CASE NOS. 12-2790 and 12-2797 (consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JAREK CHARVAT,

Plaintiff-Appellant,

v.

MUTUAL FIRST FEDERAL CREDIT UNION,

Defendant-Appellee.

JAREK CHARVAT,

Plaintiff-Appellant,

v.

FIRST NATIONAL BANK OF WAHOO,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

The Honorable Laurie Smith Camp
Chief District Judge

BRIEF OF APPELLEE FIRST NATIONAL BANK OF WAHOO

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SUMMARY OF THE CASE

The District Court granted Appellee/Defendant First National Bank of Wahoo's ("FNBW") motion pursuant to Federal Rule of Civil Procedure 12(b)(1), to dismiss Appellee/Plaintiff Jarek Charvat's ("Charvat") claims, with prejudice, because the District Court lacked subject matter jurisdiction over Charvat's claims. The District Court correctly concluded that Charvat suffered no injury in fact and therefore has no standing to bring this claim. Further, the District Court held that Charvat failed to allege that FNBW caused any injury to Charvat because Charvat had actual knowledge of the fee. The District Court's decision was not unprecedented, and was based soundly upon the facts alleged in Charvat's Complaint.

FNBW believes that 15 minutes of oral argument is sufficient. The District Court's decision is limited solely to the deficiencies in Charvat's Complaint. The issues presented in this case are limited to their facts, and because Congress has amended the applicable statute, are not capable of repetition. Essentially, this is a case of last impression.

NOTE ON FORM OF CITATIONS

"JA" followed by page numbers refers to the pages in "Consolidated Joint Appendix" filed by Appellant/Plaintiff Jarek Charvat.

"SA" followed by page numbers refers to the pages in the "Stipulated Supplemental Appendix" filed contemporaneously with this Brief by Appellee/Defendant First National Bank of Wahoo and Appellee/Defendant Mutual First Federal Credit Union.

"Appellant's Br." refers to Appellant's Principal Brief.

"DOJ Amicus Br." refers to the Brief filed by the DOJ as Amicus Curiae in Support of Plaintiff-Appellant.

CORPORATE DISCLOSURE STATEMENT

The Appellee/Defendant, First National Bank of Wahoo, has no parent company or affiliate. Appellee is not publicly traded, and no publicly traded corporation owns 10% or more of its stock.

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JURISDICTIONAL STATEMENT

FNBW adopts Charvat's jurisdictional statement except to state that subject matter jurisdiction is lacking.

STATEMENT OF THE ISSUES

1. Whether Charvat lacks constitutional standing where he has not alleged an injury in fact.

2. Whether Charvat lacks constitutional standing even if he had alleged an injury in fact where any alleged injured was caused by his own acts according to his own actual knowledge.

Most Apposite Cases

Summers v. Earth Island Inst., 555 U.S. 488 (2009).

Vermont Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765 (2000)

Raines v. Byrd, 521 U.S. 811 (1997).

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

ABF Freight Sys. v. Int'l Bhd. of Teamsters, 645 F.3d 954 (8th Cir. 2011).

Burks-Marshall v. Shalala, 7 F.3d 1346 (8th Cir. 1993).

Mausolf v. Babbitt, 85 F.3d 1295 (8th Cir. 1996).

Cargill, Inc. v. United States, 173 F.3d 323 (5th Cir. 1999).

STATEMENT OF THE CASE

Charvat filed his Class Action Complaint (the "Complaint") against FNBW on March 8, 2012. (JA 21, 24). Charvat alleged on behalf of himself and others similarly situated, that FNBW violated the Electronic Funds Transfer Act, 15 U.S.C. 1693b, by failing to post a notice on or at an automatic teller machine ("ATM") allegedly operated by FNBW. (JA 24, 30). Charvat based his claims on two separate visits to the same ATM. (JA 25). On March 30, 2012, FNBW moved to dismiss Charvat's Complaint for lack of subject matter jurisdiction. (JA 21). The Court concluded that Charvat did not allege an injury in fact caused by FNBW's failure to provide notice of the fee on the exterior of its ATM. (JA 38). The District Court dismissed Charvat's Complaint with prejudice on July 12, 2012. (JA 47).

STATEMENT OF THE FACTS

1. Former Statutory and Regulatory Structure

On March 8, 2012, Plaintiff/Appellant Jarek Charvat ("Charvat") filed a Complaint claiming that Defendant/Appellee First National Bank of Wahoo ("FNBW") violated the Electronic Fund Transfer Act ("EFTA"), 15 U.S.C. § 1693 *et seq.*, by failing to provide an on machine notice during two transactions at an automated teller machine ("ATM") operated by FNBW. (JA 24-31). Congress enacted EFTA as part of the comprehensive Consumer Credit Protection Act, Pub.L. No. 95-630 § 2001, 92 Stat. 3641 (1978) (codified as amended at 15 U.S.C. § 1601 *et seq.*). EFTA was aimed at protecting individual consumer rights by "provid[ing] a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems." 15 U.S.C. § 1693(b). EFTA requires certain fee disclosures to be present at ATMs. 15 U.S.C. § 1693b(d)(3). During the pendency of this action, EFTA was specifically amended to eliminate the need for an ATM operator to provide a notice on or about the ATM, while leaving the on-screen notice requirement. Electronic Fund Transfer Act Amendment, Pub. L. No. 112-216, 126 Stat. 1590 (2012) (to be codified at 15 U.S.C. §

1693b(d)(3)(B)). The statute operative at the time the Complaint was filed, 15 U.S.C. § 1693b(d)(3), provided in relevant part:

> **(3) Fee disclosures at automated teller machines**
>
> **(A) In general**
>
> The regulations prescribed under paragraph (1) shall require any automated teller machine operator who imposes a fee on any consumer for providing host transfer services to such consumer to provide notice in accordance with subparagraph (B) to the consumer (at the time the service is provided) of--
>
> > **(i)** the fact that a fee is imposed by such operator for providing the service; and
> >
> > **(ii)** the amount of any such fee.
>
> **(B) Notice requirements**
>
> > **(i) On the machine**
> >
> > The notice required under clause (i) of subparagraph (A) with respect to any fee described in such subparagraph shall be posted in a prominent and conspicuous location on or at the automated teller machine at which the electronic fund transfer is initiated by the consumer.
> >
> > **(ii) On the screen**
> >
> > The notice required under clauses (i) and (ii) of subparagraph (A) with respect to any fee described in such subparagraph shall appear on the screen of the automated teller machine, or on a paper notice issued from such machine, after the transaction is initiated and before the consumer is irrevocably committed to completing the transaction.
> >
> > …

> **C) Prohibition on fees not properly disclosed and explicitly assumed by consumer**
>
> No fee may be imposed by any automated teller machine operator in connection with any electronic fund transfer initiated by a consumer for which a notice is required under subparagraph (A), unless--
>
> > **(i)** the consumer receives such notice in accordance with subparagraph (B); and
> >
> > **(ii)** the consumer elects to continue in the manner necessary to effect the transaction after receiving such notice.

