Nos. 15-961, 15-962

IN THE

Supreme Court of the United States

VISA INC., ET AL.,
Petitioners,
v.
SAM OSBORN, ET AL.,
Respondents.

VISA INC., ET AL.,
Petitioners,
v.
MARY STOUMBOS, ET AL.,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION OF RESPONDENTS

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March 30, 2016

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QUESTION PRESENTED

Did the court of appeals correctly hold that Plaintiffs' specific allegation of an agreement and other allegations beyond mere membership in a trade association sufficed to plausibly allege an illegal horizontal agreement under Section 1 of the Sherman Act, 15 U.S.C. § 1?

CORPORATE DISCLOSURE STATEMENT

Respondents are Sam Osborn; Andrew Mackmin; Barbara Inglis; Mary Stoumbos; The National ATM Council, Inc.; ATMs of the South, Inc.; Business Resource Group, Inc.; Cabe & Cato, Inc.; Just ATMs, Inc.; Wash Water Solutions, Inc.; ATM Bankcard Services, Inc.; Meiners Development Company of Lee's Summit, Missouri, LLC; Mills-Tel, Corp. d/b/a First American ATM; Scot Garner d/b/a SJI; Selman Telecommunications Investment Group, LLC; Turnkey ATM Solutions, LLC; Trinity Holdings Ltd, Inc.; T&T Communications, Inc.; and Randal N. Bro d/b/a T & B Investments.

Pursuant to this Court's Rule 29.6, Respondents state that no Respondent has a parent company, and no publicly-held company owns 10% or more of the stock in any Respondent.

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BRIEF IN OPPOSITION OF RESPONDENTS

The question presented in the petitions – whether mere membership in a trade association suffices for agreement under the antitrust laws – is not at issue. The court of appeals decided that question in Petitioners' favor. The court of appeals ruled against Petitioners, however, because it held there were sufficient allegations beyond mere membership. Accordingly, the question here is whether, at the pleading stage, the complaints' substantial allegations beyond mere membership sufficed to allege a plausible agreement. This case-specific question presented at an interlocutory stage does not warrant this Court's review.

First, there is no circuit conflict. Petitioners and their amici attempt to manufacture a conflict by presuming that the D.C. Circuit meant the opposite of what it said. The D.C. Circuit clearly stated that mere membership in a trade association does not suffice for agreement. Indeed, for this principle, it quoted approvingly the primary case that Petitioners cite to establish a supposed conflict. As for the allegations beyond mere membership that the D.C. Circuit relied upon for its decision, Petitioners fail to show any conflict whatsoever.

Second, the case-specific evaluation of the allegations here does not implicate any other cases. Petitioners' argument about the supposed importance of this case is based entirely on their misplaced assertion that the D.C. Circuit's holding relied upon allegations of mere membership. Because the court of appeals actually relied upon the particular allegations regarding the agreement at issue and its plausibility,

there is no broader implication for trade associations generally.

Third, the D.C. Circuit's decision is correct under well-established law. Respondents unambiguously alleged the existence of an agreement among banks to prohibit ATM operators from charging lower access fees for transactions over lower-cost networks. Respondents further provided detailed, non-conclusory factual allegations to explain why the agreement was (at a minimum) plausible, including the fact that the restriction was irrational but for the existence of an agreement among the competitor banks. The restriction is a form of price-fixing, and there is no support for Petitioners' suggestion that price-fixing is permissible simply because it was agreed on in the context of a trade association.

For these reasons, the Petitions should be denied.

COUNTERSTATEMENT

A. Factual Background

Respondents are independent (non-bank) ATM operators and two groups of consumers that in 2011 filed three separate class action complaints under Section 1 of the Sherman Act, 15 U.S.C. § 1. All three complaints challenge Petitioners' ATM access fee restraints ("Access Fee Rules"), which prohibit ATM operators from charging a lower access fee for transactions over a rival network than they charge for Visa and MasterCard transactions. Even though the costs of the various networks can vary by as much as $0.60/transaction, the Access Fee Rules expressly prohibit any ATM operator at any given ATM terminal from charging lower access fees for transactions over

lower-cost networks. *Stoumbos* Pet. App. 65a ¶ 43, 128a ¶ 56.[1]

The challenged Visa restraint states:

> 4.10A Imposition of Access Fee
>
> An ATM Acquirer may impose an Access Fee if:
>
> It imposes an Access Fee on all other Financial Transactions through other shared networks at the same ATM;
>
> The Access Fee is not greater than the Access Fee amount on all other Interchange Transactions through other shared networks at the same ATM . . . .

