

09-3293-CV

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

AMIDAX TRADING GROUP, ON BEHALF OF ITSELF AND
ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

— v. —

S.W.I.F.T. SCRL, S.W.I.F.T. PAN-AMERICAS INC., S.W.I.F.T., INC., JOHN SNOW, IN HIS PERSONAL CAPACITY, STUART LEVEY, IN HIS PERSONAL AND PROFESSIONAL CAPACITIES, UNITED STATES DEPARTMENT OF THE TREASURY, GEORGE W. BUSH, IN HIS PERSONAL CAPACITY, BARACK H. OBAMA, IN HIS PROFESSIONAL CAPACITY, CENTRAL INTELLIGENCE AGENCY, RICHARD CHENEY, IN HIS PERSONAL CAPACITY, JOSEPH R. BIDEN, JR., IN HIS PROFESSIONAL CAPACITY, GEORGE TENET, IN HIS PERSONAL CAPACITY, MICHAEL HAYDEN, IN HIS PERSONAL CAPACITY, LEON E. PANETTA, IN HIS PROFESSIONAL CAPACITY, HENRY M. PAULSON, JR., IN HIS PERSONAL CAPACITY, AND TIMOTHY F. GEITHNER, IN HIS PROFESSIONAL CAPACITY,

Defendants-Appellees.

*On Appeal From The United States District Court
For The Southern District Of New York
The Hon. P. Kevin Castel, United States District Judge, Presiding*

**BRIEF OF DEFENDANTS-APPELLEES S.W.I.F.T. SCRL, S.W.I.F.T.
SCRL d/b/a S.W.I.F.T., INC. and S.W.I.F.T. PAN-AMERICAS INC.**

Andrew S. Marovitz
Catherine A. Bernard
MAYER BROWN LLP
71 S. Wacker Drive
Chicago, IL 60606
(312) 782-0600

Andrew H. Schapiro
Scott A. Chesin
MAYER BROWN LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

Shawn J. Chen
CLEARY, GOTTLIEB, STEEN
& HAMILTON LLP
2000 Penn. Ave., NW
Washington, DC 20006
(202) 974-1500

*Attorneys for Defendants-Appellees S.W.I.F.T. SCRL, S.W.I.F.T. SCRL d/b/a S.W.I.F.T., INC.
& S.W.I.F.T. Pan-Americas Inc.*

CORPORATE DISCLOSURE STATEMENT

Defendants-Appellees S.W.I.F.T. SCRL and S.W.I.F.T. SCRL d/b/a S.W.I.F.T., Inc. have no parent corporation, and no publicly traded corporation owns 10% or more of their stock.

Defendant-Appellee S.W.I.F.T. Pan-Americas Inc. is a wholly-owned subsidiary of S.W.I.F.T. SCRL.

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
STATEMENT OF THE ISSUES.....	3
STATEMENT OF THE FACTS	4
SUMMARY OF ARGUMENT	15
ARGUMENT	16
I. THE DISTRICT COURT CORRECTLY HELD THAT AMIDAX FAILED TO PLEAD STANDING TO SUE SWIFT	16
A. The Allegations In The Complaint, Accepted As True, Do Not Plausibly Suggest That SWIFT Disclosed Amidax’s Financial Records In Response To The Treasury Department Subpoenas.....	18
1. The Materials Attached To And Incorporated In The Complaint Directly Contradict Amidax’s Allegation That Its Financial Information Was Disclosed By SWIFT.....	19
2. Amidax’s Approach To Interpreting Its Own Pleading Is Impermissible Under <i>Iqbal</i> And <i>Twombly</i>	22
3. The District Court Correctly Applied The <i>Iqbal/Twombly</i> “Plausibility Standard”	24
B. The District Court Was Correct To Dismiss The Complaint Because The Uncontradicted Evidence Demonstrates That Amidax’s Standing Allegations Are Factually False.....	26
II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING AMIDAX’S REQUESTS FOR JURISDICTIONAL DISCOVERY INTO ITS OWN STANDING AND LEAVE TO AMEND	30
III. NUMEROUS ALTERNATIVE GROUNDS SUPPORT THE DISTRICT COURT’S JUDGMENT IN FAVOR OF SWIFT	36

TABLE OF CONTENTS
(continued)

	Page
A. Federal Law Immunizes SWIFT From Liability For Compliance With Treasury Department Subpoenas	37
B. Amidax’s Claims All Fail As A Matter Of Law	40
1. Amidax’s Constitutional Claims Are Invalid	40
2. Amidax Has No Cognizable Claim Under The Right To Financial Privacy Act.....	42
3. None of Amidax’s State Law Claims Meets The Pleading Standards Of The Federal Rules	46
C. S.W.I.F.T., Inc. And S.W.I.F.T. Pan-Americas Inc. Are Improper Parties	47
CONCLUSION	49

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>ACLU v. National Security Agency</i> , 493 F.3d 644 (6th Cir. 2007)	25
<i>Adirondack Transit Lines, Inc. v. United Transp. Union, Local 1582</i> , 305 F.3d 82 (2d Cir. 2002).....	37
<i>Allee v. Medrano</i> , 416 U.S. 802 (1974)	35
<i>Alliance for Env't Renewal, Inc. v. Pyramid Crossgates Co.</i> , 436 F.3d 82 (2d Cir. 2006).....	31
<i>Ashcroft v. Iqbal</i> , 129 S. Ct. 1937 (2009)	2, 18, 19, 23, 24, 36, 46
<i>Aurelius Capital Partners, LP v. Republic of Argentina</i> , 584 F.3d 120 (2d Cir. 2009).....	31
<i>Bey v. City of New York</i> , 210 F. App'x 50 (2d Cir. 2006).....	33
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	18, 36
<i>Butler v. Goldblatt Bros.</i> , 589 F.2d 323, 327 (7th Cir. 1978)	41
<i>Cave v. E. Meadow Union Free Sch. Dist.</i> , 514 F.3d 240 (2d Cir. 2008).....	16
<i>Compania Del Bajo Caroni (Caromin) C.A. v. Bolivarian Republic of Venezuela</i> , No. 08-2706-cv, 2009 WL 2476688 (2d Cir. Aug. 14, 2009).....	33
<i>Cortec Indus., Inc. v. Sum Holding L.P.</i> , 949 F.2d 42 (2d Cir. 1991).....	19
<i>DaimlerChrysler Corp. v. Cuno</i> , 547 U.S. 332 (2006).....	17
<i>Daniel v. Safir</i> , 135 F. Supp. 2d 367 (E.D.N.Y. 2001), <i>aff'd</i> , 42 F. App'x 528 (2d Cir. 2002).....	41
<i>Denney v. Deutsche Bank AG</i> , 443 F.3d 253 (2d Cir. 2006).....	16
<i>Doniger v. Niehoff</i> , 527 F.3d 41 (2d Cir. 2008).....	37

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>Exchange Nat’l Bank of Chicago v. Touche Ross & Co.</i> , 544 F.2d 1126 (2d Cir. 1976).....	32
<i>Ernst Haas Studio, Inc. v. Palm Press, Inc.</i> , 164 F.3d 110 (2d Cir. 1999)	33
<i>Fisher v. United States</i> , 425 U.S. 391 (1976)	40
<i>Goldman v. Belden</i> , 754 F.2d 1059 (2d Cir. 1985).....	19
<i>Gualandi v. Adams</i> , 385 F.3d 236 (2d Cir. 2004).....	31, 32
<i>Halebian v. Berv</i> , No. 07-3750-cv, 2009 WL 5101758 (2d Cir. Dec. 29, 2009)	24
<i>Hamilton Bank, N.A. v. Kookmin Bank</i> , 44 F. Supp. 2d 653 (S.D.N.Y. 1999) <i>aff’d in part and vacated in part on other grounds</i> , 245 F.3d 82 (2d Cir. 2001)	4
<i>Harris v. Mills</i> , 572 F.3d 66 (2d Cir. 2009).....	24
<i>Hayden v. County of Nassau</i> , 180 F.3d 42 (2d Cir.1999).....	34
<i>Int’l Shipping Co., S.A. v. Hydra Offshore, Inc.</i> , 875 F.2d 388 (2d Cir. 1989).....	31
<i>Jazini v. Nissan Motor Co.</i> , 148 F.3d 181 (2d Cir. 1998)	44
<i>Liffiton v. Keuker</i> , 850 F.2d 73 (2d Cir. 1988)	46
<i>Luckett v. Bure</i> , 290 F.3d 493 (2d Cir. 2002)	27, 29
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992)	17
<i>McCarthy v. Dun & Bradstreet Corp.</i> , 482 F.3d 184 (2d Cir. 2007)	31
<i>Organizacion JD Ltda. v. U.S. Dep’t of Justice</i> , 18 F.3d 91 (2d Cir. 1994)	45
<i>O’Shea v. Littleton</i> , 414 U.S. 488 (1974)	35
<i>Schwanborn v. Cty. of Nassau</i> , No. 08-4753-pr, 2009 WL 3199001 (2d Cir. Oct. 7, 2009)	34
<i>SEC v. Jerry T. O’Brien, Inc.</i> , 467 U.S. 735 (1984).....	42, 43

