UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA, LTD, and ADVANCE AMERICA, CASH ADVANCE CENTERS, INC., Plaintiffs, v. FEDERAL DEPOSIT INSURANCE CORP., BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, OFFICE OF THE COMPTROLLER OF THE CURRENCY and THOMAS J. CURRY, Defendants.	Civil Action No. 1:14-cv-00953-GK

DEFENDANT BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM'S MOTION TO DISMISS THE AMENDED COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM

Pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, defendant Board of Governors of the Federal Reserve System ("Board") moves to dismiss this action for lack of subject matter jurisdiction and failure to state a claim.

In support of this motion, the Board respectfully refers the Court to the accompanying Memorandum of Points and Authorities in Support. A proposed Order consistent with this Motion is filed herewith.

Dated: August 18, 2014
Washington, D.C.

Respectfully submitted,

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The Board of Governors of the Federal Reserve System (the "Board") moves to dismiss this case because the plaintiffs, payday lenders who have allegedly lost business relationships with banks, lack standing to bring their claims against the Board. They do not allege that their claimed injuries are fairly traceable to any action of the Board, nor does their Amended Complaint allege that the remedy they seek against the Board will redress whatever harm they claim to have suffered. Thus, they lack standing to raise their claims against the Board. Moreover, even if they had standing, their claim is foreclosed by section 8(i) of the Federal Deposit Insurance Act, which withdraws jurisdiction over such claims. If that were not enough, their suit against the Board must be dismissed for failure to state a claim because they fail to

allege any final agency action by the Board, or an actionable failure to act, as required under the Administrative Procedure Act; they fail to state a claim against the Board that is plausible on its face as required under the Federal Rules; and they fail to state a cognizable claim for deprivation of their due process rights. The Amended Complaint against the Board should therefore be dismissed in its entirety.

STATUTORY AND PROCEDURAL BACKGROUND

A. The Payday Loan Industry and the Board's Role in the Bank Regulatory System

A "payday loan" is a short term, small dollar loan extended by a non-depository institution. Plaintiffs' Amended Complaint for Declaratory and Injunctive Relief, filed July 30, 2014 ("Am. Compl."), ¶ 1.[1] Payday loans are not collateralized and require minimal underwriting. In exchange for an immediate advance of funds, a customer generally gives a payday lender a post-dated check or authorizes him electronically to debit his bank account for the loan amount plus associated fees. Am. Compl., ¶ 26. If the customer does not repay the loan within the specified period (usually his next payday), the payday lender deposits the customer's check into its bank account or executes the debit authorization from the customer's account. *Id*. In order to facilitate these transactions, many payday lenders maintain deposit accounts at banks. *Id.*

The Board is a federal agency authorized by law to regulate and examine bank holding companies and state-chartered banks that are members of the Federal Reserve System, among other functions. 12 U.S.C. §§ 248(a), 325, 1844. State member banks that are regulated by the

[1] For more background on payday lending, see Consumer Financial Protection Bureau ("CFPB"), *Payday Loans and Deposit Advance Products, A White Paper of Initial Data Findings*, April 24, 2013, available at http://files.consumerfinance.gov/f/201304_cfpb_payday-dap-whitepaper.pdf ("CFPB White Paper") at 3-9.

Board are also regulated by state banking agencies. *See, e.g., The Federal Reserve System, Purposes and Functions*, Ninth Edition at 60, available at http://www.federalreserve.gov/pf/pdf/pf_complete.pdf. Because payday lenders are not banks, neither the Board, nor defendants Federal Deposit Insurance Corporation ("FDIC") nor Office of the Comptroller of the Currency ("OCC"), regulate them. Payday lenders are by and large licensed and regulated by the States, and some federal consumer protection laws, such as the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, apply to payday loans. *See* Am. Compl., ¶ 23. The Dodd Frank Wall Street Reform and Consumer Protection Act gave the CFPB authority to supervise payday lenders and promulgate regulations pertaining to payday lending. *See, e.g.*, 12 U.S.C §§ 5514(a)(1)(E), 5512(b).

B. Allegations of the Amended Complaint and Issuance of FDIC and OCC Guidance

Plaintiffs are an association of payday lenders, Community Financial Services Association ("CFSA"), and an individual payday lending company which claims to have been harmed by the defendant agencies' regulatory pressure on banks, which allegedly resulted in the termination of banking relationships between some payday lenders and certain banks. On July 30, 2014, plaintiffs filed their Amended Complaint against the Board, OCC and FDIC seeking declaratory and injunctive relief "to set aside certain informal guidance documents and other unlawful regulatory actions" by defendants. Am. Compl. at 2 (unnumbered paragraph). The Amended Complaint seeks non-monetary relief under sections 706(2)(A)-(D) of the APA, 5 U.S.C. §§ 706(2)(A)-(D), and the Due Process Clause of the Fifth Amendment of the United States Constitution. Am. Compl., ¶¶ 10, 185. In particular, plaintiffs claim that the issuance of informal regulatory guidance and other unspecified regulatory actions exceeded the agencies' statutory authority and were arbitrary and capricious, that the guidance was promulgated without

observance of the procedures required by law, and that the guidance deprived plaintiffs of liberty interests without due process of law. *Id.* at 2 (unnumbered paragraph). Plaintiffs also seek an injunction prohibiting the defendant agencies from "taking any action whatsoever" pursuant to those guidance documents," "from applying informal pressure to banks to encourage them to terminate business relationships with payday lenders," or from "seeking to deprive plaintiffs of their ability to pursue their chosen line of lawful business without due process of law." *Id.*, ¶¶ 185(f)-(g).

The Amended Complaint cites no formal or informal rule or order issued by the Board, and, by way of background, points to only one informal guidance document issued by the Board.[2] There are no allegations in the Amended Complaint that the Board engaged in "final