Stoumbos Pet. App. 82a ¶ 78. The challenged MasterCard restraint states:

> 7.14.1.2 Non-Discrimination Regarding ATM surcharge fees
>
> An Acquirer must not charge an ATM Access Fee in connection with a Transaction that is greater than the amount of any ATM Access Fee charged by that Acquirer in connection with the transactions of any other network accepted at that terminal.

Stoumbos Pet. App. 135a ¶ 64.

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[1] Respondents use "Pet." and "Pet. App." to refer to the petition and appendix in *Visa Inc. v. Osborn*, No. 15-961. The petition in *Visa Inc. v. Stoumbos*, No. 15-962, simply adopts the arguments made in the *Osborn* petition, and therefore it should be denied for the same reasons. Respondents use "*Stoumbos* Pet. App." to refer to the appendix for that petition.

Respondents allege that the defendant banks agreed among themselves to these restraints at the time when Visa and MasterCard were owned and operated as joint ventures by the banks. Pet. App. 77a ¶ 81. The member banks later relinquished direct control over the bankcard associations through public offerings, but the IPOs did not alter the substance of the Access Fee Rules, which remain in force. Pet. App. 90a ¶ 118. Moreover, "[p]rior to the defendants' IPOs, each bank that was a member of the Visa or MasterCard networks knew and understood that the ATM Restraints would continue after the IPOs." *Stoumbos* Pet. App. 145a ¶ 91.

Respondents allege anticompetitive harm because Visa and MasterCard prevent banks and independent ATM operators from charging less, and potentially earning more, when an ATM transaction is processed through a network unaffiliated with Visa and MasterCard. *Stoumbos* Pet. App. 84a-92a ¶¶ 82-100. By forbidding ATM operators from lowering access fees for lower-cost networks, the ATM restraints harm competition among ATMs, harm competition among networks, raise ATM access fees for consumers, and raise network services fees for ATM operators. *Id.* The restraints further protect banks from competition with each other over the types of "bugs" offered on bank cards. Pet. App. 18a-19a (quoting Osborn Prop. Compl. ¶¶ 80, 116-17). Bugs are logos on the back of bank cards that indicate the ATM networks to which the cards are linked. *Stoumbos* Pet. App. 120a ¶ 40. In addition, independent ATM operators must enter into sponsoring agreements with the banks as a prerequisite for access to the dominant Visa and MasterCard ATM Networks, and these agreements effectively impose the Access Fee Rules on independent ATM operators. *Stoumbos* Pet. App. 64a ¶ 42.

Respondents also allege that the banks' conduct is irrational but for an agreement among them. Specifically, "[t]his horizontal conspiracy is only effective because the Bank Defendants and Bank Co-Conspirators know that their competitors are also complying. It would be contrary to any one bank's self-interest independently to agree to the [Access Fee Rules], unless it knew that its competitors were also agreeing to it." Pet. App. 83a ¶ 98. The reason is that "[a] bank that was not bound by the Restraints could charge lower prices for transactions conducted over networks that pay a higher net interchange fee, and attract customers away from banks that complied with the [Access Fee Rules]." Pet. App. 83a-84a ¶ 98; see also*, e.g.*, *Stoumbos* Pet. App. 86a ¶ 87 ("The ATM Access Fee restraints prevent ATM operators from maximizing revenue by prohibiting them from implementing a revenue-maximizing Access Fee pricing structure that properly reflects the variability of ATM costs and revenues depending on which of the various competing ATM Networks is used for the transaction.").

