UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BARRY'S CUT RATE STORES INC.; DDMB, INC. d/b/a EMPORIUM ARCADE BAR; DDMB 2, LLC d/b/a EMPORIUM LOGAN SQUARE; BOSS DENTAL CARE; RUNCENTRAL, LLC; CMP CONSULTING SERV., INC.; TOWN KITCHEN, LLC d/b/a TOWN KITCHEN & BAR; GENERIC DEPOT 3, INC. d/b/a PRESCRIPTION DEPOT; and PUREONE, LLC d/b/a SALON PURE,

Plaintiffs,

v.

VISA, INC.; MASTERCARD INCORPORATED; MASTERCARD INTERNATIONAL INCORPORATED; BANK OF AMERICA, N.A.; BA MERCHANT SERVICES LLC (f/k/a DEFENDANT NATIONAL PROCESSING, INC.); BANK OF AMERICA CORPORATION; BARCLAYS BANK PLC; BARCLAYS BANK DELAWARE; BARCLAYS FINANCIAL CORP.; CAPITAL ONE BANK, (USA), N.A.; CAPITAL ONE F.S.B.; CAPITAL ONE FINANCIAL CORPORATION; CHASE BANK USA, N.A.; CHASE MANHATTAN BANK USA, N.A.; CHASE PAYMENTECH SOLUTIONS, LLC; JPMORGAN CHASE BANK, N.A.; JPMORGAN CHASE & CO.; CITIBANK (SOUTH DAKOTA), N.A.; CITIBANK N.A.; CITIGROUP, INC.; CITICORP; and WELLS FARGO & COMPANY,

Defendants.

MEMORANDUM & ORDER
05-MD-1720 (MKB)

MARGO K. BRODIE, United States District Judge:

On May 4, 2021, the putative Rule 23(b)(2) injunctive relief class plaintiffs ("Plaintiffs" or "Rule 23(b)(2) Class Plaintiffs")[1] filed their fully briefed motion for certification of a Rule 23(b)(2) class in this multi-district litigation ("MDL"). (Pls.' Mot. for Class Certification, Docket Entry No. 8444.) The National Retail Federation (the "NRF") and the Retail Industry Leaders Association (the "RILA") (together, the "Merchant Trade Groups") and Walmart, Inc., (collectively, the "Proposed Intervenors"), move to intervene pursuant to Rule 24 of the Federal Rules of Civil Procedure for the limited purpose of opposing the Plaintiffs' motion for class certification. (Walmart, Inc. Mot. to Intervene ("Walmart Mot."), Docket Entry No. 8463; Walmart, Inc. Mem. in Supp. of Walmart Mot. ("Walmart Mem."), Docket Entry No. 8464; Merchant Trade Groups Mot. to Intervene ("Merchant Trade Groups Mot."), Docket Entry No. 8466; Merchant Trade Groups Mem. in Supp. of Merchant Trade Groups Mot. ("Merchant Trade Groups Mem."), Docket Entry No. 8467.)

For the reasons set forth below, the Court grants the motions for permissive intervention.

I. Background

The Court assumes familiarity with the facts and extensive procedural history as set forth in its prior decisions. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-MD-1720, 2019 WL 6875472 (E.D.N.Y. Dec. 16, 2019); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-MD-1720, 2019 WL 6888488, (E.D.N.Y. Dec. 16, 2019); *Barry's Cut Rate Stores Inc. v. Visa, Inc.*, No. 05-MD-1720, 2019 WL

[1] Documents and filings refer to the Rule 23(b)(2) action in a variety of ways. In the MDL, the Rule 23(b)(2) action is proceeding as *Barry's Cut Rate Stores Inc. v. Visa, Inc.*, No. 05-MD-1720. In addition, the action is sometimes referred to as "*Barry's*" and the class is sometimes referred to as the "equitable relief class." For the purposes of consistency across opinions, the Court uses the terms "Rule 23(b)(2)" and "injunctive relief" to refer to the action, as opposed to "*Barry's*" and "equitable relief."

7584728 (E.D.N.Y. Nov. 20, 2019). The Court therefore provides only a summary of the relevant facts and procedural history.

a. Plaintiffs' class certification motion

On May 4, 2021, Plaintiffs filed their fully briefed motion for certification of a Rule 23(b)(2) class in this multi-district litigation. (Pls.' Mot. for Class Certification; Pls.' Mem. in Supp. of Pls.' Mot. for Class Certification ("Pls.' Mem."), Docket Entry No. 8446.) Plaintiffs seek certification of a Rule 23(b)(2) class defined as:

> All persons, businesses, and other entities (referred to [therein] as "Merchants") that accept Visa and/or Mastercard Credit and/or Debit cards in the United States at any time during the period between December 18, 2020 and [eight] years after the date of entry of Final Judgment in this case.

(Pls.' Mem. 5.) Plaintiffs request that the Court certify the class without permitting any opt-out rights. (*Id.* at 6.)

