

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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JOHN PALLADINO, GARIB KARAPETYAN, STEVE
PALLADINO, AND JOHN NYPL, Individual Plaintiffs and
on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

JP MORGAN CHASE & CO., *et al.*,

Defendants.
-----X

**REPORT AND
RECOMMENDATION**

23-CV-1215
(Brodie, C.J.)
(Marutollo, M.J.)

JOSEPH A. MARUTOLLO, United States Magistrate Judge:

Plaintiffs John Palladino, Garib Karapetyan, Steve Palladino, and John Nypl commenced this action, individually and on behalf of a putative statewide class, against Defendants Visa Inc., Visa U.S.A., Inc., and Visa International Service Association (together, “Visa”) and MasterCard International Incorporated (“Mastercard”), as well as Visa and Mastercard’s member banks, JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A. (together, “Chase”); Bank of America Corporation, Bank of America, National Association, and Bank of America, N.A. (together, “Bank of America”); Wells Fargo & Company and Wells Fargo Bank, N.A. (together, “Well Fargo”); Citigroup Inc., Citibank, N.A., and Citibank, N.A. (National Association) (together, “Citi”); U.S. Bancorp and U.S. Bank National Association (together, “U.S. Bank”); PNC Financial Services Group, Inc., PNC, and PNC Bank National Association (together, “PNC”); Capital One Financial Corporation, Capital One, F.S.B., Capital One Bank (USA) National Association, and Capital One National Association (together, “Capital One”); and BMO Harris Bank N.A., successor-in-interest to Bank of the West (“Bank of the West”) (collectively, “Defendants”).

Plaintiffs are California citizens and Visa or Mastercard holders who allege that Defendants violated California’s Cartwright Act, Cal. Bus. & Prof. Code § 16700 *et. seq.*, and California’s

Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et. seq.* (“UCL”). *See generally* Dkt. No. 1-3. Plaintiffs allege that Defendants, and all the retail merchants who accept Visa or Mastercard, conspired to fix the price of the interchange fees charged when a consumer uses a Visa or MasterCard to purchase a retail good or service, which harmed competition and resulted in increased retail prices. *Id.* ¶¶ 62-65, 72-80, 89-98, 124, 127-40, 147-51, 211. Plaintiffs seek monetary damages, disgorgement, and injunctive relief. *Id.* ¶¶ 13, 70.

Currently pending before this Court, on a referral from Chief Judge Margo K. Brodie, is Defendants’ motion to dismiss the amended complaint, or in the alternative, to compel arbitration. *See* Dkt. No. 71; July 8, 2024 Dkt. Order. For the reasons explained below, this Court respectfully recommends that Defendants’ motion be granted in part and denied in part.

I. Background

A. Factual Background

The following facts are drawn from the allegations in the amended complaint (Dkt. No. 1-3), documents deemed incorporated by reference, and matters of which the Court may take judicial notice. *See Hu v. City of New York*, 927 F.3d 81, 88 (2d Cir. 2019).

1. The Parties

Plaintiffs are citizens and residents of California. Dkt. No. 1-3 ¶ 14. All have been issued credit or debit general purpose payment cards¹ by Visa or Mastercard member banks doing business in California. *Id.* Plaintiffs bring this class action on behalf of all California citizens who are Visa or MasterCard cardholders and who have used a Visa or MasterCard payment card to

¹ “General purpose payment cards” are cards that “carry a network brand, or logo, from one of the four major card networks (American Express, Discovery, MasterCard, Visa) or from smaller or regional networks and can be used wherever that network card is accepted, regardless of merchant or merchant type.” Dkt. No. 1-3 ¶ 101 (citation omitted).

make a purchase transaction from at least January 1, 2004, up to the filing of this action on December 30, 2022. *Id.* ¶¶ 14-15, 211.

Defendants are comprised of Visa and MasterCard (“Network Defendants”) and their member banks, Chase, Bank of America, Wells Fargo, Citi, U.S. Bank, PNC, Capital One, and Bank of the West (“Bank Defendants”). *Id.* ¶ 11. Bank Defendants are licensed members of Network Defendants and issue Visa and Mastercard general purpose debit and credit cards to consumers. *Id.* Bank Defendants also contract with merchants to “acquire and process merchants’ sales transactions for cardholders’ purchases conducted on the cards.” *Id.*

2. The Alleged Conspiracy

Plaintiffs accuse Defendants of engaging in a vast price-fixing conspiracy to fix the fees charged on Visa and Mastercard transactions in violation of the Cartwright Act and UCL. *See id.* at 9.² These fees—known as “interchange fees”—are set by Visa and Mastercard, charged to the merchant’s acquiring bank, and collected by the cardholder’s issuing bank. *Id.* ¶¶ 63, 124.³

² Page citations are to the ECF-stamped pages, unless otherwise noted.

³ As the Second Circuit explained in *Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*, 62 F.4th 704, 712-13 (2d Cir. 2023):

It is well known that Visa and MasterCard operate two of the world’s largest payment-card networks. An understanding of this case requires some knowledge of how those networks operate. In brief: the customer presents a payment card to the merchant; the merchant relays the card information to its bank (the acquiring bank); the acquiring bank forwards that information to the appropriate network (Visa or MasterCard); the network relays the information to the bank that issued the customer’s card (the issuing bank); and the issuing bank confirms that the customer has sufficient credit or funds to cover the purchase. When these steps are completed, the issuing bank transmits its approval back through the chain to the acquiring bank, which relays it to the merchant at the point of sale.

Next, the issuing bank provides the funds via the appropriate network to the acquiring bank, less the “interchange fee” (the focus of this litigation) which the issuing bank – a member of the Visa or MasterCard network - keeps. While the issuing and acquiring banks are contractually free to agree on an applicable interchange fee, Visa and MasterCard each set a default fee in the absence of such an agreement. The acquiring bank, in turn, pays the merchant while charging what is known as a “merchant discount fee.” That fee covers the

Merchants' acquiring banks "typically pass[] these fees on to the merchants, so interchange fees can be thought of as a cost to merchants and as revenue to [card] issuers." *Id.* ¶ 24 (citation omitted). Interchange fees "represent a transfer of value between the financial institutions participating in" the Visa/Mastercard networks. *Id.* ¶ 127 (citation omitted).

Plaintiffs contend that interchange fees are "fixed and stabilized by written agreement" among Defendants. *Id.* at 9. Specifically, Plaintiffs allege that Network Defendants set "'default' interchange amounts" that their "member banks must charge their merchant customers for providing access to the networks." *Id.* ¶ 65. Network Defendants enforce these "default interchange fees" through their rules (the "Rules"), which Bank Defendants must comply with to use the Visa and Mastercard networks. *Id.* ¶¶ 64-65, 91. The Rules describe the interchange fee as "a default transfer price between Acquirers and Issuers"—that is, between the merchant's bank and the cardholder's bank—in the Visa or Mastercard system. *Id.* ¶ 66. The interchange fee is "normally a percentage of the cardholder's purchase amount plus a flat fee," and the amount can vary "based on the merchant's type of business, sales volume, and the level of benefits bundled with the customer's card." *Id.* ¶ 78. Plaintiffs estimate that the average interchange fee is between 1.5% and 2% of the retail purchase price and, at times, has exceeded 3.5%. *Id.* at 9.

interchange fee as well as an additional amount that compensates the acquiring bank for processing the transaction. The applicable default fee varies depending on factors that include the type of payment card.

Merchants who accept Visa- and MasterCard-branded cards are bound by the issuers' network rules, which in effect are identical to one another. For example, the "honor-all-cards" rules require any merchant that accepts a Visa- or MasterCard-branded credit card to accept all credit cards of that brand, regardless of the differences in interchange fees. Further, multiple rules prohibit merchants from influencing customers to use one type of payment over another--such as a credit card with a lower interchange fee, or cash rather than credit. These "anti-steering" rules include the "no-surcharge" and "no-discount" rules, which prohibit merchants from charging different prices at the point of sale depending on the means of payment.

Plaintiffs allege that Bank Defendants, in turn, “have contracts with merchants to process the sales transactions resulting from cardholders’ Visa/Mastercard purchases.” *Id.* ¶ 64. These contracts “enforce the interchange rates set by the [Network Defendants].” *Id.* Plaintiffs contend that Bank Defendants “are familiar with what competing banks charge their merchant customers, and every bank agrees by contract to charge its own merchant customers the same unlawfully fixed rate.” *Id.* ¶ 65 (citations omitted). Plaintiffs argue that the Rules, which Bank Defendants enforce through their contracts with merchants, “strip merchants of [the] ability to negotiate interchange rates with their banks.” *Id.* ¶ 81. Thus, “[f]aced without choice other than to accept the high, fixed fees, merchants are the forced, unwilling co-conspirators, marking up prices and shifting their inflated interchange costs to cardholders (and all customers[.]).” *Id.* ¶ 81.

Plaintiffs contend that interchange fees are “purposefully not disclosed” to cardholders. *Id.* While cardholders think that they are paying “their merchants the transaction amounts shown on their receipts and charged on their cardholder statements,” “part of each of their payments goes not to the merchant but directly to their card-issuing bank.” *Id.* Plaintiffs allege that this has the effect of “cardholders unknowingly bear[ing] the cost of the fixed fees, which have been included in the merchants’ sale prices.” *Id.* In the amended complaint, Plaintiff provides the following illustration to show how this process works:

1. The cardholder uses a Visa or Mastercard to make a \$100 purchase.
2. The merchant accepts the payment card from the cardholder and submits the \$100 transaction for approval to the merchant’s acquiring bank.
3. The acquiring bank sends an authorization request across the Visa or Mastercard network to the cardholder’s issuing bank.
4. If the cardholder’s issuing bank determines that the cardholder has sufficient credit, it will approve the transaction and authorize the cardholder to spend the specified amount, representing the price of the goods or services charged by the merchant and purchased by the consumer – here, \$100. The issuing bank retains an interchange fee—here, in

the amount of \$1.70—and transfers the remaining \$98.30 to the merchant’s bank using the Visa or Mastercard network. This process is completed “without the [c]ardholder’s consent or knowledge.”

5. The merchant’s acquiring bank, upon receipt of the \$98.30, retains an acquiring fee—here, \$0.40—and a network assessment fee—here, \$0.10—and transfers the net amount of \$97.80 to the merchant. The merchant thus “absorbs the discount fee of \$2.20,” which Plaintiffs contend “it has wrapped into its price.”

Id. ¶¶ 3-5.

Plaintiffs contend that cardholders are harmed by this process in three ways. *Id.* ¶ 81. First, “[w]hen the purchase-item is scanned at the register, the cardholder is damaged as an indirect purchaser, paying inflated prices for everything because interchange is built into ticket prices.” *Id.* Second, “[t]he cardholder, as direct purchaser and first payer, is damaged the moment a merchant rings the sale. On authorization of the cardholder’s card, the Visa/Mastercard network simultaneously sells the transaction to both merchant and cardholder, who jointly share that single transaction.” *Id.* ¶ 82 (citing *Ohio v. Am. Express Co.* (“*Amex*”), 585 U.S. 529 (2018)). Third, “[t]he cardholder suffers damage because of concealment. Nowhere is it disclosed that the cardholder is a joint direct purchaser of each payment-card transaction, or that an interchange fee is applied to the transaction and withdrawn from the cardholder’s payment account. The cardholder is unaware that not all the money spent went to the merchant.” *Id.* ¶ 83.

Plaintiffs contend that they “suffer direct injury with each retail purchase” and seek damages “based upon merchants’ pass-through overcharges present in the prices of all Visa/Mastercard payment-card purchases occurring throughout the relevant period.” *Id.* ¶ 87. Plaintiffs also seek disgorgement and injunctive relief to remove the “‘default’ interchange fees and other competitive restraints embodied in each of the networks’ member agreements and Rules.” *Id.* ¶¶ 70, 85-86.

3. The Arbitration Agreements

Plaintiffs contend that they assert claims against “defendants with whom no arbitration agreement exists[.]” Dkt. No. 1-3 ¶ 16. They explain that “[n]o Plaintiff class member seeks relief herein or makes a claim against any banking institution that issued such Plaintiff a credit or debit card with which bank that Plaintiff has executed an arbitration agreement.” *Id.* “To the extent that arbitration agreements may have been executed by any named Plaintiff or class member after a Defendant Bank added such agreements to its credit/debit card customer agreements, the affected Plaintiff makes no claim herein through this litigation against that named Defendant Bank.” *Id.*

In response, Defendants claim that “[e]ach plaintiff in this case has an agreement containing a mandatory arbitration clause with at least one bank defendant . . . that require[s] arbitration of all cardholder disputes on an individual, non-class basis.” Dkt. No. 72, at 38. Specifically, Defendants contend that:

- “John Palladino has had an Arbitration Agreement with Bank of the West since 2014 and Wells Fargo since 2006 that contain mandatory arbitration provisions and class action waivers.” *Id.* (citing Dkt. Nos. 73-1, 73-5).
- “Steve Palladino has had Arbitration Agreements with Bank of the West since 2014 that contain a mandatory arbitration provision and class action waiver.” *Id.* at 39 (citing Dkt. No. 73-1).
- “John Nypl has had Arbitration Agreements with Chase since 2009 that contain mandatory arbitration provisions and class action waivers.” *Id.* (citing Dkt. Nos. 73-2 – 73-4).
- “Garib Karapetyan has had Arbitration Agreements with Bank of the West since 2014 and Wells Fargo since 2014 that contain mandatory arbitration provisions and class action waivers.” *Id.* (citing Dkt. Nos. 73-1, 73-5).

Defendants contend that while these arbitration agreements vary slightly from bank to bank, they all contain similar language to the following effect⁴:

This arbitration agreement provides that all disputes between you and Chase must be resolved by BINDING ARBITRATION whenever you or we choose to submit or refer a dispute to arbitration. . . . Arbitration will proceed on an INDIVIDUAL BASIS, so class actions and similar proceedings will NOT be available to you.

YOU HAVE THE RIGHT TO REJECT THIS AGREEMENT TO ARBITRATION, BUT IF YOU WISH TO REJECT IT, YOU MUST DO SO PROMPTLY . . . If you do not reject this agreement by [], you or we may elect to resolve any Claim by arbitration.

* * *

For purposes of this agreement to arbitrate, “you” includes any co-applicant or authorized user on your account, or anyone else connected with you or claiming through you; and “we” or “us” includes JPMorgan Chase Bank, N.A. and Chase Bank USA, N.A., all of their parents, subsidiaries, affiliates, successors, predecessors, employees, and related persons or entities and all third parties who are regarded as agents or representatives of us in connection with the account, or the subject matter of the claim or dispute at issue.

All claims or disputes between you and us about or relating in any way to your account, any prior account, your cardmember agreement with us (including any future amendments), any prior cardmember agreement, or our relationship are referred to as “Claims” for purposes of this agreement to arbitrate. Claims include, for example, claims or disputes arising from or relating in any way to transactions involving your account; any interest, charges, or fees assessed on your account; any service(s) or programs related to your account; any communications related to

⁴ Defendants attach approximately 1,232 pages of exhibits to their motion, which consist of various account agreements entered into by Plaintiffs and certain Bank Defendants from 2006 through the present. *See* Dkt. No. 73. At oral argument, the Court asked Defendants’ counsel if there was a specific year or agreement that the Court should focus on for purposes of the motion to compel, to which defense counsel replied: “Regardless of the year, Your Honor, the claims are going to fall within the scope of the arbitration provisions. And no argument has been made to the contrary, Your Honor.” Dkt. No. 84, at 18:2-10. Defendants’ counsel then identified various agreements attached to docket number 73-1, including the Bank of the West agreement at page 37 and the Chase agreement at page 17, and the Wells Fargo agreement attached to docket number 73-5 at page 61. Dkt. No. 86, at 24:15-25:7. For the purposes of this motion, the Court relies on the specific agreements identified by defense counsel at oral argument.

your account; and any collection or credit reporting of your account. . . . Claims are subject to arbitration regardless of whether they are based on contract, tort, statute, regulation, common law or equity, or whether they seek legal or equitable remedies. All Claims are subject to arbitration whether they arose in the past, may currently exist, or may arise in the future. Arbitration will apply even if your account is closed, sold, or assigned; you pay us in full any outstanding debt you owe; or you file for bankruptcy. In the event that your account is sold and/or assigned, we retain our right to elect arbitration of Claims by you and you retain your right to elect arbitration of Claims by us. []

* * *

This agreement to arbitrate is governed by the Federal Arbitration Act, 9 U.S.C. §§ 1 *et. seq.*

* * *

Under this agreement to arbitrate, the party filing a Claim must select either Judicial Arbitration and Mediation Services (“JAMS”) or the American Arbitration Association (“AAA”) as the arbitration administrator. [] Each of these organizations will apply its code of procedures in effect at the time the arbitration claim is filed. [] All issues are for the arbitrator to decide, except that issues relating to the scope, enforceability, interpretation, formation, and validity of this arbitration agreement are for a court to decide. [] The arbitrator’s authority is limited to claims between you and us, and the arbitrator can award damages or relief only to you, but not to or on behalf of anyone else.

