IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

LISA NASS-ROMERO, on behalf of herself and all others similarly situated,

Plaintiff-Appellant,

vs.

No. 30,540

VISA U.S.A. INC. and MASTERCARD INTERNATIONAL INCORPORATED,

Defendants-Appellees.

Appeal from the First Judicial District Court, Santa Fe County, New Mexico
The Honorable Sarah Singleton, Judge

ANSWER BRIEF

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The district court hearing of May 6, 2010 was audio recorded. No specific reference to that district court hearing is made in this brief.

Statement of Compliance

The body of the attached brief exceeds the 35-page limit set forth in Rule 12-213(F)(2) NMRA. As required by Rule 12-213(G) NMRA, we certify that this

brief complies with Rule 12-213(F)(3) NMRA, that the brief is proportionally spaced and that the body of the brief contains 10,874 words. The brief was prepared and the word count was determined using Microsoft Office Word 2007.

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I. SUMMARY OF PROCEEDINGS

A. Nature Of The Case

Plaintiff is a consumer who alleges that Defendants MasterCard and Visa each "tied" the sale of the "credit" and "debit" network processing services that its member banks provided to merchants. That "tying" allegedly resulted in MasterCard and Visa member banks charging New Mexico merchants excessive fees for processing the debit transactions. Plaintiff alleges that this, in turn, led every single one of those merchants to raise the price of every single good that it sold to Plaintiff over the course of several years. Based on those allegations, Plaintiff asserts claims under the New Mexico Antitrust Act ("Antitrust Act") and the New Mexico Unfair Trade Practices Act ("Unfair Practices Act"), as well as common law claims for unjust enrichment and money had and received.

B. Course Of Proceedings And Disposition Of The Court Below

On July 1, 2004, MasterCard and Visa moved to dismiss Plaintiff's claims on the grounds that Plaintiff lacks standing to recover for her allegedly derivative and remote injuries, and alleges no facts that could state a claim. (RP 59-171.) The parties fully briefed that motion and the district court heard argument on the motion on September 17, 2004. (RP 59-168, 221-255, 263-354.)[1] At the district

[1] The briefing and argument included Defendants' motion to dismiss a separate consolidated action, *Hughes v. Visa U.S.A. Inc., et al.*, No. D-0101-CV-2003-02334, which was later voluntarily dismissed.

court's direction, the parties filed supplemental briefs on the motion. (RP 376-402.) The parties also subsequently submitted additional decisions addressing the same issues from parallel actions filed against Defendants in other states.

On January 20, 2010, the case was transferred to another district court judge (RP 464), who heard argument on Defendants' motion to dismiss on May 14, 2010. The district court judge granted Defendants' motion and issued an Order and Judgment of Dismissal with Prejudice on June 9, 2010. (RP 490-494.) Plaintiff appeals from that Order and Judgment. (RP 495-502.)

C. Summary Of The Facts Relevant To The Issues Presented For Review

1. The MasterCard and Visa Payment Networks

Plaintiff alleges that MasterCard and Visa each is an association of thousands of member banks, established to operate a national bank card network. (RP 9, 13.) MasterCard and Visa do not issue the payment cards that bear their brands. Instead, individual banks that are members of MasterCard issue MasterCard-branded payment cards to consumers. (RP 8.) Individual banks that are members of MasterCard also establish agreements with merchants that allow the merchants to accept MasterCard-branded payment cards, thereby "acquiring" the merchants to participate in the MasterCard network. (*Id.*) The same is true of banks that are members of the Visa network. (*Id.*)

The member banks of MasterCard or Visa that issue payment cards to consumers issue what Plaintiff claims are two types of payment cards — "credit" cards and "debit" cards. (RP 6-7.) Credit cards allow a consumer to buy on credit and pay later. (RP 6.) Debit cards — such as the *MasterMoney* and *Visa Check* debit cards — allow a consumer to make a payment directly from funds in his or her bank account. (RP 6-8, 17.)

A merchant that wants to accept MasterCard- or Visa-branded payment cards enters into an agreement with one of the "acquiring" member banks of MasterCard or Visa. (RP 8.) Such a merchant agrees to pay a fee to its "acquiring" member bank — called the merchant "discount fee" — for the processing of each payment that a consumer makes with a MasterCard- or Visa-branded card. (RP 8-9.) The "acquiring" bank remits, back to the member bank that issued the card which the consumer used to pay, an "interchange fee." (RP 8.)

Plaintiff does not allege, nor could she, that consumers who make payments to merchants with a MasterCard- or Visa-branded card pay any portion of those discount fees or interchange fees directly to MasterCard or Visa, or even to MasterCard or Visa member banks. The merchant pays the discount fee to the acquirer member bank, who remits the interchange fee to the issuer member bank. (RP 8-9.) Consumers like Plaintiff pay only for the retail goods that they purchase.

2. Related Lawsuits in Other Courts

Plaintiff's case, like those of consumers in parallel cases filed against Defendants in other states, piggybacks on a prior federal action brought by merchants against MasterCard and Visa. *See In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. 68, 71-73, 90 (E.D.N.Y. 2000), *aff'd*, 280 F.3d 124 (2d Cir. 2001), *cert. denied*, 536 U.S. 917 (2002). In that prior action, the merchants complained that MasterCard had an "Honor All Cards" rule, which required merchants that chose to accept MasterCard-branded payment cards to accept all such cards — without discriminating against particular cards or the consumers who used them for payment. *See* 192 F.R.D. at 73. Specifically, the merchants alleged that if they wanted to accept and process MasterCard-branded "credit" card payments, MasterCard's "Honor All Cards" rule had the effect of also requiring merchants to accept and process MasterCard-branded "debit" card payments. *Id.* at 71-73. Visa was alleged to have a similar "Honor All Cards" rule. *Id.*

The merchants claimed that those rules constituted "tying" arrangements and an attempt to monopolize a debit market in violation of the federal antitrust laws. *Id.* The merchants further asserted that the fees they paid for processing debit transactions over the MasterCard and Visa networks were higher than the fees that they paid for processing debit transactions over other debit networks, and attributed those higher fees to the alleged "tying." *Id.* at 73.

In February 2000, the federal court certified a nationwide class of more than four million merchants that had accepted and processed MasterCard- or Visa-branded card transactions. *Id.* at 73-74, 90. MasterCard and Visa denied any wrongdoing or liability, and the federal court never found otherwise. But confronted with a potentially enormous class damages claim, MasterCard and Visa each entered into a separate settlement agreement with the merchant class. They agreed to pay, collectively, more than three billion dollars into a settlement fund, and to abandon the alleged "tying" by creating separate "Honor All Cards" rules for certain defined "credit" and "debit" processing services provided to merchants. *See In re Visa Check/MasterMoney Antitrust Litig.*, 297 F. Supp. 2d 503, 506-09 (E.D.N.Y. 2003), *aff'd sub nom. Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96 (2d Cir. 2005), *cert. denied*, 544 U.S. 1044 (2005).

The federal court granted final approval of the settlements in December 2003, concluding that they were "reasonable[] in light of the best possible recovery." *Id.* at 512. The federal court specifically found that proving liability "was no sure thing," that there were "complexities inherent in proving damages," and that there was a distinct possibility that "the [c]lass could have been decertified." *Id.* at 511. The Second Circuit affirmed "the fairness of [the] settlement[s]" and approved them "in all respects." *Wal-Mart Stores, Inc.*, 396 F.3d at 101. Merchants that accepted MasterCard or Visa, including New Mexico

merchants, accordingly have received substantial payments from the settlement fund for the alleged "tying" and other asserted conduct.

Following on the merchants' federal class action, consumers in nineteen states and the District of Columbia filed class actions asserting that the alleged "tying" violated each state's respective antitrust laws and, in some cases, consumer protection and common laws. The consumer-plaintiffs claimed that the "tying" resulted in higher debit processing fees to merchants, and that the merchants, in turn, charged higher prices for every single retail good that they sold to consumers.

MasterCard and Visa filed motions to dismiss those claims. Every state court that finally resolved those motions granted them and dismissed the consumer-plaintiffs' state antitrust and consumer protection statute claims, as well as their unjust enrichment and other common law claims. Those decisions include opinions from the Iowa and Nebraska Supreme Courts, the intermediate appellate court in New York, and more than a dozen state trial courts.

