AMENDED THIS June 22, 2016 PURSUANT TO
MODIFIÉ CE CONFORMÉMENT À
☒ RULE/LA RÈGLE 26.02 (a)
☐ THE ORDER OF
L'ORDONNANCE DU
DATED / FAIT LE
(m Brenton)
REGISTRAR GREFFIER
SUPERIOR COURT OF JUSTICE COUR SUPÉRIEURE DE JUSTICE

Court File No. CV-11-426591

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

JONATHON BANCROFT-SNELL and 1739793 ONTARIO INC.

Plaintiffs

- and -

VISA CANADA CORPORATION, MASTERCARD INTERNATIONAL INCORPORATED, BANK OF AMERICA CORPORATION, BANK OF MONTREAL, BANK OF NOVA SCOTIA, CANADIAN IMPERIAL BANK OF COMMERCE, CAPITAL ONE FINANCIAL CORPORATION, CITIGROUP INC., FEDERATION DES CASSES DESJARDINS DU QUEBEC, NATIONAL BANK OF CANADA INC., ROYAL BANK OF CANADA, and TORONTO DOMINION BANK

Defendants

Proceedings Under the *Class Proceedings Act, 1992*

FRESH AS AMENDED STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiffs. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiffs' lawyer or, where the plaintiffs do not have a lawyer, serve it on the plaintiffs, and file it, with proof of service in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: May 16, 2011 Issued by N. Gathi

Local registrar

393 University Avenue
10th Floor
Toronto ON M5G 1E6

TO: Visa Canada Corporation
900-1959 Upper Water Street
Halifax, NS B3J 2X2

AND TO: MasterCard International Incorporated
200 Purchase Street
Purchase, NY 10577
USA

AND TO: Bank of America Corporation
101 South Tryon Street
Charlotte, NC 28255
USA

AND TO: Bank of Montreal
Corporate Secretary's Department
100 King Street West
1 First Canadian Place, 19th Floor
Toronto, ON M5X 1A1
Tel: 416-867-6785

AND TO: Bank of Nova Scotia
Scotia Plaza
44 King Street West
Toronto, ON M5H 1H1

AND TO: Canadian Imperial Bank of Commerce
Commerce Court
Toronto, ON M5L 1G2

AND TO: Capital One Financial Corporation
1680 Capital One Drive
McLean, VA 22102
USA

AND TO: Citigroup Inc.
399 Park Avenue
New York, NY 10043
USA

AND TO: Fédération des caisses Desjardins du Québec
2 Complexe Desjardins
PO Box 9000, Desjardins Station
Montreal, PQ H5B 1H5

AND TO: National Bank of Canada Inc.
600 de la Gauchetiere St W
Montreal, PQ H3B 4L2

AND TO: Royal Bank of Canada
200 Bay Street
Toronto, ON M5J 2J5

AND TO: Toronto-Dominion Bank
PO Box 1
Toronto Dominion Centre
Toronto, ON M5K 1A2

CLAIM

1. The plaintiffs, on their own behalf, and on behalf of the Visa and MasterCard Class Members (as defined in paragraphs 17 and 18 below), claims against the defendants:

   (a) a declaration that the defendants, and each of them, participated in conspiracies to impose and maintain the Network Rules and in particular the Default Interchange Rule and the Merchant Restraints during the Class Period, and to raise, maintain, fix or stabilize the rates of Merchant Discounts by raising, maintaining, fixing or stabilizing Interchange Fees, in violation of statutory, common law, and equitable laws as alleged in this claim;

   (b) an order certifying this action as a class proceeding against Visa, CIBC, Desjardins, RBC, Scotiabank, and TD, and appointing the plaintiffs as representative plaintiffs in respect of the Visa Class Members;

   (c) an order certifying this action as a class proceeding against MasterCard, BMO, Capital One, CIBC, Citi, MBNA, National, and RBC, and appointing the plaintiffs as representative plaintiffs in respect of the MasterCard Class Members;

   (d) general damages in the amount of $5,000,000,000.00 for:

      (i) conspiracy and unlawful interference with economic interests; and

      (ii) conduct that is contrary to Part VI of the *Competition Act*, RS 1985, c 19 (2nd Suppl) ("*Competition Act*");

   (e) an injunction enjoining the defendants from conspiring or agreeing with each other, or others, to impose the Network Rules;

   (f) an injunction enjoining the defendants from conspiring or agreeing with each other, or others, to raise, maintain, fix and/or stabilize the rates of Interchange Fees;

(g) punitive damages;

(h) costs of investigation and prosecution of this proceeding pursuant to s 36 of the *Competition Act*;

(i) pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*, RSO 1990 c 43 s 127; and

(j) such further and other relief as to this Honourable Court may seem just.

STATEMENT OF FACTS

The Representative Plaintiffs

2. The plaintiff, Jonathon Bancroft-Snell, is a resident of London, Ontario, and a merchant who has accepted payments by Visa credit cards and MasterCard credit cards during the proposed Class Period. In 2007, Mr. Bancroft-Snell incorporated his business as 1739793 Ontario Inc.

