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2 Plaintiff, the Federal Trade Commission (“FTC”), for its complaint alleges:

3 1. The FTC brings this action under Section 13(b) of the Federal Trade
4 Commission Act (“FTC Act”), 15 U.S.C. § 53(b), to obtain temporary,
5 preliminary, and permanent injunctive relief, rescission or reformation of contracts,
6 restitution, the refund of monies paid, disgorgement of ill-gotten monies, and other
7 equitable relief for defendants’ acts or practices in violation of Section 5(a) of the
8 FTC Act, 15 U.S.C. § 45(a), in connection with defendants’ marketing and sale of
9 debit and credit card payment processing services and equipment to consumers.

10 **JURISDICTION AND VENUE**

11 2. This Court has subject matter jurisdiction over this matter pursuant to
12 28 U.S.C. §§ 1331, 1337(a), and 1345, and 15 U.S.C. §§ 45(a) and 53(b).

13 3. Venue in this District is proper under 28 U.S.C. §§ 1391(b)(2),
14 (c)(1),(c)(2), and (d), and 15 U.S.C. § 53(b).

15 **PLAINTIFF**

16 4. The FTC is an independent agency of the United States Government
17 created by statute. 15 U.S.C. §§ 41-58. The FTC enforces Section 5(a) of the FTC
18 Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or
19 affecting commerce.

20 5. The FTC is authorized to initiate federal district court proceedings, by
21 its own attorneys, to enjoin violations of the FTC Act and to secure such equitable
22 relief as may be appropriate in each case, including rescission or reformation of
23 contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten
24 monies. 15 U.S.C. §§ 53(b) and 56(a)(2)(A).

25 **DEFENDANTS**

26 6. Defendant **Merchant Services Direct, LLC (“MSD”)**, is a
27 Washington limited liability company, also doing business as **Sphyra, Inc.** Its
28 registered address and principal place of business is at 621 N. Argonne Road,

1 Spokane, WA 99212. MSD also conducts business from offices located at 16775
2 Addison Road, Suite 201, Addison, TX 75001. MSD transacts or has transacted
3 business in this district and throughout the United States.

4 7. Defendant **Boost Commerce, Inc. (“Boost”)**, is a Texas corporation
5 with its registered address at 211 E. 7th Street, Suite 620, Austin, TX, and its
6 principal place of business at 16775 Addison Road, Suite 201, Addison, TX 75001.
7 Boost transacts or has transacted business in this district and throughout the United
8 States.

9 8. Defendant **Generation Y Investments, LLC (“Gen Y”)**, is a
10 Washington limited liability company with its registered address at 621 N.
11 Argonne Road, Spokane, WA 99212. Gen Y transacts or has transacted business
12 in this district and throughout the United States.

13 9. Defendant **Kyle Lawson Dove (“Dove”)** is an officer and managing
14 member of MSD, Boost, and Gen Y. At all times material to this Complaint,
15 acting alone or in concert with others, he has formulated, directed, controlled, had
16 the authority to control, or participated in the acts and practices of MSD, Boost,
17 and Gen Y, including the acts and practices set forth in this Complaint. Defendant
18 Dove directs and controls MSD’s sales and marketing departments; created or
19 oversaw the creation of MSD’s marketing and training materials and the training of
20 MSD sales agents; is a signatory on some of MSD’s bank accounts and the bank
21 accounts of Boost and Gen Y; and has responded to a civil investigative demand
22 from the Washington Attorney General’s Office on behalf of MSD. Dove resides
23 or has resided in this district and, in connection with the matters alleged herein,
24 transacts or has transacted business in this district and throughout the United
25 States.

26 10. Defendant **Shane Patrick Hurley (“Hurley”)** is an officer and
27 managing member of MSD, Boost, and Gen Y. At all times material to this
28 Complaint, acting alone or in concert with others, he has formulated, directed,

1 controlled, had the authority to control, or participated in the acts or practices of
2 MSD, Boost, and Gen Y, including the acts and practices set forth in this
3 Complaint. Defendant Hurley directs and controls MSD's processing of merchant
4 applications for card payment processing and manages MSD's customer service
5 department, which handles merchant customer complaints; has signed agreements
6 on behalf of MSD; is a signatory on the bank accounts for MSD, Boost, and Gen
7 Y; is the contact for MSD's web sites and has paid for MSD's web sites; has
8 responded to a civil investigative demand from the Washington Attorney General's
9 Office on behalf of MSD; and has appealed, on behalf of MSD, a 2010 Better
10 Business Bureau ("BBB") decision denying MSD BBB accreditation. Defendant
11 Hurley resides or has resided in this district and, in connection with the matters
12 alleged herein, transacts or has transacted business in this district and throughout
13 the United States.