[2] With the exception of this one informal Board guidance document, *see* Am. Compl., ¶¶ 40-41 (citing Federal Reserve, Supervisory Letter: Risk-Focused Safety and Soundness Examinations and Inspections, SR 96-14 (May 24, 1996) ("Board SR 96-14")), all of the guidance documents described in the Amended Complaint were issued by the FDIC or OCC. The Board guidance document is cited only by way of background, and plaintiffs do not allege that it violated any right or statute, nor do they seek relief with respect to that document. *See* Am. Compl., ¶¶ 40-50, 185 (challenging an allegedly expanded definition of reputation risk in four FDIC and one OCC informal guidance documents, but not in any Board guidance document); *see also* Am. Compl., ¶¶ 5, 35, 43, 50 (citing FDIC Financial Institution Letter, Guidance for Managing Third Party Risk, FIL-44-2008 (June 6, 2008) ("FDIC FIL-44-2008"); ¶ 35 (citing FDIC Notice of Proposed Guidance on Deposit Advance Products, 78 Fed. Reg. 25,268-01 (Apr. 30, 2013) ("2013 FDIC Notice")); ¶ 41 (citing OCC, Risk Management Guidance: Third Party Relationships, OCC Bull No. 2001-47 (Nov. 1, 2001) ("OCC Bull. 2001-47") and FDIC, Foreign-Based Third-Party Service Providers: Guidance on Managing Risks in These Outsourcing Relationships, FIL-52-2006 (June 21, 2006) ("FDIC-FIL 52-2006"); ¶ 42 (citing OCC Bulletin 2004-20, Risk Management of New, Expanded, or Modified Bank Products (May 10, 2004) ("OCC Bull. 2004-20"); ¶ 44 (citing FDIC, Financial Institution Letter, Guidance on Payment Processor Relationships, FIL-127-2008 (Nov. 7, 2008) ("FDIC FIL-127-2008")); ¶ 45 (citing FDIC Supervisory Insight Article entitled "Managing Risks in Third Party Payment Processor Relationships," Summer 2011 ("2011 FDIC Supervisory Insight")); ¶ 46 (citing FDIC, Financial Institution Letter, Revised Guidance on Payment Processor Relationships, FIL-3-2012 (Jan. 31, 2012) ("FDIC FIL-3-2012")); ¶ 47 (citing OCC, Risk Management Guidance: Third Party Relationships, OCC Bull. No. 2013-29 (Oct. 30, 2013) ("OCC Bull. 2013-29")); Am. Compl., ¶¶ 59, 60, 83 (discussing FDIC-FIL-3-2012); ¶ 185 (requesting relief with regard to FDIC FIL-44-2008, FDIC FIL-127-2008, 2011 FDIC Supervisory Insight, FDIC FIL-3-2012, and OCC Bull 2013-29). Plaintiffs also cite FDIC and OCC guidelines applicable to FDIC and OCC-

agency action" under the APA.[3] While plaintiffs complain of an expanded reputation risk standard allegedly adopted by defendants, they point to only FDIC and OCC informal guidance documents purportedly expanding that standard, and not to any Board guidance. *Id.*, ¶¶ 43-50.

Rather, the Amended Complaint alleges that the Board, "relying on the foregoing informal guidance documents" issued by the FDIC and OCC and "acting through their examiners and other agents have, on information and belief, communicated privately to banks that they face adverse regulatory action, such as harsh and prolonged examinations and reduced examination ratings, if they continue to do business with payday lenders." *Id*., ¶ 55. Thus, plaintiffs' sole complaint against the Board appears to be that Board examiners, in conducting examinations, followed regulatory guidance issued by the FDIC and OCC and used "back-room pressure tactics," *id*., ¶ 7, to coerce banks to terminate their relationships with CFSA members. *See also id*., ¶¶ 4, 55, 169.[4]

The Amended Complaint alleges that these tactics have caused some banks to terminate relationships with some payday lenders, including CFSA members. *Id*., ¶¶ 57, 64-77. The

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regulated financial institutions that establish safety and soundness standards pursuant to 12 U.S.C. § 1831p-1. *See* Am. Compl., ¶¶ 33, 34 (citing 12 C.F.R. Part 364, App. A, and 12 C.F.R. 30.6, App.A II.A).

[3] See, by way of comparison, Am. Compl., ¶¶ 43-47 (alleging that FDIC FIL-44-2008, FDIC FIL-127-2008, 2011 FDIC Supervisory Insight, FDIC FIL-3-2012, and OCC Bull 2013-29 are "final agency action" because they are being enforced as "binding legal norm[s]" and represent "the culmination of [those agencies'] decision-making process[es]").

[4] The Amended Complaint also alleges that the Board and the other defendants are part of a "coordinated campaign" known as "Operation Choke Point," by which the Department of Justice and the defendants "us[e] their regulatory and enforcement authorities to quietly coerce banks to terminate their relationships with the disfavored businesses" such as payday lenders. Am. Compl., ¶ 52. Despite the Amended Complaint's focus on Operation Choke Point, however, the actual allegations against the Board relate to its direct interactions with regulated banks rather than with the Department of Justice or Operation Choke Point, which is exclusively a Department of Justice initiative.

Amended Complaint further alleges that at least three banks regulated by the Board (Bank Independent, Fifth Third Bank, and Regions Bank) terminated their banking relationship with CFSA members on the grounds that these payday lenders were outside of the banks' risk tolerance. *Id*., ¶¶ 65-66, 68-71, 74. The Amended Complaint does not point to a regulation, guidance document, or other binding directive issued by the Board that *required* these banks to act in this manner. *Id*.; *see also, id*., ¶¶ 55, 169.

In their Prayer for Relief, plaintiffs ask the Court to declare invalid under the APA five of the guidance documents issued by the FDIC or OCC, *id*., ¶¶ 185(a)-(c), but do not seek similar relief for any guidance document issued by the Board. *Id.* Plaintiffs seek a declaration that defendant agencies "significantly changed the definition of reputation risk" without notice and comment, and "deprived plaintiffs of liberty without due process of law in violation of the Fifth Amendment." *Id.*, ¶¶ 185(d)-(e). They ask the Court to enjoin the Board, and its officers, employees, and agents "from implementing, applying, or taking any action whatsoever pursuant to the above agency actions; from relying on the novel and revised definition of reputation risk that they have adopted without notice and comment rulemaking; and from applying informal pressure to banks to encourage them to terminate business relationships with payday lenders." *Id.*, ¶ 185(f). They seek an injunction preventing defendants from "harming the reputations of the plaintiffs" and "seeking to deprive plaintiffs of their access to financial services" and "their ability to pursue their chosen line of lawful business without due process of law." *Id.*, ¶ 185(g). Essentially, the plaintiffs appear to be seeking an injunction preventing the Board from following non-binding guidance documents issued by other bank regulatory agencies.

STANDARD OF REVIEW

A. Rule 12(b)(1)

Federal courts are courts of limited jurisdiction, and the law presumes that "a cause lies outside this limited jurisdiction . . . ." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *see also Gen. Motors Corp. v. EPA*, 363 F.3d 442, 448 (D.C. Cir. 2004) ("[a]s a court of limited jurisdiction, we begin, and end, with an examination of our jurisdiction"). Under Rule 12(b)(1), "the plaintiff bears the burden of establishing the factual predicates of jurisdiction by a preponderance of the evidence." *Lindsey v. United States*, 448 F. Supp. 2d 37, 42 (D.D.C. 2006) (citing, among other authorities, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). "'The court, in turn, has an affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority.'" *Lindsey*, 448 F. Supp. 2d at 42-43 (quoting *Abu Ali v. Gonzales*, 387 F. Supp. 2d 16, 17 (D.D.C. 2005)).

