

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

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

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 19th day of November, two thousand fifteen.

PRESENT: DENNIS JACOBS,
PIERRE N. LEVAL
GERARD E. LYNCH,
Circuit Judges.

- - - - -X
ROBERT ROSS, on behalf of himself and
all others similarly situated, ANDREA
KUNE, WOODROW CLARK, S. BYRON
BALBACH, JR., MATTHEW GRABELL, PAUL
IMPELLEZZERI, on behalf of themselves
and all others similarly situated,
RICHARD MANDELL, RANDAL WACHSMUTH,
Plaintiffs-Appellants,

-v.-
14-1610(L)
14-1616(con)

CITIGROUP, INC., CITIBANK (SOUTH
DAKOTA), N.A., CITICORP DINERS CLUB,
CITIBANK USA, N.A., UNIVERSAL BANK,
N.A., UNIVERSAL FINANCIAL CORPORATION,
DISCOVER FINANCIAL SERVICES, INC.,
DISCOVER BANK, AMERICAN EXPRESS CO.,

1 AMERICAN EXPRESS TRAVEL RELATED
2 SERVICES CO., INC., DB SERVICING
3 CORPORATION,

4 Defendants-Appellees.

5 - - - - -X

6
7 **FOR APPELLANTS:**

MERRILL G. DAVIDOFF (with DAVID
A. LANGER on the brief), Berger
& Montague, P.C., Philadelphia,
Pennsylvania, *for Plaintiffs-*
Appellants.

12
13 **FOR APPELLEES:**

EAMON P. JOYCE (with DAVID F.
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Sidley Austin LLP, New York, New
York, *for Defendants-Appellees*
Citigroup Inc., Citibank, N.A.
(as successor-in-interest to
Citibank (South Dakota), N.A.,
for itself and as successor-in-
interest to Citibank U.S.A.,
N.A., Universal Bank, N.A., and
Universal Financial Corp.), and
Citicorp Diners Club Inc.

28 ELIZABETH P. PAPEZ (with ROBERT
29 Y. STERLINE and CHRISTOPHER J.
30 LETKEWICZ, on the brief),
31 Winston & Strawn LLP,
32 Washington, D.C., *for*
33 *Defendants-Appellees* Discover
34 Financial Services, DB Servicing
35 Corporation, and Discover Bank.

37 ROWAN D. WILSON (with EVAN R.
38 CHESLER and GARY A. BORNSTEIN on
39 the brief), Cravath, Swaine, &
40 Moore LLP, New York, New York,
41 *for Defendants-Appellees*
42 American Express Company,
43 American Express Travel Related
44 Services Company, Inc., and
45 American Express Centurion Bank.

1 Appeal from a judgment of the United States District
2 Court for the Southern District of New York (Pauley, J.).
3

4 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**
5 **AND DECREED** that the judgment of the district court be
6 **AFFIRMED.**
7

8 Plaintiffs appeal from the judgment of the United
9 States District Court for the Southern District of New York
10 (Pauley, J.), which entered judgment in favor of defendants-
11 appellees following a five-week bench trial. At issue are
12 agreements between defendants (credit card issuing banks¹)
13 and plaintiffs (classes of individual cardholders). These
14 agreements include provisions that specify arbitration as
15 the sole method of resolving disputes relating to the credit
16 accounts and disallow (among other things) class actions.
17 We assume the parties' familiarity with the underlying
18 facts, the procedural history, and the issues presented for
19 review.
20

21 1. Plaintiffs challenge the finding that defendants did
22 not collusively adopt class-action-barring arbitration
23 clauses in violation of the Sherman Act, 15 U.S.C. § 1. The
24 standard of review for a district court's findings of fact
25 following a bench trial is clear error.² Fed. R. Civ. P.

¹ Several other credit card issuing banks that allegedly conspired and colluded with defendants have either settled those claims or are otherwise not a part of this appeal.

² Plaintiffs argue that certain language in United States v. General Motors Corp., should be used to adopt a rule that the existence of a conspiracy is a legal conclusion subject to review de novo. See 384 U.S. 127, 141 n.16 (1966) ("the ultimate conclusion by the trial judge, that the defendants' conduct did not constitute a combination or conspiracy in violation of the Sherman Act, is not to be shielded by the 'clearly erroneous' test"). However, in the very same paragraph, the Supreme Court continues: "the question here is not one of 'fact,' but consists rather of the legal standard required to be applied *to the undisputed facts of the case.*" Id. (emphasis added). Here, by contrast, the facts were hotly disputed, especially on the ultimate question whether certain conduct by defendants warranted an inference that a conspiracy existed.

1 52(a)(6); Ceraso v. Motiva Enters., LLC, 326 F.3d 303, 316
2 (2d Cir. 2003); see also Anderson v. City of Bessemer City,
3 N.C., 470 U.S. 564, 573-74 (1985) ("If the district court's
4 account of the evidence is plausible in light of the record
5 viewed in its entirety, the court of appeals may not reverse
6 it even though convinced that had it been sitting as the
7 trier of fact, it would have weighed the evidence
8 differently."). The district court's conclusion that there
9 was no conspiracy was not clearly erroneous.

