UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE	:	MDL No. 1409 M 21-95
CURRENCY CONVERSION FEE ANTITRUST LITIGATION	:	
THIS DOCUMENT RELATES TO:		
ROBERT ROSS et al.,	:	
		05 Civ. 7116 (WHP)
Plaintiffs,	:	
		MEMORANDUM AND ORDER
-against-	:	
BANK OF AMERICA, N.A. (USA) et al.,	:	
Defendants.	:	

WILLIAM H. PAULEY III, District Judge:

Plaintiffs bring this putative antitrust class action alleging that certain general purpose credit card issuers[1] conspired to include mandatory arbitration clauses in cardholder agreements in violation of the Sherman Act, 15 U.S.C. §1. Defendants now move to dismiss the Class Action Complaint pursuant to Rule 12(b)(1) for lack of Article III standing and Rule

[1] Plaintiffs bring their claims against Bank of America, N.A. (USA) ("Bank of America"), Capital One Bank, Capital One, F.S.B. (together with Capital One Bank, "Capital One"), J.P. Morgan Chase (prior to its merger with Bank One Corporation, which previously acquired First USA, Inc., "Chase"), Chase Bank USA, N.A., Citigroup, Inc., Citibank (South Dakota) N.A., Citibank USA, N.A., Universal Bank, N.A., Universal Financial Corp. (the Citigroup, Citibank and Universal entities are collectively referred to as "Citibank"), Citicorp Diners Club, Inc., HSBC Finance Corp., HSBC Bank, Nevada, N.A. (together with HSBC Finance Corp. and its predecessor Household International Inc., "Household"), MBNA America Bank, N.A., MBNA America (Delaware), N.A. (together with MBNA America Bank, N.A., "MBNA"), Providian Financial Corp., and Providian National Bank (together with Providian Financial Corp., "Providian") (collectively, the "Bank Defendants") and Novus Credit Services, Inc., Discover Financial Services and Discover Bank (collectively, "Discover" and together with the Bank Defendants, the "Defendants").

12(b)(6) for failure to establish antitrust standing. Alternatively, the Bank Defendants move for a stay of proceedings in favor of arbitration pursuant to Section 3 of the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 3. Finally, Plaintiffs move for a jury trial under Section 4 of the FAA, 9 U.S.C. § 4.

For the following reasons, Defendants' motion to dismiss for lack of Article III standing is granted. Because this Court lacks subject matter jurisdiction, the remaining motions are denied as moot.

BACKGROUND

Plaintiffs hold general purpose cards issued by one or more of the Defendants.[2] General purpose cards are payment devices that enable consumers to make purchases from unrelated merchants without accessing or reserving cardholders' funds at the time of the transaction. (Class Action Complaint, dated August 11, 2005 ("Complaint" or "Compl.") ¶ 88.) Plaintiffs allege that together with American Express Company and its subsidiaries ("American Express") and Wells Fargo & Company and its subsidiaries ("Wells Fargo"), Defendants dominate the general purpose card market. (Compl. ¶ 78.) At the close of 2004, these entities

[2] Familiarity with this Court's prior Memoranda and Orders in Ross v. American Express Co., No. 04 Civ. 5723 and In re Currency Conversion Fee Antitrust Litigation, MDL No. 1409 is presumed. See Ross v. American Express Co., No. 04 Civ. 5723, 2005 WL 2364969 (S.D.N.Y. Sept 27, 2005); In re Currency Conversion Fee Antitrust Litig., No. M 21-95, 2005 WL 3304605 (S.D.N.Y. Dec. 7, 2005) ("Currency Conversion VI"); In re Currency Conversion Fee Antitrust Litig., No. M 21-95, 2005 WL 1871012 (S.D.N.Y. Aug. 9, 2005) ("Currency Conversion V"); In re Currency Conversion Fee Antitrust Litig., 229 F.R.D. 57 (S.D.N.Y. 2005) ("Currency Conversion IV"); In re Currency Conversion Fee Antitrust Litig., 361 F. Supp. 2d 237 (S.D.N.Y. 2005) ("Currency Conversion III"); In re Currency Conversion Fee Antitrust Litig., 224 F.R.D. 555 (S.D.N.Y. 2004) ("Currency Conversion II"); In re Currency Conversion Fee Antitrust Litig., 265 F. Supp. 2d 385 (S.D.N.Y. 2003) ("Currency Conversion I").

had issued 89.2 percent of all general purpose cards and accounted for more than 86 percent of outstanding general purpose card receivables. (Compl. ¶ 78.)

