No. 13-63

IN THE

Supreme Court of the United States

PAMELA BRENNAN *et al.*,

Petitioners,

v.

CONCORD EFS, INC. *et al.*,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF NACS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

NACS® was founded on August 14, 1961, as the National Association of Convenience Stores. It is an international trade association representing more than 2,200 retail and 1,600 supplier company members. NACS® serves the convenience and fuel retailing industry, with the majority of its members based in the United States, by, among other things, providing advocacy to ensure the competitive viability of its members' businesses. In that capacity NACS® has a substantial interest in the vigorous enforcement of the antitrust laws and in the Ninth Circuit's opinion below which undermines that vigorous enforcement. Additionally, NACS® is a named plaintiff in *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, No. 05-MD-1720 (JG) (JO) (E.D.N.Y.), in which the defendants have relied on the erroneous opinion below as justifying dismissal of NACS' complaint.[1]

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1. Counsel of record for Petitioners and Respondents were timely notified, by August 2, 2013, of NACS' intent to file the instant brief. Petitioners and Respondents thereafter consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. In addition to *amicus curiae* NACS, the following made a monetary contribution to the brief's preparation and submission: Aldo US Inc.; American Multi-Cinema, Inc.; Brainerd Lively Auto, LLC; Cracker Barrel Old Country Store, Inc.; Dick's Sporting Goods, Inc.; Drury Hotels Company, LLC; Fleet and Farm of Alexandria, Inc.; Fleet and Farm of Green Bay, Inc.; Fleet and Farm of Manitowoc, Inc.; Fleet and Farm of Menomonie, Inc.; Fleet and Farm of Plymouth, Inc.; Fleet and Farm of Waupaca, Inc.; Fleet and Farm Supply Company of West Bend, Inc.; Fleet

SUMMARY OF ARGUMENT

In its opinion below, the Court of Appeals for the Ninth Circuit held—contrary to this Court's precedents and contrary to the Courts of Appeals for the Third and Seventh Circuits—that antitrust plaintiffs that purchase directly from conspirators in a horizontal price-fixing conspiracy do not have standing under the Clayton Act § 4, 15 U.S.C. § 15, unless those plaintiffs allege a conspiracy to fix the actual prices that those plaintiffs paid as opposed to a conspiracy to otherwise fix, maintain, or raise prices to those plaintiffs. The Ninth Circuit's decision should be reversed because it runs afoul of this Court's precedents on multiple, well-established principles of antitrust law.

First, as a threshold matter, the Ninth Circuit erred in imposing an additional element of proof that this Court has expressly held is not required for price-fixing claims. Not only is price fixing per se unlawful, but antitrust plaintiffs can prevail "even though there was no direct agreement on the actual prices to be maintained." *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) (holding per se unlawful an agreement to refuse to extend credit to customers); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978) (holding per se unlawful an agreement among engineering firms not to discuss prices until after

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Wholesale Supply Co., Inc.; Fleet Wholesale Supply of Fergus Falls, Inc.; Footlocker, Inc.; Gap, Inc.; Genesco Inc.; IKEA North America Services, LLC; J. Crew Group, Inc.; Kwik Trip, Inc.; Michaels Stores, Inc.; Mills Auto Center, Inc.; Mills Auto Enterprises, Inc.; Mills E-Commerce Enterprises, Inc.; Mills Fleet Farm, Inc.; Mills Motor, Inc.; P.C. Richard & Son, Inc.; Panera Bread Company; Recreational Equipment, Inc.; Starbucks Corporation; Thorntons Inc.; and Willmar Motors, LLC.

clients' selection of an engineer); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (holding per se unlawful an agreement among competitors to buy surplus gasoline to prevent prices from falling).

