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August 6, 2024

VIA ECF

The Honorable Judge Margo K. Brodie
United States District Court
for the Eastern District of New York
225 Cadman Plaza East
Courtroom 6F
Brooklyn, NY 11201

Re: *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*,
No. 1:05-MD-1720 (MKB)(JAM)

Dear Judge Brodie:

Rule 23(b)(3) Class Counsel (“Class Counsel”) write: (i) to request an extension of the claims-filing deadline; (ii) to report to the Court an issue involving data from Square Inc. (“Square”) that is important to the ability of the Class Administrator to get certain merchants claim forms; and (iii) to report to the Court Class Counsel’s and Epiq’s (“Epiq” or “Class Administrator”) proposal to establish a minimum payment option for approved claimants.

Class Counsel does not make this request lightly and does not expect that another request for an extension will be necessary.

A. The Request for an Extension is Necessary

Epiq has provided a declaration from Senior Vice President Loree Kovach explaining the factors related to the request for an extension. *See* Exhibit 1 (Declaration of Loree Kovach, dated August 6, 2024) (“Kovach Declaration”).¹ For the 2019 Notice Mailing, the Class Administrator, in conjunction with Class Counsel, employed data compiled from data sources produced for the 2013 Settlement along with supplemental data sets produced by various parties through 2019. *See* ECF 7469-7 (Declaration of Nicole Hamann, dated June 6, 2019), ¶¶8-17. The developed methodology resulted in, for the vast majority of cases, a single mailing of the long-form notice to each unique Taxpayer Identification Number (“TIN”) in the data set at an address identified based on a number

¹ A prior request for an extension was made on May 14, 2024 and granted on the same day. ECF 9294. *See also* ECF 9294-1 (Declaration of Loree Kovach, dated May 14, 2024). The reasons for that request are different from the reasons for this current request, although additional time will likely also help to manage those concerns which included many thousands of unresolved conflicting claims between third-party filers, class members, and claim buyers as well as thousands of requests from class members regarding data, including requests to re-query the database and to provide additional data to determine interchange fees paid which has been greater than anticipated.

The Honorable Margo K. Brodie

August 6, 2024

Page 2

of criteria. *Id.*, ¶18.a.-g. Merchants which were not excluded parties and for which the data was usable were included in the mailing, with the exception of a subset of records. All merchants who received the long-form notice via mail were informed they would automatically be sent a claim form if and when the settlement was approved by the Court.

Since 2019 Epiq has received additional data, including updated data from Visa Acquirer Merchant Master File (“Visa AMMF 5”) which contains additional merchant TINs.² In all, Epiq possesses four large sets of data, including the disputed Square data (as discussed below), that could and should be used to check if a claim form has been mailed and/or mail additional claim forms. If the Square issue is resolved in favor of allowance to use the data, then data from Intuit Inc. and Intuit Payment Solutions, LLC (“Intuit”), Visa AMMF 5, Square, and one additional smaller subset of data will be used after Epiq works to combine and de-duplicate the data sets. Epiq will also analyze address data from multiple sources to identify the best address for mailing purposes as well as create mailing files. Exhibit 1, ¶¶8-10. The proposed data work is detailed in the Kovach Declaration. *Id.* Following the creation of mailing files, printing would commence on a rolling basis. *Id.*, ¶10. As printing is completed, the Claim Forms will be dropped into the mailstream. Epiq expects to complete the mailings over the next two months, and requests the claim deadline be extended 180 days from now. *Id.*, ¶¶4, 10.

There is an enormous volume of data in this case and the understanding of that data and the use to which it can be put has evolved as the claims process has progressed. Class Counsel and Epiq want to ensure that as many class members as possible are able to obtain settlement benefits and mailing claim forms to additional potential claimants which can be recovered from these additional data sets will advance that goal. If granted, this additional time for the claims process will benefit all class members.

B. Square’s Refusal to Allow Use of Important Data for Claims Administration Purposes

Class Counsel has reached an impasse with Square regarding a request to use for claims purposes only, data previously provided by Square to effectuate its opt out in 2019. Class Counsel requests the Court order Square to allow the data provided in 2019 be used to check if a claim form has already been sent directly, and if not, send claim forms to certain submerchants who may be

² From investigation, it appears clear that while these new data sources may contain a large number of new TINs that may reflect potential class member, the corresponding amount of relevant commerce is quite small.

