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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 20-2658

[Filed June 29, 2021]

MELVIN SALVESON, EDWARD LAWRENCE, DIANNA LAWRENCE, WENDY M. ADAMS,

Plaintiffs-Appellants,

v.

JPMORGAN CHASE & CO., JPMORGAN CHASE BANK, N.A., BANK OF AMERICA CORPORATION, BANK OF AMERICA N.A., CAPITAL ONE, F.S.B., CAPITAL ONE FINANCIAL CORPORATION, CAPITAL ONE BANK, HSBC FINANCE CORPORATION, HSBC BANK USA, N.A., HSBC NORTH AMERICA HOLDINGS INC., HSBC HOLDINGS PLC,

Defendants-Appellees.

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A

SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 29th day of June, two thousand twenty-one.

PRESENT:

SUSAN L. CARNEY,
RICHARD J. SULLIVAN,
JOSEPH F. BIANCO,
Circuit Judges.

FOR APPELLANTS: JOSEPH M. ALIOTO JR. (Joseph M. Alioto, Jamie Miller, Alioto Law Firm, San Francisco, CA, *on the brief*), Joseph Alioto Jr. Law, San Francisco, CA.

FOR APPELLEES: BORIS BERSHTEYN (Michael M. Powell, Kamali Pettiford Willet, *on the brief*), Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY, *for JPMorgan Chase & Co., JPMorgan Chase Bank, N.A.*

David Lesser, Wilmer Cutler Pickering Hale and Dorr LLP, New York, NY, *for HSBC Finance Corporation, HSBC Bank USA, N.A., HSBC North America Holdings Inc., HSBC Holdings PLC.*

Michael B. Miller, Morrison & Foerster LLP, New York, NY, *for Bank of America Corporation, Bank of America N.A.*

Andrew J. Frackman and Abby F. Rudzin, O'Melveny & Myers LLP, New York, NY, *for Capital One, F.S.B., Capital One Financial Corporation, Capital One Bank.*

FOR AMICI CURIAE MERCHANT PLAINTIFFS:

Adam O. Glist (Jeffrey I. Shinder and Ankur Kapoor, *on the brief*), Constantine Cannon LLP, New York, NY, *for 7-Eleven.*

Steig D. Olson and David M. Cooper, Quinn Emanuel Urquhart and Sullivan LLP, New York, NY, *for The Home Depot, Inc., Home Depot U.S.A., Inc.*

James A. Wilson, Robert N. Webner, and Kimberley Weber, Herlihy, Vorys, Sater, Seymour and Pease LLP, Columbus, OH, and Kathy Patrick, Barrett Reasoner, and Denise Drake, Gibbs & Bruns LLP, Houston, TX, *for Target.*

John C. Briody and James H. Smith, McKool Smith, New York, NY, *for Elgin Ave. Recovery, LLC, successor in interest to Sears Holdings Corporation.*

Appeal from an order of the United States District Court for the Eastern District of New York (Brodie, *C.J.*).

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order entered on July 16, 2020, is **AFFIRMED**.

Plaintiffs-Appellants Melvin Salveson,[1] Edward Lawrence, Dianna Lawrence, and Wendy M. Adams ("plaintiffs") brought this antitrust action on behalf of themselves and a putative class of similarly situated Mastercard and Visa cardholders alleging that the Defendant-Appellee banks ("defendants") conspired to fix the interchange fees imposed in processing credit and debit card transactions, in violation of § 1 of the Sherman Act, 15 U.S.C. § 1, and California's Cartwright Act, Cal. Bus. & Prof. Code § 16720 *et seq*.

Plaintiffs' complaint was dismissed in 2014, and their motion for reconsideration was denied in 2016. *See Salveson v. JP Morgan Chase & Co.*, 14-CV-3529 (JG), 2014 WL 12770235 (E.D.N.Y. Nov. 26, 2014) (dismissing federal claim and declining to exercise supplemental jurisdiction over California claim); *Salveson v. JP Morgan Chase & Co.*, 166 F. Supp. 3d 242 (E.D.N.Y. 2016) (denying plaintiffs' motion for reconsideration, but granting defendants' motion for

[1] Salveson has died. Plaintiffs move to substitute a representative for Salveson and to amend the caption accordingly. Because we affirm the district court's denial of plaintiffs' motion for relief from final judgment, we deny as moot plaintiffs' motion to substitute a party and amend the caption. Separately, we hereby grant the merchant plaintiffs' motion for leave to file a brief as amici curiae.

reconsideration and dismissing California claim).[2] We affirmed. *See Salveson v. JP Morgan Chase & Co.*, 663 F. App'x 71 (2d Cir. 2016) (summary order). More than three years later, plaintiffs moved in the district court for relief from final judgment under Federal Rule of Civil Procedure 60(b)(6). Rule 60(b)(6) provides that a court "may relieve a party or its legal representative from a final judgment . . . for . . . any . . . reason that justifies relief." Plaintiffs argued in the district court, and assert again on appeal, that the Supreme Court's decisions in *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018), and *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019), changed the decisional law regarding antitrust standing and that the cases entitled them to relief under Rule 60(b)(6). The district court rejected both of these arguments and denied plaintiffs' Rule 60(b) motion. Plaintiffs now appeal. We assume the parties' familiarity with the underlying facts, procedural history, and arguments on appeal, to which we refer only as necessary to explain our decision to affirm.

Litigants are entitled to relief under Rule 60(b)(6) only in "extraordinary circumstances." *Stevens v. Miller*, 676 F.3d 62, 67 (2d Cir. 2012); *accord Marrero Pichardo v. Ashcroft*, 374 F.3d 46, 55-56 (2d Cir. 2004). While a change in decisional law alone is generally not sufficient to warrant Rule 60(b)(6) relief, a change in decisional law that produces "inconsistent results between two sets of plaintiffs suing for damages based on the same incident" may constitute "extraordinary" circumstances warranting relief. *In re Terrorist*

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[2] Unless otherwise noted, in quoting caselaw, this Order omits all alterations, citations, footnotes, and internal quotation marks.

Attacks on Sept. 11, 2001, 741 F.3d 353, 357 (2d Cir. 2013). "We review a district court's decision on a Rule 60(b) motion for abuse of discretion." *Id.* "A court abuses its discretion when (1) its decision rests on an error of law or a clearly erroneous factual finding; or (2) cannot be found within the range of permissible decisions." *Id.* "An appeal from an order denying a rule 60(b)(6) motion brings before [the Court] only the denial of the motion, not the merits of the underlying judgment." *Matarese v. LeFevre*, 801 F.2d 98, 106 (2d Cir. 1986).

As we recognized back in 2016, cardholders do not directly pay the heightened interchange fees that plaintiffs claim are the result of the defendant banks' alleged conspiracy. *See Salveson*, 663 F. App'x at 75 ("Contrary to plaintiffs' allegations, the structure of these transactions demonstrates that cardholders do not directly pay interchange fees."). From this starting point, we reasoned that plaintiffs were not directly injured by the supracompetitive interchange fees that they alleged defendants imposed, and concluded that plaintiffs were barred from suing the banks for antitrust injury by the doctrine established in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). *See id.*; *see also Salveson*, 2014 WL 12770235, at *3 ("Because the interchange fee runs between financial institutions within the card services market, consumers do not directly pay interchange fees and are not directly injured by their imposition."); *Salveson*, 166 F. Supp. 3d at 252 (recognizing that "Plaintiffs' allegations did not permit a reasonable inference that cardholders are direct payors" and that "Plaintiffs have not identified any controlling law that the Court overlooked"). In denying Rule 60(b) relief, the district court concluded that *American Express* and *Apple* did not call these prior decisions into question: Plaintiffs' complaint still failed to plausibly allege that they were direct payors of the interchange fees. We identify no abuse of discretion in the district court's ruling.

With respect to *American Express*, plaintiffs overstate the scope of the Supreme Court's decision. In plaintiffs' view, that decision established that credit card markets involve the sale of a single product—transactions—to both cardholders and merchants. On this basis, plaintiffs contend that they pay the interchange fee when they "purchase transactions" from the defendant banks. Appellants' Br. at 29. This argument confuses the issue of market definition, however, with the issue of who may be a proper plaintiff under *Illinois Brick*. Importantly, *American Express* did not directly address antitrust standing at all. After *American Express*, courts must use a two-sided market definition when analyzing market power in the credit card market, but we do not understand the decision to bar courts from treating participants in these markets as purchasers of distinct goods for the purposes of the *Illinois Brick* doctrine. *See American Express*, 138 S. Ct. at 2280 (explaining that a credit card network "provides *separate* but interrelated services to both cardholders and merchants" (emphasis added)). The district court recognized the import of the *American Express* decision, but reasonably concluded that the ruling did not call into question the prior dismissal of plaintiffs' complaint on the ground that plaintiffs do not directly pay the interchange fees.

The district court also reasonably concluded that plaintiffs were not entitled to Rule 60(b) relief in light of *Apple*. In *Apple*, the Supreme Court held that iPhone owners were not barred by the *Illinois Brick* doctrine from suing Apple for taking a 30% commission from iPhone app sales before passing on the remainder of the sale price to app developers. 139 S. Ct. at 1519-20 (explaining that "the iPhone owners were direct purchasers who may sue Apple for alleged monopolization" because "[i]t [wa]s undisputed that the iPhone owners bought the apps directly from Apple"). On appeal, plaintiffs maintain that *Apple* confirms their reading of *American Express*—that it establishes that cardholders, as participants in a two-sided market, pay the interchange fees charged by one bank to another in the course of processing credit card transactions.

But the *Apple* decision turned on the basic fact that the iPhone owner plaintiffs, who alleged they were injured by the 30% commission, also purchased the apps directly from Apple, and thus paid the allegedly supracompetitive price directly to Apple. Under these circumstances, the Court held, *Illinois Brick* did not preclude the suit. *See Apple*, 139 S. Ct. at 1525 (explaining that plaintiff consumers' suit was not barred by *Illinois Brick* because they "purchased apps directly from Apple, and they allege that Apple used its monopoly power over the retail apps market to charge higher-than-competitive prices"). Here, we and the district court have repeatedly rejected as implausible plaintiffs' allegation that cardholders pay the interchange fee directly to the defendant banks. The district court thus reasonably rejected plaintiffs' motion for Rule 60(b) relief based on the *Apple* decision.

* * *

We have considered plaintiffs' remaining arguments and find in them no basis for reversal. The order of the district court is **AFFIRMED**.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

/s/ Catherine O'Hagan Wolfe

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

14-CV-3529 (MKB)

[Filed July 16, 2020]

MARVIN SALVESON, EDWARD LAWRENCE, DIANNA LAWRENCE and WENDY M. ADAMS, on behalf of themselves and all others similarly situated,	)
Plaintiffs,	)
v.	)
JP MORGAN CHASE & CO., J.P. MORGAN BANK, N.A., BANK OF AMERICA CORPORATION, BANK OF AMERICA N.A., CAPITAL ONE F.S.B., CAPITAL ONE FINANCIAL CORPORATION, CAPITAL ONE BANK, HSBC FINANCE CORPORATION, HSBC BANK USA, N.A., HSBC NORTH AMERICAN HOLDINGS, INC. and HSBC HOLDINGS, PLC,	)
Defendants.	)

MEMORANDUM & ORDER

MARGO K. BRODIE, United States District Judge:

Plaintiffs Marvin Salveson, Edward Lawrence, Dianna Lawrence and Wendy M. Adams commenced this putative antitrust class action on December 16, 2013, in the United States District Court for the Northern District of California against Defendants, financial institutions who issue general purpose payment cards that consumers use to purchase goods and services, and the affiliates of such institutions.[1] (Compl., Docket Entry No. 1.) On behalf of a putative nationwide class of consumers using payment cards issued by Defendants, Plaintiffs asserted claims pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, and pursuant to the Cartwright Act, California Business and Professions Code § 16750(a). (*Id.*) Defendants moved to dismiss all of Plaintiffs' claims, and by Memorandum and Order filed on November 26, 2014 (the "November 26, 2014 Decision"), the Court dismissed Plaintiffs' federal claims and declined to exercise jurisdiction over Plaintiffs' state law claims.[2] (Nov. 26, 2014 Decision,

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[1] On June 4, 2014, the Clerk of Court for the Northern District of California entered a Transfer Order from the United States Judicial Panel on Multidistrict Litigation, transferring this case to the Eastern District of New York. (MDL Transfer Order, Docket Entry No. 61.)

[2] On December 18, 2014, the United States Judicial Panel on Multidistrict Litigation, with the consent of the Court, ordered that the case be reassigned from Judge John Gleeson to the undersigned. (Order Reassigning Litigation, Docket Entry No. 88.)

Docket Entry No. 83.) The Clerk of Court entered judgment on December 4, 2014. (Dec. 4, 2014 J., Docket Entry No. 86.) By Memorandum and Order dated February 24, 2016 (the "February 24, 2016 Decision"), the Court denied Plaintiffs' motion for reconsideration of the dismissal of their federal claims, granted Defendants' cross-motion for reconsideration, and dismissed Plaintiffs' state law claims. (Feb. 24, 2016 Decision, Docket Entry No. 112.) On October 17, 2016, the Second Circuit affirmed both the November 26, 2014 Decision and the February 24, 2016 Decision. *See Salveson v. JP Morgan Chase & Co.*, 663 F. App'x 71 (2d Cir. 2016), *cert. denied*, --- U.S. ---, 137 S. Ct. 1826 (2017).

By Memorandum and Order dated August 29, 2018 and filed on the main MDL docket (the "August 29, 2018 Decision"), the Court "invited [Plaintiffs] to brief whether they are entitled to any relief in light of the Supreme Court's decision in *Ohio v. American Express Co.* [(*Amex II*)], 625 U.S. ---, 138 S. Ct. 2274 (2018)," as well as the Court's decision permitting various groups of plaintiffs in the MDL to amend their complaints to add an "alternative two-sided definition of the relevant market." *In Re Payment Interchange Fee & Merch. Disc. Antitrust Litig.* (*Interchange Fee Litig.*), No. 05-MD-1720, 2018 WL 4158290, at *14 n.10 (E.D.N.Y. Aug. 30, 2018). By letter dated September 12, 2019, counsel for Plaintiffs informed the Court that he "did not become aware of [the August 29, 2018 Decision] until Friday, September 6, 2019," and sought leave to brief the issues previously identified by the Court. (Letter dated Sept. 12, 2019, Docket Entry No. 119.) The Court granted Plaintiffs' request, (Order dated Oct.

3, 2019), and on November 1, 2019, Plaintiffs moved for relief from final judgment, pursuant to Rule 60 of the Federal Rules of Civil Procedure and "this Court's inherent authority," (Pls. Mot. for Relief from Final Judgment ("Pls. Mot."), Docket Entry No. 122; Pls. Mem. in Supp. of Pls. Mot. ("Pls. Mem."), Docket Entry No. 122-1). Defendants oppose the motion. (Defs. Opp'n to Pls. Mot. ("Defs. Opp'n"), Docket Entry No. 125.)

For the reasons set forth below, the Court denies Plaintiffs' motion.

I. Background

a. Factual background

The Court assumes the parties' familiarity with the facts as set forth in the Court's previous decisions and summarizes only the pertinent facts.

According to Plaintiffs, in the course of issuing payment cards to consumers, Defendants and their affiliates knowingly participated in an anticompetitive conspiracy to fix fees related to those payment cards. (Compl. ¶¶ 26–29.) These fees are known as interchange fees. (*See id.* ¶¶ 40, 48.) Plaintiffs contend that consumers like Plaintiffs and members of the putative class used the payment cards to purchase goods and services and "paid supracompetitive [i]nterchange [f]ees to Defendants and their co-conspirators." (*Id.* ¶¶ 19–20.)

Plaintiffs allege that each time a consumer uses a payment card, the following sequence of events occurs: the merchant accepts the payment card from the cardholder and relays the transaction information to the merchant's "acquiring bank"; the acquiring bank then transmits the transaction information to the payment card's network — either Visa or MasterCard; and the network then relays the transaction information to the cardholder's "issuing bank" for approval of the transaction. (*Id.* ¶ 49 (quoting *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 235 (2d Cir. 2003)).) If the issuing bank determines the consumer has sufficient credit and approves the transaction, it conveys its approval to the acquiring bank and the acquiring bank then relays its approval to the merchant. (*See id.*) Finally, the issuing bank — in this case, one of the Defendants — pays the acquiring bank an amount representing the price of the goods or services purchased by the consumer in the underlying transaction, less an "interchange fee," the fee at issue in this case. (*See id.*)

Plaintiffs allege that Defendants' participation in an anticompetitive conspiracy has injured cardholders by causing them to "pa[y] supracompetitive price-fixed [i]nterchange [f]ees to Defendants" that were higher "than [the fees] they would have paid in the absence of . . . antitrust violations" by Defendants. (*Id.* ¶¶ 104–05.) Plaintiffs contend that a cardholder "pays the gross amount of the transaction, including fees, directly to the [issuing bank], which keeps the [i]nterchange [f]ee and passes on a separate transaction fee to the [acquiring bank] and the net amount to the merchant via the Visa or MasterCard network." (*Id.* ¶ 38.) According to Plaintiffs, the interchange fee is paid "directly" by the cardholders. (*Id.* ¶ 6.) Plaintiffs specifically allege that the initial payment in the transaction is made by cardholders, that the issuing bank "keep[s]" the interchange fee from that payment, and that the payments made by cardholders are "comprise[d]" of the "balance" due to the merchant plus the interchange fee and other fees. (*Id.* ¶¶ 47–48, 81.)

b. Procedural history

i. The November 26, 2014 Decision

In the November 26, 2014 Decision, the Court found that Plaintiffs were indirect purchasers and therefore, under *Illinois Brick Company v. Illinois*, 431 U.S. 720 (1977), lacked standing to sue under Section 4 of the Clayton Act. (*See* Nov. 26, 2014 Decision 5–8.)

The Court summarized the structure of a "credit card transaction using the Visa or MasterCard network . . . as follows":

> When a cardholding consumer uses a Visa or MasterCard payment card, the merchant that accepts the card relays the transaction to its "acquiring bank," which in turn transmits it to the network, *i.e.* Visa or MasterCard, which sends the information to the cardholder's "issuing bank." The issuing bank may approve the transaction and the approval is conveyed to the acquiring bank, which relays it to the merchant. The issuing bank then sends the acquiring bank the amount of the purchase price minus an interchange fee.

(*Id.* at 4 (citing Compl. ¶ 49 (quoting *Visa U.S.A., Inc.*, 344 F.3d at 235)).)

In analyzing whether Plaintiffs had standing under *Illinois Brick*, the Court noted that "markets for general purpose payment cards and for payment card network services are separate and distinct, and payment-card consumers are considered to participate only in the former." (*Id*. at 6.) Thus, "[w]hereas in the market for general purpose *cards*, the issuers are the sellers, and cardholders are the buyers, in the market for general purpose card *network services*, the four networks themselves are the sellers, and the issuers of cards and merchants are the buyers." (*Id*. (quoting *Visa U.S.A., Inc.*, 344 F.3d at 239).) The Court concluded that "[b]ecause the interchange fee runs between financial institutions within the card services market, consumers do not directly pay interchange fees and are not directly injured by their imposition." (*Id.* at 7.)

The Court rejected Plaintiffs' contention that "cardholders, as the first and only link in the credit card transaction chain to actually make a payment, pay the interchange fees charged for each transaction directly," (*id.* at 4), finding that it was "refuted by [Plaintiffs'] own allegations about how transactions over the[] two networks occur," and "[bore] no resemblance to the transaction structure at the heart of this nine-year-old case," (*id.* at 7).

ii. The February 24, 2016 Decision

In the February 24, 2016 Decision, the Court denied Plaintiffs' motion for reconsideration of the dismissal of their federal claims, finding that Plaintiffs had failed to show that the Court had "overlooked critical facts . . . or any relevant controlling decision" and thus had not satisfied the standard for reconsideration. (Feb. 24, 2016 Decision 8.)

The Court rejected Plaintiffs' arguments that the Court had "ignored the obligation [on a motion to dismiss] to credit Plaintiffs' factual allegations," and had "overlooked Plaintiffs' allegations that the interchange fees are paid directly by cardholders." (*Id.*) The Court noted that, "in describing the structure of the transactions giving rise to the incursion and payment of the interchange fee," the Complaint "specifically quote[d] a portion of the Second Circuit decision [in *Visa U.S.A., Inc.*] stating '[w]hereas in the market for general purpose *cards*, the issuers are the sellers, and cardholders are the buyers, in the market for general purpose card *network services*, the four networks themselves are the sellers, and the issuers of cards and merchants are the buyers.'" (*Id.* (quoting Compl. ¶ 48).) The Court reasoned that:

> based on the allegations, Plaintiffs recognize that there is a distinction between two markets: one for payment cards (the "Payment Card Market"), in which consumers participate by purchasing cards from issuing banks, and another for network services (the "Card Network Services Market"), in which merchants purchase services to facilitate the use of those cards.

(*Id.* at 8–9.) The Court further noted that "Plaintiffs also allege[d] that the interchange fee is exchanged between financial institutions in the Card Network Services Market," and concluded that "the Court was not obligated to credit Plaintiffs' allegation that cardholders are the direct payors of interchange fees, as this allegation is directly contradicted by the specific allegations about the Payment Card and Card Services Markets and the transactions involving the interchange fee." (*Id.* at 9–10.) In addition, the Court rejected Plaintiffs' argument that "the Court [had] specifically overlooked allegations that cardholders pay interchange fees directly by initiating the chain of events that occurs as part of each transaction," finding that "[t]he Court [had] considered and rejected this claim." (*Id.* at 10.) Because Plaintiffs had "failed to identify controlling law or allegations that the Court overlooked," the Court "decline[d] to reconsider its determination that Plaintiffs are barred from asserting claims under § 4 of the Clayton Act by the *Illinois Brick* doctrine." (*Id.* at 11.)

iii. The Second Circuit's decision affirming dismissal of Plaintiffs' federal claims

On October 17, 2016, the Second Circuit affirmed, *inter alia*, the November 26, 2014 Decision's dismissal of Plaintiffs' federal claims and the February 24, 2016 Decision's denial of Plaintiffs' motion for reconsideration of the dismissal of the federal claims. *Salveson*, 663 F. App'x at 75.

The Second Circuit agreed with the Court's ruling that Plaintiffs had "failed to plausibly allege that [they] directly pay interchange fees and are directly injured by their imposition," and thus lacked standing under *Illinois Brick*. *Id.* Quoting the November 26, 2014 Decision's summary of "the structure of the relevant credit card transactions," which had been "cited with approval by [P]laintiffs in their brief on appeal," the

Second Circuit concluded that "[c]ontrary to [P]laintiffs' allegations, the structure of these transactions demonstrates that cardholders do not directly pay interchange fees." *Id.* at 74–75. To illustrate its point, the Second Circuit provided the following example:

> [W]hen a cardholder makes a $100 purchase, the merchant sends notice of the charge to its acquiring bank, and the acquiring bank in turn sends the information to the card issuer bank. If the charge is approved, the issuer bank pays the acquiring bank for the $100 purchase, retaining a portion as an interchange fee. The issuer bills the cardholder, who then is bound to pay the issuer according to the terms of the card.

Id. at 75. Thus, the Second Circuit reasoned, "[t]he cardholder has not directly paid the interchange fee, but rather has only paid the full price for the item or service it has purchased." *Id.* In addition, the Second Circuit cited its previous decisions noting that the interchange fee is paid by the acquiring bank to the issuing bank, *see id.* (first citing *United States v. Am. Express Co.* (*Amex I*), 838 F.3d 179, 188 (2d Cir. 2016); and then citing *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 102 (2d Cir. 2005)), "as the price for handling its transactions with the cardholder," *id.* (quoting *Amex I*, 838 F.3d at 188).

iv. The August 29, 2018 Decision

Following the Second Circuit's decision vacating the class action settlement in the *Interchange Fee Litigation*, the Court permitted various groups of MDL plaintiffs to amend their complaints to assert "an alternative, two-sided market definition." *See Interchange Fee Litig.*, 2018 WL 4158290, at *1–3. While, in their original complaints, plaintiffs had "defined the scope of the relevant market as a one-sided market based on then-existing case law and their understanding of two separate markets — the network services market and the general purpose payment cards market," they sought to amend their complaints in light of the Second Circuit's decision in *Amex I*, 838 F.3d 179, holding that the relevant market in a case involving similar claims was a single, two-sided market. *See Interchange Fee Litig.*, 2018 WL 4158290, at *3.

In a footnote, the Court noted that it was "cognizant that this Memorandum and Order may be in tension with [the November 26, 2014] [D]ecision," and "invited [Plaintiffs] to brief whether they are entitled to any relief in light of the Supreme Court's decision in [*Amex II*] and this decision." *Id.* at *14 n.10. The Court directed Plaintiffs to file any submission on or before October 1, 2018. *Id.*

By letter dated September 12, 2019, counsel for Plaintiffs informed the Court that he had "not become aware of the [August 29, 2018 Decision] until . . . September 6, 2019." (Letter dated Sept. 12, 2019.) Counsel explained that because the August 29, 2018 Decision had been filed only on the main MDL docket, counsel had not received an electronic docket notification when it was filed. (*Id.*) Having just discovered the Court's invitation to provide briefing to the Court regarding any relief Plaintiffs might now be entitled to in light of the Supreme Court's decision in *Amex II* and the August 29, 2018 Decision, Plaintiffs requested leave to file briefing on the issues by October 14, 2019. (*Id.*) The Court granted Plaintiffs' request, (Order dated Oct. 3, 2019), and this motion followed.

II. Discussion

a. Standard of review

Rule 60(b) of the Federal Rules of Civil Procedure provides for relief from a final judgment, order, or proceeding in the following circumstances:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . . , misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b). "Properly applied, Rule 60(b) strikes a balance between serving the ends of justice and preserving the finality of judgments." *Reese v. Bahash*, 574 F. App'x 21, 23 (2d Cir. 2014) (quoting *Nemaizer v. Baker*, 793 F.2d 58, 61 (2d Cir. 1986)). Such a motion "must be made within a reasonable time," *Stevens v. Miller*, 676 F.3d 62, 67 (2d Cir. 2012) (citing Fed. R. Civ. P. 60(c)), and cannot be used "as a substitute for appeal," *Stevens v. Schneiderman*, No.

05-CV-10819, 2011 WL 6780583, at *5 (S.D.N.Y. Dec. 23, 2011) (quoting *United Airlines, Inc. v. Brien*, 588 F.3d 158, 176 (2d Cir. 2009)). "A Rule 60(b) motion is properly denied where it seeks only to relitigate issues already decided." *Maldonado v. Local 803 I.B. of Tr. Health & Welfare Fund*, 490 F. App'x 405, 406 (2d Cir. 2013) (citing *Zerman v. Jacobs*, 751 F.2d 82, 85 (2d Cir. 1984)). Each of the first five subsections of Rule 60(b) addresses a particular circumstance under which a party can obtain relief from a final judgment. *See Dugan v. United States*, No. 11-CV-3973, 2015 WL 5244341, at *3 (E.D.N.Y. Sept. 8, 2015).

In order to qualify for Rule 60(b)(6) relief, a plaintiff must also demonstrate either "extraordinary circumstances, or extreme hardship." *DeCurtis v. Ferrandina*, 529 F. App'x 85, 86 (2d Cir. 2013) (quoting *Harris v. United States*, 367 F.3d 74, 81 (2d Cir. 2004)); *see also Stevens*, 676 F.3d at 67 (noting that "courts require the party seeking to avail itself of [Rule 60(b)(6)] to demonstrate that 'extraordinary circumstances' warrant relief" (citing *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988))); *DePasquale v. DePasquale*, No. 12-CV-2564, 2013 WL 4010214, at * 2 (E.D.N.Y. Aug. 5, 2013) ("Granting a Rule 60(b)(6) motion requires a showing of extraordinary circumstances to justify the reopening of a final judgment." (citations and internal quotations marks omitted)); *Crawford v. Franklin Credit Mgmt. Corp.*, No. 08-CV-6293, 2013 WL 2951957, at * 1 (S.D.N.Y. June 14, 2013) ("Motions for relief under Rule 60(b) are disfavored, and are reserved for exceptional cases." (citations omitted)).

b. Plaintiffs' motion to set aside the judgment

Plaintiffs argue that in light of the Supreme Court's decisions in *Amex II* and *Apple v. Pepper*, --- U.S. ---, 139 S. Ct. 1514 (2019), the Court must now find that, under newly developed and controlling law, Plaintiffs, as cardholders, are "consumers of the transactions product offered by the credit-card network[s]," and that "they *directly* purchase that product from the network participants and therefore have standing under *Illinois Brick*." (Pls. Mem. 5.) Plaintiffs further argue that "[e]xtraordinary circumstances exist in this case" requiring that the Court vacate the judgment "in the interest of justice." (*Id.* at 7.) In support, Plaintiffs argue that "[i]n light of the changes in the law . . . there is now a risk that [c]ardholders and [m]erchants will be treated inconsistently, even though both groups suffered injuries from the same tort when [Defendants] illegally raised the price of transactions simultaneously sold to both groups." (*Id.*) In addition, Plaintiffs argue that the decisions in *Amex II* and *Apple* "might be used to call into question the [m]erchants' standing to sue, which would leave no plaintiff available to prosecute the [D]efendants' transgressions." (*Id.* at 10.)

In response, Defendants argue that Plaintiffs have "fail[ed] to demonstrate any extraordinary circumstances" warranting vacatur of the judgment pursuant to Rule 60(b)(6). (Defs. Opp'n 5.) In support, Defendants argue that (1) "there [has been] no relevant change in the decisional law here because the holding of *Amex II* was already controlling in the Second Circuit when the Second Circuit last considered and rejected [Plaintiffs' claims]," (*id.* at 7); (2) merchants and cardholders are not, as Plaintiffs contend, "victims of the same tort," (*id.* at 9 (quoting Pls. Mem. 8)), because "cardholders benefit — not suffer — when interchange fees rise, and *Amex II* confirms this conclusion," (*id.*); and (3) in addition to demonstrating "the circularity of their argument," Plaintiffs' contention that there may be no remaining viable plaintiff fails "[a]s a factual matter, [because] there is no reason that the parties who actually pay the interchange fees alleged to be anticompetitive — the acquiring banks — cannot bring suit," (*id.* at 10–11). Defendants further argue that "[t]he holding of *Amex II* . . . is logically and legally disconnected from the question of who is the direct payor of interchange fees," and "did not address (much less change) the reason this Court and the Second Circuit dismissed [Plaintiffs' federal claims]," and that *Apple* is "entirely inapposite." (*Id.* at 11–12, 13.)

i. *Amex II* represented a change in decisional law

Defendants argue that the holding in *Amex II* was already controlling law in this Circuit at the time the Second Circuit issued its decision affirming the dismissal of Plaintiffs' federal claims, and thus does not represent a change in decisional law. (Defs. Opp'n 6–7.) According to Defendants, *Amex II* merely affirmed the Second Circuit's decision in *Amex I*. (*See id.* at 7.) Thus, although the Supreme Court had not yet decided *Amex II* at the time the Second Circuit issued its decision in this case, because the Second Circuit *had* issued its decision in *Amex I*, and in fact cited to *Amex I* in affirming dismissal of Plaintiffs' claims, Defendants contend that *Amex II* did not constitute a change in decisional law. (*Id.* at 6–7.)

In response, Plaintiffs argue that while it is true that *Amex II* affirmed *Amex I*, "[m]ere affirmance doesn't mean the change in decisional law was effectuated by the Second Circuit in *Amex I* rather than the Supreme Court in *Amex II*." (Pls. Reply in Further Supp. of Pls. Mot. ("Pls. Reply") 5, Docket Entry No. 126.) Plaintiffs further argue that while *Amex I* "*reaffirmed* the vitality of the *Visa* [*U.S.A., Inc.*] decision," relied on by the Court in dismissing Plaintiffs' claims, and simply "distinguished it on the facts," (*id.*), *Amex II* "roundly repudiated *Visa* [*U.S.A., Inc.*], if not by name," (*id.* at 2).

The Court finds that *Amex II* represents a change in decisional law. As Plaintiffs point out, the Second Circuit has explicitly stated that "the central holding of *Amex II* . . . differs from the conclusion [it] had reached" in *Amex I*. (*Id.* (quoting *U.S. Airways, Inc. v. Sabre Holdings Corp.*, 938 F.3d 43, 56 (2d Cir. 2019)).) While in *Amex I*, the Second Circuit "concluded that the credit card market *at issue* was properly defined not as two separate markets, but as a single, two-sided market, which included both the merchants on one side and the cardholders on the other," the Supreme Court's holding in *Amex II* "was that in a case brought under the Sherman Act that involves a 'two-sided *transaction* platform,' the relevant market must *always* include both sides of the platform.'" *U.S. Airways, Inc.*, 938 F.3d at 56 (first emphasis added) (quoting *Amex II*, 138 S. Ct. at 2283). Because, as the Second Circuit has made clear, *Amex II*'s holding was different from *Amex*

I's, the Court agrees with Plaintiffs that *Amex II* was not controlling law at the time the Second Circuit affirmed the November 26, 2014 Decision and the February 14, 2016 Decision. *See Salveson*, 663 F. App'x 71. While *Amex I* specifically distinguished the facts before it from the facts in *Visa U.S.A., Inc.*, that distinction, at least as it relates to relevant market definition in antitrust cases, is now meaningless as a matter of law. However, as explained further below, the Court finds that the change in the law effected by *Amex II* ultimately has no bearing on whether Plaintiffs have standing under *Illinois Brick* and does not disturb the prior reasoning of either this Court or the Second Circuit in finding they do not.

ii. Standing under *Illinois Brick*

1. The parties' arguments

Plaintiffs argue that in dismissing Plaintiffs' federal claims, the Court relied on the Second Circuit's decision in *Visa U.S.A., Inc.* to support its finding that the "markets for general purpose payment cards and for payment card network services are separate and distinct." (Pls. Mem. 2 (quoting Nov. 26, 2014 Decision 6).) Based on this framework, under which cardholders were buyers in the market for general purpose payment cards but not in the market for payment card network services, "the Court concluded that the Cardholder Plaintiffs did not *participate* in the market for credit card network services, and thus could not have been direct purchasers under *Illinois Brick*." (*Id.*)

Plaintiffs further argue that while it may be that *Amex II* concerned relevant market definition, and did not discuss direct purchaser standing, the same "is also true of *Visa* [*U.S.A., Inc.*]" — while "*Visa* [*U.S.A., Inc.*] makes no reference to the direct-purchaser doctrine," the decision "provided a template for this Court to decide whether the cardholders participated in the market as direct purchasers." (Pls. Reply 9.) Thus, Plaintiffs contend that the Court should apply "the framework . . . from [its] original decision," in a way that accounts for "updated legal principles." (*Id.*) Plaintiffs argue that *Amex II* articulated "a number of important principles governing 'two-sided' credit-card markets that directly apply to this case":

> First, "two-sided transaction platforms, like the credit-card market" do not consist of two separate markets, but rather are "better understood as supplying only one product — transactions." The network can sell that product "only if a merchant and a cardholder both simultaneously choose to use the network." Second, the credit-card platform sells a transaction to both the cardholder and merchant, every time a credit-card is used: "whenever a credit-card network sells one transaction's worth of card-acceptance services to a merchant it also must sell one transaction's worth of card-payment services to a cardholder." Therefore, cardholders and merchants are *both* direct purchasers of the network's transactions. Third, the cardholder and merchant both consume each transaction: "[i]n the credit-card market, these transactions are jointly consumed by a cardholder, who uses the payment card to make a transaction, and a merchant, who

> accepts the payment card as a method of payment."

(Pls. Mem. 5 (first quoting *Amex II*, 138 S. Ct. at 2286; and then citing *id.* at 2286 n.8).) According to Plaintiffs, *Amex II* "resets the manner in which courts must view *all* credit-card markets in antitrust cases," and is "not limited to judicial questions of defining the relevant market." (Pls. Reply 9.)

Plaintiffs argue that in addition to establishing that "cardholders consume[] the transaction product offered by the credit-card network," the Supreme Court's decision in *Apple* also "compel[s]" the "conclusion" that cardholders "*directly* purchase that product from the network participants and therefore have standing under *Illinois Brick*." (Pls. Mem. 5.) Plaintiffs assert that the Supreme Court's "conclusion" in *Apple* that Plaintiffs were direct purchasers under *Illinois Brick* "was based on the fact that 'there is no intermediary in the distribution chain between Apple and the consumer,'" and that "[b]ecause the same is true of cardholders and issuing banks, the Cardholder Plaintiffs must be direct purchasers." (*See id.* at 6 (alteration omitted) (quoting *Apple*, 139 S. Ct. at 1522).) Plaintiffs argue that just as the iPhone users in *Apple* purchased apps directly from Apple, and paid the alleged supracompetitive fees directly to Apple, a cardholder purchases one transaction's worth of services from a credit-card network every time she uses her card, and "the banks take the overcharge directly from the [c]ardholders' accounts." (*Id.* (first citing *Amex II*, 138 S. Ct. at 2286; then citing *Apple*, 139 S. Ct. at 1522; and then citing Compl. 2:3–4, ¶¶ 104, 110, 120).)

In response, Defendants argue that "*Amex II* did not address (much less change) the reason this Court and the Second Circuit dismissed [Plaintiffs' claims] — 'that cardholders do not directly pay interchange fees.'" (Defs. Opp'n 11 (quoting *Salveson*, 663 F. App'x at 75).) Defendants contend that "[m]arket definition and antitrust standing are separate questions," and that the holding in *Amex II* dealt only with market definition, without reference to standing and the direct-purchaser doctrine. (*Id.* at 12.) Defendants further argue that "[e]ven if one credited [Plaintiffs'] imaginative construction of *Amex II* — that cardholders are 'direct purchasers of the network's transactions' — they still did not directly pay the allegedly inflated interchange fees at issue in this case, and thus have no standing to sue." (*Id.*) Defendants point to three previous decisions — the November 26, 2014 Decision, the February 24, 2016 Decision, and the Second Circuit's decision affirming dismissal of Plaintiffs' federal claims — all of which found that the Plaintiffs' claim that they directly paid the interchange fee was refuted by the structure of the transaction at issue, both as alleged by Plaintiffs and as described by courts in related cases, and argue that *Amex II* does nothing to "change[] these facts" or "disturb this reasoning." (*Id.* at 13.) Finally, Defendants argue that *Apple* is "entirely inapposite," because while in that case, the plaintiffs, iPhone users, directly paid the alleged overcharge to the defendant, Apple, in this case, "both this Court and the Second Circuit have squarely held that [Plaintiffs] do not pay interchange fees <u>at all</u>, much less pay them directly to the defendants." (*Id.* at 13–14.)