Second, the Ninth Circuit's rationale—that the indirect-purchaser rule of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), requires this additional element of proof—is contrary to this Court's bright-line rule that direct purchasers are not barred by *Illinois Brick*. The Ninth Circuit's rationale is also contrary to this Court's repeatedly expressed judgment that effective private antitrust enforcement under the Clayton Act § 4 requires conferral of antitrust standing on those that purchase directly from violators of the antitrust laws—most especially consumers or businesses that have paid excessive prices to price-fixing conspirators. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 529-30 (1983); *Illinois Brick*, 431 U.S. at 734-35; *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 488-89 (1968).

Third, the Ninth Circuit's decision that direct purchasers from conspirators at an intermediate level of distribution should be considered indirect purchasers without standing violates the century-old rule that co-conspirators are jointly and severally liable for antitrust violations. *See Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 646 (1981). Allowing conspiring intermediaries to escape joint and several liability would undermine a bedrock rule of antitrust enforcement. Worse, the Ninth Circuit's rule would practically invite conspirators to layer their conspiracies with middlemen to avoid antitrust liability altogether. Conspirators could

collude on virtually the entirety of the price and, so long as the intermediaries charged consumers a slightly different price, the Ninth Circuit's rule would shield the conspiracy from suit because the conspirators had not colluded on the exact price charged those that directly purchased the price-fixed goods or services. Such an untenable consequence of the rule makes the rule itself equally untenable. Further, the difficulties identified in *Illinois Brick* of tracing overcharges and apportioning damages among intermediaries and their direct purchasers are not present where the intermediaries are themselves part of the conspiracy, because conspiring intermediaries are jointly and severally liable for the overcharges along with their co-conspirators and are not entitled to any damages.

The jurisprudential violence done by the Ninth Circuit to this Court's precedents on the per-se rule against horizontal price fixing, the direct-purchaser rule, and the rule of joint and several liability, and the Ninth Circuit's conflict with the Third and Seventh Circuits, warrant this Court's review and reversal of the Ninth Circuit's opinion below.

THE OPINION BELOW

Plaintiffs, Petitioners here, are holders of various banks' automated teller machine (ATM) cards. Petitioners filed a putative class action alleging that their banks, defendants below, colluded to fix the price of "ATM interchange" that Petitioners' banks paid the owner of another ATM (a so-called "foreign ATM") when a bank's cardholder used an ATM not owned by that bank. *In re ATM Fee Antitrust Litig.*, 686 F.3d 741, 744, 746-47 (CA9 2012). Petitioners alleged that the defendant banks' objectives in this scheme were: (1) to raise the ATM

interchange fees that the banks receive as ATM owners when they serve as foreign ATM owners for other banks' cardholders' transactions; and (2) to raise the "foreign ATM fee" that the banks charge their own cardholders when their cardholders use a foreign ATM. *See* Petition for a Writ of Certiorari, at 8, 24 (filed Jul. 11, 2013); 686 F.3d at 746-47, 752.

On summary judgment, the district court found and the Ninth Circuit accepted that "'Plaintiffs do *not* allege that Defendants have conspired to illegally fix the foreign ATM fee that Plaintiffs pay to their bank . . . Instead, Plaintiffs assert that their banks pay an unlawfully inflated interchange fee and then pass the cost of the artificially high interchange fee along to them through foreign ATM fees.'" *Id.* at 746-47, 749-50 (quoting *In re ATM Fee Antitrust Litig.*, No. C 04-02676 CRB, 2010 WL 3701912, at *2, 3, 5 (N.D. Cal. Sep. 16, 2010)).

The district court held and the Ninth Circuit affirmed that, notwithstanding Petitioners' direct purchase of ATM services from the defendant banks, Petitioners lacked standing under the indirect-purchaser rule of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). The Ninth Circuit affirmed summary judgment for defendants, holding:

> "In sum, 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." . . . "[E]ven assuming that any economic assumptions underlying the *Illinois Brick* rule might be disproved in a specific case, we think it an unwarranted and counterproductive exercise to litigate a series of exceptions."

686 F.3d at 748-49 (quoting *Del. Valley Surgical Supply Inc. v. Johnson & Johnson*, 523 F.3d 1116, 1124 (CA9 2008), and *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 208 (1990)).