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>Selevan v. New York Thruway Auth.</i> , 584 F.3d 82 (2d Cir. 2009).....	18
<i>Seneca Beverage Corp. v. Healthnow New York, Inc.</i> , 200 F. App'x 25 (2d Cir. 2006)	33
<i>Shipping Fin. Servs. Corp. v. Drakos</i> , 140 F.3d 129 (2d Cir. 1998).....	27
<i>Simon v. E. Ky. Welfare Rights Org.</i> , 426 U.S. 26 (1976).....	35
<i>Sims v. Blot</i> , 534 F.3d 117 (2d Cir. 2008)	31
<i>Steel Co. v. Citizens for a Better Env't</i> , 523 U.S. 83 (1998)	17
<i>United Republic Ins. Co. v. Chase Manhattan Bank</i> , 315 F.3d 168 (2d Cir. 2003).....	30
<i>United States v. Daccarett</i> , 6 F.3d 37 (2d Cir. 1993)	41, 43, 44, 45
<i>United States v. Miller</i> , 425 U.S. 435 (1976)	40
<i>United States v. Payner</i> , 447 U.S. 727 (1980).....	41
<i>W.R. Huff Asset Mgmt. Co., LLC v. Deloitte & Touche LLP</i> , 549 F.3d 100 (2d Cir. 2008).....	17
Constitutional Provisions	
U.S. Const. art. III § 2.....	17
Statutes	
12 U.S.C. § 3401	42, 43
12 U.S.C. § 3402	43
12 U.S.C. § 3403	46
12 U.S.C. § 3410.....	42
12 U.S.C. § 3414.....	45

TABLE OF AUTHORITIES
(continued)

	Page(s)
12 U.S.C. § 3417	46
50 U.S.C. § 1701	6, 38
50 U.S.C. § 1702	38
USA PATRIOT Act, Pub. L. No. 107-56 (2001)	45
 Rules	
31 C.F.R. § 501.602	38
Fed. R. Civ. P. 8(a)(2).....	18
Fed. R. Civ. P. 11	12, 30
Fed. R. Civ. P. 12(b)(1).....	2, 12, 14, 18, 26
Fed. R. Civ. P. 12(b)(6).....	14, 18, 37
Fed. R. Civ. P. 21	5, 14, 48
Fed. R. Civ. P. 59(e).....	15
Fed. R. Civ. P. 60(b)	15
 Other Authorities	
H.R. Res. No. 895, 109th Cong. (2006) (enacted).....	9
Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).....	6, 38
Notice: Publication of U.S./EU Exchange of Letters and Terrorist Finance Tracking Program Representations of the United States Department of the Treasury, 72 Fed. Reg. 60,054 (Oct. 23, 2007)	4, 9, 10

PRELIMINARY STATEMENT

In the wake of the terrorist attacks on the World Trade Center and the Pentagon on September 11, 2001, the United States Department of the Treasury issued a number of compulsory subpoenas to defendant-appellee S.W.I.F.T. SCRL (“SWIFT”). Acting pursuant to the International Emergency Economic Powers Act and related Executive Orders, the Department of the Treasury issued these subpoenas as part of its Terrorist Finance Tracking Program (“TFTP”), a classified effort to combat terrorists by tracing the funding for their operations. This appeal has been brought by plaintiff-appellant Amidax Trading Company in an effort to impose liability on SWIFT for responding to those compulsory subpoenas.

The complaint asserts that, in responding to the subpoenas, SWIFT disclosed Amidax’s financial information to the Government in violation of the First and Fourth Amendments of the United States Constitution, the federal Right to Financial Privacy Act, dozens of state wiretap and consumer fraud statutes, all 50 state constitutions, and the common law. But, as the District Court ruled, Amidax’s allegations do not satisfy even the minimum pleading standards of the federal courts.

The entirety of this lawsuit fails for a number of reasons, but the District Court dismissed the action because Amidax could not clear the first hurdle: standing. Amidax did not allege facts giving rise to a plausible inference that its

information had been disclosed as part of the TFTP, and therefore that it had suffered any injury-in-fact. The District Court thus properly dismissed the action pursuant to Fed. R. Civ. P. 12(b)(1), holding that the complaint, construed as a whole, failed to plead the “irreducible constitutional minimum” of standing. The District Court also properly denied Amidax’s requests for leave to undertake jurisdictional discovery that Amidax should have done *before* filing, and to amend the complaint in some (unspecified) way.

On appeal, Amidax barely addresses the District Court’s conclusions regarding the inadequacy of its complaint. Instead, Amidax devotes the majority of its appellate brief to arguing that the District Court engaged in a rogue fact-finding venture by declining to credit a stray conclusory allegation over the specific facts actually pled by the complaint. Amidax’s argument is legally flawed, as is evident from the fact that Amidax turns for support to the dissent in the Supreme Court’s recent decision in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). Br. 14-15.

Similarly, Amidax’s bare contention that it should have been permitted to sue first and plead standing later fails to demonstrate that the District Court abused its discretion in denying Amidax leave to conduct jurisdictional discovery or to amend its complaint. And even had the District Court erred – which it did not – ample alternative grounds support judgment in favor of SWIFT, both on the basis

of the record below and as a matter of law. This lawsuit – against a subpoena *recipient* for producing documents in response to lawful and compulsory government process – is inadequate on its face, and nothing in Amidax’s appellate brief demonstrates otherwise.

STATEMENT OF THE ISSUES

1. Did the trial court err by dismissing Amidax’s claims where the allegations in the complaint, taken as true, did not plausibly suggest that Amidax’s financial information was disclosed as a result of SWIFT’s compliance with Treasury Department subpoenas?
2. Did the District Court abuse its discretion in denying Amidax’s requests for jurisdictional discovery and opportunity to amend where Amidax (a) failed to plead plausibly that it suffered any injury as a result of SWIFT’s compliance with Treasury Department subpoenas and (b) failed to identify the facts it purportedly sought to discover?

STATEMENT OF THE FACTS

SWIFT's Business

SWIFT is “a Belgian-based cooperative that operates a worldwide messaging system used to transmit financial transaction information” between its members. Notice: Publication of U.S./EU Exchange of Letters and Terrorist Finance Tracking Program Representations of the United States Department of the Treasury, 72 Fed. Reg. 60,054, 60,055 (Oct. 23, 2007). *See also* DA 110 (describing SWIFT as “the premier messaging service used by banks around the world to issue international transfers”); *Hamilton Bank, N.A. v. Kookmin Bank*, 44 F. Supp. 2d 653, 656 n.12 (S.D.N.Y. 1999) (“SWIFT is a secured means of communication among financial institutions used primarily to confirm financial transactions”), *aff'd in part and vacated in part on other grounds*, 245 F.3d 82 (2d Cir. 2001).

SWIFT's U.S. operations are headquartered in Virginia, where SWIFT is authorized to do business under the alias “S.W.I.F.T., Inc.” DA 124, 126. S.W.I.F.T. Pan-Americas Inc. is a sales, marketing, and educational support office in New York City that is unconnected with the allegations brought by Amidax in

the complaint. DA 125.¹ Materials incorporated and relied upon in Amidax's own complaint make clear that SWIFT's messaging service is "predominantly used for overseas transfers," and routine transactions "such as deposits, withdrawals, checks, electronic bill payments and the like ... are not handled by SWIFT."

DA 110.

Amidax's description in its opening brief of SWIFT as holding a "virtual global monopoly" over the "processing" of "private financial transactions" is inaccurate, irrelevant, and unsupported by the record. Br. 1. SWIFT is not a financial institution and does not "process" financial transactions; it is one of many service providers to financial institutions. Indeed, it is precisely because SWIFT provides messaging services to its member financial institutions, and because those services primarily are used in connection with overseas wire transfers, that the

¹ Thus, although the complaint names SWIFT, S.W.I.F.T., Inc., and S.W.I.F.T. Pan-Americas Inc. as defendants, the only proper such party to this action is SWIFT, the entity that actually responded to the Treasury Department subpoenas. The complaint contains neither general nor specific allegations that S.W.I.F.T., Inc. or S.W.I.F.T. Pan-Americas Inc. was responsible in any way for Amidax's alleged injuries. SWIFT argued before the District Court that both S.W.I.F.T., Inc. and S.W.I.F.T. Pan-Americas Inc. therefore should be dismissed as misjoined parties pursuant to Fed. R. Civ. P. 21, but because the entirety of the complaint was dismissed, the District Court never reached this issue. The fact that neither S.W.I.F.T., Inc. nor S.W.I.F.T. Pan-Americas Inc. properly are named as defendants is one of the many alternative grounds supporting the District Court's judgment. *See infra* at 47-48.

federal Government subpoenaed certain SWIFT data in an effort to ferret out the sources of terrorism financing.

The Treasury Department Subpoenas

Nowhere in its 4,165-word opening brief does Amidax use the word “subpoena.” Its decision not to acknowledge the existence of the lawfully issued Treasury Department subpoenas – the catalyst for SWIFT’s disclosure of information to the federal Government – is telling. Regardless, the complaint itself attached, incorporated, and relied on materials that provide a comprehensive description of the process by which those subpoenas were issued. Those alleged facts, not Amidax’s subsequent briefs, are assessed to determine the adequacy of Amidax’s claims.