Those courts uniformly concluded that the consumer-plaintiffs claimed injuries that were derivative and too remote to provide them with standing to recover pursuant to well-established antitrust standing principles followed under both federal and state antitrust laws. Moreover, even though the antitrust laws in each of those states permits "indirect purchasers" to sue, the courts uniformly held that the consumer-plaintiffs were not "indirect purchasers" of the allegedly "tied"

debit processing services through an intermediary. The courts found that the consumer-plaintiffs instead were "non-purchasers" of those services, since they claim only derivative and remote injuries based on their purchases of retail goods from merchants. *See, e.g., Southard v. Visa U.S.A. Inc.*, 734 N.W.2d 192 (Iowa 2007); *Kanne v. Visa U.S.A. Inc.*, 723 N.W.2d 293 (Neb. 2006); *Ho v. Visa U.S.A. Inc.*, 793 N.Y.S.2d 8 (N.Y. App. Div. 2005), *motion for leave to appeal denied*, 833 N.E.2d 708 (N.Y. 2005).[2]

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[2] *See also Goldberg v. Visa U.S.A. Inc.*, No. 04 CA 0005158, 2007 WL 2011732 (D.C. Super. Ct. Mar. 2, 2007); *Smith v. Visa U.S.A. Inc.*, No. C0-04-2096, 2005 WL 1936336 (Minn. Dist. Ct. July 12, 2005); *Peterson v. Visa U.S.A. Inc.*, No. 03-8080, 2005 WL 1403761 (D.C. Super. Ct. Apr. 22, 2005); *Strang v. Visa U.S.A. Inc.*, No. 03 CV 011323, 2005 WL 1403769 (Wis. Cir. Ct. Feb. 8, 2005); *Fucile v. Visa U.S.A. Inc.*, No. S11560-03 CNC, 2004 WL 3030037 (Vt. Super. Ct. Dec. 27, 2004); *Consiglio-Tseffos v. Visa U.S.A. Inc.*, No. CV 2003-020170, 2004 WL 3030043 (Ariz. Super. Ct. Dec. 8, 2004); *Moore v. Visa U.S.A. Inc.*, Nos. 03 CV 4086/03 CV 5002, 2004 WL 3030032 (Kan. Dist. Ct. Nov. 15, 2004); *Crouch v. Crompton Corp. & Morris v. Visa U.S.A. Inc.*, Nos. 02 CVS 4375/03 CVS 2514, 2004 WL 2414027 (N.C. Super. Ct. Oct. 28, 2004); *Knowles v. Visa U.S.A. Inc.*, No. Civ. A CV-03-707, 2004 WL 2475284 (Me. Super. Ct. Oct. 20, 2004); *Tackitt v. Visa U.S.A. Inc.*, No. CI03-740, 2004 WL 2475281 (Neb. Dist. Ct. Oct. 19, 2004); *Credit Debit Tying Cases*, J.C.C.P. No. 4335, 2004 WL 2475287 (Cal. Super. Ct. Oct. 14, 2004); *Cornelison v. Visa U.S.A. Inc.*, No. 03-1350, Order (S.D. Cir. Ct. Sept. 29, 2004); *Beckler v. Visa U.S.A. Inc.*, No. Civ. 09-04-C-00030, 2004 WL 2475100 (N.D. Dist. Ct. Sept. 21, 2004); *Gutzwiller v. Visa U.S.A. Inc.*, No. C4-04-58, 2004 WL 2114991 (Minn. Dist. Ct. Sept. 15, 2004); *Stark v. Visa U.S.A. Inc.*, No. 03-055030, 2004 WL 1879003 (Mich. Cir. Ct. July 23, 2004). In Tennessee, the court also dismissed the consumer-plaintiffs' claims, but on different grounds. *See Bennett v. Visa U.S.A. Inc.*, 198 S.W.3d 747 (Tenn. Ct. App. 2006), *permission to appeal denied* (Aug. 21, 2006). The consumer-plaintiffs in Florida and Nevada voluntarily dismissed their complaints.

Plaintiff notes that MasterCard and Visa settled two of the consumer actions (Brief in Chief at 7), but the courts in those cases did not finally resolve whether the plaintiffs had standing. In West Virginia, the state Attorney General brought a *parens patriae* action on behalf of West Virginia consumers. The Attorney General then decided to settle while the trial court was considering whether to dismiss that action due to the Nebraska Supreme Court's decision affirming the dismissal of the consumer-plaintiffs' claims in Nebraska. In California, the court dismissed the state antitrust act claim for lack of standing. *See Credit Debit Tying Cases*, 2004 WL 2475287. The consumer-plaintiffs then chose to settle while MasterCard and Visa were preparing to file a motion for judgment on the pleadings, which would have sought the dismissal of the remaining claim under California's unique unfair competition statute.

3. Plaintiff's Claims in This Case

After the well-publicized settlement in 2003 of the federal merchant class action, Plaintiff filed suit in the district court. Plaintiff's complaint is based on the same alleged conduct of MasterCard and Visa that was at issue in the federal merchant class action and the parallel state cases. (*See* RP 2-3, 6-9, 13-32); *In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. at 71-73.

Plaintiff is a New Mexico resident who allegedly purchased retail goods from "one or more Merchants located in New Mexico who were forced by Visa

and/or MasterCard to accept their customers' *Visa Check* and/or *MasterMoney* debit cards when those debit cards were presented by them for payment as a condition of being able to accept Visa and/or MasterCard credit cards." (RP 9.) Plaintiff seeks to bring this action on behalf of a class of New Mexico residents who have made purchases from merchants in New Mexico that accepted MasterCard or Visa. (RP 10-11.)

Plaintiff claims that as a consequence of the alleged conduct of MasterCard and Visa, trade was restrained in a market for the provision of debit card services to merchants. (RP 35-42, 44.) That allegedly led merchants to pay supra-competitive prices for processing debit transactions over the MasterCard and Visa networks, and the merchants, in turn, purportedly "passed those prices on to consumers in the for[m] of artificially-inflated and advanced prices for goods." (RP 36, 39, 41; *see also* RP 3-4, 37.) Consequently, Plaintiff asserts that she has "paid artificially-inflated and advanced prices for *all* merchandise." (RP 37-38 (emphasis added); *see also* RP 3-4, 43 (Plaintiff has "paid higher prices for all merchandise").) Plaintiff thus claims to have paid higher prices on *every* purchase that she made from New Mexico merchants who accept MasterCard or Visa, regardless of what form of payment she used to make the purchase, and regardless of whether she was buying such diverse items as a blouse, a tennis racket, a television, or a head of lettuce.

Based on those allegations, Plaintiff claims that the alleged conduct of MasterCard and Visa constitutes a "tying" arrangement and an attempt to monopolize in violation of the Antitrust Act, NMSA 1978 §§ 57-1-1 to -19 (1891), as amended. (RP 35-44.) Plaintiff also asserts that this same conduct violated the Unfair Practices Act, NMSA 1978, §§ 57-12-1 to -26 (1967), as amended. (RP 45.) Lastly, Plaintiff asserts claims based on common law theories of unjust enrichment and money had and received. (RP 45-46.)

4. The District Court's Order and Judgment of Dismissal with Prejudice

Defendants moved to dismiss Plaintiff's claims based on her lack of standing and failure to allege facts that could state a claim. (*See* RP 59-171.) After considering the parties' briefing and argument, the district court granted the motion and dismissed Plaintiff's claims. (RP 490-91.) In so ruling, the district court joined the numerous state appellate and trial courts across the country that have dismissed parallel consumer actions asserting the same claims against MasterCard and Visa.

