IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ATM COUNCIL, INC., et al., Plaintiffs, v. VISA INC., et al., Defendants.	No. 1:11-cv-01803 (RJL) Electronically Filed

VISA AND MASTERCARD DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF NATIONAL ATM COUNCIL, INC.'S APPLICATION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiff National ATM Council, Inc.'s ("NAC") motion for a preliminary injunction should be denied. The motion and supporting declarations fail to establish irreparable harm or a likelihood of success on the merits, or that the balance of equities or public interest favors NAC — all prerequisites for this extraordinary relief. Nor has NAC identified any urgency in addressing its claim. NAC does not and cannot explain why a preliminary injunction is warranted now, more than four years after it filed this action in October 2011 to challenge Visa and MasterCard ATM access fee rules that have been in place since 1996.

Attempting to show irreparable harm, NAC contends that the challenged rules prevent independent ATM operators from setting profit-maximizing access fees and from taking advantage of certain alleged efficiencies when making a technological upgrade to ATM terminals to reduce fraud. But even if proven, these purported lost profits and business opportunities are purely economic injuries, and it is well settled that such injuries are reparable with monetary damages. Only in rare instances, when economic injury is shown to threaten a business's very existence, can economic injury rise to the level of irreparable harm. NAC does not come close to meeting this high evidentiary bar. Not a single NAC member — or any other independent ATM operator — submitted a declaration attesting that the challenged ATM access fee rules threaten its existence. Indeed, none of the 13 NAC members who are plaintiffs in this case even joined NAC's preliminary injunction motion.

NAC instead relies on generalized allegations that unnamed independent ATM operators have gone out of business or may do so in the future. It is well established, however, that conclusory and unsubstantiated assertions are insufficient to demonstrate an entitlement to the extraordinary remedy of a preliminary injunction. And NAC's own inordinate delay in bringing this motion further undercuts NAC's claims that these rules are causing anyone irreparable harm.

While the Court need not reach any of the other preliminary injunction factors, those factors likewise do not support a preliminary injunction. NAC has not met its burden of showing a likelihood of success on the merits of its claims, for at least four reasons. First, this case involves complex network rules properly analyzed under the rule of reason, not the *per se* or "quick look" standards that NAC advocates. Second, NAC has not shown a likelihood of proving that the ATM access fee rules are on balance unreasonable and anticompetitive in a properly defined market. Third, NAC has not established, and will not be able to establish, that the challenged rules are products of actionable Section 1 conspiracies. Finally, NAC fails to offer evidence that could prove a non-remote injury-in-fact caused by the challenged rules, as required to establish antitrust standing for purposes of a preliminary injunction.

Likewise, neither the balance of equities nor the public interest supports granting a preliminary injunction. NAC contends that enjoining the challenged rules would *indirectly* benefit ATM customers in disadvantaged communities by allowing NAC members to charge supposedly profit-maximizing differential access fees. But an injunction would *directly* harm customers in all communities whose ATM transactions are processed over the Visa or MasterCard networks by allowing ATM operators to charge them access fees higher than those charged to other customers. An injunction would also directly harm Visa and MasterCard, for the same reason. These direct, negative effects from a preliminary injunction outweigh NAC's speculative theory of an indirect benefit.

BACKGROUND

A. Factual Background

1. The Structure of the ATM System

Visa and MasterCard own and operate the Plus and MasterCard (formerly Cirrus) ATM networks, respectively, which facilitate transactions at millions of ATMs worldwide.

Declaration of Jeff Sachs ("Sachs Decl.") ¶¶ 3-4; Declaration of Leland Englebardt ("Englebardt Decl.") ¶¶ 4-5. Visa and MasterCard do not issue ATM cards and do not own or operate ATMs. Sachs Decl. ¶ 5; Englebardt Decl. ¶ 6. Rather, they provide ATM network services to their customers, typically financial institutions that compete with one another to (a) issue Visa/Plus- or MasterCard-branded cards[1] to consumers (acting as "issuers"), or (b) acquire ATM transactions from ATM terminals (acting as "acquirers"). Sachs Decl. ¶ 5; Englebardt Decl. ¶ 6.

Acquirers either own and operate their own ATMs or contract with an independent ATM owner or operator. Sachs Decl. ¶ 5; Englebardt Decl. ¶ 6. To accept a Visa/Plus- or MasterCard-branded card, an independent ATM operator must affiliate with a Visa- or MasterCard-acquiring financial institution. Sachs Decl. ¶ 5; Englebardt Decl. ¶ 6. Any financial institution may issue ATM cards and have its own ATMs (and thus serve as both an issuer and an acquirer). Sachs Decl. ¶ 5; Englebardt Decl. ¶ 6.

ATM transactions fall into two categories — "on-us" transactions and "foreign" or "off-us" transactions. On-us transactions occur when a cardholder uses a card issued by his or her bank at an ATM owned by that same bank. Sachs Decl. ¶ 8; Englebardt Decl. ¶ 8. For these transactions, a single bank acts as both issuer and acquirer, and the bank, rather than Visa or MasterCard, processes the transaction. Sachs Decl. ¶ 8; Englebardt Decl. ¶ 8. By contrast, when an ATM cardholder uses a "foreign" ATM — that is, an ATM that is not owned or operated by the bank that issued the card — the operator of that foreign ATM must connect to the cardholder's bank, customarily through one of several competing ATM networks, to complete the transaction. Sachs Decl. ¶ 8; Englebardt Decl. ¶ 9.

[1] The MasterCard ATM network can be accessed using either MasterCard-, Maestro-, or Cirrus-branded cards. Englebardt Decl. ¶ 4. As used herein, "MasterCard-branded cards" includes all three brands.

ATM operators typically obtain access to and utilize multiple competing networks. For example, an ATM often accepts debit cards that operate over Visa's Plus Network, MasterCard's ATM network, and other ATM networks such as Star, Pulse, NYCE, Accel, and Shazam. Sachs Decl. ¶ 7; Englebardt Decl. ¶ 7. Issuers often enable ATM cards so that one card can access multiple competing networks. Sachs Decl. ¶ 7; Englebardt Decl. ¶¶ 7, 10.

Plaintiffs do not contend that when an ATM card can access multiple networks, the cardholder selects the network over which the transaction is routed. Instead, under some networks' rules, the card-issuing bank generally selects the network by indicating a network preference for any given card based on its contractual relationships with the various ATM networks. Englebardt Decl. ¶ 10; *see* Sachs Decl. ¶ 9. Where those network rules do not apply, or the issuer does not identify a preference or prioritizes multiple networks, the ATM operator's acquirer generally determines the network over which to route the transaction. Sachs Decl. ¶ 9; Englebardt Decl. ¶ 10.

2. ATM Transaction Fees

A foreign ATM transaction conducted with a Visa/Plus- or MasterCard-branded card may involve several fees. First, the ATM operator may charge the cardholder an ATM access fee (or surcharge). Sachs Decl. ¶ 10; Englebardt Decl. ¶ 11. The ATM operator — not Visa or MasterCard — determines the amount of surcharge, if any, it imposes and discloses that amount to the cardholder at the ATM. Sachs Decl. ¶ 10; Englebardt Decl. ¶¶ 12-13. Second, the card-issuing bank may charge the cardholder a "foreign ATM fee" for using an ATM owned by another ATM operator. Sachs Decl. ¶ 10; Englebardt ¶ 11. Third, the card-issuing bank may pay an "interchange fee" to the ATM acquiring bank. Sachs Decl. ¶ 10; Englebardt Decl. ¶ 11. Visa and MasterCard independently set default interchange fees (which apply absent an agreement between the issuer and the acquirer) and administer the collection of interchange fees,

but Visa and MasterCard do not retain any part of those fees. Sachs Decl. ¶¶ 10-11; Englebardt Decl. ¶¶ 12-13. Finally, Visa and MasterCard may charge a "switch fee" to the card-issuing bank and a "network fee" to the ATM acquiring bank. Sachs Decl. ¶ 10; Englebardt Decl. ¶ 11. The acquirer decides whether and how to pass the network fee and its other costs on to the ATM operator in the contracts between those parties. Englebardt Decl. ¶ 13.

3. Adoption of the ATM Access Fee Rules

Visa's Plus network and MasterCard's ATM network each have adopted rules governing ATM transactions routed over those networks. The access fee non-discrimination rules at issue in this case have been in place for 20 years.

When Plus and Cirrus began operating in the early 1980s, each network's operating regulations prohibited ATM acquirers from levying surcharges on any transactions, including cash disbursements, processed through the networks. Sachs Decl. ¶ 13; Englebardt Decl. ¶ 15. Plus and Cirrus each maintained no-surcharge rules to establish price predictability for ATM customers, to protect the integrity of the network brands, and to ensure cardholders ubiquitous access to cash. Sachs Decl. ¶ 13; Englebardt Decl. ¶ 15.

Beginning in 1989, some states passed laws prohibiting bans on ATM surcharging. Sachs Decl. ¶ 14; Englebardt Decl. ¶ 15. By 1995, nine states had enacted legislation nullifying ATM no-surcharge rules. Sachs Decl. ¶ 14. Competing ATM networks allowed consumer surcharging, and several banks brought legal challenges to the Plus no-surcharge rule. Sachs Decl. ¶¶ 14, 17.

In response to this changing landscape, Plus and Cirrus each separately determined to amend its operating regulations to permit surcharging. In doing so, each also incorporated several provisions aimed at protecting cardholders using its branded cards and preserving its network's value. Sachs Decl. ¶ 15; Englebardt Decl. ¶¶ 17-18.

In early 1995, Visa decided to implement rules that would permit surcharging of Plus transactions by ATM operators in the United States, but also provide for, among other things: (1) non-discrimination, so that the amount of any surcharge levied by an ATM operator on a Plus transaction would not exceed a surcharge levied by the same ATM operator on a transaction routed over another network; and (2) consumer disclosure, so that the ATM operator would provide advance notice to the holder of the Visa/Plus-branded card of the amount of any surcharge. Sachs Decl. ¶ 15. In February 1996, Visa announced new operating regulations, effective April 1, 1996, that implemented these operating principles. Sachs Decl. ¶ 16.