EFTA contains express provisions regarding the enforcement of the regulations associated with the statutes. *See* 15 U.S.C. § 1693o. EFTA assigns compliance enforcement to the Board of Directors of the Federal Deposit Insurance Corporation ("FDIC") in the case of a state chartered bank that is insured by the FDIC but is not a member bank of the Federal Reserve System. 15 U.S.C. § 1693o(a)(1)(C). To that end, one of the enumerated purposes of the FDIC is to "make examinations of and to require information and reports from depository institutions." 12 U.S.C. §§ 1819 & 1820, *see also* 12 U.S.C. § 1818(n). The regulations contained provisions similar to the former 15 U.S.C. § 1693b(d), that required notice of the fact and amount of the fee posted on the machine

and notice on the screen or through a paper notice. *See* 12 C.F.R. § 1005.15(c); 12 C.F.R. § 205.16(c). Specifically, the regulations required:

> (c) *Notice requirement.* To meet the requirements of paragraph (b) in this section, an automated teller machine operator must comply with the following:
>
> > (1) *On the machine.* Post in a prominent and conspicuous location on or at the automated teller machine a notice that:
> >
> > > (i) A fee will be imposed for providing electronic fund transfer services or for a balance inquiry; or
> > >
> > > (ii) A fee may be imposed for providing electronic fund transfer services or for a balance inquiry, but the notice in this paragraph (c)(1)(ii) may be substituted for the notice in paragraph (c)(1)(i) only if there are circumstances under which a fee will not be imposed for such services; **and**
> >
> > (2) *Screen or paper notice.* Provide the notice required by paragraphs (b)(1) and (b)(2) of this section either by showing it on the screen of the automated teller machine or by providing it on paper, before the consumer is committed to paying a fee.

12 C.F.R. § 205.16(c) (emphasis added).[1] Unlike the regulations, there is no conjunctive "and" between the former 15 U.S.C. § 1693b(d)(3)(B)(i) and 15 U.S.C. § 1693b(d)(3)(B)(ii).

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[1] The language of the former 12 C.F.R. § 1005.16(c) is identical. Charvat does not specify which regulations would apply to FNBW in this case. In his Complaint he cites to 12 C.F.R. § 205.16(c), while his brief cites to 12 C.F.R. § 1005. However, this distinction is irrelevant because Charvat does not have the power to enforce the regulations, and his claims are thus limited to the provisions of the statute.

As previously noted, Congress passed an amendment to the EFTA in December 2012 and the President signed the amendment into law on December 20, 2012. Pub. L. No. 112-216, 126 Stat. 1590 (2012). The amendment expressly eliminated any requirement that a consumer receive both an on-machine and on-screen notice. *Id.* The purpose of the amendment, as described in the House Report, explained that the on-machine notice "is unnecessary because ATM operators are required to disclose fees on ATM screens and consumers have the right to decline the transactions without being charged." H.R. Rep. No. 112-576 at 1 (2012).[2] Congress further explained that dual notice requirements are obsolete and unnecessary. *Id.* at 2. Congress recognized that the on-machine notice requirement "exposes banks, credit unions and retailers to frivolous lawsuits and unnecessary costs." *Id.* at 2.

2. Charvat's Allegations In His Complaint Against FNBW.

Charvat is an individual residing in Douglas County, Nebraska. (JA 24 ¶ 4). FNBW is a Nebraska corporation with its principle place of business in Wahoo, Nebraska. (JA 24 ¶ 5). On January 22, 2012, and March 4, 2012, Charvat made a cash withdrawal from an automatic

[2] FNBW respectfully requests that the Court take judicial notice of the legislative history pursuant to Fed. R. Evid. 201.

teller machine ("ATM") operated by FNBW at 354 North Chestnut Street, Wahoo, Nebraska. (JA 25 ¶ 7). FNBW charged Charvat a $2.00 transaction fee in connection with both transactions. (JA 25 ¶ 7). Charvat alleged that there was no notice posted "on or at" the ATM that notified customers that a fee would be charged. (JA 25 ¶ 9). Charvat does not allege that he received no on-screen notice that a service fee would be charged. (*See* JA 24-31). Charvat claimed that because no notice was posted "on or at" the ATM machine, FNBW violated EFTA, 15 U.S.C. § 1693b(d)(3)(A). (JA 30 ¶ 34). However, Charvat did not allege that he relied in any way upon FNBW's alleged lack of a notice on the ATM. (*See* JA 24-31). Charvat requested an order certifying the class and appointing Charvat as the representative of the class, and appointing his counsel as counsel for the class. (JA 31). Charvat also sought statutory damages for himself and the members of the class and an award of costs and attorney fees. (JA 31).

FNBW sponsors the operation of four ATM's in different locations throughout Saunders, Otto, and Johnson Counties, Nebraska. (SA 48 ¶ 3). Beginning on or about October 25, 2011, FNBW began to charge a $2.00 service fee to any non-bank customer of FNBW who makes a cash

withdrawal from an ATM sponsored by FNBW. (SA 48 ¶ 4). Any non-bank customer of FNBW will be unable to consummate a cash withdrawal transaction without seeing the on-screen notice shown below:

(SA 49 ¶ 6, SA 50). If the non-bank customer does not affirmatively accept the fee by pressing the button, the non-bank customer will be unable to complete the transaction. (SA 49 ¶ 48).