The district court held that Plaintiff lacked standing to obtain relief under the Antitrust Act because she "alleges derivative and remote injuries." (RP 490.) The district court concluded that while "the Antitrust Act sought to remove the federal defense against indirect purchaser suits . . . that did not do away with the distinct antitrust standing requirements." (*Id.*) Moreover, "Plaintiff is not a purchaser of

Defendants' alleged services to bring her within the indirect purchaser provision of the Antitrust Act," since she claims injuries based on her purchases of unrelated retail goods from merchants. (*Id.*)

The district court further determined that "the same standing concepts" make Plaintiff's "alleged injuries too remote to provide standing under the Unfair Practices Act." (RP 491.) In addition, the district court held that "Plaintiff's allegations are insufficient to show any factual basis for a false or misleading statement, or unconscionable conduct from a gross disparity in value," under the Unfair Practices Act. (*Id.*) In so ruling, the district court emphasized that "Plaintiff offered nothing at the argument that would be sufficient to state a claim." (*Id.*)

Finally, the district court dismissed Plaintiff's unjust enrichment and money had and received claims because the purportedly excessive charges that Plaintiff allegedly paid went to merchants and then to banks, and so "there was no benefit to the Defendants." (*Id.*) The court also found that "Defendants retained no benefits" from their alleged conduct due "to the settlement of the merchant class action." (*Id.*)

II. STANDARD OF REVIEW

In reviewing the district court's order granting Defendants' motion to dismiss, this Court should accept all well-pleaded facts in the complaint as true.

Romero v. U.S. Life Ins. Co., 104 N.M. 241, 242, 719 P.2d 819, 820 (Ct. App. 1986). The Court then "review[s] de novo the question of whether the district court properly applied the law to those facts." *Cruz v. FTS Constr. Inc.*, 2006-NMCA-109, ¶ 7, 140 N.M. 284, 142 P.3d 365. Conclusory allegations without adequate factual support are insufficient to state a claim for relief. *See, e.g.*, *Saylor v. Valles*, 2003-NMCA-037, ¶¶ 24-25, 133 N.M. 432, 63 P.3d 1152 (filed 2002).

III. ARGUMENT

The issues raised on appeal present questions of law. For the reasons that follow, which Defendants presented in their arguments to the district court and thus preserved for appeal (RP 59-168, 263-354, 384-402), the district court correctly determined that Plaintiff's allegations fail to state a claim for relief.

A. The District Court Correctly Held That Plaintiff Fails To State A Claim Under The Antitrust Act

1. Well-Established Antitrust Standing Principles Require Dismissal of Claims Based on Derivative or Remote Injuries

Plaintiff first claims that MasterCard and Visa engaged in "tying" and an attempt to monopolize in violation of the Antitrust Act. (RP 35-44.)[3] Like federal antitrust law, which provides a potential remedy for any person injured "by reason

[3] The Antitrust Act states that "[e]very contract, agreement, combination or conspiracy in restraint of trade or commerce . . . within this state, is unlawful." NMSA 1978, § 57-1-1 (1987). It further states that it is "unlawful for any person to . . . attempt to monopolize . . . trade or commerce." *Id.* § 57-1-2.

of" an antitrust violation, 15 U.S.C. § 15(a), the Antitrust Act provides a potential damages remedy to persons injured "directly or indirectly, by a violation of" the Act. NMSA 1978, § 57-1-3(A) (1979).

Despite this broad language, not every person claiming remote or tangential injury from an antitrust violation can maintain a suit under the antitrust laws. As the United States Supreme Court concluded, although "[a] literal reading of the [federal] statute is broad enough to encompass every harm that can be attributed *directly or indirectly* to the consequences of an antitrust violation," the "federal courts have been 'virtually unanimous in concluding 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.'" *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 529, 534 (1983) (quoting *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 263 n.14 (1972)) (emphasis added).

The New Mexico appellate courts have not addressed the question of when a plaintiff's alleged injury is too remote to permit suit under the Antitrust Act. But as Plaintiff acknowledges (*see* Brief in Chief at 14), the Legislature specifically provided that "unless otherwise specified in the Antitrust Act, the Antitrust Act shall be construed in harmony with judicial interpretations of the federal antitrust laws . . . to achieve uniform application of the state and federal laws prohibiting

restraints of trade and monopolistic practices." NMSA 1978, § 57-1-15 (1979). The New Mexico Supreme Court thus recently confirmed that "[i]t is therefore the duty of the courts to ensure that New Mexico antitrust law does not deviate substantially from federal interpretations of antitrust law." *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 18, 148 N.M. 713, 242 P.3d 280; *see also Griffin v. Guadalupe Med. Ctr. Inc.*, 1997-NMCA-012, ¶ 9, 123 N.M. 60, 933 P.2d 859 ("in the absence of New Mexico authority on point, New Mexico's Antitrust Act is interpreted in harmony with the federal antitrust laws").

Both New Mexico state and federal courts accordingly have applied federal antitrust law to claims under the Antitrust Act. *E.g., Romero*, ¶ 12, 242 P.3d at 289 ("to construe our law in harmony with federal law, *see* § 57-1-15, we must first undertake an analysis of substantive federal antitrust law"); *State v. Ray Bell Oil Co.*, 101 N.M. 368, 370, 683 P.2d 50, 52 (Ct. App. 1983) (looking to federal antitrust law in determining meaning of Antitrust Act provision); *Leyba v. Renger*, 874 F. Supp. 1229, 1231 n.1 (D.N.M. 1994) ("[t]he New Mexico antitrust statute is construed in harmony with the federal law," and so "the Court's conclusions as to the federal antitrust claims apply equally to the state claims").

In the seminal federal decision on antitrust standing, *Associated General Contractors*, the United States Supreme Court identified five factors for determining whether the relationship between the plaintiff's harm and the

defendants' conduct is sufficiently close to confer standing to sue. Those factors are: (1) whether the plaintiff is a consumer or competitor in the allegedly restrained market; (2) whether the injury alleged is a direct, first-hand impact of the restraint alleged; (3) whether there are more directly injured plaintiffs with motivation to sue; (4) whether the damages claims are speculative; and (5) whether the plaintiff's claims risk duplicative recoveries and would require a complex apportionment of damages. 459 U.S. at 538-45. Based on its analysis of those factors in that case, the Supreme Court held that the claims of the plaintiff labor union, which alleged that the defendants had coerced third parties to enter into relationships with non-union firms, should be dismissed. *Id.*; *see also Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 416-18 (2004) (Stevens, J. concurring) (applying same factors to conclude that retail customer of AT&T lacked antitrust standing to challenge Verizon's alleged anticompetitive conduct adversely affecting AT&T).

The Tenth Circuit Court of Appeals and other federal courts routinely have applied the standing factors identified in *Associated General Contractors* to dismiss derivative or remote claims under federal antitrust law. For example, in *Sharp v. United Airlines, Inc.*, 967 F.2d 404 (10th Cir. 1992), the Tenth Circuit affirmed the dismissal of employees' claims that the defendant's restraint of trade drove their employer out of business. The Tenth Circuit held that the employees'

alleged injuries were "at most indirect," their damages were "speculative" and "uncertain," and "there is a risk of duplicative recoveries or the necessity of apportioning damages if [the employees] are allowed standing." *Id.* at 406-10; *see also, e.g.*, *Peck v. Gen. Motors Corp.*, 894 F.2d 844, 846-48 (6th Cir. 1990); *Alpha Shoe Serv. v. Fleming Cos.*, 849 F.2d 352, 353-54 (8th Cir. 1988); *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 219-20 (4th Cir. 1987); *Eagle v. Star-Kist Foods, Inc.*, 812 F.2d 538, 539-43 (9th Cir. 1987).

State courts likewise have applied the *Associated General Contractors* standing factors to dismiss claims based on derivative or remote injuries under state antitrust laws that — like the Antitrust Act — look to federal antitrust law for guidance in applying state antitrust law. For example, in the parallel action against MasterCard and Visa in Nebraska, the Nebraska Supreme Court concluded that the federal harmonization provision in Nebraska's antitrust statute required that "we follow the federal courts' construction of the Clayton Act" and its antitrust standing principles. *Kanne*, 723 N.W.2d at 297. In the parallel action in Iowa, the Iowa Supreme Court likewise found that "the interpretation given to the federal antitrust laws at the time the Iowa competition law was adopted informs our search for the legislative intent," and concluded that it should apply the *Associated General Contractors* standing factors to determine whether the plaintiffs had standing. *Southard*, 734 N.W.2d at 197-99. Courts similarly have applied the

Associated General Contractors factors in other cases to determine whether a plaintiff has standing to recover under state antitrust law.[4]

The district court below thus properly looked to well-established federal antitrust standing principles, also applied in other states and in the parallel actions against MasterCard and Visa, to assess whether Plaintiff has standing to recover under the Antitrust Act. (RP 490.) Indeed, Plaintiff admits that "the most relevant federal precedent is *AGC* [*Associated General Contractors*]." (Brief in Chief at 14.)

