

SUPREME COURT OF NEW YORK
COUNTY OF NEW YORK

WAL-MART STORES, INC.; SAM’S EAST,)
INC.; SAM’S WEST, DELAWARE INC.;)
VUDU, INC.; WAL-MART STORES EAST,)
LP; WAL-MART STORES ARKANSAS, LLC;)
WAL-MART LOUISIANA, LLC; WAL-MART)
STORES TEXAS, LLC; WAL-MART PUERTO)
RICO, INC.; WAL-MART.COM USA, LLC,)
))
Plaintiffs,)
))
v.)
))
VISA U.S.A. INC.,)
))
Defendant.)
_____)

Index No. 652530/2016

Hon. Anil C. Singh
I.A.S. Part 45

ANSWER & COUNTERCLAIMS
(Jury Trial Demanded)

Defendant Visa U.S.A. Inc. (“Visa”), by its attorneys, hereby responds to plaintiffs’
(together, “Walmart’s”) Complaint filed May 10, 2016 (“Complaint”).

To the extent that the paragraph prior to the Introduction, the headings, or the prayer for relief require a response, Visa denies the allegations therein. With respect to the allegations in the numbered paragraphs of the Complaint, Visa responds as follows:

1. To the extent the Complaint cites to the Acceptance Agreement executed on November 13, 2015 by Walmart and Visa (“Agreement”), Visa refers to that document for its content and context. Visa admits that Walmart purports to seek a declaration from this Court that the Agreement allows Walmart to require Visa cardholders to provide a PIN when using their debit cards at Walmart stores, even if cardholders express a preference for providing a signature. Visa denies the remaining allegations in paragraph 1 of the Complaint.

2. Visa admits that Walmart implemented a protocol whereby Visa debit cardholders were required to enter a PIN to the exclusion of signature and other verification methods. Visa denies the remaining allegations in paragraph 2 of the Complaint.

3. Visa admits that Walmart's PIN-only protocol violates the Agreement and further admits that Visa issued a breach and termination notice pursuant to the terms of that Agreement after Walmart refused to cure its material breach. Visa admits that Walmart purports to seek a declaration from this Court that the Agreement allows Walmart to require PIN and eliminate the signature option when cardholders use their Visa debit cards at Walmart stores. Visa denies the remaining allegations in paragraph 3 of the Complaint.

4. Visa admits that this Court has jurisdiction over Visa for purposes of this action.

5. Visa admits that venue is proper in New York County for purposes of this action.

6. Visa is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 6 of the Complaint and on that basis denies them.

7. Visa is without knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph 7 of the Complaint and on that basis denies it.

8. Visa is without knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph 8 of the Complaint and on that basis denies it.

9. Visa is without knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph 9 of the Complaint and on that basis denies it.

10. Visa is without knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph 10 of the Complaint and on that basis denies it.

11. Visa is without knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph 11 of the Complaint and on that basis denies it.

12. Visa is without knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph 12 of the Complaint and on that basis denies it.

13. Visa is without knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph 13 of the Complaint and on that basis denies it.

14. Visa is without knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph 14 of the Complaint and on that basis denies it.

15. Visa is without knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph 15 of the Complaint and on that basis denies it.

16. Visa admits that it is a Delaware corporation and that its principal place of business is Foster City, California.

17. Visa admits that debit cards permit consumers to purchase goods and services by debiting directly from their accounts. Visa otherwise denies that the allegations in paragraph 17 of the Complaint completely or accurately describe debit cards and on that basis denies the remaining allegations in paragraph 17 of the Complaint.

18. Visa admits that consumers using debit cards can authenticate their identities by entering a PIN or by providing a signature. Visa otherwise denies that the allegations in paragraph 18 of the Complaint completely or accurately describe debit cards and on that basis denies the remaining allegations in paragraph 18 of the Complaint.

19. Visa is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 19 of the Complaint and on that basis denies them.

20. Visa is without knowledge or information sufficient to form a belief as to the truth of allegations in the second, third, fifth, and sixth sentences of paragraph 20 of the Complaint and on that basis denies them. To the extent the Complaint cites to Visa's Card Acceptance

Guidelines, to a paper published by the Congressional Research Service, and to a paper published by the Federal Reserve, Visa refers to those documents for their content and context. Visa denies the remaining allegations in paragraph 20 of the Complaint.

21. Visa admits that consumers using debit cards can authenticate their identities by entering a PIN or by providing a signature. Visa further admits that the method of cardholder verification for a transaction can affect whether that transaction is routed across a particular debit network. Visa further admits that if merchants require PIN verification, then consumers may not be able to choose to have their transaction routed across Visa's debit network. Visa otherwise denies that the allegations in paragraph 21 of the Complaint completely or accurately describe debit card verification or routing practices and on that basis denies the remaining allegations in paragraph 21 of the Complaint.

22. Visa admits that it operates a debit network and further admits that Interlink, also a debit network, is a wholly-owned subsidiary of Visa Inc. Visa admits, on information and belief, the remaining allegations in paragraph 22 of the Complaint.

23. Visa admits that interchange has been used since the early days of Visa and, among other things, helps apportion costs between issuing and acquiring banks. To the extent the Complaint cites to portions of the Federal Reserve's proposed rulemaking for Regulation II, Visa refers to that document for its content and context. Visa denies that the allegations in paragraph 23 of the Complaint completely or accurately describe the history of debit card pricing or routing, and on that basis denies the remaining allegations in paragraph 23 of the Complaint.

24. Visa denies that the allegations in paragraph 24 of the Complaint completely or accurately describe Visa debit volume. Visa is without knowledge or information sufficient to form a belief as to whether the allegations in paragraph 24 of the Complaint completely or

accurately describe MasterCard debit volume and on that basis denies them. To the extent the Complaint cites to a paper presented to the Federal Reserve, Visa refers to that document for its content and context. Visa denies the remaining allegations in paragraph 24 of the Complaint.