This was not the first case Charvat initiated on these grounds in 2012 in the District Court. As noted above, Charvat brought three other nearly identical purported class actions on essentially the same

grounds in the District Court in the first few months of 2012. *See Charvat v. Mutual First Fed. Credit Union*, 8:12-CV-11-LSC-FG3 (Filed January 8, 2012); *Charvat v. IDI ATM, LLC*, 8:12-CV-12-LSC-FG3 (Filed January 8, 2012); *Charvat v. ACO*, 8:12-CV-13-LSC-FG3 (Filed January 8, 2012). The Mutual First Federal Credit Union case has been consolidated with this case on appeal, and is therefore part of the record on appeal. FNBW respectfully requests that the Court take judicial notice of the other cases pursuant to Fed. R. Evid. 201.

3. The District Court's Memorandum and Order

Before the District Court, Charvat argued that "[t]he injury to Plaintiff Charvat and the putative class in this matter is not the $2.00 fee, but the failure to provide information in the manner prescribed by Congress." (SA 27, 75, 92). FNBW argued that because Charvat knew of the fee before even initiating the transaction, he did not suffer an injury in fact that is necessary to confer standing under Article III of the Constitution. (JA 33). The District Court framed the issue as: "whether FNBW's failure to give a notice to which Charvat was statutorily entitled in itself constitutes an injury in fact to Charvat," and concluded that it did not. (JA 36). The District Court explained

that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing. (JA 36) (citing *Raines v. Byrd,* 521 U.S. 811, 820 n.3 (1997)). The District Court further reasoned that Congress could create a legal right sufficient for standing under the EFTA, but Charvat was still required to allege a distinct and palpable injury to himself. (JA 36) (citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). The Court concluded that Charvat did not allege an injury in fact caused by FNBW's failure to provide notice of the fee on the exterior of its ATM. (JA 38). Charvat brings this appeal, asserting that the District Court erred in dismissing the Complaint for lack of subject matter jurisdiction on the ground that Charvat did not have standing. Appellant's Designation and Statement of Issues at 1.

SUMMARY OF THE ARGUMENT

The District Court correctly found that Charvat does not have standing to pursue his claim. Article III of the United States Constitution requires Charvat to allege that he sustained an injury in fact that is fairly traceable to the conduct of FNBW in order to have standing. This standing analysis is not a generalized one, but a

particular one that must be done on a case by case basis. What is more, each step focuses on the facts and circumstances particular to Charvat as alleged by him and as found in the record.

The facts and circumstance particular to Charvat show that he has not alleged an injury in fact and, even if he had done so, he cannot show how any purported injury he sustained was caused by FNBW. Reducing this case to its core, Charvat not only knew of the fee of which he now complains when he twice used the same ATM operated by FNBW, he was informed of the fee and affirmatively accepted the fee each time in order to complete the transaction. The reasons Charvat now gives in order to try to escape these facts and his knowledge do not provide any basis to find he has standing. His contention that he suffered an informational injury is contrary to the fact that he had actual knowledge of the information. His argument that the fee in and of itself confers him standing suffers from the same defect, in addition to his expressly disclaiming it as a basis for standing to the District Court. Likewise, Charvat's arguments do nothing to counter the stark fact that he does not allege that the alleged lack of a notice on the machine caused him to use the ATM and consummate the transaction

by accepting the fee. The Constitution requires more than an injury in law that could be applicable to anyone and everyone, it requires Charvat to allege a distinct and palpable injury that was caused by someone other than himself. Because he did not do so, the District Court was correct to grant FNBW's Motion to Dismiss for Lack of Subject Matter Jurisdiction. Accordingly, FNBW respectfully requests that the judgment of the District Court be affirmed.

STATEMENT OF THE STANDARD OF REVIEW

This Court reviews a district court's dismissal of Charvat's Complaint de novo. *Gomez v. Wells Fargo Bank, N.A.*, 676 F.3d 655, 660 (8th Cir. 2012). A party may assert lack of subject matter jurisdiction as a defense to a claim for relief under Federal Rule of Civil Procedure 12(b)(1). According to Federal Rule of Civil Procedure 12(h)(3), a federal court must dismiss an action if it determines at any time it lacks subject matter jurisdiction. *Harris v. P.A.M. Transport, Inc.*, 339 F.3d 635, 637 n.4 (8th Cir. 2003). To dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), the Complaint may be challenged either on its face or on the factual truthfulness of its averments. *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993). In a facial

challenge to jurisdiction, although the factual allegations regarding jurisdiction are presumed true, the motion could succeed if the plaintiff failed to allege an element necessary for subject matter jurisdiction. *Gebhardt v. ConAgra Foods, Inc.*, 335 F.3d 824, 829 (8th Cir. 2003). A district court has authority to consider matters outside the pleadings when subject matter jurisdiction is challenged under Rule 12(b)(1). *Harris v. P.A.M. Transp., Inc.*, 339 F.3d 635, 637, n. 4 (8th Cir. 2003). In a factual attack on the jurisdictional allegations of a complaint, a court can consider competent evidence such as affidavits, in order to determine the factual dispute. *Id.* Charvat has the burden of proving that jurisdiction does in fact exist. *Osborn v. United States*, 918 F.2d 724, 730 (8th Cir. 1990).

ARGUMENT

The District Court correctly determined that Charvat lacked standing to bring his claim. "Under Article III of the United States Constitution, federal courts may only adjudicate actual cases and controversies." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006). "The fundamental aspect of standing is that it **focuses on the party seeking to get his complaint before a federal court and not on the**

issues he wishes to have adjudicated." *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (emphasis added). Since the focus is on the party and not the claim, standing questions must be resolved on a case-by-case basis. The Supreme Court explained the necessity for a case-by-case inquiry in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 151 (1970): "Generalizations about standing to sue are largely worthless as such. One generalization is, however, necessary and that is that the question of standing in the federal courts is to be considered in the framework of Article III which restricts judicial power to 'cases' and 'controversies.'"

