to market. *See, e.g.*, *NCAA*, 468 U.S. at 102. That is not the law. Absent plausible allegations that the parties to purportedly anticompetitive conduct acted in pursuit of their separate interests as competitors, a plaintiff has not pleaded an agreement in the "antitrust sense." *Dagher*, 547 U.S. at 6.

In this case, nothing in respondents' allegations of the makeup of the networks' boards or the rules' nature or effects plausibly suggests the rules were anything but the product of unilateral action beyond the reach of Section 1.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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