UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

IN RE PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION	Case No. 1:05-MD-1720 (JG)(JO) **CLASS PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT CHASE PAYMENTECH SOLUTIONS LLC'S MOTION TO STRIKE**

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INTRODUCTION

Based on hyperbole and strained interpretation of non-binding case law, Defendant Chase Paymentech Solutions, LLC ("Paymentech") brings this motion to strike seeking to remove itself as a Defendant in this case. Specifically, Paymentech seeks to strike those portions of the Second Consolidated Amended Class Action Complaint ("Second Consolidated Complaint"), the First Amended Supplemental Class Action Complaint, and the Second Supplemental Class Action Complaint (collectively, "Plaintiffs' three Complaints") that name Paymentech as a defendant. However, as the history of this case and the liberal construction and application of Federal Rule of Civil Procedure 15(a) make clear, Class Plaintiffs' ("Plaintiffs'") amended pleadings are entirely proper and the instant motion is meritless.

BACKGROUND

In April 2006, Plaintiffs filed their First Consolidated Amended Class Action Complaint ("First Consolidated Complaint"), naming Paymentech's parent, JP Morgan Chase & Co. ("Chase"), as a Defendant in this case. Since that time, as a subsidiary of Chase, Paymentech has provided discovery comprising more than 28,000 documents from 19 custodians and depositions of six Paymentech witnesses. Based on this discovery, Plaintiffs named Paymentech as a Defendant in the Second Consolidated Complaint, filed January 29, 2009. The Court gave Plaintiffs leave to submit this amended pleading by its Order on September 18, 2008. Docket No. 1083.

Defendant Paymentech now brings this motion to strike under Rule 15(a) based on a technicality. It argues that Plaintiffs' inadvertent omission to name Paymentech as a Defendant in the draft Second Consolidated Complaint submitted to the Court on May 23, 2008 should work to bar Plaintiffs from naming Paymentech as a Defendant. Paymentech takes this technical position despite that (1) Paymentech was explicitly referenced in the draft Second Consolidated

Complaint, *see* Docket No. 988-2 ¶ 64; (2) eight months and voluminous discovery passed between the draft Second Consolidated Complaint and submission of the Second Consolidated Complaint; (3) the proposed Second Consolidated Complaint was explicitly labeled "draft"; and (4) Plaintiffs did not (and were not requested to) represent that the filed Second Consolidated Complaint would correspond verbatim to the draft pleading.

The inclusion of Paymentech as a Defendant in the pleading as filed is not a substantive alteration to the Second Consolidated Complaint because it neither materially changes this litigation nor prejudices Paymentech. Even a cursory review of the history of this case and of the cases on which Paymentech relies demonstrates that Paymentech's motion is legally and factually baseless.

ARGUMENT

A. Rule 15(a) Establishes a Liberal Standard for Amending Pleadings

Paymentech argues that it should not have been included in the Second Consolidated Complaint, despite that the governing Rule 15(a) standard provides that leave "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a)(2); *see also Monahan v. New York City Dep't of Corrections*, 214 F.3d 275, 283 (2d Cir. 2000) (leave to amend under Rule 15 should not be withheld due to "mere technicalities"). The Court affirmed the liberal Rule 15(a) standard by granting Plaintiffs' motion for leave to amend the First Consolidated Complaint by adding Barclays Bank plc, the parent company of another Defendant already in this case. *See* Docket No. 1083 (Order granting Plaintiffs' Motion to Amend). As with Barclays, the addition of Paymentech comports with Rule 15 and the Court should permit the inclusion of Paymentech in this case.

B. Amendments Exceeding the Scope of Leave Should Stand Absent a Showing of Prejudice or Improper Matter Under Rule 12(f)

An amendment to a complaint that does not substantively change the action, as here, should stand even if it "exceeds" the scope of the court's leave, absent a showing of prejudice or one of the types of matter enumerated in Rule 12(f). *Tuff-N-Rumble Mgmt., Inc. v. Sugarhill Music Publ'g, Inc.*, 49 F. Supp. 2d 673, 681-82 (S.D.N.Y. 1999).

In *Sugarhill*, the defendants moved to strike the amended complaint "on the grounds that the Amended Complaint as filed exceed[ed] the scope of the leave granted to Tuff by the Court," and as such was "'grossly unfair' and prejudicial." *Id*. at 681. The contested paragraphs "add[ed] new parties to the action" and provided factual support for these additions. *Id*. at 682. The court agreed that this material was beyond the anticipated amendment, but found that these additions did "not change any of the causes of action," nor did they "alter the substance of the complaint." *Id*. Because the defendant failed to establish prejudice or that any part of the pleading constituted "redundant, immaterial, impertinent, or scandalous matter" under Rule 12(f), the court denied defendants' motion to strike. *Id*.