Article III standing is an antecedent question that must be determined as a threshold matter. *Miller v. Redwood Toxicology Lab., Inc.*, 688 F.3d 928, 933 (8th Cir. 2012) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-96 (1998)). The United States Supreme Court and this Court have set forth three elements that a plaintiff must show to establish standing:

> The **irreducible constitutional minimum** of standing contains three requirements. First and foremost, there must be alleged (and ultimately proved) an **injury in fact**-a harm suffered by the plaintiff that is concrete and actual or imminent, not conjectural or hypothetical. Second, there must be **causation**-a fairly traceable connection between the

> plaintiff's injury and the complained-of conduct of the defendant. And third, there must be **redressability**-a likelihood that the requested relief will redress the alleged injury. **This triad of injury in fact, causation, and redressability constitutes the core of Article III's case-or-controversy requirement**, and the party invoking federal jurisdiction bears the burden of establishing its existence.

Id. (quoting *Steel Co.*, 523 U.S. at 102-04) (internal quotations omitted) (emphasis added).

The allegations in Charvat's complaint fail to allege the existence of an injury in fact or causation. First, Charvat has not alleged a concrete and particularized injury in fact. Second, Charvat has failed to allege that any injury he suffered was caused by the complained-of conduct of FNBW. For these reasons, Charvat has failed to establish constitutional standing and the District Court correctly determined that it lacked subject matter jurisdiction.

I. Charvat Failed To Allege A Concrete And Particularized Injury In Fact And His Duty To Demonstrate Such An Injury Cannot Be Removed By Statute.

A. Charvat Did Not Allege An Injury In Fact To Satisfy The Constitutional Minimum Requirement Of Standing.

Charvat lacks standing to sue because he has not alleged a concrete and particularized injury in fact. The Supreme Court has held that "the requirement of injury in fact is a hard floor of Article III

jurisdiction that cannot be removed by statute." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009). For that reason, the Court has held:

> It would exceed Article III's limitations if, at the behest of Congress and in the absence of any showing of concrete injury, we were to entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws. The party bringing suit must show that the action injures him in a concrete and personal way.

Id. (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580-81 (1992) (Kennedy, J., concurring in part and concurring in judgment)) (internal marks omitted). This Court has explained that "Congress cannot circumvent Article III's limits on the judicial power." *Mausolf v. Babbitt*, 85 F.3d 1295, 1300 (8th Cir. 1996).

In this case, the first question is whether Charvat has adequately alleged an "'injury in fact' – a harm that is both 'concrete' and 'actual or imminent, not conjectural or hypothetical.'" *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). To demonstrate injury in fact to meet standing requirements, "Article III's case and controversy prerequisite 'requires the party who invokes the court's authority to show that he personally has suffered some actual or

threatened injury as a result of the putatively illegal conduct of the defendant.'" *Nolles v. State Comm. for the Reorganization of Sch. Dists*, 524 F.3d 892, 901 (8th Cir. 2008) (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472, (1982)). "'Past exposure to illegal conduct' is not enough absent present adverse effects." *Elizabeth M. v. Montenez*, 458 F.3d 779, 784 (8th Cir. 2006) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)).

The Supreme Court has stated that "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines v. Byrd*, 521 U.S. 811, 820 n. 3 (1997) (citing *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979)). The Court explained in *Lujan v. Defenders of Wildlife* that "[s]tatutory broadening of the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." 504 U.S. at 578 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972)). EFTA and its accompanying regulations simply cannot eliminate the constitutional requirement that

a plaintiff demonstrate a concrete and particularized injury in fact. Instead, claimants under EFTA must demonstrate that they were adversely affected or aggrieved by some wrongdoing of the defendant. *Nat'l Wildlife Federation v. Agricultural Stabilization & Conservation Serv.*, 901 F.2d 673, 675 (8th Cir. 1990). This Charvat cannot do.

Charvat alleged no present adverse effect of any past exposure to any illegal conduct. Put even more simply, Charvat does not plead that he relied on any lack of notice to initiate his ATM transactions. Indeed, it is undisputed that he had to affirmatively accept the fee to complete the transaction after he was provided notice of the fee on the screen of the ATM. Further, as each transaction proceeded, Charvat acquired actual knowledge that he would be charged a fee. EFTA and its accompanying regulations simply cannot eliminate the constitutional requirement that a plaintiff demonstrate a concrete and particularized injury in fact. "An interest unrelated to injury in fact is insufficient to give a plaintiff standing." *Vermont Agency*, 529 U.S. at 772 (citing *Valley Forge*, 454 U.S. at 486; *see also Sierra Club v. Morton*, 405 U.S. 727, 734-735 (1972) (stating "the 'injury in fact' test requires more than

an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.").

Charvat has tried to stretch the statement in *Warth v. Seldin*, 422 U.S. 490, 500 (1975) that the "actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." (internal marks and quotations omitted). Reliance on this statement to determine that Congress may create standing is misplaced. The Court in *Warth* immediately clarified that a plaintiff suing under a statutory provision must still allege a particularized injury:

> Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains: the plaintiff *still must allege a distinct and palpable injury to himself*.

Warth, 422 U.S. at 501 (emphasis added).

In sum, Charvat's claim does not address the hard floor constitutional requirement of injury in *fact*. The Constitution requires more than mere injury in *law* that could be applicable to anyone and everyone, it requires Charvat to allege a distinct and palpable injury. Charvat has not done so, and therefore, he lacks standing.

B. Charvat's Claimed Injuries Are Unavailing.

Charvat has not alleged that he suffered any injury in fact. Fatal to each of Charvat's arguments is the fact that he had actual knowledge of the information and fee allegedly imposed on him by the ATM. Charvat suffered no informational injury because he was not deprived of the information contemplated by the notice, and in fact possessed the information before initiating the transaction. Charvat cannot qualify as a "tester" plaintiff because his claims do not seek to enforce the dignitary interests of protecting against discrimination, nor does EFTA permit Charvat to enforce the statute as a private attorney general. Finally, Charvat cannot claim that he was injured by a technical deficiency in the notice requirements without an allegation of a concrete and particularized injury in fact. Further, he expressly waived any argument that he was injured by the imposition of the fee.

1. Charvat had no informational injury because he had actual knowledge of the fact and amount of the alleged fee.

Charvat's claim that he suffered an informational injury fails because he did — in fact — possess the information he now claims gives him a basis to have standing in federal court. For example, Charvat argued exclusively to the District Court, and now partially to this Court, that he was injured because he had a statutory right to receive

information, citing *Federal Election Commission v. Akins*, 524 U.S. 11, 20 (1998). According to Charvat's mistaken reading of *Akin*, it stands for the proposition that a statutory right to information is sufficient to establish Article III standing. However, *Akins* does no such thing. It merely reaffirmed the Constitution's requirement that a plaintiff must show an "injury in fact." Consequently, *Akins* undermines Charvat's claim.

