UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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.; 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:

A putative Rule 23(b)(2) class of millions of merchants commenced this antitrust action under the Clayton Act, 15 U.S.C. § 16, to prevent and restrain violations of the Sherman Act, 15 U.S.C. §§ 1 and 2, and the California Cartwright Act, Cal. Bus. & Prof. Code § 16700 *et seq.*, seeking equitable relief against Defendants Visa, Inc. ("Visa") and Mastercard[1] networks (together, the "Network Defendants"), as well as various issuing and acquiring banks ("Bank Defendants").[2] *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*); (Equitable Relief Class Action Compl ("Compl."), Docket Entry No. 6892.) Plaintiffs seek to represent a class of merchants that accept Visa- and Mastercard-branded cards as forms of payment, and they allege that Defendants engage in anticompetitive conduct that harms competition and imposes supracompetitive and collectively fixed fees on the merchants. (Compl. ¶ 4.)

Currently before the Court is the putative Rule 23(b)(2) equitable relief class plaintiffs' ("Plaintiffs" or "Rule 23(b)(2) Class Plaintiffs")[3] motion for class certification, seeking to certify

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[1] Defendants Mastercard Incorporated and Mastercard International Incorporated are collectively referred to as "Mastercard."

[2] Defendants 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.; ChasePaymentech Solutions, LLC; JP Morgan Chase Bank, N.A.; JPMorgan Chase & Co.; Citibank (South Dakota), N.A.; Citibank N.A.; Citigroup, Inc.; Citicorp; and Wells Fargo & Company are collectively referred to as the "Bank Defendants."

[3] Documents and filings refer to the Rule 23(b)(2) action in a variety of ways. In the multidistrict litigation ("MDL"), the Rule 23(b)(2) action has proceeded as *Barry's Cut Rate*

a class under Rule 23(a) and Rule 23(b)(2) of the Federal Rules of Civil Procedure. (*See* Pls.' Mot. for Class Certification ("Pls.' Mot."), Docket Entry No. 8444; Pls.' Mem. in Supp. of Pls.' Mot. ("Pls.' Mem."), Docket Entry No. 8447.) Direct Action Plaintiffs,[4] Grubhub Plaintiffs,[5] and Intervenors the Merchant Trade Groups and Walmart, Inc.[6] oppose certification of a mandatory class.[7] Defendants do not oppose class certification but argue that the class should be

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Stores Inc. v. Visa, Inc., No. 05-MD-1720. In addition, the action has sometimes been referred to as "*Barry's*" and the class referred to as the "equitable relief class" or the "injunctive relief class." Because the Rule 23(b)(2) Plaintiffs seek both declaratory and injunctive relief, and because Barry's Cut Rate Stores Inc. is no longer a party to this action, the Court uses the terms "Rule 23(b)(2)" and "equitable relief" to refer to the action, as opposed to "*Barry's*" and "injunctive relief" action.

[4] 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. 180; (*see also* Decl. of Jeffrey I. Shinder in Supp. of Direct Action Pls.' Class Certification Opp'n ("Shinder Decl.") ¶ 3, Docket Entry No. 8451 (listing the Direct Action Plaintiffs)).

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

[6] On June 28, 2021, the Court granted Intervenors' motion for permissive intervention pursuant to Rule 24 of the Federal Rules of Civil Procedure for the limited purpose of opposing the Rule 23(b)(2) Class Plaintiffs' motion for class certification. (*See* Mem. and Order dated June 28, 2021, Docket Entry No. 8605.) "Merchant Trade Groups" refers to the National Retail Federation (the "NRF") and the Retail Industry Leaders Association (the "RILA"). (*See id.* at 2.)

[7] (*See* Direct Action Pls.' Mem. in Opp'n to Pls.' Mot. ("Direct Action Pls.' Opp'n"), Docket Entry No. 8450; Grubhub Pls.' Mem. in Opp'n to Pls.' Mot. ("Grubhub Pls.' Opp'n"), Docket Entry No. 8454; Walmart's Mem. in Opp'n to Pls.' Mot. ("Walmart's Opp'n"), Docket Entry No. 8465; Merchant Trade Groups Mem. in Opp'n to Pls.' Mot. ("Merchant Trade Groups' Opp'n"), Docket Entry No. 8468-1.) The CenturyLink Plaintiffs, as described in their respective complaint, (*see* CenturyLink Pls.' Second Am. Compl., Docket Entry No. 7874), join in the Direct Action Plaintiffs' opposition to Plaintiffs' motion, (*see* CenturyLink Pls.' Notice of Joinder, Docket Entry No. 8475).

certified without opt-out rights. (*See* Defs.' Reply to Class Certification Opp'n ("Defs.' Reply"), Docket Entry No. 8460.)

For the reasons set forth below, the Court grants Plaintiffs' motion for class certification in part and denies it in part.

I. Background

The Court assumes familiarity with the facts and extensive procedural history as set forth in prior decisions. *See Interchange Fees II*, 827 F.3d at 223; *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.* (*Interchange Fees IV)*, No. 05-MD-1720, 2019 WL 6875472 (E.D.N.Y. Dec. 16, 2019); *Barry's Cut Rate Stores Inc. v. Visa, Inc.*, No. 05-MD-1720, 2019 WL 7584728 (E.D.N.Y. Nov. 20, 2019); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.* (*Interchange Fees III*), 330 F.R.D. 11 (E.D.N.Y. 2019); *Interchange Fees I*, 986 F. Supp. 2d at 213; (*see also* Compl.). The Court therefore provides only a summary of the relevant facts and procedural history.

a. Prior settlement approval and class certification

On November 27, 2012, Judge John Gleeson granted preliminary approval of a jointly submitted class settlement agreement (the "2013 Settlement Agreement"). *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-MD-1720, 2012 WL 12929536, at *1 (E.D.N.Y. Nov. 27, 2012). Judge Gleeson also provisionally certified two separate classes for settlement purposes only: (1) a mandatory Rule 23(b)(2) settlement class seeking equitable relief, from which class members could not opt out, and (2) a Rule 23(b)(3) class seeking damages, from which class members could opt out.[8] *See id.* at *1–2. After issuance of notice to the class

[8] Under Rule 23, members of a class certified under Rule 23(b)(3) are afforded "opt-out" rights, or the right to exclude themselves from the class. Fed. R. Civ. P. 23(c)(2)(B)(v).

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