No.

IN THE

Supreme Court of the United States

IN RE ATM FEE ANTITRUST LITIGATION

PAMELA BRENNAN *et al.*,

Petitioners,

v.

CONCORD EFS, INC. *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), this Court ruled that, in general, "indirect purchasers" do not have standing to bring civil antitrust claims; standing instead is ordinarily reserved for "direct purchasers." *Id.* at 729. The question presented is:

Whether a plaintiff who purchases directly from a member of a price-fixing conspiracy is necessarily a "direct purchaser" under *Illinois Brick* (as the Third and Seventh Circuits have held), or whether instead the plaintiff must show that the conspirators agreed to set the specific price the plaintiff paid and not merely that the conspiracy inflated that price by anticompetitive means (as the Ninth Circuit held below).

PARTIES TO THE PROCEEDINGS BELOW

Petitioners Pamela Brennan, Terry Crayton, and Darla Martinez were plaintiffs in the district court and appellants in the court of appeals.

Respondents Bank of America, N.A., Bank One, N.A., Citibank (West), FSB, Citibank N.A., Concord EFS, Inc., First Data Corporation, JPMorgan Chase Bank N.A., Servus Financial Corporation, SunTrust Banks, Inc., Wachovia Corporation, and Wells Fargo Bank, N.A. were defendants in the district court and appellees in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Pamela Brennan, Terry Crayton, and Darla Martinez respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (App., *infra*, 1a-29a) is reported at 686 F.3d 741. The district court's opinion (App., *infra*, 30a-53a) is not reported but is available at 2010 WL 4918971.

STATEMENT OF JURISDICTION

The court of appeals entered judgment on July 12, 2012. App., *infra*, 1a-29a. It denied rehearing on March

13, 2013. *Id.* at 54a. On June 4, 2013, Justice Kennedy extended the time to file a petition for a writ of certiorari to July 11, 2013. No. 12A1161. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of the Clayton Act, 15 U.S.C. §§ 12-27, and the Sherman Act, 15 U.S.C. §§ 1-7, are set forth in the Appendix. App., *infra*, 99a-101a.

PRELIMINARY STATEMENT

Expressly disagreeing with the Third and Seventh Circuits, the Ninth Circuit's decision in this case exacerbates an acknowledged circuit conflict over the scope of *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977). In *Illinois Brick*, this Court ruled that indirect purchasers ordinarily do not have standing to bring civil antitrust claims; instead, only "direct purchasers" have standing. *Id.* at 729. The courts of appeals, however, are divided on whether a plaintiff who directly purchases from a defendant who participated in a price-fixing conspiracy is necessarily a "direct purchaser" under *Illinois Brick*. Answering that question in the affirmative, the Third Circuit has held that "a plaintiff who purchases directly from the alleged offender" is a "direct purchaser." *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 159 (3d Cir. 2002). That is true, the court held, whether the conspirators directly set the price of the product the plaintiff buys, or the plaintiff instead "buys a product which incorporates the price-fixed product as one of its ingredients." *Ibid.* The Seventh Circuit likewise "allocate[s] to the first non-conspirator in the distribution chain the right to collect 100% of the damages" regardless of whether the conspirators expressly set the price paid by the plaintiff. *Paper Sys. Inc.* v. *Nippon Paper Indus. Co.*, 281 F.3d 629, 631-632 (7th Cir. 2002).

In this case, the Ninth Circuit held the opposite. Rejecting the Third and Seventh Circuits' approach, the Ninth Circuit ruled that petitioners are not "direct purchasers" even though they purchased services directly from members of the alleged conspiracy—not from an innocent intermediary. App., *infra*, 23a-24a n.7. In the court's view, petitioners are not "direct purchasers" because the conspiracy set the price of an *input* to the product petitioners purchased and not the price of the *product itself*. Plaintiffs who purchase from members of a price-fixing conspiracy cannot be considered "direct purchasers," the court held, unless the conspiracy specifically "set" the price the plaintiff actually paid. *Id.* at 18a. "[T]he price paid by plaintiffs must be the price set (not merely 'fixed' in some broad sense) for plaintiffs to be a direct purchaser." *Id.* at 20a; see *id.* at 23a (conspiracy must "involve[ ] the setting of the price actually paid (and not an upstream price that was then passed on)"). The Ninth Circuit thus held that it is not enough that the defendants agreed on the price for an input they all supply and use, even where the defendants use that price to inflate the charges levied on the plaintiffs. App., *infra*, 24a; see *id.* at 13a, 15a-16a, 19a-20a, 23a, 25a. Invoking *Dickson* v. *Microsoft Corp.*, 309 F.3d 193 (4th Cir. 2002), the court declared that the Fourth Circuit "also requires that plaintiffs allege a conspiracy to fix the price paid by the plaintiffs." App., *infra*, 16a. That open and acknowledged circuit conflict warrants this Court's review.

STATEMENT

I. STATUTORY FRAMEWORK

Section 1 of the Sherman Act prohibits "[e]very contract, combination * * *, or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. "[H]orizontal agreements among competitors to fix prices" are per se illegal under § 1. *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 886 (2007). Under § 4 of the Clayton Act, "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue" for compensation. 15 U.S.C. § 15(a).

This Court addressed the scope of the private right of action created by § 4—and who has "standing" to sue under it—in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977). *Hanover Shoe* concerned whether an antitrust defendant (which manufactured machines for making shoes) could defend by arguing that the plaintiff (a shoe manufacturer) had no injury because it passed along any overcharge to its customers. The Court held that an antitrust plaintiff can collect damages without regard to whether it recouped losses by passing on the inflated price to downstream purchasers. 392 U.S. at 493-494. A contrary rule, the Court explained, would undermine enforcement by leaving it to downstream customers with "only a tiny stake" in bringing suit. *Id.* at 494.

In *Illinois Brick*, this Court addressed the status of downstream customers. In that case, the State of Illinois and local government entities sought damages from the manufacturers and distributors of concrete blocks used in construction. 431 U.S. at 726. The manufacturers and distributors sold the blocks to masonry contractors "who submit[ted] bids to general contractors for the masonry portions of construction projects." *Ibid.* "The general contractors, in turn, submit[ted] bids for these projects to customers" such as the plaintiffs. *Ibid.* The blocks were "purchased directly from [defendants] by masonry contractors and used by them to build masonry structures; those structures [we]re incorporated into entire buildings by general contractors and sold" to the plaintiffs. *Ibid.* The plaintiffs were "thus indirect purchasers of concrete block, which passe[d] through two separate levels in the chain of distribution before reaching" them. *Ibid.* Relying on *Hanover Shoe*, the Court held that the plaintiffs could not sue under the Clayton Act. Such "an indirect purchaser," the Court held, cannot "show its injury by establishing pass-on by the direct purchaser." *Ibid.* The right to sue, the Court held, belongs exclusively to the innocent intermediary—in that case, the masonry contractors—who purchased from the antitrust violator. *Id.* at 727.

A contrary rule, the Court observed, would risk multiple recoveries. If a direct purchaser could recover "the full amount of the overcharge" under *Hanover Shoe,* and an "indirect purchaser" could also "sue to recover the same amount," the defendant would be subject to multiple awards for the same harm—a concern exacerbated by the availability of treble damages. *Illinois Brick*, 431 U.S. at 730. The Court noted the evidentiary difficulties that would arise if a downstream plaintiff had to prove "how much of the overcharge was passed on * * * at each point at which the price-fixed goods changed hands before they reached the plaintiff." *Id.* at 732-733. And the Court invoked *Hanover Shoe*'s concern about dispersed indirect purchasers who "have only a tiny stake in a lawsuit." *Hanover Shoe*, 392 U.S. at 494. According the exclusive right to sue to the person who purchased from the violator, the Court held, would "concentrate[] * * * recovery for the overcharge in the direct purchasers," giving them an appropriate incentive to sue. *Illinois Brick*, 431 U.S. at 735, 745-746.

II. PROCEEDINGS BELOW

The complaint in this case alleges a conspiracy to fix certain fees charged in connection with transactions using automated teller machines (known as "ATMs").

A. Background

The ATM was first conceived in the 1930s, when Luther Simjian "came up with the idea of creating a hole-in-the-wall machine that would allow customers to make financial transactions." MIT School of Engineering, *Inventor of the Week Archive: Luther Simjian*, http://web.mit.edu/invent/iow/simjian.html. The idea, however, was initially "met with a great deal of skepticism." *Ibid.* Time has vindicated Mr. Simjian's vision. From modest beginnings in the 1960s, ATMs have become a ubiquitous feature of the modern banking system. Today, more than 400,000 ATMs dot the country. Gov't Accountability Office, *Automated Teller Machines* 1 (2013). Consumers have made billions of ATM withdrawals, totaling hundreds of billions of dollars. *Ibid.*

When a consumer withdraws money from an ATM owned by an entity other than his bank (such as when his own bank does not have ATMs in the area), the withdrawal is termed a "foreign ATM transaction." App., *infra*, 2a. Those transactions occur through interbank ATM networks, which establish rules governing (among other things) foreign ATM transactions among network members. *Id.* at 3a. The STAR network at issue here—the largest such network—was originally a joint venture by its member banks (who are competitors in most other contexts). *Id.* at 3a-4a. In February 2001, Concord EFS, Inc. ("Concord") purchased the STAR network. *Ibid.* Concord agreed with the member banks to establish a Network Advisory Board that would advise Concord of the member banks' interests and provide "input on policies and pricing issues." *Id.* at 28a. The larger member banks sat on the Network Advisory Board. *Id.* at 4a-5a. In 2004, Concord was purchased by First Data Corp., which assumed control of the STAR network. *Id.* at 5a.

A foreign ATM transaction on the STAR network triggers a series of financial transactions involving four parties: (1) the customer; (2) the bank that issued the customer's ATM card; (3) the owner of the ATM; and (4) the STAR network. App., *infra*, 2a-3a. The bank that owns the ATM charges the customer's bank an "interchange fee" set by the STAR network. *Id.* at 3a. The card-issuing bank, in turn, charges its customer—the cardholder—what is known as a "foreign ATM fee." *Ibid.* That foreign ATM fee includes the interchange fee. *Id.* at 5a. The foreign ATM fee the customer's bank charges the customer is distinct from, and in addition to, any surcharge the ATM owner directly charges the customer at the time of the transaction. *Ibid.* As a result, a customer making a $20 withdrawal might also pay $6.00 in charges—a $2.50 foreign ATM fee assessed by his bank, plus a $3.50 surcharge assessed by the ATM owner. The foreign ATM fee, unlike the ATM surcharge, is not displayed to the customer at the time he withdraws money; instead, it may appear on the customer's bank statement weeks later. *Id.* at 91a-92a. It is the foreign ATM fee that is at issue here.

B. Proceedings in the District Court

Petitioners Brennan, Crayton, and Martinez, all ATM cardholders, filed this action in the U.S. District Court for the Northern District of California on July 2, 2004. App., *infra*, 5a. The complaint alleges that Concord and its parent company, First Data Corp., conspired with Bank of America, N.A., JPMorgan Chase Bank, N.A., Citibank, N.A., Citibank (West), Bank One, N.A., FSB, SunTrust Banks, Inc., Wachovia Corp., Wells Fargo Bank, N.A., and Servus Financial Corp. (collectively, the "Bank Respondents") and others to engage in "horizontal price fixing of fees paid to the ATM owners by the banks (issuing the ATM cards to the cardholders) when cardholders retrieve cash from an ATM not owned by their bank." *Id.* at 1a-2a.

The complaint alleges that respondents agreed to set the STAR interchange fee that financial institutions (including the Bank Respondents) charge each other for their customers' use of Bank Respondents' ATMs. App., *infra*, 5a. The Bank Respondents then incorporate those fees into the foreign ATM fee they charge their customers. The interchange fee thus serves as a "floor" for the foreign ATM fee. The complaint explains that interchange fees originally compensated ATM owners for the additional cost of providing cash to other banks' customers. *Id.* at 58a-59a. Those fees, however, became unnecessary at least by 1996, when the STAR network began permitting ATM owners to impose a direct surcharge on other banks' customers for using their ATMs. *Ibid.*[1]

Respondents moved to dismiss, asserting that the suit is barred by *Illinois Brick*.[2] Respondents argued that petitioners are indirect purchasers who lack standing because the complaint alleges only a conspiracy to set the

[1] Although banks other than the Bank Respondents own ATMs and charge foreign ATM fees, the complaint proposes a class limited to cardholders who were directly charged the foreign ATM fee by the Bank Respondents. App., *infra*, 23a, 70a-71a. The complaint seeks damages from July 2, 2000 onward. *Id.* at 5a.

[2] Respondents had previously moved to dismiss "on the ground that plaintiffs do not state a claim for a *per se* violation of the antitrust laws," but the district court denied those motions. *Brennan* v. *Concord EFS, Inc.*, 369 F. Supp. 2d 1127, 1131, 1138 (N.D. Cal. 2005).

price of the *interchange* fee, not the *foreign ATM fee* paid by petitioners. App., *infra*, 6a. The district court initially rejected that argument. Petitioners, the court recognized, were "purchasing directly from the price-fixing conspirators" and there was "no realistic possibility" that the Bank Respondents—all of whom are alleged to be conspirators—would sue each other and the owner of the STAR network. *Id.* at 5a.

Respondents later moved for summary judgment, again contending that *Illinois Brick* bars the suit. App., *infra*, 6a. This time, the district court agreed with respondents. *Ibid.* It ruled petitioners to be "indirect purchasers" because they "did not directly pay the alleged fixed interchange fees" and did not allege that the Bank Respondents "have conspired to fix the foreign ATM fee that [petitioners] must pay." *Ibid.* The district court also stated (without record support) that "there is a very realistic possibility that" card-issuing banks "would file suit to challenge the fixing of interchange fees at artificially high rates." *Id.* at 7a n.2. The court did not address why banks—like the Bank Respondents here—that are members of the price-fixing conspiracy, and thus receive the benefits of inflated fees, would sue when doing so would threaten those fees and potentially concede antitrust violations.

C. The Court of Appeals' Decision

The Ninth Circuit affirmed. App., *infra*, 29a. The court of appeals observed that, under *Illinois Brick*, "indirect purchasers may not use a pass-on theory to recover damages and thus have no standing to sue." App., *infra*, 10a.[3] In this case, the court noted, petitioners

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[3] The decision "limit[ed]" its discussion "to the issues relevant to standing." App., *infra*, 2a. The court did not address "the district

"have never directly paid interchange fees." *Id.* at 13a. "Instead," the "card-issuing banks" (including the Bank Respondents) "pay interchange fees and then include them when they charge foreign ATM fees (alleged by [petitioners] to be artificially inflated)." *Id.* at 12a. Because petitioners did not themselves pay the interchange fee that respondents allegedly conspired to set, the Ninth Circuit held that they were "indirect purchasers" who cannot bring suit under *Illinois Brick*. *Id.* at 13a.

1. The Ninth Circuit observed that there are "limited exceptions" under which even indirect purchasers obtain antitrust standing. App., *infra*, 11a. For example, the Ninth Circuit and other courts of appeals had recognized what is sometimes called a "'co-conspirator' exception." *Ibid.* That exception, the court of appeals held, "allows an indirect purchaser to sue when co-conspirators *set the price paid* by the plaintiff." *Id.* at 13a (emphasis added). Although that exception permits indirect-purchaser plaintiffs to sue "when the direct purchaser conspires horizontally or vertically to fix the price paid by the plaintiffs," the court held that it does not apply when the direct purchaser conspires to fix the price of an upstream input, even if that necessarily inflates the price the plaintiffs pay. *Ibid.*

Despite being labeled a "co-conspirator exception" by some courts, the panel indicated that it is "not really an exception at all." App., *infra*, 14a. Rather, where the immediate purchaser is alleged to be part of the antitrust

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court's (1) determination that the rule of reason, and not the per se rule, applies here; (2) rejection of the single-brand, derivative aftermarket alleged in the complaint; and (3) determination that the claim against Bank of America, N.A., did not relate back to the filing of the original complaint under Rule 15(c) of the Federal Rules of Civil Procedure." *Ibid.*

conspiracy, the next purchaser in line is appropriately considered the "direct purchaser": She is the one who purchases directly from those engaged in the violation. *Ibid.* "'Whether one adopts a co-conspirator exception or regards this situation as outside *Illinois Brick*'s domain,'" the court continued, *Illinois Brick* does not apply because "'there is no tracing or apportionment [of damages] to be done.'" *Ibid.* (quoting IIA Areeda *et al.*, *Antitrust Law* ¶346h (3d ed. 2007)). Because "the plaintiffs pay the fixed price directly," they "are not indirect purchasers" and "there is no pass-on theory involved." *Ibid.* Whatever the proper nomenclature, the court stated, "[i]f the direct purchaser conspires to fix the price paid by the plaintiffs, then the plaintiffs pay the fixed price directly and are not indirect purchasers." *Ibid.*

2. Applying that rule to this case, the Ninth Circuit nonetheless held that petitioners are indirect purchasers who lack antitrust standing. "Here, while Plaintiffs allege a conspiracy to set *interchange fees*, they fail to show a conspiracy to set *foreign ATM fees*." App., *infra*, 16a (emphasis added). Because petitioners paid the foreign ATM fee that incorporated the interchange fee—and not the interchange fee itself—they had not paid the price that was "fixed." *Id.* at 18a. Accordingly, the Ninth Circuit ruled that petitioners were not, under *Illinois Brick*, "injured within the meaning of § 4 of the Clayton Act." *Id.* at 20a.

The Ninth Circuit rejected petitioners' argument that they had antitrust standing because respondents "conspired to fix interchange fees *for the purpose of raising foreign ATM fees*." App., *infra*, 18a (emphasis added). The court held that *Illinois Brick* foreclosed that theory when it "rejected exceptions for markups by middlemen or when the price-fixed good is a vital input to a larger product." *Id.* at 19a. In both scenarios, the Ninth Circuit stated, a court would be required to use a "passing on" theory forbidden by *Illinois Brick*. *Id.* at 20a. The court instead concluded that *Illinois Brick* allows suit where defendants agree to set the price of the product sold to the plaintiff, but not where defendants inflate that price by agreeing to fix the price of an input. The conspiracy must "involve[ ] the setting of the price actually paid (and not an upstream price that was then passed on)." *Id.* at 23a. "[T]he price paid by plaintiffs must be the price set (not merely 'fixed' in some broad sense) for plaintiffs to be a direct purchaser." *Id.* at 20a.

Respondents, the court of appeals continued, "have not conspired to set the foreign ATM fees" paid by petitioners; the Bank Respondents "independently set the fee paid by" petitioners. App., *infra*, 22a. Even if the conspirators had intended to fix the price of the finished product by fixing an input's price—*i.e.*, had agreed to set the interchange fee in order to fix the foreign ATM fee—the court held that "the price paid by a plaintiff must be set by the conspiracy and not merely affected by the setting of another price." *Id.* at 20a.

The Ninth Circuit also rejected petitioners' contention that *Illinois Brick* did not apply because they had "purchased directly from price-fixing" conspirators. App., *infra*, 23a. The court of appeals again concluded that, under *Illinois Brick*, the inquiry focuses on what price was fixed: the one paid by petitioners or an upstream price common to all conspirators. *Ibid.* That petitioners paid fees directly to conspirators as a result of the antitrust violation committed by those conspirators made no difference, because the price fixed was "an upstream price that was then passed on" and not "the price actually paid." *Ibid.* The court of appeals thus ruled that petitioners had "'run into the *Illinois Brick* wall,'" *id.* at 24a, and "lack standing to seek damages for the alleged antitrust violations," *id.* at 29a.[4]

3. The court of appeals recognized that its ruling conflicts with decisions of the Third and Seventh Circuits. App., *infra*, 23a-24a n.7. In those circuits, a plaintiff has antitrust standing "when the direct purchaser conspires with the seller, even though the price illegally set is an upstream cost that is passed-on to the plaintiffs." *Ibid.* (citing *Paper Sys. Inc.* v. *Nippon Paper Indus. Co.*, 281 F.3d 629 (7th Cir. 2002), and *In re Linerboard Antitrust Litig.*, 305 F.3d 145 (3d Cir. 2002)). The Ninth Circuit, however, "decline[d]" to adopt that approach, *id.* at 23a, and expressed disagreement with those circuits' reasoning, *id.* at 23a-24a n.7. Relying instead on *Dickson* v. *Microsoft Corp.*, 309 F.3d 193 (4th Cir. 2002), the court of appeals stated that the Fourth Circuit "requires that plaintiffs allege a conspiracy to fix the price paid by the plaintiffs" and has "refused to recognize an exception when plaintiffs allege a conspiracy but the conspirators did not fix the price paid by the plaintiffs." *Id.* at 16a-17a.

4. The court of appeals denied rehearing on March 13, 2013. App., *infra*, 54a. On June 4, 2013, Justice Kennedy extended the time to file a petition for a writ of certiorari to July 11, 2013. No. 12A1161. This petition followed.

REASONS FOR GRANTING THE PETITION

The decision below expands an entrenched and openly acknowledged circuit conflict on an important issue of

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[4] The decision below also held that the cost-plus contract exception and the ownership-and-control exception to *Illinois Brick* did not apply. App., *infra*, 13a, 25a-29a. Any such exceptions to *Illinois Brick* are not specifically at issue here.

antitrust law—when, for purposes of the "direct purchaser" rule established in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), a plaintiff who purchases from a member of a price-fixing conspiracy is a "direct purchaser" with standing to sue. The Third and Seventh Circuits have held that such purchasers necessarily are "direct purchasers" under *Illinois Brick*. *In re Linerboard Antitrust Litig.*, 305 F.3d 145 (3d Cir. 2002); *Paper Sys. Inc.* v. *Nippon Paper Indus. Co.*, 281 F.3d 629 (7th Cir. 2002). *Illinois Brick*'s "direct purchaser" requirement, those courts hold, "allocate[s]" standing to the "first non-conspirator in the distribution chain." *Paper Systems*, 281 F.3d at 632. That is true whether the defendants conspired to set the price they charged the plaintiffs, or whether they inflated that price by setting the price of an input they all use. *Ibid.*; *Linerboard*, 305 F.3d at 159. Consequently, in the Third and Seventh Circuits, a plaintiff who purchases directly from members of a price-fixing conspiracy is a "direct purchaser" with standing to sue "even though the price illegally set is an upstream cost that is passed-on to the plaintiffs." App., *infra*, 24a n.7.

The Ninth Circuit's decision in this case took the opposite view, expressly disagreeing with the Third and Seventh Circuits. App., *infra*, 23a-24a & n.7. Relying instead on the Fourth Circuit's decision in *Dickson* v. *Microsoft Corp.*, 309 F.3d 193 (4th Cir. 2002), the Ninth Circuit held that a plaintiff who directly purchases from a member of a price-fixing conspiracy—with no innocent intermediary—is not a "direct purchaser" *unless* the "co-conspirators *set the price paid* by the plaintiff." *Id.* at 18a (emphasis added). Under the Ninth Circuit's approach, it makes no difference that the defendants conspired to fix the price of an upstream input that all of the defendants use; that they did so "for the purpose of raising" the prices they charge the plaintiffs; and that they in fact incorporated that inflated price into the amount they charged the plaintiffs. *Ibid.* Instead, plaintiffs who themselves purchase from members of a price-fixing conspiracy at inflated prices—not through an intermediary—are not "direct purchasers," and lack standing under *Illinois Brick*, unless the conspirators agreed to "set" the downstream price the plaintiffs actually paid. *Id.* at 23a.