3. The plaintiff, 1739793 Ontario Inc., is an Ontario corporation based in London, Ontario that has accepted payments by Visa credit cards and MasterCard credit cards during the proposed Class Period.

The Defendants

4. The defendant Visa Canada Corporation ("Visa") is a Nova Scotia incorporated company that is a subsidiary of Visa Inc. During the Class Period, Visa operated the Visa credit card network throughout Canada, including Ontario.

5. The defendant MasterCard International Incorporated ("MasterCard") is incorporated under the laws of the State of Delaware, USA, and is a subsidiary of MasterCard Incorporated, a publicly traded corporation under the laws of the State of Delaware, USA. During the Class Period, MasterCard operated the MasterCard credit card network throughout Canada, including Ontario.

6. The defendant Bank of America Corporation ("MBNA") is a publicly traded corporation under the laws of the State of Delaware, USA, doing business in

Canada as MBNA Bank Canada. During the Class Period, MBNA issued MasterCard-branded credit cards throughout Canada, including Ontario. MBNA sold its Canadian credit card issuing business to the defendant Toronto-Dominion Bank.

7. The defendant Bank of Montreal ("BMO") is a chartered bank incorporated pursuant to the *Bank Act*, SC 1991 c 46 (the "*Bank Act*"). During the Class Period, BMO issued MasterCard-branded credit cards throughout Canada, including Ontario. During the Class Period, BMO was, along with the Royal Bank of Canada, one of the joint investors behind Moneris Solutions Inc. ("Moneris"), one of the leading Acquirers (as defined in paragraph 21 below) in Canada.

8. The defendant Bank of Nova Scotia ("Scotiabank") is a chartered bank incorporated pursuant to the *Bank Act*. During the Class Period, Scotiabank issued Visa-branded credit cards throughout Canada, including Ontario.

9. The defendant Canadian Imperial Bank of Commerce ("CIBC") is a chartered bank incorporated pursuant to the *Bank Act*. During the Class Period, CIBC issued both Visa- and MasterCard-branded credit cards throughout Canada, including Ontario. During the Class Period, CIBC had a marketing alliance with Global Payments Inc. ("Global").

10. The defendant Capital One Financial Corporation ("Capital One") is a publicly traded corporation under the laws of the State of Delaware, USA. During the Class Period, Capital One issued MasterCard-branded credit cards throughout Canada, including Ontario.

11. The defendant Citigroup Inc. ("Citi") is a publicly traded corporation under the laws of the State of Delaware, USA. During the Class Period, Citi issued MasterCard-branded credit cards throughout Canada, including Ontario.

12. The defendant Fédération des caisses Desjardins du Québec ("Desjardins") is an organization overseeing the Desjardin Group, including its *caisses populaires* and credit unions. During the Class Period, Desjardins issued Visa-branded

credit cards throughout Canada, including Ontario. During the Class Period, Desjardins owned and operated one of the leading Acquirers in Canada.

13. The defendant National Bank of Canada Inc. ("National") is a chartered bank incorporated pursuant to the *Bank Act*. During the Class Period, National issued MasterCard-branded credit cards throughout Canada, including Ontario. During the Class Period, National had a marketing alliance with Global.

14. The defendant Royal Bank of Canada ("RBC") is a chartered bank incorporated pursuant to the *Bank Act*. During the Class Period, RBC issued both Visa and MasterCard-branded credit cards throughout Canada, including Ontario. During the Class Period, RBC was, along with BMO, one of the joint investors behind Moneris.

15. The defendant Toronto-Dominion Bank ("TD") is a chartered bank incorporated pursuant to the *Bank Act*. During the Class Period, TD issued Visa-branded credit cards throughout Canada, including Ontario. During the Class Period, TD owned and operated TD Merchant Services, one of the leading Acquirers in Canada. In or about August 2011, TD purchased MBNA's Canadian credit card issuing business.

16. Collectively, BMO, Capital One, Citi, Desjardins, CIBC, MBNA, National, RBC, Scotiabank, and TD are known as the "Defendant Banks".

The Classes and the Class Period

17. This action is brought on behalf of members of a class of merchants (the "Visa Class Members") consisting of the plaintiffs and all Canadian resident persons, who, during some of all of the period commencing at least as early as May 16, 2001 and continuing through to the present, or other such class period as the Court may decide at the motion for certification (the "Class Period"), accepted payments for the supply of goods and services by way of Visa credit cards pursuant to the terms of merchant agreements, or such other class definition as the Court may ultimately decide on the motion for certification.

18. This action is brought on behalf of members of a further class of merchants (the "MasterCard Class Members") consisting of the plaintiffs and all Canadian resident persons who, during some or all of the Class Period, accepted payments for the supply of goods and services by way of MasterCard credit cards pursuant to the terms of merchant agreements or such other class definition as the Court may ultimately decide on the motion for certification.

