IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CUSTOM HAIR DESIGNS BY SANDY, LLC, and SKIP'S PRECISION WELDING, LLC, on behalf of themselves and all others similarly situated, Plaintiffs, v. CENTRAL PAYMENT CO., LLC, Defendant.	)	CASE NO. 8:17-cv-00310-JFB-CPZ **JURY TRIAL DEMANDED**

FIRST AMENDED CLASS ACTION COMPLAINT

COME NOW Plaintiffs Custom Hair Designs by Sandy, LLC and Skip's Precision Welding, LLC, on behalf of themselves and the class of persons and entities defined below, and for their First Amended Class Action Complaint[1] allege as follows, based on personal knowledge as to allegations regarding Plaintiffs; discovery taken to date, including Defendant's internal documents; investigation of counsel and experts; and information and belief:

INTRODUCTION

1. The documents and data produced in this case by Defendant Central Payment Co., LLC ("CPAY") have revealed that CPAY has for years engaged in a multifaceted fraudulent scheme that operates through a web of independent agents as a racketeering enterprise that uses highly improper sales tactics to induce merchants to use CPAY's card payment processing services. Then, once merchants are locked into lengthy contracts, CPAY buries them with numerous unanticipated, improper, and excessive fees, and deliberately obscures and hides the

[1] Pursuant to Rule 15(a)(1)(B), Plaintiffs obtained CPAY's "written consent" to file this First Amended Complaint. Fed. R. Civ. P. 15(a)(1)(B). Plaintiffs also made the redactions in this document at CPAY's request per the terms of the Protective Order entered in this matter.

upcharges so that merchants cannot reasonably detect that they have been improperly charged. The evidence set forth below shows that this was not an isolated incident over a particular fee or a mistake by a legitimate business trying to serve its customers. Instead, it was a business model of deception designed and executed by CPAY's founders, twin brothers Matthew and Zachary Hyman. As explained in more detail below, the Federal Trade Commission has already banned the Hyman brothers from one industry after their company was found to have been a fraudulent operation. Much like the Hymans' prior venture, Plaintiffs can now prove with documents and other evidence that CPAY operated as a scheme to defraud its customers. CPAY committed hundreds of thousands of acts of mail fraud and wire fraud by means of deceptive marketing materials, obtaining payments through the wires by fraud, fraudulent billing statements sent through the mails, and a host of other deceptive communications outlined below. CPAY's actions have caused significant injury to the property of its customers on a monthly basis. The only difference between customers is the extent of their injury.

2. This action seeks to hold CPAY accountable for its improper and illegal business practices, including the assessment and seizure of unauthorized and excessive fees for merchant payment processing services by CPAY.

3. In today's business world, the vast majority of merchants must accept payment for goods and services via credit and debit cards to stay competitive in the marketplace. In order to accept this method of payment, a merchant must utilize a payment processing service. As used throughout this First Amended Class Action Complaint, the word "merchant" should be taken to mean any person or entity that accepts credit or debit cards for payments. This includes non-profits, schools, churches, government agencies, individuals, and many persons or entities that are not traditional businesses. All are subject to the same improper treatment by CPAY.

4. Merchants rely on the companies that provide this critical service to do so in accordance with fair and appropriate terms. Indeed, for many businesses, fees for card processing services are likely to be the third highest expense following labor and product costs. Even for a very small business, these fees can easily exceed $100 per month. Merchants on average effectively pay 2-3% of card transaction revenue to the various participants in the payment processing industry. As described below, merchants are promised such rates by CPAY but end up paying much more based on improper billing practices.

5. The card processing system can be a difficult one to understand, with many involved parties. For instance, in addition to the merchant who receives payment and the customer who provides such payment, the processing of a card transaction involves several other parties:

(a). <u>The Card Issuer</u> – the company that issued the credit or debit card to the customer, which is typically a bank such as Chase or Bank of America, and which charges a fee whenever a customer uses one its cards for a transaction. These companies charge fees that are usually calculated as a percentage of a transaction plus a per-transaction fee (e.g., 1.65% + $0.20/transaction). This fee varies based on the type of card used. For example, the card issuing companies will charge a higher fee for transactions involving a rewards credit card than a card with no rewards program. These fees are generally known as "interchange rates."

(b). <u>The Card Association</u> – the card associations (i.e., Visa, MasterCard, and Discover) also charge per transaction fees. By way of example, Visa assesses a fee known as the "APF" ("Acquirer Processing Fee"), and MasterCard charges a fee known as the "NABU" ("Network Access Brand Usage") fee. The card networks also charge various additional fees depending on the type of transaction. These fees are generally known as "assessments."

(c). The Payment Processor – this is the entity that actually processes the payment through the card network and ensures that whenever a customer pays for an item or service with a credit or debit card, the customer's account is debited, and the merchant's account is credited. During the relevant time period, CPAY has used Total System Services, Inc. and its subsidiaries (collectively, "TSYS") as its payment processor. TSYS has been an owner of CPAY at all relevant times and now owns 100% of the company.

(d). The Member Bank – only banks may be members of card associations. These member banks "sponsor" merchant acquirers and payment processors so they may process transactions through the card associations. During the relevant time period, CPAY has been sponsored by First National Bank of Omaha and Wells Fargo.

(e). The Merchant Acquirer – this is the company that markets the payment processor's services to merchants. Merchant acquirers essentially act as a "middle man" between merchants and payment processors. They enroll merchants in payment processing services and usually provide customer support to the merchant. Merchant acquirers usually work with independent sales agents who sign up merchants. The merchant acquirer then pays the agent based on a percentage of the processing fees obtained from "their" merchants. CPAY is a merchant acquirer and aggressively seeks to enter relationships with independent sales agents to sign up merchants on its behalf. These agents are not employees of CPAY. They are independent contractors.

6. Ordinarily, a merchant that desires to accept credit and debit cards as a form of payment reaches agreement with a merchant acquirer (or its independent sales affiliates) to obtain such services. The parties agree on the fees that the merchant will be charged, which commonly consist of two parts:

(a). "Pass Through" Costs – these charges consist of fees imposed by card issuers and the assessments imposed by card associations. These are set costs incurred by the member bank that apply universally at any given time, regardless of the type or amount of the transaction or the identity of the merchant. These costs are set, unavoidable, and are "passed through" to the merchant.

(b). Payment Processing Fees – these are the fees which the merchant is charged by the merchant acquirer for payment processing services. These fees are not uniform but can be varied or negotiated by the parties.

7. The number of involved parties and moving pieces can make it difficult for merchants to understand whether they are only being charged agreed-upon fees. Merchants thus rely on merchant acquirers (or their agents) to explain on the front end of their relationship exactly what fees will be charged.

8. Unfortunately, CPAY takes advantage of its position of power and merchant confusion by having the agents induce small, "mom and pop" merchants like Plaintiffs to execute a standardized CPAY "Merchant Processing Application & Agreement" ("Application") with the promise of low, straightforward, transparent pricing. These sales agents, with the full knowledge and encouragement of CPAY's management, seek to enroll merchants by every trick in the book, including by omitting or concealing fee practices they know will occur. Agents can and do earn substantial commission income and bonuses by doing so.

9. CPAY aggressively perpetrates this scheme through its form documents. Its standardized proposals and Applications intentionally omit and conceal key facts concerning the fees and rates it knows it will eventually charge merchants if they sign on the dotted line.

10. CPAY engages in this fraud to induce merchants to do business. Indeed, CPAY knows full well that if merchants knew the true nature and extent of the fees they would eventually be charged, they would not agree to do business with CPAY.

11. The fine print “Terms and Conditions” (“Terms”) that Defendant intends to largely govern the relationship are set forth in a separate document. In this way merchants see and execute one document that prominently displays the agreed-upon rates and fees but are purportedly also bound by another document. Through the separate, fine print Terms, Defendant seeks to (a) backtrack from the agreed-upon fees and rates that have actually been reviewed and approved by the merchant and (b) immunize itself and its processing partners from liability if the merchant discovers and takes issue with Defendant’s deviation from the agreed-upon pricing. Such provisions are illusory, exculpatory, lack mutuality, violate public policy, and are unconscionable.

12. After inducing merchants to bind themselves to the standardized Application, CPAY then systematically crams merchants with fees that were either not disclosed, were not sufficiently explained, and/or that exceed the rates promised or otherwise violate the express terms of the Application. For instance, CPAY inflates “pass through” costs and agreed-upon payment processing fees and imposes new junk fees.

13. Making matters worse, CPAY formats and crafts its monthly statements in a manner designed to confuse and confound merchants, and to obscure and hide its overcharges so that merchants cannot reasonably detect that they have been improperly charged. For instance, CPAY describes charges using deceptive language that leads merchants to believe increases are being mandated by card associations, as opposed to being imposed merely to pad Defendant’s bottom line.

14. CPAY furthers its scheme by seizing the charged amounts from merchant bank accounts before merchants receive statements.

15. CPAY's practices are fraudulent and its overcharges are also in direct breach of the contract and violate the covenant of good faith and fair dealing.

16. Any arguments by Defendant that the excessive fees and charges are authorized by the self-serving, adhesive Terms referenced above are without merit because such Terms are the product of fraud and otherwise inapplicable and unenforceable.

17. CPAY's mark-ups are assessed for the sole purpose of raising additional revenue at the merchant's expense. The challenged fees do not result from higher than anticipated costs suffered by CPAY. Rather such additional revenue goes straight to the bottom line as more profit.

18. For several years, Defendant has perpetrated this overbilling scheme. This case challenges the nature and amount of fees that CPAY imposes.

PARTIES

19. Plaintiff Hair Designs by Sandy, LLC ("Sandy") is a Florida limited liability company that specializes in hair styling and other cosmetology services. It is owned and operated by Sandra Carrano and uses a legal address in Palm Beach Gardens, Florida. Sandy was a payment processing customer of CPAY from approximately November 2015 through February 2017.

20. Plaintiff Skip's Precision Welding, LLC ("Skip's") is an Arizona limited liability company that specializes in providing welding services. It is owned and operated by Thomas "Skip" Payne and is located in Kingman, Arizona. Skip's was a payment processing customer of CPAY from approximately July of 2016 through February of 2017.

21. Defendant CPAY is a Delaware limited liability company that is headquartered in San Rafael, California. According to its website, CPAY provides payment processing services to over 65,000 businesses and processes over $10 billion in credit card sales annually. CPAY may be served with process via its registered agent – CT Corporation System, 5601 S. 59th Street, Lincoln, Nebraska 68516.

JURISDICTION AND VENUE

22. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1332(d)(2) because there are more than 100 potential class members and the aggregate amount in controversy exceeds $5 million exclusive of interest, fees, and costs, and at least one class member is a citizen of a state other than Nebraska.