The Treasury Department’s authority to issue subpoenas to SWIFT was based on an Executive Order issued shortly after the September 11 attacks that declared a national emergency with respect to “grave acts of terrorism ... and the continuing and immediate threat of further attacks.” Exec. Order No. 13,224, 66 Fed. Reg. 49,079, 49,081 (Sept. 23, 2001). The Order delegated to the Secretary of the Treasury all powers granted to the President by the International Emergency Economic Powers Act (the “IEEPA”), 50 U.S.C. 1701 *et seq.*, to facilitate “the prevention and suppression of acts of terrorism, the denial of financing and financial services to terrorists and terrorist organizations, and the sharing of

intelligence about funding activities in support of terrorism.” *Id.* That delegation was consistent with the Treasury Department’s “critical and far-reaching role in enhancing national security by implementing economic sanctions against foreign threats to the U.S., identifying and targeting the financial support networks of national security threats, and improving the safeguards of our financial systems.” *See* www.ustreas.gov/education/duties (last accessed January 26, 2010).

The details of this antiterrorism program were widely disclosed on June 23, 2006, when *The New York Times* published an article (the “June 23 Article”) describing the program and reporting that SWIFT data had, among other things, “helped in the capture of the most wanted Qaeda figure in Southeast Asia.” A 17. The June 23 Article noted that the records subject to subpoena primarily were related to “wire transfers and other methods of moving money overseas” and that “most routine financial transactions confined to this country are not in [SWIFT’s] database.” *Id.* The Article also stated that SWIFT had informed the Treasury Department that it would provide data “only in response to a valid subpoena” and “insisted that the data be used only for terrorism investigations.” A 19, 22. Lastly, the Article noted that “multiple safeguards have been imposed to protect against any unwarranted searches of Americans’ records,” including the retention of “an outside auditing firm that verifies that the data searches are based on intelligence leads about suspected terrorists.” A 17, 18.

Later that same day, Treasury Secretary John Snow and Under Secretary Stuart Levey held a press conference (the “June 23 Press Conference”) that confirmed the existence of the TFTP and explained that “very significant protocols and safeguards” had been implemented to control the privacy, handling, and use of any data subpoenaed from SWIFT, including:

- “An extremely secure environment” for the subpoenaed data where access was restricted exclusively to persons with appropriate security clearances;
- The requirement that every search of the data be “tied to a terrorist lead”;
- The individual logging of every search inquiry;
- The use of auditors who monitored searches in real time and could prevent any search; and
- The logging and review of all search inquiries by auditors who “have found consistently that the government is not abusing this data.”

DA 107, 110. In addition, Secretary Snow noted that the Treasury subpoenas allowed the Government to access only a limited subset of SWIFT’s data, which had been narrowed over time. DA 108. Both the June 23 Article and the June 23 Press Conference expressly were incorporated by the plaintiff into its complaint. A 65.

After the June 23 Article was published, the United States House of Representatives responded clearly and directly, issuing a formal resolution

declaring that the TFTP (including the subpoenas issued to SWIFT) had been “conducted in accordance with all applicable laws, regulations, and Executive Orders” and that “appropriate safeguards and reviews ha[d] been instituted to protect individual civil liberties.” H.R. Res. No. 895, 109th Cong. (2006) (enacted); DA 117-23.

Following the disclosure of the existence of the TFTP, a review was undertaken in the European Union to determine whether the TFTP program had jeopardized SWIFT’s data privacy obligations under certain EU directives in Europe. The issue was resolved in an exchange of letters between the Treasury Department and the EU on June 28, 2007, wherein the European Union represented that the safeguards already implemented, together with the appointment of “an eminent European” to act in an oversight capacity and the fulfillment of certain other procedural requirements, meant that SWIFT is “in compliance with [its] responsibilities under European data protection law.”

Notice: Publication of U.S./EU Exchange of Letters and Terrorist Finance Tracking Program Representations of the United States Department of the Treasury, 72 Fed. Reg. at 60,065-66. The EU also explicitly acknowledged the Treasury Department’s legal authority to subpoena data from SWIFT. *Id.* Notably, in its representations to the EU, the Treasury Department made clear that only a limited subset of SWIFT’s data was subject to the TFTP subpoenas. *Id.* at

60,059. The Treasury Department also confirmed that, as a result of the many safeguards in place, only a minute fraction (*i.e.*, “substantially less than one percent”) of that data actually had been accessed, “and only because those messages have been directly responsive to a targeted, terrorism-related search.” *Id.*

The Walker Case²

Amidax is the second lawsuit filed by appellant’s counsel against SWIFT. On the very day that *The New York Times* disclosed the existence of the TFTP, these same counsel filed a lawsuit against SWIFT in the United States District Court for the Northern District of Illinois (the “Chicago District Court”) on behalf of Ian Walker, a Washington, D.C. resident whom the complaint alleged had completed “numerous domestic transactions and at least one international financial transaction since September 11, 2001.” A 30.³ Walker brought his claims under the First and Fourth Amendments to the United States Constitution, the Right to Financial Privacy Act (the “RFPA”), and the Illinois Consumer Fraud and

² *Amidax*’s opening brief refers repeatedly to the *Walker* litigation, which involved a different plaintiff bringing different allegations in a different court. While the *Walker* litigation ultimately is irrelevant to this appeal, *Amidax*’s inaccurate description of *Walker* necessitates the brief response above.

³ *Amidax*’s appendix includes Walker’s Second Amended Complaint, which was filed after SWIFT moved to dismiss in the Chicago District Court. A 28. The Second Amended Complaint added a second named plaintiff, Stephen Kruse, to address earlier pleading deficiencies. A 30. Kruse was dropped as a party after the case was transferred to the Eastern District of Virginia. *See infra* at 11.

Deceptive Business Practices Act. As with the Amidax complaint, Walker alleged that SWIFT disclosed its “entire ... database” to the federal Government. A 31.⁴ The Chicago District Court dismissed Walker’s First Amendment claim with prejudice, dismissed Walker’s state law consumer fraud claim without prejudice, and granted SWIFT’s motion to transfer the matter to the United States District Court for the Eastern District of Virginia (the “Virginia District Court”). DA 144.

SWIFT asked the Virginia District Court to reconsider the surviving claims. The Virginia District Court then *granted* SWIFT’s motion with respect to standing.⁵ Upon further review, the Virginia District Court held that the Chicago District Court’s earlier conclusion that Walker had sufficiently pled injury-in-fact was clearly erroneous and found that Walker had “fail[ed] to allege any facts giving rise to a plausible inference that [his] financial information was disclosed by SWIFT.” DA 153; *see also* DA 196 (“By Order dated October 18, 2007, defendant’s motion for reconsideration was granted in part, and plaintiffs’ complaint was dismissed for lack of standing.”). The Virginia District Court deferred the remainder of SWIFT’s arguments on reconsideration and granted

⁴ Unlike Amidax’s complaint, the complaint filed by Walker in the Northern District of Illinois attached neither the June 23 Article nor the June 23 Press Conference.

⁵ For all its discussion of the *Walker* litigation, Amidax notably fails to mention this fact in its opening brief. We have included the Virginia District Court’s ruling in our Supplemental Appendix. *See* DA 144-55.

Walker leave to amend his complaint, but instructed him to “allege facts that make standing plausible rather than merely conceivable” and to do so “in accordance with Rule 11.” DA 145, 154-55; DA 181 (upon amendment, court’s intention was to “proceed to consider the remaining matters raised by defendant’s motion for reconsideration”).

Walker then filed his fourth amended complaint, for the very first time alleging specific, identified financial transactions: his use of an American Express card and American Express travelers cheques. DA 199. Because neither of these products is serviced by the SWIFT messaging system, SWIFT brought a new motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), arguing that Walker still had not managed to plead constitutionally adequate standing allegations. DA 181-82. Walker objected to the motion, but the Virginia District Court ordered him to respond, reiterating that Walker had been granted leave to amend “provided [he] could do so consistent with [his] obligations under Rule 11.” *Id.* After briefing, the Virginia District Court allowed “focused, limited discovery” related to *plaintiff* regarding: (1) “the precise American Express services used by plaintiff” and (2) “whether the precise American Express services used by plaintiff might have caused plaintiff’s financial information to be transmitted over SWIFT’s messaging network.” DA 199. That discovery was never completed. On the evening before

Walker's scheduled deposition, plaintiffs' counsel voluntarily dismissed the lawsuit in its entirety.

Proceedings in This Case Before the District Court

Four months later, on June 23, 2008, the same counsel filed the complaint below on behalf of Amidax Trading Company, this time naming as defendants SWIFT, S.W.I.F.T., Inc., SWIFT's wholly-owned subsidiary S.W.I.F.T. Pan-Americas Inc. (collectively, the "SWIFT Defendants"), and numerous federal government agencies and officials (collectively, the "Federal Defendants"). Amidax alleges that it "sells household cleaning products ... throughout the world," servicing customers "located in Israel, the United Arab Emirates, Qatar, Yemen, and other foreign countries." A 67. Amidax brings its claims under the First and Fourth Amendments to the U.S. Constitution and the RFPA; in addition, Amidax alleges violations of the wiretap statutes of 49 states and the District of Columbia, the consumer fraud statutes of 50 states and the District of Columbia, and all 50 state constitutions, as well as common law claims for breach of warranty and breach of contract. The complaint seeks declaratory relief, injunctive relief, statutory money damages under the RFPA, including punitive damages, and attorneys' fees and costs. A 86-87. As in the *Walker* case, Amidax's central contention is that its individual financial information unlawfully was disclosed

when SWIFT allegedly turned over its “entire database” to the federal Government. A 69.⁶

On October 24, 2008, the SWIFT Defendants moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject-matter jurisdiction and pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. SWIFT also moved to dismiss S.W.I.F.T., Inc. and S.W.I.F.T. Pan-Americas Inc. as misjoined parties pursuant to Fed. R. Civ. P. 21. Separately, the Federal Defendants filed a motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6).