B. The District Court Granted Petitioners' Motion To Dismiss And Denied Leave To Amend

On February 13, 2013, the district court dismissed the First Amended Complaints. *See Nat'l ATM Council, Inc. v. Visa, Inc.*, 922 F. Supp. 2d 73 (D.D.C. 2013). On December 19, 2013, the district court (Jackson, J.) denied Plaintiffs' motions for leave to amend. The district court's reasoning relied on the timing of the agreement – an issue not raised by the petitions here – stating that "[a]llegations that the member banks made a *prior* agreement when they were members of the bankcard associations do not

suffice to allege a *current* agreement." Pet. App. 47a (emphases added).

C. The Court Of Appeals Held That Respondents Stated A Claim For Violation Of The Antitrust Laws

On August 4, 2015, the court of appeals (Wilkins J., joined by Tatel and Srinivasan, JJ.) reversed, holding that the complaints stated claims for violation of the antitrust laws. Pet. App. 3a-25a.

As relevant here, the court of appeals explained why the existence of an agreement to restrain trade was properly alleged. Pet. App. 17a-23a. The court began by citing the legal rule that "the Plaintiffs must allege that 'the challenged anticompetitive conduct stems from . . . an agreement, tacit or express.'" Pet. App. 18a (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007) (internal quotation marks and brackets omitted; alteration in original)). The court then noted that "the member banks developed and adopted the Access Fee Rules when the banks controlled Visa and MasterCard," and those "rules protected Visa and MasterCard from competition with lower-cost ATM networks, thereby permitting Visa and MasterCard to charge supra-competitive fees." Pet. App. 18a. The court therefore concluded: "The allegations here – that a group of retail banks fixed an element of access fee pricing through bankcard association rules – describe the sort of concerted action necessary to make out a Section 1 claim." Pet. App. 19a.

The court further explained that the complaints sufficed based on the particular allegations of agreement to the challenged rules, *not* based on the simple fact of membership in a trade association. The court, quoting *Fed. Prescription Serv., Inc. v. Am.*

Pharm. Ass'n, 663 F.2d 253, 265 (D.C. Cir. 1981), stated: "The Defendants correctly observe that '[m]ere membership in associations is not enough to establish participation in a conspiracy with other members of those associations.'" Pet. App. 20a. And the court affirmatively quoted *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008), for this proposition. *Id.* The court held that this proposition was inapposite, though, because "Plaintiffs here have done much more than allege 'mere membership.'" *Id.* "They have alleged that the member banks *used* the bankcard associations to adopt and enforce a supra-competitive pricing regime for ATM access fees." *Id.* In particular, "the rules of the former bankcard associations [were] *agreed to by the banks themselves*." *Id.* (quoting Osborn Prop. Compl. ¶ 81; emphasis added in opinion); *see also* Pet. App. 20a-21a (citing NAC Prop. Comp. ¶¶ 89-90). The court therefore concluded that the complaints alleged "enough to satisfy the plausibility standard." Pet. App. 21a.

Finally, the court of appeals rejected the district court's reasoning that a prior agreement did not suffice. Pet. App. 21a-23a. The court recognized that the question of whether defendants have withdrawn from an agreement is typically a question of fact for the jury, and that the allegations established such a fact question here. Pet. App. 21a-22a. The court thus held: "The Plaintiffs have adequately alleged an agreement that originated when the member banks owned and operated Visa and MasterCard and which continued even after the public offerings of those associations." Pet. App. 23a.

On September 28, 2015, the court of appeals denied Petitioners' petitions for rehearing *en banc*. Pet. App. 1a-2a.

REASONS FOR DENYING THE WRIT

I. THIS CASE DOES NOT IMPLICATE ANY SUPPOSED CIRCUIT CONFLICT OVER WHETHER MEMBERSHIP IN A TRADE ASSOCIATION SUFFICES TO SHOW AGREEMENT

A. There Is No Circuit Conflict On The Issue Of Mere Membership

Petitioners argue (Pet. 10-19) that there is a split of authority over whether mere membership in a trade association suffices to establish an agreement under the antitrust laws. However, every circuit court to address the issue – including the court below – has held that mere membership is not enough. Indeed, the court of appeals could not have been clearer on this point: it quoted the Ninth Circuit case with which it supposedly conflicts for the proposition that "'[m]embership in an association does not render an association's members automatically liable for antitrust violations committed by the association.'" Pet. App. 20a (quoting *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008)). It also quoted its own precedent, which established the same point 35 years ago: "'[m]ere membership in associations is not enough to establish participation in a conspiracy with other members of those associations.'" Pet. App. 20a (quoting *Fed. Prescription Serv., Inc.*, 663 F.2d at 265).