The Honorable Margo K. Brodie

August 6, 2024

Page 3

unique in Square's data. Without this data, some set of merchants who only used Square as a payment facilitator during the relevant time, may not be mailed claim forms,³ despite the data being extant.

As part of its original request to opt out of the settlement, Square provided Epiq a significant volume of data to effectuate that opt out. In providing that data, Epiq and Square executed a mutual non-disclosure agreement ("MNDA"). Following receipt of Square's data, Epiq and Square discussed the planned destruction of this data. After several discussions, the matter was left unresolved, and Epiq still possess the data.

On July 2, 2024, Class Counsel wrote to Square's counsel and requested, because of the MNDA, permission to use the opt-out data for claims administration purposes.⁴ Having received no response, Class Counsel followed up on July 10, 2024. On July 11, 2024, Class Counsel again requested permission to use the data.

On July 17, 2024, Square's counsel responded that he could not respond without further discussions with Square. Class Counsel followed up on the original request that same day. On July 18, 2024, Square's counsel raised several issues that are not relevant to providing claim forms to the Square submerchants but instead relate to Defendants' Motion to Enforce. Class Counsel responded on July 22, 2024 explaining that the request was made for claims administration purposes and Square's counsel's questions and statements made in response to that request appeared to try to draw Class Counsel into a dispute between defendants and Square. Class Counsel further noted that Square's references to views of Class Counsel reported in defendants' motion to enforce were neither inaccurate nor contradictory to the request regarding the data. Class Counsel further addressed what appeared to be notice-related questions, by pointing out that the Court long ago held that the notice provided to the Rule 23(b)(3) Settlement Class was the best notice practicable under the circumstances. *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 2019 WL 6875472, at *34 (E.D.N.Y. Dec. 16, 2019) ("For the reasons set forth in the Preliminary Approval Order, the Court finds that the notices that were sent to putative class members were the best

³ Claim forms are available in multiple languages to anyone on the Court-approved website. <https://www.paymentcardsettlement.com/en/Document/ClaimForms>.

⁴ It should be noted that Intuit, an entity that also provided a significant volume of data related to its opt-out request and also entered into a non-disclosure agreement with Epiq, acceded to Class Counsel's request to use their data for claims-administration purposes. A review of the data possessed and the mailings made directly to submerchants shows 2.3 million out of 2.6 million submerchants did indeed receive a mailed claim form directly. Intuit was also one of several entities that were subpoenaed in 2019 to obtain merchant data. There have been several communications with Intuit regarding matters related to notice to Intuit's submerchants. The parties appear to be at odds over some issues, which Intuit may raise with the Court, but Intuit did agree to the request regarding use of the data.

The Honorable Margo K. Brodie
August 6, 2024
Page 4

practicable notices under the circumstances.”), *aff’d sub nom. Fikes Wholesale, Inc. v. HSBC*, 62 F.4th 704 (2d Cir. 2023). This included both mailed notice and a massive publication notice program. Finally, Class Counsel sought a firm response by July 25, 2024 so that it could raise the issue with the Court.

On July 25, 2024, Square responded stating that Class Counsel refused to explain the need for data. The need for the data is to ensure that merchants receive a mailed claim form and to crosscheck that data with data provided by Visa and others. While the volume of the submerchant PayFac interchange fees may be small, perhaps less than 3% of the overall interchange volume, the number of small merchants is large. On July 25, 2024, Class Counsel explained the request and notified Square’s counsel that Class Counsel would raise the data permission request with the Court.

C. Minimum Payment Proposal

Class Counsel and Epiq propose a minimum payment option be offered to class members, following a determination that, particularly as to certain submerchants, the technological challenges that exist in determining interchange fees paid would result in a significant expenditure of the settlement funds for likely modest claims without a corresponding benefit. Specifically, attempts to match the interchange fees paid by certain merchants will take so much time to determine that the administrative costs will greatly exceed the small claim amount they might otherwise receive.

