IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LONE STAR NATIONAL BANK, N.A., et al.,	)	Case No. 4:10-cv-00171
Plaintiffs,	)	
v.	)	JUDGE LEE H. ROSENTHAL
KEYBANK, N.A., et al.,	)	
Defendants.	)	

DEFENDANT HEARTLAND BANK'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS UNDER FED. R. CIV. P. 12(B)(2) AND FED. R. CIV. P. 12(B)(6)

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I. NATURE AND STAGE OF PROCEEDINGS AND SUMMARY OF ARGUMENT

This case arises from the same third-party criminal intrusion into the payment processing system of Heartland Payment Systems, Inc. ("HPS") that also gave rise to the cases consolidated before this Court under the caption *In re Heartland Payment Systems, Inc. Data Security Breach Litigation*, Case No. H-09-MD-02046. Plaintiffs are banks that issued payment cards and that claim to have suffered losses as a result of the intrusion. Whereas Plaintiffs and other banks in the consolidated cases comprising the Financial Institution track of the MDL action sued only HPS, the Plaintiffs in this case assert claims against Key Bank, N.A. and Heartland Bank, who were acquiring banks for HPS at the time of the intrusion.[1]

Plaintiffs' claims against Heartland Bank – for breach of contract, breach of fiduciary duty, negligence, and vicarious liability[2] – fail for many reasons. First, this Court lacks personal jurisdiction over Heartland Bank, a Missouri bank that does not have "minimum contacts" with Texas. Second, Plaintiffs' third-party beneficiary breach of contract claim clearly fails under Missouri law, which governs the contract at issue. Third, Plaintiffs cannot assert fiduciary duty claims because there was no joint venture or other fiduciary relationship between the five

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[1] The five banks that are Plaintiffs in this case are members of the group of banks that are Plaintiffs in the Financial Institution track of the MDL action, where their Master Complaint names only HPS as responsible for their claimed losses. With this action, filed a year later, the five Plaintiffs in this case now seek to proceed against Key Bank and Heartland Bank as well. The remaining banks in the Financial Institution track assert no such claims against Key Bank and Heartland Bank.

[2] The Complaint asserts a fifth claim, on behalf of a claimed "subrogee" class consisting of insurance companies, bond issuers, and other entities that have paid money to plaintiffs. *See* Cmpl. ¶¶ 106, 153-54. None of the four Plaintiffs appears to be a subrogee with standing to assert subrogation claims, *id.* ¶¶ 15-19, and in any case the subrogation claims are contingent upon the success of the four principal claims, *id.* ¶¶ 153-54. Because the four principal claims all fail for the reasons stated herein, the "subrogee claims" necessarily fail as well.

Plaintiffs and Heartland Bank. Fourth, Plaintiffs' negligence claims are barred by the economic loss doctrine. Finally, Plaintiffs' vicarious liability claims must be dismissed because there is no basis for attributing HPS's alleged liability to Heartland Bank.

II. STATEMENT OF ISSUES, STANDARDS OF REVIEW, AND ARGUMENT

A. Plaintiffs' Claims Should Be Dismissed Under Fed. R. Civ. P. 12(b)(2) Because This Court Lacks Personal Jurisdiction Over Heartland Bank.

In deciding a Rule 12(b)(2) motion, this Court may look outside the pleadings and consider "affidavits, interrogatories, depositions, oral testimony, or any combination of the recognized methods of discovery." *Stuart v. Spademan*, 772 F.2d 1185, 1192 (5th Cir. 1985). It is a plaintiff's burden to present *prima facie* evidence that personal jurisdiction over the defendant exists. *Seiferth v. Helicopteros Atuneros, Inc.*, 472 F.3d 266, 270 (5th Cir. 2006).

The Complaint says little about Heartland Bank and provides no information about why Texas courts would have jurisdiction over the Bank. The Complaint notes only that Heartland Bank has its principal place of business in Missouri. *See* Cmplt. ¶21. In fact, Heartland Bank is a regional bank with branches in Missouri and Colorado. Aff. of David Minton (April 7, 2010) ¶2. Heartland Bank does not have any branches, employees, or business operations in Texas and does not own any property in Texas. *Id.*

Plaintiffs' claims against Heartland Bank arise from the Bank's contract with HPS. *See, e.g.*, Cmplt. ¶¶ 3-4. That contract, called the Merchant Processing Agreement, is made between Heartland Bank, a bank with its principal office in Missouri, and HPS, a Delaware corporation with its principal office in New Jersey. Minton Aff. ¶3 & Ex. A, at 1. No party to the contract is a Texas corporation or resident. *Id.* The contract was not negotiated in Texas. Minton Aff. ¶3. Under the contract, required notices will be sent to Heartland Bank in Missouri and HPS in New Jersey, and the contract stipulates that it is governed by Missouri law. *Id.* Ex. A, Art. 4.8, 4.11.