On February 13, 2009, the District Court granted SWIFT’s Rule 12(b)(1) motion and dismissed the entirety of the complaint with prejudice. Describing the complaint as “a patchwork of guesses and contradictions,” the District Court held that the complaint as a whole, construed together with the exhibits attached thereto, “contradicts and undermines the conjectural allegation that the government obtained the entire SWIFT database, and thus fails to adequately allege that Amidax’s data was disclosed to the government.” A 91, 101.

⁶ In its appellate brief, Amidax depicts this litigation as merely a continuation of the *Walker* case. But the chief commonality between the actions is the group of lawyers that filed them. In any event, as noted above, Amidax neglected to mention that, in *Walker*, the Virginia District Court reconsidered the Chicago District Court’s decision and held that Walker had not adequately alleged standing.

In its briefing on the motion to dismiss, Amidax had requested jurisdictional discovery into the issue of its own standing, as well as leave to amend (although no amended complaint ever was provided to the District Court for consideration). The District Court denied both requests, holding that jurisdictional discovery was not warranted and that amendment would be futile. A 102. After judgment was entered against it, Amidax moved for reconsideration, to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e), and for relief from judgment pursuant to Fed. R. Civ. P. 60(b). Both of those motions were denied. A 109. This appeal followed.

SUMMARY OF ARGUMENT

The District Court properly dismissed Amidax’s complaint. It correctly concluded, on the basis of Amidax’s own pleadings, that Amidax lacked standing to bring this lawsuit: the complaint as a whole not only failed plausibly to allege that Amidax’s financial information was disclosed by SWIFT, but indeed set forth numerous facts rendering that conclusion *implausible*. Amidax’s argument that the District Court should have credited a single vague assertion – that SWIFT had disclosed its “entire database” to the Government – over the numerous contrary and specific facts pled in the complaint is inconsistent with the principles articulated by the United States Supreme Court in *Twombly* and *Iqbal*.

Nor did the District Court abuse its discretion in denying Amidax's request to conduct jurisdictional discovery that Amidax should have pursued *before* filing suit, and in denying Amidax's motion to amend its complaint in some unidentified way. Finally, there are several other separate and independent grounds that the District Court did not have to reach and that support judgment for SWIFT. Those include (1) the complete statutory immunity conferred on SWIFT by the IEEPA, (2) the well-established rule that Amidax has no constitutionally protected privacy interest in financial records provided to a third party, (3) the lack of any basis to show that SWIFT is a government actor, (4) Amidax's failure to allege properly that SWIFT is (a) a "financial institution," (b) a "customer," and (5) Amidax's failure to plead the rudimentary elements of its state and common law claims.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT AMIDAX FAILED TO PLEAD STANDING TO SUE SWIFT.

Standing pursuant to Article III of the United States Constitution is "the threshold question in every federal case, determining the power of the court to entertain the suit." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263 (2d Cir. 2006). If the plaintiff lacks standing, then the court lacks subject-matter jurisdiction and "must take proper notice of the defect by dismissing the action." *Cave v. E. Meadow Union Free Sch. Dist.*, 514 F.3d 240, 250 (2d Cir. 2008) (citing

Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737, 740 (1976)). This obligation “springs from the nature and limits of the judicial power of the United States and is inflexible and without exception.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94-95 (1998) (internal quotation omitted). “[A] plaintiff must demonstrate standing for each claim he seeks to press.” *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006).

The “irreducible constitutional minimum” of standing is injury-in-fact. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To ensure that courts only resolve actual “cases” or “controversies” instead of rendering advisory opinions, *see* U.S. Const. art. III § 2, the Constitution requires that a plaintiff plead (1) “an invasion of a legally protected interest which is (a) concrete and particularized ... and (b) actual or imminent, not conjectural or hypothetical”; (2) that is “fairly traceable” to the defendant’s challenged conduct; and (3) is “likely” to be “redressed by a favorable decision.” *Lujan*, 504 U.S. at 560-61 (citations and internal quotations omitted). The plaintiff must plead facts sufficient to allow the court to ascertain not only injury to a cognizable interest, but also that “the party seeking review [is] himself among the injured.” *Id.* at 563. Thus, “[a]s a general rule, the ‘injury-in-fact’ requirement means that a plaintiff must have personally suffered an injury.” *W.R. Huff Asset Mgmt. Co., LLC v. Deloitte & Touche LLP*, 549 F.3d 100, 107 (2d Cir. 2008) (citations omitted).

This Court reviews *de novo* a district court’s dismissal of a complaint for lack of standing. *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 88 (2d Cir. 2009). In accordance with the Supreme Court’s decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), the central inquiry is whether the allegations in the complaint “plausibly give rise to an entitlement to relief.” *Selevan*, 584 F.3d at 88 (citing *Iqbal*, 129 S. Ct. at 1950).⁷

A. The Allegations In The Complaint, Accepted As True, Do Not Plausibly Suggest That SWIFT Disclosed Amidax’s Financial Records In Response To The Treasury Department Subpoenas.

Rule 8 of the Federal Rules of Civil Procedure requires “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). In *Twombly*, the United States Supreme Court held that this language obligated the plaintiffs in a federal antitrust case to plead facts that “nudged their claims across the line from conceivable to plausible.” 540 U.S. at 570. Just last year, in *Iqbal*, the Supreme Court clarified that this “plausibility standard” applies to all complaints brought in the federal courts. Thus, “[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to

⁷ While both *Twombly* and *Iqbal* were decided in the context of motions to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), this Circuit has noted that the same pleading standard applies where a facial challenge to subject-matter jurisdiction is brought pursuant to Fed. R. Civ. P. 12(b)(1). *See, e.g., Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 88 (2d Cir. 2009).

‘state a claim for relief that is plausible on its face.’” *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570). The Court explained that

[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 ... The plausibility standard is not akin to a “probability requirement,” but it asks for more than a sheer possibility that a defendant has acted unlawfully.

Id. (quoting *Twombly*, 550 U.S. at 556-57). In particular, the Court instructed, “[w]here a complaint pleads facts that are ‘merely consistent’ with a defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’” *Id.* (quoting *Twombly*, 550 U.S. at 557) (internal quotation omitted).

1. The Materials Attached To And Incorporated In The Complaint Directly Contradict Amidax’s Claim That Its Financial Information Was Disclosed By SWIFT.

Amidax’s complaint manifestly fails the “facial plausibility” test. This Circuit long has held that a complaint “is deemed to include any document attached to it as an exhibit ... or any document incorporated in it by reference.” *Goldman v. Belden*, 754 F.2d 1059, 1065-66 (2d Cir. 1985); *see also Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991) (complaint is construed together with “any statements or documents incorporated in it by reference”). By attaching the June 23 Article and June 23 Press Conference to the complaint and relying on those materials in its allegations, Amidax thus

incorporated numerous well-pled facts that flatly contradict its conclusory allegation that SWIFT disclosed its “entire database” over to the Treasury Department and provide no support for the conjecture that Amidax’s information was even in that database. Indeed, the complaint not only fails to set forth any factual allegations that allow the plausible inference that Amidax’s financial information was disclosed by SWIFT to the federal Government, but actually pleads facts that render Amidax’s claim *implausible*.

In particular, the complaint alleges (by incorporating the June 23 Press Conference) that Secretary Snow and Under Secretary Levey made clear that the TFTP was lawfully authorized by the IEEPA and that SWIFT had *not* “exceeded the scope of the subpoena[s]” or “provided its entire database to the United States Government.” A 69, 70. Secretary Snow explained that SWIFT had informed the Treasury Department that it was not technologically possible to extract and produce individual data from the SWIFT database, and therefore, together with the Government, “set up a process” to extract the data, segregate it in a highly secured, limited-access environment, and “assure that [the Government was] only getting data that were pursuant to the subpoena [and] that the inquiries were narrowly targeted on intelligence leads.” DA 107-08. He also explicitly stated that SWIFT had produced data only in response to “government compulsion,” *i.e.*, mandatory administrative subpoenas, and that those subpoenas allowed the Government to

access only a limited subset of SWIFT's data, which had been narrowed over time.

Id.