14 **COMMON ENTERPRISE**

15 11. Defendants MSD, Boost, and Gen Y (collectively, "Corporate
16 Defendants") have operated as a common enterprise while engaging in the
17 deceptive acts and practices alleged below. Defendants have conducted the
18 business practices described below through an interrelated network of companies
19 that have common ownership, managers, employees, and office locations, and that
20 have commingled funds. Because these Corporate Defendants have operated a
21 common enterprise, each of them is jointly and severally liable for the acts and
22 practices alleged below. Individual defendants Dove and Hurley have formulated,
23 directed, controlled, had the authority to control, or participated in the acts and
24 practices of the Corporate Defendants that constitute the common enterprise.

1 **COMMERCE**

2 12. At all times material to this Complaint, defendants have maintained a
3 substantial course of trade in or affecting commerce, as “commerce” is defined in
4 Section 4 of the FTC Act, 15 U.S.C. § 44.

5 **DEFENDANTS’ BUSINESS ACTIVITIES**

6 13. Independent Sales Organizations (“ISOs”) are independent sales
7 agents for financial institutions that are members of credit card associations such as
8 MasterCard and Visa and they sell processing services to businesses that want to
9 accept credit and debit card payments. They allow businesses to establish accounts
10 (“merchant accounts”) with a financial institution (“acquiring bank”) into which
11 are deposited the proceeds of the businesses’ card sales, for which the businesses
12 pay processing fees, including a “discount rate,” that is a percentage of each sale
13 they make. MSD is an ISO that specifically targets consumers who own small
14 storefront businesses and sole proprietorships.

15 14. Defendants’ sales agents, operating from offices in at least six states,
16 typically make their first contact with consumers by making cold telephone calls,
17 in which the sales agents claim that defendants can save them substantial money on
18 their credit and debit card processing. Defendants instruct their sales agents to
19 avoid discussing pricing over the telephone. Instead, defendants instruct their sales
20 agents to set up appointments for the consumers to meet defendants’ sales agents in
21 person at the consumers’ places of business. On occasion, defendants make their
22 first contact with consumers by sending their sales agents to visit them
23 unannounced.

24 15. When defendants’ sales agents initially call consumers to set up
25 appointments, the agents often either state or imply that they are associated with
26 the consumers’ current card processors and offer to lower consumers’ card
27 processing rates substantially. Defendants’ sales agents do nothing to correct
28

1 consumers' impressions that the agents are related to the consumers' current
2 payment processors, Visa or MasterCard, or their banks.

3 16. At the in-person visit, defendants' sales agents again tell consumers
4 that defendants can offer them a lower discount rate, based on the consumers'
5 monthly volume of sales transactions made with credit or debit cards. In numerous
6 instances, defendants' agents tell consumers that they are there to "upgrade" their
7 current processing services to get them a lower discount rate. Using billing
8 statements that the consumers have received from their current payment
9 processors, defendants' agents compute a "cost analysis," which compares the
10 processing fees the consumers are currently paying with those that defendants
11 claim to offer. After performing this analysis, defendants' agents promise
12 substantial savings.

13 17. The sales agents typically quote a discount rate that is considerably
14 lower than the rate the consumers currently are paying. The agents represent that
15 this rate is the only processing rate the consumers will be required to pay if they
16 use defendants' services. Defendants claim that they can offer this low rate
17 because defendants eliminate the "middleman" in the processing transaction and,
18 therefore, the rate is a "wholesale" rate. In some instances, they tell consumers
19 that, because of changes in the law, they can now offer them lower rates.
20 Defendants' sales agents also quote a fixed per-transaction fee that consumers will
21 be required to pay. In numerous instances, the agents do not mention any other
22 fees. If consumers ask if there are any other fees, in numerous instances, the
23 agents say no.

24 18. Defendants additionally offer card processing terminals, also known
25 as card swipe terminals ("terminals"), for consumers to lease. The terminals are
26 subject to two to four-year leases between consumers and third-party leasing
27 companies.

28

1 19. To induce consumers to sign the new equipment leases, defendants'
2 agents claim that the consumers' current terminals are outdated or incompatible
3 with defendants' services, or that the new terminals are a necessary part of
4 defendants' services. Defendants' agents claim that, even with higher lease
5 payments, consumers will save money on processing services overall because of
6 defendants' low rates. In numerous other instances, defendants' agents tell
7 consumers that the new terminals are free.