2. Amex II does not disturb the prior reasoning of this Court or the Second Circuit

As discussed above, the Court's previous decisions finding that Plaintiffs lacked standing under *Illinois Brick* rested in part on the Court's understanding, consistent with then-controlling Second Circuit case law cited by Plaintiffs in the Complaint, that the "markets for general purpose payment cards and for payment card network services are separate and distinct," with cardholders participating only in the former. (*See* Nov. 24, 2016 Decision 6.) This framework had been endorsed by the Second Circuit in its decision in *Visa U.S.A., Inc.*, in regard to relevant market definition for purposes of the antitrust claims at issue in that case. *See Visa U.S.A., Inc.*, 344 F.3d at 238–39.

Following *Amex II*, that framework no longer reflects courts' understanding of the credit-card market in the context of relevant market analysis in antitrust cases. Instead, the Supreme Court has held that "the credit-card market" is a "two-sided transaction platform," in which "transactions are 'jointly consumed by a cardholder, who uses the payment card to make a transaction, and a merchant, who accepts the payment card as a method of payment.'" *Amex II*, 138 S. Ct. at 2286 (quoting Klein et al., Competition in Two–Sided Markets: The Antitrust Economics of Payment Card Interchange Fees, 73 Antitrust L.J. 571, 580 (2006)). "In cases involving two-sided transaction platforms, the relevant market must, as a matter of law, include both sides of the platform." *U.S. Airways, Inc.*, 938 F.3d at 57 (emphasis omitted).

While antitrust standing was not at issue in *Visa U.S.A., Inc.* and the decision did not address the direct-purchaser doctrine, Plaintiffs are correct that the market framework it adopted nevertheless provided a basis, in part, for the Court's reasoning that Plaintiffs were not direct purchasers under *Illinois Brick*. However, it does not follow that any change to that framework in the context of relevant market definition will necessarily affect whether Plaintiffs have standing. In finding that Plaintiffs lacked standing under *Illinois Brick*, the Court also pointed to Plaintiffs' allegations that "the interchange fee is exchanged between financial institutions." (*See* Feb. 24, 2016 Decision 9.) The Court rejected Plaintiffs' contention that "cardholders, as the first and only link in the credit card transaction chain to actually make a payment, pay the interchange fees charged for each transaction directly," (Nov. 26, 2014 Decision 4), finding that it was "refuted by [Plaintiffs'] own allegations about how transactions over the[] two networks occur," and "[bore] no resemblance to the transaction structure at the heart of this nine-year-old case," (*id.* at 7). Similarly, the Second Circuit, in finding that "the structure of these transactions demonstrates that cardholders do not directly pay interchange fees," noted that "the issuer bank pays the acquiring bank for the . . . purchase, retaining a portion as an interchange fee," and cited to other Second Circuit decisions for the proposition that the interchange fee is paid by the acquirer to the issuer. *Salveson*, 663 F. App'x at 75 (first citing *Amex I*, 838 F.3d at 188; and then citing *Wal-Mart Stores, Inc.*, 396 F.3d at 102).

Amex II does not disturb this Court's or the Second Circuit's reasoning that Plaintiffs do not directly pay the interchange fee. If anything, the Supreme Court's decision clarifies that this Court's discussion of *Visa U.S.A., Inc.* in its prior decisions is best understood as supporting the primary reasoning of those decisions, i.e., that the structure of the transaction at issue demonstrates that Plaintiffs are not direct purchasers under *Illinois Brick*. In *Amex II*, the Supreme Court held that, in the context of relevant market definition in antitrust cases, the credit-card market is a two-sided transaction platform that "facilitate[s] a single, simultaneous transaction between participants." 138 S. Ct. at 2286. A credit-card network "can sell its services only if a merchant and cardholder simultaneously choose to use the network," and "are thus better understood as 'supplying only one product' — transactions . . . [which] 'are jointly consumed by a cardholder . . . and a merchant.'" *Id.* (alteration omitted) (quoting Klein et al., *supra*, at 580). This forms the basis for the heart of Plaintiffs' argument — that following *Amex II*, "cardholder[s] and merchant[s] both consume each transaction," and "are both direct purchasers of the network's transaction." (Pls. Mem. 5.)

In taking this discussion of two-sided platforms in the context of relevant market definition and attempting to transpose it directly into a discussion about the direct-purchaser doctrine, Plaintiffs ignore that, in *Amex II*, the Supreme Court made clear that even as a cardholder and a merchant jointly consume a transaction, they each consume separate and distinct services from the network:

> The network provides separate but interrelated services to both cardholders and merchants. For cardholders, the network extends them credit, which allows them to make purchases without cash and to defer payment until later. . . . For merchants, the network allows them to avoid the cost of processing transactions and offers them quick, guaranteed payment.

Amex II, 138 S. Ct. at 2280. This distinction in services, in addition to being factually apparent in the context of credit-card network services, is inherent to the definition of a two-sided platform. *See id.* ("[A] two-sided platform offers different products or services to two different groups who both depend on the platform to intermediate between them."). Thus, when a cardholder and merchant simultaneously engage in a transaction, they consume two distinct services at precisely the same time:

> These platforms facilitate a single, simultaneous transaction between participants. For credit cards, the network can sell its services only if a merchant and cardholder both simultaneously choose to use the network. Thus, whenever a credit-card network sells one transaction's worth of card-acceptance services to a merchant it also must sell one transaction's worth of card-payment services to a cardholder. It cannot sell transaction services to either cardholders or merchants individually.

Id. at 2286. In defining the relevant market in an antitrust case involving credit-card networks, "courts must include both sides of the platform — merchants and cardholders," because given the relationship between pricing on one side of the platform and demand on the other, "[p]rice increases on one side of the platform . . . do not suggest anticompetitive effects without some evidence that they have increased the overall cost of the platform's services." *Id.* at 2285.

Thus, in the context of relevant market definition, the distinction between the services provided on each side of the platform is not particularly important. What matters instead is that for every credit-card transaction, there is necessarily activity on both sides of the platform, and activity on one side is inextricably linked to activity on the other. However, for purposes of determining whether Plaintiffs are direct purchasers, this distinction between services is critical: the "card-payment services" the network supplies to the cardholder primarily include the extension of credit, "which allows [her] to . . . defer payment until later,"[3] *id.* at 2280, 2286, and thus do not implicate the interchange fee. In fact, the reasoning in the Court's prior decisions relied on a similar distinction, despite using different terminology to describe it, and ultimately found that the distinction supported the conclusion that Plaintiffs did not pay the interchange fee.

In the November 26, 2014 Decision, the Court, relying on *Visa U.S.A., Inc.*, observed that "[t]he

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[3] In addition to the extension of credit, "[c]ardholders also can receive rewards based on the amount of money they spend, such as airline miles, points for travel, or cash back." *Ohio v. Am. Express Co.* (*Amex II*), 625 U.S. ---, ---, 138 S. Ct. 2274, 2280 (2018).

markets for general purpose payment cards and for payment card network services are separate and distinct, and payment-card consumers are considered to participate only in the former." (Nov. 26, 2014 Decision 6.) The Court went on to conclude that "[b]ecause the interchange fee runs between financial institutions within the card services market, consumers do not directly pay interchange fees and are not directly injured by their imposition." (*Id.* at 7.) In this context, the Court's reference to the "card services market" could just as well be a reference to the "card-acceptance services" supplied on one side of the two-sided platform but not the other. The Court further noted that Plaintiffs' "contention that cardholders pay interchange fees directly is refuted by their own allegations about how transactions over these two networks occur." (*Id.* at 7.)

Similarly, in the February 24, 2016 Decision, the Court found that "based on the allegations, Plaintiffs recognize that there is a distinction between two markets: one for payment cards . . . , in which consumers participate by purchasing cards from issuing banks, and another for network services . . . , *in which merchants purchase services to facilitate the use of those cards*." (Feb. 24, 2016 Decision 8–9 (emphasis added).) Again, the Court's reference to the market for network services is essentially a reference to the "card-acceptance services" that, as *Amex II* makes clear, Plaintiffs do not purchase. The Court found that these allegations, together with Plaintiffs' allegations that "the interchange fee is exchanged between financial institutions in the [network services market]," (*id.* at 9 (citing Compl. ¶ 48)), "directly contradicted" the allegation that "cardholders are the direct payors of interchange fees," (*id.* at 10).

The Court's discussion of two separate markets for cards and network services, drawn from then-current Second Circuit law defining relevant markets in antitrust cases involving credit-card networks, no longer reflects the precise way in which courts view credit-card markets in antitrust cases. Undoubtedly, these decisions would be written differently today. But the outcome would be the same, because nothing about the structure of the transaction at issue has changed. The Court previously cited *Visa U.S.A., Inc.*'s distinction between the market for general purpose payment cards and the market for payment card network services to support its finding that, based on the structure of the transaction at issue, Plaintiffs did not directly pay the interchange fee, and the Court now points to *Amex II*'s distinction between card-payment services and card-acceptance services to support that same proposition.

Significantly, in affirming this Court's decisions and finding that Plaintiffs lacked standing under *Illinois Brick*, the Second Circuit did not at all discuss the separate markets for cards and network services. Instead, the Second Circuit focused exclusively on the structure of the transaction, which, "[c]ontrary to [P]laintiffs' allegations, . . . demonstrates that cardholders do not directly pay interchange fees." *Salveson*, F. App'x at 75. To illustrate its point, the Second Circuit provided the following example:

> [W]hen a cardholder makes a $100 purchase, the merchant sends notice of the charge to its

> acquiring bank, and the acquiring bank in turn sends the information to the card issuer bank. If the charge is approved, the issuer bank pays the acquiring bank for the $100 purchase, retaining a portion as an interchange fee. The issuer bills the cardholder, who then is bound to pay the issuer according to the terms of the card.

Id. Thus, the Second Circuit reasoned, "[t]he cardholder has not directly paid the interchange fee, but rather has only paid the full price for the item or service it has purchased." *Id.* Thus, even if the market framework set forth in *Visa U.S.A., Inc.* and later displaced by *Amex II* had been central to this Court's reasoning, it played no role in the Second Circuit's decision finding that Plaintiffs lacked standing under *Illinois Brick*.

Plaintiffs contend that the inflated interchange fees come directly from the cardholders' accounts, and that cardholders directly pay the interchange fee. As the Court has previously found, this claim is contradicted by the structure of the transaction at issue, and it was this reasoning that drove both this Court and the Second Circuit to find that Plaintiffs were not direct purchasers under *Illinois Brick*. Because *Amex II* does nothing to disturb this reasoning, Plaintiffs still lack standing.

3. Apple does not apply

Plaintiffs argue that the Supreme Court's decision in *Apple* compels the conclusion that Plaintiffs are direct purchasers under *Illinois Brick*. (Pls. Mem. 5.) In support, Plaintiffs argue that just as the iPhone user plaintiffs in *Apple* purchased apps directly from the alleged antitrust violator, Apple, a cardholder swiping her card purchases one transaction's worth of card-payment services from the credit-card network. (*Id.* at 6 (first citing *Apple*, 139 S. Ct. at 1522; and then citing *Amex II*, 138 S. Ct. at 2286).) Plaintiffs further argue that just as the plaintiffs in *Apple* paid "'the alleged overcharge directly to Apple,' . . . the banks take the overcharge directly from the Cardholders' accounts." (*Id.* (first quoting *Apple*, 139 S. Ct. at 1522; and then citing Compl. 2:3–4, ¶¶ 104, 110, 120).) Plaintiffs argue that "there is no party between the cardholder and the credit-card banks — either on the sale of the transaction or on the payment of the overcharge," and thus under *Apple*, the Court must find that Plaintiffs are direct purchasers under *Illinois Brick*. (*Id.* at 6–7.)

As discussed at length above, Plaintiffs do not pay the interchange fee. Accordingly, Plaintiffs reliance on *Apple* is misplaced, and their attempt to analogize the facts in this case to the facts in *Apple* fails.

iii. Extraordinary circumstances do not warrant vacatur of the judgment pursuant to Rule 60(b)

Plaintiffs argue that there are "[e]xtraordinary circumstances" in this case that warrant vacatur of the judgment. (Pls. Mem. 7.) In support, Plaintiffs argue that due only to "a fluke in timing," cardholders and merchants are now subject to inconsistent treatment despite being "equally injured" by Defendants' alleged conduct, and that under Second Circuit precedent, this inconsistency constitutes an extraordinary circumstance warranting vacatur of the judgment. (*Id.* at 10.) In addition, Plaintiffs argue that the Supreme

Court's decision in *Apple* may also "be used to call into questions the [m]erchants' standing to sue, . . . leav[ing] no plaintiff available to prosecute" Defendants' alleged antitrust violations.[4] (*Id.*)

In response, Defendants argue that Plaintiffs have "fail[ed] to demonstrate any extraordinary circumstances here" because (1) "*Amex II* did not change the applicable decisional law," (Defs. Opp'n 6); (2) "[Plaintiffs] and merchants are [not] similarly situated 'victims' of the same tort," because "[i]f interchange fees were inflated, the effect would be to benefit cardholders (who would receive better rewards offers and other benefits)," (*id.*); and (3) "there is no reason that the parties who actually pay the interchange fee alleged to be anticompetitive — cannot bring suit," as "acquiring institutions have . . . in the past," (*id.* at 10).

As discussed above, although the Court finds that *Amex II* represents a change in the law, the Court finds that its prior reasoning, as well as the Second Circuit's,

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[4] Plaintiffs contend that just as the app developers in *Apple* "*received* a smaller percentage of the price than they would have absent the monopoly," but "*paid* nothing to Apple," in this case, "the credit card merchant does not *pay* anything to the banks as compensation for the sale of the transaction . . . even if, like the app developers, the merchants *received* a smaller percentage than they would have in a competitive environment." (Pls. Mem. 11.) Because the "overcharge . . . comes directly from [cardholders'] accounts," Plaintiffs argue, they, like the plaintiffs in *Apple*, are not only direct purchasers, but if successful on their claims, would be "'entitled to the *full amount* of the unlawful overcharge.'" (*Id.* (quoting *Apple v. Pepper*, --- U.S. ---, ---, 139 S. Ct. 1514, 1525 (2019)).)

in finding that Plaintiffs lack standing under *Illinois Brick* is undisturbed by *Amex II*. Because Plaintiffs still lack standing to sue under Section 4 of the Clayton Act, there is no basis for the Court to set aside its prior decisions. The Court therefore declines to address Plaintiffs' additional arguments as to why there are extraordinary circumstances present warranting vacatur of the judgment.

III. Conclusion

For the foregoing reasons, the Court denies Plaintiffs' motion to set aside the judgment.

Dated: July 15, 2020
Brooklyn, New York

SO ORDERED:

s/ MKB
MARGO K. BRODIE
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. 20-2658

[Filed August 13, 2021]

Melvin Salveson, Edward Lawrence, Dianna Lawrence, Wendy M. Adams,	)
Plaintiffs - Appellants,	)
v.	)
JPMorgan Chase & Co., JPMorgan Chase Bank, N.A., Bank of America Corporation, Bank of America N.A., Capital One, F.S.B., Capital One Financial Corporation, Capital One Bank, HSBC Finance Corporation, HSBC Bank USA, N.A., HSBC North America Holdings Inc., HSBC Holdings PLC,	)
Defendants - Appellees.	)

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 13th day of August, two thousand twenty-one.

ORDER

Appellants Melvin Salveson, Edward Lawrence, Dianna Lawrence and Wendy M. Adams filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
/s/ Catherine O'Hagan Wolfe

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

Case No: CV 13 5816

[Filed December 16, 2013]

MELVIN SALVESON, an individual,)
EDWARD LAWRENCE, an individual)
DIANNA LAWRENCE, an individual)
and WENDY M. ADAMS, an individual on)
behalf of themselves and those similarly)
situated,)
)
Plaintiffs,)
)
v.)
)
JP MORGAN CHASE & CO; J.P. MORGAN)
BANK, N.A.; BANK OF AMERICA)
CORPORATION; BANK OF AMERICA N.A.;)
CAPITAL ONE F.S.B.; CAPITAL ONE)
FINANCIAL CORPORATION; CAPITAL)
ONEBANK; HSBC FINANCE)
CORPORATION; HSBC BANK USA, N.A.;)
HSBC NORTH AMERICAN HOLDINGS,)
INC.; HSBC HOLDINGS, PLC,)
)
Defendants.)
)

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Attorneys for Plaintiffs
And All Others Similarly Situated
[ADDITIONAL COUNSEL APPEAR ON LAST PAGE]

CLASS ACTION COMPLAINT FOR VIOLATIONS OF THE SHERMAN ACT (15 USC § 1), THE CALIFORNIA CARTWRIGHT ACT (BUS. & PROF. CODE § 16700 *et seq.*)

DEMAND FOR JURY TRIAL

Transactions in the United States involving general purpose payment cards amount to more than one trillion, eight hundred billion dollars ($1,800,000,000,000) annually. These transactions are subject to so-called "Interchange Fees" and other fees that are paid directly by cardholders to the banks that issue the payment cards (including the Defendants herein). Since at least 1991, the Defendants and their co-conspirators have conspired to fix the Visa and MasterCard Interchange Fees, and as a result they extract more than fifty-four billion ($54,000,000,000) each year from Visa and MasterCard cardholders by way of illegal overcharges.

Plaintiffs Dr. Melvin Salveson, Edward Lawrence, Dianna Lawrence and Wendy M. Adams bring this action, on behalf of themselves and all other Visa and MasterCard cardholders similarly situated within the United States ("Cardholders"), in order to obtain damages, treble damages, restitution, legal fees, and injunctive relief under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26, and Section 16750(a) of the California Business & Professions Code, against Defendants Bank of America Corporation; Bank of America, N.A. (together, "Bank of America"); JP Morgan Chase & Co; J.P. Morgan Bank, N.A. (together, "J.P. Morgan Chase"); Capital One Bank; Capital One F .S.B.; Capital One Financial Corporation (together, "Capital One"); HSBC Finance Corporation; HSBC Bank USA, N.A.; HSBC North American Holdings; HSBC Holdings, plc (together, "HSBC"), arising out of Defendants' violations of the Sherman Act, 15 U.S.C. § 1, and Sections 16700 *et seq.*, 16720 *et seq.*, of the California Business & Professions Code (the "Cartwright Act"). Plaintiffs demand a trial by jury, and allege and complain as follows:

1. Plaintiffs on behalf of a nationwide class of Visa and MasterCard Cardholders, similarly situated, seek injunctive relief, legal fees, and monetary damages, including treble damages, to compensate them for more than fifty-four billion dollars ($54,000,000,000) in illegal overcharges imposed upon them each year by Defendants J.P. Morgan Chase, Bank of America, Capital One, and HSBC and their co-conspirators as a result of agreements among Defendants and their co-conspirators to fix the Visa and MasterCard Interchange Fees paid directly by Cardholders on annual transactions totaling more than one trillion eight hundred billion dollars ($1,800,000,000,000).

2. No court has ever been confronted with such massive figures. In the absence of this price-fixing conspiracy, more than forty billion dollars ($54,000,000,000) per year would have been available to Cardholders as disposable income in the United States economy. This price-fixing conspiracy is ongoing and additional overcharge dollars are being extracted from Cardholders pursuant to the conspiracy every time they swipe their Visa and MasterCard payment cards.

3. Visa's uniform *Operating Regulations* (including Section 9.4 entitled "Interchange Reimbursement Fees), issued May 15, 2000, and Visa's *OpRegs* (including Section 9.5), re-issued November 15, 2008, and other agreements pertaining to the fixing of Visa Interchange Fees and other anticompetitive restraints were adopted, ratified, agreed to and implemented by Defendants and their co-conspirators.

Similarly, MasterCard's uniform *MasterCard Worldwide US. and Interregional Interchange Rates* (hereafter "*MasterCard's Interchange Rates*"), *MasterCard Rules*, *MasterCard Consolidated Billing System Reports*, and related other agreements pertaining to the fixing of MasterCard Interchange Fees and other anticompetitive restraints were adopted, ratified, agreed to and implemented by Defendants and their co-conspirators. Such agreements among Defendants and their co-conspirators to fix the Interchange Fees paid directly by Visa and MasterCard Cardholders nationwide are illegal price-fixing agreements.

4. Because J.P. Morgan Chase, Bank of America, Capital One and HSBC are competitors, their horizontal conspiracy to fix the Interchange Fees, using Visa and MasterCard as co-conspirator implementers of their nationwide price-fixing scheme, is per se illegal under Section 1 of the Sherman Act and the California Cartwright Act.

5. Pursuant to their unlawful agreements, Defendants have fixed Interchange Fees and imposed them directly on Visa and MasterCard Cardholders for transactions processed over the Visa and MasterCard computer network systems. In furtherance of the conspiracy, Defendants and their co-conspirators also agreed to and have collectively imposed restraints on competition, such as so-called "Exclusionary Rules," "No Discount Rules," "No Surcharge Rules," and "Honor All Cards Rules," as well as Anti-Steering and other restrictions imposed upon merchants to the detriment of Cardholders.

6. The supracompetitive Interchange Fees fixed by Defendants and paid directly by Visa and MasterCard Cardholders are traceable through the application of economic analyses to the computerized bank records of Defendants, their bank co-conspirators, and their co- conspirators Visa and MasterCard.

JURISDICTION AND VENUE

7. This is an action under Section 4 of the Clayton Act (15 U.S.C. § 15) and Section 16750(a) of the Cartwright Act to recover damages and legal fees, including treble damages, and under Section 16 of the Clayton Act (15 U.S.C. § 26) and the Cartwright Act to obtain injunctive and equitable relief, against the Defendants J.P. Morgan Chase, Bank of America, Capital One, and HSBC due to their violations of Section 1 of the Sherman Act (15 U.S.C. § 1), as well as the Cartwright Act and other laws of the State of California, arising from Defendants' illegal conspiracy to fix Visa and MasterCard Interchange Fees and to impose other restraints on competition that injured Cardholders. Jurisdiction of this Court is based on violations of the Sherman Act (15 U.S.C. § 1) and the California Cartwright Act (Cal. Bus. & Prof. Code § 16700 *et seq.*, 16720 *et seq.*).

8. This Court has subject matter jurisdiction under Sections 4 and 16 of the Clayton Antitrust Act (15 U.S.C. §§ 15 and 26), Section 1 of the Sherman Act (15 U.S.C. § 1), and Title 28, United States Code, Sections 1331 and 1337. This Court has subject matter jurisdiction of California law claims asserted in this action under Title 28, United States Code, Sections 1332(d) and 1367, in that the amount in controversy

exceeds the sum of $5 million exclusive of interest and costs, and members of the nationwide Cardholder class are citizens of states different from defendants.

9. Venue is proper in this Judicial District pursuant to Section 12 of the Clayton Act (15 U.S.C. § 22) and Title 28, United States Code, Section 1391 (b), (c), and (d), because a substantial part of the events giving rise to plaintiffs' claims occurred in this District, a substantial portion of the affected interstate trade and commerce was carried out in this District, and one or more of the Defendants J.P. Morgan Chase, Bank of America, Capital One, and HSBC has an agent, maintains an office or does business in this District.

10. Defendants J.P. Morgan Chase, Bank of America, Capital One, and HSBC conduct business throughout the United States, including in this jurisdiction, and they have purposefully availed themselves of the laws of the United States, as well as the laws of the State of California. Defendants J.P. Morgan Chase, Bank of America, Capital One, and HSBC Payment Card products and services are sold in the flow of interstate commerce, and defendants' activities had a direct, substantial and reasonably foreseeable effect on such commerce.

11. Defendants J.P. Morgan Chase, Bank of America, Capital One, and HSBC have availed themselves of the laws of the State of California relating to the production, marketing, and sale of Visa and MasterCard products and services. Defendants J.P. Morgan Chase, Bank of America, Capital One, and HSBC produced, promoted, sold, marketed, and/or distributed Visa and MasterCard products and services

in California and throughout the 50 United States plus the District of Columbia, thereby purposefully profiting from access to Visa and MasterCard Cardholders in California nationwide. As a result of the activities described herein, Defendants:

a. Caused injury and damage to Visa and MasterCard Cardholders in the Northern District of California and each of the 50 states plus the District of Columbia by overt acts of combination, agreement, and conspiracy to fix the Interchange Fees and to impose other restraints on competition by adopting and ratifying price-fixing agreements and trade restraints in California and enforcing price-fixing agreements and trade restraints from California;

b. Engaged in continuing courses of conduct within California and each of the 50 States plus the District of Columbia and/or derived substantial revenue in California from the marketing of Visa and MasterCard payment cards or related products and services from California used in each of the 50 United States plus the District of Columbia; and

c. Committed acts or omissions in California that they knew or should have known would cause damage and that did, in fact, cause such damage, while regularly soliciting business from California in each State plus the District of Columbia, engaging in continuing courses of conduct, and/or deriving substantial revenue from the marketing of Visa and MasterCard payment cards or related products and services nationwide.

12. The California-based conspiracy of Defendants has resulted in injury or damage to the members of the nationwide class of Visa and MasterCard Cardholders in each of the 50 United States plus the District of Columbia who directly paid supra-competitive Interchange Fees inflated as a consequence of Defendants' scheme.

13. Interchange Fees nationwide were raised to supra-competitive levels by the price-fixing conspiracy among Defendants J.P. Morgan Chase, Bank of America, Capital One, and HSBC. Defendants' illegal conduct has resulted in injury and damage to Visa and MasterCard Cardholders within the Northern District of California, within the State of California and throughout the United States, and the trade described herein is carried on in interstate commerce.

THE PLAINTIFFS

14. Plaintiff, Dr. Melvin Salveson, a California resident, has been issued Visa and MasterCard payment cards, and has purchased many thousands of dollars' worth of goods and services and paid related Interchange Fees on Visa and MasterCard transactions at prices inflated by the Defendants' price-fixing conspiracy over many years. Dr. Salveson and others similarly situated have been injured in that they have paid more in Interchange Fees than they would have paid in the absence of Defendants' antitrust violations.

15. Dr. Salveson is the inventor of the credit card form of payment card here in issue, and is particularly knowledgeable about the origins, workings, operations of Visa and MasterCard and their computer networks.

In or about 1968, Dr. Salveson received patents on the very credit cards that are now the subject of this litigation.

16. Wendy M. Adams, a California resident, has been issued Visa and MasterCard payment cards, including payment cards issued by Bank of America and J.P. Morgan Chase and has purchased thousands of dollars' worth of goods and services and paid related Interchange Fees on Visa and MasterCard transactions at prices inflated by the Defendants' price-fixing conspiracy over many years. Wendy Adams and others similarly situated have been injured in that they have paid more in Interchange Fees than they would have paid in the absence of the antitrust violations of Defendants.

17. Edward Lawrence, a California resident, has been issued Visa and MasterCard Payment Cards, including Payment Cards issued by J.P. Morgan Chase, and has purchased thousands of dollars' worth of goods and services and paid related Interchange Fees on Visa and MasterCard transactions at prices inflated by the Defendants' price-fixing conspiracy over many years. Edward Lawrence and others similarly situated have been injured in that they have paid more in Interchange Fees than they would have paid in the absence of Defendants' antitrust violations.

18. Dianna Lawrence, a California resident, has been issued Visa and MasterCard Payment Cards, including Payment Cards issued by J.P. Morgan Chase, and has purchased thousands of dollars' worth of goods and services and paid related Interchange Fees on Visa and MasterCard transactions at prices inflated by the

Defendants' price-fixing conspiracy over many years. Dianna Lawrence and others similarly situated have been injured in that they have paid more in Interchange Fees than they would have paid in the absence of Defendants' antitrust violations.

<u>PLAINTIFF CARDHOLDER CLASS ACTION ALLEGATIONS</u>

19. Plaintiffs bring this action under Federal Rule of Civil Procedure Rule 23, on behalf of themselves and a class defined as follows:

> All Visa and MasterCard Cardholders in the United States who paid supracompetitive Interchange Fees to Defendants and their co-conspirators incident to the purchase of retail products or services using a Visa or MasterCard Payment Card, at any time during the period at least since January 1, 2000 to and including class certification, herein. Excluded from the class are Defendants, any co-conspirators of Defendants, Defendants' predecessors, successors, parent, subsidiaries, affiliates, officers and directors, federal and state government entities and agencies, cities, counties, and other municipalities, and any judge, justice or judicial officer presiding over this matter and members of their immediate family.

20. "Cardholders" and "Cardholder Class" as used herein mean all holders of Visa and MasterCard credit and debit payment cards resident in the 50 United States plus the District of Columbia.

CLASS ACTION COMPLAINT

21. The anticompetitive conduct of Defendants J.P. Morgan Chase, Bank of America, Capital One, and HSBC alleged herein has imposed, and threatens to impose, a common antitrust injury on Plaintiffs and the Plaintiff Visa and MasterCard Cardholder Class members. The number of potential Plaintiff Cardholder Class members is so numerous that joinder is impracticable.

22. Plaintiffs, as representatives of the Plaintiff Visa and MasterCard Cardholder Class will fairly and adequately protect the interests of the class members and have engaged counsel experienced and competent in litigation of this type. The interests of plaintiffs are coincident with, and not antagonistic to, those of the class members.

23. The anticompetitive conduct of Defendants has been substantially uniform. Plaintiffs' claims are typical of those to be asserted by the Visa and MasterCard Cardholder Class. Except as to the amount of damages each member of the class has sustained, all other questions of law and fact are common to the class, including, but not limited to, the combination and conspiracy and acts of unfair competition hereinafter alleged, and the effects of such violation.

24. The questions of law and fact common to the members of the class predominate over any questions affecting only individual members of the class. Among the questions of law and fact common to the class are the following:

a. Whether Defendants J.P. Morgan Chase, Bank of America, Capital One, and HSBC illegally combined, agreed and conspired to set, fix and establish uniform schedules of Interchange Fees for payment card transactions, which were imposed directly on Visa and MasterCard Cardholders, thereby extracting supra-competitive Interchange Fees.

b. All questions of law and fact relating to Defendants are common to all members of the class especially since Defendants have participated in a common combination, agreement and conspiracy with Visa and MasterCard to adopt, ratify, implement and enforce the payment of Interchange Fees by Visa and MasterCard Cardholders and enforced implementation of the common trade restraints and have adopted, ratified, implemented and enforced Visa's uniform *Operating Regulations* and related rules, and MasterCard's uniform *MasterCard Worldwide US. and Interregional Interchange Rates* and related documents, implementing their common Interchange Fees price-fixing conspiracy over Visa's BASE II network system and MasterCard's network system.

c. Plaintiffs' claims against Defendants are typical of the claims against, Defendants by class members. The separate prosecution by individual class members would create risks of inconsistency or varying adjudications respecting the validity, scope, and enforceability of Visa's uniform *Operating Regulations* and related rules, and MasterCard's *Interchange Rates Rules*, by-laws and related rules, and the existence of and legal effect of the combination, agreement and conspiracy among Defendants J.P. Morgan Chase, Bank of America, Capital One, and HSBC.

25. Class action treatment is a superior method for the fair and efficient adjudication of the controversy, as joinder is impracticable. Since the damages suffered by many Class members are small in relation to the expense and burden of individual litigation, it is highly impractical for such Class members to individually attempt to redress the wrongful anticompetitive conduct alleged herein.

THE DEFENDANTS

26. Defendant J.P. Morgan Chase & Co. and Defendant J.P. Morgan Chase N.A. (together, "J.P. Morgan Chase") are Delaware corporations with their principal place of business in New York, New York, whose predecessor Chase Bank held seats on MasterCard International's and MasterCard U.S. Region boards of Directors as well as on major committees of both Visa and MasterCard. Defendants J.P. Morgan Chase and their predecessors have issued general purpose payment cards in this judicial district, and do business in California and in interstate commerce. J.P. Morgan Chase is an Issuer of Visa and MasterCard payment cards. It has had actual knowledge of, and has knowingly participated in, the conspiracy alleged in this Complaint.

27. Defendant Bank of America NA is a Delaware Corporation and Defendant Bank of America Corporation is a Delaware corporation (together, "Bank of America") that had their principal place of business in San Francisco, California during the development of

BankAmericard and the BASE II system that its San Francisco Bay Area-based successor, Visa, employs to effectuate Cardholders' payment of price-fixed Interchange Fees directly to Defendants. Bank of America had a seat on Visa International's Board of Directors, and on major committees of Visa and MasterCard. Bank of America later relocated its principal place of business to Charlotte, North Carolina, and subsequently acquired Countrywide Bank and MBNA Bank, which significantly increased its general purpose payment card issuing capacity and power. It has issued general purpose payment cards in this judicial district, in California and does business in interstate commerce. Bank of America is an Issuer of Visa and MasterCard payment cards. It has had actual knowledge of, and has knowingly participated in the conspiracy alleged in this Complaint.

28. Defendant HSBC Finance Corporation is a Delaware corporation with its principal place of business in Prospect Heights, Illinois. It is a subsidiary of Defendant HSBC Bank USA, NA, a Delaware corporation with its principal place of business in Wilmington, Delaware, which is a subsidiary of Defendant HSBC North America Holdings, Inc. which is a subsidiary of defendant HSBC Holdings, plc, a United Kingdom corporation with its principal place of business in London, England. These entities are collectively referred to as "HSBC." HSBC Finance Corporation is the successor to Household Finance Corporation that held seats on MasterCard International's and MasterCard International's U.S. Region Boards of Directors as well as on major committees of both Visa and MasterCard. HSBC is an

Issuer of Visa and MasterCard payment cards. It has had actual knowledge of, and has knowingly participated in, the conspiracy alleged in this Complaint. In 2012, HSBC Finance and HSBC North America were acquired by Capital One.

29. Defendant Capital One Bank F.S.B. is a Virginia bank with its principal place of business in Glen Allen, Virginia, has its principal place of business in McClean, Virginia, is wholly owned-owned subsidiary of Defendant Capital One Financial Corporation, a Delaware corporation with its principal place of business in McLean, Virginia. Defendants Capital One Bank, Capital One F.S.B., and Capital One Financial Corporation are collectively referred to as "Capital One." Capital One is a member of both Visa and MasterCard, has been represented on the MasterCard Board of Directors, has issued general purpose payment cards in this judicial district, and does business in interstate commerce. Capital One is an Issuer of Visa and MasterCard payment cards. It has had actual knowledge of, and has knowingly participated in, the conspiracy alleged in this Complaint. In 2012, Capital One acquired HSBC Finance and HSBC North America.

30. Co-conspirator Wells Fargo Bank, NA is a Delaware corporation with its principal place of business in San Francisco, California and is an Issuer and an Acquirer of Visa and MasterCard Payment Cards, which during pertinent times herein had a seat on Visa U.S.A., Inc.'s Board of Directors as did Wachovia Bank, which was acquired by Wells Fargo. Both banks had seats on major committees of Visa and

MasterCard and both have issued Visa and MasterCard payment cards in this judicial district, and do business in interstate commerce. Wells Fargo has had actual knowledge of, and has knowingly participated in, the conspiracy alleged in this complaint. In 1966, Wells Fargo Bank through its predecessor California banks, headquartered in San Francisco, California formed the Interbank Card Network ("ICA"), which joined with HSBC Bank USA to create "MasterCharge The Interbank Card." In 1979, "MasterCharge The Interbank Card" changed its name to "MasterCard." Well Fargo Banks's predecessor California banks were San Francisco headquartered Crocker National Bank, which merged into Wells Fargo Bank and San Francisco headquartered United California Bank, which became First Interstate Bank and subsequently merged into Wells Fargo Bank.

31. Co-conspirator Visa U.S.A., Inc. ("Visa"), is organized under the laws of the State of Delaware, with its principal places of business in San Francisco, California and Foster City, California. Visa has offices, agents and transacts business, and is found in San Francisco, California and Foster City, California. Visa is the successor to the original BankAmericard, which originated in San Francisco, California where its BASE II software was developed so that Visa, its successor, could affect the network transactions by which Cardholder's payment of Interchange Fees to Bank Issuers and Acquirers is performed. Visa entered into agreements and arrangements with its Issuers to set, fix, establish, adopt, ratify, and enforce uniform, standard payment card Interchange Fees including, among other things as set forth in Visa's *Operating*

Regulations at Chapter 9 "*Fees and Charges*" sec. 9.4, 9.5 "*Interchange Reimbursement Fees*," drafted, adopted and promulgated by Visa in the San Francisco, California Bay Area, which are the price-fixed Interchange Fees that Defendants have adopted, ratified, agreed to, implemented and comply with. It has had actual knowledge of, and has knowingly participated in the conspiracy alleged in this Complaint.

32. Co-conspirator MasterCard International Incorporated ("MasterCard"), which was originated in the San Francisco Bay Area as MasterCharge, is organized under the laws of the State of Delaware, with its principal place of business in Purchase, New York. MasterCard has offices, agents, and transacts business, and is found in the Northern District of California, including in San Francisco, California. MasterCard's anticompetitive policies are extensions of the anticompetitive policies developed and enforced by Visa in San Francisco, California and MasterCard has engaged in anticompetitive meetings and litigation in the Northern District of California to fix Interchange Fees and to enforce trade restraints in furtherance of the conspiracy to fix Interchange Fees alleged in this Complaint. It has had actual knowledge of, and has knowingly participated in the conspiracy alleged in this Complaint.

33. Co-conspirator Citibank a.k.a Citicorp is a Delaware corporation with its principal place of business in New York, New York that held seats on MasterCard International's and MasterCard U.S.

Region Boards of Directors as well as on major committees of both Visa and MasterCard.

34. Various persons, firms, corporations, organizations, and other business entities, some unknown and others known, have participated as co-conspirators in the violations alleged and have performed acts in furtherance of the conspiracies. Defendants J.P. Morgan Chase, Bank of America, Capital One, and HSBC and their co-conspirators received approximately $700 Billion in Troubled Asset Recovery Program ("TARP") bailout funds in 2008 and after from United States taxpayers through the U.S. Department of the Treasury. Plaintiffs may seek leave to amend this complaint to add the co-conspirators, known and unknown as Defendants.