The contract provides that Heartland Bank will perform certain processing services for HPS. *See* Minton Aff. Ex. A, Art. 1.1. The Bank performs those processing services in Missouri, not Texas. Minton Aff. ¶4. The contract requires the Bank to establish a Settlement Account to be used for settlement of transactions by HPS clients, *id.* Ex. A, Art. 1.5(a), and that Account is maintained at Heartland Bank's Missouri offices. Minton Aff. ¶4. Under the contract, payments by HPS to Heartland Bank are made through that Missouri-based Settlement Account. *Id.* Ex. A, Art. 1.5(d). The contract also requires HPS to obtain and deposit a CD with Heartland Bank as collateral for performance of HPS's contractual obligations, *id.* Ex. A, Art. 3.1, and that CD is maintained at Heartland Bank's Missouri offices. Minton Aff. ¶4.

To defeat Heartland Bank's motion to dismiss, Plaintiffs must show that the exercise of personal jurisdiction by this Court over Heartland Bank complies with Texas' long-arm statute and that "the exercise of personal jurisdiction comports with the Due Process Clause of the Fourteenth Amendment." *McFadin v. Gerber*, 587 F.3d 753, 759 (5th Cir. 2009). Because the Texas long-arm statute extends as far as due process allows, only the second step is required. *Id.* The due process standard is well-established:

> The plaintiff must show that (1) the defendant purposefully availed himself of the benefits and protections of the forum state by establishing minimum contacts with the forum state, and (2) the exercise of personal jurisdiction over that defendant does not offend traditional notions of fair play and substantial justice. Where a defendant has continuous and systematic general business contacts with the forum state, the court may exercise general jurisdiction over any action brought against the defendant. Where contacts are less pervasive, the court may still exercise specific jurisdiction in a suit arising out of or related to the defendant's contacts with the forum.

Id. (citations omitted) (internal quotation marks omitted).

Plaintiffs do not appear to suggest that Texas courts have general jurisdiction over Heartland Bank, and in any case there is no factual basis for such an allegation. Heartland Bank has no business operations, employees, or property in Texas, much less the kind of "continuous

and systematic" contacts needed to establish general personal jurisdiction. *See McFadin v. Gerber*, 587 F.3d at 759; *Huynh v. Nguyen*, 180 S.W.3d 608, 616 (Tex. Ct. App. 2005).

The "specific jurisdiction" inquiry focuses on "the relationship among the defendant, the forum, and the litigation," *Lewis v. Indian Springs Land Corp.*, 175 S.W.3d 906, 913 (Tex. Ct. App. 2005), and the controversy must be "related to" or "arise[ ] out of" the nonresident defendant's contacts with the forum. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984). The key issue is whether "defendant's conduct shows that it reasonably anticipates being haled into court" in the forum state. *McFadin v. Gerber*, 587 F.3d at 759 (citations and internal quotation marks omitted). Further, "[t]he defendant must not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or third person." *Id.* (citations and internal quotation marks omitted).

Here, there are no actions by Heartland Bank that show that it reasonably anticipated being sued in Texas, or that it has purposefully availed itself of the benefits and protections of Texas law. As set forth above, Heartland Bank does not do business in Texas. Heartland Bank's contract with HPS, from which Plaintiffs' claims purportedly arise, is governed by Missouri law, not Texas law, and Heartland Bank's performance of its obligations under that contract takes place in Missouri, not Texas. Given these facts, it cannot be contended that Plaintiffs' claims relate to or arise from Heartland Bank's "contacts" – in reality, lack of contacts – with Texas.

From the Complaint, the contacts between this litigation and Texas are that one of the five Plaintiffs has its principal place of business in Texas, Cmplt. ¶15, that Defendant Key Bank is authorized to do business in Texas, *id.* ¶20, that other litigation is pending in this Court, *id.* ¶23, and that some actions giving rise to Plaintiffs' claims occurred in Texas, *id.* ¶23. None of these stated contacts relates to Heartland Bank or its activities; instead, they all concern third

parties – and therefore they are irrelevant to the analysis of whether this Court has personal jurisdiction over Heartland Bank.

As the Fifth Circuit has stated, "A plaintiff's or third party's unilateral activities cannot establish minimum contacts between the defendant and forum state." *Moncrief Oil Intern. Inc. v. OAO Gazprom*, 481 F.3d 309, 311 (5th Cir. 2007) (citing *Hydrokinetics, Inc. v. Alaska Mech., Inc.*, 700 F.2d 1026, 1028 (5th Cir. 1983)); *see also IRA Resources, Inc. v. Griego*, 221 S.W.3d 592, 596 (Tex. 2007) (noting that "only the defendant's forum-state contacts matter, not anyone else's" and that defendant "can only trigger specific jurisdiction through its own conduct, not the unilateral acts of third parties") (citation omitted). In *Moncrief Oil*, the Court noted that where "the defendant did not perform any of its obligations in Texas, the contract did not require performance in Texas, and the contract is centered outside of Texas," the exercise of personal jurisdiction in Texas is improper. 481 F.3d at 312 (citation omitted). That same analysis applies to this case and requires dismissal of the claims against Heartland Bank. *See also Lansing Trade Group, LLC v. 3B Biofuels GmbH & Co., KG*, 612 F. Supp. 2d 813, 824, 827 (S.D. Tex. 2009).

B. Plaintiffs' Claims Against Heartland Bank Should Be Dismissed Under Fed. R. Civ. P. 12(b)(6) For Failure To State A Claim.