In derogation of the "bright line rule" of *Illinois Brick* reserving federal antitrust standing for direct purchasers, the Ninth Circuit further held that Petitioners could not avail themselves of the fact that they directly purchased ATM services from alleged conspirators, i.e., their banks, because "they do not allege a conspiracy to fix the price paid by the Plaintiffs," i.e., the foreign ATM fee. *See id.* 686 F.3d at 744, 749, 755-56 (relying solely on Ninth Circuit precedent). In the Ninth Circuit's view, direct purchasers are required further to allege and prove that the conspiracy was to "set the price paid by the plaintiff." *Id.* at 750. The Ninth Circuit's justification for this additional element of proof was that, for conspiracies involving an intermediate level of distribution, requiring proof of a conspiracy to set the price paid by the plaintiff eliminates the need to trace the alleged overcharge through the chain of distribution and to apportion damages among multiple entities. *Id.*[2]

2. While the Ninth Circuit framed its discussion under the so-called "co-conspirator exception" to the indirect-purchaser rule, it acknowledged that "this co-conspirator exception is not really an exception at all." 686 F.3d at 750 (citing *In re ATM Fee Antitrust Litig.*, 2010 WL 3701912, at *6, and 2A Phillip E. Areeda et al., *Antitrust Law* ¶ 346h, at 175 (3d ed. 2007) ("Whether one adopts a co-conspirator exception or regards this situation as outside *Illinois Brick*'s domain, there is no tracing or apportionment to be done.")); *accord Paper Sys., Inc. v. Nippon Paper Indus. Co., Ltd.*, 281 F.3d 629, 631-32 (CA7 2002) ("The right to sue middlemen that joined the conspiracy is sometimes referred to as a co-conspirator

ARGUMENT

I. UNDER THE BRIGHT-LINE RULES OF *HANOVER SHOE* AND *ILLINOIS BRICK*, INDIRECT PURCHASERS ARE BARRED FROM SUIT BUT DIRECT PURCHASERS ARE NOT

This Court's cases addressing pass-on of anticompetitive overcharges are all premised on the principle that effective private antitrust enforcement under the Clayton Act § 4 requires recognition of antitrust standing by those who directly purchase from antitrust violators. The Ninth Circuit's opinion flatly contradicts this Court's precedents by denying standing outright to direct purchasers pursuant to *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 734-35 (1977).

In *Hanover Shoe*, this Court held that plaintiff Hanover Shoe, a shoe manufacturer, was entitled to recover damages under the Clayton Act § 4 for monopoly overcharges imposed by Hanover Shoe's shoe-construction machinery supplier, United Shoe Machinery, even if Hanover Shoe may have passed-on those overcharges when it sold shoes to its customers. 392 U.S. at 488. The Court began with the plain language of the Clayton Act

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'exception' to *Illinois Brick,* but it would be better to recognize that *Hanover Shoe* and *Illinois Brick* allocate to the first non-conspirator in the distribution chain the right to collect 100% of the damages."). Thus, the Ninth Circuit's characterization of its reasoning as a refusal to expand the co-conspirator "exception" to *Illinois Brick* is incorrect; rather, the Ninth Circuit was addressing and improperly limiting the scope of *Illinois Brick*'s reservation of antitrust standing for direct purchasers.

§ 4, which is the statute affording a private right of action for damages pursuant to federal antitrust laws:

> Section 4 . . . provides that any person "who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained. . . ." We think it sound to hold that when a buyer shows that the price paid by him for materials purchased for use in his business is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage within the meaning of § 4.