Thus, the supposed circuit split is completely illusory. It is based on nothing more than Petitioners' mischaracterization of the D.C. Circuit's opinion as stating that mere membership is enough for an agreement. In fact, the court stated precisely the opposite. And it held that the allegations here were sufficient because "Plaintiffs here have done *much*

more than allege 'mere membership.'" Pet. App. 20a (emphasis added).

B. There Is No Circuit Conflict On The Issue Of Whether The Specific Allegations Here Beyond Mere Membership Suffice To State A Claim

As to the question actually at issue in this case – whether the specific allegations beyond mere membership suffice – there is no conflict.

First, Petitioners focus primarily on *Kendall*, *see* Pet. 11-15, but the reasoning and outcome in that case are entirely consistent with the D.C. Circuit's opinion, which is why the D.C. Circuit quoted *Kendall* approvingly. In *Kendall*, the Ninth Circuit affirmed dismissal of a Section 1 claim where a group of merchants had claimed that "the Banks 'knowingly, intentionally and actively participated in an individual capacity in [an] alleged scheme' to fix the interchange fee or the merchant discount fee" for acceptance of Visa and MasterCard payment cards. 518 F.3d at 1048. Critically, there was no allegation that the banks *agreed* to the merchant discount rate charged by Visa and MasterCard. Rather, the plaintiff merchants in *Kendall*, even after being afforded discovery, alleged only that the member banks charged the fees set by MasterCard and Visa, not that they charged them pursuant to any agreement or conspiracy. *Id.* The Ninth Circuit accordingly held that "merely charging, adopting or following the fees set by a Consortium is insufficient as a matter of law to constitute a violation of Section 1 of the Sherman Act." *Id.* The allegations in *Kendall* therefore amounted to nothing more than mere membership. *Id.*; *see also* Pet. 14-15 ("The court ruled that the plaintiff failed to plead a conspiracy when they alleged

only that the defendant manufacturers belonged to a standard-setting organization, actively participated therein, and subsequently adhered to rules adopted by the organization.").

Here, in contrast, Respondents specifically allege the existence of an agreement (and facts supporting the plausibility of that agreement) among defendant banks to adopt a rule that *requires* ATM operators to fix prices charged to consumers. Respondents did not allege that the banks were merely members of the associations that adopted the rule. Rather, Respondents alleged that the defendant banks agreed to this rule and to apply it in setting their prices. *See* Pet. App. 65a-66a ¶ 47; Pet. App. 77a ¶ 81. As Petitioners themselves recognize, "banks that were members of the associations allegedly agreed 'to adhere to rules and operating regulations,' including the Access Fee Rules." Pet. 7 (quoting Pet. App. 65a-66a, 77a ¶¶ 47, 81). The D.C. Circuit likewise noted the specific allegations of an agreement: "a supracompetitive pricing regime for ATM access fees . . . 'originated in the rules of the former bankcard associations *agreed to by the banks themselves*,'" and the rules were established "'with the cooperation and assent of the member banks.'" Pet. App. 20a-21a (quoting Osborn Prop. Compl. ¶ 81 and NAC Prop. Compl. ¶¶ 89-90 (emphasis added in opinion)). Petitioners assert (Pet. 12-13) that the "conspiracy allegations are materially indistinguishable from the allegations made by the *Kendall* plaintiffs," but Petitioners can make this assertion only by ignoring

the allegations of the alleged agreement upon which the D.C. Circuit relied.[2]

In addition, the alleged restriction in *Kendall* was very different from the Access Fee Rules challenged here. In *Kendall*, the collusion concerned the discount rate charged by an acquiring bank to a merchant, but set by Visa and MasterCard. Here, in contrast, the challenged Access Fee Rules govern not what Visa and MasterCard do in setting internal network fees, but what the banks and ATMs do when setting fees charged to consumers.[3] Because this case concerns the banks fixing their own prices, the complaints here alleged an agreement, while the complaint in *Kendall* did not. Indeed, as detailed in the complaints and discussed *supra* at 2-5, the factual allegations supporting the existence of the banks' agreement to the Access Fee Rules are overwhelming, based on the implausibility and economic irrationality of Respondents independently following the Access Fee Rules. There were no analogous allegations in *Kendall*,