23. This Court has personal jurisdiction over CPAY because it is registered to transact business in Nebraska and has engaged in a continuous and systematic course of doing business in Nebraska by offering its services to thousands of Nebraska citizens and companies.

24. Venue lies within this judicial district under 28 U.S.C. § 1391 because Defendant conducts substantial business in this district and a substantial portion of the events, omissions, and acts giving rise to the claims herein occurred in this district.

25. Venue and jurisdiction are also proper in this Court pursuant to Section 13.2 of the Terms which mandates that the litigation of disputes related to the Application and Terms occur in "the courts of Douglas County, Nebraska." Plaintiffs would much prefer to litigate this case elsewhere, such as Florida or Arizona, but do not wish to fight about the enforceability of CPAY's venue provision.

COMMON FACTUAL ALLEGATIONS

A. History of CPAY.

26. CPAY was founded by twin brothers Zachary and Matthew Hyman.

27. The Hyman brothers got their start in business with a company called Productive Marketing, Inc. ("PMI"). PMI marketed and sold guide materials for auctions of foreclosed homes and repossessed vehicles.

28. In June of 2000, the Federal Trade Commission ("FTC") filed a complaint against PMI and the Hyman brothers alleging that they committed numerous deceptive and fraudulent practices in connection with PMI's business activities, including: debiting or charging consumer checking and credit card accounts without authorization; charging consumers for two sets of materials even if consumers had only authorized the charge for one set or none; failing to disclose material conditions and restrictions of their refund policy; and making false and unsubstantiated claims about late model cars sold at public auto auctions.

29. In response to the FTC's complaint, the United States District Court for the Central District of California issued a temporary restraining order and froze PMI and the Hyman brothers' assets.

30. The charges were subsequently settled. As part of the settlement, PMI and the Hyman brothers were permanently barred from advertising, marketing, offering for sale, or selling information guides, and were required to pay a total of $180,000 in consumer redress.

31. After being barred from marketing and selling information guides, the Hyman brothers switched their business pursuits to the payment processing industry.

32. In or about 2000, they founded a company called CardPayment Solutions, Inc. ("CPS"), a merchant acquiring business. CPS quickly became notorious for bad practices in the card payment industry. Common complaints about CPS were that its agents failed to disclose the

true processing fees at the outset of a relationship and then provided poor customer service when merchants complained about these higher-than-quoted fees.

33. The Hymans sold CPS in or about 2003 to iPayment for $18 million. As part of that transaction, they were forced to sign a two-year non-compete agreement, promising not to open another business in the same field.

34. When the non-compete expired in 2005, the Hymans formed CPAY, a merchant acquiring business catering to small and mid-sized merchants.

35. At or about that time, CPAY began to sign up merchants for Wells Fargo and First National Bank of Omaha and contracted to have TSYS process its merchant customer transactions.

36. CPAY grew rapidly and from 2009 to 2012 was named by *Inc.*, a business magazine, as one of the country's fastest growing companies.

37. By August of 2012, CPAY had acquired 40,000 merchants, was handling roughly $3.5 billion in card transactions per year, and was valued at approximately $125 million. At this time, the Hymans sold a 60% controlling stake in CPAY to its processor partner, TSYS. The acquisition price was not disclosed.

38. In February of 2014, TSYS acquired an additional 15% of CPAY, bringing its total ownership stake to 75%. At that time, CPAY was valued at $250 million. The acquisition price was not disclosed.

39. CPAY's rapid growth is due in large part to the thousands of independent sales agents it has affiliated with to aggressively market CPAY's services. These agents are generally paid as a percentage of the fees that are ultimately charged to merchants.

40. Discovery in this case has revealed that CPAY grew so quickly by employing a host of improper business practices.

B. CPAY Intentionally Targeted the Least Sophisticated Merchants.

41. CPAY actively recruited and utilized a network of agents with strong ties to local merchants who were uneducated or unsophisticated. CPAY's internal emails reveal that CPAY intentionally capitalized on the targeted merchants' lack of sophistication to set higher rates and generate more revenue in fees. According to Zach Hyman, "our merchants are small and single locations."[2]

42. [redacted] These training materials encourage the sales agent to gain the merchant's trust by trying to make it appear that they are not there to sell anything to the merchant.

43. Internally, CPAY encouraged sales directors to be aggressive in motivating sales agents in the field. Zach Hyman, in a February 2015 internal email, outlined his expectations for the tone of conference calls between CPAY sales directors and agents: "FIRED UP. MOTIVATED. LIKE YOU ARE EXCITED TO BE ON THAT CALL. SEE ME FOR SOME FREE CAFFEINE (I am not allowed to give drugs away for free sorry)."[5] Meanwhile, CPAY Sales Director Matt Daneman outlined to Zach Hyman his strategy for the conference calls:

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[2] CPAY00032143 (this is the format for CPAY's Bates-numbered documents used herein).
[3] CPAY00009761.
[4] CPAY00009764.
[5] CPAY00009012, at 014.

- [redacted]
- [redacted]
- [redacted]
- "Just high energy, be the fucking MAN."[6]

44. CPAY's entire business model was exploiting merchants to extract as much money as possible and internal emails show that CPAY cared far more about keeping agents happy so they would continue to sign more merchants. Matt Hyman at one point remarked: "I am not too worried about merchants (albeit I actually am a bit) – but more concerned about agents".[7]

45. A November 2016 email from an agent leaving CPAY illustrates how CPAY and its sales agents really felt about the merchants: [redacted]

C. <u>CPAY Induces Merchants to Do Business with Promises of Low Cost Pricing.</u>

46. Via its agents, CPAY approaches and markets to these unsophisticated merchants in an attempt to induce them to switch to Defendant's services through promises of transparent, low cost pricing. Merchants are attracted by promises of being able to save money by reducing

[6] CPAY00009012 (emphasis added).
[7] CPAY00014127.
[8] CPAY00028866.

the costs they would pay for payment processing services if they switched providers. This approach is very appealing to merchants because payment processing is a substantial business expense for them.

47. CPAY provides prospective merchants with the form Application.

48. The member bank (i.e., either Wells Fargo or First Bank of Omaha) ("Bank") is also a party and signatory to the Agreement. Since neither Bank is known to have participated in the improper conduct alleged herein, they have not been named as defendants.

49. The Application identifies the payment processing fees to which the merchant will be subject if it decides to enroll in Defendant's services. In the Application's Fee Schedule, merchants are informed of the applicable payment processing fees.

50. The Application first describes the pricing method. Under the "tiered pricing" model, merchants agree to pay a specified amount for each type of card transaction with such amount being calculated as a percentage of a transaction plus a per-authorization fee. Another option is "interchange plus" or, as Defendant calls it, "pass-through pricing" where customers pay the actual rates of the card networks plus a specified mark-up for CPAY.

51. In addition to the pricing method, the Application also specifically identifies other miscellaneous fees (both periodic fees and per occurrence fees) to which the merchant will be subject.

52. Finally, the Application notes that the merchant will be subject to certain card association fees and such fees will be passed through to the merchant at the standard card association rates.

53. The Application thus informs the merchant in clear, unambiguous terms what it will be charged if it agrees to enroll in Defendant's services and how such charges would be

calculated. This transparency is very important to merchants, especially to those whose agreements extend for a set period of time, typically three years. If a merchant on a set term desires to end its relationship with Defendant prior to the expiration of this term, it often must pay an early termination fee of between $300 and $550.

D. <u>CPAY Systematically Incentivized Agents to Deceive and Mislead Merchants About the Rates and Fees CPAY Charged.</u>

54. CPAY preached to the agents that CPAY was "not a one size fits all business."[9] The core tenet of CPAY's marketing pitch was that CPAY could beat any other processor's rates. [redacted]

55. [redacted] By intentionally making the various rates and fees sound confusing, the agent is able to make the merchant dependent on the sales agents' version of the information.

56. [redacted]

[9] CPAY00009012.
[10] CPAY00009763.
[11] CPAY00011680.

[redacted]

57. [redacted]

58. [redacted]

59. [redacted],

12 *See* CPAY00002962; *see also* CPAY00010396; CPAY00000217, at 218.
13 CPAY00002962, at 975.
14 CPAY00010396.
15 CPAY00000217, at 218.
16 CPAY00006065.

[redacted]

60. On occasion, agents would complain to CPAY about rate and fee increases because the merchants would often complain to the agents. [redacted]

61. [redacted]

62. [redacted]

63. [redacted]

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[17] CPAY00006065, at 066.
[18] CPAY00002170.
[19] CPAY00002170, at 171.
[20] CPAY00002170, at 171.
[21] CPAY00012171, at 172.
[22] CPAY00012151, at 155.
[23] CPAY00012151.

[redacted]

64. These CPAY internal sales documents illustrate that CPAY's entire business model was focused on extracting as much money as possible from each individual merchant through deceptive sales practices.

E. <u>CPAY Systematically Pressured Agents to Sign New Merchants Through Any Means.</u>

65. CPAY's internal communications and documents show that CPAY utilized dubious tactics to encourage sales agents to generate more business. Documents produced in this case show that CPAY put financial pressure on sales agents and tolerated agents' deceptive and aggressively unethical sales practices.

66. CPAY engaged in questionable deals with sales agents whereby CPAY would advance sums of money to agents. [redacted] [redacted]

67. [redacted]

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[24] CPAY00002170.
[25] CPAY00003942, at 943.
[26] CPAY00008944, at 949.

[redacted]

68. CPAY also tolerated and encouraged outrageous behavior from agents selling CPAY's merchant services. Several email interactions between CPAY, the Hyman brothers, and sales agents illustrate a systematic lack of professionalism and tolerance of improper conduct on the part of sales agents working on behalf of CPAY.

69. In one example, a Merchant Relations Representative noted the egregious antics of an agent working on behalf of CPAY. In August 2015, a merchant called in to CPAY to complain that he had not signed an agreement with CPAY, however, the sales agent allowed an employee to sign the agreement.[28] The agent also wrote "this is an Indian Merchant" in the special instructions portion of the agreement.[29] After the Merchant Relations Representative advised the agent that it was inappropriate to reference a merchant's race on an agreement, the agent complained to Matt and Zach Hyman, writing:

> SERIOUSLY, WHERE DID YOU ALL FIND THIS PIECE OF TIMOTHY SHIT FROM???? REALLY??? THIS PIECE OF SHIT WANTS TO TELL ME HOW TO DO MY FREAKIN JOB!!!! STUPID ASSHOLE!!!![30]

Zach Hyman sent the agent a brief message in response: "Calm down lol".[31]

70. [redacted]

[27] CPAY00008205, at 207.
[28] CPAY00013477.
[29] CPAY00013477.
[30] CPAY00013477.
[31] CPAY00013477.