25. Visa admits that the method of cardholder verification for a transaction can affect whether that transaction is routed across a particular debit network. Visa denies the remaining allegations in paragraph 25 of the Complaint.

26. Visa admits that there is competition among debit networks. To the extent the Complaint cites to papers published by the Federal Reserve, Visa refers to those documents for their content and context. Visa denies the remaining allegations in paragraph 26 of the Complaint.

27. To the extent the Complaint cites the Durbin Amendment, Visa refers to the Durbin Amendment for its content and context. Visa denies the remaining allegations in paragraph 27 of the Complaint.

28. To the extent the Complaint cites the Federal Reserve's proposed rulemaking for Regulation II, Visa refers to that document for its content and context. Visa denies the remaining allegations in paragraph 28 of the Complaint.

29. To the extent the Complaint cites the Federal Reserve's proposed rulemaking for Regulation II, Visa refers to that document for its content and context. Visa denies the remaining allegations in paragraph 29 of the Complaint.

30. To the extent the Complaint cites the Federal Reserve's final rule and findings for Regulation II, and to a letter from Visa to the Board of Governors of the Federal Reserve, Visa refers to those documents for their content and context. Visa denies the remaining allegations in paragraph 30 of the Complaint.

31. To the extent the Complaint cites the Federal Reserve’s final rule and findings for Regulation II and its briefing to the D.C. Circuit, Visa refers those documents for their content and context. Visa denies the remaining allegations in paragraph 31 of the Complaint.

32. Visa admits the allegations in paragraph 32 of the Complaint.

33. Visa admits that a liability shift became effective on October 1, 2015 in the U.S. such that the party that has not enabled EMV chip—either the issuer or the merchant (through an acquirer)—would be liable for counterfeit fraud. To the extent the Complaint cites to an article published by the Congressional Research Service, Visa refers to that document for its content and context. Visa denies the remaining allegations in paragraph 33 of the Complaint.

34. To the extent the Complaint cites to portions of publicly available materials and exhibits to the Complaint, Visa refers to those documents for their content and context. Visa denies the remaining allegations in paragraph 34 of the Complaint.

35. Visa admits that Visa Canada announced its intention to bring chip cards to market in 2003. To the extent the Complaint cites to portions of publicly available materials and an exhibit to the Complaint, Visa refers to those documents for their content and context. Visa denies the remaining allegations in paragraph 35 of the Complaint.

36. Visa admits that in Australia many chip card transactions are authenticated using PIN. Visa admits the allegations in the second sentence of paragraph 36. To the extent the Complaint cites to portions of publicly available materials and an exhibit to the Complaint, Visa refers to those documents for their content and context. Visa denies the remaining allegations in paragraph 36 of the Complaint.

37. To the extent the Complaint cites to portions of publicly available materials, Visa refers to those documents for their content and context. Visa is without knowledge or

information sufficient to form a belief as to the truth of the remaining allegations in paragraph 37 of the Complaint and on that basis denies them.

38. To the extent the Complaint cites to portions of publicly available materials and statements, Visa refers to those materials and statements for their content and context. Visa denies the remaining allegations in paragraph 38 of the Complaint.

39. Visa admits that Walmart is the largest retail merchant in the country. Visa is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 39 of the Complaint and on that basis denies them.

40. Visa denies that PIN verification has demonstrated superior security. Visa is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 40 of the Complaint and on that basis denies them.

41. To the extent the Complaint cites to portions of publicly available materials, Visa refers to those documents for their content and context. Visa is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 41 of the Complaint and on that basis denies them.

42. To the extent the Complaint cites to portions of publicly available materials and statements, Visa refers to those materials and statements for their content and context. Visa is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 42 of the Complaint and on that basis denies them.

43. To the extent the Complaint cites to portions of publicly available materials, Visa refers to those documents for their content and context. Visa is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 43 of the Complaint and on that basis denies them.

44. Visa admits that Walmart secretly began testing a protocol in a small number of its U.S. stores that eliminated signature verification for Visa debit card transactions. Visa is without knowledge of information sufficient to form a belief as to the truth of the remaining allegations in paragraph 44 of the Complaint and on that basis denies them.

45. Visa denies the allegation in the first sentence of paragraph 45 of the Complaint. Visa is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 45 of the Complaint and on that basis denies them.

46. Visa admits that in February 2016, Walmart instituted a protocol at thousands of its U.S. stores that eliminated signature verification for Visa debit card transactions. Visa is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 46 of the Complaint and on that basis denies them.

47. Visa admits that the Agreement sets terms by which Walmart accepts Visa payment products but denies that the Agreement is the sole source of such terms. Visa admits the remaining allegations in paragraph 47 of the Complaint.

48. Visa admits the allegations in the first sentence of paragraph 48 of the Complaint. To the extent the Complaint cites to portions of the Agreement, Visa refers to that document for its content and context. Visa denies the remaining allegations in paragraph 48 of the Complaint.

49. To the extent the Complaint cites the Federal Reserve's final rule and findings and the Durbin Amendment, Visa refers to those documents for their content and context. Visa denies the remaining allegations in paragraph 49 of the Complaint.

50. To the extent the Complaint cites to portions of the Agreement, Visa refers to that document for its content and context. Visa denies the remaining allegations in paragraph 50 of the Complaint.

51. Visa admits that it objected to Walmart's elimination of the signature option for Visa debit cards in February 2016 because it was a material breach of the Agreement. Visa denies the remaining allegations in paragraph 51 of the Complaint.

52. To the extent the Complaint cites to portions of the Agreement, Visa refers to that document for its content and context. Visa admits that Walmart implemented a protocol in secret at a small number of its U.S. stores that eliminated signature verification for Visa debit cards beginning in November 2015 and continuing through the Effective Date. Visa denies the remaining allegations in paragraph 52 of the Complaint.

53. To the extent the Complaint cites to portions of the Agreement, Visa refers to that document for its content and context. Visa denies the remaining allegations in paragraph 53 of the Complaint.

54. To the extent the Complaint cites to portions of the Agreement and the Federal Reserve's final rule and findings for Regulation II, Visa refers to those documents for their content and context. Visa denies the remaining allegations in paragraph 54 of the Complaint.