In late 1995, Cirrus began reconsidering its surcharging ban in order to remain competitive and avoid a reduction in the number of Cirrus acquirers and ATMs. Englebardt Decl. ¶ 16. Consequently, Cirrus adopted a policy of permitting ATM surcharging of Cirrus transactions in the United States subject to the non-discrimination and signage provisions that were becoming standard in the industry. Englebardt Decl. ¶ 17. In February 1996, MasterCard amended its rules to permit acquirers to surcharge MasterCard cardholders, as of April 1, 1996, subject to a non-discrimination provision, in order to ensure that MasterCard's cardholders would continue to enjoy access to their funds in the same manner as cardholders of the competing ATM networks. Englebardt Decl. ¶¶ 18-19.

Significantly, when Visa and MasterCard/Cirrus each adopted its non-discrimination provisions, rival networks had similar rules. Sachs Decl. ¶ 17; Englebardt Decl. ¶ 17. The industry-wide prevalence of non-discrimination provisions reflects the procompetitive benefits those provisions provide to cardholders and networks alike. Non-discrimination provisions, among other things, protect consumer expectations and enhance a brand's competitiveness. Sachs Decl. ¶ 19; Englebardt Decl. ¶ 22. The provisions ensure that a brand's cardholders are

treated consistently and equitably, which benefits all network participants. Sachs Decl. ¶ 19; Englebardt Decl. ¶ 22.

Specifically, the non-discrimination provisions benefit cardholders by preventing ATM operators from imposing higher costs on them for transactions routed over the Visa/Plus or MasterCard/Cirrus networks than for transactions routed over other networks. Sachs Decl. ¶ 20; Englebardt Decl. ¶ 21. The non-discrimination provisions also protect consumers from bait-and-switch tactics, in which an ATM operator attracts a cardholder to an ATM by advertising acceptance of Visa or MasterCard transactions, only to charge the cardholder more for then using a Visa/Plus- or MasterCard-branded card. Sachs Decl. ¶ 21; Englebardt Decl. ¶ 22. By ensuring a positive cardholder experience, the rules incentivize card use, which in turn increases ATM operator and acquirer revenue. Sachs Decl. ¶ 21; Englebardt Decl. ¶ 22.

Finally, the non-discrimination provisions enable a network to protect the integrity of its network brand — such as the Visa/Plus or MasterCard/Cirrus/Maestro brands — by preventing free-riding. Without a non-discrimination provision, an ATM operator could hold itself out as accepting Visa/Plus or MasterCard ATM cards and receive the benefits of the Visa/Plus or MasterCard ATM brand image, but effectively refuse or discourage acceptance of a brand's transactions by imposing Draconian surcharges. Sachs Decl. ¶ 22; Englebardt Decl. ¶ 22.

As long as the ATM operator does not surcharge its cardholders in a discriminatory manner, neither Visa's nor MasterCard's rules control the level of the surcharge the operator assesses — or whether the operator assesses a surcharge at all. *See* Sachs Decl. ¶¶ 10, 16; Englebardt Decl. ¶ 25.

Visa and MasterCard each periodically issue new operating rules for its ATM network. Sachs Decl. ¶ 23; Englebardt Decl. ¶ 26. The substance of the non-discrimination provisions has remained in place at each network since 1996. Sachs Decl. ¶ 23; Englebardt Decl. ¶ 26.

Although MasterCard and Visa each restructured into public companies through IPOs in 2006 and 2008, respectively, and although each network has issued new editions of its rules after its IPO, Visa's and MasterCard's managements, operating under independent boards of directors, have determined that the cardholder and network benefits underlying the ATM access fee rules remain applicable and thus continue to incorporate these provisions in each network's rules. Sachs Decl. ¶ 23; Englebardt Decl. ¶ 26.

4. EMV Liability Shift

On January 30, 2012, MasterCard announced a roadmap to encourage the implementation of EMV chip card technology for MasterCard payment cards in the U.S,[2] and in September 2012 announced the expansion of its U.S. roadmap to include a "liability shift" at ATMs beginning in October 2015.[3] (This date was subsequently extended to October 2016. Englebardt Decl. ¶ 27.) Visa had previously announced similar plans in 2011 regarding point-of-sale transactions, and expanded its policy to encompass ATM transactions in 2013.[4] Chip cards provide enhanced

[2] EMV is an abbreviation for Europay, MasterCard, and Visa, the three organizations that developed the initial specifications. Today, EMVCo is owned by American Express, Discover, JCB, MasterCard, UnionPay, and Visa, and includes other organizations from the payments industry participating as technical and business associates. EMV is an open-standard set of specifications for smart card payments and acceptance devices. EMV chip cards contain embedded microprocessors that provide strong transaction security features and other application capabilities not possible with traditional magnetic stripe cards. EMV Connection, EMV FAQ, http://www.emv-connection.com/emv-faq.

[3] *See* Press Release, MasterCard Inc., MasterCard Introduces U.S. Roadmap to Enable Next Generation of Electronic Payments (Jan. 30, 2012), http://newsroom.mastercard.com/press-releases/mastercard-introduces-u-s-roadmap-to-enable-next-generation-of-electronic-payments (announcing roadmap for EMV implementation); Press Release, MasterCard Inc., MasterCard Extends U.S. EMV Migration Roadmap to ATM Channel (Sept. 10, 2012), https://newsroom.mastercard.com/press-releases/mastercard-extends-u-s-emv-migration-roadmap-to-atm-channel (announcing liability shift for U.S. ATM acquirers); *see also* Englebardt Decl. ¶ 27.

[4] *See* Press Release, Visa Inc., Visa Announces Plans to Accelerate Chip Migration and Adoption of Mobile Payments (Aug. 9, 2011), http://pressreleases.visa.com/phoenix.zhtml?c=215693&p=irol-newsarticlePR&ID=1594598 (announcing October 2015 liability shift for U.S. point-of-sale transactions); Press Release, Visa Inc., Visa Expands U.S. Roadmap for EMV Chip Adoption to Include ATM and a Common Debit Solution (Feb. 4, 2013), http://press

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security for ATM transactions by, among other things, storing payment information in a secure chip (rather than a magnetic stripe) that is virtually impossible to counterfeit.[5] Pursuant to MasterCard and Visa rules, liability for fraudulent transactions using chip-enabled cards over the MasterCard and Visa/Plus ATM networks will be shifted, as of October 21, 2016 and October 1, 2017, respectively, from issuers to acquirers for ATMs that do not adopt chip-compliant technology. Sachs Decl. ¶¶ 26-27; Englebardt Decl. ¶¶ 27-28.

The announced liability policies are not a mandate requiring the adoption of new technology, but instead are designed to incent card issuers and ATM acquirers to implement a safer and more secure technology. Chip cards also have the traditional magnetic stripe, and cardholders will be able to use them at non-EMV-compliant ATMs. After the deadlines pass, however, ATM operators and acquirers who elect not to make the financial investment to upgrade their ATMs' security will bear the cost of fraudulent transactions perpetrated with cards that include chip capability. Sachs Decl. ¶ 27; Englebardt Decl. ¶ 28. In essence, the liability will shift to the operator or acquirer because the ability to avoid that fraud loss was in its control: it could have used the EMV technology that would have been likely to prevent the fraud.

B. Procedural History

NAC and 13 of its ATM operator-members brought this action on October 12, 2011, asserting that Visa's and MasterCard's respective ATM access fee rules violated federal antitrust law under Section 1 of the Sherman Act. Dkt. No. 1. On January 10, 2012, NAC and its co-

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releases.visa.com/phoenix.zhtml?c=215693&p=irol-newsArticle_print&ID=1780934 (announcing October 2017 liability shift for U.S. ATM acquirers); *see also* Sachs Decl. ¶ 25.

[5] EMV Connection, EMV FAQ, http://www.emv-connection.com/emv-faq.

plaintiffs filed a First Amended Complaint. Dkt. No. 22. NAC did not seek a preliminary injunction when it filed either its original or its first amended complaint.

Also in late 2011, consumer plaintiffs filed two putative class actions — *Mackmin, et al. v. Visa Inc., et al.*, No. 1:11-cv-01831 (previously captioned *Osborn, et al. v. Visa Inc., et al.*), and *Stoumbos v. Visa Inc., et al.*, No. 1:11-cv-01882 — likewise challenging the ATM access fee rules. None of the consumer plaintiffs sought a preliminary injunction then — or thereafter.

On February 8, 2012, the Court ordered joint briefing on all defendants' motions to dismiss the three cases. On February 13, 2013, after hearing argument, the Court granted defendants' motions to dismiss. Dkt. Nos. 33, 34. The Court concluded that all plaintiffs failed adequately to plead an injury-in-fact caused by, or an antitrust conspiracy to impose, the challenged access fee rules. Dkt. No. 34.

On March 12, 2013, all plaintiffs moved for leave to alter or amend the judgment. Dkt. No. 36. Plaintiffs lodged proposed amended complaints on April 15, 2013. Dkt. No. 39; Dkt. No. 39-2 (NAC's proposed Second Amended Class Action Complaint). Again, NAC did not seek preliminary injunctive relief.

On December 19, 2013, the Court denied plaintiffs' motions. Dkt. Nos. 45, 46.[6] Appeals followed. On August 4, 2015, the D.C. Circuit vacated and remanded for further proceedings.

[6] The district court held that the proposed "amendments in all three cases would be futile." *Nat'l ATM Council, Inc. v. Visa Inc.*, 7 F. Supp. 3d 51, 54 (D.D.C. 2013), *vacated sub nom Osborn v. Visa Inc.*, 797 F.3d 1057 (D.C. Cir. 2015). There, as here (*see infra* p. 41), NAC theorized that "in the absence of the access fee rules, ATM operators would offer consumers differentiated access fees at the point of transaction, consumers would then demand multi-bug [debit] cards from their banks, [and] their banks would provide these cards." *Nat'l ATM Council*, 7 F. Supp. 3d at 59-60. The district court rejected this theory, finding that it "is based on an attenuated, speculative chain of events, that relies on numerous independent actors, including the [debit or ATM] card issuing banks." *Id*. at 60. The district court further held that the proposed amended complaints "provide no additional facts that constitute direct evidence of agreements that would support a claim of a current horizontal conspiracy among member banks,"

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Osborn v. Visa Inc., 797 F.3d 1057 (D.C. Cir. 2015). On October 23, 2015, after denying defendants' petitions for rehearing, the D.C. Circuit issued its mandate returning the cases to this Court. Dkt. No. 52. On January 27, 2016, defendants filed petitions for certiorari seeking review of the D.C. Circuit's opinion. *See* Petition for Writ of Certiorari, *Visa Inc. v. Osborn*, No. 15-961 (U.S. Jan. 27, 2016); Petition for Writ of Certiorari, *Visa Inc. v. Stoumbos*, No. 15-962 (U.S. Jan. 27, 2016).