71. CPAY and the Hyman brothers fostered a culture that encouraged or tolerated outrageous antics from sales agents in the field. It is clear, from reviewing CPAY's internal communications, that the agents did not fear repercussions for their behavior and that the Hyman brothers did not care as long as the agents were making money for CPAY. The CPAY internal communications frequently involve vulgar and derogatory language regarding merchants and demonstrate CPAY's profound lack of respect or empathy for the merchants that CPAY systematically preys upon.

72. Many small business-oriented websites have multiple pages filled with similar complaints from merchants that CPAY agents misled them, failed to disclose important contract terms, or outright lied to them.

For example, one business posted this in June 2018:

> If I could give zero stars, I would. Signing up with Central Payment has been the biggest mistake I have made in my life. I have never experienced with any other company what I have gone through with them. Someone else in the comments described their experience with CPay as "nightmarish", and nightmarish is absolutely right. The lesson I have learned from my experience with them is never, absolutely never sign a contract. This experience has been traumatic to say the least.
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> When I have specific questions that I need specific answers for, they will not answer my questions. They avoid it or they reword my question as their answer to me. Also, every person you speak with seems to explain your contract to you differently. Everyone in their company from the Company Director to the customer service department seems to be trained to do this. They basically lead you into a circular conversation that never resolves anything.

Another post from February 2018:

> Stole money out of our account. This company is a FRAUD. DO NOT USE!

And another from June 2017:

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[32] CPAY00013724. "ETF" refers to "Early Termination Fee." [redacted]

> Fees have ended up being more than I was originally told. Shady company to deal with.

And from February 2017:

> Lied just like every other Credit Card Merchant. Told me there was no contract and fees would be $25 if not used and could cancel anytime without a penalty or fee. Also said they would pay for my other merchant cancellation fee. In order for them to do that after I paid $495 they said I had to sign a 3 year contract. Then I cancelled and 7 months later I'm fighting to get it stopped. Also my monthly fee is $46.90 now when I only paid in the $30s when I used their service. Then they hit me with a $146.40 fee out of the blue for the new year. STAY AWAY !!!!

And from November 2016:

> Buyer beware. If you have a shady sales rep your experience here will be very poor. . . . You will be locked in to a contract (no matter what your rep tells you). Pathetic companies enjoy hiring people who like to talk fast and conveniently "forget" to add things to your contract that are promised, and rush through the paperwork so hopefully you won't catch it. This is one of those companies. They brag about how much commission they pay to their reps, and the fact is, you, the merchant pays those commissions. There are much better options (simplicity and fees) out there. I enjoy doing long term business with companies who aren't out to screw their clients. This is not one of those businesses.

Such complaints span several years and are included on numerous small business websites and social media.

F. CPAY Provided Intentionally Misleading Merchant Proposals to Induce Merchants to Switch to CPAY's Service.

73. CPAY also created and provided agents with misleading merchant proposals to persuade merchants to switch to CPAY's service. A point of CPAY's marketing strategy was CPAY's claim that it could beat any other processor's rate. As Zach Hyman told one merchant, [redacted]

[33] CPAY00010490 (phone number redacted for privacy).

74. [redacted]

75. [redacted]

> [redacted]

76. [redacted]

77. By omitting certain charges from the proposals, CPAY presented merchants with comparisons that greatly inflated the savings the merchant would see by switching card processors. [redacted] CPAY

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[34] CPAY00009763.
[35] *See* CPAY00031051; CPAY00032098 (number redacted for privacy).
[36] CPAY00031051.
[37] CPAY00032098, at 100.
[38] CPAY00032098, at 100.
[39] CPAY00020537.
[40] CPAY00032098, at 100.

knew the potential savings outlined in the merchant proposals were unrealistic and distributed [redacted]

G. CPAY Taught Agents to Encourage Merchants to Fill Out the Merchant Applications Without Carefully Reviewing the Contract Terms.

78. Documents produced in this case show that merchants frequently complained about sales agents not reviewing the contract terms with them. Initial discovery has revealed that it was CPAY's practice to rush merchants through the merchant agreements so the merchants would not know or understand all of the contractual provisions contained therein.

79. [redacted]

80. [redacted]

41 CPAY00010464.
42 CPAY00010490 (emphasis added).
43 CPAY00010490.
44 CPAY00010493, at 495.
45 CPAY00010490.

81. CPAY and the sales agents were focused on quickly signing as many merchants as possible. By hurrying merchants through the merchant agreements and not carefully reviewing the terms, CPAY was better able to keep merchants in the dark. Documents produced so far show that the practice of encouraging merchants to sign without reading was a systematic practice throughout CPAY and the independent agents working in the field.

H. <u>CPAY Buries Absurd Provisions in the Fine Print of the Terms that Purport to Allow It to Charge Whatever It Wants Without Fear of Legal Action.</u>

82. The Application itself does not indicate that (a) the agreed-upon fees and rates will increase (nor would increases be expected since technology and competition has actually driven down costs for payment processing) or (b) new, undisclosed fees and rates will be charged. Such terms unquestionably are important to merchants and would influence their decision to do business with Defendant.

83. Instead of conspicuously setting forth such critical provisions in the Application, Defendant buries them in the separate and non-negotiable Terms.

84. In very fine print, the Application states that the merchant is obligated to the separate Terms. Given the dense legalese of the Terms, which are spread over 35 pages, there is zero chance that a merchant could actually read or understand it. Notably, Chief Justice John Roberts, Judge Richard Posner, and other federal judges have stated that they do not read – and are aware that no one reads – fine print form contracts.

85. The Terms are a boilerplate document that is not negotiable. *See* Terms, § 13.9 ("Any alteration or strikeover in the text of this pre-printed AGREEMENT will have no binding effect and will not be deemed to amend this AGREEMENT").

86. Several provisions set forth in the Terms represent an effort by Defendant and its partners to (a) covertly backtrack from the rates and fees prominently set forth in the Application and (b) immunize the Bank and TSYS from liability for improper practices.

87. The Terms include clauses purporting to:

(a). give the Bank (but not CPAY or TSYS) broad discretion to change the amounts of agreed-upon fees or impose whatever new fees it desires immediately and without notice (*id.* at §§ 3.1 – 3.5);

(b). limit the Bank's liability for overcharges to a maximum of one month's worth of processing fees (excluding pass through charges) (*id.* at § 10.1);

(c). require merchants to notify the Bank of "any error or discrepancies detected by MERCHANT in writing to BANK within ninety (90) days following the end of any monthly reporting period" as a hurdle to the pursuit of legal claims against the Bank (*id.* at § 7.5);

(d). reduce the statute of limitations for all claims against the Bank to one year (*id.* at § 13.3);

(e). require all cases to be filed in Nebraska pursuant to Nebraska law (*id.* at § 13.2);

(f). prohibit merchants from enforcing their right to a jury trial (*id.* at § 13.3); and

(g). prohibit merchants from pursuing a class action against the Bank (*id.*).

88. Defendant uses these provisions, as well as a hefty early termination fee (Application; Terms, § 5.2(C)), as tools to discourage aggrieved merchants from terminating their relationships with CPAY or pursuing legal action for overcharges.

89. Several of the provisions highlighted above, and others, violate public policy, lack mutuality, are unconscionable, and are otherwise void and unenforceable.

I. <u>CPAY Raises Fees and Imposes New Categories of Fees Not Reflected in the Application.</u>

90. After CPAY begins servicing merchants, almost immediately it begins increasing charges and cramming merchants with fees that are inconsistent with the agreed-upon charges prominently set forth in the Application and the pre-Application proposals provided to merchants.

91. Indeed, Defendant increases the applicable rates, miscellaneous fees, and card association rates that are supposed to be passed through at cost. CPAY also invents and charges new fees that are not mentioned in the Application.

92. CPAY and its agents know that if they disclosed these substantial fees in the Application or on the front end of the relationship, merchants would be much less likely to leave their then-current processor to do business with them. Instead, CPAY slams merchants with these unanticipated fees after the relationship has commenced and merchants are "locked in."

93. CPAY describes its fees in a very misleading fashion so as to preclude merchants from realizing the fees are improper or that CPAY, as opposed to the card associations, is responsible.

94. CPAY seizes these additional amounts from merchant bank accounts before merchants even know they are gone. Even if merchants could effectively decipher Defendant's amorphous monthly statements, by the time merchants receive such statements, Defendant has already debited the improper amounts from merchant bank accounts.

J. <u>CPAY Carefully Crafted Billing Statements to Hide Fees and Mislead Merchants.</u>

95. [redacted]

[redacted] This statement, however, is a stark contrast to CPAY's actual business practices. CPAY never intended to charge only the rates initially quoted to the merchants and crafted billing statements to hide new and increased fees from the merchants.

96. Internal communications produced in this case show that CPAY intentionally hid charges from merchants by burying charges in consolidated fees which were made up of several other charges. By hiding the charges, CPAY sought to reduce the amount it would have to refund merchants who complained. [redacted] In fact, a large part of CPAY's business plan counted on unsophisticated merchants not closely scrutinizing their bills.

97. CPAY also actively worked with TSYS to increase revenues by developing new processing and network fees where it could bury rate increases in the hope that merchants would not notice. One particularly glaring example of this is the TSSNF Fee. [redacted]

> [redacted]
>
> 1) [redacted]

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[46] CPAY00011680.
[47] CPAY00032941, at 943.

[redacted]

2) [redacted]

[redacted]

98. CPAY then implemented this new fee, naming it TSSNF, and added a message buried in the fine print in the merchant statements announcing the new fee. The statement message was designed to create the misimpression that the fee covered mandatory increases in card interchange rates:

> Did you know that you can find answers to most questions online in your free merchant portal? Visit mystorecentral.com today to find information on your merchant account. ***In order to help consolidate modifications from card brands affecting Interchange rates (Visa Base II Trans Fees, APL and LPA Fees; Mastercard KB Trans Fees, International Service Assessment fees and more), there will be a four basis point 'TSSNF Fee' on all card brand processing volume effective December 1, 2014***.[49]

99. In January 2015, following the implementation of this new fee, an agent emailed Zach Hyman to ask what the fee was on the billing statements.[50] [redacted]

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[48] CPAY00013170, at 171 (emphasis added).
[49] CPAY00007431 (emphasis added).
[50] CPAY00008429.
[51] CPAY00008429.
[52] CPAY00008427; *see also* CPAY00008428; CPAY00008429; CPAY00008430; CPAY00008432; CPAY00008433; CPAY00008435.