Id. at 488-89 (first alteration added). The Court reasoned that the direct purchaser is "injured in his business or property" regardless of whether it "does nothing and absorbs the loss," maintains its profit level by decreasing its other costs, or raises prices to its own customers. *Id.* at 489.[3] "At whatever price the buyer sells, the price he pays the seller remains illegally high, and his profits would be greater were his costs lower." *Id.*

In *Illinois Brick*, 431 U.S. at 734-35, the Court described *Hanover Shoe* "as resting on the judgment that the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge

3. Although not expressed by the Court in *Hanover Shoe*, the direct purchaser may be harmed when it raises price to cover increased costs because the higher price in most markets will cause lower sales. *See* Areeda, *supra* note 2, at 191 ("the retailer is injured not only by the reduced profit on each bottle sold, but also by the reduction in the number of bottles sold").

in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it." The *Illinois Brick* Court thus announced the mirror-image rule and necessary consequence of *Hanover Shoe* that, because recovery under federal antitrust law was to be concentrated in direct purchasers, indirect purchasers would no longer have standing. *Id.* at 728-30.

The Court reasoned in *Illinois Brick* that: (1) "allowing offensive but not defensive use of pass-on would create a serious risk of multiple liability for defendants" to both direct and indirect purchasers for the same overcharge, *id.* at 730; (2) "the attempt to trace the complex economic adjustments to a change in the cost of a particular factor of production would greatly complicate and reduce the effectiveness of already protracted treble-damages proceedings," *id.* at 731-32; and (3) the "massive efforts to apportion the recovery among" multiple entities across multiple levels of distribution would "seriously undermine" the effectiveness of private antitrust enforcement, *id.* at 737. As in *Hanover Shoe*, the Court's reasoning thus rested on the core principle that effective private antitrust enforcement requires standing to be reserved for direct purchasers.

In *Illinois Brick* and subsequently in *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199 (1990), the Court addressed the limited extent to which courts should depart from the bright-line rules of *Hanover Shoe* and *Illinois Brick*. The *Illinois Brick* Court noted that

> the process of classifying various market situations according to the amount of pass-on

> likely to be involved and its susceptibility of proof in a judicial forum would entail the very problems that the *Hanover Shoe* rule was meant to avoid. The litigation over where the line should be drawn in a particular class of cases would inject the same "massive evidence and complicated theories" into treble-damages proceedings, albeit at a somewhat higher level of generality.

Id. at 744-45. One exception postulated in *Illinois Brick*, and later accepted in *Utilicorp United*, is an exception for "a pre-existing cost-plus contract" in which the indirect purchaser is "committed to buying a fixed quantity regardless of price." 431 U.S. at 736; *Utilicorp United*, 497 U.S. at 217. In this situation, "'[t]he effect of the overcharge is essentially determined in advance," *ibid.*, because both the fact of overcharge (the cost) and the total amount of the overcharge (cost multiplied by quantity) are known with contractual certainty.

This Court's precedents thus establish clear, bright-line rules that antitrust standing is reserved for direct purchasers and not for indirect purchasers because this Court has "maintained, throughout [its] cases, that [its] interpretation of § 4 [of the Clayton Act] must promote the vigorous enforcement of the antitrust laws," *Utilicorp United*, 497 U.S. at 214, and that direct-purchaser enforcement is the most effective and efficient, *Illinois Brick*, 431 U.S. at 734-35. Indirect-purchaser suits create problems of tracing anticompetitive overcharges and apportioning damages throughout multiple levels of distribution. Direct-purchaser suits, however, do not create such problems. As stated in *Laumann v. NHL*,

907 F. Supp. 2d 465, 481 (S.D.N.Y. 2012) (emphasis added), "where the relationship between the parties in a multi-tiered distribution chain is such that plaintiffs are the *first or only* victims of alleged anticompetitive agreements, the rationale for the *Illinois Brick* bar disappears."

II. THE NINTH CIRCUIT'S OPINION BELOW VIOLATES THE BRIGHT-LINE RULES OF *HANOVER SHOE* AND *ILLINOIS BRICK*

A. Direct Purchasers from Horizontal Conspirators Are Not Barred by *Illinois Brick*; They Are the Very Entities on Which This Court Relies for Private Antitrust Enforcement

This Court held in *Illinois Brick*:

> until there are clear directions from Congress to the contrary . . . the legislative purpose in creating a group of private attorneys general to enforce the antitrust laws under § 4 is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it.