That ruling does not merely exacerbate an open circuit conflict. It also takes the wrong side of the split. As the Third and Seventh Circuits have recognized, *Illinois Brick* allocates standing to sue to those who purchase directly—with no innocent intermediary—from the members of the illegal antitrust conspiracy. *Illinois Brick* does not exenterate the Clayton Act's right of action by barring injured customers from suit whenever conspirators in a multi-level conspiracy are savvy enough to agree on the price of an upstream input rather than the end-product itself. The issue, moreover, is important and recurring. This Court's review is warranted.

I. THE NINTH CIRCUIT'S DECISION DEEPENS AN ACKNOWLEDGED CIRCUIT CONFLICT

The courts of appeals are in open conflict on the scope of the "direct purchaser rule" this Court established in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977). In *Hanover Shoe*, the Court held that direct purchasers may seek damages under the Nation's antitrust laws even if they are alleged to have passed all of their costs on to their customers. 392 U.S. at 493-494. Building on that decision, *Illinois Brick* held that only "direct purchasers" have standing to sue. 431 U.S. at

727. The courts of appeals are now sharply divided on who may bring suit as a "direct purchaser" under that rule. That conflict warrants this Court's review.

A. The Third and Seventh Circuits Accord Standing to the First Non-Conspirator Purchaser

The rule in the Third and Seventh Circuit is straightforward: Where the defendants have engaged in an antitrust conspiracy, anyone who makes purchases from one of the conspiring defendants at prices inflated by the conspiracy has standing under *Illinois Brick*. As the Seventh Circuit explained in *Paper Systems*, "*Hanover Shoe* and *Illinois Brick* allocate to the first non-conspirator in the distribution chain the right to collect 100% of the damages." 281 F.3d at 632; see *id.* at 631 ("The first buyer from a conspirator is the right party to sue."). Under that rule, it makes no difference whether the defendants conspire to directly fix the price of the goods they sell, or instead conspire to inflate those prices by agreeing on a critical upstream price for a product or service they provide each other. Plaintiffs alleging a conspiracy between suppliers and intermediaries "are entitled to collect damages from both the [suppliers] and their intermediaries if conspiracy and overcharges can be established." *Id.* at 632. Adopting the same approach, the Third Circuit has held that "a plaintiff who purchases directly from the alleged offender, but buys a product which incorporates the price-fixed product as one of its ingredients," is a "direct purchaser." *Linerboard*, 305 F.3d at 159.

1. In *Paper Systems*, the plaintiffs—consumers of thermal paper—sometimes made purchases from manufacturers and sometimes made purchases through intermediaries. 281 F.3d at 631. They sued five thermal-paper manufacturers, all alleged to be part of a conspir-

acy, and the intermediary sellers also alleged to be part of the conspiracy. *Ibid.* All but one defendant, Nippon Paper, settled. *Ibid.* The Seventh Circuit ruled that the plaintiffs could sue Nippon Paper for damages caused by the conspiracy, even if "plaintiffs did not buy from Nippon Paper directly." *Id.* at 634. Invoking the principle of joint-and-several liability, it held that "any direct purchaser * * * can collect its own portion of damages (that is, the damages attributable to its direct purchases) from any conspirator." *Id.* at 632.

The court of appeals rejected the contention that *Illinois Brick* barred the suit simply because the sales occurred through intermediaries. When the intermediaries are *not* "alleged to have participated in the conspiracy," the court agreed that the plaintiffs would lack standing under *Illinois Brick*. 281 F.3d at 632. For such sales, "*Hanover Shoe* and *Illinois Brick* allocate * * * any right to collect overcharges" solely to the intermediaries. *Ibid.* But for sales made through intermediaries alleged to be part of the conspiracy, "the first non-conspirator in the distribution chain" has the right to bring suit. *Ibid.*; see *In re Brand Name Prescription Drug Antitrust Litig.*, 123 F.3d 599, 604 (7th Cir. 1997) (including intermediaries in a conspiracy would cause "any indirect-purchaser defense [to] go by the board, since the pharmacies [*i.e.*, the end buyers] would then be direct purchasers from the conspirators"); *Fontana Aviation, Inc.* v. *Cessna Aircraft Co.*, 617 F.2d 478, 481 (7th Cir. 1980) (similar).

The Seventh Circuit rejected the argument that its rule would require "judges or juries * * * to trace the original overcharge through several levels of distribution" in violation of *Illinois Brick*. *Paper Systems*, 281 F.3d at 632. The amount of "monopoly overcharge," the court of appeals held, "is the excess price at the initial sale," not the excess price charged to the plaintiff downstream. *Id.* at 633. And that figure could be calculated by "the conspirators' own agreement" or, if necessary, by calculating "the elasticities of supply and demand." *Ibid.*

The Seventh Circuit also concluded that its approach conformed to *Illinois Brick*'s rationale. The direct purchaser rule promotes deterrence by concentrating the prospect of recovery in parties that can most readily detect cartel behavior. *Paper Systems*, 281 F.3d at 632-633. Permitting suit by those who directly purchase from members of the conspiracy, the court held, would serve that end. *Ibid.* And because the plaintiffs are limited to collecting damages on account of their own direct purchases from a conspiring defendant, there is no risk of multiple recoveries. *Ibid.*

2. In *Linerboard*, the Third Circuit adopted the same rule. That case concerned a conspiracy to fix the price of linerboard—a "grade of paperboard suitable for * * * production of corrugated sheets, which are in turn used in the manufacture of corrugated boxes." 305 F.3d at 148 n.1. The defendants were vertically integrated manufacturers that made and sold linerboard, corrugated sheets, and corrugated boxes. *Ibid.* The antitrust suit sought damages for purchasers who bought corrugated containers or corrugated sheets from the defendants. *Id.* at 148-149. They alleged that the defendants entered a "conspiracy to raise the price of linerboard" that "correspondingly raised the price of corrugated products [*i.e.*, sheets and containers]." *Id.* at 149.

The defendants argued that *Illinois Brick* barred the claims, because "members of the proposed classes purchased corrugated sheets or boxes, of which linerboard was a mere ingredient, and did not purchase linerboard *per se*." 305 F.3d at 159. The Third Circuit disagreed. It held that "a plaintiff who purchases directly from the alleged offender, but buys a product which incorporates the price-fixed product as one of its ingredients," is a "direct purchaser" within the meaning of *Illinois Brick*. *Ibid.* The fact that "there will be some additional complications underlying the damage claims * * * must not be allowed to obscure the fact that the plaintiff did purchase directly from the alleged violator." *Ibid.*

Consequently, the rule in the Third Circuit—as in the Seventh—is that direct purchasers from members of a cartel or conspiracy have standing under *Illinois Brick*, even if the cartel members inflate their prices by setting the price of an input rather than expressly setting the price for the finished product they sell to the public. As one district court explained, "although *Illinois Brick* bars Clayton Act suits by persons who are not direct purchasers from an antitrust defendant," that "decision does not preclude a suit by a plaintiff who purchases directly from the alleged offender" by "buy[ing] a product which incorporates the price-fixed product as one of its ingredients." *In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 480 (W.D. Pa. 1999).[5]

B. The Ninth and Fourth Circuits Have Adopted The Contrary Rule

Expressly disagreeing with the Third and Seventh Circuits, the decision below adopted the opposite rule, deepening an entrenched circuit conflict.

1. Rejecting the Third and Seventh Circuits' approach, the Ninth Circuit held that *Illinois Brick* does

[5] The Eleventh Circuit has similarly ruled that "*Illinois Brick* does not apply to a single vertical conspiracy where the plaintiff has purchased directly from a conspiring party in the chain of distribution." *Lowell* v. *Am. Cyanamid Co.*, 177 F.3d 1228, 1232 (11th Cir. 1999).

not necessarily permit the first purchaser outside a price-fixing conspiracy to bring suit as a "direct purchaser." App., *infra*, 23a. Instead, the court held that plaintiffs who purchase directly from members of a price-fixing conspiracy still lack standing unless "the conspiracy involves *setting the price paid* by the plaintiffs." App., *infra*, 24a (emphasis added). The court of appeals ruled that it is not enough that the defendants conspired to fix the price of an upstream input or component, even if they did so "for the purpose and effect of inflating another fee." *Id.* at 22a. Instead, a plaintiff who purchases from a conspirator or cartel member has standing to sue only if the conspiracy or cartel "involve[s] the setting of the price actually paid (and not an upstream price that was then passed on)." *Id.* at 23a.

Applying that rule to this case, the court of appeals ruled that plaintiffs were not "direct purchasers" within the meaning of *Illinois Brick*. App., *infra*, 13a. The court accepted the complaint's allegation that the Bank Respondents had conspired to set the "STAR interchange fee" they charge one another for transactions using each others' ATMs. *Id.* at 6a. It also accepted the allegation that the Bank Respondents incorporated the price-fixed interchange fee into the "foreign ATM fee" they all charged their customers (including plaintiffs). *Id.* at 3a. However, because it read the complaint to allege that the Bank Respondents had conspired to set only the interchange fee and not to set the precise amount of the foreign ATM fee petitioners paid, the court held that petitioners lacked standing under *Illinois Brick*. *Id.* at 22a, 29a. It did not matter that petitioners "purchased directly from price-fixing Defendants," *id.* at 22a, or that the Bank Respondents had "fix[ed] one fee for the purpose and effect of inflating" the fee charged to petitioners, *id.* at 21a. Absent an allegation that the Bank Respondents had agreed on and set the foreign ATM fee that petitioners "directly paid," the case could not proceed. *Id.* at 23a.

The court acknowledged the Third and Seventh Circuits' contrary rule. App., *infra*, 23a-24a & n.7. But the Ninth Circuit "decline[d] to" adopt that rule, criticizing it as inconsistent with *Illinois Brick*. *Ibid.* In particular, the Ninth Circuit urged that the Third Circuit's *Linerboard* decision and the Seventh Circuit's *Paper Systems* decision inappropriately "restrict *Illinois Brick*'s influence by allowing an exception when the direct purchaser conspires with the seller, even though the price illegally set is an upstream cost that is passed-on to the plaintiffs." *Id.* at 24a n.7. That approach, the Ninth Circuit opined, "contradicts the Supreme Court's admonition 'not to carve out exceptions to the [direct purchaser] rule for particular types of markets.'" *Ibid.* (quoting *Kansas* v. *Utilicorp United*, 497 U.S. 199, 216 (1990)). "[T]he price paid by plaintiffs must be the price set (not merely 'fixed' in some broad sense) for plaintiffs to be a direct purchaser * * * ." *Id.* at 20a.

2. In so holding, the Ninth Circuit relied on the Fourth Circuit's decision in *Dickson* v. *Microsoft Corp.*, 309 F.3d 193 (4th Cir. 2002). *Dickson* concerned a monopolization claim: The plaintiffs alleged that Microsoft colluded with computer manufacturers who paid supracompetitive prices for Microsoft's operating system and application software. *Id.* at 200. That, in turn, caused consumers to pay more for computers purchased from the manufacturers. *Ibid.*

The Fourth Circuit held that the plaintiff customers were indirect purchasers who lacked standing under *Illinois Brick*. The plaintiffs there had not alleged a conspiracy fixing the price that the plaintiffs themselves paid for the software; the plaintiffs' theory was that the monopoly "overcharge" for Microsoft's operating system and application software was priced into the cost of the computers they purchased. 309 F.3d at 215. Because the plaintiffs alleged only a conspiracy relating to the price of the operating system and software—rather than the price of the computer itself—the court held that the suit was barred by *Illinois Brick*. *Ibid.*

Judge Gregory dissented. "Permitting plaintiffs * * * to sue intermediaries that were part of a conspiracy to raise retail prices above a competitive level," he observed, "is consistent with *Hanover Shoe* and *Illinois Brick*." *Dickson*, 309 F.3d at 222 (Gregory, J., dissenting). He would have followed the Seventh Circuit's holding that "'*Hanover Shoe* and *Illinois Brick* allocate to the first non-conspirator in the distribution chain the right to collect 100% of the damages.'" *Ibid.* (quoting *Paper Systems*, 281 F.3d at 631-632).

3. The circuit conflict thus is established, developed, and entrenched. It was openly acknowledged by the decision below. App., *infra*, 23a-24a & n.7. It was openly acknowledged in *Dickson*. And it has been acknowledged by the district courts as well. As one district court observed (with considerable understatement), "those circuits that have addressed the issue have not taken a uniform view." *Laumann* v. *Nat'l Hockey League*, 907 F. Supp. 2d 465, 481-482 (S.D.N.Y. 2012) (following the Third and Seventh Circuits). This Court's review is warranted.

II. THE DECISION BELOW IS INCORRECT

The decision below does not merely aggravate a circuit conflict. It over-reads *Illinois Brick* to create an inappropriate immunity for price-fixing conspiracies. *Illinois*

Brick governs only *who* may assert a claim for an antitrust violation. See, *e.g.*, *UtiliCorp*, 497 U.S. at 204 ("only the utility has the cause of action because it alone has suffered injury within the meaning of § 4"); *Illinois Brick*, 431 U.S. at 735 (masonry contractors have the right to sue). But it does not protect conspirators from suit whenever they are sufficiently astute to increase the prices they charge the plaintiffs by setting the price of a common critical input—effectively setting a price floor—while managing to avoid agreement on the specific price of the ultimate product itself.

The leading treatise agrees. "[I]t was never *Illinois Brick*'s purpose to place antitrust violations completely out of the reach of private plaintiffs." IIA Areeda *et al.*, *supra*, ¶ 346j. "Thus, one set of purchasers should never be identified as 'indirect' unless those identified as 'direct' (1) actually have the proper incentives to sue and (2) would themselves have a cause of action for overcharge damages rather than damages based on lost profits or some other figure." *Ibid.*; see *id.* ¶ 346a ("When a consumer (or other down-the-line purchaser) buys from an innocent intermediary who was overcharged due to its supplier's antitrust violation, the intermediary ordinarily recovers from the offender without deduction for the amount of its injury 'passed on' to the consumer."). *Illinois Brick* "does not stand for the proposition * * * that a defendant cannot be sued under the antitrust laws by any plaintiff to whom it does not sell." *Loeb Indus., Inc.* v. *Sumitomo Corp.*, 306 F.3d 469, 481 (7th Cir. 2002). It instead allows those who suffer the immediate injury—those who purchase from the violators and not from an innocent intermediary—to bring suit.

Here, as the "first non-conspirator[s] in the chain of distribution," petitioners are appropriate plaintiffs under

Illinois Brick. *Paper Systems*, 281 F.3d at 631-632. The complaint alleges that the Bank Respondents conspired to impose excessive interchange fees, App., *infra*, 2a, and then incorporated those interchange fees into the foreign ATM fees they charge plaintiffs, *id.* at 5a. Because the Bank Respondents profit as ATM owners by receiving the inflated interchange fees they fixed, and as card-issuing banks by charging their cardholders a foreign ATM fee that includes a marked-up interchange fee, they have little incentive to bring suit (and have indicated no intention of doing so). The total harm instead is borne by non-conspirators, such as cardholders who pay foreign ATM fees incorporating the inflated interchange fee. The decision below, however, precludes any cardholder from recovering any overcharge unless the conspirators make the mistake of conspiring to set the foreign ATM fee itself, as opposed to the interchange fee they all incorporate into that fee.

The Ninth Circuit's approach turns on a distinction that is as unworkable as it is artificial. The Ninth Circuit attempted to distinguish between conspiracies in which competitors and intermediaries merely "set" the price of an input they use (in order to inflate the price they charge their customers), and conspiracies in which they agree upon and "set" the prices paid by the plaintiffs. "[T]he price paid by plaintiffs," the court of appeals held, "must be the price set (not merely 'fixed' in some broad sense) for plaintiffs to be a direct purchaser * * * ." App., *infra*, 20a; see *id.* at 23a. But a product's price can be "fixed" as much through conspiracies to set the price of a required component as through agreements to set the end-product's price: Once set, the price of the component effectively becomes a "floor" for the final product's price, as happened here.[6] Agreements "formed for the purpose and with the effect of raising" prices are per se illegal, whether they operate directly or indirectly. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). Even exchanges of information for the purpose of inflating prices, without an actual agreement to set a price, can be horizontal price fixing. *United States* v. *Container Corp.*, 393 U.S. 333, 334-335 (1969). And this Court has ruled that fixing part of a price is tantamount to fixing the price itself. See *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643, 647-648 (1980). Where the plaintiff himself purchases from a member of a price-fixing conspiracy at an inflated price—and not through an innocent intermediary—he is the "direct purchaser." The means by which the conspiracy illegally inflated the price the plaintiff paid made is immaterial.

The Ninth Circuit's artificial distinction between conspiracies to fix prices by setting the price for *inputs*, and those that specifically set the price of the *finished product*, is also a recipe for circumvention. To avoid private lawsuits, conspiring suppliers and intermediaries in the Ninth Circuit need only train their agreements on the prices charged at an earlier step in the distribution chain. This Court has held that parties cannot use a joint venture among competitors "as a vehicle for ongoing concerted activity" in violation of § 1. *Am. Needle, Inc.* v. *Nat'l Football League*, 130 S. Ct. 2201, 2209 (2010). The Ninth Circuit allows just that so long as the joint venture sets the price of the upstream product or service alone.

[6] By conspiring to set the price for an input they all provide to each other (the interchange fee charged for access to each others' ATMs), the Bank Respondents were able to establish a price floor, resulting in inflated charges to customers through the "foreign ATM fee." See p. 8, *supra*.

The Ninth Circuit nowhere addressed why that loophole makes sense.

The Ninth Circuit did invoke the rationales for the "direct purchaser" rule, explaining that it "(1) eliminate[s] the complications of apportioning overcharges between direct and indirect purchasers," (2) avoids "multiple recoveries," and (3) "promote[s] the vigorous enforcement of the antitrust laws." App., *infra*, 10a (quoting *UtiliCorp*, 497 U.S. at 208, 212, 214). To the extent those rationales are relevant, they defy the Ninth Circuit's approach for precisely the reasons the Seventh Circuit identified in *Paper Systems*.

As to the first, there should be no concern about "apportioning overcharges." This suit has been brought by the most direct plaintiff—the first non-conspirator in the chain of distribution—and the amount at issue is the overcharge the Bank Respondents agreed upon (here, the interchange fee). *Paper Systems*, 281 F.3d at 631-633. There are no competing damage claims to apportion among categories of plaintiffs (*e.g.*, cardholders and intermediaries).

Nor can there be "multiple recoveries." For any overcharge, damages can be recovered only by the *first* non-conspirator claimant in the distribution chain; there is only one first. And even if one had to determine how much of the illegal interchange fee was incorporated into a particular foreign ATM fee, as the Ninth Circuit supposed, App., *infra*, 23a; but see *Paper Systems*, 281 F.3d at 631-632, the "[d]ifficulty of ascertainment is no longer confused with right of recovery for a proven invasion of the plaintiff's rights," *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 265-266 (1946) (quotation marks omitted). The prospect of calculating the overcharge "is present in every cartel case" and can be addressed through economic analysis. *Paper Systems*, 281 F.3d at 633; see, *e.g.*, *Temple* v. *Circuit City Stores, Inc.*, No. 06-5303, 2007 WL 2790154, at *7 (E.D.N.Y. Sept. 25, 2007); *In re Mid-Atl. Toyota Antitrust Litig.*, 516 F. Supp. 1287, 1295-1296 (D. Md. 1981). If *Illinois Brick* barred every antitrust case that required expert economic analysis, few cases would survive.

The decision below also undermines "the longstanding policy of encouraging vigorous private enforcement of the antitrust laws." *Illinois Brick*, 431 U.S. at 746. That is particularly true in cases like this one, which involve "[t]he rule against price fixing," probably "the least controversial prohibition in competition law throughout the world." Louis Kaplow, *Direct Versus Communications-Based Prohibitions on Price Fixing*, 3 J. Legal Analysis 449, 449 (2011). The decision below would exempt price-fixing conspiracies from private damages actions whenever the conspirators fix the price of an input that is ultimately charged to non-conspirators, so long as they are savvy enough to avoid agreeing to set the price of the ultimate product.

The Ninth Circuit may have thought it inappropriate to "creat[e] exceptions" to *Illinois Brick*, *UtiliCorp*, 497 U.S. at 207, or to "extend [the] current co-conspirator exception," App., *infra*, 23a. As the decision below acknowledged, however, the issue here is not really whether there should be an exception to *Illinois Brick*. The issue is the scope of *Illinois Brick*'s "direct purchaser" rule: The "co-conspirator exception is not really an exception at all" because it asks whether a plaintiff is a direct purchaser under *Illinois Brick*. *Id.* at 14a; see *Linerboard*, 305 F.3d at 158-159; *Laumann*, 907 F. Supp. 2d at 482. Where, as here, the plaintiff is the first non-conspirator in the chain of distribution—buying from conspirators and not from an innocent intermediary—the plaintiff *is* the direct purchaser and thus has standing under *Illinois Brick*. This Court has "refused to engraft artificial limitations on the §4 remedy." *Blue Shield of Va.* v. *McCready*, 457 U.S. 465, 473 (1982). The decision below does just that, creating a rule under which there may be no direct purchaser who can realistically bring suit.

III. THE ISSUE IS IMPORTANT AND RECURRING

The question presented by this case is important and recurring. Many products go through multiple hands on their way to the consumer; "*[e]very* firm sells indirectly in some respect." *Paper Systems*, 281 F.3d at 632. At least four courts of appeals have weighed in on the issue, arriving at sharply diverging results. See pp. 15-22, *supra*. And the issue keeps arising in the district courts. Confronted by court of appeals decisions that "have not taken a uniform view," *Laumann*, 907 F. Supp. 2d at 481-482, district courts have reached equally disparate results.