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Iqbal v. Ashcroft*, --- U.S. --, 129 S. Ct. 1937 (2009), the Supreme Court revisited the standards to be applied in determining whether claims should be dismissed under Fed. R. Civ. P. 12(b)(6). Those decisions make clear that courts deciding Rule 12(b)(6) motions should not accept as true legal conclusions, and that "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 129 S. Ct. at 1949. In addition, "only a complaint that states a plausible claim for relief survives a motion to dismiss," and factual allegations that are only

"consistent with" or that merely suggest a "possibility of misconduct" are insufficient to state a plausible claim. *Id.* at 1949–50 (citation and internal quotations omitted).

In deciding a Rule 12(b)(6) motion, the court may rely on the Complaint, "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). Documents that are mentioned in the Complaint – like the Merchant Processing Agreement in this case, *see, e.g.*, Cmplt. ¶¶ 3-4, 59 – may be considered without converting the motion into a motion for summary judgment. *See Randolph v. Dimension Films*, 630 F. Supp. 2d 741, 745 (S.D. Tex. 2009).

1. Plaintiffs' Breach of Contract Claim Must Be Dismissed.

Texas choice of law rules apply to this action, *see Resolution Trust Corp. v. Northpark Joint Venture*, 958 F.2d 1313, 1318 (5th Cir. 1992), and those rules enforce contractual choice of law provisions. *See Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984). Plaintiffs' third-party beneficiary claim is based on the Merchant Processing Agreement between Heartland Bank and HPS, *see* Cmplt. ¶¶ 118-22, and that Agreement explicitly states that it is governed by Missouri law. *See* Minton Aff. Ex. A, Art. 4.11. Accordingly, Missouri law applies to Plaintiffs' breach of contract claim. *See also* Restatement (Second) Conflict of Law § 205 (1971), cmt. d ("The local law of the state selected by application of the rule of this Section determines whether a third party beneficiary obtains enforceable rights under the contract.").

Under Missouri law, only intended third-party beneficiaries may sue to enforce a contract to which they are not a party. *See Executive Bd. of the Mo. Baptist Conv. v. Windermere Baptist Conf. Ctr.*, 280 S.W.3d 678, 694 (Mo. Ct. App. 2009). The contract itself must "clearly express an intent to benefit" the purported third-party beneficiary, and "[i]n the absence of an express declaration of that intent . . . there is a strong presumption that the third party is not a beneficiary

and that the parties contracted to benefit only themselves." *Seeck v. Geico Gen. Ins. Co.*, 212 S.W.3d 129, 135 (Mo. 2007) (citations and quotations omitted); *see also Chmieleski v. City Prods. Corp.*, 660 S.W.2d 275, 289 (Mo. Ct. App. 1983) (stating that it must be clear from the terms of the contract itself that "the benefit to the third party was the cause of the creation of the contract"). If a third party will receive only incidental, indirect, or collateral benefits from a contract, then it is not a third-party beneficiary entitled to enforce the contract. *See Executive Bd. of the Mo. Windermere Baptist Conf. Conv.*, 280 S.W.3d at 694.

Here, the four corners of the Merchant Processing Agreement establish that Plaintiffs are not third-party beneficiaries of that contract under Missouri law. The Agreement does not even mention Plaintiffs or any banks that issue payment cards, much less "clearly express an intent to benefit" Plaintiffs or issuing banks. *Seeck*, 212 S.W.3d at 135. Further, any claimed benefit to card-issuing banks clearly was not "the cause of the creation of the contract." *Chmieleski*, 660 S.W.2d at 289. To the contrary, the contract was established because HPS wanted Heartland Bank to provide certain processing and related services for HPS. *See* Minton Aff. Ex. A, at 1.[3]

The Complaint cites two grounds for the allegation that Plaintiffs are intended third-party beneficiaries. First, Plaintiffs point to "the lack of any provision in the [Agreement] expressly or impliedly disclaiming the intent of KeyBank and Heartland to create third party beneficiaries."

[3] The limitation on damages provision of the contract, *see* Minton Aff. Ex. A, Art. 4.7, also reflects the parties' intent that Heartland Bank and HPS were the only two "parties" who could bring an action for breach of contract. That provision states:

> In any action by one of the parties against the other arising from performance, or the failure of performance . . . damages will be limited to general money damages in an amount not to exceed the actual damages of the party . . . . In no case will the other party be responsible for special, incidental, consequential or exemplary damages, except for willful breach of the Agreement. (emphasis added).

Cmplt. ¶118. That argument misstates the proper inquiry under Missouri law. It is Plaintiffs' burden to show, from the terms of the contract, that they were intended beneficiaries. *See Seeck*, 212 S.W.3d at 135; *Kansas City Ass'n Contractors Enterprise, Inc. v. City of Kansas City*, 279 S.W.3d 551, 555 (Mo. Ct. App. 2009). If Plaintiffs were correct, any third parties who had any kind of connection to a contract that lacked an explicit disclaimer provision could sue for breach of that agreement. Obviously, that is not the law of Missouri.