55. To the extent the Complaint cites to portions of the Agreement, Visa refers to that document for its content and context. Visa denies the remaining allegations in paragraph 55 of the Complaint.

56. To the extent the Complaint cites to portions of the Agreement and the Federal Reserve's final rule and findings for Regulation II, Visa refers to those documents for their content and context. Visa denies the remaining allegations in paragraph 56 of the Complaint.

57. Visa admits that Walmart modified its PIN-only protocol after Visa objected to it, but that this modification did not cure Walmart's material breach of the Agreement. Visa denies the remaining allegations in paragraph 57 of the Complaint.

58. To the extent the Complaint cites to portions of the Agreement and to correspondence between the parties, Visa refers to those documents for their content and context. Visa denies the remaining allegations in paragraph 58 of the Complaint.

59. To the extent the Complaint cites to portions of the Agreement and to correspondence between the parties, Visa refers to those documents for their content and context. Visa denies the remaining allegations in paragraph 59 of the Complaint.

60. To the extent the Complaint cites to correspondence between the parties, Visa refers to those documents for their content and context. Visa denies the remaining allegations in paragraph 60 of the Complaint.

61. To the extent the Complaint cites to correspondence between the parties, Visa refers to those documents for their content and context. Visa is without knowledge or information sufficient to form a belief as to the truth of the allegations in the third and fifth sentences of paragraph 61 of the Complaint and on that basis denies them. Visa denies the remaining allegations in paragraph 61 of the Complaint.

62. To the extent the Complaint cites to correspondence between the parties, Visa refers to those documents for their content and context. Visa denies the remaining allegations in paragraph 62 of the Complaint.

63. To the extent the Complaint cites to correspondence between the parties, Visa refers to those documents for their content and context. Visa denies the remaining allegations in paragraph 63 of the Complaint.

64. Visa admits that representatives of the parties met to discuss the issues in dispute and were unable to reach agreement. Visa further admits that Walmart purportedly filed this lawsuit to seek a declaration from the Court that the Agreement allows Walmart to require debit

cardholders to use a PIN at Walmart stores, even when they express a preference for using a signature. Visa denies the remaining allegations in paragraph 64 of the Complaint.

65. Visa responds to the allegations in paragraph 65 of the Complaint as it did when those allegations were made separately.

66. Visa admits the allegations in paragraph 66 of the Complaint.

67. Visa denies the allegation in paragraph 67 of the Complaint.

68. Visa admits that there is a substantial and immediate controversy between Visa and Walmart as to whether the Agreement allows Walmart to require debit cardholders to use a PIN at Walmart stores, even when they express a preference for using a signature. Visa denies the remaining allegations in paragraph 68 of the Complaint.

69. Visa admits that Walmart purports to seek a declaration from this Court that the Agreement allows Walmart to require debit cardholders to use a PIN at Walmart stores, even when they express a preference for using a signature.

Visa denies each and every allegation not specifically admitted above. Visa denies that Walmart is entitled to the relief requested.

AFFIRMATIVE OR OTHER DEFENSES

Without assuming any burden of proof it would not otherwise bear, Visa asserts the following affirmative or other defenses.

FIRST DEFENSE

Walmart's claims are barred, in whole or in part, because Walmart lacks standing to assert them.

SECOND DEFENSE

Walmart's claims are barred, in whole or in part, because the Complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

Walmart's claims are barred, in whole or in part, because Visa was fraudulently induced to enter into the Agreement forming the basis for this Complaint.

FOURTH DEFENSE

Walmart's claims are barred, in whole or in part, by the doctrines of laches, waiver, estoppel, unclean hands, consent, ratification, and/or acquiescence.

FIFTH DEFENSE

Walmart's claims are barred, in whole or in part, by doctrines of res judicata and/or collateral estoppel.

SIXTH DEFENSE

Walmart's claims are barred, in whole or in part, by Walmart's failure to comply with the governing Agreement.

SEVENTH DEFENSE

Walmart's claims are barred, in whole or in part, by Walmart's own material breach of the Agreement.

EIGHTH DEFENSE

Walmart's claims are barred, in whole or in part, by Walmart's bad faith, including, but not limited to, its breach of the duty of good faith and fair dealing.

NINTH DEFENSE

Any alleged harm suffered by Walmart is the result of the conduct of third parties for which Visa is not responsible.

* * *

Visa preserves and asserts all affirmative defenses under any applicable law, and reserves the right to assert additional affirmative defenses at a later time.

COUNTERCLAIMS

Visa, by and through its undersigned counsel, alleges counterclaims against Walmart as follows:

1. Walmart attempts to portray the parties' dispute as one arising under and controlled by Federal regulations. That is wrong. The parties' dispute arises under a contract, and it is in that contract that the relevant provisions governing the parties' relationship are to be found. That contract was heavily negotiated between Visa and Walmart—a company that, as Walmart's own complaint points out, has massive annual sales and considerable sophistication. The contract confers enormous benefits on Walmart. One benefit it does *not* confer is the right to require PIN entry for Visa debit cards to the exclusion of signature and other methods of authentication. Many Visa cardholders do not want to enter, or cannot remember, their PIN (assuming they even have one), and the contract preserves cardholders' freedom to provide a signature instead. The contract also does not confer on Walmart the right to violate Visa's network rules, including the requirement that Walmart honor all Visa-branded cards.