Dkt. No. 73-3, at 16-17 (Chase); *see also* Dkt. No. 73-1, at 37 (Bank of the West); Dkt. No. 73-5, at 61 (Wells Fargo).

B. Procedural History

Plaintiffs commenced this putative antitrust class action against Defendants on December 30, 2022 by filing a complaint in the Superior Court of the City of San Francisco, State of California. Dkt. No. 1-1. On January 11, 2023, Plaintiffs filed an amended complaint. Dkt. No. 1-3. On January 30, 2023, Defendants timely removed the action to the United States District Court for the Northern District of California. Dkt. No. 1.

On February 15, 2023, the Clerk of Court for the Northern District of California entered a Transfer Order from the United States Judicial Panel on Multidistrict Litigation, conditionally transferring this case to the Eastern District of New York for consolidation with *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, No. 05-MD-1720 (the “MDL”). Dkt. No. 9.

On February 9, 2024, Defendants filed the instant motion. Dkt. No. 71. Defendants, except for Visa, move to dismiss the amended complaint under Fed. R. Civ. P. 12(b)(6). *Id.* Visa moves to dismiss the amended complaint under Fed. R. Civ. P. 12(c) because it already filed its answer on February 15, 2023. *Id.*; *see also* Dkt. No. 11.

PNC also moves to dismiss the amended complaint under Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction and, in the alternative, joins Defendants’ Rule 12(b)(6) joint motion. Dkt. No. 71. All Defendants move, in the alternative, to compel arbitration and for a stay of litigation pending arbitration. *Id.*

The Court heard oral argument on Defendants’ anticipated motion on January 26, 2024. Dkt. No. 75. The Court heard further oral argument on Defendants’ filed motion on May 6, 2024. Dkt. No. 84.

On July 26, 2024, the Court issued the following order:

ORDER: Defendants’ motion to dismiss and compel arbitration [71] raises the issue of whether non-signatories to an arbitration agreement can enforce the agreement against a signatory on estoppel grounds. The parties’ arguments on estoppel focus exclusively on case law from the Second Circuit. By July 30, 2024 at 5:00 p.m., the parties shall submit supplemental letters addressing the choice of law that governs Defendants’ estoppel arguments and provide representative case law in support of their positions. In addressing this issue, the parties shall consider, *inter alia*, the Supreme Court’s decision in *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009) and the Second Circuit’s discussion of the law applicable to cases transferred to a multidistrict litigation in *Menowitz v. Brown*, 991

F.2d 36 (2d Cir. 1993). Ordered by Magistrate Judge Joseph A. Marutollo on 7/26/2024. (KAR) (Entered: 07/26/2024)

July 26, 2024 Dkt. Order.

On July 30, 2024, the parties filed their respective supplemental letters in accordance with the Court's order. *See* Dkt. Nos. 89-91.

II. Legal Standards

A. Fed. R. Civ. P. 12(b)(6)

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556). “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* (quoting *Twombly*, 550 U.S. at 556).

“[T]he court’s task is to assess the legal feasibility of the complaint; it is not to assess the weight of the evidence that might be offered on either side.” *Lynch v. City of New York*, 952 F.3d 67, 75 (2d Cir. 2020). Determining whether a complaint states a claim is “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Iqbal*, 556 U.S. at 679. The Court must accept the well-pleaded factual allegations set forth in the complaint as true and draw all reasonable inferences in favor of the plaintiff; however, the Court need not “credit conclusory allegations or legal conclusions couched as factual allegations.” *Rothstein v. UBS AG*, 708 F.3d 82, 94 (2d Cir. 2013).

“Because a Rule 12(b)(6) motion challenges the complaint as presented by the plaintiff, taking no account of its basis in evidence, a court adjudicating such a motion may review only a narrow universe of materials. Generally, we do not look beyond ‘facts stated on the face of the complaint, . . . documents appended to the complaint or incorporated in the complaint by reference, and . . . matters of which judicial notice may be taken.’” *Goel v. Bunge, Ltd.*, 820 F.3d 554, 559 (2d Cir. 2016) (quoting *Concord Assocs., L.P. v. Entm’t Props. Tr.*, 817 F.3d 46, 51 n.2 (2d Cir. 2016)).

B. Fed. R. Civ. P. 12(c)

Visa moves under Fed. R. Civ. P. 12(c) for judgment on the pleadings because it has already answered the complaint. *See* Dkt. No. 72, at 10 n.1.

In deciding a Fed. R. Civ. P. 12(c) motion, courts “employ[] the same standard applicable to dismissals pursuant to Fed. R. Civ. P. 12(b)(6).” *Hayden v. Paterson*, 594 F.3d 150, 160 (2d Cir. 2010) (quoting *Johnson v. Rowley*, 569 F.3d 40, 43 (2d Cir. 2009) (per curiam)). Thus, the court must “accept all factual allegations in the complaint as true and draw all reasonable inferences in [plaintiffs’] favor. To survive a Rule 12(c) motion, [plaintiffs’] complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Id.* (alterations in original) (quoting *Johnson*, 569 F.3d at 43-44). “Judgment on the pleadings may be granted ‘where material facts are undisputed and where a judgment on the merits is possible merely by considering the contents of the pleadings.’” *Deckers Outdoor Corp. v. Next Step Grp., Inc.*, No. 23-CV-02545 (ALC), 2024 WL 3459609, at *2 (S.D.N.Y. July 18, 2024) (quoting *Sellers v. M.C. Floor Crafters, Inc.*, 842 F.2d 639, 642 (2d Cir. 1988)).

On a Fed. R. Civ. P. 12(c) motion, the court may consider “the complaint, the answer, any written documents attached to them, and any matter of which the court can take judicial notice for

the factual background of the case.” *L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 422 (2d Cir. 2011) (citation omitted). The complaint is “deemed to include any written instrument attached to it as an exhibit, materials incorporated in it by reference, and documents that, although not incorporated by reference, are ‘integral’ to the complaint.” *Id.* (citation omitted).

C. Fed. R. Civ. P. 12(b)(2)

“[I]n deciding a pretrial motion to dismiss for lack of personal jurisdiction[,], a district court has considerable procedural leeway. It may determine the motion on the basis of affidavits alone; or it may permit discovery in aid of the motion; or it may conduct an evidentiary hearing on the merits of the motion.” *Johnson v. UBS AG*, 791 F. App’x 240, 241 (2d Cir. 2019) (quoting *Dorchester Fin. Sec., Inc. v. Banco BRJ, S.A.*, 722 F.3d 81, 84 (2d Cir. 2013)). “Where, as here, a court relies on pleadings and affidavits, rather than conducting a full-blown evidentiary hearing, the plaintiff need only make a *prima facie* showing that the court possesses personal jurisdiction over the defendant.” *JCorps Int’l, Inc. v. Charles & Lynn Schusterman Fam. Found.*, 828 F. App’x 740, 742 (2d Cir. 2020) (quoting *DiStefano v. Carozzi N. Am., Inc.*, 286 F.3d 81, 84 (2d Cir. 2001)). While affidavits submitted by both parties may be considered, *Johnson*, 791 F. App’x at 241, the materials are construed in the light most favorable to, and any factual disputes are resolved in favor of, the plaintiff, *Dorchester*, 722 F.3d at 85-86. The plaintiff cannot, however, meet its burden with conclusory allegations or assertions based on mere conjecture. *See JCorps*, 828 F. App’x at 744-46; *see also Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 566 (2d Cir. 1996) (“On a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of showing that the court has jurisdiction over the defendant.”).

D. Arbitration

The Federal Arbitration Act (“FAA”) applies to written contracts “evidencing a transaction involving commerce.” 9 U.S.C. § 2. Under the FAA, arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” *Id.* This provision reflects “both a liberal federal policy favoring arbitration, and the fundamental principle that arbitration is a matter of contract.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (quotation marks and citations omitted). As a result, “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

On a motion to compel arbitration, the Court’s role under the FAA is “limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue.” *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). In determining whether an arbitration agreement exists, “district courts rely on the summary judgment standard of Rule 56 of the Federal Rules of Civil Procedure.” *Hansen v. LMB Mortg. Servs., Inc.*, 1 F.4th 667, 670 (9th Cir. 2021). Thus:

In considering a motion to compel arbitration which is opposed on the ground that no agreement to arbitrate was made, a district court should give to the opposing party the benefit of all reasonable doubts and inferences that may arise. Only when there is no genuine issue of material fact concerning the formation of an arbitration agreement should a court decide as a matter of law that the parties did or did not enter into such an agreement.

Concat LP v. Unilever, PLC, 350 F. Supp. 2d 796, 804 (N.D. Cal. 2004) (citations omitted). If the court “concludes that there are genuine disputes of material fact as to whether the parties formed an arbitration agreement, the court must proceed without delay to a trial on arbitrability and hold any motion to compel arbitration in abeyance until the factual issues have been resolved.” *Hansen*,

1 F.4th at 672. If a valid arbitration agreement exists, “the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration.” *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000).

If the court is “satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.” 9 U.S.C. § 4. Where the claims alleged in a complaint are subject to arbitration, the Court “shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.” *Id.* § 3. “[N]otwithstanding the language of § 3, a district court may either stay the action or dismiss it outright when . . . all of the claims raised in the action are subject to arbitration.” *Johnmohammadi v. Bloomingdale’s, Inc.*, 755 F.3d 1072, 1074 (9th Cir. 2014).

III. Applicable Law

In the context of multidistrict litigation, the transferee court must apply “the substantive *state* law, including choice-of-law rules, of the jurisdiction in which the action was filed.” *Menowitz v. Brown*, 991 F.2d 36, 40 (2d Cir. 1993) (per curiam) (emphasis added) (citing *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964)); see *In re Acetaminophen - ASD-ADHD Prod. Liab. Litig.*, No. 22-CV-9052 (DC), 2023 WL 3467057, at *3 (S.D.N.Y. May 15, 2023) (“A multidistrict litigation transferee court ‘applies the substantive state law, including choice-of-law rules, of the jurisdiction in which the action was filed.’” (citing *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85, 91 (2d Cir. 2006))).

When analyzing issues arising under *federal* law, the transferee court “should apply its interpretations of federal law, not the constructions of federal law of the transferor circuit.”

Menowitz, 991 F.2d at 40; *see also In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1176 (D.C. Cir. 1987) (Ginsburg, J.) (holding that transferee court should apply its own interpretations of federal law in cases transferred under the multidistrict litigation statute, 28 U.S.C. § 1407), *aff'd sub nom. Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989). Thus, while the “law of a transferor forum on a federal question . . . merits close consideration, [it] does not have *stare decisis* effect in a transferee forum situated in another circuit.” *In re Korean Air Lines*, 829 F.2d at 1176. “[E]ach [federal circuit] has an obligation to engage independently in reasoned analysis. Binding precedent for all is set only by the Supreme Court, and for the district courts within a circuit, only by the court of appeals for that circuit.” *Id.*

The Court will apply California law to Plaintiffs’ state law claims brought under the Cartwright Act and UCL. The Court will analyze whether personal jurisdiction exists over PNC in California according to the law of the Second Circuit. *In re Libor-Based Fin. Instruments Antitrust Litig.*, No. 11-MDL-2262 (NRB), 2015 WL 4634541, at *17 (S.D.N.Y. Aug. 4, 2015) (analyzing whether personal jurisdiction existed in transferor court according to Second Circuit case law, not the law of the transferor circuit); *see also Menowitz*, 991 F.2d at 40 (“[A] transferee court should apply its interpretations of federal law, not the constructions of federal law of the transferor circuit.”).

Finally, the Court will apply California law to Defendants’ motion to compel arbitration. As the Supreme Court has recognized, state law determines whether an arbitration agreement is enforceable by a non-signatory through estoppel. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009) (“traditional principles of state law allow a contract to be enforced by or against nonparties to the contract through . . . estoppel” (quotations and citation omitted)). Thus, notwithstanding the FAA’s presumption of arbitrability, state law, not federal law, governs the

enforceability of arbitration agreements. *See id.* at 630 n.5 (“We have said many times that federal law requires that ‘questions of arbitrability . . . be addressed with a healthy regard for the federal policy favoring arbitration.’ . . . Whatever the meaning of this vague prescription, it cannot possibly require the disregard of state law permitting arbitration by or against nonparties to the written arbitration agreement.” (quoting *Moses*, 460 U.S. at 24-25)); *see also Paguirigan v. DirecTV, Inc.*, No. 10-CV-1401, 2010 WL 11595781, at *12 (C.D. Cal. Sept. 9, 2010) (“[T]he Court determines that as to the Plaintiffs who originally filed in California, under California choice of law rules, California law applies to the enforcement of the Arbitration Clause. As to the Plaintiffs who originally filed in their home states, the parties agree that the home state’s laws should be applied to the enforcement of the Arbitration Clause.”).

IV. Discussion

Defendants move to dismiss the complaint, or in the alternative, to compel arbitration. *See* Dkt. No. 71. The Court will address the motion to compel first because a ruling in Defendants’ favor would eliminate the need to consider the merits of the motion to dismiss. *See Hebei Hengbo New Materials Tech. Co. v. Apple, Inc.*, 344 F. Supp. 3d 1111, 1120 (N.D. Cal. 2018) (“A favorable ruling for Plaintiff on the Motion to Compel Arbitration would eliminate any need to consider the Motion to Dismiss.”); *see also Morgikian v. Fid. Invs.*, No. 20-CV-05724 (JMA) (ARL), 2022 WL 836950, at *1 n.1 (E.D.N.Y. Mar. 21, 2022) (“It is well-established that a district court should rule on a motion to compel arbitration before proceeding to a merits-based motion to dismiss.”).

A. Defendants’ Motion to Compel Arbitration

When Plaintiffs entered into cardholder agreements with certain issuing banks, they agreed that they would arbitrate certain disputes that might arise between them. *See* Dkt. No. 72, at 38-39; *see also* Dkt. No. 1-3 ¶ 16. It is undisputed that Plaintiffs John Palladino, Steve Palladino, and

Garib Karapetyan have arbitration agreements with the Bank of the West; John Nyp1 has an arbitration agreement with Chase; and John Palladino and Garib Karapetyan have arbitration agreements with Wells Fargo. *See* Dkt. No. 72, at 38-39; *see also* Dkt. No. 1-3 ¶ 16. It is further undisputed that Plaintiffs have not asserted a claim against any Bank Defendant with whom they have an arbitration agreement.⁵ *See* Dkt. No. 72, at 39; *see also* Dkt. No. 1-3 ¶ 16. Defendants nonetheless contend that they may enforce Plaintiffs’ arbitration agreements on equitable estoppel grounds. *See* Dkt. No. 72, at 39.

“With limited exceptions, the FAA governs the enforceability of arbitration agreements in contracts involving interstate commerce.” *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1126 (9th Cir. 2013) (citing 9 U.S.C. § 1 *et seq.*). “Section 2—the FAA’s substantive mandate—makes written arbitration agreements ‘valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of a contract.’” *Arthur Andersen*, 556 U.S. at 629–30 (quoting 9 U.S.C. § 2). “The FAA reflects both a ‘liberal federal policy favoring arbitration,’ and the ‘fundamental principle that arbitration is a matter of contract.’” *Kramer*, 705 F.3d at 1126 (citations omitted).

Section 2 of the FAA “creates substantive federal law regarding the enforceability of arbitration agreements, requiring courts ‘to place such agreements upon the same footing as other contracts.’” *Arthur Andersen*, 556 U.S. at 630 (citation omitted); *see also Kramer*, 705 F.3d at 1126 (“The scope of an arbitration agreement is governed by federal substantive law.”). “Nevertheless, ‘arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.’” *Kramer*, 705 F.3d at 1126 (citation omitted). “Generally, the contractual right to compel arbitration ‘may not be invoked by one who

⁵ Defendants reserve their rights to enforce any arbitration agreement signed by unnamed, putative class members. Dkt. No. 72, at 38 n.14.

is not a party to the agreement and does not otherwise possess the right to compel arbitration.” *Id.* (citation omitted). “Accordingly, the strong public policy in favor of arbitration does not extend to those who are not parties to an arbitration agreement.” *Id.* (cleaned up).