Plaintiffs next claim to be intended beneficiaries because the Agreement "expressly and/or impliedly" required HPS to safeguard payment card data and required Heartland Bank to monitor HPS' systems to ensure that they were "adequate and complied with all applicable laws and guidance." Cmplt. ¶119. This allegation is based not on any specific contract provision that addresses payment card issuers like Plaintiffs, but rather on extracontractual provisions, like the rules and regulations of Visa and MasterCard, that are generally mentioned in the contract. *See, e.g., id.* ¶¶ 39-45, 52-54, 59-60; *see also* Minton Aff. Ex. A, Arts. 1.1, 1.5(a), 1.6, 1.8(a), 2.2(d), 3.1(d), 4.3, 4.5 & Schedule A.[4] Indeed, Plaintiffs allege that every member of the MasterCard and Visa payment card associations is a third-party beneficiary "of each other member's contracts with nonmember, third party entities, regardless of whether they are signatories" by virtue of their membership in the associations, not by virtue of any specific contractual provision. Cmplt. ¶ 54. That argument is contrary to Missouri law, which holds that a party who claims third-party beneficiary status must demonstrate, from the contract itself, that the parties to the contract intended to confer a benefit on that non-contracting party. *Seeck*, 212 S.W.3d at 135.

[4] Heartland Bank also notes that the court in *In re TJX Cos. Retail Sec. Breach Litig.*, 564 F.3d 489, 499 (1st Cir. 2009), aff'g 524 F. Supp. 2d 83, 90 (D. Mass. 2007), denied third-party beneficiary status to issuing banks that sued an acquiring bank under its contract with the merchant that suffered the breach and the card associations' rules and regulations.

The fact that Plaintiffs – as well as other card-issuing banks, merchants, consumers, and the thousands of other participants in the payment card system – may claim to be incidentally benefited by the Merchant Processing Agreement between HPS and Heartland Bank does not convert those persons and entities into third-party beneficiaries. *See Nitro Distributing, Inc. v. Dunn*, 194 S.W.3d 339, 345 (Mo. 2006) (holding that any benefit to companies that provided services to Amway distributors from provision in contract between distributors and Amway that applied Amway "Rules of Conduct" was merely incidental, such that service providers were not third-party beneficiaries); *Netco, Inc. v. Dunn*, 194 S.W.3d 353, 358 (Mo. 2006) (same); *see also JTL Consulting, LLC v. Shanahan*, 190 S.W.3d 389, 400 (Mo. Ct. App. 2006).

Put simply, Plaintiffs are not parties to the Merchant Processing Agreement between HPS and Heartland Bank, and the four corners of that contract make clear that Plaintiffs and other card-issuing banks were not intended to be beneficiaries of that contract. Under Missouri law, therefore, Plaintiffs' breach of contract claim must be dismissed.

2. Plaintiffs' Breach of Fiduciary Duty Claim Must Be Dismissed.

Plaintiffs next assert a breach of fiduciary duty claim, and contend that, by virtue of their memberships in MasterCard and Visa, Plaintiffs and Heartland Bank were part of a joint venture and owed fiduciary duties to each other as a result. *See* Cmplt. ¶ 124.

MasterCard's rules and regulations specify that they are governed by New York law. *See* Minton Aff. Ex. B, MasterCard Rules § 3.4 ("The substantive laws of the State of New York govern all disputes involving the Corporation, the Standards, and/or the Members and Activity without regard to conflicts.") (emphasis added). Under Texas choice of law rules that specification of New York law as the applicable law will be enforced. *See Duncan v. Cessna Aircraft Co.*, 665 S.W.2d at 421.

New York law requires Plaintiffs to plead and establish five elements before a joint venture will be found. As one recent decision stated:

> A joint venture exists in New York when (1) two or more persons enter into an agreement for profit; (2) the parties intend to be associated as joint venturers; (3) each of the venturers contributes something of value to the venture, such as property, skill, knowledge or effort; (4) each coventurer has some degree of control over the venture; and (5) the co-venturers agree to some division of profit and loss allocation.

Cosy Goose Hellas v. Cosy Goose USA, Ltd., 581 F. Supp. 2d 606, 620 (S.D.N.Y. 2008) (citing *Dinaco Inc. v. Time Warner, Inc.*, 346 F.3d 64, 67-68 (2d Cir. 2003); *Itel Containers Int'l Corp. v. Atlanttrafik Express Serv. Ltd.*, 909 F.2d 698, 701 (2d Cir. 1989)).