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[2] Petitioners also claim (Pet. 13 n.5) that the 39-paragraph complaint at issue in *Kendall* was more specific than the complaints here because the *Kendall* complaint alleged "a specific incident as evidence of the purported conspiracy." However, the "incident" described in the *Kendall* complaint occurred in 1997, while the *Kendall* plaintiffs alleged the conspiracy did not begin until January 1, 2004. *See* First Amend. Class Action Antitrust Compl. and Demand for Jury Trial, Dkt. No. 64, Case No. 04-CV-04276 (N.D. Cal.) ¶¶ 13, 15.

[3] Amici law professors (Br. 9) suggest that the banks' agreement here was vertical because the restraints are included as part of contracts between ATM networks and ATM operators. But they ignore the fact that the alleged agreement to adopt these rules was made between the banks and that the alleged agreement restricts what the banks themselves can charge. *See, e.g.*, *Stoumbos* Pet. App. 69a ¶ 52.

where the plaintiffs "pleaded only ultimate facts, such as conspiracy, and legal conclusions." 518 F.3d at 1047-48.

Second, Petitioners suggest a conflict with *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412 (4th Cir. 2015) ("*SawStop*") (Pet. 14-17), but there is no conflict. *SawStop* dismissed allegations of two conspiracies where the industry participants "allegedly used their influence" to affect standard-setting, but "[t]he complaint identifies no fact other than consistent votes [in meetings of a trade association] against SawStop's proposal (and for the other designs) to establish the alleged illegal agreements." 801 F.3d at 435, 437.[4] As Petitioners recognize, *SawStop* "held that naked allegations of membership and a governance role in a business association do not sufficiently plead an antitrust conspiracy." Pet. 14 (citing 801 F.3d at 423-26). As discussed above, Respondents

[4] *SawStop* upheld allegations of a different conspiracy where the plaintiffs alleged parallel conduct and the nature of the agreement. 801 F.3d at 429-32. Petitioners argue that unlike the conspiracy allegations upheld in *SawStop*, Respondents did not allege the "'who, what, when, where and why'" of the conspiracy. Pet. 16; *see also* Amicus American Society of Association Executives Br. 8. Petitioners, however, never argued in the D.C. Circuit that such specificity is required. In any event, the complaints did provide this information: the agreement was made by the defendant banks along with Visa and MasterCard; it provides that no ATM operator may charge customers whose transactions are processed on Visa or MasterCard networks a greater access fee than that charged to any customer whose transaction is processed on an alternative ATM network; it was made prior to Visa and MasterCard's IPOs in 2006 and 2008 and remains in force today; it was formed through the use of Visa and MasterCard bankcard associations; and it was done to ensure supra-competitive fees and to limit competition among both networks and banks. *Stoumbos* Pet. App. 59a-71a ¶¶ 27-55.

alleged far more than that here. In particular, the allegations are not about using influence or rejecting an alternative, but actually agreeing to a specific rule that required banks and ATMs to fix their prices.[5]

Third, the supposed conflict with *In re Insurance Brokerage Antitrust Litig.*, 618 F.3d 300 (3d Cir. 2010) (Pet. 17-19), is likewise illusory. Once again, Petitioners attempt to equate the allegations by simply ignoring the allegations in this case, not present in *In re Insurance Brokerage*, of more than mere membership in a trade association. There, the plaintiffs alleged a "global conspiracy" among insurance brokers not to disclose commission agreements, which was undercut by allegations that "explained why each broker had ample independent motive to avoid disclosure." 618 F.3d at 348. Moreover, the allegations concerning the trade group suggested only that the defendants were members of the group and adopted the trade group's suggestions. *Id.* at 349. Here, in contrast, the D.C. Circuit was not required to reconcile allegations of the existence of an agreement with allegations that contradicted that existence. Respondents have identified an agreement and quoted its relevant language requiring price-fixing. And the complaints further allege reasons for that agreement, explaining that "[t]his horizontal conspiracy is only