THE ORIGINS OF VISA AND MASTERCARD

35. The Visa and Mastercard networks evolved from regional and local credit card systems formed during the l 960's. Visa's predecessor, BankAmericard, was the local credit card program of Bank of America, founded and based in San Francisco, California by A. P. Gianini. In 1970, the San Francisco program was introduced throughout the United States under the name National Bank Americard, Inc. In 1977, its name was changed to Visa.

36. With the development of computer technology, Bank of America's IT staff in 1976 created a data processing network and software program, known as BASE II, for the clearing and settlement of its BankAmericard Payment Card transactions (BASE stands for "Bank of America System Engineering"). The

BASE II system is utilized by all Defendants, who are all members of Visa, to provide net daily account settlement of payment card transactions among Defendants and their co-conspirator Visa and MasterCard members.

37. MasterCard was also formed and originated in the San Francisco Bay Area. In 1966, Wells Fargo Bank through its predecessor California banks, headquartered in San Francisco, California formed the Interbank Card Network ("ICA"), which joined with HSBC Bank USA to create "MasterCharge The Interbank Card." In 1979, "MasterCharge The Interbank Card" changed its name to "MasterCard." It operates a network computer system similar to Visa's BASE II.

38. A typical Visa or MasterCard payment card transaction involves four parties: (a) the Cardholder, who seeks to purchase a good or service utilizing his or her card; (b) a Visa or MasterCard member bank that issued the payment card (the "Issuer"); (c) the merchant who is selling the good or service; and (d) the merchant's own bank (known in industry parlance as the "Acquirer"). The Cardholder (such as the Plaintiffs here) pays the gross amount of the transaction, including fees, directly to the Issuer, which keeps the Interchange Fee and passes on a separate transaction fee to the Acquirer and the net transaction amount to the merchant via the Visa or MasterCard network.

DEFENDANTS' ILLEGAL CONSPIRACY TO FIX VISA AND MASTERCARD INTERCHANGE FEES IS DOCUMENTED IN WRITTEN AGREEMENTS, INCLUDING VISA'S OPERATING REGULATIONS AND MASTERCARD'S INTERCHANGE RATE AGREEMENTS

39. Since at least 1991, Defendants Bank of America, J.P. Morgan Chase, Capital One and HSBC and their co-conspirators have entered into illegal written membership agreements and written perpetual license agreements with Visa U.S.A., Inc. requiring Interchange with all other licensees and members of Visa and agreeing to, adopting, ratifying, and implementing (a) Visa's *Operating Regulations* including Interchange rates, among other agreements, including Bank Agreements, Membership Agreements and Partnership Agreements (*e.g.* Partnership II Agreements), and (b) illegal written membership agreements and written perpetual license price-fixing agreements with MasterCard International, Inc. requiring Interchange with all other Licensees and members of MasterCard and agreeing to, adopting, ratifying, and implementing MasterCard's uniform *MasterCard Worldwide US. and Interregional Interchange Rates, MasterCard Rules, MasterCard Consolidated Billing System Report*, among other agreements, in a conspiracy to fix and enforce uniform, standard Visa and MasterCard Interchange Fees, utilizing Visa's BASE II network computer system and MasterCard's network computer system to implement their price-fixing agreements.

The Visa network and its *Operating Regulations* and the MasterCard network and its *Rules*, *Interchange Rates* and *Billing System* were and are the hubs of the conspiracy to fix Interchange Payment Card rates and each of the defendants and their co-conspirator members were obligated to apply these regulations and rules by Membership Agreements, Licensing Agreements and other written agreements with Visa and MasterCard, which agreements preceded and continue on to the present after Visa's IPO and MasterCard's IPO. Each of the Defendants and their co-conspirator members of Visa and MasterCard knew that they were in competition with each other and that without substantially common action with respect to Interchange and increases in Interchange, there was a prospect of a loss of business contrary to each member's self-interest if each member bank acted independently, but that with the conspiracy to fix Interchange rates there was the prospect of increased profits. Defendants and their member banks and Visa and MasterCard knew and was assured that it would not lose business to its competitor banks due to the fact that Defendants and their co-conspirators were engaged in a conscious commitment to a common scheme to fix the price of Interchange Fees.

40. The Defendants have collectively agreed to Visa's by-laws and *Operating Regulations*, including Chapter 9 "*Fees and Charges*," sections 9.4 and 9.5 "Interchange Reimbursement Fees," that fix uniform Interchange Fees for Visa payment cards, which are automatically implemented through Visa's BASE II network computer system.

As of December 5, 2013, Visa states on its website:

> "VISA U.S.A. Interchange Reimbursement Fees
>
> The following tables set forth the interchange reimbursement fees applied on Visa financial transactions completed within the 50 United States and the District of Columbia.
> Visa uses interchange reimbursement fees as transfer fees between financial institutions to balance and grow the payment system for the benefit of all participants. Merchants do not pay interchange reimbursement fees; merchants pay "merchant discount" to their financial institution. This is an important distinction, because merchants buy a variety of processing services from financial institutions; all these services may be included in their merchant discount rate, which is typically a percentage rate per transaction."

41. For instance, the Visa U.S.A., Inc. *Operating Regulations* dated November 14, 2008 state:

> "Consumer Credit Transactions – Interchange Reimbursement Fee:
>
> Standard Interchange Reimbursement Fee – 2.70% of Net Sales plus $0.10 per item" (Visa *Operating Regulations* 9.5.A.1 November 15, 2008)

The updated version for 2010 online entitled "Visa U.S.A. Interchange Reimbursement Fees" states at page 3:

> "Visa U.S.A. Consumer Credit Interchange Reimbursement Fees, Rates Effective April 17, 2010:
>
> Standard Interchange Reimbursement Fee – 2.95% + $0.10 Fees paid to cardholder financial institution."

42. Defendants adopted, ratified and agreed on the Visa *Operating Regulations* that fix Interchange Fees (and impose other anti-competitive restraints on interstate commerce, as described below), in San Francisco, California.

43. Similarly, Defendants have collectively entered into membership agreements to fix MasterCard Interchange Fees and agreed to MasterCard's uniform *MasterCard Worldwide US. and Interregional Interchange Rates, MasterCard Rules, MasterCard Consolidated Billing System Report*, among other agreements, which are automatically implemented through MasterCard's network computer system

44. For instance, MasterCard's *MasterCard Worldwide US. and Interregional Interchange Rates* effective April 2010 states:

> "U.S. Interchange Rates MasterCard Consumer Credit Core Value
> Cards: 2.95% + USD 0.10"

45. Defendants adopted and implemented the *MasterCard Worldwide US. and Interregional Interchange Rates* that fix Interchange Fees (and impose other anti-competitive restraints on interstate

commerce, as described below), in San Francisco, California.

46. No defendant or co-conspirator has made any affirmative withdrawal from the conspiracy, combination and agreement to fix the prices of Interchange Fees.

THE PRICE-FIXED, UNIFORM INTERCHANGE FEES ARE ELECTRONICALLY IMPLEMENTED BY VISA'S BASE II COMPUTER NETWORK SYSTEM AND MASTERCARD'S COMPUTER NETWORKS

47. Pursuant to Visa's *Operating Regulations*, the MasterCard Worldwide U.S. and Interregional Interchange Rates agreements, and other agreements among Defendants and their co-conspirators that fix Interchange Fees, the Visa BASE II computer network system and MasterCard's computer network system automatically implement the Interchange Fees at the rates fixed by defendants and transfer the amounts of the Interchange Fees directly from the Cardholders' accounts to the Defendants in real time.

48. For example, the BASE II system enables virtually simultaneous, multiple payments flowing from a Cardholder's single swipe of her card. If, say, a Cardholder uses her Visa or MasterCard Payment Card for a $100 purchase, Visa's BASE II network software and MasterCard's network software electronically implement and force the Cardholder to make three (3) virtually instantaneous and simultaneous payments: (a) a $3.05 Interchange Fee (i.e., 2.95% + US$ 0.10) paid directly from the Cardholder's account to the

Defendants, as the Cardholders' payment card Issuer Banks, in a direct computer-generated transfer of the Cardholders's funds to Defendants; (b) a separate processing fee (say, $0.60 for illustrative purposes) paid directly from the Cardholder's account to the Defendants, and passed on by Defendants to the merchant's bank (i.e., the "Acquirer" bank); and (c) a $96.35 electronic payment of the Cardholder's funds transmitted directly to the merchant's account at the Acquirer bank. It should be noted that much (perhaps most) of the time, the Defendants and/or their co-conspirators are also the Acquirer banks and thus the processing fee ($0.60 in the example above) is pocketed by them in addition to the $3.05 Interchange Fee.

49. In *United States v. Visa U.S.A., Inc. et al.* 344 F.3d 229 (2d Cir. 2003), the Second Circuit acknowledged that Cardholders pay Interchange Fees and additional processing fees directly to the Issuer banks. Based on the Interchange Fee rates agreed among the Defendants and their co-conspirators that were then in force, the court found as follows:

> When a consumer uses a Visa card or a MasterCard card to pay for goods or services, the accepting merchant relays the transaction information to the acquiring bank with which it has contracted. The acquirer processes and packages that information and transmits it to the network (Visa U.S.A. or MasterCard). The network then relays the transaction information to the cardholder's issuing bank, which approves the transaction if the cardholder has a sufficient

> credit line. Approval is sent by the issuer to the acquirer, which relays it to the merchant.
>
> Payment requests are sent by the merchant to the acquirer, which forwards the requests to the issuer. The issuer then pays the acquiring bank the amount requested, less what is called an "interchange fee—typically 1.4%. The acquirer retains an additional fee—approximately .6%. Thus, the issuing bank and the acquirer withhold an aggregate of approximately 2% of the amount of the transaction from the merchant. This is known as the "merchant discount." For a $100 sale, the merchant typically will receive $98, the issuing bank retaining $1.40, while the acquiring bank retains 60 cents.

50. In *United States v. Visa U.S.A., Inc. et al.* 344 F.3d 229 (2d Cir. 2003), the Second Circuit expressly held that Cardholders are "direct purchasers" for antitrust purposes: "in the market for general purpose [credit cards], the issuers are the sellers, and the cardholders are the buyers . . . "

DEFENDANTS ENGAGED IN NUMEROUS OTHER ANTI-COMPETITIVE ACTS IN FURTHERANCE OF THE CONSPIRACY

51. As described in the following paragraphs, Defendants in furtherance of their conspiracy to fix Interchange Fees agreed to implement, impose and enforce other restraints on competition, such as "Exclusionary Rules" that prevent Visa and

MasterCard member banks from offering competing payment cards; "No discount Rules"; "No Surcharge Rules"; "Honor All Cards Rules"; and "Non-disclosure Rules" (which mandate concealment of Visa and MasterCard Interchange Fees from Cardholders). Also in furtherance of the conspiracy, Defendants employ such anti-competitive strategies as bundling Payment Guarantees and Network Process Servicing, and Anti-Steering restrictions that preclude merchants from (a) steering Cardholders to less expensive forms of payment, (b) negotiating less expensive Interchange Fees, and/or (c) otherwise protecting Cardholders from the supra-competitive, inflated Visa and MasterCard Interchange Fees and overcharges.

52. Such trade restraints were incorporated in Visa's *Operating Instructions* and promulgated through the offices Visa has maintained in San Francisco, California and Foster City, California. Similarly, such trade restraints were incorporated in MasterCard's Worldwide U.S. and Interregional Interchange Rates agreements and related agreements and promulgated through offices in San Francisco, California and nationwide.

(1) In Furtherance of the Interchange Price-Fixing Conspiracy, the Exclusionary Rules Were Adopted and Implemented in California and Enforced Nationwide

53. In furtherance of the Interchange Fee price-fixing conspiracy, Defendants through Visa and MasterCard adopted, ratified and implemented exclusionary rules to exclude competition such as

American Express and Discover from offering their cards through member banks of Visa and MasterCard. As the District Court found in *United States v. Visa U.S.A., Inc. et al.*, 163 F.Supp.2d 322, 379 (SDNY 1991), aff'd 344 F.3d 229 (2d Cir. 2003), *cert. denied* 160 L.Ed 2d 14 (Oct. 2004) (hereinafter "the *DOJ Case*"):

> In 1991, Visa U.S.A. passed by-law 2.10(e). It provides that "*the membership of any member shall automatically terminate* in the event it, or its parent, subsidiary or affiliate, issues, directly or indirectly, Discover Cards or American Express Cards, or any other card deemed competitive by the Board of Directors." (Ex. P-0647) (emphasis added.)

54. Visa's By-law 2.10(e) was drafted in Visa's Legal Department in San Francisco by Visa's Corporate Counsel Bennett Katz, adopted in March, 1991 in California on the votes of Defendants as members of the Visa Board of Directors and enforced through Visa from San Francisco, California as shown in Government Exhibit P-0647 in that case.

55. In furtherance of the conspiracy to fix Interchange Fees, Defendants in utilizing Visa and MasterCard rules and regulations and technology such as BASE II implemented a strategy by which each Defendant knows that the other Defendants will and must comply with the price-fixed Interchange Fees promulgated by Visa and MasterCard and therefore adopts, ratifies and agrees to implement the price-fixed Interchange Fees. In furtherance thereof, Defendants adopted and enforced By-law 2.10(e) nationwide from

San Francisco, California through Visa U.S.A., Inc. for the purpose of excluding American Express and Discover from offering their cards through Defendants to restrain price competition from American Express, Discover and others to protect their price-fixed Interchange Fees. In the *DOJ Case*, 163 F.Supp.2d at 406, the District Court held:

> "Since defendants' exclusionary rules [Visa's By-law 2.10(e) and MasterCard's CPP] undeniably reduce output and harm consumer welfare,...these rules constitute agreements that unreasonably restrain interstate commerce in violation of Section 1 of the Sherman Act."

56. MasterCard enacted its Competitive Practices Policy (CPP) in 1996 to plug the MasterCard loophole in Visa's pre-existing By-Law 2.10(e) in response to pressure from Defendants, in that members of Defendants threatened to move business away from MasterCard unless it also adopted the CPP policy to exclude American Express and Discover from offering their cards through Visa and MasterCard member banks.

57. In 1996, MasterCard adopted its Competitive Practices Policy (CPP) as an extension of Visa's California-based scheme to exclude American Express and Discover with knowledge of the European Commission's concern about its illegality in response to pressure from Defendants.

58. Joseph W. Saunders (herein "Saunders") is a resident of San Francisco, California and the San Francisco Bay Area. Defendant Saunders has actively

engaged in the conspiracy to fix the price of Interchange Fees and as Chairman and a Director of MasterCard from 1994-1997, advocated for and voted for the adoption of MasterCard's illegal Competitive Practices Policy (CPP), which was adopted at a meeting of the MasterCard Board of Directors on June 26, 1996 attended by Mr. Saunders. The District Court in the *DOJ Case* found that: "The CPP, applicable only in the United States, provides that with 'the exception of participation by members in Visa, which is essentially owned by the same member entities, and [Diners Club and JCB], members of MasterCard may not participate either as issuers or acquirers in competitive general purpose card programs." 163 F.Supp.2d 322 at 381 (holding Visa's by-law 2.10(e) and Visa's CPP illegal under section of the Sherman Act).

59. During 1991-1997, when Mr. Saunders was CEO of Household Credit Services, a predecessor of HSBC, he served on the MasterCard U.S. Region Business Committee and the Visa marketing advisory committee. Mr. Saunders was a member of the Board of Directors of Visa U.S.A., Inc. and attended Board of Directors meetings in California during the time Visa, U.S.A., Inc. was enforcing its exclusionary rule, By-law 2.10(e) to exclude American Express and Discover from offering their payment cards through financial institutions that were members of Visa. During the period 1994-1997 Mr. Saunders a member of the MasterCard Board of Directors.

60. Moreover, MasterCard's Chairman of the Board in 1996, Joseph W. Saunders, while he was a member of both the MasterCard U.S. Region Business

Committee, but also a member of Visa USA's marketing committee, attended at least two Visa executive conferences at Pebble Beach, California 10/28/04 as well as MasterCard Board of Directors meetings in California, such as the MasterCard Board of Directors meeting in Marina del Rey California on July 16, 1994 at which anticompetitive practices were discussed. Mr. Saunders is presently Chairman and CEO of Visa, Inc.

61. By way of enforcing their Exclusionary Restraints in furtherance of the conspiracy to fix Interchange Fees, Defendants through Visa U.S.A., Inc. and MasterCard actively engaged in litigation in Northern California to enforce By-law 2.10(e) and the CPP against Advanta Bank, a non-California member bank and issuer of Visa and MasterCard cards, to preclude Advanta from issuing Amex or Discover cards. The District Court in the *DOJ Case*, 163 F.Supp.2d 322 at 385, found as follows:

> "In an attempt to conform to By-law 2.10(e) and the CPP, Advanta went forward with a "Rewards Accelerator" program that linked MasterCard usage on an Advanta bankcard with aspects of American Express' rewards program. (See id. at 1292-93 (Hart). T]he program resulted in litigation between Visa, MasterCard and Advanta; Visa and MasterCard claimed that the MasterCard link to American Express' rewards program violated By-law 2.10(e) and the CPP. (*See* Tr. 1839 (Lockhart, MasterCard.) The litigation concluded with a settlement that

terminated the Rewards Accelerator program. (*See* Tr. 1293-95 Hart).)

62. As the District Court for the Southern District of New York found, Visa and MasterCard conducted the above litigation in the Northern District of California to enforce their illegal exclusionary clauses. That litigation, entitled *Visa U.S.A., Inc. et al. v. American Express Company, Advanta National Bank U.S.A. et al.*, action No. C-964260 CAL, and *MasterCard International, Inc. v. American Express Company, Advanta National Bank US.A. et al.*, action No. C-97-0647 SI (related cases per Related Case Order filed Feb. 25, 1997), was instituted and conducted in the U. S. District Court for the Northern District of California in San Francisco, California, to enforce the illegal nationwide exclusionary clauses, to protect the Interchange price-fixing scheme from competition from American Express and Discover.

63. The adoption of the illegal Interchange Fees price-fixing scheme and the adoption of Visa U.S.A., Inc.'s illegal By-law 2.10(e) to exclude price competition and enforcement thereof in furtherance of the price-fixing conspiracy occurred in and emanated from San Francisco, California as to the entire United States as shown by the District Court's finding in the *DOJ Case*, 163 F.Supp.2d at 384, that Visa enforced the exclusionary rules against Banco Popular nationwide:

> "In a September 1997 letter, Visa U.S.A. informed Banco Popular that if it wanted to continue to issue Visa cards in the continental United States, it could neither issue cards nor

solicit customers for American Express in the continental United States." (See Tr. At 175-76 (Kesler); Ex. P-0252)

64. Visa U.S.A.'s letter enforcing illegal By-law 2. 10(e) dated September 3, 1997, cited by the District Court, was written from Visa U.S.A., Inc.'s San Francisco, California headquarters by Ronald J. Schmidt, Executive Vice-President of Visa U.S.A., Inc., acting as agent for Defendants to Banco Popular in Puerto Rico threatening the loss of its Visa franchise or right to issue or process Visa cards if Banco Popular issued American Express cards through its mainland United States branches. [DOJ Trial Ex. P-0252]. Thus, from San Francisco, California, Visa enforced the exclusionary rules as to the entire United States against, Banco Popular, Advanta Bank, and Bank One. The District Court found that "Because of the [enforcement of exclusionary rules, the discussions [with American Express] were non-starter[s]" with the following banks: Capital One, Nations Bank, Metris (Fingerhut), Chemical, Manufacturers Hanover, Bank One, Union Bank, First Consumers National, Key Corp., First USA, MBNA, Dime, Mellon, Wachovia, Banco Popular North America, and Heartland Savings Bank kept in line in furtherance of the conspiracy to fix Interchange Fees. *DOJ Case*, 163 F.Supp.2d 322 at 384-387.

65. By engaging in their combination, agreement and conspiracy to fix Interchange Fees prices and to exclude competition in California, Defendants engaged in a California-based horizontal scheme to fix and obtain Interchange Fees paid by Cardholders, exclude

competition from American Express and Discover, and impose Trade Restraints on Cardholders, subjected themselves to California law, including the California Cartwright Act and the California Unfair Competition Law.

66. Based on the finding that the exclusionary rules violated section 1 of the Sherman Act, American Express filed suit against Visa and MasterCard, which they settled for $4.05 billion. (Visa Inc. 10K for 2012 at pp. 122-123)

67. When Discover filed suit, Visa and MasterCard settled for $2.8 billion making a combined total of $6.85 billion for Visa By-law 2.10(e) and MasterCard CPP exclusionary rule settlements to date. (Visa Inc. 10K for 2012 at pp. 122-123) (Master Card 2009 Annual Report at p. 119; MasterCard 10K for 2010 at p. 124.).

(2) In Furtherance of the Interchange Price-Fixing Conspiracy, the Defendants Engaged in Illegal Tying Practices

68. In furtherance of their conspiracy to fix Interchange Fees, through their "Honor All Cards" Acceptance Rules (Visa's *OpRegs* and *MasterCard Rules* 5.6.1 "Honor All Cards"), Visa and MasterCard, as co-conspirators with Defendants have required merchants who accepted Visa and MasterCard credit cards to also accept Visa and MasterCard debit cards, and through their No-Surcharge Rule (Visa *OpRegs* 5.2.E; *MasterCard Rules* 5.9.2) and other Anti- Steering restraints, Visa and MasterCard have prevented

merchants from providing information or incentives to Cardholders for using less expensive payment methods and thereby further suppressing competition.

69. The above-said class actions have tolled the statute of limitations with respect to the instant action. Thus, the Merchants Cases resulted in combined settlements of $7 billion in the Interchange Fee case and $3 billion in *In re Visa Check/MasterMoney Antitrust Litigation* (Visa, Inc. 10K for 2012 at pp. 124-127), for a combined Merchants Cases settlements total of over $10 billion. When added to the American Express and Discover settlement totals of $6.85 billion, this produces a combined total of approximately $17 billion paid by Visa and MasterCard to settle antitrust claims by merchants and by competitors American Express and Discover. The above-said class actions have tolled the statute of limitations with respect to the instant action.

(3) In Furtherance of the Conspiracy, Defendants Imposed Restrictions on Merchants That Prevented Cardholders from Learning of the Price-Fixed Interchange Fees and Excluded Competition by Payment Cards Other Than Visa and Mastercard

70. Defendants also agreed to impose restraints on merchants that forbid, among other things, the following types of actions that merchants could otherwise use at the point of sale to inform Cardholders regarding Interchange fees that Defendants' extracted

from Cardholders' accounts and that would foster competition on Interchange Fees among Defendants:

a. Informing the consumer by posting truthful information comparing the relative costs of different forms of payment.

b. Promoting a less expensive general purpose card brand more actively than another general purpose card brand.

c. Offering customers a discount or benefit for use of a general purpose card brand that costs less to the Cardholder.

d. Asking customers at the point of sale if they would consider using another general purpose brand card in their wallets.

e. Posting a sign encouraging use of, or expressing preference for, a general purpose card brand that is less expensive for Cardholders.

f. Posting the signs or logos for general purpose Payment Cards brands that cost less for Cardholders more prominently than signs or logos of more costly general purpose card brands. But for these rules, Interchange Fees would be lower or non-existent.

g. Disclosing Interchange Fees in Cardholder disclosure statements.

GOVERNMENT INVESTIGATIONS

71. Competition and regulatory authorities in the United States and around the globe have concluded that Defendants' collectively-set and established

uniform schedule of Interchange Fees and other trade restraints promulgated through Visa and MasterCard are anti-competitive and illegal.

72. Defendants' anticompetitive and exclusionary has been the subject of investigation by the Federal Trade Commission. Visa Inc.'s 10K for 2012 at p. 132 states:

> "On September 21, 2012, the Bureau of Competition of the United States Federal Trade Commission (the "Bureau") requested that Visa provide on a voluntary basis documents and information regarding potential violations of certain regulations associated with the Dodd-Frank Act, particularly Section 920(b)(1)(B) of the Electronic Funds Transfer Act, 15 U.S.C. 1693o-2, and Regulation II, 12 C.F.R. sec. 235.7(b) (commonly known as the "Durbin Amendment" and regulations)." (10K for 2012 at p. 132)

73. In addition to the DOJ Case discussed above, Defendants' anticompetitive and exclusionary conduct has been further investigated by the Antitrust Division of the Department of Justice. Visa Inc.'s 10K for 2012 at p. 132 states:

> "On March 13, 2012, the Antitrust Division of the United States Department of Justice the "Division") issued a Civil Investigative demand, or "CID," to Visa Inc. seeking documents and information regarding a potential violation of Section 1 or 2 of the Sherman Act, 15 U.S.C. sec. 1, 2. The CID focuses on PIN-Authenticated Visa

> Debit and Visa's competitive responses to the Dodd-Frank Act, including Visa's Set, fix and established Acquirer Network fee." (Visa Inc.'s 10K for 2012 at p. 132).

74. On April 10, 2013, the EU announced that it is opening an investigation into the anticompetitive practices of Visa and MasterCard stating:

> "When a U.S. tourist uses a MasterCard to make purchases in the [European Economic Area], these fees can be quite high, generally much higher than those paid [by a European consumer] in Europe," Mr. Colombani, a commission spokesman said." "The commission also is looking into MasterCard's honor-all-cards rule, which requires merchants to accept all of the company's cards." (Wall St. Journal April 10, 2013 p. C2).

75. The European Commission ruled that MasterCard's cross border Interchange Fees violate the E.C. Treaty, its counterpart to the U.S. antitrust laws. On March 25, 2008, the E.C announced that it was launching an antitrust investigation into the setting of the same fees for Visa. Visa has since settled with the E.C.

76. Similarly, in 2007 the antitrust enforcement body in the United Kingdom, the Office of Fair Trading, concluded that MasterCard's domestic Interchange Fees violated their antitrust laws.

77. The Reserve Bank of Australia (RBA) has also extensively investigated its payment card industry, as a result of that investigation, the RBA

ordered Visa and MasterCard to reduce domestic Interchange Fees from a weighted average of about 0.95 to about .05. The data since the reforms indicate that the card issuance and transactions volumes are up.

DEFENDANTS HAVE MAINTAINED CONTROL OVER VISA AND MASTERCARD IN IMPLEMENTING THEIR INTERCHANGE FEE PRICE-FIXING AGREEMENTS AND TRADE RESTRAINTS

78. Defendants have agreed to and have engaged in a scheme whereby they and their co-conspirators fix the payment card Interchange Fees processed through Visa and MasterCard, using Visa and MasterCard to publish and promulgate the price-fixed Interchange Fees with the agreement and the knowledge that their fellow member banks have agreed to Visa's and MasterCard's price-fixing and anticompetitive Interchange Fees, bylaws, rules regulations and policies, and have and will comply with them.

79. In 1996, approximately nineteen banks had a representative on the board of directors of one network and on at least one important committee of the other network, twelve of the twenty-one banks represented on Visa's Board of Directors were also represented on MasterCard's Business Committee. Seventeen of the twenty-seven banks on MasterCard's Business Committee had representatives on Visa's Marketing Advisors Committee. Seven of the twenty-two banks represented on MasterCard's Board of Directors were also represented on Visa's Marketing Advisors Committee.

80. In response to the Second Circuit's characterization of the networks as consortia of competitors, Defendants and their co-conspirator member banks, acting through the networks' boards of directors restructured the networks, but designed the restructurings to continue the practice of the networks continuing to set uniform schedules of Interchange Fees and continue to enforce the trade restraints as before. Defendants and their member banks engaged in a series of transactions in which the networks acquired the banks' ownership shares, and issued new classes of preferred stock to the banks that entitled the banks to elect a minority of each network's board of directors and to veto certain extraordinary transactions. The member banks caused each network to set aside a majority of common shares to be sold to the public, but put in place restrictions to protect interchange fees by imposing restrictions that prevented any single public shareholder or groups of shareholders from acquiring more than 15% of the equity in the restructured networks as found by the European Commission. The networks financed their acquisition of the shares previously held by the banks with proceeds from the IPOs (held on May 26, 2006 for MasterCard and on March 18, 2008 for Visa).

81. Cardholders participate in the Visa and MasterCard Payment Card market in that they are issued payment cards by their Issuer Banks (i.e., by Defendants and their co-defendants). These payment cards, which are trademarked with the "Visa" or "MasterCard" logo, are the keys that activate Visa's BASE II computer network system and MasterCard's computer network system, thereby enabling virtually

simultaneous, multiple payments from a Cardholder's account via a single swipe of her card, comprising (a) Interchange Fees paid directly to the Cardholder's Card Issuer bank as a computer generated transfer of funds; (b) an additional fee paid directly to the merchant's bank (the Acquirer) as a computer generated transfer of funds; and (c) and the remaining balance paid directly to the merchant as a computer-generated transfer.

82. Defendants promote and market their trademarked "Visa" payment cards and "MasterCard" payment cards directly to Cardholders through national advertising on television, in newspapers, periodicals and on the Internet to maintain their Cardholder base as a source of Interchange Fees and other fees.

83. Defendants acting by and through the Board of Directors and Committees of Visa and MasterCard have set similar uniform Interchange Fees for all Visa and MasterCard payment card transactions that they agreed to impose. Since 1976, Visa's and MasterCard's, rules have permitted banks to be members of both Visa and MasterCard and to issue both brands of credit cards.

84. Through their common control of both Visa and MasterCard, Defendants and their co-conspirators have stifled competition between Visa and MasterCard and have thwarted competition from smaller competitor networks such as American Express and Discover. This reduction in competition among general purpose payment card networks has resulted in higher Interchange Fees, hindered and delayed the

development and implementation of improved network products and services, and has lessened consumer choice.

85. Visa and MasterCard, who publish and promulgate the fixed Interchange Fees are financed through fees and assessments levied on Defendants, including a share of the Interchange Fees.

86. Under Visa's *Operating Regulations* and MasterCard's Rules, By-laws and related rules, a Member Bank in either Visa or MasterCard has the right to issue payment cards bearing the network's trademark and to offer card acceptance services for the network's payment cards. Defendants also became owners of the networks and received rights similar to those of a shareholder in a corporation. These rights at various times have included the opportunity to vote for a board of directors, participate in the governance of the network, and share in the network's assets upon dissolution, and serve on key committees. Voting and dissolution rights are apportioned according to the dollar volume of transactions that the member bank has transmitted through each network. Defendants have made agreements to abide by Visa's and MasterCard's price-fixing and anticompetitive bylaws, rules, regulations, and policies.

87. Despite this overlap in ownership and governance, neither Visa nor MasterCard has enforced the safeguards necessary to prevent one network from obtaining confidential competitive information about the other. Both Visa and MasterCard have rules with Defendants whereby if a member bank determines it

was harmed by the uniform schedules of Interchange Fees, it is prevented from suing Visa and MasterCard.

88. Visa and MasterCard, the Defendant, and their co-conspirators exchange data and sensitive information on a continuous basis and act as information conduits for the sharing of pricing and other competitive information between the Visa and MasterCard networks ensuring that Visa's and MasterCard's Interchange Fees are essentially the same on similar transactions and continue to increase in parallel and step-lock fashion.

89. Defendants have acted and continue to act as information conduits for the sharing of pricing and other competitive information between Visa and MasterCard, thereby ensuring that Visa's and MasterCard's Interchange Fees continue to increase in parallel and step-lock fashion. Such information exchanges among Visa, MasterCard and their members have led to Interchange Fees that are essentially the same on similar transactions.

90. Visa and Defendants have executed several agreements to ensure that Defendants would retain significant control over Visa's competitive decisions, including but not limited to the Retrospective Responsibility Plan under which Defendants have agreed to indemnify Visa for liabilities incurred.

91. MasterCard and Defendants have executed several agreements to ensure that Defendants would retain significant control over MasterCard's competitive decisions in order to continue to prevent MasterCard from becoming a legitimate competitor to

the market power of Visa. For example, MasterCard and its member banks, including Defendants, enacted a restriction to prevent an investor (for example a merchant or group of merchants) from acquiring a controlling stake in MasterCard and deciding to operate as a lower-priced Interchange Fees competitor to Visa.

RELEVANT MARKET

92. Payment cards are payment means that a Cardholder can use to make purchases from a wide variety of merchants. There are two principal types of Visa and MasterCard payment cards that operate through their network services:

a. Credit cards—that usually permit the cardholder to either (i) pay all charges within a set period after a monthly bill is rendered, or (ii) pay only a portion of the charges within that time and pay the remainder in monthly installments, including interest; as to which Interchange Fees apply and

b. Debit cards that enable the cardholder to directly access the funds in his/her own bank account to pay for goods or services as to which Interchange Fees apply.

93. Defendants and their co-conspirators issue Visa and MasterCard payment cards to Cardholders and provide the services that enable merchants to accept them for the purchase of goods or services nationwide.

94. Visa and MasterCard general purpose Credit cards and Debit cards and Visa and MasterCard credit

card network services and Debit card network services are the relevant markets.

95. As specified in Visa OpRegs Sec. 9.5 and as found by the District Court and affirmed by the Second Circuit in *United States v. Visa U.S., Inc.*, the United States is the relevant geographic market.

MARKET POWER

a. Visa and MasterCard each has significant market power in the highly concentrated Network Services market and the general purpose Credit Card and Debit Card Payment Card markets. In affirming a finding of their market power the Second Circuit stated: "In 1999, Visa U.S.A. members accounted for approximately 47% of the dollar volume of credit and charge card transactions, while MasterCard members accounted for approximately 26%." *U.S. v. Visa U.S.A., Inc.*, 344 F.3rd 229, 239-240 (2nd Cir. 2003).

96. Due to consolidations and mergers, Defendants J.P Morgan Chase, Bank of America, Capital One and HSBC collectively and individually have market power in the Visa/MasterCard Payment Card markets. Even in the face of frequent and significant increases in Interchange Fees, Cardholders have no choice but to continue to use Visa's and MasterCard's dominant payment cards because they would face serious economic consequences if they ceased to use them. Said markets are characterized by concentration in both Issuing and Acquiring Banks and low and decreasing transactional costs, thus, the economic characteristics of these relevant markets has changed materially since the early 1980's in that

(A) Credit card transactions have grown over 20,000 per cent from approximately $8 billion per year then to more than $1.7 trillion in 2004 generating the highest proft margins of all banking services (B) in the early 1980's only about 16% of consumers had payment cards, but by 2004 that figure had materially changed to about 78%; (C) In the early 1980's the top ten issuing banks issued about 35% of the cards issued. By contrast to the early 1980's, the top ten issuing banks issued about 82% of the cards issued, and the top 25 issuing banks issued about 98% of the card issued and the trend is toward further consolidation. In 2009, Defendants J.P. Morgan Chase, Bank of America, Capital One and HSBC accounted for more than 60% of the Purchase Volume on Visa and MasterCard credit cards. (C) In the early 1980's card transactions were primarily paper and authorizations were person-to-person. By 2004, virtually all steps in card authorization and processing were conducted electronically and almost instantaneously with resulting cost savings and rapidly declining costs and rising increase in Interchange Fees. In the 1980's interstate banking was in its incipiency while today it is the norm. (D) In the early 1980" Visa attempted to justify its interchange fees based on cost, but by 2004 Visa claims that interchange fees are profit maximizing. (E) in the early 1980's member banks were free to by-pass the Visa system and the interchange fee was not mandatory, but by 2004, member banks treat interchange as mandatory. (F) Debit Payment Cards, which are commonplace today, did not even exist in the early 1980's.

97. Visa's and MasterCard's acceptance among U.S. retailers is widespread. Visa and MasterCard are accepted at over 8.2 million merchant locations in the U.S.

98. Significant barriers to entry and expansion protect Visa's and MasterCard's market power and Defendants' market power and have contributed to their ability to maintain high Interchange Fees for years without the threat of price competition by new entry or expansion in the market. These barriers to entry and expansion include the prohibitive cost of establishing a physical network over which general purpose cards transactions can run, developing a widely recognized brand, and establishing a base of merchants and a base of cardholders. Visa, MasterCard and Defendants who achieved these necessities early in the history of the industry, obtained substantial early mover advantages over prospective subsequent entrants. Successful subsequent entry would be difficult and expensive. In the presence of these barriers, the only successful market entrant since the 1960's has been Discover. Even so, Discover's market share historically has been, and remains, very small. In 2009, Discover's market share based on dollar volume of purchases placed on general purpose credit cards was approximately 6%.

99. The trade restraints adopted by Defendants and their co-conspirators in furtherance of their Interchange Fee price fixing scheme heighten these barriers to competitors' expansion and entry. Merchants' inability to encourage their customers to use less costly general purpose card networks makes it

even harder for existing or potential competitors to threaten Visa's and MasterCard's market power.

ANTICOMPETITIVE PURPOSE AND EFFECT

100. The purpose of the agreement among and between Defendants is to extract supra-competitive Interchange Fees from Cardholders. Defendants know and understand that the prices charged for Interchange Fees in the United States, including California, are excessive and they would not be able to charge such high non-competitive fees were it not for the illegal agreement, combination and conspiracy between and among themselves to set, fix and establish and maintain the higher Interchange Fees charged.

101. The combination, agreement and conspiracy is aimed at restraining competition, from competing with the price-fixed Interchange Fees, and in fact harms competition by:

a. Causing increased prices for Interchange Fees;

b. Denying consumers information about the relative costs of Defendants J.P. Morgan Chase, Bank of America, Capital One, and HSBC payment card usage compared to other card usage that would cause more consumers to choose lower cost payment methods;

c. Harming the competitive process and disrupting the proper functioning of the price-setting mechanism of a free market;

d. Stifling innovation in network services and card offerings that would emerge if competitors were forced to compete for merchant business at the point of sale;

e. Restraining merchants from competing and offering lower prices;

f. Insulating each Defendant from competition from rival networks that would otherwise encourage merchants to favor use of those network's cards;

g. Inhibiting other networks from competing on price at merchants that accept each Defendants J.P. Morgan Chase, Bank of America Capital One, and HSBC and their Co-conspirators general purpose Payment Cards; and

h. Causing increased retail prices for goods and services paid by Cardholders.

FRAUDULENT CONCEALMENT

102. Until shortly before the filing of this complaint, Plaintiffs and members of the Plaintiff Cardholder Class had no knowledge that Defendants were violating the antitrust laws as alleged herein. Plaintiffs and the members of the class could not have discovered any other violations at any time prior to this date by the exercise of due diligence because of fraudulent and active concealment of the conspiracy by Defendants. Although Defendants disclose their finance charges to Cardholders in Cardholder disclosure statements, they uniformly do not disclose their Interchange Fees to Cardholders in their Cardholder disclosure statements in furtherance of the conspiracy.

