UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION	:	**MDL Docket No. 1720**
	:	**MASTER FILE NO. 1:05-md-1720-JG-JO**
This Document Relates To:	:	
ALL CLASS ACTIONS	:	

CLASS PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE SECOND CONSOLIDATED AMENDED CLASS ACTION COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND RULES

I. PRELIMINARY STATEMENT

Defendants' Motion to Dismiss the Second Consolidated Amended Class Action Complaint turns on four arguments – three of which Defendants could have just as readily raised in response to Plaintiffs' First Consolidated Amended Class Action Complaint, which Plaintiffs filed over three years ago.

Defendants rely most heavily on an argument which would have this Court construe the release in the *Visa Check* case, as approved by Judge Gleeson, to be a perpetual license to Defendants to violate the antitrust laws at the expense of merchants and consumers. This argument finds no support in the text of the release, nor in decisions of this Court and other courts that have interpreted the release, nor in Plaintiffs' wide-ranging allegations as to Defendants' post-2003 conduct. Moreover, such an interpretation would contravene long-standing public policy, derived from Supreme Court precedent and reaffirmed by the Second Circuit earlier this year, in a case Defendants ignore.

As to their intra-network conspiracies, Defendants ignore substantial recent and apposite Second Circuit precedent – established in large part in cases to which they were parties – as well as federal law enforcement guidelines governing the analysis of antitrust issues related to joint ventures. Defendants cite legal support only in the form of a single, 25-year-old case, in which the court considered a joint venture unique in every way to another industry and – unlike Defendants in this case – focused primarily on the demand side of the relevant market. No other court has since ascribed to that case the significance that Defendants now ascribe to it. This Court should not be the first.

The only claim that Defendants could not have asserted earlier is one to the effect that the Network Defendants' respective restructurings that resulted in initial public offerings ("IPOs")

exempt them from liability for their conduct thereafter. As to that, Defendants would have the Court ignore in its entirety the decades of anti-competitive conduct that preceded the IPOs, and assume that Defendants themselves forgot about that conduct in consummating the IPOs. Defendants would also have the Court ignore the conclusions of other tribunals, which found after a full evidentiary hearing that the banks' control of MasterCard to anticompetitive ends has survived the network's IPO.

Finally, Defendants challenge Plaintiffs' allegations as to their inter-network conspiracy, as well as plus factors that are uniquely suggestive of such a conspiracy, based in large part on the repeatedly discredited premise that the Court should examine those factors in isolation, rather than as a whole. Those factors not only tend to show a plausible inter-network conspiracy, but are also consistent with the economics unique to the markets in which Defendants operate.

For all of these reasons, Defendants' motion should be denied.

II. ARGUMENT

A complaint "attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations[.]" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The factual allegations need only "be enough to raise a right to relief above the speculative level" so that they "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Id. See also Erickson v. Pardus,* 551 U.S. 89, 93 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). "Determining whether a complaint states a plausible claim for relief will…be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 1950.

In deciding a motion to dismiss, the court must accept the material facts alleged in the complaint as true. *See Spool v. World Child Int'l Adoption Agency*, 520 F.3d 178, 180 (2d Cir. 2008). The court must consider the totality of the factual allegations, rather than considering part or parts of the facts in isolation. *See Twombly*, 550 U.S. at 569 n.14 (a complaint warrants dismissal only where it fails "*in toto* to render plaintiffs' entitlement to relief plausible"); *In re Tamoxifen Citrate Antitrust Litig.*, 466 F. 3d 187, 201 (2d Cir. 2006) (citing *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690, 699 (1962)). Finally, all reasonable inferences from those allegations must be construed in the plaintiffs' favor. *See Spool*, 520 F.3d at 180. As the Supreme Court recognized, the decisive question is: "[W]hen the allegations are accepted as true, and taken collectively, would a reasonable person deem the inference of scienter [*i.e.*, liability] at least as strong as any opposing inference?" *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 127 S. Ct. 2499, 2511 (2007).

A. The *Visa Check* Release Does Not Bar Plaintiffs' Claims.

Defendants seek to immunize their collective fixing of interchange fees and other anticompetitive conduct in perpetuity, contending that Plaintiffs' claims are subsumed by the *Visa Check* release. Defendants' argument ignores Plaintiffs' numerous allegations of post-release anticompetitive conduct. Further, if adopted, Defendants' argument would violate the due process rights of absent class members as well as long-standing public policy considerations prohibiting releases that insulate wrongdoers from future antitrust liability.[1]

[1] Defendants apparently do not seek dismissal of Plaintiffs' injunctive relief claims. Defendants' cases are in accord, as those actions sought only damages. *See*, *e.g.*, *Record Club of Am., Inc. v. United Artists Records, Inc.*, 611 F. Supp. 211, 213-14 (S.D.N.Y. 1985).

1. The *Visa Check* Release Applies Only Prior to January 1, 2004.

The scope of the *Visa Check* release is unambiguous.[2] As this Court has held, it only released Defendants from liability for "conduct up through the end of [2003,] the year in which the agreement was reached." *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 2008 WL 115104, at *10 (E.D.N.Y. Jan. 8, 2008) ("*Interchange Fee*"). That holding is consistent with other courts' interpretation of the release. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 104 (2d Cir. 2005) ("*Wal-Mart*") (release "precludes actions for conduct occurring prior to January 1, 2004"). *See also Reyn's Pasta Bella LLC v. Visa U.S.A., Inc.*, 442 F.3d 741, 745 (9th Cir. 2006) (release absolved Defendants "of all antitrust liability arising out of conduct" prior to January 1, 2004). Accordingly, the *Visa Check* release does not preclude Plaintiffs' claims regarding Defendants' anticompetitive conduct after that date. *Interchange Fee*, 2008 WL 115104, at *14 (*Visa Check* class counsel plausibly concluded that credit interchange increases "would wipe out much of the benefit to the class but would presumably be subject to renewed litigation starting in 2004 if continued in effect"). *See Wal-Mart*, 396 F.3d at 110 (because *Visa Check* did not "involv[e] future claimants . . . [c]onduct occurring after December 31, 2003 is not precluded from being the subject of a future suit") (internal citation omitted); *id.*, 396 F.3d at 113 (*Visa Check* "class representatives . . . did not agree to preclude lawsuits arising out of similar conduct in the future").

New claims arise from Defendants' new anticompetitive conduct. The *Visa Check* release does not, and could not, extinguish Plaintiffs' claims because the new, post-release conduct had yet to occur. *Lawlor v. Nat'l. Screen Serv. Corp.*, 349 U.S. 322, 328 (1955). Other

[2] Visa's and MasterCard's respective decisions to modify their corporate structures demonstrate that they never intended that the *Visa Check* release would insulate them from antitrust liability for post-2004 conduct.

courts have likewise found that releases similar to the *Visa Check* release do not preclude post-release claims stemming from new antitrust violations. For example, in *Flying J, Inc. v. TA Operating Corp.*, 2008 WL 4923041, at *3-*4 (D. Utah Nov. 14, 2008), the Court held that a release substantially identical to the *Visa Check* release did not release claims that had not arisen as of the effective date and which were based on post-release conduct.[3] *See also Marketing Assistance Plan, Inc. v. Assoc. Milk Producers, Inc.*, 338 F. Supp. 1019, 1021-1022 (S.D. Tex. 1972) ("*MAP*") (release of claims "'which were or could have been asserted in [prior action] or growing out of or in any way connected with the matters and issues therein involved'. . . did not and could not settle disputes which had not yet arisen or serve as a license to engage in unlawful monopoly activities against the releasors").[4]

Defendants do not dispute that the *Visa Check* release only applies to conduct before January 1, 2004. Defendants instead argue that Plaintiffs do not allege any new anticompetitive conduct after December 31, 2003. They are wrong.

---

[3] The release released claims "*based in whole **or in part** on any conduct occurring on or before the Effective Date . . . including **but not limited to** conduct that **relates in any way*** to . . . claims that have been asserted or *could have been asserted* in any respect whatsoever [in the prior lawsuit]." *Flying J*, 2008 WL 4923041, at *3 (italics and emphasis in original).

[4] Possible overlap between Defendants' prior acts and their post-release wrongdoing does not bar Plaintiffs from asserting claims based on post-release antitrust violations. *Flying J*, 2008 WL 4923041, at * 5. *See Exhibitors Poster Exch., Inc. v. National Screen Serv. Corp.*, 421 F.2d 1313, 1318 (5th Cir. 1970) (subsequent actions in combination with prior actions may be the basis for new claims for damages traceable to those actions). And nothing precludes Plaintiffs from supporting their allegations of post-release wrongdoing with references to Defendants' prior anticompetitive conduct. *See Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 218 n.9 (3d Cir. 2008) ("no authority . . . for the proposition that a release prevents a party from relying on events that occurred prior . . .to the signing of the release to establish facts necessary to show a continuing conspiracy").

2. Plaintiffs Allege Wide-Ranging Anticompetitive Conduct After January 1, 2004.

Contrary to Defendants' argument, Plaintiffs' claims are not based on mere adherence to rules and policies established prior to January 1, 2004. Rather, Plaintiffs' complaint is replete with allegations of Defendants' new anticompetitive conduct after that date, including: (1) the imposition of unlawful, collectively-set interchange fees on Visa and MasterCard payment card transactions accepted by class members on and after January 1, 2004, and the adoption of new, collectively-set interchange fee schedules after January 1, 2004 (which fees continue to increase); (2) the collective adoption and ratification of the challenged rules each time the networks publish and impose new revised operating rules books and the collective enforcement of those rules; (3) the collective fixing and imposition of interchange fees after the networks' IPOs; *and* (4) the IPOs themselves.

a. Defendants' Fixing and Imposition of Interchange Fees After January 1, 2004 is Outside the Scope of the Release.