Under Secretary Levey, in turn, identified the IEEPA as the “routine and absolutely clear” “legal basis” for the subpoenas to SWIFT – noting that the Treasury Department “issue[s] such subpoenas regularly and [its] authority to do so has never been seriously questioned.” DA 110. He also described the measures that had been implemented to protect and control access to SWIFT's data:

- First, before Treasury analysts could access any of the data subpoenaed from SWIFT, they had to identify “a person, an entity, some targeted search by name and articulate the connection that we already have ... to terrorism.” “If that link cannot be established and articulated by the analyst, the data cannot be searched.” DA 110, 112.
- Second, “multiple layers of strict controls” had been implemented with respect to conducting searches on the data produced by SWIFT to the Treasury Department, including:
 - Requiring that every search inquiry be logged and tied to an ongoing terrorist investigation;
 - Monitoring searches in real time with auditors who may stop any search at any time; and
 - Employing auditors to review all search records.

DA 107, 110. Under Secretary Levey also explained that “[the Government is] not permitted to browse through this data [that has been subpoenaed from SWIFT], nor can we search it for any nonterrorism-related investigation. In practice, that means that [the Government] ha[s] access to only a minute fraction of the data we obtain

from SWIFT.” DA 110; *see supra* at 9-10 (citing exchange of letters between the EU and Treasury Department).

Similarly, the June 23 Article incorporated into the complaint states that SWIFT “made clear that it could provide data only in response to a valid subpoena” and “insisted that the data be used only for terrorism investigations.” A 19, 22. All of these *facts*, pled in the complaint, regarding the numerous safeguards and procedures relating to the SWIFT data flatly contradict Amidax’s speculative and conclusory argument that SWIFT turned over its entire message database to the federal Government without any protection at all.

2. Amidax’s Approach To Interpreting Its Own Pleading Is Impermissible Under *Iqbal* And *Twombly*.

In the face of its own pleading, Amidax is reduced to (1) asserting conclusorily that its financial information is contained in the SWIFT database and (2) crediting, over all of the other specific statements and assertions in the complaint, a single broad declaration: that at the June 23 Press Conference, Secretary Snow stated that SWIFT “said to us, ‘We’ll give you all the data.’” Amidax argues that, despite all of the other contrary facts that it pleads, this single statement plausibly suggests that SWIFT not only offered but in fact disclosed without protection its entire database, including Amidax’s financial information. Thus, Amidax contends that the District Court engaged in a rogue fact-finding

venture by declining to credit this particular allegation to the exclusion of the specific, contrary facts pled in the complaint.⁸ But Amidax’s approach is inconsistent with *Iqbal* and *Twombly*, which instruct the federal courts to determine whether the inferences the plaintiff seeks to draw are plausible – rather than merely possible – in the context of the *entire* complaint.

Iqbal is illustrative. *Iqbal* alleged that he had been subjected to an unlawful governmental policy of holding Arab Muslim men in maximum-security conditions. The Supreme Court determined that, once stripped of conclusory allegations not entitled to a presumption of truth, the complaint as a whole pled facts from which invidious discrimination “[wa]s not a plausible conclusion.” 129 S. Ct. at 1951-52. The Court identified a single allegation that, taken as true, could be construed as pleading that high-level federal officials had approved a policy of restrictive confinement for post-September 11 detainees pending clearance by the FBI. *Id.* But the Court ultimately rejected that interpretation, concluding that the complaint as a whole pled facts from which it was *more* plausible to infer that such a policy was lawful and justified by nondiscriminatory intent. *Id.* Now, despite

⁸ The complaint also quotes a statement in the June 23 Article, credited to an anonymous source, that “[a]t first, they got everything – the entire SWIFT database.” A 65. The District Court held that any such reliance on this “speculative and conjectural assertion[.]” was misplaced. A 98. Indeed, with a citation to Rule 11, the District Court observed that the complaint gave “no indication that plaintiff conducted any kind of inquiry to determine whether the anonymous source was reliable or whether the statement itself was accurate.” *Id.*

the Court's clear instruction to the contrary in *Iqbal*, Amidax urges this Court to credit one stray statement to the exclusion of the rest of the complaint. Indeed, because the Court's majority opinion unambiguously precludes that very interpretive approach, Amidax is forced to rely on the *Iqbal* dissent in its opening brief. Br. 14-15.

This Circuit has adopted the “[t]wo working principles” set out in *Iqbal*. 129 S. Ct. at 1949. First, courts are to review the complaint for and set aside legal conclusions and “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements.” *Harris v. Mills*, 572 F.3d 66, 71-72 (2d Cir. 2009) (quoting *Iqbal*, 129 S. Ct. at 1949). Second, courts are to examine the remaining well-pled facts and determine whether the theory of relief advanced by the plaintiff plausibly may be drawn from them. *Id.* at 72. This second step is “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Halebian v. Berv*, No. 07-3750-cv, 2009 WL 5101758, at *5 (2d Cir. Dec. 29, 2009) (quoting *Iqbal*, 129 S. Ct. at 1950). We discuss the District Court's careful application of these principles below.

3. The District Court Correctly Applied The *Iqbal/Twombly* “Plausibility Standard.”

The District Court engaged in precisely this examination, identifying as “speculative and conjectural” the assertion that SWIFT had disclosed its “entire

database” to the Government and finding that this claim was not plausible within “the context of the entire complaint,” particularly the facts incorporated from the June 23 Article and June 23 Press Conference. A 98. Indeed, the District Court held that “taken in its totality, the complaint *does not allege* that Amidax’s financial information was disclosed to the government” and therefore fails to plead any injury whatsoever. *Id.* (emphasis added). This is fatal. In *ACLU v. National Security Agency*, 493 F.3d 644 (6th Cir. 2007), the Sixth Circuit relied on identical grounds to reverse a district court judgment ordering the cessation of the NSA’s Terrorist Surveillance Program, holding that the plaintiffs lacked standing to bring their statutory and constitutional claims because they “d[id] not, and cannot, assert that any of their own communications have ever been intercepted” and therefore had failed to allege a concrete and particularized injury. *See id.* at 673-74 (noting that “it would be unprecedented for this court to find standing for plaintiffs to litigate a Fourth Amendment cause of action without any evidence that the plaintiffs themselves have been subjected to an illegal search or seizure”) (citing *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978)); *id.* at 683 (finding that plaintiffs “have not asserted a viable FISA cause of action” because they “have not alleged ... that they were actually the target of, or subject to, the NSA’s surveillance”). The same is true here: because it is not plausible to infer from the complaint that Amidax’s financial information was among the data provided to the Government

under the TFTP subpoenas or retrieved through the Government's search protocols, Amidax fails to allege standing.

B. The District Court Was Correct To Dismiss The Complaint Because The Uncontradicted Evidence Demonstrates That Amidax's Standing Allegations Are Factually False.

The complaint fails adequately to allege standing for a second, equally compelling reason: the few non-conclusory facts Amidax pleads with respect to standing – that it is a SWIFT customer and a recipient of payments directly through the SWIFT system – are demonstrably false. A 67. In the proceedings below, SWIFT brought facial *and* factual challenges to the complaint pursuant to Fed. R. Civ. P. 12(b)(1). In its dismissal opinion, the District Court observed that Amidax had established at best “scant support for the proposition that plaintiff’s data was contained in the SWIFT database during the period after September 11, 2001 and prior to the public disclosure of the TFTP in 2006.” A 97. But because Amidax had not plausibly pled injury-in-fact, the District Court declined to resolve that issue, simply assuming that Amidax’s financial information was in SWIFT’s database at the time of the TFTP subpoenas. *Id.* However, in the event that this Court questions the District Court’s determination that the complaint insufficiently pleads injury-in-fact, it must also address the threshold issue of whether Amidax has shown its data were contained in SWIFT’s database during the relevant period.

Where a defendant brings a motion contending that a complaint's jurisdictional allegations are untrue, "jurisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it." *Shipping Fin. Servs. Corp. v. Drakos*, 140 F.3d 129, 131 (2d Cir. 1998) (citing *Norton v. Larney*, 266 U.S. 511, 515 (1925)). "In resolving the question of [subject-matter] jurisdiction, the district court can refer to evidence outside the pleadings and the plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Luckett v. Bure*, 290 F.3d 493, 496-97 (2d Cir. 2002) (citing *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000)). In the proceedings below, both Amidax and SWIFT submitted affidavits and supporting exhibits. These materials make clear that Amidax's standing allegations are untrue and legally flawed.

First and foremost, the complaint's allegations that "Amidax is a customer of Defendant SWIFT" and has its own "SWIFT Code"⁹ are false and unsupportable. A 67. Together with its motion to dismiss, SWIFT provided a sworn declaration from Vincent Gibson, SWIFT's Manager of Finance & Administration – US, stating that, in fact, Amidax is not and to SWIFT's

⁹ By "SWIFT Code," Amidax means the Bank Identifier Code ("BIC") assigned to identify a particular financial institution and used by that institution to send messages through the SWIFT system. See http://www.swift.com/biconline/index.cfm?fuseaction=display_aboutbic (last accessed January 26, 2010).

knowledge never has been (i) a member or customer of SWIFT, (ii) a licensed user of a SWIFT code, or (iii) an authorized user of any of SWIFT's messaging services and software products. DA 96-97. Nor could Amidax possibly have "receiv[ed] payments, via SWIFT, from its international customers" (A 67), because SWIFT does not transmit payments: it provides services and software that *financial institutions* use to transmit payments. DA 97; *see also* DA 110 (describing SWIFT as "the premier messaging service *used by banks* around the world to issue international transfers") (emphasis added).