2. Rather than focus on the contract it negotiated and signed, Walmart attempts to find justification for its conduct in regulations promulgated by the Federal Reserve Board pursuant to the so-called "Durbin Amendment". Those regulations, however, do not apply to, let alone permit, the contract-breaching conduct in which Walmart has engaged. In tacit recognition of that fact, Walmart cites to a "proposed" rule that was *not* implemented by the Federal Reserve Board, and ignores a decision of the District of Columbia Circuit Court of Appeals that makes crystal clear that consumers are not bound by the Durbin regulations and that, if a consumer chooses to complete a Visa debit transaction via signature rather than PIN verification, the Durbin regulations simply do not come into play. The consumer's freedom to choose how she

wishes to complete a debit transaction is ultimately what is at stake here, but that issue is addressed not by the Durbin regulations but by the parties' agreement and Visa's rules, both of which make clear that Walmart has no right to require PIN verification from a consumer who wishes to use an alternate method of completing a Visa debit transaction.¹

3. Walmart also attempts to distract the Court—and perhaps the public at large—from the relevant legal issues by casting unwarranted aspersions on the security of Visa transactions. Visa is committed to keeping commerce safe. Fraud on Visa payment cards has declined two-thirds over the last two decades and is near historic lows, even as transaction volume has increased more than 1,000 percent. Fraud rates stand to drop even further and even more dramatically as banks issue, and merchants accept, chip-enabled cards. Chip technology virtually eliminates the risk of counterfeit cards—which represents up to approximately 74 percent of in-store fraud—and recent rule changes mean that banks that don't issue, and merchants that don't accept, chip-enabled Visa cards will bear the risk of counterfeit fraud going forward. (Of course, *Visa cardholders* are never responsible for any kind of fraud, counterfeit or otherwise, because of Visa's zero liability policy on credit, debit and prepaid cards.)

4. Walmart narrowly focuses on the benefits of PIN technology, but fails to mention both that PIN technology is only helpful at preventing fraud resulting from lost and stolen cards—which represents approximately 9.7 percent of overall payment fraud—and that PIN technology presents its own risks. For example, PINs are subject to compromise and heavily targeted by thieves. In any event, Walmart's purported concerns for its own liability are

¹ As the Federal Reserve Board explained to the D.C. Circuit: "To the extent a consumer insists that a transaction must be authenticated by either signature or PIN, and the consumer's demand in a particular instance causes less than two unaffiliated networks to be available for routing the transaction through no action of the issuer or payment card network, that is not a restriction covered by [the Durbin Amendment]."

groundless: under Visa's rules, merchants are held harmless for lost and stolen fraud. Financial institutions, not merchants or consumers, bear liability for lost and stolen fraud.

5. Again, this dispute does not concern federal statutes, regulations, best practices in the payments industry, or harm to consumers: it concerns a contract between Walmart and Visa, executed on November 13, 2015 ("Agreement"). The Agreement, along with Visa's network rules, determined the terms under which Walmart would accept Visa cards at Walmart's thousands of stores across the United States as well as for sales online or over the phone. The Agreement provided that the obligations contained therein were not effective until January 1, 2016 ("Effective Date").

6. As with any complex commercial agreement, Walmart and Visa each sought to include a variety of terms in the Agreement that were favorable to it. The parties intensely negotiated over the terms of the Agreement starting in 2013 and continued doing so until shortly before execution. Visa ultimately accepted some of the terms Walmart sought, and rejected others.

7. Among the terms that Walmart sought and Visa expressly rejected was a right to require Visa cardholders to enter a PIN when they used their Visa-branded debit cards to make payments at terminals in Walmart stores. Visa's cardholders had long had the choice at Walmart's terminals—a choice required by Visa's rules—to provide either a signature or a PIN when they used their debit cards. Eliminating the cardholder's option to provide a signature, and foreclosing other possible means of verification in the future, would infringe on the consumer's choice, reduce the consumer's ability to conduct a transaction over the Visa network, tarnish Visa's brand, and, in many cases, lead to non-acceptance of Visa debit cards. Visa's rejection of Walmart's demand was conveyed orally to, and accepted by, Walmart, and terms memorializing

that rejection were ultimately included in the Agreement. Specifically, the Agreement provided that Walmart must continue to accept Visa debit cards in a manner and form no less than it did on the Effective Date.

8. On information and belief, and unbeknownst to Visa at the time, when Walmart executed the Agreement it had no intention of observing this obligation and several others provided in the Agreement. Indeed, at the time of execution Walmart had already hatched a plan to eliminate the signature option at its physical locations shortly after the Effective Date. It nevertheless falsely promised not to change the manner and form by which it accepted Visa debit cards to induce Visa to enter into the Agreement and provide it with low acceptance fees.

9. Shortly after procuring the Agreement by fraud, Walmart took steps in bad faith to deprive Visa of the benefit of its bargain. Starting in November 2015 and continuing through the Effective Date, Walmart secretly tested eliminating the signature option at terminals in a handful of its stores. Doing so, of course, was entirely consistent with its prior intention not to honor its obligations under the Agreement. It also, Walmart hoped, provided the basis for an argument that because it had eliminated the signature option at a handful of its stores as of the Effective Date, it had the right to eliminate the signature option at all its stores throughout the term of the Agreement.

10. Beginning in February 2016, after the Effective Date, Walmart eliminated the signature option at terminals in its physical stores nationwide and in so doing breached multiple provisions of the Agreement. Visa received complaints from cardholders, lost revenue due to missed transactions, and suffered damage to its reputation and brand. After weeks of correspondence between Walmart and Visa, Walmart ultimately modified its terminals to once again provide cardholders the opportunity to verify their identity with a signature.

11. Walmart continues to take the position that it is entitled to make PIN the exclusive means of verification for Visa debit transactions at its terminals. Walmart is wrong, and Visa is entitled to a declaration that Walmart must provide Visa cardholders with a mechanism to process their Visa-branded debit card transactions without a PIN.

I. Walmart's Historical Practice and Visa's Rules

12. Requiring Visa cardholders to provide a PIN when using their Visa-branded debit cards deviated from Walmart's longstanding practice at its physical locations. Before demanding the right to eliminate the signature option in its negotiations over the Agreement, Walmart had historically, and consistently with Visa's rules, encouraged customers to enter their PIN instead of providing a signature, but like all merchants accepting Visa, it had always provided Visa cardholders with a mechanism to use their Visa-branded debit cards without providing a PIN, if that is what the cardholder ultimately wanted to do.