Charvat's claim is readily distinguishable from *Akins*. In *Akins*, the plaintiffs alleged that their injury was a complete failure to obtain information. As a result of that failure, the plaintiffs were not able to evaluate candidates and the role the information may play in an election. Thus, the lack of information and the resulting consequences were sufficient to demonstrate an injury in fact. Stated another way, the Court based standing not on the fact that a legal right created by Congress had been violated, but instead on the factual consequences of the plaintiffs' failure to obtain information. In contrast, Charvat did not suffer a complete failure to obtain information. Even assuming that § 1693b(d)(3)(B) similarly gives Plaintiff a "right to specific information," Charvat has not alleged a violation of that right because

he possessed actual knowledge of the fee as it was provided to him through the on-screen notice. What is more, he had to accept the fee in order to complete the transaction, which demonstrates he had actual knowledge of the fee. Unlike the plaintiffs in *Akins* who were harmed because they were unable to obtain any of the information they requested, Charvat was provided the information and affirmatively agreed to accept the fee.

Charvat's attempts to analogize his claims to cases decided under the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601(a) and the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, are equally unconvincing and unhelpful. None of the cases cited by Charvat addressed a situation under TILA or the FDCPA where the plaintiff had actual knowledge of the information required to be disclosed. Further, as described below, Charvat does not allege in any way that he relied on the deficient notice when initiating his ATM transactions. In fact, he returned to the same ATM a second time after having actual knowledge of the fee. Accordingly, Charvat's comparisons to TILA and the FDCPA are unconvincing because of his actual knowledge.

Charvat has not alleged any way in which he was personally injured as a consequence of any alleged statutory violation. Just as with any case or controversy, a plaintiff claiming injury through failure to provide the form of notice required by statute must still allege a particularized injury. Charvat attempts to transform FNBW's standing argument into something it is not — some sort of public policy argument. He did so by pointing out to the District Court that even if it disliked the policy outcome, it must interpret the statute as written. However, this is not a question of policy, but one of constitutional power. As quoted by the Supreme Court in *Vermont Agency*, "the Art. III judicial power exists only to redress or otherwise to protect against injury to the *complaining* party." 529 U.S. at 771 (emphasis in original) (citing *Warth*, 422 U.S. at 499). This limitation on judicial power "is no mere formality: it 'defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded.'" *Dominguez v. UAL Corp.*, 666 F.3d 1359, 1361 (D.C. Cir. 2012) (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1983)). It is simply beyond dispute that a Charvat bears the burden of demonstrating that he suffered an injury-in-fact. *Ctr. For Special Needs Trust Admin., Inc. v. Olson*, 676

F.3d 688, 697 (8th Cir. 2012). Charvat cannot allege an injury in fact because he had actual knowledge of the fee imposed having accepted the fee to complete the transaction he requested. Accordingly, he has not met his burden under Article III of the Constitution.

2. Charvat cannot use "tester" cases in order to conjure a basis for his standing here.

Charvat is not a "tester," he is a profiteer. As a profiteer, Charvat cannot fit himself within the class of plaintiffs that have been found to have standing as "testers." Courts have permitted "tester" standing "where minority applicants apply for jobs or housing that they have no intention of accepting for the sole purpose of determining whether the employer or landlord is unlawfully discriminating." *Shaver v. Indep. Stave Co.*, 350 F.3d 716, 724 (8th Cir. 2003) (citing *Havens Realty Corp. v. Coleman,* 455 U.S. 363 (1982); *Kyles v. J.K. Guardian Sec. Servs., Inc.*, 222 F.3d 289 (7th Cir. 2000)). This Court recognized two reasons for allowing "tester" standing. First, "the mere fact of discrimination offends the dignitary interest that the statutes are designed to protect, regardless of whether the discrimination worked any direct economic harm to the plaintiffs." *Id.* (citing *Kyles*, 222 F.3d at 297). Second,

"tester cases have been allowed to proceed on a 'private attorney general' theory." *Id.* (citing *Kyles*, 222 F.3d at 299).

Neither of these reasons supports a finding that Charvat could have tester standing. First, Charvat's interest here — profiting from an alleged lack of notice that a fee would be charged when in fact he knew it would be — is entirely different in every possible respect from the dignitary interests associated with discrimination. Charvat's asserted purpose of the statute, protecting consumers from being charged a fee without notice, is not implicated here because he had actual notice that the fee would be charged. As the District Court recognized, the information presented to the "testers," was deficient in that it was false, misleading, or delayed. (JA 39); *see also Havens Realty Corp. v. Coleman,* and *Kyles v. J.K. Guardian Sec. Servs., Inc.*, *supra*. Charvat, in contrast, does not allege that FNBW's failure to provide a fee notice "on or at" the ATM was in any way false or misleading. The fee information was provided to him through the on-screen notice, and he had to accept the fee to complete the transaction. Charvat does not and cannot cite a case, including the "tester" cases, that eliminates his

burden to allege an *injury in fact* caused by FNBW's failure to comply with the EFTA notice requirements.

The second justification for "tester" standing is not at issue here as Charvat does not challenge the District Court's holding that he has no right to bring his claim as a private attorney general. This is because the District Court correctly recognized that § 1693b(d)(3)(B) does not allow a plaintiff to bring a claim on behalf of the United States as a private attorney general. EFTA is not a *qui tam* statute. Accordingly, Charvat in no way can be considered a "tester" for standing purposes.

3. Charvat cannot argue that he was injured by the $2.00 fee because he had actual knowledge of the fee, and in any event he has waived any argument claiming otherwise.

i. Charvat's Actual Knowledge Precludes Any Injury in Fact By Imposition of the Fee.

The $2.00 fee does not constitute an injury in fact because Charvat had actual knowledge of the fee. EFTA requires that an ATM operator imposing a fee provide notice to consumers of the fact that a fee would be imposed and the amount of the fee. 15 U.S.C. § 1693b(3)(A). Even if Charvat may assert this position, his argument fails to demonstrate an illegal fee because he suffered no injury in fact

when he was charged the fee. It is undisputed that to complete the transactions at FNBW'S ATM, Charvat was required to affirmatively acknowledge that a fee would be charged. Thus, it is undisputed that Charvat had notice of (i) the fact of the fee, and (ii) the amount of the fee.