431 U.S. at 746 (internal quotations and citation omitted). And there is no stronger case for private antitrust enforcement than where direct purchasers who have been injured by a per se unlawful horizontal price-fixing conspiracy, as here, sue the conspirators to recover the amount of the anticompetitive overcharge. *See Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of*

Carpenters, 459 U.S. 519, 530 (1983) ("*AGC*") ("The legislative history of [§ 4 of the Clayton Act] shows that Congress was primarily interested in creating an effective remedy for consumers who were forced to pay excessive prices by the giant trusts and combinations that dominated certain interstate markets.").

The Ninth Circuit incorrectly characterized Petitioners' allegations as a vertical conspiracy among the defendant banks to fix the interchange paid to "upstream" foreign ATM owners and then to "pass-on" the inflated ATM interchange to the banks' cardholders. The Ninth Circuit clearly erred by not realizing that the allegedly conspiring defendant banks are themselves the largest group of ATM owners and thus are the primary beneficiaries of the alleged horizontal conspiracy to inflate the ATM interchange they receive when they serve as foreign ATM owners. *See* 686 F.3d at 745 (the largest group of STAR Network ATM owners are "financial institutions that both issue ATM cards and own ATMs," including the defendant banks). Thus, the alleged conspiracy is a horizontal one involving an agreement among the banks to inflate the ATM interchange each receives when serving as a foreign ATM owner and to recoup any ATM interchange payments it makes from its direct, cardholding customers. *See Howard Hess Dental Labs., Inc. v. Dentsply Int'l, Inc.*, 424 F.3d 363, 378-79 n.12 (CA3 2005) (dealer conspiracy with artificial tooth manufacturer to impose minimum resale prices for artificial teeth on plaintiff dental labs "is effectively a *horizontal* price-fixing conspiracy at the dealer level (which could presumably be profitable to the dealers)"); *Laumann v. NHL*, 907 F. Supp. 2d 465, 482-83 n.95 (S.D.N.Y. 2012) (*Illinois Brick* does not bar claims where suppliers and distributors compete with one another).

In re Linerboard Antitrust Litigation, 305 F.3d 145 (CA3 2002), involved an analogous scenario where the plaintiffs, buyers of corrugated sheets and containers made from those sheets, sued manufacturers of the linerboard used to make corrugated sheets and containers—manufacturers from whom the plaintiffs directly purchased corrugated sheets and containers—alleging a conspiracy among the manufacturers to fix the prices of linerboard. *Id.* at 148-49. Thus, the linerboard is analogous to the ATM interchange alleged by Petitioners here to have been collusively set by the defendant banks; and the foreign ATM services directly purchased from the defendant banks by Petitioners are analogous to the corrugated sheets and containers directly purchased from the linerboard manufacturers by the plaintiffs in *Linerboard*.

The Third Circuit reasoned from its closely analogous precedent, *In re Sugar Industry Antitrust Litigation*, 579 F.2d 13 (CA3 1978), in which the plaintiffs brought a horizontal price-fixing claim against candy manufacturers for collusively setting the price of sugar. The Third Circuit held in *Sugar* that *Illinois Brick* did not bar suit by plaintiffs that directly purchased "a product [candy] which incorporates the price-fixed product as one of its ingredients." *Linerboard*, 305 F.3d at 159. The Third Circuit reasoned: "True, the price-fixed commodity had been combined with other ingredients to form a different product. But just as the sugar sweetened the candy, the price-fixing enhanced the profits of the candy manufacturers." *Id.* Similarly here, the defendant banks' price-fixing of ATM interchange has enhanced their profits at the expense of their cardholders who directly purchase ATM services from the horizontally conspiring defendant banks.