As this Court recognized, an interchange fee increase "must to some extent be ratified with each new transaction – it is always, at least in theory, subject to renegotiation absent an exercise in bargaining power, licit or otherwise, that artificially keeps the subject off the table." *Interchange Fee*, 2008 WL 115104, at *14. Thus, on each occasion on and after January 1, 2004 when Plaintiffs and class members accepted a Visa or MasterCard transaction and paid an unlawful, collectively-set interchange fee, Defendants engaged in new anticompetitive conduct not covered by the release. *See* SCACAC ¶¶ 163-165, 171, 231-233, 248, 279, 281; FASCAC ¶¶ 151-152, 167; SSCAC ¶ 139. *See also Interchange Fee*, 2008 WL 115104, at *14 (2003

interchange fee increase "would presumably be subject to renewed litigation starting in 2004 if it continued in effect").[5]

Defendants' suggestion that post-2004 imposition of interchange fees merely reflects adherence to pre-2004 policies ignores the fundamental rule that a private antitrust plaintiff can impose liability on a defendant only if it has suffered actual injury to its business or property. 15 U.S.C. § 15(b); *New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065, 1076 (2d Cir. 1987); *Cornwell Quality Tools Co. v. C.T.S. Co., Inc.*, 446 F.2d 825, 832 (9th Cir. 1971). *See also Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321, 338 (1971) ("each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act. . . ."); *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264, 1269-70 (9th Cir. 1975) (a damages claim arises when plaintiff suffers injury).

Further, at least twice yearly since January 2004, Defendants have agreed upon, announced, and imposed new schedules of default interchange fees. *See* SCACAC ¶¶ 163-165, 171, 231-233, 248, 279, 281; FASCAC ¶¶ 151-152, 167; SSCAC ¶ 139. *See also* Exs. 1-25 (rate schedules). Defendants' anticompetitive conduct has caused merchants injury and damages on a daily basis since January 1, 2004 and is therefore outside the scope of the release.

b. Defendants' Adoption and Enforcement of Revised Rules and Restraints after January 1, 2004 is Outside the Scope of the Release.

Since January 1, 2004, Defendants have also engaged in new anticompetitive conduct by collectively re-adopting, re-imposing, and revising the rules and regulations challenged in this

[5] For brevity's sake, Plaintiffs reference the pending complaints as follows: Second Consolidated Amended Class Action Complaint – "SCACAC"; First Amended Supplemental Class Action Complaint – "FASCAC"; Second Supplemental Class Action Complaint – "SSCAC." The SCACAC incorporates the other two complaints by reference. *See* SCACAC ¶ 261.

litigation, including the anti-steering restraints and the rules requiring the payment of default interchange fees. *See* SCACAC ¶¶ 100, 156, 253, 239; FASCAC ¶¶ 8, 10. SSCAC ¶¶ 45. *See also* Exs. 26-42 (revisions to rules). In addition, since January 1, 2004 Defendants have actively enforced the challenged rules. *See* SCACAC ¶¶ 100, 190, 192. Enforcement of the anticompetitive rules has maintained Defendants' collective market power and prevented merchants from exerting competitive pressure on interchange fees. *Id.* Further, since January 1, 2004, Defendants have imposed and enforced the challenged rules through new contractual relationships with merchants. SCACAC ¶¶ 190, 192, 240, 241.

c. The Networks' IPOs and Subsequent Actions are Outside the Scope of the Release.

Defendants ignore Plaintiffs' challenge to the Networks' corporate restructurings, which culminated in the 2006 and 2008 IPOs, as well as acts following those restructurings, improperly asserting that the allegations of the supplemental complaints are irrelevant to this motion.[6] *See, e.g.*, FASCAC ¶¶ 9, 95, 106, 126, 177; SSCAC ¶¶ 79, 93. Yet, as Plaintiffs' allegations demonstrate, this is undeniably new conduct that is not covered by the release:

- Defendants collusively imposed and enforced rules mandating payment of uniform default interchange fees on all transactions, and collectively fixed and imposed new and increased uniform interchange fee schedules. FASCAC ¶¶ 8, 10, 43, 51, 62, 151-52. SSCAC ¶¶ 6, 8, 44, 47, 139; *and*
- Defendants collusively imposed and enforced the anti-steering rules and other restraints. FASCAC ¶¶ 50, 62, 228; SSCAC ¶¶ 49, 198.

[6] Allegations in Plaintiffs' supplemental complaints must be considered along with the facts alleged in the SCACAC. *Slavenburg Corp. v. Boston Ins. Co.*, 30 F.R.D. 123, 126 (S.D.N.Y. 1962) ("'[A] supplemental pleading stands with the original and adds to it some fact or facts happening after the filing of the pleading to which it is a supplement.'") (citation omitted). *See also* Fed. R. Civ. P. 15 (d).

3. Defendants' Cases are Inapposite.

Because Plaintiffs allege that Defendants engaged in new anticompetitive conduct after January 1, 2004, Defendants' reliance on *Madison Square Garden, L.P. v. National Hockey League*, 2008 WL 4547518 (S.D.N.Y. Oct. 10, 2008) ("*NHL*") and other cases is misplaced. In *NHL*, the court found that because the release at issue "evidence[d] that the 'parties had in mind a general settlement of all accounts up to that time,'" it properly foreclosed plaintiff's attempted reassertion of a claim existing at the time the release was drafted. *Id.* at * 6. By contrast, here, Plaintiffs' claims had not yet accrued at the time of the *Visa Check* release. Any injuries at issue in this case did not accrue until the merchant Plaintiffs and other class members paid collusively-fixed and collusively-imposed interchange fees in 2004 and thereafter.

Defendants' reliance on *MCM Partners, Inc. v. Andrews-Bartlett & Assocs., Inc.*, 161 F.3d 443 (7th Cir. 1998), *Hunter Douglas, Inc. v. Comfortex Corp.*, 1999 U.S. Dist. LEXIS 10906 (N.D.N.Y. Mar. 11, 1999) and *Record Club of America, Inc. v. United Artists Records, Inc.*, 611 F. Supp. 211 (S.D.N.Y. 1985), is similarly misplaced. In each of those cases, the claims either arose solely from pre-release conduct, or had already accrued at the time of the release. Defendants' reliance on *VKK Corp. v. National Football League*, 244 F.3d 114 (2d Cir. 2001) is misplaced because the case involved the (rare) application of the "part and parcel" doctrine, in which the release was alleged to be an instrument of the alleged conspiracy. Plaintiffs do not allege that the *Visa Check* release operates in that way.

4. The Release of Future Antitrust Claims Violates Public Policy.

Agreements limiting or waiving future antitrust liability are void as a matter of public policy. *American Express Merch. Litig.*, 554 F.3d 300, 319 (2d Cir. 2009). That is the case, especially in class actions, because such waivers immunize wrongdoers from future liability and

undermine the public interest in the vigilant enforcement of the antitrust laws through private treble-damages actions. *Id.* at 319-320 (internal citations omitted). The same is true of prospective application of broad releases of past claims, which would act to bar future claims based on subsequent conduct, as it would grant wrongdoers perpetual antitrust immunity. *Lawlor*, 349 U.S. at 328; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985) (if clauses operated "as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy").[7] In cases involving releases similar to the *Visa Check* release, courts have refused to apply them prospectively on public policy grounds. *Flying J*, 2008 WL 4923041, at *4.[8] If the *Visa Check* release were applied prospectively, Defendants would be allowed to violate the antitrust laws *ad infinitum* – collusively fixing and imposing supra-competitive interchange fees which form the basis for the current claims.[9]

Further, construing the release to bar claims that did not exist prior to 2004 would be fundamentally unfair to absent class members, and would deprive them of due process. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).[10] Because the *Visa Check*

---

[7] *See also Minnesota Mining and Mfg. Co. v. Graham-Field, Inc.*, 1997 WL 166497, at *3 (S.D.N.Y. Apr. 9, 1997). *See also U.S. v. General Electric Co.*, 358 F. Supp. 731, 740 (S.D.N.Y. 1973) (noting the "public policy considerations against giving a defendant . . . perpetual immunity").

[8] *See MAP*, 338 F. Supp. at 1022. *See also Fox Midwest Theatres v. Means*, 221 F. 2d 173 (8th Cir. 1955) (release of claims based on antitrust violations alleged and settled in prior dispute "could therefore itself operatively serve as a contract 'in restraint of trade'" if the release was applied to absolve the defendant from liability for future antitrust violations).

[9] Unlike *NHL*, where Judge Preska held that the NHL's "undisputed legitimacy" vitiated the kind of public policy concern at issue here in favor of the public interest in settling disputes, Plaintiffs here allege a price-fixing "conspiracy whose very existence is unlawful." *NHL*, 2008 WL 4547518, at *7.

[10] Tellingly, none the cases Defendants cite in this context were class actions.

settlement did not compensate class members for post-2004 damages claims, Plaintiffs' claims do not share an identical factual predicate with the *Visa Check* claims, and were not adequately represented in the settlement. *In re Visa Check/MasterMoney Antitrust Litig.*, 297 F. Supp. 2d 503, 519-520 (E.D.N.Y. 2003) (settlement proceeds allocated based on class members' Visa and MasterCard transaction volume prior to 2004), *aff'd sub nom*, *Wal-Mart Stores, Inc. v. Visa, U.S.A., Inc.*, 396 F.3d 96 (2d Cir. 2005). For this reason, Plaintiffs' claims could not have been released in the prior litigation. *Wal-Mart*, 396 F.3d at 106-107 (prior class action can release only those claims that share identical factual predicate and are adequately represented); *TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982) (same); *National Super Spuds v. New York Mercantile Exch.*, 660 F.2d 9, 18 n.7 (2d Cir. 1981) (refusing to approve a settlement that extinguished class claims based on both existing and future claims, but determined settlement shares solely on the basis of the existing claims).

5. Defendants Waived the Release Defense.

In an effort to convince the Court that they did not waive their release argument, Defendants claim it is only now "apparent" from the SCACAC that the release forestalls Plaintiffs' claims. Defs.' Mem. at 5. Defendants' failure to cite to any allegations in the SCACAC or the FASCAC buttressing this argument reveals its tenuousness. Defendants' argument could just as well have been made in their prior motion, and therefore is waived under Federal Rule of Civil Procedure 12(g).[11]

[11] The oral argument on Defendants' previous motion to dismiss reflects that any preservation was of an argument far narrower than Defendants make now. Defendants intended, at most, to preserve the argument that damages suffered post-2004 as a result of the August 2003 interchange fee increase were subject to the release. Nov. 21, 2006 Hr'g Tr. (DE 738), at 23-29. Moreover, the Court told Defendants that they might have waived even that argument by having

B. Plaintiffs Adequately Allege that the Networks' Rules Requiring the Payment of an Interchange Fee on Every Transaction Constitute a Restraint of Trade.