Plaintiffs have failed to plead any facts plausibly suggesting the existence of these five essential elements. Plaintiffs fail to cite any provisions of the MasterCard operating regulations indicating that they and Heartland Bank "intended to be associated as joint venturers" – rather than simply as members of MasterCard. Plaintiffs also fail to allege that they and Heartland Bank have "some degree of control" over the operation of the MasterCard system. The operating regulations make clear that MasterCard retains sole control and authority over the network and the interpretation and enforcement of the regulations. *See* Minton Aff. Ex. B, MasterCard Operating Regulations § 3.1 ("The Corporation [MasterCard] has the sole right in its sole discretion to interpret and enforce the Standards."). Because there is no plausible allegation of joint control, Plaintiffs' joint venture claim fails under New York law. *See Int'l Eq. Invests., Inc. v. Opportunity Eq. Partners, Ltd.*, 472 F. Supp. 2d 544, 552–53 (S.D.N.Y. 2007); *Magnum Real Estate Servs., Inc. v. 133-134-135 Assocs., LLC*, 874 N.Y.S.2d 434, 435 (App. Div. 2009). Plaintiffs' failure to allege that they and Heartland Bank have an agreement to share profits and losses resulting from the purported MasterCard joint venture also is fatal to their joint venture claim. *See Schur v. Marin*, 729 N.Y.S.2d 155, 156 (App. Div. 2001) (stating that the "[f]ailure

of the purported joint venturers to agree upon the division of equity" precluded the existence of a joint venture); *see also Kidz Cloz, Inc. v. Officially for Kids, Inc.*, 320 F. Supp. 2d 164, 171 (S.D.N.Y. 2004) ("The absence of any one element is 'fatal to the establishment of a joint venture.'") (quoting *Zeising v. Kelly*, 152 F. Supp. 2d 335, 347–48 (S.D.N.Y. 2001)).

Plaintiffs' effort to find a joint venture on the basis of membership in the Visa Association fares no better. Unlike MasterCard, Visa's regulations do not have a choice-of-law provision. Inasmuch as Plaintiffs invoke the Visa regulations solely because they are mentioned in the Merchant Processing Agreement and that Agreement has a Missouri choice-of-law clause, this Court should apply Missouri law to the joint venture allegation as well. In any case, the Visa-based joint venture fiduciary duty claim fails under any state law that conceivably could apply to that claim – regardless of whether this Court applies the law of Texas, Florida, Washington, Maine, and Pennsylvania, where Plaintiffs have their principal places of business, *see* Cmplt. ¶¶ 15-19, or the law of Missouri, where Heartland Bank is located.[5]

As noted, Plaintiffs make no allegation that they have an agreement with Heartland Bank to share profits and losses related to Visa business or that they share joint control over the Visa system with Heartland Bank. Visa's regulations, like those of MasterCard, vest sole control over the enforcement of Visa's operating regulations with Visa. *See* Minton Aff. Ex. C, Visa Operating Regulations § 1.7. Plaintiffs also fail to cite any provision of the Visa operating

[5] In the absence of a controlling choice-of-law provision, Texas courts apply the "most significant relationship" test, which looks to which state has the most "contacts" to the occurrence and considers factors such as where the claimed injury occurred, where the conduct causing the injury occurred, the domicile, place of incorporation, and place of business of the parties, and the place where the relationship of the parties is centered. *See Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984); *Red Roof Inns, Inc. v. Murat Holdings, L.L.C.*, 223 S.W.3d 676, 685 (Tex. Ct. App. 2007).

regulations or any other written or oral agreement in which they agreed with Heartland Bank to create a joint venture. As a result of these failures, Plaintiffs have not alleged a joint venture under the law of Florida, *see Jackson-Shaw Co. v. Jacksonville Aviation Auth.*, 8 So. 3d 1076, 1089 (Fla. 2008), Maine, *see John Nagle Co. v. Gokey*, 799 A.2d 1225, 1227 (Me. 2002), Pennsylvania, *see Snellbaker v. Herrmann*, 462 A.2d 713, 716 (Pa. Super. Ct. 1983) (citing *McRoberts v. Phelps*, 138 A.2d 439, 443–44 (Pa. 1958)), Texas, *see Arthur v. Grimmett*, --- S.W.3d ---, 2009 WL 2461812, at *9 (Tex. Ct. App. Aug. 12, 2009), Washington, *see Lopez v. Courville*, No. 24940-9-III, 2008 WL 2460280, at *2 (Wash. Ct. App. June 19, 2008), and Missouri, *see State ex rel. Henley v. Bickel*, 285 S.W.3d 327, 331-32 (Mo. 2009).

Plaintiffs' fiduciary duty claim also runs afoul of the rule that a fiduciary relationship must arise from something more than an arm's-length commercial transaction. *See Watkins v. NCNB Nat'l Bank of Florida, N.A.*, 622 So. 2d 1063, 1065 (Fla. Dist. Ct. App. 1993); *Fitzpatrick v. Teleflex, Inc.*, 630 F. Supp. 2d 91, 96 (D. Me. 2009); *eToll, Inc. v. Elias/Savion Advertising, Inc.*, 811 A.2d 10, 23 (Pa. Super. Ct. 2002); *Assoc. Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 288 (Tex. 1998); *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 177 (Tex. 1997); *Interstate Production Credit Ass'n v. MacHugh*, 810 P.2d 535, 540 (Wash. Ct. App. 1991); *Constance v. B.B.C. Dev. Co.*, 25 S.W.3d 571, 581 (Mo. Ct. App. 2000). The allegations of the Complaint make clear that Plaintiffs and Heartland Bank were all banks who participated in standard commercial transactions related to payment card purchases. *See* Cmplt. ¶¶ 52–53. For that reason as well, Plaintiffs' joint venture/fiduciary duty claims must be dismissed.