The Ninth Circuit's decision would vitiate the ability of direct purchasers—this Court's appointed private antitrust enforcers—to bring horizontal price-fixing cases against agreements that raise or fix prices even where those agreements do not explicitly fix prices. This Court has long held that such cases can and should be brought. In *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980), the Court held per se unlawful an agreement to refuse to extend credit to customers. *Id.* at 647. It was irrelevant that there was no "direct agreement to raise prices." *Id.* at 645-46 (internal quotations and citation omitted). "[T]he agreement was just as plainly anticompetitive" and "[i]t has long been settled" that such horizontal price-fixing agreements are "archetypal" examples of per se unlawful restraints of trade. *Id.* at 645-47, 650 (internal quotations omitted). Citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), which held per se unlawful "an agreement among competitors to engage in a program of buying surplus gasoline . . . in order to prevent prices from falling . . . even though there was no direct agreement on the actual prices to be maintained," this Court reiterated in *Catalano* that "'the machinery employed by a combination for price-fixing is immaterial. 'Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*.'" 446 U.S. at 647 (quoting *Socony-Vacuum*, 310 U.S. at 223). *See also Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978) (holding per se unlawful an agreement among engineering firms not to discuss prices until after clients' selection of the firm).

B. Even Assuming Arguendo That the Ninth Circuit Correctly Characterized the Alleged Conspiracy as Vertical, *Illinois Brick* Does Not Bar Claims by Direct Purchasers from Intermediate Co-Conspirators, Because Tracing and Apportionment of Overcharges Are Unnecessary in Such Cases

"The first buyer from a conspirator is the right party to sue." *Paper Systems, Inc. v. Nippon Paper Indus. Co., Ltd.*, 281 F.3d 629, 631 (CA7 2002) (citing *Hanover Shoe*, *Illinois Brick*, and *Utilicorp United*). This Court defines indirect purchasers as those that are not "the immediate buyers from the alleged antitrust violators." *Utilicorp United*, 497 U.S. at 207; *accord California v. ARC Am. Corp.*, 490 U.S. 93, 97 (1989); *AGC*, 459 U.S. at 541-42 ("immediate victims" of the anticompetitive conduct are directly injured).

This principle is applicable even where the buyer purchases directly from a conspirator that is an intermediary in the chain of distribution. *Paper Systems*, 281 F.3d at 631-32 ("The right to sue middlemen that joined the conspiracy is sometimes referred to as a co-conspirator 'exception' to *Illinois Brick,* but it would be better to recognize that *Hanover Shoe* and *Illinois Brick* allocate to the first non-conspirator in the distribution chain the right to collect 100% of the damages."); *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 604-05 (CA7 1997) ("[I]f the plaintiffs [retail pharmacies] went on to obtain a judgment against the wholesalers and manufacturers, any indirect-purchaser defense would go by the board, since the pharmacies would then be direct purchasers from the conspirators."); *Fontana*

Aviation, Inc. v. Cessna Aircraft Co., 617 F.2d 478, 481 (CA7 1980) (*Illinois Brick* bar does not apply "where the manufacturer and the intermediary are both alleged to be co-conspirators in a common illegal enterprise resulting in intended injury to the buyer"). As one court has explained:

> While mindful of the Supreme Court's admonition against even the "most meritorious of exceptions" to the direct purchaser requirement, the purpose of *Illinois Brick* was *not* to prevent the only non-conspirators in a multi-level distribution chain—consumers no less—from bringing a private antitrust suit. Thus, holding that the first purchaser who is not party to the unlawful agreements to restrain trade has standing to sue is not an *exception* to *Illinois Brick,* but rather a recognition that *Illinois Brick* "bans Clayton Act lawsuits by persons who are not direct purchasers *from the defendant antitrust violator[s].*"

Laumann, 907 F. Supp. 2d at 481 (footnotes omitted).