On remand, the Court deemed filed NAC's Second Amended Complaint on November 23, 2015. *See* Dkt. No. 55. Again, NAC did not seek preliminary injunctive relief. Visa and MasterCard filed answers on December 10, 2015. Dkt. Nos. 56, 57.

On February 18, 2016, NAC's counsel notified defendants' counsel for the first time that NAC planned to seek a preliminary injunction. On February 23, 2016 — four months after the cases were returned to this Court — NAC filed its preliminary injunction motion, Dkt. No. 60, along with a statement of points and authorities, Dkt. No. 61 ("NAC Br."), and six declarations. None of the 13 NAC members who are plaintiffs in this case joined NAC's motion. Only one of those 13 plaintiffs submitted a declaration in support of the motion.

Simultaneously with the preliminary injunction motion, NAC filed the parties' joint stipulation agreeing to enlarge to 30 days the time for defendants to oppose NAC's motion. Dkt. No. 59. Eight days later, on March 2, 2016, the consumer plaintiffs in the *Mackmin* and *Stoumbos* cases moved to intervene in this case "for the limited purpose of responding to" NAC's preliminary injunction motion. Dkt. No. 62-3, at 1. The consumer plaintiffs stated that they "do not adopt or join in NAC's Motion," and suggested that "any consideration of the

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and that allegations that banks "were members of the bankcard associations do not suffice to allege a current agreement." *Id*. at 62-63.

Preliminary Injunction Motion should be adjourned until such time as all plaintiffs in these related cases have had an opportunity to pursue relevant fact discovery and expert disclosure." *Id.* at 1-2.[7]

ARGUMENT

"A preliminary injunction is an extraordinary remedy that should be granted only when the party seeking the relief, by a clear showing, carries the burden of persuasion." *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004). "A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

Courts considering the preliminary injunction factors "typically do so on a 'sliding scale' that balances the relative strengths of each prong." *Econ. Research Servs., Inc. v. Resolution Econ., LLC* (*ERS*), --- F. Supp. 3d ---, No. 1:15-cv-1282, 2015 WL 6406390, at *3 (D.D.C. Oct. 21, 2015) (Leon, J.). However, "because irreparable harm has always been the touchstone of injunctive relief, a movant's failure to demonstrate the requisite injury is grounds for denying a motion for a preliminary injunction, even if the other three factors merit relief." *Id.* (citation and internal quotation marks omitted); *see also GEO Specialty Chems., Inc. v. Husisian*, 923 F. Supp. 2d 143, 147 (D.D.C. 2013) (Leon, J.) ("[A] court may refuse to issue an injunction without considering any other factors when irreparable harm is not demonstrated."); *Air Transp. Ass'n of Am., Inc. v. Exp.-Imp. Bank of the U.S.*, 840 F. Supp. 2d 327, 333 (D.D.C. 2012) ("[I]f a party

[7] The Court granted the motion to intervene on March 3, 2016. Dkt. No. 63.

makes no showing of irreparable injury, the court may deny the motion for injunctive relief without considering the other factors.").

In addition, where, as here, a party seeks to change the status quo rather than to preserve it, the movant must "meet a higher standard than in the ordinary case by showing 'clearly' that he or she is entitled to relief or that 'extreme or very serious damage' will result from the denial of the injunction." *Ajilon Prof'l Staffing, PLC v. Kubicki*, 503 F. Supp. 2d 358, 361 n.4 (D.D.C. 2007) (Leon, J.) (quoting *Columbia Hosp. for Women Found., Inc. v. Bank of Tokyo-Mitsubishi, Ltd.*, 15 F. Supp. 2d 1, 4 (D.D.C. 1997)); *see also, e.g.*, *Elec. Privacy Info. Ctr. v. Dep't of Justice*, 15 F. Supp. 3d 32, 39 (D.D.C. 2014).

I. NAC FAILS TO ESTABLISH IRREPARABLE HARM TO INDEPENDENT ATM OPERATORS

The D.C. Circuit "has articulated a 'high standard for irreparable injury.'" *ERS*, 2015 WL 6406390, at *4 (quoting *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006)). To satisfy this threshold, a plaintiff's injury "must be 'both certain and great' and, in all events, beyond remuneration." *Id.* (quoting *Wis. Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir. 1985)); *see also Air Transp.*, 840 F. Supp. 2d at 334 ("The alleged injury must be certain, great, actual, and imminent." (internal quotation marks omitted)). "Imminence is key to this inquiry, and vague or threadbare allegations of future harm simply will not garner injunctive relief." *ERS*, 2015 WL 6406390, at *4 (citing *Wis. Gas*, 758 F.2d at 674). "Nor, for that matter, will harms of a purely economic nature." *Id.* (citing same). Indeed, "a preliminary injunction will only issue when the injury is utterly, and entirely, beyond compensatory relief." *Id.*

NAC makes no more than generalized and speculative allegations of economic injuries that would be reparable with monetary damages. NAC has not demonstrated that the defendants' non-discrimination rules have caused any economic injuries that threaten the existence of

independent ATM operators. And NAC's lengthy delay in seeking injunctive relief belies any claim of irreparable harm at this late date. Accordingly, as in *ERS*, this Court's preliminary injunction analysis should "begin[], and end[], with this factor alone." *Id.* at *3; *see also GEO*, 923 F. Supp. 2d at 151.

A. The Asserted Economic Injuries Do Not Establish Irreparable Harm

It is "well settled" in this Circuit that "economic loss does not, in and of itself, constitute irreparable harm." *Wis. Gas*, 758 F.2d at 674. "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough." *Id.*; *accord ERS*, 2015 WL 6406390, at *4. This is "because economic injuries are generally in fact reparable with monetary damages in the ordinary course of litigation." *Air Transp.*, 840 F. Supp. 2d at 335.

1. NAC Asserts Only Economic Injuries

NAC argues that the challenged ATM access fee rules have impaired the volume and profitability of independent ATM operators' businesses. According to NAC, the rules "reduce the number of [ATM] locations that can be cost- and risk-justified," potentially leading operators to decommission ATM terminals because they "cannot economically enhance profitability at those locations." NAC Br. 15-16 (quoting Kuhn Decl. ¶ 20 and Powell Decl. ¶ 10). NAC further asserts that independent ATM operators will be unable to take advantage of certain cost "efficiencies" unless the challenged rules are eliminated before operators expend funds to make technology upgrades to terminals in 2016 to reduce fraud. *Id.* at 16-17 (quoting Kuhn Decl. ¶ 22); *see also id.* at 40.

As courts in this District have routinely held, economic injuries do not justify preliminary injunctive relief. *See ERS*, 2015 WL 6406390, at *4; *Air Transp.*, 840 F. Supp. 2d at 335; *Ajilon*, 503 F. Supp. 2d at 362; *Clipper Cruise Line, Inc. v. United States*, 855 F. Supp. 1, 4 (D.D.C.

1994). Here, the lost revenues, profits, and business opportunities claimed by NAC are all recognized forms of economic injury reparable with monetary damages. *See, e.g.*, *ERS*, 2015 WL 6406390, at *4 (siphoning of future profits); *Air Transp.*, 840 F. Supp. 2d at 335 (lost business opportunities, market share, and customer goodwill); *Ajilon*, 503 F. Supp. 2d at 362 (lost revenues); *Clipper Cruise Line*, 855 F. Supp. at 4 (lost profits and goodwill). The D.C. Circuit in fact characterized the "theor[y] of injury" NAC alleges as one of "[e]conomic harm." *Osborn*, 797 F.3d at 1064. NAC does not argue otherwise.

2. NAC Does Not Demonstrate Existential Economic Injury

NAC attempts to avoid this bar to preliminary injunctive relief by suggesting that the asserted economic injuries are so grave as to threaten the "existence" of independent ATM operators. NAC Br. 15; *see also id.* at 14, 40. "'Recoverable monetary loss may constitute irreparable harm' but '*only* where the loss threatens the very existence of the movant's business.'" *ERS*, 2015 WL 6406390, at *4 (quoting *Wis. Gas*, 758 F.2d at 674).

As this Court explained in *ERS*, "[t]he universe of harms that meet this litmus test is narrow indeed, and courts in this Circuit have been unwilling to find irreparable economic injury where the plaintiff's business remains robust and its employees' livelihoods unaffected." *Id.* "[T]he standard for irreparable economic harm in [this] Circuit is so demanding that the proof of even tens of millions of dollars in economic detriment does not necessarily suffice." *R.J. Reynolds Tobacco Co. v. FDA*, 823 F. Supp. 2d 36, 50 (D.D.C. 2011) (Leon, J.). To demonstrate irreparable economic harm, the movant "must marshal 'a strong showing' that the damage to its business is 'above and beyond a simple diminution in profits.'" *ERS*, 2015 WL 6406390, at *4 (quoting *Mylan Pharm., Inc. v. Shalala*, 81 F. Supp. 2d 30, 43 (D.D.C. 2000)).

Applying these standards, courts in this District repeatedly have rejected claims that economic injuries threatened a plaintiff's existence. *See, e.g.*, *ERS*, 2015 WL 6406390, at *5

(plaintiff did not show that the challenged conduct "ha[d] crippled [its] business as a whole" or would "have a systemic effect on the company"); *Nat'l Mining Ass'n v. Jackson*, 768 F. Supp. 2d 34, 51-52 (D.D.C. 2011) (plaintiff trade association failed to show through a "conclusory projection" that its small-business members "face[d] irreparable harm in the form of certain or imminent business closings").