Amidax did not rebut this evidence in response to SWIFT's motion. To the contrary, Amidax offered a declaration from its principal, Marcello Schor, that *admits* that Amidax does not have an individual SWIFT account or any direct relationship with SWIFT. DA 173 (stating that Schor "make[s] use of [his] financial institution's SWIFT account number"). The Schor Declaration concedes that "customers" like Amidax "do not have individual SWIFT account numbers but must use *their financial institution's SWIFT account* to effect money transfers." *Id.* (emphasis added). Although it evidences a patent misunderstanding of what constitutes a customer relationship, this sworn statement corroborates the fact that SWIFT's customers are financial institutions, not individuals or entities like Amidax with accounts at those institutions. It also completely undermines the complaint's allegation that Amidax *itself* "is a customer of Defendant SWIFT." *Id.*

Still, Amidax argues that the Schor Declaration is “sufficient ... to create an issue of fact as to whether [Amidax’s] records were” disclosed by SWIFT. Br. 16. But the Schor Declaration provides no support whatsoever for such an inference, and even if it did, “an issue of fact” is not sufficient to allow a case to proceed in the face of a factual challenge to subject-matter jurisdiction. As this Court has held, where subject-matter jurisdiction is challenged, “the *plaintiff* ... has the burden of proving by a preponderance of the evidence that it exists.” *Lockett*, 290 F.3d at 497 (emphasis added).

Amidax attached to the Schor Declaration (1) an Amidax customer invoice dated August 7, 2008, that, among other information, lists a SWIFT code; and (2) a letter on Commerce Bank letterhead dated May 27, 2008, that the Schor Declaration claims is a “typical transaction receipt identifying my specific account number transmitted on the SWIFT network.” DA 173, 175-176. As the District Court observed, however, the Commerce Bank letter contains neither the SWIFT code listed on the invoice nor any other reference to SWIFT, and both documents are dated years after the complaint alleges the Government obtained Amidax’s financial data from SWIFT. A 97. At best, these documents might allow a court to infer that Amidax – not SWIFT – disclosed a record that identifies a SWIFT code,

and that Commerce Bank – not SWIFT – disclosed a record that identifies some details about a single wire transfer to Amidax’s bank account.¹⁰

One final point: as discussed below, Amidax now contends that it was deprived of an opportunity to conduct discovery behind the truth or falsity of its own jurisdictional allegations. But Amidax was entitled to and did present extrinsic evidence on this very subject in the proceedings below, and was unable to muster *any* testimony or documentary evidence from which it reasonably could be inferred that SWIFT ever possessed or produced Amidax’s financial information.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING AMIDAX’S REQUESTS FOR JURISDICTIONAL DISCOVERY INTO ITS OWN STANDING AND FOR LEAVE TO AMEND.

On appeal, Amidax argues that the District Court abused its discretion by refusing to allow Amidax the opportunity to take “jurisdictional discovery” on the question of its own standing, and to amend its complaint depending on what it found. Of course, Amidax has it exactly backwards: Rule 11 of the Federal Rules of Civil Procedure requires a plaintiff to investigate its own standing *before* filing suit. *See United Republic Ins. Co. v. Chase Manhattan Bank*, 315 F.3d 168, 171 (2d Cir. 2003) (noting that Rule 11 sanctions may be assessed where plaintiff

¹⁰ Notably, although the Schor Declaration references Amidax’s dealings with customers from “Arab countries,” the Amidax invoice and Commerce Bank letter indicate transactions with parties in Mexico and Singapore, respectively. DA 172, 175-76.

brings and pursues lawsuit without investigating legal and factual bases of subject-matter jurisdiction); *Int'l Shipping Co., S.A. v. Hydra Offshore, Inc.*, 875 F.2d 388, 392-93 (2d Cir. 1989) (affirming \$10,000 award in Rule 11 sanctions against attorney who failed to conduct a reasonable pre-filing inquiry into subject-matter jurisdiction).

This Court reviews the District Court's denial of Amidax's motions for jurisdictional discovery and leave to amend for abuse of discretion. *Gualandi v. Adams*, 385 F.3d 236, 244-45 (2d Cir. 2004); *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007). "A district court has abused its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or rendered a decision that cannot be located within the range of permissible decisions." *Sims v. Blot*, 534 F.3d 117, 132 (2d Cir. 2008) (internal citation and quotation marks omitted). Amidax comes nowhere close to meeting this standard.

This Court has made clear that jurisdictional discovery as a response to a motion to dismiss for lack of subject-matter jurisdiction is purely discretionary and not available as of right. *See Alliance for Env't Renewal, Inc. v. Pyramid Crossgates Co.*, 436 F.3d 82, 88 (2d Cir. 2006) (once a motion puts a plaintiff's "Article III standing in issue, the District Court has leeway as to the procedure it wishes to follow"); *Aurelius Capital Partners, LP v. Republic of Argentina*, 584

F.3d 120, 129 (2d Cir. 2009) (“[A] district court is afforded broad discretion in its determination of jurisdictional issues.”). It is well within the district court’s discretion to resolve a factual challenge to subject-matter jurisdiction on the basis of facts set forth in declarations or affidavits. *See Exchange Nat’l Bank of Chicago v. Touche Ross & Co.*, 544 F.2d 1126, 1130 (2d Cir. 1976). In the proceedings below, the declarations and extrinsic materials presented by *both* parties affirmatively demonstrated that Amidax is *not* a SWIFT customer. SWIFT presented un rebutted factual evidence that Amidax’s claimed direct use of SWIFT’s services is untrue, and Amidax failed to elicit any evidence supporting the inference that its data were in the SWIFT database or were retrieved by the federal Government in response to the TFTP subpoenas. Against this factual backdrop, the District Court was well within its discretion to conclude that Amidax’s “mere speculation that it might have suffered a constitutional injury” did not merit an opportunity to conduct further jurisdictional discovery. A 102, 108.

Although courts have the discretion to allow jurisdictional discovery where jurisdictional facts “are peculiarly within the knowledge of the opposing party,” it remains the plaintiff’s burden to identify *what* those facts are, how they are to be obtained, and, most critically, how this information would bear on the disputed jurisdictional issues. *Gualandi*, 385 F.3d at 244-45 (district court did *not* abuse its discretion in denying request for jurisdictional discovery where extrinsic evidence

supported dismissal and “appellants were unable to demonstrate that additional discovery was needed in order to decide the jurisdictional issue”).

Amidax’s wholesale failure to make any such showing in the proceedings below or, for that matter, before this Court is reason enough to deny its request. *See also Compania Del Bajo Caroni (Caromin) C.A. v. Bolivarian Republic of Venezuela*, No. 08-2706-cv, 2009 WL 2476688, at *1 (2d Cir. Aug. 14, 2009) (finding no abuse of discretion in denial of request for jurisdictional discovery where plaintiffs had failed to identify any specific facts or statements it wished to challenge). In comparison, it is telling that neither of the cases upon which Amidax relies and where discovery *was* allowed had anything whatsoever to do with jurisdictional discovery: *Bey v. City of New York*, 210 F. App’x 50 (2d Cir. 2006), and *Seneca Beverage Corp. v. Healthnow New York, Inc.*, 200 F. App’x 25 (2d Cir. 2006), both addressed the propriety of further discovery in response to *summary judgment* motions, not standing challenges.¹¹

The same yardstick applies to Amidax’s motion for leave to amend. “[W]here the plaintiff is unable to demonstrate that he would be able to amend his complaint in a manner which would survive dismissal, opportunity to replead is

¹¹ Any additional authority Amidax might belatedly offer in its reply brief should be disregarded: “[N]ew arguments may not be made in a reply brief.” *Ernst Haas Studio, Inc. v. Palm Press, Inc.*, 164 F.3d 110, 112 (2d Cir. 1999) (where “attempt [wa]s made in the Reply Brief to supply what was conspicuously omitted in the main Brief,” citations to new legal authority would be ignored).

rightfully denied.” *Hayden v. County of Nassau*, 180 F.3d 42, 53 (2d Cir. 1999); *see also Schwanborn v. County of Nassau*, No. 08-4753-pr, 2009 WL 3199001, at *1 (2d Cir. Oct. 7, 2009) (ruling that district court did not abuse its discretion where “proposed amended complaint merely restates the claims in [the] earlier complaint, without remedying its prior jurisdictional and factual inadequacies”). Under this standard, there is no question that the District Court properly denied Amidax’s request, since Amidax failed to tender *any* proposed amended complaint for consideration. *See* A 102 (noting that Amidax had requested “leave to amend its complaint in unspecified ways”); A 89 (“Although plaintiff refers to an ‘Amended Complaint,’ ... no such document was ever filed with the Court.”).

Essentially, Amidax argues that because, in the *Walker* case, the Virginia District Court allowed “completion of substantial jurisdictional discovery,” the same result is required here. Br. 3. But Amidax yet again misrepresents what happened in those proceedings, because the discovery allowed was neither “substantial” nor, for that matter, completed. As described above, what the Virginia District Court permitted was “focused, limited discovery” into “the precise American Express services used by” Walker and the relationship between those services and SWIFT, topics on which the court concluded there was a factual dispute. DA 199; *see supra* at 12. And the discovery process abruptly was terminated by Walker himself, who voluntarily dismissed his entire case on the

evening of February 20, 2008, to avoid his deposition the following morning. More importantly, there was no need for jurisdictional discovery here, because Amidax had (1) attached to and incorporated within its complaint factual statements that squarely contradicted its conclusory assertion that its financial information must have been among the data disclosed to the federal Government by SWIFT; and (2) tendered a sworn declaration that *contradicted* the allegation that it is a SWIFT customer and a direct user of SWIFT's products and services. *See supra* at 20-22, 28.