100. With the new fee exposed on the billing statements, CPAY struggled internally to come up with how to explain the TSSNF fee. [redacted]

101. [redacted]

[redacted]

[redacted]

102. [redacted]

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53 CPAY00009447, at 448 (emphasis added).
54 CPAY00009447, at 448 (emphasis added).
55 CPAY00009447, at 448 (emphasis added).
56 CPAY00009499, at 500.
57 CPAY00009499.
58 CPAY00009499.

103. These emails definitively show that CPAY knew that their new fee did not reflect legitimate interchange rate increases and that CPAY's intent was to defraud merchants by hiding this newly added fee. The TSSNF fee was not a fee initially outlined in the Application at the time it was introduced. The version of the Application from December 2015 does not mention the TSSNF fee, but makes vague reference to "all other applicable association fees."[59] [redacted]

[redacted]

104. [redacted]

105. Another CPAY tactic was to raise other interchange rates that should have been passed on to merchants at cost. For example, in June 2016, MasterCard announced a new

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[59] CPAY00000045, at 047.
[60] CPAY00026779, at 781.
[61] CPAY00014127 (emphasis added).
[62] CPAY00014127 (emphasis added).

Annual Merchant Location Fee of $15.[63] [redacted]

106. [redacted]

107. [redacted] What CPAY was really doing was making it harder for merchants to know what they were actually being charged by consolidating and burying various fees under a single category.

K. <u>CPAY Conspired with Sales Agents to Raise Fees and Add New Charges to Merchant Accounts.</u>

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63 CPAY00026465, at 468.
64 CPAY00026465, at 468.
65 CPAY00026465, at 468.
66 CPAY00026465, at 468.
67 CPAY00026465, at 466.
68 CPAY00026454.
69 CPAY00028710, at 711.
70 CPAY00028710, at 711.

108. The internal CPAY communications show that throughout the class period CPAY conspired with the sales agents to add charges to merchant billing statements regardless of what was originally agreed to in the Application.

109. One of the ways CPAY worked with agents to add charges was to create new fees or increased rates for specific agents. [redacted]

110. [redacted]

111. [redacted]

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71 CPAY00025399.
72 CPAY00025399.
73 CPAY00029465.
74 CPAY00029465 (emphasis added).
75 CPAY00023064.

[redacted]

112. CPAY also worked with agents and sales directors to create custom applications for certain agents who wanted to charge higher rates and fees than those outlined on the standard applications. [redacted]

[redacted]

113. [redacted]

114. [redacted]

76 CPAY00023064.
77 CPAY00009818, at 822.
78 CPAY00009818.
79 CPAY00014715, at 718.
80 CPAY00014715, at 718.
81 CPAY00014715.

[redacted]

[redacted]

115. [redacted]

L. **<u>CPAY Coached its Sales Team and Agents on Responding to Merchant Inquiries About Improper Fees.</u>**

116. CPAY did not have clear answers when agents asked about new or increased fees showing up on merchant accounts. [redacted]

117. In response to this inquiry, [redacted]

[redacted]

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[82] CPAY00014715.
[83] CPAY00014715.
[84] See CPAY00007431; CPAY00031797.
[85] CPAY00029231, at 232.
[86] CPAY00029231 (emphasis added).

[redacted]

118. In some instances, CPAY and the Hyman brothers would become combative with sales agents who questioned the rate increases and fees added to merchant accounts. [redacted]

119. [redacted]

[redacted]:

1. [redacted]

2. [redacted]

120. [redacted]

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87 CPAY00001243 (emphasis added).
88 CPAY00012113, at 114.
89 CPAY00012113.

121. [redacted]

M. CPAY Systematically Overbilled and Budgeted for Selectively Refunding Merchants Who Complained.

122. In their leisure time, both Hyman brothers are high stakes poker players who frequently win or lose thousands of dollars at poker tournaments.[92] Matt Hyman's total poker winnings are reportedly over $1.94 million[93], while Zach Hyman's are slightly less at just over $1.87 million.[94] While CPAY was bilking small merchants out of their hard earned money, the Hyman brothers were playing at poker tournaments with a $100,000 buy-in and enjoying tableside massages.[95] Much like gambling at the poker table, part of CPAY's business model was to make a calculated wager on a percentage of merchants never noticing or demanding refunds for overcharges on merchant statements. CPAY would try to avoid issuing refunds, because any overcharges CPAY did not refund were realized as pure profit.

123. Several of CPAY's internal emails acknowledge both that CPAY overcharged merchants and that CPAY was hesitant to refund merchants for these overcharges. For example, [redacted]

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[90] CPAY00012151 (emphasis added).
[91] CPAY00029758.
[92] *See* https://www.cardplayer.com/poker-players/44858-matt-hyman; https://www.cardplayer.com/poker-players/53795-zachary-hyman.
[93] https://www.cardplayer.com/poker-players/44858-matt-hyman.
[94] https://www.cardplayer.com/poker-players/53795-zachary-hyman.
[95] *See* https://www.pokerstars.com/en/blog/pca/2014/pca-2014-zach-hyman-wants-a-smoothie-144731.html; http://www.casinoguardian.co.uk/2017/09/14/matt-hyman-proceeds-chip-leader-poker-masters-series-event-1-day-2/.

[redacted]

124. In considering whether to issue refunds to merchants, CPAY often took advantage of the timing of the complaints, agreeing only to partial refunds. CPAY would often only issue refunds for a few months even in situations where CPAY overcharged the merchant for over a year. [redacted]

125. In another example, [redacted]

126. Likewise, [redacted]

127. In some cases, [redacted]

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[96] CPAY00001046.
[97] CPAY00001046.
[98] CPAY00003225.
[99] CPAY00006295, at 296-97.
[100] CPAY00006295.
[101] *See* CPAY00028825.
[102] CPAY00020531.

[redacted]

128. [redacted]

129. CPAY did not want to proactively issue refunds because CPAY did not want to draw attention to its overbilling issues and give merchants reason to scrutinize their billing statements. CPAY was also betting that many merchants would not notice or complain and CPAY would profit from the overcharges.

N. CPAY's Reaction to Potential Complaints to FTC, BBB, or Attorneys General Show that CPAY Knew the Business Was Not Operating Legitimately.

130. While CPAY carried on its scheme of systematically defrauding merchants, CPAY also took measures to avoid scrutiny. Numerous emails produced in discovery show that CPAY would try to avoid issuing refunds for merchant complaints; however, it seems CPAY would quickly resolve billing disputes if merchants mentioned the FTC, BBB, or an Attorney General. Given the Hyman brothers' previous issues with the FTC, they did not want to draw attention to their deception and fraud.

[103] CPAY00020531.
[104] CPAY00027050.
[105] CPAY00027050.

131. [redacted]

132. [redacted]

133. [redacted]

134. There is evidence throughout the documents produced in this case to show that CPAY knew that it was defrauding merchants and took measures to prevent exposing its business practices to scrutiny.

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[106] CPAY00029758.
[107] CPAY00024432.
[108] CPAY00002152, at 153.
[109] CPAY00002498.
[110] CPAY00001429.
[111] CPAY00005109.
[112] CPAY00005109.

INDIVIDUAL FACTUAL ALLEGATIONS

A. CPAY Overcharges Plaintiffs.

Sandy.

135. In or about October of 2015, Sandy was renting a chair to perform hair-styling services from a beauty salon known as “Salon Bella” in West Palm Beach, Florida. At that time, Salon Bella management was having stylist contractors such as Sandy process their customers’ credit card payments through CPAY.

136. The CPAY agent assigned to Salon Bella was “Adam.” Sandy was given the Application, which indicates that the relationship with CPAY was “month to month” and could be terminated at any time on thirty (30) days notice.

137. The Application specifically identified the agreed-upon fees and rates Sandy would be charged for processing customer card payments through CPAY.

138. According to the Application, for each card transaction Sandy would pay $0.22 cents and a percentage of the transaction (“discount rate”), as follows:

Check Card Rate	0.9%
Qualified Rate	1.7%
Mid-Qualified Rate	Qual. (1.7%) + 1.3% = 3.0%
Non-Qualified Rate	Qual (1.7%) + 0.8% = 2.5%

139. Sandy was also to pay standard card association fees, which were to be “passed through” at cost.

140. Finally, Sandy was to pay a number of miscellaneous fees. For example, the Application notes (a) a monthly statement fee of $9.50, (b) a “batch fee” of $0.25 cents, (c) a PCI annual compliance fee of $85.00, and (d) a monthly non-compliance fee of $23.95.

141. At no time was Sandy advised that these identified fees and charges would change. Sandy executed the Application and thereafter commenced to process her customers' card payments through CPAY. Sandy chose to enroll in CPAY's services because of the fees and rates specified in the Application. Had it known the true card processing fees that would be charged, Sandy's would not have done business with CPAY.

142. Over the course of its relationship with Sandy, CPAY charged fees that did not comport with those set forth in the Application. These fee manipulations generally fall into four categories.

143. First, CPAY inflated the agreed discount rates. Specifically, in April of 2016, CPAY inflated each applicable discount rate by eight basis points. For example, rather than charging Sandy 0.9% for check cards, CPAY charged it 0.98%.

144. Second, CPAY inflated card association fees. Indeed, rather than pass through such amounts at cost as required by the Application, CPAY inflated them. By way of example only, in August of 2016, CPAY began charging Sandy a monthly MasterCard location fee of $1.50. Given that the standard "pass through" charge for this fee is actually $15.00/year per payment terminal (which was shared by numerous co-workers of Sandy), the fee charged to Sandy was grossly inflated.

145. CPAY almost certainly inflated other card association fees. However, CPAY has intentionally formatted its monthly statements so as to make it impossible for Sandy and other merchants to make this determination. Indeed, rather than break out the amount charged for each applicable card association fee, CPAY aggregates most such fees into one line item, called "PASSTHRU FEES." Because CPAY fails to breakdown which card association fees were charged (and the amount charged for each), Sandy and other customers cannot possibly

determine how much was being improperly added to their bills. The evidence uncovered to date shows these fees included non-pass through fees.

146. Third, CPAY added a new discount rate that Sandy never agreed to pay. Indeed, in April of 2016, CPAY began charging Sandy a “TSSNF FEE” of seven basis points of total processing volume (0.07%). This fee is mentioned nowhere in the Application.

147. To make matters worse, CPAY aggregated this fee with the “PASSTHRU FEES” on monthly statements. This formatting maneuver not only made it difficult to calculate the true amount of the “TSSNF FEE” but made it seem to customers as though the fee was another “pass through” charge coming from the card associations. In reality, it was just another fee added by CPAY to increase its bottom line profit.

