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August 4, 2021

The Honorable Magistrate Judge Vera M. Scanlon
U.S. District Court, Eastern District of New York
225 Cadman Plaza East 1214 South
Brooklyn, NY 11201

Re: In re Payment Card Interchange Fee and Merchant Discount Litigation, 05-md-1720 (E.D.N.Y.) (MKB) (VMS): Motion to Compel Non-Party Production

Dear Magistrate Judge Scanlon:

The Grubhub Plaintiffs move to compel non-party Klarna, Inc. (“Klarna”) to produce documents in response to a subpoena. The Grubhub Plaintiffs have, in good faith, sought to resolve the parties’ disagreements, but without success. Accordingly, the Grubhub Plaintiffs seek the intervention of this Court.

Klarna offers installment payment products that allow users to make purchases and pay what is owed over time. (Broz Decl. ¶ 2.) Defendants have previously argued that the existence of such alternative payment products is evidence of Defendants’ lack of market power. (*Id.* ¶ 3.) Klarna also leverages Visa’s Honor All Cards rule, which is a focus of the Grubhub Plaintiffs’ case, by offering a “one-time” Visa card to allow users to shop at merchants that have chosen not to accept Klarna as a payment form. (*Id.* ¶ 4.) In addition, the fact that a purported “alternative” payment product provides users with a Visa card under certain circumstances suggests that Visa may have taken steps to suppress or restrain potential competition. (*Id.*)

The subpoena, which includes twelve document requests, was served on May 13, 2021. (Broz Decl. ¶ 5, Ex. A.) On May 27, Klarna’s counsel made nine general objections, including relevance and burdensomeness, and said “Klarna will not produce any documents.” (*Id.* ¶ 6 & Ex. B.) On May 30, counsel for the Grubhub Plaintiffs asked for a meet and confer, which occurred on June 10, by telephone, without resolving the dispute. (*Id.* ¶¶ 7-8 & Ex. C.)

Over the next two months, the Grubhub Plaintiffs sought to address the relevance and burdensomeness objections. (*Id.* ¶¶ 9, 11, 13 & Exs. D, F, H.) On July 2, Klarna’s counsel stated “[w]e certainly agree that whether the market sees new entrants is relevant, and there is no dispute that Klarna is such a new entrant,” and added that “the honor all cards rule is certainly relevant” and “Klarna understands that its place in the payments market might mean that it has

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some relevant documents.” (*Id.* ¶ 10 & Ex. E.) The letter then asserted that the subpoena was “broad” and asked for “much greater particularity.” (*Id.*) With relevance acknowledged, the Grubhub Plaintiffs asked Klarna to identify “what documents and information it is willing to produce” and to describe “the burden any broader production would impose in sufficient detail for us to evaluate that burden and discuss how it might be limited.” (*Id.* ¶ 11 & Ex. F.) Klarna then denied it conceded that “some of the documents sought in the subpoena are relevant” and said that asking it to support its claim of burdensomeness—two months *after* the subpoena was served—was “simply premature.” (*Id.* ¶ 12 & Ex. G.) On July 19, the Grubhub Plaintiffs explained which documents would be responsive to each request, but Klarna responded that, despite the explanations, it “does not understand the importance of any of the documents sought by the Requests.” (*Id.* ¶¶ 13-14 & Exs. H & I.) Klarna still has not produced any documents. (*Id.* ¶ 15.)

1. *Klarna has waived any objections not specifically raised in its May 27 letter*

A party commanded to produce documents may serve written objections to the requests no later than 14 days after the subpoena is served. *See* Fed. R. Civ. P. 45(d)(2)(B). The subpoenaed entity must make specific objections to particular subpoena specifications. *See Rinaldi v. Nice*, No. 19-CV-424, 2020 U.S. Dist. LEXIS 133034, at *14 (S.D.N.Y. July 27, 2020). This specificity requirement is important, because it prevents the meet-and-confer process from becoming an endless game of whack-a-mole.