Defendants' argument that Plaintiffs have not adequately alleged a restraint of trade within the meaning of Section 1 of the Sherman Act is fundamentally flawed for at least two reasons.[12] First, price-fixing agreements necessarily limit price competition and thus are a restraint of trade. Second, Defendants' argument does not even address the restraint at issue in this case, but instead focuses primarily on whether Visa's and MasterCard's member banks are free to compete as issuers for cardholders of general purpose and private label payment cards.

Moreover, Defendants' reliance on *Buffalo Broadcasting Co., Inc. v. ASCAP*, 744 F.2d 917 (2d Cir. 1984) ("*Buffalo Broadcasting*"), is misplaced. Plaintiffs' factual allegations are distinguishable in their entirety from the evidence in *Buffalo Broadcasting*. And, to the limited extent that any "rule" might derive from that case, it is limited to the unique facts that were before the court.

1. The Network Defendants' Rules Mandating Payment of an Interchange Fee are a Restraint of Trade because they Restrict Price Competition.

Plaintiffs generally must allege a "contract, combination or conspiracy …in restraint of trade" to plead a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. For pleading purposes, the restraint of trade element is easily established because, as the Supreme Court has recognized, "every contract is a restraint of trade" as "[t]o bind, to restrain, is of their very essence." *Nat'l Collegiate Athletic Ass'n v. Board of Regents of Univ. of Oklahoma*, 468 U.S.

---

failed to raise it at that point. Defendants claimed that they might still be entitled to raise it at the summary judgment stage only. *Id*. at 27.

[12] Defendants notably do not dispute that they have collusively imposed and fixed the fees at issue. For the purposes of this motion, the Court may assume that they have done that.

85, 98 (1984); *Board of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918). A horizontal restraint is "an agreement among competitors on the way in which they will compete with one another." *N.C.A.A.*, 468 U.S. at 99. Trade is restrained within the meaning of the statute even where the restraint does not completely eliminate competition. *See United States v. Socony-Vacuum Oil, Co.*, 310 U.S. 150, 220 (1940) (agreements which curtail but do not eliminate price competition are illegal).

Here, Plaintiffs allege that Visa and its member banks and MasterCard and its member banks have restrained price competition for card acceptance services through their collusive rules and conduct, which allows them to artificially fix and maintain interchange fees. Defendants' argument that Plaintiffs do not allege a restraint focuses solely on the allegations regarding the rules requiring payment of an interchange fee, and ignores these other rules which allow Defendants to raise interchange fees without competitive pressure. Price competition is restrained not only through the networks' rules requiring an interchange fee on every payment card transaction, but also by fixing uniform fee schedules for those transactions. In addition, Defendants impose and enforce anti-steering restraints to maintain and enhance the networks' market power by preventing merchants from applying even minimal competitive pressure on interchange fees. *See, e.g.*, SCACAC ¶¶ 190-98, 238-47, 292-312, 328-30, 336-38. Plaintiffs further allege that price competition is restrained through the network Defendants' Honor All Cards rules. *See, e.g.*, SCACAC ¶¶ 244-45. Specifically, Plaintiffs allege the following:

- Before the IPOs, Bank Defendants, acting through the Visa and MasterCard Boards of Directors, collectively adopted and enforced rules that required the payment of an interchange fee set at Visa's and MasterCard's uniform levels for all transactions on the respective networks. Since the IPOs, those rules have remained in place, and the Bank Defendants have agreed to abide by them. SCACAC ¶¶ 155, 163-164, 184-185, 238-239, 242-243;

- By enacting and enforcing the Honor All Cards and interchange fee payment rules, the Defendants have effectively required the payment of interchange fees on all their card transactions, regardless of the issuing bank. The Honor All Cards rule prevents merchants from rejecting any particular transaction and restrains price competition. SCACAC ¶¶ 244-45;

- The result is that both issuing and acquiring banks agree to and enforce the imposition of collectively-fixed interchange fees for every payment card transaction on the Visa and MasterCard networks. That is a restraint of trade. *Socony-Vacuum,* 310 U.S. at 220.

- Visa and MasterCard impose the No-Surcharge rule and other anti-steering rules to prevent merchants from encouraging consumers to use alternative (and less costly) means of payment, and to preclude the imposition of downward pressure on interchange fees. These rules restrain price competition. SCACAC ¶¶ 190-98.

These allegations taken together adequately allege that intra-network price competition is restrained within the meaning of Section 1 of the Sherman Act. Upon considering similar facts after the equivalent of a full bench trial, the European Commission reached a similar conclusion. *See* SCACAC ¶¶ 250-53. *See also* Ex. 43, Commission Decision (E.C.) COMP/34.579 of 19 Dec. 2007 ("*E.C. Decision*") ¶¶ 2 (MasterCard's scheme "restricts competition" by artificially increasing the fees paid by merchants), 405 ("MasterCard's [interchange fee] has the consequence of fixing to a large part the fees" paid by merchants), 407 ("it can be clearly established that the MasterCard [interchange fee] has the effect of appreciably restricting and distorting competition to the detriment of merchants"), 653 ("MasterCard's [interchange fee] forms part of a network of inter-related or similar arrangements that, taken together, have a cumulative restrictive effect on competition").

Agreements to fix, raise, stabilize or maintain prices are the "paradigm of an unreasonable restraint of trade" because by definition they restrict price competition. *See N.C.A.A.*, 468 U.S. at 100; *E.C. Decision* ¶¶ 2, 400-12, 460, 648, 653, 664, 665. Price-fixing agreements are a restraint of trade even where, as here, they result from the rules or practices of joint ventures. Courts and antitrust enforcement agencies have repeatedly found that a rule or

practice of a joint venture that restricts members' freedom to compete with each other is a "restraint" for Section 1 purposes, regardless of whether that restraint limits activities inside or outside of the joint venture. *See, e.g., N.C.A.A.*, 468 U.S. at 99 (NCAA rules which curtailed members' freedom to negotiate television rights for football games constituted a restraint); *F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 447 (1986) (association rule prohibiting members from providing x-rays to insurers was a restraint within the meaning of Section 1).[13] *See generally* F.T.C & U.S. D.O.J. Antitrust Guidelines for Collaborations Among Competitors (2000) ("*Competitor Collaboration Guidelines*") (summarizing law and economics relevant to the analysis of joint venture conduct).

For example, in *N.C.A.A.*, the Supreme Court found that N.C.A.A rules that limited competition among member schools to sell the rights to televise football games to broadcasters constituted a restraint of trade:

> There can be no doubt that the challenged practices of the NCAA constitute a "restraint of trade" in the sense that they limit members' freedom to negotiate and enter into their own television contracts…. By participating in an association which prevents member institutions from competing against each other on the basis of price or kind of television rights that can be offered to broadcasters, the NCAA member institutions have created a horizontal restraint – an agreement among competitors on the way in which they will compete with one another. A restraint of this type has often been held to be unreasonable as a matter of law.

468 U.S. at 98-99. Similarly, in *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1971), the government challenged the association's rules granting each member an exclusive territory within which to sell Topco-branded products, and prohibiting members from selling those products outside that territory. The association argued that the rules promoted inter-brand

[13] *See also National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978) (restraint found where members could not negotiate or quote prices with potential customers before a member was selected for the project).

competition between members and large chain supermarkets. The Court held that the rules were an unlawful horizontal restraint of trade because they prevented intra-brand competition on Topco-branded products. *See Topco*, 405 U.S. at 608-11.

Not surprisingly, other courts have found that Visa's and MasterCard's rules restrain trade within the meaning of Section 1. For example, in *United States v. Visa*, 163 F. Supp. 2d 322 (S.D.N.Y. 2001) ("*Visa*"), the court found that the Network Defendants' rules prohibiting members from issuing AmEx- or Discover-branded payment cards restrained trade illegally. In that case, neither Visa nor MasterCard disputed that the "antitrust law's concern with the free working of the competitive process applies with equal force to joint ventures. Although a joint venture may involve aspects of agreement among competitors to enable a joint venture to function, agreements among those competitors unrelated to the efficiency of the joint venture and in particular limiting competition in areas where the competitors should compete, are subject to scrutiny under the antitrust laws." *Visa*, 163 F. Supp. 2d at 345.

Plaintiffs allege that Defendants collusively fixed rules which: (1) set a fixed interchange fee schedule; (2) via the anti-steering and Honor All Cards rules, prevented merchants from exerting any downward pressure on those fees; and (3) by effectively concealing the interchange fee associated with any particular transaction, prevented consumers from exerting any downward pressure on those fees. Plaintiffs' allegations regarding Defendants' intra-network price-fixing scheme sufficiently plead a restraint of trade within the meaning of Section 1.

2. Defendants' Argument that Card Issuing Banks Compete for Cardholders is Irrelevant.

Defendants argue that Plaintiffs do not allege a restraint within the meaning of Section 1 because Visa's and MasterCard's member banks are free to compete in the card-issuing business,

as they issue various network-branded cards and private label merchant cards. Defs.' Mem. at 11-13. Defendants' argument is irrelevant because Plaintiffs are challenging a restraint in the card *acceptance* services market, and not the separate market for card *issuance* to consumers.[14] While issuing banks may be free to compete for cardholders, that competition has nothing to do with competition for merchants or Visa- and MasterCard-branded card acceptance services.[15] The restraint of competition in the card acceptance services market prevents merchants from asserting competitive pressure to reduce interchange fees and permits Defendants to fix interchange fees at ever-increasing levels. SCACAC ¶¶ 8(p), 100. Likewise, card issuers do not compete to enlist acquirers to provide card acceptance services. Thus, acquirers do not exert any competitive pressure on interchange fees. *Id*. ¶¶ 8(b, p), 100, 181, 184. Nor do cardholders, as Defendants do not disclose to cardholders either the existence or the amount of the interchange fees associated with their respective cards. *Id.* ¶¶ 189-90, 194.