Because subject matter jurisdiction focuses on the Court's power to hear a claim, the Court must give the plaintiff's factual allegations closer scrutiny than would be required for a 12(b)(6) motion. *Food and Water Watch v. EPA,* Civ. No. 12-1639 (RC), 2013 U.S. Dist. LEXIS 174430, at *17 (D.D.C. Dec. 13, 2013). As a result, the court is not limited to the allegations contained in the complaint. *Wilderness Soc'y v. Griles,* 824 F.2d 4, 16 n.10 (D.C. Cir. 1987). Rather, "where necessary, the court may consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Herbert v. Nat'l Acad. of Sciences*, 974 F.2d 192, 197 (D.C. Cir. 1992); *see also Coalition for Underground Expansion v. Mineta,* 333 F.3d 193, 198 (D.C. Cir. 2003).

B. Rule 12(b)(6)

The Federal Rules require that a complaint contain "a short and plain statement of the claim" in order to give the defendant fair notice of the claim and the grounds upon which it rests. Fed. R. Civ. P. 8(a)(2); *see Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (per curiam). A motion to dismiss under Rule 12(b)(6) "does not test a plaintiff's ultimate likelihood of success on the merits" but rather "whether a plaintiff has properly stated a claim." *Food and Water Watch*, 2013 U.S. Dist. LEXIS 174430, at *19. In making its determination on a 12(b)(6) motion, the Court "may only consider the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint, and matters about which the Court may take judicial notice." *Gustave-Schmidt v. Chao*, 226 F. Supp. 2d 191, 196 (D.D.C. 2002).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This means that a plaintiff's factual allegations "must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555-56 (citations omitted). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are therefore insufficient to withstand a motion to dismiss. *Iqbal*, 556 U.S. at 678.

ARGUMENT

I. THE COMPLAINT AGAINST THE BOARD MUST BE DISMISSED UNDER RULE 12(B)(1) FOR LACK OF SUBJECT MATTER JURISDICTION

A. Plaintiffs' Claims Against the Board Must Be Dismissed For Lack of Article III Standing

The Constitution limits the Court's subject matter jurisdiction to "cases" or "controversies" for which plaintiff has standing to bring suit. *Defenders of Wildlife*, 504 U.S. at 560. "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). "Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Defenders of Wildlife*, 504 U.S. at 560.

At a minimum, the plaintiffs must meet three requirements to establish Article III standing. First, "the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id*. at 560 (internal citations and quotation marks omitted). "Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court." *Id.* at 560-61. Finally, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision" of the court.[5] *Id.* at 561 (internal citations and quotation marks omitted).

[5] In the D.C. Circuit, a motion to dismiss for lack of standing is a motion under Rule 12(b)(1) because "the defect of standing is a defect in subject matter jurisdiction." *Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987).

Here, plaintiffs cannot meet the irreducible constitutional minimum of standing. As shown below, even assuming that the injuries plaintiffs complain of – the alleged termination of bank accounts and banking relationships of some CFSA members by Board-regulated banks – meet the injury-in-fact requirement, these alleged harms are not fairly traceable to any action of the Board, but rather are the result of the actions of independent third-party banks. Moreover, plaintiffs' alleged injuries are not likely redressable by a favorable decision of the Court. Accordingly, the Amended Complaint against the Board must be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1).

1. The Alleged Injuries to CFSA Members Were Caused By the Independent Actions of Banks, Not the Board

As noted above, with respect to the Board, plaintiffs claim that Board examiners pressured banks in reliance on the FDIC and OCC guidance documents, causing some banks to sever their relationships with certain payday lenders. Am. Compl., ¶¶ 55, 57, 64-77. It is well established that where "'the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish.'" *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (quoting *Defenders of Wildlife*, 504 U.S. at 562); *accord Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976) ("Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court."); *Nat'l Wrestling Coaches Ass'n v. U.S. Dep't of Educ.*, 366 F.3d 930, 940 (D.C. Cir. 2004) ("courts [only] occasionally find the elements of standing to be satisfied in cases challenging government action on the basis of third-party conduct"). The Supreme Court recently reaffirmed its reluctance to "endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment."

Clapper v. Amnesty Int'l, 133 S. Ct. 1138, 1150 (2013). In such cases, "causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction – and perhaps on the response of others as well." *Defenders of Wildlife*, 504 U.S. at 562.

Here, plaintiffs' claims of injury rest entirely on the actions of independent third party banks, and they have not met their high burden of alleging that their injuries are fairly traceable to any action of the Board. Although the Amended Complaint vaguely alludes to "regulatory pressure" or an adverse "regulatory environment," *see, e.g.*, Am. Compl., ¶¶ 66, 69, plaintiffs point to no action by the Board that *required* the Board-regulated banks mentioned – Fifth Third, Regions Bank, or Bank Independent – to terminate banking relationships with CFSA members, much less to any judicially reviewable final Board action. *See, infra*, pp. 17-24. Indeed, the Amended Complaint suggests nothing more than that these banks independently chose to terminate relationships with customers they deemed to be high-risk. Am. Compl., ¶¶ 65, 66, 68, 69. These allegations fall well short of plaintiffs' burden on the causation component of standing.

In particular, in the letters from the Board-regulated banks to CFSA members referenced in the Amended Complaint, the banks identify their own reasons for terminating their relationships with CFSA members. Fifth Third Bank allegedly told plaintiff Advance America and CFSA members Cash Tyme and Xpress Cash Management that "the payday loan industry was 'outside [its] risk tolerance.'" Am. Compl., ¶¶ 66, 68 (quoting letter); *accord id.*, ¶ 65. Regions Bank allegedly told Cash Tyme that it "'ha[d] *chosen to end* relationships with certain types of customers deemed to be high risk.'" *Id.*, ¶ 66 (emphasis added). These statements do not attribute termination of the banking relationship to any action by the Board.

Plaintiffs' vague allegations that Board-regulated Bank Independent and Fifth Third cited "regulatory pressures *or risk concerns*" as a reason for terminating account relationships, *id*., ¶ 69 (emphasis added), and that Fifth Third was "conferring with regulators" before terminating relationships, *id.*, ¶ 70, likewise fall far short of plaintiffs' burden of alleging that injury to CFSA members was fairly traceable to action by the Board in particular.[6] To the contrary, these claims amount to nothing more than "'unadorned speculation' as to the existence of a relationship between the challenged [Board] action and the third-party conduct [which] 'will not suffice to invoke the federal judicial power.'" *Nat'l Wrestling Coaches*, 366 F.3d at 938 (quoting *Simon*, 426 U.S. at 44); *see also Gettman v. DEA*, 290 F.3d 430, 435 (D.C. Cir. 2002) ("speculative claims dependent upon the actions of third parties do not create standing"). Indeed, plaintiffs themselves point to another potential cause of the harm they allege, suggesting that "DOJ's aggressive use of subpoenas" in connection with its enforcement initiative known as Operation Choke Point "is compelling banks to terminate longstanding lending and depository relationships" with payday lenders. Am. Compl., ¶ 63.