Here, NAC does not meet its heavy burden to show that the challenged ATM access fee rules jeopardize the very existence of independent ATM operators. Of the 13 operators named as plaintiffs in this case, NAC submits a declaration from only one. *See* Selman Decl. (president of Selman Telecommunications Investment Group, LLC). NAC also submits declarations from two non-party operators. *See* Powell Decl. (CEO of First Regents Bancservices, LLC); Baxter Decl. (president of SwypCo, LLC). All three operators' declarations are silent on the subject of their own ability to remain in existence. Not one operator claims that it is existentially threatened, much less provides details of its financial status to support such an assertion. Rather, the operators, like NAC's other declarants, focus on the "great[] benefit[s]" or "substantial efficiency gain[s]" that a preliminary injunction would allow them to pursue — all of which, even if accepted at face value, are economic opportunities that monetary damages can compensate. Myers Decl. ¶¶ 13-14; *see also* Powell Decl. ¶ 11 (injunction would have "an immediate and positive effect on First Regents"); Selman Decl. ¶ 5 (injunction would "immediately invigorate the industry . . . and ensure a more secure future for my business"); Baxter Decl. ¶ 10 (with injunction, SwypCo "would seize the opportunity to price by network brand").

Unable to provide evidence that their existence is actually threatened, NAC's declarants offer generalized assertions that some unidentified independent ATM operators have gone out of business or may do so at some point in the future. For example, one declarant asserts — without citing any evidentiary support — that the challenged rules "will eventually wipe out interchange

altogether, running 30-40% of independent ATM operators with interchange-based business models out of business." Baxter Decl. ¶ 9. The other declarants offer even less detail. *See* Kuhn Decl. ¶ 11 ("This dynamic is already causing many smaller [independent ATM operators] to exit the market as stand-alone competitors."); Renard Decl. ¶ 5 (referencing "numerous members who are existentially threatened").

Unsubstantiated, generalized assertions like these are insufficient to establish irreparable harm. *See Wis. Gas.*, 758 F.2d at 674 (rejecting allegation that suppliers would not contract with plaintiff absent evidence that "a single supplier" had stated such an intention); *Miniter v. Moon*, 684 F. Supp. 2d 13, 16 (D.D.C. 2010) (rejecting "generalized allegations about the financial state" of the defendant). Courts in this District thus have consistently denied preliminary injunction motions based on a purported existential economic threat where, as here, the plaintiff fails to provide specific and detailed supporting evidence. *See, e.g.*, *GEO*, 923 F. Supp. 2d at 150 & n.10 (plaintiff "completely failed to demonstrate the certainty or imminence of its financial deficits"); *Berman v. DePetrillo*, No. CIV.A. 97-70 (TAF), 1997 WL 148638, at *3 (D.D.C. Mar. 20, 1997) (plaintiffs' claim of "complete destruction of their business" not supported in testimony or affidavits). In short, NAC has failed to satisfy the high standard for establishing irreparable economic injury.

3. NAC Asserts Speculative Injury

NAC's claim of irreparable harm independently fails because the link between the ATM access fee rules and the asserted harm is speculative at best. *See Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931) (injunctive relief "will not be granted against something merely feared as liable to occur at some indefinite time in the future"); *accord Wis. Gas.*, 758 F.2d at 674. NAC argues that independent ATM operators have experienced financial losses and will do so in the future "solely because" the challenged ATM access fee rules "restrict their lawful pricing

discretion." NAC Br. 39. But as discussed below in connection with NAC's failure to show injury-in-fact, NAC has done nothing to show that additional pricing discretion would have any effect on ATM customers' choices or ATM operators' profitability. *See infra* pp. 40-42. Nor does NAC address the other industry factors that could be contributing to independent ATM operators' financial performance, such as increasing shifts by consumers from cash to other payment methods, and the prevalence of "on-us" ATM transactions at bank branches or at ATM machines where consumers can avoid surcharges altogether. *See* Sachs Decl. ¶¶ 8, 24; Englebardt Decl. ¶ 8.

NAC also claims that the "deadline[s]" for ATM operators to "transition terminal equipment to accept the EMV chip cards" "exacerbat[e] the harm" to its members. NAC Br. 16; *see also id.* at 40. But NAC is merely complaining that its members would like to take advantage of purported cost efficiencies in making multiple modifications to their ATM machines at one time. This is economic harm that monetary damages could repair. Further, NAC makes no showing that the financial expenditure necessary to meet the EMV "deadline[s]" would put any NAC member or other independent ATM operator out of business. Indeed, the only consequence of not meeting the EMV "deadline[s]" is that the ATM acquirer, rather than the card issuer, bears liability for counterfeit fraud on a chip-enabled card. *See* Sachs Decl. ¶¶ 26-27; Englebardt Decl. ¶ 28. NAC makes no attempt to quantify any harm to ATM operators as a result of this liability shift. Because NAC has not tied the challenged conduct to any harm that is "likely" — rather than, at best, "just a possibility" — it cannot establish irreparable harm.

GEO, 923 F. Supp. 2d at 149 (rejecting claim of irreparable harm "full of hypotheticals, assumptions and possibilities, rather than likelihoods, actualities and forthcomings").[8]

In sum, although NAC asserts that its independent ATM operator members will suffer irreparable harm absent injunctive relief, NAC has asserted only economic harm, has not shown that a single operator has gone or will go out of business, and has not identified any injury caused by the rules that is certain rather than speculative. NAC's application for a preliminary injunction should be denied on this basis alone.

B. NAC's Delay in Seeking Relief Belies Its Claim of Irreparable Harm

NAC's extensive delay in pursing preliminary injunctive relief from the challenged ATM access fee rules, which were enacted 20 years ago, "further undercuts its allegation of irreparable harm." *Mylan*, 81 F. Supp. 2d at 43; *see also Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975) (finding that 44-day delay in filing suit and seeking temporary restraining order was "inexcusable" and "bolstered" court's conclusion that an injunction was unwarranted). "An unexcused delay in seeking extraordinary injunctive relief . . . implies a lack of urgency and irreparable harm." *Newdow v. Bush*, 355 F. Supp. 2d 265, 292 (D.D.C. 2005).

The challenged rules have been in effect since 1996. Sachs Decl. ¶ 16; Englebardt Decl. ¶ 19. NAC did not file suit until 15 years later, on October 12, 2011. Dkt. No. 1. Even then, NAC did not request a preliminary injunction. Nor did NAC seek a preliminary injunction in September 2012, when MasterCard announced its timeline for shifting fraud liability to ATM

[8] In a recent case, another court concluded that merchants could not demonstrate irreparable injury stemming from the liability shift. *B&R Supermarket, Inc. v. Visa, Inc.*, No. 3:16-cv-01150-WHA, Dkt. No. 36 (N.D. Cal. Mar. 16, 2016) (order denying motion for preliminary injunction).

acquirers for machines that had not adopted EMV technology,[9] or in early February 2013, when Visa did so.[10] NAC did not seek a preliminary injunction at any time before the initial dismissal of its claims in February 2013. *See* Dkt. No. 33. Even after the D.C. Circuit's mandate returned the case to this Court on October 22, 2015, *see* Dkt. No. 52, NAC waited another four months to file the instant motion.

Courts have weighed delays of even a few months against a party claiming irreparable harm. *See, e.g.*, *Guttenberg v. Emery*, 26 F. Supp. 3d 88, 91, 103 (D.D.C. 2014) (around two months); *Newdow*, 355 F. Supp. 2d at 292 (more than a month); *Mylan*, 81 F. Supp. 2d at 43 (at least over two, and possibly over eight, months). NAC's extraordinary 20-year delay strongly militates against its claim of irreparable harm.

II. NAC IS UNLIKELY TO SUCCEED ON THE MERITS

As noted, NAC's motion can be denied based solely on its failure to demonstrate irreparable injury. NAC also fails to demonstrate a likelihood of success on the merits.

A. The *Per Se* and "Quick Look" Standards Do Not Apply

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. The Supreme Court has recognized, however, that only "unreasonable restraints" of trade can constitute a Section 1 violation. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

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[9] *See* David Heun, *MasterCard Brings EMV Chip-Card Liability Policy to U.S. ATMs*, PaymentsSource, Sept. 10, 2012, http://www.paymentssource.com/news/debit-prepaid/mastercard-brings-emv-chip-card-liability-policy-to-us-atms-3011829-1.html (describing MasterCard's announcement of October 2016 liability shift for U.S. ATM acquirers).

[10] *See* Press Release, Visa Inc., Visa Expands U.S. Roadmap for EMV Chip Adoption to Include ATM and a Common Debit Solution (Feb. 4, 2013), http://pressreleases.visa.com/phoenix.zhtml?c=215693&p=irol-newsArticle_print&ID=1780934 (announcing October 2017 liability shift for U.S. ATM acquirers).

NAC seeks to avoid this inquiry into the "reasonableness" of the ATM access fee rules by stating "it is likely that the violation will turn out to be either *per se* unlawful or require only a quick look." NAC Br. 37 (footnotes omitted). But NAC ignores the limited circumstances in which the *per se* and "quick look" standards are appropriate — circumstances that do not apply to NAC's case. NAC likewise ignores the presumption that most alleged restraints under Section 1— particularly those involving novel categories of dealings or complex issues — should be analyzed under the rule of reason. Other challenges to Visa and MasterCard rules uniformly have been assessed under this standard.

A practice may be found unlawful *per se*, without analysis under the rule of reason, only after "experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it." *Khan*, 522 U.S. at 10; *see also Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (*per se* liability is limited to "only those agreements that are 'so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality'"). Indeed, the *per se* rule is "a judicial shortcut; it represents the considered judgment of courts, after considerable experience with a particular type of restraint, that the rule of reason — the normal mode of analysis — can be dispensed with." *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1181 (D.C. Cir. 1978).

Courts do not apply the *per se* rule "where the effects of a particular restraint are unclear, even where aspects of the restraint may appear to be facially anticompetitive." *Meijer, Inc. v. Barr Pharm., Inc.*, 572 F. Supp. 2d 38, 51 (D.D.C. 2008). This is particularly so where a court is examining "novel categories of dealings" that have not been found to violate the Sherman Act. *United States v. Microsoft Corp.*, 253 F.3d 34, 84 (D.C. Cir. 2001). A *per se* violation occurs *only* where "the practice facially appears to be one that would always or almost always tend to

restrict competition and decrease output." *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19-20 (1979). This is not such a case.[11]

Nor does this case warrant a so-called "quick look" analysis. Like *per se* treatment, a "quick look" is "appropriate *only* where 'an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect.'" *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2237 (2013) (emphasis added) (quoting *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999)); *see also Texaco*, 547 U.S. at 7 (quick look analysis appropriate only where "courts need undertake only a cursory examination before imposing antitrust liability").