1. The Court’s Authority to Decide the Threshold Issue of Arbitrability

As an initial matter, the Court must address its authority to decide the issue of whether the non-signatory Defendants can rely on equitable estoppel to compel arbitration. *See Staley v. Gilead Scis., Inc.*, No. 19-CV-02573 (EMC), 2021 WL 4972628, at *1 (N.D. Cal. Mar. 12, 2021).

Because arbitration is a matter of contract, “courts must enforce arbitration contracts according to their terms.” *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 67 (2019). Under the FAA, parties to an arbitration agreement may “delegate threshold arbitrability questions to the arbitrator.” *Id.* at 69. An “agreement to arbitrate a gateway issue” like arbitrability “is simply an additional, antecedent agreement the party seeking arbitration asks the federal courts to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other.” *Id.* at 68 (citation omitted). “Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question ‘who has the primary power to decide arbitrability’ turns upon what the parties agreed about *that* matter.” *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (emphasis in original and citations omitted).

Whether the Court or the arbitrator decides arbitrability is “an issue for judicial determination unless the parties clearly and unmistakably provide otherwise.” *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (alterations omitted and citation omitted); *see also Kramer*, 705 F.3d at 1127 (“Whether parties have agreed to submit a particular dispute to arbitration is typically an issue for judicial determination.” (cleaned up)). “In this manner the law treats silence or ambiguity about the question ‘*who* (primarily) should decide arbitrability’

differently from the way it treats silence or ambiguity about the question ‘*whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement’— for in respect to this latter question the law reverses the presumption.” *First Options*, 514 U.S. at 944-45 (emphasis in original and citation omitted). “Clear and unmistakable evidence of an agreement to arbitrate arbitrability ‘might include . . . a course of conduct demonstrating assent . . . or . . . an express agreement to do so.’” *Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1208 (9th Cir. 2016) (ellipses in original and citation omitted).

Here, there is no clear and unmistakable evidence that Plaintiffs and the banks with whom they have arbitration agreements agreed to arbitrate arbitrability. For example, the arbitration agreement between John Palladino and Chase does not include an express delegation of arbitrability to the arbitrator. *See* Dkt. No. 73-3, at 17. The arbitration agreement also does not contain any references to disputes with third parties, let alone a delegation of arbitrability issues that might arise in connection with a dispute with a third-party. *See id.* The arbitration agreement does, however, carve out specific issues for the Court to decide, including, most notably, “issues relating to the scope, enforceability, [and] interpretation” of the arbitration agreement. *Id.* This carve-out precludes a finding that the parties clearly and unmistakably intended to delegate arbitrability to an arbitrator. *See AT&T Mobility LLC v. Bernardi*, No. 11-CV-03992 (CRB), 2011 WL 5079549, at *4 (N.D. Cal. Oct. 26, 2011) (finding that a similar carve-out “reiterated th[e] general principle” that the court must determine arbitrability).

The Wells Fargo and the Bank of the West arbitration agreements do not include similar carve-outs. For example, the Wells Fargo arbitration agreement requires arbitration of “disputes,” which is defined to include “any disagreements about the meaning or application of this Arbitration Agreement.” Dkt. No. 73-5, at 61. The Bank of the West arbitration agreement requires arbitration

of “claims relating to the enforceability or interpretation of this arbitration provision.” Dkt. No. 73-1, at 37.

Even if these clauses were interpreted to include issues of arbitrability, their language is insufficient to establish that the parties intended to arbitrate arbitrability with non-signatories. In *Kramer*, the Ninth Circuit considered an arbitration clause that assigned questions of arbitrability to the arbitrator but also stated, before doing so, that “[e]ither you or we may choose to have any dispute between you and us decided by arbitration.” *Kramer*, 705 F.3d at 1127. That language, the Ninth Circuit held, evidenced the parties’ “intent to arbitrate arbitrability” with the other party to the arbitration agreement “and no one else.” *Id.* That reasoning applies here, given that the Bank of the West and Wells Fargo agreements also contain “you and we” language that is legally indistinguishable from the language the Ninth Circuit found dispositive in *Kramer*. See Dkt. No. 73-1, at 37; Dkt. No. 73-5, at 61.

Because the Court has not been presented with any “clear and unmistakable evidence” to overcome the presumption that arbitrability is an issue for judicial determination, the Court has the authority to determine whether the non-signatory Defendants can enforce the arbitration agreements contained within Plaintiffs’ cardholder agreements.

2. The Non-Signatory Defendants May Not Compel Arbitration Because Equitable Estoppel Does Not Apply Here

The non-signatory Defendants argue that they can enforce Plaintiffs’ arbitration agreements on equitable estoppel grounds. See Dkt. No. 72, at 38-44.

The United States Supreme Court has held that a litigant who is not a party to an arbitration agreement may invoke arbitration under the FAA if the relevant state contract law allows the litigant to enforce the agreement. See *Arthur Andersen*, 556 U.S. at 632; see also *In re Carrier IQ, Inc. Consumer Priv. Litig.*, No. C-12-MD-2330 (EMC), 2014 WL 1338474, at *5 (N.D. Cal. Mar.

28, 2014) (“After the Supreme Court’s decision in *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009), it is clear that state law, and not federal law, determines the applicability of equitable estoppel in the arbitration context.”).

In their initial submission, Defendants presented the Court with Second Circuit case law in support of their position that Plaintiffs should be estopped from avoiding arbitration. *See* Dkt. No. 72, at 39-44. After the Court requested supplemental briefing on the choice of law that governs this issue, Defendants conceded that California law would apply “if the Court were to find a choice-of-law analysis is required.” Dkt. No. 89, at 1. Defendants contend, however, that a choice-of-law analysis is not required “because the laws of each potentially relevant jurisdiction are in accord” and require arbitration of Plaintiffs’ claims. *Id.* Defendants claim that the relevant “choice-of-law jurisdictions” are: (1) California, where the case was filed and the law selected by the choice-of-law provision in the arbitration agreements between the Bank of the West and John Palladino, Steve, Palladino, and Garib Karapetyan; (2) Delaware, the law selected by the choice-of-law provision in the arbitration agreement between Chase and John Nypl; (3) South Dakota, the law selected by the choice-of-law provision in the arbitration agreements between Wells Fargo and John Palladino and Garib Karapetyan; and (4) New York, though Defendants do not explain why New York is a relevant choice-of-law jurisdiction.⁶ *Id.* at 2-3. Plaintiffs contend that California applies. *See* Dkt. No. 90, at 1.

Applying California’s choice-of-law principles, this Court finds that California state law applies to Defendants’ argument that equitable estoppel compels arbitration of Plaintiffs’ claims.

⁶ In their motion, Defendants do not direct the Court to any specific arbitration agreement and do not raise the choice-of-law provisions contained therein. Defendants also did not raise the issue at oral argument despite the Court asking which specific agreements it should focus its analysis on. As a result, Plaintiffs have not had the opportunity to respond to Defendants’ contention that Delaware and South Dakota are relevant choice-of-law jurisdictions. Plaintiffs are not prejudiced, however, because this Court agrees with Plaintiffs that California law applies. *See* Dkt. No. 90, at 1.

See Menowitz, 991 F.2d at 40 (holding that a transferee court must apply “the substantive state law, including choice-of-law rules, of the jurisdiction in which the action was filed”); *Kramer*, 705 F.3d at 1128 (applying California law to defendants’ equitable estoppel claims). Notwithstanding this finding, this Court briefly addresses the laws governing equitable estoppel in the other jurisdictions identified by Defendants.

a. California

Under California law, a non-signatory may enforce an arbitration provision through equitable estoppel in two circumstances: “(1) when a signatory must rely on the terms of the written agreement in asserting its claims against the nonsignatory or the claims are ‘intimately founded in and intertwined with’ the underlying contract, or (2) when the signatory alleges substantially interdependent and concerted misconduct by the nonsignatory and another signatory and ‘the allegations of interdependent misconduct [are] founded in or intimately connected with the obligations of the underlying agreement.’” *Kramer*, 705 F.3d at 1128 (citing *Goldman v. KPMG LLP*, Cal. Rptr. 3d 534 (Ct. App. 2009)). “[E]quitable estoppel in this context is narrowly confined.” *Murphy v. DirecTV, Inc.*, 724 F.3d 1218, 1229 (9th Cir. 2013).

Defendants argue that estoppel is warranted because Plaintiffs’ claims, “arise out of and are covered by their card agreements,” Dkt. No. 89, at 3, and “are entirely dependent on [their] status as holders of cards issued by banks with whom plaintiffs signed arbitration agreements,” Dkt. No. 72, at 34. Defendants, however, miss the essential element of the test articulated by the Ninth Circuit in *Kramer*. While it is true that Plaintiffs are holders of Visa or Mastercard payment cards and entered into cardholder agreements for those cards, the core test of estoppel is whether Plaintiffs’ claims are “intertwined” with the contractual obligations contained in the cardholder agreements. *Kramer*, 705 F.3d at 1128 (citation omitted); *see also Mundi v. Union Sec. Life Ins.*

Co., 555 F.3d 1042, 1046 (9th Cir. 2009) (examining cases in which non-signatories were permitted to compel a signatory to arbitrate based on estoppel and reasoning that it was “essential in all of these cases that the subject matter of the dispute was intertwined with the contract providing for arbitration”).

Defendants mistakenly equate Plaintiffs’ status as cardholders and the mere fact that Plaintiffs entered into cardholder agreements with the interrelatedness between Plaintiffs’ claims and the obligations in the cardholder agreements. The extent of the obligations in the cardholder agreements concern Plaintiffs’ financing and payment obligations. *See, e.g.*, Dkt. No. 73-3, at 7. The cardholder agreements also include provisions regarding how the issuing bank will communicate with the cardholder and the cardholder’s rights if they are dissatisfied with the goods they purchased. *Id.* at 9-10. Plaintiffs do not seek to enforce or challenge these terms in the cardholder agreements or any duty owed by the issuing banks. *See generally* Dkt. No. 1-3. The operative documents at issue are not the cardholder agreements, but the alleged contracts between the member banks and merchants and the Rules that govern those contracts. *See id.* Simply put, Plaintiffs’ claims do not rely on the content of the cardholder agreements for their success.⁷ Nor do Defendants cite to any provision in the cardholder agreements that Plaintiffs rely upon in asserting their claims.

The court’s decision in *Nitsch v. DreamWorks Animation SKG Inc.*, 100 F. Supp. 3d 851 (N.D. Cal. 2015) is instructive. There, employees of various film studios in California filed a putative class action against the studios, alleging that they had engaged in a conspiracy to fix and suppress employee compensation and to restrict employee mobility, in violation of the Sherman

⁷ In fact, Plaintiffs contend the opposite—they argue that “even if a cardholder paid cash [*sic*] he would be entitled to recover in this case.” Dkt. No. 90, at 4. For purposes of resolving Defendants’ motion to compel, the Court need not resolve the veracity of this statement. *See In re Apple iPhone Antitrust Litig.*, 874 F. Supp. 2d 889, 898 n.21 (N.D. Cal. 2012).

Act, Cartwright Act, and UCL. *See Nitsch*, 100 F. Supp. 3d. at 853-54, 60. Plaintiff Nitsch had an employment agreement with one of the defendants, DreamWorks, that contained an arbitration clause, and the other defendants sought to enforce the arbitration clause on equitable estoppel grounds. *Id.* at 863. Applying the two-part test from *Kramer*, the court held that equitable estoppel did not apply because Nitsch’s antitrust claims did not rely on any of the terms of his employment agreement. *Id.* at 865-66. Nitsch was not suing for breach of the employment agreement, nor did he challenge the terms, duties, or obligations of that agreement. *Id.* at 866. Instead, his claims took issue with alleged wrongful conduct that occurred outside the scope of the employment agreement—namely, that defendants engaged in an antitrust conspiracy to suppress wages and restrict employee mobility. *Id.* While Nitsch was an employee of DreamWorks vis-à-vis his employment agreement, and while his antitrust claims related to his compensation as an employee, the court concluded that Nitsch’s claims would be cognizable even if he worked for DreamWorks without an employment agreement. *Id.* Thus, the court concluded that Nitsch’s claims “arose independently of the terms of the agreements containing arbitration provisions.” *Id.*

Courts in other antitrust cases have applied similar reasoning in declining to compel arbitration with non-signatories. *See, e.g., Staley*, 2021 WL 4972628, at *8 (holding that plaintiffs’ antitrust claims were not intertwined with distribution agreement containing arbitration clause because “[p]laintiffs are not suing [defendants] directly on terms contained in the [distribution agreements]. Rather, the main anticompetitive conduct for which [p]laintiffs are suing [defendants] is based on terms contained in the ‘joint venture’ agreements between [defendants]”); *In re Apple iPhone Antitrust Litig.*, 874 F. Supp. at 898 (declining to apply estoppel because plaintiffs’ claims alleging that Apple monopolized an alleged aftermarket for software applications for iPhones did not arise from plaintiffs’ service contracts with non-party AT&T Mobility).

Defendants also argue that estoppel is warranted because Plaintiffs allege joint and several liability conspiracy claims. *See* Dkt. No. 72, at 44. But the mere fact that Plaintiffs allege a conspiracy among Defendants to fix the price of interchange fees, on its own, is insufficient to invoke equitable estoppel because the cardholder agreements containing the arbitration provisions are not a part of the core conduct comprising the conspiracy. *See Kramer*, 705 F.3d at 1132-33 (“California state contract law does not allow a nonsignatory to enforce an arbitration agreement based upon a mere allegation of collusion or interdependent misconduct between a signatory and nonsignatory.”); *Staley*, 2021 WL 4972628, at *8 (holding the “mere fact that Plaintiffs allege a conspiracy” among defendants was insufficient to invoke estoppel because the alleged conspiracy was independent of the agreement containing the arbitration clause). Indeed, as one California Court of Appeals explained, “allegations of substantially interdependent and concerted misconduct by signatories and nonsignatories, standing alone, are not enough: the allegations of interdependent misconduct must be founded in or intimately connected with the obligations of the underlying agreement.” *Goldman*, 92 Cal. Rptr. 3d at 542.

The core conduct comprising the conspiracy alleged by Plaintiffs concerns interchange fees that were “fixed and stabilized by written agreement” among Defendants. Dkt. No. 1-3, at 9. Plaintiffs contend that Network Defendants set “‘default’ interchange amounts” that their “member banks must charge their merchant customers for providing access to the networks.” *Id.* ¶ 65. Network Defendants enforce these “default interchange fees” through the Rules, which Bank Defendants must comply with to use the Visa and Mastercard networks. *Id.* ¶¶ 64-65, 91. Plaintiffs allege that Bank Defendants, in turn, “have contracts with merchants to process the sales transactions resulting from cardholders’ Visa/Mastercard purchases.” *Id.* ¶ 64. These contracts “enforce the interchange rates set by the networks.” *Id.* None of these allegations relate to the

cardholder agreements or otherwise connect the core conduct comprising the conspiracy to the cardholder agreements.

As a result, this Court finds that Defendants have failed to establish that California law warrants the application of equitable estoppel in this case. While this Court (and the parties) submit that California law is applicable here, the Court nonetheless evaluates, in the alternative, this issue under New York law, Delaware law, and South Dakota law.

b. New York

Courts in the Second Circuit have held that “[a] signatory to an arbitration clause is estopped from refusing to arbitrate against a non-signatory where (1) ‘the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed’ and (2) there is ‘a relationship among the parties of a nature that justifies a conclusion that the party which agreed to arbitrate with another entity should be estopped from denying an obligation to arbitrate a similar dispute’ with the non-signatory.” *Doe v. Trump Corp.*, 453 F. Supp. 3d 634, 640 (S.D.N.Y. 2020) (quoting *Ragone v. Atl. Video at Manhattan Ctr.*, 595 F.3d 115, 127 (2d Cir. 2010)), *aff’d*, 6 F.4th 400 (2d Cir. 2021). “This does not mean, however, that whenever a relationship of any kind may be found among the parties to a dispute and their dispute deals with the subject matter of an arbitration contract made by one of them, that party will be estopped from refusing to arbitrate.” *Ragone*, 595 F.3d at 127 (citation omitted).

While the estoppel inquiry is “fact-specific,” the Second Circuit cases applying “estoppel against a party seeking to avoid arbitration have tended to share a common feature in that the non-signatory party asserting estoppel has had some sort of *corporate* relationship to a signatory party; that is, this Court has applied estoppel in cases involving subsidiaries, affiliates, agents, and other related business entities.” *Ross v. Am. Exp. Co.*, 547 F.3d 137, 144 (2d Cir. 2008) (emphasis in

original). Courts have also applied estoppel “when a non-signatory defendant owns or controls a signatory defendant” or “where a defendant, while a non-signatory to the . . . contract containing an arbitration clause, was nevertheless explicitly named therein as having certain tasks to perform under that contract[.]” *Id.* at 144-45.