Some district courts have followed the Third and Seventh Circuits' approach, holding that the first non-conspirator purchaser in the distribution chain is the direct purchaser. For example, one district court recently concluded that, "[w]here 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." *Laumann*, 907 F. Supp. 2d at 481 (emphasis omitted). "The purpose of *Illinois Brick*," that court concluded, "was *not* to prevent the only non-conspirators in a multi-level distribution chain—consumers no less—from bringing a private antitrust suit." *Id.* at 482. And "holding that the first purchaser who is not a party to the unlawful agreement to restrain trade is not an *exception* to *Illinois Brick*, but rather a recognition that *Illinois Brick* 'bans Clayton Act suits by persons who are not direct purchasers *from the defendant antitrust violator[s].*'" *Ibid.* Consequently, "the first purchaser who is not party to the unlawful agreements to restrain trade has standing to sue." *Ibid.* Other district courts agree.[7] But still others have followed the more restrictive approach adopted by the decision below.[8]

In the wake of that disarray, plaintiffs seeking relief in federal court receive a different brand of justice depending on the happenstance of geography. This case, for example, could have been pursued in Illinois or Pennsylvania, but not in Virginia or California. The decision thus will encourage forum shopping: Plaintiffs would be well advised not to bring suits like this one in the Fourth or Ninth Circuits if they have a choice, see 15 U.S.C. § 22 (allowing suit anywhere the defendant conducts business), or instead to bring a state-law antitrust action, perhaps in a State within the Fourth and Ninth Circuits.[9]

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[7] See *Wallach* v. *Eaton Corp.*, 814 F. Supp. 2d 428, 434-438 (D. Del. 2011); *Fla. Power Corp.* v. *Granlund*, 78 F.R.D. 441, 443-444 (M.D. Fla. 1978); *Gen. Refractories Co.* v. *Stone Container Corp.*, No. 98-cv-3543, 1999 WL 14498, at *3 (N.D. Ill. Jan. 8, 1999). That approach had been adopted by district courts in the Fourth Circuit and the Ninth Circuit before *Dickson* and the decision below as well. *Mid-Atlantic Toyota Antitrust Litig.*, 516 F. Supp. at 1295; *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 291, 306 (N.D. Cal. 2010); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 738 F. Supp. 2d 1011, 1023 (N.D. Cal. 2010).

[8] See *In re Refrigerant Compressors Antitrust Litig.*, 795 F. Supp. 2d 647, 657-659 (E.D. Mich. 2011); *Stanislaus Food Prods. Co.* v. *USS-POSCO Indus.*, No. 09-cv-0560, 2010 WL 3521979, at *8 (E.D. Cal. Sept. 3, 2010).

[9] Several States within the Fourth and Ninth Circuits do not follow *Illinois Brick* at all. Cal. Bus. & Prof. Code § 16750; Nev. Rev. Stat.

The issue is also potentially important to state antitrust actions in the many States that either require their antitrust laws to be consistent with this Court's rulings,[10] or follow *Illinois Brick* as a matter of decisional law.[11]

The impact on enforcement of federal antitrust law underscores the need for this Court's review. The Ninth Circuit's approach will often leave damages from an antitrust conspiracy uncollectable, and the bounty of violations in the hands of the conspirators. See *Paper Systems*, 281 F.3d at 634. So long as a multi-level conspiracy does not set the price charged to outsiders, and instead inflates the price of inputs conspirators provide to each other, innocent non-conspirators cannot sue. It might be that some intermediaries are not part of the conspiracy, and that they could sue suppliers for fixing the price that *they* pay. But those intermediaries could recover only their own damages; the gains from sales through conspirator intermediaries would be immune from private recovery. *Id.* at 632. That result cannot be reconciled with the goal of robust enforcement of the antitrust laws. And even if the Ninth Circuit's approach were correct,

§ 598A.210(2); W. Va. Code § 142-9-2; *Bunker's Glass Co.* v. *Pilkington, PLC*, 75 P.3d 99, 102 (Ariz. 2003); *Teague* v. *Bayer AG*, 671 S.E.2d 550, 555-556 (N.C. Ct. App. 2009).

[10] See Conn. Gen. Stat. § 35-44b; Mo. Stat. § 416.141; N.H. Rev. Stat. § 356.14; Okla. Stat. tit. 79, § 212; Tex. Bus. & Com. Code § 15.04.

[11] See *Berghausen* v. *Microsoft Corp.*, 765 N.E.2d 592, 594 (Ind. Ct. App. 2002); *Arnold* v. *Microsoft Corp.*, No. 2999-CA-002144, 2001 WL 1835377, at *3 (Ky. Ct. App. Nov. 21, 2001); *Johnson* v. *Microsoft Corp.*, 834 N.E.2d 791, 794-795 (Ohio 2005); *Pomerantz* v. *Microsoft Corp.*, 50 P.3d 929, 933 (Colo. App. 2002); *Free* v. *Abbott Labs, Inc.*, 164 F.3d 270, 275 (5th Cir. 1999) (Louisiana law); *Davidson* v. *Microsoft Corp.*, 792 A.2d 336, 342 (Md. Ct. Spec. App. 2002); *Boos* v. *Abbott Labs.*, 925 F. Supp. 49, 51 (D. Mass. 1996) (Massachusetts law); *Wilson* v. *Gen. Motors Corp.*, 921 A.2d 414, 416 (N.J. 2007); *Siena* v. *Microsoft Corp.*, 796 A.2d 461, 464 (R.I. 2002).

that would mean defendants in the Third and Seventh Circuits are confronting private antitrust suits that should not be filed. "Because of the importance of the issue * * * for the administration of the antitrust laws," *Nat'l Broiler Mktg. Ass'n* v. *United States*, 436 U.S. 816, 820 (1978), the petition should be granted.

IV. THIS CASE IS AN IDEAL VEHICLE

This case is an appropriate vehicle for resolving the question presented. The court of appeals addressed that issue at length in a published opinion. It expressly acknowledged the circuit conflict, relying on the Fourth Circuit while rejecting the approach of the Third and Seventh Circuits. App., *infra*, 16a-18a, 23a-24a & n.7. There can be no serious debate that the outcome would have been different in the Third and Seventh Circuits, as the decision below acknowledges. *Id.* at 23a-24a & n.7. And the decision is final, affirming the district court's grant of summary judgment.[12] A case that presents the issue more cleanly, squarely, or starkly, is difficult to imagine.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[12] The Ninth Circuit did not address other issues, such as whether the case is subject to "rule of reason" or "the per se" rule applicable to price fixing, App., *infra*, 2a, the scope of the relevant market, *id.* at 2a-3a, or whether the complaint related back with respect to one specific Bank Respondent, *id.* at 4a. But the issue of standing is logically antecedent to all of those issues; this Court would have no reason to address them; and they would, following this Court's decision on the merits, at most be issues for the lower courts on remand.

Respectfully submitted.

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JULY 2013

APPENDIX

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APPENDIX A
IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NO. 10-17354

IN RE: ATM FEE ANTITRUST LITIGATION,
PAMELA BRENNAN *et al.*,
Plaintiffs-Appellants,

v

CONCORD EFS, INC. *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of California

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(JULY 12, 2012)

Before CARLOS F. LUCERO,* CONSUELO M. CALLAHAN, and N. RANDY SMITH, Circuit Judges.

OPINION

N.R. SMITH, Circuit Judge:

Plaintiffs–Appellants (Plaintiffs) are automated teller machine (ATM) cardholders, who allege horizontal price fixing of fees paid to the ATM owners by the banks

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* The Honorable Carlos F. Lucero, Circuit Judge for the Tenth Circuit, sitting by designation.

(issuing the ATM cards to the cardholders) when cardholders retrieve cash from an ATM not owned by their bank. Plaintiffs do not directly pay the allegedly fixed fee; therefore, as indirect purchasers, Supreme Court precedent prohibits Plaintiffs from bringing this suit. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Further, Plaintiffs do not qualify for the narrow exceptions to the *Illinois Brick* rule, because (1) they do not allege a conspiracy to fix the price paid by the Plaintiffs and (2) the banks are not controlled by each other or by the ATM network. Therefore, Plaintiffs do not have standing under § 4 of the Clayton Act to proceed with their § 1 Sherman Act suit. We thus affirm the district court's summary judgment dismissal of this suit for lack of antitrust standing.

We limit our discussion in this opinion to the issues relevant to standing. Because Plaintiffs lack antitrust standing, we do not address Plaintiffs' appeal regarding the district court's (1) determination that the rule of reason, and not the per se rule, applies here; (2) rejection of the single-brand, derivative aftermarket alleged in the complaint; and (3) determination that Plaintiffs' claim against Bank of America, N.A., did not relate back to the filing of the original complaint under Rule 15(c) of the Federal Rules of Civil Procedure.

I. BACKGROUND

A. Facts

A "foreign ATM transaction" occurs when ATM cardholders withdraw money from their bank account using an ATM not owned by their bank (which issued them the card). Such foreign ATM transactions involve four parties: (1) the cardholder, i.e., the person using the ATM to retrieve money from his or her bank account; (2) the card-issuing bank, i.e., the bank at which the cardholder holds an account and who issues the cardholder an ATM card; (3) the ATM owner, i.e., the entity that owns the machine used by the cardholder; and (4) the ATM network, i.e., the entity that connects the ATM owners with card-issuing banks. Of all these parties, the ATM network plays a particularly important role in this fact situation. The network administers agreements between card-issuing banks and ATM owners to ensure that customers can withdraw money from network member ATMs.

Foreign ATM transactions generate four fees. The cardholder must pay two of these fees—one to the ATM owner for use of the ATM (known as a "surcharge") and one to the card-issuing bank (known as a "foreign ATM fee"). The card-issuing bank also pays two of these fees—one to the ATM network that routed the transaction (known as a "switch fee") and one to the ATM owner (known as an "interchange fee"). At issue in this case are the interchange fee and the foreign ATM fee. The ATM network (not the card-issuing bank nor the ATM owners) establishes the interchange fee. Individual card-issuing banks set their own foreign ATM fees.

The STAR Network (STAR) is the ATM network at issue in this case. STAR has thousands of members who collectively own hundreds of thousands of ATMs nationwide. These members can be roughly divided into three groups. The first group includes so-called Independent Service Organizations ("ISOs"). ISOs own ATMs, but they are not banks and do not issue ATM cards (e.g., grocery stores or gas stations). The second group consists of financial institutions that accept deposits and issue ATM cards, but do not own any ATMs (e.g., credit unions or internet banks). The third and largest STAR member group includes financial institutions that both issue ATM cards and own ATMs. The defendant banks (or Bank Defendants) named in this case, which include all defendants except for Concord EFS, Inc. (Concord) and First Data Corporation, fit into this category. Until February 1, 2001, STAR was a member-owned network. As a member-owned network, member banks (including Bank Defendants), controlled STAR and set the interchange fees paid by the members. On February 1, 2001, Defendant–Appellee Concord, a publicly traded Delaware corporation, acquired STAR. After the acquisition by Concord, Bank Defendants lacked control of STAR based on ownership and board member appointment, because Concord was not owned by the member banks of STAR.

Some Bank Defendants were concerned about the acquisition by Concord, because Concord was not owned by the member banks and thus Bank Defendants would likely lose influence over policies and pricing decisions (such as interchange fees). To moderate this concern, before the acquisition STAR revised its agreement with its members to include language that indicated that it would not change fees arbitrarily and that it would consider the interests of its members before implementing any changes. Additionally, to allegedly quell the reluctance by the Bank Defendants, Concord agreed to retain the pre-acquisition Chief Executive Officer of STAR (who has no formal affiliation with the Bank Defendants) to run the new network and agreed to elect him to Concord's board of directors to give a voice to the Bank Defendants. Concord also agreed to establish a Network Advisory Board (comprised of the larger member banks including Bank Defendants) to advise Concord concerning the interests of the large financial institutions. The Network Advisory Board would provide input to Concord's board as to policy and pricing decisions, but had no authority to determine or veto interchange fee changes.

In February 2004, First Data Corporation (another Delaware corporation) acquired Concord. As such, after February 2004, First Data owned and operated STAR.[1]

B. Procedural History

On July 2, 2004, Plaintiffs filed suit. On behalf of themselves and all those similarly situated, Plaintiffs alleged that Defendants engaged in horizontal price fixing, a per se violation of § 1 of the Sherman Act. They alleged that Defendants colluded to fix the STAR interchange fee, which is then passed on to Plaintiffs as part of the foreign ATM fee. Plaintiffs sought damages dating back to July 2, 2000.

Defendants filed a motion to dismiss arguing that Plaintiffs, as indirect purchasers, lacked standing to allege an antitrust violation pursuant to *Illinois Brick. In re ATM Fee Antitrust Litig.*, 768 F. Supp. 2d 984, 990 (N.D. Cal. 2009). On September 4, 2009, the district court denied the motion to dismiss. *Id.* at 994. Accepting all of Plaintiffs' allegations as true and construing the pleadings in the light most favorable to Plaintiffs, the district court found that Plaintiffs' suit could not be dismissed for lack of standing. *Id.* at 992–94. The court found that there was no realistic possibility that the Bank Defendants would sue STAR and that Plaintiffs alleged that they were "purchasing directly from the price-fixing conspirators. . . ." *Id.* at 992. On October 19, 2009, Plaintiffs filed their third amended complaint.

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[1] For simplicity, throughout the rest of the opinion we refer to Concord as the owner and operator of STAR even though First Data took over that role in 2004.

Subsequently, "Defendants . . . moved for summary judgment, [again] arguing that the *Illinois Brick* rule barring indirect purchasers from recovering monetary damages in an antitrust suit applies here and precludes Plaintiffs from seeking such damages." *In re ATM Fee Antitrust Litigation*, No. C 04-02676 CRB, 2010 WL 3701912, at *4 (N.D. Cal. Sep. 16, 2010). On September 16, 2010, the district court granted Defendants' motion for summary judgment and dismissed Plaintiffs' claim on the ground that Plaintiffs lack standing under *Illinois Brick's* direct purchaser rule. *Id.* at *11. Finding no genuine issue of material fact, the district court found Plaintiffs to be indirect purchasers. *Id.* at *12. Plaintiffs did not directly pay the alleged fixed interchange fees—labeled by the district court as the alleged "unlawful fee." *Id.* at *5.

> Critically, Plaintiffs do *not* allege that Defendants have conspired to illegally fix the foreign ATM fee that Plaintiffs pay to their bank when they use a foreign ATM. . . . Importantly, Plaintiffs do not allege that the Defendants or any other banks have conspired to fix the foreign ATM fee that Plaintiffs must pay. . . . 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. . . . Plaintiffs . . . do not pay this allegedly unlawful fee directly (their banks do) and therefore are not directly harmed by it. . . . Plaintiffs do not dispute that they pay the purportedly unlawful interchange fee only indirectly. . . . Plaintiffs therefore acknowledge that they are only indirect payers of the interchange fee and that the banks are the direct payers. . . . Given that Plaintiffs are not "direct purchasers" of the

> unlawful fee, their damages claims are barred by the Illinois Brick rule, unless an exception to the rule applies.

Id. at *2, *3, *5. The district court found no exception applicable.[2] *Id*. at *5-10. The district court filed a final judgment against Plaintiffs on September 17, 2010. A timely appeal followed.

II. JURISDICTION AND STANDARD OF REVIEW

Federal district courts have jurisdiction over "questions alleging the violation of federal laws pursuant to 28 U.S.C. § 1331." *Del. Valley Surgical Supply Inc. v. Johnson & Johnson*, 523 F.3d 1116, 1119 (9th Cir. 2008). We have jurisdiction over appeals from final decisions of district courts. 28 U.S.C. § 1291.

Standing is a question of law for the district court to decide. *See Warth v. Seldin*, 422 U.S. 490, 498–99 (1975); *Del. Valley*, 523 F.3d at 1119; *see also Haase v. Sessions*, 835 F.2d 902, 904 (D.C. Cir. 1987) ("[T]he ultimate responsibility to ensure subject matter jurisdiction always lies with the court, not the parties."). Because the

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[2] Notably, "Plaintiffs argue[d] that there is 'no realistic possibility' that the direct purchasers of interchange fees—i.e., the card-issuing banks—would file a lawsuit challenging the unlawful fixing of those fees, for several reasons." *Id.* at *7. The district court rejected the argument, "because it ignores the critical fact that the overwhelming majority of ATM card-issuing banks pay more in interchange fees than they receive." *Id.* In other words, they are net payers. *Id.* "Because they pay more in interchange fees than they receive, the higher the interchange fee, the higher their costs. Thus, there is a very realistic possibility that these entities (or some subset of them) would file suit to challenge the fixing of interchange fees at artificially high rates." *Id.* at *8. In the end, the district court concluded that "card-issuing banks are better-off if interchange fees are eliminated," and so they have incentive to sue. *Id.*

court (and not a jury) decides standing, the district court must decide issues of fact necessary to make the standing determination. *See Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 72 (1978) (district court held four days of hearings to decide motion to dismiss for want of standing). "The fact-finding of the [district] court to support or deny standing is subject to review under the clearly erroneous standard." *Haase*, 835 F.2d at 907 (citing *Duke Power*, 438 U.S. at 77 ("[W]e cannot say we are left with 'the definite and firm conviction that' the finding by the trial court . . . is clearly erroneous; and, hence, we are bound to accept it." (citation omitted))). However, when standing is challenged on summary judgment, "[t]he court shall [not] grant summary judgment if the movant shows that there is [a] genuine dispute as to any material fact. . . ." Fed. R. Civ. P. 56(a); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("[E]ach element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation."). Therefore, if there is a genuine issue of material fact, then summary judgment is inappropriate without the district court resolving the factual dispute. *See Bischoff v. Osceola Cnty., Fla.,* 222 F. 3d 874, 878–80 (11th Cir. 2000); *see also Haase,* 835 F.2d at 907, 910. "Several [other] circuits explicitly prohibit district courts from resolving disputed factual questions or making credibility determinations essential to the question of standing on the basis of affidavits alone." Harry T. Edwards & Linda A. Elliott, *Federal Standards of Review* Ch. III.A (2007) (citing *Bischoff,* 222 F.3d at 880–81 (following First and Fifth Circuit cases)). We need not decide whether the district court must conduct additional evidentiary inquiries or the necessary extent of those inquires when resolving issues of material fact at the summary judgment stage, because our holding confronts no genuine issue of material fact and does not rely on factual findings of the district court.

When a district court determines standing on summary judgment (as is the case here), "[w]e must determine [de novo], viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Del. Valley*, 523 F.3d at 1119. In the absence of genuine issues of material fact, we may affirm the district court's summary judgment "on any ground supported by the record, regardless of whether the district court relied upon, rejected, or even considered that ground," *Kling v. Hallmark Cards Inc.*, 225 F.3d 1030, 1039 (9th Cir. 2000), if "the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

III. DISCUSSION

Under § 4 of the Clayton Act, "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15(a). However, "[t]he Supreme Court has interpreted that section narrowly, thereby constraining the class of parties that have statutory standing to recover damages through antitrust suits." *Del. Valley,* 523 F.3d at 1119 (citing *Illinois Brick*, 431 U.S. 720).

The Supreme Court has held that a direct purchaser has "been injured in its business as required by [§] 4" even though it passes on "claimed illegal overcharge[s] to" its customers. *Illinois Brick,* 431 U.S. at 724 (discussing *Hanover Shoe, Inc. v. United Shoe Mach.*

Corp., 392 U.S. 481 (1968)). Thus, defendants may not use a pass-on theory to challenge the standing of direct purchasers. However, the Supreme Court has also held that § 4 of the Clayton Act does not "permit offensive use of a pass-on theory against an alleged violator that could not use the same theory as a defense in an action by direct purchasers." *Id.* at 735. In other words, indirect purchasers may not use a pass-on theory to recover damages and thus have no standing to sue. *Id.* at 745–46. This rule (the *Illinois Brick* rule), that indirect purchasers suffer no injury under § 4, was reaffirmed in *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 207 (1990). "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." *Del. Valley,* 523 F.3d at 1120–21.

The underlying purposes for the rule are (1) "to eliminate the complications of apportioning overcharges between direct and indirect purchasers," *UtiliCorp,* 497 U.S. at 208; (2) "to eliminate multiple recoveries," *id.* at 212; and (3) to "promote the vigorous enforcement of the antitrust laws," *id.* at 214. However, the Supreme Court has stated that, while "[t]he rationales underlying . . . *Illinois Brick* will not apply with equal force in all cases[, w]e nonetheless believe that ample justification exists for our stated decision not to 'carve out exceptions to the [direct purchaser] rule for particular types of markets.' " *Id.* at 216 (second alteration in original) (quoting *Illinois Brick*, 431 U.S. at 744). "[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." *Id.* at 217; *see also Del. Valley,* 523 F.3d at 1124 ("The Court's firm rule does not provide us the leeway to make a policy determination on a case-by-case basis as to whether standing should be recognized when there are special business arrangements.").

While the Supreme Court has expressed reluctance in carving out exceptions to the *Illinois Brick* rule, limited exceptions do exist. First, the Supreme Court recognized standing for indirect purchasers when a preexisting cost-plus contract with the direct purchaser exists. *Illinois Brick,* 431 U.S. at 736; *UtiliCorp,* 497 U.S. at 217–18. Second, indirect purchasers may have standing under a "co-conspirator" exception. 2A Phillip E. Areeda et al., *Antitrust Law* ¶346h (3d ed. 2007). The court explained this exception, stating that "an indirect purchaser may bring suit where he establishes a price-fixing conspiracy between the manufacturer and the middleman." *Del. Valley,* 523 F.3d at 1123 n.1 (citing *Arizona v. Shamrock Foods, Co.,* 729 F.2d 1208, 1211 (9th Cir. 1984)). However, for the indirect purchaser to merit standing under this exception, the conspiracy must fix the price paid by the plaintiffs. *Shamrock Foods,* 729 F.2d at 1211. Third, indirect purchasers may sue when customers of the direct purchaser own or control the direct purchaser, *Illinois Brick,* 431 U.S. at 736 n.16, or when a conspiring seller owns or controls the direct purchaser, *Royal Printing Co. v. Kimberly-Clark Corp.,* 621 F.2d 323, 326 (9th Cir. 19[8]0). For example, an indirect purchaser may sue if the direct purchaser is a division or subsidiary of the price-fixing seller. *Id.* In *Freeman*, our court may have outlined a fourth exception, that "indirect purchasers can sue for damages if there is no realistic possibility that the direct purchaser will sue," relying on the seller's control of the direct purchaser. *Freeman*, 322 F.3d at 1145–46 (citing *Royal Printing Co.,* 621 F.2d at 326). However, whether there is such an exception is unclear, because we held that standing existed in *Freeman* based on the control or co-conspirator exceptions.[3] See *id.*

In this case, the parties argue over the contours of these exceptions. But after review, none of the exceptions allow Plaintiffs to avoid "run[ning] squarely into the *Illinois Brick* wall." *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1049 (9th Cir. 2008).

A. Indirect Purchasers

Plaintiffs argue that they should be considered as direct purchasers or fit within the co-conspirator exception, because the foreign ATM fee they have paid is an illegally fixed fee as defined by antitrust law.[4] However, Plaintiffs concede that they have never directly paid interchange fees. Instead, card-issuing banks (including Bank Defendants) pay interchange fees and then include them when they charge foreign ATM fees (alleged by Plaintiffs to be artificially inflated). In other words, the Bank Defendants pass on the cost of the interchange fees through the foreign ATM fees. The district court found Plaintiffs to be indirect purchasers, because they do not directly pay the fixed interchange fee, labeled by the district court as the alleged "unlawful fee." *In re ATM Fee Antitrust Litig.*, 2010 WL 3701912, at *5. The district court found it important that "Plain-

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[3] "[T]he exception that [*Freeman*] purported to recognize is not yet one acknowledged by the Supreme Court, which has thus far been indifferent to the question whether the direct purchaser is likely to sue. What the [Ninth Circuit] was really describing was a 'control' or perhaps a 'co-conspirator' exception." 2A Phillip E. Areeda et al., *Antitrust Law* ¶ 346f (3d ed. 2007).