The D.C. Circuit and Supreme Court have affirmed the dismissal of a number of similar lawsuits alleging injury caused not by government action or inaction, but by the independent actions of third parties. For example, in *National Wrestling Coaches*, the D.C. Circuit held that, even assuming that appellants had stated an injury-in-fact – colleges' decisions to eliminate or reduce men's wrestling teams to comply with Title IX – they nevertheless lacked standing because their "alleged injury results from the independent decisions of federally funded educational institutions" and not the defendant agency. 366 F.3d at 933; *see also Freedom Republicans, Inc. v. FEC*, 13 F.3d 412, 419 (D.C. Cir. 1994) (affirming dismissal for lack of

[6] As noted, *supra*, pp. 2-3, each of the Board-regulated entities is also regulated by state banking agencies.

standing where delegate selection practices by Republican Party were "not fairly traceable to any encouragement on the part of the government, but appear[] instead to be the result of decisions made by the Party"); *see also Clapper*, 133 S. Ct. at 1150 ("We decline to abandon our usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors."); *Simon*, 426 U.S. at 41 ("injury at the hands of a hospital is insufficient by itself to establish a case or controversy in the context of this suit, for no hospital is a defendant").

This case is no different. At its base, the Amended Complaint alleges nothing more than that a handful of Board-regulated banks, citing their own risk concerns, elected on their own to terminate banking relationships with some CFSA members. Accordingly, plaintiffs are unable to meet the causation component of standing and the Amended Complaint should be dismissed for lack of subject matter jurisdiction.

2. Plaintiffs' Alleged Injuries are Not Likely Redressable By a Favorable Decision of the Court

Similarly, the Amended Complaint must be dismissed for lack of subject matter jurisdication because plaintiffs cannot show redressability. Under the redressability component of Article III standing, plaintiffs must show that it is "'likely,' as opposed to merely 'speculative' that the injury will be redressed by a favorable decision.'" *Defenders of Wildlife,* 504 U.S. at 561 (quoting *Simon*, 426 U.S. at 38, 43). In conducting this analysis, "a court 'examines whether the relief sought, assuming that the court chooses to grant it, will likely alleviate the particularized injury alleged by the plaintiff.'" *Food and Water Watch*, 2013 U.S. Dist. LEXIS 174430, at *37 (quoting *Fla. Audubon Soc'y*, 94 F.3d 658, 663-64 (D.C. Cir. 1996)). To establish redressability at the pleading stage, the D.C. Circuit requires "more than a bald allegation." *Renal Physicians Ass'n v. U.S. Dep't of Health and Human Servs.*, 489 F.3d 1267, 1275 (D.C. Cir. 2007). Rather, "the facts alleged [must] be sufficient to demonstrate a

substantial likelihood that the third party directly injuring the plaintiff would cease doing so as a result of the relief the plaintiff sought." *Id.* (citing *Nat'l Wrestling Coaches*, 366 F.3d at 942-44).

Here, plaintiffs have failed to show that an order by the Court invalidating the challenged FDIC and OCC guidance is likely to result in restoration of banking services to CFSA members by Board-regulated banks or the cessation of future termination of such services. Even if the Court were to invalidate the challenged FDIC and OCC guidance, Board-regulated banks would remain free to terminate accounts of payday lenders on the basis that they posed an excessive risk to the bank, that the bank lacked the capacity or systems effectively to manage that risk, or for any other lawful reason. Redressability is even more tenuous in the case of the Board because the plaintiffs have not alleged that the Board issued *any* rule or final agency action that required Board-regulated banks to terminate banking relationships with payday lenders. *See, infra*, pp. 17-24. Moreover, to the extent that DOJ's Operation Choke Point itself is causing banks to withdraw from relationships with payday lenders, *see, e.g.*, Am. Compl. ¶¶ 63, 76-79, any remedy addressed only at the defendant banking agencies would be wholly ineffective, and of course plaintiffs have not sued the Department of Justice in this action.

In cases such as this where the requested Court order would not bind the actions of the independent third parties who allegedly caused plaintiffs' harm, Supreme Court and D.C. Circuit decisions require dismissal for lack of redressability. *Defenders of Wildlife*, 504 U.S. at 568 (finding no redressability where the requested court order would not bind the decisions of third party actors necessary to the requested relief); *DaimlerChrysler*, 547 U.S. at 350 (finding no redressability where the requested injunction would not remedy the alleged injury without the independent actions of a state government); *Renal Physicians*, 489 F.3d at 1278 ("[Appellant] has not satisfied the redressability prong … because it has not alleged any facts showing that an

order invalidating the safe harbor will likely cause dialysis facilities to increase the wages of RPA members"); *Nat'l Wrestling Coaches*, 366 F.3d at 939 ("appellants offer nothing to substantiate their assertion that a decision from the court vacating the [agency's policy interpretation] will redress their injuries by altering schools' independent decisions whether to eliminate or retain their men's wrestling programs"). Accordingly, in addition to the lack of causation, the Amended Complaint must be dismissed for failure to show that plaintiffs' harm is redressable by an order of this Court.

B. Section 8(i) of the FDI Act Divests the Court of Jurisdiction to Grant Relief Plaintiffs Seek Against the Board

Likewise, the principal relief the plaintiffs seek against the Board – that the Court enjoin the Board, and its officers, employees, and agents "from implementing, applying, or taking any action whatsoever pursuant to the above agency actions; from relying on the novel and revised definition of reputation risk …; [and] from applying informal pressure to banks to encourage them to terminate business relationships with payday lenders," Am. Compl., ¶¶ 185(f) – is for the most part barred by statute. Plaintiffs allege that Board examiners "communicated privately to banks that they face adverse regulatory action ... if they continue to do business with payday lenders." Am. Compl., ¶ 55. Such "adverse regulatory action" could take the form of an administrative investigation and issuance of a formal notice of charges claiming that a bank engaged in "unsafe and unsound" practices by maintaining accounts for payday lenders and seeking a cease and desist order or civil money penalties as a remedy, *see* 12 U.S.C. §§ 1818(b) and (i)(2), or of a consent order entered into by the Board and the institution under these provisions.