Plaintiffs maintain that Defendants conspired with American Express and Wells Fargo to impose mandatory arbitration clauses in their cardholder agreements to eliminate class actions and other litigation. (Compl. ¶¶ 97, 112, 124.) Beginning in late 1998 or early 1999 through October 2003, Plaintiffs contend that Defendants, Wells Fargo and American Express met on several occasions to develop and implement their arbitration initiative. On May 25, 1999, at the Washington D.C. office of the firm now known as Wilmer, Cutler, Pickering Hale and Dorr LLP, First USA, American Express, Citigroup and Sears co-sponsored a meeting of senior in-house counsel for credit card companies. (Compl. ¶ 98.) Representatives of Capital One, Chase, Citibank, First USA, Household, Providian and American Express attended the meeting. (Compl. ¶ 99.) At that time, only Bank of America, First USA and American Express included arbitration clauses in their cardholder agreements and only the First USA and American Express provisions contained a class action waiver. (Compl. ¶ 100.) Following this meeting and subsequent discussions, Defendants formed "an organization uniquely devoted to collectively promoting and implementing mandatory arbitration clauses" known among participants as the "Arbitration Coalition." (Compl. ¶ 101.)

On July 28, 1999, representatives of Bank of America, Chase, Citibank, Discover, First USA, Household and American Express attended the first Arbitration Coalition meeting devoted to "sharing best practices and drafting enforceable arbitration clauses." (Compl. ¶ 103.) Representatives of these institutions met again on September 29, 1999, where they further discussed developing and adopting arbitration clauses, needing "to control class action litigation" and creating an arbitration clause template. (Compl. ¶¶ 106-08.) First USA shared the favorable

results it achieved working with the National Arbitration Forum ("NAF") as its arbitration administrator and its payment of more than $2 million in fees for NAF services since 1998. (Compl. ¶ 109.) Plaintiffs allege that while most Defendants list NAF among possible arbitration administrators in their arbitration provisions, MBNA, Discover and American Express currently name NAF as the only administrator in their clauses. (Compl. ¶ 109.) Following the September 1999 meeting, the Arbitration Coalition convened at least seventeen different times to plan the implementation of arbitration clauses in their cardholder agreements. (Compl. ¶¶ 111-12.)

In addition to the activities of the Arbitration Coalition, Plaintiffs contend that First USA, Capital One, Chase, Citibank, Household, MBNA, Providian, American Express and Wells Fargo formed a "Consumer Class Action Working Group." (Compl. ¶¶ 114-15.) This group met twice in 2001 to consider methods to deflect consumer class action litigation in light of the Federal Arbitration Act. (Compl. ¶¶ 114-15.) In-house counsel from these entities also created a separate "In-House Counsel Working Group" dedicated exclusively to concerns of credit card issuers. (Compl. ¶ 116.) Through this conduit, participating in-house counsel discussed arbitration issues and shared strategies on the implementation of compulsory provisions. (Compl. ¶¶ 116-17.) For example, at the March 19, 2002 meeting, the group addressed "methods of disclosing arbitration clauses in solicitations." (Compl. ¶117.)

Based on these allegations, Plaintiffs contend that Defendants participated in a conspiracy to suppress competition and impede access to the court system by incorporating compulsory arbitration clauses in their cardholder agreements. (Compl. ¶¶ 124, 152-54.) Plaintiffs allege three types of injury: (1) reduced choice and diminished quality of credit card services, (2) increased costs of credit card services attributable to dispute resolution expenses,

and (3) increased costs of credit card services attributable to violations of consumer protection antitrust statutes. (Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss, dated Dec. 19, 2005 ("Pls. Opp. Mem.") at 10.) Plaintiffs seek declaratory and injunctive relief for Defendants' alleged Sherman Act violations. (Compl. ¶¶ 150-63.)