[4] Although the argument touches upon the initial inquiry whether Plaintiffs are indirect purchasers, we address the argument within our discussion of the co-conspirator exception.

tiffs do not allege that the Defendants or any other banks have conspired to fix the foreign ATM fee that the Plaintiffs must pay." *Id.* at *2. We agree with the district court that Plaintiffs are indirect purchasers.

B. Exceptions to Illinois Brick

1. No Preexisting Cost-Plus Contract

Plaintiffs do not contend that they had a preexisting cost-plus contract with Defendants. Therefore, this exception, allowing indirect purchasers to sue when they have a preexisting cost-plus contract with the direct purchaser, *Illinois Brick,* 431 U.S. at 736; *UtiliCorp*, 497 U.S. at 217–18, does not apply here.

2. Co-Conspirator Exception and the Price "Fixed"

This co-conspirator exception allows an indirect purchaser to sue when co-conspirators set the price paid by the plaintiff. 2A Phillip E. Areeda et al., *Antitrust Law* ¶346h ("*Illinois Brick* does not limit suits by consumers against a manufacturer who illegally contracted with its dealers to set the latter's resale price. The consumer plaintiff is a direct purchaser from the dealer who . . . has conspired illegally with the manufacturer with respect to the very price paid by the consumer." (footnote omitted)).

Specifically, our circuit has outlined this exception in *Shamrock Foods* as applying when the direct purchaser conspires horizontally or vertically to fix the price paid by the plaintiffs. 729 F.2d at 1211. In *Shamrock Foods*, consumers alleged that retail grocery stores conspired with dairy producers, who also sold directly to consumers, to fix the retail prices of dairy products. *Id.* *Illinois Brick* did not apply, because "the retail price was the one fixed," and thus, the "theory of recovery d[id] not depend on pass-on damages." *Id.; see also id.* at 1214 ("The consumers confine their claim for damages . . .

solely to that overcharge resulting from a retail level price-fixing conspiracy. There is no need to apportion that overcharge because it was not passed on to the consumers through any other level in the distribution chain."). As the district court aptly noted, this co-conspirator exception is not really an exception at all. *In re ATM Fee Antitrust Litig.,* 2010 WL 3701912, at *6; *see also* 2A Phillip E. Areeda et al., *Antitrust Law* ¶346h ("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." (footnote omitted)). If the direct purchaser conspires to fix the price paid by the plaintiffs, then the plaintiffs pay the fixed price directly and are not indirect purchasers (i.e., there is no pass-on theory involved). *See Shamrock Foods,* 729 F.2d at 1211–12.

Here, the district court found *Shamrock Foods* inapplicable, because

> Plaintiffs in this case, unlike the plaintiffs in *Shamrock Foods*, do not allege that Defendants conspired to fix the price Plaintiffs paid (*i.e.*, the foreign ATM fee). Instead, Plaintiffs allege that Defendants fixed the interchange fee that Star Network pay one another and then passed along the artificially inflated fee to Plaintiffs. Thus, unlike *Shamrock Foods*, Plaintiffs' theory of recovery expressly depends on pass-on damages. . . . In short, the *Shamrock Foods* exception applies where the Defendants have conspired to fix the price that Plaintiffs paid directly. That is not the case here.

In re ATM Fee Antitrust Litig., 2010 WL 3701912, at *6 (internal quotation marks and alterations omitted). We agree with the district court.

As we emphasized in *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, the price paid by plaintiffs must be fixed. *Kendall* applies particularly well to this case, because it involved similar allegations and fee structures. In *Kendall*, merchants sued credit card companies (or Consortiums) and banks, alleging that they conspired to set the transaction fee charged to merchants for each retail transaction—i.e., the merchant discount fee—by setting the interchange fees charged by the Consortiums to the issuing banks. *Id*. at 1049. The merchant plaintiffs alleged that setting the interchange fees "establish[ed] a minimum amount for the merchant discount fees." *Id.* However, the merchant plaintiffs "[ran] squarely into the *Illinois Brick* wall," with respect to interchange fees, because they were not charged the interchange fee directly. *Id.* Also, "[a]ppellants allege[d] the Consortiums indirectly establish[ed] the minimum merchant discount fee the Banks charge[d] Merchants." *Id.* "[T]his allegation [was] barred by *Illinois Brick* to the extent that the Consortiums d[id] not directly set the merchant discount fee; the acquiring bank sets that fee." *Id*. More importantly, the *Kendall* plaintiffs alleged that the credit card companies directly conspired with the banks *to set the merchant discount fee*, so they should have standing under the co-conspirator exception. *Id*. at 1050. Critically, the plaintiffs alleged a conspiracy to fix the price paid by the plaintiffs. *Id.* Although the court rejected the argument because plaintiffs provided no facts to support such a conspiracy, the court found significant the fact that the plaintiffs did "not allege any facts showing the Consortiums have any direct control over the merchant discount fee the acquiring bank chooses to charge. . . ." *Id.*

The *Kendall* plaintiffs failed to show a conspiracy "to set merchant discount fees," and "appellants [did] not allege any facts showing the Consortiums ha[d] any direct control over the merchant discount fee." *Id.* As such, *Kendall* reaffirmed that the co-conspirator exception applies when the conspirators set the price paid by the consumer. The same analysis applies in our case. Here, while Plaintiffs allege a conspiracy to set interchange fees, they fail to show a conspiracy to set foreign ATM fees. Plaintiffs do not allege that STAR has control to set foreign ATM fees. Further, Bank Defendants have no control over the foreign ATM fees of other Bank Defendants or STAR members.

The Fourth Circuit also requires that plaintiffs allege a conspiracy to fix the price paid by the plaintiffs. *Dickson v. Microsoft Corp.,* 309 F.3d 193 (4th Cir. 2002). In *Dickson*, computer purchasers alleged that license agreements between computer sellers and Microsoft

> resulted in supracompetitive prices for Microsoft's operating system and application software. [Computer purchasers do] not allege any conspiracy between Microsoft and the OEM Defendants to set the resale price of the software. Instead, [they] claim[ ] that overcharges were passed on to the consumers by the OEM Defendants when the consumers purchased personal computers (PCs) from the OEM Defendants.

309 F.3d at 200. As such, *Dickson* held the claim it faced to be "materially indistinguishable from the claim under consideration in *Illinois Brick*, and [the plaintiffs'] inclusion of a conspiracy allegation [was] insufficient to circumvent the *Illinois Brick* rule." *Id.* at 215. *Dickson* acknowledged the trend of recognizing a co-conspirator exception. *Id.* at 214–15. However, the court "interpret[ed] these cases as standing for the more narrow

proposition that *Illinois Brick* is inapplicable to a particular type of conspiracy—price-fixing conspiracies." *Id.* at 215. In other words, the court concluded that only a conspiracy to fix the price paid by the consumer is an exception to *Illinois Brick*, because it is "grounded on the damages theory underlying the alleged conspiracy"—i.e., "no overcharge has been passed on to the consumer." *Id.* *Dickson* refused to recognize an exception when plaintiffs allege a conspiracy but the conspirators did not fix the price paid by the plaintiffs, because such an action would be contrary to the Supreme Court's direction not to carve out exceptions to the *Illinois Brick* rule. *Id.* at 214 (citing *UtiliCorp*, 497 U.S. at 216 ("We . . . believe that ample justification exists for our stated decision not to 'carve out exceptions to the [direct purchaser] rule for particular types of markets.'" (quoting *Illinois Brick*, 431 U.S. at 744))).

Although *Dickson* cites *Shamrock Foods* as an example of the co-conspirator exception, *id.* at 214–15, *Shamrock Foods* parallels *Dickson's* understanding that the exception only applies when the co-conspirators fix the price paid by the plaintiff. *Shamrock Foods* held that *Illinois Brick* does not apply when co-conspirators fix the retail price paid by consumers because the "theory of recovery does not depend on pass-on of damages. . . ."[5] *See* 729 F.2d at 1211. *Shamrock Foods* then indicates that a conspiracy to fix upstream prices relies on the pass-on damages *Illinois Brick* prohibits. *See id.* There-

[5] Plaintiffs argue that *Delaware Valley* construed *Shamrock Foods* to mean that plaintiffs have standing by "establish[ing] a price-fixing conspiracy between manufacturer and middleman—without regard to the price at issue." But *Delaware Valley* only discussed *Shamrock Foods* in a passing footnote and did not describe the scope of the price-fixing conspiracy. *Delaware Valley*, 523 F.3d at 1123 n. 1.

fore, we agree with the Fourth Circuit and decline to extend the co-conspirator exception past the situation when alleged co-conspirators set the price paid by the plaintiffs.

Plaintiffs argue that they have standing here, because Defendants conspired to fix interchange fees for the purpose and effect of fixing foreign ATM fees. In sum, Plaintiffs argue that the foreign ATM fee was "fixed," because

> [w]hen the term 'fix prices' is used, that term is used in its larger sense. A combination or conspiracy formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity in interstate commerce is unreasonable per se under the Sherman Act.

Plymouth Dealers' Ass'n of N. Cal. v. United States, 279 F.2d 128, 132 (9th Cir. 1960); *see also Palmer v. BRG of Ga., Inc.,* 498 U.S. 46, 48 (1990) (per curiam). Plaintiffs argue that Defendants conspired to fix interchange fees for the purpose of raising foreign ATM fees. Therefore, Defendants fixed the foreign ATM fees (which Plaintiffs directly paid), and Plaintiffs have standing.

However, Plaintiffs' argument hinges on what it means to "fix" a price. The district court and Defendants suggest that, in the *Illinois Brick* context, fixing a price sets the price directly paid, not a price la[ ]ter passed-on as part of the price at issue. However, Plaintiffs argue that conspiring to set a price for the purpose and effect of raising the price at issue equates to fixing that price and makes the payers of the raised price direct purchasers.

Plaintiffs' argument misses the mark. *Illinois Brick* rejected this argument when it rejected "mark up" claims. *See* 431 U.S. at 744. Plaintiffs' argument recharacterizes the "mark up" claim by alleging that the Defendants imposed fixed interchange fees for the purpose of marking up foreign ATM fees. Plaintiffs' argument differs little from the argument that a fixed percentage mark up or a price-fixed good used in the ultimate product should allow indirect purchasers to sue, because the price ultimately paid by Plaintiffs includes the fixed costs. However, the Supreme Court expressly rejected such arguments, based largely on the reasoning that "[f]irms in many sectors of the economy rely to an extent on cost-based rules of thumb in setting prices . . . [and t]he intricacies of tracing the effect of an overcharge on the purchaser's prices, costs, sales, and profits . . . are not spared the litigants." *Id.* Further, Plaintiffs do not allege here that the banks agreed to fix the level of the "mark up" in the foreign ATM fees or even whether such fees would be charged at all. The third amended complaint states that "Defendants have continued to impose fixed Interchange Fees because the Bank Defendants mark them up to set Foreign ATM Fees, which generate substantial revenues for Bank Defendants." Plaintiffs allege a mark up of foreign ATM fees to pass on the interchange fees. The allegation contradicts *Illinois Brick*, because *Illinois Brick* rejected exceptions for markups by middlemen or when the price-fixed good is a vital input to a larger product. 431 U.S. at 743-45.

Moreover, Plaintiffs' cited precedent does not support the argument that foreign ATM fees were fixed. *See Plymouth Dealers' Ass'n,* 279 F.2d at 132; *Palmer,* 498 U.S. at 48. Neither case involved the question of who is injured under § 4 of the Clayton Act or pass-on theories. In *Plymouth Dealers' Ass'n*, car dealers agreed to a fixed price list that would be the starting point for bargaining. 279 F.2d at 132. In *Palmer*, competitors agreed to give one of them the exclusive rights to Georgia. 498 U.S. at 47–48. Neither involved passing on the price fixed through the price paid by the plaintiffs. Both cases determined what constituted fixing prices under § 1 of the Sherman Act. *See, e.g.*, *Plymouth Dealers' Ass'n,* 279 F.2d at 132 (holding that conspiring to raise, depress, fix, peg, or stabilize a price "is unreasonable per se under the *Sherman Act*" (emphasis added)).

However, as in *Illinois Brick*, our task involves determining whether Plaintiffs are injured within the meaning of § 4 of the Clayton Act. *See Illinois Brick*, 431 U.S. at 723–26. Section 4 of the Clayton Act provides: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue. . . ." 15 U.S.C. § 15(a). Therefore, *Plymouth Dealers' Association* and *Palmer* decided what constitutes "anything forbidden in the antitrust laws," while *Illinois Brick* decided whether injury results based on a pass-on theory. See *Illinois Brick*, 431 U.S. at 729 ("[T]he overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the party 'injured in his business or property' within the meaning of [§ 4 of the Clayton Act]. . . ."). In sum, the price paid by plaintiffs must be the price set (not merely "fixed" in some broad sense) for plaintiffs to be a direct purchaser under the narrowly defined injury requirement of § 4 of the Clayton Act. Further, under the co-conspirator exception recognized in this circuit, the price paid by a plaintiff must be set by the conspiracy and not merely affected by the setting of another price. *See Shamrock Foods*, 729 F.2d at 1211.

Plaintiffs cite *Knevelbaard Dairies v. Kraft Foods, Inc.,* 232 F.3d 979 (9th Cir. 2000), for the proposition that Defendants effectively fixed foreign ATM fees by fixing interchange fees, which thus gives Plaintiffs standing. However, Plaintiffs inappropriately rely on *Knevelbaard*, because *Knevelbaard* found antitrust injury under California's Cartwright Act, which "is enlarged, by statute, in comparison to federal law." *Id.* at 991. "As a result, the more restrictive definition of antitrust injury under [*Illinois Brick*] does not apply to the Cartwright Act." *Id.* (internal quotation marks omitted). Because "California law affords standing more liberally than does federal law," *Knevelbaard* did not decide whether antitrust injury, or standing, existed under *Illinois Brick. See id.* at 987.

Lastly, *Freeman* fails to support Plaintiffs' argument that the foreign ATM fees were "fixed." In *Freeman*, realtor associations formed a single MLS[6] database r[u]n by Sandicor, a corporation they created, owned, and controlled. 322 F.3d at 1141, 1146. The plaintiffs alleged that the associations conspired to fix support fees charged to Sandicor, and that these fees inflated the MLS fees charged by Sandicor and paid by plaintiffs. *Id.* at 1142. The associations fixed the support fees charged to Sandicor, and Sandicor set the MLS fees charged to subscribers. *Id.* at 1141, 1145. *Freeman* held that fixing the support fees artificially inflated th[e] MLS fees paid by the plaintiffs. *See Freeman*, 322 F.3d at 1145.

Contrary to Plaintiffs' argument, *Freeman* demonstrates that fixing one fee for the purpose and effect of inflating another fee does not make the purchaser a direct purchaser under *Illinois Brick*. In *Freeman*, the

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[6] "[T]he Multiple Listing Service, or 'MLS,' [ ] lets agents share information about properties on the market with the help of a computerized database. Agents who subscribe to the MLS can peruse the listings of other subscribers and post their own." *Freeman*, 322 F.3d at 1140.

court was forced to find an exception to *Illinois Brick* even though the court found price fixing by setting the support fees and passing them on through MLS fees. *Id.* at 1145–46. Therefore, in the context of *Illinois Brick*, fixing an upstream cost did not equate to fixing the price paid by the plaintiffs. Standing existed in *Freeman,* not because the associations fixed the support fees for the purpose and effect of raising MLS fees, but because of the associations' ownership and control of Sandicor (the direct purchaser). *Id.* at 1145–46 (citing *Royal Printing*, 621 F.2d at 326).

Plaintiffs argue *Freeman* relies on the co-conspirator exception, because the court noted that the associations, in essence, had agreed to have the MLS charge be $44. *See* 322 F.3d at 1146 (comparing the case to resale price maintenance and noting that "Defendants can't turn a horizontal agreement to fix prices into something innocuous just by changing the way they keep their books"). However, even if *Freeman* applied the co-conspirator exception, it does not help Plaintiffs. The defendants in that case conspired to effectively set the price paid by the customers of the MLS. *See id.* (associations effectively "agree[d] among themselves to resell [MLS database access] with support services for exactly $22.50"). Here, unlike *Freeman*, the Bank Defendants independently set the fee paid by Plaintiffs (i.e., foreign ATM fee) and the amount of such fee varies between Bank Defendants. As such, Defendants have not conspired to set the foreign ATM fees unlike the associations in *Freeman* effectively setting the price for Sandicor's MLS service.

Plaintiffs next argue that they have standing, because they "purchased directly from price-fixing Defendants," an argument closely related to the argument that the foreign ATM fees were "fixed." In other words, Plaintiffs argue that the direct purchaser Bank Defendants conspired to fix the interchange fees (an upstream cost), so Plaintiffs purchased from a horizontal price fixing conspirator. They argue *Illinois Brick* does not apply even though Defendants did not fix the price Plaintiffs directly paid, because they are purchasing from a violator. However, because *Shamrock Foods* only involved the setting of the price actually paid (and not an upstream price that was then passed on), we would have to extend our current co-conspirator exception. Though other courts have,[7] we decline to do so.

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[7] In *In re TFT–LCD (Flat Panel) Antitrust Litigation*, the Northern District of California held that a purchaser of a finished TFT–LCD product was a direct purchaser, even though "the alleged price-fixing conspiracy existed only with regard to TFT–LCD panels, and not finished products." 267 F.R.D. 291, 306–07 (N.D. Cal. 2010). The district court classified consumers of the final products as direct purchasers because they "purchase[d] directly from the alleged violator." *Id.* at 307 (quoting *In re Sugar Indus. Antitrust Litig.*, 579 F.2d 13, 17 (3d Cir. 1978)). In support of the conclusion, the Northern District of California cited two Third Circuit cases.

In *In re Sugar Industries Antitrust Litigation*, the Third Circuit classified candy wholesalers as direct purchasers because the candy manufacturers also refined sugar (sugar refiners being the alleged violators). 579 F.2d at 17–18. In *In re Sugar Industries*, the plaintiff "limited the issue to the summary judgment only insofar as it affects the direct purchases of candy from defendants," because "in the face of *Illinois Brick* . . . plaintiff has no hope of success on the purchases from nondefendants." *Id*. at 16. Thus, *In re Sugar Industries* actually exemplifies the exception allowed when an upstream violator controls or owns the direct purchaser, which is discussed in more detail below. *See id*. at 18–19; 2A Phillip E. Areeda et al., *Antitrust Law* ¶ 346f & n. 41.

Later, in *In re Linerboard Antitrust Litigation,* the Third Circuit classified purchasers of corrugated sheets and boxes as direct purchasers of linerboard (which was included in the purchased corrugated sheets and boxes), because the linerboard was subject to

Based on our precedent in *Kendall* and *Shamrock Foods*, we recognize the co-conspirator exception only when the conspiracy involves setting the price paid by the plaintiffs. Therefore, as the district court concluded, the exception does not apply, because the theory of recovery depends on pass-on damages. We decline to extend the co-conspirator exception further. As in *Kendall*, Plaintiffs "run into the *Illinois Brick* wall," because Plaintiffs do not pay interchange fees directly and the Bank Defendants independently set foreign ATM fees.

3. Ownership and Control and Freeman's "No Realistic Possibility that Direct Purchasers Will Sue"

Royal Printing allowed indirect purchasers to sue "where a direct purchaser is a division or subsidiary of a co-conspirator." 621 F.2d at 326. *Royal Printing* created an exception when parental control existed, because applying *Illinois Brick* "would eliminate the threat of private enforcement," *id.* at 326 n.7, and "close off every avenue for private enforcement," *id.* at 327. "The co-conspirator parent will forbid its subsidiary or division to

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a price-fixing agreement. 305 F.3d 145, 158–60 (3d Cir. 2002) ("*Illinois Brick* . . . bans Clayton Act lawsuits by persons who are not direct purchasers from the defendant antitrust violator."). Similarly, the Seventh Circuit has held that "the first purchaser[ ] from *outside* the conspiracy" may sue. *Paper Sys. Inc. v. Nippon Paper Indus. Co.,* 281 F.3d 629, 631–32 (7th Cir. 2002). Thus, these cases restrict *Illinois Brick's* influence by allowing an exception when the direct purchaser conspires with the seller, even though the price illegally set is an upstream cost that is passed-on to the plaintiffs. This contradicts the Supreme Court's admonition "not to 'carve out exceptions to the [direct purchaser] rule for particular types of markets.'" *UtiliCorp,* 497 U.S. at 216 (quoting *Illinois Brick*, 431 U.S. at 744).

bring a lawsuit that would only reveal the parents own participation in the conspiracy." *Id*. at 326. In our case, neither Bank Defendants nor STAR are divisions or subsidiaries of the other. However, Plaintiffs argue that the exception in *Royal Printing* should, as construed in *Freeman*, 322 F.3d at 1145–46, apply in any event. We disagree.

Freeman, citing *Royal Printing*, enunciated the exception as follows: "[I]ndirect purchasers can sue for damages if there is no realistic possibility that the direct purchaser will sue its supplier over the antitrust violation." *Freeman*, 322 F.3d at 1145–46. However, *Freeman* did not create a new variation of the *Royal Printing* exception, because Freeman relied on ownership and control to find standing. *Id.* at 1146 ("The associations own Sandicor . . . , [t]hey appoint its board of directors, and they are accused of conspiring with it."); *id.* at 1146 n.12 ("*Royal Printing* applies because the associations own Sandicor."). In *Freeman*, the co-conspiring realtor associations owned and controlled Sandicor (the direct purchaser) and had the power to appoint Sandicor's board of directors. *Id*. Thus, in *Freeman*, we found no realistic possibility of suit, because the associations owned and controlled the direct purchaser.[8] *Id*. at 1146. Therefore, *Freeman* outlines that, whether a realistic possibility of suit exists, depends on the existence of ownership or control between the direct purchaser and the seller. *See, e.g.*, *Royal Printing*, 621 F.2d at 326 n.7 ("[I]f Royal Printing is . . . barred

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[8] *Freeman* concludes the paragraph discussing the exception by stating that "[t]here's no realistic possibility Sandicor will sue them," but in the corresponding footnote the court finds *Royal Printing* applicable because of the associations *ownership* of Sandicor. 322 F.3d at 1146 n. 12.

[from suing], and the *controlled* wholesalers will not sue, the appellees' transactions would be immune from private antitrust enforcement." (emphasis added)).

We do not overlook that Plaintiffs argue that there is no realistic possibility that the Bank Defendants will sue STAR or their co-defendants, because the district court preliminarily denied the Defendants' motion to dismiss (on September 4, 2009) on such grounds. *In re ATM Fee Antitrust Litig.*, 768 F. Supp. 2d at 991–92. However on summary judgment (with more information in the record than at the time of the motion to dismiss), the district court subsequently found a lack of standing, because there was a realistic possibility of suit by pure-payer (and net-payer) direct purchasers of the interchange fee.[9] *In re ATM Fee Antitrust Litig.*, 2010 WL 3701912.