Any injunction the Court might enter that would interfere with such an ongoing administrative proceeding is specifically precluded by statute. Section 8(i)(1) of the Federal

Deposit Insurance Act ("FDI Act"), 12 U.S.C. § 1818(i)(1), provides "no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any such notice or order under any such section [1818, 1831*o* or 1831p-1], or to review, modify, suspend, terminate, or set aside any such notice or order."

The Supreme Court has interpreted this provision to "provide[] . . . clear and convincing evidence that Congress intended to deny the District Court jurisdiction to review and enjoin the Board's ongoing administrative proceedings." *Bd. of Governors of the Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 44 (1991); *accord CityFed Fin. Corp. v. OTS*, 58 F.3d 738, 741 (D.C. Cir. 1995) ("[t]o prevent regulated parties from interfering with the comprehensive powers of the federal banking regulatory agencies, Congress [in section 1818(i)] severely limited the jurisdiction of courts to review ongoing administrative proceedings brought by banking agencies"); *Ridder v. OTS*, 146 F.3d 1035, 1041 (D.C. Cir. 1998) ("section 1818(i) unambiguously precludes judicial review" of enforcement proceedings brought by banking agencies against regulated financial institutions or institution-affiliated parties).

Thus, section 1818(i)(1) of the FDI Act specifically divests the Court of jurisdiction to enjoin any ongoing or future enforcement proceeding by the Board, OCC, or FDIC against a bank involving its relationships with payday lenders, or otherwise. Indeed, even if the Board or other banking agency were to issue a *final* order in such an enforcement action, this Court *still* would not have jurisdiction to review it. Sections 8(h)(1) and (2) of the FDI Act vest review of final banking agency orders under section 8 "exclusively" in the courts of appeals, thereby divesting the district courts of subject matter jurisdiction. 12 U.S.C. § 1818(h)(1), (2); *see Horvath v. FDIC*, 20 F. Supp. 2d 844, 849 (E.D. Pa. 1998) (sections 1818(h)(1) and (2) of the FDI Act "clearly provide[] that exclusive jurisdiction for review of the FDIC's decision rests

with the Court of Appeals"). The plaintiffs' claims for injunctive relief against the Board should therefore be dismissed for lack of subject matter jurisdiction.

II. PLAINTIFFS' APA AND DUE PROCESS CLAIMS AGAINST THE BOARD MUST BE DISMISSED UNDER RULE 12(B)(6) FOR FAILURE TO STATE A CLAIM

A. Plaintiffs' APA Action Must be Dismissed Because Plaintiffs Have Failed to Allege Final Agency Action as Required By the APA

Even if the Court were to find that the plaintiffs have standing to bring their claims, or that they are not barred by section 8(i) of the FDI Act, it must dismiss the claims against the Board for failure to state a claim under the APA and the Due Process Clause.[7] Section 704 of the APA authorizes judicial review of "'[a]gency action made reviewable by statute and *final agency action* for which there is no other adequate remedy in a court.'" *Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 13 (D.C. Cir. 2005) (emphasis in original) (quoting 5 U.S.C. § 704). Here, the Amended Complaint alleges no special sttutory review provision, and the Board's action therefore must be final in order to be reviewable under the APA. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990) ("When, as here, review is sought not pursuant to specific authorization in the substantive statute, but only under the general review provisions of the APA, the 'agency action' in question must be 'final agency action.'") (quoting 5 U.S.C. § 704); *Norton*, 415 F.3d at 13; *see also Reliable Automatic Sprinkler*, 324 F.3d at 731 ("[i]f there was no final agency action here, there is no doubt that appellant would lack a cause of action under the APA").

[7] Because the APA grants a cause of action rather than subject matter jurisdiction, the "final agency action" inquiry in the D.C. Circuit is made under Rule 12(b)(6), not Rule 12(b)(1). *See Reliable Automatic Sprinkler Co. v. Consumer Product Safety Comm'n*, 324 F.3d 726, 731 (D.C. Cir. 2003).

The Supreme Court and D.C. Circuit have set forth a two-part test to determine the finality of agency action under the APA. "First, the action under review 'must mark the consummation of the agency's decisionmaking process – it must not be of a merely tentative or interlocutory nature.'" *Norton*, 415 F.3d at 13 (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). "Second, the action must 'be one by which rights or obligations have been determined, or from which legal consequences will flow.'" *Id.* (quoting *Bennett*, 520 U.S. at 178). Here, neither test is met with respect to the Board.

1. Plaintiffs Fail to Allege Consummation of a Decision-Making Process by the Board

First, the Amended Complaint alleges no final agency action by the Board which marks the consummation of a decision-making process. While pointing to four FDIC and one OCC informal guidance documents that they allege constitute "final agency action," Am. Compl., ¶¶ 43-47, plaintiffs point to no such document by the Board.[8] Indeed, the Amended Complaint points to no "agency action"[9] or decision-making process by the Board at all. The Complaint does not allege that the Board issued a "rule," that is, "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4); *see Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004) (affirming dismissal for lack of final agency action where EPA letter "cannot fairly be

[8] The only Board guidance document plaintiffs mention, Board SR 96-14, is cited as an example of how the defendants "previously defined … 'reputation risk'" before the alleged improper expansion of that term. Am. Compl., ¶ 41. Plaintiffs do not claim that this Board supervisory letter constituted "final agency action," *compare id., with* ¶¶ 43-47, nor do they seek relief with respect to Board SR 96-14. *Id.*, ¶¶ 185(a)-(c).

[9] The APA defines "agency action" to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13).

described as implementing, interpreting, or prescribing law or policy"). Nor does the Amended Complaint allege that the Board issued an "order," a "license," a "sanction," or "relief."

Rather, the Amended Complaint alleges that the Board, "relying on the foregoing informal guidance documents" issued by the FDIC and OCC and "acting through [its] examiners and other agents, ha[s], on information and belief, communicated privately to banks that they face adverse regulatory action, such as harsh and prolonged examinations and reduced examination ratings, if they continue to do business with payday lenders." Am. Compl., ¶ 55; *see also, id*., ¶ 161. The Amended Complaint cites only informal guidance documents issued by other banking agencies, not the Board. *See* Am. Compl., ¶ 35 (citing FDIC guidance); ¶¶ 43-46 (FDIC guidance); ¶ 47 (OCC guidance); ¶¶ 50, 59-60 (FDIC guidance); ¶¶ 185(a)-(c) (asking court to invalidate four FDIC and one OCC guidance documents); *see also, supra*, p. 4, n. 2. And it does not cite any *actual* "adverse regulatory action" taken by the Board against banks that failed to comply with the other agencies' guidance documents.