148. Fourth, CPAY charged Sandy higher “junk fees” than those listed in the Application. For example, although the Application discloses a “PCI Annual Compliance Fee” of $85, in January of 2017 CPAY charged Sandy $99.50 for such a fee, an overcharge of $14.50.

149. It was impossible for Sandy or other merchants to detect these overcharges. As the evidence above shows, CPAY took careful steps to conceal these fees from merchants.

150. CPAY also tricked merchants into maintaining the relationship.

151. For example, in September of 2016, Sandy contacted CPAY and provided thirty (30) days notice that she was leaving her chair at Salon Bella and thus terminating the relationship.

152. Although Sandy’s relationship with CPAY was month to month, CPAY removed $375.00 from Sandy’s bank account for what it called an early termination fee.

153. Upon learning of the fee, Sandy contacted CPAY to complain, insisting she was on a month to month deal and no early termination fee should have been charged. The CPAY

representatives responded by encouraging Sandy to continue using its services at the new salon. Sandy agreed to continue using CPAY so the $375.00 early termination fee would be credited back to her account.

154. Clearly, CPAY had no basis to charge the early termination fee in the first place but used it as a means to compel Sandy to continue the relationship.

155. Sandy finally became so fed up with CPAY's overbilling that it terminated the relationship for good in or about February 2017.

Skip's.

156. In or about July of 2016, Skip's was approached by a CPAY representative named Thomas Newman, who presented him with an Application.

157. The Application specifically identified the agreed-upon fees and rates Skip's would be charged for processing customer card payments through CPAY. According to the Application, for each card transaction Skip's would pay $0.10 cents and a discount rate, as follows:

Check Card Rate	1.0%
Qualified Rate	1.75%
Mid-Qualified Rate	Qual. (1.75%) + 1.0% = 2.75%
Non-Qualified Rate	Qual (1.75%) + 1.75% = 3.5%

158. Skip's was also to pay standard card association fees, which were to be "passed through" at cost.

159. Finally, Skip's was to pay a number of miscellaneous fees. For example, the Application notes a monthly statement fee of $9.50, a "batch fee" of $0.25 cents, a PCI annual compliance fee of $95.00, and a monthly non-compliance fee of $23.95.

160. At no time was Skip's advised that these identified fees and charges would change. Skip's executed the Application and thereafter commenced to process customer card payments through CPAY. Skip's chose to enroll in CPAY's services because of the fees and rates specified in the Application. Had it known the true card processing fees that would be charged, Skip's would not have done business with CPAY.

161. Over the course of its relationship with Skip's, CPAY charged fees that did not comport with those set forth in the Application.

162. For example, just as it did with Sandy, CPAY inflated card association fees. By way of example only, in September of 2016, CPAY began charging Skip's a monthly MasterCard location fee of $1.50. Given that the standard "pass through" charge for this fee is actually $15.00/year per payment terminal, the fee charged to Skip's was inflated.

163. CPAY almost certainly inflated other card association fees. However, CPAY has intentionally formatted its monthly statements so as to make it impossible for Skip's and other merchants to make this determination. Indeed, rather than break out the amount charged for each applicable card association fee, CPAY aggregates most such fees into one line item, called "PASSTHRU FEES." Because CPAY fails to breakdown which card association fees were charged (and the amount charged for each), Skip's and other customers cannot possibly determine how much was being improperly added to their bills.

164. As was the case with Sandy, CPAY added a new discount rate that Skip's never agreed to pay. Indeed, in December of 2016, CPAY began charging Skip's a "TSYS NETWORK FEE" of seven basis points of total processing volume (0.07%). This fee is mentioned nowhere in the Application.

165. CPAY charged Skip's higher "junk fees" than those listed in the Application. For example, although the Application discloses a "PCI Annual Compliance Fee" of $95, in January of 2017 CPAY charged Skip's $99.50 for such a fee, an overcharge of $4.50.

166. In December of 2016 and January of 2017, CPAY also charged Skip's a $7.95 "CARD COMPROMISE ASSIST PLAN" fee. CPAY charged this fee despite the Application noting that it was "optional" for all merchants who were PCI compliant. Skip's was PCI compliant during these months and never opted in to such a fee.

167. CPAY also charged Skip's a "PCI NON-COMPLIANCE FEE" of $15.95 and the associated "CARD COMPROMISE ASSIST PLAN" fee of $7.95 in September of 2016. The Application, however, states that such fees cannot be charged for the first two months of the Agreement, which was signed on July 28, 2016.

168. CPAY deducted $813.36 from Skip's bank account on the September 2016 statement for "OTHER FEE ADJUSTMENT." This massive deduction violated the contract.

169. Skip's became fed up with the overcharges it was able to discern and CPAY's refusal to forward amounts due from Skip's customers. These problems and Defendant's poor customer service and nonresponsiveness led Skip's to terminate the relationship in or about February of 2017.

170. As a consequence of CPAY's fraudulent practices and overbilling policies and practices, Plaintiffs and the proposed class have been wrongfully forced to pay unauthorized fees and charges. Defendant has improperly deprived Plaintiffs and those similarly situated of significant funds, causing ascertainable monetary losses and damages.

B. <u>The Anticipated Defenses Have No Merit.</u>

Voluntary Payment.

171. CPAY may respond by claiming that Plaintiffs voluntarily paid the charges of which they now complain and recovery is thus barred by the voluntary payment doctrine. However, the voluntary payment doctrine does not apply and the contract was only entered into as a result of CPAY's fraudulent concealment and illegal scheme to deceive merchants.

172. By the time Plaintiffs received Defendant's monthly statements, Defendant had already seized the charges noted therein from Plaintiffs' bank accounts. This is Defendant's general practice – to send statements so that they are not received by merchant customers until after Defendant is already in possession of the fees. Because the fees are taken before merchants are notified or have a reasonable opportunity to understand how they were computed, it cannot be said that Plaintiffs have "voluntarily" paid them with full knowledge of the facts.

173. Even if Plaintiffs had received the statements in a timely fashion, this is not a simple case where readily accessible information would have easily put Plaintiffs on notice they were being overcharged.

174. First, the statements mix "pass through" fees with those imposed solely by CPAY. Thus, determining whether a fee should be checked against the Application or the "pass through" fee schedules published by the card associations is often impossible.

175. Moreover, a single credit card transaction often involves many different fees, making it even more difficult to determine whether Plaintiffs have been overcharged for "pass through" fees.

176. Furthermore, the statements use terminology that differs from that contained in the Application. For instance, rather than referring to discount rates by the names assigned in the Application (i.e., "Check Card Rate," "Qualified Rate", "Mid-Qualified Rate," and "Non-Qualified Rate") the statements refer to rates by numerical tiers (i.e., "Rate 1," "Rate 2," "Rate

3," and "Rate 4") without providing any clarifying explanation. This discrepancy makes determining overcharges impossible.

177. Even if merchants could successfully match the rate tiers to the Application, the statements provide no information as to why a transaction was assigned to a certain tier. For example, Sandy had no way to determine whether the $30.00 credit card sale on March 6, 2016, was properly assigned to the "Rate 2" tier, as the statement reflects. In general tiered pricing is known to be a scam in the card payment industry, with nearly every card type failing to qualify for the lower "qualified rate" based only on the discretion of the payment processor. For example, CPAY utilized tiered pricing to charge astronomical rates, such as in excess of 3% when the pass-through rate would only be 1.65%. This mechanism provides massive, unearned profits for CPAY.

178. Additionally, CPAY often buries language in monthly statements purporting to raise or vary the charges noted in the Application. Thus, to determine if it was being overcharged, Plaintiffs would arguably have to check the charges against every prior monthly statement (in addition to the Application and the card association fee schedules).

179. Plaintiffs anticipate presenting evidence from industry experts that it is extraordinarily difficult for merchants to understand invoices from payment card processors, which are in many ways even more incomprehensible than the explanations of benefits sent to patients by health insurers. The amount of work needed by a merchant to understand the details of a payment card invoice, even if possible, can be extraordinary.

180. Even if it can be said that Plaintiffs had the duty and capability to perform this onerous investigation in response to each and every monthly statement, failure to do so before paying the subject amounts was, at worst, due to negligence or a lack of diligence. Payments

made under such circumstances can be recovered because it would not prejudice Defendant, which makes millions of dollars in profits each year, to return the overcharges.

"90-Day Notice" Provision.

181. CPAY may attempt to invoke Section 7.5 of the Terms, which states

> MERCHANT is supplied with monthly reports by BANK regarding MERCHANT's SALES or SERVICES activity. It is MERCHANT'S sole responsibility to report any error or discrepancies detected by MERCHANT in writing to BANK within ninety (90) days following the end of the monthly reporting period. After such period, MERCHANT will be deemed to have accepted the monthly reports as delivered.

182. This provision is inapplicable for multiple reasons. First, the contract was only entered into as a result of CPAY's fraudulent concealment and illegal scheme to deceive merchants, thus the contract is subject to rescission and its self-serving provisions are not enforceable. Second, the term "error or discrepancies" as used herein clearly refers to factual mistakes that are best addressed while information and facts are easily remembered. This case does not address mistakes at all, but rather only CPAY's willful efforts to improperly raise fees and charges. Unlike a mistaken transaction – where a customer was charged $100 rather than $10, for example – Defendant's intentional and systematic markups and overcharges can be dealt with after-the-fact.

183. Indeed, interpreting the 90-day notice provision more broadly to include Defendant's systematic overcharges within the scope of the term "error or discrepancies" would only serve to exculpate CPAY from liability if merchants failed to "catch it in the act" soon after the overbilling occurs.

184. Moreover, the provision only applies to "any error or discrepancies *detected by MERCHANT*." As shown above, Sandy, Skip's, and other merchants were precluded by

Defendant's deceptive practices and cryptic statements from detecting that they were being overcharged.

185. Defendant cannot properly cram and bury improper charges under these circumstances and then try to use the notice provision as a shield against liability for their willfully deceptive and unfair conduct.

186. Regardless, the 90-day notice provision is an invalid exculpatory clause. Exculpatory clauses are contractual provisions severely restricting remedies or waiving substantial rights. Here, the written notice provision, if interpreted as Defendant is likely to suggest, would severely restrict remedies and insulate Defendant from liability and is thus an exculpatory clause.

187. To be enforceable, the written notice provision must be explicit, prominent, clear, and unambiguous. There is nothing about this provision that effectively and sufficiently distinguishes it from the dozens of other provisions in the lengthy, small-type Terms. Rather it is buried in the middle of the Terms. The provision was effectively designed to draw as little attention as possible. It is thus unenforceable.