In *Royal Printing* and *Freeman*, the ownership or control of the direct purchasers by the conspiring sellers created no realistic possibility of suit. Here, Plaintiffs do not allege that STAR owns or controls Bank Defendants or that Bank Defendants own or control other Bank Defendants. Thus, this case does not involve a lack of a realistic possibility of suit because of the seller (STAR) prohibiting the direct purchasers (Bank Defendants) from suing through its ownership or control, as found in *Royal Printing* and *Freeman*. Instead, this case deals with whether a realistic possibility of suit exists when a

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[9] We do not rely on the same reasoning as the district court, because *Royal Printing* may cast some doubt on the district court's conclusion. In *Royal Printing*, we found that the plaintiffs had standing to sue for the purchases they had made from wholesalers controlled by the paper manufactures even though the plaintiffs also made purchases from independent wholesalers. *Royal Printing*, 621 F.2d at 324, 327–28.

direct purchaser conspires with the seller to set a cost passed-on to Plaintiffs. We decline to extend the exception noted in *Royal Printing* and *Freeman* to situations where the seller does not own or control the direct purchasers, because, after *Royal Printing*, the Supreme Court stated that "[t]he possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule." *UtiliCorp*, 497 U.S. at 216; *see* 2A Phillip E. Areeda et al., *Antitrust Law* ¶346h ("[T]he Supreme Court . . . has thus far been indifferent to the question whether the direct purchaser is likely to sue. . . .").

Plaintiffs argue that Bank Defendants owned or controlled STAR. The applicable statute does not define control. Therefore, we construe it in its ordinary, contemporary, and common meaning. *United States v. Bennett*, 621 F.3d 1131, 1139 n.2 (9th Cir. 2010). Control means "'to exercise restraint or direction over; dominate, regulate, or command,'" *id.* (quoting Webster's College Dictionary 297 (Random House 1991)), or to have "the 'power or authority to guide or manage,'" *id.* (quoting Webster's New Collegiate Dictionary 285 (9th ed. 1983)).

Plaintiffs' outline sources purported to show that Bank Defendants' ownership and control of STAR foreclosed a realistic possibility of suit. However, Bank Defendants did not control STAR after Concord, a publicly owned Delaware corporation, purchased STAR on February 1, 2001.[10] Former stockholders of STAR owned, in aggregate, approximately ten percent of Concord's

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[10] As for the time period from July 2, 2000, to February 1, 2001, there are no allegations that Bank Defendants controlled one another or conspired to fix foreign ATM fees. As such, the concern in *Royal Printing* of a controlling party prohibiting the direct purchaser from suing is not present here.

outstanding common stock after the merger. Because of Concord's widely disbursed ownership and Bank Defendants' small ownership percentage, Bank Defendants had insufficient ownership interests to control Concord and thus STAR. *Cf. Weinstein Enters., Inc. v. Orloff,* 870 A.2d 499, 506–08 (Del. 2005) (in finding that a fiduciary duty exists, a shareholder must have control of the affairs of the corporation, which does not exist unless the shareholder owns a majority of the stock or has actual control over the corporation's conduct); *Kaplan v. Centex Corp.,* 284 A.2d 119, 122–23 (Del. Ch. 1971) ("A plaintiff who alleges domination of a board of directors and/or control of its affairs must prove it. Stock ownership alone, at least when it amounts to less than a majority, is not sufficient proof of domination or control." (citation omitted)). Moreover, the language added to STAR's agreement with its members does not create control, because (1) it is a negotiated agreement between STAR and its members, and (2) STAR still has the ultimate power to change interchange fees based on market conditions. The language essentially protects Bank Defendants from arbitrary changes, but Concord has the power to change interchange fees if changes are reasonably related to prevailing market conditions. Likewise, the Network Advisory Board (composed of large member banks like Bank Defendants) does not create control, because it had no power to set interchange fees or to control Concord's board. The Network Advisory Board has influence, because it represents the views of large member banks. However, input on policies and pricing issues by interested members does not constitute the type of control necessary to meet the exception to *Illinois Brick. See Freeman,* 322 F.3d at 1145–46 (control existed from ownership); *cf. Werner v. Miller Tech. Mgmt., L.P.*, 831 A.2d 318, 328 (Del. Ch.

2003) ("The ability to offer ideas [by the Advisory Board] cannot be construed as an ability to manage the affairs of Interprise."). As a Delaware corporation, Concord's board of directors has the power, authority, and responsibility to manage the corporation. Del. Code Ann. tit. 8, § 141. Therefore, to control STAR, the Bank Defendants must have had control of Concord's board of directors, which is not demonstrated here.

CONCLUSION

For these reasons, we AFFIRM the district court's summary judgment. Plaintiffs lack standing to seek damages for the alleged antitrust violations.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

NO. C 04-02676 CRB

IN RE ATM FEE ANTITRUST LITIGATION,
PAMELA BRENNAN *et al.*,

Plaintiffs,

v.

CONCORD EFS, INC. *et al.*,

Defendants.

Order Granting Defendants' Motion For Summary Judgment

SEPTEMBER 16, 2010

CHARLES R. BREYER, District Judge:

In this longstanding antitrust action, Defendants have moved for summary judgment on the issue of whether Plaintiffs lack standing to bring an antitrust claim for damages under the rule set forth in *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977). For the reasons explained below, the Court agrees with Defendants that Plaintiffs, as indirect purchasers of the allegedly fixed fee at issue in this case, lack standing to bring a claim for damages under *Illinois Brick*. Accordingly, the Court GRANTS

Defendants' motion and dismisses Plaintiffs' damages claims.[1]

BACKGROUND

A. Overview

This case concerns fees that are generated when a customer of one bank withdraws money from his or her account by using an automated teller machine ("ATM") owned by another bank or by an independent ATM operator. Such "foreign ATM transactions" involve four parties: (1) the "cardholder," *i.e.*, the customer who retrieves money from the ATM machine; (2) the "card-issuer bank," *i.e,* the bank at which the customer holds an account and from which the customer has received an ATM card; (3) the "ATM owner," *i.e.*, the entity that owns the ATM machine from which the customer withdraws money from his account; and (4) the "ATM Network," *i.e.*, an entity that owns a network that connects the ATM owners with the card-issuing banks. The ATM Network administers agreements between various card-issuer banks and ATM owners and thereby ensures that customers can withdraw money from one network member's ATM as readily as from another.

A single foreign ATM transaction generates up to four fees. Generally, a customer must pay two fees—one to the ATM owner for use of that entity's ATM machine (known as a "surcharge") and one to the bank at which he has an account (known as a "foreign ATM fee"). The card-issuer bank also pays two fees. It pays one of these

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[1] In light of the Court's conclusion that Plaintiffs lack standing to bring a damages claim, Plaintiffs' Motion for Reconsideration of September 4, 2009 Order and Defendant Bank of America, N.A.'s Motion to Dismiss Plaintiffs' Third Amended Complaint, both of which concern the amount of damages Plaintiffs may seek from Bank of America, N.A., are DENIED as moot.

fees, known as a "switch fee," to the ATM Network that routed the transaction. It pays a second fee, known as an "interchange fee," to the owner of the foreign ATM.

To illustrate the above concepts, assume that a Bank of America customer withdraws money from her account at a Wells Fargo ATM and that the transaction is routed over the Star ATM Network. Generally, Wells Fargo will charge Bank of America's customer a "surcharge" at the time of the transaction for using its ATM. Wells Fargo will also later collect an "interchange fee" from Bank of America for allowing Bank of America's customer to withdraw cash from its ATM. Bank of America also pays the Star Network a "switch fee" for routing the transaction. Lastly, Bank of America will, in some cases, charge its customer a "foreign ATM fee" for using a non-Bank of America ATM.

Only two of the four fees are involved in this case: the "interchange fee" that the card-issuing bank pays to the ATM owner and the "foreign ATM fee" that the customer pays to his or her bank for using a foreign ATM. Plaintiffs, a putative class of bank customers, allege that Defendants, the Star ATM Network and several large banks[2], have conspired to illegally fix the interchange fee that the card-issuer bank pays to the ATM owner.

Critically, Plaintiffs do *not* allege that Defendants have conspired to illegally fix the foreign ATM fee that Plaintiffs pay to their bank when they use a foreign ATM. Instead, Plaintiffs assert that their banks pay an unlawfully inflated interchange fee and then pass the cost

[2] The bank Defendants are Bank of America, N.A., JPMorgan Chase Bank, N.A., Citibank, N.A., Suntrust, and Wells Fargo Bank, N.A./Wachovia. Third Amended Complaint ¶¶ 17-29.

of the artificially high interchange fee along to them through foreign ATM fees.

The interchange fee, though paid by a card-issuing bank to an ATM owner, is established by the ATM Network that routes the foreign ATM transaction between the card-issuing bank and the ATM owner. Moreover, although there are as many as twenty-five such networks, Plaintiffs' lawsuit concerns only the largest one, the Star ATM Network. Plaintiffs allege that the bank Defendants, acting through Star's Board, have unlawfully fixed the interchange fee that members of the Star Network charge one another for each transaction routed over Star. Since 2003, Star has set the interchange fee at $0.46 for on-premises transactions (*i.e.*, transactions at ATMs deployed on a bank's premises) and $0.54 for off-premises ATM transactions.

To reiterate: Plaintiffs allege that several large banks have conspired with Star to fix the interchange fee that a card-issuing bank pays to an ATM owner when a foreign ATM transaction involving the card-issuing bank's customer is routed over the Star Network. As a result of this alleged "price fix," interchange fees are, Plaintiffs maintain, higher than they would otherwise be.

Plaintiffs, however, do not pay this allegedly unlawful fee directly (their banks do) and therefore are not directly harmed by it. Rather, Plaintiffs assert that their respective banks pass on this inflated fee to them in form of higher foreign ATM fees. Importantly, Plaintiffs do not allege that the Defendants or any other banks have conspired to fix the foreign ATM fee that the Plaintiffs must pay.

As just described, Plaintiffs' case focuses on the interchange fee that members of the Star Network charge one another when the customer of one member uses an ATM owned by another member. Because Plaintiffs' case centers on the Star Network, a brief description of the Star ATM Network, which connects ATM owners and ATM card-issuers, is necessary.

The Star Network has 4,750 members who collectively own 380,000 ATMs nationwide. *See* Sawicki Decl. ¶3. These members can be roughly divided into three groups. The first group is made up of so-called "Independent Service Organizations" ("ISOs"). *Id*. at ¶¶8, 20. ISOs own ATMs, but they are not banks and do not issue ATM cards. Examples of ISOs include grocery stores and gas stations that have installed an ATM on their premises.

The second group is, in some sense, the polar opposite of the ISOs. This group consists of financial institutions that accept deposits and issue ATM cards, but do not own any ATMs themselves. *Id.* at ¶13. This group includes, for example, many credit unions and internet banks. *Id.* at ¶15. Approximately 1,000 Star members fall within this group. *Id.* at ¶15.

The third, and largest, Star Network member group are financial institutions, like the bank Defendants, that both issue ATM cards and own ATMs. At least 3,100 Star Network members are in this category. *Id.* at ¶16.

Interchange fees are, as already noted, paid by members of the Star Network to other members of the Star Network. Thus, among members of the Star Network, the payment and receipt of interchange fees is a zero sum game. Every dollar in interchange fees that is paid by one member is received by another, and vice versa.

Moreover, although the "net cost" of interchange is zero when aggregated across the Star Network membership (*i.e.,* total payments equal total receipts), the distribution of interchange fee payments and receipts is not evenly distributed between the three groups just discussed. For example, because ISOs own ATMs, but do not issue ATM cards, they *only* receive interchange fees. They never pay them. *Id.* at ¶8, 20. By contrast, the second group mentioned above *only* pays interchange fees because they do not own any ATM that would generate fees. *Id.* at ¶13. In short, ISOs are "pure receivers" of interchange fees, while entities in the second group are "pure payers" of interchange.

The third and final group falls somewhere in between. Because financial institutions in this group both own ATMs and issue ATM cards to customers who use foreign ATMs, they both pay *and* receive interchange fees. According to evidence submitted by Defendants, however, most of the entities in this last group pay more in interchange fees than they receive. *Id.* at ¶16. In other words, they are "net payers" of interchange fees. *Id.* Interestingly, all of the banks named as defendants in this lawsuit who were members of the Star Network over the past two years are substantial "net payers" of interchange.[3] *Id.* at ¶17, 18. In fact, four of the five relevant bank Defendants are among the top-five "net payers" of interchange fees among Star Network members, and the fifth paid the eleventh most. *Id.* at ¶17. Collectively, these five banks paid approximately $120 million more in interchange fees than they received over the past two years.[4]

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[3] Suntrust is the only bank Defendant who was not a member of the Star Network over the past two years. Sawicki Decl. ¶17.

[4] As an aside, the Court notes that these data cast serious doubt on the central theory of Plaintiffs' case: namely, that the bank Defendants have conspired with the Star Network to fix interchange fees at

B. Defendants' Motion for Summary Judgment

Through this lawsuit, Plaintiffs seek damages in the amount of the unlawful interchange fee that their respective banks have passed through to them in the form of foreign ATM fees. Plaintiffs therefore acknowledge that they are only indirect payers of the interchange fee and that the banks are the direct payers.

In light of this concession, Defendants have moved for summary judgment, arguing that the *Illinois Brick* rule barring indirect purchasers from recovering monetary damages in an antitrust suit applies here and precludes Plaintiffs from seeking such damages. As explained below, the Court agrees.

LEGAL STANDARD

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" only if there is a sufficient evidentiary basis on which a reasonable fact finder could find for the nonmoving party, and a dispute is "material" only if it could affect the outcome of the suit under governing law. *See*

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artificially high levels. Third Amended Complaint ¶ 93. As the data indicate, the bank Defendants pay more in interchange fees than almost all other members of the Star Network and are therefore the entities most adversely affected by such fees. As a result, it strikes th[e] Court as somewhat implausible that they would conspire to set the interchange fee at artificially high levels, in contravention to their financial interests. If anything, these entities would presumably conspire to ensure that interchange fees were set as low as possible. Because the Court does not reach the merits of Plaintiffs' claims, however, it need not address this interesting issue.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49, (1986).

The party moving for summary judgment bears the initial burden of establishing the absence of a genuine issue of material fact and can satisfy this burden by presenting evidence that negates an essential element of the non-moving party's case. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, (1986).

Once the moving party meets its initial burden, the non-moving party "may not rely merely on allegations or denials in its own pleading," but must go beyond the pleadings and, "by affidavits or as otherwise provided in [Rule 56,] set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e); *Celotex Corp.*, 477 U.S. at 324; *Valandingham v. Bojorquez*, 866 F.2d 1135, 1137 (9th Cir. 1989). In its inquiry, the court must view any inferences drawn from the underlying facts in the light most favorable to the nonmoving party, but may not engage in credibility determinations or weigh the evidence. *Anderson*, 477 U.S. at 255; *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986).

DISCUSSION

A. The *Illinois Brick* direct purchaser rule

In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the Supreme Court held that only "direct purchasers," *i.e.,* those entities that directly pay the allegedly fixed price, may recover antitrust damages. *Id.* at 736. The Court reasoned that allowing "indirect purchasers," *i.e.,* those entities to whom the direct purchaser passes on all or part of the cost of the allegedly fixed price, to recover damages would introduce into antitrust litigation substantial "evidentiary complexities and uncertainties" over the apportionment of overcharges between direct and indirect purchasers. *Id.* at 732; *see also Delaware Valley Surgical Supply Inc. v. Johnson & Johnson*, 523 F.3d 1116, 1120-21 (9th Cir. 2008). "However appealing this attempt to allocate the overcharge might seem in theory," the Court reasoned, "it would add whole new dimensions of complexity to [antitrust]-damages suits and seriously undermine their effectiveness." *Illinois Brick*, 431 U.S. at 737. The Court therefore concluded that, "on balance," the costs of permitting indirect purchasers to sue for antitrust damages outweighed the benefits. *Id.* at 746; *id*. at 735 ("[A]ntitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue. . . .").

The Supreme Court reaffirmed the direct purchaser rule in *Kansas v. UtiliCorp United Inc.,* 497 U.S. 199 (2010). In the case, the states of Kansas and Missouri, acting on behalf of individual energy consumers, initiated suits against a pipeline company and five gas production companies, alleging that the companies had conspired to fix the price of gas. *Id.* at 204. The Court held that the direct purchaser barred the states from suing to recover damages because the consumers they represented were indirect payers of the allegedly inflated gas prices. *Id.* at 207. Because the utilities from whom the consumers bought their gas were the entities that had directly paid the purportedly inflated price, "any antitrust claim against the defendants [was] . . . for the utilities to assert." *Id.*

In this case, Plaintiffs do not dispute that they pay the purportedly unlawful interchange fee only indirectly. ATM card-issuing banks, such as the bank Defendants, pay the artificially inflated interchange fee directly and then, at least according to Plaintiffs, pass some portion of it on to the Plaintiffs as part of the foreign ATM fee Plaintiffs pay. In short, card-issuing banks, like the utilities in *UtiliCorp*, are the "direct purchasers" of allegedly unlawful fee, while Plaintiffs, like the consumers in *UtiliCorp*, are "indirect purchasers."

Given that Plaintiffs are not "direct purchasers" of the purportedly unlawful fee, their damages claims are barred by the *Illinois Brick* rule, unless an exception to the rule applies. As explained below, the Court finds that no exceptions apply and that Plaintiffs' damages claims are therefore barred.

B. Exceptions to the direct purchaser rule

Courts have recognized three circumstances in which an indirect purchaser may sue for antitrust damages, despite the rule set forth in *Illinois Brick*. *See Delaware Valley,* 523 F.3d at 1123 n.1. The first situation occurs where the direct purchaser has entered into a "cost-plus" pricing contract with the indirect purchaser before the direct purchaser pays the allegedly inflated fixed price to the antitrust conspirators. *See UtiliCorp*, 497 U.S. at 217-18 (noting that "in a [pre-existing] cost-plus contract situation, . . . [t]he effect of the overcharge [to the indirect purchaser] is essentially determined in advance, without reference to the interaction of supply and demand that complicates the determination [of the amount of the pass-through] in the general case") (quotation marks and citations omitted).

This first exception is inapplicable here. Plaintiffs neither allege nor argue that they entered into a "cost-plus" pricing contract with their banks and that the banks pass along the interchange fee pursuant to such a contract.

A second "exception" to the direct purchaser rule applies where the direct purchaser has conspired with the producer to fix the price that the indirect purchaser pays. *See Arizona v. Shamrock Foods Co.*, 729 F.2d 1208, 1211 (9th Cir. 1984). This so-called "co-conspirator" exception was identified by the Ninth Circuit in *Shamrock Foods. Id.* In *Shamrock Foods*, the plaintiffs, a class of consumers, alleged that dairy producers had conspired amongst themselves and with retail grocery stores to fix the retail price of milk. *Id.* The Ninth Circuit held that *Illinois Brick* did not apply because the retail price—*i.e.*, the price that the plaintiffs had paid—was the one purportedly fixed, and, as a result, plaintiffs' "theory of recovery [did] not depend on pass-on damages." *Id.* In short, *Illinois Brick* did not apply because Plaintiffs alleged that the price they paid was the one that had been unlawfully fixed. Hence, "there [was] no need to apportion [the overcharge resulting from the price fix] because it was not passed on to the consumers through any other level in the distribution chain." *Id.* at 1214.

Strictly speaking, the co-conspirator "exception" identified in *Shamrock Foods* is not an exception to the direct purchaser rule. *Shamrock Foods* stands for the proposition that a plaintiff may sue for damages when the price that they have paid directly is the one that was unlawfully fixed. That holding is fully consistent with *Illinois Brick*, which held that a plaintiff may not sue for damages when the plaintiff has only indirectly paid the unlawfully fixed price.

However described, the *Shamrock Foods* "exception" is inapplicable here. As already discussed, Plaintiffs in this case, unlike the plaintiffs in *Shamrock Foods*, do not allege that Defendants conspired to fix the price

Plaintiffs paid (*i.e.,* the foreign ATM fee). Instead, Plaintiffs allege that Defendants fixed the interchange fee that Star Network pay one another and then passed along the artificially inflated fee to Plaintiffs. Thus, unlike in *Shamrock Foods*, Plaintiffs' theory of recovery expressly "depend[s] on pass-on damages." *Id.* at 1211. And, as a result, there exists a "need to apportion" any overcharge resulting from the inflated interchange fee between Plaintiffs and the direct purchasers, the card-issuing banks. In short, the *Shamrock Foods* exception applies where the Defendants have conspired to fix the price that Plaintiffs paid directly. That is not the case here.

The third and final circumstance in which an indirect purchaser may sue for damages is in a situation where "there is no realistic possibility that the director purchaser will sue its supplier over the antitrust violation." *Freeman v. San Diego Ass'n of Realtors,* 322 F.3d 1133, 1145-46 (9th Cir. 2003). The quintessential example of such a circumstance is one where "the direct purchaser is a subsidiary or division of a co-conspirator." *See Royal Printing Co. v. Kimberly Clark Corp.,* 621 F.2d 323, 326 (9th Cir. 1980). In such a case, the Ninth Circuit noted in *Royal Printing*, the parent-supplier is likely to "forbid its subsidiary or division [from] bring-[ing] a lawsuit that would only reveal the parent's own participation in the conspiracy." *Id.* Applying the direct purchaser in such a case would therefore "effectively immunize the [unlawful conduct of the parent] from private antitrust liability," an outcome the court in Royal Printing considered "intolerable." *Id.* Thus, the court concluded, an indirect purchaser may sue a remote supplier where "as a practical matter the chance of a direct-purchaser suit" is nonexistent. *Id.*

The Ninth Circuit found this exception applicable in *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d at 1145-46. In *Freeman*, eleven competing San Diego real estate agent associations agreed to combine their separately maintained databases of property listings into a single, San Diego-wide database. *Id.* at 1140. The database was maintained centrally by an entity named Sandicor, which the associations collectively created, owned, and controlled. *Id.* at 1140-41. The associations, however, remained individually responsible for performing certain support services, such as enrolling new subscribers to the database, billing and collecting payments, and answering subscribers' questions. *Id.* at 1141.

In forming Sandicor, the associations agreed that Sandicor would charge subscribers a database access fee of $44 per month. *Id.* at 1146. They further agreed that, out of this access fee, Sandicor would pay the associations $25 per subscriber per month to cover the cost of the support services the individual associations provided.

As it turned out, however, the cost of providing support services varied across the eleven associations. The largest association, for instance, paid only $10 per subscriber per month, while the smallest associations paid close to $50. *Id.* at 1141. The agreed-upon $25 reimbursement therefore provided a windfall to the larger associations and created a substantial loss for the smaller associations. To correct this problem, the larger associations agreed to pay cash subsidies to their smaller competitors. *Id.*

The plaintiffs in *Freeman*, two subscribers to the Sandicor database, objected to this arrangement, arguing that it amounted to unlawful price-fixing. They asserted that the eleven associations' unlawful agreement to the fixed reimbursement and subsidy system for support services resulted in artificially inflated database access fees. They argued, for instance, that, if the access fee incorporated only the largest associations' cost of services (*i.e.,* $10 per subscriber per month), rather than the $25 agreed-upon reimbursement rate, the access fee would be considerably lower. *Id.* at 1142.