Factual background to the credit card industry

19. The defendants Visa and MasterCard operate the two largest credit card networks in Canada, including in Ontario. In 2009, Visa had approximately 31 million credits cards in circulation and MasterCard had approximately 44 million. In 2009, approximately 670,000 merchants across Canada accepted Visa or MasterCard credit cards. In 2009, the Canadian credit card market had $265 billion in purchase transactions. Visa's share of these transactions was approximately 60% and MasterCard's share approximately 30%.

20. There are significant barriers to entry in the credit card network services market. There have been no significant new entrants in the market for credit card network services over the past 20 years.

21. Each credit card network involves contracts with issuing banks that are authorized by the defendants to issue credit cards to consumers bearing the trademarks Visa and/or MasterCard ("Issuing Banks") and acquiring financial institutions that function as payment processors to merchants, including Moneris Solutions, TD Merchant Services, Global Payments, Peoples Trust, First Data, Elavon, Desjardins, and Chase Paymentech Solutions ("Acquirers"). The Defendant Banks are all Issuing Banks. Some of the defendant banks are also Acquirers, or have an ownership interest in Acquirers.

22. There are five participants in each credit card network:

    (a) the Issuing Banks that issue credit cards to cardholders;

    (b) the networks (Visa and MasterCard);

(c) the Acquirers that enter into arrangements with merchants that permit the merchants to accept various Visa and/or MasterCard credit cards and receive payment for goods and services provided to cardholders;

(d) the merchants who accept Visa and/or MasterCard credit cards; and

(e) the cardholders.

23. Within each credit card network, the Issuing Banks compete with each other with respect to issuing credit cards to cardholders, and but for the alleged conspiracy, the Issuing Banks would compete with each other with respect to merchants by reducing Interchange Fees in order to increase and maintain their merchant market share. The Default Interchange Rule and the Merchant Restraints, as described below, eliminate competition among the Issuing Banks in relation to Interchange Fees and allow the Issuing Banks to profit from *supracompetitive* Interchange Fees.

24. The credit card network services market is characterized by contractual relationships among and between Visa, its Issuing Banks, and the Acquirers, and among and between MasterCard, its Issuing Banks, and the Acquirers, giving each credit card network market power in the Canadian market for credit card network services.

25. Credit card network services are supplied to merchants by the networks, the Issuing Banks, and the Acquirers. The networks provide the network infrastructure, the Issuing Banks provide the credit card and access to consumers, and the Acquirers provide point of sale services.

26. The agreements and contractual relationships that govern the Visa and MasterCard credit card networks constitute two separate but interrelated conspiracies in operation by way of contracts which are among and between:

(a) the Visa network and its member banks (which are Issuing Banks and Acquirers); and

(b) the MasterCard network and its member banks (which are Issuing Banks and Acquirers).

27. In essence, the Visa and MasterCard networks are organizations that facilitate credit and debit card transactions. They do so by setting standards for the exchange of transaction data and funds among merchants, Issuing Banks, and Acquirers. The networks also provide authorization, clearance and settlement services for all Visa and MasterCard branded payment card transactions.

28. Certain Issuing Banks, such as the defendants CIBC, Desjardins, TD and RBC, and all Acquirers participate in both credit card networks. Certain Issuing Banks, including the defendants BMO, Desjardins, RBC, and TD, are also Acquirers or own large stakes in Acquirers, and in some cases control the operations of those Acquirers. TD and Desjardins are both Issuing Banks and Acquirers. BMO and RBC own and control Moneris as partners in a joint venture. CIBC and National have marketing alliances with Global.

29. In order to accept payments by Visa or MasterCard credit cards, a merchant must enter into an agreement with an Acquirer. Pursuant to Visa and MasterCard rules these agreements include standard terms and conditions that are required to be in each contract between a merchant and an Acquirer. These agreements are required to incorporate the terms of the Visa International Operating Regulations (the "Visa Rules") and the MasterCard International MasterCard Rules (the "MasterCard Rules") (collectively the "Network Rules").

30. Visa and MasterCard were founded as joint ventures of competing banks. Acting through the then-joint-venture networks, the Issuing Banks set the terms of contracts among themselves and to be imposed on merchants, including the Visa Rules, the MasterCard Rules, the Merchant Restraints and the levels of Interchange Fees, and including the requirement that each Acquirer require each card-accepting merchant to abide by the Network Rules.

31. In response to competition litigation in the United States and Europe, first MasterCard then Visa conducted Initial Public Offerings ("IPOs"), in a failed attempt to exempt the Interchange Fees and Network Rules that were agreed to

by the banks from competition laws in Canada, the United States, Europe, and other jurisdictions.