Based upon Epiq’s current understanding of the data in its possession, transactions of a particular payment facilitator are often associated to aggregate merchant identifiers such that these Visa monthly roll-up reports *do not* include a distinct merchant identifier for each distinct underlying payment facilitator submerchant. Without a distinct merchant identifier Epiq does not have a way to link the submerchant to the interchange fee data without substantial and costly work, that may not even result in a “match.” This type of analysis therefore would be extraordinarily burdensome.

The proposal would allow for a minimum payment of \$25 for all eligible class members who file an otherwise valid Claim and for whom Epiq is unable to identify interchange fee data in its data set, regardless of whether the class member is a submerchant or not. Should this minimum payment provision be implemented, Epiq would update the settlement website and would engage in a media campaign using internet banner ads and social media to inform class members of this minimum payment option. In addition, should the extension of the claim filing deadline be granted, Class Counsel and Epiq intend to send a reminder postcard to all class members who have not yet filed a claim. The minimum payment can be addressed on the reminder postcard.

Review of the Appendix I – Plan of Administration and Distribution (ECF 7257-2) (“Plan”) authorizes Epiq to make “a reasonable estimate of . . . claim value” and expressly describes principles in carrying out the Plan as including reaching results that are “fair and equitable” and “ensures that

**Robbins Geller
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The Honorable Margo K. Brodie
August 6, 2024
Page 5

the administration is as simple and cost-effective and imposes as minimal a burden on Claimants as possible.” *Id.* at I-2, I-8. Class Counsel believes the minimum payment proposal is within the Class Administrator’s designated duties. Class Counsel present this proposal to the Court in the event the Court considers the proposal a modification of the Plan. If so, the media campaign and postcard reminder notice plan mentioned above would satisfy any notice concerns.

Respectfully submitted,

/s/ Ryan W. Marth
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Thomas J. Undlin
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Exhibit 1

cc: All Counsel via ECF

EXHIBIT 1

**UNITED STATE DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

**IN RE PAYMENT CARD INTERCHANGE
FEE AND MERCHANT DISCOUNT
ANTITRUST LITIGATION**

No. 05-MD-1720 (MKB) (JO)

This Document Applies to: All Cases.

**DECLARATION OF LOREE KOVACH REGARDING CLAIM FORM MAILINGS FOR
ADDITIONAL CLASS MEMBERS**

I, LOREE KOVACH, declare and state as follows:

1. I am a Senior Vice President for Epiq Class Action & Claims Solutions, Inc. (“Epiq”), the Class Administrator in the above-captioned case. In this capacity, I am authorized to make the following Declaration on behalf of Epiq. I received my Bachelor of Science degree in Finance from The Florida State University and hold a Juris Doctorate degree, also from The Florida State University. I have over 20 years’ experience in the settlement administration industry. The following statements are based upon my personal knowledge, information provided to me by associates and staff under common supervision, and upon a review of the business records maintained by Epiq.

INTRODUCTION

2. This declaration provides information about potential additional settlement administration activities that the Class Administrator believes are in the best interest of the Settlement Class. Such activities include mailing additional Claim Forms to known likely Settlement Class Members, an extended deadline to submit claims in light of those anticipated

mailings, and a minimum payment alternative approach to more efficiently process low-dollar claims.

3. Since notice was provided to class members in 2019, the Class Administrator has received additional data from Visa and others. This additional data reveals a significant number of additional Class Members who did not receive claim forms sent in 2023. The Class Administrator recommends mailing Claim Forms to those Class Members after it concludes necessary analysis of the data at issue.

4. As discussed in further detail in ¶¶ 8-10, *infra*, finalizing the data for this mailing will be completed within the next two months. The Class Administrator expects to be able to finalize all data preparation work and commence mailing within approximately 50 days of entry of an Order from this Court. Accordingly, the Class Administrator recommends an extension to the Claim Filing Deadline that is equal to 180 days from the date this Court enters an order which approves this additional Claim Form mailing and the corresponding deadline extension.