103. The affirmative actions of Defendants hereinbefore alleged were wrongfully concealed and carried out in a manner which precluded detection. Plaintiffs had no knowledge of the antitrust violations herein alleged or any facts that might have led to their discovery. Plaintiffs could not have uncovered the violations alleged herein at an earlier date inasmuch as the means for discovering their causes of action were not reasonably ascertainable due to the fraudulent concealment of activities through various means and methods designed to avoid detection. Defendants secretly conducted activities in furtherance of the conspiracy and attempted to confine information concerning the conspiracy to key officials and engaged in conduct giving rise to an estoppel to assert the statute of limitations.

DAMAGES

104. During the period of time covered by the antitrust violations by Defendants, Plaintiffs and each member of the class they represent made payments with Visa and MasterCard payment cards in which Plaintiffs and the Plaintiff Cardholder Class members paid supra-competitive price-fixed Interchange Fees to Defendants. In 2010 alone, Defendants J.P. Morgan Chase, Bank of America, Capital One, HSBC and their co-conspirators collected more than $40,000,000,000 in supra-competitive, price-fixed Interchange Fees from Cardholders based on more than $1,800,000,000,000 in Cardholder Visa and MasterCharge transactions.

105. By reason of the antitrust violations herein alleged, plaintiffs and each member of the Plaintiff Cardholder Class paid more than they would have paid

in the absence of such antitrust violations. As a result, Plaintiff and each member of the class they represent have been injured and damaged in an amount presently undetermined.

VIOLATIONS ALLEGED

FIRST CLAIM FOR RELIEF

(Price-Fixing, Violation of Section 1 of the Sherman Act)

106. Plaintiffs incorporate and re-allege, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

107. Beginning at a time currently unknown to plaintiffs, but at least as early as January 1, 1991, and continuing through class certification, the exact dates being unknown to plaintiffs, Defendants J.P. Morgan Chase, Bank of America, Capital One, and HSBC entered into a continuing combination, agreement, and conspiracy in restraint of trade artificially to set, fix and establish, raise, stabilize, and peg payment card Interchange Fees in the United States, in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

108. In formulating and carrying out the alleged combination, agreement, and conspiracy, Defendants J.P. Morgan Chase, Bank of America, Capital One, and HSBC did those things that they combined and conspired to do, including but not limited to the acts, practices, and course of conduct set forth above, and the following, among others:

a. Setting, fixing and establishing, raising, stabilizing, and pegging the Interchange Fees paid by Cardholders directly to them through Visa's *Operating Regulations*, Bank Agreements, and other agreements and implemented through Visa's BASE II computer network system and *MasterCard's Interchange Rates* and other agreements and implemented through MasterCard's computer network system;

b. Imposing Trade Restraints to Protect their Combination, Agreement and Conspiracy to Fix Prices;

c. Allocating Payment Card market share among themselves and collusively excluding competition.

109. The combination and conspiracy alleged herein has had the following effects, among others:

a. Interchange Fees paid by Cardholders have been set, fixed and established, raised, maintained and stabilized at artificially high, non-competitive levels throughout the 50 United States by Defendants J.P. Morgan Chase, Bank of America, Capital One, and HSBC;

b. Price competition in the 50 United States plus D.C. has been restrained, suppressed, and/or eliminated with respect to Interchange Fees;

c. Interchange Fees have been set, fixed and established, raised, maintained and stabilized at artificially high, non-competitive levels throughout the United States by Defendants J.P. Morgan Chase, Bank of America, Capital One, and HSBC; and

d. Visa and MasterCard Cardholders have been deprived of the benefits of free and open competition by Defendants J.P. Morgan Chase, Bank of America, Capital One, and HSBC and their Co-conspirators.

110. Plaintiffs and other Plaintiff Cardholder Class members have been injured and will continue to be injured in their businesses and property by paying higher Interchange Fees than they would have paid and will pay in the absence of the combination and conspiracy.

111. Plaintiffs and the Plaintiff Cardholder Class are entitled to damages, treble damages, attorneys' fees and costs, and an injunction against defendants, preventing and restraining the violations alleged herein.

SECOND CLAIM FOR RELIEF

(California Cartwright Act)

(Trust To Set, Fix and Establish Prices And Restrain Trade)

112. Plaintiffs incorporate and re-allege all paragraphs in this Complaint, as though fully set forth below.

113. Plaintiffs allege this Claim on behalf of themselves and the class of all others similarly situated.

114. Beginning at least as early as 1991 and continuing up to and including the date of the filing of this Complaint, Defendants J.P. Morgan Chase, Bank of America, Capital One, and HSBC and their

co-conspirators have continuously combined, conspired, and agreed among themselves and others, and are members of, acted with or in pursuance of, or aided or assisted in carrying out a combination of acts with the purpose and effect to create or carry out restriction of commerce and restraints of trade by agreeing to fix high non-competitive, supracompetitive Interchange Fees, imposed on Cardholders in the Visa and MasterCard networks in the 50 States of the United States plus D.C. and have collectively adopted and enforced trade restraints such as Exclusionary Rules, No Discount Rules, Honor All Cards Rules, No Surcharge Rules and Anti-Steering Rules to prevent and prohibit competition, which would have the effect of lower, competitively priced Interchange Fees to protect the supracompetitive Interchange Fees fixed by the Interchange Fees price-fixing conspiracy among Defendants.

115. Defendants, acting by and through their co-conspirators, Visa and MasterCard, engaged in a California-based horizontal scheme to fix Interchange Fees paid by Cardholders, to exclude competition from American Express and Discover from offering their cards through the banks, and impose trade restraints on Cardholders and merchants to protect the conspiracy to fix Interchange Fees, subjected themselves to California law, including the California Cartwright Act and the California Unfair Competition Law.

116. In furtherance of the aforesaid combination and conspiracy, Defendants J.P. Morgan Chase, Bank of America, Capital One, and HSBC and their

co-conspirators have taken action in concert to enforce the maintenance of higher, non-competitive Interchange Fees in the United States, by, *inter alia*, agreeing to maintain artificially high Interchange Fees in the United States and by taking collective action to stop potential erosion of the high, non-competitive fees by continuing to impose and enforce trade restraint that prevent competition.

117. Said combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among Defendants J.P. Morgan Chase, Bank of America, Capital One, and HSBC to maintain the high supra-competitive prices of Interchange Fees imposed on Visa and MasterCard Cardholders.

118. Defendants J.P. Morgan Chase, Bank of America, Capital One, and HSBC participated in overt acts in furtherance of the conspiracy alleged and have participated in conspiratorial activities and attended conspiratorial meetings on a frequent and regular basis. These anti-competitive agreements were made and implemented by personal meetings and communications among and between Defendants J.P. Morgan Chase, Bank of America, Capital One, and HSBC.

119. The specific conduct of Defendants as alleged in this Complaint violates Sections 16700 *et seq.*, 16720 *et seq*. of the California Business and Professions Code.

120. As a result Plaintiffs Dr. Melvin Salveson, Wendy M. Adams, Edward Lawrence, and Dianna Lawrence and all other Visa and MasterCard Cardholders similarly situated, have been injured by

being forced to pay higher Interchange Fees than they would pay in the absence of the price-fixing conspiracy alleged herein.

121. Plaintiffs and the Plaintiff Visa and MasterCard Cardholder Class are entitled to damages, treble damages, attorneys' fees and costs and an injunction against defendants, preventing and restraining the violations alleged herein.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs demand:

A. That the Court determines that this action may be maintained as a class action pursuant to the Federal Rules of Civil Procedure Rule 23;

B. With respect to the First and Second Claims:

a. that the alleged combination and conspiracy among Defendants J.P. Morgan Chase, Bank of America, Capital One, and HSBC be adjudged and decreed to be an illegal combination and trust, and an unreasonable restraint of trade in violation of the Sherman Act Section 1, and California Business & Professions Code Sections 16700 *et seq.*, 16720 *et seq.*, § 16727 *et seq.*;

b. that judgment be entered against Defendants and in favor of Plaintiffs and each member of the class they represent for injunctive relief;

c. that judgment be entered against Defendants J.P. Morgan Chase, Bank of America, Capital One, and HSBC and in favor of Plaintiffs and each member of the class they represent for threefold the damages determined to have been sustained by them

d. that Defendants, successors, assignees, subsidiaries and transferees, and their respective officers, directors, agents and employees, and all other persons acting or claiming to act on behalf thereof or in concert therewith, be perpetually enjoined and restrained from, in any manner, directly or indirectly, continuing, maintaining or renewing the aforesaid combination, conspiracy, agreement, understanding or concert of action, and adopting or following any practice, plan, program or design having a similar purpose or effect in restraining competition;

e. that Plaintiffs be awarded reasonable attorneys' fees and costs.

D. That Plaintiffs and members of the class be allowed to recover pre-judgment and Post-judgment interest on the above sums at the highest rate allowed by law; and

E. That the Court order such other and further relief as may appear necessary and appropriate.

JURY DEMAND

Plaintiffs respectfully demand a trial by jury of all issues so triable.

Respectfully Submitted,

Dated: December 16, 2013

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By: /s/ Joseph M. Alioto
JOSEPH M. ALIOTO
Attorneys for Plaintiffs

Dated: December 16, 2013

LAW OFFICES OF
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APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

14-CV-3529 (JG)

[Filed November 26, 2014]

MELVIN SALVESON, EDWARD LAWRENCE, DIANNA LAWRENCE and WENDY M. ADAMS, on behalf of themselves and all others similarly situated,

Plaintiffs,

– versus –

JP MORGAN CHASE & CO.; J.P. MORGAN BANK, N.A.; BANK OF AMERICA CORP.; BANK OF AMERICA N.A.; CAPITAL ONE F.S.B.; CAPITAL ONE FINANCIAL CORP.; CAPITAL ONE BANK; HSBC FINANCE CORP.; HSBC BANK USA N.A.; HSBC NORTH AMERICAN HOLDINGS, INC.; HSBC HOLDINGS, PLC,

Defendants.

FOR ONLINE PUBLICATION ONLY

MEMORANDUM
AND ORDER

A P P E A R A N C E S

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JOHN GLEESON, United States District Judge:

The plaintiffs bring this antitrust class action pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26, on behalf of a putative nationwide class of payment cardholders. They allege that the defendants conspired to fix interchange fees in violation of the Sherman Act, 15 U.S.C. § 1. The defendants have moved to dismiss the complaint, asserting that the plaintiffs lack standing to bring their antitrust claim, and that the claim is barred by the *Illinois Brick* doctrine. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). For the reasons that follow, the motion is granted.

BACKGROUND

A. *Procedural History*

The plaintiffs filed their complaint on December 16, 2013 in the Northern District of California, three days after I granted final approval of the settlement in the antitrust class action *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation* ("*Interchange*"). 986 F. Supp. 2d 207 (E.D.N.Y. 2013); *see* ECF No. 1 ("Compl."). In that case, 40 class action complaints, together with 19 individual actions, were consolidated before me by the Judicial Panel on Multidistrict Litigation. *See Interchange*, 986 F. Supp. 2d at 212. *Interchange's* putative nationwide class of some 12 million merchants alleged that the Visa and MasterCard payment networks, as well as issuing and acquiring banks – including nearly all of the defendants in this case[1] – conspired to fix interchange fees in violation of the Sherman Act, 15 U.S.C. § 1. The settlement I approved calls for, *inter alia*, injunctive relief in the form of various network rules changes, which apply to all members of a Rule 23(b)(2) class. The changes reform rules that operated to "insulate the Visa and MasterCard networks from competition with each other, from other brands and from other forms of

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[1] Defendants JP Morgan Chase & Co., Bank of America Corp., Bank of America N.A., Capital One F.S.B., Capital One Financial Corp., Capital One Bank, HSBC Finance Corp., HSBC Bank USA N.A., and HSBC North American Holdings, Inc. were also defendants in the *Interchange* case.

payment, allowing Visa and MasterCard and the issuing banks to set supracompetitive default interchange fees." *Id*.

The Judicial Panel on Multidistrict Litigation transferred this case to me for inclusion in the *Interchange* docket on June 4, 2014, citing its prior order holding that this court was the proper forum for actions alleging antitrust violations related to interchange fees. ECF No. 61 (citing *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 398 F. Supp. 2d 1356, 1358 (J.P.M.L. 2005)).

B. *Factual Background*

The plaintiffs allege that the defendants – financial institutions that issued Visa and/or MasterCard payment cards – knowingly participated in a conspiracy to fix interchange fees. The putative class consists of cardholders of payment cards issued by the defendants and used to purchase goods and services from merchants. They contend that cardholders have been injured by the defendants' conduct because they have "paid supracompetitive price-fixed Interchange Fees to Defendants" that were higher "than they would have paid in the absence of [the defendants'] antitrust violations." Compl. ¶¶ 104-05. Interim class counsel argued at a July 18, 2014 proceeding that cardholders, as the first and only link in the credit card transaction chain to actually make a payment, pay the interchange fees charged for each transaction directly. *See* No. 14-md-1720, ECF No. 104 (Jul. 18, 2014 Proceedings Tr.) at 62, 64.

A credit card transaction using the Visa or MasterCard network is structured as follows: When a cardholding consumer uses a Visa or MasterCard payment card, the merchant that accepts the card relays the transaction to its "acquiring bank," which in turn transmits it to the network, *i.e.*, Visa or MasterCard, which sends the information to the cardholder's "issuing bank." Compl. ¶ 49 (quoting *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 235 (2d Cir. 2003)). The issuing bank may approve the transaction and the approval is conveyed to the acquiring bank, which relays it to the merchant. *See id.* The issuing bank then sends the acquiring bank the amount of the purchase price minus an interchange fee. *See id.* The defendants in this case are issuing banks.

DISCUSSION

A. *Legal standard*

"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 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Allegations in a typically complex antitrust suit "must be enough to raise a right to relief above the speculative level" to justify "the potentially enormous expense of discovery" in such cases. *Twombly*, 550 U.S. at 555, 559. Allegations constituting mere "labels and conclusions" or "naked assertions devoid of further factual enhancement" are insufficient. *Iqbal*, 556 U.S. at 678 (citations omitted). I draw all reasonable inferences in the plaintiffs' favor. *See Sheppard v.*

Beerman, 18 F.3d 147, 150 (2d Cir. 1994), *cert. denied*, 513 U.S. 816 (1994).

B. *Indirect Purchasers and Illinois Brick*

In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the Supreme Court held that indirect purchasers – individuals or entities that do not make purchases directly from the defendants alleged to have violated antitrust laws – do not have standing to sue under § 4 of the Clayton Act. "The Court concluded that direct purchasers rather than indirect purchasers were the injured parties who as a group were most likely to press their claims with the vigor that the § 4 treble-damages remedy was intended to promote." Blue Shield of Virginia v. *McCready*, 457 U.S. 465, 474 (1982). Thus, "a bright line rule emerged from *Illinois Brick*: only direct purchasers have standing under § 4 of the Clayton Act to seek damages for antitrust violations."[2] *Delaware Valley Surgical Supply Inc. v. Johnson & Johnson*, 523 F.3d 1116, 1120-21 (9th Cir. 2008).

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[2] The Supreme Court recognized two possible exceptions to the *Illinois Brick* rule, neither of which applies in this case. These exceptions might allow indirect purchasers to sue when: (1) they have a preexisting cost-plus contract with the direct purchaser, *see Illinois Brick*, 431 U.S. at 736, *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968); or (2) where a direct purchaser is owned or controlled by its customer or where the defendant owns or controls the intermediary, *In re Microsoft Corp. Antitrust Litig.*, 127 F.Supp.2d 702, 713 (D. Md. 2001), *supplemented*, MDL-1332, 2001 WL 137254 (D. Md. Feb. 15, 2001), *aff'd sub nom. Kloth v. Microsoft Corp.*, 444 F.3d 312 (4th Cir. 2006).

There are two rationales for the *Illinois Brick* rule: (1) allowing both direct and indirect purchasers to claim damages based on the same antitrust violations "would create a serious risk of multiple liability for defendants," *Illinois Brick*, 431 U.S. at 730, and (2) the complex process of apportioning antitrust damages between direct and indirect purchasers would both increase litigation burdens and diminish the benefits of bringing treble-damages actions, potentially undermining the enforcement of antitrust laws via private actions, *id.* at 745-47. For these reasons, there is a strong presumption against § 4 recovery for plaintiffs who "are not the immediate buyers from the alleged antitrust violators" – even in cases in which immediate buyers "pass on 100 percent of their costs to their customers." *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 207-08 (1990); *see also Paycom*, 467 F.3d at 285-88 (affirming dismissal of antitrust claim against MasterCard's chargeback policy by merchant that processed payments for website operators).

C. *Analysis*

The plaintiffs claim that because pay for each of their credit card transactions, they have sufficiently alleged they are direct purchasers – that is, they directly paid supracompetitive, fixed and inflated interchange fees to the defendants. I disagree and hold that the plaintiffs' allegations require the dismissal of their federal claim pursuant to *Illinois Brick.*

The markets for general purpose payment cards and for payment card network services are separate and distinct, and payment-card consumers are considered to participate only in the former. "Whereas in the market for general purpose *cards*, the issuers are the sellers, and cardholders are the buyers, in the market for general purpose card *network services*, the four networks themselves are the sellers, and the issuers of cards and merchants are the buyers." *See United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 239 (2d Cir. 2003) (emphasis in original). Because the interchange fee runs between financial institutions within the card services market, consumers do not directly pay interchange fees and are not directly injured by their imposition. The plaintiffs' facile contention that cardholders pay interchange fees directly is refuted by their own allegations about how transactions over these two networks occur. It also bears no resemblance to the transaction structure at the heart of this nine-year-old case.

The specter of duplicative recovery underlying *Illinois Brick* looms large in this case. The ongoing *Interchange* litigation brought by merchants who pay interchange fees demonstrates that if indirect purchasers such as the plaintiffs are also able to recover on the same or similar antitrust claims, the double payment of damages may be inevitable for the defendants. Indeed, even plaintiffs' counsel could not bring himself at oral argument to say that the merchants are without an antitrust claim against these defendants.[3]

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[3] *See* Tr. of Proceedings dated July 18, 2014 at 67-70. Counsel's argument that "sometimes *Illinois Brick* has a – it has a very bad and seemingly unfair result," *id.* at 69, betrayed the fact that the plaintiffs' real complaint is about that case, and how it precludes the federal claim advanced here.

Moreover, "[d]ismissal is the right result here, given the Supreme Court's concern with avoiding, in private federal antitrust cases, complicated problems of tracing and apportionment of damages. When an antitrust violator and a plaintiff are separated by more than one transaction, the possible causes of economic loss in each transaction multiply, presenting a challenge for the plaintiff looking to trace her injury to the antitrust violation." *Temple v. Circuit City Stores, Inc.*, 06-CV-5303, 2007 WL 2790154 (E.D.N.Y. Sept. 25, 2007) (citing *Utilicorp United*, 497 U.S. at 209; *Mid-Atl. Toyota Antitrust Litig.*, 516 F. Supp. 1287, 1292-93 (D. Md. 1981). Here, for example, the harm to the consumers from the antitrust violation they allege will depend on whether (and to what extent) the interchange fees charged to the merchants were passed along to the consumers.

In sum, plaintiffs and the members of the class they seek to represent are indirect purchasers who may not bring their Sherman Act claim. Because that fact requires the dismissal of the federal claim, I need not address the defendants' other arguments in support of their motion. I decline to exercise supplemental jurisdiction over the state law claim.

CONCLUSION

For the reasons set forth above, the motion to dismiss is granted.

So ordered.

John Gleeson, U.S.D.J.

Dated: September 26, 2014
Brooklyn, New York

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

14-CV- 3529 (JG)

[Filed December 4, 2014]

MELVIN SALVESON, EDWARD LAWRENCE, DIANNA LAWRENCE and WENDY M. ADAMS, on behalf of themselves and all others similarly situated,	)
Plaintiffs,	)
-against-	)
JP MORGAN CHASE & CO.; J.P. MORGAN BANK, N.A.; BANK OF AMERICA CORP.; BANK OF AMERICA, N.A.; CAPITAL ONE F.S.B.; CAPITAL ONE FINANCIAL CORP.; CAPITAL ONE BANK; HSBC FINANCE CORP.; HSBC BANK USA N.A.; HSBC NORTH AMERICAN HOLDINGS, INC.; HSBC HOLDINGS, PLC,	)
Defendants.	)

JUDGMENT

A Memorandum and Order of Honorable John Gleeson, United States District Judge, having been filed on November 26, 2014, granting the Defendants' motion to dismiss the complaint; it is

ORDERED and ADJUDGED that the Defendants' motion to dismiss the complaint is granted.

Dated: Brooklyn, New York
December 04, 2014

Douglas C. Palmer
Clerk of Court

by: *<u>/s/ Janet Hamilton</u>*
Deputy Clerk

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

14-CV-3529 (MKB)

[Filed February 24, 2016]

MARVIN SALVESON, EDWARD LAWRENCE, DIANNA LAWRENCE and WENDY M. ADAMS, on behalf of themselves and all others similarly situated,	)
Plaintiffs,	)
v.	)
JP MORGAN CHASE & CO., J.P. MORGAN BANK, N.A., BANK OF AMERICA CORPORATION, BANK OF AMERICA N.A., CAPITAL ONE F.S.B., CAPITAL ONE FINANCIAL CORPORATION, CAPITAL ONE BANK, HSBC FINANCE CORPORATION, HSBC BANK USA, N.A., HSBC NORTH AMERICAN HOLDINGS, INC. and HSBC HOLDINGS, PLC,	)
Defendants.	)

MEMORANDUM & ORDER

MARGO K. BRODIE, United States District Judge:

Plaintiffs Marvin Salveson, Edward Lawrence, Dianna Lawrence and Wendy M. Adams commenced this putative antitrust class action on December 16, 2013, in the United States District Court for the Northern District of California against Defendants, financial institutions who issue general purpose payment cards that consumers use to purchase goods and services, and the affiliates of such institutions.[1] On behalf of a putative nationwide class of consumers using payment cards issued by Defendants, Plaintiffs assert claims pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, and pursuant to the Cartwright Act, California Business and Professions Code § 16750(a). Defendants moved to dismiss all of Plaintiffs' claims, and by Memorandum and Order filed on November 26, 2014, the Court granted Defendants' motion (the "November 26, 2014 Decision").[2] The Clerk of Court entered judgment on December 4, 2014. (Dec. 4, 2014 J., Docket Entry No. 86.)

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[1] On June 4, 2014, the Clerk of Court for the Northern District of California entered a Transfer Order from the United States Judicial Panel on Multi District Litigation, transferring this case to the Eastern District of New York. (MDL Transfer Order, Docket Entry No. 61.)

[2] On December 18, 2014, the United States Judicial Panel on Multidistrict Litigation, with the consent of the Court, ordered that the case be reassigned from Judge John Gleeson to the undersigned. (Order Reassigning Litigation, Docket Entry No. 88.)

Plaintiffs now move to vacate the judgment and, pursuant to Local Civil Rule 6.3, for reconsideration of the dismissal of their federal claim. Defendants cross-move for reconsideration pursuant to Rule 59(e) of the Federal Rules of Civil Procedure and Local Civil Rule 6.3, seeking reconsideration of the Court's refusal to exercise supplemental jurisdiction over Plaintiffs' California state law claim. For the reasons set forth below, Plaintiffs' reconsideration motion is denied. The Court grants Defendants' reconsideration motion and, on reconsideration, dismisses Plaintiffs' state law claim.

I. Background

The Court assumes familiarity with the facts and procedural background as set forth in the November 26, 2014 Decision. (Nov. 26, 2014 Memorandum and Order ("M&O"), Docket Entry No. 83.) The Court summarizes only the pertinent facts.

According to Plaintiffs, in the course of issuing payment cards to consumers, Defendants and their affiliates knowingly participated in an anticompetitive conspiracy to fix fees related to those payment cards. (Compl. ¶¶ 26–29.) These fees are known as interchange fees. (*See id.* ¶¶ 40, 48.) Plaintiffs contend that consumers like Plaintiffs and the putative class used the payment cards to purchase goods and services and "paid supracompetitive [i]nterchange [f]ees to Defendants and their co-conspirators." (*Id.* ¶¶ 19–20.)

Plaintiffs allege that each time a consumer uses a payment card, the following sequence of events occur: the merchant accepts the payment card from the cardholder and relays the transaction information to the merchant's "acquiring bank"; the acquiring bank then transmits the transaction information to the payment card's network — either Visa or MasterCard; and the network then relays the transaction information to the cardholder's "issuing bank" for approval of the transaction. (*Id.* ¶ 49 (quoting *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 235 (2d Cir. 2003)).) If the issuing bank determines the consumer has sufficient credit and approves the transaction, it conveys its approval to the acquiring bank and the acquiring bank then relays its approval to the merchant. (*See id.*) Finally, the issuing bank — in this case, one of the Defendants — pays the acquiring bank an amount representing the price of the goods or services purchased by the consumer in the underlying transaction, less an "interchange fee," the fee at issue in this case. (*See id.*)

Plaintiffs allege that Defendants' participation in an anticompetitive conspiracy has injured cardholders by causing them to "pa[y] supracompetitive price-fixed [i]nterchange [f]ees to Defendants" that were higher "than [the fees] they would have paid in the absence of . . . antitrust violations" by Defendants. (*Id.* ¶¶ 104–105.) Plaintiffs contend that a cardholder "pays the gross amount of the transaction, including fees, directly to the [issuing bank], which keeps the [i]nterchang [f]ee and passes on a separate transaction fee to the [acquiring bank] and the net amount to the merchant via the Visa or MasterCard network." (*Id.* ¶ 38.) According to Plaintiffs, the interchange fee is paid "directly" by the cardholders. (*Id.* ¶ 6.) Plaintiffs specifically allege that the initial payment in the transaction is made by cardholders, that the issuing bank "keep[s]" the interchange fee from that payment, and that the payments made by cardholders are "comprise[d]" of the "balance" due to the merchant plus the interchange fee and other fees. (*Id.* ¶¶ 47–48, 81.)

II. Discussion

a. Standards of review

i. Reconsideration

The standard for granting a motion for reconsideration is strict, and "[r]econsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked — matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Cedar Petrochemicals, Inc. v. Dongbu Hannong Chem. Co., Ltd.*, --- F. App'x ---, ---, 2015 WL 5999215, at *3 (2d Cir. 2015) (quoting *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995)); *Bank of Am. Nat'l Ass'n v. AIG Fin. Prods. Corp.*, 509 F. App'x 24, 27 (2d Cir. 2013) ("The standard for granting such a motion is strict . . . ." (quoting *Shrader*, 70 F.3d at 257)), *as amended* (Apr. 5, 2013); *see also* Local Civ. R. 6.3 (The moving party must "set[] forth concisely the matters or controlling decisions which counsel believes the Court has overlooked.").

It is thus "well-settled" that a motion for reconsideration is "not a vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a 'second bite at the apple.'" *Analytical Surveys, Inc. v. Tonga Partners, L.P.*, 684 F.3d 36, 52 (2d Cir. 2012) (quoting *Sequa Corp. v. GBJ Corp.*, 156 F.3d 136, 144 (2d Cir. 1998)), *as amended* (July 13, 2012). A motion for reconsideration is "neither an occasion for repeating old arguments previously rejected nor an opportunity for making new arguments that could have previously been made." *Simon v. Smith & Nephew, Inc.*, 18 F. Supp. 3d 423, 425 (S.D.N.Y. 2014) (citation and internal quotation marks omitted). In order to prevail on a motion for reconsideration, "the moving party must demonstrate that the Court overlooked controlling decisions or factual matters that were put before the Court on the underlying motion." *Lichtenberg v. Besicorp Grp. Inc.*, 28 F. App'x 73, 75 (2d Cir. 2002) (citations and internal quotation marks omitted); *see also Stoner v. Young Concert Artists, Inc.*, No. 11-CV-7279, 2013 WL 2425137, at *1 (S.D.N.Y. May 20, 2013) ("A motion for reconsideration is an extraordinary remedy, and this Court will not reconsider issues already examined simply because a party is dissatisfied with the outcome of his case. To do otherwise would be a waste of judicial resources." (alteration, citations and internal quotation marks omitted)); *Henderson v. City of New York*, No. 05-CV-2588, 2011 WL 5513228, at *1 (E.D.N.Y. Nov. 10, 2011) ("In order to have been 'overlooked,' the decisions or data in question must have been put before [the court] on the underlying motion . . . and which, had they been considered, might have reasonably altered the result before the court." (citations and internal quotation marks omitted)).

ii. Motion to dismiss for failure to state a claim

In reviewing a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a court must "accept all factual allegations in the complaint as true and draw inferences from those allegations in the light most favorable to the plaintiff." *Tsirelman v. Daines*, 794 F.3d 310, 313 (2d Cir. 2015) (quoting *Jaghory v. N.Y. State Dep't of Educ.*, 131 F.3d 326, 329 (2d Cir. 1997)); *see also Matson v. Bd. of Educ.*, 631 F.3d 57, 63 (2d Cir. 2011) (quoting *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 320 (2d Cir. 2009)). A complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Matson*, 631 F.3d at 63 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)); *see also Pension Ben. Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 717–18 (2d Cir. 2013). Although all allegations contained in the complaint are assumed true, this principle is "inapplicable to legal conclusions" or "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Iqbal*, 556 U.S. at 678.

b. Plaintiffs' motion for reconsideration of the dismissal of the federal claim

In the November 26, 2014 Decision, the Court granted Defendants' motion to dismiss the Complaint. The Court determined that Plaintiffs are indirect purchasers and therefore the dismissal of the federal claim was appropriate because the claim is barred by the rule set forth in *Illinois Brick Company v. Illinois*, 431 U.S. 720 (1977), which denies standing to indirect purchasers' under Section 4 of the Clayton Act. (M&O 6–8.)

i. The November 26, 2014 Decision

The Court explained in the November 26, 2014 Decision that, pursuant to the Supreme Court decision in *Illinois Brick*, "indirect purchasers — individuals or entities that do not make purchases directly from the defendants alleged to have violated antitrust laws — do not have standing to sue under § 4 of the Clayton Act." (*Id*. at 5.) As the Court stated, "only direct purchasers have standing under § 4 of the Clayton Act to seek damages for antitrust violations." (*Id*. (internal quotation marks omitted) (quoting *Delaware Valley Surgical Supply Inc. v. Johnson & Johnson*, 523 F.3d 1116, 1120–21 (9th Cir. 2008)).) The Court further explained that the presumption against recovery for plaintiffs who are "not the immediate buyers from the alleged antitrust violations" includes cases "in which immediate buyers pass on 100 percent of their costs to their customers." (*Id*. (internal quotation marks omitted) (quoting *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 207–208 (1990)).)

The Court determined that Plaintiffs failed to allege that they are direct purchasers or that their federal claim came within an exception to the *Illinois Brick* doctrine. (*Id*. at 5–7.) The Court stated that Plaintiffs' allegations — including the allegation that the payments made by cardholders as part of each credit card transaction represented direct payments of the "supracompetitive" interchange fees to Defendants — were insufficient to plead that cardholders are direct purchasers with standing. (*Id*. at 6.)

ii. Plaintiffs' arguments in support of their reconsideration motion

In seeking reconsideration, Plaintiffs argue, in substance, that the Court overlooked the standard applicable to a motion to dismiss by failing to accept Plaintiffs' allegations as true. (Mem. in Support of Pls. Mot. ("Pls. Mem.") 4, Docket Entry No. 91.) Plaintiffs argue that, "[t]here is no question that the cardholders repeatedly alleged that they were the direct payors or purchasers" and that the allegation that cardholders pay the interchange fee is not only plausible but also "manifest and self-evident." (*Id*.) Plaintiffs further argue that the Court overlooked their pleadings as to the role of cardholders in the payment transactions containing the interchange fee.[3] (*Id*. ("[T]his Court

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[3] In support of their argument that cardholders directly pay interchange fees, Plaintiffs file a declaration and exhibits in support of their motion. (Decl. of Joseph M. Alioto, Docket Entry No. 92; *see also* Pls. Reply 1, Docket Entry No. 103 (arguing that the "dispositive charts" in the exhibits "showed that the cardholder paid the money, which included the interchange fee" and that the "charts also showed, in support of the plausibility of the allegations in [P]laintiffs' complaint, that the cardholder paid the issuing bank, which kept the interchange fee and passed on the remainder to the acquiring bank, which kept its fee and in turn passed on the remainder to the merchant").) The Court declines to consider these documents as they were not attached to the Complaint and were not otherwise before the Court when it decided Defendants' motion to dismiss, and, therefore, these

explained the structure of the network. . . . Although the [C]ourt included the so-called 'issuing bank,' the 'acquiring bank,' and the merchant, the cardholder consumer was omitted.").)

iii. Plaintiffs fail to satisfy the standard for reconsideration

The Court neither overlooked Plaintiffs' allegations that the interchange fees are paid directly by cardholders nor ignored the obligation to credit Plaintiffs' factual allegations. Because Plaintiffs have not shown (1) that the Court overlooked critical facts or (2) that the Court overlooked any relevant controlling decisions, there is no basis for the Court to reconsider the dismissal of Plaintiffs' federal law claim for failure to state a claim. *See Shrader*, 70 F.3d at 257 (holding that a party seeking reconsideration must identify overlooked "controlling decisions or data"); *Analytical Surveys*, 684 F.3d at 52 (explaining that a motion for reconsideration is not a vehicle for relitigation of issues already addressed by the court); *Bey v. City of New York*, No. 13-CV-9103, 2015 WL 5473155, at *1 (S.D.N.Y. Sept. 16, 2015) (construing plaintiff's motion

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documents are not properly before the Court on Plaintiffs' motion for reconsideration. *See Drapkin v. Mafco Consol. Grp., Inc.*, 818 F. Supp. 2d 678, 695 (S.D.N.Y. 2011) (explaining that a moving party seeking reconsideration may "not advance new facts, issues or arguments not previously presented to the Court" (internal quotation marks and citation omitted)). Moreover, Local Civil Rule 6.3 specifies that on a motion for reconsideration "[n]o affidavits shall be filed by any party unless directed by the Court." Local Civil Rule 6.3.

for relief from court's order as a motion for reconsideration).

In the Complaint, Plaintiffs quote *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003), in describing the structure of the transactions giving rise to the incursion and payment of the interchange fee. (Compl. ¶ 48.) Plaintiffs specifically quote a portion of the Second Circuit decision stating "[w]hereas in the market for general purpose *cards,* the issuers are the sellers, and cardholders are the buyers, in the market for general purpose card *network services,* the four networks themselves are the sellers, and the issuers of cards and merchants are the buyers."[4] (*Id.* ¶ 48 (quoting *Visa U.S.A.*, 344 F.3d at 239).) Thus, based on the allegations, Plaintiffs recognize that there is a distinction between two markets: one for payment cards (the "Payment Card Market"), in which

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[4] Plaintiffs selectively quote the Second Circuit's explanation in *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003) that, "in the market for general purpose [credit cards], the issuers are the sellers, and the cardholders are the buyers" to inaccurately plead that this phrase demonstrates that "the Second Circuit expressly held that Cardholders are 'direct purchasers' for antitrust purposes." (Compl. ¶ 50 (quoting *Visa U.S.A.*, 344 F.3d at 239).) The *Visa U.S.A* decision contains no such holding. The standing of cardholders to bring antitrust claims, as direct or indirect purchasers, was not at issue in *Visa U.S.A.* In the phrase cited by Plaintiffs, the Second Circuit was explaining its determination that the district court had correctly found that the payment card networks "compete with one another in a market for 'network services.'" *Visa U.S.A.*, 344 F.3d at 239. In doing so, the Second Circuit described that consumers are "buyers" of payment cards, not payers of interchange fees, and did so to provide an explanatory contrast. *Id.* (emphasis in original).

consumers participate by purchasing cards from issuing banks, and another for network services (the "Card Network Services Market"), in which merchants purchase services to facilitate the use of those cards. Plaintiffs also allege that the interchange fee is exchanged between financial institutions in the Card Network Services Market. (*Id.* ¶ 48.) In rejecting their claim, the Court determined that Plaintiffs' "facile contention that cardholders pay interchange fees directly is refuted by their own allegations about how transactions over these two networks occur" and that Plaintiffs' conclusory and contradictory pleadings did not plausibly allege that the cardholders are direct purchasers. (M&O 6–7.)

Plaintiffs argue that the Court failed to credit the allegations that cardholders are the direct payors of interchange fees and, in so doing, overlooked controlling law, namely the standard applicable to a motion to dismiss. Although the Court may not have expressly referenced the pleading standard in stating that Plaintiffs failed to allege that cardholders are direct purchasers, the Court's determination was based on its rejection of the direct purchaser allegations as conclusory, contradictory and insufficient to support an inference that cardholders are the payors of interchange fees. (*Id.* at 6–7.) "Although factual allegations of a complaint are normally accepted as true on a motion to dismiss, . . . that principle does not apply to general allegations that are contradicted 'by more specific allegations in the Complaint.'" *DPWN Holdings (USA), Inc. v. United Air Lines, Inc.*, 747 F.3d 145, 151–52 (2d Cir. 2014) (citations omitted); *see also Sherman v. Town of Chester*, 752 F.3d 554, 568 n.5 (2d

Cir. 2014) (declining to credit allegation that an appeal was timely filed where the complaint also "explicitly state[d]" contradictory allegations); *Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1095 (2d Cir. 1995) ("[T]he [c]omplaint's attenuated allegations of control are contradicted both by more specific allegations in the Complaint and by facts of which we may take judicial notice . . . .").

The Court accepted Plaintiffs' factual allegations and drew "all reasonable inferences in [P]laintiffs' favor." (M&O 5 (citing *Sheppard v. Beerman*, 18 F.3d 147, 150 (2d Cir. 1994)). However, the Court was not obligated to credit Plaintiffs' allegation that cardholders are the direct payors of interchange fees, as this allegation is directly contradicted by the specific allegations about the Payment Card and Card Services Markets and the transactions involving the interchange fee. *DPWN Holdings*, 747 F.3d at 152. The Court considered the applicable standard and determined that Plaintiffs' allegations did not permit a reasonable inference that cardholders are direct payors, given that such a conclusion is at odds with the allegations regarding the structure of the relevant transactions. (M&O 5); *see also Matson*, 631 F.3d at 63 (A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." (quoting *Iqbal*, 556 U.S. at 678)). Plaintiffs have not identified any controlling law that the Court overlooked.