While acquiring banks compete to enlist merchants, they do not, and cannot, compete on the basis of interchange fees – which comprise the bulk of the merchants' payment card-related costs. *Id*. ¶¶ 8(b), 100. Plaintiffs thus allege that Defendants have designed the Visa and MasterCard networks so that card issuers do not compete with respect to card acceptance services, and consequently intra-network interchange fees are free from normal competitive market pressures. This is the paradigm of a restraint of trade.

---

[14] Defendants' restraint argument is also erroneous in that it truncates the analysis necessary to determine whether their conduct restrains competition. As described in the Competitor Collaboration Guidelines, determining whether a feature of a joint venture is a restraint, and if so, whether it is unreasonable, requires the examination of a number of factors, and "no one factor is dispositive." *Competitor Collaboration Guidelines* § 3.3.

[15] In addition, private label cards do not even compete in any of the relevant markets in this case. *See, e.g.*, SCACAC ¶¶ 271-91, 358-70, 380-408.

Defendants also suggest that banks could negotiate bilateral interchange fees with merchants. However, Defendants' memorandum does not claim that banks actually do that. Defs.' Mem. at 12-13. As Plaintiffs allege, Defendants' rules and conduct have effectively discouraged bilateral agreements. *See* SCACAC ¶ 236. Moreover, while members of any price-fixing cartel may cheat, that is not a defense to a price-fixing claim. *Socony-Vacuum*, 310 U.S. at 220 (agreements which curtail but do not eliminate price competition are illegal). At most, the issue is one of disputed fact that cannot be decided at this stage.

3. *Buffalo Broadcasting* is Irrelevant.

Defendants erroneously contend that the Second Circuit's decision in *Buffalo Broadcasting* is dispositive of Plaintiffs' intra-network conspiracy claims. Defs.' Mem. at 13-17. In *Buffalo Broadcasting*, the Second Circuit explicitly recognized its decision was limited to the facts and circumstances of that case: "[W]e conclude [after trial] that the evidence was insufficient as a matter of law to show that the blanket license is an unlawful restraint of trade *in the legal and factual context in which it currently exists*." *Buffalo Broadcasting*, 744 F.2d at 919 (emphasis added). As the Supreme Court has explained, "[t]his Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the 'particular facts disclosed by the record'…this Court has examined closely the economic reality of the market at issue." *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466-67 (1992) (citations omitted) (denying summary judgment motion). That perhaps is why no Second Circuit court has *ever* relied on the "rule" *Buffalo Broadcasting* established in passing judgment as to any industry other than the performing rights industry.

Predictably, the unusual facts in *Buffalo Broadcasting* – which was the culmination of a 40-year series of related cases – by themselves distinguish it from this case to the point that it is

irrelevant.[16] In *Buffalo Broadcasting*, the plaintiff television stations were purchasers of performing rights to musical compositions. They had several options for purchasing those rights in the relevant market: (1) a non-exclusive blanket license, which included millions of musical compositions contributed by thousands of individual composers; (2) directly from individual composers; (3) source licenses; *and* (4) program-specific licenses. *Id*. at 921-22. Because plaintiffs had realistic alternatives for purchasing performing rights in the relevant market, the court found that the non-exclusive blanket license did not restrain competition. *Id*. at 925-26. This finding is consistent with black-letter law holding that where the facts of a particular case do not establish that the challenged horizontal agreement restrained competition, plaintiff cannot prove a violation of section 1 of the Sherman Act. *See Buffalo Broadcasting*, 744 F.2d at 933.

More importantly, in *Buffalo Broadcasting*, the Second Circuit did not even consider the defendants' collective power in the market for performing rights, as there was no question that it was substantially limited.[18] But in this case, the Second Circuit has already held that Defendants

---

[16] In particular, the challenged non-exclusive blanket license had been the subject of significant litigation and a court-supervised consent decree for nearly forty years. *Id*. at 922-24. In fact, the license had already been found not to unreasonably restrain trade in the context of a television network, radio stations, nightclubs and bars. *Id*. at 924, 933.

[18] That power was limited in part because the blanket license was merely the sum of its pre-existing parts (*i.e.*, the rights to individual songs), and the composers remained free to sell those parts independent of the blanket license arrangements. Conversely, the joint ventures in this case (Visa and MasterCard) created an entirely new product (General Purpose Card Network Services), and strictly precluded their members from selling the product in any form other than that dictated by the networks.

Plaintiffs are aware that in *Broadcast Music Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 34 (1979), Justice Stevens noted in his dissent that he would have found that BMI and ASCAP dominated the market. However, that finding was contrary to the district court's finding that defendants lacked market power, which was based on thorough analysis of the trial evidence. *See Columbia Broadcasting Sys., Inc. v. American Society of Composers*, 400 F. Supp. 737, 783 (S.D.N.Y. 1975). And Supreme Court dissents have no precedential value. *United States v. Barbera*, 514 F.2d 294, 299 (2d Cir. 1975).

have market power in the relevant market. The relevant market in this case is the market for General Purpose Card Network Services. *See In re Visa Check/MasterMoney Antitrust Litig.*, 2003 WL 1712568, at *3 (E.D.N.Y. Apr. 1, 2003); *Visa*, 163 F. Supp. 2d at 338, *aff'd*, 344 F.3d at 239 (both cited in SCACAC ¶ 272). "Both Visa and MasterCard, 'together with their Member Banks,' jointly and separately, have market power in the market for General Purpose Cards and General Purpose Card Network Services." SCACAC ¶ 273 (quoting *Visa*, 163 F. Supp. 2d at 340, *aff'd*, 344 F.3d at 239).

In *Columbia Broadcasting System, Inc. v. American Society of Composers, Authors and Publishers*, 620 F.2d 930 (2d Cir. 1980) ("*CBS*"), competitive conditions in the relevant market were also critical to the Second Circuit's finding that the same blanket license as challenged in *Buffalo Broadcasting* did not restrain competition in the market for performing rights. In *CBS*, the Second Circuit found that the plaintiff television network had freedom of choice to purchase such rights because competition among sellers in the relevant market was "realistically feasible." 620 F.2d at 937-39 ("we agree that the issue is whether competition among copyright owners is realistically feasible, regardless of whether CBS may have some business reason of its own for preferring not to enter an available competitive market").

Here, the banks' alternatives in the markets have at all times been substantially limited. American Express and Discover maintain relatively small market shares. And the networks' rules substantially limit the banks' alternatives within that segment of the General Purpose Card Network Services market that Visa and MasterCard control. The Honor All Cards rules preclude acquiring banks from offering their merchant customers any subset of Visa- and/or MasterCard-branded card products. *See, e.g.*, ¶¶ SCACAC 8(m), 240, 241, 244. The interchange fee rules preclude acquiring banks from offering Visa- and/or MasterCard-branded card products with

reduced fees. *See, e.g.*, ¶¶ SCACAC 150, 151, 185, 238-46. The anti-steering rules preclude acquiring banks from offering merchants alternatives in managing their acceptance of Visa- and/or MasterCard-branded card products. *See, e.g.*, ¶¶ SCACAC 8(d), 189-98, 247. And when customers seek to use Visa and/or MasterCard credit cards, merchants must accept them regardless of the resulting interchange fees, unless they previously chose not to accept any and all such credit cards – which Plaintiffs allege is effectively impossible, because of the networks' market power. SCACAC ¶ 171; *Visa*, 163 F. Supp. 2d at 340, *aff'd*, 344 F.3d at 240.

Nothing remotely comparable existed in *Buffalo Broadcasting*, as all composers were free to offer the individual rights that comprised the blanket license in any combination and on any terms they pleased, so long as they did so outside the context of the joint venture. *Buffalo Broadcasting*, 744 F.2d at 928-29. Finally, before the IPOs, the banks' lucrative ownership interests in Visa and MasterCard gave them an ongoing incentive to maintain the restrictive interchange and anti-steering rules that assured the dominance of those networks. *See, e.g.*, SCACAC ¶¶ 49, 52, 102, 104, 184, 185, 238-47. Again, nothing remotely comparable existed in *Buffalo Broadcasting*.

Finally, Defendants' focus on the supply side of the market in *Buffalo Broadcasting* is contrary to the Second Circuit's focus on the demand side of the market in that case. The court relied substantially, if not entirely, on the plaintiffs' failure to establish "the absence of realistic alternatives." *See, e.g.*, *Buffalo Broadcasting*, 744 F.2d at 925-33. Conversely, Plaintiffs in this case repeatedly allege the merchants' absence of realistic alternatives. *See, e.g.*, SCACAC ¶¶ 171, 244-47, 278, 279, 281, 286, 287.

In short, *Buffalo Broadcasting* has no bearing on this case.[19]

C. Plaintiffs Adequately Plead Post-IPO Intra-Network Conspiracies.

Defendants contend that Plaintiffs do not adequately allege horizontal agreements among the member banks of Visa and MasterCard for the periods after their respective IPOs. That argument is premised on the erroneous assumption that Defendants' pre-IPO conduct is irrelevant in this context.[20] Before the IPOs, the member banks, through Visa and MasterCard, collusively fixed and imposed interchange fees, and imposed and enforced the anti-steering restraints. *See, e.g.*, SCACAC ¶¶ 1, 94, 97, 120, 159, 185. While Defendants claim that this collusive conduct was lawful, they do not, and cannot, dispute that it constituted a series of horizontal agreements within the meaning of Section 1 of the Sherman Act. Plaintiffs allege, and the European Commission found, that the member banks created new Visa and MasterCard organizations, in large part as a result of their hope that they might avoid antitrust liability while preserving the banks' favored position.[21]

Through the IPOs, Defendants purported to effect change in the mechanism for setting interchange fees and network rules. *See, e.g.*, FASCAC ¶¶ 107-108, 132, 137; SSCAC ¶¶ 95-98, 101-102. After the IPOs, member banks purportedly allow Visa and MasterCard to establish

---

[19] Defendants' reliance on *Buffalo Broadcasting* is also misplaced because the appeal in that case followed a four-week trial. *Id*. at 924. The Second Circuit's finding that the blanket license did not restrain trade was based on an extensive review of the evidentiary record. *Id*. at 925-33. In sharp contrast, here, the Court's review is limited to the factual allegations of the SCACAC. In addition, the economic expert evidence is not before the Court.