32. Despite the IPOs, however, the Network Rules remain essentially unchanged and the Issuing Banks continued to use Visa and MasterCard to enforce the pre-existing agreements to impose and maintain Interchange Fees and the Network Rules. The Issuing Banks and the networks knew and understood that each member of the relevant network would continue to adhere to the unlawful agreements to impose and maintain Interchange Fees and the Network Rules both before and after the IPOs. At no time after the IPOs have the Issuing Banks or the networks taken affirmative action to withdraw from the relevant agreements or end their acceptance of benefits, primarily *supracompetitive* Interchange Fees, under the agreements.

33. Every time a cardholder customer uses a Visa or MasterCard credit card to pay a merchant for a good or service, that merchant must pay a fee, commonly referred to as a "Merchant Discount". The Merchant Discount is calculated as a percentage of the sale price of the good or service supplied. The Merchant Discount is the difference between the price a merchant charges for a good or service and the amount that is paid to the merchant by the Acquirer. In 2009, merchants in Canada paid approximately $5 billion in Merchant Discounts.

34. The Merchant Discount is divided into three parts: the “Interchange Fee” paid to the Issuing Bank associated with the cardholder customer’s particular Visa or MasterCard credit card, the “Service Fee” retained by the Acquirer and “Network Fees” paid to either Visa or MasterCard. The Interchange Fee is typically 80% of the Merchant Discount.

35. During the Class Period, the Issuing Banks, along with the relevant network with whom the Issuing Bank was associated, and the associated Acquirers with the relevant Networks, agreed and did set default rates for the calculation of Interchange Fees for use by Acquirers and Issuing Banks within their respective credit card networks (the “Default Interchange Fees”). Typically, the Default Interchange Fees are set as a percentage of the price of the good or service

supplied. The Visa Rules and the MasterCard Rules require that the Default Interchange Fees be paid absent a specific agreement as between the Issuers and Acquirers establishing different Interchange Fees (the "Default Interchange Rule"). As a result, the Default Interchange Fees applied to virtually all purchase transactions within the Visa and MasterCard credit card networks.

36. Interchange Fees vary from card to card depending on the services and incentives bundled with the credit card. Premium credit cards that offer consumers additional incentives such as reward points typically carry a higher Interchange Fee. Merchants are not made aware of the Interchange Fee that will apply to any particular purchase with any particular card until the Acquirer reimburses or invoices the merchant.

37. Visa and MasterCard, their respective Issuing Banks and Acquirers agreed and set their Interchange Fees as prices to merchants, not Acquirers. Interchange Fees are structured to impose different rates on different types of merchants. For instance, Interchange Fees on grocery store and gas station transactions are lower than Interchange Fees on most other retailers. The defendants' market power gives them the ability to price discriminate in this manner.

38. Despite increases to the cost to merchants of accepting Visa and MasterCard credit cards, the defendants' market power is such that the number of merchants who accept Visa and MasterCard credit cards has not decreased.

39. By enforcing adherence to the Visa Rules and the MasterCard Rules, the defendants, through the Visa network and MasterCard network have created agreements or arrangements that impose significant restrictions on the terms upon which credit card network services are provided to merchants. Both the Visa Rules and the MasterCard Rules impose substantially the same restraints, including:

    (a) the Default Interchange Rule;

    (b) the requirements that merchants must honour all credit cards of the same network (the "Honour All Cards Rule");

(c) the requirement that merchants must not impose surcharges on purchases made using any credit card of the same network, regardless of the Merchant Discount, and in particular the Interchange Fee, associated with use of a particular credit card (the "No Surcharge Rule"); and

(d) the requirement that merchants must not make it more difficult to pay by MasterCard credit cards, or offer preferential treatment for paying by any particular method (the "No Discrimination Rule").

40. The Honour All Cards Rule, the No Surcharge Rule and the No Discrimination Rule are collectively referred to as the "Merchant Restraints".

41. The Merchant Restraints and Interchange Fees create a phenomenon known as the "holdup problem." Network Rules include an "Honour All Cards" Rule that requires any merchant that accepts Visa or MasterCard payment cards to accept all cards bearing that network's marks. The Network Rules further require that—in the absence of a bilateral agreement between an Issuer, Acquirer, and Merchant—an Interchange Fee at the default level established by the network be applied to the transaction. However, because the merchant must accept the transaction, the Issuing Bank has no incentive to offer an Interchange Fee at anything other than the default level (and in fact it is extremely rare for transactions to clear at anything other than the default rate). The Network Rules further perpetuate the holdup problem by preventing merchants from passing on the Interchange Fee to cardholders via a surcharge. But for the Network Rules, merchants could attempt to influence cardholder choice of payment form at the point of sale, which in turn would give the Issuing Banks an incentive to offer merchants more competitive Interchange Fees.

42. Through this process, the Issuing Banks artificially inflate Interchange Fees, which in turn inflates the Merchant Discount and decreases the amount of each transaction that is retained by the merchant. But for the agreements among Issuing Banks as to the Network Rules and Interchange Fees—which continue to exist as agreements between Visa or MasterCard, Issuers, and Acquirers, Issuing Banks would compete on the level of Interchange Fees offered to

merchants. If Issuing Banks competed amongst themselves on the level of Interchange Fees offered to merchants, the merchants would benefit in the form of lower Interchange Fees and Merchant Discounts.