5. The Settlement Agreement Plan of Administration and Distribution is based on the equitable distribution of the Cash Fund to eligible claimants in proportion to Interchange Fees Paid as located in the data provided by Defendants or via specified alternative methods of approximating such amounts when Interchange Fees Paid cannot be ascertained “with reasonable effort.” Superseding and Amended Definitive Class Settlement Agreement at Appendix I, II.E, September 18, 2018, ECF No. 7257, hereinafter “Settlement Agreement.” Because interchange fee data is not readily identifiable for a significant number of Class Members in the data available to the Class Administrator, and because the cost to the Class for the Class Administrator to review documentation these Class Members would need to produce to prove their Claims in the absence of locating interchange fee data in the Class Administrator’s records would likely exceed the value

of many such Claims, the Class Administrator recommends implementation of a \$25 minimum payment for all Class Members who submit Claims affirming they accepted payment cards and paid interchange fees during the Class Period, provided those affirmations can be validated in third party records (e.g., Visa, Mastercard or acquirer data files provided to the Class Administrator) and/or documentation provided by the claimant that the Class Member accepted Visa and/or Mastercard during the Class Period. See ¶¶ 11-15, *infra*, for further discussion.

DATA AVAILABLE TO THE CLASS ADMINISTRATOR

6. The 2019 Declaration of Nicole Hamann on Class Administrator’s Implementation of Settlement Notice Plan (Dkt. 7469) (“2019 Hamman Declaration”) details the data provided to the Class Administrator for purposes of conducting the 2019 Notice Mailing, the processing of that data, and the resulting notices mailed.

7. Since notices were mailed in 2019, the Class Administrator received additional data from Visa (an updated, fifth version of Visa’s Acquirer Merchant Master File [hereinafter referred to as “AMMF 5”]) and others. Some of this data included records identifying a potentially significant number of possible Class Members to whom claim forms had not been sent; but, a large number of those new records related to merchants who began accepting Visa after the end of the Class Period and hence were not in the class. Visa recently provided the Class Administrator with information that would allow it to identify and exclude the non-class member records from the set of newly identified potential Class Members who had not received a Claim Form. The Class Administrator thus recommends mailing Claim Forms to the remaining merchants who had not been sent claim forms.

PREPARATION OF DATA FOR CLAIM FORM MAILING

8. There is work that remains to be done with respect to the data received since 2019 in order for it to be useful in sending additional Claim Forms. This includes normalizing and deduping records, processing to identify best available address when multiple addresses exist in the data for a particular merchant, other data hygiene including programmatic and manual reviews of anomalies, and comparison of the records to merchant records which already received a Claim Form or otherwise registered or filed a Claim.

9. Once a final combined data set for mailing is created, those records will be inserted into the claims database used by the Class Administrator to track all interactions with Class Members throughout the Settlement. This insertion process creates a unique Class Member record for the merchant, with a unique key, in the database and allows for efficient management of outgoing communications, undeliverable mail and any submissions related to any Claims filed. Mailing files are created from this database. This data insertion and mailing file creation process is expected to take approximately two weeks.

10. Printing will begin for each mailing file shortly after the file is created, and files will start printing on a rolling basis. As printing is completed, the Claim Forms will be dropped into the mailstream. As noted in ¶ 4, *supra*, the Class Administrator expects to begin mailing within approximately 50 days of entry of an Order approving this mailing.

IMPLEMENTATION OF A MINIMUM PAYMENT FOR ELIGIBLE CLAIMS

11. As the Class Administrator has reviewed Claims received to date, it has become apparent that there are many otherwise eligible Class Members for whom the Class Administrator was unable to identify Interchange Fees Paid, or for whom the Class Administrator was only able to identify a subset of Interchange Fees Paid by the Class Member, and these Class Members are

unable to produce the level of documentation needed to validate the amount of Interchange Fees they actually paid. Moreover, in many cases, review of such documentation would result in the Class Administrator expending significant amounts of time for what will ultimately result in a very small award to the Class Member.¹