Here, NAC cannot overcome the presumption that the challenged ATM access fee rules should be analyzed under the rule of reason. *See Texaco*, 547 U.S. at 5 ("[T]his Court presumptively applies rule of reason analysis . . . ."). The ATM access fee rules operate in a two-sided market platform and present complex questions involving competitive effects on cardholders, banks, networks, and ATM operators. *See* Sachs Decl. ¶¶ 19-22; Englebardt Decl. ¶¶ 21-22. Moreover, although NAC incorrectly predicates its challenge on defendants' conduct when each was structured as a joint venture years ago, that focus makes the rule of reason only more appropriate. The Supreme Court repeatedly has stated that "it would be inconsistent with [the] Court's antitrust precedents to condemn the internal pricing decisions of a legitimate joint venture as *per se* unlawful." *Texaco*, 547 U.S. at 7.

[11] NAC relies on *Broadcast Music* to argue that coordination among horizontal competitors to set the means of determining price is "probably the kind of agreement that 'would always or almost always tend to restrict competition and decrease output.'" NAC Br. 37 (quoting *Broad. Music*, 441 U.S. at 19-20). But *Broadcast Music* goes on to hold that a court must also examine whether a practice is "designed to 'increase economic efficiency and render markets more, rather than less, competitive.'" *Broad. Music*, 441 U.S. at 20 (quoting *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978)).

In addition, as discussed below, *see infra* pp. 29-30, the ATM access fee rules are simply "most favored nations" provisions that are also regularly analyzed under the rule of reason. *See United States v. Blue Cross Blue Shield of Mich.*, 809 F. Supp. 2d 665, 671 (E.D. Mich. 2011) ("The parties agree that in order to assess whether the [most favored nations] clauses unreasonably restrain trade, the 'rule of reason' is applied.").

Significantly, NAC cites no cases showing that courts have experience analyzing the networks' ATM access fee rules or comparable non-discrimination rules and finding them to be manifestly anticompetitive, much less the considerable judicial experience needed for a court to condemn those rules as unlawful *per se*. To the contrary, courts have regularly applied the rule of reason when analyzing the rules of Visa and MasterCard. *See, e.g.*, *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 238 (2d Cir. 2003) ("The practices challenged in this case are properly analyzed under the rule of reason, as neither Visa U.S.A. nor MasterCard has restricted trade in a manner that constitutes a *per se* violation."); *In re Visa Check/Mastermoney Antitrust Litig.*, No. 96-CV-5238 (JG), 2003 WL 1712568, at *5 (E.D.N.Y. Apr. 1, 2003) (assessing network rules under rule of reason); *Nat'l Bancard Corp. v. Visa U.S.A., Inc.* (*NaBanco*), 596 F. Supp. 1231, 1253 (S.D. Fla. 1984) ("[T]he Court concludes that IRF should be analyzed under the rule of reason . . . ."), *aff'd*, 779 F.2d 592 (11th Cir. 1986). This Court should do the same.

B. NAC Has Not Shown That It Will Likely Succeed in Proving That the ATM Access Fee Rules Are an Unreasonable Restraint of Trade

Under the rule of reason, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Meijer*, 572 F. Supp. 2d at 46-47 (quoting *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977)). "The reasonableness of a particular restraint depends on a broad range of considerations, including specific information about the relevant product

market, the history, nature, and effect of the particular restraint, and whether the companies involved have market or monopoly power." *Id*. at 47 (citing *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885-86 (2007)).

NAC has not demonstrated that it will likely succeed in showing that the ATM access fee rules violate Section 1 under the rule of reason. NAC makes no effort to define a proper relevant market or to identify the legal basis for its conclusory assertions that Visa and MasterCard exercise market power in any market. NAC also ignores that the challenged rules are reasonable, procompetitive measures that protect consumer interests.

1. NAC Does Not Identify Any Relevant Market in Which To Assess Potential Anticompetitive Effects

"A rule of reason analysis almost always begins with the definition of the relevant market, without which there is little context to discuss competition, anticompetitive effects, or procompetitive benefits." *Meijer*, 572 F. Supp. 2d at 53. A plaintiff must show the product market's outer boundaries through evidence regarding "the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962); *accord Sky Angel U.S., LLC v. Nat'l Cable Satellite Corp.*, 947 F. Supp. 2d 88, 103 (D.D.C. 2013).

Here, although NAC acknowledges the importance of properly defining a relevant market (*see* NAC Br. 7), it has done nothing to meet its burden. NAC presents no evidence regarding an appropriate product market boundary. For example, a consumer can use a Visa- or MasterCard-branded card at an ATM owned by his or her bank, which will process the transaction itself as an "on-us" transaction, and likely not impose a surcharge on its customer. Sachs Decl. ¶ 8; Englebardt Decl. ¶ 8. Neither Visa nor MasterCard processes these "on-us" transactions or has any "share" of them. Sachs Decl. ¶ 8; Englebardt Decl. ¶ 8. And on-us transactions constitute

the clear majority of ATM transactions initiated with Visa- and MasterCard-branded cards. Sachs Decl. ¶ 8; Englebardt Decl. ¶ 8. But NAC has done nothing to address whether on-us transactions are part of a relevant market. By itself, the failure to provide evidence of an appropriate relevant market undermines NAC's likelihood of success on the merits. *Meijer*, 572 F. Supp. 2d at 56 (rule of reason "requires Plaintiffs to proffer evidence of the relevant antitrust market"); *In re Lorazepam & Clorazepate Antitrust Litig.*, 467 F. Supp. 2d 74, 81 (D.D.C. 2006) ("To prove that the restraint of trade was unreasonable, Plaintiffs had to prove by a preponderance of the evidence . . . what the relevant market is . . . .").

2. NAC Provides No Support for Its Conclusory Assertions of Market Power

Similarly, NAC provides no legal or factual basis supporting its conclusory allegations that both Visa and MasterCard have "market power" in some undefined market. Antitrust plaintiffs generally prove a defendant's market power by defining a relevant market and either indicating a substantial percentage share of the market possessed by the defendant or identifying actual evidence that the defendant has the ability to "profitably raise prices substantially above the competitive level." *Meijer*, 572 F. Supp. 2d at 54-55 (citing *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 221 (D.C. Cir. 1986), and *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C.Cir. 2001)). NAC's motion does not meet this standard.

Without providing any evidence to support a narrow market, NAC first points to Visa's and MasterCard's purported growth in share of ATM transaction volume from independent ATM operators. Relying on unsubstantiated estimates from a transaction processor, NAC contends that (i) in the first decade of ATM surcharging (1996-2006), the average share of ATM transactions over each network was 3-5%; (ii) those respective shares rose to about 10-12% by the time NAC filed this lawsuit in 2011; and (iii) today, the two networks' shares each have risen to approximately 20%. NAC Br. 8 (citing Myers Decl. ¶ 8).

These shares, even if valid, would not support a finding of market power. Courts regularly reject claims of market power where a defendant has market shares of less than 30-40%. *See, e.g.*, *Rothery Storage*, 792 F.2d at 214 (affirming summary judgment for defendant on Section 1 claim because defendant's "market share [6%] is far too small for the restraint to threaten competition or to have been intended to do so"); *Assam Drug Co. v. Miller Brewing Co.*, 798 F.2d 311, 318 n.18 (8th Cir. 1986) (no market power with 19.1% share); *Woman's Clinic, Inc. v. St. John's Health Sys., Inc.*, 252 F. Supp. 2d 857, 868 (W.D. Mo. 2002) (no market power with 35% share); *New York v. Anheuser-Busch, Inc.*, 811 F. Supp. 848, 873 (E.D.N.Y. 1993) (no market power with 39% share).

Although some courts have determined that credit card networks' market shares of less than 30% could reflect market power in "highly concentrated" markets with few competitors, NAC makes no showing of that sort of market concentration in this case. *See United States v. Am. Express Co.*, 88 F. Supp. 3d 143, 190 (E.D.N.Y. 2015); *United States v. Visa*, 344 F.3d at 240. To the contrary, NAC concedes that there are approximately 15 different networks that all "compete for the business of PIN debit card issuers and acquirers of ATM debit transactions." NAC Br. 6-7. And if "on-us" transactions are included, the Visa and MasterCard shares of ATM transactions that NAC asserts would be less than half of what NAC contends. No court has found market power at those levels.

NAC seeks to obfuscate defendants' insufficient market shares by relying on a different, "wider debit card market," where this Court found that "Visa and MasterCard exercise considerable market power over merchants with respect to debit card acceptance." NAC Br. 7 (quoting *NACS v. Bd. of Governors of the Fed. Reserve Sys.*, 958 F. Supp. 2d 85, 89 (D.D.C. 2013), *rev'd on other grounds*, 746 F.3d 474 (D.C. Cir. 2014)). Yet NAC offers no proof that a purported "debit card market" that includes cardholders' debit card transactions *at merchants* is

the proper relevant market in which to assess the effects of the *ATM* access fee rules. Indeed, the challenged rules do not apply to debit transactions at merchants — only to ATM transactions. NAC likewise makes no showing that the ATM access fee rules have any effect at all on competition within a market that includes all debit network transactions.

At bottom, NAC has not supported its contention that Visa or MasterCard can exercise market power through any control over price. *See* NAC Br. 6-8. ATM operators have full discretion under the challenged rules to set ATM access fees at a level that both covers their costs and is profit-maximizing; they simply cannot surcharge ATM transactions in a way that would discriminate against Visa or MasterCard cardholders (or the cardholders of any competing ATM network that has adopted a similar non-discrimination rule). And although NAC contends that no operator can make as much money if it stops accepting Visa- or MasterCard-branded ATM cards, NAC offers no legal authority establishing that an operator's loss of either network of this market size evinces any one defendant's market power.

Finally, NAC's contention that "Defendants' market power is demonstrated by their ability to force ATM operators to accept network rules that are not the product of negotiation, but rather terms agreed to by ATM operators because they cannot compete without access to Defendants' debit networks" (NAC Br. 6), merits little response. Like other ATM networks, Visa and MasterCard each provide a set of operating rules designed to ensure an efficient network connecting banks, ATM operators, and consumers. Sachs Decl. ¶ 6; Englebardt Decl. ¶ 6. NAC makes no showing that ATM operators individually negotiate terms of acceptance with *any* network. *See* NAC Br. 6-7; Dkt. No. 55 ("Second Am. Compl.") ¶¶ 40-41, 47-48. If the presence of network rules were enough to establish market power, then every one of the numerous ATM networks NAC identifies would have market power. NAC itself contends that Visa and MasterCard each had only a 3-5% share of ATM transactions when each purportedly

exercised market power by enacting its rules in 1996. NAC's market power arguments cannot withstand scrutiny.