Here, Defendants have failed to establish that the requisite relationship exists between Plaintiffs and the non-signatory Defendants such that Plaintiffs could have reasonably anticipated having to arbitrate their claims against the non-signatories. Plaintiffs do not allege, nor do Defendants argue, that the non-signatories have a corporate affiliation with the Bank of the West, Wells Fargo, or Chase. *Cf. Contec Corp. v. Remote Solution Co., Ltd.*, 398 F.3d 205, 209 (2d Cir.2005) (holding post-merger survivor corporation could invoke arbitration agreement signed by corporation subsumed in merger). Plaintiffs also do not allege that the non-signatories control the Bank of the West, Wells Fargo, or Chase. *Cf. In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d 237, 262 (S.D.N.Y. 2005) (holding that Visa and Mastercard could enforce arbitration clauses in plaintiffs’ cardholder agreements with issuing banks because plaintiffs alleged that the issuing banks controlled the network defendants). Moreover, the non-signatories are not mentioned in the account agreements containing the arbitration clauses. *Cf. Choctaw Generation Ltd. P’ship v. Am. Home Assur. Co.*, 271 F.3d 403, 406 (2d Cir. 2001) (non-signatory party which was to provide letter of credit under construction contract could avail itself of arbitration clause because “dispute concerns the duty to replenish a letter of credit”). In short, this case does not share any of the “common features” that are present in the Second Circuit cases applying estoppel against a non-signatory.

The Second Circuit’s decision in *Ross* is instructive. There, the plaintiffs sued Amex, alleging that it colluded with other credit card companies, like Visa and Mastercard, to “fix,

maintain, and conceal the artificially inflated” foreign currency transaction fees at issue in a related multidistrict litigation involving claims brought against credit card companies and their issuing banks for violations of the Sherman Antitrust Act. *Ross*, 547 F.3d at 139. None of the *Ross* plaintiffs had arbitration agreements with Amex. *Id.* at 139-40. Amex nonetheless sought to enforce the arbitration clauses in the Visa/Mastercard cardholder agreements that plaintiffs had with their issuing banks, arguing that plaintiffs should be estopped from avoiding arbitration because they alleged a conspiracy among Amex and the banks with whom they had arbitration agreements that arose directly from their cardholder agreements. *Id.* at 140. The district court agreed with Amex and granted its motion to compel arbitration. *Id.*

On appeal, the Second Circuit reversed, holding that the plaintiffs could not be forced to arbitrate their claims against Amex because Amex was not a signatory to the cardholder agreements that contained the arbitration clauses. *Id.* at 143. The court held that estoppel did not apply because Amex had no corporate affiliation with the issuing banks, and plaintiffs did not allege that they had any contact whatsoever with Amex. *Id.* Amex likewise made no claim to the contrary. *Id.* at 146. It was a stranger to the plaintiffs’ cardholder agreements—it did not sign them, it was not mentioned in them, and it performed no function whatsoever relating to their operation. *Id.* The court therefore agreed with plaintiffs that “[t]here [was] no reason for someone signing up for a Chase Visa card, for example, to believe that he (or she) was entering into any kind of relationship with [Amex].” *Id.* at 148.

Here too, the non-signatory banks are strangers to the arbitration agreements contained within Plaintiffs’ cardholder agreements. The non-signatory banks did not sign the agreements, are not mentioned in the agreements, and perform no function whatsoever relating to their operation. Thus, like the plaintiffs in *Ross*, there was no reason for Plaintiffs here to believe that

they were entering into a relationship with any Defendant other than the bank with whom they have a cardholder agreement.

The cases cited by Defendants do not apply here. *JLM Indus., Inc. v. Stolt-Nielsen SA* stands for the general proposition that arbitration agreements can apply to non-signatories through the applications of principles of estoppel. *See JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 177 (2d Cir. 2004).⁸ In *JLM*, the Second Circuit reversed the district court's decision denying a motion to compel arbitration filed by ship owners who sought to enforce arbitration agreements entered into by their subsidiaries. *Id.* at 177. The Court held that the plaintiffs were estopped from avoiding arbitration with the owners because they had treated the owners as if they had signed the shipping charters containing the arbitration agreements. *Id.* at 178. The plaintiffs repeatedly alleged throughout their complaint that regardless of whether the owners or subsidiaries signed the charter contracts, the plaintiffs purchased shipping services directly from the owners and were harmed by the allegedly inflated prices charged by the owners. *Id.* In light of these allegations, the court held that the plaintiffs had implicitly recognized the close relationship between the owners and subsidiaries and were therefore estopped from avoiding arbitration. *Id.*

In the wake of *JLM*, the court in *In re Currency Conversion Fee Antitrust Litig.* held that cardholders in an antitrust multidistrict litigation were estopped from avoiding arbitration of their price-fixing conspiracy claims with certain banks, Visa, and Mastercard, even though none of these parties had arbitration agreements with plaintiffs. *In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d at 263-64. There, the court found that the plaintiffs' complaint contained sufficient allegations to establish that "the banks ha[d] insinuated themselves into the network defendants to

⁸ *JLM* predates the Supreme Court's decision in *Arthur Andersen*. While the Second Circuit does not specify what state law it is applying, the equitable estoppel standard it applies is consistent with the standard applied in other cases in the Circuit.

such a degree that the networks are effectively part of the member banks operations.” *Id.* at 263. In addition, the currency conversion fee that was at the heart of the plaintiffs’ antitrust claims was set by the networks but imposed on the cardholders through the issuing banks. *Id.* Lastly, the court was persuaded by the plaintiffs’ conspiracy claims, finding that under *JLM*, it was appropriate to extend the arbitration agreements to the non-signatory banks, Visa, and Mastercard because the alleged antitrust claims stemmed from the alleged close relationship among all defendants. *Id.* at 264.

Contrary to Defendants’ claim, *In re Currency Conversion Fee Antitrust Litig.* is not dispositive for several reasons. First, *In re Currency Conversion Fee Antitrust Litig.* does not apply California law. Second, even if New York law applied to this case, the Court is not obligated to follow a decision from another district court in this Circuit. *See Firemen’s Ins. Co. of Newark, New Jersey v. Keating*, 753 F. Supp. 1146, 1156 n.10 (S.D.N.Y. 1990) (“[T]he decision of one district court does not control the decision of another district court.” (collecting cases)). Third, while the Second Circuit mentions *In re Currency Conversion Fee Antitrust Litig.* in *Ross*, it does not cite it with approval or endorse the district court’s analysis. *See Ross*, 547 F.3d at 144. Notably, *Ross* arises from the same multidistrict litigation as *In re Currency Conversion Fee Antitrust Litig.*, and the same district judge decided the motions to compel in both cases. *See Ross*, 547 F.3d at 144, 46. In *Ross*, the Second Circuit rejects the district court’s estoppel analysis, and that same analysis was applied in *In re Currency Conversion Fee Antitrust Litig.* Even though *In re Currency Conversion Fee Antitrust Litig.* was not reviewed on appeal, the *Ross* decision is a strong indicator that the Second Circuit would have rejected the district court’s analysis if it had been reviewed. As a result, this Court does not find Defendant’s reliance on *In re Currency Conversion Fee Antitrust Litig.* compelling.

For these reasons, even if New York law applied, Defendants' motion to compel arbitration should still be denied.

c. Delaware

Under Delaware law, "equitable estoppel applies when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory" or "when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract." *Wilcox & Fetzer, Ltd. v. Corbett & Wilcox*, No. CV-2037-N, 2006 WL 2473665, at *5 (Del. Ch. Aug. 22, 2006) (citation omitted).

Similar to California, in order for equitable estoppel to apply under Delaware law, "there must be some kind of relationship between the claims at issue and the contract containing the arbitration clause." *Staley*, 2021 WL 4972628, at *7 (comparing California and Delaware estoppel laws). As discussed above, Defendants have failed to establish that the requisite relationship exists, and thus, this Court finds that Delaware law would not support the application of equitable estoppel in this case.

d. South Dakota

Under South Dakota law, equitable estoppel applies when "all the claims against the nonsignatory defendants are based on alleged substantially interdependent and concerted misconduct by both the nonsignatories and one or more of the signatories to the contract." *Estrada v. The Moore L. Grp., APC*, No. 22-CV-01594 (ODW) (AFMX), 2022 WL 2666924, at *3 (C.D. Cal. July 11, 2022) (quoting *Rossi Fine Jewelers, Inc. v. Gunderson*, 648 N.W.2d 812, 815 (S.D. 2002)). Estoppel also applies when "the signatory plaintiff 'asserts claims arising out of

agreements against non-signatories to those agreements without allowing those defendants also to invoke the arbitration clause contained in the agreements.” *Id.*

In *Rossi*, the Supreme Court of South Dakota held that non-signatories to an arbitration agreement could compel arbitration against a plaintiff where the plaintiff alleged “substantially interdependent and concerted misconduct” between the non-signatory and signatory to the agreement. *Rossi*, 648 N.W.2d at 815–16. The plaintiff in *Rossi* contracted with a company called Nature’s 10 to operate a jewelry franchise. *Id.* at 813. The plaintiff eventually sued Nature’s 10, Nature’s 10’s owner Mylan Ventures, and several individuals who were officers of Nature’s 10 or Mylan. *Id.* Among other things, the plaintiff alleged breach of contract, fraud, deceit, and personal liability of the officers. *Id.* at 814. Although Mylan Ventures and the officers were not signatories to the franchise agreement between the plaintiff and Nature’s 10, they moved to compel arbitration under the arbitration agreement contained therein. *Id.* Relying on agency principles, principles of equitable estoppel, and the idea that plaintiffs should not be able to avoid arbitration simply by adding a non-signatory defendant, the Supreme Court of South Dakota held that Mylan Ventures and the officers could enforce the arbitration clause. *Id.* at 815-16.

Applying *Rossi* here, this Court finds that the non-signatory Defendants cannot enforce Plaintiffs’ arbitration agreements under South Dakota law. One of the reasons the Supreme Court of South Dakota allowed the officers in *Rossi* to enforce the arbitration clause was because the officers were agents of Mylan or Nature’s 10 and were being sued for actions they took as officers of the companies. *Id.* at 815. The court explained that allowing agents to enforce an arbitration agreement under such circumstances was necessary “to prevent circumvention of arbitration agreements” and “to effectuate the intent of the signatory parties.” *Id.* (citation omitted).

Here, Plaintiffs do not allege a close relationship between the non-signatory and signatory Defendants beyond the broader allegations of an antitrust conspiracy. Unlike the defendants in *Rossi*, Plaintiffs do not allege that the non-signatory Defendants are agents of the signatory Defendants. Moreover, Defendants do not present the Court with any compelling case law to establish that South Dakota's equitable estoppel principles would warrant enforcement of Plaintiffs' arbitration agreements.

Accordingly, this Court finds that South Dakota law would not warrant the application of equitable estoppel in this case.

* * *

For the reasons explained above, this Court respectfully recommends that Defendants' motion to compel arbitration be denied. As a result, a stay under 9 U.S.C. § 3 is not warranted, and this Court respectfully recommends that Defendants' motion for a stay pending arbitration be denied.

B. Defendants' Motion to Dismiss

In light of the foregoing recommendation that Defendants' motion to compel arbitration be denied, this Court must address Defendants' motion to dismiss the amended complaint.

Defendants move for dismissal under Fed. R. Civ. P. 12(b)(6) on three grounds. First, Defendants argue that Plaintiffs lack standing to assert claims under the Cartwright Act as either direct purchasers or indirect purchasers, thereby requiring dismissal of Plaintiffs' causes of action I through IV and VII through VII. Dkt. No. 72, at 17-32. Second, Defendants seek dismissal of Plaintiffs' UCL claims for the same reasons as Plaintiffs' Cartwright Act claims, thereby requiring dismissal of Plaintiffs' causes of action V through IX. *Id.* at 31-32. Third, Defendants argue that most of Plaintiffs' claims are time-barred under the applicable four-year statute of limitations for

Cartwright Act and UCL claims, and Plaintiffs have not established their entitlement to equitable tolling for fraudulent concealment. *Id.* at 31-34.

PNC also moves to dismiss Plaintiffs' complaint under Fed. R. Civ. P. 12(b)(2) on the grounds that it is not subject to general or specific personal jurisdiction in California. *Id.* at 34-38.

1. Plaintiffs' Standing to Assert Claims under the Cartwright Act

The Cartwright Act is California's principal antitrust statute and "generally outlaws any combinations or agreements which restrain trade or competition or which fix or control prices." *Pac. Gas & Elec. Co. v. Cnty. of Stanislaus*, 947 P.2d 291, 294 (Cal. 1997) (citations omitted). The essential elements of a Cartwright Act claim are an unlawful agreement, wrongful acts committed pursuant to it, and damages. *See Marsh v. Anesthesia Servs. Med. Grp., Inc.*, 132 Cal. Rptr. 3d 660, 671 (Ct. App. 2011). A proper plaintiff may sue to recover treble damages and for injunctive relief. Cal. Bus. & Prof. Code § 16750(a).

"Antitrust standing is required under the Cartwright Act." *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 987 (9th Cir. 2000). In contrast to federal antitrust laws, the Cartwright Act confers standing on direct and indirect purchasers of the alleged price-fixed product. *Compare* Cal. Bus. & Prof. Code § 16750(a) ("Any person who is injured . . . by reason of anything forbidden or declared unlawful by this chapter . . . may sue . . . regardless of whether such injured person dealt directly or indirectly with the defendant.") *with Illinois Brick Co. v. Illinois*, 431 U.S. 720, 735-36 (1977) (holding that indirect purchasers lack standing to sue for damages under the Clayton Act). Indeed, the California legislature amended the Cartwright Act "in direct response to *Illinois Brick* . . . to provide that unlike federal law, state law permits indirect purchasers as well as direct purchasers to sue" for antitrust violations. *Clayworth v. Pfizer, Inc.*, 233 P.3d 1066, 1070 (Cal. 2010).

Notwithstanding the broad reach of the Cartwright Act, courts look to federal antitrust law for guidance in analyzing whether a plaintiff has antitrust standing under the Cartwright Act. *See, e.g., Salveson v. JP Morgan Chase & Co.* (“*Salveson I*”), 166 F. Supp. 3d 242, 259 (E.D.N.Y. 2016) (Brodie, J.). To establish standing under federal antitrust laws, “a plaintiff must show (1) antitrust injury, which is ‘injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful,’ and (2) that he is a proper plaintiff in light of [the] ‘efficient enforcer’ factors[.]” *Schwab Short-Term Bond Mkt. Fund v. Lloyds Banking Grp. PLC*, 22 F.4th 103, 115 (2d Cir. 2021) (Sullivan, J.) (quoting *In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677, 688 (2d Cir. 2009)). These “efficient enforcer factors” were first outlined by the Supreme Court in *Associated General Contractors v. California State Council of Carpenters* (“*AGC*”), 459 U.S. 519, 537-544 (1983) and include: “(1) the nature of the plaintiff’s alleged injury, (2) the directness of the injury, (3) the speculative nature of the harm, (4) the risk of duplicative recovery[,] and (5) the complexity in apportioning damages.” *Salveson II*, 166 F. Supp. 3d at 259 (citation omitted).

As Judge Sullivan cogently explained in *Schwab*, “[a]t its core, the efficient enforcer analysis requires a court to decide if the plaintiff is a proper party to perform the office of a private attorney general and thereby vindicate the public interest in antitrust enforcement.” *Schwab*, 22 F.4th at 115 (internal quotations and citation omitted). “[T]he Supreme Court has recognized that ‘Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation.’” *Id.* at 114-15 (quoting *AGC*, 459 U.S. at 534). “Accordingly, the private right to seek treble damages for federal antitrust violations has ‘developed limiting contours,’ which are [e]mbodied in the concept of ‘antitrust standing.’” *Id.* (citing *Gatt Commc’ns, Inc. v. PMC Assocs., L.L.C.*, 711 F.3d 68, 75 (2d Cir. 2013)).

a. Applicable legal standard

“The California Supreme Court has not addressed whether antitrust standing under California state law is properly analyzed under the same framework as that used to determine federal antitrust standing.” *In re Am. Express Anti-Steering Rules Antitrust Litig.*, 433 F. Supp. 3d 395, 413 (E.D.N.Y. 2020), *aff’d*, 19 F.4th 127 (2d Cir. 2021); *see also In re Capacitors Antitrust Litig.*, 106 F. Supp. 3d 1051, 1072-73 (N.D. Cal. 2015). Thus, “[w]here a plaintiff asserts a state law antitrust claim, the ‘threshold question presented’ is whether the *AGC* factors also apply to establish the antitrust injury.” *Salveson II*, 166 F. Supp. 3d at 256 (quoting *In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1151 (N.D. Cal. 2009)). Case law interpreting the federal antitrust laws is “instructive, not conclusive, when construing the Cartwright Act.” *Schwab*, 22 F.4th at 115 (quoting *Aryeh v. Canon Bus. Sols., Inc.*, 292 P.3d 871, 877 (Cal. 2013)).