[20] Defendants cavalierly claim that "the Visa and MasterCard IPOs cut off potential antitrust liability from the dates of those IPOs onwards" Defs.' Mem. at 30. This is simply untrue. No court has ruled to that effect and Plaintiffs have challenged both the IPOs themselves and Defendants' subsequent conduct as anti-competitive.

[21] *See* SCACAC ¶ 268, 270, 432; FASCAC ¶¶ 78-82, 96-99, 113-115, 117, 123-24, 130-31, 134; SSCAC ¶¶ 77-81, 94, 98, 103-05, 122, 129-30, 133; *E.C. Decision* ¶¶ 3, 76-77, 81, 88, 93, 94, 97, 99, 362, 378, 388, 396.

those fees, rather than establishing the fees themselves under the Visa and MasterCard umbrellas. Plaintiffs allege that, when the member banks created the new Visa and MasterCard organizations through the IPOs, they did so with the knowledge that each member bank agreed to continue to abide by each network's rules, including the rules requiring an interchange fee on every transaction, the interchange fee schedule of rates and the anti-steering restraints. SCACAC ¶¶ 98, 433- 34; *E.C. Decision* ¶¶ 3, 76, 88, 91, 94, 97, 99, 350, 352, 355, 365 378-80, 388, 395, 396. In so agreeing, the member banks knew that the interchange fees would continue to be received by the issuer member banks. Defendants thus maintained the unlawful *status quo.* Accordingly, Plaintiffs adequately plead intra-network horizontal conspiracies for the networks' respective post-IPO periods.

1. Defendants Maintained Long-Standing Horizontal Intra-Network Conspiracies before their Respective IPOs.

Before their respective IPOs – each of which post-dated the beginning of the proposed Class Period – Visa and MasterCard were member associations comprised of thousands of member banks, but were controlled by a small number of members, including Bank Defendants, who had the largest shares of card issuance and highest sales transaction volume. SCACAC ¶¶ 1, 120-133, 221. Visa's and MasterCard's policies were set through the collective action of their respective membership. SCACAC ¶¶ 94, 97, 159, 185. The SCACAC is replete with allegations that, before Visa's and MasterCard's IPOs, member banks acted through the networks to collectively impose rules requiring the payment of fixed interchange fees on every transaction conducted over the Visa and MasterCard networks and, pursuant to those rules, collectively fixed uniform interchange fee schedules. *See, e.g.*, SCACAC ¶¶ 104, 163-164, 238-239, 242, 264.

Plaintiffs also allege that Defendants collusively imposed and enforced anti-steering restraints. SCACAC ¶¶ 104, 190.

Defendants do not, and cannot, dispute that Plaintiffs adequately allege that their collective action in setting and imposing these policies is a contract, combination or conspiracy within the meaning of Section 1 of the Sherman Act. In fact, as the Second Circuit recognized, prior to their respective IPOs, Visa and MasterCard were structural conspiracies:

> Visa U.S.A. and MasterCard, however, are not single entities; they are consortiums of competitors. They are owned and effectively operated by some 20,000 banks, which compete with one another in the issuance of payment cards and the acquiring of merchants' transactions. These 20,000 banks set the policies of Visa U.S.A. and MasterCard…. Each has agreed not to compete with the others in a manner which the consortium considers harmful to its combined interests. Far from being "presumptively legal," such arrangements are exemplars of the type of anticompetitive behavior prohibited by the Sherman Act.

United States v. Visa U.S.A., Inc., 344 F.3d 229, 242 (2d Cir. 2003). *See also* SCACAC ¶ 101. Visa and MasterCard were also found to be structural conspiracies in several foreign jurisdictions. SCACAC ¶ 262.

Plaintiffs allege that these findings, coupled with the filing of these consolidated MDL 1720 actions, induced Visa and MasterCard to restructure themselves to avoid antitrust liability based on collusive conduct, by undertaking to create the appearance of unilateral conduct. SCACAC ¶¶ 262, 270. *See also E.C. Decision* ¶¶ 3, 76-77, 81, 88, 93, 94, 97, 99, 362, 378, 388, 396. For example, Plaintiffs allege that "in May 2005, MasterCard's then-CEO Robert Selander noted in a presentation to the European banks that were then represented on MasterCard's Board of Directors that through an IPO, MasterCard wished to terminate the 'structural conspiracy previously found to exist by courts in the United States.'" SCACAC ¶ 263.

2. Plaintiffs Adequately Allege that the Banks Maintained Horizontal Agreements After the IPOs.

Plaintiffs' post-IPOs conspiracy allegations must be analyzed in light of the allegations in the SCACAC as a whole, including the context in which the IPOs were planned and consummated. The Visa and MasterCard networks were not created as a result of the IPOs. Those networks did business for over 35 years before the IPOs as bank-controlled joint ventures and, as of the date of the IPOs, the Second Circuit had ruled that they were structural conspiracies.

Defendants ignore these critical allegations in arguing that Plaintiffs do not allege horizontal agreements among the banks after the IPOs. On the contrary, Plaintiffs allege, and (as to MasterCard) the European Commission found, that the member banks collectively agreed to the IPOs for the purpose of attempting to avoid antitrust liability for the ongoing conspiracies that preceded the IPOs. The networks and their member banks understood that network policies favoring member banks would not be affected by the IPOs.[22] For example, Plaintiffs allege that it "was the Member Banks themselves, acting through the Networks' respective Boards of Directors, which adopted the Networks' respective plans to restructure themselves and conduct IPOs in an attempt to continue their anticompetitive practices outside of the scope of Section 1 of the Sherman Act." SCACAC ¶ 432. *See also E.C. Decision* ¶¶ 99, 378.

Plaintiffs further allege that, in restructuring Visa and MasterCard, the member banks intended to preserve their favored position via, among other things, the imposition of the networks' rules and the imposition of supra-competitive interchange fees for the benefit of the

[22] SCACAC ¶¶ 95-96, 98, 165, 221, 223-224, 238, 243,266-268, 430-431, 432-438, 440-442; FASCAC ¶¶ 3,8, 43, 47, 50-52, 56, 62, 154; SSCAC ¶¶ 6, 39, 44-46, 50; *E.C. Decision*, ¶¶ 85-99, 378-97.

banks (as opposed to Visa and MasterCard). *See, e.g.*, SCACAC ¶¶ 262, 264, 268, 270, 432, 437; *E.C. Decision* ¶ 378 ("MasterCard's member banks shaped and eventually approved the IPO in order to perpetuate the [interchange fee] as part of the business model in a form that they perceived to be less exposed to antitrust scrutiny").[23] One way in which they did so was by agreeing to a purportedly new mechanism for setting interchange fee rates.[24] As Plaintiffs allege, before the IPOs, member banks set interchange fees by vote, through Visa and MasterCard.

After the IPOs, they agreed to allow Visa and MasterCard to set uniform interchange fee schedules.[25] Each member bank agreed to this price-setting mechanism, and each knew that all of the other member banks agreed to it. *See, e.g.*, SCACAC ¶¶ 264, 268, 270, 433-34; *E.C. Decision* ¶ 379 ("[t]he member banks were a driving force behind the new governance model and they approved the preceding and subsequent 'outsourcing' of interchange related decision making from boards of bank directors to [] the Global Board").[26] And both the networks and banks explicitly addressed their concerns that any new arrangements maintain the banks' existing interchange revenue streams. *See* SSCAC ¶¶ 89-90, 100-101, 122; FASCAC ¶¶ 108, 135, 137; *E.C. Decision* ¶ 99.

Plaintiffs also allege that each bank knew that every member bank would agree to abide by the networks' rules, which would require the payment of a fixed interchange fee and impose

[23] *See also E.C. Decision* ¶¶ 3, 76, 88, 94, 95, 99, 352, 355, 360, 361, 365, 379, 380, 382-84, 388-97.

[24] *See, e.g.*, FASCAC ¶¶ 132, 137; SSCAC ¶¶ 101-02; *E.C. Decision* ¶¶ 378-80, 383, 388-90, 395, 398.

[25] *See, e.g.*, SCACAC ¶¶ 264, 268, 270, 429-31; *E.C. Decision* ¶¶ 378-80, 383, 388-90, 395, 398.

[26] *See also E.C. Decision* ¶¶ 99, 378, 380, 383, 395-99.

anti-steering restraints.[27] Plaintiffs further allege that Visa's largest member banks have retained sufficient power and control to prevent Visa from reducing interchange fees absent the member banks' consent. SSCAC ¶ 137(e). Likewise, Plaintiffs allege that MasterCard's largest member banks have retained sufficient power and control to prevent MasterCard from reducing interchange fees absent the member banks' consent.[28] The SCACAC, as well as the other pending complaints are replete with additional allegations reflecting Defendants' efforts to favor the banks' interests after the IPOs.[29]

Plaintiffs allege, and the European Commission found as to MasterCard, that the horizontal agreements among the banks continued despite the changes in Visa's and MasterCard's corporate forms. *See, e.g.*, SCACAC ¶ 429; *E.C. Decision* ¶¶ 361, 362, 378-99. These allegations suffice to plead horizontal price-fixing conspiracies post-IPOs, even though the banks appointed Visa and MasterCard to set their interchange fees – fees that the *banks* collect and keep, and that merchants pay. *See E.C. Decision* ¶¶ 361, 373, 378-80, 382-84, 386, 388-92, 394-99. As the Supreme Court recognized in *United States v. Masonite Corp.*, 316 U.S. 265 (1942):

> The fixing of prices by one member of a group pursuant to express delegation, acquiescence, or understanding is just as illegal as the fixing of prices by direct, joint action. [] Since there was price-fixing, the fact that there were business reasons which made the arrangements desirable to the appellees, the fact that the effect of the combination may have been to increase the distribution of hardboard without increase of price to the consumer or even to promote competition between

[27] SCACAC ¶¶ 433, 440; *E.C. Decision* ¶¶ 99, 352, 353, 355, 357, 361, 362, 365, 373, 378-80, 395-99.