3. The ATM Access Fee Rules Are Reasonable and Procompetitive

To show a likelihood of success under the rule of reason, NAC must also show that defendants' conduct "unreasonably restrained competition" and "was, on balance, anticompetitive." *Microsoft Corp.*, 253 F.3d at 95. The record shows the opposite: the ATM access fee rules are both reasonable and procompetitive.

After initially prohibiting acquirers from imposing any surcharge on ATM cash disbursements, Visa and MasterCard announced in 1996, in response to marketplace developments, that they would permit surcharging for ATM transactions on their networks, subject to provisions designed to continue to protect cardholders and the value of the networks. Sachs Decl. ¶¶ 15-16; Englebardt Decl. ¶ 19. These protective measures ensured: (1) non-discrimination, so that the amount of any surcharge levied would not exceed the amount levied at the same ATM on any other shared ATM network transaction; and (2) consumer disclosure, so that the cardholder would have advance notice of the amount of the surcharge. Sachs Decl. ¶ 15; Englebardt Decl. ¶¶ 17, 19.

Other ATM networks — including Star, Honor, and Exchange/Accel — had previously adopted access fee rules imposing similar non-discrimination requirements. Sachs Decl. ¶ 17. Indeed, when MasterCard adopted its non-discrimination rule in 1996, it identified this type of provision as being standard among competing networks. Englebardt Decl. ¶ 17. Even today, nearly every ATM network has an access fee non-discrimination rule. Englebardt Decl. ¶ 24. The industry-wide prevalence of ATM access fee non-discrimination provisions itself underscores the pro-competitive benefits they provide to networks and their cardholders. For example, the rules serve to:

- ensure that the networks' cardholders have a consistent and positive experience when using ATMs (Sachs Decl. ¶¶ 19-20; Englebardt Decl. ¶¶ 21-22);

- maintain the benefits and value of the networks' brands (Sachs Decl. ¶ 20; Englebardt Decl. ¶¶ 21-22);

- protect against bait-and-switch tactics whereby an ATM operator uses network logos or branding to attract a cardholder to an ATM and only then informs the cardholder of an additional fee for transactions conducted over a Visa or MasterCard network (Sachs Decl. ¶ 21; Englebardt Decl. ¶ 22); and

- prevent an ATM operator from "free-riding" and enjoying the benefit from holding itself out as accepting Visa or MasterCard ATM cards, while effectively limiting or refusing acceptance, and damaging the networks' brand images, by imposing high surcharges (Sachs Decl. ¶ 22; Englebardt Decl. ¶ 22).

At their core, the Visa and MasterCard ATM access fee rules function like "most favored nations" clauses, which ensure that buyers pay the lowest price that a seller charges to competing buyers. Through the rules, Visa and MasterCard each require ATM operators to provide Visa and MasterCard cardholders (who are the "buyers" of ATM transaction services here) the ability to obtain ATM transaction services at a price that is no worse than the price offered for transactions on other ATM networks. Courts have recognized that such "most favored nations" clauses are procompetitive under the rule of reason and are not the type of conduct that the antitrust laws are designed to prevent. As the Seventh Circuit held in *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*, 65 F.3d 1406 (7th Cir. 1995):

> "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. . . . [T]hat is the sort of conduct that the antitrust laws seek to encourage. It is not price-fixing.

Id. at 1415. In *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of Rhode Island*, 692 F. Supp. 52 (D.R.I. 1988), *aff'd*, 883 F.2d 1101 (1st Cir. 1989), the district court similarly concluded that "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." *Id.* at 71. The First Circuit affirmed, holding that such conduct is "legitimate competitive activity of a sort that is favored — not prohibited — by the antitrust laws" because "a policy of insisting on a supplier's lowest price . . . tends to further competition on the merits." 883 F.2d at 1102, 1110.

Further, courts have dismissed antitrust challenges to payment network rules that — like the challenged ATM access fee rules — prevent surcharges that would increase the price to consumers who use the network's services. For example, in *SouthTrust Corp. v. Plus System, Inc.*, 913 F. Supp. 1517 (N.D. Ala. 1995), a court granted summary judgment dismissing an antitrust challenge to the Plus ATM network's then-ban on surcharging consumers for certain ATM transactions. The court reasoned that "[t]he no-surcharge rule . . . poses no identifiable threat of injury to competition," since "it enhances consumer welfare by limiting prices consumers will pay . . . and restricting the ability . . . to opportunistically profit in situations where consumers are less able to protect themselves." *Id.* at 1522; *see also*, *e.g.*, *Tennessean Truckstop, Inc. v. NTS, Inc.*, 875 F.2d 86, 90 (6th Cir. 1989) (affirming dismissal of merchant's antitrust claim challenging payment network's surcharge cap because it "is obviously a proconsumer device, and if it has cost [the merchant] some profit, the 'injury' is not 'of the type the antitrust laws were intended to prevent'" (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977))). If rules that prohibit surcharging entirely survive antitrust scrutiny, rules that prohibit only discriminatory surcharges should be lawful *a fortiori.*

Nor are the ATM access fee rules any more restrictive than necessary to deliver these benefits. As NAC acknowledges, independent ATM operators or their partners, not Visa or MasterCard, set the amount of any access fee to be charged at each of the terminals they own or operate. NAC Br. 38; *see also* Sachs Decl. ¶ 10; Englebardt Decl. ¶ 12. Nothing in Visa's or

MasterCard's rules prevents an ATM operator from engaging in dynamic pricing, e.g., assessing different surcharges at each of the machines it operates, so that access fees vary by location. Englebardt Decl. ¶ 25. Operators are also free to adjust access fee levels by time of day or season of the year, or even to adopt more creative subscription- or loyalty-based pricing models. *Id*. Visa's and MasterCard's rules guard only against differential pricing by ATM operators discriminatorily harming each network's respective cardholders.

4. NAC Cannot Establish That the ATM Access Fee Rules' Procompetitive Benefits Are Outweighed by the Purported Harms NAC Identifies

When analyzed under the rule of reason, the procompetitive, consumer-protective benefits of the ATM access fee rules outweigh any speculative harm to competition identified by NAC.

First, NAC asserts that the rules require "ATM operators to choose a profit-maximizing access fee that earns different margins on different networks, instead of choosing a margin and then setting a profit-maximizing access fee for each brand of network services sold according to its cost." NAC Br. 38. But NAC ignores how the result it seeks would directly harm customers whose ATM transactions are processed over the Visa or MasterCard networks, as well as harming Visa and MasterCard, by allowing ATM operators to charge those customers higher access fees than those charged to other customers. Visa and MasterCard have set out above and in their supporting evidentiary submissions the cardholder protection rationales for the rules. *See supra* pp. 6-7, 28-29; Sachs Decl. ¶¶ 19-22; Englebardt Decl. ¶¶ 21-23.

Second, NAC similarly asserts that the ATM access fee rules "create[] a welfare transfer from consumers, who miss out on a discount, to Visa and MasterCard." NAC Br. 38. But for all the reasons set out below, this assertion is based on a series of assumptions for which NAC offers no supporting evidence. *See infra* pp. 41-42. Logically, if the ATM operators claim they

are losing money at current pricing levels, they would not offer a discount but instead raise surcharges on Visa- and MasterCard-branded transactions if they differentially surcharged by brand. Further, NAC offers no evidence of what any purported consumer discount would be, whether that discount in fact would prompt consumers to attempt to obtain a different card or open a deposit account at a different bank to take advantage of the incentive, or whether offering the discount would in turn actually increase ATM operators' profits or consumers' welfare.

Third, NAC complains that "[t]he rule has an asymmetric negative effect on independent ATM deployers, burdening them far more than it burdens banks," because "banks have other revenue streams to draw upon." NAC Br. 36. But the fact that banks choose to engage in other revenue-generating activities is irrelevant to any antitrust question in this case. Independent ATM operators chose to employ different business models than banks have, and they cannot use antitrust law as a means of shielding themselves from the consequences of their business decisions. *See Brunswick*, 429 U.S. at 488 (antitrust laws "were enacted for the protection of *competition*, not *competitors*" (internal quotation marks omitted)).

Fourth, NAC characterizes each network's ATM access fee rule as a "contract that references rivals" and thus "a potential Section 1 violation." NAC Br. 32-33. These conclusory labels, however, are insufficient to meet NAC's burden under the rule of reason. Indeed, the only two sources to which NAC refers make clear that "[u]nsurprisingly, these contracts are ordinarily lawful," and that "[t]he traditional rule of reason still governs to determine whether the net effect of the arrangement is materially harmful to consumers." Jonathan M. Jacobson & Daniel P. Weick, *Contracts That Reference Rivals As an Antitrust Category*, The Antitrust Source, 2 (April 2012); *accord* Fiona Scott-Morton, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Contracts that Reference Rivals 1 (April 5, 2012) ("[T]he types of

contracts I discuss can be pro-competitive or anti-competitive, so I will not be able to provide a very simple blanket rule.").

C. NAC Cannot Show That the ATM Access Fee Rules Are the Products of Section 1 Conspiracies

NAC also is unlikely to succeed on the merits because it cannot establish that the ATM access fee rules are the products of an actionable "contract, combination . . ., or conspiracy" under Section 1 of the Sherman Act. 15 U.S.C. § 1. Section 1 liability requires showing a "conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984). To satisfy this standard, a plaintiff "must present evidence that tends to exclude the possibility that the alleged conspirators acted independently," since "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (internal quotation marks omitted). NAC will not be able to meet that test here.

1. Association Rule-Making Alone Does Not Reflect Concerted Action Under Section 1

As post-IPO, stand-alone public companies, Visa and MasterCard each have regularly issued *new* sets of ATM rules (including re-adopted former rules) that Visa's and MasterCard's management, each operating under independent boards of directors, have determined to be in the best interests of their respective organizations. *See* Sachs Decl. ¶ 23; Englebardt Decl. ¶ 26. NAC ignores these indisputable facts and contends instead that because Visa and MasterCard each first enacted their ATM access fee rules in 1996 while they were organized as joint venture associations of banks, the rules are the product of an actionable antitrust conspiracy. NAC Br. 28-30.