“In the absence of a clear rule provided by state law, federal courts analyzing ‘unsettled areas of state law’ must ‘carefully predict how the state’s highest court would resolve the uncertainties,’ so as to avoid ‘distort[ing] established state law.’” *Salveson II*, 166 F. Supp. 3d at 256 (quoting *Runner v. N.Y. Stock Exch., Inc.*, 568 F.3d 383, 386 (2d Cir. 2009)). This requires courts to “give the fullest weight to pronouncements of the state’s highest court” while also “look[ing] to the rulings of the state’s lower courts as providing important data points for understanding state law.” *Schwab*, 22 F.4th at 120 (internal quotations and citations omitted).

While courts have disagreed on whether the *AGC* factors apply to Cartwright Act claims—and authority is sparse in either direction—this Court is persuaded by those courts, including the Second Circuit, that have found that the same or substantially similar factors apply. *See Schwab*, 22 F.4th at 120 (“California law substantially incorporates the *AGC* factors.”); *see also Salveson II*, 166 F. Supp. 3d at 258 (analyzing cases and holding that the *AGC* factors applied to plaintiffs’

Cartwright Act claims); *In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d at 1151 (applying *AGC* factors to Cartwright Act claims); *but see In re Capacitors Antitrust Litig.*, 106 F. Supp. 3d at 1072-73 (“The application of *AGC* to California state antitrust claims has recently become murky, and that murkiness persuades the Court *AGC* should not be applied.”).

This determination is also in accordance with at least one of California’s intermediate appellate courts, which expressly described the antitrust standing required under the Cartwright Act in terms of the *AGC* factors. *See Vinci v. Waste Mgmt., Inc.*, 43 Cal. Rptr. 2d 337, 338-39 (Ct. App. 1995); *see also Wholesale Elec. Antitrust Cases I & II*, 55 Cal. Rptr. 3d 253, 265 (Ct. App. 2007) (quoting federal antitrust standing elements in deciding antitrust standing under the Cartwright Act). As the Second Circuit explained in *Schwab*, “[t]he *Vinci* court looked to federal antitrust elements both because the Cartwright Act contains ‘similar language’ to the federal antitrust statute interpreted in *AGC* and ‘[b]ecause the Cartwright Act has objectives identical to the federal antitrust acts.’” *Schwab*, 22 F.4th at 120 (quoting *Vinci*, 43 Cal. Rptr. 2d at 338 & n.1). The United States Court of Appeals for the Ninth Circuit has also applied the *AGC* factors to Cartwright Act claims. *See Knevelbaard*, 232 F.3d at 987.

Notwithstanding these decisions, this Court also observes that “California law affords standing more liberally than does federal law.” *Id.*; *see also Salveson II*, 166 F. Supp. 3d at 259 (explaining how the *AGC* factors are “instructive, not conclusive” (quoting *Aryeh*, 292 P.3d at 877)). Thus, “[c]onsistent with the Ninth Circuit’s approach in *Knevelbaard*, this Court will apply the *AGC* factors ‘liberally,’ and in concert with the broader antitrust standing requirements under California law, particularly with respect to the application of *AGC*’s second factor, the directness of the injury.” *Salveson II*, 166 F. Supp. 3d at 259 (citing *Knevelbaard*, 232 F.3d at 985-89).

b. Plaintiffs' direct purchaser theory

Plaintiffs allege that they “have standing as direct purchasers” of payment card transactions “provided by Defendants’ General Purpose Card Network Services.” Dkt. No. 1-3 ¶ 57. Specifically, Plaintiffs allege that “[t]he cardholder, as direct purchaser and first payer, is damaged the moment a merchant rings the sale. On authorization of the cardholder’s card, the Visa/Mastercard network simultaneously sells the transaction to both merchant and cardholder, who jointly share that single transaction.” *Id.* ¶ 82 (citing *Amex*). To that end, Plaintiffs contend that they are “direct joint purchasers along with the Merchant when the interchange amount deducts from [their] account the instant [their] payment card is read and authorized.” *Id.* ¶ 120.

In response, Defendants argue that “the Court can quickly dispatch with [P]laintiffs’ conclusory claim that they are ‘a direct purchaser and first payer’—the same claim this Court and the Second Circuit rejected in *Salveson*.” Dkt. No. 72, at 18 (citing *Salveson v. JP Morgan Chase & Co.* (“*Salveson I*”), No. 14-CV-3529 (JG), 2014 WL 12770235, at *3 (E.D.N.Y. Nov. 26, 2014)), *on reconsideration in part, Salveson II*, 166 F. Supp. 3d 242, *and aff’d*, 663 F. App’x 71 (2d Cir. 2016) (“*Salveson III*”). Defendants contend that “the alleged facts here[] are identical to *Salveson* and identical to the countless other cases where as direct or indirect purchasers, cardholders sought to bring this kind of claim. And all of them found that the standing is lacking.” Dkt. No. 84, at 10. Defendants also contend that Plaintiffs misconstrue *Amex* and that their “direct joint purchaser” theory was likewise rejected by this Court in *Salveson v. JP Morgan Chase & Co.* (“*Salveson IV*”), No. 14-CV-3529 (MKB), 2020 WL 4810704, at *11 (E.D.N.Y. July 16, 2020) and the Second Circuit in *Salveson v. JPMorgan Chase & Co.* (“*Salveson V*”), 860 F. App’x 207 (2d Cir. 2021).

The Court begins with a recitation of the *Salveson* decisions as they illustrate the hurdles that Plaintiffs face with respect to their direct joint purchaser theory of standing. *Salveson* was an antitrust case brought by a group of Visa and Mastercard cardholders, on behalf of a putative nationwide class, against various financial institutions that issued Visa and/or Mastercard payment cards. *Salveson I*, 2014 WL 12770235, at *1. The plaintiffs alleged that these institutions “knowingly participated in a conspiracy to fix interchange fees” in violation of the Clayton Act and Cartwright Act. *Id.*

As background, in *Salveson I*, the court considered whether the plaintiffs had standing to bring their antitrust claims under the Clayton Act or if their claims were barred by the *Illinois Brick* doctrine. *Id.* at *3. Put differently, the *Salveson I* court assessed whether the plaintiffs were direct purchasers of the alleged “supracompetitive, fixed[,] and inflated interchange fees” or if they were indirect payers, meaning they did “not make purchases directly from the defendants alleged to have violated antitrust laws.” *Id.* at *2-3. The plaintiffs claimed that they were direct purchasers of interchange fees because they paid for each of their credit card transactions. *Id.* at *3.

Analyzing the structure of the payment card transaction system, the *Salveson I* court held that the plaintiffs were indirect purchasers and thus lacked standing to assert a Clayton Act claim under *Illinois Brick*. *Id.* In reaching this conclusion, the court explained:

Because the interchange fee runs between financial institutions within the card services market, consumers do not directly pay interchange fees and are not directly injured by their imposition. The plaintiffs’ facile contention that cardholders pay interchange fees directly is refuted by their own allegations about how transactions over these two networks occur. It also bears no resemblance to the transaction structure at the heart of this nine-year-old case.

Id.

Importantly, the court drew a distinction between “[t]he markets for general purpose payment cards and for payment card network services” and concluded that cardholders “participate only in the former.” *Id.* Citing to the Second Circuit’s decision in *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 239 (2d Cir. 2003), the court explained how “[w]hereas in the market for general purpose *cards*, the issuers are the sellers, and cardholders are the buyers, in the market for general purpose card *network services*, the four networks themselves are the sellers, and the issuers of cards and merchants are the buyers.” *Id.* (emphasis in original). The *Salveson I* court thus dismissed the plaintiffs’ Clayton Act claims for lack of standing and declined to exercise supplemental jurisdiction over their Cartwright Act claims, which it dismissed without prejudice. *Id.* at *3-4.

The parties subsequently moved for reconsideration of *Salveson I*.⁹ See *Salveson II*, 166 F. Supp. 3d at 247. In *Salveson II*, the court declined to reconsider its dismissal of the Clayton Act claims but granted reconsideration of its dismissal of the Cartwright Act claims. *Id.* Applying the *AGC* factors to the Cartwright Act claims, the *Salveson II* court held that the plaintiffs “failed to assert a direct antitrust injury that confers standing to bring a claim under the Cartwright Act because plaintiffs [were] not in the relevant market of the alleged antitrust conduct and because allowing such a claim would inevitably result in duplicative and expensive litigation.” *Id.* at 264.¹⁰

⁹ The plaintiffs moved for reconsideration of the dismissal of their Clayton Act claims. *Salveson II*, 166 F. Supp. 3d at 250. The defendants moved for reconsideration of the court’s decision declining to exercise supplemental jurisdiction over the plaintiffs’ Cartwright Act claims and its dismissal of those claims without prejudice. *Id.* at 252. The defendants argued that the court had original jurisdiction over the Cartwright Act claims pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d) and therefore should have addressed the merits of those claims in *Salveson I*. *Id.* The defendants urged the court to dismiss the plaintiffs’ Cartwright Act claims because they failed to allege a cognizable antitrust injury. *Id.*

¹⁰ The court declined to consider the plaintiffs’ indirect purchaser claims, which were raised for the first time in their motion for reconsideration. *Id.* at 264-65.

Specifically, the *Salveson II* court found that the “allegedly anticompetitive interchange fee is set and paid between financial institutions in the Card Network Services Market, not between issuing banks and cardholders in the Payment Card Market.” *Id.* at 261.

In reaching this conclusion, the *Salveson II* court rejected the plaintiffs’ claim that the interchange fee is withdrawn directly from the cardholder’s account at the point of sale. *Id.* at 263. Contrasting the plaintiffs’ characterization of their claims with what they alleged in their complaint, the court explained how the plaintiffs’ allegations “acknowledge[d] that the amount withdrawn from a cardholder’s account is due, in its entirety, to a merchant for goods or services, and thus there is no increased cost to cardholders from the interchange fee.” *Id.* The plaintiffs also “concede[d] that the amount withdrawn from the cardholder’s account is the price to purchase the goods, rather than the price of the goods combined with a surcharge for any interchange fee.” *Id.*

On appeal of *Salveson II*, the Second Circuit affirmed the dismissal of the Clayton Act and Cartwright Act claims, stating that “[c]ontrary to plaintiffs’ allegations, the structure of these transactions demonstrates that cardholders do not directly pay interchange fees.” *Salveson III*, 663 F. App’x at 75. Describing the structure of the payment card transaction system, the Second Circuit explained:

By way of example, when a cardholder makes a \$100 purchase, the merchant sends notice of the charge to its acquiring bank, and the acquiring bank in turn sends the information to the card issuer bank. If the charge is approved, the issuer bank pays the acquiring bank for the \$100 purchase, retaining a portion as an interchange fee. The issuer bills the cardholder, who then is bound to pay the issuer according to the terms of the card. The cardholder has not directly paid the interchange fee, but rather has only paid the full price for the item or service it has purchased.

Id. The Second Circuit thus concluded that “the district court correctly determined that the complaint failed to plausibly allege that plaintiffs directly pay interchange fees and are directly injured by their imposition.” *Id.*

The transaction structure described above in *Salveson* is the same transaction structure at the heart of Plaintiffs’ claims in this case. Plaintiffs’ amended complaint describes how the Network Defendants operate in the “General Purpose Card Network Services” market to “facilitate authorization, clearance, and settlement of transactions that member banks acquire and process from merchants with whom they are contracted.” Dkt. No. 1-3 ¶¶ 2, 102. Within this market, Network Defendants “supply the channels that move transaction data and funds among cardholders, merchants, merchants’ banks, cardholders’ banks, and among themselves.” *Id.* ¶ 103. Plaintiffs allege that Network Defendants “each contract individually with issuing banks and acquiring banks” and pursuant to these contracts, Bank Defendants “are contractually bound” to abide by Network Defendants’ Rules, which “establish ‘default’ interchange amounts that individual member banks must charge their merchant customers for providing access to the networks.” *Id.* ¶¶ 10, 65.

The amended complaint separately describes a market for “General Purpose Cards” wherein “[m]ember banks issue the networks’ trademarked debit and credit-General Purpose Cards to cardholders, and acquire and process merchant-sales transactions conducted on the cards.” *Id.* ¶ 102. Based on the illustration included in the amended complaint, which sets forth the hypothetical \$100 purchase described by the Court in section I(A)(2) *supra* and the Second Circuit in *Salveson III*, it is clear that “the cardholder has not directly paid the interchange fee, but rather has only paid the full price for the item or service it has purchased.” *Salveson III*, 663 F. App’x at 75. The Court is therefore “not obligated to credit Plaintiffs’ allegation that cardholders are the

direct payors of interchange fees, as this allegation is directly contradicted by the specific allegations about the Payment Card and Card Services Markets and the transactions involving the interchange fee.” *Salveson II*, 166 F. Supp. 3d at 252.

Plaintiffs now assert a new theory of direct purchaser standing that was not raised in *Salveson I*, *II*, or *III*. Citing to *Amex*, Plaintiffs allege that they are “direct joint purchasers (alongside merchants) in a two-sided market.” *Id.* ¶ 20. Plaintiffs claim that “[o]n authorization of the cardholder’s card, the Visa/Mastercard network simultaneously sells the transaction to both merchant and cardholder, who jointly share that single transaction.” *Id.* ¶¶ 20, 82. Under this theory, Plaintiffs argue that they are direct purchasers of transactions involving interchange fees. *Id.* ¶¶ 82, 104-05.

Defendants argue that Plaintiffs misconstrue *Amex* by confusing its discussion of market definition with antitrust standing. Dkt. No. 72, at 20. Notwithstanding this confusion, Defendants argue that cardholders are not direct purchasers of interchange fees regardless of how the payment card transaction market is defined. *Id.* This Court agrees with Defendants and finds Plaintiffs’ reliance on *Amex* unavailing.

In *Amex*, the Supreme Court considered whether the merchant plaintiffs had met their burden of establishing that American Express’s network rules had an actual anticompetitive effect in the relevant market. *Amex*, 585 U.S. at 541-47. To answer this question, the Court explained that it had to first define the relevant market. *Id.* at 542-43. In the context of credit cards, the Court held that the relevant market consists of a “two-sided transaction platform” that involves both cardholders and merchants who jointly consume payment card transactions. *Id.* at 545. Examining the structure of this market, the Court explained how the credit-card networks extend cardholders credit, “which allows them to make purchases without cash and to defer payment until

later,” and the networks allow merchants “to avoid the cost of processing transactions and offers them quick, guaranteed payment” without the risk of extending credit to customers. *Id.* at 534. Within this market, “transactions ‘are jointly consumed by a cardholder, who uses the payment card to make a transaction, and a merchant, who accepts the payment card as a method of payment.’” *Id.* at 545 (quoting Klein et al., *Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees*, 73 Antitrust L.J. 571, 580 (2006)). As a result of *Amex*, “[i]n cases involving two-sided transaction platforms, the relevant market must, as a matter of law, include both sides of the platform.” *US Airways, Inc. v. Sabre Holdings Corp.*, 938 F.3d 43, 57 (2d Cir. 2019) (emphasis omitted).

In *Salveson IV*, the court discussed *Amex*’s relevance to the issue of antitrust standing and held that *Amex* did not undermine the court’s prior decisions finding that cardholders are not direct purchasers of interchange fees. *Salveson IV*, 2020 WL 4810704, at *9-12. The court explained how *Amex*’s change to the relevant market definition did not impact the threshold issue of whether the plaintiffs had antitrust standing. *Id.*

First, the fact remained that the transaction structure at issue demonstrates that cardholders do not directly pay interchange fees. *Id.* at *9, 12. The *Salveson* complaint, like the amended complaint here, described how interchange fees are exchanged between financial institutions. *Id.* at *9; *see also* Dkt. No. 1-3 ¶ 127 (interchange fees “represent a transfer of value between the financial institutions participating in” the payment card networks (quoting Visa’s Rules)); *id.* at 113 (Mastercard’s rules define “[i]nterchange fee” as an “amount paid by the Acquirer to the Issuer with respect to the interchange of a [t]ransaction conducted by a Merchant”).