[28] FASCAC ¶ 149(f); *E.C. Decision* ¶¶ 362, 365, 378-80, 383, 386, 388-91, 394-99.

[29] *See* SCACAC ¶¶ 438-40; FASCAC ¶¶ 43, 122; 133-134, 136, 142, 143, 138-40; SSCAC ¶¶ 95, 101, 105-07, 117, 133, 151-54. *See also* Class Pls.' Mem. in Opp. to Defs.' Mots. to Dismiss First Am. Suppl. Class Action Compl. and Second Suppl. Class Action Compl. (DE 1224) §§ II.B.2, III.B, III.C.1, IV.C.

> dealers, or the fact that from other points of view the arrangements might be deemed to have desirable consequences would be no more a legal justification for price-fixing than were the "competitive evils" in the *Socony-Vacuum* case.

316 U.S. at 276 (internal citations omitted).[30]

It is well-established that plaintiffs need not prove any direct communications among the competitors to prove a horizontal agreement in the form of a hub-and-spoke conspiracy, where the agreement can be inferred from other circumstances. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939); *Toys "R" Us, Inc. v. F.T.C.*, 221 F.3d 928 (7th Cir. 2000). "Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act." *Interstate Circuit*, 306 U.S. at 227 (citations omitted). The Bank Defendants' agreement to participate in a scheme with a hub or ringmaster – in this case, the networks – combined with the knowledge that their competitors would participate, and the necessity of their participation to effectuate the conspiracy, are by themselves sufficient to establish a horizontal agreement. *Id*.; *Toys "R" Us*, 221 F.3d at 936.

In *Interstate Circuit*, the Supreme Court inferred a horizontal agreement among movie distributors who never communicated with each other. Interstate Circuit, the hub of the conspiracy, sent a single letter to each of eight movie distributors, asking them to maintain a minimum price for first-run theaters and refrain from showing night-time double features. *Interstate Circuit*, 306 U.S. at 215-17. Each distributor knew that the scheme would not work unless all agreed to it, even though they never communicated with each other. *Id*. at 222. But each movie distributor agreed to the uniform terms. The Court found a horizontal agreement

[30] *See also Citizen Publ'g Co. v. United States*, 394 U.S. 131, 134-36 (1969); *New York ex rel. Spitzer v. St. Francis Hosp.*, 94 F. Supp. 2d 399, 412-14 (S.D.N.Y. 2000) (three hospitals appointed single negotiator with insurers; court applied *per se* test).

based on the circumstances of the proposal, despite the lack of communications between the horizontal conspirators. *Id.* at 225-27.

Similarly, in *Toys "R" Us*, the court found a horizontal agreement to boycott sales to warehouse stores, without any communication between the horizontal competitors. In that case, Toys "R" Us, acting as the hub, engineered vertical agreements with manufacturers to boycott warehouse clubs. *Toys "R" Us*, 221 F.3d at 934. Each of the manufacturers was concerned that its competitors would cheat on the boycott to gain a competitive advantage. *Id*. at 936. The manufacturers would not agree to boycott warehouse stores unless they could be assured that their competitors were doing the same. *Id*. The manufacturers never communicated this condition to each other. Rather, they depended upon Toys "R" Us to construct an agreement on the common understanding that it would enter into similar agreements with all of the manufacturers. Because each of the vertical agreements was effected with this common understanding, the court found a horizontal agreement. *Id*.

Likewise, in this case, a horizontal agreement among the banks after the IPOs can be inferred from the surrounding circumstances. However, unlike *Interstate Circuit* and *Toys "R" Us*, in which the ringleaders organized hub-and-spoke conspiracies in what had been competitive markets, here the conspiracies were ongoing as of the commencement of the hub-and-spoke conspiracies. For that reason, the banks did not have to rely on the networks to manufacture an agreement among all bank members to prevent cheating on the conspiracy, and they did not have to expressly condition their participation on assurances that others would agree to abide by the rules. The member banks and each network merely agreed to enforce similar rules and restraints under a new structure, with the same benefit to the member banks and the same consequences to the merchants. Based on these circumstances, it is plausible to infer that the banks had "a

conscious commitment to a common scheme designed to achieve an unlawful objective." *See Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984). Thus, Plaintiffs adequately allege post-IPO horizontal agreements among the banks.

The cases upon which Defendants rely – *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042 (9th Cir. 2008), *Toscano v. Prof'l Golfers Ass'n*, 258 F.3d 978 (9th Cir. 2001), and *American Airlines v. Christensen*, 967 F.2d 410 (10th Cir. 1992) – are decidedly distinguishable, and have no binding effect on this Court. In *Kendall*, the Ninth Circuit found that plaintiffs alleged no facts to support their conclusory conspiracy allegations. Despite having been given multiple opportunities and explicit instructions from the district court, plaintiffs failed to allege that the member banks collusively imposed rules requiring payment of interchange fees, much less that they actually voted on and set interchange fees, and likewise failed to allege that the banks appointed Visa and MasterCard to set the fees that they all agreed to impose. The plaintiffs' conspiracy allegation was based solely on the banks' memberships in Visa and MasterCard. The Ninth Circuit found that mere membership in a consortium is insufficient to allege a price-fixing conspiracy. *Kendall*, 518 F.3d at 1048.

Defendants' reliance on *Toscano* and *American Airlines* is even more misplaced. Those cases addressed rules created and imposed by a single entity without the involvement of any other defendant. The parties bound by the rules were neither members nor owners of the entities imposing the rules. In *Toscano*, the local sponsor defendants agreed to abide by the PGA Tour's rules, but they were not members of the PGA Tour and thus "had no involvement in the establishment or enforcement of the allegedly anticompetitive provisions of the contracts." *Toscano*, 258 F.3d at 984. Likewise, in *American Airlines*, plaintiffs failed to prove that the

broker defendants had any role in creating and setting the terms under which American Airlines offered travel rewards, but merely agreed to abide by those rules.

Defendants also cite *Fuchs Syrups & Sugar, Inc. v. Amstar Corp*., 602 F.2d 1025 (2d Cir. 1979), and *Beutler Sheetmetal Works v. McMorgan & Co.*, 616 F. Supp. 453 (N.D. Cal. 1985), for the premise that Plaintiffs' theory in this case would impose antitrust liability for merely believing others are agreeing to some type of pro-competitive territorial or customer restrictions, or acquiescing to the demands of another party. Defs.' Mem. at 34. That argument is irrelevant. This case does not involve a series of agreements involving a manufacturer and distributors, nor mere acquiescence to a contractual provision. Again, Defendants ignore Plaintiffs' allegations that Visa and MasterCard were structural conspiracies and that Defendants devised the rules at issue and agreed to impose them on merchants both before and after the IPOs.

D. Plaintiffs Allege a Plausible Inter-Network Conspiracy.

Defendants' challenge to Plaintiffs' inter-network conspiracy allegations is based on the time-worn implication that the Court should examine separately each of the many "plus factors" Plaintiffs allege in that context. The relevant standard in fact dictates that the Court should examine those "plus factors" – as well as all of Plaintiffs' other allegations – as a whole.

Defendants' procedural argument in this context is lacking as well. *See* Defs.' Mem. at 17-18. *Twombly* was a lawsuit against the "Baby Bell" telephone companies that arose from the divestiture of AT & T. After the divestiture, those companies continued to operate in those regions of the United States where they had historically operated before the break-up, not pursuing, according to plaintiffs, "attractive business opportunities" in other regions. *Id*. at 551. Second, according to plaintiffs, each took actions in their respective regions to thwart new entrants from competing in those regions. *Id.* Plaintiffs alleged that an inference of conspiracy

among the regional companies could be drawn from these two events. *Id.* at 565. The Supreme Court held that there was no allegation of actual agreement stated in the complaint, and that the inference of collusion simply based upon a "parallel course of conduct" in each region was insufficient to support the complaint. *Id.* at 564.

As the Court held in *Twombly*, "[a] statement of parallel conduct . . . needs some setting suggesting the agreement necessary to make out a §1 claim." *Id.* at 557. Plaintiffs in this case establish that "setting" with numerous detailed factual allegations, including those relating to unique opportunities to conspire facilitated by duality and the explicit adoption of Visa's and MasterCard's parity policies, features unique to the relevant markets. Those allegations establish a factual context for Defendants' parallel conduct that is more than sufficient to "nudg[e] th[e] claims across the line from conceivable to plausible," and satisfy the *Twombly* standard. *Id*. at 570.

Consistent with long-established principles of antitrust law, Plaintiffs allege an agreement between Visa and MasterCard to fix interchange fees, by eliminating the then-existing three-to-five basis point gap between the networks' effective rates, which moved in parallel fashion, and a number of "plus factors." *See, e.g.*, SCACAC ¶¶ 227, 229, 230, 308. The plus factors are: (1) network duality offers ample opportunities for access to and the exchange of sensitive pricing information, and confers upon the networks an identity of interests far greater than that existing between competitors in a typical conspiracy; (2) the history and structure of the relevant markets, product interchangeability, the networks' and banks' market power and their profit motives facilitated an inter-network agreement; and (3) public statements suggesting collective action preceded a shift in the market's pricing structure and parallel increases in both networks' interchange fees.

1. Duality Facilitates the Inter-Network Agreement to a Degree Far Greater than Plus Factors Alleged in other Actions.

Defendants claim Plaintiffs' duality allegations do not make the alleged conspiracy plausible because other courts have passed judgment on the legality of duality, or because the "opportunity to conspire" that duality presents is a plus factor that "repeatedly has been held to be an insufficient ground from which to infer an agreement."[31] Defs.' Mem. at 21-22. But Plaintiffs do not allege that duality is itself an antitrust violation. In addition, *Twombly* did not alter the well-established principle that opportunities to conspire are in fact a "plus factor" in this substantive and procedural context. *See Todd v. Exxon*, 275 F.3d 191, 213 (2d Cir. 2001) (upholding complaint alleging that defendants regularly attended industry meetings where pricing information was exchanged); *In re NASDAQ Market-Makers Antitrust Litig.*, 894 F. Supp. 703, 714 (S.D.N.Y. 1995) (allegations that defendants were in "continuous communication with one another" sufficient to withstand motion to dismiss).