The law is clear that "[m]ere membership in associations is not enough to establish participation in a conspiracy with other members of those associations." *Fed. Prescription Serv., Inc. v. Am. Pharm. Ass'n*, 663 F.2d 253, 265 (D.C. Cir. 1981); *see also AD/SAT v. Associated Press*, 181 F.3d 216, 234 (2d Cir. 1999) ("[E]very action by a[n] . . . association is not concerted action by the association's members."). An association "is not by its nature a 'walking conspiracy', its every denial of some benefit amounting to an unreasonable restraint of trade." *Viazis v. Am. Ass'n of Orthodontists*, 314 F.3d 758, 764 (5th Cir. 2002).

The Ninth Circuit rejected the same argument NAC makes on these grounds in *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042 (9th Cir. 2008). There, the court affirmed the dismissal of merchants' claims that banks, by virtue of their membership in Visa and MasterCard, conspired to adopt and enforce network rules that allegedly fixed interchange fees charged to merchants on payment card transactions. It held that "merely charging, adopting, or following the fees set by [Visa or MasterCard] is insufficient as a matter of law to constitute a violation of Section 1 of the Sherman Act." *Id.* at 1048.

To be sure, the D.C. Circuit upheld NAC's complaint because its allegations "suffice[d] at the pleadings stage," when "a court must accept as true all material allegations of the complaint." *Osborn*, 797 F.3d at 1064, 1066 (internal quotation marks omitted).[12] Now, however, faced with the obligation on this preliminary injunction motion to show that it is likely to succeed on the merits of its claim, NAC still points merely to the defendants' prior organizational structures, not any facts to evidence a "conscious commitment to a common

[12] That opinion created a split in the Circuits and is the subject of pending petitions for certiorari filed by the defendants. *See* Petition for Writ of Certiorari, *Visa Inc. v. Osborn*, No. 15-961 (U.S. Jan. 27, 2016); Petition for Writ of Certiorari, *Visa Inc. v. Stoumbos*, No. 15-962 (U.S. Jan. 27, 2016).

scheme designed to achieve an unlawful objective." *Monsanto*, 465 U.S. at 768. That is not enough.

2. NAC's Other Arguments Do Not Support Any Inference of Conspiracy

NAC makes a number of other assertions supporting its request that "the Court . . . infer . . . that the challenged rule stems from an agreement" in violation of Section 1. NAC Br. 23. None of these arguments can satisfy NAC's burden of proof.

First, NAC offers no evidence for its suggestion that the ATM access fee rules are a "pricing restraint" that banks have imposed on themselves with the "clear intent . . . to establish uniform pricing behavior" among banks that acquire ATM transactions. NAC Br. 24. To the contrary, it is Visa and MasterCard — not banks — that enacted the ATM access fee rules in response to network competitor activity and in order to preserve the interests of each network and cardholders, and that have continued to adopt those rules in each new version of their operating rules issued after their respective IPOs. *See supra* pp. 5-6, 33. Network rules do not deprive ATM-operating banks or other ATM operators of the ability to set any particular ATM's access fees independently, and at any level they wish. *See supra* p. 31.

NAC attempts to draw parallels to *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939), *see* NAC Br. 25-26, but the facts that motivated the Supreme Court in that case to infer an unlawful agreement among competitors are not present here. In *Interstate Circuit*, the Supreme Court emphasized that the evidence showed "a radical departure from the previous business practices of the industry and a drastic increase in . . . prices" and "substantial unanimity" in "far-reaching changes in their business methods." 306 U.S. at 222-23. But Visa's and MasterCard's adoption of their ATM access fee rules was not an abrupt and dramatic change from industry practice that could be explained only by an illicit agreement. Quite the opposite — the rules in the first instance were a competitive response to practices that were becoming

standard in other networks in the industry, and each network independently benefitted from adopting them.

Second, NAC's reliance on *American Needle, Inc. v. National Football League*, 560 U.S. 183 (2010), is misplaced. *See* NAC Br. 26-28. In that case, the Supreme Court considered whether an agreement by NFL teams to license their independently owned team trademarks under common, exclusive terms through the NFL constituted concerted action under Section 1. The Court found that the agreement could fall within Section 1 because it "depriv[ed] the marketplace of independent centers of decisionmaking," and "therefore of actual or potential competition." 560 U.S. at 197. But unlike NFL teams, each of which owned and controlled the rights to its own team trademarks that it ceded to the league, no bank independently had authority to control the terms of foreign, "off-us" Visa or MasterCard ATM transactions. Because there is no independent network rulemaking power that any one bank could cede to Visa or MasterCard, *American Needle* is inapposite.

Third, the post-IPO continuation of the ATM access fee rules does not indicate that the rules are the products of conspiracy. *See* NAC Br. 28-32. In fact, Visa and MasterCard will show that both before and after the IPOs, the ATM access fee rules have been procompetitive measures that advance each network's interests and cardholders' welfare, regardless who owned the networks or sat on the board of directors. Moreover, these types of rules were becoming standard in the industry when respectively adopted 20 years ago by Visa and MasterCard, who at the time were concededly small players and each merely reacting to competitive developments. No inference of conspiracy can properly be drawn from this context.

Fourth, NAC argues that anticompetitive agreements should be inferred from the fact that a consumer pays the same access fee at a given ATM terminal regardless whether his or her transaction is routed through one of Visa's or MasterCard's networks "or one of the many other

PIN networks." NAC Br. 23. But ATM operators set the same access fee for transactions on all networks because multiple ATM networks — not just Visa's and MasterCard's — have implemented a non-discrimination rule. Englebardt Decl. ¶ 24. Adoption of non-discrimination provisions by networks throughout the industry only indicates reasonableness and confirms their procompetitive benefits.

3. Visa and MasterCard Withdrew from Any Purported Pre-IPO Conspiracy

For the reasons discussed above, NAC cannot show that the ATM access fee rules were the product of any pre-IPO conspiracy. Yet even if NAC were able to establish that Visa and its member banks, or MasterCard and its member banks, developed ATM access fee rules through an unlawful conspiracy based on association form, Visa and MasterCard each withdrew from any conspiracy via their subsequent organizational restructurings. MasterCard conducted an IPO in 2006 and Visa conducted an IPO in 2008 through which any alleged bank control over the networks was terminated. Following the IPOs, Visa and MasterCard are now publicly owned and traded entities governed by boards consisting of independent directors, not executives of banks.[13] *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-MD-1720, 2008 WL 5082872, at *10 (E.D.N.Y. Nov. 25, 2008) (granting motion to dismiss Section 1 claim, in part because plaintiffs failed to allege facts demonstrating that banks controlled MasterCard after its IPO).

To withdraw from a conspiracy, there need only be "[a]ffirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-

[13] *See* Visa Inc., Prospectus (Form 424B4) 7, 32 (Mar. 18, 2008), *available at* http://www.sec.gov/Archives/edgar/data/1403161/000119312508060989/d424b4.htm; MasterCard Inc., Amendment No. 8 to Registration Statement (Form S-1/A) 23, 73, 111-14 (May 23, 2006), *available at* http://www.sec.gov/Archives/edgar/data/1141391/000119312506117887/ds1a.htm.

conspirators." *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 464-65 (1978). Although the D.C. Circuit concluded that plaintiffs' complaint alleged enough to overcome a dismissal motion, whether Visa's and MasterCard's respective IPOs were a withdrawal remains an open issue that plaintiffs do not (and cannot) refute with evidence. *Osborn*, 797 F.3d at 1068. The IPOs themselves were public and widely reported affirmative acts that removed the alleged structure and mechanism of the conspiracy in a way that was fundamentally inconsistent with the asserted object of the alleged conspiracies, *i.e.*, allegedly enabling the networks and banks to restrain trade by collectively restricting ATM access fee pricing. Because NAC has alleged a pre-IPO "structural conspiracy," the IPO restructurings therefore were more than the "formalistic distinctions" the Supreme Court cautioned against relying upon in *American Needle*. 560 U.S. at 191; *accord id.* at 195. The IPOs transformed Visa and MasterCard into independent corporations each acting in its own economic best interests. Accordingly, NAC cannot show that Visa or MasterCard is participating in an actionable Section 1 conspiracy based on banks' adherence to the ATM access fee rules.

D. NAC Has Not Adequately Established Injury-in-Fact

NAC's claims also are unlikely to succeed on the merits because NAC has not demonstrated an injury-in-fact caused by the challenged ATM access fee rules, as required to establish antitrust standing.

Antitrust standing "has more demanding requirements than Article III." *Klein v. Am. Land Title Ass'n*, 926 F. Supp. 2d 193, 198 (D.D.C. 2013), *aff'd*, 560 F. App'x 1 (D.C. Cir. 2014). To obtain relief under the antitrust laws, a plaintiff must prove conduct that results in an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick*, 429 U.S. at 489. Among other things, courts must determine whether plaintiff's alleged injury is too remote from the alleged misconduct to

confer standing. *Andrx Pharm., Inc. v. Biovail Corp. Int'l*, 256 F.3d 799, 806 (D.C. Cir. 2001). To assess remoteness, courts consider factors such as "the directness of the injury, whether the claim for damages is 'speculative,' the existence of more direct victims, the potential for duplicative recovery and the complexity of apportioning damages." *Id.* (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 542-45 (1983)).

Unlike at the pleading stage, where courts can determine standing based on complaint allegations, "when a plaintiff seeks a preliminary injunction, the plaintiff's burden to demonstrate standing will normally be no less than that required on a motion for summary judgment." *Food & Water Watch, Inc. v. Vilsack*, 79 F. Supp. 3d 174, 186 (D.D.C. 2015) (internal quotation marks omitted). And, as the D.C. Circuit stated in this case, "[o]n a motion for summary judgment by a defendant, the question is not whether the plaintiff has asserted a plausible theory of harm, but rather whether the plaintiff has offered sufficient evidence for a reasonable jury to conclude that its theory is correct." *Osborn*, 797 F.3d at 1065.