The Direct Action Plaintiffs[2] oppose certification of a mandatory class, arguing that certifying a mandatory class would "threaten the individualized monetary claims of class members" who are pursuing damages claims should the injunctive relief class lose on liability issues, and would "confiscate" claims for injunctive relief and "turn them over to parties with different interests." (Direct Action Pls.' Opp'n to Pls.' Mot. for Class Certification ("Direct Action Pls.' Class Certification Opp'n") 1–2, Docket Entry No. 8450.) The Direct Action Plaintiffs further argue that Plaintiffs will "seek to place the commercial agreements of large

[2] For purposes of this Memorandum and Order, "Direct Action Plaintiffs" collectively refers to the Target Plaintiffs, the 7-Eleven Plaintiffs, and Home Depot. The Target Plaintiffs and 7-Eleven Plaintiffs in turn are comprised of many other merchants, as described in their respective complaints. (*See* Target Pls.' Second Am. Compl., Docket Entry No. 7117; Sixth Am. Compl., *7-Eleven, Inc., v. Visa Inc.*, No. 13-CV-5746 (E.D.N.Y. Apr. 30, 2020), Docket Entry No. 183; *see also* Decl. of Jeffrey I. Shinder in Supp. of Direct Action Pls.' Class Certification Opp'n ¶ 3, Docket Entry No. 8451 (listing the Direct Action Plaintiffs).)

merchants (like the Direct Action Plaintiffs) with Defendants under ongoing scrutiny by the Court" which is adverse to the interests of large merchants. (*Id.* at 2.) The Direct Action Plaintiffs argue that the Court should provide an opt-out right should an injunctive relief class be certified. (*Id.* at 3.) The Grubhub Plaintiffs,[3] who opted out of the Rule 23(b)(3) settlement, also oppose certification of a mandatory class, arguing that certification of a mandatory class would hold them to the "same restrictions imposed on the entities that voluntarily accepted the Rule 23(b)(3) monetary settlement and its limitations on their right to seek injunctive relief." (Grubhub Pls.' Mem. in Opp'n to Pls.' Mot. for Class Certification ("Grubhub Pls.' Class Certification Opp'n") 1–2, Docket Entry No. 8453.) In addition, the Grubhub Plaintiffs argue that the differences between the large companies that make up the Grubhub Plaintiffs and the "small, single-location businesses that pay only a fraction of the interchange fees paid by the Grubhub Plaintiffs" which make up both the class representatives and the vast majority of the putative class give rise to different interests and therefore different remedies and relief. (*Id.*)

Defendants do not oppose class certification as Plaintiffs define it but argue that the Court "should not certify the Rule 23(b)(2) class and allow opt-outs or carve outs from the class, or exclude the future merchants from the class as the opponents of class certification . . . suggest." (Defs.' Reply Mem. to Opp'n to Pls.' Mot. for Class Certification ("Defs.' Class Certification Opp'n Reply") 1, Docket Entry No. 8460.)

b. Merchant Trade Groups' involvement in the litigation

The Merchant Trade Groups state that they are nonprofit associations that have merchant members that "account for over $1.5 trillion in annual retail sales, millions of American jobs, and

[3] "Grubhub Plaintiffs" refers to the seven companies described in the Grubhub Plaintiffs' operative Complaint. (*See* Grubhub Pls.' Am. Compl. ¶ 1, Docket Entry No. 7906.)

more than 100,000 store locations nationwide." (Merchant Trade Groups Mem. 1.) The Merchant Trade Groups are putative class members because they "accept Visa and Mastercard branded cards as payment for a wide range of services, such as payment for membership dues, conference registrations, and a wide variety of other services that they provide." (*Id.*)

In 2013, the Merchant Trade Groups were among the objectors and opt-outs to the settlement for an injunctive relief class and a monetary damages relief class (the "2013 Settlement Agreement"),[4] which the Second Circuit vacated on June 30, 2016, and remanded to this Court. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207, 213, 223 (E.D.N.Y. 2013) ("*Interchange Fees I*"), *rev'd and vacated*, 827 F.3d 223 (2d Cir. 2016) ("*Interchange Fees II*"). In 2014, the Merchant Trade Groups submitted one of the merchant briefs opposing the 2013 Settlement Agreement to the Second Circuit. (*See* Merchant Trade Groups Appellate Br., annexed to Greenberger Decl. as Ex. 4, Docket Entry No. 8468-4.)

After the Second Circuit's decision in 2016, the Merchant Trade Groups requested that the Court reconsider class representation and instead appoint independent counsel "who are willing to reconsider, and, as appropriate, deviate from[] prior counsel's (conflicted) decisions about prospective relief — such as the decision to seek certification of a mandatory (b)(2) class and the decision to focus on meaningless surcharging relief." (Merchant Trade Groups Mem. in Supp. Appointment of Kirby/Goldstein 1–2, annexed to Greenberger Decl. as Ex. 5, Docket Entry No. 8468-5.)

[4] (*See* RILA Obj. to 2013 Settlement Agreement, annexed to Decl. of Debra L. Greenberger in Supp. Merchant Trade Groups Mot. ("Greenberger Decl.") as Ex. 2, Docket Entry No. 8468-2; NRF Obj. to 2013 Settlement Agreement, annexed to Greenberger Decl. as Ex. 3, Docket Entry No. 8468-3.)

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