In defending the suit, the associations argued that the direct purchaser rule barred plaintiffs' claim for antitrust damages. They noted that Sandicor, not the plaintiffs, paid the support services' fee and that, as only indirect payers of the fee, plaintiffs were barred from bringing a damages claim.

Relying on the exception to the direct purchaser rule set forth in *Royal Printing*, the court held that plaintiffs' claims were not barred. *See id.* at 1145–46. It concluded that because the associations owned Sandicor, appointed its board of directors, and conspired with it, there was "no realistic possibility Sandicor, [the direct purchaser,] will sue them." *Id*. Thus, plaintiffs' damages action could proceed.[5]

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[5] Though the court in *Freeman* relied on the "no reasonable possibility" exception to the direct purchaser rule in allowing the plaintiffs' suit to proceed, the situation in *Freeman* was more directly analogous to the one presented in *Shamrock Foods*. In essence, the associations jointly agreed that consumers would pay $44 per month for access to the database and, of that, $25 would be returned to the association that serviced the customer. *See Freeman*, 322 F.3d at 1146 (noting that, though "defendants nominally [sold] services through another entity rather than to consumers directly," they effectively "agree[d] among themselves . . . to fix [the] price[]" that subscribers paid for access to the database). Thus, as in *Shamrock Foods*, the defendants in *Freeman* conspired to fix the price that the plaintiffs paid. As a result, the plaintiffs in *Freeman*, like the plaintiffs in *Shamrock Foods*, paid the fixed price directly and therefore were not, in fact, indirect purchasers.

In this case, Plaintiffs argue that there is "no realistic possibility" that the direct purchasers of interchange fees—*i.e.*, the card-issuing banks—would file a lawsuit challenging the unlawful fixing of those fees, for several reasons. First, they argue that, because card-issuing banks that own ATMs receive interchange fees when a foreign customer uses one of the banks' ATMs, they would never sue to challenge the unlawful fixing of those fees at an artificially high level. In other words, in Plaintiffs' view, because banks receive interchange fees, as well as pay them, they have an incentive not to sue.

Plaintiffs' first argument fails because it ignores the critical fact that the overwhelming majority of ATM card-issuing banks pay more in interchange fees than they receive. Of Star's 4,750 members, approximately 4,100 pay more in interchange fees than they take in. *See* Sawicki Decl. ¶¶3, 14, 16. One thousand of these entities are, in fact, "pure payers" of interchange, meaning that they do not receive interchange fees at all. *Id.* at ¶14.[6] In short, several thousand members of the Star Network do not, on net, receive interchange fees and therefore do not receive the benefit Plaintiffs suggest.

Moreover, contrary to Plaintiffs' assertion, these 4,100 direct purchasers (including, incidentally, all but one of the bank Defendants) have a strong economic incentive to ensure that the interchange fee is set as low as possible. Because they pay more in interchange fees than they receive, the higher the interchange fee, the higher their costs. Thus, there is a very realistic possibility that these entities (or some subset of them) would

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[6] This group includes credit unions and other banks, such as some internet banks, that issue ATM cards but do not own ATMs. *Id.* at ¶13.

file suit to challenge the fixing of interchange fees at artificially high rates.

Plaintiffs next argue that the direct payers of interchange fees would not sue to end the imposition of such fees because the paying of interchange fees justifies the decision to charge Plaintiffs a marked-up foreign ATM fee. Stated differently, Plaintiffs assert that, if interchange fees were abolished, card-issuing banks would be unable or unwilling to impose foreign ATM fees on their customers, from which they earn substantial revenues. Thus, because the elimination of interchange fees would mean the elimination of foreign ATM fees, card issuing banks have, in Plaintiffs' view, no incentive to challenge them.

Plaintiffs' argument is illogical. For the past several years, the Star Network has set interchange fees at $0.46 for on-premises ATM transactions and $0.54 for off-premises ATM transactions. According to Plaintiffs' complaint, card-issuing banks charge foreign ATM fees of around $2.00. Third Amended Compl., Figure A. Thus, per Plaintiffs' allegations, card-issuing banks mark-up the interchange fee by around $1.50 and then pass along the interchange fee and the markup to their customers.

Given that banks earn $1.50 on every foreign ATM fee that they charge ($2.00 minus the $0.50 interchange fee[7]), the Court is hard-pressed to understand why the banks would suddenly stop charging foreign ATM fees altogether if the cost of interchange was eliminated. Logic dictates that one of two things would happen instead. Either banks would continue to set foreign ATM

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[7] Assuming banks pass on the full interchange cost to customers, rather than only a portion of it.

fees at $2.00 and thereby earn $0.50 more per transaction. Or, perhaps more likely, banks would lower their foreign ATM fees by $0.50 and earn the same net profit ($1.50), but at lower prices. These lower prices would, in turn, spur additional sales volume, thereby increasing a banks' total profits. See *Illinois Brick*, 431 U.S. at 733 n.13 (noting that a direct purchaser is injured even where the direct purchaser can pass along the entire cost of a supplier's illegally fixed price because the direct purchaser suffers "a reduction in the volume of its sales caused by its higher prices").

As the two scenarios just described reveal, card-issuing banks are better-off if interchange fees are eliminated, even if they currently pass the entire cost of interchange fees along to their customers. Eliminating interchange fees would either allow card-issuing banks to earn more money per foreign ATM transaction or it would allow them to earn the same per transaction profit at lower prices. Thus, Plaintiffs' argument that card-issuing banks have no incentive to seek the elimination of interchange fees because those fees justify the imposition of foreign ATM fees is without merit.

Plaintiffs next assert that there is no realistic possibility that the direct payers of interchange fees would file suit because the direct payers are participants in the conspiracy to fix the interchange fee. Plaintiffs note that, when an entity joins the Star Network, that entity agrees to both pay and receive the fixed interchange fee. As a result, all members of the Star Network are, Plaintiffs maintain, co-conspirators and therefore unlikely to sue to end the conspiracy.

The Court disagrees with Plaintiffs' assessment of the members of the Star Network. It is true that all members of the network agree to charge other members the fixed interchange fee. But, as discussed, for the vast majority of card-issuing banks that join the Star Network, including the bank Defendants, this promise is meaningless. One thousand card-issuing banks do not receive interchange fees at all. Another 3,100 do receive interchange fees from other members, but these entities pay more in interchange fees than they charge. For these 3,100 entities, then, the agreement to charge and accept the fixed fee is equivalent simply to an agreement to pay a lower net interchange fee.

From an economic perspective, the 4,100 Star Network members who pay more in interchange fees than they receive are, at least with respect to interchange fees, essentially customers of the approximately 650 Star Network members who receive more in interchange fees than they pay. *See* Sawicki Decl. ¶¶3, 14, 16. One thousand of these entities pay the interchange "list price" (*i.e.*, $0.46 for on-premises transactions and $0.54 for off-premises transactions), because they receive no interchange payments. Thirty-one hundred pay something less than the list price, because they do receive some interchange fees. But, the point is that, for all 4,100 of these entities, interchange fees are a net cost that they have agreed to incur. To describe these entities as co-conspirators to an agreement to fix the price of interchange fees at artificially inflated levels is therefore, in the Court's view, inappropriate. Instead, these entities are tantamount to the customers of an illegal price-fixer. The entities agreement to pay the allegedly fixed price, like any customer's agreement to pay an unlawfully fixed price, does not render them co-conspirators.

Moreover, unlike the direct purchasers in *Royal Printing* and *Freeman*, these 4,100 entities are not owned by, nor do they own, the 650 entities to which they pay interchange fees. As a result, there is a realistic possibility that they would sue to end the illegal fixing of inflated interchange fees.

Put simply, for over 4,000 members of the Star Network interchange fees are a cost that they pay to be part of the network. In addition, these entities pay that cost to other, independent members of the Star Network. They do not pay it to a parent or a subsidiary. These entities therefore have every incentive to make sure that interchange fees are set no higher than necessary.

In sum, the Court rejects Plaintiffs' argument that, by joining the Star Network and agreeing to its terms, all 4,100 entities that are net payers of interchange fees have agreed to join a conspiracy to fix interchange fees at artificially high rates and are therefore unlikely to sue to challenge the conspiracy. To the contrary, these entities (or at some portion of them) have a strong financial incentive to bring such a suit.

In a final argument, Plaintiffs assert that it is unlikely that the card-issuing banks who are net payers of interchange fees would file suit because they would not wish to disrupt their access to the Star Network. This argument fails, for several reasons. First, there are over 4,000 members of the Star Network who are net payers of interchange fees. Even if some of these entities would choose not to sue to challenge the unlawful fixing of interchange fees, there is no structural reason to believe that all 4,000 would so behave. Second, ATM network members have, in fact, sued ATM Networks in the past, indicating that such suits are a realistic possibility. *See, e.g., SouthTrust Corp. v. Plus Sys., Inc.,* 913 F. Supp. 1517, 1524 (N.D. Ala. 1995).

Third, and most importantly, the Supreme Court rejected this very argument in *Illinois Brick*. *See* 431

U.S. at 745-46. In *Illinois Brick,* the Court "recognize[d] that direct purchasers sometimes may refrain from bringing a treble-damages suit for fear of disrupting relations with their suppliers." *Id.* Nonetheless, the Court concluded that, "on balance," the goal of vigorous enforcement of the antitrust laws 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." *Id.* Thus, Plaintiffs' argument that the direct purchasers would refrain[ ] from suing due to a fear of disrupting relations with the Star Network, even if valid, would be insufficient to overcome the *Illinois Brick* bar.

For all the reasons discussed above, the Court finds that there is a "realistic possibility" that one or more direct purchasers of an unlawfully inflated interchange fee would bring an antitrust suit to challenge that fee. Accordingly, the Court finds that the exception to the direct purchaser rule described by the Ninth Circuit in *Royal Printing*, like the other exceptions to the rule, does not apply here.

C. Summary

In *Illinois Brick*, the Supreme Court concluded that the "vigorous private enforcement of the antitrust laws" was best achieved by allowing only direct payers of an unlawfully fixed price to sue for antitrust damages. 431 U.S. at 745. In so concluding, the Court was particularly concerned with avoiding the "evidentiary complexities and uncertainties" involved in determining how much of the unlawfully fixed fee was passed on by the direct purchaser to the indirect purchaser. *Id.* at 732. In *Shamrock Foods* and *Royal Printing*, the Ninth Circuit concluded, sensibly, that the *Illinois Brick* rule against indirect purchaser suits should not apply where it is almost certain that direct purchasers would not bring an antitrust suit challenging an unlawfully fixed price. As the Ninth Circuit noted in *Royal Printing*, to apply the direct purchaser rule in such cases would "effectively immunize the [unlawful conduct] from private antitrust liability." *Royal Printing*, 621 F.2d at 326.

In the end, this case involves a fairly straightforward application of the rule set forth in *Illinois Brick.* Plaintiffs' theory of recovery is an indirect one that would require this Court to grapple with the very "evidentiary complexities and uncertainties" that the Court in *Illinois Brick* warned against. The Court would have to determine how much of the interchange fee each of several defendants passed on to their respective customers, requiring the Court to engage in the complicated task of "trac[ing] the effects of the overcharge on the [card-issuing banks'] prices, sales, costs, and profits, and of showing that these variables would have behaved differently without the overcharge." *Illinois Brick*, 431 at 725. In short, this case presents the very challenges that the *Illinois Brick* rule was designed to address.

Moreover, unlike in *Shamrock Foods* and *Royal Printing,* there is a realistic possibility that the direct payers of the interchange fee would sue to challenge an unlawfully fixed price. In this case, there are literally thousands of direct purchasers who have an economic incentive to ensure that interchange fees are set as low as possible. Even if a subset of this group would choose not to sue for some reason, there is no structural or underlying fundamental reason, such as the ownership of the direct purchaser by the supplier, why all of these entities would refrain from filing suit. As a result, the Court finds that there is a realistic possibility that there are direct purchasers who would file an antitrust suit challenging the validity of unlawfully fixed interchange fee. Accordingly, the rule set forth in *Illinois Brick* bars Plaintiffs' claim for antitrust damages.

D. Rule 56(f)

Plaintiffs ask that, if this Court is inclined to grant summary judgment in favor of Defendants, it first permit Plaintiffs to conduct further discovery. Plaintiffs argue that Defendants have not "produced a complete, systematic set of data about interchange fees, foreign fees, or surcharges, either paid and received, for any period prior to 2008." Opp. at 18. Further, Plaintiffs argue that they have not had the opportunity to depose Mary Kim Sawicki, on whose declaration Defendants rely in their motion.

In order to justify a Rule 56(f) continuance a party must establish that the facts sought in further discovery are "essential to resist . . . summary judgment." *California v. Campbell*, 138 F.3d 772, 779 (9th Cir. 1998) (quotation marks omitted). Plaintiffs have failed to meet this standard. First, while it is true that Plaintiffs do not have precise tabulations of the various fees that Defendants paid and received during the class period, these data are not necessary to oppose summary judgment. Plaintiffs do not dispute that there are members of the Star Network who do not own ATMs and therefore are pure payers of interchange fees. These parties are direct purchasers in that they pay interchange fees, but by virtue of the fact that they do not own ATMs, they never receive them. Further discovery would in no way change this dynamic, and Plaintiffs in fact conceded at the hearing that such parties exist.

Similarly, with regard to Plaintiffs' interest in deposing Mary Kim Sawicki, Plaintiffs have failed to establish that such a deposition is essential to oppose summary judgment. Sawicki's declaration provided precise figures regarding the payment of these fees for a two-year period, and Defendants have produced the underlying data. While Plaintiffs suspect that Sawicki's statements with regard to other periods of time are unfounded, the truth or falsity of this suspicion is immaterial. Whether or not certain bank Defendants were or were not net-payers for various periods of time does not alter the pivotal conclusion: in *any* period of time, there existed direct purchasers who had sufficient incentive to bring an antitrust suit.

Because Plaintiffs have failed to identify any discovery that would be essential to oppose summary judgment, their request for further discovery is DENIED. All pending motions to compel are similarly DENIED.

CONCLUSION

For the reasons discussed above, the Court GRANTS Defendants' motion for summary judgment and dismisses Plaintiffs' claim for antitrust damages.

Plaintiffs have also requested equitable relief, which is not barred by the *Illinois Brick* rule. *See Freeman*, 322 F.3d at 1145. It appears to the Court, however, that Plaintiffs' interest in obtaining injunctive relief did not motivate the filing of this lawsuit. Moreover, the Court finds that litigating the issue of Plaintiffs' entitlement to equitable relief before the issue of Plaintiffs' entitlement to damages is finally resolved would be highly inefficient. Accordingly, the Court will enter judgment in Defendants' favor, dismissing this case in its entirety. If, after all issues are finally resolved on appeal, Plaintiffs wish to pursue equitable relief, they may do so by notifying the Court within thirty days from the issuance of the mandate.

IT IS SO ORDERED.

Dated: September 16, 2010

/s/ Charles R. Breyer
CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

APPENDIX C

[*]UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NO. 10-17354

IN RE ATM FEE ANTITRUST LITIGATION

PAMELA BRENNAN, *et al.*,
Plaintiffs-Appellants,

v.

CONCORD EFS, INC. *et al.*,
Defendants-Appellees.

ORDER

MARCH 13, 2013

Before: LUCERO, CALLAHAN, and N.R. SMITH, Circuit Judges.

Judge Callahan and Judge Smith have voted to deny the petition for rehearing en banc, and Judge Lucero has so recommended.

The full court was advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

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[*] The Honorable Carlos F. Lucero, Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

APPENDIX D

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

CIVIL ACTION NO. 04-CV-2676 CRB

IN RE ATM FEE ANTITRUST LITIGATION,
PAMELA BRENNAN *et al.*,
Plaintiffs,
v.
CONCORD EFS, INC., *et al.*
Defendants.

October 16, 2009

THIRD AMENDED COMPLAINT

DOCUMENT SUBMITTED UNDER SEAL
(REDACTED)

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Plaintiffs Pamela Brennan and Darla Martinez, by and through their undersigned attorneys, bring this action on behalf of themselves and all other similarly situated members of the proposed California classes seeking damages and injunctive relief under the United States antitrust laws against Defendants Concord EFS, Inc., First Data Corp., Bank of America, N.A., JPMorgan Chase Bank, N.A., Citibank, N.A., Citibank (West), FSB, SunTrust Banks, Inc., Wachovia Corp., Wells Fargo Bank, N.A., and Servus Financial Corp., and demand a trial by jury.

Plaintiff Terry Crayton, by and through his undersigned attorneys, brings this action on behalf of himself and all other similarly situated members of the proposed non-California classes seeking damages and injunctive relief under the United States antitrust laws against all Defendants and demands a trial by jury.

For their Complaint against Defendants, Plaintiffs allege the following:

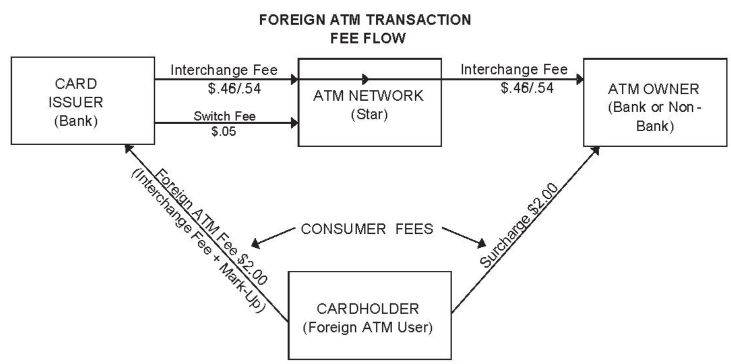
1. Since the inception of the Star ATM Network ("Star"), Defendants have fixed the interchange fee ("Interchange Fee") paid to ATM Owners on Automated Teller Machine ("ATM") transactions over the network. Bank Defendants mark up the fixed Interchange Fee, and charge it to most of their cardholders as the Foreign ATM Fee.

2. The original purported purpose for the fixed Interchange Fee was to compensate ATM Owners for the additional cost of providing cash to other Banks' customers. However, fixed Interchange Fees have been unnecessary for that purpose, or for the efficient operation of an ATM Network, since at least 1996, when Star eliminated its rules that effectively prohibited "Surcharges." By virtue of Surcharging, ATM Owners

have been able to unilaterally recover their additional costs, and to set the amount of compensation they receive from cardholders when they withdraw cash from their ATMs. Since the wide-spread implementation of Surcharges, consumers have been paying twice for the same transaction to withdraw their own funds: Surcharges paid to ATM owners and Foreign ATM Fees to their own Banks, the latter of which are artificially inflated by fixed – and unnecessary – Interchange Fees.

3. Figure A below depicts a typical transaction involving a cardholder's cash withdrawal from an ATM not owned by his/her Bank:

FIGURE A



Amounts of fees shown are representative examples.

4. Defendants' fixing of Star's Interchange Fee is an unreasonable restraint of trade in violation of Section 1 of the Sherman Act.

JURISDICTION

5. Plaintiffs bring this antitrust class action under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§15 and 26, to recover for injuries they have suffered as a result of Defendants' continuing violation of Section 1 of the

Sherman Act, 15 U.S.C. § 1. Plaintiffs seek treble damages, injunctive relief, and the costs of suit, including reasonable attorneys' fees, for themselves and for the members of the classes that they seek to represent. This Court has jurisdiction over this case under 28 U.S.C. §§ 1331 and 1337(a), and 15 U.S.C. §§ 15 and 26.

VENUE

6. Venue is proper in this judicial district under 15 U.S.C. §§ 22 and 28 U.S.C. §§ 1391(b) and (c) because each of the Defendants resides, or is licensed to do business or is doing business, or is found or transacts business, in this district, or the claims arose in this district.

PLAINTIFFS

7. Plaintiff Pamela Brennan is a resident of San Francisco, California. Ms. Brennan has paid "Foreign ATM Fees," as that term is defined herein, to one or more of the Defendants named herein during the Relevant Period.

8. Plaintiff Terry Crayton is a resident of Wichita, Kansas. Mr. Crayton has paid "Foreign ATM Fees," as that term is defined herein, to one or more of the Defendants named herein during the Relevant Period.

9. Plaintiff Darla Martinez is a resident of Alta Loma, California. Ms. Martinez has paid "Foreign ATM Fees," as that term is defined herein, to one or more of the Defendants named herein during the Relevant Period.

DEFENDANTS

A. Concord

10. Defendant Concord EFS, Inc. ("Concord") is a Delaware corporation with its principal place of business in Memphis, Tennessee. In 2001, Concord acquired Star Systems, Inc., at which time Concord succeeded to and assumed all rights and obligations of Star. Star Systems, Inc. was itself the result of a 1999 merger between Honor Technologies, Inc. ("Honor") and Star Systems, Inc.

11. Prior to acquiring Star Systems, Inc., Concord had purchased two other ATM networks, MAC in 1999 and Cash Station in 2000. Throughout the Relevant Period, an ATM Network operated under the name Star. Star is the largest ATM Network in the United States. Prior to February 1, 2001, officers of the other Defendants and their co-conspirators served on Star's Board of Directors. Concord presently is a wholly-owned subsidiary of Defendant First Data Corporation.

B. First Data

12. Defendant First Data Corporation ("First Data") is a Delaware corporation with its principal place of business in Greenwood, Colorado. In February 2004, First Data acquired Concord. Plaintiffs are informed and believe that First Data has succeeded to the liability for the acts, omissions and unlawful conduct of Concord and Star. Under the terms of a merger agreement dated April 1, 2003, Monaco Subsidiary Corporation ("Monaco"), a wholly-owned subsidiary of First Data, merged with and into Concord, and Concord, as the surviving corporation, succeeded to and assumed all the rights and obligations of Monaco and Concord.

13. Pursuant to the merger, First Data acquired Concord through an exchange of stock. Concord shareholders received 0.365 of a share of First Data common

stock for every share of Concord common stock. Following the consummation of the merger, First Data reorganized its business segments and fully integrated the businesses and assets of Concord, including Star, into the newly modified First Data segments. As a result of this transaction, First Data now owns and operates Star. Concord no longer owns or operates Star.

14. In connection with the merger, Concord's sales forces and product lines, as well as several operating centers and administrative departments, were completely integrated into First Data. Richard Kiphart, the Chairman of Concord, also became a director of First Data and Ronald Congemi, the president and founder of Star, became the CEO of First Data Debit Services, the business segment controlling Star. On March 31, 2005, Mr. Congemi became First Data's senior vice president for strategic industry relations. Plaintiffs also are informed and believe that Star acts as the agent of First Data. In press releases, on its website and in other public filings, First Data has held itself out as the owner and operator of Star. First Data itself also enters into contracts, including contracts with a number of other Defendants, regarding participation in Star. First Data now reports income from Star. Before the merger, Concord reported assets that included $500 million in cash. After the merger, Concord ceased reporting this amount in its balance statements. At all relevant times, First Data exercised such dominion and control over Concord and Star that it is liable for the acts of Concord and Star.