Plaintiffs also argue that the Court specifically overlooked allegations that cardholders pay interchange fees directly by initiating the chain of events that occurs as part of each transaction. The Court considered and rejected this claim. *See, e.g.*, *Boyd v. J.E. Robert Co.*, No. 05-CV-2455, 2013 WL 5436969, at *2 (E.D.N.Y. Sept. 27, 2013) (denying reconsideration where "[p]laintiffs' motion . . . merely attempts to relitigate and rehash arguments already considered and rejected by the court"), *aff'd*, 765 F.3d 123 (2d Cir. 2014); *PAB Aviation, Inc. v. United States*, No. 98-CV-5952, 2000 WL 1240196, at *1 (E.D.N.Y. Aug. 24, 2000) ("Because PAB's motion involves only reformulations of arguments already considered and rejected, reconsideration is not warranted."), *aff'd*, 169 F. App'x 61 (2d Cir. 2006). Plaintiffs disagree with the Court's outcome and are attempting to "relitigat[e] old issues," which is not a basis for reconsideration. *See Analytical Surveys*, 684 F.3d at 52.

Plaintiffs have failed to identify controlling law or allegations that the Court overlooked. The Court therefore declines to reconsider its determination that Plaintiffs are barred from asserting claims under § 4 of the Clayton Act by the *Illinois Brick* doctrine. Plaintiffs' reconsideration motion is denied.

c. Defendants' cross-motion for reconsideration of the state law claim

In the November 26, 2014 Decision, the Court declined to exercise supplemental jurisdiction over Plaintiffs' state law claim and dismissed the claim without prejudice. (M&O 8.) Defendants seek reconsideration of this determination, arguing that the Court overlooked the fact that it had original jurisdiction over Plaintiffs' state law claim pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d), ("CAFA"), and that the Court should therefore have addressed the merits of the state law claim. (Defs. Opp'n & Mem. 5, Docket Entry No. 98.) Defendants further argue that on reconsideration of the underlying motion to dismiss, the Court should dismiss the Cartwright Act claim because Plaintiffs have failed to allege a cognizable antitrust injury. (*Id.* at 7–8.)

i. The Court's jurisdiction pursuant to CAFA

Defendants argue that CAFA provides the Court with original jurisdiction over Plaintiffs' Cartwright Act claim because the claim is asserted on behalf of a nationwide class against diverse Defendants and the damages sought are sufficient that "no permissive or mandatory exceptions apply." (*Id.* at 5.) Plaintiffs oppose Defendants' motion primarily by arguing against the dismissal of the state law claim on the merits. (Pls. Mem in Opp'n to Defs. Mot. ("Pls. Opp'n") 8–9, Docket Entry No. 104.) Plaintiffs do not address Defendants' argument that CAFA provides original jurisdiction over the state law claim. (*Id.* at 8.) Plaintiffs also fail to address the argument that because the Court overlooked this controlling law, there are grounds to reconsider Defendants' motion to dismiss. (*Id.*) Instead, Plaintiffs argue that "a federal court has discretion whether to entertain a supplemental state claim, after dismissing federal claims," and appear to argue that the Court should not exercise its discretion to exercise jurisdiction. (*Id.*)

CAFA provides federal district courts "with 'original jurisdiction' to hear a 'class action' if the class has more than 100 members, the parties are minimally diverse, and the 'matter in controversy exceeds the sum or value of $5,000,000.'" *Standard Fire Ins. Co. v. Knowles*, 562 U.S. ---, ---, 133 S. Ct. 1345, 1348 (2013) (quoting 28 U.S.C. § 1332(d)(2), (d)(5)(B)); *see also Estate of Pew v. Cardarelli*, 527 F.3d 25, 30 (2d Cir. 2008) ("CAFA amends the diversity jurisdiction statute by adding § 1332(d), which confers original federal jurisdiction over any class action with minimal diversity (*e.g.*, where at least one plaintiff and one defendant are citizens of different states) and an aggregate amount in controversy of at least $5 million (exclusive of interest and costs).").

CAFA provides three exceptions to original jurisdiction: "the so-called 'local controversy,' 'home state controversy,' and 'interests of justice' exceptions." *Mattera v. Clear Channel Commc'ns, Inc.*, 239 F.R.D. 70, 77 (S.D.N.Y. 2006). The local controversy and home state exceptions to CAFA jurisdiction mandate that district courts decline jurisdiction if certain elements are present that identify a case with primarily in-state class members seeking relief principally for in-state harm by citizens of the same state.[5] *Id.* (citing 28 U.S.C. § 1332(d)(4)(A) and (d)(3)); *see also Hart v. Rick's N.Y. Cabaret Int'l, Inc.*, 967 F. Supp. 2d 955, 962 (S.D.N.Y. 2014) ("The mandatory exceptions are designed to draw a delicate balance between making a

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[5] The local controversy and home state exceptions have distinct requirements, but both are similarly tailored to address claims involving in-state harms. Plaintiffs have not argued either of these exceptions, and it is clear that this is not a state or local issue, thus the exceptions are not applicable.

federal forum available to genuinely national litigation and allowing the state courts to retain cases when the controversy is strongly linked to that state. . . . [T]hese exceptions are intended to keep purely local matters and issues of particular state concern in the state courts." (internal quotation marks and citation omitted)). A district court may also, in the "interest of justice," decline jurisdiction after considering a set of factors "designed to address similar concerns regarding truly local controversies in cases where neither mandatory exception applies." *Sorrentino v. ASN Roosevelt Ctr., LLC*, 588 F. Supp. 2d 350, 355 (E.D.N.Y. 2008); *see also Mattera*, 239 F.R.D. at 77 (listing the statutory factors); *Hart*, 967 F. Supp. 2d at 962–69 (finding that neither mandatory exception applied to class claims asserted under New York state law, and declining to invoke the interest of justice exception).

Plaintiffs allege that the Court has original jurisdiction over their state law claim pursuant to section 1332(d) and that the claim is asserted on behalf of a nationwide class against diverse Defendants, seeking damages in excess of $5,000,000. (Compl. ¶ 8.) While Plaintiffs do not expressly plead that the class would number more than 100 members, the parties appear to concede that a nationwide class of Visa and Mastercard cardholders would exceed 100 members. (*Id.* ¶¶ 1, 8.) Plaintiffs do not seek relief for primarily in-state class members to remedy in-state harm by citizens of the same state, and thus, the claim does not fall within either of the mandatory exceptions to CAFA's grant of original jurisdiction. 28 U.S.C. § 1332(d)(4)(A), (d)(3). Neither party argues to the contrary. Finally, it is not in the interests of justice to consider declining jurisdiction, as it is apparent that Plaintiffs' allegations relate to the nationwide practices of national financial institutions affecting consumers in every state, as opposed to allegations regarding to a "truly local" controversy. *Sorrentino*, 588 F. Supp. 2d at 355.

In declining to exercise supplemental jurisdiction in the November 26, 2014 Decision, the Court overlooked controlling law, specifically, CAFA's provision of original jurisdiction over the state law Cartwright Act claim. The Court therefore grants reconsideration of Defendants' motion to dismiss Plaintiffs' state law claim.

ii. Reconsideration of Defendants' motion to dismiss Plaintiffs' state law claim

Plaintiffs allege that Defendants violated California's Cartwright Act, which "enumerates a relatively broad array of anticompetitive and conspiratorial conduct" and "provides a private right of action to '[a]ny person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by this chapter.'" (Compl. ¶ 112–121); *AT&T Mobility LLC v. AU Optronics Corp.*, 707 F.3d 1106, 1110 (9th Cir. 2013) (quoting Cal. Bus. & Prof. Code § 16720(a)); *see also Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 986 (9th Cir. 2000) (The Cartwright Act "prohibits, among other things, any combination '[t]o prevent competition in [the] sale or purchase of . . . any commodity' or to '[a]gree in any manner to keep the price of . . . [any] commodity . . . at a fixed or graduated figure.'" (quoting Cal. Bus. & Prof. Code § 16720(c) and (e)(2))); *Clayworth v. Pfizer, Inc.*, 49 Cal. 4th 758, 770 (2010) (stating that the Cartwright Act "authorizes anyone injured in his or her business or property by actions forbidden" by the statute to seek to recover treble damages (internal quotation marks and citation omitted)); *Asahi Kasei Pharma Corp. v. CoTherix, Inc.*, 138 Cal. Rptr. 3d 620, 625 (Ct. App. 2012) (explaining that the Cartwright Act "generally outlaws any combinations or agreements which restrain trade or competition or which fix or control prices" (citations omitted)). Stating a claim under the Cartwright Act requires a plaintiff to allege: "(1) the formation and operation of the conspiracy; (2) illegal acts done pursuant thereto; and (3) damage proximately caused by such acts." *In re High-Tech Employee Antitrust Litig.*, 856 F. Supp. 2d 1103, 1126 (N.D. Cal. 2012) (internal quotation marks omitted) (quoting *Kolling v. Dow Jones & Co.,* 187 Cal. Rptr. 797, 803 (Ct. App. 1982); *Asahi*, 138 Cal. Rptr. 3d at 626–27 (same).

1. Standing to recover as direct purchasers

Defendants move to dismiss Plaintiffs' Cartwright Act claim, arguing that Plaintiffs have failed to adequately plead an antitrust injury and thus lack standing to recover. (Defs. Not. of Mot. and Mem in Support of Mot. to Dismiss ("Defs. MTD") 12–18, Docket Entry No. 38.) As with the federal claim, Plaintiffs' state law claim is based on allegations that cardholders are the direct payors of interchange fees that were inflated through anti-competitive behavior. (*See, e.g.*, Compl. ¶ 114 (alleging that Defendants with their co-conspirators have acted "to create or carry out restriction of commerce and restraints of trade by agreeing to fix high non-competitive . . . [i]nterchange [f]ees imposed on [c]ardholders in the Visa and MasterCard networks"); *id.* ¶ 115 (stating that Defendants "engaged in a California-based horizontal scheme to fix [i]nterchange [f]ees paid by [c]ardholders").) The Complaint alleges that the named Plaintiffs have "been injured by being forced to pay higher [i]nterchange [f]ees than they would pay in the absence of the price-fixing conspiracy alleged herein."[6] (*Id.* ¶ 120.)

Defendants contend that Plaintiffs lack standing to bring a Cartwright Act claim because Plaintiffs cannot satisfy the requirements for an antitrust injury as established by *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983) ("*AGC*"). Defendants argue that Plaintiffs lack standing to recover because, according to Plaintiffs' pleadings, the alleged fixing of interchange fees only occurs in the Card Network Services Market, in which financial institutions provide

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[6] Plaintiffs also allege that the anti-competitive conspiracy causes "increased retail prices for goods and services paid by [c]ardholders." (Compl. ¶ 101(h)). However, in response to Defendants' motion to dismiss, Plaintiffs expressly state that they plead an injury that is "not . . . damages from the inflated price of goods and services purchased from merchants." (Pls. Opp'n to Defs. MTD ("Pls. MTD Opp'n) 13, Docket Entry No. 52). Plaintiffs also state that construing the Complaint to allege price inflation "is a distortion of the allegations" because the Complaint "does not allege that Plaintiffs' damages are based on inflated costs to merchant which the merchants passed on the Plaintiffs by charging higher prices for goods and services." (*Id.* at 14.)

services to facilitate card transactions, while cardholders participate only in the Payment Card Market, in which consumers purchase payment cards. (MTD Mem. 8.) Defendants argue that cardholders do not purchase network services or pay interchange fees and thus "any alleged downstream impact on the price of retail consumer goods is . . . derivative and too remote to confer standing under well-established antitrust standing principles." (Defs. Reply in Support of Defs. MTD ("MTD Reply") 2, Docket Entry No. 63.) Plaintiffs respond that they have pled a direct, rather than downstream, antitrust injury that confers standing and disagree that the *AGC* factors apply to the California claim, an argument presented for the first time in their motion for reconsideration. (Pls. MTD Opp'n 13; Pls. Cross Mot. Opp'n 3–4.)

A. Standard applicable to determining antitrust standing for a Cartwright Act claim

The Cartwright Act grants a private right of action to "[a]ny person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by this chapter." Calif. Bus. & Prof. Code § 16750(a). The Clayton Act uses similar language, entitling "[a]ny person who [is] injured in his business or property by reason of anything forbidden in the antitrust laws" to receive treble damages for those injuries. 15 U.S.C. § 15; *see also Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C.*, 711 F.3d 68, 75 (2d Cir. 2013). The Supreme Court has explained that the federal statutory language is limited because "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Gatt Commc'ns*, 711 F.3d at 75 (quoting *AGC*, 459 U.S. at 534); *see also Knevelbaard*, 232 F.3d at 987–92 ("The Supreme Court has held that Congress did not intend to afford a remedy to everyone injured by an antitrust violation simply on a showing of causation. The plaintiff must have 'antitrust standing.'" (citing *AGC*, 459 U.S. at 534–35)). Courts consider the following factors, identified in *AGC*, in order to determine whether a federal plaintiff has antitrust standing:

> [W]hether the plaintiff's alleged injury is of the type that the antitrust statute was intended to forestall; . . . the directness or indirectness of the asserted injury; . . . the extent to which the plaintiff's asserted damages are speculative; . . . the potential for duplicative recovery or complex apportionment of damages; . . . and the existence of more direct victims of the alleged conspiracy . . . .

Gatt Commc'ns, 711 F.3d at 76 (internal quotation marks and citations omitted) (quoting *AGC*, 459 U.S. at 535, 542, 545); *see also Port Dock & Stone Corp. v. Oldcastle Ne., Inc.*, 507 F.3d 117, 121–22 (2d Cir. 2007). The Second Circuit has "distilled these factors into two imperatives": that an antitrust plaintiff allege (1) that "it suffered a special kind of 'antitrust injury,'" and (2) that "it is a suitable plaintiff to pursue the alleged antitrust violations and thus is an 'efficient enforcer' of the antitrust laws." *Gatt Commc'ns*, 711 F.3d at 76 (citations omitted).

Consistent with standing more generally, "antitrust standing is a threshold, pleading-stage inquiry and when a complaint by its terms fails to establish this requirement," the claim must be dismissed as a matter of law. *Id.* at 75 (internal quotation marks omitted) (quoting *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 450 (6th Cir. 2007) (en banc)); *see also Port Dock*, 507 F.3d at 121, 126–27 (dismissing Clayton Act Section 4 claim for lack of antitrust standing); *Paycom Billing Servs., Inc. v. MasterCard Int'l, Inc.*, 467 F.3d 283, 290–95 (2d Cir. 2006) (evaluating the suitability of an antitrust plaintiff by "efficient enforcer" factors, the second through fifth factors articulated in *AGC*). The importance assigned to these factors "will necessarily vary with the circumstances of particular cases." *Daniel*, 428 F.3d at 443.

Where a plaintiff asserts a state law antitrust claim, the "threshold question presented" is whether the *AGC* factors also apply to establish the antitrust injury. *In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1151 (N.D. Cal. 2009). In the absence of a clear rule provided by state law, federal courts analyzing "unsettled areas of state law" must "carefully predict how the state's highest court would resolve the uncertainties," so as to avoid "distort[ing] established state law." *Runner v. N.Y. Stock Exch., Inc.*, 568 F.3d 383, 386 (2d Cir. 2009) (quoting *Travelers Ins. Co. v. Carpenter*, 411 F.3d 323, 329 (2d Cir. 2005)); *see also Empire City Capital Corp. v. Citibank, N.A.*, No. 10-CV-2601, 2011 WL 4484453, at *2 (S.D.N.Y. Sept. 28, 2011) (explaining that the court "construe[s] and appl[ies] state law as it believes the state's highest court would" (quoting *Liddle & Robinson, LLP v. Garrett*, 720 F. Supp. 2d 417, 424 (S.D.N.Y. 2010)).

In predicting how a state's highest court would resolve the issue, courts must "give the fullest weight to pronouncements of the state's highest court . . . while giving proper regard to relevant rulings of the state's lower courts." *Runner*, 568 F.3d at 386 (quoting *Carpenter*, 411 F.3d at 329); *see also Reddington v. Staten Island Univ. Hosp.*, 511 F.3d 126, 133 (2d Cir. 2007) (explaining that lower state court's decisions, while not "strictly" binding, may be "helpful indicators of how the [state's highest court] would decide" an issue), *certified question accepted*, 9 N.Y.3d 1020, *and certified question answered*, 11 N.Y.3d 80 (2008); *New York v. Nat'l Serv. Indus., Inc.*, 460 F.3d 201, 210 (2d Cir. 2006) ("[T]he judgment of an intermediate appellate state court 'is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.'" (quoting *Comm'r v. Estate of Bosch*, 387 U.S. 456, 465 (1967))); *Ryman v. Sears, Roebuck and Co.*, 505 F.3d 993, 994 (9th Cir. 2007) (If "there is relevant precedent from the state's intermediate appellate court, the federal court must follow the state intermediate appellate court decision unless the federal court finds convincing evidence that the state's supreme court likely would not follow it."). While decisions of federal courts construing state law may also be considered, "no deference" is owed to a "district court's interpretation" of state law. *Reddington*, 511 F.3d at 133.

California's highest court has not directly addressed whether the *AGC* factors should be applied to determine whether a plaintiff has alleged antitrust injury under California law. *In Re Flash Memory*, 643 F. Supp. at 1151–52. The California Supreme Court has recently stated that "'[i]nterpretations of federal antitrust law are at most instructive, not conclusive, when construing the Cartwright Act, given that the Cartwright Act was modeled not on federal antitrust statutes but instead on statutes enacted by California's sister states around the turn of the 20th century.'"[7]

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[7] Plaintiffs argue, for the first time in seeking reconsideration, that the application of the *AGC* factors to claims under the Cartwright Act is precluded by the California Supreme Court's decision in *Clayworth*. (Pl. Opp'n to Defs. Cross Mot. for Reconsideration ("Pls. Cross Mot. Opp'n"), 3–4, Docket Entry No. 104.) Plaintiffs argue that in *Clayworth*, the California Supreme Court "departed" from *AGC*'s "principles in interpreting the Cartwright Act." (*Id*. at 3.) Because Plaintiffs did not rely on this authority in their initial motion, they cannot do so on reconsideration. *Lichtenberg*, 28 F. App'x at 75 (explaining that a Court on reconsideration considers only overlooked decisions "that were put before the Court on the underlying motion"). In any event, the issue addressed by the California Supreme Court in *Clayworth* is not before this Court. The issue in *Clayworth* involved the assertion of the so-called "pass-through defense" by alleged antitrust conspirators, who asserted that claims brought by manufacturers were barred because the manufacturers conceded that they had passed the cost of the direct antitrust injury on to their customers. *Clayworth*, 49 Cal. 4th at 774. In deciding the case, the California Supreme Court did not address antitrust standing or the sufficiency of an antitrust injury under the Cartwright Act. *Id*. (noting that *AGC* and *Vinci*, as cases that dealt with antitrust causation, have "nothing to say on the general topic that concerns us: when (as here) causation *has* been properly alleged, how are antitrust damages to be measured?" (first citing *AGC,* 459 U.S. at

Aryeh v. Canon Bus. Solutions, Inc., 55 Cal. 4th 1185, 1195 (2013); *see also In re Cipro Cases I & II*, 61 Cal. 4th 116, 142 (2015).

At least one California intermediate appellate court has applied the *AGC* factors to a state antitrust claim. *Vinci v. Waste Mgmt., Inc.*, 43 Cal. Rptr. 2d 337, 338–39 (Ct. App. 1995). This decision is due particular weight. *See Schoenefeld v. New York*, 748 F.3d 464, 469 (2d Cir.) (explaining that "the absence of authority from New York's highest court does not provide us license to disregard lower court rulings nor to analyze the question as though we were presented with a blank slate"), *certified question accepted*, 23 N.Y.3d 941 (2014) *and certified question answered*, 25 N.Y.3d 22 (2015); *Statharos v. N.Y. City Taxi & Limousine Comm'n*, 198 F.3d 317, 321 (2d Cir. 1999) ("[T]he ruling of an intermediate appellate state court . . . is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." (internal quotation marks and citation omitted)). In *Vinci*, a California intermediate appellate court observed that "the Cartwright Act has objectives identical to the federal antitrust acts," and noted that, in the past, California courts construing the Cartwright Act have looked to cases construing federal antitrust laws for guidance. *Vinci*, 43 Cal. Rptr. 2d at 338 n.1.

It is also instructive that the Ninth Circuit, although without explanation, has applied the *AGC* factors to an antitrust claim brought under the

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535; and then citing *Vinci*, 43 Cal. Rptr. 2d at 338)).

Cartwright Act. *Knevelbaard*, 232 F.3d at 987 (holding, after applying the *AGC* factors, that "all elements of antitrust standing are satisfied on the face of the present complaint"). However, despite applying the *AGC* factors, the Ninth Circuit has noted that, "California law grants antitrust standing more liberally than does federal law." *Theme Promotions, Inc. v. News Am. FSI*, 35 F. App'x 463, 466–67 (9th Cir. 2002) (citing *Knevelbaard*, 232 F.3d at 987) (reversing the dismissal of federal antitrust claims for failure to allege injury to competition and thus "also revers[ing] the dismissal of the broader, more liberal state antitrust claims"); *see also In re ATM Fee Antitrust Litig.*, 686 F.3d 741 (9th Cir. 2012). In *Knevelbaard*, the Ninth Circuit applied the "directness of the injury" *AGC* factor and explained that the "extent to which antitrust injury is recognized under the Cartwright Act is enlarged, by statute, in comparison to federal law." *Knevelbaard*, 232 F.3d at 991 (As a result of the *Illinois Brock* repealer statute, "the more restrictive definition of 'antitrust injury' under federal law does not apply" to the Cartwright Act. (quoting *Cellular Plus, Inc. v. Superior Court*, 18 Cal. Rptr. 2d 308 (Cal. Ct. App. 1993))).

District courts presented with the issue of whether to apply the *AGC* factors in a Cartwright Act case have reached differing conclusions. *See In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig.*, No. 9-CV-3690, 2015 WL 3988488, at *8 (N.D. Ill. June 29, 2015) (applying the *AGC* factors to antitrust claims brought under the Cartwright Act); *In Re Flash Memory*, 643 F. Supp. at 1151–52 (finding the *AGC* factors to be applicable to an analysis of antitrust standing for a

Cartwright Act claim); *In re TFT–LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109, 1120–24 (N.D. Cal. 2008) (stating that a clear directive from state legislature or high court was necessary to apply the *AGC* factors, but nevertheless finding that plaintiffs had standing by considering factors); *In re Graphics Processing Units Antitrust Litig.*, 540 F. Supp. 2d 1085, 1097 (N.D. Cal. 2007) (declining to apply *AGC* because, while "some [state] appellate courts have used the *AGC* test," that "is not the same as showing that *AGC* has been adopted").

Giving the "fullest weight to pronouncements of the state's highest court," *Runner*, 568 F.3d at 386, and mindful that the California Supreme Court has not addressed whether the *AGC* factors may be applied to a Cartwright Act claim and has recently reiterated that federal law provides only guidance for state antitrust law, *Aryeh*, 55 Cal. 4th at 1195, and because there is no California law contrary to the state appellate court's application of the *AGC* factors in *Vinci*, the Court applies the *AGC* factors to Plaintiffs' claim. The decision of both an intermediary court and the Ninth Circuit remain the best predictor of the state's highest court's action on the issue, and the Court is not "convinced" to "disregard" this data by any other indication that "the highest court of the state would decide otherwise." *Nat'l Serv. Indus., Inc.*, 460 F.3d at 210; *see also In re Dairy Farmers*, 2015 WL 3988488, at *8 (applying *AGC* factors "mindful that . . . California's antitrust-standing provision is broader in some respects than federal antitrust-standing law because of California's repealer statute"); *but see Los Gatos Mercantile, Inc v. E.I. DuPont De Nemours & Co.*, No.

13-CV-01180, 2015 WL 4755335, at *19 n.11 (N.D. Cal. Aug. 11, 2015) (concluding that the California Supreme Court "would not find rationale set forth in *Vinci* persuasive and would not apply *AGC*" given "repeated instruction that federal antitrust law does not control interpretation of the Cartwright Act"); *In re Capacitors Antitrust Litig.*, 2015 WL 3398199, at *13 (N.D. Cal. May 26, 2015) ("The application of *AGC* to California state antitrust claims has recently become murky, and that murkiness persuades the Court *AGC* should not be applied.").

The Court finds that it is appropriate to apply the *AGC* factors in order to determine whether Plaintiffs have antitrust standing to assert their Cartwright Act claim and that the factors are "instructive, not conclusive." *See Aryeh*, 55 Cal. 4th at 1195. Consistent with the Ninth Circuit's approach in *Knevelbaard*, this Court will apply the *AGC* factors "liberally," and in concert with the broader antitrust standing requirements under California law, particularly with respect to the application of *AGC*'s second factor, the directness of the injury. *See Knevelbaard*, 232 F.3d at 985, 89 ("[F]ederal antitrust precedents are properly included in a Cartwright Act analysis, but their role is limited: they are 'often helpful' but not necessarily decisive." (quoting *State of Cal. ex rel. Van de Kamp v. Texaco, Inc.*, 762 P.2d 385, 395 (1988))).

B. Plaintiffs lack antitrust standing under the Cartwright Act as direct purchasers

The Court now applies the *AGC* factors to determine whether Plaintiffs have antitrust standing to assert a claim pursuant to the Cartwright Act. The factors for determining "whether a plaintiff who has borne an injury has antitrust standing" are: "(1) the nature of the plaintiff's alleged injury, (2) the directness of the injury, (3) the speculative nature of the harm, (4) the risk of duplicative recovery and (5) the complexity in apportioning damages." *Abbouds' McDonald's LLC v. McDonald's Corp.*, No. 05-CV-36032, 2006 WL 1877247, at *1 (9th Cir. July 7, 2006) (citing *AGC*, 459 U.S. at 535–37); *see also Vinci*, 43 Cal. Rptr. 2d at 339 ("The factors identified by the court which favor a finding that the plaintiff is a proper party include the following: (1) the existence of an antitrust violation with resulting harm to the plaintiff; (2) an injury of a type which the antitrust laws were designed to redress; (3) a direct causal connection between the asserted injury and the alleged restraint of trade; (4) the absence of more direct victims so that the denial of standing would leave a significant antitrust violation unremedied; and (5) the lack of a potential for double recovery.").

(1) The nature of Plaintiffs' injury

The first *AGC* factor considers whether the nature of the injury asserted by a plaintiff is "the type the antitrust laws were intended to forestall." *Knevelbaard*, 232 F.3d at 987 (quoting *Am. Ad Mgmt., Inc. v. Gen. Tel. Co.*, 190 F.3d 1051, 1055 (9th Cir. 1999)). The Ninth Circuit has "identif[ied] four requirements that must be met in order to conclude that there is antitrust injury: (1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent." *Id.* (quoting *Am. Ad Mgmt.*, 190 F.3d at 1055). "The requirement that the alleged injury be related to anti-competitive behavior requires, *as a corollary*, that the injured party be a participant in the same market as the alleged malefactors." *In re Flash Memory*, 643 F. Supp. 2d at 1153 (internal quotation marks and citation omitted) (quoting *Bhan v. NME Hosps., Inc.*, 772 F.2d 1467, 1470 (9th Cir. 1985)); *see also AGC*, 459 U.S. at 539 (dismissing claim asserted where plaintiff "was neither a consumer nor a competitor in the market in which trade was restrained"); *Vinci*, 36 Cal. App. 4th at 1816 (dismissing for lack of antitrust standing because "plaintiff was neither a consumer nor a competitor in the market in which trade was restrained"); *Tanaka v. Univ. of Southern Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001) (explaining that the anticompetitive effects must be felt in the "relevant market"); *In re Dynamic Random Access Memory (Dram) Antitrust Litig.*, 516 F. Supp. 2d 1072, 1090 (N.D. Cal. 2007) (dismissing antitrust claims asserted by plaintiffs who were "participants in separate, albeit related, markets").

Here, Plaintiffs allege that cardholders were injured by the "payment of inflated [i]nterchange [f]ees by payment cardholders to their [i]ssuer banks" and that cardholders pay interchange fees directly in the Payment Card Market "because *the cardholder is the first and only person who pays anything*." (Pls. MTD Opp'n 5.) Plaintiffs assert that "by extracting the price-fixed 'interchange fee' directly from the cardholder's account . . . and keeping it, the [i]ssuer bank inflicts injury and damage on the cardholder . . .

within the [i]ssuer-cardholder market." (Pls. MTD Opp'n 7 (citing Compl. ¶¶ 49, 81).)

Defendants' central argument is that Plaintiffs "are not consumers, competitors, or participants in the allegedly restrained market," and that any unlawful conduct by Defendants was not directed at Plaintiffs. (Defs. MTD 7 (citing *Eagle v. Star-Kist Foods, Inc.*, 812 F.2d 538, 539–43 (9th Cir. 1987) (affirming a district court determination that plaintiffs failed to satisfy the first *AGC* factor because they were "neither consumers nor competitors in the relevant market" and "because the alleged anticompetitive conduct was directed" at a party other than the plaintiffs)).) In *Eagle*, fishing boat employees and their union sued their employer for its allegedly anticompetitive behavior in the market to buy and sell fish, arguing that the employer's conspiracy to set artificially low prices for tuna reduced their wages and, ultimately, the dues paid to their union. *Eagle*, 812 F.2d at 539. The Ninth Circuit held that the crewmembers lacked standing because, as non-parties to their employer's agreements to sell the fish, they were not participants in the relevant market as either consumers or competitors and the employer's conduct was "directed at the vessel owners, not the crewmembers or the union." *Id*. at 541.

According to Defendants, Plaintiffs "blur the definition of the relevant market" to obscure the distinction between the Payment Card Market, in which cardholders participate, and the Card Network Services Market, in which the interchange fee is paid between financial institutions. (*Id*. at 8 (citing Compl. ¶ 94 (alleging that "Visa and MasterCard general purpose Credit cards and Debit cards and Visa and MasterCard credit card network services and Debit card network services are the relevant markets")).) Defendants argue that Plaintiffs fail to allege any participation by cardholders in the Card Network Services Market or any anticompetitive conduct in the Payment Card Market and thus, like the fishing boat employees in *Eagle*, there was no anticompetitive conduct directed at Plaintiffs. (*Id.*)

In attempting to characterize the allegedly anticompetitive conduct of the issuing banks as being directed at cardholders, Plaintiffs emphasize that cardholders are in privity with issuing banks in the Payment Card Market. For example, Plaintiffs argue that Defendants' reliance on *Eagle* is misplaced and the facts are distinguishable because, "unlike cardholders" who do have a contractual relationship with the issuing banks, the fishing boat employees were "not parties to their employer's . . . agreement" to sell fish. (Pls. MTD Opp'n 8 (citing *Eagle*, 812 F.2d at 539).) In *Eagle*, the fishing boat employees had a contractual relationship with their employer in a separate and distinct market for the fishing services provided by the fishing boat employees, but were nevertheless not parties to the agreement relevant to the anticompetitive behavior. *Eagle*, 812 F.2d at 539. The same is true here. Plaintiffs allege in the Complaint that cardholders "participate in the . . . card market in that they are issued payment cards" rather than in the Card Network Services Market, which facilitates the purchases of goods and services when cardholders use their payment cards to obtain goods and services from merchants. (Compl. ¶ 81.) Although cardholders and issuing banks transact in the Payment Card Market, that is insufficient to overcome the fact that the allegedly anticompetitive interchange fee is set and paid between financial institutions in the Card Network Services Market, not between issuing banks and cardholders in the Payment Card Market.

Plaintiffs also argue that the Ninth Circuit's decision in *Knevelbaard*, where the court found sufficient antitrust injuries despite conduct by the defendants across multiple relevant markets, supports a finding of sufficient injuries here. (Pls. MTD Opp'n 9 (citing *Knevelbaard*, 232 F.3d at 987).) Plaintiffs' reliance on *Knevelbaard* is misplaced. In *Knevelbaard*, the milk-seller plaintiffs asserted a claim against milk-buyer defendants, who the plaintiffs alleged had rigged the price of bulk cheese with the direct effect of creating "artificially depressed milk prices." *Knevelbaard*, 232 F.3d at 987–88. The Ninth Circuit concluded that the defendants' actions in the market for bulk cheese caused economic loss to the plaintiffs in the related market for milk, in which the defendants both participated and sought to fix prices. *Id*. at 989 ("[T]he complaint's allegations unmistakably place all parties in the milk market — the defendants as buyers and the plaintiffs as sellers — and even have them transacting business with each other."). Unlike the milk seller plaintiffs in *Knevelbaard*, Plaintiffs have not alleged that issuing banks directed anticompetitive fees at cardholders in the Payment Card Market or that cardholders suffered any resulting economic harm when issuing banks "kept" the interchange fee charged within the Card Network Services Market. Although conduct across multiple markets may result in an antitrust injury, Plaintiffs have not alleged such injury.

Plaintiffs further argue that cardholders suffer an injury analogous to those experienced by purchasers at the low end of a distribution chain. (Pls. MTD Opp'n 9–10.) Plaintiffs argue that the Payment Card Market and the Card Network Services Market are "inextricably linked" because "without the card with its card number, the network is inoperable." (*Id*. at 8.) Plaintiffs contend that, because no transaction could take place without cardholders and their accounts, the interchange fees are sufficiently "traceable" to cardholders to provide antitrust standing, similar to damages that are passed along a distribution chain. (*Id*. at 8–9.) Plaintiffs argue repeatedly that the similarity between their injury and that of secondary purchasers renders the damages to cardholders traceable. (*Id*. at 9 (first citing *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 738 F. Supp. 2d 1011, 1024 (N.D. Cal. 2010) (finding an alleged overcharge for cathode ray tubes significantly intertwined and traceable through market for televisions and computer monitors that contain cathode ray tubes); then citing *In re Flash Memory*, 643 F. Supp. 2d at 1150–56 (finding antitrust injury across markets for NAND flash memory and finished products containing NAND flash memory); then citing *In re TFT-LCD*, 586 F. Supp. 2d at 1123–24 (identifying traceable antitrust injury across market for TFT-LCD panels and market for finished products containing TFT-LCD panels); and then citing *In re Graphics Processing Units*, 540 F. Supp. 2d at 1098–99 (finding an antitrust injury traceable from a market for GPUs through a market for computers that contain GPUs)).) Defendants contend that the "inextricably linked" exception to participating in the relevant market is a narrow one, and requires a plaintiff to suffer a direct injury. (Defs. MTD Reply 3.) Defendants argue that Plaintiffs have not alleged any injury, including one traceable to a secondary market. (*Id.*)

Plaintiffs have expressly alleged in the Complaint that cardholders are directly injured when interchange fees are assessed from the funds extracted from cardholders' accounts, and have disclaimed the allegation that the cost of supracompetitive interchange fees are passed onto cardholders through merchants. (Compl. ¶¶ 49, 81; *see also* Pls. MTD Opp'n 13–14; MTD Reply 5 (arguing that "plaintiffs expressly disavow reliance on an overcharge pass-through theory, or a claim that the prices they paid for goods and services were inflated at all").) As such, the cases Plaintiffs rely on to argue that their harm is traceable or similar to damages passed through a distribution change are inapposite.

With respect to demonstrating the presence of "unlawful conduct causing an injury to the plaintiff," *Knevelbaard*, 232 F.3d at 987, because Plaintiffs are "neither consumer[s] nor competitor[s] in the market in which trade was restrained," anticompetitive behavior by issuing banks within the Card Network Services Market was not directed at Plaintiffs, *AGC*, 459 U.S. at 539. Rather, cardholders are "consumer[s] of goods sold by merchants who happen to be part of the affected market." *Nass-Romero v. Visa U.S.A. Inc.*, 279 P.3d 772, 778 (N.M. Ct. App. 2012) (affirming dismissal of federal antitrust claims asserted by cardholders against Visa entities for lack of standing, including because cardholders are not in the restrained market)). Plaintiffs have failed to plead that anticompetitive behavior by Defendants, the issuing banks, was directed at cardholders or caused an economic injury to cardholders, and thus, have failed to allege an antitrust injury that satisfies the first *AGC* factor. The failure to satisfy this factor is grounds to dismiss Plaintiffs' claim. *See, e.g.*, *Crouch v. Crompton Corp.*, No. 02-CV-4375, 2004 WL 2414027, at *26 (N.C. Super. Ct. Oct. 28, 2004) ("This factor alone would strongly support a finding of no standing . . . ."). The Court nevertheless addresses the additional factors.

(2) The directness of Plaintiffs' injury

To assess the directness of a plaintiff's injury, pursuant to the second *AGC* factor, the court "look[s] to the chain of causation between [plaintiff's] injury and the alleged restraint in the market." *Knevelbaard*, 232 F.3d at 989 (internal quotation marks omitted) (quoting *Am. Ad Mgmt.*, 190 F.3d at 1058). In *AGC*, the Supreme Court identified "two separate considerations" within the directness inquiry: "(1) the chain of causation alleged by the plaintiffs; and (2) the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement." *In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig.*, No. 09-CR-3690, 2013 WL 4506000, at *12 (N.D. Ill. Aug. 23, 2013) (citing *AGC,* 459 U.S. at 540–42); *see also In re Refrigerant Compressors Antitrust Litig.*, 2013 WL

1431756, at *14–15 (E.D. Mich. Apr. 9, 2013) (explaining that the "causal nexus between the alleged conspiracy" and the alleged injury cannot be "too remote and attenuated" for it to provide antitrust standing"). However, as explained above, "[t]he extent to which antitrust injury is recognized under the Cartwright Act is enlarged, by statute, in comparison to federal law" because an action "may be brought by any person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by this chapter, *regardless of whether such injured person dealt directly or indirectly with the defendant*." *Knevelbaard*, 232 F.3d at 991 (internal quotation marks omitted) (quoting Calif. Bus. & Prof. Code § 16750(a)).