[5] Amici law professors (Br. 5) erroneously suggest that the particular language used by the Fourth Circuit in the context of standard-setting – *i.e.*, the plaintiff must "'show[] that the standard was deliberately distorted by competitors of the injured party . . . in addition to a further showing of market foreclosure,'" (quoting *SawStop*, 801 F.3d at 436) – applies to all trade association cases. But the Fourth Circuit made clear that its reasoning was specific to the standard-setting context, *see SawStop*, 801 F.3d at 435-36, and amici identify no case applying it outside that context.

effective because the Bank Defendants and Bank Co-Conspirators know that their competitors are also complying. It would be contrary to any one bank's self-interest independently to agree to the Restraints, unless it knew that its competitors were also agreeing to it." Pet. App. 83a ¶ 98. These clear differences belie any suggestion of a circuit conflict, and make clear the case-specific nature of the inquiry sought by the petitions.

II. THE QUESTION OF WHETHER THE ALLEGATIONS HERE IN ADDITION TO MEMBERSHIP IN A TRADE ASSOCIATION SUFFICED TO STATE A CLAIM DOES NOT WARRANT THIS COURT'S REVIEW

Petitioners' arguments about the importance of this case (Pet. 21-25) are based entirely on their misstatement of the D.C. Circuit's opinion as holding that mere membership suffices for agreement. As for what the D.C. Circuit actually held – that the specific allegations here beyond mere membership sufficed at the pleading stage – the ruling has no implications outside of this particular case. Petitioners do not cite a single case that concerns similar allegations of an express agreement to fix fees through trade association rules. Rather, petitioners cite cases (like *Kendall*) where there was in fact no allegation of agreement, or cases (like *National Society of Professional Engineers*) where it is undisputed that the agreement did suffice to state a claim. In short, this case does not affect trade associations unless the members make a specific agreement to restrain trade – which has always been recognized as a potential antitrust violation.

As to Petitioners' and amici's arguments about the pro-competitive benefits of trade associations

generally, those are not disputed. But those benefits do not shield trade associations from all antitrust scrutiny.

Furthermore, Petitioners' suggestion (Pet. 24) that there is uncertainty in this area of law is baseless. They cite four district court cases, three of which held simply that mere membership is not enough for an agreement. The fourth correctly held that allegations beyond membership did suffice where the facts alleged indicated the existence of an agreement. *See Home Quarters Real Estate Grp., LLC v. Michigan Data Exch., Inc.*, No. CIV. 07-12090, 2009 WL 276796, at *1 (E.D. Mich. Feb. 5, 2009) ("In addition to the allegation of parallel conduct, the plaintiff has asserted that the defendants are comprised of the plaintiff's competitors, have overlapping memberships, operate in the same geographic region, and took action within 24 hours of one another. All of these allegations, taken as true, 'suggest that an agreement was made.'"). Thus, there is no ambiguity, only different courts applying the same standard to different factual allegations.

III. THE COURT OF APPEALS CORRECTLY HELD THAT THE ALLEGATIONS HERE IN ADDITION TO MEMBERSHIP IN A TRADE ASSOCIATION SUFFICED TO STATE A CLAIM

A. The Existence Of An Agreement Here Was Far More Than Plausible

The case-specific allegations here that belie the existence of any circuit conflict also demonstrate why the D.C. Circuit correctly held that Plaintiffs satisfied the plausibility standard in alleging a horizontal agreement to restrain trade.

First, "the banks have continued to issue Visa- and MasterCard-branded cards and to comply with the Access Fee Rules at their own ATMs." Pet. App. 22a (citing NAC Prop. Compl. ¶¶ 101, 103). Without the Access Fee Rules, nothing would prevent each of the banks from making its own market decisions relating to ATM access fees, including whether to charge ATM customers less for transactions over less costly networks. The fact that the banks continue to enforce the Access Fee Rules, even though the member banks no longer control the bankcard associations and even though it would be an easy matter for any bank to adopt network-by-network ATM access fees, strongly indicates the existence of an agreement. *See, e.g.*, *Stoumbos* Pet. App. 85a ¶ 85, 149a ¶ 103.