Plaintiffs allege that duality enables the Bank Defendants who are members of both Visa and MasterCard to assert simultaneous control over both networks and to effectively eliminate competition between Visa and MasterCard. *See, e.g.*, SCACAC ¶¶ 159, 214, 218-22, 226, 237. For example, Plaintiffs allege that "Visa and MasterCard Member Banks have historically

[31] Certain cases Defendants cite in this context are inapposite, some because of their procedural posture. *See United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 345 (S.D.N.Y. 2001) (duality, standing alone, not proven to be anticompetitive at trial); *Discover Fin. Serv. v. Visa U.S.A., Inc.*, 598 F. Supp. 2d 394, 412 (S.D.N.Y. 2008) (at summary judgment, "*duality alone* does not permit . . . speculative inferences [of conspiratorial motives]") (emphasis added). *See also Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs. Inc.*, 996 F.2d 537 (2d Cir. 1993) (addressing summary judgment); *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287 (11th Cir. 2003) (same). In other cases, plaintiffs alleged only parallel conduct rather than any agreement among the defendants. *See In re Late Fee & Over-Limit Fee Litig.*, 528 F. Supp. 2d 953, 962 (N.D. Cal. 2007) ("The heart of the plaintiffs' antitrust allegations . . . [is] a chart of allegedly current late-fee levels of the six defendant banking organizations").

exerted control over the operations of the competing Visa and MasterCard networks by simultaneously participating on the Boards of Directors and other important committees of the Networks." SCACAC ¶¶ 214, 218. Plaintiffs also allege "[t]hese banks established their control by simultaneously serving on the Boards of Directors and/or important committees of either or, in many cases, both Visa and MasterCard. This relationship among Member Banks and the Networks has lessened competition between Visa and MasterCard because it makes the Member Banks less willing to implement policies that would increase competition between Visa and MasterCard for the business of Merchants." *Id*. ¶ 221. Other allegations that duality permits the Bank Defendants to control the networks, eliminate competition and exchange information include:

- Duality allows Visa and MasterCard, through their common owners/members, to "communicate frequently, exchange data, and coordinate much of their activity through joint programs," and to "pass sensitive information between the two Networks." *Id.* ¶¶ 217, 222, 223. *See also* FASCAC ¶ 143; SSCAC ¶¶ 100-101, 103;
- "Oftentimes, the same [Bank Defendant] employee or employees act as liaisons to both Networks," and in 2006 "five of the eight bank representatives on the Visa U.S.A. Board sat on a MasterCard advisory board or council." *Id.* ¶¶ 216, 218;
- "Five out of 13 banks were represented on the U.S. Board of Directors of MasterCard had a representative on at least one of Visa U.S.A.'s executive councils." *Id.* ¶ 218. *See also id.* ¶ 219;
- Duality makes "'each of the Associations a fishbowl [where] officers and board members are aware of what the other is doing,'" making "the Interchange-Fee-setting activities" of Visa and MasterCard "transparent" to one another and has lessened competition between the networks. SCACAC ¶¶ 220, 308(b); *and*
- Duality therefore ensures that the networks are "aware of each other's policies through communications with their dual Member Banks" and that each network knows that any interchange fee increase will be matched by the other network. SCACAC ¶¶ 228-229.

Plaintiffs also allege that duality has permitted the banks to retain control even after the IPOs. SCACAC ¶¶ 221, 261-270. For example, Plaintiffs allege that "MasterCard and its Member Banks executed several related agreements, which ensured that the banks would retain

significant control over New MasterCard's competitive decisions and prevent New MasterCard from becoming a legitimate competitor to the banks' and Visa's market power in the relevant market." *Id.* ¶ 266. Plaintiffs also allege that after the IPOs, the member banks continue to have power and control over Visa and MasterCard so that they cannot lower interchange fees without the member banks' consent and authority. SSCAC ¶ 137(e); FASCAC ¶ 149(f).

These allegations alone show the plausibility of an agreement. *In re Currency Conversion Fee Antitrust Litig.*, 265 F. Supp. 2d 385, 419 (S.D.N.Y. 2003) (networks "dual governance and parallel pricing create sufficient circumstances for an inference of an antitrust conspiracy" between Visa and MasterCard). *See also Visa Check/MasterMoney*, 2003 WL 1712568, at *6 (denying summary judgment, based on "evidence, direct and circumstantial, from which a jury could find a conspiracy" between the two networks).[32] But even if they did not, Plaintiffs' duality allegations, in conjunction with all of Plaintiffs' other allegations, tend to establish that an inter-network agreement is plausible.

2. The Networks' Announcements and Subsequent Changes in their Interchange Fees and Structures are Indicative of a Conspiracy.

Plaintiffs allege that Visa's member banks caused the network to enact, publicize and adhere to a policy that it would "not be disadvantaged" on interchange fees. SCACAC ¶ 227. MasterCard's member banks thereafter caused MasterCard to adopt a policy of engaging in "competitive response" to increases in Visa's interchange fees by "matching Visa's effective interchange rates, which guarantee that its Interchange Fees do not fall out of line with Visa's."

[32] *See also Apex Oil Co. v. DiMauro*, 822 F.2d 246, 253-254 (2d Cir. 1987) (a "high level of interfirm communications," in conjunction with parallel conduct, can support the inference of a conspiracy); *Dahl v. Bain Capital Partners, LLC*, 589 F. Supp. 2d 112, 118-19 (D. Mass. 2008) ("presence of the same [private equity] firms in multiple transactions" and "overlap in firms, coupled with" allegations of conspiracy to prevent open bidding for leveraged buy-outs "'plausibly suggests' an illegal agreement") (citing *Twombly*, 550 U.S. at 556).

Id. These "twin policies . . . have enabled the Networks to agree on levels of Interchange Fees to be paid by Merchants." *Id.*

Plaintiffs allege that these "twin policies" were not the result of inter-network competition, but rather a manifestation and exacerbation of network duality. *Id.* ¶¶ 227-229, 232. Duality ensured a "meeting of the minds" between the networks: Visa and MasterCard are "aware of each other's policies through communications with their dual Member Banks," and "because MasterCard knows that Visa's policy is not to be disadvantaged, it knows that Visa will match any Interchange Fee increase that it announces," and vice-versa. *Id.* ¶¶ 228-229. This means that "virtually without an exception, an Interchange Fee increase by either Visa or MasterCard is followed by a similar Interchange Fee increase by the other network." *Id.* ¶ 232.

Plaintiffs further allege that the adoption of these "twin policies" resulted in a change in the structure of pricing in the relevant markets, which is sufficient to infer an agreement between the networks and their major banks. MasterCard undertook to maintain "parity" with Visa on an overall effective rate and product basis. *Id.* ¶ 230. Plaintiffs allege that "since the explicit adoption of these policies, the average effective interchange rates have been identical." *Id.* ¶ 227. Allegations that "there was a marked change in defendants' behavior in the market around the time the conspiracy allegedly started . . . if true would make an antitrust conspiracy plausible." *In re Graphics Processing Units Antitrust Litig.*, 540 F. Supp. 2d 1085, 1096 (N.D. Cal. 2007). *See Twombly*, 550 U.S. at 556 n.4 ("'historically unprecedented changes in pricing structure' . . . would support a plausible inference of conspiracy.").

Defendants contend that Visa's public pronouncement and MasterCard's subsequent response – even when followed by parallel and near-equal increases in interchange fees and imposition of identical interchange rate structures – do not permit an inference of a plausible

conspiracy because it "is nothing more than conscious parallelism" and was the result of "competition with American Express for issuers' portfolios." Defs.' Mem. at 26. These contentions are wrong.

First, it is well-settled that an agreement can be inferred from statements followed by parallel action. *See Socony-Vacuum*, 310 U.S. at 179 (agreement can include "informal gentlemen's agreement or understanding"); *Brown v. Pro Football, Inc.* 518 U.S. 231, 241 (1996) (jury is permitted "to premise antitrust liability upon little more than uniform behavior among competitors, preceded by conversations implying that later uniformity might prove desirable, or accompanied by other conduct that in context suggests that each competitor failed to make an independent decision") (citations omitted); In re *TFT-LCD(Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109, 1116 (N.D. Cal. 2008) ("*TFT-LCD"*) ("a conspiracy . . . can be inferred from an invitation, followed by responsive assurances and conduct").[33]

Second, Defendants' claim that the "twin policies" resulted from "competition with American Express for issuers' portfolios" is disingenuous. As Defendants know, when the networks adopted these "parity" policies, and for some time thereafter, both Visa and MasterCard had rules which *precluded* "competition with American Express for issuers' portfolios" but allowed each network's member banks to belong to both Visa and MasterCard

[33] Defendants also claim that Plaintiffs fail to plead any facts that either network would have engaged in a strategy to reduce interchange fees, or that it would have been more lucrative for each network to have done so. Defs.' Mem. 28. But Plaintiffs have gone one step further, as the complaints allege that both networks considered *eliminating* interchange fees in favor of alternative business models without them, yet both Visa and MasterCard abandoned those considerations in favor of maintaining the *status quo*. FASCAC ¶¶ 5, 85-103, 149(e) (describing MasterCard's development of a "New Business Model" that included elimination of interchange fees); SSCAC¶¶ 88-94, 137(d) (detailing Visa's strategies to develop "alternative models" to interchange fees). Those allegations surely support a plausible inference of an inter-network agreement.

networks. *Visa*, 163 F. Supp. 2d at 329-30; *Visa*, 344 F.3d at 242. *See* FASCAC ¶¶ 64-67, SSCAC ¶¶ 58-61. If anything, Defendants' long-term maintenance of policies aimed *against* American Express buttresses Plaintiffs' inter-network conspiracy allegations rather than undermining them.

In fact, the unique relationship between the networks that resulted from duality gave them motives to seek price parity that would not exist in any other cartel. At all relevant times, merchants have had no choice but to accept both Visa and MasterCard payment cards. SCACAC ¶ 171. However, if either network had allowed the other to maintain substantially lower interchange fees, merchants would have encouraged bidding wars by threatening to reject the higher-priced card. Left unabated, the result would have been wide-ranging competition in the market for card acceptance – contrary to Defendants' long-standing business model, based on competition only in the market for card issuance.