The parties' arguments with respect to the directness of the injury to Plaintiffs are the same as their arguments about the nature of the injury to Plaintiffs. Defendants contend that "any impact on Plaintiffs" through final consumer prices "would be at most derivative" of the effect on the Card Network Services Market. (Defs. MTD 9.) Plaintiffs assert that Defendants have misconstrued their allegations, and that the payment of the interchange fee from funds withdrawn from cardholders' accounts renders a direct injury to Plaintiffs. (Pls. MTD Opp'n 11.) Plaintiffs argue that the injury is directly incurred from issuing bank to cardholder, rather than passed along through the merchant and the cost of the good or service purchased by the cardholder. (*Id.*) Plaintiffs also reiterate their argument that their injuries are traceable and, thus, "adequate to show that there is a chain of causation between . . . allegedly anticompetitive conduct" and the injury to cardholders. (*Id.* (quoting *In re Flash Memory*, 643 F. Supp. at 1155).)

When considering the application of the directness factor to a Cartwright Act claim, the Court is aware that California law allows recovery for antitrust injuries that result from a more attenuated and indirect causal chain than is permitted under federal law. *See Knevelbaard*, 232 F.3d at 989 (explaining the development of the Cartwright Act in response to *Illinois Brick*); *In re Dairy Farmers*, 2015 WL 3988488, at *8 (explaining that "California's antitrust-standing provision is broader in some respects than federal antitrust-standing law because of California's repealer statute"). Plaintiffs' allegations are deficient, not because they fail to assert a direct injury, but because they fail to plead that the cardholders suffered any plausible economic injury. Although Plaintiffs argue that the interchange fee is paid from "the cardholder's account *first* before paying *the balance* to the acquirer bank and the merchant," their allegations also acknowledge that the amount withdrawn from a cardholder's account is due, in its entirety, to a merchant for goods or services, and thus there is no increased cost to cardholders from the interchange fee. (Pls. MTD Sur-Reply 2.) Plaintiffs concede that the amount withdrawn fromthe cardholder's account is the price to purchase the goods, rather than the price of the goods combined with a surcharge for any interchange fee. (Pls. MTD Opp'n 11.) The Court finds that Plaintiffs cannot satisfy the second *AGC* factor because, as explained above, the allegedly anticompetitive conduct of the issuing banks was not directed at cardholders and has not resulted in an injury for the Court to assess for its directness.

(3) Speculative nature of the harm, the risk of duplicative recovery, and the complexity in apportioning damages

The Court considers the final three *AGC* factors together, as they reflect overlapping concerns. Under the third factor, courts consider whether a plaintiff's damages are only speculative, in that "(1) the alleged injury was indirect; and (2) 'the alleged effects . . . may have been produced by independent factors.'" *Am. Ad Mgmt.*, 190 F.3d at 1059 (quoting *AGC*, 459 U.S. at 542); *see also Knevelbaard*, 232 F.3d at 991 (Where "the alleged effects on the [plaintiff] may have been produced by independent factors, the [plaintiff's] damages claim" may also be "highly speculative."); *Eagle*, 812 F.2d at 542 (citing these considerations). As to the fourth factor, "[t]he risk to be avoided . . . is that potential plaintiffs may be in a 'position to assert conflicting claims to a common fund . . . thereby creating the danger of multiple liability.'" *Am. Ad Mgmt.*, 190 F.3d at 1059 (quoting *AGC*, 459 U.S. at 544); *see also Eagle*, 812 F.2d at 542. Finally, the court considers whether, "if the plaintiff is allowed standing, any attempt to ascertain damages would lead to 'long and complicated proceedings involving massive evidence and complicated theories.'" *Eagle*, 812 F.2d at 543 (quoting *AGC*, 459 U.S. at 544).

Plaintiffs argue that merchants asserting claims arising from the same allegedly anticompetitive interchange fees "are not better positioned to assert injury to card holders as they are not direct payers" of the interchange fee, and thus the recovery to Plaintiffs is neither speculative nor complex to apportion. (Pls. MTD Opp'n 12.) Plaintiffs also argue that the injury is concrete and simple, and rely on their assertion that cardholders' injury need not be traced through inflated costs passed on by merchants. (*Id*. at 12–13.) Similarly, Plaintiffs state that because damages are "traceable by cardholder account number, there is no risk of duplicative recovery." (*Id*. at 13.) Defendants counter that other parties "are better positioned to bring these claims" and have an adequate economic motivation to do so, including both merchants and the acquiring banks who pay the interchange fees in the Card Network Services Market. (Defs. MTD 10.)

Assuming that there is harm to Plaintiffs caused by the interchange fees and also that it would be feasible to determine the amount of such harm, there remains a large and predictable risk of duplicative recovery against the issuing banks as well as the need for "long and complicated proceedings" to determine the damages due to cardholders and merchants. *Eagle*, 812 F.2d at 543. Plaintiffs do not address the certified class of merchants before the Court who have asserted essentially identical claims to Plaintiffs, and the fact that duplicative recovery — and thus the need to apportion damages — is not merely hypothetical. Thus, assuming an injury to cardholders, Plaintiffs have not shown that their claims can be litigated without expensive and duplicative efforts.

The Court finds that Plaintiffs have failed to assert a direct antitrust injury that confers standing to bring a claim under the Cartwright Act because Plaintiffs are not in the relevant market of the alleged antitrust conduct and because allowing such a claim would inevitably result in duplicative and expensive litigation.

2. Standing to recover as indirect purchasers

On reconsideration, Plaintiffs for the first time argue that the Court may decline to dismiss their state law claim on an alternative ground that cardholders are indirect purchasers. (Pls. Cross Mot. Opp'n 1–2.) In response, Defendants argue that "it is neither in dispute nor relevant" that California has "no *per se* bar against actions by indirect purchasers" because Plaintiffs have "never alleged that they were *indirect* purchasers" but rather have only alleged that cardholders are the *direct* payors of interchange fees. (Defs. Cross Mot. for Reconsideration Reply 2, Docket Entry No. 106.) Defendants also argue that Plaintiffs are not permitted to "amend [the] complaint through statements made in moving papers." (*Id*. at 3 (quoting *Hernandez v. City of New York*, No. 11-CV-3521, 2013 WL 593450, at *4 n.5 (E.D.N.Y. Feb. 13, 2013)).)

Arguments "raised for the first time in [a] motion for reconsideration" are "not properly presented to the district court" and, absent a reason to excuse the untimeliness, are waived by the party. *Phillips v. City of New York*, 775 F.3d 538, 544 (2d Cir.), *cert. denied sub nom.*, *Phillips v. City of New York*, *N.Y.*, 136 S. Ct. 104 (2015) (finding that a party had waived arguments based on documents obtained in discovery and asserted for the first time in a motion for reconsideration); *see also Harris v. Millington*, 613 F. App'x 56, 57 (2d Cir. 2015) ("We do not generally consider claims that were raised for the first time in a motion for reconsideration."); *Sompo Japan Ins. Co. of Am. v. Norfolk S. Ry. Co.*, 762 F.3d 165, 188 (2d Cir. 2014) (declining to consider arguments raised without excuse for the first time on a motion to reconsider); *Official Comm. of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 159 (2d Cir. 2003) (explaining that the appeals court retains discretion to consider "issues not timely raised below," including those raised for the first time on reconsideration, particularly in instances where "(1) consideration of the issue is necessary to avoid manifest injustice or (2) the issue is purely legal and there is no need for additional factfinding"); *Goldberg v. UBS AG*, 690 F. Supp. 2d 92, 98 (E.D.N.Y. 2010) ("[B]y failing to timely raise such an argument during the briefing of its motion to dismiss, defendant waived its right to seek reconsideration of this point.").

In opposing Defendants' original motion to dismiss, Plaintiffs argued that cardholders satisfy the requirements for standing as direct purchasers. Plaintiffs stated that they "sue herein for direct payment by them to their issuer banks" of the allegedly supra-competitive price-fixed interchange fees. (Pls. MTD Opp'n 14.) Plaintiffs' only mention of indirect purchasers prior to their motion for reconsideration was in a passing reference to the fact that the Cartwright Act "contains an *Illinois Brick* repealer for indirect purchasers," not in connection with an argument by Plaintiffs that cardholders sought to recover as indirect purchases. (*Id.* at 5.) Plaintiffs now direct the Court's attention to cases concluding that the Cartwright Act is a so-called "Repealer Act," which, unlike federal antitrust statutes, provides standing to indirect purchasers to assert claims for antitrust injury. (Pls. June 22, 2015 Ltr 1, Docket Entry No. 109

(citing *In re Capacitors*, 2015 WL 3398199, at *13).) These arguments are untimely and "not properly presented" to the Court, as they were not made prior to the motion for reconsideration. *Phillips*, 775 F.3d at 544. Plaintiffs have not presented any compelling excuse for the untimeliness of this argument, and the Court therefore declines to consider whether cardholders could have standing to assert antitrust claims as indirect purchasers.

III. Conclusion

For the foregoing reasons, the Court denies Plaintiffs' motion for reconsideration. The Court grants Defendants' cross-motion for reconsideration, and, on reconsideration, dismisses Plaintiffs' claim under the Cartwright Act.

SO ORDERED:

s/ MKB
MARGO K. BRODIE
United States District Judge

Dated: February 24, 2016
Brooklyn, New York

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

15-0015-cv

[Filed December 19, 2016]

MELVIN SALVESON, EDWARD LAWRENCE, DIANNA LAWRENCE, WENDY M. ADAMS,
Plaintiffs-Appellants,

v.

JP MORGAN CHASE & CO., JP MORGAN CHASE BANK, N.A., BANK OF AMERICA CORP., BANK OF AMERICA N.A., CAPITAL ONE F.S.B., CAPITAL ONE FINANCIAL CORP. CAPITAL ONE BANK, HSBC FINANCE CORP., HSBC BANK USA N.A., HSBC NORTH AMERICA HOLDINGS, INC., HSBC HOLDINGS PLC,
Defendants-Appellees.

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS

PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 17th day of October, two thousand sixteen.

PRESENT: DENNY CHIN,
SUSAN L. CARNEY,
Circuit Judges,
BRIAN M. COGAN,
*District Judge.**

FOR PLAINTIFFS-APPELLANTS:

JOSEPH M. ALIOTO, Alioto Law Firm, San Francisco, California.

FOR DEFENDANTS-APPELLEES JPMORGAN CHASE & CO AND JPMORGAN CHASE BANK, N.A.:

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* Judge Brian M. Cogan, United States District Court for the Eastern District of New York, sitting by designation.

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FOR DEFENDANTS-APPELLEES BANK OF AMERICA CORP. AND BANK OF AMERICA, N.A.:

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FOR DEFENDANTS-APPELLEES CAPITAL ONE F.S.B., CAPITAL ONE FINANCIAL CORP., AND CAPITAL ONE BANK:

Andrew J. Frackman, Abby F. Rudzin, O'Melveny & Myers LLP, New York, New York.

FOR DEFENDANTS-APPELLEES HSBC BANK USA N.A., HSBC HOLDINGS PLC, HSBC FINANCE CORP., AND HSBC NORTH AMERICA HOLDINGS, INC.:

David S. Lesser, Wilmer Cutler Pickering Hale and Dorr LLP, New York, New York.

Appeal from the United States District Court for the Eastern District of New York (Gleeson and Brodie, *JJ.*)

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment and order of the district court are **AFFIRMED.**

Plaintiffs-appellants ("plaintiffs"), representatives of a putative nationwide class of consumers using payment cards, brought suit against defendants-appellees ("defendants"), financial institutions who issue Visa and/or MasterCard payment cards, asserting claims under §§ 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, and the Cartwright Act, California Business and Professions Code § 16750(a). Plaintiffs appeal the district court's December 4, 2014 judgment (Gleeson, *J.*) granting defendants' motion to dismiss plaintiffs' claims pursuant to Federal Rule of Civil Procedure 12(b)(6) and declining to exercise jurisdiction over their state law claim. The district court explained its reasoning in a memorandum and order entered November 26, 2014.[1] Plaintiffs also appeal the district court's February 24, 2015 memorandum and order (Brodie, *J.*) denying their motion for reconsideration of the dismissal of their claims, granting defendants' motion for reconsideration, and, on reconsideration, dismissing plaintiffs' state law claim on the merits.[2] We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

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[1] The memorandum and order is dated September 26, 2014, but the docket reflects that it was entered November 26, 2014.

[2] On December 18, 2014, the United States Judicial Panel on Multidistrict Litigation reassigned the case from Judge John Gleeson to Judge Margo K. Brodie.

I. *Clayton Act*

A. Motion to Dismiss

We review *de novo* the dismissal of a complaint pursuant to Rule 12(b)(6), accepting all factual allegations as true and drawing all reasonable inferences in favor of the plaintiff. *Caro v. Weintraub*, 618 F.3d 94, 97 (2d Cir. 2010). "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 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

Under *Illinois Brick Co. v. Illinois*, indirect purchasers generally do not have standing to sue for damages for antitrust violations under § 4 of the Clayton Act. 431 U.S. 720, 729, 736 (1977).[3] The rationale is twofold: "First, defendants may otherwise face multiple liability. Second, there are too many 'uncertainties and difficulties in analyzing price and out-put decisions in the real economic world rather than an economist's hypothetical model.'" *Simon v. KeySpan Corp.*, 694 F.3d 196, 202 (2d Cir. 2012) (quoting *Ill. Brick*, 431 U.S. at 731-32).

Plaintiffs are a putative class of cardholders of Visa and MasterCard payment cards issued by defendants who used the cards to purchase goods and services.

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[3] The Supreme Court recognized an exception, not applicable here, in which an indirect purchaser may have standing if it had a pre-existing cost-plus contract with the direct purchaser. *Ill. Brick*, 431 U.S. at 735-36.

Plaintiffs allege that in the course of issuing payment cards to consumers, defendants and their affiliates knowingly participated in an anticompetitive conspiracy to fix fees related to those payment cards, and that consumers have been injured by paying supracompetitive price-fixed interchange fees. Plaintiffs assert that they, as cardholders, directly pay the interchange fees. The district court summarized the structure of the relevant credit card transactions as follows, cited with approval by plaintiffs in their brief on appeal:

> When a cardholding consumer uses a Visa or MasterCard payment card, the merchant that accepts the card relays the transaction to its "acquiring bank," which in turn transmits it to the network, i.e., Visa or MasterCard, which sends the information to the cardholder's "issuing bank." The issuing bank may approve the transaction and the approval is conveyed to the acquiring bank, which relays it to the merchant. The issuing bank then sends the acquiring bank the amount of the purchase price minus an interchange fee.

Special App. at 4. (citing Compl. ¶ 49).

Contrary to plaintiffs' allegations, the structure of these transactions demonstrates that cardholders do not directly pay interchange fees. "Although factual allegations of a complaint are normally accepted as true on a motion to dismiss, that principle does not apply to general allegations that are contradicted by more specific allegations in the Complaint." *DPWN Holdings (USA), Inc. v. United Air Lines, Inc.*, 747 F.3d

145, 151-52 (2d Cir. 2014) (citations and internal quotation marks omitted). By way of example, when a cardholder makes a $100 purchase, the merchant sends notice of the charge to its acquiring bank, and the acquiring bank in turn sends the information to the card issuer bank. If the charge is approved, the issuer bank pays the acquiring bank for the $100 purchase, retaining a portion as an interchange fee. The issuer bills the cardholder, who then is bound to pay the issuer according to the terms of the card. The cardholder has not directly paid the interchange fee, but rather has only paid the full price for the item or service it has purchased. *See United States v. Am. Express Co.*, No. 15-1672, 2016 WL 5349734, at *5 (2d Cir. Sept. 26, 2016) ("[T]he interchange fee . . . is paid by the acquirer to the issuer as the price for handling its transactions with the cardholder."); *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 102 (2d Cir. 2005) (defining "interchange fee" as a "fee the acquiring institution must pay to the card-issuing institution").

In sum, the district court correctly determined that the complaint failed to plausibly allege that plaintiffs directly pay interchange fees and are directly injured by their imposition. Accordingly, under Illinois Brick, plaintiffs do not have standing to bring their Clayton Act claim.

B. Motion for Reconsideration

Plaintiffs argue that the district court abused its discretion by denying their motion for reconsideration. "A district court's denial of a motion for reconsideration is reviewed for abuse of discretion." *Smith v. Hogan*, 794 F.3d 249, 253 (2d Cir. 2015). "The standard for granting such a motion is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked." *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995). The district court held that plaintiffs had not shown that it had overlooked critical facts or relevant controlling decisions; therefore, there was no basis to reconsider its dismissal of the Clayton Act claim. We identify no abuse of discretion in the district court's conclusion that plaintiffs' motion failed to meet the strict criteria for granting reconsideration.

Plaintiffs also argue that the district court abused its discretion in declining to consider charts purportedly depicting the transfer of fees in a credit card transaction that they offered in support of their motion for reconsideration. The district court held that the charts were not properly before it on the motion for reconsideration because they were not attached to the complaint, they were not before the court when it decided defendants' motion to dismiss, and plaintiffs violated the district court's Local Civil Rule 6.3, which prohibits filing affidavits in support of a motion for reconsideration absent leave of court. Because a motion for reconsideration is "not a vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a second bite at the apple," we hold that this ruling was not an abuse of discretion. *Analytical Surveys, Inc. v. Tonga Partners, L.P.*, 684 F.3d 36, 52 (2d Cir. 2012), as amended (July 13, 2012) (internal quotation marks omitted).

C. Leave to Amend

Plaintiffs contend that the district court should have granted them leave to amend the complaint. "We review denial of leave to amend under an 'abuse of discretion' standard." *Hutchison v. Deutsche Bank Sec. Inc.*, 647 F.3d 479, 490 (2d Cir. 2011). "The rule in this Circuit has been to allow a party to amend its pleadings in the absence of a showing by the nonmovant of prejudice or bad faith." *Block v. First Blood Assocs.*, 988 F.2d 344, 350 (2d Cir. 1993). This rule, while permissive, still requires a party to request leave to amend. *See Gallop v. Cheney*, 642 F.3d 364, 369 (2d Cir. 2011) ("While leave to amend under the Federal Rules of Civil Procedure is 'freely granted,' no court can be said to have erred in failing to grant a request that was not made." (quoting Fed. R. Civ. P. 15(a))). Plaintiffs did not request leave here. They also failed to include a proposed amended complaint, which is considered "normal procedure." *Twohy v. First Nat. Bank of Chi.*, 758 F.2d 1185, 1197 (7th Cir. 1985). Failure to do so "indicates a lack of diligence and good faith." *Id.*

Plaintiffs argue that leave to amend is warranted because the charts they submitted with their motion for reconsideration cure any "perceived defect" in their complaint. Appellants' Br. at 22. Even assuming plaintiffs were permitted to supplement their allegations with these charts, the allegations fail to establish that, as cardholders, plaintiffs directly pay interchange fees and are directly injured by their imposition. The charts are merely pictorial representations of the transactions that were described in the complaint, and, as discussed above, they do not demonstrate that cardholders directly pay the interchange fees. Accordingly, in the absence of any allegations that would make their complaint viable, "we see no reason to grant appellant[s] relief in this Court which was not requested below." *Wilson v. Merrill Lynch & Co.*, 671 F.3d 120, 140 (2d Cir. 2011) (quoting *Nat.l Union of Hosp. & Health Care Emps. v. Carey*, 557 F.2d 278, 282 (2d Cir. 1977)). We note that plaintiffs explicitly disclaim any intention of alleging generally elevated prices as the basis for their damages, and we express no view on whether such a claim would survive a motion to dismiss.

II. *Cartwright Act*

In their main brief on appeal, plaintiffs do not advance any substantive argument regarding (1) the district court's determination, on reconsideration, that it had original jurisdiction over plaintiffs. Cartwright Act claim, or (2) the merits of the district court's dismissal of their Cartwright Act claim. We generally do not consider issues raised for the first time in a reply brief. *McBride v. BIC Consumer Prod. Mfg. Co.*, 583 F.3d 92, 96 (2d Cir. 2009); *see Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998) ("Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal."). Plaintiffs do not challenge the district court's determination that it had original jurisdiction over plaintiffs. Cartwright Act claim. Although plaintiffs list their Cartwright claim in their Statement of Issues Presented for Review, they provide no substantive argument in their main brief and fail to even articulate the standards that must be met for such claims to survive a motion to dismiss. "[S]imply stating an issue does not constitute compliance with [Federal Rule of Appellate Procedure] 28(a): an appellant or cross-appellant must state the issue *and* advance an argument." *Gross v. Rell*, 585 F.3d 72, 95 (2d Cir. 2009) (quoting *Frank v. United States*, 78 F.3d 815, 833 (2d Cir. 1996)). Moreover, plaintiffs have not offered an explanation as to why they waited until their reply brief to advance an argument regarding the Cartwright Act claim. Accordingly, we find that plaintiffs have waived these arguments and affirm the dismissal of the Cartwright Act claim.

* * *

We have considered all of plaintiffs' arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
/s/ Catherine O'Hagan Wolfe

APPENDIX I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

05-MD-1720 (MKB) (JO)

[Filed September 27, 2017]

IN RE PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION	)
This document refers to: ALL ACTIONS.	)

MEMORANDUM AND ORDER

James Orenstein, Magistrate Judge:

The plaintiffs in this multi-district litigation – some acting on behalf of putative classes of millions of merchants, and others acting independently – have accused the corporate entities that operate the Visa and MasterCard payment card networks as well as several banks of violating federal and state antitrust laws. As a result of recent developments, both in this case and in the case law of this circuit, they now seek to amend their respective complaints in a number of ways. For the following reasons, I partially grant and partially deny the motions.

I. <u>Background</u>

I assume the reader's familiarity with the factual and procedural history of this litigation, and in particular refer the reader to the detailed descriptions of the payment card industry set forth in the opinion of this court approving a class-wide settlement in 2013, and the opinion of the appellate court reversing that approval three years later. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207, 214-15 (E.D.N.Y. 2013) ("*Interchange I*"), *rev'd*, 827 F.3d 223 (2d Cir. 2016) ("*Interchange II*"), *cert. denied*, 137 S. Ct. 1374 (2017).[1] I discuss here only those aspects of that history relevant to the instant motions. In doing so, it is convenient to use certain shorthand labels to refer to various groups of parties, as set forth in the Appendix.

A. <u>The Payment Card Industry</u>

When a consumer uses a payment card to purchase goods or services from a merchant, the transaction is received by the merchant's acquiring bank, which in turn notifies that credit card's network provider (in this case Visa or MasterCard) of the intended purchase. The network reaches out to the cardholder's issuing bank, and assuming the needed funds are available, the issuing bank approves the transaction. The network

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[1] Most of the history of this litigation is reflected on the docket under which this order is captioned. However, district court proceedings from early 2014 through late October 2016, during which jurisdiction over much of the litigation had vested in the circuit court, are recorded in the docket of *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 14-MD-1720 (MKB) (JO).

then informs the acquiring bank that the transaction has been approved, and the issuing bank transfers the purchase price minus an interchange fee (set by the issuing bank) and a merchant discount fee (an amount retained by the acquiring bank).

Merchants that accept Visa or MasterCard cards are bound to the defendants' network rules. These rules include a default interchange fee that applies to every transaction on the network (unless the merchant and issuing bank enter into their own agreement); the Honor-All-Cards rule which requires merchants that choose to accept any of the Network Defendants' credit cards to accept all of them; and anti-steering rules that prevent merchants from charging different prices at the point of sale based on the shopper's form of payment (collectively, the "Network Rules").

B. The Initial Class Action Complaints

On October 20, 2005, the Judicial Panel on Multidistrict Litigation consolidated fourteen actions asserting the antitrust claims described above and transferred them to this court for pretrial proceedings. Docket Entry ("DE") 1; DE 2. Since then, dozens more have been added, and there are currently over 90 cases associated with this action, some pleaded as class actions and some filed by plaintiffs suing only on behalf of themselves.

Following this court's appointment of interim co-lead class counsel, the Class Plaintiffs filed their First Consolidated Amended Class Complaint on April 24, 2006. DE 317 ("First Class Comp."). That pleading defined two putative classes: one seeking monetary damages and the other seeking equitable relief. *Id.* ¶ 97. The Class Plaintiffs asserted claims under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, as well as state law claims, all predicated on a contention that the defendants' unlawful contracts, combinations, and conspiracies, harmed competition and caused merchants to pay supracompetitive prices in the market for network services. *Id.* ¶¶ 3-4, 213-347.

In defining the scope of the relevant market, the Class Plaintiffs relied on controlling case law arising from earlier litigation concerning the same networks' practices. *See id.* ¶¶ 198-212 (citing *In re Visa Check/MasterMoney Antitrust Litig.* ("*Visa Check*"), 2003 WL 1712568 (E.D.N.Y. Apr. 1, 2003); *United States v. Visa* ("*Visa*"), 163 F. Supp. 2d 322, 335 (S.D.N.Y. 2001), *aff'd*, 344 F.3d 229 (2d Cir. 2003). As the circuit court had explained in *Visa*, and as the Class Plaintiffs alleged here, there exist two related but distinct markets relevant to the instant dispute. In the market for network services – the market in which the Class Plaintiffs alleged that the defendants had engaged in unlawful anticompetitive conduct – payment card networks are sellers that compete with one another to secure the business of the banks and merchants that purchase such services. In the separate market for general purpose payment cards, the sellers are the banks that issue the cards and the buyers are the consumers who obtain the cards and use them for purchases. *See Visa*, 344 F.3d at 238-39; First Class Comp. ¶¶ 198-212. More recently, however, the same appellate court has held that the relevant market for similar complaints by a nationwide class of merchants against another payment card network – American

Express – is a single, two-sided market that encompasses the networks, the processing banks, the merchants who accept cards for payments, and the consumers who use those cards. *See United States v. American Express, Co.* ("*AmEx*"), 838 F.3d 179, 196-200 (2d Cir. 2016), *petition for cert. filed*, No. 16-1454 (U.S. June 6, 2017). That decision has been a significant factor in prompting the instant motions to amend.

On January 29, 2009, after filing further supplemental pleadings and litigating dismissal motions, the Class Plaintiffs filed their Second Consolidated Class Action Complaint, which, together with two supplemental complaints filed the same day, collectively comprise the Class Plaintiffs' currently operative pleading. *See* DE 1153 (the "Operative Class Complaint" or "Class Comp."); DE 1154 (the Second Supplemental Class Action Complaint); DE 1152 (the First Amended Supplemental Class Action Complaint).[2] The Operative Class Complaint omitted

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[2] Each of the cited documents is a redacted version, available on the public docket, of a corresponding sealed pleading. The sealed versions are docketed at DE 1146, DE 1145, and DE 1144, respectively. The supplemental pleadings assert claims arising from the fact that after this litigation began, each of the networks conducted an initial public offering of stock ("IPO") that transformed it from a consortium of banks into a new public company independent of the banks. In their supplemental pleadings, the class plaintiffs asserted that the IPOs were anticompetitive and violated the Clayton Act. Second Supplemental Class Action Complaint ¶¶ 1-8, 235-267; First Amended Supplemental Class Action Complaint ¶¶ 1-10; 270-302. Those claims are not implicated in the instant motions to amend, and I therefore refer exclusively to Operative Class Complaint as the baseline for comparison to the proposed amendment.

certain class claims that had been included in its predecessor and added an antitrust claim against Visa for fixing interchange fees for PIN debit card transaction but otherwise replicated the class plaintiffs' earlier claims. *See* DE 988 (letter describing proposed amendments). Of particular relevance here, like its predecessor, the Operative Class Complaint asserts that the Network Rules unlawfully allow issuing banks to set interchange fees in the market for network services at supracompetitive rates. Class Comp. ¶¶ 246-248; DE 6880-1 ("Damages Class Memo.") at 6.

C. The Class Settlement

On October 19, 2012, after extensive negotiations, the parties to the then-pending class claims executed a proposed settlement agreement. DE 1656. On November 27, 2012, the court preliminarily approved the proposed settlement, provisionally certified two classes (a class for damages claims, from which members could opt out, and a class for injunctive relief in which membership was mandatory), and enjoined all members of the provisionally certified settlement classes from litigating any claims covered by the settlement. DE 1745 (Order). On December 13, 2013, the court certified the two settlement classes and approved the proposed settlement over the objections of several named plaintiffs as well as several non-party class members. *Interchange I*, 986 F. Supp. 2d at 213, 217. Under the approved terms, the defendants were released from any claims arising from the Network Rules existing as of November 27, 2012, and the members of the certified classes received over seven billion dollars in damages and injunctive relief.

D. <u>The Direct Action Plaintiffs' Post-Settlement Complaints</u>

Following the court's preliminary approval of the proposed settlement, three groups of merchants that had not previously appeared as named parties – the Target, 7-Eleven, and Home Depot groups or, collectively, the "Direct Action Plaintiffs" – opted out of the settlement's damages class and filed their own complaints in other districts, all of which were ultimately transferred to this court and consolidated in the instant multidistrict litigation. *See Target Corp., et al. v. Visa Inc., et al.*, 13-CV-5745 (MKB) (JO) ("*Target*"), DE 1 (complaint); *id.*, DE 95 (transfer order); *id.*, DE 107 (amended complaint) (the "Target Operative Complaint" or "Target Comp."); *7-Eleven, Inc., et al. v. Visa Inc., et al.*, 13-CV-5746 (MKB) (JO) ("*7-Eleven*"), DE 1 (complaint); *id.*, DE 9 (transfer order); *id.*, DE 80 (fourth amended complaint) (the "7-Eleven Operative Complaint" or "7-Eleven Comp."); *The Home Depot, Inc., et al. v. Visa Inc., et al.*, 16-CV-5507 (MKB) (JO) ("*Home Depot*"), DE 1 (complaint) (the "Home Depot Operative Complaint" or "Home Depot Comp."); *id.*, DE 34 (transfer order). All of the Direct Action Plaintiffs sought relief only for themselves; they did not seek to represent a putative class.

As relevant here, the operative pleadings of the three groups of Direct Action Plaintiffs assert claims under Sections 1 and 2 of the Sherman Act and state antitrust laws. Specifically:

- Target alleges that the defendants have violated Section 1 because the Network Rules "individually and in combination, preclude merchants from gaining the benefits of competition as to the terms, including a fee (if any), for the acceptance of cards of particular issuing banks and preclude card issuers from competing for merchant acceptance of their cards." Target Comp. ¶ 6.

- 7-Eleven alleges that the defendants have violated Sections 1 and 2 (and also state antitrust laws) because the Network Rules have "prevented merchants from realizing the price-reducing benefits of Issuers competing on price, which would have occurred in a competitive market. Instead, merchants … pay the same Interchange Fee on a given transaction regardless of which Issuer is involved. There is no competition." 7-Eleven Comp. ¶ 89.

- Home Depot alleges that the defendants have violated Sections 1 and 2 (and also state antitrust laws) because the Network Defendants' conduct has "caused substantial and ongoing anticompetitive harm to merchants as direct purchasers of General Purpose Payment Card Network Services in the form of inflated Interchange Fees paid directly by those merchants, foreclosure of network competitors, and reduced output." Home Depot Comp. ¶ 187.

E. Vacatur of the Settlement and Subsequent Developments

After the Direct Action Plaintiffs had filed their initial complaints, on June 30, 2016, the circuit court vacated this court's decision to certify the settlement classes and approve the proposed settlement. *Interchange II*, 827 F. 3d 223 (2d Cir. 2016). The appellate court concluded that the Class Plaintiffs lacked adequate representation, in violation of the rule governing class actions and of their right to due process, and therefore remanded the litigation to this court for further proceedings.

On November 30, 2016, I appointed two groups of interim co-lead class counsel. One group was appointed to represent merchants seeking to certify a class pursuant to Federal Rule of Civil Procedure 23(b)(2) (the "Equitable Relief Class"). The second group represents those seeking to certify a class pursuant to Federal Rule of Civil Procedure 23(b)(3) (the "Damages Class"). DE 6754 (memorandum and order).[3] The appointment of new interim co-lead counsel to represent the interests of different putative classes,

[3] The class names are imprecise, and used as a convenient shorthand. *See id*. at 2 n.2. The Direct Action Plaintiffs, along with Walmart, having opposed the appointment of any lead counsel for a group seeking class certification under Federal Rule of Civil Procedure (b)(2), have sought relief with respect to the role that co-lead counsel may play in representing the Equitable Relief Class. Their objections to my order denying those requests remain pending before the court. DE 6947 (appeal); DE 6957 (Equitable Relief Class Response); DE 6958 (Defendants' Response); DE 6964-1 (Direct Action Plaintiffs' Reply).

necessitated by the circuit court's decision that unified class counsel had labored under an inherent conflict of interest, naturally required each newly defined group of putative class plaintiffs to file a new pleading. The Equitable Relief Class did so on March 31, 2017. DE 6892.

As discussed below, the ability of the Damages Class to file an updated pleading, as well as the Direct Action Plaintiffs' perceived need to further amend their complaints, has been affected by two recent circuit court decisions in other actions involving antitrust claims arising from interchange fees and network rules for merchants: *AmEx* and *Salveson v. JP Morgan Chase & Co.*, 663 F. App'x 71, 75 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 1826 (2017).

The *AmEx* decision, issued about three months after the opinion reversing the settlement in this case, affected the parties' understanding of the litigation risks attendant to their proposed definitions of the relevant market. As noted above, the initial complaints in this litigation relied on precedent such as *Visa* and *Visa Check* to assert claims that the defendants had harmed competition in a one-sided market for payment card network services – that is, a market in which merchants act solely as buyers of the products the networks sell. In *AmEx*, however, the circuit court rejected a district court's application of such a market definition because it failed to account for harm to the consumers who use payment cards for their purchases. *See AmEx*, 838 F.3d at 197; *see also* DE 7068 (transcript of oral argument dated Apr. 20, 2017) ("Tr.") at 44 (defendant JP Morgan Chase's counsel, opposing the motions to amend, describing the *AmEx* opinion as "the first time in a credit card case a court has expressly said it is a two-sided market").

Like the plaintiffs in this litigation, the *AmEx* plaintiffs challenged certain nondiscriminatory provisions ("NDPs") contained in American Express's regulations that prohibited merchants from discounting and steering at the point of sale. The appellate court in *AmEx* reasoned that the rules about which the merchant plaintiffs in *Visa* complained constituted horizontal restraints in a one-sided market for network services, but that the NDPs constituted vertical restraints that affected competition in both the market for network services and the two-sided market for general purpose cards. *AmEx*, 838 F.3d at 197-98. The court, noting that the evidence in the record demonstrated "that the quality and output of credit cards across the entire industry continues to increase[,]" thus held that the plaintiffs in *AmEx* had failed to prove a "net harm to … both cardholders and merchants[.]" *Id*. at 206.

The *Salveson* case also turned on the role of payment card holders in the markets relevant to this litigation. In the *Salveson* complaint, originally filed in the Northern District of California on December 16, 2013, four individual plaintiffs acting on behalf of a putative class alleged that as consumers using payment cards for their purchases, they had directly paid to the defendant banks supracompetitive, price-fixed interchange fees. *See Melvin Salveson, et al. v. JP Morgan Chase & Co., et al.*, 14-CV-3529 (MKB) (JO), DE 1. On June 4, 2014, the Judicial Panel on

Multidistrict Litigation transferred the case to this court. *Id.*, DE 61. On November 26, 2014, this court granted the *Salveson* defendants' motion to dismiss that action on the ground that the cardholder plaintiffs were, with respect to their payment of interchange fees, indirect purchasers of payment card network services who therefore lacked standing to complain of the antitrust violations that resulted in such fees. *See id.*, DE 83 at 6 ("The markets for general purpose payment cards and for payment card network services are separate and distinct, and payment-card consumers are considered to participate only in the former.") (citing *Visa*, 344 F.3d at 239); *see Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). On review of that decision, the same circuit court that had just weeks before issued the *AmEx* opinion affirmed the order of dismissal, explaining that cardholders like Salveson suffer no direct injury by paying interchange fees. *See Salveson*, 663 F. App'x at 75.

F. The Instant Motions

The various groups of plaintiffs now seek leave to amend their respective complaints in several ways for a number of reasons. *See* DE 6884 (fully-briefed 7-Eleven motion); DE 6881 (fully-briefed Target motion); DE 6890 (sealed version of Target's memorandum of law in support); DE 6887 (fully-briefed Home Depot motion); DE 6888 (sealed version of Home Depot's memorandum of law in support); DE 6880 (fully-briefed Damages Class motion).[4] The defendants

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[4] In addition to the motions described above, the plaintiffs listed below have adopted some of their counterparts' arguments in

consent to some of those amendments, but object to any amendment that would assert antitrust claims predicated on the definition of a two-sided market of the type described in *AmEx*. DE 6881-2 (defendants' memorandum of law) ("Opp.") at 1, 25 (opposing amendments "to the extent that they assert new legal

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litigating their own motions to amend:

- The plaintiffs in *Sunoco Inc. (R&M) v. Visa Inc., et al.*, 14-CV-5800 (MKB) (JO), rely on Target's arguments. *See* DE 6875.

- The remaining plaintiffs in *Delta Airlines Inc., et al v. Visa Inc., et al.*, 14-CV-5800 (MKB) (JO), rely on the arguments of both Target and 7-Eleven. *See* DE 6889; DE 6889-8 (reply).

- Plaintiff Roundy's Supermarket, Inc. filed a separate motion to amend that raises the same issues as the motions summarized in the text above. *See* DE 6907; Opp. at 1 n.1.

- Plaintiff Rue21, Inc. ("Rue21") similarly asked to file an amended complaint in a letter dated December 6, 2016, DE 6766, but never filed a fully-briefed motion as directed or responded to the defendants' opposition; it later filed a notice of bankruptcy. DE 6973. To the extent Rue21's motion remains pending, it implicates the same issues (*see* Opp. at 1 n.1), and is resolved in the same way, as the motions described above.

- The sole plaintiff in *American Eagle Outfitters, Inc. v. Visa Inc., et al.*, 14-CV-0321 (MKB) (JO), joins in the motions of Target, 7-Eleven, and Rue21. DE 6885.

- The plaintiffs in *Wal-Mart Stores, Inc., et al v. Visa U.S.A. Inc., et al.*, 14-CV-2318 (MKB) (JO) ("*Wal-Mart*"), moved to amend on the same grounds as those asserted by the Direct Acton Plaintiffs. *See* DE 6989; DE 6994. Because the *Wal-Mart* action has been stayed to accommodate the parties' settlement efforts, *see* DE 7072, this order does not formally resolve the motion on the merits; instead, I terminate it without prejudice.

and factual allegations regarding market definitions, market power, and competition for or effects on cardholders.").[5] Moreover, to the extent such amendments are allowed, the defendants contend that they should not relate back to the time of the pleadings they would supersede, and that the Direct Action Plaintiffs' claims should not be given the benefit of a tolling theory that would deem them to have been asserted as early as 2005. Opp. at 21-25; *see also* Tr. 46-47, 51; DE 6937 ("Defs. Supp. Ltr.") at 4-5.