Second, the *Salveson IV* court explained how *Amex* “made clear that even as a cardholder and a merchant jointly consume a transaction, they each consume separate and distinct services

from the network.” *Salveson IV*, 2020 WL 4810704, at *10. For purposes of assessing direct purchaser standing, this distinction between services is “critical because the ‘card-payment services’ the network supplies to the cardholder primarily include the extension of credit, ‘which allows [her] to . . . defer payment until later,’ and thus do not implicate the interchange fee.” *Id.* (citation omitted). In short, the *Salveson IV* court concluded that notwithstanding *Amex*, the service purchased and consumed by the plaintiff cardholders did not directly implicate the challenged interchange fees. *Id.* at *11-12. As a result, the plaintiffs could not sustain a claim of direct purchaser standing. *Id.*

In *Salveson V*, the Second Circuit affirmed the *Salveson IV* court’s decision and reiterated that the structure of the payment card transaction system demonstrates that cardholders are not direct purchasers and “were not directly injured by the supracompetitive interchange fees that they alleged defendants imposed.” *Salveson V*, 860 F. App’x at 209. The Second Circuit said that plaintiffs were overstating the significance of *Amex* because *Amex* does not address antitrust standing at all. *Id.* Instead, *Amex* stands for the proposition that courts must use a two-sided market definition when analyzing market power and anticompetitive effects. *Id.* But this does not mean that courts cannot treat the participants in these markets as purchasers of separate goods or services for the purposes of antitrust standing. *Id.*

Plaintiffs offer no reason why this Court should depart from the reasoning set forth in *Salveson IV* and *Salveson V*, and this Court can find none. *See Salveson IV*, 2020 WL 4810704, at *11 (“[N]othing about the structure of the transaction at issue has changed.”). Accordingly, this Court also rejects Plaintiffs’ claim that they are “direct joint purchasers.” Dkt. No. 1-3 ¶ 20.

c. Plaintiffs' indirect purchaser claims

Plaintiffs also allege that they are indirect purchasers of transactions because “[w]hen the purchase-item is scanned at the register, the cardholder is damaged as an indirect purchaser, paying inflated prices for everything because interchange is built into ticket prices.” Dkt. 1-3 ¶ 81. Plaintiffs allege that they were injured by “merchants pass-through” of these charges. *Id.* ¶¶ 87, 152, 228. As explained above, Plaintiffs’ antitrust standing hinges on whether Plaintiffs can satisfy the “efficient enforcer” balancing test set forth by the Supreme Court in *AGC*. These factors include: “(1) the nature of the plaintiff’s alleged injury, (2) the directness of the injury, (3) the speculative nature of the harm, (4) the risk of duplicative recovery[,] and (5) the complexity in apportioning damages.” *Salveson II*, 166 F. Supp. 3d at 259 (citation omitted).

For the reasons explained below, this Court finds that the *AGC* factors weigh against a finding that Plaintiffs have antitrust standing as indirect purchasers under the Cartwright Act.

i. Nature of the injury

The first factor under *AGC* is whether the injury alleged by Plaintiffs is “the type the antitrust laws were intended to forestall.” *Knevelbaard*, 232 F.3d at 987 (quoting *Am. Ad Mgmt., Inc. v. Gen. Tel. Co.*, 190 F.3d 1051, 1055 (9th Cir. 1999)). The Ninth Circuit has “identif[ied] four requirements that must be met in order to conclude that there is antitrust injury: (1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent.” *Knevelbaard*, 232 F.3d at 987 (quoting *Am. Ad Mgmt.*, 190 F.3d at 1055).

Plaintiffs here have satisfactorily alleged both unlawful conduct—by way of Defendants’ conspiracy to fix the price of interchange fees—and that such conduct caused them injuries in the form of having paid artificially high prices for goods and services. *See, e.g.*, Dkt. No. 1-3 at 9; *id.*

¶ 81; *see also In re Dynamic Random Access Memory (Dram) Antitrust Litig.*, 516 F. Supp. 2d 1072, 1090 (N.D. Cal. 2007) (“Plaintiffs here have satisfactorily alleged both unlawful conduct—by way of defendants’ conspiracy to horizontally restrain trade—and that such conduct caused plaintiffs to suffer injury in the form of having paid artificially high prices for DRAM.”). Because Plaintiffs allege that they were subjected to inflated prices for goods and services, their injuries flow “from that which makes the conduct unlawful,” *i.e.*, from the price-fixing itself. *See In re Dram*, 516 F. Supp. 2d. at 1090 (citation omitted).

The more troubling issues for the Court, however, centers on the fourth element identified by the Ninth Circuit in *Knevelbaard*—*i.e.*, whether Plaintiffs’ injuries are “of the type the antitrust laws were intended to prevent.” *Knevelbaard*, 232 F.3d at 937. “In passing on this question, both the Supreme Court and the Ninth Circuit have noted that a central concern of the antitrust injury analysis is in ‘protecting the economic freedom of participants in the relevant market.’” *In re Dram*, 516 F. Supp. 2d at 1090 (citation omitted). “To that end, antitrust standing is granted only where the plaintiff is a participant in the relevant market—*e.g.*, a consumer or competitor in the relevant market alleged.” *Id.* (dismissing antitrust claims asserted by plaintiffs who were “participants in separate, albeit related, markets”); *see also Vinci*, 43 Cal. Rptr. 2d at 339 (dismissing antitrust claims for lack of standing because “plaintiff was neither a consumer nor a competitor in the market in which trade was restrained”).

Here, Plaintiffs allege that cardholders were injured as indirect purchasers because they “pay[] inflated prices for everything because interchange is built into ticket prices.” Dkt. No. 1-3 ¶ 81. Defendants’ central argument is that Plaintiffs’ injuries are not of the type that antitrust laws are designed to forestall because they are so far removed from the allegedly anticompetitive conduct and do not occur in the same market as that conduct. *See* Dkt. No. 72, at 30. Defendants

argue that Plaintiffs are participants in the Payment Card Market, whereas the anticompetitive conduct is alleged to occur in the Network Services Market. *Id.* Because the amended complaint “does not even suggest that cardholders compete or otherwise participate in” the Network Services Market, Defendants argue that Plaintiffs have not alleged an antitrust injury. *Id.* at 30-31.

This Court finds Defendants’ argument persuasive. The Rules “are at the center of the conspiracy” alleged in the amended complaint and “provide the essential mechanism for the operation and enforcement of the price-fixing conspiracy alleged [by Plaintiffs].” Dkt. No. 1-3 ¶ 16. According to Plaintiffs, Network Defendants set default interchange fees in their Rules, which their member banks must adhere to. *Id.* ¶ 74 (“Visa and Mastercard Rules and fee schedules establish the interchange amounts that card-issuing member banks charge and levy the cardholder.”), ¶ 91 (“Every bank belonging to the Visa/Mastercard membership consortium must execute” the Rules), ¶ 124 (“Interchange fees are those fees set by the network, charged to acquirers and received by debit card issuers as part of a debit card transaction. The acquirer typically passes these fees on to the merchants, so interchange fees can be thought of as a cost to merchants and as revenue to debit card issuers.”). These actions take place in the Network Services Market. *See id.* ¶ 102 (“Visa and Mastercard operate separate General Purpose Card Network Services” (emphasis removed)), ¶ 134 (“Even though the merchant’s acquirer pays the interchange fees and issuers receive the proceeds, fee schedules are set by the card networks.” (citation omitted)).

While Plaintiffs strenuously argue in opposition to Defendants’ motion that they participate in the Network Services Market (Dkt. No. 78, at 20), the amended complaint is devoid of such allegations. Instead, the amended complaint describes separate, albeit related, markets for the “Merchant Acceptance of General Purpose Credit Cards and Merchant Acceptance of Debit

Cards.” Dkt. No. 1-3 ¶ 100 (emphasis removed), ¶ 183 (“The relevant market encompasses *General Purpose Card Network Services* and *Merchant Acceptance of Credit and of Debit Cards*.”). This is the market in which cardholders participate by making payments to merchants. *See id.* ¶ 104 (“Every purchase made with a general purpose payment-card all at once involves interaction among the cardholder, the merchant, the merchant’s bank and the cardholder’s bank. This simultaneous interaction creates a transaction. Transaction platforms operated by the payment-card networks are what facilitates the cardholders’ payments to the merchants.”). While the payment transaction is facilitated by the member banks who use the Visa and Mastercard networks, the cardholder’s participation is nonetheless limited to the Payment Card Market. *See id.* ¶ 102 (“Member banks issue the networks’ trademarked debit-and-credit-General Purpose Cards to cardholders, and acquire and process merchant-sales transactions conducted on the cards. These activities—carried out and managed by member banks—are controlled by the Visa and Mastercard networks[.]”). Absent specific allegations in the amended complaint that establish Plaintiffs’ participation in the Network Services Market, this Court cannot credit Plaintiffs’ conclusory arguments made in opposition to Defendants’ motion.

Salveson II is instructive on this point. There, the court found that the cardholder-plaintiffs did not participate in the allegedly restrained market because “the allegedly anticompetitive interchange fee is set and paid between financial institutions in the Card Network Services Market, not between issuing banks and cardholders in the Payment Card Market.” *Salveson II*, 166 F. Supp. 3d at 261. As Defendants point out, other cases considering similar antitrust claims in the credit card industries have also found that indirect purchasers are not participants in the relevant market because the ultimate goods that they purchased—and which were the alleged source of artificially raised prices—were part of a market that was secondary to the allegedly restrained

market. *See, e.g., Stark v. Visa U.S.A. Inc.*, No. 03-CV-055030 (CZ), 2004 WL 1879003, at *2 (Mich. Cir. Ct. July 23, 2004) (applying *AGC* factors and holding that “in the alleged market, the merchants are the consumers of Visa and MasterCard debit card services; and other debit networks are the competitors of Visa and MasterCard. Thus, there is no connection between Plaintiff’s purchases of consumer goods and the Defendants’ alleged tying of debit services.”).

Like the *Salveson* and *Stark* plaintiffs, Plaintiffs here have failed to allege an antitrust injury that satisfies the first *AGC* factor. While Plaintiffs’ failure to satisfy this factor alone is grounds to dismiss Plaintiffs’ claims, *see Salveson II*, 166 F. Supp. 3d at 262 (citation omitted), this Court nonetheless addresses the other *AGC* factors.

ii. Directness of the injury

The second *AGC* factor “looks to the chain of causation between [plaintiffs’] injury and the alleged restraint in the market.” *Knevelbaard*, 232 F.3d at 989 (citing *Am. Ad Mgmt.*, 190 F.3d at 1058). In *AGC*, the Supreme Court identified “two separate considerations” within the directness inquiry: “(1) the chain of causation alleged by the plaintiffs; and (2) the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement.” *In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig.*, No. 09-CR-3690, 2013 WL 4506000, at *12 (N.D. Ill. Aug. 23, 2013) (citing *AGC*, 459 U.S. at 540–42).

The first consideration, “[t]he chain of causation between the injury and the alleged restraint in the market[,] should lead directly to the ‘immediate victims’ of any alleged antitrust violation.” *Eagle v. Star-Kist Foods, Inc.*, 812 F.2d 538, 541 (9th Cir. 1987) (finding no standing where “injuries were merely derivative”); *see also Schwab*, 22 F.4th at 116 (explaining how courts in the Second Circuit apply the “first-step rule,” where a plaintiff has standing only if their injuries

were proximately caused by the antitrust behavior, meaning their injuries must “happen at the first step following the harmful behavior”). But the fact that Plaintiffs are allegedly indirect purchasers does not “have negative bearing on this factor because Plaintiffs have explicitly been granted indirect purchaser standing pursuant to state law.” *In re Dram*, 516 F. Supp. 2d at 1091. Accordingly, the Court must simply consider whether, as indirect purchasers, there is a direct link in the causation chain between Defendants’ alleged anticompetitive conduct, and the artificially high prices paid by Plaintiffs who purchased goods and services using a Visa or Mastercard payment card. *Id.*

Plaintiffs allege that their injuries were directly caused by Defendants’ antitrust conduct because cardholders “suffer direct injury with each retail purpose . . . based upon merchants’ pass-through overcharges present in the prices of all Visa/Mastercard payment-card purchases[.]” Dkt. No. 1-3 ¶ 87. Plaintiffs claim that at “the time of the sale, the fee has already been deducted from the cardholder’s account by the issuing banks,” and the cardholder’s “credit/debit account funds the entire interchange fee.” Dkt. No. 78, at 7-8. And because Plaintiffs cast the merchants as co-conspirators in Defendants’ antitrust violations, Plaintiffs contend that there is “no intermediary between the Plaintiff purchaser and any of the interchange conspirators.” *Id.* at 11.

Defendants counter that “[P]laintiffs’ alleged injuries are necessarily derivative” because “[a]ny alleged effect of interchange fees on retail prices follows only from effects felt more directly by several layers of other economic actors, including merchants.” Dkt. No. 79, at 10. Defendants also argue that Plaintiffs cannot plead around this deficiency by recasting “[l]iterally all retail merchants that accept credit or debit cards” as “involuntary co-conspirators.” Dkt. No. 72, at 14 (citing Dkt. No. 1-3, at 8; *id.* ¶¶ 54-55).

This Court agrees with Defendants that Plaintiffs’ claimed injuries are derivative to those suffered by merchants, who directly pay the interchange fees at the heart of this alleged conspiracy. While Plaintiffs characterize the payment card transaction system as one in which cardholders pay the interchange fees directly, the Rules establish that the interchange fees are exchanged between the member banks, not between the banks and the cardholders. *See* Dkt. No. 1-3 ¶¶ 66, 127; *see id.* at 113, 123; *see also Daus v. Janover, LLC*, No. 19-CV-06341 (FB) (RER), 2022 WL 523548, at *2 (E.D.N.Y. Feb. 22, 2022) (“Where an attached document contradicts the Complaint, the attachment controls.”). Moreover, as Defendants point out, “Plaintiffs’ attempt to draw a connection between interchange fees and cardholders’ wallets winds through layer after layer of intermediate events: “(1) The payment card networks allegedly set default interchange fees at ‘supracompetitive rates’ ([Dkt. No. 1-3] ¶¶ 62-63), leading to (2) the issuing banks charging supracompetitive interchange fees to the acquiring banks (*id.* ¶ 124), leading to (3) the merchants ‘absorb[ing]’ the allegedly inflated interchange fees as part of a ‘package of fees’ charged to them by acquiring banks (*id.* ¶¶ 5, 62, 66), leading to (4) the merchants ‘passing on’ some proportion of those fees to consumers by raising prices on at least some goods and services they sell (*id.* ¶¶ 9, 55), finally leading to (5) consumers allegedly paying inflated prices for ‘everything’ they purchase (*id.* ¶¶ 80, 81).” Dkt. No. 72, at 21-22. These layers of intermediate events, comprised of allegations in the amended complaint that the Court must accept as true, establish that Plaintiffs’ injuries are a “secondary, consequential, or remote result of the allegedly unlawful conduct.” *In re Am. Express Anti-Steering Rules Antitrust Litig.*, 433 F. Supp. 3d at 416 (internal quotations omitted).

The question before the Court then is whether Plaintiffs can establish the requisite directness by naming “all retail merchants that accept credit or debit cards” as “involuntary co-

conspirators.” Dkt. No. 1-3, at 8, ¶¶ 54-55. To that end, Plaintiffs allege that merchants are co-conspirators with the Bank Defendants and Network Defendants because they obey the Rules relating to secrecy, refrain from encouraging cash or alternative card purchases by its customers, and increase their prices to reflect the cost of interchange fees “charged” to them by Bank Defendants. *Id.* ¶¶ 8, 66-77, 91, 97, 121-27. Because of this, Plaintiffs argue that cardholders “interact directly with all of the co-conspirators in their purchase of products and services” and that “[t]here is no intermediary between the Plaintiff purchaser and any of the interchange conspirators.” Dkt. No. 78, at 10-11 (citation omitted).

This Court finds Plaintiffs’ arguments unpersuasive. First, the “directness of the injury” element of the *AGC* test focuses on whether Plaintiffs’ alleged injuries are the direct result of the alleged anticompetitive conduct. *See, e.g., Eagle*, 812 at 541. While in some circumstances it might be relevant whether a plaintiff has interacted directly with the alleged wrongdoer, here it is not because the fact remains, as alleged in the amended complaint, that Plaintiffs’ injuries derive from an alleged antecedent injury to the merchants that was “passed along to consumers.” Dkt. No. 1-3 ¶¶ 87 (“seek[ing] damages based upon merchants’ pass-through overcharges”).