When viewed in the context of duality, Plaintiffs' allegations that the "twin policies" preceded parallel increases in interchange fees and a shift in the market's pricing structure make the inference of an inter-network agreement plausible.

3. The Relevant Markets have been and are Susceptible to Collusion.

Defendants claim that parity in interchange fees should be "expected" because Visa and MasterCard transactions are indistinguishable. Defs.' Mem. at 23-24. Defendants also claim that Plaintiffs' allegations relating to their market power and profit motives to conspire are insufficient to state a Section 1 claim. *Id.* at 24-25, 28-29.[34] Plaintiffs do not contend that such

[34] Defendants' cases on these points are inapposite. To support their market power argument, Defendants cite to *E.I. DuPont de Nemours & Co. v. Federal Trade Comm'n.*, 729 F.2d 128 (2d Cir. 1984) and *In re Elevator Antitrust Litig.*, 2006 WL 1470994 (S.D.N.Y. May 30, 2006)("*Elevator I*"). *E.I. DuPont* involved review of an administrative order under § 5(c) of the

allegations alone are sufficient, but only that they lay a predicate for conspiracy allegations. Courts recognize that where fungible products are sold in an oligopolistic market, the market is susceptible to collusion. *See Todd*, 275 F.3d at 207-210. Allegations reflecting a market's susceptibility to collusion support the inference of such collusion. *See, e.g.*, *TFT-LCD*, 586 F. Supp. 2d 1109 (upholding complaint alleging market concentration and homogeneous products); *In re Static Random Memory Access (SRAM) Antitrust Litig.*, 580 F. Supp. 2d 896 (N.D. Cal. 2008) (same).

The relevant markets in this case are paradigms of that susceptibility. In particular, Plaintiffs allege that Visa's and MasterCard's network services are indistinguishable from each other. *See* SCACAC ¶¶ 148-156, 235, 308(c); SSCAC ¶¶ 76 (statement of Visa's Bill Sheedy that "[MasterCard] has the same exact acceptance functionality" as Visa). Plaintiffs further allege that merchant demand for these network services is inelastic. *See, e.g.*, FASCAC ¶¶ 39, 151, 220, 222-226, 242; SCACAC ¶¶ 34, 139, 167, 169, 171-173, 191, 194-195, 210, 218, 279 (MasterCard and Visa establish fees based on elasticity of demand and can increase fees without losing merchant acceptance).

Courts have found these types of allegations sufficient to support inferences that the product market is susceptible to collusion, and lend plausibility to allegations of an anti-

---

FTC Act, in which the court addressed appropriate use of the FTC's power under § 5(c), and not the sufficiency of its findings. The language defendants quote from *Elevator I* simply reflects citations to *E.I. DuPont* and *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993), a price-discrimination case. To support their profit motives argument, Defendants cite to *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 134-135 (3d Cir. 1999), *In re Late Fee* and *In re Digital Music Antitrust Litig.*, 592 F. Supp. 2d 435, 444 (S.D.N.Y. 2008). *Baby Food* is a summary judgment case, and Defendants cite to that portion of the opinion related to the sufficiency of the plaintiffs' proof, not the sufficiency of the plaintiffs' allegations. *In re Late Fee* and *In re Digital Music* were both dismissed primarily because plaintiffs had only alleged what the *Digital Music* court characterized as "bald conscious parallelism." *Digital Music*, 592 F. Supp. 2d at 444. Plaintiffs here have alleged much more than that.

competitive agreement. *See generally Todd*, 275 F.3d at 208-211. *See also SRAM*, 580 F. Supp. 2d at 902-903 (allegations of homogenous product sufficient to support inference that product market is susceptible to price-fixing) (citing *United States v. Container Corp. of America*, 393 U.S. 333, 337 (1969)).

Moreover, Plaintiffs allege that Visa and MasterCard have individual and collective market power in the highly-concentrated relevant markets, and have exercised their market power to insulate themselves from competition. For example, Plaintiffs allege that the networks:

- Collectively account for over 70 percent of General Purpose Card purchase volume in the United States in 2007, with Visa accounting for 43 percent of General Purpose Card purchase volume and MasterCard accounting for 29 percent of General Purpose Card purchase volume. SCACAC ¶¶ 275–276, 308(g)-(h). *See* SSCAC ¶ 62;

- Collectively account for 100 percent of Offline Debit Card Network Services, FASCAC ¶ 23, SSCAC ¶ 185;

- Have implemented and enforced nearly-identical sets of anti-steering rules and issuer restrictions on bilateral agreements with merchants to insulate themselves from competition and keep interchange fees high, SCACAC ¶¶ 189-199, 234-245, 286-88, 308(g)-(h), FASCAC ¶¶ 60, 256-257, SSCAC ¶¶ 221-222; and

- Are able to force merchants to pay bundled prices for separate and distinct services (which are not based on the networks' actual costs) that merchants might otherwise seek from the networks' competitors, SCACAC ¶¶ 200-210, 308(g)-(h).

Plaintiffs also allege that Defendants' individual and collective profit motives restrain the type of inter-network competition that might result in lower interchange fees. SCACAC ¶¶ 213, 225-226, 308(e); FASCAC ¶ 149(b), SSCAC ¶¶ 43-44, 137(b), 172 (when MasterCard performs a price study, it questions "[h]ow high could interchange fees go before we would start having serious acceptance problems").

When viewed in conjunction with all of Plaintiffs' factual allegations – especially those about the history and structure of the relevant markets – Defendants' market power and profit

motives to conspire make a conspiracy particularly plausible. *See, e.g., In re Pressure Sensitive Labelstock Antitrust Litig.*, 566 F. Supp. 2d 373, 371 (M.D. Pa. 2008) (price-fixing conspiracy among oligopolists "makes perfect economic sense" where market conditions raised "inference that collusive conduct was both plausible and in [Defendants'] economic interests"); *In re OSB Antitrust Litig.*, 2007 WL 2253419, at *3 (E.D. Pa. Aug. 03, 2007) (denying motion to dismiss where "market is highly concentrated, facilitating collusion"); *NASDAQ*, 894 F. Supp. at 714 (allegation of a profit motive to conspire is a sufficient "plus factor" to sufficiently allege a conspiracy at the motion to dismiss stage).

Plaintiffs' "plus factors" reflect the conditions that make the relevant markets susceptible to a conspiracy. Plaintiffs "plus factors" show the genesis, rationale and effects of the conspiracy between Visa and MasterCard. In sum, Plaintiffs allege facts which, taken as true and viewed as a whole, plausibly suggest a conspiracy between Visa and MasterCard to fix, stabilize and maintain interchange fees.[35]

E. If the Court Grants Defendants' Motion, in Whole or In Part, Plaintiffs Request Leave to Amend.

If the Court finds the complaints lacking in any way, Plaintiffs respectfully request leave to amend. Rule 15(a) of the Federal Rules of Civil Procedure provides that "leave to amend a pleading 'shall be freely given when justice so requires.'" *See Rivers v. Towers, Perrin, Forster*

[35] Post-*Twombly* cases upon which Defendants rely have far more in common with *Twombly* itself than does this case. *See In re Elevator Antitrust Litig.*, 502 F.3d 47, 50-51 (2d Cir. 2007) (upholding dismissal of horizontal price-fixing complaint alleging only generalized, non-specific parallel conduct, including conclusory averments of "'basically every type of conspiratorial activity that one could imagine,'" and citing European enforcement action with no connection to the United States); *In re LTL Shipping Servs. Antitrust Litig.*, 2009 WL 323219 (N.D. Ga. Jan. 28, 2009) (no allegation of collective pricing conduct that "reasonably centers on some fixed date"); *In re Late Fee & Over-Limit Fee Litig.*, 528 F. Supp. 2d 953 (N.D. Cal. 2007) (plaintiffs alleged only parallel conduct).

& Crosby Inc., 2009 WL 817852, at *6 (E.D.N.Y. Mar. 27, 2009); *Graves v. Deutsche Bank Secs., Inc.*, 2009 WL 735076, at *3 (S.D.N.Y. Mar. 20, 2009). Once a complaint has been amended, it is within the discretion of the District Court as to whether or not to grant leave for an additional amendment. *Atkins v. Apollo Real Estate Advisors, L.P.*, 2008 WL 1926684 (E.D.N.Y. Apr. 30, 2008); *Graves*, 2009 WL 735076, at *3. In this case, amendment would be neither futile, nor in bad faith, nor dilatory. *See Ryder Energy Distrib. Corp. v. Merrill Lynch Commodities, Inc.,* 748 F. 2d 774, 783 (2d Cir. 1984) ("[I]f the movant has colorable grounds to support its claim or defense, justice requires that leave to amend be granted"); *Brown v. Kelly*, 244 F.R.D. 222, 227 (S.D.N.Y. 2007) ("'The rule in this Circuit is to allow a party to amend its pleadings in the absence of the non-movant's showing of prejudice or bad faith.'") (citation omitted).

Further, Plaintiffs reserve their rights to renew on appeal arguments concerning the scope of the *Visa Check* release, as well as arguments regarding the enforceability of the notice of pendency raised in opposition to Defendants' previous motion to dismiss (DE 453), but for the purposes of this opposition, accept the Court's previous ruling.

III. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' Motion to Dismiss the Second Consolidated Amended Class Action Complaint.

Dated: June 2, 2009

Respectfully submitted,

BERGER & MONTAGUE, P.C.
H. Laddie Montague, Jr. (HM-8479)
Merrill G. Davidoff
Bart D. Cohen
Michael J. Kane
1622 Locust Street
Philadelphia, PA 19103
(215) 875-3000

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.
K. Craig Wildfang
Thomas B. Hatch
Thomas J. Undlin
Ryan W. Marth
2800 LaSalle Plaza
800 LaSalle Avenue South
Minneapolis, MN 55402
(612) 349-8500

COUGHLIN STOIA GELLER RUDMAN & ROBBINS LLP
Patrick J. Coughlin
Bonny E. Sweeney
David W. Mitchell
Alexandra S. Bernay
655 West Broadway
Suite 1900
San Diego, CA 92101
(619) 231-1058

Co-Lead Counsel for Class Plaintiffs