The *Sugarhill* court had granted the plaintiff leave to add two particular defendants, and the opinion is not clear as to whether the "new parties" appearing in the amended complaint included more than the two previously specified parties. *Id*. at 681-82. However, irrespective of the ambiguity regarding which portions of the complaint exceeded the scope of leave, *Sugarhill* is unambiguous on the key point: absent a showing of prejudice or matter that may be stricken under Rule 12(f), an amendment that does not substantively change the action should stand, even if it "exceeds" the scope of the court's leave. *Id*.

Here, Paymentech has made no allegation under Rule 12(f) and the history of this case readily belies any claim of prejudice. *See* Section D, *infra*.

C. The Cases that Paymentech Relies on Are Distinguishable and Non-Binding

Paymentech bases its argument on inapposite legal authority. Indeed, upon examination, the cited cases actually bolster Plaintiffs' position by underscoring the insignificance of the omission and subsequent correction in this case and the lack of resultant prejudice to Paymentech. For example, in *Index Fund, Inc. v. Hagopian*, the challenged amendment asserted a claim for punitive damages not previously disclosed to or approved by the court. 107 F.R.D. 95, 97 (S.D.N.Y. 1985); Def.'s Br. at 2. Not only did the plaintiff fail to request leave to add this claim, but it also defied and exceeded an explicit court order to confine the amendment to allegations of secondary liability. *Id*. at 98. The court held that this "flagrant disregard" for the prior order warranted not only striking the contested amendment, but also sanctioning plaintiff's attorney. *Id*. at 99.

The contrast with the present case could hardly be more stark. Plaintiffs here have violated no Court order and have in no way altered the substance of their claims.[1] Remedying a slight oversight by naming a party that is already apprised of, involved in, and up to speed on the case raises none of the issues in *Index Fund* and, significantly, does not prejudice Paymentech.

Paymentech additionally cites *Bartels v. Hudson Ins.*, No. 05-3890, 2008 U.S. Dist. LEXIS 95445, at *2-3 (D.N.J. Nov. 21, 2008) (unpublished decision); Def.'s Br. at 2. There, the challenged, previously undisclosed amendment added class-action allegations for the first time in

[1] *Cf. Dover Steel Co. v. Hartford Accident & Indem. Co.*, 151 F.R.D. 570, 574-76 (E.D. Pa. 1993). As Paymentech acknowledges, even in a case involving multiple, material changes between the proposed amended complaint and the amended pleading as filed, one court denied the defendants' motion to strike and permitted the "new" amendments to stand. *See id.* at 576 (refusing to strike challenged potions even where "the Amended Complaint named an additional defendant, added five new counts, expanded the time frame of the action, and injected a number of new theories of liability into the case"). Reciting that "the hallmark of Rule 15(a) is the prevention of unfair prejudice to the non-moving party," *id*. at 575, the court found that justice was best served by allowing "the wholesale changes" to the proposed complaint, notwithstanding plaintiffs' violation of Rule 15. *Id*. at 574. The additional counts, time period and legal theories asserted in *Dover Steel* are not comparable to adding one party that was already substantially part of the litigation. Moreover, because Paymentech will suffer no prejudice, the underlying concerns of Rule 15 are not implicated here. Like the cases discussed above, *Dover Steel* serves to highlight the negligibility of the change Paymentech challenges in this motion.

the litigation. *Id.* at *2-3. The Court also found that the challenged amendment violated New Jersey Local Rule 7.1(f), which provides that the party moving to amend "shall attach to the motion a copy of the proposed pleading or amendment." *Id.* at *8-9 (quoting D.N.J. Local R. 7.1(f)). Citing prior New Jersey precedent, the court thus struck the class action allegations as outside the scope of the proposed amendment. *Id.* at *10-11.

Here, the Court has no equivalent to the New Jersey Local Rule 7.1(f) that governed in *Bartels*. Second, the *Bartels* opinion, which in any event is not controlling, expressly states that failure to provide the proposed amendments pursuant to the New Jersey rule is not an absolute bar to amendment. *Id.* *9. Finally, in contrast to the addition of an entire class of new parties in *Bartels*, the challenged portion of the Second Consolidated Complaint merely added one Defendant that, as detailed below, was already well aware of and involved in the litigation, as a subsidiary of Chase. The correction of a this minor omission changes nothing of the substance of the action. Paymentech has long been on notice of this case and, contrary to its present contentions, it has already participated in discovery. *See* Section D, *infra*. It shares counsel with its parent, Defendant Chase, one of the largest Member Banks and a former representative on both the Visa and MasterCard Boards of Directors. Second Consolidated Compl. ¶¶ 63, 218.

