**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.

MDL No. 1720

Case No: 1: 05-md-01720-MKB-VMS

**MERCHANT TRADE GROUPS' SUPPLEMENTAL OPPOSITION TO EQUITABLE RELIEF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

Having been permitted by the Court on July 6, 2021 to intervene as parties, access confidential documents, and supplement their prior briefing accordingly (Dkt. 8605), National Retail Federation ("NRF") and the Retail Industry Leaders Association ("RILA") (collectively "Merchant Trade Groups") submit this supplemental brief opposing Equitable Relief Plaintiffs' ("ERPs") motion for class certification under Federal Rule of Civil Procedure 23(b)(2) as proposed by ERPs. This brief supplements and incorporates Merchant Trade Groups' prior memoranda. *See* Merchant Trade Grps.' Mem. of Law in Opp'n to ERPs' Mot. for Class Cert. as Proposed (Mar. 26, 2021), Dkt. 8468-1 (attached as Ex. 1); Merchant Trade Grps.' Resp. to Defs.' and ERPs' Reply in Resp. to Opp'ns to Class Cert. (May 14, 2021), Dkt. 8479 (attached as Ex. 2).

**ARGUMENT**

Merchants should be permitted to opt out of any class certified under Rule 23(b)(2) and future merchants should not be included in any certified class, as Merchant Trade Groups have detailed in prior briefing (*see* Exs. 1 and 2). A class of millions of merchants should not be bound to a litigation or settlement strategy dictated by the handful of merchants that make up ERPs given, *inter alia*, differences between ERPs and other merchants regarding which of Defendants' anticompetitive restraints pose the gravest harms to a functioning payments market and, accordingly, what forms of relief could meaningfully address those restraints. ERPs' unredacted briefing further supports Merchant Trade Groups' arguments that ERPs' priorities in this case do not align with those of Merchant Trade Groups. Merchant Trade Groups, and other merchants, should have the right to decide not to be represented by ERPs.

As Merchant Trade Groups pointed out in their initial opposition to ERPs' motion for class certification, ERPs have focused on Defendants' no-surcharge rules. Merchant Trade Groups and other class members, in contrast, view Defendants' Honor-all-Cards ("HAC") and

default interchange rules as the primary harms. Dkt. 8468-1 at 10–11. Until merchants have a meaningful ability to negotiate payment card acceptance with banks individually (rather than collectively through Visa and Mastercard) and gain the ability to reject issuers' high-interchange-fee cards—such as travel rewards cards—at the point of sale and negotiate interchange fees without pre-set defaults, Defendants will face no meaningful downward pressure on ever-rising interchange fees, as Merchant Trade Groups previously detailed. *See* Dkt. 8468-1 at 11 ("Defendants' antitrust violations cannot be remediated for Merchant Trade Groups or the merchant community more broadly unless the Honor-all-Cards and default interchange rules are eliminated.").

Surcharging alone will not meaningfully affect inflated interchange rates because surcharging is illegal in some states, variously regulated in others, and surcharging is unlikely to become widespread anywhere. Besides, surcharging relief could not, alone, inject competition into the payments market as it only passes the costs of Defendants' anti-competitive conduct onto consumers. Merchant Trade Groups' views are in accord with the substantial evidence in the record demonstrating that experts and the merchant community view relief from Defendants' Honor-all-Cards rules and default interchange fees as crucial—these are the core restraints that allow Visa and Mastercard to cartelize the issuing banks, who have agreed to not compete for merchant acceptance. Yet ERPs' submissions ignore this fulsome evidence.

ERPs claimed that Merchant Trade Groups were "wildly speculat[ing]" about ERPs' priorities. Dkt. 8470 at 1, 10–11. While ERPs' redacted briefing alone evidenced that Merchant Trade Groups' concerns were well grounded,[1] ERPs' unredacted briefing and

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supporting exhibits underscore that ERPs are misaligned with Merchant Trade Groups in the anti-competitive conduct they prioritize challenging and concomitant relief they seek. ERPs focus is on Defendants' anti-surcharging rules—notably, the only rules that Defendants were amenable to altering in the prior (rejected) injunctive settlement.