Second, Plaintiffs have failed to plead a plausible conspiracy sufficient to confer antitrust standing under *Iqbal* or *Twombly*. In *Illinois Brick*, the Supreme Court described a “co-conspirator” exception that would allow indirect purchasers to establish antitrust standing. *Illinois Brick*, 431 U.S. at 736. “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.” *In re ATM Fee Antitrust Litig.*, 686 F.3d 741, 749 (9th Cir. 2012) (internal quotations and citation omitted). “However, for the indirect purchaser to merit standing under this exception,

the conspiracy must fix the price paid by the plaintiffs.” *Id.*; *State of Ariz. v. Shamrock Foods Co.*, 729 F.2d 1208, 1211 (9th Cir. 1984) (same).

Analyzing this co-conspirator exception in *In re ATM Fee Antitrust Litig.*, the Ninth Circuit held that the plaintiff cardholders lacked standing to challenge an alleged international conspiracy between banks to fix the fees charged for using foreign ATM machines, where the fee was imposed on the card-issuing banks and then passed through to the cardholder. *In re ATM Fee Antitrust Litigation*, 686 F.3d at 758. There, the court explained that the co-conspirator exception did not apply because plaintiffs had not alleged a plausible conspiracy between the bank defendants and the network defendants to illegally “fix the price that [p]laintiffs paid directly,” *i.e.*, the foreign ATM fee. *Id.* at 750-51. Rather, plaintiffs had alleged a conspiracy to set interchange fees that were paid by banks and then passed through to cardholders. *Id.* at 752-53. The court contrasted plaintiffs’ claims to those in *Shamrock Foods Co.*, where it held that retail consumers had standing to challenge an alleged conspiracy between retailers and wholesalers to fix dairy prices at the retail level. *Shamrock Foods Co.*, 729 F.2d at 1211. Because the *Shamrock Foods Co.* plaintiffs were not seeking damages attributable to a price-fixing conspiracy at the wholesale level, but rather a conspiracy that occurred at the retail level, the court determined that the retail consumers had standing. *Id.*

Here, like the plaintiffs in *In re ATM Fee Antitrust Litig.*, Plaintiffs do not allege a plausible conspiracy between Defendants and the merchants to illegally fix the only price that cardholders are alleged to pay directly—*i.e.*, the price of the goods and services purchased using a Visa or Mastercard payment card. Indeed, Plaintiffs do not allege that Defendants have any involvement with the prices set by merchants. And as a corollary, Plaintiffs do not plead that merchants have any involvement with setting the price for interchange fees or the Rules that purportedly advance

the alleged conspiracy. Instead, Plaintiffs allege that the merchants merely “involuntarily” comply with a system that exists for accepting payment cards and pass along the costs of using such system in the form of inflated prices for goods and services. Dkt. No. 1-3 ¶¶ 54-55, 58, 81. This is insufficient to establish a conspiracy to fix interchange fees among all merchants who accept Visa or Mastercard and the Network Defendants and Bank Defendants. *See In re ATM Fee Antitrust Litig.*, 686 F.3d 741 at 750-51; *see also Dickson v. Microsoft Corp.*, 309 F.3d 193, 215 (4th Cir. 2002) (holding that indirect purchasers failed to establish conspiracy between computer manufacturers and Microsoft sufficient to confer antitrust standing because purchasers’ damages claim was premised on an attempt to recover for Microsoft’s illegal overcharge that allegedly was passed on to purchasers by manufacturers); *McCarthy v. Recordex Serv., Inc.*, 80 F.3d 842, 855 (3d Cir. 1996) (dismissing plaintiffs’ antitrust claim and explaining that in order to establish a conspiracy, plaintiffs “would have to allege that the intermediaries *immediately upstream*, that is, the attorneys, colluded with the defendants to overcharge plaintiffs for the photocopies. Moreover, plaintiffs would be obliged to join the lawyers as defendants, which they have not done.” (emphasis in original)).

The second consideration of the directness of the injury factor—“the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement”—also weighs against Plaintiffs. *See In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig.*, 2013 WL 4506000, at *12 (citation omitted). As the Supreme Court explained in *AGC*, the existence of such plaintiffs “diminish[es] the justification for allowing a more remote party . . . to perform the office of a private attorney general.” *AGC*, 459 U.S. at 542.

Here, the merchants have established that they are motivated to enforce antitrust laws by challenging conduct in the MDL that is similar to what is alleged in this case. While Plaintiffs argue that they are the most efficient enforcers because they are the only parties not involved in the alleged conspiracy (*see, e.g.* Dkt. No. 84, at 8:4-13), this Court does not credit Plaintiffs' conspiracy allegations for the reasons stated above. This factor therefore weighs against antitrust standing here. *See In re Am. Express Anti-Steering Rules Antitrust Litig.*, 19 F.4th 127 at 141 (finding that this factor weighed against antitrust standing because “[a]s noted, the merchants who have a relationship with Amex were harmed at the first step by Amex’s Anti-Steering Rules. And those merchants have already sued Amex.”); *IQ Dental Supply, Inc. v. Henry Schein, Inc.*, 924 F.3d 57, 66 (2d Cir. 2019) (“Given that [plaintiff] is further removed from the harm caused by the Defendants than the parties directly affected by the boycott that have already sued the Defendants, the second efficient-enforcer factor weighs against [plaintiff’s] antitrust standing.”).

At bottom, the allegations in the amended complaint are insufficient to establish a direct link between the alleged price-fixing conspiracy and the injuries purportedly suffered by Plaintiffs. Instead, Plaintiffs plead injuries that are secondary to those suffered by the immediate victims of the alleged antitrust violations – the merchants who have sued Defendants for the same conduct underlying the allegations in the amended complaint. Plaintiffs’ conclusory claims of a conspiracy between the merchants and Defendants to fix the price of interchange fees contradict the allegations in the amended complaint and are otherwise insufficient to confer antitrust standing.

Accordingly, this Court finds that the directness of injury factor weighs against Plaintiffs’ standing.

iii. Speculative nature of the harm

The third *AGC* “factor focuses attention on the possibility that an antitrust plaintiff’s damages theory is mere speculation because the claimed damages are too indirect and may have been produced by factors independent from any alleged overcharge.” *In re Lithium Ion Batteries Antitrust Litig.*, No. 13-MD-2420 (YGR), 2014 WL 4955377, at *15 (N.D. Cal. Oct. 2, 2014). “This concern may arise in a particularly acute form where the price-fixed product or service is but one among many factors used in determining the price paid by the plaintiff.” *Id.* “However, Ninth Circuit precedent requires courts inquiring into this factor to avoid substituting defendants’ ‘speculation for the complaint’s allegations of causation.’” *Id.* (quoting *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1171 (9th Cir. 2002)); *see also Knevelbaard*, 232 F.3d at 991 (rejecting defendants’ argument that plaintiffs’ harm was speculative because “other factors” could influence milk prices where plaintiffs alleged that a defunct state agency controlled the price of milk in California).

Here, Plaintiffs allege that they were harmed by the alleged price-fixing conspiracy in the form of inflated prices for goods and services. *See* Dkt. No. 1-3 ¶ 81 (“When the purchase-item is scanned at the register, the cardholder is damaged as an indirect purchaser, paying inflated prices for everything because interchange is built into ticket prices.”), ¶ 239 (“The anticompetitive fees charged to merchants are damaging to Plaintiffs because Plaintiffs pay the merchants’ pass-through prices.”), ¶ 244 (“As the *result* of Defendants’ violations, Plaintiffs have been injured by paying artificially inflated retail prices for goods and services paid for with Defendants’ credit and debit payment-cards.” (emphasis in original)). Plaintiffs further allege that “[r]oughly 1% to 2.5% of the cost of all goods and services goes to cover per-transaction charges when a customer pays with a payment card.” *Id.* ¶ 23.

Defendants argue that Plaintiffs' alleged injuries are "inherently, and incurably, speculative" because they would require "a fact finder to calculate the alleged price overcharge on each and every transaction involving a Visa or Mastercard cardholder in California over the past nineteen years." Dkt. No. 72, at 26. Defendants highlight that "[f]or each purchase of a retail good from a California merchant, plaintiffs would need to demonstrate that (1) the merchant actually paid to its acquiring bank a merchant discount rate that included a supracompetitive default interchange rate, (2) the merchant did not absorb the cost of interchange (or some of that cost) by reducing profits or cutting costs, and (3) the merchant increased the price of that particular good because of the interchange fee and, if so, by how much." *Id.*

Based on the allegations in the amended complaint, Plaintiffs' alleged harm is indeed speculative. Plaintiffs allege indirect injuries caused by merchants' alleged pass-through of interchange fees in the form of inflated prices. While Plaintiffs allege that approximately 1% to 2.5% of the cost of all goods and services is attributable to covering per-transaction charges, Plaintiffs do not allege that interchange fees are the only factor that contributes towards the price of goods and services. Instead, as Defendants argue, the "direct victim here is the merchant." Dkt. No. 84, at 15:18. Moreover, the fees paid by merchants do not solely consist of the interchange fee. According to the amended complaint, "[m]erchants pay additional fees to their acquiring banks and third-party processors," Dkt. No. 1-3 ¶ 21, and the amount of the interchange fee can vary "based on the merchant's type of business, sales volume, and the level of benefits bundled with the customer's card," *id.* ¶ 78. Thus, even if Plaintiffs could ultimately prove that merchants paid inflated interchange fees, Plaintiffs would still need to prove that merchants actually passed those fees, not other fees, through to its customers, either in whole or in part. *See Schwab*, 22 F.4th at 119 ("Though simple to articulate, Plaintiffs' damages theory would be difficult to apply

because, at least for those who purchased their bonds during the suppression period, Plaintiffs’ theory would require the court to speculate about how the third-party sellers would have factored a non-suppressed [London Interbank Offered Rate] into the transaction.”).

As a result, this Court finds that Plaintiffs’ alleged damages are speculative.

iv. Duplicative recovery

The fourth *AGC* factor considers the risk of duplicative recovery. “The risk to be avoided . . . is that potential plaintiffs may be in a ‘position to assert conflicting claims to a common fund . . . thereby creating the danger of multiple liability.’” *Salveson II*, 166 F. Supp. 3d at 264 (quoting *Am. Ad Mgmt.*, 190 F.3d at 1059); *see also Eagle*, 812 F.2d at 542.

This factor weighs against Plaintiffs’ standing in light of the related MDL action. As this Court recognized in *Salveson II*, the risk of duplicative recovery “is not merely hypothetical” considering the “certified class of merchants before the Court who have asserted essentially identical claims to Plaintiffs.” *Salveson II*, 166 F. Supp. at 264. For this reason, the *Salveson II* court found that Plaintiffs had failed to show that their claims could be “litigated without expensive and duplicative efforts.” *Id.*

The same risks are present in this case. In fact, in the amended complaint, Plaintiffs acknowledge that “[m]erchants have sued [Defendants] under the Sherman Act similarly alleging price-fixing of interchange fees. The Court preliminarily approved a proposed settlement awarding damages on January 24, 2019.” Dkt. No. 1-3 ¶ 69. While Plaintiffs allege that “[t]he paltry settlement will not benefit cardholders” (*id.*), their apparent dissatisfaction with that settlement does not diminish the risk of duplication against Defendants.

Notwithstanding this risk, California courts have recognized that “[d]uplicative recovery is, in many if not all cases alleging a nationwide conspiracy with both direct and indirect purchaser

classes, a necessary consequence that flows from indirect purchaser recovery.” *In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d at 1156 (quoting *In re DRAM*, 516 F. Supp. 2d at 1089). Thus, while the risk of duplicative recovery is present in this case, this Court assigns this factor less weight in assessing whether Plaintiffs have established antitrust standing.

v. Complexity in Apportioning Damages

The final *AGC* factor assesses the complexity in apportioning damages. This factor “refers to the difficulty in ascertaining what portion of an overcharge was passed on from direct purchasers to downstream links in a distribution chain, such as indirect purchasers.” *In re Lithium Ion Batteries Antitrust Litig.*, 2014 WL 4955377, at *15; *see AGC*, 459 U.S. at 543-44 (“stress[ing] the importance of avoiding either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other”).

For the reasons explained in evaluating the speculative nature of Plaintiffs’ damages, this Court also finds that Plaintiffs’ damages would be difficult to apportion. *See Salveson II*, 166 F. Supp at 264 (considering this factor with the speculative nature of the harm and risk of duplicative recovery factors because “they reflect overlapping concerns”).

* * *

For the reasons set forth above, this Court finds that the *AGC* factors weigh against a finding that Plaintiffs have established antitrust standing as indirect purchasers to assert claims under the Cartwright Act. This Court therefore respectfully recommends that Defendants’ motion to dismiss Plaintiffs’ Cartwright Act claims (Causes of Action I through IV and VI through VIII) be granted.

2. Plaintiffs' UCL Claims

Plaintiffs' claims under California's UCL are based on the same allegations underlying their Cartwright Act claims. *See* Dkt. No. 1-3 ¶¶ 254-77.

“[U]nder California law, ‘[w]here a plaintiff fails to state an antitrust claim, and where an unfair competition claim is based upon the same allegations, such state claims are properly dismissed.’” *Oliver v. Am. Express Co.*, No. 19-CV-566 (NGG) (SMG), 2020 WL 2079510, at *17 (E.D.N.Y. Apr. 30, 2020) (quoting *Formula One Licensing v. Purple Interactive*, No. 00-CV-2222 (MMC), 2001 WL 34792530, at *4 (N.D. Cal. Feb. 6, 2001)); *In re Am. Express Anti-Steering Rules Antitrust Litig.*, 19 F.4th at 144 n.12 (“Because the UCL claim is predicated on violations of the Sherman and Cartwright Acts, we affirm the dismissal of that claim as well.”).

Here, as explained above, this Court respectfully recommends that Plaintiffs' underlying Cartwright Act claims be dismissed for lack of antitrust standing. “Therefore, because Plaintiffs have made no attempts to distinguish their antitrust claims from their consumer-protection claims,” this Court respectfully recommends that Plaintiffs' claims under the UCL (Causes of Action V through IX) also be dismissed. *See Oliver*, 2020 WL 2079510, at *17 (internal quotation marks and citation omitted).

3. Timeliness of Plaintiffs' Cartwright Act and UCL Claims

Defendants also argue that the majority of Plaintiffs' Cartwright Act and UCL claims are time-barred under the applicable four-year statutes of limitations, and Plaintiffs have not plausibly alleged that their claims are subject to equitable tolling on fraudulent concealment grounds. Dkt. No. 72, at 32-33.

Claims under the Cartwright Act and the UCL are subject to four-year statutes of limitations. *See* Cal. Bus. & Prof. Code § 16750.1 (Cartwright Act); Cal. Bus. & Prof. Code §

17208 (UCL). Plaintiffs commenced this case on December 30, 2022 and seek to bring claims based on credit and debit card transactions dating back to January 1, 2004. Dkt. No. 1-1; Dkt. No. 1-3 ¶ 211. Plaintiffs do not dispute that their claims are subject to the four-year statutes of limitations, but instead argue that the limitations periods should be tolled under the fraudulent concealment doctrine. Dkt. No. 1-3 ¶¶ 206-07.