13. Prior to Walmart's demand, Visa cardholders attempting to pay with their Visa-branded debit card at Walmart's physical locations had faced a series of prompts at a card-accepting terminal, and their responses would determine whether the transaction would be processed with a PIN or a signature. After either swiping her card or presenting her card to be swiped, a cardholder would initially be prompted to provide a PIN. Entering a PIN, however, was never the cardholder's only option. That initial prompt would, for example, often be accompanied by a "cancel" button. If the cardholder opted to "cancel", she would not exit the transaction but rather would face a new prompt and choices that she could navigate to reach the signature option.

14. Cardholders often availed themselves of the signature option at Walmart. Given the many reasons Visa cardholders opt to provide a signature rather than a PIN, why they chose

the signature option varied. In some instances, it was simply because there was no PIN associated with the card. This is true for the debit cards issued by certain credit unions. In others, cardholders likely chose not to provide a PIN because they did not remember their assigned PIN, or they were not comfortable entering their PIN while standing in a checkout line.²

15. The practice described in paragraph 13 above is consistent with the rules that all merchants accepting Visa cards must follow. For example, Visa’s “Honoring All Visa Cards” rule states that “Visa Merchants may not refuse to accept a Visa product that is properly presented for payment . . .” (“Honor All Cards Rule”). The rule further provides that “Merchants may attempt to steer customers who initially present a Visa Card to an alternative method of payment, such as by providing discounts for cash, but may not do so in a confusing manner that denies consumer choice,” and that “Merchants may also consider whether present circumstances create undue risk” in determining whether to decline a particular transaction. Collectively, these rules are designed to ensure that a Visa cardholder can in fact use her card to complete a Visa transaction at retail locations that hold themselves out as accepting Visa.

16. A Visa-branded debit card is “a Visa product” within the meaning of the Honor All Cards Rule, and a cardholder “properly present[s]” her Visa-branded debit card for payment when she opts to provide a signature instead of a PIN as proof of her identity. Indeed, for Visa-branded debit cards with which no PIN is associated, there is no other way to present the card for payment. Providing some mechanism through which Visa cardholders could process a Visa-branded debit card transaction without a PIN is therefore not only consistent with Visa’s Honor All Cards Rule, but also required by it.

² For example, cardholders may be concerned that PINs may be stolen from a retailer’s system. In fact, in May 2016, it was reported that Walmart customers had their PINs stolen when thieves put electronic skimmers on checkout card machines at a Walmart in Fredericksburg, Virginia.

17. The practice described in paragraph 13 above is also consistent with Visa's "Selection of Payment System" rule otherwise known as its "Consumer Choice" rule. That rule states that when cardholders present a valid Visa card for payment that "bears a Mark representing another payment service", the merchant "must honor the [c]ardholder's request" if the cardholder requests that the transaction be processed as a Visa transaction. Further, the rule provides that merchants may not mislead the cardholder regarding what payment service may be used.

18. By statute, most debit cards issued in the U.S. must have the technical capacity to route transactions over at least two unaffiliated payment networks. For Visa-branded debit cards, this will be the Visa network and one or more other debit networks. The "Mark[s]" representing these other debit networks are typically found on the back of a Visa-branded debit card. Card-accepting terminals at Walmart stores, however, have historically not listed in their prompts the networks available for use in the transaction. Rather, Walmart would typically process a debit transaction over the non-Visa network if the cardholder provided a PIN and over the Visa network if the cardholder provided a signature. Accordingly, Walmart "honor[ed] the [c]ardholder's request" that the transaction be processed as a Visa transaction when it provided the signature option at its terminals and the cardholder opted to provide a signature. Consistent with the rule, Walmart was permitted to process the transaction as something other than a Visa Transaction if its terminals first prompted the cardholder to provide a PIN and the cardholder provided it, but only if it gave the cardholder the option to cancel entering a PIN and therefore the opportunity to agree that the transaction may be processed as something other than a Visa Transaction.

19. The network over which a transaction was processed had significant consequences for the cardholder, Walmart, and Visa. When transactions were processed over Visa's network, cardholders may have received certain benefits not offered for transactions on other debit networks, including rewards, no fees, full protection from unauthorized charges, and transaction alerts. Cardholders had an incentive, therefore, to choose the Visa network over another debit network. Further, Visa itself received a small fee from its clients—issuers and acquirers—whenever a debit transaction was processed over the Visa network.

II. Negotiations, the Agreement, and Walmart's Fraud

20. Notwithstanding Walmart's longstanding acceptance practices and Visa's rules, in negotiations over the Agreement, Walmart repeatedly sought the right to require Visa cardholders to enter a PIN in order to process a Visa-branded debit card transaction. Visa repeatedly refused. Among the reasons Visa gave for its position were that eliminating the signature option violated Visa's rules and denied consumer choice.

21. As part of the negotiations, Walmart requested that Visa cite those of its rules violated by making PIN the exclusive means of verification. Visa cited to, and sent copies to Walmart of, its Honor All Cards Rule and its Consumer Choice Rule.

22. Over the course of a series of meetings between negotiators for Walmart and Visa, Walmart ultimately conveyed orally that it would abandon its demand to eliminate the signature option and agreed to continue to observe Visa's Honor All Cards and Consumer Choice rules as memorialized in the then-current draft of the Agreement.

23. In this fashion, and sometimes also in writing, Walmart abandoned several other demands that Visa had consistently rejected, including various changes to the fee and incentive structure that Visa had originally proposed.

24. Following these negotiations, the parties executed the Agreement on November 13, 2015. The Effective Date for the parties' obligations was set as January 1, 2016. Two provisions of the Agreement—Sections 2(a)(i) and 2(b)(i)(A)—expressly covered acceptance and verification methods.

25. Section 2(a)(i) of the Agreement provides that “[s]tarting on the Effective Date and continuing throughout the remainder of the Term . . . Walmart and Walmart Affiliates agree: . . . to accept Visa Cards . . . in a manner and form no less than the manner and form in which Visa Cards . . . are accepted as of the Effective Date at every Point-of-Sale where Cards are accepted, in all forms that such Cards are accepted and all methods where such Cards are supported, located in all [of Walmart’s physical locations].”