One reason that direct purchasers from intermediaries are not barred by *Illinois Brick* is that intermediate co-conspirators are jointly and severally liable for the overcharges imposed by the conspiracy. *Paper Systems*, 281 F.3d at 632-34 (citing *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981)); *see also Howard Hess Dental Labs.*, 424 F.3d at 378 ("[W]e have found no precedent holding that plaintiffs, who purchase from dealers who are part of a price-fixing conspiracy with the initial seller, may not recover damages from the initial seller."). Thus, there is no need to apportion damages

between the plaintiff and some other, innocent purchaser because the intermediary is a culpable conspirator with no right to damages. *Howard Hess Dental Labs.*, 424 F.3d at 380 ("[T]he risk of duplicative liability is alleviated because . . . the middlemen are barred from recovery."); *id.* at n.15 ("[T]here would be no need to apportion any damages to the direct purchasing middleman."); *Laumann*, 907 F. Supp. 2d at 483 ("Where all middlemen are alleged to be co-conspirators, the problems of apportioning recovery among all potential plaintiffs and duplicative recovery simply do not arise, and the principle of permitting the purchasers who have been most directly injured is honored.") (footnote omitted).

Applied here, the rule of joint and several liability would make each defendant bank liable for the inflated ATM interchange fees collusively imposed by the banks on each other and recouped from their direct purchaser cardholders. "Nothing in *Illinois Brick* displaces the rule of joint and several liability, under which each member of a conspiracy is liable for all damages caused by the conspiracy's entire output." *Paper Systems*, 281 F.3d at 632. "Joint and several liability is another vital instrument for maximizing deterrence." *Id.* at 633. So long as other direct purchasers' rights to their recoveries are preserved by granting plaintiffs recoveries only to the extent of the plaintiffs' purchases, which should always be the case, there is no risk of duplicative recovery and "the holding and goals of *Illinois Brick* have been satisfied." *See id.* at 633-34.

By barring Petitioner-cardholders from suing the conspiring horizontal competitor-banks from which Petitioners directly purchased ATM services merely

because the conspiracy was to fix a price other than the price actually paid by Petitioners, the Ninth Circuit's opinion would enable the defendant banks to escape liability to their direct purchasers in violation of both *Hanover Shoe* and the rule of joint and several liability.[4] On this basis alone, the Ninth Circuit's opinion is untenable. Joint and several liability "has been the established doctrine of antitrust law for the better part of a century[,] which Congress has not seen fit to disapprove." *Burlington Indus. v. Milliken & Co.*, 690 F.2d 380, 394 (CA4 1982); *see Tex. Indus.*, 451 U.S. at 646 (citing *Atlanta* v. *Chattanooga Foundry & Pipeworks,* 127 F. 23, 26 (CA6 1903), *aff'd*, 203 U.S. 390 (1906)) (acknowledging that rule of joint and several liability in antitrust cases "simply ensures that the plaintiffs will be able to recover the full amount of damages from some, if not all, participants" in the conspiracy, and that any contrary rule is for Congress alone to promulgate). Contrary to disapproving of joint and several liability, Congress recently reaffirmed its applicability in § 214 of the Antitrust Criminal Penalty

4. *See Paper Systems*, 281 F.3d at 632 ("Nippon Paper contends that *Illinois Brick* creates an exception. If it is liable at all, it insists, judges or juries will have to trace the original overcharge through several levels of distribution to determine what damages it caused. The difficulty of figuring out how much was passed on, and how much swallowed by a distributor, is one major reason that *Illinois Brick* came out as it did. That's true enough, but it does not justify abandonment of the joint-and-several-liability norm. *Every* firm sells indirectly in some respect. All products of this industry went through multiple hands; the plaintiffs are themselves distributors. If the presence of any wholesaler or retailer in the chain of distribution creates complications too great to allow joint liability, then the norm that every conspirator is responsible for the acts of every other would be overthrown.").

Enhancement and Reform Act of 2004 (ACPERA), Pub. L. No. 108-237, sec. 214, 118 Stat. 665, 667-68, which provides that nothing in ACPERA "shall be construed to . . . affect, in any way, the joint and several liability of any party to a civil action . . . other than that of the antitrust leniency applicant and cooperating individuals."[5]

Further, the Ninth Circuit violated the rule of joint and several liability based on the false premise that the tracing problem identified in *Illinois Brick*—tracing overcharges from innocent direct purchasers to indirect purchasers—is implicated. It is not, because the overcharge was imposed on the direct purchaser by the culpable, intermediate co-conspirator that is equally liable to the direct purchaser for the overcharge. *See Paper Systems*, 281 F.3d at 631-32 (". . . *Hanover Shoe* and *Illinois Brick* allocate to the first non-conspirator in the distribution chain the right to collect 100% of the damages.").