8 20. Defendants' sales agents ask consumers to sign documents on the spot
9 that include a Merchant Application and Agreement ("Processing Application")
10 and a lease for a terminal ("Terminal Lease"). In some cases, defendants' agents
11 tell consumers that, by signing the Processing Application and Terminal Lease,
12 they are not committing and can cancel at any time. In other instances, defendants'
13 agents tell consumers that they are merely signing an application for processing
14 and are not contractually bound until the acquiring bank accepts the contract. The
15 sales agents do not show consumers all of the pages of the Processing Applications
16 and Terminal Leases. These documents contain numerous fine print terms and
17 conditions. In fine print, the Processing Applications incorporate by reference
18 another document of an additional 40-50 pages of fine print terms and conditions
19 that can only be accessed through defendants' web site by scrolling to the bottom
20 of the web site page and clicking on a link titled "Merchant Services Program
21 Guide." Agents do not direct consumers to the document on the web site before
22 they sign. Agents also use tactics that prevent or discourage consumers from
23 reading the documents that are presented to them. Typically, the sales agents do
24 not leave copies of these documents with consumers.

25 21. To induce consumers to purchase defendants' card processing services
26 and goods, defendants also have disseminated or caused to be disseminated
27 advertisements for their card processing services and goods on their web site,
28 www.msmerchants.com. As in their in-person sales visits, defendants claim or

1 have claimed on their web site that they offer “Guaranteed Lowest Rates” for
2 processing card payments, that consumers can “save 30 - 60% with whole sale
3 processing” [sic], and that defendants’ “unique style of pricing guarantees drastic
4 savings for businesses that already except bank cards” [sic]. In other versions of
5 their web site, defendants claim or have claimed that consumers can “see anywhere
6 from 20% to 30% savings when switching to MSD.”

7 22. In fact, defendants are a “middleman” in the card processing
8 transaction and their rates are not wholesale rates. Defendants’ customers’ card
9 processing is actually done by a third-party processor, not defendants. Nor are
10 defendants’ rates the lowest rates that consumers can obtain. Typically, consumers
11 are forced to pay more for processing through defendants than they were paying
12 through their former processor and consumers do not save substantial money on
13 their card processing. In numerous instances, consumers do not save “30% to
14 60%” or “20% to 30%” on their card processing expenses and defendants do not
15 have support for these claimed savings. Consumers who use defendants’ services
16 are also charged an additional processing rate, called a surcharge, for certain types
17 of card transactions, which defendants’ agents do not tell consumers about in their
18 sales presentations. These surcharges are an additional percentage of the
19 transaction amount and are described in the fine print pages of the contract that
20 many of the consumers do not see at the time of signing.

21 23. Many consumers who use defendants’ services also are charged
22 miscellaneous fees that appear on the consumers’ statements. Defendants’ sales
23 agents do not tell consumers about these additional miscellaneous fees in their
24 sales presentations. These miscellaneous fees also are not disclosed or are
25 inadequately disclosed in the fine print pages of the contract that many consumers
26 do not see before signing.

27 24. In numerous instances, defendants do not provide free terminals to
28 consumers and many consumers do not need upgraded equipment to use

1 defendants' payment processing services. The Terminal Leases are non-
2 cancellable leases held by third-party leasing companies. Often, payments on the
3 leases defendants offer are higher than the payments on consumers' existing leases.
4 Many consumers do not discover that they have signed a non-cancellable
5 equipment lease with a third-party leasing company until they receive their billing
6 statements. Further, consumers learn only later that they are obligated to make the
7 monthly payments to the leasing company regardless of whether the consumers use
8 the terminals or whether the terminals work properly. Consumers who already
9 have a lease with a third-party leasing company must also pay the balance of their
10 previous lease – which can be thousands of dollars – or make lease payments for
11 two terminals, one of which they do not use.

12 25. Many consumers contact defendants' customer service department.
13 Defendants' customer service phone number is answered by employees who are
14 often unable or unwilling to assist consumers. On some occasions, defendants'
15 customer service agents tell consumers that defendants will waive fees or provide
16 refunds and then fail to do so.

17 26. Many consumers ultimately cancel the Processing Applications that
18 defendants induced them to sign. In such instances, consumers are charged
19 substantial cancellation fees that are described in the fine print pages that many
20 consumers do not see at the time of signing or that are otherwise inadequately
21 disclosed in the fine print of the Processing Applications or on a separate document
22 on defendants' web site. Many consumers who knew about the cancellation fees,
23 but were told by sales agents they would be waived when they signed the contracts,
24 were nevertheless charged cancellation fees.

25 27. Many consumers have complained directly to defendants about their
26 practices and many have filed complaints with Better Business Bureaus and state
27 attorneys general that have been forwarded to defendants. Defendants have
28 refunded, reduced, or provided compensation for additional costs incurred by

1 consumers usually only in response to such complaints. However, defendants have
2 generally not provided refunds to or waived fees for consumers who have been
3 misled by defendants' sales agents.

4 **VIOLATIONS OF SECTION 5 OF THE FTC ACT**

5 28. Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), prohibits "unfair or
6 deceptive acts and practices in or affecting commerce."