D. Paymentech Has Suffered No Prejudice as a Result of Not Being Listed as a Defendant on the Draft Second Consolidated Complaint

Paymentech argues that it has been "disadvantaged" and "deprived" of the opportunity to conduct discovery into the factual bases of Plaintiffs' claims. Def.'s Br. at 2. But Paymentech cannot point to any alleged prejudice that was not already argued by Barclays Bank plc and Barclays plc (collectively, "Barclays") – and found wanting by the Court – in the context of Barclays' objections to Plaintiffs' proposed Second Consolidated Complaint. *See e.g.*, Tr. of Telephonic Conference of 7/2/08, at 5 (attached hereto as Exhibit B) ("If the new party is related

to a party that's been in the case and has participated fully in discovery, just give me some practical significance here. What's really at stake?"). *See also* Docket No. 1083 (Order granting Plaintiffs' Motion to Amend). In fact, Paymentech's arguments of prejudice are weaker.

First, as a subsidiary of Chase, Paymentech has already provided discovery in this matter since at least mid-2006. This discovery has comprised more than 28,000 documents from 19 custodians, and deposition of six Paymentech witnesses. Thus, while Barclays Bank plc asserted that it had not yet provided any discovery and would thus be required to undertake an enormous effort, Paymentech cannot make the same claim.

Second, Paymentech has at all times been represented by the same counsel as its majority parent, Chase,[2] and presumably (as it does not contend otherwise) has had and will continue to have ready access to Plaintiffs' discovery through Chase, should it desire to conduct an independent analysis of the documentary and testimonial evidence supplied. Counsel for Chase has asserted claims of privilege over communications by Paymentech General Counsel and provided data and organizational information specific to Paymentech. *See, e.g.*, 12/21/07 Letter from Amir-Mokri to Slaughter at 3-4, 7; 9/8/08 Letter from Julian to Slaughter (cover letter enclosing CD of Paymentech merchant data); 6/30/06 Letter from Greene to Wildfang and Blechman at 9, 15 (attached collectively hereto as Exhibit A). Unless Paymentech suggests that neither Chase nor any of the other acquiring Defendants are vigorously pursuing the defense of this case, it is hard to imagine what "focus[ing] and narrow[ing]" of the issues it has been "denied." Def.'s Br. at 3.

Particularly in light of the liberal standard of Rule 15 and the underlying principle that "'mere technicalities' should not prevent cases from being decided on the merits," the lack of

[2] Interestingly, it is the same counsel, Skadden, Arps, Slate, Meagher & Flom, that defended all of Paymentech's witness depositions that now brings this motion contending that Paymentech's ability to defend itself has been "unfairly impinged." Defs.' Br. at 3; *see e.g.*, Duffy Dep. at 6:24-7:1 (attached hereto as Exhibit C) ("Skadden, Arps, Slate, Meagher & Flom, representing the witness and JP Morgan Chase").

prejudice to Paymentech should be conclusive and the motion to strike should be denied. *See Monahan v. New York City Dep't of Corrections*, 214 F.3d 275, 283 (2d Cir. 2000) (leave to amend under Rule 15 should not be withheld due to "mere technicalities").

E. Paymentech's Merits-Based Arguments are Not Relevant, and Are Unpersuasive

Lastly, Paymentech repeats one of the arguments forming the basis of Defendants' Motion to Dismiss,[3] that is, that it cannot be a conspirator as a matter of law because it does not retain any of the Interchange Fees it collects from Merchants. Def.'s Br. at 3. As regarding all acquirer Defendants, Plaintiffs have adequately pled Paymentech's active participation in the conspiracy detailed in the Second Consolidated Complaint, by virtue of its agreement that the Visa and MasterCard uniform schedule of Interchange Fees will apply to all Merchant transactions on Network cards, with the understanding that all other Acquiring Banks so agree and contract with Merchants accordingly. Second Consolidated Compl. ¶ 100. This action is not, as Paymentech asserts, alleging liability merely on the basis "that acquirers reflected the issuing banks' default interchange fees on their bills to merchants." Def.'s Br. at 3. Rather, it is an exemplar of the long-standing rule that an anticompetitive agreement may be established where, "knowing that concerted action was contemplated and invited, the [defendants] gave their adherence to the scheme and participated in it." *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939). Each Acquirer Defendant participates in the alleged conspiracy with the knowledge that the other Acquirers, Visa and MasterCard, and the Issuing Banks are likewise cooperating in the unlawful conduct. As such, each Acquirer Defendant is liable. *See id.* at 226-27*; Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 935-36 (7th Cir. 2000).