26. Section 2(a)(i) memorializes Walmart’s agreement to continue its historical acceptance practices, including providing cardholders with a mechanism for using their Visa-branded debit cards without providing a PIN. Whatever its acceptance practices were as of January 1, 2016, Walmart agreed to continue those practices.

27. Section 2(b)(i)(A) of the Agreement provides that:

Walmart and the Walmart Affiliates shall comply with all Rules that are in effect and applicable to Walmart or a Walmart Affiliate as of the Effective Date, subject to any written waivers in effect Notwithstanding the foregoing, **Visa does not and shall not waive any Rule which would prohibit Walmart or a Walmart Affiliate from . . . limiting the cardholder verification method available to a cardholder on any Visa Card**

28. Section 2(b)(i)(A) memorializes Walmart’s agreement to comply with Visa’s rules, excepting whatever rules for which it had historically been provided waivers. The provision, however, makes clear that Visa had not waived, and would not waive, the Honor All Cards Rule or the Consumer Choice Rule because each of those rules “prohibit[ed] Walmart [and] Walmart Affiliate[s] from . . . limiting the cardholder verification method available to a

cardholder on any Visa Card or Interlink Card.” Because both the Honor All Cards Rule and the Consumer Choice Rule prohibited and continue to prohibit Walmart from limiting cardholder verification methods on debit transactions to PIN only, those rules were not waived, and Walmart is required to follow them.

29. Separately, unless the Rules somehow mandated such activity, Section 2(d)(i)(B) of the Agreement also prohibited Walmart from “engag[ing] in practices that encourage the customer to use a Non-Visa Card without giving customers the opportunity to use a Visa Card, including, but not limited to, deploying multiple steps, interruptions, or obstacles, when compared to Non-Visa Cards, for Visa cardholders to select, use, or retain the Visa Card as their preferred payment option at Walmart Locations.”

30. Despite making all the promises to Visa contained in Sections 2(a)(i) and 2(b)(i)(A), on information and belief, Walmart had no intention of performing its obligations under the provisions when it executed the Agreement. Walmart knew that these provisions prohibited it from making PIN the exclusive means of verification at its terminals. Visa had repeatedly told Walmart that it could not eliminate the signature option under the Agreement, and Walmart ultimately abandoned its demands for modifications of the Agreement to allow it to eliminate this option. Walmart nevertheless intended at the time of the Agreement’s execution (and likely long before) to make PIN the exclusive means of verification at its terminals and therefore breach the Agreement.

31. On information and belief, Walmart concluded that it could procure what it wanted only by fraud. Only if it promised not to eliminate the signature option would Visa have agreed to provide it with the low acceptance fees contained in the Agreement. But the low fees bargained for by Walmart were not enough. It wanted those low fees and the benefits of

accepting Visa cards generally without having to accommodate cardholders' choice to complete their Visa debit transactions with a signature instead of a PIN.

32. At the time of the Agreement's execution, Visa took Walmart at its word. It relied on Walmart's promises just as Walmart had intended. It did not know that in barely three months' time, Walmart would begin executing its plan to eliminate the signature option in violation of the Agreement.

III. EMV and Walmart's Bad Faith Conduct

33. Upon information and belief, Walmart had always intended to use a change in payment card technology as an excuse to require PIN entry for Visa-branded debit cards despite its promise not to do so. Around or about the execution of the Agreement, Walmart took steps to begin using that change to effect its goals.

34. The change in payment card technology of which Walmart sought to take advantage was the migration to EMV chip technology. For decades, cardholder information was contained on a magnetic strip on the back of Visa-branded cards. Card-reading terminals would extract that information from the magnetic strip and use it to authorize the transaction over the Visa network. EMV chip technology replaces the magnetic strip with a computer chip, and chip card-reading terminals use the chip to authorize the transaction.

35. EMV chip cards present a variety of benefits over magnetic strip cards. For example, the information on magnetic strip cards is static and can be copied by thieves to make counterfeit cards and unauthorized transactions. In contrast, chip cards contain dynamic encryption codes, or cryptograms, that change with every transaction. Even if card data is stolen, information contained in the chip cannot be used to create counterfeit cards.

36. The Agreement was executed against the backdrop of a national rollout of EMV chip cards. On October 1, 2015, certain liability shifted among the parties to payment card transactions to provide an incentive for merchants to upgrade their terminals to accept EMV chip cards. In particular, for all major payment cards, including Visa, liability for transactions involving counterfeit fraud on chip cards shifted from the issuing bank to the acquiring bank (and thus to the merchant) if the merchant had not enabled chip technology at its terminals.³

37. Very little in the Agreement, however, turns on whether the Visa cards accepted by Walmart were EMV chip cards or not. Walmart agreed to accept any “Visa Card”, which includes Visa-branded debit cards regardless of whether they contain EMV chips. Nothing in the Agreement’s provisions requiring Walmart’s continuation of its Effective Date acceptance policies or Walmart’s observance of Visa’s rules depends on the presence or absence of EMV chips.

38. Nothing in Walmart’s historical acceptance practices as they concerned cardholder verification depended on whether Walmart’s terminals were reading magnetic strips or EMV chips. Nor was there any technical reason why Walmart’s upgraded, EMV-chip terminals could not provide a mechanism for Visa cardholders to process their Visa-branded debit card transactions without a PIN.

39. Walmart now unsuccessfully attempts to justify denying cardholders the signature verification option by reference to Visa’s liability shift program relating to EMV chip implementation. Under that program, liability shifts only for counterfeit transactions—precisely the type of fraud that chip cards are designed to eliminate. Requiring PIN entry adds no

³ Unlike some of its competitors, Visa did not change its policy for lost or stolen card fraud, in which case liability remains with the issuing bank.

additional security with regard to mitigating counterfeit fraud. Liability arising from lost or stolen cards or information remains with the card issuer.