188. The 90-day notice provision is also unconscionable. Indeed, the process by which Defendant "made" its contracts with Plaintiffs is unconscionable. Defendant is a large merchant acquirer while Plaintiffs are small, "mom and pop"-type merchant. Plaintiffs must accept debit and credit cards to make themselves competitive in the marketplace and thus must use a payment processing service. They are thus at the mercy of companies such as Defendant that provide such services. Defendant has taken full advantage of this fact by imposing the decidedly one-sided Terms on Plaintiffs without negotiation or the ability to "opt out" of disfavored provisions. *See* Terms, § 13.9. This "take-it-or-leave-it" process meant Plaintiffs were forced to sign the

Application and accept the separate Terms as-is. Moreover, on its face the written notice provision is inconspicuous and difficult to comprehend. Under these circumstances, the subject provision is procedurally unconscionable.

189. The written notice provision is substantively unconscionable because if enforced in a strained manner that may be suggested by CPAY it would be grossly unfair in that it would have the practical effect of condoning Defendant's intentional overbilling practices. There are many problems with the misleading statements, which given their form and the generally confusing nature of the card processing system, do not effectively place merchants on notice that they are being overbilled. It would be grossly unfair to expect another to "eat" their losses if he does not even realize he is being overbilled and a fair minded man would never agree to such a restriction.

Class Waiver.

190. CPAY may attempt to make use of Section 13.3 of the Terms, which states in pertinent part:

> MERCHANT ALSO COVENANTS NOT TO BRING OF PARTICIPATE IN ANY CLASS ACTION AGAINST BANK BASED UPON ANY CLAIMS ARISING FROM THIS AGREEMENT. IF A CLASS PROCEEDING IS INITIATED AGAINST BANK, MERCHANT MAY NOT JOIN THE PROCEEDING OR PARTICIPATE AS A MEMBER OF THE CLASS.

191. This provision is clearly inapplicable because it only applies to class actions brought against "BANK." Plaintiffs do not assert any claims against their Bank (First National Bank of Omaha).

192. However, even if CPAY had been included in the provision, the clause is plainly unenforceable. The contract was only entered into as a result of CPAY's fraudulent concealment and illegal scheme to deceive merchants.

193. Additionally, the “class waiver” is an exculpatory clause because it severely restricts, if not eliminates, Plaintiffs’ remedies and thus effectively insulates Defendant from liability. Indeed, if Plaintiffs are forced to seek relief on an individual basis, it would make no economic sense for them to proceed with this case. Because the contract purportedly does not allow Plaintiffs to recover attorneys’ fees if their claims are vindicated and may limit what Plaintiffs can recover (Terms, § 10.1), the costs of litigating the case to conclusion would far outweigh the potential damages at stake. Thus, the only practical way to remedy Defendant’s small-value overbilling is by a class action. *See generally Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (“The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30”).

194. The class action waiver is also an improper exculpatory clause because (a) it is not explicit, prominent, clear, and unambiguous and (b) Plaintiffs allege Defendant’s overcharges were imposed willfully and wantonly, as opposed to via mistake or negligence.

195. The waiver is also unconscionable. It is procedurally unconscionable given the way it was presented in the Terms and for the reasons set out above as to other sections.

196. The waiver is also substantively unconscionable because it is grossly unfair in that it allows Defendant to steal small amounts with impunity.

Other Contractual Provisions.

197. CPAY may attempt to defend its conduct by arguing that it had the contractual discretion to amend the Application to increase fees or impose new fee categories. *See* Terms, §§ 3.1 – 3.5. However, such discretion clearly is only given to the Bank, not CPAY. Defendant’s internal documents confirm that the Bank had nothing to do with CPAY’s overcharges. The Hyman brothers and their ethically-compromised staff did not notify the Bank

or seek approval before creating new fees or increasing existing fees. Of course, because the contract was only entered into as a result of CPAY's fraudulent concealment and illegal scheme to deceive merchants, this provision is not enforceable.

198. Moreover, while that language may, for example, allow for increases or reductions in "pass through" fees required by the card associations, any expansive construction of this language that would allow CPAY to charge whatever it wants is improper. Under such an interpretation, Defendant could, arbitrarily, for any reason or no reason at all, and without procuring agreement from merchants, increase any charge or fee by any amount, and could say whatever it liked about the amounts collected, without breaching the contract. If that is the meaning of such "change in terms" provisions, then they are void for vagueness, illusory, and lack mutuality.

199. Even if the contract did not limit discretionary fee increases, good faith and fair dealing constrains Defendant's ability to use discretion to increase fees in ways which were not contemplated by the parties. For example, although a contract may leave discretion to increase a fee, and thereby profit one party to the other party's detriment, good faith and fair dealing precludes such conduct unless increased costs have necessitated the increase.

200. Thus, even if its purported ability to change rates is enforceable, CPAY is bound to exercise its contractual discretion in good faith. Defendant's manipulation of Plaintiffs' fees and charges was not done in response to actual cost increases. Such unilateral mark-ups to agreed-upon rates do not comport with good faith and fair dealing.

201. Defendant may also argue that its billing manipulations are proper because it provided Plaintiffs with advance notice of some changes. However, Plaintiffs were not provided with advance notice of many of the fee increases and new charges. Sandy, for example, was not

provided with advance notice of the $99.50 PCI Annual Compliance Fee and Skip's was not provided with advance notice that it would be assessed the "CARD COMPROMISE ASSIST PLAN" fee even when it was PCI compliant. Moreover, the form, format, and content of the statement notices given by CPAY for some of the charges at issue were insufficient to provide Plaintiffs with actual notice of the increases and were therefore ineffective.

202. For example, the statement notices given to Sandy in February of 2016 for the April of 2016 fee increases, and to Skip's in October of 2016 for the December of 2016 increase, are worded so as to create the false impression that the increases were mandated by the card associations (and not CPAY). Also, Skip's was not provided with 30 days notice before CPAY began charging $1.50/month for the "MC Per Location Fee" on the September 2016 billing statement.

203. The "change in terms" provisions are also procedurally unconscionable for the reasons expressed above as to other sections of the contract.

204. The provisions are substantively unconscionable because they are grossly unfair. Indeed, no reasonable merchant would agree to a provision that allows a processor to disregard all agreed-upon pricing considerations (i.e., the considerations which induced the merchant to do business with the processor in the first place) and charge whatever, whenever, and for whatever reasons it wants.

205. Defendant may also attempt to invoke Section 10.1's provision which purports to limit merchant damages to "the lesser of the direct loss to MERCHANT or any amount equal to the processing portion of the DISCOUNT paid to BANK by MERCHANT in the month prior to the incident giving rise to liability." Again, however, this provision is only applicable to the Bank, not CPAY.

206. This "limitation of liability" provision is an unenforceable exculpatory clause and procedurally unconscionable for the reasons expressed above. It is substantively unconscionable because, if enforced, it would have the practical effect of immunizing Defendant from liability. Customers such as Plaintiffs simply cannot afford to pay attorneys to pursue only one month worth of payment processing charges (i.e., often less than a hundred dollars). Moreover, attorneys have no incentive to take such cases on a contingency basis given the limited potential damages. It would be grossly unfair to expect merchants to "eat" the vast majority of their losses if a breach of contract is proven.

207. Defendant may also attempt to invoke Section 13.3's provision which purports to reduce the statutes of limitations for claims against the Bank to "one (1) year of the date the error or the incident giving rise to such action occurred."

208. This provision is clearly only applicable to claims against the Bank, not CPAY.

209. Regardless, this provision (which purports to reduce the applicable five-year statute of limitation for breach of contract to one year) is an unenforceable exculpatory clause and procedurally unconscionable for the reasons described above. It is substantively unconscionable because, if enforced as written, it does not allow for equitable tolling and would unfairly bar suit by those customers who did not immediately discover Defendant's scheme.

210. Plaintiffs' experiences with CPAY are not isolated, but rather are illustrative of Defendant's improper business practices towards its merchant customers, as the evidence above makes clear.

CLASS ALLEGATIONS

211. Plaintiffs bring this action on behalf of themselves and all others similarly situated.

212. The Class is preliminarily defined as:

> All customers in the United States that paid a fee to Defendant that is higher than those set forth in the Merchant Processing Application & Agreement.

213. Plaintiffs reserve the right to modify or amend the definition of the proposed Class before the Court determines whether certification is appropriate and as the Court may otherwise allow.

214. Excluded from the Class are Defendant, its parents, subsidiaries, affiliates, officers, and directors, any entity in which Defendant has a controlling interest, all customers who make a timely election to be excluded, and all judges assigned to hear any aspect of this litigation, as well as their immediate family members.

215. The time period for the Class is the number of years immediately preceding the date on which the Complaint is filed as allowed by the applicable statute of limitations, going forward into the future until such time as Defendant remedies the conduct complained of herein. If the contractual choice of law provision is deemed binding, then Nebraska's five-year statute of limitations for breach of contract will be applicable to all Class members.

216. Certification of Plaintiffs' claims for class-wide treatment is appropriate because Plaintiffs can meet all the applicable requirements of Federal Rule of Civil Procedure 23 and can prove the elements of its claims on a class-wide basis using the same evidence as would be used to prove those elements in individual actions alleging the same claim.

217. *Numerosity*. The members of the Class are so numerous that individual joinder of all the members is impracticable. On information and belief, there are tens of thousands of merchants that have been damaged by Defendant's wrongful conduct as alleged herein. The precise number of Class members and their addresses is presently unknown to Plaintiffs, but can readily be ascertained from CPAY's books and records. Class members may be notified of the

pendency of this action by recognized, Court-approved notice dissemination methods, which may include U.S. Mail, electronic mail, and/or published notice.

218. *Commonality and Predominance*. Numerous common questions of law and fact exist as to the claims of Plaintiffs and the other Class members. Such questions include, but are not limited to:

(a). Whether Defendant has breached its contracts with Plaintiffs and the other Class members, either directly or via the covenant of good faith and fair dealing;

(b). Whether Defendant acted and continues to act fraudulently in inducing merchants, including Plaintiffs and the other Class members, to contract with Defendant;

(c). Whether Defendant acted and continues to act fraudulently in crafting and formatting its monthly statements and the notice messages contained therein;

(d). Whether Defendant is liable to Plaintiffs and the other Class members for imposing unauthorized fees on merchants for Defendant's own benefit;

(e). Whether certain of the Terms are invalid exculpatory clauses, violate public policy, are illusory, lack mutuality, are procedurally and substantively unconscionable, and are otherwise void and unenforceable;

(f). Whether Defendant engaged in a pattern of racketeering activity (mail and/or wire fraud);

(g). Whether the alleged Fraudulent Overbilling Enterprise is an "enterprise" within the meaning of 18 U.S.C. § 1961(4);

(h). Whether Defendant conducted or participated in the affairs, directly or indirectly, of the Fraudulent Overbilling Enterprise;

(i). Whether the pattern of racketeering alleged caused the injury alleged;

(j). Whether Plaintiffs and the Class are entitled to appropriate equitable remedies, including declaratory, injunctive relief and/or disgorgement; and

(k). Whether Plaintiffs and the Class are entitled to monetary damages, including treble damages under RICO.