Klarna’s May 27 letter—its only communication within the 14-day period—made only general objections that, for the most part, did not identify specific requests. (Broz Decl. Ex. B.) Items 4-9 of Klarna’s rote objections do not mention *any* specific request, and in fact *could not apply* to each request. For instance, the attorney-client privilege and work product objection could not apply to Requests 1, 2, and 3, for agreements with Visa, Mastercard, and issuing banks. The May 27 letter also does not mention—much less object to—Request 12, which seeks documents Klarna produced to the Department of Justice during its investigation of the proposed merger of Visa and Plaid. Klarna thus has waived any objection to Request 12 and is limited to only its relevance and burdensomeness objections set forth in its first, second, and third general objections. *See Rinaldi*, 2020 U.S. Dist. LEXIS 133034, at *14 (rejecting “blanket general objections” to subpoena on bases of relevancy and overbreadth; subpoenaed party “waived them because it did not make a specific objection(s) to any particular request(s)”).

2. *Klarna’s relevance objections are without merit*

Klarna makes two cursory relevance objections that apply only to Requests 1, 2, 3, 4, 7, 10, and 11. (Broz Decl. Ex. B at 1-2.) First, it states that “Requests 2, 4, 7, 10 and 11 seek documents that have nothing to do with any of the parties to the case.” (*Id.*) Second, it states that Requests 1 and 3 “fare no better” because Klarna “fails to see how any agreement

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Klarna might have with a network has anything to do with the networks' allegedly anticompetitive behavior vis-à-vis the Grubhub Plaintiffs." (*Id.*)

Discovery is not limited to documents involving named parties. *See* Fed. R. Civ. P. 26(b). Klarna's objections also make no sense in the context of this case. Requests 2 and 4 seek agreements between Klarna and issuing banks, who are members of Defendants' networks and participants in the anticompetitive restraints challenged by the Grubhub Plaintiffs. Klarna's agreements with such banks are relevant to discovery of admissible evidence about the impact of the challenged rules. Requests 1, 3, 7, 10, and 11 seek information about Klarna's agreements with Defendants, its interaction with merchants, and its operations; such information is relevant to assessing whether Defendants have acted to avoid competition from Klarna, whether Klarna should be included in the relevant market, whether Klarna has encountered barriers to entry, and other issues that are relevant to the claims and defenses in this case. *See* Fed. R. Civ. P. 26(b)(1). These are precisely the kinds of issues and topics that caused Klarna's counsel, in her July 2 letter, to concede that the Klarna possesses "some relevant documents." (Broz Decl. Ex. E.)

3. *Klarna's burdensomeness and overbreadth objections are without merit*

Klarna's first and second general objections—which apply only to Requests 1, 3, 5, 6, 7, 8, and 9—allege overbreadth and burdensomeness. (Broz Dec. Ex. B.) Klarna objects to producing agreements with Visa and Mastercard (Requests 1, 3, 8, and 9) solely on the ground that such documents are in the possession of the networks. (*Id.*) Parties issuing subpoenas are not limited to obtaining documents from only one source. *See Palm Bay Int'l, Inc. v. Marchesi Di Barolo S.P.A.*, No. CV 09-601, 2009 U.S. Dist. LEXIS 104020, at *28 (E.D.N.Y. Nov. 9, 2009) (duplicativeness objection "does not obviate the obligation to produce" documents because parties have "the right to obtain the documents from more than one source"). Klarna offers *no evidence whatsoever* that producing the documents these requests seek would impose an unreasonable burden—or indeed, any burden at all—and ignores that the requests also seek *internal* Klarna documents. The same response applies to the objection that Requests 5 and 6 seek communications between Klarna and the Grubhub Plaintiffs.

Klarna also contends that Request 7 is burdensome because it could implicate communications with "millions of Merchants that do not have an agreement with Klarna." (Broz Decl. Ex. B.) Klarna offers no evidence that it has communicated with "millions" of merchants, so its objection is wholly hypothetical. In any event, the Grubhub Plaintiffs responded to this claim by asking that Klarna simply "produce its typical or template response to a merchant who has written Klarna and declined to enter into an acceptance agreement" and "any employee training on how to respond to merchants that decline to enter into an agreement with Klarna." (*Id.* Ex. H.) There is no reason to suspect that such limited requests are burdensome.

In short, the objected-to requests are relevant, and there is no basis for claims of unfair burden or overbreadth. This Court should order Klarna to produce responsive documents.

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Respectfully submitted,

/s/ Alycia N. Broz

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cc: Counsel of Record (via ECF)