15. The transaction between Concord and First Data constitutes a *de facto* merger or consolidation. There is a continuation of the enterprise of Concord, including continuity of management, personnel, physical location, assets, and operation of Star. There is a con-

tinuity of shareholders. On information and belief, Concord has ceased operations, liquidated and/or dissolved. First Data has assumed the obligations of Concord necessary for uninterrupted continuation of Star and its other ongoing business operations.

16. The transaction between Concord and First Data also constitutes a continuation of the business of Concord, including Star. Concord and First Data have continued to produce the same products and services, including those of Star. First Data and Concord have continued to employ Star's employees and supervisory personnel and maintained Star's physical location and other operations. Concord and First Data have retained the Star name. They have continued Star's general business operations. First Data holds itself out as a continuation of Concord.

C. Bank of America

17. Defendant Bank of America, N.A. ("Bank of America") is a national banking association incorporated in North Carolina and with its principal place of business in Charlotte, North Carolina. It is a wholly-owned subsidiary of NB Holdings Corporation, which in turn is wholly-owned by Bank of America Corporation. During the Relevant Period, Bank of America, N.A. has offered deposit accounts and other banking services, including ATMs, to the general public.

18. Bank of America Corporation represented to the Federal Reserve Board that it (along with certain other Defendants named herein) would conduct Star's activities, and would own more than five percent of Star's voting shares. Prior to February 1, 2001, Bank of America was entitled to appoint outside directors to Star's Board of Directors. During the Relevant Period, Bank of America has been a member of Star.

D. Chase

19. Defendant JPMorgan Chase Bank, N.A., a national banking association with its principal place of business in Columbus, Ohio, is a wholly-owned subsidiary of JPMorgan Chase & Co. JPMorgan Chase Bank, N.A. is an interstate bank that has offered deposit accounts and other banking services to the general public.

20. Defendant Bank One, N.A. was a Delaware corporation with its principal place of business in Chicago, Illinois. In 2001, Bank One, N.A. acquired Bank One of Arizona, N.A. ("Bank One Arizona"), which was also a wholly-owned subsidiary of Bank One Corporation, and entitled to appoint outside directors to Star's Board of Directors prior to February 1, 2001. In 2004, Bank One Corporation and Bank One, N.A. merged into Chase. Plaintiffs are informed and believe that Chase succeeded to the liability or assumed the liability for the acts, omissions and unlawful conduct of Bank One, N.A. which in turn did the same with respect to Bank One Arizona. During the Relevant Period, Bank One N.A. and Bank One of Arizona, N.A., offered deposit accounts and other banking services, including ATMs, to the general public.

21. Defendants JPMorgan Chase Bank, N.A. and Bank One, N.A. are collectively referred to as "Chase." During the Relevant Period, Chase has been a member of Star.

E. Citibank

22. Defendant Citibank, N.A. is a bank with its principal place of business in New York, New York, and is a subsidiary of Citigroup, Inc. Citibank, N.A., through Defendant Citibank (West), FSB, had a representative on Star's Board prior to February 1, 2001. During the Relevant Period Citibank, N.A., has offered deposit accounts and other banking services, including ATMs, to

the general public. Citibank, N.A., also succeeded to the liabilities of California Federal Bank, another member of Star.

23. During the Relevant Period Defendant Citibank (West), FSB was a federal savings bank with its principal place of business in San Francisco, California. In 2002, Citibank (West), FSB acquired California Federal Bank, FSB, a Star member entitled to appoint outside directors to Star's Board of Directors prior to February 1, 2001. On October 1, 2006, Citibank (West), FSB became a national bank named West, National Association ("West"). Immediately following the conversion, West was merged with and into Citibank, N.A. with Citibank, N.A. constituting the surviving institution. Plaintiffs are informed and believe that Citibank, N.A. succeeded to the liability or assumed the liability for the acts, omissions and unlawful conduct of Citibank (West), FSB. During the Relevant Period, Citibank (West), FSB offered deposit accounts and other banking services, including ATMs, to the general public.

24. Defendants Citibank N.A. and Citibank (West), FSB are collectively referred to herein as "Citibank." During the Relevant Period, Citibank has been a member of Star.

F. Suntrust

25. Defendant SunTrust Banks, Inc. ("SunTrust") is a Georgia corporation with its principal place of business in Atlanta, Georgia. During the Relevant Period, SunTrust was a Star member and represented to the Federal Reserve Board that it (along with certain other Defendants named herein) would conduct Star's activities, and would own more than five percent of its voting shares. Crestar Financial Corporation (a subsidiary that subsequently merged into SunTrust) was

entitled to appoint outside directors to Star's Board of Directors prior to February 1, 2001. The Crestar appointee represented the interests of SunTrust on Star's Board. During the Relevant Period, SunTrust has offered deposit accounts and other banking services, including ATMs, to the general public.

G. Wells Fargo/Wachovia

26. Defendant Wachovia Corporation ("New Wachovia") is a North Carolina corporation, with its principal place of business in Charlotte, North Carolina. In 2001, another entity, also named Wachovia Corporation ("Old Wachovia"), merged into First Union Corporation ("First Union"), which subsequently renamed itself Wachovia Corporation ("New Wachovia"). During the Relevant Period, Old Wachovia and New Wachovia offered deposit accounts and other banking services, including ATMs, to the general public. Both First Union and Old Wachovia represented to the Federal Reserve Board that they (along with certain other Defendants) would conduct Star's activities, and would own more than five percent of its voting shares. Prior to February 1, 2001, both First Union and Old Wachovia were entitled to appoint outside directors to Star's Board of Directors. On December 31, 2008, New Wachovia merged with Defendant Wells Fargo & Co. Wells Fargo & Co. emerged as the surviving corporation and succeeded to all of the businesses, assets and obligations of Old Wachovia and New Wachovia.

27. Defendant Wells Fargo Bank, N.A. ("Wells Fargo Bank"), a federally chartered bank with its principal place of business in San Francisco, California, is a wholly-owned subsidiary of Wells Fargo & Co. During the Relevant Period Wells Fargo Bank offered deposit accounts and other banking services, including ATMs, to

the general public. Prior to February 1, 2001, Wells Fargo Bank, N.A. was entitled to appoint outside directors to Star's Board of Directors.

28. Defendant Servus Financial Corporation ("Servus Financial"), a corporation with its principal place of business in Herndon, VA, is a wholly-owned subsidiary of Wells Fargo & Co. First Security Corporation, which in 2003 merged into Servus Financial Corporation, was entitled to appoint outside directors to Star's Board of Directors.

29. Defendants New Wachovia, Wells Fargo Bank and Servus Financial are collectively referred to herein as "Wells Fargo." During the Relevant Period, Wells Fargo has been a Star member.

AGENTS AND CO-CONSPIRATORS

30. Each Defendant committed the acts alleged in this Complaint through its officers, directors, agents, employees, or representatives while they were actively engaged in the management, direction, control, or transaction of the Defendant's business or affairs.

31. Defendants' unlawful and intentional concerted actions have severely damaged and will continue to damage Plaintiffs and the members of the classes they seek to represent.

32. Various other firms or corporations not named Defendants in this lawsuit, including but not limited to other Banks whose representatives have served on Star's Board of Directors prior to February 1, 2001, have participated as co-conspirators with Defendants in the offenses charged herein and have performed acts and made statements in furtherance thereof.

DEFINITIONS

33. "Automated Teller Machine" or "ATM" is a device consisting principally of a computer, cash dispensing equipment, a card reader, and security that enable the electronic processing or dispensing of banking services such as cash withdrawals, balance inquiries, account transfers and deposits.

34. "ATM Card" means a card, generally made of plastic with a data-encoded magnetic strip, capable of initiating transactions at ATMs.

35. "ATM Network" means a group of multiple ATMs and multiple Banks which are interconnected by electronic or telecommunications means, to one or more computers, processors or switches for the purpose of providing ATM services to the customers of member Banks. Only Foreign ATM Transactions are routed over ATM Networks.

36. "ATM Owner" means an entity that owns and operates one or more ATMs. An ATM Owner may be a Bank or a non-Bank, such as a retailer or other operating company.

37. "ATM Switch Fee" means a fee paid to an ATM Network to compensate the network for processing Foreign ATM Transactions.

38. "Bank" means a financial institution in which customers deposit and/or keep funds. "Banks" include savings banks, thrifts, credit unions and all other financial institutions.

39. "Bank Defendants" are Defendants Bank of America, Chase, Citibank, SunTrust, and Wells Fargo. They hold themselves out as horizontal competitors, for purposes including the provision of deposit accounts and other banking services, such as ATMs, to the general

public and in regulatory filings with various governmental entities.

40. "Cardholder" is a holder of an ATM Card issued by a Bank.

41. "Cash Withdrawal" means a transaction in which a Cardholder withdraws funds from his or her deposit account via an ATM. Cash Withdrawals comprise the vast majority of ATM transactions.

42. "Foreign ATM" means an ATM owned by an ATM Owner other than the Cardholder's Bank.

43. "Foreign ATM Fee" means a transaction fee imposed by a Bank on its own customer for a Cash Withdrawal at a Foreign ATM.

44. "Foreign ATM Transaction" means a Cash Withdrawal in which a Cardholder uses an ATM owned by an entity other than his or her own Bank.

45. "Interchange Fee" means a fee paid to the ATM Owner for a Foreign ATM Transaction.

46. "Issuer" means a Bank that issues ATM Cards to Cardholders.

47. "On-Us ATM Transaction" means a Cash Withdrawal at an ATM owned by the Cardholder's Bank. On-Us ATM Transactions are not routed over Star.

48. "Relevant Period" means the time period beginning July 2, 2000. The Relevant Period has not yet ended, as Defendants' actions described herein are ongoing.

49. "Star" means the Star ATM Network, currently owned by First Data Corporation.

50. "Surcharge" means a fee imposed by the ATM Owner on a Cardholder for a Cash Withdrawal at a

Foreign ATM. Banks sometimes refer to it as a "convenience fee."

CLASS ACTION ALLEGATIONS

51. Plaintiffs Pamela Brennan and Darla Martinez bring this action under Federal Rules of Civil Procedure 23(a), (b)(2) and (b)(3) on behalf of themselves and the two California classes.

a. The first California class, "the California Damages Class," seeks only damages and is defined as:

> All persons, firms, corporations, partnerships, or other business entities, who (1) opened a deposit account with a Bank Defendant at a branch office in California and (2) paid a Foreign ATM Fee directly to one of the Bank Defendants, or any subsidiary or affiliate thereof, during the Relevant Period. This Class does not include the Defendants, their parents, subsidiaries and affiliates, other co-conspirators, governmental entities, the judge in this action, or the judge's immediate family members.

b. The second California class, "the California Injunctive Relief Class," seeks only injunctive relief and is defined as:

> All persons, firms, corporations, partnerships, or other business entities, who (1) opened a deposit account with a Bank Defendant at a branch office in California and (2) currently have an ATM card linked to a deposit account with a Bank Defendant. This Class does not include the Defendants, their parents, subsidiaries and affiliates, other co-conspirators, governmental entities, the judge in

> this action, or the judge's immediate family members

52. Plaintiff Terry Crayton brings this action under Federal Rules of Civil Procedure 23(a), (b)(2) and (b)(3) on behalf of himself and the two non-California classes.

a. The first non-California class, "the Non-California Damages Class," seeks only damages and is defined as:

> All persons, firms, corporations, partnerships, or other business entities, who (1) opened a deposit account with a Bank Defendant at a branch office in the United States outside of California and (2) paid a Foreign ATM Fee directly to one of the Bank Defendants, or any subsidiary or affiliate thereof, during the Relevant Period. This Class does not include the Defendants, their parents, subsidiaries and affiliates, other co-conspirators, governmental entities, the judge in this action, or the judges immediate family members.

b. The second non-California class, "the Non-California Injunctive Relief Class," seeks only injunctive relief and is defined as:

> All persons, firms, corporations, partnerships, or other business entities, who (1) opened a deposit account with a Bank Defendant at a branch office in the United States outside of California and (2) currently have an ATM card linked to a deposit account with a Bank Defendant. This Class does not include the Defendants, their parents, subsidiaries and affiliates, other co-conspirators, governmental entities, the judge in this action, or the judges immediate family members.

53. Plaintiffs do not know the exact size of the Classes, since such information is in the exclusive control of Defendants. However, due to the nature of the trade and commerce involved, class members are so numerous and geographically dispersed as to render joinder of all class members impracticable.

54. There are questions of law or fact common to the Classes, including, but not limited to the following:

a. Whether Defendants engaged in a contract, combination and conspiracy to fix, raise, maintain, or stabilize Interchange Fees in California and throughout the United States;

b. Whether Defendants collectively adopted and enforced an operating rule mandating payment of Star's Interchange Fees, whether Star members agreed to abide by this rule, and all other Star operating rules as a condition of membership of Star;

c. Whether Defendants' contract, combination and conspiracy to fix, raise, maintain or stabilize Interchange Fees is an unreasonable restraint of trade;

d. The relevant product and geographic market for assessing Defendants' conduct;

e. Whether Defendants conduct caused Foreign ATM Fees to be set at artificially high and supra-competitive levels;

f. Whether Defendants conduct injured Plaintiffs and the other members of the Classes; and

g. For the Injunctive Relief Classes, whether Plaintiffs and other members of the Classes are entitled to injunctive relief.

55. These and other questions of law and fact are common to the Classes and predominate over any questions affecting only individual class members.

56. Plaintiffs' claims are typical of the claims brought on behalf of the Classes because they paid Foreign ATM Fees directly to one or more of the Defendants.

57. Plaintiffs will represent the interests of the Classes fairly and adequately in that Plaintiffs are members of the Classes they seek to represent and their interests do not conflict with those of any other members of the Classes. Furthermore, Plaintiffs have retained competent counsel experienced in antitrust and other class action litigation.

58. The prosecution of separate actions by individual members of the Classes would create a risk of inconsistent or varying adjudications, establishing incompatible standards of conduct for Defendants.

59. Defendants have acted, and refused to act, on grounds generally applicable to the Classes, thereby making appropriate final injunctive relief with respect to the Classes as a whole.

60. Class certification is superior to alternative methods for the fair and efficient adjudication of this controversy. Prosecution as a class action will avoid repetitious litigation.

COUNT I
(Violation of Section One of the Sherman Act, 15 U.S.C. § 1)
(Against All Defendants)

61. Plaintiffs incorporate by reference and reallege each and every allegation contained in paragraphs 1 through 60 above as though fully set forth herein.

A. Interstate Trade And Commerce

62. During the Relevant Period, Defendants and their co-conspirators engaged in various business activities, including activities related to Foreign ATM Transactions, throughout the United States. Star is the largest ATM Network in the country, processing approximately 69 million Foreign ATM Transactions per month throughout the United States.

63. At all relevant times, Defendants have operated in interstate commerce, and their practices at issue in this litigation have affected interstate commerce.

B. Development Of ATM Networks

64. Banks introduced ATMs in the 1970s to dispense cash on bank premises and give customers greater access to their deposit accounts while cutting costs, especially on human tellers. Subsequently, Banks introduced off-premises ATMs.

65. Banks later established so-called "regional" shared ATM Networks, such as Star, Honor, MAC, Cash Network, NYCE and Pulse, in various states and regions throughout the country. Banks did so to provide customers with greater access to ATMs via Foreign ATM Transactions. Through the end of the 1980s, over 150 regional shared ATM Networks were established.

66. The geographic scope of the regional networks was generally circumscribed by the geographic area in which their member Banks operated. To provide their customers with nationwide access to ATMs, certain Banks established, and many others joined, the Plus and CIRRUS ATM Networks, which were national in scope. ATM transactions were routed through the national networks when cardholders' transactions occurred outside the geographic area serviced by their respective

regional networks. For that reason, the national networks were deemed the ATM Network of last resort.

67. An ATM Network, such as Star, can have several thousand members or participants, including both Banks and non-Bank ATM Owners. Banks may own ATMs and issue ATM Cards while non-Banks may own ATMs but do not issue ATM Cards. Membership in the network is typically open only to Banks. Non-Bank ATM Owners are typically not network members and have virtually no role in establishing network policies, but are bound by those policies.

68. Banks participate in ATM Networks, such as Star, so that the Banks' customers are able to use ATMs at many more locations than one Bank alone could deploy.

69. As a result of industry consolidation, there are now approximately 25 ATM Networks with the market dominated by a few networks, of which Star is the largest.

C. Star

1. Star's Origins

70. In approximately 1984, twelve California Banks established Star. Star provided ATM Network services, including the ability to make Cash Withdrawals at Foreign ATMs, in several western states, including California and Arizona. Each of those Banks owned shares of Star stock, but membership was open to all Banks. Upon information and belief, shares in Star were issued to additional member Banks.

71. Star grew exponentially in membership size, transaction volume and geographic coverage primarily through mergers with other regional ATM Networks,

and not as a result of unique product development or superior competitive practices.

2. Star Growth Through Consolidations and Mergers

72. Star's first significant merger was consummated on or around February 1, 1999, when Star merged with the Honor ATM Network. As result of that merger, Star's geographic area of operation expanded to include the southeastern United States, including Florida and Georgia. In addition, Star significantly increased its numbers of member Banks and Cardholders.

73. Just two years later, on February 1, 2001, Concord – the owner of the MAC and Cash Station ATM Networks – acquired Star by purchasing all of the member Banks' ownership interests in Star. As a result of that acquisition, Star's geographic area of operation expanded significantly to include the mid-Atlantic and mid-western United States. In addition, Star again increased its numbers of Banks and Cardholders.

74. Star now comprises approximately 306,000 ATMs and over 5,400 members nationwide. Star processes far more Foreign ATM Transactions than any other ATM Network.

D. Star Is Not and Has Never Been an Economically Integrated Joint Venture

75. Star has never been an economically integrated joint venture:

a. at all relevant times, Star's member Banks have competed with each other to offer deposit accounts to consumers, and in several other relevant contexts as well;

b. Star's member Banks have never transferred any of their ATM-related assets to Star;

c. Star's member Banks have never pooled their revenues or expenses associated with Star Foreign ATM Transactions, as either ATM Card Issuers or ATM Owners. They have never divided their profits and losses generated by Foreign ATM Transactions and ATM deployment;

d. significantly, since Concord's acquisition of Star, Star's member Banks have never shared the risk of loss, as well as the opportunities to profit, from Star's business; and

e. at all relevant times, Star's member Banks have not owed each other a fiduciary duty to act for each others' economic benefit.

76. Moreover, Star's fixed Interchange Fee is not a fee for the service that Star sells. Star sells ATM Network processing services (authorization, clearance and settlement) to its members and participants. Star does not receive *any* portion of the Interchange Fee. It has merely, in collusion with the Bank Defendants, established and maintained an illegal rule requiring that its co-conspirators pay *each other* Interchange Fees. Star is paid only Switch Fees for its services, by Cardholders' Banks. Those fees are legal, and entirely separate and apart from Interchange Fees. Setting Interchange Fees is not a core activity of Star.

E. Star's Fixed ATM Interchange Fees Serve No Pro-Competitive Purpose

77. Defendants' fixed Interchange Fees are not necessary to accomplish any procompetitive benefit of Star. Even if some procompetitive benefit were achieved through fixed Interchange Fees, that benefit is outweighed by the anticompetitive effects of fixed Interchange Fees.

78. Interchange Fees were, and are, fixed by Star and its members. The original alleged purpose of Interchange Fees was to compensate ATM Owners for the costs of providing cash to other Banks' customers. Some ATM Networks even retained third parties, such as accounting firms, to attempt to determine the amount of those costs.

79. Cardholders' Banks initially considered ATMs to be primarily a source of costs savings, and fixed Interchange Fees to be a lesser cost of achieving those savings. However, Banks soon began to charge their Cardholders for Interchange Fees, by marking up Interchange Fees and renaming them "Foreign ATM Fees." They applied Foreign ATM Fees to Cash Withdrawals at ATMs other than their own. Cardholders could withdraw their own money without charge only at their own Banks' ATMs (On-Us ATM Transaction).

80. Foreign ATM Fees were, and are, imposed by every Bank Defendant Star member, and Foreign ATM Fees were and are markups of Interchange Fees.

81. Until 1996, fixed Interchange Fees and Foreign ATM Fees were the sole sources of revenue on Foreign ATM Transactions for Bank Issuers and ATM Owners. That is because ATM Owners were effectively prohibited from Surcharging for Cash Withdrawals as a result of rules imposed by the networks.

82. The networks, including Star, dropped their long-standing bans against Surcharges in April 1996. This effectively permitted Surcharging on Foreign ATM Transactions over any network, including Star.

83. As a result, ATM Owners quickly imposed Surcharges. For example, in January 1997, Bank of America and Wells Fargo imposed Surcharges of $1.50 per

transaction on non-customers at their combined 12,000-plus ATMs. That month, Bank Network News reported that ATM Owners were imposing Surcharges at 35 percent of ATMs nationwide. Since then, Surcharge rates have risen dramatically. Between April 1999 and October 2008, the percentage of ATM Owners imposing surcharges increased from 95 to 99 percent, and the average Surcharge amount rose from $1.37 to $1.97. Today all Bank Defendants impose Surcharges at their ATMs and their average charge exceeds two dollars, with Bank of America and Citibank charging three dollars.

84. With the advent of Surcharges, ATM Owners have been able to independently set the level of their compensation, and not only recover the costs of Foreign ATM Transactions, but earn profits as well. Unlike Interchange Fees, these Surcharges are set independently and competitively, rather than collusively fixed.

85. Because fixed Interchange Fees were no longer necessary to compensate ATM owners as of 1997, the Plus ATM Network (owned by Visa) proposed eliminating them that year. Similarly, the Pulse ATM Network considered eliminating Interchange Fees and in 2001, the president and CEO of Pulse suggested that Interchange Fees "may be an anachronism."

86. In approximately 1999, a senior Star employee also proposed eliminating Star's fixed Interchange Fee to Star's founder and President Ron Congemi.

87. Other industry participants, including the Bank Defendants, have suggested that fixed Interchange Fees are unnecessary. For example, in 1999, Wells Fargo considered several alternatives to the then-existing fee structure in the ATM industry, including eliminating network-fixed Interchange Fees and Foreign ATM Fees.

88. Yet no ATM Network has eliminated Interchange Fees because Banks do not want to lose the significant revenue that they earn through Foreign ATM Fees, which would be significantly lower or non-existent absent Interchange Fees. In fact, Tony Hayes, a senior associate of a Bank consulting firm that serves several networks including Star, NYCE, and Pulse, was quoted in the March 26, 1998 edition of Bank Network News as saying, "No one is talking seriously about getting rid of interchange. Why endanger both incomes?"