DISCUSSION

"Determining that a matter before the federal courts is a proper case or controversy under Article III . . . assumes particular importance in ensuring that the Federal Judiciary respects the proper – and properly limited – role of the courts in a democratic society. . . . If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854, 1860-61 (2006); see also Denney, 443 F.3d at 263. It is well-established that "[i]f plaintiffs lack Article III standing, a court has no subject matter jurisdiction to hear their claim." Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C., 433 F.3d 181, 198 (2d Cir. 2005).

Article III standing is a threshold issue that must be decided before a merits determination such as antitrust standing. See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101-02 (1998) (Article III is an "antecedent question" to be resolved before determining contested issues of law.); Alliance for Envtl. Renewal, Inc. v. Pyramid Crossgates Co., 436 F.3d 82, 87-88 (2d Cir. 2006) (Article III standing must be decided before merits and statutory standing issues intertwined with merits.); see also Adamu v. Pfizer, Inc., 399 F. Supp. 2d 495, 500 (S.D.N.Y. 2005) ("A court presented with a motion to dismiss under both Rule 12(b)(1) and 12(b)(6) must decide the jurisdictional question first because a disposition of a Rule 12(b)(6)

motion is a decision on the merits, and therefore, an exercise of jurisdiction.") (internal quotation marks omitted).

On such a motion, all facts alleged in the complaint are taken as true and all reasonable inferences drawn in Plaintiffs' favor. Bldg. & Const. Trades Council of Buffalo, N.Y. & Vicinity v. Downtown Dev., Inc., 448 F.3d 138, 144 (2d Cir. 2006) ("Because standing is challenged on the basis of the pleadings, we accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.") (internal quotation marks omitted); Denney v. Deutsche Bank AG, 443 F.3d 253, 263 (2d Cir. 2006). Dismissal is appropriate only where Plaintiffs can prove no set of facts entitling them to relief. Raila v. United States, 355 F.3d 118, 119 (2d Cir. 2004) (12(b)(1) motion).

To establish standing under Article III, Plaintiffs must demonstrate: (1) an injury in fact that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) causation; and (3) it is likely, not speculative, that the injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992); Central States, 433 F.3d at 198; Ziemba v. Rell, 409 F.3d 553, 554-55 (2d Cir. 2005). Courts must determine whether these elements are satisfied, and thus whether jurisdiction is appropriate, based on the facts at the time the complaint is filed. Lujan, 504 U.S. at 569 n.4 (noting the Supreme Court's "longstanding rule that jurisdiction is to be assessed under the facts existing when the complaint is filed"). Further, "an injury that is only a byproduct of the suit itself does not mean that the injury is cognizable under [Article] III." Diamond v. Charles, 476 U.S. 54, 70-71 (1986); accord Vt. Agency of Nat. Res. v. U.S., 529 U.S. 765, 773 (2000) ("[A]n interest that is merely a 'byproduct' of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes.").

Defendants argue that because Plaintiffs' injury is not concrete, actual or imminent, Plaintiffs do not have standing to bring their claims. As discussed above, Plaintiffs assert they have sustained three types of injury resulting from Defendants' alleged conspiracy. As framed by Plaintiffs, however, these injuries are entirely speculative and, therefore, insufficient to establish Article III standing.

"An injury-in-fact must be 'distinct and palpable,' as opposed to 'abstract,' and the harm must be 'actual or imminent,' not 'conjectural or hypothetical.'" Denney, 443 F.3d at 264. Defendants argue that because Plaintiffs' claims rest on events that have not occurred and may never occur, Plaintiffs cannot establish a cognizable injury in fact under Article III. Specifically, Defendants maintain that the injury required to establish standing for Plaintiffs' to pursue their claims hinges on the occurrence of the following events: (1) conduct by Defendants giving rise to a claim; (2) Plaintiffs' commencement of an action in connection with such claim; and (3) Defendants' attempt to invoke applicable arbitration clauses to compel arbitration of the claim. (Transcript of Oral Argument on March 16, 2006 ("Tr.") at 8.) According to Defendants, until the arbitration clauses are invoked against Plaintiffs, they are dormant contract provisions incapable of creating the requisite Article III injury-in-fact. This Court agrees.

