UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANDREW MACKMIN, BARBARA INGLIS, SAM OSBORN, and JOHN EPSELAND, individually and on behalf of themselves and all others similarly situated, Plaintiffs, v. VISA INC., et al., Defendants.	Case 1:11-cv-01831-ABJ Electronically filed ORAL ARGUMENT REQUESTED

THE BANK DEFENDANTS' MOTION TO DISMISS

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, defendants Bank of America, National Association, NB Holdings Corp., Bank of America Corp., Chase Bank USA, N.A., JPMorgan Chase & Co., JPMorgan Chase Bank, N.A., Wells Fargo & Co. and Wells Fargo Bank, N.A. (collectively the "bank defendants") respectfully submit this motion to dismiss the first amended class action complaint filed in the above-captioned action. The grounds for this motion are set forth in the accompanying memorandum of points and authorities.

Dated: January 30, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of January 2012, I caused the foregoing Bank Defendants' Motion to Dismiss, Memorandum of Points & Authorities in Support of Bank Defendants' Motion to Dismiss; Proposed Order, and Certificate of Service to be filed and served via the Court's CM/ECF system.

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ANDREW MACKMIN, BARBARA INGLIS, SAM OSBORN, and JOHN EPSELAND, individually and on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

VISA INC., et al.,

Defendants.

Case 1:11-cv-01831-ABJ

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ORAL ARGUMENT REQUESTED

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF BANK DEFENDANTS' MOTION TO DISMISS

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Preliminary Statement

Bank defendants Bank of America,[1] Chase[2] and Wells Fargo[3] respectfully submit this memorandum of points and authorities in support of their motion, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the first amended class action complaint in this action (the "Complaint" or "Compl.") as to them.

The Complaint is brought by four individuals, on behalf of a putative class of consumers, who claim to have paid supracompetitive access fees at automated teller machines ("ATMs"). It contains three claims for relief, but only one of those claims is asserted against the bank defendants. (Compl. ¶¶ 106-11.)[4] In that claim, plaintiffs allege that the bank defendants have engaged in a horizontal conspiracy among themselves and with the network defendants, Visa and MasterCard, "to adhere to rules and operating regulations that require ATM Access Fees to be fixed at a certain level." (*Id.* ¶¶ 45, 72.) According to the Complaint, ATM operators may – and plaintiffs allege that, as ATM operators, the bank defendants do – charge consumers an access fee when the consumer completes a foreign ATM transaction. Plaintiffs define a "foreign ATM transaction" as a transaction in which a consumer with a depository account in one

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[1] The complaint names Bank of America, National Association, NB Holdings Corp., and Bank of America Corp., as defendants and collectively refers to them as "Bank of America." (Compl. ¶¶ 28-31.)

[2] The complaint names Chase Bank USA, N.A., JPMorgan Chase & Co., and JPMorgan Chase Bank, N.A., as defendants and collectively refers to them as "Chase." (*Id.* ¶¶ 33-36.)

[3] The complaint names Wells Fargo & Co. and Wells Fargo Bank, N.A. as defendants and collectively refers to them as "Wells Fargo." (*Id.* ¶¶ 39-41.)

[4] The remaining two claims for relief are asserted only against the Visa and MasterCard network defendants. (*Id.* ¶¶ 112-52.)

bank withdraws money from that account at an ATM owned or operated by another bank. (*Id.* ¶ 56.) The Complaint alleges that each of the network defendants has adopted a "most favored nations" operating regulation that provides that an ATM operator may charge consumers an ATM access fee on a transaction completed over its ATM network, provided that such access fee is no greater than the ATM access fee charged by that ATM operator at that ATM for transactions completed over any other network. (*Id.* ¶¶ 45, 69, 70, 72.) Plaintiffs allege that each bank defendant had adhered to the Visa and MasterCard "most favored nations" rules, and that this adherence constitutes horizontal price-fixing in *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 ("Section 1"). (Compl. ¶¶ 1, 73, 81, 83, 106.)