Essentially, plaintiffs are seeking injunctive and declaratory relief preventing Board bank examiners from raising, in the examination process, concerns set out in guidance documents not issued by the Board. The Supreme Court and D.C. Circuit have made clear that such generalized challenges to an agency's actions that are not reduced to an identifiable final rule, order, or other agency action are not cognizable under the APA, the only statute under which plaintiffs seek releif. *Lujan*, 497 U.S. at 890 (agency's land withdrawal review program did "not refer to a single [agency] order or regulation, or even to a completed universe of particular [agency] orders and regulations" and is not an identifiable "'agency action' – much less a final agency action") (quoting APA); *Independent Petroleum Ass'n v. Babbitt*, 235 F.3d 588, 595 (D.C. Cir. 2001) (no cognizable APA action where "the 'efforts' that [plaintiff] seeks to challenge do not refer to any

particular action taken by [the agency], much less to any particular order, regulation, or completed universe of orders or regulations"); *Fund for Animals v. BLM*, 460 F.3d 13, 19 (D.C. Cir. 2006) (the D.C. Circuit "'ha[s] long recognized that the term [agency action] is not so all-encompassing as to authorize [courts] to exercise judicial review over everything done by an administrative agency'") (quoting *Indep. Equip. Dealers*, 372 F.3d at 427). Moreover, as explained, *supra*, pp. 15-17, any such injunctive or declaratory relief would be barred by the specific anti-injunction and judicial review provisions of the FDI Act.

Plaintiffs' citation in paragraph 8 of their Amended Complaint to the D.C. Circuit's decision in *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000), is unavailing. In *Appalachian Power*, the court held that "when 'an agency's … pronouncements …, as a practical matter, have a binding effect,' they are subject to judicial review." There, however, the D.C. Circuit was reviewing an agency guidance document which, while ostensibly non-binding, in fact marked the consummation of the agency's decision-making process, *id.* at 1022, and "command[ed], [] require[d], [] order[ed], [] [and] dictate[d]" action by the States. *Id.* at 1023. Under those circumstances, the court determined that the guidance document constituted final agency action. None of those factors exists here. As explained, *supra*, pp. 18-19, the Amended Complaint alleges no regulation, binding policy interpretation, or other formal "pronouncement" by the Board, but rather suggests that the Board relied on FDIC and OCC guidance in allegedly pursing aggressive examination tactics that might result in an as-yet-untaken final agency supervisory action. *Appalachian Power* is therefore inapplicable because the Board is not alleged to have issued any "pronouncement."

In short, plaintiffs cannot establish that any alleged action of the Board "mark[s] the consummation of the agency's decision-making process, as required under the first prong of the

Bennett test. *Bennett*, 520 U.S. at 178; *Norton*, 415 F.3d at 13. Accordingly, they fail to state a claim under the APA and the Amended Complaint should be dismissed.

2. Plaintiffs Do Not Allege That the Board Took Action By Which Rights or Obligations Were Determined

Even if the challenged FDIC and OCC guidance documents marked the culmination of a decision-making process by the Board, which they did not, plaintiffs could not meet the second prong of *Bennett*, which requires an action "by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett*, 520 U.S. at 178 (internal quotations omitted). This is because the disputed FDIC and OCC guidelines are purely voluntary and do not impose rights or obligations or legal consequences, as explained in briefs filed with the Court by those agencies. For example, one of the challenged FDIC documents, FDIC FIL-44-2008,[10] describes itself as a "guidance [document] describe[ing] potential risks arising from third-party relationships." *Id.* at 1. The document goes on to outline "principles" FDIC-regulated banks should "tak[e] into consideration" in managing third-party relationships. *Id.* Similarly, OCC Bull. 2013-29[11] outlines actions an OCC-regulated bank "should" take to "assess[] and manag[e] risks associated with third-party relationships." *Id.* at 1. On their face, neither of these documents purports to establish binding legal norms that banks are required to follow. *See Center for Auto Safety v. Nat'l Hwy Trans. Safety Admin.*, 452 F.3d 798, 809 (D.C. Cir. 2006) (guidelines at issue were not final agency action under the second prong of *Bennett* because the agency "has not commanded, required, ordered, or dictated" anything and the "agency remains free to exercise discretion in assessing proposed recalls and in enforcing the Act"); *Norton*, 415 F.3d at 14 ("[g]iven the voluntary nature of the language contained in the

[10] Available at http://www.fdic.gov/news/news/financial/2008/fil08044.html.
[11] Available at http://www.occ.gov/news-issuances/bulletins/2013/bulletin-2013-29.html.

[p]rotocols, it is futile for [plaintiffs] to argue that the [p]rotocols are binding on their face"); *see also Indep. Equip. Dealers*, 372 F.3d at 427 ("common sense, basic precepts of administrative law, and the Administrative Procedure Act itself all point to the conclusion that the EPA letter to [plaintiff] is not reviewable agency action").

Even assuming, as alleged in the Amended Complaint, that some banks may have relied on FDIC and OCC guidance documents in concluding that certain payday lenders present an excessive risk profile, such voluntary action by members of a regulated industry is not sufficient to turn a non-binding agency guidance document into an actionable legal norm. *Devon Energy Corp. v. Kempthorne*, 551 F.3d 1030, 1040 (D.C. Cir. 2008) (fact that "for a number of years, regulated parties followed the advice contained in the [guidance] documents" is not sufficient to bind the agency); *Center for Auto Safety*, 452 F.3d at 811 (fact that non-binding policy guidelines had "become a *de facto* industry standard for how to conduct regional recalls … does not demonstrate that the guidelines have had *legal consequences*") (emphasis in original); *Norton*, 415 F.3d at 15 ("if the practical effect of the agency action is not a certain change in the legal obligations of a party, the action is non-final for the purposes of judicial review").

Plaintiffs also allege that Board examiners "communicated privately to banks that they face adverse regulatory action ... if they continue to do business with payday lenders," based on FDIC and OCC guidance documents. Am. Compl., ¶ 55; *see also id.*, ¶ 161. However, such alleged informal communications, even assuming for purposes of this motion that they occurred, do not constitute "final agency action" under the APA because they are not definitive statements of Board policy issued by an individual with authority to bind the Board. *Devon Energy*, 551 F.3d at 1040 ("[a]t the very least, a definitive and binding statement on behalf of the agency must come from a source with the authority to bind the agency"); *Center. for Auto Safety*, 452 F.3d at

810 (guidelines issued by agency official who had "no authority to issue binding regulations or to make a final determination" on behalf of the agency were not final agency action); *Ass'n of Am. R.Rs. v. U.S. Dep't of Trans.*, 198 F.3d 944, 948 (D.C. Cir. 1999) (a letter and two emails from lower level officials did not amount to an authoritative agency interpretation); *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 587 (D.C. Cir. 1997) ("speech of a mid-level official of an agency … is not the sort of 'fair and considered judgment' that can be thought of as an authoritative departmental position").