43. Acquirers are contractually obliged to enforce the Network Rules against merchants, including the Default Interchange Rule and the Merchant Restraints.

44. The Merchant Restraints prevent merchants from effectively encouraging cardholder customers to use lower-cost methods of payment, and from declining to accept certain Visa and MasterCard credit cards, including credit cards with higher Interchange Fees, such as premium cards. The Merchant Restraints prevent merchants from applying surcharges to payments made by Visa and MasterCard credit cards as compared to other modes of payment such as cash and debit cards. The effect of the Merchant Restraints is to impede or constrain competition for credit card network services, including competition between Issuing Banks with respect to Interchange Fees.

45. As a consequence of the Merchant Restraints, consumers pay the same prices to merchants for goods and services supplied by merchants regardless of mode of payment, despite the higher cost to merchants of Visa and MasterCard credit card transactions.

46. While the Merchant Restraints eliminate or neutralize advantages offered by lower-cost methods of payment, the structure of the Visa and MasterCard credit card network schemes allows Issuing Banks to create powerful incentives for cardholders to use Visa or MasterCard credit cards for as many transactions as possible. Issuing Banks bundle credit cards with various consumer features such as rewards and points for each dollar spent on premium credit cards.

47. The effect of the Merchant Restraints is that in Canada, Interchange Fees are far in excess of similar fees in other jurisdictions where the Default Interchange Rule and Merchant Restraints are not applied or are applied differently.

48. In the typical Visa or MasterCard transaction, funds flow from the Issuing Bank through the Acquirer to the merchant. As part of this process, the Interchange

Fee is deducted by the Acquirer along with the other components of the Merchant Discount. The calculation of the Merchant Discount incorporates the Interchange Fee and Network Fee. The invariable result is that the merchant pays the Merchant Discount and in particular the Interchange Fee, whether by way of a separate payment or a deduction from the amount paid through the Acquirer with whom the merchant has contracted. During the Class Period, the allocation of the Merchant Discount into Interchange Fee, Network Fee, and Service Fee was not disclosed to merchants.

49. Visa, MasterCard, the Issuing Banks, and the Acquirers seek to maximize the aggregate Interchange Fees paid by the Visa and MasterCard Class Members through to the Issuing Banks.

50. Under the Visa and MasterCard Rules, Acquirers are prohibited from suing Visa, MasterCard, or Issuing Banks over the level of Interchange Fees or any other matter.

51. Issuing Banks bundle credit cards with various promotional features, such as rewards and points. By maintaining Interchange Fees at an artificially high level, Visa and MasterCard Class Members effectively pay some or all of the costs of these features, essentially subsidizing the Issuing Banks' promotional schemes.

52. The structure of the Visa and MasterCard credit card network schemes allows Issuing Banks to create powerful incentives for cardholder customers to use Visa or MasterCard credit cards for as many transactions as possible, offering reward points for each dollar spent on premium credit cards.

53. The Merchant Restraints in turn allow Issuing Banks to offload the cost of these promotional schemes onto merchants, who must choose to accept whatever fees are charged, or not accept credit cards at all. The Honour All Cards Rule forces merchants to accept any and all Visa and MasterCard credit cards, no matter how high the fees for using that particular card. The No Surcharge Rule prevents merchants from passing this additional expense along to cardholder customers who pay with premium credit cards.

54. The result of the Default Interchange Rule and Merchant Restraints is to cause Interchange Fees to be increased or maintained at *supracompetitive* levels by restricting the competitive pressures that would drive lower Interchange Fees. The operation of the Visa and MasterCard credit card network schemes by the Defendants are intended to maximize, increase, and maintain the total Merchant Discounts, including Interchange Fees, paid by merchants, including the Visa Class Members and MasterCard Class Members.

The Visa Conspiracy

55. Various Issuing Banks, including the defendants CIBC, Desjardins, RBC, Scotiabank, and TD, along with others not named as defendants, participated as co-conspirators in the alleged unlawful conduct and entered into anti-competitive agreements, including agreements with Visa, each other, and other Issuing Banks regarding the rates of Interchange Fees paid to Issuing Banks by Acquirers within the Visa credit card network. Visa, CIBC, Desjardins, RBC, Scotiabank, and TD are jointly and severally liable for the actions of, and damages allocable to, each other and the other co-conspirator Issuing Banks.