NAC does not satisfy this test. NAC's theory of injury is that, but for the challenged rules, ATM operators could use differential access fees to steer consumers to complete their ATM transactions over networks where interchange fees are higher, or network fees are lower, than in the Visa or MasterCard networks. Second Am. Compl. ¶¶ 1, 82, 85. According to NAC, "[e]ven the threat of differential pricing would drive competition among networks" to remit higher "net interchange" to the ATM operators — through higher interchange and lower network fees — and thereby improve ATM operator profitability. *Id.* ¶ 83. But nothing in the NAC declarations supports this theory.

1. NAC Offers No Evidence That Consumers Make Routing Decisions, Regardless of the Challenged Rules

NAC's theory of injury ultimately depends on an ability of ATM cardholders, in response to differential access fees, to route ATM transactions to networks that offer ATM operators higher "net interchange." But NAC's declarants, like its complaint, claim that independent ATM operators already have the ability to route transactions to the ATM operator's preferred, highest-paying network enabled by the card, even with the challenged rules in place. Myers Decl. ¶ 5 ("If a non-proprietary card is presented, Switch Commerce will attempt to route the transaction through the network that pays the highest revenue to the ISO or its affiliated ATM operator as permitted by network operating rules."); *see also* Second Am. Compl. ¶ 41. If the ATM operator itself already selects the highest-paying network available, it does not need to set differential surcharges in order to steer transactions to the network that allows it to maximize profits.

Moreover, the reality is that some networks have rules that provide for the card-issuing bank to choose the ATM network over which to route an ATM transaction made with the issuer's card. *See* Englebardt Decl. ¶ 10; *see also* Sachs Decl. ¶ 9. For example, MasterCard's rules provide the card-issuing banks with discretion to designate routing. Englebardt Decl. ¶ 10. If the card-issuing bank (which presumably has an incentive to pay *low* interchange) can determine how to route an ATM transaction, it is even more attenuated for NAC to argue that an ATM operator's effort to "steer" consumers at ATM terminals would make any difference at all.

2. NAC Offers No Evidence That the Ability To Charge Differential ATM Access Fees Will Lead to Higher Net Profits for ATM Operators

Because NAC does not demonstrate that cardholders have the ability at the ATM to choose the network over which a transaction is routed, NAC's theory of injury hinges on the supposed ability of ATM operators to offer discounts to persuade consumers successfully either to (1) demand that card-issuing banks add more expensive, higher-interchange networks to their

cards, which would expose those banks to paying higher interchange; or (2) move their deposit accounts to banks that offer their desired networks. Second Am. Compl. ¶ 79. As the D.C. Circuit acknowledged, this theory depends on a number of assumptions. *Osborn*, 797 F.3d at 1065. They include:

- Consumers must either request that their card-issuing banks add new networks or move their accounts to banks offering a broader array of networks on ATM cards.
- Then, although card-issuing banks *pay* interchange fees, they must be compelled by sufficient customer pressure to add *higher*-interchange networks to the cards of their account holders.
- Then, a plaintiff consumer must use the card with a new network at an ATM that transacts on that network.
- Then, the increased availability of higher-interchange networks and consumer transactions must cause the ATM operator to reduce ATM access fees for transactions over those networks.
- And then, any consumer savings from the reduced access fees must not be outweighed by higher fees charged to the consumer by his or her card-issuing bank, which, having added higher-interchange networks to its cards, would incur greater interchange costs as a result of transacting on those networks and thus would have incentives to increase the fees it charges its cardholders for using foreign ATMs.

Although the D.C. Circuit found that the allegations in NAC's complaint "pass muster for standing purposes at the pleading stage," *id.* at 1066, NAC offers no *evidence* to support this lengthy causal chain in its request for a preliminary injunction.

One of NAC's declarants makes the conclusory assertion — without citation or elaboration — that allowing ATM operators to charge differential access fees "would generate competitive pressure on networks to reduce network fees and would attract additional consumers and increase transactions at deployed ATMs." Myers Decl. ¶ 13. But NAC provides no evidence that consumers would demand new cards from banks, or would switch banks, to save a small amount on access fees for foreign ATM transactions. And that evidence is highly unlikely

to exist. A price-sensitive consumer can avoid access fees entirely by using her own bank's ATM, or carrying the card of a bank that reimburses its cardholders for access fees. It is implausible for NAC to claim that a customer who does not take those steps to avoid a $2 or $3 surcharge *entirely* would then pressure his bank — or even switch banks — so as to be able to pay an incrementally lower surcharge on networks favored by ATM operators.

Nor does NAC offer evidence that the card-issuing banks that *pay* interchange fees would choose to add *higher*-interchange networks to their cards based on consumer pressure, and that if they did, they would not also charge higher fees to consumers to compensate for paying higher interchange (which would counteract any consumer demand for new networks on their cards). Further, NAC does not even provide evidence that ATM operators in fact would lower ATM access fees if permitted to surcharge differentially, as opposed merely to raising Visa/Plus and MasterCard access fees by the $.20-$.30 necessary to recoup the purported differential caused by Visa's and MasterCard's lower net interchange fees.

In short, NAC fails to offer sufficient evidence of any injury-in-fact that could justify preliminary injunctive relief.

III. NEITHER THE BALANCE OF EQUITIES NOR THE PUBLIC INTEREST SUPPORTS GRANTING A PRELIMINARY INJUNCTION

Because NAC has not established either irreparable harm or a likelihood of success on the merits, the Court need not reach the last two preliminary injunction factors — *i.e.*, the balance of the equities and the public interest. *See, e.g.*, *Davenport v. Int'l Bhd. of Teamsters, AFL-CIO*, 166 F.3d 356, 367 (D.C. Cir. 1999) ("[B]ecause plaintiffs have demonstrated neither likelihood of success on the merits nor irreparable injury, the district court did not abuse its discretion in denying the motion for a preliminary injunction."). Nevertheless, NAC has not met

its burden of "clearly" demonstrating an entitlement to relief on the basis of either factor. *Ajilon*, 503 F. Supp. 2d at 361 n.4.

NAC argues that enjoining the challenged ATM access fee rules would give independent ATM operators additional pricing discretion, which in turn would allow those operators to operate more terminals profitably, thereby preserving ATM access in underbanked and disadvantaged communities. *See* NAC Br. 41-42. As discussed above, this argument assumes a causal connection between the challenged rules and independent ATM operators' financial performance, which NAC has failed to establish. *See supra* pp. 41-42. But even setting that aside, NAC's position that improving its own members' bottom lines will *indirectly benefit* their customers ignores that the ATM access fee rules *directly protect* those same customers.

The ATM access fee rules prevent ATM operators, like NAC's members, from charging higher prices to consumers when processing their transactions over Visa's or MasterCard's network. *See* Sachs Decl. ¶ 20; Englebardt Decl. ¶ 21. One of NAC's declarants candidly concedes that the rules ensure that ATM operators are "[u]nable to raise the surcharge on only Visa or MasterCard transactions." Powell Decl. ¶ 8. NAC's declarants make clear that, if an injunction were granted, they would do precisely what the rules prohibit: charge higher prices to ATM customers for transactions routed over Visa and MasterCard networks than for transactions routed over other networks.

Thus, according to NAC, a direct result of granting the requested injunction would be that consumers whose ATM cards complete transactions over the Visa or MasterCard network would have to pay higher access fees to NAC's members than would other consumers. And it is far from clear that independent ATM operators would reduce access fees for non-Visa/non-MasterCard transactions, rather than increase them for Visa/MasterCard transactions. Increasing fees would be a more direct way for operators to increase surcharge revenue, particularly as

surcharge rates have steadily increased in recent years. The higher prices charged to consumers using Visa- or MasterCard-branded ATM cards would also harm Visa and MasterCard, whose businesses depend on providing value to the cardholders who complete transactions over their networks. *See* Sachs Decl. ¶ 20; Englebardt Decl. ¶¶ 22-23.

The direct, negative effect of a preliminary injunction on consumers whose ATM transactions are processed over the Visa or MasterCard network, as well as on Visa and MasterCard themselves, outweighs NAC's speculative theory that allowing independent ATM operators to set differential prices could benefit underserved communities.

IV. NAC WOULD NEED TO POST A SUBSTANTIAL BOND IF A PRELIMINARY INJUNCTION WERE GRANTED

Under Federal Rule of Civil Procedure 65(c), "[t]he court may issue a preliminary injunction . . . only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined." This Rule both "assur[es] compensation of the defendant for the resulting losses if the injunction proves to have been wrongfully granted" and "forc[es] the plaintiff to consider the injury to be inflicted on its adversary in deciding whether to press ahead in its quest for a preliminary injunction," thereby deterring "flimsy" requests for preliminary injunctive relief. *Nat'l Kidney Patients Ass'n v. Sullivan*, 958 F.2d 1127, 1134 (D.C. Cir. 1992).

If preliminary injunctive relief is awarded here (which, for all the reasons above, it should not be), a substantial bond would be necessary to assure compensation of Visa and MasterCard for the harm resulting from allowing ATM operators to impose higher access fees on customers whose transactions are processed over their networks rather than other networks. This departure from the status quo, which has existed for almost 20 years, would result in significant financial and reputational harm to defendants by diminishing the value of their networks to cardholders.

NAC summarily states that it is "prepared to give security," but suggests that the bond be "nominal" without specifying any amount it is prepared to secure. Dkt. No. 60 ¶ 8. Following the approach that courts in this District have taken in other cases, Visa and MasterCard request that the parties be permitted to submit supplemental briefs on the appropriate amount of a bond only if the Court determines that a preliminary injunction is warranted. *See, e.g.*, *Ellipso, Inc. v. Mann*, No. CIV.A. 05-1186, 2005 WL 5298646, at *4 (D.D.C. Nov. 2, 2005); *Atl. Coast Airlines Holdings, Inc. v. Mesa Air Grp., Inc.*, No. CIV.A. 03-2198, 2003 WL 23274220, at *1 (D.D.C. Dec. 30, 2003).

CONCLUSION

For the foregoing reasons, NAC's motion for a preliminary injunction should be denied. A proposed order is attached.

March 24, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on March 24, 2016, I caused the foregoing Visa and MasterCard Defendants' Memorandum of Points and Authorities in Opposition to Plaintiff National ATM Council, Inc.'s Application for a Preliminary Injunction to be filed using the Court's CM/ECF system, which will send e-mail notification of that filing to counsel of record.

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