89. Mandatory fixed Interchange Fees are unnecessary to the efficient operation of Star. Interchange Fees neither enhance nor promote competition between ATM Networks, or within Star's membership. Neither Star nor any other ATM Network uses Interchange Fees as a competitive tool.

90. Mandatory fixed Interchange Fees are not necessary to the efficient operation of an ATM Network. Defendant First Data's Australian subsidiary Cashcard ATM Network is in the process of eliminating Interchange Fees. In that network, ATM Owners will recoup their costs and earn profits on Foreign ATM Transactions via Surcharges only.

91. In December 2007, the European Commission held that MasterCard's Interchange Fees for credit and debit card transactions were illegal under the European Union's equivalent to the Sherman Act, finding that MasterCard's payment card network could operate efficiently without them. *See* Commission Decision (E.C.) COMP/34/579 of 19 December 2007

F. Star's Illegal Fixed Interchange Fees

92. Beginning before the Relevant Period, Defendants and their co-conspirators engaged in a continuing contract, combination and conspiracy to restrain

trade and commerce unreasonably in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The unlawful contract, combination and conspiracy continue to the present.

93. The contract, combination and conspiracy in violation of Section 1 of the Sherman Act consists of a continuing agreement among the Defendants and their co-conspirators to fix, raise, maintain, or stabilize at artificially high levels the Interchange Fees that the Bank Defendants charge for Foreign ATM Transactions. Those transactions have resulted in the payment of artificially-inflated Foreign ATM Fees directly from Cardholders to Defendants and their co-conspirators.

94. Bank Defendants, acting through Star's Board of Directors, collectively adopted and enforced Star's Operating Rules mandating payment of Interchange Fees. All Star members agree to abide by this rule, and all other Star Operating Rules, as a condition of membership in Star.

95. From Star's inception through January 31, 2001, Star and its Board of Directors conspired to fix, through a concert of action, Star's Interchange Fees. Pursuant to this illegal agreement, each member Bank agreed to pay the fixed Interchange Fees.

96. For example, on October 27, 1989, the Board of Directors, including representatives of Citibank and Bank of America, fixed Star's Interchange Fees at $0.45 for "on-premise" transactions and $0.55 for "off-premise" transactions.

97. The Board repeatedly re-affirmed and extended its price-fixing, including in the instances when Star acquired new networks. For example, according to notes from an April 8, 1999, Executive Committee Meeting of

H&S Holding Company, Star's President and CEO, Ronald Congemi, advised the Committee that "interchange fee structure was a matter reserved for decision by the full [Star] board."

98. At a meeting on February 9-10, 2000, the Board, comprised of employees and agents of the Banks that controlled Star, voted again to fix Interchange Fees: at \$0.45 for on-premise transactions and \$0.55 for off-premise transactions, effective December 1, 2000. That vote raised Interchange Fees for transactions at ATMs connected to the recently-acquired Honor network, which had previously been set at \$0.40 for both on- and off-premises transactions.

99. At that time, each of the Bank Defendants had representatives on Star's Board. Each of the Bank Defendants agreed to the price fix and agreed to abide by it.

100. **[REDACTED]**. In other words, even after the Star-Concord merger, the Bank Defendants effectively controlled Star/Concord's setting of Interchange Fees.

101. Indeed, in consideration of the Star-Concord merger, the Bank Defendants and their principals, and their co-conspirators received approximately ten percent of the voting stock in Concord.

102. Defendants have perpetuated and maintained the price-fixing mechanism that has been in place since Star's inception.

103. Until February 1, 2001, Defendants agreed that they would pay Interchange Fees at the price fixed by the Board of Directors. Since February 1, 2001, that same price-fixing agreement effectively remains in place, as Star's members have continued to fix Star's Interchange Fees. For example, the Star Advisory Board,

consisting of member Banks, not only "recommended, reviewed and approved" "revised fees" for the 2004 fee schedule, the Advisory Board also determined that these "revised fees" should be delayed due to industry conditions. Moreover, Star's former President Ron Congemi solicited the input of Star's Advisory Board members – consisting of Star's member Banks – in analyzing and considering changes to Interchange Fees and other network fees, rules (including Operating Rules), and procedures.

104. At all relevant times, Bank Defendants knew that Star contemplated that each card-issuing member Bank would agree to charge and to pay the same fixed Interchange Fees. Banks Defendants also knew that Star invited them to agree to charge the same fixed Interchange Fees.

105. At all relevant times, Bank Defendants have agreed to pay, and do pay, fixed Interchange Fees as required by Star's Operating Rules. Moreover, at all relevant times, the Bank Defendants knew that the other members of Star agreed to pay the fixed fees, and each, with that knowledge, continued to agree to participate and did participate in the price-fixing.

106. At all relevant times, the Defendants continued to participate in the conspiracy and reap the benefits of supracompetitive Interchange Fees. At no time did any of the Defendants take the steps necessary to withdraw publicly from the conspiracy or otherwise abandon it. To the contrary, Interchange Fee levels, as fixed by Defendants before the acquisition, remained the same until 2003, when they were modified by a mere penny. Since then, their levels have not changed.

107. At all relevant times, Star's fixed Interchange Fees have been set in stone: they are immutable and non-

negotiable. They are not "default" fees. No Star member has ever paid an Interchange Fee for even a single transaction that deviated from the fixed Interchange Fees set forth in Star's schedule of fees.

108. The aforesaid contract, combination and conspiracy had the following anticompetitive effects, among others:

a. Foreign ATM Fees have been maintained at artificially high levels;

b. ATM Cardholders who have used Foreign ATMs have been deprived of the benefits of free and open competition;

c. Price competition has been unreasonably restrained and suppressed; and

d. The Defendants conduct has injured the Plaintiffs in their business and property.

109. The Defendants' conduct, undertaken for the purpose of fixing prices and restraining competition, unreasonably restrains trade in violation of Section One of the Sherman Act, 15 U.S.C. § 1.

G. Harm To Competition

110. Despite being unnecessary to compensate ATM Owners, or for the efficient operation of Star, Defendants have continued to impose fixed Interchange Fees because the Bank Defendants mark them up to set Foreign ATM Fees, which generate substantial revenues for Bank Defendants.

111. The imposition of a mandatory fixed Interchange Fee directly impacts the price that consumer Cardholders pay for Foreign ATM Transactions. If Defendants had not collusively imposed and fixed Interchange Fees, free and open competition in the

marketplace would have resulted in significant reductions to, or the elimination of, Foreign ATM Fees, and the price consumers paid to get their own money would have been substantially reduced.

112. Fixed Interchange Fees have not incentivized or promoted the deployment of additional ATMs since 1996. Rather, according to industry experts, Surcharging, and not Interchange Fees, facilitated the quantum leap in ATM deployment. In fact, Surcharging led to the deployment of an additional 250,000 ATMs. Dove Consulting's 2006 ATM Deployer Study, sponsored in part by Star, shows that "ATM deployment growth exploded" as a result of Surcharging.

H. Relevant Product And Geographic Markets

1. Provision of Foreign ATM Transactions Routed Over ATM Networks

113. One relevant product market for assessing Defendants' collusive conduct is the provision of Foreign ATM transactions routed over ATM networks. The Defendants should compete in this market, and but for their agreement they would compete by lowering or eliminating Interchange Fees and Foreign ATM Fees. The agreement on Interchange fees has artificially increased, maintained, or stabilized Star's Interchange Fee, resulting in the Bank Defendants' Foreign ATM Fees being set at supra-competitive levels. Defendants are liable for this conduct regardless of whether they possess "market power" in the market for the provision of Foreign ATM transactions routed over ATM networks. Nevertheless, they do have market power, as evidenced by their ability to raise prices above competitive levels.

2. Provision of Foreign ATM Transactions Routed Over Star

114. Another relevant product market for assessing Defendants' collusive conduct is the provision of Foreign ATM Transactions routed over Star.

115. The Bank Defendants, which are some of the largest Banks in the United States, compete directly with each other to offer deposit accounts to consumers. A substantial feature of such accounts is consumers' ability to access and withdraw their own funds upon demand. Upon opening deposit accounts with Bank Defendants, consumers are given ATM cards, which are linked to those accounts, to use at Star-branded ATMs to withdraw funds. Upon information and belief, consumers cannot obtain ATM Cards without first opening deposit accounts.

116. Because ATM Cards are issued primarily for withdrawing funds from or depositing funds into deposit accounts, the relevant product market for Foreign ATM Transactions routed over the Star Network would not exist without the primary market for deposit accounts. The relevant product market is wholly derivative from and dependent on the market for deposit accounts.

117. ATM Cards allow consumers to withdraw their own funds at ATMs other than those owned by the Bank that issued the card, *i.e.*, to initiate Foreign ATM Transactions. However, the Bank Defendants, and not consumers, determine that those transactions will be routed over Star. The Bank Defendants and Star fix Interchange Fees that consumers unknowingly pay for Foreign ATM Transactions routed over Star. When Interchange Fees are increased, Foreign ATM Fees are increased as well.

118. When consumers withdraw their own funds from Foreign ATMs, they cannot choose: (1) the ATM Network over which those transactions are routed or (2) to avoid paying or limiting fixed Interchange Fees associated with the transactions. Consumers are locked into both using Star and paying fixed Interchange Fees for those transactions.

119. Consumers withdrawing their own funds through Foreign ATM Transactions routed over Star have no adequate substitute when they seek to withdraw cash from their deposit accounts. Foreign ATM Transactions over Star provide consumers with access to cash at all times, regardless of where those consumers are located. Consumers' ability to withdraw cash at a particular Bank Defendant's branches is limited both by the Bank's business hours and branch locations. Similarly, consumers' ability to withdraw cash at ATMs owned by a particular Bank Defendant is circumscribed by the geographic locations where the Bank's ATMs are deployed. Although consumers can get cash back on PIN debit transactions at many retail establishments, those transactions require a purchase and are limited by the establishment's business hours and rules which limit the amount of cash back they may give to a consumer for such transactions.

120. To avoid paying Star's supra-competitive Interchange Fees, consumers must switch their deposit accounts to banks which do not route their foreign ATM transactions over Star. Switching banks, however, does not guarantee that consumers will avoid paying Star's fixed Interchange Fee. Due to market imperfections, consumers cannot determine the ATM network over which their foreign ATM transactions will be routed upon opening new deposit accounts. Banks, including Bank

Defendants, generally do not disclose this information to consumers and it is generally neither disclosed on Banks' web sites nor in literature describing various deposit accounts. Moreover, many consumers are unaware of a Banks' Foreign ATM Fees, again due to market imperfections. Accordingly, when consumers switch their deposit account from one Bank Defendant to another, or to one of the approximately 5,400 other member Banks of Star, they may unknowingly continue to pay Star's fixed Interchange Fees. In fact, in some geographic areas Star is dominant to the point that consumers would be hard-pressed to avoid paying Star's fixed Interchange Fee.

121. Consumers are economically locked into their deposit accounts because the costs of switching to a new bank exceed the amounts they pay in overcharges on the Foreign ATM Fees. These switching costs are both monetary and non-monetary.

122. Monetary switching costs and impediments include, but are not limited to: (1) maintenance fees that Banks charge when consumers do not maintain minimum amounts in their deposit accounts, which Banks may waive for consumers who have multiple accounts within the same Bank; (2) forfeiture of "reward points" given to consumers for having linked credit or debit accounts; (3) fees to obtain checks for new accounts; (4) funds that must remain in existing accounts to ensure that outstanding checks and recurring automated payments clear; (5) funds that must remain in both existing and new accounts to satisfy minimum deposit amount requirements necessary to avoid monthly account fees; and (6) funds tied up in a new account placed on hold, up to one business day for amounts up to $5,000 and up to eight

business days for amounts over $5,000. *See* 12 U.S.C. § 4003.

123. Non-monetary switching costs include, but are not limited to, the cost of time expended to: (1) investigate options and open new accounts, including the additional time that consumers must spend to verify their identities as required by the Patriot Act, 31 U.S.C. § 5318(l), 31 C.F.R. § 103.121; (2) close existing accounts; (3) notify parties (e.g., monthly billers) to whom recurring payments are payable; (4) notify employer(s) and others to re-route direct deposits; and (5) learn the new Bank's online banking system.

124. Consumers are aware that they also face a risk that mistakes or problems could occur when opening new accounts. For example, Banks may make mistakes establishing and processing new accounts, which must be resolved before consumers have access to their funds. Errors occur in the processing of automated payments to billers who fail to act promptly and accurately in processing new banking information from their customers.

125. Even consumers who take steps to avoid these switching costs subject themselves to risks. For example, consumers who leave insufficient funds in their existing accounts to clear outstanding checks and/or automated recurring payments are charged penalties by Banks and whoever presents the dishonored checks for payment. Thus, while it is possible for consumers to switch Banks, the costs of and risks associated with switching are significant, and generally exceed any amounts saved in the short term by avoiding supra-competitive Foreign ATM Fees.

126. In addition, consumers – including Bank customers – are often reluctant to switch from a product and/or service to which they are accustomed and about

which they are knowledgeable, a phenomenon known as "cognitive lock-in" among behavioral economists. For example, customers who learn to use a Bank's online banking web site efficiently become "cognitively loyal" to that site, and will resist having to master a new one. Thus, even when consumers are dissatisfied with a particular Bank's services, real and perceived habits developed from repeat usage of those services significantly limit the likelihood that those consumers will switch Banks. Banks are well aware of cognitive switching costs and exploit them to retain customers.

127. Switching costs and cognitive lock-in increase the price differentials that consumers will tolerate before changing Banks. Because switching costs are high compared to the lower transaction price that consumers pay for each Foreign ATM Transaction by switching Banks, consumers are economically locked into their Bank. Cognitive lock-in has a similar effect. Star's fixed Interchange Fee can thus be set at a level that is both profitable to the Bank Defendants and supra-competitive, even if some of the Bank Defendants' customers are willing and able to overcome switching costs and cognitive lock-in effects to change Banks. Once locked into their deposit accounts, class members are required to pay Star's fixed Interchange Fee as part of its Foreign ATM Fee.

128. ATM Networks other than Star are not substitutes for Foreign ATM Transactions routed over Star. When withdrawing cash at Foreign ATMs, consumers have no choice regarding the ATM Networks over which the transactions are routed. The Bank Defendants alone dictate that those transactions are routed over Star.

129. The existence of other ATM Networks does not discipline the level at which Star's Interchange Fees are fixed. Star does not compete with other ATM Networks as to Interchange Fees. As a result, and as a consequence of switching costs, cognitive lock-in and limited disclosure of Foreign ATM Fees, Star is able to sustain a small but significant, non-transitory increase in Interchange Fees without forfeiting Foreign ATM Transactions to other networks. Indeed, Star has for years maintained Interchange Fees at artificially stable and supra-competitive levels.

130. The Defendants have market power in the market for Foreign ATM Transactions routed over Star. Star's members are able to raise the price of a Foreign ATM Transaction to a supra-competitive level through fixed Interchange Fees.

131. The total price consumers pay for Foreign ATM Transactions routed over Star is comprised of Foreign ATM Fees (the marked-up fixed Interchange Fee), plus Surcharges. However, consumers are informed only of the level of the Surcharge at the time of the transaction. When consumers are informed of Surcharges, they have the option of cancelling their transactions and shopping for machines with better prices. In stark contrast, consumers are not informed about fixed Interchange Fees, or marked-up Foreign ATM Fees at the time of the transaction, and therefore do not have the option to cancel their transaction and shop for machines with better prices. Consumers are informed about Foreign ATM Fees only in monthly statements, well after their transaction dates. Consumers are more sensitive to information, including prices, when it is transparent. Accordingly, consumers are generally more sensitive to

changes in Surcharges than changes in Foreign ATM Fees.

132. Because consumers are more sensitive to changes in Surcharges than to changes in Foreign ATM Fees, relatively large increases in Foreign ATM Fees would reduce the demand for ATM transactions by a relatively small amount, while relatively small increases in Surcharges would decrease the demand for ATM transactions by a relatively large amount. As a result, Star's members have increased the prices of Foreign ATM Transactions, and, in the aggregate, increased their profits, through collusively set and imposed mandatory Interchange Fees. The effect has been to shift consumer payments from transparent Surcharges to opaque and hidden Foreign ATM Fees. Thus, Defendants have exercised market power by raising the total price of Foreign ATM Transactions to a supra-competitive level.

133. Defendants' fixed Interchange Fees are not subject to normal competitive pressures. Consumers cannot exert any downward pressure on Interchange Fees, and hence cannot exert any downward pressure on Foreign ATM Fees. At the time of their transactions, they have no freedom to choose the ATM Network over which the transaction is routed. They tend to be unaware that they are paying Interchange Fees or that Defendants have fixed the amounts of those fees. Consumers have no freedom to avoid paying fixed Interchange Fees. Absent providing consumers with the total cost (including the marked-up Interchange Fee) of Foreign ATM Transactions at the time of the transactions, consumers cannot make the most rational decisions which would lead to the most economically efficient outcome. Consumers therefore cannot and do not constrain the levels of Star's Interchange Fees.

134. During the Relevant Period, Defendants have also jointly controlled price, and thereby exercised market power, by fixing Star's Interchange Fees at supra-competitive levels without regard to costs.

135. Star's fixed Interchange Fees have never been based on natural market forces or the costs of providing cash to other Banks' customers. When the fees were originally fixed at $.40 for on-premises and $.60 for off-premises ATMs in 1984, they were set based on cost data and the Banks' limited understanding of difference in costs, if any, related to on- and off-premises machines. Star has never determined or had an independent party analyze the costs associated with Foreign ATM Transactions. When, in 1990, Star and its Bank members fixed Interchange Fees at $.45 for on-premises and $.55 for off-premises ATMs, they did not do so based on any cost study. Cost has never been a consideration in the levels of Star's fixed Interchange Fees.

136. STAR's Interchange Fees have continued to be fixed at a price far above the costs of providing cash to other Banks' customer. As of 1993, at least one ATM Network estimated that cost to be approximately 25 cents per transaction. That cost has only decreased over time as the costs of technology – especially telecommunications costs – have declined rapidly.

137. Nevertheless, Star's fixed Interchange Fees remained static through 2002. In 2003, Star's fixed Interchange Fees were adjusted by a mere penny, to $.46 for on-premises ATMs and $.54 for off-premises ATMs. Cost was not a reason for this *de minimis* change. Star's fixed Interchange Fees have been set well above and without regard to costs.

138. Defendants' control over price is further evidenced by the significant increase in the fixed Inter-

change Fees charged on the former Honor and MAC networks. In approximately February 2000, Star's Board of Directors voted and agreed to fix and raise Honor's Interchange Fees from a flat $.40 per transaction to Star's then prevailing rates of $.45 for on-premises ATMs and $.55 for off-premises ATMs effective December 2000. This price increase was unrelated to cost.

139. Similarly, in 2002, Interchange Fees on the former MAC network were fixed and raised significantly from a flat $.38 to Star's then prevailing rates of $.45 for on-premises ATMs and $.55 for off-premises ATMs. This price increase was unrelated to costs.

140. Moreover, because consumers pay fixed Interchange Fees, no Bank Defendant or other Bank members of the former Honor or MAC ATM networks left Star because of these increases in Interchange Fees.

141. The structure of the banking/ATM Network industry encourages consolidation and discourages new entrants. Banks require high start-up costs (for example, capitalization, regulatory compliance, and brick-and-mortar branches) and have relatively low marginal costs. ATM Networks exhibit economies of density or economies of ubiquity within a geographic area (that is, the more ubiquitous, the more valuable the network). This encourages consolidation and inhibits new entrants, because a new entrant is at a substantial disadvantage to an established, wide-spread network (such as Star). In fact, the market has significantly consolidated, from 127 ATM networks in 1984, to 40 in 2002, to 25 in 2006.

142. The geographic dimension of both alleged relevant product markets is any location in the United States where a consumer has been able to conduct a Foreign ATM Transaction over Star during the Relevant Period.

143. For the purpose of forming and effectuating the aforesaid contract, combination and conspiracy, the Defendants and their co-conspirators did those things which they combined and conspired to do, including, among other things, fixing and maintaining Interchange Fees.

I. Star's Member Banks Have No Ability Or Incentive To Seek Redress For Star's Fixed Interchange Fees

144. There is no realistic possibility that any member Bank that both issues ATM Cards and owns ATMs, which is the vast majority of members including all Bank Defendants, would sue Star over fixed Interchange Fees, because they both pay and receive Interchange Fees. The Bank Defendants also mark-up the Interchange Fees to compute Foreign ATM Fees, which are a significant source of their revenue. Accordingly they benefit from fixed Interchange Fees. They are also co-conspirators.[1]

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief:

1. That the Court determine that each class should be certified under Rules 23(b)(2) and 23(b)(3) of the Federal Rules of Civil Procedure, and direct that reasonable notice of this action, as provided by Federal Rule of Civil Procedure 23(c)(2), be given to the members of the Damages Classes;

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[1] Pursuant to *Parrino v. FHP, Inc.*, 146 F.3d 699, 704 (9th Cir. 1998), Plaintiffs preserve all appealable rights relating to dismissed claims and parties.

2. That the Court adjudge and decree that Defendants actions violate Section 1 of the Sherman Act, 15 U.S.C. § 1;

3. That the Court adjudge and decree that Plaintiffs and each member of the Damages Classes have sustained damages, and that the Court enter judgment in favor of Plaintiffs and each member of the Damages Classes and against Defendants, and each of them, for damages sustained;

4. That the Court enjoin Defendants from combining or conspiring to fix, raise, maintain or stabilize Interchange Fees, and from engaging in the wrongful practices alleged in this Complaint;

5. That the Court award Plaintiffs and other members of the Classes their costs of suit, including reasonable attorneys' fees, as provided by law; and

6. That the Court grant Plaintiffs and the other members of the Classes such other, further and different relief as the nature of the case may require or as may seem just and proper to this Court.

Dated: October 16, 2009

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DEMAND FOR JURY TRIAL

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

Dated: October 16, 2009

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APPENDIX E
RELEVANT STATUTORY PROVISIONS

1. The Sherman Act, 15 U.S.C. §§ 1-7, provides, in relevant part:

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

* * * * *

2. The Clayton Act, 15 U.S.C. §§ 12-27, provides, in relevant part:

§ 15. Suits by persons injured

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(b) Amount of damages payable to foreign states and instrumentalities of foreign states

(1) Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection (a) of this section an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee.

(2) Paragraph (1) shall not apply to a foreign state if—

(A) such foreign state would be denied, under section 1605(a)(2) of Title 28, immunity in a case in which the action is based upon a commercial activity, or an act, that is the subject matter of its claim under this section;

(B) such foreign state waives all defenses based upon or arising out of its status as a foreign state, to any claims brought against it in the same action;

(C) such foreign state engages primarily in commercial activities; and

(D) such foreign state does not function, with respect to the commercial activity, or the act, that is the subject matter of its claim under this section as a procurement entity for itself or for another foreign state.

(c) Definitions

For purposes of this section—

(1) the term "commercial activity" shall have the meaning given it in section 1603(d) of Title 28, and

(2) the term "foreign state" shall have the meaning given it in section 1603(a) of Title 28.