2. Application of Well-Established Antitrust Standing Principles Requires Dismissal of Plaintiff's Antitrust Act Claims

Applying the *Associated General Contractors* antitrust standing factors, the district court correctly held that Plaintiff's claims under the Antitrust Act should be dismissed for the same reasons found by courts in the parallel actions in other states. (RP 490.) First, Plaintiff is not a consumer or competitor in the allegedly

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[4] *See, e.g., Serv. Employees Int'l Union Health and Welfare Fund v. Philip Morris Inc.*, 83 F. Supp. 2d 70, 89-91 (D.D.C. 1999) (District of Columbia antitrust law), *aff'd on this ground*, 249 F.3d 1068, 1076 (D.C. Cir. 2001); *Int'l Bhd. Of Teamsters, Local 734 Health & Welfare Trust Fund v. Philip Morris, Inc.*, 196 F.3d 818, 828 (7th Cir. 1999) (Illinois antitrust law); *Haw. Health & Welfare Trust Fund for Operating Eng'rs v. Philip Morris, Inc.*, 52 F. Supp. 2d 1196, 1197-1200 (D. Haw. 1999) (Hawaii antitrust law); *Laborers' & Operating Eng'rs' Util. Agreement Health & Welfare Trust Fund for Ariz. v. Philip Morris, Inc.*, 42 F. Supp. 2d 943, 949-50 (D. Ariz. 1999) (Arizona antitrust law); *Vinci v. Waste Mgmt., Inc.*, 43 Cal. Rptr. 2d 337, 339-40 (Ct. App. 1995) (California antitrust law).

restrained market. Plaintiff asserts that Defendants' alleged "tying" restrained trade in the provision of debit processing services to merchants:

> The contract, combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among Visa, MasterCard and co-conspirators, and forced agreements with the Merchants the substantial terms of which have been to limit the sale of two distinct "tying" products, Visa Credit Card services and MasterCard Credit Card services (including the right to accept Visa and MasterCard credit cards), to Merchants who agree, albeit under coercion and/or unwittingly, to buy two other distinct "tied" products, *Visa Check* services and *MasterMoney* services (including the obligation to accept *Visa Check* and *MasterMoney* [debit] cards).

(RP 40-41; *see also* RP 36, 38-39.) In that alleged market, the merchants are consumers of MasterCard and Visa debit processing services, and other debit networks are the competitors of MasterCard and Visa. Plaintiff is neither a debit network competitor nor a merchant consumer of the allegedly "tied" debit processing services, as courts in the parallel actions have emphasized. *See, e.g.*, *Southard*, 734 N.W.2d at 199 (the consumer-plaintiffs "are neither consumers of defendants' products nor competitors of the defendants"); *Kanne*, 723 N.W.2d at 298 (the consumer-plaintiffs "are not competitors in . . . the business of providing debit network processing services to merchants . . . [n]or are [they] consumers of those services").

Second, as the district court concluded, "Plaintiff alleges derivative and remote injuries." (RP 490.) Here, the direct, first-hand impact of the restraint

allegedly fell on the merchants. Plaintiff asserts that "[t]he tying arrangements . . . have forced *Merchants* to accept [Visa- and MasterCard-branded debit cards] and pay fees which are supra-competitive, exorbitant and fixed." (RP 3 (emphasis added); *see also* RP 15, 36, 39, 41.) Plaintiff claims to have been injured only derivatively, as the purportedly "exorbitant fees are *passed on to the Plaintiff* and Class members in the form of artificially higher and advanced prices." (RP 3-4 (emphasis added); *see also* RP 36 ("[t]he Merchants . . . passed those prices on to consumers in the for[m] of artificially inflated and advanced prices for goods"); RP 39, 41.) Plaintiff does not allege that she was injured as the direct purchaser of the overcharged debit processing services, or even indirectly by purchasing the allegedly overpriced debit processing services from merchants in a chain of distribution. Plaintiff instead asserts a *derivative* injury, based on a theory that merchants transformed the asserted effect of the alleged "tying" of debit processing services into changes on prices for thousands of *unrelated retail goods* that Plaintiff purchased from merchants. (RP 3, 10-11, 37-38, 43.)

The distinction among direct, indirect, and derivative injuries is important because they reflect different degrees of remoteness. In this context, a *direct* injury is harm suffered by an immediate purchaser of the allegedly overcharged good or service. An *indirect* injury occurs when the same harm is suffered as with the direct injury, but by a purchaser further down in the chain of distribution for the

allegedly overcharged good or service. A *derivative* injury occurs when a different harm is suffered as a consequence of the impact of the harm on a directly or indirectly injured party. Claims are derivative when an intermediary does not simply pass on an alleged overcharge on the resale of a good or service, but instead factors that cost into its pricing of unrelated goods or services — in effect, treating it as a form of "overhead."

Here, Plaintiff's claimed injuries are neither direct nor even indirect in any chain of distribution for the allegedly "tied" debit processing services. They are, instead, *derivative*, as courts emphasized in the parallel actions. *See*, *e.g.*, *Southard*, 734 N.W.2d at 199 ("the injuries alleged by the plaintiffs are not even indirect, as the plaintiffs are not in the chain of distribution . . . [t]heir injuries are better described as derivative"); *Kanne*, 723 N.W.2d at 298-99 (same).

Third, there are more directly injured persons with motivation to sue to vindicate any interest in antitrust enforcement. The alleged direct victims of Defendants' conduct — the more than four million merchants nationwide that accepted MasterCard or Visa — litigated for years and settled a class action challenging the very same "tying" and other conduct at issue in this case. Denying Plaintiff an antitrust remedy will not "leave a significant antitrust violation undetected or unremedied." *Associated Gen. Contractors,* 459 U.S. at 542; *see also, e.g.*, *Kanne*, 723 N.W.2d at 299 ("the more than 4 million merchants

nationwide that accepted Visa or MasterCard . . . litigated for years, and it is undisputed that they settled a class action challenging the very same tying alleged here"); *Ho*, 793 N.Y.S.2d at 8 (MasterCard and Visa "were the subject of an action brought by the retailers, which was settled," and so "they have been subjected to judicial remediation for their wrongs").

Fourth, Plaintiff's damages claims are overwhelmingly speculative. Plaintiff does not and cannot allege that she overpaid for purchases of debit processing services from merchants. Instead, Plaintiff asserts that she paid an overcharge on *every single purchase* that she made from *every single merchant* that accepted MasterCard or Visa, over the course of *several years*, and regardless of the form of payment used to make her purchases. She alleges that "Plaintiff and Class have paid artificially inflated and advanced prices for *all merchandise* . . . ." (RP 37-38 (emphasis added); *see also* RP 43.)

Consider what this claim entails for Plaintiff Ms. Nass-Romero in this case. Assume that Ms. Nass-Romero purchased items at an Albertsons supermarket that accepted MasterCard and Visa cards on February 2, 2002. To recover damages, Ms. Nass-Romero first would need to prove that as a result of the alleged "tying," Defendants unlawfully restrained trade when their respective member banks provided debit card services to that Albertsons supermarket, and, as a result, that the supermarket paid excessive debit fees to the banks. Ms. Nass-Romero then

would need to prove that the Albertsons supermarket did not absorb the allegedly excessive portion of those fees by making less profit, or absorb it in some non-monetary way, such as by hiring fewer cashiers or eliminating free coffee for its employees, but instead passed it on in the price of the items sold at the supermarket. Ms. Nass-Romero then would need to prove that some identifiable portion of the $2.49 that she paid for, say, a carton of orange juice, was attributable not to such factors as competitive pricing by nearby supermarkets, the wholesale cost of orange juice, cold weather in Florida that damaged orange groves and drove up orange prices, overhead costs at the supermarket, or strategic pricing decisions made at Albertsons' headquarters, but instead was attributable to the alleged "tying" of debit processing services.