The Complaint fails to state a plausible claim for relief, as required by Rule 8 of the Federal Rules of Civil Procedure. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007). First, plaintiffs have no basis on which to pursue their claim against the bank defendants as a *per se* violation of Section 1. Unlike the agreements to which *per se* treatment typically attaches, "most favored nations" arrangements like the challenged rules have been held to be pro-competitive, pro-consumer devices by which customers are guaranteed the lowest prices available from the seller. Courts have therefore encouraged – not outlawed – such arrangements under the Sherman Act. Second, the Complaint fails to set forth any factual allegations – as opposed to conclusory legal assertions, to which no weight may be given – from which this Court could reasonably infer that the bank defendants have entered into a horizontal conspiracy among themselves to adhere to the challenged "most favored nations" rules or to fix ATM access fees. At best, the Complaint alleges that each bank defendant has individually decided whether to participate in the Visa or MasterCard ATM network and to adhere to each network's "most favored nations" rule as a condition of that participation. Such unilateral decisionmaking does not vio-

late Section 1. Finally, the Complaint fails to allege facts – as opposed to theoretical conjecture – that plausibly suggest either that ATM operators, including the bank defendants, would have reduced ATM access fees on any transactions in the absence of the challenged "most favored nations" rules, or that the named plaintiffs are among the consumers whom plaintiffs allege were adversely affected by the challenged rules. Accordingly, the Complaint fails to allege any facts that, if proven, would establish either antitrust injury or injury-in-fact.

The Complaint should be dismissed as to the bank defendants on each, and all, of these bases.

The Complaint

The Complaint contains few factual allegations about ATM access fees, and even fewer factual allegations about the bank defendants. For purposes of this motion to dismiss only, the bank defendants assume the truth of the few factual allegations in the Complaint. Nevertheless, as demonstrated below, even if true, these few factual allegations do not show that the bank defendants have violated Section 1 or that plaintiffs are entitled to relief against the bank defendants.

A. ATM Access Fees

According to the Complaint, consumers initiate ATM transactions using a PIN-debit card, which is a debit card that requires a "personal identification number" to authenticate a debit transaction at the point of the transaction. (Compl. ¶¶ 48, 52.) Although banks deploy their own ATM terminals to allow their customers to withdraw money from their deposit accounts at the bank, banks generally also participate in ATM networks to enable their customers to withdraw funds at more ATM locations than one bank alone could support. (*Id.* ¶ 63.) The

Complaint alleges that Visa and MasterCard operate such ATM networks (*id.* ¶ 64), and that the "overwhelming majority" of debit cards issued in the United States are Visa- and MasterCard-branded bank account-linked PIN debit cards. (*Id.* ¶¶ 55, 65.)

The Complaint asserts that, beginning in 1996, ATM operators generally began to charge ATM access fees to consumers. (*Id.* ¶¶ 3, 61.) According to the Complaint, each of the network defendants has adopted a "most favored nations" rule that prohibits ATM operators from charging a greater access fee to consumers whose foreign ATM transactions are completed over the Visa or MasterCard ATM network than the access fee charged at that particular ATM to consumers whose foreign ATM transactions are completed over any other ATM network. (*Id.* ¶¶ 69, 70.) The Complaint does not allege that either network communicated, much less agreed, with the other concerning the adoption of its "most favored nations" rule.

B. The Bank Defendants

The Complaint alleges that each bank defendant is a member of the Visa and MasterCard networks. (*Id.* ¶¶ 32, 37, 42, 43.) The Complaint alleges that "a majority of the retail banks in the United States" used to own and operate Visa and MasterCard (*id.* ¶¶ 44, 71), but acknowledges that, on May 24, 2006 – prior to the statute of limitations period applicable to plaintiffs' claim – MasterCard became a publicly held corporation through an initial public offering ("IPO") in which the banks sold their voting securities in MasterCard. (*Id.* ¶ 44.) The Complaint also acknowledges that, on March 18, 2008, Visa became a publicly held corporation through an IPO in which the banks sold their voting securities of Visa. (*Id.*) The Complaint alleges that one or more employees of certain bank defendants has served on the board of directors of Visa or MasterCard. (*Id.* ¶¶ 32, 37, 38, 42, 43.)

The Complaint further alleges that the bank defendants "represent the largest of the nation's consumer banking entities and are the leading providers of ATM services." (*Id.* ¶ 84.) The Complaint asserts that the bank defendants charge consumers ATM access fees at the ATMs the bank defendants operate (*id.* ¶ 62), and implies that each bank defendant has agreed with Visa and/or MasterCard to adhere to each network's "most favored nations" rule.