The Supreme Court recently reiterated that courts must look to factual consequences of a statutory violation to determine whether a plaintiff has met its burden of establishing Article III standing. *See Massachusetts v. EPA*, 549 U.S. 497 (2007). In *Massachusetts v. EPA*, the Court determined that Massachusetts had standing to challenge the EPA's refusal to issue a rule regulating emissions that allegedly contribute to global warming. The Court recognized that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Id.* at 516 (quoting *Lujan*, 504 U.S. at 580). However, Congress' power is not limitless, and in exercising its power it must "identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit[.]" *Id.* at 516-17 (quoting *Lujan*, 504 U.S. at 580-81). As such, the Court explained that the Constitution does not allow the

judicial branch to "entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws." *Id.* at 516-17 (quoting *Lujan*, 504 U.S. at 580-81). Though the Court recognized that Massachusetts had a statutory right to challenge the EPA's refusal to regulate climate change, the Court based standing not on the fact that a legal right created by Congress had been violated but instead on the factual consequences of global warming. *See id.* at 522-23.

Charvat's claim that the fee was illegal because of a technical deficiency in the lack of notice is insufficient to overcome his lack of injury in fact. *Cf. Cargill, Inc. v. United States*, 173 F.3d 323 (5th Cir. 1999) (holding that plaintiff lacked standing where plaintiffs had actual knowledge of defendants' actions, even if defendants failed to comply with statutory notice requirements); *Central Arizona Irrigation & Drainage Dist. v. Lujan*, 764 F. Supp. 582 (D. Ariz. 1991) (determining that plaintiffs lacked standing where plaintiffs had actual notice of defendants' actions). As established by the Supreme Court in *Massachusetts v. EPA*, courts must look to the factual consequences of a potential violation to determine whether standing exists. It is worth

noting that it is not clear whether EFTA even requires both forms of notice, as there is no conjunctive "and" connecting the on-screen notice requirement to the on-machine notice requirement. *Compare* 15 U.S.C. § 1693b(d)(3) *with* 12 C.F.R. § 205.16(c); 12 C.F.R. § 1005.16(c). This ambiguity is inapposite under these facts because Charvat was not factually harmed by any deficiency in the notice. He acquired this knowledge through his own actions, rather than by some writing or other agreement. Because Charvat had actual knowledge of the fact and amount of the fee, he may not establish injury simply by virtue of some alleged technical deficiency in the notice provided. Accordingly, there is no injury in fact resulting from the $2.00 fee.

ii. Charvat Waived Any Argument By Himself Or The United States That He Was Injured By The Fee.

The arguments by Charvat and the United States that Charvat's injury was the $2.00 fee are precluded because this theory of standing was expressly waived and was not raised in the District Court. In response to FNBW's motion to dismiss in the District Court, not only did Charvat not present the $2.00 fee theory upon which he now relies on appeal, but he expressly waived it on three occasions. In Charvat's Response to Defendant's Motion to Dismiss (SA 75) Charvat stated,

"The injury to Plaintiff Charvat and the putative class in this matter is not the $2.00 fee, but the failure to provide information in the manner prescribed by Congress." Charvat had a second opportunity to present additional argument in response to the District Court's Order to Show Cause. In his response, Charvat again insisted, "The injury to Plaintiff Charvat and the putative class in this matter is not the $2.00 fee, but the failure to provide information in the manner prescribed by Congress." (SA 92).[3]

These statements made in the context of briefs to the District Court should be considered evidentiary admissions pursuant to Fed. R. Evid. 801(d)(2)(C) and (D). *See Heil Co. v. Snyder Industries, Inc.*, 763 F. Supp. 422, 427-28 (D. Neb. 1991). In *Heil*, the court admitted as evidentiary admissions excerpts from a defendant's trial brief. The court noted that the statements were included by defendant's attorneys in support of its position and that the attorneys "were well within their scope of authority in making those statements." *Id.*; *see also American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988)

[3] Charvat repeated the same statement in its response to the District Court's Show Cause Order (SA 75), and in Plaintiff's Response to Show Cause Order in *Charvat v. Mutual First Federal Credit Union*. (SA 27).

(explaining that "statements of fact contained in a brief may be considered admissions of the party in the discretion of the district court."). Based on *Heil* and the Federal Rules of Evidence, the statements made by Charvat are evidentiary admissions. The statements are "not conclusive, and may be contradicted by other evidence;" however, the evidence reinforces the strength of the admissions. *Id.* Charvat made the statement on three separate occasions to the district court.

In addition to the express waiver, Charvat's illegal fee argument cannot be considered because the theory was not presented to the District Court despite being given multiple opportunities to do so. It is well settled that, "[o]rdinarily an appellate court does not give consideration to issues not raised below." *Hormel v. Helvering*, 312 U.S. 552, 556 (1941); *see also Skipper v. French*, 130 F. 3d 603, 610 (4th Cir. 1997) (stating that "[o]rdinarily for very good reasons we do not decide issues on the basis of theories first raised on appeal."); *Gilby v. Travelers Ins. Co.*, 248 F.2d 794, 797 (8th Cir. 1957) (refusing to "consider a question . . . raised here for the first time on appeal which

was never presented to or passed upon by the trial court."). Noting that this rule is not rigid, the Supreme Court in *Hormel* explained that:

> [W]e held in *Helvering v. Wood*, 309 U.S. 344, 348, 349, 60 S.Ct. 551, 553, 84 L.Ed. 796, that the government could not present in this Court as a wholly new issue the applicability of section 22(a). But we there especially relied upon the fact that the government, when the case was before the Circuit Court of Appeals, had made an express waiver of any reliance upon 22(a).

Hormel v. Helvering, 312 U.S. 552, 557 (1941). Similarly here, Charvat not only did not present or rely upon the illegal fee theory, he expressly waived any reliance on the theory on three separate occasions in the District Court. As a result, the argument concerning the illegal fee as a basis for standing cannot be considered now on appeal.