That same proof would then need to be made for every single other item in Ms. Nass Romero's grocery cart that day, each of which is subject to unique pricing factors, and then for every single item that she purchased that same day at Wal-Mart, Sears or other merchants, each of which operates in its own distinctive competitive environment. Ms. Nass-Romero then would need to offer that same proof for every other item that she purchased the following day at any merchant who accepted MasterCard or Visa, and so on for every day of the alleged multi-year damages period. Even for Ms. Nass-Romero alone, such a claim is hopelessly speculative. *See, e.g., Kanne*, 723 N.W.2d at 299 (the "damages claims are

speculative" because "the claimed price increases over a period of years could have resulted from myriad independent reasons unrelated to the alleged violation") (internal quotation omitted); *Ho*, 793 N.Y.S.2d at 9 (the plaintiff's damages "would be virtually impossible to calculate").

Finally, Plaintiff's claims risk duplicative recoveries and would require a complex apportionment of damages. MasterCard and Visa settled with the nationwide merchant class and Plaintiff's claims here are based on the same alleged "tying" and other conduct asserted in the merchants' class action. Plaintiff thus seeks a recovery duplicative of the substantial settlement sums that MasterCard and Visa already have paid to New Mexico merchants. Plaintiff's claims also would require apportionment of damages among each New Mexico merchant at which Plaintiff shopped, and among each item that Plaintiff purchased at each such merchant — from a pack of gum to a refrigerator — during the years for which Plaintiff seeks damages. Any effort to make such an apportionment would be incredibly complex, if not practically impossible, as courts in the parallel cases have concluded. *See Kanne*, 723 N.W.2d at 299 ("appellants' claims pose a risk of a double recovery" and "would require an apportionment of damages among each Nebraska merchant at which appellants shopped and among each item that each appellant purchased at each merchant — an incredibly complex task"); *Ho*, 793 N.Y.S.2d at 9 ("any recovery here would be duplicative").

The district court thus correctly held that Plaintiff cannot satisfy the factors for standing to recover under the Antitrust Act. That conclusion is consistent with the conclusions that courts have reached in the parallel actions in other states. While those decisions sometimes focus on certain *Associated General Contractors* standing factors, or apply them in a somewhat modified manner under state law, every one of those decisions ultimately held that plaintiffs asserting the same claims as Plaintiff here lacked standing to recover under state antitrust law. (*See* RP 490); *see also supra*, pp. 7-8 & n.2 (citing parallel cases).

3. Plaintiff Offers No Basis for Concluding That She Has Standing to Recover Under Well-Established Antitrust Standing Principles

On this appeal, Plaintiff principally argues that the district court erred in applying the *Associated General Contractors* antitrust standing factors in three respects, none of which has any merit.

First, Plaintiff asserts that the district court "erred in relying so heavily on the interpretations of other states." (Brief in Chief at 14.) But the district court in fact applied the Antitrust Act's directive that it "be construed in harmony with judicial interpretations of the federal antitrust laws," NMSA 1978, § 57-1-15, and applied the *Associated General Contractors* standing factors to determine whether Plaintiff has standing to recover. (RP 490.) In applying those standing factors, the district court properly considered how courts in other states applied those same

standing factors in parallel actions asserting the very same claims that Plaintiff asserts in this action. (*See id.*)

Second, Plaintiff asserts that the district court misapplied *Associated General Contractors* because "its analysis and logic support plaintiff's position." (Brief in Chief at 14.) Yet Plaintiff attempts to find support in *Associated General Contractors* simply by pointing to supposed factual differences between that case and this case, without making any effort to explain how her claims could satisfy the test for standing described in that case. (*See id.* at 14-18.) Regardless of any factual differences, Plaintiff does not and cannot establish that she satisfies any of the antitrust standing factors identified in *Associated General Contractors*.

Third, Plaintiff argues that Justice Stevens' opinion in *Associated General Contractors* denied standing in part because the labor union in that case did not raise claims of consumer harm that the antitrust laws are designed to address. (Brief in Chief at 16-17.) But Justice Stevens' decision set out factors to determine the standing of all antitrust plaintiffs, including consumers. *See Associated Gen. Contractors*, 459 U.S. at 535-45. Indeed, Justice Stevens subsequently applied those factors to find that a retail consumer lacked antitrust standing in his concurring opinion in *Verizon Communications.*

In that case, a local telephone service customer of AT&T claimed to have received unsatisfactory service from AT&T because Verizon's allegedly

anticompetitive conduct adversely affected AT&T's ability to serve its customers. 540 U.S. at 416. Justice Stevens, joined by Justices Souter and Thomas, found that "whatever antitrust injury [the plaintiff-customer] suffered because of Verizon's conduct was purely derivative of the injury that AT&T suffered." *Id.* at 417. The claims also ran "both the risk of duplicative recoveries and the danger of complex apportionment of damages," since, among other things, "[t]he task of determining the monetary value of the harm caused," "the portion . . . attributable to Verizon's misconduct," and "what offset, if any, should be allowed to make room for a recovery" by AT&T was "certain to be daunting." *Id.* Finally, as a "direct victim," AT&T was "in a far better position . . . to vindicate the public interest in enforcement of the antitrust laws." *Id.* Justice Stevens and the other concurring Justices thus concluded that the retail consumer's claims should be dismissed for lack of antitrust standing. *Id.* at 417-18.

4. The Antitrust Act's Repeal of the *Illinois Brick* Rule Did Not Eliminate Well-Established Antitrust Standing Principles

Plaintiff also suggests that she has standing because the Antitrust Act provides in Section 57-1-13 that a person may seek a recovery if injured "directly or indirectly" by prohibited conduct. (*See* Brief in Chief at 18.) But as Plaintiff acknowledges and the district court found, that "directly or indirectly" language was designed to remove a federal bar on suits by "indirect purchasers" announced

in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). (*See* Brief in Chief at 18; RP 490.) In *Illinois Brick*, the plaintiffs sought to recover a purported "passed-on" overcharge on concrete block purchased from general contractors, whose subcontractors had purchased the concrete block directly from allegedly price-fixing manufacturers. 431 U.S. at 726-27. The Supreme Court held that direct purchasers could sue and recover the full overcharge, but "indirect purchasers" could not sue at all, since that could result in multiple treble damages liability for defendants and overly complicated proof. *Id.* at 729-47.

In response to the *Illinois Brick* decision in 1977, a number of states amended their antitrust laws to remove the bar against "indirect purchaser" actions. In 1979, the New Mexico Legislature amended the Antitrust Act to provide a damages remedy to persons injured "directly or indirectly" by a violation of the Act. NMSA 1978, § 57-1-3(A) (1979). Judge James Wechsler, who at that time was the Director of the Antitrust Unit of the State of New Mexico, explained in an article written that same year that the provision was a response to *Illinois Brick*: "To specifically permit recovery by injured indirect purchasers under the Antitrust Act, the New Mexico Legislature provided that a person injured in his business or property 'directly or indirectly'" could bring an action under the Act. James J. Wechsler, *New Mexico Antitrust Law*, 9 N.M. L. Rev. 339, 345 (Summer 1979) (RP 110). Confirming that this provision was a limited deviation from the overall

"purpose of conforming the Act with the federal antitrust laws," Judge Wechsler noted that the passage of this provision centered entirely around "indirect purchasers" and "overturning the *Illinois Brick* decision." *Id.* at 344-45 (RP 110).

Thus, the New Mexico amendment removed the *Illinois Brick* bar against otherwise proper suits by "indirect purchasers," who seek to recover passed-on overcharges on a product purchased from intermediaries that purchased the product directly from alleged antitrust violators. As the district court correctly held, however, that amendment did not do away with the distinct requirements for antitrust standing that bar Plaintiff's claims here. (RP 490.)