Importantly, the Complaint does not make any factual allegations from which this Court could infer a horizontal agreement among the bank defendants concerning ATM access fees. Plaintiffs make no factual allegations to suggest that any bank defendant has communicated in any way, or in fact agreed, with any other bank defendant or other ATM operator about the challenged "most favored nations" rules or the level of its ATM access fees. Nor do plaintiffs make any factual allegations about any specific level of access fees that any bank defendant or any other ATM operator has ever charged to any customer at any ATM at any time. Plaintiffs do not allege that the access fees charged by any bank defendant are – or have ever been – the same as the access fees charged by any other ATM operator, including any other bank defendant. And plaintiffs do not allege that either network's "most favored nations" rule prohibits any bank defendant from independently deciding whether to charge an access fee at any ATM it operates, or from unilaterally deciding how much of an access fee to charge, or from individually deciding to charge different access fees at different ATMs. The only inference that this Court can draw from the Complaint's factual allegations is that, whatever ATM access fee each bank defendant unilaterally decides to charge at any particular ATM it operates, Visa and MasterCard debit cardholders are given the benefit of the lowest ATM access fee charged at that ATM.

Argument

THE COMPLAINT FAILS TO MEET THE PLEADING REQUIREMENTS TO STATE A CLAIM UNDER SECTION 1

A. The Pleading Requirements Of Rule 8

A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of a complaint. *See, e.g., D.C. Oil, Inc. v. ExxonMobil Oil Corp.*, 746 F. Supp. 2d 152, 155 (D.D.C. 2010). Rule 8 of the Federal Rules of Civil Procedure, which governs federal pleading standards, requires that a complaint contain "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 Supreme Court made it clear that Rule 8 "requires a 'showing,' rather than a blanket assertion, of entitlement to relief." 550 U.S. at 555 n.3. A plaintiff's obligation under Rule 8 "to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555 (citation omitted).

A complaint "must state facts sufficient to 'raise a right to relief above a speculative level.'" *Sprint Nextel Corp. v. AT&T Inc.*, Nos. 11-1600 (ESH), 11-1690 (ESH), 2011 WL 5188081, at *21 (D.D.C. Nov. 2, 2011) (quoting *Twombly* 550 U.S. at 555). "To survive a motion to dismiss, the pleadings must suggest a plausible scenario that shows that the pleader is entitled to relief." *Id.* at *5; *accord Jones v. Horne*, 634 F.3d 588, 595 (D.C. Cir. 2011); *Atherton v. D.C. Office of the Mayor*, 567 F.3d 672, 681 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 3275 (2010). A complaint must be dismissed for failure to state a claim if it does not allege "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570; *accord Garabis v. Unknown Officers of the Metro. Police*, No. 10-2150 (ABJ), 2011 WL 5042379, at *2 (D.D.C. Oct. 25, 2011). As the Supreme Court held in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009):

> 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." 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. Where 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. at 1949 (citations omitted).

The *Iqbal* Court explained the "two-pronged approach" to determining whether a complaint satisfies the pleading requirements of Rule 8, based on the two working principles underlying the *Twombly* decision. *Id.* at 1949-50. First, the Court held, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*. at 1949. Accordingly, the first step for a court considering a motion to dismiss is to identify and set aside pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. *Id.* at 1950. Second, the Court held, "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n]' – 'that the pleader is entitled to relief.'" *Id.* (quoting Fed. R. Civ. P. 8(a)(2)). Accordingly, after setting aside legal conclusions that are entitled to no weight, the second step for a court considering a motion to dismiss is to assume the truth of any well-pleaded factual allegations and determine whether they plausibly give rise to an entitlement to relief. *Id.*

Dismissal under Rule 12(b)(6) of complaints that fail to meet the pleading requirements of *Twombly* and *Iqbal* promotes judicial economy by eliminating unwarranted dis-

covery and factfinding. As the *Iqbal* Court explained, Rule 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Id.* And as the *Twombly* Court made clear, the problem of discovery abuse cannot be alleviated by "'careful scrutiny of evidence at the summary judgment stage,' much less 'lucid instructions to juries.'" 550 U.S. at 559 (citation omitted). Rather, in the context of conspiracy claims brought under Section 1, "it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no "'reasonably founded hope that the [discovery] process will reveal relevant evidence'" to support a [Section] 1 claim." *Id.* (citations omitted); *see also In re Travel Agent Commission Antitrust Litig.*, 583 F.3d 896, 904 (6th Cir. 2009) ("A district court's early assessment of the sufficiency of a [Section] 1 claim under [Rule 12(b)(6)] addresses the dilemma of the extensive litigation costs associated with prosecuting and defending antitrust lawsuits," where "the costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint.") (quoting *Twombly*, 550 U.S. at 558), *cert. denied*, 131 S. Ct. 896 (2011).