Additionally, the similar argument presented by the United States as *amicus curiae* in this case should also be disallowed. Amicus briefs are normally not allowed to introduce new issues that have not been presented by the parties. *See Olmsted v. Pruco Life Ins. Co. of N.J.*, 283 F.3d 429, 436 n. 5 (2d Cir. 2002) (stating "an issue raised only by an amicus curiae is normally not considered on appeal"); *Bano v. Union Carbide Corp.*, 273 F.3d 120, 127 n. 5 (2d Cir. 2001); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 445 (2d Cir.2001) (explaining that

"[a]lthough an amicus brief can be helpful in elaborating issues properly presented by the parties, it is normally not a method for injecting new issues into an appeal, at least in cases where the parties are competently represented by counsel."); *New Jersey Retail Merch. Ass'n v. Sidamon-Eristoff*, 669 F.3d 374, 382 n. 2 (3rd Cir. 2012) (citing *Olmsted* and *Corley* and declining to address a Commerce Clause claim raised only by an amicus brief); *Resident Council of Allen Parkway Vill. v. U.S. Dep't of HUD*, 980 F.2d 1043, 1049 (5th Cir.1993) (stating that "[a]n amicus curiae generally cannot expand the scope of an appeal to implicate issues that have not been presented by the parties to the appeal."); 16A Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 3975.1 (3d ed. 1999) (noting that "In ordinary circumstances, an amicus will not be permitted to raise issues not argued by the parties."). Given that the illegal fee argument was not properly presented by Charvat in this case, but was expressly waived, it cannot be injected into this appeal through the brief of the United States and, thus that portion of the amicus brief must not be considered.

In addition, because Charvat's illegal fee theory is wholly at odds with the position taken before the District Court, he should be judicially estopped from proceeding on this theory on appeal. "The doctrine of judicial estoppel provides that when 'a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.'" *Gray v. City of Valley Park*, 567 F.3d 976, 981 (8th Cir. 2009) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001)). This Court has explained that judicial estoppel is "limited to those instances in which a party takes a position that is clearly inconsistent with its earlier position." *Hossaini v. Western Mo. Med. Center*, 140 F.3d 1140, 1143 (8th Cir. 1998). "The purpose of the doctrine is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *Gray*, F.3d at 982 (citing *New Hampshire*, 532 U.S. at 749-50; *Monterey Dev. Corp. v. Lawyer's Title Ins. Corp.*, 4 F.3d 605, 609 (8th Cir. 1993)).

The Supreme Court has identified several factors to inform the decision whether to apply judicial estoppel in a particular case:

> (1) whether a party's later position is clearly inconsistent with its earlier position; (2) whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Gray, F.3d at 982 (citing *New Hampshire*, 532 U.S. at 750-51).

Applying these factors here weigh in favor of a determination that Charvat is estopped from asserting his illegal fee theory on appeal. First, Charvat's position is clearly at odds with his position before the District Court. Charvat did not simply fail to argue that the fee was not his injury, but affirmatively asserted that the $2.00 fee was not his injury. Second, Charvat succeeded in persuading the District Court to accept its position because the District Court did not address the legality of the fee. The District Court relied on Charvat's interpretation of his own Complaint in concluding that Charvat only sought to protect informational injury. It is only on appeal that Charvat has attempted

to transform and broaden the scope of his Complaint. Accordingly, Charvat is precluded from asserting this new position on appeal.

II. Charvat Does Not Have Standing Because He Failed To Allege That Any Injury He Suffered Is Fairly Traceable To The Conduct Of FNBW Or Any Alleged Failure To Provide The On-Machine Notice.

Charvat's own pleadings do not show any causal connection between FNBW's actions and any potential injury. Causation is one cord of the triad that must be satisfied to establish the core of Article III's case-or-controversy requirement. To establish standing, "there must be a causal connection between the injury and the conduct complained of-the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'" *Lujan*, 504 U.S. at 560-61. In other words, "Article III causation must be fairly traceable to, and a direct consequence of, the alleged unlawful conduct." *Miller*, 688 F.3d at 936 (quoting *Red River Freethinkers v. City of Fargo*, 679 F.3d 1015, 1024 (8th Cir. 2012). A complaint's failure "to include any allegations regarding the [defendant's] prominent role in all of these injuries is fatal for purposes of Article III." *Id.*

Charvat's Complaint fails to include any allegations of FNBW's "prominent role" in relation to its alleged injuries. Charvat admits that his supposed entitlement to statutory damages is a merits question, and unrelated to the question of standing. Appellant's Br. at 17-20. Charvat's claimed injuries on appeal – being charged a $2.00 fee and not receiving an on-machine notice of the fee – are not fairly traceable to any wrongful action by FNBW. Charvat's knowledge of the $2.00 fee broke any causal link between any alleged wrongdoing and Charvat's alleged injury. Additionally, Charvat's claimed lack of notice fails because he has not alleged that he relied in any way on any lack of notice when he initiated the transactions at the ATM.

A. Charvat's Knowledge Of The Fee Precludes Any Causal Link Between FNBW And Charvat's Alleged Injury.

Charvat has not and cannot allege that any alleged wrongdoing of FNBW caused him to incur a $2.00 fee because Charvat knew he would be charged the fee — indeed, he accepted the fee upon being provided the on-screen notice of the fee by FNBW. As set forth above, Charvat has not alleged any injury in fact. Additionally, Charvat has not alleged or demonstrated any causal connection between any act by FNBW and his alleged injuries. Charvat claims that he suffered

information injury. He also claims for the first time on appeal that he was injured by being charged a $2.00 fee each time he used FNBW's ATM. However, Charvat has not shown that either of these injuries were the caused by FNBW. Instead, the record shows that if there was an injury it was the result of Charvat's own acts.

This Court has expressly held that a "plaintiff who **causes its own injury** does not satisfy the traceability prong." *ABF Freight Sys. v. Int'l Bhd. of Teamsters*, 645 F.3d 954, 961 (8th Cir. 2011) (emphasis added) (citing *McConnell v. FEC*, 540 U.S. 93, 228 (2003) (explaining that candidates who refused large contributions could not trace any inability to compete to the statute, due to their own personal choice); *Brotherhood of Locomotive Eng'rs & Trainmen v. Surface Transp. Bd.*, 457 F.3d 24, 28 (D.C. Cir. 2006) (stating that "[t]his injury was not in any meaningful way 'caused' by the Board; rather, it was entirely self-inflicted and therefore insufficient to confer standing upon the Union."). Because of Charvat's actual knowledge (both before initiating the transaction and consummating the transaction), any injury he incurred was completely due to his own actions. In other words, Charvat caused his own injury, if any, because he had direct, actual knowledge that he

would be charged a fee to complete the transaction, and expressly chose to accept the fee.