For the same reasons, Amidax's suggestion that this Court consider the comparative scope of the putative classes in the *Walker* case and this one (*see* Br. 9) is a red herring. "That a suit may be a class action ... adds nothing to the question of standing." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976); *see also O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) ("[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class."). Amidax's "[s]tanding cannot be acquired through the back door of a class action." *Allee v. Medrano*, 416 U.S. 802, 828-29 (1974).

The gist of Amidax's arguments – that it is permissible to sue now and establish standing later – flouts the key principles at the very heart of the Supreme Court's decisions in *Twombly* and *Iqbal*. Indeed, in *Iqbal*, the Court specifically

noted that pleading standards are a gatekeeper to discovery, cautioning that although “Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, ... it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.” 129 S. Ct. at 1950.

Similarly, in *Twombly*, the Court explicitly rejected the argument that “a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process,” noting that judicial success at preventing discovery abuse has been, at best, “modest.” 550 U.S. at 559. Both decisions make clear that a plaintiff must make *some* investigation into the soundness of its claim, including the existence of Article III standing, *before* filing suit.¹² Amidax manifestly did not, and it has no “right” to do so now. *Cf.* Br. 7.

III. NUMEROUS ALTERNATIVE GROUNDS SUPPORT THE DISTRICT COURT’S JUDGMENT IN FAVOR OF SWIFT.

As explained above, the District Court’s decision was correct and should be affirmed in its entirety. But the reasons given by the District Court were not the only ones it could have cited to support dismissal. Numerous other grounds, all

¹² In stark contrast to its argument that the District Court committed legal error “in acting as a jury or finder of fact” (Br. 15), Amidax characterizes the District Court’s *assumption* (for the purposes of SWIFT’s dismissal motion) that Amidax adequately had alleged that its data was in the SWIFT database as a “finding ... sufficient to show that Amidax’s requested discovery is ‘no mere fishing expedition.’” Br. 17. The only “finding” that the District Court made on this issue was that there was “scant support for the proposition that [Amidax’s] data was contained in the SWIFT database.” A 97.

briefed below, also support judgment for SWIFT. Specifically, even if the complaint somehow had cleared the opening hurdle and alleged facts sufficient to establish standing, each of the claims still is subject to dismissal on multiple grounds pursuant to Rule 12(b)(6) for failure to state a claim. This Court can and should affirm the judgment even if, for some reason, it chooses not to adopt the District Court's reasoning. *See, e.g., Doninger v. Niehoff*, 527 F.3d 41, 50 n.2 (2d Cir. 2008) (this Court may “affirm the district court's judgment on any ground appearing in the record, even if the ground is different from the one relied on by the district court”); *Adirondack Transit Lines, Inc. v. United Transp. Union, Local 1582*, 305 F.3d 82, 88 (2d Cir. 2002) (“Appellees, as the prevailing parties, may of course assert any ground in support of that judgment, ‘whether or not that ground was relied upon or even considered by the trial court.’”) (quoting *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970)).

A. Federal Law Immunizes SWIFT From Liability For Compliance With Treasury Department Subpoenas.

Beyond principles of standing, judgment for SWIFT was proper because the company has *immunity* from Amidax's claims. As the Federal Defendants will address in their brief to this Court, federal law precludes *any* claims against SWIFT arising out of its good-faith compliance with subpoenas issued pursuant to the TFTP. And the facts pled in Amidax's complaint amply demonstrate that

SWIFT's actions were just that: good-faith efforts to comply with compulsory federal subpoenas.

The TFTP is authorized by the IEEPA, *see* Exec. Order No. 13,224, 66 Fed. Reg. 49,079, which confers on the President wide latitude to investigate foreign transactions in response to “unusual and extraordinary” threats to national security. 50 U.S.C. §§ 1701(a), 1702(a)(1)(A). The IEEPA also authorizes the President to demand the production of reports and records in furtherance of such investigations. 50 U.S.C. § 1702(a)(2); *see also* 31 C.F.R. § 501.602.

To facilitate compliance and ready cooperation in times of national emergency, the IEEPA contains a broad immunity provision:

No person shall be held liable in any court for or with respect to anything done or omitted in good faith in connection with the administration of, or pursuant to and in reliance on ... any regulation, instruction, or direction issued under this chapter.

50 U.S.C. § 1702(a)(3). This provision stands as a complete bar to Amidax's suit.

Amidax makes a conclusory attempt to plead around the IEEPA's immunity provision by baldly declaring in its complaint, without any supporting facts, that SWIFT “acted in bad faith” by “exceed[ing] the scope of the subpoena[s]” and “provid[ing] its entire database to the United States Government.” A 69, A 70. But as already demonstrated, the specific facts pled in the complaint belie those assertions. In particular, the facts pled through the complaint's incorporation of

the June 23 Press Conference demonstrate that, far from acting in “bad faith,” SWIFT provided a set of responsive message data in compliance with valid subpoenas, secured numerous stringent protocols and safeguards to ensure the protection and confidentiality of the information in the responsive data, and obtained the Government’s agreement that the produced data could be accessed only in connection with a specific terrorism-related investigation. *See supra* at 7-8, 20-22. Its actions fall squarely within the statutory protections provided by the IEEPA.

The IEEPA’s good-faith immunity provision *must* be available to a party that receives a federal subpoena during a national emergency. Amidax cannot plead away the statute’s protections by uttering the words “bad faith” or by implying that SWIFT’s production somehow was “overly cooperative” – especially where the facts Amidax *does* plead demonstrate the opposite. Otherwise, recipients of valid process during times of national crisis will find themselves forced to resist, either by refusing to comply absent court order or by initially producing documents and information under the most restrictive subpoena interpretations possible. Such a result is anathema to the purpose of the IEEPA and the national security goals it seeks to achieve.

B. Amidax's Claims All Fail As a Matter of Law.

Even if SWIFT had no statutory immunity, each of Amidax's separate claims fails on its own merits. The constitutional claims are deficient because Amidax has no First or Fourth Amendment privacy interest in the records disclosed by SWIFT, which is not, in any event, a state actor. Amidax also has no cognizable claim under the Right to Financial Privacy Act because, pursuant to the plain terms of the statute, SWIFT is not a "financial institution" and Amidax is not its "customer." Finally, none of Amidax's state law claims – purporting to arise under the state constitutions, wiretap statutes, and consumer fraud statutes of all 50 states and the District of Columbia – come close to satisfying the pleading standards of the federal rules. Amidax's complaint fails even to identify the specific state laws or constitutions purportedly violated, much less to recite the elements of its state law claims or explain how SWIFT's actions were in violation.

1. Amidax's Constitutional Claims Are Invalid.

The first two counts in Amidax's complaint purport to assert claims under the First and Fourth Amendments to the United States Constitution. But as the Federal Defendants will demonstrate in their brief to this Court (hereby adopted by the SWIFT Defendants in relevant part and incorporated by reference), Amidax has no First or Fourth Amendment privacy interest in the records at issue. *See Fisher v. United States*, 425 U.S. 391 (1976); *United States v. Miller*, 425 U.S. 435

(1976); *United States v. Payner*, 447 U.S. 727 (1980). Indeed, this Court has held that “a bank customer ha[s] no ‘protected Fourth Amendment interest’” in financial records maintained by a third party. *United States v. Daccarett*, 6 F.3d 37, 50 (2d Cir. 1993) (quoting *Miller*, 425 U.S. at 440). Amidax’s First and Fourth Amendment counts fail as a matter of law.

Even if the First or Fourth Amendments *were* implicated here – which they are not – Amidax has failed to allege that SWIFT is a state actor. As this Court is aware, the Bill of Rights prohibits the *Government* from trespassing on citizens’ rights to be free from unreasonable searches and seizures and to speak and associate freely. If a plaintiff fails plausibly to allege that a defendant is a state actor or government agent, a constitutional claim simply does not lie. Amidax’s conclusory statement that SWIFT’s compliance with Treasury Department subpoenas rendered it “an instrument or agent of the United States government” (A 71) does not somehow make it so. *See Daniel v. Safir*, 135 F. Supp. 2d 367, 375 (E.D.N.Y. 2001), *aff’d*, 42 F. App’x 528 (2d Cir. 2002) (dismissing federal civil rights claim against subpoenaed telephone company because “[m]ere compliance with a subpoena” does not transform private entity into state actor); *Butler v. Goldblatt Bros.*, 589 F.2d 323, 327 (7th Cir. 1978) (“the mere act of furnishing information to law enforcement officers” does not constitute action “under color of law”).

The rule advocated by Amidax would place all recipients of subpoenas from the federal Government in the untenable position of either challenging the subpoenas in court or facing the prospect of expensive litigation over whether they were acting as “agents” of the federal Government when they complied. This would impose massive burdens on subpoena recipients, undermine legitimate law enforcement objectives, and open the floodgates to litigation around the country over the validity of federal subpoenas. That is not and cannot be the law.