56. Various Acquirers, including Acquirers not named as defendants or owned or controlled by defendants, participated as co-conspirators in the alleged unlawful conduct and entered into anti-competitive agreements, including agreements with each other, Visa, and the Issuing Banks. Pursuant to these agreements, the Acquirers entered into merchant agreements with merchants across Canada, including the Visa Class Members, which imposed standard anti-competitive terms and conditions, including the Network Rules and the Merchant Restraints. The agreements resulted in the imposition of *supracompetitive* Merchant Discount rates by the establishment and imposition of *supracompetitive* Interchange Fees paid by the Visa Class Members. Visa, CIBC, Desjardins, RBC, Scotiabank, and TD are jointly and severally liable for the actions of, and damages allocable to, the co-conspirator Acquirers. These co-conspirator Acquirers include, without limitation, Moneris Solutions, TD Merchant Services, Global Payments, Peoples Trust, First Data, Elavon, Desjardins, and Chase Paymentech Solutions. Defendants who are Issuing Banks and also own,

operate, or control Acquirers, being Desjardins, RBC, and TD, participated in the conspiracy in both capacities.

57. During the Class Period, senior executives and employees of Visa, CIBC, Desjardins, RBC, Scotiabank, and TD and other co-conspirators, acting in their capacities as agents for the defendants and co-conspirators, engaged in communications, conversations and attended meetings with each other. As a result of the communications and meetings, and through the imposition of the Visa Rules, Visa, CIBC, Desjardins, RBC, Scotiabank, and TD and their co-conspirators unlawfully conspired or agreed to:

(a) impose the Default Interchange Rule, Merchant Restraints and other restraints set out in the Visa Rules on merchants including the Visa Class Members and thereby unreasonably increase Interchange Fees which formed part of the Merchant Discounts paid by merchants, including the Visa Class Members, for payments made using Visa credit cards in Canada including Ontario;

(b) fix, maintain, increase or control the rates of Interchange Fees in Canada including Ontario;

(c) exchange information in order to monitor and enforce adherence to the agreed upon Default Interchange Rule, Merchant Restraints and other restraints set out in the Visa Rules, in Canada including Ontario; and

(d) control the supply of credit card network services in Canada including Ontario.

58. In furtherance of the conspiracy, during the Class Period, Visa, CIBC, Desjardins, RBC, Scotiabank, and TD, their co-conspirators, and their servants and agents:

(a) increased or maintained the default rates Interchange Fees, in Canada, including Ontario;

(b) controlled the supply of credit card services by imposing the Visa Rules including the Default Interchange Rule and the Merchant Restraints on merchants in Canada, including in Ontario;

(c) imposed the Visa Rules, including the Default Interchange Rule and the Merchant Restraints on merchants in Canada, including Ontario;

(d) communicated, in person and by telephone, to discuss and fix the Default Interchange Fees in Canada, including Ontario;

(e) exchanged information regarding the rates for Interchange Fees and the volume of transactions using Visa credit cards for the purposes of monitoring and enforcing adherence to the agreed upon Merchant Restraints;

(f) took active steps to, and did, conceal the rates of the constituent elements of Merchant Discounts from all merchants; and

(g) disciplined any Acquirer which failed to impose the Default Interchange Rule or enforce the Merchant Restraints or any merchant which failed to comply with the Merchant Restraints.

59. Visa, CIBC, Desjardins, RBC, Scotiabank, and TD and their co-conspirators were motivated to conspire and their predominant purposes and predominant concerns were to: harm the plaintiffs and other Visa Class Members by requiring them to pay *supracompetitive* rates for Interchange Fees, which formed a part of the Merchant Discounts. The acts alleged in this claim to have been done by Visa, CIBC, Desjardins, RBC, Scotiabank, and TD were authorized, ordered, and done by the respective officers, directors, agents, employees or representatives of each while engaged in the management, direction, control or transaction of its business affairs.

The MasterCard Conspiracy

60. Various Issuing Banks, including the defendants BMO, Capital One, CIBC, Citi, MBNA, National, and RBC, along with others not named as defendants,

participated as co-conspirators in the alleged unlawful conduct and entered into anti-competitive agreements, including agreements with MasterCard, each other, and other Issuing Banks regarding the rates of Interchange Fees paid to Issuing Banks by Acquirers within the MasterCard credit card network. MasterCard, BMO, Capital One, CIBC, Citi, MBNA, National, and RBC are jointly and severally liable for the actions of, and damages allocable to, each other and the other co-conspirator Issuing Banks.

61. Various Acquirers, including Acquirers not named as defendants or owned or controlled by defendants, participated as co-conspirators in the alleged unlawful conduct and entered into anti-competitive agreements, including agreements with MasterCard, each other, and the Issuing Banks. Pursuant to these agreements, the Acquirers entered into merchant agreements with merchants across Canada, including the MasterCard Class Members, which imposed standard anti-competitive terms and conditions, including the Network Rules and the Merchant Restraints. The agreements resulted in the imposition of *supracompetitive* rates for Merchant Discounts paid by the MasterCard Class Members. MasterCard, BMO, Capital One, CIBC, Citi, MBNA, National, and RBC are jointly and severally liable for the actions of, and damages allocable to, the co-conspirator Acquirers. These co-conspirator Acquirers include, without limitation, Moneris Solutions, TD Merchant Services, Global Payments, Peoples Trust, First Data, Elavon, Desjardins and Chase Paymentech Solutions. Defendants who are Issuing Banks and also own, operate, or control Acquirers, being BMO, Desjardins, RBC, and TD, participated in the conspiracy in both those capacities.