Courts have held in analogous situations that actual knowledge precluded standing to sue under a statutory deficiency. For example, in *Cargill, Inc. v. United States*, 173 F.3d 323 (5th Cir. 1999), the plaintiffs claimed that they were injured because the defendants filed a reestablishment charter in an untimely fashion, and thus failed to comply with the regulatory notice requirements of reestablishing an agency. *Id.* at 332. The court held that the plaintiff lacked standing to raise the issue of inadequate notice because the plaintiff failed to identify an injury in fact. *Id.* The court reasoned that even if defendants failed to comply with notice requirements, the plaintiffs had actual knowledge that the agency had been reestablished. *Id.* The court concluded that because of plaintiffs' actual knowledge, there was no indication that the purpose of the notice was thwarted by a technical violation of the notice rules. *Id.*

Similarly, in *Central Arizona Irrigation & Drainage Dist. v. Lujan*, 764 F. Supp. 582 (D. Ariz. 1991), the plaintiffs claimed the Secretary of the Interior violated the notice provisions of the

Reclamation Reform Act, 43 U.S.C. § 485h(f). *Id.* at 595. The Secretary of the Interior proposed amendments granting recharge of entitlements to groundwater in a water-supply contract, and published notice of the proposed amendments in several Arizona newspapers. *Id.* The notices, however, failed to specifically mention the recharge provisions. *Id.* The court determined that plaintiffs lacked standing because they had identified no injury in fact. *Id.* The court explained, "[t]he problem with Plaintiffs' claim is that they had *actual notice* of the proposed amendment regarding the recharge provision." *Id.* (emphasis in original).

Charvat's claim that FNBW caused his injury suffers from the same defects as each of the cases above. Even if Charvat's Complaint alleged that the ATM did not have notice posted on or around the machine, he does not and cannot dispute that he had actual knowledge that he would be charged a fee as a non-bank customer of FNBW. Indeed, the only way to consummate the transaction was to affirmatively accept the fee. Thus, just as the plaintiffs in *Cargill* and *Central Arizona*, Charvat fails to allege an "invasion of a legally protected interest" that is both "concrete and particularized," and

"actual or imminent, not conjectural or hypothetical." *See Lujan*, 504 U.S. at 560. Because Plaintiff had actual notice of the fee and directly accepted the fee to complete the transaction, he has not met the constitutional requirement of a concrete and particularized injury in fact. Any injury Charvat incurred "is so completely due to the plaintiff's own fault as to break to the causal chain." Wright, Miller & Kane, *Federal Practice and Procedure* § 3531.5, 362 (3d ed. 2010). Accordingly, there is no causal connection between the $2.00 fee and any wrongdoing by FNBW.

B. Deficiency Of A Notice Cannot Provide A Basis For Standing When No Causal Connection Is Pled.

While Charvat claimed that he was injured through the failure to receive information, he did not plead that he relied in any way on any lack of notice. This Court has held that deficient notice without any connection to factual injury is insufficient to establish the causal element of Article III's case-or-controversy requirement. *See Burks-Marshall v. Shalala*, 7 F.3d 1346, 1349 (8th Cir. 1993). In *Burks-Marshall*, the a claimant for Social Security disability benefits argued that a prior determination that she was not disabled should be reopened in a later disability proceeding, despite the fact that she failed

to appeal. *Id.* at 1348. The claimant argued that the notice of her right to appeal was defective. *Id.* This Court concluded that she lacked standing to challenge the deficient notice because the claimant had "not shown that the alleged deficiency in the notice had any connection in fact with her own failure to seek review of the two early denials." *Id.* at 1349. The Court noted that the claimant identified a violation of her rights, but failed to say that after reading the deficient notice, she relied on it in her decision to forego further review at that time. *Id.* at 1350.

Charvat has similarly failed to allege that he relied on deficient notice before initiating the ATM transaction. In fact, the opposite is true. The record shows that he was aware of and accepted the fee to complete the transactions. The pleadings reveal that he returned to the FNBW ATM a second time, and even alleges lack of notice for this second use. Charvat's other claims reveal that he sought out ATMs that allegedly had no posted notice to initiate a transaction and attempt to collect the bounty associated with the outdated rule. At no time did Charvat plead, or even argue, that he relied on any defective notice to initiate a transaction. Charvat is the protyhpical EFTA plaintiff profiteer, filing the very types of lawsuits Congress saw as frivolous and

has since eradicated any statutory basis for such claims from the United States Code. However, while the amendment eliminates Charvat's ability to profiteer in the future, there can be no doubt that he does not meet the hard floor of constitutional standing to bring his claims here. Here, Charvat has failed to demonstrate that any alleged deficiency in the notice provided to him of the fee had any connection in fact with his injury. Accordingly, Charvat has not pled sufficient facts to allege causation and the District Court properly dismissed his claims.

CONCLUSION

For the foregoing reasons, Charvat has failed to allege a concrete and particularized injury in fact. Further, Charvat has failed to allege that any injury suffered was fairly traceable to any wrongdoing by FNBW. Therefore, the District Court properly determined that it lacks subject matter jurisdiction over Charvat's claims. Accordingly, FNBW respectfully requests that the Court affirm the District Court's order dismissing this action.

Dated this 16th day of January, 2013

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation provided in Rule 32(a)(7)(B) because the document was prepared using Microsoft Word 97-2003, and, relying on the word processor word count feature, contains 10,476 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

The PDF version of this brief has been scanned for viruses and is virus-free pursuant to Eighth Circuit Local Rule 28A(h)(2), which was electronically filed on January 16, 2013.

Dated this 16th day of January, 2013.

s/Kenneth W. Hartman
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CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2013, I electronically filed the foregoing with the Clerk of the Court by using the Appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the Appellate CM/ECF system.

s/Kenneth W. Hartman
Kenneth W. Hartman, Attorney for Appellee