2. Amidax Has No Cognizable Claim Under The Right To Financial Privacy Act.

Count III of Amidax’s complaint asserts a claim under the Right to Financial Privacy Act of 1978, 12 U.S.C. § 3401 *et seq.* (the “RFPA”). The RFPA “accords customers of banks and similar financial institutions certain rights to be notified of and to challenge in court administrative subpoenas of financial records in the possession of the banks.” *SEC v. Jerry T. O’Brien, Inc.*, 467 U.S. 735, 745 (1984). By its terms, the statute provides “the sole judicial remedy available to a customer to oppose disclosure of financial records” by third parties. 12 U.S.C. § 3410(e). Amidax claims that SWIFT violated this statute by producing documents in response to the TFTP subpoenas. Its basic assertion is that SWIFT and the federal Government failed to observe certain procedural requirements set out in § 3402 of the Act, rendering SWIFT’s compliance with the subpoenas improper. *See* A 78.

This assertion is meritless but ultimately irrelevant, because by its terms, the RFPA applies neither to SWIFT nor to Amidax. The statute does even not permit the type of civil damages suit Amidax attempts to bring.

To begin with, the plain terms of the statute make clear that it does not apply to SWIFT or to Amidax. “The most salient feature of the [RFPA] is the narrow scope of the entitlements it creates.” *Jerry T. O’Brien*, 467 U.S. at 745. To that end, the Act’s protections apply only where a “financial institution” discloses the records of a “customer.” *See* 12 U.S.C. § 3402; *Daccarett*, 6 F.3d at 51. These terms are defined by the statute:

“financial institution” ... means any office of a bank, savings bank, card issuer ..., industrial loan company, trust company, savings association, building and loan, or homestead association (including cooperative banks), credit union, or consumer finance institution. ...

“customer” means any person or authorized representative of that person who utilized or is utilizing any service of a financial institution, or for whom a financial institution is acting or has acted as a fiduciary, in relation to an account maintained in the person’s name.

12 U.S.C. § 3401(1), (5).

As discussed above, the facts pled in Amidax’s complaint and the materials attached to the complaint establish that SWIFT is not a “financial institution,” under this definition or any other. SWIFT supplies messaging services *to* its

member financial institutions; SWIFT is not a financial institution itself. *See* DA 109 (“SWIFT itself is not a bank” but “an intermediary for financial institutions” that provides “electronic transmission of information about financial transactions on a worldwide basis”); DA 114 (“The users of SWIFT are ... financial institutions.”). Indeed, the Chicago District Court, taking judicial notice of the descriptions of SWIFT in other court opinions, concluded that “SWIFT’s role is to facilitate communications about financial transactions, rather [than] to actually conduct financial transactions itself.” A 58 (citing cases). The plaintiff in the *Walker* case was “precluded” from arguing to the contrary. *Id.*

In the alternative, Amidax alleges that SWIFT “act[ed] as an agent of its member financial institutions.” A 71. But the complaint does not plead any facts from which this legal conclusion plausibly may be inferred, and the District Court was not required to credit Amidax’s conclusory allegation. *See, e.g., Jazini v. Nissan Motor Co.*, 148 F.3d 181, 183-85 (2d Cir. 1998) (court was not obliged to accept as true “sparse” and “conclusory” allegations of an agency relationship between foreign corporation and affiliate).

Nor is Amidax a “customer” as defined by the statute. As this Court has noted, the “RFPA is meant to protect those who maintain accounts in their names at financial institutions.” *Daccarett*, 6 F.3d at 51-52 (citations omitted). The notion that Amidax is a direct customer of SWIFT’s has been proven untrue. *See*

supra at 28-29. And while the complaint alleges that “Amidax has held accounts at two different banks” (A 67), it fails to plead that these unnamed banks are SWIFT members or any other facts suggesting a link between Amidax’s customer relationship with some financial institution and SWIFT’s response to the Treasury Department subpoenas. *See Daccarett*, 6 F. 3d at 51-52 (where intended beneficiaries of wire transfers to be credited to Colombian bank accounts maintained at intermediary bank did not hold accounts in their own names at those intermediary banks, they were not “customers” and RFPA protections did not apply to DEA subpoenas for records from the intermediary banks); *Organizacion JD Ltda. v. U.S. DOJ*, 18 F.3d 91, 95 (2d Cir. 1994) (because the RFPA was “meant to protect those who maintain accounts in their names at financial institutions,” plaintiffs in *Daccarett* had no claim under the RFPA against the federal government for seizure of wire transfers at intermediary banks where plaintiffs did not have accounts) (citing *Daccarett*, 6 F.3d at 51-52).¹³

¹³ Moreover, as SWIFT argued before the District Court, even if the RFPA did apply to SWIFT and to Amidax, following the 2001 amendments to that statute by the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), the procedural requirements of Section 3402 do not apply to “the production and disclosure of financial records pursuant to requests from ... a Government authority authorized to conduct investigations of, or intelligence or counterintelligence analyses related to, international terrorism for the purpose of conducting such investigations or analyses.” 12 U.S.C. § 3414(a)(1)(C); *see* Pub. L. No. 107-56, § 358, 115 Stat. 272, 327. SWIFT’s response to the subpoenas issued by the Treasury Department as part of the TFTP clearly comes within this exception.

In any event, although the RFPA includes employees and agents within the sweep of its authority, *see* 12 U.S.C. § 3403, the statute *excludes* agents as targets of civil liability. *See* 12 U.S.C. § 3417(a) (providing for the assessment of civil damages against “[a]ny agency or department of the United States or financial institution” disclosing financial information in violation of the statute). This Court has recognized that the RFPA “*does not impose civil liability upon individual officers, employees, or agents of financial institutions.*” *Liffiton v. Keuker*, 850 F.2d 73, 78-79 (2d Cir. 1988) (emphasis added). Thus, even if SWIFT were an “agent of a financial institution,” it could not be held liable for damages under the RFPA.

3. None Of Amidax’s State Law Claims Meets The Pleading Standards Of The Federal Rules.

In *Iqbal*, the Supreme Court noted that “[a] pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do. ... Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 555, 557) (internal citations omitted). It follows, then, that a complaint that fails even to provide such a “formulaic recitation of the elements” is doubly insufficient as a matter of law.

Amidax's complaint falls into this category. It not only fails to recite the elements of any of its state law claims, but it makes no effort even *to identify* the specific state laws or constitutions purportedly violated with respect to Amidax's data. Instead, Count IV ("Violation of State Wire Interception Statutes") and Count V ("Violation of State Consumer Protection Statutes") sweepingly declare that SWIFT's conduct violates "state statutes" and then list citations for the wiretap statutes of 49 states and the District of Columbia and the consumer fraud statutes of 50 states and the District of Columbia. A 78-83. Amidax provides fewer specifics for Count VI ("Violation of State Constitutions"), pleading only that SWIFT "violated and continues to violate the Constitutions of the nation's member states." A 84. And with respect to Count VII ("Breach of Contract") and Count VIII ("Breach of Warranty"), Amidax pleads none of the predicate facts – such as the existence of a contract – necessary to render the claims plausible. A 84-85. The District Court was correct to dismiss these boilerplate claims, and that decision should be affirmed.

C. S.W.I.F.T., Inc. And S.W.I.F.T. Pan-Americas Inc. Are Improper Parties.

Finally, Amidax never should have included S.W.I.F.T. Pan-Americas Inc. and S.W.I.F.T., Inc. in this action. Amidax's complaint alleges no facts to suggest that S.W.I.F.T. Pan-Americas (a New York sales and support office) received any

Treasury Department subpoenas or was in any way involved in responding to those subpoenas. And S.W.I.F.T., Inc. is merely an *alias* for SWIFT; as described above, it is simply the registered name under which SWIFT holds a Certificate of Authority to transact business in the State of Virginia. DA 124, 126; *see also supra at 5 n.1.*

For these reasons, SWIFT moved the District Court to dismiss these defendants pursuant to Fed. R. Civ. P. 21, which allows the court, “on just terms, [to] add or drop a party” “any time.” The District Court’s decision to dismiss the entire complaint obviated the need to grant this motion, but it is clear that these parties were improperly joined.

CONCLUSION

This Court should affirm the District Court's decision dismissing the complaint and granting judgment to defendants.

Dated: New York, New York
January 27, 2010

Respectfully submitted,
MAYER BROWN LLP

Andrew H. Schapiro
Scott A. Chesin
1675 Broadway
New York, NY 10019
212-506-2500

By: _____
Andrew S. Marovitz
Catherine A. Bernard
MAYER BROWN LLP
71 S. Wacker Drive
Chicago, IL 60606
312-782-0600

Shawn J. Chen
CLEARY, GOTTLIEB, STEEN
& HAMILTON LLP
2000 Pennsylvania Ave., NW
Washington, DC 20006
202-974-1500

*Attorneys for Defendants-Appellees S.W.I.F.T. SCRL,
S.W.I.F.T. SCRL d/b/a S.W.I.F.T., Inc. & S.W.I.F.T. Pan-Americas Inc.*