B. <u>The Complaint Fails To Satisfy The Pleading Requirements Of Rule 8</u>

In this case, plaintiffs' sole claim against the bank defendants is that they have allegedly engaged in a horizontal agreement among themselves and with the networks to adhere to each network's "most favored nations" rules with respect to ATM access fees, and that that horizontal agreement constitutes price-fixing of ATM access fees in violation of Section 1. Plaintiffs assert that they intend to pursue this claim on a theory of *per se* illegality that would obviate the need for them to allege or prove any facts concerning the competitive effects of such an agree-

ment. (Compl. ¶¶ 81, 83.) But, as demonstrated below, *per se* illegality is reserved for agreements that have been held over time almost always to be anticompetitive with no redeeming procompetitive virtue whatsoever. "Most favored nations" arrangements do not constitute such agreements, and instead have been held to be procompetitive, pro-consumer arrangements by which consumers are guaranteed the lowest available price from a seller. Thus, plaintiffs have no basis on which to pursue their claim against the bank defendants on a *per se* theory of illegality. Moreover, as further demonstrated below, regardless of the plaintiffs' theory, the Complaint should be dismissed as against the bank defendants because plaintiffs have not alleged facts to support an inference that the bank defendants have actually *agreed* among themselves to adhere to the challenged "most favored nations" rules or to fix ATM access fees. Finally, the Complaint should be dismissed as against the bank defendants because plaintiffs have not alleged facts to support an inference that they have suffered injury-in-fact or antitrust injury as a result of the "most favored nations" rules.

1. Plaintiffs Have No Basis To Pursue Their Claim As A Per Se *Violation Of Section 1*

Plaintiffs unequivocally assert that they intend to pursue their claim as a *per se* violation of Section 1. (Compl. ¶¶ 1, 73, 81, 83, 106.) Such a theory of illegality is unavailable to the plaintiffs, however, because "most favored nations" arrangements like the ones challenged here are not the kinds of arrangements that can be summarily condemned as *per se* unlawful under Section 1.

All business agreements, by their nature, restrain trade. *Board of Trade of the City of Chicago v. United States*, 246 U.S. 231, 238 (1918). For this reason, the "true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes

competition or whether it is such as may suppress or even destroy competition." *Id.* Most challenged agreements are examined under the more robust rule of reason, which requires an examination of "the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts." *Id.*

Per se illegality, which condemns an agreement without inquiry into the nature of its effects or the reason for its adoption, is reserved for those agreements that have been shown over time to have a pernicious effect on competition and lack any redeeming virtue. As the Supreme Court long ago explained:

> [T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable – an inquiry so often wholly fruitless when undertaken. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements.

Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) (citations omitted); *accord Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) ("*Per se* liability is reserved for only those agreements that are 'so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.'") (citation omitted); *California Dental Ass'n v. Federal Trade Comm'n*, 526 U.S. 756, 771 (1999) (*per se* rule does not apply where challenged restraint "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition").

In *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), the Court held that the *per se* rule of illegality may be applied to alleged conduct only after the courts have had "considerable experience" with the type of "business relationship" at issue and have developed confidence that the challenged practice is nearly always anticompetitive. *Id.* at 9. To determine whether to apply the rule of *per se* illegality or the rule of reason, courts must inquire whether the purpose and effect of the practice "threaten the proper operation of our predominantly free-market economy – that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'" *Id.* at 19-20 (citations omitted). Only in the former circumstances, where "the practice facially appears to almost always restrict competition and decrease output," do courts condemn the arrangement as *per se* illegal without further inquiry into its possible procompetitive effects or justifications. *Id.*