219. Defendant has engaged in a common course of conduct toward Plaintiffs and the other Class members. The common issues arising from this conduct that affect Plaintiffs and the other Class members predominate over any individual issues. Adjudication of these common issues in a single action has important and desirable advantages of judicial economy.

220. *Typicality*. Plaintiffs' claims are typical of the other Class members' claims because, among other things, all of the claims arise out of a common course of conduct and assert the same legal theories. Further, Plaintiffs and members of the Class were comparably injured through the uniform misconduct described above.

221. *Adequacy of Representation.* Plaintiffs are adequate Class representatives because their interests do not conflict with the interests of the other Class members; Plaintiffs have retained counsel competent and experienced in complex commercial and class action litigation; and Plaintiffs intend to prosecute this action vigorously. Class members' interests will be fairly and adequately protected by Plaintiffs and their counsel.

222. *Declaratory and Injunctive Relief.* Defendant has acted or refused to act on grounds generally applicable to Plaintiffs and the other Class members, thereby making appropriate final injunctive and declaratory relief, as described below. Specifically, Defendant continues to induce merchants to contract through omission and concealment and knowingly overbill the Class and to enforce unconscionable or otherwise unenforceable contractual

provisions in order to block the Class members from seeking legal relief. Class-wide declaratory and/or injunctive relief is appropriate to put an end to these illicit practices.

223. *Superiority*. A class action is superior to any other available means for the fair and efficient adjudication of this controversy, and no unusual difficulties are likely to be encountered in the management of this class action. The damages or other financial detriment suffered by Plaintiffs and each of the other Class members are small compared to the burden and expense that would be required to individually litigate their claims against Defendant, thus rendering it impracticable for Class members to individually seek redress for Defendant's wrongful conduct. Even if Class members could afford individual litigation, the court system could not. Individualized litigation creates a potential for inconsistent or contradictory judgments, and increases the delay and expense to all parties and the court system. By contrast, the class action device presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.

CLAIMS FOR RELIEF

COUNT ONE
Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing

224. Plaintiffs repeat paragraphs 1 through 223 above.

225. The actions taken by Defendant have materially violated the specific terms of its form Merchant Processing Application & Agreement.

226. Further, Defendant has breached the contract by violating the covenant of good faith and fair dealing. Defendant is liable for the losses of Plaintiffs and the Class that have resulted from its breaches of contract.

227. Defendant violated the contract by assessing charges not provided for in the fee schedule in the Application and by unilaterally marking up agreed-upon fees and charges without

proper basis or contractually-required notice. Furthermore, Defendant has assessed other fees in the guise of “pass through” fees from the card associations which are actually retained by Defendant. Thus, Defendant has materially breached the express terms of its own form contract.

228. Plaintiffs and the Class have performed all, or substantially all, of the conditions precedent imposed on them under the contracts.

229. Plaintiffs and the Class sustained damages as a result of Defendant’s breaches of contract.

230. Nebraska law imposes upon each party to a contract the duty of good faith and fair dealing. Good faith and fair dealing, in connection with executing contracts and discharging performance and other duties according to their terms, means preserving the spirit – not merely the letter – of the bargain. Put differently, the parties to a contract are mutually obligated to comply with the substance of their contract in addition to its form. Evading the spirit of the bargain and abusing the power to specify terms constitute violations of good faith and fair dealing in the performance of contracts.

231. Subterfuge and evasion violate the obligation of good faith in performance even when an actor believes his conduct to be justified. A lack of good faith may be overt or may consist of inaction, and fair dealing may require more than honesty.

232. By charging fees that are inconsistent with those laid out in the contract, including but not limited to, increasing the amounts of agreed-upon fees and imposing new categories of fees not referenced in the contract, Defendant has violated the spirit of the contract and breached the covenant of good faith and fair dealing. Even if Defendant believed that it had given itself contractual discretion to increase mark-ups and fees, or add new fees, such discretion is constrained by good faith and fair dealing and Defendant’s actions do not comport with this duty.

233. Plaintiffs and the Class have performed all, or substantially all, of the obligations imposed on them under the contract. There is no legitimate excuse or defense for Defendant's conduct.

234. Defendant's anticipated attempts to defend its overbilling through reliance on contractual provisions in the Terms and elsewhere will be without merit. Such provisions are either inapplicable or are unenforceable because they are void, illusory, lacking in mutuality, are invalid exculpatory clauses, violate public policy, and are procedurally and substantively unconscionable, among other reasons. These provisions do not excuse Defendant's breaches or otherwise preclude Plaintiffs and the Class from recovering for such breaches.

235. Plaintiffs and members of the Class sustained damages as a result of Defendant's direct breaches of the contract and Defendant's breaches of the covenant of good faith and fair dealing.

COUNT TWO
Violation of Racketeer Influenced and Corrupt Organizations Act
18 U.S.C. §§ 1962(a), (c) & (d)

236. Plaintiffs repeat paragraphs 1 through 235 above.

237. Plaintiffs bring this claim individually and on behalf of all other Class members.

238. "CPAY" is a "person" under 18 U.S.C. § 1961(3) because it is an entity capable of holding, and does hold, "a legal or beneficial interest in property."

239. Section 1962(a) makes it "unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of Section 2, Title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or

operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1962(a).

240. Section 1962(c) makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c).

241. Section 1962(d) makes it unlawful for "any person to conspire to violate" §§ 1962(a) and (c), among other provisions. 18 U.S.C. § 1962(d).

The Fraudulent Overbilling Enterprise and Pattern of Racketeering Activity

242. The enterprise, the activities of which affected interstate and foreign commerce, was comprised of an association in fact of persons consisting of CPAY, Zachary and Matthew Hyman, TSYS, and the independent sales agents. This association-in-fact is referred to for purposes of this claim as the "Fraudulent Overbilling Enterprise."

243. The Fraudulent Overbilling Enterprise was characterized by CPAY's, Zachary and Matthew Hyman's, and independent sales agents' deceptive sales practices, which enabled the enterprise to gain market share; the unauthorized inflation of the rates and fees payable and the levying of other charges misrepresented as payable to third parties or which were otherwise undisclosed, omitted and/or unauthorized – all to fraudulently increase revenues, at least some of which were used to acquire, operate, and expand the enterprise and to enhance the fortunes of TSYS, CPAY, Zachary and Matthew Hyman, and the independent sales agents, causing injury to Plaintiffs and to the Class members.

244. CPAY, Zachary and Matthew Hyman, TSYS and the independent sales agents were associated with an illegal enterprise, and conspired, conducted, and participated in that

enterprise's affairs, through a pattern of racketeering activity consisting of numerous and repeated uses of the interstate mail and wire facilities to execute a scheme to defraud, in violation of 18 U.S.C. §§ 1341 and 1343, all in violation of RICO, 18 U.S.C. §§ 1962(a), (c)-(d). These acts, committed by interstate wire and through the mails, include: (1) sending and receiving thousands of statements over a number of years that contained what were purported to be pass-through interchange rates and card association access fees that were in fact secretly inflated by CPAY and that contained other charges misrepresented as payable to third parties or which were otherwise undisclosed, omitted, and/or unauthorized; and (2) receiving over that same time payments for inflated pass-through interchange rates and card association access fees and other misrepresented charges from Plaintiffs and members of the Class. CPAY and the independent agents enrolled merchants in numerous states and charged them inflated interchange rates and card association access fees, the payments for which flowed from the merchants in those various states back to CPAY and then to agents in the form of commissions or residuals.

245. CPAY, the Hyman brothers, TSYS, and the independent sales agents profited from the enterprise, and Plaintiffs and the Class members suffered injury to their property because the enterprise significantly increased the amounts paid by them. CPAY, TSYS, and the Hyman brothers used the proceeds from this scheme to advance the scheme by, among other things, funding and operating their billing systems and the use of the mails and interstate wires to obtain inflated interchange rates and card association access fees and other misrepresented payments from Class members and by promoting and marketing their services to other merchants not yet a part of its network, thereby growing the enterprise and causing further injury to the members of the Class.

246. CPAY, Zachary and Matthew Hyman, TSYS, and the independent sales agents conspired to defraud Plaintiffs and the Class, who obtained payment processing services from CPAY.

247. The members of the Fraudulent Overbilling Enterprise all share a common purpose: to enrich themselves at Class members' expense by fraudulently inflating interchange rates and card association access fees and adding unauthorized fees. CPAY, Zachary and Matthew Hyman, TSYS, and the independent sales agents have benefitted financially from their scheme to defraud Plaintiffs and the Class members, including by sharing the inflated interchange rates and card association access fees and other fraudulently misrepresented or omitted charges received from Class members and otherwise obtaining monies which they would not have received but for the existence of the scheme.

248. The Fraudulent Overbilling enterprise has existed for at least six years. It has functioned as a continuing unit and maintains an ascertainable structure separate and distinct from the pattern of racketeering activity.

249. CPAY conducted and participated in the affairs of the Fraudulent Overbilling Enterprise through a pattern of racketeering activity that consisted of numerous and repeated violations of the federal mail and wire fraud statutes, which prohibit the use of any interstate or foreign mail or wire facility for the purpose of executing a scheme to defraud, in violation of 18 U.S.C. §§ 1341 and 1343.

250. The CPAY standard form Application and monthly statements demonstrate the continuity of CPAY's conduct over multiple years and on a monthly basis, representing numerous separate and distinct examples of mail and wire fraud.

251. By using a systematic scheme to fraudulently inflate, charge, and collect fees to which they were not entitled the members of the enterprise used the United States Mail and interstate electronic wires and thus committed hundreds of thousands of separate acts of mail and wire fraud in violation of 18 U.S.C. §§ 1341 and 1343. These acts and transactions were not isolated but were related and part of the same fraudulent scheme, were directed at Plaintiffs and each Class member; were committed in the same or similar manner; and resulted from the same or similar fraudulent and improper intent by CPAY and the other members of the enterprise.