62. During the Class Period, senior executives and employees of MasterCard, BMO, Capital One, CIBC, Citi, MBNA, National, RBC, and their co-conspirators, acting in their capacities as agents for MasterCard and the co-conspirators, engaged in communications, conversations and attended meetings with each other. As a result of the communications and meetings MasterCard and the co-conspirators unlawfully conspired or agreed to:

(a) impose the Default Interchange Rule, Merchant Restraints and other restraints set out in the MasterCard Rules on merchants, including the

MasterCard Class Members, and thereby unreasonably increase the rates Interchange Fees, which formed part of the Merchant Discounts paid by merchants, including the MasterCard Class Members, for payments made using MasterCard credit cards in Canada including Ontario;

(b) fix, maintain, increase or control the rates of Interchange Fees in Canada including Ontario;

(c) exchange information in order to monitor and enforce adherence to the agreed upon Default Interchange Rule, Merchant Restraints and other restraints set out in the MasterCard Rules in Canada including Ontario; and

(d) control the supply of credit card network services in Canada including in Ontario.

63. In furtherance of the conspiracy, during the Class Period, MasterCard, BMO, Capital One, CIBC, Citi, MBNA, National, RBC, and their co-conspirators and their servants and agents:

(a) increased or maintained the default rates Interchange Fees, in Canada, including Ontario;

(b) controlled the supply of credit card services by imposing the MasterCard Rules including the Default Interchange Rule and the Merchant Restraints on merchants in Canada, including in Ontario;

(c) imposed the Default Interchange Rule, Merchant Restraints and other restraints set out in the MasterCard Rules on merchants in Canada, including Ontario;

(d) communicated, in person and by telephone, to discuss and fix the Default Interchange Fees in Canada, including Ontario;

(e) exchanged information regarding the rates for Interchange Fees and the volume of transactions using MasterCard credit cards for the purposes of

monitoring and enforcing adherence to the agreed upon Merchant Restraints;

(f) took active steps to, and did, conceal the rates of the constituent elements of Merchant Discounts from all merchants; and

(g) disciplined any Acquirer which failed to impose the Default Interchange Rule or enforce the Merchant Restraints or any merchant which failed to comply with the Merchant Restraints.

64. MasterCard, BMO, Capital One, CIBC, Citi, MBNA, National, and RBC, and their co-conspirators were motivated to conspire and their predominant purposes and predominant concerns were to harm the plaintiffs and other MasterCard Class Members by requiring them to pay *supracompetitive* rates for Interchange Fees, which formed a part of the Merchant Discount.The acts alleged in this claim to have been done by MasterCard, BMO, Capital One, CIBC, Citi, MBNA, National, and RBC were authorized, ordered, and done by their respective officers, directors, agents, employees or representatives of each while engaged in the management, direction, control or transaction of its business affairs.

CAUSES OF ACTION

Civil Conspiracy

65. As described in paragraph 66-71below, the acts particularized in paragraphs 55-64 were unlawful acts directed towards the plaintiffs and other Visa and MasterCard Class Members, which unlawful acts the defendants knew in the circumstances would likely cause injury to the plaintiffs and other Visa and MasterCard Class Members and, as such, the defendants are each jointly and severably liable for the tort of civil conspiracy. Further, or alternatively, the predominant purpose of the acts particularized in paragraphs 55-64 was to injure the plaintiffs and the other Visa and MasterCard Class Members and the defendants are jointly and severally liable for the tort of civil conspiracy.

Breach of the Competition Act

66. Further, or alternatively, the acts particularized in paragraphs 55-64 are in breach of ss. 45, 49 and 61 of Part VI of the *Competition Act*, were and are unlawful, and render the defendants jointly and severally liable to pay damages and costs of investigation pursuant to s 36 of the *Competition Act*.

67. Specifically, and contrary to ss. 45 and 61 of the *Competition Act*, in committing the acts particularized in paragraphs 55-64, the defendants conspired to fix, maintain, increase or control the price for the supply of credit card network services, and in particular Interchange fees, to the Class. Further, or alternatively, in committing the acts particularized in paragraphs 55-64, the defendants agreed to attempt to influence upward and discourage the reduction of the price at which credit card network services, and in particular Interchange Fees were supplied to the Class.

68. Further, and contrary to s. 49 of the *Competition Act*, in committing the acts particularized in paragraphs 55-64, the defendants agreed with each other with respect to the amount and/or kind of Interchange fee charges to be imposed on their merchant customers in the Class for the provision of credit card network services. The Interchange Fee is a charge for a service provided to the Class, being the provision of credit card network services.

69. Further, or alternatively, the acts particularized in paragraphs 55-64 were in breach of s. 45 of the *Competition Act* at the time the acts were committed, and hence were unlawful.