10
11 An antitrust conspiracy in violation of Section 1 of
12 the Sherman Act requires proof of joint or concerted action
13 as opposed to unilateral action. Anderson News, L.L.C. v.
14 Am. Media, Inc., 680 F.3d 162, 183 (2d Cir. 2012).
15 Plaintiffs concede that they have no direct evidence of
16 conspiracy; so the conspiracy here "must be proven though
17 'inferences that may fairly be drawn from the behavior of
18 the alleged conspirators.'" Id. (quoting Michelman v.
19 Clark-Schwebel Fiber Glass Corp., 534 F.2d 1036, 1043 (2d
20 Cir. 1976)).

21
22 As the district court recognized, parallel conduct can
23 be probative evidence of unlawful collusion. Apex Oil Co.
24 v. DiMauro, 822 F.2d 246, 253 (2d Cir. 1987). An agreement
25 among competitors "may be inferred on the basis of conscious
26 parallelism, when such interdependent conduct is accompanied
27 by circumstantial evidence and plus factors." Todd v. Exxon
28 Corp., 275 F.3d 191, 198 (2d Cir. 2001). These "plus
29 factors" may include (but are not limited to) "a common
30 motive to conspire, evidence that shows that the parallel
31 acts were against the apparent individual economic
32 self-interest of the alleged conspirators, and evidence of a
33 high level of inter-firm communications." Twombly v. Bell
34 Atl. Corp., 425 F.3d 99, 114 (2d Cir. 2005) (internal
35 citations omitted), rev'd on other grounds by Bell Atl.
36 Corp. v. Twombly, 550 U.S. 544 (2007); see also Mayor & City
37 Council of Baltimore, Md. v. Citigroup, Inc., 709 F.3d 129,
38 136 (2d Cir. 2013).
39

Our Circuit has never applied General Motors as expansively
as plaintiffs urge, and we see no reason to depart from
well-settled principles of "clear error" review of factual
determinations.

1 Having found that there was “conscious parallel action
2 in the adoption and maintenance of arbitration clauses,”³
3 the district court thoroughly analyzed various “plus
4 factors,” including (1) whether defendants had a motive to
5 collude, (2) the quantity and nature of inter-firm
6 communications between defendants and other issuing banks,
7 (3) whether the acts were contrary to the self interest of
8 the defendants, (4) whether the arbitration clauses were
9 “artificially standardized” as a result of an illegal
10 agreement, (5) whether communications about a separate
11 conspiracy to fix foreign currency exchange fees helped
12 prove the instant conspiracy, (6) whether the lack of notes,
13 internal work product, or recollection regarding meetings
14 may suggest a conspiracy, (7) the documentation of the
15 meetings, and (8) recollections of the meetings. After
16 “weighing all the ‘plus factors’ evidence” and the
17 “extensive record of inter-firm communications,” the
18 district court found that the “final decision to adopt
19 class-action-barring clauses was something the Issuing Banks
20 hashed out individually and internally.” Ross v. Am. Exp.
21 Co., 35 F. Supp. 3d 407, 452-53 (S.D.N.Y. 2014).⁴ That
22 conclusion is plausible in light of the record viewed in its
23 entirety, and we cannot say that the district court was
24 “clearly erroneous” in reaching this conclusion. See
25 Anderson, 470 U.S. at 574.⁵
26

³ This conclusion was well supported by the record:
the district court credited expert testimony that the credit
card industry “is an oligopoly in which conscious
parallelism is the norm” and noted that “the temporal
connection between the meetings and the adoption of the
clauses suggests parallel conduct.”

⁴ The district court then, “for the sake of
assisting appellate review,” concluded that the alleged
conduct would have been an unreasonable restraint on trade.
Because we affirm the district court’s conclusion that the
clauses were not adopted as the result of a conspiracy, we
need not consider whether this conclusion was sound.

⁵ The district court also held that there was no
antitrust standing because there was no antitrust injury.
Because we affirm the finding that there was no antitrust
conspiracy, we need not reach the issue of whether
plaintiffs had antitrust standing.

1 2. Defendant American Express argues separately that
2 the district court's judgment should be affirmed for lack of
3 Article III standing because plaintiffs are not American
4 Express cardholders. To demonstrate standing, a plaintiff
5 must show (1) injury-in-fact; (2) causation; and (3)
6 redressibility. Lujan v. Defenders of Wildlife, 504 U.S.
7 555, 560 (1992). As to injury, the mere existence of the
8 clauses diminishes the cards' value by foreclosing the
9 opportunity for cardholders to go to court and address
10 grievances through class action litigation. See Ross v.
11 Bank of Am., 524 F.3d 217, 224 (2d Cir. 2008).
12 Additionally, it is undisputed that consumer choice was
13 reduced when banks who collectively held between 79 and 87%
14 of the transaction volume and outstanding balances in the
15 credit card market from 1999 to 2009 each adopted a class
16 action barring clause, and it is of no moment that those
17 banks may have since deleted the clauses from their
18 cardholder agreements as part of settlements of these very
19 same cases. As to causation, it is obvious that the
20 adoption of the clauses is linked to the injury claimed by
21 the cardholders. As to redressibility, an injunction
22 invalidating the arbitration clauses would arguably redress
23 the injuries to the market. Thus, we agree with the
24 district court that plaintiffs satisfy Article III's
25 standing requirements.

26
27 For the foregoing reasons, and finding no merit in
28 plaintiffs' other arguments, we hereby **AFFIRM** the judgment
29 of the district court.

30
31 FOR THE COURT:
32 CATHERINE O'HAGAN WOLFE, CLERK
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