Judicial experience with "most favored nations" provisions of the type challenged here does not support the conclusion that such arrangements "almost always restrict competition and decrease output." *Id*. To the contrary, those courts that have assessed "most favored nations" agreements requiring that buyers get the benefit of the most favorable price offered by the seller have found them to be procompetitive and pro-consumer, and not to violate the antitrust laws. In *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of Rhode Island*, 883 F.2d 1101 (1st Cir. 1989), for example, the First Circuit affirmed the district court's holding that, as a matter of law, such a "most favored nations" requirement did not violate the Sherman Act. In that case, in order to ensure that it was getting the physicians' best prices, Blue Cross required each of its participating physicians to certify that he or she was not accepting any lower

fees from other health insurers than he or she was receiving from Blue Cross for the same service. *Id*. at 1104. Rejecting a competitor's claim that Blue Cross's "most favored nations" agreements with its participating physicians were intended to run the competitor out of business by inducing physicians to resign from the competitor's program, the district court held that "[a]s a naked proposition, it would seem silly to argue that a policy to pay the same amount for the same services is anticompetitive, even on the part of one who has market power. This, it would seem, is what competition should be all about." *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of Rhode Island*, 692 F. Supp. 52, 71 (D.R.I. 1988), *aff'd*, 883 F.2d 1101 (1st Cir. 1989). In affirming the district court's judgment, the First Circuit held: "We agree with the district court that such a policy of insisting on a supplier's lowest price – assuming that the price is not 'predatory' or below the supplier's incremental cost – tends to further competition on the merits and, as a matter of law, is not exclusionary." 883 F.2d at 1110.

In *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*, 65 F.3d 1406 (7th Cir. 1995), the Seventh Circuit similarly approved a "most favored nations" arrangement, this one imposed by the Marshfield Clinic and challenged by Blue Cross. In that case, Blue Cross alleged that the Marshfield Clinic and its affiliated physicians had conspired to raise the physicians' fees by adhering to the Clinic's "most favored nations" provision. Characterizing the argument as "ingenious but perverse," Chief Judge Posner, writing for the panel, explained:

> [T]he Clinic, when buying services from the affiliated physicians either directly or through Security, would not pay them more than what these physicians charge their other patients. This is said to put a floor underneath these physicians' prices, since if they cut prices to their other patients their reimbursement from the Clinic will decline automatically. This is an ingenious but perverse argument. "Most favored nations" clauses are standard devices by which buyers try to bargain for low prices, by getting the seller to agree to treat them as favorably as any of their other customers. The Clinic did this to minimize the cost of these physicians to it,

> and that is the sort of conduct that the antitrust laws seek to encourage. It is not price-fixing.

Id. at 1415.

Like the "most favored nations" requirements in *Ocean State* and *Marshfield Clinic*, the challenged network "most favored nations" rules have the procompetitive effect of ensuring that Visa and MasterCard ATM debit cardholders receive the benefit of ATM operators' lowest ATM access fees at any particular ATM. As Chief Judge Posner wrote, the antitrust laws encourage such arrangements. And while the procompetitive benefits of "most favored nations" arrangements in *Ocean State* and *Marshfield Clinic* precluded any condemnation whatsoever of those arrangements, such procompetitive benefits clearly render *per se* condemnation inappropriate here. Accordingly, plaintiffs have no basis to pursue their Section 1 claim against the bank defendants on a *per se* theory of illegality.

2. Plaintiffs Have Not Alleged Facts To Support An Inference That The Bank Defendants Have Engaged In A Horizontal Agreement

The Complaint should be dismissed for the independent reason that, regardless of whether plaintiffs intend to pursue a *per se* or rule of reason theory of liability, plaintiffs have failed to allege facts from which this Court could infer that the bank defendants actually *agreed* among themselves to adhere to the networks' "most favored nations" rules. As a threshold matter, Section 1 requires that the challenged conduct constitute concerted action rather than independent or unilateral conduct. In *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), the Supreme Court held that the inference of concerted action can be drawn only where the plaintiff alleges "direct or circumstantial evidence that reasonably tends to prove that [each defendant] 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Id.* at 764 (citation omitted).

Furthermore, "antitrust law limits the range of permissible inferences from ambiguous evidence." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*, 475 U.S. 574, 588 (1986). Accordingly, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* The Complaint must allege facts – as opposed to rhetorical legal conclusions – that "'exclude the possibility' that the alleged conspirators acted independently." *Id.* (citation omitted). If the factual allegations about the bank defendants' conduct are "consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy." *Id.* at 596-97.

