

4. Defendant Merchant Services is a Delaware limited partnership that is co-owned by PNC Bank and First Data Corporation (currently known as Fiserv). PNC Bank is the sixth largest retail bank in the United States, with over \$380 billion in assets. First Data/Fiserv is the country's largest payment processor. Defendant was formed in 1996 and has been incredibly successful for its two partners.

5. Merchant Services did not grow rapidly until 2005. After nine years of operation, the company had only 25,000 customers. In 2005, the decision was made to make Merchant Services a bigger sales focus at PNC Bank. The Bank bought an additional 20 percent of the company from First Data, taking the ownership percentages from 60 percent for First Data and 40 percent for PNC to 60 percent for PNC Bank and 40 percent for First Data. The Bank was reorganized to make Merchant Services "a core product offering."

6. The number of accounts grew rapidly thereafter. Merchant Services went from having a shrinking number of clients in 2005 to growing at over 20 percent per year in 2008-2012. The customer count went from 25,000 to over 100,000 by 2013. Growth has continued under the aggressive sales practices described herein, pushing more recent customer accounts to over 124,000 merchants.

JURISDICTION AND VENUE

7. 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 New York.

8. Oddly, Defendant is not registered to do business in New York even though it contractually mandates that all disputes against it be pursued in New York courts. This Court

still has personal jurisdiction over Defendant, however, because it has engaged in a continuous and systematic course of doing business in New York by offering and providing payment processing services to thousands of New York citizens and companies.

9. Venue lies within this judicial district because Merchant Services mandates that suits against it be filed in Suffolk County, which falls entirely within this district.

FACTUAL ALLEGATIONS

10. Defendant's sales agents pitch the benefits of Defendant's services with prospective merchants and discuss the pricing associated with such services. If merchants express any interest, the agents ask the customer to sign a "Merchant Processing Application and Agreement" ("Application"). The Application comprises several fine print contract documents, including a Program Guide. By way of example, a true and correct copy of Plaintiff's Application, including the Program Guide, is attached hereto as Exhibit A.

11. The Application sets forth the pricing Defendant will charge the merchant. The Application's Service Fee Schedule provides:

Annual Fee

We reserve the right to assess, on an annual basis and with at least 30 days' advance written notice, a reasonable fee to defray the cost of necessary systems technology upgrades, communication requirements and reporting.

Id. at 4.

12. The plain language of the Application thus states to prospective merchants that Defendant may or may not assess an annual fee each year but, if it does: (1) at least 30 days' advance written notice will be provided, (2) the fee will be reasonable, and (3) the fee will only be charged as needed to defray certain specified costs.

13. The reality is, however, that Defendant assesses the fee every year on less than 30 days' advance written notice, the fee is unreasonable, and the fee is not used to defray the specified costs but rather is additional profit that goes straight to Defendant's bottom line.

14. Rather than explain these truths to merchants on the Application, Defendant worded the Application in a false manner to induce more customers to do business. Indeed, Defendant knew merchants would rarely agree to do business if they knew they would *definitely* be charged a large fee (typically \$109.95 per year, as in the case of Plaintiff). Thus, Defendant crafted the disclosure to lead merchants to believe such fee may not be charged and, if it was charged, it would be reasonable and would be used to defray new specified costs (and not generate more profit).

15. Defendant's sales agents echoed this fact by telling customers "I can't remember the last time we did that" despite knowing full well that the fee was consistently charged every year. The non-definitive language in the Application's description of annual fees gives agents wiggle room to make these false representations.

16. After customers sign the Application, which automatically locks them into a long-term agreement with Defendant that is often cancellable only upon the payment of hefty early termination penalties, they are hit with an annual fee each year they remain customers as a matter of course.

17. Each year, Defendant notifies customers via a standard message on their monthly billing statement that the annual fee will be assessed "on or after" the first day of the *same month* that the statement is first made available to customers.

18. By way of example, attached hereto as Exhibit B is a true and correct copy of Plaintiff's August 2019 statement, which provides:

2019 Annual Fee

PNC Merchant Services will be assessing the Annual Fee of \$109.95 on or after September 1, 2019. This fee offsets the cost of implementing upgrades. Our commitment is to continue to maintain the highest industry standards and security for your payment transactions. If we can answer any questions regarding the fee or your merchant account, please contact our Customer Help Desk at 1-800-742-5030.

Id. at 1.

19. As a matter of consistent practice, and contrary to the clear contractual requirement, Defendant assesses the fee after less than 30 days' notice.

20. By way of example, Plaintiff's August 2019 statement was first made available to Plaintiff on September 3, 2019. However, the annual fee was assessed on Plaintiff on September 21, 2019, i.e., 18 days later. *See* September 2019 Statement, p. 3 (noting "MISC ADJUSTMENT ANNUAL FEE" of \$109.95 made on "9/21/19") (Exh. C hereto).