3. Plaintiffs' Negligence Claim Must Be Dismissed.

Plaintiffs' negligence claim is predicated upon the allegation that when Heartland Bank entered into the Merchant Processing Agreement with HPS and agreed to process transactions

that are subject to the rules and regulations of Visa and MasterCard, it thereby assumed certain duties to card-issuing banks. *See* Cmplt. ¶131. As noted, the Merchant Processing Agreement specifically states that the Agreement is to be governed by the law of Missouri. *See* Minton Aff. Ex. A, Art. 4.11. Accordingly, because the contract which purportedly gives rise to Plaintiffs' negligence claim stipulates that it is governed by Missouri law, Missouri law also necessarily has the most significant relationship to this action and therefore governs Plaintiffs' negligence claim. *See Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984); *Red Roof Inns, Inc. v. Murat Holdings, L.L.C.*, 223 S.W.3d 676, 685 (Tex. App. 2007).

Missouri, like other states, applies the "economic loss doctrine," which holds that a plaintiff may not recover in tort for intangible economic losses or losses that do not arise from tangible physical harm to persons or tangible things. *See Rockport Pharmacy, Inc. v. Digital Simplistics, Inc.*, 53 F.3d 195, 198 (8th Cir. 1995); *Auto-Owners Ins. Co. v. Mid-America Piping, Inc.*, No. 4:07-CV-00394, 2008 WL 2859193, *2 (E.D. Mo. March 17, 2008); *Self v. Equilon Enterprises, LLC*, No. 4:00CV1903TA, 2005 WL 3763533, * 10-11 (E.D. Mo. March 30, 2005). The economic loss doctrine bars Plaintiffs' negligence claim in this case.

The only injury claimed by Plaintiffs on their negligence claim is an intangible economic injury, in the form of costs purportedly incurred in notifying customers about the HPS intrusion, canceling certain payment cards, and absorbing unauthorized charges made on such cards. *See* Cmplt. ¶133. A number of courts have held that the economic loss doctrine bars such claims when made in the context of data security breaches. *See, e.g., In re TJX Cos., Inc. Retail Sec. Breach Litig.*, 564 F.3d 489, 498-99 (1st Cir. 2009) (applying Massachusetts law); *Sovereign Bank v. BJ's Wholesale Club, Inc.*, 533 F.3d 162, 179-80 (3d Cir. 2008) (applying Pennsylvania law). This Court should follow those cases and hold that, under Missouri law, the economic loss

doctrine bars Plaintiffs' attempt to recover in tort for the purely intangible economic losses that are the subject of Plaintiffs' negligence claim.

4. Plaintiffs' Vicarious Liability Claim Must Be Dismissed.

Plaintiffs' final claim is for vicarious liability. Plaintiffs argue that, by virtue of the terms of the Merchant Processing Agreement, HPS became Heartland Bank's agent and Heartland Bank became liable for the claimed wrongful actions of HPS. *See* Cmplt. ¶¶ 136-152.

Although Plaintiffs allege that the Merchant Processing Agreement creates a principal-agent relationship between Heartland Bank and HPS, the contract itself expressly disclaims any such relationship. Indeed, the contract specifically states:

> [Heartland] Bank and HPS agree that in performing their responsibilities pursuant to this Agreement, they are in the position of independent contractor. This Agreement is not intended to create, nor does it create and shall not be construed to create, a relationship or joint venture or agency or any association for profit between [Heartland] Bank and HPS. HPS is not authorized hereunder to hold itself out as an agent of Bank or to inform or represent that HPS has authority to bind or obligate Bank or to otherwise act on behalf of Bank.

Minton Aff. Ex. A, Art. 1.1(j) (emphasis added). As that provision and the rest of the Merchant Processing Agreement make clear, Heartland Bank and HPS simply entered into a commercial contract whereby Heartland Bank provides certain processing and related services for HPS. *See* Minton Aff. Ex. A. That contract does not make HPS the agent of Heartland Bank.

Because the contract is governed by Missouri law, *see* Minton Aff. Ex. A, Art. 4.11, Missouri law will govern whether the contract creates an agency relationship. In *State ex rel. McDonald's Corp. v. Midkiff*, 226 S.W.3d 119 (Mo. 2007) (en banc), the Missouri Supreme Court recently addressed whether a franchise agreement made franchisees the agents of the franchisor corporation. The Court noted that Missouri applies a three-part test for determining whether a party is the agent of another:

> First, the principal must have the right to control the conduct of the agent with respect to matters entrusted to the agent. Second, an agent must be a fiduciary of the principal. Third, the agent must be able to alter legal relationships between the principal and a third party. The absence of any one of these three elements defeats a claim that agency exists.

Id. at 123 (citing *State ex rel. Ford Motor Co. v. Bacon*, 63 S.W.3d 641, 642 (Mo. 2002) (en banc) and *State ex rel. Bunting v. Koehr*, 865 S.W.2d 351, 353 (Mo. 1993) (en banc)) (internal citations omitted).