The *Illinois Brick* decision made clear that it dealt only with whether there should be a *per se* bar against such "indirect purchaser" suits. It expressly "d[id] not address the standing issue." 431 U.S. at 728 n.7. It instead addressed whether "indirect purchasers" suffer a cognizable antitrust injury, a question that the Supreme Court emphasized is "analytically distinct from the question of which persons have sustained injuries too remote to give them standing to sue for damages." *Id.* As the Supreme Court subsequently reiterated, such standing requirements are "[a]nalytically distinct" from the bar against "indirect purchaser" suits recognized in *Illinois Brick*. *Blue Shield v. McCready*, 457 U.S. 465, 476 (1982).

Accordingly, decisions both before and after *Illinois Brick* have separately applied antitrust standing requirements to bar claims based on derivative or remote injuries. *See, e.g., Associated Gen. Contractors*, 459 U.S. at 529-37; *Hawaii*, 405 U.S. at 263 n.14. Indeed, even the dissenting judge in *Illinois Brick* — who would have allowed suits to be maintained by indirect purchasers in a product's chain of distribution — made clear that he still would have applied standing limitations to antitrust claims. *See Illinois Brick*, 431 U.S. at 760-61 (Brennan, J., dissenting). As appellate courts have recognized, a state's rejection of the *Illinois Brick* bar does not eliminate the well-established requirements for standing to assert an antitrust claim.[5]

Indeed, that is exactly what courts concluded in dismissing the parallel actions against MasterCard and Visa under state antitrust laws that, like the Antitrust Act, permit persons injured "directly or indirectly" to sue. For example, the Nebraska Supreme Court concluded that the Nebraska Legislature's

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[5] *See, e.g., Int'l Bhd. of Teamsters,* 196 F.3d at 828 (noting that "Illinois does not follow the *Illinois Brick* doctrine," but affirming the dismissal of an Illinois antitrust law claim for lack of standing because "[t]he direct-purchaser doctrine of *Illinois Brick* and the direct-injury doctrine of *Associated General Contractors* are analytically distinct"); *Tremco, Inc. v. Holman*, No. C8-96-2139, 1997 WL 423575, at *1-2 (Minn. Ct. App. July 29, 1997) (applying *Associated General Contractors* to hold that plaintiff lacked antitrust standing, since although Minnesota's antitrust statutes "depart from the federal law and allow indirect purchasers to have a cause of action," that "does not require us to conclude [plaintiff] has standing").

amendment to its state antitrust law, to provide a damages remedy whether a person dealt "directly or indirectly" with the defendant, "did not eliminate separate and distinct antitrust standing requirements that bar [the consumer-plaintiffs'] claims." *Kanne*, 723 N.W.2d at 299-300; *see also, e.g.*, *Knowles*, 2004 WL 2475284, at *3 (Maine antitrust law provides a "remedy for any person injured 'directly or *indirectly*' in its business or property," but "the fact that the Maine legislature decided to overrule *Illinois Brick* on the issue of whether indirect purchasers may assert a remedy does not necessarily resolve the issue of standing") (emphasis in original); *Stark*, 2004 WL 1879003, at *3-4 (Michigan's antitrust law provides a "remedy to persons injured 'directly or indirectly' by a violation," but "it does not necessarily follow that Michigan's repeal of the *Illinois Brick* rule also eliminated the *Associated General Contractors* standing requirements").

The district court also correctly held that Plaintiff is not an "indirect purchaser" permitted to sue under the Antitrust Act. (RP 490.) Plaintiff does not, and cannot, claim to have repurchased from merchants the allegedly "tied" debit processing services that MasterCard and Visa member banks provided to merchants. Plaintiff is a "non-purchaser" of those services. She instead claims to have paid higher prices on a wide variety of retail goods that she purchased from merchants — from tennis shoes to light bulbs, from carrots to computers —

regardless of the form of payment that she used. (RP 3, 10-11, 37-38, 43.) None of those goods were manufactured or distributed by MasterCard or Visa.

Plaintiff thus does not sue as an "indirect purchaser," as courts uniformly concluded in the parallel actions against MasterCard and Visa. *See, e.g., Southard*, 734 N.W.2d at 196-97 (the consumer-plaintiffs "are not in a comparable position" to indirect purchasers "because they did not purchase, directly or indirectly, the product that is the subject of anticompetitive activity by Visa and MasterCard . . . the plaintiffs are nonpurchasers"); *Kanne*, 723 N.W.2d at 301 (the consumer-plaintiffs "are not indirect purchasers permitted to sue" under state antitrust law because "they did not purchase the debit card services, either directly or indirectly").

5. Plaintiff Offers No Basis for Abandoning Well-Established Antitrust Standing Principles in Favor of a Different Test for Antitrust Standing

Implicitly recognizing that well-established antitrust standing principles bar her claims, Plaintiff offers three arguments as to why a different test for standing should be applied. All are meritless.

First, Plaintiff argues that she has standing because the injuries to "business or property" that the Antitrust Act covers include "business and non-business injuries" that "need not even be a purchase." (Brief in Chief at 19 (citing NMSA § 57-1-3(D) (1979)).) However, that distinction does not support any different test

for antitrust standing, since the federal antitrust laws with which the Antitrust Act must be harmonized likewise apply to persons injured in their "business or property" by an antitrust violation, and are not limited to business injuries or injuries on a purchase. 15 U.S.C. § 15(a). Plaintiff identifies no authority or logic for eliminating well-established antitrust standing principles simply because the alleged injury in some cases might not involve a purchase. Nor could this case provide any occasion for addressing whether some distinction in standing should be drawn for a plaintiff not claiming an injury on a purchase, since Plaintiff does claim an injury on purchases of retail goods.

Second, Plaintiff suggests that the Antitrust Act should provide a remedy to consumers "who were the alleged intended targets of the scheme" and are within the "zone of interests to be protected" by the Act, quoting *Key v. Chrysler Motors Corp.*, 1996-NMSC-038, 121 N.M. 764, 768, 918 P.2d 350, 354. (Brief in Chief at 19.) *Key* is not an antitrust case addressing standing under the Antitrust Act. But as Plaintiff acknowledges, what the New Mexico Supreme Court instructed in *Key*, as a matter of statutory interpretation, is that "[w]hether we ask if [plaintiff] had standing to sue or whether we ask if the Act provided [plaintiff] with a cause of action we must look to the Legislature's intent as expressed in the Act or other relevant authority." 121 N.M. at 768, 918 P.2d at 354. Here, the Legislature expressed its intent that the Antitrust Act "shall be construed in harmony with

judicial interpretations of the federal antitrust laws." NMSA 1978, § 57-1-15 (1979). *Associated General Contractors* therefore provides the governing antitrust standing test.

Moreover, since Plaintiff claims only derivative and remote injuries for which she lacks standing, and is not an "indirect purchaser," she cannot fall within the "zone of interest" of the Antitrust Act. The district court's dismissal of her claim thus is entirely consistent with the "zone of interests" analysis recognized in *Key*. *See* 121 N.M. at 768, 918 P.2d at 354 (finding that the Motor Vehicle Dealers Franchising Act "cannot be said to afford protection to every prospective purchaser of an automobile franchise"); *City of Sunland Park v. Santa Teresa Servs. Co.*, 2003-NMCA-106, ¶ 41, 134 N.M. 243, 75 P.3d 843 ("Cases in New Mexico are clear that injury — whether actual or threatened — is not enough by itself to confer standing. To be accorded standing on a particular issue the party must show that the statute or constitutional provision relied on reaches or provides protection against the injury.").

Third, Plaintiff argues that this Court should determine antitrust standing based on common law standards of "foreseeability" of harm. (*See* Brief in Chief at 20-23.) But Plaintiff offers no authority — from any jurisdiction — for applying a "foreseeability" test for determining standing under an antitrust statute. To the contrary, by the time the Legislature enacted the Antitrust Act in 1979, federal

courts had largely rejected "foreseeability" as an appropriate standard for antitrust standing. As the United States Court of Appeals for the Tenth Circuit concluded in 1973, "[a]ntitrust violations admittedly create foreseeable ripples of injury to individual stockholders, consumers and employees, but the law has not allowed all of these standing to sue." *Reibert v. Atl. Richfield Co.*, 471 F.2d 727, 731 (10th Cir. 1973); *see also Calderone Enters. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1296 n.2 (2d Cir. 1971) (rejecting "foreseeability" test because it "would permit anyone to sue, regardless of how distant his interest or relationship").