70. Further, or alternatively, the acts particularized in paragraphs 55-64 were in breach of s. 49 of the *Competition Act* at the time the acts were committed, and hence were unlawful.

71. Further, or alternatively, the acts particularized in paragraphs 55-64 were in breach of s. 61 of the *Competition Act* at the time the acts were committed, and hence were unlawful.

Aiding and Abetting

72. Further, or alternatively, as of March 2010, the acts committed by Visa, MasterCard, and the Acquirers , as particularized in paragraphs 55-64 above, constitute counseling, aiding or abetting the Issuing Banks in committing an offence under ss. 45 and 61 of the *Competition Act* contrary to ss. 21 and 22 of the *Criminal Code*, RSC, 1985, c. c-46.

Damages

73. The plaintiffs and the other Class Members suffered the following damages:

    (a) the rates of Merchant Discounts and in particular Interchange Fees have been maintained at and/or increased to a *supracompetitive* level; and

    (b) competition in the supply of credit card network services has been lessened.

74. During the period covered by this claim, the plaintiffs and the other Visa Class Members and MasterCard Class Members entered into standard form merchant agreements with Acquirers containing the Merchant Restraints imposed pursuant to the Visa Rules and MasterCard Rules, respectively, and paid excessive and *supracompetitive* Merchant Discounts and in particular, Interchange Fees. By reason of the alleged violations of the *Competition Act,* the *Criminal Code,* and the common law, the plaintiffs and the other Visa and MasterCard Class Members paid more for credit card network services than they would have paid in the absence of the illegal agreements and, as a result, they have been injured in their business and property and have suffered damages in an amount presently undetermined (the "Merchant Discount Overcharge").

Punitive Damages

75. The plaintiffs plead that the defendants' conduct as particularized in paragraphs 55-64 was high-handed, outrageous, reckless, wanton, entirely without care, deliberate, callous, disgraceful, wilful, in contumelious disregard of the plaintiffs' rights and the rights of each Visa and MasterCard Class Member, indifferent to

the consequences and, as such, renders the defendants jointly and severally liable to pay punitive damages.

Unjust Enrichment and Waiver of Tort

76. In the alternative, the plaintiffs waive the tort and plead that they and the other Visa and MasterCard Class Members are entitled to recover under restitutionary principles.

77. The defendants have each been unjustly enriched by the receipt of the Merchant Discount Overcharge. Visa and MasterCard Class Members have suffered a deprivation in the amount of such Merchant Discount Overcharge.

78. Since the Merchant Discount Overcharge that was received by the defendants from the Visa and MasterCard Class Members resulted from the defendants' wrongful or unlawful acts, there is and can be no juridical reason justifying the defendants' retaining any part of such overcharge.

JURISDICTION

Real and Substantial Connection With Ontario

79. There is a real and substantial connection between Ontario and the facts alleged in this proceeding because:

(a) many of the defendants maintain offices in Ontario;

(b) the defendants engage in business with residents of Ontario;

(c) the defendants derive substantial revenue from carrying on business in Ontario; and

(d) the alleged conspiracies were directed toward residents of Ontario.

Service Outside of Ontario

80. This originating process may be served without court outside Ontario because the claim is:

(a) in respect of a tort committed in Ontario (rule 17.02(g));

(b) in respect of damages sustained in Ontario arising from a tort wherever committed (rule 17.02(h));

(c) against a person outside Ontario who is a necessary or proper party to a proceeding properly brought against another person served in Ontario (rule 17.02(o)); and

(d) against a person carrying on business in Ontario (rule 17.02(p)).

May 13, 2011

BRANCH MACMASTER LLP
Barristers & Solicitors
1410 – 777 Hornby Street
Vancouver, BC V6Z 1S4

WARD K. BRANCH, Q.C.
LSUC#: 42471K

Tel: (604) 631-6299
Fax: (604) 631-3429
E-mail: wbranch@branmac.com

CAMP FIORANTE MATTHEWS MOGERMAN
Barristers & Solicitors
400-856 Homer Street
Vancouver, BC V6B 2W5

Lawyers for the Plaintiffs

BANCROFT-SNELL and 1739793 ONTARIO INC.
Plaintiffs

v. VISA CANADA CORPORATION, et al
Defendants

Court File No. CV-11-426591

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDINGS COMMENCED AT TORONTO

Proceedings under the *Class Proceedings Act, 1992*

FRESH AS AMENDED STATEMENT OF CLAIM

BRANCH MACMASTER LLP
Attn: Ward K. Branch
LSUC#: 42471K
1410 – 777 Hornby Street
Vancouver, BC V6Z 1S4
Telephone: (604) 654-2999
Fax: (604) 684-3429

CAMP FIORANTE MATTHEWS MOGERMAN LLP
Attn: Reidar Mogerman
400 – 856 Homer Street
Vancouver, BC V6B 2W5
Telephone: (604) 689-7555
Fax: (604) 689-7554

LAWYERS FOR THE PLAINTIFFS

FILE: X01-029