Moreover, plaintiffs have not alleged that the Board has taken a formal enforcement action against a bank based on an allegation that maintaining an account for a CFSA member is an unsafe and unsound practice. *See AT&T v. EEOC,* 270 F.3d 973, 976 (D.C Cir. 2001) (agency's decision to file a lawsuit is not final agency action). Such a formal enforcement action, had one been taken, would have to reach the stage of a final Board decision, not simply an administrative notice of charges,[12] to constitute final agency action. *FTC v. Standard Oil*, 449 U.S. 232, 243 (1980) (holding that the agency's issuance of an administrative complaint averring reason to believe that the plaintiff was violating the law is not a final agency action); *Reliable Automatic Sprinkler*, 324 F.3d at 732 ("the agency must hold a formal, on-the-record adjudication before it can make any determination that is legally binding"). Moreover, as explained, *supra*, pp. 15-17, even if such action was alleged, sections 8(i) and (h) of the FDI Act divest this Court of jurisdiction to enjoin ongoing banking agency enforcement proceedings, or to review final Board orders in such proceedings.

[12] Under section 8(h) of the FDI Act, 12 U.S.C. § 1818(h), an administrative notice of charges issued under section 8 is followed by a hearing, after which the agency will issue its decision and order, which are final for purposes of judicial review.

Even if banks were concerned about the possibility of such actions, *see* Am. Compl., ¶ 57, the D.C. Circuit has held that the prospect of a future enforcement action is insufficient to find that a protocol or guidance document is final for purposes of the APA. *Norton*, 415 F.3d at 15 (explaining that, "[a]t the time of any enforcement proceeding, the [complainant] can challenge the soundness of the [agency's] methodology [in issuing the protocol]"); *accord Indep. Equip. Dealers*, 372 F.3d at 428 ("'[p]ractical consequences,' such as the threat of '[plaintiff's] having to defend itself in an administrative hearing should the agency actually decide to pursue enforcement,' are insufficient to bring an agency's conduct under our purview") (quoting *Reliable Automatic Sprinkler*, 324 F.3d at 732).

Finally, plaintiffs allege that the defendant agencies have "acted in concert with DOJ, which has used its investigatory authority to reinforce the [d]efendant agencies' backroom pressure tactics." Am. Compl., ¶ 56. Even assuming that these allegations are true, the use of investigatory authority is not final agency action. *Standard Oil*, 449 U.S. at 243; *Norton*, 415 F.3d at 15; *Reliable Automatic Sprinkler*, 324 F.3d at 731-32. And if the DOJ's use of its investigatory authority would not be actionable, certainly an allegation that an agency cooperated with another agency's investigation is not.

Accordingly, plaintiffs' claims against the Board under the APA must be dismissed under Rule 12(b)(6) for failure to allege final agency action.[13]

B. The Amended Complaint Fails to Allege an Actionable "Failure to Act" By the Board Under the APA

Plaintiffs also cannot make out a cause of action by focusing on what the Board has *not* done. Unable to allege that the Board's adoption of guidance documents violated the APA –

[13] Because the Board has not engaged in final agency action, the Board believes that compliance with LCvR 7(n), which requires filing of a certified index of administrative record in APA actions, is neither possible nor required in this case.

because the Board is not alleged to have issued the contested guidance – plaintiffs claim that "the Board has failed to engage in notice and comment rulemaking to develop safety and soundness rules concerning banks' relationships with the payday lending industry and that distinguish between law-abiding, responsible payday lenders and payday lenders that engage in fraudulent or other wrongful practices." Am. Compl., ¶ 155. This does not state a claim.

The Supreme Court has held that "failures to act are sometimes remediable under the APA, but not always." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 61 (2004). A claim for relief for failure to act under § 706(1) "can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Id*. at 64 (emphasis in original). The Court has ruled that "[t]he limitation to discrete agency action precludes the kind of broad programmatic attack" such as that launched by plaintiffs here. *Id.* at 64. Rather, where a complaint "does not identify a legally required discrete action that the [agency] has failed to perform – a threshold requirement for a § 706 failure-to-act claim," dismissal is appropriate. *Montanans for Multiple Use v. Barbouletos*, 568 F.3d 225, 227 (D.C. Cir. 2009).

Here, while plaintiffs complain that the Board has not adopted safety and soundness rules containing their preferred provisions, plaintiffs point to no statute requiring the Board to promulgate such discrete rules. Am. Compl., ¶ 155. Section 39 of the FDI Act, 12 U.S.C. § 1831p-1, cited elsewhere in the Amended Complaint at paragraphs 30, 32, 167-168, is not such a statute. It provides "[e]ach appropriate Federal banking agency shall, for all insured depository institutions, prescribe – (1) standards relating to" internal controls, loan documentation, credit underwriting, interest rate exposure asset growth and compensation. 12 U.S.C. § 1831p-1(a). It says nothing at all about banks' relationships with payday lenders, much less does it *require* the Board to issue *discrete* regulations governing these relationships. Thus, plaintiffs have failed to

identify a legally required discrete action that the Board has failed to perform, and their claim under section 706(1) of the APA must be dismissed for failure to state a claim. *S. Utah Wilderness Alliance*, 542 U.S. at 64; *Montanans for Multiple Use*, 568 F.3d at 227.

C. The Amended Complaint Fails to State a Claim Against The Board That is Plausible on Its Face

Plaintiffs' Amended Complaint fails for the additional reason that it does not allege sufficient factual matter to support plaintiffs' claims against the Board. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Because plaintiffs' Amended Complaint relies exclusively on their unfounded speculation and contains not a single fact plausibly suggesting that the Board has in any way acted to "enforce a *de facto* boycott by financial institutions of CFSA's member businesses," Am. Compl. at 2, it "stops short of the line between possibility and plausibility" and is insufficient as a matter of law. *Twombly*, 550 U.S. at 546; *see also id.* at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level."); *RSM Prod. Corp. v. Freshfields Bruckhaus Deringer U.S. LLP*, 682 F.3d 1043 (D.C. Cir. 2012) (affirming dismissal of complaint where allegations did not include "sufficient factual matter" to give rise to a plausible inference of liability).

Notably, plaintiffs' substantive allegations concerning the Board extend no further than their speculative claim, made "on information and belief," that the Board has through "examiners and other agents . . . communicated privately to banks that they face adverse regulatory action, such as harsh and prolonged examinations and reduced examination ratings, if they continue to do business with payday lenders." Am. Compl., ¶ 55. Nothing more. Although the Board is the

prudential regulator of three of the banks plaintiffs allege have stopped servicing payday lenders to one degree or another, *see* Am. Compl., ¶ 74, nowhere do plaintiffs specifically allege that *the Board* applied regulatory pressure to these banks to take such action or that *the Board* threatened these banks with any consequences if they failed to do so. *Id*., ¶¶ 69, 70 (citing pressure from unspecified regulators).