There accordingly is no reason to believe that when the Legislature enacted the Antitrust Act, and specifically instructed courts to construe the Act in harmony with federal antitrust law, it intended for New Mexico courts to apply a "foreseeability" test for antitrust standing that federal courts had rejected. Moreover, standing is a separate issue from the causation concept of "foreseeability." As the Iowa Supreme Court explained in the parallel case against MasterCard and Visa, "[t]he remoteness doctrine is not based upon a factual inquiry to determine whether the damages claimed were foreseeable or whether they were a proximate cause; rather, it is a legal doctrine incorporating public policy considerations." *Southard*, 734 N.W.2d at 197 (internal quotation omitted); *see also, e.g., Associated Gen. Contractors*, 459 U.S. at 537 (even a plaintiff who

"does allege a causal connection between an antitrust violation and [its] harm" may allege a harm too remote to provide standing to sue).

B. The District Court Correctly Held That Plaintiff Fails To State A Claim Under The Unfair Practices Act

Plaintiff also asserts a claim under the Unfair Practices Act, which makes unlawful (1) "unfair or deceptive trade practices" and (2) "unconscionable trade practices." NMSA 1978, § 57-12-3 (1971). An "unfair or deceptive trade practice" is defined to be an act "specifically declared unlawful" under the statute or "a false or misleading oral or written statement, visual representation or other representation of any kind knowingly made." *Id.* § 57-12-2(D) (2009). An "unconscionable trade practice" is defined to be an act that "takes advantage . . . of a person to a grossly unfair degree" or that "results in a gross disparity between the value received by a person and the price paid." *Id.* § 57-12-2(E). Here, the district court correctly dismissed Plaintiff's Unfair Practices Act claim. Plaintiff lacks standing to recover for her allegedly derivative and remote injuries under the Act, and offers no factual allegations that either MasterCard or Visa made false representations or acted unconscionably.

1. Plaintiff Lacks Standing to Assert an Unfair Practices Act Claim

First, the district court correctly concluded that Plaintiff lacks standing to recover for a derivative and remote injury under the Unfair Practices Act for the

same reasons as under the Antitrust Act. (RP 491.) The claimed retail overcharge injury based on the challenged "tying" is the same under the Unfair Practices Act claim as under the Antitrust Act. The reasons for imposing well-established antitrust standing requirements thus apply equally to bar Plaintiff's claim under the Unfair Practices Act, as courts in the parallel actions and elsewhere have held.

For example, in the parallel case against MasterCard and Visa in New York, the consumer-plaintiffs also asserted claims under New York's Consumer Protection From Deceptive Practices Act ("NYDPA"), N.Y. Gen. Bus. Law § 349. The New York appellate court unanimously affirmed the dismissal of those claims "because of the remoteness of their damages from the alleged injurious activity." *Ho*, 793 N.Y.S.2d at 8-9. The court concluded that even if merchants paid overcharges for debit card processing services, that "does not elevate to an actionable claim any perceived injuries to the retailers' customers. Those injuries are too remote and derivative to countenance such a cause of action." *Id.* at 9.

New York's highest court reached a similar conclusion in *Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris USA Inc.*, 818 N.E. 2d 1140 (N.Y. 2004). There, the court refused to "presume an intent to include recovery for derivative injuries" under the NYDPA "in the absence of a clear indication of such intent from the Legislature." *Id.* at 1144. Such "derivative injuries," the court found, occurred "when the loss arises solely as a result of injuries sustained by

another party." *Id.* at 1145. The court concluded that a plaintiff alleging such derivative injuries "has no standing to bring an action under [the Act] because its claims are too remote." *Id.* That conclusion, the court noted, is in accord with several other decisions that "recognize a remoteness bar to recovery under their state consumer protection statutes." *Id.* at 1145 n.3; *see also, e.g., A.O. Fox Mem'l Hosp. v. Am. Tobacco Co.*, 754 N.Y.S.2d 368, 370 (N.Y. App. Div. 2003) (affirming dismissal of NYDPA claim because the "injury is entirely derivative . . . and therefore too remote to permit recovery").

Relying on those New York decisions, the Nebraska Supreme Court reached the same conclusion in the parallel case against MasterCard and Visa in Nebraska. The court concluded that because consumer-plaintiffs making the same claims as Plaintiff "allege injuries that are derivative and remote, they also fail to state a claim under Nebraska's Consumer Protection Act." *Kanne*, 723 N.W.2d at 302; *see also Fucile*, 2004 WL 3030037, at *3 (dismissing parallel claims against MasterCard and Visa under the Vermont Consumer Fraud Act because "the court cannot imagine that the Legislature intended the Act to redress injuries to all consumers, even those whose contact to the goods or services tainted by unfair competition is remote and tangential").

Appellate courts in other states likewise have concluded that their state consumer protection statutes do not permit recoveries based on derivative or

remote injuries. In *Ganim v. Smith and Wesson Corp.*, 780 A.2d 98 (Conn. 2001), the Connecticut Supreme Court found that it is "part of the judicial task, based on policy considerations, of setting some reasonable limits on the legal consequences of wrongful conduct." *Id.* at 120. Based on case law from several jurisdictions, the court concluded that "the doctrine that one may not sue for injuries only indirectly caused by a defendant's conduct has deep roots in our common law," and so "where a plaintiff complains of injuries that are wholly derivative of harm to a third party, plaintiff's injuries are generally deemed indirect and as a consequence too remote, as a matter of law, to support recovery." *Id.* at 120, 122.

The Connecticut Supreme Court therefore affirmed the dismissal of the Connecticut Unfair Trade Practice Act (CUTPA) claims because "the harms suffered by the plaintiffs are derivative of those suffered by the various actors in between defendants and the plaintiffs," and the directly injured actors could "obtain compensation, and deter defendants." *Id.* at 124, 126; *see also id.* at 129-30. The court emphasized that without "the remoteness doctrine as a standing limitation," CUTPA would be rendered "virtually limitless," a result contrary to what "the legislature intended." *Id.* at 133-34; *see also, e.g., Conn. Med. Soc'y v. Oxford Health Plans (CT), Inc.*, 863 A.2d 645, 651 (Conn. 2005) (affirming dismissal because "derivative, or indirect, harms are not actionable" under CUTPA); *Steamfitters Local Union No. 614 Health & Welfare Fund v. Philip*

Morris, Inc., No. W1999-01061-COA-R9-CV, 2000 WL 1390171, at *7 (Tenn. Ct. App. Sept. 26, 2000) (dismissing Tennessee Consumer Protection Act claim because losses allegedly derived from harm to third parties are "too remote as a matter of law").

Accordingly, because Plaintiff alleges only derivative and remote injuries, she lacks standing to state a claim for relief under the Unfair Practices Act.

2. Plaintiff Alleges No Facts to Support Her Conclusory Allegation That Defendants Made Misrepresentations to Her

Second, the district court correctly concluded that Plaintiff alleges no facts to support her claim that MasterCard or Visa made false or misleading statements to her in violation of the Unfair Practices Act. (RP 491.) Plaintiff's complaint, like her brief on appeal, alleges only in a conclusory fashion that Defendants "knowingly made false or misleading representations to [p]laintiff as regards the cost to her and other consumers for the cost of the service provided." (RP 45; *see* Brief in Chief at 24-25.) Plaintiff identifies no communication between MasterCard or Visa and Plaintiff at all, much less any representations that were false or misleading. (*See id.*) Moreover, Plaintiff does not and cannot allege that she was a deceived purchaser of the debit card processing "service provided" to merchants. She claims injury only from her "cost" for the unrelated retail goods that she purchased from merchants.