Given this evident misalignment (among other concerns detailed in prior briefing), Merchant Trade Groups should not be bound by any settlement reached between ERPs and Defendants; nor should they be bound by any judgment reached through litigation shaped by ERPs' overly-narrow view of the problems with the payments market. The very existence of multiple different potential injunctive remedies rather than a single injunction that would cure the antitrust violation demonstrates that a mandatory Rule 23(b)(2) class should not be certified, particularly where ERPs' desired relief—surcharging—is unavailable to the many merchants operating in states that ban the practice. While ERPs are free to focus on surcharging, though it is far from the core of the anti-competitive conduct that distorts the payments market, merchants—including merchants who do not yet exist—should not be bound to be represented by ERPs and the choices made by their counsel. *See* Dkt. 8468-1 at 10–11.

[redacted]

**ERPs' Unredacted Expert Reports and Briefing Prioritize Surcharging, Despite Ample Evidence that Remedying Honor-all-Cards and Default Interchange Fees Is Crucial**

Defendants' Honor-all-Cards and default interchange rules are at the core of their anticompetitive behavior and at the core of the relief Merchant Trade Groups—as well as other merchants and experts—view as meaningful. As the Direct Action Plaintiffs (DAPs) detailed, citing a wealth of record evidence, "[t]he HAC Rules prevent merchants from using competitive forces to negotiate with issuing banks for lower acceptance fees." Dkt. 8329 ¶ 105 ("DAPs' 56.1 Statement") (citing depositions of merchants describing the negative impact of the Honor-all-Cards rules on their businesses). "Although merchants would prefer to negotiate with issuers over the acceptance of payment cards, they are unable to do so because of the HAC Rules." *Id.* ¶ 104 (citing additional testimony as to the detrimental effects of Honor-all-Cards). The DAPs' experts, Professor Jerry Hausman and Dr. Robert Harris, concluded that Honor-all-Cards rules are key to Defendants' ability to charge supracompetitive prices. *Id.* ¶ 167. Because of the Honor-all-Cards rules, "merchants have no bargaining power," and "competition [therefore] occurs only on the cardholder side of the platform." *Id.* ¶ 173 (citing Dr. Harris's and Professor Hausman's reports discussing the drastic anticompetitive effects of Honor-all-Cards).

Additionally, merchants as well as experts have testified that Defendants' default interchange rules are anticompetitive and extremely costly to merchants, as "[p]ayment card fees make up one of the largest categories of costs for merchants." *Id.* ¶ 110 (citing numerous merchants' testimony); *see also id.* ¶ 104 (citing testimony from merchants stating that default interchange fees block their ability to negotiate fees); *id.* ¶ 109 ("Because the HAC Rules negate any economic incentive for issuers to negotiate with merchants, the 'Default' rates published by Visa and Mastercard become the actual interchange rates 'for almost all Visa and Mastercard transactions'" (quoting Hausman Report)).

But ERPs ignored this body of evidence about the harms to merchants from Honor-all-Cards and default interchange and instead focused on Defendants' no-surcharging rules. Evidencing that ERPs' focus is not aligned with much of the merchant community's, ERPs' unredacted class certification brief cites no evidence about the merchant community's most widespread concerns—the Honor-all-Cards and Default Interchange rules.[2] One ERP even revealed that it is not personally interested in HAC at all.[3] This stands in stark contrast to the interests of Merchant Trade Groups and the broader merchant community.

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It is troubling that ERPs focus on the very relief—surcharging—that Defendants have already made clear they are willing to offer in a settlement, as evidenced by the 2013 Rule 23(b)(2) settlement in this case, particularly where that is *not* the relief most meaningful to the merchant community. *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 827 F.3d 223, 230, 238 (2d Cir. 2016).

Moreover, surcharging is (at best) "less valuable for any merchant that operates . . . [in] states that ban surcharging," as the Second Circuit recognized. *Id.* at 238. And, even when merchants are permitted to surcharge, they rarely do so because surcharging is unpopular with customers (online airline bookings are a rare example of merchants imposing surcharges, likely because consumers have few alternatives). That ERPs prioritize surcharging though it has little to no value to merchants in states banning surcharging and is unpopular with merchants nationwide demonstrates that they seek a rules change that will *not* "provide relief to each member of the class," as the Supreme Court has made clear is required for mandatory classes. Dkt. 8468-1 at 15 (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360–61 (2011)).