Shorn of its conclusory allegations of conspiracy, which are entitled to no weight on this motion, the Complaint is completely devoid of any factual allegations from which this Court could reasonably infer a horizontal agreement among the bank defendants to adhere to the challenged "most favored nations" rules or to fix ATM access fees at any level. (Compl. ¶¶ 45, 72.) The Complaint contains no factual allegations even to suggest that any bank defendant has communicated in any way, or in fact agreed, with any other bank defendant – or, for that matter, any ATM operator – about the level of its ATM access fees or its alleged adherence to each network's "most favored nations" rule. The Complaint contains no allegations as to any level of access fees charged by any bank defendant or other ATM operator for any particular ATM transaction at any ATM at any time. The Complaint does not allege that either network's "most favored nations" rule prohibits any ATM operator, including any bank defendant, from independently deciding whether to charge an access fee at any ATM it operates, whether to charge different access fees at different ATMs, or how much of an access fee to charge. Nor does the Complaint allege that any bank defendant has ever charged the same access fees as any other bank defendant. In short, there are no factual allegations whatsoever from which this Court could rea-

sonably infer that the bank defendants conspired with each other or any other ATM operator either to adhere to each network's "most favored nations" rule or to fix access fees for foreign ATM transactions.

At best, the Complaint can be read to allege that each bank defendant has independently decided that, in order to participate in the Visa or MasterCard ATM network, it will adhere to each network's "most favored nations" rule and ensure that consumers whose foreign ATM transactions are completed over the Visa or MasterCard network are charged no greater access fee at any particular ATM than consumers whose foreign ATM transactions are completed over other networks at that same ATM. But such an allegation is insufficient to state a plausible claim for relief. Quite apart from the procompetitive, pro-consumer nature of the challenged "most favored nations" rules, an individual bank's unilateral decision to adhere to network rules does not raise an inference of a horizontal agreement, as "merely charging, adopting or following the fees set by a Consortium is insufficient as a matter of law to constitute a violation of Section 1 of the Sherman Act." *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008); *see also American Airlines v. Christensen*, 967 F.2d 410, 413-14 (10th Cir. 1992) (finding that the mere acceptance by members of terms under an agreement set by an airline does not result in concerted action sufficient to support a Section 1 violation).

To plausibly allege a horizontal agreement among the bank defendants, plaintiffs must allege facts that, if proven, would establish an agreement *among the banks*, not simply an agreement between each bank and a network over the terms of that individual bank's participation in the network. Otherwise stated, to plausibly allege a "hub-and-spoke" conspiracy of the type plaintiffs appear to try to allege here, plaintiffs must allege facts that could establish a horizontal agreement among the competing members of the association – the "wheel" or "rim" – and

not just the vertical "spoke" agreements between individual members and the association itself. *See, e.g., PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 420 (5th Cir. 2010) (affirming dismissal of Section 1 claim because "there is no wheel and therefore no hub-and-spoke conspiracy"), *cert. denied*, 131 S. Ct. 1476 (2011); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 327 (3d Cir. 2010) (same); *see also United States v. Mathis*, 216 F.3d 18, 24 (D.C. Cir. 2000) ("competing spoke suppliers in a hub conspiracy must not only have a connection to the hub sellers but must also have interdependence among each other in order to form a rim and constitute a single conspiracy") (footnote omitted).

Plaintiffs' allegation that each bank defendant is a member of Visa and MasterCard (*id.* ¶¶ 32, 37, 38, 42, 43) is insufficient to raise a reasonable inference of a horizontal agreement among the bank defendants or to state a plausible claim for relief under Section 1. As a matter of law, membership in an association is not sufficient to infer a horizontal conspiracy among the association's members. *See, e.g., Federal Prescription Serv., Inc. v. American Pharm. Ass'n*, 663 F.2d 253, 265 (D.C. Cir. 1981) ("Mere membership in associations is not enough to establish participation in a conspiracy with other members of those associations, much less in a conspiracy between those associations and yet another association."); *Association of Retail Travel Agents, Ltd. v. Air Transport Ass'n of Am.*, 635 F. Supp. 534, 536 (D.D.C. 1986) ("mere membership in a trade association does not give rise to an inference of conspiracy"); *accord AD/SAT v. Associated Press*, 181 F.3d 216, 234 (2d Cir. 1999) (Section 1 complaint must contain factual allegations showing "that association members, in their individual capacities, consciously committed themselves to a common scheme designed to achieve an unlawful objective").