New Mexico appellate courts routinely have rejected Unfair Practices Act claims as a matter of law where, as here, they lack the necessary predicate of a false or misleading statement by the defendant to the plaintiff. *See, e.g.*, *Stevenson v. Louis Dreyfuss Corp.*, 112 N.M. 97, 101, 811 P.2d 1308, 1312 (1991) (directing dismissal of Unfair Practices Act claim because "evidence was never presented that [defendant] knowingly made any false or misleading statement of any kind"); *Eckhardt v. Charter Hosp. of Albuquerque, Inc.*, 1998-NMCA-017, ¶ 61, 124 N.M. 549, 953 P.2d 722 ("[s]ince [p]laintiff failed to show that [defendant's] advertising was false or misleading in connection with the sale of its goods and services, she failed to establish a claim under the Unfair Practices Act"); *Parker v. E.I. DuPont de Nemours & Co.,* 121 N.M. 120, 133, 909 P.2d 1, 14 (Ct. App. 1995) (affirming summary judgment for defendant because plaintiffs made no "showing that [defendant] participated in the marketing or labeling of . . . or made any representations concerning the . . . implants" that allegedly injured plaintiffs). Plaintiff fails to state a claim under the Unfair Practices Act here for the same reason.

3. Plaintiff Alleges No Facts to Support Her Conclusory Allegation of Unconscionable Conduct

Third, the district court correctly concluded that Plaintiff alleges no factual basis for any unconscionable conduct from a gross disparity in value that could support a claim under the Unfair Practices Act. (RP 491.) Plaintiff simply offers

the conclusory allegation that the "tying" and other conduct of MasterCard and Visa "resulted in a gross disparity between the value received by plaintiff and the class as compared to the price paid." (RP 45; *see* Brief in Chief at 25.) Plaintiff makes no factual allegations that could establish that there was an "unconscionable" or "gross" disparity between the value that she received and the price she paid for a newspaper, a pack of gum, a lime, or any other particular purchase on which she claims to have been overcharged by merchants. (*See id.*) She makes no allegations at all concerning the value or specific prices that she paid for any such goods. (*See id.*) Moreover, she does not claim to have purchased anything from MasterCard or Visa at any price — "grossly" excessive or not. (*See id.*)

Furthermore, Plaintiff cannot legitimately assert that her defective Antitrust Act "tying" claim is an "unconscionable trade practice" under the Unfair Practices Act. Unlike the Antitrust Act, the Unfair Practices Act does not prohibit allegedly anticompetitive practices like "tying." *See* NMSA 1978, § 57-12-2(D), (E). Such a claim is therefore not actionable under the Act.

Appellate courts in other states with similar consumer protection statutes, which also prohibit deceptive or unconscionable practices but not unfair methods of competition, have rejected, as a matter of law, claims based on alleged anticompetitive conduct that was not actionable under the state's antitrust law.

See, e.g., *Bennett*, 198 S.W.3d at 753-55 (affirming holding that Tennessee Consumer Protection Act did not apply to parallel claims against MasterCard and Visa based on asserted "tying"); *Abbott Labs., Inc. v. Segura*, 907 S.W.2d 503, 507 (Tex. 1995) (Texas "forecloses the recovery of damages for seeking a prohibited antitrust recovery under the masquerade of our consumer protection statute"); *Johnson v. Microsoft Corp.,* 802 N.E. 2d 712, 719-21 (Ohio Ct. App. 2003) (dismissing flawed antitrust allegations under Ohio's Consumer Sales Practices Act because the Act does not prohibit unfair methods of competition). For the same reasons, Plaintiff cannot assert her defective Antitrust Act claim under the Unfair Practices Act.

C. The District Court Correctly Held That Plaintiff Fails To State A Claim For Unjust Enrichment Or Money Had And Received

Finally, Plaintiff asserts claims for unjust enrichment and money had and received. Both those theories of liability are based on the notion that a defendant should provide restitution of money obtained unjustly from the plaintiff. *See, e.g.*, *Hydro Conduit Corp. v. Kemble*, 110 N.M. 173, 175-76, 793 P.2d 855, 857-58 (1990); *Elgin v. Gross-Kelly & Co.*, 20 N.M. 450, 455, 150 P. 922, 923 (1915); *Tom Growney Equip., Inc. v. Ansley*, 119 N.M. 110, 112, 888 P.2d 992, 994 (Ct. App. 1994).

Because Plaintiff's Brief in Chief does not address those claims, it appears that Plaintiff concedes that they were correctly dismissed and has abandoned them

on appeal. *See, e.g., C&H Constr. & Paving Co. v. Citizens Bank*, 93 N.M. 150, 167, 597 P.2d 1190, 1207 (Ct. App. 1979) (when appellant "fails to argue that the trial court erred," it "is deemed to have abandoned its attack on the trial court's ruling concerning these issues"). In any event, the district court correctly dismissed those claims for several reasons.

First, the district court concluded that Plaintiff does not allege that she paid any monies to MasterCard or Visa because "[t]he alleged fees went to banks and there was no benefit to Defendants." (RP 491.) Plaintiff does not and cannot allege that she made any payment to MasterCard or Visa, as opposed to a payment to merchants for retail goods. (*See* RP 45-46.) Nor does Plaintiff claim that MasterCard or Visa received the purportedly excessive debit card processing fees that merchants paid. Plaintiff instead alleges that merchants paid those fees to the "acquirer" member banks of MasterCard and Visa. (*See* RP 8-9.)

New Mexico appellate courts repeatedly have held that there can be no claim for restitution under unjust enrichment or related theories when, as here, the plaintiff did not make any payment that benefited the defendants. *See, e.g., Toltec Int'l, Inc. v. Village of Ruidoso*, 95 N.M. 82, 84, 619 P.2d 186, 188 (1980) (reversing verdict for plaintiff and ordering dismissal when there was "no evidence of benefit to the [defendant]"); *Bowlin's, Inc. v. Ramsey Oil Co.*, 99 N.M. 660, 672, 662 P.2d 661, 673 (Ct. App. 1982) (when there was "no evidence that [the

intermediary's] unjust enrichment passed through to either of [the defendants] . . . there could have been no unjust enrichment theory upon which to impose liability upon [defendants]").

Second, the district court found that "[d]efendants retained no benefits due to the settlement of the merchant class action." (RP 491.) In those settlements, MasterCard and Visa agreed to provide payment to the merchants for their claims seeking *treble* the amount of the claimed overcharges under federal antitrust law. The federal district court held that the settlement amount was "fair, adequate, and reasonable" compensation for the merchants' claims, and the Second Circuit affirmed that on appeal. *In re Visa Check/MasterMoney Antitrust Litig.*, 297 F. Supp. 2d at 509-12, *aff'd*, 396 F.3d at 101. As appellate courts in the parallel consumer actions concluded, because of the settlements, MasterCard and Visa retain no unjust benefit from the asserted "tying." *See Kanne*, 723 N.W.2d at 303; *Bennett*, 198 S.W.3d at 757.

Finally, it has long been the case in common law, as well as antitrust and consumer protection law, that a plaintiff cannot obtain a recovery for derivative and remote injuries. As the United States Supreme Court has stated, "at common law, . . . a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover." *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S.

258, 268-69 (1992) (citation omitted); *see also S. Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918) ("[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step"). Courts thus routinely dismiss unjust enrichment claims that are based on allegedly derivative or remote injuries.[6] Indeed, that is exactly what the Iowa Supreme Court concluded in affirming the dismissal of the consumer-plaintiffs' parallel unjust enrichment claim, reasoning that "this common-law theory is subject to the common-law rule that bars recovery for remote injuries." *Southard*, 734 N.W.2d at 199.

IV. CONCLUSION

For the foregoing reasons, Defendants-Appellees respectfully request that this Court enter an order, pursuant to Rule 12-405 NMRA, affirming the district court's dismissal of Plaintiff's Class Action Complaint.

V. STATEMENT REGARDING ORAL ARGUMENT

Defendants-Appellees believe oral argument will assist the Court in disposing of this appeal and therefore request it.

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[6] *See, e.g., Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 917-18, 936-37 (3d Cir. 1999) (affirming dismissal of unjust enrichment claim "because of the remoteness of plaintiffs' injuries from defendants' wrongdoing"); *Ganim*, 780 A.2d at 119-20 (same); *Owens Corning v. R.J. Reynolds Tobacco Co.*, 868 So. 2d 331, 334-43 (Miss. 2004) (same).

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CERTIFICATE OF SERVICE

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