40. Consistent with the irrelevancy of EMV chip cards to following Visa's rules, when Walmart upgraded its terminals in the months preceding October 1, 2015—*i.e.*, before execution of the Agreement—it changed nothing of its acceptance practices as described above in paragraph 13. The only difference in the Visa cardholder's experience after Walmart upgraded its terminals was that, to initiate a transaction, the cardholder needed to insert her Visa-branded debit card into the terminal rather than swipe her card at the terminal. If the cardholder were to swipe instead, she would be prompted to insert her card. Otherwise, the sequence of prompts seen by the cardholder was exactly the same: the cardholder would be prompted to enter a PIN but given a means to complete the transaction with a signature instead, such as, for example, a "cancel" option that would lead to a series of prompts and choices navigable to a signature option. As before, Walmart provided Visa cardholders with a mechanism to use their Visa-branded debit cards without providing a PIN.

41. Nevertheless, around or about the time Walmart executed the Agreement, it began testing the elimination of the signature option in secret on upgraded, EMV-chip terminals at a handful of stores. At no point during the testing did Walmart disclose to Visa that it was conducting the tests. Upon information and belief, the testing continued through at least December 2015.

42. Walmart tested eliminating the signature option at a handful of its stores both to lay the groundwork for a national rollout of PIN-only verification at all of its physical locations and, upon information and belief, to provide a basis for it to argue later to Visa that the "manner

and form in which Visa Cards . . . [were] accepted as of the Effective Date [at Walmart’s physical locations]” included requiring PIN.

43. Upon information and belief, Walmart acted in bad faith in an attempt to deprive Visa of the benefits of the Agreement when it tested eliminating the signature option in secret in November and December of 2015.

IV. Walmart Breaches the Agreement

44. In February 2016, Walmart began implementing a nationwide policy of requiring PIN at all of its physical locations in the United States. In a coordinated effort, Walmart’s card-accepting terminals—already EMV-chip compatible—were re-configured to eliminate Visa cardholders’ option to process Visa-branded debit card transaction with a signature.

45. For example, although the “cancel” option remained after many terminals prompted cardholders to enter a PIN, cardholders that opted to “cancel” were not then provided the opportunity to navigate to a prompt where they could provide a signature. Instead, the following message would be displayed on the terminal: “Card declined. Use a different card or pay with cash. Tender declined reason: CUSTOMER CANCELLED BANKCARD.”

46. Walmart did not disclose the rollout to Visa. Instead, Visa learned of the change when it began to receive complaints from customers claiming that they could no longer use their debit cards at Walmart stores without a PIN. Visa also noticed a significant drop in debit transactions at Walmart stores.

47. Visa reached out to Walmart to inquire about the apparent breach of the Agreement. In a series of exchanges, Walmart representatives confirmed that Walmart had implemented PIN as the exclusive verification method at its card-accepting terminals, but denied that its conduct constituted a breach. Visa insisted that Walmart re-configure its terminals to

conform to its historical acceptance practices, and Walmart refused, insisting in turn that it would take six months to implement such a re-configuration.

48. As negotiations continued, Walmart announced that it had temporarily reconfigured its terminals such that if, after receiving the prompt described in paragraph 45 above, Visa cardholders swiped their debit cards, they would proceed through the same transaction flow as they had historically (the “Interim Process”). The cardholder would not, however, be given any notice that it could swipe her card at that point in the transaction flow, and indeed, if the cardholder had initially attempted to swipe her card, she would have instead been directed to insert it. Visa confirmed that the Interim Process was unacceptable and continued to violate Visa’s rules.

49. On March 23, 2016, and pursuant to Section 8 of the Agreement, Visa provided Walmart with written notice of its material breaches, citing Sections 2(a)(i), 2(b)(i)(A), and 2(d)(i)(B) and providing an explanation for each breach. Walmart, in written and oral communications that followed, continued to deny any breach.

50. On April 22, 2016, Visa received a letter from Walmart indicating that it had “cured” the breaches Visa had identified in its March 23, 2016 letter. Specifically, Walmart claimed that it had “placed on the PIN entry screens of all its U.S. stores a button that allows cardholders to provide a signature instead of a secure PIN as the cardholder verification method in a dipped transaction with an EMV debit card.”

51. On May 2, 2016, representatives from Walmart and Visa met to discuss the ongoing dispute. At that meeting and subsequently, Walmart continued to assert that it was entitled to require PIN for EMV debit cards under the Agreement and that Visa’s breach notice had been “wrongful”. Walmart also demanded that the fee and incentive structure of the

Agreement be renegotiated to compensate Walmart for its alleged losses. In doing so, Walmart made many of the same demands that Visa had expressly rejected during the parties' previous negotiations. Visa continued to reject Walmart's position regarding eliminating the signature option and the appropriateness of Visa's breach notice.

52. On May 10, 2016, Walmart filed with the Court a redacted version of the complaint in this action.

COUNT I
(Declaratory Judgment – Breach of Contract)

53. Visa re-alleges and fully incorporates herein by reference each and every allegation contained in paragraphs 1 through 52 above.

54. The Agreement is a valid and enforceable contract between Visa and Walmart. Visa has performed all of its material obligations under the Agreement.

55. Section 2(a)(i) of the Agreement requires Walmart "to accept Visa Cards . . . in a manner and form no less than the manner and form in which Visa Cards . . . are accepted as of the Effective Date at every Point-of-Sale where Cards are accepted, in all forms that such Cards are accepted and all methods where such Cards are supported" at Walmart's physical locations.

56. Section 2(b)(i)(A) of the Agreement requires Walmart to comply with, among other rules, Visa's Honor All Cards Rule, which prohibits Walmart from refusing to accept for payment a properly presented Visa-branded debit card.

57. Section 2(d)(i)(B) of the Agreement prohibits Walmart from engaging "in practices that encourage the customer to use a Non-Visa Card without giving customers the opportunity to use a Visa Card"

58. As of the Effective Date, Walmart permitted Visa cardholders to use their Visa-branded debit cards at Walmart's physical locations without providing a PIN. Approximately

one month after the Effective Date, at those same locations, Walmart began refusing to allow Visa cardholders to use their Visa-branded debit cards without providing a PIN. When Visa cardholders attempted to provide a signature instead of a PIN as they had previously, they were informed that their transaction had been cancelled and were prompted to use another form of payment.