252. CPAY and the Hyman brothers received payment for the inflated and misrepresented charges from Plaintiffs and the Class members through interstate wire facilities and a portion of these improper amounts was shared with the independent sales agents through interstate wire facilities. These wirings are part of the pattern of racketeering activity in which CPAY, TSYS, and the Hyman brothers engaged. In furtherance of the scheme, CPAY and the Hyman brothers committed thousands of separate mail and wire fraud violations on a monthly basis over more than six years by transmitting their standard form merchant agreements and invoices, each one constituting its own separate and distinct predicate act, through the United States Mail and interstate wire facilities. Each of these violations was related because they effectuated the common purpose of the enterprise and its participants of defrauding Plaintiffs and the Class by collecting inflated interchange rates and card association access fees and other charges misrepresented as payable to third parties or which were otherwise undisclosed, omitted, and/or unauthorized. CPAY, Zachary and Matthew Hyman, TSYS, and the independent sales agents also transferred between and among themselves, and received from Plaintiffs and the Class, monetary proceeds of the enterprise, in furtherance of their scheme to defraud Plaintiffs and Class members in violation of 18 U.S.C. § 1343.

253. These related acts had the same or similar purpose, results, participants, victims, and methods of commission, and are otherwise related by distinguishing characteristics which are not isolated events.

254. CPAY, Zachary and Matthew Hyman, TSYS, and the independent sales agents each had the specific intent to participate in the overall Fraudulent Overbilling Enterprise and the scheme to defraud Plaintiffs and the Class. CPAY's scheme was reasonably calculated to deceive Plaintiffs and Class members, all of whom are of ordinary prudence and comprehension, through the execution of their complex and illegal overbilling scheme. Plaintiffs and Class members would not have paid the inflated and improper charges but for the deceptive actions by CPAY and it co-conspirators.

255. CPAY, the Hyman brothers, and TSYS received money from a pattern of racketeering activity and invested that money in the enterprise, and the enterprise affected interstate commerce. Furthermore, CPAY, the Hyman brothers, and TSYS used and invested the income they received through a pattern of racketeering activity to operate the enterprise, which caused Plaintiffs and the Class members to suffer damages. As noted above, the investment of the proceeds from the scheme in the enterprise enabled CPAY, the Hyman brothers, and TSYS to perpetuate the operation of the enterprise and to continue to defraud Plaintiffs and Class members, in violation of 18 U.S.C. § 1962(a).

256. CPAY, the Hyman brothers, TSYS, and the independent sales agents conducted and participated both directly and indirectly in the conduct of the above-described Fraudulent Overbilling Enterprise's affairs through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c). Specifically, CPAY's merchant agreements and marketing materials contained uniform misrepresentations that CPAY would not inflate interchange rates and card

association access fees charged by card issuers and card networks, but would rather pass those fees through at cost, and that their charges would be clear and transparent. Plaintiffs and the Class, all of whom were of ordinary prudence and comprehension, relied on these uniform misrepresentations, believing that they accurately reflected the charges that they were obligated to pay, and paid CPAY's statements as a direct and proximate result of CPAY's representations and/or omissions.

257. CPAY, Matthew and Zachary Hyman, TSYS, independent sales agents, and other unnamed co-conspirators, as noted above, conspired to violate sections 1962(a) and (c), in violation of 18 U.S.C. § 1962(d). The agreement between CPAY, Matthew and Zachary Hyman, and the independent sales agents is reflected by, among other things, their joint participation in the same fraudulent scheme that would not have been able to proceed without their joint participation and knowledge, and their intentional and knowing sharing of the proceeds from the scheme, along with TSYS.

Causation and Injury to Plaintiff and the Class

258. Plaintiff and each member of the putative Class have sustained injury to his or her property by reason of the acts and conduct of Defendants alleged in this Complaint, including their loss of money due to their overpayment.

259. Plaintiff and members of the proposed Class were the direct and indeed only targets of the RICO scheme to defraud. They agreed to use CPAY's services based on false express and implied representations, and concealment of the truth about how the relationship would operate.

260. Plaintiff and members of the proposed Class would not have transacted business with CPAY had they known the truth about how the company actually operated.

261. But for the conduct of Defendants alleged in this First Amended Complaint, Plaintiff and the putative Class would not have been injured. The injury suffered by Plaintiff and each member of the Class herein was a foreseeable and natural consequence of the scheme to defraud.

262. Other than Plaintiff and the putative Class, there are no victims more directly injured by Defendants' scheme and enterprise who can be counted on to seek remedies under RICO.

263. The injuries of Plaintiff and members of the proposed Class were directly and proximately caused by Defendants' racketeering activity that defrauded merchants, and which allowed the Defendants to charge excessive fees compared to their true value, injuring all those who were billed during the Class Period.

264. As a result and by reason of the foregoing, the Plaintiff and Class members have been injured, suffered harm and sustained damage to their business and property, and are therefore entitled to recover actual and treble damages, and their costs of suit, including reasonable attorney fees, pursuant to 18 U.S.C. § 1964(c).

265. In addition, as set forth above, Defendants have violated 18 U.S.C. §§ 1962 (c), and (d), and will continue to do so in the future.

266. Enjoining Defendants from committing these RICO violations in the future and/or declaring their invalidity and disgorging ill-begotten gains is appropriate pursuant to 18 U.S.C. § 1964(a), which authorizes the district courts to issue appropriate orders to provide equitable relief to civil RICO plaintiffs and enjoin violations of 18 U.S.C. § 1962.

267. Plaintiffs seek compensatory damages, disgorgement, equitable relief, injunctive relief, treble damages, and attorneys' fees.

COUNT THREE
Fraudulent Concealment

268. Plaintiffs repeat Paragraphs 1 through 267 above.

269. Plaintiffs bring this claim individually and on behalf of all other Class members.

270. CPAY knew its business model focused on forming relationship with agents who would carry out its systematic scheme to exploit and deceive merchants into forming a relationship with CPAY to provide credit card processing services, as described above. CPAY knew that its business model was working closely with agents to mislead and deceive merchants into forming a relationship with CPAY. CPAY knew that its intent was to inflate or mark-up agreed discount rates, card association fees, TSSNF FEES, TSYS NETWORK FEES, PASSTHRU FEES, CARD COMPROMISE ASSIST PLAN FEES, PCI-NONCOMPLIANCE FEES, OTHER FEE ADJUSTMENT, junk fees, early termination fees, other dues and assessments, and a variety of junk fees not authorized by the Merchant Processing Application & Agreement and charged the Plaintiffs and the other Class members, as alleged above. CPAY knew its goal was to exploit merchants as part of its scheme to fraudulently inflate its profits.

271. Given the circumstances surrounding the relationship with merchants, CPAY had a duty to disclose material information to merchants about CPAY's business practices and intentions prior to forming the contractual relationship for several reasons. First, the contractual relationship by its very nature gave rise to a duty to disclose material information about the relationship with these merchants. CPAY and its agents had the knowledge about how the relationship would work, and it had an obligation to accurate explain the relationship. CPAY and the agents working with CPAY had a duty to fully disclose the truth, as opposed to making half-truths that were intentional deceiving. Second, CPAY had superior knowledge about its own business model and business practices, and as such it had a duty to disclose to merchants

material information that it had about the business. Third, CPAY had knowledge of basic facts described above that the merchants did not, and CPAY knew that the merchants were entering into the relationship under a mistake as to how the relationship would exist, and in the situation, it was reasonable for the merchants to expect a disclosure of the factual information by CPAY.

272. CPAY concealed its true intentions from merchants, and deceived them into the contractual relationship by failing to disclose the truth about the relationship and CPAY's business model of systematically overcharging merchants and inflating service fees to fraudulently pad its profits.

273. Furthermore, each and every monthly statement supplied to Plaintiffs and the other Class members by CPAY contains fraudulent billing entries, all of which were made intentionally by CPAY with the purpose of further concealing the truth about CPAY's scheme and deceiving the merchants.

274. For example, by stating on those monthly statements that each Plaintiff has been charged standard card association fees, TSSNF FEES, TSYS NETWORK FEES, PASSTHRU FEES, CARD COMPROMISE ASSIST PLAN FEES, PCI-NONCOMPLIANCE FEES, and/or OTHER FEE ADJUSTMENTs, CPAY fraudulently concealed that it was actually inflating the charges and systematically overcharging merchants for the services being provided.

275. Had CPAY accurately represented its true intentions or accurately explained its business model to merchants at the time of contracting or been candid about its intentions to charge Plaintiffs and the other Class members inflated or marked-up agreed discount rates, card association fees, TSSNF FEES, TSYS NETWORK FEES, PASSTHRU FEES, CARD COMPROMISE ASSIST PLAN FEES, PCI-NONCOMPLIANCE FEES, OTHER FEE ADJUSTMENT, junk fees, early termination fees, other dues and assessments, and a variety of

junk fees not authorized by the Merchant Processing Application & Agreement, Plaintiffs and the other Class members would not have obtained card processing services from CPAY, and/or would not have continued to receive such services from CPAY.

276. Plaintiffs and the other Class members reasonably relied on CPAY to their detriment and were damaged by CPAY's fraudulent actions in an amount to be proven at trial.

277. Accordingly, Plaintiffs seek monetary, declaratory, and injunctive relief, including attorneys' fees and costs of suit to the full extent permitted by law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs and the proposed Class demand a jury trial on all claims so triable and judgment as follows:

1. Certifying this case as a class action pursuant to Federal Rule 23, including appointment of Plaintiffs as Class Representatives and their counsel as Class Counsel;

2. Temporarily and permanently enjoining Defendant from continuing the improper business practices alleged herein;

3. Declaring certain contractual provisions to be unenforceable and enjoining their enforcement;

4. Awarding restitution of all improper fees seized by Defendant from Plaintiffs and the Class as a result of the wrongs alleged herein in an amount to be determined at trial;

5. An order requiring Defendant to return all sums obtained from Plaintiffs and the other Class members as a result of its unlawful, fraudulent, deceptive, misleading, and unfair business practices;

6. Compelling disgorgement of the ill-gotten gains derived by CPAY from its misconduct pursuant to 18 U.S.C. § 1964(a);

7. Awarding damages in an amount to be determined by a jury;

8. Compensatory and treble damages pursuant to 18 U.S.C. § 1964(c);

9. Awarding compensatory, general, nominal, punitive, and exemplary damages, as allowed by law;

10. Awarding pre- and post-judgment interest at the maximum rate permitted; and

11. Awarding such other relief as this Court deems just and proper.

DESIGNATION OF PLACE OF TRIAL

Plaintiffs hereby designate Omaha, Nebraska as the place for trial of this action.

Dated: November 15, 2018.

Respectfully submitted,

WAGSTAFF & CARTMELL, LLC

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