In *Midkiff*, the Missouri Supreme Court concluded that franchisees were not the agents of McDonald's Corporation because there was nothing to suggest that the franchisees had the ability to alter the legal relationship between McDonald's Corporation and a third party. 226 S.W.3d at 124. For similar reasons, the Missouri Supreme Court concluded that Ford Credit was not an agent under Missouri law in *State ex rel. Ford Motor Co. v. Bacon*, 63 S.W.3d at 644. In this case, too, HPS does not have the ability to alter Heartland Bank's legal relationships with third parties. The Merchant Processing Agreement specifically disclaims that HPS has that ability, by providing that "HPS is not authorized hereunder to hold itself out as an agent of [Heartland] Bank or to inform or represent that HPS has authority to bind or obligate [Heartland] Bank or to otherwise act on behalf of [Heartland] Bank." Minton Aff. Ex. A, Art. 1.1(j).

In short, there is no basis for contending that HPS was the agent of Heartland Bank, and as a result there is no basis for attempting to foist vicarious liability on Heartland Bank. This Court therefore should dismiss Plaintiffs' vicarious liability claim against Heartland Bank.

III. CONCLUSION

Plaintiffs' claims against Heartland Bank should be dismissed in their entirety. This Court lacks personal jurisdiction over Heartland Bank because Heartland Bank took no actions to

purposely avail itself of the privilege of doing business in Texas and lacks the requisite minimum contacts with Texas needed to support the exercise of personal jurisdiction over Heartland Bank.

Furthermore, Plaintiffs' Complaint fails to state a claim against Heartland Bank on which relief can be granted. Plaintiffs' breach of contract claim fails because they are not third-party beneficiaries of Heartland Bank's contract with HPS. Plaintiffs' breach of fiduciary duty claim fails because they were not part of a joint venture with Heartland Bank. Plaintiffs' negligence claim is barred by application of the economic loss doctrine. Plaintiffs' vicarious liability claim fails because HPS clearly was not an agent of Heartland Bank. Finally, Plaintiffs' "subrogee" claims fail because no Plaintiff apparently is a subrogee with subrogation claims and because Plaintiffs' underlying claims fail for the reasons stated above. This Court therefore should dismiss all of the claims against Heartland Bank for lack of personal jurisdiction under Rule 12(b)(2) and for failure to state a claim upon which relief may be granted under Rule 12(b)(6).

Dated: April 9, 2010

Respectfully submitted,

s/ Latosha Lewis Payne

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Attorneys for Defendant Heartland Bank

CERTIFICATE OF SERVICE

A copy of the foregoing ***Defendant Heartland Bank's Memorandum in Support of Motion to Dismiss*** was served by the Court's CM/ECF system, this 9th day of April 2010, on:

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s/ Latosha Lewis Payne
Latosha Lewis Payne

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LONE STAR NATIONAL BANK, N.A., et al.,	)	Case No. 4:10-cv-00171
Plaintiffs,	)	
v.	)	
KEYBANK, N.A., et al.,	)	
Defendants.	)	

AFFIDAVIT OF DAVID P. MINTON

STATE OF MISSOURI)
) ss:
COUNTY OF St Louis)

David P. Minton, being first duly cautioned and sworn, hereby deposes and states as follows:

1. I am President and Chief Executive Officer of Heartland Bank. I am over the age of 21 and am competent to testify to the matters addressed in this affidavit. I make this affidavit upon personal knowledge and in support of the motion of Defendant Heartland Bank to Dismiss Under Fed. R. Civ. P. 12(b)(2) for Lack of Personal Jurisdiction and Under Fed. R. Civ. P. 12(b)(6) for failure to state a claim.
2. Heartland Bank is a regional federal savings bank with branches in Missouri and Colorado. The principal office of Heartland Bank is in Missouri. Heartland Bank does not have any

branches, employees, or business operations in Texas and does not own any property in Texas.

3. Heartland Bank is a party to a contract with Heartland Payment Systems, Inc. ("HPS") called the Merchant Processing Agreement. A true and accurate copy of the Merchant Processing Agreement is attached hereto as Exhibit A. Neither Heartland Bank nor HPS is a Texas corporation, and the Merchant Processing Agreement was not negotiated in Texas.
4. Under the Merchant Processing Agreement, Heartland Bank is to perform certain processing services, and the Bank performs those processing services in Missouri, not Texas. The Merchant Processing Agreement also requires the Bank to establish a Settlement Account to be used for settlement of transactions for which HPS provides front-end and back-end processing, and that Account is maintained at Heartland Bank's Missouri offices. Under the Merchant Processing Agreement, payments by HPS to Heartland Bank are made through that Missouri-based Settlement Account. The Merchant Processing Agreement also requires HPS to obtain and deposit a CD with Heartland Bank as collateral for performance of HPS' contractual obligations, and that CD is maintained at Heartland Bank's Missouri offices.
5. Attached hereto as Exhibit B is true and accurate copy of Rule 3.1 and Rule 3.4 of the Rules and Regulations of MasterCard.
6. Attached hereto as Exhibit C is a true and accurate copy of Section 1.7 of the Visa Operating Regulations, Volume 1, General Rules.

Further, affiant sayeth naught.

David P. Minton

Sworn to before me and subscribed in my presence this 7th day of April, 2010.