12. Claimants for whom the Class Administrator is unable to locate accurate Interchange Fees Paid information currently must engage in the challenge process described in the Plan of Distribution in order to establish the amount of interchange fees they paid. The first step in this process currently is for these merchants to submit a research request, whereby they provide additional data points, such as merchant identifiers, sample merchant statements, and other data that can be used by the Class Administrator to re-query Defendants' records in Epiq's custody and identify interchange fee data applicable to that merchant. Based on the research requests received to date, it appears that many small merchants are unable or unwilling to provide sufficient data such that a research request would be successful, or the Class Administrator is otherwise unable to find missing transactional information the merchant alleges should be present. These efforts thus consume time and expense without producing results in these instances. The next step

¹ For example, a large number of Class Members are merchant-customers of payment facilitators. Based upon the Class Administrator's current understanding of the data in its possession, transactions of a particular payment facilitator are often associated to aggregate merchant identifiers such that the Visa monthly roll-up reports of interchange transaction activity do not include a distinct merchant identifier for each distinct underlying payment facilitator merchant-customer. Without a distinct merchant identifier for a given merchant-customer, the Class Administrator is not aware of a method to link this interchange activity data back to a merchant-customer TIN. Consequently, the only available method to link this interchange activity data to a merchant entity name, mailing address and TIN would be to analyze the merchant "doing business as" or "DBA" name as it appears on a consumer's Visa statement along with the city, state and ZIP Code to attempt to identify interchange fees within the data for a given merchant-customer and link this back to merchant name, address and TIN lists.

available to a merchant to prove their Interchange Fees Paid would be to submit certain types of sales data for years during the Class Period for which they accepted Visa or Mastercard. However, such submissions would require documentation to validate the merchant's sales figures, and the effort for the Class Administrator to review such documentation to validate what would equate to a small settlement payment for the Class Member in many if not most cases is not worth the cost to the Class of such review, nor will many smaller merchants be likely to file a Claim if they had to compile such documentation in order to prove the value of their Claim.

13. The Class Administrator recommends offering a \$25 minimum payment option for all eligible Class Members who file an otherwise valid Claim. This minimum payment would be available to all Class Members for whom the Class Administrator is unable to identify interchange fee data in its data set, regardless of whether the Class Member is a submerchant or not. Class Members for whom the Class Administrator is not able to identify interchange fee data, but who paid interchange fees in an amount that would result in a settlement payment larger than the minimum payment, would still be allowed to avail themselves of the challenge process. To the extent the data provided to the Class Administrator by Visa, Mastercard, other settling defendants and subpoenaed acquirers substantiates that a Claimant most likely accepted Visa or Mastercard during the claim period, it is expected this would be sufficient validation for a Claimant to qualify for at least the proposed minimum payment amount.

14. The impacts on the administration procedures for this settlement to incorporate a minimum payment amount are expected to be limited. A version of the Claim Form already exists for merchants for whom the Class Administrator was not able to identify any interchange fee information and was used in the 2023 Claim Form mailing, and this Claim Form, and the subsequent processing steps created by the Class Administrator, can continue to be used without

modification after implementation of a minimum payment. Currently, all Class Members who submit this Claim Form are informed of the next steps they need to take to establish the amount of Interchange Fees Paid and prove the value of their Claim. Should a minimum payment be implemented, a minor addition to the processing steps would be incorporated to inform each such Claimant that, should they take no further action and their Claim is deemed eligible, they would be awarded the minimum payment amount.


15. In addition, Class Counsel and the Class Administrator intend to conduct another reminder postcard mailing to all Class Members who have not yet filed a Claim, should the Court agree to the recommended extension of the Claim-Filing Deadline. Should the minimum payment be implemented, the Class Administrator would include reference to the minimum payment in the reminder postcard. Finally, should the minimum payment be implemented, the Class Administrator will update the Settlement Website and provide certain notice via internet banner ads to inform Class Members of this minimum payment.

CONCLUSION

16. For the reasons stated above, the Class Administrator hereby recommends that the Court approve (1) an additional Claim Form mailing to likely Class Members who have not yet received a Claim Form based on the data sets described in ¶¶8-10, *supra*, (2) an extension of the Claim Filing Deadline equal to 180 days from the date the Court enters an Order approving the mailing and deadline extension, and (3) implementing a \$25 minimum payment.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge.

Executed on August 6, 2024 at Gdańsk, Poland.



Loree Kovach