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5. In 2007, the bipartisan Antitrust Modernization Commission which was established by Congress pursuant to the Antitrust Modernization Act of 2002, Pub. L. No. 107-273, § 11054(h), 116 Stat. 1856, 1857 (2002), recommended to Congress and the President that joint and several liability be maintained as a reinforcement to the antitrust laws' monetary remedies and thereby as a reinforcement to the "critically important role" of private antitrust enforcement. Antitrust Modernization Commission Report and Recommendations 243, 251-52 (Apr. 2, 2007).

III. THE JURISPRUDENTIAL HARM CREATED BY THE OPINION BELOW IS UNNECESSARY TO ADDRESS ANY INDIRECTNESS ISSUES THAT THE COURT BELOW PERCEIVED

The jurisprudential violence done by the Ninth Circuit to the per-se rule against horizontal price fixing, the direct-purchaser rule, and the rule of joint and several liability is unjustified and unjustifiable. Any issues of indirect injury or difficulty in calculating damages are properly addressed by this Court's factors for determining whether a particular plaintiff or set of plaintiffs has antitrust standing. *Illinois Brick* holds only that indirect purchasers do not have standing; it does not hold that all direct purchasers have standing. 431 U.S. at 728 n.7 ("the question of which persons have been injured by an illegal overcharge for purposes of § 4 is analytically distinct from the question of which persons have sustained injuries too remote to give them standing to sue for damages under § 4").

This Court's precedents contemporaneous with and subsequent to *Illinois Brick* established the elements of antitrust standing. First, an antitrust plaintiff must have suffered "antitrust injury," i.e., "injury . . . that flows from that which makes defendants' acts unlawful [and] reflect[s] the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

Second, an antitrust plaintiff must prove itself to be an efficient enforcer of the antitrust laws. In *Associated General Contractors of California, Inc. v. California*

State Council of Carpenters, 459 U.S. 519 (1983) ("*AGC*"), this Court identified multiple factors that courts should consider in making this determination. First: the nature of the injury, e.g., whether the plaintiff was harmed as a consumer or a competitor. *Id.* at 538-39. "The legislative history of [§ 4 of the Clayton Act] shows that Congress was primarily interested in creating an effective remedy for consumers who were forced to pay excessive prices by the giant trusts and combinations that dominated certain interstate markets." *Id.* at 530. Second: the directness or indirectness of the plaintiff's injury and whether the allegedly anticompetitive conduct proximately caused that injury. *Id.* at 535-37, 540-41. The "immediate victims" of the anticompetitive conduct are the ones who are directly injured. *Id.* at 541-42. Third: whether damages are speculative. *Id.* at 542. Fourth: the existence of a more directly injured, "identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement" and conversely whether "a significant antitrust violation" is likely to go "undetected or unremedied." *Id.* Fifth, and directly relevant to any issues perceived below by the Ninth Circuit: "avoiding either the risk of duplicative recoveries on the one hand, or the danger of complex apportionment of damages on the other." *Id.* at 543-44.

Questions of antitrust standing are often resolved on motions pursuant to Federal Rule of Civil Procedure 12(b)(6) where the complaint alleges sufficient industry facts to allow an assessment of antitrust injury and standing, because antitrust standing is a question of law for the court. *E.g.*, *AGC*, *supra*; *Laumann v. NHL*, 907 F. Supp. 2d 465, 483-84 (S.D.N.Y. 2012) (granting Rule 12(b)(6) dismissal in part for lack of antitrust standing because alleged

injuries were remote and speculative notwithstanding that plaintiffs were not barred by *Illinois Brick*). Thus, resolution of antitrust standing under *Brunswick* and *AGC* need not involve protracted discovery.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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