Notary Public

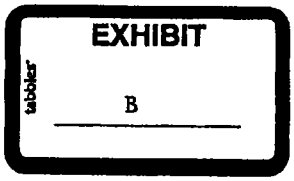
3/30/2010 8173923

MICHELE BREWER
Notary Public - Notary Seal
STATE OF MISSOURI
St. Louis County
My Commission Expires: Sept. 19, 2011
Commission # 07268386

MasterCard Worldwide

MasterCard Rules

October 2008



3.1 Standards

From time to time, the Corporation promulgates Standards governing the conduct of Members and Activities. The Corporation has the sole right in its sole discretion to interpret and enforce the Standards. The Corporation has the right, but not the obligation, to resolve any dispute between or among Members including, but not limited to, any dispute involving the Corporation, the Standards, or the Members' respective Activities, and any such resolution by the Corporation is final and not subject to appeal or other similar action. The Corporation has the right to limit, suspend or terminate Membership, Membership privileges, or both, of any Member that does not comply with any Standard or with any decision of the Corporation with regard to the interpretation and enforcement of any Standard, or that in any respect violates any Standard or applicable law.

3.1.1 Variances

A variance is the consent by the Corporation for a Member to act other than in accordance with a Standard. Only a Member may request a variance. Any such request must specify the Rule(s) or other Standard(s) for which a variance is sought. The request must be submitted to the Corporation in writing, together with a statement of the reason for the request.

If the Member claims to be prevented from fully complying with a Standard because of law or regulation, the Member must provide a copy of the law or regulation and if such law or regulation is in a language other than English, a complete certified English translation. As a condition of granting a variance for that reason, the Corporation may require the Member to undertake some other and not prohibited Activity.

The Corporation may assess a fee to consider and act on a variance request.

or arising; to the fullest extent permitted by law; unless otherwise prohibited by law; and notwithstanding any other provision of the Standards.

A payment or credit by the Corporation to or for the benefit of a Member that is not required to be made by the Standards will not be construed to be a waiver or modification of any Standard by the Corporation. A failure or delay by the Corporation to enforce any Standard or exercise any right of the Corporation set forth in the Standards will not be construed to be a waiver or modification of the Standard or of any of the Corporation's rights therein.

3.4 Choice of Laws

The substantive laws of the State of New York govern all disputes involving the Corporation, the Standards, and/or the Members and Activity without regard to conflicts. Any action initiated by a Member regarding and/or involving the Corporation, the Standards and/or any Member and Activity must be brought, if at all, only in the United States District Court for the Southern District of New York or the New York Supreme Court for the County of Westchester, and any Member involved in an action hereby submits to the jurisdiction of such courts and waives any claim of lack of personal jurisdiction, improper venue, and *forum non conveniens*.

This provision in no way limits or otherwise impacts the Corporation's authority described in Rule 3.1. Each Member agrees that the Standards are construed under, and governed by, the substantive laws of the State of New York without regard to conflicts.

3.5 Examination and Audit

The Corporation, at any time, and whether or not a Member is subject to periodic examination by banking regulatory authorities of the United States or any state thereof, or to periodic examination by regulatory authorities of another government, and at the Member's sole expense, may require that Member to be subjected to an examination and/or audit and/or periodic examination and/or periodic audit by a firm of independent certified accountants or by any other person or entity satisfactory to the Corporation. The complete results of each such examination and/or audit will be provided to the Corporation promptly upon completion.

Visa U.S.A. Inc. Operating Regulations

Volume I—General Rules

November 15, 2008

EXHIBIT

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C

1.7 Regulation Enforcement

This section defines the enforcement mechanism for violations of any *Visa U.S.A. Inc. Operating Regulations*. It also specifies the procedure for allegation, investigation and Notification of violations, the schedule for fines, and the rights to appeal. These procedures and fines are in addition to enforcement rights available to Visa U.S.A. under other provisions of these Operating Regulations, the *Visa U.S.A. Inc. Certificate of Incorporation and Bylaws*, or through other legal or administrative procedures.

1.7.A *Visa U.S.A. Inc. Operating Regulations*

Visa U.S.A. officers may levy fines, as specified in the *Visa U.S.A. Inc. Operating Regulations*.

1.7.B Enforcement Procedures

1.7.B.1 Allegations

Allegations of violations may be brought by:

- A Member **or**
- A Visa officer

1.7.B.2 Investigation

1.7.B.2.a Visa U.S.A. may investigate allegations of violations of the *Visa U.S.A. Inc. Operating Regulations*.

1.7.B.2.b A Member must respond to, and provide information requested in, a Notification of the violation that is under investigation. The Member must submit its response and information within the time period specified in the Notification.

1.7.B.2.c Visa U.S.A. may make such investigations as it deems appropriate and assess all investigative costs to the Member in addition to any fine that may be applicable.

1.7.B.3 Determination of Violation

Determination of a violation of the *Visa U.S.A. Inc. Operating Regulations* may be made as follows:

- Based on the response from the Member to a Notification of investigation and other available information, Visa U.S.A. will determine whether a violation of the *Visa U.S.A. Inc. Operating Regulations* has occurred.
- The Member's failure to respond to a Notification of investigation and to provide all information requested may result in a determination that a violation has occurred.