21. PNC automatically withdrew the \$109.95 annual fee from Plaintiff's bank account on October 2, 2019, which is also less than 30 days after the date its August 2019 statement was first made available (i.e., September 3, 2019).

22. These facts are not unique to Plaintiff but rather Defendant has programmed its computer systems to always assess annual fees on less than 30 days' notice on its customer base.

23. Moreover, the annual fees that Defendant charges are neither "reasonable" nor are they used to offset "the cost of necessary systems technology upgrades, communication requirements and reporting." Rather, they are imposed as a planned yearly "release" strictly to pad Defendant's bottom line at the expense of its customers.

24. That the amount charged (\$109.95) has been the same for years shows the fees are not dependent on changing necessary costs or requirements, as such factors are not uniform on a year-to-year basis.

25. Upon information and belief, this fee results in annual proceeds of over \$15,000,000 for Defendant. Since First Data, not Defendant, handles all back-office processing for Merchant Services, and the same systems are shared by hundreds of other companies – such as Bank of America Merchant Services and Wells Fargo Merchant Services – there are no actual “necessary costs” that would allow Defendant to charge this fee. In fact, no costs are being defrayed – as is required by the contract – but rather the proceeds from the annual fee travel straight to Defendant’s bottom line.

26. Buried deep in the fine print of the Program Guide is the following provision:

11.10 You agree to promptly and carefully review your merchant statements or other documents provided or made available to you (physically, electronically, or otherwise provided by Us or others) reflecting Card transaction activity, including, activity in your Settlement Account. If you believe any adjustments should be made with respect to your Settlement Account, you must notify us in writing within sixty (60) days after any debit or credit is, or should have been effected or such shorter period as provided in the terms and conditions that govern such account. If you notify us after sixty (60) days, we shall have no obligation to investigate or effect any adjustments. Any voluntary efforts by us to assist you in investigating such matters shall not create any obligation to continue such investigation or any future investigation.

27. Defendant claims this provision requires its customers to contemporaneously “catch it in the act” and provide written notice of any disputed fees within 60 days of the fees being assessed.

28. Despite purporting to require written complaints to preserve the right to challenge fees such as annual fees, Defendant’s corporate practice was to instruct merchants to make *telephonic* complaints to its customer service department. Indeed, Merchant Services included language on the statements that directed merchants to “contact our Customer Help Desk at 1-800-742-5030” if “we can answer any questions regarding the [annual] fee or your merchant account.”

29. Former employees confirm that the corporate policy was to instruct customers to call the 1-800 for complaints and refunds. Thus, despite knowing full well that language buried deep in its own boilerplate contract purports to require complaints to be lodged in writing, month after month Defendant nonetheless consistently directed customers to lodge complaints telephonically, which Plaintiff did repeatedly. Defendant took such actions to frustrate customers' performance under Section 11.10 and like provisions. Merchant Services also had the right to waive any specific contractual requirements, which it did verbally and in writing on a routine basis.

30. Despite the actions taken by Defendant to frustrate performance of the written notice requirement, Plaintiff provided timely written notice of its dispute with the 2019 annual fee assessed by Defendant on two separate occasions.

31. First, on October 9, 2019, Plaintiff mailed letters to each of the notice addresses for Defendant reflected in the Program Guide disputing its 2019 annual fee. A true and correct copy of this letter is attached hereto as Exhibit D.

32. These letters were mailed seven days after the annual fee was automatically debited from Plaintiff's bank account by Defendant and 16 days after the annual fee was charged to Plaintiff. According to the Program Guide, notice is effective upon mailing.

33. Second, this Class Action Complaint also serves as timely written notice. On October 11, 2019, copies of it have been mailed to each of the notice addresses for Defendant reflected in the Program Guide. This date is nine days after the annual fee was debited from Plaintiff's bank account by Defendant and 18 days after the annual fee was assessed on Plaintiff's account. Plaintiff has thus timely complied with Section 11.10 on two separate

occasions and has preserved its right to dispute the 2019 annual fee (both on its own behalf and behalf of those similarly situated).

34. As a consequence of Defendant's conduct described herein, Plaintiff and the members of the proposed Class have been wrongfully forced to pay unauthorized annual fees. Defendant has improperly deprived Plaintiff and those similarly situated of significant funds, causing ascertainable monetary losses and damages.

PROCEDURAL HISTORY

35. This is not the first billing dispute between Plaintiff and Defendant. On October 22, 2018, Plaintiff filed a Class Action Complaint against Defendant alleging multiple instances of overbilling by Defendant, including with respect to the 2018 annual fee. The case was assigned Docket Number 18-cv-5906.

36. The case was consolidated with another overbilling action brought by other customers of Defendant that had previously been assigned Docket Number 17-cv-6255. A Consolidated Class Action Complaint ("CCAC") was collectively filed by all Plaintiffs in the earlier case.