ERPs' focus on surcharging to the exclusion of relief that is more valuable to the merchant community writ large and, particularly, merchants in no-surcharging states, extends beyond their brief to their experts' reports. ERPs submitted three expert reports, two in support of their argument for Defendants' liability, Ex. 1 to Eisler Decl., Dkt. 8448 ("Carlton Rep."); Ex. 2 to Eisler Decl., Dkt. 8448 ("Stiglitz Rep."); and one in support of their argument for class certification under Federal Rule of Civil Procedure 23(b)(2), Ex. 3 to Eisler Decl., Dkt. 8448 ("Leffler Rep."). All three expert reports focus on Defendants' no-surcharging rules—both in their analyses of Defendants' liability and in their recommended injunctive relief—and give short shrift to Defendants' Honor-all-Cards and default interchange rules, which are central to

Merchant Trade Groups' concerns with Defendants' policies and are focused on the core problem—a system where banks have no incentives to compete against each other for merchants' business.

ERPs' first liability expert, Dr. Dennis Carlton, summarizes the anticompetitive effects of Defendants' various rules in Section III of his report. Carlton Rep. ¶¶ 38–73. His analysis focuses almost entirely on steering practices like surcharging and discounting. Dr. Carlton spends considerable space on the ways Defendants' anti-surcharging rules in particular restrain competition, providing numerous examples. *Id.* ¶¶ 51–59. Yet Dr. Carlton does not mention Defendants' Honor-all-Cards rule a single time in his Section III, which described the anticompetitive effects of Defendants' rules, indicating that he does not view the Honor-all-Cards rule as central to Defendants' liability. While he does briefly mention the anticompetitive effects of Defendants' default interchange fees, he spends only two paragraphs on them and offers no examples. *Id.* ¶¶ 60–61.

Dr. Carlton similarly prioritizes surcharging in his recommended relief. He recommends that Defendants' prohibitions on surcharging and other steering methods be eliminated entirely and permanently.[4] *Id.* ¶¶ 8, 112–16. But he only recommends "relaxing" the Honor-all-Cards rule, and only in states that prohibit surcharging by law.[5] *Id.* ¶¶ 8, 122. Dr. Carlton does not recommend any alteration of default interchange rules or fees at all.

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ERPs' second liability expert, Dr. Joseph Stiglitz, recommends outright elimination of the rule against surcharging, which he calls the "No-Price rule," as well as of other steering rules.[6] Stiglitz Rep. ¶ 130. But he downplays the importance of the Honor-all-Cards rule and the default interchange fee by comparison. Like Dr. Carlton, Dr. Stiglitz recommends altering the Honor-all-Cards rule only in states that prohibit surcharging.[7] *Id.* ¶ 134. As to default interchange, Dr. Stiglitz recommends only eliminating the default interchange fee for large banks, defined as banks with assets over $10 billion. *Id.* ¶ 137.

ERPs' expert on class certification, Dr. Keith Leffler, follows the liability experts' leads and focuses considerably more attention on Defendants' no-surcharging rules than other restraints. Leffler Rep. ¶¶ 25–37. He also notes that large merchants are positioned differently than small merchants with respect to default interchange fees and their relationships with Defendants. *Id.* ¶ 53. This is further evidence that merchants' interests are not unitary and the handful of very small merchants who constitute the ERPs should not "control the legal destiny of the entire 20 million plus class," as Merchant Trade Groups previously argued. Dkt. 8468-1 at 13–14.

ERPs and their experts have thus made clear that their focus, in terms of both liability and injunctive relief sought, is on Defendants' surcharging rules, and not on restraints crucial to other merchants, such as the Honor-all-Cards and default interchange rules. This focus has and surely will continue to drive their litigation and settlement strategy. They plainly do not

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share the interests of all absent class members, including Merchant Trade Groups, who are much more concerned about Defendants' Honor-all-Cards and default interchange restraints. The merchant community should not be bound by the decisions of the ERPs without the ability to weigh these potentially conflicting interests and decide whether to opt out.

**CONCLUSION**

For the reasons above, and in Merchant Trade Groups' prior memoranda of law in opposition to class certification as proposed, if the Court decides to certify a class under Rule 23(b)(2) in this case, it should require notice and opt-out rights to class members and it should exclude future class members from the class definition.

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New York, New York

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