At oral argument on April 20, 2016, *see* DE 6929 (minute entry), I discussed with the parties the effect of *AmEx* and the extent to which the parties' earlier pleadings had – or had not -- asserted that the defendants had acted to harm competition in a two-sided market that included cardholders. I also asked the parties to address the effect on the analysis of the instant motions, if any, of the fact that the *Salveson* case, which was consolidated as part of the instant multidistrict litigation, had been resolved on the basis of the proposition that cardholders are not part of the relevant market for purposes of the claims being litigated here. *See* Tr. at 31-32, 56. Following oral argument, the parties submitted supplemental letters in support of their respective positions. *See* DE 6936 ("Damages Class Supp. Ltr."); DE 6937 ("Defs. Supp. Ltr."); DE 6939 ("Direct Action Plaintiffs' Supp. Ltr.").

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[5] The defendants submitted one memorandum of law (with supporting exhibits) in opposition to each of the plaintiffs' motions for leave to amend. *See* Opp. at 1. For ease of reference, I cite to the version submitted in opposition to Target's motion.

II. Discussion

A. Applicable Law

1. Leave to Amend

A court should "freely" grant leave to amend a pleading in the absence of reasons to deny it such as "undue delay, bad faith or … futility[.]" *Foman v. Davis*, 371 U.S. 178, 182 (1962) (quoting Fed. R. Civ. P. 15(a)). "Mere delay, however, absent a showing of bad faith or undue prejudice, does not provide a basis for a district court to deny the right to amend." *State Teachers Ret. Bd. v. Fluor Corp.*, 654 F.2d 843, 856 (2d Cir. 1981). The party seeking leave to amend bears the burden of satisfactorily explaining any delay. *Franconero v. UMG Recordings, Inc.*, 542 F. App'x 14, 18 (2d Cir. 2013). Once it does so, the opposing party has to show more in terms of prejudice. *Evans v. Syracuse City Sch. Dist.*, 704 F.2d 44, 46-47 (2d Cir. 1983). In determining prejudice, courts consider whether the proposed amendment would impose significant new discovery and trial preparation burdens on the opponent, whether it would significantly delay the dispute's resolution, and the movant's ability to bring a timely action in another forum. *See Block v. First Blood Assocs.*, 988 F.2d 344, 350 (2d Cir. 1993). The decision to grant or deny a motion to amend rests within the sound discretion of the district court. *Zahra v. Town of Southold*, 48 F.3d 674, 685 (2d Cir. 1995).

2. Relation Back

"An amendment to a pleading relates back to the date of the original pleading when … the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out – or attempted to be set out – in the original pleading." Fed. R. Civ. P. 15(c)(1)(B). For a newly-added claim to relate back under Rule 15(c), the "basic claim must have arisen out of the conduct set forth in the original pleading[,]" and the central inquiry is "whether adequate notice of the matters raised in the amended pleading has been given to the opposing party." *ASARCO LLC v. Goodwin*, 756 F.3d 191, 202 (2d Cir. 2014).

3. Class Action Tolling

Once a party files a class action complaint, the applicable limitations period for the asserted claim is tolled as to all members of the putative class. *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974) ("*American Pipe*") ("[T]he commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action."). The rationale for this *American Pipe* tolling is that "absent putative class members are expected and encouraged to remain passive ... and to 'rely on the named plaintiffs to press their claims.'" *Cullen v. Margiotta*, 811 F.2d 698, 719 (2d Cir. 1987) (quoting *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 350-51 (1983)), *overruled on other grounds by Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143 (1987). *American Pipe* tolling applies not only to wholly passive members of the putative class, but also to those "who later file their own independent actions." *Police & Fire Ret. Sys. v. IndyMac MBS*, 721 F.3d 95, 105 (2d Cir. 2013). The rule shadows "the functional operation of a statute of limitations.... The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *American Pipe*, 14 U.S. at 554 (quoting *Order of R.R Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348-49 (1944)). However, as the Supreme Court recently explained, "[t]he source of the tolling rule applied in *American Pipe* is the judicial power to promote equity, rather than to interpret and enforce statutory provisions. Nothing in the *American Pipe* opinion suggests that the tolling rule it created was mandated by the text of a statute or federal rule." *Ca. Pub. Employees' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2051-52 (2017) ("*CalPERS*").

B. The Damages Class

The Damages Class Plaintiffs contend that they should be granted leave to amend over the defendants' objections, and that the amendment should relate back to their original complaint, because "the core of [their] allegations has been and continues to be that Defendants' collusive agreements and network rules inflate prices to supracompetitive levels." DE 6880-5 (Damages Class Reply) at 6. While I agree with that characterization of their factual allegations, I disagree that it resolves the dispute. Specifically, I conclude that the Damages Class Plaintiffs rely on a legal theory that is not only new, but fundamentally distinct from the legal violation that they previously asserted – indeed, it relies on the new authority of *AmEx* to posit a theory of liability that accounts for benefits to cardholders that they had affirmatively rejected earlier in the litigation. DE 1494-2 (redacted version of Class Plaintiffs' memorandum of law in support of summary judgment) at 61-67; 1494-4 (redacted reply) at 40-42; DE 1503 (sealed version of Class Plaintiffs' motion for summary judgment); s*ee also* Opp. at 3-4 (citing Class Plaintiffs' opposition to dismissal motion, DE 1226, at 17). Thus, while fairness requires that the Damages Class Plaintiffs be permitted to adapt to *AmEx* by asserting claims that they previously had reason to believe would be futile, fairness likewise precludes having those claims relate back to the start of the instant litigation.

1. <u>Leave to Amend</u>

The defendants fault the plaintiffs for delay, arguing that they have had the opportunity to assert claims based on a two-sided market at least since the defendants themselves raised it as a defense to the Class Plaintiffs' assertion that the defendants had harmed competition in a market defined to exclude cardholders as relevant actors. *See* Opp. at 15-17. Without more, however, such delay is not a reason to deny leave to amend. *See Agerbrink v. Model Svc. LLC*, 155 F. Supp. 3d 448, 452 (S.D.N.Y. 2016) (citing cases).

What matters more than the delay itself is the reason for it. All of the parties appear to agree that the recent decision in *AmEx* has prompted the plaintiffs to seek to add to their pleadings the claims that the defendants oppose. *See* DE 6880-1 ("Damages Class Memo.") at 6; DE 6880-5 ("Damages Class Reply") at 8; Opp. at 1 (arguing that the plaintiffs seek to amend so as to avoid dismissal under *AmEx*); Defs. Supp. Ltr. at

2 (contending that without additional discovery, the plaintiffs' case would be dismissed under *AmEx*); Tr. 44 (agreeing that absent amendment and without further discovery, the defendants will likely seek dismissal on the basis of *AmEx*). That is no surprise, as the parties also appear to agree that *AmEx* significantly changed the legal landscape: the opinion is the first in which any court has expressly analyzed a payment card antitrust action in the context of a two-sided market. Tr. 33, 44-45; *see also US Airways, Inc. v. Sabre Holdings Corp.*, 2017 WL 1064709, at *10 (S.D.N.Y. Mar. 21, 2017) (recognizing that *AmEx* "is one of the few cases that explicitly addresses two-sided markets").[6]

To be sure, the court in *AmEx* took pains to distinguish the case before it from the circumstances of the *Visa* case (upon which the plaintiffs here previously relied in describing the market relevant to the instant litigation), and it would be premature to opine as to whether *AmEx* does or does not provide a basis for dismissing the claims previously asserted in these consolidated actions. At a minimum, the fact that the same court that decided *AmEx* went on just a few weeks later to affirm this court's dismissal of the claims in *Salveson* – a decision predicated on the assumption of a one-sided market that excludes

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[6] The parties' description of the unprecedented nature of the *AmEx* opinion is not in tension with the reference in *US Airways, Inc.* to some "few" cases addressing two-sided markets. The latter case involved claims arising "in a different industry and with very different facts" and the opinion did not cite any other decisions discussing a two-sided market in the context of payment cards. *Id.*

cardholders as relevant actors – would at least support a colorable argument that the initial claims in this litigation asserting a one-sided market remain viable. But what cannot reasonably be disputed is that *AmEx* altered the parties' litigation risks in an important way. Simply put, the plaintiffs had no reason to add two-sided market claims before *AmEx* because they disagreed with the defendants that such a market definition was appropriate and the unequivocal case law of this circuit supported that view; once *AmEx* necessarily altered their analysis in that regard, they promptly moved to amend. The delay about which the defendants complain was therefore excusable.[7]

The defendants also argue that allowing the disputed amendments now would be unduly prejudicial because it would require them to redo years of discovery, throughout all of which the parties on both sides had assumed that the plaintiffs would seek to prove that the defendants had harmed competition in a one-sided market. *See* Opp. at 17-20. There is no question that the parties have already borne substantial discovery burdens: by the time the court approved the settlement in *Interchange I*, the parties had completed fact and expert discovery, which included hundreds of depositions and voluminous

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[7] The defendants also argue in a footnote – the placement of which is itself a reason to disregard the argument, *see*, *e.g.*, *Dorchester Fin. Sec., Inc. v. Banco BRJ, S.A.*, 2014 WL 684831, at *2 n.2 (S.D.N.Y. Feb. 21, 2014) (citing cases) – that the plaintiffs' alternative pleading tactics violate Federal Rules of Civil Procedure 8. Opp. at 8-9 n.7. To the contrary, Rule 8 permits pleading alternative statements and inconsistent claims. Fed. R. Civ. P. 8(d).

document productions. Nor do I seriously question the proposition that the parties have a great deal of work ahead of them in preparing to litigate the newly asserted claims.[8] But those burdens – both the arguably wasted efforts of the past and the work that lies ahead – are common to all of the parties; they are not uniquely, or unduly, prejudicial to the defendants alone.

The ground has shifted under all of the parties. That does not mean that one side alone should suffer by being limited to the assertion of claims that may suddenly, and quite unexpectedly, have become untenable. Over the past dozen years, all of the parties to this litigation have invested heavily in their assumption that controlling law presumes the relevant market to be one-sided. Now that the circuit court has upset that assumption, both sides will have to invest still more to prepare for litigation of the newly asserted claims. But that in itself is not a reason to foreclose the claims entirely. *See Monahan v. New York City Dep't of*

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[8] Although I do not base my decision on any assumption that allowing the proposed amendments will be less burdensome than the defendants claim to fear, I am confident that the parties will rise to the challenge of supplementing their past discovery efforts efficiently. As the Damages Class Plaintiffs note, the parties have already taken extensive discovery relating to potential effects of the challenged practices on cardholders. *See* Damages Class Memo. at 6-7; Damages Class Reply at 2-4; *see also* Opp. at 20 n.15 (recognizing the overlap in discovery); Tr. at 11-12 (reporting that the parties are working jointly to avoid any inefficiencies and incompatible demands on the defendants). Moreover, the advent of the Direct Action Plaintiffs' claims and the circuit court's reversal of the earlier class settlement has in any event required extensive new discovery that has yet to be done.

Corrections, 214 F.3d 275, 285 (2d Cir. 2000) (citing *Block*, 988 F.2d at 351) ("the fact that one party has spent time and money preparing for trial will usually not be deemed prejudice sufficient to warrant a deviation from the rule broadly allowing amendment to pleadings"); *N.Y. State Elec. & Gas Corp. v. Sec'y of Labor*, 88 F.3d 98, 104-05 (2d Cir. 1996) (prejudice does not arise from an amending party's change of legal theory, but rather from a resulting disadvantage to the opposing party in presenting its case). In the absence of any undue delay, bad faith, or futility of the newly asserted claims predicated on the existence of a two-sided market, I grant the Damages Class Plaintiffs' motion for leave to amend.

2. Relation Back

The Damages Class Plaintiffs argue that the new claims based on a two-sided market relate back to their original complaint because they rely on the same factual allegations about the defendants' conduct as before and that the defendants were on notice of the two-sided market theory because they themselves cited it in their own defense. *See* Damages Class Memo. at 6; Damages Class Reply at 9. As explained below, I respectfully disagree.

The proposition that the defendants could have put themselves on notice of the two-sided market theory by citing it as a refutation of the plaintiffs' initial one-sided market theory is untenable. The Damages Class Plaintiffs cite no authority supporting such a counter-intuitive theory, and it is at odds with prevailing case law. Rule 15 does not allow a wholly new legal theory to relate back to an earlier claim simply because both rest on the same factual assertions. Rather, those factual assertions, and the pleadings that surround them, must give fair notice of the possibility of the later claim. *See Slatyon v. Am. Express Co.*, 460 F.3d 215, 228 (2d Cir. 2006) ("Under Rule 15, the 'central inquiry is whether adequate notice of the matters raised in the amended pleading has been given to the opposing party within the statute of limitations by the general fact situation alleged in the original pleading.'") (quoting without internal quotations and citations *Stevelman v. Alias Research, Inc.*, 174 F.3d 79, 86 (2d Cir. 1999)). The litigation of this case did not satisfy that requirement. Instead, the Class Plaintiffs pleaded claims predicated on certain conduct that they contended harmed competition in a one-sided market; the defendants sought to refute those claims in part by arguing that the conduct alleged had in fact promoted competition when viewed in the context of a two-sided market; and the Class Plaintiffs replied that such a redefinition of the market was inapposite and therefore unavailing. That is the precise opposite of providing the defendants with fair notice that they might have to defend against a claim that the relevant market has two sides – it is an attempt to forestall the defendants' efforts to characterize the Class Plaintiffs' claims in a way the latter explicitly disavowed.

Such a reading of the record is particularly apt in the context of an antitrust case, where market definition is a critical aspect of the litigation. A plaintiff pleading a claim under Section 1 or 2 of the Sherman Act "must allege a plausible relevant market in which competition will be impaired." *City of New*

York v. Group Health Inc., 649 F.3d 151, 155 (2d Cir. 2011). The Class Plaintiffs originally contended that the defendants were liable because they engaged in conduct that harmed the merchants who purchased their services in a one-sided market, and that any benefits to cardholders arising from that conduct could not avert that liability. Those same plaintiffs now seek to plead a wholly new alternative claim: that the defendants' conduct harmed competition in a different, two-sided market. *See* Tr. at 54 (Damages Class counsel: "I am not going to run away from the fact that the two-sided market theory is different than the one-sided market theory").[9] I therefore conclude that the Damages Class Plaintiffs' new claims relating to a

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[9] Citing *US Airways*, the Damages Class Plaintiffs contend that relation back is appropriate because the newly added claims and the original one-sided market claims are pleaded in the alternative based on the same core facts. Damages Class Supp. Ltr. at 1-3. In *US Airways, Inc.*, the plaintiffs proceeded to trial and secured a jury verdict on the basis of a one-sided market theory, but the jury also answered in the affirmative when asked to decide whether the plaintiff had proved that the defendants had harmed competition in a hypothetical two-sided marked. In upholding that verdict, the court noted that the evidence had sufficed for the latter theory as well as the former. *US Airways, Inc.*, 2017 WL 1064709, at *12 n.6. The case may stand for the proposition that the Damages Class Plaintiffs might not need to respond to *AmEx* by asserting a new alternative claim, but it says nothing about whether, if such a claims is asserted, it relates back to the original complaint.

[10] In a footnote, the defendants add that the plaintiffs' new claims pertaining to EMV "Chip" technology should not relate back. *See* Opp. at 21 n.17. The argument is not properly before the court, and I disregard it. *See*, *e.g.*, *Dorchester Fin.*, 2014 WL 684831, at *2 n.2.

two-sided market do not relate back to the original complaint.[10]

C. The Direct Action Plaintiffs

1. Leave to Amend

The Direct Action Plaintiffs raise many of the same arguments in support of leave to amend as the Damages Class Plaintiffs, and I rely on the reasoning set forth above to grant their motions as well. I note, however, that the Direct Action Plaintiffs are in a different position with respect to some of their arguments. First, granting leave to amend does not have as great an impact on the discovery burdens facing the parties to the Direct Action Plaintiffs' claims: because those claims were filed only after the earlier class-wide settlement, discovery on those claims has not proceeded nearly as far as discovery on the Class Plaintiffs' claims; moreover, recent discovery productions have already begun to focus on the role of cardholders. *See* DE 6881-3 (Target Reply) at 2-4; DE 6884-6 (7-Eleven Reply) at 3-8; DE 6887-9 (Home Depot Reply) at 6-8 (noting that at the time of filing, depositions for Home Depot had not yet been scheduled).

Second, as the defendants acknowledge, the Direct Action Plaintiffs are entitled in any event to assert for the first time claims for injunctive relief that had previously been barred under the terms of the class-wide settlement. Because such claims can properly include allegations of harm to cardholders in a two-sided market, the discovery that the parties will inevitably conduct on the injunctive relief claims that the Direct Action Plaintiffs are plainly entitled to assert will in any event overlap significantly with the discovery burdens that the defendants fear would arise as a result of granting the contested motions to amend. *See* Tr. 45-46. I therefore grant the Direct Action Plaintiffs leave to amend.

2. Relation Back and *American Pipe* Tolling

Like the Damages Class Plaintiffs, the claims that the Direct Action Plaintiffs originally filed were predicated on allegations that the defendants' conduct harmed competition in a one-sided market. *See*, *e.g.*, Tr. at 20 (acknowledgment by Target's counsel). Accordingly, as with the Damages Class Plaintiffs, I conclude that the Direct Action Plaintiffs' new claims relating to a two-sided market do not relate back to their original complaints.

The Direct Action Plaintiffs fare no better in seeking to take advantage of *American Pipe* tolling by characterizing their two-sided market claims as an "alternative" theory that supplements the Class Plaintiffs' original claims. Even before the Supreme Court made clear in *CalPERS* that the nature of *American Pipe* tolling is wholly equitable, courts in this circuit considering the availability of such tolling employed a notice-based analysis similar to that used to determine the availability of relation back under Rule 15(c). Thus, whether viewed through the prism of relation back or that of equitable tolling under *American Pipe*, the pertinent question is whether the original class complaint sufficed to put the defendants on fair notice of the plaintiffs' later claims. *Cullen*, 811 F.2d at 720 ("American Pipe tolling is properly extended to claims of absent class members that involve the same evidence, memories, and witnesses as were involved in the initial putative class action."), *overruled on other grounds by Agency Holding Corp. v. Malley-Duff &Assocs., Inc.*, 483 U.S. 143 (1987); *Escott v. Barchis Constr. Corp.*, 340 F.2d 731, 734 (2d Cir. 1965) (tolling the plaintiffs' claims because "[t]he defendants were thus made aware of the nature of the evidence that would be needed at the trial"); *see also CalPERS*, 137 S. Ct. at 2051 ("By filing a class complaint within the statutory period, the named plaintiff [in *American Pipe*] 'notifie[d] the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment.'") (quoting *American Pipe*, 414 U.S. at 555); *Crown, Cork & Steal Co.* 462 U.S. at 353 (notice required to make defendants aware of "the need to preserve evidence and witnesses respecting the claims of all the members of the class.").[11]

Thus, for the same reasons that I conclude above that the newly pleaded claims asserting harm in a two-sided market do not relate back to earlier pleadings asserting harm in a different market, I also conclude that equity does not require applying equitable tolling under *American Pipe* to the Direct Action Plaintiffs' claims based on a two-sided market.

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[11] Other jurisdictions appear to take a more restrictive approach, applying *American Pipe* tolling only the same cause of action previously asserted by the putative class. *See In re Comm. Bank of N. Va.*, 622 F.3d 275, 299 (3d Cir. 2010) (collecting cases); *Scott v. Ill. Bell Tel. Co.,* 169 F. Supp. 3d 845, 854 (N.D. 2016) (same).

In addition to relying on the same reasoning set forth above, however, I also take into account arguments that the Direct Action Plaintiffs offer specifically on the tolling issue.

First, the Direct Action Plaintiffs' reliance on the "same anticompetitive rules and conduct" alleged in the class complaint and their proposed amendments incorrectly narrows the scope of the notice required. *See* Target Reply at 9; 7-Eleven Reply at 10; Home Depot Reply at 9. To successfully plead and prove a violation of Section 1 or 2 of the Sherman Act, a plaintiff must identify not only the defendant's allegedly anticompetitive conduct, but also the relevant market and the resulting anticompetitive harm. *Group Health, Inc.*, 649 F.3d at 155 (citing cases). But the Class Plaintiffs' original complaints identified only a one-sided market in which the effect of the defendants' conduct on cardholders was immaterial. *See* Tr. 23 (counsel for Damages Class Plaintiffs explaining that "if this case had gone to trial three years ago, we would have put in evidence that there is a one-sided market."). As a result, the defendants were never on sufficient notice that they needed to preserve and develop evidence relating to the effect of their conduct on cardholders who were actors in a two-sided market. *See Crown, Cork & Steal Co.*, 462 U.S. at 353.

Second, Home Depot contends that declining to toll the "alternative" market allegations in this case will force absent plaintiffs to file separate actions if they disagree "even slightly" with any of class counsel's litigation decisions. Home Depot Reply at 9-10. I respectfully disagree: if Home Depot or any of the other

Direct Action Plaintiffs had refrained from asserting a two-sided market theory only out of respect for *American Pipe*'s preference to avoid a proliferation of lawsuits (and not because, like all of the other parties to this litigation, they assumed that the relevant market was the one-sided kind at issue in *Visa* that excludes cardholders), they would have asserted such claims as soon as they entered the fray rather than now. It thus does no violence to the rationale of *American Pipe* to observe that under the precise circumstances of this litigation, equity does not compel the tolling the Direct Action Plaintiffs seek. The goal of *American Pipe* tolling is "to prevent a 'needless multiplicity of actions' which might result if putative class members were required to file separate actions to hedge against the possibility of the class action failing." *Lawrence v. Phillip Morris Cos.*, 1999 WL 51845, at *3 (E.D.N.Y. Jan. 9, 1997) (citing *Crown, Cork & Steal Co.*, 462 U.S. at 351)). But that goal is not served by tolling in this case because no putative class member ever had a reason to hedge against the failure of the Class Plaintiffs' original claims by asserting a separate claim predicated on allegations of competitive harm to a two-sided market – as the history of this litigation makes clear, the incentive for any party to do so arose only once the circuit court decided *AmEx*.

Finally, the Direct Action Plaintiffs cite the defendants' acknowledgement that the new two-sided market claims will be consolidated with earlier causes of action as a basis to conclude that the two types of claims share sufficient common factual issues to support *American Pipe* tolling. Direct Action Plaintiffs' Supp. Ltr. at 3. Again, I respectfully disagree: the standard for consolidation in multidistrict litigation is wholly distinct from the analysis pertinent to a request for *American Pipe* tolling. *See* 28 U.S.C. § 1407(a) (requiring "one or more common questions of fact."). I therefore conclude that the Direct Action Plaintiffs' proposed two-sided market allegations are not entitled to *American Pipe* tolling.

III. Conclusion

For the reasons set forth above, I grant in part and deny in part the plaintiffs' contested motions for leave to file an amended complaint. Specifically, I grant the plaintiffs leave to amend their complaints to include allegations pertaining to a two-sided relevant market over the defendants' objections, but only to the extent that these claims are not time-barred: the two-sided market claims do not relate back to earlier pleadings and are not subject to equitable tolling. As to all other proposed amendments, I grant leave on consent. The plaintiffs are respectfully directed to amend their complaints in accordance with this order and to file the amended complaints as separate entries on the docket by October 27, 2017.

SO ORDERED.

Dated: Brooklyn, New York
September 27, 2017

/s/
James Orenstein
U.S. Magistrate Judge

APPENDIX

Consistent with the general usage in this litigation:

- "Class Plaintiffs" refers collectively to all of the named plaintiffs asserting class action claims, and in particular refers to the group of parties for whom interim co-lead counsel was appointed in 2006. *See* DE 278.

- "Equitable Relief Class" refers collectively to the plaintiffs seeking to certify a class under Federal Rule of Civil Procedure (b)(2), for whom interim co-lead counsel was appointed in 2016. *See* DE 6754.

- "Damages Class" refers collectively to the plaintiffs he plaintiffs seeking to certify a class under Federal Rule of Civil Procedure (b)(3), for whom interim co-lead counsel was appointed in 2016. *See* DE 6754.

- "Target" refers collectively to Target Corporation, Macy's Inc.; The TJX Companies, Inc.; Kohl's Corporation; Staples, Inc.; J.C. Penney Corporation, Inc.; Office Depot, Inc.; L Brands, Inc.; OfficeMax Incorporated (now a subsidiary of Office Depot Inc.); Big Lots Stores, Inc.; Abercrombie & Fitch Co.; Ascena Retail Group, Inc.; Saks Incorporated; Lord & Taylor LLC; The Bon-Ton Stores, Inc.; Chico's FAS, Inc.; Luxottica U.S. Holdings Corp.; American Signature, Inc.; and their respective subsidiaries.

- "7-Eleven" refers collectively to 7-Eleven; Academy Sports; Aldo; Alimentation Couche-Tard; Alon USA; Amazon.com; AMC Theatres; Ashley Furniture;

Barnes & Noble; Barnes & Noble College; Beall's, Boscov's; Brookshire's; The Buckle; Carter's; Children's Place; Coborn's; Costco; Cracker Barrel; Crate & Barrel; Cumberland Farms; D'Agostino's; Dick's Sporting Goods; Dillard's; Drury Hotels; Family Dollar; Family Express; Foot Locker; The Gap; Genesco; GNC; Gulf; HMSHost; IKEA; Jetro; Lowe's; Michaels Stores; Mills Companies; National Association of Convenience Stores; National Community Pharmacists Association; National Grocers Association; New York & Company; NIKE; P.C. Richard & Son; PacSun; Panda Restaurant Group; Panera; Ralph Lauren; REI; Republic Services; Restoration Hardware; Sears; Starbucks; Stein Mart; Swarovski; Talbots; Thermo Fisher Scientific; Thorntons; Whole Foods; and Yum! Brands.

- "Home Depot" refers collectively to The Home Depot, Inc. and Home Depot U.S.A., Inc.

- "Direct Action Plaintiffs" refers collectively to the Target, 7-Eleven, and Home Depot plaintiffs (and is distinct from a separate grouping of plaintiffs known as the "Individual Plaintiffs" who likewise asserted claims independent of the class actions but who entered into separate settlement agreements with the defendants that remain in effect, and whose claims have therefore been resolved).

- "Visa" refers collectively to Visa, Inc., Visa U.S.A., Inc., and Visa International Service Association.

- "MasterCard" refers collectively to MasterCard International Incorporated and MasterCard Incorporated.
- "Network Defendants" refers collectively to the Visa and MasterCard defendants.
- "Bank Defendants" refers to collectively to all of the remaining defendants, each of which is a bank.

APPENDIX J

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

05-MD-1720 (MKB)

[Filed August 30, 2018]

IN RE PAYMENT CARD INTERCHANGE)
FEE AND MERCHANT DISCOUNT)
ANTITRUST LITIGATION)
)
This document refers to:)
ALL ACTIONS)
)

MEMORANDUM & ORDER

MARGO K. BRODIE, United States District Judge:

A putative class of over twelve million merchants brought antitrust actions under the Sherman Act, 15 U.S.C. §§ 1 and 2, and state antitrust laws, against Defendants Visa and MasterCard networks, as well as various issuing and acquiring banks. *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207 (E.D.N.Y. 2013), *rev'd and vacated*, 827 F.3d 223 (2d Cir. 2016). Plaintiffs allege that Defendants harmed competition and charged merchants supracompetitive prices by creating unlawful contracts and rules, and by engaging in conspiracies. *Id.* at 213.

In addition to the class actions, groups of some of the largest merchants brought separate actions against Defendants, which actions were consolidated together with the class actions into a multi-district litigation in 2005. *Id.* at 223. After years of litigation, former District Judge John Gleeson approved a settlement of the class action. *Id.* at 240. On June 30, 2016, the Second Circuit vacated the class certification and settlement of the action, noting the inherent conflict of interest in the appointment of a single set of counsel to represent the two classes certified for settlement purposes under Rules 23(b)(2) and 23(b)(3) of the Federal Rules of Civil Procedure. *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 827 F.3d 223, 229 (2d Cir. 2016). Upon remand, the Court appointed separate counsel to represent two separate putative classes — an injunctive class under Rule 23(b)(2) and a damages class under Rule 23 (b)(3). Plaintiffs subsequently moved to amend the Complaints.[1] (*See, e.g.*, Class Pls. Mot. for Leave to

[1] The Court refers to all plaintiff groups who moved to amend their respective Complaints, and subsequently appealed Magistrate Judge James Orenstein's decision, as "Plaintiffs." (Mem. and Order Granting in Part and Denying in Part Mots. to Amend Compl. dated September 27, 2017, 16 ("September 2017 Order"), Docket Entry No. 7076.) The Court collectively refers to the 7-Eleven, Target, and Home Depot Plaintiffs as "Direct Action Plaintiffs." The Court's reference to "Class Plaintiffs" is to the Rule 23(b)(3) class only. Similarly, the Court's reference to "Complaints" is to the operative Complaints of all appealing Plaintiffs, and "Class Complaints" refers to Rule 23(b)(3) putative class operative Complaints, prior to Plaintiffs' motions for leave to amend. "Amended Complaints" and "Amended Class Complaint" refers to the complaints inclusive of amendments currently sought.

Amend Compl. 3, 5, Docket Entry No. 6880; September 2017 Order.) Defendants consented to the proposed amendments except for the addition of the alternative two-sided definition of the relevant market. (Defs. Opp'n to Pls. Mot. for Leave to Amend Compl. ("Defs. Opp'n") 1, 25, Docket Entry No. 6881-2; September 2017 Order 9.)

By order dated September 27, 2017, Magistrate Judge James Orenstein granted in part and denied in part Plaintiffs' motion to amend the Complaints. (September 2017 Order.) Judge Orenstein granted Plaintiffs' motion to amend the Complaints asserting an alternative, two-sided market definition. (*Id.*at 13–16; 18.) However, Judge Orenstein determined that the amendments do not relate back to the time of the original pleadings. (*Id.* at 16, 18–19.) Judge Orenstein further ruled that Direct Action Plaintiffs are not entitled to tolling based on *American Pipe &*

Direct Action Plaintiffs filed a joint brief appealing the September 2017 Order. (Direct Action Pls. Appeal of the September 2017 Order ("Direct Action Pls. Appeal"), Docket Entry No. 7103.) Class Plaintiffs filed a separate appeal. (Class Pls. Appeal of the September 2017 Order ("Class Appeal"), Docket Entry No. 7104.) The two remaining Plaintiffs in *Delta Air Lines, Inc., v. Visa, Inc.,* 13-cv-04766 (E.D.N.Y.) — Blarney Castle Oil Co. and Ricker Oil Company Inc. — filed their own appeal, reiterating arguments made by Class and Direct Action Plaintiffs. (Pls. Blarney Castle Oil Co. and Ricker Oil Company Inc.'s Appeal of the September 2017 Order ("Delta Pls. Appeal") Docket Entry No. 7101); Plaintiffs Sunoco Retail, LLC and Aloha Petroleum, Ltd., join the appeals of the Delta Plaintiffs and Direct Action Plaintiffs. (Pls. Sunoco Retail, LLC, and Aloha Petroleum, Ltd., Appeal of the September 2017 Order, and Joinder ("Sunoco Appeal"), Docket Entry No. 7106.)

Construction Co. v. Utah, 414 U.S. 538, 554 (1974) (*"American Pipe"*). (*Id.* at 19.)

Currently before the Court are Plaintiffs' appeals of Judge Orenstein's ruling that the amendments do not relate back to the original Complaints and that Direct Action Plaintiffs are not entitled to *American Pipe* tolling. For the reasons discussed below, the Court finds that the amendments relate back to the original Complaints, and that Direct Action Plaintiffs are entitled to *American Pipe* tolling.

I. Background

The Court assumes the parties' familiarity with the facts and procedural history as set forth in Judge Orenstein's September 2017 Order. (*See* September 2017 Order.) The Court provides only a summary of the relevant facts.

a. Plaintiffs' motions to amend the Complaints

Plaintiffs sought leave to amend the Complaints (1) to update them based on "industry developments that occurred" since the last amended complaints were filed for each respective group; and (2) to add "alternative relevant markets that consist of both merchants and cardholders," and explain how Defendants' conduct affected competition in those markets. (*See, e.g.,* Class Pls. Mot. for Leave to Amend Compl. 3, 5; September 2017 Order.)

Defendants consented to the amendments based on developments in the industry, but opposed the alternative relevant markets amendments, "to the extent that they asserted new legal and factual allegations regarding market definitions, market power, and competition for or effects on cardholders." (Defs. Opp'n 1, 25; September 2017 Order 9.) Defendants also argued that, to the extent the Court allowed Plaintiffs to amend the Complaints to add the two-sided market theory, the amendments should not relate back to the time of the original pleadings and the amendments by Direct Action Plaintiffs should not be subject to tolling pursuant to *American Pipe*. (*Id.*)

b. Judge Orenstein's September 2017 Order

Judge Orenstein granted in part and denied in part Plaintiffs' motions to file amended complaints. (September 2017 Order.) Judge Orenstein (1) granted leave to amend the Complaints to add the alternative two-sided market theory to the extent that the claims were not time-barred, but found that the amendments could not relate back to the time of the filing of the original Complaints pursuant to Rule 15(c) of the Federal Rules of Civil Procedure, and (2) determined that Direct Action Plaintiffs' amendments are not entitled to *American Pipe* tolling. (September 2017 Order 22.)

i. Amendments to include two-sided market theory

In his September 2017 Order, Judge Orenstein explained that, in their original Complaints, Class Plaintiffs defined the scope of the relevant market as a one-sided market based on then-existing case law and their understanding of two separate markets — the network services market and the general purpose payment cards market. Judge Orenstein stated:

> In defining the scope of the relevant market, the Class Plaintiffs relied on controlling case law arising from earlier litigation concerning the same networks' practices . . . . (*See id.* [("First Class Compl.")] citing *In re Visa Check/MasterMoney Antitrust Litig.* ("*Visa Check*"), 2003 WL1712568 (E.D.N.Y. Apr. 1, 2003); *United States v. Visa* ("*Visa*"), 163 F. Supp. 2d 322, 335 (S.D.N.Y. 2001), *aff'd*, 344 F.3d 229 (2d Cir. 2003). As the circuit court had explained in *Visa*, and as the Class Plaintiffs alleged here, there exist[ed] two related but distinct markets relevant to the instant dispute. In the market for network services — the market in which the Class Plaintiffs alleged that the defendants had engaged in unlawful anticompetitive conduct — payment card networks are sellers that compete with one another to secure the business of the banks and merchants that purchase such services. In the separate market for general purpose payment cards, the sellers are the banks that issue the cards and the buyers are the consumers who obtain the cards and use them for purchases. *See Visa*, 344 F.3d at 238-39; First Class Compl.

(September 2017 Order 3.)

Plaintiffs, however, sought to amend the Complaints to assert an alternative, two-sided market theory following the Second Circuit's decision in *United States v. American Express Co.*, 838 F.3d 179 (2d Cir.

2016), *aff'd sub nom. Ohio v. American Express Co.*, 625 U.S. ---, ---, 138 S. Ct. 2274, 2285 (2018) ("*AmEx*"). Judge Orenstein noted that the Second Circuit:

> has held that the relevant market for similar complaints by a nationwide class of merchants against another payment card network – American Express – is a single, two-sided market that encompasses the networks, the processingbanks, the merchants who accept cards for payments, and the consumers who use those cards. *See United States v. American Express, Co. ("AmEx")*, 838 F.3d 179, 196-200 (2d Cir. 2016), *petition for cert. filed*, No. 16-1454 (U.S. June 6, 2017). That decision has been a significant factor in prompting the instant motions to amend.

(September 2017 Order 3.) Finding no "undue delay, bad faith, or futility of the newly asserted claims, predicated on the existence of a two-sided market," Judge Orenstein granted Plaintiffs' motion for leave to amend. (*Id.* at 16.)

ii. Relation back of amendments based on two-sided market theory

Judge Orenstein ruled, however, that the proposed amendments do not relate back to the original date of the Complaints because the amendments "rely on a legal theory that is not only new, but fundamentally distinct from the legal violation that they previously asserted." (September 2017 Order 12, 17.) Judge Orenstein reasoned that the definition of the relevant market is a critical aspect of antitrust litigation, and a plaintiff "must allege a plausible relevant market in which competition will be impaired." (*Id.* at 17 (quoting *City of New York v. Grp. Health Inc.*, 649 F.3d 151, 155 (2d Cir. 2011)).) Therefore, because the newly asserted "theory of liability accounts for benefits to cardholders that [Plaintiffs] had affirmatively rejected earlier in the litigation," Plaintiffs could not have possibly put Defendants on notice of such theory, as required for relation back under Rule 15. (*Id.* at 12, 17.) In finding lack of notice, Judge Orenstein was not persuaded by Plaintiffs' argument that Defendants were on notice because Defendants had argued the two-sided market theory in refuting Plaintiffs' initial pleadings asserting a one-sided market theory. (*Id.* at 17.)

iii. *American Pipe* tolling

Judge Orenstein also determined that Direct Action Plaintiffs' amendments were not entitled to *American Pipe* tolling because of lack of notice to Defendants. He explained that "courts in this circuit considering the availability of such tolling employ a notice-based analysis similar to that used to determine the availability of relation back under Rule 15(c)." (*Id.* at 19– 21.) Having denied relation back based on the lack of notice of the two-sided theory, Judge Orenstein thus denied *American Pipe* tolling for the "same reasons." (*Id.*)

In addressing Direct Action Plaintiffs' reliance on the fact that the proposed amendments rely on the "same anticompetitive rules and conduct" as alleged in the Class Complaint, Judge Orenstein found that the argument "incorrectly narrows the scope of the notice required," because in order to prove an antitrust violation, "a plaintiff must identify not only the defendant's allegedly anticompetitive conduct, but also the relevant market and the resulting anticompetitive harm." (*Id.* (citing *Grp. Health, Inc.*, 649 F.3d at 155).) Judge Orenstein concluded that "[D]efendants were never on sufficient notice that they needed to preserve and develop evidence relating to the effect of their conduct on cardholders who were actors in a two-sided market." (*Id.*)

Judge Orenstein also rejected Direct Action Plaintiff Home Depot's argument that without tolling, absent plaintiffs will be forced to file separate actions if they disagree with any of class counsel's litigation decisions. (*Id.* at 20.) Judge Orenstein noted that "the goal of *American Pipe* tolling is to prevent a needless multiplicity of actions which might result if putative class members were required to file separate actions to hedge against the possibility of the class action failing," but concluded that such a goal is not served in this case because prior to *AmEx*, no putative class member ever had an incentive to file "a separate claim predicated on allegations of competitive harm to a two-sided market." (*Id.* at 21.)

c. Plaintiffs' appeal of Judge Orenstein's September 2017 Order

Four different Plaintiff groups appealed Judge Orenstein's decision: Class Plaintiffs, Direct Action Plaintiffs, Delta Plaintiffs, and Sunoco Plaintiffs. (*See* Class Pls. Appeal; Direct Action Pls. Appeal; Delta Pls. Appeal; Sunoco Appeal.) On November 17, 2017, Defendants filed a consolidated response to Plaintiffs' appeals. (Defs. Resp. to Pls. Appeal, Docket Entry No.