37. Defendant moved to dismiss the CCAC and the motion was granted by the Court with respect to all of Plaintiff's claims. Specifically, the Court found that Plaintiff failed to allege it provided a written notice of dispute to Defendant within 60 days of the charges for which it sought recovery (including the 2018 annual fee). *See* Dkt. 38 in Case No. 17-cv-6255, p. 27.

38. Plaintiff contended the Court overlooked key allegations in the CCAC that it *did* provide timely written notice of its dispute with the 2018 annual fee and filed a motion for reconsideration. Such motion is currently pending before the Court.

39. Plaintiff's dispute with the 2019 annual fee was not at issue in the CCAC, nor could it have been. Indeed, the 2019 annual fee was not assessed on Plaintiff until September 21, 2019, and not removed from Plaintiff's account until October 2, 2019. The order on Defendant's motion to dismiss was entered on September 30, 2019.

40. Plaintiff has a legal right to pursue a breach of contract claim against Defendant concerning the 2019 annual fee regardless of whether its motion seeking reconsideration of the Court's dismissal of its claim concerning the 2018 annual fee is granted.

CLASS ALLEGATIONS

41. Plaintiff brings this action on behalf of itself and all others similarly situated.

42. The Class is preliminarily defined as "[a]ll United States customers of PNC Merchant Services that were assessed an annual fee."

43. Plaintiff reserves 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.

44. Excluded from the Class is 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.

45. Given the Program Guide's indication that New York law governs, the time period for the Class is six years immediately preceding the date on which the Complaint is filed, going forward into the future until such time as Defendant remedies the conduct complained of herein.

46. Certification of Plaintiff's claims for class-wide treatment is appropriate because Plaintiff 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.

47. **Numerosity.** The members of the Class are so numerous that individual joinder of all the members is impracticable. There are hundreds of thousands of customers that have been assessed annual fees and damaged by Defendant's wrongful conduct as alleged herein. The precise number of Class members and their addresses is presently unknown to Plaintiff but can readily be ascertained from Defendant'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.

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

- (a). Whether Defendant assesses annual fees after less than 30 days' notice;
- (b). Whether the annual fees assessed by Defendant are reasonable fees;
- (c). Whether the annual fees assessed by Defendant defray the cost of necessary systems technology upgrades, communication requirements, and reporting;
- (d). Whether the annual fees assessed by Defendant are assessed to generate additional profit at customer expense;
- (e). Whether the annual fees assessed by Defendant violate its contract with customers;
- (f). The proper method or methods by which to measure damages; and

(g). Whether Defendant should be enjoined from assessing annual fees in violation of its contract.

49. Defendant has engaged in a common course of conduct toward Plaintiff and the other Class members. The common issues arising from this conduct that affect Plaintiff 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.

50. **Typicality.** Plaintiff's 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 theory. Further, Plaintiff and the members of the Class were comparably injured through the uniform misconduct described above.

51. **Adequacy of Representation.** Plaintiff is an adequate Class representative because its interests do not conflict with the interests of the other Class members; Plaintiff has retained counsel competent and experienced in complex class action litigation; and Plaintiff intends to prosecute this action vigorously. Class members' interests will be fairly and adequately protected by Plaintiff and its counsel.

52. **Declaratory and Injunctive Relief.** Defendant has acted or refused to act on grounds generally applicable to Plaintiff and the other Class members, thereby making appropriate final injunctive and declaratory relief, as described below. Specifically, Defendant continues to knowingly assess annual fees in violation of its form contract and overbill the Class. Class-wide declaratory and/or injunctive relief is appropriate to put an end to this illicit practice.

53. **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 Plaintiff 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.

COUNT ONE
Breach of Contract

54. Plaintiff repeats paragraphs 1 through 53 above.

55. Plaintiff and the Class members each signed form Applications prepared by Defendant. This form Application is a contract which binds those who apply.

56. The actions taken by Defendant have materially violated the specific terms of these form contracts. Specifically, Defendant has breached the contract by charging annual fees without providing 30 days' advance notice. Also, by charging an unreasonable fee Defendant has breached the contract. Finally, by assessing the fee in an amount greater than necessary to "defray the cost of necessary systems technology upgrades, communication requirements and reporting" Defendant breached the contract.

57. Plaintiff and the Class members have performed all conditions precedent to suit and all, or substantially all, of the other obligations imposed on them under the contracts, including but not limited to any obligations pursuant to Section 11.10 of the Program Guide.

58. Defendant's breaches of contract have resulted in damages sustained by Plaintiff and the Class.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff and the proposed Class demand judgment as follows:

1. Certifying this case as a class action pursuant to Federal Rule 23;
2. Declaring Defendant's annual fees to be improper and in violation of the contract;
3. Temporarily and permanently enjoining Defendant from continuing the assessment of improper annual fees;
4. Awarding damages allowed by law in an amount to be determined by the Court;
5. Awarding pre-judgment interest at the maximum rate permitted; and
6. Awarding such other relief as this Court deems just and proper.

DATED this 11th day of October, 2019.

Respectfully submitted,

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