Plaintiffs' additional allegation that employees of the bank defendants have served on the board of directors of Visa or MasterCard (Compl. ¶¶ 32, 37, 38, 42, 43) also fails to raise a reasonable inference that the bank defendants have agreed among themselves to adhere to the challenged "most favored nations" rules or to fix ATM access fees at some level. *Kendall*, 518 F.3d at 1048 ("Even participation [by employees of association members] on the association's board of directors is not enough by itself" to establish a conspiracy among those members). Nothing about the Complaint's allegations of board service by individual employees of bank defendants has anything to do with ATM access fees or the bank defendants' alleged agreement among themselves to adhere to the challenged "most favored nations" rules. And no factual allegations in the Complaint even suggest that the bank defendants exert any control over either network following each network's IPOs. Plaintiffs allege that the banks have ceded power and authority to the networks through the IPOs to "design, implement, and enforce a horizontal price-fixing restraint" (*id.* ¶ 45), but such an assertion is merely conclusory; it contains no facts to show that the bank defendants have exerted control over the networks after the IPOs. Indeed, all the alleged facts suggest that the contrary is true. As the court held in *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, No. 05-MD-1720 (JG)(JO), 2008 WL 5082872 (E.D.N.Y. Nov. 25, 2008), when dismissing a similar complaint against MasterCard and several bank defendants, "plaintiffs cannot plausibly allege that MasterCard will continue to impose supracompetitive interchange fees following its IPO, because its board would not be controlled by the Banks. Rather, a majority of the board would consist of independent directors who would theoretically oppose any efforts to enrich the Banks at MasterCard's expense." *Id.* at *10.

In sum, the Complaint contains no factual allegations from which this Court could reasonably infer that each bank defendant has done anything other than independently decide to

adhere to each network's "most favored nations" rule so as to provide consumers whose foreign ATM transactions are completed over the Visa or MasterCard ATM network with the lowest access fees available at the defendant's ATMs. Because the Complaint fails to plead factual content that would allow the Court to draw a reasonable inference that the bank defendants have engaged in a horizontal agreement among themselves in violation of Section 1, it fails to satisfy the controlling pleading standards announced in *Twombly* and consistently applied in this circuit.

3. ***Plaintiffs Have Not Plausibly Alleged The Existence Of Antitrust Injury As A Result Of The "Most Favored Nations" Rules***

The Complaint also fails to set forth any factual allegations plausibly suggesting that the Visa and MasterCard "most favored nations" rules have caused plaintiffs or any members of their putative class to suffer "antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Antitrust injury – injury arising from harm to competition – is a necessary element of any private antitrust lawsuit. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990) ("we have previously recognized that even in cases involving *per se* violations, the right of action under [Section] 4 of the Clayton Act is available only to those private plaintiffs who have suffered antitrust injury"). And an antitrust plaintiff must plead facts showing the existence of antitrust injury. "[A] 'naked assertion' of antitrust injury, the Supreme Court has made clear, is not enough; an antitrust claimant must put forth factual 'allegations plausibly suggesting (not merely consistent with)' antitrust injury." *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 451 (6th Cir. 2007) (quoting *Twombly*, 550 U.S. at 557); *accord Sprint Nextel Corp.*, 2011 WL 5188081, at *5.

Plaintiffs' theory of antitrust injury is this: Consumers would choose to have their ATM transactions completed over alternative, less expensive networks if the access fees for such transactions were less than the access fees for transactions completed over the Visa or MasterCard networks. Plaintiffs allege that, in the absence of the challenged "most favored nations" rules, ATM operators, including the bank defendants, that would receive whatever access fee is charged, would set differentiated ATM access fees to reflect different costs to the ATM operators of completing a transaction over different ATM networks, thereby encouraging consumers to select the least expensive network over which to complete their ATM transactions.[5] The "most favored nations" rules prevent ATM operators from discounting ATM access fees for foreign transactions completed over alternative, less expensive ATM networks. Consumers whose debit cards can complete a transaction over alternative networks are allegedly injured by the failure of ATM operators to discount ATM access fees for transactions completed on those alternative networks.

Importantly, not all ATM customers would be injured under plaintiffs' theory. Plaintiffs do not contend that the challenged rules have had an anticompetitive effect on access fees for transactions completed over the Visa or MasterCard ATM networks, or that ATM operators, including the bank defendants, are in any way restrained from discounting the access fees they may charge for transactions completed over the Visa or MasterCard ATM networks. Thus, consumers whose ATM transactions may by completed only on the Visa or MasterCard networks – and plaintiffs assert that the "overwhelming majority" of debit cards used for ATM

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[5] Although the Complaint refers to "less expensive" alternative networks (Compl. ¶ 74), it does not state for whom these alternative networks are less expensive.

transactions are Visa- or MasterCard-branded (Compl. ¶¶ 55, 65) – are not injured by the "most favored nations" rules because the access fee for completing their transactions is already the lowest access fee available at any given ATM. Only consumers who have the power to select an alternative network because their Visa- and MasterCard-branded PIN debit cards may be used over alternative networks (*id.* ¶¶ 66, 80) would, in theory, be injured by the bank defendants' inability to discount access fees for those transaction. (*Id.* ¶¶ 55, 74-75.)