59. Walmart's refusal to allow Visa cardholders to use their Visa-branded debit cards without providing a PIN breached Sections 2(a)(i), 2(b)(i)(A), and 2(d)(i)(B) of the Agreement. Walmart's implementation of the Interim Process did not cure these breaches.

60. Although Walmart now claims to provide a meaningful mechanism for cardholders to use their Visa-branded debit cards without a PIN, it has expressed its intention to return to its practice of not providing such a mechanism and, upon information and belief, has brought this lawsuit to further that intention.

61. Walmart's actions, including bringing this lawsuit, create an actual and immediate justiciable controversy between Visa and Walmart with respect to whether Walmart has violated the Agreement and to whether it will violate the Agreement in the future.

62. Visa has suffered irreparable harm for which there is no adequate remedy at law to its reputation and brand, as well as lost revenue from transactions not flowing over Visa's network, due to Walmart's actions and would continue to suffer such harm if Walmart were allowed to eliminate the signature option in violation of the Agreement.

63. Accordingly, Visa is entitled to a declaration that, from the Effective Date until termination of the Agreement, any failure by Walmart to provide a meaningful mechanism for Visa cardholders to use their Visa-branded debit cards without providing a PIN at Walmart's physical locations violates:

- a. Section 2(a)(i) of the Agreement;
- b. Visa's Honor All Cards Rule, among other Visa Rules, and therefore Section 2(b)(i)(A) of the Agreement; and
- c. Section 2(d)(i)(B) of the Agreement.

64. In addition to the aforesaid declaration, Visa is entitled to injunctive relief, and an order of specific performance and such other and further relief as the Court deems appropriate.

COUNT II

(Declaratory Judgment – Breach of the Implied Duty of Good Faith and Fair Dealing)

65. Visa re-alleges and fully incorporates herein by reference each and every allegation contained in paragraphs 1 through 64 above.

66. The Agreement is a valid and enforceable contract between Visa and Walmart. Visa has performed all of its material obligations under the Agreement.

67. Pursuant to the covenant of good faith and fair dealing implicit in the Agreement, Walmart is prohibited from doing anything that will have the effect of destroying or injuring Visa's right to receive the benefits of its bargain.

68. Walmart knew that Visa did not read the Agreement to permit Walmart to deny Visa cardholders a mechanism to process Visa-branded debit card transactions without a PIN, and yet, upon information and belief, Walmart fully intended at the time the Agreement was formed to deny Visa cardholders such a mechanism.

69. After the Agreement was formed but before the Effective Date, and at a very small number of its physical locations, Walmart began testing the capacity of its point-of-sale terminals to deny Visa cardholders the ability to process Visa-branded debit card transactions without a PIN.

70. Upon information and belief, Walmart continued testing through the Effective Date in part so that it could argue that its acceptance practices as of the Effective Date included requiring PIN under Section 2(a)(i).

71. Walmart's testing between the formation date and the Effective Date of the Agreement breached the covenant of good faith and fair dealing.

72. Visa has suffered irreparable harm for which there is no adequate remedy at law to its reputation and brand, as well as lost revenue on transactions not flowing over Visa's network, due to Walmart's actions.

73. Visa is therefore entitled to a declaration that Walmart's testing between the formation date and the Effective Date of the Agreement breached the covenant of good faith and fair dealing.

74. In addition to the aforesaid declaration, Visa is entitled to injunctive relief and an order of specific performance and such other and further relief as the Court deems appropriate.

COUNT III (Fraudulent Inducement)

75. Visa re-alleges and fully incorporates herein by reference each and every allegation contained in paragraphs 1 through 74 above.

76. To induce Visa to execute the Agreement, Walmart knowingly and falsely represented to Visa in Sections 2(a)(i) and 2(b)(i)(A) of the Agreement that Walmart would continue to allow cardholders the option of signature verification and that it would not require PIN.

77. At the time Walmart made the foregoing representation and executed the Agreement, it had no intent of ever performing its obligations under Sections 2(a)(i) and 2(b)(i)(A).

78. Walmart intended that Visa rely on the foregoing misrepresentations, and Visa reasonably and justifiably did rely upon the foregoing misrepresentations.

79. Walmart did, in fact, fail to perform its obligations under Sections 2(a)(i) and 2(b)(i)(A) of the Agreement.

80. As a result of the foregoing, Visa has suffered damages.

81. Further, as a result of the foregoing, Visa is entitled to rescission of the Agreement.

DEMAND FOR A JURY TRIAL

Visa demands a jury trial on its counterclaims.

PRAYER FOR RELIEF

WHEREFORE, Visa respectfully requests that this Honorable Court dismiss the Complaint with prejudice and enter judgment in its favor and against Walmart on Counterclaim Counts I, II, and III granting:

- (a) A declaration that Walmart breaches the Agreement if it fails to provide a meaningful mechanism for Visa cardholders to use their Visa-branded debit cards without providing a PIN at Walmart's physical locations;
- (b) A declaration that Walmart breached the implied covenant of good faith and fair dealing when, between formation of the Agreement and the Effective Date, and at a small number of its physical locations, it tested the capacity of its point-of-sale terminals to deny Visa cardholders the ability to process Visa-branded debit card transactions without a PIN;
- (c) An injunction enjoining Walmart from refusing to allow Visa cardholders to use their Visa-branded debit cards without providing a PIN while the Agreement remains in effect;
- (d) An order of specific performance directing Walmart to allow Visa cardholders to use their Visa-branded debit cards without providing a PIN while the Agreement remains in effect;
- (e) Rescission of the Agreement and all other legal remedies to which Visa is entitled as the target of fraud;

- (f) Costs of this suit, including reasonable attorneys' fees; and
- (g) Any such further relief as justice and equity may require.

DATED: New York, New York
June 29, 2016

Respectfully submitted,

HOLWELL SHUSTER & GOLDBERG LLP

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