7126.) Direct Action Plaintiffs filed a reply in support of their appeal on December 6, 2017. (Direct Action Pls. Reply, Docket Entry No. 7132.)

i. Class Plaintiffs' arguments

Class Plaintiffs contend that pursuant to Rule 15(c), the amendments should relate back to the original filing because the amendments arose out of the same conduct, transaction, or occurrence described in the original pleading. (Class Pls. Appeal 4.) Class Plaintiffs argue that the amendments do not result in any new claims for the purposes of the relation back analysis, and contend that Judge Orenstein "improperly conflates elements of an antitrust claim with a conduct, transaction, or occurrence under Rule 15."[2] Class Plaintiffs also argue that Defendants were on notice of the alternative market theory. (Class Pls. Appeal 4–11.)

First, Class Plaintiffs argue that Judge Orenstein's analysis implies that the alleged "conduct, transaction, or occurrence" under Rule 15(c) "is coextensive with the elements required to plead an antitrust cause of action, in particular the relevant-market element." (*Id.* at 5–6.) Class Plaintiffs disagree and argue that if "conduct, transaction, or occurrence relevant to Rule 15" were defined "by reference to the elements necessary to plead a cause of action . . . amending a

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[2] Rule 15(c) provides that "[a]n amendment of a pleading relates back to the date of the original pleading when the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed. R. Civ. P. 15(c)(2).

complaint to plead a new . . . cause of action would necessarily implicate a different conduct, transaction, or occurrence and therefore be disallowed by Rule 15." (*Id.*) Such an outcome, Class Plaintiffs argue, would be inconsistent with the caselaw allowing new claims and their relation back. (*Id.*) Class Plaintiffs also argue that an assertion of an alternative, two-sided market theory is not a claim, and that both the prior operative Class Complaints and the Amended Class Complaint "allege simply that competition was injured 'in the Relevant Markets.'" (*Id.* at 10.)

Second, Class Plaintiffs argue that Defendants had notice of the two-sided market theory because Defendants themselves repeatedly argued that the applicable relevant market is two-sided. (*Id.* at 8.) Class Plaintiffs argue that the fact that Defendants themselves asserted such a theory is not necessarily an indication that they put themselves on notice, as noted by Judge Orenstein, but rather is an indication that the two-sided market theory arises out of the same fact situation as the one-sided market asserted in Plaintiffs' original Complaints. (*Id.*)

ii. Direct Action Plaintiffs

Direct Action Plaintiffs' relation back arguments are similar to those of Class Plaintiffs. They argue that the proposed amendments challenge the same conduct as set forth in the prior Complaints and therefore satisfy Rule 15, and, in any event, they are not bound by the prior definition of the relevant market. Direct Action Plaintiffs further contend that the denial of relation back prevents adjudication of the case on the merits. Finally, Direct Action Plaintiffs contend that

Defendants had requisite notice both for the purposes of relation back and *American Pipe* tolling. (*See* Direct Action Pls. Appeal.)

First, Direct Action Plaintiffs argue that the proposed amendments satisfy the requirement of Rule 15(c) because they challenge "identical conduct" alleged in the original Complaints, and "seek damages for the identical set of transactions in which merchants allegedly paid supracompetitive interchange fees as a result of the challenged conduct." (*Id.* at 2.)

Second, Direct Action Plaintiffs argue that Defendants had notice of the two-sided market theory both for the purposes of relation back and *American Pipe* tolling because they "themselves raised the issue long before" Plaintiffs moved for leave to amend, and the two-sided market theory was repeatedly raised throughout the litigation, including in expert reports. (*Id.* at 16.) Direct Action Plaintiffs argue that pleadings are not the exclusive source of notice to Defendants and, furthermore, a plaintiff is not bound by the relevant market definition asserted in the original pleading and can change its definition throughout the course of the case. (*Id.* at 17 (citing *Todd v. Exxon Corp.*, 275 F.3d 191, 199-200 (2d Cir. 2001)).).

Lastly, Direct Action Plaintiffs argue that by not allowing the proposed amendments to relate back, Judge Orenstein is preventing the case from being decided on the merits, in contravention of the very purpose of Rule 15, and is allowing Defendants to enforce "artificial limits on the evidence that [Plaintiffs] can introduce to prove competitive harm for the earlier time period." (*Id.* at 22.)

iii. Delta Plaintiffs and Sunoco Plaintiffs

Delta Plaintiffs reiterate the arguments made by Class Plaintiffs and Direct Action Plaintiffs. (*See* Delta Pls. Appeal.) Plaintiffs Sunoco Retail, LLC and Aloha Petroleum, Ltd., join in the appeals by Delta Plaintiffs and Direct Action Plaintiffs. (*See* Sunoco Appeal.)

d. Defendants' response to Plaintiffs' appeal

Defendants contend that the Court should affirm the September 2017 Decision in its entirety because Judge Orenstein correctly found that the amendments should not relate back to the date of the original Complaints in view of the fact that Defendants lacked notice that "they would be forced to defend themselves against factual claims directed to the cardholder side of a two-sided market." (Defs. Resp. to Pls. Appeal 2.)

Moreover, Defendants contend that Plaintiffs' amendments are based on new factual allegations, and therefore do not relate back. (*Id.* at 17.) Defendants argue that they did not have notice of the two-sided market theory because Plaintiffs not only asserted that the relevant market was one-sided, but opposed the two-sided market theory. (*Id.* at 15.) Defendants also argue that, to the extent that the two-sided market theory was mentioned in documents outside of Complaints, such as expert reports, these documents do not provide notice, as notice can be given only through pleadings. (*Id.* at 16.)

e. Applicable standard of review

The parties disagree as to the applicable standard that the Court should apply in reviewing the September 2017 Decision. Defendants argue that the Court should apply a "clear error" standard for factual determinations and "contrary to law" standard for legal conclusions because a ruling on a motion to amend a complaint is non-dispositive. (Defs. Resp. to Pls. Appeal 14 (citing *Fielding v, Tollaksen*, 510 F.3d 175, 178 (2d Cir. 2007)).) Defendants also argue that even if such ruling is dispositive, Plaintiffs consented to Judge Orenstein's authority by filing their motions to amend before him. (*Id.* at 12.)

Plaintiffs argue that the Court should conduct a *de novo* review because, "[w]hile the grant of leave to amend is generally considered non-dispositive, a ruling that a claim is or is not time-barred is dispositive and therefore subject to *de novo* review." (Class Pls. Appeal 4; *see also* Direct Action Pls. Appeal 12 (citing *Slayton v. Am. Express Co.*, 460 F.3d 215, 228 (2d Cir. 2006)).)

II. Discussion

a. Standard of review

Under the Federal Magistrates Act, 28 U.S.C. § 636, and Rule 72 of the Federal Rules of Civil Procedure, a magistrate judge "may issue orders regarding nondispositive pretrial matters . . . [and] the district court reviews such orders under the clearly erroneous or contrary to law standard." *Thomas E. Hoar, Inc. v. Sara Lee Corp.*, 900 F.2d 522, 525 (2d Cir. 1990) (citations and internal quotation marks omitted); *see* *also Fielding*, 510 F.3d at 178 (the district judge "shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law" (quoting Fed. R. Civ. P. 72(a))).

An order is clearly erroneous if, based on all the evidence, a reviewing court "is left with the definite and firm conviction that a mistake has been committed." *In re Gordon*, 780 F.3d 156, 158 (2d Cir. 2015) (internal quotations marks omitted) (quoting *United States v. Murphy*, 703 F.3d 182, 188 (2d Cir. 2012). "An order is contrary to law when it fails to apply or misapplies relevant statutes, case law, or rules of procedure." *Lifeguard Licensing Corp. v. Ann Arbor T-Shirt Co.*, LLC, No. 15-CV-8459, 2017 WL 3142072, at *1 (S.D.N.Y. July 24, 2017) (citation and internal quotation marks omitted); *Ebo v. New York Methodist Hosp.*, No. 12-CV-4432, 2015 WL 4078550, at *4 (E.D.N.Y. July 6, 2015) (same).

A magistrate judge can report and recommend a ruling on a dispositive matter, upon referral by a district judge. 28 U.S.C. § 636(b)(1)(B); *Collins v. Foreman*, 729 F.2d 108, 116 (2d Cir. 1984); *see also Jean-Laurent v. Wilkerson,* 461 F. App'x 18, 25 (2d Cir. 2012) ("As to nondispositive matters, the magistrate judge may rule, but as to dispositive matters, the magistrate judge may do no more than recommend."). When a party submits a timely objection to a magistrate judge's report and recommendation, the district court reviews *de novo* the parts of the report and recommendation to which the party objected. *United States v. Romano*, 794 F.3d 317, 340 (2d Cir. 2015) ("If a party timely objects to any portion of a magistrate judge's report and recommendation, the district court must make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." (citation and internal quotation marks omitted)). On *de novo* review, a district court reviewing a magistrate judge's recommended ruling "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C); *Rojas v. Heath*, No. 11-CV-4322, 2012 WL 5878752, at *1 (S.D.N.Y. Nov. 16, 2012). The district court may adopt those portions of the recommended ruling to which the parties did not timely object, provided no clear error is apparent from the face of the record. *Williams v. Beemiller, Inc.*, 527 F.3d 259, 264 (2d Cir. 2008); *John Hancock Life Ins. Co. v. Neuman*, No. 15-CV-1358, 2015 WL 7459920, at *1 (E.D.N.Y. Nov. 24, 2015).

b. The Court applies a *de novo* standard of review

Although the parties disagree as to whether a motion to amend a complaint is a dispositive or non-dispositive ruling, they do not object to the September 2017 Decision granting leave to amend the Complaints, (*see* Class Pls. Appeal; Direct Action Pls. Appeal; Defs. Resp. to Pls. Appeal). As a result, the Court need not resolve this dispute and declines to determine whether a motion to amend a complaint is dispositive. *See Tardif v. City of New York*, No. 13-CV-4056, 2016 WL 2343861, at *2 (S.D.N.Y. May 3, 2016) (stating that the Second Circuit "has not clearly stated whether a denial of leave to amend a pleading should be treated as dispositive or non-dispositive for Rule 72 purposes" and citing cases treating the issue as non-dispositive and a case treating the issue as dispositive).

Instead, the Court focuses on the issues disputed by the parties to determine the appropriate standard of review. Plaintiffs appeal the ruling that the amendments do not relate back to the filing of the original Complaints pursuant to Rule 15(c). (Class Pls. Appeal; Direct Action Pls. Appeal.) Direct Action Plaintiffs appeal the additional determination that the amendments are not entitled to *American Pipe* tolling. (Direct Action Pls. Appeal 19.) The Court therefore determines the applicable standard of review to resolve the relation back and tolling disputes. As discussed below, Judge Orenstein's relation back and tolling decisions are dispositive and therefore these rulings require *de novo* review.

i. Relation back and tolling decisions are dispositive

Section 636(b)(1)(A) of the Magistrates Act specifies a non-exhaustive list of the matters that a magistrate judge cannot hear and determine. It provides:

> [A] judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a

> class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action.

28 U.S.C. § 636(b)(1)(A); *see Williams*, 527 F.3d at 264 (stating the list is not exhaustive). In addition, Federal Rule of Civil Procedure 72(b) states that a magistrate judge, in the absence of consent by the parties, must recommend a ruling for a "matter dispositive of a claim or defense." Fed. R. Civ. P. 72(b). While a magistrate judge can make a report and recommendation as to the enumerated and other dispositive matters, a magistrate judge cannot decide them. Fed. R. Civ. P. 72(b) and Advisory Committee Notes, 1983 Addition (noting that Rule 72(b) addresses district court-ordered referrals of dispositive matters under § 636(b)(1)(B)); *Williams*, 527 F.3d at 264 (finding that without consent of the parties, a magistrate judge's ruling on a motion to remand to a state court is dispositive because it was the "functional equivalent" of an order of dismissal); *Jean-Laurent*, 461 F. at 25 ("As to nondispositive matters, the magistrate judge may rule, but as to dispositive matters, the magistrate judge may do no more than recommend.").

A ruling that a claim is time-barred is dispositive. *Amaya v. Garden City Irrigation, Inc.*, 645 F. Supp. 2d 116, 120 (E.D.N.Y. 2009) (citing *Unilever Ltd. v. M/T Stolt Boel*, 77 F.R.D. 384, 386 (S.D.N.Y. 1977)). A decision that a claim does not relate back and is not subject to tolling bars the claim as untimely. *Gibson v. Artus*, 407 F. App'x 517, 519 (2d Cir. 2010) ("The claims in the amended petition . . . do not relate back to the claims in the original petition and are time-barred.");

see also Johnson v. Nyack Hosp., 86 F.3d 8, 13 (2d Cir. 1996) (affirming district court's dismissal of claims as time bared upon finding that they were not subject to tolling); *In re Chaus Sec. Litig.*, 801 F. Supp. 1257, 1263 (S.D.N.Y. 1992) ("Since the claims against the [defendants] do not relate back, they are time-barred under the applicable statutes of limitations . . . . Accordingly, Counts I and II of the Amended Complaint are dismissed with prejudice.").

A ruling that terminates a claim is a dispositive ruling. *Williams*, 527 F.3d at 264 (stating that a decision that is equivalent of an order of dismissal is dispositive); *see also Kiobel v. Millson*, 592 F.3d 78, 86 (2d Cir. 2010) (holding that a ruling on a motion for sanctions is dispositive because it resolves what is "the functional equivalent of an independent claim" (citing *Williams*, 527 F.3d at 265)); *Nitchman v. Union Pac. R. Co.*, No. 05-CV-01219, 2006 WL 2781416, at *2 (D. Colo. Sept. 26, 2006) (treating as dispositive the rulings concerning joinder of parties because a denial "would end Plaintiff's claim against the [defendants] in this court" (citing *First Union Mortgage v. Smith*, 229 F.3d 992, 995 (10th Cir. 2000))); *cf. Cumming v. Indep. Health Ass'n, Inc.*, No. 13-CV-969, 2014 WL 3533460, at *1 (W.D.N.Y. July 16, 2014) (stating that a ruling compelling arbitration is nondispositive because the arbitrator's judgement of award is "subject to judicial confirmation").

ii. Plaintiffs did not consent to Judge Orenstein deciding a dispositive motion

Defendants argue that the Court can only review the September 2017 Order for clear error because Plaintiffs consented to Judge Orenstein's authority by filing the original motion to amend the Complaints with him. (Defs. Resp. to Pls. Appeal 12.) Defendants cite to Judge Orenstein's Individual Practice Rules that only allow for nondispositive motions to be directly filed with him. (*Id.*)

The practice in this district requires parties consenting to a magistrate judge's authority to rule on a dispositive matter to sign a document acknowledging their consent, which document must then be so-ordered by a district judge. (*See* Rule 73.1. of the Local Rules of the United States District Courts for the Southern and Eastern Districts of New York.) Consent may be implied where a party is aware of the need to consent in an unequivocally dispositive matter. *Roell v. Withrow*, 538 U.S 580, 590 (2003); *Astra USA, Inc. v. Bildman*, 375 F. App'x 129, 132 (2d Cir. 2010) (holding that court may imply consent for purposes of section 636(c)(1) "where . . . the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case before the Magistrate Judge" (citing *Roell*, 538 U.S. at 590)).

A motion to amend a complaint is not unequivocally dispositive. Unlike in *Roell*, where entering judgment after a jury verdict was an unequivocally dispositive matter, it is unclear whether a motion to amend a complaint is dispositive. *Tardif*, 2016 WL 2343861, at *2 (discussing that the Second Circuit has not ruled on whether a motion to amend is dispositive, but that the district courts differ in their treatment of motions to amend); *Charlot v. Ecolab, Inc.*, 97 F. Supp. 3d 40, 46 (E.D.N.Y. 2015) (same); *see also Louis v. Metro. Transit Auth.,* No. 12–CV–6333, 2014 WL 5311455, at *1 (E.D.N.Y. Oct. 16, 2014) (noting that the Second Circuit has referred to a motion to amend as a non-dispositive matter, but has not explicitly decided the issue, and that district courts in this circuit have suggested that a magistrate judge's denial of a motion to amend should be treated as dispositive, while a grant of the same motion should be treated as non-dispositive). Given the lack of clarity, the Court cannot conclude that Plaintiffs were aware of the need for consent in filing the motion before Judge Orenstein. The lack of clarity as to whether a magistrate judge, when considering a motion to amend, can decide the issue or must submit a recommended ruling to a district judge also weighs in favor of the Court conducting a *de novo* review. *See Williams*, 527 F.3d at 264 (stating that because of the possible constitutional implications of delegating Article III judges' duties to magistrate judges, . . . the Federal Magistrates Act is construed narrowly).

iii. Contrary to law and *de novo* standards of review

In reviewing issues of *law*, as is the case here,[3]

[3] In *Slayton*, after determining that whether claims relate back to an earlier complaint is a question of law and is not in the district court's discretion, the Second Circuit conducted *de novo* review of the district court's conclusion as to that issue. *Slayton v. Am. Express Co.*, 460 F.3d 215, 228 (2d Cir. 2006). However, the Second Circuit's *de novo* review of the district court's ruling that the proposed amendments did not relate back is not controlling in this

there is also no practical difference between a court's application of the "contrary to law" standard and the *de novo* standard under Rule 72(b). *See Wakefern Food Corp. v. Prospect Plaza Improvements, LLC*, No. 10-CV-827, 2010 WL 4514287, at *2 n.2 (D. Conn. Nov. 2, 2010) ("Regarding legal issues, the language 'contrary to law' appears to invite plenary review." (quoting 12 Charles Alan Wright *et al.*, Federal Practice and Procedure § 3069, at 350 (2d ed. 1997))); *see also Powershare, Inc. v. Syntel, Inc.*, 597 F.3d 10 (1st Cir. 2010) ("When . . . review of a non-dispositive motion by a district judge turns on a pure question of law, that review is plenary under the 'contrary to law' [standard]").

The Court therefore reviews *de novo* Judge Orenstein's rulings that Plaintiffs' amendments do not relate back and that Direct Action Plaintiffs' amendments are not subject to tolling.

c. The Amended Complaints relate back to the earlier Complaints

Class Plaintiffs contend that in order to determine if the amendments relate back, the Court must review

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case because determination of the standard of review to be used by a court of appeals turns on whether or not a question under review is a question of law or fact, *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. ---,---, 134 S. Ct. 1744, 1748, (Apr. 29, 2014), while a district court's review of a magistrate judge's ruling depends on whether the ruling is dispositive, *Kiobel v. Millson*, 592 F.3d 78, 106 (2d Cir. 2010) (Jacobs, J., concurring) ("When a district court refers a matter to a magistrate judge under § 636(b), the extent of the magistrate judge's authority turns generally on whether the matter is dispositive.").

Defendants' alleged anticompetitive conduct as alleged in the earlier Complaints — "[C]ollusive agreements and network rules inflat[ing] prices to supracompetitive levels." (Class Pls. Mot. for Leave to Amend Compl. 6.) Direct Action Plaintiffs argue in their appeal that the amendments at issue challenge the same conduct as the original Complaints — the Visa and Mastercard rules that restrain horizontal competition among card issuers, resulting in supracompetitive interchange fees charged to merchants. (Direct Action Pls. Appeal 14.) Direct Action Plaintiffs further argue that "both the original and [A]mended [C]omplaints bring the same causes of action (federal and state antitrust claims), alleging that the same restraints on competition among card issuing banks caused the identical harm to merchants (supracompetitive interchange fees) on the same set of payment-card transactions." (*Id.*)

Defendants argue that the amendments make "a litany of new factual allegations regarding competition for cardholders and alleged cardholder harm," and they did not have notice of these new factual allegations. (Defs. Resp. to Pls. Appeal 10.) Defendants note that in the prior iterations of the Complaints, Plaintiffs did not allege any harm to cardholders, but in the Amended Complaints allege that absent Defendants' anticompetitive conduct, cardholders would have been better off because issuers would compete for these cardholders. *Id.*

"Rule 15(c) of the Federal Rules of Civil Procedure governs when an amended pleading 'relates back' to the date of a timely filed original pleading and is thus itself timely even though it was filed outside an applicable statute of limitations." *Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538, 541 (2010). "The purpose of Rule 15 is to provide maximum opportunity for each claim to be decided on its merits rather than on procedural technicalities." *Avila v. Riexinger & Assocs., LLC*, 644 F. App'x 19, 23 (2d Cir. 2016) (quoting *Slayton*, 460 F.3d at 228). Pursuant to Rule 15(c)(1)(B), "[a]n amendment to a pleading relates back to the date of the original pleading when: the amendment asserts a claim or defense that arose out of the conduct[,] transactions, or occurrence set out — or attempted to be set out — in the original pleading . . . ." Fed. R. Civ. P. 15(c)(1)(B).

In applying this rule, courts review whether the conduct giving rise to amended claims or defenses was alleged in the timely filed complaints; if alleged, the amendments relate back. *S.A.R.L. Galerie Enrico Navarra v. Marlborough Gallery, Inc.*, No. 10-CV-7547, 2013 WL 1234937, at *4 (S.D.N.Y. Mar. 26, 2013) (finding that the new claim related back to the original complaint because the conduct giving rise to the complaint was a part of the factual situation alleged in the original complaint).[4] If not, the amendments do not

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[4] In *S.A.R.L. Galerie*, an art gallery sued another art gallery for engaging in a campaign to eliminate competition and achieve a monopoly over an artist's ceramic artwork. *S.A.R.L. Galerie Enrico Navarra v. Marlborough Gallery, Inc.*, No. 10-CV-7547, WL 1234937, at *4 (S.D.N.Y. Mar. 26, 2013). The plaintiff sought to amend its complaint to add a claim of tortious interference with the production agreement that the plaintiff had with the artist. The defendants argued that the amended claim did not relate back because it alleged interference with the production agreement,

relate back. *See Stevelman v. Alias Research Inc.*, 174 F.3d 79, 86 (2d Cir. 1999) (stating that if the amended complaint "introduced sufficiently new conduct, transactions, and occurrences," it "would not relate back to the date of the original complaint"); *see also ASARCO LLC v. Goodwin,* 756 F.3d 191, 203 (2d Cir. 2014) (denying relation back when new claims were based on "different conduct, in a different location, and attributable to different entities than the claims set forth in [the original] pleading"); *Moritz v. Town of Warwick*, No. 15-CV-5424, 2017 WL 4785462, at *4 (S.D.N.Y. Oct. 19, 2017) ("An amendment will not relate back if it sets forth a new set of operational facts; it can only make more specific what has already been alleged." (quoting *Jewell v. Capital Cities/ABC, Inc.*, No. 97-CV-5617, 1998 WL 702286, at *2 (S.D.N.Y. Oct. 7, 1998))); *Naughright v. Robbins*, No. 10-CV-8451, 2014 WL 5315007, at *6 (S.D.N.Y. Oct. 17, 2014) (finding that new claims did not relate back because "the conduct giving rise" to such claims "was not mentioned in the FAC [first amended complaint] or the initial complaint"); *In re Noah Educ. Holdings, Ltd.,*

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whereas the plaintiffs' original claims alleged interference only with the plaintiff's Hong Kong contract. The court ruled that the "lack of identity, however, is not decisive." *Id.* The court further noted that that "[a]lthough the original complaint did not assert a tortious interference claim arising out of the Production Agreement," it did allege the defendant's conduct of "demand[ing] that the Production Agreement be terminated." *Id*. (citations and internal quotation marks omitted).

Sec. Litig., No. 08-CV-9203, 2010 WL 1372709, at *9 (S.D.N.Y. Mar. 31, 2010).[5]

"Provided the amended pleading is based on the same series of transactions and occurrences alleged in the original pleading, the revised pleading will relate back to the original pleading, even where the revised pleading contains legal theories not included in the original." *White v. White Rose Food, a Div. of DiGiorgio Corp.*, 128 F.3d 110, 116 (2d Cir. 1997) (first citing *Travelers Ins. Co. v. 633 Third Assocs.*, 14 F.3d 114,

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[5] In this securities action, the claims in the original complaint were based on allegations of the defendant's omission of information about the cost of raw materials from the registration statement and prospectus. *In re Noah Educ. Holdings, Ltd. Sec. Litig.*, No. 08-CV-9203, 2010 WL 1372709, at *9 (S.D.N.Y. Mar. 31, 2010). In the amended complaint, the plaintiffs' allegations were based on the defendant's "noncompliance with Chinese regulatory requirements, its labeling practices, or its brand image." *Id.* The court found that the claim of failure to disclose the noncompliance with Chinese regulations did not relate back to the original complaint because "relation back is only appropriate in securities actions where the new allegations relate to the same or similar conduct complained of in the original complaint." *Id.* (citing *Slayton*, 460 F.3d at 229).

125 (2d Cir. 1994);[6] and then citing *Villante v. Dep't of Corrections of the City of New York,* 786 F.2d 516, 520 (2d Cir. 1986)); *see also Mercier v. Greenwich Acad., Inc.*, No. 13-CV-4, 2013 WL 3874511, at *6 (D. Conn. July 25, 2013) ("The fact that an amendment changes the legal theory on which the action initially was brought is of no consequence if the factual situation upon which the action depends remains the same and has been brought to defendant's attention by the original pleading." (quoting 6A Wright et al., Federal Practice and Procedure § 1497 (3d ed. 2010))).

In determining whether the amendments arise out of previously alleged conduct, "[u]nder Rule 15, the 'central inquiry is whether adequate notice of the matters raised in the amended pleading has been given to the opposing party within the statute of limitations by the general fact situation alleged in the original pleading.'" *Slayton*, 460 F.3d at 228 (quoting *Stevelman*, 174 F.3d at 86; *see also ASARCO LLC*, 756 F.3d at 202–03 (rejecting that there was "adequate notice" where the new claims were based on "different conduct" not previously alleged); *New York Univ. v. Factory Mut. Ins. Co.*, 15-CV-8505, 2018 WL 1737745,

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[6] In *Travelers*, the plaintiff-mortgagor brought a claim of fraudulent conveyance against the mortgagee, a partnership which distributed most of its funds to the partners prior to defaulting on the mortgage. *Travelers Ins. Co. v. 633 Third Assocs.*, 14 F.3d 114 (2d Cir. 1994). The plaintiff later amended its complaint to include claims of waste and breach of contract. *Id.* at 117. The Second Circuit held that the new legal theories were "based on the very series of transactions and occurrences alleged in the original complaint," and therefore the claims in the "amended complaint relate[d] back to the time of the original complaint." *Id.*

at *7 (S.D.N.Y. Mar. 27, 2018) (finding no "adequate notice" of claims based on inducement in the sale of an insurance policy where initial complaint alleged denial of claims under that policy); *S.A.R.L. Galerie Enrico Navarra*, WL 1234937, at *4 (finding that a new claim of tortious interference with an agreement related back to the original complaint because the defendant's conduct giving rise to the new claim was alleged in the original complaint, providing clear notice to the defendant); *see also Slayton* (concluding that there was notice of the amended claims as the conduct at issue was "amplified, or stated in a slightly different way").[7]

Defendants correctly note that the Amended Complaints include new facts about the impact of Defendants' conduct on cardholders, a group not previously identified by Plaintiffs. However, that conduct — Defendants' horizontal agreements and network rules resulting in supracompetitve prices — was previously alleged in Plaintiffs' earlier Complaints. Specifically, the alleged anticompetitive conduct supporting Plaintiff's claim that Defendants imposed

[7] In *Slayton*, the amendment stated that "Amex failed to disclose its lack of risk management controls," and the original complaint alleged that Amex failed to disclose that it was investing in high-yield instruments "involving complex risk factors that [Amex] management and personnel did not fully comprehend." *Slayton*, 460 F.3d at 226. The Second Circuit concluded that, "[i]n stating that Amex did not properly comprehend the risks of its portfolio, no leap of imagination is required to expect that the lack or adequacy of risk management controls might be one reason behind the failure to comprehend the risks." *Id.* Therefore, Amex had sufficient notice of risk management claims, and the amended claims related back to the original complaint. *Id.*

supracompetitive interchange fees consists of the rules implemented by Defendants, such as the Honor All Cards Rule, the No Surcharge Rule, the Honor All Issuers Rule, and other Anti-Steering Restraints. (*See, e.g.,* First Am. Class Compl. ¶¶ 154, 155,157, 215, Docket Entry No. 317; Second Am. Class Compl. ¶¶ 241–247.) As noted above, the relevant inquiry is not whether the amendments include any new facts, but whether the amendments rely on facts consisting of new conduct that was not previously alleged. *See, e.g., Slayton*, 460 F.3d at 229 (finding relation back when the original complaint did not include factual allegations about defendant's lack of risk management controls, but the amended complaint did because the lack of management controls was the reason behind the defendant's failure to comprehend the risks, and this failure was alleged in the original complaint).

Defendants rely on *Griffith v. Sadri*, No. 07-CV-4824, 2009 WL 2524961 (E.D.N.Y. Aug. 14, 2009), to support their argument that new factual allegations cannot relate back to the original complaint, but their reliance is misplaced. In *Griffith*, the district court adopted the magistrate judge's recommendation denying relation back where the plaintiff sought to amend the complaint by adding an excessive force claim to the previously alleged claims of false arrest and malicious prosecution. *Griffith*, 2009 WL 2524961, at *4. In denying relation back, the court noted that "it is of no moment that the arrest complained of in the original complaint occurred at the same time as the newly alleged excessive force" claim, and because "not a word in the complaint even suggested a claim of physical assault, the defendants cannot be said to have been on notice of a claim for excessive force." *Id.* (citations and internal quotation marks omitted). Unlike the plaintiff in *Griffith*, who did not allege any conduct of physical assault in the original pleading, Plaintiffs alleged the relevant conduct in the earlier Complaints and the two-sided relevant market theory requires consideration of the same conduct — Defendants entering into horizontal agreements and instituting network rules resulting in supracompetitve prices.[8]

Thus, since the amendment of the alternative market definition does not involve any new conduct by Defendants, but rather calls for consideration of additional impact from the conduct already alleged in the original Complaints, the amendments relate back to the original Complaints.[9]

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[8] Defendants' reliance on *Avila v. Riexinger & Associates*, 2015 WL 1731542 (E.D.N.Y. Apr. 2015) is equally inapposite. In *Avila*, the original complaint alleged a claim of unfair collection practice and the amended complaint alleged that the interest rate charged by the defendant was in excess of New York laws. *Id.* at *8. In concluding that the amendments did not relate back, the court reasoned that the amended complaint relied on the defendant charging excessive interest rate, which was "not at issue in the original complaint." *Id.* Similar to the amended claims in *Griffith v. Sadri*, No. 07-CV-4824, 2009 WL 2524961 (E.D.N.Y. Aug. 14, 2009), the amended claim in *Avila* relied on conduct that was not previously alleged.

[9] Moreover, as Plaintiffs argue, the claimants, claims, and types of damages all remain the same, thereby favoring relation back of the amendments. For example, in *Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1133 (11th Cir. 2004), in denying relation back and *American Pipe* tolling, the Eleventh Circuit noted that the amendment substantially changed the size of the class (from

d. *American Pipe* tolling

Defendants and Direct Action Plaintiffs agree that the Court's decision on whether the amendments relate back informs the applicability of *American Pipe* tolling to Direct Action Plaintiffs' amendments because both doctrines require notice to the opposing party. (Direct Action Pls. Appeal 19; Defs. Resp. to Pls. Appeal 22.) Direct Action Plaintiffs argue that they are entitled to *American Pipe* tolling because in applying this doctrine, "courts consider whether the factual basis of the absent class members' claims was the same as in the initial putative class action," so that there is "notice to preserve evidence." (Direct Action Pls. Appeal 20.) Direct Action Plaintiffs further contend that the inquiry under this standard is limited to the "challenged conduct" notwithstanding changes in the proposed legal theories. (*Id.*) Defendants argue that *American Pipe* does not toll Direct Action Plaintiff's amendments due to lack of notice because the amendments consist of "new factual theories" not found in the original Class Complaints. (Defs. Resp. to Pls. Appeal 22–23.)

Commencement of a class action tolls the statute of limitations for the claims of all potential members of the class. *See Am. Pipe*, 414 U.S. at 554. "[T]he

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state-wide to nation-wide) and was prejudicial to the defendants due to the lack of notice. The court reasoned that "[w]ithin the period set by the statute of limitations, the defendants [should] have the essential information necessary to determine both the subject matter and size of the prospective litigation . . . ." (quoting *Arneil v. Ramsey*, 550 F.2d 774, 782–83 (2d Cir.1977)). Defendants have had this information since the start of the litigation.

commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Id.*; *In re WorldCom Sec. Litig.*, 496 F.3d 245, 254 (2d Cir. 2007). The Supreme Court has noted that, were it to hold otherwise, putative class members would be forced to file motions to join or intervene simply to ensure their ability to share in any final judgment, a result that would "breed needless duplication of motions" and frustrate the goals of "efficiency and economy" that Rule 23 was designed to promote. *Am. Pipe*, 414 U.S. at 553–54. This rule "applies not only to putative class members who seek to intervene in an action [where class certification has been denied], but also to would-be class members who later file their own independent actions." *Police and Ret. Firefighter Sys. of City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95, 105 (2d Cir. 2013) (citing *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353–54 (1983)).

"[T]he source of the tolling rule applied in *American Pipe* is the judicial power to promote equity, rather than to interpret and enforce statutory provisions," and equity in class members receiving justice is weighed against prejudice to the defendant from lack of notice of claims to be defended. *California Pub. Emps. Ret. Sys. v. ANZ Sec., Inc.*, 582 U.S. ---,---, 137 S. Ct. 2042, 2051 (Apr. 17, 2017) ("By filing a class complaint within the statutory period, the named plaintiff notified the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." (alteration and internal quotations omitted)). This tolling is available so that "absent putative class members [can] remain passive" and "rely on the named plaintiffs to press their claims." *Cullen v. Margiotta*, 811 F.2d 698, 719 (2d Cir. 1987).

Complaints introducing new legal theories can be tolled under *American Pipe*, so long as they rely on the same facts as those alleged by the class. *Id.* at 721 ("[W]e do not regard the fact that the state court action was premised on different legal theories as a reason not to apply *American Pipe* tolling . . . . Indeed, limiting *American Pipe* tolling to the identical 'causes of action' asserted in the initial class action would encourage and require absent class members to file protective motions to intervene . . . , thereby producing the very results the New York courts seek to prevent . . . ."); *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11-MDL-2262, 2015 WL 4634541, at *136 (S.D.N.Y. Aug. 4, 2015), *amended sub nom. In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11-MDL-2262, 2015 WL 13122396 (S.D.N.Y. Oct. 19, 2015) (stating that *American Pipe* tolling is available to subsequent actions that are based on different legal theories, but are not available to those that are based on different "factual theories").

The requirements of *American Pipe* tolling "operate in harmony with the amendment and relation back rules of the Federal Rules of Civil Procedure," *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 2015 WL 6243526, at *148, and therefore deciding one issue has implications for the other. Similar to the relation back analysis, a court deciding whether claims can be tolled under *American Pipe* needs to ensure that the defendant had notice of such claims. *Crown, Cork & Seal Co.*, 462 U.S. at 355 (quoting *Am. Pipe*, 414 U.S. at 562).

Judge Orenstein based his decision that *American Pipe* tolling did not apply to Direct Action Plaintiffs' claims on his finding that the amendments proposed by Class Plaintiffs did not relate back to the original Complaints due to lack of notice of the two-sided market theory. (*See* September 2017 Order 19 ("Thus, whether viewed through the prism of relation back or that of equitable tolling under *American Pipe*, the pertinent question is whether the original class complaint sufficed to put the defendants on fair notice of the plaintiffs' later claims.").) Defendants concede that the denial of *American Pipe* tolling is a "logical" continuation of the finding that the class amendments do not relate back. (Defs. Resp. to Pls. Appeal 22.)

Having found that Plaintiffs' Amended Complaints relate back to their prior Complaints because Defendant had the requisite notice of the alleged anticompetitive conduct resulting in supracompetitive interchange fees, the Court finds that *American Pipe* tolling applies to Direct Action Plaintiffs' amendments for the same reason.

III. Conclusion

For the foregoing reasons, the Court finds that the amendments to the Class Complaint relate back to the original pleadings, and that *American Pipe* tolling applies to the amended claims by Direct Action

Plaintiffs.[10] The Court sets aside Judge Orenstein's decision to the contrary.

SO ORDERED:

s/ MKB
MARGO K. BRODIE
United States District Judge

Dated: August 29, 2018
Brooklyn, New York

[10] The Court is cognizant that this Memorandum and Order may be in tension with its decision in *Salveson v. JP Morgan Chase & Co.*, 14-CV-3529, 2014 WL 12770235 (E.D.N.Y. Nov. 26, 2014), *on reconsideration in part*, 166 F. Supp. 3d 242 (E.D.N.Y. 2016), *and aff'd*, 663 F. App'x 71 (2d Cir. 2016). The plaintiffs in *Salveson* are invited to brief whether they are entitled to any relief in light of the Supreme Court's decision in *Ohio v. American Express Co.*, 625 U.S. ---, 138 S. Ct. 2274 (2018), and this decision. Any submission must be made by October 1, 2018. Any party may respond to any submission on or before November 15, 2018.