The Complaint lacks factual allegations to support plaintiffs' theory of antitrust injury. To plausibly show a right to relief under their theory, plaintiffs must allege facts showing (i) that there are "less expensive," "lower cost PIN-based networks" (*id.* ¶¶ 74-75) over which foreign ATM transactions could be directed, (ii) that consumers, rather than the bank defendants or some other network participant, have the power to select the ATM network over which to complete a foreign ATM transaction, and (iii) that plaintiffs have been charged access fees for foreign ATM transactions using debit cards capable of completing transactions over a less expensive ATM network. The Complaint fails to make any of these factual allegations. In the absence of such factual allegations, plaintiffs have not alleged either that the "most favored nations" rules have harmed competition generally or plaintiffs in particular.

First, the Complaint does not identify any ATM networks that are allegedly "less expensive" than the Visa and MasterCard ATM networks. Indeed, the Complaint contains no factual allegations at all about the costs of the Visa, MasterCard or any other ATM network. Accordingly, the Complaint contains no factual allegations to support plaintiffs' conclusory assertion that there are alternative, less expensive ATM networks to which ATM operators like the bank defendants would have steered consumers by discounting access fees in the absence of the challenged "most favored nations" rules.

Second, the Complaint does not contain any factual allegations to suggest that consumers – rather than the bank defendants themselves or some other network participant – actually choose the ATM network on which to complete a foreign ATM transaction. To be sure, the Complaint alleges that some foreign ATM transactions using Visa- and MasterCard-branded debit cards currently may be completed over alternative networks (*id.* ¶ 66), and that many consumers carry debit cards "capable of initiating ATM transactions over more than one network." (*Id.* ¶ 80.) But there are no factual allegations that, if proven, would show that consumers themselves have the power to select the ATM network over which the ATM operator will complete the consumer's ATM transaction, or that discounting could persuade a consumer to choose to process a transaction over a particular ATM network. In addition, there are no factual allegations from which to infer that ATM operators, including the bank defendants, do not already complete transactions over the least expensive network, or that, if the "most favored nations" rules did not exist, ATM operators would have any incentive or ability to steer consumers' transactions to an ATM network other than the one over which those transactions are currently completed. In the absence of such factual allegations, plaintiffs have not alleged a plausible theory of antitrust injury or injury-in-fact.

Finally, plaintiffs do not allege that *their* foreign ATM transactions were, or could have been, completed on an alternative network for which, in the absence of the challenged "most favored nations" rules, ATM operators like the bank defendants would have charged a lower ATM access fee. Indeed, plaintiffs make no allegations whatsoever about their ATM experience, including which bank issued their ATM cards, which other banks charged them ATM access fees and in what amounts, and whether those fees would have been lower in the absence of the challenged rules. In light of the plaintiffs' allegation that the "overwhelming majority" of

ATM cards are Visa- or MasterCard-branded bank account-linked debit cards (*id.* ¶¶ 55, 65), only some of which have the capability to initiate foreign ATM transactions over alternative networks (*id.* ¶¶ 66, 80), the failure of the Complaint to contain any factual allegations to show that plaintiffs used such a multi-network ATM card is fatal to their ability to satisfy Rule 8's pleading requirement showing that they suffered antitrust injury as a result of the challenged "most favored nations" rules.

In sum, plaintiffs' Complaint fails to plead factual allegations from which this Court may infer that the bank defendants' alleged adherence to the challenged "most favored nations" rules has caused injury either to competition generally or to plaintiffs themselves. Because the Complaint leaves so much in this regard to conjecture, plaintiffs fail adequately to allege threatened antitrust injury or injury-in-fact, and, on this independent ground, their Complaint should be dismissed. *Sprint Nextel Corp.*, 2011 WL 5188081, at *21.

Conclusion

For the foregoing reasons, plaintiffs' Complaint against the bank defendants should be dismissed, with prejudice, in its entirety.

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Respectfully submitted,

/s/ Peter E. Greene

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