Kendall is inapplicable and does nothing to change this result, as in that case the plaintiffs made no factual showing to support their averments of conspiracy. *See Kendall v. Visa U.S.A.*,

[3] As Paymentech notes, concurrently with this motion Defendants collectively served a 12(b)(6) motion to dismiss.

Inc., 518 F.3d 1042, 1047-48 (9th Cir. 2008) ("Here, appellants pleaded only ultimate facts, such as conspiracy, and legal conclusions."). By contrast, the Second Consolidated Complaint is replete with specific cites from the voluminous evidentiary record providing strong inferences of willful, collective anticompetitive behavior. *E.g.*, Second Consolidated Compl. ¶¶ 214-237. It also explains the *formal process* by which Defendants agreed to fix Interchange Fees and to impose Anti-Steering Restraints in violation of the antitrust laws, *e.g.*, *id.* at ¶¶ 94-97, and cites with particularity the Visa and MasterCard rules that were concededly set by Member Banks, by virtue of their (often simultaneous) positions on MasterCard and Visa Boards of Directors. *E.g.*, *id*. ¶¶ 8(n), 101, 150-151, 214-26, 238-42. The Second Consolidated Complaint also explicates how the Networks have retained Member Bank control over these anticompetitive rules even after their structural changes, in continuing violation of the Sherman Act. *E.g.*, *id.* at ¶¶ 243, 429-442.

Paymentech, like all Acquiring Banks, as a condition of doing business requires every Merchant with which it deals to comply with all Network Rules. *E.g.*, *id.* at ¶ 192. Rather than merely listing Interchange Fees on its bills, as Defendants contend, Paymentech actively enforces the Interchange, No-Surcharge, No-Minimum-Purchase Rules and all other Network restraints. *Id*.; Duffy Dep. at 125:10-126:7; 128:3-5; 129:1-130:3 (attached hereto as Exhibit C). Indeed, Paymentech may terminate a merchant agreement for failure to abide by any of these Network restraints. Duffy Dep. at 132:24-133:9. Paymentech, with its fellow Acquirers, is an active participant and integral part of the Networks' collective restraint of trade. *E.g.*, *id*. at 151:20-152:2 (Network rules require Merchants to settle through an acquirer).

Focusing on the substantive rather than the technical, there can be no real question of the propriety of Plaintiffs' addition of Paymentech as a Defendant in this action, notwithstanding its inadvertent omission from the proposed Second Consolidated Complaint. Paymentech has been

actively involved in the litigation for more than two years and has had its interests asserted and protected by counsel throughout. The claims in the Second Consolidated Complaint derive from the same facts set forth in the First Consolidated Complaint, did not expand the scope of discovery, and apply to all bank Defendants as they do to Paymentech. [4]

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that the Court deny Paymentech's Motion to Strike the Second Consolidated Amended Class Action Complaint, the First Amended Supplemental Class Action Complaint, and the Second Supplemental Class Action Complaint.

[4] In a footnote, Paymentech asserts that adding it as a Defendant would "materially complicate the calculation of damages in this case" due to a purported unique statute of limitations defense. Def.'s Br. at 3 n.3. Paymentech does not elaborate on or explain this material complication, but given that Paymentech was formed in October 2005 and joined as a Defendant on January 29, 2009, the four-year statute of limitations should be entirely irrelevant to this motion. Even if it were a factor distinguishing Paymentech from other Defendants, it strains credulity that a time limit on damages would create a significant challenge to proper calculation.

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Respectfully submitted,

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In re Payment Card Interchange Fee And Merchant Discount Antitrust Litigation

Case File No. 05-md-1720

Exhibits A, B and C to Class Plaintiffs' **CLASS PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT CHASE PAYMENTECH SOLUTIONS LLC'S MOTION TO STRIKE** which was electronically filed on June 2, 2009, are FILED UNDER SEAL.

These documents are sealed pursuant to order of the Court and contain Highly Confidential Information filed in this case by Plaintiffs and are not be opened or the contents thereof to be displayed or revealed except by order of the Court.