Second, "even though the banks no longer directly control Visa and MasterCard, . . . the banks work with those associations to route more transactions over their networks." Pet. App. 22a. Indeed, "at least some member banks offer single-bug cards so that independent ATM operators have no choice but to run those transactions over a high-cost network run by Visa or MasterCard." *Id.* (citing Osborn Prop. Compl. ¶¶ 83-85, 87). Once again, these factual allegations support the existence of an agreement among the banks to favor Visa and MasterCard over lower-cost networks.

Third, as discussed above, the banks' adoption of the Access Fee Rules makes sense only if they knew that their competitors were also adopting the same rules. Pet. App. 83a-84a ¶ 98. Petitioners offer no legitimate reason for the banks to have surrendered their ATM pricing discretion to Visa and MasterCard. Amici law professors (Br. 4) state that "ATM networks need rules that govern the interactions among members of the

network and between the network and third parties, such as ATM owners," but they fail to explain why this rule – restricting banks' setting of lower fees – was required for the functioning of the networks. In the absence of a procompetitive justification to restrain the banks' exercise of their own pricing discretion, it is not credible to suggest that identical pricing behavior by thousands of competing ATM-operating banks occurred merely because of the banks' membership in the associations. It is far more reasonable – and certainly plausible – to conclude that the banks' conduct is the result of a common agreement among them.

In short, these allegations detailing precisely what the agreement entails and why it is the only rational explanation go far beyond the requirement of plausibility that this Court set forth in *Twombly*.

B. Petitioners Fail To Show Any Error In The D.C. Circuit's Opinion

Petitioners' argument that the D.C. Circuit erred (Pet. 19-21) rests on their erroneous assumption that the allegations consist of mere membership in the bankcard associations. Once again, Petitioners ignore the specific allegations of an agreement and the allegations supporting the plausibility of that agreement. As for Petitioners' suggestion that Visa and MasterCard were treated by the court of appeals as "'walking conspiracies'" (Pet. 20), that suggestion is completely inconsistent with the language of the D.C. Circuit's opinion. Pet. App. 20a.

Indeed, the approach of Petitioners and their amici would effectively immunize all trade associations from the antitrust laws. In particular, they argue that trade associations are necessarily procompetitive and

necessarily involve collective action. Pet. 20-21, 23; Amici Law Professors' Br. 3-7; Amicus American Society of Association Executives Br. 10-11. Yet they fail to provide any procompetitive rationale for the Access Fee Rules, or why the possibility of procompetitive cooperation generally should immunize all trade association agreements from antitrust scrutiny.

Their argument also fails to confront the numerous cases establishing that trade associations can violate the antitrust laws. *See*, *e.g.*, *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183 (2010) (antitrust violation for national sports league to require teams jointly to license intellectual property); *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332 (1982) (antitrust violation for a physician group's rule setting the maximum fees they could accept for medical services); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978) (antitrust violation for professional engineering society to prohibit competitive bidding by members); *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975) (antitrust violation for a minimum fee schedule promulgated by a state bar). Indeed, in 2003, the Second Circuit upheld a trial court's finding that rules adopted by Visa and MasterCard that prohibited member banks from issuing American Express or Discover cards violated Section 1 of the Act. *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003).

It would be nonsensical to allow defendants to agree to restrain trade as long as the agreement was formed under the rubric of trade association rules. If there is an agreement and if it restrains trade, then it cannot be immune from scrutiny. As this Court explained in *American Needle*, "[t]he fact that NFL teams share an interest in making the entire league successful and

profitable, and that they must cooperate in the production and scheduling of games, provides a perfectly sensible justification for making a host of collective decisions. . . . But the conduct at issue in this case is still concerted activity under the Sherman Act that is subject to § 1 analysis." 560 U.S. at 185. The same is true here: regardless of whatever shared interests the banks might have (and such shared interests are plainly less than those of NFL teams, for whom cooperation is essential to the existence of the product), their agreements are subject to antitrust scrutiny.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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March 30, 2016