Indeed, for all of plaintiffs' discussion of the Department of Justice's "Operation Choke Point," their characterization of the actions and guidance of other agencies, and their attempt to aggregate the alleged actions of each individual defendant with one another as well as with the investigatory actions of non-party Department of Justice, their bald speculation of "back-room arm-twisting," *see* Am. Compl., ¶¶ 55, 58, is the sum total of the "factual matter" alleged in support of plaintiffs' claims against the Board. Plaintiffs identify no threatened regulatory action made by the Board against any particular institution, identify no guidance issued by the Board that they allege was in furtherance of an enforced boycott against payday lenders, and identify no other facts of any kind plausibly leading to the conclusion that the Board has unlawfully targeted payday lenders.

On this thin allegation, it is impossible to conclude that plaintiffs have pled "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Because there is not a single fact alleged in the Amended Complaint that plausibly leads to the conclusion that the Board is responsible for the actions plaintiffs claim that certain financial institutions have taken against payday lenders, plaintiffs' claims against the Board must fail.

D. Plaintiffs Have Failed to State a Claim Against The Board For Denial of Due Process

Plaintiffs also contend that the Board has violated their Constitutional due process rights and that, apart from the APA, the Court "has authority under 28 U.S.C. § 1331 and its traditional powers of equity to declare invalid and enjoin agency action that violates the Constitution." Am. Compl., ¶ 179. In support of their due process claim, plaintiffs allege that "[t]he Board has inflicted reputational harm upon CFSA's members" and other payday lenders "by stigmatizing them as, among other things, 'illegitimate,' 'fraudulent,' and 'high risk,'" and that such stigma "threatens to preclude them from pursuing their lawful, chosen line of business." Am. Compl., ¶¶ 180-181; *see also id.* at 2 (unnumbered paragraph) (defendants' alleged actions "deprive Plaintiffs of liberty interests without due process of law"). Beyond the fact that plaintiffs have identified no Board regulation or guidance using such "stigmatizing" language, and even assuming for the sake of argument that plaintiffs have identified a cognizable liberty or property interest harmed by the alleged actions of the Board,[14] plaintiffs' due process claim fails.

Unlike adjudicatory proceedings involving only one or a small number of parties, "due process restrictions [are] not applicable to legislative activities of [an] administrative agency." *Natural Res. Def. Council v. EPA*, 859 F.2d 156, 194 (D.C. Cir. 1988) (citing *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915) (Holmes, J.)); *see also Brown v. McGarr*, 583 F. Supp. 734, 736 (N.D. Ill. 1984) (collecting authorities establishing that "[i]n the context of rulemaking . . . the fifth amendment's requirements of individualized due process do not apply"). Here, plaintiffs allege that the Board has taken action of a generalized nature that

[14] The Board does not agree that plaintiffs have identified such an interest. *See* Section IA *supra* (noting that plaintiffs' claims of injury from loss of banking services are dependent on the actions of independent third-party banks); *Orange v. District of Columbia*, 59 F.3d 1267, 1274 (D.C. Cir. 1995) ("By themselves, charges of government defamation are insufficient to create a liberty interest.") (citing *Paul v. Davis*, 424 U.S. 693 (1976)).

governs the entire "payday loan industry" and not that the Board has targeted only one or a few institutions within that industry. *See, e.g.*, Am. Compl., ¶¶ 1, 5, 182-83. In these circumstances, the Supreme Court has made clear that procedural due process restrictions do not apply. *See U.S. v. Florida East Coast Ry. Co.*, 410 U.S. 224, 245-46 (1973) (rejecting procedural due process challenge to Interstate Commerce Commission order because it was "applicable across the board to all of the common carriers by railroad subject to the Interstate Commerce Act" and "[n]o effort was made to single out any particular railroad for special consideration based on its own peculiar circumstances"); *see also Nat'l Coalition Against the Misuse of Pesticides v. Thomas*, 809 F.2d 875, 881 n.4 (D.C. Cir. 1987) ("due process imposes no constraints on informal rulemaking beyond those imposed by the statute"); 3 Ronald D. Rotunda and John E. Nowak, *Treatise on Constitutional Law-Substance & Procedure* § 17.8(c) (2013) ("the Supreme Court has not required procedural safeguards of systemic fairness in th[e] rulemaking or quasi-adjudicative process beyond those established in the Administrative Procedure Act"). As a result, plaintiffs' claim that the Board has violated their Constitutional due process rights would fail even if the Board had adopted the generalized policy against payday lenders that plaintiffs allege, and any relief plaintiffs seek must be found within the strictures of the APA.[15]

[15] Plaintiffs are making a procedural due process claim, *see* Am. Compl., ¶ 183 (alleging the Board failed to provide notice and hearing), but to the extent that they also seek to assert a substantive due process claim, i.e., that the Board has acted without a rational basis, the standard is even more rigorous than that set forth in the APA. Although the Board is not in a position to defend the rational basis of an agency action for which there is no evidence or plausible allegation, where agency action is "not arbitrary and capricious under the APA," it is "clear that the agency action d[oes] not rise to the level of a constitutional violation." *Holy Land Found. for Relief and Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 77 (D.D.C. 2002); *see also Zevallos v. Obama*, No. 13-0390, 2014 WL 197864, at *16 (D.D.C. Jan. 17, 2014) (agency action that is not arbitrary and capricious under the APA does not amount to a substantive due process violation).

CONCLUSION

For the foregoing reasons, the Board's motion to dismiss for lack of subject matter jurisdiction and failure to state a claim should be granted.

Dated: August 18, 2014
Washington, D.C.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA, LTD, and ADVANCE AMERICA, CASH ADVANCE CENTERS, INC., Plaintiffs, v. FEDERAL DEPOSIT INSURANCE CORP., BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, OFFICE OF THE COMPTROLLER OF THE CURRENCY and THOMAS J. CURRY, Defendants.	Civil Action No. 1:14-cv-00953-GK

[PROPOSED] ORDER

Upon consideration of Defendant Board of Governors of the Federal Reserve System's Motion to Dismiss the Amended Complaint for Lack of Subject Matter Jurisdiction and Failure to State a Claim, filed August 18, 2014, and the attached Memorandum of Points and Authorities in Support, and based upon the entire record of these proceedings, it is, this __ day of _____, 2014 hereby

ORDERED that defendant's motion to dismiss is **GRANTED** and the Amended Complaint is hereby **DISMISSED**.

Gladys Kessler
United States District Judge