7 29. Misrepresentations or deceptive omissions of material fact constitute
8 deceptive acts or practices prohibited by Section 5(a) of the FTC Act.

9 **Count I**

10 **Deception – Misrepresentations**

11 30. In numerous instances in connection with the advertising, marketing,
12 promotion, offering for sale, or sale of credit and debit card processing goods or
13 services, defendants have represented, directly or indirectly, expressly or by
14 implication, that:

- 15 a. Defendants are affiliated with consumers' current credit and debit
16 card processors and are merely offering additional or upgraded
17 payment processing goods or services;
- 18 b. Consumers who purchase the goods or services that defendants
19 offer will save substantial money on their card processing
20 expenses;
- 21 c. Consumers must lease or purchase from defendants new terminals
22 for accepting credit and debit cards because their existing
23 terminals are outdated or incompatible with defendants' payment
24 processing services;
- 25 d. Consumers who sign Processing Applications and Terminal
26 Leases for defendants' payment processing goods or services
27 either are not contractually bound by their signatures or can cancel
28 at any time with no penalty; and

1 e. Consumers who purchase goods and services that defendants offer
2 will receive free upgraded or new terminals for accepting credit
3 and debit cards.

4 31. In truth and in fact, in numerous instances in which the defendants
5 have made the representations in Paragraph 30 of this Complaint:

6 a. Defendants are not affiliated with consumers' current credit and
7 debit card processors and are not merely offering additional or
8 upgraded payment processing goods or services;

9 b. Consumers who purchase goods or services that defendants offer
10 do not save substantial money on their card processing expenses;

11 c. Consumers' existing terminals are not outdated or incompatible
12 with defendants' payment processing services, and consumers do
13 not need to lease or purchase from defendants new terminals for
14 accepting credit and debit cards;

15 d. Consumers who sign Processing Applications and Terminal
16 Leases for defendants' payment processing goods or services are
17 contractually bound by their signatures and cannot cancel at any
18 time without penalty; and

19 e. Consumers who purchase goods and services that defendants offer
20 do not receive free upgraded or new terminals for accepting credit
21 and debit cards.

22 32. Therefore, defendants' representations as set forth in Paragraph 30
23 are false and misleading and constitute deceptive acts or practices in violation of
24 Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

25 **Count II**

26 **Deception – Unsubstantiated Savings Claim**

27 33. In numerous instances in connection with the advertising, marketing,
28 promotion, offering for sale, or sale of credit and debit card processing goods or

1 services, defendants have represented, directly or indirectly, expressly or by
2 implication, that consumers who purchase card processing goods and services from
3 defendants will save specific amounts each month in their card processing
4 expenses, including “20% to 30%” and “30% to 60%.”

5 34. The representation set forth in paragraph 33 was not substantiated at
6 the time the representation was made.

7 35. Therefore, the making of the representation set forth in Paragraph 33
8 constitutes a deceptive act or practice in violation of Section 5(a) of the FTC Act,
9 15 U.S.C. § 45(a).

10 **Count III**

11 **Deception – Failure to Disclose Material Information**

12 36. In numerous instances in connection with the advertising, marketing,
13 promotion, offering for sale, or sale of credit and debit card processing goods or
14 services, defendants have represented, directly or indirectly, expressly or by
15 implication, that:

- 16 a. Consumers will be charged specific transaction fees and discount
17 rates in connection with credit and debit card processing services;
18 and
19 b. The Terminal Lease that consumers sign as part of the application
20 process is non-binding or the Terminal Lease is cancellable at any
21 time without penalty.

22 37. In numerous instances in which defendants have made the
23 representations set forth in Paragraph 36, above, defendants have failed to disclose
24 or to disclose adequately to consumers that:

- 25 a. Consumers will be charged additional fees for certain kinds of
26 card transactions, substantial fees if they cancel their processing
27 agreements before their term expires, and other additional
28 miscellaneous fees;

PRAYER FOR RELIEF

Wherefore, Plaintiff FTC, pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), and the Court’s own equitable powers, requests that the Court:

A. Award Plaintiff such preliminary injunctive and ancillary relief as may be necessary to avert the likelihood of consumer injury during the pendency of this action and to preserve the possibility of effective final relief, including but not limited to, temporary and preliminary injunctions, an order freezing assets, immediate access to Corporate Defendants’ business premises and defendants’ financial records, and the appointment of a receiver;

B. Enter a permanent injunction to prevent future violations of the FTC Act by defendants;

C. Award such relief as the Court finds necessary to redress injury to consumers resulting from defendants’ violations of the FTC Act, including, but not limited to, rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies; and

D. Award plaintiff the costs of bringing this action, as well as such other and additional relief the Court may determine to be just and proper.

Dated: July 30, 2013

Respectfully submitted,

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