Plaintiffs' claims challenge arbitration clauses that were not invoked against them when they commenced this litigation. A plaintiff has no Article III standing to challenge an arbitration clause that has not been invoked because such a claim involves "contingent future events that may not occur as anticipated, or indeed may not occur at all." Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 580-581 (1985) (no standing to challenge arbitration clause not yet invoked); Bowen v. First Family Fin. Servs., Inc., 233 F.3d 1331, 1341 (11th Cir. 2000) ("In the absence of a substantial likelihood that the arbitration agreement will be enforced

against the plaintiffs, they lack standing to challenge its enforceability."); see also Barry v. Carnival Corp., 424 F. Supp. 2d 1354, 1358 (S.D. Fla. 2006) (no standing to challenge forum selection clause where injury stemming therefrom is neither actual nor imminent). Accordingly, Plaintiffs' attack is premature.

Plaintiffs' injuries are contingent on their speculation that someday (1) Defendants may engage in misconduct; (2) the parties will be unable to resolve their differences; (3) Plaintiffs may commence a lawsuit; (4) the dispute will remain unresolved; and (5) Defendants will seek to invoke arbitration provisions. Assuming each of the foregoing occurs, Plaintiffs argue that as a result of Defendants' conspiracy, they will be forced to engage in costly individual arbitrations. In addition, Plaintiffs invite this Court to assume, without offering any supporting facts, that Defendants are violating numerous unidentified consumer protection laws with impunity. This Court declines to meander through this labyrinth of assumptions. See Tamplenizza v. Josephthal & Co., 32 F. Supp. 2d 702, 704 (S.D.N.Y. 1999) (Pollack, J.) (declining to exercise subject matter jurisdiction to determine the validity of an arbitration agreement prior to the commencement of any lawsuit because it would require the court to make similar assumptions).

Plaintiffs' reliance on Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council, 857 F.2d 55, 63-65 (2d Cir. 1988) is misplaced. There, the Court of Appeals recognized in the antitrust context, "a rule that has yet to be enacted or enforced may be ripe for review if its mere proposal is likely to inhibit competition." Volvo N. Am. Corp., 857 F.2d at 64. The focus of the Court of Appeals' analysis was whether the challenged rules were "having a present anti-competitive effect." Volvo N. Am. Corp., 857 F.2d at 64 (finding only one of four rules sufficiently plead "a real impact on present affairs"). In contrast to Volvo, Plaintiffs allege only

future anti-competitive effects including the deprivation of meaningful choice in dispute resolution alternatives and insulation from liability for hypothetical consumer protection violations. (Compl. ¶¶ 127, 131-32.) But these alleged anticompetitive effects are inchoate. Because Plaintiffs have failed to plead how the dormant arbitration clauses have any "real impact on present affairs," their antitrust claims do not present a ripe case or controversy under Article III.

Accordingly, this Court finds that Plaintiffs have not met their burden of establishing an injury-in-fact sufficient to support Article III standing. Because subject matter jurisdiction is inappropriate, this Court cannot consider the issues raised by the remaining motions. See DaimlerChrysler Corp., 126 S. Ct. at 1860-61; Denney, 443 F.3d at 263.

CONCLUSION

For the foregoing reasons, Defendants' motions to dismiss the Class Action Complaint for lack of Article III standing are granted. Because subject matter jurisdiction is inappropriate, Defendants' Rule 12(b)(6) motions to dismiss for lack of antitrust standing, the Bank Defendants' motion for a stay of proceedings under Section 3 of the FAA and Plaintiffs' motion for a jury trial pursuant to Section 4 of the FAA are denied as moot.

The Clerk of Court is directed to mark this case closed.

Dated: September 20, 2006
New York, New York

SO ORDERED:

WILLIAM H. PAULEY III
U.S.D.J.

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