The fraudulent concealment doctrine operates to toll statutes of limitations “if the defendant fraudulently concealed the existence of a cause of action in such a way that the plaintiff, acting as a reasonable person, did not know of its existence.” *Hexcel Corp. v. Ineos Polymers, Inc.*, 681 F.3d 1055, 1060 (9th Cir. 2012); *see Aryeh*, 292 P.3d at 875 (“The doctrine of fraudulent concealment tolls the statute of limitations where a defendant, through deceptive conduct, has caused a claim to grow stale.”). To plead fraudulent concealment, the plaintiff must allege that: (1) the defendant took affirmative acts to mislead the plaintiff; (2) the plaintiff did not have “actual or constructive knowledge of the facts giving rise to its claim”; and (3) the plaintiff acted diligently in trying to uncover the facts giving rise to its claim. *Hexcel*, 681 F.3d at 1060. “To satisfy the diligence element, “the complaint must allege (1) when the fraud was discovered; (2) the circumstances under which it was discovered; and (3) that the plaintiff was not at fault for failing to discover it or had no actual or presumptive knowledge of facts sufficient to put him on inquiry.” *Johnson v. Glock, Inc.*, No. 20-CV-08807 (WHO), 2021 WL 1966692, at *3 (N.D. Cal. May 17, 2021) (quoting *Cnty. Cause v. Boatwright*, 177 Cal. Rptr. 657, 664 (Ct. App. 1981)). “Because the [doctrine] sounds in fraud, it must be plead[] with particularity under Rule 9(b).” *Id.*

Plaintiffs fail to plead the elements of fraudulent concealment with the required particularity. First, the amended complaint provides no details about the circumstances under which the purported fraudulent concealment occurred. While Plaintiffs claim that Defendants

“intentionally, uniformly, and by written agreement do not disclose their interchange fees to cardholders,” Dkt No. 1-3 ¶ 206, Plaintiffs do not aver any affirmative steps taken by Defendants to mislead “above and beyond” the existence of the alleged conspiracy. *See In re Animation Workers Antitrust Litig.*, 87 F. Supp. 3d 1195, 1215 (N.D. Cal. 2015) (holding that plaintiffs failed to plausibly allege a fraudulent concealment claim because “[t]hat [d]efendants did not affirmatively disclose the details of their allegedly unlawful conspiracy to [p]laintiffs is neither surprising nor sufficient to constitute ‘affirmative steps to mislead’” (quoting *Conmar Corp. v. Mitsui & Co. (U.S.A.)*, 858 F.2d 499, 505 (9th Cir. 1988)). “Passive concealment of information is not enough to toll the statute of limitations, unless the defendant had a fiduciary duty to disclose information to the plaintiff.” *Conmar*, 858 F.2d at 505. Because Plaintiffs do not allege that Defendants had a fiduciary duty to disclose the interchange fees to cardholders, Plaintiffs’ bare allegations of concealment are lacking.

The amended complaint also does not explain why Plaintiffs “could not have uncovered the alleged violations at an earlier date.” Dkt. No. 1-3 ¶¶ 206-07. Besides making this conclusory claim, Plaintiffs do not provide any details about how they discovered the fraud and when they first discovered it. “California law requires specific facts to support the discovery doctrine. [Plaintiffs] must plead the manner and circumstances of discovery, not just that it happened.” *Johnson*, 2021 WL 1966692, at *4.

Plaintiffs have also failed to adequately plead reasonable diligence or lack of excuse. To be sure, the amended complaint includes conclusory allegations about how Plaintiffs “could not have uncovered the alleged violations at an earlier date” and “could not have discovered violations at any time prior to this date by the exercise of due diligence[.]” Dkt. No. 1-3 ¶¶ 206-07. These statements, without more, fail to allege the necessary explanation for *why* due diligence would not

have revealed the alleged violations at an earlier date. *See Johnson*, 2021 WL 1966692, at *4 (holding that plaintiff’s conclusory allegations were insufficient to establish fraudulent concealment); *cf. Philips v. Ford Motor Co.*, No. 14-CV-02989 (LHK), 2016 WL 1745948, at *14 (N.D. Cal. May 3, 2016) (“California Plaintiffs allege that Colburn’s vehicle first experienced issues in October 2014, at which point Colburn took her vehicle in for service at a local Ford dealership. Colburn’s actions thus demonstrate ‘due diligence’ in uncovering ‘the [pertinent] facts.’” (internal citations omitted)).

Moreover, as Defendants point out, “[P]laintiffs’ own counsel brought the *Salveson* action over 10 years ago, alleging on behalf of cardholders that [D]efendants’ conduct concerning interchange fees violated the Cartwright Act.” Dkt. No. 72, at 33. Yet, Plaintiffs do not explain why it took them so many years to discover the same facts underlying their claims in this case. *Id.*; *see also Bartlett*, 2019 WL 2177655, at *1, *3 (referring to another action where “the named Defendants, factual allegations and legal claims asserted in this action are nearly identical”); *Galvez v. Ford Motor Co.*, No. 17-CV-02250 (KJM) (KJN), 2018 WL 4700001, at *5 (E.D. Cal. Sept. 30, 2018) (rejecting fraudulent concealment defense where “three class actions demonstrate[d] that during [plaintiff’s] several years of inaction, other similarly situated consumers identified the fraud alleged here and pursued their claims”).

Ultimately, Plaintiffs’ conclusory allegations fall short of establishing a fraudulent concealment claim, and Plaintiffs therefore “cannot recover alleged excess charges preceding the four-year limitations period.” *Aryeh*, 292 P.3d at 881. Accordingly, in the event that Plaintiffs’ claims are not dismissed for lack of standing, this Court respectfully recommends, in the alternative, that Plaintiffs’ claims for damages stemming from transactions before December 30, 2018 nonetheless be dismissed as time-barred.

4. PNC's Motion to Dismiss for Lack of Personal Jurisdiction

PNC moves to dismiss the amended complaint on the grounds that it is not subject to personal jurisdiction in California. Dkt. No. 72, at 34-38.

“Personal jurisdiction over a non-resident defendant is governed by the law of the state in which a federal court sits.” *In re Sterling Foster & Co., Inc. Sec. Litig.*, 222 F. Supp. 2d 289, 300 (E.D.N.Y. 2002). “However, in a multidistrict litigation, the transferee court must apply the law of the transferor forum in determining issues of personal jurisdiction.” *Id.* “Indeed, in cases that are consolidated for pretrial purposes under 28 U.S.C. § 1407, a transferee court can exercise personal jurisdiction only to the same extent as the transferor court could.” *Id.* (citing *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 163 (2d Cir. 1987)). Thus, in determining whether the Northern District of California has personal jurisdiction over PNC, this Court will apply California state law.

“A federal court sitting in diversity may exercise personal jurisdiction over a nonresident defendant if: (1) the long-arm statute of the forum state confers personal jurisdiction over that defendant; and (2) the exercise of such jurisdiction by the forum state is consistent with due process under the United States Constitution.” *Id.* “Because California’s jurisdictional statute is coextensive with federal due process requirements, the jurisdictional analyses under state law and federal due process are the same.” *In re Ski Train Fire In Kaprun, Austria on Nov. 11, 2000*, 257 F. Supp. 2d 717, 729 (S.D.N.Y. 2003) (citing *Dole Food Co. v. Watts*, 303 F.3d 1104, 1110 (9th Cir. 2002)); see also *Daimler AG v. Bauman*, 571 U.S. 117, 125 (2014) (“California’s long-arm statute allows the exercise of personal jurisdiction to the full extent permissible under the U.S. Constitution.”).

For a court to exercise personal jurisdiction over a nonresident defendant, due process requires that the defendant have “minimum contacts” with the relevant forum such that the exercise of jurisdiction “does not offend traditional notions of fair play and substantial justice.” *Int’l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945) (internal quotation marks and citation omitted). The “minimum contacts” required by due process depend upon whether a court is exercising “‘general’ (sometimes called ‘all-purpose’) jurisdiction” or “‘specific’ (sometimes called ‘case-linked’) jurisdiction.” *Bristol-Meyers Squibb v. Superior Ct. of Cal., S.F. Cnty.*, 582 U.S. 255, 262 (2017).

a. General jurisdiction

Under *Daimler*, “the test for general jurisdiction asks whether a corporation is essentially ‘at home’ in the forum state.” *Williams v. Yamaha Motor Co.*, 851 F.3d 1015, 1021 (9th Cir. 2017) (quoting *Daimler*, 571 U.S. at 127). A corporation is typically at home in the state where it was incorporated and where it has its principal place of business. *Id.* at 137-38 (describing these as “paradigm all-purpose forums”); *see also Daimler*, 571 U.S. at 137 (“With respect to a corporation, the place of incorporation and principal place of business are paradig[matic] . . . bases for general jurisdiction.”) (internal citations omitted). In addition, “in an exceptional case . . . a corporation’s operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that state.” *Daimler*, 571 U.S. at 139 n.9 (citing *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952)). A corporation is not, however, “at home” in any state where it conducts business. *Id.* at 137, 139; *see also Project Stewart LLC v. JPMorgan Chase Bank, N.A.*, 21-CV-00381 (RAJ), 2022 WL 971478, at *3 (W.D. Wash. Mar. 31, 2022) (concluding that “as a national banking association, [JPMC] engages in business in many other jurisdictions and cannot be at home in all of them”).

Here, neither of the paradigmatic bases for general jurisdiction are present. PNC was not incorporated in California, and it does not have its principal place of business there. *See* Dkt. No. 74 ¶¶ 4-6 (stating that PNC was incorporated in Delaware and has its principal place of business in Pennsylvania); *see also* Dkt. No. 84, at 43 (explaining that PNC is “domiciled, incorporated, and operates its principle places of business in Pennsylvania and Delaware, not California”). Thus, to establish general jurisdiction over PNC in California, Plaintiff would need to show that this is the kind of “exceptional case” where PNC’s California operations are “so substantial and of such a nature as to render [PNC] at home” there. *Daimler*, 571 U.S. at 139 n.19. No such allegations are included in the amended complaint, and Plaintiffs offer no additional facts in their opposition to establish that this is the kind of “exceptional case” alluded to in *Daimler*. Plaintiffs have therefore not met their burden to establish general personal jurisdiction over PNC in California. *See JCorps Int’l, Inc.*, 828 F. App’x at 742 (“[T]he plaintiff bears the burden of showing that the court has jurisdiction over the defendant” (citations and quotations omitted)); *Schwarzenegger*, 374 F.3d at 800 (same).

Accordingly, this Court finds that PNC is not subject to general jurisdiction in California.

b. Specific jurisdiction

For a court to have specific jurisdiction over a non-resident defendant, “the defendant’s suit-related conduct must create a substantial connection with the forum State.” *Williams*, 851 F.3d at 1022-23 (quoting *Walden v. Fiore*, 571 U.S. 277, 284 (2014)); *Bristol-Myers Squibb Co.*, 582 U.S. at 264 (specific jurisdiction requires an “affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State.” (quoting *Goodyear*, 564 U.S. at 919)). “[T]he relationship must arise out of contacts that the ‘defendant [itself]’ creates with the forum State,” and the contact must be with the forum state

itself and not with persons who reside there. *Walden*, 571 U.S. at 284-85 (citation omitted). Regarding Plaintiffs’ Cartwright Act and UCL claims, any specific jurisdiction over PNC “must be substantially connected to or arise out of” PNC’s contacts with California. *In re Auto. Antitrust Cases I & II*, 37 Cal. Rptr. 3d 258, 272 (Ct. App. 2005). Plaintiffs must therefore make jurisdictional allegations regarding PNC’s specific contacts with or “forum-related acts” in California for the purpose of furthering the alleged conspiracy. *Id.* at 271.

Here, Plaintiffs allege that California has specific jurisdiction over PNC based on a conclusory averment that PNC markets payment cards within California and other references to PNC’s non-California location, size, and revenues. Dkt. No. 1-3 ¶¶ 24, 45-46, 59. Plaintiffs do not allege that PNC has done anything in California in furtherance of the alleged Cartwright Act or UCL claims. *See generally id.*

While Plaintiffs’ amended complaint alleges a conspiracy with nationwide effect, that does not suffice to satisfy the purposeful direction prong. *See, e.g., Learning Evolution, LLC v. CPG Catnet Inc.*, No. 20-CV-2153 (TWR) (WVG), 2022 WL 484999, at *4 (S.D. Cal. Feb. 16, 2022) (finding no basis for specific jurisdiction over defendants in Cartwright Act case because plaintiffs did not show that defendants expressly aimed their intentional conduct at California); *In re Packaged Seafood Prods. Antitrust Litig.*, 15-MD-2670 (JLS), 2020 WL 2747115, at *58 (S.D. Cal. May 26, 2020) (“[E]ffects from [a] nation-wide price fixing conspiracy . . . create no connection to any particular forum.”).

Further, no Plaintiff has a PNC payment card. *See* Dkt. No. 74 ¶¶ 8-9. Therefore, no Plaintiff is alleged to have paid, even indirectly, PNC’s interchange fees. Thus, even assuming *arguendo* that Plaintiffs could establish jurisdiction by alleging that a California PNC cardholder suffered injuries in California, there are no such Plaintiffs here. And pursuant to the Supreme

Court's due process jurisprudence, the fact that PNC has credit card customers in California who would have allegedly suffered the injuries complained of is immaterial because "a defendant's relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction." *Walden*, 571 U.S. at 286. This remains true even when the third parties are residents of the forum. *Bristol-Myers Squibb Co.*, 582 U.S. at 265.

Accordingly, this Court finds that PNC is not subject to personal jurisdiction in California.

c. Plaintiffs' request for jurisdictional discovery

In response to PNC's motion to dismiss, Plaintiffs state that they "believe that with minimal written discovery they can establish additional facts" sufficient to confer jurisdiction over PNC in California. *See* Dkt. No. 78, at 23.

A district court has broad discretion to permit or deny jurisdictional discovery. *In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d 765, 811 (S.D.N.Y.); *Gillespie v. Prestige Royal Liquors Corp.*, 183 F. Supp. 3d 996, 1001 (N.D. Cal. 2016). "[D]iscovery should be granted when . . . the jurisdictional facts are contested or more facts are needed." *Hernandez v. Mimi's Rock Corp.*, 632 F. Supp. 3d 1052, 1062 (N.D. Cal. 2022) (citation omitted); *see also In re Terrorist Attacks*, 349 F. Supp. 2d at 812 ("If a plaintiff has identified a genuine issue of jurisdictional fact, jurisdictional discovery is appropriate even in the absence of a prima facie showing as to the existence of jurisdiction.").

While "a plaintiff need not make out a prima facie case of personal jurisdiction before it can obtain jurisdictional discovery," they must present "a colorable basis for jurisdiction, or some evidence constituting a lesser showing than a prima facie case." *Id.* (internal quotations and citations omitted); *see also Leon v. Shmukler*, 992 F. Supp. 2d 179, 194 (E.D.N.Y. 2014) ("Obviously, a plaintiff is not entitled to such discovery in every situation, but rather only when

the allegations are sufficient to articulate a colorable basis for personal jurisdiction, which could be established with further development of the factual record.”). “But ‘where a plaintiff’s claim of personal jurisdiction appears to be both attenuated and based on bare allegations in the face of specific denials made by defendants, the Court need not permit even limited discovery.’” *Hernandez*, 632 F. Supp. 3d at 1062 (cleaned up); *see also Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 254 (2d Cir. 2007) (“We conclude that the district court acted well within its discretion in declining to permit discovery because the plaintiff had not made out a prima facie case for jurisdiction.”).

Here, Plaintiffs have identified no specific discovery that could credibly support their claim that PNC is subject to personal jurisdiction in California. Instead, Plaintiffs merely speculate, without any support, that discovery might allow them to demonstrate that jurisdiction in California is proper. This is insufficient to warrant jurisdictional discovery. *See Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008) (“The denial of [Plaintiff’s] request for discovery, which was based on little more than a hunch that it might yield jurisdictionally relevant facts, was not an abuse of discretion.”).

Accordingly, this Court respectfully recommends that Plaintiffs’ request for jurisdictional discovery be denied. Further, this Court respectfully recommends that the Court reject Plaintiffs’ request to seek leave to further amend their complaint to assert facts in support of PNC’s activities in California that impose jurisdiction over PNC. *See* Dkt. No. 79, at 23. Such an amendment would be futile in light of the Court’s recommendation of dismissal of this action.

V. Conclusion

For the reasons explained above, this Court respectfully recommends that Defendants’ motion to compel arbitration and to stay litigation be denied. This Court further respectfully

recommends that Defendants' motion to dismiss Plaintiffs' Cartwright Act and UCL claims be granted and PNC's motion to dismiss for lack of personal jurisdiction be granted.

A copy of this Report and Recommendation is being electronically served on counsel.

Any objections to this Report and Recommendation must be filed within 14 days after service of this Report and Recommendation. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(2). *See also* Fed. R. Civ. P. 6(a) & (d) (addressing computation of days). Any requests for an extension of time for filing objections must be directed to Chief Judge Brodie. Failure to file objections within this period designating the particular issues to be reviewed waives the right to appeal the district court's order. *See* 28 U.S.C. § 636(b); Fed. R. Civ. P. 72(b)(2); *Wagner & Wagner, LLP v. Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, P.C.*, 596 F.3d 84, 92 (2d Cir. 2010); *Kotlyarsky v. United States Dep't of Just.*, No. 22-2750, 2023 WL 7648618 (2d Cir. Nov. 15, 2023); *see also Thomas v. Arn*, 474 U.S. 140 (1985).

Dated: Brooklyn, New York
July 31, 2024

SO ORDERED.

/s/ Joseph A. Marutollo
JOSEPH A. MARUTOLLO
United States Magistrate Judge